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WITNESSES

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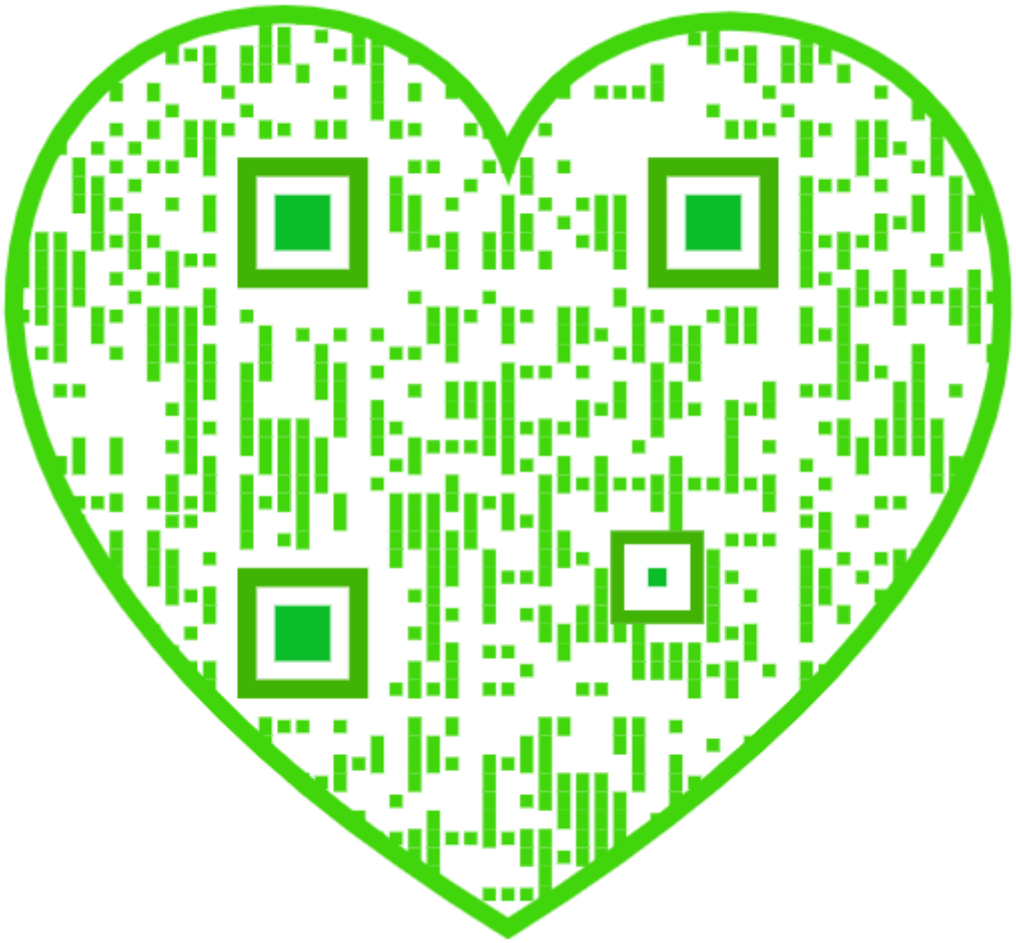

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TOPICAL INDEX.

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CURRENT LAW.

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Scope of topic.—This topic includes general criminal procedure from indict-

ment to final judgment.[1] The substantive law of crimes[2] and procedure before indictment[3] are elsewhere treated, and matters of indictment, evidence and procedure peculiar to particular crimes are treated under titles appropriate to such crimes.

§ 1. *Limitation of time to institute.*[4]—Statutes of limitation are construed liberally in favor of the accused.[5] The time during which a prior indictment was pending is not computed as a part of the statutory period,[6] but commencement of prosecution for one offense will not toll the statute as to another distinct offense, though they be of the same nature.[7] Where the statute is tolled as to persons "fleeing from justice," one who casually removes from the state before the statute has fully run is not protected by it.[8]

§ 2. *Jurisdiction.*[9]—Felonies are usually triable only in courts of general original jurisdiction,[10] while jurisdiction of misdemeanors is frequently conferred on inferior courts.[11] Municipal and corporation courts are generally restricted in their jurisdiction to offenses committed within the corporate limits of the municipality,[12] and against the by-laws or ordinances thereof,[13] though they are sometimes given jurisdiction concurrent with ordinary justices of the peace,[14] and criminal cases in the city of Milwaukee are cognizable only by the police court of the city, the justices of the peace having no jurisdiction in such matters.[15] A civil action to recover a fine for a violation of an ordinance cannot be prosecuted in the municipal court of Buffalo.[16]

1. See analytical index at head of topic.
2. See Criminal Law, 3 Curr. L. 979.
3. See Arrest and Binding Over, 3 Curr. L. 312.
4. See 2 Curr. L. 308.
5. State v. Snyder [Mo.] 82 S. W. 12.
6. State v. Hansbrough, 181 Mo. 348, 80 S. W. 900.
7. Carrying concealed weapons. Greene v. State, 139 Ala. 157, 36 So. 773.
8. In re Bruce, 132 F. 390.
9. See 2 Curr. L. 308.
10. The circuit courts of Oregon have exclusive jurisdiction of felonies. Ex parte Stacey [Or.] 75 P. 1060. The criminal court of common pleas of Connecticut has no jurisdiction of a prosecution for perjury. State v. Campane, 76 Conn. 549, 57 A. 164.
11. The supreme court of New York has no jurisdiction of misdemeanor cases. Lottery. People v. Pickert, 96 App. Div. 637, 89 N. Y. S. 183. County courts have concurrent jurisdiction with the justices of the peace to try offenses against the liquor laws. Langan v. People [Colo.] 76 P. 1048. A city magistrate has no power to commit to the reformatory for prostitution. People v. Keeper of State Reformatory for Women, 89 N. Y. S. 770 [Advance sheets only].
12. Moss v. State [Tex. Cr. App.] 83 S. W. 829; Agner v. Com. [Va.] 48 S. E. 493. The territorial jurisdiction of the police court of a city cannot be extended beyond the limits of the city. Ky. St. 1903, § 3496, attempting it is invalid. Ingram v. Fuson [Ky.] 82 S. W. 606.
13. A city court in Texas has no jurisdiction to try an alleged violation of a penal law of the state. Ex parte Anderson [Tex. Cr. App.] 81 S. W. 973; Ex parte Hinson [Tex. Cr. App.] 81 S. W. 987. The police court in Ohio is without final jurisdiction in misdemeanor cases unless the accused waives trial by jury in writing. Howard v. State, 2 Ohio N. P. (N. S.) 285. The president pro tem of a village council, as acting mayor, has no jurisdiction to hear and determine a misdemeanor [Violation of Beal Law, Rev. St. §§ 1536, 854]. State v. Hance, 4 Ohio C. C. (N. S.) 541. A police magistrate of New York City has jurisdiction to summarily convict an offender against certain provisions of the city charter and compel him to find sureties for good behavior or stand committed to the city prison for transfer to the workhouse for not longer than six months. People v. Warden of City Prison, 44 Misc. 149, 89 N. Y. S. 830. The mayor and council of Americus, Ga., have jurisdiction to try, convict and punish a person keeping intoxicating liquors for an unlawful purpose contrary to an ordinance of the city. Robinson v. Americus [Ga.] 48 S. E. 924.
14. Sections 190, 191 and 192 of act of October 22, 1902, being a nullity, and said act having repealed certain previous acts creating police courts, and conferring jurisdiction, the jurisdiction of the police court of the city of Columbus, after said act, was the same as that of a justice of the peace. Backenstor v. State, 2 Ohio N. P. (N. S.) 178. Under the Beal law, the mayor's court has jurisdiction to try the offense of selling intoxicating liquors, though it be the first or second offense. Kappes v. State, 4 Ohio C. C. (N. S.) 14, 25 Ohio C. C. 723. A police judge has jurisdiction of petit larceny within the city [Rev. St. 1899, § 5798]. State v. Chappell, 179 Mo. 324, 78 S. W. 585. The Illinois constitution of 1870, art. 6, § 21, repealed the section of a city charter giving the president of the city council exclusive jurisdiction in cases of violation of city ordinances, and concurrent jurisdiction with justices in other cases, by directing the elec-

Offenses on Federal territory[17] or against Federal laws are within the jurisdiction of the Federal courts, though there may be a concurrent jurisdiction;[18] but they have no jurisdiction to punish for conspiracy to injure, oppress, threaten and intimidate a citizen in the exercise of his rights of personal liberty and security.[19] The district court of Oklahoma has jurisdiction of crimes committed in the Indian country by persons not Indians.[20]

An offense committed anywhere on the Ohio river is cognizable by the courts of Kentucky.[21]

Equity will enjoin criminal proceedings under a void municipal ordinance where property rights will be destroyed by its enforcement.[22]

Transfer[23] to another court[24] or another division of the same court for prejudice of the judge is provided for in some states,[25] and in Indiana, indictments may be transferred to the county in which the proof shows the offense to have been committed.[26] In certain cases, indictments returned into the district court of Texas are transferred to the county court for trial.[27] Removal to the Federal court may be had where a Federal officer is prosecuted in a state court for an act done under color of his office.[28] The jurisdiction of the district court of North Dakota in bastardy proceedings is complete when the transcript of the proceedings before the justice and the jurisdictional papers filed below are lodged with the clerk.[29]

§ 3. *Place of prosecution and change of venue.*[30]—Prosecution may be had in the county or state where the offense was consummated,[31] or where it was initi-

tion of justices of the peace. City of Windsor v. Cleveland, etc., R. Co., 105 Ill. App. 46.

15. Laws 1895, p. 7, c. 6, § 5. Heller v. Clarke [Wis.] 98 N. W. 952.

16. City of Buffalo v. Preston, 81 App. Div. 480, 80 N. Y. S. 851.

17. The state courts have no jurisdiction over homicide committed on a military post or reservation. Baker v. State [Tex. Cr. App.] 83 S. W. 1122; State v. Tully [Mont.] 78 P. 760.

18. The Federal courts have jurisdiction of prosecutions under the statute denouncing peonage, though the state courts might also prosecute the same acts under the name of kidnapping and false imprisonment [Rev. St. § 5526]. United States v. McClellan, 127 F. 971.

19. Rev. St. § 5508, does not apply. United States v. Eberhart, 127 F. 254.

20. Herd v. United States, 13 Okl. 512, 75 P. 291; Welty v. United States [Okl.] 76 P. 121.

21. Commonwealth v. Louisville & E. Packet Co., 25 Ky. L. R. 2098, 80 S. W. 154.

22. Dobbins v. Los Angeles, 25 S. Ct. 18, 49 Law. Ed. ——; Daly v. Elton, 25 S. Ct. 22, 49 Law. Ed. ——.

23. See 2 Curr. L. 309.

24. The trial of a prosecution for illegal voting will not be transferred on the ground that the wardens of the town before whom it is pending have already passed upon the case by allowing the defendants to vote, where the attorney general has not been requested to apply for the transfer. Williams v. Champlin [R. I.] 59 A. 75.

25. On the transfer of a cause to another division of the same court because of an application for change of venue on the ground of prejudice of the judge, a transcript is not necessary. State v. Lehman [Mo.] 81 S. W. 1118.

26. Where the constitution authorizes the legislature to modify or abolish the grand jury system, a statute providing that when it appears that the crime was committed in a county other than that in which the indictment was found, it may be amended as to venue and transferred to the county in which the crime was committed, is valid and procedure thereunder confers jurisdiction on the court to which the transfer is made. Welty v. Ward [Ind.] 72 N. E. 596.

27. An order transferring a case from the district to the county court need not designate the county. Transfer held sufficiently shown. Dittforth v. State [Tex. Cr. App.] 80 S. W. 628. Identification of the case by its number and style is sufficient. Mitchell v. State [Tex. Cr. App.] 80 S. W. 629; Dittforth v. State [Tex. Cr. App.] 80 S. W. 628. A variance in the clerk's name between the body of the order and the certificate is immaterial. Mitchell v. State [Tex. Cr. App.] 80 S. W. 629. Order of transfer to county court held sufficient, though omitting name of defendant. Haynes v. State [Tex. Cr. App.] 83 S. W. 16.

28. Full discussion of the practice in cases of removal and trial in Federal court. State v. Felts, 133 F. 85.

29. Where bail is furnished, the justice's transcript need not show a formal order holding defendant for trial. State v. Carroll [N. D.] 101 N. W. 317.

30. See 2 Curr. L. 309.

31. Nonsupport of children is triable in the county where they reside, regardless of the domicile of the father. State v. Peabody [R. I.] 56 A. 1028. Prosecution for wife desertion must be at the county where the parties resided at the time of the separa-

ated, if a complete offense was there committed.[32] Statutes regulate the procedure where the fatal blow is struck in one county and death ensues in another.[33] A crime committed in an unorganized county may be prosecuted in the county having by statute jurisdiction over the territory of such unorganized county,[34] notwithstanding the subsequent organization of the county in which the crime was committed.[35]

Change of venue.[36]—Upon a proper application and showing, a change of venue will be granted,[37] either on the application of the defendant or the state.[38] A change, however, will not be granted unless it affirmatively appears that there is such a prejudice in the community as will be reasonably certain to prevent a fair and impartial trial.[39] Application must be timely made,[40] but the state does not abandon its motion by failure to press it to a hearing at the term at which it was filed.[41] The motion addresses itself to the sound discretion of the trial court,[42] and a counter showing is properly allowed;[43] but where defendant denies the state's showing, the better practice is to put the matter to a test.[44] Where an entire case is before

tion. Cuthbertson v. State [Neb.] 101 N. W. 1031. Obstruction of a stream in Ohio may be prosecuted in any county into which the stream runs. American Strawboard Co. v. State [Ohio] 71 N. E. 284. Where, pursuant to false pretenses in one county, goods are delivered to a carrier in another, the prosecution may be in the latter. In re Stephenson, 67 Kan. 556, 73 P. 62. Receipt in this state of goods stolen in another may be prosecuted here. Curran v. State [Wyo.] 76 P. 517.

32. Where a fatal blow is struck in one jurisdiction and death occurs in another, the former has jurisdiction to prosecute. Moran v. Territory [Okl.] 78 P. 111.

33. Where the fatal blow is struck in one county and death ensues in another, defendant is triable in the county where he is first arrested, unless indictment is pending in the other. Ky. St. 1903, § 1147, and Code Cr. Prac. § 24, so providing, is valid. Commonwealth v. Jones [Ky.] 82 S. W. 643. Under a statute providing that where the fatal blow is struck in one county and death occurs in another, the jurisdiction shall be in either county where prosecution is first begun, a nolle prosequi in the county where proceedings are first begun will not confer jurisdiction on the other county [Code 1892, § 1334]. Coleman v. State [Miss.] 35 So. 937. That there is no contest between the courts of two counties does not deprive the accused of his right to be proceeded against only in the county where the prosecution was first had. Coleman v. State [Miss.] 35 So. 937.

34. Robinson v. State [Neb.] 98 N. W. 694.

35. Moran v. Territory [Okl.] 78 P. 111.

36. See 2 Curr. L. 309.

37. Garrison v. Territory, 13 Okl. 690, 76 P. 182; Barry v. Truax [N. D.] 99 N. W. 769. Showing required of state discussed. State v. Wheat, 111 La. 860, 35 So. 955; O'Berry v. State [Fla.] 36 So. 440. Under the Beal Liquor Law, §§ 1744, 1817, there is no provision for a change of venue from the mayor's court in the case of a violation of an election prohibiting the sale of intoxicating liquor. Fike v. State, 4 Ohio C. C. (N. S.) 81, 25 Ohio C. C. 554. Under Beal Law, mayor cannot grant change of venue in misdemeanor cases; his jurisdiction is final. Id. Refusal to grant change is not error where no proper application or showing is made. Green v. Com. [Ky.] 83 S. W. 638.

38. State v. Wheat, 111 La. 860, 35 So. 955; O'Berry v. State [Fla.] 36 So. 440; Barry v. Truax [N. D.] 99 N. W. 769, fully reviewing the question and discussing many cases.

39. Intemperate expression of crowd and inflammable articles in newspapers at time of homicide held insufficient to show prejudice at trial a year after. Elias v. Territory [Ariz.] 76 P. 605. Not entitled. Reeves v. State [Tex. Cr. App.] 83 S. W. 803. Local prejudice confined to town is not ground for change where jury are drawn from body of county. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076; State v. Callahan [S. D.] 99 N. W. 1099. Under the Beal Law, prejudice is not a ground for change of venue, unless it be in the citizenship, and the defendant is entitled to a jury trial. Prejudice of the magistrate alone is not sufficient, though the trial is summary without jury. Kappes v. State, 4 Ohio C. C. (N. S.) 44, 25 Ohio C. C. 723. Fact that deceased's relatives assisted the prosecution is not ground, but fact that judge was defeated for renomination because he granted a continuance of the case may be. Alarcon v. State [Tex. Cr. App.] 83 S. W. 1115. Defendant held entitled under showing. Brown v. State [Miss.] 36 So. 73. The overruling of a motion for a change will not be held erroneous because of a statement by the judge to the defendants before trial from which an inference of his belief in their guilt could be drawn. State v. Crilly [Kan.] 77 P. 701.

40. Application made while the jurors are being examined is properly refused. State v. Lehman [Mo.] 81 S. W. 1118.

41. State v. Wheat, 111 La. 860, 35 So. 955.

42. Lindsay v. State, 24 Ohio C. C. 1, 4 Ohio C. C. (N. S.) 409; State v. Icenbice [Iowa] 101 N. W. 273.

43. Affidavits in opposition need not deny affiant's relationship to prosecuting witness. State v. Icenbice [Iowa] 101 N. W. 273. Unless the state attacks the credibility of defendant's compurgators or their means of knowledge, no issue is raised and defendant is entitled to his order. Moore v. State [Tex. Cr. App.] 79 S. W. 565.

44. O'Berry v. State [Fla.] 36 So. 440.

the supreme court on error, it may look into the whole case to determine whether the denial of a change of venue was prejudicial.[45] The record and papers must be certified to the court to which the change is made[46] and timely filed in such court.[47] In California, the court to which the action is transferred acquires jurisdiction on the making of the order, irrespective of the transmission of the records;[48] but in Louisiana, an order for change on defendant's application may on his further application be rescinded on a proper showing if the transfer has not in fact taken place.[49]

§ 4. *Indictment and information. A. Necessity of indictment.*[50]—At the common law and in the Federal courts, infamous crimes and felonies can be prosecuted only by indictment;[51] but in the absence of treaty so providing, there is no rule which entitles aliens to be prosecuted only by indictment in states where information is the recognized procedure.[52] Several states have dispensed with the necessity of indictments in all cases, and in none are indictments required for misdemeanors,[53] though it is said that no indictable offense can be prosecuted by information in Pennsylvania.[54] Under the common law, a finding of a coroner's jury is the equivalent of the finding of a grand jury, and a person may be presented for murder or manslaughter thereon without the intervention of a grand jury.[55]

(§ 4) *B. Finding and filing and formal requisites. Indictments.*[56]—The indictment must commence[57] and conclude in the constitutional or statutory form,[58] and be signed by the prosecuting officer.[59] It must be found by the grand jury of

45. Territory v. Shankland, 3 Ariz. 403, 77 P. 492. Where an impartial jury was in fact obtained, a conclusive presumption that the motion for a change of venue was unfounded arises. Bowles v. Com. [Va.] 48 S. E. 527; State v. Callahan [S. D.] 99 N. W. 1099. The fact that three peremptory challenges remained to defendant when he went to trial may be considered in determining whether a denial of a change of venue prejudiced him. Territory v. Shankland, 3 Ariz. 403, 77 P. 492.

46. Certificate of clerk transmitting transcript held sufficient. Taylor v. State [Ark.] 82 S. W. 495. That the original indictment was not transmitted is not error available to accused, where a complete and accurate copy was transmitted with the transcript. Martin v. Territory [Okl.] 78 P. 88. Omission of the petition for removal from the transcript cannot prejudice defendant. Gardner v. United States [Ind. T.] 82 S. W. 704. Certiorari to the clerk of the court from which the record came to complete the transcript and include defendant's motion to quash and demurrer is properly denied, the record showing a sufficient indictment. Long v. State [Ark.] 81 S. W. 387.

47. Record held to show sufficient evidence of timely filing in county to which change was made, though not bearing file mark of trial court. Brewer v. State [Ark.] 78 S. W. 773.

48. People v. Suesser, 142 Cal. 354, 75 P. 1093.

49. State v. Gray [La.] 37 So. 597.

50. See 2 Curr. L. 310.

51. A second prosecution of an agent under the liquor law of New York should be by indictment. People v. Hoenig, 86 N. Y. S. 673. Whether a crime is infamous depends upon the fact whether by the statute defining it an infamous punishment can be awarded. Jamison v. Wimbish, 130 F. 351; Ex parte Wilson, 114 U. S. 417, 29 Law. Ed. 89.

52. State v. Neighbaker [Mo.] 83 S. W. 523.

53. A prosecution for simple assault does not require indictment. State v. Thornton [N. C.] 48 S. E. 602. In Vermont, all crimes not punishable by death or more than 20 years' imprisonment may be prosecuted by information. Statutory rape. State v. Leach [Vt.] 59 A. 168. Misdemeanor in office. Commonwealth v. Fletcher, 208 Pa. 137, 57 A. 346. An information is the proper pleading to file in a criminal prosecution for violating a city ordinance, both in the municipal court and on appeal. Pratesi v. Wilmington [Del. Super.] 54 A. 694. There is no reason why it cannot be provided that prosecutions in a municipal court shall be based on an accusation preferred and signed officially by the prosecuting officer of that court. Wright v. Davis [Ga.] 48 S. E. 170.

54. Bill of Rights, § 10. In re Mansfield, 22 Pa. Super. Ct. 224.

55. State v. Jackson, 111 La. 343, 35 So. 593. Such is not the law in Idaho. In re Sly [Idaho] 76 P. 766.

56. See 2 Curr. L. 311.

57. Brown v. State [Tex. Cr. App.] 81 S. W. 718.

58. Must conclude "against the peace and dignity of the state" [Const. art. 6, § 28; Code 1896, § 4893]. Smith v. State, 139 Ala. 115, 36 So. 727; Poss v. State [Tex. Cr. App.] 83 S. W. 1109.

59. An indictment otherwise legal is not invalidated because not in fact signed by the solicitor for the state as it purports to be, but by another in his name. Prince v. State [Ala.] 37 So. 171. An assistant attor-

the county or district in which the crime was committed,[60] and be returned in open court by them,[61] at a term of the court for that county.[62]

Informations.[63]—An information must generally be preceded by a sufficient preliminary complaint,[64] examination[65] and commitment,[66] and be filed within the statutory period thereafter,[67] though technical exactness is not required in the complaint.[68]

The verdict of a coroner's jury is not a sufficient basis in Idaho for an information by the public prosecutor.[69]

Verification or a supporting affidavit is necessary in Missouri,[70] though failure to verify may be waived,[71] and the lack of it is not fatal if no objection is made on that ground,[72] and an information need not show on its face that it is based on the affidavit of a competent and reputable person.[73]

ney general may sign an indictment for a prosecution under the liquor law in Kansas. State v. Crilly [Kan.] 77 P. 701.

60. Where the constitution provides that the legislature may modify or abolish the grand jury system, a person charged with a felony has no constitutional right to be tried only on an indictment found in the county in which the crime was committed. Welty v. Ward [Ind.] 72 N. E. 596. Omission to name the county in the caption is not fatal where it is entitled in the circuit court and the body of the indictment names the county. Kilgore v. State [Ark.] 83 S. W. 928.

61. An indictment in regular form will be presumed in the absence of a showing to the contrary, to have been duly returned in open court, though the record does not so state. State v. Crilly [Kan.] 77 P. 701.

62. The return of the grand jury endorsed on the back of the indictment showing the term at which it was found is sufficient as to that fact. Nixon v. State [Ga.] 48 S. E. 966.

63. See 2 Curr. L. 312.

64. In burglary need not allege ownership of building. People v. Price [Cal.] 77 P. 73. Charge of embezzlement as agent held not a departure from complaint charging embezzlement as bailee. People v. Walker [Cal.] 77 P. 705. Affidavit for prosecution in county court may be taken before the clerk of the circuit court, he being ex officio clerk of the county court. Pruett v. State [Ala.] 37 So. 343. Complaint against "Bill (or W. H.) Gaines" held not bad for uncertainty where the information omits the alternative. Gaines v. State [Tex. Cr. App.] 78 S. W. 1076. A complaint for an offense of which a justice has no jurisdiction may be used in the county court on being transferred. Mitchell v. State [Tex. Cr. App.] 79 S. W. 26. Variance held immaterial. State v. Naves [Mo.] 84 S. W. 1. No affidavit is required where the information is verified by the prosecuting attorney, based on a complaint by the prosecuting witness. Id. A motion to quash a complaint before a justice of the peace for a formal defect cannot be taken for the first time on exception from the superior court. Commonwealth v. Anselvich [Mass.] 71 N. E. 790. That the complaint before the magistrate fails to charge an offense will not avail to defeat the information where defendant was properly committed for trial after an examination at which competent evidence was produced. People v. Lee Look, 143 Cal. 216, 76 P. 1028.

65. Practice on appointment of shorthand reporter to attend examination. People v. Nunley, 142 Cal. 441, 76 P. 45. State need not produce all available evidence. In re Sly [Idaho] 76 P. 766. Examination held sufficient. State v. Fordham [N. D.] 101 N. W. 888. Waiver of examination on warranty charging larceny will not support information for receiving. State v. Fields [Kan.] 78 P. 833.

66. In California, where one is committed by the examining magistrate for a certain offense, the district attorney has no authority to file an information charging him with another offense. People v. Nogiri, 142 Cal. 596, 76 P. 490. The magistrate may endorse the commitment on the original complaint, treating it as a depositlon. People v. Price [Cal.] 77 P. 73.

67. In Montana, failure to comply with statute can only be taken advantage of by motion to quash before demurrer or plea. State v. Lagoni [Mont.] 76 P. 1044. A statute requiring an information to be filed within a limited time after commitment has no application to the filing of a new one after overruling the original. People v. Lee Look, 143 Cal. 216, 76 P. 1028.

68. Failure to charge an offense is not ground of objection to information. People v. Lee Look, 143 Cal. 216, 76 P. 1028.

69. In re Sly [Idaho] 76 P. 766.

70. State v. Brown, 181 Mo. 192, 79 S. W. 1111; State v. Schnettler, 181 Mo. 173, 79 S. W. 1123; State v. Lewis, 181 Mo. 235, 79 S. W. 671; State v. Hannigan [Mo.] 81 S. W. 406; State v. Sheridan [Mo.] 81 S. W. 410; State v. Decker [Mo.] 83 S. W. 1082. Affidavit charging two jointly is good to base an information against either. State v. Hunter, 181 Mo. 316, 80 S. W. 955. An information predicated on affidavit must disclose that fact on its face. State v. Schnettler, 181 Mo. 173, 79 S. W. 1123. An information may be verified by the prosecuting attorney upon knowledge, information and belief. State v. Hunt [Mo. App.] 80 S. W. 279.

71. State v. Brown, 181 Mo. 192, 79 S. W. 1111.

72. An unverified information is not void, and may be verified by leave of court, at any time before trial. State v. Schnettler, 181 Mo. 173, 79 S. W. 1123.

73. Stifel v. State [Ind.] 72 N. E. 600.

It should commence and conclude in the proper form,[74] and be signed by the proper prosecuting officer.[75]

(§ 4) *C. Requisites and sufficiency of the accusation. General rules.*[76]—Indictments and informations must clearly inform the accused of the nature and cause of the accusation against him,[77] though it is a general rule and expressly provided by statute in many states that no information or indictment is insufficient for any imperfection in matter of form which does not prejudice substantial rights,[78] and an indictment is always sufficient which states the offense clearly and distinctly, in ordinary and concise language, without repetition and in such manner as to enable a person of common understanding to know what is intended.[79] The words of an indictment should be given their ordinary and commonly accepted meaning.[80] One count may refer to matter in a previous count for the purpose of avoiding unnecessary repetition,[81] though the count referred to is defective,[82] and the caption and commencement of an indictment may be looked to for the purpose of showing in what court the indictment was found,[83] but not for the purpose of making more certain any of the essential averments in the charging part.[84]

Certainty.[85]—An indictment or information must be direct and certain as regards the party charged,[86] the offense charged, and the particular circumstances of the offense charged, when they are necessary to constitute a completed offense;[87] and no necessary allegation can be aided by intendment or inference,[88] nor will con-

74. That the words "against the peace and dignity of the state," etc., modify only the concluding sentence of the count does not invalidate it. State v. Stickney, 29 Mont. 523, 75 P. 201.

75. That the wrong person is named in the body of the information as county attorney is not fatal where the county attorney in fact signs and prosecutes it. Adams v. State [Tex. Cr. App.] 81 S. W. 963; Mimms v. State [Tex. Cr. App.] 81 S. W. 965.

76. See 2 Curr. L. 313.

77. U. S. Const. so providing is not made a part of the law of California by its constitution, art. 1, § 3. People v. Nolan [Cal.] 77 P. 774. Indictment for corrupting a juror must name the juror. State v. Nunley [Mo.] 83 S. W. 1074.

78. Pen. Code, § 1842. State v. Rogers [Mont.] 77 P. 293. Code, § 5290. State v. Martin [Iowa] 101 N. W. 637. Wilson's St. 1903, § 5366. Smith v. Territory [Okl.] 77 P. 187. Rev. St. 1899, § 2531. State v. Lehman [Mo.] 81 S. W. 1118. Rev. St. 1887, § 8236. State v. Ireland [Idaho] 75 P. 257.

79. Wilson's Rev. & Ann. St. 1903, §§ 5357, 5365; Heatley v. Territory [Okl.] 78 P. 79. Indecent exposure [Code, § 5289]. State v. Martin [Iowa] 101 N. W. 637. Omission of words "then and there" held not fatal [B. & C. Comp. § 1259]. State v. Eggleston [Or.] 77 P. 738. An information is good when it meets the tests provided by the Code, §§ 1830, 1833, 1841. State v. Stickney, 29 Mont. 523, 75 P. 201.

80. Smith v. State [Neb.] 100 N. W. 806.

81. United States v. McKinley, 127 F. 166. Reference held not sufficient. "The aforesaid neat cattle." State v. Fields [Kan.] 78 P. 833.

82. Bass v. U. S., 20 App. D. C. 232.

83. That being its office. United States v. Howard, 132 F. 325.

84. United States v. Howard, 132 F. 325.

85. See 2 Curr. L. 313.

86. United States v. Doe, 127 F. 982. Several aliases. State v. Howard [Mont.] 77 P. 50.

87. Pen. Code, § 1834. State v. Keerl, 29 Mont. 508, 75 P. 362. Rev. St. 1887, § 7679. State v. Collett [Idaho] 75 P. 271. Particulars of defendant's possession of property need not be stated. People v. Goodrich, 142 Cal. 216, 75 P. 796. All material facts and circumstances requisite to constitute the offense must be charged clearly and certainly, and nothing left to intendment or implication. Using mails to defraud. Dalton v. U. S. [C. C. A.] 127 F. 544. Conspiracy to defraud the revenue. United States v. Grunberg, 131 F. 137. Indictment for obstructing highway held not demurrable for uncertainty. Commonwealth v. Illinois Cent. R. Co. [Ky.] 82 S. W. 381. Information for sending forged telegram with intent to deceive need not state the nature of the deceit. People v. Chadwick, 143 Cal. 116, 76 P. 884. Larceny by fraud need not set out acts constituting fraud. Flohr v. Territory [Okl.] 78 P. 565. Indictment charging in alternative acts prohibited and not prohibited is demurrable for uncertainty. Watson v. State [Ala.] 37 So. 225. Information for violation of local option law held uncertain. Thurman v. State [Tex. Cr. App.] 78 S. W. 937. Indictment for failure to pay wages held specific and certain. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287. Information for bribery held sufficiently definite and certain. State v. Schnettler, 181 Mo. 173, 79 S. W. 1123. The manner in which the instrument was used to produce a miscarriage must be stated. Smartt v. State [Tenn.] 80 S. W. 586.

88. Smith v. State [Neb.] 100 N. W. 806; State v. Fontenot, 112 La. 628, 36 So. 630. Negation of truth of testimony in perjury.

clusions of the pleader suffice to eke out defective allegations of necessary facts.[89] Every essential ingredient of the crime must be set forth,[90] with such particularity that the accused may not only know the particular charge against him but may be able to plead the judgment in bar of a second prosecution.[91] The means used to commit the offense should be stated where the degree of the offense depends upon that fact,[92] but where the statute makes the particular kind of act punishable, that only need be stated.[93] Where the crime can be committed only in certain territory, it must be clearly alleged that defendant's acts were committed within the prescribed area.[94] By statute in some states, where a crime may have been committed by different means, the means may be alleged in the alternative.[95]

Bad spelling and ungrammatical construction[96] do not vitiate an indictment,[97] where no prejudice results to accused, but the omission of "then and there" is fatal where by it the necessary averment that the assault was "felonious" is not made.[98]

Intent or knowledge.[99]—Where knowledge is not a statutory element of the offense, it need not be averred,[1] and the specific intent need not be specially averred where the acts charged necessarily involve it.[2] In charging attempts, where the intent is the gist of the offense, it must be directly and certainly charged.[3]

Venue[4] must be alleged,[5] but beyond a mere showing that the offense was

State v. Gallaugher, 123 Iowa, 378, 98 N. W. 906.

89. "And so defendant did murder deceased" will not aid failure to aver causal connection between injury and death. State v. Keerl, 29 Mont. 508, 75 P. 362. An averment of previous conviction of the "same offense" will not authorize the state to impose greater punishment for a subsequent offense, though that is the statutory language, since the statute must be construed to mean an offense of like character. Kinney v. State [Tex. Cr. App.] 79 S. W. 570.

90. State v. Fontenot, 112 La. 628, 36 So. 630. Wife desertion. Cuthbertson v. State [Neb.] 101 N. W. 1031. Information for false pretenses must affirmatively show some reasonable connection between the pretense and the receipt of the money. Stifel v. State [Ind.] 72 N. E. 600. An indictment for an attempt to commit an offense must not only allege the attempt and intent but it is essential that it also allege the overt acts relied on as constituting the attempt. State v. Doran [Me.] 59 A. 440. The particular felony intended by one attempting burglary must be averred. Intent to commit a "felony" is not sufficient. Id.

91. United States v. Pupke, 133 F. 243.

92. Stokes v. State [Tex. Cr. App.] 81 S. W. 1213. An indictment charging murder with some weapon to the grand jury unknown is sufficient in the absence of evidence that the weapon was known to the grand jury. Eatman v. State, 139 Ala. 67, 36 So. 16.

93. Assault by adult male on female. Stokes v. State [Tex. Cr. App.] 81 S. W. 1213.

94. Local option law. Crigler v. Com. [Ky.] 83 S. W. 587.

95. Shannon's Code, § 7084. Smartt v. State [Tenn.] 80 S. W. 586. Disjunctive averments following the language of the statute will not invalidate an affidavit returned with a commitment by a magistrate holding defendant to trial at the special sessions in the city of New York. People v. Zabor, 44 Misc. 633, 90 N. Y. S. 412.

96. See 2 Curr. L. 314.

97. Defendant's or other person's name. Bartley v. State [Tex. Cr. App.] 83 S. W. 190. "Krowder" and "Krower." Alexis v. U. S. [C. C. A.] 129 F. 60. "Fraudulently" for "fraudulently" in indictment for embezzlement. Bell v. State, 139 Ala. 124, 35 So. 1021. "Affect" for "effect." Smith v. Territory [Okl.] 77 P. 187. An indictment for a misdemeanor is not bad because it uses the verb in the participial form in charging the offense. That defendant committed the offense by then and there "executing and presenting" a false voucher. Pooler v. U. S. [C. C. A.] 127 F. 509. Misspelling the name of the county is immaterial. Guadalupe. Cabellero v. State [Tex. Cr. App.] 80 S. W. 1014; Reys v. State [Tex. Cr. App.] 76 S. W. 457. See 2 Curr. L. 319, n. 56. Use of "it" meaning value of "said hogs" in the appropriation clause of indictment for theft. Pate v. State [Tex. Cr. App.] 83 S. W. 695.

98. State v. Williams [Mo.] 83 S. W. 756.

99. See 2 Curr. L. 314.

1. Relationship in incest. State v. Glindemann, 34 Wash. 221, 75 P. 800; People v. Koller, 142 Cal. 621, 76 P. 500.

2. Intent to kill where poison is administered. State v. Robinson [Iowa] 101 N. W. 634; Chelsey v. State [Ga.] 49 S. E. 258. "Unlawfully, wrongfully, and feloniously" sufficiently charges intent. State v. Fordham [N. D.] 101 N. W. 888; Chelsey v. State [Ga.] 49 S. E. 258.

3. Chelsey v. State [Ga.] 49 S. E. 258.

4. See 2 Curr. L. 314.

5. Venue held sufficiently charged. Flohr v. Territory [Okl.] 78 P. 565; Cabellero v. State [Tex. Cr. App.] 80 S. W. 1014; Leach v. State [Tex. Cr. App.] 81 S. W. 733. "Then and there" is sufficient where it relates to a time and place previously sufficiently alleged. State v. Knowles [Mo.] 83 S. W. 1083.

committed within the jurisdiction of the court, a specific averment of locality is not generally otherwise required,[6] and in Alabama, it need not appear that the crime was committed within the jurisdiction of the court.[7] An indictment averring that the alleged bigamous marriage occurred in some county and city to the grand jurors unknown does not show a want of jurisdiction on its face.[8] Where a crime is committed in an unorganized county, it may be alleged to have been committed in the county in which under the statute the prosecution may be had.[9]

Surplusage[10] is a term applied to those nondescriptive averments in a pleading which may be rejected without impairing its validity.[11] Such averments may be treated as merely useless and of no effect and need not be proved.[12] Thus averments as to shooting inmates of a house burglarized are surplusage in an indictment for burglary and larceny,[13] and where only two prior convictions are necessary to bring defendant into the class of habitual criminals, an indictment is not objectionable because it recites three or more prior convictions.[14]

Time.[15]—Where there is no statute of limitations barring the offense, it is unnecessary to state the day or even the year, but is sufficient to aver generally that the offense was committed before finding the indictment,[16] and it is not necessary to state in any case the day on which the offense was committed, unless the day itself is of the essence of the offense,[17] or unless time is important to bring the offense within the operation of new or amended statutes or the like,[18] and where an impossible date is given, it will be disregarded if the offense be one as to which there is no limitation and as to which the date is not important.[19]

Avoiding statute of limitations.[20]—Where there is a statute of limitations

An allegation of facts from which the venue clearly appears is sufficient. Manning v. State [Tex. Cr. App.] 81 S. W. 957. "Said county" refers to county previously named. Moss v. State [Tex. Cr. App.] 83 S. W. 829.

6. No locality except venue need be alleged in prosecutions for stealing baled cotton in Georgia, being a felony without regard to place or value (Hall v. State, 120 Ga. 142, 47 S. E. 519); or for exhibiting a gaming table in Missouri (State v. Runzi, 105 Mo. App. 319, 80 S. W. 36). Though the county contains a military reservation over which the state courts have no jurisdiction, the information need not negative commission on the reservation. State v. Tully [Mont.] 78 P. 760.

7. Burton v. State [Ala.] 37 So. 435.

8. State v. Hansbrough, 181 Mo. 348, 80 S. W. 906.

9. Robinson v. State [Neb.] 98 N. W. 694.

10. See 2 Curr. L. 315.

11. Clark's Cr. Proc. p. 178, § 80; Bishop's New Cr. Proc. § 478. Several negations of exceptions in statute defining offense. State v. Scampini [Vt.] 59 A. 201. Unessential averments as to time. O'Hara v. U. S. [C. C. A.] 129 F. 551. Placing obstruction on railroad track; aggravating averments rejected. State v. Bisping [Wis.] 101 N. W. 359. Conspiracy to obtain money by false pretenses. Averments relied on to show merger held surplusage. People v. Wiechers, 94 App. Div. 19, 87 N. Y. S. 897.

12. Averment that assault with intent to murder was accompanied by a battery. Pyke v. State [Fla.] 36 So. 577. Allegations as to the use of force in the rape of a female under the age of consent are surplusage. State v. Scroggs, 123 Iowa, 649, 96 N. W. 723. The allegation of "force and arms" is immaterial in an indictment for rape on a female under age. State v. Anderson [Iowa] 101 N. W. 201; State v. Bibb [Iowa] 96 N. W. 714. The name of the person from whom defendant received stolen goods, and the charge that it is unknown may be rejected. Curran v. State [Wyo.] 76 P. 577.

13. Mann v. Com., 25 Ky. L. R. 2281, 80 S. W. 438.

14. State v. Jones, 128 F. 626.

15. See 2 Curr. L. 315.

16. State v. Shaw [Tenn.] 82 S. W. 480. An averment that defendant obstructed the highway on a certain date and on divers other days is not bad, since the commonwealth cannot be confined to the particular date laid. Commonwealth v. Illinois Cent. R. Co. [Ky.] 82 S. W. 381.

17. As in violations of Sunday law, etc. State v. Shaw [Tenn.] 82 S. W. 480. Charge of a negligent act by defendant at a certain date and deceased's death therefrom is sufficient [Code Cr. Proc. § 280]. People v. Murphy, 93 App. Div. 383, 87 N. Y. S. 786. "On or about" held sufficient. United States v. McKinley, 127 F. 168; Morris v. State [Tex. Cr. App.] 83 S. W. 1126. Murder. Burton v. State [Ala.] 37 So. 435. Blank in indictment for perjury where date should have been laid held a defect of form merely. United States v. Howard, 132 F. 325. Averment held sufficient in perjury case. State v. John [Iowa] 100 N. W. 193. "One thousand nine hundred three" is sufficient as to the year. Morris v. State [Tex. Cr. App.] 83 S. W. 1126.

18, 19. State v. Shaw [Tenn.] 82 S. W. 480.

20. See 2 Curr. L. 315.

applicable to the offense, there should be a sufficiently definite averment of time to show that the statute has not run,[21] and where an impossible date is alleged for the commission of a crime to which the statute of limitations applies, the indictment must be quashed, since if the date be disregarded it would not appear from the indictment that the statute had not run.[22] Where it appears on the face of the indictment that limitations have run against the offense, facts which avoid the bar of the statute must be pleaded.[23]

Repugnancy[24] consists in two inconsistent allegations in the same count which destroy each other.[25] No contradictory or repugnant matters which can be rejected as surplusage will vitiate,[26] nor is an indictment repugnant that conjunctively unites in a single count all the disjunctive elements recited in the statute defining the offense.[27] Repugnancy between counts is not demurrable.[28]

Designation and characterization of the offense.[29]—In New York, the crime must be designated by name if it has one, otherwise a brief description must be given.[30]

Statutory crimes.[31]—An indictment in the language of the statute or in terms substantially equivalent thereto is sufficient,[32] subject to the qualification, fundamental in the law of criminal procedure, that the accused is thereby apprised with reasonable certainty of the nature of the accusation against him.[33] If the words of themselves do not fully, directly and expressly without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense,[34] or if the statute merely designate the crime by its common-law name,[35] an indictment following the statute will not suffice. An information for a statutory offense need not use the language of the statute if the facts stated set forth all the essential elements of the offense,[36] nor state circumstances of aggravation subjecting accused

21. State v. Shaw [Tenn.] 82 S. W. 480; Tipton v. State, 119 Ga. 304, 46 S. E. 436; United States v. McKinley, 127 F. 168.

22. State v. Shaw [Tenn.] 82 S. W. 480.

23. That defendant had not been an "inhabitant of or resident in the state." Terms defined. State v. Snyder [Mo.] 82 S. W. 12, citing many cases. Burglary and larceny. State v. Foley [La.] 36 So. 940.

24. See 2 Curr. L. 315.

25. Lehman v. U. S. [C. C. A.] 127 F. 41. An averment that defendant made a false affidavit before "A. L. K. deputy clerk" is not variant from the affidavit set out showing the jurat to have been signed "A. L., clerk, by A. L. K., deputy clerk." Mahon v. State [Tex. Cr. App.] 79 S. W. 28. "Haynes" and "Haygens" are repugnant. Black v. State [Tex. Cr. App.] 79 S. W. 308.

26. Lehman v. U. S. [C. C. A.] 127 F. 41; O'Hara v. U. S. [C. C. A.] 129 F. 551.

27. Dealing and pretending to deal in green articles and spurious treasury notes. Lehman v. U. S. [C. C. A.] 127 F. 41. There is no repugnancy in charging that defendant did "embezzle and destroy" a letter. Bromberger v. U. S. [C. C. A.] 128 F. 346.

28. State v. Scampini [Vt.] 59 A. 201. Courts charging embezzlement of letter and larceny of its contents respectively are not repugnant. Bromberger v. U. S. [C. C. A.] 128 F. 346.

29. See 2 Curr. L. 315.

30. Conspiring to cheat and defraud is sufficient [Pen. Code, §§ 168, 276]. People v. Rathbun, 44 Misc. 88, 89 N. Y. S. 746.

31. See 2 Curr. L. 316.

32. Dalton v. United States [C. C. A.] 127 F. 544; State v. Block [Mo. App.] 82 S. W. 1103; Lipschitz v. State [Ind. App.] 72 N. E. 145; Holland v. State, 139 Ala. 120, 35 So. 1009; State v. Runzi, 105 Mo. App. 319, 80 S. W. 36; Robbins v. State, 119 Ga. 570, 46 S. E. 834. Procuring mock marriage. Barclay v. Com., 25 Ky. L. R. 463, 76 S. W. 4. Practicing medicine without license. State v. Edmunds [Iowa] 101 N. W. 431. Violation of liquor law. Atkinson v. State [Ind. App.] 70 N. E. 560. Misfeasance in office by county clerk [Sand. & H. Dig. § 1753]. Howard v. State [Ark.] 82 S. W. 196. Gambling. Commonwealth v. Schatzman [Ky.] 82 S. W. 238. Disturbing peace. Stancliff v. U. S. [Ind. T.] 82 S. W. 882. Larceny as bailee. McCracken v. People, 209 Ill. 215, 70 N. E. 749. Bribery. Sharp v. U. S. [Okl.] 76 P. 177. Swindling by three card monte. State v. Edgen, 181 Mo. 582, 80 S. W. 942. Offering to give bribe to juror. State v. Woodward [Mo.] 81 S. W. 857. Indecent exposure. State v. Martin [Iowa] 101 N. W. 637. Crime against nature. State v. McGruder [Iowa] 101 N. W. 646.

33. Dalton v. United States [C. C. A.] 127 F. 544; State v. Doran [Me.] 59 A. 440. Chastity of female need not be alleged in indictment for seduction. Caldwell v. State [Ala.] 83 S. W. 929.

34. Dalton v. United States [C. C. A.] 127 F. 546; Gallagher v. People, 211 Ill. 158, 71 N. E. 842; State v. Doran [Me.] 59 A. 440.

35. State v. Doran [Me.] 59 A. 440.

36. State v. Cruikshank [N. D.] 100 N. W. 697; Smith v. State [Neb.] 100 N. W. 806;

to greater punishment,[37] but the facts alleged must bring the offense clearly within the statutory terms.[38] An indictment for a statutory offense need not state the time when the statute took effect.[39]

Exceptions and provisos.[40]—Where an exception is so engrafted in the enacting clause of a statute that the offense cannot be described without meeting and negativing the exception, it must be alleged in the indictment that defendant is not within the excepted class;[41] but where the exceptions and provisos appear in distinct or subsequent clauses, negotiation is not necessary.[42] In Oklahoma, it is not necessary to charge that defendant is not an Indian, where conviction is not sought under 23 Stat. 385, § 9.[43]

Setting forth written or printed matter.[44]—The general rule is that unless there is a special reason therefor a written instrument may be described by its legal effect,[45] but a variance between the purport and tenor clauses in forgery is fatal.[46]

Principals and accessories.[47]—At the common law, an accessory must be charged as such.[48] In those states where the distinction between principals and accessories has been abolished, the ancient rule as to the necessity of charging accessories as such no longer prevails, and accessories may be prosecuted as principals.[49]

Designation of accused.[50]—An indictment must identify the accused with certainty,[51] but one equally well known under two or more names may be indicted under either,[52] and the misspelling of a name is immaterial.[53] Defendant's aliases need not be repeated in subsequent parts of the indictment.[54]

Designation of third persons.[55]—It is of no consequence that the name by which a third person is designated in the indictment is incorrect or an assumed one, if it is the name by which he is generally known,[56] and if a person be known by the name alleged, it is sufficient, though he may be better known by another.[57]

State v. La Chall [Utah] 77 P. 3; Kizer v. People, 211 Ill. 407, 71 N. E. 1035; Schley v. State [Fla.] 37 So. 518. Should use statutory words or their legal equivalent. State v. Rosenblatt [Mo.] 83 S. W. 975.

37. Robbery being armed. State v. Poe, 123 Iowa, 118, 98 N. W. 587.

38. State v. Jett [Kan.] 77 P. 546; State v. Doran [Me.] 59 A. 440. A statutory indictment must contain all those forms of expression, those descriptive words which will bring the defendant precisely within the definition of the statute. State v. Etchman [Mo.] 83 S. W. 978.

39. State v. Scampini [Vt.] 59 A. 201.

40. See 2 Curr. L. 316.

41. State v. Snyder [Mo.] 82 S. W. 12; City of Tarkio v. Loyd [Mo. App.] 82 S. W. 1127; Fleeks v. State [Tex. Cr. App.] 83 S. W. 381.

42. State v. Snyder [Mo.] 82 S. W. 12; People v. Shuler [Mich.] 98 N. W. 986; Langan v. People [Colo.] 76 P. 1048; State v. Durein [Kan.] 78 P. 152; City of Billings v. Brown [Mo. App.] 80 S. W. 322; State v. Price [N. J. Law] 58 A. 1015.

43. Herd v. U. S., 13 Okl. 512, 75 P. 291.

44. See 2 Curr. L. 316.

45. Pooler v. U. S. [C. C. A.] 127 F. 509; United States v. Grunberg, 131 F. 137. Checks used in fraudulent pretenses held sufficiently described. Moore v. People, 31 Colo. 336, 73 P. 30.

46. Webb v. State [Tex. Cr. App.] 83 S. W. 394.

47. See 2 Curr. L. 316.

48. One cannot be convicted on indictment charging him as a principal on evidence that shows him to be at most an accomplice. Barnett v. State [Tex. Cr. App.] 80 S. W. 1013. An indictment alleging that defendant advised and encouraged another to steal horses he had hired is not bad for failure to allege defendant was a party to the hiring. Harrold v. State [Tex. Cr. App.] 81 S. W. 728.

49. Swindling by three card monte. State v. Egden, 181 Mo. 582, 80 S. W. 942. In California, an accessory before the fact may be charged as a principal. Pen. Code, § 971, so providing is constitutional. People v. Nolan [Cal.] 77 P. 774.

50. See 2 Curr. L. 316.

51. "John Doe, a Chinese person, whose true name is unknown," shows on its face that the person is unidentified. United States v. Doe, 127 F. 982.

52. State v. Appleton [Kan.] 78 P. 445.

53. Bartley v. State [Tex. Cr. App.] 83 S. W. 190.

54. Moree v. State [Tex. Cr. App.] 83 S. W. 1117.

55. See 2 Curr. L. 317.

56. Pyke v. State [Fla.] 36 So. 577. "Harry Kowallio" and "Henry Kavalsky." State v. Neighbaker [Mo.] 83 S. W. 523.

57. A married woman may be referred to by the name of her husband, i. e. "Mrs. G. W. S.," though her name is "Ella S." Stokes v. State [Tex. Cr. App.] 81 S. W. 1213.

Misspelling of names is immaterial where the names are idem sonans.[58] An information charging an assault on "Charles Clark" and the killing of "the said Charley Clark" is good.[59] An indictment for forgery of the name of "H. Wiseman & Co., Bankers," need not allege whether the payer was a firm, partnership or corporation, or set forth the names of its members.[60]

Description of money[61] need not be exact,[62] and an averment of "current money" or "currency" of the United States of America is good and is sustained by proof of any current paper money.[63]

Ownership of property[64] must be correctly laid,[65] though by statute in some states the separate property of a married woman may be alleged to be owned by either her or her husband,[66] and property owned jointly or in common by several may be laid in all or either of them.[67]

(§ 4) *D. Issues, proof and variance.*[68]—Insanity of defendant to the extent that he is incapable of forming a criminal intent is raised by the plea of not guilty,[69] but where burglary with intent to steal and larceny are both charged, defendant cannot be convicted of both, the conviction of burglary including the larceny.[70]

All necessary averments must be proved as laid,[71] including unnecessarily minute descriptions of necessary facts, but an unnecessary description of an unnecessary fact need not.[72]

Where it appears that the grand jury knew, or by the exercise of reasonable diligence could have known, material facts stated to be unknown to them, there is a fatal variance.[73] A charge of sending a forged telegram is proved by evidence of giving it to the telegraph operator to be sent;[74] and where an indictment charges an assault with intent to murder two persons, the fact that the assault was by different acts in the same transaction does not amount to a fatal variance.[75] When two persons are jointly indicted for murder, one as principal in the first degree and the other as principal in the second degree, each may be convicted upon evidence showing that he was either the absolute perpetrator of the crime, or was present aiding and abetting the other in its commission.[76]

58. "Krowder" and "Krower." Alexis v. U. S. [C. C. A.] 129 F. 60. "Shuter" and "Shutter." State v. Johnson [Wash.] 78 P. 903.

59. State v. Williams [Mo.] 83 S. W. 756.

60. Usher v. State [Tex. Cr. App.] 81 S. W. 309.

61. See 2 Curr. L. 317.

62. The specific marks and numbers on bank bills, treasury notes, and the like need not be set forth. Bromberger v. U. S. [C. C. A.] 128 F. 346. "One ten dollar greenback bill, paper currency, lawful money of the United States," is sufficient. Rowland v. State [Ala.] 37 So. 245.

63. Berry v. State [Tex. Cr. App.] 80 S. W. 630; Johnson v. State [Ark.] 83 S. W. 651.

64. See 2 Curr. L. 317.

65. Young v. State [Ark.] 83 S. W. 934. Alleging ownership in "Butter Bros." is insufficient. State v. Pollock, 105 Mo. App. 273, 79 S. W. 980.

66. Code Cr. Proc. 1895, art. 445. Hames v. State [Tex. Cr. App.] 81 S. W. 708.

67. Code Cr. Proc. 1895, art. 445. Mass v. State [Tex. Cr. App.] 81 S. W. 45. Shannon's Code, § 7090. Lowry v. State [Tenn.] 81 S. W. 373.

68. See 2 Curr. L. 318.

69. State v. Howard [Mont.] 77 P. 50.

70. Cronin v. State [Tenn.] 82 S. W. 477.

71. Held no variance as to building burglarized. People v. Price, 143 Cal. 351, 77 P. 73; State v. Rogers [Mont.] 77 P. 293. Indictment charging use of "gun" and "fire arm" is not variant from proof that it was a "six shooter." Stancliff v. U. S. [Ind. T.] 82 S. W. 882.

72. Hall v. State, 120 Ga. 142, 47 S. E. 519; Morgan v. State, 119 Ga. 964, 47 S. E. 567.

73. Name of baby which defendant, its mother, killed, McCoy v. State [Tex. Cr. App.] 80 S. W. 524. It does not necessarily follow that the grand jury knew the means defendant used to murder deceased, though an indictment against an accessory found the day before alleged a certain means, and a motion in arrest on that ground is properly overruled. Sanchez v. State [Tex. Cr. App.] 78 S. W. 504. An averment that the name of the person who stole, and from whom defendant received stolen goods, is unknown is not variant where there is nothing in the evidence that the prosecuting attorney did know when he filed the information. Curran v. State [Wyo.] 76 P. 577.

74. People v. Chadwick, 143 Cal. 116, 76 P. 884.

The venue.[77]—*The time* is not material further than to avoid the statute of limitations and to prove that the crime was committed prior to the finding of the indictment,[78] and a conviction will not be disturbed because the offense was shown to have been committed on a day prior to that alleged where defendant was not prejudiced,[79] but where the evidence is positive and unequivocal that the crime was committed on the date charged in the indictment, an instruction that the date was not material is unfair to a defendant who has established a complete alibi.[80]

Name or other description of accused or third person.[81]—The allegations and proof must correspond as to the owner of land trespassed upon,[82] or property stolen or embezzled,[83] but where a third person is charged by one of two names by which she is indifferently known, the fact that the other is her true name will not cause a mistrial.[84] Where the state takes issue on defendant's plea of misnomer, the question is not what name he is known by at the time of the trial, but at the time the indictment was found.[85]

(§ 4) *E. Defects, defenses and objections.*[86]—Formal defects, apparent of record,[87] or on the face of the indictment, must be taken advantage of before plea, or before the jury is sworn,[88] such defects being waived by plea and cured by verdict,[89] though failure to move to quash an information or to arrest the judgment founded thereon does not waive a substantial defect, though apparent on the face of the information.[90] An indictment failing to charge a public offense may be first attacked on appeal,[91] but will not be adjudged insufficient for every defect of substance for which a motion to quash would lie,[92] and objec-

75. Scott v. State [Tex. Cr. App.] 81 S. W. 959.

76. Morgan v. State [Ga.] 48 S. E. 9.

77. See 2 Curr. L. 319.

78. State v. Carr [Del. Gen. Sess.] 57 A. 370; State v. Eggleston [Or.] 77 P. 738; State v. Bates [Mo.] 81 S. W. 408; Springer v. State [Ga.] 48 S. E. 907. May be looked to to avoid plea of former jeopardy. Gallagher v. People, 211 Ill. 158, 71 N. E. 842. Ordinarily where a month is referred to in evidence it will be understood to be of the current year, and when no contest as to time is made at the trial and all parties assume the transaction to have been during the month named last past, the verdict will not be set aside for failure to prove the year. Tipton v. State, 119 Ga. 304, 46 S. E. 436.

79. Burglary. State v. Rogers [Mont.] 77 P. 293.

80. People v. Davey [N. Y.] 72 N. E. 244.

81. See 2 Curr. L. 319.

82. Jeter v. State, 71 Ark. 472, 75 S. W. 929. A charge of malicious mischief against property alleged to be owned by four named persons is not supported by proof that only one of them had an interest therein and that was only an easement. Grant v. State, 120 Ga. 199, 47 S. E. 624. Where ownership is laid in one person, proof that it is in him and another is not variant. People v. Nunley, 142 Cal. 105, 75 P. 676; State v. Ireland [Idaho] 75 P. 257.

83. Young v. State [Ark.] 83 S. W. 934. An allegation that property embezzled belonged to a certain person is supported by proof that it was in his possession as guardian of the owner. Leach v. State [Tex. Cr. App.] 81 S. W. 733.

84. Whittington v. State [Ga.] 48 S. E. 948.

85. Noble v. State, 139 Ala. 90, 36 So. 19.

86. See 2 Curr. L. 320.

87. To be available, objection to an indictment on the ground that the fact of its presentment was not entered on the minutes of the court must be made before trial. Moore v. State [Tex. Cr. App.] 81 S. W. 48.

88. That count required by Code, § 131, in indictment for murder, charging carrying of concealed weapon, was nolle prossed before trial. State v. Edwards [S. C.] 47 S. E. 395. Technical defects not affecting the merits will not be regarded where not raised by demurrer, and first called attention to on motion in arrest. People v. Mead [Cal.] 78 P. 1047. Motion to quash cannot be considered after plea unless the plea is withdrawn upon leave. McKevitt v. People, 208 Ill. 460, 70 N. E. 693.

89. The doctrine of laider by verdict is recognized in Louisiana. State v. Hauser, 112 La. 313, 36 So. 396. The objection that the information was not verified is waived if not taken before appeal. State v. Schnettler, 181 Mo. 173, 79 S. W. 1128; State v. Runzi, 105 Mo. App. 319, 80 S. W. 36; State v. Montgomery, 181 Mo. 19, 79 S. W. 693. Where the county attorney fails to file the information within the time limited by statute, any advantage thereof must be taken by defendant by motion to set aside before demurrer or plea, and failure to so take advantage of the irregularity will waive it. State v. Lagoni [Mont.] 76 P. 1044.

90. State v. Nunley [Mo.] 83 S. W. 1074.

91. Only in a capital case can an indictment be attacked for the first time in the court of appeals of New York. People v. Wiechers [N. Y.] 72 N. E. 501.

92. Atkinson v. State [Ind. App.] 70 N. E. 560.

tions that the crime charged was merged in a greater one shown in the indictment,[93] or that the indictment is duplex, come too late on appeal.[94] Neither a motion to make more definite and certain[95] nor a motion for new trial is a proper remedy for attacking an indictment,[96] and a motion for a directed verdict on the ground that the offense charged has not been proven raises no question as to the sufficiency of the indictment.[97]

Only clear points of law are considered on motion to quash, demurrer or motion in arrest being the proper manner in which to raise involved questions,[98] and where the indictment is sufficient in form and describes and pleads the offense with technical precision, a motion to quash is properly overruled.[99] A statutory enumeration of grounds has been held exclusive.[1] That the name of the wrong juror is designated as foreman in the body of the indictment,[2] that property is not described with sufficient certainty in an indictment for robbery,[3] or that accused is designated by initials instead of Christian name is not ground for a motion to quash, though there is no averment that his name is unknown to the pleader;[4] but the objection that an indictment has been amended in material matter without consent of the grand jury who found it can be raised only by motion to quash,[5] and a motion to dismiss on the ground that no record entry of the presentment of the indictment appears should be granted, though made after transfer to the county court for trial.[6]

The bill of particulars is no part of the indictment and will not prevent its quashal if insufficient without the bill.[7]

Repugnancy is ground for demurrer or motion to quash,[8] but cannot be taken advantage of after verdict.[9]

Failure to identify the accused may be taken advantage of either by demurrer or plea in abatement;[10] but failure of the indictment to state a time certain or that the crime was committed within the jurisdiction of the court are not demurrable in Alabama,[11] and amendment after finding, to be ground for demurrer, must appear on the face of the indictment.[12]

An indictment alleging that defendant made a false bill or order with intent to defraud sufficiently alleges a scienter to withstand a motion in arrest.[13]

Demurrers should specifically point out the defect complained of,[14] and an objection to an indictment on the ground that the statute under which it is drawn is unconstitutional must point out the particular part of the constitution claimed to have been violated.[15] A general demurrer,[16] motion in arrest,[17] or motion to quash, is properly overruled if the indictment has one good count;[18]

93. People v. Wiechers, 94 App. Div. 19, 87 N. Y. S. 897.
94. People v. Wiechers, 94 App. Div. 19, 87 N. Y. S. 897; State v. Blakeley [Mo.] 83 S. W. 980.
95. State v. Bogardus [Wash.] 78 P. 942.
96. State v. Hauser, 112 La. 313, 36 So. 396.
97. People v. Wiechers [N. Y.] 72 N. E. 501.
98. United States v. Grunberg, 131 F. 137.
99. Commonwealth v. Packard, 185 Mass. 64, 69 N. E. 1067.
1. Code, § 5319. State v. De Groate, 122 Iowa, 661, 98 N. W. 495. **Contra,** Code Cr. Proc. §§ 262-264, 313. People v. Bills, 44 Misc. 348, 89 N. Y. S. 1091.
2. Taylor v. State [Ga.] 49 S. E. 317.
3. McKevitt v. People, 208 Ill. 460, 70 N. E. 693.
4. State v. Appleton [Kan.] 78 P. 445.
5. Watts v. State [Md.] 57 A. 542.
6. Moore v. State [Tex. Cr. App.] 81 S. W. 48.
7. State v. Van Pelt [N. C.] 49 S. E. 177.
8. Repugnancy of a count on which the prosecutor has elected not to proceed is not ground for quashing the one he proceeds under. Blair v. State [Neb.] 101 N. W. 17.
9. Lehman v. U. S. [C. C. A.] 127 F. 41.
10. United States v. Doe, 127 F. 982.
11. Burton v. State [Ala.] 37 So. 435.
12. Watts v. State [Md.] 57 A. 542.
13. State v. Hauser, 112 La. 313, 36 So. 396.
14. Flohr v. Territory [Okl.] 78 P. 565.
15. State v. Brockmiller [Mo. App.] 81 S. W. 214.
16, 17. Pooler v. U. S. [C. C. A.] 127 F. 509.
18. Watts v. State [Md.] 57 A. 542.

and a conviction generally on an indictment in several counts will be sustained if any count is good and supported by the evidence.[19]

Motion to quash and not demurrer[20] is proper to raise the objection that the information is not verified or supported by affidavit,[21] or that it is not preceded by a proper examination.[22] That it appears on the trial that the person making the affidavit supporting the information had no personal knowledge of the facts is not ground for motion to quash.[23]

Technical or formal objections to the sufficiency of an indictment will not be considered in proceedings for removal of a Federal prisoner to the district in which he is triable, but will be left for the determination by the court in which it was found,[24] but if on broad and liberal construction the indictment does not appear to charge an offense, the prisoner should not be held for removal.[25]

That a negro is indicted by a grand jury composed exclusively of white men, negroes having been excluded by reason of race, color, or previous condition of servitude,[26] that defendant was compelled to go before the grand jury and give evidence against himself,[27] that there were irregularities in the deliberations of the grand jury,[28] and that unauthorized persons were present, are grounds of motion to quash;[29] but neither the attorney general[30] nor an assistant district attorney is unauthorized.[31] Irregularity in summoning grand jurors may be raised by motion to quash,[32] and disqualification of individual jurors is

19. Lehman v. U. S. [C. C. A.] 127 F. 41; Pooler v. U. S. [C. C. A.] 127 F. 509; Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

20. A demurrer to an information does not reach the defect that it was not verified or supported by affidavit. State v. Brown, 181 Mo. 192, 79 S. W. 1111.

21. Motion to quash an information lies for lack of verification or supporting affidavit. State v. Runzi, 105 Mo. App. 319, 80 S. W. 36. Lack of verification. State v. McGee, 181 Mo. 312, 80 S. W. 899. Motion held to raise the objection that no affidavit in fact was filed. State v. Schnettler, 181 Mo. 173, 79 S. W. 1123. Lack of verification must be attacked by motion to quash, duly preserved by bill of exceptions and renewed by motion in arrest. State v. Brown, 181 Mo. 192, 79 S. W. 1111. Where failure to verify an information is not taken advantage of by motion to quash, the failure is not open to review. State v. Speyer [Mo.] 81 S. W. 430.

22. Motion to set aside information for irregularities in examining trial held properly refused. Appointment of stenographer and filing transcript. People v. Nunley, 142 Cal. 441, 76 P. 45.

23. Overland Cotton Mill Co. v. People [Colo.] 75 P. 924.

24. In re Benson, 131 F. 968; Id., 130 F. 486.

25. In re Benson, 131 F. 968.

26. Discrimination held not shown by evidence. Smith v. State [Tex. Cr. App.] 78 S. W. 694. Not ground for quashing where no actual discrimination is shown. State v. Daniels, 134 N. C. 641, 46 S. E. 743.

27. Not grounds unless his constitutional privilege is violated. Presence before knowledge of accusation, and being compelled to assume the dress of persons charged with crime and so dressed to exhibit himself before witnesses who afterward testified before the grand jury. Lindsay v. State, 4 Ohio C. C. (N. S.) 409, 24 Ohio Circ. R. 1. An inquest before a grand jury is not a trial and a plea in abatement because of such inquest will not lie where it is not alleged that one who gave self-incriminating testimony therein claimed his constitutional privilege. Id.

28. Absence of one member during part of deliberations is immaterial if he was not absent when defendant's case was considered. State v. Sullivan [Mo. App.] 84 S. W. 105.

29. Presence of stenographer does not invalidate if no prejudice resulted. State v. Sullivan [Mo. App.] 84 S. W. 105. Not quashed on the ground that a third person was in grand jury room while a witness testified. Mason v. State [Tex. Cr. App.] 81 S. W. 718. A plea in abatement of an indictment on the ground of presence of the prosecuting attorney in the grand jury room must negative the circumstances which may authorize his presence. Smartt v. State [Tenn.] 80 S. W. 586.

30. State v. Sullivan [Mo. App.] 84 S. W. 105.

31. United States v. Cobban, 127 F. 713.

32. Rev. St. 1899, §§ 3769, 3770; Acts 1901, p. 192, § 3770a, held complied with. State v. Berry, 179 Mo. 377, 78 S. W. 611. Mere irregularities in the summoning of grand jurors which do not affect their qualifications are not ground of a motion to quash. Lindsay v. State, 4 Ohio C. C. (N. S.) 409, 24 Ohio Circ. R. 1. See 2 Curr. L. 321, n. 77. Where an indictment was found by a resummoned grand jury, the fact that two jurors failed to appear and their places were supplied will not vitiate it. Lax v. State [Tex. Cr. App.] 79 S. W. 758. Gen. Laws 1899, c. 151, p. 154, providing for drawing grand jury held valid. State v. Ames, 91 Minn. 365, 98 N. W. 190.

ground in some states,[33] though not in others.[34] Objection by plea in abatement and before arraignment on the ground that some of the grand jurors were disqualified is in due time and taken in the proper way.[35] Defendant does not waive his right to raise the question, on motion in arrest, that the indictment was found by a grand jury illegally drawn, by pleading to the indictment and going to trial;[36] but one who has been arrested on preliminary information and released on bail and who fails to appear on the adjourned day of the term on which the grand jury is impaneled waives objection to the grand jury and cannot thereafter have the indictment set aside for objection to the panel.[37]

A motion to quash is allowable on the ground that essential facts before the grand jury were proved by incompetent evidence,[38] but such motion is addressed to the discretion of the court,[39] and is not available after conviction, since the verdict supplies the necessity of a prima facie case required as basis for the finding of a true bill.[40] Mere presence of incompetent evidence with sufficient legal evidence will not avail to quash,[41] and the general rule is that the court cannot inquire into the sufficiency of the proof or the mode of examining the witnesses.[42] Failure to swear a witness before the grand jury might be ground of a motion to quash, but is not sufficient reason for acquittal after issue joined.[43]

Duplicity cannot be taken advantage of in the Federal courts either by general demurrer or motion in arrest,[44] and the joinder of several offenses in separate counts is left to the discretion of the court, who may compel election or separate trials.[45] In Kentucky, a demurrer to a duplex indictment should be sustained or the prosecution required to elect,[46] though a motion to elect and not dismissal is the proper remedy.[47]

Lack of answer or demurrer to a motion to quash does not make it error to overrule it,[48] and a motion to quash for duplicity may be overruled on striking from the information the language claimed to charge the second offense.[49] A plea in abatement is properly overruled where it appears that the indictment was properly returned in open court, though no entry was made on the minutes at the time.[50] The quashing of an information for an amendable defect in charging the offense does not abate the suit, though the statute under which the prosecution was begun was repealed prior to the quashal.[51] Where the court deems an information insufficient, it may, prior to the entry of final judgment, set the verdict founded thereon aside and allow a new information to be substituted, though a demurrer to the previous one has been overruled.[52]

33. That a grand juror cannot write is ground of motion to quash in Iowa. Code, § 332. Showing held not sufficient. State v. Greenland [Iowa] 100 N. W. 341. An indictment cannot be quashed because one of the grand jury was above the legal age for jurors. People v. Borgstrom, 178 N. Y. 254, 70 N. E. 780; State v. Hoffman [N. J. Law] 57 A. 263.

34. See 2 Curr. L. 321, n. 76.

35. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075. And disqualification for recent service may be taken advantage of by challenge or by plea in abatement filed in due time. Plea held good. McFarlin v. State [Ga.] 49 S. E. 267.

36. State v. Edwards [S. C.] 47 S. E. 395.

37. State v. McPherson [Iowa] 101 N. W. 738.

38. Radford v. U. S. [C. C. A.] 129 F. 49; People v. Bills, 44 Misc. 348, 89 N. Y. S. 1091.

39, 40. Radford v. U. S. [C. C. A.] 129 F. 49.

41. Child under 12 years of age. People v. Sexton, 42 Misc. 312, 86 N. Y. S. 517. Defendant's wife. State v. De Groate, 122 Iowa, 661, 98 N. W. 495.

42. State v. De Groate, 122 Iowa, 661, 98 N. W. 495; People v. Bills, 44 Misc. 348, 89 N. Y. S. 1091.

43. Nixon v. State [Ga.] 48 S. E. 966.

44. Pooler v. U. S. [C. C. A.] 127 F. 509.

45. United States v. Eastman, 132 F. 551.

46. Messer v. Com. [Ky.] 80 S. W. 489.

47. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287.

48. Peckham v. People [Colo.] 75 P. 422.

49. Both manifestly relating to the same act. State v. Schaben [Kan.] 76 P. 823.

50. Chelsey v. State [Ga.] 49 S. E. 258.

51. State v. Stevens [Kan.] 75 P. 546.

52. State v. Riley [Wash.] 78 P. 1001.

(§ 4) *F. Joinder and separation of counts and election. Joinder of parties.*[53]—Several may be jointly indicted for offenses arising wholly out of the same joint act or omission.[54]

Joinder of counts.[55]—The propriety of joining offenses of the same nature in different counts is left to the discretion of the court, which may compel election or separate trials;[56] but where an act may constitute one or more of several distinct crimes, each of such crimes may be charged in a separate count to meet different phases of the proof.[57] A contention that the several counts of an information for exhibiting stock gambling shall be treated as one for the reason that the offense is a continuing one is untenable where the statute makes each exhibition an offense.[58]

Duplicity.[59]—A count that charges two separate and distinct offenses is bad,[60] and where the alternative words in the statute create separate offenses, they cannot both be used in the same count,[61] but a single count may state facts that show that a statutory offense has been committed by all the modes named in the statute,[62] and an indictment is not duplicitous because it sets out the acts done in furtherance of the conspiracy charge.[63] Acts alleged as incidents or parts of the main offense charged do not render the indictment duplex, though in themselves sufficient to amount to a statutory offense,[64] and an information is not double when one of the offenses is insufficiently charged.[65] In Kentucky, the statutory enumeration of offenses that may be joined in one indictment is exclusive,[66] and under the act of congress but three offenses committed within six months may be joined.[67]

53. See 2 Curr. L. 322.

54. State v. Lehman [Mo.] 81 S. W. 1118.

55. See 2 Curr. L. 322.

56. United States v. Eastman, 132 F. 551.

57. Theft from the person and theft of over $50. Flynn v. State [Tex. Cr. App.] 83 S. W. 206.

58. State v. Runzi, 105 Mo. App. 319, 80 S. W. 36.

59. See 2 Curr. L. 322.

60. An indictment charging an assault with intent to murder two persons is not duplicitous. Scott v. State [Tex. Cr. App.] 81 S. W. 950. Indictment for bribery by receipt of a sum of money contributed by several held to charge a single offense on the theory that the contributions were joint. State v. Ames, 91 Minn. 365, 98 N. W. 190. A charge that defendant feloniously ravished and carnally knew a female under the age of consent is not double. State v. Priest, 32 Wash. 74, 72 P. 1024. An indictment charging that on a certain day and on each day thereafter for one year defendant committed a certain offense is duplex and is not cured by confining the proof to the day alleged. Scales v. State [Tex. Cr. App.] 81 S. W. 947.

61. Taking female for purpose of "prostitution" or "concubinage" [Rev. St. 1899, § 1842]. State v. Adams, 179 Mo. 334, 78 S. W. 588.

62. Flohr v. Territory [Okl.] 78 P. 565; State v. Cates [Me.] 58 A. 238; Pooler v. U. S. [C. C. A.] 127 F. 509; Stancliff v. U. S. [Ind. T.] 82 S. W. 882; Kemp v. State, 120 Ga. 157, 47 S. E. 548; State v. Howard [Mont.] 77 P. 50; Lipschitz v. State [Ind. App.] 72 N. E. 145; People v. Shuler [Mich.] 98 N. W. 986; Miller v. Com., 25 Ky. L. R. 1931, 79 S. W. 250; Steele v. State [Tex. Cr. App.] 81 S. W. 962; State v. Schleuter [Mo. App.] 83 S. W. 1012.

63. People v. Rathbun, 44 Misc. 88, 89 N. Y. S. 746.

64. Indictment for common nuisance in polluting stream also charging statutory offense. Peacock Distilling Co. v. Com., 25 Ky. L. R. 1778, 78 S. W. 893. Omission by police captain to prevent bawdy houses, further charging failure to arrest keepers. State v. Boyd [Mo. App.] 84 S. W. 191.

Contra: An information which purports to charge a single offense, but in stating the facts and circumstances alleged to constitute such crime unnecessarily alleges matters of aggravation which sufficiently describe one or more other crimes not necessarily included in the one offense intended to be charged, is bad for duplicity. State v. Mattison [N. D.] 100 N. W. 1091.

65. Kappes v. State, 4 Ohio C. C. (N. S.) 14, 25 Ohio Circ. R. 723; State v. Edmunds [Iowa] 101 N. W. 431. False pretenses. Information held to charge but one offense. Obtaining signature to deed. Moline v. State [Neb.] 100 N. W. 810.

66. And forgery and uttering cannot be so charged [Cr. Code, §§ 126, 127]. Messer v. Com. [Ky.] 80 S. W. 489.

67. Act Mch. 2, 1889, c. 393 (25 Stat. 873); U. S. Comp. St. 1901, p. 3696. See 2 Curr. L. 323, n. 28. Where the indictment shows on its face that the three violations of the postal laws charged were not committed within six months, the demurrer should be sustained. Bass v. U. S., 20 App. D. C. 232.

Election.[68]—Where two offenses of the same nature are charged, it is discretionary whether the prosecutor shall be required to elect and at what stage of the proceedings;[69] but where each of several acts proved constitutes a distinct offense, the prosecution should be required to elect.[70] A motion to elect for duplicity comes too late after the jury is sworn.[71] Failure to submit a count is tantamount to an election to stand upon the one submitted.[72]

Consolidation.[73]—Indictments cannot be consolidated in the Federal court which together charge three offenses not committed within six months,[74] but nine indictments, each charging three offenses, were tried at once in the first circuit, and separate verdict and judgment rendered on each.[75]

(§ 4) *G. Amendments. Indictments.*[76]—Indictments, as a rule, cannot be amended in material matter except by the grand jury finding them,[77] and where a change of venue is had, an indictment must in general be amended if at all in the county from which it came.[78] Statutes of jeofails have relaxed the ancient rule as to matters of form,[79] but such statutes as a rule only authorize amendments after and not before the jury has been sworn,[80] and then cannot avail to cure an indictment that fails to charge a public offense.[81] No prejudice results from an unnecessary or immaterial amendment.[82]

Informations.[83]—The insertion of defendant's name in the body of the information during trial is an amendment as to form merely,[84] and a new information filed after demurrer to the original is sustained is not invalidated by writing at the head of it, "Amended information."[85]

(§ 4) *H. Conviction of lesser degrees and included offenses.*[86]—A verdict for a less crime may be found under an indictment for a greater of the same generic class,[87] the evidence supporting it,[88] and the averments being sufficient

68. See 2 Curr. L. 323.

69. Blair v. State [Neb.] 101 N. W. 17; State v. Darling [Vt.] 58 A. 974.

70. Rape. Powell v. State [Tex. Cr. App.] 82 S. W. 516; State v. Lancaster [Idaho] 78 P. 1081. Every obstruction of a highway being a separate offense, the prosecution must elect where it has proved several on different days. Commonwealth v. Illinois Cent. R. Co. [Ky.] 82 S. W. 381. Not where only one act shown is criminal. Brown v. State [Tex. Cr. App.] 83 S. W. 378. Where the indictment charges an assault on two and it appears that the assault was by different acts in the same transaction, the state should be required to elect. Scott v. State [Tex. Cr. App.] 81 S. W. 950.

71. State v. Woods, 112 La. 617, 36 So. 626.

72. Martin v. State [Tex. Cr. App.] 83 S. W. 390. Hence it is error on a subsequent trial to submit the count not elected before. Parks v. State [Tex. Cr. App.] 79 S. W. 301.

73. See 2 Curr. L. 324.

74. Act Mch. 2, 1889, c. 393 (25 Stat. 873); U. S. Comp. St. 1901, p. 3696. Bass v. U. S., 20 App. D. C. 232.

75. Betts v. U. S. [C. C. A.] 132 F. 228.

76. See 2 Curr. L. 324.

77. Names of persons are material, both Christian and surnames. Watts v. State [Md.] 57 A. 542.

78. Whether it was proper to allow the clerk of the county in which the indictment was found to amend the transcript thereof after transmission was not decided where the amendment was as to the name of the person killed and the names were idem sonans. Taylor v. State [Ark.] 82 S. W. 495. See 2 Curr. L. 324, n. 45.

79. See 2 Curr. L. 324, n. 46.

80. P. L. 1898, p. 831, § 44. State v. Twining [N. J. Law] 58 A. 1098. The statute of Maryland allowing amendments as to the name of any person other than the accused, only authorizes amendment after the jury has been sworn [Code Pub. Gen. Laws, art. 27, § 284]. Watts v. State [Md.] 57 A. 542.

81. State v. Twining [N. J. Law] 58 A. 1098.

82. A blank in the indictment for the given name of the defendant may be filled after trial has begun, especially when the accused has been arraigned by his full name, and the full name appears on the back of the indictment. State v. Matthews [La.] 36 So. 48. The value of the property taken not being material in robbery, an averment thereof is not necessary, and an amendment alleging it is not prejudicial. State v. La Chall [Utah] 77 P. 3. Where an indictment for robbery alleges force and intimidation, the omission of the statutory words "and against his will" is immaterial, and an amendment inserting them not prejudicial. Id.

83. See 2 Curr. L. 324.

84. State v. Coover [Kan.] 76 P. 845.

85. People v. Lee Look, 143 Cal. 216, 76 P. 1028.

86. See 2 Curr. L. 325.

87. Charge of assault with intent to mur-

to include it,[89] though the two crimes are statutory;[90] the test generally applied being that the evidence required to establish the greater would prove the lesser offense as a necessary element.[91] A verdict of assault cannot be rendered on an indictment for homicide in New York where the deceased died of the wound.[92]

§ 5. *Arraignment and plea. Arraignment.*[93]—Arraignment and plea are necessary in most states,[94] though in some a formal arraignment is no longer necessary where no prejudice results,[95] and the plea may be waived.[96] On discovery after the jury are selected that defendant has not been arraigned, he may then be arraigned, a plea entered for him on refusal to plead, and the trial proceeded with before the jury already chosen.[97]

General pleas.[98]—The court may, in the exercise of a sound discretion, refuse to allow the plea in bar withdrawn,[99] except that the plea of not guilty may be withdrawn at any time before judgment, in order to enter a plea of guilty,[1] and on the entry of such plea, the commonwealth has the right to introduce evidence, the jury being required to fix the penalty.[2] Plea of guilty has the force of a verdict,[3] but amounts merely to an admission of record of the truth of whatever is well charged in the indictment.[4] Permission should be granted to withdraw a plea of guilty induced by error,[5] but a plea of guilty entered on the agreement of the informer to recommend the minimum fine cannot be with-

der supports conviction of assault. State v. Scott [Del. Gen. Sess.] 57 A. 534. Indictment for first degree murder supports conviction of any degree of felonious homicide. State v. Brinte [Del.] 58 A. 258; United States v. Densmore [N. M.] 75 P. 31; Smith v. Territory [Okl.] 77 P. 187. Maiming is not included in shooting with intent to kill. State v. Mattison [N. D.] 100 N. W. 1091. Embezzlement by national bank officer includes abstraction and willful misappropriation. United States v. Breese, 131 F. 915. Indictment for rape of female under age of consent will support conviction of assault with intent to rape. People v. Dowell [Mich.] 99 N. W. 23. Robbery and assault with intent to rob. People v. Blanchard [Mich.] 98 N. W. 983; State v. Franklin [Kan.] 77 P. 588.

88. A conviction of assault and battery or assault with intent to do great bodily harm may be had on an indictment for assault with intent to rape, though the corroboration of the prosecutrix is not sufficient to support a conviction of the offense charged. State v. Egbert [Iowa] 101 N. W. 191.

Rape: No question as to complete sexual intercourse. Instruction on included offenses held properly refused. People v. Keith, 141 Cal. 686, 75 P. 304.

89. Indictment for assault with intent to kill will sustain a verdict of assault, but not assault and battery unless the averments charge and the proof establishes an actual battery. State v. Henry, 98 Me. 561, 57 A. 891. Likewise assault with intent to rape. State v. Miller [Iowa] 100 N. W. 334; State v. Egbert [Iowa] 101 N. W. 191. Attempt to rape need not be specifically charged. Horton v. State [Miss.] 36 So. 1033. An indictment sufficiently charging assault with intent to commit murder in the first degree also charges assault with intent to commit murder in the second degree and will support a conviction for the latter crime. Pyke v. State [Fla.] 36 So. 577. An indictment for breaking and entering with intent to commit larceny authorizes a conviction of larceny where that offense is also well pleaded. Ray v. State [Ga.] 48 S. E. 903. Charge of attempt to commit larceny from person includes assault. State v. Houghton [Or.] 75 P. 822.

90. Assault by willfully shooting and assault. State v. Matthews [La.] 36 So. 48. Indictment for shooting will not support conviction of assault with dangerous weapon. State v. Mattison [N. D.] 100 N. W. 1091; State v. Cruikshank [N. D.] 100 N. W. 697. The statutory crime of horse stealing includes no lesser offense. State v. Gouvernale, 112 La. 956, 36 So. 817.

91. State v. Henry, 98 Me. 561, 57 A. 891. Altering brands on cattle with intent to steal is not included in indictment for larceny. People v. Kerrick [Cal.] 77 P. 711.

92. People v. Schiavi, 96 App. Div. 479, 89 N. Y. S. 564.

93. See 2 Curr. L. 326.

94. Blevins v. Territory [Ariz.] 77 P. 616; Wells v. Terrell [Ga.] 49 S. E. 319. Record held to show sufficient arraignment. Gardner v. U. S. [Ind. T.] 82 S. W. 704.

95. Homicide. Brewer v. State [Ark.] 78 S. W. 773. Defendant in open court may waive arraignment and plead not guilty. State v. Rasberry [La.] 37 So. 545.

96. Defendant does so where he was arraigned and given time and did not plead. Martin v. Territory [Okl.] 78 P. 88.

97. State v. Horine [Kan.] 78 P. 411.

98. See 2 Curr. L. 326.

99. State v. Pine [W. Va.] 48 S. E. 206.

1, 2. Williams v. Com., 25 Ky. L. R. 2041, 80 S. W. 173.

3. Hillier v. State, 5 Ohio C. C. (N. S.) 245.

4. State v. Rosenblatt [Mo.] 83 S. W. 975.

5. State v. Coston [La.] 37 So. 619.

drawn because the judge declines to follow the recommendation.[6] Where an information contained counts for false pretenses and larceny, and on arraignment the court asked defendant his plea to the charge of false pretenses, his answer that he was not guilty as charged in the information was a plea to the whole information and sustains a conviction of larceny.[7] In felony cases, defendant must be present in court in person when a plea of guilty is entered,[8] and a plea of guilty in a misdemeanor case cannot be made by the constable who arrested defendant, and while defendant is incarcerated and absent from the court.[9]

Pleas in abatement and special pleas.[10]—A plea in abatement must be verified[11] and set up facts showing that the irregularities complained of are prejudicial.[12] Where accused is indicted under several aliases, a plea of misnomer must allege that he has never been known by any of them.[13] Disqualification of grand jurors is matter of abatement,[14] but it has been otherwise held as to irregularities in summoning grand jurors.[15] A plea in bar operates as a withdrawal of a special plea that because of a former conviction of manslaughter on an indictment for murder defendant could not again be placed on trial on the indictment.[16] A replication to a plea of misnomer that defendant is as well known by the name charged in the indictment as he is by the one set out in his plea does not raise the issue of misnomer.[17] A motion to dismiss at the conclusion of the state's testimony on the ground that a prior plea in bar was undecided is properly overruled and disposition of the plea then entered on the minutes.[18]

In homicide, the defense of insanity must be specially pleaded.[19]

A plea of former acquittal or conviction,[20] based on a prosecution before a magistrate who had no jurisdiction of the subject-matter, is properly stricken as frivolous,[21] and a plea setting up a former prosecution for an assault on one person will not bar a prosecution for assaulting another, though the assaults were committed at the same time.[22] A plea in abatement that because of a prior conviction of manslaughter on the indictment for murder, defendant cannot be again tried on the indictment, is without merit.[23] The plea of former conviction must contain a complete record of the former conviction,[24] and a plea of former acquittal must aver that there was a judgment entered upon the verdict of acquittal in the first case.[25] A plea of former conviction not tendered until

6. Beatty v. Roberts [Iowa] 101 N. W. 462.
7. State v. Boatright [Mo.] 81 S. W. 450.
8. State v. Coston [La.] 37 So. 619.
9. Ex parte Jones [Tex. Cr. App.] 80 S. W. 995.
10. See 2 Curr. L. 326.
11. A plea in abatement verified merely on information and belief is demurrable. Territory v. Smith [N. M.] 78 P. 42.
12. Plea in abatement cannot be based on compulsion of the accused to appear before the grand jury and give self-incriminating testimony without the advice of counsel, where it is not alleged that he claimed his constitutional right. Lindsay v. State, 4 Ohio C. C. (N. S.) 409. A plea in the Federal court need not aver that the irregularities complained of were prejudicial to the accused, that being a mere conclusion, but it must set forth facts showing such prejudice. Rev. St. § 1025, provides that irregularities shall not vitiate an indictment unless prejudicial. United States v. Cobban, 127 F. 713.
13. Stinchcomb v. State, 119 Ga. 442, 46 S. E. 639.
14. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075.
15. The remedy being by challenge. Lindsay v. State, 24 Ohio Circ. R. 1, 4 Ohio C. C. (N. S.) 409.
16. Powers v. State [Miss.] 36 So. 6.
17. "Noble" and "Nobles" are not as matter of law idem sonans. Noble v. State, 139 Ala. 90, 36 So. 19.
18. Powers v. State [Miss.] 36 So. 6.
19. Parrish v. State, 139 Ala. 16, 36 So. 1012.
20. See 2 Curr. L. 327.
21. Assault with intent to murder before county court. Spraggins v. State, 139 Ala. 93, 35 So. 1000.
22. McNish v. State [Fla.] 36 So. 175.
23. Powers v. State [Miss.] 36 So. 6.
24. State v. Wells [Kan.] 77 P. 547. Though a certified copy of the former judgment was attached as an exhibit to the plea of former conviction, where the record does not show that it was introduced in evidence, and the fact is not admitted, the defense is not made out. Feagin v. State, 139 Ala. 107, 36 So. 18.
25. State v. Hankins [N. C.] 48 S. E. 593.

after the state closed its case and accused had been examined in his own behalf is properly refused.[26] Where the plea shows on its face that the offenses are not identical, a demurrer is the proper remedy,[27] but the demurrer must specify the objection.[28] Where the evidence of defendant makes out a prima facie case in favor of his plea, and the state offers no contradictory evidence, it is error to overrule the plea.[29]

§ 6. *Preparation for, and matters preliminary to, trial.*[30]—Defendant is not entitled to a copy of the jury list, unless so provided by statute,[31] but when provided for, failure on request to supply defendant with it is fatal,[32] though immaterial errors in a list furnished will not vitiate.[33] Defendant on trial in one branch of the court is entitled to a list of all jurors drawn for the several branches of the same court.[34] The accused is entitled to a list of witnesses in the Federal courts only in treason and other capital offenses,[35] and that defendant was furnished with an incorrect list is no ground for motion in arrest or to set aside the judgment.[36] Defendant is not entitled to a separate trial on his special plea of limitation,[37] but a special issue on the plea of insanity is frequently provided for.[38] Allowance of bill of particulars is generally discretionary.[39] There is no error in substituting an indictment and then allowing the trial to proceed on the original after it is found, there being no order of substitution, and the original being found pending the substitution.[40] Cases may be allotted in the criminal district court of the parish of Orleans, Louisiana, previous to the finding of the indictment.[41]

Compulsory process to compel attendance of defendant's witnesses guaranteed by the constitution does not guaranty their attendance nor more than ordinary diligence in service of subpoena,[42] and a statute authorizing the subpoenaing of witnesses to appear at a criminal trial in another state cannot be sustained.[43]

§ 7. *Postponement of trial.*[44]—Continuance or postponement on behalf of the state for cause does not invade defendant's right to a speedy trial.[45]

Postponement should be granted for lack of opportunity for preparation,[46] for absence of counsel,[47] and for inability of accused from illness to attend.[48]

26. McNulty v. State, 110 Tenn. 482, 75 S. W. 1015.

27. State v. Laughlin, 180 Mo. 342, 79 S. W. 401.

28. That it shows no reason in law why the indictment should be quashed is not sufficient [Code 1896, § 3303]. Turk v. State [Ala.] 37 So. 234.

29. Bryant v. State [Ark.] 81 S. W. 234.

30. See 2 Curr. L. 327.

31. Welty v. U. S. [Okl.] 76 P. 121.

32. State v. Hunter, 181 Mo. 316, 80 S. W. 955. Defendant is not entitled to two days' service of the list of tales jurors. State v. Bordelon [La.] 37 So. 603.

33. Omission of "Jr." from juror's name is not fatal. State v. Cafiero, 112 La. 453, 36 So. 492. Failure of the copy of the venire served on defendant to state the occupations of the jurors as given in the original is immaterial. McClellan v. State [Ala.] 37 So. 239.

34. Wistrand v. People [Ill.] 72 N. E. 748.

35. Rev. St. § 1033. Balliet v. U. S. [C. C. A.] 129 F. 689.

36. Regopoulas v. State, 116 Ga. 596, 42 S. E. 1014.

37. State v. Snyder [Mo.] 82 S. W. 12.

38. Trying defendant on the main issue before same jury does not deprive him of an impartial jury. Schissler v. State [Wis.] 99 N. W. 593.

39. Gallagher v. People, 211 Ill. 158, 71 N. E. 842; State v. Bogardus [Wash.] 78 P. 942.

40. Owens v. State [Tex. Cr. App.] 79 S. W. 575.

41. State v. Bollero, 112 La. 850, 36 So. 754; State v. Henderson [La.] 36 So. 950.

42. Smith v. State, 118 Ga. 61, 44 S. E. 817.

43. In re Commonwealth of Pa., 45 Misc. 46, 90 N. Y. S. 808.

44. See 2 Curr. L. 328.

45. Sample v. State [Ala.] 36 So. 367.

46. Brown v. State, 120 Ga. 145, 47 S. E. 543. Refusal for nonaccess of defendant's counsel not abuse of discretion, though defendant was confined in the jail of another county where freedom to visit him there was granted. State v. Lewis, 181 Mo. 235, 79 S. W. 671. Inability because of confinement to procure counsel in county to which change of venue was taken, accused represented by seven lawyers at trial. Taylor v. State [Ark.] 82 S. W. 495. Time for preparation held sufficient. Howland v. Territory, 13 Okl. 575, 76 P. 143; Morgan v. State [Ga.] 48 S. E. 238; Barrow v. State [Ga.] 48 S. E. 950; Welty v. U. S. [Okl.] 76 P.

Continuance should also be granted for the *absence of a witness,*[49] but it must appear that his testimony is competent and material,[50] credible,[51] necessary,[52] not merely cumulative[53] or impeaching,[54] that applicant believes it to be true,[55] that the witness is within the jurisdiction of the court,[56] that his absence is without the consent or procurement of the applicant,[57] that he will probably testify as set forth,[58] that diligence was exercised to procure his attendance or

121; State v. Sanders [S. C.] 46 S. E. 769, 47 S. E. 55. Four days in murder case involving cause of death from chloroform or drowning. State v. Underwood [Wash.] 77 P. 863.

47. Absence of senior counsel is not ground where defendant was well represented by other able and eminent counsel. Sheperd v. Com. [Ky.] 82 S. W. 378; Mason v. State [Tex. Cr. App.] 81 S. W. 718; Smith v. State [Fla.] 37 So. 573. The withdrawal of one of the counsel after the commencement of a criminal trial is not ground for a postponement, where the accused is still represented by an attorney who assisted in a previous trial. Marchan v. State [Tex. Cr. App.] 75 S. W. 532. Denial does not infringe accused's right to be represented. Usher v. State [Tex. Cr. App.] 81 S. W. 309. Forcing appellant to trial with unfamiliar counsel assigned at last minute held error. State v. Barr, 123 Iowa, 139, 98 N. W. 595; People v. Calabur, 91 App. Div. 529, 87 N. Y. S. 121. Refusal held proper where cause had once been continued to allow same counsel to prepare. Moore v. Com. [Ky.] 81 S. W. 669.

48. Refusal held proper exercise of discretion. State v. Wilson [Iowa] 99 N. W. 1060; Barrow v. State [Ga.] 48 S. E. 950.

49. Continuance from 5 p. m. to 9 a. m. held properly denied under circumstances. Turner v. Com., 25 Ky. L. R. 2161, 80 S. W. 197. Continuance from 3 p. m. till morning to procure witness whose connection first developed from testimony of defendant. Eatman v. State, 139 Ala. 67, 36 So. 16.

50. Elias v. Territory [Ariz.] 76 P. 605; Terry v. State [Tex. Cr. App.] 79 S. W. 317; Peres v. State [Tex. Cr. App.] 80 S. W. 525; Mitchell v. State [Tex. Cr. App.] 80 S. W. 629; State v. Woodward [Mo.] 81 S. W. 858; House v. State, 139 Ala. 132, 36 So. 732; Adcock v. State [Ark.] 83 S. W. 318; Randle v. State [Tex. Cr. App.] 78 S. W. 512; Crayton v. State [Tex. Cr. App.] 80 S. W. 839. Materiality of insanity witness not shown. Ewert v. State [Fla.] 37 So. 334. Testimony of threats by deceased is not material where the facts are conclusive against self defense. Territory v. Shankland, 3 Ariz. 403, 77 P. 492. Threats by deceased not shown to be material. Kimberlain v. State [Tex. Cr. App.] 82 S. W. 1043. Bad character of witness who did not testify. Mullins v. Com., 25 Ky. L. R. 2044, 79 S. W. 258.

Materiality held shown: Thompson v. State [Tex. Cr. App.] 78 S. W. 691; Tyler v. State [Tex. Cr. App.] 79 S. W. 558; Wallace v. State [Tex. Cr. App.] 81 S. W. 966. Refusal held error. McMahon v. State [Tex. Cr. App.] 81 S. W. 296; Dyer v. State [Tex. Cr. App.] 83 S. W. 192; State v. Hesterly [Mo.] 81 S. W. 624; Askew v. State [Tex. Cr. App.] 83 S. W. 706. Alibi witness. Goldsmith v. State [Tex. Cr. App.] 81 S. W. 710.

51. Franklin v. State [Tex. Cr. App.] 78 S. W. 934; State v. Woodward [Mo.] 81 S. W. 857; Pate v. State [Tex. Cr. App.] 83 S. W. 695; Dodson v. State [Tex. Cr. App.] 78 S. W. 514; Blain v. State [Tex. Cr. App.] 78 S. W. 518; Pettis v. State [Tex. Cr. App.] 81 S. W. 312. Refusal cannot be made on the ground of unreliability of absent witness. Wallace v. State [Tex. Cr. App.] 81 S. W. 966. Refusal held proper where testimony of absent witness was in direct conflict with defendants. Meadows v. State [Ark.] 78 S. W. 761. Where the affidavit of the absent witness is attached to the motion for new trial, the court will not speculate on the truth of it but will award the new trial. Lawthorn v. State [Tex. Cr. App.] 81 S. W. 714.

52. State v. Wills [Mo. App.] 80 S. W. 311. Other witnesses who could prove same fact. Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107.

53. Heatley v. Territory [Okl.] 78 P. 79; Gardner v. U. S. [Ind. T.] 82 S. W. 704; Blair v. State [Neb.] 101 N. W. 17; State v. Riddle, 179 Mo. 287, 78 S. W. 606; Dean v. Com., 25 Ky. L. R. 1876, 78 S. W. 1112; Mullins v. Com., 25 Ky. L. R. 2044, 79 S. W. 258; Williams v. State [Tex. Cr. App.] 75 S. W. 859; Dorman v. State [Fla.] 37 So. 561; Morgan v. State [Ga.] 48 S. E. 238. Second application. Brown v. State [Tex. Cr. App.] 83 S. W. 378; Bearden v. State [Tex. Cr. App.] 83 S. W. 808; McComas v. State [Tex. Cr. App.] 81 S. W. 1212. Where the evidence of defendant himself is insufficient to raise the issue of self defense, the absence of a witness who will merely echo his evidence is not ground. Pettis v. State [Tex. Cr. App.] 81 S. W. 312. Matter proved by defendant and deceased's dying declaration and not controverted. Baker v. State [Tex. Cr. App.] 81 S. W. 1215. A first application may be granted for material testimony, though cumulative. Gilford v. State [Tex. Cr. App.] 78 S. W. 692; Robbins v. State [Tex. Cr. App.] 83 S. W. 690.

Held not cumulative: Little v. State [Ga.] 48 S. E. 904.

54. Eatman v. State, 139 Ala. 67, 36 So. 16; People v. Chutnacut, 141 Cal. 682, 75 P. 340.

55. State v. Wills [Mo. App.] 80 S. W. 311; State v. Woodward [Mo.] 81 S. W. 857.

56. Webster v. State [Fla.] 36 So. 584.

57. Webster v. State [Fla.] 36 So. 584. Finding that witness was not sick as alleged held not supported. Dyer v. State [Tex. Cr. App.] 83 S. W. 192.

58. On previous trial witness testified differently. Huling v. State [Tex. Cr. App.] 80 S. W. 1006. Improbability of circumstances. Usher v. State [Tex. Cr. App.] 81 S. W. 309; State v. Woodward [Mo.] 81 S. W. 857. Counter showing by state. Dean v. State [Tex. Cr. App.] 83 S. W. 816.

deposition,[59] and that there is some probability of procuring his testimony at the postponed trial.[60] Continuance is sometimes avoided by admitting the facts sought to be shown by the absent witness,[61] or that he will testify as averred in the affidavit for continuance,[62] or allowing the affidavit to be read as his deposition,[63] and where this is done, the state may object to the testimony as incompetent,[64] or the absent witness may be impeached by showing his bad character in the same manner that he might be if present and testifying;[65] but where the affidavit is admitted in lieu of the continuance, the prosecuting attorney should not attack it as false.[66]

An affidavit for continuance is not insufficient because it states that the absent witness will testify that defendant "did not and could not" have committed the offense,[67] but an affidavit on information and belief of what the absent witness will testify must state the sources of information and grounds of belief.[68]

Counter affidavits may be received,[69] but not oral testimony,[70] and extraneous facts ascertained by the judge and recited as reasons for overruling an application for a continuance must be shown by affidavit, and an opportunity given defendant to controvert them.[71] It is not improper for the court to recite in its order denying a continuance for lack of diligence, that defendant at a previous term was informed in open court of his rights and duty in regard to witnesses.[72]

Certiorari from the supreme court to the court of sessions is allowed in Pennsylvania to operate as a continuance in cases prosecuted by information.[73] It is ex-

59. State v. Riddle, 179 Mo. 287, 78 S. W. 606; Dean v. Com., 25 Ky. L. R. 1876, 78 S. W. 1112; State v. Burns [Iowa] 99 N. W. 721; Elias v. Territory [Ariz.] 76 P. 605; People v. Chutnacut, 141 Cal. 682, 75 P. 340; Welty v. U. S. [Okl.] 76 P. 121; People v. Lang, 142 Cal. 482, 76 P. 232; Blain v. State [Tex. Cr. App.] 78 S. W. 518; Franklin v. State [Tex. Cr. App.] 78 S. W. 934; State v. Woodward [Mo.] 81 S. W. 857; Surrency v. State [Fla.] 37 So. 575; Howland v. Territory, 13 Okl. 575, 76 P. 143; Pate v. State [Tex. Cr. App.] 83 S. W. 695. Witness not subpoenaed. Mullins v. Com., 25 Ky. L. R. 2044, 79 S. W. 258. Interrogatories held not propounded soon enough. Mch. 30; trial Apr. 1; arraignment Mch. 26. Kroell v. State, 139 Ala. 1, 36 So. 1025. Attendance could have been procured. Sheperd v. Com. [Ky.] 82 S. W. 378. Accused refused to take attachment but relied on second subpoena, which the witness disobeyed, there having been a prior continuance on account of such disobedience. Brady v. State, 120 Ga. 181, 47 S. E. 535. Order for summons for witness from another parish is not diligence, it being discretionary with the court to summon them. State v. Nix, 111 La. 812, 35 So. 917.

Diligence held shown: Wallace v. State [Tex. Cr. App.] 81 S. W. 966; Dyer v. State [Tex. Cr. App.] 83 S. W. 192; Thompson v. State [Tex. Cr. App.] 80 S. W. 623. Defendant's minor son as witness. Pettis v. State [Tex. Cr. App.] 81 S. W. 312. Ignorance of defendant of years of understanding will not excuse negligence. Hughes v. Com., 25 Ky. L. R. 2153, 80 S. W. 197. Neglect of defendant's counsel appointed by the court will not excuse lack of diligence. Id.

60. Turner v. Com., 25 Ky. L. R. 2161, 80 S. W. 197; Webster v. State [Fla.] 36 So. 584; State v. Burns [Iowa] 99 N. W. 721; Elias v. Territory, [Ariz.] 76 P. 605; People v. Chutnacut, 141 Cal. 682, 75 P. 340; State v. Woodward [Mo.] 81 S. W. 857; Territory v. Dooley [Ariz.] 78 P. 138; Hilburn v. State [Ga.] 49 S. E. 318; State v. Allen [La.] 37 So. 614.

61. Admission held not to cover fact relied on. Little v. State [Ga.] 48 S. E. 904. Instruction limiting effect of testimony so admitted is error. Durham v. State [Tex. Cr. App.] 76 S. W. 563.

62. State v. Burns [Iowa] 99 N. W. 721. Refusal for lack of diligence held proper. Kroell v. State, 139 Ala. 1, 36 So. 1025.

63. Sheperd v. Com. [Ky.] 82 S. W. 378; Hopkins v. Com., 25 Ky. L. R. 2117, 80 S. W. 156; Mise v. Com., 25 Ky. L. R. 2207, 80 S. W. 457; Howard v. Com. [Ky.] 80 S. W. 817. The same showing as to diligence is necessary to procure admission of affidavit that is necessary to procure continuance. Dean v. Com., 25 Ky. L. R. 1876, 78 S. W. 1112. Statute so providing does not invade defendant's right of confrontation or compulsory process. Davis v. Com., 25 Ky. L. R. 1426, 77 S. W. 1101.

64. State v. Leuhrsman, 123 Iowa, 476, 99 N. W. 140.

65. Gregory v. State [Ala.] 37 So. 259.

66. Darrell v. Com. [Ky.] 82 S. W. 289.

67. State v. McConnell [Del. Gen. Sess.] 57 A. 367.

68. State v. Carroll [N. D.] 101 N. W. 317.

69. State v. Hesterly [Mo.] 81 S. W. 624; Territory v. Shankland, 3 Ariz. 403, 77 P. 492.

70. State v. Hesterly [Mo.] 81 S. W. 624.

71. Dyer v. State [Tex. Cr. App.] 83 S. W. 192.

72. Hughes v. Com., 25 Ky. L. R. 2153, 80 S. W. 197.

73. Commonwealth v. Fletcher, 208 Pa. 137, 57 A. 346.

pressly provided by statute in Texas that a severance shall not of itself operate as a continuance.[74] Continuance is not grantable at the request of defendant in rape on the ground that prosecutrix's pregnancy is plainly apparent and that parturition within a short time would be conclusive that he was not responsible for her condition.[75]

§ 8. *Dismissal or nolle prosequi before trial.*[76]—Dismissal is grantable for want of prosecution in the absence of good cause shown for the delay,[77] and where no order of transfer from the county to the district court appears of record, the case should be dismissed.[78] The count required in South Carolina of carrying concealed weapons in indictments for murder may be nolle prossed without affecting the balance of the indictment.[79] In West Virginia, an order retiring an indictment for a felony from the trial docket is equivalent to a dismissal thereof, and the same may not thereafter on motion of the state be restored to the docket for trial;[80] but in Kentucky, an order filing away an indictment is permissible where defendant has not been apprehended and is not before the court, is not equivalent to a nolle prosequi, and though not providing therefor, does not prevent reinstatement of the indictment on the subsequent arrest of defendant.[81] A dismissal is no bar to a subsequent prosecution for the same or an included offense,[82] and the order of dismissal need not be set aside before inaugurating the subsequent prosecution.[83]

§ 9. *Evidence. Judicial notice*[84] is taken of the names of the court's own officers,[85] and of who are the public officers of the state where the law requires such officers to be commissioned by the governor.[86] The state courts take judicial notice of executive orders of the Federal government creating military reservations,[87] that such a reservation is in a particular county,[88] and that title to it was acquired by the United States by purchase, but notice is not taken of the precise metes and bounds of parcel.[89] Judicial notice will be taken of the value of the denominational coins of the United States,[90] and of the population of a city of the state,[91] but notice is not taken of the plan of numbering houses on streets nor the existence or location of buildings on certain lots and blocks.[92] Notice is taken of general statutes, though of local application,[93] but not of municipal ordinances.[94] A court does not in the trial of one case take judicial notice of proceedings had in other cases, even though shown by its own records.[95] Judicial knowledge, however, extends to the record and proceedings of the case on trial.[96]

74. An application on a ground that exists only because of the severance is properly denied. Wilson v. State [Tex. Cr. App.] 81 S. W. 34; Evans v. State [Tex. Cr. App.] 80 S. W. 374.

75. State v. Carpenter [Iowa] 98 N. W. 775.

76. See 2 Curr. L. 331.

77. Denial held proper. People v. Martin, 91 N. Y. S. 486; State v. Van Waters [Wash.] 78 P. 897. Defendant is not entitled to trial or dismissal at the term succeeding the one at which the indictment is found. State v. Breaw [Or.] 78 P. 896. The fact that the record shows that more than three terms since indictment have passed without trial is no ground for discharge. It must further appear that accused has been held for trial as well as charged with the crime. State v. Kellison [W. Va.] 47 S. E. 166. Under a statute providing for the discharge of one indicted and on bail who is not tried before the end of the third term held after indictment found, the term at which the indictment or information is filed is not included in such three terms [Rev. St. 1899, § 2642]. State v. Riddle, 179 Mo. 287, 78 S. W. 606.

78. Application being made before defendant announces "ready." Johnson v. State [Tex. Cr. App.] 79 S. W. 27.

79. State v. Norton [S. C.] 48 S. E. 464; State v. Edwards [S. C.] 47 S. E. 395.

80. Dudley v. State [W. Va.] 47 S. E. 285.

81. Gross v. Com. [Ky.] 82 S. W. 618; Jones v. Com., 24 Ky. L. R. 1434, 71 S. W. 643.

82, 83. People v. Kerrick [Cal.] 77 P. 711.

84. See 2 Curr. L. 332.

85. Pruett v. State [Ala.] 37 So. 343.

86. Abrams v. State [Ga.] 48 S. E. 965.

87, 88. State v. Tully [Mont.] 78 P. 760.

89. Baker v. State [Tex. Cr. App.] 83 S. W. 1122.

90. Ector v. State [Ga.] 48 S. E. 315.

91. State v. Page [Mo. App.] 80 S. W. 912.

92. State v. Rogers [Mont.] 77 P. 293.

93. Stock law applicable to particular county. Davis v. State [Ala.] 37 So. 454.

Presumptions and burden of proof.[97]—Generally speaking, conclusive presumptions and estoppels have no place in a criminal proceeding for the purpose of establishing the body of the crime charged.[98] The jury, however, may find facts by inference from other facts proven in the case,[99] and in the absence of evidence to the contrary, it is presumed that the laws of another state are similar to the laws of the forum.[1] There is a presumption that a person intends all the natural, probable and usual consequences of his acts,[2] and marriage once shown to exist is presumed to have continued.[3] Presumptions may be retrospective,[4] though where the presumption of continuity runs counter to the presumption of innocence, the latter will prevail.[5] The presumption of coercion of a married woman by her husband may be rebutted.[6]

In every criminal prosecution, the burden is on the government of proving beyond a reasonable doubt, by competent evidence, every essential ingredient of the crime charged.[7] This burden never shifts,[8] and the defendant is entitled to have evidence tending to prove facts showing that he did not commit the crime considered by the jury with all the other evidence, and though they do not establish innocence, they may raise the reasonable doubt which must be removed before conviction can be had.[9] This rule applies to the defense of alibi.[10] The defense of alibi must satisfy the jury that the accused was at a place where it was impossible for him to have committed the crime,[11] but the evidence of alibi is to be considered in the general case with the rest of the testimony, and if a reasonable doubt is raised by the evidence as a whole, the doubt must be given in favor of innocence[12] and good character.[13] The authorities are in conflict as to the burden of proof where insanity or other irresponsibility is relied on as a defense, the rule in England and a majority of the states being that the burden is on defendant of establishing his defense,[14] at least by a preponderance of the evidence,[15] while the supreme court

94. City of Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797.

95. Withaup v. U. S. [C. C. A.] 127 F. 530; McNish v. State [Fla.] 36 So. 176.

96. Withaup v. U. S. [C. C. A.] 127 F. 530; McNish v. State [Fla.] 36 So. 176.

97. See 2 Curr. L. 332.

98. Defendant may prove the actual fact in dispute notwithstanding any admission or confession he may have made to the contrary. Markey v. State [Fla.] 37 So. 53.

99. Larkin v. State [Ind.] 71 N. E. 959. Knowledge of defendant of character of persons harbored in her house. State v. Steen [Iowa] 101 N. W. 96.

1. State v. Allen [La.] 37 So. 614.

2. Wells v. Territory [Okl.] 78 P. 124.

3. State v. Eggleston [Or.] 77 P. 738.

4, 5. State v. Durein [Kan.] 78 P. 152.

6. Commonwealth v. Adams [Mass.] 71 N. E. 78.

7. State v. Brinte [Del.] 58 A. 258; People v. Muste [Mich.] 100 N. W. 455; State v. Levy [Idaho] 75 P. 227; United States v. Breese, 131 F. 915; Sikes v. State [Ga.] 48 S. E. 153. In every criminal case the defendant is presumed in law to be innocent until his guilt is established by competent evidence beyond a reasonable doubt. State v. Scott [Del. Gen. Sess.] 57 A. 534. Larceny by married woman in presence of husband. Commonwealth v. Adams [Mass.] 71 N. E. 78.

8. State v. Lax [N. J. Law] 59 A. 18; United States v. Breese, 131 F. 915.

9. State v. Lax [N. J. Law] 59 A. 18.

10. Hauser v. People, 210 Ill. 253, 71 N. E. 416; State v. Pray [Iowa] 99 N. W. 1065; State v. Worthen [Iowa] 100 N. W. 330.

11. Harris v. State, 120 Ga. 167, 47 S. E. 520; Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269.

12. Henderson v. State [Ga.] 48 S. E. 167, citing cases; Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269. As a distinct issue, alibi must be established by a preponderance of the evidence. State v. Worthen [Iowa] 100 N. W. 330.

13. Wells v. Territory [Okl.] 78 P. 124; People v. Childs, 90 App. Div. 58, 85 N. Y. S. 627; People v. Bonier [N. Y.] 72 N. E. 226; Cunningham v. People, 210 Ill. 410, 71 N. E. 410.

14. State v. Clark, 34 Wash. 485, 76 P. 98, citing cases from 23 states; State v. Quigley [R. I.] 58 A. 905, citing many cases; State v. Corrivau [Minn.] 100 N. W. 638. In Alabama, by statute, the burden is on defendant to prove irresponsibility for crimes. Parrish v. State, 139 Ala. 16, 36 So. 1012; Porter v. State [Ala.] 37 So. 81. Evidence held insufficient to shift burden upon state. Talbert v. State [Ala.] 37 So. 78.

15. People v. Zeigler, 142 Cal. 337, 75 P. 1090; People v. Suesser, 142 Cal. 354, 75 P. 1093; People v. Niheli [Cal.] 77 P. 916; Parrish v. State, 139 Ala. 16, 36 So. 1012; Kroell v. State, 139 Ala. 1, 36 So. 1025. Defendant need not satisfy the jury. People v. Wells [Cal.] 78 P. 470. Where a dazed and irresponsible condition of mind relied on as excusing a homicide was produced by a

of the United States and the courts of many of the states have adopted the contrary rule, placing the burden on the government of proving defendant's responsibility as an element of the offense, beyond a reasonable doubt.[16] One charged as an accessory after the fact has the burden of proving such relationship to the principal as excuses him under the statute.[17]

Relevancy and competency in general.[18]—The rules of evidence governing the Federal courts are those which were in force in the state at the time of its admission to the Union, unaffected by their subsequent statutory changes.[19] Any fact is relevant which alone or in connection with other facts warrants an inference as to the issue on trial.[20] Hence a wide latitude is allowed as to evidence tending to show malice, motive or intent,[21] its remoteness going rather to its weight than its admissibility.[22] Evidence to support a theory that a person other than defendant was guilty is properly excluded as immaterial where there is nothing in the case to pertinently connect him with it,[23] and generally testimony tending to prove facts from which no inference relative to any issue in the case can be legitimately drawn,[24]

blow by deceased immediately prior to the killing, the burden is not on defendant to establish his mental condition as claimed by a preponderance of the evidence, but it is sufficient for acquittal if the evidence raises a reasonable doubt thereof; for the blow and its consequences are a part of the res gestae. Dent v. State [Tex. Cr. App.] 79 S. W. 525. The statute of Arizona, adapted from California, placing the burden of proving circumstances of mitigation or justification on defendant in homicide, unless they arise from the state's evidence, is construed to require defendant only to raise a reasonable doubt, and not to compel him to produce a preponderance of evidence. Anderson v. Territory [Ariz.] 76 P. 636.

16. See cases cited in State v. Clark, 34 Wash. 485, 76 P. 98, and State v. Quigley [R. I.] 58 A. 905; People v. Muste [Mich.] 100 N. W. 456; People v. Spencer [N. Y.] 72 N. E. 461.

17. Rev. St. 1899, § 2365. State v. Miller [Mo.] 81 S. W. 867.

18. See 2 Curr. L. 332.

19. Withaup v. U. S. [C. C. A.] 127 F. 530; Balliet v. U. S. [C. C. A.] 129 F. 689. Where the prosecution is based on a United States statute, the court is governed by the common law unaffected by the statutes and decisions of the state, except so far as they may be persuasive. Lang v. U. S. [C. C. A.] 133 F. 201.

20. Deceased stated that her assailant was a negro who oiled his gun at a certain place the day before. Witness may state that defendant was the man who oiled the gun. Walker v. State, 139 Ala. 56, 35 So. 1011. Sudden and contemporaneous show of funds by one accused of robbery (People v. Sullivan [Cal.] 77 P. 1000), or larceny (Buckine v. State [Ga.] 49 S. E. 257). Defendant's presence in the vicinity. State v. Johnson [La.] 36 So. 30; Spraggins v. State, 139 Ala. 93, 35 So. 1000. One shown to have been an accomplice may be shown to have been last seen shortly after the crime in company with defendant. Commonwealth v. Kelly [Mass.] 71 N. E. 807. Witnesses may be allowed to testify to facts by which they fix the date of the offense. Smith v. State [Tex. Cr. App.] 78 S. W. 516.

21. Weaver v. State [Tex. Cr. App.] 81 S. W. 39; State v. Sargood [Vt.] 58 A. 971; State v. Poole [Minn.] 100 N. W. 647. Purchase of intoxicating bitters by defendant after change of label. Murry v. State [Tex. Cr. App.] 79 S. W. 568. Relations of defendant accused of wife murder with other woman. People v. Montgomery, 176 N. Y. 219, 68 N. E. 258. Circumstantial evidence tending to show participation by third person and to characterize the crime is admissible, though not tending to connect defendant therewith. State v. Moore, 67 Kan. 620, 73 P. 905. Hostile feelings or animus of defendant to a class to which deceased belonged may be shown. Hostility to "spotters" cannot be shown where the evidence only shows deceased to have been a "prohibitionist." Harrison v. State [Tex. Cr. App.] 83 S. W. 699. Where it is claimed that prosecutrix and her relatives have conspired to charge defendant with rape, and he admits voluntary sexual intercourse with her, he may show that her brother and sister were discovered in incestuous relation by him and the ill feeling arising therefrom. State v. Harness [Idaho] 76 P. 788.

22. Defendant criminally intimate with his sister-in-law procured defendant to marry her to cover it up and afterwards killed him in order to renew the relation. Weaver v. State [Tex. Cr. App.] 81 S. W. 39.

23. Rape. Henard v. State [Tex. Cr. App.] 82 S. W. 655. Forgery. Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107. Admissions by a third person that he committed the crime cannot be shown whether oral or in writing. Mays v. State [Neb.] 101 N. W. 979.

24. Where evidence has been produced showing that a conspiracy was formed at a certain time and place, evidence that defendant transacted legitimate business at that time is immaterial. Gallagher v. People, 211 Ill. 168, 71 N. E. 842. An alibi witness having testified he was with defendant until 9 o'clock, at which time defendant went to bed and he did not see him again till morning, cannot be further asked if defendant went anywhere that night, the crime not being committed until 11 o'clock or after. State v. Worthen [Iowa] 100 N. W. 330. Where defendant reclined on a cot during the trial and breathed heavily, stating he could not help it, the receipt of evidence

or which depend for their relevance upon other facts not offered or shown, are inadmissible,[25] though evidence of otherwise irrelevant facts may be received to rebut an unfavorable inference arising indirectly from other facts apparent or in evidence.[26] Matters explanatory of other matters shown in evidence are not restricted to res gestae in Texas, but the explanatory matter may have transpired at another time.[27]

On the identity of the person who committed a crime, tracks made in the vicinity may be described and their similarity to accused's shoes shown,[28] and evidence of trailing by bloodhounds is admissible where proper foundation is laid.[29]

Where one party shows a part of a conversation, the other is entitled to show the remainder,[30] but the rule does not require the admission of mere hearsay or self-serving declarations,[31] and irrelevant evidence is not rendered admissible because it is the remainder of a conversation part of which has already gone in without objection.[32]

Where direct proof of a person's insanity has been given, it may be shown that there has been insanity in his family,[33] and where the defense to a charge of murder is insanity caused by a previous physical injury, evidence of defendant's conduct between the injury and the homicide is proper.[34] Evidence that defendant was an habitual drunkard and suffering from delirium tremens at the time is admissible,[35] and his appearance, emotions, and condition of mind immediately after the offense may be shown.[36] Evidence that the family physician of accused had never heard any intimation that he was insane is inadmissible.[37]

that he could help it is error, the matter not being relevant. Miller v. State [Tex. Cr. App.] 83 S. W. 393. That defendant furnished evidence to indict deceased of another crime is inadmissible in homicide. Tonnsell v. State [Tex. Cr. App.] 78 S. W. 938. On a prosecution for murder, evidence of the paternity of all the children of a witness who was a mistress of the accused, not merely of those she had by him, was inadmissible, where it was admitted that some of the children were not his. Ivy v. State [Miss.] 36 So. 265. Exclusion of evidence as to how defendant acted when drunk or that he was drunk the night before the murder is not error. State v. Brown, 181 Mo. 192, 79 S. W. 1111. Poverty and distress of witness rendering her easy to deceive and defraud is not relevant, in a prosecution for using the mails to defraud. Bass v. U. S., 20 App. D. C. 232.

25. Whether prosecutor had cattle on another range besides the one from which he claims the cattle were stolen is immaterial, unless it is proposed to show that the missing cattle were on that range. People v. Green, 143 Cal. 8, 76 P. 649. Placards adapted to pool room use but also adapted to use at a bona fide race cannot be used in a prosecution for pool selling without proof that they were in fact used illegally or not intended to be used legally. People v. Ebel, 90 N. Y. S. 628. In the absence of an offer of proof that defendant in homicide had not sufficient intelligence to be responsible for his acts, evidence that he had not "much sense" and was little above an idiot is not admissible. Demaree v. Com. [Ky.] 82 S. W. 231.

26. Where, in a prosecution for statutory rape, prosecutrix's pregnancy is apparent, he should be allowed, in order to avoid any prejudicial effect of that fact, to show by cross-examination of her that she has had intercourse with others. State v. Bebb [Iowa] 101 N. W. 189. **Contra,** State v. Bebb [Iowa] 96 N. W. 714. Proffered testimony to explain the absence of a witness should be admitted where the state in cross-examining defendant shows that he has not produced such witness who if facts testified to by defendant are true has knowledge of such facts. Long v. State [Ark.] 81 S. W. 387.

27. Smith v. State [Tex. Cr. App.] 81 S. W. 936.

28. Parker v. State [Tex. Cr. App.] 80 S. W. 1008.

29. See 2 Curr. L. 333, n. 67-69. Personally known to witness to be bred, trained and reliable. Parker v. State [Tex. Cr. App.] 80 S. W. 1008; Davis v. State [Fla.] 36 So. 170, citing Hodge v. State, 98 Ala. 10; Simpson v. State, 111 Ala. 6; State v. Hall, 3 Ohio Dec. 147; Pedego v. Com., 103 Ky. 41; State v. Moore, 129 N. C. 494; Davis v. State [Fla.] 35 So. 76. Use of dogs may be shown as bearing on good faith in searching plaintiff's house for stolen property. McClurg v. Brenton, 123 Iowa, 368, 98 N. W. 881.

30. Adams v. State [Tex. Cr. App.] 84 S. W. 231.

31. Chenault v. State [Tex. Cr. App.] 81 S. W. 971.

32. Buck v. State [Tex. Cr. App.] 83 S. W. 387.

33. Watts v. State [Md.] 57 A. 542.

34. People v. Manooglan, 141 Cal. 592, 75 P. 177.

35, 36. Parrish v. State, 139 Ala. 16, 36 So. 1012.

37. Watts v. State [Md.] 57 A. 542.

The mental condition of a witness while testifying may be shown by a third person for the purpose of accounting for discrepancies in her testimony at different trials,[38] but the state cannot contradict or impeach its own witness who has given no adverse testimony,[39] and a witness cannot state that he testified to the same facts on the preliminary examination.[40] Defendant cannot show that an eye witness not sworn by the state was unfriendly to him,[41] and that one of defendant's witnesses since a previous trial has been indicted for perjury therein is inadmissible on a second trial.[42] Memorandum showing prosecutor's loss of goods may be admitted to corroborate his testimony.[43] It is error to admit evidence that defendant accused of murder did not testify at the preliminary examination.[44]

Tampering with the state's witnesses by defendant[45] or a person introduced by him may be shown,[46] but tampering by third persons not traced to defendant is inadmissible,[47] and the prosecution's efforts to locate a material witness cannot be shown where there is nothing to connect defendant with his absence.[48] Efforts of defendant to conciliate a witness whose credibility he has attacked by showing hostility to him may be shown.[49] Where no previous contradictory statement is shown, defendant cannot on cross-examination of a state's witness show that she has been intimidated by the officers and others to testify against him.[50]

Flight of accused[51] and evidence of the steps taken by the sheriff to apprehend him as showing the extent of his flight,[52] and that he refused to return without extradition, may be shown.[53] It is proper to show that defendant resisted arrest,[54] attempted to escape,[55] and attempted suicide while in jail charged with the crime.[56] His actions and appearance when a search warrant was read in his presence,[57] and his conduct and circumstances at the time of his arrest, may be shown.[58] Evidence of what was found on searching him or his premises is admissible, though there was no legal authority for the search.[59] That defendant asked to be taken before deceased before she died,[60] refused to flee from the scene of the crime when accused, and promptly surrendered to an officer, cannot be shown,[61] where such acts constitute no part of the res gestae and the state has made no attempt to show flight or resistance of arrest.[62]

Remoteness or uncertainty of evidence, as a rule, affects its weight or credibil-

38. Weaver v. State [Tex. Cr. App.] 81 S. W. 39.
39. Hanna v. State [Tex. Cr. App.] 79 S. W. 544.
40. Boyd v. State [Miss.] 36 So. 525.
41. Freeman v. State [Tex. Cr. App.] 81 S. W. 953.
42. Bennett v. State [Tex. Cr. App.] 81 S. W. 30.
43. Llcett v. State [Tex. Cr. App.] 79 S. W. 33.
44. Boyd v. State [Miss.] 36 So. 525.
45. Blair v. State [Neb.] 101 N. W. 17; Ward v. Com. [Ky.] 83 S. W. 649; State v. Alexander [Mo.] 83 S. W. 753.
46. Parks v. State [Tex. Cr. App.] 79 S. W. 301.
47. Smartt v. State [Tenn.] 80 S. W. 586; Lounder v. State [Tex. Cr. App.] 79 S. W. 552.
48. Clifton v. State [Tex. Cr. App.] 79 S. W. 824.
49. Commonwealth v. Oakes [Mass.] 72 N. E. 323.
50. Ex parte McCoy [Tex. Cr. App.] 82 S. W. 1044.
51. Bennett v. State [Tex. Cr. App.] 81 S. W. 30; State v. Poe, 123 Iowa, 118, 98 N. W. 587; State v. Stentz, 33 Wash. 444, 74 P. 588; State v. Deatherage [Wash.] 77 P. 504; State v. Wills [Mo. App.] 80 S. W. 311; State v. Haupt [Iowa] 101 N. W. 739.
52. Bennett v. State [Tex. Cr. App.] 81 S. W. 30; State v. Deatherage [Wash.] 77 P. 504.
53. Johnson v. State, 120 Ga. 135, 47 S. E. 510.
54. McKevitt v. People, 208 Ill. 460, 70 N. E. 693.
55. Kennedy v. State [Neb.] 99 N. W. 645.
56. State v. Jaggers [N. J. Err. & App.] 58 A. 1014.
57. Gilford v. State [Tex. Cr. App.] 78 S. W. 692.
58. Kennedy v. State [Neb.] 99 N. W. 645.
59. Springer v. State [Ga.] 48 S. E. 907; Adams v. New York, 192 U. S. 585, 48 Law. Ed. 575, afg. 176 N. Y. 351, 68 N. E. 636.
60. Walker v. State, 139 Ala. 56, 35 So. 1011.
61. Thomas v. State [Fla.] 36 So. 161; Walker v. State, 139 Ala. 56, 35 So. 1011.
62. Thomas v. State [Fla.] 36 So. 161.

ity and not its admissibility,[63] though evidence has been rejected on the ground of remoteness.[64]

Other offenses, convictions and acquittals[65] are not generally admissible.[66] Exception is made, however, in the case of other offenses committed at the same time with the one on trial, when they are admissible under the familiar rule of res gestae,[67] and when they are so connected with the offense on trial as to illustrate it by way of supplying a motive,[68] or showing the intent with which it was committed,[69] or show a system,[70] or defendant's identity,[71] they may generally be shown, and

63. Andrews v. State [Tex. Cr. App.] 83 S. W. 188; Weaver v. State [Tex. Cr. App.] 81 S. W. 39; Alanis v. State [Tex. Cr. App.] 81 S. W. 709; Gregory v. State [Ala.] 37 So. 259; Nickles v. State [Ala.] 37 So. 312. Remote and fragmentary evidence to corroborate accomplices held properly used. Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211. Deed made eight years before used to show ownership. Frazier v. State [Tex. Cr. App.] 81 S. W. 532. Inconclusive circumstances may be shown. Schley v. State [Fla.] 37 So. 518. A telephone conversation with accused testified to by the other party to it is not to be rejected on the ground of insufficiency of proof of identity of accused where the witness swears positively. Lillie v. State [Neb.] 100 N. W. 316.

64. Some of the threats of deceased to take her own life held too remote where the charge was murder by poison and the defense was suicide. State v. Kelly [Conn.] 58 A. 705. Where issue is as to defendant's sanity, evidence as to what sort of a man he was 18 years ago is too remote. State v. Quigley [R. I.] 58 A. 905. Purpose of accused three years before in going to place where cattle were stolen. People v. Green, 143 Cal. 8, 76 P. 649. Declarations of accused that he would like a reputation of having killed several men. Casteel v. State [Ark.] 83 S. W. 953. Purchase of clothes at a time and place other than witnesses have stated as showing date of offense. Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107.

65. See 2 Curr. L. 333.

66. Dunn v. State, 162 Ind. 174, 70 N. E. 521; Schultz v. People, 210 Ill. 196, 71 N. E. 405; People v. Dowell [Mich.] 99 N. W. 23; Cawthon v. State, 119 Ga. 395, 46 S. E. 897; State v. Boatright [Mo.] 81 S. W. 450; Bass v. U. S., 20 App. D. C. 232; Owens v. State [Tex. Cr. App.] 79 S. W. 575; State v. Eder [Wash.] 78 P. 1023; Livingston v. State [Tex. Cr. App.] 83 S. W. 1111. Evidence that on the arrest of defendant for assault with a pistol, he was found to have brass knuckles in his pocket, is inadmissible on his trial for the assault. People v. Wells [Cal.] 78 P. 470. That defendant was drunk at the time witness saw him carrying a weapon concealed. Gainey v. State [Ala.] 37 So. 355. Previous violations of local option law. Belt v. State [Tex. Cr. App.] 78 S. W. 933; Marks v. State [Tex. Cr. App.] 78 S. W. 512. Previous disturbances of peace. Maxwell v. State [Tex. Cr. App.] 78 S. W. 516. Improper familiarity with another woman cannot be shown in prosecution for wife desertion. Cuthbertson v. State [Neb.] 101 N. W. 1031. Other thefts by accomplice cannot be shown in absence of system. Buck v. State [Tex. Cr. App.] 83 S. W. 390.

67. See post, this section.

68. State v. Johnson [La.] 36 So. 30; State v. Bates [Mo.] 81 S. W. 408. Indictment for larceny of deceased's cattle may be shown as motive for homicide. Smith v. State [Fla.] 37 So. 573. Illicit relations between co-defendant and female are proper to show motive for abortion. Barrow v. State [Ga.] 48 S. E. 950. Where murder was committed in resisting arrest, the circumstances of the previous crime are admissible, both to show motive and defendant's identity. State v. Lewis, 181 Mo. 235, 79 S. W. 671; Cortez v. State [Tex. Cr. App.] 83 S. W. 812. Robbery in connection with murder. Moran v. Territory [Okl.] 78 P. 111. Prior unsuccessful attempts at abortion during the same pregnancy may be shown. Sullivan v. State [Ga.] 48 S. E. 949.

Not admissible: Systematic embezzlement is not material in forgery on the assumption that the forgery was induced to conceal the embezzlement. People v. Gaffey, 90 N. Y. S. 706.

69. Other larcenies may be shown in a prosecution for larceny or for entering with intent to steal. People v. Nagle [Mich.] 100 N. W. 273; Flohr v. Territory [Okl.] 78 P. 565; Buck v. State [Tex. Cr. App.] 83 S. W. 387. Other embezzlement. Eatman v. State [Fla.] 37 So. 576. Other forgeries. Withaup v. U. S. [C. C. A.] 127 F. 530; People v. Weaver, 177 N. Y. 434, 69 N. E. 1094; Usher v. State [Tex. Cr. App.] 81 S. W. 309; Taylor v. State [Tex. Cr. App.] 81 S. W. 933. Issuance of other illegal and fraudulent county warrants. Howard v. State [Ark.] 82 S. W. 196. Other transactions of similar nature showing use of mails to defraud. O'Hara v. U. S. [C. C. A.] 129 F. 551. Other transactions by national bank officer. United States v. Breese, 131 F. 915. Other shots at same time defendant fired at deceased or prosecuting witness. State v. Robinson, 112 La. 939, 36 So. 811. Other poisonings in neighborhood. State v. Sargood [Vt.] 58 A. 971. Prior assaults may be shown in rape. State v. Carpenter [Iowa] 98 N. W. 775; State v. Trusty, 122 Iowa, 82, 97 N. W. 989. Other arson in neighborhood. Mitchell v. State [Ala.] 37 So. 76. Prior gaming in same house. State v. Behan [La.] 37 So. 607. Previous sales to minor are not admissible to show knowledge of minority. Dettforth v. State [Tex. Cr. App.] 80 S. W. 628.

70. Other forgeries. Taylor v. State [Tex. Cr. App.] 81 S. W. 933. Other embezzlements. Leach v. State [Tex. Cr. App.] 81 S. W. 733. Defendant's scheme of accounting resulting in embezzlement. State v. Pittam, 32 Wash. 137, 72 P. 1042. Other false pretenses. People v. Noblett, 96 App. Div. 293, 89 N. Y. S. 181. Other bribery. State v. Schnettler, 181 Mo. 173, 79 S. W. 1123. Other violations of

where unlawful sexual intercourse is under investigation, other acts of the parties may be shown to illustrate their inclination.[72] Evidence fairly admissible upon an issue in the case is not rendered inadmissible because indirectly showing the commission of another offense.[73] Goods found in the house of another also charged with the larceny are not admissible against defendant, no confederacy or conspiracy being shown,[74] and on a trial for poisoning, it cannot be shown that it was current talk in the neighborhood that defendant poisoned others.[75] Where evidence of another crime is admitted to show intent, defendant is entitled to show the record of his acquittal thereof on the theory of res judicata.[76]

Character and reputation.[77]—The character of the accused as reflected by his general reputation in the community in which he resides,[78] with reference to the traits relevant to the offense charged[79] may always be put in issue by him by offering evidence that it is good, whereupon the contrary may be proved in the same manner by the state.[80] The character of third persons,[81] especially of witnesses in the case,[82] may be material. Defendant for the purpose of impeachment may be asked whether he has served a term in prison in another state.[83] A dying declarant may be impeached as any other witness,[84] and where impeached by showing convic-

local option law. White v. State [Tex. Cr. App.] 79 S. W. 523.

71. State v. Lewis, 181 Mo. 235, 79 S. W. 671; Cortez v. State [Tex. Cr. App.] 83 S. W. 812.

72. Incest. People v. Koller, 142 Cal. 621, 76 P. 500. Adultery. State v. Eggleston [Or.] 77 P. 738. Rape under age of consent. State v. Lancaster [Idaho] 78 P. 1081. Other intercourse **not admissible** in rape under age of consent in Texas. Henard v. State [Tex. Cr. App.] 79 S. W. 810. Nor in incest. Clifton v. State [Tex. Cr. App.] 79 S. W. 824.

73. State v. Levy [Idaho] 75 P. 227; State v. Coleman [S. D.] 98 N. W. 175; State v. Donavan [Iowa] 101 N. W. 122; State v. Franklin [Kan.] 77 P. 588; State v. Johnson [La.] 36 So. 30; Goodman v. State [Tex. Cr. App.] 83 S. W. 196. Efforts to induce witness not to testify may be shown, though they tend to show bribery. State v. Alexander [Mo.] 83 S. W. 753. A conversation between an officer and accused, a bartender, shortly after a homicide, is not inadmissible because it also shows that the saloon was then open after hours, nor is cross-examination of accused as to a prior difficulty referred to in his examination in chief, in regard to where and when such difficulty occurred, prejudicial because showing that the saloon was open on Sunday. People v. Farrell [Mich.] 100 N. W. 264. Accused may be asked on cross-examination if he had not drawn a revolver on other persons than deceased, though it tends to show that he had committed another offense. Id. One on trial for the murder of his wife's paramour, having testified to his unusual affection for his wife and his shock and surprise at the discovery of her infidelity, it may be shown that before marriage she was an inmate of a house of ill fame kept by him, and that he married her to prevent her becoming a witness against him in a prosecution for keeping such place. Schissler v. State [Wis.] 99 N. W. 593.

74. State v. Drew, 179 Mo. 315, 78 S. W. 594.

75. Stith v. Com. [Ky.] 82 S. W. 245.

76. Mitchell v. State [Ala.] 37 So. 76.

77. See 2 Curr. L. 334.

78. State v. Prins, 117 Iowa, 505, 91 N. W. 758. Discharge from army is not admissible on question of character. Taylor v. State [Ga.] 48 S. E. 361. Reputation among fellow workmen is inadmissible. State v. Brady [N. J. Law] 59 A. 6. Opinion based on personal knowledge is not admissible. People v. Albers [Mich.] 100 N. W. 908.

79. State v. Thornton [N. C.] 48 S. E. 602. A physician on trial for administering medicines to produce a miscarriage may prove his general reputation for morality and decency. State v. Jones [Del.] 53 A. 858. Only chastity and morality may be shown in prosecution for sexual crime. State v. Brady [N. J. Law] 59 A. 6. Peace and violence is material in rape. Horton v. State [Miss.] 36 So. 1033. In perjury, defendant's reputation for truth and veracity, as well as for honesty and integrity, is material. People v. Albers [Mich.] 100 N. W. 908.

80. State cannot show bad character until put in issue by defendant. Maxwell v. State [Tex. Cr. App.] 78 S. W. 516; Dysart v. State [Tex. Cr. App.] 79 S. W. 534. General reputation by what people in neighborhood said and that it was bad is properly admitted. State v. Prins, 117 Iowa, 505, 91 N. W. 758. Evidence of bad reputation in town 12 miles distant from defendant's residence, he having lived there 2½ years before, is proper. People v. Nunley, 142 Cal. 441, 76 P. 45.

81. In adultery, defendant's paramour may be shown to have had the reputation of a common prostitute. State v. Eggleston [Or.] 77 P. 738.

82. See Witnesses, 2 Curr. L. 2163. The character of a prosecuting witness cannot be shown by inquiry into the particulars of disputes had by him with other persons and at other times in no manner connected with the case on trial. State v. Frank, 109 La. 131, 33 So. 110.

83. Elmore v. State [Tex. Cr. App.] 78 S. W. 520.

tion of felony, pardon cannot be shown in rebuttal.[85] Insanity cannot be proved by reputation.[86]

Hearsay.[87]—Unsworn statements out of court by third persons are, unless within certain well known exceptions, inadmissible.[88]

Admissions and declarations.[89]—Incriminating statements and admissions of defendant are admissible, whether made before or after the commission of the crime,[90] but self-serving declarations are not generally admissible, except in some instances, as showing the intent with which the act under investigation was done.[91]

Acts and declarations of a joint defendant may be considered against the one on trial when made in his presence, though no conspiracy was shown,[92] and where two are charged as principals, the acts and declarations of one at the time of committing the offense are admissible against the other;[93] but declarations of a co-defendant in defendant's absence are inadmissible on a separate trial, in the absence of proof of a conspiracy.[94] Declarations tending to prove guilt of the principal may be shown, though made in the absence of the accomplice on trial,[95] and

84, 85. Martin v. Com., 25 Ky. L. R. 1928, 78 S. W. 1104.

86. State v. Lagoni [Mont.] 76 P. 1044; Parrish v. State, 139 Ala. 16, 36 So. 1012.

87. See 2 Curr. L. 334.

88. State v. Peabody [R. I.] 56 A. 1028; People v. Dowell [Mich.] 99 N. W. 23; People v. Albers [Mich.] 100 N. W. 908; Wildman v. State, 139 Ala. 125, 35 So. 995; Lightfoot v. State [Tex. Cr. App.] 78 S. W. 1075; Gibson v. State [Tex. Cr. App.] 83 S. W. 1119. Witness may fix the time of a fact by the time he heard something related by another, and may state what was related, but the hearsay thus produced is admissible for no other purpose nor can it be used for any other. Alford v. State [Fla.] 36 So. 436.

Examples. Not admissible: Witness had been informed he could get whiskey from defendant. Holley v. State [Tex. Cr. App.] 81 S. W. 957. Witness had heard that defendant, indicted for murder in whipping his child, was addicted to cruel and unusual punishment, and had previously killed a child. Ackers v. State [Ark.] 83 S. W. 909. Evidence of what a third person said about defendant's insanity. Porter v. State [Ala.] 37 So. 81. Statement by relative of deceased that from what deceased's son, the only eye witness, told him immediately after the homicide that defendant was justified. Hellard v. Com. [Ky.] 80 S. W. 482. An entry in a school register is not competent evidence of the age of the pupil. Simpson v. State [Tex. Cr. App.] 81 S. W. 320. Witness cannot state that the morning after a horse was stolen he heard defendant had a similar one. Lightfoot v. State [Tex. Cr. App.] 78 S. W. 1075. Statements of an accomplice to witness under such circumstances that the facts stated must have been derived from defendant are hearsay. Wallace v. State [Tex. Cr. App.] 81 S. W. 966.

Not hearsay: Testimony to the fact of having received letters from a person is not hearsay. People v. Barker [Cal.] 78 P. 266. The place of a crime may be identified, and the fact that such place is within the state proved independently (to prove place of a mock marriage). Barclay v. Com., 25 Ky. L. R. 463, 76 S. W. 4. What another has told witness about it is hearsay. Taylor v. State [Tex. Cr. App.] 80 S. W. 378. Testimony of a witness that he had heard that the prosecutor had lost certain property is not inadmissible as hearsay where offered solely for the purpose of showing why he had carefully examined the property found in possession of defendant. Stafford v. State [Ga.] 48 S. E. 903.

89. See 2 Curr. L. 334.

90. Barclay v. Com., 25 Ky. L. R. 463, 76 S. W. 4. Voluntary conversation between defendant and police officer. Parrish v. State, 139 Ala. 16, 36 So. 1012. Indefinite statements may be admitted where the context shows their purport. Reeves v. State [Tex. Cr. App.] 83 S. W. 803. An admission of defendant that he was present at the scene of a crime makes his previous denials of that fact, like flight, evidence against him. People v. Moran [Cal.] 77 P. 777. Statement by defendant that another committed the crime, but that he would pay to settle it. State v. Wideman [S. C.] 46 S. E. 769. The declaration of accused that the night before he had been to a woman's house and "romped hell out of her" is admissible on his trial for assault with intent to rape. Huling v. State [Tex. Cr. App.] 80 S. W. 1006. Mere admissions need not first be shown to be voluntary. People v. Jan John [Cal.] 77 P. 950. The officer's statement to accused that his story was absurd need not be stricken. People v. Buckley [Cal.] 77 P. 169. The admissions of an agent of a corporation are admissible to incriminate him personally, but not against the corporation. Sinclair v. D. C., 20 App. D. C. 336.

91. Self-serving declarations, denoting an intention, are admissible only if regarded as an act of the party supporting his testimony. State v. Adams [S. C.] 47 S. E. 676.

92. State v. Lehman [Mo.] 81 S. W. 1118. Statements of defendant's co-defendants made in his presence and in a conversation in which he took part are admissible. State v. Burns [Iowa] 99 N. W. 721.

93. State v. Lewis, 181 Mo. 235, 79 S. W. 671; Hudson v. State, 137 Ala. 60, 34 So. 854.

94. State v. Austin [Mo.] 82 S. W. 5.

95. Mason v. State [Tex. Cr. App.] 81 S. W. 718; Harrold v. State [Tex. Cr. App.] 81 S. W. 728.

a co-defendant's statements against interest may be admitted where the jury are warned that they are to be taken as evidence against him alone.[96] Evidence of the finding of stolen property where it had been hidden by the thieves, one of them being present, is admissible on the trial of another who was not present.[97]

Declarations by third persons with regard to defendant's guilt are not admissible, whether exculpatory[98] or incriminating,[99] except that failure of defendant to deny the statements of others in his presence is sometimes taken as an admission of their truth; but such evidence should be received with caution.[1] Statements of deceased, neither res gestae nor dying declarations, are not admissible against or in favor of one accused of homicide.[2] Declarations of the prosecuting witness cannot bind the state, but are admissible only as affecting credibility, and then only after witness' attention has been called to them.[3] As a general rule, evidence of prior statements of a witness cannot be introduced to support or corroborate his evidence. The rule, however, has its exceptions, and one of them is that where a witness has been discredited by showing prior statements contradictory of his evidence on the trial, it may be shown that soon after the occurrence he made statements corroborative of his statements at the trial.[4]

96. State v. Adams [S. C.] 47 S. E. 676.

97. Kennon v. State [Tex. Cr. App.] 82 S. W. 518.

98. Defendant on trial for cattle stealing cannot show what his mother said when she sent him to the range two years before. People v. Green, 143 Cal. 8, 76 P. 649. Witness cannot state that a third person had admitted the commission of the offense. Mays v. State [Neb.] 101 N. W. 979. The declaration of a third person some time after the homicide, that he accidentally killed deceased is hearsay. Selby v. Com., 25 Ky. L. R. 2209, 80 S. W. 221. Witness cannot testify that defendant's wife stated before property was stolen that he had such property. Gibson v. State [Tex. Cr. App.] 83 S. W. 1119. Witnesses cannot state what they did or thought in the absence of defendant and deceased during the interim between the preliminary quarrel and the homicide. Chambers v. State [Tex. Cr. App.] 79 S. W. 572.

99. In the absence of a conspiracy, conversations between third persons in defendant's absence are inadmissible against him. Goodman v. State [Tex. Cr. App.] 83 S. W. 196; Wilson v. U. S. [Ind. T.] 82 S. W. 924. Defendant is not bound by the statements of others with reference to the facts of the case without his connivance or consent. Suggs v. State [Tex. Cr. App.] 79 S. W. 307. Statement of defendant's father "that he might as well give the case up—he could not account for him after 7 o'clock," held improperly shown. State v. Teachey, 134 N. C. 656, 46 S. E. 733. Declarations at a fight some time before the killing and at which defendant was not present are not admissible. Gray v. State [Tex. Cr. App.] 83 S. W. 705. It cannot be shown that the alleged purchaser of intoxicating liquor stated in defendant's absence that he got it from defendant. Vauter v. State [Tex. Cr. App.] 83 S. W. 186.

Contra: Proof that the person robbed named defendant immediately afterward is not hearsay. Commonwealth v. Kelly [Mass.] 71 N. E. 807.

1. Statements of defendant's child of four to officers in defendant's presence and defendant's failure to deny them held inadmissible. Geiger v. State [Ohio] 17 N. E. 721. In the separate trial of one of several defendants, statements by the others while in custody and in the hearing of defendant are not admissible. Merriweather v. Com. [Ky.] 82 S. W. 592. Accused cannot be contradicted by statements made in his presence without contradiction by one since deceased. Nicks v. State [Tex. Cr. App.] 79 S. W. 35. Defendant's father's statement to searching officers in defendant's presence that all the meat on the place was in the smoke house is admissible, the stolen meat being found in a crib. Gilford v. State [Tex. Cr. App.] 78 S. W. 692. Statements by prosecuting witness when defendant was brought before her for identification, and made in his presence, are not admissible. State v. Egbert [Iowa] 101 N. W. 191. **Contra,** State v. Worthen [Iowa] 100 N. W. 330.

2. Smith v. State [Fla.] 37 So. 573. Declarations of deceased a week before her death, that she first became sick on taking certain medicine, are not admissible, she having died of poison. Boyd v. State [Miss.] 36 So. 525. Statement by deceased the morning before he died after being shot in the leg, that his bowels hurt him and that if he could get over that he would be all right, is hearsay. Pitts v. State [Ala.] 37 So. 101. Where evidence of threats by deceased to take her own life is shown, further statements that she had the stuff to do it with are hearsay and are not admissible either on the theory that they show possession, or knowledge of the effect of the poison used. State v. Kelly [Conn.] 58 A. 705. Declarations of deceased months before as to feeling between him and defendant are not admissible. Casteel v. State [Ark.] 83 S. W. 953.

3. State v. Brady [N. J. Law] 59 A. 6. An opinion of the prosecuting witness expressing a want of belief in defendant's guilt is inadmissible. Chenault v. State [Tex. Cr. App.] 81 S. W. 971.

4. Wallace v. State [Tex. Cr. App.] 81 S. W. 966; State v. Sharp [Mo.] 82 S. W. 134;

Confessions[5] are admissible,[6] though made while defendant is in custody,[7] but only when voluntary,[8] and made understandingly,[9] without threat or inducement.[10] Evidence that stolen goods were found where defendant said they were, together with defendant's statement where they were, is admissible, though the confession was obtained by improper inducements,[11] but what he said about committing the crime is not,[12] and though there be a prior confession improperly induced, a subsequent one, made after the effect of the inducement has passed, may be shown.[13] Where defendant is in custody, he must in some states be warned that whatever he says may be used against him,[14] but the warning need not be exactly contemporaneous with the confession,[15] nor be made by the party receiving it,[16] and attempts

Lounder v. State [Tex. Cr. App.] 79 S. W. 552; Simpson v. State [Tex. Cr. App.] 81 S. W. 320. A discredited witness may be supported by showing statements in harmony with testimony at trial. State v. Sharp [Mo.] 82 S. W. 134. **Contra,** State v. McDaniel [S. C.] 47 S. E. 384.

5. See 2 Curr. L. 335.

6. Nicks v. State [Tex. Cr. App.] 79 S. W. 35; Adcock v. State [Ark.] 83 S. W. 318; Abrams v. State [Ga.] 48 S. E. 965. Confessions of one of two on trial are admissible only as to himself. Howson v. State [Ark.] 83 S. W. 933. Where two are jointly tried, the confession of one is not inadmissible because it implicates the other, but it should only be considered against the party making it. State v. Brinte [Del.] 58 A. 258. The provisions in American constitutions, that no person in a criminal case shall be compelled to be a witness against himself, are merely declarative of the common law and provide nothing for a defendant's security not already provided by that law. State v. Middleton [S. C.] 48 S. E. 35.

7. State v. Lewis, 112 La. 872, 36 So. 788; Hilburn v. State [Ga.] 49 S. E. 318; Hathaway v. Com. [Ky.] 82 S. W. 400; Plant v. State [Ala.] 37 So. 159; State v. Worthen [Iowa] 100 N. W. 330; State v. Icenbice [Iowa] 101 N. W. 273; State v. Washing [Wash.] 78 P. 1019; Williams v. State [Fla.] 37 So. 521.

8. State v. Brinte [Del.] 58 A. 258; Commonwealth v. Hudson, 185 Mass. 402, 70 N. E. 436. Burden is on state of proving voluntary character. Watts v. State [Md.] 57 A. 542. But not that it was not induced. Jenkins v. State, 119 Ga. 431, 46 S. E. 628. Statements elicited by severe cross-examination from one under arrest are not admissible, though he was warned. Parker v. State [Tex. Cr. App.] 80 S. W. 1008. Where confession appears to be voluntary, burden is on defendant to show otherwise. State v. Icenbice [Iowa] 101 N. W. 273. That defendant was in chains and officer had pistol in pocket does not necessarily render confession inadmissible. McNish v. State [Fla.] 36 So. 176. Where the evidence conflicts, they are admissible, subject to a proper charge. Sanchez v. State [Tex. Cr. App.] 78 S. W. 504. "You have been telling me a pack of lies; now you had better tell the truth" renders confession involuntary. West v. U. S., 20 App. D. C. 347. The state of mind of defendant making admissions and his character are material on the question whether his admissions were voluntary. Timid and easily frightened. State v. Lewis [N. C.] 48 S. E. 654.

9. State v. Sargood [Vt.] 58 A. 971.

10. State v. Brinte [Del.] 58 A. 258; State v. Hunter, 181 Mo. 316, 80 S. W. 955. Confessions extorted by hanging and threatening life are incompetent. Edmonson v. State [Ark.] 82 S. W. 203; State v. Middleton [S. C.] 48 S. E. 35. Inducement held shown. Watts v. State [Md.] 57 A. 542. Promise of protection from mob violence is not an inducement sufficient to nullify. Brewer v. State [Ark.] 78 S. W. 773. Defendant held not in fear of crowd when giving confession. State v. Daniels, 134 N. C. 641, 46 S. E. 743. Statements to judge investigating case of jury bribing. State v. Woodward [Mo.] 81 S. W. 857. To tell defendant that his codefendant is laying the killing all on him is not an inducement. Cortez v. State [Tex. Civ. App.] 83 S. W. 812.

Predicate held sufficient: Talbert v. State [Ala.] 37 So. 78. No threats or extortion shown. State v. Gianfala [La.] 37 So. 30.

11. Commonwealth v. Phillips [Ky.] 82 S. W. 286; State v. Middleton [S. C.] 48 S. E. 35.

12. State v. Middleton [S. C.] 48 S. E. 35.

13. Green v. Com. [Ky.] 83 S. W. 638.

14. Defendant held to have been in custody, and, not having been warned, his confession not admissible. Moore v. State [Tex. Cr. App.] 79 S. W. 565; Parks v. State [Tex. Cr. App.] 79 S. W. 301; Alanis v. State [Tex. Cr. App.] 81 S. W. 709. Warning held sufficient. Reeves v. State [Tex. Cr. App.] 83 S. W. 803. Confession when defendant was confined on another charge is admissible without warning. Pate v. State [Tex. Cr. App.] 81 S. W. 737. Mere purpose of officer to arrest defendant does not put him in custody. Bain v. State [Tex. Cr. App.] 79 S. W. 814. Witness before grand jury. Bowen v. State [Tex. Cr. App.] 82 S. W. 520; Gibson v. State [Tex. Cr. App.] 83 S. W. 1119. Acts as well as statements are inadmissible in absence of warning. Thompson v. State [Tex. Cr. App.] 78 S. W. 691. Contradictory statements. Parks v. State [Tex. Cr. App.] 79 S. W. 301. Lack of warning does not affect admissibility. State v. Hand [N. J. Eq.] 58 A. 641; State v. Blay [Vt.] 58 A. 794. Fitting accused's shoe to track held admissible, though accused was not warned. Guerrero v. State [Tex. Cr. App.] 80 S. W. 1001.

15. Nicks v. State [Tex. Cr. App.] 79 S. W. 35; Black v. State [Tex. Cr. App.] 81 S. W. 302. Warning shortly before by another officer is sufficient. Kennon v. State [Tex. Cr. App.] 82 S. W. 518. Statements next day after warning are too remote. Mc-

to escape after arrest may be shown, though defendant was not warned.[17] The evidence being conflicting as to whether defendant was warned,[18] or the statement was voluntary,[19] the question is primarily for the judge, and finally for the jury;[20] and where after confessions are shown, it appears that they were given under duress, prompt exclusion and instructions to disregard them furnish as complete a remedy as has been provided.[21] A confession must go to the jury entire,[22] except that confessions of other crimes unconnected with the one under investigation, if possible, must be rejected;[23] and if the witness can give the substance of the confession, it is immaterial that he does not recall the entire conversation.[24] An admission of killing, coupled with a justification, is not properly a confession;[25] and offers by a person arrested for forging a check to pay the sum represented or a greater sum to settle the matter are not confessions.[26] Defendant's statements to his co-conspirators in plotting and carrying out the plan, being admissible as res gestae, are not to be rejected as confessions.[27]

Acts and declarations of co-conspirators.[28]—Declarations of co-conspirators made after the conspiracy is formed and in furtherance of it,[29] but not those before,[30] are admissible, though made in the absence of defendant,[31] and the trial is for a crime only incidental to the object of the conspiracy,[32] and the declarant is not named in the indictment.[33] There must, however, be independent evidence of the conspiracy,[34] the acts and declarations of a co-conspirator not being admissible

Danial v. State [Tex. Cr. App.] 81 S. W. 301.

16. Kennon v. State [Tex. Cr. App.] 82 S. W. 518. Nor by an officer. Black v. State [Tex. Cr. App.] 81 S. W. 302.

17. Andrews v. State [Tex. Cr. App.] 83 S. W. 188.

18. Kennon v. State [Tex. Cr. App.] 82 S. W. 518; Cortez v. State [Tex. Cr. App.] 83 S. W. 812.

19. Commonwealth v. Hudson, 185 Mass. 402, 70 N. E. 436; State v. Middleton [S. C.] 48 S. E. 35; State v. Washing [Wash.] 78 P. 1019. Where the testimony of the officer discloses the involuntary character of the confession, it is error to submit the question to the jury, though the defendant denies making a confession, he not denying the inducement. West v. U. S., 20 App. D. C. 347.

20. On the preliminary question as to its admissibility, the court may hear evidence from both parties. Zuckerman v. People [Ill.] 72 N. E. 741.

21. State v. Middleton [S. C.] 48 S. E. 35.

22. State v. Busse [Iowa] 100 N. W. 536; Owens v. State [Ga.] 48 S. E. 21. Extenuating statements with the incriminating ones. People v. Loomis, 178 N. Y. 400, 70 N. E. 919. Where a confession is the result of questions and is written down, read over to and signed by defendant, the fact that the questions are not written is no objection to its admissibility. State v. Brinte [Del.] 58 A. 258.

23. People v. Loomis, 178 N. Y. 400, 70 N. E. 919. A written confession admitting other crimes may go to the jury entire, under proper instructions to disregard all except that portion relating to the crime under investigation. State v. Knapp [Ohio] 71 N. E. 705, rvg. 4 Ohio C. C. (N. S.) 184, 25 Ohio Circ. R. 571, which rvd. trial court.

24. Green v. Com. [Ky.] 83 S. W. 638.

25. Owens v. State [Ga.] 48 S. E. 21.

26. Michaels v. People, 208 Ill. 603, 70 N. E. 747

27. People v. McGarry [Mich.] 99 N. W. 147.

28. See 2 Curr. L. 337.

29. Smith v. State [Tex. Cr. App.] 81 S. W. 936; State v. Lewis, 181 Mo. 235, 79 S. W. 671; Graff v. People, 208 Ill. 312, 70 N. E. 299; People v. Mol [Mich.] 100 N. W. 913; Wallace v. State [Tex. Cr. App.] 81 S. W. 966; People v. Lawrence, 143 Cal. 148, 76 P. 893; Commonwealth v. Stambaugh, 22 Pa. Super. Ct. 386. Evidence of every act done in furtherance of a common unlawful purpose is relevant as against every one engaged therein. State v. Donavan [Iowa] 101 N. W. 122. Testimony merely narrative of something said or done by other conspirators is not admissible. Bowen v. State [Tex. Cr. App.] 82 S. W. 520; People v. McGarry [Mich.] 99 N. W. 147. Conversation after abandonment of the conspiracy relative to concealing it is admissible. People v. Mol [Mich.] 100 N. W. 913. Testimony of one narrating the facts is admissible against others where conspiracy shown. Hudson v. State, 137 Ala. 60, 34 So. 854.

30. Smith v. State [Tex. Cr. App.] 81 S. W. 936; Barnett v. State [Tex. Cr. App.] 80 S. W. 1013. Declaration that declarant had grievance against deceased and had hired defendant to do him an injury is a mere narrative of a fact. State v. Walker [Iowa] 100 N. W. 354.

31. Graff v. People, 208 Ill. 312, 70 N. E. 299; People v. McGarry [Mich.] 99 N. W. 147; People v. Strauss, 94 App. Div. 453, 88 N. Y. S. 40.

32. Murder in pursuance of conspiracy by strikers to prevent running of street cars. Bowen v. State [Tex. Cr. App.] 82 S. W. 520.

33. Graff v. People, 208 Ill. 312, 70 N. E. 299.

34. Wallace v. State [Tex. Cr. App.] 81 S. W. 966. Conspiracy to resist arrest held sufficiently shown to authorize admission of declarations of one defendant against the

for the purpose of proving the conspiracy itself.[35] Slight evidence is sufficient,[36] its sufficiency in the first instance being a question for the trial court;[37] but evidence raising a mere suspicion is not sufficient.[38] A conspiracy may be proved by circumstances,[39] and if the circumstances tend to prove a conspiracy, it is for the jury and not the court to determine whether they are consistent with a reasonable hypothesis of innocence.[40] It is not error to admit evidence of the acts of alleged conspirators before the conspiracy is established,[41] on a promise to subsequently make it competent,[42] but where declarations are admitted over objection, on the promise to show a conspiracy, and none is shown, they should be stricken, though no motion is made,[43] and such evidence should be disregarded if the jury find on conflicting evidence that there was no conspiracy.[44]

Res gestae.[45]—Exclamations or other statements made at the time or so soon thereafter as to result from impulse rather than reflection are admissible, whether made by defendant,[46] the person injured,[47] or third persons,[48] and whether the person exclaiming would be a competent witness or not.[49] Likewise conversation[50] and contemporaneous acts and circumstances of the parties may be shown where they are part and parcel of the transaction under investigation.[51] The acts and

other on trial for murder. State v. Lewis, 181 Mo. 235, 79 S. W. 671.

35. Wallace v. State [Tex. Cr. App.] 81 S. W. 966; Smith v. State [Tex. Cr. App.] 81 S. W. 936. Declarations of a third person that he had hired defendant to commit the crime are inadmissible in the absence of independent evidence of a conspiracy. State v. Walker [Iowa] 100 N. W. 354.

36. Wells v. Territory [Okl.] 78 P. 124.

37, 38. State v. Walker [Iowa] 100 N. W. 354.

39. People v. Lawrence, 143 Cal. 148, 76 P. 893; People v. Moran [Cal.] 77 P. 777. Other offenses. Com. v. Clancy [Mass.] 72 N. E. 842.

40. People v. Moran [Cal.] 77 P. 777; People v. Lawrence, 143 Cal. 148, 76 P. 893.

41. People v. McGarry [Mich.] 99 N. W. 147; People v. Donnolly [Cal.] 77 P. 177; Barrow v. State [Ga.] 48 S. E. 950. It is not necessary to first establish a conspiracy before evidence of the acts and declarations of co-conspirators in the absence of defendant are admissible against him, but such evidence may be introduced in the first instance and stricken out if no conspiracy is thereafter shown, or disregarded if the jury find on conflicting evidence that there was no conspiracy. Bowen v. State [Tex. Cr. App.] 82 S. W. 520.

42. Wells v. Territory [Okl.] 78 P. 124.

43. State v. Walker [Iowa] 100 N. W. 354. Admission of evidence of acts of unknown persons not shown to have been acting with defendant held not cured by striking out. Bowen v. State [Tex. Cr. App.] 82 S. W. 520.

44. Bowen v. State [Tex. Cr. App.] 82 S. W. 520.

45. See 2 Curr. L. 338.

46. Plank v. State [Ala.] 37 So. 159; Ferguson v. State [Ala.] 37 So. 448; Moody v. State [Ga.] 48 S. E. 340; Johnson v. State [Tex. Cr. App.] 81 S. W. 945; Gray v. State [Tex. Cr. App.] 83 S. W. 705; Elmore v. State [Tex. Cr. App.] 78 S. W. 520; Bateson v. State [Tex. Cr. App.] 80 S. W. 88. Statements by defendant 10 or 15 minutes after the homicide to the effect that it was accidental are admissible. Scott v. State [Tex. Cr. App.] 81 S. W. 294. Statements by defendant in rape as to his relations with other women. State v. Bebb [Iowa] 96 N. W. 714; Id., 101 N. W. 189.

47. Weightnovel v. State [Fla.] 35 So. 856; State v. Charles [La.] 36 So. 29; Bowles v. Com. [Va.] 48 S. E. 527; State v. Ripley, 32 Wash. 182, 72 P. 1036; Taylor v. State [Tex. Cr. App.] 80 S. W. 378; Flores v. State [Tex. Cr. App.] 79 S. W. 808; State v. Foley [La.] 36 So. 885. Statements of child 3½ years old after being raped. Kenney v. State [Tex. Cr. App.] 79 S. W. 817.

48. "You see boys this was an accident" by person attempting to disarm defendant when deceased was shot. Selby v. Com., 25 Ky. L. R. 2209, 80 S. W. 221. "If he comes out we will shoot at him." People v. Sing Yow [Cal.] 78 P. 235.

49. Child 3½ years old on whom rape was committed. Kenney v. State [Tex. Cr. App.] 79 S. W. 817. The declaration of one at the time he was shot is admissible as res gestae, though he was an unpardoned convict. Flores v. State [Tex. Cr. App.] 79 S. W. 808.

50. Conversation between the parties at the time stolen goods came into defendant's possession is admissible. State v. Simon [N. J. Law] 57 A. 1016. Witnesses may state the conversation attendant on drawing up an affidavit, though the affidavit is admitted and is the best evidence of what was actually sworn to. Simpson v. State [Tex. Cr. App.] 79 S. W. 530.

51. Shots by defendant at prosecutor's wife immediately after the assault. Scott v. State [Tex. Cr. App.] 81 S. W. 950. Other shooting by defendant at the time of the homicide is admissible. Bennett v. State [Tex. Cr. App.] 81 S. W. 30. Defendant's disorderly conduct and assaults on others immediately prior to killing. Havens v. Com. [Ky.] 82 S. W. 369. Robbery motive of and immediately following murder. Moran v. Territory [Okl.] 78 P. 111. Occurrences before the crime but so intimately connected with it that a substantial statement of the facts could not be made without reference to them. People v. Linares, 142 Cal. 17, 75

declarations must be such that the events speak through the participants,[52] and where the participants speak about the events,[53] or the declarations are in a narrative form,[54] or the acts are done,[55] or the declarations made so far subsequent to the transaction as to permit reflection, they are inadmissible.[56] Testimony as to stolen property in addition to that alleged in the information, stolen at the same time and found in defendant's possession in the execution of a search warrant, is admissible as res gestae.[57] Where declarations are not precisely concurrent with a transaction, their admissibility is in the sound discretion of the trial court.[58]

Expert and opinion evidence.[59]—Ordinarily, questions are objectionable which call for conclusions of the witness rather than facts,[60] and testimony in the nature of conclusions and opinions is generally inadmissible.[61] An opinion or conclusion

P. 308. Train and mail robbery may be shown on prosecution for robbery of safe on train. State v. Howard [Mont.] 77 P. 50. Testimony with reference to other property stolen at the same time may be shown, though the property is not traced to defendant. Thompson v. State [Tex. Cr. App.] 78 S. W. 941. What was said and done by the parties at the time of delivery of the bottle supposed to contain liquor. Patrick v. State [Tex. Cr. App.] 78 S. W. 947. Defendant's curses at the time it was claimed he was assaulting his wife. Townley v. State [Tex. Cr. App.] 81 S. W. 309. That defendant began to dig ditch complained of a few days before the date alleged is admissible as res gestae. Adams v. State [Tex. Cr. App.] 81 S. W. 963. Flight of deceased and pursuit by defendant after infliction of fatal wound may be shown on question of malice. Hancock v. State [Tex. Cr. App.] 83 S. W. 696. Murder and flight may be shown where defendant killed deceased in resisting arrest thereafter. Cortez v. State [Tex. Cr. App.] 83 S. W. 812.

52. Physician called 9 or 10 minutes after shooting said, "Before I put my hands on you, who did the shooting?" Answer held not res gestae. State v. Charles [La.] 36 So. 29.

53. State v. Charles [La.] 36 So. 29; State v. Kelly [Conn.] 58 A. 705.

54. State v. Charles [La.] 36 So. 29; Davis v. Com., 25 Ky. L. R. 1426, 77 S. W. 1101; Freeman v. State [Tex. Cr. App.] 81 S. W. 953. Expressions of fear of defendant that deceased will attack him made subsequent to prior difficulty. State v. Raymo [Vt.] 57 A. 993.

55. Preparations for marriage six months after alleged seduction, not brought to knowledge of accused. People v. Tibbs, 143 Cal. 100, 76 P. 904.

56. State v. Gianfala [La.] 37 So. 30; Bowles v. Com. [Va.] 48 S. E. 527; Sutherland v. State [Ga.] 48 S. E. 915; State v. Harness [Idaho] 76 P. 788. Statement by defendant to one who heard shooting after walking ¼ mile is not admissible. Pitts v. State [Ala.] 37 So. 101. Dying declarations of one of two killed at the same time are not admissible at trial of slayer for murder of the other. Taylor v. State [Ga.] 48 S. E. 361. Statements made after walking a mile are not res gestae. Martin v. State [Tex. Cr. App.] 82 S. W. 657.

57. People v. Nagle [Mich.] 100 N. W. 273; Flohr v. Territory [Okl.] 78 P. 565.

58. State v. McDaniel [S. C.] 47 S. E. 384; State v. Lindsey [S. C.] 47 S. E. 389.

59. See 2 Curr. L. 338.

60. Whether there had been a previous attempt to break into defendant's house. Osborne v. State [Ala.] 37 So. 105. Whether witness' brother had such a bitter feeling against defendant, her husband, as to refuse to write a check in her married name. State v. Stockhammer, 34 Wash. 262, 75 P. 810. In a murder trial, witness cannot be asked whether she would have taken deceased into her family had she known he had been in prison. People v. Rodawald [N. Y.] 70 N. E. 1. Whether defendant had had any other altercation with prosecutor. State v. Day [Del.] 58 A. 946. The question of prior marriage in bigamy cases being one of fact arising from the evidence, a witness should not be allowed to state generally that the parties were married. Sokel v. People [Ill.] 72 N. E. 382. Whether witness saw a boy give defendant a bill of money calls for a fact. Rowland v. State [Ala.] 37 So. 245. "Was any thing said that led you to believe," etc. Clemons v. State [Fla.] 37 So. 647.

61. Wildman v. State, 139 Ala. 125, 35 So. 995. A witness cannot state the impression produced on his mind by a conversation, the language of which he does not remember. Wallace v. State [Tex. Cr. App.] 81 S. W. 966. A witness testifying to the evidence of another witness on a former hearing cannot state that his reason for remembering with particularity about the former testimony is because it was so unreasonable. Dyer v. State [Tex. Cr. App.] 83 S. W. 192. Witness cannot state from casual observation without measuring that he thought certain tracks and defendant's shoes were about the same size, though he may state his observation as to the size of the tracks and the size of the shoes. Parker v. State [Tex. Cr. App.] 80 S. W. 1008. Deceased's sister should not be permitted to state as a reason for her dislike of defendant, "I think he poisoned my sister." Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. Testimony of prosecutrix in rape that she "fought all the time" is a mere conclusion and of no probative force. Devoy v. State [Wis.] 99 N. W. 455. Opinion as to what was in books of record. Thurman v. State [Tex. Cr. App.] 78 S. W. 937. Evidence tending indirectly to show the opinions of themselves and others of defendant's conduct and the probability of his guilt should not be admitted. Denton v. State [Tex. Cr. App.] 79 S. W. 560. Statement that it is impossible to comply with law prohibiting smoke. Bradley v. District of Columbia, 20

is permissible, however, where the nature of the facts on which it is founded makes it impossible to state them,[62] and exception is made with respect to matters presumably not within the experience of ordinary men, but as to which certain learned persons have special knowledge.[63] As to such matters, any person shown to be of sufficient learning and experience[64] may give his opinion, based on facts in evidence, or on his observation of the subject-matter,[65] except that he cannot give an opinion as to the ultimate fact in the case.[66] Nonexpert witnesses having an intimate acquaintance with the person under investigation may give their opinion as to his sanity,[67] or his handwriting,[68] though in most states they must give with their opinion on sanity the facts on which it is based.[69] The jury, being informed as to the witness' opportunities to know all the circumstances and of the reasons upon

App. D. C. 169; Sinclair v. District of Columbia, 20 App. D. C. 336.

62. Sanity of one accused of murder. Parrish v. State, 139 Ala. 16, 36 So. 1012; Kroell v. State, 139 Ala. 1, 36 So. 1025. A person not an expert may describe deceased's wounds and body, there being nothing that any intelligent person could not relate from examination and observation. Wells v. Territory [Okl.] 78 P. 124. Whether defendant was drunk. Pace v. State [Tex. Cr. App.] 79 S. W. 531. Appearance and actions of accused at time of arrest. Bain v. State [Tex. Cr. App.] 79 S. W. 814. A nonmedical witness may state how deceased's leg looked just before he died. Pitts v. State [Ala.] 37 So. 101. Nonexperts, not intimate with defendant, may give the result of their observations at the various times they came in contact with him as to his appearance in respect to being rational or irrational. People v. Manoogian, 141 Cal. 592, 75 P. 177. Witness may state that certain marks were "moss stains." People v. Nunley, 142 Cal. 105, 75 P. 676. Resemblance of tracks. Alford v. State [Fla.] 36 So. 436. That person seen near the scene was defendant. Id. Whether several gunshots seen and heard by witness could have been fired by one person. Kroell v. State, 139 Ala. 1, 36 So. 1025. Intoxicating quality of beverage sold by defendant. Murry v. State [Tex. Cr. App.] 79 S. W. 568.

63. State v. Walke [Kan.] 76 P. 408. Whether person suffering from high fever in the afternoon could walk 12 miles and kill a man and return and show no fever the next morning is a matter for expert testimony. Dixon v. State, 139 Ala. 104, 36 So. 784. Whether fracture of head could be produced by blow of naked fist. Clemons v. State [Fla.] 37 So. 647.

64. Testimony of a witness that he was familiar with gun-shot wounds qualified him to state that a wound was a gun-shot wound. Patton v. State [Tex. Cr. App.] 80 S. W. 86. A chemist and toxicologist is competent to testify from analysis that decedent died of poison, though not a druggist, or pathologist, and there is a claim that death was due to pneumonia. Scott v. State [Ala.] 37 So. 357. A qualified medical expert may testify that a fracture of the skull of deceased was produced by a blunt instrument other than a man's fist, though he does not show that he has treated fractures of the skull. Bowers v. State [Wis.] 99 N. W. 447. One qualified by long experience in handling cattle may testify that cattle found in defendant's possession had the appearance of having been hard driven. Kennon v. State [Tex. Cr. App.] 82 S. W. 518. Handwriting expert. State v. Burns [Nev.] 74 P. 983. Real estate agent cannot testify to the possibility of preventing smoke. Bradley v. District of Columbia, 20 App. D. C. 169. One not an expert may state that no dynamite or other explosive substance was in his house when he left it. Davis v. State [Ala.] 37 So. 676.

65. Regularly licensed physician who has treated insanity and examined defendant may testify as to his sanity. Porter v. State [Ala.] 37 So. 81. A witness who testifies that in tracking certain cattle he found evidence that they were scouring may state that fast driving of fat cattle makes them scour. Kennon v. State [Tex. Cr. App.] 82 S. W. 518. Physician's acquaintance with defendant held not sufficient to authorize his giving an opinion as to his sanity based thereon. Schissler v. State [Wis.] 99 N. W. 593.

66. Jesse v. State [Tex. Cr. App.] 80 S. W. 999.

67. Watts v. State [Md.] 57 A. 542; Bothwell v. State [Neb.] 99 N. W. 669; Parrish v. State, 139 Ala. 16, 36 So. 1012. A nonmedical witness testifying to facts tending to show defendant's predisposition to insanity may be asked, "Is he crazy now?" Bell v. State [Ala.] 37 So. 281. Only intimate acquaintances of defendant can give opinions as to his sanity based on their acquaintance with him [Code Civ. Proc. § 1870, subd. 10]. People v. Manoogian, 141 Cal. 592, 75 P. 177. Whether witnesses are "intimate acquaintances" is for the court and is discretionary. People v. Manoogian, 141 Cal. 592, 75 P. 177; People v. Suesser, 142 Cal. 354, 75 P. 1093. Acquaintance of 20 years may testify as to defendant's sanity. Porter v. State [Ala.] 37 So. 81. Persons merely testifying to insanity in defendant's family cannot give their opinion on his sanity. Watts v. State [Md.] 57 A. 542. Physician not competent as an expert held competent as an acquaintance. Kroell v. State, 139 Ala. 1, 36 So. 1025.

68. Nonexpert held sufficiently qualified to testify to defendant's handwriting. Bess v. Com. [Ky.] 82 S. W. 576. Letters held admissible on testimony of accused that he had received two notes from the hand of prosecuting witness and the letters were in the same hand. State v. Barrett [Del. Gen. Sess.] 59 A. 45.

69. Watts v. State [Md.] 57 A. 542; Parrish v. State, 139 Ala. 16, 36 So. 1012.

which he rests his statements as to the ultimate general fact of sanity or insanity, are able to test the accuracy or soundness of the opinion expressed, and thus by using the ordinary means for the ascertainment of the truth reach the ends of substantial justice.[70] Witnesses, whether expert or not, cannot state their opinion as to physical facts of which ordinary men can judge, one as well as another.[71] In some states, only those papers can be used for a comparison of hands which are in the case for some other relevant purpose;[72] but in others, any genuine specimen[73] with enlarged photographs thereof, are admissible for comparison by experts,[74] and writings properly in the case may be compared by the jury, without recourse to expert testimony.[75] Books of science are not admissible to prove such matters,[76] and previous knowledge of defendant is not necessary to an expert.[77] An expert on handwriting not being allowed to give his reasons, it is to be presumed that he would have been able to state his reasons, but not that they would have been convincing.[78]

Best and secondary evidence.—Parol evidence to vary writing.[79]—The rule as to best and secondary evidence applies to criminal cases.[80]

70. Bothwell v. State [Neb.] 99 N. W. 669, citing many cases. If the facts are such that no rational mind would draw the conclusion of the witness therefrom the conclusion may be stricken. Watts v. State [Md.] 57 A. 542. In New York, lay witnesses can only state facts, and give their impression as to whether acts were rational or irrational. People v. Spencer [N. Y.] 72 N. E. 461.

71. Whether stick produced was a deadly weapon. Moran v. State [Ga.] 48 S. E. 324; Majors v. State [Miss.] 35 So. 825. Position deceased was in when shot. Wilson v. U. S. [Ind. T.] 82 S. W. 924; Wells v. Territory [Okl.] 78 P. 124. Whether product sold as oleomargarine bore the yellow color of true butter. State v. Armour Packing Co. [Iowa] 100 N. W. 59. An expert cannot give his opinion as to whether accused was capable of judging right from wrong, that being a question for the jury. State v. Brown, 181 Mo. 192, 79 S. W. 1111. Testimony of a person who has never tried it that a pool room cannot be successfully conducted at a distance of 2 or 3 blocks from the business center of the city amounts to a mere opinion not of an expert and is valueless as evidence. City of Schreveport v. Schulsinger [La.] 36 So. 870. An expert may testify that all of certain symptoms of insanity could not be present in the same person at the same time. People v. Sowell [Cal.] 78 P. 717.

72. Such is the rule also of the Federal court in Colorado. Withaup v. U. S. [C. C. A.] 127 F. 530, exhaustively discussing the question of comparison of hands. Papers held properly in case. People v. Hutchings [Mich.] 100 N. W. 753.

73. A letter handed by defendant to the jailer addressed to the state's attorney, and purporting to have been written by defendant and sworn by his brother and sister to be in his handwriting is sufficiently proven genuine to admit it in evidence for the purpose of comparing handwriting. State v. Coleman [S. D.] 98 N. W. 175.

74. Forgery. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

75. Mahon v. State [Tex. Cr. App.] 79 S. W. 28.

76. Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677.

77. Parrish v. State, 139 Ala. 16, 36 So. 1012.

78. Withaup v. U. S. [C. C. A.] 127 F. 530.

79. See 2 Curr. L. 341.

80. Parol evidence of the contents of a paper may be given when the paper is not the foundation of the cause of action, but merely relates to a collateral fact. Parol evidence that defendant made telephone contract admissible to show that defendant had control of building. State v. McKinnon [Me.] 58 A. 1028. A question which seeks to ascertain the knowledge of the witness independent of contents of the writing calls for primary evidence and is not subject to the objection that it calls for secondary evidence of the contents of the writing. Eatman v. State [Fla.] 37 So. 576. Testimony as to holes in deceased's clothes is not to be rejected on the ground that the clothes are the best evidence. Underwood v. Com. [Ky.] 84 S. W. 310. A witness may testify that he cut a stick the length of certain tracks and compared it with defendant's shoes, though he does not produce the stick. Weaver v. State [Tex. Cr. App.] 81 S. W. 39. Original entries only are admissible. Stockyard's record compiled therefrom held not admissible to trace cattle shipments. Donner v. State [Neb.] 100 N. W. 305. The statute legalizing certified copies of official records as evidence does not render the originals inadmissible [Rev. St. 1895, art. 2252]. Manning v. State [Tex. Cr. App.] 81 S. W. 957. Letters from school superintendents to witness are not admissible to show that in fact no vacancies existed in their staffs of teachers as stated by defendant. Bass v. U. S., 20 App. D. C. 232. Parol evidence of the existence of a corporation may be used. State v. Pittam, 32 Wash. 137, 72 P. 1042. True copies of the records of the internal revenue collector are admissible, but witness cannot state what he saw recorded. Thurman v. State [Tex. Cr. App.] 78 S. W. 937. The date of presentation of a forged instrument may be shown by parol, though it is stated in

Documentary evidence,[81] including books of account,[82] public records,[83] and records of judicial proceedings,[84] if accompanied by proper authentication,[85] is admissible under the same rules applied in civil cases. Statutes providing for the use of depositions are frequent.[86] A written statement by a third person that he committed the crime not authenticated as a deposition cannot be received.[87] A letter is not to be rejected as evidence merely because it has no date,[88] and courts consider the competency of evidence and not the method by which it was obtained, and the fact that papers pertinent to the issue were illegally taken from the possession of the party is no ground of objection to them.[89] The statutes of another state may be proved by showing a compilation which by a statute published therein is made presumptive evidence of the statutes of that state.[90] Where a portion of a document is introduced by one party, the other is entitled to the introduction of all the remainder tending in any way to explain or qualify the portion introduced and no more.[91]

Accomplice testimony[92] is competent when sufficiently corroborated to connect defendant with the commission of the crime,[93] and may be introduced without first obtaining consent;[94] but defendant should be allowed to probe an accomplice as to his expectation of favor from the prosecution.[95] One who compounds a felony is not an accessory after the fact so as to disqualify him as a witness.[96]

prosecutor's books. Prosecutor can use book only to refresh memory. Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107.

The proper manner of proving a prior conviction is by the record. State v. Howard [Mont.] 77 P. 50. Though the record might be better evidence, a witness may be compelled to answer on cross-examination whether he has been convicted of another crime. State v. Knowles, 98 Md. 429, 57 A. 588; Lang v. U. S. [C. C. A.] 133 F. 201. **Contra,** McKevitt v. People, 208 Ill. 460, 70 N. E. 693.

Before secondary evidence of papers may be given, their absence must be accounted for. Kirkland v. State [Ala.] 37 So. 352. Existence of letters held sufficiently shown, and absence accounted for. State v. Leasia [Or.] 78 P. 328. Letters written by defendant and destroyed by their recipient at his request may be proved by parol. Gould v. State [Neb.] 99 N. W. 541. The mere fact that the production of original letters could not be compelled does not avoid the necessity of effort to secure them before using press copies. State v. Lentz [Mo.] 83 S. W. 970.

Parol evidence is admissible in a perjury case to show the testimony given, though it was taken down by a stenographer (State v. Woolridge [Or.] 78 P. 333), and the justice before whom the oath was taken may show his authority by oral evidence of lost documents relating to his title to the office (State v. Horine [Kan.] 78 P. 411).

81. See 2 Curr. L. 341.

82. State v. Stephenson [Kan.] 76 P. 905.

83. Record proof of marriage in bigamy cases does not violate the constitutional right of confrontation of witnesses. Sokol v. People [Ill.] 72 N. E. 382. No notice of intention is necessary to the introduction of the tax records to show ownership of property. Frazier v. State [Tex. Cr. App.] 81 S. W. 532.

84. Judgment of police judge, regular on its face, is admissible to show prior conviction. State v. Chappell, 179 Mo. 324, 78 S. W. 585. A warrant of arrest fair on its face is not inadmissible as evidence because unaccompanied by the affidavit on which it was founded. Hilburn v. State [Ga.] 49 S. E. 318. Proceedings for change of venue are not admissible for any purpose. Moore v. State [Tex. Cr. App.] 79 S. W. 565.

85. Affidavit of deceased held properly rejected where the officer taking it was within reach of the court and process for his appearance was offered and refused. Weaver v. State [Tex. Cr. App.] 81 S. W. 39. Book of by-laws of beneficial association held admissible without proof of comparison with original draft. State v. Knowles [Mo.] 83 S. W. 1083. Record of defendant's marriage in another state held sufficiently authenticated. State v. Allen [La.] 37 So. 614. Papers purporting to be the files in a suit brought against defendant before a justice of the peace in another state are not admissible in the absence of proper authentication. Michaels v. People, 208 Ill. 603, 70 N. E. 747.

86. Diligence in searching for witness held sufficient [Pen. Code, § 686, subd. 3]. People v. Lewandowski, 143 Cal. 574, 77 P. 467.

87. Mays v. State [Neb.] 101 N. W. 979.

88. State v. Allen [La.] 37 So. 614.

89. Adams v. New York, 192 U. S. 585, 48 Law. Ed. 575; People v. Adams, 176 N. Y. 351, 68 N. E. 636.

90. Beard v. State [Tex. Cr. App.] 83 S. W. 824.

91. Brown v. State, 119 Ga. 572, 46 S. E. 833.

92. See 2 Curr. L. 342.

93. Rhodes v. State [Ala.] 37 So. 365. Remote and fragmentary evidence to corroborate held proper. Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211.

94. State v. Hauser, 112 La. 313, 36 So. 396.

Demonstrative evidence and experiments.[97]—It is within the discretion of the trial court to admit evidence of experiments to illustrate transactions that have been testified to,[98] but the prosecuting attorney should not perform experiments himself before the jury in the absence of defendant,[99] and the results of experiments not made in the presence of the court nor under its direction need not be admitted.[1] The state's counsel while examining an eye witness may place persons in position before the jury to illustrate the relation of the parties to each other during the difficulty that ended in the homicide,[2] and in seduction, it is not error to permit prosecutrix's child to be brought before the jury and referred to.[3] Instrumentalities claimed to have been used in the commission of the crime are admissible[4] when properly identified,[5] and deceased's clothes are admissible,[6] but not unless they illustrate or make pertinent some phase of the oral testimony.[7] Enlarged photographs of genuine specimens of handwriting are admissible to facilitate comparison by experts.[8] On the issue as to the age of defendant, witnesses may state what it appears to be from observation, but the jury cannot fix his age by merely looking at him.[9]

Evidence at preliminary examination or at former trial[10] is admissible at a subsequent trial, where the witness is beyond the reach of the court,[11] is insane or otherwise unable to testify,[12] is deceased,[13] or his whereabouts unknown,[14] or there is an issue raised as to whether they did not testify differently at such trial,[15] provided the testimony, if written, has been preserved in the manner prescribed by law

95. People v. Moore, 96 App. Div. 56, 89 N. Y. S. 83.

96. Chenault v. State [Tex. Cr. App.] 81 S. W. 971.

97. See 2 Curr. L. 342.

98. Effect of pistol shots on cloth. Lillie v. State [Neb.] 100 N. W. 316. Actual tests as to what could be seen between certain points. Hauser v. People, 210 Ill. 253, 71 N. E. 416.

99. Hendrick v. State [Tex. Cr. App.] 83 S. W. 711.

1. Firing tests of shot gun. State v. Ronk, 91 Minn. 419, 98 N. W. 334.

2. Black v. State [Tex. Cr. App.] 81 S. W. 302.

3. People v. Tibbs, 143 Cal. 100, 76 P. 904.

4. Knife used by defendant in murder. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116. Bullet which killed deceased. People v. Morales, 143 Cal. 550, 77 P. 470. Pistol cartridges and pistols used by defendant and deceased. Id.

5. Must be identified. State v. Wilson, 66 Kan. 472, 71 P. 849.

6. To show location of wounds. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223; Carroll v. Com. [Ky.] 83 S. W. 552.

7. Christian v. State [Tex. Cr. App.] 79 S. W. 562; Melton v. State [Tex. Cr. App.] 83 S. W. 822.

8. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

9. Wistrand v. People [Ill.] 72 N. E. 748.

10. See 2 Curr. L. 342.

11. Predicate held insufficient as not showing that witness might not return. Sims v. State, 139 Ala. 74, 36 So. 138; Kirkland v. State [Ala.] 37 So. 352; Dorman v. State [Fla.] 37 So. 561. Predicate held sufficient. Wilson v. State [Ala.] 37 So. 93; People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Moran [Cal.] 77 P. 777; State v. Sejours [La.] 37 So. 599. Permanent absence of witness held sufficiently shown. State v. Bollero, 112 La. 850, 36 So. 754. Several items of evidence held admissible on question of absence. People v. Barker [Cal.] 78 P. 266. Testimony at hearing on habeas corpus. Kirkland v. State [Ala.] 37 So. 352. Failure of prosecution to subpoena when possible will not deprive state of testimony. State v. Nelson [Kan.] 75 P. 505. Where as a predicate to the admission of testimony of an absent witness given at a former hearing, it is attempted to show that a witness has received letters from him dated and postmarked in another state, the letters themselves are the best evidence and must be produced or their absence accounted for before secondary evidence of date and postmark may be shown. Kirkland v. State [Ala.] 37 So. 352; People v. Barker [Cal.] 78 P. 266. Such determination by the courts of a state presents no Federal question. West v. State, 194 U. S. 258, 48 Law. Ed. 965.

12. Improperly admitted. State v. Wheat, 111 La. 860, 35 So. 955.

13. The testimony on a former trial of a witness who has since deceased may be read by the stenographer. Fuqua v. Com. [Ky.] 81 S. W. 923.

14. State v. Wheat, 111 La. 860, 35 So. 955. Diligence in searching for the absent witness must be shown to authorize use of testimony taken on a prior hearing. Subpoena directed to another county not returned and no rule to compel return. State v. Riddle, 179 Mo. 287, 78 S. W. 606.

15. Waller v. People, 209 Ill. 284, 70 N. E. 681; Davis v. State [Fla.] 36 So. 170. Where a witness admits he testified differently below, his deposition below cannot be used. Dean v. State [Tex. Cr. App.] 83 S. W. 816. Where witness admits his signature to the notes of the testimony below, but claims it was not correctly taken down,

and is properly authenticated,[16] and defendant's testimony on a former trial may be admitted where he refuses to testify on the subsequent trial.[17] But a mere change in the interest of the witness will not authorize the showing by himself as a witness what his testimony was before,[18] and the fact that prosecutrix in rape is not constant in her accusation will not authorize the introduction of her testimony below.[19] On a separate trial for larceny, a co-defendant's testimony in the examining court cannot be used against defendant,[20] but testimony at a preliminary examination of several is not to be rejected on the separate trial of one of them because part of it is the cross-examination of counsel for a co-defendant.[21] The constitutional right of confrontation is provided by confrontation at the previous hearing.[22]

Quantity required and probative effect.[23]—The proof of guilt must be beyond all reasonable doubt,[24] as to every element of the offense,[25] including the degree thereof,[26] the venue,[27] and that the crime was committed within the period of limitations.[28] A reasonable doubt, however, that will authorize acquittal must be actual and substantial,[29] and must be raised by the evidence in the case and not on the argument of counsel,[30] and it is not required that each fact which may aid the jury in reaching a conclusion of guilt be clearly proved; it is sufficient if on the whole evidence the jury are able to pronounce that guilt is proved to a moral certainty, or beyond a reasonable doubt,[31] and the exclusion of all uncertainty is not necessary,[32] but a probability of innocence is the equivalent of a

it need not be read to the jury. Mitchell v. State [Ark.] 83 S. W. 1050.

16. Longhand transcript of stenographer's minutes held sufficiently authenticated. People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Moran [Cal.] 77 P. 777. That testimony was taken through interpreter does not affect its admissibility. People v. Lewandowski, 143 Cal. 574, 77 P. 467.

17. Is not unconstitutionally required to give evidence against himself nor prejudice him for having failed to testify. Bess v. Com. [Ky.] 82 S. W. 576.

18. State v. Callahan [S. D.] 99 N. W. 1099.

19. People v. Miner [Mich.] 101 N. W. 536.

20. People v. Hutchings [Mich.] 100 N. W. 753.

21. People v. Moran [Cal.] 77 P. 777.

22. State v. Nelson [Kan.] 75 P. 505; State v. Harmon [Kan.] 78 P. 805.

23. See 2 Curr. L. 343.

24. State v. Carr [Del.] 57 A. 370; State v. Emory [Del.] 58 A. 1036; State v. Lax [N. J. Law] 59 A. 18; United States v. Breese, 131 F. 915. "Fully satisfying" to jury is not enough. Jones v. State [Miss.] 36 So. 243. The jury must acquit unless so convinced. State v. Brinte [Del.] 58 A. 258.

25. State v. Brinte [Del.] 58 A. 258; State v. Carr [Del.] 57 A. 370.

26. A reasonable doubt of the degree acquits as to the degree about which it is entertained. Wells v. Territory [Okl.] 78 P. 124. A reasonable doubt as to the existence of an element of a higher degree of the offense calls for a verdict of the lower degree, provided there exists no reasonable doubt of the existence of every element necessary to constitute the latter offense. The defendant need not "satisfy" the jury that the lower degree only was committed. Galloway v. State [Fla.] 36 So. 168.

27. Simpson v. Lumpkin [Ga.] 48 S. E. 904; Smith v. State [Ga.] 48 S. E. 912; Heard v. State [Ga.] 48 S. E. 905; Carroll v. State [Ga.] 48 S. E. 909. The name of the town or city alone is not sufficient. Wooten v. State, 119 Ga. 745, 47 S. E. 193; Murphy v. State [Ga.] 48 S. E. 909. Venue in murder case held sufficiently shown. Waller v. People, 209 Ill. 284, 70 N. E. 681. Proof that the prosecutor lived in a certain county and was assaulted at his residence is sufficient. Tipton v. State, 119 Ga. 304, 46 S. E. 436. And where the only rational conclusion from the evidence is that the offense was committed in the county alleged in the indictment, it is sufficient, though no witness expressly states it was there committed. Weinberg v. People, 208 Ill. 15, 69 N. E. 936.

28. **Held, sufficiently shown:** "Last November." Jordan v. State, 119 Ga. 443, 46 S. E. 679; Tipton v. State, 119 Ga. 304, 46 S. E. 436.

29. Pitts v. State [Ala.] 37 So. 101; United States v. Breese, 131 F. 915. Not a vague, speculative or whimsical doubt or uncertainty. State v. Brinte [Del.] 58 A. 258. A reasonable doubt is a fair doubt arising from all the evidence. It is not a mere imaginary, captious or possible doubt, but a fair doubt based upon reason and common sense. State v. Levy [Idaho] 75 P. 227. Must be such as intelligent men may entertain on a conscientious consideration of all the evidence. State v. Emory [Del.] 58 A. 1036. Such as may reasonably control the conviction and judgment of reasonable, intelligent and impartial men. State v. Carr [Del.] 57 A. 370.

30. Walker v. State, 139 Ala. 56, 35 So. 1011.

31. Pitts v. State [Ala.] 37 So. 101; Delahoyde v. People [Ill.] 72 N. E. 732.

32. Jones v. State [Ala.] 37 So. 390. A requested instruction that the state must

reasonable doubt and requires an acquittal.[33] Where circumstantial evidence is relied upon, the facts proved beyond a reasonable doubt must be such as to exclude every reasonable hypothesis inconsistent with guilt;[34] but the converse is not true, and where defendant relies on circumstantial evidence, it is error to charge that the proved facts must not only be consistent with innocence but inconsistent with guilt.[35]

An extrajudicial confession must be corroborated by proof aliunde corpus delicti in order to support a conviction,[36] but full proof is not required,[37] and it may be proved by circumstantial evidence.[38] Though a confession must be considered in entirety, the jury need not believe such portions thereof as seem unreasonable.[39]

Though the testimony of an accomplice is viewed with suspicion, it may be sufficient to convict, in the absence of a contrary statute,[40] though statutes requiring corroboration are usual.[41] Statements of an accomplice made out of court cannot corroborate.[42]

prove its case by positive evidence is properly refused. Dodd v. State [Tex. Cr. App.] 82 S. W. 610.

33. Gainey v. State [Ala.] 37 So. 355.

34. Lillie v. State [Neb.] 100 N. W. 316; Commonwealth v. Kokovic [Pa.] 58 A. 857; State v. Brinte [Del.] 58 A. 258; Spraggins v. State, 139 Ala. 93, 35 So. 1000; Bowen v. State [Ala.] 37 So. 233; State v. Coleman [S. D.] 98 N. W. 175; State v. Levy [Idaho] 75 P. 227; Jones v. State [Ala.] 37 So. 390; Edwards v. Territory [Ariz.] 76 P. 458; Sikes v. State [Ga.] 48 S. E. 153.

35. Sikes v. State [Ga.] 48 S. E. 153.

36. People v. Burness, 178 N. Y. 429, 70 N. E. 966; Curran v. State [Wyo.] 76 P. 677; Knapp v. State, 4 Ohio C. C. (N. S.) 184, 25 Ohio Circ. R. 671, rvd. 71 N. E. 705. Corroboration held sufficient. Holland v. Com. [Ky.] 82 S. W. 596; Mitchell v. State [Fla.] 33 So. 1009; Green v. Com. [Ky.] 83 S. W. 638. Arson. State v. Rogoway [Or.] 78 P. 987. But the confession may be considered with the other evidence in determining whether the commission of the crime has been established. Griffiths v. State [Ind.] 72 N. E. 563; State v. Knowles [Mo.] 83 S. W. 1083. Age of defendant in statutory rape is a necessary element of the corpus delicti. Wistrand v. People [Ill.] 72 N. E. 748. Confessions alone are not sufficient to convict one of being accessory before the fact to suicide. Commonwealth v. Hicks [Ky.] 82 S. W. 266.

37. State v. Knowles [Mo.] 83 S. W. 1083.

38. Curran v. State [Wyo.] 76 P. 677. Arson held sufficiently shown. Davis v. State [Ala.] 37 So. 676. Murder. Green v. Com. [Ky.] 83 S. W. 638.

39. Brewer v. State [Ark.] 78 S. W. 773. Where a written confession is introduced, the whole of it must be taken together, but the jury may credit that part which incriminates and reject that which exculpates or vice versa. State v. Brinte [Del.] 58 A. 258.

40. State v. Lyons [N. J. Err. & App.] 58 A. 398; State v. Simon [N. J. Law] 58 A. 107.

41. Corroboration held sufficient under Code Cr. Proc. § 399. Receiving stolen property. People v. Ammon, 92 App. Div. 205, 87 N. Y. S. 358. Selling counterfeit trademarks. People v. Strauss, 94 App. Div. 463, 88 N. Y. S. 40. Corroboration in robbery held sufficient. People v. Sullivan [Cal.] 77 P. 1000. Corroboration held insufficient. Horse theft. Buck v. State [Tex. Cr. App.] 83 S. W. 387, 390; Moree v. State [Tex. Cr. App.] 83 S. W. 1117. Burglary. Denson v. State [Tex. Cr. App.] 83 S. W. 820. A conviction based on the testimony of an accomplice will be sustained where there is any evidence to corroborate it. Mann v. Com., 25 Ky. L. R. 1964, 79 S. W. 230.

Who are accomplices: One who merely makes an offer not to prosecute if defendant will pay him what he owes him is not an accomplice so that his testimony will require corroboration. Robertson v. State [Tex. Cr. App.] 80 S. W. 1000. The receiver of stolen goods is not an accomplice of the thief. Birdsong v. State [Ga.] 48 S. E. 329, 330; Baker v. State [Ga.] 48 S. E. 967. Mere knowledge or belief that an offense is to be or has been committed and concealment thereof does not render one an accomplice. Martin v. State [Tex. Cr. App.] 83 S. W. 390. A person going with defendant to arrest persons for vagrancy without lawful authority is not an accomplice to a homicide committed by defendant not within the contemplation of the parties, nor directly connected with the unlawful act. Scott v. State [Tex. Cr. App.] 81 S. W. 294. An intimate friend of a pregnant woman who accompanies her to the house where an abortion is performed, but attempts to dissuade her from it and does not in any way assist therein, is not an accomplice. People v. Balkwell, 143 Cal. 259, 76 P. 1017. By statute in Texas, one who purchases liquor illegally sold is not an accomplice [Pen. Code 1895, art. 407; Acts Leg. 1903, p. 57, c. 40]. Terry v. State [Tex. Cr. App.] 79 S. W. 320. Party to incest held to be an accomplice. Clifton v. State [Tex. Cr. App.] 79 S. W. 824. The pathic in abortion is not an accomplice. Smartt v. State [Tenn.] 80 S. W. 586. The briber is an accomplice of the bribed. Morawietz v. State [Tex. Cr. App.] 80 S. W. 997. Sister of burglar who helps him to secrete property is an accomplice. McDaniel v. State [Tex. Cr. App.] 81 S. W. 301. Son held accomplice of father in cattle theft. Barnes v. State [Tex. Cr. App.] 81 S. W. 735. Where the state's evidence is to the effect

A conspiracy to commit a crime may be shown by circumstances without direct proof of an agreement,[42] and intent or knowledge may, and generally must, be proved by circumstances.[44] Expert testimony is subject to the same tests and is to be weighed and judged, like any other.[45] Testimony of an eye witness is sufficient proof of marriage.[46] The absence of a motive may be considered, but where the commission of the crime by defendant is clearly proved, the fact that his motive is not shown is immaterial,[47] and that defendant when charged with the crime refused to flee but surrendered himself to the proper authorities cannot be considered as showing his innocence.[48] The prisoner's statement in Georgia not being under oath is not evidence and is therefore insufficient proof of attack by deceased to authorize the admission of uncommunicated threats.[49]

Defendant's good character must be considered,[50] and good character alone may give rise to a reasonable doubt,[51] though in a plain case of guilt, good character cannot avail.[52]

Alibi involves the impossibility of the prisoner's presence at the scene of the offense at the time it was committed,[53] but evidence thereof raising a reasonable doubt of guilt is sufficient to demand an acquittal.[54]

§ 10. *Trial. A. Conduct of trial in general.*[55]—Procedure in the Federal courts where not otherwise provided for by act of congress follows that of the state court at the period of its admission to the Union, unaffected by subsequent state legislation,[56] and the district court of Oklahoma while sitting as a district or circuit court of the United States is governed by the procedure of the territory, except where in conflict with the statutes of the United States.[57]

Severance is discretionary,[58] but must be asked before trial,[59] and the court

that witness could not have participated in the crime, and the defendants' evidence is that witness alone committed it, there is nothing in the case to warrant a charge on accomplice testimony as applied to that witness. Nelms v. Com. [Ky.] 82 S. W. 260.

42. Thompson v. State [Tex. Cr. App.] 78 S. W. 691.

43. People v. Lawrence, 143 Cal. 148, 76 P. 893; People v. Moran [Cal.] 77 P. 777; Owens v. State [Ga.] 48 S. E. 21. Mere business partnership with one who defrauds the revenue will not justify conviction of the partner as a conspirator, though the defrauding is for the benefit of the firm. United States v. Cohn, 128 F. 615.

44. Knowledge that received goods were stolen. Delahoyde v. People [Ill.] 72 N. E. 732.

45. State v. Kelly [Conn.] 58 A. 705.

46. Adultery. State v. Eggleston [Or.] 77 P. 738.

47. Schmidt v. U. S. [C. C. A.] 133 F. 257.

48. Walker v. State, 139 Ala. 56, 35 So. 1011.

49. Nix v. State, 120 Ga. 162, 47 S. E. 516.

50. State v. Carr [Del.] 67 A. 370; United States v. Breese, 131 F. 915; State v. Stentz, 33 Wash. 444, 74 P. 688.

51. Wells v. Territory [Okl.] 78 P. 124; People v. Childs, 90 App. Div. 58, 85 N. Y. S. 627. And it is error to refuse to so charge in a case of circumstantial evidence. People v. Bonier [N. Y.] 72 N. E. 226.

52. Henderson v. State [Ga.] 48 S. E. 167; State v. Stentz, 33 Wash. 444, 74 P. 588; State v. King, 122 Iowa, 1, 96 N. W. 712.

53. Harris v. State, 120 Ga. 167, 47 S. E. 520; Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269. Must show that he was at the other place such a length of time that he could not have been at the place where the crime was committed either before or after. Mays v. State [Neb.] 101 N. W. 979. But defendant by pleading it makes no admission of guilt, nor does he by failing to prove it relieve the state from proving beyond a reasonable doubt that he committed the crime. Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269. Issue held not presented by evidence. Smith v. State [Tex. Cr. App.] 78 S. W. 516.

54. Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269; Henderson v. State [Ga.] 48 S. E. 167.

55. See 2 Curr. L. 344.

56. Withaup v. U. S. [C. C. A.] 127 F. 530; Balliet v. U. S. [C. C. A.] 129 F. 689.

57. Welty v. U. S. [Okl.] 76 P. 121.

58. Under indictment for a misdemeanor in the Federal court, separate trials for defendants jointly indicted are discretionary. Cochran v. U. S. [Okl.] 76 P. 672. Should not be granted on the ground that the co-defendant's wife is a material witness for the applicant. She may be used, notwithstanding the coverture. State v. Smith [Del.] 57 A. 368. A severance in Delaware is not allowable in a murder case because one defendant does not feel safe in joining with the others in peremptory challenges or in the defense which the other will make, or because there is prejudice against the others which will operate against him, or because the other has made a confession implicating him. State v. Brinte [Del.] 68 A. 258.

59. Motion after state had announced ready is too late. Austin v. State, 139 Ala. 14, 36 So. 879; Hudson v. State, 137 Ala. 60, 34 So 854.

need not of its own motion separate a consolidated trial when separate defenses are made.[60] On proper application in Texas, severance should be granted, and one jointly indicted for encouraging the crime tried first;[61] but a severance which will operate as a continuance must be denied.[62] Misdemeanants may be tried together.[63]

Appointment of counsel.[64]—Parties may engage private counsel to assist in the prosecution in Nebraska[65] and Illinois,[66] though the prosecuting attorney cannot be supplanted by such counsel. In Texas, counsel are required to be appointed for defendant only in capital cases,[67] it being discretionary in other cases.[68]

The witnesses may properly be sworn in a body,[69] and names may be endorsed after filing the information, if the court is satisfied they were not known to the prosecuting attorney at the time of filing.[70] And the statutory requirement that the names of witnesses testifying before the grand jury be endorsed on the indictment does not affect the right of the state to swear witnesses not on its subpoena.[71] After repeal of a state statute requiring indorsement of names, a defendant in a Federal court of that state cannot rely on the rule, though the statute was adopted as a rule of the court prior to its repeal.[72] Witnesses other than those whose names are endorsed may be sworn in the discretion of the court,[73] but in Iowa, if a witness is to be sworn who was not examined by the grand jury, the defendant must be given notice and informed of the substance of his testimony.[74]

The state need not call all the eye witnesses.[75] The court may question a witness,[76] or explain a question,[77] and may properly limit the number of witnesses that shall be subpoenaed for defendant at the government's expense.[78]

The court in its discretion may exclude the witnesses from the court room during the trial,[79] and may except a witness from the operation of the rule,[80] and

60. Quinn v. People [Colo.] 75 P. 396.

61. Follis v. State [Tex. Cr. App.] 78 S. W. 1069. Where defendant has a right under the statute to have his joint defendant tried first that he may use him as a witness after his acquittal, and there is insufficient evidence to convict him, the state cannot defeat his motion by continuing the co-defendant's case and forcing defendant to trial. Wolf v. State [Tex. Cr. App.] 79 S. W. 520.

62. Evans v. State [Tex. Cr. App.] 80 S. W. 374; Wilson v. State [Tex. Cr. App.] 81 S. W. 34.

63. People v. Strauss, 94 App. Div. 453, 88 N. Y. S. 40.

64. See 2 Curr. L. 345.

65. Blair v. State [Neb.] 101 N. W. 17.

66. Hayner v. People [Ill.] 72 N. E. 792.

67. Lopez v. State [Tex. Cr. App.] 80 S. W. 1016.

68. Mass v. State [Tex. Cr. App.] 81 S. W. 45.

69. State v. Crea [Idaho] 76 P. 1013; Walker v. State, 139 Ala. 56, 35 So. 1011.

70. State v. Crea [Idaho] 76 P. 1013; State v. Van Waters [Wash.] 78 P. 897. On trial. Welty v. U. S. [Okl.] 76 P. 121; Cochran v. U. S. [Okl.] 76 P. 672.

71. Underwood v. Com. [Ky.] 84 S. W. 310.

72. Balliet v. U. S. [C. C. A.] 129 F. 689; Withaup v. U. S. [C. C. A.] 127 F. 530.

73. Hauser v. People, 210 Ill. 263, 71 N. E. 416.

74. Notice held sufficient [Code, § 5373]. State v. Bebb [Iowa] 96 N. W. 714. Notice stating name to be Rome instead of Rowe held good. State v. Anderson [Iowa] 101 N. W. 201.

75. Though those called were probably accomplices. Alanis v. State [Tex. Cr. App.] 81 S. W. 709. Defendant's son. Freeman v. State [Tex. Cr. App.] 81 S. W. 953.

76. State v. Woods, 112 La. 617, 36 So. 626; State v. Knowles [Mo.] 83 S. W. 1083.

77. State v. Steen [Iowa] 101 N. W. 96.

78. O'Hara v. U. S. [C. C. A.] 129 F. 651.

79. Territory v. Dooley [Ariz.] 78 P. 138; Coolman v. State [Ind.] 72 N. E. 568. Accused's right to public trial is not invaded thereby. State v. Worthen [Iowa] 100 N. W. 330. Refusal to exclude single witness held not abuse of discretion. Bromberger v. U. S. [C. C. A.] 128 F. 346. Infraction of the rule by a witness does not render his evidence inadmissible. Davis v. State [Ga.] 48 S. E. 305; People v. McGarry [Mich.] 99 N. W. 147; Phillips v. State [Ga.] 49 S. E. 290. Held error to refuse testimony showing violation of will. Parrish v. State, 139 Ala. 16, 36 So. 1012.

80. Coolman v. State [Ind.] 72 N. E. 568. Sheriff. People v. Nunley, 142 Cal. 441, 76 P. 45. Deputy sheriff. Lax v. State [Tex. Cr. App.] 79 S. W. 578. Deputy sheriffs needed to wait on the court. Kennon v. State [Tex. Cr. App.] 82 S. W. 518. Only female witness. State v. Pray [Iowa] 99 N. W. 1065. Presence of prosecuting witness during prosecutor's statement held not error. State v. Worthen [Iowa] 100 N. W. 330.

permitting counsel to talk to the witnesses while together after the rule has been invoked but before it is granted is not error.[81] That certain witnesses were not excluded under the rule is not error where none but they testified on the subject of their testimony.[82]

Defendant must be present[83] in court during the whole of a trial for felony,[84] though not when the minutes of the court are corrected so as to conform to the truth,[85] nor when return of the venires is made by the sheriff and the veniremen are called to see whether all are present,[86] nor is it necessary that he be present at a view,[87] nor when his motion for a new trial is heard.[88] In South Dakota, his presence is required only at such times as the statute prescribes.[89] Private examination of a juror by the court in appellant's absence with appellant's consent and at the request of his counsel is not fatal.[90] It being shown that defendant was present on a certain day, his continued presence on that day will be presumed in the absence of a showing on the record to the contrary.[91] The right to be present at rendition of the verdict is a privilege which may be waived by defendant or his counsel,[92] and a defendant voluntarily absent when the jury returned to the court room for further instructions can take no advantage thereof.[93] Absence when the verdict is returned and the jury discharged is not fatal in misdemeanor cases.[94]

The judge must be present and in such a situation that he can see and hear all that transpires so as to protect the legal rights of the defendant,[95] though his temporary absence will not be ground for reversal where no prejudice is shown to have resulted therefrom.[96] The judge may be a witness.[97]

The prosecutor may be permitted to remain but the court should require him to be examined first. Smartt v. State [Tenn.] 80 S. W. 586. Error in allowing witness to testify after having been allowed in court room after promulgation of rule will not reverse if not prejudicial. Id.

81. Hatchell v. State [Tex. Cr. App.] 84 S. W. 234.

82. Underwood v. Com. [Ky.] 84 S. W. 310.

83. See 2 Curr. L. 345.

84. When witness restates his testimony after jury has once retired. Burton v. State [Tex. Cr. App.] 81 S. W. 742. At rendition of verdict. Commonwealth v. Gabor [Pa.] 58 A. 278. Calling jury in his absence held cured by recalling after his return. McNish v. State [Fla.] 36 So. 175. Error for judge, prosecuting attorney and defendant's counsel to go to jury room and further instruct jury without giving defendant opportunity to go. Stroope v. State [Ark.] 80 S. W. 749. The indictment and written instructions or other writings proper to be given to the jury should be delivered to them in presence of the accused and his counsel that objection if any may be made at the time. Bowles v. Com. [Va.] 48 S. E. 527.

85. State v. Thomas, 111 La. 804, 35 So. 914.

86. The case is not then "begun." Thomas v. State [Fla.] 36 So. 161.

87. Defendant asking view cannot raise constitutionality of statute providing one without his presence. Elias v. Territory [Ariz.] 76 P. 605.

88. Alexis v. U. S. [C. C. A.] 129 F. 60.

89. State v. Swenson [S. D.] 99 N. W. 1114.

90. Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211.

91. Gallagher v. People, 211 Ill. 158, 71 N. E. 842; Flohr v. Territory [Okl.] 78 P. 565; State v. Neighbors, 179 Mo. 351, 78 S. W. 591. Affidavit of counsel held insufficient to rebut presumption. State v. Naves [Mo.] 84 S. W. 1. Where the record shows that defendant was personally present during the impaneling of the jury, and gave testimony in his own behalf before them, it will be presumed until the contrary is shown that he was present during the remainder of the trial. State v. Swenson [S. D.] 99 N. W. 1114.

92. Does so by voluntarily absenting himself. Hill v. State, 118 Ga. 21, 44 S. E. 820. Waiver by counsel in his presence. Cawthon v. State, 119 Ga. 395, 46 S. E. 897.

93. Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

94. Rippey v. State [Tex. Cr. App.] 81 S. W. 531.

95. Bateson v. State [Tex. Cr. App.] 80 S. W. 88; Evans v. State [Tex. Cr. App.] 80 S. W. 1017; Graves v. People [Colo.] 75 P. 412. Absence of judge from court room during argument held prejudicial. Goodman v. State [Tex. Cr. App.] 83 S. W. 196. The judges must be present during the whole of the trial of a capital case. Slaughter v. U. S. [Ind. T.] 82 S. W. 732. See 2 Curr. L. 345, n. 6.

96. Quigg v. People, 211 Ill. 17, 71 N. E. 886.

97. To show that prosecutor's testimony in a former trial was not inconsistent with present statements. State v. Houghton [Or.] 75 P. 887. To prove defendant's testimony at a former trial at which the judge also presided. Nelson v. State [Tex. Cr. App.] 81 S. W. 713.

Remarks of the court intimating his opinion on the facts may be prejudicial,[98] but counsel for defendant may be admonished in presence of the jury to adhere to the rules of evidence.[99]

Applause in the court room is not ground for reversal where rebuked by court.[1]

The jury may be excluded during argument of discretionary motions and questions of law;[2] and that the jury or some of them saw defendants in irons is not prejudicial where they appeared unshackled at all times during the trial.[3] In Idaho, failure of the clerk to read the indictment and state the plea to the jury is fatal.[4]

Postponement for matters arising during the progress of the trial is discretionary,[5] and defendant is not prejudiced by his co-defendant withdrawing his plea of not guilty and pleading guilty after the state has rested, though it is in the jury's presence.[6]

A view is generally allowable within the court's discretion,[7] and testimony may be taken while the judge, jury and defendant are taking a view.[8]

The order of taking proof is a matter peculiarly within the discretion of the trial court,[9] and under the statute in Texas, testimony to a fact pertinent or ma-

98. State v. Glindemann, 34 Wash. 221, 75 P. 800. Error for the court to say—"Your memory seems remarkably clear," etc. McIntosh v. State [Ala.] 37 So. 223. Remark of court in sustaining objection to testimony, that he did not want the case to be again reversed, held not prejudicial as indicating his expectation of verdict. People v. Keeth, 141 Cal. 686, 75 P. 304. It is improper for the court in terminating the cross-examination of a witness to remark that "it is immaterial anyway." Fuqua v. Com. [Ky.] 81 S. W. 923. In overruling a question as to the effect of delirium tremens, it is error for the court to state in the hearing of the jury that d. t. would not excuse defendant even if he could not distinguish between right and wrong. Parrish v. State, 139 Ala. 16, 36 So. 1012. Remarks of court in sustaining objections to argument of counsel on defendant's failure to testify held prejudicial as accentuating the error rather than protecting defendant. State v. Snyder [Mo.] 82 S. W. 12. To say—"The witness has explained for an hour to the satisfaction of the court" is error. State v. Davis [N. C.] 49 S. E. 162. A statement by the court of the penalty provided for the crime is not error. People v. Canepi, 87 N. Y. S. 773. To state in the presence of the jury that certain testimony is admissible because "an inference might be drawn" from it invades their province. Smartt v. State [Tenn.] 80 S. W. 586. For the court on ruling on an objection to argument to state that counsel has a right to present his theory as to what the evidence shows but that the jury will understand that it is argument merely is not error. State v. Tully [Mont.] 78 P. 760. A remark of the judge when the jury brought in a verdict of not guilty in another case that if he had not another important case to try he would discharge them is not prejudicial to one subsequently tried by the same jury. Landthrift v. State [Ala.] 37 So. 287.

99. Stripling v. State [Tex. Cr. App.] 80 S. W. 376.

1. Bowles v. Com. [Va.] 48 S. E. 527; Sullivan v. State [Ga.] 48 S. E. 949. Unhostile applause before nor hostile applause after verdict are not ground for reversal where instantly stopped and rebuked by the court. Green v. Com. [Ky.] 83 S. W. 638.

2. State v. Worthen [Iowa] 100 N. W. 330; Lewis v. State [Miss.] 37 So. 497.

3. Hauser v. People, 210 Ill. 253, 71 N. E. 416. After trial sheriff ironed one of defendant's witnesses before jury retired. People v. Metzger, 143 Cal. 447, 77 P. 155.

4. Rev. St. 1887, § 7855. State v. Chambers [Idaho] 75 P. 274; State v. Crea [Idaho] 76 P. 1013.

5. State v. Ripley, 32 Wash. 182, 72 P. 1036.

Surprise which will authorize the court to continue the case or discharge the jury is not the mere emotion of the party on being confronted with evidence he hoped would not be produced, but must be the result of a practical injustice to his substantial rights. Underwood v. Com. [Ky.] 84 S. W. 310; Graff v. People, 208 Ill. 312, 70 N. E. 299.

6. Graff v. People, 208 Ill. 312, 70 N. E. 299.

7. Elias v. Territory [Ariz.] 76 P. 605; Mise v. Com., 25 Ky. L. R. 2207, 80 S. W. 457. Statutory view extends to personal as well as real property, but it must be only a view, not explanations by witnesses. O'Berry v. State [Fla.] 36 So. 440.

8. Underwood v. Com. [Ky.] 84 S. W. 310. **Contra,** O'Berry v. State [Fla.] 36 So. 440.

9. Reopening case. Alexis v. U. S. [C. C. A.] 129 F. 60; Blair v. State [Neb.] 101 N. W. 17; Cochran v. U. S. [Okl.] 76 P. 672. Allowing accused to make statement after resting. Dunwoody v. State, 118 Ga. 308, 45 S. E. 412. Second statement. Owens v. State, 120 Ga. 209, 47 S. E. 545. Rebuttal evidence. Schissler v. State [Wis.] 99 N. W. 593. Recalling witnesses is within the sound discretion of the court. Hauser v. People, 210 Ill. 253, 71 N. E. 416; Vann v. State [Ala.] 37 So. 158. Where the attorneys disagree as to what a witness testified to and defendant's attorney offers to reintroduce the witness but the jury do not indicate any desire to have him recalled, it is

terial to the case is introduceable at any time before the close of the argument;[10] but in Kentucky, it is error to allow evidence in chief to be introduced in rebuttal.[11]

The purpose of admitting testimony admissible only on a particular issue should be stated.[12]

(§ 10) *B. Arguments and conduct of counsel.*[13]—Counsel should not so conduct the people's case as to unfairly prejudice the defendant,[14] but asking questions calling for incompetent answers does not of itself show prejudice,[15] and where objection to an improper question is sustained, it is not error to refuse to reprimand counsel or charge with reference to it.[16] The opening statement of counsel is not prejudicial, though he makes claims not substantiated by the testimony.[17]

Unwarranted speeches and statements that may tend to influence the minds of the jury outside and beyond the facts of the case should not be indulged,[18] but counsel has the right to fully state his views as to what the evidence shows and as to the conclusions fairly to be drawn therefrom,[19] and embellishment by figures

not error not to recall him. Scott v. State [Tex. Cr. App.] 81 S. W. 47. Refusal to allow accused to make a supplementary statement after the state on rebuttal had introduced new evidence strengthening its case is not cause for new trial. Johnson v. State [Ga.] 48 S. E. 199. It is not error to admit evidence in reply which should have been offered in chief, but which was ruled out because the witness was thought to be incompetent, which ruling was afterwards found to be incorrect. State v. Thompson [S. C.] 46 S. E. 941. Admitting evidence of defendant's sanity before any evidence of insanity has been produced is not prejudicial. Kroell v. State, 139 Ala. 1, 36 So. 1025. Conversation between defendant and prosecutor at the time of the assault may be introduced in rebuttal of the defense of insanity. State v. Jack [Del. Gen. Sess.] 58 A. 833. Allowing cross-examination of defendant's witnesses as to matters properly provable only by the state may be prejudicial. People v. Padilla, 143 Cal. 158, 76 P. 889.

10. Perkins v. State [Tex. Cr. App.] 80 S. W. 619.

11. Fletcher v. Com. [Ky.] 83 S. W. 588.

12. Where evidence is admitted as to one only of several joint defendants and so stated by the court and counsel at the time, the others have no ground of complaint. Radford v. U. S. [C. C. A.] 129 F. 49. Evidence tending to show motive need not be expressly limited to that purpose. Though it tends also to prove a distinct offense. Weaver v. State [Tex. Cr. App.] 81 S. W. 39. Where testimony is admissible both as direct and impeaching, it is not necessary to limit it to the purpose of impeachment alone. Contradicting material facts brought out on cross-examination of defendant. Id. Previous statements of accused. Nelson v. State [Tex. Cr. App.] 81 S. W. 713.

13. See 2 Curr. L. 348.

14. Asking defendants each in turn whether they would admit it had they committed such a crime. Allen v. Com. [Ky.] 82 S. W. 589. Asking witness what he paid another for testifying. Burks v. State [Ark.] 82 S. W. 490. Calling several children and asking defendant as to each if he had committed unnatural acts with them People v. Davey [N. Y.] 72 N. E. 244. Asking defendant about relations with other women. People v. Dowell [Mich.] 99 N. W. 23. Persistence in asking improper questions may be so prejudicial as to require new trial. State v. Greenland [Iowa] 100 N. W. 341. Asking witness questions tending merely to degrade him and defendant. State v. Rogers [Mont.] 77 P. 293. Question to defendant's witness held not prejudicial. People v. Metzger, 143 Cal. 447, 77 P. 155. Humiliating and degrading questions to witness having no tendency to develop bias. Adkinson v. State [Fla.] 37 So. 522.

15. Effect held removed by court's action and subsequent conduct of counsel for state. State v. Greenland [Iowa] 100 N. W. 341.

16. Parrish v. State, 139 Ala. 16, 36 So. 1012.

17. Mullins v. Com., 25 Ky. L. R. 2044, 79 S. W. 258.

18. State v. Harness [Idaho] 76 P. 788; Willyard v. State [Ark.] 78 S. W. 765; Burks v. State [Ark.] 82 S. W. 490; Mason v. State [Tex. Cr. App.] 81 S. W. 718; Robbins v. State [Tex. Cr. App.] 83 S. W. 690; Johnson v. State [Tex. Cr. App.] 81 S. W. 945; People v. Montgomery, 176 N. Y. 219, 68 N. E. 258; Howe v. State [Tex. Cr. App.] 78 S. W. 1064; Tyler v. State [Tex. Cr. App.] 79 S. W. 558. Argument that defendant's principal witness was in jail for murdering a poor old Confederate soldier is prejudicial, there being no evidence of it, though the sheriff's return on the subpoena, not introduced in evidence, shows that he was in jail on a charge of murder. Long v. State [Ark.] 81 S. W. 387. Referring to defendant's witness as his "pal" held improper. People v. Hutchings [Mich.] 100 N. W. 753. Reference to trial below held prejudicial. Willyard v. State [Ark.] 78 S. W. 765. Statement that defendant could afford to pay a $50 fine and go on selling liquor as he would do. State v. Gillespie, 104 Mo. App. 400, 79 S. W. 477. Reference to the trial of another defendant charged with the same offense held fatal. Powers v. Com. [Ky.] 83 S. W. 146.

19. Owens v. State, 120 Ga. 209, 47 S. E. 545; Wilson v. State [Fla.] 36 So. 580; People v. Mead [Cal.] 78 P. 1047; Adams v.

of speech[20] and persuasive arguments drawn from independent sources of learning may be used,[21] and physical objects in evidence may be exhibited and commented upon,[22] the matter being one which in every case must be left to the discretion of the trial judge.[23] Unnecessary repetition in argument of low coarse expressions while reprehensible is not reversible,[24] and the same is true of repetitions of matters once ruled out by the court.[25] The court may properly correct a slip of the tongue in counsel's argument.[26] The opening statement of the district attorney is not evidence, and the people are not bound by it.[27] The state may waive its opening argument.[28]

Counsel should not comment on *defendant's failure to testify,*[29] and such comment will cause reversal, notwithstanding an instruction to disregard it;[30]

State [Tex. Cr. App.] 84 S. W. 231; People v. Romero [Cal.] 77 P. 163; McCracken v. People, 209 Ill. 215, 70 N. E. 749; People v. McGarry [Mich.] 99 N. W. 147; Walker v. Com., 25 Ky. L. R. 1729, 79 S. W. 191. Allowing prosecutor to argue at length that defendant waylaid deceased held not error. State v. Daniels, 134 N. C. 641, 46 S. E. 743. Remarks on the heinousness of the crime are not objectionable. State v. Thomas, 111 La. 804, 35 So. 914; Hatchell v. State [Tex. Cr. App.] 84 S. W. 234. Reference to prosecutrix's demeanor in rape case held proper. State v. Clark [Vt.] 58 A. 796. Prosecuting attorney may state that he leaves it to the jury whether defendant's witness told the truth when testifying or when making a previous contradictory statement. Walker v. State, 139 Ala. 56, 35 So. 1011. Where defendant claims that another participant in the fight, not present at the trial, struck the fatal blow, argument by the prosecuting attorney that the absent one if present would probably claim defendant did it is not unfair. State v. Fuller [Iowa] 100 N. W. 1114. Defendant's jumping bail may be referred to. State v. Smith [S. D.] 100 N. W. 740. Peculiarity of handwriting may be referred to where larcency on trial involves forgery. People v. Hutchings [Mich.] 100 N. W. 753. Statement in prosecution of a physician for abortion that "defendant used the knowledge gained by his profession for the purpose of murder." Barrow v. State [Ga.] 48 S. E. 950. Where the defense is insanity, it is not error to overrule objection to counsel's argument asking why no complaint had been made by defendant's friends, etc., if he was insane. Parrish v. State, 139 Ala. 16, 36 So. 1012. That defendant who testified was a liar and a scoundrel. Ball v. State [Tex. Cr. App.] 78 S. W. 508; Miller v. State [Tex. Cr. App.] 83 S. W. 393. "It is just such impudent and sassy negroes as this that are causing trouble." Dodson v. State [Tex. Cr. App.] 78 S. W. 514. That defendant, a negress, was "by her own confession a low down black whore" is legitimate. Love v. State [Tex. Cr. App.] 78 S. W. 691. Allusion to number of empty bottles in defendant's back yard. Violation of liquor law. Murry v. State [Tex. Cr. App.] 79 S. W. 568. Statement that "if the evidence be true, the defendant has been as low as the most lecherous animal that ever crawled on earth" held proper under the evidence. Crocker v. People [Ill.] 72 N. E. 743. Evidence in case is a proper basis for argument, though subject to an objection not made. Moree v. State [Tex. Cr. App.] 83 S. W. 1117. "We cannot as good citizens turn defendant loose," etc., held reprehensible but not reversible for failure to take proper measures to correct it. Hatchell v. State [Tex. Cr. App.] 84 S. W. 234.

20. Taylor v. State [Ga.] 49 S. E. 303.

21. The circumstances of other notorious crimes may be related by way of argument. State v. Busse [Iowa] 100 N. W. 536; Powers v. Com. [Ky.] 83 S. W. 146.

22. Where clothes of the person slain have been properly introduced, the prosecuting attorney may exhibit them to the jury and from their condition draw inferences sustaining the testimony of witnesses. Carroll v. Com. [Ky.] 83 S. W. 552. Where pages of a hotel register are introduced to show alibi, the whole book may be exhibited by the prosecutor and argument made from its appearance that it is not a bona fide register. Hauser v. People, 210 Ill. 253, 71 N. E. 416.

23. Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

24. Hauser v. People, 210 Ill. 253, 71 N. E. 416.

25. State v. Donavan [Iowa] 101 N. W. 122.

26. Use of word "ballot" for "lot" in urging jury not to find verdict by lot. Scott v. State [Tex. Cr. App.] 81 S. W. 294.

27. People v. Stoll, 143 Cal. 689, 77 P. 818.

28. Harmon v. State [Fla.] 37 So. 520.

29. Hoff v. State [Miss.] 35 So. 950; McDanial v. State [Tex. Cr. App.] 81 S. W. 301. Statement that no one has denied certain facts which under the evidence only defendant could deny is improper. Hanna v. State [Tex. Cr. App.] 79 S. W. 514; Washington v. State [Tex. Cr. App.] 77 S. W. 810; Wallace v. State [Tex. Cr. App.] 81 S. W. 966.

Contra: Where defendant might have proved the fact by others if it existed. Rippey v. State [Tex. Cr. App.] 81 S. W. 531.

30. Minor v. State [Ga.] 48 S. E. 198; State v. Robinson, 112 La. 939, 36 So. 811; State v. Snyder [Mo.] 82 S. W. 12; Anglin v. State [Tex. Cr. App.] 80 S. W. 370. Calling attention to fact that defendant's exculpatory evidence before examining magistrate is not introduced at trial. Miller v. State [Tex. Cr. App.] 78 S. W. 511.

Harmless error. Lee v. State [Ark.] 83 S. W. 916.

but legitimate argument on the failure of defendant, who has testified, to explain certain facts, is proper.[31]

Argument by defendants' counsel[32] is properly stricken out where unsupported by the evidence,[33] but quotations from memory may be made and brief extracts read, of literary or historical matter, by way of illustrating argument, though nothing amounting to evidence can be first introduced in that way.[34] Defendant's attorney may waive his right to argue after the prosecutor has closed, and if he does so, the prosecutor should not be again allowed to argue on the pretense that he had inadvertently omitted something.[35]

(§ 10) *C. Questions of law and fact.*[36]—Contrary to the general rule,[37] juries in Louisiana in criminal cases are the judges of both the law and the evidence.[38] They are the judges of the credibility of the witnesses,[39] and defendant's intent, the facts being shown,[40] identification of defendant,[41] and whether positive identification is met by proof of alibi are questions for the jury.[42] Insanity of defendant incapacitating him to form a criminal intent is a question of fact,[43] but the doubt of sanity which will require the judge to submit the question to a jury when defendant is brought up for judgment is a doubt in the mind of the judge.[44]

Questions of law arising on the face of the indictment,[45] whether an act is special legislation,[46] whether or not the person killed was a deputy sheriff,[47] and whether witnesses, expert or nonexpert, are competent to give opinions as to defendant's sanity, are for the court.[48]

(§ 10) *D. Taking case from jury.*[49]—A peremptory direction to find a verdict of guilty is not allowable,[50] and in some states directions for acquittal are not allowed;[51] but if the state fails or refuses to prosecute a cause removed to the Federal court because the accused acted under color of his office as a Federal

31. Jones v. State [Tex. Cr. App.] 83 S. W. 198; Balliet v. U. S. [C. C. A.] 129 F. 689.

32. See 2 Curr. L. 350.

33. General unreliability of dying declarations. Pitts v. State [Ala.] 37 So. 101.

34. Opinions of experts. Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677.

35. Cunningham v. People, 210 Ill. 410, 71 N. E. 389.

36. See 2 Curr. L. 351.

37. Juries in the recorder's court of Detroit are not the judges of both the law and the facts. People v. Gardner [Mich.] 100 N. W. 126.

38. State v. Cooper, 112 La. 281, 36 So. 350.

39. State v. Leasia [Or.] 78 P. 328; State v. Brinte [Del.] 58 A. 258; Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041; Hauser v. People, 210 Ill. 253, 71 N. E. 416; Ector v. State [Ga.] 48 S. E. 315; State v. Ripley, 32 Wash. 182, 72 P. 1036; Peacock Distilling Co. v. Com., 25 Ky. L. R. 1778, 78 S. W. 893; State v. Johnson [Wash.] 78 P. 903. Weight of opinions of experts. Parrish v. State, 139 Ala. 16, 36 So. 1012.

40. State v. Blay [Vt.] 58 A. 794; State v. Clark [Vt.] 58 A. 796.

41. State v. Hyatt, 179 Mo. 344, 78 S. W. 601.

42. Tipton v. State, 119 Ga. 304, 46 S. E. 436.

43. State v. Howard [Mont.] 77 P. 50; State v. Keerl, 29 Mont. 508, 75 P. 362.

44. State v. Howard [Mont.] 77 P. 50.

45. State v. Woods, 112 La. 617, 36 So. 626

46. State v. Hammond, 66 S. C. 219, 44 S E. 797.

47. Hendrickson v. Com. [Ky.] 81 S. W. 266.

48. Farrish v. State, 139 Ala. 16, 36 So 1012.

49. See 2 Curr. L. 351.

50. In Michigan, the jury may be told that it is their duty, under the law, to return a verdict of guilty, the facts being admitted or undisputed; but in case they decline to render such verdict, the court cannot enter it for them, and a refusal to poll them on their coming in with a verdict of guilty in such a case is prejudicial. People v. Remus [Mich.] 98 N. W. 397. Where there is a general plea of not guilty and a special plea of not guilty by reason of insanity, and the evidence is conclusive of guilt except as controverted by the evidence of insanity, the state is entitled to an affirmative charge on the issue raised by the general plea. Parrish v. State, 139 Ala. 16, 36 So. 1012. In Kentucky, the court has no right in a prosecution for an offense punishable by a fine of $500, in which defendant pleads a former conviction to instruct the jury to find defendant guilty. Lucas v. Com. [Ky.] 82 S. W. 440.

51. In California, the jury may be advised, but not directed, to acquit. Not, however, on the opening statement of the prosecutor. People v. Stoll, 143 Cal. 689, 77 P. 818. See, also, 2 Curr. L. 351, n. 84. People v. Moran [Cal.] 77 P. 777.

officer, a jury should be impaneled and a verdict of not guilty directed.[52] Where the state's evidence, if uncontradicted, would warrant a conviction, a motion to dismiss or direct an acquittal is properly denied,[53] and instructions amounting to an affirmative charge for the accused are properly refused where the evidence supports a verdict of guilty.[54] Where there is an absolute lack of evidence to sustain a verdict, the case should not be submitted to the jury,[55] and defendant's motion for a discharge should be granted.[56] Offering testimony in his own behalf after denial of his motion for judgment on the close of the case in chief is an abandonment by defendant of his motion.[57]

(§ 10) *E. Instructions. Necessity and duty of charging.—Requests.*[58]—Instructions clearly defining all the issues in the case should be given.[59] An instruction should not be given unless there is evidence on which to predicate it,[60] or the matter is in issue,[61] nor should mere abstract principles of law be given,[62] but defendant's theory of the case supported by the evidence must be given,[63]

52. Virginia v. Felts, 133 F. 85.

53. State v. Stockhammer, 34 Wash. 262, 75 P. 810. Dying declarations. State v. Davis, 134 N. C. 633, 46 S. E. 722. Refusal of a peremptory instruction is proper where there is any evidence of guilt. Stancliff v. U. S. [Ind. T.] 82 S. W. 882. Where in an action for violation of a municipal ordinance, there is evidence of the existence of the ordinance and defendant's violation of it, a nonsuit is improper. People v. Croot [Colo. App.] 78 P. 310.

54. Wilson v. State [Fla.] 36 So. 680. As to whether they are ever proper in criminal cases, see McCray v. State [Fla.] 34 So. 5.

55. State v. Gordon [Utah] 76 P. 882.

56. Devoy v. State [Wis.] 99 N. W. 455; State v. Egbert [Iowa] 101 N. W. 191.

57. Ullman v. District of Columbia, 21 App. D. C. 241.

58. See 2 Curr. L. 351. It is proper for the **Recorder of Detroit** to instruct juries in cases tried before him. People v. Gardner [Mich.] 100 N. W. 126.

59. What constitutes a "sale" need not be stated in a prosecution for unlawful liquor selling. State v. Green [Kan.] 77 P. 95. Intoxicating effect of liquor in prosecution for selling. Hendrick v. State [Tex. Cr. App.] 83 S. W. 711. In Kentucky, the trial court is required without request to give the law, the correct law and the whole law of the case. Circumstantial evidence of homicide requires submission of every grade. Brown v. Com., 25 Ky. L. R. 1896, 78 S. W. 1126; Green v. Com. [Ky.] 83 S. W. 638. All included degrees of homicide must be given. Demaree v. Com. [Ky.] 82 S. W. 231. Evidence in case of hog theft held to require charge on circumstantial evidence. Guerrero v. State [Tex. Cr. App.] 80 S. W. 1001. Evidence held to require charge on temporary insanity from the use of liquor, though not requested. Hierholzer v. State [Tex. Cr. App.] 83 S. W. 836.

60. Johnson v. Com., 102 Va. 927, 46 S. E. 789; Spraggins v. State, 139 Ala. 93, 35 So. 1000; State v. Matthews [La.] 36 So. 48; Ross v. State, 139 Ala. 144, 36 So. 718; Thomas v. State, 139 Ala. 80, 36 So. 734; Wildman v. State, 139 Ala. 125, 35 So. 995; Hjeronymus v. State [Tex. Cr. App.] 79 S. W. 313; State v. Brown, 181 Mo. 192, 79 S. W. 1111; State v. Pine [W. Va.] 48 S. E. 206; State v. Gordon [Utah] 76 P. 882; Davis v. State [Fla.] 36 So. 170; Commonwealth v. Mitchka [Pa.] 58 A. 474; Owens v. State, 120 Ga. 205, 47 S. E. 513; Nix v. State, 120 Ga. 162, 47 S. E. 516; Wilson v. State [Fla.] 36 So. 580; Suggs v. State [Tex. Cr. App.] 79 S. W. 307; Taylor v. State [Tex. Cr. App.] 80 S. W. 378; Rooks v. State, 119 Ga. 431, 46 S. E. 631; Norman v. U. S., 20 App. D. C. 494; State v. Hertzog [W. Va.] 46 S. E. 792; Eatman v. State [Fla.] 37 So. 576. Charge on circumstantial evidence held properly refused. Mahon v. State [Tex. Cr. App.] 79 S. W. 28; Usher v. State [Tex. Cr. App.] 81 S. W. 309, 712. Weight of accomplice testimony. People v. Balkwell, 143 Cal. 259, 76 P. 1017. Prejudice from such a charge will necessitate reversal. Blair v. State [Neb.] 100 N. W. 808. Charge on confessions held proper. Abrams v. State [Ga.] 48 S. E. 965. Instruction on conspiracy when none was shown held error. State v. Potter, 134 N. C. 719, 47 S. E. 1. Charge on irresponsibility held properly refused. State v. Berry, 179 Mo. 377, 78 S. W. 611; Berry v. State [Tex. Cr. App.] 80 S. W. 630. Authorizing consideration of other violations of local option law to show system where defendant is prosecuted for a straight sale. Belt v. State [Tex. Cr. App.] 78 S. W. 933. Alibi held not in issue. Smith v. State [Tex. Cr. App.] 78 S. W. 516.

61. Refusal to instruct on necessity of proof, aliunde confession is not error where abundance of proof of the corpus delicti exists. Green v. Com. [Ky.] 83 S. W. 638. Charge in murder case on issue of improper treatment not demanded by evidence. Hancock v. State [Tex. Cr. App.] 83 S. W. 696.

62. Kirby v. State, 139 Ala. 87, 36 So. 721; Spraggins v. State, 139 Ala. 93, 35 So. 1000; Ross v. State, 139 Ala. 144, 36 So. 718; McClellan v. State [Ala.] 37 So. 239; People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Donnolly, 143 Cal. 394, 77 P. 177; McCormick v. State [Ala.] 37 So. 377; State v. Guidor [La.] 37 So. 622. Incorrect statement of responsibility of accessory. State v. Gordon [Utah] 76 P. 882. Abstract propositions relating to rights of society and enforcement of criminal laws. State v. Ronk, 91 Minn. 419, 98 N. W. 334.

63. State v. Pine [W. Va.] 48 S. E. 206; Williams v. State [Tex. Cr. App.] 79 S. W. 521; Hall v. State, 120 Ga. 142, 47 S. E. 519; Mann v. State [Tex. Cr. App.] 83 S. W. 195; Owens v. State, 120 Ga. 205, 47 S. E. 513;

and generally it is error to fail to charge as to all the necessary elements of the offense,[64] and all offenses included in the indictment,[65] and supported by the evidence.[66] Included offenses should not be presented where the evidence so excludes them that if the principal crime was not committed defendant is not guilty.[67] Where testimony is admissible only on a particular issue, but is persuasive as to other matters, it is error to fail to limit it.[68] Ambiguous[69] and misleading instructions should not be given.[70] The submission of defensive theories finding no support in the evidence is prejudicial.[71] Technical words should be defined.[72] Matters once covered by the charge need not be repeated.[73] Ordi-

Gather v. State [Tex. Cr. App.] 81 S. W. 717; Webb v. State [Tex. Cr. App.] 83 S. W. 394; People v. Dowell [Mich.] 99 N. W. 23; James v. State [Tex. Cr. App.] 78 S. W. 951. Defendant's own testimony is a sufficient basis for submission of his theory. Casteel v. State [Ark.] 83 S. W. 953. Where there is a question as to whether a witness was an accomplice or a detective, the question should be submitted to the jury. Lightfoot v. State [Tex. Cr. App.] 78 S. W. 1076. Insanity from use of narcotics is a separate defense from intoxication from ardent spirits. Otto v. State [Tex. Cr. App.] 80 S. W. 625.

64. Intent in robbery. State v. Fordham [N. D.] 101 N. W. 888.

65. State v. Duffy [Iowa] 100 N. W. 796; State v. Egbert [Iowa] 101 N. W. 191.

66. State v. Franklin [Kan.] 77 P. 588; Venters v. State [Tex. Cr. App.] 83 S. W. 832. Where the evidence in a murder case is circumstantial, all degrees of homicide must be given. Brown v. Com., 25 Ky. L. R. 1896, 78 S. W. 1126; Green v. Com. [Ky.] 83 S. W. 638; Demaree v. Com. [Ky.] 82 S. W. 231. If circumstantial evidence is relied on in murder, and a theory excluding premeditation and deliberation may fairly be formulated from it, a charge on second degree is necessary. State v. Moore, 67 Kan. 620, 73 P. 905.

67. Rape under age of consent, issue being intercourse or not. Bryant v. State [Tex. Cr. App.] 79 S. W. 554.

Rape: No question as to complete sexual intercourse, issue being consent vel non. People v. Keith, 141 Cal. 686, 75 P. 304.

68. Mahon v. State [Tex. Cr. App.] 79 S. W. 28; Webb v. State [Tex. Cr. App.] 83 S. W. 394; Fletcher v. Com. [Ky.] 83 S. W. 588; Robbins v. State [Tex. Cr. App.] 83 S. W. 690; Alford v. Com. [Ky.] 80 S. W. 1108. Confession of joint defendant admissible only as to him. Howson v. State [Ark.] 83 S. W. 933.

69. People v. Sylva, 143 Cal. 62, 76 P. 814; McCormick v. State [Ala.] 37 So. 377.

70. Hayner v. People [Ill.] 72 N. E. 792. Requests held properly refused. Mitchell v. State [Ala.] 37 So. 76; Pitts v. State [Ala.] 37 So. 101; McClellan v. State [Ala.] 37 So. 239; Bell v. State [Ala.] 37 So. 281; Kirby v. State, 139 Ala. 87, 36 So. 721. Ignoring defendants' character as accomplices. People v. Chin Yuen [Cal.] 77 P. 954. A requested charge based on a part only of the evidence on an issue is properly refused. Ferguson v. State [Ala.] 37 So. 448; Curran v. State [Wyo.] 76 P. 577. Contradictory statements out of court. Mims v. State [Ala.] 37 So. 354. A request, correct in itself but not fully stating the law applicable to the case before the court, may be refused. Roberts v. U. S. [C. C. A.] 126 F. 897. Charge on constructive presence where the defense is alibi is error. McDonald v. State [Tex. Cr. App.] 79 S. W. 542.

71. Arthur v. State [Tex. Cr. App.] 80 S. W. 1017.

72. "Deliberately." Mahon v. State [Tex. Cr. App.] 79 S. W. 28. "Corroborated." State v. Hunter, 181 Mo. 316, 80 S. W. 955. "Adequate cause." Harrison v. State [Tex. Cr. App.] 83 S. W. 699. "Manslaughter" need not be defined when used in charge on murder when not in issue. Martin v. State [Tex. Cr. App.] 83 S. W. 390. Where the jury were instructed to give the proper weight to the evidence, an objection that no definition of proper weight was given is hypercritical. State v. Druxinman, 34 Wash. 257, 75 P. 814. To charge that murder in the perpetration of robbery is "per se" first degree is not erroneous for use of the quoted words. Schwartz v. State [Tex. Cr. App.] 83 S. W. 195. The duty to explain technical words cannot be omitted because some of the jury may be able to explain them. State v. Clark, 134 N. C. 698, 47 S. E. 36.

73. People v. Nunley, 142 Cal. 105, 75 P. 676; State v. Eggleston [Or.] 77 P. 738; Havens v. Com. [Ky.] 82 S. W. 369; State v. Brown, 181 Mo. 192, 79 S. W. 1111; Thomas v. State [Fla.] 36 So. 161; Schrader v. State [Miss.] 36 So. 385; State v. Coleman [S. D.] 98 N. W. 175; Norman v. U. S., 20 App. D. C. 494; Delahoyde v. People [Ill.] 72 N. E. 732; Commonwealth v. Clancy [Mass.] 72 N. E. 842; Harmon v. State [Fla.] 37 So. 520; Williams v. State [Fla.] 37 So. 521; Fine v. State [Tex. Cr. App.] 81 S. W. 723; Bearden v. State [Tex. Cr. App.] 83 S. W. 808; Parnell v. State [Fla.] 36 So. 165; Davis v. State [Fla.] 36 So. 170; State v. Woods, 112 Fla. 617, 36 So. 626; State v. Laughlin, 180 Mo. 342, 79 S. W. 401; Kelly v. State [Tex. Cr. App.] 80 S. W. 382; Wildman v. State, 139 Ala. 125, 35 So. 995; Farrish v. State, 139 Ala. 16, 36 So. 1012; State v. Clark, 34 Wash. 485, 76 P. 98; Elias v. Territory [Ariz.] 76 P. 605; People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Donnolly, 143 Cal. 394, 77 P. 177; Nickles v. State [Fla.] 37 So. 312; People v. Moran [Cal.] 77 P. 777; Wells v. Territory [Okl.] 78 P. 124; Coolman v. State [Ind.] 72 N. E. 568; Becknell v. State [Tex. Cr. App.] 82 S. W. 1039; Kimberlain v. State [Tex. Cr. App.] 82 S. W. 1043; State v. Sargood [Vt.] 58 A. 971; Roberts v. U. S. [C. C. A.] 126 F. 897; People v. Hutchings [Mich.] 100 N. W. 753; People v. Ammon, 92 App. Div. 205, 87 N. Y. S. 358; Flohr v. Territory [Okl.] 78 P. 565; People v. Ochoa, 142 Cal. 268, 75 P. 847; People v. Perry [Cal.] 78 P. 284; Mason v. State [Tex. Cr. App.] 81 S. W. 718; May v. State, 120 Ga. 135, 47 S. E. 548;

narily, an incorrect request is sufficient to require a correct charge on a subject within the issues not already covered,[74] but an incorrect request need not be given as requested,[75] and where the proper matters in such a request are properly covered by the general charge, or are given after being corrected, there is no error.[76] The court may properly modify instructions requested before giving them,[77] but need not give a special request which requires qualification, limitation or explanation,[78] and where instructions are asked in the aggregate, or propositions are presented as one request, the whole may be refused if there be anything objectionable in any one of them.[79] The court may properly instruct the jury to disregard irrelevant testimony, though no objection to its introduction was made,[80] and the presence of incompetent testimony unobjected to does not require the submission of an instruction that such testimony shall be considered in arriving at a verdict,[81] and caution against considering confessions not admitted in evidence cannot be complained of where the court was actuated by fear that the jury may have heard of them.[82] A charge correct in itself cannot be attacked because it fails to present some other or further proposition,[83] on which a proper request was not presented,[84] and generally instructions more fully developing issues already pre-

State v. Guldor [La.] 37 So. 622; Suckow v. State [Wis.] 99 N. W. 440; Johnson v. State [Ga.] 48 S. E. 199; State v. Burns [Nev.] 74 P. 983; McCoy v. State [Tex. Cr. App.] 81 S. W. 46; Furlow v. State [Ark.] 81 S. W. 232. A requested instruction that neither of two defendants was responsible for what anybody else did was included in a charge that the jury must consider the case of each separately and there must be evidence of the guilt of the particular defendant. People v. Blanchard [Mich.] 98 N. W. 983. No error to refuse to again instruct jury that they may convict of murder in the first degree and impose imprisonment for life, after jury has come in with verdict. State v. Hunter [W. Va.] 48 S. E. 839. Fair charge on circumstantial evidence and necessity of excluding hypothesis of innocence need not be supplemented by charge on necessity of showing that no other committed the crime. Berry v. State [Tex. Cr. App.] 80 S. W. 630.

74. State v. Robertson, 178 Mo. 496, 77 S. W. 628. Not in misdemeanor cases. Murry v. State [Tex. Cr. App.] 79 S. W. 568.

75. Alexis v. U. S. [C. C. A.] 129 F. 60; Betts v. U. S. [C. C. A.] 132 F. 228; State v. Burns [Nev.] 74 P. 983. A request stating an erroneous rule and which counsel declines to modify or inform the court the purpose of may be refused as offered. Predicating acquittal on "any doubt" as to what occurred in room where deceased was killed. People v. Boggiano [N. Y.] 72 N. E. 101.

76. Alexis v. U. S. [C. C. A.] 129 F. 60.

77. Town of Orrick v. Akers [Mo. App.] 83 S. W. 649. A request stating the hypothesis on which defendant claims an acquittal may be modified by a reminder that it is for the jury to determine the facts. People v. Moran [Cal.] 77 P. 777. But in giving defendants' requests properly stating the law as applied to the facts, it is improper to add repeated modifications on the credibility of defendant as a witness. People v. Chadwick, 143 Cal. 116, 76 P. 884.

78, 79. State v. Guldor [La.] 37 So. 622.

80. Bradley v. State [Ga.] 48 S. E. 981.

81. Refusal of defendant to flee or resist arrest. Thomas v. State [Fla.] 36 So. 161.

82. Green v. Com. [Ky.] 83 S. W. 638.

83. Sullivan v. State [Ga.] 48 S. E. 949; Williams v. State [Tex. Cr. App.] 75 S. W. 859. Mere failure to charge that a majority of the jury are authorized to recommend to the mercy of the court in capital cases is not error. Webster v. State [Fla.] 36 So. 584. It is not error to omit to define reasonable doubt. State v. Blay [Vt.] 58 A. 794. General charge on reasonable doubt is sufficient without further charge on doubt as to various degrees. Smith v. State [Tex. Cr. App.] 78 S. W. 517.

84. State v. Walke [Kan.] 76 P. 408; State v. Harness [Idaho] 76 P. 788; Harlan v. People [Colo.] 76 P. 792; Ramfos v. State, 120 Ga. 176, 47 S. E. 562; Face v. State [Tex. Cr. App.] 79 S. W. 631; Taylor v. State [Ga.] 49 S. E. 303; Hull v. State [Tex. Cr. App.] 80 S. W. 380; State v. Carpenter [Mo.] 81 S. W. 410; Redden v. State [Tex. Cr. App.] 78 S. W. 929; Higdon v. State [Tex. Cr. App.] 79 S. W. 546. Venue. State v. Eggleston [Or.] 77 P. 738. Nature and value of circumstantial evidence. People v. Balkwell, 143 Cal. 259, 76 P. 1017. Accomplice testimony. Id. But see State v. Parker, 134 N. C. 209, 46 S. E. 511, where it is held that failure to limit evidence corroborative of prosecutrix in rape is error. Presumption of continuance of insanity. Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677. Reasonable doubt. Grantham v. State, 120 Ga. 160, 47 S. E. 518. Impeachment of witness. Watts v. State [Ga.] 48 S. E. 142; Phillips v. State [Ga.] 49 S. E. 290. Purpose of impeaching testimony. Jones v. U. S. [Okl.] 78 P. 100. Insanity arising from use of intoxicants as excuse or mitigation of homicide. Dyer v. State [Tex. Cr. App.] 83 S. W. 192. Alibi. State v. Walke [Kan.] 76 P. 408. An unwritten request may be refused in Georgia. Callaway v. State [Ga.] 48 S. E. 907; Carter v. State [Ga.] 49 S. E. 280; Baker v. State [Ga.] 48 S. E. 967.

In Texas: Code Cr. Proc. art. 723, has not changed the rule as to misdemeanors. Llcett v. State [Tex. Cr. App.] 79 S. W. 33; Schrimsher v. State [Tex. Cr. App.] 80 S. W. 1013; Rippey v. State [Tex. Cr. App.] 81 S. W.

sented in sufficient general terms if desired must be requested.[85] If defendant desires a form of verdict of acquittal, he must request it.[86] A theory of defense not raised by the evidence and presented solely by the statement of the accused need not be submitted unless an appropriately worded request is presented.[87] The authorities are in conflict as to the propriety of instructing, even on request, that no inference is to be drawn from accused's failure to testify,[88] and the court should be careful in charging as to defendant's failure to explain pertinent facts where he does testify.[89] A request stating the hypothesis on which defendant claims an acquittal must include all the elements necessary to predicate the verdict,[90] and in giving hypothetical instructions, the jury should be cautioned against assuming the existence or nonexistence of the facts stated.[91] The constituent elements of the offense may be grouped and the jury instructed that if all be proved beyond a reasonable doubt conviction should follow.[92] Where, at the close of the general charge, the jury are told that they must take the law from the court, a similar admonition should accompany special instructions subsequently given for defendant,[93] and a statement by the court in submitting instructions to which the accused is entitled, that "they are given because they present his theory of the case," is prejudicial as indicating that the jury are not bound to regard them as the law.[94] It is not improper for the judge to call attention to and correct in his charge a misstatement of the law by counsel in argument.[95] A charge which does not purport to declare any principle of law, but which is merely a statement of fact, can never be ground for a new trial, unless the judge himself certifies that the statement is incorrect.[96] A rule of court that requests be preferred before argument is proper and should be adhered to, but such rule will not justify the court in refusing a proper material instruction not elsewhere given.[97]

531; Loessin v. State [Tex. Cr. App.] 81 S. W. 715. One indicted for a felony and convicted of a misdemeanor is entitled to a charge on alibi presented by the evidence, though not requested. Wilcher v. State [Tex. Cr. App.] 83 S. W. 384.

In Alabama, written requests must be given as requested or refused, so that a request may properly be refused for an unintentional clerical error. Request referring to defendant in murder as deceased. Thomas v. State, 139 Ala. 80, 36 So. 734.

Mere omission to instruct as to matters not imperatively demanded by the issues is not error in the absence of a request. State v. Duffy [Iowa] 100 N. W. 796; Territory v. Watson [N. M.] 78 P. 504; Alexis v. U. S. [C. C. A.] 129 F. 60.

85. Adcock v. State [Ark.] 83 S. W. 318; Alexis v. U. S. [C. C. A.] 129 F. 60.

That the instructions are general in their nature so that the jury may have misunderstood them is not ground for reversal where counsel did not request further instructions. Self defense. People v. Rodawald [N. Y.] 70 N. E. 1; State v. Kellison [W. Va.] 47 S. E. 166. Charge on manslaughter in second degree not requested. State v. Ronk, 91 Minn. 419, 98 N. W. 334. Failure to apply a rule of evidence to the testimony of a particular witness is not error in the absence of a request to do so. Williams v. State [Ga.] 48 S. E. 368. Failure to instruct as to the recommendation to mercy is not error, it not being requested. State v. Adams [S. C.] 47 S. E. 676.

86. Clemons v. State [Fla.] 37 So. 647.

87. Collins v. State [Ga.] 48 S. E. 903; West v. State [Ga.] 49 S. E. 266.

88. A charge that defendant's failure to testify shall not be considered against him is not erroneous. State v. Levy [Idaho] 75 P. 227; State v. Deatherage [Wash.] 77 P. 504; Lounder v. State [Tex. Cr. App.] 79 S. W. 552; Lillie v. State [Neb.] 100 N. W. 316; McCoy v. State [Tex. Cr. App.] 81 S. W. 46; Mason v. State [Tex. Cr. App.] 81 S. W. 718.

Refusal to so instruct on request is error. Thomas v. State, 139 Ala. 80, 36 So. 734. Contra, State v. Younger [Kan.] 78 P. 429. That charge was not as full as statute is harmless where it does not appear that any reference to it was made on argument. Brown v. State [Tex. Cr. App.] 83 S. W. 704.

89. Balliet v. U. S. [C. C. A.] 129 F. 689; Jones v. State [Tex. Cr. App.] 83 S. W. 198.

90. State v. Guidor [La.] 37 So. 622.

91. People v. Chadwick, 143 Cal. 116, 76 P. 884.

92. Bradley v. State [Ga.] 48 S. E. 981.

93. Burnett v. State [Tex. Cr. App.] 79 S. W. 550.

94. People v. Farrell [Mich.] 100 N. W. 264.

95. Cole v. State [Ga.] 48 S. E. 156.

96. Davis v. State [Ga.] 48 S. E. 305.

97. People v. Lang, 142 Cal. 482, 76 P. 232.

Submission of charge.[98]—Oral instructions are prohibited by statute or constitution in many states,[99] though remarks in the course of the trial and not part of the charge need not be written,[1] and in others the court on request is required to put his charge in writing.[2] In such states, the taking down in shorthand of a charge delivered orally is not sufficient.[3] A written charge may be waived.[4] Undue emphasis in stating the law is not reversible,[5] and the jury may be recalled after retirement and an omission in the charge supplied.[6]

Form of instructions in general.[7]—Instructions should not be argumentative in form;[8] no matter should be given undue prominence,[9] as by repetition[10] or otherwise. The charge is to be construed as a whole,[11] and deficiencies in one part may be cured by other parts,[12] but an instruction fundamentally wrong is

98. See 2 Curr. L. 355.

99. United States v. Densmore [N. M.] 75 P. 31; Kizer v. People, 211 Ill. 407, 71 N. E. 1035; State v. Walke [Kan.] 76 P. 408. Const. 1874, art. 7, § 23. Burnett v. State [Ark.] 81 S. W. 382. It is a statutory requirement that the charge be written in Idaho. State v. Harness [Idaho] 76 P. 788.

1. Remarks of the court in ruling on evidence (Kizer v. People, 211 Ill. 407, 71 N. E. 1035), stating what count or offense the prosecution has elected (State v. Younger [Kan.] 78 P. 429). Sending jury back for further consideration. United States v. Densmore [N. M.] 75 P. 31.

2. A statement "Sect. 1548 read" sufficiently shows that the section of that number in the code of the state was read. White v. State [Ga.] 48 S. E. 941. In Wyoming, the charge need not be written unless requested. Curran v. State [Wyo.] 76 P. 577.

3. Const. 1874, art. 7, § 23. Burnett v. State [Ark.] 81 S. W. 382.

4. People v. Lang, 142 Cal. 482, 76 P. 232.

5. People v. Perry [Cal.] 78 P. 284.

6. Gather v. State [Tex. Cr. App.] 81 S. W. 717; Mason v. State [Tex. Cr. App.] 81 S. W. 718.

7. See 2 Curr. L. 355.

8. Wildman v. State, 139 Ala. 125, 35 So. 995; Spraggins v. State, 139 Ala. 93, 35 So. 1000; Eatman v. State, 139 Ala. 67, 36 So. 16; Thomas v. State, 139 Ala. 80, 36 So. 734; Wilson v. State [Ala.] 37 So. 93; Bell v. State [Ala.] 37 So. 281; Peckham v. People [Colo.] 75 P. 422; Zuckerman v. People [Ill.] 72 N. E. 741. Flagrant case. McIntosh v. State [Ala.] 37 So. 223. Better that many guilty should escape than that one innocent should suffer. Walker v. State, 139 Ala. 56, 35 So. 1011; Bell v. State [Ala.] 37 So. 281; People v. Nunley, 142 Cal. 105, 75 P. 676. That doctrine of retreat does not require one to run from knife or pistol in striking distance, since that would increase his peril. Sims v. State, 139 Ala. 74, 36 So. 138. Several argumentative instructions on self defense and duty to retreat condemned. Gordon v. State [Ala.] 36 So. 1009. Request that good character of defendant in murder case may raise reasonable doubt is properly refused. McClellan v. State [Ala.] 37 So. 239; Bell v. State [Ala.] 37 So. 281; State v. Stentz, 33 Wash. 444, 74 P. 588. Charge that it is not the policy of the law to punish the guilty, but to protect the innocent, is bad. Smith v. State [Ala.] 37 So. 423. That presumption of innocence is an instrument of proof, and evidence in defendant's behalf. People v. Moran [Cal.] 77 P. 777. That witness had strong motive to testify. People v. Noblett, 96 App. Div. 293, 89 N. Y. S. 181. That rape is easy to charge and hard to disprove. Black v. State, 119 Ga. 746, 47 S. E. 370. Weight to be given accomplice testimony. State v. Hauser, 112 La. 313, 36 So. 396.

9. Singling out particular portions of testimony. Sims v. State, 139 Ala. 74, 36 So. 138; Ross v. State, 139 Ala. 144, 36 So. 718; Wilson v. State [Fla.] 36 So. 580; Parrish v. State, 139 Ala. 16, 36 So. 1012; People v. Keith, 141 Cal. 686, 75 P. 304. Defendant's testimony should not be singled out as to his credibility. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076. Undue stress on theory of state with no corresponding presentation of defense. Baldwin v. State, 120 Ga. 188, 47 S. E. 558.

10. Perrin v. State [Tex. Cr. App.] 78 S. W. 930. Repetition held not prejudicial. State v. Clark, 34 Wash. 485, 76 P. 98.

11. State v. Coleman [S. D.] 98 N. W. 175; State v. Clark, 34 Wash. 485, 76 P. 98; United States v. Densmore [N. M.] 75 P. 31; State v. Kellison [W. Va.] 47 S. E. 166; Walker v. State [Ga.] 48 S. E. 184; Schissler v. State [Wis.] 99 N. W. 593; Sullivan v. D. C., 20 App. D. C. 29; Delahoyde v. People [Ill.] 72 N. E. 732; Clemons v. State [Fla.] 37 So. 647; Addis v. State, 120 Ga. 180, 47 S. E. 505; Sutherland v. State [Ga.] 48 S. E. 915; People v. Lang, 142 Cal. 482, 76 P. 232; People v. Shuler [Mich.] 98 N. W. 986; State v. Kinder [Mo.] 83 S. W. 964; Connor v. Com. [Ky.] 81 S. W. 259; State v. Sharp [Mo.] 82 S. W. 134; State v. Smith [Iowa] 100 N. W. 40. All instructions must be read together. Charge held not objectionable as authorizing jury to infer that defendant might be responsible for acts of another. Becknell v. State [Tex. Cr. App.] 82 S. W. 1039. Where a general exception is taken to the charge and errors are assigned on a particular portion thereof, reversal follows only where the charge as a whole is prejudicial. State v. Zdanowicz, 69 N. J. Law, 619, 55 A. 743. Remarks of judge that a warehouseman is not protected from prosecution for plain stealing while construing statute are not prejudicial where court states that he does not intimate that defendant did such thing. State v. Humphreys, 43 Or. 44, 70 P. 824.

12. Eliminating self defense and defense of another. Havens v. Com. [Ky.] 82 S. W. 369. Charge on self defense ignoring apparent danger. Waller v. People, 209 Ill. 284,

not cured by another correct one in conflict therewith,[13] and where instructions are irreconcilable upon a material issue, they are erroneous, regardless of which is right.[14] An instruction undertaking to cover all the elements of the offense and omitting one is fatally defective.[15] A charge admonishing against assessing punishment by lot should be prefaced by the clause "If you find defendant guilty;"[16] but the failure of the trial court to repeat in every clause of an instruction that the jury "must find from the evidence" is not reversible error.[17] An instruction designating defendant by the name and aliases used in the indictment to which he has pleaded is not error.[18]

Invading province of jury or charging on facts.[19]—Instructions must not invade the province of the jury,[20] or assume the existence of facts[21] not admitted or undisputed,[22] but admitted or conceded facts may be assumed.[23] In many states the court is forbidden to charge on the weight of the evidence[24] or intimate

70 N. E. 681. Charge on manslaughter ignoring element of unlawfulness. State v. Adams [S. C.] 47 S. E. 676. Omission of words "willfully and corruptly" in perjury case. Quigg v. People, 211 Ill. 17, 71 N. E. 886. Inadvertent use of phrase "preponderance of evidence." State v. Rivers [Iowa] 98 N. W. 785. Reasonable doubt. State v. Newman [Minn.] 101 N. W. 499. Charge on insanity. Schissler v. State [Wis.] 99 N. W. 593. Intent. Sullivan v. State [Ga.] 48 S. E. 949. Definition of intoxicating liquors. Murry v. State [Tex. Cr. App.] 79 S. W. 568. The inadvertent omission of a word supplied by the context is immaterial. Jackson v. State [Tex. Cr. App.] 80 S. W. 83. Error in one instruction will be presumed cured by others not in record. Mitchell v. State [Ark.] 83 S. W. 1050. An instruction erroneous for the omission of some necessary element may be cured by another in which the hiatus is supplied. Monroe v. State [Tex. Cr. App.] 81 S. W. 726. General rules such as reasonable doubt, etc., need not be repeated with reference to each particular theory or paragraph of the charge. Delahoyde v. People [Ill.] 72 N. E. 732; Carter v. State [Ga.] 49 S. E. 280.

13. State v. Williams [Wash.] 78 P. 780; Harris v. People [Colo.] 75 P. 427; State v. Clark, 134 N. C. 698, 47 S. E. 36. Manslaughter and aggravated assault. Posey v. State [Tex. Cr. App.] 78 S. W. 689. Instruction putting burden on defendant. Scott v. State [Tex. Cr. App.] 79 S. W. 543. The jury are not supposed to know which is correct. State v. Morgan [N. C.] 48 S. E. 670.

14. Right and wrong test and irresistible impulse test in insanity. State v. Keerl, 29 Mont. 508, 75 P. 362.

15. Embezzlement, consent of prosecutor omitted. State v. Lentz [Mo.] 83 S. W. 970.

16. Hart v. State [Tex. Cr. App.] 82 S. W. 652.

17. Blashfield, Instructions to Juries, § 79. Bell v. State [Ga.] 48 S. E. 197.

18. Hauser v. People, 210 Ill. 253, 71 N. E. 416.

19. See 2 Curr. L. 356.

20. People v. Nunley, 142 Cal. 105, 75 P. 676; Lyles v. U. S., 20 App. D. C. 559. Charge on relative credibility of dying declarations and other evidence. Sims v. State, 139 Ala. 74, 36 So. 138. Instruction on sufficiency of corroboration of prosecutrix held unobjectionable. State v. Smith [Iowa] 100 N. W. 40. It is error to tell the jury that if they believe the evidence they should convict. State v. Green, 134 N. C. 658, 46 S. E. 761.

21. Arnold v. State [Tex. Cr. App.] 83 S. W. 205. That witness is impeached by evidence of contrary statements. McKinney v. Com. [Ky.] 82 S. W. 263. Assuming self defense where defendant denies striking. State v. Lindsey [S. C.] 47 S. E. 389. Assuming that witness will be witness in future civil suit. People v. Noblett, 96 App. Div. 293, 89 N. Y. S. 181. An instruction that any "shift or device" to evade the liquor law is unlawful is not objectionable, though defendant was on trial merely for an unlawful sale. State v. Green [Kan.] 77 P. 95. Instruction held bad as assuming that statements made before grand jury were confessions. Barnes v. State [Tex. Cr. App.] 81 S. W. 735. Abstract charge on law of murder in perpetration of robbery held not prejudicial as assuming facts not proven. People v. Lawrence, 143 Cal. 148, 76 P. 893. Former conviction held not assumed. State v. Chappell, 179 Mo. 324, 78 S. W. 585. Instruction against accessory held not to assume commission of crime. Parks v. State [Tex. Cr. App.] 79 S. W. 537. Arrest after flight held not assumed. State v. Knowles [Mo.] 83 S. W. 1083.

22. Charge on accomplice testimony and necessity of corroboration held erroneous as assuming that it made out a case and was true. Hart v. State [Tex. Cr. App.] 82 S. W. 652; Washington v. State [Tex. Cr. App.] 82 S. W. 653. In support of an instruction assuming a fact, it will be presumed, in the absence of the evidence, that it stood admitted or undisputed. People v. Allen [Cal.] 77 P. 948.

23. Burnett v. State [Ark.] 81 S. W. 382; Delahoyde v. People [Ill.] 72 N. E. 732.

24. Purpose of receiving evidence of defendant's insanity [Rev. Code 1892, § 732]. Maston v. State [Miss.] 36 So. 70; State v. Keert, 29 Mont. 508, 75 P. 362; Flohr v. Territory [Okl.] 78 P. 565. Argumentative instruction on defendant's insanity. Tidwell v. State [Miss.] 36 So. 393; State v. Keerl, 29 Mont. 508, 75 P. 362. Const. art. 6, § 19. People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Donnolly, 143 Cal. 394, 77 P. 177. Statute providing otherwise as to charging on testimony of accomplices is void. People v. Moran [Cal.] 77 P. 777. Request to disregard certain evidence. People v. Nunley, 142 Cal.

its opinion on the facts,[25] but by statute in Rhode Island, the trial judge is authorized, though not required to comment on the evidence,[26] and in that state there is no error in the court's disclosing his opinion.[27] It is not error in New Jersey for the court to call attention to the salient features of the evidence corroborative of an accomplice's testimony,[28] nor to state that no mitigating or extenuating circumstances are shown,[29] and where the disputed questions of fact are clearly left to the jury, the judge's comments and expressions of opinion are not assignable for error.[30] In Georgia, an instruction on the weight to be given defendant's statement should follow the statute.[31]

A charge applying the law to facts introduced by defendant cannot be complained of as a charge on the facts,[32] and the narration of the evidence in defendant's own language is not erroneous, though his story seems unreasonable or incredible.[33]

It is error to charge without qualification that positive evidence is stronger than negative,[34] but an instruction to carefully scan the evidence of alibi is proper,[35] and a statement of the grounds of admissibility of dying declarations is not a charge on the weight of the evidence,[36] though the jury should not be instructed that dying declarations are to be given the same weight and force as if the declarant had been a witness in court.[37]

Reference to the crime as "murder" is not error where the only issue is as to the identity of the perpetrator,[38] and there is no error in charging that the law is no respecter of persons and whether one of the parties is white and the other colored should have no weight with the jury.[39]

Form and propriety of particular charges.[40]—Holdings as to the form and sufficiency of instructions as to burden and degree of proof,[41] presumption of inno-

105, 75 P. 676. Const. art. 4, § 16. State v. Deatherage, 35 Wash. 326, 77 P. 504; State v. Underwood, 35 Wash. 558, 77 P. 863; State v. Thield [Wash.] 78 P. 919. Statement that certain evidence was received as corroborative of other evidence. State v. Keerl, 29 Mont. 508, 75 P. 362. Instruction specifically aimed at defendant's testimony and setting forth principle falsus in uno falsus in omnibus is not error. McCracken v. People, 209 Ill. 215, 70 N. E. 749. For court to dispute counsel and stenographers as to what prosecutrix's evidence was and allow her to answer over conformably to his view is prejudicial. State v. Glindemann, 34 Wash. 221, 75 P. 800. An instruction detailing the facts charged and stating that they must all be proved beyond a reasonable doubt is not on the weight of the evidence. Young v. State [Tex. Cr. App.] 79 S. W. 34. An instruction applying the law to the facts is not objectionable. Carroll v. State [Tex. Cr. App.] 81 S. W. 294. Instruction limiting purpose for which certain evidence was introduced held fatal. Leach v. State [Tex. Cr. App.] 81 S. W. 733. Forgery. Charge on burden and degree of proof held not on weight of evidence. Chenault v. State [Tex. Cr. App.] 81 S. W. 971. Theft; recent possession. Smotherman v. State [Tex. Cr. App.] 83 S. W. 838.

25. Maston v. State [Miss.] 36 So. 70; Mumford v. State [Tex. Cr. App.] 78 S. W. 1063; People v. Weaver, 177 N. Y. 434, 69 N. E. 1094. Definition of murder held not a charge on facts. State v. McDaniel [S. C.] 47 S. E. 384. Charge on flight of accused held not comment on facts. State v. Deatherage, 35 Wash. 326, 77 P. 504. Judge may refer to testimony in deciding a point raised in progress of the trial. Brown v. State, 119 Ga. 672, 46 S. E. 833. Remarks on prosecutrix's reluctance to inform against defendant. Denton v. State [Tex. Cr. App.] 79 S. W. 560.

26. State v. Quigley [R. I.] 58 A. 905.

27. State v. Peabody [R. I.] 56 A. 1028.

28. State v. Lyons [N. J. Err. & App.] 68 A. 398.

29. State v. Bectsa [N. J. Err. & App.] 58 A. 933.

30. State v. Simon [N. J. Law] 58 A. 107.

31. Amplification held not reversible. Morgan v. State, 119 Ga. 566, 46 S. E. 836.

32. State v. Adams [S. C.] 47 S. E. 676.

33. People v. Smith [N. Y.] 72 N. E. 931.

34. Minor v. State [Ga.] 48 S. E. 198; Cowart v. State [Ga.] 48 S. E. 198.

35. State v. Worthen [Iowa] 100 N. W. 330.

36. McArthur v. State, 120 Ga. 195, 47 S. E. 553.

37. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042.

38. Dean v. State [Miss.] 37 So. 501.

39. Summerford v. State [Ga.] 49 S. E. 268.

40. See 2 Curr. L. 357.

41. Bell v. State [Ala.] 37 So. 281; State v. Knapp [Ohio] 71 N. E. 705; People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116; People v. Taylor, 92 App. Div. 29, 86 N. Y. S. 996; Burton v. State [Ala.] 37 So. 435; State v. Lax [N. J. Law] 59 A. 18; Quigg v.

cence,[42] presumption of intent of natural and necessary consequences of act,[43] presumption arising from flight,[44] degree of crime,[45] included offenses,[46] intent,[47] responsibility of principals and accessories,[48] definitions of reasonable doubt,[49] instructions on the issue of insanity,[50] intoxication,[51] alibi,[52] and limitations,[53] the purpose and effect of particular evidence,[54] rules for considering evidence in

People, 211 Ill. 17, 71 N. E. 886; State v. Scroggs, 123 Iowa, 649, 96 N. W. 723; State v. Green [Kan.] 77 P. 95; People v. Miles, 143 Cal. 636, 77 P. 666; Barnard v. State, 119 Ga. 436, 46 S. E. 644; Grantham v. State, 120 Ga. 160, 47 S. E. 518; Chenault v. State [Tex. Cr. App.] 81 S. W. 971; Zuckerman v. People [Ill.] 72 N. E. 741; State v. Davis [N. C.] 49 S. E. 162; McCary v. State [Tex. Cr. App.] 80 S. W. 373. Instruction held bad as putting burden on defendant and giving state benefit of doubt. Melton v. State [Tex. Cr. App.] 83 S. W. 822. Several instructions in a homicide case where the evidence was circumstantial held argumentative and misleading. Spraggins v. State, 139 Ala. 93, 35 So. 1000; Bowen v. State [Ala.] 37 So. 233. That jury must convict of higher degree unless "satisfied" that only lower degree was committed. Galloway v. State [Fla.] 36 So. 168. Burden of proving irresponsibility for murder. Porter v. State [Ala.] 37 So. 81; Bell v. State [Ala.] 37 So. 281; State v. Corrivau [Minn.] 100 N. W. 638; Kroell v. State, 139 Ala. 1, 36 So. 1025. Pretermitting consideration of incriminating evidence introduced by defendant. Wilson v. State [Ala.] 37 So. 93. Charge on necessity that evidence be consistent only with theory of guilt, and necessity of satisfying jurors to the extent that each would venture to act upon it with reference to matters of highest concern. Pitts v. State [Ala.] 37 So. 101; Gregory v. State [Ala.] 37 So. 259. Not at liberty to disbelieve as jurors if they believe as men. Lillie v. State [Neb.] 100 N. W. 316. Charge that the only burden on defendant is that of going forward with the evidence is properly refused. Smith v. State [Ala.] 37 So. 423. Instruction as to the effect of the statute requiring the testimony of two witnesses or its equivalent to convict of a capital crime held not misleading. State v. Kelley [Conn.] 58 A. 705. Charge on inferences deducible from facts proven held proper, being in language of Code Civ. Proc. § 1960. People v. Balkwell, 143 Cal. 259, 76 P. 1017. Charge on degree of proof required held misleading. People v. Albers [Mich.] 100 N. W. 908. Modification of request held proper. Mims v. State [Ala.] 37 So. 354; Gainey v. State [Ala.] 37 So. 355; Mitchell v. State [Ark.] 83 S. W. 1050.

42. Commonwealth v. Clancy [Mass.] 72 N. E. 842; Wilson v. State [Ala.] 37 So. 93; Bell v. State [Ala.] 37 So. 281; State v. Knapp [Ohio] 71 N. E. 705; United States v. Breese, 131 F. 915; People v. Linares, 142 Cal. 17, 75 P. 308; People v. Miles, 143 Cal. 636, 77 P. 666; Fugitt v. State [Miss.] 37 So. 557. Court need not state that it is an "instrument of proof" and "evidence" in defendant's behalf. People v. Moran [Cal.] 77 P. 777. A charge that "in all doubtful cases this presumption [of innocence] is sufficient to turn the scale in favor of the defendant" is erroneous in not giving defendant the full benefit of reasonable doubt of his guilt. Knapp v. State, 4 Ohio C. C. (N. S.) 184, 25 Ohio Circ. R. 571.

43. State v. Williams [Wash.] 78 P. 780; Clemons v. State [Fla.] 37 So. 647.

44. State v. Knowles [Mo.] 83 S. W. 1083.

45. Error to refuse to charge that a reasonable doubt as to the degree acquits of the degree as to which the doubt is entertained. Coolman v. State [Ind.] 72 N. E. 568.

46. State v. Leuhrsman, 123 Iowa, 475, 99 N. W. 140.

47. Charge ignoring necessity of criminal intent held erroneous in view of its juxtaposition to one on the necessity of motive. State v. Morgan [N. C.] 48 S. E. 670.

48. State v. Bland [Idaho] 76 P. 780; Cortez v. State [Tex. Cr. App.] 83 S. W. 812. Responsibility of accessory. Harrold v. State [Tex. Cr. App.] 81 S. W. 728.

49. Spraggins v. State, 139 Ala. 93, 35 So. 1000; Walker v. State, 139 Ala. 56, 35 So. 1011; Pitts v. State [Ala.] 37 So. 101; Bell v. State [Ala.] 37 So. 281; Lillie v. State [Neb.] 100 N. W. 316; State v. Kellison [W. Va.] 47 S. E. 166; Bothwell v. State [Neb.] 99 N. W. 669; Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269; Alexis v. U. S. [C. C. A.] 129 F. 60; United States v. Breese, 131 F. 915; People v. Nunley, 142 Cal. 105, 75 P. 676; People v. Lewandowski, 143 Cal. 574, 77 P. 467; Barnard v. State, 119 Ga. 436, 46 S. E. 644; O'Dell v. State, 120 Ga. 152, 47 S. E. 577; Mitchell v. State [Ala.] 37 So. 76; Delahoyde v. People [Ill.] 72 N. E. 732; Mays v. State [Neb.] 101 N. W. 979; Tanks v. State, 71 Ark. 459, 75 S. W. 851. Need not be one that a reason can be given for. Owens v. U. S. [C. C. A.] 130 F. 279. **Contra,** People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116; State v. Newman [Minn.] 101 N. W. 499. Reasonable probability of innocence its equivalent. Gainey v. State [Ala.] 37 So. 355.

50. Porter v. State [Ala.] 37 So. 81; Bell v. State [Ala.] 37 So. 281; State v. Keerl, 29 Mont. 508, 75 P. 362; Schissler v. State [Wis.] 99 N. W. 593; Bothwell v. State [Neb.] 99 N. W. 669; Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677; Nugent v. State [Tex. Cr. App.] 80 S. W. 84. Caution not to be imposed upon by "ingenious counterfeit." People v. Manoogian, 141 Cal. 592, 75 P. 177; People v. Nihell [Cal.] 77 P. 916.

51. Bell v. State [Ala.] 37 So. 281; State v. Corrivau [Minn.] 100 N. W. 638; People v. Nihell [Cal.] 77 P. 916; Phillips v. State [Ga.] 49 S. E. 290.

52. Sufficiency of defense. Harris v. State, 120 Ga. 167, 47 S. E. 520; Henderson v. State [Ga.] 48 S. E. 167; State v. Pray [Iowa] 99 N. W. 1065; People v. Lang, 142 Cal. 482, 76 P. 232. Charge on weight of evidence. Commonwealth v. Gutshall, 22 Pa. Super. Ct. 269. Degree of proof required. State v. Worthen [Iowa] 100 N. W. 330. That it is a special plea separate from that of not guilty. Young v. State [Tex. Cr. App.] 79 S. W. 34.

53. Instructions held prejudicial, as confusing and misleading. State v. Snyder [Mo.] 82 S. W. 12.

54. Application to each count of an infor-

general,[55] and of particular kinds of evidence, such as circumstantial evidence,[56] evidence of intoxication and insanity,[57] expert and opinion evidence,[58] acts and declarations of co-conspirators,[59] accomplice testimony,[60] evidence of character of defendant,[61] testimony of defendant,[62] admissions and confessions,[63] and as to the credibility of witnesses,[64] as to the form of the verdict,[65] as to the conduct of the jury's deliberations,[66] as to their power and duty to judge the effect of the evidence,[67] as to their duty in arriving at a decision,[68] and their power to fix the punishment,[69] are collected in the notes.

mation. State v. Darling [Vt.] 58 A. 974. Inference arising from flight. State v. Poe, 123 Iowa, 118, 98 N. W. 587; State v. Deatherage [Wash.] 77 P. 504.

55. United States v. Breese, 131 F. 915.

56. Several instructions refused as argumentative and misleading. Spraggins v. State, 139 Ala. 93, 35 So. 1000. Probability that another may have done the shooting calls for acquittal. Spraggins v. State, 139 Ala. 93, 35 So. 1000. Circumstances capable of explanation on any reasonable hypothesis other than guilt. Bowen v. State [Ala.] 37 So. 233; Lillie v. State [Neb.] 100 N. W. 316; State v. Jackson [S. C.] 46 S. E. 538. As cogent as any other. State v. Coleman [S. D.] 98 N. W. 175. Flight of accused. State v. Stantz, 33 Wash. 444, 74 P. 588. Right to consider other crimes as evidence of conspiracy. Commonwealth v. Clancy [Mass.] 72 N. E. 842. That if from the "established facts" defendant's guilt appears, the verdict rests on a foundation as secure and reliable as though supported by the testimony of eye witnesses. People v. Smith [N. Y.] 72 N. E. 931. Where the evidence is circumstantial, the court need not instruct as to any particular circumstance, but a general instruction on circumstantial evidence is sufficient. Smotherman v. State [Tex. Cr. App.] 83 S. W. 838.

57. People v. Nihell [Cal.] 77 P. 916, and cases cited.

58. Significance to be attached to defendant's objection to expert's stating his reasons for his opinion and the weight those reasons would have probably been entitled to had they been stated. Withaup v. U. S. [C. C. A.] 127 F. 530.

59. Failure to specifically instruct as to purpose of receiving evidence of acts and declarations of co-conspirators held not error. Allen v. Com. [Ky.] 82 S. W. 589.

60. People v. Balkwell, 143 Cal. 259, 76 P. 1017; People v. Ruiz [Cal.] 77 P. 907; Loessin v. State [Tex. Cr. App.] 81 S. W. 715. Caution against conviction on accomplice testimony alone while usual is not necessary. State v. Simon [N. J. Law] 58 A. 107.

61. Bell v. State [Ala.] 37 So. 281; Lillie v. State [Neb.] 100 N. W. 316; Henderson v. State [Ga.] 48 S. E. 167; People v. Childs, 90 App. Div. 58, 85 N. Y. S. 627; People v. Bonler [N. Y.] 72 N. E. 226; United States v. Breese, 131 F. 915; State v. Stentz, 33 Wash. 444, 74 P. 588; Cox v. State [Ark.] 81 S. W. 1056.

62. People v. Wells [Cal.] 78 P. 470; Alexis v. U. S. [C. C. A.] 129 F. 60; McCracken v. People, 209 Ill. 215, 70 N. E. 749; Donner v. State [Neb.] 100 N. W. 305; People v. Tibbs, 143 Cal. 100, 76 P. 904; Waller v. People, 209 Ill. 284, 70 N. E. 681; Walker v. State [Ga.] 48 S. E. 184; Sutherland v. State [Ga.] 48 S. E. 915; Schultz v. People, 210 Ill. 196, 71 N. E. 405. An instruction that the credibility of witnesses was for the jury; that they should consider the interest each one had in the case, his manner of giving, and the opportunity he had for observing, etc., was not objectionable on the ground that it cautioned the jury against the testimony of the defendants. People v. Blanchard [Mich.] 98 N. W. 983.

63. Admissions. State v. Coleman [S. D.] 98 N. W. 175; People v. Buckley, 143 Cal. 375, 77 P. 169; State v. Sargood [Vt.] 58 A. 971; People v. Tibbs, 143 Cal. 100, 76 P. 904; People v. Ruiz [Cal.] 77 P. 907. Confessions. Morgan v. State [Ga.] 48 S. E. 238. To charge that what defendant said against himself is presumed to be true and what he said for himself need not be considered is error. State v. Hunter, 181 Mo. 316, 80 S. W. 955. A charge "sane men who are innocent as a rule do not make confession of crime" is erroneous, because capable of more than one meaning and invades the province of the jury, being an expression of experience as to the conduct and actions of men. Knapp v. State, 4 Ohio C. C. (N. S.) 184, 25 Ohio Circ. R. 571, rvd. 71 N. E. 705.

64. United States v. Breese, 131 F. 915; People v. Miles, 143 Cal. 636, 77 P. 666; Dickerson v. State [Ga.] 48 S. E. 942; O'Dell v. State, 120 Ga. 152, 47 S. E. 577. Bad character. Ector v. State [Ga.] 48 S. E. 315. Contradictory statements. Pitts v. State [Ala.] 37 So. 101. Credibility of defendant. Pitts v. State [Ala.] 37 So. 101; Waller v. People, 209 Ill. 284, 70 N. E. 681. Falsus in uno, etc. State v. Burns [Nev.] 74 P. 983; Wilkerson v. State [Ala.] 37 So. 265.

65. Thompson v. State, 120 Ga. 132, 47 S. E. 566.

66. A requested charge that "race, color, or previous conditions must not enter into the deliberations of the jury" is properly refused. State v. Nix, 111 La. 812, 35 So. 917. That defendant is on trial for a particular homicide, and that other killings in county be not considered. Bell v. State [Ala.] 37 So. 281.

67. Hayner v. People [Ill.] 72 N. E. 792.

68. That each individual must be satisfied is improper. Spraggins v. State, 139 Ala. 93, 35 So. 1000; Wilson v. State [Ala.] 37 So. 93; Pitts v. State [Ala.] 37 So. 101; State v. Coleman [S. D.] 98 N. W. 175. "Ninety and nine" charge. Bell v. State [Ala.] 37 So. 281. To not consider punishment. State v. Wilson [Iowa] 99 N. W. 1060. Duty to state and to defendant. Id.

69. Williams v. State, 119 Ga. 425, 46 S. E. 626. Stating maximum too high is error. Steele v. State [Tex. Cr. App.] 81 S. W. 962. Instruction authorizing jury to fix punish-

(§ 10) *F. Custody of jury, conduct and deliberations.*[70]—The jury should not be allowed to separate while deliberating on their verdict under circumstances such that any harm could possibly come to the defendant from the separation,[71] but in the absence of a showing of prejudice, temporary or slight separation will not reverse,[72] though prejudice will be presumed from separation in California.[73] Under the statute of Washington, allowing separation on consent, the defendant's counsel may consent for him,[74] and where the jury are admonished as to its duties on separation, failure to repeat the admonition on subsequent separations is not error.[75] Where veniremen have not been sworn as jurors, the rule in capital cases forbidding them to separate has no application.[76] Communication with jurymen during the trial is improper,[77] and after retirement, fatal,[78] and all communications between judge and jury must take place in open court in the presence of defendant.[79]

Where the statute does not require that the officer in charge of the jury shall be specially sworn, it is not error that they were not all the time in the custody of the sworn officer.[80]

The jury may carry from the bar papers used in evidence,[81] but exhibits other than papers should not be taken to the jury room in Idaho,[82] and the indictment on which is plainly written the verdict rendered on a former trial should not be given the jury to take out with them.[83]

The jury should not discuss or consider the absence of witnesses and defendant's failure to account for the whereabouts of third persons,[84] nor discuss matters

ment where they could not fix it is fatal. Hayner v. People [Ill.] 72 N. E. 792.

70. See 2 Curr. L. 363.

71. Murder. Waller v. People, 209 Ill. 284, 70 N. E. 681. Where a juror was seen conversing with an outsider, the burden is on the state of proving nonprejudice and is met by showing that the conversation was on a domestic matter entirely foreign to the trial. Vowell v. State [Ark.] 78 S. W. 762. A separation is allowable in Virginia where the maximum punishment does not exceed 10 years. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

72. Temporary absence of one from others held not prejudicial. Waller v. People, 209 Ill. 284, 70 N. E. 681; Commonwealth v. Williams [Pa.] 58 A. 922. Temporary absence of part of jurors, and presence of veniremen in jury room held not material. Jones v. State [Tex. Cr. App.] 83 S. W. 198. Jury attending theatre and sitting in two separate boxes facing each other. State v. Levy [Idaho] 75 P. 227. Separation after conclusion of instructions but before case has been finally committed is not reversible in absence of showing of prejudice. State v. Ferrell, 69 Ohio St. 521, 69 N. E. 995. Separation of one juror from the rest under surveillance of bailiff held not fatal. May v. State [Ga.] 48 S. E. 153. Whites and negroes on jury taking meals apart but within view is not error, nor is allowing juror to visit place where horse was tied, still within view. Lounder v. State [Tex. Cr. App.] 79 S. W. 552.

73. People v. Adams, 143 Cal. 208, 76 P. 954.

74. Ball. Ann. Codes & St. § 6947. State v. Stockhammer, 34 Wash. 262, 75 P. 810.

75. State v. Stockhammer, 34 Wash. 262, 75 P. 810.

76. Bell v. State [Ala.] 37 So. 281.

77. Communication by father of deceased to juror held not reversible. State v. Daniels, 134 N. C. 671, 46 S. E. 991. That during a murder trial some of the jurors read an account of another similar murder is not ground for reversal, no prejudice being shown. Schissler v. State [Wis.] 99 N. W. 593. For prosecutor to accompany a juror home to dinner and stay until after court convened was fatal. Mann v. State [Tex. Cr. App.] 83 S. W. 195.

78. It is error to deliver a sealed letter to a juror after retirement. State v. Bland [Idaho] 76 P. 780. Communication by court bailiff to jury held violative of Burns' Ann. St. 1901, § 1897, and to vitiate the verdict. Coolman v. State [Ind.] 72 N. E. 568. Leaving the door of the jury room unguarded for a short time is not reversible where no prejudice is shown, though the prosecuting attorney made statements that indicated knowledge of the state of the jury's deliberations. State v. Neighbaker [Mo.] 83 S. W. 523.

79. For judge to go to jury room and hold converse with juror or jury after retirement is error. State v. Bland [Idaho] 76 P. 780.

80. Territory v. Dooley [Ariz.] 78 P. 138; State v. Kellison [W. Va.] 47 S. E. 166; State v. Crilly [Kan.] 77 P. 701.

81. Code 1887, § 3388. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

82. State v. Crea [Idaho] 76 P. 1013.

83. Hjeronymus v. State [Tex. Cr. App.] 83 S. W. 708.

84. Hanna v. State [Tex. Cr. App.] 79 S. W. 544.

outside the evidence in the case,[85] and discussion by jurors of defendant's failure to testify will vitiate their verdict.[86] Conflict in the evidence should be reconciled if possible.[87] A verdict arrived at by lot will be set aside.[88]

Any conduct of the judge amounting to coercion of a verdict is fatal,[89] and a discharge of the jury for failure to agree without a judicial investigation of whether they can agree, and entry thereof on the record operates as an acquittal, though the judge was satisfied in his own mind they could not agree.[90]

(§ 10) *G. Verdict.*[91]—When polling the jury, it is not necessary to call each by name or require an audible answer.[92] Bad spelling[93] or ungrammatical construction will not vitiate a verdict,[94] and writing by some juror the value of property stolen in the blank verdict submitted with the charge is not prejudicial.[95] An informal verdict, received without objection by defendant or his counsel, though not sufficient basis for judgment, will not be ground for discharge, but only entitles him to a new trial.[96] A general verdict of "guilty as charged" is sufficient as a rule,[97] but where the jury attempt to set out a description of the offense and it is not responsive to the indictment, it is bad;[98] and where defendant pleads not guilty and autrefois acquit, a verdict is necessary on each issue, and judgment entered on a general verdict of guilty will be set aside.[99] Where defendant pleads

85. Juror offered personal opinion as to credibility of witness based on knowledge of him, and argued that an example should be made of somebody to stop killing. Riley v. State [Tex. Cr. App.] 81 S. W. 711. Jurors visited scene, drew a plat and used it in discussing case, and one stated that he knew deceased was a law-abiding man. Logan v. State [Tex. Cr. App.] 81 S. W. 721. Juror made statements derogatory of defendant's general character. Crow v. State [Tex. Cr. App.] 82 S. W. 1033. Juror stated that he knew defendant kept saloon because he had drunk beer there. State v. Duncan [Kan.] 78 P. 427. Juror stated that he knew defendant was lying because he knew train did not stop, etc. Dixon v. State [Tex. Cr. App.] 79 S. W. 310. Juror stated that defendant had assaulted prosecutor on a prior occasion. Mann v. State [Tex. Cr. App.] 83 S. W. 195. Other offenses were discussed. Robbins v. State [Tex. Cr. App.] 83 S. W. 690. Failure on defendant's request to summon juror who had stated that foreman said they must give defendant the death penalty or he would be hung before morning. Lax v. State [Tex. Cr. App.] 79 S. W. 579.

86. State v. Rambo [Kan.] 77 P. 563; Brogden v. State [Tex. Cr. App.] 80 S. W. 378. Showing held insufficient to reverse. Mason v. State [Tex. Cr. App.] 81 S. W. 718.

87. State v. Dyer [Del.] 58 A. 947.

88. Sanders v. State [Tex. Cr. App.] 78 S. W. 518.

89. Charge on attempt first given after jury came back second time and full disclosure of their position had been made. People v. Stouter, 142 Cal. 146, 75 P. 780. To urge the jury to "get together and make a verdict" is prejudicial. State v. Chambers [Idaho] 75 P. 274; State v. Nelson, 181 Mo. 340, 80 S. W. 947; United States v. Densmore [N. M.] 75 P. 31. Threat to punish jury by keeping them locked up during adjournment. State v. Eathly [Mo.] 83 S. W. 1081. Urging held not prejudicial. People v. Miles, 143 Cal. 636, 77 P. 666.

90. State v. Klauer [Kan.] 78 P. 802.

91. See 2 Curr. L. 364.

92. Brown v. State [Ala.] 37 So. 408.

93. Bain v. State [Tex. Cr. App.] 79 S. W. 814. The incorrect spelling of defendant's name is immaterial, it being idem sonans, and the word "defendant" being used. Ewert v. State [Fla.] 37 So. 334. We "fine" defendant guilty and assess a fine of $100 is good. Pruett v. State [Ala.] 37 So. 343.

94. "Assault with intent to do great bodily harm" is sufficient, though the statute instead of "do" reads "commit." State v. Leuhrsman, 123 Iowa, 476, 99 N. W. 140.

95. State v. Motto [Iowa] 98 N. W. 600.

96. Waddle v. State [Tenn.] 82 S. W. 827.

97. State v. Pollock, 105 Mo. App. 273, 79 S. W. 980. Where there are several material counts, a general verdict of guilty is good in the absence of a request to find on some particular one. Townley v. State [Tex. Cr. App.] 81 S. W. 309. A general conviction is not objectionable where defendants under the evidence could have been convicted as principals either in the first or second degree, the punishment in both cases being the same. Lofton v. State [Ga.] 48 S. E. 908. Where counsel for the state abandons everything in the indictment except the least heinous offense included in the indictment and the court so instructs, a general verdict of guilty as charged is sufficient and will be regarded as a conviction of the lowest degree. Johnson v. State [Ga.] 48 S. E. 951.

98. State v. Pollock, 105 Mo. App. 273, 79 S. W. 980. A verdict of guilty of larceny from "a" person is insufficient; it should designate the particular person alleged in the indictment. State v. McGee, 181 Mo. 312, 80 S. W. 899.

Contra: Unnecessary and repugnant words in a verdict may be rejected as surplusage, though added to the correct verdict they define an offense known to the law, but not charged in the indictment. State v. Henry, 98 Me. 561, 57 A. 891.

99. State v. Creechley, 27 Utah, 142, 75 P. 384; Spraggins v. State, 139 Ala. 93, 35 So. 1000.

guilty to the charge of former conviction, and the count charging it is not read to the jury, failure to return a verdict as to that charge is of no harm to defendant.[1] A verdict of conviction on each of two counts charging separate offenses may be found, but the better practice is to find a general verdict for the two cognate offenses.[2] Silence of the verdict as to a particular count operates as an acquittal on that count,[3] and in Georgia a general verdict of guilty is referred to the count charging the highest offense, and a verdict of guilty of a named offense will be construed as a conviction of the highest degree of that offense;[4] but in Texas, where the principal and an included offense are submitted, the verdict must state the offense of which defendant is convicted.[5] Where the essence of the offense charged in each of two counts is the same, an acquittal of one bars conviction on the other;[6] but where both counts are predicated on the same fact, but allege different offenses, an acquittal on one does not require an acquittal on the other.[7] Where a crime is punishable under the indeterminate sentence law, the jury are not required to fix the time of imprisonment,[8] and a finding of defendant's age is not necessary to support a sentence under that law.[9] Jurors cannot impeach their own verdicts, as by stating that they agreed upon persuasion that the punishment would be light.[10]

§ 11. *New trial and arrest of judgment. Writ of error coram nobis.*[11]—The harmful effect of error is elsewhere treated.[12]

The grounds.[13]—A new trial may be granted upon discovery that a juror was prejudiced[14] or disqualified,[15] for surprise in the testimony of the party's witnesses,[16] for misconduct of counsel for the state[17] or the jury,[18] for insufficiency of the evidence,[19] and for errors occurring at the trial.[20] But not because witness

1. People v. Chadwick, 143 Cal. 116, 76 P. 884.

2. Johnson v. Com., 102 Va. 927, 46 S. E. 789.

3. Johnson v. Com., 102 Va. 927, 46 S. E. 789; State v. McAnally, 105 Mo. App. 333, 79 S. W. 990.

4. Thomas v. State [Ga.] 49 S. E. 273; Dickerson v. State [Ga.] 49 S. E. 275.

5. Winzel v. State [Tex. Cr. App.] 83 S. W. 187.

6. State v. Headrick, 179 Mo. 300, 78 S. W. 630.

7. State v. Wills [Mo. App.] 80 S. W. 311.

8, 9. Herder v. People, 209 Ill. 50, 70 N. E. 674.

10. Territory v. Dooley [Ariz.] 78 P. 138.

11. See 2 Curr. L. 365.

12. See post, § 15.

13. See 2 Curr. L. 365.

14. Ellis v. Territory, 13 Okl. 633, 76 P. 159. Discretion in denying held not abused, evidence conflicting. Lounder v. State [Tex. Cr. App.] 79 S. W. 552; Schrader v. State [Miss.] 36 So. 385; State v. Levy [Idaho] 75 P. 227. New trial will not be granted for subsequent discovery of evidence that a juror had expressed an opinion as to defendant's guilt, where he so stated on his voir dire and was not challenged either peremptorily or for cause, though defendant had challenges unused when the jury was accepted. Schrader v. State [Miss.] 36 So. 385. Not ground in South Dakota. State v. Coleman [S. D.] 98 N. W. 175. No inquiry on voir dire and no showing that counsel was not cognizant of facts. Webster v. State [Fla.] 36 So. 584. Statement by juror that after the trial began he remembered that accused had been brought up several times before on similar charges, but that he had forgotten it on his voir dire. State v. Druxinman, 34 Wash. 257, 75 P. 814. Prejudice held not shown. Information from mere rumor. Vowell v. State [Ark.] 78 S. W. 762.

15. Commonwealth v. Wong Chung [Mass.] 71 N. E. 292; Jordan v. State, 119 Ga. 443, 46 S. E. 679.

16. Defendant must show that he can procure other testimony. Commonwealth v. Bavarian Brew. Co. [Ky.] 80 S. W. 772.

17. People v. Sing Lee [Cal.] 78 P. 636.

18. Discussing defendant's failure to testify. Brogden v. State [Tex. Cr. App.] 80 S. W. 378; State v. Rambo [Kan.] 77 P. 563.

19. Robbins v. State, 119 Ga. 570, 46 S. E. 834. In Louisiana the allegation that the verdict is contrary to the law and the evidence specifies no error and is entitled to no consideration. State v. Henderson [La.] 36 So. 950.

20. Not for refusal of continuance where it appears by the motion that the testimony of the absent witness was in direct conflict with that of accused. Meadows v. State [Ark.] 78 S. W. 761. The refusal of a continuance is no ground for new trial where the witness dies before the motion for new trial is acted upon. Scoville v. State [Tex. Cr. App.] 81 S. W. 717. Not for variance between indictment and proof as to ownership of burglarized premises. Mass v. State [Tex. Cr. App.] 81 S. W. 45. Should be granted for error in excluding material evidence offered by defendant. Affidavits of 20 people to prove material fact excluded at trial held sufficient ground, the evidence being neither cumulative nor impeaching, and being of-

in a capital case received a part of the reward offered for the arrest and conviction of the guilty person,[21] nor because of the disqualification of grand jurors returning the indictment ascertainable before arraignment,[22] nor because of defendant's ignorance of the law and of his right to examine certain witnesses, though he was unrepresented by counsel.[23] Error in overruling a motion for change of venue[24] and excessiveness of sentence[25] cannot be raised by this motion. Refusal to grant new trial for incompetence of witness on ground of prior conviction of felony will not be reviewed where no diligence is shown, even on appeal to procure the record.[26] Where there is nothing in the record showing the race of the jurors, the refusal of a new trial on the ground that defendant, a negro, was tried by a jury of white men, is proper.[27] The grant of a new trial to one conspirator does not require that a new trial be granted to any co-conspirator tried and convicted with him.[28]

Newly discovered evidence[29] is one of the well recognized grounds,[30] but applications on this ground are regarded with disfavor,[31] and the applicant must satisfy the court that the proposed evidence is competent and material,[32] credible,[33] not merely cumulative,[34] impeaching or contradictory,[35] such as to probably affect the result,[36] and that he could not by the exercise of proper diligence have procured the evidence for the previous trial.[37] Where it appears that the jury did not have the real case before it but acted on an erroneous assumption as to the facts, which may have been material, a new trial should be granted as of course.[38] Defendant is not entitled to a new trial in order that he may avail himself of the testimony of a witness unaffected by an indictment for perjury under which he has since the trial been acquitted.[39] Laches in applying may defeat the motion.[40]

fered at trial and rejected. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042.

21. State v. Levy [Idaho] 75 P. 227.

22. Davis v. State [Ga.] 48 S. E. 305.

23. Lopez v. State [Tex. Cr. App.] 80 S. W. 1016.

24. The remedy is by exception to the ruling. Williford v. State [Ga.] 48 S. E. 962.

25. Whittington v. State [Ga.] 48 S. E. 948; Bradley v. State [Ga.] 48 S. E. 981.

26. Bise v. U. S. [Ind. T.] 82 S. W. 921.

27. Merriweather v. Com. [Ky.] 82 S. W. 592.

28. United States v. Cohn, 128 F. 615.

29. See 2 Curr. L. 366.

30. Defendant held entitled on showing that important evidence for the government was false. United States v. Radford, 131 F. 378.

31. People v. Gonzales, 143 Cal. 605, 77 P. 448; State v. Jones, 112 La. 980, 36 So. 825.

32. Specific act of deceased 28 years before showing him to have been a dangerous man. State v. Ronk, 91 Minn. 419, 98 N. W. 334. Will not be granted where proposed evidence is hearsay. State v. Jones, 112 La. 980, 36 So. 825.

33. Tipton v. State, 119 Ga. 304, 46 S. E. 436; Dickerson v. State [Ga.] 48 S. E. 942.

34. State v. Coleman [S. D.] 98 N. W. 175; Ford v. State [Neb.] 98 N. W. 807; State v. Levy [Idaho] 75 P. 227; Tipton v. State, 119 Ga. 304, 46 S. E. 436; Graff v. People, 208 Ill. 312, 70 N. E. 299; Bickers v. State, 120 Ga. 172, 47 S. E. 515; State v. Bates [Mo.] 81 S. W. 408; State v. Carpenter [Mo.] 81 S. W. 410; State v. Sparks, 112 La. 418, 36 So. 479. Cause of death. State v. Underwood [Wash.] 77 P. 863. Evidence held not cumulative. Bastardy case. State v. Lowell, 123 Iowa, 427, 99 N. W. 125.

35. Spaulding v. State, 162 Ind. 297, 70 N. E. 243; Monts v. State, 120 Ga. 144, 47 S. E. 574; Jones v. State [Ark.] 80 S. W. 1088; McClarney v. State [Tex. Cr. App.] 80 S. W. 1142.

36. State v. Coleman [S. D.] 98 N. W. 175; Ford v. State [Neb.] 98 N. W. 807; Lillie v. State [Neb.] 100 N. W. 316; People v. Buckley, 143 Cal. 375, 77 P. 169; People v. Gonzales, 143 Cal. 605, 77 P. 448; Bickers v. State, 120 Ga. 172, 47 S. E. 515; Lopez v. State [Tex. Cr. App.] 80 S. W. 1016; Townley v. State [Tex. Cr. App.] 81 S. W. 309; People v. Sing Yow [Cal.] 78 P. 235; Kluting v. State [Tex. Cr. App.] 80 S. W. 84.

37. State v. Gonzales, 143 Cal. 605, 77 P. 448; Gaines v. State, 120 Ga. 137, 47 S. E. 571; State v. Sparks, 112 La. 418, 36 So. 479; Monts v. State, 120 Ga. 144, 47 S. E. 574; Archibald v. State [Tex. Cr. App.] 83 S. W. 189; Blakeley v. State [Ark.] 83 S. W. 948. Diligence held sufficient. State v. Lowell, 123 Iowa, 427, 99 N. W. 125. Lack of diligence held not excused by averment of want of knowledge as to facts. Rape case, age of prosecutrix. State v. Smith [S. D.] 100 N. W. 740. Immaterial that defendant was unrepresented by counsel and ignorant of his rights. Appointment of counsel being necessary only in capital cases. Lopez v. State [Tex. Cr. App.] 80 S. W. 1016.

38. State v. Lowell, 123 Iowa, 427, 99 N. W. 125.

39. Bennett v. State [Tex. Cr. App.] 81 S. W. 30.

A motion in arrest of judgment[41] lies only on account of some intrinsic defect apparent on inspection of the record,[42] and the objection must of course be one which is not required to be made at the trial.[43] Judgment will be arrested where defendant was not present when the verdict was received, but a new trial and not absolute discharge is the extent of his relief.[44] Failure of the record to show that a venire facias had been issued for the summoning of the grand jury is not ground of a motion in arrest,[45] and judgment will not be arrested when the part of the verdict that is repugnant to the indictment may be rejected as surplusage.[46]

A motion to set aside a judgment,[47] like a motion in arrest, must be predicated on some defect apparent on the face of the record and differs from it only in the time at which it should be made.[48] In Georgia, the silence of the record as to defendant's presence when the verdict was rendered and sentence pronounced,[49] or its failure to show that defendant was asked whether there was any reason why sentence should not be pronounced upon him, is no ground for setting aside or arresting the judgment, it not being the practice in that state to enter such fact.[50]

A writ of error coram nobis,[51] in the absence of statutory inhibition, may be issued by any court of common law jurisdiction,[52] is applicable as well to criminal as to civil cases,[53] and lies to correct an error of fact in respect to a matter affecting the validity and regularity of the proceedings in the same court in which the judgment was rendered and where the record is, when the error assigned is not for any fault of the court.[54] It may be applied for and issue at any time, though practically obsolete, as the same purpose may be attained by motion.[55] The denial of a motion to set aside the proceedings on the ground that defendant was insane at the time of trial is tantamount to a determination by the court that he was sane, leaves the verdict in force against him, and is erroneous.[56] The authority and jurisdiction of the district court of Nebraska to grant new trials in criminal cases are derived from the statute, and that court cannot, in the exercise of its equity jurisdiction, grant a new trial in such case on the ground of newly discovered evidence, because the time to apply therefor under the statute has expired.[57]

Practice on motion.[58]—Time to move for new trial is generally regulated by statute,[59] and briefs of evidence must be filed within the statutory or allowed time

40. Laches held not fatal. United States v. Radford, 131 F. 378.
41. See 2 Curr. L. 367.
42. State v. Henry, 98 Me. 561, 57 A. 891; State v. Smith [Me.] 58 A. 779. A motion in arrest can be taken for defect in the information only when founded on a defect enumerated in Pen. Code, § 1922. State v. Tully [Mont.] 78 P. 760.
43. See post, § 14.
44. Commonwealth v. Gabor [Pa.] 58 A. 278.
45. State v. Pine [W. Va.] 48 S. E. 206.
46. State v. Henry, 98 Me. 561, 57 A. 891.
47. See 2 Curr. L. 367.
48. Lies not for furnishing defendant with incorrect list of witnesses. Regopoulas v. State, 116 Ga. 596, 42 S. E. 1014.
49, 50. Franks v. State [Ga.] 48 S. E. 148.
51. See 2 Curr. L. 367.
52, 53. Fugitt v. State [Miss.] 37 So. 554.
54. As where defendant was insane at the time of the trial. Linton v. State [Ark.] 81 S. W. 608. Lies not to revoke judgment for bias of jurors. Fugitt v. State [Miss.] 37 So. 554
55. A motion to set the trial aside because of defendant's insanity should be treated as an application for the writ and requires an inquiry to determine the truth of the facts alleged in the motion. Linton v. State [Ark.] 81 S. W. 608; Fugitt v. State [Miss.] 37 So. 554.
56. Linton v. State [Ark.] 81 S. W. 608.
57. Hubbard v. State [Neb.] 100 N. W. 153.
58. See 2 Curr. L. 367.
59. By statute in Pennsylvania a new trial in murder cases may be allowed in a term subsequent to that in which the conviction occurred. Act of April 22, 1903 (P. L. 245). But there is no right of appeal from a discharge of the rule for a new trial by the lower court. Commonwealth v. Greason, 208 Pa. 126, 57 A. 349. An application for a new trial at a term subsequent to that at which the judgment was rendered cannot be entertained in Nebraska. Hubbard v. State [Neb.] 100 N. W. 153. Where the statute requires that the motion for new trial be made before judgment, and defendant's motion on all statutory grounds is denied and judgment entered on the same day, he is not en-

or the motion will be dismissed.[60] Motions are addressed in great measure to the discretion of the court,[61] but a motion on general grounds addressed to the discretion of the court need not be approved by him and it is error to dismiss it for lack of such approval.[62] In Kentucky, an appeal may be taken by the commonwealth before final judgment to have the law of the case settled by the court, but the appeal cannot interfere with the action of the trial court in granting a new trial.[63] Defendant should produce other evidence than his own affidavit of the facts on which he relies,[64] but a motion on the ground that the judge was absent from the court room during the argument may properly be presented by affidavit, and the mere unsworn statement of the judge in contradiction will not suffice.[65] An application on the ground of prejudice of a juror must identify the juror.[66] Counter affidavits are properly received and the motion denied where the applicant's showing is overcome,[67] and where a juror was stood aside for cause insufficiently proved, additional evidence of his disqualification may be produced on the hearing of the motion.[68] In passing on the motion, the trial judge has power to correct the minutes to make them speak the truth,[69] and the fact that the indictment was duly returned and filed in the county where it was found may be shown on motion for new trial in the county to which the venue was changed.[70] A juror may be sworn to show that defendant's failure to testify was discussed in the jury room,[71] and testimony of jurors showing misconduct vitiating their verdict will not be excluded merely because the court would discipline such misconduct.[72] Affidavits of jurors as to unlawful conduct in arriving at their verdict have no probative force.[73]

Motions in arrest must be filed before judgment.[74] An unsworn statement in the motion will not overcome the presumption that the trial court followed the law in ordering a special grand jury.[75] Extrinsic evidence cannot be received at a hearing on motion in arrest,[76] but if the record before the court is not a true record, the court may permit its amendment at any time before deciding the question raised by motion.[77] The verdict may be set aside and a new trial ordered on motion in arrest and for discharge,[78] and the allowance of a motion in arrest does not operate as an acquittal, but only places defendant in the position of one against whom no prosecution has been begun.[79]

titled to another motion on the judgment being set aside for a formal defect and again pronounced. People v. Walker, 142 Cal. 90, 75 P. 658. Amended motions after time are discretionary. Carusales v. State [Tex. Cr. App.] 82 S. W. 1038.

60. Blakeman v. State [Ga.] 49 S. E. 261.

61. State v. Jones, 112 La. 980, 36 So. 825.

62. Harris v. State, 120 Ga. 196, 47 S. E. 573.

63. Cr. Code Prac. §§ 335-337. Commonwealth v. Hourigan, 89 Ky. 305, 12 S. W. 550; Commonwealth v. Robinson [Ky.] 84 S. W. 319.

64. State v. Jones, 112 La. 980, 36 So. 825. The motion must be accompanied by the affidavits of witnesses by whom the new facts are expected to be proved or by an excuse for not filing them. Spaulding v. State, 162 Ind. 297, 70 N. E. 243; McClarney v. State [Tex. Cr. App.] 80 S. W. 1142.

65. Bateson v. State [Tex. Cr. App.] 80 S. W. 88.

66. State v. Jones, 112 La. 980, 36 So. 825.

67. Misconduct of juror. State v. Underwood [Wash.] 77 P. 863; State v. Levy [Idaho] 75 P. 227. Qualification of juror. State v. Cafiero, 112 La. 453, 36 So. 492. Newly discovered evidence. People v. Sing Yow [Cal.] 78 P. 235; Townley v. State [Tex. Cr. App.] 81 S. W. 309.

68. Relationship to defendant. Jordan v. State [Ga.] 48 S. E. 352.

69. Presence of accused. Mitchell v. State [Fla.] 33 So. 1009.

70. Martin v. Territory [Okl.] 78 P. 88.

71. State v. Rambo [Kan.] 77 P. 563.

72. Dixon v. State [Tex. Cr. App.] 79 S. W. 310.

73. Bearden v. State [Tex. Cr. App.] 83 S. W. 808.

74. State v. Rosenblatt [Mo.] 83 S. W. 975.

75. Howard v. State [Ark.] 82 S. W. 196.

76. State v. Tully [Mont.] 78 P. 760.

77. State v. Smith [Me.] 58 A. 779.

78. Commonwealth v. Gabor [Pa.] 58 A. 278.

79. State v. Stephenson [Kan.] 76 P. 905; Commonwealth v. Gabor [Pa.] 58 A. 278. Trial and verdict of guilty on an insufficient information does not constitute jeopardy, and defendant need not be discharged on setting the verdict and information aside

§ 12. *Sentence and judgment.*[80]—The court should take evidence as to aggravating or mitigating circumstances before sentencing on a plea of guilty,[81] but a conviction of felony will not be reversed because no evidence of defendant's age was introduced in conformance with the act, confining persons between the ages of 16 and 30 in a reformatory.[82] Where the record fails to show the date of the return of the bill by the grand jury, a sentence in accordance with the law as it was prior to an amendatory act is legal.[83] Sentence of death must substantially follow the statutory language,[84] but immaterial words may be rejected as surplusage.[85] Sentence may be imposed the same day the verdict is rendered if the court does not intend to remain longer in session,[86] but where a felon is convicted at a special term called expressly to try his case, he is entitled to two days' respite before sentence.[87] Sentences imposed by different courts cannot be concurrent,[88] and where the fine imposed is not greater than might be assessed for a single offense, a single judgment and sentence is not objectionable as cumulative, though based on an information charging two offenses.[89] Prior convictions can be considered only on conviction of crime committed subsequent to the prior conviction,[90] and one convicted and sentenced under the habitual criminal act is not after repeal of the act entitled to the parole provided therein.[91] A judge at chambers has no authority to change the judgment.[92] Where defendant in a criminal prosecution removed into the Federal court because the acts complained of were done under color of Federal office is convicted and sentenced in that court in accordance with the state law, either to be executed or imprisoned, he should be delivered to the proper officer of the state for the execution of the sentence, and if a fine is imposed, which is paid, it should be transmitted to the clerk of the court from which the cause was removed.[93] The indeterminate sentence laws of Kansas[94] and Michigan are valid,[95] are prospective in their operation, and under the latter, where no minimum sentence is fixed by the act defining the crime, the court is empowered to fix a minimum not less than six months,[96] but the court need fix no maximum where the statute defining and punishing the crime fixes one.[97] A sentence for the maximum and minimum period of five years is improper,[98] but not absolutely void.[99]

on that ground. State v. Riley [Wash.] 78 P. 1001.

80. See 2 Curr. L. 368.

81. Perjury committed in the presence of the judge. Smith v. People [Colo.] 75 P. 914.

82. Bradburn v. State [Ind.] 71 N. E. 133.

83. Baker v. State, 118 Ga. 787, 45 S. E. 617.

84. Rev. St. 1892, § 2947, providing that sentence shall "be executed within the walls or enclosure of the jail or prison where the prisoner may be confined" is not complied with by a sentence that defendant be taken "to the yard surrounding the jail" and there hung. Webster v. State [Fla.] 36 So. 584.

85. In a sentence for the crime of "robbery, etc.," the etc., is meaningless and the sentence is for robbery only, irrespective of the circumstances of aggravation charged in the indictment. McKevitt v. People, 208 Ill. 460, 70 N. E. 693. The words "at hard labor" in a judgment sentencing to imprisonment cannot be rejected as surplusage in order to uphold the judgment. State v. Houghton [Or.] 75 P. 822.

86. Code Cr. Proc. § 472. People v. Spencer [N. Y.] 72 N. E. 461.

87. Powers v. Com. [Ky.] 83 S. W. 146.

88. Hightower v. Hollis [Ga.] 48 S. E. 969.

89. State v. Darling [Vt.] 58 A. 974.

90. A number of violations of the same statute on the same day and separate convictions thereof will not authorize the increased punishment provided by statute for subsequent convictions, since the statute must be regarded as reformatory and to apply only to offenses committed after conviction and punishment of the prior one. Kinney v. State [Tex. Cr. App.] 79 S. W. 570.

91. Rev. St. 1892, §§ 3788-11. In re Kline, 70 Ohio St. 25, 70 N. E. 511.

92. In re Rex [Kan.] 78 P. 404.

93. State v. Felts, 133 F. 85.

94. Laws 1903, p. 571, c. 375. State v. Tyree [Kan.] 77 P. 290; Id. [Kan.] 78 P. 525. Chapter held to repeal prior statute not mentioned. State v. Knoll [Kan.] 77 P. 580.

95. Pub. Acts 1903, p. 168, No. 136. In re Lambrecht [Mich.] 100 N. W. 606. A law authorizing sentences in which no maximum is fixed is authorized by the constitution of Michigan. In re Campbell [Mich.] 101 N. W. 826.

96. In re Leonard [Mich.] 100 N. W. 579.

97. In re Campbell [Mich.] 101 N. W. 826.

98. In re Cummins [Mich.] 100 N. W. 1008.

§ 13. *Record or minutes and commitment.*[1]—The record is conclusive,[2] but may be amended by the court,[3] though only on record evidence;[4] and the action of the trial judge in so amending his minutes as to make them speak the truth is binding and conclusive.[5] Minutes cannot be entered or signed after adjournment in Texas.[6] The record must show every jurisdictional fact,[7] but the presumption of regularity of the proceedings avails to aid a record not showing lack of jurisdiction.[8] A recital that defendant admitted the violation of the statute as charged and that a certain fine was imposed sufficiently shows a plea of guilty.[9] A minute entry showing a judgment of sentence by the court in accordance with the verdict sufficiently implies a judgment of guilt, though the formal adjudication on the verdict is omitted.[10]

Commitment.[11]

§ 14. *Saving questions for review. Necessity of objection, motion or exception.*[12]—Aside from objections to the jurisdiction,[13] the sufficiency of the indictment,[14] or the competency of witnesses,[15] prompt objection and exception in

99. Will be treated as a sentence for 5 years maximum, and for the minimum prescribed by the statute defining the offense. In re Cummins [Mich.] 100 N. W. 1008.

1. See 2 Curr. L. 368.

2. See 2 Curr. L. 368, n. 12.

3. And this power may be exercised at the same or any succeeding term regardless of the lapse of time. People v. Ward, 141 Cal. 628, 75 P. 306; Moore v. State [Tex. Cr. App.] 81 S. W. 48. Amendment may be made and entry made nunc pro tunc showing that the indictment was presented in open court. Moore v. State [Tex. Cr. App.] 81 S. W. 48. The record may be amended in the presence of the accused nunc pro tunc to show arraignment and plea. Cooper v. State [Fla.] 36 So. 53. A motion to correct the record by striking defendant's plea of not guilty, claimed to have been entered inadvertently by the clerk, must show when defendant was first apprised of the misprision, it being his duty to make the motion at the earliest possible moment. McKevitt v. People, 208 Ill. 460, 70 N. E. 693.

4. Record cannot be amended on affidavits unless there is some minute, memorandum or notation made by the judge or clerk to sustain it. Quigg v. People, 211 Ill. 17, 71 N. E. 886. Where the record of a judgment itself affords satisfactory evidence, not only of a mistake therein but also of what the order of judgment really was, it may be corrected without extraneous proof. People v. Ward, 141 Cal. 628, 75 P. 306. The testimony of defendant alone is not sufficient to successfully impeach the record and authorize its correction. McKevitt v. People, 208 Ill. 460, 70 N. E. 693.

5. Mitchell v. State [Fla.] 33 So. 1009.

6. Moore v. State [Tex. Cr. App.] 81 S. W. 48.

7. It is not necessary that defendant's plea of not guilty be again re-entered of record where by permission of court it is withdrawn in favor of a motion to quash which is overruled. O'Hara v. U. S. [C. C. A.] 129 F. 551. The recital that "The defendant, being arraigned, pleads not guilty" sufficiently shows that he was present in court when arraigned. State v. Hunter, 181 Mo. 316, 80 S. W. 955.

8. Where the order recites without more that the jury were sworn "the truth to speak upon the issue joined," it will be presumed they were properly sworn. State v. Kellison [W. Va.] 47 S. E. 166. It is not necessary that the order showing the impaneling of the jury recite that the jurors are good and lawful men. Id. Failure of the record to show that accused had the benefit of counsel is not ground of reversal, if it does not affirmatively appear that he was denied. Id.

9. Beatty v. Roberts [Iowa] 101 N. W. 462.

10. Talbert v. State [Ala.] 37 So. 78.

11, 12. See 2 Curr. L. 369.

13. See 2 Curr. L. 369, n. 24. That defendant did not object to being tried after the term ended does not prevent his raising the question on appeal. Johnson v. State [Ala.] 37 So. 421. Objection to the jurisdiction on the ground that there is no legal term in session is waived by submission to the jurisdiction without objection and trial by a regularly selected jury. Gardner v. U. S. [Ind. T.] 82 S. W. 704. Defendant cannot waive trial by jury or consent to trial by the court. State v. Rea [Iowa] 101 N. W. 507.

14. See 2 Curr. L. 369, n. 25. An objection that the indictment fails to designate the owner of property stolen may be first made on appeal. State v. Pollock, 105 Mo. App. 273, 79 S. W. 980. A plea of guilty does not prevent defendant from taking advantage of defects of substance in an indictment on writ of error. State v. Rosenblatt [Mo.] 83 S. W. 975. On appeal from a conviction of conspiracy to obtain money by false pretenses, an objection that the allegations of the indictment showed that the conspiracy had merged in the crime of false pretenses goes to the sufficiency of the facts to constitute a crime, and being such as may be raised at the trial or in arrest, may be first raised on appeal. People v. Wiechers, 94 App. Div. 19, 87 N. Y. S. 897. Failure to object to an information for lack of verification waives the defect. State v. Montgomery, 181 Mo. 19, 79 S. W. 693. An objection to an information that it is not verified by the affidavit of the prosecuting attorney nor predicated upon that of some person competent to testify in the case cannot be taken for the first time on motion in arrest. State v. Lewis, 181 Mo. 235, 79 S. W. 671; State v. Brown, 181 Mo. 192, 79 S. W. 1111.

the trial court is necessary to preserve the right to a review of the ruling complained of. This rule is applied to failure to serve copy of indictment,[16] procedure on change of venue,[17] errors in the selection and impaneling of jurors,[18] and disqualification of jurors.[19] Matters disqualifying jurors are waived where not inquired about on voir dire,[20] or of the judge,[21] remarks and conduct of the court,[22] the order of proof,[23] examination of witnesses,[24] rulings on the admissibility of evidence,[25] permitting stenographer to read notes of evidence to jury,[26] remarks[27] and argument of counsel,[28] remarks of the court,[29] instructions,[30] failure to swear officer in charge of jury.[31] It is frequently required that the objection be also presented to the trial court by motion for new trial,[32] but such mo-

15. See 2 Curr. L. 369, n. 26.

16. Any irregularity on arraignment in delivering the copy of the information to defendant's attorney instead of to him personally is waived by failure to object. People v. Suesser, 142 Cal. 354, 75 P. 1093.

17. Lee v. State [Ark.] 83 S. W. 916. Any irregularity in transmitting the records on change of venue is waived by failure to object. People v. Suesser, 142 Cal. 354, 75 P. 1093.

18. People v. Albers [Mich.] 100 N. W. 908; State v. Icenbice [Iowa] 101 N. W. 273; Hernandez v. State [Tex. Cr. App.] 81 S. W. 1210; Bell v. State [Ala.] 37 So. 281; State v. Clark, 34 Wash. 485, 76 P. 98. Failure to swear officer before selecting talesmen. Chism v. State [Tex. Cr. App.] 78 S. W. 949. An exception to the manner of impaneling a jury must be taken at the time the jury is being impaneled, or it is deemed to have been waived, and cannot be raised by including it in the grounds of a motion for new trial and embodying the motion in the bill of exceptions. Black v. State [Tex. Cr. App.] 81 S. W. 302. Defendant cannot contend that transcript shows no order directing summoning of regular jurors for the week. Tipton v. State [Ala.] 37 So. 231. New trial not granted because jury was not properly sworn, where defendant knew it before verdict and made no objection. Stancliff v. U. S. [Ind. T.] 82 S. W. 882.

19. An objection to a juror for relationship to prosecuting witness is waived by counsel having knowledge of it failing to raise it before verdict. State v. Pray [Iowa] 99 N. W. 1065.

20. State v. Greenland [Iowa] 100 N. W. 341. Grounds of challenge for cause not inquired into on the voir dire cannot be taken advantage of after verdict, especially where there is no showing that defendant's counsel was not cognizant of the facts on which the objection is based. Webster v. State [Fla.] 36 So. 584; McNish v. State [Fla.] 36 So. 175. Failure to ask to have tested again the impartiality of veniremen who have been allowed to separate from the rest of the jury before being sworn waives the right. Bell v. State [Ala.] 37 So. 281.

21. A plea of not guilty before a justice of the peace waives objection based on his disqualification from interest. People v. Kuney [Mich.] 100 N. W. 596.

22. State v. Warren [Iowa] 101 N. W. 508; O'Dell v. State, 120 Ga. 152, 47 S. E. 577; Surrency v. State [La.] 37 So. 575.

23. Guthrie v. State, 2 Neb. Unoff. 28, 96 N. W. 243.

24. Hauser v. People, 210 Ill. 253, 71 N. E. 416; State v. Ripley, 32 Wash. 182, 72 P. 1036; People v. Lang, 142 Cal. 482, 76 P. 232. Neither questions nor answers can be reviewed in absence of objection, exception or motion to strike. State v. Botha, 27 Utah, 289, 75 P. 731. Failure to move to strike out the testimony of a witness unsworn waives the error. State v. Smith [Iowa] 100 N. W. 40.

25. State v. Worthen [Iowa] 100 N. W. 330; People v. Lewandowski, 143 Cal. 574, 77 P. 467; Markey v. State [Fla.] 37 So. 53; Mass v. State [Tex. Cr. App.] 81 S. W. 45; Delahoyde v. People [Ill.] 72 N. E. 732; State v. Pittam, 32 Wash. 137, 72 P. 1042; Carter v. State [Ga.] 49 S. E. 280; State v. Bates [Mo.] 81 S. W. 408; Taylor v. State [Ark.] 83 S. W. 922; Gaines v. State, 120 Ga. 137, 47 S. E. 571. Objection first raised on motion for new trial is too late. Reeves v. State [Tex. Cr. App.] 83 S. W. 803.

26. State v. Norton [S. C.] 48 S. E. 464.

27. O'Dell v. State, 120 Ga. 152, 47 S. E. 577.

28. Dean v. State [Tex. Cr. App.] 83 S. W. 816; Thomas v. State [Fla.] 36 So. 161; Tuggle v. State, 119 Ga. 969, 47 S. E. 577; Powers v. State [Miss.] 36 So. 6. Statement of theory of guilt. State v. Davis, 134 N. C. 633, 46 S. E. 722.

29. State v. Tully [Mont.] 78 P. 760.

30. Smith v. State [Tex. Cr. App.] 78 S. W. 694; Heatley v. Territory [Okl.] 78 P. 79; State v. Burns [Nev.] 74 P. 983; Parnell v. State [Fla.] 36 So. 165; Redden v. State [Tex. Cr. App.] 78 S. W. 929; Pace v. State [Tex. Cr. App.] 79 S. W. 531; State v. Carpenter [Mo.] 81 S. W. 410; Norman v. U. S., 20 App. D. C. 494; State v. Still [S. C.] 46 S. E. 524. Given by court of his own motion after argument. State v. Riddle, 179 Mo. 287, 78 S. W. 606. Exception must be taken and saved at the time of refusing instructions. State v. Sharp [Mo.] 82 S. W. 134. Error in charging on the weight of the evidence is waived when not excepted to. Martin v. State [Tex. Cr. App.] 83 S. W. 390.

31. State v. Crilly [Kan.] 77 P. 701.

32. Instructions. Smith v. State [Tex. Cr. App.] 78 S. W. 694. Motion to make election more certain. State v. Douglas [Kan.] 77 P. 697. Remarks of court. State v. Knowles [Mo.] 83 S. W. 1083. Sufficiency of evidence. Herder v. People, 209 Ill. 50, 70 N. E. 674; Davis v. State [Fla.] 36 So. 170. Nonjurisdictional errors not presented by motion for new trial will not be reviewed. Welty v. U. S. [Okl.] 76 P. 121. Where defendant has a bill of exceptions, he may have rulings on evidence reviewed, though he has made no

tion, while customary, is not necessary in Georgia.[33] Matters first brought to the attention of the trial court by motion for new trial are not generally reviewable on appeal,[34] but where a motion in arrest and for a new trial was based on written exceptions to the instructions filed therewith, and was received, considered and denied by the trial court, the exceptions were reviewed by the circuit court of appeals, though the exceptions were not taken at the time the charge was given.[35] Statutes in some states authorize a general review of criminal cases especially where there is judgment of death,[36] irrespective of whether proper objection was made and exception saved on the trial,[37] and exceptions to instructions in a capital case were reviewed in North Carolina where first raised on appeal, the attorney general consenting,[38] and where no objection or exception was taken to the introduction of hearsay evidence and there was barely enough to sustain a conviction, the court granted a new trial in the interests of justice, the attorney general so advising.[39] Hearsay testimony not objected to at the time of its introduction should be stricken on motion.[40]

Waiver of objection.[41]—An objection and exception timely made may be waived,[42] and an exception against invited error is unavailing.[43] The request of instructions embodying an erroneous theory adopted by the court does not estop defendant from urging error in refusing his prior requests based on the correct theory,[44] and the introduction of incompetent evidence over objection is not waived by defendant's afterward attempting to explain it,[45] but where evidence is admitted over objection with the statement that it will be passed upon later, failure

motion for a new trial. People v. Walker, 142 Cal. 90, 75 P. 658.

33. Act of Dec. 20, 1898, p. 92, discussed. Cawthon v. State, 119 Ga. 395, 46 S. E. 897.

34. Cr. Code Prac. § 281. Green v. Com. [Ky.] 83 S. W. 638. Misconduct of jury. Taber v. Com. [Ky.] 82 S. W. 443. Argument of counsel. Thomas v. State [Fla.] 36 So. 161. An exception to a charge for its failure to properly present an issue raised by the evidence is timely where presented in the motion for new trial. Palmer v. State [Tex. Cr. App.] 83 S. W. 202. An objection to the testimony of a witness on the ground that he was the same person indicted with defendant under another name cannot be first raised on motion for new trial. Bise v. U. S. [Ind. T.] 82 S. W. 921. Incapacity of defendant because of non-age cannot be first presented by motion for new trial. Meierholtz v. Territory [Okl.] 78 P. 90. Complaint for surprise in the testimony of a party's own witness comes too late on motion for new trial. State v. Henderson [La.] 36 So. 950.

35. Owens v. U. S. [C. C. A.] 130 F. 279.

36. Code Cr. Proc. § 528, does not authorize review of controverted questions of fact. People v. Boggiano [N. Y.] 72 N. E. 101.

37. State v. Brady [N. J. Law] 59 A. 7. Causes for relief or reversal to which no objection was made or exception saved at the trial cannot be reviewed under the statute in New Jersey unless a specification thereof is made, filed and served on the prosecuting attorney as provided [Laws 1898, p. 915, c. 237, § 137]. State v. Lyons [N. J. Err. & App.] 58 A. 398. Where a ruling excluding a question is not excepted to and the case comes up under a strict bill of exceptions, the ruling is not reviewable. State v. Brady [N. J. Law] 59 A. 6. Mich. Comp. Laws 1897, § 10274, authorizing review of instructions given and refused, does not authorize review of ruling on challenge to juror not excepted to. People v. Albers [Mich.] 100 N. W. 908. Iowa Code, § 5462, requires the court to render such judgment as the law demands, notwithstanding technical errors or defects not affecting result. Reversal will follow prejudicial error, though no proper objection and exception are shown. State v. Barr, 123 Iowa, 139, 98 N. W. 595; State v. Motto [Iowa] 98 N. W. 600. Forcing accused to trial after counsel withdrew held reversible, though no legal error shown [Code Cr. Proc. § 527]. People v. Calabur, 91 App. Div. 529, 87 N. Y. S. 121. State v. Barr, 123 Iowa, 139, 98 N. W. 595. Comp. L. 1900, § 4391, providing for the review of requested instructions given or refused, regardless of exception, does not apply to instructions given by the court of his own motion. State v. Burns [Nev.] 74 P. 983. Cr. Code 1896, § 4312, dispenses with exceptions to action on requests to charge. Feagin v. State, 139 Ala. 107, 36 So. 18.

38. State v. Adams [N. C.] 48 S. E. 589.

39. Thomas v. State [Ark.] 82 S. W. 202.

40. Lightfoot v. State [Tex. Cr. App.] 78 S. W. 1075.

41. See 2 Curr. L. 371.

42. Withdrawal. People v. Childs, 87 App. Div. 474, 84 N. Y. S. 853.

43. Invited error, see post, § 15, Harmless Error. An objection to the constitutionality of the act under which defendant is prosecuted may be waived below by requesting a ruling recognizing its constitutionality. Cummings v. People, 211 Ill. 392, 71 N. E. 1031.

44. State v. Pine [W. Va.] 48 S. E. 206.

45. People v. Gaffey, 90 N. Y. S. 706.

to again raise the question waives any error in its admission,[46] and error cannot be predicated on refusal to rule out a paper admitted on consent.[47] That defendant offered a wrong reason for the admission of certain testimony does not render it any the less admissible, nor its rejection any the less erroneous.[48] Where defendant properly objected to the discharge of two jurors after the jury had been impaneled and sworn, he did not waive his objection by failing to object to the jurors sworn in their place or by calling for a new venire.[49]

Sufficiency of objections.[50]—Objections must be specific,[51] the grounds of objection to testimony must be stated,[52] since a general objection to evidence will not avail if it be admissible in part,[53] or for any purpose,[54] and a general objection will not raise specific grounds, such as that the question calls for an opinion as distinguished from a fact,[55] or that physicians offered as experts are not qualified.[56] The objection must be to the question, not to the answer,[57] unless the question does not disclose the incompetency of the response,[58] or the answer is unresponsive. An objection to a question after it is answered comes too late.[59] The remedy for an unresponsive answer to a cross question,[60] and for incompetent evidence admitted without objection, is by motion to strike.[61] Where, on motion to strike out an entire declaration, a part only is stricken and what remains is objectionable because disconnected, the remedy is by motion to restore subject to objection.[62] Where testimony is admissible for only a particular purpose, the remedy is by asking for a specific direction limiting its scope and not by general objection to its admission.[63] If defendant wishes to raise the question of the sufficiency of the evidence, he must move for a directed verdict.[64] Defendant surprised by the testimony of a state's witness and failing to move for a postponement cannot complain on appeal,[65] and the question of surprise is not

46. Cawthon v. State, 119 Ga. 395, 46 S. E. 897.

47. Williams v. State, 119 Ga. 425, 46 S. E. 626.

48. Evidence admissible as impeaching offered as dying declaration and res gestae. State v. Charles [La.] 36 So. 29.

49. Tomasson v. State [Tenn.] 79 S. W. 802.

50. See 2 Curr. L. 372.

51. That the charge was erroneous in that it was made up of statutory definition and abstract definitions and was argumentative and calculated to disclose the opinion of the court is too vague and general. Smith v. State [Tex. Cr. App.] 81 S. W. 936. Objection to charge on implied malice held too general. Adams v. State [Tex. Cr. App.] 84 S. W. 231.

52. Phillips v. State [Ga.] 49 S. E. 290; Moree v. State [Tex. Cr. App.] 83 S. W. 1117.

53. Barnard v. State, 119 Ga. 436, 46 S. E. 644; Weaver v. State, 139 Ala. 130, 36 So. 717; Kirby v. State, 139 Ala. 87, 36 So. 721. The court is under no duty to separate the legal from the illegal and exclude the latter. Rhodes v. State [Ala.] 37 So. 365. Motion to strike out document. Markey v. State [Fla.] 37 So. 53.

54. That evidence was immaterial and irrelevant is bad unless the evidence objected to was immaterial and irrelevant for any purpose. McKinley v. State [Tex. Cr. App.] 82 S. W. 1042.

55. Gordon v. State [Ala.] 36 So. 1009.

56. The objection that physicians were not qualified under the statute to testify is not raised by an objection that there is nothing in the record to qualify the testimony or make it competent. People v. Farrell [Mich.] 100 N. W. 264.

57. People v. Scalamiero, 143 Cal. 343, 76 P. 1098. A party may not sit by and allow questions apparently calling for incompetent testimony to be asked, take his chances on something favorable being disclosed, and then finding the proof prejudicial, be heard to complain of refusal to strike it out. Hudson v. State, 137 Ala. 60, 34 So. 854.

58. Where it is not apparent from the question itself that the response thereto will upon any theory of the case be inadmissible, an objection alone to the question is of no avail; but the party must, when the inadmissible evidence is for the first time disclosed by the answer, move to have it stricken out; failing in which, he will be in no position to predicate error upon it. People v. Lawrence, 143 Cal. 148, 76 P. 893. Motion to strike held seasonably made. Territory v. Smith [N. M.] 78 P. 42; People v. Scalamiero, 143 Cal. 343, 76 P. 1098.

59. Schley v. State [Fla.] 37 So. 518.

60. By not objecting to the answer of a witness on cross-examination and proceeding to question him with regard to it, defendant waives his right to have it stricken out. People v. Myring [Cal.] 77 P. 975.

61. State v. Adams [S. C.] 47 S. E. 676.

62. State v. Wideman [S. C.] 46 S. E. 769.

63. Howson v. State [Ark.] 83 S. W. 933.

64. McDonnell v. U. S. [C. C. A.] 133 F. 293. In absence of a motion for a directed verdict, it will be presumed that there was evidence sufficient to convict. State v. Eggleston [Or.] 77 P. 738.

65. Fleming v. State [Ark.] 78 S. W. 766.

open for review where defendant only objected to the evidence on the ground that the people had closed their case.[68] Objections to the manner of allotting cases in the criminal district court should be made before going to trial.[67] Refusal to discharge the jury for an improper remark by the state's counsel is not error, the remedy being by motion to have it withdrawn.[68] To raise a constitutional question, the objection must point out the particular part of the constitution violated.[69] The remedy to correct misconduct of counsel in argument is by motion to exclude it and exception to the court's refusal, not by exception to the remarks.[70] In Texas, a written request to charge is the proper way to call to the court's attention prejudicial argument by counsel for the state.[71]

Sufficiency of exceptions.[72]—Exception must be specific,[73] and if it covers several rulings, is insufficient if any one was correct.[74] A general exception will not raise special matters.[75] An exception to the exclusion of evidence is not available where its object is not stated to the trial court.[76] Whether the prosecuting attorney heard an exception made to his argument is immaterial.[77]

§ 15. *Harmless or prejudicial error. Trivial or immaterial error.*[76]—Generally speaking, a conviction will not be reversed for technical errors where substantial justice has been done,[79] or because of error that resulted in no harm or prejudice to defendant,[80] though he has properly saved his objection and exception to the ruling.[81] Prejudice will not be presumed from error in excusing a juror.[82] Errors favorable to defendant[83] or his co-defendant,[84] or which he has

66. Graff v. People, 208 Ill. 312, 70 N. E. 299.

67. State v. Henderson [La.] 36 So. 950.

68. Miller v. Com., 25 Ky. L. R. 1931, 79 S. W. 250.

69. State v. Brockmiller [Mo. App.] 81 S. W. 214.

70. State v. Van Waters [Wash.] 78 P. 897.

71. Hatchell v. State [Tex. Cr. App.] 84 S. W. 234; Adams v. State [Tex. Cr. App.] 84 S. W. 231; Ball v. State [Tex. Cr. App.] 78 S. W. 508.

72. See 2 Curr. L. 372.

73. Where the original instructions are elaborated in response to a request from the jury, an exception thereto for the same reasons given for exceptions to the original charge is not specific enough to cover the objection that the jury's question was not answered categorically and specifically. Roberts v. U. S. [C. C. A.] 126 F. 897. An exception to a charge containing a correct principle of law cannot be considered unless the vice or error is specified. Owens v. State, 120 Ga. 205, 47 S. E. 513.

74. A general exception to an entire charge will not avail if the charge contains a single correct proposition. Parnell v. State [Fla.] 36 So. 165; Thomas v. State [Fla.] 36 So. 161; Griffin v. State [Fla.] 37 So. 209; Ewert v. State [Fla.] 37 So. 334; Sullivan v. District of Columbia, 20 App. D. C. 29. Exception to the court's refusal to give several instructions is unavailing if any one is bad. Johnson v. State [Ala.] 37 So. 456.

75. State v. Sargood [Vt.] 58 A. 971. A general exception to instructions does not raise for review the court's failure to instruct the jury to fix the punishment in case of conviction. Stancliff v. U. S. [Ind. T.] 82 S. W. 882.

76. State v. Kelley [Conn.] 58 A. 705.

77. Adams v. State [Tex. Cr. App.] 84 S. W. 231.

78. See 2 Curr. L. 373.

79. Quigg v. People, 211 Ill. 17, 71 N. E. 886; State v. Moore, 67 Kan. 620, 73 P. 905; State v. Klusmier [Kan.] 77 P. 550; People v. Smith, 89 N. Y. S. 1098, 44 Misc. 379; Smith v. Territory [Okl.] 77 P. 187. Appellate courts will not be astute to find mere technical errors upon which to reverse judgments. There are cases, however, in which apparently technical errors may be so prejudicial as to produce the gravest injustice. People v. Davy [N. Y.] 72 N. E. 244. One convicted of second degree murder on evidence that fully warrants the conviction, and on which a verdict of guilty of murder in the first degree would not be disturbed, is not prejudiced by errors in the introduction of evidence, remarks of counsel, instructions, and failure to charge the officer having charge of the jury. Taylor v. State [Ark.] 82 S. W. 495.

80. Statute so provides [Code 1896, § 4333]. Walker v. State, 139 Ala. 56, 35 So. 1011; Dryer v. State, 139 Ala. 117, 36 So. 38. St. 1893, § 5330. Martin v. Territory [Okl.] 78 P. 88. Code Cr. Proc. § 542. People v. Montgomery, 176 N. Y. 219, 68 N. E. 258. Burns' Ann. St. 1901, § 1964. Griffiths v. State [Ind.] 72 N. E. 563. Irregularity of change of venue and improper remarks by prosecutor [Sand. & H. Dig. § 2438]. Lee v. State [Ark.] 83 S. W. 916. If from the entire record it appears that error was harmless, it will not work reversal. State v. Miller [Iowa] 100 N. W. 334.

81. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076.

82. State v. Pray [Iowa] 99 N. W. 1065.

83. Brenton v. Territory [Okl.] 78 P. 83; Taylor v. State [Tex. Cr. App.] 81 S. W. 933; Clemons v. State [Fla.] 37 So. 647. Answer to question objected to tending to help accused. Wilson v. State [Fla.] 36 So. 580. Erroneous testimony favorable to defendant if effective at all. Wells v. Territory [Okl.] 78 P. 124. Taking question of punishment

invited[85] or acquiesced in, are not reversible.[86] No harm is done defendant by a question asked by the court which gives him an opportunity to deny an unfavorable inference arising from his testimony.[87] The rule that reversal will not follow nonprejudicial error has been applied to rulings on application for continuance,[88] procedure on change of venue,[89] ruling on pleas,[90] selection of jury,[91] conduct of trial,[92] rulings on the sufficiency of indictments,[93] examination of wit-

from jury followed by less than minimum sentence. Taylor v. State [Ark.] 83 S. W. 922. The restriction of the state's evidence to a particular offense where several are charged is not prejudicial. Miller v. Com., 25 Ky. L. R. 1931, 79 S. W. 250.

Instructions placing greater burden on state than law requires. State v. Hunter, 181 Mo. 316, 80 S. W. 955. Requiring jury to be convinced beyond a reasonable doubt of the facts limiting right of self defense. Adkins v. Com. [Ky.] 82 S. W. 242. Requiring emission in sodomy. State v. McGruder [Iowa] 101 N. W. 646. Stating rule as to necessity of corroboration of accomplice testimony too strongly against state. State v. Lyons [N. J. Err. & App.] 58 A. 398. Stating limits of punishment at less than law provides. Leal v. State [Tex. Cr. App.] 81 S. W. 961; Mayo v. State [Tex. Cr. App.] 82 S. W. 515. Authorizing jury to pass on competency of confession admitted in evidence. Green v. Com. [Ky.] 83 S. W. 638. Where prosecutions are limited to three years, defendant cannot complain of a restriction of the evidence to acts within two years. State v. Wilson [Iowa] 99 N. W. 1060. An instruction predicating manslaughter on the existence of two facts of which one only is necessary becomes in view of a verdict of manslaughter, error favorable, rather than unfavorable, to defendant. Sheperd v. Com. [Ky.] 82 S. W. 378. Where defendant is given a more favorable charge on a certain phase of the testimony than he is entitled to, he cannot complain that the exact law of that issue was not charged. Charge that if homicide was negligently committed he is not guilty. Becknell v. State [Tex. Cr. App.] 82 S. W. 1039.

Failure to instruct, in prosecution for theft, as to receiving and concealing charged in the indictment, is favorable to defendant. York v. State [Tex. Cr. App.] 82 S. W. 517. Failure to define threats where indictment charges rape by force and threats. Ball v. State [Tex. Cr. App.] 78 S. W. 508.

84. A defendant whose conviction of conspiracy has been affirmed by the intermediate court of appeals has no ground of complaint on further appeal, that the conviction was reversed as to others. Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

85. Exclusion of evidence on defendant's own motion. Bowers v. State [Wis.] 99 N. W. 447. Argument to jury that case is one of murder or self defense does not dispense with charge on such included offenses as evidence demands. Horton v. State, 120 Ga. 307, 47 S. E. 969. Testimony brought out by defendant. Terry v. State [Tex. Cr. App.] 79 S. W. 319; Owens v. State [Tex. Cr. App.] 79 S. W. 575. Requested instructions. People v. Galmari, 176 N. Y. 84, 68 N. E. 112; Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677; Hopkins v. State, 119 Ga. 569, 46 S. E. 835; Robinson v. State, 120 Ga. 311, 47 S. E. 968. Instruction substantially like one requested. State v. Wilson [Iowa] 99 N. W. 1060; Clemons v. State [Fla.] 37 So. 647. One cannot procure the discharge of a jury and then plead former jeopardy on the ground that it was improperly discharged. Nixon v. State [Ga.] 48 S. E. 966. Transcript admitted at request of defendant for best evidence. State v. Woodward [Mo.] 81 S. W. 857. Defendant cannot complain that the judge permitted him to point out important locations while at a view. Underwood v. Com. [Ky.] 84 S. W. 310.

86. Discharge of sick juror, swearing another and reproducing testimony. State v. Ronk, 91 Minn. 419, 98 N. W. 334. Immaterial evidence not in its nature necessarily injurious to defendant, received without objection and not complained of in the petition in error, will be considered to be without prejudice. Lillie v. State [Neb.] 100 N. W. 316.

87. State v. Lyons [N. J. Err. & App.] 58 A. 398.

88. One failing to avail himself of the right to compulsory process may not claim prejudice in not having his witnesses present, their testimony being read from the affidavits for continuance. Davis v. Com., 25 Ky. L. R. 1426, 77 S. W. 1101.

89. Lee v. State [Ark.] 83 S. W. 916.

90. Striking plea of former jeopardy. Court so safeguarded defendant's rights that the prior offense was not considered. Kelly v. State [Tex. Cr. App.] 80 S. W. 382.

91. Overruling challenge for cause when peremptory challenges are not exhausted. Brown v. State [Tex. Cr. App.] 78 S. W. 507; Graff v. People, 208 Ill. 312, 70 N. E. 299; State v. Hayes [S. C.] 48 S. E. 251; Territory v. Skankland, 3 Ariz. 403, 77 P. 492; State v. Pray [Iowa] 99 N. W. 1065; Reeves v. State [Tex. Cr. App.] 83 S. W. 803. Selection of grand jurors. Wells v. Territory [Okl.] 78 P. 124; Sharp v. U. S., 13 Okl. 522, 76 P. 177. Overruling question as to prejudice engendered by hearing collateral trial is harmless where only one witness who testified on the former trial testified in the case at bar, and his testimony was incompetent. People v. Albers [Mich.] 100 N. W. 908. Irregularity in impaneling jury is harmless as to one against whom no other verdict could have been rendered. Langan v. People [Colo.] 76 P. 1048. Erroneous statement by juror as to time of paying poll tax held not prejudicial where there is no evidence that he did not stand fair. Smith v. State [Tex. Cr. App.] 78 S. W. 517. Irregularity merely in drawing a special venire is not prejudicial where the jury selected is impartial. Buchanan v. State [Miss.] 36 So. 388. Error held prejudicial. State v. John [Iowa] 100 N. W. 193.

92. Laughter in court room at discomfiture of defendant's counsel by witness. Lax v. State [Tex. Cr. App.] 79 S. W. 578. Separation of jury. State v. Levy [Idaho] 75 P.

nesses,[94] swearing witnesses whose names are not endorsed on indictment,[95] admission[96] and exclusion of evidence,[97] refusal to strike out evidence,[98] conduct or remarks of court,[99] conduct,[1] remarks[2] and argument of counsel,[3] instructions,[4]

227. Admission in rebuttal of evidence properly in chief. People v. Padilla, 143 Cal. 158, 76 P. 889. Allowing the father of witness, a female child, to sit near her while testifying must be shown to have been prejudicial to be ground for reversal. Gould v. State [Neb.] 99 N. W. 541.

93. Defendant is not harmed by the overruling of a demurrer to an indictment sufficient as a charge of the crime of which he is convicted, though insufficient to charge a greater degree which it attempts to charge. State v. Knoll [Kan.] 77 P. 580. Motion to quash on ground of irregularity in drawing grand jury. Wells v. Territory [Okl.] 78 P. 124.

94. Hauser v. People, 210 Ill. 253, 71 N. E. 416; People v. Brittain, 142 Cal. 8, 75 P. 314; Fine v. State [Tex. Cr. App.] 81 S. W. 723. Showing by witness that she was married to defendant at the county jail. People v. Barker [Cal.] 78 P. 266. Reading during cross-examination from testimony of other witnesses before the examining court. Bearden v. State [Tex. Cr. App.] 79 S. W. 37. Asking question to which exception is sustained. State v. Brown, 181 Mo. 192, 79 S. W. 1111. To ask defendant's brother whether he had contributed in any way to the absence of certain witnesses is not prejudicial where no damaging fact was elicited. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223. Inadvertently swearing incompetent witness who did not testify. Walker v. State, 139 Ala. 56, 35 So. 1011. Sustaining objections to proper questions is harmless where the most favorable answer possible could not have helped defendant. State v. Jones [Iowa] 99 N. W. 179. Leading question calling for opinion is harmless where subsequent proof fully shows qualifications as expert. Bess v. Com. [Ky.] 82 S. W. 576. Refusal to permit refreshing memory in favor of defense of alibi held not reversible. State v. Wideman [S. C.] 46 S. E. 769. Sustaining objections to questions as leading where witness afterwards fully discloses all the questions sought to bring out. Lyles v. U. S., 20 App. D. C. 559. Statement by court to expert that he need base his opinion only on facts he deems to be true is harmless where it appears he in fact considered all the evidence. People v. Sowell [Cal.] 78 P. 717. Refusal to permit repetition of questions and answers. Eatman v. State [Fla.] 37 So. 576.

95. State v. Woodward [Mo.] 81 S. W. 857.

96. Fact rendered immaterial by other undisputed evidence. Dean v. Com., 25 Ky. L. R. 1876, 78 S. W. 1112. Immaterial evidence inefficient to the result. Wilson v. U. S. [Ind. T.] 82 S. W. 924; State v. Simon [N. J. Law] 58 A. 107; Smith v. Territory [Okl.] 77 P. 187; Brown v. State, 119 Ga. 572, 46 S. E. 833; Wilson v. State [Fla.] 36 So. 580; Archibald v. State [Tex. Cr. App.] 83 S. W. 189; Hames v. State [Tex. Cr. App.] 81 S. W. 708; State v. Manning [Mo. App.] 81 S. W. 223. Trailing by bloodhounds. Davis v. State [Fla.] 36 So. 170. Fact conclusively shown by other evidence. Bowers v. State [Wis.] 99 N. W. 447; Welch v. State [Tex. Cr. App.] 81 S. W. 50. Improper dying declaration. Connell v. State [Tex. Cr. App.] 81 S. W. 746; People v. Sowell [Cal.] 78 P. 717. Exclamation of witness characterizing impression that murder was being committed where murder was committed. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116. Bad feeling between defendant and deceased. Brock v. Com. [Ky.] 82 S. W. 638. Testimony of a physician that when he first saw deceased's body he thought he had been "doped" is not prejudicial where it appears from the undisputed evidence that he died of morphine administered by defendant. State v. Burns [Iowa] 99 N. W. 721. The admission of an indorsement on a deposition taken by defendant purporting to be the certificate of the judge before whom it was taken, that the prosecuting attorney refused to cross-examine the deponent, while improper, cannot harm defendant. State v. Sharp [Mo.] 82 S. W. 134. Evidence apparently justifying illegal arrest where defendant attempted to kill in resisting. Dryer v. State, 139 Ala. 117, 36 So. 38. Opinion as to position of deceased when shot. Wells v. Territory [Okl.] 78 P. 124. The erroneous admission of evidence affecting the credibility of a witness whose testimony is immaterial is harmless. McKevitt v. People, 208 Ill. 460, 70 N. E. 693. Letter immaterial. State v. Howard [Mont.] 77 P. 50. The admission of testimony that witness went to defendant's because he understood defendant had whiskey is harmless where the evidence shows unquestionably a sale. Haynes v. State [Tex. Cr. App.] 83 S. W. 16.

97. Matter sufficiently before jury by inference from other evidence. Bromberger v. U. S. [C. C. A.] 128 F. 346; State v. Bebb [Iowa] 96 N. W. 714; State v. Callahan [S. D.] 99 N. W. 1100; People v. Nihell [Cal.] 77 P. 916; Mitchell v. State [Ark.] 83 S. W. 1050; State v. Glindemann, 34 Wash. 221, 75 P. 800; Ray v. State [Tex. Cr. App.] 83 S. W. 1121. Excluding incompetent evidence on an objection in which no specific ground is stated. State v. Leuhrsman, 123 Iowa, 476, 99 N. W. 140. Exclusion of impeaching testimony is not prejudicial where the verdict is amply supported without the testimony of the witness sought to be impeached. Vowell v. State [Ark.] 78 S. W. 762. A ruling that defendant's regular physician is incompetent as an expert is harmless where he has testified to all the facts and his opinion thereon. Kroell v. State, 139 Ala. 1, 36 So. 1025.

98. Statement of witness that he had been called to jail to see several other men and identified none but defendant. McKevitt v. People, 208 Ill. 460, 70 N. E. 693. Matter not prejudicial. State v. Ripley, 32 Wash. 182, 72 P. 1036.

99. Ruling that witness be not interrupted till after he had told his story. Dean v. Com., 25 Ky. L. R. 1876, 78 S. W. 1112. Remark that if "defendant told the truth then it won't hurt him now." State v. Coleman [S. D.] 98 N. W. 175. That certain proffered evidence "would not explain" defendant's situation. Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

or failure to instruct,[5] judgment.[6] Refusal to charge on an issue as to which the state was entitled to an affirmative charge is not prejudicial.[7] Submission of a lesser degree not charged in the indictment,[8] or which the evidence does not warrant, it being sufficient to support conviction of the principal crime,[9] and con-

1. Insinuating questions. Wells v. Territory [Okl.] 78 P. 124.

2. Statement that state too has been trying to secure attendance of witness and showing telegram refusing to come. Bearden v. State [Tex. Cr. App.] 79 S. W. 37. The statement by the prosecuting attorney on a trial for murder to the jurors on their voir dire, of what the state expects to prove, is not prejudicial. State v. Brown, 181 Mo. 192, 79 S. W. 1111.

3. That defendant's acquittal of the charge of murder will make more murder. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076. That attorney if not an attorney would have been a witness, that he saw the killing and knew the state's theory to be correct. Bearden v. State [Tex. Cr. App.] 79 S. W. 37. Language outside record, not abusive nor inflammatory, held not prejudicial. Havens v. Com. [Ky.] 82 S. W. 369; Schrader v. State [Miss.] 36 So. 385. Relating case where one juror on panel acquitting defendant helped lynch him. State v. Busse [Iowa] 100 N. W. 536. Comment on defendant's motive for excluding inadmissible evidence. People v. Romero [Cal.] 77 P. 163. Not reversible where prejudice not apparent. Gallagher v. People, 211 Ill. 158, 71 N. E. 842. Statements as to jurisdiction of larceny committed in another state not prejudicial to one convicted of receiving. Curran v. State [Wyo.] 76 P. 577. Criticism of defendant's failure to testify. Lee v. State [Ark.] 83 S. W. 916.

4. Connor v. Com. [Ky.] 81 S. W. 259; Quigg v. People, 211 Ill. 17, 71 N. E. 886; People v. Miles, 143 Cal. 636, 77 P. 666; Black v. State, 119 Ga. 746, 47 S. E. 370; Clark v. State [Tex. Cr. App.] 78 S. W. 1078; Clemons v. State [Fla.] 37 So. 647; McKinley v. State [Ga.] 48 S. E. 917. Insanity and intoxication. People v. Nihell [Cal.] 77 P. 916. Presumption of innocence and burden of proof. Tuggle v. State, 119 Ga. 969, 47 S. E. 577. Reasonable doubt. State v. Newman [Minn.] 101 N. W. 499; Langan v. People [Colo.] 76 P. 1048. Instruction on phase of self-defense not warranted by evidence is not prejudicial to defendant. Elmore v. State [Tex. Cr. App.] 78 S. W. 520. Purpose of testimony relating to former indictments of accused sworn as a witness. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076. Further instruction after argument held not prejudicial where counsel are given opportunity to argue further. Turner v. Com., 25 Ky. L. R. 2161, 80 S. W. 197. Instruction that there is no evidence to convict of a particular degree when in fact there is none. Thomas v. State [Fla.] 36 So. 161. The repetition of an instruction is not reversible error unless its effect is to mislead or confuse the jury. Robinson v. State [Neb.] 98 N. W. 694. Specific reference to accomplice testimony. Graff v. People, 208 Ill. 312, 70 N. E. 299. Inadvertent confusion of terms. State v. Steen [Iowa] 101 N. W. 96; State v. Meals [Mo.] 83 S. W. 442; Hancock v. State [Tex. Cr. App.] 83 S. W. 696. A charge on impeachment of witnesses is not prejudicial where accused swore no witnesses though no effort was made to impeach any state's witness. Cole v. State [Ga.] 48 S. E. 156. Charging that principal is one who "aids or abets" instead of "aids and abets." People v. Padilla, 143 Cal. 158, 76 P. 889. Reference or mistake to term as a previous term at which a former trial of the case was had. Ball v. State [Tex. Cr. App.] 78 S. W. 508. Defendant cannot complain of an instruction on the weight to give his admissions, since if there was no testimony on which to base it there was no prejudice. State v. Chappell, 179 Mo. 324, 78 S. W. 585. Misdirection on the law of possession is harmless to one not in possession, the offense being destruction of another's fence. Smith v. State [Tex. Cr. App.] 79 S. W. 34. Instruction treating counts for forgery and passing forged instrument as though they were different degrees of the same offense is harmless. Usher v. State [Tex. Cr. App.] 81 S. W. 712. An instruction too restrictive in the character of funds receivable from a defaulting county treasurer is harmless where he had made no effort to satisfy his defalcation in any kind of money. Butler v. State [Tex. Cr. App.] 81 S. W. 743. Where several are jointly charged an instruction including one whom the evidence failed to show was a party to the alleged corrupt agreement was harmless. State v. Lehman [Mo.] 81 S. W. 1118. Misdirection on the law of defense from unlawful arrest is harmless where the attempted arrest was lawful. Cortez v. State [Tex. Cr. App.] 83 S. W. 812. Attributing testimony to wrong witness is not error. Peres v. State [Tex. Cr. App.] 80 S. W. 525.

5. The giving or refusal of instructions containing mere commonplaces that any intelligent juror would be apt to know and act upon is harmless. Oral admissions and accomplice testimony should be viewed with caution. Rule for weighing defendant's testimony. People v. Tibbs, 143 Cal. 100, 76 P. 904; People v. Ruiz [Cal.] 77 P. 907. Defendant in homicide cannot complain of the court's failure to instruct on the limitations of the right of self-defense. Baker v. State [Tex. Cr. App.] 81 S. W. 1215. One acquitted of murder in the first degree cannot complain of failure to define express malice. Connell v. State [Tex. Cr. App.] 81 S. W. 746; Williams v. State [Ala.] 37 So. 228. Failure to present defendant's theory is harmless where by it, and the undisputed facts, he is guilty of the degree of homicide of which he stands convicted. Ford v. State [Neb.] 98 N. W. 807.

6. Judgment providing for removal to penitentiary "within a reasonable time" instead of "without delay" as statute provides will not reverse in the absence of a showing of harm. Waller v. People, 209 Ill. 284, 70 N. E. 681.

7. Parrish v. State, 139 Ala. 16, 36 So. 1012.

8. One convicted of a certain crime cannot complain of a charge authorizing conviction of a lesser degree not charged in the indictment. State v. Miller [Iowa] 100 N. W. 334.

9. Evans v. State [Tex. Cr. App.] 80 S. W. 374; Green v. Com. [Ky.] 83 S. W. 638. Mur-

viction of an included offense where the evidence would support a verdict of guilty of the principal crime, are harmless.[10] Where the testimony is in sharp conflict and evenly balanced, it cannot be said that the admission of incompetent evidence is harmless,[11] and where the state's case can be sustained only by reference to incompetent evidence admitted over objection, manifest injury has resulted which can only be redressed by reversal.[12] It cannot be presumed that unintelligible evidence was harmless where expressly treated as competent by the court in his charge.[13]

Cure of error.[14]—Reversible error is not committed by denying a continuance for the absence of a witness who afterwards appears and testifies,[15] and any error in overruling a challenge for cause is cured by allowing an additional peremptory challenge after defendant had used his number.[16] Where the state peremptorily challenged all jurors who did not appear, defendant was not harmed by refusal to delay the trial until they could be brought in by attachment.[17] The admission of improper evidence may be cured by afterwards excluding it,[18] or withdrawing it from the jury,[19] or permitting proof of otherwise immaterial facts rendering it innocuous,[20] or sufficiently establishing the same fact by other unobjectionable evidence,[21] by instructions rendering it immaterial,[22] or by verdict showing that it was disregarded.[23] Error in admitting evidence of defendant's sanity as a part of the state's case in chief is cured by admitting defendant's evidence of insanity.[24] The improper exclusion of evidence may be cured by afterwards admitting the same,[25] or other evidence of similar effect,[26] or recalling the witness

der. People v. Lagroppo, 90 App. Div. 219, 86 N. Y. S. 116.

10. Burglary in first and second degrees. People v. Coulter [Cal.] 78 P. 348. Defendant charged with burglary and larceny cannot complain that he was convicted of the burglary and acquitted of the larceny though he admitted the larceny. State v. Helms, 179 Mo. 280, 78 S. W. 592.

11. Thompson v. State [Miss.] 36 So. 389; People v. Montgomery, 176 N. Y. 219, 68 N. E. 258. Though there be sufficient competent evidence to sustain a conviction, defendant is entitled to a verdict free from prejudice arising from improper evidence, and the appellate court cannot determine the sufficiency of competent evidence to authorize the verdict. State v. Walker [Iowa] 100 N. W. 354.

12. State v. Ricardo [N. J. Law] 58 A. 1087.

13. People v. Ebel, 90 N. Y. S. 628.

14. See 2 Curr. L. 377.

15. Underwood v. Commonwealth [Ky.] 84 S. W. 310; State v. Forbes, 111 La. 473, 35 So. 710.

16. Murder. Brewer v. State [Ark.] 78 S. W. 773; Lax v. State [Tex. Cr. App.] 79 S. W. 578.

17. Miller v. State [Tex. Cr. App.] 83 S. W. 393.

18. Hendrickson v. Com. [Ky.] 81 S. W. 266; State v. Scroggs, 123 Iowa, 649, 96 N. W. 723; People v. Smith, 44 Misc. 379, 89 N. Y. S. 1098; De Yampert v. State, 139 Ala. 53, 36 So. 772. Refusal to strike, cured by subsequently striking. Wilson v. State [Fla.] 36 So. 580. Evidence may be so prejudicial that prompt striking out will not remove its effect. People v. Davey [N. Y.] 72 N. E. 244.

19. Evidence of attempts to influence witnesses not connected with defendant. Lounder v. State [Tex. Cr. App.] 79 S. W. 552. General statements of defendant's intentions —"Kill somebody." Friday v. State [Tex. Cr. App.] 79 S. W. 815. Questions to defendant in regard to matters not connected with the offense on trial. Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223. Inability of bloodhounds to find trail. Allen v. Commonwealth [Ky.] 82 S. W. 589. Statement of defendant's partner in adultery that he was "guilty as charged." State v. Eggleston [Or.] 77 P. 738. Testimony may be so prejudicial that instructions to disregard it will not avail. Denton v. State [Tex. Cr. App.] 79 S. W. 560; Henard v. State [Tex. Cr. App.] 79 S. W. 810.

20. Error in admitting evidence that defendant did not pay the funeral expenses of deceased, his wife, whom he claims he accidentally killed, is cured by permitting him to show that he offered to pay but was not permitted. Washington v. State [Tex. Cr. App.] 79 S. W. 811. It appearing that witness admitting having been "arrested" was afterward acquitted. State v. Ripley, 32 Wash. 182, 72 P. 1036.

21. Where a copy of a mortgage is introduced to show that defendant made it, he is not prejudiced where he afterwards admits he made it. State v. McKinnon [Me.] 58 A. 1028. Improper cross-examination cured by defendant afterward recalling witness and proving same matters. State v. Smith [S. D.] 100 N. W. 740. Taking affidavit to jury room where affiant testified to same facts at the trial. Langan v. People [Colo.] 76 P. 1048.

22. Helm v. Commonwealth [Ky.] 81 S. W. 270.

23. Stripling v. State [Tex. Cr. App.] 80 S. W. 376.

24. Kroell v. State, 139 Ala. 1, 36 So. 1025.

25. Parrish v. State, 139 Ala. 16, 36 So. 1012; Wells v. Territory [Okl.] 78 P. 124; People v. Hutchings [Mich.] 100 N. W. 753; State

and offering defendant the privilege of examining him as to the excluded matter.[27] Error in allowing a question to be put may be cured by the answer,[28] or failure to answer,[29] or subsequently bringing out the same fact by a proper question.[30] A verdict on an issue to which the error did not relate renders the error innocuous.[31] Improper remarks,[32] conduct[33] and argument by the prosecuting attorney, may, if not too flagrant, be cured by prompt action of the court and instructions to disregard them.[34] Refusal to correct an erroneous ruling by instruction is prejudicial,[35] and improper evidence may be of such a damaging character as not to be curable by withdrawal or instructions to disregard it.[36] Error in overruling a motion to quash is cured by the withdrawal of all except one count as to which all the evidence applies,[37] but where a demurrer should have been sustained, the action of counsel in stating that he would not ask for a conviction under the invalid count will not relate back to cure the error.[38]

§ 16. *Stay of proceedings after conviction.*[39]—Regardless of the state practice, the Federal courts do not suspend sentence pending proceedings in error.[40] In order to entitle a convicted misdemeanant to a stay of proceedings pending appeal in Kansas, the record must be filed in the supreme court within 90 days.[41] Arrest of defendant on a capias pro fine after notice of appeal and recognizance

v. Carpenter [Iowa] 98 N. W. 775; Eatman v. State [Fla.] 37 So. 576.

26. Insanity of defendant. State v. Stockhammer, 34 Wash. 262, 75 P. 810. Character of defendant. State v. Anderson [Iowa] 101 N. W. 201. Character of defendant's wife whom he killed, and their relations. People v. Ochoa, 142 Cal. 268, 75 P. 847. Error in rejecting evidence of defendant's good reputation for truth and veracity is not cured by allowing his honesty and integrity to be shown in perjury. People v. Albers [Mich.] 100 N. W. 908. Fraudulent intent in forgery. State v. Rivers [Iowa] 98 N. W. 785.

27. People v. Spencer [N. Y.] 72 N. E. 461.

28. State v. Steen [Iowa] 101 N. W. 96; People v. Majoine [Cal.] 77 P. 952; Townley v. State [Tex. Cr. App.] 81 S. W. 309. Asking defendant about the commission of a distinct offense. Answer in negative. Ross v. State, 139 Ala. 144, 36 So. 718. Question calling for conclusion answered by relating fact. Wilson v. State [Ala.] 37 So. 93. Negative answer to question not sufficiently limited. Bess v. Commonwealth [Ky.] 82 S. W. 576.

29. Plant v. State [Ala.] 37 So. 159; State v. Reynolds [N. J. Law] 59 A. 5.

30. Hypothetical question including fact not in evidence. State v. Robinson [Iowa] 101 N. W. 634.

31. One convicted of murder in the second degree cannot complain that an instruction confused negligent homicide and accident. Friday v. State [Tex. Cr. App.] 79 S. W. 815. And one convicted of a lesser degree of crime cannot complain of errors in charging upon the greater degrees. State v. Cruikshank [N. D.] 100 N. W. 697; Chapman v. State [Ga.] 48 S. E. 350; Kilgore v. State [Ark.] 83 S. W. 928. Error in charge on first degree murder is harmless to one convicted of second degree. Thomas v. State [Fla.] 36 So. 161; State v. Underwood [Wash.] 77 P. 863; Venters v. State [Tex. Cr. App.] 83 S. W. 332. One convicted of manslaughter cannot complain of error in charging on the law of murder. Hendrickson v. Com. [Ky.] 81 S. W. 266; May v. State, 120 Ga. 135, 47 S. E. 548; Tardy v. State [Tex. Cr. App.] 83 S. W. 1128. Refusal of instructions on greater degrees. Williams v. State [Ala.] 37 So. 228. Conviction of shooting cures error in charging what constitutes assault with intent to murder. Harris v. State, 120 Ga. 167, 47 S. E. 520. When a defendant is convicted of manslaughter, errors assigned on a charge upon murder in the second degree will not be considered. Clemons v. State [Fla.] 37 So. 647. Errors in instructions with respect to the separate conviction of conspirators jointly convicted are harmless. State v. Sargood [Vt.] 58 A. 971. An erroneous instruction as to the penalty is harmless where the lowest penalty provided by the statute is assessed. Clark v. State [Tex. Cr. App.] 78 S. W. 1078. Failure to instruct as to all the isues may be cured by the verdict. Usher v. State [Tex. Cr. App.] 81 S. W. 309.

32. People v. Brittain, 142 Cal. 8, 75 P. 314; People v. Smith, 143 Cal. 597, 77 P. 449; People v. Smith [N. Y.] 72 N. E. 931.

33. Improper course of questioning. Jones v. Commonwealth, 25 Ky. L. R. 2062, 79 S. W. 1183. Reference to former conviction. Bearden v. State [Tex. Cr. App.] 83 S. W. 808.

34. State v. Warren [Iowa] 101 N. W. 508; People v. Perry [Cal.] 78 P. 284; Scott v. State [Tex. Cr. App.] 81 S. W. 47; Schissler v. State [Wis.] 99 N. W. 593; State v. Van Waters [Wash.] 78 P. 897.

Held prejudicial: State v. Barr, 123 Iowa, 139, 98 N. W. 595. Criticism of defendant's failure to testify. Lee v. State [Ark.] 83 S. W. 916.

35. State v. Priest, 32 Wash. 74, 72 P. 1024.

36. Parol evidence of receipt of telegram from defendant. Durham v. State [Tex. Cr. App.] 76 S. W. 563.

37. State v. Schaben [Kan.] 76 P. 823.

38. Bass v. U. S., 20 App. D. C. 232.

39. See 2 Curr. L. 378.

40. Pooler v. United States [C. C. A.] 127 F. 509.

41. Laws 1903, p. 594, c. 389, § 1. Youngberg v. Smart [Kan.] 78 P. 422.

is improper though the fine imposed was less than the amount required to give the appellate court jurisdiction.[42]

§ 17. *Appeal and review. A. Right of review.*[43]—Appeals are allowable only where expressly authorized by statute.[44] The general rule is that an acquittal, however accomplished, is final, and that appeal or error on behalf of the government does not lie,[45] but in some states an appeal or error proceedings on behalf of the state are provided.[46] The supreme court of Minnesota were equally divided on the question whether one convicted of a capital crime waives his right of appeal by accepting commutation to life sentence.[47] The statute 11 Hen. VII, c. 12, providing for the prosecution of suits by poor persons, has reference only to civil cases, and neither this statute nor the similar act of congress[48] gives a person convicted of crime the right to prosecute a writ of error at the expense of the government.[49]

(§ 17) *B. The remedy for obtaining review.*[50]—Statutory modes of review such as appeal and error must be pursued where provided and applicable and not certiorari,[51] prohibition,[52] or habeas corpus.[53] Criminal cases are reviewed by error and not by appeal in Illinois,[54] but an unauthorized appeal will in the absence of a motion to dismiss be heard as a writ of error, where everything essential to a review on error is present.[55] A judgment of conviction of contempt in violating an injunction is reviewable in the circuit court of appeals by error and not by appeal.[56]

(§ 17) *C. Adjudications which may be reviewed.*[57]—The judgment must be a finality in the trial court.[58] Intermediate orders are generally not appealable.[59] An order sentencing defendant and fixing the date for execution is not

42. Ex parte Parsons [Tex. Cr. App.] 78 S. W. 502; Ex parte Freedman [Tex. Cr. App.] 78 S. W. 503.

43. See 2 Curr. L. 378.

44. People v. Martin, 91 N. Y. S. 486.

45. Error cannot be prosecuted by the state from a judgment of a court having jurisdiction of a criminal case where the accused is discharged. State v. Hance, 4 Ohio C. C. [N. S.] 541.

46. People v. Stoll, 143 Cal. 689, 77 P. 818. Order granting new trial. People v. Sing Lee [Cal.] 78 P. 636. In Kentucky, where the punishment can only be a fine, the commonwealth may have a reversal for new trial of a judgment on a verdict of acquittal [Cr. Code Pr. § 352]. Commonwealth v. Keathly [Ky.] 82 S. W. 1001.

47. State v. Corrivan [Minn.] 100 N. W. 638.

48. U. S. Comp. St. 1901, p. 706.

49. Bristol v. U. S. [C. C. A.] 129 F. 87.

50. See 2 Curr. L. 379.

51. Valentine v. Police Court, 141 Cal. 615, 75 P. 336. Does not lie to review the action of a police judge in summoning a jury. Wittman v. Police Court [Cal.] 78 P. 1052; State v. Thompson, 111 La. 315, 35 So. 582.

52. Valentine v. Police Court, 141 Cal. 615, 75 P. 336; State v. Thompson, 111 La. 315, 35 So. 582.

53. Bray v. State [Ala.] 37 So. 250; Ex parte Smith [Ariz.] 78 P. 1035; People v. Murphy [Ill.] 72 N. E. 902; Gillespie v. Rump [Ind.] 72 N. E. 138; In re Butler [Mich.] 101 N. W. 630; Ex parte Stacy [Or.] 75 P. 1060; State v. Graham, 34 Wash. 81, 74 P. 1058.

54. Gallagher v. People, 207 Ill. 247, 69 N. E. 962.

55. Graff v. People, 208 Ill. 312, 70 N. E. 299.

56. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105.

57. See 2 Curr. L. 379.

58. State v. Mioton, 112 La. 180, 36 So. 314. Not where sentence has been suspended. State v. Brewer [N. J. Law] 59 A. 31. Rev. St. 1899, § 2697. State v. Rosenblatt [Mo.] 83 S. W. 975. An entry of what seems to be a confession of judgment for fine and costs following verdict is not sufficient. Moss v. State [Ala.] 37 So. 156. Where defendant tendered security for his fine and costs which was refused and he was thereupon sentenced to the workhouse, his appeal was from final judgment. Halfacre v. State [Tenn.] 79 S. W. 132. Motion in arrest after final judgment in no manner affects the finality of the judgment nor operates to stay it, hence error lies notwithstanding the motion. State v. Rosenblatt [Mo.] 83 S. W. 975. Conviction of contempt in violating injunction is final. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105.

59. No appeal lies from an order denying a motion to dismiss an indictment for want of prosecution. People v. Martin, 91 N. Y. S. 486. Where a motion in arrest was sustained and a motion for acquittal and discharge overruled and the charge resubmitted to another grand jury, an appeal therefrom is from an interlocutory order. State v. Gallaugher [Iowa] 101 N. W. 193. No appeal lies from the overruling of a motion in arrest or from a verdict. People v. Ruiz [Cal.] 77 P. 907. An order overruling a motion for a new trial in a criminal case is not

appealable, defendant having escaped after conviction and his appeal therefrom having never been perfected.[60] No appeal lies in South Carolina from an order setting aside a verdict on motion of the state.[61] Though an order granting a new trial is not ordinarily appealable, where the defendant claims to be entitled on the record to an absolute discharge, the appeal will be heard on its merits.[62] An order denying a motion to set aside a conviction on the ground that defendant was insane at the time of trial is appealable.[63] Further appealability of judgments of courts of review rests in statute.[64] The remedy applicable to criminal cases is proper on conviction of contempt,[65] but an order of the judge of a county court denying discharge on habeas corpus is not a judgment within the statute allowing writs of error in criminal cases.[66]

(§ 17) *D. Courts of review and their jurisdiction.*[67]—The supreme court of the United States does not consider itself bound on the question of its jurisdiction by a prior case in which jurisdiction was entertained without any suggestion as to the want of it.[68] That court has jurisdiction of a writ of error to the district court of Porto Rico where a right claimed under the constitution, a treaty or statute of the United States is denied,[69] and in any case which if determined in one of the territories could be taken to the supreme court.[70] It cannot review a capital case decided in Oklahoma.[71] The supreme court of Missouri has jurisdiction where a right claimed under the constitution is denied below,[72] or where a political subdivision of the state is a party.[73] The supreme court of appeals of West Virginia cannot entertain a writ of error from the judgment of

appealable. West v. U. S., 20 App. D. C. 347. No right of appeal exists in a murder case from a denial of a new trial applied for under the statute after the end of the term at which defendant was tried. Act Apr. 22, 1903 (P. L. 245). Commonwealth v. Greason, 208 Pa. 126, 57 A. 349. Where a motion for new trial is made before judgment, error will not lie from the refusal unless the court below grants a stay, the remedy in such case being error to the final judgment. Ullman v. State [Wis.] 100 N. W. 818.

60. Allen v. State [Ala.] 37 So. 393.

61. State v. Timmons [S. C.] 47 S. E. 140.

62. Commonwealth v. Gabor [Pa.] 58 A. 278.

63. Linton v. Stay [Ark.] 81 S. W. 608.

64. Refusal by the common pleas of a writ of error to a municipal court is not reviewable on error in the circuit court. Village of Canfield v. Brobst [Ohio] 72 N. E. 459. No appeal lies in Arizona from a judgment of the district court rendered on appeal from a justice of the peace [Pen. Code 1901, § 1067]. Hall v. Territory [Ariz.] 76 P. 476.

65. Contempt in violating an injunction is criminal, and the supreme court has jurisdiction to review the judgment punishing it. Wright v. People, 31 Colo. 461, 73 P. 869. A judgment of the United States circuit court convicting one of contempt in an equity suit is reviewable in the circuit court of appeals on writ of error. Under 26 Stat. 826, the court has jurisdiction to review judgments in criminal cases. In re Heinze [C. C. A.] 127 F. 96; Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105. Appeal lies in contempt cases in Indiana where the punishment is imprisonment or a fine of $50 or more. Mahoney v. State [Ind. App.] 72 N. E. 151.

66. Code 1896, § 4327. Smotherman v. State [Ala.] 37 So. 376.

67. See 2 Curr. L. 380.

68. New v. Oklahoma, 25 S. Ct. 68, 49 Law. Ed. ——.

69. Law governing qualifications of grand jurors. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075; Amado v. U. S., 25 S. Ct. 13, 49 Law. Ed. ——. An objection that the indictment does not set forth "an offense under the statutes of the United States" amounts to a mere demurrer to the indictment and confers no jurisdiction on the supreme court. Amado v. U. S., 25 S. Ct. 13, 49 Law. Ed. ——.

70. Amado v. U. S., 25 S. Ct. 13, 49 Law. Ed. ——.

71. New v. Oklahoma, 25 S. Ct. 68, 49 Law. Ed. ——.

72. Where the right was upheld below and reversed in the court of appeals, jurisdiction for a further appeal does not attach. State v. Brockmiller [Mo. App.] 81 S. W. 214. Jurisdiction is not conferred on the ground of constitutional construction where it appears that the motion to dismiss the prosecution was based on several grounds and the record does not show on which the decision was based. City of Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797. Where a constitutional question appears in Missouri on appeal to the court of appeals, the case should be transferred to the supreme court. State v. Brockmiller [Mo. App.] 81 S. W. 214.

73. The supreme court of Missouri is not given jurisdiction of an appeal from a conviction of a violation of a city ordinance on the ground that the city is a party to the suit, the city not being a political subdivision of the state within the constitutional provision relating to such jurisdiction. City of Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797.

the circuit court discharging a defendant from prosecution for violating a city ordinance, though the validity of the ordinance is involved.[74] And the circuit court of Ohio has no jurisdiction to hear a petition in error filed by the state in criminal case to reverse a judgment of the common pleas discharging the accused.[75] The decisions of the court of criminal appeals of Texas are conclusive as to the validity and construction of criminal statutes when called in question in the supreme court of that state.[76] Where the fine is less than $100, there is no appeal in Texas.[77]

(§ 17) *E. Procedure to bring up the cause.*[78]—Where accused excepts to the overruling of a demurrer and brings error before trial on the merits, the clerk of the court in which the case is pending has no right to demand the payment of accrued costs before sending up the record.[79] In New Mexico, appeals must be applied for at the term at which judgment is rendered,[80] and an appeal taken more than 30 days before the beginning of a term of the supreme court is returnable to that term.[81]

A recognizance on appeal[82] in the statutory form is necessary,[83] and in Texas must state the crime of which defendant was convicted[84] and the amount of punishment inflicted;[85] and a defective bond cannot be amended by filing a new one before expiration of the time to file bond.[86] A bond on appeal from a justice to the county court is not defective for failure to contain the number of the case appealed, the judgment being otherwise sufficiently described.[87]

(§ 17) *F. Perpetuation of proceedings in the "record." What must appear, and whether by record proper or bill of exceptions.*[88]—What must appear to authorize a review of particular errors is elsewhere treated.[89] The transcript must show that an appeal was taken from the judgment.[90] When the bill of exceptions recites that the court passed an order overruling a motion for new trial, it is not necessary that such order should be specified as a part of the record to be transmitted.[91] In Texas, in misdemeanor cases, the record must contain a recognizance or a certificate that defendant is confined in jail pending appeal.[92] Those matters which belong to the record proper must appear thereby,[93] and such mat-

74. Town of Phillipi v. Kittle [W. Va.] 49 S. E. 238.

75. State v. Hance, 4 Ohio C. C. (N. S.) 541.

76. Local option law. Commissioners' Court of Nolan County v. Beall [Tex.] 81 S. W. 526.

77. Parsons v. State [Tex. Cr. App.] 78 S. W. 1073; Freedman v. State [Tex. Cr. App.] 79 S. W. 545.

78. See 2 Curr. L. 380.

79. Wells v. Potter [Ga.] 48 S. E. 354.

80, 81. United States v. Sena [N. M.] 78 P. 58.

82. See 2 Curr. L. 380.

83. Code Cr. Proc. 1895, art. 887. Zobel v. State [Neb.] 100 N. W. 947; Allen v. State [Tex. Cr. App.] 79 S. W. 308; Lane v. State [Tex. Cr. App.] 82 S. W. 1034; Angel v. State [Tex. Cr. App.] 80 S. W. 379.

84. "Unlawfully carrying pistol." Davis v. State [Tex. Cr. App.] 82 S. W. 512. "Violating local option law." Parish v. State [Tex. Cr. App.] 82 S. W. 517.

85. Flynn v. State [Tex. Cr. App.] 82 S. W. 509; Gordon v. State [Tex. Cr. App.] 82 S. W. 1037; Noble v. State [Tex. Cr. App.] 82 S. W. 511; Townsend v. State [Tex. Cr. App.] 82 S. W. 511; Everett v. State [Tex. Cr. App.] 82 S. W. 512; Allen v. State [Tex. Cr. App.] 79 S. W. 537; Saufly v. State [Tex. Cr. App.] 83 S. W. 709.

86. Guenzel v. State [Tex. Cr. App.] 80 S W. 371.

87. Goree v. State [Tex. Cr. App.] 82 S. W. 515.

88. See 2 Curr. L. 381.

89. See post, this section.

90. State v. Kono [Iowa] 100 N. W. 854.

91. Smith v. State, 119 Ga. 564, 46 S. E. 846.

92. Code Cr. Proc. 1895, art. 886. Childress v. State [Tex. Cr. App.] 81 S. W. 302.

93. Pleadings and the rulings thereon. A bill of exceptions is proper to show motion to strike and exception to the ruling thereon, but the record proper should also show that judgment was rendered by the court. Spraggins v. State, 139 Ala. 93, 35 So. 1000. Entries showing the convening of the court, etc. Vann v. U. S. [Ind. T.] 82 S. W. 745. Instructions certified as provided by statute are part of the judgment roll. People v. Sing Yow [Cal.] 78 P. 235. Under Rev. St 1892, §§ 1090, 1091. Charges given and refused may appear in and form part of the record. Parnell v. State [Fla.] 36 So. 165. Order extending time to file bill must appear where the bill itself shows it was filed out of time. Peterman v. State, 139 Ala. 131, 36 So. 767.

ters need not be and cannot be otherwise shown;[94] but all matters not part of the record proper must appear by bill of exceptions, or its equivalent,[95] and where there is no bill of exceptions, or it is not properly in the record, matters necessary to be presented thereby cannot be reviewed,[96] only the record proper in such case being presented for review.[97] No bill of exceptions is required to raise the error of trying defendant without a plea, notwithstanding the statute providing otherwise.[98] A statement filed by the judge and entered of record relating to an alleged contempt in the presence of the court imparts absolute verity,[99] and recitals in the judgment as to matters necessary to be set out therein will prevail over contradictory statements in the bill of exceptions.[1] In Indiana, the original bill is properly made part of the record,[2] but nothing but the evidence and its incidents can be brought up thereby.[3] Affidavits filed in support of a motion for new trial cannot be taken as evidence of what occurred at the trial.[4] The bill of exceptions cannot be aided by reference to the statement of facts.[5]

94. Gratuitous recitals in the record cannot supply matters necessary to appear by bill. Motion for continuance. State v. Bates [Mo.] 81 S. W. 408. Motions for new trials must be evidenced to the appellate court by bill of exceptions, and will not be considered unless so evidenced, though copied by the clerk in the transcript sent up in obedience to the writ of error. Cooper v. State [Fla.] 36 So. 53.

95. Argument of counsel. Ball v. State [Tex. Cr. App.] 78 S. W. 508. Original information, demurrer, order sustaining it, motion to dismiss prosecution and order overruling it. State v. Stickney, 29 Mont. 523, 75 P. 201. Objections to the court's action in excusing the regular panel. Harnage v. State [Tex. Cr. App.] 82 S. W. 512. Objections to refusal to quash the panel. Dodd v. State [Tex. Cr. App.] 82 S. W. 510. Qualification of a juror. York v. State [Tex. Cr. App.] 82 S. W. 517; Dodd v. State [Tex. Cr. App.] 82 S. W. 510. Misconduct of jurors. Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041. Motion to quash proceedings. Hooper v. State [Ala.] 37 So. 652. Rulings on motion to change venue. State v. Navis [Mo.] 84 S. W. 1. Refusal of continuance. Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041; Sampson v. State [Tex. Cr. App.] 78 S. W. 926; McClarney v. State [Tex. Cr. App.] 80 S. W. 1142; Usher v. State [Tex. Cr. App.] 81 S. W. 712; McComas v. State [Tex. Cr. App.] 81 S. W. 1212; Sayles v. State [Tex. Cr. App.] 82 S. W. 1039; Mills v. State [Tex. Cr. App.] 82 S. W. 1045; Leach v. State [Tex. Cr. App.] 82 S. W. 1035; Ragland v. State [Tex. Cr. App.] 80 S. W. 1006; Taylor v. State [Tex. Cr. App.] 81 S. W. 299; Collins v. State [Tex. Cr. App.] 83 S. W. 805. Errors relating to the admission of evidence. Dutton v. State [Tex. Cr. App.] 82 S. W. 511; Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041; Usher v. State [Tex. Cr. App.] 81 S. W. 309, 712; Scott v. State [Tex. Cr. App.] 81 S. W. 294; Wilson v. State [Tex. Cr. App.] 82 S. W. 1042; Bartley v. State [Tex. Cr. App.] 83 S. W. 190. Alleged errors in a charge. State v. Block [Mo. App.] 82 S. W. 1103; Usher v. State [Tex. Cr. App.] 81 S. W. 712; Manning v. State [Tex. Cr. App.] 81 S. W. 957; Dutton v. State [Tex. Cr. App.] 82 S. W. 511; State v. Eathly [Mo.] 83 S. W. 1081; Ragsdale v. State [Tex. Cr. App.] 82 S. W. 1034; Stapf v. State [Ind. App.] 71 N. E. 165. Failure to charge on accomplice testimony. Flores v. State [Tex. Cr. App.] 81 S. W. 292; Viescas v. State [Tex. Cr. App.] 81 S. W. 292. Inaccuracies and misleading references to the testimony in the charge of the court cannot be reviewed in the absence of the evidence. State v. Reynolds [N. J. Law] 59 A. 5. Refusal of requests to charge. Dodd v. State [Tex. Cr. App.] 82 S. W. 510. Sufficiency of evidence. Reed v. State [Tex. Cr. App.] 79 S. W. 307; Holmes v. State [Tex. Cr. App.] 80 S. W. 1141; Viescas v. State [Tex. Cr. App.] 81 S. W. 292.

Motion for new trial: Cooper v. State [Fla.] 36 So. 53; People v. Ruiz [Cal.] 77 P. 907; Parnell v. State [Fla.] 36 So. 165; Wilson v. State [Tex. Cr. App.] 81 S. W. 34; Fardy v. State [Tex. Cr. App.] 83 S. W. 1128; Halbert v. State [Tex. Cr. App.] 79 S. W. 304; Handy v. State [Tex. Cr. App.] 80 S. W. 526; Sayles v. State [Tex. Cr. App.] 82 S. W. 1039; Torres v. State [Tex. Cr. App.] 83 S. W. 184; Johnson v. State [Fla.] 36 So. 166; Harris v. State [Tex. Cr. App.] 79 S. W. 539. Affidavits and proceedings thereon. People v. Sing Yow [Cal.] 78 P. 235; Miller v. Com., 25 Ky. L. R. 1931, 79 S. W. 250. Grounds of a motion for new trial based on proceedings had at the trial not verified by any bill of exceptions cannot be reviewed. Schwartz v. State [Tex. Cr. App.] 83 S. W. 195.

96. Challenges to jurors. Myers v. State [Ind.] 71 N. E. 957.

97. State v. Smith [Mo.] 84 S. W. 15; State v. Boyer, 179 Mo. 286, 78 S. W. 601; State v. Bates [Mo. App.] 78 S. W. 682; Territory v. McDonald [N. M.] 78 P. 55; Raymond v. State [Tex. Cr. App.] 80 S. W. 1007. Law points raised on a motion in arrest may be brought up on appeal without the necessity of a formal bill of exceptions or assignment of error. Sufficiency of indictment. State v. Williams [La.] 35 So. 111.

98. Code Cr. Proc. 1895, art. 904. Thompson v. State [Tex. Cr. App.] 80 S. W. 623.

99. Mahoney v. State [Ind. App.] 72 N. E. 151.

1. That defendant filed plea of former acquittal on which the state took issue. Spraggins v. State, 139 Ala. 93, 35 So. 1000.

2. Burns' Ann. St. 1901, § 538a. Dunn v. State, 152 Ind. 174, 70 N. E. 521.

3. Stapf v. State [Ind.] 71 N. E. 165.

4. Gallagher v. People, 211 Ill. 158, 71 N. E. 842.

5. Laudermilk v. State [Tex. Cr. App.] 83

Making, settling and approving.[6]—The bill of exceptions or like memorial of the proceedings must be approved by the trial judge, and filed within the statutory or allowed period,[7] and signing must precede filing,[8] and the bill must show such facts.[9] It is no longer the practice to make up the bills of exceptions during progress of the trial.[10] The bill of exceptions must be submitted by the judge to the district attorney before signature,[11] and should be granted or refused outright, and not signed with the qualification that the judge was unable to say whether the matter complained of occurred.[12] Upon settlement, the minutes of the clerk are not conclusive, but the judge may of his own knowledge, or from the reporter's transcript determine the true facts.[13] Affidavits attached to a transcript on appeal cannot be considered where they are not certified as a part of the record in the case.[14] It is counsel's duty to see to the making and settlement of exceptions,[15] but where defendant makes and files his statement in proper time, but no approval is had because of the laches of the judge and district attorney, reversal follows.[16]

S. W. 1107; Kennon v. State [Tex. Cr. App.] 82 S. W. 518.

6. See 2 Curr. L. 382.

7. Territory v. Flores, 3 Ariz. 215, 77 P. 491; United States v. Sena [N. M.] 78 P. 58; Peterman v. State, 139 Ala. 131, 36 So. 767; Dunn v. State, 162 Ind. 174, 70 N. E. 521; Talty v. District of Columbia, 20 App. D. C. 489; Washington v. State [Fla.] 37 So. 573; State v. Youngberg [Kan.] 78 P. 421; Cook v. State, 120 Ga. 137, 47 S. E. 562. A statement marked "approved" and signed by the judge without more will be presumed to have been made by the judge because the parties failed to agree. Lozano v. State [Tex. Cr. App.] 81 S. W. 37. An express approval of the grounds of an amendment to a motion for a new trial affords a presumption that the amendment was allowed. Smith v. State, 119 Ga. 564, 46 S. E. 846. Agreement of counsel as to its correctness will not supply the necessary approval by the trial judge of a brief of evidence appearing in the record. Cawthon v. State, 119 Ga. 395, 46 S. E. 897.

Time given "until" a certain day may include that day. State v. Horine [Kan.] 78 P. 411; State v. Burton [Kan.] 78 P. 413. Signing nunc pro tunc after appeal is taken is improper. State v. Hauser, 112 La. 313, 36 So. 396. The bill of exceptions must be prepared and filed during the term at which the trial was had, unless the time is extended by order of the court. State v. Chenoweth [Ind.] 71 N. E. 197; Mason v. State [Tex. Cr. App.] 81 S. W. 718; Talty v. District of Columbia, 20 App. D. C. 489. After timely moving for a new trial, accused has until the day set for the hearing, it not being more than 30 days distant and before the end of the term, to file his brief of evidence. Hall v. State, 120 Ga. 305, 47 S. E. 907. Evidence as to change of venue must be perpetuated in a bill of exceptions prepared and filed during the term. Code Cr. Proc. 1895, art. 621, is not affected by Act 28th Leg. p. 32, c. 25, authorizing bills to be filed out of term time. Wallace v. State [Tex. Cr. App.] 81 S. W. 966; Lax v. State [Tex. Cr. App.] 79 S. W. 578; Mason v. State [Tex. Cr. App.] 81 S. W. 718. The statute providing that a party may be granted 20 days after term to file a statement of facts and bill of exceptions, authorizes the filing during such time of a bill of exceptions in connection with the statement of facts and is not limited in its application to separate bills of exceptions [Acts 28th Leg. p. 32, c. 25]. Martin v. State [Tex. Cr. App.] 82 S. W. 657.

Extension must be granted before expiration of statutory or extended period. Continuance of application to prosecute as poor person held not to extend time. Myers v. State [Ind.] 71 N. E. 957. Extension cannot be made at subsequent term. Scott v. State [Ala.] 37 So. 366. Defendant must see that order extending time is properly filed. Sampson v. State [Tex. Cr. App.] 78 S. W. 926.

8. Where both appear to have been on same day, signing will be presumed to have preceded in the absence of contrary showing. Dunn v. State, 162 Ind. 174, 70 N. E. 521.

9. A bill not affirmatively showing that the draft thereof was noticed for settlement will not be considered. State v. Stickney, 29 Mont. 523, 75 P. 201. The record must affirmatively show a compliance with the statute as to the time of presentation of the bill of exceptions for allowance. Territory v. Flores [Ariz.] 77 P. 491. Where it is not shown that the bill of exceptions was ever marked "filed," errors based upon the facts cannot be considered. Cronin v. State [Tenn.] 82 S. W. 477. A statement bearing a file mark later than the end of the term cannot be considered, there being no order extending the time. Trevinio v. State [Tex. Cr. App.] 81 S. W. 1206.

10. Refusal to delay trial until bill could be signed held not error. Sanchez v. State [Tex. Cr. App.] 78 S. W. 504.

11. Territory v. Flores, 3 Ariz. 215, 77 P. 491.

12. Remarks of counsel. McCarty v. State [Tex. Cr. App.] 78 S. W. 506.

13. State v. Ronk, 91 Minn. 419, 98 N. W. 334.

14. State v. Yandell, 34 Wash. 409, 75 P. 988.

15. Appellant is not entitled to a reversal on the ground that he was deprived of his right to have a fair statement of the facts certified where he has failed to take all possible steps, though he relied on the statement of the clerk that the record was closed. Lozano v. State [Tex. Cr. App.] 81 S. W. 37.

Amendments, additions, and corrections.[17]—The appeal court cannot correct or amend the memorial of the evidence;[18] corrections of the record being necessarily made in the trial court on application seasonably made.[19] In Washington the trial judge has authority to correct his certificate according to the fact at any time before the appeal is heard,[20] and may be compelled by mandate in a proper case to correct it.[21] A motion for certiorari to correct the record and rehear the cause as corrected will be granted in North Carolina after reversal.[22] An amendment of the record made nunc pro tunc showing proper arraignment and plea will control in deciding assignments of error.[23] In some states parties are allowed to present the affidavits of bystanders as to what occurred at the trial where they deem themselves aggrieved by the action of the judge in settling the bill,[24] but in Kentucky the verity of the bill as certified by the judge cannot be so assailed,[25] and the trial court's explanation of a bill of exceptions cannot be attacked by ex parte affidavits.[26]

The statement of facts[27] must be approved,[28] served[29] and filed,[30] within the statutory or allowed period, and a statement not agreed to by counsel nor approved by the court will not be considered though authenticated by the affidavit of three witnesses.[31] A statement not appearing to have been approved cannot be considered,[32] but where defendant takes all the necessary legal steps to have his statement of facts approved and the court refuses to approve it or prepare a correct one, reversal will follow.[33] It should state that it contains all facts admitted, the facts admitted to have been proven, and the evidence of the facts disputed.[34]

Under the Georgia practice, the motion for new trial,[35] unless the recitals of fact contained in a ground of a motion for new trial are approved or certified as true by the trial judge, the errors therein alleged cannot be considered.[36] A

16. Shepherd v. State [Tex. Cr. App.] 79 S. W. 316.

17. See 2 Curr. L. 383.

18. The court will not consider as a part of the brief of the evidence, matter which affirmatively appears to have been stricken therefrom before it was filed below and which is sought to be incorporated therein on the hearing in the supreme court. Davis v. State [Ga.] 48 S. E. 305.

19. Affidavits will not be received to contradict recitals in the record and show that the bill was in fact presented and signed in time and inadvertently dated too late by the judge. Talty v. District of Columbia, 20 App. D. C. 489.

20, 21. State v. Klein [Wash.] 78 P. 137.

22. State v. Marsh, 134 N. C. 184, 47 S. E. 6.

23. Cooper v. State [Fla.] 36 So. 53.

24. Conflicting affidavits of bystanders held insufficient to establish matter stricken from the bill by the court. State v. Steen [Iowa] 101 N. W. 96. A bill signed by the judge cannot be impeached by affidavit of counsel. Statute provides for affidavits of bystanders. Moree v. State [Tex. Cr. App.] 83 S. W. 1117. Counsel's affidavit stating that the court qualified the bills of exception without counsel's knowledge at a time when he could not secure the affidavits of bystanders presents nothing for review where it shows no prejudice or what the qualifications were. Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107.

25. Dodson v. Commonwealth, 25 Ky. L. R. 1765, 78 S. W. 874.

26. Littlefield v. State [Tex. Cr. App.] 80 S. W. 85.

27. See 2 Curr. L. 383.

28. A statement merely signed by counsel is not sufficiently authenticated by the signature of the judge approving the record as correct. Ex parte Wallace [Tex. Cr. App.] 83 S. W. 1110. The statement of facts to be considered must be made up within the time limited by the statute or an extension thereof. Territory v. Flores, 3 Ariz. 215, 77 P. 491.

29. Where the copy of the statement of facts is served before the original is filed, as required by statute, it cannot be considered. State v. Yandell, 34 Wash. 409, 75 P. 988. When the statement of facts is not served until more than 30 days after judgment, and no extension of time has been obtained, it cannot be considered. Id.

30. Must be filed within the time allowed by order of the court. Motion for continuance not reviewed. Townsell v. State [Tex. Cr. App.] 78 S. W. 938. The order limiting the time within which to file statement must be entered at the trial term. Cannot be entered nunc pro tunc. Id.

31. Bailey v. State [Tex. Cr. App.] 81 S. W. 1208.

32. Williams v. State [Tex. Cr. App.] 81 S. W. 36.

33. Nelson v. State [Tex. Cr. App.] 81 S. W. 744.

34. Territory v. Flores, 3 Ariz. 215, 77 P. 491.

35. See 2 Curr. L. 384.

36. Mere allowance of an amendment to the motion does not amount to an approval. Williams v. State [Ga.] 48 S. E. 149; Bradley v. State [Ga.] 48 S. E. 904; Sindy v. State, 120 Ga. 202, 47 S. E. 554.

motion for new trial cannot be amended in the supreme court by adding new assignments of error.[37]

Limitation of review to matters in the record.[38]—Except as to those jurisdictional matters which the record is in most states required to show,[39] every reasonable presumption is in favor of the correctness of the proceedings below, and unless the record shows error this presumption will prevail,[40] and the certified record is conclusive as to matters contained therein.[41] Accordingly, to entitle appellant to review a ruling it must affirmatively appear that such ruling was made,[42] or the proceeding had,[43] of which complaint is made, and such facts as show that it was error,[44] or explain the objection,[45] and the objection and excep-

37. Miller v. State [Ga.] 48 S. E. 904.

38. See 2 Curr. L. 384.

39. See ante, this section, "The Record."

40. State v. Ronk, 91 Minn. 419, 98 N. W. 334; People v. Allen [Cal.] 77 P. 948. Record held not to show that prosecutrix was not sworn. State v. Smith [Iowa] 100 N. W. 40. This presumption will require the court to assume that counsel adopted a line of argument justifying an instruction that nothing said on the argument should cause the jury to fail to follow the court's instructions. State v. Leuhrsman, 123 Iowa, 476, 99 N. W. 140. Presumed in favor of conviction, that declarations of prosecutrix were introduced after an attempt to impeach her had been made. State v. Parker, 134 N. C. 209, 46 S. E. 511. The record will not be interpreted to show error if it be susceptible of a reasonable interpretation to the contrary. State v. Durein [Kan.] 78 P. 152. On appeal in a contempt case it will be presumed in aid of the conviction that the accused was present, there being no showing to the contrary. Mahoney v. State [Ind.] 72 N. E. 151.

41. That defendant acquiesced in excusing sick juror, swearing another and reproducing testimony. State v. Ronk, 91 Minn. 419, 98 N. W. 334. A statement of the time at which defendant moved to discharge the jury, which appears in the statement of fact contained in the order of the court in the bill of exceptions must be accepted as true. Turner v. Commonwealth, 25 Ky. L. R. 2161, 80 S. W. 197. The statement of facts is conclusive as to the date of the commission of the offense and cannot be controlled by the averment of the indictment, though the statement shows the prosecution to be barred by limitations. Lane v. State [Tex. Cr. App.] 82 S. W. 1034.

42. State v. Eggleston [Or.] 77 P. 738; State v. Henderson [La.] 36 So. 950. A motion for new trial for newly-discovered evidence cannot be considered on appeal where there is no bill of exceptions in reference to the matter, and no order of the trial court overruling the motion, or any exception thereto, appears in the record. Elmore v. State [Tex. Cr. App.] 78 S. W. 520. Where no motion to quash the affidavit on which the arrest was made is set out in the transcript, no question as to the ruling of the court on such motion is presented for review. Ross v. State, 139 Ala. 144, 36 So. 718. Objections to jurors will not be reviewed where the bill does not show whether they sat in the trial and what disposition was made of them. Dodd v. State [Tex. Cr. App.] 82 S. W. 510.

43. Improper remarks of the prosecuting attorney will not be reviewed unless preserved in the record. State v. Brown, 181 Mo. 192, 79 S. W. 1111. Reading from books or paper by prosecuting attorney not shown by record. Sampson v. Commonwealth [Ky.] 82 S. W. 384. Where testimony at the inquest claimed to have been improperly read at the trial is not set out, and the prosecuting attorney denies reading it and the court instructed that if any such testimony had been read it should be disregarded, the objection is untenable. Scott v. State [Tex. Cr. App.] 81 S. W. 47. Objection to allowing witness to testify must be supported by bill showing he did testify. Smotherman v. State [Tex. Cr. App.] 83 S. W. 838.

44. State v. Lewis, 112 La. 872, 36 So. 788; State v. Henderson [La.] 36 So. 950. The court will not inspect legislative journals to determine whether the statute under which defendant was convicted was constitutionally enacted, the facts he relies on not being in the bill. Peckham v. People [Colo.] 75 P. 422. An exception on the ground of variance must be accompanied by a facsimile of the indictment where necessary to decide. Kirby v. State, 139 Ala. 87, 36 So. 721. Objectionable publication getting into hands of jurors must be shown or described. State v. Schaben [Kan.] 76 P. 823. Remarks of the judge and the connection in which they were made must be set out. State v. Sanders [S. C.] 47 S. E. 55. Refusal to dismiss for delay in prosecution. State v. Van Waters [Wash.] 78 P. 897. Refusal to continue on the ground that the district attorney had promised to dismiss cannot be considered where it does not appear that the court assented to the dismissal. Taylor v. State [Tex. Cr. App.] 81 S. W. 299. Reference, in argument, to failure to make explanations, must be shown by the bill to have referred to defendant. Brown v. State [Tex. Cr. App.] 83 S. W. 704. Refusal of new trial for insufficiency of the evidence cannot be reviewed in the absence of the evidence. Allen v. State [Tex. Cr. App.] 83 S. W. 1111. No showing that witness inadvertently sworn was examined. Walker v. State, 139 Ala. 56, 35 So. 1011. The bill must show that the action of the court in asking defendant a question was injurious to him. Washington v. State [Tex. Cr. App.] 79 S. W. 811. Where challenge for cause is overruled, it must appear that the jurors were accepted or peremptorily challenged and that defendant exhausted his challenges. State v. Woods, 112 La. 617, 36 So. 626; Bailey v. State [Tex. Cr. App.] 81 S. W. 1208; Martin v. State [Tex. Cr. App.] 83 S. W. 390; Hierholzer v. State [Tex. Cr. App.] 83 S. W. 836. A mere statement in the bill of exceptions that defendant moved to quash the venire because of a certain variance between the writ and the copy is not enough to show the

tion must be shown[46] with the grounds.[47] Where there is no certificate that the

variance existed. McClellan v. State [Ala.] 37 So. 239.

Admission of evidence: Evidence complained of must be set out. Whittington v. State [Ga.] 48 S. E. 948; Andrews v. State [Tex. Cr. App.] 83 S. W. 188; Laudermilk v. State [Tex. Cr. App.] 83 S. W. 1107. Materiality, relevancy, reception, and probable injury, must appear. State v. Woods, 112 La. 617, 36 So. 626; State v. Lewis, 112 La. 872, 36 So. 788. Where a paper introduced as a dying declaration is not shown in the bill of exceptions, the ruling on objection to its introduction cannot be reviewed. Pitts v. State [Ala.] 37 So. 101. Defendant who seeks to obtain a review of a ruling admitting a deposition on the ground that the certificate is not in due form, must see that the certificate is in the record. People v. Moran [Cal.] 77 P. 777. Where all the testimony offered as a predicate for the admission of dying declarations is not in the bill, their admissibility cannot be reviewed. Kimberlain v. State [Tex. Cr. App.] 82 S. W. 1043. A bill of exceptions to cross-examination of defendant's witness cannot be considered where the objections do not show that the cross-examination was not germane. Kennon v. State [Tex. Cr. App.] 82 S. W. 518. A bill of exceptions complaining of the questions asked of a witness relative to the condition of a dying person presents no question where it is not shown that the person made any dying declaration or that any was introduced in evidence. Washington v. State [Tex. Cr. App.] 79 S. W. 811. Enough of the surrounding facts and circumstances must be set out to show that the admission of the evidence complained of was error. Patton v. State [Tex. Cr. App.] 80 S. W. 86; Pace v. State [Tex. Cr. App.] 79 S. W. 531. Bill must show that alleged improper questions were answered. Hays v. State [Tex. Cr. App.] 83 S. W. 201. Answers to questions complained of must appear. Blain v. State [Tex. Cr. App.] 78 S. W. 518; Love v. State [Tex. Cr. App.] 78 S. W. 691. Bill of exceptions to competency of witness must show his testimony. Ham v. State [Tex. Cr. App.] 78 S. W. 929. Admission of testimony concerning other property found in defendant's possession objected to on the ground that it did not appear to have been stolen will not be reviewed where the bill does not show whether there was testimony showing it to have been stolen. Thompson v. State [Tex. Cr. App.] 78 S. W. 941. Bill to admission of evidence complained of as not the best must show that the best evidence was not in fact introduced. Daugherty v. State [Tex. Cr. App.] 80 S. W. 624. A bill of exceptions to the introduction of a deed on the ground that no notice was given does not show that no notice was in fact given though the bill was approved by the judge. Frazier v. State [Tex. Cr. App.] 81 S. W. 532. Bill allowing witness to state what was the purpose of an indefinite conversation, held bad as not negativing the idea that the purpose was as stated and apparent to the parties. Haynes v. State [Tex. Cr. App.] 83 S. W. 16. A statement of the grounds of objection urged is not a certificate by the court that the grounds existed. Andrews v. State [Tex. Cr. App.] 83 S. W. 188. Bill of exceptions to proof of other offenses must show they were not part of a system. Buck v. State [Tex. Cr. App.] 83 S. W. 387. Seemingly irrelevant testimony will not be regarded as prejudicial in the absence of any showing as to how it might prejudice. Why people often went to a depot where a homicide occurred. Black v. State [Tex. Cr. App.] 81 S. W. 302.

Rejected evidence or questions: State v. Thompson [Iowa] 101 N. W. 109; Sutherland v. State [Ga.] 48 S. E. 915. Sustaining objections to a question is not reviewable where it is not shown what the witness would have answered. Love v. State [Tex. Civ. App.] 78 S. W. 691; Mullins v. Com., 25 Ky. L. R. 2044, 79 S. W. 258; Kennon v. State [Tex. Cr. App.] 82 S. W. 518; Commonwealth v. Bavarian Brewing Co. [Ky.] 80 S. W. 772; Ross v. State, 139 Ala. 144, 36 So. 718; Washington v. State [Tex. Cr. App.] 79 S. W. 811. The bill should show the materiality of the evidence excluded. Henard v. State [Tex. Cr. App.] 82 S. W. 655. The purpose and object of rejected testimony must be shown. Townsell v. State [Tex. Cr. App.] 78 S. W. 938; Gather v. State [Tex. Cr. App.] 81 S. W. 717; McVey v. State [Tex. Cr. App.] 81 S. W. 740. Where materiality sufficiently appears from question, answer need not be shown. Parrish v. State, 139 Ala. 16, 36 So. 1012. Rejection of transcript of testimony at former trial cannot be reviewed in absence of the transcript. Commonwealth v. Bavarian Brewing Co. [Ky.] 80 S. W. 772. Rejected confession must be shown. Taylor v. State [Tex. Cr. App.] 81 S. W. 299.

Instructions: State v. Thompson [Iowa] 101 N. W. 109. Instructions must appear. Loessin v. State [Tex. Cr. App.] 81 S. W. 715; Johnson v. State [Ark.] 83 S. W. 651. Bill must show facts in order that error from refusal of requested instruction may appear. State v. Matthews [La.] 36 So. 48; State v. Woods, 112 La. 617, 36 So. 626. Answer of court to hypothetical question by juror must be shown to have been applicable to the evidence. People v. Kriesel [Mich.] 98 N. W. 850. Amendments to instructions presumed correct where not shown in record. Mitchell v. State [Ark.] 83 S. W. 1050.

Statement of facts is necessary to authorize review of ruling on motion for continuance (Sanchez v. State [Tex. Cr. App.] 78 S. W. 504), denial of new trial for newly-discovered evidence (Bailey v. State [Tex. Cr. App.] 81 S. W. 1208), admission of evidence (Id.).

45. An argument by the county attorney that defendant's testimony had been changed since talking with her attorney is not reviewable where her testimony or its character or the manner in which it was changed is not shown. Scott v. State [Tex. Cr. App.] 81 S. W. 47. A bill of exceptions taken to the admission of evidence is insufficient if it fail to show how the testimony came to be introduced. Elmore v. State [Tex. Cr. App.] 78 S. W. 520. Testimony objected to as brought out by leading questions must be specified. Scoville v. State [Tex. Cr. App.] 81 S. W. 717.

46. Admission of improper evidence. Wilson v. U. S. [Ind. T.] 82 S. W. 924. Bill of exceptions must show motion for new trial and exception to overruling. State v. Block [Mo. App.] 82 S. W. 1103. Remarks of

record contains all the material evidence its sufficiency cannot be considered,[48] and it cannot be assumed, in the absence of the evidence, that the court erred in admitting certain evidence because he instructed the jury to disregard it;[49] but where pleas of not guilty and autrefois acquit are both at issue, and judgment is entered on general verdict of guilty, it cannot be presumed in aid of the judgment, the evidence not being brought up, that none was offered in aid of the plea of autrefois acquit.[50] Questions not raised by the record will not be considered though argued.[51]

Setting out evidence or statement of facts.[52]—A statement of facts or other showing of the evidence is necessary to a review of the sufficiency of the evidence,[53] giving or refusal of instructions,[54] denial of new trial,[55] admission of evidence,[56] refusal of continuance,[57] acceptance of juror,[58] variance,[59] misconduct of jurors.[60] Testimony should be presented in narrative form unless it is material that the court should know how it was given.[61] Written and printed exhibits objected to should be set out, not merely referred to and described by date and general import.[62] The bill of exceptions to the admission of a person's declaration should state as a fact and not merely as a ground of objection that the declarant was an unpardoned convict and hence incompetent to testify.[63]

(§ 17) *G. Practice and procedure in reviewing court.*[64]—The Federal courts in matters of procedure in error, follow the common law without regard to the practice in the state courts.[65]

Assignments, abstracts, briefs, etc.[66]—In some states, in criminal cases, all questions apparent on the record must be considered, though there are no assignments.[67] Generally, however, errors must be specifically assigned,[68] and a general assignment to several rulings will be overruled if any ruling be correct. A gen-

prosecuting attorney. State v. Meals [Mo.] 83 S. W. 442. Remarks of court. Smith v. Commonwealth [Ky.] 83 S. W. 647.

47. Love v. State [Tex. Cr. App.] 78 S. W. 691; Hatchell v. State [Tex. Cr. App.] 84 S. W. 234. Objection to juror. Hays v. State [Tex. Cr. App.] 83 S. W. 201. Objection to evidence. Phillips v. State [Ga.] 49 S. E. 290; Schley v. State [Fla.] 37 So. 518. Grounds not shown will not be considered. Moree v. State [Tex. Cr. App.] 83 S. W. 1117.

48. State v. Pittam, 32 Wash. 137, 72 P. 1042. Where the bill recites that it contains all the evidence as to a particular matter it will not be presumed that it contains all evidence introduced. People v. Coulter [Cal.] 78 P. 348.

49. People v. Allen [Cal.] 77 P. 948.

50. State v. Creechley, 27 Utah, 142, 75 P. 384.

51. Hall v. State [Ga.] 48 S. E. 903.

52. See 2 Curr. L. 386.

53. Wilson v. State [Tex. Cr. App.] 82 S. W. 1042; Stanton v. State [Tex. Cr. App.] 82 S. W. 1049.

54. Dutton v. State [Tex. Cr. App.] 82 S. W. 511; Ragsdale v. State [Tex. Cr. App.] 82 S. W. 1034; State v. Reynolds [N. J. Law] 59 A. 5; Dodd v. State [Tex. Cr. App.] 82 S. W. 510; Wilson v. State [Tex. Cr. App.] 82 S. W. 1042; Stanton v. State [Tex. Cr. App.] 82 S. W. 1049.

55. Cooper v. State [Fla.] 36 So. 53; Sayles v. State [Tex. Cr. App.] 82 S. W. 1039. Assignments of error predicated on grounds of a motion for new trial that are not supported by evidence in the transcript cannot be considered. Webster v. State [Fla.] 36 So. 584.

56. Dutton v. State [Tex. Cr. App.] 82 S. W. 511; Scott v. State [Tex. Cr. App.] 81 S. W. 294; Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041.

57. McComas v. State [Tex. Cr. App.] 81 S. W. 1212; Sayles v. State [Tex. Cr. App.] 82 S. W. 1039; Leach v. State [Tex. Cr. App.] 82 S. W. 1036; Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041.

58. York v. State [Tex. Cr. App.] 82 S. W. 517; Dodd v. State [Tex. Cr. App.] 82 S. W. 510.

59. Whether evidence supported allegation as to deceased's name. Provata v. State [Tex. Cr. App.] 82 S. W. 1040.

60. Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041.

61. Radford v. United States [C. C. A.] 129 F. 49.

62. Balliet v. U. S. [C. C. A.] 129 F. 689.

63. Flores v. State [Tex. Cr. App.] 79 S. W. 808.

64. See 2 Curr. L. 387.

65. Pooler v. U. S. [C. C. A.] 127 F. 509.

66. See 2 Curr. L. 387.

67. Action of the court with reference to requests to charge may be considered. Feagin v. State, 139 Ala. 107, 36 So. 18.

68. Commonwealth v. Stambaugh, 22 Pa. Super. Ct. 386; State v. Donohue [N. J. Law] 59 A. 12; Betts v. U. S. [C. C. A.] 132 F. 228; State v. Moody [S. C.] 49 S. E. 8. That the court erred in not charging the law applicable to the case and that the charge was prejudicial to defendant is too general. White v. State [Tex. Civ. App.] 81 S. W. 30.

eral assignment referring to several instructions will be overruled if any be good.[69] Unless apparent, the assignment must show wherein the error consists,[70] and set out the matters complained of and the rule of law claimed to be violated.[71] In some states, neither brief nor argument is necessary;[72] but the general rule is that in the absence of a brief, the court will only look to the jurisdiction of the court, the sufficiency of the indictment, and the regularity of the judgment;[73] and that exceptions[74] and assignments not referred to in the brief or argument will be treated as abandoned,[75] unless error in the ruling is so glaring or patent that no argument is needed to demonstrate it.[76] The assignment or brief should refer to the portion of the record where the error lies,[77] and point out the exact defect.[78] An additional argument filed for the state will not be stricken where pertinent and called forth by the defense.[79]

Dismissal[80] will be granted for failure to properly bring up the case,[81] or where appellant dies pending the appeal.[82] Dismissed appeals may be reinstated on proper application and showing.[83] Where exceptions are waived after being entered

69. Miller v. State [Ind. App.] 71 N. E. 248; Parnell v. State [Fla.] 36 So. 166; Miller v. State [Ga.] 48 S. E. 904. And one referring to several requests will be overruled if any should not have been given. Miller v. State [Ind. App.] 71 N. E. 248.

70. Assignment of error on refusal to allow counsel to read from book on argument must show what he desired to read. Smith v. State, 120 Ga. 161, 47 S. E. 562. General objections that extracts from the charge are erroneous will be overruled if it appear that they are correct, viewed as abstract propositions of law. Owens v. State, 120 Ga. 209, 47 S. E. 645. Where the law is correctly given by the trial judge, the appeal court will not, in the absence of a special assignment, undertake to inquire whether the charge was adjusted to the facts of the case. Bone v. State [Ga.] 48 S. E. 986. An omission to charge a proposition of law favorable to accused cannot be taken advantage of by assigning error on an unobjectionable instruction given. Williams v. State [Ga.] 48 S. E. 368. An assignment of error in allowing to be put a certain question set out in full, and which appears to be answerable only by yes or no only one of which answers would be prejudicial to defendant, is sufficient. Dunn v. State, 162 Ind. 174, 70 N. E. 621.

71. The court will not look into the transcript for instructions and at the code to determine whether error was committed. People v. Chutnacut, 141 Cal. 682, 75 P. 340.

72. In criminal cases, unlike civil, the court must examine the record and render judgment thereon, though neither party favors the court with argument. State v. Rea [Iowa] 101 N. W. 507.

73. Hiatt v. Territory [Okl.] 78 P. 81; Manning v. U. S. [Okl.] 78 P. 92.

74. The case being submitted on briefs. Commonwealth v. Clancy [Mass.] 72 N. E. 842.

75. McNish v. State [Fla.] 36 So. 176; Wilson v. State [Fla.] 36 So. 580; Schley v. State [Fla.] 37 So. 518; Williams v. State [Ga.] 48 S. E. 906; Bickers v. State, 120 Ga. 172, 47 S. E. 515; Hicks v. State, 120 Ga. 176, 47 S. E. 547; Bromberger v. U. S. [C. C. A.] 128 F. 346. Mere reference to the ruling and the page where found is not argument. People v. Mead [Cal.] 78 P. 1047.

76. Thomas v. State [Fla.] 36 So. 161.

77. In the circuit court of appeals the brief or assignment of errors must quote the substance of the testimony objected to, and cite the page of the record where it will be found [Rules 11 & 24 (89 F. vii, 32 C. C. A. xiv, xxiv)]. Balliet v. U. S. [C. C. A.] 129 F. 689. Assignments stated in general terms and which are discussed in the brief in such general language as to throw upon the court the burden of searching the record to determine the point involved will not be considered. Betts v. U. S. [C. C. A.] 132 F. 228.

78. An indefinite demurrer will not be considered on appeal unless defendant points out the exact defect in his brief. Flohr v. Territory [Okl.] 78 P. 565.

79. State v. Smith [Iowa] 100 N. W. 40.

80. See 2 Curr. L. 388.

81. No notice of appeal. Pitman v. State [Tex. Cr. App.] 82 S. W. 1041. Record not certified. Hesch v. Com., 25 Ky. L. R. 2152, 80 S. W. 158. Failure of the recognizance to contain the statutory averments. Davis v. State [Tex. Cr. App.] 82 S. W. 512; Parish v. State [Tex. Cr. App.] 82 S. W. 517; Flynn v. State [Tex. Cr. App.] 82 S. W. 509; Noble v. State [Tex. Cr. App.] 82 S. W. 511; Townsend v. State [Tex. Cr. App.] 82 S. W. 511; Everett v. State [Tex. Cr. App.] 82 S. W. 612; Lane v. State [Tex. Cr. App.] 82 S. W. 1034; Gordon v. State [Tex. Cr. App.] 82 S. W. 1037. Failure of record proper to contain record entries showing the convening of the court, etc. Vann v. U. S. [Ind. Ter.] 82 S. W. 745. Where the record fails to show that defendant is in custody pending the appeal. Childress v. State [Tex. Cr. App.] 81 S. W. 302; Lowrey v. State [Tex. Cr. App.] 82 S. W. 517; Lane v. State [Tex. Cr. App.] 82 S. W. 1034.

82. Proceedings abate as in civil cases. Overland Cotton Mill Co. v. People [Colo.] 75 P. 924.

83. An appeal dismissed for defect in the recognizance will not be reinstated on the affidavit of the defendant that it has been falsified on the records by the clerk and prosecuting attorney, where their affidavits and that of the judge depose otherwise. Saufly v. State [Tex. Cr. App.] 83 S. W. 709. An appeal dismissed for gross laches in perfecting it will not be heard on a motion for rehearing also subject to the same objection, where no excuse for the delay is suggested, though a defense on the merits is claimed. Brownson v. State [Ark.] 83 S. W. 328.

in the supreme judicial court and a rescript sent to the superior court, it is not too late for that court to entertain a motion for revision of the sentence.[84]

Rehearing.[85]—Rehearings in criminal cases are not granted in North Carolina.[86] A motion for rehearing sent before expiration of the time fixed by rule to a judge of the court for permission to file, but not soon enough for him to forward to the clerk within the prescribed time, is too late.[87]

Interlocutory and provisional proceedings.[88]—A writ of error may be amended in Wisconsin to show that its purpose is to review the order refusing a new trial and not the final judgment as stated therein.[89]

(§ 17) *H. Scope of review.*[90]—Review is confined to matters made of record[91] and properly assigned and argued[92] and which have been preserved by necessary and proper objection and exception;[93] but some states have relaxed the requirements by requiring a review of apparent error.[94] The review of the refusal of the trial court to discharge defendant or direct a verdict in his favor at the close of the state's evidence, permitted and required by the New Jersey criminal procedure act,[95] brings into question only whether there were then presented facts proper to be submitted to the jury in respect to the charge contained in the indictment.[96] Where there is no bill of exceptions or other memorial of the proceedings required to be shown thereby, nothing is reviewed but the record proper.[97] Review is restricted to the rulings below,[98] and to the theory on which the action below was based;[99] but a correct decision will not be reversed because based on a wrong reason.[1] No neglect of defendant's counsel to introduce available evidence favorable

84. Commonwealth v. Lobel [Mass.] 72 N. E. 977.

85. See 2 Curr. L. 388.

86. State v. Marsh, 134 N. C. 184, 47 S. E. 6.

87. Carusales v. State [Tex. Cr. App.] 82 S. W. 1038.

88. See 2 Curr. L. 388.

89. Ullman v. State [Wis.] 100 N. W. 818.

90. See 2 Curr. L. 388.

91. See ante, § 17 F.

92. See ante, § 17 G.

93. See ante, § 14, saving questions for review. In considering the denial of a motion for new trial, grounds thereof which are proper only in a motion in arrest will not be considered. Markey v. State [Fla.] 37 So. 53.

94. Code Cr. Proc. §§ 527, 528. People v. Boggiano [N. Y.] 72 N. E. 101; People v. Calabur, 91 App. Div. 529, 87 N. Y. S. 121. Laws 1898, p. 915, c. 237, § 137. State v. Brady [N. J. Law] 59 A. 6; State v. Lyons [N. J. Err. & App.] 58 A. 398. Comp. Laws 1897, § 10,274. People v. Albers [Mich.] 100 N. W. 908. Code, § 5462. State v. Barr, 123 Iowa, 139, 98 N. W. 595; State v. Motto [Iowa] 98 N. W. 600; State v. Rea [Iowa] 101 N. W. 507. Comp. Laws 1900, § 4391. State v. Burns [Nev.] 74 P. 983. Cr. Code 1896, § 4312. Feagin v. State, 139 Ala. 107, 36 So. 18; State v. Adams [N. C.] 48 S. E. 589; Thomas v. State [Ark.] 82 S. W. 202. By the express provisions of the criminal code of Kentucky, judgments in misdemeanor cases can be reversed only for prejudicial errors apparent on the face of the record. Kelly v. Com. [Ky.] 83 S. W. 99.

95. P. L. 1898, p. 915, § 137.

96. State v. Jaggers [N. J. Err. & App.] 58 A. 1014.

97. See ante, § 17 F.

98. Norman v. U. S., 20 App. D. C. 494. Passing sentence is a sufficient ruling on defendant's motion in arrest. Commonwealth v. Gabor [Pa.] 58 A. 278. A motion to exclude testimony not passed upon by the trial court cannot be considered on appeal. Pitts v. State [Ala.] 37 So. 101. A mere remark of the judge as to what the general rule of law is does not amount to a ruling. State v. Reynolds [N. J.] 59 A. 5. Where a verdict is directed on the ground that there is no evidence to sustain the indictment, the sufficiency of the indictment is not reviewable on the state's appeal, though the court intimates in his opinion that the indictment is insufficient. State v. Chenoweth [Ind.] 71 N. E. 197. Questions that could have been but were not raised on appeal from the county to the circuit court cannot be raised on further appeal. Allowing amendment of affidavit. Holland v. State, 139 Ala. 120, 35 So. 1009. A plea in abatement not brought to the attention of the court, on which no issue is joined, and in support of which no evidence was introduced, will be presumed on appeal to have been abandoned. Prince v. State [Ala.] 37 So. 171. A contention that a police regulation was not published as required by act of congress cannot be made for the first time on appeal from a conviction for violating the regulation. Ullman v. District of Columbia, 21 App. D. C. 241.

99. An objection of duplicity overruled on the erroneous theory that one of the offenses was included in the other cannot be avoided on the theory that there is an offense that includes them both. State v. Mattison [N. D.] 100 N. W. 1091. A conviction cannot be sustained on a different ground involving matters of fact that were not presented to or passed upon by the jury. State v. Ricardo [N. J. Law] 58 A. 1087. The grounds of objection to evidence cannot be changed on appeal. State v. Coover [Kan.] 76 P. 845; State v. Stephenson [Kan.] 77 P. 582.

to him, or unskillful conduct of the case, is ground for reversal.[2] Gratuitous questions are not decided,[3] and excessiveness of sentence will not be reviewed where the judgment is reversed on other grounds.[4]

Rulings on matters within the discretion of the trial court, such as denial of motion to quash indictment for insufficiency of evidence on which it was found,[5] resubmission of bill to grand jury, or setting aside so much of their findings as imposes costs on the prosecutor,[6] continuances,[7] change of venue,[8] allowance of bill of particulars,[9] appointment of counsel in noncapital case,[10] placing of witnesses under the rule,[11] application to disqualify sheriff,[12] rulings on the qualification of jurors,[13] the examination of witnesses,[14] the order of proof,[15] the primary admissibility of confessions,[16] dying declarations,[17] or declarations claimed to be res gestae,[18] competency of witnesses,[19] limiting the time for argument,[20] the argu-

1. Halfacre v. State [Tenn.] 79 S. W. 132. An indorsement on requested instructions of the grounds of their refusal will not require reversal, though invalid where the instructions should not have been given. People v. Keith, 141 Cal. 686, 75 P. 304.

2. Edwards v. Territory [Ariz.] 76 P. 458.

3. The sufficiency of the evidence to support a conviction of one of the two offenses of which defendant was convicted on the same trial will not be reviewed where the sentences run concurrently and the other crime was clearly proved. Quinn v. People [Colo.] 75 P. 396. One who is tried on an affidavit cannot object to the constitutionality of the act creating the court on the ground that prosecutions therein are not required to be on affidavit. Wright v. Davis [Ga.] 48 S. E. 170. The sufficiency of the evidence of premeditation and deliberation to support a conviction of murder will not be reviewed on the appeal of one convicted of manslaughter. State v. Fuller [Iowa] 100 N. W. 1114. Whether refusal to require election was error, defendant being acquitted as to all but one count and the conviction reversed as to that. Alford v. State [Fla.] 36 So. 436.

4. State v. Harness [Idaho] 76 P. 788.

5. Radford v. U. S. [C. C. A.] 129 F. 49.

6. Commonwealth v. Charters, 20 Pa. Super. Ct. 599.

7. Kroell v. State, 139 Ala. 1, 36 So. 1025; Dean v. Com., 25 Ky. L. R. 1876, 78 S. W. 1112; Turner v. Com., 25 Ky. L. R. 2161, 80 S. W. 197; Webster v. State [Fla.] 36 So. 584; Howland v. Terr., 13 Okl. 575, 76 P. 143; Territory v. Shankland, 3 Ariz. 403, 77 P. 492; Heatley v. Territory [Okl.] 78 P. 79; Gardner v. U. S. [Ind. T.] 82 S. W. 704; State v. Wilson [Iowa] 99 N. W. 1060; Welty v. U. S. [Okl.] 76 P. 121; Garrison v. Terr., 13 Okl. 690, 76 P. 182; State v. Howard [Mont.] 77 P. 50; State v. Hesterly [Mo.] 81 S. W. 624; Bone v. State [Ga.] 48 S. E. 905; State v. Sanders [S. C.] 46 S. E. 769. Postponement on request of prosecuting attorney is not reviewable in absence of abuse of discretion. State v. Breaw [Or.] 78 P. 896; State v. Van Waters [Wash.] 78 P. 897.

8. State v. Icenbice [Iowa] 101 N. W. 273; State v. Wheat, 111 La. 860, 35 So. 955; Elias v. Terr. [Ariz.] 76 P. 605; Territory v. Shankland, 3 Ariz. 403, 77 P. 492; Lindsay v. State, 4 Ohio C. C. (N. S.) 409; State v. Callahan [S. D.] 99 N. W. 1099.

9. Gallagher v. People, 211 Ill. 158, 71 N. E. 842; Bass v. U. S., 20 App. D. C. 232; People v. Remus [Mich.] 98 N. W. 397; State v. Bogardus [Wash.] 78 P. 942. Denial not disturbed where application was insufficient and nothing shown in its support. Eatman v. State [Fla.] 37 So. 576.

10. Mass v. State [Tex. Cr. App.] 81 S. W. 45.

11. Bromberger v. U. S. [C. C. A.] 128 F. 346. See ante, § 10 A.

12. State v. Hunter, 181 Mo. 316, 80 S. W. 955.

13. Rev. Code 1892, § 2355. Lewis v. State [Miss.] 37 So. 497. Errors in the manner of selecting the jury are not subject to revision in the court of appeals in Kentucky [Code Cr. Prac. § 281]. Turner v. Com., 25 Ky. L. R. 2161, 80 S. W. 197; Hathaway v. Com. [Ky.] 82 S. W. 400; Howard v. Com., 25 Ky. L. R. 2213, 80 S. W. 211.

14. State v. Newman [Minn.] 101 N. W. 499; State v. Carpenter [Iowa] 98 N. W. 775; Fuqua v. Com. [Ky.] 81 S. W. 923; Wilson v. U. S. [Ind. T.] 82 S. W. 924; State v. Vandemark [Conn.] 58 A. 715. Allowing leading questions. O'Dell v. State, 120 Ga. 152, 47 S. E. 577; Ham v. State [Tex. Cr. App.] 78 S. W. 929; Taylor v. State [Ga.] 49 S. E. 303; Schley v. State [Fla.] 37 So. 518. Reading contradictory affidavit to witness who cannot read; presence of jury. Robinson v. State, 120 Ga. 311, 47 S. E. 968.

15. Turner v. Com., 25 Ky. L. R. 2161, 80 S. W. 197; Thomas v. State [Fla.] 36 So. 161; State v. Druxinman, 34 Wash. 257, 75 P. 814; Ham v. State [Tex. Cr. App.] 78 S. W. 929. Reopening case. Alexis v. U. S. [C. C. A.] 129 F. 60; Barclay v. Com., 25 Ky. L. R. 463, 76 S. W. 4. Allowing witness to be recalled. Walker v. State, 139 Ala. 56, 35 So. 1011; Thomas v. State [Fla.] 36 So. 161; Hauser v. People, 210 Ill. 253, 71 N. E. 416. Allowing different conversation to be related on redirect. People v. Majoine [Cal.] 77 P. 952.

16. State v. Rogoway [Or.] 78 P. 987. Whether a confession was voluntary is for the determination of the trial judge whose conclusion will be interfered with only for an abuse of discretion. State v. Middleton [S. C.] 48 S. E. 35.

17. Martin v. Com., 25 Ky. L. R. 1928, 78 S. W. 1104.

18. State v. McDaniel [S. C.] 47 S. E. 384; State v. Lindsey [S. C.] 47 S. E. 389.

19. Infant. Ham v. State [Tex. Cr. App.] 78 S. W. 929; Griffin v. State [Fla.] 37 So. 209; People v. Stouter, 142 Cal. 146, 75 P. 780. Expert. State v. Arthur [N. J. Law] 57 A. 156; Schley v. State [Fla.] 37 So. 518; Bradley v. District of Columbia, 20 App. D. C. 169. Intimate acquaintances qualified to give opinion as to defendant's sanity. Peo-

ment of counsel for the state,[21] refusal to direct a verdict,[22] motion for new trial,[23] allowing amendment thereof after time,[24] will be reversed only in clear cases of abuse of discretion to the prisoner's prejudice. Sentence within the limits of the law is within the discretion of the trial judge.[25]

On questions of fact, the findings of the trial judge[26] and the verdict of the jury will be sustained, as where based on sufficient,[27] or conflicting evidence,[28] or

ple v. Manooglan, 141 Cal. 592, 75 P. 177; People v. Suesser, 142 Cal. 354, 75 P. 1093. Witness not understanding nature of oath. State v. Burns [Nev.] 74 P. 983.

20. State v. Rogoway [Or.] 78 P. 987.

21. Gallagher v. People, 211 Ill. 158, 71 N. E. 842; People v. Sing Lee [Cal.] 78 P. 636.

22. Davis v. State [Ga.] 48 S. E. 162.

23. Thomas v. State, 139 Ala. 80, 36 So. 734, citing cases; McDonnell v. U. S. [C. C. A.] 133 F. 293. Cr. Code Pr. § 281. Moore v. Com. [Ky.] 81 S. W. 669. Misconduct of counsel. State v. Greenland [Iowa] 100 N. W. 341; People v. Sing Lee [Cal.] 78 P. 636. Improper conduct of county attorney in jury room. King v. Com., 25 Ky. L. R. 713, 76 S. W. 341. Misconduct of juror. People v. Koepping, 178 N. Y. 247, 70 N. E. 778. Former conviction first raised by motion for new trial. State v. Durein [Kan.] 78 P. 152. Relationship. Qualification of juror. Lillie v. State [Neb.] 100 N. W. 316; Commonwealth v. Wong Chung [Mass.] 71 N. E. 292. Juror under 21 [Code Cr. Prac. § 281]. Hensley v. Com. [Ky.] 82 S. W. 456; Howard v. Com. [Ky.] 80 S. W. 817; State v. Lipscomb, 134 N. C. 689, 47 S. E. 44. Nonresidence. King v. State, 119 Ga. 426, 46 S. E. 633. Newly discovered evidence. People v. Buckley [Cal.] 77 P. 169; State v. Lowell, 123 Iowa, 427, 99 N. W. 125; People v. Sing Yow [Cal.] 78 P. 235; Nix v. State, 120 Ga. 162, 47 S. E. 516; Bradley v. State [Ga.] 48 S. E. 317; Jordan v. State [Ga.] 48 S. E. 352; Miller v. State, 119 Ga. 561, 46 S. E. 838; Surles v. State, 119 Ga. 561, 46 S. E. 839. Verdict contrary to law and evidence. Tipton v. State, 119 Ga. 304, 46 S. E. 436; Suckow v. State [Wis.] 99 N. W. 440; Barnard v. State, 119 Ga. 436, 46 S. E. 644; State v. Hayes [S. C.] 48 S. E. 251. Adultery and fornication. Johnson v. State, 119 Ga. 446, 46 S. E. 634. Arson. Ware v. State, 118 Ga. 752, 45 S. E. 615. On ground that defendant was unconscious during trial as result of epilepsy. Counter showing that he was a malingerer. Galner v. State [Tex. Cr. App.] 81 S. W. 736.

24. Carusales v. State [Tex. Cr. App.] 82 S. W. 1038.

25. State v. Sanders [S. C.] 47 S. E. 56. A sentence within the discretion of the trial court cannot be reduced or modified on appeal in Washington. State v. Van Waters [Wash.] 78 P. 897. The supreme court of Georgia cannot grant a new trial on the ground of excessive punishment, though defendant was found guilty with a recommendation to mercy. Tipton v. State, 119 Ga. 304, 46 S. E. 436.

26. Motion for new trial. Finding that juror was not hostile to accused. Schrader v. State [Miss.] 36 So. 385; Schissler v. State [Wis.] 99 N. W. 593; Lillie v. State [Neb.] 100 N. W. 316. Misconduct of juror. Allen v. State [Tex. Cr. App.] 81 S. W. 292. The court in Oklahoma may examine the facts. Ellis v. Territory, 13 Okl. 633, 76 P. 159. Competency of juror. People v. Sowell [Cal.] 78 P. 717.

27. People v. Donnolly [Cal.] 77 P. 177; Martin v. Territory [Okl.] 78 P. 88; Curran v. State [Wyo.] 76 P. 577; State v. Lachall [Utah] 77 P. 3; State v. Jackson [S. C.] 46 S. E. 538; McNish v. State [Fla.] 36 So. 175; State v. Hyatt, 179 Mo. 344, 78 S. W. 601; State v. Sullivan [Mo. App.] 84 S. W. 105; People v. Gonzales, 143 Cal. 605, 77 P. 448; Johnson v. State, 119 Ga. 661, 46 S. E. 838; Kincaid v. Com., 25 Ky. L. R. 1695, 78 S. W. 433. Circumstantial evidence. State v. Wideman [S. C.] 46 S. E. 769; Nelson v. State, 120 Ga. 312, 47 S. E. 899. On review of a conviction of murder in the first degree, where the defense of insanity was interposed, the verdict will be regarded as conclusive upon that issue in the absence of such elements in the case as show the verdict was against the weight of the evidence, or that it was influenced by some mistake, error, or prejudice. People v. Spencer [N. Y.] 72 N. E. 461. The appeal court does not pass upon the question of reasonable doubt. State v. Pray [Iowa] 99 N. W. 1065. Whether the verdict is supported by the weight of evidence cannot be considered on writ of error. State v. Donohue [N. J. Law] 59 A. 12.

28. In case of conflict of the evidence its sufficiency to support a conviction cannot be reviewed. State v. Leasla [Or.] 78 P. 328; Cuthbertson v. State [Neb.] 101 N. W. 1031; Seaborn v. Com., 25 Ky. L. R. 2203, 80 S. W. 223; State v. Collett [Idaho] 75 P. 271; Cochran v. U. S. [Okl.] 76 P. 672; Jones v. U. S. [Okl.] 78 P. 100; Connor v. Com. [Ky.] 81 S. W. 259; McKinney v. Com. [Ky.] 82 S. W. 263; People v. Rodawald [N. Y.] 70 N. E. 1; People v. Mooney, 178 N. Y. 91, 70 N. E. 97; People v. Koepping, 178 N. Y. 247, 70 N. E. 778; People v. Lagroppo [N. Y.] 71 N. E. 737; Larkin v. State [Ind.] 71 N. E. 959; State v. Coleman [S. D.] 98 N. W. 175; State v. Miller [Iowa] 100 N. W. 334; State v. Greenland [Iowa] 100 N. W. 341; People v. Buckley, 143 Cal. 375, 77 P. 169; State v. Deatherage [Wash.] 77 P. 604; State v. Druxinman, 34 Wash. 257, 75 P. 814; State v. Matto [Iowa] 98 N. W. 600; People v. Blanchard [Mich.] 98 N. W. 983; Clark v. State [Tex. Cr. App.] 80 S. W. 617. Will be reversed only in clear cases. State v. Coleman [Mo. App.] 83 S. W. 1096; Henry v. State [Neb.] 100 N. W. 295; Meierholtz v. Territory [Okl.] 78 P. 90; State v. Alexander [Mo.] 83 S. W. 753; State v. Peabody [R. I.] 56 A. 1028; State v. Sullivan [W. Va.] 47 S. E. 267. Code Cr. Proc. § 528, requiring new trial in capital cases where justice has not been done regardless of proper objection and exception does not authorize review of controverted questions of fact. People v. Boggiano [N. Y.] 72 N. E. 101. Cause of death in trial for murder. Hamby v. State [Ark.] 83 S. W. 322. In Illinois a conviction based on conflicting evidence will not be set aside unless a reasonable and well

depends on the credibility of witnesses,[29] even though the evidence be not of the most convincing kind,[30] or preponderates against the verdict,[31] especially where the trial court has approved the verdict.[32] Where the jury impose the penalty, the case must be rare and the abuse flagrant to justify setting it aside on the ground of excessiveness.[33] The admission of evidence subsequently ruled out on its incompetence appearing cannot be deemed prejudicial in a case tried to the court without a jury.[34]

An order of reversal that does not upon its face exclude the possibility that it was based upon an examination of the facts, or made as a matter of discretion, presents no question of law reviewable by the court of appeals of New York.[35] Where the instructions are ambiguous and the verdict can only be accounted for on the theory that the jury were misled as to the law or willfully disregarded it, it cannot be presumed they did the latter.[36]

(§ 17) *I. Decision and judgment of the reviewing court.*[37]—An equal division of judges makes an affirmance.[38]

Remand for new trial is not necessary if the error is one that requires no retrial of the facts. Thus the judgment may be conformed to the verdict;[39] but generally, where a judgment is reversed for failure of the court to pronounce a legal judgment, the case may be remanded with instructions to render judgment on the verdict.[40] New trial was granted on affirmance in a hard case in North Carolina.[41] In California a new trial need not be directed where the reversal

founded doubt arises from all the evidence. McCracken v. People, 209 Ill. 215, 70 N. E. 749. Whether defendant or deceased was the aggressor, whether defendant had good reason to believe deceased intended to kill him and did so believe. State v. Sharp [Mo.] 82 S. W. 134.

29. McNish v. State [Fla.] 36 So. 176. Whether witnesses have been successfully impeached is within province of jury. State v. Sharp [Mo.] 82 S. W. 134. Jury is judge of the weight to be given the testimony of witnesses. State v. Levy [Idaho] 75 P. 227; Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041; Quigg v. People, 211 Ill. 17, 71 N. E. 886.

30. State v. Ripley, 32 Wash. 182, 72 P. 1036; Garrison v. Territory, 13 Okl. 690, 76 P. 182; Sindy v. State, 120 Ga. 202, 47 S. E. 554. If there is evidence which, with the inferences which the jury were warranted in reasonably drawing therefrom, supports the judgment rendered on every material point, a reversal is not authorized on the ground that upon certain points such evidence is weak and unsatisfactory. Larkin v. State [Ind.] 71 N. E. 959.

31. Ball v. State [Tex. Cr. App.] 78 S. W. 508.

32. State v. Callahan [S. D.] 99 N. W. 1100; Black v. State, 119 Ga. 746, 47 S. E. 370; Hicks v. State, 120 Ga. 176, 47 S. E. 547. As by refusal to set it aside. Brown v. State [Ga.] 48 S. E. 152; Murphy v. State, 119 Ga. 300, 46 S. E. 450; Nix v. State, 120 Ga. 162, 47 S. E. 516; Coursey v. State, 120 Ga. 205, 47 S. E. 560; Butler v. State, 119 Ga. 562, 46 S. E. 838; Bickers v. State, 120 Ga. 172, 47 S. E. 515; Ramfos v. State, 120 Ga. 175, 47 S. E. 562; Powell v. State, 120 Ga. 181, 47 S. E. 563; Gaines v. State, 120 Ga. 137, 47 S. E. 571; Collier v. State, 120 Ga. 172, 47 S. E. 571; Gray v. State, 120 Ga. 305, 47 S. E. 900; May v. State [Ga.] 48 S. E. 153; Lewis v. State [Ga.] 48 S. E. 227; Cotton v. State [Ga.] 48 S. E. 902; Collins v. State [Ga.] 48 S. E. 903; Harris v. State [Ga.] 48 S. E. 904, 905; Buckine v. State [Ga.] 49 S. E. 257; Watts v. State [Ga.] 49 S. E. 267; Meadows v. State [Ga.] 49 S. E. 268; State v. McKain [W. Va.] 49 S. E. 20.

33. Peacock Distilling Co. v. Com., 25 Ky. L. R. 1778, 78 S. W. 893.

34. Terry v. State [Tex. Cr. App.] 79 S. W. 317.

35. People v. Calabur, 178 N. Y. 463, 71 N. E. 2.

36. People v. Sylva, 143 Cal. 62, 76 P. 814.

37. See 2 Curr. L. 390.

38. State v. Middleton [S. C.] 48 S. E. 35.

39. In some states judgment will not be reversed for error in the sentence but the court will resentence defendant for the correct length of time as shown by the record. State v. Nunley [Mo.] 83 S. W. 1074; Landermilk v. State [Tex. Cr. App.] 83 S. W. 1107.

40. State v. Houghton [Or.] 75 P. 822; Smith v. People [Colo.] 75 P. 914; State v. Tyree [Kan.] 77 P. 290; McCormick v. State [Neb.] 99 N. W. 237; State v. Tyree [Kan.] 78 P. 525. For error in the sentence the judgment will be reversed and the cause remanded for a proper sentence. Webster v. State [Fla.] 36 So. 584. One who procures a voidable sentence to be set aside on appeal may thereafter be properly sentenced though he has served part of the voidable sentence. State v. Tyree [Kan.] 77 P. 290.

41. Where the court in affirming the correctness of the proceedings below reverses a prior ruling which it appears may have influenced defendant in making his defense, a new trial will be granted him with permission to establish his defense according to the prior ruling if possible but the later ruling will be adhered to in all subsequent cases. State v. Bell [N. C.] 49 S. E. 163.

extends to the order denying a new trial as well as the judgment.[42] Where there is no evidence to sustain the verdict, and it appears from the record that there is no probability that any could be produced, defendant should be discharged.[43] In New York, where the verdict in a prosecution for homicide is for assault but is not justifiable under the law, deceased having died of the wound, a reversal on appeal does not necessitate defendant's discharge.[44] After affirmance, plaintiff in error cannot procure the setting aside of his conviction by motion on the theory that the record he brought up was incorrect.[45]

(§ 17) *J. Proceedings after reversal and remand.*[46]—The issuance and filing of the mandate after reversal is not essential to the jurisdiction of the lower court to again try the accused.[47] New trial after reversal is had upon the same indictment in the same court, and the entire proceedings constitute one record.[48]

Questions determined on a prior appeal are the law of the case.[49] Where a conviction of an included offense is reversed, defendant cannot, on motion for new trial, first raise the question that he could not again be tried for the original offense.[50]

§ 18. *Summary prosecutions and review thereof.*[51]—Prosecutions under municipal ordinances are generally regarded as civil in their nature rather than criminal,[52] and may be founded on any oral or written accusation reasonably informing accused of the nature of the charge.[53] Affidavits and complaints in prosecutions for misdemeanors may be amended.[54] Trial by jury is not necessary,[55] and pleas of guilty may be received.[56] Sentence must conform to the statute.[57] Summary prosecution followed by punishment consisting of hard labor in the public chain gang is not due process of law within the constitution of the United States.[58]

42. Statute requires direction either that new trial be had or defendant discharged [Pen. Code § 1262]. People v. Lee Look, 143 Cal. 216, 76 P. 1028.

43. State v. Gordon [Utah] 76 P. 882. Though defendant must be discharged on reversal if it appears no offense has been committed, where reversal is had for defects in the information and defendant appears to be guilty, he must be held for a new trial [Ballinger's Ann. Codes & St. § 6532]. State v. Riley [Wash.] 78 P. 1001.

44. People v. Schiavi, 96 App. Div. 479, 89 N. Y. S. 564. The fact that defendant moved for a discharge instead of for a new trial does not prevent the court on appeal from ordering a new trial. People v. Schiavi, 96 App. Div. 479, 89 N. Y. S. 564.

45. State v. De Maio [N. J. Law] 58 A. 565.

46. See 2 Curr. L. 390.

47. May be waived by failing to object. State v. Houghton [Or.] 75 P. 887.

48. McNish v. State [Fla.] 36 So. 176.

49. People v. Jan John [Cal.] 77 P. 950.

50. State v. Houghton [Or.] 75 P. 887.

51. See 2 Curr. L. 391.

52. City of Billings v. Brown [Mo. App.] 80 S. W. 322. An ordinance providing that any person violating it shall forfeit a certain penalty contemplates a civil and not a criminal proceeding to recover the penalty. People v. Sloan, 90 N. Y. S. 762.

53. Prosecution may be founded on an accusation based on an affidavit. Affidavit held sufficient. Murphy v. State, 119 Ga. 300, 46 S. E. 450. An affidavit upon which an accusation in a city court is founded is not bad for being made before and attested by the clerk of that court. Wright v. Davis [Ga.] 48 S. E. 170. An affidavit upon which is based a prosecution in municipal court is sufficient if it informs accused what acts are complained of and what ordinance has been violated. State v. Thompson, 111 La. 315, 35 So. 582. A proceeding for violating a city ordinance being civil in its character, an information is not necessary. City of Billings v. Brown [Mo. App.] 80 S. W. 322.

54. McQueen v. State [Ala.] 37 So. 360.

55. May be waived. Hillier v. State, 5 Ohio C. C. (N. S.) 245. The constitutional guaranty of trial of indictments by a jury does not extend to prosecutions for violations of city ordinances. Bray v. State [Ala.] 37 So. 250.

56. A mayor having complete jurisdiction in cases of misdemeanor, a plea of guilty entered before him is to be given the same effect as in the courts of higher jurisdiction. Waives jury trial. Hillier v. State, 5 Ohio C. C. (N. S.) 245. A plea of guilty in a prosecution begun before a justice of the peace, can properly be put in only when the offense charged is one within his final jurisdiction. McVeigh v. Ripley [Conn.] 58 A. 701.

57. A sentence of a police court that the defendant be imprisoned and pay a fine and stand committed "until the fine and costs of prosecution are paid" is not void because it fails to add the words of the statute, "or secured to be paid or the offender is otherwise discharged by law." Backenstoe v. State, 2 Ohio N. P. (N. S.) 178.

58. Jamison v. Wimbish, 130 F. 351.

The record must show all the legal requisites of a legal trial, conviction, and judgment[59] including the offense,[60] the names of the witnesses,[61] the evidence,[62] and judgment.[63]

Review.[64]—In the Indian Territory the filing of the statutory affidavit is a condition precedent to defendant's appeal from a conviction of violation of a city ordinance.[65] In Missouri failure to give a recognizance does not prevent the appeal,[66] and a recognizance filed the same day a motion to dismiss was overruled will be presumed to have been filed first.[67] A motion in the circuit court on appeal to dismiss a complaint for violation of a city ordinance because it charges no offense under the ordinance cannot be disposed of where the ordinance is not before the court,[68] and an unauthenticated paper purporting to be a copy of an ordinance among the papers filed by the police judge is no basis for a constitutional construction of the ordinance.[69] Defendant's unsupported motion will not overcome the presumption of correctness of a justice's return supported by his affidavit, and authorize the court to compel him to amend it.[70] An appeal and trial de novo from a conviction in a city court which had no jurisdiction of the offense does not vest the county court with jurisdiction.[71] On trial before mayor and aldermen on appeal from the mayor it is improper for him to state that there is a variance in the evidence of a witness who testified on both trials.[72] Review is limited by the statute.[73]

On certiorari.[74]—On certiorari to a magistrate on a commitment in the nature of a final judgment, the only question is that of jurisdiction.[75] In Pennsylvania, a special allowance from the court of common pleas must be had for a writ of certiorari to a justice of the peace or alderman in a summary conviction for a violation of the Sunday law.[76] No bond is required as a condition precedent to the issuance of the writ in Georgia;[77] and the proceeding will not be dismissed on final hearing for want of bond in New Jersey, where it appears that the judgment must be for the petitioner.[78] The writ may stay execution of the sentence but will not operate to discharge the prisoner. That privilege must be secured as in all other bailable cases.[79] Application for a certiorari to a municipal court need not state that accused has not had a fair trial, etc., as required where the writ runs against a county court.[80] If petitioner makes no move to have a defective return perfected, the petition should be overruled.[81] A certiorari dismissed for failure to serve the officer whose action is sought to be reviewed is not one which cannot be renewed under the statute.[82]

59. City of Orange v. McConnell [N. J. Law] 59 A. 97.

60, 61. Leek v. Kreps [N. J. Law] 56 A. 167.

62. City of Orange v. McConnell [N. J. Law] 59 A. 97.

63. Sentence is not sufficient. Lewis v. State [Del.] 58 A. 945.

64. See 2 Curr. L. 391.

65. Fortune v. Wilburton [Ind. T.] 82 S. W. 738. The affidavit must be filed with the justice before whom conviction is had, and not with the appeal court. Id.

66, 67. City of Tarkio v. Loyd [Mo. App.] 82 S. W. 1127.

68. City of Billings v. Brown [Mo. App.] 80 S. W. 322.

69. City of Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797.

70. Fortune v. Wilburton [Ind. T.] 82 S. W. 738.

71. Ex parte Hinson [Tex. Cr. App.] 81 S. W. 987.

72. Erwin v. Cartersville, 120 Ga. 150, 47 S. E. 512.

73. Under the Beal Liquor Law there is no provision for the review of a conviction before the mayor of a misdemeanor on the ground that the judgment is against the weight of the evidence. Fike v. State, 4 Ohio C. C. (N. S.) 81, 25 Ohio Circ. R. 554.

74. See 2 Curr. L. 392.

75. People v. Warden of City Prison, 44 Misc. 149, 89 N. Y. S. 830.

76. Commonwealth v. Antone, 22 Pa. Super. Ct. 412.

77. Dixon v. State [Ga.] 49 S. E. 311.

78. City of Orange v. McConnell [N. J. Law] 59 A. 97.

79. Dixon v. State [Ga.] 49 S. E. 311.

80. Williams v. Sylvester, 119 Ga. 424, 46 S. E. 662.

81. Return did not even indicate what charge the accused was tried upon, nor what, if any, disposition was made of the case. Stephens v. Macon [Ga.] 48 S. E. 152.

82. Civ. Code 1895, § 3786. Bass v. Milledgeville [Ga.] 48 S. E. 919.

INDORSING PAPERS; INFAMOUS CRIMES, see latest topical index.

INFANTS.

§ 1. Status and Disabilities in General (92).
§ 2. Custody, Protection, Support, and Earnings (92).
§ 3. Statutes for the Protection of Infants (92).
§ 4. Property and Conveyances (92).
§ 5. Contracts (93).
§ 6. Torts (94).
§ 7. Crimes (94).
§ 8. Actions by and Against (94).

§ 1. *Status and disabilities in general.*[1]—Rights and duties as between parent and child,[2] powers and proceedings of guardians ad litem,[3] and commitment of infants to penal and reformatory institutions,[4] are elsewhere treated, as is the application to infants of the doctrines of contributory negligence and assumption of risk.[5]

A male person remains a minor until the age of 21 years.[6] In Arkansas the circuit court may remove the disability of minors before they come of age, and give to all their acts the same force and effect as if done by an adult.[7] So also in Alabama, if the minor has no father or mother.[8] A minor is a ward of the court, and entitled to the fullest protection therefrom of all his interests.[9] A minor, if otherwise qualified, may act as appraiser of land to be sold on execution.[10]

§ 2. *Custody, protection, support, and earnings.*[11]

§ 3. *Statutes for the protection of infants.*[12]—Infants may be debarred from amusements of immoral tendency[13] or from engaging in dangerous employment.[14]

§ 4. *Property and conveyances.*[15]—Children who are owners of land cannot be bound by contracts, in relation thereto, made by a step-mother. A natural guardian has no inherent power to bind the infant by contracts relating to realty,[16] or to appeal from orders of the probate court affecting an estate to which the infant is heir.[17] A voluntary deed from an infant to his father is valid between the parties and, though voidable on the ground of infancy, is not void.[18] Under some circumstances an infant may be estopped from setting aside his deed on the ground of infancy.[19] A minor's sale of his property, where his disability has been

1. See 2 Curr. L. 392.
2. See Parent and Child, 2 Curr. L. 1089.
3. See Guardians Ad Litem and Next Friends, 3 Curr. L. 1567.
4. See Prisons, Reformatories, and Jails, 4 Curr. L. —; Charitable and Correctional Institutions, 1 Curr. L. 507.
5. See Master and Servant, 2 Curr. L. 801, and Negligence, 2 Curr. L. 996.
6. Iowa Code, § 3188. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.
7. Sand. & H. Dig. § 119. Young v. Hiner [Ark.] 79 S. W. 1062.
8. If the court is satisfied that it is for the minor's interest it is not essential that the petition should so claim [Code 1896, § 829, subd. 3]. Boykin v. Collins [Ala.] 37 So. 248.
9. Parken v. Safford [Fla.] 37 So. 567; State v. Sommerville [La.] 36 So. 104.
10. White v. Laurel Land Co. [Ky.] 82 S. W. 571.
11. See 2 Curr. L. 392.
12. See 2 Curr. L. 393.
13. From playing billiards without the written permission of their custodians. Commonwealth v. Wills [Ky.] 82 S. W. 236.
14. In Missouri children under 14 years of age must not be employed in certain specified manufacturing establishments [Rev. St. 1899, §§ 2189-2190]. State v. Deck [Mo. App.] 83 S. W. 314. The law as to child labor is a proper exercise of police power and germane to the act it amends. Laws 1903, c. 459, § 4. It is no defense to a prosecution for employing a child under 14, during school term, that the employer acted in good faith on the child's statement and the father's affidavit. City of New York v. Chelsea Jute Mills, 43 Misc. 266, 88 N. Y. S. 1085.
15. See 2 Curr. L. 393.
16. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204.
17. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.
18. Hiles v. Hiles [Ky.] 82 S. W. 580.
19. The deed was executed when he was at most not more than a month under 21, was wearing a full beard, was a married man and the father of two children, and both he and his mother represented him to be of age. After he came of age he rented the land from the grantor for two successive years, thus confirming the sale. Ingram v. Ison [Ky.] 80 S. W. 787. Willful misrepresentation of age by a minor, by which money is obtained on mortgage from another, who is deceived thereby, is a bar to an avoidance of the mortgage in equity by the borrower, especially where the money is not tendered back. Ostrander v. Quin [Miss.] 36 So. 257. Heirs, who are not informed of their rights, may accept part of the estate after reaching their majority, without being estopped to impeach a void sale of

removed by an order valid on its face, cannot be set aside so as to affect innocent purchasers from his grantee, even though his sale had been induced by fraud.[20] Though an infant owner of real estate may maintain partition, the use, without authority, of the name of an infant owner, in partition proceedings, does not confer jurisdiction over the infant, so as to bind him by the decree rendered; nor is his suit to set aside the partition barred by the statute of limitations, though fraud is an incidental cause of action.[21] In actions for partition, where the legal formalities have not been fulfilled, the partition, in the case of minors, is considered provisional, and may be redemanded for the least lesion.[22] The statute allowing infants one year after becoming of age in which to redeem lands sold for nonpayment of taxes is construed liberally in their favor.[23] In certain cases the vested estates of minors in real property may be sold by order of court of equity.[24]

§ 5. *Contracts.*[25]—A minor must disaffirm his contract within a reasonable time after coming of age, or be bound thereby.[26] Contracts of infants to sell real estate may be ratified when they come of age, and specific performance then compelled; but so long as they remain infants, specific performance cannot be had against them.[27] All voidable contracts of an infant in reference to personalty may be avoided by the infant at any time during his minority, or on his arrival at full age; nor is he obliged to place the other party in statu quo;[28] but he cannot sue and recover anything thereunder.[29] A nonenforceable contract may be ratified after suit has been commenced thereon.[30] A partial payment made after

part of such estate, there being no change of relation to the property on the part of the purchasers on account of any acts of the heirs. Ball v. Clothier, 34 Wash. 299, 75 P. 1099. A minor may sue to recover property inherited from the mother, and illegally sold by the father, and is not estopped by the payment of price to any one for him, not qualified as his tutor, nor by the payment of part of the price to him after reaching his majority, he not being informed of the source whence it comes. George v. Delaney, 111 La. 760, 35 So. 894. Not estopped by doing work in pursuance of a contract by guardian, having done nothing to induce contract. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204.

20. Young v. Hiner [Ark.] 79 S. W. 1062.

21. Underwood v. Deckard [Ind. App.] 70 N. E. 383.

22. Civ. Code, arts. 1399, 1400. Rhodes v. Cooper [La.] 37 So. 527.

23. Cain v. Brown, 54 W. Va. 656, 46 S. E. 579.

24. Civ. Code Prac. §§ 489, 491. Crutcher v. Rodman [Ky.] 81 S. W. 252. Courts of equity have no inherent power, as guardians of infants, to sell their real estate for the purpose of reinvestment, but they may be authorized by statute to do so [Code 1887, § 2616 (Code 1904, p. 1332)]. Rhea v. Shields [Va.] 49 S. E. 70.

25. See 2 Curr. L. 394.

26. Three years is too long a time to delay the disaffirmance. Johnston v. Gerry, 34 Wash. 524, 76 P. 258; McCullough v. Finley [Kan.] 77 P. 696. Where a statute gives three years after majority for an infant to bring an action against a disseisor, three years should, by analogy, be regarded as a reasonable time within which to disaffirm a deed. Weeks v. Wilkins, 134 N. C. 516, 47 S. E. 24. Fourteen years is too late to avoid a deed made by an infant's mother for him, where he acted as her agent and received part of the money for himself. Kinard v. Proctor [S. C.] 47 S. E. 390.

27. Tillery v. Lane [N. C.] 48 S. E. 824.

28. Shipley v. Smith, 162 Ind. 526, 70 N. E. 803.

Contra: Where an infant seeks to rescind an executed contract, he must first restore all that he has received on that account, if he still has it. Zuck v. Turner Harness & Carriage Co. [Mo. App.] 80 S. W. 967. A minor may disaffirm a contract before coming of age and is required to restore "property received remaining in his control after attaining his majority." Code, § 3189. Where he offered in writing to return a team of horses, and the offer was refused and he then sold the team, he was not obliged, when he afterwards came of age to return the team as a prerequisite to disaffirmance. Beickler v. Guenther, 121 Iowa, 419, 96 N. W. 895. An infant cannot repudiate his contract and invoke judicial remedies to restore him to his former position without making or offering restitution. An infant having paid money for the right to take a course of study, received a receipt called a "scholarship." On repudiating the contract he offered to return the "scholarship" and on the trial produced it in court and left it there. This constituted a complete restitution. Jones v. Valentines' School of Telegraphy [Wis.] 99 N. W. 1043.

29. Skinner v. Young [Mo. App.] 81 S. W. 464. Upon the disaffirmance of a minor's contract for the purchase of land he is entitled to recover the market value thereof at the time of disaffirmance, less the amount due on the contract, with interest from the time of payment to the time of trial. Beickler v. Guenther, 121 Iowa, 419, 96 N. W. 895.

30. Snyder v. Gericke, 101 Mo. App. 647, 74 S. W. 377.

majority constitutes a ratification of a contract made during minority.[31] Payment to a minor is full satisfaction for services rendered by him, and the parents or guardian cannot recover therefor.[32] The marriage contract of an infant is voidable only at the election of one of the parties.[33] An infant is not liable on an executory contract to furnish him with necessaries. His executed contract is not absolutely void, but only voidable.[34] A minor's contract for other than necessaries, is, if executory, voidable; if executed on both sides he must restore what he received in order to recover what he parted with. If he cannot restore he may rescind and recover what he parted with, unless the other party shows that the contract was fair and free from fraud or over-reaching.[35] A minor making a mortgage on land belonging to him may, if the same be not a purchase-money mortgage, disavow the same.[36] A minor cannot disaffirm his mortgage in part, and affirm a part beneficial to himself.[37] Under a law prohibiting the disaffirmance of a minor's contract, where he has engaged in business as an adult, so as to give other parties reason to believe him capable of contracting, his employment as a farm laborer is not being "engaged in business" so as to preclude him from rescinding a contract for the purchase of land.[38] A minor may sue for recovery of money paid on a contract rescinded by the opposite party.[39]

§ 6. *Torts.*[40]

§ 7. *Crimes.*[41]—A boy of 13 is presumed incapable of committing crime, and the state must prove him to have the mental capacity of knowing right from wrong in reference to the offense charged.[42] A minor arrived at the age of discretion may be convicted of a violation of the local option laws.[43]

§ 8. *Actions by and against.*[44]—A minor to whom is refused a transfer from one line of city railway to another is entitled to bring an action, through a guardian ad litem, for the penalty provided by statute.[45] As an infant cannot maintain an action for seduction—that right belonging to him who bears to her the relation of master (ordinarily the parent)—the right of action does not survive her death.[46] Minors are allowed a reasonable time after coming of age to institute suits to defend or enforce their property rights.[47] The prescription of 10 years

31. But a direction to a minor's debtor to pay the amount of the debt to the holder of the minor's note, believing that the holder had agreed to look to such debtor for payment, does not constitute a ratification [Rev. St. 1899, § 3423]. Snyder v. Gericke, 101 Mo. App. 647, 74 S. W. 377.

32. Ping Min. & Mill. Co. v. Grant [Kan.] 75 P. 1044.

33. A father cannot under Code Civ. Proc. § 1744, maintain an action to annul his daughter's marriage on the ground that she had not arrived at the age of consent, unless she is a party thereto. Wood v. Baker, 43 Misc. 310, 88 N. Y. S. 854.

34. Jones v. Valentines' School of Telegraphy [Wis.] 99 N. W. 1043.

35. Braucht v. Graves-May Co. [Minn.] 99 N. W. 417.

36. Citizens' Bldg. & Loan Ass'n v. Arvin, 207 Pa. 293, 56 A. 870.

37. Lake v. Lund [Minn.] 99 N. W. 884. Evidence held insufficient to show a disaffirmance. Id.

38. Code, § 3190. Beickler v. Guenther, 121 Iowa, 419, 96 N. W. 895.

39. Vanatter v. Marquardt [Mich.] 95 N. W. 977.

40. See 2 Curr. L. 394.

41. See 2 Curr. L. 395.

42. Harrison v. State [Ark.] 78 S. W. 763.

43. Brown v. State [Tex. Cr. App.] 83 S. W. 378.

44. See 2 Curr. L. 395.

45. Code Civ. Proc. § 468. Fox v. Interurban St. R. Co., 42 Misc. 538, 86 N. Y. S. 64.

46. Laroque v. Conheim, 42 Misc. 613, 87 N. Y. S. 625.

47. Under Kentucky statutes infants may institute an equitable action to impeach a judgment within twelve months after reaching their majority [Ky. St. 1899, § 4861]. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46. A minor heir for good cause shown may be allowed to defend his interest in real property, in actions involving title to same, within two years after his coming of age. Gen. St. 1894, § 5842. Jurisdiction was obtained by publication and the heir was without actual notice of the pendency of the action, before the entry of judgment. Hoyt v. Lightbody [Minn.] 101 N. W. 304. Minors may within a year after attaining their majority institute an action to vacate a judgment of sale of their interest in land, on doing equity in regard to the part of the purchase money received by them [Civ. Code Prac. §§ 391-518]. Taylor v. Webber [Ky.] 83 S. W. 567.

acquirendi causa does not run against infants.[48] Limitations do not run against an infant, save for penalties and forfeitures, until one year after majority.[49] Where a minor's disability ceases during the running of a limitation period, the period allowed him must run concurrently with the limitation period and not successively to it.[50] The doctrine that a person has a reasonable time after reaching majority in which to disaffirm or ratify acts performed during infancy does not give an infant a time other than that specified by limitations.[51] The requirements as to the service of summons on a minor are mandatory and must be strictly followed, or the judgment rendered against him will, as far as his rights are concerned, be void.[52] The court acquires no jurisdiction over a minor defendant by the appointment of a guardian ad litem and the filing of his answer, unless due service of process has been made.[53] No judgment can be rendered against a minor until after a defense by guardian.[54] It is error to render judgment against minors, parties to trespass to try title, without their appearance by guardian;[55] but a default judgment against an infant personally served is voidable only, and where the record is silent as to his nonage, he may not restrain the levy of an execution thereunder, without taking steps to vacate or modify the judgment.[56] While it is error to try a case against a minor, where the guardian has not filed a general denial, the defect is not jurisdictional.[57] The rendering of a judgment against infant defendants, which is void by reason of no defense having been made, is not a ground for appeal, until acted upon by the lower court.[58] A submission to arbitration of an infant's cause by himself, or his next friend, or attorney for him, is absolutely void.[59] Where a suit is brought by a minor, by his next friend, the minor, on arriving at his majority, may at his election, assume the prosecution in his individual capacity.[60] It is the duty of a chancellor to see that infants are not prejudiced by any act or omission of their next friend,[61] and the court is bound to protect the rights of infants notwithstanding the failure of the guardian ad litem to do so.[62] The court will protect infant litigants from oppression or ex-

48. Civ. Code art. 3522. George v. Delaney, 111 La. 760, 35 So. 894.

49. Code, § 3453. Rice v. Bolton [Iowa] 100 N. W. 634.

50. 20 years after title accrued is allowed to make entry into lands. A minor is allowed 10 years after coming of age to make entry. If he come of age during the 20 year period he cannot tack his 10 years on to the end of the 20 year period. Wickes v. Wickes [Md.] 56 A. 1017.

51. Action to attack a constructive fraud of guardian in purchasing trust property at foreclosure sale. The ten years' limitation having expired during infancy, the infant had but one year after reaching majority to begin suit. Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. S. 1009.

52. Code, § 76, as to service of summons on a minor under 14. If the judgment shows it is against a minor, but is silent as to his age, he will be presumed to be under 14 for the purpose of questioning the jurisdiction. Melcher v. Schluter [Neb.] 98 N. W. 1082.

53. Boden v. Mier [Neb.] 98 N. W. 701.

54. On petition by administrator to sell lands, it was necessary to appoint a guardian for intestate's minor child, who had no guardian [Code, § 3482]. Rice v. Bolton [Iowa] 100 N. W. 634.

55. Butner v. Norwood [Tex. Civ. App.] 81 S. W. 78.

56. Cook v. Edson, Keith & Co. [Ind. T.] 82 S. W. 918.

57. Swartwood v. Sage [Kan.] 75 P. 508.

58. Lyon's Ex'x v. Logan County Bank's Assignee, 25 Ky. L. R. 1668, 78 S. W. 454.

59. Millsaps v. Estes, 134 N. C. 486, 46 S. E. 988.

60. His failure to amend, by striking out the name of the next friend, did not prejudice defendant, plaintiff having recovered a judgment including costs. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396.

61. The chancellor may revoke the authority to sue of the next friend, or dismiss suits instituted by him for the ostensible, but not real, interest of the infants. The suits were brought against the protest of the statutory guardian, and apparently for the sole purpose of earning a fee for the next friend. Robinson v. Talbot, 25 Ky. L. R. 1914, 78 S. W. 1108.

62. The court should give infants the benefit of every ground of defense they might have pleaded; and an appellate court should do so even though the infants have not appealed, or assigned, or argued any errors. Parken v. Safford [Fla.] 37 So. 567. The lack of diligence on part of a guardian in producing evidence at a trial will not prevent an infant from obtaining a new trial for newly-discovered evidence. Hagen v. New York, etc., R. Co., 44 Misc. 540, 90 N. Y. S. 125. The court may order reasonable

tortion in the matter of costs.[63] Infants have the right to sue by guardian or next friend to recover damages for injuries to the person from the torts of others.[64] In an action by an infant for injury, there can be no recovery for loss of wages.[65] Where an infant has neither natural nor legal guardian, he may recover for loss of time, in suing for damages for personal injury.[66] An infant in an action against his employer cannot recover the cost of things for which his parents are primarily liable, without showing facts rendering himself liable for such cost.[67] Where defendant in partition is an infant and has filed an answer traversing the allegations of the complaint, it is error to direct a compulsory reference over plaintiff's objection.[68] The law permitting a minor to take an appeal from orders of the probate court, within a certain time after arriving at full age, does not prohibit him from taking an appeal by next friend during his minority; nor is an authority from any court necessary to enable a next friend to commence an action on behalf of an infant.[69] But if an infant during his minority sues by guardian, he cannot thereafter institute another suit for the same purpose.[70]

INFORMERS, see latest topical index.

INJUNCTION.

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§ 1. *Nature of remedy and grounds therefor.*[71]—In general, the function of injunction is to compel inaction and of mandamus to compel action.[72]

A special injunction is one granted for the prevention of irreparable injury, when the preventive aid of the court is the ultimate and only relief sought, and the

delay in a cause if needed for the protection of a minor's interests, the minor being considered the ward of the court. State v. Sommerville [La.] 36 So. 104.

63. There were two infant plaintiffs and two infant defendants. They might all have been plaintiffs and appeared by one attorney. The costs allowed were reduced one-half by the appellate court. Grannemann v. Grannemann, 95 App. Div. 37, 88 N. Y. S. 405. Where infant appellees are not represented by guardian or next friend, the costs of appeal should be taxed to appellants, though the cause be reversed. Ex parte Cooper [N. C.] 48 S. E. 581.

64. Clasen v. Pruhs [Neb.] 95 N. W. 640.

65. There was no showing that plaintiff was entitled by emancipation to recover for his earnings, and being under age they belonged to his father. Nemorofskie v. Interurban St. R. Co., 87 N. Y. S. 463.

66. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908.

67. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869.

68. Code Civ. Proc. § 1544. Fairweather v. Burling, 90 N. Y. S. 516.

69. Williams v. Cleaveland, 76 Conn. 426, 56 A. 850.

70. Bohannon v. Tarbin, 25 Ky. L. R. 515, 76 S. W. 46.

71. See 2 Curr. L. 397. In many of the topics relating to particular matters, e. g., Corporations, 3 Curr. L. 880, the applicability of injunctive relief is incidentally discussed.

72. Newlin v. Harris [Pa.] 58 A. 925. Injunction restrains, and mandamus commands action. State v. Board of Com'rs, 162 Ind. 580, 70 N. E. 373. A mandatory injunction is in effect a mandamus. Waddick v. Merrill, 5 Ohio C. C. (N. S.) 103.

primary equity involved in the suit.[73] A common injunction is one granted in aid of, or as secondary to, another equity.[74]

An injunction issues against persons and not against property or a business.[75] The right thereto depends upon the facts existing at the time of the rendition of the judgment.[76] The motive of defendant is immaterial.[77] The fact that the chancellor acts as "of grace" does not authorize him to refuse an injunction to which a person has shown himself clearly entitled.[78]

As a general rule injunction will only issue where there is an unquestionable right,[79] and where irreparable injury will result from the acts complained of,[80] for which there is no adequate remedy at law.[81] The remedy at law must be plain and

73, 74. Cobb v. Clegg. [N. C.] 49 S. E. 80,

75. Not to suppress a business in which defendant has no right to engage. Fleckenstein Bros. Co. v. Fleckenstein [N. J. Eq.] 57 A. 1025.

76. Under N. Y. Laws 1895, p. 882, c. 953; Laws 1899, p. 486, c. 264; and Laws 1904, p. 1906, c. 749, plaintiff held not entitled to continuance of injunction restraining injury to ice in river by operation of cement factory. American Ice Co. v. Catskill Cement Co., 90 N. Y. S. 801.

77. Malice, etc. Robertson v. Montgomery Baseball Ass'n [Ala.] 37 So. 388.

78. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065.

79. Andrews v. Kingsbury [Ill.] 72 N. E. 11. Lease held not to give defendant right to cut ice from pond. Oliphant v. Richman [N. J. Eq.] 59 A. 241. Plaintiff must show a right in himself, and it is not sufficient to show an absence of right in defendant. Injunction to maintain possession of public office. Watson v. McGrath [La.] 36 So. 204. Must be admitted or established by legal adjudication. Not issued where real purpose is to settle disputed title to realty. Christman v. Howe [Ind.] 70 N. E. 809. Bill must set forth a plain right, as well as a probable danger that it will be defeated without the intervention of the court. Calaway v. Baltimore [Md.] 57 A. 661. Even where the injunction is only sought for the purpose of protecting a legal right until it can be established in some other proceeding, the application must show a fair prima facie case in support of such right. Will not issue at instance of vendors of reservoir site to restrain enforcement of ordinance repealing ordinance under which city purchased it and diverting proceeds of bonds issued for that purpose into sinking fund so as to put them beyond complainant's reach, where it does not appear that vendors have legal title or ever will have. Id. One cannot enjoin the commission of waste on lands to which he has no title and of which he is not in possession. Perkins v. Mason [Mo. App.] 79 S. W. 987.

80. Andrews v. Kingsbury [Ill.] 72 N. E. 11; Oliphant v. Richman [N. J. Eq.] 59 A. 241. Complainant must make out plain case of injury and damage. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065; Stauffer v. Cincinnati, etc., R. Co. [Ind. App.] 70 N. E. 543. This does not mean that complainant must show that all his financial transactions will be ruined unless the relief is granted, but that he will be irreparably deprived of the particular right or property referred to in his bill of complaint. Oliphant v. Richman [N. J. Eq.] 59 A. 241. If threatened act is in the nature of a tort, it must be such a one as, if committed, will constitute a legal wrong. Sale of nontransferable commutation and excursion tickets by brokers. Illinois Cent. R. Co. v. Caffrey, 128 F. 770.

In Idaho, will issue to restrain temporariiy an act which will result in great damage to plaintiff, although the injury is not irreparable and notwithstanding he has other remedies. Idaho Rev. St. 1887, § 4288. To restrain trespass in alteration of premises a part of which had been leased to plaintiff. Meyer v. First Nat. Bank [Idaho] 77 P. 334.

In California it is held that the right to an injunction is not defeated by the mere absence of substantial damage from the acts sought to be enjoined. As where the injury complained of is the invasion of a right, and an injunction is necessary to prevent a total destruction thereof. Mendelson v. McCabe [Cal.] 77 P. 915. As by adverse user. Plaintiff restrained from leaving gates across his right of way over defendant's land open. Mendelson v. McCabe [Cal.] 77 P. 915; Waddick v. Merrill, 5 Ohio C. C. (N. S.) 103.

81. Andrews v. Kingsbury [Ill.] 72 N. E. 11. By way of action for damages for breach of contract, or for wrongfully preventing complainant from carrying it out. American Lighting Co. v. Public Service Corp., 132 F. 794. When the remedy at law is inadequate and inefficient to do justice in the particular case. Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 A. 845. A judgment absolutely requiring the furnishing of a bond to pay damages that may result from defendant's acts is an adjudication that complainant has an adequate remedy at law. Suit to restrain location of subway so as to interfere with another. Court held to have no right to interfere with city's location. Western Union Tel. Co. v. Electric Light & Power Co., 178 N. Y. 325, 70 N. E. 866.

By statute in Missouri will issue to prevent the doing of any legal wrong whatever, wherever in the opinion of the court an adequate remedy cannot be afforded by an action for damages [Rev. St. 1899, § 3649]. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020; State v. Dearing [Mo.] 79 S. W. 454. By this is meant in any case falling within the class of cases properly cognizable in a court of equity. Sale of nontransferable tickets by brokers. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020.

Hence appeal from an erroneous judgment and not injunction against its enforcement is the remedy. See Appeal and Review, 3

adequate, that is it must be as practical and efficient to the ends of justice, and its proper administration, as the remedy in equity.[82] It must also be one which may be invoked as a matter of right, without let or hindrance,[83] and by way of a civil action and not by criminal proceedings.[84] The remedy at law may be inade-

Curr. L. 171, note 85. Compare Judgment, 2 Curr. L. 592.

The extraordinary legal remedies, mandamus, prohibition, and quo warranto being "legal" should be applied if fully adequate. Compare Mandamus, 2 Curr. L. 771; Prohibition, 2 Curr. L. 1278; Quo Warranto, 2 Curr. L. 1377.

Injunction issued: To prevent gas company from cutting off supply to consumer. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329. To prevent laying tracks in street under void enactment of city council, enacted over protest of property owners and without a hearing. Holst v. Savannah Elec. Co., 131 F. 931. To restrain brokers from selling nontransferable excursion tickets. Illinois Cent. R. Co. v. Caffrey, 128 F. 770. To restrain enforcement of ordinance reducing water rates in violation of contract, pending suit. Palatka Waterworks v. Palatka, 127 F. 161. To prevent removal of buildings on right of way condemned by railroad. Stauffer v. Cincinnati, etc., R. Co. [Ind. App.] 70 N. E. 543. To compel issuance of certificate of election. Bennett v. Richards [Ky.] 83 S. W. 154. To restrain separate actions at law against three insurance companies on policies covering same building where policies are same, facts substantially identical, and same defense is interposed, and where the liability of the companies is concurrent since there can be but one true fixation of the amount of loss. Bill also alleged false bookkeeping. Tisdale v. Insurance Co. [Miss.] 36 So. 568. To prevent taking sufficient ice from complainant's pond to fill icehouse. Oliphant v. Richman [N. J. Eq.] 59 A. 241. To restrain enforcement of foreign judgment, where complainant alleged that she had no adequate remedy at law and it did not appear that she had not lost her rights under statute giving her relief, which was not properly pleaded. Weed v. Hunt [V] 56 A. 980. To suppress adjoining house of ill fame. Ingersoll v. Rousseau, 35 Wash. 92, 75 P. 513.

Injunction refused: To prevent proceedings in a probate court to recover a debt, the discharge of which it is alleged was obtained by undue influence. Norwood v. Tyson [Ala.] 36 So. 370. Bill held proper invocation of jurisdiction of equity to compel specific performance of contract and hence judgment dissolving temporary injunction and dismissing bill for want of equity was erroneous. Id. To prevent seizure and sale of personalty for payment of void tax. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432. To prevent county commissioners from proceeding against tax collector for contempt for failure to appear before them with his books and papers. Sayer v. Brown, 119 Ga. 539, 46 S. E. 649. To prevent transfer of notes not due, to which plaintiff alleges he has a good defense, to a bona fide holder, in absence of allegation of insolvency of payee, or to prevent suit on notes past due, where no relief is prayed on ground of avoiding multiplicity of suits. Detwiler v. Bainbridge Grocery Co., 119 Ga. 981, 47 S. E. 553. To prevent construction of railroad by defendant for reason that it will be several feet lower than the one which it desires to construct over practically the same line. Toledo, St. L. & N. O. T. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715. Injunction to restrain city from enforcing ordinance repealing ordinance for purchase of reservoir site held not necessary to prevent proceeds of sale of bonds for that purpose passing into sinking fund, and thus being put beyond reach of vendors in action on contract. Callaway v. Baltimore [Md.] 57 A. 661. To restrain city, which has repudiated contract for lighting streets, from entering into new contract with another. Riker v. Oakland Circuit Judge [Mich.] 101 N. W. 229. To prevent railway company from taking possession of street under alleged void resolution, on ground that plaintiff is entitled to damages which have not been paid. Vanderburgh v. Minneapolis [Minn.] 100 N. W. 668. To prevent breach of contract in regard to feeding and watering cattle. Brown v. Reed [Neb.] 100 N. W. 143. No question of plaintiff's duty to support its elevated railroad open to defendant making excavation in street under contract with city whereby it agreed to protect such structure from injury. Evidence sufficient to vacate temporary injunction, it not being shown that defendant's method of protection was insufficient. Interborough Rapid Transit Co. v. Gallagher, 95 App. Div. 632, 89 N. Y. S. 152. To compel protection of elevated railroad by contractor excavating in street. If plaintiff compelled to protect its own railroad, it will be able to recover damages if it is not bound to so protect it in the first instance. Interborough Rapid Transit Co. v. Gallagher, 44 Misc. 536, 90 N. Y. S. 104. To prevent removal of personalty in absence of allegation that defendant is insolvent. Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478. To restrain defendant from operating gas well under lease from complainant's grantor, where ejectment will lie. Hicks v. American Natural Gas Co., 207 Pa. 570, 57 A. 55. To restrain publication of result of local option election. Robinson v. Wingate [Tex. Civ. App.] 80 S. W. 1067.

82. Holst v. Savannah Elec. Co., 131 F. 931; Ingersoll v. Rousseau, 35 Wash. 92, 75 P. 513; Tisdale v. Insurance Co. [Miss.] 36 So. 568. Issued to restrain removal of buildings on right of way condemned by railroad. Stauffer v. Cincinnati, etc., R. Co. [Ind. App.] 70 N. E. 543.

83. No legal remedy where exists wholly in discretion of the court. Pittsburg, etc., R. Co. v. Greenville, 59 Ohio St. 487, 69 N. E. 976.

84. Fact that defendants might be required to give bond to keep the peace not such a remedy. Underhill v. Murphy, 25 Ky. L. R. 1731, 78 S. W. 482. See post, § 2 J. Fact that criminal law provides adequate punishment immaterial. Chambers v. Haskell, 25 Ky. L. R. 1707, 78 S. W. 478.

quate because requiring a multitude of suits,[85] or because defendant is insolvent,[86] or because the resulting damages will not be susceptible of computation.[87]

An injury may be irreparable because the party cannot be adequately compensated therefor by damages,[88] or because the damages cannot be measured by any certain pecuniary standard,[89] or because defendant is insolvent.[90]

The writ will be refused where greater injury will result to defendant by granting it than will result to complainant by refusing it,[91] or where defendant's injury will be greater than complainant's resulting benefit;[92] but this rule has no application where the act complained of is in itself, as well as in its incidents, tortious.[93] Thus equity will not refuse to protect one in the possession and enjoyment of his property merely because his right is less valuable to him than the power to destroy it may be to another, or the public.[94]

85. Sale of nontransferable excursion tickets by brokers. Illinois Cent. R. Co. v. Caffrey, 128 F. 770. Equity will enjoin to prevent a multiplicity of suits between two persons only where the whole controversy arises out of the same matter, has been settled at law, and further litigation, which seems purely vexatious, is persisted in. Suit to restrain removal of coal causing subsidence of plaintiff's land cannot be maintained on above ground as each trespass is distinct cause of action. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. Laying tracks in street under void enactment of city council, which was enacted over protest of property owners and without a hearing. Holst v. Savannah Elec. Co., 131 F. 931. Sale of nontransferable tickets by brokers. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020. Continuing trespass. Mendelson v. McCabe [Cal.] 77 P. 915. Turning water from irrigation ditch onto another's land. Boglino v. Giorgetta [Colo. App.] 78 P. 612. Interference with navigation of navigable stream by placing pound nets therein. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761. To restrain separate actions at law against three insurance companies on policies covering same buildings, where policies and facts were same, and same defense was interposed. Tisdale v. Insurance Co. [Miss.] 36 So. 568. Wrongful use of blast furnaces. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065.

86. Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 A. 845. Sale of nontransferable tickets by brokers. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020. Petition in action for ousting plaintiff from possession of farm which he held under lease from defendant, and for withholding possession thereof, alleging insolvency of defendant, held sufficient to entitle plaintiff to injunction, restitution of property, and damages, a jury having found for him on questions of fact. Foster v. Roseberry [Tex. Civ. App.] 78 S. W. 701.

87. Removal of patented machinery from factory, where, relying on its use, complainant has entered into contracts to furnish products to its customers. American Electrical Works v. Varley Duplex Magnet Co. [R. I.] 58 A. 977; Id., 59 A. 110.

88. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 A. 845; Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478. Where injury is not susceptible of complete pecuniary compensation. Christman v. Howe [Ind.] 70 N. E. 809. Destruction of home and impairment of health irreparable injuries. Redd v. Edna Cotton Mills [N. C.] 48 S. E. 761.

89. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. Interference with navigation by placing pound nets in navigable stream. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761. Issued to prevent the threatened invasion by a stranger of a tract on which complainant had the exclusive right to bore for oil and gas, for the purpose of extracting gas and oil without complainant's consent, since damages would be difficult of ascertainment. American Steel & Wire Co. v. Tate [Ind. App.] 71 N. E. 189.

90. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761. Cutting trees, and working turpentine trees. Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478. Evidence in suit to restrain cutting of timber sufficient to sustain finding that defendant was not insolvent and injury from refusing it would not be irreparable. Not brought under timber cutter's act. Stonecipher v. Wilson, 120 Ga. 465, 47 S. E. 936.

91. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065.

92. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. The mining of coal under complainant's land will not be enjoined when it cannot be determined from the evidence whether it will cause a subsidence and injury to complainant and no rule appears by which the court can determine in what manner the work can be done so as to prevent such injury. Id. Construction of passageway above alley will not be enjoined nor removal of those already constructed compelled, though they tend to retain disagreeable odors in alley to plaintiff's annoyance, where irreparable damage to defendant would result. May be compelled to abate nuisance, if it is such. Washington Lodge, I. O. O. F. v. Frelinghuysen [Mich.] 101 N. W. 569.

93. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065.

94. Operation of blast furnaces so as to emit ore dust enjoined. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065.

Injunction will not issue to allay mere apprehensions of injury,[95] nor to prevent an imaginative or fanciful wrong or injury.[96]

Where defendant is solvent, no injunction can be predicated on acts done before the suit is commenced.[97] In order that mere threats may be the basis of an injunction they must be threats to do a wrong which is within the power of a court of equity to correct.[98] Where an intention to commit the acts complained of is admitted, the writ, if otherwise proper, may issue before their actual commission.[99] Preventive injunctions necessarily operate upon unperformed and unexecuted acts, and prevent threatened but nonexistent injuries.[1] In granting them, the court does not prescribe a rule of civil conduct, or invade the province of the law-making body, but merely enforces rules prescribed by organic or statute law, or that arise naturally and regulate all men.[2]

The right to injunction may be barred by laches.[3]

§ 2. *Who and what may be enjoined. A. In general.*[4]—The various grounds whereon equity in general may be invoked[5] and the general nature and office of injunctions[6] have already been discussed. Injunction as a statutory remedy pertains to the particular subject-matter or right whereto the statute relates.[7]

(§ 2) *B. Actions or proceedings.*[8]—The bringing of actions or suits may be restrained to work out any principle of equitable relief like multiplicity,[9] vexation, and groundlessness;[10] but action will not be enjoined at the instance of parties having a perfect defense thereto at law,[11] nor will one legally liable be protected

95. Petition for injunction to prevent sale of nontransferable tickets by brokers held, when aided by appearance of defendants, to make out concrete case and to present live issue as to tickets then held by brokers or thereafter issued. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020. Not to restrain publication of result of local option election because action in promulgating void result might impel others to use it to detriment of private interests. Robinson v. Wingate [Tex. Civ. App.] 80 S. W. 1067. Will not be granted on a hearing on demurrer to an answer denying any intention to do the thing complained of. Fritter v. Bohl, 2 Ohio N. P. (N. S.) 365. An action to enjoin the construction of a system of sewers will not lie where it is averred in the answer that the contract for the work has been canceled for failure to comply with the Burns Law. Id.

96. Will not restrain location of cemetery next to plaintiff's land unless it is shown to be a nuisance. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

97. Cutting timber. North Lumber Co. v. Gary [Miss.] 36 So. 2. Not to enjoin erection of sewer and water pipes by owner of upper story of building. Christman v. Howe [Ind.] 70 N. E. 809. Will not lie to prevent city from enforcing alleged void resolution vacating certain streets. Vanderburgh v. Minneapolis [Minn.] 100 N. W. 668.

98. Forbes v. Carl [Iowa] 101 N. W. 100. Will not issue at the instance of a lessee not in possession and not yet entitled thereto, to enjoin a purchaser from the lessor from interfering with an attempt to take possession in the future. Purchaser solvent and with notice of lessee's rights. Id.

99. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21.

1. Contention that there can be no concrete case until acts have been committed unsound. Will issue to prevent sale of nontransferable tickets by brokers, though tickets not yet issued. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020.

2. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020.

3. To restrain city from using land, claimed by defendant under lease from it, as highway. Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626. Plaintiff not estopped by laches to enjoin use of trade name for cigars. Sartor v. Schaden [Iowa] 101 N. W. 511. Barred. To restrain construction of passageways connecting parts of hotel and to compel removal of those constructed. Washington Lodge No. 54, I. O. O. F. v. Frelinghuysen [Mich.] 101 N. W. 569.

4. See 2 Curr. L. 403.

5. See 3 Curr. L. 1210.

6. See ante, § 1.

7. E. g., that authorized in proceeding to dissolve corporations. See 3 Curr. L. 896, note 42 et seq.

8. See 2 Curr. L. 403.

9, 10. Suits which are vexatious, groundless, and not prosecuted in good faith. To recover penalty provided by void statute for failure to send 542 telegrams for 15 cents each. Jordon v. Western Union Tel. Co. [Kan.] 76 P. 396.

11. Action by owners of abutting vacant lots for damages for change of street grade will not be enjoined on ground that there is no liability except in case of lots having building thereon. United New Jersey R. & Canal Co. v. McCulley [N. J. Eq.] 59 A. 229. A defendant to a suit must set up all his defenses therein, and cannot file an independent suit in the same court setting up such matters and asking that the action of his adversary be enjoined because of them. Ga. Civ. Code 1895, § 4839. Defenses of subrogation,

while he works out a right to be indemnified against such liability,[12] nor where the doing of equity on complainant's part will discontinue the other suit.[13] It is proper to grant injunction in aid of, or ancillary to, actions at law, e. g., to restrain the setting up of a defense at law which is inequitable[14] or to maintain the status quo.[15] None will issue to prevent the bringing of a suit for injunction against complainant.[16] Enforcement of a judgment will not be restrained to permit the set-off of a prospective judgment which will be amply secured.[17] Injunction will issue to prevent the enforcement of a foreign judgment obtained through accident and mistake where it does not appear that there is an adequate remedy at law.[18]

Injunction will not issue when the defendant will thereby be put in conflict with the order of another court,[19] nor will equity interfere with matters over which another court is given exclusive jurisdiction.[20]

Statutes in some states provide that no injunction shall issue to stay the trial of a personal action in a court of law until the party applying therefor shall execute a bond to the plaintiff in such law action.[21]

By statute, federal courts are forbidden to grant a writ of injunction to stay proceedings in state courts, except where authorized by the bankruptcy act.[22] This

estoppel and forgery in suit for land. McCall v. Fry [Ga.] 48 S. E. 200.

12. Abutting owners will not be enjoined from suing railroad company for changing street grade, without ordinance authorizing it, because city has contracted to assume liability for damages resulting from change. United New Jersey R. & Canal Co. v. Lewis [N. J. Eq.] 59 A. 227; United New Jersey R. & Canal Co. v. McCulley [N. J. Eq.] 59 A. 229.

13. Action to foreclose trust deed when it appears from complainant's own showing that the proceedings would be discontinued if he would pay what he admits to be due, and avers his willingness and ability to pay. Injunction properly dissolved where it appears that plaintiff did not make tender or meet offer, on hearing, to accept part of sum admitted to be due and discontinue foreclosure proceedings. Meetz v. Mohr, 141 Cal. 667, 75 P. 298.

14. Executrix restrained from setting up, as defense to action on claim, a decree of the surrogate barring all claims not duly verified and presented within a specified time and which cannot be collaterally attacked, on complainant showing a waiver of verification of his claim which was presented before such decree. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

15. Making a change of the subject-matter of a litigation pending an appeal, which might render the judgment of the appellate court nugatory when pronounced. Defendant restrained from occupying street with railway tracks pending appeal of complainant, who claimed exclusive rights, where law court could not grant relief because not in session. People's Traction Co. v. Central Pass. R. Co. [N. J. Eq.] 58 A. 597. Property rights will not be disturbed by a preliminary injunction pending trial of the right. See post, § 4.

16. Presumed that no application will be allowed without sufficient showing of right. Robertson v. Montgomery Baseball Ass'n [Ala.] 37 So. 388.

17. Defendant judgment creditor was insolvent but plaintiff had valid attachment lien on land and a bond with good surety for performance of contract on which complainant's action is based. Montgomery Water Power Co. v. Chapman, 128 F. 197.

18. Where plaintiff's attorney was not notified by clerk of dissolution of previous injunction restraining prosecution of suit, in accordance with his agreement with clerk to do so. Statute giving remedy at law not pleaded. Weed v. Hunt [Vt.] 56 A. 980.

19. A private citizen cannot maintain a bill to restrain the enforcement of a writ of mandamus to compel a state treasurer to pay the salary of a public officer under an act held constitutional, on the ground that the judges issuing the writ had no authority to sit in the matter. Newlin v. Harris [Pa.] 58 A. 925. Mandamus will not lie to compel a board of county commissioners to order the collection of a railroad aid tax which it has been enjoined from enforcing. Even if injunction restraining board of county commissioners from enforcing railroad aid tax and county auditor and treasurer from collecting it are void as to commissioners, being valid as to auditor and treasurer it furnishes defense to mandamus against board to order its collection. State v. Board of Com'rs, 162 Ind. 580, 70 N. E. 373.

20. Will not enjoin qualification of executrix named in will, or restrain her from prosecuting motion made to county court to remove administrator appointed during her insanity, where probate jurisdiction is exclusively vested in such court. Stone v. Simmons [W. Va.] 48 S. E. 841.

21. Injunction by bondholders to restrain removal of machinery from factory by vendor pending determination of rights of bondholders whose bonds were secured by factory, held not to have effect of staying action of replevin by vendor to recover machinery [Mich. Comp. Laws, § 102]. American Foundry & Machinery Co. v. Charlevoix Circuit Judge [Mich.] 101 N. W. 210.

22. U. S. Rev. St. § 720; U. S. Comp. St. 1901, p. 581. Massie v. Buck [C. C. A.] 128 F. 27. Neither fact that plaintiff, after removal of his suit to federal court, dismissed it without prejudice and instituted new suit

act does not prevent them from enjoining proceedings in state courts when such remedy is ancillary to granting relief in a case of which the federal court has jurisdiction,[23] nor does it apply to proceedings not pending, but merely threatened.[24] The federal court has jurisdiction, under such act, to restrain a suit by a claimant against a trustee in bankruptcy for conversion of the proceeds of goods sold by order of the court.[25]

A state court has no jurisdiction to enjoin actions or proceedings in a federal court, or to enjoin parties from commencing or continuing them.[26]

(§ 2) *C. Public, official, and municipal acts*[27] that are wrongful or unlawful may be restrained, as where police surveillance is made a trespass,[28] or a drainage scheme will collect surface water and irreparably damage land,[29] or part of a public park will be used as a public highway.[30] Injunction may issue to restrain a breach of contract on the part of a city,[31] but it will not be so restrained as to disable the city to serve the public interests and needs.[32]

Acts of boards or officers[33] exercising judicial discretion vested in them will not be controlled.[34] Injunction will also lie to prevent the exercise of duties which are purely ministerial,[35] and it may also restrain public officers and boards from exercising unconstitutional powers,[36] but not excesses of authority adequately

in state court on same cause of action, nor that he reduced damages claimed below amount necessary to give federal court jurisdiction, prevents operation of statute. Texas Cotton Products Co. v. Starnes, 128 F. 183. Federal court having taken jurisdiction of creditor's suit against lessee of street railway and appointed receiver cannot enjoin prosecution of suit by stockholders of lessor to enjoin extension of lease on ground of fraud, since suit does not interfere with possession of property by federal court, or its management by receivers, nor affect any issue in creditor's suit. Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801.

23. May enjoin defendant from selling or disposing of lands purchased at sheriff's sale in suit to set aside sheriff's deed of which it has jurisdiction. Massie v. Buck [C. C. A.] 128 F. 27. Applies to criminal proceedings instituted by city for violation of ordinance requiring electric line to keep flagmen at crossings. Camden Interstate R. Co. v. Catlettsburg, 129 F. 421. The fact that a bill in a state court incidentally prays for relief which might, if granted, interfere with the constructive possession of property by receivers of a federal court will not authorize its prosecution to be enjoined, where the principal relief sought does not trench on the jurisdiction of the latter court. Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801.

24. Camden Interstate R. Co. v. Catlettsburg, 129 F. 421.

25. Claimant sold goods to bankrupts and after filing petition sought to rescind for fraud. In re Mertens, 131 F. 507.

26. Enjoining litigants is, in effect, enjoining court. Cannot be done though state court has jurisdiction of all the parties to proceeding in federal court. Attempt to enjoin contempt proceedings. Johnstown Min. Co. v. Morse, 44 Misc. 504, 90 N. Y. S. 107.

27. See 2 Curr. L. 408.

28. To restrain police captain from keeping officers permanently in licensed saloon on mere suspicion that gambling is being carried on there. Hale v. Burns, 44 Misc. 1, 89 N. Y. S. 711. From keeping officers in front of and in hotel who interfered with hotel business. Hertz v. McDermott, 45 Misc. 28, 90 N. Y. S. 803.

29. Render it valueless. Fuller v. Belleville Tp. [N. J. Eq.] 58 A. 176.

30. Abutter suing need not show damage. Village of Riverside v. Maclean, 210 Ill. 308, 71 N. E. 408.

31. Injunction issued to restrain city from violating contract allowing complainant to maintain telephone line in streets. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313.

32. City will not be restrained from repudiating contract for lighting and letting new one. Riker v. Oakland Circuit Judge [Mich.] 101 N. W. 229.

33. See 2 Curr. L. 408.

34. Right of board of public works of Virginia to determine whether, and how, one railroad shall cross another. Southern R. Co. v. Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784; Bennett v. Richards [Ky.] 83 S. W. 154. Will not enjoin the discharge of duties imposed upon the executive branch of the government. Zevely v. Weimer [Ind. T.] 82 S. W. 941. Before an injunction can issue to restrain the secretary of the interior or those acting under him from enforcing the right given the Choctaw and Chickasaw nations to compel traders to take out licenses it must appear that he has no authority to exercise discretion in the premises. Id.

35. To require election judges to correct returns by adding votes omitted by mistake or oversight, to require election commissioners to canvas and count votes and certify them to secretary of state, there being no claim of fraud or improper conduct. Bennett v. Richards [Ky.] 83 S. W. 154.

36. Removal of county seat restrained because consent of people had not been obtained by requisite constitutional majority. Lindsay v. Allen [Tenn.] 82 S. W. 171. A state railroad commission will be enjoined from enforcing unauthorized orders interfering with interstate commerce. Rosen-

remediable at law, such as invalid contempt proceedings.[37] Threatened acts in alleged excess of authority given by a board may be restrained until the question be legally settled.[38]

Elections and right to office.[39]—As a general rule equity will not interfere in any matter growing out of an election which may be settled by a contest provided for by statute.[40] It may do so, however, where the property or person of a citizen is imperiled under the guise of an unauthorized election.[41] The right to office, or of the nomination to an office, or the acts of public officers in the discharge of their duties, cannot be regulated or controlled by injunction.[42] The writ will not issue to restrain the removal of one from a public office,[43] nor to prevent the incumbent of an office from exercising the functions thereof pending a suit to determine his right thereto.[44] But the officer having the apparent title will be protected by injunction from interference by rival claimants.[45]

Equity has no jurisdiction to enjoin the publication of the result of a local option election, either on the ground of its invalidity, or because of unfairness in conducting it, even where irreparable injury to property in case of such publication is alleged.[46] If it can interfere at all, complainant must await the attempted enforcement of the law.[47]

In a proceeding to obtain for relator the office of member of the city council, other members cannot be enjoined from interfering with his enjoyment of the office, since it will be presumed that, when the courts have decided that he is entitled thereto, they will no longer do so.[48]

baum Grain Co. v. Chicago, etc., R. Co., 130 F. 46. May issue on petition of taxpayers to restrain city officers who are about to expend money or incur obligations purporting to bind the city in a manner beyond its power. Mass. Rev. Laws, c. 25, § 100. To restrain mayor from ordering repairs to streets. Draper v. Fall River, 185 Mass. 142, 69 N. E. 1068. Will lie to prevent unauthorized acts by county officers on petition for a change of a county seat. To prevent auditor and commissioners from taking action on petition for removal. Remedy at law by election contest inadequate. Gile v. Stegner [Minn.] 100 N. W. 101.

37. County commissioners will not be enjoined from proceeding against the tax collector for contempt for failure to appear before them with his books and papers, since, if they have no authority to do so, he has ample remedy at law to prevent its collection. Remedies under Ga. Pol. Code, § 419. Sayer v. Brown, 119 Ga. 539, 46 S. E. 649.

38. Attempted change of grade under cover of authority for crossing. Southern R. Co. v. Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784.

39. See 2 Curr. L. 412.

40. Will not enjoin ordinary from proclaiming result of an election under Georgia local option liquor law on ground that notice thereof was not published for the prescribed time. Ogburn v. Elmore [Ga.] 48 S. E. 702.

41. Ogburn v. Elmore [Ga.] 48 S. E. 702.

42. Injunction prohibiting secretary of state from certifying name of one as nominee to office held void for want of jurisdiction. People v. Rose, 211 Ill. 259, 71 N. E. 1125. Equity held to have no jurisdiction to restrain a city clerk from putting on the official ballot the names of persons mentioned in certificates of nomination filed with him. City of Annapolis v. Gadd, 97 Md. 734, 57 A. 941. The eligibility of a person to an office cannot be raised in a suit for an injunction restraining election commissioners from issuing a certificate of election to him, where they have no power to pass upon the question. Smith v. Doyle, 25 Ky. L. R. 958, 76 S. W. 519.

The remedy is **quo warranto** which see, 2 Curr. L. 1377; and see, also, Officers and Public Employes, 2 Curr. L. 1069.

43. Commissioners will not be restrained from removing keeper of penitentiary under N. Y. Laws 1902, p. 387, c. 127, though such act is invalid. People v. Howe, 177 N. Y. 499, 69 N. E. 1114. Authorities reviewed.

44. Incumbent will not be enjoined from exercising the functions thereof pending quo warranto to try title thereto. State v. Board of Deputy State Sup'rs [Ohio] 71 N. E. 717.

45. Members of boards attempted to be abolished enjoined from interfering with new board appointed to take their place, pending determination of validity of statute under which change was made. State v. Board of Deputy State Sup'rs. [Ohio] 71 N. E. 717.

46. Suit to contest must be brought under statute relating to contests. No injury results from mere publication and remedy too drastic in operation and far-reaching in results. Robinson v. Wingate [Tex. Civ. App.] 80 S. W. 1067; affirmed [Tex.] 83 S. W. 182.

47. Whether injunction will then lie under the Texas statutes (Rev. St. 1895, § 2989) not decided. Robinson v. Wingate [Tex. Civ. App.] 80 S. W. 1067; affirmed [Tex.] 83 S. W. 182.

48. State v. Grace [Tenn.] 82 S. W. 485.

Taxes.[49]—As a general rule, injunction will not issue to prevent the collection of taxes,[50] but it will issue to prevent an assessment for taxation made on unconstitutional principles.[51] In such case no payment or tender of any amount is a necessary prerequisite to suit.[52] It will not lie to restrain the collection of an assessment for a local improvement unless the action of the municipal authorities has been fraudulent or unless the assessment is so excessive as to clearly exceed the benefits to the property.[53]

A suit to restrain the removal of a county seat because the consent of the people has not been obtained by the requisite constitutional majority does not fall under the class of contested election cases.[54]

(§ 2) *D. Enforcement of statutes or ordinances*[55] may be restrained if they are invalid.[56]

(§ 2) *E. Exercise of right of eminent domain*[57] without prior compliance with the requirements of law[58] will be prevented; thus if payment be prerequisite, to prevent taking before ascertaining and at least paying the award into court.[59] A statutory procedure for the ascertainment of damages suffered by a landowner who has permitted a right of way over his land to be taken without previous compensation will be enjoined, when the right to compensation is denied, until such right is determined in the injunction proceedings.[60]

(§ 2) *F. Acts affecting rights in highways and public or quasi public places.*[61]—An injunction will lie at the instance of an abutting property owner to

49. See 2 Curr. L. 410.

50. Fargo v. Hart, 193 U. S. 490, 48 Law. Ed. 761. Not to prevent a municipality from enforcing taxes on personalty, by seizure and sale thereof, without lawful authority, since such seizure would be a mere trespass, remediable in a court of law. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432.

51. Taking personal property of nonresident express company situated outside the state into account in fixing value of its property within the state for taxation purposes. Fargo v. Hart, 193 U. S. 490, 48 Law. Ed. 761. Even if proceedings by petition to board of county commissioners for canceling railroad aid tax on ground of nonperformance by it are exclusive, they do not prevent injunction to restrain its collection on other grounds rendering it void. State v. Board of Com'rs, 162 Ind. 580, 70 N. E. 373.

52. Fargo v. Hart, 193 U. S. 490, 48 Law. Ed. 761.

53. Price v. Toledo, 4 Ohio C. C. (N. S.) 57.

54. Lindsay v. Allen [Tenn.] 82 S. W. 171. Chancery court may go behind findings of county court and determine for itself whether constitutional majority voted for removal. Id.

55. See 2 Curr. L. 415. Compare Municipal Corporations, 2 Curr. L. 940.

56. Mills v. Chicago, 127 F. 731. Whether bill will lie to restrain enforcement of municipal ordinance see line of cases cited in Duluth Brewing & M. Co. v. Superior [C. C. A.] 123 F. 353 at p. 356. It may do so to prevent a multiplicity of suits. Ordinance fixing rates to be charged by gas company to consumers. Mills v. Chicago, 127 F. 731. Equity will entertain jurisdiction to restrain, as impairing contract obligations, the enforcement of a municipal ordinance reducing rates of fare on a section only of a consolidated street railway line, in view of the public interests, and of the controversies, confusion, risks, and multiplicity of suits which would necessarily result from resisting its enforcement. City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102.

57. See 2 Curr. L. 416.

58. Taking land for road without compensation. Wenger v. Fisher [W. Va.] 46 S. E. 695. Officers charged with the establishment and maintenance of roads, the surveyor of roads, and the road contractor, are proper parties defendant to a bill for an injunction restraining the laying out of a road through plaintiff's land without first complying with the statutory requirements as to compensation. Id. To restrain a city from condemning streets or alleys across railroad tracks pending a determination of the question whether such condemnation will unnecessarily interfere with their reasonable use, where, in such event, no right of condemnation exists. Pittsburg, etc., R. Co. v. Greenville, 69 Ohio St. 487, 69 N. E. 976.

59. Payment must first be made under Wash. Const. art. 1, § 16. Where city attempts to change grade of street so as to permanently damage plaintiff without providing for, or offering to pay, damages. Swope v. Seattle, 35 Wash. 69, 76 P. 517. To prevent building of railroad across plaintiff's right of way, until statutory requirements relating to condemnation are complied with [S. C. Const. art. 1, § 17; art. 9, §§ 1, 2, 20]. Wilson v. Alderman & Sons Co. [S. C.] 48 S. E. 81. Injunction properly issued under pleadings. Id.

60. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476.

61. See 2 Curr. L. 419. See, also, Highways and Streets, 3 Curr. L. 1593.

prevent an interference with his property rights in the street,[62] or park[63] when such acts constitute a public nuisance, and complainant is specially injured thereby,[64] but not where a servitude contemplated when the highway was taken is newly exercised, e. g., a street railway.[65]

The mere anticipation of future breaches and injuries resulting therefrom is insufficient.[66] It will issue to prevent the laying of street railway tracks in a street under a void ordinance.[67] Where consent of the owners of a majority of the foot frontage on a street in which it is proposed to lay a street railway is necessary to such action, an abutting owner who has not consented thereto may enjoin its construction if such consent has not been obtained.[68] If the requisite number of consents have been obtained, a consenting abutter cannot prevent a change of route, unless such change is alleged and proved to have worked a fraud on him.[69]

Injunction is the proper remedy to prevent interference with and obstruction of the exercise of the statutory right of natural gas companies to lay pipes through cities,[70] or to prevent the tearing up or removing of a track lawfully laid,[71] but not to prevent the repeal of valid ordinances granting permission to occupy the streets.[72]

The owner of land who has dedicated it for cemetery purposes will be restrained from defacing or meddling with graves or monuments therein at the instance of anyone having friends or relatives buried there.[73]

It will also issue to aid a railroad company in keeping its tracks clear of trespassers who, by their constant presence, endanger the lives of the public.[74] Complainant in such case has no adequate remedy at law regardless of whether defendant is adequately able to respond in damages or not.[75]

(§ 2) *G. Acts of quasi public and private corporations or associations.*[76]—Injunction will issue at the instance of stockholders of a corporation, who are in-

62. Laying of railway track 26 feet from entrance to factory where wagons are loaded and unloaded is a material interference with his rights. Cleveland Burial Case Co. v. Erie R. Co., 4 Ohio C. C. (N. S.) 365.

63. Use of park for a highway. Village of Riverside v. MacLean, 210 Ill. 308, 71 N. E. 408.

64. One carrying on retail business next door held specially injured by platform for unloading wagons. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21. To restrain use of street in front of hotel as public hack stand. Odell v. Bretney, 93 App. Div. 607, 87 N. Y. S. 655. Bank not enjoined from erecting building with columns encroaching on street, pursuant to permission granted by council, and not interfering with its reasonable use. Sautter v. Utica City Nat. Bank, 45 Misc. 15, 90 N. Y. S. 838. A railroad company improperly occupying a public highway may be enjoined. Without obtaining city's consent. Collier v. Union R. Co. [Tenn.] 83 S. W. 155.

65. Interurban railroad held not additional burden. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642.

66. Will not be presumed that contract will be broken. If it is, injured parties will have action for damages. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642.

67. Property owners may maintain suit against city and company in federal court. Holst v. Savannah Elec. Co., 131 F. 931.

68. May raise the question as to whether a majority have consented, but if they have he has no further rights. Ireton Bros. v. Ft. Wayne, V. W. & L. Traction Co., 2 Ohio N. P. (N. S.) 317.

69. General public and not owner is then real party in interest. Ireton Bros. v. Ft. Wayne, V. W. & L. Traction Co., 2 Ohio N. P. (N. S.) 317.

70. Rights given by Kan. Gen. St. 1901, § 1366. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448.

71. Injury irreparable. Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612.

72. Railroad could treat improper repeal as void, or else have council's action reviewed at law. Belington & N. R. Co. v. Alston, 54 W. Va. 597, 46 S. E. 612.

73. Bill held to show grounds for equitable relief. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865.

74. One constantly riding a railroad bicycle thereon may be perpetually enjoined from so doing. Is a continuing menace to public travel. Petition sufficient. Atchison, etc., R. Co. v. Spaulding [Kan.] 77 P. 106. Company entitled to uninterrupted and exclusive use of tracks and right of way except where built on highway or over public crossings. Gulf, etc., R. Co. v. Puckett [Tex. Civ. App.] 82 S. W. 662.

75. Gulf, etc., R. Co. v. Puckett [Tex. Civ. App.] 82 S. W. 662.

76. See 2 Curr. L. 416, 419. Compare title Corporations, 3 Curr. L. 880.

jured thereby, to prevent the others from proceeding illegally and wrongfully.[77] It will not lie unless it affirmatively appears that the plaintiff has exhausted all the remedies provided by the constitution and by-laws of the organization.[78] Unsecured creditors cannot obtain an injunction against a corporation to deprive it of its assets, and to administer and distribute them, solely on the ground of its insolvency.[79]

A state court cannot issue an injunction against a national banking association before final judgment.[80] A foreign corporation may be enjoined only as to acts within the state.[81]

A public service gas company may be restrained from shutting off the city's supply of gas for failure to pay an unreasonable price,[82] or a telephone company from exacting an illegal rate.[83]

(§ 2) *H. Breach or enforcement of contract or of trust.*[84]—Injunction will not ordinarily lie to compel specific performance of a contract where complainant has an adequate remedy at law by way of an action for damages for its breach.[85] Recently, however, it has been done to prevent the violation of express negative covenants, even though such violation would have occasioned no substantial injury or though there was an adequate remedy at law.[86] It will not be denied merely because the contract is one which cannot be specifically enforced,[87] but it will not issue to prevent breach of a contract against public policy.[88] Where the bill alleges that a breach of the contract will result in injury which cannot be adequately compensated in damages, it is not necessary to allege that defendant is

77. To prevent persons claiming to be stockholders from acting as such pending determination of their rights. State v. Kennan, 35 Wash. 52, 76 P. 516. Stockholders who intervene after an injunction has issued against them in a suit against the corporation alone, cannot thereafter claim that the court had no jurisdiction of their persons. Id.

78. Coss v. Mansfield Lodge, No. 56, B. P. O. E., 4 Ohio C. C. (N. S.) 11.

79. Jones v. Mutual Fidelity Co., 123 F. 506.

80. U. S. Rev. St. § 5242 [3 U. S. Comp. St. 1901, p. 3517], does not prevent injunction restraining officers from committing trespass on rights of lessee in building purchased subject to lease. Meyer v. First Nat. Bank [Idaho] 77 P. 334.

81. Temporary injunction to restrain defendant from selling or delivering bag frames to persons other than plaintiff in violation of contract. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816.

82. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

83. Charles Simon's Sons Co. v. Maryland Tel. & T. Co. [Md.] 57 A. 193.

84. See 2 Curr. L. 421.

85. Contract to use complainant's trading stamps only. Sperry & H. Co. v. Vine [N. J. Err. & App.] 57 A. 1036. Contract for hauling grain. Rosenbaum Grain Co. v. Chicago, etc., R. Co., 130 F. 46. To restrain the violation of a contract whereby defendant agreed not to carry on a particular business within a certain territory for a cetrain period. Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 A. 845.

It is grantable where promisor is insolvent even though the contract provides for liquidated damages for its breach, the breach in such case being irreparable. Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 A. 845. Legal remedy inadequate on account of difficulty of estimating damages and because of multiplicity of suits. Davis v. Booth & Co. [C. C. A.] 131 F. 31, modifying Booth & Co. v. Davis, 127 F. 875; Fleckenstein Bros. Co. v. Fleckenstein [N. J. Eq.] 57 A. 1025. Agreement not to engage in competitive business. Eugene Dietzgen Co. v. Kokosky [La.] 37 So. 24.

To prevent a gas company from shutting off the supply of gas to a consumer complying with the terms of his contract and averring readiness to continue to do so. Gallagher v. Equitable Gaslight Co., 141 Cal. 699, 75 P. 329. To prevent the taking up of a pipe line by a company contracting to furnish complainant with gas. Agreement to furnish gas in consideration of right of way. Injunction and not mandamus the proper remedy. State v. Connersville Natural Gas Co. [Ind.] 71 N. E. 483.

86. Agreement not to engage in newspaper business. Andrews v. Kingsbury [Ill.] 72 N. E. 11. See, also, Specific Performance, 2 Curr. L. 1678; 4 Curr. L. ——.

87. Will issue where it will do substantial justice by obliging defendant to carry out his contract or lose benefit of its breach, and remedy at law is inadequate and there is no reason of policy against it. To restrain removal of machinery which complainant has contract right to use. American Electrical Works v. Varley Duplex Magnet Co. [R. I.] 58 A. 977; Id., 59 A. 110.

88. Agreement to abstain from legitimate use of one's own property. Fullington v. Kyle Lumber Co., 139 Ala. 242, 35 So. 852.

insolvent.[89] One may be enjoined from violating a contract by acts which in any view would exceed his right.[90] In the absence of anything in a contract to the contrary, the injured party has the option to proceed either in law or in equity.[91]

In case of covenants respecting real property, violation will be restrained.[92]

Executors will, at the suit of devisees, be enjoined from conveying property of their testator which they have no authority to dispose of under the will.[93]

Third persons may be enjoined from causing a covenantor to violate his contract by employing him in a similar business,[94] or otherwise unfairly and fraudulently interfering with performance.[95] Injunction also lies against a party, who has contracted to do for complainant exclusively some act calling for the exercise of skill or artistic capacity, from giving his services to anyone else,[96] and the assignee of a trade secret may enjoin employes of the assignor from disclosing or using the same.[97]

(§ 2) *I. Interference with property, business, or comfort of private persons.*[98]—It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources,[99] nor will the court impair the right of the owner to the use of his property further than may be necessary to protect the rights of the parties.[1]

Injunction may issue to protect intangible as well as tangible property rights, including the right to carry on business and to fulfill contracts made in the course thereof.[2] Thus it will issue to prevent strikers from interfering with plaintiff's business and property and indulging in violence toward, and intimidation of,

89. Fullington v. Kyle Lumber Co., 139 Ala. 242, 35 So. 852.

90. Injunction issued to restrain board of education from hiring principal of academy at larger salary and to prevent introduction of nonresident pupils free, in contravention of contract between such board and academy. Trustees of Washington Academy v. Crulkshank, 89 N. Y. S. 375.

91. Augusta Steam Laundry Co. v. Debow, 98 Me. 496, 57 A. 845.

92. To restrain lateral addition to pier on ocean side of board walk in violation of covenant in deed by defendant's grantor to city giving it easement. Atlantic City v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 729.

93. Equity will construe will and compel executors to perform their duties thereunder. McClane v. McClane, 207 Pa. 465, 56 A. 996.

94. By employing him as the manager of a similar business, with knowledge that the other party is thereby being injured and obtaining a corresponding advantage to themselves in their business. Fleckenstein Bros. Co. v. Fleckenstein [N. J. Eq.] 57 A. 1025. Complainant held entitled to injunction restraining defendant from breach of contract not to engage in fish business, and restraining third person from benefiting in any way by his services and experience in such business. Booth & Co. v. Davis, 127 F. 875, modified Davis v. Booth & Co., 131 F. 31. Is no defense that such third person hired him in ignorance of the contract, and will suffer damage if deprived of his services. Id. Injunction, in so far as it concerns the third person, should be limited to his actions in regard to defendant. Davis v. Booth & Co. [C. C. A.] 131 F. 31, modifying Booth & Co. v. Davis, 127 F. 875.

95. By inducing merchants to sell trading stamps in violation of their contracts with plaintiff, and by selling stamps to other merchants, and by false and fraudulent advertising. Fact that defendant had acquired some stamps in proper manner would not prevent injunction restraining use of all where it was impossible to separate them. Sperry & H. Co. v. Mechanics' Clothing Co., 128 F. 800. To prevent sale of nontransferable tickets by brokers. Illinois Cent. R. Co. v. Caffrey, 128 F. 770; Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020.

96. Agreement to furnish patent printing presses. Myers v. Steel Mach. Co. [N. J. Eq.] 57 A. 1080.

97. Vulcan Detinning Co. v. American Can. Co. [N. J. Eq.] 58 A. 290. One bound not to reveal it cannot defend on the ground that it had been obtained honestly by complainant from one who obtained it dishonestly from the discoverer. Id.

98. See 2 Curr. L. 423.

99. A temporary injunction will not issue at the instance of one claiming under a mere entry on land as vacant to restrain or interfere with the use and possession thereof by one who has had possession for more than thirty years under color of title. Cutting of timber. May be compensated in damages if successful. Newton v. Brown, 134 N. C. 439, 46 S. E. 994. Blowing of factory whistle. Redd v. Edna Cotton Mills [N. C.] 48 S. E. 761.

1. Will not, at instance of purchaser at tax sale who has not received deed, enjoin owner of land from cutting timber or otherwise using premises. Millard v. Breckwoldt, 90 N. Y. S. 890.

2, 3. Underhill v. Murphy, 25 Ky. L. R. 1731, 78 S. W. 482.

his employes.[3] None will issue where the title to personalty is the sole question involved.[4]

Equity will not enjoin threatened trespasses upon the person, even though they infringe upon the constitutional rights of life, liberty, and pursuit of happiness.[5]

Trade names or reputations, though not registered or properly selected as trade marks, may be protected.[6] This will not be done, however, where plaintiff has himself been guilty of unfair competition, or such fraud as disentitles him to relief in equity.[7]

Waste may be prevented by injunction,[8] also the destruction of property in an attempt to enforce a supposed right.[9] By statute in New York, the owner of property sold for taxes may, after notice of the sale, be restrained from despoiling the same.[10]

Nuisance.[11]—Equity has original jurisdiction to restrain a nuisance.[12] An injunction will issue to restrain the maintenance of a private nuisance.[13] The fact that the persons maintaining it did not know that it was offensive to complainant and that, had they known it, they would have endeavored to minimize it as far as possible,[14] or the mere fact that it is profitable to the person maintaining it, is no defense.[15] Where the evidence does not satisfy the court that the facts complained of constitute a nuisance, injunction will not issue until such fact has been passed upon by a jury.[16] But where the facts clearly and certainly establish its existence, the rule is otherwise.[17] The petition in a suit to enjoin a threatened nuisance must allege such facts as show with cogency, clearness, and reasonable certainty that the acts threatened will, if committed, bring into existence a nuisance, and that complainants will suffer irreparable injury thereby.[18] Injunction will also lie to protect one suffering private injury or annoyance from that which is a

4. Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478. Remedy at law adequate. Burton v. Walker [N. D.] 100 N. W. 257. To prevent mere taking of timber. Additional facts showing insolvency of defendant or other reason why legal remedies are inadequate must appear. Stephenson v. Burdett [W. Va.] 48 S. E. 846.

5. Arrests under void ordinances. Brown v. Birmingham [Ala.] 37 So. 173.

6. Label on cigars. Sartor v. Schaden [Iowa] 101 N. W. 511. See Trade Marks and Trade Names, 2 Curr. L. 1881.

7. Plaintiff not guilty of fraud or unfair competition in use of label on cigars. Sartor v. Schaden [Iowa] 101 N. W. 511.

8. Complaint in action to quiet title and to enjoin waste and claim of adverse title held sufficient under N. M. Comp. Laws 1897, § 4010, as against demurrer challenging jurisdiction of court of equity. Marquez v. Maxwell Land Grant Co. [N. M.] 78 P. 40.

9. To restrain corporation having contract with city to light streets from removing burners used by gas company and attached to its pipes encased in city's lamp posts, so as to replace them with its own. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

10. Injunction will not issue until after notice of sale. Law not intended to interfere with usual enjoyment or reasonable use of land [Laws 1896, p. 840, c. 908, § 129]. Millard v. Breckwoldt, 90 N. Y. S. 890.

11. See 2 Curr. L. 426.

12. City of Cambridge v. Dow Co., 185 Mass. 448, 70 N. E. 447. Also has such jurisdiction in regard to it as is given by statute. Supreme judicial court of Massachusetts has no jurisdiction of bill by city to enjoin melting or rendering establishment, in which horses and other animals were never killed, where it was not alleged to be nuisance and board of health had not passed any orders in regard to it [Rev. Laws, c. 75, §§ 73, 108-111, construed]. City of Cambridge v. Dow Co., 185 Mass. 448, 70 N. E. 447.

13. Hospital next to plaintiff's residence. Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748; Redd v. Edna Cotton Mills [N. C.] 48 S. E. 761. The mere proximity of a proposed cemetery to plaintiff's property and the consequent depreciation of its value affords him no right of action to restrain its establishment. Must show nuisance. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

14. Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748.

15. Redd v. Edna Cotton Mills [N. C.] 48 S. E. 761.

16. Whether blowing of factory whistles impairs and injures plaintiff's health and home. Redd v. Edna Cotton Mills [N. C.] 48 S. E. 761. Where the evidence is such that there remains a substantial doubt as to whether a nuisance exists. Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748.

17. Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748.

18. Allegations in petition to enjoin location of cemetery next to plaintiff's land insufficient. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

public nuisance.[19] The fact that a landowner purchases the property after the establishment of such nuisance, which is a continuing one,[20] or that the municipal authorities tolerate its continuance, is immaterial.[21] So is a change therein which does not do away with the injury.[22]

Trespass.[23]—Injunction will not issue to prevent a mere threatened trespass upon real estate,[24] but it will do so where, by reason of the continuous character of the threatened invasion, many actions at law would be necessary, in none of which could compensation for the whole wrong be obtained,[25] or where the threatened trespass will work irreparable injury to the property itself, amounting essentially to a destruction thereof,[26] or where defendant is insolvent.[27] Complainant must show an intention to continue the injurious acts and a reasonable ground to apprehend that defendant can do so.[28] Injunction will not issue to restrain the cutting of timber by one who is solvent and is in possession of the property under a bona fide claim of title, where no other action of any kind is pending to which the relief asked is ancillary.[29] By statute in some states it is not necessary to allege defendant's insolvency where the trespass is continuous, or is the cutting or destruction of timber trees.[30] Such acts have been held not to deprive the court of the discretion to require defendant to give bond to secure plaintiff's damages, or to appoint a receiver, instead of issuing an injunction.[31] By statute in Georgia, injunction to prevent the cutting of timber will only issue to one having perfect title, in the absence of an allegation of insolvency or of irreparable injury.[32] The title required is a duly executed paper one, the exhibition of which will show both the right of possession and the right of property in plaintiff.[33]

19. By reason of crowds of disorderly persons on public highways, drawn there by entertainments given by third persons on their own lands. Sunday ball games. Also nuisance to restrain noise. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532. To prevent Sunday base ball. Dissolution of temporary injunction properly denied. Dunham v. Binghamton & L. Baseball Ass'n, 89 N. Y. S. 762. To restrain adjoining landowner from permitting his property to be used as a house of ill-fame. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513. Placing pound nets in navigable stream so as to obstruct it and interfere with ordinary navigation. Evidence sufficient. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761.

20. Right is property right running with land. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513.

21, 22. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513.

23. See 2 Curr. L. 426.

24. Miller v. Hoeschler [Wis.] 99 N. W. 228. Unless an irreparable injury is threatened. Not to prevent entry on land and working turpentine trees, or cutting staves, or removal of lumber, unless defendant insolvent. Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478; Kelley v. Boyer [Neb.] 99 N. W. 832.

25. Bill for injunction to restrain defendant from erecting fence which plaintiff had once removed, held not demurrable. Miller v. Hoeschler [Wis.] 99 N. W. 228. Will lie if the threatened trespass is so vexatiously persisted in that a multiplicity of suits must result. For tearing down screen on lot. Under Kentucky Statute 1899, § 2361, providing that owner may maintain appropriate action to prevent or restrain injury to or trespass on land. Chambers v. Haskell, 25 Ky. L. R. 1707, 78 S. W. 478. Crossing right of way. Alderman & Sons Co. v. Wilson [S. C.] 48 S. E. 85. Will issue to prevent a continuing trespass under an unfounded claim of right. Use of roadway for drawing timber. Fact that defendant had almost completed use held no defense, where complainant supposed he intended to persist. Rhoades v. McNamara [Mich.] 98 N. W. 392.

26. Complaint for trespass on land constituting lake residence. De Pauw v. Oxley [Wis.] 100 N. W. 1028; Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715.

27. Evidence held not to show trespass. Kelley v. Boyer [Neb.] 99 N. W. 832; Chambers v. Haskell, 25 Ky. L. R. 1707, 78 S. W. 478.

28. Cross complaint sufficient in this regard. Mendelson v. McCabe [Cal.] 77 P. 915. Complaint held sufficient on appeal, though not alleging a threat to continue injuries, where it may be implied from allegation of constant repetition of injuries. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

29. North Lumber Co. v. Gary [Miss.] 36 So. 2.

30. Does not apply to removal of lumber [N. C. Acts 1885, p. 664, c. 401]. Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478.

31. Kistler v. Weaver, 135 N. C. 388, 47 S. E. 478.

32. Civil Code 1895, § 4927. Powell v. Brinson, 120 Ga. 36, 47 S. E. 499.

33. Title resting partly in parol held insufficient. Powell v. Brinson, 120 Ga. 36, 47 S. E. 499.

In states where it is the duty of the owner of land to fence it, injunction will not issue to prevent one from permitting cattle to wander on the unfenced land of another,[34] but it will issue to prevent his herding or driving them there.[35] The decree will not be extended so as to include land on which defendants have not trespassed or threatened to trespass.[36]

Incorporeal property.—It will lie to prevent the destruction of a well defined underground watercourse, or its diversion from the spring of a lower proprietor,[37] or for the malicious diverting or wasting of percolating waters,[38] or to prevent the unauthorized interference with water and ditch rights.[39] It will also issue to restrain the taking of oysters from a non-navigable stream flowing over plaintiff's land.[40]

Easements and rights of way.[41]—Equity has jurisdiction to prevent, by injunction, the actual or threatened interference with, disturbance, or destruction of easements,[42] or rights of way.[43] A right of way will be protected though plaintiff does not own the land in fee simple,[44] and he need not allege that he has an exclusive right thereto.[45]

(§ 2) *J. Crimes.*[46]—Equity has no jurisdiction to enjoin the commission of threatened crimes,[47] or threatened prosecutions for the commission of alleged crimes.[48] Violations of state laws and of penal municipal ordinances, and prose-

34. Martin v. Platte Valley Sheep Co. [Wyo.] 76 P. 571.

35. Evidence sufficient to justify decree enjoining defendant from herding or driving cattle on or across plaintiff's land. Martin v. Platte Valley Sheep Co. [Wyo.] 76 P. 571. Decree too broad as in effect restricting owners from permitting cattle to run at large on government land. Id. The fact that plaintiff has constructed an unlawful fence enclosing public land is no defense to an action for an injunction to restrain defendant from driving cattle on plaintiff's land within such enclosure. Id.

36. Martin v. Platte Valley Sheep Co. [Wyo.] 76 P. 571.

37. Damage irreparable. St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

38. St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

39. Restraining interference with water and ditch rights. Rodgers v. Pitt, 129 F. 932. Turning water from irrigation ditch on land of another. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

40. Petition held sufficient. Instructions approved. Evidence sufficient to authorize verdict for plaintiff. Prey v. Oemler, 120 Ga. 223, 47 S. E. 546.

41. See ante, § 2F. **Acts affecting rights in highways,** etc.

42. Railroad right of way obtained by prescription. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1. Every such disturbance will be restrained whenever, from the essential nature of the injury or its continued character, the legal remedy is inadequate. Id. Right of way over railroad right of way. Bubenzer v. Philadelphia, etc., R. Co. [Del. Ch.] 57 A. 242. Defendant held entitled to injunction restraining destruction of fence on land on which she had easements without regard to whether she owned fee or not. Evidence held to show that strip was not public highway. Gilfillan v. Shattuck, 142 Cal. 27, 75 P. 646.

43. To restrain obstruction of private right of way across railroad's right of way. Bubenzer v. Philadelphia, etc., R. Co. [Del.] 57 A. 242.

44. Railroad. Wilson v. Alderman & Sons Co. [S. C.] 48 S. E. 81. Motion to dissolve injunction restraining obstruction of right of way by fences held properly denied. Jackson v. Snodgrass [Ala.] 37 So. 246; Alderman & Sons Co. v. Wilson [S. C.] 48 S. E. 85.

45. Complaint sufficient. Wilson v. Alderman & Sons Co. [S. C.] 48 S. E. 81.

46. See 2 Curr. L. 432.

47. Brown v. Birmingham [Ala.] 37 So. 173. Question whether liquor dealer has violated local option law, involving validity of license issued to him cannot be tested by injunction, but only by criminal proceedings in which defendant can have trial by jury. Hargett v. Bell, 134 N. C. 394, 46 S. E. 749.

48. Brown v. Birmingham [Ala.] 37 So. 173; Palatka Waterworks v. Palatka, 127 F. 161. To enjoin publication of local option law which can only be enforced by criminal prosecutions. Robinson v. Wingate [Tex. Civ. App.] 80 S. W. 1067, affirmed [Tex.] 83 S. W. 182. Cannot restrain county attorney from prosecuting plaintiff's salesmen under local option law for selling alcohol to druggists, on the ground that such sales are not in violation of the law, that question being one for the criminal court. No question as to validity of law involved. Greiner-Kelly Drug Co. v. Truett [Tex.] 79 S. W. 4. Will not lie against enforcement of municipal ordinance regulating liquor traffic the violation of which is a misdemeanor, because it imposes unreasonable, vexatious and oppressive restrictions. Paul v. Washington, 134 N. C. 363, 47 S. E. 793. Violation of statute against book-making and pool selling. Old Dominion Telegraph Co. v. Powers [Ala.] 37 So. 195. Will not enjoin a criminal prosecution to enforce an ordinance requiring a railroad to maintain flagmen at street cross-

cutions for both, stand upon the same footing in this regard.[40] It is immaterial that the statute or ordinance for an alleged violation of which prosecution is threatened is absolutely void,[50] that such prosecutions will inflict irreparable damage on the person threatened,[51] or that the municipality and its officers are insolvent so that damages cannot be recovered against them.[52] Nor will equity interfere on the theory of preventing a multiplicity of suits.[53] In such case the threatened party has an adequate remedy at law in his opportunity to establish his innocence in the criminal court before which he is tried, and by an action for damages in case the prosecution is malicious.[54]

But the court is not deprived of jurisdiction to protect property rights by the fact that the interference with them to some extent takes the form of criminal prosecutions,[55] nor by the fact that the acts complained of are accompanied by, or are themselves violations of, the criminal law,[56] and it may prevent the institution of criminal proceedings by a party to a suit already pending before it, to try the same right that is in issue therein.[57]

§ 3. *Suits or actions for injunction.*[58]—Courts of equity alone have power to issue injunctions.[59] The court operates in personam in granting an injunction and hence its jurisdiction is not affected by the location of the property affected by the acts complained of.[60] Where it obtains jurisdiction because of a prayer for an injunction, it has jurisdiction to decide all questions and grant appropriate relief.[61] The court has no jurisdiction to determine a question of disputed title on a bill to restrain trespass upon land.[62] The complainant must be a person aggrieved in the capacity wherein he sues.[63] Several owners of distinct

ings. Camden Interstate R. Co. v. Catlettsburg, 129 F. 421.

49, 50. Brown v. Birmingham [Ala.] 37 So. 173; Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

51. Brown v. Birmingham [Ala.] 37 So. 173; Old Dominion Telegraph Co. v. Powers [Ala.] 37 So. 195.

52. Brown v. Birmingham [Ala.] 37 So. 173; Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

53. Brown v. Birmingham [Ala.] 37 So. 173; Old Dominion Telegraph Co. v. Powers [Ala.] 37 So. 195; Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

54. Brown v. Birmingham [Ala.] 37 So. 173; Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

55. May prohibit the invasion of rights of property by the enforcement of an unconstitutional law. Camden Interstate R. Co. v. Catlettsburg, 129 F. 421. Obstruction of right of natural gas companies to lay pipes in certain cities. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co. [Kan.] 76 P. 448. Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be enjoined. Arbitrary interference with property rights by ordinance narrowing limits within which gas works may be erected. Dobbins v. Los Angeles, 25 S. Ct. 18, 49 Law. Ed. —. Bill to prevent enforcement of ordinance fixing lower water rates not one to enjoin criminal prosecutions, though ordinance may be enforced by fines and penalties. Palatka Waterworks v. Palatka, 127 F. 161.

56. Acts of strikers. Underhill v. Murphy, 25 Ky. L. R. 1731, 78 S. W. 482. See, also, cases cited in Greiner-Kelly Drug Co. v. Truett [Tex.] 79 S. W. 4.

57. Camden Interstate R. Co. v. Catlettsburg, 129 F. 421.

58. See 2 Curr. L. 433, 434, 441-447.

59. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020. In Ohio the supreme court has no original jurisdiction of suits for injunctions (State v. Board of Deputy State Sup'rs [Ohio] 71 N. E. 717), but it may, in an action in quo warranto to determine the right of rival boards to exercise official functions, grant an ancillary injunction to protect those having the prima facie right from interference by the other claimants during the pendency of such original action (Id.).

60. Title to realty not involved within meaning of Mo. Rev. St. 1899, § 564, in action by corporation to restrain promoters of corporation from foreclosing trust deed on ground of fraud. State v. Dearing [Mo.] 79 S. W. 454. An action may be maintained by a nonresident to restrain a breach of contract within the state by a foreign corporation, no matter where such contract was made. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816.

61. Where prayer asks for injunction to restrain interference with ditch, court may quiet title thereto. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053. May award damages. Rhoades v. McNamara [Mich.] 98 N. W. 392. But on a proceeding to dissolve an injunction it refused to try collateral issues (rights under a contract, breach whereof was enjoined). Eugene Dietzgen Co. v. Kokosky [La.] 37 So. 24.

62. Chappell v. Roberts [Ala.] 37 So. 241.

63. An abutter may have an injunction

tenements may join in a suit to restrain a nuisance or other grievance common to them all and affecting each in a similar way,[64] but they may not so join to restrain a distinct and separate injury to each of their properties.[65] Where the injuries are dissimilar complainants must, at some stage of the proceedings, elect on which kind of injury they will rely.[66] Different landowners may be joined in a suit to restrain them from interfering with a right of way, where the same right is asserted against each,[67] and one of several joint owners of an irrigation ditch may maintain a suit to enjoin third persons from interfering therewith.[68] Several subscribers, each having a contract with a telephone company, may join in a bill to restrain it from charging higher rates than those fixed by ordinance,[69] or an individual may maintain the suit.[70] Though all proper parties have not been joined as defendants, the decree is binding on those duly served.[71]

The bill must state facts showing that plaintiff is entitled to the relief sought,[72] and a failure to allege facts showing a right to equitable relief may be taken advantage of at any time, since it goes to the jurisdiction of the court.[73] In Alabama it has been held that a bill insufficient in regard to the allegation that the injury cannot be adequately compensated in damages will, on motion to dismiss, be considered as amended in this regard.[74] The character of the bill must be determined from the allegations upon which relief can be allowed.[75] As a rule a statement of ownership of the property, for an injury to which relief is sought, is sufficient.[76]

There must be a formal prayer for injunction,[77] and the extent of the relief granted will be confined to that prayed for.[78] The insufficiency of the jurat at-

against diversion of a park to highway uses though he shows no damages. Village of Riverside v. MacLean, 210 Ill. 308, 71 N. E. 408.

64. Sunday baseball. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532.

65. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532.

66. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532. The fact that the injuries are dissimilar, as where some complainants are injured by noises in baseball park and others by fact that ball games cause assemblage of disorderly crowd on streets held not to prevent issuance of temporary injunction. Id.

67. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1.

68. Rodgers v. Pitt, 129 F. 932.

69, 70. Simon's Sons Co. v. Maryland Tel. & T. Co. [Md.] 57 A. 193.

71. Fact that township not made party to suit to enjoin collection of railroad aid tax does not render injunction void. State v. Board of Com'rs, 162 Ind. 580, 70 N. E. 373.

72. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432. Petition in action to enjoin location of cemetery held to insufficiently describe location of complainant's land. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56. In Virginia by statute an injunction will not issue unless the court is satisfied by affidavit, or otherwise, of plaintiff's equity. Code 1887, § 3440. Affidavit of officer of corporation held sufficient. Southern R. Co. v. Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784.

73. If it omits essential facts, or states facts showing an adequate remedy at law or that complainant is otherwise not entitled to equitable relief, it is the duty of the appellate court to notice the defect of its own motion, and direct a dismissal, though no such objection was raised by the pleadings or otherwise. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432. The fact that the answer does not state that complainant has an adequate remedy at law does not prevent defendant from raising the question where the facts show the case to be one over which equity has no jurisdiction. Where it appears that only questions involved are possession and title to realty. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715.

74. Fullington v. Kyle Lumber Co., 139 Ala. 242, 35 So. 852.

75. Bill held one for injunction though damages were alleged, where no specific amount of damages was claimed. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

76. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 58 A. 290.

77. Consolidated Gas Co. v. Baltimore County Com'rs [Md.] 57 A. 29. Court cannot issue order on motion of plaintiff enjoining defendant from prosecuting action, which defendant has brought against him, until termination of plaintiff's suit, where injunction is not part of relief prayed for. David Belasco Co. v. Klaw, 90 N. Y. S. 593.

78. Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748. Not broader than asked for. Andrews v. Kingsbury [Ill.] 72 N. E. 11. Where there is a particular prayer for a preliminary injunction and an order is passed directing it to be issued as asked for therein, such prayer must be looked to in order to ascertain its extent. Where injunction was asked to restrain defendant from laying pipes in street until it obtained written permit it could not be continued after the court determined that such company had authority to lay pipes without permit. Consolidated Gas Co. v. Baltimore County Com'rs [Md.] 57 A. 29.

tached to the bill goes only to the temporary injunction and has no effect upon the bill as a whole when it shows sufficient equity to require an answer.[79]

Defenses arising after answer filed and issue joined must be presented by a cross bill in the nature of a plea puis darrein continuance.[80] A defendant against whom writs of ne exeat and injunction have issued, and who has escaped from custody and remains beyond the jurisdiction of the court, cannot, on appeal, question the correctness of the action of the lower court in granting them.[81] Where defendant desires a mutual or reciprocal injunction, he must apply for it in the original suit in which an injunction pendente lite issued against him.[82] Where an injunction is denied, plaintiff may not, after dismissing it, institute another suit on the same grounds and again apply for an injunction for the same purpose.[83]

Complainants may dismiss, or consent to the dismissal of, their bill at any time before decree.[84] This is true when they sue as members of a class and expressly state that the suit is not only for their own benefit but also for that of such others of the class as may come in and share the expense.[85] But this right ends when one of the class, not a party to the original bill, is admitted, by order of court, as a complainant.[86] In Missouri when a petition for an injunction is filed, in which no temporary injunction is asked, the court may, on defendant's voluntary appearance, order the case to be tried at the term when such appearance is made instead of the term to which the process was returnable.[87] The complaint should be dismissed as to persons losing, after the filing of the complaint, the property rights on which the right to injunctive relief depended.[88]

§ 4. *Preliminary injunction. A. Issuance.*[89]—The object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights involved until it can be finally determined.[90] It is provisional in its nature and does not finally conclude the rights of the parties.[91] A preliminary injunction will not issue to change possession of premises during the trial of an action for specific performance.[92]

The granting of an injunction pendente lite is largely in the discretion of the trial court,[93] and it may be conditioned as he may deem proper.[94] It must appear

Will not issue to prevent a nuisance on a prayer specifically asking for it on an entirely different ground and for a different purpose. Where asked to restrain company from digging up streets until it obtained a permit, will not be granted because it was doing so in such a manner as to constitute a nuisance, it appearing that defendant had a right to excavate without a permit. Id. The alternative "or until the further order of this court" cannot enlarge the relief prayed for. Restraining company from laying pipes until they obtained permit, "or," etc. Id.

79. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865.

80. McAlpin v. Universal Tobacco Co. [N. J. Eq.] 57 A. 418.

81. Injunction against disposing of property pending suit for allmony and maintenance. Bronk v. Bronk [Fla.] 35 So. 870.

82. Cannot maintain another action for that purpose. Maloney v. King [Mont.] 76 P. 939.

83. Injunction against operating ore vein. Maloney v. King [Mont.] 76 P. 939.

84, 85. McAlpin v. Universal Tobacco Co. [N. J. Eq.] 57 A. 418.

86. Suit by stockholders to restrain execution and sale of corporate bonds. McAlpin v. Universal Tobacco Co. [N. J. Eq.] 57 A. 418.

87. Rev. St. 1889, §§ 5488, 5489, 5505, regulate practice only where temporary injunction has issued. Section 2042 does not apply where defendant appears voluntarily. Harding v. Carthage [Mo. App.] 78 S. W. 654.

88. Where license to maintain hack stand expired and he no longer maintained it. Odell v. Bretney, 93 App. Div. 607, 87 N. Y. S. 655.

89. See 2 Curr. L. 434.

90. Harriman v. Northern Securities Co., 132 F. 464. A restraining order is not expected to do final and complete justice between the parties to a suit, but merely to hold the matter approximately in statu quo, so as to prevent irreparable injury until all matters may be adjusted on final hearing. American Electrical Works v. Varley Duplex Magnet Co. [R. I.] 59 A. 110.

91. Harriman v. Northern Securities Co., 132 F. 464.

92. Forbes v. Carl [Iowa] 101 N. W. 100.

93. First Nat. Bank v. Crabtree [S. D.] 100 N. W. 744; Jones v. Dimes, 130 F. 638; Palatka Waterworks v. Palatka, 127 F. 161; Sponenburgh v. Gloversville, 96 App. Div. 157, 89 N. Y. S. 19, affirming 42 Misc. 563, 87 N. Y. S. 602; Harriman v. Northern Securi-

that complainant's right is reasonably certain,[95] and that the injury to his property is imminent and will be irreparable.[96] Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties which will result from awarding or denying it.[97] It should usually be granted where its denial would, on the assumption that complainant will ultimately prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by defendant through its allowance.[98] It may properly issue to protect the status quo whenever the

ties Co., 132 F. 464. Its decree will not be disturbed unless there has been a plain violation of some settled rule of equity which should govern the issue of injunctions, so that it appears that it was issued improvidently. Injunction restraining seizure and sale of municipal property held not improvidently granted. Kerr v. New Orleans [C. C. A.] 126 F. 920. Where evidence is conflicting. Pittman v. Colbert, 120 Ga. 341, 47 S. E. 948. Denied to compel gas company to furnish gas to nonresident corporation whose only interest in city arises out of contract to furnish burners for street lamps. American Lighting Co. v. Public Service Corporation, 132 F. 794. Held no abuse of discretion in refusing to enlarge scope of injunction in regard to operation of mine. Heinze v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 77 P. 421. Restraining sale of property purchased at sheriff's sale, pending suit to set aside deed. Massie v. Buck [C. C. A.] 128 F. 27. The appellate court will not examine into the merits of the case where the injunction was granted before issue joined and it appears that the case involves controverted questions of fact. Kerr v. New Orleans [C. C. A.] 126 F. 920; Massie v. Buck [C. C. A.] 128 F. 27. Temporary injunction granted to restrain defendant from carrying out combination, declared by court to be illegal, to prevent plaintiffs from purchasing books. Straus v. American Publishers' Ass'n, 92 App. Div. 350, 86 N. Y. S. 1091. Where it is practically admitted that bridge could not be built without consent of government and that, in absence thereof, an injunction was proper, an order granting it will not be disturbed on appeal because it is made binding until further order of the court rather than until such consent has been obtained, in the absence of an abuse of discretion. Gordon County v. Pyron, 120 Ga. 101, 47 S. E. 645. Held no abuse of discretion to refuse, under evidence, to grant injunction restraining cutting of timber, questions of fact being for the trial court. Steadman & Co. v. Dorminey-Price Lumber Co., 119 Ga. 616, 46 S. E. 839. Evidence conflicting. Decree refusing injunction affirmed with leave to present another application. St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949. Court held not to have abused discretion in restraining defendant from enforcing cost fi. fa. issued by presiding judicial officer in contested election case, until hearing could be had on issues raised by pleadings. McLeod v. Reid [Ga.] 48 S. E. 315.

94. Suspension of injunction restraining pollution of stream on payment of damages. Sponenburgh v. Gloversville, 96 App. Div. 157, 89 N. Y. S. 19, affirming 43 Misc. 563, 87 N. Y. S. 602. May require bond on refusal to issue it. Newton v. Brown, 134 N. C. 439, 46 S. E. 994.

95. Ivins v. Jacobs [N. J. Eq.] 58 A. 941. Will not issue to restrain collection of piano rentals at instance of administrator of one employed by defendant to do so, no continuing contract obliging him to employ complainant being shown, and defendant being able to respond in damages. Id. Not issued to restrain sale of patents pending suit to compel their assignment. Paul Steam System Co. v. Paul, 129 F. 757. Held error not to allow defendant to amend his answer in suit to enjoin him from cutting timber, so as to show license to do so. Watson v. Adams, 32 Ind. App. 281, 69 N. E. 696.

96. Not to restrain operation of gas well, where amount used can be ascertained by measurement. Hicks v. American Natural Gas Co., 207 Pa. 570, 57 A. 55. Preliminary injunction issued restraining state railroad commission from enforcing unauthorized orders interfering with interstate commerce. Rosenbaum Grain Co. v. Chicago, etc., R. Co., 130 F. 46. Injunction restraining defendant from assigning patents and manufacturing inventions thereunder refused in suit to compel specific performance of contract for their assignment. Paul Steam System Co. v. Paul, 129 F. 757. Will be refused unless the case shows beyond a reasonable question the necessity therefor. Wrong must be manifest. Hicks v. American Natural Gas Co., 207 Pa. 570, 57 A. 55.

97. Harriman v. Northern Securities Co., 132 F. 464. Will not be issued to compel gas company to furnish gas to company having contract with city to furnish burners for street lamps where it would be detrimental to public. American Lighting Co. v. Public Service Corp., 132 F. 794. To be exercised in favor of the party most likely to be injured. Restraining disposal of funds of bankrupt pending determination of plaintiff's rights under mortgage lien. First Nat. Bank v. Crabtree [S. D.] 100 N. W. 744.

98. Harriman v. Northern Securities Co., 132 F. 464. The balance of convenience or hardship is ordinarily of controlling importance in cases where substantial doubt exists at the time of its refusal or allowance. Id. Such doubt may relate either to the facts or the law, or both. Id. Court should take the course most conducive to justice to both parties. Sampson & M. Co. v. Seaver-Radford, 129 F. 761. Will issue to prevent digging of well to divert flow of underground water so as to destroy spring, where no harm can result to defendant and irreparable injury to plaintiff might result from its refusal. St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949. To restrain removal of machinery by vendor where no injury would result to it by allowing it to

questions of law or fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss of inconvenience to the opposing party will be comparatively small if granted.[99] It should not, however, be granted where the benefit or advantage to claimant will be out of proportion to the injury or disadvantage necessarily resulting to defendant.[1] The fact that no appeal lies from an interlocutory decree denying a preliminary injunction is of no weight where it clearly appears that complainant cannot prevail on final hearing;[2] but it may be of controlling importance where there is room for reasonable doubt as to the ultimate result.[3] It should issue where the action is for the sole purpose of an injunction and a temporary injunction is essential to the preservation of a legal right, if established as alleged in the complaint.[4] It should be denied if it does not appear on the prima facie showing that plaintiff is entitled to any relief, and does appear that the bill will probably be dismissed on final hearing.[5]

By statute in some states a temporary injunction may be granted where it appears by the complaint that plaintiff is entitled to the judgment demanded, which consists in restraining the continuance or commission of some act, the continuance or commission of which during litigation would produce injury to plaintiff.[6]

The complaint must show the facts entitling plaintiffs to a temporary in-

remain pending litigation and irreparable injuries would result to bondholders, whose bonds were secured by building, by removal. American Foundry & Machinery Co. v. Charlevoix Circuit Judge [Mich.] 101 N. W. 210. Delay not injurious to defendant, and determination of question on ex parte affidavits would have been to plaintiff. Stillwater Water Co. v. Farmer [Minn.] 99 N. W. 882.

99. Northern Securities Co. restrained from disposing of Northern Pacific stock pending suit. Harriman v. Northern Securities Co., 132 F. 464. To prevent enforcement of lower water rates than those fixed by contract with city. Palatka Waterworks v. Palatka, 127 F. 161. Where it appears that defendants' knowledge of trade secret, whose use was sought to be enjoined, was obtained by them while officers and employes of plaintiff's assignor, which had obtained it dishonestly, held that preliminary injunction would not issue, but merely limited one restraining defendant from communicating it to others or employing any others in utilization of it than those then employed. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 58 A. 290. Order authorizing crossing held not to authorize lowering of rail of complainant's track so as to render travel dangerous. Defendant enjoined from doing so until right determined by board. Southern R. Co. v. Washington, etc., R. Co., 102 Va. 483, 46 S. E. 784.

1. Not to restrain manufacture of machines alleged to infringe on patent where defendant has made them under claim of right for 6 years, and was amply able to respond in damages, and where patent expires in three months. Thomson-Houston Elec. Co. v. Wagner Elec. Mfg. Co., 130 F. 902. Where defendant will be irreparably injured without corresponding advantage to complainant, whose rights may be adequately protected by a bond. Injunction restraining publication of directory alleged to be infringement on complainant's copyright refused on condition that defendant give bond to secure payment of damages recovered, and keep an accurate account of its sales. Sampson & Murdock Co. v. Seaver-Radford Co., 129 F. 761.

2, 3. Harriman v. Northern Securities Co., 132 F. 464.

4. Restraining trespass. Complaint shows irreparable injury. Jordan v. Wilson [S. C.] 48 S. E. 37; Alderman & Sons Co. v. Wilson [S. C.] 48 S. E. 85.

5. Palatka Waterworks v. Palatka, 127 F. 161.

6. Held abuse of discretion not to restrain trespass [Wis. Rev. St. 1898, § 2774]. De Pauw v. Oxley [Wis.] 100 N. W. 1028. To prevent interference with plaintiff's exclusive right of way, where threatened trespass is continuous [S. C. Code Civ. Proc. § 240]. Alderman & Sons Co. v. Wilson [S. C.] 48 S. E. 85. Continued trespass on realty [Ky. Civ. Code, § 272]. Chambers v. Haskell, 25 Ky. L. R. 1707, 78 S. W. 478. In North Dakota will issue only when the complaint contains averments which, if proven, would entitled plaintiff to the relief demanded, and its issuance is made to appear necessary to protect plaintiff's rights during litigation. Not where complaint shows mere threatened conversion of personalty. Burton v. Walker [N. D.] 100 N. W. 257. To authorize a temporary injunction, the complaint must show a right to the relief demanded therein, and must pray that the defendant be restrained from the continuance or commission of the act complained of, and that its continuance or commission during the litigation will produce injury to plaintiff. N. D. Rev. Codes 1899, § 5344, subd. 1. Complaint insufficient. McClure v. Hunnewell [N. D.] 99 N. W. 48.

The Missouri statute provides for a temporary injunction during the litigation [Rev. St. 1899, § 3630]. State v. Dearing [Mo.] 79 S. W. 454.

junction,[7] and must pray for permanent equitable relief.[8] The motion for a preliminary injunction must rest, on the part of complainant, on the bill and accompanying affidavits originally filed.[9] The verified petition and answer serve the office both of pleading and evidence.[10] The office of the affidavits is merely to support the bill or petition,[11] and they cannot amend it or add new grounds of relief.[12] Imperfections in the original affidavits may be corrected.[13] Affidavits and a complaint based upon complainant's understanding or information and belief are insufficient unless the sources and grounds of such understanding and belief are stated.[14] Affidavits in rebuttal are not permissible except under special circumstances and by leave of court.[15] As a general rule a preliminary injunction will not be granted on ex parte affidavits unless in a clear case.[16] This does not, however, apply where its function is merely to preserve the status quo until final decree and where comparatively great injury may result from withholding, and comparatively little can result from granting it.[17] In such case the court will regard with just discrimination the balance of convenience and hardship, and endeavor to do the most good with the least harm.[18]

A decree of a court of concurrent or superior jurisdiction determining the validity of a patent is ordinarily sufficient basis for a preliminary injunction in a suit for its infringement, where such infringement clearly appears.[19] When the infringement is doubtful no preliminary injunction will issue.[20]

The merits of the action cannot be considered except in so far as is necessary to determine whether or not complainant has made a prima facie showing.[21]

Unless under special circumstances, a motion for preliminary injunction will

7. Mere allegation that unless defendant is restrained from using opening cut in wall of demised premises without permission, irreparable damages will be sustained by plaintiffs, held insufficient. Glascoe v. Willard, 44 Misc. 166, 89 N. Y. S. 791.

8. In New York, where the right to such relief depends upon the nature of the action, a temporary injunction will not be granted where plaintiff makes no demand for any permanent relief which a court of equity may decree. Code Civ. Proc. § 603. Should not issue to restrain directors of corporation from selling treasury stock, where complainant's purpose was merely to prevent such sales until after next election of directors so that he could, by reason of controlling majority of stock, secure election of persons friendly to his interest. Gillette v. Noyes, 92 App. Div. 313, 86 N. Y. S. 1062.

9. Infringement of patent. Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 F. 614. A petition for a preliminary injunction must be regarded as pursuant to and in aid of the bill. Montgomery Water Power Co. v. Chapman, 128 F. 197.

10. St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

11. Montgomery Water Power Co. v. Chapman, 128 F. 197.

12. Injunction will not be granted to restrain enforcement of judgment against complainant pending action by him against defendant, where complainant has sufficient security to cover amount claimed, because affidavit alleges that it is proposed to apply for increase thereof. Montgomery Water Power Co. v. Chapman, 128 F. 197. Cannot supply defects. McClure v. Hunnewell [N. D.] 99 N. W. 48; Glascoe v. Willard, 44 Misc. 166, 89 N. Y. S. 791.

13. Failure to attach certificate authenticating notary's signature. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816.

14. Not cured by further joint affidavit. Gillette v. Noyes, 92 App. Div. 313, 86 N. Y. S. 1062.

15. Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 F. 614.

16. Gring v. Chesapeake & Delaware Canal Co., 129 F. 996.

17. Not granted to restrain enforcement of canal charges and regulations, some of which had been in force for some years, where defendant able to respond in damages. Gring v. Chesapeake & Delaware Canal Co., 129 F. 996. Will be awarded to restrain creditor of bankrupt from withdrawing from bank money received by her by way of preference. Jones v. Dimes, 130 F. 638.

18. Gring v. Chesapeake & Delaware Canal Co., 129 F. 996; Jones v. Dimes, 130 F. 638.

19. Thomson-Houston Elec. Co. v. Wagner Elec. Mfg. Co., 130 F. 902. Such decree is decisive upon the question of validity. Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 F. 614. Only question on motion is whether infringement is undoubted. Id.

20. Not where question depends upon application of law of physics governing electric current, in regard to which experts differ. Thomson-Houston Elec. Co. v. Wagner Elec. Mfg. Co., 130 F. 902.

21. Jordan v. Wilson [S. C.] 48 S. E. 37; Alderman & Sons Co. v. Wilson [S. C.] 48 S. E. 85. The only question is whether plaintiff has made a prima facie showing for equitable relief by injunction. Id.

not be entertained when complainant has completed testimony for final hearing, leaving defendant to oppose by affidavits only.[22] When defendant's proofs are also complete, application should be on interlocutory hearing, and not by motion, so that each side may have equal opportunity to appeal.[23] An injunction is properly issued against a defendant who does not answer.[24]

A decree will be so framed as to maintain the status quo, as far as possible, until final hearing or judgment.[25] When the rights of a litigant are protected to the extent of excluding all possibility of injury, he has no cause to complain.[26]

The court has a discretion in disposing of an application for a second interlocutory injunction upon proper showing made,[27] but this rule does not apply where the record shows that the first proceeding resulted in the dismissal of the petition upon general demurrer.[28]

In South Carolina the judge may grant a temporary restraining order without notice and before summons is served or lodged for service, for the purpose of having it served with the summons.[29] Procuring a restraining order before the service of summons, which is served with it, is a mere irregularity which is waived by answering to the merits.[30]

(§ 4) *B. Bonds.*[31]—The injunction is not effective until the statutory bond is given,[32] but the defendant may apply to the appellate court for its dissolution or modification before the bond is executed.[33] If the bond given is shown to be insufficient, a new one may be required as a condition precedent to continuing the injunction to the time of trial.[34] The amount of the bond is generally left to the discretion of the court granting the order,[35] but it must not be oppressive or unreasonable.[36] Where the statute makes the giving of a bond a condition precedent to the granting of an injunction, the court cannot dispense with it.[37]

The fact that the bond is in a larger sum than that required by the order is immaterial where the damages recovered are smaller than the amount fixed by such order.[38]

(§ 4) *C. Dissolution, modification, or continuance; reinstatement.*[39]—The dissolution of a temporary injunction is largely within the discretion of the trial

22, 23. Consolidated Retail Booksellers v. Ward, 130 F. 389.

24. Thereby admits facts pleaded in sworn petition. St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

25. Hicks v. American Natural Gas Co., 207 Pa. 570, 57 A. 55.

26. By bond and provision that matter may be brought on for hearing on six days' notice. First Nat. Bank v. Crabtree [S. D.] 100 N. W. 744.

27. Gunn v. James [Ga.] 48 S. E. 148.

28. Held that plea of res adjudicata should have been sustained. Gunn v. James [Ga.] 48 S. E. 148.

29. Under Code Civ. Proc. § 241, authorizing granting of injunction at time of commencing action or at any time thereafter before judgment. Remedy is provisional only. Jordan v. Wilson [S. C.] 48 S. E. 224.

30. Jordan v. Wilson [S. C.] 48 S. E. 224. An order continuing a temporary restraining order until a hearing on the merits depends for its validity, as far as jurisdiction is concerned, on the state of the litigation when it is issued and not on its state when the first order was issued. Is in effect temporary injunction dating from making of order, and former order is functus officio. Id.

31. See 2 Curr. L. 441.

32. Ky. Civ. Code Prac. § 278. Bennett v. Richards [Ky.] 83 S. W. 154. Bailinger's Codes & St. Wash. § 5438. Swope v. Seattle, 35 Wash. 69, 76 P. 517; State v. Dearing [Mo.] 79 S. W. 454.

33. Bennett v. Richards [Ky.] 83 S. W. 154. The validity of the injunction, when brought up for review, does not depend upon whether the party to whom it was granted has carried it into effect by executing the bond. Id.

34. Should not be ordered unless good reason is shown why one already given is insufficient. Swope v. Seattle, 35 Wash. 69, 76 P. 517.

35. Ballinger's Codes & St. § 5438. Swope v. Seattle, 35 Wash. 69, 76 P. 517.

36. Fact that contractors grading street may be bound to pay penalty exacted by city for delay held no reason why plaintiff should be required to give bond to full value of property damaged in order to secure right to compensation. Amount of bond held unreasonable. Swope v. Seattle, 35 Wash. 69, 76 P. 517.

37. Swope v. Seattle, 35 Wash. 69, 76 P. 517.

38. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552.

39. See 2 Curr. L. 436.

court.[40] But where the facts are substantially admitted, the question is largely one of law.[41] In South Carolina an order granting a temporary injunction, made after notice and hearing defendant, cannot be thereafter dissolved by the court granting it.[42]

On final judgment on the merits in favor of defendants dissolving the temporary injunction and dismissing the bill, the court has power therein to continue in force the interlocutory injunction granted at the beginning of the case, pending an appeal.[43] The power is discretionary, but should always be exercised when any irremediable injury may result from the effect of the decree as rendered.[44] On appeal from an order granting a preliminary injunction, complainant may, as a condition to its continuance, be required to give bond to indemnify defendants from damages arising from the issuance of the writ.[45]

A special injunction should be continued to the hearing if there is probable cause to suppose that plaintiff will be able to maintain his primary equity, and there is reasonable apprehension of irreparable loss unless it remains in force, or if it appears reasonably necessary to maintain his right until the merits of the controversy are settled.[46] A preliminary injunction to restrain trespass on realty which is continued until such time as judgment may be obtained in ejectment should not be dissolved until the final determination of the second suit in ejectment, there being no lack of diligence.[47]

The court may, in its discretion, temporarily suspend the operation of its judgments granting injunctive relief, or stay proceedings on them for such time and on such terms as it may see proper.[48] The granting of a second suspension is not an amendment of the judgment but only a regulation of the manner in which it shall be enforced.[49] Where, as a condition to the suspension, the court directs a payment of damages to complainant, the latter may refuse to accept such sum in full of his damages and thereafter have the same determined by a jury or a commission.[50]

As a general rule the court will dissolve a preliminary injunction upon the filing of a sworn answer fully meeting the allegations of the bill of complaint,[51] but he may, in the exercise of his discretion, refuse to do so.[52] Collateral issues will not be tried in order to justify the act enjoined.[53]

40. Order denying motion to dissolve injunction restraining defendant from excavating on his own land near spring on plaintiff's land. Stillwater Water Co. v. Farmer [Minn.] 99 N. W. 882; Gile v. Stegner [Minn.] 100 N. W. 101.

41. Gile v. Stegner [Minn.] 100 N. W. 101.

42. Is in nature of review, which can only be had as prescribed in statute regulating appeals [Code Civ. Proc. §§ 246, 335, 336]. Jordan v. Wilson [S. C.] 48 S. E. 37. See, also, Id., 48 S. E. 224.

43, 44. State v. Dearing [Mo.] 79 S. W. 454.

45. Davis v. Booth & Co. [C. C. A.] 131 F. 31, modifying Booth & Co. v. Davis, 127 F. 875.

46. Not error to refuse to dissolve temporary injunction in action to restrain defendant from occupying a cafe in a room in a hotel in violation of an alleged parol covenant in a lease thereof, there being no sufficient denial of allegations of complaint. Cobb v. Clegg [N. C.] 49 S. E. 80. Preliminary injunction restraining defendant from interfering with body of deceased father, lying in receiving vault of cemetery, as against his step-mother, should be continued until final determination of right to custody of body. Butler v. Butler, 91 App. Div. 327, 86 N. Y. S. 586. Vendee of mortgaged land agreed to pay mortgagee what was actually due on the debt. Mortgage note called for usurious interest and vendee sued to restrain sale under mortgage, alleging tender of amount actually due. Held that restraining order issued at commencement of suit should be continued until final hearing to determine whether "actually due" meant amount legally due, or face of the note. Erwin v. Morris [N. C.] 49 S. E. 53.

47. Until determination of appeal in second suit. Two actions in ejectment allowed. Chappell v. Roberts [Ala.] 37 So. 241.

48. Prohibiting discharge of sewage in creek. Sponenburgh v. Gloversville, 42 Misc. 563, 87 N. Y. S. 602.

49, 50. Sponenburgh v. Gloversville, 42 Misc. 563, 87 N. Y. S. 602.

51. Chicago, etc., R. Co. v. Kalamazoo Circuit Judge [Mich.] 101 N. W. 525; Harrison v. Maury [Ala.] 37 So. 361.

52. Chicago, etc., R. Co. v. Kalamazoo Circuit Judge [Mich.] 101 N. W. 525.

53. Sale of photographic supplies, etc. Question as to whether defendant was relieved from carrying out contract not to reenter business by his discharge from employ-

An injunction may be modified upon a proper showing affecting the grounds upon which it was originally issued, or setting up new matter from which it appears that to continue it would result in serious or unnecessary injury.[54]

In Idaho when the adverse party moves to dissolve the temporary injunction upon the papers upon which it was granted, no notice to the party obtaining it is required, and no further showing can be made in opposition thereto.[55]

The dissolution of an injunction which will support an appeal is one effected by an order or decree of the chancellor and not by the act of complainant.[56] A judgment dissolving an injunction, if not appealed from, is conclusive on all parties.[57]

In Nebraska, an order dissolving or modifying a temporary injunction is not final, and is not appealable until after a final judgment in the action.[58] In Louisiana plaintiff is entitled to an appeal from an order dismissing the injunction on bond, if it may be that irreparable loss will result therefrom.[59] The particular facts of each case control as to such question.[60]

Costs.[61]—On dissolution of a temporary injunction, costs will be awarded defendant where complainant is not entitled to enjoin the acts complained of and the injunction is not necessary because defendant has no intention of violating plaintiff's rights.[62] One losing his rights on which his right to injunctive relief depends, after the filing of the complaint, should not be taxed with costs on dismissal of the bill as to him.[63]

(§ 4) *D. Damages on dissolution, and liability on bond.*[64]—In order to recover damages on the vacation of a temporary injunction, there must be a determination that plaintiffs were not entitled to the injunction,[65] and that defendant was damaged thereby.[66] The dismissal of the action by plaintiff without defendant's consent and against his consent is, in legal effect, a determination that he was not entitled to such injunction.[67] The final outcome of the suit, and not the

ment held not relevant to case as before court. All rights which he might have by reason thereof reserved to him. Eugene Dietzgen Co. v. Kokosky [La.] 37 So. 24.

54. Injunction restraining defendants from using trading stamps because a portion of them were acquired in an unlawful manner will not be modified to permit use of stamps acquired in lawful manner after its issuance, where question of right to use stamps at all is in issue, and was expressly reserved for decision on final hearing. Sperry & H. Co. v. Mechanics' Clothing Co., 128 F. 1015.

55. Rev. St. 1887, § 4295. Meyer v. First Nat. Bank [Idaho] 77 P. 334.

56. Ala. Code 1896, § 428. Robertson v. Montgomery Base Ball Ass'n [Ala.] 37 So. 241. The same is true of appeals from orders refusing applications to reinstate injunctions under Alabama rules of chancery practice [Rule 101, Code 1896, p. 1224]. Id. A recital in a decree that the filing of an amendment operated a dissolution of the injunction is not a decree dissolving the injunction. Id. An order or decree reciting that the motion to dismiss the bill for want of equity is well made, and unless complainant amends within two days it shall stand dismissed, is not a decree dismissing the bill which will support an appeal. Id.

57. Under Rev. St. 1899, §§ 3639, 3640. State v. Douglass [Mo. App.] 83 S. W. 87.

58. Neb. Code Civ. Proc., § 679, does not make it so. Horst v. Board of Sup'rs [Neb.] 98 N. W. 822. Affidavits submitted held not to show waste and not to be within rule allowing use of affidavits in opposition to motion to dissolve. Harrison v. Maury [Ala.] 37 So. 361.

59. State v. Sommerville [La.] 37 So. 476.

60. Dispute between city and board of liquidation as to ownership of property. Appeal granted. State v. Sommerville [La.] 37 So. 476.

61. See 2 Curr. L. 447.

62. Action by purchaser at tax sale to restrain removal of timber. Millard v. Breckwoldt, 90 N. Y. S. 890.

63. Odell v. Bretney, 93 App. Div. 607, 87 N. Y. S. 655.

64. See 2 Curr. L. 440, 452.

65. McGown v. Barnum, 42 Misc. 585, 87 N. Y. S. 605. Need not be formal adjudication but proceedings had must be equivalent to such a result. Cannot recover on dismissal under stipulation providing that there was no adjudication on question of plaintiff's right to injunction and that dismissal should not prejudice defendant's right to sue on undertaking. Freifeld v. Sire, 96 App. Div. 296, 89 N. Y. S. 260.

66. McGown v. Barnum, 42 Misc. 585, 87 N. Y. S. 605.

67. Order of reference to determine damages held proper. McGown v. Barnum, 42 Misc. 585, 87 N. Y. S. 605. The confession of the motion to dissolve the temporary injunction, its dissolution upon motion of plaintiffs in the main suit, and the voluntary dismissal of such suit make out a prima facie case of its wrongful issuance. Williams v. Ballinger [Iowa] 101 N. W. 139.

orders entered upon motions to vacate a temporary injunction granted therein, determines the right to damages.[68] Hence suit cannot be maintained on an injunction bond pending an appeal or petition in error from a judgment dissolving the injunction, even though no supersedeas bond is filed.[69]

An adjudication, on appeal, that defendant is entitled to a reference to ascertain his damages on dissolution of an injunction, necessarily is a determination that he is entitled to damages.[70] The petition for damages must show that the injunction was wrongfully issued.[71]

Damages are recoverable either by an action on the bond or by an allowance in the suit in which the injunction issued.[72] In either case they consist of those actually sustained by defendant by reason of the issuance of the writ,[73] including reasonable counsel fees incurred in procuring its dissolution,[74] or in preparing to move for its dissolution.[75] In the latter case the fact that plaintiff dismissed the action and dissolved the writ before the filing or hearing of the motion is immaterial.[76] Counsel fees incurred in resisting the application for a preliminary injunction[77] and those incurred on the trial of the issue in the action, unless in-

68. McGown v. Barnum, 42 Misc. 585, 87 N. Y. S. 605.

69. Not a final determination that plaintiffs were not entitled to it [Rev. St. 1899, § 4043, relating to injunction bonds and §§ 4247, 4249, 4256, 4265, relating to appeals]. Tutty v. Ryan [Wyo.] 78 P. 657.

70. Perlman v. Bernstein, 93 App. Div. 335, 87 N. Y. S. 862.

71. Need not so state if it states facts showing that such was the case. Williams v. Ballinger [Iowa] 101 N. W. 139. Complaint alleging that plaintiff had right to remove building and that he was wrongfully enjoined from so doing to his damage held sufficient without stating the nature and extent of such right. Id.

72. The extent of the recovery on the bond depends upon its conditions which are fixed by the statutes of the various states. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552.

73. Bonds generally provide for the reimbursement of the defendant for all damages and costs incurred by reason of an injunction improperly issued (Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552), and cover only damages sustained after the giving of the bond which are the direct and proximate result of the issuance of the writ [Mills' Ann. Code Colo. § 156] (Id.). Evidence held to show that defendant was entitled to damages for sand which he otherwise could have sold but not for injuries to lawn caused by drifting sand. Chicago Title & Trust Co. v. Chicago, 209 Ill. 172, 70 N. E. 572. Pleadings and evidence insufficient to show damage resulting from injunction restraining enforcement of judgment. Warren v. Foust [Tex. Civ. App.] 81 S. W. 323. Injuries to coal mine by falling in of workings pending injunction against its operation recoverable by equitable owner of realty. Evidence sufficient to authorize recovery. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552; Quinn v. Silka [Colo. App.] 76 P. 555.

74. Chicago Title & Trust Co. v. Chicago, 209 Ill. 172, 70 N. E. 572. Fees of solicitors employed by defendant's successor. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715. Restraining removal of county seat. Hinton v. Perry County Sup'rs [Miss.] 36 So. 565. Evidence held to sustain award of attorney's fees on dissolution of injunction. North Lumber Co. v. Gary [Miss.] 36 So. 2. Fees for services in procuring dissolution of injunction restraining use of premises as drug store, where complaint demanded permanent injunction. Perlman v. Bernstein, 93 App. Div. 335, 87 N. Y. S. 862. On voluntary dismissal of a suit in which a temporary injunction has been granted, where defendants have made several motions to vacate it, they are entitled to counsel fees as damages. Will be referred to determine reasonable fees even though defendants have suffered no other damages. McGown v. Barnum, 42 Misc. 585, 87 N. Y. S. 605; Lacey v. Davis [Iowa] 98 N. W. 366.

In Kentucky it is held that when the injunction is merely ancillary or in aid of the relief sought, or is relied on to secure the relief when obtained, or to prevent the commission of a wrongful or tortious act that would result in irreparable injury before the termination of the prime cause of action, then a recovery may be had on the bond for reasonable counsel fees when defendant procures the discharge of the injunction (Chicago, etc., R. Co. v. Sullivan, 25 Ky. L. R. 2295, 80 S. W. 515), but when the injunction is the relief sought and in fact would give such relief if sustained, no recovery for counsel fees can be had (Id.). Not where injunction was to prevent interference with railroad's possession of condemned right of way. Id. In such case the only damages recoverable are those resulting from the operation of the injunction itself. Id.

In Iowa necessary costs and expenses incurred in procuring a dissolution may be recovered in action on bond, where injunction is the only remedy sought. Complaint held to sufficiently show necessity of costs and expenses incurred. Williams v. Ballinger [Iowa] 101 N. W. 139.

75, 76. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552.

77. Action on bond. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552; Quinn v. Silka [Colo. App.] 76 P. 555.

curred solely or principally on account of the injunction, are not recoverable.[78] Costs and expenses stated to have been incurred will be presumed to be reasonable.[79]

Depreciation in the value of stock, the sale of which was enjoined, may be recovered.[80] It is no defense that plaintiff held title thereto in fraud of the creditors of the true owner.[81] One securing an injunction restraining a minor from disposing of his property cannot defend on the ground that no order of court was obtained authorizing him to sell.[82] The fact that defendant violated the temporary injunction does not prevent a recovery of damages for its wrongful issuance,[83] and it is no defense that the assignment of defendant's claim for damages to his attorneys is champertous.[84]

Practice in actions on bonds.[85]—The complaint must allege a failure to pay the damages suffered.[86] The fact that the injunction suit is still pending, if relied on as a defense, must be pleaded, where it is not disclosed by the petition.[87] The admission of such fact at the close of the evidence does not change the rule.[88]

The Kentucky statutes provide that on dissolution of an injunction to stay proceedings on a judgment the damages shall be assessed by the court, and judgment shall be rendered against the party obtaining the injunction for the amount.[89] Such remedy is exclusive and is a condition precedent to an action on the injunction bond.[90]

(§ 4) *E. The appealability* of preliminary orders, and of the dissolution, vacation, modification, or refusal thereof, is regulated by statute, and has been fully discussed elsewhere.[91]

§ 5. *Decree, judgment, or order for injunction.*[92]—The formal order of injunction fixes the rights of the parties.[93] It must clearly specify the acts enjoined.[94] Clerical errors therein will be corrected.[95]

All questions decided on the hearing for a preliminary injunction are open for review on final hearing, but the original decision should be adhered to unless it clearly appears that an error was committed, or additional facts were brought out on the trial requiring a modification or reversal of the views then expressed.[96]

Neither a decree for an injunction nor a decree dissolving an injunction is suspended by appeal.[97] In Kentucky the order granting the injunction and not the action of the clerk issuing the writ is reviewable by the appellate court.[98]

78. Perlman v. Bernstein, 93 App. Div. 335, 87 N. Y. S. 862.

79. Williams v. Ballinger [Iowa] 101 N. W. 139.

80. Though caused by company's forfeiture of lease and injuries to its property. Complaint held to authorize evidence that plaintiff had purchaser for stock. Slack v. Stephens [Colo. App.] 76 P. 741.

81, 82. Slack v. Stephens [Colo. App.] 76 P. 741.

83. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715.

84. Champerty only a defense in action to enforce champertous agreement. Lacey v. Davis [Iowa] 98 N. W. 366.

85. See 2 Curr. L. 441.

86. Van Horn v. Holt [Mont.] 75 P. 680.

87. Lacey v. Davis [Iowa] 98 N. W. 366. An abatement of the action on such ground cannot be accomplished by a motion in arrest of judgment [Iowa Code, § 3758]. Id.

88. Lacey v. Davis [Iowa] 98 N. W. 366.

89. Applies to injunction to stay proceedings on an execution issued on a judgment [Civ. Code § 295]. Mason, Gooch & Hoge Co. v. Mechanics' Lien & Trust Co. [Ky.] 82 S. W. 290.

90. Mason, Gooch & Hoge Co. v. Mechanics' Lien & Trust Co. [Ky.] 82 S. W. 290.

91. See Appeal and Review, 3 Curr. L. 182.

92. See 2 Curr. L. 447.

93. Signed order supersedes the clerk's minutes of the proceedings in which the decision was rendered. Cannot be punished for contempt for acts not in contravention of such order, though they violate injunction as stated in minutes. State v. Bell, 34 Wash. 185, 75 P. 641.

94. Order restraining consolidation of schools set aside as unintelligible. Regan v. Sorenson [N. D.] 100 N. W. 1095.

95. As to duration of injunction. Andrews v. Kingsbury [Ill.] 72 N. E. 11.

96. Rodgers v. Pitt, 129 F. 932.

97. State v. Dearing [Mo.] 79 S. W. 454.

98. Ky. Code Civ. Prac. § 297. Bennett v. Richards [Ky.] 83 S. W. 154.

§ 6. *Violation and punishment.*[99]—The willful violation of an injunction by a party to the cause is contempt of court, constituting a specific offense.[1] An injunction is operative from the time the order is made,[2] and is binding on all parties having actual notice thereof, whether served with the writ or not.[3] The spirit as well as the letter of the writ must be observed.[4] Persons confederating or conspiring with defendant in a breach of an injunction are punishable for contempt if they have actual notice thereof.[5] Persons enjoined individually cannot escape liability for a violation of the injunction by changing their relations to each other, as by forming a corporation.[6] Advice of counsel operates in extenuation only.[7] Where the violation is not willful or intentional but is the result of the advice of counsel and the defendant's view of his rights under the decree, the punishment imposed will be nominal.[8]

In order to support contempt proceedings, the proof should be so clear and convincing as to leave no reasonable doubt of guilt.[9] One cannot be punished for contempt for violating an injunction which is void for want of jurisdiction.[10]

An appeal does not lie from an order refusing to punish as for contempt an alleged violation of an injunction.[11] In New Mexico an appeal will not lie from a judgment committing one to jail for contempt for the violation of an injunction.[12] Mandamus to compel the chancellor to punish violations of an injunction will be denied where the bill has been dismissed and the preliminary injunction dissolved.[13]

99. See 2 Curr. L. 449.

1. Marinan v. Baker [N. M.] 78 P. 531; Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277. Evidence insufficient to show violation of injunction restraining construction of railroad over certain land. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715. Injunction restraining third persons, in supplementary proceedings, from disposing of money belonging to judgment debtors held not violated by failure to turn it over to receiver, in absence of personal demand therefor by him. Gerson v. Bertl, 87 N. Y. S. 458. Evidence held to show violation of injunction prohibiting sale of device alleged to be infringement of patent. Defendant fined. Westinghouse Air Brake Co. v. Christensen Engineering Co., 130 F. 735.

2. Wenger v. Fisher [W. Va.] 46 S. E. 695.

3. Wenger v. Fisher [W. Va.] 46 S. E. 695. Service on defendant's counsel and on manager of eastern office, and sending copy to defendant corporation at its home office by registered mail held sufficient on which to base contempt proceedings. Westinghouse Air Brake Co. v. Christensen Engineering Co., 130 F. 735. Service of a notice of motion to punish defendant for contempt for violating a preliminary injunction on defendant's counsel, who admit service, and on one whom defendant advertises to be the manager of its eastern office is sufficient, though such counsel deny their authority to accept service in such proceedings. Id.

4. Maloney v. King [Mont.] 76 P. 939. An injunction held properly extended so as to restrain defendants from bringing any actions against plaintiffs in regard to mining ore vein until final determination of suit in which injunction in regard to same vein was issued to plaintiff, and in which suit all matters in controversy could be determined. Injunction restraining defendant from interfering with working of vein held broad enough to prevent bringing suits to recover ore mined, etc. Id. Persons enjoined from manufacturing an article adjudged to be an infringement of a patent may be guilty of contempt in inducing and furnishing to another the means to do so, notwithstanding the fact that they are not pecuniarily interested with him and do not personally participate in his acts. In furnishing machine, wire and springs for fastening belts. Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 130 F. 893.

5. Pickets for labor union, though not parties to the suit, are amenable to injunction restraining it from obstructing business of plaintiff and employés. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277.

6, 7. Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 130 F. 893.

8. Refusal of railroad company to allow another company to use its tracks held violation of injunction. Central Trust Co. v. Wabash, etc., R. Co., 132 F. 582.

9. Evidence in action to punish for contempt in violating injunction against mining claims held insufficient to sustain a conviction. State v. District Court of Second Judicial Dist. [Mont.] 75 P. 956.

10. As attempting to enjoin violation of criminal statute. Old Dominion Tel. Co. v. Powers [Ala.] 37 So. 195. Restraining prosecution of contempt proceedings in federal court. Johnston Min. Co. v. Morse, 44 Misc. 504, 90 N. Y. S. 107.

11. People v. Ann Arbor R. Co. [Mich.] 100 N. W. 892.

12. Not within Comp. Laws 1897, § 3406, giving right to appeal from final judgments prosecuted by indictment or information. Marinan v. Baker [N. M.] 78 P. 531.

13. Petitioner has no interest that could be subserved by contempt proceedings. Old Dominion Tel. Co. v. Powers [Ala.] 37 So. 195.

The Indiana statute relating to contempts of court does not apply to contempt proceedings for violation of an injunction.[14]

Contempt proceedings may not be resorted to to settle and adjudicate the title to property in no way affected by the decree in the injunction proceedings.[15] In New York the mandate of commitment for contempt for violating an injunction must set forth the particular circumstances of the offense.[16]

Matters relating to practice in contempt proceedings are treated elsewhere.[17]

§ 7. *Liability for wrongful injunction.*[18]

INNS, RESTAURANTS AND LODGING HOUSES.[19]

Who is a guest.—One who registers at a hotel as a guest retains his status as guest though, after a week's stay, he is charged at the regular weekly rate.[20] One who merely allows his baggage to be taken to a hotel, and does not go there himself or procure any accommodation, does not become a guest.[21] In such case the hotelkeeper is only the gratuitous bailee of the baggage, liable for its loss only if guilty of gross negligence.[22]

Under the Kentucky "hospitality act" a person, not a keeper of a tavern or house of private entertainment, cannot recover for accommodations furnished unless a contract was made therefor.[23]

Liability for guest's safety.[24]—An innkeeper is not an insurer of the safety of the persons of his guests; his obligation is limited to the exercise of reasonable care for their safety, comfort and entertainment.[25] He is therefore not liable for negligent, willful or violent acts of servants without the scope of their employment.[26]

Liability for effects.—While the strict rules making hotel and innkeepers in-

14. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277.

15. Title to certain veins held not to have been determined in injunction suit. State v. District Court [Mont.] 75 P. 956.

16. Code Civ. Proc. § 11. Roncoroni v. Gross, 92 App. Div. 366, 86 N. Y. S. 1113.

17. See Contempt, 3 Curr. L. 795.

18. See 2 Curr. L. 453. In so far as there is an abuse of process the procuring of an injunction is a tort in some of the states. See Malicious Prosecution, 2 Curr. L. 767; Process, 2 Curr. L. 1259.

19. See 2 Curr. L. 453.

20. Polk & Co. v. Melenbacker [Mich.] 99 N. W. 867.

NOTE. Guest and boarder: The distinction between a guest and boarder is said to be that the guest comes to remain without any bargain for time, and may go when he pleases, paying only for the actual entertainment which he receives; and the fact that a person has remained at the inn a long time in this way does not make him a boarder rather than a guest. Shoecraft v. Bailey, 25 Iowa, 553. Nor does a special agreement as to the price of board make the traveler a boarder and not a guest. Berkshire Woolen Co. v. Proctor, 7 Cush. [Mass.] 417. See note in Singer Mfg. Co. v. Miller [Minn.] 21 L. R. A. 229.

21, 22. Tulane Hotel Co. v. Holohan [Tenn.] 79 S. W. 113.

23. Claim for boarding and lodging decedent's minor son disallowed, there being no evidence that claimant was an innkeeper or the keeper of a private house of entertainment, and no evidence of a contract except claimant's affidavit, which was incompetent [Ky. St. 1899, § 2178]. Ramsey v. Keith's Adm'r, 25 Ky. L. R. 582, 76 S. W. 142.

24. See 2 Curr. L. 453.

25. Clancy v. Barker [C. C. A.] 131 F. 161.

26. A six year old boy left his parents' room and went to a room where servants, off duty, were amusing themselves, and was injured by the accidental discharge of a pistol aimed at him by a servant. Held, innkeeper not liable. Clancy v. Barker [C. C. A.] 131 F. 161. The supreme court of Nebraska held to the contrary on the same facts, on the ground that the act of the servants, though not done in the course of their employment, constituted a breach of the innkeeper's contract to treat his guests with due consideration, for which the innkeeper was liable in damages. Clancy v. Barker [Neb.] 98 N. W. 440. The circuit court of appeals refuses to follow the state court and remarks (opinion by Sanborn, Circuit Judge) that the case is the only one in the field of American or English jurisprudence which holds an innkeeper liable for willful or negligent acts of servants beyond the scope of their employment.

It is held in California that an assault on a guest by a waiter is without the scope of his employment, and an act for which the hotel keeper is not liable. Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659.

surers of the effects of guests do not apply to restaurant keepers,[27] yet the latter are liable for damages caused by the negligence of their servants in the conduct of the business for which they are employed.[28] A watch and fob is included within the meaning of the phrase "jewels and ornaments" in the Tennessee innkeepers' liability act.[29]

In an action to recover for baggage lost in a hotel fire, the question of plaintiff's contributory negligence in failing to remove the baggage in time is ordinarily one for the jury.[30] The clerk's statement to the guest that the hotel was fireproof was held admissible on that issue.[31] A guest has the right, in case of fire, to rely to some extent on statements of persons, apparently servants, or employes, in regard to the danger; but he must use his own intelligence and not rely on such statements as those of experts.[32]

Liens.[33]—Where a statute regulating innkeepers' liens provides that nothing therein contained shall preclude any other existing remedy for the enforcement of innkeepers' liens, the common-law lien of an innkeeper is not affected by it.[34] Where the guest has lawful possession of property which he brings to a hotel and treats as his own, the innkeeper has a lien thereon for the accommodation of the guest, though the general ownership is in another, the innkeeper having no notice of such general ownership.[35]

Public regulation; licenses.—Municipalities have such power to license or regulate inns as their charters and the statutes give them.[36] The power to license inns and taverns is said to be administrative rather than judicial, and the right to impose it on courts of New Jersey rests only on long continued usage in that state.[37] A license tax on restaurants and boarding houses apportioned according to the amount of business done, as determined by the method of conducting it, is not invalid for unreasonable discrimination.[38]

In a prosecution for failure to obtain a hotel license, the fact that the proprietor, being ill, directed his clerk to obtain the license, and believed he had done so, though in fact he had not, was no defense.[39] Under provisions of the charter

27. Block v. Sherry, 43 Misc. 342, 87 N. Y. S. 160.

28. Liable for value of dress ruined by water spilled thereon through servant's negligence. Block v. Sherry, 43 Misc. 342, 87 N. Y. S. 160. Whether spilling water on guest's dress in a crowded restaurant was negligence was for the jury. Id.

29. Hotelkeeper not liable for loss, when a safe place was provided and notice thereof given, and watch and fob were not left there [Shannon's Code, § 3593]. Rains v. Maxwell House Co. [Tenn.] 79 S. W. 114.

30, 31. Jefferson Hotel Co. v. Warren [C. C. A.] 128 F. 565.

32. Jury properly so instructed in action to recover for lost baggage. Jefferson Hotel Co. v. Warren [C. C. A.] 128 F. 565.

33. See 2 Curr. L. 454.

Note: The lien does not extend to goods of a boarder as distinguished from a guest (for distinction, see note above). Pollock v. Landis, 36 Iowa, 651; Hursh v. Beyers, 29 Mo. 469; Coates v. Acheson, 23 Mo. App. 255. See, also, Singer Mfg. Co. v. Miller, 52 Minn. 516, 38 Am. St. Rep. 568, and note in 21 L. R. A. 229.

34. Polk & Co. v. Melenbacker [Mich.] 99 N. W. 867.

35. Agent had principal's property in his possession while in performance of his duties. Polk & Co. v. Melenbacker [Mich.] 99 N. W. 867.

Note: So, it is held in Singer Mfg. Co. v. Miller, 52 Minn. 516, 38 Am. St. Rep. 668, 21 L. R. A. 229, that the lien attaches to goods in the possession of a guest though they belong to a stranger, provided the innkeeper has no notice of that fact.

36. City of Marysville, Cal., has power to collect license taxes for revenue from restaurants and boarding houses. Construing charter and general laws made part thereof. Ex parte Lemon [Cal.] 77 P. 455. The power to license inns and taverns, formerly possessed by boroughs of New Jersey, was taken away by the general borough act of 1897 (P. L. 1897, p. 285). The act repealed the special power given by charter to Hightstown. Smith v. Hightstown [N. J. Law] 57 A. 901.

37. Smith v. Hightstown [N. J. Law] 57 A. 901.

38. Tax of $3 a month on places where meals were cooked and served by proprietor or members of his family, and of $8 on restaurants where meals were not so cooked and served, sustained. Ex parte Lemon [Cal.] 77 P. 455.

39. Commonwealth v. Keathley [Ky.] 82 S. W. 232.

of New York requiring hotels and other establishments to adopt means of communicating alarms of fire to the police and fire departments, it is held that the fire commissioner's order must specify the means of communication to be adopted, in order to render one notified liable to the penalty imposed for failure to obey such an order.[40]

INQUEST OF DAMAGES, see latest topical index.

INQUEST OF DEATH. [41]

Under Idaho statutes, it is the duty of the coroner to hold an inquest when he is informed that the death of the deceased was under such circumstances as to afford reasonable ground to suspect that it was caused by the act of another by criminal means.[42] But failure of the coroner to hold an inquest is no ground for the release of one charged with murder of the deceased,[43] since the coroner is not a magistrate, authorized to hold preliminary examinations; and the inquest is not a sufficient basis for information by the public prosecutor.[44]

A verdict on an inquest of death being an ex parte finding of facts in aid of the public administration of the law has no force as evidence, in a collateral proceeding, of the cause of death,[45] but there is authority for the other view.[46] If admissible the inquest is only prima facie,[47] and since even a conviction for homi-

40. Order to hotelkeeper to adopt "direct means" of communication insufficient [Laws 1897, p. 263, c. 378, § 762]. Hayes v. Brennan, 90 N. Y. S. 453.

41. For character of coroner as an official, his duties and compensation, see Coroners, 3 Curr. L. 879, 1 Curr. L. 709.

42. Construing Idaho statutes relative to coroner's inquests. In re Sly [Idaho] 76 P. 766.

43. Writ of habeas corpus denied. In re Sly [Idaho] 76 P. 766.

44. Under common law, the finding of the coroner's jury was equivalent to the finding of a grand jury. Not so under statutes. In re Sly [Idaho] 76 P. 766.

45. Aetna Life Ins. Co. v. Milward [Ky.] 82 S. W. 364, in accord with which is Germania Ins. Co. v. Ross-Lewin, 24 Colo. 43, 51 P. 488, 65 Am. St. Rep. 215, citing State v. County Com'rs, 54 Md. 426; Goldschmidt v. Mutual Life Ins. Co., 102 N. Y. 486.

Note: The Kentucky court follows Aetna Life Ins. Co. v. Kaiser, 24 Ky. L. R. 2454, 74 S. W. 203, and explains that cases wherein the inquest was received having been submitted with the proofs of death should not be regarded as authorities for the admission of it other than as a material admission or declaration by the beneficiary who submitted the proofs. Such cases are Insurance Co. v. Newton, 22 Wall. [U. S.] 32, 22 Law. Ed. 793, followed by Walther v. Mutual Life Ins. Co., 65 Cal. 417; Insurance Co. v. Higginbotham, 95 U. S. 390, 24 Law. Ed. 499. The cases wherein evidence of an impeaching character was adduced from testimony before the inquest (People v. Devine, 44 Cal. 452); those wherein the benefit certificate required a coroner's certificate (Knights of Honor v. Fletcher, 78 Miss. 377, 28 So. 872, 29 So. 523), and those wherein no objection was made (Metzradt v. Modern Brotherhood, 112 Iowa, 522, 84 N. W. 498), are also to be rejected as precedents.

It has no judicial character to render it admissible (Cox v. Royal Tribe, 42 Or. 365, 71 P. 73, 95 Am. St. Rep. 752). Compare In re Sly [Idaho] 76 P. 766. In a note 5 Columbia L. R. 165, it is said: "Whatever the historical character of the coroner's office, it cannot be said that under modern statutes a coroner's inquest is a judicial proceeding to the extent that its verdict should affect any stranger to such proceeding. Cox v. Royal Tribe, 42 Or. 365, 95 Am. St. Rep. 752; Wasey v. Travelers' Ins. Co., 126 Mich. 119; Goldschmidt v. Mut. Life Ins. Co., 102 N. Y. 486. The purpose of such inquisition is to furnish foundation for criminal prosecution in case death was caused by felony. Germania Life Ins. Co. v. Lewin, 24 Colo. 43, 65 Am. St. Rep. 215. In criminal prosecutions the verdict of the coroner's jury is not admitted in evidence for the reason that in proceedings before the coroner there is neither confrontation nor an opportunity for cross-examination. Whitehurst v. Com., 79 Va. 556; People v. Coughlin, 67 Mich. 466."

46. Note: The opposite view finds support on the ground that such a verdict, being secured by a public officer, under his official oath, in the discharge of his official duty, and filed with the circuit court, is therefore a record of that court. United States Life Ins. Co. v. Vocke, 129 Ill. 557, 6 L. R. A. 65; Grand Lodge v. Wieting, 168 Ill. 408, 61 Am. St. Rep. 123. See 5 Columbia L. R. 165.

A purported inquest of Missouri was rejected in Illinois because it did not show essentials of an inquest at common law or under the Illinois statute. National Gross Loge v. Jung, 65 Ill. App. 313. The Illinois court rejects—properly so—the testimony of plaintiff, an administrator, made at the inquest. The reason is that statements as an individual do not bind a representative. Gooding v. United States Life Ins. Co., 46 Ill. App. 307; 5 Ill. Cyc. Dig. 1145.

47. Rumbold v. Supreme Council Royal League, 206 Ill. 513, 69 N. E. 590; Goldschmidt v. Mutual Life Ins. Co., 33 Hun [N. Y.] 441, judgment reversed, 102 N. Y. 486; 8 Abb. N. Y. Cyc. Dig. 260, par. 317; Insurance Co. v. Vocke, 129 Ill. 557, 6 L. R. A. 65; Greenleaf, Ev. 556. Such evidence, while

cide is only prima facie as against an insurer of deceased,[48] it should on reason yield to slight contrary evidence. It is not evidence of the character or degree of negligence wherefrom death resulted,[49] nor even that there was negligence.[50]

INSANE PERSONS.

§ 1. Existence and Effect of Insanity in General (126).
§ 2. Inquisitions (126).
§ 3. Guardianship and Support (127). Expenses and Accounts (127). Support (128).
§ 4. Commitment to Asylums (128).
§ 5. Property and Debts (128).
§ 6. Contracts and Conveyances (129).
§ 7. Torts (129).
§ 8. Actions by or Against (129).

This topic includes only adjudication of insanity and the rights and disabilities of adjudicated lunatics. Contractual capacity in general,[51] and capacity to commit crime,[52] are elsewhere treated.

§ 1. *Existence and effect of insanity in general.*[53]—The presumption that where unsoundness of mind is shown it continues until the contrary is shown does not extend to temporary, intermittent unsoundness, caused by intoxication, sickness, or other transitory causes.[54] While an adjudication of a probate court that one is non compos and placing him under guardianship remains in force, he is prima facie without testamentary capacity.[55] A finding that one was desperate when he killed another does not amount to a finding that he was insane;[56] nor is a finding by a jury that a person is "feeble in mind, incapable of managing business affairs, and a typical imbecile," a finding of insanity within the statutory meaning of the term.[57] The fact that a person has been duly committed as insane, and thereafter discharged as cured, is not, in the absence of peculiar conduct, notice to persons dealing with him in good faith, that he is incompetent.[58] The insanity of a client operates to terminate the relation of attorney and client.[59] Where a party becomes insane while indebted to an attorney representing him, the appointment of a guardian does not divest the attorney of any lien he may have acquired, but the attorney has no right per se of representing the guardian.[60]

§ 2. *Inquisitions.*[61]—In lunacy proceedings, summons must be served on the alleged lunatic as a foundation to any judgment declaring him to be of unsound mind.[62] Where a person is mentally incompetent, it is proper for the court to

competent, is not conclusive. Metzradt v. Modern Brotherhood, 112 Iowa, 522.

48. Schreiner v. High Court, etc., of Foresters, 35 Ill. App. 576.

49. Callaway v. Spurgeon, 63 Ill. App. 571.

50. Cox v. Chicago, etc., R. Co., 92 Ill. App. 15; Chicago, etc., R. Co. v. Staff, 46 Ill. App. 499.

Where the policy called for the inquest with proofs of loss it was, when offered and not limited to proof of compliance with that condition, evidence of every fact which it tended to prove. Lawrence v. Mutual Life Ins. Co., 5 Ill. App. 280.

51. See Incompetency, 3 Curr. L. 1696.

52. See Criminal Law, 3 Curr. L. 979.

53. See 2 Curr. L. 454.

54. Branstrator v. Crow, 162 Ind. 362, 69 N. E. 668.

55. In re Wheelock's Will [Vt.] 56 A. 1013.

56. Box v. Lanier [Tenn.] 79 S. W. 1042.

57. Gen. St. 1901, § 6570. Caple v. Drew [Kan.] 78 P. 427.

58. Leinss v. Weiss [Ind. App.] 71 N. E. 254.

59. An agreement by a sane person with an attorney to appear for him at an inquisition and prosecute an appeal therefrom if it found him insane, confers no authority to appear for him, if at the time of the inquisition he is really insane and unaware that his mental status is involved in the proceedings. Chase v. Chase [Ind.] 71 N. E. 485.

60. State v. District Court of Second Judicial Dist. [Mont.] 75 P. 516.

61. See 2 Curr. L. 455.

Fees of probate judge and commissioner. In the matter of inquests of lunacy, a probate judge is entitled to only such fees as are provided for in Rev. St. § 719. Section 547 is inapplicable. Millard v. Conradi, 5 Ohio C. C. (N. S.) 145. Where an inquiry results in a determination that the person is sane, costs and compensation of commissioners should be charged against the petitioners not against the alleged lunatic. Sander v. Larner, 91 N. Y. S. 428.

62. Norman v. Central Kentucky Asylum, 25 Ky. L. R. 1846, 79 S. W. 189.

appoint a guardian ad litem on the hearing of an application for the appointment of a general guardian.[63] The question of sanity should not be tried on affidavits, but should be sent to a commissioner or a jury.[64] A commissioner on an inquisition may dissent from the finding of a jury on the question of sanity and the court may refuse to confirm the finding.[65] In a trial of an issue as to whether one was and is of sound mind, the evidence must relate to his condition up to the time of the trial.[66] The finding of an inquisition should recite that the incapacity of a person to manage himself and his property is the result of unsoundness of mind.[67] Where physicians appointed by the probate court certify to sanity the probate judge has no authority to proceed and himself determine the question of sanity.[68] Where a lunatic is too imbecile to desire that a defense be made for him to an inquisition, his interests are properly confided to the prosecuting attorney.[69] When upon an application for leave to traverse an inquisition of lunacy, an issue is directed to be tried at law, a motion for a new trial of the issue is to be made before the chancellor, and not in the supreme court.[70] A cause of action to have defendant declared a lunatic does not survive the death of the defendant.[71]

§ 3. *Guardianship and support.*[72]—The Federal courts have no jurisdiction to exercise the function of parens patriae for the determination of the right to the custody of an insane person.[73] In Texas the county judge may of his own motion, and without application made therefor, appoint a guardian for a person of unsound mind.[74] Under a statute permitting a guardianship where one is likely to bring himself or his family to want, a petition merely stating his incapacity to manage his estate is insufficient, and a decree entered thereon is a nullity, and open to collateral attack.[75] The fact that one is confined in an asylum in another county does not affect his residence, or the jurisdiction of the court of his residence to appoint a guardian for him.[76] An order appointing a guardian for an alleged incompetent will be reversed if purely a consent order.[77] Where a guardian receives funds of his insane ward and mingles them with his own he is properly charged with interest upon the balance left in his hands at the beginning of each year after the first.[78]

Expenses and accounts.[79]—Estates of insane persons and of those legally bound to support them are liable to the county for reasonable expenses for their care in the county asylum, but such estates may not be taxed with the costs of the hearing as to insanity, and the costs of transportation to the hospital.[80]

63. County Court Rule 3, § 1. Ziegler v. Bark [Wis.] 99 N. W. 224.

64. Even if, as in this case, the evidence adduced by the affidavits would be ground for dismissing the petition, or of reversing a finding of incompetency. In re Milchsack, 89 N. Y. S. 524.

65. In re Preston, 95 App. Div. 89, 89 N. Y. S. 517.

66. A stipulation that the evidence should be restricted to the period covered by the inquisition is unlawful and is ground for a retrial. In re Comfort [N. J. Eq.] 57 A. 426.

67. A find that he is "of unsound mind and incapable of such management" is not sufficient. In re Dayton [N. J. Eq.] 57 A. 871.

68. Pub. Acts pp. 328, 329, provides that two reputable physicians appointed by the court shall pass on the sanity of an alleged lunatic, and that no person shall be held in any asylum, except on the certificate of such physician. Grinky v. Durfee [Mich.] 100 N. W. 171.

69. Burns' Ann. St. 1901, § 2715. Chase v. Chase [Ind.] 71 N. E. 485.

70. In re Comfort [N. J. Eq.] 57 A. 426.

71. Posey v. Posey [Tenn.] 83 S. W. 1.

72. See 2 Curr. L. 456.

73. Hoadly v. Chase, 126 F. 818.

74. Rev. St. 1895, art. 2574, 2742. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245.

75. Providence County Sav. Bank v. Hughes [R. I.] 58 A. 254.

76. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245.

77. Neither the incompetent or her attorney could consent that the decision might be rendered by a judge who did not hear the evidence, nor to any appointment so as to deprive the alleged incompetent of the right to appeal therefrom. In re Sullivan [Cal.] 77 P. 153.

78. Jones v. Nolan [Ga.] 48 S. E. 166.

79. See 2 Curr. L. 456.

Support.[81]—An asylum to which a person was committed on a void inquest may recover on a quantum meruit for necessaries furnished him; and he is entitled to credit for services rendered.[82] Necessaries furnished to a lunatic are recoverable against him, and after his death against his estate.[83] Insane residents of the state shall receive board and treatment free at the state insane hospital and there is no provision for reimbursing the county from the property of those who are obliged to support the lunatic.[84] Judgment for necessaries furnished to an alleged lunatic cannot be recovered, where, in an action for same, the lunacy is denied and not proved.[85] The services voluntarily rendered to an incompetent, by a person who knows of a contract made by the guardian with third parties for such care, cannot be recovered for as necessaries where the guardian knew nothing of their being rendered.[86]

§ 4. *Commitment to asylums.*[87]—The statutory requirements in committing insane persons to an asylum must be followed even though the prescribed delay cause inconvenience or even danger.[88] On habeas corpus by a person committed as insane, the ordinary procedure will be followed unless the court in its discretion, on account of some special cause, see fit to direct a jury trial.[89] An act providing that a person acquitted of murder on the ground of insanity may be committed to an asylum for the dangerous insane, and can only be discharged by act of the general assembly, is unconstitutional; but a person so committed cannot be released on habeas corpus if he is insane at the time of the return of the writ and must be restrained pending the inquiry as to his insanity.[90] Keepers of asylums are not given judicial powers, because they may not hold a patient except on certificates of insanity and an order for admission.[91] The detention of a widow in an insane asylum is not a voluntary abandonment of her homestead, and does not affect her rights therein.[92]

§ 5. *Property and debts.*[93]—A widow, insane at the time of her husband's death, is not barred of her right to apply for dower, until the statute of limitations has run, dating from the time of the removal of her disability; but the right to take a child's share in the estate is dependent upon her election within the period prescribed after administration granted.[94] A wife acting as conservatrix of her insane husband's estate, and who inventories certain lots as part thereof, is not estopped from claiming, after his death, a resulting trust in her favor as to such lots.[95] A second committee of an insane person may maintain a suit in his own name against the estate of a deceased committee for money chargeable to the first committee as such; and money so received under color of his appointment may be sued for, though the appointment be void.[96]

80. Westlake's Estate v. Scott County [Iowa] 101 N. W. 88.

81. See 2 Curr. L. 457.

82. Michaels v. Central Kentucky Asylum for Insane [Ky.] 81 S. W. 247.

83. Waldron v. Davis [N. J. Err. & App.] 58 A. 293. After obtaining an allowance of $50 per month from the court, the guardian cannot after the ward's death, claim $395 for extraordinary services to the ward in the last ten weeks of his life. Gibson v. Wild [Iowa] 99 N. W. 569.

84. Hamlin County v. Tauer [S. D.] 100 N. W. 430.

85. Norman v. Central Kentucky Asylum, 25 Ky. L. R. 1846, 79 S. W. 189.

86. Schramek v. Shepeck [Wis.] 98 N. W. 213.

87. See 2 Curr. L. 457.

88. A judgment appointing a guardian for an alleged insane person is void where the record shows the proceedings were begun and concluded in one day, and no statutory notices were given. Allen v. Barnwell [Ga.] 48 S. E. 176.

89. No special cause as contemplated in § 19, ch. 82, Laws 1896, was urged in this case. In re Palmer [R. I.] 58 A. 660.

90. In re Boyett [N. C.] 48 S. E. 789.

91. Grinky v. Durfee [Mich.] 100 N. W. 171.

92. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245.

93. See 2 Curr. L. 457.

94. LaGrange Mills v. Kener [Ga.] 49 S. E. 300.

95. Madison v. Madison, 206 Ill. 534, 69 N. E. 625.

96. Straight v. Ice [W. Va.] 48 S. E. 837.

§ 6. *Contracts and conveyances.*[97]—The deed of an insane person may be avoided as against a grantee for value without notice of his grantor's insanity.[98] The deed of an insane person is not absolutely void, but voidable at his election, on recovery of his reason, and is of force and effect until the option to declare it void is exercised;[99] but neither the court, nor a person under guardianship by reason of insanity, nor the guardian of the latter, nor all together, can ratify a conveyance of land by the ward made previous to the guardianship, but while he was insane.[1] An assignment of a contract to purchase land, by a person non compos mentis is voidable only.[2] A confirmed insane person may, in a lucid interval, make a valid contract, and if the insanity be intermittent, it must be proved to exist at the time of making the contract in order to avoid the same.[3] But ordinarily the burden of showing that a conveyance by an insane person was made during a lucid interval is upon the person claiming under the instrument.[4] The record in one action where a conveyance was set aside on the ground of mental incapacity is not admissible in an action to set aside a second and subsequent conveyance by the same grantor.[5]

§ 7. *Torts.*[6]

§ 8. *Actions by or against.*[7]—The mental condition of an incompetent does not prevent him from commencing in his own name, prior to the appointment of a guardian for him, an action to set aside an agreement conveying his property to another.[8] A committee appointed for an incompetent infant after the latter has commenced an action by guardian ad litem may be properly substituted as plaintiff.[9] Where on foreclosure, personal service is had on an insane person and his guardian, failure to appoint a guardian ad litem for the insane person is a mere irregularity not affecting the judgment.[10] In a suit by a next friend for a lunatic, the objection that there is no allegation of no guardian, or reason for not appearing by guardian, if there be one, must be taken by special demurrer or plea in abatement.[11] The statute of limitations does not run against a committee of a lunatic, who is also his administrator, who has never been discharged from these offices, and who sues the heirs for an accounting.[12] The rule that a person may voluntarily dismiss his appeal has no application where the party is of unsound mind.[13]

INSOLVENCY.[14]

§ 1. Effect of Federal Bankruptcy Act on State Insolvency Laws (129).
§ 2. Procedure and Parties to Adjudicate Insolvency (130).
§ 3. Property Passing to the Assignee (130).
§ 4. Administration of Insolvent Estate (130).
§ 5. Rights and Liabilities Affected by Insolvency and Discharge of Insolvent (131).

§ 1. *Effect of federal bankruptcy act on state insolvency laws.*[15]—The enact-

97. See 2 Curr. L. 457.
98. Gingrich v. Rogers [Neb.] 96 N. W. 156.
99. Blinn v. Schwarz, 177 N. Y. 252, 69 N. E. 542.
1. Gingrich v. Rogers [Neb.] 96 N. W. 156.
2. Evidence held to show a ratification of the assignment after the assignor's restoration to capacity. Wolcott v. Connecticut General Life Ins. Co. [Mich.] 100 N. W. 569.
3. McPeck's Heirs v. Graham's Heirs [W. Va.] 49 S. E. 125.
4. Gingrich v. Rogers [Neb.] 96 N. W. 156.
5. Bollnow v. Roach, 210 Ill. 364, 71 N. E. 454.
6, 7. See 2 Curr. L. 458.
8. Ziegler v. Bark [Wis.] 99 N. W. 224.
9. Callahan v. New York, etc., R. Co., 90 N. Y. S. 657.
10. Carroll Imp. Co. v. Engleman [Iowa] 99 N. W. 574.
11. LaGrange Mills v. Kener [Ga.] 49 S. E. 300.
12. Cauthen v. Cauthen [S. C.] 49 S. E. 321.
13. Combs v. Combs [Ky.] 82 S. W. 298.
14. This article comprehends the general law of insolvency and insolvency procedure and settlements. Matters specifically per-

ment of the federal bankruptcy law did not suspend the jurisdiction of state courts in insolvency cases where no proceedings in bankruptcy have been instituted respecting the matters in controversy.[16]

§ 2. *Procedure and parties to adjudicate insolvency.*[17]—One is insolvent when the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be sold or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts.[18] When the question of insolvency is in issue in a state court it is proper for it to follow the definition of insolvency as embraced in the federal bankruptcy act.[19]

In Louisiana the test of the jurisdiction of the supreme court in appeals in insolvency cases is the amount of the funds to be distributed in the case.[20]

It is no defense to an action on an insolvent bond, based on the party's failure to appear at the next term of court and take advantage of the insolvency laws, that he thereafter appeared pending such action.[21]

The Washington insolvency law is not unconstitutional as embracing more than one subject not expressed in its title.[22]

§ 3. *Property passing to the assignee*[23] is generally such as might be subjected to payment of debts.[24]

§ 4. *Administration of insolvent estate.*[25]—As a general rule only debts absolutely due are provable.[26] The liability of a surety on an administrator's bond does not constitute a debt provable in insolvency until after a breach of the bond.[27]

All creditors will, as far as possible, be placed on an equality.[28] Therefore creditors who have realized on collaterals before a dividend has been declared are entitled to a dividend only on so much of their debt as remains after deducting the proceeds of such collaterals.[29] The fact that their claims have theretofore been proved and allowed for the full amount is immaterial.[30] The statutory rule as to secured claims, generally applied in bankruptcy proceedings, limits a creditor with a secured claim, to the amount of his claim less the value of his security, unless he surrenders the security.[31] In equity a creditor of an insolvent whose estate is in process of administration under judicial supervision, having a secured claim against such insolvent, may prove it to the full amount, and in such case

tinent to Bankruptcy (3 Curr. L. 434), and to Assignments for Creditors (3 Curr. L. 326), are not included. Discharge of insolvents from imprisonment for debt (Civil Arrest, 3 Curr. L. 700), and Composition with Creditors (3 Curr. L. 718), are related matters but are also excluded.

15. See 2 Curr. L. 459.

16. Jensen-King-Byrd Co. v. Williams, 35 Wash. 161, 76 P. 934.

17. See 2 Curr. L. 459.

18. Bankruptcy Act 1898, § 1, subd. 15, 30 St. 544, 545 [U. S. Comp. St. 1901, p. 3420]. Owen v. American Nat. Bank [Tex. Civ. App.] 81 S. W. 988. Instruction defining insolvency sustained as favorable to plaintiff. Id.

19. Owen v. American Nat. Bank [Tex. Civ. App.] 81 S. W. 988.

20. Not amount distributed under provisional account [Act 1898, No. 159, p. 314, § 4; Const. 1898, art. 85]. In re New Iberia Cotton Mills Co. [La.] 37 So. 8.

21. Glynn v. Kelly [N. J. Law] 58 A. 178.

22. Laws 1890, p. 88. Jensen-King-Byrd Co. v. Williams, 35 Wash. 161, 76 P. 934.

23. See 2 Curr. L. 459.

24. See the titles Assignment for Benefit of Creditors, 3 Curr. L. 341; Bankruptcy, 3 Curr. L. 446; Fraudulent Conveyances, 3 Curr. L. 1535.

25. See 2 Curr. L. 460.

26. Must be absolutely due at time of publication of notice of issuance of warrant, though payable in future [Mass. Pub. St. 1882, c. 157, § 26]. McIntire v. Cottrell, 185 Mass. 178, 69 N. E. 1091.

27. Under Mass. Pub. St. 1882, c. 143, § 10; Rev. Laws, c. 149, § 20; is no violation of bond as to any debt until it has been established by judgment, which administrator has failed to pay on demand. Until that time is not absolutely due within meaning of Pub. St. 1882, c. 157, § 26. McIntire v. Cottrell, 185 Mass. 178, 69 N. E. 1091.

28. Property of insolvent debtor placed in hands of receiver, by order of court, to be administered upon for payment of his debts. State Nat. Bank v. Esterly, 69 Ohio St. 24, 68 N. E. 582.

29, 30. State Nat. Bank v. Esterly, 69 Ohio St. 24, 68 N. E. 582.

31, 32. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

he is entitled to share with general creditors upon that basis in every general distribution of trust funds till the dividends, together with the receipts, if any, from the security, are sufficient to fully pay such claim, the residue of the security remaining to belong to the trust fund or to the owner of the equity.[32]

Preferences must be surrendered[33] and may generally be recovered by the receiver in an action brought for that purpose.[34] The fact that receivers of an insolvent corporation know of and report the existence of assets, from which report a creditor obtains his knowledge thereof, shows that the latter is not entitled to a preference on account of diligence.[35]

A receiver collecting from a stockholder of an insolvent corporation more than is necessary to pay its debts and the costs of administration is bound to restore the balance.[36]

§ 5. *Rights and liabilities affected by insolvency and discharge of insolvent.*[37]—A creditor whose claim antedates the proceedings and who has full notice thereof cannot enforce such claim outside such proceedings.[38]

Insolvency proceedings have no effect, proprio vigore, beyond the state in which they are instituted.[39] But a nonresident creditor voluntarily becoming a party thereto thereby elects to take advantage of, and become bound by, them, and cannot thereafter resort to remedies against the property of the insolvent in other states, to which he might otherwise have had recourse.[40] Statutes generally provide for an order requiring creditors to show cause why a discharge should not be granted, and fixing a day for the hearing thereof.[41] The fixing of the day is jurisdictional.[42] Notice of the order to show cause must generally be given, and the same must be published, and proof of such publication must be made and filed before a valid discharge can be granted.[43]

Proceedings to obtain a discharge are strictly adversary, and creditors whose

33. After attachment of property of officer in suit on his bond and giving of note by him and his sureties to bank to raise money to make settlement, held that giving of trust deed by him to secure its payment was not a preference within meaning of Kentucky St. 1899, § 1910, since condition of sureties was not bettered thereby. Stephens v. Wilson, 25 Ky. L. R. 662, 76 S. W. 180. Insurance company deposited money with trust company to secure surety on appeal bond in case judgment recovered against it was affirmed. Judgment was reversed and on retrial judgment creditor again recovered. Insurance company had, in meantime become insolvent. Held that judgment creditor was not entitled to preference in such deposit. Malick v. Bulkley, 206 Ill. 249, 69 N. E. 87.

34. In New Jersey the receiver of an insolvent corporation may recover payments made when it was insolvent or in contemplation of insolvency to creditors having knowledge thereof. Where president and treasurer paid claims due themselves within ten days of appointment of receiver. Jessup v. Thomason [N. J. Eq.] 59 A. 226. Evidence held to show that creditor had knowledge of insolvency so as to require him to refund preference. Id.

35. Money deposited with trust company. Malicki v. Bulkley, 206 Ill. 249, 69 N. E. 87.

36. In re New Iberia Cotton Mills Co. [La.] 37 So. 8.

37. See 2 Curr. L. 460.

38. Where a debtor makes an assignment for the benefit of his creditors and his estate is administered according to law. Jensen-King-Byrd Co. v. Williams, 35 Wash. 161, 76 P. 934.

39. Proceeding by creditor's bill in federal court will not be allowed to prevail against any remedy which courts of another state give its citizens against property of insolvent therein. Gerding v. East Tenn. Land Co., 185 Mass. 380, 70 N. E. 206.

40. Gerding v. East Tennessee Land Co., 185 Mass. 380, 70 N. E. 206. Owner of claim holding judgment for it in insolvency proceedings cannot maintain bill for attachment in another state. Id. Creditors who have elected to prove interest on bonds thereby prove bonds, and by electing to prove them as collateral they elect to prove note secured by them. Id.

41. Wis. Rev. St. 1898, § 4285. German-American Bank v. Powell [Wis.] 99 N. W. 222.

42. German-American Bank v. Powell [Wis.] 99 N. W. 222. The actual order made from the bench and not the written order is the one referred to. Statute satisfied if announcement fixing day is made, though date in written order left blank. Recitals in written order held to sufficiently show fixing of date. Id.

43. Under Wis. Rev. St. 1898, § 4288, discharge made before proof of service and publication is void. German-American Bank v. Powell [Wis.] 99 N. W. 222.

claims are to be barred must be made parties and jurisdiction of them obtained in the way provided by statute, or their claims will not be affected thereby.[44] In Maine the omission of the name of a creditor from the schedule of creditors, when not willful or fraudulent, does not affect the validity of the discharge duly granted, in a suit brought by the creditor whose name was thus omitted.[45]

In New Jersey the insolvent must make an assignment of all his nonexempt property to the assignee appointed by the court before he can be discharged from custody.[46] An order of discharge from custody will be set aside where the petition presented to the court is not filed with the clerk for more than two months afterwards.[47] A discharge may be collaterally attacked for want of jurisdiction appearing upon the face of the record.[48]

INSPECTION, see latest topical index.

INSPECTION LAWS.[49]

The states have power to enact and enforce inspection laws applicable to interstate commerce.[50] Inspection laws are not invalid because designed to enforce police regulations calculated and suited to prevent frauds and crimes.[51] So long as the fee required to be paid by an inspection law is not so much in excess of the reasonable expense of inspection as to change the nature of the act to a tax law, the amount of the fee presents no judicial question.[52]

A statute regulating the fees of inspectors is not unconstitutional as local or special legislation though it in fact applies only to the inspector in one city, where it in terms applies to all cities which have or may have a certain number of inhabitants[53] or over; but a law in Pennsylvania has been held not to apply to places subsequently attaining that population.[54] The inspectors to whom the Missouri law applies are state, not county, officers.[55] The maximum compensation fixed by the act was $7,000 per annum.[56]

44. German-American Bank v. Powell [Wis.] 99 N. W. 222.

45. Discharge a bar to all claims which were or might have been proven [Me. Rev. St. 1883, c. 70, § 49]. Hewin v. Whitney [Me.] 58 A. 59.

46. Discharge ineffectual unless this is done [Gen. St. p. 1728, § 11]. Stokes v. Hardy [N. J. Law] 58 A. 650.

47. Stokes v. Hardy [N. J. Law] 58 A. 650.

48. German-American Bank v. Powell [Wis.] 99 N. W. 222.

49. See 2 Curr. L. 460.

50. Laws 1901, p. 96, c. 45, providing for inspection of hides of animals killed at slaughter houses, permitted an inspection fee of ten cents per hide, and prohibiting the shipping beyond the limits of the territory of hides uninspected and untagged, is valid. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74.

51. As to protect cattle industry of New Mexico [Laws 1901, p. 96, c. 45]. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74.

Note: This case, following Neilson v. Garza, 2 Woods, 287, Fed. Cas. No. 10,091, extends the doctrine of the earlier cases as to the proper purpose and scope of inspection laws. Thus, Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. [U. S.] 1, 203, 6 Law. Ed. 23, defined inspection as follows: "The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the states, and prepare it for that purpose." Again it was said in Turner v. Maryland, 107 U. S. 38, 55, 27 Law. Ed. 370: "Recognized elements of inspection laws have always been quality of the article, form, capacity, dimensions, and weight of package, mode of putting up, and marking and branding of various kinds; all these matters being supervised by a public officer having authority to pass or not pass the article as lawful merchandise, as it did or did not answer the prescribed requirements."

52. If the charge proves to be in excess of actual need, it is presumed that the legislature will reduce it. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74. A fee of ten cents per hide for all animals killed at slaughter houses, held not to change law from one of inspection to one of taxation [Laws 1901, p. 96, c. 45]. Id. This law does not apply to pelts and skins, other than hides; the fee is not therefore unreasonable. Id.

53. Acts 1899, p. 231, does not violate state Const. art. 4, § 53; or art. 9, § 12. State v. Speed [Mo.] 81 S. W. 1260.

54. Commonwealth v. Bradley [Pa.] 59 A. 433.

55. State v. Speed [Mo.] 81 S. W. 1260.

56. Not $7,000 semi-annually, or a total of $14,000, as claimed. State v. Speed [Mo.] 81 S. W. 1260.

INSTRUCTIONS.

§ 1. **Object and Purpose (133).**
§ 2. **Province of Court and Jury (133).**
§ 3. **Duty of Instructing; Requests for Instructions (134).** Limiting Number of Instructions (135). Requests for Instructions (135). Form and Sufficiency of Request (136). Time of Making Request (136). Disposition of Requests (136). Repetition (137).
§ 4. **Assumption of Facts (138).**
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§ 6. **Form of Instruction (142).** Instruction Should be Certain (143). The Instructions Should be Consistent (145).
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§ 16. **Additional Instructions after Retirement (153).**
§ 17. **Review. Objections and Exceptions Below (154).** Invited Error (155). Harmless Error (155). Instructions Must be Considered as a Whole (155).

Scope of topic.—This topic is confined to instructions in civil cases. Instructions in criminal prosecutions is elsewhere treated.[57]

§ 1. *Object and purpose.*—The object and purpose of instructions is to submit questions of fact,[58] and to convey to the jury the correct principles of law as applicable to the evidence introduced,[59] and nothing should be given unless it will promote that end.[60] Questions of law should not be submitted.[61] A court need not comment on the wisdom and beneficence of the statute of limitations after properly instructing the law,[62] but may instruct as to the result of a verdict.[63] The jury must take the whole charge as the law of the case.[64]

§ 2. *Province of court and jury.*[65]—It is the exclusive province of the jury to determine all issues of fact,[66] the credibility of the witnesses, and the weight to be given their testimony.[67] Therefore, when there is substantial conflict in the

57. See Indictment and Prosecution, 4 Curr. L. 1.

Note: In general structure this title is similar to that of Blashfield on Instructions which may therefore be used with this and the article in 2 Curr. L. 461, as a substantially exhaustive treatise on the law of instructions down to the present time. [Editor.]

58. Barton v. Odessa [Mo. App.] 82 S. W. 1119.

59. Weller Mfg. Co. v. Krumholz, 102 Ill. App. 284.

60. Instructions outside the theories, evidence and pleadings. See post, § 5, Relation of Instructions to pleading and evidence. As to whether proper parties had been joined is not a proper subject. Worcester City Missionary Soc. v. Memorial Church [Mass.] 72 N. E. 71. Objections to pleadings cannot be raised. Harper v. Fidler [Mo. App.] 78 S. W. 1034.

61. Where the fact that an ordinance is in force is admitted, its application is a question of law. Barton v. Odessa [Mo. App.] 82 S. W. 1119. Whether plaintiff's next friend was regularly appointed. Heinzle v. Metropolitan St. R. Co. [Mo.] 81 S. W. 848. What is a good cause for repudiating a contract. Harmison v. Fleming, 105 Ill. App. 43. Whether a justice who issued execution had jurisdiction of the parties and subject-matter. Gallick v. Bordeaux [Mont.] 78 P. 583. Requiring the jury to consider the extent to which any instruction given might be qualified does not submit a question of law. Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022.

62. No error to refuse such request. Nelson v. Brisbin [Neb.] 98 N. W. 1057.

63. It is not erroneous to charge that if a verdict was rendered against a defendant he would be incarcerated. Reiss v. Kienle, 88 N. Y. S. 359.

64. Morrison v. Dickey, 119 Ga. 698, 46 S. E. 863. It is not for them to select one part to the exclusion of another nor to decide whether one part cures or qualifies another without being instructed to do so. Id. A request that the instructions given by the court must be accepted as the law of the case and that the jury would not be justified in finding a verdict contrary to such law is proper. Chicago, etc., R. Co. v. Burridge, 211 Ill. 9, 71 N. E. 838.

65. See 2 Curr. L. 461.

66. See Questions of Law and Fact, 2 Curr. L. 1361.

Colwell v. Brown, 103 Ill. App. 22. Controverted questions. Western Md. R. Co. v. State, 95 Md. 637, 53 A. 969. The meaning of "just crossed over" as applied to persons who have passed a railroad crossing in advance of an approaching train is for the jury. Chalkley v. Central of Georgia R. Co. [Ga.] 48 S. E. 194. Inferences of fact or the conclusion of the existence of a fact from some other fact is for the jury. Southern Pine Co. v. Powell [Fla.] 37 So. 570.

67. See post, § 10, Rules of Evidence, Credibility, etc. Strickler v. Gitchell [Okl.] 78 P. 94.

evidence relating to material facts[68] or when fair and rational minds may well draw different conclusions from the established facts, the issues should be submitted to the jury,[69] and an instruction which invades this province is erroneous;[70] but where the evidence leaves the material facts and the deductions from them admitted or undisputed[71] or of such a conclusive character that the exercise of sound judicial discretion would permit effect to be given to but one verdict, it is the duty of the court to instruct the jury to return it.[72]

In actions tried by the court instructions should be given and refused in the same manner as when trial is before a jury.[73]

The construction of instruments.[74]—It is the province of the court to construe written instruments,[75] and submit such construction to the jury.[76]

§ 3. *Duty of instructing; requests for instructions.*[77]—If not restricted by the constitution, the legislature may authorize any court to instruct the jury.[78] In some jurisdictions the court is required, of its own motion, to instruct upon the general features of the law applicable to the material issues,[79] and in other jurisdictions courts are not required to instruct except as requested by the parties.[80] The court is not required to give the whole law of the case.[81] If the charge is

68. Chicago G. W. R. Co. v. Roddy [C. C. A.] 131 F. 712.

69. Chicago G. W. R. Co. v. Roddy [C. C. A.] 131 F. 712. An instruction which withdraws from the jury the consideration of facts from which they might reach a conclusion different from that which the charge requires them to find is erroneous. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

70. Moulton v. Gibbs, 105 Ill. App. 104; City of Chicago v. Webb, 102 Ill. App. 232. A peremptory instruction is improper when there is substantial testimony direct or inferential tending to establish the claims of the adverse party (Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507; Heinzle v. Metropolitan St. R. Co. [Mo.] 81 S. W. 848; Libby v. Banks, 209 Ill. 109, 70 N. E. 599; Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899), or where issues are raised by pleadings and evidence (Howerton v. Iowa State Ins. Co. [Mo. App.] 80 S. W. 27). Making assessment of punitive damages compulsory is erroneous. Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106.

71. Facts which the undisputed evidence show to exist need not be submitted. Thomson Bros. v. Lynn [Tex. Civ. App.] 81 S. W. 330. Where there is in fact no dispute in the evidence on a certain issue, it is proper for the court to so instruct. Greer & Co. v. Raney, 120 Ga. 290, 47 S. E. 939.

72. See Directing Verdict and Demurrer to the Evidence, 3 Curr. L. 1093.

Where under the undisputed evidence a party is entitled to recover a peremptory instruction is proper. Lynch v. Burns [Tex. Civ. App.] 79 S. W. 1084.

73. See Verdicts and Findings, 2 Curr. L. 2009. Rosenbaum v. Gilliam, 101 Mo. App. 126, 74 S. W. 507.

74. See 2 Curr. L. 462.

75. Sexton v. Barrie, 102 Ill. App. 586. Deeds. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565. Railroad company's rule. Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 108, 69 N. E. 1000. Instructions in a libel action need not point out the particular words in the libelous article. It is sufficient to charge that the article as a whole is libelous. Cranfill v. Hayden [Tex.] 80 S. W. 609.

76. Acts of general assembly and minutes of city council. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53.

77. See Blashfield, Instructions to Juries, § 126 et seq.

78. A constitutional provision that judges of the supreme court shall instruct does not mean that no other judge can instruct; therefore the legislature may authorize inferior courts to instruct. In re Opinion of the Justices [R. I.] 58 A. 51.

79. Telfair County v. Webb, 119 Ga. 916, 47 S. E. 218. In Texas the court must deliver a written charge unless expressly waived by the parties. Statutes construed. Schwartzlose v. Mehlitz [Tex. Civ. App.] 81 S. W. 68. It is the duty of the court to instruct upon all the issues made by the pleadings and evidence. Olson v. Aubolee [Minn.] 99 N. W. 1123.

80. Leaving the jury to determine from the evidence whether goods had been delivered to a carrier without defining what constitutes delivery is not error where no request for instruction was made. Lackland v. Chicago & A. R. Co., 101 Mo. App. 420, 74 S. W. 505. In Illinois failure to instruct cannot be complained of by a party who requested no instructions. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869. Verdict will not be disturbed for want of a proper instruction unless it was requested and refused. Werner Co. v. Calhoun [W. Va.] 46 S. E. 1024.

81. Particular instructions must be requested. Spearman v. Sanders [Ga.] 49 S. E. 296; Garrigan v. Kennedy [S. D.] 101 N. W. 1081. Instruction that plaintiff may recover if any item of negligence is proved must be requested. Vicars v. Gulf, etc., R. Co. [Tex. Civ. App.] 84 S. W. 286. If a charge does not state a rule of universal application a limitation should be requested. Zvonik v. Interurban St. R. Co., 88 N. Y. S. 399. Statement of theory of one party more fully than that of adversary must be made subject of request. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735.

too general[82] or is not as full as desired[83] in that it omits reference to particular points,[84] theories,[85] issues[86] or defenses,[87] or that such reference is not sufficiently specific,[88] it is incumbent on the litigants to request such particular instruction as they deem proper,[89] and this rule is not changed by a mandatory statute making it the duty of the court to instruct in writing.[90]

Limiting number of instructions.—The court has no authority to arbitrarily fix the number of instructions that shall be presented or passed upon;[91] such unauthorized conduct, however, is not reversible error unless prejudicial.[92]

Requests for instructions.[93]—A party is entitled to have the jury instructed as

82. Failure to apply the principle in a hypothetical way to the particular facts. Central of Georgia R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590. Not error to fail to amplify or particularize or state other correct principles. O'Brien v. Foulke [Kan.] 77 P. 103. That the court in giving a charge that is legal and pertinent omits to charge some equally applicable principle. Atlanta R. & Power Co. v. Johnson [Ga.] 48 S. E. 389.

83. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991; Nadeau v. Sawyer [N. H.] 59 A. 369. Objection to an instruction to find for plaintiff if they believed the facts hypothesized without stating that they should believe them from the evidence is unavailing where no explanatory charge was asked. Davis v. Kornman [Ala.] 37 So. 789; Wingate v. Johnson [Iowa] 101 N. W. 751; Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571; Gooding v. Watkins [Ind. T.] 82 S. W. 913. An instruction on the question of damages. Longan v. Weltmer [Mo.] 79 S. W. 655.

84. Evans v. Gay [Tex. Civ. App.] 74 S. W. 575; Chicago Live Stock Commission Co. v. Fix [Okl.] 78 P. 316; Chicago Live Stock Commission Co. v. Connally [Okl.] 78 P. 318; Miller v. Shumway [Mich.] 98 N. W. 385; Pritchard v. Edison Elec. Illuminating Co., 92 App. Div. 178, 87 N. Y. S. 225; Ellington v. Great Northern R. Co. [Minn.] 100 N. W. 218; Cowles v. Lovin, 135 N. C. 488, 47 S. E. 610; Atlanta R. & Power Co. v. Johnson [Ga.] 48 S. E. 389; Nashville, etc., R. v. Heikens [Tenn.] 79 S. W. 1038; Gooding v. Watkins [Ind. T.] 82 S. W. 913; International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991; Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 81 S. W. 67; Texas Cotton Produce Co. v. Denny Bros. [Tex. Civ. App.] 78 S. W. 557; Turner v. Faubion [Tex. Civ. App.] 81 S. W. 810. Not to consider evidence admitted on irrelevant allegations. Martin v. Seaboard Air Line R. Co. [S. C.] 48 S. E. 616. On the subject of expert testimony. Godwin v. Atlantic Coast Line R. Co. [Ga.] 48 S. E. 139. As to intervening or preponderating causes. Id. Failure to call the attention of the jury to corroborating circumstances. Stewart v. New York & C. Gas Coal Co., 207 Pa. 220, 56 A. 435. Features essential to his recovery not mentioned. Cornwell v. St. Louis Transit Co. [Mo. App.] 80 S. W. 744. Failure to instruct upon some particular feature. Olson v. Aubolee [Minn.] 99 N. W. 1128. Omission which does not constitute positive error. Keas v. Gordy [Tex. Civ. App.] 78 S. W. 385. To submit a particular fact. San Antonio, etc., R. Co. v. Votaw [Tex. Civ. App.] 81 S. W. 130; San Antonio, etc., R. Co. v. Hahl [Tex. Civ. App.] 83 S. W. 27. To submit one of the elements of damage. St. Louis S. W. R. Co. v. Bolton [Tex. Civ. App.] 81 S. W. 123. Use which jury might make of mortality tables in assessing damages for uniawful death. Hewitt v. East Jordan Lumber Co. [Mich.] 98 N. W. 992.

85. On his theory of the case. Illinois Cent. R. Co. v. Jackson, 25 Ky. L. R. 2087, 79 S. W. 1187.

86. Kneeland v. Arnold, 88 N. Y. S. 367. To state the issues raised by the pleadings. International, etc., R. Co. v. Haddox [Tex. Civ. App.] 81 S. W. 1036. Failure to fully state the issues at the outset of the charge is not available in the absence of a request. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735.

87. Failure to present the defense of inherent weakness in the live stock shipped. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040.

88. Parman v. Kansas City [Mo. App.] 78 S. W. 1046; Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. On a particular view of the law. Providence Mach. Co. v. Browning [S. C.] 49 S. E. 325.

89. City of Louisville v. Keher, 25 Ky. L. R. 2003, 79 S. W. 270. A party will be treated as not having requested an instruction where he withdraws it at the court's suggestion on the supposition that the charge given was more in his favor than the request. Keas v. Gordy [Tex. Civ. App.] 78 S. W. 385. Requested instruction that if plaintiff's husband took his own life there could be no recovery did not suggest an instruction that unless his death was caused by intoxicants plaintiff could not recover. Garrigan v. Kennedy [S. D.] 101 N. W. 1081.

90. San Antonio & A. P. R. Co. v. Votaw [Tex. Civ. App.] 81 S. W. 130. Such a statute does not make the failure to submit every issue affirmative error. San Antonio, etc., R. Co. v. Hahl [Tex. Civ. App.] 83 S. W. 27.

91. Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294; Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022.

92. Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294. Where no proper instruction is refused. Chicago Union Traction Co. v. Reuter, 210 Ill. 279, 71 N. E. 323; Chicago Union Traction Co. v. Olsen, 211 Ill. 255, 71 N. E. 985. Where the requests given included the substance of those offered and refused. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. An order limiting the number of instructions is not prejudicial to a party who requested less than the limit. The Fair v. Hoffman, 209 Ill. 330, 70 N. E. 622.

93. See 2 Curr. L. 474.

to the issues and law bearing upon his theory of the case,[94] and where a special request is made for an instruction which fairly reflects either a meritorious cause of action or a ground of defense[95] which has not been covered by other instructions,[96] or where the instruction is made necessary by erroneous procedure,[97] it should either be given or its substance embodied in another instruction.

Form and sufficiency of request.[98]—A request to charge should be complete in itself,[99] strictly correct,[1] and applicable to the case.[2]

Time of making request.[3]—Written propositions should be submitted to the court before argument.[4] Requests not submitted in apt time as required by the rules of the court may be refused.[5]

Disposition of requests.[6]—Requests to charge upon points of law applicable to the case should be given or refused;[7] the words "given" or "refused" should be used.[8] A failure to charge a request amounts to a refusal if such failure is brought to the attention of the court at the conclusion of his charge.[9] The instruction need not be given in the precise language requested;[10] it is sufficient if the substance be given.[11] Furthermore, it is the duty of the court to simplify

94. Suburban R. R. Co. v. Malstrom, 105 Ill. App. 631. Requested charge should have been given where the main charge failed to affirmatively submit. Missouri, etc., R. Co. v. Renfro [Tex. Civ. App.] 83 S. W. 21. Each party is entitled to an instruction announcing the law applicable to the evidence introduced in his behalf. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245; North Texas Const. Co. v. Bostick [Tex.] 83 S. W. 12. Submitting defenses pleaded. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869.

95. Western Mattress Co. v. Ostergaard [Neb.] 101 N. W. 334. A party has a right to demand that the jury be instructed what facts are admitted of record. Barton v. Odessa [Mo. App.] 82 S. W. 1119. It is reversible error to refuse a request for a proper instruction. Collard v. Beach, 81 App. Div. 582, 81 N. Y. S. 619. Error to refuse an instruction that "it is presumed that public officers do their duty." McKinstry v. Collins [Vt.] 56 A. 985; Braucht v. Graves-May Co. [Minn.] 99 N. W. 417.

96. Wright v. Roberts, 90 N. Y. S. 752; Chicago, etc., R. Co. v. Appell, 103 Ill. App. 185; Weinberg v. Novick, 88 N. Y. S. 168. It is error to refuse instructions correct and applicable. City of Columbus v. Anglin [Ga.] 48 S. E. 318; International, etc., R. Co. v. Tisdale [Tex. Civ. App.] 81 S. W. 347.

97. False argument of counsel. Drumm-Flato Commission Co. v. Gerlach Bank [Mo. App.] 81 S. W. 503.

98. See 2 Curr. L. 474.

99. A request which does not state a distinct proposition of law but only groups together a portion of the alleged facts essential to such an issue is ordinarily insufficient. Leaves the jury no opportunity to determine qualifying matters. McQueen v. Kondelin [C. C. A.] 127 F. 76.

1. Pennsylvania R. Co. v. Naive [Tenn.] 79 S. W. 124. Request which does not correctly state the law. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023. Not error to refuse to charge an unconstitutional statute as the law. Ballentine v. Hammond [S. C.] 46 S. E. 1000. Under Rev. St. 1898, § 2853, providing that requests must be given without change or modification or refused in full, the request must be complete and accurate. Lynch v. Waldwick [Wis.] 101 N. W. 925.

2. Request not applicable properly refused. Mulherin v. Kennedy [Ga.] 48 S. E. 437.

3. See 2 Curr. L. 474.

4. Stauffer v. Volentine, 104 Ill. App. 382.

5. Requests made during the trial. Plunger Elevator Co. v. Day, 184 Mass. 130, 68 N. E. 16. In Illinois superior court (Rule 24), instructions must be presented at the conclusion of the taking of the evidence. Pennsylvania Co. v. Greso, 102 Ill. App. 252.

6. See 2 Curr. L. 475.

7. Where made prior to the commencement of the summing up of counsel. Franklin v. Friehofer Vienna Baking Co. [N. J. Law] 58 A. 82. Where a party requested an instruction and the court replied "Yes, I will not touch that any more than I have," the language should be construed as given and not as refused. Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. S. 763.

8. Marking an instruction "not received" instead of "refused" is not reversible error where the instruction is erroneous. Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022.

9. Franklin v. Friehofer Vienna Baking Co. [N. J. Law] 58 A. 82.

10. May be modified by the court. Gulf, etc., R. Co. v. Davis [Tex. Civ. App.] 80 S. W. 253. The duty of the court is fully discharged if it embraces all the principles of law in its own language. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1. "Failure to observe" changed to failure to "use due care." Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428; Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

11. Bond v. Bean, 72 N. H. 444, 57 A. 340; Kasjeta v. Nashua Mfg. Co. [N. H.] 58 A. 874; Elwell v. Roper, 72 N. H. 585, 58 A. 507. Requests for special charges of negative propositions are satisfied by clear and correct statements in the general charge of the material and necessary facts which must be established by the plaintiff in order to re-

the charge. The practice of taking all the requests and formulating a general charge properly covering the case is to be commended.[12] The court may modify requests by striking out erroneous propositions,[13] but is not required to do so.[14] Where a provision in a request is erroneous, the entire instruction may be refused.[15] An inadvertent clerical error, however, should be corrected.[16]

Repetition.—A requested instruction substantially covered by the charge already given may be refused,[17] even though it contains correct propositions applica-

cover. Cleveland, etc., R. Co. v. Tehan, 4 Ohio C. C. (N. S.) 145.

12. Instructions are thereby made more clear and unnecessary repetition avoided. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1.

13. Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28.

14. St. Louis S. W. R. Co. v. Kennemore [Tex. Civ. App.] 81 S. W. 802; Werner & Co. v. Calhoun [W. Va.] 46 S. E. 1024.

15. International, etc., R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189. Partly inapplicable (City of Rome v. Sudduth [Ga.] 49 S. E. 300). Objectionable in form and substance (Stern v. Leopold Simons & Co. [Conn.] 58 A. 696), also contained matter that was misleading, inaccurate or argumentative (Chicago, etc., R. Co. v. Burridge, 211 Ill. 9, 71 N. E. 838). Not supported by the evidence. Dolan v. Meehan [Tex. Civ. App.] 80 S. W. 99. Court is not required to reduce it to accuracy and give the unobjectionable part. International, etc., R. Co. v. Haddox [Tex. Civ. App.] 81 S. W. 1036; Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906; Chicago G. W. R. Co. v. Roddy [C. C. A.] 131 F. 712. A request which does not state the law correctly may be refused. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018.

16. Term "plaintiff" used instead of "defendant." Haney v. Mann [Tex. Civ. App.] 81 S. W. 66.

17. Anglin v. Thomas [Ala.] 37 So. 784; Tennessee, etc., R. Co. v. Garrett [Ala.] 37 So. 355; Jones-Pope Produce Co. v. Breedlove [Ark.] 83 S. W. 924; Miller v. Minturn [Ark.] 83 S. W. 918. A request which was merely cumulative. In re McKenna's Estate [Cal.] 77 P. 461; Pennsylvania R. Co. v. Palmer [C. C. A.] 127 F. 956. Not error to refuse to repeat it in the words of counsel. Chicago G. W. R. Co. v. Roddy [C. C. A.] 131 F. 712; Maultsby v. Boulware [Fla.] 36 So. 713; Macon R. & Light Co. v. Barnes [Ga.] 49 S. E. 282. If a charge is correct, failure to instruct as to another pertinent legal proposition in the same connection is not error. Macon R. & Light Co. v. Barnes [Ga.] 49 S. E. 282; Atlanta R. & Power Co. v. Johnson [Ga.] 48 S. E. 389; Atlantic & B. R. Co. v. Rabinowitz [Ga.] 48 S. E. 326; City of Columbus v. Anglin [Ga.] 48 S. E. 318; Belken v. Iowa Falls, 122 Iowa, 430, 98 N. W. 296; First Nat. Bank v. Anderson [Ind. T.] 82 S. W. 693; Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899.

Illinois: Chicago, etc., R. Co. v. Stewart, 104 Ill. App. 37. No error can be predicated on such refusal. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789; Illinois Cent. R. Co. v. Keegan, 210 Ill. 150, 71 N. E. 321; The Fair v. Hoffmann, 209 Ill. 330, 70 N. E. 622; Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328; Shickle-Harrison & H. Iron Co. v. Beck [Ill.] 72 N. E. 423; Kehl v. Abram, 210 Ill. 218, 71 N. E. 347; Chicago City R. Co. v. Matthieson [Ill.] 72 N. E. 443; City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338; Chicago Union Traction Co. v. Reuter, 210 Ill. 279, 71 N. E. 323; Indiana, etc., R. Co. v. Otstot [Ill.] 72 N. E. 387; Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Chicago City R. Co. v. Biederman, 102 Ill. App. 617; Chicago City R. Co. v. Lannon [Ill.] 72 N. E. 585; Chicago, etc., R. Co. v. Strathmann [Ill.] 72 N. E. 800; Chicago City R. Co. v. Leach, 208 Ill. 198, 70 N. E. 222.

Indiana: Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032; Espenlaub v. Ellis [Ind. App.] 72 N. E. 527; Barricklow v. Stewart [Ind.] 72 N. E. 128; Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685; Southern R. Co. v. State [Ind. App.] 72 N. E. 174; Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239; Indianapolis St. R. Co. v. Schonberg [Ind. App.] 71 N. E. 237; Vincent v. Willis [Ky.] 82 S. W. 583. Instruction that burden is on plaintiff to show that an instrument was signed by defendant in the form in which it appeared is properly refused where the court has already charged that if the instrument had been materially altered defendant was not liable. Graham v. Middleby, 185 Mass. 349, 70 N. E. 416.

Missouri: Maguire v. St. Louis Transit Co., 103 Mo. App. 459, 78 S. W. 838. As to contributory negligence in boarding moving car. Kaiser v. St. Louis Transit Co. [Mo. App.] 84 S. W. 199; Stoble v. Earp [Mo. App.] 83 S. W. 1097; Beatty v. Clarkson [Mo. App.] 83 S. W. 1033; Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506; Weller v. Wagner [Mo.] 79 S. W. 941; Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126. Requests covered by instructions given for other party. York v. Farmers' Bank [Mo. App.] 79 S. W. 968; Cameron v. Roth Tool Co. [Mo. App.] 83 S. W. 279; Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138; Montgomery v. Missouri Pac. R. Co. [Mo.] 79 S. W. 930.

Montana: Gallick v. Bordeaux [Mont.] 78 P. 533; Paxton v. Woodward [Mont.] 78 P. 215; City of Minden v. Vedene [Neb.] 101 N. W. 330.

New York: Keating v. Mott, 92 App. Div. 156, 86 N. Y. S. 1041; Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272, 65 N. E. 1108. Where the court has fully charged the law, it is not bound to reiterate the instruction in another form. Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. S. 763. Where instructions have been given covering the law of the case, instructions tending to confuse the jury are properly refused. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 N. Y. S. 1018; Lexington Grocery Co. v. Southern R. Co.

ble to the case,[18] as it would have the effect of giving undue prominence to the issues to which it relates,[19] and would tend to mislead and confuse the jury.[20] The court is not required to charge the converse of a proposition.[21] An instruction may be refused when a more favorable charge has been given,[22] especially where the requested instruction is faulty.[23]

§ 4. *Assumption of facts.*[24]—The court may not assume the existence or nonexistence of disputed facts,[25] no matter how slight the evidence;[26] but uncontro-

[N. C.] 48 S. E. 801; Stewart v. North Carolina R. Co. [N. C.] 48 S. E. 793; Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226; Strickler v. Gitchel [Okl.] 78 P. 94; Anderson v. Oregon R. Co. [Or.] 77 P. 119; Barnes v. Leidigh [Or.] 79 P. 51; Reynolds v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 393; Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374.

Texas: Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852; Houston, etc., R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902; Missouri, etc., R. Co. v. Keahey [Tex. Civ. App.] 83 S. W. 1102; Texas & P. R. Co. v. Murtishaw [Tex. Civ. App.] 78 S. W. 953; Central Tex., etc., R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351; Texas, etc., R. Co. v. Kelly [Tex.] 80 S. W. 79. Where the court charged that the burden was on plaintiff to make out his case by a preponderance of evidence, it was proper to refuse a request that the burden was on him to prove his case by the evidence. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856; Texas, etc., R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073. A charge that it is the duty of a railroad to use ordinary care to prevent injury to persons on the track applies to all persons. It need not be repeated in an instruction defining trespassers. Smith v. International, etc., R. Co. [Tex. Civ. App.] 78 S. W. 556; St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778; Missouri, etc., R. Co. v. Matherly [Tex. Civ. App.] 81 S. W. 589; International & G. N. R. Co. v. Divara [Tex. Civ. App.] 81 S. W. 337; Kingston v. Austin Oil Mfg. Co. [Tex. Civ. App.] 81 S. W. 813; Ft. Worth, etc., R. Co. v. Waggoner Nat. Bank [Tex. Civ. App.] 81 S. W. 1050; Missouri, etc., R. Co. v. Purdy [Tex. Civ. App.] 83 S. W. 37; Gulf, etc., R. Co. v. Dunman [Tex. Civ. App.] 81 S. W. 789; Gulf, etc., R. Co. v. Davis [Tex. Civ. App.] 80 S. W. 253; Houston, etc., R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557; Galveston, etc., R. Co. v. Levy [Tex. Civ. App.] 79 S. W. 879; Missouri, etc., R. Co. v. Calkins [Tex. Civ. App.] 79 S. W. 852; St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774; Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226. Where the jury has been instructed that plaintiff must establish his case by a preponderance of evidence, an instruction that if the evidence is equally balanced to find for defendant is properly refused. International & G. N. R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063; Galloway v. Floyd [Tex. Civ. App.] 81 S. W. 805; Ft. Worth & D. C. R. Co. v. Alexander [Tex. Civ. App.] 81 S. W. 1015; International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991; Standard Mfg. Co. v. Etter [Mo. App.] 80 S. W. 968; San Antonio, etc., R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045; Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362; Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029; Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020; International & G. N. R. Co. v. Walters [Tex. Civ. App.] 80 S. W. 668; Chicago, etc., R. Co. v. Barrett [Tex. Civ. App.] 80 S. W. 660; Missouri, etc., R. Co. v. Stinson [Tex. Civ. App.] 78 S. W. 986; Wilkinson v. Anderson-Taylor Co. [Utah] 79 P. 46; Havens v. Rhode Island Suburban R. Co. [R. I.] 58 A. 247.

18. Erwin v. Daniels [Tex. Civ. App.] 79 S. W. 61; Stone v. Lewiston, etc., R. Co. [Me.] 59 A. 56.

19. Special requests. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71; Reynolds v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 393.

20. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853. Where instructions given cover the whole case, requests of minor importance may be refused. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089.

21. Nagle v. Hake [Wis.] 101 N. W. 409.

22. Conant v. Jones [Ga.] 48 S. E. 234; Nashville, etc., R. Co. v. Heikens [Tenn.] 79 S. W. 1038.

23. Conant v. Jones [Ga.] 48 S. E. 234.

24. See 2 Curr. L. 462.

25. Southern Pine Co. v. Powell [Fla.] 37 So. 570. Under statute declaring the jury to be the judges of the value of evidence. Gallick v. Bordeaux [Mont.] 78 P. 583. No error to refuse an instruction assuming a fact not proven. Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428. Request properly refused as assuming a fact which was shown by the evidence not to exist. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. Assuming as a fact that which under the evidence should have been submitted to the jury. Rabbermann v. Carroll, 207 Ill. 253, 69 N. E. 759. A trial court is not bound to assume that there was no evidence of negligence on the part of a street car conductor toward a passenger attempting to alight where the whole case as to the alleged negligence of the company was properly submitted. City & S. R. Co. v. Svedborg, 194 U. S. 201, 48 Law. Ed. 935. Assuming a fact pleaded, as proved, there being no evidence or legal admission thereof. Harrison v. Western Union Tel. Co. [N. C.] 48 S. E. 772.

Instruction erroneous as assuming that damage done to one person's property by reason of the closing of a highway was common to the community at large. Missouri, etc., R. Co. v. Calkins [Tex. Civ. App.] 79 S. W. 852. That **damages** had been sustained. Illinois, etc., R. Co. v. Easterbrook, 211 Ill. 624, 71 N. E. 1116. That a fact in issue was an element of damages. Northern Tex. Traction Co. v. Peterman [Tex. Civ. App.] 80 S. W. 535. What is the correct measure of damages for wrongful death. Such measure not being fixed by law. Houston & T. C.

verted facts,[27] facts established by such evidence as would admit of but one find-

R. Co. v. Turner [Tex. Civ. App.] 78 S. W. 712. The existence of **negligence or contributory negligence.** Montgomery St. R. Co. v. Shanks [Ala.] 37 So. 166. That failure to sound statutory signals before reaching a crossing is not negligence even where a person injured knew of the approach of the train. International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. That failure to discover a defect in the cylinder of an air jack is negligence. Chicago, etc., R. Co. v. Harton [Tex. Civ. App.] 81 S. W. 1236. That ice on a sidewalk resulting from certain causes was negligence. Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738. That a switchman's failure to keep a lookout was the proximate cause of his injury. Peoples v. North Carolina R. Co. [N. C.] 49 S. E. 87. Request assuming that one attempting to cross a railroad track without stopping to look and listen is negligent per se properly refused. Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106. That a certain act constitutes negligence. Bauer v. Dubuque [Iowa] 98 N. W. 355. Such acts not amounting to negligence per se. Alabama Midland R. Co. v. Guilford, 119 Ga. 623, 46 S. E. 655. The court may, however, charge what would be **negligence per se.** Violation of speed ordinance. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374.

Miscellaneous facts: Existence of relation of principal and agent. First Nat. Bank v. Bower [Neb.] 98 N. W. 834. Assuming evidence not in case. Pim v. St. Louis Transit Co. [Mo. App.] 84 S. W. 155. That a person injured, purposely allowed his finger to come in contact with the machinery. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. That there was an agreement to pay a broker commissions. Green v. Southern States Lumber Co. [Ala.] 37 So. 670. As to terms on which contract in suit was ambiguous. Locke v. Lyon Medicine Co. [Ky.] 84 S. W. 307. That it is the duty of an insured person to do a specified thing in case of danger from fire. Insurance Co. v. Leader [Ga.] 48 S. E. 972. That warnings of approaching train, given, were sufficient. Central Tex., etc., R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351. That a brakeman had authority to create the relation of passenger by taking fare from a person and allowing him to ride on a coal car. Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525. That a certain structure is a scaffold. Conger v. Wiggins, 208 Pa. 122, 57 A. 341. That a certain machine is dangerous. Vollman Buggy Body Co. v. Spry [Ky.] 80 S. W. 1092. Seeming to imply a material fact prejudicial to a party. Roach v. Johnson, 71 Ark. 344, 74 S. W. 299. That a passenger alighted from a car, might have been taken by the jury as an intimation that he was not thrown from the car. Birmingham R. Light & Power Co. v. Lindsey [Ala.] 37 So. 289. That an assignor of a claim could settle it after he assigned it. Ivy Coal & Coke Co. v. Long, 139 Ala. 635, 36 So. 722. That **rules and regulations** of a railroad company governing the operation of trains had been published prior to the date of an injury. Chicago & A. R. R. Co. v. O'Leary, 102 Ill. App. 665. That the **burden of proof** is upon the defendant in a will contest to show affirmatively the testamentary capacity of the testator. As to whether testator acted of his own free will. West v. Knoppenberger, 4 Ohio C. C. (N. S.) 305. That a motorman knew that there was a passenger on the back platform of his car. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219. That a sidewalk was defective. Baker v. Independence [Mo. App.] 81 S. W. 501. Where evidence is conflicting that a certain state of facts exist "from the undisputed evidence." Richardson v. Dybedahl [S. D.] 98 N. W. 164.

Forms: "If you believe the deed was accepted as a credit on the debt" assumes that there was a debt. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362. That release by president of corporation would be effective held error as assuming his power. Stripling v. Maguire [Mo. App.] 84 S. W. 164. That "it was not necessary that such agreement or contract be in writing" assumes that there was a contract. Briseno v. International, etc., R. Co. [Tex. Civ. App.] 81 S. W. 579. In an action by one injured by alighting from a wagon because of fright from a passing train, an instruction to find for plaintiff if she undertook to alight to save herself "from danger" of being thrown from the wagon assumed that there was danger. Texas Midland R. Co. v. Booth [Tex. Civ. App.] 80 S. W. 121.

Held not to assume facts: Negligence. Missouri, etc., R. Co. v. Stinson [Tex. Civ. App.] 78 S. W. 986. Machine to be in a defective condition. Fries v. Bettendorf Axle Co. [Iowa] 101 N. W. 859; Chicago Screw Co. v. Weiss, 203 Ill. 636, 68 N. E. 54. Sidewalk to be defective. Considine v. Dubuque [Iowa] 102 N. W. 102. That a foreman failed to inform a workman as to the proper method of handling machinery. Missouri, etc., R. Co. v. Stinson [Tex. Civ. App.] 78 S. W. 986. Instruction reciting elements of damages held not to assume that physical suffering had been endured by reason of injury. Longan v. Weltmer [Mo.] 79 S. W. 655. A fact which would mislead the jury. Indianapolis St. R. Co. v. Schomberg [Ind. App.] 71 N. E. 237.

Forms: That before jury can find for plaintiff they must find certain specified facts does not assume the truth of such facts. Sheridan v. Forsee [Mo. App.] 81 S. W. 494. That "if profane language was used," etc., does not assume that such language was used. St. Louis S. W. R. Co. v. Wright [Tex. Civ. App.] 84 S. W. 270. If the circumstances are such that negligence can be inferred "such as running at a high rate of speed" does not assume that a train was running at a high rate of speed. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025. "If you find that the engineer warned plaintiff by certain signals in time for him to get out of the way, he cannot recover" does not assume that it was defendant's duty to warn him by such signals. International & G. N. R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063. "That plaintiff, if guilty of contributory negligence in using the car as alleged in his petition" did not assume his use of the hand car as alleged. Texas & N. O. R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073. "If the jury believed the train operatives announced the station

ing,[28] facts admitted or assumed by each of the parties,[29] or facts that are necessary inferences or deductions from other facts proved,[30] or from the ordinary conduct of men[31] or business,[32] may be assumed.

§ 5. *Charging with respect to matters of fact or commenting on weight of evidence.*[33]—The force and weight to be given to the testimony of respective witnesses is a question for the jury,[34] and as a general rule trial courts are not permitted to comment on the evidence or express an opinion as to its weight.[35] This

prior to the train's reaching it," stated in connection with other facts held not to assume that it was a material issue; it being an admitted fact. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023. To find for plaintiff "if you believe he was exercising ordinary care for his own safety" does not assume that the plaintiff was not negligent. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. Charge to find for defendant if plaintiff was guilty of contributory negligence in using a hand car "at time, place and under conditions alleged by him in his petition" was not objectionable as assuming facts alleged where in other parts of the charge the jury were carefully instructed as to contributory negligence. Texas & N. O. R. Co. v. Kelly [Tex.] 80 S. W. 79.

26. Court may refuse to direct a verdict where the effect would be to disregard the testimony of one of the parties. Hodges v. Pike [Md.] 59 A. 178. That an employe was a vice principal. Such fact depended on evidence introduced by one party. It was not, however, contradicted. Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138.

27. Chicago Screw Co. v. Welss, 203 Ill. 536, 68 N. E. 54; Terre Haute Elec. Co. v. Kiely [Ind. App.] 72 N. E. 658; Abbitt v. St. Louis Transit Co. [Mo. App.] 81 S. W. 484; El Paso & N. W. R. Co. v. McComus [Tex. Civ. App.] 81 S. W. 760. Testimony as to the execution of a will and as to its being wholly in writing of testatrix was undisputed. Henning v. Stevenson [Ky.] 80 S. W. 1135. That one who boarded a car with the intention of paying his fare is a passenger. Dallas Rapid Transit R. Co. v. Payne [Tex. Civ. App.] 78 S. W. 1085. In action for injuries that use of arm was totally destroyed. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038.

28. Phelps, Dodge & Co. v. Miller [Tex. Civ. App.] 83 S. W. 218.

29. Admitted in the pleadings. Markey v. Louisiana, etc., R. Co. [Mo.] 84 S. W. 61 An agreement allowing grain to be mixed and used where testimony shows that owner and agent had made statements consistent therewith. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789. That a plaintiff suffered the injuries complained of in his declaration. North Chicago St. R. R. Co. v. Rodert, 105 Ill. App. 314.

30. Negligence in failing to stop a car where there was uncontradicted evidence that signal to stop was given; that the speed was lessened and then began to get faster. Dallas Rapid Transit R. Co. v. Payne [Tex. Civ. App.] 78 S. W. 1085. That a person neither an officer nor employe was on the premises by invitation. Cameron v. Roth Tool Co. [Mo. App.] 83 S. W. 279. That a servant had been discharged. Johnson v. Crookston Lumber Co. [Minn.] 100 N. W. 225.

31. Where several passengers were standing it was not error to assume that a passenger, injured by being thrown down, was obliged to stand. Halverson v. Seattle Elec. Co. [Wash.] 77 P. 1058.

32. It is proper to base an instruction upon the assumption that a motorman operates his car in response to signals from the conductor. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219.

33. See 2 Curr. L. 463. See Blashfield, Instructions to Juries, § 38 et seq.

34. Indiana, etc., R. Co. v. Otstot [Ill.] 72 N. E. 387.

35. Charge on the facts is prohibited by Rev. St. 1892, § 1088. Southern Pine Co. v. Powell [Fla.] 37 So. 570; Galloway v. Floyd [Tex. Civ. App.] 81 S. W. 805; Carr v. American Locomotive Co. [R. I.] 58 A. 678; King v. Ann Arbor R. Co. Mich.] 100 N. W. 783. Instruction as to weight of certain evidence properly refused. Georgia, etc., R. Co. v. Wisenbacker [Ga.] 48 S. E. 146. Reversible error for the court to comment on the strength or probative force of evidence. Kleutsch v. Security Mut. Life Ins. Co. [Neb.] 100 N. W. 139.

Instructions held to violate the rule: Intimation of opinion by the court upon the main issue of fact in the case (Insurance Co. v. Leader [Ga.] 48 S. E. 972) leads the jury to believe that the court is of the opinion that a fire was set in a certain way (Franey v. Illinois Cent. R. Co., 104 Ill. App. 499). That a certain fact had been established. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366. A charge "sane men who are innocent as a rule do not make confession of crime" is erroneous because capable of more than one meaning and invades the province of the jury, being an expression of opinion as to the conduct and actions of men. Knapp v. State, 4 Ohio C. C. (N. S.) 184. Where the evidence is sufficient to go to the jury, instruction that it is not strong, clear and convincing. Jones v. Warren, 134 N. C. 390, 46 S. E. 740. That a motorman of a street car should do some particular thing in case of emergency. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374. Instruction calculated to cause the jury to ignore a material fact. International & G. N. R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063. That if the latch on a coal bucket was not in a safe condition, and on account of such unsafe fastening plaintiff was injured, he should recover. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787. Frequent repetition of a phrase calling attention to a particular circumstance. Gulf, etc., R. Co. v. Condra [Tex. Civ. App.] 82 S. W. 528. Assuming that a certain act constitutes negligence. Chicago, etc., R. Co. v. Harton [Tex. Civ. App.] 81 S. W. 1236. As to what would constitute a delivery of cattle to a carrier. Ft. Worth, etc., R. Co. v.

rule may be violated by incorporating the testimony into the charge,[86] but not by

Waggoner Nat. Bank [Tex. Civ. App.] 81 S. W. 1050. That there was no evidence tending to prove what motive actuated a section foreman to attempt to remove a push car from a track to prevent its being struck by a passenger train. International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. "The evidence must show" with a reasonable degree of certainty. St. Louis S. W. R. Co. v. Burke [Tex. Civ. App.] 81 S. W. 774. "That the warranted capacity of a motor was 75 horse power." Capacity of motor was in dispute. Wofford v. Buchel Power & Irrigation Co. [Tex. Civ. App.] 80 S. W. 1078. Directing the jury to consider a portion only of the facts in evidence. Mears v. Gage [Mo. App.] 80 S. W. 712. In an action for unlawful death, an instruction that in determining damages, "industry of deccased, capacity, ability, and disposition to continue to earn money and contribute to plaintiff's support." Gulf, etc., R. Co. v. Phillips [Tex. Civ. App.] 80 S. W. 107. "If you believe plaintiff got a cinder in his eye while riding on defendant's car, and that at the time he had his face near to and turned to the open window and that a person of ordinary care possessed of information of the danger he was subjected to from flying cinders would not have remained in such position you will find for defendant." Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. "I want to tell the jury that another court has passed on the facts in this case and rendered judgment for plaintiff." Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072. Authorizing recovery if a master with knowledge that a servant was inexperienced sent him to work around dangerous machinery, without warning. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. To find for plaintiff if they find the facts alleged, unless, as a matter of law, the facts alleged establish his case. Id. That the testimony of two witnesses as to the general reputation for truth and veracity is insufficient to impeach. Schuch v. McGuire [Colo. App.] 77 P. 1090. Stating the amount of damages sustained by loss of employment according to his calculation. Heller v. Donellan, 90 N. Y. S. 352. That a father and son in dealings with each other are upon the same footing as strangers. Merrill v. Merrill, 105 Ill. App. 5. That a purchaser of potatoes would not in the exercise of ordinary care be required to examine the entire mass in a car or look at them in other than an ordinary way in order to determine whether they corresponded to the grade ordered. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. In an action for damages because of delay of a train where there was evidence that it remained at the station some hours and that the conductor refused to give any information as to when it would start or the cause of delay, an instruction that defendant was not liable for punitive damages was properly refused as a charge on the evidence. Miller v. Southern R. Co. [S. C.] 48 S. E. 99. That certain facts are shown by undisputed evidence. Galveston, etc., R. Co. v. Manns [Tex. Civ. App.] 84 S. W. 254. That a certain state of facts constitutes negligence. City of Rome v. Sudduth [Ga.] 49 S. E. 300. That "sworn officers of the law" are entitled to better credit than plaintiff. Durst v. Ernst, 91 N. Y. S. 13. Instruction to answer an issue of contributory negligence "No" is bad in form. Harmless where there is an entire absence of negligence. Walker v. Carolina Cent. R. Co., 135 N. C. 738, 47 S. E. 675.

Held not to violate the rule: Reciting facts and declaring what would constitute negligence. St. Louis S. W. R. Co. v. Kennemore [Tex. Civ. App.] 81 S. W. 802. To enumerate act of negligence charged in the petition and instruct to find for plaintiff if they found defendant guilty of any negligence alleged. Missouri, etc., R. Co. v. Purdy [Tex. Civ. App.] 83 S. W. 37. That the professional standing and experience of expert witnesses may be considered in weighing their testimony. Cosgrove v. Burton [Mo. App.] 78 S. W. 667. Reciting certain evidence is not prejudicial to the party who introduced it. Red River, etc., R. Co. v. Hughes [Tex. Civ. App.] 81 S. W. 1135. **Submitting a charge corrected** by drawing a pencil through some of the words. San Antonio & A. P. R. Co. v. Votaw [Tex. Civ. App.] 81 S. W. 130. Submitting an issue as to whether car operatives knew that the rapid speed at which car was being propelled was frightening a horse and after this did not exercise ordinary care to stop the car. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054. In an action for injuries an instruction that if plaintiff exercised ordinary care in attending to his injuries, defendant was liable, although if he had pursued some other course the injury would not have resulted so seriously. Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. As to weight of admission held not misleading. Sullivan v. Mauston Milling Co. [Wis.] 101 N. W. 679. That a brakeman can assume that a hand-hold on a caboose is in a safe condition where there is proof that the caboose was old and in a dilapidated condition of which he had notice. Missouri, etc., R. Co. v. Hoskins [Tex. Civ. App.] 79 S. W. 369. Under Code § 413, prohibiting a judge from expressing an opinion as to the weight of evidence, he may charge that an oral contract to bequeath certain property in return for personal services must be shown by strong, clear, and convincing proof. Earnhardt v. Clement [N. C.] 49 S. E. 49. "You have the testimony as to that." Pickett v. Southern R. Co. [S. C.] 48 S. E. 466. In an action for the price of goods, an instruction that testimony shows that the goods were sold to the secretary of a firm to which they were delivered was not prejudicial where it was added that whether the secretary was authorized to buy the goods was a question for the jury. That he bought the goods was admitted. Turner v. Lyles [S. C.] 48 S. E. 301. Prefacing a requested instruction not previously given by "I did not cover that, gentlemen, in so many words." Wrightsville & T. R. Co. v. Kelley, 119 Ga. 883, 47 S. E. 366. That a servant's work done in the presence of a foreman is equivalent to an assurance by the master that he may proceed to do the work and is not bound to search for danger. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. Assuming uncontroverted facts. El Paso, etc., R.

reciting admitted facts[37] or facts as to which there is no reasonable ground for difference of opinion;[38] and when the introduction of evidence to prove the existence of evidentiary facts is necessary, the court may instruct as to the effect of the establishment of such fact.[39] In the federal courts it is not reversible error for the judge to express his own opinion of the facts if the jury are given to understand that they are not bound by such opinion.[40]

Conflicting evidence.—The respective value of positive and negative testimony should be called to the attention of the jury.[41] In Texas it is error to instruct the jury to reconcile as far as possible any conflict in the evidence.[42]

§ 6. *Form of instruction.*[43]—Instructions assuming to cover the entire case should not omit material elements.[44] They should be so framed as to indicate the burden of proof without expressly referring to presumptions of law.[45] They should be fair and not tend to excite prejudice,[46] and when dealing with conflicting evidence they should use the words "from the evidence" after "if your believe,"[47] and should not conclude "plaintiff is not entitled to recover" under a system in which the jury responds to specific issues.[48] An act made the subject of several counts may be submitted as a single proposition.[49]

Co. v. McComas [Tex. Civ. App.] 81 S. W. 760. Where the facts are undisputed and there could, in reason, be but one inference drawn from them, the court may charge that they constitute negligence. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245. Advising the jury as to the elements they are to consider in determining the preponderance of evidence and after enumerating those elements directing that from all the evidence they are to determine on which side is the preponderance. Miller v. John, 208 Ill. 173, 70 N. E. 27. That jury in assessing damages should take into account physical and mental pain and consider the permanent or temporary character of the injury. Wells v. Missouri-Edison Elec. Co. [Mo. App.] 84 S. W. 204. A charge on a hypothetical state of facts does not violate the rule. Sentell v. Southern R. Co. [S. C.] 49 S. E. 215. That plaintiff "must recover in this case by the preponderance of the evidence" states the burden of proof and does not direct a verdict. Gray v. Moore [Tex. Civ. App.] 84 S. W. 293. Stating the reasons why the plaintiff withdrew an issue. Lownsdale v. Gray's Harbor Boom Co. [Wash.] 78 P. 904.

36. Const. 1895, art. 5, § 26, providing that the judge shall not charge with respect to matters of fact. Ballentine v. Hammond [S. C.] 46 S. E. 1000. Reciting the evidence. Missouri, etc., R. Co. v. Stinson [Tex. Civ. App.] 78 S. W. 986.

37. Where applicant has admitted such facts he cannot complain. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53; Turner v. Lyles [S. C.] 48 S. E. 301. Constitutional inhibition against commenting on the facts refers only to disputed facts. Lownsdale v. Gray's Harbor Boom Co. [Wash.] 78 P. 904.

38. That a shock to the nervous system might be the result of a blow. Davis v. Collins [S. C.] 48 S. E. 469. Under a constitutional provision that judges are not allowed to state the testimony to the jury, the statement must be of a fact in issue and there must be reasonable ground for supposing that the jury may have been influenced in a manner prejudicial to the rights of a party. Turner v. Lyles [S. C.] 48 S. E. 301.

39. City of Guthrie v. Finch, 13 Okl. 496, 75 P. 288.

40. Nome Beach Lighterage & Transp. Co. v. Munich Assur. Co., 123 F. 820. Where the decided weight of evidence on an issue is in favor of one party. Butler v. Barret, 130 F. 944. "For myself, I do not believe for a minute that they did any such thing, but that is a question of fact for you to determine and not me." Sebeck v. Plattdeutsche Volksfest Verein [C. C. A.] 124 F. 11. The judge may in supplementing his charge express his opinion to the jury on the evidence, if necessary to avert a probable mistrial of a case after several prior new trials. Fireman's Fund Ins. Co. v. Hoffman, 123 F. 408.

41. Trainmen testified that whistle was sounded. Those within hearing testified that they did not hear it. St. Louis, etc., R. Co. v. Brock [Kan.] 77 P. 86.

42. Williamson v. Smith & Co. [Tex. Civ. App.] 79 S. W. 51.

43. See 2 Curr. L. 464.

44. Element of actual knowledge in assumed risk. Southern I. R. Co. v. Moore [Ind. App.] 72 N. E. 479. Excludes from the consideration of the jury certain defenses pleaded. Drumm-Flato Commission Co. v. Gerlach Bank [Mo. App.] 81 S. W. 503.

45. Henning v. Stephenson [Ky.] 80 S. W. 1135. In instructing that a state of facts once shown to exist is presumed to continue until the contrary is shown, the court should inform the jury that this is a presumption of fact only and may be rebutted by circumstantial as well as direct evidence. Atchison, etc., R. Co. v. Lloyd [Kan.] 75 P. 478.

46. In condemnation proceedings, calling attention to the fact that land was taken against the owner's will. Illinois, etc., R. Co. v. Easterbrook, 211 Ill. 624, 71 N. E. 1116.

47. Mansfield v. Morgan [Ala.] 37 So. 393. An instruction which does not contain the element of a finding "from the evidence" is vicious. Staninger v. Tabor, 103 Ill. App. 330.

48. Earnhardt v. Clement [N. C.] 49 S. E. 49; Satterthwaite v. Goodyear [N. C.] 49 S. E. 205.

Verbal inaccuracies and inelegancies[50] in the charge do not constitute ground for reversal unless the jury was misled.[51]

Instruction should be certain.[52]—Instructions should be clear, concise, and plain so as to be readily understood,[53] especially where the evidence is conflicting,[54]

49. Allegations of negligence in different counts. International, etc., R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063. Instruction that the question of negligence defining it, is one of fact, is proper. Economy Light & Power Co. v. Hiller, 211 Ill. 568, 71 N. E. 1096.

50. See 2 Curr. L. 465.

51. Strebin v. Lavengood [Ind.] 71 N. E. 494.

Held harmless: Use of "its" in designating the preponderance of evidence by which a case must be proved. Indianapolis St. R. Co. v. Schomberg [Ind. App.] 71 N. E. 237. "Properly" instead of "improperly." Bussell v. Ft. Dodge [Iowa] 101 N. W. 1126. Use of disjunctive "or" instead of charging on the conjunctive. Robert Portner Brew. Co. v. Cooper, 120 Ga. 20, 47 S. E. 631. Qualifying the rule that a party must prove his case by a preponderance of evidence by adding that "the degree of preponderance is immaterial." City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338. Charge as to negligence though not happily worded held not ground for a new trial. Atlanta R. & Power Co. v. Johnson [Ga.] 48 S. E. 389. "Testimony" instead of "evidence." Russell v. Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528. "Adverse" and "hostile" used together. Weller v. Wagner [Mo.] 79 S. W. 941. Term "constructive notice" held not misleading. Definition had been given. Texas Southern R. Co. v. Long [Tex. Civ. App.] 80 S. W. 114. Use of the word "disease" instead of "malaria" in an action for death caused by maintaining a cesspool. Godwin v. Atlantic Coast Line R. Co. [Ga.] 48 S. E. 139. "Immediate and proximate" cause was not error; it being apparent that "immediate" did not mean "speedy" but was used in contradistinction to "remote." Id. "Plaintiff" for "defendant." Bowick v. American Pipe Mfg. Co. [S. C.] 48 S. E. 276. "Plaintiff" instead of "plaintiff's intestate." Blackshear v. Dekle [Ga.] 48 S. E. 311.

Inaccurate: "Reasonably safe condition" should be used instead of "good condition." Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787. "Slightest neglect or negligence" should be avoided. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. "If it appears from the evidence" without the qualification "by a preponderance." Richardson v. Dybedahl [S. D.] 98 N. W. 164. To believe the theory of one side or the other "right through" where the jury might have believed plaintiff as to the cause of the accident and disbelieved him as to the extent of his injuries. Butler v. Detroit, etc., R. Co. [Mich.] 101 N. W. 232. "Competent" instead of "credible" in charging that if a witness was disbelieved as to any material fact his entire testimony might be disregarded except in so far as corroborated by other "competent" evidence. Weston v. Teufel [Ill.] 72 N. E. 908.

Held not inaccurate: "Prudent man" is synonymous with "person of ordinary prudence." San Antonio & A. P. R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045. "Proper care" does not impose too high a degree where the care a carrier is bound to exercise toward a passenger has been defined. Missouri, etc., R. Co. v. Flood [Tex. Civ. App.] 79 S. W. 1106. Instruction to find for a "round sum" does not require a verdict for a substantial amount. Hunting & Co. v. Quarterman, 120 Ga. 344, 47 S. E. 928. Objection that the court used "mental capacity" instead of "sufficient strength of mind and memory" held not well founded. Will contest. Barricklow v. Stewart [Ind.] 72 N. E. 128. "Impression" is equivalent to "mistake" in an action for reformation of a deed for mutual mistake. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362. That it is the duty of a master to "securely fasten" and maintain an appliance in a "safe" condition rendered harmless by a subsequent instruction that absolute security or safety was not required. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 82 S. W. 343. That common carriers are not "absolutely" insurers of the safety of passengers was cured by an instruction accurately defining the degree of care required. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884. The inadvertent stating of an issuable fact affirmatively is not ground for reversal where the issues have been properly submitted. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4.

52. See 2 Curr. L. 465.

53. Giving confusing and misleading instruction is error. Vocke v. Chicago, 208 Ill. 192, 70 N. E. 325; Smith v. Lehigh Val. R. Co., 94 App. Div. 125, 87 N. Y. S. 1035. "If you believe the evidence you should find for plaintiff" should not be given where the evidence is conflicting. Southern R. Co. v. Bunnell [Ala.] 36 So. 380. The jury should be made to understand what constitutes performance of a contract when such is one of the issues they are to determine. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356. An instruction that the jury "shall" consider certain facts and if found "should" render such a verdict is proper. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571. Where remote contributory negligence must be considered in mitigation of damages, the jury should not be instructed that they may consider it. They should be charged that it is their duty to do so. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374. Instruction stating the duties of the operatives of a street car and a teamster should state the legal consequences of a neglect of such duties. Kimble v. St. Louis & S. R. Co. [Mo. App.] 82 S. W. 1096. Error to instruct to consider facts attempted to be proved. Chicago, etc., R. Co. v. Wicker [Ind. App.] 72 N. E. 614. Instruction that street car must give warning on approaching crossing is not defective for failing to state what warning should be given. Story v. St. Louis Transit Co. [Mo. App.] 83 S. W. 992. Instruction setting forth a clear statement of the nature of the case and the issues is not objectionable. Paxton v. Woodward [Mont.] 78 P. 215. The jury should not be instructed to

or slight or doubtful,[55] or where the case is a very close one upon the facts.[56]

consider a fact on a wrong theory. Griffin v. Atlantic Coast Line R. Co. [N. C.] 49 S. E. 212. That a porter invited a passenger to alight from a moving train. The train was standing. Id.

Held misleading: Instruction as to delivery of cattle in satisfaction of a mortgage held misleading. Drumm-Flato Commission Co. v. Gerlach Bank [Mo. App.] 81 S. W. 503. Instructions on "prescription" and "dedication" given together so as to be confusing. Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. Instruction as to measure of damages for obstruction of a stream held not misleading. Neely v. Detroit Sugar Co. [Mich.] 101 N. W. 664. A charge in an action for pollution of a stream that damages to the fish could not be assessed was properly refused. Might lead the jury to assume that the right to fish was not a substantial right. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. Frequent repetition of a phrase calling attention to a particular circumstance held to render the charge ambiguous. Gulf, etc., R. Co. v. Condra [Tex. Civ. App.] 82 S. W. 528. Instruction as to fraud in a sale of merchandise held too indefinite and uncertain. Roach v. Johnson, 71 Ark. 344, 74 S. W. 299. From which the jury might have inferred an erroneous idea of the law. Espenlaub v. Ellis [Ind. App.] 72 N. E. 527. Leaving the jury to consider whatever circumstances they desired to in **assessing damages.** McKinstry v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1108. "Such damages as they 'feel' he is entitled to." Fries v. American Lead Pencil Co., 141 Cal. 610, 75 P. 164. Which allows a recovery of an amount greater than claimed. Miller v. Armstrong, 123 Iowa, 86, 98 N. W. 561. In personal injury case, erroneous as allowing **double damages.** Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 82 S. W. 343. Warranting an inference that double damages might be allowed. Red River, etc., R. Co. v. Hughes [Tex. Civ. App.] 81 S. W. 1235. "You will find for plaintiff in such sum as will be fair compensation for injuries to hearing, etc., and if you find such injuries to be permanent you should find for him in such sum as would be just compensation," etc. International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 81 S. W. 347. "If defendant killed one or both of plaintiff's ponies you will return a verdict for the value of each of the ponies." Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785. Where testimony was conflicting as to the manner in which a collision occurred, an instruction in an action by one injured that the jury might find for him "either on the view you take of his own testimony or on the view you take of the defendant's testimony" is erroneous. No negligence could be inferred from defendant's testimony. Garoskewsky v. North Jersey St. R. Co. [N. J. Law] 58 A. 1090.

Extent to which evidence may be considered: The jury should be instructed that evidence admitted to impeach a witness can only be considered in that connection. South Covington & C. St. R. Co. v. Riegler's Adm'r [Ky.] 82 S. W. 382. Where evidence is admitted for a special purpose the jury should be instructed to consider it for such purpose only. Bell v. Missouri, etc., R. Co. [Tex. Civ. App.] 82 S. W. 1073. An instruction should limit the consideration, interest, and relationship of the witnesses to the weighing of their testimony. Goulding v. Phillips [Iowa] 100 N. W. 516; Westfeldt v. Adams, 135 N. C. 591, 47 S. E. 816. A rule of court that provides that it will not be ground for exception that the judge fails to instruct the nature of impeaching testimony unless special request is made does not apply when such testimony is marshalled with the substantive evidence of the case. Id.

Held not misleading: Authorizing a recovery in malicious prosecution for "mental anguish, pain, and injury to feelings," does not authorize a recovery for physical suffering. Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303. To state the law as to the duty of a master to furnish a "safe place" though the breach of duty alleged related only to appliances. Terre Haute Elec. Co. v. Kiely [Ind. App.] 72 N. E. 658. Where goods of a different quality than called for by a contract were furnished at the special request of a purchaser, an instruction in an action for the price of such goods that the seller was entitled to recover the reasonable value was not misleading. Could have been understood to refer only to the goods furnished at special request. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506. Referring to a motorman held not misleading because not designating the particular motorman intended. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. That one could recover the value of time spent in removing rubbish cast on his premises because of failure of the city to put in culverts could not be understood otherwise than to include labor involved in doing so. Taylor v. Houston, etc., R. Co. [Tex. Civ. App.] 80 S. W. 260. That if the instrument under which plaintiff claimed was intended as a mortgage the jury should so find was not fatally ambiguous for the reason that it was impossible to say whether a special finding was required or whether they should find for plaintiff or defendant. Culver v. Randle [Or.] 78 P. 394. Cautionary instruction as to how oral declarations and admissions should be received held not to have included evidence of oral contracts though mentioned in the instructions. Thompson v. Purdy [Or.] 77 P. 113. "It is for you to determine whether plaintiff (a boy injured on the highway) used such care as boys of his age and discretion usually exercised" did not mislead the jury to believe that age only and not intelligence should be considered. Beaudin v. Bay City [Mich.] 99 N. W. 285. Where two counts of a petition stated the same cause of action in a different form, failure of an instruction to direct on which count there might be a recovery is not error. Maguire v. St. Louis Transit Co., 103 Mo. App. 459, 78 S. W. 838. Not defective as limiting the consideration of contributory negligence to a particular time. Texas & N. O. R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073. Instruction in an action by an engineer for injury sustained in a wreck that if he failed to exercise ordinary care "at the time of the wrecking of his train" he could not recover, does not limit the defense of contributory negligence.

They should specifically call attention to circumstances to which they are referred.[57] A confusing instruction is not ground for new trial if not prejudicial,[58] and an ambiguous[59] or misleading instruction is cured by one correctly stating the law.[60] Where special questions are submitted, the instructions should be confined to an explanation of them and not extend to the law applicable to the ultimate facts.[61] In Kentucky the court may, at the request of a juror, explain the instructions after the submission of the case.[62]

Argumentative instructions are properly refused.[63]

The instructions should be consistent.[64]—Where one instruction is inconsistent with others given, the erroneous one is not cured by the correct one;[65] but in order to require a reversal, the inconsistent paragraphs must leave the jury in doubt as to the law.[66]

§ 7. *Relation of instruction to pleading and evidence.*[67]—The instructions must be confined to the issues made by the pleadings.[68] Requests not based on

Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. Where the only part of crops in question was the landlord's share, an instruction that a sale without reservation carried growing crops was not misleading, nor prejudicial to the tenant. Abbott v. Abbott [Kan.] 75 P. 1040. Instruction not to consider evidence stricken need not identify such evidence. Considine v. Dubuque [Iowa] 102 N. W. 102.

54. Illinois Cent. R. R. Co. v. Smiesni, 104 Ill. App. 194; Gillespie Home Tp. Mut. Fire Ins. Co. v. Prather, 105 Ill. App. 123.

55. Chicago City R. Co. v. Osborne, 105 Ill. App. 462.

56. Chicago, etc., R. Co. v. Appell, 103 Ill. App. 185.

57. "Conduct improper under the instructions herein" was error. No language to which the words could apply. There were, however, many facts relied on not mentioned in the instructions and it might be inferred that these were excluded from consideration. Weston v. Teufel [Ill.] 72 N. E. 908.

58. Freeze v. White, 120 Ga. 446, 47 S. E. 928.

59. Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022, citing other Illinois cases.

60. City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338. A misleading charge is ground for reversal. Southern Pine Co. v. Powell [Fla.] 37 So. 570.

61. Lyon v. Grand Rapids [Wis.] 99 N. W. 311.

62. Civ. Code Prac. § 321. City of Covington v. Bostwick [Ky.] 82 S. W. 569.

63. That the jury could look to a fact, if it be a fact. Lynn v. Bean [Ala.] 37 So. 515. See 2 Curr. L. 466.

64. See 2 Curr. L. 466.

65. Impossible to tell upon which the verdict was based. Harte v. Fraser, 104 Ill. App. 201; Phelps, Dodge & Co. v. Miller [Tex. Civ. App.] 83 S. W. 218; Flannery v. Campbell [Mont.] 75 P. 1109. Inaccurate special charges in conflict with the general charge leave the jury without any proper guide. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 81 S. W. 74.

Held inconsistent: "That uncontradicted evidence shows a certain fact" and "that whether such fact exists is a question for the jury." Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565. "It is not the duty of a railroad company to furnish absolutely safe cars, etc., for its employes to work with" and "It is the duty of the company to furnish reasonably safe appliances and use ordinary care to see that they are kept safe." St. Louis S. W. R. Co. v. Corrigan [Tex. Civ. App.] 81 S. W. 554. In one clause assumes the existence of a contract and in another that there was not. Williamson v. Smith & Co. [Tex. Civ. App.] 79 S. W. 51. Instructions in irreconcilable conflict. Stern v. Westchester Elec. R. Co., 90 N. Y. S. 870. As to measure of damages. Lane v. Calby, 95 App. Div. 11, 88 N. Y. S. 465.

Held not inconsistent: In one place tells the jury to find from the evidence whether a certain person was insolvent and in another place charges that the evidence shows without dispute that he is insolvent. Meyer Bros. Drug Co. v. Durham [Tex. Civ. App.] 79 S. W. 860. That if the floods were unprecedented defendant would not be liable is not inconsistent with "that though they were unprecedented he would be liable if the trestle was defectively constructed and such defect was the cause of the damage. San Antonio & A. P. R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045. Authorizing a recovery "if a third person was defendant's agent or held out by him as such is not in conflict with one directing a verdict for defendant if such person was not his agent. Farmers' Bank of Dearborn v. Fudge [Mo. App.] 82 S. W. 1112. Instruction as to contributory negligence held not in conflict with one as to duty of defendant to avoid injury after discovery of plaintiff's peril. Hyman v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1030. Separate instructions presenting separate defenses that obstruction was not dangerous and was not on the highway but on defendant's premises. McClure v. Feldmann [Mo.] 84 S. W. 16.

66. Meyer Bros. Drug Co. v. Durham [Tex. Civ. App.] 79 S. W. 860. An instruction that defendant was liable for all the results of the malicious prosecution, "no matter what happened" is cured by a subsequent instruction that he is liable only for what damages would naturally arise or be expected to happen as a probable consequence of the wrongful act. Laing v. Mitten, 185 Mass. 233, 70 N. E. 128.

67. See 2 Curr. L. 467.

68. See Blashfield Instructions to Juries,

such issues are properly refused.[69] The submission of such an issue may be rendered harmless where no evidence was introduced to support it.[70] An issue made by evidence not admissible under the pleadings, but admitted without objection, need not be mentioned in the instructions;[71] such instructions, however, are not erroneous.[72] Instructions having no relevancy to the matters in controversy should not be given.[73] Instructions should be applicable to and limited to the evidence

§ 84, where it is stated that there is a diversity of opinion as to whether instructions must be strictly within the issues made by the pleadings.

That cattle were roughly handled in transit. Houston, etc., R. Co. v. Dolan [Tex. Civ. App.] 84 S. W. 297. Charge as to burden to prove "each and every item" error when some are admitted. Oliver v. Love [Mo. App.] 78 S. W. 335. Instruction as to an issue not tendered is ground for new trial. Hydinger v. Chicago, etc., R. Co. [Iowa] 101 N. W. 746. Error to permit verdict for defendant on a defense not pleaded. Duff v. Willamette Iron & Steel Works [Or.] 78 P. 668; Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072. Where both parties testified that a contract was entered into but differed as to its terms, the right to recover on a quasi contract should not have been submitted. Williamson v. Smith & Co. [Tex. Civ. App.] 79 S. W. 51. Whether one was negligent in a particular other than that alleged should not be submitted. Fauboin v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 56. Charge restricting question of apparent danger to facts alleged in the petition was not erroneous where no other circumstances from which negligence could be inferred was shown. Texas, etc., R. Co. v. Kelly [Tex.] 80 S. W. 79; Heinzle v. Metropolitan St. R. Co. [Mo.] 81 S. W. 848. Error to instruct that a verdict may be based on a cause not alleged, however meritorious or satisfactorily proved. Louisville & N. R. Co. v. Guyton [Fla.] 36 So. 84. On an issue as to whether a contract had been complied with, instruction presuming a requirement of the contract not shown by pleading or evidence. Stafford v. Christian [Tex. Civ. App.] 79 S. W. 595. Where no affirmative defense is set up, error to charge that defendant must establish his defense by a preponderance of evidence. Strickland v. Capital City Mills [S. C.] 49 S. E. 478. Allowing a recovery on a cause of action not pleaded is erroneous. Heller v. Donellan, 90 N. Y. S. 352. There being nothing in the pleadings to support a recovery of certain interest, it was error to instruct to consider it. Sullivan & Co. v. Owens [Tex. Civ. App.] 78 S. W. 373. Where a complaint did not charge any negligence in failing to furnish rules and regulations for safety of employes, it was error to charge that it was the master's duty to furnish such rules. Texas Short Line R. Co. v. Patton [Tex. Civ. App.] 80 S. W. 881. Where it was not alleged that defendant was negligent in not transporting stock on a regular stock train, it was not necessary to instruct that his failure to do so was not negligence. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040.

Pleading sufficient: A general plea of contributory negligence is sufficient to warrant its submission generally or in any and all forms in which the issue is made by the evidence. Stewart v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 979. A charge adjusted to a plea is not rendered erroneous because it conflicts with a theory which is not pleaded. Teasley v. Bradley, 120 Ga. 373, 47 S. E. 925.

69. Gillespie Home Tp. Mut. Fire Ins. Co. v. Prather, 105 Ill. App. 123; Georgia, etc., R. Co. v. Wisenbacker [Ga.] 48 S. E. 146; Martin, Moodie & Co. v. Petty [Tex. Civ. App.] 79 S. W. 878; Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899; Richey v. Southern R. Co. [S. C.] 48 S. E. 285. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. Issue of discovered peril not raised by the fact that a conductor knew when a passenger entered the car that she was sick and needed assistance. Action for injuries caused by sudden starting of a car. Pelly v. Denison & S. R. Co. [Tex. Civ. App.] 78 S. W. 542. Instruction as to failure to feed, water, and take stock from the cars to rest during transit, properly refused. It was not alleged as a cause of their injury. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040. In **assault and battery** the defendant is not entitled to a charge on the law of self-defense where the general issue alone is pleaded. Blackmore v. Ellis [N. J. Err. & App.] 57 A. 1047.

70. By mistake an instruction referred to a paragraph of an answer to which a demurrer had been sustained. Guthrie v. Carpenter [Ind.] 70 N. E. 486.

71. Thompson v. Bucholz [Mo. App.] 81 S. W. 490.

72. Regardless of whether an answer was good, evidence having been admitted in support of it, instructions on the law applicable was not error. Freeze v. White, 120 Ga. 446, 47 S. E. 928.

73. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785; Helms v. Helms, 135 N. C. 164, 47 S. E. 415; Greif & Bro. v. Seligman [Tex. Civ. App.] 82 S. W. 533; International & G. N. R. Co. v. Tisdale [Tex. Civ. App.] 81 S. W. 347; Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023; International & G. N. R. Co. v. Walters [Tex. Civ. App.] 80 S. W. 668; Cahill v. Baird, 138 Cal. 691, 72 P. 342; Wendel v. Mallory Commission Co., 122 Iowa, 712, 98 N. W. 612; Stern v. Leopold Simons & Co. [Conn.] 58 A. 696; Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789; Conant v. Jones [Ga.] 48 S. E. 234; Giheline v. Smith [Mo. App.] 80 S. W. 961; Farmers' Bank of Dearborn v. Fudge [Mo. App.] 82 S. W. 1112; Heinzle v. Metropolitan St. R. Co. [Mo.] 81 S. W. 848. Issues eliminated from the case by the court's action in sustaining exceptions to that portion of the petition. Gulf, etc., R. Co. v. White [Tex. Civ. App.] 80 S. W. 533. It is proper to refuse instructions so framed as

adduced in the case.[74] It is erroneous to give instructions based on a state of facts which there is no evidence tending to prove,[75] or which the undisputed evidence shows not to exist;[76] and it makes no difference that such instructions con-

to direct inquiries to facts not material or relevant to the issue. Their tendency is to mislead and confuse. Werner Co. v. Calhoun [W. Va.] 46 S. E. 1024.

74. Alabama & V. R. Co. v. Overstreet [Miss.] 37 So. 819; Taylor v. San Antonio, etc., R. Co. [Tex. Civ. App.] 83 S. W. 738; El Paso Elec. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 718. Instruction not supported by testimony may be refused. York v. Inhabitants of Athens [Me.] 58 A. 418. They tend to confuse the jury. Washington Iron Works v. McNaught, 35 Wash. 10, 76 P. 301; Gunn v. Head, 116 Ga. 325, 42 S. E. 343; Leviness v. Kaplan [Md.] 59 A. 127; Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28; Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685; Indiana, etc., R. Co. v. Otstot [Ill.] 72 N. E. 387; Shickle-Harrison & H. Iron Co. v. Beck [Ill.] 72 N. E. 423; Mathews v. Daly West Min. Co., 27 Utah, 193, 75 P. 722; Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850; Stewart v. North Carolina R. Co. [N. C.] 48 S. E. 793; Tennessee Coal, Iron & R. Co. v. Garrett [Ala.] 37 So. 355; Missouri, etc., R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374; Rea v. State [Tex. Cr. App.] 80 S. W. 1003; Thompson v. Bucholz [Mo. App.] 81 S. W. 490; Gulf, etc., R. Co. v. Dunman [Tex. Civ. App.] 81 S. W. 789; International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991; Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 138. No evidence of the ordinary method of operating a gasoline motor, it was proper to refuse an instruction that a party had a right to operate his car in the ordinary way. Illinois Cent. R. Co. v. Scheffner, 209 Ill. 9, 70 N. E. 619. On a hypothesis concerning which there is no evidence. Goldstein v. Leake [Ala.] 36 So. 458. Instruction as to hypothetical questions properly refused when no such questions were asked at the trial. McKee v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1013. Authorizing consideration, as elements of damage, facts which there was no evidence to support. Alabama & V. R. Co. v. Overstreet [Miss.] 37 So. 819. Stating hypothetical case not in accordance with the evidence. Chastang v. Chastang [Ala.] 37 So. 799. Charge on effect of ordinance not in evidence. Dallas Consol. Elec. St. R. Co. v. Ison [Tex. Civ. App.] 83 S. W. 408. There being no competent evidence to support a counterclaim, it was proper to refuse to submit it. Gillespie v. Ashford [Iowa] 101 N. W. 649. In a will contest where there was no evidence of incapacity or undue influence. Yelton v. Black [Ky.] 82 S. W. 634. Question of contributory negligence may be ignored where there is no evidence. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. Where there was no evidence to support a proposition, the court did not err in failing to charge on the subject. Greer & Co. v. Raney, 120 Ga. 290, 47 S. E. 939. An affirmative issue which there is insufficient evidence to maintain should not be submitted. Link v. Campbell [Neb.] 100 N. W. 409. There being no evidence to sustain a count in a declaration, the court should on request instruct the jury to disregard it. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850. Where there was but one issue involved it was proper to refuse an instruction that evidence should be considered only in determining such issue. Shannon v. Marchbanks [Tex. Civ. App.] 80 S. W. 860. Instruction to eliminate from consideration allegations upon which there is no evidence properly refused. Missouri, etc., R. Co. v. Cannady [Tex. Civ. App.] 82 S. W. 1069.

Evidence held sufficient to authorize the submission of an issue to the jury. Conant v. Jones [Ga.] 48 S. E. 234. Where there was evidence of insane delusions, particular instructions on the subject were proper. In re McKenna's Estate [Cal.] 77 P. 461. Instruction held proper. Based on evidence and issues. Ryan v. Incorporated Town of Lone Tree, 122 Iowa, 420, 98 N. W. 287; Central of Georgia R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641. Pleadings and evidence held to justify a charge on plaintiff's loss of time. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856.

75. Tend to mislead the jury (McAdams v. McCook [Neb.] 99 N. W. 656), and are prejudicial (Chicago, etc., R. Co. v. Jamison [Neb.] 98 N. W. 823). Woldert Grocery Co. v. Veltman [Tex. Civ. App.] 83 S. W. 224; Ringue v. Oregon Coal & Navigation Co., 44 Or. 407, 75 P. 703; Bowling v. Chambers [Colo. App.] 77 P. 16; Anderson v. Oregon R. Co. [Or.] 77 P. 119; Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 P. 939; Parker v. National Mut. Bldg. & Loan Ass'n [W. Va.] 46 S. E. 811; Kennedy v. Portmann, 97 Mo. 253, 70 S. W. 1099; Bryan v. Southern R. Co., 134 N. C. 538, 47 S. E. 15; Trippensee v. Braun [Mo. App.] 78 S. W. 674; Center Creek Min. Co. v. Frankenstein, 179 Mo. 564, 78 S. W. 785; Heinzle v. Metropolitan St. R. Co. [Mo.] 81 S. W. 848; Chicago, etc., R. Co. v. Harton [Tex. Civ. App.] 81 S. W. 1236; Weller Mfg. Co. v. Krumholz, 102 Ill. App. 284; Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925; Libby v. Banks, 209 Ill. 109, 70 N. E. 599; Jackson v. Knoxville [Iowa] 101 N. W. 88; Davis v. Kuck [Minn.] 101 N. W. 165. No evidence as to defects in certain appliances. Carr v. American Locomotive Co. [R. I.] 58 A. 678. No evidence that failure to equip a car with fenders was negligence, error to instruct upon defendant's duty to so equip cars. Carney v. Concord St. R. Co., 72 N. H. 364, 57 A. 218. Where there was no evidence from which it could be found that regulations for the management of trains were not sufficient. Landon v. Boston, etc., R. Co., 72 N. H. 600, 57 A. 920. No evidence of payment by plaintiff of doctor's bills and burial expenses. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850; Kimble v. St. Louis & S. R. Co. [Mo. App.] 82 S. W. 1096.

76. Instruction based on facts clearly disproved is erroneous. Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106.

tain correct statements of law.[77] An instruction having no support in the evidence is not ground for reversal where not prejudicial.[78] It is the province of the court to determine whether there is evidence to render a particular instruction relevant,[79] and in determining this it is not to be considered as upon demurrer to the evidence. The question is, is there evidence to which it is referrable.[80]

§ 8. *Stating issues to jury.*[81]—It is the duty of the court to instruct the jury as to the issues to be tried.[82] This duty is not fulfilled by referring them to the pleadings,[83] especially where the pleadings are voluminous or involved;[84] but if the pleadings are short and unambiguous it is not error.[85] The use of the words "as charged in the declaration" is approved in Illinois.[86] It is not required that issues should be submitted in any particular form.[87] An instruction which misstates the issues as made by the pleadings[88] or allows the jury to find the existence of elements of a cause of action not stated therein is erroneous.[89] Error in stating the issues made by the pleadings must be excepted to if it is desired to make it ground of appeal.[90]

§ 9. *Ignoring material evidence, theories, and defenses.*[91]—Instructions so framed as to withdraw from the jury the consideration of material evidence are erroneous.[92] Requests for such instructions may be refused.[93] So, also, it is

77. Parker v. National Mut. Bldg. & Loan Ass'n [W. Va.] 46 S. E. 811; Bering Mfg. Co. v. Fenelat [Tex. Civ. App.] 79 S. W. 869.

78. So guarded by the language of the court that the jury could not be misled. Camp v. Chicago G. W. R. Co. [Iowa] 99 N. W. 735.

79. Rowan & Co. v. Hull [W. Va.] 47 S. E. 92. An instruction cannot be given and its consideration by the jury made to depend upon whether they find that there is or is not such evidence. Id.

80. Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862.

81. See 2 Curr. L. 469.

82. No definite issue submitted. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142. In order that the jury may not be misled, abstract principles of law instructed should be connected with the evidence. Parker v. National Mut. Bldg. & Loan Ass'n [W. Va.] 46 S. E. 811.

83. Chicago City R. Co. v. Mauger, 105 Ill. App. 579; Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158. Referring the jury to the pleadings to determine for themselves what the issues are is reversible error. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. Held harmless in this case; the issues having been fully stated in other instructions. Lackland v. Chicago & A. R. Co., 101 Mo. App. 420, 74 S. W. 505.

Held not to refer jury to the pleadings: Referring to the petition for the purpose of identifying a thing about which an issue was raised is not a reference to the petition to find what the issues are. Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303. Instruction if the drawer "drew the drafts described in the petition" does not refer the jury to the pleadings for a description of the drafts where such drafts were in evidence. Farmers' Bank v. Fudge [Mo. App.] 82 S. W. 1112.

Note: Practice of referring jury to the pleadings is condemned in Texas. Bradshaw v. Mayfield, 24 Tex 482; Barkley v. Tarrant County, 53 Tex. 257; Texas & N. O. R. Co. v. Scott [Tex. Civ. App.] 71 S. W. 26.—From Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869.

84. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869.

85. City of South Omaha v. Ruthjen [Neb.] 99 N. W. 240.

86. See Illinois Cyc. Dig. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328. No objection to "charged" instead of "alleged." United States Brew. Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081. Where there are several counts in a declaration charging negligence, the statements intended to be descriptive of the injury should be "in the manner charged in the declaration or in one or more of the counts thereof." Cole v. Central R. Co., 103 Ill. App. 160.

87. Issues held properly submitted. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 134 N. C. 574, 47 S. E. 116. Submitting issues separately (piecemeal) condemned but held not reversible error. Rapid Transit R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 788. An instruction which simply requires the jury to find whether the evidence establishes the existence of a specific group of facts which, if true, would, in law, establish a plea of contributory negligence and if so to find for defendant, is a proper method of presenting the issue. Houston, etc., R. Co. v. Buiger [Tex. Civ. App.] 80 S. W. 557.

88, 89. Chicago, etc., R. Co. v. Clinebell [Neb.] 99 N. W. 839.

90. Turner v. Lyles [S. C.] 48 S. E. 301.

91. See 2 Curr. L. 469.

92. Anglin v. Thomas [Ala.] 37 So. 784. That "you must consider much, if not most, of the testimony introduced" [special verdict being submitted] is erroneous as permitting rejection of material testimony. Roberts v. McWatty [Wis.] 102 N. W. 18. Leaving out of view certain material evidence. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219; Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525. Error to refuse an instruction giving effect to circumstantial evidence. Moulton v. Gibbs, 105 Ill. App. 104. Erroneous as barring a recovery for injuries un-

error to ignore or exclude from the consideration of the jury any of the issues,[94] defenses,[95] or theories,[96] and a refusal of instructions defective in this respect is proper.[97] Where a party relies on two theories and but one is submitted he cannot complain unless he requests the submission of the other.[98]

disputed. Vocke v. Chicago, 208 Ill. 192, 70 N. E. 325. A party is entitled to have the whole case submitted, either for a general verdict or for such special findings as will be determinative of the case. Coolidge v. Ayers [Vt.] 57 A. 970. Any instruction by which a court assumes as a matter of law to direct a verdict must embrace all the evidence which under the pleadings and evidence is essential to a verdict. Chicago City R. Co. v. Mauger, 105 Ill. App. 579. Directing a finding on facts provable under the first paragraph of a complaint without reference to an issue made by the second paragraph. Ludwick v. Petrie, 32 Ind. App. 550, 70 N. E. 280.

93. Request that if a servant knew of danger and of the employer's failure to provide a safe place to work he could not recover. Proof of specific order to do the work ignored. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 817; Central of Georgia R. Co. v. Larkins [Ala.] 37 So. 660; St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. As to the effect of part only of the facts established. Lakeside Mfg. Co. v. Worcester [Mass.] 72 N. E. 81; Blackmore v. Ellis [N. J. Err. & App.] 57 A. 1047. As to a case as shown by an auditor's report, where there was other evidence introduced; being a ruling as to a part of evidence considered separately from the rest. American Tube Works v. Tucker, 185 Mass. 236, 70 N. E. 59. Request confined to certain enumerated facts the effect of which is to withdraw from the jury all other facts. Hodges v. Pike [Md.] 59 A. 178. Based on a theory of the case not supported by the evidence and ignoring evidence qualifying supposed facts. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789. A request to charge the legal effect of a portion of the testimony of a sole witness is properly refused where the same witness on cross-examination contradicts the matters to which the request relates. Hardeman v. Bell, 120 Ga. 342, 47 S. E. 919.

94. Request based on part only of the issues involved is properly refused. Caven v. Bodwell Granite Co. [Me.] 59 A. 285. Instruction on negligence held to ignore issue of willful injury. Maggioli v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1026. Erroneous as withdrawing a material issue. Durst v. Ernst, 91 N. Y. S. 13; Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362; St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71. Where the court's charge fails to present an issue involved, it is error to refuse a request presenting such issue. Consumers' Cotton Oil Co. v. Wilkins [Tex. Civ. App.] 80 S. W. 870. As to whether stock was carefully handled by a carrier during transit. This was an act of negligence alleged. St. Louis S. W. R. Co. v. Lovelady [Tex. Civ. App.] 81 S. W. 1040. Where issue of fraud in procuring a release of damages for injuries was eliminated from consideration of the jury. Johnson v. Gulf, etc., R. Co. [Tex. Civ. App.] 81 S. W. 1197. Where one preferred to ride on a coal car rather than in a caboose, the question as to whether he became a passenger as well as the question whether he might become one should have been submitted. Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525.

95. Where contributory negligence is pleaded, an instruction authorizing a recovery regardless of such defense. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. Ignoring necessity of exclusive possession in adverse possession. Chastang v. Chastang [Ala.] 37 So. 799. Request omitting essential qualifications properly refused. Lynch v. Waldwick [Wis.] 101 N. W. 925. Instruction to find for plaintiff if material allegations of her complaint had been proved was erroneous as ignoring a defense of contributory negligence, evidence of which had been introduced. Chicago, etc., R. Co. v. Wicker [Ind. App.] 72 N. E. 614. Charge that unauthorized sale is valid if proceeds be accounted for is bad for omitting exception in favor of bona fide holders. Aleshire v. Lee County Sav. Bank, 105 Ill. App. 32. Charging that there is no presumption of law from the relationship of parties to a fraudulent sale is misleading when if considered in connection with other facts proven the circumstance of relationship might have been of controlling influence. Merrill v. Merrill, 105 Ill. App. 5.

96. Instructions which though correct as to one theory on which a recovery is sought but which exclude other theories are properly refused. City of Columbus v. Anglin [Ga.] 48 S. E. 318.

Held not to ignore issue: That in determining whether depositary had in his mill a sufficient quantity of wheat of like grade as that deposited by plaintiff they should take into consideration all the facts and circumstances proven did not obscure material issues presented by other instructions. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789. An instruction upon a given question is not erroneous because it does not conform to an alleged theory of one of the parties when such theory under the evidence is itself erroneous. Chalkley v. Central of Georgia R. Co. [Ga.] 48 S. E. 194. Held not to ignore theory that contract of sale called for actual delivery. Jones-Pope Produce Co. v. Breedlove [Ark.] 83 S. W. 924.

97. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248. Eliminating issue of delays and rough handling of cattle en route. Ft. Worth & D. C. R. Co. v. Alexander [Tex. Civ. App.] 81 S. W. 1015. Ignoring issue of discovered peril. Central Tex., etc., R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351. Making failure to exercise ordinary care a bar to recovery without the condition that it must have contributed to the injuries. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. Which takes from the jury the consideration of every issue except the one presented by it. Missouri, etc., R. Co. v. Purdy [Tex. Civ. App.] 83 S. W. 37.

§ 10. *Giving undue prominence to evidence, issues, and theories.*[99]—If a court undertakes to rehearse the evidence it should cover all the essential facts on both sides;[1] particular facts[2] or portions of the testimony should not be singled out and given undue prominence,[3] even when such facts cannot be considered except in connection with the issue to which they are limited,[4] and such a practice is not authorized by the principle which authorizes the court to advise the jury as to the relative value of certain species of evidence.[5] Singling out particular witnesses,[6] or the witnesses of one party, is improper.[7] Undue prominence may be given by reiterating certain features of the case,[8] and while the practice is con-

98. Stewart v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 979.

99. See 2 Curr. L. 470.

1. Sullivan v. Mauston Milling Co. [Wis.] 101 N. W. 679.

2. Illinois Cent. R. Co. v. Keegan, 210 Ill. 150, 71 N. E. 321; Louisville R. Co. v. Hartman's Adm'r [Ky.] 83 S. W. 570; Merrill v. Merrill, 105 Ill. App. 5; Missouri, etc., R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374. Request emphasizing particular phase of the evidence properly refused. Lynn v. Bean [Ala.] 37 So. 515. Instruction properly refused as singling out a fact. Policemen's Benev. Ass'n v. Ryce [Ill.] 72 N. E. 764. As to the effect of a particular part of the evidence. Henderson v. Raymond Syndicate, 183 Mass. 443, 67 N. E. 427. A court cannot select isolated facts and state their effect. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4. Emphasizing duty to exercise due care. Chicago & E. I. R. Co. v. Coggins [Ill.] 72 N. E. 376. That selling arsenic to an unknown person twenty years old, intelligent appearing, and who gives a good account of the person for whom and the purpose for which it is bought, is not negligence. Galvin v. Overbeck, 2 Ohio N. P. (N. S.) 63. Whether a testator was of sound mind at the time of the execution of a will is to be gathered from all the evidence including the will itself. The submission of the question without making specific mention of any of the evidence is proper. Henning v. Stephenson [Ky.] 80 S. W. 1135. Separate instructions, each isolating a fact and charging that such fact is not sufficient to overthrow a will, are erroneous. A consideration of all the facts might lead to a finding in favor of contestants. Weston v. Teufel [Ill.] 72 N. E. 908.

Instructions held not to violate the rule: Referring in one portion of a charge to particulars recited in another portion. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 566. That if deceased's negligence "contributed at all" did not unduly emphasize "contributed." Predmore v. Consumers' Light & Power Co., 91 N. Y. S. 118. Recalling the jury and correcting an erroneous charge. Dresser v. Lemma [Wis.] 100 N. W. 844. That a deposition is as good evidence as if the witness had testified in court [Hurd's Rev. St. 1903, c. 51, § 34]. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084. That no more than $15,000, the amount demanded, could be recovered does not make the amount demanded unduly prominent. Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239. Instruction as to one issue held not to have obscured issues presented by other instructions. Mayer v. Gersbacher, 207 Ill. 296, 69 N. E. 789. Where the court writes on a request "refused as ignoring proof of certain specific matters" and afterwards draws a pen through such interlineations and submits the instruction. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. "That if the conductor told the plaintiff not to get off until he could stop the train and before he could stop it she proceeded to get off and was injured, she could not recover" held not to give undue prominence to an uncontroverted fact favorable to defendant, but not inconsistent with plaintiff's theory of the case. Harris v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 1023. Where the only evidence of contributory negligence was the act of a passenger passing up the aisle of a car without taking the first vacant seat such fact may be singled out. Peilly v. Denison & N. R. Co. [Tex. Civ. App.] 78 S. W. 542.

3. Giving undue prominence to testimony of one witness, properly refused. Central of Georgia R. Co. v. Larkins [Ala.] 37 So. 660; Kleutsch v. Security Mut. Life Ins. Co. [Neb.] 100 N. W. 139. Instruction directing a jury to consider a portion of the facts in evidence. Mears v. Gage [Mo. App.] 80 S. W. 712. Singling out certain circumstances from the proof and instructing the jury to consider them is error. Will contest. Hughes v. Rader [Mo.] 82 S. W. 32.

4. St. Louis S. W. R. Co. v. Cannon [Tex. Civ. App.] 81 S. W. 778. Where plaintiff alone testified, it was proper for the court to limit the jury in determining defendant's liability to a consideration of such evidence. Wilhelm v. Donegan, 143 Cal. 50, 76 P. 713.

5. In re Knox's Will, 123 Iowa, 24, 98 N. W. 468.

6. In a personal injury action, it is improper for the court to intimate that the plaintiff can best describe his injuries. Butler v. Detroit, etc., R. Co. [Mich.] 101 N. W. 232. Undue prominence to details of defendant's testimony. Crabtree v. Dawson [Ky.] 83 S. W. 557.

Rule not violated: Where his name was mentioned but once in the charge and then on an issue which was answered as a proposition of law under an instruction. Lance v. Butler, 135 N. C. 419, 47 S. E. 488. Instructions relative to the testimony of attorneys held not open to the objections that it singled out and cast discredit upon it. King v. Hanson [N. D.] 99 N. W. 1085.

7. Charging that they may consider the interest which certain witnesses feel in the result of the case growing out of their relation to a party and give it such weight as they think it entitled to. Zapel v. Ennis, 104 Ill. App. 175.

8. Bath v. Houston & T. C. R. Co. [Tex. Civ. App.] 78 S. W. 993. Repeatedly submit-

demned, a restatement, if correct, does not constitute ground for reversal.[9] Not every repetition, however, will amount to giving undue prominence.[10] Special significance should not be given to the evidence of one party by speaking of it in detail while opposing evidence is not mentioned.[11]

§ 11. *Definition of terms used.*[12]—The meaning of technical terms, which occur in the instructions should be explained,[13] and it is error to refuse an instruction requested for this purpose.[14] In some jurisdictions it is necessary to give such definitions,[15] but the prevailing rule seems to be that a failure to do so will not be ground for reversal unless such an instruction was requested.[16] Terms, the meaning of which are generally understood, need not be defined.[17]

§ 12. *Rules of evidence; credibility and conflicts.*[18]—The court may instruct that a preponderance of evidence is not necessarily on the side of the greater number of witnesses.[19] A "clear" preponderance of evidence is not required.[20] "Preponderance" should not be qualified by "fair."[21] It is not necessary that the "conscience" of a juror be satisfied.[22] The hypothesis in an instruction should be on the "reasonable satisfaction" rather than if the jury believes that it is probable.[23]

The credibility of a witness is for the jury.[24] It is proper to call attention

ting the issue of contributory negligence. Adams v. Weakley [Tex. Civ. App.] 80 S. W. 411. Frequent repetition of terms. Cranfill v. Hayden [Tex.] 80 S. W. 609. Where the general charge has fully presented a party's theories, to give special charges presenting the same theories operates to unduly emphasize his side of the case. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 81 S. W. 74.

Rule not violated: Repetition of the element of damages for personal injuries and injuries to feelings. Texas & P. R. Co. v. Bratcher [Tex. Civ. App.] 78 S. W. 531.

9. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. Where facts adverted to were conspicuous in any aspect of the case. Held harmless. Swink v. Anthony [Mo. App.] 81 S. W. 915.

10. "That it is the duty of a railway company to keep its tracks in a reasonably safe condition for the running of trains." Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038.

11. Coman v. Wunderlich [Wis.] 99 N. W. 612. Nor should a court so charge as to refresh the memory of the jury as to what was testified to on one side while not doing so as to what was testified to on the other. Id.

12. See 2 Curr. L. 471.

13. See Blashfield, Instructions to Juries, § 112 et seq., where terms requiring or not requiring definition are collected.

"Ordinary care" as applied to the conduct of either of the parties. Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294. Definition of preponderance of evidence approved. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571; St. Louis & O. R. Co. v. Union Trust & Sav. Bank, 209 Ill. 457, 70 N. E. 651; Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28. Defined as that "greater and superior weight of testimony as reasonably satisfies your minds." Ball v. Marquis, 122 Iowa, 665, 98 N. W. 496. Instruction that plaintiff must prove certain facts "to the satisfaction of the jury" did not require too great a degree of proof where the court had charged that he must prove his case by a preponderance of evidence and defined such term. Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226. Giving a definition of "negligence" which had not been approved held not reversible error. Faubion v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 56.

14. Contributory negligence. Galveston, etc., R. Co. v. De Castillo [Tex. Civ. App.] 83 S. W. 25.

15. Questions of negligence should not be submitted without instructing as to what constitutes negligence. Magrane v. St. Louis & S. R. Co. [Mo.] 81 S. W. 1158.

16. Failure to define "mitigation of damages," and "privileged communications." Holmes v. Cilsby [Ga.] 48 S. E. 934. "Contributory negligence." Brown v. St. Louis Transit Co. [Mo. App.] 83 S. W. 310. "Joint ownership" or to state elements constituting it. Gaston v. Johnson [Mo. App.] 80 S. W. 276. "Negligence." Taylor v. Houston, etc., R. Co. [Tex. Civ. App.] 80 S. W. 260. "Preponderance of evidence" and "ordinary care." Georgia, etc., R. Co. v. Young Inv. Co., 119 Ga. 513, 46 S. E. 644. "Respondeat superior," where the rule is correctly stated in another instruction. Chicago, etc., R. Co. v. White, 209 Ill. 124, 70 N. E. 588.

17. "Agent." Harper v. Fidler [Mo. App.] 78 S. W. 1034.

18. See 2 Curr. L. 471.

19. That the preponderance of evidence means the weight of evidence. Indianapolis St. R. Co. v. Schomberg [Ind. App.] 71 N. E. 237.

20. Nelson v. Fehd, 104 Ill. App. 114; Schofield v. Baldwin, 102 Ill. App. 560.

21. Link v. Campbell [Neb.] 100 N. W. 409.

22. Evidence is addressed to his mind not to his conscience. Birmingham R. Light & Power Co. v. Hinton [Ala.] 37 So. 635.

23. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784.

24. Bradley v. Gorham [Conn.] 58 A.

to facts tending to affect their credibility[28] or the weight of their testimony,[26] and in connection with such a charge to add that "you are not required to believe as jurors what you would not believe as men."[27] This is not violating the rule that the testimony of one witness should not be singled out by special comment.[28] But an instruction that tends to belittle testimony,[29] or that the jury "should" consider certain facts as affecting credibility, is an invasion of the province of the jury.[30]

"Falsus in uno falsus in omnibus" is applicable only where a witness swears to a falsehood willfully and knowingly.[31] It may be given in a case where the only

698; Acolia v. Elizabeth, etc., R. Co. [N. J. Law] 57 A. 257; Ball-Barnhart-Putman Co. v. Lane [Mich.] 97 N. W. 727. It is error for the court to tell the jury that a witness knows what he is talking about. Pardridge v. Cutler, 104 Ill. App. 89.

25. Under a statute declaring that the presumption that a witness speaks the truth may be repelled by the manner in which he testifies, an instruction to judge his credibility by his "appearance" is erroneous. Fries v. American Lead Pencil Co., 141 Cal. 610, 75 P. 164. An instruction that the testimony of a witness who had intentionally sworn to statements inconsistent with his own testimony might be disregarded was erroneous. It should also have been stated that the statements must have been knowingly false and on a material matter. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195.

26. Instruction held not erroneous as telling the jury how to weigh evidence. Indianapolis St. R. Co. v. Johnson [Ind. App.] 72 N. E. 571. The court may tell the jury they "should" consider the interest of the witnesses, their manner and conduct while testifying. Strebin v. Lavengood [Ind.] 71 N. E. 494. Especially where they are cautioned against drawing an unfair inference because of such interest. Lovely v. Grand Rapids & I. R. Co. [Mich.] 100 N. W. 894. Error to refuse such an instruction. Kavanaugh v. Wausau [Wis.] 98 N. W. 550. Where a party has made no admissions, it is proper to refuse an instruction that what he has testified to against his interest is to be taken as true and what he has testified to in his favor is to be given only such weight as the jury believe from all the evidence it is entitled to. Conner v. Missouri Pac. R. Co. [Mo.] 81 S. W. 145. Where a general instruction on the credibility of witnesses, authorizing the jury to consider their interest in the result of the litigation has been given, an instruction specifically referring to plaintiff stating that admissions against interest are to be taken as true and testimony in his favor given only such weight as the jury believe from all the evidence in the case it is entitled to may be refused. Montgomery v. Missouri Pac. R. Co. [Mo.] 79 S. W. 930. Where it has been instructed that it is the duty of the jury to consider the interest of all witnesses in determining their credibility, it is not error to make such reference to the plaintiff specifically. Strasser v. Goldberg [Wis.] 98 N. W. 554. Instruction that expert testimony should be received with "great caution" modified by substituting the words "with other evidence," held proper where the succeeding part of the instruction was cautionary. Buckalem v. Quincy, etc., R. Co. [Mo. App.] 81 S. W. 1176. The court may instruct that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if there is reason to believe that the latter testified falsely, and is not corroborated by other witnesses or circumstances proved. Strickler v. Gitchel [Okl.] 78 P. 94. Charge that the jury are under the duty of considering the interest of witnesses is harmless where they are further charged that they are the exclusive judges of the evidence and credibility of the witnesses. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879.

27. Dodge v. Reynolds [Mich.] 98 N. W. 737.

28. Kavanaugh v. Wausau [Wis.] 98 N. W. 550.

29. Disparaging the testimony of a witness. Norman Printers' Supply Co. v. Ford [Conn.] 59 A. 499. That testimony should receive little regard. Bradley v. Gorham [Conn.] 58 A. 698. To refer to expert testimony as "boughten testimony." People v. Jennings, 132 Mich. 662, 94 N. W. 216. Instruction that a deposition is not to be taken as true; that it is to be considered and given the same weight as other testimony, etc., held erroneous. City of Covington v. Bostwick [Ky.] 82 S. W. 569. That expert testimony is not binding on the jury but that they must give it such weight as they deem it entitled to, held not to belittle such testimony. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468.

30. Word "may" should be used. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. Instruction that if the jury believe witness testified under fear of losing his employment or fear of offending, such fact should be considered, is erroneous. Gregory v. Detroit United R. Co. [Mich.] 101 N. W. 546.

31. Instruction that "jury are judges of credibility of witnesses and of the weight to be given their statements, and if you believe" from all you have seen and heard "at the trial, that a witness has sworn falsely you may disregard his testimony" is **too broad.** Held not to have misled the jury in this case. Eikenberry v. St. Louis Transit Co. [Mo. App.] 80 S. W. 360. Where testimony is entirely contradictory an instruction that the jury "may discredit the entire statement of any witness believed to have testified falsely in any material particular" is proper. Walker v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 282.

testimony to which it could apply was either true or knowingly false,[32] and where applicable it is error to refuse it.[33]

§ 13. *Admonitory and cautionary instructions.*[34]—The giving of cautionary instructions is largely within the discretion of the court,[35] and such instructions must be so framed as not to be misleading.[36] A charge that a verdict must not be based on inference or guess is too broad.[37] It is not error to refuse to caution the jury to ignore matters not included in the pleadings nor involved in the proof.[38] It is proper to instruct not to be influenced by passion or prejudice and that a verdict rendered against the law and evidence would be set aside.[39] In an action against a corporation, an instruction that the case should be considered the same as a case between two private citizens is correct.[40]

§ 14. *Necessity of instructing in writing.*[41]—In Oklahoma when special instructions are desired, they must be reduced to writing, numbered and signed, and delivered to the court at the conclusion of the evidence.[42] In Illinois instructions cannot be modified otherwise than in writing.[43] It is within the discretion of the court to waive the requirement that requests for instructions must be in writing,[44] and though a statute so requires, a cause will not be reversed because of a failure to do so, unless prejudice resulted.[45]

§ 15. *Presentation of instructions.*[46]—Noting at the head of each instruction the volume and page of the statute or report supposed to authorize the instruction held harmless where the jury did not have the books in the jury room.[47]

§ 16. *Additional instructions after retirement.*[48]—The court has a large discretion in the matter of giving additional instructions after the jury has retired,[49] and only in case of abuse, resulting in injury, will an exercise of such discretion be reviewed.[50] It may supplement the original charge whenever no substantial right will be infringed.[51] As a general rule such communications to the jury should be made in open court,[52] but it is held that they may be given in the absence

32. Glenn v. Augusta R. & Elec. Co. [Ga.] 48 S. E. 684.

33. Where witnesses were contradicted by their own testimony. Strasser v. Goldberg [Wis.] 98 N. W. 554.

34. See 2 Curr. L. 473.

35. Instruction against arriving at a quotient verdict. Carson v. Southern R. Co. [S. C.] 46 S. E. 525.

36. An instruction which attempts to state that petitioner should not be discriminated against because it was a railroad company. Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444. Proper admonitory instructions may be refused if coupled with misleading and inaccurate statements of the law. Indiana, etc., R. Co. v. Otstot [Ill.] 72 N. E. 387.

37. Excludes the right to draw inferences from facts. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499.

38. Diminished earning capacity as an element of damages. Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884.

39. Action against a coal mining company at a time of labor troubles. Bachert v. Lehigh Coal & Navigation Co., 208 Pa. 362, 57 A. 765.

40. Chicago, etc., R. Co. v. Burridge, 211 Ill. 9, 71 N. E. 838.

41. See 2 Curr. L. 473.

42. Chicago Live Stock Commission Co. v. Fix [Okl.] 78 P. 316; Chicago Live Stock Commission Co. v. Connally [Okl.] 78 P. 318.

43. Chicago, etc., Co. v. Zapp, 209 Ill. 339, 70 N. E. 623.

44. Such rules being for the benefit of the court. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538.

45. Schwartzlose v. Mehlitz [Tex. Civ. App.] 81 S. W. 68. Oral restatement of an undoubted principle of law contained in the written instructions in response to a question by the jury after retirement, held harmless. Standard Oil Co. v. Doyle [Ky.] 82 S. W. 271. Where none are offered by either party and the jury returns a verdict without fixing the amount, the court may instruct orally that they must find the amount and send them back to the jury room for that purpose. Chapman v. Salfisberg, 104 Ill. App. 445.

46. See 2 Curr. L. 476.

47. Buckalew v. Quincy, etc., R. Co. [Mo. App.] 81 S. W. 1176.

48. See 2 Curr. L. 476.

49. Carter v. Becker [Kan.] 77 P. 264. Requiring a hung jury to reach a verdict if possible; calling attention to the fact that some jury would have to decide the question, but saying that if they could not agree they would be discharged, etc., held proper. City of Covington v. Bostwick [Ky.] 82 S. W. 569.

50, 51. Carter v. Becker [Kan.] 77 P. 264.

52. See Blashfield, Instructions to Juries, § 179.

of counsel;[53] it not being the duty of the court to send for counsel.[54] The court may enter the jury room and withdraw an improper instruction.[55]

§ 17. *Review.*[56]—*Objections and exceptions below.*[57]—It is presumed on appeal that the jury understood the instructions.[58] No exception lies to the charge as a whole.[59] Where no specific assignment of error is made, the charge will be considered no further than to determine whether it states an abstractly correct principle of law;[60] but error in failing to submit a material issue may be complained of under a general assignment alleging error in the charge given.[61] Objections to instructions will not be considered on appeal unless special exception thereto was taken below,[62] at the time they were given,[63] in the manner prescribed by rules of court.[64] In Federal courts, exceptions must be taken while the jury are at the bar.[65] Exceptions must point out the defects complained of.[66] Errors will not be reviewed on any other ground than that assigned.[67] Where an erroneous instruction is excepted to, a party may avail himself of the error though he requested no special instruction.[68]

The record of appeal must set out the language or a succinct statement of the instructions complained of[69] and the evidence upon which it is based.[70]

53. National Life & Trust Co. v. Omans [Mich.] 100 N. W. 595.

54. It is the duty of counsel to remain in attendance. Usually, however, the court will not, in the absence of counsel, give further instructions as to the correctness of which there can be any question. Fournier v. Pike, 128 F. 991.

55. Martin, Moodie & Co. v. Petty [Tex. Civ. App.] 79 S. W. 878.

56. See 2 Curr. L. 477; Appeal and Review, 3 Curr. L. 167.

57. See 2 Curr. L. 477.

58. Presumption not overcome by an affidavit of a party that he believes the jury misunderstood. Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489.

59. Savage v. Marlborough St. R. Co. [Mass.] 71 N. E. 531. Exception that a charge is reversible error is too general. Central Tex., etc., R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351.

60. Mulherin v. Kennedy [Ga.] 48 S. E. 437. Where an instruction includes different and independent subjects, a general exception thereto cannot be considered unless it is incorrect as a whole. Mathews v. Daly West Min. Co., 27 Utah, 193, 75 P. 722.

61. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362.

62. Vonderhorst Brew. Co. v. Amrhine [Md.] 56 A. 833; Morisette v. Canadian Pac. R. Co. [Vt.] 56 A. 1102; Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552. Errors not assigned in motion for a new trial cannot be considered. Kehl v. Abram, 210 Ill. 218, 71 N. E. 347. Error in limiting number of instructions. The Fair v. Hoffman, 209 Ill. 330, 70 N. E. 622.

Exception held sufficient: A request to "save 4 and 8 of defendant's requests which were given" and an assent thereto by the court is a sufficient exception to the general nature of the charge given covering such requests. Galligan v. Old Colony St. R. Co., 182 Mass. 211, 65 N. E. 48.

63. Chicago Live Stock Commission Co. v. Fix [Okl.] 78 P. 316; Chicago Live Stock Commission Co. v. Connally [Okl.] 78 P. 318.

64. Where error is alleged as to a portion of an instruction such portion must be set forth in totidem verbis. City of Denver v. Strobridge [Colo. App.] 75 P. 1076. Specification of error which merely refers to the pages of the transcript in which the instructions which comprise the entire charge are to be found is not a compliance with the rules of court. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Assignment of error which complains of two distinct matters is bad. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362.

65. Improper practice to permit formal exceptions to be then noted and specification of the objection to be supplied in the record later. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1.

66. Penn v. Trompen [Neb.] 100 N. W. 312. No error can be predicated on a refusal to give instructions when no special reasons for giving them are pointed out. Miller v. John, 208 Ill. 173, 70 N. E. 27. Where the record of appeal does not show whether requested instructions were given or refused they will not be considered on appeal. Texas Cotton Produce Co. v. Denny Bros. [Tex. Civ. App.] 78 S. W. 557.

67. Errors in instructions will not be considered on any ground other than that assigned. Fauboin v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 56. Error in not submitting an issue suggested by an improper request must be specifically noted. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362.

68. Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226.

69. Cowles v. Lovin, 135 N. C. 488, 47 S. E. 610. Otherwise objections are deemed to have been waived. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552. Where the substance of an instruction is not set out in appellant's brief as required by Sup. Ct. Rule No. 22, it will not be reviewed. Barricklow v. Stewart [Ind.] 72 N. E. 128. Cautionary instruction not made clear in bill of exceptions. Thompson v. Purdy [Or.] 77 P. 113. Only affirmative errors can be considered by reviewing court, where a part of the

Invited error.[71]—A party cannot complain of an instruction given at his own request,[72] though it be erroneous,[73] or when he has himself requested a similar instruction,[74] nor of the submission of an issue which his own instructions have submitted[75] or suggested,[76] or which is based on his pleadings.[77]

Harmless error.[78]—Error in giving or refusing to give instructions must have been prejudicial to the appellant,[79] and must have materially affected the merits of the action.[80] Therefore he cannot complain of an error favorable to himself.[81] And if it appear from the record that even under a correct instruction a different conclusion would not be justified, the error will be deemed harmless.[82]

Instructions must be considered as a whole,[83] and if, taken together and

charge is omitted from the record. Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19. The record of appeal must contain the portion of the charge excepted to and the reasons. Freeman & T. News Co. v. Mencken, 115 Ga. 1017, 42 S. E. 369.

70. Maultsby v. Boulware [Fla.] 36 So. 713. Appellate court is restricted to an examination of the instruction and accompanying statement. [Special rule 3 (18 South. xii.)] Southern Pine Co. v. Powell [Fla.] 37 So. 570. In passing upon an assignment of error based on an instruction, an appellate court is restricted to an examination of the instruction and statement of evidence accompanying it as made to appear in the ordinary bill of exceptions. Daytona Bridge Co. v. Bond [Fla.] 36 So. 445.

71. See 2 Curr. L. 478.

72. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696; Georgia Northern R. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659; Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020; McKinstry v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1108; Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248.

73. Cahill v. Baird, 138 Cal. 691, 72 P. 342.

74. Conant v. Jones [Ga.] 48 S. E. 234; Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068.

75. Gould v. Magnolia Metal Co., 207 Ill. 172, 69 N. E. 896. Where a trial was conducted on the incorrect theory that the action was predicated on a statute and the defendant obtained an instruction applying the statute, he cannot complain because the statute was applied in an instruction given for plaintiff. Spring Valley Coal Co. v. Robizas, 207 Ill. 226, 69 N. E. 925. The submission of a question for which the testimony affords no basis cannot be complained of by a party who requests a charge which could not be given unless modified so as to present such issue. Pearistine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4.

76. An instruction requested by a defendant to find for it unless its operatives knew of the peril of the person injured, and the issue of discovered peril and precluded could have avoided such injuries suggested defendant from insisting on appeal that no charge on such issue should have been given. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71.

77. Where a party relies on certain grounds pleaded, he cannot complain that the court charged relative thereto. Fussell v. Heard, 119 Ga. 527, 46 S. E. 621.

78. See 2 Curr. L. 478; Harmless and Prejudicial Error, 2 Curr. L. 159.

79. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Refusal to give requests on the question of contributory negligence will not be reviewed where on plaintiff's own evidence the court held that decedent was guilty of contributory negligence. Stewart v. North Carolina R. Co. [N. C.] 48 S. E. 793. If there is any libelous language in a written article, it is not reversible error that other language therein pointed out by the court to be libelous is not so. Cranfill v. Hayden [Tex.] 80 S. W. 609. The giving of further instructions to the jury in regard to an immaterial point of evidence, at their request made after their retirement, and without giving counsel an opportunity to reargue, held not error. Beyer v. Hermann, 173 Mo. 295, 73 S. W. 164.

80. McKinstry v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1108. Where a correct instruction given for plaintiff conflicts with a defective one given for defendant, the latter may not complain. Weston v. Lackawanna Min. Co. [Mo. App.] 78 S. W. 1044.

81. Refusal of instructions relating to an issue found in appellant's favor. Stewart v. North Carolina R. Co. [N. C.] 48 S. E. 793; McAfee v. Dix, 91 N. Y. S. 464. More favorable to him than is warranted by the evidence. Delaware & H. Canal Co. v. Mitchell, 211 Ill. 379, 71 N. E. 1026. The submission of an issue which the uncontroverted evidence showed to be a fact is not prejudicial to the party to whom such submission was favorable. Central Tex., etc., R. Co. v. Gibson [Tex. Civ. App.] 79 S. W. 351. A verdict will not be disturbed for an erroneous instruction favorable to appellant. Vincent v. Willis [Ky.] 82 S. W. 583. Charge imposing on one party too high a degree of proof is not prejudicial to the other party. York v. Farmers' Bank [Mo. App.] 79 S. W. 968; Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

82. Authorizing the consideration as an element of damages, a circumstance which should not have been considered. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552. Where the jury find for defendant, instructions as to the measure of damages could not have harmed plaintiff. Conant v. Jones [Ga.] 48 S. E. 234. Instructions on the question of damages become immaterial on a verdict being rendered for defendant on the main issue. Wilhelm v. Donegan, 143 Cal. 50, 76 P. 713; Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862.

83. See 2 Curr. L. 479. Bianchard-Ham-

reasonably construed they present the law with reasonable accuracy and it cannot be said the jury was misled,[84] a judgment will not be reversed though excerpts as abstract propositions do not accurately state the law.[85] Omission to give a correct instruction is cured if the charge as a whole conveys the same impression,[86] and

ilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032; Hunting & Co. v. Quarterman, 120 Ga. 344, 47 S. E. 928; Taylor v. Taylor's Estate [Mich.] 101 N. W. 832; Bowick v. American Pipe Mfg. Co. [S. C.] 48 S. E. 276; City of Columbus v. Anglin [Ga.] 48 S. E. 318; McKinstry v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1108; International & G. N. R. Co. v. McGehee [Tex. Civ. App.] 81 S. W. 804; Missouri, etc., R. Co. v. Matherly [Tex. Civ. App.] 81 S. W. 589; Paducah Commission Co. v. Boswell [Ky.] 83 S. W. 144; Parsons v. Hecla Iron Works [Mass.] 71 N. E. 572. To determine whether any particular charge was misleading. Beattie v. Detroit [Mich.] 100 N. W. 574; El Paso & N. W. R. Co. v. McComus [Tex. Civ. App.] 81 S. W. 760. Element lacking in one supplied by another. Beidler v. King, 209 Ill. 302, 70 N. E. 763; Weston v. Lackawanna Min. Co. [Mo. App.] 78 S. W. 1044. As to presumption of death from long absence. Policemen's Benev. Ass'n v. Ryce [Ill.] 72 N. E. 764. Held not to eliminate issue of contributory negligence. Shanahan v. St. Louis Transit Co. [Mo. App.] 83 S. W. 783. Taken as a whole, held not to be a special plea on behalf of the plaintiff. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468. No error can be predicated on instructions which properly state the law when considered in connection with others given. Cleveland, etc., R. Co. v. Potts & Co. [Ind. App.] 71 N. E. 685. Instruction as to **negligence** held not too general when considered in connection with other instructions given by the court on its own motion. Montgomery v. Missouri Pac. R. Co. [Mo.] 79 S. W. 930. Setting forth facts alleged to be negligence and allowing recovery if such negligence was the proximate cause, should be read in connection with an instruction defining proximate cause. Gulf, etc., R. Co. v. Davis [Tex. Civ. App.] 80 S. W. 253. Instruction to disregard statements of counsel which might result in influencing them not objectionable when considered with the rest of the charge to render such verdict as would represent their best collective judgment. Neely v. Detroit Sugar Co. [Mich.] 101 N. W. 664.

84. Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489. One clear statement of a proposition of law is sufficient. Need not be repeated in enumerating various points. Terre Haute Elec. Co. v. Kiely [Ind. App.] 72 N. E. 658; Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661; City of Colorado Springs v. May [Colo. App.] 77 P. 1093. If they fully inform the jury as to rights of the parties there is no cause for complaint. Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28. Not erroneous because omitting mention of the issue of contributory negligence. Such issue had been submitted by other instructions. International, etc., R. Co. v. Walters [Tex. Civ. App.] 80 S. W. 668. Instruction "that if person killed was guilty of contributory negligence there could be no recovery and a further charge that if the death was caused by sole negligence of defendant's servants there could be no recovery did not take from the jury the issue of contributory negligence. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032; St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71.

85. Though detached excerpts are erroneous. McAfee v. Dix, 91 N. Y. S. 464; Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862; Miller v. John, 208 Ill. 173, 70 N. E. 27; Allison v. Long Clove Trap Rock Co., 92 App. Div. 611, 86 N. Y. S. 833; Teasley v. Bradley, 120 Ga. 373, 47 S. E. 925. Fact that one of the instructions ignored an issue is immaterial. Hanheide v. St. Louis Transit Co. [Mo. App.] 78 S. W. 820. Instruction considered by itself was **vague and obscure.** St. Louis S. W. R. Co. v. Kennemore [Tex. Civ. App.] 81 S. W. 802. An instruction cured. Logan v. Metropolitan St. R. Co. [Mo.] 82 S. W. 126. Instruction that if plaintiff was injured "in whole or in part" as alleged, she is entitled to recover, was not erroneous though injuries were pleaded of which there was no proof. Other paragraphs of the charge limited her recovery to injuries shown by the evidence. Missouri, etc., R. Co. v. Cannady [Tex. Civ. App.] 82 S. W. 1069. Error, if any, in instructions relative to preponderance of evidence, held obviated by subsequent instruction upon burden of proof. Missouri, etc., R. Co. v. Moody [Tex. Civ. App.] 79 S. W. 856. If inaccurate because limiting contributory negligence to the exact time of the accident was cured. Chicago, etc., R. Co. v. Strathmann [Ill.] 72 N. E. 800. Omitting reference to a material issue cured. Policemen's Benev. Ass'n v. Ryce [Ill.] 72 N. E. 764. Erroneous instruction as to preponderance of evidence cured by a subsequent instruction in the same connection. Garske v. Ridgeville [Wis.] 102 N. W. 22. Error, if any, in refusing to submit certain issues was cured by an instruction presenting the real question in controversy clearly to the jury. National Cash Register Co. v. Hill [N. C.] 48 S. E. 637. Objection to one paragraph of an instruction cured by paragraph following. Missouri, etc., R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374. It must be clear that the jury have drawn an improper inference from a single instruction. Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022. Instruction on **assumed risk** eliminating assumption of open and obvious dangers unknown to plaintiff cured by a subsequent instruction embodying them. Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306. That the testimony of any witness might be disregarded, without also instructing that they must believe from the evidence that he had sworn falsely, is not ground for reversal where they were instructed that all their conclusions must be based on a preponderance of evidence. Chicago, etc., R. Co. v. Keely, 103 Ill. App. 205.

86. Morisette v. Canadian Pac. R. Co. [Vt.] 56 A. 1102.

refusal to give a correct instruction is deemed harmless where no substantial rights are prejudiced.[87] If an incomplete instruction is supplemented by ample instructions on the point, the error is nonprejudicial.[88] When, however, misleading instructions have not been corrected, and it is impossible to say from the record that justice has been done, there is ground for reversal.[89]

A bad instruction is cured only by its withdrawal,[90] and as a general rule an incorrect instruction is not cured by a correct one subsequently given,[91] especially where a case is close upon the facts,[92] or if the latter instruction does not refer to the former,[93] or it is expressly stated that they are to be considered in connection with each other.[94] The giving of an erroneous instruction is not reversible error if the jury have not been misled.[95]

INSURANCE.

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87. Rev. St. 1899, § 865, requiring error to be substantially prejudicial. Brown v. St. Louis Transit Co. [Mo. App.] 83 S. W. 310.

88. Quinlan v. Kansas City [Mo. App.] 78 S. W. 660.

89. Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661.

90. Evansville, etc., R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554.

91. As to the right of a real estate broker to commissions. Ball v. Dolan [S. D.] 101 N. W. 719; Cresler v. Asheville, 134 N. C. 311, 46 S. E. 738. Will be deemed prejudicial if it does not clearly appear that the verdict was right. Borkenstein v. Shrack, 31 Ind. App. 220, 67 N. E. 547. Refusing a correct instruction was not cured by referring to the matters in a negative way. Allen v. St. Louis Transit Co. [Mo.] 81 S. W. 1142. Refusal to give a correct instruction. Mansfield v. Morgan [Ala.] 37 So. 393. Error in invading the province of the jury. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374. That a street car has a paramount right of way not cured by an instruction that "Incumbent on the company to use all reasonable care to prevent injury." Solomon v. Buffalo R. Co., 96 App. Div. 487, 89 N. Y. S. 99. Assumption of facts. Missouri, etc., R. Co. v. Huff [Tex.] 81 S. W. 525; Texas Midland R. Co. v. Booth [Tex. Civ. App.] 80 S. W. 121. Assuming that a sidewalk is unsafe. Baker v. Independence [Mo. App.] 81 S. W. 501. Determination of weight and sufficiency of evidence. In re Knox's Will, 123 Iowa, 24, 98 N. W. 468. Error in making a city liable for defective sidewalk, if the defective condition was known of before the accident without requiring it to have been known a sufficient length of time to have enabled the city to have it repaired is not rendered harmless by the fact that the case was tried on the theory of constructive notice. Baker v. Independence [Mo. App.] 81 S. W. 501. That words charging one with having a venereal disease are not slanderous per se is not corrected by instructing that malice may be inferred from facts and circumstances. McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506.

92. Chicago, etc., R. Co. v. Appell, 103 Ill. App. 185.

93. Texas Southern R. Co. v. Long [Tex. Civ. App.] 80 S. W. 114; Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248.

94. Klimpl v. Metropolitan St. R. Co., 92 App. Div. 291, 87 N. Y. S. 39.

95. Beidler v. King, 209 Ill. 302, 70 N. E. 763. No other verdict could have been sustained. Henry v. Dussell [Neb.] 99 N. W. 484. An erroneous instruction that plaintiff claimed that certain of his injuries were permanent is cured by an instruction to not allow damages for permanent injuries of any kind. Hollingsworth v. Ft. Dodge [Iowa] 101 N. W. 455. Submitting an issue not raised was cured by subsequent instruction assuming it as a fact. Abbott v. Stiff [Tex. Civ. App.] 81 S. W. 562. An inadvertent reference to an outside issue immediately qualified in such manner as to destroy its force. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038.

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Matters relating to fraternal mutual benefit associations[96] and marine insurance[97] are treated elsewhere.

§ 1. *Insurance laws, regulations and supervision in general.*[98]—The insurance business is of such a nature as to be subject to regulation under the police power of the state,[99] and supervisory and visitorial powers are usually conferred on a state officer.[1] The legislature may enact a law relative to one class of insurance so long as it is general in its terms as to that class.[2]

§ 2. *Corporations and associations doing an insurance business. A. Corporate existence, character, management, rights and liabilities.*[3]—Employers' liability insurance is within a statute authorizing life insurance companies to insure against accidents to persons.[4]

A statute authorizing a life insurance company to change its methods of doing business from the assessment to the legal reserve, flat premium plan does not work a violation of its contracts with certificate holders refusing to make the change, though their assessments are increased because of the lesser number subject to assessment and the death of members, where the right of amendment is expressly reserved in the articles of association.[5]

96. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1499.

97. See Marine Insurance, 2 Curr. L. 792. In Volume 4 this subject will be treated in the title Shipping and Water Traffic.

98. See 2 Curr. L. 480. See, also, Fraternal Mutual Benefit Associations, 3 Curr. L. 1500, § 1.

99. Metropolitan Life Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643.

1. **In Maryland,** the insurance commissioner is authorized to institute suits for violations of the insurance laws and proceedings for the liquidation of the affairs of insolvent or fraudulently conducted insurance companies. Code, art. 23, § 122, subsec. 7, as re-enacted by Acts 1902, p. 453, c. 338, is not unconstitutional as depriving companies of their property without due process of law. Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125. The circuit court has jurisdiction of suits brought to secure the appointment of receivers under such statutes. Id. Insurance company held bound by order appointing receivers, to which its counsel consented. Id.

2. Idaho Sess. Laws 1903, pp. 74 to 81, governing mutual co-operative companies, not class legislation. Idaho Mut. Co-op. Ins. Co. v. Myer [Idaho] 77 P. 628.

3. See 2 Curr. L. 481. See, also, Fraternal Mutual Benefit Associations, 3 Curr. L. 1500, § 1; Id. 1502, § 3; Corporations, 3 Curr. L. 880.

4. Ohio Rev. St. § 3596. State v. Aetna Life Ins. Co. [Ohio] 69 N. E. 608.

5. Minn. Gen. Laws 1901, c. 143. Wright v. Minnesota Mut. L. Ins. Co., 193 U. S. 657, 48 Law. Ed. 832. Reservation of power of amendment except that the fund pledged for

An article of a mutual fire insurance company authorizing it to make an assessment as often as necessary on premium notes to settle losses and pay expenses does not preclude it from issuing insurance for cash premiums.[6]

The board of directors and the president of a mutual life association are governed by the articles of incorporation and the statutes of the state defining and limiting their respective duties and powers.[7] Fidelity bonds of the president, though running to the association, may be enforced by anyone for whose benefit they were executed.[8] Such association acts as trustee in the collection of funds and their distribution to the beneficiaries entitled to them,[9] and its obligations end with such collection and distribution.[10] It may follow any part thereof which has been wrongfully diverted to another purpose and recover it for the benefit of such beneficiaries,[11] and this right passes to a receiver winding up its affairs.[12] Under the Iowa code, the articles and by-laws of a mutual life association and its notices of assessments must state the objects to which the money to be collected is to be devoted, and no part of the proceeds thereof can be applied to any other purpose, any excess being set aside to be used for like purposes.[13] The act applies only to assessments made, and not to fixed charges for contingent expenses, such as an agent's commission charge on renewals.[14] The president of an association is not, in the absence of knowledge, liable on his bond for the error of its bonded cashier, whose duty it is to receive the moneys and apportion them to their proper funds, in depositing money received from investments to the credit of

death losses should not be diverted, authorizes change from "assessment" to "old line" insurance business. Id.

6. Graham v. Mercantile Town Mut. Ins. Co. [Mo. App.] 84 S. W. 93.

7. Violations by president constitute breach of duty, though acquiesced in or directed by board. Sherman v. Harbin [Iowa] 100 N. W. 629.

8. Liability on each becomes fixed at termination of period covered by it, and breach during such period and resulting damage must be shown. Sherman v. Harbin [Iowa] 100 N. W. 622.

9, 10, 11. Sherman v. Harbin [Iowa] 100 N. W. 622.

12. Sherman v. Harbin [Iowa] 100 N. W. 622. Neither, however, can recover on the bond of an officer misappropriating such funds, more than the actual damages resulting therefrom. Id. New bond executed by president on his re-election held not a renewal of old one but a separate and independent undertaking. Sherman v. Harbin [Iowa] 100 N. W. 629. Provisions of bond held broad enough to cover all delinquencies complained of. Id. Act of president in applying proceeds of assessments to payment of beneficiaries to whom they do not belong is mere breach of duty and not act involving fraud or dishonesty on his part so as to require notice to be given to surety. Id. Neither can recover for funds wrongfully paid to one beneficiary which in fact belonged to another, where the latter has been subsequently paid in full from funds subsequently accruing. Sherman v. Harbin [Iowa] 100 N W. 622. The receiver cannot recover on the bond of president for moneys erroneously withdrawn from the benefit fund for the payment of expenses of litigation and the investigation of claims, except for the benefit of unpaid beneficiaries. Sherman v. Harbin [Iowa] 100 N. W. 622, 629. Amendment of by-laws as to issuance of certificates of membership held not to have changed association's method of doing business. Sherman v. Harbin [Iowa] 100 N. W. 622.

13. Where notices contained names of deceased members and stated amount of assessment for "above deaths," held that fund could only be applied on particular losses specified [Code, § 1788]. Sherman v. Harbin [Iowa] 100 N. W. 622, 629. A "safety clause" in a mutual life association policy providing that, if share equitably due from mortality fund should be insufficient to pay a claim in full, it might draw sufficient from its surplus and reserve to meet the deficiency, or call on the members for a pro rata share thereof, held not to limit indemnity payable under policy to proceeds of assessment or eliminate liability to pay the fixed amount of insurance. Sherman v. Harbin [Iowa] 100 N. W. 622. The president has no right to pay the portion of the proceeds of an assessment belonging to one beneficiary to another, even though the association is liable for the payment of the claim of the latter in full. Id. The officer wrongfully diverting the fund is liable on his official bond to beneficiaries filing their claims after the association becomes insolvent only for such sum as they were entitled to receive from it. President, who, assessments being insufficient to pay policies in full, made payments from proceeds of other assessments. Id.

14. Does not prevent agreement to pay agent commissions on renewals. Schrimplin v. Farmers' Life Ass'n, 123 Iowa, 102, 98 N. W. 613. In any event, such charge is an expense incident to the business and its payment is not a diversion of the fund. Id.

the wrong fund.[15] The directors of a mutual life insurance company who are authorized to distribute the surplus earnings of the company may declare a dividend provisionally, conditioning its distribution upon the payment of the next maturing annual premium.[16] An agreement whereby an assessment life insurance association, on assuming the policies of another association, undertakes to pay the agent of the latter his renewal commissions charged on policies written by him is not ultra vires.[17] In an action by an agent for such commissions, the burden is on defendant to make a showing from which the court can determine the amount due.[18] If it does not do so, it cannot complain if the court adjudges it liable for the largest amount which plaintiff's evidence tends to establish as his due.[19]

A receiver of a trust and life insurance company, appointed in sequestration proceedings, is vested with title to all its property and choses in action, and represents both the creditors and stockholders, and may sue to set aside an illegal transfer of its property previously made.[20] An action for that purpose brought by a judgment creditor, suing on behalf of all creditors and stockholders who may come in and be made parties, must be treated substantially as one brought on behalf of the receiver.[21] The assets of the company constitute a trust fund for the benefit of its creditors.[22] Any assignment thereof depriving them of their lien is a fraud on them and may be set aside.[23]

The receiver of a co-operative fire insurance company cannot maintain an action to recover an alleged preference under the insolvency laws, since the company itself could not do so.[24] The payment by such a company of money borrowed to pay losses is not, as against its members, a fraudulent preference.[25]

An order or decree of a court having jurisdiction levying an assessment upon the policy holders of an insolvent mutual insurance company without personal notice to them is conclusive as to all matters relating to the necessity for making it and the amount thereof,[26] but it is not conclusive upon any one of them as to the question whether his relation to the company is such as to subject him to liability therefor, or as to any other defense personal to himself.[27] Policy

15. Sherman v. Harbin [Iowa] 100 N. W. 622, 629.

16. Dividend apportioned to policy did not immediately become applicable to reduce amount of loan made by company to insured, so as to increase difference between debt and cash surrender value, which was applicable to the purchase of extended insurance under the terms of the policy, and thereby extend insurance until after insured's death. Petrie v. Mutual Ben. Life Ins. Co. [Minn.] 100 N. W. 236.

17. Schrimplin v. Farmer's Life Ass'n, 123 Iowa, 102, 98 N. W. 613. Estopped to plead ultra vires where it collects such assessments knowing of and having promised to pay such charges. Id.

18. Since it has books and all information. Schrimplin v. Farmer's Life Ass'n, 123 Iowa, 102, 98 N. W. 613.

19. Judgment held excessive. Schrimplin v. Farmer's Life Ass'n, 123 Iowa, 102, 98 N. W. 613.

20. Raymond v. Security Trust & Life Ins. Co., 44 Misc. 31, 89 N. Y. S. 753.

21. Creditor cannot thereby obtain undue advantage over other creditors. Raymond v. Security Trust & Life Ins. Co., 44 Misc. 31, 89 N. Y. S. 753.

22. Raymond v. Security Trust & Life Ins. Co., 44 Misc. 31, 89 N. Y. S. 753.

23. Raymond v. Security Trust & Life Ins. Co., 44 Misc. 31, 89 N. Y. S. 753. Transfer of all the property of the company so as to put it out of business, leaving certain creditors unprotected and carried into effect against the will of a considerable number of stockholders, held not a reinsurance under the New York insurance law (Laws 1892, c. 690, § 22), but an illegal transaction which must be set aside. Id.

24. Enterprise Fire Ins. Co.'s Receiver v. Enterprise Fire Ins. Co., 25 Ky. L. R. 1630, 79 S. W. 1180. A co-operative company having outstanding $700,000 worth of policies covering property insured for not more than two-thirds of its value, and to secure which the statute gives it a first lien on such property, and whose total indebtedness is $13,000, is not insolvent within statute relating to fraudulent preferences [1 Acts 1855-56, p. 107, c. 704]. Id.

25. Organized under Ky. St. 1903, §§ 702-712. Enterprise Fire Ins. Co.'s Receiver v. Enterprise Fire Ins. Co., 25 Ky. L. R. 1630, 79 S. W. 1180.

26. Swing v. Humbird [Minn.] 101 N. W. 938.

27. That he is not liable under terms of contract. Swing v. Humbird [Minn.] 101 N. W. 938. Evidence sufficient to sustain finding that company never reorganized so as to render defendants liable for assessments. Id. Policies of defendants held not subject

holders are not estopped to defend an action for such assessments because they have met with a loss and have been paid the full amount of their policies.[28] Limitations against the right to enforce liability of policy holders begins on insolvency of the corporation and does not stop running until they are served with summons and made parties.[29]

Taxation of the property of domestic or foreign companies within the state is governed by the provisions of the general and special revenue laws and is treated elsewhere.[30]

(§ 2) *B. Conditions necessary to engage in insurance business, and certification and withdrawal of right.*[31]—In Illinois, the insurance superintendent is authorized to file a bill for an injunction to restrain an insurance company which has abandoned its charter from doing business in that state and for the appointment of a receiver.[32]

Under the New York insurance law, companies must make a deposit with the superintendent of insurance to secure the payment of policies.[33] The distribution of such fund should be made by the superintendent himself, and he cannot be compelled to pay it over to the receiver.[34] The court having acquired jurisdiction may direct its distribution.[35]

§ 3. *Foreign insurers and companies.*[36]—The power of an insurance company to do business in a state other than that where it was organized is derived from the express or implied will of the legislature thereof.[37] Where there is no positive prohibitive statute, the presumption, under the law of comity, prevails that a state permits a foreign company to do any act authorized by its charter or the law under which it is created, unless it is manifest that such act is obnoxious to the policy of its laws.[38] This rule applies to companies authorized by their

to assessment on its insolvency, and by-laws held not to impose any liability on them beyond amount of cash deposit. Id.

28. Swing v. Humbird [Minn.] 101 N. W. 938.

29. Boyd v. Mutual Fire Ass'n, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171.

30. See Licenses, 2 Curr. L. 730; Taxes, 2 Curr. L. 1786. In Idaho mutual co-operative insurance companies are not liable to the 2 per cent tax on earnings and the annual license provided for by Sess. Laws 1901, p. 165. Idaho Mut. Co-op. Ins. Co. v. Myer [Idaho] 77 P. 628. In Louisiana the license on the business of insurance as carried on by foreign companies is based on the gross annual amount of premiums. Not on the number of agents or agencies in the state [Act No. 17 of 1898]. State v. Philadelphia Underwriters, 112 La. 47, 36 So. 221. Where two nonresident insurance companies have paid their license fees, additional fees for the same years cannot be collected from their joint agents issuing their joint policies under a certain name or style, on premiums included in the returns theretofore made by such companies. Id. Evidence dehors such returns is admissible to show that a certain amount of the total premiums was derived from the business transacted by such agency. Id. Under Mo. Rev. St. 1899, § 5508, cities of the second class may impose license tax on foreign companies. Not repealed by, or in conflict with Id. § 8043, providing for tax on premiums in lieu of all other taxes. City of St. Joseph v. Metropolitan Life Ins. Co. [Mo. App.] 84 S. W. 97.

31. See, post, § 3. See, also, Fraternal Mutual Benefit Associations, 3 Curr. L. 1500, § 1.

32. Under Laws 1893, p. 108, § 3, giving him powers in regard to insurance formerly had by auditor and attorney general, and Rev. St. 1874, p. 612, c. 73, giving auditor such power. Entitled to file cross bill for that purpose in suit by company to enjoin him from denying that it was licensed by insurance department or refusing to grant it same privileges as other companies. Yates v. Continental Ins. Co., 207 Ill. 512, 69 N. E. 779.

33. Laws 1892, p. 1960, c. 690, § 71. Raymond v. Security Trust & Life Ins. Co., 44 Misc. 31, 89 N. Y. S. 753.

34, 35. Raymond v. Security Trust & Life Ins. Co., 44 Misc. 31, 89 N. Y. S. 753.

36. See 2 Curr. L. 483. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1502, § 2; Foreign Corporations, 3 Curr. L. 1455.

37. Is a mere privilege or license which legislature may withhold. United States Fidelity & Guaranty Co. v. Linehan [N. H.] 58 A. 956.

38. Foreign life insurance company authorized to write employer's liability insurance may be licensed to do so in Ohio, even though domestic life companies are not specifically authorized to do so. Employers' liability insurance expressly recognized by Rev. St. § 3596. State v. Aetna Life Ins. Co. [Ohio] 69 N. E. 608. There being no provisions to contrary it is policy of New Hampshire to allow foreign surety and burglary insurance companies to carry on business in that state, subject to their charter provisions and the insurance laws. United States

charters to carry on two or more distinct classes of insurance business, though the statutes of the state where it proposes to carry on business do not provide for the organization of such companies.[39]

The legislature of a state may absolutely exclude foreign insurance companies,[40] or it may allow them to do business therein upon such conditions as it may see fit to impose.[41] It also has power to revoke or recall a permission once granted,[42] or to add new conditions after such companies have commenced to do business;[43] but rights acquired cannot be taken away except by express legislative action.[44] Provisions imposing retaliatory taxes or licenses on such companies,[45] and providing for the revocation of the license of a company which shall remove actions brought against it to the Federal courts, without the consent of the plaintiff, have been held to be valid.[46] Retaliatory tax laws become operative immediately upon the existence of the conditions against which they provide,[47] and regardless of whether any agency has been established or attempt to do business has been made in the state against whose companies it is directed.[48]

As a general rule foreign companies are required to file a stipulation appointing the insurance commissioner or some other public officer as their agent upon whom process may be served.[49] Such stipulations are for the benefit of the

Fidelity & Guaranty Co. v. Linehan [N. H.] 58 A. 956.

39. Surety and burglary insurance company. United States Fidelity & Guaranty Co. v. Linehan [N. H.] 58 A. 956. Insurance commissioner cannot exclude them solely on the ground that he believes that such combinations are opposed to the public interest. Id.

40. Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10; Prewitt v. Security Mut. Life Ins. Co. [Ky.] 83 S. W. 611; Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667; Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438.

41. Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10; Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110. Removal of causes to Federal courts. Prewitt v. Security Mut. Life Ins. Co. [Ky.] 83 S. W. 611. Service of summons. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667; Hunter v. Mutual Reserve Life Ins. Co., 97 App. Div. 222, 89 N. Y. S. 849. Requiring them to become domestic corporations does not revoke authority of insurance commissioner to accept service of summons. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438. Retaliatory tax and license fees imposed by Neb. Comp. St. 1901, c. 43, § 33, such a condition. State v. Insurance Co. [Neb.] 99 N. W. 36. May also define the kind of business which it may carry on. State v. Aetna Life Ins. Co. [Ohio] 69 N. E. 608. The business of insurance is not commerce within the interstate commerce clause of the Federal constitution. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667.

42. Prewitt v. Security Mut. Life Ins. Co. [Ky.] 83 S. W. 611; Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110.

43. As to service of process. Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10; Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438.

44. United States Fidelity & Guaranty Co. v. Linehan [N. H.] 58 A. 956.

45. Neb. Comp. St. 1901, c. 43, § 33. State v. Insurance Co. [Neb.] 99 N. W. 36. The fact that exaction may not be demanded in advance as condition precedent to doing business does not render it invalid. Id. Nor is it arbitrary and unreasonable classification within art. 9, § 1 of the Nebraska constitution, because applicable only to companies having domicile in states discriminating against Nebraska corporations. Id. The fact that a less reserve fund is required of companies organized under laws of Nebraska than is required by laws of Pennsylvania of all companies doing business in that state does not prevent enforcement of such tax against companies of that state. State v. Insurance Co. [Neb.] 100 N. W. 405. Such section held not repealed by Comp. St. 1901, c. 77, art. 1, § 38, since the latter is void in so far as it attempts to exempt companies from personal property taxes. Id.

46. Ky. St. 1903, § 631, held constitutional. Prewitt v. Security Mut. Life Ins. Co. [Ky.] 83 S. W. 611.

47. Neb. Comp. St. 1901, c. 43, § 33, requires foreign companies to pay same licenses, etc., as are required by such foreign states of Nebraska companies. State v. Insurance Co. [Neb.] 100 N. W. 405.

48. State v. Insurance Co. [Neb.] 100 N. W. 405.

49. See Foreign Corporations, 3 Curr. L. 1462, § 3; Process, 2 Curr. L. 1262, § 4a.

North Carolina: Laws 1899, p. 175, c. 54, § 62. Birch v. Mutual Reserve Life Ins. Co., 91 App. Div. 384, 86 N. Y. S. 872. Motion to set aside service of summons on insurance commissioner properly denied. Hinton v. Mutual Reserve Fund Ass'n, 135 N. C. 314, 47 S. E. 474. A company which has not been licensed to do business in the state may be served by service on the secretary of the corporation commission, if it has no officer or agent therein upon whom process may be served [Pub. Laws 1901, p. 66, c. 5, held con-

policy holders, and may be enforced by them.[50] A stipulation permitting such service so long as any liability remains outstanding within the state is irrevocable while such liability exists, though the company ceases to do business therein,[51] or though its license has been revoked.[52] Where policies are issued before the enactment of such a statute but under an act requiring the company to maintain some agent or attorney within the state upon whom process may be served so long as contractual liability exists, service may be made on the commissioner as long as the company continues to transact business within the state.[53] A company does not cease doing business so long as it collects premiums and settles claims on outstanding policies, even though it has ceased to accept new business within the state.[54] A statute substituting the insurance commissioner for the secretary of state as the officer on whom process may be served, when accepted by the company, applies to policies theretofore issued.[55] By the statutes of Wisconsin, service upon a foreign insurance company may be made upon any one who aids or assists it in transacting any business.[56]

In some states foreign companies must obtain a license to do business from the insurance commissioner or other officer.[57] In others their assets must equal their liabilities.[58] It is the duty of the insurance commissioner to issue a license

stitutional]. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667. Act applies to all foreign corporations doing business or which have done business in the state, whether they have property therein or not. Id. Continues to operate until all its debts to citizens are paid. Id. Will be presumed that facts necessary to validity of such service existed where record is silent on the subject. Id. The act authorizing such service on foreign corporations generally and that authorizing service on foreign insurance companies by leaving process with the insurance commissioner (Acts 1899, p. 175, c. 54, § 62) are cumulative, and service may be made in either way. Id.

50. Where stipulation provided for service on secretary of state as long as any policies should remain in force and thereafter, and in accordance with subsequent statute, new stipulation was filed authorizing service on insurance commissioner, latter inured to benefit of those receiving policies when first was in force. Foreign judgment could not be attacked on ground that such service conferred no jurisdiction. Woodward v. Mut. Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10. Cannot be revoked at least as to policies on which it has thereafter received premiums. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438. Attempted cancellation invalid both as to transactions originating within state and also with regard to claims on policies issued to persons in other states on which suits were properly brought in North Carolina. Hunter v. Mutual Reserve Life Ins. Co., 97 App. Div. 222, 89 N. Y. S. 849.

51. N. C. Laws 1899, p. 147, c. 54. Mutual Reserve Fund Life Ass'n v. Scott [N. C.] 48 S. E. 581; Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10.

52. Does not revoke the stipulations so as to render such service insufficient in an action by a citizen of such state upon a cause of action arising out of transactions between the parties while the company was doing business thereunder. Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 47 Law. Ed. 987. See note to this case in 47 Law. Ed. 987, for collection of authorities on service of process on foreign companies.

53. Birch v. Mutual Reserve Life Ins. Co., 91 App. Div. 384, 86 N. Y. S. 872. Attempted revocation invalid where company continued to receive premiums and settle claims on outstanding policies, and judgments recovered on policies issued prior to compliance with act on service so made held valid. Id.

54. Birch v. Mutual Reserve Life Ins. Co., 91 App. Div. 384, 86 N. Y. S. 872. Though license to do business is canceled. Mutual Reserve Fund Life Ass'n v. Phelps, 190 U. S. 147, 47 Law. Ed. 987. See Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438.

55. Original stipulation provided for service on secretary as long as any policies should remain in force in state. Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10. Statute merely changes remedy and does not impair contract obligations. Johnston v. Mutual Reserve Fund Life Ins. Co., 43 Misc. 251, 87 N. Y. S. 438.

56. Rev. St. 1898, § 2637, subd. 9. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206.

57. See Licenses, 2 Curr. L. 730. Under the laws of West Virginia, a foreign accident insurance company is not required to comply with Code 1899, c. 34, § 2, and get a certificate to do business in the state from the auditor, but gets its certificate from the secretary of state under Id., c. 54, § 30, upon complying with its provisions. Virginia Acc. Ins. Co. v. Dawson, 53 W. Va. 619, 46 S. E. 51. Such company is not required to file a writing accepting the provisions of § 30, and agreeing to be governed thereby. Company held entitled to certificate. Id.

58. Vermont Acts 1902, p. 69, No. 73, amending V. S. 4178, providing that foreign joint stock life insurance companies could not do business in that state unless it had assets equal to its liabilities, held not to have changed method of computing net

to a company possessing and complying with the statutory requirements,[59] and mandamus will lie to compel him to do so.[60] New burdens cannot be imposed or exclusions effected by the unauthorized acts of any state officer or private person.[61] A foreign company transacting business in the state as a corporation but failing to take out a license cannot raise the question of its want of corporate capacity as against the person with whom it has so dealt.[62]

§ 4. *Agents and solicitors for insurance. A. The right to negotiate insurance and regulations thereabout.*[63]—The state superintendent of insurance may refuse a license to an insurance agent who has solicited applications without it and offered rebates as an inducement.[64]

(§ 4) *B. Rights and liabilities of agents.*[65]—The general rules of contract and agency apply to the relations existing between insurance companies and their agents.[66]

The mere fact that the agent introduces the applicant to the insurer, or discloses names by which they come together to treat will not entitle him to compensation.[67] But if it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted and the contract entered into, the parties cannot afterwards, by agreement between themselves, withdraw the matter from the agent's hands so as to deprive him of his commissions.[68] An agent is not entitled to commissions where the original application was postponed and the second application was procured by another agent

values of policies. Bankers' Life Ins. Co. v. Fleetwood [Vt.] 57 A. 239. Amendment does not require computation of the net value of all outstanding policies on a prescribed basis, without distinguishing between those providing for a preliminary one year term, with an option for renewal, and any other class of policies. Id. Acts 1902, p. 73, No. 77, amending V. S. 4205, does not give the insurance commissioners discretion to require a different calculation of the reinsurance reserve than that pointed out by statute. Id.

59. In New Hampshire (Pub. St. 1901, c. 109, § 6), commissioner cannot refuse license if company complies with statutory regulations, has requisite capital and assets, and he is satisfied that it is safe and reliable, even though he believes it not to be for best interests of public that one company shall carry on two classes of business. United States Fidelity & Guaranty Co. v. Linehan [N. H.] 58 A. 956.

60. United States Fidelity & Guaranty Co. v. Linehan [N. H.] 58 A. 956.

61. Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110. Companies may maintain a suit to restrain the insurance commissioner from compelling them to use a form of policy prescribed by him, which has not been enacted as a law of the state. Id.

62. Fisher v. Traders' Mut. Life Ins. Co. [N. C.] 48 S. E. 667.

63. See 2 Curr. L. 484. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1502, § 3.

64. Vorys v. State, 67 Ohio St. 15, 65 N. E. 150.

65. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1502, § 3. Right of agents to waive warranties and conditions, post, § 16c. Right to waive proofs of loss, etc., post, § 19.

66. See Agency, 3 Curr. L. 68; Contracts, 3 Curr. L. 805. Levinesss v. Kaplan [Md.] 59 A. 127. Contract of agency construed. Arbaugh v. Shockney [Ind. App.] 72 N. E. 668; Id., 71 N. E. 232. Provision in contract between life insurance company and agent that the former "may offset against any claims for commissions under this contract any debt or debts due at any time" by the agent, held to apply only to such debts as arose out of the relation created thereby, and not to authorize it to offset against renewal premiums advances made to the agent after such relation had ceased, and rights thereunder had been transferred to third person with company's knowledge. Campbell v. Equitable Life Assur. Soc., 130 F. 786. Contract of employment held terminable at the will of either party. Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359. Letter held to constitute contract of employment. Id. The fact that a contract of employment, otherwise complete in its terms, does not state its duration, does not render it so uncertain as to admit parol evidence. Id. Contract of brokers to furnish clients all insurance required for three years at fixed rate, providing that if tariff association should reduce rates the clients should have the benefit thereof, held not terminated by dissolution of such association, and not rescinded. Tanenbaum v. Josephl, 91 App. Div. 341, 87 N. Y. S. 839. In an action on an agent's bond to recover unremitted premiums, the question whether they were collected within his territory is one of fact for the jury, where the language describing it is ambiguous. Error to strike out certain items because collected outside such territory. Fidelity & Casualty Co. v. Brown [Kan.] 77 P. 111.

67, 68. Levinesss v. Kaplan [Md.] 59 A. 127.

after he had abandoned his employment.[69] Where an agent induces an applicant to increase the amount applied for through another agent, the agent procuring the first application is not entitled to commissions on such increase.[70] An agent is, in the absence of a special agreement to the contrary, bound by a general custom among insurance companies to allow commissions to the agent procuring a new application rather than to the one procuring the original application which has been postponed or abandoned.[71]

The fundamental duty of an insurance agent is to obey his instructions.[72] If he fraudulently issues a policy at a lower rate than authorized, against the express directions of the company, and continuously and purposely fails to make report thereof, and the latter is thereby compelled to pay a loss which it might otherwise have avoided, such agent is liable both for the premium which he should have exacted and for the full amount of damages suffered by reason thereof.[73] In case the risk is not a prohibited one, the measure of damages is the difference between the premium charged and that which should have been charged, or, in case the premium has not been paid, the full amount which should have been exacted.[74] The fact that, owing to its provisions, the policy could not have been canceled before the loss, even if the company had been informed of its issuance, is no defense.[75] The acceptance of the premium actually exacted does not constitute an election of remedies, or a ratification or estoppel.[76] The petition in such case need not negative contributory negligence.[77]

An agent inducing an applicant by means of false representations to take out insurance in an insolvent company is liable for the damages resulting therefrom.[78] An agent of a foreign company is not ordinarily personally liable for misrepresenting to an applicant that the company has been admitted to do business in the state, thereby inducing him to take out a policy of insurance, where such policy is not thereby rendered invalid.[79] By statute in some states, the agent of any foreign company which has not complied with the laws in relation to such companies is made personally liable on all contracts of insurance made by or through him on its behalf.[80] Such statutes apply only to contracts of insurance on property situated in such state.[81] The liability is on the contract and cannot be enforced after the expiration of the time within which, by its terms, action may be brought thereon.[82]

69. Leviness v. Kaplan [Md.] 59 A. 127. Instruction in action for commissions, authorizing finding for defendant, though plaintiff's work led to second application, if insurance was placed by second agent because of his negligence, properly refused where evidence did not raise question of negligence. Id.

70, 71. Leviness v. Kaplan [Md.] 59 A. 127.

72. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524.

73. Amount of loss and expenses of adjustment, etc., recoverable where it appears that the company would have canceled the policy if it had known of its issuance. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524. Where one of the agents, who were partners, advised the adjuster to pay the amount of the loss, defendants cannot claim that they are not bound by his adjustment on the question of damages. Id.

74. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524.

75. Required five days' notice. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524.

76. Company entitled to premium. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524. Held error to refuse to allow plaintiff, before judgment, to dismiss that part of his claim which sought to recover premium. Id.

77. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524.

78. Jones v. Horn [Mo. App.] 78 S. W. 638. The burden is on plaintiff to prove such insolvency. Id. No presumption of the insolvency of a foreign company arises from the fact that it has not been authorized to do business in the state. Id.

79. Policy not thereby rendered void under Mo. Rev. St. 1899, §§ 7989, 8001. Jones v. Horn [Mo. App.] 78 S. W. 638.

80. Pa. Act May 1, 1876 (P. L. 66) § 48. Rothschild v. Adler-Weinberger S. S. Co. [C. C. A.] 130 F. 866.

81. Not to marine policy issued to nonresidents on vessels outside state. Rothschild v. Adler-Weinberger S. S. Co. [C. C. A.] 130 F. 866.

82. Rothschild v. Adler-Weinberger S. S. Co. [C. C. A.] 130 F. 866.

The business of an agent who represents several companies, and whose customers leave the matter of the selection of the company to him, has a well recognized value, which is the subject of sale.[83] A former agent of a company may solicit its customers and patrons in behalf of any company he may see fit, so long as he does not use for that purpose information gathered exclusively from such company's property, or abridge its enjoyment of existing contracts by inducing improper cancellations.[84]

An agreement by the company to pay its agent a reasonable commission on renewals received upon the insurance negotiated by him is not unreasonable and void as operating to tie up the future accruing funds, and to control the discretion of future boards of directors.[85]

§ 5. *Insurable risks and interests. Fire insurance.*[86]—The insured must have an insurable interest in the property covered by the policy or the contract is void.[87] In general, it may be said that anyone who will suffer pecuniary loss by its destruction or injury has such an interest,[88] even though he has neither the equitable nor legal title thereto.[89]

Life insurance.[90]—The issue of a policy of life insurance to one having no interest in the life of the insured is in the nature of a wager, and hence is contrary to public policy and void.[91] In order to have such an interest, the parties must be

83. Sale can only be defeated by refusal of company to appoint vendee as agent, or refusal of vendor's customers to patronize him. National Fire Ins. Co. v. Sullard, 97 App. Div. 233, 89 N. Y. S. 934.

84. National Fire Ins. Co. v. Sullard, 97 App. Div. 233, 89 N. Y. S. 934. Expiration register of agent held his own property. Id. Company is entitled to an injunction to restrain him from using information obtained exclusively from it in soliciting business from its policy holders. Id.

85. Agreement to pay $1 per $1,000 per year as long as insurance remained in force. Schrimplin v. Farmers' Life Ass'n, 123 Iowa, 102, 98 N. W. 613.

86. See 2 Curr. L. 490.

87. Tyree v. Virginia Fire & Marine Ins. Co. [W. Va.] 46 S. E. 706.

88. Holder of the interest who is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it. Farmers' & Merchants' Ins. Co. v. Mickel [Neb.] 100 N. W. 130.

The following have been held to have insurable interests: One in possession of a building under an agreement with the owner that, if he pays the taxes and insurance thereon, he may do what he pleases with it, except to sell it. Evidence held to show insurable interest both at time policy was issued and when loss occurred. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857. The lessor of property in a building erected thereon by the lessee. McArdle v. German Alliance Ins. Co., 96 App. Div. 139, 90 N. Y. S. 485. One making contract of sale for entire output of glass factory, whereby he was released from liability for loss by fire on the goods insured, particularly where goods have not been paid for and seller pays the premiums. Burke v. Continental Ins. Co., 91 N. Y. S. 402. One who has made payments on machines, pursuant to a contract with the patentee, though ownership is to remain in the patentee until the expiration of the patent. State v. Springfield Underwriters' Mut. Fire Ins. Co., 2 Ohio N. P. (N. S.) 111. The owner of a life estate, to the full value of the property. Grant v. Buchanan [Tex. Civ. App.] 81 S. W. 820. A carrier, in goods in his possession as such, to the full extent of their value, against a loss for which he may possibly become responsible. Under marine policy insuring charterer of vessel against "general average," insurer held liable for loss resulting from a jettison of a part of the cargo, chargeable to the ship, cargo, and freight in general average. Munich Assur. Co. v. Dodwell & Co. [C. C. A.] 128 F. 410. Question whether he has a right to recover under the policy is not to be determined, after the loss, by inquiring whether he is then liable therefor to the owners. Has right to insure against his own negligence and the necessity of inquiring whether loss was caused thereby. Id. Bailee or agent holding property for purposes of repair or sale. Johnston v. Abresch [Wis.] 101 N. W. 395.

No insurable interest: A husband living with his wife, in a house on property belonging to his wife's separate estate. Tyree v. Virginia Fire & Marine Ins. Co. [W. Va.] 46 S. E. 706.

89. Burke v. Continental Ins. Co., 91 N. Y. S. 402.

90. See 2 Curr. L. 490. See, also, Fraternal Mutual Benefit Associations, 3 Curr. L. 1513, § 8.

For necessity of insurable interest in assignee, see post, § 14.

91. Because interest of holder is to shorten rather than to lengthen life of insured. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444; American Mut. Life Ins. Co. v. Bertram [Ind.] 70 N. E. 258; Berdan v. Milwaukee Mut. Life Ins. Co. [Mich.] 99 N. W. 411; Hinton v. Mutual Reserve Fund Ass'n, 135 N. C. 314, 47 S. E. 474; Wilton v. New York Life Ins. Co. [Tex. Civ. App.] 78 S. W. 403. In

related by blood or marriage,[92] or the beneficiary must be dependent on the insured for support,[93] must have a reasonable expectation of pecuniary benefit or advantage from his continued life,[94] or there must be some contract between them, the fulfillment of which would be prevented by death.[95] The insured has an insurable interest in his own life,[96] and a creditor in that of his debtor.[97]

Evidence that the insured was a person of no property and had no capacity or ability to earn money to pay premiums is admissible to show that the policy was a mere wager.[98] Evidence that the policy was procured pursuant to an agreement with plaintiff having no insurable interest to pay the premiums and take the proceeds and that plaintiff, though suing as administrator, is in fact seeking to recover so as to carry out such agreement, is not objectionable as an attempt to vary the policy by parol.[99]

§ 6. *Application.*[1]—If ambiguous, the application should be construed most strongly against the insurer.[2]

§ 7. *The contract of insurance in general, and general rules for its interpretation.*[3]—Insurance on life includes all policies in which the payment of insurance money is contingent on the loss of life.[4]

Essentials and validity; acceptance.—An insurance contract is not within the statute of frauds, and may be oral.[5] Hence an acceptance by the company of the

Indiana, by statute, the beneficiary under a life policy must have an insurable interest in the life of the insured, where assessments are paid by any person other than the insured and without his written consent. Acts 1883, p. 204, c. 136, § 6. Sec. 9 makes it felony to procure insurance on life of another without his knowledge or consent. American Mut. Life Ins. Co. v. Bertram [Ind.] 70 N. E. 258.

92. In case the interest depends on consanguinity alone must be related as closely as the second degree, and it will only be presumed in favor of the father, mother, child, brother, sister, or husband or wife of the insured. Wilton v. New York Life Ins. Co. [Tex. Civ. App.] 78 S. W. 403. Wife's interest ceases on divorce. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411.

The following have been held to have insurable interests: Father in life of son. Wrather v. Stacy [Ky.] 82 S. W. 420. A sister-in-law of the insured who is a member of his household and to whom he owes money for services. King v. Cram, 185 Mass. 103, 69 N. E. 1049.

93. Child accepted by husband and wife as their own, under arrangement with its mother, known and recognized as nephew of wife's sister, on whom he becomes dependent for support after wife's death, has insurable interest in life of wife's sister. Berdan v. Milwaukee Mut. Life Ins. Co. [Mich.] 99 N. W. 411.

94. Wilton v. New York Life Ins. Co. [Tex. Civ. App.] 78 S. W. 403. A niece having no expectation of pecuniary benefit other than an occasional gift has not. Id.

95. Hinton v. Mutual Reserve Fund Ass'n, 135 N. C. 314, 47 S. E. 474.

96. King v. Cram, 185 Mass. 103, 69 N. E. 1049.

97. Wrather v. Stacy [Ky.] 82 S. W. 420. Issue or pledge of a policy upon his life as collateral security for the payment of his debt is valid. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444.

98. Hinton v. Mutual Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474.

99. Evidence as to such agreement not objectionable as varying terms of instrument. Hinton v. Mutual Reserve Fund Life Ass'n, 135 N. C. 314, 47 S. E. 474.

1. See 2 Curr. L. 488. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1504, § 5.

2. Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 P. 822. Statement in application that it was for insurance for a term of years from a named date held sufficient embodiment therein of agent's agreement that insurance was to take effect on that date to satisfy a condition that company would not be bound by agreements of agent not contained in application. Alliance Co-operative Ins. Co. v. Corbett [Kan.] 77 P. 108. Parol evidence admissible to explain alterations in application made by agent. Id. Policies already held by plaintiff on such date held admissible. Id.

3. See 2 Curr. L. 500. See, also, Contracts, 3 Curr. L. 817, 827, §§ 3, 4; Fraternal Mutual Benefit Associations, 3 Curr. L. 1504, § 5.

4. Policy providing against accident and loss of life by accident is life insurance policy within Pa. Act May 11, 1881 (P. L. 20), providing that application shall not be admitted in evidence unless attached to policy. Zimmer v. Central Acc. Ins. Co., 207 Pa. 472, 56 A. 1003.

5. Mattingly v. Springfield Fire & Marine Ins. Co. [Ky.] 83 S. W. 577. Specific performance can only be decreed where the contract is complete in all its parts, and nothing remains for construction. Not enforceable where it is made by an agent representing two companies and the one to take the risk is not specified. Hartford Fire Ins. Co. v. Trimble, 25 Ky. L. R. 1497, 78 S. W. 462. Director of mutual insurance company held to have authority to make oral contract insuring a member pending action on his application, and that defendant could not, under the circumstances, escape liability by rejecting application after loss oc-

proposal for insurance contained in the application constitutes a valid and enforceable contract, though no policy is issued.[6] This of course does not apply where the contract provides that the insurance shall not take effect until the policy is issued or delivered,[7] or where such is the evident intention of the parties.[8] Nor does a contract to write and deliver a policy render the insurer liable for loss occurring before such delivery in the absence of a contract for temporary insurance.[9] Although in writing, the policy may be subsequently modified by parol, even though it contains a provision to the contrary.[10]

The general rule that to establish a bi-lateral contract, when the parties are at the same place, there must be an offer and an acceptance actually communicated to the offerer, applies to contracts of insurance.[11] Hence the insurer is not liable until it communicates to the insured its acceptance of his application.[12] Delivery of the policy to the insured must ordinarily be shown,[13] in the absence of a provision mak-

curred. Loomis v. Jefferson County Patrons' Fire Relief Ass'n, 92 App. Div. 601, 87 N. Y. S. 5.

6. **Fire insurance:** Evidence sufficient to sustain verdict for plaintiff on appeal. Herring v. American Ins. Co., 123 Iowa, 533, 99 N. W. 130. Binding contract may be consummated with mutual fire company without issuance of policy, in absence of agreement or provision in by-laws to the contrary. Evidence held to show contract. Instructions approved. Alliance Co-operative Ins. Co. v. Corbett [Kan.] 77 P. 108.

Life insurance: Insurer liable for loss before issuance and delivery of policy if contract completed by meeting of minds. Summers v. Mutual Life Ins. Co. [Wyo.] 75 P. 937. Contract not finally executed until delivered and accepted, though it may be so far assented to as to give right of action thereon. Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 P. 822.

7. Summers v. Mutual Life Ins. Co. [Wyo.] 75 P. 937. Application and receipt of sum to be applied as first premium held not to constitute preliminary contract for temporary insurance, but to render insurance effective only when application is accepted and policy signed by secretary and issued. Cooksey v. Mutual Life Ins. Co. [Ark.] 83 S. W. 317.

8. Evidence held to show intent that policy should not take effect until policy was issued. Summers v. Mutual Life Ins. Co. [Wyo.] 75 P. 937. Complaint in action to recover premiums on nondelivery of policy held not to be construed as alleging that agents themselves had authority to issue it. Id. Fact that petition demands damages for refusal to issue policy on which first premium has been paid, held not to affect right of plaintiff to recover in that action amount so paid, as money had and received. Id.

9. Consumers' Match Co. v. German Ins. Co. [N. J. Err. & App.] 57 A. 440. Where a provisional certificate of insurance is issued for a definite period to be then merged in a permanent policy and the amount paid therefor to be applied on the first year's premium, unless the company shall decide not to accept the risk, in which event such insurance may be terminated at any time prior to its expiration by notice to the insured and a return of the amount paid, and no such notice is given or return made, the insured is entitled to assume that his permanent policy takes effect at the end of such period, and the company is liable on his death shortly thereafter, notwithstanding the fact that no permanent policy has been issued. Keen v. Mutual Life Ins. Co., 131 F. 559.

10. Provision as to change of ownership. Mattingly v. Springfield Fire & Marine Ins. Co. [Ky.] 83 S. W. 577.

11. Busher v. New York Life Ins. Co., 72 N. H. 551, 58 A. 41.

12. No liability where application for life policy was taken by agent and forwarded to company, which issued policy and returned it to agent, who received it after applicant's death and never delivered it. Busher v. New York Life Ins. Co., 72 N. H. 551, 58 A. 41. Application was accompanied by payment on account of first premium, and receipt stipulated that policy should not be in force until first premium was paid in full and policy should be delivered to insured while in good health. Policy was issued and sent to agent, but applicant died before he was notified of this fact and before balance of premium was paid or policy delivered. Held no contract. Kilcullen v. Metropolitan Life Ins. Co. [Mo. App.] 82 S. W. 966. The pastor of a church who invites proposals for insurance without authority is the agent of the insurer in receiving and transmitting executed policies which require mere acceptance by church trustees, hence his knowledge of an acceptance is sufficient to complete the contract before its communication to the principal. While trustee was remitting premium, property burned. National Mut. Church Ins. Co. v. Trustees M. E. Church, 105 Ill. App. 143.

13. The burden of proving an unconditional delivery is on plaintiff (Coffin v. New York Life Ins. Co. [C. C. A.] 127 F. 555), and it still rests upon him, notwithstanding the fact that he makes out a prima facie case by showing that it came to him from the custody of the insured, complete in form. Evidence held to show conditional delivery only, it being insufficient to impeach receipt for "inspection" only (Id.). A recital of payment of the first premium is not a substitute for due proof of delivery. Id. Where the application provides that the policy shall not take effect until the policy is issued and the first premium is paid, and the agent holds the policy, after its issuance

ing it effective before delivery.[14] Where it is retained by the agent, at the request or with the acquiescence of the insured until after the fire, when it is delivered to him on demand, it will be regarded as delivered when issued.[15]

Conflict of laws.[16]—The contract is governed by the laws of the state where it is completed,[17] which is generally held to be in the state where the policy is delivered and the premium paid,[18] though there seems to be some conflict of authority in this regard.[19] Matters relating to the performance of the contract are governed by the laws of the place where such performance takes place.[20] Parties may incorporate into the contract the laws of a state other than that in which they reside, provided they are not in conflict with the laws or public policy of the latter state,[21] and may provide that it shall be governed thereby.[22] Such a provision does not require its validity and effect to be determined by such laws, but merely makes them a part of the contract, to be construed and enforced as any other part thereof.[23] Though the policy provides that it shall be construed according to the laws of a foreign state, they will be disregarded where no evidence of them is introduced.[24]

Construction.[25]—A policy of insurance, when plain and unambiguous in its terms, is a contract between the parties, to be enforced only according to its provisions and in the same manner as any other written contract.[26] Its meaning, like

by the company, under an agreement with the applicant, whereby it is to be delivered to him on a specified date on payment of half the premium in cash and the execution of the insured's note for the balance, the company is not liable on the death of the insured before the policy is delivered to him and the premium is paid. Mutual Life Ins. Co. v. Lucas, 25 Ky. L. R. 2052, 79 S. W. 279.

14. Under custom binding company as soon as agent took application, held that where, on cancellation of policy, agent at once wrote plaintiff's name on margin of policy of defendant company, and after fire informed him that he had the policy, and where the defendant delivered the policy and accepted the premium after the fire with full knowledge of the facts, and did not offer to return it until after suit was brought, it was liable. Southern Ins. Co. v. Hannah [Miss.] 37 So. 506. Policy held "issued," within provision in application making contract effective when that was done, when signed and executed at office of company, though not delivered. Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 P. 822.

15. Young v. St. Paul Fire & Marine Ins. Co. [S. C.] 47 S. E. 681. Where agent hands policy to officer of insured, who accepts it and then hands it back with the request that the agent keep it for him for a few days, there is a completed contract. Cassville Roller Mill. Co. v. Aetna Ins. Co. [Mo. App.] 79 S. W. 720.

16. See 2 Curr. L. 501. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1505, § 5C; Conflict of Laws, 3 Curr. L. 720, § 1.

17. Policy held Louisiana contract. Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790.

18. Where policy is executed at home office but is forwarded to the local agent in the state where the insured resides and is there delivered to the insured on payment of the premium to such agent, the contract is governed by the laws of the latter state. Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 Law. Ed. 788; Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790. Policy issued by a foreign corporation becomes an Ohio contract when the application is made, the policy delivered and the premiums paid in Ohio. Plaut v. Mutual Life Ins. Co., 4 Ohio C. C. (N. S.) 94.

19. Life policy issued to resident of Iowa, but providing that premiums and insurance was to be made at company's home office in New York, where it was executed, held New York contract, though to take effect when delivered, in absence of proof of place of actual delivery. Summit v. United States Life Ins. Co., 123 Iowa, 681, 99 N. W. 563. A policy executed and signed in New York and payable in that state is a New York contract, though delivered elsewhere. Laws of that state govern as to interest. Cudahy Packing Co. v. New Amsterdam Casualty Co., 132 F. 623.

20. Where contract insuring Mexican bank against loss of articles sent through mails provided that packages must be packed by two adults and remain in control of one of them until mailed, Mexican law governs as to who are adults. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

21. As to notice of premiums. Mutual L. Ins. Co. v. Hill, 193 U. S. 551, 48 Law. Ed. 778.

22. Contract of insurance held to show intent of parties that it should be governed by laws of New York. Nederland Life Ins. Co. v. Meinert [C. C. A.] 127 F. 651.

23. New York statutory notice of premiums not necessary. Mutual Reserve Fund Life Ass'n v. Minehart [Ark.] 83 S. W. 323. See, also, Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 Law. Ed. 778.

24. New York Life Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004.

As to notice of premium required by foreign laws, see post, § 8.

25. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1505, § 5C; Contracts, 3 Curr. L. 827, § 4.

26. Provision requiring waiver of proofs of loss to be in writing. Missouri Pac. R.

that of all other contracts, is to be determined from the language used by the parties as embodying their intention, in the light of the circumstances under which it was made,[27] which should receive a reasonable construction,[28] and be taken in its plain, ordinary, and popular sense, unless a contrary intention appears.[29] When the language is ambiguous, it is to be understood in the sense in which the insurer had reason to suppose it was understood by the assured,[30] and extrinsic evidence in regard to the relations of the parties, the subject-matter and circumstances surrounding its making is admissible.[31] The position taken by defendant in regard thereto may also be looked to to determine its meaning.[32] All the terms of the contract should be considered together,[33] and if possible should be so construed as to give effect to every clause.[34] Special provisions control general ones,[35] and the written must prevail over the printed parts.[36] The policy will if possible be construed so as to give it effect rather than to make it void.[37]

Contracts of insurance will be strictly construed against the insurer and liberally construed in favor of the insured,[38] particularly when prepared by the insurer,[39]

Co. v. Western Assur. Co., 129 F. 610. Where there is no waiver, the rights of the parties are to be determined by the written contracts alone. As to double insurance and building additions. Meigs v. London Assur. Co., 126 F. 781. Where there is no standard form of policy prescribed by statute, courts will enforce the contract as made and cannot relieve against the results of the insured's failure to comply with its lawful provisions. Proofs of injury under accident policy. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

27. Fire policy issued to one engaged in repairing vehicles, on stock of carriages, supplies, etc., either belonging to insured or held by him in trust, or in storage, or for repairs, held to cover not only interest of insured, but also interest of owner. Johnston v. Abresch Co. [Wis.] 101 N. W. 395; Bracher v. Equitable Life Assur. Soc., 42 Misc. 290, 86 N. Y. S. 557. Condition against foreclosure proceedings. London & L. Fire Ins. Co. v. Davis [Tex. Civ. App.] 84 S. W. 260. In so far as it is lawful. Blunt v. Fidelity & Casualty Co. [Cal.] 78 P. 729. Where the words are clear and free from ambiguity cannot change it by a forced construction. Id.

28. Provisions allowing cancellation. Hamburg-Bremen Fire Ins. Co. v. Browning [Va.] 48 S. E. 2. Concurrent insurance. L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462.

29. Bastian v. British American Assur. Co. [Cal.] 77 P. 63; London & L. Fire Ins. Co. v. Davis [Tex. Civ. App.] 84 S. W. 260; Bracher v. Equitable Life Assur. Soc., 42 Misc. 290, 86 N. Y. S. 557. Age limit in policy held to refer to time of accident and not to age when policy was issued. Hence declaration must allege that insured was between prescribed ages when accident happened. Wheeler v. United States Casualty Co. [N. J. Law] 57 A. 124. Fact that defendant knew that he was 64 when policy issued, age limit being 65, and that policy issued for a year held immaterial. Wheeler v. United States Casualty Co. [N. J. Law] 59 A. 347.

30. Bracher v. Equitable Life Assur. Soc., 42 Misc. 290, 86 N. Y. S. 557.

31. L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462.

32. New York Life Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004.

33. Beneficiary under accident policy held to have no right to recover for death from accident where insured could not have recovered for the accident, if it had not resulted in his death, on account of nonpayment of premiums. Roberts v. Aetna Life Ins. Co. [Ill.] 72 N. E. 363.

34. Clauses as to forfeiture for nonpayment of premiums and providing that policy should be nonforfeitable after certain number had been paid, held not inconsistent. Ferguson v. Union Mut. Life Ins. Co. [Mass.] 72 N. E. 358; L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462.

35. Where contract provides that it is to be governed by laws of New York, and also specifically provides that failure to receive a notice of dues and assessments shall not excuse their nonpayment, the New York statutory notice is not necessary. Mutual Reserve Fund Life Ass'n v. Minehart [Ark.] 83 S. W. 323; Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 Law. Ed. 788.

36. Bracher v. Equitable Life Assur. Soc., 42 Misc. 290, 86 N. Y. S. 557.

37. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074.

38. Provision that insurer should not be held to have waived any provision of policy by any act relating to appraisement held not to apply to provision limiting time within which action could be brought on policy. Fritz v. British American Assur. Co., 208 Pa. 268, 57 A. 573; L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462; Howerton v. Iowa State Ins. Co. [Mo. App.] 80 S. W. 27; Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. Providing for forfeiture for ceasing to operate factory. Queen Ins. Co. v. Excelsior Mill. Co. [Kan.] 76 P. 423. Burglary insurance. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167. Death of carpenter in cotton ginning plant held covered by employer's liability policy. Fidelity & Casualty Co. v. Lone Oak Cotton Oil & Gin Co. [Tex. Civ. App.] 80 S. W. 541.

39. Robson v. United Order of Foresters [Minn.] 100 N. W. 381; Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595; Nederland Life Ins. Co. v. Meinert [C. C. A.] 127 F. 651. Condition avoiding policy for

or when they are ambiguous in their terms;[40] but this rule does not go to the extent of disregarding a plain provision of the policy.[41]

Warranty clauses will be construed most favorably toward the insured.[42] Forfeitures are not favored and it is generally held that they will not be enforced unless specifically and definitely provided for in the contract,[43] though it has been held that when the situation is such as will, as a matter of law, carry with it a forfeiture as a penalty, that result will follow whether expressly stipulated for or not.[44] Provisions creating them will be construed strictly against the insurer and liberally in favor of the insured.[45] If susceptible of more than one meaning, that most favorable to the insured should be adopted.[46] The fact that a forfeiture is specifically provided for in other clauses and omitted in the one under consideration will tend to show that it was not intended.[47] Where the language used is equally susceptible of two interpretations, the one giving greater indemnity and sustaining the claim will be adopted.[48] The rights of the parties cannot be affected by subsequent expressions of the agent's opinion in regard to them.[49] An agreement for a policy of insurance contemplates the issuance of a policy containing the ordinary conditions, and when delivered, such conditions are binding on the insured.[50]

In Kentucky it is held that a life policy payable to insured's wife and children

foreclosure proceedings. London & L. Fire Ins. Co. v. Davis [Tex. Civ. App.] 84 S. W. 260. In bond indemnifying employer against loss by dishonesty of employes. Union Pac. Tea Co. v. Union Surety & Guaranty Co., 43 Misc. 50, 86 N. Y. S. 466.

40. Provisions of marine policy held not ambiguous. Fulton v. Insurance Co., 127 F. 413; New York Life Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004. As to vacancy. Central Mont. Mines Co. v. Fireman's Fund Ins. Co. [Minn.] 99 N. W. 1120. Deduction of unpaid premiums on life policy. Bracher v. Equitable Life Assur. Soc., 42 Misc. 290, 86 N. Y. S. 557. As to cancellation. Continental Ins. Co. v. Daniel, 25 Ky. L. R. 1501, 78 S. W. 866.

41. Forfeiture for having dynamite on premises. Bastian v. British American Assur. Co. [Cal.] 77 P. 63.

42. As to inventory. Phoenix Assur. Co. v. Stenson [Tex. Civ. App.] 79 S. W. 866. So as to protect him against obligations of strict warranty. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

43. Queen Ins. Co. v. Excelsior Mill. Co. [Kan.] 76 P. 423; German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897. Burden is on the one who claims the benefit thereof to clearly establish his right. Lawrence v. Penn Mut. Life Ins. Co. [La.] 36 So. 898. For failure to furnish proofs of loss in time specified. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227; Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283. Proofs of loss. St. Paul Fire & Marine Ins. Co. v. Owens [Kan.] 77 P. 544. To effect an impairment of the original obligation to pay a specified sum, the language of subsequent clauses must be clear and unambiguous. Bracher v. Equitable Life Assur. Soc., 42 Misc. 290, 86 N. Y. S. 557. Under policy requiring payment of premiums in advance in semi-annual instalments, and providing that amount of future instalments necessary to complete full year's premium at time of insured's death should be deducted from amount of claim, held that company was entitled to deduct next semi-annual premium due after death of insured. Id. Where two constructions are possible, the one avoiding a forfeiture will be adopted. Promissory warranty as to keeping books. Aetna Ins. Co. v. Fitze [Tex. Civ. App.] 78 S. W. 370.

44. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

45. German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897. For foreclosure proceedings. Fitzgibbons v. Merchants' & Bankers' Mut. Fire Ins. Co. [Iowa] 101 N. W. 454. As to person on whom proofs of loss must be served. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074. Will not be construed as broader than the terms which create it. Ferguson v. Union Mut. Life Ins. Co. [Mass.] 72 N. E. 358.

46. Forfeiture for nonpayment of premiums held not to affect right to paid up policy. Ferguson v. Union Mut. Life Ins. Co. [Mass.] 72 N. E. 358.

47. Provision in slip attached to policy that insured property shall not remain idle for more than thirty days held not to ipso facto work a forfeiture. Hence defense simply reciting that plant was idle for prohibited time but making no claim that loss was occasioned thereby states no defense. Queen Ins. Co. v. Excelsior Mill. Co. [Kan.] 76 P. 423.

48. In policy agreeing to pay indemnity from the immediate, continuous and total loss of time necessarily resulting from injuries, word "immediate" held to apply to causation and not to time. Pacific Mut. Life Ins. Co. v. Branham [Ind. App.] 70 N. E. 174; L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462; Pritchett v. Continental Casualty Co., 25 Ky. L. R. 2064, 80 S. W. 181.

49. As to other insurance and additions. Meigs v. London Assur. Co., 126 F. 781.

50. Against other insurance. Young v. St. Paul Fire & Marine Ins. Co. [S. C.] 47 S. E. 681.

should be construed as a testamentary instrument in the light of statutes relating to devises and bequests.[51]

The contract will be presumed to have been made with reference to statutes then in force,[52] which become a part thereof.[53] Any provisions in conflict therewith are, of course, void.[54]

The standard fire policy adopted by statute is generally made the exclusive contract between the parties,[55] and notwithstanding the fact that it is dictated by law, it must be construed under the rules applicable to similar contracts voluntarily entered into.[56] The power of the legislature to prescribe a standard form of policy cannot be delegated.[57] Statutes authorizing a state officer to prepare a form of policy do not give him authority to insert provisions therein which are contrary to existing statutes.[58] Statutes creating stipulations in the contract to which the parties have not agreed should be strictly construed.[59] The rights of the parties to a policy issued by a foreign company are not affected by subsequent legislation in the state of its domicile.[60]

Where a policy calling for extended insurance does not designate what mortality tables are to be used in calculating it, it will be presumed that the parties contracted with reference to the tables in use when it was issued,[61] and the company cannot thereafter adopt a table less favorable to the insured.[62]

Provisions and conditions in riders are to be construed as constituting a part of the policy to the same extent and with like effect as if embodied therein.[63] Any doubt as to whether a paper attached to the policy is a part of it will be resolved against the company.[64] Where the policy consists of one sheet of four pages, containing the main contract, conditions, a copy of the application, and endorsements, the entire sheet will be considered to be the policy.[65] By statute in some states,

51. Under St. 1903, § 2064, relating to devises to a class, the persons interested in a policy payable to insured's wife and children are to be determined as of the date of his death, and the wife of insured's son, who died without issue and before insured, has no interest in the proceeds of such policy, though company covenanted to pay proceeds to the beneficiaries, their executors, administrators or assigns. Gault v. Gault, 25 Ky. L. R. 2308, 80 S. W. 493.

52. Gault v. Gault, 25 Ky. L. R. 2308, 80 S. W. 493.

53. Allowing service of process on insurance commissioner in actions against foreign companies. Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 N. E. 10. Prohibiting prorating of invalid insurance [Iowa Code, § 1746]. Gurnett v. Atlas Mut. Ins. Co. [Iowa] 100 N. W. 542. As to conclusiveness of value, etc., in valued policies. Ritchie v. Home Ins. Co. [Mo. App.] 78 S. W. 341.

54. As to time within which notice of loss must be given. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167.

55. Minn. Gen. Laws 1895, p. 417, c. 175, as amended by Gen. Laws 1897, p. 468, c. 254. Kollitz v. Equitable Mut. Fire Ins. Co. [Minn.] 99 N. W. 892.

56. Kollitz v. Equitable Mut. Fire Ins. Co. [Minn.] 99 N. W. 892.

57. S. D. Rev. Civ. Code, § 644, held repugnant to the constitution (art. 3, § 17) in so far as it delegates to insurance commissioner power to prescribe form of policy. Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110.

58. S. D. Civ. Code, § 1276, forbidding limitations in contracts on time within which suit may be brought thereon not repealed by Laws 1893, c. 105, p. 174. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074; Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110.

59. Me. Rev. St. c. 49, § 95, extending time of giving notice of death, accident or injury, held not to apply to health insurance. Whalen v. Equitable Acc. Co. [Me.] 58 A. 1057.

60. Policy issued by New York company in Kentucky not affected by subsequent New York statute as to mortality tables. Provident Sav. Life Assur. Soc. v. Bailey, 25 Ky. L. R. 2251, 80 S. W. 452.

61. Provident Sav. Life Assur. Soc. v. Bailey, 25 Ky. L. R. 2251, 80 S. W. 452. A copy of the company's report to the insurance commissioner. Id. And parol evidence is admissible to show what mortality table was in use when the contract was made. Id.

62. One cutting down period of extended insurance. Provident Sav. Life Assur. Soc. v. Bailey, 25 Ky. L. R. 2251, 80 S. W. 452.

63. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299.

64. A slip attached to the policy reading "$—— other concurrent insurance permitted," prevents a forfeiture for obtaining such insurance. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101.

65. Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790. Where it is offered without reservation, the whole will

the application cannot be considered as a part of a policy of life insurance which refers to it, or be received in evidence, unless a correct copy thereof is attached to the policy.[66]

The members of a mutual company are presumed to have knowledge of its by-laws and are bound by them.[67] This is particularly true when the by-laws are printed upon the same sheet as the policy and the attention of the assured is called to them by a notice in the body of the contract.[68] Provisions printed on the same sheet as the policy and referred to therein as the by-laws of the company will be regarded as what they purport to be until impeached.[69] A provision unreasonable as a by-law may be good as a contract.[70]

§ 8. *Premiums and premium notes, dues and assessments, and payment of same.*[71]—A level rate annual renewal premium policy is one on which the regular annual renewal premiums provided for are to be kept down to a level with the first one by the application of the profits earned on the policy to that end.[72]

The giving of notice of premiums is usually held to be an essential prerequisite to a forfeiture for their nonpayment.[73] But this does not generally apply where failure to give notice is preceded by acts which amount to an abandonment and rescission of the contract by both parties.[74] In Louisiana, the company cannot cancel the policy for nonpayment of a premium note without any special demand and notice to the insured.[75]

Under the laws of New York, no life policy may be declared forfeited or lapsed for nonpayment of premiums within one year thereafter unless notice shall be given

be considered as offered. Need not introduce application separately. Id.

66. Massachusetts: Acts 1894, p. 718, c. 522, § 73. Manhattan Life Ins. Co. v. Albro [C. C. A.] 127 F. 281. The copy must not differ in substance from the original, though mere clerical errors are immaterial. Omission of an answer respecting health and age at time of death of ancestor held one of substance preventing admission of application. Id. Where application is not admissible under such statute, statements made by the insured, which were afterwards incorporated therein cannot be shown by parol in support of a defense of fraud, though such defense is saved to the company by the statute. Rule to this effect adopted by state court is binding on Federal court sitting in state. Id.

Pennsylvania: Act May 11, 1881 (P. L. 20) applies to fire and life policies. Zimmer v. Central Acc. Ins. Co., 207 Pa. 472, 56 A. 1003. Matter printed on back of policy held not waiver of statute. Id. There is no absolute duty imposed upon the insured as a matter of law, to read his policy, and he has right to assume that company has complied with statute in regard to attaching copy of application Id. A correct photographic copy, reduced in size but legible, held sufficient compliance. Arter v. Northwestern Mut. Life Ins. Co. [C. C. A.] 130 F. 768.

Kentucky: St. 1903, § 679. Metropolitan Life Ins. Co. v. Moore, 25 Ky. L. R. 1613, 1748, 79 S. W. 219.

67. Wilson v. Union Mut. Fire Ins. Co. [Vt.] 58 A. 799. When not unlawful. Provision in regard to forfeiture for intemperance. Purdy v. Bankers' Life Ass'n, 101 Mo. App. 91, 74 S. W. 486. Term "steam farm engine" in by-laws, making fire policy void if such engine used within certain distance of buildings, held to include any engine adapted to farm purposes. Wilson v. Union Mut. Fire Ins. Co. [Vt.] 58 A. 799. Where it is expressly agreed that the application, the declaration attached thereto, and the certificate shall constitute the contract, the by-laws are no part thereof. Purdy v. Bankers' Life Ass'n, 101 Mo. App. 91, 74 S. W. 486.

68. Wilson v. Union Mut. Fire Ins. Co. [Vt.] 58 A. 799.

69. Printed on same sheet and attention called to them in body of contract. Wilson v. Union Mut. Fire Ins. Co. [Vt.] 58 A. 799.

70. Purdy v. Bankers' Life Ass'n, 101 Mo. App. 91, 74 S. W. 486.

71. See 2 Curr. L. 479. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1510, §§ 6, 7.

72. Ijams v. Provident Sav. Life Assur. Soc. [Mo.] 84 S. W. 51.

73. Leonhard v. Provident Sav. Life Assur. Soc. [C. C. A.] 130 F. 287. Evidence held to show sending of notice of premium. Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790.

74. As where policy has been surrendered by insured as agent for beneficiary and new one issued in its place, and company did not know that he exceeded his authority as such agent in so doing. Leonhard v. Provident Sav. Life Assur. Soc. [C. C. A.] 130 F. 287. A beneficiary claiming that the original policy was surrendered for others without her consent and which she repudiates is not entitled to have premiums paid on the subsequent policies applied in satisfaction of the premiums accruing on the original policy after its surrender, in order to prevent its forfeiture for nonpayment. Id.

75. Lawrence v. Penn Mut. Life Ins. Co. [La.] 36 So. 898.

of the time when the payment is due.[76] The fact that the notice allows ten days of grace within which payment may be made does not invalidate it,[77] nor does the fact that it does not contain the name and address of the agent to whom the premium receipt has been sent relieve the insured from making payment at the home office in accordance with the terms of his policy.[78] The affidavit of any officer, clerk or agent of the company or of any one authorized to mail such notice that it has been duly addressed and mailed is made presumptive evidence that it has been given.[79] This statute has no extraterritorial effect, and does not of itself apply to contracts made by New York companies outside of that state,[80] in the absence of provisions in the policy showing a contrary intention.[81]

Policies generally provide for forfeiture for nonpayment of premiums,[82] but no forfeiture will take place in the absence of an express provision to that effect.[83]

76. Notice of premium held insufficient under such acts and terms of policy to work a forfeiture for nonpayment [Laws 1892, c. 690, § 92, as amended by Laws 1897, c. 218, p. 92]. Nederland Life Ins. Co. v. Meinert [C. C. A.] 127 F. 651. Notice must state amount due, place where and person to whom it must be paid, and that unless paid on day it becomes due, policy will be forfeited. Notice held sufficient. Summit v. United States Life Ins. Co., 123 Iowa, 681, 99 N. W. 563. Must be mailed at least 15 and not more than 45 days before due. Id.

77, 78. Summit v. United States Life Ins. Co., 123 Iowa, 681, 99 N. W. 563.

79. Affidavit accompanied by testimony of person making it held sufficient. Summit v. United States Life Ins. Co., 123 Iowa, 681, 99 N. W. 563. Evidence of nonpayment of premium sufficient in view of fact that there was no affirmative claim of payment on part of plaintiff, who merely relied on defendant's inability to prove forfeiture. Id. Notice giving authority to pay premium to person holding receipt held to cast burden on company of showing that he did not receive it. Evidence sufficient. Id. Affidavit insufficient to show giving of required notice, because not showing that notice related to policy in suit, and not containing copy of it. McCall v. Prudential Ins. Co., 90 N. Y. S. 644.

80. Notice required under Laws 1876, c. 341, as amended by Laws 1877, c. 321. Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 Law. Ed. 788; Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790. Does not apply where insured lives in Texas and policy is delivered there, though premiums and policy are payable in New York. Metropolitan Life Ins. Co. v. Bradley [Tex.] 82 S. W. 1031.

81. Will not be presumed where policy contains waiver of notice. Metropolitan Life Ins. Co. v. Bradley [Tex.] 82 S. W. 1031. Where contract made and delivered in Arkansas provides that it is to be governed by laws of New York, and also specifically provides that failure to receive notice of certain dues and assessments shall not excuse their nonpayment, the notice provided for by the New York statute is not necessary. Mutual Reserve Fund Life Ass'n v. Minehart [Ark.] 83 S. W. 323. See, also, Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 48 Law. Ed. 788.

82. Life insurance: Evidence held to show forfeiture. Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790. Policy held forfeited by failure to pay second semi-annual premium when due. Provision allowing grace of one month in payment of second annual or any subsequent premium not applicable. Gayford v. Metropolitan Life Ins. Co. [Cal.] 78 P. 258. Evidence held to show payment of six annual premiums on policy. Ferguson v. Union Mut. Life Ins. Co. [Mass.] 72 N. E. 358. Life insurance was renewed from year to year on payment of year's premiums. Insured, under direction of company, sent it bank draft for amount from Mexico, payable directly to it and not indorsed by him, and received receipt in return. Thereafter bank suspended and draft was dishonored. Held that defendant could not charge loss to insured and cancel policy for nonpayment of premiums. MacMahon v. United States Life Ins. Co. [C. C. A.] 128 F. 388.

Fire insurance: Failure to pay assessment on premium note held to have suspended policy. Graham v. Mercantile Town Mut. Ins. Co. [Mo. App.] 84 S. W. 93.

Accident insurance: Where letter of insurer recited that, since accident policy had expired on certain date for nonpayment of premium note, there could be no claim under it, held immaterial that date so specified was Sunday so that note did not mature until succeeding day, and not to prevent setting up failure to pay on latter day as defense, since defense specified in letter was nonpayment at maturity. Roberts v. Aetna Life Ins. Co. [Ill.] 72 N. E. 363. Accident policy held to be insurance for four separate, consecutive periods, each covered by separate premium, and payment of second premium note held to be condition precedent to existence of any insurance for second period, during which accident occurred. Id. The fact that the policy provided that the amount due the insured should be applied to payment of premium notes held not to operate to continue policy which had been forfeited for nonpayment of premium note for second period of insurance. Id. Plaintiff cannot recover on accident policy providing that no renewal shall take effect unless premium actually paid where evidence shows that he knew it was overdue and unpaid, and promised to pay it at a future time, and was distinctly informed that he would be carrying his own risk in the meantime. Brown v. Pennsylvania Casualty Co., 207 Pa. 609, 56 A. 1125.

83. Nederland Life Ins. Co. v. Meinert [C. C. A.] 127 F. 651.

A requirement of "actual payment" does not exclude all other methods of payment than those made in cash.[84] Where the company delivers a policy reciting a payment of the premium before such payment is actually made, it will be held to have thereby extended credit to the insured.[85] If it delivers the policy under such circumstances that it goes into effect at once, and accepts, in lieu of cash the promissory note of the insured payable to the company, which is delivered and accepted as payment, a failure to pay the note will not work a forfeiture.[86] But where, as a favor to the insured, credit is extended to him for some portion of a cash premium, a failure to pay the note representing such portion is regarded as a failure to pay the premium, and the policy is forfeited.[87] A provision that the policy shall be void if the premium or any note given therefor shall have been due and unpaid for a specified time before the loss occurs is binding, and the policy is canceled by the mere failure to pay within such time, in the absence of a waiver.[88] Neither a demand for payment or notice of an intention to enforce the forfeiture is necessary.[89] Payments of semi-annual premiums on a policy once in force are conditions subsequent, of which the insurer may or may not avail itself to defeat a recovery.[90] Hence the burden of proving their nonpayment is on the insurer.[91]

As a general rule, an agent may not accept property in lieu of cash for premiums, in the absence of express authority to do so.[92] But where he actually pays the premium in cash to the insurer, it is immaterial whether he has received cash from the insured or not.[93] An agreement by an insurance agent to pay premiums out of his own funds is sufficient consideration for a premium note.[94] The policy cannot be forfeited for nonpayment of such note in the absence of a provision to that effect.[95]

There can be no forfeiture for nonpayment where the insured tenders the amount due within the time limited by the policy, and the same is refused.[96] He need not repeat the tender without notice from the insurer that it will be received,[97] but unpaid premiums, with interest, will be deducted from the amount due on the

84. May be made by credit if so accepted. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

85. Kollitz v. Equitable Mut. Fire Ins. Co. [Minn.] 99 N. W. 892. Evidence held to show binding credit given for payment of first premium. Winn v. Provident Life & Trust Co., 91 N. Y. S. 167.

86. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

87. Company held not bound to apply amount of paid up insurance on note. New York Life Ins. Co. v. Meinken's Adm'r, 25 Ky. L. R. 2113, 80 S. W. 175.

88. Ohio Farmers' Ins. Co. v. Wilson [Ohio] 71 N. E. 715. Policy forfeited. National Life Ins. Co. v. Reppond [Tex. Civ. App.] 81 S. W. 1012. Provision forfeiting policy for nonpayment of premium notes held limited to contract as a general policy of life insurance after payment of two premiums, and failure to pay third or subsequent ones did not forfeit right of insured to paid up nonforfeiture policy. Ferguson v. Union Mut. Life Ins. Co. [Mass.] 72 N. E. 358. Provisions in regard to payment of premiums and right of set-off held to imply right to make payments by notes of either insured or beneficiary. Id. Where subsequent notes included both the amount of a first premium note, which was surrendered, and the part of the yearly premium then due, it could not be contended against a finding that the premiums had been paid, that the last note was only a renewal of first and succeeding ones. Id. Note given in payment of premium containing stipulation for deduction of amount thereof from the policy if it becomes a claim, but not providing for a forfeiture in case of its nonpayment, is not "an indebtedness on account of the policy," within a provision for extended insurance upon the payment of such indebtedness within a certain time after the lapse of a premium. New York Life Ins. Co. v. Smith, 139 Ala. 303, 35 So. 1004.

89. Ohio Farmers' Ins. Co. v. Wilson [Ohio] 71 N. E. 715.

90, 91. Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 P. 665.

92. Herring v. American Ins. Co., 123 Iowa, 533, 99 N. W. 130.

93. That insured simply gave agent credit therefor on account. Herring v. American Ins. Co., 123 Iowa, 533, 99 N. W. 130.

94. Evidence sufficient to show agreement. White v. McPeck, 185 Mass. 451, 70 N. E. 463.

95. Lawrence v. Penn Mut. Life Ins. Co. [La.] 36 So. 898.

96. Refused on ground that policy has already been forfeited. McMahon v. United States Life Ins. Co. [C. C. A.] 128 F. 388.

97. McMahon v. United States Life Ins. Co. [C. C. A.] 128 F. 388. Note. Lawrence v. Penn Mut. Life Ins. Co. [La.] 36 So. 898.

policy.[98] A tender of a bank check is good where it is refused on some ground other than that it is not lawful money, which is not well taken.[99]

The rights of the parties are fixed by the death of the insured.[1] Hence, where the policy has been issued but not delivered before the death of the applicant, such rights cannot be altered by a payment of the premium after his death.[2]

If the beneficiary agrees to pay the premiums, both he and the insured are bound by the provisions of the policy relating to their payment.[3]

Where, under an assignment of wages by the insured for the purpose of paying the premium, he leaves the instalment due in the hands of his paymaster, his duty in relation thereto is fully performed, and payment will be regarded as made until he is notified to the contrary.[4]

Payment to an agent having actual or apparent authority to receive premiums is, of course, binding on the company.[5]

As in the case of other contracts, one signing a premium note is conclusively presumed to know its contents and terms, and his failure to read it does not alter the rule.[6]

A settlement of the amount due for premiums on an employer's liability policy, based on the number of employes, made with full knowledge of the facts, is an accord and satisfaction, and precludes a recovery of an additional sum for omitted employes.[7]

A trustee in bankruptcy may, for the benefit of the estate, make the payments necessary to mature a tontine life policy payable to the bankrupt or his assigns or legal representatives, and will be required to do so when such course is clearly in the best interest of the creditors.[8] The receiver of an insolvent mutual insurance company is entitled to recover on premium notes given to the company the amount of an assessment levied by him, on proof of the notes, the assessment, and the giving of the notice required by the charter.[9]

98. McMahon v. United States Life Ins. Co. [C. C. A.] 128 F. 388.

99. Because company claimed that it was sent too late. Kollitz v. Equitable Mut. Fire Ins. Co. [Minn.] 99 N. W. 892.

1. Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 P. 822.

2. Company had no knowledge that he was dead. Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 P. 822.

3. Ferguson v. Union Mut. Life Ins. Co. [Mass.] 72 N. E. 358.

4. Insurance held not forfeited by failure to notify company of his discharge where amount of instalment was deducted from wages due. Policy provided for forfeiture in case of discharge before first instalment was due, unless insured notified company and remitted instalment. Amount deducted not remitted by employer until after injury. Pritchett v. Continental Casualty Co., 25 Ky. L. R. 2064, 80 S. W. 181. Where premiums on accident policy were to be paid from insured's wages for certain months, he having executed an assignment for the amount thereof, and policy provided that it should be void in case the insured failed to leave in the hands of the paymaster any instalment as it became due, held that the assignment was a conditional one only, and that it was not the employer's duty to deduct and pay the instalments to the insurer, and hence policy was avoided where, on leaving employment, insured received and receipted for full amount due for one of such months, and premium was not paid. Brown v. Pacific Mut. Life Ins. Co. [Mo. App.] 82 S. W. 1122.

5. In action to recover premium on policy, evidence held to show that an absconding broker, to whom such premium had been paid, had such apparent authority as justified defendant in paying it to him, and that he also had actual authority to receive same on behalf of the company. Globe & R. Fire Ins. Co. v. Robbins & Myers Co., 43 Misc. 65, 86 N. Y. S. 493.

6. Fact that note was so folded that plaintiff did not realize he was signing note, unaccompanied with any deceit calculated to mislead him, held not to constitute fraud, where he could read. Graham v. Mercantile Town Mut. Ins. Co. [Mo. App.] 84 S. W. 93.

7. Where initial premiums on employer's liability indemnity policies were paid upon estimated number of employes under an agreement for a subsequent settlement based on the actual number engaged and the wages paid them, held that such subsequent settlement, made with full knowledge of all the facts, was an accord and satisfaction protecting the insured from an action for additional premiums claimed by the insurer. Omission of employes held mistake of law. Fidelity & Casualty Co. v. Gillette-Herzog Mfg. Co. [Minn.] 99 N. W. 1123.

8. In re Mertens, 131 F. 972.

9. Notes provided for payment in such proportions and at such times as directors might, agreeably to their charter, require.

The premiums on policies of insurance on the lives of partners, taken out in pursuance of the partnership agreement, are, as between the partners, partnership debts.[10]

By statute in Illinois, insurance companies are prohibited from making or permitting any discrimination between insurants of the same class and equal expectation of life, and both the companies and their agents are made jointly and severally liable to a penalty for so doing.[11] It is no defense to an action for such penalty that a rebate of premium was allowed by the agent without the knowledge of the company and in violation of its instructions.[12]

§ 9. *Warranties, conditions and representations.*[13]—A substantial compliance with the contract is sufficient.[14]

A warranty is a statement of fact made by the insured, on which the insurer relies, and on the strength of which he enters into the contract.[15] Affirmative warranties consist of a representation in the policy of a fact.[16] Promissory warranties are those that require that something shall be done or not done after the policy takes effect.[17]

In the absence of statutory prohibition, the parties may, as in the case of other contracts, incorporate into the contract of insurance such conditions as they see fit, whether they are material or immaterial.[18] If there is no agreement as to the materiality of a statement, its falsity does not affect the policy unless the misstatement is, as a matter of fact, material to the risk assumed by the insurer.[19] If a representation partly fails, but is true or is complied with, in so far as it is essential to the risk, the policy remains in force.[20]

Where no specific inquiry has been made as to facts material to the risk, and there is no misrepresentation in regard thereto by the insured, and no intentional concealment thereof, their existence will not invalidate the policy.[21] In such case

French v. Millville Mfg. Co. [N. J. Err. & App.] 59 A. 214.

10. White v. McPeck, 185 Mass. 451, 70 N. E. 463.

11. Laws 1891, p. 107. Metropolitan Life Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643.

12. Metropolitan Life Ins. Co. v. People, 209 Ill. 42, 70 N. E. 643. Amendment of bill to recover penalty for allowing rebate of premiums by substituting name of local agent for that of assistant superintendent held not to change cause of action so as to enable company to plead limitations. Id. Proper under Hurd's Rev. St. Ill. 1899, c. 110, § 10, to render judgment against insurance company in action for statutory penalty for granting rebates of premiums, and to continue case against agent, jointly liable and a party, who had not been served. Id.

13. See 2 Curr. L. 506. See, also, Fraternal Mutual Benefit Associations, 3 Curr. L. 1504, § 5A; Id., 1507, § 5D.

14. Phoenix Assur. Co. v. Stenson [Tex. Civ. App.] 79 S. W. 866.

15. Under Cal. Code, § 2607, is a statement, as a fact, of a matter relating to the person or thing insured, or the risk. By § 2608, a statement importing that it is intended to do or not to do a thing which materially affects the risk is a warranty that such act or omission shall take place. Conner v. Manchester Assur. Co. [C. C. A.] 130 F. 743.

16, 17. Rosenthal Clothing & Dry Goods Co. v. Scottish Union & Nat. Ins. Co. [W. Va.] 46 S. E. 1021.

18. As to effect of misrepresentations. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502.

19. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502; Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595. A material misrepresentation, in reliance on which the policy is issued, avoids the policy, whether made intentionally, or through mistake and in good faith. Evidence held to show that life policy was issued in reliance on untrue statements in regard to health of insured. Bankers' Life Ins. Co. v. Miller [Md.] 59 A. 116. False and fraudulent statements in regard to material matters, though not warranties, will be presumed to be intentional where they relate to matters peculiarly within insured's knowledge, as misrepresentation as to amount paid on contract price of building. Dunham v. Citizens' Ins. Co., 34 Wash. 205, 75 P. 804. Under the California Code, breaches of immaterial provisions do not avoid the policy unless the contract so provides. Civ. Code, § 2611. Policy may declare that violations of specific provisions shall avoid it. Bastian v. British American Assur. Co. [Cal.] 77 P. 63.

20. Overinsurance on merchandise. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342.

21. Fact that gambling was carried on over plaintiff's saloon held not to avoid policy, where he did not know that company regarded it as increasing the risk. Ameri-

it will be presumed that the insurer has obtained all the information desired.[22] But a misrepresentation or concealment in regard to a fact specifically inquired about, though not material, avoids the policy,[23] a question and answer being equal to an agreement that the matter is material.[24] Whether the parties have agreed that a particular statement shall be a material part of the contract is a question of interpretation.[25] The intention of the parties controls,[26] hence the fact that statements are called warranties is not necessarily conclusive if they are not warranties within the fair meaning and spirit of the contract.[27] The absence of a forfeiture clause may be considered in determining whether they are intended as representations or warranties.[28] With respect to matters which the insurer must know are not within the personal knowledge of the applicant,[29] and with respect to those calling for statements of belief or opinion, the letter of the contract will be controlled by its spirit and purposes, and the answers will be held warranties only of the bona fide belief and opinion of the applicant.[30] This does not apply to statements calling for a mere matter of fact within the knowledge of the applicant.[31] In order to avoid the policy for misrepresentations, the insurer must allege that it would not have been issued but for the alleged false statements.[32]

The falsity of a statement which the parties have expressly warranted to be true, or agreed shall constitute a material part of the contract,[33] or the breach of a promissory warranty, ordinarily avoids the policy, whether actually material to the risk or not.[34] Their materiality cannot be inquired into.[35] By statute in some states, no conditions or warranties may be construed as other than mere represen-

can Cent. Ins. Co. v. Nunn [Tex. Civ. App.] 79 S. W. 88.

22. American Cent. Ins. Co. v. Nunn [Tex. Civ. App.] 79 S. W. 88.

23. Brignac v. Pacific Mut. Life Ins. Co. 112 La. 574, 36 So. 595.

24. As to use of intoxicants. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

25, 26, 27. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502.

28. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

29. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502.

30. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502. False statements in an application made in answer to questions calling for matters of judgment or opinion will not avoid the policy unless shown to have been made knowingly and with intent to deceive the company. Instructions approved. Royal Neighbors of America v. Wallace [Neb.] 99 N. W. 256. A warranty in regard to the health of a member of insured's family means merely that he has indicated in his actions and appearance no symptoms or traces of disease, and to the observation of an ordinary friend or relative is in truth well. Evidence insufficient to require finding of breach of warranty in regard to health of insured's brother. Schmitt v. Michigan Mut. Life Ins. Co., 91 N. Y. S. 448.

31. As to when he last consulted a physician. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502.

32. Evidence tending to show false representations as to value properly excluded. Ritchie v. Home Ins. Co. [Mo. App.] 78 S. W. 341.

33. Fire insurance: Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342.

Life insurance: Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595. A warranty by the insured that no proposal for life insurance had ever been made by him upon which a policy had not been issued for the amount applied for relates to a matter upon which the insured could fully answer. Finn v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 57 A. 438. Whether same is true of warranty that he never had pneumonia, quaere. Id. That the beneficiary is the wife of the insured, when in fact she is not. Evidence held to show as matter of law that she was not. Gaines v. Fidelity & Casualty Co., 93 App. Div. 524, 87 N. Y. S. 821. That the applicant is the wife of the beneficiary. Evidence held to show that applicant was not insured's wife. Makel v. John Hancock Mut. Life Ins. Co., 95 App. Div. 241, 88 N. Y. S. 757. Under by-laws and statutes allowing any one to be named as beneficiary who has an insurable interest in the life of the insured, the policy is not rendered void because it falsely states that the beneficiary is related to the insured, notwithstanding the fact that such statement is made a warranty. Berdan v. Milwaukee Mut. Life Ins. Co. [Mich.] 99 N. W. 411.

34. Fire insurance: Rosenthal Clothing & Dry Goods Co. v. Scottish Union & Nat. Ins. Co. [W. Va.] 46 S. E. 1021. Unless waived or performance rendered impossible. Clause binding insured to furnish for examination books, bills, invoices, and other vouchers. Id.

35. Warranty that packages shall be packed by two adults, and remain in control of one of them until mailed, in contract insuring articles sent by mail. Banco

tations unless they materially affect the risk.[36] A stipulation that the insurer shall not be liable for loss from certain specified causes is not a warranty.[37]

Where the application is made a part of the contract and the answers to questions therein are made warranties, a false answer avoids the policy,[38] even though the applicant acted in good faith and believed his answers to be true.[39] Representations in the application are not warranties where they are not made so, and are not made a part of the policy or referred to therein.[40] In such case they need

De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

36. Missouri: Rev. St. 1899, §§ 7973, 7974. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342; Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc. [Mo. App.] 80 S. W. 694. Does not affect warranties material to the risk as one against storing of explosives. Id. A stipulation against overinsurance of merchandise is immaterial to the risk, since the indemnity to be paid is limited to the cash value of the stock at the time of the loss. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342. Substantial compliance therewith is sufficient. Id.

In Tennessee, no misrepresentation or warranty will be deemed material or will defeat the policy, unless it is made with intent to deceive, or unless the risk of loss is thereby increased [Acts 1895, p. 332, c. 160, § 22 (Shannon's Code, § 3306)]. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119. Such act is a valid exercise of the police power, and is not class legislation, though applying to nonassessment companies. Id. Under this statute a breach of the iron-safe clause (Id.), and misrepresentations as to incumbrances have been held not to avoid the policy on the ground that they do not increase the risk (Id.).

In Kentucky, all statements or descriptions in the application are deemed representations and not warranties, and do not prevent a recovery unless material or fraudulent. St. 1903, § 639. No fraudulent intention in making false statement as to incumbrances. Manchester Assur. Co. v. Dowell & Co., 25 Ky. L. R. 2240, 80 S. W. 207.

37. Not within Cal. Civ. Code, §§ 2605, 2607, 2608. Provision that company shall not be liable for loss caused directly or indirectly by order of any civil authorities. Conner v. Manchester Assur. Co. [C. C. A.] 130 F. 743.

38. As to rejection by other companies. Hook v. Michigan Mut. Life Ins. Co., 44 Misc. 478, 90 N. Y. S. 56. No recovery can be had unless they are substantially true. Evidence held not to sustain finding that insured's statement of his age was true. Winn v. Provident Life & Trust Co., 91 N. Y. S. 167. Evidence held to show breach of warranty as to occupation. Fell v. Hancock Mut. Life Ins. Co., 76 Conn. 494, 57 A. 175. Under policy making statements in application warranties, misstatements in regard to diseases from which insured had suffered and physicians who had treated him held to be material and to avoid policy. National Life Ins. Co. v. Reppond [Tex. Civ. App.] 81 S. W. 1012. False statements made to medical examiner as to when insured had last consulted physician held to avoid policy, where application, which was expressly made part of policy, provided that such statements were warranted true. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502. That insured had never been declined by another company. Webb v. Bankers' Life Ins. Co. [Colo. App.] 76 P. 738. As to insured's last illness. Mutual Reserve Fund Life Ass'n v. Cotter [Ark.] 83 S. W. 321. Question as to whether there was loss of consciousness in spells with which insured was afflicted prior to the issuance of the policy, contrary to statements in application held to be for jury under evidence, which supported verdict for plaintiff. Sternaman v. Metropolitan Life Ins. Co., 94 App. Div. 610, 87 N. Y. S. 904. Finding that representation in application that insured did not use liquor to excess was true held against weight of evidence. Moore v. Prudential Ins. Co., 92 App. Div. 135, 87 N. Y. S. 368. Agreement of warranty held part of application, and incorporated into contract by reference thereto in policy. Webb v. Bankers' Life Ins. Co. [Colo. App.] 76 P. 738. The company has a right to require, as a condition precedent to entering into the contract, that they be truthfully informed as to how recently the applicant had need of medical advice. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502. Where the policy provided that answers to questions in the application should be regarded as warranties, and the policy provided that it and the application contained the complete contract, and the policy contained what purported to be a copy of the application, alleged answers not shown therein were immaterial. Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398. Where the application, which is made a part of the policy, provides that the policy shall be void in case any statements are untrue or fraudulent, the answers to material questions are warranties. Winn v. Provident Life & Trust Co., 91 N. Y. S. 167.

39. Webb v. Bankers' Life Ins. Co. [Colo. App.] 76 P. 738; Bankers' Life Ins. Co. v. Miller [Md.] 59 A. 116. Evidence held to show untruthfulness of warranty that applicant had never been postponed or declined by any other company. Webb v. Bankers' Life Ins. Co. [Colo. App.] 76 P. 738. Evidence held to show that statement that insured had never been seriously ill was false and fraudulent, where he had been inmate of sanitarium for treatment of alcoholism. Winn v. Provident Life & Trust Co., 91 N. Y. S. 167.

40. As to health of insured. Bankers' Life Ins. Co. v. Miller [Md.] 59 A. 116. When the application is made a part of the policy, representations therein are read into and imported into the contract, but do not thereby lose their character as representations and become warranties. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

not be strictly and technically accurate, but must be essentially and substantially true when they relate to matters material to the risk.[41] They must be construed and interpreted in connection with the language used in the policy.[42] A provision that the policy shall be void if any material fact or circumstance stated in the application has not been fairly represented by the insured refers exclusively to the conditions upon which the contract was entered into and the policy issued, and not to the conditions of the insurance or facts arising subsequent to the issuance of the policy.[43]

Where the policy provides that any misrepresentations shall avoid it, it is immaterial that the misstatements were not contained in the application, but were oral.[44] The fact that misrepresentations were not communicated to the home office is immaterial, where the agent has authority to and did issue the policy himself.[45] By statute in some states every express warranty made at or before the execution of a policy must be contained in the policy itself, or in another instrument signed by the insured, and referred to in the policy, as making a part of it.[46]

In Iowa, the violation of a condition rendering a policy void before loss does not defeat a recovery, if it is made to appear that it did not contribute to the loss.[47] This does not apply to a condition precedent to the taking effect of the contract.[48] In Michigan, no fire policy may be declared void for breach of condition unless the loss occurs during such breach.[49]

An insurance solicitor who takes the application of the insured is the agent of the company, notwithstanding a provision in the policy making him the agent of the insured.[50] Hence the insured is not guilty of misrepresentation as to matters erroneously stated in the application, where he tells the truth to the agent who writes the application,[51] nor as to matters inserted therein by the agent, in regard to which he made no statements, even though he signs such application without

41. Bankers' Life Ins. Co. v. Miller [Md.] 59 A. 116.

42. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

43. Not to provision that policy shall be held suspended unless premium paid within 10 days after delivery, where policy recites its payment. Kollitz v. Equitable Mut. Fire Ins. Co. [Minn.] 99 N. W. 892.

44, 45. Dunham v. Citizens' Ins. Co., 34 Wash. 205, 75 P. 804.

46. California: Civ. Code, § 2605. Conner v. Manchester Assur. Co. [C. C. A.] 130 F. 743.

In Minnesota, all conditions of fire policies must be stated in full and neither the application nor the by-laws of the company will be considered as warranties or a part of the contract, except in so far as they are incorporated in full into the policy. Minn. Gen. Laws 1895, p. 417, c. 175, § 52. Provisions in application that policy should be held suspended if premium was not paid in 10 days held ineffectual. Kollitz v. Equitable Mut. Fire Ins. Co. [Minn.] 99 N. W. 892.

47. Iowa Code, § 1743. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

48. Requiring notice of mailing articles to be deposited in post office as condition precedent to attaching of risk. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532. Conditions requiring books to be kept in iron safe and making their production a condition precedent to recovery will be construed together as constituting binding stipulation as to evidence to be produced, and hence policy is not thereby rendered void before loss occurs and this section does not apply. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517.

49. Does not prevent forfeiture for procuring additional insurance where fire occurs while latter is in force [Comp. Laws, § 5180]. Todd Co. v. Farmers' Mut. Fire Ins. Co. [Mich.] 100 N. W. 442.

50. Reilly v. Empire Life Ins. Co., 90 N. Y. S. 866. Where agent filled out application and insured when he signed it had nothing to do with statements and did not know they were made held that such statements were those of defendant and it is estopped to claim them as warranties. Ormsby v. Laclede Farmers' Mut. Fire & Lightning Ins. Co., 105 Mo. App. 143, 79 S. W. 733. Evidence sufficient to sustain finding that answers to questions as to health of insured contained in application were those of the company's medical examiner and not those of the insured. Price v. Washington Life Ins. Co. [Minn.] 99 N. W. 810.

51. As to ownership. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119. Competent to show that the insured gave truthful answers to such agent, who wrote false ones in the application. As to date of birth. Reilly v. Empire Life Ins. Co., 90 N. Y. S. 866; Carmichael v. Hancock Mut. Life Ins. Co., 90 N. Y. S. 1033. If the facts are known to the agent, a misstatement in the application will not avoid the policy,

reading it.[52] This is not the case, however, where the insured knows that his answers have been improperly recorded,[53] unless the agent represents to him that they are sufficient as written.[54]

Where the agent inserts in the policy as warranties facts different from those stated to him by the insured, the latter may have it reformed in equity.[55]

Fire insurance.[56]—Provisions in fire policies requiring the insured to be the sole and unconditional owner of the property are valid, and a breach of warranty to that effect works a forfeiture.[57] The whole policy is avoided where title to a part of such property is not in the insured.[58] A company insuring property located in the Cherokee Nation at a time, when by statute the land of such nation was not subject to individual ownership, is estopped to claim a forfeiture under a clause making the policy void if the property is not owned by the insured in fee.[59]

Provisions avoiding the policy for any change in the title to the property,[60]

even though it contains the express stipulation that any such statement will render it invalid. As to ownership. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857.

52. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119.

53. That such answer was inserted by the medical examiner is immaterial where the insured had knowledge that it was improperly recorded. Signing application and possession of copy thereof and of policy held to charge him with notice. Hook v. Michigan Mut. Life Ins. Co., 44 Misc. 478, 90 N. Y. S. 56.

54. Where the insured makes true answers as to chattel mortgage, but the agent writes different ones, assuring him that they will meet the requirements of the policy, the company is liable, though it might have refused the insurance had true answers been given. Manchester Assur. Co. v. Dowell & Co., 25 Ky. L. R. 2240, 80 S. W. 207.

55. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101.

56. See 2 Curr. L. 518.

57. Object is to protect the company against taking risks beyond the value of the interest insured so that the insured will use all reasonable precautions to avoid the destruction of the property. Security Ins. Co. v. Kuhn, 207 Ill. 166, 69 N. E. 822. Not broken by the existence of an incumbrance on the land. Requests for instructions properly refused. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. Provision requiring entire, absolute, unincumbered and unconditional ownership is reasonable, and valid. Tyree v. Virginia Fire & Marine Ins. Co. [W. Va.] 46 S. E. 706.

Following have been held to have sole and unconditional ownership: Insured having life estate in property or its proceeds, united with absolute right as an active testamentary trustee to dispose of the same as she saw fit for the purposes of the trust, held to be sole and unconditional owner in fee simple. Security Ins. Co. v. Kuhn, 207 Ill. 166, 69 N. E. 822. A vendee in possession, to whom the vendor has sold and conveyed the property, taking notes containing a vendor's lien thereon to secure the purchase price, and giving a bond for a deed to be executed on payment of such price. Instruction approved. Hamburg-Bremen Fire Ins. Co. v. Ruddell [Tex. Civ. App.] 82 S. W. 826. Owner of life estate. Requests for instructions properly refused. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the owner has unqualifiedly agreed to sell to him upon certain terms, is sole and unconditional ownership, since vendor may compel vendee to pay for property and suffer any loss that occurs. Phenix Ins. Co. v. Kerr [C. C. A.] 129 F. 723. One giving another the possession of property under an irrevocable option to sell the same to him still has sole and unconditional ownership thereof where the holder of the option may abandon it at any time, and is not bound to accept the property. Plaintiff held to be owner of elevator. Id. The test is whether the vendor can compel the vendee to take the property and to suffer any loss which occurs. Id.

58. Rhode Island standard policy. Gen. Laws 1896, c. 183. Void where insured was purchasing part of property in house under instalment plan, and title was in vendor. Dow v. National Assur. Co. of Ireland [R. I.] 58 A. 999.

59. German-American Ins. Co. v. Paul [Ind. T.] 83 S. W. 60. Proof of ownership of property by plaintiff as against his wife sufficient to justify submission of question to jury. Id.

60. Voluntary conveyance. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94; Richardson v. Insurance Co. of North America [N. C.] 48 S. E. 733. In the absence of evidence as to a valid conveyance held that court did not err in refusing to submit to jury any question as to change of title. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857. Where plaintiffs purchased land, conveyance being made to their mother under an agreement that she would deed or will it to them, and she died intestate without doing so, leaving the two plaintiffs and two other children, held that plaintiffs took legal title to half the property and equitable title to the other half, so that it could not be said that, as a matter of law, it belonged to the four in equal parts. Nute v. Hartford Fire Ins. Co. [Mo. App.] 83 S. W. 83.

Provision not violated: By contract whereby insured sells entire output of plant to

or for its removal without the company's consent,[61] or if, with the knowledge of the insured, foreclosure proceedings are commenced against the property or notice of sale under a mortgage or trust deed is given,[62] or for any increase of the hazard,[63] or for keeping explosives on the premises,[64] or for failure to employ a watchman,[65] or for allowing the premises to remain vacant and unoccupied,[66] or idle or shut down, without the company's consent, are valid and binding on the insured, and any violation thereof will ordinarily prevent a recovery in case of loss.[67] The term "occupied as a dwelling" will be construed as a warranty, and the company is not liable where the building is unoccupied when the policy is issued, and continues to be so until the time of the fire.[68] The examination of the premises by the insurer required by the Minnesota statute is only for the

one corporation under policy covering product of glass manufacturer's plant, his own or held by him in trust, or on commission, or sold but not delivered, for which he may be held liable, where the sale was conditional only, the seller remaining liable for all loss except by fire, and paying the premiums. Burke v. Continental Ins. Co., 91 N. Y. S. 402. By a mere adjudication in bankruptcy, before the appointment of a trustee or receiver. Referee had noted in his record name of person he intended to appoint as receiver, but appointment was not made until after fire. Fuller v. Jameson, 90 N. Y. S. 456. By the execution of a mortgage upon insured property. The deed shown to be in fact and equity, a security only. Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283. By the mere accumulation of interest on an incumbrance of which the insurer had notice when it entered into the contract. Fitzgibbons v. Merchants' & Bankers' Mut. Fire Ins. Co. [Iowa] 101 N. W. 454. By release of mortgage of record, where the debt secured thereby is not paid, and the parties do not intend that the mortgagee's interest in the insurance shall be released thereby. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074.

61. Miller v. Insurance Co. of North America [Mo. App.] 80 S. W. 330.

62. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. "Knowledge" of the "commencement" of foreclosure suit does not exist where the knowledge of insured was derived from the service of citation which in Texas is not the "commencement" of the action. London & L. Fire Ins. Co. v. Davis [Tex. Civ. App.] 84 S. W. 260. A provision working a forfeiture in case foreclosure proceedings are instituted against the "property insured" means against all the property, and hence the institution of such proceedings against the realty only does not work a forfeiture where the policy covers both realty and personalty. Fitzgibbons v. Merchants' & Bankers' Mut. Fire Ins. Co. [Iowa] 101 N. W. 454.

63. Finding of jury that hazard was not increased by occupancy by tenant instead of owner held supported by evidence. Whether it was change of use and occupancy not decided. Nicholas v. Iowa Merchants' Mut. Ins. Co. [Iowa] 101 N. W. 115.

Hazard not increased: By insurance of personal property in building, especially where there is no claim of fraud or overinsurance. Nicholas v. Iowa Merchants' Mut. Ins. Co. [Iowa] 101 N. W. 115. By sawing off the charred end of a joist and removing boards in close contact with a flue. Main v. Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S. W. 56. Insured is not chargeable with the act of his son in filling the stove with combustible material at night, where he did not order or direct him to do so, and did not know that he had done so. Id.

Hazard increased: By the shutting down of the machinery of a shingle mill plant for more than the specified time without the consent of the company. Brehm Lumber Co. v. Svea Ins. Co. [Wash.] 79 P. 34. By storage of explosives. Kennefick-Hammond Co. v. Norwich Union Fire Ins. Co. [Mo. App.] 80 S. W. 694.

64. The keeping of dynamite on the premises avoids policy whether the fire was caused thereby or not, both under and independently of Cal. Civ. Code, § 2611. Bastian v. British American Assur. Co. [Cal.] 77 P. 63. Storage of explosives in building, though they did not cause fire, and were removed from burning building in time to prevent explosion. Policy held to forbid it. Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc. [Mo. App.] 80 S. W. 694.

65. Warranty as to employment of watchman when mining property was idle or inoperative held to apply to property as a whole and not to have been broken by shutting down of quartz mill. Central Mont. Mines Co. v. Fireman's Fund Ins. Co. [Minn.] 99 N. W. 1120.

66. Bartlett v. British America Assur. Co. [Wash.] 77 P. 812. Shutting down of quartz mill belonging to mining plant held not to render premises vacant and unoccupied. Central Mont. Mines Co. v. Fireman's Fund Ins. Co. [Minn.] 99 N. W. 1120. A dwelling house is unoccupied when no one lives in it. Not where, after tenant vacated, plaintiff's husband slept there five nights a week, carrying on his business on the premises during the day. Thieme v. Niagara Fire Ins. Co., 91 N. Y. S. 499.

67. The fact that some work was done on the premises and that plaintiff was shipping shingles and getting bolts for manufacture does not prevent a forfeiture under a clause prohibiting a shingle mill plant from being "idle or shut down" for a specified period, where the machinery is not run for such period. Case properly taken from jury. Brehm Lumber Co. v. Svea Ins. Co. [Wash.] 79 P. 34.

68. Aiple v. Boston Ins. Co. [Minn.] 100 N. W. 8.

purpose of fixing the value of the structure, and noncompliance therewith does not charge the company with notice that the premises were vacant.[69]

Where the policy provides that it shall be void if the property be or becomes covered by a chattel mortgage, the existence of such an incumbrance on a part of the property avoids the whole of the insurance, even as to the portion of the property not covered thereby.[70] The policy is avoided though the mortgage is thereafter set aside as a fraud upon creditors under the insolvency laws.[71] The foreclosure of a mortgage does not work a forfeiture under a provision that no lien or incumbrance shall fall or be placed on the property.[72]

Provisions requiring the insured to keep certain books[73] and to make certain inventories,[74] which he must keep in an iron safe during other than business hours, and making their production a condition precedent to recovery, are valid.[75] A substantial compliance therewith is generally held to be sufficient, and no forfeiture will result where the information sought to be preserved thereby can be obtained from the other sources.[76] There seems to be some conflict of authority in this regard, however.[77] The burden is on the company to show that the fire occurred at a time when the books were required to be kept in the safe.[78]

69. Laws 1895, p. 401, c. 175, § 25. Aiple v. Boston Ins. Co. [Minn.] 100 N. W. 8.

70. Separable policy covering barber's furniture and fixtures and stock of merchandise held void as to former, including tools and implements used by him in his business. Vucci v. North British & Mercantile Ins. Co., 88 N. Y. S. 986.

71. Action to set aside pending at time of fire. Mortgage valid as between the parties. Secrest v. Hartford Fire Ins. Co. [S. C.] 47 S. E. 680.

72. Does not create new lien, but confirms old one. Fitzgibbons v. Merchants' & Bankers' Mut. Fire Ins. Co. [Iowa] 101 N. W. 454.

73. Record of goods taken from stock for home consumption held not required. Aetna Ins. Co. v. Fitze [Tex. Civ. App.] 78 S. W. 370. Not substantially complied with by the preservation of slips from a cash register. Monger v. Delaware Ins. Co. [Tex.] 79 S. W. 7. Occasional clerical errors or omissions in keeping books will not avoid the policy, but the company must show that the books as kept would not enable it, with reasonable certainty, to arrive at the actual loss sustained. Aetna Ins. Co. v. Fitze [Tex. Civ. App.] 78 S. W. 370. Provision held not complied with. Everett-Ridley-Ragan Co. v. Traders' Ins. Co. [Ga.] 48 S. E. 918. Books held sufficient. First Nat. Bank v. Cleland [Tex. Civ. App.] 82 S. W. 337.

74. Making inventory on date of transfer of policy and keeping books from that time held substantial compliance. Scottish Union & Nat. Ins. Co. v. Moore [Tex. Civ. App.] 81 S. W. 573. Policy held to require that inventory next preceding date of policy and one taken afterwards should be kept and produced. Continental Ins. Co. v. Cummings [Tex.] 81 S. W. 705. A provision requiring the keeping of the books and inventory "and also the last preceding inventory, if such has been taken," in a safe, held to mean last inventory taken before issuance of the policy. Phoenix Assur. Co. v. Stenson [Tex. Civ. App.] 79 S. W. 866. Under rider waiving provision requiring itemized inventory of stock within 60 days, and providing for taking of inventory once a year, failure to take an inventory is not a defense where the loss occurred before the expiration of the year. Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27. Policy requiring inventory to be taken within 12 months of loss does not require the taking of an inventory every 12 months. German Ins. Co. v. Kistner, 5 Ohio C. C. (N. S.) 165.

75. Vital question is not whether they were kept in safe, but whether failure to keep them there prevented their production. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517. The fact that the cash book of a country store had not been placed in the safe at 10 P. M., and cannot be produced because destroyed by fire occurring at that hour, does not afford a defense under the "iron safe clause," where a lunch counter connected with the store was still in operation at that hour. German Ins. Co. v. Kistner, 5 Ohio C. C. (N. S.) 165.

76. As where amount and character of inventory could be ascertained from books. Virginia Fire & Marine Ins. Co. v. Cummings [Tex. Civ. App.] 78 S. W. 716. Satisfied by production of data from which value of goods at time of fire can be ascertained. Malin v. Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S. W. 56. Bank pass book held not substantial compliance with requirement to keep books showing amounts of sales, etc., and inadmissible. Gillum & Co. v. Fire Ass'n of Philadelphia [Mo. App.] 80 S. W. 283. See, also, Continental Fire Ins. Co. v. Cummings [Tex. Civ. App.] 78 S. W. 378.

77. Where the policies require inventories to be kept where they will not be destroyed, secondary evidence of destroyed inventories not so kept is inadmissible. Gillum & Co. v. Fire Ass'n [Mo. App.] 80 S. W. 283.

78. First Nat. Bank v. Cleland [Tex. Civ. App.] 82 S. W. 337.

A policy so written as to place separate valuations upon separate and distinct classes of property will ordinarily be regarded as severable, and a breach of a condition covering one class will not affect the validity of the insurance on the other classes,[79] in the absence of fraud, or increase of risk on the whole of the property, or any unlawful act against public policy.[80] This rule applies even in cases of breach of warranty,[81] and even though the policy provides that any breach of a condition shall render the entire contract void.[82]

Life insurance.[83]—A provision that the policy shall not be binding unless the insured is in sound health upon the date of its delivery applies only to unsoundness of health arising after the application and medical examination.[84] Actual and not apparent good health at such time is essential to liability.[85] The insurer is under no obligation to investigate the state of insured's health when the premium is paid,[86] but it is the duty of the applicant to disclose such changes in his physical condition as occur pending the negotiation which would influence the judgment of the company in passing on the risk.[87] Before any temporary ailment can be called a disease within the meaning of a warranty in the policy, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon general health and the continuance of life, or such as, according to common understanding, would be called a disease.[88]

Accident insurance.[89]—Restrictions in accident policies rendering the insurance nugatory and valueless by attempting to avoid liability for injuries sustained by the insured while performing necessary acts embraced in his classified occupation are inoperative.[90] The incurring of risks and dangers ordinarily incident to such occupation is not a voluntary exposure to unnecessary danger.[91]

79. Republic County Mut. Fire Ins. Co. v. Johnson [Kan.] 76 P. 419; Donley v. Glens Falls Ins. Co., 91 N. Y. S. 302; Vucci v. North British & Mercantile Ins. Co., 88 N. Y. S. 986.

80. Under policy covering building, furniture and fixtures, and stock of merchandise, a breach of the inventory and iron safe clause only prevents recovery of loss on merchandise. Miller v. Delaware Ins. Co. [Okl.] 75 P. 1121, and cases there cited. Does not apply unless it appears that the risk intended to be excluded by the violated condition does not affect the item of property for which a recovery is sought. Policy covering losses from fire, lightning, tornadoes and windstorms on house, hay and grain, and corn crib held not divisible, so as to prevent forfeiture for vacancy of house. Republic County Mut. Fire Ins. Co. v. Johnson [Kan.] 76 P. 419. Fact that machinery of shingle mill was shut down for more than specified time held to render policy void as to dry kiln and stock of shingles, where omission to keep steam in boilers affected entire risk. Brehm Lumber Co. v. Svea Ins. Co. [Wash.] 79 P. 34.

81. Donley v. Glens Falls Ins. Co., 91 N. Y. S. 302.

82. Miller v. Delaware Ins. Co. [Okl.] 75 P. 1121; Donley v. Glens Falls Ins. Co., 91 N. Y. S. 302.

83. See 2 Curr. L. 516. See, also, Fraternal Mutual Benefit Associations, 3 Curr. L. 1504, § 5.

84. Metropolitan Life Ins. Co. v. Moore, 25 Ky. L. R. 1613, 1748, 79 S. W. 219.

85. Thompson v. Travelers' Ins. Co. [N. D.] 101 N. W. 900. Applicant suffering from Bright's disease, which was direct though remote cause of his death held not in good health. Austin v. Mutual Reserve Fund Life Ass'n, 132 F. 555.

86. Thompson v. Travelers' Ins. Co. [N. D.] 101 N. W. 900.

87. Thompson v. Travelers' Ins. Co. [N. D.] 101 N. W. 900. Admission of and refusal to strike out evidence to effect that premium was not returned or tendered to insured, and that insurer made no inquiry as to insured's health when premium was paid held prejudicial error, where disease which defendant claims insured had at that time was not known to any one until his death, and not to company until disclosed by proofs of death. Id.

88. Evidence insufficient to require finding of breach of warranty as to insured's health. Schmitt v. Michigan Mut. Life Ins. Co., 91 N. Y. S. 448.

89. See 2 Curr. L. 517.

90. Provision restricting one classified as "a cattle dealer or broker visiting yards by occupation," restricting him to occupancy of passenger cars, inoperative and does not release company because he climbs on and rides on top of freight car when necessary to pursuit of his business in ordinary and usual manner. Richards v. Travelers' Ins. Co. [S. D.] 100 N. W. 428.

91. Richards v. Travelers' Ins. Co. [S. D.] 100 N. W. 428. Evidence held to show that fall from car resulting in death was accidental. Use of word "fall" implies accident. Id. Risk of using stick of dynamite in attempt to remove well casing while engaged in prosecution of business of dealer in pumps and well supplies, specified in ac-

To make one guilty of voluntary exposure to unnecessary danger, he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous.[92] In such case the general principles of negligence apply, and a recovery cannot be had unless the insured exercised ordinary care.[93] The burden is on defendant to show such exposure.[94]

The term disease in an accident policy does not cover the temporary derangement of the functions of some organ.[95]

A provision for double indemnity in case the insured is killed while riding in or on a public conveyance does not require that he should have been killed while riding inside the car.[96] A provision exempting the company from liability in case the insured is killed while attempting to enter or leave a public conveyance does not preclude a recovery for death caused by being thrown from the platform of such car when not attempting to alight.[97]

Policies frequently exempt the company from liability in case the insured is killed while fighting,[98] or in case death results from injuries intentionally inflicted.[99]

Insurance against embezzlement.—A provision in a bond, guarantying an employer against loss, sustained by reason of the fraud or dishonesty of any of his employes, requiring him to use all diligence in prosecuting any such employe to conviction, and making such action, when requested, a condition precedent to recovery thereunder, only requires him to use due diligence in endeavoring to secure a conviction.[1]

cident policy as occupation of insured, held not risk excluded under language relating to occupation of handling explosives. Mortensen v. Central Life Assur. Ass'n [Iowa] 99 N. W. 1059. Perils incident to occupation as bridgeman not "exposure to unnecessary danger or obvious risk of injury." Jamison v. Continental Casualty Co., 104 Mo. App. 306, 78 S. W. 812.

92. Going to railroad station through railroad yards instead of by public streets, and climbing over moving train held voluntary exposure to avoidable danger so as to limit recovery on accident policy for resulting injuries. Aiter v. Union Casualty & Surety Co. [Mo. App.] 83 S. W. 276. Exposure to unnecessary danger or to obvious risk of injury means a voluntary assumption of unnecessary risk. Assumption of risk in expectation of encountering the danger and avoiding the injury from it. Jamison v. Continental Casualty Co., 104 Mo. App. 306, 78 S. W. 812. Steeple-chase riding is voluntary exposure to unnecessary danger where plaintiff states in his application that he is a cotton manufacturer. Not a common sport or amusement and not incident to his business. Fact that it was for amateurs immaterial. Smith v. Aetna Life Ins. Co. [Mass.] 69 N. E. 1059. Unnecessary exposure to obvious risk of injury or obvious danger will be deemed to include all cases of exposure to unnecessary danger attributable to negligence on the part of the insured. Price v. Standard Life & Acc. Ins. Co. [Minn.] 99 N. W. 887. Petition held to sufficiently aver that insured's death was caused by accident. Jamison v. Continental Casualty Co., 104 Mo. App. 306, 78 S. W. 812. Statements of insured while in semiconscious condition as to cause of accident held not entitled to weight in determining whether he unnecessarily exposed himself to danger. Id. Not precluded from recovery where death results from being thrown from platform of car where insured had gone to vomit after being unable to get into closet. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926.

93. Verdict for plaintiff, who poured kerosene on fire, held sustained by evidence. Price v. Standard Life & Acc. Ins. Co. [Minn.] 99 N. W. 887.

94. Jamison v. Continental Casualty Co., 104 Mo. App. 306, 78 S. W. 812. Evidence insufficient to establish that death was due to such exposure. Id.

95. Sickness at stomach. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926. Sickness not cause of death resulting from being thrown from the platform of a passenger train where the insured has gone to vomit after being unable to get into the closet. Id.

96. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926. Accident policy held not to preclude recovery, as a matter of law, for death from being thrown from platform of passenger train in daytime, he having gone there for purpose of vomiting after finding closet door locked. Id.

97. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926.

98. Evidence sufficient to support finding that insured was not engaged in fighting when he was killed. Gaines v. Fidelity & Casualty Co., 93 App. Div. 524, 87 N. Y. S. 821.

99. Evidence held to show that injuries resulting in death were not intentionally inflicted. Gaines v. Fidelity & Casualty Co., 93 App. Div. 524, 87 N. Y. S. 821.

1. Sufficient where he procures employe's arrest, and presents proof of fraud to grand jury, though no indictment is returned. Union Pac. Tea Co. v. Union Surety & Guaranty Co., 43 Misc. 50, 86 N. Y. S.

§ 10. *The risk or object of indemnity.*[2]—The risk covered to a large extent depends upon the terms of the policy.[3]

Employer's liability insurance.[4]—Such policies generally limit liability to cases where injuries result from certain specified occupations.[5] Under a policy indemnifying the insured against a "loss actually sustained and paid in satisfaction of a judgment after trial of the issue," there can be no recovery until a judgment recovered against the insured by an employe is paid.[6] The fact that the insurer undertakes the defense of an action against the employer by an injured employe does not preclude it from relying on a provision making payment of the judgment a condition precedent to an action on the policy.[7] Under a policy insuring against liability and loss resulting therefrom for a specified term, the insurer is liable where an employe is injured during such term, though plaintiff's liability to the employe is not fixed by judgment until after its expiration.[8] A provision that the insurer shall not be liable for injuries caused by failure of the insured to observe any statute for the safety of his employes is not repugnant to a preceding general statement agreeing to indemnify against common law or statutory liability to servants.[9] To take the liability of an employer for injuries to his employes, under the provisions of a contract with third persons, out of the provisions of the policy, the contract must be such as to make the liability not that of one engaged in the described occupation but a separate and independent liability.[10]

Accident insurance.[11]—A provision that the policy shall not cover injuries

466. Evidence insufficient to sustain finding that employe defaulted in specified amount. Id. Evidence held sufficient to sustain finding that employe had defaulted in specified amount by failure to account for goods sent to him. Id.

2. See 2 Curr. L. 516.

3. **Insurance against loss in mails:** Provision that no article should be deemed insured until a letter of advice should be deposited in postoffice not complied with by depositing it in mail box. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

Burglary insurance policy held to limit liability of company to sum of $250 on any one article of jewelry. Wormser v. General Acc. Assur. Corp., 94 App. Div. 213, 87 N. Y. S. 974. Loss by breaking into money drawer in safe after working combination held within terms of policy. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167.

Health insurance: Policy held to render insurer liable only in case disease necessitated continuous confinement indoors and treatment by a physician was reasonably required. Bishop v. United States Casualty Co., 91 N. Y. S. 176.

Accident indemnity policy construed and held merely to indemnify insured against loss of time and earning capacity by accident, and not to insure his life against death by accident. Shaw v. Equitable Mut. Acc. Ass'n [Neb.] 99 N. W. 672.

4. See 2 Curr. L. 519.

5. Work in and about the construction of a new building to replace an old one held not additions to or repairs to the latter within meaning of employer's liability policy. Andrus v. Maryland Casualty Co., 91 Minn. 358, 98 N. W. 200. Carpenter killed while removing scaffold in water tower held to have been engaged in making "ordinary repairs" and to have "been on duty in an occupation described" within the meaning of employer's liability policy, describing plaintiff's business as manufacturing cotton seed oil, including refining and ginning. Fidelity & Casualty Co. v. Lone Oak Cotton Oil & Gin Co. [Tex. Civ. App.] 80 S. W. 541.

6. Hence injured employe cannot recover on policy amount of judgment against insured. Cushman v. Carbondale Fuel Co., 122 Iowa, 656, 98 N. W. 509. Policy of employer's liability insurance held to mean that company, after taking control of the proceedings in suit against insured, could not thereafter be discharged except by payment of indemnity to assured or securing his discharge from the claim. Fact that policy provided that no claim should lie against insurer unless brought by insured to reimburse him for loss paid immaterial. Sanders v. Frankfort M., Acc. & Plate Glass Ins. Co., 72 N. H. 485, 57 A. 655.

7. O'Connell v. New York, etc., R. Co. [Mass.] 72 N. E. 979; Connolly v. Bolster [Mass.] 72 N. E. 981.

8. Southern R. News Co. v. Fidelity & Casualty Co. [Ky.] 83 S. W. 620.

9. Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co., 130 F. 957.

10. Liability of "stevedores and contractors" for death resulting from failure to keep runway in repair in accordance with agreement with third persons held covered by policy. Cashman v. London Guarantee & Acc. Ins. Co. [Mass.] 72 N. E. 957.

As to right of employe to collect insurance, see post, § 11.

11. See 2 Curr. L. 517.

received while the insured is insane is valid.[12] Total disability means inability to do substantially all the business necessary for one to do in carrying on his ordinary occupation.[13] Murder is an accidental death.[14] So is death resulting from blood poison due to cutting a corn with a knife.[15] Insured's pallor, emaciation, and decline are visible marks on the body within the provisions of a policy covering only injuries leaving such marks.[16]

Fire insurance.[17]—An exception to liability for a fire loss should be clearly expressed.[18] Policies generally exempt the company from liability for losses caused by order of the civil authorities,[19] or by explosives.[20] As a rule no exceptions can be added to those contained in the standard policy prescribed by statute.[21] The terms of the policy determine the liability for losses on additions to buildings insured thereunder.[22]

Mistake.—The company and not the insured is chargeable with the agent's failure to correctly report the risk as contracted for.[23] An agent's authority to issue a policy continues until he has completely executed it by issuing one embodying the terms of the binding contract therefor;[24] hence, where he, by mistake, omits words necessary to make it embody the binding contract for insurance, he may insert them, even after loss has occurred.[25] This rule is not changed by the fact that the policy is left in the agent's custody until after the loss.[26] Errors in the description of the location of the property will not avoid the policy if, after eliminating them, sufficient remains to clearly point out its actual location.[27] Where there is a mistake in reducing the agreement to writ-

12. Blunt v. Fidelity & Casualty Co. [Cal.] 78 P. 729. Provision that company shall not be liable "in case of injuries intentionally inflicted on himself by the insured, or inflicted on himself or received by him while insane," exempts it from liability for injuries to him while insane, whether intentionally inflicted or not. Id.

13. Not necessarily an absolute physical inability, or inability to do any business whatever. Pacific Mut. Life Ins. Co. v. Branham [Ind. App.] 70 N. E. 174. Evidence held to show continuous disability, though plaintiff attended to part of his business for a part of the time. Id. Where 24 days elapsed between date of injury and time when plaintiff was first confined to his bed, during which time he was continuously at his place of business, though not performing his usual duties, held that he could not recover under an accident policy providing for indemnity in case he was "immediately disabled so as to cause a total loss of time." Vess v. United Benev. Soc., 120 Ga. 411, 47 S. E. 942.

14. Aetna Life Ins. Co. v. Milward [Ky.] 82 S. W. 364.

15. Is death from "accidental, external and violent" injury. Nax v. Travelers' Ins. Co., 130 F. 985.

16. Means such injuries as can be shown by external and visible means to have been accidental. Root v. London Guarantee & Acc. Co., 92 App. Div. 578, 86 N. Y. S. 1055.

17. See 2 Curr. L. 518.

18. Under Wisconsin standard policy (Rev. St. 1898, § 1941), company cannot exempt itself from liability for loss by lightning. Hence, clause exempting it from liability for loss caused by electric current, whether artificial or natural, is void, since cannot have exception including fire by artificial current and excluding fire by natural current, both exceptions being created by same words. Wausau Telephone Co. v. United Firemen's Ins. Co. [Wis.] 101 N. W. 1100.

19. Loss to grain caused by fires started by county supervisors for purpose of destroying insects held to be within provision relieving from loss caused by order of civil authorities, though fire was started on other property and loss caused by its getting beyond control. Conner v. Manchester Assur. Co. [C. C. A.] 130 F. 743.

20. Fact that wall of building was shattered by explosion held not to relieve company from liability where it did not fall therefrom, though, on account of it, it fell more readily from the effects of the fire. Instructions disapproved. Eppens, Smith & Wiemann Co. v. Hartford Fire Ins. Co., 90 N. Y. S. 1035.

21. Exception of loss caused by electric current, whether artificial or natural, held void [Wis. Rev. St. 1898, § 1941]. Wausau Telephone Co. v. United Firemen's Ins. Co. [Wis.] 101 N. W. 1100.

22. Addition to main building of school held covered by policy permitting additions, and agreeing to cover the same. Meigs v. London Assur. Co., 126 F. 781.

23. Where agent had authority to insert lightning clause and contracted for policy containing it. McLaughlin v. American Fire Ins. Co. [Iowa] 101 N. W. 765.

24. McLaughlin v. American Fire Ins. Co. [Iowa] 101 N. W. 765.

25. Lightning clause omitted. McLaughlin v. American Fire Ins. Co. [Iowa] 101 N. W. 765.

26. McLaughlin v. American Fire Ins. Co. [Iowa] 101 N. W. 765.

27. Policy insuring property in V.'s stor-

ing but no mistake in the contract itself, the policy will be reformed after loss.[28] A court of equity will reform and enforce contracts of insurance on the ground of fraud or mistake.[29] Relief will not be granted unless a plain mistake is clearly made out by satisfactory and unquestionable proof.[30] Fraud relied on must be established by the same degree of proof.[31] One seeking to recover for damage to property not covered by the policy on the ground of a mistake in its description must allege and prove that a mistake has been made, and that it was mutual.[32] Mistakes may be reformed in an action on the policy.[33] In a suit to reform the policy and to recover for a loss thereunder, a failure to show facts authorizing a reformation does not prevent a recovery of the amount to which plaintiff shows himself entitled under the policy as written.[34]

Life policies generally exempt the company from liability in case the insured is killed while serving in the army or navy,[35] or in case of suicide.[36] Where the policy is silent in regard to the matter, the insured is liable in case of suicide.[37] Where it provides against liability in case of suicide, the insurer is not liable in the event of intentional self-destruction while sane, but is liable if the insured was insane.[38] There is a conflict of authority as to the effect of a provision exempting the company in case of suicide while sane or insane, some courts holding that it avoids the policy in every case,[39] and others that it does not prevent a recovery where insured does not have sufficient mind to render him conscious that he is taking his own life when he commits the act.[40] A clause

age warehouse "situate No. 73 M street" not rendered void because it was in one of four buildings composing warehouse which was on B street, where such building was connected with, and only access to it was through designated building. Edwards v. Fireman's Ins. Co., 43 Misc. 354, 87 N. Y. S. 507.

28. Dwelling in which personalty insured was situated described as on southerly instead of northerly side of road. Le Gendre v. Scottish Union & National Ins. Co., 95 App. Div. 562, 88 N. Y. S. 1012. Under circumstances held that there was no estoppel from fact that plaintiff's agent may have represented house in which insured personalty was located as being on southerly instead of on northerly side of road, where it does not appear that hazard was thereby increased, or that company had been misled to its prejudice. Id.

29. Warner, Moore & Co. v. Western Assur. Co. [Va.] 49 S. E. 499.

30. Evidence sufficient to show that error in describing location of goods was due to mutual mistake, and to require reformation. Warner, Moore & Co. v. Western Assur. Co. [Va.] 49 S. E. 499.

31. Warner, Moore & Co, v. Western Assur. Co. [Va.] 49 S. E. 499. Mistake or fraud in the description of the property covered in the policy must be pleaded. Error otherwise to admit evidence showing destruction of property in different building than one described, and that defendant knew when policy was issued that it was not in latter building, and to submit questions of mistake and fraud to jury. Aetna Fire Ins. Co. v. Brannon [Tex. Civ. App.] 81 S. W. 560.

32. Instructions held erroneous. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072.

33. Where a loss-payable clause indorsed on the policy by an agent, having authority and with knowledge of the facts, for the purpose of protecting the interested parties, is defective, and fails to express the true intention of the parties, it may be reformed in an action on the policy. Mistake may be shown by parol. Hartford Fire Ins. Co. v. McCarthy [Kan.] 77 P. 90.

34. Ga. Civ. Code 1895, § 4833. Trust Co. of Georgia v. Scottish Union & Nat. Ins. Co., 119 Ga. 672, 46 S. E. 855. Petition held to set out good cause of action on policy as actually written, though it did not show facts entitling plaintiff to a reformation of the policy, and there was a failure of necessary parties. Id.

35. Under policy exempting company from liability if insured was killed while serving in army in time of war unless he gave notice of his enlistment and paid additional premium held that company was not liable where insured was killed at Mindanao. Court will take judicial notice that insurrection existed there. La Rue v. Kansas Mut. Life Ins. Co. [Kan.] 75 P. 494.

36. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1515, § 9.

37, 38. Robson v. United Order of Foresters [Minn.] 100 N. W. 381.

39. Robson v. United Order of Foresters [Minn.] 100 N. W. 381. Not against public policy. Northwestern Mut. Ins. Co. v. Churchill, 105 Ill. App. 159. Covers all cases of insanity though so great as to utterly destroy volition or consciousness. Id.

40. Evidence sufficient to authorize recovery. Supreme Council Knights of Equity of the World v. Heineman, 25 Ky. L. R. 1604, 78 S. W. 406.

forfeiting the policy in case the insured dies by his own hand or act, voluntary or involuntary, sane or insane, covers only acts done with suicidal intent.[41]

§ 11. *The beneficiary and the insured.*[42]—The beneficiary has a vested interest in the policy, and it cannot be surrendered by the insured without his consent.[43] Where the policy so provides, the insured may change the beneficiaries at will.[44] Substituted beneficiaries must have an insurable interest.[45] A provision giving the insured the right to change the beneficiary with the consent of, and on written notice to, the company, makes its approval of the change a condition prerequisite to its validity.[46]

Where the policy is payable to any one of several persons no one of them has an exclusive right to recover the proceeds, and hence no one of them has an attachable interest in the fund.[47] A provision that the production by the company of the policy and a receipt signed by any person giving satisfactory proof that he is an executor, husband or wife, or relative by blood, or lawful beneficiary of the insured, shall be conclusive evidence that the sum has been paid to the person lawfully entitled to the same, gives the company the right to pay the amount of the policy to any one of such persons.[48]

A husband has no attachable interest in the proceeds of a policy of life insurance payable to his wife, until her debts have been paid and he has reduced her estate to possession.[49]

The construction of the policy as to who are the beneficiaries, as in other contracts, depends upon the language used, to be read when doubt arises, in the light of the circumstances surrounding the parties when the contract was made.[50]

41. Does not include taking of opium for sake of obtaining relief. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

42. See 2 Curr. L. 502. See, also, Fraternal Mutual Benefit Associations, 3 Curr. L. 1513, § 8.

43. Leonhard v. Provident Sav. Life Assur. Soc. [C. C. A.] 130 F. 287; Fish v. Massachusetts Mut. Life Ins. Co. [Mass.] 71 N. E. 786. Beneficiary who thereafter joins in exchanging second policy for third cannot, in absence of fraud, claim that first was not lawfully surrendered, though she believed that she was exchanging first one. Leonhard v. Provident Sav. Life Assur. Soc. [C. C. A.] 130 F. 287. Interest can only be divested to the extent provided for in the policy. Allegations insufficient to show different rule in state where contract was made. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132. A surrender of the policy by the insured for his wife, who is the beneficiary, is ineffectual if made without her consent. Id. The fact that the policy, for which the company exacts a fixed rate of premium for a fixed amount of insurance, provides that it shall participate annually in the surplus earnings of the company in accordance with regulations adopted by the board of trustees, does not make it a mere benefit certificate in so far as the rights of the beneficiary are concerned. Id.

44. Original beneficiary has no vested interest, but takes subject to such right. Wrather v. Stacy [Ky.] 82 S. W. 420.

45. Wrather v. Stacy [Ky.] 82 S. W. 420.

46. Rule not changed by New York statute making consent of beneficiary unnecessary. Newman v. John Hancock Mut. Life Ins. Co., 90 N. Y. S. 471. The mere fact that plaintiff's agent obtained at the company's office blanks for the purpose of making the plaintiff beneficiary, and was instructed to have them filled out, does not estop the company from attacking the validity of the change. Id.

47. Since company could interpose defense that it had paid some other of the persons named. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454.

48. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454. Under industrial insurance policy giving company right to make payment to anyone related by blood or marriage to the insured, or to any other person appearing to the insurer to be equitably entitled thereto by reason of his having incurred expense in insured's behalf, and making production of receipt conclusive evidence that payment has been made to person entitled thereto, held that payment in good faith to, and receipt of, person with whom insured had gone through form of marriage after separating from her husband, and who had paid her funeral expenses was a bar to an action by insured's administrator. Bradley v. Prudential Ins. Co. [Mass.] 72 N. E. 989.

49. Has a right to administer her estate and take surplus after payment of her debts, under R. I. Gen. Laws 1896, c. 212, § 9. Providence County Sav. Bank v. Vadnais [R. I.] 58 A. 454.

50. Fidelity Trust Co. v. Marshall, 178 N. Y. 468, 71 N. E. 8. Under policies payable, one to the insured's wife, "her executors, administrators or assigns," for her sole use if she survived her husband, but if she died first then to "her children, for their use, or

Neither a beneficiary who feloniously takes the life of the insured, nor those claiming under him, can recover on the policy,[51] but the insurer is not thereby relieved from liability.[52]

No resulting trust arises in favor of one paying premiums on a life policy, where the money is merely advanced as a loan.[53] Mere physical custody of the policy does not create either a trust or a lien.[54] Where creditors are made beneficiaries under a life policy, and are required by contract with the insured to pay a part of the proceeds to third persons, they become trustees, and suits against them for settlement of such trust should be brought in equity.[55]

Under a fire policy payable to the owner of a life estate in the property, the remaindermen are entitled only to the excess over the value of such life estate.[56] In order to recover, they must show the value of such excess.[57] Where a creditor secured by a trust deed procures insurance on the trust property for his own benefit, and himself pays the premiums, the trust debtor cannot require him to account for money received therefrom.[58] Any claim of an insolvent corporation to share in the proceeds of a policy on the life of its managing director on the ground that the premiums were paid from its assets is enforceable only by its receiver.[59]

Rights of employe under employer's liability policy.—Under a policy insuring directly against liability, the amount thereof, to the extent of the liability incurred by the employer on account of an accident to an employe, becomes, immediately upon the happening of the accident and the giving of the notice provided for, an asset of the insured, which, in the absence of a provision to the contrary, may be assigned by him or taken for his debts, subject to the making of the required proofs.[60] But under a policy insuring against loss or damage by reason of liability, the amount of insurance does not become available until the insured has paid the loss and proper notice has been given as provided for therein.[61] Under both classes, the contract is one between the insurer and the

to their guardian if under age," and the other to the wife "or to her legal representatives," if she was then living, and if not, "to her children, or their guardian if under age," held that, on the death of the wife before the husband, the policies vested in the children then living, who became substituted beneficiaries under the contract and did not take through their mother. On death of insured, proceeds divided equally between surviving child and issue of deceased child. Id. Under a policy payable to the wife and child of the insured, "or if they are not living, to his executors, administrators, or assigns," where the wife dies before the insured, the surviving child is entitled to the whole amount by force of the contract. Fish v. Massachusetts Mut. Life Ins. Co. [Mass.] 71 N. E. 786.

51. Legal representatives of insured who murders his wife, the beneficiary, cannot recover proceeds of policy as against her representatives on the ground that right thereto passed to him as survivor. Box v. Lanier [Tenn.] 79 S. W. 1042; Supreme Lodge Knights of Ladies of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567. Such rule does not violate provisions of federal constitution against forfeiture [art. 1, § 12] (Box v. Lanier [Tenn.] 79 S. W. 1042), nor those prohibiting bills of attainder [art. 1, §§ 9, 10] (Id.). A refusal to permit the husband to take such proceeds does not escheat them to the state, but they go to the wife's administrator. Id.

52. Proceeds of benefit certificate held payable to insured's heirs. Under ordinary life policy rule appears to be that administrator of insured may recover. Supreme Lodge Knights & Ladies of Honor v. Menkhausen, 209 Ill. 277, 70 N. E. 567.

53. Johnston v. Coney [Ga.] 48 S. E. 373.

54. Johnston v. Coney [Ga.] 48 S. E. 373. To show implied trust in proceeds of life policy or any lien thereon in favor of plaintiff. Id.

55. Duty to disburse money according to contract. Wrather v. Stacy [Ky.] 82 S. W. 420. Under contract widow and insured's estate held to have no interest in part of proceeds which beneficiaries were required to pay to insured's father. Id.

56, 57. Grant v. Buchanan [Tex. Civ. App.] 81 S. W. 820.

58. Insurance held to be for sole benefit of defendant and that plaintiff had no interest therein. Dunbrack v. Neall [W. Va.] 47 S. E. 303.

59. Insurance company not entitled to interplead beneficiaries and creditors of corporation claiming proceeds. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489. See Id. [Ind. App.] 69 N. E. 204.

60. Finley v. United States Casualty Co. [Tenn.] 83 S. W. 2.

61. Policy held to belong to this class,

master for the benefit of the latter, and the employe is not regarded as being in privity with them.[62] There is a conflict of authority as to whether equity will compel the company to pay the proceeds of the policy directly to the injured employe.[63] In no event will such suit lie until the employer has complied with all the provisions of the policy which are made conditions precedent to his right to recover thereon.[64]

Rights of mortgagee.—Under a policy made payable to a mortgagee as his interest may appear, the insurer undertakes that the capacity of the property to pay the mortgage debt shall not be diminished, and that, if it is diminished by fire, it will pay over the loss to the mortgagee, irrespective of the fact that the property in its damaged condition may be more than sufficient to pay the mortgage debt.[65] The mortgagee may maintain an action at law on the policy, in his own name alone, when the amount of the mortgage debt exceeds the value of the insurance, and the mortgage covers all the property destroyed.[66] Where a policy which provides that the loss, if any, shall be payable to the mortgagee for the owner's account, is issued to the owner, who pays the premium, suit thereon is properly brought in the name of such owner for the use of the mortgagee.[67] In the absence of a provision in the policy to the contrary, the mortgagee's rights are generally held to be subject to the same defenses as could be set up against the insured,[68] though there seems to be some conflict of authority in this

though provided that, on suit being brought against the employer, he should forward process to insurer, who would defend or settle claim, and hence could not be impounded by employe who had recovered judgment against employer. Finley v. United States Casualty Co. [Tenn.] 83 S. W. 2.

62. Finley v. United States Casualty Co. [Tenn.] 83 S. W. 2.

63. **In New Hampshire** it is held that where the insurer has rendered itself liable on the policy equity may compel payment of the amount thereof to an employe who has recovered judgment against the insured, where the latter is insolvent. Company took charge of action. Sanders v. Frankfort M., Acc. & Plate Glass Ins. Co., 72 N. H. 485, 57 A. 655.

In Massachusetts it is held that employe's remedy is to attach the debt due the employer from the insurer by trustee process. Connolly v. Bolster [Mass.] 72 N. E. 981. Mass. Rev. Laws, c. 159, § 3, cl. 7, authorizing plaintiff to reach in equity his debtor's property and apply same to the payment of his debt, does not apply. Id.

64. Payment of judgment condition precedent. O'Connell v. New York, etc., R. Co. [Mass.] 72 N. E. 979. Employe has no claim against insurer for amount of judgment recovered against employer, where the latter's policy provides for indemnity only against judgments actually paid. Iowa Code, § 4087, authorizing judgment creditor to institute equitable proceedings to subject rights and credits belonging to debtor to satisfaction of his judgment, in which persons indebted to debtor may be made defendants, does not apply. Cushman v. Carbondale Fuel Co., 122 Iowa, 656, 98 N. W. 509.

65. No damage to his interest where fire occurred after foreclosure of mortgage and sale to mortgagee, but before delivery of deed, where sale was thereafter completed by acceptance of the deed. Uhlfelder v. Palatine Ins. Co., 44 Misc. 153, 89 N. Y. S. 792. The mortgagee must show that his security was damaged. Id.

66. Trust Co. of Georgia v. Scottish Union & Nat. Ins. Co., 119 Ga. 672, 46 S. E. 855. Mortgage covering one item. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94.

67. Hartford Fire Ins. Co. v. Peterson, 209 Ill. 112, 70 N. E. 757.

68. Contract proper is with insured, and mortgagee merely appointed to receive payment. Hamburg-Bremen Fire Ins. Co. v. Ruddell [Tex. Civ. App.] 82 S. W. 826. The person named in the policy as owner, and not the mortgagee to whom the loss is payable, is the insured within the meaning of a condition of forfeiture. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94. Unless the insured can recover on the policy, his mortgagee cannot. Lewis v. Guardian Fire & Life Assur. Co., 93 App. Div. 157, 87 N. Y. S. 525. Has no greater rights under condition of forfeiture. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94. Under a provision that if the policy is made payable to a mortgagee "the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," no conditions not contained in a slip attached to the policy making it payable to a mortgagee as his interest may appear are binding on him. Not precluded from recovering to extent of his interest because insured procured additional insurance without company's consent. Senor v. Western Millers' Mut. Fire Ins. Co., 181 Mo. 104, 79 S. W. 687. The mere failure to designate him as mortgagee does not change the rule, where he was recognized as such in the application. Id.

regard.[69] A by-law of a mutual company providing that the policy may, at the request of the insured, be indorsed payable to the mortgagee as his interest may appear, is not obligatory, and a failure to so indorse it does not relieve the insurer from liability.[70]

Under a contract for the sale of land requiring the vendee to insure the buildings thereon, the loss, if any, to be paid to the vendor as his interest may appear, the amount of such policy is payable to the vendor for the purpose of indemnifying and protecting him to the extent of the purchase price unpaid.[71] He cannot be compelled to apply the proceeds to the rebuilding of the destroyed property, in the absence of an agreement to that effect,[72] nor in the absence of proof of what such rebuilding would cost.[73] Nor can the vendee compel the application of the proceeds to that purpose without an offer to rebuild or a showing that such rebuilding can be done so as to protect the vendor's interest.[74]

Insurance by bailee or agent.[75]—A bailee or agent, holding property for the purpose of repair or sale, may, in his own name, insure it against loss or damage by fire for the protection of his special interest and that of the owner.[76] In case of loss, the avails of the policy may be applied in satisfaction of his claim against the property,[77] but he holds any surplus, remaining after such claim is satisfied, in trust for the owner.[78] The amount of loss paid by the insurer is payable to the owners in such proportion as the value of the property of each bears to the whole amount paid, notwithstanding the fact that the proceeds of the policy are less than the value of all the property destroyed, the insured having the right to deduct from the share of each the amount of his lien on the property.[79] He should collect such surplus in his name as trustee of an express trust, and is liable for the resulting damage to any owner whose property he fails to include in the proofs of loss.[80] The insurance need not be upon specific property, nor need the owner be known at the inception of the contract,[81] though it must appear from the policy that he was within the contemplation of the parties when the contract was made.[82] It will be presumed that the parties intended that the insurance provided for in the policy shall inure to the benefit of every person assuming the relationship to the assured which is covered thereby, whenever a loss occurs.[83] Such presumption is binding both on the assured and the insurer, and cannot be varied or contradicted unless it can be shown that there was an agreement between them and the owner that the latter's interest was not to be included.[84] The insurer is supposed to have intended that all persons assuming the prescribed relationship were within the protection of the policy, if, when informed of its existence, they assented to and adopted the acts of the insured.[85] The right of such adoption and ratification continues while the contract is in force,[86] and the fact that loss has occurred does not preclude its exercise within a reasonable time thereafter.[87] Such adoption makes the owner, in legal effect, a

69. Fraud of the mortgagor in procuring insurance on mortgaged premises for the benefit of the mortgagee under agreement to do so, is no defense to the mortgagee's claim under the policy. Agner v. Firemen's Ins. Co., 2 Ohio N. P. (N. S.) 254.

70. Loomis v. Jefferson County Patrons' Fire Relief Ass'n, 92 App. Div. 601, 87 N. Y. S. 5.

71. Sufficient for vendor to credit amount on purchase price. Marion v. Wolcott [N. J. Eq.] 59 A. 242.

72, 73, 74. Marion v. Wolcott [N. J. Eq.] 59 A. 242.

75. See 2 Curr. L. 503.

76. Policy issued to one engaged in repairing vehicles covering stock of carriages, etc., either belonging to insured, or held by him in trust, or in storage, or for repairs held to cover interest of owners. Johnston v. Abresch Co. [Wis.] 101 N. W. 395.

77, 78, 79. Johnston v. Abresch Co. [Wis.] 101 N. W. 395.

80. Complaint held to sound in contract and not in tort. Johnston v. Abresch Co. [Wis.] 101 N. W. 395.

81, 82, 83, 84, 85, 86, 87, 88. Johnston v. Abresch Co. [Wis.] 101 N. W. 395.

party to the contract, and hence its terms, as to him, cannot thereafter be modified, contradicted, or varied by parol.[88]

§ 12. *Policy value in cash or loans before loss.*[89]—No policy has a cash surrender value unless it contains a provision to that effect, enforceable by the insured.[90] A policy of a foreign company is not affected by a statute authorizing the recovery of the cash surrender value of forfeited policies.[91]

§ 13. *Options and privileges under policy.*[92]—Under a policy providing that on default in the payment of premiums the insured shall be entitled to term insurance for the full amount of the policy, or, on application and surrender of the policy within a specified time, to a nonparticipating paid-up policy, it is generally held that a failure to make such application and surrender will be deemed an election to take the term insurance.[93] This rule is not changed by the fact that the beneficiaries are minors.[94] Some courts, however, hold that time is not of the essence of such a contract.[95]

§ 14. *Assignments and transfers of benefits or insurance.*[96] *Life insurance.*[97]—The ordinary essentials of a valid assignment must, of course, exist.[98] It may be oral,[99] and an assignment under seal imports a consideration.[1] The insured has at least a contingent interest in a life policy payable to his wife, if she survives him, and if not to his executors, administrators, or assigns, which he may assign.[2]

There is a conflict of authority as to whether the assignee of a life policy must have an insurable interest in the life of the insured.[3] Some courts hold that an assignment for value and in good faith by one having such an interest

89. See 2 Curr. L. 531.

90. Mere fact that company has adopted custom of paying surrender value on semitontine policies does not bring them within meaning of section 70 of bankruptcy act allowing bankrupt to retain policy upon paying amount of surrender value [30 St. 565 (U. S. Comp. St. 1901, p. 3451)]. In re Mertens, 131 F. 972.

91. Ferguson v. Union Mut. Life Ins. Co. [Mass.] 72 N. E. 358.

92. See 2 Curr. L. 531.

93. Mutual Ben. Life Ins. Co. v. Harvey, 25 Ky. L. R. 1992, 79 S. W. 218. Failure to surrender endowment policy held election to take term insurance though application for paid up policy was made. Inloes v. Prudential Ins. Co. [Mo. App.] 82 S. W. 1089. Provision requiring surrender before default in the payment of any premium, or within six months thereafter, is reasonable and binding. Bonner v. Mutual Life Ins. Co. [Miss.] 36 So. 538; Grevenig v. Washington Life Ins. Co., 112 La. 879, 36 So. 790. Failure to demand paid up insurance held to result in continuance of policy for full amount for definite period, which expired before insured's death. New York Life Ins. Co. v. Meinken's Adm'r, 25 Ky. L. R. 2113, 80 S. W. 175.

94. Mutual Ben. Life Ins. Co. v. Harvey, 25 Ky. L. R. 1992, 79 S. W. 218.

95. In Kentucky where the policy provides that, upon its lapse for nonpayment of premiums, the insured shall be entitled to a paid-up policy provided he applies therefor and surrenders the policy within a specified time, time is held not to be of the essence of the contract, and having made a demand for a paid-up policy within five years of the lapse, he may, under the statute, sue therefor at any time within fifteen years after his cause of action accrues. Washington Life Ins. Co. v. Lyne [Ky.] 83 S. W. 122.

96. See 2 Curr. L. 503.

97. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1513, § 8.

98. Assignment of life policy by insured held void for lack of mental capacity. Bickel v. Bickel, 25 Ky. L. R. 1945, 79 S. W. 215.

99. Barnett v. Prudential Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842. Evidence held to show parol assignment. Lockett v. Lockett [Ky.] 80 S. W. 1152. A parol assignment by the insured of a policy payable to his executors, administrators, or assigns, accompanied by a delivery of the policy, is valid. Delivery of policy to wife, to whom it was payable if she survived him, with intention that she should keep it alive and that it should belong to her, held to vest his contingent interest in her, and if he survived her he could only take the proceeds by virtue of his rights as surviving husband. Box v. Lanier [Tenn.] 79 S. W. 1042.

1. N. Y. Code Civ. Proc. § 1840. Von Schuckmann v. Heinrich, 93 App. Div. 278, 87 N. Y. S. 673. Burden of proving the contrary is on the party attacking it. Where recites consideration as natural love and affection, burden on attacking party to show that there was no further consideration, if it was necessary. Id.

2. Box v. Lanier [Tenn.] 79 S. W. 1042.

3. The question is one of general law in the decision of which the federal courts are not bound by the decisions of the court where it arises. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444.

to one who has not is valid.[4] This rule of course does not apply where the transaction is made with a preconceived intention to avoid the rule against wagering contracts.[5] Others hold that no one can enforce a policy issued on the life of another unless he has an insurable interest therein,[6] and that when the insurable interest ceases, the interest in the policy also ceases except that the beneficiary or assignee has a lien thereon for premiums paid.[7]

An assignment of a policy as collateral security for a debt is valid, and the assignee is entitled to hold the same until the debt is paid.[8] A married woman may assign her interest in a policy on her husband's life to secure his debt.[9] Where the policy is payable to the wife for her sole use, if living, and if not, to her children, her interest is contingent on surviving her husband,[10] and her assignee takes a defeasible title only, which becomes absolute on her husband dying before she does.[11] One who retains a policy on property sold by him as collateral to secure the payment of the purchase price is bound to credit the amount recovered by him in settlement of a loss thereunder on the purchase price, after deducting the cost of collection.[12] Payment of the unearned premium, on can-

4. Federal courts. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444. The pledgee of a policy has the right and power to sell it to the highest bidder for the purpose of realizing money to pay the debt which it secures, and both immediate and remote assignees under such sale take good title to the policy and its proceeds. Id.

Massachusetts: The insurable interest of the insured in his own life is sufficient to support a policy payable to him or his assigns, though it is assigned to one having no insurable interest. King v. Cram, 185 Mass. 103, 69 N. E. 1049.

In New York an assignee of a policy, valid in its inception, may maintain an action thereon. Peck v. Washington Life Ins. Co., 91 App. Div. 597, 87 N. Y. S. 210.

5. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444. As where it was agreed when application was made that one having no such interest should pay the premiums and receive the proceeds. Hinton v. Mutual Reserve Fund Ass'n, 135 N. C. 314, 47 S. E. 474. Where policy payable to insured's estate was assigned to him and he sued as administrator, but for purpose of securing proceeds under original agreement, he could not recover. Id. In the absence of evidence that it was intended as a gambling transaction, the purchaser or donee takes good title. King v. Cram, 185 Mass. 103, 69 N. E. 1049.

6. Kentucky: Surety of insured, to whom policy was assigned, held, as against original beneficiary, to be entitled only to amount of debt and premiums paid by him, with interest. Lee v. Mutual Life Ins. Co. [Ky.] 82 S. W. 258.

In Texas assignee cannot recover unless assignment was to secure indebtedness, in which case it is valid to the extent thereof. Wilton v. New York Life Ins. Co. [Tex. Civ. App.] 78 S. W. 403; Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411. Insurable interest must be alleged. Dugger v. Mutual Life Ins. Co. [Tex. Civ. App.] 81 S. W. 335. The fact that the policy is an endowment one does not change the rule. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411.

In Kentucky same rule prevails. Lockett v. Lockett [Ky.] 80 S. W. 1152.

7. Insurable interest of wife ceases on her divorce either for her own or her husband's fault. Not entitled to surrender value. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411. Judgment in divorce proceedings not res adjudicata of wife's rights as assignee of policy, that question not having been involved. Id. Nor does a judgment in such proceedings in her favor for a certain amount give her any rights in, or lien upon the policy. Id.

8. One to whom the owner of a life policy has assigned it as collateral security is entitled to hold it, as against the latter's administrator, until the debt is paid, in the absence of a showing that he is insolvent, or that loss would result to the administrator from permitting him to collect it. Cash v. Hayden's Adm'r [Ky.] 83 S. W. 136. Where first assignment did not cover future indebtedness and a second one was made as collateral for whole debt owing defendant which was created by advancements made on the faith thereof, defendant was entitled to be reimbursed for the whole amount of the debt, the evidence being insufficient to show fraud in procuring second assignment. Cox v. Higginbotham's Adm'r [Ky.] 83 S. W. 137. Where such advances include premium on policies payable to insured's children, the beneficiary under the assigned policies should be reimbursed to that extent from the proceeds of the children's policies. Id. Though assignee of life policy prevails over administrator in contest over proceeds of life policy, the latter should be allowed for premium paid by him after insured's death. Von Schuckmann v. Heinrich, 93 App. Div. 278, 87 N. Y. S. 673. Evidence insufficient to show that assignment of benefits of life policy was procured by fraud. Pioso v. Bitzer [Pa.] 58 A. 891.

9. Not forbidden by Pa. Act June 8, 1893 (P. L. 344), relating to contracts of suretyship, etc., by married women. Herr v. Reinoehl [Pa.] 58 A. 862.

10. Herr v. Reinoehl [Pa.] 58 A. 862.

11. Children need not join in assignment. Assignment held to be as collateral for notes. Herr v. Reinoehl [Pa.] 58 A. 862.

12. Mattingly v. Springfield Fire & Marine Ins. Co. [Ky.] 83 S. W. 577.

cellation of the policy, to the pledgee of the policy who holds it as security for the repayment of premiums advanced by him, and under an agreement providing that he may collect such unearned premiums and apply the same on his debt, is a complete defense to an action therefor brought by the insured against the insurer.[13] One holding a life policy as collateral may enforce his rights thereunder notwithstanding the fact that the debt which it is given to secure and a judgment recovered thereon are barred by limitations.[14] The fact that the assignee is nominally acting as the insurer's general agent does not vitiate the assignment, in the absence of fraud.[15]

In an action to compel the company to comply with the terms of a life policy by making a loan thereon, where the insured's divorced wife claims the policy under a previous assignment, and the company declares its willingness to make the loan to the true owner, it should be treated as a stakeholder and is entitled to costs and attorney's fees.[16] The insured cannot in such case compel the loan until he pays the lien of the assignee for premiums paid by her, in the absence of her consent.[17]

The title to a life policy payable to the insured's executors, administrators, or assigns passes to his trustee in bankruptcy provided it has a real cash value which can be realized by the latter through a sale or otherwise, even though it has no surrender value.[18]

Fire insurance.—An assignment of a fire policy after an adjusted loss is valid as between the assignor and the assignee.[19] On assignment of the policy with the consent of the insurer to the purchaser of the personalty covered thereby, it becomes a new contract and is unaffected by the acts of the person originally insured.[20] The rights of persons holding policies as collateral are dependent on the terms of their contracts with the insured.[21]

13. Agreement cannot be regarded as tending of fasten on the policy any new or different contract so as to exclude parol proof thereof. Miller v. Home Ins. Co. [N. J. Law] 58 A. 98. Such contract is a dealing by the insured with the unearned premium to become due in case of cancellation before the expiration of the policy. Id.

14. Plaintiffs held to have no title to policy until defendant's debt was paid. Conway v. Caswell [Ga.] 48 S. E. 956. Evidence held to show that defendant was entitled to policy, plaintiff's ancestor having consented to its assignment to his ancestor, and defendant and his predecessor having paid premiums. Id.

15. Peck v. Washington Life Ins. Co., 91 App. Div. 597, 87 N. Y. S. 210. Where a life policy is delivered by one having the authority of a general agent without payment of the premium, a subsequent acceptance of the premium by the company with knowledge that the policy had been assigned to its general agent on the day of its delivery gives complete force and effect to the contract on such day of delivery. Id.

16, 17. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411.

18. Where policy had no cash or surrender value at time of adjudication, held that trustee took no title thereto and on bankrupt's subsequent suicide before policy lapsed the proceeds were payable to his administratrix. Gould v. New York Life Ins. Co., 132 F. 927. A semitontine life policy payable to a bankrupt, or his assigns, or legal representatives, having no cash surrender value, but giving the insured a right to a paid-up policy on lapse [Bankruptcy Act 1898, § 70 A, cl. 5, 30 St. 565 (U. S. Comp. St. 1901, p. 3451)]. In re Mertens, 131 F. 972.

19. Assignment of all insured's interest in policy, for valuable consideration, with authority to collect same. Frels v. Little Black Farmers' Mut. Ins. Co. [Wis.] 98 N. W. 522. The fact that no fund is shown to have been in the hands of a mutual company as due on the policy, or then enforceable by action cannot stand in the way of an equitable assignment of its proceeds, if the claim is thereafter definitely established under the facts and circumstances as they existed when such assignment was made. Id.

20. Not subject to forfeiture for breach of inventory clause by assignor, nor because he was not the sole owner at the time policy was issued. Bayless v. Mercantile Town Mut. Ins. Co. [Mo. App.] 80 S. W. 289. Where policy provided that inventory should be taken within 30 days after the date of the policy, and that insured should keep a set of books, held that the assignee had 30 days after assignment in which to do so. Id. Evidence sufficient to sustain finding that plaintiff was owner of goods at time of the fire. Id.

21. Under credit obligation, banker held entitled to lien on proceeds of policy of insurance, payable to them as their interest might appear, on cargo purchased under let-

§ 15. *Change or substitution of contract, or risk, or of conditions thereupon.*[22]—An insurance company is bound by the act of a clerk in the office of its agents transferring the insurance on goods located in a certain building to the same property in a different building, if he was acting under general or specific authority from such agents to make such transfer.[23]

§ 16. *Rescission, forfeiture, cancellation, and avoidance. A. By agreement.*[24]—The policy may, of course, be surrendered and canceled by consent at any time.[25]

(§ 16) *B. For breach of contract, condition, or warranty, or misrepresentation.*[26]—All prior negotiations will be presumed to have been merged in the written policy.[27] The insured is presumed to know the contents of his policy, and is bound by other instruments therein referred to and made a part of the contract.[28] It is his duty to examine it and see that it conforms to the one contracted for.[29] Where it differs materially from that for which he applied or intended to apply, it is his duty, if he does not wish to accept it, to return it within a reasonable time;[30] and if he fails to do so, and neglects to examine it, he cannot avoid payment of the promissory note given by him for the first premium,[31] or claim that it contains any provisions to which he did not consent and agree.[32] The only damages which can be recovered for fraud in issuing a policy different from that contracted for are such as are the natural, probable, and proximate consequences thereof.[33] The acceptance of the policy, by the beneficiary, and

ter of credit to secure payment of subsequent indebtedness, and to share same proportionately with other bankers holding other policies. In re McElheny, 91 App. Div. 131, 86 N. Y. S. 326.

22. See 2 Curr. L. 502. For amendment to by-laws as affecting benefit certificates, see Fraternal Mutual Benefit Associations, 3 Curr. L. 1507, § 5D.

23. Evidence sufficient to justify submission of question to jury. Thuringia Ins. Co. v. Goldsmith [C. C. A.] 132 F. 456.

24. See 2 Curr. L. 506.

25. Evidence held not to show legal surrender of policy. Winn v. Provident Life & Trust Co., 91 N. Y. S. 167.

26. See 2 Curr. L. 508. Forfeiture for breach of condition, ante, § 9. For nonpayment of premiums, ante, § 8.

27. As to premiums. Ijams v. Provident Sav. Life Assur. Soc. [Mo.] 84 S. W. 51. Where the contract is not for parol insurance. Evidence held to show that the contract was not for parol insurance. Young v. St. Paul Fire & Marine Ins. Co. [S. C.] 47 S. E. 681.

28. May demand inspection of it and refuse to enter into contract if it is denied them. Plaintiffs held bound by provisions of an open policy so referred to though they had no knowledge thereof. Conner v. Manchester Assur. Co. [C. C. A.] 130 F. 743. Policy providing for payment of part of premium in cash and balance by note held to merge antecedent agreement for issuance of insurance for cash premium. Graham v. Mercantile Town Mut. Ins. Co. [Mo. App.] 84 S. W. 93.

29. Cannot, in absence of fraud, contend that agent misrepresented meaning of "level rate" policy, where he retained policy for seven years without objection, and policy itself showed terms in regard to premiums. Ijams v. Provident Sav. Life Assur. Soc. [Mo.] 84 S. W. 51.

30. Johnson v. White [Ga.] 48 S. E. 426. Where the application provides that no representations by the agent shall bind the company unless in writing, and that the application and the policy shall constitute the entire contract, defendant, in an action on a premium note, cannot show that the agent represented that the policy would contain provisions which it did not. Would be varying terms by parol. Blanks v. Moore, 139 Ala. 624, 36 So. 783. Pleas held to sufficiently show privity. Id.

31. Johnson v. White [Ga.] 48 S. E. 426. One signing an application for a life policy without reading it, though given an opportunity to do so, and subsequently receiving a policy of the kind for which such application calls, cannot defend an action by a bona fide holder of his premium note on the ground that he was induced to sign an application which he did not intend to make by the false representations of the soliciting agent. Verdict properly directed for plaintiff. Id. Retention of the policy for an unreasonable time and failure to repudiate the transaction waive fraud in the procurement of the premium note (National Life & Trust Co. v. Omans [Mich.] 100 N. W. 595), though the policy provides that nonpayment of a premium when due shall terminate the company's liability, where there is also a provision for reinstatement, including the right to a payment of a specified sum at the end of a certain period (Id.).

32. Especially where he renews it twice. Blunt v. Fidelity & Casualty Co. [Cal.] 78 P. 729.

33. Damages because of after inability to procure other insurance because of advanced age and then physical condition too remote.

the commencement of suit thereon, will, in the absence of fraud or imposition, be held to show that he had notice of, understood, agreed to, and is bound by the terms, limitations, and conditions contained therein.[34] The insurer may insert in the policy conditions not mentioned in the application.[35]

Plaintiff, in a suit to set aside a life policy on the ground of the agent's fraudulent representations, will not be estopped to complain of their falsity because he could have informed himself of the truth by means of information at hand, unless he was inexcusably negligent in not doing so.[36] He need not allege that the agent knew that the representations were false,[37] nor is defendant prejudiced by his retention of the binding receipt.[38] It is not necessary for him to offer to pay any part of the premium.[39]

One who executes and delivers a note to an agent in consideration of an agreement that the company will deliver a policy within a stated time may, on the latter's receiving the note and appropriating the proceeds and failing to deliver the policy, treat the contract as rescinded and recover the money advanced as money had and received.[40]

Life insurance.—A life policy cannot be surrendered without the consent of the insured and the beneficiary.[41] Many policies contain provisions making them noncontestable after a certain number of premiums have been paid.[42]

Before a loss, a court of equity has jurisdiction of a suit brought by the insurer for the surrender and cancellation of a policy on the ground that it was procured through fraud, false representations or concealments, since plaintiff has no adequate remedy at law.[43] Having once acquired jurisdiction, it may proceed to a final decree, though a loss occurs pending suit and before final hearing,[44] and though the beneficiary immediately brings suit on the policy.[45] This is particularly true where, on account of the peculiar nature of the contract, the beneficiaries have no adequate remedy at law.[46] After loss the company has an adequate remedy at law by setting up such facts as defenses to an action on the policy, and hence the courts have no jurisdiction, in the absence of special

Ijams v. Provident Sav. Life Assur. Soc. [Mo.] 84 S. W. 51. In an action for damages on the ground that defendant had issued policies different from those contracted for, in that the amount of the annual premiums was not absolutely fixed, evidence held to show that there was no fraud, but that plaintiff received the kind of policies which he contracted for. Id.

34. By provision that policy is issued in consideration of application, which is made a part thereof. Refused to accept it until it was changed. Dwyer v. Mutual Life Ins. Co., 72 N. H. 572, 58 A. 502.

35. Relieving it from liability for injuries incurred while insane. Blunt v. Fidelity & Casualty Co. [Cal.] 78 P. 729.

36. Requested instruction properly refused. Equitable Life Assur. Soc. v. Maverick [Tex. Civ. App.] 78 S. W. 560.

37, 38. Equitable Life Assur. Soc. v. Maverick [Tex. Civ, App.] 78 S. W. 560.

39. Equitable Life Assur. Soc. v. Maverick [Tex. Civ. App.] 78 S. W. 560. Evidence sufficient to sustain verdict canceling policy on ground of agent's false representations. Id.

40. Note to be held until delivery of policy. Summers v. Mutual Life Ins. Co. [Wyo.] 75 P. 937.

41. Lawrence v. Penn Mut. Life Ins. Co. [La.] 36 So. 898.

42. Where policies provided that they should not take effect unless delivered and first premium paid while insured was in good health and also that they should be incontestable after three years, and applicant was not in good health when delivery was made, but company accepted premiums for more than three years, held that it could not avoid policies. Acceptance of second premium gave them effect as voidable contracts. Austin v. Mutual Reserve Fund Life Ass'n, 132 F. 555.

43. Since estoppel to deny its validity may arise in favor of third persons advancing money thereon, and because of remoteness of time when it can be established as defense to action on policy. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207; Mutual Life Ins. Co. v. Blair, 130 F. 971.

44. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207.

45. Where insured dies after commencement of suit. Mutual Life Ins. Co. v. Blair, 130 F. 971.

46. Where, on death of insured, new contract is to issue providing for payment of annuity to widow, or children, or personal representatives of decedent. Mutual Life Ins. Co. v. Blair, 130 F. 971.

circumstances invoking the aid of a court of equity.[47] Such remedy is not rendered inadequate because the action may be brought in a state court, where the company will have a right to remove it, even though such removal may forfeit its license to do business in such state,[48] nor because it has no choice of the time or place of the commencement of such action, and less control of its conduct than the insured.[49]

Before a forfeiture will be declared, the terms of the contract must be strictly complied with.[50]

Incorporated mutual assessment insurance companies have no power of expulsion or forfeiture unless granted by their charter or general municipal law.[51] The mere failure of a member to seek reinstatement after a void expulsion does not operate to ratify the illegal forfeiture of his certificate, where the association has sufficient money in its hands to discharge all assessments coming due before his death, and sustains no injury by his conduct.[52]

Fire insurance.—A policy is canceled when the agent advises the insured to that effect, and that the unearned premium will be remitted to him on receipt of the policy,[53] especially when the amount of such premium is insufficient to keep it alive until the date of the fire.[54] An attempted cancellation without notice to the insured or a return of the premium is invalid.[55] In such case the acceptance by him of the amount of the premiums returned by the agent after the fire is not an election to treat the contract as void,[56] nor can it be regarded as a compromise.[57] Conditions requiring a certain number of days' notice before the policy can be canceled are for the benefit of the insured only.[58] Under

47. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207; Mutual Life Ins. Co. v. Blair, 130 F. 971. Bill to cancel life policy after death of insured, on ground of false statements in application. Des Moines Life Ins. Co. v. Seifert, 210 Ill. 157, 71 N. E. 349. In an action to cancel policy for fraud, office of plea held to be to bring before court the fact of insured's death and the pendency of action at law on policy as bar to suit and hence not to bring before court want of equity in complainant's bill. Mutual Life Ins. Co. v. Blair, 130 F. 971.

48, 49. Riggs v. Union Life Ins. Co. [C. C. A.] 129 F. 207.

50. Nederland Life Ins. Co. v. Meinert [C. C. A.] 127 F. 651. See, also, ante, § 7.

51. Certificate held not forfeitable because member's habits had become intemperate, though that might be a good defense to an action thereon. Purdy v. Bankers' Life Ass'n, 101 Mo. App. 91, 74 S. W. 486. By-law in regard to expulsion held unreasonable. Id.

52. Purdy v. Bankers' Life Ass'n, 101 Mo. App. 91, 74 S. W. 486. Under articles and by-laws, held that assessments should be both levied and collected from guaranty fund, and that any assessment must be passed and not collected if there was money enough on hand to pay mortuary benefits. Id.

53. For nonpayment of premiums. Insured made no objection until after fire. Hamburg-Bremen Fire Ins. Co. v. Browning [Va.] 48 S. E. 2.

54. Hamburg-Bremen Fire Ins. Co. v. Browning [Va.] 48 S. E. 2.

55. Cassville Roller Mill Co. v. Aetna Ins. Co., 105 Mo. App. 146, 79 S. W. 720. Defendant held not liable on policy which had been canceled and had been replaced by plaintiff's agent with policy in another company, even though agent exceeded his authority where plaintiff ratified his acts with full knowledge of all the facts, and even though plaintiff did not know that defendant's policy would, under terms of other policies, have to be taken into account in adjusting loss. Larsen v. Thuringia American Ins. Co., 208 Ill. 166, 70 N. E. 31. Even if agent acted for defendant, plaintiff having notice of all the facts was put to election, and having accepted new policy and received payment thereon he could not claim want of consideration for surrender of defendant's policy, and that it was not relieved from liability. Id.

56. Cassville Roller Mill Co. v. Aetna Ins. Co., 105 Mo. App. 146, 79 S. W. 720. The damages recoverable under the policy become fixed by the fire and are then assets of the insured. Hence, a general agent of the insured corporation cannot bind it by accepting the returned premium, since he has no authority to dispose of the corporation's assets. Id. Company notified agent to cancel policy and he did so and substituted another therefor but did not notify insured of these facts until after the fire. He then delivered new policy to plaintiff who surrendered defendant's. Held defendant was nevertheless liable on repudiation by new company of liability because of nondelivery of its policy. Yoshimi v. Fidelity Fire Ins. Co., 91 N. Y. S. 393. Policy requiring notice to insured not canceled by company notifying agent to cancel it, where insured was not notified until after fire. Id.

57. Cassville Roller Mill. Co. v. Aetna Ins. Co., 105 Mo. App. 146, 79 S. W. 720.

58. Cannot be taken advantage of by

a provision that the policy may be canceled by the company giving five days' notice of such cancellation, and returning the unearned premium, it does not cease to be in force until five days after the act of cancellation and the giving of the notice and the tender of the return premium.[59] Under a policy authorizing cancellation at any time by either party, the insurer cannot have it canceled after loss on account of fraud exercised in obtaining it.[60]

An insurance agent may be the agent of the insured in procuring policies, in so far as his authority to so act is not restricted by statutes making him the agent of the insurer.[61] But the mere fact that one is employed as such agent to procure insurance does not authorize him to represent the insured to receive notice of cancellation of subsisting policies and to substitute other insurance in place thereof.[62] By statute in Wisconsin anyone transmitting an application for, or a policy of, insurance, other than for himself, to or from an insurance company, is made the agent of the company.[63] Under this act agents receiving orders for insurance and placing them through other agents, without any directions being given to the latter by the insured, are agents of the company writing the policies.[64]

Recovery of premiums paid.[65]—As a general rule, the insured may recover premiums which he was induced to pay through fraudulent representations of the agent as to the insurance to be issued therefor.[66] This does not apply where the policy is illegal by statute or because against public policy,[67] unless the party paying them is innocent of any wrong, and is induced to do so by the false and fraudulent misrepresentations of the agents of the insurer.[68] A demand is a necessary prerequisite to an action to recover premiums paid on a void policy where such payments were made because of the false representations of the company as to its validity.[69] The statute of limitations does not begin to run until such demand is made.[70] In the absence of fraud, where the risk has once attached, a recovery of premiums paid cannot be had because of a breach of the conditions of the policy by the insurer.[71] The amount of premium in such case is not apportionable and the remedy is by a suit for specific performance.[72]

Return of premiums.[73]—The return of the premium is not a prerequisite to an assertion of forfeiture for the violation of conditions after the policy becomes effective and operative.[74] There is a conflict of authority as to whether

agent issuing policy against instructions, to show that company would have been liable even had he notified them of its issuance. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524.

59. Continental Ins. Co. v. Daniel, 25 Ky. L. R. 1501, 78 S. W. 866.

60. Ritchey v. Home Ins. Co., 104 Mo. App. 146, 78 S. W. 341.

61, 62. Wisconsin Cent. R. Co. v. Phoenix Ins. Co. [Wis.] 101 N. W. 703.

63. Authority to act for insured must yield to that imposed by this act [Rev. St. 1898, § 1977]. Wisconsin Cent. R. Co. v. Phoenix Ins. Co. [Wis.] 101 N. W. 703.

64. Wisconsin Cent. R. Co. v. Phoenix Ins. Co. [Wis.] 101 N. W. 703. Evidence insufficient to show course of dealing amounting to giving them authority to do so. Id. Evidence held to show that agents through whom orders for insurance were given had no authority to receive notice of cancellation of policies, or to substitute other insurance for that canceled. Id.

65. See 2 Curr. L. 498.

66. Evidence held sufficient to sustain judgment for plaintiff in action to recover premiums on life policy because of fraudulent representation of agent as to amount of insurance to be issued therefor. Prudential Ins. Co. v. Connelly [Neb.] 98 N. W. 812.

67. American Mut. Life Ins. Co. v. Bertram [Ind.] 70 N. E. 258.

68. Assignee of policy taken out without knowledge of insured by one having no insurable interest in his life held not in pari delicto with defendant. American Mut. Life Ins. Co. v. Bertram [Ind.] 70 N. E. 258.

69, 70. American Mut. Life Ins. Co. v. Bertram [Ind.] 70 N. E. 258.

71. Refusal of insurance company, in good faith, to change beneficiary in mode provided by policy, no defense to action on premium note. Harris v. Scrivener [Tex. Civ. App.] 78 S. W. 705.

72. Harris v. Scrivener [Tex. Civ. App.] 78 S. W. 705.

73. See 2 Curr. L. 503.

74. For notice of sale under trust deed. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101.

it is necessary where the policy is invalid in its inception.[75] A provision that the unearned premium shall be returned in case the policy becomes void or is canceled on its surrender, does not require a return until such surrender is made.[76]

(§ 16) *C. Estoppel or waiver of right to cancel or avoid.*[77]—Waiver is the intentional reliquishment of a known right.[78] To create an implied waiver, there must be some act inconsistent with the right waived.[79] An insurer whose conduct is such as to induce the insured to rest on the well founded belief that strict performance of a condition will not be insisted upon cannot in good faith afterwards set it up as a bar to recovery,[80] but will be deemed to have waived compliance therewith.[81] No waiver by acts or conduct can become effective until the party making it is informed of the essential facts on which it is based.[82]

75. Must do so where the policy is invalid because the insured was not the sole owner of the property. Virginia Fire & Marine Ins. Co. v. Cummings [Tex. Civ. App.] 78 S. W. 716. Also, in order to avoid a recovery under a condition that it shall not be binding unless the insured is in sound health at the date of its delivery. Metropolitan Life Ins. Co. v. Moore, 25 Ky. L. R. 1613, 1748, 79 S. W. 219.

The return or tender of the premiums is not necessary to entitle the insurer to defend on the ground that policy never went into effect. Because insured was not in good health when it was delivered. Austin v. Mutual Reserve Fund Life Ass'n, 132 F. 555. The remedy for a return of premiums in such case is by an action therefor. Id.

76. Senor v. Western Millers' Mut. Fire Ins. Co., 181 Mo. 104, 79 S. W. 687.

77. See 2 Curr. L. 512. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1504, § 5; Id., 1510, § 7.

NOTE. "Election," "waiver," "forfeiture," as applied to insurance: In a recent critical article in XVIII. Harv. L. R. 364, Mr. John S. Ewart advances with great force the theory that the doctrine of waiver in its relation to insurance cases is erroneously so called; that the true principle is election; that the conflict and confusion in the doctrine and its applications are explicable by the known principles of an election. The term "waiver" is so well fixed in the law that limitations on its meaning or attempted submergencies of it in other terms are not likely to be accepted. Its intimate relationship to election is recognized in the title Election and Waiver, 3 Curr. L. 1177. In two comparatively recent cases the indicia of an election appears in the statement that "if the company contemplated the forfeiture of the policy because of the nonpayment of the premium **it should at once have so declared** plainly and unconditionally." United States L. I. Co. v. Lesser, 126 Ala. 568, 28 So. 646; Pollock v. German Ins. Co. [Mich.] 86 N. W. 1017, cited by Mr. Ewart. [Editor.]

78. Proofs of loss. Nicholas v. Iowa Merchants' Mut. Ins. Co. [Iowa] 101 N. W. 115. A voluntary relinquishment of a right that one party has in his relations to another. Definitions of express and implied waiver. Astrich v. German-American Ins. Co. [C. C. A.] 131 F. 13.

79. Provision making payment of judgment condition precedent to liability on employer's liability policy not waived. O'Connell v. New York, etc., R. Co. [Mass.] 72 N. E. 979.

80. Facts held not to show waiver of iron safe clause requiring keeping and production of books, and question improperly submitted to jury. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517. Provisions in regard to forfeiture for nonpayment of premiums may be waived by doing some act or pursuing some course of conduct which tends to mislead the insured or to lull him into delay in performing the stipulations in his contract. Evidence that agent had told witnesses that he had given credit for premiums held insufficient to prove custom binding on company so as to constitute waiver of condition that policy should not be binding until payment was made. Brown v. Pennsylvania Casualty Co., 207 Pa. 609, 56 A. 1125. Any agreement, declaration, or course of action on the part of the insurer which leads the insured honestly to believe that by conforming thereto a forfeiture on his part will not be incurred, followed by due conformity on his part, will estop the company from claiming a forfeiture, though it might do so under the express letter of the contract. Battin v. Northwestern Mut. Life Ins. Co. [C. C. A.] 130 F. 874. Acts of adjuster, having knowledge of the facts, in requiring insured to furnish other proofs, extending time for making proofs, and requiring insured, at some trouble and expense, to submit to examination under oath, held waiver of right to forfeiture for failure to keep books of specified kind. German Ins. Co. v. Allen [Kan.] 77 P. 529.

81. Agreement of agent that, on sale of premises, plaintiff might retain policy as collateral to secure payment of purchase price, and that policy would not be forfeited, held waiver of right to forfeit policy for change of ownership. Mattingly v. Springfield Fire & Marine Ins. Co. [Ky.] 83 S. W. 577.

82. Provision in indemnity policy exempting insurer from liability for injuries caused by failure to observe statutory requirements in regard to operation of mine held not waived. Failure to keep passageway around bottom of shaft. Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co., 130 F. 957. Undisputed evidence in action on employer's liability policy as to knowledge of agent that building was not fully completed when policy was issued held to warrant directing verdict on question of waiver. Andrus v.

The burden is on plaintiff to show such knowledge.[83] Where it is sought to charge the company through notice to its agents, it is only required to produce the agent to whom plaintiff claims notice was given, and need not prove a negative by producing them all.[84] Declarations of the agent made after the issuance of the policy that the company desired to change it by inserting the name of the true owner are inadmissible in the absence of a showing that, at the time, the agent was charged with any duty in regard to the policy.[85] Where it is conceded that the policies permitted other insurance, conversations with the agent at the time of issuing it, tending to show a waiver of the clause forbidding it, are immaterial.[86] Evidence of the general reputation in the neighborhood that property was partnership property is admissible to show the agent's knowledge of that fact, but is not of itself sufficient for that purpose.[87] The company is not charged with the duty of inquiring into the title, and the fact that the agent could have learned the truth by inquiry will not avoid the warranty of title.[88] It is proper to show that defendant knew the true state of the title after the policies issued and before the fire.[89]

Conditions inserted for the benefit of the insurer may be waived by it.[90]

Maryland Casualty Co., 91 Minn. 358, 98 N. W. 200. To sustain finding of jury that agent knew that defendant used gasoline when policies were issued, and intended to continue to do so, contrary to their terms. Hartley v. Pennsylvania Fire Ins. Co., 91 Minn. 382, 98 N. W. 198. No waiver of iron safe clause requiring keeping and production of books. Question improperly submitted to jury. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517. The acceptance and retention of the premium does not constitute a waiver of a forfeiture or other defense, or an estoppel to assert it, unless the insurer has knowledge of the facts. Change in health pending negotiations. Thompson v. Travelers' Ins. Co. [N. D.] 101 N. W. 900. Evidence insufficient to show that agent knew that building was vacant and unoccupied for more than ten days before the fire, and to show waiver of conditions of policy in that regard. Sergent v. Liverpool & London & Globe Ins. Co., 96 App. Div. 117, 89 N. Y. S. 35. Evidence held not to show waiver of condition against additional insurance. Philadelphia Underwriters' Ins. Co. v. Bigelow [Fla.] 37 So. 210. A waiver of the production of inventories by the adjuster immediately after the loss is not a waiver of the production of the one made next preceding the date of the policy unless he knows of its destruction. Evidence held not to show knowledge. Continental Fire Ins. Co. v. Cummings [Tex.] 81 S. W. 705. The collection and retention of assessments is not a waiver of a condition against concurrent insurance where the company did not know of its procurement until after the fire, when it immediately denied liability, and has not refused to return them, and has not led insured to do any act or incur any expense, because of its acts in relation to them. Todd Co. v. Farmers' Mut. Fire Ins. Co. [Mich.] 100 N. W. 442. Fact that soliciting agent who took application assisted insured several years later in procuring additional insurance in other companies held not a waiver of condition prohibiting such insurance. Id. Evidence insufficient to authorize finding that defendant's secretary was informed of and consented to the procurement of additional insurance. Id. A provision avoiding the policy if the building is allowed to remain vacant and unoccupied for more than a certain number of days is not waived because it was vacant when the policy was issued, when the insurer had no knowledge of that fact (Bartlett v. British American Assur. Co. [Wash.] 77 P. 812), or because the insurer made no inquiry in regard to the matter (Id.).

83. Evidence insufficient to show knowledge of agent that building was on leased ground. Sergent v. Liverpool & London & Globe Ins. Co., 96 App. Div. 117, 89 N. Y. S. 35.

84. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

85. Continental Ins. Co. v. Cummings [Tex.] 81 S. W. 705.

86. Meigs v. London Assur. Co., 126 F. 781.

87, 88, 89. Continental Fire Ins. Co. v. Cummings [Tex.] 81 S. W. 705.

90. No evidence to show waiver of forfeiture for nonpayment of premium. Ohio Farmers' Ins. Co. v. Wilson [Ohio] 71 N. E. 715.

Iron-safe clause: Conduct of agent held waiver of provision requiring keeping and production of certain books of account. German Ins. Co. v. Allen [Kan.] 77 P. 529. Evidence sufficient to justify submission of question of waiver to jury. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115.

Notice of mailing: Evidence held not to show waiver of provision requiring notice of mailing articles to be deposited in post office. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

Condition against other insurance: Glasscock v. Des Moines Ins. Co. [Iowa] 100 N. W. 503. Provision that policy should be void if other insurance procured, "unless otherwise provided by agreement indorsed thereon or added thereto," of itself implies that notice to insurer of such additional insurance and negotiations in regard to it are contemplated, so that breach could be waived. Id. Words "$—— Total concurrent in-

Very slight evidence may be sufficient to show waiver.[91] The fact that policies are prepared for general use without reference to particular cases may be considered.[92]

The issuance and delivery of a policy and the acceptance of premiums with knowledge on the part of the insurer of facts making it, by its terms, inoperative at its inception, is a waiver of all conditions therein inconsistent with such facts.[93] Some courts base their refusal to allow the insurer to set up such conditions on the doctrine of estoppel. The principle is the same in either case.[94] In Wisconsin it is held that the doctrine rests on the principle of estoppel in pais, and not on waiver, the latter applying only to acts occurring after the making of the contract, and not those involved in its inception,[95] and that statutory provisions requiring waivers to be in writing do not apply.[96]

Knowledge of an agent at the time of delivering the policy[97] or knowledge on the part of the soliciting agent when he takes the application is generally held

surance permitted," contained in a slip attached to the policy, are not a waiver of a provision prohibiting other insurance. Philadelphia Underwriters' Ins. Co. v. Bigelow [Fla.] 37 So. 210. Statement in daily report of agent to company that policies are concurrent held not to convey information to it that other policies on the property were in existence. Id. Evidence held not to show waiver of provisions in regard to double insurance. Meigs v. London Assur. Co., 126 F. 781. Evidence held not to show waiver of indorsement on policy of consent to additional insurance. Works v. Springfield Fire & Marine Ins. Co. [Tex. Civ. App.] 79 S. W. 42.

91. German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897.

92. Allesina v. London & L. & G. Ins. Co. [Or.] 78 P. 392.

93. Knowledge of agent held waiver of provision in employer's liability policy that it should not apply to injuries received before the premises were fully completed and ready for occupancy. Andrus v. Maryland Casualty Co., 91 Minn. 358, 98 N. W. 200. Condition against incumbrances. German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897. Evidence sufficient to show knowledge of existence of chattel mortgage. Id. Provision in by-laws of mutual fire association that all members using gas must have good regulators and that association will not otherwise be liable for loss held waived by issuance of policy and acceptance of premiums. Farmers' Ins. Ass'n v. Reavis [Ind.] 70 N. E. 518. Other insurance. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62; Lewis v. Guardian Fire & Life Assur. Co., 93 App. Div. 157, 87 N. Y. S. 525. Knowledge that issuance would increase insurance to more than three fourths of value of property. Gurnett v. Atlas Mut. Ins. Co. [Iowa] 100 N. W. 542. Waiver applies to substitutions for and renewals of such other insurance. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

94. Battin v. Northwestern Mut. Life Ins. Co. [C. C. A.] 130 F. 874. This rule is not changed by Wisconsin standard policy law [Rev. St. 1898, § 1941-62]. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227. Knowledge of director of mutual company who took application that plaintiff was not sole owner. Loomis v. Jefferson County Patrons' Fire Relief Ass'n, 92 App. Div. 601, 87 N. Y. S. 5. Sole ownership. Evidence held to show agent's knowledge. Continental Fire Ins. Co. v. Cummings [Tex.] 81 S. W. 705.

95. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227.

96. Wis. Rev. St. 1898, § 1941. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227.

97. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227. Agent who solicits the insurance and to whom the policy is sent for delivery. That issuance would increase insurance to more than three-fourths of value of property. Gurnett v. Atlas Mut. Ins. Co. [Iowa] 100 N. W. 542; Lewis v. Guardian Fire & Life Assur. Co., 93 App. Div. 157, 87 N. Y. S. 525. Knowledge of agent that gasoline was being used on premises held waiver of provision prohibiting its use without written permission. Hartley v. Pennsylvania Fire Ins. Co., 91 Minn. 382, 98 N. W. 198. Company estopped from claiming a forfeiture because of facts which were fully disclosed to him when the policy was issued, and the premium accepted. Because of existence of mortgages and pending foreclosure proceedings. Nor can forfeiture be allowed on ground that hazard was thereby increased. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074. Evidence held insufficient to show that agent had knowledge when policy was issued that plaintiff was not the sole owner of the property. Virginia Fire & Marine Ins. Co. v. Cummings [Tex. Civ. App.] 78 S. W. 716. Agent procuring insurance from other agents having authority to issue policies for defendant held agent of defendant, so that his knowledge of facts avoiding policy was binding on it. Id. Knowledge as to condition of title held waiver of condition requiring unconditional ownership unless mortgage clause is indorsed on policy. Hartford Fire Ins. Co. v. McCarthy [Kan.] 77 P. 90. Agent who writes and delivers the policy. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074; Nute v. Hartford Fire Ins. Co. [Mo. App.] 83 S. W. 83. An agent, who has authority to issue policies and collect premiums, has power to waive conditions of the policy which would render it void from the beginning and which are in some meas-

to be the knowledge of the company, and will estop it from relying on provisions ignoring such knowledge,[98] though the agent has never communicated such facts to the company.[99] In most states these rules apply even where the policy provides that all waivers must be indorsed thereon in writing,[1] though there is some conflict or authority in this regard.[2] This is not the case, however, if the in-

ure collateral to the principal agreement to insure the property upon payment of a certain premium. Agent of foreign company held to have authority to waive condition that existing incumbrance by way of chattel mortgage, whose existence is known to him, should avoid the policy. German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897. Averments that plaintiff had no notice that incumbrance would avoid policy, and that provisions for forfeiture in such case were in fine print and not known to him until after fire held mere surplusage. Id. If he makes false statements of fact in the policy after having been truthfully and fully informed in regard to the matters covered thereby, the company is estopped to avoid the policy by reason thereof. As to state of title. Nute v. Hartford Fire Ins. Co. [Mo. App.] 83 S. W. 83. The same rule applies to statements in an indorsement made by him on account of changes in the title. Agent makes false statements. Id. Where an agent is correctly informed as to all facts inquired into affecting the inception of the contract, and takes no written application, and inserts in the policy as warranties facts different from those so stated to him, the company is estopped from defending on the ground of their falsity, in the absence of a showing that the insured knew of the agent's want of authority to waive conditions. Raises equitable estoppel which may be asserted in court of law. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. Failure to read the policy for a short time after its delivery does not prevent such a waiver, or the reformation of the policy. Id. By statute in Wisconsin one who delivers the policy and receives the premium, though acting as a broker, is an agent of the company within this rule. Applies where he receives it from company's agents, and pays premiums to them [Rev. St. 1898, § 1977]. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227.

98. Cannot avoid policy because of chattel mortgage, where agent told insured that it was not necessary to mention it because it was so small. Manchester Assur. Co. v. Dowell, 25 Ky. L. R. 2240, 80 S. W. 207. General agent held to have authority to waive provisions as to sole ownership. Hartford Fire Ins. Co. v. McCarthy [Kan.] 77 P. 90. Agent held to have waived forfeiture on account of execution of contract to sell premises, by informing owner that no change in the policy was necessary. Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S. E. 463.

99. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074. It will be presumed that he informs the company of any circumstances affecting its liability which come to his knowledge, and if subsequently it receives premiums without objection it will be deemed to have waived any forfeiture incurred by reason thereof. German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897. Company will not be heard to say that agent has exceeded his powers and has not made known to it facts communicated to him by the insured. Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S. E. 463.

1. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227. As to ownership. Virgina Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S. E. 463. Incumbrances. German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897. Company has power to abrogate or change the contract, which involves the power to waive any conditions therein. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132. Cannot restrict or regulate its own right to contract by provisions in the policy, and may waive or alter its terms by parol, through its agents acting within the scope of their authority, in any respect desired. Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 80 S. W. 255. Invalid in so far as it attempts to relieve the company from the consequences of knowledge or notice possessed by its agents at the time when the policy was issued. Andrus v. Maryland Casualty Co., 91 Minn. 358, 98 N. W. 200. Conditions requiring all waivers to be indorsed on the policy may be waived. By accepting premium and issuing policy with full knowledge of facts, it will be presumed that if anything was omitted which was necessary to the validity of the policy, it was done by mistake, or that condition was waived, or that the company held itself estopped from setting it up. German-American Ins. Co. v Yeagley [Ind.] 71 N. E. 897; Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074. Whereby conduct induces insured not to comply. Mattingly v. Springfield Fire & Marine Ins. Co. [Ky.] 83 S. W. 577. As to vacancy. Queen Ins. Co. v. Straughan [Kan.] 78 P. 447. Fact that agent knew that building was vacant when policy was issued and thereafter at insured's request agreed to indorse permit on policy but failed to do so held waiver of condition against vacancy. Id. Restrictions on the power of the agent to waive any conditions of the policy, or to waive conditions except in a particular manner do not apply to conditions relating to the inception of the contract. Does not prevent waiver, or reformation of contract. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. A limitation therein not communicated to the insured before he acts upon such agent's representations or conduct will not relieve the company, unless the insured, after his discovery of the want of authority, has precluded himself from the assertion of his rights by laches. Id.

2. A provision that no alterations or waivers shall be binding on the company unless by the written consent of an officer of the company is valid and binding as to conditions and provisions relating to the formation and continuance of the contract. Term for which policy is to run and age

sured has actual notice of the agent's want of authority.[3] Mere constructive notice from the fact that the policy contains the limitation is insufficient.[4] Where no question as to the delivery of the policy is raised by the pleadings, it will be presumed that it was delivered by some one representing the power of the company to waive all conditions precedent,[5] or else that the circumstances were such that, as against the insured and the beneficiary, the company had become estopped to deny its validity.[6]

Prior negotiations are merged in the policy.[7] Hence, the insured cannot show that the agent agreed before the policy was issued that some of its conditions need not be complied with.[8]

There is a conflict of authority as to the power of an agent to waive the forfeitures occurring after the delivery of the policy. Some courts hold that he cannot do so without express authority;[9] others that a provision in the policy that he shall have no such power is binding;[10] and still others that he may do so[11] even when the policy contains a provision to the contrary.[12]

limit. Wheeler v. United States Casualty Co. [N. J. Law] 59 A. 347. Condition provided that if personal property insured was incumbered the policy should be void. Sought to be shown that insured told the agent it was incumbered. Hammel v. Insurance Co., 4 Ohio C. C. (N. S.) 380. That there was a chattel mortgage on the property insured. Id.

3. Testimony of witness to prove limitation of agent's authority in commission appointing him held inadmissible in absence of showing that insured knew of such limitation. Fire Assn. of Philadelphia v. Masterson [Tex. Civ. App.] 83 S. W. 49. A parol contract to insure a house occupied by negroes is unenforceable where the insured has actual notice that the agent has no authority to make such contracts, as where company had previously refused to take such risks on other houses belonging to plaintiff. Hartford Fire Ins. Co. v. Trimble, 25 Ky. L. R. 1497, 78 S. W. 462; Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S. E. 463. Must show that insured knew of want of authority. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101.

4. Virginia Fire & Marine Ins. Co. v. Richmond Mica Co., 102 Va. 429, 46 S. E. 463. Such limitation not conclusive. Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 80 S. W. 255.

5. Condition requiring first premium to be paid before contract takes effect. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

6. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

7. Instruction erroneous. Gillum & Co. v. Fire Ass'n [Mo. App.] 80 S. W. 283.

8. As to keeping books, and iron safe clause. Gillum & Co. v. Fire Ass'n [Mo. App.] 80 S. W. 283. Knowledge on the part of the soliciting agent that the insured does not intend to procure a safe in which to keep his books, does not constitute a waiver of the promissory condition therein. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517. Statements of agents, relied on to show a waiver, must be made after the issuance and delivery of the policy. Otherwise merged therein. German Ins. Co. v. Allen [Kan.] 77 P. 529.

9. Letter of local agent offering compromise not a waiver of previous forfeiture for procuring additional insurance without permission. Lippman v. Aetna Ins. Co., 120 Ga. 247, 47 S. E. 593. Burden is on plaintiff to show such authority. Id. The fact that the company's agent knew that plaintiff occasionally rode in steeple-chases does not prevent an avoidance of the policy for voluntary exposure to unnecessary danger. Smith v. Aetna Life Ins. Co. [Mass.] 69 N. E. 1059.

10. Meigs v. London Assur. Co., 126 F. 781. Effective and binding as to all conditions or warranties becoming effective after the completion of the contract. Forfeiture on account of notice of sale under trust deed. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. Acts of agent in receiving and collecting premium notes given him by vendee held not waiver of forfeiture for change of ownership. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94.

11. Agent with power to make contracts and countersign and deliver policies. Miller v. Insurance Co. [Mo. App.] 80 S. W. 330.

12. Adjuster. American Cent. Ins. Co. v. Nunn [Tex. Civ. App.] 79 S. W. 88, rvd. 82 S. W. 497. Company cannot limit its right to contract, and must act through its agents. Fire Ass'n of Philadelphia v. Masterson [Tex. Civ. App.] 83 S. W. 49. Agent of foreign company held to have power to waive, and to have waived, condition requiring inventory to be taken within 30 days, where insured had no notice of limitation of his authority. Id. Provisions in regard to other insurance. Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 80 S. W. 255. By statute in Iowa any officer, agent, or other representative of an insurance company who solicits insurance or transacts its business generally is made its agent, with authority to transact all business within the scope of his employment, anything to the contrary in the application, policy, by-laws or articles of incorporation of such company to the contrary notwithstanding [Code, § 1750]. Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co. [Iowa] 101 N. W. 749. This act inhibits any limitations or restrictions upon the agent's authority as therein specified. Id. Hence, a local agent has authority to waive conditions in policies notwithstanding provisions therein to the contrary. Knowledge of

When a company issues its policy and accepts and retains the premium without requiring an application by the insured, and without making any inquiry as to the condition of the property or the state of the title, and the insured has in fact an insurable interest, it will be conclusively presumed to have insured such interest, and to have waived all conditions in the policy in regard thereto.[13] Under similar circumstances it will be held to have waived conditions against incumbrances.[14] The contract is made before the policy is written, and its mere acceptance cannot be construed as a representation as to the title.[15]

The mere neglect of the insurer to declare its intention of insisting on a forfeiture in a policy does not of itself constitute a waiver thereof.[16] An eighty per cent. average or co-insurance clause contained in the policy does not constitute a waiver of a forfeiture by reason of other insurance obtained without the insurer's permission, beyond the eighty per cent. therein mentioned.[17]

A condition precedent to the attaching of the risk, which must be performed before the policy takes effect with respect to the property to be insured is not waived by exacting additional proofs of loss after knowledge of its breach.[18] Neither the fact that the company received notice and proofs of loss,[19] nor that it required the insured to submit to an examination in regard to the fire,[20] nor the acceptance and retention of the premium,[21] nor that it refused to pay the loss because of a violation of a condition requiring the keeping of certain books,[22] is a waiver of such condition. A provision that the company shall not be deemed to have waived any provision or condition of the policy or any forfeiture thereof by any act or requirement on its part relating to the appraisal, or the examination of the insured on oath, is valid and binding on the insured.[23]

The subsequent acceptance of premiums waives a lapse of the policy for failure to pay them when due.[24] A clause exempting the company from liability until the premium is paid may be waived by the insurer on its authorized agent.[25] A provision that the policy shall not take effect until the first premium is actually paid is ordinarily waived by delivery of the policy on receipt of a premium note.[26] A general agent has authority to waive the immediate payment of the

agent of condition of title and of existence of chattel mortgage, and his statement that policy was all right without indorsement is a waiver of indorsement required by its terms. Id.

13. Building on leased premises. Policy required that fact to be expressed therein, and recited sole ownership. Farmers' & Merchants' Ins. Co. v. Mickel [Neb.] 100 N. W. 130.

14. When the company, without a written application, and without any inquiry in regard to incumbrances or any statements or representations being made by the insured with reference thereto, issues a policy covering mortgaged property, and accepts and retains the premium which is paid and the policy accepted by the insured in good faith and without knowledge that the incumbrance in any way affects the contract, or that the company intends to insist on the mortgage clause, it will be held to have accepted the risk with the existing liens and incumbrances thereon, and to that extent to have waived the printed terms of the policy. Allesina v. London & L. & G. Ins. Co. [Or.] 78 P. 392.

15. Farmers' & Merchants' Ins. Co. v. Mickel [Neb.] 100 N. W. 130.

16. For breach of iron-safe clause. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517.

17. Nestler v. Germania Fire Ins. Co., 91 N. Y. S. 29, afg. 89 N. Y. S. 782.

18. Condition in policy, insuring articles sent by mail, that no risk should attach unless letter of advice should be deposited in post office not waived by requiring proofs after notice that it had been deposited in mail box. Banco De Sonora v. Bankers' Mut. Casualty Co. [Iowa] 100 N. W. 532.

19, 20, 21, 22. Everett-Ridley-Ragan Co. v. Traders' Ins. Co. [Ga.] 48 S. E. 918.

23. American Cent. Ins. Co. v. Nunn [Tex.] 82 S. W. 497, rvg. 79 S. W. 88. Hence forfeiture for failure of insured to produce books not waived by requiring examination under oath. Id.

24. White v. McPeck, 185 Mass. 451, 70 N. E. 463.

25. Evidence held to show waiver of requirement that premium be paid in advance. Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398.

26. Lawrence v. Penn Mut. Life Ins. Co. [La.] 36 So. 898. Note held not intended to be regarded as payment of first premium unless paid when due while insured was in good health, hence its acceptance and the issuance of policy after applicant became ill

premium on delivery of the policy.[27] The acts or silence of the officers of the corporation after it has constructive notice of his act in delivering it before such payment may constitute a waiver, at least where good faith requires a timely disaffirmance.[28] An agent cannot absolutely waive the payment of a part of the premium, thereby reducing the rate of insurance, without express authority.[29] An agreement between the applicant and the agent that the latter shall hold the policy until a certain date and then deliver it upon payment of half the premium in cash and the giving of the applicant's note for the balance is not a waiver of such a condition.[30] The acceptance by the insurer of a partial payment on account of a premium and the giving of credit for the unpaid balance is a waiver of the condition that a failure to pay the premium at or before the time mentioned in the policy will work a forfeiture thereof.[31] Statements of the agent that he had tried to get the insured to pay the premium, and had kept it up, hoping he would do so are admissible to show waiver of a forfeiture for nonpayment.[32]

Where the agent issuing the policy, having power to waive forfeitures, has knowledge of the fact that it has been forfeited, he is bound to return the unearned premium to the insured, and his failure to do so ordinarily constitutes a waiver of such forfeiture.[33] This rule does not apply where the premium is a lump sum and the policy is only forfeited as to one of the items which it covers, and there is no showing as to what portion thereof was paid for the insurance on such item,[34] nor where the insured leads the agent to believe that he will use such unearned premium in procuring a transfer or new insurance.[35] A retention by the company of unearned premiums after notice before the fire that the policy has become void under its terms may be evidence of waiver.[36]

The retention of premium notes by the company is not inconsistent with an intention to treat the policy as void for their nonpayment,[37] particularly where the policy provides that their possession by the insurer shall be conclusive evidence of their nonpayment, and that the insurance has ceased at the expiration

was not a waiver of stipulation that first premium should be paid while insured was in good health. Stringham v. Mutual Life Ins. Co., 44 Or. 447, 75 P. 822. Note taken by agent and company did not object when it ascertained the facts. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132. In such case it takes effect from the date of such acceptance. Lawrence v. Penn Mut. Life Ins. Co. [La.] 36 So. 898.

27. Peck v. Washington Life Ins. Co., 91 App. Div. 597, 87 N. Y. S. 210. The husband of a general agent, acting for her with the knowledge of the company has the authority of a general agent. Id. The provisions of a policy which the company has caused to be signed and placed in the hands of an agent for delivery may be waived by the latter, if he has sufficient power in the premises. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

28. By making no objection to acceptance of note for first premium waives provision that premium must actually be paid before policy takes effect. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

29. Cannot reduce rate of insurance. Graham v. Mercantile Town Mut. Ins. Co. [Mo. App.] 84 S. W. 93.

30. Mutual Life Ins. Co. v. Lucas, 25 Ky. L. R. 2052, 79 S. W. 279.

31. Battin v. Northwestern Mut. Life Ins. Co. [C. C. A.] 130 F. 874. Provisions that no premium after first should be deemed paid unless receipt should be given therefor and that the payment of any premium less than full annual one should not continue policy longer than three or six months held not applicable, where it was alleged that on maturity of annual premium a certain part thereof was paid and received on account, and credit extended to insured for balance. Id.

32. Made after insured's death. Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 P. 665.

33, 34. Miller v. Insurance Co. [Mo. App.] 80 S. W. 330.

35. Miller v. Insurance Co. [Mo. App.] 80 S. W. 330. Insured held to have constituted agent of company his agent to transfer insurance on property removed and company was not bound because of his failure to do so. Id. Letter introduced by plaintiff held to show agent's lack of authority to transfer insurance to property after it had been removed. Id. Evidence insufficient to show that agent agreed to transfer insurance so as to cover property after its removal. Id.

36. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4.

37. New York Life Ins. Co. v. Meinken's Adm'r. 25 Ky. L. R. 2113, 80 S. W. 175.

of the term for which the premium has been paid.[38] Any attempt to collect such notes, however, is a waiver.[39] Demands for the payment of premium notes after loss do not alone constitute a waiver of the breach of a condition of the policy whereby it is rendered void,[40] but are material as showing the intention of the company.[41]

Waiver of conditions will not be implied from a retention of the policy by the agent until after the fire, at the request or with the acquiescence of the insured.[42]

The mere expression by the local soliciting agent of hope and confidence that the loss will be paid is no evidence of waiver,[43] nor is the fact that he notified the adjuster of the loss, and that the latter came and investigated it.[44]

If notice be given to the company or its agent of the procuring of additional insurance, and no objection is made, the insurer will be estopped from insisting on a forfeiture because its consent was not indorsed thereon, in accordance with the requirements of the policy.[45]

One holding a policy in a mutual fire insurance company may be estopped by his conduct from asserting as a defense to an action against him for premiums that he is not legally a member,[46] and the association may also be estopped in the same manner from setting up the same defense to an action on the policy.[47]

(§ 16) *D. Reinstatement.*—On reinstatement of the policy, the insured is only bound to exercise good faith in his statement that his condition is not substantially different from what it was when the policy was issued.[48] Where he is not afflicted with any other diseases than those mentioned in the original application, and those have not become so aggravated as to make his condition substantially different from what it then was, he is in good health within the meaning of the contract.[49]

§ 17. *Contracts of reinsurance and concurrent insurance.*[50]—Double insurance exists where there are two separate insurers liable for the same loss.[51] The fact that one policy covers more property or wider risks than the other is immaterial.[52]

38. Roberts v. Aetna Life Ins. Co. [Ill.] 72 N. E. 363.

39. May retain it as evidence of nonpayment but cannot retain and treat it as evidence of indebtedness. Union Cent. Life Ins. Co. v. Spinks [Ky.] 83 S. W. 615. Attempting to enforce collection by suit and judgment. National Life Ins. Co. v. Reppond [Tex. Civ. App.] 81 S. W. 1012.

40. As to other insurance. Glasscock v. Des Moines Ins. Co. [Iowa] 100 N. W. 503. Breach of iron-safe clause requiring keeping and production of books. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517.

41. Glasscock v. Des Moines Ins. Co. [Iowa] 100 N. W. 503.

42. Against other insurance. Young v. St. Paul Fire & Marine Ins. Co. [S. C.] 47 S. E. 681.

43, 44. Young v. St. Paul Fire & Marine Ins. Co. [S. C.] 47 S. E. 681.

45. Evidence sufficient to sustain finding of notice. Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 80 S. W. 255. Company must, within a reasonable time, notify him whether or not it elects to stand on the strict terms of the contract. Glasscock v. Des Moines Ins. Co. [Iowa] 100 N. W. 503. A failure to do so amounts to a waiver of such condition. Evidence held to sustain finding of waiver. Id.

46. Cannot defend because he has not signed constitution where policy has been issued in good faith and accepted and premiums paid, and insured has expressly agreed to pay future premiums as they become due. Richards v. Louis Lipp Co., 69 Ohio St. 359, 69 N. E. 616.

47. Where policy has been issued and received and premiums paid and accepted. Statute (Ohio Rev. St. 1892, § 3690) does not make policy void for failure to sign constitution. Richards v. Louis Lipp Co., 69 Ohio St. 359, 69 N. E. 616.

48. Representations not of such binding force as the original application. Mulligan v. Prudential Ins. Co., 76 Conn. 676, 58 A. 230.

49. Mulligan v. Prudential Ins. Co., 76 Conn. 676, 58 A. 230.

50. See 2 Curr. L. 505.

51. Meigs v. London Assur. Co., 126 F. 781. The question as to the existence of double insurance, requiring contribution between the insurers, is one of general commercial law in regard to which the federal courts are not bound to follow the courts of the state in which it arises. Id.

52. Policies on addition to main building

A prohibition against concurrent[53] or additional insurance beyond a certain limit will be enforced.[54] The continuation of existing insurance, either by renewals of existing policies, or the substitution of others therefor, is not procuring other insurance within the meaning of the policy.[55]

The term "total concurrent insurance" means that the total insurance operates at the same time and upon the same property as designated in the policy upon which the suit is brought.[56]

Valued policy laws do not prevent concurrent insurance to a larger amount than the designated value of the property.[57] Overvaluation of the property in taking out a policy providing for other insurance not to exceed a certain percentage of its value avoids the policy.[58] But this rule does not apply where the property is merchandise and hence constantly changing in value, and the amount to be paid is made to depend on the value of the goods at the time of their loss.[59] The eighty per cent average clause in the New York standard policy authorizes, by necessary implication, additional insurance on the property up to eighty per cent of its actual value, though additional insurance is forbidden.[60] Such clause also refers to and includes insurance already existing, provided the aggregate amount thereof does not exceed the eighty per cent limit specified.[61]

A provision that, in case other insurance shall be permitted and it shall be invalid, it shall be deemed an election to cancel the policy and that it shall be void, refers only to insurance procured after the issuance of the policy.[62]

Fire policies frequently contain a provision that the insurer shall not be liable for any greater proportion of the loss than the amount of the policy shall bear to the whole insurance, whether valid or invalid.[63] By statute in Iowa, no

held entitled to contribution from policies on main building which were also to cover future additions, all the policies providing for apportionment of the loss. Loss apportioned. Meigs v. London Assur. Co., 126 F. 781.

53. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342. The words "2,500 total concurrent insurance permitted," held to permit other concurrent insurance not to exceed $2,500, notwithstanding the fact that the insurable value was fixed at that amount. L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462.

54. Todd Co. v. Farmers' Mut. Fire Ins. Co. [Mich.] 100 N. W. 442. Policy void for procuring additional insurance in excess of the amount allowed. Works v. Springfield Fire & Marine Ins. Co. [Tex. Civ. App.] 79 S. W. 42. Policy avoided by procuring additional insurance without consent. Planters' Mut. Ins. Ass'n v. Green [Ark.] 80 S. W. 151. Presumption arising from mailing letter, properly stamped and addressed, notifying company of intention to take out additional insurance held overcome by evidence. Id.

55. Lewis v. Guardian Fire & Life Assur. Co., 93 App. Div. 157, 87 N. Y. S. 525.

56. Under policy prohibiting the taking of additional insurance unless otherwise provided for in the policy, a further provision "$3,500 total insurance permitted concurrent herewith" on buildings, etc., construed as intended to limit the insurance upon the character of the property mentioned, and as contemplating the taking into account the amount of insurance written into the policy in suit, and not the taking of $3,500 additional insurance. Senor v. Western Millers' Mut. Fire Ins. Co., 181 Mo. 104, 79 S. W. 687. Words "$———. Total concurrent insurance permitted," contained in a slip attached to the policy do not give permission for additional insurance, nor are they an indorsement of an agreement for other insurance. Philadelphia Underwriters' Ins. Co. v. Bigelow [Fla.] 37 So. 210.

57. L'Engle v. Scottish Union & Nat. Ins. Co. [Fla.] 37 So. 462.

58. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342.

59. Not changed by Mo. Rev. St. 1899, § 7979. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342.

60. Procuring additional insurance above such limit held to avoid policy. Nestler v. Germania Fire Ins. Co., 44 Misc. 97, 89 N. Y. S. 782, afd. 91 N. Y. S. 29.

61. Where policy provided it should be void if insured then had other insurance, it was avoided where the amount already issued exceeded such 80 per cent. Nestler v. Germania Fire Ins. Co., 44 Misc. 97, 89 N. Y. S. 782, afd. 91 N. Y. S. 29.

62. Gurnett v. Atlas Mut. Ins. Co. [Iowa] 100 N. W. 542.

63. Under such provision in policy authorizing cancellation on notice, held that, where insurer's agent canceled policy without knowledge of mortgagor, to whom it was payable, and procured another policy for same amount payable to mortgagee and after loss suit was brought on both policies the insurer under first policy was only liable for half the loss, though attempted cancellation thereof was void. Hartford Fire Ins. Co. v. Peterson, 209 Ill. 112, 70 N. E. 757.

condition or stipulation fixing the amount of liability or recovery with reference to the pro rata with other insurance is valid except as to valid and collectible insurance, any agreement to the contrary notwithstanding.[64] The fact that a company, which has issued invalid insurance, regards its policy as valid or pays something on the loss to avoid litigation, is immaterial.[65]

Reinsurance.[66]—The right of a mutual insurance company to transfer risks and reinsure is generally recognized, unless prohibited by statute.[67] Statutes in some states restrict transfers and reinsurance and provide the methods by which it may be accomplished.[68]

An application clerk and counterman employed at the home office, having full authority to accept risks and cancel policies, has prima facie authority to sign an agreement waiving a provision in a contract of reinsurance, providing that such company shall not be liable on such risks to exceed the amount retained by the ceding company.[69]

§ 18. *The loss, its extent and extent of liability therefor.*[70]—A contract of fire insurance is one of indemnity, and the insured is only entitled to be put in the same pecuniary condition that he would have been in had there been no fire.[71] Hence he is only entitled to recover the value of his insurable interest in the property at the time of the fire.[72] His damages are not to be diminished because he has collateral contracts or relations with third persons which relieve him wholly or in part from the loss,[73] but this rule does not operate to enlarge an insurable interest, the value of which fixes the amount to be paid under the policy.[74] The rights of the parties become fixed at the time of the loss and cannot be affected by subsequent agreements between the insured and other companies.[75] It is competent for the company and the insured to fix the measure of damages in case of loss.[76] A company fixing the amount of the risk and accepting a premium based thereon, after having an opportunity to fully examine the property, is estopped in case of a total loss, to question the value as agreed upon.[77]

64. Code, § 1746. Gurnett v. Atlas Mut. Ins. Co. [Iowa] 100 N. W. 542.

65. Rights become fixed at time of loss, especially when total amount received by insured does not equal loss. Gurnett v. Atlas Mut. Ins. Co. [Iowa] 100 N. W. 542.

66. See 2 Curr. L. 505.

67. Member refusing to pay assessments on ground that they were unjust held to have acquired no rights under contract providing for reinsurance of all members in good standing on association's books, his original certificate providing that it should be forfeited for nonpayment of assessments. Parvin v. Mutual Reserve Life Ins. Co. [Iowa] 100 N. W. 39.

68. Hurd's Rev. St. Ill. 1903, p. 1109, c. 73, § 245, construed, and held not to dictate terms of contract for transfer of membership nor prohibit contract limiting reinsurance to members in good standing on books of company. Parvin v. Mutual Reserve Life Ins. Co. [Iowa] 100 N. W. 39.

69. Northern Ins. Co. v. Associated Mf'rs Mut. Fire Ins. Corp., 90 N. Y. S. 14. Notice to such agent of the fact that reinsurance had already been effected in accordance with the terms of such waiver, was at least sufficient to put the company on inquiry as to its extent, and in the absence thereof such waiver was applicable to contracts made before as well as after its execution. Id.

70. See 2 Curr. L. 520.

71. Tabbut v. American Ins. Co., 185 Mass. 419, 70 N. E. 430. Evidence sufficient to sustain finding of jury as to amount of certain articles destroyed. Rickeman v. Williamsburg City Fire Ins. Co. [Wis.] 98 N. W. 960.

72. Holder of an executory contract to purchase piano at a given price payable in installments held only entitled to recover amount of her payments at time of fire with interest, under policy indemnifying her to extent of her loss. Tabbut v. American Ins. Co., 185 Mass. 419, 70 N. E. 430. Plaintiff held entitled to use of building for life only, and hence instruction authorizing recovery on theory that his interest might continue during the existence of the building was erroneous. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857.

73, 74. Tabbut v. American Ins. Co., 185 Mass. 419, 70 N. E. 430.

75. Gurnett v. Atlas Mut. Ins. Co. [Iowa] 100 N. W. 542.

76. Error in charge ignoring three-fourths value clause held nonprejudicial, where three-fourths of the value of the property destroyed exceeded the amount of the insurance. Malin v. Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S. W. 56.

77. Ritchey v. Home Ins. Co., 104 Mo. App. 146, 78 S. W. 341.

In order that the negligence of the insured resulting in the destruction of the property may defeat a recovery, it must be willful or of such a degree as to amount to fraud.[78] Where the policy requires him to use all reasonable efforts to save the property from threatened destruction, the company is responsible to him for loss sustained in consequence of his compliance therewith.[79] Thus, it will be held liable for loss caused by a removal or preparation for removal, where, at the time the work is begun, it is in such imminent danger of destruction that a reasonably prudent man would take measures to protect it.[80] The insured is only bound to use reasonable means to protect the property.[81]

Valued policies.—Valued policy laws in many states make the insurer liable for the total amount of insurance specified in the contract, in case of a total loss, notwithstanding any provision in the policy to the contrary.[82] In such case, no proof of its value is necessary in an action on the policy.[83] It may be shown, however, that personalty has been reduced by sales, or has depreciated in value.[84] Such laws do not deprive the insurer of the right to defend on the ground that the fire was caused by the criminal conduct of the insured,[85] or that the insurable value was fixed at too high a figure through his fraud.[86] The insurable value under valued policy laws is fixed with reference to the particular policy in which it is written, and not with reference to other insurance which may be permitted.[87] It is for the purpose of fixing the measure of damages, and does not prevent

78. Instructions approved. St. Paul Fire & Marine Ins. Co. v. Owens [Kan.] 77 P. 544.

79. Is a loss under Ga. Civ. Code 1895, § 2094. Insurance Co. v. Leader [Ga.] 48 S. E. 972.

80. Insurance Co. v. Leader [Ga.] 48 S. E. 972.

81. Such a course as a reasonably prudent man would have adopted under the circumstances. Requested instruction properly refused. Insurance Co. v. Leader [Ga.] 48 S. E. 972. Amendment to complaint alleging loss and damage by preparation for removal held not to set up new cause of action. Id. As to duty of insured to remove goods for their protection. Id.

82. West Virginia: Applies only to policies on realty [Acts 1899, c. 33, p. 120]. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94.

Arkansas: Acts Gen. Assem. 1899, p. 112, No. 61, applies only to realty. Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz [Ark.] 80 S. W. 576.

In Georgia all insurance companies must pay the full amount of the loss on property insured by them, not to exceed the amount of the policy, except that in the case of stocks of merchandise and other personalty changing in quantity by the usual customs of trade, only the actual loss need be paid. This act does not violate 14th amendment to U. S. Constitution [Civ. Code 1895, § 2110]. Aetna Ins. Co. v. Brigham [Ga.] 48 S. E. 348. Nor is it unconstitutional because making arbitrary and unreasonable classification. Id.

Missouri: Rev. St. 1899, § 7979, providing that no company shall take a risk on property greater than three-fourths of its value, and, when taken, its value shall not be questioned in any proceeding, applies to both realty and personalty. Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27. Its practical effect is to make a valued policy. Statute enjoins company from taking greater risk, but when value is fixed, and risk taken on given amount, that sum cannot be questioned afterwards though it is in fact more than three-fourths of the actual value. Siegle v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 637. Makes policy a valued one only to extent of precluding company from denying value of property when policy was written. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342. The company cannot dispute that the amount of the risk was not greater than three-fourths of the value of the property, whether the property is covered by one or by several policies. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115. Where realty alone is covered, the value of the property, or the risk accepted and insured, as stated in the policy, is made conclusive and incontestable in actions thereon. Ritchey v. Home Ins. Co., 104 Mo. App. 146, 78 S. W. 341; Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115. Where policy limits liability to three-fourths of the cash value of the property, instruction on measure of damages ignoring such provision is error, but is not cause for reversal where defendant adopted same rule for measure of damages in its request for instructions. St. John v. German-American Ins. Co. [Mo. App.] 82 S. W. 543.

Florida valued policy law (Act May 31, 1899, c. 4677, p. 33) is not repugnant to the state or federal constitution. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

83. Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz [Ark.] 80 S. W. 576.

84. Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342. Depreciation. Siegel v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 637; Aetna Ins. Co. v. Brigham [Ga.] 48 S. E. 348.

85, 86. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

87. L'Engle v. Scottish Union & Nat. Ins. Co. [Fla.] 37 So. 462.

either party from showing that the property was worth more, if such fact becomes material.[88]

Employers' liability insurance.[89]—It is the duty of the employer to make the loss as small as possible so far as he reasonably can, though the insurer does not avail itself of its right under the policy to defend the suit.[90] If he in good faith and with reasonable prudence, compromises the claim, the company is bound to pay the loss actually sustained.[91] Such compromise is not conclusive as to the actual loss, but may be considered in determining it.[92] Where the company defends an action for such injuries to an employe in accordance with the terms of the policy, and a judgment exceeding the full amount of the indemnity is recovered against the insured which he pays, the insurer is liable for the full amount of the policy with the costs of suit and interest from the date of the judgment.[93] The insurer is liable for interest thereon and costs and expenses incurred in defending suits which it should have defended or settled,[94] but it is not liable for costs incurred by the insured in defending its own liability for the injury on a contract with a carrier over whose line it operates,[95] nor for hospital expenses incurred in caring for the injured employe, to an extent increasing the total liability above the amount limited.[96]

§ 19. *Notice, claim, and proof of loss.*[97]—Provisions requiring notice and claim of loss are conditions precedent and must be complied with before a recovery can be had on the policy, unless they are waived.[98] The same is true in regard to the sworn statement required by the standard policies of some states.[99] Under the valued policy laws of some states, no proofs are necessary where the loss is total.[1] Notice of loss may be given through the mail at the risk of the insured.[2]

Where no time is specified, notice and proofs of loss must be furnished within a reasonable time.[3] Immediate notice means notice within a reasonable time under all the circumstances.[4] The period of sixty days from the date of the loss is a reasonable limitation.[5] The statutes of Indiana prohibit foreign insurance companies doing business in that state from requiring notice of loss to be given forthwith or within a less time than five days.[6]

88. Does not prevent concurrent insurance to a larger amount. L'Engle v. Scottish Union & Nat. Ins. Co. [Fla.] 37 So. 462.

89. See 2 Curr. L. 521.

90, 91, 92. Southern R. News Co. v. Fidelity & Casualty Co. [Ky.] 83 S. W. 620.

93. Cudahy Packing Co. v. New Amsterdam Casualty Co., 132 F. 623.

94. Policy limiting amount of recovery in case of death. Southern News Co. v. Fidelity & Casualty Co. [Ky.] 83 S. W. 620.

95. News company had contract with railroad exempting latter from liability for injuries to employes. Southern News Co. v. Fidelity & Casualty Co. [Ky.] 83 S. W. 620.

96. Southern News Co. v. Fidelity & Casualty Co. [Ky.] 83 S. W. 620.

97. See 2 Curr. L. 521. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1517, § 10.

98. Burglary insurance. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167; Exchange Bank v. Thuringia Ins. Co. [Mo. App.] 83 S. W. 534; Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160; Missouri Pac. R. Co. v. Western Assur. Co., 129 F. 610.

99. Boruszewski v. Middlesex Mut. Assur. Co. [Mass.] 72 N. E. 250.

1. Hence, in such case the fact that they were made by mortgagee instead of mortgagor is immaterial. Hamburg-Bremen Fire Ins. Co. v. Ruddell [Tex. Civ. App.] 82 S. W. 826.

2. Deposit in mail prima facie evidence only of its receipt. Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160.

3. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

4. Accident insurance. Pacific Mut. Life Ins. Co. v. Branham [Ind. App.] 70 N. E. 174. It is sufficient if the notice, required to be given forthwith, or immediately, or as soon as possible, is given with due diligence under all the circumstances and without unnecessary and unreasonable delay. Nax v. Travelers' Ins. Co., 130 F. 985. Employer's liability policy. Eight months held not a reasonable time. Deer Trail Consol. Min. Co. v. Maryland Casualty Co. [Wash.] 78 P. 135.

5. Missouri Pac. R. Co. v. Western Assur. Co., 129 F. 610.

6. Burns' Rev. St. 1901, § 4923. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167. Under these statutes, provisions of the policy requiring immediate notice and that proofs of loss be furnished forthwith,

Delays caused by the company will be deducted in reckoning the time within which proofs must be furnished.[7]

A requirement that proofs of loss be furnished within a specified time does not work a forfeiture for noncompliance therewith in the absence of a provision to that effect, but at most only affects the maturity of the claim.[8] This is true even where the policy provides that no action may be maintained thereon until after a full compliance with its conditions.[9] They must, however, be made within such time as will enable the insured to bring his suit within the time limited by the policy.[10] In Arkansas it is held that the rule does not apply where the furnishing of proofs within the specified time is made a condition precedent to suit.[11]

A proof of loss may be made by an agent, in the absence of his principal, where he has knowledge of the facts therein stated,[12] or by a receiver in bankruptcy of the insured, specially authorized to do so by the court appointing him, where the insured has absconded.[13] No duty to give notice to the insurer rests upon the beneficiary until his right becomes vested by the death of the insured.[14] In the absence of a provision to the contrary, proofs may be served on the agent who countersigned and issued the policy.[15] Proofs of loss may also serve as notice of loss when sufficiently full to give the required information.[16] The sufficiency of the notice depends upon the provisions of the contract or of the statutes.[17] Proofs of death need not show any greater degree of proof that death was caused by accident than would be necessary to establish a prima facie case in a court of law.[18] Loss of the policy does not excuse compliance with its requirements as to furnishing notice and proofs of loss.[19]

Where the first proofs under an accident policy show injury and disability sufficiently to render the company liable, in rendering additional proofs it is only necessary to show a continuation of such disability during the life of the policy.[20] The fact that the insured makes proof of disability and loss of time to a certain date only does not prevent him, in an action on the policy, from claiming for disability continuing after that time.[21] Where the policy forfeits to the company

are void (Id.), and the insured is only required to use reasonable diligence in the premises (Id.).

7. German-American Ins. Co. v. Paul [Ind. T.] 83 S. W. 60. Evidence held to sustain verdict that delay was caused by previous delay of insurer in replying to request to send blank forms. Robinson v. Northwestern Nat. Ins. Co. [Minn.] 100 N. W. 226.

8. Operates merely to postpone day of payment. St. Paul Fire & Marine Ins. Co. v. Owens [Kan.] 77 P. 544; Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160. Failure to furnish proofs within 60 days not a bar to action. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119. Same rule applies under Wis. standard policy [Rev. St. 1898, §§ 1941-1957]. Welch v. Fire Ass'n of Philadelphia [Wis.] 98 N. W. 227.

9. Applies to notice and proofs of loss required by Florida standard policy. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

10. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

11. Where policy provides that they must be furnished within specified time, and that no action can be maintained "until after full compliance by the insured with all the foregoing conditions." Teutonia Ins. Co. v. Johnson [Ark.] 82 S. W. 840.

12. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4.

13. Sims v. Union Assur. Soc., 129 F. 804.

14. Though insured bound to give notice of accident in order to secure benefits, the beneficiary needs only to give notice of death. Nax v. Travelers' Ins. Co., 130 F. 985.

15. Where policy provides that they must be served on company. Particularly true in case of foreign companies. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074.

16. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

17. Proofs of loss held sufficient under W. Va. valued policy law. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94. Proofs held substantial compliance with provision requiring them to state knowledge and belief of insured as to time and origin of fire. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

18. Aetna Life Ins. Co. v. Milward [Ky.] 82 S. W. 364.

19. Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160.

20. Woodall v. Pacific Mut. Life Ins. Co. [Tex. Civ. App.] 79 S. W. 1090.

21. Proofs made under advice of physician that he would probably then be well. Pa-

any sum for which proofs are not made within a stipulated time, the insured cannot recover any greater amount than that claimed in such proofs.[22] A provision requiring a notice containing full particulars of the accident is complied with if such notice contains the best information the insured possesses, or that is available at the time.[23] A defense that no notice of the accident was given within the time limited by the policy, and a defense that no accident happened, are not inconsistent.[24]

Under an employer's liability policy covering any loss resulting from accident caused by plaintiff's teams and requiring immediate notice of any accident to be given to the insurer, the insured is bound to exercise ordinary diligence to acquire knowledge of accidents.[25] The knowledge of an employe who could not give the required notice cannot be imputed to the insured.[26] Failure to give such notice is not excused by the fact that the employer who knew of the accident did not know of the policy, and that the one who knew of the policy did not know of the accident.[27]

A condition in a policy of health insurance forfeiting all benefits thereunder unless the insured gives to the company notice of any sickness within a certain time after its commencement is valid.[28]

Waiver.[29]—Notice and proofs of loss[30] and delay in furnishing them may be waived by the insurer,[31] even when they are required by statute.[32] A waiver once made cannot be abrogated without the consent of the insured.[33]

cific Mut. Life Ins. Co. v. Branham [Ind. App.] 70 N. E. 174.

22. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

23. Notice sufficient. Root v. London Guarantee & Acc. Co., 92 App. Div. 578, 86 N. Y. S. 1055. Proofs of death under accident policy held sufficiently explicit. Id.

24. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 101 N. W. 341.

25. Woolverton v. Fidelity & Casualty Co., 96 App. Div. 275, 89 N. Y. S. 292. A rule requiring drivers to make a full report of all accidents shows the exercise of such care. Id.

26. Neither the knowledge of the driver of the vehicle causing the accident nor that of the employe in charge of insured's freight depot. Could not, by withholding knowledge, avoid policy. Woolverton v. Fidelity & Casualty Co., 96 App. Div. 275, 89 N. Y. S. 292.

27. Deer Trail Consol. Min. Co. v. Maryland Casualty Co. [Wash.] 78 P. 135. Statements and conduct of agent eight months after accident held not a waiver of a provision requiring immediate notice. Id.

28. Failure avoids policy. Whalen v. Equitable Acc. Co. [Me.] 58 A. 1057. The Maine statute relating to notice does not apply to health insurance [Rev. St. c. 49, § 95]. Id.

29. See 2 Curr. L. 523.

30. Queen Ins. Co. v. Straughan [Kan.] 78 P. 447. Offer of settlement after receipt of paper purporting to show some statement of loss, and fact that company did not claim for over three months that it was without prejudice to its right to proofs held to raise inference from which jury might have found waiver of formal proofs of loss, and hence it was error not to submit question to jury. Glazer v. Home Ins. Co., 90 N. Y. S. 426. By any acts or conduct on the part of the company justifying the conclusion that it does not intend to insist on its statutory rights. Verification of proofs made by telegram held waived. Nicholas v. Iowa Merchants' Mut. Ins. Co. [Iowa] 101 N. W. 115. Agreement to settle loss if insured would "knock off" specified sum from his claim and acceptance by adjuster of requested affidavit held waiver. Exchange Bank v. Thuringia Ins. Co. [Mo. App.] 83 S. W. 534. There must be some official act or declaration during the currency of the time from which the insured might reasonably infer that the company does not mean to insist on proofs being furnished. Id.

Evidence held to show waiver: Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132; Virginia Fire & Marine Ins. Co. v. Cummings Tex. Civ. App.] 78 S. W. 716. By adjuster. Continental Ins. Co. v. Cummings [Tex.] 81 S. W. 705.

31. A waiver results when the conduct of the company and its agents is such as to lead the insured honestly to believe that he need not furnish the proofs within the time named in the policy, and that if he furnishes them afterwards it will be a sufficient compliance with the contract. National Masonic Acc. Ass'n v. McBride, 162 Ind. 379, 70 N. E. 983. Delay in giving notice of accident waived by company sending blank proofs containing statement that upon their return the claim would be adjusted without unnecessary delay. Pacific Mut. Life Ins. Co. v. Branham [Ind. App.] 70 N. E. 174. No waiver of terms of policy requiring sworn statement. Statement of adjuster, at most, only relieved plaintiff from furnishing it until after reasonable time. Boruszewski v. Middlesex Mut. Assur. Co. [Mass.] 72 N. E. 250. Evidence sufficient to authorize finding that defendant received proofs of injury within time limit, or if it did not, it waived its right to insist on forfeiture. National Masonic Acc. Ass'n v. McBride, 162 Ind. 379, 70

A distinct denial of liability, made by a company after the loss and within the time prescribed for furnishing proofs, upon other grounds than a failure to furnish them, is a waiver of proofs of loss.[34] The fact that denial of liability and a refusal to furnish blanks is made to one having no authority to receive payment is immaterial.[35] A denial of liability is also a waiver of a provision giving the insured a certain time after notice in which to pay the loss.[36]

The mere fact that the company sends to the insured blank forms for proof of his claim after the expiration of the time within which proofs may be made under the terms of the policy does not constitute a waiver of such limitation, in the absence of knowledge by the company of all the facts.[37]

Where the proofs of death are required to be made on blanks furnished by the insurer, the latter thereby assumes the obligation of furnishing them,[38] and it is its duty to place such blanks in the hands of the beneficiary after proper request.[39] By statute in Missouri, on notice of loss, the company is required to furnish the insured blank forms for making proofs, and a failure to do so constitutes a waiver of proofs.[40] It has a reasonable time in which to do so, but must act reasonably and in good faith.[41]

It is the duty of the insurer to notify the insured of defects in the proof of loss,[42] and their retention for an unreasonable time without objection, constitutes a waiver thereof.[43] A local agent with authority to represent the company in mak-

N. E. 483. Evidence held not to show waiver of provision requiring notice of accident within fifteen days. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 101 N. W. 341.

32. Required by Iowa Code, §§ 1742-1744. Nicholas v. Iowa Merchants' Mut. Ins. Co. [Iowa] 101 N. W. 115.

33. Exchange Bank v. Thuringia Ins. Co. [Mo. App.] 83 S. W. 534.

34. Declarations of agent held acts of company. Denial on ground that there was no contract. Phenix Ins. Co. v. Kerr [C. C. A.] 129 F. 723; Scottish Union & Nat. Ins. Co. v. Moore [Tex. Civ. App.] 81 S. W. 573; Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398; Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Nicholas v. Iowa Merchants' Mut. Ins. Co. [Iowa] 101 N. W. 115. Where denied liability from date of fire to time of trial. Continental Ins. Co. v. Daniel, 25 Ky. L. R. 1501, 78 S. W. 866. Instructions approved. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. Statement of adjuster in presence of insured that it would be a long time before the latter got a cent, held a denial of liability. Siegle v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 637. Not necessary to show furnishing of proofs where it contends it has fully discharged its liability and refuses to accept them, or it appears that it would have ignored them. Woodall v. Pacific Mut. Life Ins. Co. [Tex. Civ. App.] 79 S. W. 1090. Must be made before the policy is forfeited by failure to comply with its conditions. As to notice and proof of loss. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167. Notice under accident policy. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 101 N. W. 341. Applies only where company claims policy was not in force at time of loss. Two defenses inconsistent. Id. Letter of plaintiff's attorney held admissible to show that proofs of loss had been furnished and that defendant had denied all liability. Aetna Ins. Co. v. Fitze [Tex. Civ. App.] 78 S. W. 370.

35. Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398.

36. Edwards v. Fireman's Ins. Co., 43 Misc. 354, 87 N. Y. S. 507.

37. Not when it did not know when he became ill. Health insurance. Whalen v. Equitable Acc. Co. [Me.] 58 A. 1057.

38. Robinson v. Northwestern Nat. Ins. Co. [Minn.] 100 N. W. 226.

39. Robinson v. Northwestern Nat. Ins. Co. [Minn.] 100 N. W. 226. Merely depositing them in the post office properly stamped and directed is insufficient unless they are actually received. Offer to show that it was understanding of company from request that they might be sent by mail held properly excluded. Id. Evidence of clerks as to receipt and delivery of letters held harmless where submission and findings based on uncontroverted facts as to when blanks were received. Id.

40. Rev. St. 1899, §§ 7977, 7978. St. John v. German-American Ins. Co. [Mo. App.] 82 S. W. 543. Defendant's admission that blanks were not furnished dispenses with further proof in regard to them by insured. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299.

41. Delay, evasion, and objection to proofs furnished, held waiver. St. John v. German-American Ins. Co. [Mo. App.] 82 S. W. 543.

42. German-American Ins. Co. v. Paul [Ind. T.] 83 S. W. 60.

43. Fact that unverified inventory, which had been accepted by adjuster in lieu of proofs, was not returned to permit verification, at insured's request, until too late to verify and return it within prescribed time, held waiver of defect. German-American Ins. Co. v. Paul [Ind. T.] 83 S. W. 60; Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074. Fact that proofs made by telegram not verified as required by statute held waived. Nicholas v. Iowa Merchants' Mut. Ins. Co. [Iowa] 101 N. W. 115. A company which has, through its adjuster, ac-

ing contracts of insurance, collecting premiums and signing policies, may, in the absence of a provision in the policy to the contrary, waive proofs of loss, either in writing, or orally, or by acts constituting an estoppel.[44] A provision requiring such waiver to be in writing is valid.[45] A provision that no alterations or waivers shall bind the company unless by the written consent of an officer of the company is inoperative as to conditions to be performed after loss.[46]

Slight evidence has been held sufficient to show waiver.[47] Evidence that the insurer's superintendent stated that the company would not pay the policy and would not furnish blanks because the premiums had not been paid,[48] declarations of the company's supervisor of death claims relative to the grounds of its refusal to pay,[49] and evidence that the adjuster agreed to settle the loss if the insured would "knock off" a certain sum from his claim,[50] are admissible. So is an answer in a prior suit, in which defendant was nonsuited, pleading a failure of compliance with the arbitration clause.[51]

Examination under oath.—The insurance company has a right, when the policy so provides, to require an examination under oath of the insured, and his failure to appear for that purpose is a good defense to an action on the policy[52] unless waived.[53] Neither his agent[54] nor his trustee in bankruptcy[55] can take his place for this purpose. The privilege given to the company by the policy of examining the body of the insured must be exercised within a reasonable time,[56] and application therefor must be made to some one authorized to grant such privilege.[57]

False swearing.—In dealing with the insurer, the insured must observe the utmost good faith, without which there can be no recovery.[58] The unexplained pres-

cepted an inventory of the property furnished by the insured, and waived further proofs, is estopped from denying the sufficiency of proofs theretofore sent it. Minneapolis Fire & Marine Mut. Ins. Co. v. Fultz [Ark.] 80 S. W. 576.

44. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342; Queen Ins. Co. v. Straughan [Kan.] 78 P. 447. Where such agent informs the insured that it will be sufficient if the proofs are verified by another having knowledge of the facts, the company is estopped from questioning such verification. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342.

45. Where the policy provides that any waiver of a provision requiring proofs of loss to be made within a stipulated time must rest in a writing to that effect, executed in such a manner as will bind the company, no waiver can be predicated upon acts or conduct of the company resting in parol. Not waived by acknowledgment of notice of loss and negotiations for settlement without requiring proofs. Missouri Pac. R. Co. v. Western Assur. Co., 129 F. 610.

46. Wheeler v. United States Casualty Co. [N. J. Law] 59 A. 347.

47. Proofs. National Masonic Acc. Ass'n v. McBride, 162 Ind. 379, 70 N. E. 483.

48. Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398.

49. Not hearsay. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

50. Not objectionable as proof of proposed compromise. Exchange Bank v. Thuringia Ins. Co. [Mo. App.] 83 S. W. 534.

51. Implied admission. Exchange Bank v. Thuringia Ins. Co. [Mo. App.] 83 S. W. 534.

52. Receiver in bankruptcy cannot take place of insured even when he is appointed for purpose of collecting insurance, though policy provides that the term "insured" shall include his "legal representatives." Sims v. Union Assur. Soc., 129 F. 804. The fact that he has fled the country to avoid arrest does not excuse him. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4.

53. Where the insurer made no request for the production of the insured's books and papers and to examine him under oath after the fire in accordance with the provisions of the policy, it could not question his right to sue on the ground that such provision had been violated. Wells Whip Co. v. Tanners' Mut. Fire Ins. Co. [Pa.] 58 A. 894.

54. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4.

55. A provision that the term "insured" shall include his "legal representatives" does not authorize his receiver in bankruptcy, appointed to collect the insurance, to take his place under a provision requiring the insured to submit to an examination under oath after the loss. Sims v. Union Assur. Soc., 129 F. 804.

56. Delay in demanding autopsy until after burial held unreasonable where insurer knew of death the day after it occurred. Root v. London Guarantee & Acc. Co., 92 App. Div. 578, 86 N. Y. S. 1055.

57. Refusal, by one not a relative and not appointed administrator until thereafter, to allow autopsy, held not to avoid policy. Root v. London Guarantee & Acc. Co., 92 App. Div. 578, 86 N. Y. S. 1055.

58. Vaughan & Co. v. Virginia Fire & Marine Ins. Co., 102 Va. 541, 46 S. E. 692.

ence of false invoices in the proofs of loss avoids the policy for fraud, though enough goods, actually covered by it, are destroyed, to have warranted a recovery of the full amount of the insurance.[59] False swearing must be intentional and for the purpose of defrauding the insurer,[60] and must have a prejudicial or harmful result.[61] No part of the claim can be recovered though the false swearing is as to one item only.[62] Where the proofs of loss are made by defendant's agent, who inserts false statements therein after having been fully informed of the facts, the company cannot avoid liability on the ground of false swearing.[63]

§ 20. *Adjustment and arbitration.*[64]—The value of the property remaining after the fire must be ascertained in the manner provided by the policy.[65] Provisions looking to the ascertainment of the loss cannot be disregarded by the insured, and a sale of the damaged property by him which cuts off these rights avoids the policy.[66] It is no defense to a sale before appraisal that the object of the latter is to determine the value of the property, which is sufficiently shown by the sale itself.[67]

A provision making an appraisal a condition precedent to suit is valid and binding on the insured[68] unless waived.[69] Where no time is fixed within which

59. Evidence held insufficient to explain presence of false invoices. Vaughan & Co. v. Virginia Fire & Marine Ins. Co., 102 Va. 541, 46 S. E. 692.

60. Instruction defective. Proofs of loss. Medley v. German Alliance Ins. Co. [W. Va.] 47 S. E. 101. Under a provision that any false swearing either before or after loss avoids the policy, there can be no recovery where, in his claim of loss, the insured falsely states his loss largely in excess of what he knows it to be, for the purpose of deceiving and defrauding the company. Instructions approved. Hall v. Western Underwriters' Ass'n [Mo. App.] 81 S. W. 227. The fact that insured in a previous affidavit made to obtain a merchant's license fixed the value of the goods at less than he swore they were worth before and at the trial does not render him guilty of false swearing as a matter of law. Merely goes to his credibility. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342. Plaintiff held not guilty of fraud or false swearing in making up proofs of loss because she answered that there was no foreclosure suit pending, where a suit theretofore instituted had been prosecuted to final decree. Fitzgibbons v. Merchants' & Bankers' Mut. Fire Ins. Co. [Iowa] 101 N. W. 454.

61. Not where loss is concededly total and values far in excess of insurance, and explanation of insured is reasonable. Refusal to allow filing of special pleas held proper. Home Ins. Co. v. Lowenthal [Miss.] 36 So. 1042. The fact that plaintiff had taken out a privilege license tax for a less amount than the loss claimed in his proofs does not show false swearing, where, at the time of the fire, he had not commenced business, and hence was not required to pay such tax. Id.

62. Hall v. Western Underwriters' Ass'n [Mo. App.] 81 S. W. 227.

63. Insured illiterate. Nute v. Hartford Fire Ins. Co. [Mo. App.] 83 S. W. 83.

64. See 2 Curr. L. 525. For arbitration and dispute of claims in Fraternal Mutual Benefit Associations, see 3 Curr. L. 1503.

65. Astrich v. German-American Ins. Co., 128 F. 477, afd. 131 F. 13. The right thereby given to the insurer to have the goods exhibited as often as required is not affected by the fact that they were given a preliminary examination by adjusters with a view of reaching an amicable settlement of the loss. Id.

66. Right of insurer to have goods inspected as often as desired, to have loss determined by appraisement, and to take goods at appraised value, are substantial rights, and plaintiff cannot recover where he prevents their exercise by sale of goods after distinct notice that company insisted on them. Astrich v. German-American Ins. Co., 128 F. 477, afd. 131 F. 13. It is essential to the enjoyment of the right to an appraisal that damaged stock be retained by the insured where it can be examined for that purpose. Pleadings held not to show an abandonment of right so as to justify insured in disposing of stock. Providence Washington Ins. Co. v. Wolf [Ind. App.] 72 N. E. 606.

67. Astrich v. German-American Ins. Co., 128 F. 477, afd. 131 F. 13.

68. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Providence Washington Ins. Co. v. Wolf [Ind. App.] 72 N. E. 606.

69. Failure of insurer to answer telegram held not to be waiver. Providence Washington Ins. Co. v. Wolf [Ind. App.] 72 N. E. 606. Insurer held estopped by its conduct to claim that insured was barred from suing on policy by abortive attempt at arbitration under collateral agreement, which failed because of its action. British America Assur. Co. v. Darragh [C. C. A.] 128 F. 890. The fact that an adjuster states, at a preliminary examination of the goods, that an appraisal would be useless without a statement of the insured as to the amount of goods totally destroyed, which he declines to give, does not constitute a waiver of such appraisal. Astrich v. German-American Ins. Co., 128 F. 477, afd. 131 F. 13. The fact that an adjuster requested insured to furnish proofs of loss as to fixtures and furniture to a company which had insured merchandise only and that he did so, did not constitute a waiver of a previous forfeiture

it may be had, the right thereto must be exercised within a reasonable time under the circumstances.[70] Where the goods are deteriorating it is the duty of the insured to notify the insurer of the necessity for a prompt disposition of them.[71] The motive of the insurer in requiring an appraisal cannot be inquired into, when he has an absolute right to do so.[72] A denial of liability dispenses with the necessity for an appraisal,[73] but such denial must ordinarily occur before answering in a suit on the policy.[74] No arbitration is necessary where the loss under a valued policy is total,[75] or where there is no dispute as to the amount of the loss.[76]

It is generally held that where arbitration is made a condition precedent to recovery in case of disagreement, it is incumbent on plaintiff to secure, or attempt to secure, such arbitration,[77] though there seems to be some conflict of authority in this regard.[78]

The provisions in regard to an appraisal should receive a reasonable construction.[79] A stipulation for an appraisal other than that provided for in the policy depriving the insured of his right of action, is in derogation of common right, and will be strictly construed.[80] Any substantial departure therefrom will make the agreement in which it appears collateral with and independent of the policy, and will avoid the effect of the latter instrument.[81]

There must be a fair and reasonable effort to make the appraisal successful.[82] If the insured or his appraiser, by acting in bad faith, prevents an appraisal, that fact will be a good defense to an action on the policy.[83] If a failure to arbitrate arises from the fault of the insurer, the insured is thereby relieved from compliance with the condition requiring it.[84] Though the arbitrator is not the agent of the party selecting him, yet the latter will be held responsible for any conduct on his part defeating an appraisal.[85] If both parties endeavor to prevent an appraisal, or to render abortive an agreement for one, it will cease to be a con-

of the merchandise policies. Id. [C. C. A.] 131 F. 13, afg. 128 F. 477. Evidence sufficient to show waiver of arbitration. Queen Ins. Co. v. Straughan [Kan.] 78 P. 447.

70, 71. Astrich v. German-American Ins. Co., 128 F. 477.

72. Providence Washington Ins. Co. v. Wolf [Ind. App.] 72 N. E. 606.

73. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757. The provisions as to appraisement are inoperative where adjuster intentionally gives the insured to understand that it denies all liability under the policy. Sufficient evidence on which to base instruction. Seigle v. Badger Lumber Co. [Mo. App.] 80 S. W. 4.

74. Answer in former action denying liability both because there was no appraisal and also on other grounds does not preclude denial of liability for former reason in second action. Former answer not admissible to show waiver. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

75. Evidence sufficient to sustain findings that the loss was total leaving nothing to arbitrate. Queen Ins. Co. v. Straughan [Kan.] 78 P. 447.

76. Evidence held to show that there was no dispute requiring arbitration. Queen Ins. Co. v. Straughan [Kan.] 78 P. 447.

77. Fowble v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 485.

78. Provisions for appraisal and the furnishing of the award to the company by the insured, imposes no obligation upon the insured to furnish such an award, except where an appraisement has been demanded by the company. German Ins. Co. v. Kistner, 5 Ohio C. C. (N. S.) 165.

79. Not unreasonable to require insured to retain goods to await possible exercise of right of inspection and appraisal, where proofs of loss not yet made out, and company not liable where he sells them in spite of a notice not to do so. Astrich v. German-American Ins. Co., 128 F. 477.

80. As to arbitration. British America Assur. Co. v. Darragh [C. C. A.] 128 F. 890.

81. Agreement to arbitrate before disagreement. British America Assur. Co. v. Darragh [C. C. A.] 128 F. 890.

82. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

83. By postponing indefinitely the choice of an umpire, or otherwise. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Fowble v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 485.

84. As by refusal to accept competent person for umpire suggested by insured, and insisting on one living at a distance. Fowble v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 485. By endeavoring to utilize agreement to obtain delay. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

85. Fowble v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 485. The unfair behavior of an appraiser may be taken into account, in fixing the blame for a failure. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

dition precedent to suit.[86] Neither arbitrator should endeavor to secure a prejudiced, incompetent, or dishonest person for umpire, or a person living at a distance, when competent parties can be found nearby.[87] Prior service of an arbitrator in a similar capacity does not render him incompetent or invalidate an award in which he takes part, in the absence of a showing that he was prejudiced.[88]

The proceedings must be conducted openly, and fairly, and in a judicial manner.[89] The insured is entitled to appear before the arbitrators and be heard, and to introduce evidence as to the amount of his loss,[90] and a denial of such right makes the award voidable.[91] An award will also be set aside if the arbitrators refuse to hear or consider material evidence,[92] but such evidence must have been actually offered.[93] The duties of an umpire appointed to determine disagreements between arbitrators are a personal trust, and he has no right to base his conclusions on facts reported to him by another person.[94] Where the appraisal is merely for the purpose of determining the amount of loss, the insured cannot withdraw therefrom.[95] The resignation of the appraiser appointed by the insured after the award is signed and delivered does not affect its validity.[96] One submitting the amount of loss to appraisers cannot thereafter claim that such submission was void because there was no disagreement.[97] Some courts hold that the failure of the appraisers to make an award, when not due to any fault of the insured, does not operate to deprive him of his right of action on the policy.[98] Others that an honest but futile effort to make an award will not dispense with the necessity of an appraisal unless it causes a too protracted and wholly unreasonable delay.[99]

The award of appraisers cannot be impeached or set aside for fraud in a court of law.[1] A court of equity will set it aside for fraud, collusion, corruption, or gross misconduct on the part of the arbitrators, or for some palpable mistake appearing on its face,[2] but not for a mere mistake of judgment.[3] An action may be maintained to set aside the award, and, in the event of accomplishing that result, to recover for the actual loss sustained.[4] All the companies which had insured plaintiff's property and were parties thereto are properly joined as defend-

86. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

87. Fowble v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 485.

88. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82.

89. Award made by umpire and one appraiser on estimates of latter, which former had merely shown to other appraiser, and without any conference of appraisers held void. New York Mut. Sav. & Loan Ass'n v. Manchester Fire Assur. Co., 94 App. Div. 104, 87 N. Y. S. 1075.

90. Redner v. New York Fire Ins. Co. [Minn.] 99 N. W. 886.

91. Redner v. New York Fire Ins. Co. [Minn.] 99 N. W. 886. The complaint, in such case, need not set out the evidence plaintiff would have offered had he been granted a hearing. Id.

92. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82.

93. Cannot be said to have refused it where plaintiff merely stated that he wished to present it, but failed to appear and do so, though he had notice of the meetings. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82.

94. British America Assur. Co. v. Darragh [C. C. A.] 128 F. 890.

95. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

96. Award made by other appraiser and umpire. Eisenberg v. Stuyvesant Ins. Co., 87 N. Y. S. 463.

97. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757. Where company and insured stated their disagreement in writing, and each selected an arbitrator, latter cannot contend that there was no disagreement. Fowble v. Phoenix Ins. Co. [Mo. App.] 81 S. W. 485.

98. Where has made honest effort to secure award and has failed. Fritz v. British American Assur. Co., 208 Pa. 268, 57 A. 573.

99. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

1. Fire Ass'n v. Allesina [Or.] 77 P. 123.

2. Evidence insufficient to justify setting aside. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82. The only remedy is in equity. In Oregon the proper practice for the insurer desiring to set up such a defense is to file a complaint in the nature of a cross-bill with his answer [B. & C. Comp. § 391]. Fire Ass'n v. Allesina [Or.] 77 P. 123. This may be done though the insurer filed an answer to the action at law alleging a complete defense thereto. Id.

3. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82.

4. New York Mut. Sav. & Loan Ass'n v. Manchester Fire Assur. Co., 94 App. Div. 104, 87 N. Y. S. 1075.

ants.[5] If the award is set aside, the court will retain jurisdiction, and grant full relief by prorating the loss among the several defendants.[6] The test in determining whether the award is in fact insufficient is whether it results in a substantial loss to plaintiff as compared with the actual value of the property destroyed.[7] Fraud or want of good faith on the part of an appraiser must be pleaded and proved.[8] An arbitrator cannot contradict an award which he has signed.[9]

Where it is agreed that the award shall be in reference to the amount of loss and damage only, the insured should sue on the policy and not on the award.[10]

§ 21. *Option to pay loss or restore property.*—The company must exercise its option to take the damaged goods at their appraised value within a reasonable time,[11] and a failure to do so is a waiver of the right.[12] It is, however, ordinarily entitled to the full period given it by the policy in which to determine whether it will take and replace any part or all of the damaged property.[13] Any material abridgment of this right avoids the policy,[14] notwithstanding the fact that there are several insurers who are only ratably liable, and may have divergent views.[15]

Several insurers only ratably liable for the loss may severally elect to take advantage of clauses giving them the right to take and replace any part or all of the goods damaged.[16]

§ 22. *Payment of loss or benefits and adjustment of interests in proceeds.*[17]—The debt evidenced by the policy is extinguished by giving a check in payment therefor,[18] and the insurer is thereby estopped from denying that the payee was the real party in interest when it was executed.[19]

A policy of insurance, after loss, is not a liquidated demand, and, if a defense is made thereto, is a proper subject of compromise.[20] Where the company denies all liability and pays to the insured a sum less than he claims in full settlement of the controversy, and the latter executes a release and surrenders the policy, he cannot maintain an action at law thereon on the ground that such release was obtained by fraud, without a return or tender of the amount received.[21] Where the settlement is pleaded in the answer, the reply must set up such payment or tender.[22] Payment by the company of sick benefits due under an accident policy is

5, 6. Redner v. New York Fire Ins. Co. [Minn.] 99 N. W. 886.

7. New York Mut. Sav. & Loan Ass'n v. Manchester Fire Assur. Co., 94 App. Div. 104, 87 N. Y. S. 1075.

8. No evidence to show that conduct of defendant's appraiser was "contrary, aggressive, and not in good faith." Eisenberg v. Stuyvesant Ins. Co., 87 N. Y. S. 463.

9. Van Winkle v. Continental Fire Ins. Co. [W. Va.] 47 S. E. 82.

10. Collateral agreement to arbitrate before disagreement. British-America Assur. Co. v. Darragh [C. C. A.] 128 F. 890.

11. Phoenix Assur. Co. v. Stenson [Tex. Civ. App.] 79 S. W. 866.

12. Phoenix Assur. Co. v. Stenson [Tex. Civ. App.] 79 S. W. 866. Failure of the company for three days after the fire to avail itself of a provision requiring the insured to separate the damaged from the undamaged property and giving the insurer an option to take such goods at their appraised value, held a waiver, so that insured did not break the contract by disposing of them after that time. Id.

13. Astrich v. German-American Ins. Co., 128 F. 477.

14. Sale of goods within such time, over protest of the insurer. Astrich v. German-American Ins. Co., 128 F. 477.

15. Does not prevent several election, or may conclude to join. Astrich v. German-American Ins. Co., 128 F. 477.

16. Astrich v. German-American Ins. Co., 128 F. 477, afd. 131 F. 13.

17. See 2 Curr. L. 531. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1515, § 8.

18. Northwestern Mut. Life Ins. Co. v Kidder, 162 Ind. 382, 70 N. E. 489. See Id. [Ind. App.] 69 N. E. 204.

19. Cannot interplead beneficiaries and creditors claiming interest in action on check. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489. See Id. [Ind. App.] 69 N. E. 204.

20. Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294, 70 N. E. 74.

21. Even though such amount is, in petition, credited as payment on policy. Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294, 70 N. E. 74. Evidence held to show that plaintiff received payment in settlement of claim and not as payment on account. Id.

22. Irresponsive and insufficient unless it does so. Manhattan Life Ins. Co. v. Burke, 69 Ohio St. 294, 70 N. E. 74.

no consideration for a release of liability for additional benefits subsequently accruing.[23] Where there is no consideration, it is immaterial whether the release was fraudulently obtained by the insurer, or whether insured knew of its contents, or failed to exercise reasonable diligence in ascertaining its import.[24] Equity has jurisdiction to set aside as fraudulent a settlement of a minor's claim made by his guardian by order of the probate court.[25]

The widow of insured is not entitled to half the proceeds of a policy payable to his estate, where there is no surplus estate after the payment of his debts even including such proceeds.[26] A wife joining her husband in the mortgaging of his realty, conveying away her dower interest therein, may require the proceeds of a life policy payable to his estate to be applied to the payment of the mortgage debts, in order that she may realize her dower interest therein.[27] Under a life policy payable to insured's wife and children, the wife's interest survives to the children on her death before the insured, and his second wife is not entitled to any portion of the proceeds.[28]

Statutes in some states provide that where there are no persons in existence to whom the insurance can be paid by the terms of the policy, it reverts to the estate of the insured.[29]

It is the duty of an insurance company having notice of an assignment of the proceeds of the policy, when summoned as garnishee in an action against the insured, to set it up as a defense, and, if it fails to do so, it cannot be relieved from liability to the assignee to the amount paid into court in such proceedings, to which the assignee was not a party.[30]

In many states the proceeds of life policies are exempted from the payment of decedent's debts[31] except by special contract or agreement.[32] Such contract must be clearly and explicitly shown, a mere intention that the debt is to be paid therefrom being insufficient.[33]

§ 23. *Subrogation and other secondary rights of insurer.*[34]—An insurance company which has indemnified the owner of property for loss incurred by him is entitled to all the means of indemnity which the latter had against the party primarily liable, to the extent of the payment,[35] and it may therefore bring and control, in the name of the insured, a suit against the wrongdoer who has occasioned the loss.[36] Under the code requiring suits to be brought in the name of the real party in interest, it must sue in its own name.[37] If the liability covers the entire loss, the company's right of action becomes absolute at law.[38] If it covers a part only, the insurer has an equitable interest merely, which it has and holds jointly with the insured, and they together may maintain an action for the

23, 24. Woodall v. Pacific Mut. Life Ins. Co. [Tex. Civ. App.] 79 S. W. 1090.

25. Settlement held fraudulent. Berdan v. Milwaukee Mut. Life Ins. Co. [Mich.] 99 N. W. 411.

26, 27, 28. Bickel v. Bickel, 25 Ky. L. R. 1945, 79 S. W. 215.

29. Ohio Rev. St. 1879, § 3629, does not apply to a policy issued before the act was passed. Plant v. Mutual Life Ins. Co., 4 Ohio C. C. (N. S.) 94.

30. Frels v. Little Black Farmers' Mut. Ins. Co. [Wis.] 98 N. W. 522.

31. Claim for nursing decedent is a debt, but funeral expenses and administrator's attorney's fee are not, and may be paid therefrom [Miss. Rev. Code 1892, § 1965]. Dobbs v. Chandler [Miss.] 36 So. 388.

32. Iowa Code, § 3313. In re Donaldson's Estate [Iowa] 101 N. W. 870.

33. Evidence that deceased promised to take out policy payable to estate in belief that, when he died, the avails could be used to pay debt, held insufficient. In re Donaldson's Estate [Iowa] 101 N. W. 870.

34. See 2 Curr. L. 531.

35. Firemen's Fund Ins. Co. v. Oregon R. & Nav. Co. [Or.] 76 P. 1075. No subrogation where company has advanced the amount as a loan to be held as security for payment in case no recovery is had against parties causing loss. Judd v. New York & T. S. S. Co. [C. C. A.] 128 F. 7.

36. Judd v. New York & T. S. S. Co. [C. C. A.] 128 F. 7.

37. B. & C. Comp. §§ 27, 393. Firemen's Fund Ins. Co. v. Oregon R. & Nav. Co. [Or.] 76 P. 1075.

38, 39. Firemen's Fund Ins. Co. v. Oregon R. & Nav. Co. [Or.] 76 P. 1075.

entire loss against the wrongdoer.[39] The insurer must recover thereon, if at all, in the right of the insured alone.[40] The company must have actually asserted its right of subrogation by bringing and controlling a suit in the name of the insured against the party causing the loss, before it can be vested with such an interest as a party as will render its admission evidence on the part of defendant.[41]

The Maine statute giving to railroad companies the benefit of any insurance effected by the owner of any property damaged by fire communicated by locomotives applies only to those cases where the liability of the company is, by the act, made that of an insurer, and not to those where the fire is caused by its own negligence.[42] Hence, in the latter case an insurance company which has paid a policy upon the property injured, may maintain an action against the railroad in the name of the owner, to recover from it the amount so paid, not exceeding the difference between the value of the property and any sum already paid by the railroad to the owner.[43]

§ 24. *Remedies and procedure. A. Rights of action and defenses and parties.*[44]—The court has jurisdiction to determine the rights of a nonresident mortgagee in the proceeds of a policy issued by a foreign corporation authorized to do business in the state, where the plaintiff and his assignor are both residents of the state, though the property insured is located in a foreign country.[45] The office of an insurance agent representing several companies, maintained at his own expense, is the "place of doing business" of such of them as have no other place in such city for the transaction of their business.[46]

Equity will enforce specific performance of a policy in the nature of a contract to insure or grant an annuity.[47] A policy creates a single cause of action though the amount of insurance is apportioned in part to personalty and in part to realty,[48] but it has been held that separate actions may be prosecuted under separate and distinct items.[49]

An action on an account stated may be maintained on a claim under an insurance policy for loss by fire, where the amount due has been agreed upon by the parties.[50]

In an action brought by a receiver in the name of the beneficiary for the benefit of the insured, neither he nor the widow can stand in any better position than the beneficiary.[51]

Process.—By statute in Missouri, process may be served on town mutual insurance companies by serving a certified copy of the petition and summons on the

40. Hence, no declaration of company concerning character of risk is admissible. Judd v. New York & T. S. S. Co., 130 F. 991. Can take nothing but the rights of the insured. Id. [C. C. A.] 128 F. 7.

41. Judd v. New York & T. S. S. Co. [C. C. A.] 128 F. 7.

42. Rev. St. 1883, c. 51, § 64, as amended by Pub. Laws 1895, c. 79, p. 77, makes railroad company an insurer. Dyer v. Maine Cent. R. Co. [Me.] 58 A. 994.

43. Evidence sufficient to show negligence. Dyer v. Maine Cent. R. Co. [Me.] 58 A. 994.

44. See 2 Curr. L. 532. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1518, § 12.

45. Lewis v. Guardian Fire & Life Assur. Co., 93 App. Div. 157, 87 N. Y. S. 525.

46. City court of Richmond county has jurisdiction in such case under Ga. Civ. Code, § 2145. Aetna Ins. Co. v. Brigham [Ga.] 48 S. E. 348.

47. Agreement to issue annuity contract payable to widow, or children, or executor. Mutual Life Ins. Co. v. Blair, 130 F. 971.

48. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299.

49. Judgment in action an item covering realty not res judicata as to item covering personalty. Ritchie County Bank v. Firemen's Ins. Co. [W. Va.] 47 S. E. 94.

50. Farmers' Ins. Ass'n v. Reavis [Ind.] 71 N. E. 905. For former opinion see 70 N. E. 518. Answer of jury to special interrogatory in regard to conversation about settlement held not to necessarily show that there was no account stated, since it had no tendency to prove that there might not have been a statement of account at some other time, there being general verdict for plaintiff. Id.

51. Except that possibly waiver to widow might inure to benefit of plaintiff. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801.

president or secretary or other chief officer in charge of its principal office.[52] Service may also be had in the manner prescribed for service on corporations generally.[53]

Parties.[54]—The party named in the policy as the insured is a necessary party to a suit thereon, even though plaintiff claims that he was named through mistake, and seeks a reformation of the policy in that particular.[55] Insured's widow is not a necessary party to any action on a life policy by his special administrator.[56] The assignee of a mortgagee, to whom the policy is payable as his interest may appear, is a necessary party to a suit thereon, and, if he fails to join as a plaintiff, is properly made a defendant.[57] The persons insured and a mortgagee to whom the policy is made payable as his interest may appear are properly made joint plaintiffs in an action thereon.[58] By statute in many states the person to whom a policy of life insurance is payable may sue thereon in his own name.[59] In such case, the right survives to the administrator of the beneficiary.[60] By statute in Missouri, an action may be maintained on a risk or policy by a member or stockholder of a company organized under the laws of that state, if the loss is not paid within two months after it becomes due.[61]

Limitation of actions.—There is a conflict of authority as to the validity of provisions limiting the time within which actions may be brought on the policy. Some courts hold them to be valid and binding on the insured and the beneficiaries[62] even when such limitation is shorter than that allowed by the general statute of limitations.[63] Others hold that stipulations fixing a shorter limitation than that provided by such statutes are void.[64]

In South Dakota by statute, limitations on the time within which actions may be brought on the policy are void.[64a]

52. Return showing service on secretary in charge of company's "usual business office" held insufficient. Thomassen v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911. Service may be made by a deputy sheriff. Id.

53. Return insufficient [Rev. St. 1899, § 995]. Thomassen v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911.

54. See 2 Curr. L. 534.

55. Trust Co. of Georgia v. Scottish Union & Nat. Ins. Co., 119 Ga. 672, 46 S. E. 855.

56. Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398.

57. Lewis v. Guardian Fire & Life Assur. Co., 93 App. Div. 157, 87 N. Y. S. 525.

58. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299.

59. Mass. Rev. Laws, c. 118, § 73. Emerson v. Metropolitan Life Ins. Co., 185 Mass. 316, 70 N. E. 200.

60. Emerson v. Metropolitan Life Ins. Co., 185 Mass. 316, 70 N. E. 200.

61. Petition held to show lapse of such time, if statute applicable to town insurance companies [Rev. St. 1899, § 8005]. Pence v. Mercantile Town Mut. Ins. Co. [Mo. App.] 80 S. W. 746.

62. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801; Barry & F. Lumber Co. v. Citizens' Ins. Co. [Mich.] 98 N. W. 761. Employer's liability policy. Tolmie v. Fidelity & Casualty Co., 95 App. Div. 352, 88 N. Y. S. 717. Contained in New York standard policy. McArdle v. German Alliance Ins. Co., 90 N. Y. S. 485. Action on life policy was erased from the docket for want of an ad damnum clause in the complaint and plaintiff thereupon brought another action which was dismissed because not brought within the time limited in the policy. Thereafter she brought error in the first action, which was restored to the docket. Held, that the judgment dismissing the second action was no bar to the further prosecution of the first, which was seasonably instituted. Vincent v. Mutual Reserve Fund Life Ass'n [Conn.] 58 A. 963.

63. Employer's liability policy [N. Y. Code Civ. Proc. § 414]. Tolmie v. Fidelity & Casualty Co., 95 App. Div. 352, 88 N. Y. S. 717. The contract provision controls the statute (Mead v. Phoenix Ins. Co. [Kan.] 75 P. 475), and is good even against minor beneficiaries. Fire policy. Action after minor became of age held too late (Id.).

64. In Kentucky it is held that a provision fixing a shorter limitation than that fixed by the general statute of limitations is contrary to public policy. Fifteen year limitation on actions on contracts applies. Union Cent. Life Ins. Co. v. Spinks [Ky.] 83 S. W. 615; Southern R. News Co. v. Fidelity & Casualty Co. [Ky.] 83 S. W. 620.

64a. Civ. Code, § 1276, providing that every provision in a contract which limits the time within which a party may enforce his rights thereunder is void. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074; Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110. Applies though contained in a form of policy prepared by the state auditor in accordance with the provisions of the insurance laws. Laws 1893, c. 105, p. 174, gives auditor no authority to insert provisions contrary to statute. Id.

The limitation begins to run from the day of the fire.[65] The beneficiary is chargeable with knowledge of the terms of the policy in this regard.[66] Statutory exceptions to the running of limitations do not apply.[67] In the absence of a statute or provision of the contract to the contrary, an injunction restraining the bringing of the action, issued after such limitation has begun to run, will not stop the running of such limitation.[68] Plaintiff cannot contend that he is excused for failure to sue within the time limited because defendant had no agent within the state on whom service of process may be had where he calls a witness for the purpose of proving that he was the company's agent so as to bind it by his statements.[69]

Provisions requiring actions on policies to be brought within a certain time after loss are for the benefit of the insurer, and may be waived.[70] In the absence of an express waiver, some of the elements of an estoppel must exist.[71] Any conduct on the part of the company which is fairly calculated to induce a beneficiary to delay in bringing his action, and causes him to believe that the limitation will not be insisted upon, is sufficient to estop it from setting up such limitation as a defense.[72] It is not the duty of the insurer to inform the beneficiary of such limitation, and hence no waiver or estoppel can be predicated on his failure to do so.[73] Nor can it be predicated on the fact that, upon a demand after such limitation had run, the insurer gave another excuse for refusing payment.[74] Slight evidence is sufficient to show a waiver or estoppel.[75]

In order that a waiver by an agent may be valid, it must be shown that he had express or implied authority to make it.[76] The mere fact that he is authorized to receive proposals for insurance, and to countersign and deliver policies and collect premiums, does not show his authority to adjust losses or to waive proofs

65. Under policy providing that action must be brought within twelve months next after the fire. Allen v. Dutchess County Mut. Ins. Co., 95 App. Div. 86, 88 N. Y. S. 530.

66. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801.

67. Wis. Rev. St. 1898, § 4234, as to time within which actions may be commenced by representatives of decedents. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206. Not extended by the death of the beneficiary, notwithstanding Wis. Rev. St. 1898, § 4234, extending limitation on death of party. Id.

68. In action at law on policy question whether equity would relieve against forfeiture under such circumstances not involved. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801.

69. Especially in view of statute allowing service on anyone aiding or assisting foreign company in transacting any business [Wis. Rev. St. 1898, § 2637, subd. 9]. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206.

70. Limitation waived by notification that payment was refused because garnishment proceedings had been commenced. Frels v. Little Black Farmers' Mut. Ins. Co. [Wis.] 98 N. W. 522; Allen v. Dutchess County Mut. Ins. Co., 95 App. Div. 86, 88 N. Y. S. 530; McArdle v. German Alliance Ins. Co., 90 N. Y. S. 485. Company held to have waived limitation by writing letters holding out to insured the reasonable inference that claims would be settled, and to be estopped from setting it up as bar to actions. Peters v. Empire Life Ins. Co., 90 N. Y. S. 296. Statements of local agents that one of them was authorized to adjust loss, and his action in making out proofs and professing to do so held not a waiver. Barry & F. Lumber Co. v. Citizens' Ins. Co. [Mich.] 98 N. W. 761.

71. Limitation not waived merely by adjuster discussing possible settlement shortly after fire, and insured renewing negotiations so that they continued until shortly before it expired. Allen v. Dutchess County Mut. Ins. Co., 95 App. Div. 86, 88 N. Y. S. 530.

72. McArdle v. German Alliance Ins. Co., 90 N. Y. S. 485; Frels v. Little Black Farmers' Mut. Ins. Co. [Wis.] 98 N. W. 522. Evidence sufficient to show that plaintiff was prevented from bringing suit within time limited by defendant's conduct. Also some evidence of waiver after expiration of time. Requested instruction properly refused. Home Friendly Soc. v. Roberson [Md.] 59 A. 279.

73. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801.

74. That receiver had no authority to sue therefor. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801; Allen v. Dutchess County Mut. Ins. Co., 95 App. Div. 86, 88 N. Y. S. 530.

75. Error to dismiss complaint in view of evidence. McArdle v. German Alliance Ins. Co., 90 N. Y. S. 485.

76. Barry & F. Lumber Co. v. Citizens' Ins. Co. [Mich.] 98 N. W. 761. Evidence sufficient to warrant finding that agent was authorized to act for insurer in all matters relating to adjustment. Fritz v. British American Assur. Co., 208 Pa. 268, 57 A. 573.

of loss or the limitation on the time within which suits must be commenced on the policy.[77] His authority cannot, of course, be proved by his own declarations.[78] The Michigan statute requiring agents of foreign insurance companies to hold certificates of authority does not increase an agent's authority or make the company liable for his representations with reference thereto.[79]

Some courts hold that if the company, by its acts, induces the beneficiary to delay bringing suit on the policy, the time of such delay is not to be counted as a part of the time limited therein for the bringing of the action.[80] Where the insurer requires an appraisement, it will be deemed to have thereby waived its right to enforce a provision that all actions on policies must be brought within a specified time after the loss occurs, until the appraisers have made an award, or the appraisement has been abandoned, unless the delay in the award or the abandonment is due to the conduct of the insured.[81]

A provision that the award of appraisers shall not become due until the expiration of a certain time after it is made is valid, and an action therefor before such time is premature.[82]

(§ 24) *B. Practice and pleading.*[83] *Pleading.*—The usual rules of pleading apply.[84] The complaint must allege the execution of the policy,[85] describe the property destroyed,[86] and must allege that plaintiff owned it at the time of the fire.[87]

The performance or waiver of conditions precedent must be alleged,[88] but as

77. Agent held not to have had such authority. Barry & F. Lumber Co. v. Citizens' Ins. Co. [Mich.] 98 N. W. 761.

78. Barry & F. Lumber Co. v. Citizens' Ins. Co. [Mich.] 98 N. W. 761.

79. Comp. Laws, § 7246. Barry & F. Lumber Co. v. Citizens' Ins. Co. [Mich.] 98 N. W. 761.

80. Action held to have been brought after the expiration of limitation even after deducting delay induced by company's letters. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206.

81. Insured held not barred from maintaining action though policy provided that insured should not be deemed to have waived any of its provisions by any act relating to appraisement. Fritz v. British America Assur. Co., 208 Pa. 268, 57 A. 573.

82. Where equitable action to set aside award is instituted before sixty days expires, and plaintiff fails to show grounds for such relief, the court cannot retain cause and give judgment for plaintiff for amount of award. Bellinger v. German Ins. Co., 95 App. Div. 262, 88 N. Y. S. 1020.

83. See 2 Curr. L. 535. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1518, § 12.

84. Where the words "of Brooklyn, New York," followed the name of the company in the title of the cause, and it was so named in the policy, it sufficiently shows the state in which it was organized, if such an allegation is necessary. Phoenix Ins. Co. v. McAtee [Ind. App.] 70 N. E. 947. Designating defendant as "Underwriters' Fire Association at Dallas" instead of "of Dallas," held immaterial. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072.

Fire Insurance: Petition held to state cause of action on policy declared on. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072. Petition sufficient after verdict. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299.

Life insurance: Petition held, at its worst, to state a good cause of action imperfectly and hence to be sufficient after verdict. Robinson v. Metropolitan Life Ins. Co., 105 Mo. App. 567, 80 S. W. 9.

85. Under the laws of Indiana where each paragraph of the complaint alleges the execution of the policy, and defendant does not deny such execution under oath, it is estopped to claim that it had never been delivered with intent that it should become operative. Civ. Code, § 115 (Burns' Ann. St. 1901, § 376), relating to proof of written instruments. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

86. In an action on a policy covering goods on the first floor, the petition need not allege that they were on such floor where the building is only one story high. Is matter of defense in any event. Pence v. Mercantile Town Mut. Ins. Co. [Mo. App.] 80 S. W. 746. Petition held sufficient where description in policy was followed, and it was impossible to produce an itemized list of such property on account of the destruction of plaintiff's books. American Cent. Ins. Co. v. Nunn [Tex. Civ. App.] 79 S. W. 88, rvd. on other grounds, 82 S. W. 497.

87. Complaint held to sufficiently allege that plaintiff was owner of property at time of fire. Redner v. New York Fire Ins. Co. [Minn.] 99 N. W. 886.

88. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299; Guarino v. Firemen's Ins. Co., 44 Misc. 218, 88 N. Y. S. 1044. Complaint in action on policy of burglary insufficient, held not to sufficiently show that notice and proof of loss were given within reasonable time. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167. Declaration held sufficient. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So.

a rule this may be done generally.[89] The complaint need not negative any of the provisions of the policy not made conditions precedent to the right to institute suit.[90] The three-fourth value clause and provisions in regard to concurrent insurance are matters of defense, and need not be referred to in the petition where the loss is total.[91]

The facts showing a waiver must be pleaded.[92] It cannot be shown under an allegation of performance.[93] It is sufficient if acts constituting an estoppel are pleaded without pleading the conclusion that one is estopped.[94] An averment that after the death of the insured the defendant waived the provision that the policy should only apply to persons between certain ages, and ratified and confirmed the policy as a contract for a specified time, sets forth a new contract with the beneficiary, and must show a consideration therefor.[95] The truth of answers in the application must be alleged where they are made a part of the policy, which provides for a forfeiture if they are not strictly true.

Where the pleading, by incorporating the policy, shows that it applies only in certain cases, it must aver facts bringing the case within its provisions.[96] It is not necessary to attach to the complaint a copy of the application on which the life policy sued on was issued.[97]

In an action on an accident policy, the complaint must allege that the disability resulted immediately from the injury,[98] or that insured came to his death by violent, external and accidental means within the time covered by the policy.[99]

A mixed bill for discovery and relief must state a good case for recovery or defense in order to obtain discovery.[1]

62. Complaint insufficient to show waiver of notice and proofs of loss. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167.

89. Under Mo. Rev. St. 1899, § 634, general allegation of performance is sufficient to cover furnishing of notice and proofs of loss. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299. N. Y. Code Civ. Proc. § 533. Guarino v. Firemen's Ins. Co., 44 Misc. 218, 88 N. Y. S. 1044. An allegation that plaintiff has duly performed all of the conditions required of him by the contract does not take the place of an allegation that the disease from which he suffered necessitated his continuous confinement within doors, and the services of a physician, within the conditions of a policy of health insurance. Bishop v. United States Casualty Co., 91 N. Y. S. 176.

90. Conditions excusing insurer from payment or reducing principal sum insured are matters of defense. Petition sufficient. Aetna Life Ins. Co. v. Milward [Ky.] 82 S. W. 364.

91. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299.

92. Petition held to sufficiently allege facts constituting waiver of forfeiture for nonpayment of full amount of premium when due. Battin v. Northwestern Mut. Life Ins. Co. [C. C. A.] 130 F. 874. An allegation that defendant has, in its dealings with the insured, now deceased, treated the policy as in force held insufficient. Id. Reply held to sufficiently allege authority of agent to waive condition against incumbrances. German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897. An amendment to show waiver is properly disallowed where none of the acts alleged therein would constitute a waiver. Everett-Ridley-Ragan Co. v. Traders' Ins. Co. [Ga.] 48 S. E. 918.

93. Where pleaded waiver only of clause in regard to filing proof of loss, and alleged performance of all other conditions, could not prove waiver of limitation of time within which action must be begun. Allen v. Dutchess County Mut. Ins. Co., 95 App. Div. 86, 88 N. Y. S. 530.

94. Estoppel of company to claim, in action for return of premiums, that contract was still in force, where it retained policy when plaintiff returned it. Anderson v. New York Life Ins. Co., 34 Wash. 616, 76 P. 109.

95. Petition held demurrable. Wheeler v. United States Casualty Co. [N. J. Law] 57 A. 124.

96. Age limit in accident policy. Wheeler v. United States Casualty Co. [N. J. Law] 57 A. 124.

97. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

98. Complaint held sufficient. Pacific Mut. Life Ins. Co. v. Branham [Ind. App.] 70 N. E. 174.

99. Aetna Life Ins. Co. v. Milward [Ky.] 82 S. W. 364. Where an accident from external means results in an internal injury it is sufficient to so charge without specifying the particular organ hurt. Declaration alleging strain caused by lifting heavy substance which fell against and struck assured, held sufficient. Pervanger v. Union Casualty & Surety Co. [Miss.] 37 So. 461.

1. Discovery of provisions in regard to proofs of loss sought because of loss of policy. Must show that proofs were furnished or waived. Munson v. German-American Fire Ins. Co. [W. Va.] 47 S. E. 160.

In West Virginia the statute provides a short form of declaration on an insurance policy,[2] and if the defense is a failure of the insured to comply with, or his violation of any clause, condition, or warranty, the defendant must file a statement specifying the particular one with respect to which such failure or violation occurred.[3] Such statement must be filed even though the warranty is a condition precedent to recovery.[4] After it is filed, the burden of showing a compliance, if a condition precedent to recovery, is on plaintiff.[5] Such statement is not a plea but only a specification, and is not open to demurrer for want of sufficiency.[6]

Facts showing a forfeiture must be pleaded.[7] An allegation in the answer that no notice of loss was given is admitted by a reply pleading waiver and estoppel or matter to avoid the effect of failure to give it.[8] An affidavit of defense charging false answers and representations in the application and letters must have a copy of such applications and letters attached.[9]

Practice.—Allowing the jury to view the premises,[10] and allowing amendments,[11] are matters largely in the discretion of the trial court. A motion for nonsuit on the ground that plaintiff has not complied with the conditions of the policy, made at the close of plaintiff's evidence, should not be granted since plaintiff may show waiver in reply.[12]

Variance.[13]—The usual rules as to variance apply.[14]

(§ 24) *C. Evidence, questions for jury, instructions.*[15] *Burden of proof.*—The burden is on plaintiff to prove every element necessary to establish liability on the part of the insurer.[16] The burden is on him to show the value of the

2. Code 1899, c. 125, § 61. Rosenthal Clothing & Dry Goods Co. v. Scottish Union & Nat. Ins. Co. [W. Va.] 46 S. E. 1021.

3. Code 1899, c. 125, § 64. Rosenthal Clothing & Dry Goods Co. v. Scottish Union & Nat. Ins. Co. [W. Va.] 46 S. E. 1021.

4. Otherwise no evidence of compliance therewith is necessary. Rosenthal Clothing & Dry Goods Co. v. Scottish Union & Nat. Ins. Co. [W. Va.] 46 S. E. 1021.

5. Rosenthal Clothing & Dry Goods Co. v. Scottish Union & Nat. Ins. Co. [W. Va.] 46 S. E. 1021.

6. If too vague, evidence thereunder may be excluded. Rosenthal Clothing & Dry Goods Co. v. Scottish Union & Nat. Ins. Co. [W. Va.] 46 S. E. 1021.

7. Queen Ins. Co. v. Excelsior Mill. Co. [Kan.] 76 P. 423. Where the policy provides for a forfeiture in case the property is a manufacturing establishment and remains idle more than a specified number of days, an answer which fails to allege specifically that the property was such an establishment fails to plead a forfeiture because of idleness. Id.

8. Question of excuse, or of whether notice was given within a reasonable time is entirely eliminated, and the only question left is waiver. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 101 N. W. 341.

9. Keen v. Mutual Life Ins. Co., 131 F. 559.

10. Rickeman v. Williamsburg City Fire Ins. Co. [Wis.] 98 N. W. 960.

11. Amendment to complaint so as to allege that policy was issued to one by mistake and thereafter assigned to true owner of the property held properly allowed. Vesey v. Commercial Union Assur. Co. [S. D.] 101 N. W. 1074.

12. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4.

13. See 2 Curr. L. 538.

14. It is a variance and not a failure of proof where petition alleges an absolute promise and evidence shows a conditional promise, as that loss was payable to plaintiff as his interest might appear. Farmers' Bank v. Manchester Assur. Co. [Mo. App.] 80 S. W. 299. Variance between pleading and proof in description of building destroyed. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072. Fact that pleadings allege waiver of inventory on Dec. 16th, held not to make evidence of waiver on Jan. 1st inadmissible on ground of variance. Fire Ass'n of Philadelphia v. Masterson [Tex. Civ. App.] 83 S. W. 49. In action to recover premiums paid on life policy on ground of misrepresentations by agent as to loan clause therein, evidence as to agent's representations held within the issues raised by pleadings. Anderson v. New York Life Ins. Co., 34 Wash. 616, 76 P. 109. Demurrer on ground that action was on policy while complaint showed that loss was settled by arbitration and award, held properly overruled. Phoenix Ins. Co. v McAtee [Ind. App.] 70 N. E. 947. An allegation that plaintiff committed fraud in making false statements in plans and specifications sworn to by him, averring no facts showing fraud and in support of which no copy of specifications was filed, stated no defense. Id. Where the policy provides that it shall be void if the answers in the application are not strictly true, and the application is made a part of, and declared to be the basis of, the contract, plaintiff must allege their truth. Fell v. John Hancock Mut. Life Ins. Co., 76 Conn. 494, 57 A. 175.

15. See 2 Curr. L. 539. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1518, § 12.

16. Taylor v. General Acc. Assur. Corp.,

property destroyed.[17] In a suit on an accident policy, the burden is on plaintiff to show that the death of the insured was due to accidental causes.[18] The burden of proving the materiality of false representations is on the insurer.[19] The burden of ultimately proving the truth of representations contained in the application, which is made a part of the policy, is on the plaintiff.[20] They are, however, presumed to be true, in the absence of countervailing proof.[21] Hence, he need not, in the first instance, offer proof to support his allegations that such is the fact, but may do so in rebuttal after defendant has offered evidence tending to show misrepresentations.[22] But such presumption has no probative force in determining an issue of fact as to whether such representations were true.[23]

A company securing the right to open and close by filing an admission that plaintiff was entitled to recover unless defendant established one or more of its affirmative defenses has the burden of proving a breach so alleged.[24] The defendant has also been held to have the burden of showing that the property was idle longer than the period allowed by the policy,[25] the intentional and fraudulent exaggeration of the amount of the loss,[26] and that the insured had cancer at the time he applied for insurance.[27]

The law presumes against suicide.[28] Hence, the burden of proving it is on the insurer defending on that ground.[29] It may be shown by circumstantial as well as direct testimony.[30]

Evidence.—Proofs of death are evidence against the beneficiary of facts therein contained only on the theory that they are admissions by him.[31] Where they are

208 Pa. 439, 57 A. 830. Where employer's liability policy exempted defendant from liability for injuries caused by subcontractor or his workman, insured must prove that injuries on which liability was based were not so caused. Tolmie v. Fidelity & Casualty Co., 95 App. Div. 352, 88 N. Y. S. 717. In action on employer's liability policy by contractor, held that judgment roll in action against city for same injury, of which defendant had notice and which it had opportunity to defend, was conclusive against it of defect causing injury, the injured party's freedom from negligence, and the amount of damages recovered, but that it did not establish whether injury was due to act of plaintiff or of subcontractor. Id.

17. Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; Tabbut v. American Ins. Co., 185 Mass. 419, 70 N. E. 430.

18. To show that it was not due to suicide. Hill v. Central Acc. Ins. Co. [Pa.] 59 A. 262. That fall resulting in death was accidental. Taylor v. General Acc. Assur. Corp., 208 Pa. 439, 57 A. 830.

19. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

20. Vincent v. Mutual Reserve Fund Life Ass'n [Conn.] 58 A. 963. Burden is on him to show it as to any which are denied. Feil v. John Hancock Mut. Life Ins. Co., 76 Conn. 494, 57 A. 175. Unless their truth is established by a fair preponderance of all the evidence, defendant is entitled to judgment. Evidence held to show breach of warranty as to occupation as matter of law. Id.

21. Vincent v. Mutual Reserve Fund Life Ass'n [Conn.] 58 A. 963.

22. Introduction of policy, certificate of death, and proofs of death and loss, make prima facie case. Vincent v. Mutual Reserve Fund Life Ass'n [Conn.] 58 A. 963.

23. Instructions erroneous. Vincent v. Mutual Reserve Fund Life Ass'n [Conn.] 58 A. 963.

24. By sale of goods after fire. Phoenix Assur. Co. v. Stenson [Tex. Civ. App.] 79 S. W. 866.

25. That a mill was idle later than the winter season, contrary to the terms of the policy. Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866.

26. Goldstein v. St. Paul Fire & Marine Ins. Co. [Iowa] 99 N. W. 696.

27. That a sore on the insured's tongue at the time of the application was a cancer or that he believed it to be such. Evidence held not to show that insured had cancer or that he had reason to believe that canker on tongue was a cancer. Peck v. Washington Life Ins. Co., 91 App. Div. 597, 87 N. Y. S. 210.

28. Where death explainable on another theory, it will be adopted. Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305. Evidence insufficient to show suicide. Id. Finding that insured did not commit suicide, held not against weight of evidence. American Benev. Ass'n v. Stough [Ky.] 83 S. W. 126. Evidence sufficient, in view of presumption, to sustain finding of accidental death. Aetna Life Ins. Co. v. Milward [Ky.] 82 S. W. 364. Will not be presumed where the facts admit of any other construction. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

29. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595; Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305.

30. Presumptions on which courts will act must be weighty, precise, and consistent [La. Civ. Code, art. 2288]. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

31. To prove misstatement as to age. Barnett v. Prudential Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842.

not verified by plaintiff, it is incumbent on the company offering them to prove the circumstances making them admissible against him as an admission.[32] There is no presumption that plaintiff furnished them.[33] There is a conflict of authority as to the admissibility of affidavits of others than the beneficiary constituting a part of the proofs of death.[34] Proofs of death, though not made by plaintiffs, are admissible against them when they are made on behalf of all the beneficiaries, and no other proofs having been made, the right to recover depends on them.[35] A provision in a life policy that the proofs shall be evidence of the facts therein stated in behalf of, but not against, the company, is valid.[36]

Proofs of loss under a fire policy are not evidence for the plaintiff and cannot be read to the jury.[37] They are for the court in order that it may determine, as a preliminary matter, whether there has been a sufficient compliance with a condition precedent to the institution of the action.[38] Before a copy of the proofs can be introduced by the insured, he must give notice to the company to produce the original.[39]

In an action on an accident policy, the verdict of the coroner's jury is not admissible to show the cause of death.[40]

Parol evidence of the contents of an inventory destroyed with the goods is admissible.[41] The insured may testify that he was the owner of the insured building,[42] and as to the nature of the fixtures insured and their value at the time of the fire.[43] Declarations of the assignor of a life policy as to his age, made after the assignment, are not admissible against the assignee in an action on the policy.[44] Expressions of the agent's opinions as to the rights of the parties, made after the policy was issued, are inadmissible.[45] Statements of the insured made after the time for payment of premiums that he intended to keep up the policy are inadmissible for any purpose,[46] and his declarations, made after the policy is delivered, to the effect that he has dropped it, are inadmissible when offered with reference to the invalidity of the policy on account of the first premium not having been paid in full on delivery.[47] In an action on a life policy by an assignee thereof, declarations of the insured made after the assignment, tending to show an intention to commit suicide, are not admissible to prove that fact, when so separated from the act by lapse of time as not to be a part of the res gestae.[48]

32, 33. Barnett v. Prudential Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842.

34. The certificate of the attending physician, when made a part of the proofs of death, is competent as an admission against interest. To show breach of warranty. Not privileged. Carmichael v. John Hancock Mut. Life Ins. Co., 90 N. Y. S. 1033. Affidavits of others than the beneficiary constituting proofs of death are inadmissible except for purposes of impeachment. American Benev. Ass'n v. Stough [Ky.] 83 S. W. 126.

35. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206.

36. Donnelly v. Metropolitan Life Ins. Co., 43 Misc. 87, 86 N. Y. S. 790. Under such a provision, the physician's certificate contained therein is competent testimony in support of the insurer's contention that the insured was not in good health when the policy was revived. Revived on condition that he was then in sound health. Id. Evidence as to insured's good health held to be of no force and in no way to tend to disprove statements contained in such certificate. Id.

37, 38. Rosenberg v. Fireman's Fund Ins. Co. [Pa.] 58 A. 671.

39. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072.

40. Aetna Life Ins. Co. v. Milward [Ky.] 82 S. W. 364. Also, see Inquest of Death, 4 Curr. L. 125. Refusal to admit verdict of coroner's jury reciting cause of death where that fact established by other evidence is harmless error. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206.

41. Iron-safe clause waived. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115.

42, 43. Phoenix Ins. Co. v. McAtee [Ind. App.] 70 N. E. 947.

44. Barnett v. Prudential Ins. Co., 91 App. Div. 435, 86 N. Y. S. 842.

45. Rights not affected thereby. Meigs v. London Assur. Co., 126 F. 781.

46. Brown v. Pacific Mut. Life Ins. Co. [Mo. App.] 82 S. W. 1122.

47. Metropolitan Life Ins. Co. v. Bradley [Tex. Civ. App.] 79 S. W. 367, rvd. on other grounds 82 S. W. 1031.

48. Inadmissible in any event where they were uncertain in meaning and did not

The general rules as to the admissibility of evidence apply.[49] Proof that the insured did not sign the application on a particular occasion is insufficient to show that he never signed it.[50] The fact that the verdict is less than the amount claimed and the face of the policy does not establish the fact of fraudulent overvaluation as a matter of law.[51] The evidence as to loss need not be conclusive in character or mathematical in certainty, but only the best obtainable under the circumstances.[52]

Where a rider was attached to a policy permitting a mill insured thereby to

clearly indicate a suicidal intent. Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305.

49. Accident insurance: Evidence as to value of plaintiff's time held not admissible under the pleadings. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678. Evidence of notice to company's agent that plaintiff had hernia held admissible, not to show waiver of terms of policy, but to meet plea of fraudulent concealment. Id.

Life insurance: Objection to card notifying insured of maturity of premium as irrelevant and immaterial properly overruled. Metropolitan Life Ins. Co. v. Gibbs [Tex. Civ. App.] 78 S. W. 398. Where witness testified that he had paid the premium to agent, admission of evidence that he had received money from deceased, who told him to pay it was without prejudice. Id. Questions on cross-examination held proper to show limits of witnesses' knowledge as to cause of death. American Benev. Ass'n v. Stough [Ky.] 83 S. W. 126.

Fire insurance: Question to agent as to his knowledge of existence of inventory held not leading. Fire Ass'n of Philadelphia v. Masterson [Tex. Civ. App.] 83 S. W. 49. Where plaintiff had a right to use the building as long as he should pay insurance, taxes and repairs, evidence as to the natural life of the building, and as to the cost of repairs and the amount of taxes plaintiff would have to pay in the ordinary course of events, is admissible on the question of damages. Error not to instruct jury to take into account his natural expectancy of life. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857. Where there was no question of fraud or misrepresentation, evidence that insured stated that he "had a firebug" as tenant, and would have to increase his insurance, and did so, held immaterial. Phoenix Ins. Co. v. McAtee [Ind. App.] 70 N. E. 947. Acts and conversations of agents after fire tending to show that they regarded transfer by clerk of insurance to goods removed to new location as obligatory, held competent on question whether clerk had authority to make such transfers, or, if not, whether agents ratified her acts. Thuringia Ins. Co. v. Goldsmith [C. C. A.] 132 F. 456. Under call to produce books and bills of goods at trial, plaintiff held not bound to produce certified copies of original bills and invoices destroyed at the fire. Wells Whip Co. v. Tanners' Mut. Fire Ins. Co. [Pa.] 58 A. 894. It is proper to allow the former secretary of a mutual insurance company, when testifying as to its transactions, in regard to which, at the time of their occurrence, he had personal knowledge, to refresh his memory by consulting its books, kept at his office during the time he was secretary. French v. Millville Mfg. Co. [N. J. Err. & App.] 59 A. 214.

Evidence sufficient: To authorize verdict for plaintiff in action on fire policy. Aetna Ins. Co. v. Brigham [Ga.] 48 S. E. 348; German-American Ins. Co. v. Yeagley [Ind.] 71 N. E. 897; Wells Whip Co. v. Tanners' Mut. Fire Ins. Co. [Pa.] 58 A. 894.

To sustain finding that insured did not set fire. Burge Bros. v. Greenwich Ins. Co. [Mo. App.] 80 S. W. 342; Hartley v. Pennsylvania Fire Ins. Co., 91 Minn. 382, 98 N. W. 198.

To sustain finding that fall resulting in death of assured was accidental within meaning of policy. Taylor v. General Acc. Assur. Corp., 208 Pa. 439, 57 A. 830.

In suit on accident policy to sustain verdict for plaintiff for eight weeks' disability. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

Evidence insufficient to show express or implied promise on part of indemnity insurer to pay amount of settlement with injured employe for which they were not otherwise liable. Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co., 130 F. 957.

Harmless error. Life and accident insurance: Requiring physicians who had attended insured or assisted at post mortem to detail facts on which conclusions as to cause of death were based before allowing them to testify held harmless, where all qualified and their evidence was received. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468. Error, if any, in allowing a hypothetical question to an expert as to whether the iron-safe clause is material to the risk, is harmless where the jury finds that such clause was waived. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115. Permitting beneficiary to state when she first knew that limitation of time within which proofs of death must be made was part of contract held harmless since by theory under which cause was submitted she was bound to furnish them within such time unless prevented by defendant. Robinson v. Northwestern Nat. Ins. Co. [Minn.] 100 N. W. 226.

Accident insurance: Admission of evidence as to value of plaintiff's time. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678.

Fire insurance: Evidence by plaintiffs of comparative amount of lumber carried by them and another dealer held not ground for reversal because calling for conclusion, where loss was total, and books and inventories were burned. Seigle v. Badger Lumber Co. [Mo. App.] 80 S. W. 4.

50. Evidence insufficient to show that insured did not sign. Berry v. Metropolitan Life Ins. Co., 43 Misc. 670, 88 N. Y. S. 140.

51. Verdict held not inconsistent with finding of no fraud. Goldstein v. St. Paul Fire & Marine Ins. Co. [Iowa] 99 N. W. 696.

52. Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27.

remain idle during the "winter season" it will be presumed, in the absence of evidence to the contrary, that the company understood the local meaning of that term.[53]

Where plaintiff introduces the policy on the back of which is a copy of the application purporting to be signed by insured, and in the claim of loss herself states that it was so signed, she is thereby estopped to introduce proof that he never signed it, for the purpose of avoiding the effect of a breach of warranty.[54] Allowing the jury to take with them, to assist them in reviewing and considering the evidence, a statement, prepared by plaintiff's counsel, of the items of loss claimed, the contents of which has been given in argument without objection, is in the discretion of the court.[55]

A custom cannot be shown to contradict the plain terms of the contract.[56] Where fraud in falsely overstating the amount of the loss is alleged as a defense, evidence of plaintiff's financial condition at the time when the merchandise was in his possession is admissible.[57] A postal registry receipt signed "Underwriters' Fire Association," with a name signed underneath, is admissible to show receipt of a letter by such company on proper proof of the authority of the signer, notwithstanding its full corporate name is not signed thereto.[58]

Questions for the jury.[59]—Whether the insured was in sound health when the policy was issued,[60] whether answers to questions in the application were made by the insured or the company's medical examiner,[61] the materiality of representations,[62] whether the insured used liquor to excess within the meaning of the application,[63] the sufficiency of a notice required by an accident policy,[64] whether it was given within a reasonable time,[65] whether the delay in giving it has been waived,[66] whether delays in furnishing blanks were unreasonable and prevented the beneficiary from making proofs of death within the time limited by the policy,[67] what constitutes unnecessary exposure to obvious danger,[68] the cause of insured's death,[69] whether or not a person was the agent of the company as between it and the insured

53. Notwithstanding fact that home office was not there and that insurance was issued through broker. Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866. Evidence sufficient to raise presumption as to meaning of term "winter season" in policy, and that contract was made in reference to usage in regard to term. Id.

54. Berry v. Metropolitan Life Ins. Co., 43 Misc. 670, 88 N. Y. S. 140.

55. Rickeman v. Williamsburg City Fire Ins. Co. [Wis.] 98 N. W. 960.

56. Substituting mere notice of loss for sworn statement required by policy, and making company liable within 60 days after it is given. Bornszewski v. Middlesex Mut. Assur. Co. [Mass.] 72 N. E. 250.

57. May show that he was in pressing need of money, and was compelled to overdraw bank account when he claimed to have had goods, which were readily convertible into money. Rickeman v. Williamsburg City Fire Ins. Co. [Wis.] 98 N. W. 960.

58. Underwriters' Fire Ass'n v. Henry [Tex. Civ. App.] 79 S. W. 1072.

59. See 2 Curr. L. 544.

60. Emerson v. Metropolitan Life Ins. Co., 185 Mass. 316, 70 N. E. 200.

61. As to health, on conflicting evidence. Price v. Washington Life Ins. Co. [Minn.] 99 N. W. 810.

62. Unless materiality is palpable and manifest. Question of materiality erroneously submitted to jury in view of evidence. Bankers' Life Ins. Co. v. Miller [Md.] 59 A. 116.

63. Moore v. Prudential Ins. Co., 92 App. Div. 135, 87 N. Y. S. 368.

64. Where beneficiary had no knowledge of policy until she found it two months after insured's death, when notice was immediately given. Nax v. Travelers' Ins. Co., 130 F. 985.

65. May be question of law in determining sufficiency of pleading as against demurrer. Fidelity & Casualty Co. v. Sanders, 32 Ind. App. 448, 70 N. E. 167.

66. Where company demanded further proofs and did not object to that furnished. Nax v. Travelers' Ins. Co., 130 F. 985.

67. Proofs required to be made on such blanks. Robinson v. Northwestern Nat. Ins. Co. [Minn.] 100 N. W. 226.

68. Taking into consideration all the circumstances. Unnecessary or negligent exposure to obvious danger. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926.

69. Where the evidence is circumstantial and admits of more than one reasonable conclusion. American Benev. Ass'n v. Stough [Ky.] 83 S. W. 126. In an action on an accident policy, where there is evidence that death resulted from external and violent means, and the theories as to how it occurred are conflicting. Hill v. Central Acc. Ins. Co. [Pa.] 59 A. 262.

in relation to the policy sued on,[70] whether title passed by a verbal sale of goods so as to work a forfeiture for any change of ownership,[71] what is material to the risk,[72] whether plaintiff fraudulently overvalued the goods destroyed,[73] whether the removal of the debris was done for the purpose of destroying evidence,[74] whether plaintiff feloniously caused the fire,[75] whether he complied with provisions permitting examination of the property, and his examination under oath,[76] and the responsibility for delay in, or abandonment of, an appraisal,[77] are ordinarily questions for the jury. Waiver,[78] and whether insured ratified the action of the agent of the mortgagee in surrendering the policy for cancellation,[79] are questions of mixed law and fact. It is unnecessary to submit to the jury the question of plaintiff's compliance with conditions where there is no evidence of his failure to do so.[80]

Instructions.[81]—The usual rules as to instructions apply.[82]

70. On conflicting evidence. Lewis v. Guardian Fire & Life Assur. Co., 93 App. Div. 157, 87 N. Y. S. 525.

71. Richardson v. Insurance Co. of North America [N. C.] 48 S. E. 733.

72. Except in such clear cases as can be determined by the court as a matter of law. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115.

73. On conflicting evidence. Goldstein v. St. Paul Fire & Marine Ins. Co. [Iowa] 99 N. W. 696; Rosenberg v. Fireman's Fund Ins. Co. [Pa.] 58 A. 671.

74. Under facts and circumstances showing opportunities given defendant to examine it, length of time it had been kept, and explanations given why it was removed. Instructions approved. Rickeman v. Williamsburg City Fire Ins. Co. [Wis.] 98 N. W. 960.

75, 76. Rosenberg v. Fireman's Fund Ins. Co. [Pa.] 58 A. 671.

77. Question as to responsibility for delay or abandonment of appraisal for jury. Fritz v. British America Assur. Co., 208 Pa. 268, 57 A. 573. Evidence held to warrant submission to jury of question whether failure to arbitrate was fault of company or of insured. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

78. A question of intention, and a fact to be determined by the jury. Each case must depend on its peculiar facts. Exchange Bank v. Thuringia Ins. Co. [Mo. App.] 83 S. W. 534. Where there is sufficient evidence to warrant a finding of waiver, question is for the jury. Limitation of time for commencing action. Fritz v. British America Assur. Co., 208 Pa. 268, 57 A. 573.

79. Decision of Illinois appellate court on such question conclusive on supreme court. Hartford Fire Ins. Co. v. Peterson, 209 Ill. 112, 70 N. E. 757.

80. Woodall v. Pacific Mut. Life Ins. Co. [Tex. Civ. App.] 79 S. W. 1090.

81. See 2 Curr. L. 545.

82. **Instructions erroneous:** As to liability on partnership note given for premiums on policies on lives of partners. White v. McPeck, 185 Mass. 451, 70 N. E. 463. As to when policy went into effect. An instruction that a policy of insurance was entered into by the secretary's acceptance of the application and membership fee is erroneous in not touching upon the authority of the secretary which was a point in dispute. Gillespie Home Tp. Mut. Fire Ins. Co. v. Prather, 105 Ill. App. 123. Instruction that policy did not go into effect until delivery erroneous and also prejudicial because the date of payment of premium was thereby changed so as to make only first premium in arrears at time of insured's death. Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 P. 665. As to waiver of appraisement. Carp v. Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757. Held that instruction should have been given submitting issue as to keeping and preserving books of account. Requests properly refused. Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27. Directing verdict for plaintiff in action on fire policy. Id. Instruction as to liability of company for commissions on application accepted after plaintiff had left its employ held too broad. Leviness v. Kaplan [Md.] 59 A. 127.

Instructions approved: As to weight of expert testimony. Not objectionable as belittling it. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468. As to cause of death in suit on accident policy. Id. As to continuing and total loss of business not inconsistent. Pacific Mut. Life Ins. Co. v. Branham [Ind. App.] 70 N. E. 174. As to fraudulent exaggeration of amount of loss. Goldstein v. St. Paul Fire & Marine Ins. Co. [Iowa] 99 N. W. 696. As to fraud and false swearing. Nute v. Hartford Fire Ins. Co. [Mo. App.] 83 S. W. 83. As to ownership. Pearistine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4. As to keeping books. Aetna Ins. Co. v. Fitze [Tex. Civ. App.] 78 S. W. 370. As to validity of stipulation requiring production of books and inventories. Rundell v. Anchor Fire Ins. Co. [Iowa] 101 N. W. 517. As to representations in regard to health on renewal of policy. Mulligan v. Prudential Ins. Co. [Conn.] 58 A. 230. As to whether death was due to unnecessary exposure to obvious danger. Price v. Standard Life & Acc. Ins. Co. [Minn.] 99 N. W. 887. As to effect of notice to agent that plaintiff had hernia. Travelers' Ins. Co. v. Thornton, 119 Ga. 455, 46 S. E. 678. As to suicide. Ross-Lewin v. Germania Life Ins. Co. [Colo. App.] 78 P. 305. Instruction to find for plaintiff unless insured died from intentionally inflicted gunshot wound held proper. American Benev. Ass'n v. Stough [Ky.] 83 S. W. 126. Error, if any, in refusing to instruct that if insured was liable to have fits, or

(§ 24) *D. Verdict, findings, judgment, costs, and fees.*[83]—A finding that a clause has been waived eliminates it from the policy.[84] Where the petition does not seek a return of the premiums, it is not error to refuse to render judgment therefor.[85]

Interest will be allowed on premiums paid under a void policy only from the date of the demand for their repayment.[86]

Costs and penalties.—In an action on a life policy by an assignee of the insured, the latter's administrator, brought in by interpleader at the instance of the company, should not be personally taxed with costs, though unsuccessful.[87] By statute in Kansas, the court in rendering judgment against insurance companies in certain cases may allow the plaintiff a reasonable attorney's fee, to be recovered as a part of the costs.[88] The amount to be recovered is not determinable by a jury.[89] In Florida the plaintiff may recover attorney's fees in actions on fire and life insurance policies and have the same included in the judgment.[90] By statute in Tennessee, insurance companies refusing in bad faith to promptly pay a loss, and policy holders bringing suit thereon in bad faith, are made liable to a penalty as damages.[91]

(§ 24) *E. Enforcement of judgment.*[92]

PROXIMATE CAUSE IN ACCIDENT INSURANCE.

[Special Article by Geo. F. Longsdorf.]

The distinction between an accident which is the "sole and proximate cause" of death and a bodily or physical "condition" contributing thereto or a "secondary or predisposing" cause is difficult in its application to the facts rather than in formulation of doctrine. The words themselves express the distinction as well perhaps as it can be defined though definitions of them are numerous. Efficiency[93]

loss of consciousness, or bad spells held harmless in view of finding that he was not subject to such disabilities. Emerson v. Metropolitan Life Ins. Co., 185 Mass. 316, 70 N. E. 200. In action on accident policy charge to find for plaintiff if he had complied with all the "conditions and agreements," where policy required compliance with the "agreements as conditions," held not misleading, where all agreements were made conditions precedent. Woodall v. Pacific Mut. Life Ins. Co. [Tex. Civ. App.] 79 S. W. 1090.

Submission of interrogatories: Interrogatory seeking finding as to whether goods were placed in stock at place to which he had removed held not objectionable as equivalent to general finding on issue. Goldstein v. St. Paul Fire & Marine Ins. Co. [Iowa] 99 N. W. 696. Held proper to refuse to submit to jury interrogatories as to size of boxes in which goods were shipped, and weight of goods, etc., where such facts had only remote bearing on issues. Id. Question submitted to jury as to whether insured committed suicide held not well framed. Fey v. I. O. O. F. Mut. Life Ins. Soc. [Wis.] 98 N. W. 206. Special interrogatories in suit on accident policy bearing on cause of death held objectionable. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468.

83. See 2 Curr. L. 546. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1518, § 12.

84. Hanna & Co. v. Orient Ins. Co. [Mo. App.] 82 S. W. 1115.

85. Beneficiary had no insurable interest. Wilton v. New York Life Ins. Co. [Tex. Civ. App.] 78 S. W. 403.

86. Paid by assignee of void policy under belief, induced by defendant's false representations, that it was valid [Burns' Rev. St. Ind. 1901, § 7045]. American Mut. Life Ins. Co. v. Bertram [Ind.] 70 N. E. 258.

87. Von Schuckmann v. Heinrich, 93 App. Div. 278, 87 N. Y. S. 673.

88. Gen. St. 1901, § 3410, is constitutional. Alliance Co-operative Ins. Co. v. Corbett [Kan.] 77 P. 108; German Ins. Co. v. Allen [Kan.] 77 P. 529.

89. Recovery limited to reimbursement for necessary expense, and taxable as costs. Not a penalty. Alliance Co-operative Ins. Co. v. Corbett [Kan.] 77 P. 108.

90. Act June 3, 1893, c. 4173, p. 101, held constitutional. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62; L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462. Act not repealed by Act May 31, 1899, c. 4677, p. 33. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62; L'Engle v. Scottish Union & Nat. Fire Ins. Co. [Fla.] 37 So. 462. Hence it is proper to demand them in the declaration on the policy. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

91. Acts 1901, p. 248, c. 141, §§ 1, 2, not repugnant to the 14th amendment of the U. S. constitution. Continental Fire Ins. Co. v. Whitaker [Tenn.] 79 S. W. 119.

92. See 2 Curr. L. 546.

93. Proximate cause is efficient cause. Insurance Co. v. Boon, 95 U. S. 117, 36 Am.

and not relation in time or place[94] is the test of causal proximity. A "predisposing cause" would seem to fall within the class of causes which while they do not owe their origin to the accident do owe their efficiency to its impulse.[95] A "secondary cause" may be secondary in origin or its causal efficiency may be secondary and in that sense it would cover predisposing cause. The physical or bodily "condition" of insured is his state or situation as regards the cause. Out of the condition the cause may generate a secondary cause, but the condition is not any of the degrees of cause.[96] In their application to accident insurance the difference between proximate and remote cause may be compared by analogy to the difference between accident and incident,[97] the meaning of "accident" being an important question to be first determined.[98] It is a question for the jury what was the proximate cause.[99] The burden of proof of accidental cause is on the plaintiff but he is aided in making his prima facie case by certain presumptions.[1] In applying stipulations and terms designed to limit the risk to accidental causes, "the tendency of the courts under the settled rules of construction applicable to insurance contracts is to interpret the clause in a manner favorable to the insured, and where the accident can be considered as the proximate cause of death although disease may have been present as a secondary cause,[2] or where death is the reasonable and natural consequence of the injury although disease may have supervened,[3] the policy is not avoided unless the exception plainly includes such case.[4] To do so, "the intervening cause * * * must be a new and independent cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable result of the original accidental injury, and produces a different result that could not reasonably be anticipated. It may not be a mere effect of that injury, produced by it, and dependent upon it for both its existence and its effect.[5] Liability

St. Rep. 808, note; Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 20 L. R. A. 297.

94. Not necessarily the nearest cause in time or place. Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 17 L. R. A. 753.

95. See Travelers' Ins. Co. v. Melick, 65 F. 178, 27 L. R. A. 629, quoted infra, note.

96. In Jarnagin v. Travelers' Protective Ass'n, 133 F. 892, it was said of a policy written on one who was killed by assailants against whom arresting officers failed to protect him: "The shots * * * were the direct and proximate cause and the failure of the officers to protect him was only a condition which may or may not have contributed to the result. It may have been easier to kill him because of the condition but it was not the condition which killed him. Thus a man with heart disease might be killed by a blow which would not affect a sound man, but nevertheless it would be the blow and not the heart disease which killed him." In Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 17 L. R. A. 629, liability to recurrence of peritonitis to which insured was susceptible was held not proximate cause where there was an accidental fall which induced peritonitis and resulting death. A fall was the cause and fatty degeneration of the heart rendered it fatal in the case of Modern Woodmen Ass'n v. Shryock, 54 Neb. 250, 74 N. W. 607, 39 L. R. A. 826.

97. Distinguished in Fenwick v. Schmaiz, L. R. 3 C. P. 313, cited 54 Am. Rep. 302 note, an action on charter party.

98. If accident "led to the cause of death then it would be accidental death." Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410. Meaning of word "accident" see note 30 L. R. A. 206, and note 54 Am. Rep. 302. Same as distinguished from disease, see 30 L. R. A. 209. Temporary fainting spell held not "disease," hence fall and consequent drowning was not a death from "disease." Manufacturers' Acc. Ins. Co. v. Dorgan, 58 F. 945. Recurrence of disease by reason of accident was held a disease "accelerated by accident." Anderson v. Scottish Acc. Ins. Co., 27 Scot. L. R. 20, cited 1 Am. & Eng. Enc. Law [2nd Ed.] 317.

99. Modern Woodmen Acc. Ass'n v. Shryock, 54 Neb. 250, 39 L. R. A. 826.

1. Suicide not presumed. Note in 50 Am. St. Rep. 441; Kerr, Insurance, p. 777; 1 Am. & Eng. Enc. Law [2nd Ed.] 330, 331.

2. 1 Am. & Eng. Enc. Law [2nd Ed.] 315, citing Lawrence v. Accidental Ins. Co., 7 Q. B. Div. 216; Prader v. National Masonic Acc. Ass'n, 95 Iowa, 149, 63 N. W. 601; Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351; Wehle v. United States Mut. Acc. Ass'n, 11 Misc. [N. Y.] 41, 60 Am. St. Rep. 598; Hall v. American Masonic Acc. Ass'n, 86 Wis. 518.

3, 4. 1 Am. & Eng. Enc. Law [2nd Ed.] 315, citing Isitt v. Railway Pass. Assur. Co. 22 Q. B. Div. 504; Peck v. Equitable Acc. Ass'n, 52 Hun [N. Y.] 255.

5. Sanborn, J., in Travelers' Ins. Co. v. Melick, 65 F. 178, 27 L. R. A. 629. The court upheld findings that there was causal proximity between a pistol shot wound and

for "secondary" or "predisposing" causes may of course be avoided by stipulation but it must clearly so intend. Thus insurance against injury by accident which is the "sole and direct cause," excepting certain diseases causing death "directly or jointly" with the accidental injury, protects one who died under operation to relieve an excepted disease, hernia, caused directly by accident.[6] He was not, however, protected under similar circumstances by a policy which excluded death from "secondary" causes.[7] There is a class of cases wherein the exception of death "accelerated or promoted" by disease excludes recovery if the disease contributed with an otherwise nonfatal accident to cause death.[8]

Reducing the cases to classes, it appears that as regards proximate and remote causes the following general conclusions may be reached:

Disease which owes its existence to the injury or accident is not a cause.[9]

A disease causing accident which in turn causes death is not always the proximate cause. The accident may be.[10] The cases may perhaps be reconciled by applying the test—did the accident operating after the disease produce a different

death where tetanus had set in with aberration of mind caused by the pain during which the insured cut his throat.

6. Fitton v. Accidental Death Ins. Co., 17 C. B. [N. S.] 122, cited 8 Am. Rep. 218, note; Travelers' Ins. Co. v. Murray, 16 Colo. 267, 25 Am. St. Rep. 267. [It would seem that causes could not be joint if one owed its existence solely to the other.]

7. Smith v. Accidental Ins. Co., L. R. 5 Exch. 302, cited 8 Am. Rep. 218, note. Cases bearing on the doctrine of secondary causes are collected in 36 Am. St. Rep. 859-861, note.

Death "resulting * * * either as a cause or effect" did not exempt the insurer where temporary sickness led a passenger to go on the platform of a train to vomit and he fell off. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926. In that case the court speaks of the sickness as a "coincidence."

8. See note 30 L. R. A. 211, citing Cawley v. National Employers' Acc. & General Assur. Ass'n, 1 Cab. & El. 597; Anderson v. Scottish Ins. Co., 27 Scot. L. Rep. 20.

Whether an exclusion of liability for death "**resulting** wholly or partly, directly or indirectly from disease or bodily infirmity in any form" has a like effect is doubtful. No doubt "result" might be regarded etymologically as broader than "effect," which is the correlative of cause. Whether it is so when used in a policy seems never to have been specially considered. Probably it would be interpreted as synonymous with "effect," at least in all but the Federal courts, and even their later decisions warrant this forecast. See Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926. At least they should not be construed to mean what might substantially nullify the insurance. See Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592.

The words appear in the policies construed in the cases of National Masonic Acc. Ins. Co. v. Shryock, 73 F. 774; Commercial, etc., Ass'n v. Fulton, 79 F. 423; Travelers' Ins. Co. v. Melick, 65 F. 178, 27 L. R. A. 629. Similar words ["consequence"] appear in that of Freeman v. Ass'n, 156 Mass. 351, 17 L. R. A. 753; and in that of Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926, which added the words "either as a cause or effect."

9. Travelers' Ins. Co. v. Melick, 65 F. 178, 27 L. R. A. 629. Western Commercial Travelers' Ass'n v. Smith, 85 F. 401. Peritonitis from surgery to cure hernia caused by accident. Travelers' Ins. Co. v. Murray, 16 Colo. 296, cited 17 L. R. A. 753. Erysipelas caused by a wound. Young v. Accident Ins. Co., 20 Duv. 280, cited 1 Am. & Eng. Enc. Law [2nd Ed.] 316; Montreal L. Rep., 6 Super. Ct. 3, cited 17 L. R. A. 753. Pneumonia while bedfast from accident. Isitt v. Railway Pass. Assur. Co., 22 Q. B. Div. 504. Apoplexy. Indianapolis Nat. Ben. Ass'n v. Grauman, 107 Ind. 288, cited 17 L. R. A. 754. Blood poisoning from the wound. Martin v. Equitable Acc. Ass'n, 61 Hun [N. Y.] 467. Nervous derangement or fright from runaway. McGlinchey v. Fidelity & C. Co., 80 Me. 251, 6 Am. St. Rep. 190. Embolism or thrombus from a fracture. Peck v. Equitable Acc. Ass'n, 52 Hun [N. Y.] 255. Peritonitis from a blow on the abdomen. North American Life & Acc. Ins. Co. v. Burroughs, 64 Pa. 43, 8 Am. Rep. 212. Accident not of itself fatal causing fall into water and drowning. Mallory v. Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410. Fatal blood poisoning either from an accidental wound or from other sources introduced into the wound is accidental. Delaney v. Modern Acc. Club [Iowa] 63 L. R. A. 603.

But see: Suicide while insane from accidental injury held as matter of law not proximately caused by accident. Streeter v. Western Ins. Co., 65 Mich. 199, 8 Am St. Rep. 882.

10. Epilepsy causing one to fall into a stream and drown. Winspear v. Accident Ins. Co., 6 Q. B. Div. 42. See other cases cited 1 Am. & Eng. Enc. Law [2nd Ed.] 317. A fit causing one to fall before a locomotive. Lawrence v. Accidental Ins. Co., 7 Q. B. Div. 216, cited 1 Am. & Eng. Enc. Law [2nd Ed.] 318. Accidental drowning is sole and proximate cause where because of sickness insured fell into water. Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 F. 945, 22 L. R. A. 620. Death "resulting wholly or partly, directly or indirectly, from disease in any form either as a cause or effect" does not withdraw protection to one who became sick aboard a train and finding the closet locked went to the platform to vomit and was thrown off and killed. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926. Com-

result that could not reasonably be anticipated?[11] Such an injury is usually excepted by express provision,[12] in applying which the rule of ejusdem generis does not apply to an exception against death from intoxication, sunstroke, vertigo, hernia, "or any disease or bodily infirmity."[13]

A disease fatal or nonfatal, antedating an accident, not necessarily or probably fatal, but so set in motion by the accident that death results, is merely a condition or a predisposing cause. It is not the efficient cause. The accident is a "sole and proximate cause independent of all other causes." The words quoted do not refer to remote or secondary causes.[14] Of the opposite contention it was said "there would be scarcely any limit to their nullifying power.[15]

ASSIGNABILITY OF LIFE INSURANCE POLICIES.

[Special Article by Hascal R. Brill, Jr.]

The common law and statutes.—Being a chose in action an insurance policy was not originally assignable at common law, though the assignee had his remedy in equity.[16] By statute in most states they are now made assignable,[17] and the assignee may generally sue thereon in his own name.[18]

pare Meyer v. Fidelity, etc., Co., 96 Iowa, 378, 59 Am. St. Rep. 374.

But see Tennant v. Travelers' Ins. Co., 31 F. 322.

Delirium during which insured fell from the window of his sick room is the proximate cause. Carr v. Pacific M. L. Ins. Co., 100 Mo. App. 602, 75 S. W. 180, disapproving Lawrence v. Accident Ins. Co., 7 Q. B. Div. 216.

11. See Travelers' Ins. Co. v. Mellck, 65 F. 178, 27 L. R. A. 629. Sickness and vomiting is not a disease but a mere coincidence, and not a cause where insured on a train went to the closet but it being locked went to the platform to vomit and was thrown off and killed. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926.

12. Carr v. Pacific Mut. L. I. Co., 100 Mo. App. 602, 75 S. W. 180, citing Commonwealth Ass'n v. Fulton, 79 F. 423; National Ass'n v. Shryock, 73 F. 774; Hubbard v. Ins. Co., 98 F. 932; Sharpe v. Association, 139 Ind. 92.

Insurance nullified by heart disease and a fall resulting in death. National Masonic, etc., Ass'n v. Shryock, 73 F. 774; Commercial, etc., Ass'n v. Fulton, 79 F. 423. Insurance covered fall and predisposition to peritonitis. Freeman v. Ass'n, 156 Mass. 351, 17 L. R. A. 753. Also covered fall from train while temporarily sick. Preferred Acc. Ins. Co. v. Muir [C. C. A.] 126 F. 926. See, also, ante, n. 8.

13. Carr v. Pacific Mutual Life Ins. Co., 100 Mo. App. 602, 75 S. W. 180. "Causing death directly or jointly with" the accident excludes a fit whereby an accident befell resulting in death. Lawrence v. Accidental Ins. Co., 7 Q. B. Div. 216.

14. Fetter v. Fidelity & C. Co., 174 Mo. 256, 61 L. R. A. 459; Freeman v. Mercantile Mut. Acc. Ass'n, 156 Mass. 351, 17 L. R. A. 753. A blow which ruptured a cancerous kidney whence fatal hemorrhages followed is a proximate cause "independent of all other causes." Fetter v. Fidelity & C. Co., 174 Mo. 256, 61 L. R. A. 459. There was in that case evidence that the cancer might have resulted from the blow. Being thrown against a car seat is the cause and not the diseased condition which was thereby hastened. Aetna Life Ins. Co. v. Hicks, 23 Tex. Civ. App. 74, 56 S. W. 87. In Standard L. & Acc. Ins. Co. v. Sale [C. C. A.] 121 F. 664, 61 L. R. A. 337, a charge was approved which read—"If * * * chronic Bright's disease combined with the injury as an **efficient operative** to produce death" there could be no recovery under a policy restricted to death from accident as the "proximate and sole cause thereof." The holding is dictum since the judgment was reversed for other errors. According to the other cases, it could on a direct challenge be sustained only by interpreting the words "efficient operative" so as to exclude predisposing and secondary causes. This is the correct rule. See cases defining proximate cause as efficient cause, supra.

15. Valliant, J., in Fetter v. Fidelity & C. Co., 174 Mo. 256, 61 L. R. A. 459.

It would not seem just to apply a more strict rule against the insured than the criminal law will apply to make one guilty of a felony perpetrated by negligently setting a cause in motion. In Reg. v. Plummer, 1 Car. & K. 600, cited 61 L. R. A. 293, a prosecution for negligent homicide, the neglect was held the cause of death though it operated by accelerating a fatal disease.

16. New York Life Ins. Co. v. Flack [3 Md. 341] 56 Am. Dec. 742, note. Assignment vests an equitable interest in the assignee, who may sue thereon in the name of the assignor. Palmer v. Merrill, 6 Cush. [Mass.] 282, 52 Am. Dec. 782 and note; New York Life Ins. Co. v. Flack [3 Md. 341] 56 Am. Dec. 742, note.

17. Md. Acts 1829, c. 51. New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742 and note; Hewlett v. Home for Incurables, 74 Md. 350, 17 L. R. A. 447. Assignable under Iowa Code, §§ 3044, 3046, 3443, making all choses in action assignable. Farmers' & Traders' Bank v. Johnson, 118 Iowa, 282, 91 N. W. 1074. Policy a chose in action

Necessity of insurable interest.—One having an insurable interest may become the owner of the policy by assignment.[19]

There is a conflict of authority as to whether a life policy may be assigned to one having no insurable interest in the life of the insured.[20] Some courts hold that if the policy is valid in its inception it may be assigned to anyone, whether he has such an insurable interest or not,[21] provided the transaction is in good faith

and assignable under Ga. Civ. Code, § 3077. Steele v. Gatlin, 115 Ga. 929, 42 S. E. 253. Policies of insurance are governed by the rules applicable to ordinary simple contracts. St. John v. American Mut. Life Ins. Co., 13 N. Y. 31, 64 Am. Dec. 629. A policy issued to one in his own name, payable to his representatives, may be assigned, and assignee may recover full amount, regardless of what he paid for it. Id.

18. New York Life Ins. Co. v. Flack, 3 Md. 341, 56 Am. Dec. 742, note; Farmers' & Traders' Bank v. Johnson, 118 Iowa, 282, 91 N. W. 1074. Assignee may sue in his own name [Pa. Act March 17, 1843]. O'Grady v. Prudential Ins. Co., 3 Pa. Super. Ct. 548. An assignee of a policy valid in its inception may maintain an action thereon. Peck v. Washington Life Ins. Co., 91 App. Div. 697, 87 N. Y. S. 210.

19. Cheeves v. Anders, 87 Tex. 287, 47 Am. St. Rep. 107. Creditor. Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620. One to whom insured assumes parental relations. Carpenter v. U. S. Life Ins. Co., 161 Pa. 9, 23 L. R. A. 571.

As to what is insurable interest, see Insurance, 4 Curr. L. 166, § 5; compare Fraternal Mutual Benefit Associations, 3 Curr. L. 1499.

20. Discussions of the subject and collections of authorities on both sides will be found in notes to the following cases: Bursinger v. Bank, 58 Am. Rep. 852; Currier v. Continental Life Ins. Co., 52 Am. Rep. 143; Singleton v. St. Louis Ins. Co., 27 Am. Rep. 327; New York Life Ins. Co. v. Flack, 56 Am. Dec. 747; Morrell v. Trenton Ins. Co., 57 Am. Dec. 103; 9 L. R. A. 660; 7 L. R. A. 217; 64 L. R. A. 338. Note 17 Am. L. Reg. 86, 64 Am. Dec. 529.

The question is one of general law in the decision of which the federal courts are not bound by the decisions of the court where it arises. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444.

21. California: By statute a policy of insurance on life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and he may recover on it whatever the insured might have recovered. Civ. Code, § 2764. Whether under this act parties can stipulate against assignment to one having no interest, quaere. Curtiss v. Aetna Life Ins. Co., 90 Cal. 245, 27 P. 211, 25 Am. St. Rep. 114. After a loss and fixed liability attached, it is no concern whatever to the insurer whether the assignee has or has not an insurable interest. Id.

Connecticut: Fitzgerald v. Hartford, etc., Ins. Co., 56 Conn. 116, 13 A. 673, 677, 678, 17 A. 411, 7 Am. St. Rep. 288; Lemon v. Phoenix Mut. Life Ins. Co., 38 Conn. 294.

Illinois: Not against public policy when it does not appear that assignee ever paid any portion of the premium. Benefit Ass'n v. Blue, 120 Ill. 121. See, also, Cisna v. Sheibley, 88 Ill. App. 385; Bloomington Mut. Life Ben. Ass'n v. Blue, 120 Ill. 121, 60 Am. Rep. 558; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620.

Iowa: Farmers' & Traders' Bank v. Johnson, 118 Iowa, 282, 91 N. W. 1074, and cases cited; Belknap v. Johnston, 114 Iowa, 265, 86 N. W. 267; Carpenter v. Knapp, 101 Iowa, 729, 70 N. W. 764, 38 L. R. A. 128; Shuman v. Supreme Lodge, K. H., 110 Iowa, 480, 81 N. W. 717.

Louisiana: Succession of Hearing, 26 La. Ann. 326, 327.

Maryland: Rittler v. Smith [Md.] 16 A. 890, 892, 893; Souder v. Society [Md.] 20 A. 137, 138. The insured may assign a life policy payable to his legal representatives. Mutual Reserve Fund Life Ass'n v. Hurst, 78 Md. 69, 20 L. R. A. 761. The insurable interest, as a creditor, of an assignment of a life policy which he is required by the policy to show is not a condition of recovery where the controversy is between claimants merely. Id. See, also, Clogg v. McDaniel, 89 Md. 416, 43 A. 795.

Massachusetts: Dixon v. Nat. Life Ins. Co., 168 Mass. 48, 46 N. E. 430; King v. Cram, 185 Mass. 103, 69 N. E. 1049. Assignment by beneficiary. Brown v. Greenfield Life Ass'n, 172 Mass. 498, 63 N. E. 129. It is not an established rule of law that every contract is void which gives a party to it a pecuniary interest in the death of the other party. Assignment by insured and beneficiaries. Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245, distinguishing Stevens v. Warren, 101 Mass. 664.

Michigan: Prudential Ins. Co. v. Liersch, 122 Mich. 436, 81 N. W. 258.

Minnesota: Hogue v. Minnesota Packing & Provision Co., 59 Minn. 39, 43, 60 N. W. 812; Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968.

Mississippi: Every contract giving a party a pecuniary interest in life of other party is not void. Murphy v. Red, 64 Miss. 614, 60 Am. Rep. 68.

Nebraska: Chamberlain v. Butler, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338.

New Hampshire: Brown v. Mansur, 64 N. H. 39, 5 A. 768; Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 55 A. 191.

New Jersey: Trenton, etc., Ins. Co. v. Johnson, 24 N. J. Law, 676, 585; Vivar v. Knights of Pythias, 52 N. J. Law, 455, 469, 20 A. 36, 41.

New York: Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 44 L. R. A. 417, afg. 1 App. Div. 417, 37 N. Y. S. 279; Valton v. National Fund Life Assur. Co., 20 N. Y. 32, afg. 22 Barb. 9; Olmsted v. Keyes, 85 N. Y. 593; St. John v. American Mut. Life Ins. Co., 13 N. Y. 31, 64 Am. Dec. 629, and note p. 531. Endowment policy. McDonough v. Aetna Ins. Co., 38 Misc. 625, 78 N. Y. S. 217. The assignee may recover the whole amount of the policy even if the debt which it was given to discharge is less than the amount

and not merely for the purpose of avoiding the rule against wagering contracts.[22] Hence, the transfer is void where it is the result of an agreement made prior to

of the policy, or if the debt has been paid, or if a portion of the policy was designed by the payee in a contingency for the benefit of some other than the payee under the policy. Wright v. Mutual Ben. Life Ass'n, 118 N. Y. 237, 16 Am. St. Rep. 749, 6 L. R. A. 731. See, also, Rawls v. American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280. By statute insurance on the life of a husband for the benefit of his wife may be assigned to any one, whether having an insurable interest or not [Laws 1879, c. 248, § 1]. Fuller v. Kent, 13 App. Div. 529, 43 N. Y. S. 649.

Ohio: Eckel v. Renner, 41 Ohio St. 232, 233. See, also, Union Cent. Life Ins. Co. v. Hilliard, 63 Ohio St. 478, 59 N. E. 230.

Oregon: Brett v. Warnick, 44 Or. 511, 75 P. 1061.

Rhode Island: Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496.

South Carolina: Croswell v. Conn. Indem. Ass'n, 51 S. C. 103, 28 S. E. 200.

Tennessee: Clement v. New York Life Ins. Co., 101 Tenn. 22, 46 S. W. 561, 70 Am. St. Rep. 650, 42 L. R. A. 247.

Vermont: Fairchild v. North Eastern Mut. Life Ass'n, 51 Vt. 613.

Wisconsin: Strike v. Wisconsin, etc., Ins. Co., 95 Wis. 583, 70 N. W. 819; Hurd v. Doty, 86 Wis. 1, 56 N. W. 371. It is not an established rule of law that every contract is void which gives a party thereto a pecuniary interest in the death of the other party, or of a third person. Bursinger v. Bank of Watertown, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848, and note, citing Clark v. Durand, 12 Wis. 223. By statute (Laws 1895, c. 20), policies in the Wisconsin Odd Fellows Mutual Life Insurance Company can only be assigned to persons having an insurable interest in the life of the insured, and no money may be paid to any assignee not having such interest. This act has no retroactive effect, and does not apply to assignments made before its adoption. Strike v. Wisconsin O. F. M. Life Ins. Co., 95 Wis. 583, 70 N. W. 819.

United States Courts: In Warnock v. Davis, 104 U. S. 775, 26 Law. Ed. 924, the supreme court lays down the rule that a policy is not assignable to one having no insurable interest in the life of the insured, and bases its holding on the ground that the assignment is as objectionable as allowing the assignee to take out the policy in his own name. The facts in that case were that the policy was taken out by the insured and assigned on the next day, in pursuance of a prior agreement, and that the assignee paid the premiums. It has frequently been cited to the proposition that all such assignments are void, but later cases in the supreme and inferior federal courts hold that such transactions are valid unless they are merely colorable and for the purpose of evading the rule against wagering policies, apparently on the theory that the Warnock Case turned on the fact that the transaction there considered was in the nature of a wager. See Aetna Life Ins. Co. v. France, 94 U. S. 561, 24 Law. Ed. 287 (citing Connecticut Mut. Life Ins. Co. v. Schaefer, 94 U. S. 457, 24 Law. Ed. 251); New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 29 Law. Ed. 997; Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444; Widaman v. Hubbard, 88 F. 806; Swick v. Insurance Co., 2 Dill. 160, Fed. Case No. 13,692; Langdon v. Insurance Co., 14 F. 272. See, also, Cammack v. Lewis, 82 U. S. 643, 21 Law. Ed. 244.

The Warnock Case and others following it are also distinguished and limited in their application in the following cases: Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 445; Mechanics' Nat. Bank v. Comins, 72 N. H. 12, 55 A. 191; Fitzgerald v. Ins. Co., 56 Conn. 116, 13 A. 677, 7 Am. St. Rep. 288; Steinbach v. Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 7 Am. St. Rep. 424, 44 L. R. A. 417; Rittler v. Smith, 70 Md. 261, 16 A. 890, 2 L. R. A. 844; Croswell v. Ass'n, 51 S. C. 103, 28 S. E. 200; Metropolitan Life Ins. Co. v. Brown, 159 Ind. 644, 65 N. E. 908.

22. Mutual Protection Ins. Co. v. Hamilton, 5 Sneed [Tenn.] 269; Nye v. Grand Lodge, 9 Ind. App. 131; Ritter v. Smith, 70 Md. 261; Fairchild v. Northeastern Mut. L. Ass'n, 51 Vt. 613; Bursinger v. Watertown Bank, 67 Wis. 75, 58 Am. Rep. 848; Carpenter v. United States Life Ins. Co., 161 Pa. 9, 41 Am. St. Rep. 880; Olmstead v. Keyes, 85 N. Y. 593; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496. See, also, note to Heinlein v. Insurance Co., 25 L. R. A. 627; Fitzgerald v. Hartford L. & A. Ins. Co., 56 Conn. 116, 7 Am. St. Rep. 288; Lennon v. Phoenix Mut. Life Ins. Co., 38 Conn. 294; Cunningham v. Smith's Adm'r, 70 Pa. 450; New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, 29 Law. Ed. 997; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245; Rawles v. American Mut. Life Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Valton v. National Fund Life Ins. Co., 20 N. Y. 32; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496; Ashley v. Ashley, 3 Sim. 149; Croswell v. Ass'n, 51 S. C. 103, 28 S. E. 200. Must be made in good faith for the purpose of obtaining its present value, and not as a gaming risk, or a cover for a contract of insurance between the insured and the assignee. Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 52 Am. Rep. 245; Benefit Ass'n v. Blue, 120 Ill. 121. See, also, Cisna v. Sheibley, 88 Ill. App. 385; Chamberlain v. Butler, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338; Clement v. New York Life Ins. Co., 101 Tenn. 22, 70 Am. St. Rep. 650, 42 L. R. A. 247. Where insured procured policy for $3,000 at suggestion of third party, to whom he assigned it to cover debt of $70, and to whom he gave note for $3,000 without consideration, the assignee paying all the premiums held that the transaction was a mere wager, notwithstanding fact that assignee agreed to pay $1,000 of the proceeds to the insured's wife. Cammack v. Lewis, 82 U. S. 643, 21 Law. Ed. 244. Assignment valid only to extent of debt and premiums paid, and insured's administratrix entitled to recover balance. Id. The essential point is that it be bona fide and not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law. Metropolitan Life Ins. Co. v. Brown [Ind.]

or contemporaneous with the taking out of the policy.[23] The question is one of intention, to be arrived at by a consideration of all the attending facts and circumstances.[24] It has been held that there can be no objection to the assignment where the insured has covenanted to himself pay the premiums,[25] or where all of the premiums have been paid,[26] nor to the assignment of an endowment policy where nearly all of them have been paid.[27] The rule applies equally in the case of benefit certificates, except in so far as the right to change the beneficiary is limited by the laws of the order.[28]

Other courts hold that, unless the assignee has an insurable interest, the transaction is as much a wager on human life and as opposed to public policy as if he had taken out the insurance in the first instance, and hence is invalid,[29]

65 N. E. 908. Void where taken with intent to assign it to third person who pays premiums merely as speculation. Brockway v. Mutual Ben. Life Ins. Co., 9 F. 249. Assignment amounting to a mere wagering contract is invalid. Assignment on consideration that assignee pay a past due premium and in event of assignor's death within a certain time pay a part of the amount of the policy to third persons held a wager. Quillian v. Johnson [Ga.] 49 S. E. 801.

23. Massachusetts: In the absence of evidence that it was intended as a gambling transaction the purchaser or donee takes good title. King v. Cram, 185 Mass. 103, 69 N. E. 1049; Stevens v. Warren, 101 Mass. 564.

Nebraska: Chamberlain v. Butler, 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338.

New York: Steinback v. Diepenbrock, 158 N. Y. 24, 44 L. R. A. 417, 52 N. E. 662, afg. 1 App. Div. 417, 37 N. Y. S. 279.

North Carolina: Where policy payable to insured's estate was assigned to third person who sued as administrator, but for purpose of securing proceeds under original agreement, he could not recover. Hinton v. Mutual Reserve Fund Ass'n, 135 N. C. 314, 47 S. E. 474.

Rhode Island: Mowry v. Insurance Co., 9 R. I. 346.

Tennessee: Clement v. New York Life Ins. Co., 101 Tenn. 22, 70 Am. St. Rep. 650, 42 L. R. A. 247.

Federal Courts: Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444. Not valid where obtained with intent to assign to one not having interest. Brockway v. Mutual Ben. Life Ins. Co., 9 F. 249; Swick v. Insurance Co., 2 Dill. 160.

24. Steinback v. Diepenbrock, 158 N. Y. 24, 52 N. E. 622, 44 L. R. A. 417, afg. 1 App. Div. 417, 37 N. Y. S. 279.

25. Metropolitan Life Ins. Co. v. Brown, 159 Ind. 644, 65 N. E. 908.

26. Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 844. In Gordon v. Ware Nat. Bank, 132 F. 444, the court in speaking of those cases holding such assignments void, says: "The reason for this view that the assignee who pays the premium practically wagers it upon the early close of the life insured has much less force where, as in the case at bar, the premiums have been paid before the assignment is made." Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 462, 24 Law. Ed. 251; Bursinger v. Bank of Watertown, 67 Wis. 75, 83, 30 N. W. 290, 58 Am. Rep. 848."

27. Bursinger v. Bank of Watertown, 67 Wis. 75, 58 Am. Rep. 848.

28. Metropolitan Life Ins. Co. v. Brown, 159 Ind. 644, 65 N. E. 908; Martin v. Stubbings, 126 Ill. 387, 9 Am. St. Rep. 620. See Fraternal Mutual Benefit Associations, 3 Curr. L. 1513, § 8.

29. Alabama: Alabama Gold Mut. Life Ins. Co. v. Mobile Mut. Life Ins. Co., 81 Ala. 329, 1 So. 561; Helmetag's Adm'r v. Miller, 76 Ala. 183, 52 Am. Rep. 316; Stoelker v. Thornton, 88 Ala. 241, 6 L. R. A. 140.

Indiana: By statute (Burns' Rev. St. 1901, § 4914h), an assignment of a policy issued by a domestic corporation to one having no insurable interest, except as security for a debt, with remainder over to the beneficiaries or the estate of the insured renders the policy void. This act does not apply to assignments of policies issued by foreign corporations. Metropolitan Life Ins. Co. v. Brown [Ind.] 65 N. E. 908.

The case of Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313, holds that policies are not assignable to one who buys them merely as a matter of speculation, without interest in the life of the insured. The court, however, lays down the broad principle that no one should hold a policy on the life of another, where he has no insurable interest therein, whether he acquires it directly or by assignment. The case has frequently been cited as authority for the proposition that all assignments to persons having no insurable interest are void. See Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444. See, also, Kessler v. Kuhns, 1 Ind. App. 511, 27 N. E. 980; Franklin Ins. Co. v. Sefton, 53 Ind. 380; Nye v. Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429. In Thornburg v. Aetna Life Ins. Co., 30 Ind. App. 262, 66 N. E. 922, it is held that one holding a valid policy on the life of another cannot assign it to one having no insurable interest for the purpose of indemnifying him against loss as the surety of the assignor. In the case of Metropolitan Life Ins. Co. v. Brown, 159 Ind. 644, 65 N. E. 908, the Indiana supreme court holds that assignments of foreign policies to which the statute above quoted do not apply are void only when the transaction is merely colorable and a scheme to obtain speculative insurance, and that the Hazzard Case and others following it turn on the fact that the transactions considered were, in fact, wagers. The court also holds that there can be no objection raised where the assignor pays the premiums. See, also, Milner v.

notwithstanding the fact that the company assents to the assignment.[30] The same rule applies to benefit certificates.[31] The fact that the insured surrenders his benefit certificate and procures another payable directly to the assignee is immaterial.[32] The fact that the policy is an endowment one is immaterial.[33]

The fact that the assignee has no such interest does not relieve the company from liability under the terms of its contract.[34] It is bound to perform and the law will dispose of the money according to the rights of the parties.[35] If the assignee collects the insurance it is generally held that he will hold the proceeds in trust for the benefit of those entitled by law to receive them,[36] and that the insured's personal representatives may recover the same from him, less the premiums or assessments which he has paid.[37] Some courts hold, however,

Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95, to the same effect.

The complaint need not negative the fact that the assignment is void as a wagering policy. Metropolitan Life Ins. Co. v. Brown, 159 Ind. 644, 65 N. E. 908.

Kansas: Missouri Valley Life Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; Missouri Valley Life Ins. Co. v. McCrum, 36 Kan. 146, 12 P. 517, 59 Am. Rep. 537; Price v. First Nat. Bank, 62 Kan. 743, 64 P. 639.

Kentucky: Schlamp v. Berner's Adm'r, 21 Ky. L. R. 324, 51 S. W. 312; Burnam v. White, 16 Ky. L. R. 241, 22 S. W. 555; Basye v. Adams, 81 Ky. 368. Surety of insured, to whom policy was assigned, held, as against original beneficiary, to be entitled only to amount of debt and premium paid by him, with interest. Lee v. Mutual Life Ins. Co. [Ky.] 32 S. W. 258.

Missouri: Heusner v. Mutual Life Ins. Co., 47 Mo. App. 336. Assignee has interest only to extent of premiums paid. Mutual Life Ins. Co. v. Richards, 90 Mo. App. 88, 72 S. W. 487. See, also, Singleton v. Insurance Co., 66 Mo. 63, 27 Am. Rep. 321; Whitmore v. Supreme Lodge, 100 Mo. 36, 13 S. W. 495; Masonic Benev. Ass'n v. Bunch, 109 Mo. 560, 19 S. W. 25; Insurance Co. v. Rosenheim, 56 Mo. App. 27.

North Carolina: Where beneficiary pays all the premiums. Powell v. Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818.

Pennsylvania: Downey v. Hoffer, 110 Pa. 109, 20 A. 655; Gilbert v. Moose's Adm'r, 104 Pa. 74, 49 Am. Rep. 570. See, also, Ruth v. Katterman, 112 Pa. 251; Hardicks v. Reeves, 2 Pa. Super. Ct. 545; McHale v. McDonnell, 175 Pa. 632, 34 A. 966, 38 Wkly. Notes Cas. 345; Keystone Mut. Ben. Ass'n v. Norris, 115 Pa. 446, 8 A. 638, 19 Wkly. Notes Cas. 248; Stambaugh v. Blake [Pa.] 2 Wkly. Notes Cas. 407; Cunningham v. Smith, 70 Pa. 450. The absolute assignment of a policy to one having no insurable interest, the assignor parting with all control over the policy, renders it a wagering contract as to such assignee and he cannot recover thereon. Carpenter v. United States Life Ins. Co., 161 Pa. 9, 23 L. R. A. 571; Meily v. Hershberger [Pa.] 16 Wkly. Notes Cas. 186. Where deceased assigned policy for $5,000 on life to her husband and he assigned it absolutely in payment of debt of $1,900 at time when, if deceased had lived out expectancy of life, the premiums would have amounted, with interest, to $4,500, held that policy was not wager. Wheeland v. Atwood, 192 Pa. 237, 43 A. 946, 44 Wkly. Notes Cas. 386.

Texas: Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189. Has interest only to amount of premiums paid. Equitable Life Assur. Soc. v. Hazlewood, 75 Tex. 338, 16 Am. St. Rep. 893, 7 L. R. A. 217. See note to this case in Am. St. Rep. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411; Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057. Assignment upon no other consideration than payment of premiums. Price v. Knights of Honor, 68 Tex. 361, 4 S. W. 633. The assignment of a benefit certificate to one having no interest in the life of the insured and upon no other consideration than the payment of premiums by the assignee does not vitiate the policy, but is of itself of no effect and leaves the insurance payable to those originally designated therein as beneficiaries. Price v. Knights of Honor, 68 Tex. 361, 4 S. W. 633. Assignee cannot recover unless assignment was to secure indebtedness, in which case it is valid to the extent thereof. Wilton v. New York Life Ins. Co. [Tex. Civ. App.] 78 S. W. 403. Insurable interest must be alleged. Dugger v. Mutual Life Ins. Co. [Tex. Civ. App.] 81 S. W. 335.

Virginia: Long v. Meriden Brittania Co., 94 Va. 594, 27 S. E. 499; Roeller v. Beam, 86 Va. 512, 6 L. R. A. 136. Assignee can only recover premiums paid. New York Life Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305. See, also, Beaty v. Downing, 96 Va. 451; Tate v. Commercial Bldg. Ass'n, 97 Va. 74, 45 L. R. A. 243.

30. Schonfield v. Turner, 75 Tex. 324, 7 L. R. A. 189; Franklin Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Missouri Valley Life Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761.

31. Applies to benefit certificates. Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

32. Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189.

33. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411; Mayher v. Insurance Co., 87 Tex. 169, 27 S. W. 124; Lockett v. Lockett [Ky.] 80 S. W. 1152.

34. Cheeves v. Anders, 87 Tex. 287, 47 Am. St. Rep. 107; Equitable Life Assur. Soc. v. Hazlewood, 75 Tex. 338, 16 Am. St. Rep. 893, 7 L. R. A. 217.

35, 36. Cheeves v. Anders, 87 Tex. 287, 47 Am. St. Rep. 107.

37. Warnock v. Davis, 14 Otto [U. S.] 775; Cammack v. Lewis, 15 Wall. [U. S.] 643. Where beneficiary, having no insurable in-

that the whole transaction contravenes public policy and hence that the law will leave the parties where it finds them.[38] In this view neither the assignee[39] nor the assignor[40] can recover on the policy, nor can the personal representatives of the insured recover the proceeds of the policy from the beneficiary to whom the company has paid it.[41]

Assignment as collateral.—No insurable interest is required to support an assignment by way of collateral.[42] As in the case of other pledges, an assignment absolute in form may be shown to have been made by way of security only,[43] and the assignee must account to the assignor for any balance remaining in his hands after the debt is paid.[44]

In those states where assignments to one having no insurable interest are held void an assignment *as collateral,* whether absolute or conditional, is void beyond the amount of the debt secured thereby, together with the premiums paid by the assignee and interest thereon.[45]

Transfer by will.—One may by will bequeath the proceeds of a life policy

terest, assigned policy to third person, who also had no interest, held that the insured's administrator could recover proceeds of policy from assignee, less premiums paid by him. Gilbert v. Moose, 104 Pa. 74, 49 Am. Rep. 570; Tate v. Commercial Bldg. Ass'n, 97 Va. 74, 45 L. R. A. 243.

38. Missouri Valley Life Ins. Co. v. McCrum, 36 Kan. 146, 59 Am. Rep. 537. Assignor cannot set up lack of interest in assignee as defense. Groff v. Mutual Life Ins. Co., 92 Ill. App. 207.

39. Missouri Valley Life Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; Franklin Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Powell v. Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818. See, also, Burbage v. Windley, 108 N. C. 358. Policy assigned by insured and beneficiaries to one having no interest. After insured's death assignee, being unable to collect, canceled assignment and returned it to beneficiaries, who reassigned it to plaintiff. Held, whole transaction was against public policy, and as beneficiaries could not recover, plaintiff could not. Missouri Valley Life Ins. Co. v. McCrum, 36 Kan. 146, 59 Am. Rep. 537.

40, 41. Powell v. Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818. See, also, Burbage v. Windley, 108 N. C. 358.

42. Curtiss v. Aetna Life Ins. Co., 90 Cal. 245, 25 Am. St. Rep. 114; Brett v. Warnick, 44 Or. 511, 75 P. 1061. Assignee of fire policy as collateral, the company consenting to assignment, may recover thereon though he has no insurable interest. Merrill v. Colonial Mut. Fire Ins. Co., 169 Mass. 10, 47 N. E. 439.

43. See Pledges, 2 Curr. L. 1245, § 4.

44. See Pledges, 2 Curr. L. 1247, 1248, §§ 5, 6; Curtiss v. Aetna Life Ins. Co., 90 Cal. 245, 25 Am. St. Rep. 114. On assignment as security for debt, legal title passes to assignee, and only interest remaining in assignor is what remains after advances have been paid. Palmer v. Mutual Life Ins. Co., 38 Misc. 318, 77 N. Y. S. 869.

45. **Alabama:** The absolute or conditional assignment of policy taken out by one on his own life is only valid to extent of money paid by assignee with interest. Culver v. Guyer, 129 Ala. 602, 29 So. 779. The insured's representatives may recover the balance. Helmtag's Adm'r v. Miller, 76 Ala. 183, 52 Am. Rep. 316. Where the assignee, on default in payment of debt to secure which the policy was assigned as collateral, surrenders it and collects the cash surrender value, the insured may maintain a suit in equity against him to charge him as trustee for the amount received in excess of the amount due him and interest. Culver v. Guyer, 129 Ala. 602, 29 So. 779.

Indiana: Johnson v. Alexander, 125 Ind. 575, 9 L. R. A. 660, and note.

Kentucky: Where beneficiary and defendant having no interest in life of insured entered into agreement that latter was to have half the proceeds of policy in consideration of paying premiums, and certificate was exchanged for one payable half to each, held transfer was valid in so far as it stood security for advancements to be made, but invalid as to any additional amount. Beard v. Sharp, 100 Ky. 606, 38 S. W. 1057; Barbour's Adm'r v. Larue's Assignee, 106 Ky. 546, 51 S. W. 5; Rison v. Wilkerson, 3 Sneed [Tenn.] 565.

Pennsylvania: Assignee of policy on woman's life in favor of her husband, to whom it was assigned in consideration of a loan, is entitled to proceeds to extent of money actually advanced. Hendricks v. Reeves, 2 Pa. Super. Ct. 545.

Virginia: Roller v. Bean, 86 Va. 512, 6 L. R. A. 136; First Nat. Bank v. Terry's Adm'r, 99 Va. 194, 37 S. E. 843. If the interest is of a definite character, as that of creditor, his interest in the proceeds will be limited to the amount of the liability at the death of the insured, together with such sums as he has paid to preserve the policy, with interest, and the remainder will go to the insured's estate.

Texas: Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 129; Cawthon v. Perry, 76 Tex. 383, 13 S. W. 268; Price v. Knights of Honor, 68 Tex. 361, 4 S. W. 633; Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411. Interest of partnership in life of partner. Cheeves v. Anders, 87 Tex. 287, 47 Am. St. Rep. 107; Lewy v. Gilliard, 76 Tex. 400; Cawthon v. Perry, 76 Tex. 383.

United States: See Warnock v. Davis, 104 U. S. 755, 26 Law. Ed. 924; Cammack v. Lewis, 82 U. S. 643, 21 Law. Ed. 244.

payable to himself, or his executors or administrators to whom he pleases, and the fact that the legatee has no insurable interest will not defeat his right to recover.[46] The fact that he has previously made a void assignment thereof to the legatee is immaterial.[47]

Provisions in policy affecting assignability.—Provisions prohibiting assignments to persons not having an insurable interest are valid,[48] but they have been held not to apply to assignments as collateral.[49]

There is a conflict of authority as to whether a provision making the policy incontestable after a certain period prevents the insurer from defending on the ground that the assignee had no insurable interest and that the assignment was made in furtherance of a mere wagering contract.[50]

Consent of beneficiary.—In case the policy is payable to a named beneficiary, he must of course assent to the assignment.[51]

Policy as assets of insured.—The right of the insured's trustee in bankruptcy to policies payable to his estate[52] or the similar right of the personal representative to collect policies as assets[53] are not within this discussion.

The effect of the cessation of an insurable interest in the assignee[54] embraces matters also beyond the scope of this article.

INTEREST.

§ 1. Right to Interest and Demands Bearing Interest (241). Compound Interest (244).
§ 2. Rate and Computation (245).
§ 3. Remedies and Procedure to Recover Interest (245).

§ 1. *Right to interest and demands bearing interest.*[55]—Interest has been defined as the compensation for the use of money or the recompense for withholding it.[56] It is grounded on contract, on a rule of damages, on fraud, delinquency or breach of trust, or on the making of interest out of another's funds.[57]

It may rest in contract express[58] *or implied.*—An agreement for an increased rate of interest after maturity of a note is not affected by an extension according to the original terms,[59] but where the holder has the option to accelerate maturity

46. Clement v. New York Life Ins. Co., 101 Tenn. 22, 70 Am. St. Rep. 650, 42 L. R. A. 247; Stoelker v. Thornton, 88 Ala. 241, 6 L. R. A. 140. See, also, Rison v. Wilkerson, 3 Sneed [Tenn.] 565; Weil v. Trafford, 3 Tenn. Ch. 108; Williams v. Corson, 2 Tenn. Ch. 269; Tennessee Lodge v. Ladd, 5 Lea [Tenn.] 716; Highland v. Highland, 109 Ill. 366, 13 Ill. App. 510; Cath. Mut. Ben. Ass'n v. Priest, 46 Mich. 429; Clark v. Durand, 12 Wis. 253; Gambs v. Conn. Mut. L. Ins. Co., 50 Mo. 44; Swift v. Railway Pass. Ass'n, 96 Ill. 309; Bickerton v. Jaques, 28 Hun [N. Y.] 119; Union Mut. L. Ins. Co. v. Stevens, 19 F. 671.

47. Stoelker v. Thornton, 88 Ala. 241, 6 L. R. A. 140.

48, 49. Curtiss v. Aetna Life Ins. Co., 90 Cal. 245, 25 Am. St. Rep. 114.

50. **In Tennessee** it does not. Clement v. New York Life Ins. Co., 101 Tenn. 22, 70 Am. St. Rep. 650, 42 L. R. A. 247.

In New York it is held that such a stipulation includes the defense of lack of insurable interest in the assignee. Wright v. Mutual Ben. Life Ass'n, 118 N. Y. 237, 6 L. R. A. 731.

51. See Insurance, 4 Curr. L. 193, § 14; Fraternal Mutual Benefit Associations, 3 Curr. L. 1499.

52. See Insurance, 4 Curr. L. 193, § 14; Bankruptcy, 3 Curr. L. 446, § 9A. Only surrender value of policy payable to insured's estate passes to his assignee in bankruptcy. In re McKinney, 15 F. 535.

53. See Insurance, 4 Curr. L. 189, § 11; Estates of Decedents, 3 Curr. L. 1277, § 6D.

54. See Insurance, 4 Curr. L. 193, § 14. See, also, Manhattan Life Ins. Co. v. Hennessy [C. C. A.] 99 F. 64, and cases cited; Cheeves v. Anders, 87 Tex. 287, 47 Am. St. Rep. 107; Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; note to Morrell v. Trenton Ins. Co., 57 Am. Dec. 103; Scott v. Dickson, 56 Am. Rep. 196.

55. See 2 Curr. L. 548.

56. Cyc. Law Dict. "Interest"; 16 Am. & Eng. Enc. Law [2nd Ed.] 991.

57. 16 Am. & Eng. Enc. Law [2nd. Ed.] 999.

58. Where parties had been in business together, but not as partners, evidence held sufficient to show an agreement to pay interest on the mutual account at the rate provided by law. Gay v. Berkey [Mich.] 100 N. W. 920.

59. A note, drawing interest at six per cent, was to draw ten after maturity. An extension was agreed upon during which rate was six per cent. Held, after expira-

for breach of conditions it does not take effect until the option has been exercised,[60] and where the right to interest rests on the performance of certain conditions precedent, such conditions must be strictly and literally performed.[61] An agreement to pay interest on money held at the option of a prospective borrower renders him liable therefor whether he exercises the option or not.[62] A junior lienor lending money to take up a mortgage without intent to cancel it is entitled to interest.[63]

Open accounts do not imply a contract to bear interest,[64] nor will an overdraft carried in an account do so until payment be demanded or it becomes a separate settled debt,[65] but it is in some states allowed on annual balances of an open account.[66] An account stated bears interest from date.[67] Where a statute provides that accounts shall bear interest from due-time, a debtor cannot avoid payment by disputing the account.[68]

A debt, the amount of which is ascertained, bears interest from due-time[69] and not before.[70] In the absence of an agreement, a loan will not bear interest until demand for repayment.[71]

Interest as damages is recoverable for the breach of a contract to pay money when it is rightfully due and owing.[72] Such is the case of over-due commercial paper and matured contracts for payment of money.[73] Whence it is said that demand paper bears interest from date.[74] It should not be allowed on a note more than covered by contemporaneous right of set-off or recoupment.[75] An amount stipulated as liquidated damages bears interest from the time the right of action accrues.[76] It may be allowed for nonpayment of an award of arbitrators.[77]

tion of period of extension, rate was ten per cent. Mutual Ben. Life Ins. Co. v. Daniels [Neb.] 93 N. W. 134.

60. A note stipulated that a default in payment of interest should mature the entire debt at the option of the holder. Mortgege Trust Co. v. Bach [Kan.] 77 P. 545.

61. Agreement to pay interest on non-interest bearing notes providing that certain conditions were performed. They were copulative and were never performed. Haynesworth & Co. v. Adler, 139 Ala. 168, 36 So. 513.

62. He was to borrow the money if he could obtain security. Ehlen v. Selden [Md.] 59 A. 120.

63. Bennett v. First Nat. Bank [Iowa] 102 N. W. 129.

64. This principle applies to an overdraft, running without adjustment. Hennessy Bros. & Evans Co. v. Memphis Nat. Bank [C. C. A.] 129 F. 557.

65. Hennessy Bros. & Evans Co. v. Memphis Nat. Bank [C. C. A.] 129 F. 557.

66. Store account. Howe v. Hammond [Vt.] 58 A. 724. See, also, Langdon v. Castleton, 30 Vt. 285. Mutual accounts carry simple interest on annual balances. Holt v. Howard [Vt.] 58 A. 797.

67. De La Cuesta v. Montgomery [Cal.] 77 P. 887. As to what constitutes an account stated, see Accounts Stated and Open Accounts, 3 Curr. L. 27.

68. Florence & C. C. R. Co. v. Tennant [Colo.] 75 P. 410.

69. Amount of a street assessment. Gilfeather v. Grout, 91 N. Y. S. 533. The amount for which an article was sold under special contract. McAfee v. Dix, 91 N. Y. S. 464.

70. Where a business was sold to be delivered in the future but business transacted between date of sale and date of delivery was to be accounted for as property of the purchaser, the seller was not entitled to interest on the purchase price between such dates. Holyoke Envelope Co. v. United States Envelope Co. [Mass.] 72 N. E. 58.

71. There was no demand for payment before payment was made, therefore the lender was not entitled to recover. Ehrlich v. Brucker [Wis.] 99 N. W. 213. See ante, this section.

72. Interest on an overdue debt is said to be properly damages for breach of contract to pay rather than itself a promise to pay. 16 Am. & Eng. Enc. Law [2nd. Ed.] 1007.

73. **A life policy is a contract for the payment of money** within a statute that such contracts bear interest from due-time. A life policy stipulating that the same shall be paid sixty days after date of proof of death is a contract for the payment of money within Hurd's Rev. St. 1901, c. 74, and interest runs from 60 days after such proof. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066.

74. Hennessy Bros. & Evans Co. v. Memphis Nat. Bank [C. C. A.] 129 F. 557. See, also, ante, this section.

75. Note for price of land and recoupment for timber removed. McCall v. Wilkes [Ga.] 49 S. E. 722.

76. For breach of contract. Chicago & S. E. R. Co. v. McEwen [Ind. App.] 71 N. E. 926.

77. Ex parte Republic of Colombia, 25 S. Ct. 107, 49 Law. Ed. ——.

Moneys received which ought to be refunded,[78] e. g., illegal taxes[79] and moneys had and received for the use of another and retained without his consent[80] bear interest as damages especially when so provided by statute,[81] and so do moneys necessarily paid to another's use.[82] The circumstances may require demand to fix breach,[83] as in case of an improper preference of creditors, when it runs from date of demand and refusal to return.[84] On a quantum meruit for work and labor it runs from demand.[85] And so a secondary liability like the individual liability of a stockholder does not commence to bear interest until action brought or he is charged with notice that he is to be held for a specific corporate obligation,[86] but where payment of a judgment was coerced and thereafter the judgment was reversed, the debtor was entitled to interest from date of reversal.[87] The commencement of an action suffices for a demand,[88] but demand on one not authorized to pay avails nothing.[89]

Unless otherwise provided by statute,[90] so long as a demand rests on a con-

78. A statute providing that taxes illegally assessed and collected should be refunded need not expressly provide for interest. In re O'Berry [N. Y.] 72 N. E. 109. In the absence of evidence of special loss because of negligent delay of goods shipped, the shipper can only recover interest on the amount invested in the goods. Lee & Co. v. St. Louis, etc., R. Co. [N. C.] 48 S. E. 809.

79. **NOTE. Interest on taxes illegally collected:** The petitioner paid a transfer tax on a vested remainder which she had acquired. The law under which the tax was collected having been held unconstitutional, the petitioner sues to have her money refunded with interest. A statute provided for the refunding of taxes under the situation above stated, but was silent as to interest. Held, the state having provided by statute for the refunding of taxes collected under an unconstitutional law, the right to collect interest follows, even though not expressly so declared. In re O'Berry, 179 N. Y. 285.

The rule is that taxes do not draw interest unless interest is expressly allowed by statute. Cooley, Taxation [3rd Ed.] pp. 20, 1487. At first glance, the principal case in allowing interest would seem to be at variance with this rule. The variance is apparent, however, rather than real; for money collected as a tax, under an unconstitutional statute, is really no tax at all. There was no right to take the money, but since it was taken, it must be regarded as money had and received to the plaintiff's use, and interest can thus be allowed without conflicting with any doctrine of taxation. Another requisite for the recovery of taxes paid is that payment should have been involuntary. Odendahl v. Board, 112 Iowa, 182. This is usually taken to mean that the tax must be paid under some threatened seizure of person or property. Town of Edinburg v. Hackney, 54 Ind. 83. The principal case is liberal in its interpretation of what is an involuntary payment. 6 Columbia L. R. 66.

80. Interest runs on money had and received for the use of another from date of demand. York v. Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968. Statute providing for damages in the nature of interest above the value of goods at the time of conversion does not apply to such an action. Id. Where a bank refuses to pay a check when it has money of the drawer out of which payment should be made, it subjects itself to payment of interest until it complies with the demand. Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. S. 310.

81. Under Burns' Ann. St. 1901, § 7045, allowing interest on money had and received for the use of another and retained without his consent, interest is recoverable from a county auditor who wrongfully obtains money due the county. Tucker v. State [Ind.] 71 N. E. 140.

82. **A mortgagee in possession** who pays taxes is entitled to interest (Pollard v. American Freehold Land Mortg. Co., 139 Ala. 183, 36 So. 767), but he cannot on foreclosure recover interest on attorney's fees paid in advance. No evidence to show that he had paid them or the amount. Id.

83. Presentation of check is demand, and dishonor is refusal. Helene v. Corn Exch. Bank, 96 App. Div. 892, 89 N. Y. S. 310. Money had and received. York v. Farmers' Bank, 105 Mo. App. 127, 79 S. W. 968.

84. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247. Commencement of an action by a trustee in bankruptcy to recover a preference starts the running of interest on the claim. Kaufman v. Tredway, 25 S. Ct. 33, 49 Law. Ed. ——.

85. Such is not unliquidated in the sense that it could not become due till ascertained. Braas v. Springville, 91 N. Y. S. 699.

86. Action by creditors against individual members of a dissolved corporation. Manley v. Mayer [Kan.] 76 P. 650.

87. Florence Cotton & Iron Co. v. Louisville Banking Co. [Ala.] 36 So. 456.

88. Where the complaint contained no averment as to date of demand, interest runs from institution of the suit. Mulligan v. Smith [Colo.] 76 P. 1063. Under a statute allowing interest on claims after they becoms due and demand for payment is made, interest runs from date of commencement of the action where there is no evidence of prior demand. Trimble v. Kansas City, etc., R. Co., 180 Mo. 674, 79 S. W. 678. Under a statute allowing interest on **unliquidated damages** from date of demand. Id.

89. Presentment of warrants to one who is not the acting and qualified city treasurer. Valley Bank v. Brodie [Ariz.] 76 P. 617.

90. Under Civ. Code, § 3287, in an action for breach of contract, interest runs on the amount of damages found from the date of filing the complaint. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 P. 564.

tingency and the amount is not ascertainable by general recognized standards it will not bear interest.[91] In Wisconsin it is allowed after demand sufficiently specific to inform the debtor of the claims made.[92] Judgment does not, until it is a finality, work a liquidation.[93]

Interest from the date of the injury may be allowed in tort[94] and it is said that jurors have an equitable power to allow it.[95] It will not be allowed as damages for personal injury.[96] In Missouri it is not allowable if no pecuniary benefit could accrue from the wrong.[97]

A conversion or breach of trust of money imposes liability for interest,[98] e. g., a surviving partner who appropriates funds.[99]

Interest ceases with the cessation or tender of the debt or obligation.—Thus interest is not allowable after the ancestor's death on a note evidencing an advancement,[1] nor one more than offset when due.[2] But it was allowed on an overdue special legacy to a trustee who charged himself with interest on funds remaining in his hands.[3]

A tender to stop interest must be kept good.[4]

Compound interest.[5]—To create a contract obligation to pay compound interest, there must be an express agreement,[6] and such agreement will be literally construed.[7] Under a statute providing that the rate of interest fixed in a contract

91. Sureties of a defaulting guardian paid the liability. They received some property from his estate which his heirs claimed was of greater value than the amount paid by them. Held, they could not recover interest on the difference until it had been determined by a court. Bull v. Rich [Minn.] 100 N. W. 213. Interest cannot be allowed on damages for breach of contract from date of breach when the amount is so indefinite that it requires the verdict of a jury to determine it. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088.

92. Claim for services. Lowe v. Ring [Wis.] 101 N. W. 698.

93. When liquidation is by judgment, the final judgment after appeal sets interest running though the amount is that awarded by special verdict which was set aside by judgment appealed from. Johnston v. Gerry [Wash.] 77 P. 503.

94. Missouri, etc., R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298. Injuries to shipment of stock. Texas & P. R. Co. v. Marshaw [Tex. Civ. App.] 78 S. W. 953. Destruction of property by fire. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429, citing 16 Am. & Eng. Enc. Law [2nd. Ed.] 1027.

95. So in all cases which are not covered by statutes. See Shannon's Code, §§ 3492, 3494. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429.

96. Such damage is not a debt until judgment nor is there any detention of that to which the injured person is entitled. The award covers all damage. Louisville & N. R. Co. v. Wallace, 91 Tenn. 35, 14 L. R. A. 548. The discretion of a court of admiralty to allow it does not exist in a personal injury action. Burrows v. Lownsdale [C. C. A.] 133 F. 250.

97. Not allowable on damages awarded because of injuries to a building due to a contractor for the city making an excavation for a sewer. Gerst v. St. Louis [Mo.] 84 S. W. 34.

98. See Estates of Decedents, § 9C, 3 Curr. L. 1290; Trusts, 2 Curr. L. 1943.

99. Sums wrongfully withdrawn as salary, and assets misappropriated. Porter v. Long [Mich.] 98 N. W. 990, and cases cited. He cannot claim immunity under the rule that a co-partner is not chargeable with interest on sums withdrawn until dissolution, for death had dissolved the partnership. Id.

1. Tobias v. Richardson, 5 Ohio C. C. (N. S.) 74.

2. McCall v. Wilkes [Ga.] 49 S. E. 722.

3. Legacy to the trustee under a will who charged himself interest on funds in his hands due the estate for the same period. Kennedy v. Dickey [Md.] 57 A. 621.

4. Woodland Cemetery Co. v. Ellison, 25 Ky. L. R. 2069, 80 S. W. 169.

5. Note: Interest may be compounded against trustees for positive misconduct and willful violation or omission of duty (Wheeler v. Bolton, 92 Cal. 159; Powell v. Powell, 10 Ala. 900; Ackerman v. Emotts, 4 Barb. [N. Y.] 628; In re Guardianship of Thurston, 57 Wis. 104), or gross delinquency or such gross negligence as to be evidence of corrupt intention (Smith v. Kennard, 38 Ala. 695; Fall v. Simmons, 6 Ga. 265). Where the omission is due to simple negligence without actual intent to defraud simple interest alone is allowed. Adams v. Lombard, 80 Cal. 426; Bryant v. Craig, 12 Ala. 354; Wilmerding v. McKesson, 103 N. Y. 329.—From note to In re Ricker, 14 Mont. 153, 29 L. R. A. 622.

6. Provision for payment of annual interest does not create an obligation to pay compound interest. Cullen v. Whitham, 33 Wash. 366, 74 P. 581. That two persons in their dealings with a corporation assented to settlements with annual rests and compound interest is insufficient to show that in their dealings with each other they settled on that basis. Gay v. Berkey [Mich.] 100 N. W. 920.

7. An agreement to pay compound interest until a certain date does not extend be-

continues after maturity, a stipulation as to semi-annual rests has no application after maturity.[8] An agreement made, before interest becomes due, to compound it, is void,[9] but after it becomes due such an agreement is valid.[10]

§ 2. *Rate and computation.*[11]—Interest beyond the legal rate is usury.[12] Subject thereto the contract rate is adopted[13] or if there be none, the legal rate,[14] and it may be allowed on nonpayment of a debt bearing less.[15] Interest on a debt is computed up to the time of the first payment and the payment so made is first applied to discharge the interest; the surplus if any, to sink the principal.[16] Where the legal rate was changed pending an obligation of co-sureties to contribute, on judgment for contribution, interest should be charged at the rate provided by the contract until the legal rate was changed and from that time at the legal rate.[17] Where default has been made before due date, interest should be deducted from future installments the face of which have been increased to include interest.[18]

§ 3. *Remedies and procedure to recover interest.*[19]—Ordinarily, principal and interest must be recovered in the same action, but a party may be precluded from objecting that a demand therefor was not made.[20] A complaint must contain a prayer for interest,[21] but a prayer for general relief is sufficient,[22] and where a contract is set aside for fraud, interest may be allowed on payments made though it was not demanded.[23] None is recoverable beyond what is prayed.[24] An allega-

yond such date. Carpenter v. Rice's Adm'x, 25 Ky. L. R. 1704, 78 S. W. 458.

8. Provision in a school bond for payment of interest semi-annually does not entitle the holder to computation on his judgment with semi-annual rests. Rew v. Independent School Dist. [Iowa] 98 N. W. 802.

9. Gay v. Berkey [Mich.] 100 N. W. 920. See, also, Usury, 2 Curr. L. 1966.

10. Gay v. Berkey [Mich.] 100 N. W. 920.

11. See 2 Curr. L. 549.

12. See Usury, 2 Curr. L. 1966. "Legal interest" to be rebated in case of foreclosure on deferred instalments not yet due means the rate agreed. Greenville Bldg. & Loan Ass'n [N. J. Eq.] 59 A. 341.

NOTE: Taking interest in advance at the highest rate allowed by law is not usury (Bank of Burlington v. Durkee, 1 Vt. 403), but this practice is sanctioned by the courts rather from necessity (overwhelming current of decision) than upon principle (Tholen v. Duffy, 7 Kan. 405; Wetmore v. Brien, 3 Head [Tenn.] 733; Fleckner v. Bank of U. S., 8 Wheat. [U. S.] 388, 5 Law. Ed. 631; Marvine v. Hymers, 12 N. Y. 223; Agricultural Bank v. Bissell, 12 Pick. [Mass.] 586; Maine Bank v. Butts, 9 Mass. 49). Statutory authority to discount or loan money includes authority to take such interest in advance. Lyon v. State Bank, 1 Stew. [Ala.] 442. Individuals as well as banks have a right to take interest in advance. Vahlberg v. Keaton, 51 Ark. 534; Parker v. Cousins, 2 Grat. [Va.] 372, 44 Am. Dec. 388; Cole v. Lockhart, 2 Ind. 631; Marvine v. Hymers, 12 N. Y. 223. But in Penn. Mut. Ins. Co. v. Carpenter, 49 Ohio St. 260, express authority given by statute to banks and other corporations was held a strong implication that other persons were not so entitled.—Note to Bank of Newport v. Cook, 60 Ark. 288, 29 L. R. A. 761.

13. The rate agreed by a lender of money to take up a mortgage, not the mortgage rate, governs. Bennett v. First Nat. Bank [Iowa] 102 N. W. 129.

14. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

15. A bank which suspends payment is liable to depositors for interest at the legal rate, from date of suspension. The fact that savings deposits draw a less rate is immaterial. Ex parte Stockman [S. C.] 48 S. E. 736.

16. Dickson v. Stewart [Neb.] 98 N. W. 1085.

17. Thompson v. Hibbs [Or.] 76 P. 778.

18. Under equitable principles and under statute providing that when the residue of a secured demand payable at a future date without interest is paid, a rebate of legal interest shall be deducted. Building association loan. Greenville Bldg. & Loan Ass'n v. Wholey [N. J. Eq.] 59 A. 341.

19. See 2 Curr. L. 549.

20. Where an administrator severs the claims by an appeal from a part of a judgment of the probate court allowing interest, he cannot complain in a suit on the bond given on such appeal that in a suit on his official bond pending the appeal such interest was not demanded. McDonald v. Holdom, 208 Ill. 128, 70 N. E. 21.

21. Only interest demanded in the complaint can be recovered. Sullivan & Co. v. Owens [Tex. Civ. App.] 78 S. W. 373. See, also, Texas & P. R. Co. v. Marishaw [Tex. Civ. App.] 78 S. W. 953. In an action for damages to a shipment of grain, interest can be recovered only as an element of damages and must be specifically pleaded or the amount demanded large enough to include it. Missouri, etc., R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298. Action for damages to abutting property for grading a street. City of South Omaha v. Ruthjen [Neb.] 99 N. W. 240.

22. Complaint to recover salary as policeman. City of Houston v. Lubbock [Tex. Civ. App.] 79 S. W. 851.

23. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

24. Not prior to time prayed. Carter

tion that interest is due at a given rate from a given day will be sufficient to authorize a recovery of all interest due on the debt,[25] but if a stated sum is set forth as due at a stated date, no larger sum can be recovered for interest up to the date given.[26] When a verdict is rendered for a certain amount with interest, the court may compute it and include it in the judgment.[27] The reversal of a decree which awarded interest on an arbitrator's award unpaid does not prohibit a reallowance if the reversal was not in respect of the allowance of interest.[28]

INTERNAL REVENUE LAWS.[29]

§ 1. The Tax on Liquors and Tobacco (246).
§ 2. Oleomargarine Act August 2, 1886 (247).
§ 3. War Revenue Acts, June 13, 1898, and March 2, 1901 (247). Documentary Stamps (247). Recovery Back of Taxes Paid (249).
§ 4. Filled Cheese Act June 6, 1896 (249).

§ 1. *The tax on liquors and tobacco*[30] has called for many laws to facilitate collection and prevent evasion. Thus failure to stamp and mark a package makes it forfeitable,[31] and the penalty also provided for failure to stamp packages as required by law is not exclusive.[32] The law against false marks on wines and liquors being removed or transported applies only to wholesale dealers and the like,[33] does not require contents of a package to be indicated[34] and does not regard shipping directions as a label.[35] A vehicle not the property of a common carrier, used in transporting liquor illegally brought into the United States, is subject to forfeiture, though the owner had no knowledge of the purpose for which it was to be used.[36] In a forfeiture proceeding it must be shown that the substance was liquor,[37] that the act was unlawful when done,[38] and it must be proved as laid.[39] Proof of the intoxicating properties of a well known spirituous liquor is unnecessary.[40] The fact that the proof of spirits had been reduced so as to show a smaller percentage of alcohol raises no presumption that it had been reduced by the addition of spirits of a different quality.[41] The giving of a ware-

Brick Co. v. Clement [Tex. Civ. App.] 84 S. W. 434.

25, 26. King v. Westbrook, 116 Ga. 753, 42 S. E. 1002.

27. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429.

28. Ex parte Republic of Colombia, 25 S. Ct. 107, 49 Law. Ed. ——. A Federal court whose action is invoked by a foreign government to set aside an award made against it by arbitrators has the same power to decree the payment of interest from the date fixed for payment by the award as in an ordinary case. Id.

29. This title covers only the Federal internal taxes levied for revenue. It excludes customs duties (See 3 Curr. L. 990), also licenses (See 2 Curr. L. 730) and state revenues (See Taxes, 2 Curr. L. 1786).

30. See 2 Curr. L. 350. See, also, Customs Laws, 3 Curr. L. 990.

31, 32. United States v. Seven Barrels of Whisky, 131 F. 806.

33, 34, 35. Box marked "Glass." United States v. Twenty Boxes of Corn Whisky [C. C. A.] 133 F. 910. Statute is highly penal. Id.

36. A livery rig is not within the section of the statute which provides that vehicles used by common carriers are not subject to forfeiture unless the carrier knew of the unlawful use. See Rev. St. U. S. §§ 3061, 3062, 3063. United States v. One Black Horse, 129 F. 167.

37. The court may of its own motion recall an internal revenue collector and question him further, where at the conclusion of the evidence the identity of liquor concealed with intent to evade payment of the revenue tax is in doubt. The Kawailani [C. C. A.] 128 F. 879.

38. Evidence held to show that liquor transported to this country was manufactured in Hawaii subsequent to the taking effect in that territory of the United States Revenue Laws. The Kawailani [C. C. A.] 128 F. 879.

39. Evidence that coloring had been put into liquor after it had been gauged and stamped is inadmissible under an allegation that distilled spirits of a different quality had been added. Three Packages of Distilled Spirits v. U. S., 129 F. 329.

40. Where the supreme court of Hawaii has held that "Okolihoa" is a well known intoxicating liquor, proof of such fact is unnecessary in the United States. The Kawailani [C. C. A.] 128 F. 879.

41. A discrepancy of eight degrees is insufficient basis for an inference that the change was occasioned by the addition of other liquor of a different quality, where it was shown that the original packages had been lawfully reduced in proof from twelve to fourteen degrees by the addition of water. Three Packages of Distilled Spirits v. U. S. [C. C. A.] 129 F. 329.

house bond will not relieve sureties on the distiller's bond from the payment of the tax on all spirits distilled during its term.[42]

§ 2. *Oleomargarine Act August 2, 1886.*[43]—The congressional power to levy excises was not exceeded by the enactment of this law,[44] and the motives or purposes of its enactment are not open to judicial inquiry in considering the power of that body to enact such legislation.[45] Due process of law is not denied because natural butter artificially colored is not taxed,[46] or because the effect of the tax may be to suppress the manufacture of this commodity,[47] and any implied constitutional prohibition which may prevent the destruction by congress of fundamental rights cannot be invoked to invalidate this law.[48] Products made in conscious imitation of butter are taxable, and when any substance, although named as a possible ingredient, substantially serves only the purpose of coloring so as to cause the product to "look like butter of any shade of yellow" it is an artificial coloration.[49] Only the factory and manufacturing apparatus are subject to forfeiture for an attempt to evade payment of the tax.[50]

§ 3. *War Revenue Acts, June 13, 1898, and March 2, 1901.*[51]—The special tax imposed on the gross receipts of a sugar refining company is an excise.[52] Such receipts include moneys derived from subsidiary enterprises incidental to the refining of sugar,[53] but not those from independent business enterprises or investments.[54] The tax on banking capital reaches whatever has become substantially a part of the capital of a corporation regardless of bookkeeping.[55] The tax on telephone messages applies where by contract subscribers pay a fixed sum per term for the privilege of transmitting not to exceed a certain number of messages.[56]

Documentary stamps.[57]—The stamp tax is not a direct tax but falls within the class of "duties, imposts and excises."[58] Terms used in the act are to be

42. It is not a substituted but a cumulative security. United States v. Richardson, 127 F. 893.

43. See 2 Curr. L. 551.

44. McCray v. U. S., 195 U. S. 27, 49 Law. Ed. ——.

45. McCray v. U. S., 195 U. S. 27, 49 Law. Ed. ——.

Note: The recent decisions of McCray v. U. S., 195 U. S. 27, 49 Law. Ed. ——, and Cliff v. U. S., 25 S. Ct. 1, 49 Law. Ed. —— (Oleomargarine Cases) are criticised in a note in 3 Mich. L. R. 220, as verging on an abdication of the judicial power to declare void a law obviously for an inhibited object, while ostensibly for a valid one.

46, 47. McCray v. U. S., 195 U. S. 27, 49 Law. Ed. ——.

48. McCray v. U. S., 195 U. S. 27, 49 Law. Ed. ——. The tax cannot be deemed invalid because so high as to destroy the manufacture. Id.

49. Palm oil. Out of a total of 160 ounces there was but one and one-half ounces of palm oil. Cliff v. U. S., 25 S. Ct. 1, 49 Law. Ed. ——. Color produced by an ingredient of butter which is itself artificially colored is not "free from artificial coloration." McCray v. U. S., 195 U. S. 27, 49 Law. Ed. ——.

50. Sections 3450, 3453, of the Rev. St. [U. S. Comp. St. 1901, pp. 2277, 2278], providing forfeiture of all property used in the manufacture for attempting to defraud the U. S. of the tax, enacted prior to the Act of 1886, was repealed by the section of the later act which limits forfeiture to the factory and manufacturing apparatus. United States v. One Bay Horse and One Buggy, 128 F. 207.

51. See 2 Curr. L. 551.

52. Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 Law. Ed. 496.

53. Receipts from wharves used almost exclusively for unloading sugar consigned is properly included in the gross receipts upon which the tax is to be computed. Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 Law. Ed. 496.

54. But interest on bank deposits and dividends on shares of stock owned by the company are not. Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 Law. Ed. 496.

55. An accumulated fund carried by a bank under the head "profit and loss" and used in its business like other capital, though not "surplus," is regarded as an accretion to the capital and is subject to the tax. Leather Mfrs.' Nat. Bank v. Treat [C. C. A.] 128 F. 262.

56. $90.00 for not to exceed 600 messages. The tax applies to messages for which there is a charge of 15 cents or more. New York Telephone Co. v. Treat [C. C. A.] 130 F. 340.

57. See 2 Curr. L. 551.

58. Stamp tax on memorandum or contract of sale of certificate of stock. Thomas v. U. S., 192 U. S. 363, 48 Law. Ed. 481.

Note: A stamp tax imposed on bonds required by a state of its officers is in necessary legal effect a tax upon the right of such officers to qualify, and upon the exercise by the commonwealth of its govern-

construed in the sense in which they are used in business,[59] and documents are free if without such meaning.[60]

"Registered tonnage" fixing tax on charter parties is not used in a technical sense.[61] All memorandums of distinct transactions between broker and customer are required to be stamped.[62] A notary's certificate of acknowledgment attached to a declaration of homestead is within the provision requiring "certificates of any description required by law not otherwise specified," to be stamped,[63] and since the stamps are required to be furnished by the persons for whose benefit they are used, the tax is not objectionable as imposing a burden on a function of the state government not subject to taxation.[64] The tax cannot be evaded by executing charter parties in a foreign country and using only copies.[65]

The provision rendering instruments inadmissible unless stamped does not apply to state courts,[66] but is binding on the Federal courts,[67] and the repeal of the act did not authorize the subsequent admission in evidence of an unstamped certificate subject to the tax.[68] A telegraph company is not liable for damages resulting from failure to transmit a message to which no stamp was affixed.[69]

Legacies which are vested[70] only are transfers subject to tax. Debts of the estate are to be deducted from the amount of a residuary legacy before assessing the tax.[71] A contingent beneficial interest not absolutely vested in possession or enjoyment is not subject to the tax under Amendment of June 27, 1902.[72]

mental functions. The fact that the tax is required before the officers qualify is not important. Manifestly, therefore, the validity of the bond given by the officer to the state is not affected by the omission therefrom of a stamp. State v. Garton, 32 Ind. 1, 2 Am. Rep. 315; Bettman v. Warwick, 108 F. 46. In the last case the bond of a notary public is held to be exempt from the tax imposed by the act of 1898, within the provision of schedule "A," exempting states in the exercise of governmental functions.—Note to Estate of Ramsey v. People [Ill.] 90 Am. St. Rep. 196.

59, 60. "Duplicate" bill of lading means one of two instruments, each of which is original and has the force of an obligation irrespective of the other. Does not mean a mere copy. Wright v. Michigan Cent. R. Co. [C. C. A.] 130 F. 843. Detachable copy attached to the one marked "original" is not required to be stamped. Id.

61. Includes every ship that is required to have her measurements recorded. "Enrolled or licensed vessels" included. Wheaton v. Weston & Co., 128 F. 151.

62. Where a local broker took orders from customers and forwarded them to a member of the board of trade who executed them, it was necessary to stamp the memorandum of both transactions. Municipal Telegraph & Stock Co. v. Ward, 133 F. 70.

63, 64. Sackett v. McCaffrey [C. C. A.] 131 F. 219.

65. Applies where such papers are executed in a foreign country and left there, but copies are brought here to be used for the benefit of both parties. Simpson v. Treat, 126 F. 1003.

66. See Evidence, 3 Curr. L. 1334. Frank v. Bauer [Colo. App.] 75 P. 930. A foreign judgment is not rendered inadmissible because it has no revenue stamp. Tomlin v. Woods [Iowa] 101 N. W. 135. Lack of a revenue stamp does not in the absence of fraud affect the validity of a deed. Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

67. Sackett v. McCaffrey [C. C. A.] 131 F. 219. An action cannot be maintained for breach of an unstamped charter party, since there is no competent evidence of the contract. Wheaton v. Weston & Co., 128 F. 151.

68. Sackett v. McCaffrey [C. C. A.] 131 F. 219.

69. Western Union Tel. Co. v. Waters, 139 Ala. 652, 35 So. 773.

70. See 2 Curr. L. 551. As to vesting, see generally Wills, 2 Curr. L. 2141. Transfer taxes generally, see Taxes, 2 Curr. L. 1838.

Illustrations: The income of an estate to one for life, then the estate to be divided among certain others, is vested. Land Title & Trust Co. v. McCoach, 127 F. 381. A legacy to a person to become absolutely vested only in case he attained the age of 25 years is a vested interest, subject to be divested by his death before attaining such age. Brown v. Kinney, 128 F. 310. The income of two-thirds of an estate to a wife for life, income of one-third to a daughter and in the event of the death of either the entire income to be paid to the other, gave the daughter a vested remainder in her mother's income. Philadelphia Trust, Safe Deposit & Ins. Co. v. McCoach, 127 F. 386. One-fourth the income of a fund to be paid to each of a surviving wife and three children and in case any one of them died her share to be divided among the others, and after the wife's death, her share to be divided among the children, creates a vested interest in each of the children in one-fourth of the fund and in one-third of the mother's one-fourth. Peck v. Kinney, 128 F. 313. A legacy to a son-in-law is subject to the tax, as one to a stranger in blood. King v. Eidman, 128 F. 815.

71. Where testator had purchased certain realty and assumed mortgages as part of the purchase price, such mortgages constituted a debt. Brown v. Kinney, 128 F. 310.

72. Income to a surviving wife for life, remainder to children living at her death, the lawful issue of a deceased child to take the share of its parent. Land Title & Trust Co. v. McCoach [C. C. A.] 129 F. 901. The

The tax imposed by the Act of June 13, 1898, on any person having in charge or trust any legacy or distributive shares is payable from the capital.[73]

Recovery back of taxes paid.—An appeal to the commissioner of internal revenue from an adverse decision of the collector is essential to the maintenance of a suit to recover a sum voluntarily expended for revenue stamps,[74] and one who pays more internal revenue taxes than under the law are due cannot go around the collector and commissioner and sue the government any time within six years.[75] Where one appeals to the commissioner of internal revenue for redress, the action is subject to the two-year limitation prescribed by Rev. St. § 3226,[76] and the running of the statute is not suspended during the pendency of an appeal before the commissioner.[77] The allowance of a refund by the commissioner is not an allowance of a mere claim, but is an award[78] actionable as such[79] and conclusive unless impeached for fraud or mistake.[80] If rejected, the collector may be sued;[81] if allowed, but payment is refused by accounting officers, the government may be sued in the court of claims.[82] In suing to recover tax paid, plaintiff's allegation that he was not party to the document must not be pregnant with admission that he was a party's agent.[83] Where tax is paid under duress, an action to recover is an action for damages sounding in tort.[84]

§ 4. *Filled Cheese Act June 6, 1896.*—The imposition under the act of June 6, 1896, of the same manufacturing tax on filled cheese manufactured for export, as upon other filled cheese, is not a tax on articles exported from any state.[85] No exemption from the tax imposed by this statute was effected by the provision that the laws relative to tobacco stamps are made to apply to stamps provided for in this statute, though exported tobacco is relieved from the manufacturing tax.[86] A suit to recover a tax exacted under this law and paid under protest, in which the construction and constitutionality of the statute and the application of the Federal constitution are involved is not one arising under revenue laws, and the judgment of the circuit court of appeals is not final.[87]

INTERNATIONAL LAW.[88]

INTERPLEADER.

§ 1. Nature of Remedy and Right to It (249).
§ 2. Procedure and Relief; Discharge of Complainant; Costs (251).

§ 1. *Nature of remedy and right to it.*[89]—Strict interpleader seeks only

interest of a child in the father's estate which she was not to take unless she survived her mother is contingent. Philadelphia Trust, Safe Deposit & Ins. Co. v. McCoach [C. C. A.] 129 F. 906.

73. In re Hoyt's Estate, 44 Misc. 76, 89 N. Y. S. 744.

74. A written application to the commissioner is not sufficient. Chesebrough v. U. S., 192 U. S. 253, 48 Law. Ed. 932.

75. Act March 3, 1887, limiting the right to bring actions against the United States to six years after accrual did not supersede Rev. St. §§ 3226, 3227, actions for the recovery of internal revenue to be maintained within two years after an appeal taken and determined before the department. Christie-Street Commission Co. v. U. S., 126 F. 991.

76, 77. Christie-Street Commission Co. v. U. S., 129 F. 506.

78, 79, 80, 81, 82. Edison Illuminating Company's Case, 38 Ct. Cl. 208, distg. Medbury v. U. S., 173 U. S. 492.

83. A complaint to recover such taxes, alleging that "plaintiffs were strangers to said charter parties" and the matter to which the same related is insufficient. Does not show that plaintiffs are not agents or representatives of the parties to such instruments. Wheaton v. Weston & Co., 128 F. 151.

84. This action is expressly excepted from the jurisdiction of the circuit court by the Act of March 3, 1887. Christie-Street Commission Co. v. U. S., 129 F. 506. Dooley v. U. S., 183 U. S. 151, 46 Law. Ed. 128, differentiated as that case was controlled by the construction placed upon the Federal constitution. Id.

85, 86. Cornell v. Coyne, 192 U. S. 418, 48 Law. Ed. 504.

87. Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 Law. Ed. 496.

88. No cases have been found during the period covered. But see 2 Curr. L. 552, and see topic War, 2 Curr. L. 2025, Id., 4 Curr. L. ——.

89. See 2 Curr. L. 553.

protection against conflicting claimants,[90] while if additional relief be sought it is said to make a bill in the nature of interpleader.[91] If the object be to determine between claimants against an indifferent debtor complainant, it is interpleader, whatsoever other relief be sought or however it be called.[92] Interpleader is an equitable proceeding[93] and is largely governed by statutory provisions.[94] The remedy is concurrent with, and not superseded by, statutory remedies authorizing defendants in law actions to bring in or substitute other parties.[95] In order to be entitled thereto, the same debt, fund or thing[96] must be claimed by hostile parties under adverse title[97] derived from a common source,[98] and the complainant must have incurred no independent liability to either of the claimants,[99] and must have no claim or interest in the subject-matter,[1] though this last element is not essential

90. A bill of strict interpleader is one in which the complainant asserts his possession of some fund or something in which he claims no personal interest, but in which other persons, made defendants, set up conflicting claims, and complainant cannot safely determine to which claim he should yield. Carter v. Cryer [N. J. Eq.] 59 A. 233.

91. A bill in the nature of an interpleader is one where a complainant, in possession of some fund or thing, seeks relief respecting it, in addition to relief against conflicting claims of other persons to such fund or thing. Carter v. Cryer [N. J. Eq.] 59 A. 233.

92. Debtors seeking injunction. Quin v. Hart [Miss.] 37 So. 553.

93. Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. S. 310. Bill for interpleader in law court held properly denied and complainant remanded to his relief in equity. Wells v. Corn Exch. Bank, 43 Misc. 377, 87 N. Y. S. 480. This last case in so far as it applies to the city court of New York City is overruled in Krugman v. Hanover Fire Ins. Co., 90 N. Y. S. 448, where it is held that under Code Civ. Proc. § 3347, subds. 4, 6, and § 820, such court has authority to make an order of interpleader. But after entry of the order under Code Civ. Proc. § 820, it cannot proceed with the action; but it may grant an interpleader and proceed when the order is granted under Banking Law, § 115 (Laws 1892, p. 1896, c. 689) and when the action is to recover money on deposit. Gottschall v. German Sav. Bank, 45 Misc. 27, 90 N. Y. S. 896. See State v. Nerry, 105 Mo. App. 458, 79 S. W. 993, where it was sought to convert mandamus into an equitable suit by an interpleader. Under Code, § 3427, providing for the continuation of equitable proceedings, the action of interpleader may be maintained. Hoyt v. Gouge [Iowa] 101 N. W. 464.

94. Burns' Rev. St. 1901, § 274 is a mere substitute for the equitable remedy by independent suit, and is governed by the same rules. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489.

95. Construing Code, § 3427. Hoyt v. Gouge [Iowa] 101 N. W. 464.

96. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489; Stephenson v. Burdett [W. Va.] 48 S. E. 846; Supreme Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699. Interpleader allowed where there were two claimants to money due under policy of insurance. Id. Under Code Civ. Proc. § 820, a bank being sued by one claiming the money of a depositor held entitled to an order of interpleader, the assignee of the depositor claiming the fund. Wells v. Corn Exch. Bank, 43 Misc. 377, 87 N. Y. S. 480; Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. S. 310. See 2 Curr. L. 553, n. 70.

97. Supreme Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699; Stewart v. Fallon [N. J. Eq.] 58 A. 96.

98. Stephenson v. Burdett [W. Va.] 48 S. E. 846; Supreme Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699; Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489. An insurance company after delivery of check to beneficiary and stopping payment of same held not entitled to interplead creditors of a corporation who claimed an interest in the fund on the ground that the insured had paid premiums on the policy from the corporation's assets. Id.

NOTE. Modern tendency to relax above rule: "Originally it was uniformly held by the courts that a bill of interpleader could not be sustained except against defendants between whom there existed a privity. Their claims had to be deduced from the same title, and, if one claimed under a hostile, distinct, and paramount title, they could not be required to interplead for the protection of the plaintiff. 11 Enc. Pl. & Pr. 449. In later years there has been a tendency to relax this rule. Crane v. McDonald, 118 N. Y. 658, 23 N. E. 991. But this tendency is founded largely upon statutory provisions, and it cannot be said to be by any means general. It amounts to a criticism of the rule, rather than a repudiation of it. As to the rule requiring privity, see Haseltine v. Brickey, 16 Grat. [Va.] 116; Shaw v. Coster, 8 Paige [N. Y.] 339, 35 Am. Dec. 690; Conley v. Insurance Co., 67 Ala. 472." See Stephenson v. Burdett [W. Va.] 48 S. E. 846.

99. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489. Where a purchaser of standing timber sought to interplead owner of land, held bill not maintainable. Stephenson v. Burdett [W. Va.] 48 S. E. 846. Interpleader denied where complainant had entered into an independent contract with one defendant. Pratt v. Worrell [N. J. Eq.] 57 A. 450. Inconsistent obligations. Supreme Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699. See 2 Curr. L. 553, n. 75. Two real estate agents, each claiming to have found the purchaser of the land and each claiming the commission, held interpleader would not lie. Hoyt v. Gouge [Iowa] 101 N. W. 464.

1. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489; Supreme

in bills in the nature of an interpleader,[2] which bills are otherwise governed by the same rules as bills of interpleader.[3] The opposing claims must be such that the complainant cannot decide without hazard to himself,[4] and, in some states, he must satisfactorily show to the court that there is reasonable doubt as to his safety in undertaking to determine for himself to whom the fund belongs.[5] The danger existing, the stakeholder is entitled to the bill, though by reasonable inquiry the right of one claimant would become clear.[6] The claimants must have present rights to the fund or thing,[7] which rights must be on an equality with each other.[8] It is essential that the third party sought to be substituted be in existence and capable of interpleading.[9] The bill cannot be maintained where it appears that, as to either of the defendants, the plaintiff is a wrongdoer,[10] and it must not appear from the face of the bill that other interested parties have not been made defendants.[11] That the claim was derived from a different source by fraud or mistake cannot be set up in the interpleader proceeding.[12] The right may be lost by laches[13] or estoppel.[14]

A statutory interpleader can only be made in accord with terms of the statute,[15] but by consenting to a payment into court and substitution of parties, jurisdiction may be changed from one to another defendant.[16]

§ 2. *Procedure and relief; discharge of complainant; costs.*[17]—The bill should only set out the claims as made to the complainant.[18] An irregularity which plain-

Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699. See 2 Curr. L. 553, n. 71.

2. Stephenson v. Burdett [W. Va.] 48 S. E. 846. Where complainant claimed a lien on a chattel in his possession, which chattel was claimed by creditors of the alleged owner, held a bill to determine the title thereto was maintainable as a bill in the nature of an interpleader. Carter v. Cryer [N. J. Eq.] 59 A. 233.

3. Stephenson v. Burdett [W. Va.] 48 S. E. 846.

4. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489. The object of a bill of interpleader is to protect a party from double vexation in respect to one liability. Stewart v. Fallon [N. J. Eq.] 58 A. 96; Supreme Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699. [See this case for various statements of the law.] See 2 Curr. L. 553, n. 72. Hoyt v. Gouge [Iowa] 101 N. W. 464.

5. Civ. Code 1895, § 4896. Franklin v. Southern R. Co., 119 Ga. 855, 47 S. E. 344. [See case for short, clear discussion of Georgia rule.] In Georgia, the exemption of wages of a brakeman is so well settled that one cannot interplead a garnishee thereof. Franklin v. Southern R. Co., 119 Ga. 855, 47 S. E. 344. This is true though the summonses of garnishment issued from different courts and were sued out by different parties. Id.

6. Supreme Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699.

7. Savings bank held incapable of interpleading one having a future interest in a deposit. Construing Banking Law, § 115 (Laws 1892, p. 1896, c. 689). Gifford v. Oneida Sav. Bank, 90 N. Y. S. 693. In a bill in the nature of an interpleader, the plaintiff must have a subsisting, vested, equitable interest. Stephenson v. Burdett [W. Va.] 48 S. E. 846.

8. The mere right of a simple-contract creditor to have his debt satisfied cannot be asserted by interpleading in an attachment suit. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001. Vendee of goods having knowledge of assignment of account is not entitled when sued by the assignee to interplead attachment creditors of the vendor who had recovered a judgment against the latter. Michigan Sav. Bank v. Coy, Hunt & Co., 45 Misc. 40, 90 N. Y. S. 814.

9. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489. Creditors of a corporation after the appointment of a receiver held incapable of interpleading. Id.

10. Bill in the nature of an interpleader held not maintainable where plaintiff, in the event of the establishment of the claim of one of the defendants, would stand as to him in the attitude of a trespasser. Stephenson v. Burdett [W. Va.] 48 S. E. 846.

11. Pratt v. Worrell [N. J. Eq.] 57 A. 450. An executor's deed being void and having no effect to convert the equitable interest of the legatees in the property, he cannot compel them to interplead with the widow's representatives as to their contesting claims upon the purchase money paid for the deed. Id.

12. Northwestern Mut. Life Ins. Co. v. Kidder, 162 Ind. 382, 70 N. E. 489.

13. Where plaintiff and defendant both knew of outstanding claim, held judgment debtor not barred from subsequently bringing an interpleader suit interpleading the claimant and judgment debtor. City of New York v. Cody, 44 Misc. 270, 89 N. Y. S. 886. See 2 Curr. L. 554, n. 80.

14. Bank by allowing one in whose name stock stood to vote at meetings held not to estop it from filing a bill of interpleader to compel him to litigate his rights to the stock. Dickinson v. Griggsville Nat. Bank, 209 Ill. 350, 70 N. E. 593.

15. Under Mun. Court Act, § 187, not in trover and not after answer. Midler v. Lese, 91 N. Y. S. 148.

16. Midler v. Lese, 91 N. Y. S. 148.

17. See 2 Curr. L. 554.

18. Should not state the case of the claimants. Stewart v. Fallon [N. J. Eq.] 58 A. 96. See 2 Curr. L. 554, n. 83.

tiff, upon leave granted, has the right to correct as against the defendant, cannot be taken advantage of by an interpleader whose rights have been acquired pendente lite,[19] nor can the insufficiency of the allegations in the bill generally be questioned after judgment.[20] No reply being filed to an answer to a bill of interpleader, by any of the parties interpleading, it must be taken to be true.[21] There must be a prayer that the several claimants be compelled to interplead and state their claims that the same may be adjudged,[22] and an affidavit of good faith must be annexed.[23]

The right existing, the court must bring in such party and enjoin his proceeding in an independent action.[24] Each party must recover on the strength of his own title.[25] A verdict which in addition to finding an interpleader entitled to the property fixes the amount of his special interest therein, though erroneous, is generally harmless.[26]

The stakeholder to be discharged from liability must pay into court the amount the claimant is entitled to recover at the time when the order for interpleader was granted.[27] When nothing is paid into court, injunction will not be granted in aid.[28] Defendant on paying the money into court pursuant to an order of interpleader is not entitled to recover costs,[29] but on an interpleader caused by the fault of one of the claimants, the stakeholder should be allowed costs out of the fund, and the claimant who is not in fault is entitled to a decree against the other defendant for the costs taken out of the fund as well as his own.[30]

INTERPRETATION; INTERPRETERS; INTERSTATE COMMERCE; INTERVENTION, see latest topical index.

INTOXICATING LIQUORS.

§ 1. Control of the Liquor Traffic. Validity of Statutes and Ordinances (253).
§ 2. Local Option Laws (255).
§ 3. Licenses and License Taxes; Application For and Granting License (258). Bonds (262). Payment of License Fee or Tax

19. Where plaintiff in attachment first filed a declaration in tort, and afterwards filed an amended declaration in assumpsit. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001.

20. Supreme Council of Legion of Honor v. Palmer [Mo. App.] 80 S. W. 699.

21. Bristol Sav. Bank v. Holley [Conn.] 58 A. 691.

22, 23. Chartiers Oil Co. v. Moore's Devisees [W. Va.] 49 S. E. 449.

24. Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. S. 310.

NOTE. Right to injunction: On the filing of a bill of interpleader, a preliminary injunction will issue to restrain the prosecution of pending suits. It is an incident to the principal order that the defendants interplead. It makes no difference that positive injury to ensue is not made to appear. If the bill is entertained, the injunction follows. Where the bill contains equity, an injunction will not be denied merely because an injunction would not have been necessary had another remedy been chosen. Curtis v. Williams, 35 Ill. App. 518. On motion for an injunction, the complainant's affidavit of noncollusion cannot be contradicted. Curtis v. Williams, 35 Ill. App. 518; Laugston v. Boylston, 2 Ves. Jr. 101; Stevenson v. Anderson, 2 Ves. & B. 407; Manley v. Robinson, 4 Ch. App. 347; Toulmin v. Reid, 14 Beav. 499; Fahie v. Lindsay, 8 Or. 474. The usual order for an injunction upon a bill of this nature is that it issue upon the complainant's paying the money into court. This is a condition precedent, and an order for an injunction not containing it will be vacated. 2 Barbour, Ch. Pr. 123; Bliss v. French, 117 Mich. 538, 76 N. W. 73. If the money should be paid in in time to stay a trial, application should be made to vary the order on special grounds. 2 Barbour, Ch. Pr. 123; Sieveising v. Behrens, 2 Mylne & C. 581. Such injunction stays all proceedings. It may be moved for at once on payment of the money into court, and before the time for answering has expired. 2 Barbour, Ch. Pr. 123; Warington v. Wheatsone, Jac. 205; Vicary v. Widger, 1 Sim. 15. See, also, James v. Sams, 90 Ga. 404, 17 S. E. 962; Weikel v. Cate, 58 Md. 105; Kuhl v. Traphagen's Ex'r, 9 N. J. Law J. 343; City Bank v. Bangs, 2 Paige (N. Y.) 570. Ordinarily, a special receiver will not be appointed to take possession of the property without notice, but there are exceptions to this rule, as where immediate action is necessary to prevent great loss or injury, and especially where it is not sought to dispossess the party of his property. Oil Run Petroleum Co. v. Gale, 6 W. Va. 525.—From Fletcher's Eq. Pl. & Pr. p. 824, § 784.

25. They occupy the position of plaintiffs in possessory actions [Civ. Code 1895, § 5004]. Conway v. Caswell [Ga.] 48 S. E. 956.

26. Lafferty v. Hilliker [Mo. App.] 81 S. W. 910.

27. This includes interest. Helene v. Corn Exch. Bank, 96 App. Div. 392, 89 N. Y. S. 310.

28. Quin v. Hart [Miss.] 37 So. 553.

29. Scharff v. Supreme Lodge K. H., 96 App. Div. 632, 89 N. Y. S. 168.

30. Swiger v. Hayman [W. Va.] 48 S. E. 839. See 2 Curr. L. 554, n. 86, 87.

(263). Scope and Effect of License (263). Surrender, Transfer, or Revocation of License (263). Sale Without License, or Without Paying Tax (264).

§ 4. Regulation of Traffic. Prohibition of Sale or Keeping Open at Certain Times (265).

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§ 6. Criminal Prosecution (267).

A. Offenses and Responsibility Therefor in General (267).

B. Indictment, Information, or Complaint (272). Judicial Notice (274). Presumptions and Burden of Proof (274). Admissibility of Evidence (274). Weight and Sufficiency of Evidence (275). Trial (276).

§ 7. Summary Proceedings (277).

§ 8. Abatement of Traffic and Injunction (277).

§ 9. Civil Liabilities for Injuries Resulting From Sale (278).

§ 10. Property Rights and Contracts Relating to Intoxicants (280).

§ 1. *Control of the liquor traffic; validity of statutes and ordinances.*[31]—No one has a natural,[32] inalienable, or constitutional[33] right to sell intoxicating liquor at retail, the traffic being subject to the control of the state through an exercise of its police power;[34] but the law being complied with, the business is a legitimate one.[35] Thus, the state may absolutely prohibit the sale[36] or giving away[37] of intoxicants or nonintoxicants,[38] or it may provide for the regulation of the traffic, local option laws not being unconstitutional as special[39] or class[40] legislation, nor generally, as denying to one the equal protection of the law though certain classes of persons be excepted,[41] or as lacking uniformity in operation,[42] or as disfranchising one;[43] and, being complete,[44] such law is not unconstitutional as delegating legislative powers to the people.[45] Requiring persons of the excepted classes to

31. See 2 Curr. L. 554.

32. Burke v. Collins [S. D.] 99 N. W. 1112.

33. It is not one of the privileges or immunities of citizens within the meaning of the 14th amendment to the Constitution of the United States. Jourdan v. Evansville [Ind.] 72 N. E. 544. See 2 Curr. L. 555, n. 90.

34. Jourdan v. Evansville [Ind.] 72 N. E. 544; City of New Orleans v. Macheca, 112 La. 559, 36 So. 590; State v. New Orleans [La.] 36 So. 999; Webster v. State [Tenn.] 82 S. W. 179; State v. Scampini [Vt.] 59 A. 201. See 2 Curr. L. 555, n. 89.

35. Contract of sale thereof held enforceable. Mitchell v. Branham, 104 Mo. App. 480, 79 S. W. 739. By the Constitution of Louisiana and by statutory provisions, the business is made lawful. State v. New Orleans [La.] 36 So. 999.

36. State v. O'Connell [Me.] 58 A. 59; Burke v. Collins [S. D.] 99 N. W. 1112.

37. Parker v. State [Md.] 57 A. 677.

38. Rev. St. 1883, c. 27, § 33, amounts to a prohibition of the sale of malt liquor. State v. O'Connell [Me.] 58 A. 59.

39. Construing Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188. In re O'Brien, 29 Mont. 530, 75 P. 196; State v. Barber [S. D.] 101 N. W. 1078.

40. The "Four Mile Law" (Acts 1877, p. 37, c. 23 as amended) excepting from its operation sales by manufacturers in wholesale packages or quantities. Webster v. State [Tenn.] 82 S. W. 179. See 2 Curr. L. 555, n. 97.

41. Where certain occupations are excepted from the operation of the law: Druggists, manufacturers, etc. State v. Dollison, 194 U. S. 445, 48 Law. Ed. 1062. Sales by manufacturers in wholesale packages or quantities. Webster v. State [Tenn.] 82 S. W. 179. Where the sale is made a crime in certain territory and permitted in others. State v. Dollison, 194 U. S. 445, 48 Law. Ed. 1062. Pub. Acts 1899, p. 275, No. 183, is not unconstitutional in that it discriminates against druggists doing business in a local option county as compared with those doing business in the counties in which that law is not in force. People v. Shuler [Mich.] 98 N. W. 986. Rev. St. art. 3395, which places restrictions on the resubmission of a vote in which "no license" is carried, and practically none where it is not carried does not violate the 14th amendment of the Federal Constitution. Rippey v. State, 193 U. S. 504, 48 Law. Ed. 767. Sayles' Rev. St. arts. 3384, 3399. Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859. See 2 Curr. L. 555, n. 97.

Contra: Act 1902, § 21, No. 90, excepting from the provisions of said act sales of cider and native wines by the barrel by farmers and manufacturers denies the equal protection of the law to other persons. State v. Scampini [Vt.] 59 A. 201. Such act is not thereby rendered totally void, and by permitting all persons to sell cider by the barrel, and wine, not to be drunk on the premises, the remainder of the act may be upheld. Id. There is no warrant for unjust discrimination as between individuals engaged in the same business. State v. New Orleans [La.] 36 So. 999.

42. The Brannock Local Option Law is valid. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85. See 2 Curr. L. 555, n. 96.

43. Construing the Brannock Law. Jeffrey v. State, 4 Ohio C. C. (N. S.) 494.

44. Law providing for (1) petition for election, (2) notice, (3) form, supply, and method of marking ballots, (4) election and canvassing of return, (5) notice of result, and a definite date when law shall become operative, and (6) a penalty for a violation of its provisions, is complete. In re O'Brien, 29 Mont. 530, 75 P. 196. Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188, is complete. Id.

45. Construing Acts 1902, No. 90. State v. Scampini [Vt.] 59 A. 201. Construing Pol. Code, pt. 3, tit. 7, c. 10, §§ 3180-3188. In re O'Brien, 29 Mont. 530, 75 P. 196.

make reports is not compelling them to be witnesses against themselves.[46] The law must conform to all constitutional requirements as to its title[47] and manner of amending.[48] Statutes exempting the liquor of certain classes of dealers from the special liquor tax are not unconstitutional.[49] The liquor being an article of interstate commerce[50] it is not subject to state legislation,[51] but its introduction into a state must not be for the purpose of an illegal sale.[52] Requiring it to be shipped under its proper name is not an interference with interstate commerce.[53] Legislative powers must not be vested in the judiciary.[54] By Vermont constitution, fines must be proportionate to the offense,[55] and the same rule is applied under the constitutions of most states.[56] The constitutionality of an act cannot be contested by one whose rights it does not affect.[57]

Municipalities generally have the power either under statutory enactment[58] or

46. Considering Pub. Acts 1899, p. 275, No. 183, which requires druggists to make weekly reports. People v. Shuler [Mich.] 98 N. W. 986.

47. Acts 1898, p. 1273, c. 562, entitled "An act to enable the * * * voters of * * * to determine * * * whether * * * liquors * * * shall be sold in the county" is not unconstitutional as containing more than one subject which shall be described in the title, though it provides for the submission of the question every 4 years, the appointment of a license board and contains a number of sections providing for the regulation or prohibition of the sale of liquors. Price v. Board of Liquor License Com'rs [Md.] 57 A. 215. House Bill No. 162, of the session of 1897, does not violate Const. art. 5, § 23, declaring that no bill shall contain more than one subject, which shall be clearly expressed in its title. State v. Courtney, 27 Mont. 378, 71 P. 308. As to whether Pol. Code § 4084 is properly mentioned in title of act, quaere. Question not decided in case awarding the damages prescribed by § 4044 the amount being less than 10 per cent of the amount of the license. Id. Rev. Pol. Code § 2856 as amended by Laws 1903, p. 191, providing for annual submission of the question of license is not a prohibition law and is not invalid because "prohibition" is not expressed in the title. State v. Barber [S. D.] 101 N. W. 1078. Civil damage provisions are within the scope of the title "An act for the restriction and regulation" of the liquor traffic. Garrigan v. Kennedy [S. D.] 101 N. W. 1081. As to whether the title of Laws 1902, chap. 84, p. 105, is defective, quaere. Parker v. State [Md.] 57 A. 677.

48. The local option law (Pub. Acts 1899, p. 275, No. 183) is not repugnant to Const. art. 4, § 25, providing that no law shall be amended or revised by reference to its title alone. People v. Shuler [Mich.] 98 N. W. 986.

49. Rev. St. 1895, tit. 104, c. 1a, art. 5060l, exempting wine growers and manufacturers of domestic wines from the tax imposed thereby. Douthit v. State [Tex. Civ. App.] 82 S. W. 352.

50. Retailing liquors on a boat engaged in interstate commerce is not interstate commerce. Foppiano v. Speed [Tenn.] 82 S. W. 222. See in this connection, Commonwealth v. Louisville & E. Packet Co., 25 Ky. L. R. 2098, 80 S. W. 154.

51. See note **Constitutionality of laws affecting interstate commerce**, 3 Curr. L. 711, where the law on this subject is fully developed.

52. In Maine liquor being shipped C. O. D. from another state, if not intended for unlawful sale by the purchaser, is not liable to seizure while in the possession of the express company. State v. Intoxicating Liquors, 98 Me. 464, 57 A. 798.

53. State v. Moody [S. C.] 49 S. E. 8. The Federal laws against shipment of wines or liquors under false "names or brands" does not make it penal to ship without a label. Rev. St. § 3449, strictly construed because highly penal. United States v. Twenty Boxes of Corn Whiskey [C. C. A.] 133 F. 910. It applies only to rectifiers, wholesale dealers, and the like (Id.), and marks for a carrier's directions are not marks within the act. Mark "Glass; this side up, with care." Id.

54. Failure of act to define the words "wholesale" and "retail" does not render it void. State v. Dollison, 194 U. S. 445, 48 Law. Ed. 1062. Allowing the court to impose a fine of not less than $200 and imprisonment of not more than 60 nor less than 10 days does not render the act void. Id. Statute held not unconstitutional though it fixed no maximum fine. State v. Constantine [Vt.] 56 A. 1101.

55. A fine of not less than $300 for selling or keeping for sale intoxicating liquors without a license, held not so disproportionate to the offense as to justify the court in questioning the act of the legislature prescribing the same. State v. Constantine [Vt.] 56 A. 1101.

56. Fine not less than $25 or more than $200 or imprisonment not less than 10 or more than 60 days for allowing females to enter saloon not excessive. State v. Nelson [Idaho] 79 P. 79.

57. One selling liquor without a license cannot contest the constitutionality of a law providing for the appointment of license commissioners. State v. Scampini [Vt.] 59 A. 201. One not selling liquor for medicinal or sacramental purposes cannot complain of invalidity of local option law in not excepting from its provisions liquor imported in original packages for such purposes. In re O'Brien, 29 Mont. 530, 75 P. 196. The effect of a prohibition of the giving away of liquors is immaterial in a prosecution against one for selling liquor in violation of the act. Parker v. State [Md.] 57 A. 677.

58. Under Priv. Laws 1903, c. 170, p. 362, § 18, board of aldermen of City of Wash-

under the general welfare clause in their charters[59] to pass reasonable[60] ordinances restricting or regulating the liquor traffic in such city, and their reasonableness, in case of contest, must be finally decided by the courts.[61] Such ordinances must conform to state statutes,[62] for the state, by authorizing such regulation, does not surrender its power to license and regulate the traffic,[63] and may revoke such authority at any time.[64] The granting of such power is not unconstitutional as taking one's property without just compensation,[65] but the ordinance to be valid must not discriminate between persons in the same business in the same place.[66]

§ 2. *Local option laws.*[67]—In most states the determination of the question of prohibition is left to the electors of the political subdivisions of the state.[68] A

ington, N. C. have such power. Paul v. Washington, 134 N. C. 363, 47 S. E. 793. Under Rev. St. § 4364-20, a village may provide for the Sunday closing of saloons. Bramley v. Euclid, 2 Ohio N. P. (N. S.) 508. Under Mills' Ann. St. §§ 2833, 4403, an incorporated town may enact an ordinance prohibiting the sale or giving away of liquors. Litch v. People [Colo. App.] 75 P. 1079.

59. Robinson v. Americus [Ga.] 48 S. E. 924. May make the keeping of such liquor for sale criminal. Reese v. Newman, 120 Ga. 198, 47 S. E. 560. See 2 Curr. L. 555, n. 14-19.

60. Ordinances held reasonable: To prevent obstruction of view of interior of saloon from outside. Paul v. Washington, 134 N. C. 363, 47 S. E. 793. Establishing business hours between 6 A. M. and 8 P. M. Id. Prohibiting use of billiard or pool tables, gaming devices, bowling alleys, etc., in saloon. Id. Prohibiting saloon keeper or his servants from being in the saloon during closed hours. Id. Requiring all liquors to be served and drunk at the counter, and prohibiting the use of tables and lounges. Id. Prohibiting maintenance of any restaurant or committee rooms in connection with barroom, unless divided by solid perpendicular walls. Id. Declaring that saloon keepers, their servants and employes shall not use any side, rear, or trap doors, or elevators or stairways for the purpose of selling or delivering liquor. Id. Ordinance providing for inspection of liquors. Stephens v. Henderson, 120 Ga. 218, 47 S. E. 498. A prohibition against allowing females to enter a place where liquor is sold is unreasonable; but prohibition of entry for immoral purposes is not. State v. Nelson [Idaho] 79 P. 79.

61. Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

62. Penalties must be the same. City of Assaria v. Wells [Kan.] 75 P. 1026. Const. § 168. Ordinance imposing a penalty for illegal sale not less than $60 nor more than $100 is void, Ky. St. § 2557, B, 2, imposing a fine of not less than $50 nor more than $100 or imprisonment for 40 days or both. Kehr v. Com. [Ky.] 83 S. W. 633.

An act giving a city power to regulate saloons should be construed as authorizing regulation consistent with the state laws. Loc. Acts 1897, p. 839, No. 448, § 21, does not abrogate Comp. Laws 1897, § 5395, fixing the days on which saloons shall be closed. Moore v. Kelley [Mich.] 98 N. W. 989. City cannot prohibit sales by wine grower unless regularly engaged in the business of selling the same within the city. Stephens v. Henderson, 120 Ga. 218, 47 S. E. 498. Inspection ordinance enacted by mayor and aldermen of Cartersville in 1887 does not contravene Pub. Laws 1877, p. 33. Id.

63. A local option law being adopted in a county, it applies to sales of liquor in an incorporated town in the county, though such town in its articles of incorporation has the right to regulate the sale of liquor within its limits. In re O'Brien, 29 Mont. 530, 75 P. 196. See 2 Curr. L. 555, n. 19.

64. Though delegation was made by permission of the constitution. Parsons v. People [Colo.] 76 P. 666.

65. Burns' Ann. St. 1901, § 3927, giving a city power to regulate the sale of intoxicating liquors within 4 miles of its corporate limits. Jourdan v. Evansville [Ind.] 72 N. E. 544.

66. An ordinance should not allow certain people to continue in the business in a certain place, and at the same time prohibit others from subsequently engaging in the business in such place. Town of Mandeville v. Band, 111 La. 806, 35 So. 915.

67. See 2 Curr. L. 557. As to constitutionality of local option laws, see ante, § 1.

68. Under Const. art. 16, § 20, the statute empowering the commissioners' court to order a local option election to be held in a territory which is less than the whole county and includes more than one of the political subdivisions of the county is void. Board v. Buchanan [Tex. Civ. App.] 82 S. W. 194. The combination of precincts in which prohibition is in force with those in which it does not prevail, the entire territory being less than the whole county, is unconstitutional. Id. Under Const. 1876, art. 16, § 20a, commissioners' court has no authority to combine subdivisions of a county for the purposes of a local option election. Ex parte Mills [Tex. Cr. App.] 79 S. W. 555; Ex parte Mitchell [Tex. Cr. App.] 79 S. W. 558; Commissioners' Court v. Beall [Tex.] 81 S. W. 526. Election precincts. Efird v. State [Tex. Cr. App.] 80 S. W. 529. The above cases do not affect an election held in and for an entire county. Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859. Const. art. 16, § 20 authorizes a law authorizing the commissioners' court to alter some existing subdivision for local option purposes, but not to create new subdivisions. Ex parte Heyman [Tex. Cr. App.] 78 S. W. 349. This is true, though the legislature may create new subdivisions. Id. Hence Laws 1897, p. 235, c. 162, authorizing the combining of two or more political subdivisions of a county is unconstitutional. Id. Const. art. 16, § 20 is violated by an act

locality adopting a local option law with the right to again vote on the subject at a subsequent date, the legislature must preserve the autonomy of such locality.[66] Such local option law constitutes the exclusive system for the regulation or manner of liquor selling in the given locality, and suspends during its continuance all inconsistent laws.[70] Local option statutes are criminal laws,[71] and are not impliedly repealed by the passage of a general law.[72] They generally prescribe the date on which they take effect,[73] and in such case take precedence over a general legislative enactment prescribing the time when all laws should go into effect.[74] In Ohio, the right to adopt local prohibition is extended to residence property holders and localities,[75] and denied to manufacturing or mercantile property,[76] the number of petitioners required depending on the street frontage.[77] Names may be added to or withdrawn from the petition at any time before the election is ordered,[78] and a petitioner removing from the district before such order is made, his name cannot be counted.[79] The petition cannot be withdrawn and changed after filing.[80] Substantial compliance with statutes requiring the filing of the petition is sufficient.[81]

authorizing the commissioners' court to designate "subdivisions" by combining justices' precincts. Ex parte Wells [Tex. Cr. App.] 78 S. W. 928. Const. art. 16, § 20 contemplated that local option districts in a county should be contiguous; hence Laws 1897, p. 235, c. 162 makes possible a result not contemplated by the constitution. Ex parte Heyman [Tex. Cr. App.] 78 S. W. 349. Sp. Laws (28th Leg.) p. 391 held not void because providing for local option in territory added by the act to the City of Dallas. City of Oak Cliff v. State [Tex.] 79 S. W. 1. Local option law (Rev. St. §§ 4364-20a, 4364-20b) applies to hamlets as the same existed in the state prior to the adoption of the Municipal Code, Oct. 22, 1902. Carey v. State, 70 Ohio St. 121, 70 N. E. 955.

69. Under Const. art. 16, § 20, and Sayles' Ann. Civ. St. 1897, arts. 3393-3395, the Laws of 1897, p. 235, c. 162, which authorizes the combining of several precincts whether wet or dry, necessarily imperils the right to vote periodically in each district on the question of prohibition. Ex parte Heyman [Tex. Cr. App.] 78 S. W. 349. Action of commissioners' court in so doing is unauthorized. Id.

70. Provision of local option law that intoxicants may be sold as a medicine, so far suspends the law prohibiting sales to minors without the written consent of the parent or guardian. Atkinson v. State [Tex. Cr. App.] 79 S. W. 31.

Laws construed: Brannock Local Option Law for residence districts is not in conflict with the Beal Law. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85. The prohibitive features of Loc. Acts 1903, p. 62 are not affected by the invalidity, if any, of the dispensary features. Mitchell v. State [Ala.] 37 So. 407.

71. Commissioners' Court v. Beall [Tex.] 81 S. W. 526. Decisions of court of criminal appeals on such subject is conclusive. Id.

72. Terrell election law does not repeal the local option law. Ex parte Keith [Tex. Cr. App.] 83 S. W. 683.

73. A local option law taking effect "from and after" a certain date, it is effective for the purpose of authorizing the taking of a vote on that date. Construing Laws 1903, p. 81, c. 95. State v. Wenzel, 72 N. H. 396, 56 A. 918.

74. Pub. St. 1901, c. 2, § 38 does not apply to the license law (Laws 1903, p. 81, c. 95). State v. Wenzel, 72 N. H. 396, 56 A. 918.

75. Offices of physicians attached to residences are to be regarded as residence property under Brannock Law. In re Petition for Election, 2 Ohio N. P. (N. S.) 245.

76. Petition will be denied for the entire district where certain blocks or squares therein are devoted to business purposes [Brannock Law]. In re Petition for Election, 2 Ohio N. P. (N. S.) 245. Both sides of the streets, bounding a local option district should be considered [Brannock Law]. Id. Property enclosed by high board fence (In re Petition, etc., in Toledo, 2 Ohio N. P. [N. S.] 469), or bill boards [Brannock Law] (In re Petition for Election, 2 Ohio N. P. [N. S.] 245), there being no buildings near the street, it is not devoted to business purposes so that the frontage shall be so counted. Under the Brannock Law providing for local option for residence districts, a classification which prevents saloon property from being considered as business property held not unreasonable. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85.

77. A street that is used for substantially its whole length, together with the abutting property, by a private corporation as a lumber yard, is not a street within the meaning of the law. In re Petition, etc., in Toledo, 2 Ohio N. P. (N. S.) 469. The provision of the Brannock Law (97 O. L. 87), whereby forty per cent. of the voters of a residence district may fix the boundaries of the district, is not an invasion of legislative power. Ely v. Willard, 2 Ohio N. P. (N. S.) 571.

78. By filing a duplicate petition. In re Petition, etc., in Toledo, 2 Ohio N. P. (N. S.) 469.

79. Petition filed under Brannock Law. In re Petition, etc., in Toledo, 2 Ohio N. P. (N. S.) 469.

80. Cole v. Columbus, 2 Ohio N. P. (N. S.) 563.

81. Failure to file the petition with the county clerk within 5 days of its receipt by the town clerk, as required by Laws 1896, p. 57, c. 112, held not to require resubmission, it being filed more than 20 days prior to the taking of the vote. In re Rice, 95 App. Div. 28, 88 N. Y. S. 512.

In Ohio, summons must be served on the mayor of the city.[82] The designation of the time within which the election may be ordered is directory only.[83] The order must recite the finding of the court that the petition was properly signed,[84] must designate the day of the election,[85] the question to be voted on,[86] who may vote,[87] and the time when the law if adopted shall take effect[88] with a reasonable degree of certainty. Generally, only qualified electors can vote,[89] and the court may notify the managers of the election of his ruling that certain persons are disqualified to vote.[90] Persons being illegally permitted[91] or restrained from[92] voting, it must be shown that in the absence of such illegal acts the result would have been different. Irregularities in the form of the ballots may be disregarded unless they tend to confuse or mislead the voter,[93] and a substantial statement of the questions is sufficient.[94] Provisions which affect the time and object of the election are mandatory,[95] though in Ohio this does not seem to be true.[96] The notice may be a substantial copy of the order.[97] No voter being deprived of any opportunity to vote,

82. The requirement of the Brannock Law that service shall be made on the mayor does not supersede the provision of the municipal code which determines who is the mayor at time of service. In re Gorey, 2 Ohio N. P. (N. S.) 389. Under the Brannock Law, a summons directed to B. as mayor of the city of S., and left at the office of the mayor, is not good, in the absence of B., against the acting mayor. Id. The Brannock Law having fixed 20 days from the date of election as the time within which a mayor may be summoned to defend on behalf of a resident district, an alias summons issued more than 20 days thereafter is void. Id.

83. Brannock Law. In re Petition for Election, 2 Ohio N. P. (N. S.) 245; In re Petition, etc., in Toledo, 2 Ohio N. P. (N. S.) 469. Except where elections are asked in different districts containing common territory. Id. Time within which an election may be held under the Brannock Law is mandatory. Cole v. Columbus, 2 Ohio N. P. (N. S.) 563.

84. Under Rev. St. 1899, § 3027, order reciting that petition is signed by over a designated number held void. State v. Bird [Mo. App.] 83 S. W. 284.

85. An order of the commissioners' court approving a petition asking that the election be held on the 17th of Dec., 1902, and then ordering the election for the 6th of December, 1902, is not objectionable as rendering the election day uncertain. Thurmond v. State [Tex. Cr. App.] 79 S. W. 316.

86. Submitting the question "whether or not" local option shall be adopted is not objectionable, though the law is "whether" it shall be adopted. Thurmond v. State [Tex. Cr. App.] 79 S. W. 316.

87. The law stating that only qualified voters can vote, the order need not say that the election is to be held by the "qualified voters" of the county. Thurmond v. State [Tex. Cr. App.] 79 S. W. 316.

88. Order requiring publication of result for four weeks before the law should go into effect held unobjectionable, though the publication continues for five weeks. Thurmond v. State [Tex. Cr. App.] 79 S. W. 316.

89. Under Laws 1903, p. 63, c. 75, § 1 and the constitutional amendment of 1902, persons who had not paid their poll taxes on Feb. 1, 1903 could not vote at a local option election held May 30, 1903. Ex parte Wood [Tex. Cr. App.] 81 S. W. 529.

90. Ex parte Wood [Tex. Cr. App.] 81 S. W. 529.

91. Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859.

92. Under Sayles' Ann. Civ. St. 1897, art. 3397. Ex parte Wood [Tex. Cr. App.] 81 S. W. 529.

93. Where caption of question was printed only once, and the questions were printed without the caption, held error would be disregarded. People v. Edwards, 42 Misc. 567, 87 N. Y. S. 618. See 2 Curr. L. 558, n. 23.

94. Petition stating that the petitioners request the submission of "the several questions in relation to the sale of liquors, as provided by § 16 of the liquor tax law," sufficiently states the questions to be submitted. In re Rice, 96 App. Div. 28, 88 N. Y. S. 512. Adding a question regarding highways, the numbering being continuous, held to require a resubmission of local option questions. In re Smith, 44 Misc. 384, 89 N. Y. S. 1006. Omission of word "only" after the words "hotel keepers" in submission of question held not sufficient to require resubmission. In re Rice, 95 App. Div. 28, 88 N. Y. S. 512. Submission of questions provided for in Laws 1900, p. 853, c. 367, with the provision "if the majority of the votes cast on the first question submitted are in the negative" omitted from after the fourth question is improper. In re Munson, 95 App. Div. 23, 88 N. Y. S. 609.

95. Failure of town clerk to post notices in four public places as required by Laws 1900, p. 853, c. 367, held to render submission of such questions void. In re Smith, 44 Misc. 384, 89 N. Y. S. 1006. Under Rev. St. 1899, c. 22, art. 3, the order of the county court directing in what newspaper the notice should be published is essential, and after the election, the order cannot be made nunc pro tunc. State v. Baldwin [Mo. App.] 83 S. W. 266. Court may direct its order ordering the election to be entered nunc pro tunc after the election, the clerk having erred in entering it of record. State v. Bird [Mo. App.] 83 S. W. 284.

96. Mere failure to publish notice of election for full period of ten days, there being no fraud, does not render local option election under the Beal Law (§§ 4364-20a, Rev. St.) void. Fike v. State, 4 Ohio C. C. (N. S.) 81.

97. Keller v. State [Tex. Cr. App.] 81 S. W. 1214.

nonobservance of the time during which polls are to be kept open will not vitiate the election.[98] In contesting the result, facts showing the illegality of the election and that without such illegality the result would have been different must be averred.[99]

The validity of the election cannot be impeached collaterally in a criminal prosecution.[1] A court of equity has no jurisdiction to enjoin an election,[2] or to enjoin the publication of the result on the ground of illegality of the election,[3] and such publication being made after the dissolution of an injunction prohibiting the enforcement of prohibition is not void, the appellate court affirming the decision below.[4]

The fact that the election was held and the result may be shown by evidence other than the record of the corporation clerk.[5] After the election, it will be presumed that the petition was in legal form[6] and that the notice was properly posted,[7] the burden being on the attacking party to show the invalidity thereof.[8]

A local option law providing for the prohibition or regulation of the sale of liquors, the fact that the vote favors the sale of liquors does not operate as an implied repeal of the part relating to prohibition.[9] A vote that the local option law shall become inoperative is equivalent to voting that liquors may be sold.[10] In the absence of notice given and formal application made, one will not be allowed to intervene on an application for resubmission of local option questions.[11]

The local option laws extend to sales on steamers on navigable waters within the local option territory.[12] One buying beer from a nonresident brewing corporation and reselling the same is not a distiller or manufacturer.[13]

§ 3. *Licenses and license taxes; application for and granting license.*[14]—A license and permit are synonymous.[15] Ordinarily the power to grant the license

98. Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859.

99. Petition in language of statute and alleging that a certain person paid the poll tax of 500 qualified voters without their consent and for the purpose of having them vote against prohibition is insufficient, it not alleging they so voted. Stinson v. Gardner [Tex.] 78 S. W. 492.

1. Beal Local Option Election Law (Rev. St. §§ 4364-20a). Fike v. State, 4 Ohio C. C. (N. S.) 81.

2. Laws 1896, pp. 922, 930, c. 909, has no application to the submission of local option questions, and hence the supreme court has no jurisdiction to pass on the sufficiency of a petition to restrain a town clerk from printing ballots for the submission of such questions. In re Electors of Town of Newburgh, Orange County, 96 App. Div. 438, 89 N. Y. S. 1065.

3. Even though the suit be brought by liquor dealers who allege irreparable injury to their property if the result be published. Robinson v. Wingate [Tex. Civ. App.] 80 S. W. 1067.

4. Ex parte Wood [Tex. Cr. App.] 81 S. W. 529. Refusal to allow introduction of injunction proceedings in evidence held proper. Keller v. State [Tex. Cr. App.] 81 S. W. 1214.

5. Under Beal Local Option Law, the failure of the clerk to record in the proper way and place the result reported to him does not invalidate the election, if an election and the result thereof can be clearly established by other evidence. Dalrymple v. State, 5 Ohio C. C. (N. S.) 185.

6. Dalrymple v. State, 5 Ohio C. C. (N. S.) 185. Was signed by the requisite number. In re Rice, 95 App. Div. 28, 88 N. Y. S. 512. This presumption is in the nature of evidence and until overcome by other evidence stands as proof of the fact in question. Dalrymple v. State, 5 Ohio C. C. (N. S.) 185.

7. Keller v. State [Tex. Cr. App.] 81 S. W. 1214.

8. That it did not contain the requisite number of signatures. In re Rice, 95 App. Div. 28, 88 N. Y. S. 512. As to posting of notices. Keller v. State [Tex. Cr. App.] 81 S. W. 1214.

9. But such part may become operative under a subsequent vote authorizing prohibition. Price v. Board of Liquor License Com'rs for Cecil County [Md.] 57 A. 215.

10. Construing Ky. St. 1903, § 2554. George & Bro. v. Winchester [Ky.] 80 S. W. 1158.

11. In re Munson, 95 App. Div. 23, 88 N. Y. S. 509.

12. Under Ky. St. 1903, § 198, sale on steamer on Ohio river and tied to wharf in local option territory is a violation of the law. Commonwealth v. Louisville & E. Packet Co., 25 Ky. L. R. 2098, 80 S. W. 154.

13. Hence cannot sell beer at wholesale in a local option territory. Davis v. Com. [Ky.] 82 S. W. 277.

14. See 2 Curr. L. 559.

15. Hence Sess. Laws 1902, pp. 47, 48, c. 3, § 18, repeals Mills' Ann. St. § 4403, and druggists are subject to the state tax. Parsons v. People [Colo.] 76 P. 666.

is vested in the discretion[16] of the county court or a board of commissioners. The exercise of such power is ordinarily held to be a judicial act[17] though the contrary is held in some states,[18] but in no case does the licensing body's judicial powers extend to criminal prosecutions for violations of the law,[19] and the discretion cannot be arbitrarily used[20] nor delegated.[21] In Missouri the jurisdiction of the county court in this regard is exclusive.[22] In the absence of express authority, a municipal corporation has no power to grant licenses.[23] A statute fixing the amount of the license tax does not authorize the issuance of licenses unless otherwise allowed by law.[24] Number of dealers to be licensed may be limited.[25]

The applicant must generally be a permanent resident of the locality wherein he applies for the license,[26] and the application should show that he is a citizen of the United States,[27] and the location of the place where he desires to carry on business.[28] The personal fitness of the applicant and licensee is a matter of legislative concern,[29] one who has been adjudged guilty of violating the liquor laws being generally ineligible for a certain time.[30]

The application must generally be supported by a petition signed by the

16. State v. Common Council of Northfield [Minn.] 101 N. W. 1063.

Under Acts 1903, p. 288, c. 233, and p. 342, c. 247, § 66, the county commissioners have such discretionary power. Barnes v. Wilson County Com'rs, 135 N. C. 27, 47 S. E. 737.

17. State v. Common Council of Northfield [Minn.] 101 N. W. 1063. County court. State v. Fort [Mo. App.] 81 S. W. 476. Where they have to find from the evidence whether or not the applicant is entitled to the license, and determine the amount of the fee he should pay. Sargent v. Little, 72 N. H. 555, 58 A. 44. See 2 Curr. L. 559, n. 39.

18. Appeal of Hewitt, 76 Conn. 675, 58 A. 231; Town of Hawk's Nest v. County Court of Fayette County [W. Va.] 48 S. E. 205. Prohibition will not lie to prohibit a county assessor from issuing a license. Id.

19. Commissioners having the same power to make presentment as a grand juror, have no judicial power in the matter of criminal prosecutions. State v. Scampini [Vt.] 59 A. 201.

20. C. B. George & Bro. v. Winchester [Ky.] 80 S. W. 1158; State v. New Orleans [La.] 36 So. 999; Barnes v. Wilson County Com'rs, 135 N. C. 27, 47 S. E. 737. The license ought not to be refused on the objection of a minority of the property holders in a neighborhood where others are engaged in the business, or on the ground that no more bar-rooms are needed. State v. New Orleans [La.] 36 So. 999.

NOTE. **Discretion in granting license:** The discretion must be based upon the circumstances of each particular case as presented to the court, and must not be biased by general opinions as to the propriety or impropriety of such licenses. Schlandecker v. Marshall, 72 Pa. 200. All the merits must be considered before the application can be refused. People v. Symonds, 4 Misc. 6. The discretion must be exercised according to the requirements of the people, regard being had to the location and to the accommodation of the public therein. Att'y Gen. v. Guilford Justices, 27 N. C. 315; Muller v. Buncombe County Com'rs, 89 N. C. 171; State v. Melton, 44 N. C. 49; State v. Woodside, 31 N. C. 496. The board has no power to pass a resolution denying all applications for licenses. People v. Claverack Excise Com'rs, 4 Misc. 330.—From note to Sherlock v. Stuart, 21 L. R. A. 580.

21. Cannot delegate power to designate licensee. In re Krug [Neb.] 101 N. W. 242. Town ordinance requiring applicant to first obtain license from county court, held applicant after obtaining such license could not demand a license from the town as a matter of right. State v. Stiff, 104 Mo. App. 685, 78 S. W. 675.

22. Circuit court cannot, under Rev. St. 1899, § 1674, subd. 4, restrain a county court from acting on petition to issue license. State v. Fort [Mo. App.] 81 S. W. 476.

23. A charter by providing for disposal of funds arising from sale of licenses does not impliedly authorize the municipality to issue such licenses. Walker v. McNelly [Ga.] 48 S. E. 718. See 2 Curr. L. 559, n. 40.

24. Construing Ky. St. 1903, § 4224. Hodges v. Metcalfe County Court, 25 Ky. L. R. 1706, 78 S. W. 460.

25. State v. Common Council of Northfield [Minn.] 101 N. W. 1063.

26. On his permanent removal to another town the license will not protect an agent employed in carrying on the business. Construing Burns' Ann. St. 1901, § 7283h. State v. Dudley [Ind. App.] 71 N. E. 975.

27. An application stating that petitioner is a citizen of the United States, and that he was born in Ireland, is not fatally defective because it does not state in what manner petitioner became a citizen. In re Walsh's License, 208 Pa. 582, 57 A. 983.

28. Application held not defective for failure to give number of house, the houses in the town not being numbered. Douthit v. State [Tex. Civ. App.] 82 S. W. 352.

29. State v. Dudley [Ind. App.] 71 N. E. 975 [dicta].

30. Code § 2387. It makes no difference that the judgment was entered by consent, or in settlement of pending civil or criminal proceedings. In re Wilhelm [Iowa] 100 N. W. 44.

owners of a majority of the property in the neighborhood, such signature may be made by an authorized agent,[31] a minor, however, is not qualified to sign such a petition,[32] and a signature by his guardian, to be effective, must be as such.[33] Park frontage should be considered,[34] the park commissioners generally having the power to sign for the same.[35] The signature of a part of a number of tenants in common is a valid signature as to such proportion of the frontage as the number of tenants signing bears to the whole number.[36] In other states, the consent of a certain number of "qualified electors,"[37] or "assessed taxpaying citizens"[38] or "freeholders,"[39] or owners of dwelling houses in the vicinity[40] is required. The statute grouping those eligible to sign the petition, the requisite number of the group is sufficient.[41] A law requiring the consent of such persons is not illegal as conferring arbitrary powers on them.[42] One must not have been made a freeholder for the purpose of qualifying him to sign the petition[43] nor must his consent have been obtained for a valuable consideration,[44] for in neither case can his signature be counted. A petitioner may withdraw his name at any time prior to the final action on the application,[45] or at the end of, but not during, the year for which a tax has been paid.[46] A law requiring the consent of nearby property owners, excepting from its provisions places being used for the business when the law was enacted, the right to a liquor tax certificate without consent of such property owners is a property right attaching to such places;[47] which property right cannot be extinguished by a vote of the electors of the town that no liquor should be sold therein for a period of two years.[48] A blank petition is invalid.[49] Matters essential to the validity of the petition cannot be supplied by amendment after the time fixed for its filing is past.[50]

31. Theurer v. People, 211 Ill. 296, 71 N. E. 997.

32. People v. Griesbach, 211 Ill. 35, 71 N. E. 874.

33. A signature by a guardian held one in her individual capacity though she was entitled to dower in the infant's property. People v. Griesbach, 211 Ill. 35, 71 N. E. 874.

34. Even though the park commissioners have no power to sign for such property. Theurer v. People, 211 Ill. 296, 71 N. E. 997.

35. Theurer v. People, 211 Ill. 296, 71 N. E. 997.

36. People v. Griesbach, 211 Ill. 35, 71 N. E. 874.

37. Partnerships and trading companies are not "qualified electors" within the meaning of a law requiring a certificate signed by a certain number of such electors to be filed with the petition. Considering P. L. 259. In re Forst's License, 208 Pa. 578, 57 A. 991. [Part of the court dissents on the ground that the signature of a firm is the signature of all the members of it, and, for all useful purposes in the requirements of the statute, it should be so regarded.] See 2 Curr. L. 560, n. 53.

38. Under Rev. St. 1899, c. 129, §§ 8542, 8546, and Fayette City Ordinance, § 8, by which merchants are assessed for their goods, their assessments are equalized, and their taxes are levied, such merchants are "assessed taxpaying citizens." State v. Kingsbury, 105 Mo. App. 22, 78 S. W. 641.

39. A wife living with her husband on land, the title to which is in the latter, and which is occupied by them jointly as a homestead is not by reason thereof a freeholder within the meaning of Cobbey's Ann. St. § 7175. Campbell v. Moran [Neb.] 99 N. W. 498. The position of husband and wife as stated above being reversed the former is not such a freeholder. Id. See 2 Curr. L. 560, n. 56-58.

40. Double house may be treated as two buildings, where saloon was to be located in one-half (In re Patterson, 43 Misc. 498, 89 N. Y. S. 437), but a frame building divided into seven parts, each part being about eight feet wide cannot be treated as seven separate dwellings (Id.).

41. Rev. St. 1899, § 2997, providing that the petition shall be signed by a majority of the tax-paying citizens and guardians of minors, held majority of whole is sufficient. State v. Fort [Mo. App.] 81 S. W. 476.

42. Construing Acts 1896, p. 55, No. 45. City of New Orleans v. Macheca, 112 La. 559, 36 So. 590.

43. Where land was deeded them by applicant held could not be counted. Colglazier v. McClary & Martin [Neb.] 98 N. W. 670.

44. Theurer v. People, 211 Ill. 296, 71 N. E. 997. Leasing property held valuable consideration. Id.

45. Theurer v. People, 211 Ill. 296, 71 N. E. 997.

46. Kane v. Grady, 123 Iowa, 260, 98 N. W. 771.

47. Construing Laws 1896, p. 45, c. 112. People v. Brush [N. Y.] 71 N. E. 731.

48. On the reversal of such suspension the right is revived. People v. Brush [N. Y.] 71 N. E. 731.

49. Was not addressed to any court, and failed to designate the applicant or the town in which it was desired to carry on

The execution and presentation of a remonstrance is in no sense the exercise of judicial power.[51] All the names thereto may be signed by one person pursuant to a power of attorney.[52] The burden of proof is on a remonstrator to prove that those signing the petition are not qualified to so do.[53] Persons who by redistricting have ceased to be voters in the ward cannot be counted as such voters.[54] In Indiana a remonstrator cannot revoke his signature after the first of the three days providing for the filing of the remonstrance.[55]

The license must issue in pursuance of a decision reached by a majority of the board,[56] and the fact that a member is unavoidably absent from the public hearing does not prevent his participating in such decision.[57] The board may reject the application on their own knowledge of the applicant's unfitness to deal in liquors.[58] The proceedings must affirmatively show on their face all jurisdictional facts,[59] such recitals being generally conclusive[60] except on direct attack.[61] Affirmance by the district court of the grant or refusal of a license is not reviewable on appeal.[62]

Certiorari, not prohibition, is the proper way to prevent issuance of license,[63] though the issuance being illegal it may be enjoined if the bill show some ground of equitable jurisdiction.[64] Certiorari being invoked it is a direct attack on the order of the court.[65] As to whether mandamus will lie to compel the issuance of a license there is a conflict.[66] In Nebraska a motion for a new trial is not essential in order to obtain a review of the judgment of the district court entered on an appeal from the license board.[67]

business. State v. Tulloch [Mo. App.] 82 S. W. 645.

50. Where requisite number of qualified electors did not sign certificate required by P. L. 259. In re Forst's License, 208 Pa. 578, 57 A. 991.

51. Hence Burns' Ann. St. 1901, § 72831, providing that two-thirds of the voters of any town may by filing a remonstrance prevent the granting of a license is not violative of Const. art. 7, § 1, providing that all judicial power shall be vested in the courts. Hoop v. Affleck, 162 Ind. 664, 70 N. E. 978.

52. The so doing does not deny the applicant privileges accorded to others. Hoop v. Affleck, 162 Ind. 564, 70 N. E. 978. See 2 Curr. L. 560, n. 64, 65.

53. Colglazier v. McClary [Neb.] 98 N. W. 670. But see 2 Curr. L. 560, n. 67; Id. 561, n. 69.

54. Burns' Ann. St. 1901, § 72831. Abbott v. Inman [Ind. App.] 72 N. E. 284.

55. Sexton v. Goodwine [Ind. App.] 70 N. E. 999.

56, 57. Appeal of Hewitt, 76 Conn. 685, 58 A. 231.

58. Under Rev. Pol. Code 1903, § 2839. Burke v. Collins [S. D.] 99 N. W. 1112. And they need not state the facts known to them from which they found such unfitness. Id. Such law is not unconstitutional. Id.

59. State v. Fort [Mo. App.] 81 S. W. 476. That the granting power has considered the application and petition and investigated and found that the statutes have been complied with in every particular, and that the applicant possesses the requisite qualifications to be licensed. State v. Page [Mo. App.] 80 S. W. 912. Order held not to find as a matter of fact that a majority of the taxpaying citizens and guardians of minors owning property in said block signed said petition. Id.

60. Recital that petition is signed by requisite number of eligible persons conclusively shows the jurisdiction of the court. State v. Fort [Mo. App.] 81 S. W. 476.

61. Finding of sufficiency of petition. State v. Tullock [Mo. App.] 82 S. W. 645.

62. Halverstadt v. Berger [Neb.] 100 N. W. 934.

63. Prohibition does not lie to prevent a county court from granting licenses, or to compel it to revoke a license granted without the consent of a town council. Town of Hawk's Nest v. County Court [W. Va.] 48 S. E. 205. Appellate court will not issue writ of prohibition to circuit court prohibiting it from restraining the county court from acting on an application for a license. State v. Fort [Mo. App.] 81 S. W. 476.

64. Though the sales would constitute a public nuisance, equity cannot interfere at the suit of individuals in the absence of a showing of special injury. Strickland v. Knight [Fla.] 36 So. 363. That such sales will disturb the peace of the community, and increase taxation does not show any special or particular injury. Id. That such sales are prohibited by law does not show any special or particular injury. Id.

65. State v. Tullock [Mo. App.] 82 S. W. 645.

66. That it will. C. B. George & Bro. v. Winchester [Ky.] 80 S. W. 1158; State v. New Orleans [La.] 36 So. 999. Where board refused to approve bond. Burke v. Collins [S. D.] 99 N. W. 1112. See 2 Curr. L. 559, n. 47, 48.

That it will not. State v. Stiff, 104 Mo. App. 685, 78 S. W. 675; Barnes v. Wilson County Com'rs, 135 N. C. 27, 47 S. E. 737. See 2 Curr. L. 561, n. 81.

67. In re Krug [Neb.] 101 N. W. 242. See 2 Curr. L. 561, n. 74.

An act imposing a license tax is a revenue law.[68] Such laws are not unconstitutional for lack of uniformity in taxation,[69] nor do they generally violate the taxation provisions of state constitutions,[70] nor do they deny one the equal protection of the laws.[71] In the absence of statutory provisions, a vote to raise license fees may be had, upon sufficient notice,[72] at the same time a vote to accept a local option law is held.[73] A municipality being given unrestricted power to impose license taxes, the authority conferred is not affected by state law.[74] One selling liquor on a boat coming within the territory of a state is liable to taxation.[75] Repeals are stated in the notes.[76]

Bonds.[77]—The legislature has a right to require a bond in addition to other civil and criminal penalties,[78] but, in the absence of statutory authority, a court has no power to require such a bond.[79] The bond is a contract, the sum stated therein being in the nature of liquidated damages.[80] The principal and surety are jointly and severally liable,[81] their liability continuing during the life of the certificate,[82] and extending to the illegal acts of an agent, though done in violation of his specific instructions, unless committed in pursuance of a deliberate purpose to injure his principal.[83] A brewing company may become liable as surety upon the bond.[84] Defects in the application do not affect the validity of the bond,[85] and the latter need not designate the particular building in which the business is to be carried on.[86] The bond being accidently given in less than the statutory

68. Parsons v. People [Colo.] 76 P. 666. Sess. Laws 1902, pp. 47, 48, c. 3, providing for an annual liquor tax, and a penalty for the violation of its provisions, held title "An act in relation to revenue," etc., is sufficient. Id. Such act, being a measure for the raising of state revenue, applies to the City of Denver. Id.

69. Parsons v. People [Colo.] 76 P. 666.

70. Do not violate Const. art. 10, inhibiting all licenses or taxation of trades or occupations for the purposes of securing revenue, since the restrictions as to the rate of taxation refer only to property taxes, and the phrase "annual tax" includes occupation taxes. Parsons v. People [Colo.] 76 P. 666.

71. Considering Sess. Laws 1902, p. 47, c. 3. Parsons v. People [Colo.] 76 P. 666.

72. Warrant for a town meeting reading "Shall licenses for the sale of liquor be granted in this town under the provisions of 'An act to regulate the traffic in intoxicating liquor,' passed," etc., "and pass any vote relating thereto," held sufficient to give notice that the question of raising fees might be acted on. Sargent v. Little, 72 N. H. 555, 58 A. 44.

73. Construing Laws 1903, p. 92, c. 95, §§ 31, 32. Sargent v. Little, 72 N. H. 555, 58 A. 44.

74. That state laws require such licenses to be graduated makes no difference as far as the municipality is concerned. Town of New Iberia v. Moss Hotel Co. [La.] 86 So. 552.

75. Tax imposed by acts 1903, p. 615, c. 257 and Acts 1899, p. 1032, c. 432. Foppiano v. Speed [Tenn.] 82 S. W. 222.

76. Acts 1903, p. 184, as to amount of tax repeals Local Laws 1898-99, p. 1182. Spann v. Lowndes County [Ala.] 37 So. 369.

77. See 2 Curr. L. 561.

78. Cullinan v. Burkard, 93 App. Div. 31, 86 N. Y. S. 1003.

79. Such bond being required it is void. Cr. Code Prac. §§ 382, 391, authorizing the court to put one under bond not to commit a felony or breach of the peace confers no such authority. Cornett v. Commonwealth, 25 Ky. L. R. 1769, 78 S. W. 858.

80. Action to recover sum named in the bond is in contract, and not to recover a penalty. Cullinan v. Burkard, 93 App. Div. 31, 86 N. Y. S. 1003. See 2 Curr. L. 562, n. 87.

81. Under Code §§ 3465, 2422. Principal is not a necessary party to action against surety, nor is judgment against the former a prerequisite to the action. Knott v. Peterson [Iowa] 101 N. W. 173.

82. Principal and surety on the bond are liable for acts of assignee of certificate, unless the certificate was presented to the proper authorities for cancellation, or the assignment was consented to as required by statute. Cullinan v. Kuch, 177 N. Y. 303, 69 N. E. 597.

83. Cullinan v. Burkard, 93 App. Div. 31, 86 N. Y. S. 1003.

Conditions construed: A condition that one will not "suffer or permit" certain things to be done relates to the acts of others than the person licensed. Cullinan v. Burkard, 93 App. Div. 31, 86 N. Y. S. 1003. A condition that one will not violate the provisions of the liquor tax law is not limited to the licensee's individual acts, as distinguished from those which might be done by his servants. Id.

84. The bond being executed by it to induce the licensee to lease a building from it and deal exclusively in its products. Horst v. Lewis [Neb.] 98 N. W. 1046.

85. Application failed to state in what quantities the liquor was to be sold, and to make certain erasures. Castellano v. Marks [Tex. Civ. App.] 83 S. W. 729.

86. Morris v. Mills [Tex. Civ. App.] 82 S. W. 334. Need not give number, where houses were not numbered. Douthit v. State [Tex. Civ. App.] 82 S. W. 352. But see 2 Curr. L. 562, n. 85.

amount it is nevertheless a good statutory bond to that extent.[87] The court excluding the bond for defects in the application, plaintiff is not obliged to prove a breach of the bond, and file a statement of facts on appeal, in order to review the court's ruling.[88]

Payment of license fee or tax.[89]—A license tax being illegally levied and voluntarily paid it can be recovered on the ground of error only under exceptional circumstances.[90] In Wisconsin a village not charged with the legal obligation to support its poor is obliged to pay the license money it receives to the town.[91]

Scope and effect of license.[92]—A license is not a contract,[93] nor a "franchise," an "office," or "letters patent,"[94] but it is a mere personal privilege,[95] which may be canceled at any time.[96] Its protection extends to agents of the licensee,[97] but is limited by the scope of the license and the law under which it is granted.[98] A void license is no protection.[99] A license to manufacture gives no right to sell, where the act requiring license to sell makes no exception.[1]

Surrender, transfer, or revocation of license.[2]—In the absence of power to forbid the sale of intoxicants, a municipal corporation cannot issue licenses subject to forfeiture.[3] In revoking the license, the board acts judicially,[4] and hav-

87. Construing Rev. St. 1895, art. 5060g. Bond to sell spirituous liquors was given in amount required to sell malt liquors. Jones v. State [Tex. Civ. App.] 81 S. W. 1010.

88. Castellano v. Marks [Tex. Civ. App.] 83 S. W. 729.

89. See 2 Curr. L. 562.

90. Ordinance under which tax was levied was not signed by mayor. Town of New Iberia v. Moss Hotel Co. [La.] 36 So. 552.

91. Rev. St. 1878, § 1562. Town of Winneconne v. Winneconne [Wis.] 99 N. W. 1055. A village attempting to operate under Rev. St. 1878, c. 40, and not assuming the obligation to support its poor, held, under Rev. St. 1878, § 1562, the village was required to pay all liquor license money to the town, subject to the deduction of all sums paid for the support of the poor, as authorized by Laws 1887, p. 530, c. 473. Id. Rev. St. 1898, § 1562 does not affect the pre-existing right of the town to collect from the village the license money previously received by it, nor the liability of the village to pay it. Id. Under Rev. St. 1898, § 4249, limitations against the obligations of a village to pay such money to the town commenced to run on the passage of Laws 1897, p. 4, c. 5, validating the incorporation of villages incorporated under Rev. St. 1878, c. 40. Id. For law in Washington and construction of special law in Minnesota, see 2 Curr. L. 562, n. 93.

92. See 2 Curr. L. 562.

93. State v. Harrison, 162 Ind. 542, 70 N. E. 877. See 2 Curr. L. 562, n. 95.

94. And hence cannot be tested or vacated by quo warranto under Code 1883, §§ 607, 2788. Hargett v. Bell, 134 N. C. 394, 46 S. E. 749.

95. Cannot be issued with the privilege of selecting the person to conduct the business. In re Tierney [Neb.] 99 N. W. 518. Licensee cannot delegate right to conduct the business. In re Krug [Neb.] 101 N. W. 242. Generally nontransferable. State v. Dudley [Ind. App.] 71 N. E. 975. See 2 Curr. L. 562, n. 94.

96. State v. Harrison, 162 Ind. 542, 70 N. E. 877. The Act of 1903, amending Acts 1887, p. 293, c. 167, as amended in 1899, does not re-enact the provision in the Act of 1899, excepting from its operation sales made under licenses then in force. Webster v. State [Tenn.] 82 S. W. 179. See 2 Curr. L. 562, n. 95, 96. Laws 1903, §§ 19, 21, 28, providing that for a violation of the liquor law a license may be forfeited is not inconsistent with § 14, authorizing the board of license commissioners to revoke and cancel a license for a violation of the law. Parrent v. Little, 72 N. H. 566, 58 A. 510.

97. State v. Dudley [Ind. App.] 71 N. E. 975.

98. State v. Scampini [Vt.] 59 A. 201. A person having paid but one tax and having but one license cannot sell intoxicating liquors in two different and wholly separate rooms in the same building. Thomas v. Arle, 122 Iowa, 538, 98 N. W. 380. A druggist cannot under his permit habitually sell liquor as a beverage. People v. Congdon [Mich.] 100 N. W. 266.

99. License issued in prohibition county. Strickland v. Knight [Fla.] 36 So. 363. A licensed liquor dealer in a prohibition county, selling liquor is just as guilty as a nonlicensed dealer in a county where licenses are issued. State v. Gray, 111 La. 853, 35 So. 952. Act No. 107, p. 161, of 1902, is binding in parishes in which licenses are issued to liquor dealers. Act No. 66, p. 93, of 1902, applies to prohibition parishes. The penalty provided in each act applies to its special parish. Id.

1. State v. Schmulbach Brewing Co. [W. Va.] 49 S. E. 249.

2. See 2 Curr. L. 562.

See ante, Scope and effect of license.

3. City of Shreveport v. P. Draiss & Co., 111 La. 511, 35 So. 727. Municipality of Shreveport has no authority to entirely prohibit sale of intoxicants. Id. Forfeiture of license being an additional penalty, it cannot be imposed for violation of an ordinance in the absence of statutory enactment. Id.

4. Commissioners having the power to investigate complaints, revoke licenses and some of the powers of grand jurors, held to act judicially in the matter of revocation. State v. Scampini [Vt.] 59 A. 201. If license

ing jurisdiction,[5] or the proceedings showing on their face that it has absolutely no jurisdiction,[6] certiorari will not lie. On the return day of an order to show cause why a license should not be revoked, the court has authority to order a reference.[7] The license board generally has no power to declare the license void in its inception.[8] Assignee of a license after surrendering the same for cancellation may intervene in an action to revoke the license.[9] If one suffers his license to be revoked by consent before the expiration of the time for which it was granted, he has, after the expiration of such time, no beneficial interest in litigation to review the order of revocation.[10] In some states the license being revoked, the licensee is not entitled to a rebate,[11] even though the license was wrongfully revoked,[12] but in New York the rule is otherwise, the licensee establishing, as a condition precedent, his compliance with the law.[13] An action is not maintainable against license commissioners as such, or as individuals, to recover back alleged overpayments on fees or forfeitures.[14]

The license is not generally assignable at the will of the licensee.[15]

Sale without license, or without paying tax.[16]—License laws have no extra territorial force.[17] A dealer violating the conditions of his license is, in Florida, guilty of selling without a license.[18] It is no defense to one selling without a license that the city or town did not vote license,[19] nor that there were no commissioners to whom application for it could be made.[20] Each separate sale constitutes an offense.[21] The statute prohibiting a sale without a license, the indictment need not allege that the sale was for gain.[22] One selling liquor without a

is declared forfeited, appeal may be had to county court. Id.

5. Croot v. Board of Trustees of Town of Manitou [Colo. App.] 78 P. 313.

6. Resolution to declare license void at its inception. State v. Schroff [Wis.] 100 N. W. 1030. [In this case the action is a nullity and may be disregarded and must be distinguished from those cases, reviewable by certiorari, in which there is simply a defect in jurisdiction. Ed.]

7. Although respondent fails to appear. Considering Laws 1896, p. 69, c. 112 as amended by Laws 1903, p. 1125, c. 486, and Code Civ. Proc. § 1015. In re Cullinan, 93 App. Div. 540, 87 N. Y. S. 817; In re Cullinan, 97 App. Div. 122, 89 N. Y. S. 683. Unconstitutionality of Laws 1900, p. 863, c. 367, does not affect Laws 1896, p. 69, c. 112. Id.

8. State v. Schroff [Wis.] 100 N. W. 1030.

9. In re Cullinan, 94 App. Div. 445, 88 N. Y. S. 164.

10. Holppa v. City Council of Aberdeen, 34 Wash. 554, 76 P. 79. Appearing by attorney and confessing authority of city council to revoke license, whereupon it was revoked and a rebate warrant ordered drawn for the unexpired time of the license, held to sufficiently show consent to the revocation. Id.

11. Cannot be recovered so long as the order of revocation stands unreversed. Toman v. Westfield [N. J. Law] 57 A. 125.

12. Where a license is revoked on the ground that the licensee had sold to an intoxicated person, and he was subsequently indicted for such sales, and acquitted, he was not entitled to recover any part of the license fee. Construing Laws 1903, p. 88, c. 95; § 8, cl. 9, §§ 12, 13, 14, 15. Parrent v. Little, 72 N. H. 566, 58 A. 510. A stipulation that the order of revocation was made illegally cannot authorize the court to entertain a suit to recover the license fee. Toman v. Westfield [N. J. Law] 57 A. 125.

13. That he has been guiltless of any violation thereof and that there is no prosecution pending against him. Laws 1903, p. 1122, c. 486, § 25. People v. Cullinan, 95 App. Div. 598, 88 N. Y. S. 1022. In the absence of such a showing, mandamus will not lie to compel payment of rebate. Id. See 2 Curr. L. 563, n. 98.

14. Sargent v. Little, 72 N. H. 555, 58 A. 44.

15. Rev. St. 1899, § 2992. Mitchell v. Branham [Mo. App.] 79 S. W. 739.

16. See 2 Curr. L. 564.

Pol. Code § 4064 is amended by House Bill No. 162 of the session of 1897 so that a person is not entitled to sell liquors under the merchant's license provided for in § 4064. State v. Courtney, 71 P. 308, 27 Mont. 378. After the amendment of § 4064 there is no conflict between it and § 4063. Id.

17. Code 1896 § 3524 making all sales void if the seller has not a license, has no application to a dealer doing business in another state, and having no license in the state of the forum, the subject of the sale being in such other state and to be there delivered. Shiretzki v. Julius Kessler & Co. [Ala.] 37 So. 422.

18. Crabb v. State [Fla.] 36 So. 169.

19. State v. Scampini [Vt.] 59 A. 201. The penalty prescribed in Acts 1902, p. 107, No. 90, § 68, relates to all who sell liquor without a license, whether in license towns or elsewhere. State v. Darling [Vt.] 58 A. 974.

20. State v. Scampini [Vt.] 59 A. 201.

21. Under Acts 1902, p. 107, No. 90, § 68. State v. Darling [Vt.] 58 A. 974.

22. Construing Burns' Ann. St. 1901, § 7285. Stapf v. State [Ind. App.] 71 N. E. 165.

license cannot contest the legality of the appointment of the license commissioners.[23]

In order to convict it must be proved that the tax was imposed.[24] It is no defense that the liquor was the property of a partnership of which defendant was a member,[25] but the fact that defendant had no knowledge of the intoxicating qualities of the compound sold may be considered in mitigation of punishment.[26]

§ 4. *Regulation of traffic. Prohibition of sale or keeping open at certain times.*[27]—Generally the owner[28] of a saloon is prohibited from keeping the same open or selling liquor on legal holidays, election days[29] Sundays,[30] and certain hours of the night,[31] and he is liable for the act of his bartender in so doing,[32] though contrary to his express instructions,[33] though some states hold that knowledge or consent on his part is essential;[34] but proof of sale by the bartender presumptively establishes defendant's guilt.[35] The finding of the jury on the question of good faith in prohibiting sales is conclusive.[36] A law forbidding the sale of liquor on all legal holidays applies to those created after the passage of the law.[37] By shutting off the bar by a substantial adjustable partition, one may keep the remainder of the building open without violating the law,[38] but such partition must reach to the ceiling.[39] That the owner or another entered the building for the purpose of engaging in work pertaining to the business is no defense in the absence of an emergency,[40] and in such case they should not remain any longer than is absolutely necessary.[41] A druggist authorized to sell medicines on Sunday may sell intoxicants on such day.[42] An exception is sometimes made in favor of

23. State v. Scampini [Vt.] 59 A. 201.

24, 25, 26. Scott v. State [Tex. Cr. App.] 82 S. W. 656.

27. See 2 Curr. L. 564.

28. Evidence held insufficient to establish defendant as the owner of the saloon. Beane v. State [Ark.] 80 S. W. 573.

29. Under Acts 1901, p. 266, c. 89, § 76, making it a misdemeanor for anyone to give away intoxicating liquors on election day, it is no offense for a licensed dealer to sell such liquors on that day. State v. Edwards, 134 N. C. 636, 46 S. E. 766. Pen. Code 1895, relating to sale of intoxicants on election days, is by implication repealed by Gen. Laws (28th Leg.) p. 154, c. 101. Fleeks v. State [Tex. Cr. App.] 83 S. W. 381. See 2 Curr. L. 564, n. 21.

30. Under Laws 1895 (p. 8, c. 4322, § 9), a licensed dealer cannot sell liquor on Sunday. Crabb v. State [Fla.] 36 So. 169. Beal Law. Kappes v. State, 4 Ohio C. C. (N. S.) 14. In such case all reference in the indictment to a sale is surplusage. Id. In Florida, a sale on Sunday and a sale without a license constitute the same offense. Crabb v. State [Fla.] 36 So. 169. An ordinance prohibiting "keeping open" on Sunday is violated by keeping open for purpose other than sale of liquor. To permit consultation of proprietor and bartender. McCarty v. Atlanta [Ga.] 49 S. E. 287.

Evidence as to purchase of liquor held sufficient to warrant a conviction of keeping open on Sunday. State v. Gillespie, 104 Mo. App. 400, 79 S. W. 477.

31. A complaint charging defendant, a licensed saloon keeper, with keeping his place of business open after 11 o'clock at night in violation of the law held sufficient, and to state facts constituting a public offense. State v. Clemmensen [Minn.] 99 N. W. 640.

32. People v. Lundell [Mich.] 99 N. W. 12; People v. Possing [Mich.] 100 N. W. 396. An information charging a saloon keeper with keeping his saloon open on Sunday proof that the saloon was kept open by defendant's bartender and not by defendant personally does not constitute a variance. Id.

33. Comp. Laws 1897, § 5395. People v. Kriesel [Mich.] 98 N. W. 850.

34. Beane v. State [Ark.] 80 S. W. 573.

35, 36. State v. Terry, 105 Mo. App. 428, 79 S. W. 998.

37. People v. Kriesel [Mich.] 98 N. W. 850.

38. Matter of Cullinan, 90 App. Div. 607, 86 N. Y. S. 1046. Bar in pavilion being shut off by wood and glass partition held rest of pavilion could be legally kept open on Sunday. In re Cullinan, 93 App. Div. 427, 87 N. Y. S. 660.

39. Poolroom, construing application, license and Burns' Ann. St. 1901, §§ 7278, 7283-7283d, held part of saloon, it being divided therefrom by a partition 4 feet high, and hence it was unlawful to allow persons to enter such room on Sunday. Atkinson v. State [Ind. App.] 70 N. E. 560. See 2 Curr. L. 565, n. 22.

40. Where a bartender entered to put ice on the beer, conviction was sustained in the absence of evidence that a sufficient quantity of ice could not have been laid in the evening before. Construing Shannon's Code, § 6784. Martin v. State [Tenn.] 79 S. W. 131.

41. One entering a saloon during prohibited hours in order to repair water pipe, being permitted to remain there for a short time after repairing the same, the saloon keeper is guilty of keeping the saloon open contrary to law. People v. Lundell [Mich.] 99 N. W. 12.

42. Watson v. State [Tex. Cr. App.] 79 S. W. 31.

the proprietor of a hotel[43] who is allowed to serve liquor to guests ordering meals,[44] and, in the absence of knowledge to the contrary, the proprietor may assume that a single sandwich constitutes a meal for the person ordering.[45]

Prohibition of sale in certain places.[46]—Statutes commonly provide that the business shall be carried on in one room,[47] which shall not be in a place where a mercantile[48] or restaurant[49] business is carried on, nor located in a residential part of the town,[50] or within a certain distance of a school or church.[51] One acquiring a right of way over public lands for ditch purposes acquires no right to erect a saloon thereon.[52] In some states saloons must front on streets or highways.[53] The granting of a license is not an adjudication that the premises correspond to the statutory requirements.[54]

Prohibition of sale to certain persons.[55]—One is prohibited from selling liquor to an Indian,[56] and lack of knowledge of the latter's nationality is no defense.[57] Sales to minors are generally prohibited; as to whether or not lack of knowledge is a defense depends upon the statutes of the state and the construction thereof,[58] and the way this question is decided largely determines the sufficiency of the indictment[59] and the admission[60] and sufficiency[61] of the evidence. Evidence that

43. A house having 24 bed rooms, a kitchen adequate to provide for the feeding of the guests, a dining room containing over 300 square feet and harboring between 30 and 40 people, is a "hotel" within the meaning of Laws 1897, p. 234, c. 312, § 31, cl. "k." In re Cullinan, 93 App. Div. 427, 87 N. Y. S. 660.

44. Evidence held insufficient to establish such defense. Cullinan v. Rorphuro, 93 App. Div. 200, 87 N. Y. S. 670. Evidence as to sale of liquor without meals considered and held not to justify a revocation of the license. Matter of Cullinan, 90 App. Div. 607, 86 N. Y. S. 1046.

45. Where one bought a sandwich declaring that he had just eaten and would not eat same, held serving liquor with sandwich is a violation of the law. In re Cullinan, 93 App. Div. 427, 87 N. Y. S. 660.

46. See 2 Curr. L. 565.

47. Code, § 2448, providing that the selling or keeping for sale of intoxicants shall be carried on in one room, is violated by using a warehouse separate from one's saloon in which to store beer. Bell v. Hamm [Iowa] 101 N. W. 475. See 2 Curr. L. 566, n. 30.

48. A license to sell liquors by less measure than one quart cannot be granted for a place in which a grocery or other mercantile business is carried on. P. L. 1889, p. 83, § 11 (2 Gen. St. p. 1813, § 141). Peer v. Board of Excise Com'rs of Newark [N. J. Law] 57 A. 153.

49. Drug store selling soda water and ice cream is not a restaurant or eating house. In re Henery [Iowa] 100 N. W. 43.

50. A portion of a street 1,100 feet in length, on which there are 58 buildings, the houses being small and occupied for the most part by Italians and people of African descent, and there being four small grocery stores occupying portions of buildings which are also occupied as dwellings, and two licensed saloons, held not a purely residential part of the town. Appeal of Hewitt, 76 Conn. 685, 58 A. 231.

51. Order of the county court prohibiting sale of wine by growers within 3 miles of a schoolhouse held within the purview of Acts 1899, p. 137, § 1, though made prior to the passage of said act. Kettern v. State [Ark.] 78 S. W. 758. Under Sand. & H. Dig. § 4877, the requisite number of persons signing the petition for an order prohibiting the sale within three miles of a school or church, it is the imperative duty of the court to make such order. Bridewell v. Ward [Ark.] 79 S. W. 762. That the signers' names appear on different petitions at different times, or that a remonstrance has been filed, makes no difference. Id. Acts 1896-97, p. 79, prohibiting sale of liquors within 5 miles of Elba High School, is not repealed by the charter of the town whereby the latter is given authority to license the sale of liquors. State v. Rushing [Ala.] 36 So. 1007. Nor by Acts 1898-99, p. 114, § 13, authorizing municipalities to sell spirituous liquors, but declaring that it does not repeal any local law. Id. See 2 Curr. L. 565, n. 33.

52. Considering 26 Stat. 1095. Whitmore v. Pleasant Valley Coal Co., 27 Utah, 284, 76 P. 748.

53. Burns' Ann. St. 1901, § 7283d. Paved alleys 16 ft. wide passing through the middle of a block are not streets or highways. State v. Harrison, 162 Ind. 542, 70 N. E. 877.

54. Under Burns' Ann. St. 1901, § 7283d, making provision for the revocation of the license for violation of the statutory requirements. State v. Harrison, 162 Ind. 642, 70 N. E. 877.

55. See 2 Curr. L. 565.

56. 29 Stat. 506, prohibiting the sale of liquor to an Indian, extends to Indian students at the Carlisle school. United States v. Belt, 128 F. 168. See 2 Curr. L. 565, n. 34.

57. United States v. Stofello [Ariz.] 76 P. 611.

58. That the liquor dealer believed the minor was of age is no defense in an action on his bond. Gilbreath v. State [Tex. Civ. App.] 82 S. W. 807.

59. An indictment that defendant "unlawfully and knowingly" sold liquor to * * * "a person under the age of 21 years" sufficiently charges that the defendant knew that the purchaser was under age. Jones v. State [Tex. Cr. App.] 81 S. W. 49.

60. Testimony showing personal appearance of minor is competent (Dittforth v.

minor is a gambler is not admissible,[62] nor is evidence of previous sales competent to show knowledge.[63] Written consent of a parent or guardian being a defense, that of a stepfather is sufficient.[64] In some states minors are not permitted to enter or remain in a saloon; remaining in this case means loitering,[65] and the fact that the entering was for a harmless purpose is no excuse,[66] nor is lack of knowledge, though it would be a defense to a sale.[67] The conditions of the license often restrict one in his right to sell.[68] Liquor dealers may not be prohibited from allowing females to enter their places of business, but entry for illegal purposes may be prohibited.[69]

§ 5. *Action for penalties.*[70]—The sum recoverable on a dealer's bond being in the nature of a penalty,[71] an action therefore, in the absence of statutory provisions, does not survive.[72] Until it is exhausted there may be as many recoveries on the bond as there are breaches,[73] and recoveries for several breaches may be recovered in the same action.[74] The penalty provided for the sale of liquor to a minor cannot be recovered by the latter's parents.[75]

§ 6. *Criminal prosecution. A. Offenses and responsibility therefor in general.*[76]—In various states, county courts[77] and the mayors of towns[78] have jurisdiction over violations of the liquor laws.

State [Tex. Cr. App.] 80 S. W. 628), but it is not allowable to permit a witness to testify that from the personal appearance of the minor he would not have taken him to be a minor (Id.). In suit on bond for sale to minor, held improper to place other boye on the stand and merely prove their age, the object being to allow the jury to make comparisons. Poynor v. Holzgraf [Tex. Civ. App.] 79 S. W. 829. Declarations of minors as to their age, made to a saloon keeper, are admissible only to contradict their evidence on the same subject at the trial, and should be so confined by the charge. State v. Dittfurth [Tex. Civ. App.] 79 S. W. 52.

61. Where the overwhelming evidence was that the boys were minors, held verdict of jury that they were not was in disregard of the evidence and a new trial should be granted. State v. Dittfurth [Tex. Civ. App.] 79 S. W. 52. Evidence that seller had notice of minority of purchaser held sufficient to sustain a conviction. Menzing v. State [Tex. Cr. App.] 78 S. W. 935. See 2 Curr. L. 572, n. 47.

62. Poynor v. Holzgraf [Tex. Civ. App.] 79 S. W. 829.

63. Dittforth v. State [Tex. Cr. App.] 80 S. W. 628.

64. Though given against protest of mother. Jones v. State [Tex. Cr. App.] 81 S. W. 49. See 2 Curr. L. 565, n. 38.

65. That minor only remained in saloon long enough to purchase a bucket of beer held not to constitute an entering and remaining therein. Ghio v. Stephens [Tex. Civ. App.] 78 S. W. 1084.

66. Where minor entered to repair a gasoline lamp, held saloon keeper liable. Douthit v. State [Tex. Civ. App.] 82 S. W. 352.

67. Sayles' Civ. St. 1897, art. 5060g. State v. Dittfurth [Tex. Civ. App.] 79 S. W. 52.

68. Under Acts 1902, No. 90, §§ 23, 24, 68, a person having a license of the fourth class can sell only to persons holding a license to sell direct to consumers. Words wholesaler and retailer construed. State v. Scampini [Vt.] 59 A. 201.

69. State v. Nelson [Idaho] 79 P. 79.

70. See 2 Curr. L. 566.

71. Under Rev. St. 1895, § 3380, requiring a bond conditioned that one will not sell to minors, and allowing any person aggrieved to sue for its violation, and that such person could recover $500 as "liquidated damages" for each offense, held sum recoverable a penalty. Johnson v. Rolls [Tex.] 79 S. W. 513.

Sufficiency of petition: Petition alleging breaches of bond "on or about the 23d day of December, 1901, and on divers days before and after said date during said month," is not subject to special exception as being too vague, indefinite, and uncertain. Patton v. Williams [Tex. Civ. App.] 79 S. W. 357.

72. Upon death of principal should he abated as to sureties. Johnson v. Rolls [Tex.] 79 S. W. 513.

73. Jones v. State [Tex. Civ. App.] 81 S. W. 1010.

74. Bond given under Rev. St. 1895, art. 5060g. Douthit v. State [Tex. Civ. App.] 82 S. W. 352.

75. Construing Laws 1896, p. 79, c. 112, § 30. Westbrook v. Miller, 90 N. Y. S. 558.

76. See 2 Curr. L. 566.

77. Under Mills' Ann. St. § 2830c, the justices of the peace have not exclusive jurisdiction of the offenses stated therein. Langan v. People [Colo.] 76 P. 1048. New York rule, see 2 Curr. L. 566, n. 45.

78. Mayor and city council have jurisdiction, the offense being the violation of an ordinance. Robinson v. Americus [Ga.] 48 S. E. 924. The president pro tem of a village council, as acting mayor has no jurisdiction to hear and determine violation of the Beal Law [Rev. St. § 1536, 854]. State v. Hance, 4 Ohio C. C. (N. S.) 541. Under the Beal Law a conviction before the mayor of selling intoxicating liquor in violation of a local option law passed under the authority of said Beal Law cannot be reviewed on the ground that the judgment is against the weight of the evidence. Fike v. State, 4 Ohio C. C. (N. S.) 81.

Intoxicating liquor statutes, other than those relating to the transportation of such liquor,[79] are to be liberally construed, to the end that evasions may be prevented.[80]

In states where information prevails, a county attorney is not obliged to institute proceedings upon his own knowledge,[81] but, whenever notified by an officer or other person of any violation of the liquor laws, it is his duty to diligently exercise all the authority conferred upon him by law for the purpose of disclosing, prosecuting, and punishing the offender.[82] In an action of quo warranto for failing to prosecute, the issue of primary importance is that of good faith.[83] This good faith is presumed.[84] That the city authorities are about to prosecute does not excuse him from prosecuting.[85] Two laws being violated one may be indicted under either.[86] Preliminary proceedings before the license commissioners are not a necessary condition precedent to instituting criminal proceedings.[87] In New York the prosecution of an agent involving the forfeiture of the principal's license, it should be by indictment.[88] A statutory enumeration of intoxicating liquors while conclusive as to the liquors mentioned,[89] is not exclusive, the intoxicating qualities of any other liquor being a question of fact[90] to be proved by any competent evidence,[91] and the force and effect of such evidence are for the jury to determine.[92] Mistake of fact as to intoxicating qualities is a defense.[93]

In some states keeping liquor for sale[94] or giving it away[95] is prohibited.

79. Commonwealth v. Beck [Mass.] 72 N. E. 357.

80. Bell v. Hamm [Iowa] 101 N. W. 475.

81, 82, 83. State v. Trinkle [Kan.] 78 P. 854.

84. State must prove contrary by preponderance of evidence. State v. Trinkle [Kan.] 78 P. 854. That saloons were openly run is relevant on question of motive. Id.

85. State v. Trinkle [Kan.] 78 P. 854. Evidence held to be insufficient to warrant defendant's removal from office. Id.

86. Special act being merely cumulative to a general law. Kemp v. State, 120 Ga. 157, 47 S. E. 548. Acts 1874, p. 403, is supplementary to the general law. Id. See 2 Curr. L. 566, n. 46.

87. Under Acts 1902, No. 90, §§ 45-57. State v. Scampini [Vt.] 59 A. 201.

88. Second prosecution under Laws 1896, p. 76, c. 112. People v. Hoenig, 86 N. Y. S. 673.

89. Considering Rev. St. 1883, c. 27, § 33. State v. Piche, 98 Me. 348, 56 A. 1052. The statutory prohibition of the sale of a specific liquor being absolute it is not necessary for the jury to determine whether or not it is intoxicating. Under Rev. St. 1883, c. 17, § 1, the amount of alcohol in malt liquor is immaterial. State v. O'Connell [Me.] 58 A. 59.

90. State v. Piche, 98 Me. 348, 56 A. 1052. A liquor which contains 3 per cent or more of alcohol is not as a matter of law intoxicating, nor is one which contains a less percentage nonintoxicating as a matter of law, but the question is for the jury to determine from all the evidence in the case. Id. Charge that if the liquor will not produce intoxication "if drank in reasonable quantities" etc., held incorrect, a reasonable quantity being left undefined. The expression here used is not equivalent to saying "when drank in such quantities as may practically be drank." Murry v. State [Tex. Cr. App.] 79 S. W. 568.

91. The composition and character of the liquor, the amount of alcohol it contains, and in what quantities it produces intoxication, are all competent evidence tending to determine the character of the liquor as an intoxicant. State v. Piche, 98 Me. 348, 56 A. 1052.

92. State v. Piche, 98 Me. 348, 56 A. 1052. **Sufficiency of evidence to show an intoxicant,** see 2 Curr. L. 572, n. 47. Where evidence was that "Malt Extract" looked like beer, tasted a little like beer, but did not intoxicate, held insufficient to show intoxicating quality of liquor. Scales v. State [Tex. Cr. App.] 83 S. W. 380. Evidence that fluid sold by accused was red in color, looked like liquor, burnt like liquor, and had an effect like cheap whiskey or beer is sufficient. Finch v. State, 120 Ga. 174, 47 S. E. 504.

93. Pen. Code 1895, art. 46. Defendant is entitled to an instruction that if he delivered the liquor believing it to be a nonintoxicant, he is not guilty. Patrick v. State [Tex. Cr. App.] 78 S. W. 947. That one is incidentally in saloon, being hired for a day to wash bottles, and had no authority to sell liquor or receive money therefor, and that he took the bottle in question to the alleged purchaser at the command of a clerk, receiving the money and turning it over to the clerk is admissible. Id. Change of label held admissible as tending to show defendant's knowledge of intoxicating qualities of liquor sold. Murry v. State [Tex. Cr. App.] 79 S. W. 568.

94. Liquor in possession of a boarding house keeper is "kept for sale" where he keeps it to be disbursed under an agreement that boarders who pay the regular price should be entitled to have it with their meals when called for. State v. Wenzel, 72 N. H. 396, 56 A. 918. See 2 Curr. L. 572, n. 47.

95. An ordinance providing that, "All persons are hereby prohibited from selling in-

To constitute an illegal sale, the seller must have been the owner or have the rightful possession of the liquor,[96] and must have received therefor a present, valuable consideration,[97] but it is not necessary to prove the precise person who furnished the money.[98] Tickets may take the place of money,[99] and no sham or device to invade the above principles will be tolerated,[1] but a mere loan to be returned in kind does not constitute a sale.[2] That defendant acted in good faith

toxicating * * * liquors * * * and all persons are hereby prohibited from giving away any such intoxicating * * * liquors," prohibits the selling or giving away of such liquor. Litch v. People [Colo. App.] 75 P. 1079.

96. One wrongfully taking possession and giving the liquor to another is not guilty of a sale, gift, or disposition of it. Maxwell v. State [Ala.] 37 So. 266.

97. Held erroneous to refuse charge that if money paid was in payment of a former indebtedness defendant was not guilty. Mills v. State [Tex. Cr. App.] 82 S. W. 1045. Lack of evidence of a consideration held to render evidence of sale insufficient. Erwin v. Cartersville, 120 Ga. 150, 47 S. E. 512.

Evidence held sufficient to constitute a sale, see 2 Curr. L. 571, n. 47. That defendant received money from another to purchase brandy, which he did, turning the liquor over to another party on receipt of the amount paid, the money so received being paid to the one originally furnishing the money, held to constitute a sale in violation of Loc. Acts 1903, pp. 62, 68. Mitchell v. State [Ala.] 37 So. 407. Evidence that prosecutor said he desired some whiskey and that defendant said he took orders for it, and took money therefor and in about one-half an hour prosecutor found a quart bottle of whiskey lying on his table, held to show a violation of the local option law by defendant. James v. State [Tex. Cr. App.] 78 S. W. 951. Defendant not ordering liquor sent him C. O. D. but disposing of same is guilty of a sale, in the place where he took the liquor from the carrier and disposed of it. Ashley v. State [Tex. Cr. App.] 80 S. W. 1015. Where one asked another if he could get him some whiskey and he said he would try, and he did get it for him, held sufficient to support a conviction. Rippey v. State [Tex. Cr. App.] 81 S. W. 531. Evidence that one "borrowed" money from another and with it paid C. O. D. charges on whiskey after which he turned the whiskey over to the "lender" held to warrant a conviction. Arnold v. State [Tex. Cr. App.] 79 S. W. 547. Evidence that beer ordered could not have arrived at time of sale, and that defendant had a United States revenue license, held sufficient to warrant a conviction. Terry v. State [Tex. Cr. App.] 79 S. W. 317. Evidence, and truthfulness of witnesses, in that they recalled certain facts and failed to recollect others, examined and found sufficient to sustain a conviction. State v. Douglas [Kan.] 77 P. 697.

Evidence held material and competent to prove sale: Where defendant claimed the beer sold prosecutor was ordered for him, the time of the arrival of the beer ordered was material. Continuance refused, defendant claiming witness who would testify that he had no beer prior to the arrival of that ordered but failing to show that such witness could testify as to the time of the arrival of the beer. Terry v. State [Tex. Cr. App.] 79 S. W. 317. That the liquor was not brought in by any carrier doing business in the town is competent in order to show that defendant did not order the liquor for another as he testified. Ray v. State [Tex. Cr. App.] 79 S. W. 535.

98. Inability of witnesses to identify such person held not to warrant a verdict of not guilty. State v. Durein [Kan.] 78 P. 152.

99. Incorporated club taking anybody as a member, and selling members coupons with which they could obtain drinks, held a mere fraudulent device to evade the revenue laws of the state. Cohen v. King Knob Club [W. Va.] 46 S. E. 799. See 2 Curr. L. 567, n. 56, 60.

NOTE. Sale in club: The weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members is a sale and a violation of prohibition laws. In the following cases the question of bad faith in the organization of the club is eliminated and the distribution of liquors by a bona fide club among its members is a sale within the inhibition of the liquor laws. State v. Neis, 108 N. C. 787; State v. Lockyear, 95 N. C. 633, 59 Am. Rep. 287; State v. Horacek, 41 Kan. 87; State v. Tindall, 40 Mo. App. 271; People v. Soule, 74 Mich. 250; State v. Essex Club, 53 N. J. Law, 99; People v. Andrews, 115 N. Y. 427; Martin v. State, 59 Ala. 34; Marmont v. State, 48 Ind. 21; State v. Easton Social, etc., Club, 73 Md. 97. Other cases, however, hold that such distribution is a sale, on the ground that the organization of such club is a mere clumsy device to evade such laws. State v. Mercer, 32 Iowa, 405; Rickart v. People, 79 Ill. 85; State v. Tindall, 40 Mo. App. 271.

The cases which maintain the doctrine that the distribution of intoxicants by a bona fide club among its members is not a sale within the inhibition of liquor-license laws, even though the person receiving the liquor gives money in return for it and that a law prohibiting the sale of liquor does not apply to such a club, are Tennessee Club v. Dwyer, 11 Lea [Tenn.] 452, 47 Am. Rep. 298; Selm v. State, 55 Md. 566, 39 Am. Rep. 419; Commonwealth v. Pomphret, 137 Mass. 564, 50 Am. Rep. 340; Commonwealth v. Ewig, 145 Mass. 119; Piedmont Club v. Com., 87 Va. 540; Graft v. Evans, L. R. 8 Q. B. Div. 373.—From note to Barden v. Montana Club [Mont.] 24 Am. St. Rep. 27, 35.

1. Where bottles were placed in a wheel, the wheel being turned, the purchaser was enabled to take a bottle, held transaction a sale. Hays v. State [Tex. Cr. App.] 83 S. W. 201. It is for the jury to say whether the sale of nonintoxicants, with a simultaneous gift of whiskey, is a mere device to evade the law. Turner v. State [Ga.] 48 S. E. 906.

2. Ray v. State [Tex. Cr. App.] 79 S. W. 535. See 2 Curr. L. 567, n. 57.

as agent for the purchaser is a good defense,[3] but in the absence of evidence to the contrary, one receiving money in exchange for whiskey will be treated as the seller.[4] One present aiding and abetting the sale is equally guilty,[5] and it is no defense that others who might be equally guilty with defendant were not indicted,[6] or that there was no drunkenness at the place and time of sale.[7] Liquor being shipped to the purchaser, the sale occurs at the time and place of delivery to the carrier.[8] In North Carolina the place of delivery is the place of sale.[9] In considering statutes on this subject, it should be remembered that the legislature has no power

3. Though at purchaser's request he advanced part of the purchase money which was repaid him when he gave the liquor to his principal. Chote v. State [Tex. Cr. App.] 83 S. W. 377. Defendant receiving money and forwarding it with order to liquor dealer outside of local option territory, the liquor being shipped to the third party, defendant then kept it on ice for him if he desired it, issuing checks for it, held defendant not guilty of a sale. Kirby v. State [Tex. Cr. App.] 80 S. W. 1007. See 2 Curr. L. 568, n. 80-82.

Evidence held sufficient to overcome defense of agency: Kelly v. Com. [Ky.] 83 S. W. 99; Corzine v. State [Tex. Cr. App.] 80 S. W. 85. Evidence of money passing to defendant and statement of latter that he sold the whiskey to get rid of it. Burden v. State, 120 Ga. 198, 47 S. E. 562.

4. Reese v. Newnan, 120 Ga. 198, 47 S. E. 560.

5. Wholesale liquor dealer who paid saloonkeeper's license and was present when sale was made held equally guilty with saloonkeeper. Webster v. State [Tenn.] 82 S. W. 179.

6. Prosecution for violating local option law. Evidence of guilt of such persons held inadmissible. Patrick v. State [Tex. Cr. App.] 78 S. W. 947.

7. Failure of grand jury to find any drunkenness held inadmissible. Patrick v. State [Tex. Cr. App.] 78 S. W. 947.

8. Shipped C. O. D. That express charges were paid by seller makes no difference. State v. Intoxicating Liquors, 98 Me. 464, 57 A. 798. Where principal filed order of agent and sent the liquor to him for delivery to the purchaser. James v. State [Tex. Cr. App.] 78 S. W. 951. See generally 2 Curr. L. 567, n. 64-70, for cases on this and similar rules.

NOTE. Where is the contract made? The principle established by the great weight of authority is that when a resident of one state gives an order to a dealer doing business in another for a quantity of liquor, not specifically identified or appropriated, and the seller in the ordinary course of business delivers the same to a carrier in the latter state, consigned to the buyer in the former state, the title passes and the executed contract is consummated upon delivery to the carrier. In Sortwell v. Hughes, 1 Curt. C. C. 244, Fed. Cas. No. 13,177; Eager Co. v. Burke, 74 Conn. 634, 51 A. 544; Sachs v. Garner, 111 Iowa, 425, 82 N. W. 1007; Westheimer v. Weisman, 60 Kan. 753, 57 P. 969; Merchant v. Chapman, 4 Allen [Mass.] 362; Kling v. Fries, 33 Mich. 275; Kerwin v. Doran, 29 Mo. App. 397; Lynch v. Scott, 67 N. H. 589, 30 A. 320; Blackman v. Jenks, 55 Barb. [N. Y.] 468; Mack v. Lee, 13 R. I. 293. In the above cases the principle was applied so as to sustain an action for the purchase price, or upon a security given for the purchase price, notwithstanding that the order was given to an agent in, and the liquor was shipped into, a state (generally the forum) by the law of which the sale would have been invalid if made there. And the principle has been applied in the following cases with the result of upholding the action for the purchase price where an order was sent directly by mail from the state in which the sale was prohibited to that in which it was permitted, the liquor having been delivered to the carrier in the latter state. Engs v. Priest, 65 Iowa, 232, 21 N. W. 580; Orcutt v. Nelson, 1 Gray [Mass.] 536; Portsmouth Brew. Co. v. Smith, 155 Mass. 100, 28 N. E. 1130; Webber v. Donnelly, 33 Mich. 469; Wagner v. Breed, 29 Neb. 720, 46 N. W. 286; McConihe v. McMann, 27 Vt. 95; Tuttle v. Holland, 43 Vt. 642; Dame v. Flint, 64 Vt. 533, 24 A. 1061. The principle is also applied with the result of defeating an action by the vendee against the vendor to recover back the amount paid upon the purchase price, the delivery to the carrier having been made in a state where the sale was valid. Wind v. Iler, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219; Dolan v. Green, 110 Mass. 322; Theo. Hamm Brew. Co. v. Young, 76 Minn. 246, 79 N. W. 111, 396. The doctrine that the sale is not complete until delivery to the carrier rests upon the assumption that the order does not relate to specific liquor which is identified and appropriated by the terms of the order, but merely to a quantity of liquor that is to be furnished from a larger stock. This appears to be assumed in all of the cases above cited, but is especially emphasized in Abberger v. Marrin, 102 Mass. 70, and Dolan v. Green, 110 Mass. 322. The doctrine also rests upon the presumed intention of the parties. Wind v. Iler, 93 Iowa, 316, 61 N. W. 1001, 27 L. R. A. 219, and is therefore subject to be defeated by circumstances rebutting the presumption upon which it rests. Well v. Golden, 141 Mass. 364, 6 N. E. 229; Suit v. Woodhall, 113 Mass. 391; Lewis v. McCabe, 49 Conn. 155, 44 Am. Rep. 217. —From note to Brown v. Wieland [Iowa] 61 L. R. A. 417.

9. Under Laws 1903, p. 472, c. 349, § 2. State v. Patterson, 134 N. C. 612, 47 S. E. 808. Such act is not by reason of its title local in its operation. Id. Nor is it unconstitutional as to shipments within the state. Id. [As to interstate shipments see Rhodes v. Iowa, 170 U. S. 412, 42 Law. Ed. 1088, and 3 Curr. L. 712, n. 33, where a full discussion on the development of the law on this subject will be found.] Nor does it violate the sixth amendment to the Federal Constitution. Id.

to arbitrarily fix the locus of a sale regardless of the rules of contract law.[10] In some states the carrier must keep a record of all liquor transported.[11] A law regulating the transportation of liquor by express companies does not by implication apply to other carriers.[12] In Iowa a citizen may obtain an injunction against illegal sales and may enforce the same.[13]

In most prohibition states or counties, a druggist[14] when selling the liquor solely for medicinal purposes and not to be drank on the premises[15] is excepted from the provisions of the law; in others he is not allowed to sell a compound which retains the distinctive characteristics and effects of an intoxicant.[16] In some states the issuance of a permit to a druggist is within the sound discretion of the court,[17] and a statute so providing is not thereby rendered unconstitutional.[18] In Iowa before a permit will issue to a druggist, he must have lawfully conducted a pharmacy for six months prior to the hearing.[19] Generally a doctor's prescription is a prerequisite, but a physician licensed to act as a druggist may act in such dual capacities.[20] A doctor is not guilty of a sale by virtue of having given an illegal prescription.[21] In order to convict him for giving an illegal prescription upon which a sale is made, the doctor must have known that the applicant was not actually sick, or he must have failed to make a personal examination of him.[22] The burden is on the state to show the bad faith of the druggist in making the sale,[23] and the purpose for which the liquor was bought may be proved by anything said or done at or during the sale,[24] and that the liquor was used as a beverage may be shown by surrounding circumstances.[25] In a druggist's report, the use of ditto marks is allowable,[26] and the word "medical" is a sufficient statement of the object of the purchase,[27] but in this regard the report does not seem

10. Act 27th Leg. p. 262, providing that sale of intoxicating liquor shall be where order was solicited held beyond power of legislature. James v. State [Tex. Cr. App.] 78 S. W. 951.

11. Under Rev. Laws, c. 100, § 50, the expressman must enter in the book kept for that purpose the names and addresses of the consignor and consignee before he brings the liquor into a no-license town. Commonwealth v. Shea, 185 Mass. 89, 69 N. E. 1066

12. Construing Rev. Laws, c. 100, § 49. Commonwealth v. Beck [Mass.] 72 N. E. 357.

13. Under Code § 2406 may employ any attorney without regard to residence to obtain the enforcement of such decree. Brennan v. Roberts [Iowa] 101 N. W. 460. In such case the attorney's fees may be taxed as a part of the costs. Id. **An information** charging accused with violating an injunction restraining him from making illegal sales need not, under Code § 2407, set out a copy of the decree. Describing it is sufficient. Id.

14. In Michigan a druggist is not limited to selling quantities within the limit prescribed for retailers. Construing Comp. Laws, § 5379 et seq. People v. Longwell [Mich.] 99 N. W. 1. See generally on this subject, 2 Curr. L. 567, n. 71; also, 2 Curr. L. 568, n. 79.

15. Under Rev. St. 1899, § 3051, the assent of a druggist is not necessary in order to render the drinking of whiskey on the premises a misdemeanor. State v. McAnally, 105 Mo. App. 333, 79 S. W. 990.

16. Bradley v. State [Ga.] 48 S. E. 981.

17. In re Henery [Iowa] 100 N. W. 43; In re Gillham [Iowa] 99 N. W. 179. Where nearest druggist entitled to sell liquor was 10 miles from city of 2,500 people where permit was sought, held no abuse of discretion in granting same. Id.

18. State v. Durein [Kan.] 78 P. 152.

19. A druggist having no license, selling alcohol to be used in "preserving a specimen," is guilty of an illegal sale. In re Henery [Iowa] 100 N. W. 43.

20. May prescribe intoxicating liquors and have prescription filled at his drug store. State v. Manning [Mo. App.] 81 S. W. 223.

21, 22. Williams v. State [Tex. Cr. App.] 81 S. W. 1209. [Overruling former decisions and setting out form of indictment for above case.]

23. Charge as to right of druggist to rely on purchaser's statement considered and in view of other charges held not to be erroneous as placing on defendant the burden of showing faith. People v. Shuler [Mich.] 98 N. W. 986.

24. People v. Shuler [Mich.] 98 N. W. 986.

25. The large number of similarly labeled, empty bottles back of defendant's store held competent to show that large quantities of the alleged medicine were drank at the store, and as a circumstance to show that the same was used as a beverage, rather than as a medicine. Murry v. State [Tex. Cr. App.] 79 S. W. 568. Argument of counsel on this point held proper. Id.

26. Pub. Acts 1899, p. 280, No. 183, § 25 does not forbid the use of ditto marks in a druggist's report to indicate dates, residence, kind and quantity of liquor procured, etc. People v. Remus [Mich.] 98 N. W. 397.

27. People v. Remus [Mich.] 98 N. W. 397.

to be binding on the druggist.[28] The statement of the quantity sold must be definite.[29] A blank affidavit containing nothing but the signature of the notary is insufficient.[30] In the absence of a customary signification, abbreviations of necessary words in a prescription are not allowable.[31]

Good faith in believing sale was for sacramental purposes is a defense in some states.[32] A "wine grower" is one who manufactures wine from grapes grown on his own premises.[33] "Corked" and "sealed" when used in reference to bottles are not synonymous.[34] A minor having arrived at years of discretion he may be convicted of having violated the local option law.[35]

The state need not prove the exact date on which the sale took place but only that the action was not barred by limitation.[36] An action on one's bond being of a civil nature, it does not take the place of nor prevent a prosecution by information or indictment for an act made criminal by the law.[37] Whether convicted or acquitted, the accused cannot be again tried for such an offense, committed within the period of limitation governing the case on trial.[38] The term "offense" is the equivalent of "conviction."[39]

(§ 6) *B. Indictment, information, or complaint.*[40]—The indictment must be an intelligent statement,[41] and is sufficient if it charge the offense in the language of the statute or in terms equivalent thereto.[42] The indictment need not set out that the defendant,[43] or the liquor,[44] or the purpose for which it was sold,[45] was of

28. In a prosecution for keeping a drug store for the unlawful sale of liquor, the jury were not bound as a matter of law, to believe that illegal sales reported by defendants were actually made. People v. Remus [Mich.] 98 N. W. 397.

29. Druggist's report stating the amount of liquor sold as "1 B. Beer" and "2 B. Beer," does not, it seems, state the "quantity of liquor procured" as required by Pub. Acts 1899, p. 280, No. 183, § 25. People v. Remus [Mich.] 98 N. W. 397.

30. Where law requires druggist to "make and swear to" his report. People v. Remus [Mich.] 98 N. W. 397.

31. Letters "P. N. R." held not a valid substitute for "prescribed as a necessary remedy." State v. Manning [Mo. App.] 81 S. W. 223.

32. Instruction held sufficient. White v. State [Tex. Cr. App.] 79 S. W. 523. Instruction that good faith was a defense though defendant entered into no extended investigation held properly refused as being on the weight of the testimony. Id. That one was in the habit of selling wine to boys for sacramental purposes, and taking their certificate to that effect, is admissible to show his lack of good faith. White v. State [Tex. Cr. App.] 78 S. W. 1066.

33. If he manufacture the wine partly from the grapes grown on his own premises and partly from grapes purchased he is not protected. State v. Miller, 104 Mo. App. 297, 78 S. W. 643.

34. A grower selling wine in corked bottles only, held to violate Laws 1899, p. 137. Koban v. State [Ark.] 81 S. W. 235.

35. Where he was 16 years old conviction sustained. Brown v. State [Tex. Cr. App.] 83 S. W. 378.

36. Watts v. State [Ga.] 48 S. E. 142. Though a date was named in indictment. Cole v. State [Ga.] 48 S. E. 156.

37. That one's bond was in force held not to prevent prosecution for illegal sales. State v. Scampini [Vt.] 59 A. 20.

38. Cole v. State [Ga.] 48 S. E. 156.

39. An affidavit for prosecution which charges three separate sales to different persons on the same day, but does not allege a previous conviction is in legal effect a charge of a first offense only, and the party so charged is not entitled to a trial by jury. Carey v. State, 70 Ohio St. 121, 70 N. E. 955. The maximum fine provided by the act for the first offense being $200, a fine of $300 in such case is excessive. Id.

40. See 2 Curr. L. 568.

For general rules, see topic Indictment and Prosecution, 2 Curr. L. 307.

41. An indictment: "That * * *, on or about the ——— day of ———, A. D. 190—, * * * did then and there unlawfully on Oct. 15, 1901, an election in accordance with the laws of this state was held * * * and thereafter on, to wit the 1st day of January, 1903, and said county, did then and there unlawfully sell to one * * * liquor in violation of the law," held worthless. Thurman v. State [Tex. Cr. App.] 78 S. W. 937.

42. Indictment charging sale without a license in words of Acts 1902, No. 90, § 68. State v. Scampini [Vt.] 59 A. 201. Indictment charging one with permitting persons, not members of his family, to enter a room where liquor was sold on a Sunday held sufficient to charge the crime created by Burns' Ann. St. 1901, § 7283c. Atkinson v. State [Ind. App.] 70 N. E. 560.

43. Considering Code Pub. Loc. Laws, art. 21, §§ 127, 127a, 127b, held an indictment charging a violation of § 127 is sufficient without alleging that the defendant is not a pharmacist or druggist. Parker v. State [Md.] 57 A. 677. Sale of liquor within 5 miles of railroad grading camp, held information need not allege that defendant did not have a license from an incorporated town. Langan v. People [Colo.] 76 P. 1048.

an excepted class, unless such exception is contained in the enacting clause of the statute.[46] It need not name the purchaser;[47] by analogy this ruling is applicable to an indictment for suffering liquor to be drank on the premises,[48] nor the date of the sale,[49] especially if the accused admits an illegal sale on a day within the period of limitation,[50] nor the time the law on which it is based took effect.[51] The indictment should allege that the local option law was in effect in the territory where the act was committed,[52] and in such case need not allege that the sale was illegal.[53] All facts which would affect the degree of punishment should be alleged.[54] The offense charged being a sale within a prohibited distance from one of a certain class of places, the indictment ought to name the particular place, but failure to do so is not fatal.[55] It must allege the manner of the illegal sale, as having been made without a license.[56] A sale to an agent may be alleged as a sale to the principal.[57] Precise technical words or expressions need not be used.[58] An information charging a wholesaler with selling at "retail" charges a sale to a consumer;[59] if it alleges that the purchaser did not have a license, it sufficiently charges that the sale was not at wholesale.[60] "Spirituous" is synonymous with "intoxicating" so far as proof is concerned.[61]

Indictments charging the sale of spirituous, vinous and mixed liquors,[62] with keeping open on Sunday and with selling liquor,[63] or charging a druggist with making a specific illegal sale, and also with keeping a place where liquors are sold,[64] are not double. Allegations which are surplusage will be disregarded.[65] If a

Need not allege that defendant was not a pharmacist or an assistant pharmacist. State v. Durein [Kan.] 78 P. 152. Under Rev. St. § 4364c, the affidavit should allege that the saloon was open on Sunday, and was one in which liquor is sold on week days. Bramley v. Euclid, 2 Ohio N. P. (N. S.) 508.

44. Indictment need not allege that the liquor sold was not domestic wine. Kemp v. State, 120 Ga. 157, 47 S. E. 548.

45. An information charging the illegal sale of liquor in local option territory need not allege that the sale was not for sacramental, medicinal, etc., purposes. People v. Shuler [Mich.] 98 N. W. 986.

46. The information must negative the proviso in the Terrell Election Law, § 120, that such liquor may be sold on the prescription of a physician, etc. Fleeks v. State [Tex. Cr. App.] 83 S. W. 381.

47. Affidavit charging the offense of keeping a place for the sale of intoxicating liquors in violation of the Beal Local Option Law. Dalrymple v. State of Ohio, 5 Ohio C. C. (N. S.) 185. Where the particular sale is not of the essence of the offense. Langan v. People [Colo.] 76 P. 1048.

48, 49. State v. McAnally, 105 Mo. App. 333, 79 S. W. 990.

50. Brennan v. Roberts [Iowa] 101 N. W. 460.

51. Court will take judicial notice thereof. State v. Scampini [Vt.] 59 A. 201.

52. Under Ky. St. 1903, § 2557b. Crigler v. Commonwealth [Ky.] 83 S. W. 587. See 2 Curr. L. 569, n. 98.

53. Ikard v. State [Tex. Cr. App.] 79 S. W. 32.

Indictment held sufficient: Under Code 1896, § 5077, an indictment that "defendant sold * * * liquors without a license and contrary to law" is sufficient, though the sale be in violation of a local or special law. Mitchell v. State [Ala.] 37 So. 407.

54. Whether sale was within or without local option territory. Cousins v. State [Tex. Cr. App.] 79 S. W. 549. As to whether sale exceeded a gallon or not. Id.

55. An information charging sale of intoxicants within 5 miles of railroad grading camp. Langan v. People [Colo.] 76 P. 1048.

56. Cohen v. King Knob Club [W. Va.] 46 S. E. 799. See 2 Curr. L. 568, n. 93.

Sufficiency of indictment: An objection that the complaint did not charge defendant with not having a license in force for selling, but only with not having one in force for keeping for sale held without merit as the negation of a license clearly covered all the acts complained of. State v. Constantine [Vt.] 56 A. 1101. Though it be inferred from the complaint that defendant had a license in force at some time, which for some reason had lost its force, and left him with the liquor in question on his hands, yet, the complaint alleging that he did the acts complained of when he had no license in force, it cannot be further inferred that he was keeping the liquor for sale when his license again became in force. Id.

57. Kemp v. State, 120 Ga. 157, 47 S. E. 548.

58. The crime being a misdemeanor, failure of the information to use the words "then and there" in pleading the time and place of the offense is immaterial. State v. Scampini [Vt.] 59 A. 201.

59, 60. State v. Scampini [Vt.] 59 A. 201.

61. Under West Virginia statutes, proof of a sale of an intoxicating mixture will sustain an indictment for selling spirituous liquors. State v. Good [W. Va.] 49 S. E. 121.

62. Kemp v. State, 120 Ga. 157, 47 S. E. 548. See 2 Curr. L. 570, n. 12.

63. Kappes v. State of Ohio, 4 Ohio C. C. (N. S.) 14.

64. People v. Shuler [Mich.] 98 N. W. 986.

65. Allegations held surplusage and immaterial: An information containing a suf-

proviso is a part of the definition of the offense, it must be stated in the affidavit, but if it be an exception of certain persons, the negative averment is unnecessary.[66] No election is required unless two or more offenses are charged.[67]

The prosecutor is not obliged to furnish a bill of particulars of the testimony on which he will rely to prove the charge.[68]

Judicial notice.[69]—Courts will take judicial notice of the time an act takes effect, though that time depends upon the result of a popular vote,[70] of the sort of goods and chattels saloonkeepers keep on sale,[71] of the population of a city in the state,[72] and of the fact that joint eating houses and drinking saloons afford opportunities for carousals and lawlessness;[73] but not that a compound of intoxicants and nonintoxicants is intoxicating.[74]

Presumptions and burden of proof.[75]—Burden is on the state to prove a sale[76] of intoxicating liquor.[77] The burden is on one selling to an habitual drunkard after notice to prove his good faith,[78] but the contrary is true of a sale by a druggist for an apparently legal purpose.[79] Possession of liquor is not evidence of illegal possession.[80]

Admissibility of evidence.[81]—Evidence of other sales at different times is inadmissible unless part of the res gestae or unless it serves to show a system or criminal intent.[82] The sale of a particular liquor being alleged, evidence of sales of other liquors is inadmissible.[83] Evidence of previous sales and that accused had received consignments about the time of the alleged sale is admissible.[84] What was said and done between the parties at the time of the alleged sale is admissible,[85] but not statements made by the purchaser to a third party, defendant not being present.[86] Declarations of a principal, in order to be admissible against his surety, must ordinarily be a part of the res gestae.[87]

ficient negation of license, other negations in the same count for the same purpose, whether argumentative or otherwise, are mere surplusage. State v. Scampini [Vt.] 59 A. 201. Adding the words "then in force" to an averment negativing a license held immaterial and not to affect the force of the averment. Id.

66. Bramley v. Village of Euclid, 2 Ohio N. P. (N. S.) 508.

67. Prosecutor testifying that he bought "Iron Tonic" in the morning and whisky in the evening the state need not elect on which transaction it will seek a conviction, there being no evidence that the tonic was intoxicating. Brown v. State [Tex. Cr. App.] 83 S. W. 378.

68. People v. Congdon [Mich.] 100 N. W. 266. See 2 Curr. L. 569, n. 5.

69. See 2 Curr. L. 570.

70. State v. Scampini [Vt.] 59 A. 201.

71. State v. Clemmensen [Minn.] 99 N. W. 640.

72. State v. Page [Mo. App.] 80 S. W. 912.

73. Paul v. Washington, 134 N. C. 363, 47 S. E. 793.

74. Bradley v. State [Ga.] 48 S. E. 981. An indictment falling to allege that "medicated bitters" are intoxicating is fatally defective. Cousins v. State [Tex. Cr. App.] 79 S. W. 549.

75. See 2 Curr. L. 570.

See particular sections for specific presumptions and instances of burden of proof, as regularity of elections, § 2; that one is the seller, § 6a; good faith of druggist, § 6a, etc.

76. Scales v. State [Tex. Cr. App.] 83 S. W. 380.

77. Scales v. State [Tex. Cr. App.] 83 S. W. 380. Where witness testified that liquor tasted like whisky, and in his opinion was whisky, and defendant put in evidence that it was a nonintoxicant imitation of whisky. Patrick v. State [Tex. Cr. App.] 78 S. W. 947.

78. Haney v. Mann [Tex. Civ. App.] 81 S. W. 66.

79. People v. Shuler [Mich.] 98 N. W. 986. See ante, § 6a.

80. State v. Blackman, 134 N. C. 683, 47 S. E. 16.

81. See 2 Curr. L. 570.

For competency of evidence on particular subjects, see corresponding section, thus as to intoxicating qualities, see § 6a.

82. Belt v. State [Tex. Cr. App.] 78 S. W. 933. There being simply evidence of straight sales for money to various parties, held erroneous to charge that they could be considered as part of a system. Id. System. White v. State [Tex. Cr. App.] 79 S. W. 523. See 2 Curr. L. 570, n. 28, 30. Good faith. Id. See 2 Curr. L. 571, n. 31.

83. Sale of medicated bitters was charged. Cousins v. State [Tex. Cr. App.] 79 S. W. 549.

84. That defendant had packages of liquor in an express office on or about the time of the alleged sale. McKinley v. State [Tex. Cr. App.] 82 S. W. 1042. On the question of ownership, evidence of other sales by defendant, and that he had received several consignments of liquor about that time is admissible. McIntosh v. State [Ala.] 37 So. 223.

85. Patrick v. State [Tex. Cr. App.] 78 S. W. 947.

86. Declaration of purchaser as to quality

Evidence of intoxicating qualities of liquor put up by the same manufacturer, in bottles labeled similarly to that sold, is admissible.[88] One who has drunk an alleged medicine may testify as to its intoxicating properties, though he has not qualified as an expert.[89]

Knowledge gained by internal revenue officers officially is privileged.[90] Copies of books or records from the office of the internal revenue collector are admissible,[91] but not statements which a witness swears he saw recorded in the books[92] or his opinion as to the effect of an entry therein.[93] Where defendant alleges that the sale was on a physician's prescription, the prescription is the best evidence of its contents.[94]

The evidence must be admissible under the allegations in the indictment.[95] Evidence of search and finding of liquor on day subsequent to that of alleged sale,[96] and the testimony of one who accompanied defendant to the house where the sale was alleged to have taken place, that defendant had no liquor with him,[97] are admissible. An admission of an illegal sale amounting to a misdemeanor is inadmissible in a subsequent prosecution for the same offense, but after it has been raised to the grade of a felony.[98] Hearsay evidence is inadmissible.[99] Admission of druggist's affidavit and bond not to adulterate liquors is harmless.[1]

Orders of commissioners' court are admissible to prove existence of local option law.[2]

Weight and sufficiency of evidence.[3]—All facts required to be stated in the indictment must be proved.[4] Proof of single illegal sale is sufficient to establish keeping for unlawful purpose,[5] though in Michigan the contrary seems to prevail as the general rule.[6] A witness may be shown to be prejudiced against defend-

of whisky defendant sold. Vauter v. State [Tex. Cr. App.] 83 S. W. 186. Evidence of a conversation between prosecutor and a third party which caused them to go to the place where the alleged sale took place. Patrick v. State [Tex. Cr. App.] 78 S. W. 947.

87. Declarations of principal night before deceased's death held inadmissible in action against surety on bond. Knott v. Peterson [Iowa] 101 N. W. 173.

88. Evidence that other liquor from the same brewery and labeled the same way contained alcohol is admissible. State v. Wills [Mo. App.] 80 S. W. 311. Persons having drank such liquor may testify on such question, whether the drinking occurred on the same day as the alleged sale or not. State v. Good [W. Va.] 49 S. E. 121.

89. Murry v. State [Tex. Cr. App.] 79 S. W. 568. See 2 Curr. L. 571, n. 36.

90. In re Lamberton, 124 F. 446.

91. Thurman v. State [Tex. Cr. App.] 78 S. W. 937. Copy of books of internal revenue collector held admissible, though uncertified, the witness testifying that he had correctly copied the same. Initiale "R. L. D." under caption "Business" held to mean retail liquor dealer and intelligible. Terry v. State [Tex. Cr. App.] 79 S. W. 319.

92. Thurman v. State [Tex. Cr. App.] 78 S. W. 937.

93. A witness' opinion, conclusion or understanding that a record of an internal revenue collector covered taxpayers from June or July 1, 1902 to the same date in 1903 is inadmissible. Thurman v. State [Tex. Cr. App.] 78 S. W. 937.

94. Evidence of search for prescription held insufficient to justify secondary evidence of its contents. Cullinan v. Hosmer, 91 N. Y. S. 607.

95. Under an information charging one with selling "intoxicating liquor" without naming the time, evidence tending to show an illegal sale of anything classed as "intoxicating liquors" is admissible. State v. Scampini [Vt.] 59 A. 201.

96. Cole v. State [Ga.] 48 S. E. 156.

97. The issue being whether or not defendant had sold liquor at a certain house at a certain time. Vann v. State [Ala.] 37 So. 158.

98. State v. Wenzel, 72 N. H. 396, 56 A. 918.

99. That the prosecuting witness had been informed that he could procure whisky from appellant is hearsay. Holley v. State [Tex. Cr. App.] 81 S. W. 957. Similar question held harmless, the evidence showing a sale. Haynes v. State [Tex. Cr. App.] 83 S. W. 16.

1. State v. Manning [Mo. App.] 81 S. W. 223.

2. Holley v. State [Tex. Cr. App.] 81 S. W. 957.

3. See 2 Curr. L. 571.

For sufficiency of evidence to prove a sale, etc., see particular sections.

4. That local option law was in force in territory where act was committed. Construing Ky. St. 1903, § 2557b. Crigler v. Com. [Ky.] 83 S. W. 587.

5. Robinson v. Americus [Ga.] 48 S. E. 924. That the liquor sold was kept on the particular occasion for the purpose of illegal sale. Reese v. Newnan, 120 Ga. 198, 47 S. E. 560.

6. Proof of a single unlawful sale does not justify a conviction under an information charging that defendant kept a drug

ant.[7] Excise agents are not to be ranged in the same category of witnesses as persons hired to procure evidence, nor even as detectives.[8] Original minutes of commissioners' court containing all the essential orders are sufficient to prove the existence of the local option law.[9]

Trial.[10]—Accused admitting an illegal sale, it is not error to deny a change of venue.[11] Defendant being accused of violating a local option law, his guilt can only be determined in a criminal proceeding in which the right of trial by jury can be accorded him.[12] Defendant's attorney should be permitted to ask jurors if they have a prejudice against one who from his occupation might be in a position to violate the liquor law.[13] It is error for the prosecuting attorney, during the noon recess, in the absence of defendant and his counsel and in the presence of some of the jury, to pour out the contents of an analyzed bottle of the liquor and light the same.[14] Counsel for the state may allude to defendant's failure to explain where he got the liquor.[15]

Charges must be applicable to the facts of the case,[16] and clerical errors will be disregarded.[17] The court need not define words in common and ordinary use, the definition and meaning of which jurors are presumed to understand as well as the court.[18] One cannot complain of the giving of a requested definition.[19]

Defendant's violation being a question of fact, it is for the jury.[20] Guilt must be proved beyond a reasonable doubt.[21] In a prosecution for the violation of a local option law, the court may permit the jury to return their verdict while defendant is in jail, and may discharge the jury in the absence of defendant and his counsel.[22] The extent of the fine often depends on whether it is defendant's first offense or not,[23] and the amount being within the discretion of the trial judge and not exceeding the statutory limit, it is not subject to review.[24]

store for the unlawful sale of liquor. People v. Remus [Mich.] 100 N. W. 403. Restricting and practically overruling. People v. Remus [Mich.] 98 N. W. 397.

7. It is competent to elicit from a witness from the state that he had been convicted of an illegal sale, that defendant had testified against him, and that he had preferred this charge against the defendant and testified before the grand jury. Vann v. State [Ala.] 37 So. 158.

8. Cullinan v. Rorphuro, 93 App. Div. 200, 87 N. Y. S. 570.

9. Introduction of original petition is not necessary. Holley v. State [Tex. Cr. App.] 81 S. W. 957.

10. See 2 Curr. L. 572.

11. Brennan v. Roberts [Iowa] 101 N. W. 460.

12. Not by injunction. Hargett v. Bell, 134 N. C. 394, 46 S. E. 749.

13. Patrick v. State [Tex. Cr. App.] 78 S. W. 947.

14. Hendrick v. State [Tex. Cr. App.] 83 S. W. 711.

15. Rippey v. State [Tex. Cr. App.] 81 S. W. 531.

16. Where the sole issue is to the existence of the sale, a charge as to excuses is erroneous. Ratliff v. State [Tex. Cr. App.] 78 S. W. 936. The evidence not raising the issue of a loan, it is not error to refuse to charge thereon. Arnold v. State [Tex. Cr. App.] 79 S. W. 547. Defendant testifying that he did not sell or procure the whisky, it is not error for the court to fail to charge on the law of agency. Holley v. State [Tex. Cr. App.] 81 S. W. 957.

17. Word "plaintiff" in requested charge held a mere clerical error, and court should have substituted "defendant." Haney v. Mann [Tex. Civ. App.] 81 S. W. 66.

18. Need not define the term "malt liquor." State v. O'Connell [Me.] 58 A. 59. The meaning of the word "sale" is too well known to require explanation. State v. Green [Kan.] 77 P. 95. The offense being a misdemeanor, the court need not define intoxicating liquor unless requested. Murry v. State [Tex. Cr. App.] 79 S. W. 568.

19. Murry v. State [Tex. Cr. App.] 79 S. W. 568.

20. As to whether liquor was served with a meal. Cullinan v. Quinn, 95 App. Div. 492, 88 N. Y. S. 963. The evidence as to the intoxicating quality of the liquor being conflicting, the issue should be submitted to the jury. Hendrick v. State [Tex. Cr. App.] 83 S. W. 711. Where state's evidence establishes defendant's guilt and defendant's evidence establishes his innocence. James v. State [Tex. Cr. App.] 78 S. W. 951. As to what are questions of fact, see particular sections.

21. Instruction examined and held above criticism. State v. Green [Kan.] 77 P. 95; Langan v. People [Colo.] 76 P. 1048.

22. Rippey v. State [Tex. Cr. App.] 81 S. W. 531.

23. A fine of $100 on each count of an affidavit charging three separate offenses of keeping a place for the sale of intoxicating liquors, in violation of the Beal Local Option Law, or $300 in the aggregate, is excessive when there is no charge or claim that defendant had ever been previously convicted of a violation of said law. In such case the

§ 7. *Summary proceedings. Searches, seizures and forfeitures.*[25]—An affidavit for a search warrant is insufficient if based on information and belief and does not state or show the facts required or is not otherwise corroborated.[26] An officer being authorized to seize intoxicating liquors before obtaining a warrant, the latter must be obtained within a reasonable time after seizure, and must be valid, at least upon its face.[27] Statutory provisions largely govern.[28]

§ 8. *Abatement of traffic and injunction.*[29]—A court of equity may in some cases enjoin the illegal sale of intoxicating liquors as a public nuisance,[30] upon information filed by the proper official,[31] or in New York by a taxpayer, the petition not being based on information and belief.[32] A place being habitually used for illegal sales, it becomes a public nuisance[33] which may be abated or the liquor destroyed in a suit against the owner or keeper.[34] To prove the nuisance, proof of actual sales is unnecessary.[35] It is the keeping of the place where the liquor is sold or kept for sale that constitutes the nuisance.[36] "The place" as here used means the particular place, room, or apartment wherein the liquor was kept for sale or sold in violation of law,[37] and it must be particularly identified.[38] To be the keeper of a nuisance so as to subject the place to condemnation as such, the person must be an occupant under some claim of right, and not a mere transient and naked trespasser therein;[39] and if possession is obtained for a lawful purpose, the place will not be adjudged a nuisance as against the owner, unless, after knowledge or notice of its unlawful use, he permits the occupancy and use to continue.[40]

One having an easement in land intending to illegally erect a saloon thereon the owner of the fee may remove the material placed on the land.[41]

The condemnation and summary[42] destruction of liquor illegally kept for sale

case must be treated as a first offense, the maximum fine being $200. Dalrymple v. Ohio, 5 Ohio C. C. (N. S.) 185.

24. McCollum v. State, 119 Ga. 308, 46 S. E. 413.

25. See 2 Curr. L. 572.

26. State v. Patterson [N. D.] 99 N. W. 67. See 2 Curr. L. 572, n. 58.

27. A warrant failing to contain a command of arrest held no protection to officer seeking to justify under it. Adams v. Allen [Me.] 59 A. 62.

28. A search and seizure process could be maintained under Rev. St. c. 27, §§ 33, 40, in August, 1903, although § 38 of the statute had been repealed in part at that time. If any other prohibition were required, the constitution affords it. State v. Dowdell, 98 Me. 460, 57 A. 846. Rev. St. 1883, ch. 27, § 38 was repealed or nullified by Laws 1903, p. 133, c. 170, § 1; but this error was corrected in the general revision of the statutes. Rev. St. 1903, c. 29, § 47. Id.

29. See 2 Curr. L. 573.

30. Walker v. McNelly [Ga.] 48 S. E. 718.

31. Solicitor general of the judicial circuit wherein such sale is carried on. Walker v. McNelly [Ga.] 48 S. E. 718. In North Dakota an injunction may issue at the commencement of the action upon a complaint alone, when made by the state's attorney, and verified by him upon information or belief [Rev. Codes 1899, § 7605]. State v. Patterson [N. D.] 99 N. W. 67.

32. Laws 1896, p. 71, c. 112, as amended by Laws 1897, p. 207, c. 312. Though accompanied by evidence taken "in star chamber session" before a justice of the peace. Wheaton v. Slattery, 96 App. Div. 102, 88 N. Y. S. 1074.

33. One or more unlawful sales do not as a matter of law make the place a common nuisance. State v. McIntosh, 98 Me. 397, 57 A. 83.

34. Before intoxicating liquors can be rightfully destroyed under Rev. Codes 1899, § 7605, the nuisance must be shown to have been maintained by some person as a defendant and owner or keeper in a pending action. State v. McMaster [N. D.] 99 N. W. 58; State v. Nelson [N. D.] 99 N. W. 1077. And only after a hearing or opportunity to be heard. State v. Nelson [N. D.] 99 N. W. 1077. Rev. Codes 1899, § 7605, does not authorize a proceeding in rem against such liquors. State v. McMaster [N. D.] 99 N. W. 58.

35. Where evidence showed delivery of liquor at the place and the reputation of the premises being that of a place where intoxicating liquors were dispensed contrary to law. State v. Dominisse [Iowa] 99 N. W. 561.

36. It is not the selling or keeping for sale, or the resorting for the purpose of drinking, that constitutes the nuisance under Rev. Codes 1899, § 7605. State v. Nelson [N. D.] 99 N. W. 1077.

37. Room in hotel. State v. Nelson [N. D.] 99 N. W. 1077.

38. State v. Nelson [N. D.] 99 N. W. 1077.

39. State v. Nelson [N. D.] 99 N. W. 1077. Boarder in hotel selling intoxicating liquor in a room therein, held hotel could not be adjudged a common nuisance and closed as such. Id.

40. State v. Nelson [N. D.] 99 N. W. 1077.

41. Whitmore v. Pleasant Valley Coal Co., 27 Utah 284, 75 P. 748.

42. Acts 1899, p. 11, providing for the

is a civil proceeding,[43] and is not unconstitutional if it denies the right to a jury trial,[44] nor does it, in such case, deprive one of property without due process of law.[45]

A decree must be obeyed though irregular[46] and not providing for all possible contingencies.[47]

The finding of intoxicating liquor on the premises occupied by defendant is prima facie evidence of the existence of a nuisance only when the liquor was found by an officer empowered to search for the same under a warrant issued in connection with the temporary injunctional order.[48] A cause of action against one, selling liquors, for keeping a nuisance does not survive.[49] Repeals are stated in the notes.[50]

§ 9. *Civil liabilities for injuries resulting from sale. Civil damage laws.*[51]—Civil damage acts[52] create a cause of action which was unknown at the common law.[53] They are generally exclusive,[54] and should be strictly construed.[55] By these statutes liquor dealers are generally rendered jointly[56] and severally[57] liable for the consequences of intoxication to which they in any degree contributed, and this is especially true where the sale was illegal,[58] and such liability extends to the sureties upon their bonds,[59] and to all aiding and abetting the particular sale and sharing the profits.[60] The consequences[61] include all cases where one's family

seizure and destruction of intoxicants, but that the owner "shall be entitled to his day in court before his property is destroyed" makes the keeping of intoxicants a public nuisance to be abated by summary process. Kirkland v. State [Ark.] 78 S. W. 770.

43. Kirkland v. State [Ark.] 78 S. W. 770.

44. Acts 1899, p. 11, does not require a jury trial though it provides that the owner shall be entitled to his day in court before the property shall be destroyed. Kirkland v. State [Ark.] 78 S. W. 770.

45. Kirkland v. State [Ark.] 78 S. W. 770.

46. A decree enjoining defendant from illegally selling liquor in a certain building, which finds that he was not the owner during the period of such illegal sale, and recites that "since that time the premises have been sold, * * * and possession thereof given," is not absolutely void. Ohlrogg v. District Court of Worth County [Iowa] 99 N. W. 178.

47. A decree restraining the defendant from using its warehouse and depot for the storage and delivery of C. O. D. packages of intoxicating liquor, is not erroneous in failing to make an exception in favor of liquor lawfully transported and stored. Dosh v. United States Exp. Co. [Iowa] 99 N. W. 298.

48. Rev. Codes 1899, § 7605. State v. Nelson [N. D.] 99 N. W. 1077.

49. State v. McMaster [N. D.] 99 N. W. 58. The cause of action being abated by the death of the defendant, judgment cannot be rendered for the destruction of the property, nor for the closing of the place. Id. Upon the death of said defendant the property used by him in maintaining the nuisance passes to his heirs, subject to the control of the county court. Id.

50. Gen. St. 1901, § 2463, prescribing the punishment for a keeper of a common nuisance under the liquor law, was repealed by § 2493. State v. Stevens [Kan.] 75 P. 546.

51. See 2 Curr. L. 573.

52. **Repeals:** The civil damage act (Laws 1857, p. 415, c. 628, § 28) was repealed by Laws 1892, p. 824, c. 401. Westbrook v. Miller, 90 N. Y. S. 558.

Subject expressed in title: Civil damage provisions are within the scope of the title of "An act for the restriction and regulation" of the liquor traffic. Garrigan v. Kennedy [S. D.] 101 N. W. 1081.

53. Westbrook v. Miller, 90 N. Y. S. 558. Complaint alleging unlawful sale to plaintiff's son, a minor, held insufficient to state a cause of action at common law. Id.

54. Hence one cannot maintain an action under Burns' Rev. St. 1901, § 285, providing for an action for wrongful death. Action must be under § 7288. Couchman v. Prather, 162 Ind. 250, 70 N. E. 240.

55. Schulte v. Schleeper, 210 Ill. 357, 71 N. E. 325.

56. All such persons and sureties may be joined in a single action to recover damages, and, if a part of them do not reside or cannot be found in the county in which the action is brought, summons may be served upon them elsewhere. Horst v. Lewis [Neb.] 98 N. W. 1046.

57. Bowden v. Voorheis [Mich.] 98 N. W. 406; Horst v. Lewis [Neb.] 98 N. W. 1046. See 2 Curr. L. 674, n. 80.

58. Where liquor was sold one while intoxicated and he was found in the vault of an outhouse to the saloon 12 days later, completely covered by water, held jury were authorized to find that his death was caused by the unlawful sale of liquor to him. McCarty v. State, 162 Ind. 218, 70 N. E. 131.

59. Horst v. Lewis [Neb.] 98 N. W. 1046. But see 2 Curr. L. 674, n. 82.

60. Brewing company helping run a saloon and taking part of the profits is liable with the saloonkeeper. Terre Haute Brew. Co. v. Newland [Ind. App.] 70 N. E. 190. Manner of keeping books held immaterial. Id. Under a charge of collusion, proof of connection of brewing company with saloon business, held admissible. Id. If suicide is the result of prior intoxication it is immaterial that the person was sober when he committed suicide. Garrigan v. Kennedy [S.

is deprived of support,[62] the expense of caring for the intoxicated man,[63] and in some states all torts committed while intoxicated,[64] and all expenses incurred in all criminal and civil prosecutions growing out of and justly attributable to the traffic in such liquor.[65]

The burden is on plaintiff to show a sale of intoxicating liquor.[66] This may be done by circumstantial evidence, but the weight thereof is for the jury.[67] The plaintiff is, however, only required to establish his case by a preponderance of evidence.[68] General rules as to examination of a witness apply.[69] That the husband failed to support his family is no defense.[70]

Proof of damages must be reasonably definite.[71] Instruction that jury must be satisfied that death resulted from intoxication must be specially requested.[72] In making up the verdict, the jury may consider the deceased's age, habits of life,

D.] 101 N. W. 1081. Evidence held to show that sale of liquor caused suicide of plaintiff's husband. Id.

61. Where intoxication causes a man to commit a crime, the dram-shop keeper who furnishes the liquor is liable to the man's dependent children, who by reason of flight due to the crime are deprived of their support. Loftus v. Hamilton, 105 Ill. App. 72, 75.

62. Loss of support is an element of damage where the death of plaintiff's husband was caused by intoxication. The husband's business and earning power may be shown. Garrigan v. Kennedy [S. D.] 101 N. W. 1081. An illegitimate child may recover for death of father who was chargeable with such child's support. Goulding v. Phillips [Iowa] 100 N. W. 516. See 2 Curr. L. 574, n. 77-79. Evidence that plaintiff had a child and that she was dependent on her husband for support is competent. Garrigan v. Kennedy [S. D.] 101 N. W. 1081.

NOTE. Liability under civil damage acts: Under the civil damage acts, giving to any one injured in his person, property, or means of support, a right of action against the person causing the intoxication, an action lies for direct injuries done by the intoxicated person, as well as for damages arising from the intoxication. King v. Haley, 86 Ill. 106, 29 Am. Rep. 14; Thomas v. Dansby, 74 Mich. 398, 41 N. W. 1088. Assault and battery. English v. Beard, 51 Ind. 489; Bodge v. Hughes, 53 N. H. 614; Bacon v. Jacobs, 63 Hun, 51, 17 N. Y. S. 323. And, apart from statute, he is liable where the person assaulted is one of his patrons or customers. Mastad v. Swedish Brethren, 83 Minn. 40, 85 Am. St. Rep. 446, 85 N. W. 913. Homicide. Munz v. People, 90 Ill. App. 647; Brockway v. Paterson, 72 Mich. 122, 40 N. W. 192.

The authorities are not harmonious on the question whether a liquor seller is liable to a wife where he has sold liquor to her husband, causing his intoxication, and he, while intoxicated, commits a crime for which he is convicted and imprisoned. The following cases hold she can recover: Honsire v. Halfman, 156 Ind. 470, 60 N. E. 154; Beers v. Walhizer, 43 Hun [N. Y.] 254. The following that she cannot: Bradford v. Boley, 167 Pa. 506, 31 A. 751; Denison v. Van Wormer, 107 Mich. 471, 65 N. W. 274.

A person complaining of the wrongful act of a liquor seller in causing the intoxication of another, from which damage or injury results to him, must not be an active or willing agent in bringing about the intoxication. Hays v. Waite, 36 Ill. App. 397; Engleken v. Hilger, 43 Iowa, 563. Though if a wife purchases liquor for her husband under compulsion, or to keep him at home, she does not thereby defeat her right of action. Ward v. Thompson, 48 Iowa, 588. But see Beem v. Chestnut, 120 Ind. 390, 22 N. E. 303, where it was held that a wife, in her complaint, need not show herself free from contributory negligence, since the sale of the liquor constituted a violation of positive law, and an invasion of her right of personal security, and the doctrine of contributory negligence had no application. —From note to Mastad v. Swedish Brethren [Minn.] 85 Am. St. Rep. 446, 449.

63. Hurd's Rev. St. 1903, p. 779, par. 8, providing for a recovery for the taking care of an intoxicated man, does not authorize a recovery for the taking care of an intoxicated person who received an injury at the hands of another intoxicated person, the injury resulting from the independent act of the latter. Schulte v. Schlceper, 210 Ill. 357, 71 N. E. 325.

64. Petition alleging that defendant at a certain dance sold intoxicating liquors whereby persons became intoxicated and injured plaintiff, held to state a cause of action. Wesnieski v. Vanek [Neb.] 99 N. W. 258.

65. Wesnieski v. Vanek [Neb.] 99 N. W. 258.

66. Kuhlman v. Cole [Neb.] 98 N. W. 419. But see 2 Curr. L. 574, n. 93.

67. Whether or not the mere fact of drinking in defendant's saloon warrants the inference that the liquor was intoxicating is a question for the jury. Kuhlman v. Cole [Neb.] 98 N. W. 419.

68. Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068. Plaintiff cannot complain of instruction that she was required to prove her case by "a greater weight and worth of credible evidence." Id.

69. Witness testifying that he used liquor to excess; held no error to refuse to compel him to answer on cross-examination how many times he had taken the "Keeley Cure" or "had snakes." Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068.

70. Knott v. Peterson [Iowa] 101 N. W. 173.

71. It being inferable from plaintiff's testimony that she suffered loss of support, shame and disgrace, held the testimony relating to damages was not too uncertain and indefinite to support a verdict. Bowden v. Voorheis [Mich.] 98 N. W. 406.

72. Garrigan v. Kennedy [S. D.] 101 N. W. 1081.

and amount he was earning and furnishing his family for support at and before his death.[73] Exemplary damages should be given only to compensate injury to feelings caused by the wanton or reckless act of the defendant.[74]

§ 10. *Property rights in and contracts relating to intoxicants.*[75]—In North Dakota intoxicating liquor is recognized as property that has a legitimate use.[76]

INTOXICATION; INVENTIONS; INVESTMENTS; IRRIGATION; ISLANDS; ISSUE; ISSUES TO JURY; JEOFAILS; JEOPARDY; JETTISON; JOINDER OF CAUSES, see latest topical index.

JOINT ADVENTURES.

A joint adventure involves joint interest.[77] Such a contract does not constitute a partnership unless the parties so intend or unless they hold themselves out to the public as partners.[78] Parties to a joint adventure may be entitled to an accounting[79] or to partition.[80]

JOINT EXECUTORS AND TRUSTEES; JOINT LIABILITIES OR AGREEMENTS, see latest topical index.

JOINT STOCK COMPANIES.

Such associations differ from partnerships only in that the capital stock is divided into transferable shares,[81] and in some states they are known as partnership associations. Provisions of statute relating to corporations are generally inapplicable.[82]

JOINT TENANCY, see latest topical index.

JUDGES.[83]

§ 1. The Office; Appointment or Election; Qualifications and Tenure (280).
§ 2. Special, Substitute and Assistant Judges (282).
§ 3. Powers, Duties and Liabilities (283). Powers During Vacation or at Chambers (283). Immunities and Exemptions (284). Disability to Practice (285).
§ 4. Disqualification in Particular Cases (285). Procedure, and Trial of Fact of Disqualification (286).
§ 5. Removal (286).

§ 1. *The office; appointment or election; qualifications and tenure.*[84]—Within constitutional bounds the legislature may create the office.[85] The term and time of election fixed by the constitution cannot be altered,[86] and a legis-

73. Knott v. Peterson [Iowa] 101 N. W. 173.

74. Considering Comp. Laws 1897, § 5398. Bowden v. Voorheis [Mich.] 98 N. W. 406. An instruction referring to actual and exemplary damages as follows: "Of course you will consider them separately in the jury room," held not erroneous as making it mandatory on them to proceed in that manner. Id. See 2 Curr. L. 574, n. 91.

75. See 2 Curr. L. 575.

76. Laws of N. D. ch. 63. Possession is not prima facie unlawful. State v. McMaster [N. D.] 99 N. W. 68.

77. A license to manufacture a patented article for a royalty does not constitute a joint adventure. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665. Evidence is admissible to show that a clause in a note limiting liability of three makers to one-third each was intended to avoid a liability as partners. Wheaton v. Bartlett, 105 Ill. App. 326.

78. Shumaker, Partn., p. 19; see, also, Partnership, 2 Curr. L. 1106.

79. See Account, Action For, 3 Curr. L. 24. It is no defense that part of the profits were earned by an illegal transaction, complainant being innocent. Van Tine v. Hilands, 131 F. 124.

80. See Partition, 2 Curr. L. 1097. Where one party to a joint adventure in land erects buildings thereon so that sale of the land is impossible, the other party is entitled in equity to have the land charged with his share of the profits. Fox v. Mahony, 91 App. Div. 364, 86 N. Y. S. 679.

81. Shumaker, Partn. p. 447; see Partnership, 2 Curr. L. 1106.

82. Such associations are not within a statute providing for cumulative voting in corporate elections. Attorney General v. McVichie [Mich.] 101 N. W. 552.

83. **This title relates** solely to the law respecting judges as distinguished from courts, jurisdiction, and procedure.

See Courts, 3 Curr. L. 970; Jurisdiction, 2 Curr. L. 604; and titles relating to procedure generally. It is analogous to the title Officers and Public Employes, 2 Curr. L. 1069.

84. See 2 Curr. L. 577.

85. Act March 25, 1901, providing for an additional judge for the circuit court of Jasper county, is not void as a special or local law. State v. Dabbs [Mo.] 81 S. W. 1148.

86. In Nebraska the office of police judge is called into existence by the constitution. State v. Moores [Neb.] 99 N. W. 504. Same case 61 Neb. 9, 84 N. W. 399, followed. See,

lative change in the name or number of a judicial district does not affect the title of the judge to his office.[87] An election cannot be held on a date other than that fixed by law.[88] The term is computed according to the meaning of the statute.[89] If it run till qualification of successor, the election of a successor without qualifying does not affect the incumbency.[90] The power to fill vacancies cannot be exercised before the occasion[91] nor after the time[92] specified by statute. Such bond as required by law must be given,[93] though one tendered was refused.[94] Its approval or rejection may be compelled.[95] Failure to take the required oath will not affect the validity of official acts,[96] nor does illegality of the mode of compensation, at least not when first raised on appeal.[97] In criminal cases the want of constitutional election and qualification cannot be waived.[98]

Salary.[99]—If not fixed by the constitution, the amount of the salary is subject to statutory regulation.[1] A constitutional provision that compensation shall not be changed during continuance in office refers to the term and not to the individual.[2] A de jure judge may be precluded from recovering the salary of his office where such salary has been paid to a de facto officer who has performed the duties of the office.[3] A court commissioner is not entitled to his compensation as such unless he complies with the statute providing for it.[4] No

also, Judges, 2 Curr. L. 577, n. 38. The adoption of the biennial election amendment to the constitution in the year 1902 did not repeal biennial election law of 1901, dispensing with the election of district judges in the year 1903 and an appointment under that law, by the governor of a judge of the 29th district, to hold from January, 1904, to January, 1905, is valid. Fischer v. Moore [Kan.] 76 P. 403; approving Griffith v. Manning, 67 Kan. 559, 73 P. 75.

87. Maroney v. State [Tex. Cr. App.] 78 S. W. 696.

88. An election at any other time is void. State v. Dabbs [Mo.] 81 S. W. 1148.

89. Under New York City charter providing that judges of the court of special sessions shall hold office until Dec. 31, "until" is inclusive. People v. Fitzgerald, 96 App. Div. 242, 89 N. Y. S. 268.

90. After election but before qualifying the successor died. As there was no provision for special election, such appointee held until the next general election. State v. Dabbs [Mo.] 81 S. W. 1148.

91. If it is provided that a vacancy shall be filled after its occurrence, an appointment made before such time is void. Judges of the court of special session [New York city charter, § 1406, p. 600]. People v. Fitzgerald, 96 App. Div. 242, 89 N. Y. S. 268.

92. Where an election to fill a vacancy may be held not less than three months after the vacancy occurs, a vacancy occurring August 2d may be filled by an election held November 3d. People v. Goodrich, 92 App. Div. 445, 87 N. Y. S. 114.

93, 94. There is a vacancy in the office of county judge where the commissioners refuse to approve his official bond and no other is tendered. Gouhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104.

95. Mandamus lies to compel the commissioner's court to exercise their discretion in determining the sufficiency of the official bond furnished by a county judge. Gouhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104.

96. The acts of a special judge commissioned to try a particular case are valid as those of a de facto officer, notwithstanding. Powers v. State, 83 Miss. 691, 36 So. 6.

97. One who goes to trial without objection waives the right to complain that the judge who heard his cause received his compensation from the fines of those convicted in his court; that this method of compensation was contrary to public policy; that therefore the act establishing the court was void. Hightower v. Hollis [Ga.] 48 S. E. 969.

98. Low v. State [Tenn.] 78 S. W. 110.

99. See 2 Curr. L. 578.

1. A salary reduction act passed Dec. 22, 1893, to take effect Jan. 1, 1894, governs the salary of a judge elected in Dec., 1894, notwithstanding the general appropriation act passed Dec. 23, 1893, which took effect immediately, provided for payment of salaries under the prior salary act. State v. Jennings [S. C.] 47 S. E. 683.

2. A judge elected to complete an unexpired term of a judge elected before the passage of an act increasing the salary is not entitled to the increase. Foreman v. People, 209 Ill. 567, 71 N. E. 35.

A county judge in South Dakota is not a public officer within the meaning of a constitutional provision that the compensation of "public officers" shall not be increased during their term. Hauser v. Seeley [S. D.] 100 N. W. 437. His salary may be changed during his term. Id.

3. Laws 1894, p. 1141, c. 543, providing that the City of New York should pay the salary due a justice of the district court while such office was unlawfully occupied by one who claimed to have been elected, violates a constitutional provision prohibiting extra compensation to public officers. Stemmler v. Mayor, etc., of New York [N. Y.] 72 N. E. 581.

4. Under Ky. St. 1903, § 396, he must file a statement under oath showing the number of days he was employed. Fidelity Nat. Bank's Receiver v. Youtsey [Ky.] 81 S. W. 263.

other compensation than that provided can be allowed.[5] A fee compensated judge may have fees only in the cases provided.[6]

§ 2. *Special, substitute and assistant judges.*[7] *Appointment and calling* is governed by the statutes. The validity of a statute providing for the election of a special judge cannot be raised as an objection to a special judge lawfully presiding.[8] A statute providing for a change of judges on filing an affidavit of prejudice does not conflict with a constitutional provision authorizing judges to sit for each other on invitation.[9] The power to call in a judge does not exist in cases where the statutes provide for transfer of the cause.[10] The right to elect a special judge by consent in civil suits does not apply to criminal proceedings.[11] In Texas a special judge may be chosen for a special term just as for a general term.[12] The clerk alone in Tennessee calls the election, declares the result and administers the oath.[13] The selection of a special judge must be authenticated on the record[14] by the proper officer.[15] The order for it reciting the occasion for calling a special judge, the particulars of the election or appointment, the eligibility and qualifications of the person elected, and his oath should be entered as part of the caption of the proceedings of the term,[16] unless the appointment be for a particular case, when it should follow the style of that case on the minutes.[17] The special judge even if not authorized to do this should see that it is timely done.[18] His authority cannot be presumed in criminal cases.[19]

Powers and duration thereof.[20]—A special judge has for the purpose the jurisdiction and powers of the regular judge.[21] It will be presumed that his judicial acts are performed under his special authority.[22] Judicial acts apper-

5. Ky. St. 1903, § 1740. Fidelity Nat. Bank's Receiver v. Youtsey [Ky.] 81 S. W. 263.

6. A probate judge is entitled to fees for commitments to Boys Industrial School or Girls Industrial Home only in cases where no prosecution and conviction is required, his fees being the same as that fixed for clerks of courts of common pleas in like cases. Millard v. Conradi, 5 Ohio C. C. (N. S.) 145. In the matter of inquests of lunacy, a probate judge is entitled to only such fees as are provided for in Rev. St. § 719. Section 547 is not applicable. Id.

7. See 2 Curr. L. 378.

8. The validity of a statute under which the attorneys may select a special judge on the disqualification of the regular judge cannot be considered where the agreement of the attorneys was abrogated and the special judge agreed on was commissioned by the governor. Powers v. State, 83 Miss. 691, 36 So. 6.

9. State v. Clancy [Mont.] 77 P. 312.

10. Construing Code Civ. Proc. § 342 and §§ 52, 53, providing for the transfer of causes in case of disability of the county judge. In re Munson, 95 App. Div. 23, 88 N. Y. S. 509. Under Code Civ. Proc. § 52, a special proceeding may be continued before a justice of the supreme court residing in another county on disqualification of the justice residing in the county in which it originated. In re Town of Hadley, 44 Misc. 275, 89 N. Y. S. 910.

11. Code, § 3921. Low v. State [Tenn.] 78 S. W. 110.

12. Statute applies to both. Missouri, K. & T. R. Co. v. Huff [Tex. Civ. App.] 78 S. W. 249; Missouri, K. & T. R. Co. v. O'Connor [Tex. Civ. App.] 78 S. W. 374; St. Louis S. W. R. Co. v. Swinney [Tex. Civ. App.] 78 S. W. 547; Missouri, K. & T. R. Co. v. Stinson [Tex. Civ. App.] 78 S. W. 986.

13. Shannon's Code, §§ 5730-5732. Low v. State [Tenn.] 78 S. W. 110.

14. The signing of the order of adjournment of a term does not authenticate a nunc pro tunc order at that term reciting election at a preceding term. Low v. State [Tenn.] 78 S. W. 110.

15. In Tennessee it is the clerk's province and not the special judge's or that of a different special judge or the regular judge. Low v. State [Tenn.] 78 S. W. 110.

16, 17. Should recite presence and qualifications of the attorneys who were the electors, the presence of the person elected, and if in a particular case, that the attorneys therein took no part. Low v. State [Tenn.] 78 S. W. 110. The oath, including that against dueling, should be set out and signed by the special judge. Id. The clerk should officially sign it. Id.

18. Before he signs a judgment. Low v. State [Tenn.] 78 S. W. 110.

19. Low v. State [Tenn.] 78 S. W. 110.

20. See 2 Curr. L. 579.

21. An assistant appointed under Gen. Laws 1896, c. 228, § 11, providing that a district court may appoint an assistant from among the justices of the peace. Such justice has the criminal jurisdiction of the district judge. State v. Chappell [R. I.] 58 A. 1009. See post, § 3.

22. State v. Chappell [R. I.] 58 A. 1009. But see ante, that his authority must appear of record.

taining to the office are properly performed by virtue of his special authority, notwithstanding his ordinary powers relative thereto as a different officer.[23] If appointed to hear, try and determine a cause, he retains jurisdiction to the end,[24] and may file a decree after the expiration of his commission.[25] One appointed ex-officio to serve until appointment is revoked continues through and into a new term of his ordinary office to which he is re-elected.[26] A judge chosen in Tennessee "for the occasion" has no authority after the term.[27]

§ 3. *Powers, duties and liabilities.*[28]—A single judge may when authorized exercise court powers.[29] If judicial action be needed, a judge cannot act on that which was not heard before him.[30] A judge should not sit to review the mere exercise of judgment by his predecessor,[31] or to change a final judgment by a co-ordinate judge,[32] unless it be clearly wrong because of mistake or fraud;[33] but administrative orders may be altered or modified,[34] and statutory authority to sign bills of exception is authority to pass on a motion for a new trial on its merits.[35] The judicial powers of court commissioners authorized by law to be appointed are such as the statutes by fair construction include.[36] A judge may be compelled to consider a matter within his jurisdiction.[37] Judges have only such nonjudicial powers as are specifically conferred by law.[38]

Ministerial acts may be performed outside the district.[39]

Powers during vacation or at chambers.[40]—The judicial power of a judge during vacation or at chambers is a matter largely of statutory regulation.[41] In-

23. The judicial acts of a justice of the peace acting as assistant justice of the district court are properly signed as assistant justice, notwithstanding he may be authorized to issue warrants returnable to the district court, in which case he shall sign as justice authorized to issue warrants. State v. Chappell [R. I.] 58 A. 1009.

24. May entertain a motion to vacate findings of fact, conclusions of law, and a decree entered by him in such action. Fisher v. Puget Sound Brick, Tile & Terra Cotta Co., 34 Wash. 578, 76 P. 107.

25. It will be regarded as filed on the date it was heard. Roberts v. Wessinger [S. C.] 48 S. E. 248.

26. Under a statute providing that the assistant justice may serve until his authority is revoked, his term does not lapse because he begins a new term as justice of the peace. State v. Chappel [R. I.] 58 A. 1009.

27. Low v. State [Tenn.] 78 S. W. 110.

28. See 2 Curr. L. 579.

29. In Massachusetts a single justice of the supreme court has power to determine a motion to dismiss a creditor's appeal from a probate decree allowing a guardian's final account. Leyland v. Leyland [Mass.] 71 N. E. 794. Where one judge constitutes a quorum in the trial of certain cases, incidental questions arising in connection with such trial are subject to final decision by him, though under Pub. Laws 1897, c. 451, § 3, he may reserve it for hearing before three justices of the appellate division. Banigan v. Banigan [R. I.] 59 A. 313.

30. A judge who hears neither the evidence nor argument of a cause cannot enter judgment therein. Evidence heard by one judge, argument by another and judgment entered by a third. In re Sullivan [Cal.] 77 P. 153. The attorney of an incompetent cannot consent to the entry of such judgment. Id.

31. Parties aggrieved should be left to their remedy by appeal. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

32. The apportionment of referee's fees. Cobb v. Rhea [N. C.] 49 S. E. 161.

33. If a judge is clearly satisfied that an order was granted by his predecessor, without the exercise of judgment, or through mistake or fraud practiced on the court, or manifest indiscretion, or through the fact that adverse parties were not heard, he may set such order aside. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

34. Orders referring a case to take and report the testimony. Pratt v. Timmerman [S. C.] 48 S. E. 255.

35. Bailey v. Coe [Mo. App.] 79 S. W. 1158.

36. In Wisconsin, being equal to circuit judge at chambers, may entertain habeas corpus [Const. art. 7, § 23. Rev. St. 1898, § 2815]. Longstaff v. State [Wis.] 97 N. W. 900. In Minnesota, having the same power, he may issue writs of attachment. Clements v. Utley, 91 Minn. 352, 98 N. W. 188.

37. Where he declines, erroneously believing that he has not jurisdiction. Hill v. Morgan [Idaho] 76 P. 323.

38. The power of the circuit courts of Kentucky to appoint special commissioners is limited to two cases enumerated by such statute [Ky. St. 1903, §§ 339, 400]. Louisville Public Warehouse Co. v. Miller [Ky.] 81 S. W. 275.

39. A district judge has power to settle a case made while at a place outside his judicial district. City of Enid v. Wigger [Okl.] 77 P. 190. See, also, 2 Curr. L. 579, n. 73-76.

40. See 2 Curr. L. 579.

41. Judges of courts having appellate jurisdiction and power in vacation to hear and determine all necessary writs to carry such jurisdiction into effect have power in vacation to stay proceedings in such inferior court. Reese v. Steele [Ark.] 83 S. W. 335.

terlocutory and provisional orders may usually be made,[42] but not final judgments,[43] or a change of a judgment already entered,[44] or a motion for a new trial dismissed.[45] He cannot make a verbal order for the entry of an appeal.[46] In an equity cause, before filing the decree, the judge has power to grant a new trial.[47] A writ of prohibition does not lie to a judge at chambers,[48] but a justice of the supreme court may issue it in vacation returnable at term.[49] Alternative mandamus may be returnable at chambers,[50] but the writ itself can only be issued after judgment of a court.[51] If a summons is improperly made returnable at chambers, the action should not be dismissed. It should be transferred to the trial docket,[52] unless the complaint can be so amended as to bring it within the jurisdiction of the judge at chambers.[53]

Immunities and exemptions.[54]—Neither the judge of a superior court[55] nor the judge of an inferior court[56] is liable for judicial acts within his jurisdiction.[57] The judge of a superior court is not liable for erroneously deciding a question as to his jurisdiction,[58] but the judicial office is no protection against liability for malicious acts beyond his jurisdiction,[59] nor for erroneous ministerial acts.[60]

42. An order of reference to take testimony may be made at chambers. Pratt v. Timmerman [S. C.] 48 S. E. 255.

43. Under Mills' Ann. Code, § 408, limiting the power at chambers to a hearing of motions and demurrers and making interlocutory orders and rules preparatory to disposition of causes on the merits, a judge cannot in vacation at chambers render a final judgment. People v. Hebel [Colo. App.] 76 P. 550. Hear and pass upon a demurrer. Price v. Grice [Idaho] 79 P. 387; Johnson v. Cravey [Ga.] 48 S. E. 424. An order to show cause why the appointment of a receiver should not be made permanent is beyond the powers of a circuit judge in vacation, he having no power to enter judgment. State v. Dearing [Mo.] 84 S. W. 21.

44. Order directing a convicted defendant to be committed to a jail other than the one designated in the judgment is unauthorized. In re Rex [Kan.] 78 P. 404.

45. Miller v. Thigpen [Ga.] 49 S. E. 286. Order the entry, nunc pro tunc of a judgment or overrule a motion for a new trial, even though there is statutory authority to amend a judgment or decree. Accousi v. G. A. Stowers Furniture Co. [Tex. Civ. App.] 83 S. W. 1104.

46. At his private office after the expiration of the term and without the clerk or the clerk's notes being before him. Hays v. Philadelphia, W. & B. R. Co. [Md.] 58 A. 439.

47. After adjournment but before decree rendered, a judge at chambers in another county can refer the case to the referee, permit other attorneys to appear on behalf of the parties interested, though the result of the order is in effect to grant a new trial. First Nat. Bank v. Lee [S. C.] 46 S. E. 771.

48. Sand. & H. Dig. § 4892, defining it as one addressed to an inferior court. Reese v. Steele [Ark.] 83 S. W. 335.

49. In Missouri, a justice of the supreme court has power to issue a preliminary rule in prohibition returnable to and triable by the court in term time. Inherent powers of the supreme court and direct provisions of Rev. St. 1899, c. 55 and Const. art. 6, § 3. State v. Dearing [Mo.] 84 S. W. 21.

50. Martin v. Clark, 135 N. C. 178, 47 S. E. 397.

51. Under Sand. & H. Dig. § 4891, defining it as an order of a court of competent and original jurisdiction. Reese v. Steele [Ark.] 83 S. W. 335.

52. Martin v. Clark, 135 N. C. 178, 47 S. E. 397.

53. In North Carolina, where a summons is made returnable at chambers and the complaint states a case which should be heard at term, it may be amended so as to bring it within the jurisdiction of the judge at chambers [Code, §§ 623, 256 and § 255, as amended by Laws 1887, p. 518, c. 276]. Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508.

54. See 2 Curr. L. 580.

55. O'Connell v. Mason [C. C. A.] 132 F. 245. Allegation that acts complained of were not judicial acts and were done without authority does not state a cause of action unless particular acts are set out. Id.

56. An ordinary (probate judge) is not personally liable for erroneous judicial acts. State v. Henderson [Ga.] 48 S. E. 334. Justice of the peace. McVeigh v. Ripley [Conn.] 58 A. 701.

57. NOTE. Acts in excess of jurisdiction: The judge of an inferior court, like the judge of a superior court, is protected from acts in excess of jurisdiction if he acted in good faith. Thompson v. Jackson [Iowa] 27 L. R. A. 92; Austin v. Vrooman [N. Y.] 14 L. R. A. 138, otherwise where want of jurisdiction is known to him. Bradley v. Fisher, 13 Wall. [U. S.] 335, 20 Law. Ed. 646. This is in accord with the English rule. Calder v. Halket, 3 Moore, P. C. 75; Houlden v. Smith, 14 Q. B. 841.—From note to Thompson v. Jackson [Iowa] 27 L. R. A. 92.

58. Costs of mandamus, issued to compel him to consider a matter of which he erroneously believed he had not jurisdiction, cannot be taxed against him. Hill v. Morgan [Idaho] 76 P. 765.

59. Appointment of receiver by a police judge. Reed v. Taylor, 25 Ky. L. R. 1793, 78 S. W. 892.

60. The ordinary (probate judge) is liable on his official bond for nonperformance or neglect of duties devolving upon him as clerk. State v. Henderson [Ga.] 48 S. E. 334.

Disability to practice.[61]—Judges of inferior courts may practice in courts other than their own.[62]

§ 4. *Disqualification in particular cases.*[63]—*Interest and kinship* are the sole common-law disqualifications.[64] The interest must be such that the result would necessarily affect him to his personal pecuniary loss or gain.[65] Common-law disqualifications give way to necessity,[66] and have no application to the members of a quasi judicial tribunal acting judicially in dealing with administrative affairs.[67] A statute disqualifying for relationship applies only to parties in interest,[68] and has been held inapplicable unless the relationship be sustained to a party to the record.[69] If, however, the relationship exists, it is immaterial whether the litigant is suing in his own right or in a representative capacity.[70] Such disqualification may be waived.[71]

Disqualification because of having been of counsel applies only to actions where the same issues are involved.[72] A judge who is of counsel in an action relative to the same subject-matter is disqualified.[73]

In an action to hold a probate judge on his official bond for damages for taking a guardian's bond executed under an alleged invalid power of attorney, evidence held to show that such power of attorney was valid. Best v. Robinson [Ky.] 82 S. W. 302. Probate judge and sureties on his official bond are liable for his neglect of duty in taking an inadequate guardian's bond. Williams v. Weeks [S. C.] 48 S. E. 619. Where a probate judge takes a worthless guardian's bond, the burden is on him to show the solvency of the sureties at the time it was taken. Id.

61. See 2 Curr. L. 580.

62. The judge of a city court, though not allowed to practice in his own court, may practice in the district court. Nichols v. Oregon Short Line R. Co. [Utah] 78 P. 866.

63. See 2 Curr. L. 580.

64. State v. Houser [Wis.] 100 N. W. 964.

65. A judge is not disqualified to determine the validity of a statute providing for a local assessment by reason of being a taxpayer in the locality. City of Oak Cliff v. State [Tex.] 79 S. W. 1068. "Interest" means direct pecuniary interest. State v. Houser [Wis.] 100 N. W. 964. The county judge being incompetent because of interest, to hear and determine election cases, he properly certified them to the circuit court. Johnson v. Brice [Tenn.] 83 S. W. 791.

66. Where there is no other tribunal to try the case in hand. State v. Houser [Wis.] 100 N. W. 964.

67. Political state central committee. State v. Houser [Wis.] 100 N. W. 964.

68. Not where counsel who was a brother-in-law and had the case on a contingent basis but prior to the trial the contingent fee contract was abrogated and counsel waived any lien he might have on the judgment. Knickerbocker v. Worthing [Mich.] 101 N. W. 540. The husbands of two sisters are "brothers-in-law" within the meaning of a statute providing for the recusation of judges. State v. Foster, 112 La. 533, 36 So. 554.

69. Not where the father of the judge was attorney and was to be compensated by a percentage of the recovery. Hundley v. State [Fla.] 36 So. 362.

70. State v. Foster, 112 La. 533, 36 So. 554.

71. Defendant appealed from a conviction on the ground that the justice of the peace before whom he was tried was the employe of the complaining witness. Held, the plea of not guilty waived the objection, based on the alleged disqualification of the trial judge. People v. Kinney [Mich.] 100 N. W. 596.

Note: Assuming, as the court does in the principal case, that the judge could have been challenged on the ground of interest, there is a conflict of authority as to whether the defendant's plea would operate as a waiver or not. Holmes v. Eason, 8 Lea [Tenn.] 754; People v. Connor, 142 N. Y. 130. At common law, the right to object to a judge on the ground of interest was considered a personal privilege, in favor of the party likely to be prejudiced. Such a judgment was therefore merely voidable. Dimes v. Grand Junction Canal Co., 3 H. L. Cas. 759; Findley v. Smith, 42 W. Va. 299. But in case the parties do not know of the judge's disqualification, the judgment can be attacked directly by writ of error or appeal. Stearns v. Wright, 51 N. H. 600. Under the statutes regulating the disqualification of judges, the courts of some of the states follow the common-law rule. Floyd Co. v. Cheney, 57 Iowa, 160; Holmes v. Eason, 8 Lea [Tenn.] 754. But the weight of authority is that the judge does not have jurisdiction over the cause and that the judgment is absolutely void. In re White, 37 Cal. 190; Case v. Hoffman, 100 Wis. 314; People v. Connor, 142 N. Y. 130. As the parties to an action cannot confer jurisdiction on a judge by consent, there can be no waiver. Oakley v. Aspinwall, 3 N. Y. 547. Being void, the judgment can be attacked collaterally as well as directly. Hall v. Thayer, 105 Mass. 219, 7 Am. Rep. 513. But it would seem in the absence of an express statutory abrogation, that the common-law rule should govern as in the principal case. The conclusion reached in there, however, is contrary to the view which has heretofore prevailed in Michigan. Horton v. Howard, 79 Mich. 642, 19 Am. St. Rep. 198. See 4 Columbia L. R. 439.—From 4 Columbia L. R. 603.

72. Does not apply to an action to enforce a judgment rendered in a case in which he was counsel. Keeffe v. Third Nat. Bank, 177 N. Y. 305, 69 N. E. 593. A judge is not disqualified to determine an issue whether the maker of a note promised after

Bias and prejudice[74] is not ground for disqualification[75] unless so provided by statute.

Procedure, and trial of fact of disqualification.—A judge is not required to withdraw from the hearing of a case upon the mere suggestion that he is disqualified to sit.[76] If sitting alone he must decide the sufficiency of the proofs,[77] but his determination is not a matter of discretion.[78] A motion to recuse for affinity is properly referred by him to a judge ad hoc.[79] But a motion to recuse the judge ad hoc so appointed should be decided by him.[80]

Prejudice cannot be charged against the judge of any court other than the one to whom the application for change of venue is addressed.[81] Disqualification is waived by going to trial after a change of venue has been obtained.[82] The Montana statute providing for disqualification by merely filing an affidavit of prejudice is not in violation of the state constitution.[83] A speedy trial is not denied though two-thirds of the judges of the state may be successively disqualified.[84] Being applicable to civil cases only, it does not authorize a party to disqualify a judge to punish him for contempt.[85] It does not authorize the affidavit to be filed after trial begun.[86] The procedure prescribed must be followed.[87]

§ 5. *Removal.*[88]—Error in judgment,[89] or an erroneous application of le-

his discharge in bankruptcy to pay it by reason of the fact he was of counsel in proceedings asserting the validity of the note prior to the bankruptcy. Blackwell v. Farmers' & Merchants' Nat. Bank [Tex.] 79 S. W. 518.

73. A counsel for a wife in divorce proceedings, the grounds of which are assault, etc., cannot preside at the trial of a prosecution for such assault. Barnes v. State [Tex. Cr. App.] 83 S. W. 1124.

74. See 2 Curr. L. 581.

75. In Ohio it is a matter of doubt whether bias and prejudice on the part of the trial judge is a ground for disqualification in the common pleas court. Rev. St. § 550, considered. Ohio v. Fronizer, 2 Ohio N. P. (N. S.) 476. It is a matter of doubt whether bias or prejudice on the part of the trial judge is a ground of disqualification in the common pleas and superior courts. Cantilion v. Cincinnati, 2 Ohio N. P. (N. S.) 417. In an affidavit charging bias and prejudice against a judge as a ground of disqualification, bias and prejudice should be averred as a fact. Id. The fact that a judge could testify as to material facts relative to a cause is not ground for disqualification. State v. Pitts, 139 Ala. 152, 36 So. 20. An election warden is not disqualified to try complaints for illegal voting by reason of having approved the list of voters [under Gen. Laws 1896, c. 228, § 16]. Williams v. Champlin [R. I.] 59 A. 75.

76. Allegations of prejudice being based on information and belief and conclusively rebutted by positive affidavits, application for a change of judge was properly denied. Crouch v. Dakota, W. & M. R. R. Co. [S. D.] 101 N. W. 722.

77. State v. De Maio [N. J. Err. & App.] 58 A. 173. Upon the recusation of a judge, the party interposing the challenge must, unless the facts are admitted, lay before the court proof of their truth. Id.

78. His action if erroneous is subject to be controlled by mandamus. State v. Pitts, 139 Ala. 152, 36 So. 20.

79, 80. State v. Foster, 112 La. 533, 36 So. 554.

81. Application charging prejudice against all the judges in the city is sufficient to disqualify only the one to whom it is addressed. Gerhart Realty Co. v. Weiter [Mo. App.] 83 S. W. 278.

82. Du Quoin Waterworks Co. v. Parks, 207 Ill. 46, 69 N. E. 587.

83. Does not violate a provision enumerating the qualifications of judges. State v. Clancy [Mont.] 77 P. 312. The fact that no provision is made for a judicial determination of the bias or prejudice does not interfere with a constitutional provision granting original jurisdiction in all cases at law or equity. Id. Act Dec. 10, 1903, is not special legislation, being general in its terms, though passed for the purpose of relieving a condition in only three cities. Id. Because not providing for notice to the other party. Since a party is not entitled to have his case tried by a particular judge, he is not deprived of property without due process. State v. Clancy [Mont.] 77 P. 312; State v. District Court of Second Judicial Dist. [Mont.] 77 P. 318.

84. State v. Clancy [Mont.] 77 P. 312.

85. State v. Clancy [Mont.] 76 P. 10; State v. Dist. Court of the Second Judicial Dist. [Mont.] 77 P. 318.

86. State v. Clancy [Mont.] 77 P. 312.

87. Where the statute requires an affidavit of prejudice, a motion for change is not permissible. State v. Dist. Court of Second Judicial Dist. [Mont.] 77 P. 318.

88. Compare Officers and Public Employes, § 6, 2 Curr. L. 1074.

89. Holding that evidence was insufficient to indict. Accused was subsequently indicted by the grand jury. In re Baker, 94 App. Div. 278, 87 N. Y. S. 1022. Under Greater New York Charter [Laws 1901, p. 599, c. 466, § 1401a], providing that a magistrate may be removed for cause. In re Tighe, 95 App. Div. 23, 89 N. Y. S. 719.

gal principles is not ground for removal.[90] It must be shown that his judicial acts were corrupt,[91] or that there was a disregard of legal rules amounting to legal misconduct.[92] A judge may be removed for willfully making a wrong decision[93] or for manifesting favoritism toward one party or his attorney to the prejudice of another,[94] for a reckless exercise of judicial functions, without regard to the rights of litigants,[95] though such favoritism was not the result of bribery,[96] or for removal from the district in which he is elected where a statute provides that he shall be a resident of such district.[97]

JUDGMENT NOTES, see latest topical index.

JUDGMENTS.

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This topic excludes all matters relating to foreign judgments,[1] the conclusiveness of judgments,[2] and the mode of enforcing the judgment.[3]

§ 1. *Definition and nature.*—A judgment is the decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein.[4] A judgment is a debt,[5] and, when against a

90. In re Baker, 94 App. Div. 278, 87 N. Y. S. 1022.

91. In re Tighe, 95 App. Div. 28, 89 N. Y. S. 719. A petition for removal on the ground that he has failed to perform the duties of his office must show that he did not exercise his best judgment. In re Baker, 94 App. Div. 278, 87 N. Y. S. 1022. The fact that more persons were discharged than were committed for a particular offense does not show that he was hostile to the enforcement of laws aimed at such offense. In re Tighe, 95 App. Div. 28, 89 N. Y. S. 719. It must be shown that he did not determine the questions submitted as he thought the administration of justice required. Id.

92. In re Tighe, 95 App. Div. 28, 89 N. Y. S. 719.

93. Under Const. art. 6, §§ 2, 17, Laws 1880, p. 521, c. 354, Code Civ. Proc. 220, and Laws 1901, p. 589, c. 466. The appellate division may remove. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499. Exercising jurisdiction where it is shown that process had not been served. Id.

94. Refusing to allow objections and exceptions to be noted; omitting evidence, exceptions, and objections from returns on appeal. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499.

95. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499. Allowing persons other than attorney to practice in his court, such conduct being declared a misdemeanor. Id.

96. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499.

97. Laws 1901, p. 576, c. 466, and Laws 1892, p. 1656, providing that every office shall be deemed vacant upon the incumbent's ceasing to be an inhabitant. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499.

1. See Foreign Judgments, 3 Curr. L. 1466.

2. See Former Adjudication, 3 Curr. L. 1476.

3. See Creditors' Suits, 3 Curr. L. 976; Execution, 3 Curr. L. 1397; Sequestration, 2 Curr. L. 1622; Supplementary Proceedings, 2 Curr. L. 1774.

4. Cyc. Law Dict. "Judgment." An order of a county court incorporating a village is a judgment. State v. Huff, 105 Mo. App. 354, 79 S. W. 1010. Order directing interrogatories to be taken for confessed is not a judgment. Cusachs v. Dugue [La.] 36 So. 960.

5. Right to collect judgment obtained for a personal injury is not affected by death of person injured subsequent to the obtaining of the judgment. City of Anniston v. Hurt [Ala.] 37 So. 220.

municipality,' it has only the effect of an audited claim or demand, giving no new right in respect to the means of payment.[6]

§ 2. *Kinds of judgment. A. Judgments on offer, consent, stipulation, or confession.*[7]—An offer of judgment may be made in the appellate court;[8] in New York it need not be accompanied by an affidavit;[9] but in all cases must be for the full amount due,[10] and being unaccepted is not an admission of plaintiff's cause of action.[11] Under the New Jersey statute requiring affidavits for judgment on warrant of attorney to state the true consideration of the bond, and that the debt is justly due, such debt need not antedate the delivery of the bond,[12] and being unpaid it is immaterial whether or not it constitutes an accrued right of action.[13] That the time of payment has been extended is immaterial in the absence of a plea to that effect.[14] It is essential, however, that the consideration be stated with substantial truth,[15] and it is immaterial that the affidavit is inartificially drawn and not technically precise.[16] Judgment should be entered for the sum mentioned in the bond and warrant.[17] Authority to confess a judgment without process must be clear and explicit, and must be strictly construed;[18] it generally authorizes the entry of but one judgment,[19] and the power being inadequate the judgment is a nullity.[20] In the absence of evidence to the contrary, an attorney is presumed to have such power.[21] To be of any validity and to warrant a judgment, the waiver of citation and the confession of judgment must be made after the maturity of the obligation declared upon.[22] A judgment by confession must be for a fixed and definite sum, and in confession of a fact that can be read from the record.[23] Its validity is not affected by the fact that a jury trial was not formally waived, nor because findings were not made by the court.[24] An officer of a corporation may confess judgment against it though he be one upon whom valid service could not be had,[26] and though he be personally interested in having the judgment so rendered.[26]

6. State v. Royse [Neb.] 98 N. W. 459. In an action to compel the levying of a tax to satisfy such judgment, the court will ascertain the nature and character of the indebtedness on which it is based, in order to determine the limit of the tax which may be levied for its satisfaction. Id.

7. See 2 Curr. L. 582.

8. May be made after notice of appeal has been served, though defendant has not previously appeared in the appellate court [Code Civ. Proc. §§ 3070-3072, 421]. Cutting v. Jessmer, 91 N. Y. S. 658.

9. Cutting v. Jessmer, 91 N. Y. S. 658.

10. Must include interest due. Dietz Co. v. Miller, Sears & Walling Co., 88 N. Y. S. 322.

11. Under B. & C. Comp. § 532, in an action for breach of contract, an unaccepted tender of judgment is not an admission of the terms of the contract and of the breach alleged. Young v. Stickney [Or.] 79 P. 345.

12. Must, however, be honestly due and supported by the same consideration upon which the bond was given. Strong v. Gaskill [N. J. Err. & App.] 59 A. 339.

13, 14, 15, 16. Strong v. Gaskill [N. J. Err. & App.] 59 A. 339.

17. A judgment on a bond and warrant of attorney entered for the amount of the penalty is not illegal, although a part of the real debt had been collected by foreclosure of a mortgage given for the same debt. Construing Gen. St. pp. 2111, 2337, § 5. Earl v. Jenkins [N. J. Law] 58 A. 1086.

18. Weber v. Powers [Ill.] 72 N. E. 1070. A power to confess judgment for the rent due by the terms of a written lease cannot be construed into a power to enter up judgment for rent accruing under an implied contract resulting from the fact of a holding over by the tenant. Id.

19. A second judgment cannot be entered, though the first be void. City of Philadelphia v. Johnson, 208 Pa. 645, 57 A. 1114.

20. May be collaterally attacked for want of jurisdiction. Weber v. Powers [Ill.] 72 N. E. 1070.

21. Harniska v. Dolph [C. C. A.] 133 F. 158.

22. Being made prior to such maturity, the obligation is not thereby annulled. Kiernan v. Jackson, 111 La. 645, 35 So. 798. Being made subsequent to such date judgment may be entered though the circumstances may give rise to an action of nullity for fraud. Id. Where the state appeals from such judgment, making allegations of matters of fraud which require evidence to be taken, the proper remedy is by an action in nullity and an injunction, not by a suspensive appeal. Id.

23. Weber v. Powers [Ill.] 72 N. E. 1070.

24. Harniska v. Dolph [C. C. A.] 133 F. 158.

25. Judgment confessed by vice-president held not void on its face. Manley v. Mayer [Kan.] 75 P. 550.

26. Action by executor. Officer confessing

(§ 2) *B. Default*[27] *and office judgments.*[28]—Plaintiff agreeing to a continuance and allowing such agreement and continuance to be entered of record, the office judgment cannot become final until it is entered up as the judgment.[29] Before such entry, the defendant may have the judgment set aside by filing his counter affidavit and pleading to issue.[30]

(§ 2) *C. At particular stages of the action.*—Judgment may be entered on the pleadings[31] and a demurrer being overruled, a decision should be made directing the entry of an interlocutory judgment.[32]

(§ 2) *D. Final*[33] *and interlocutory judgments.*—A judgment to be final must finally ascertain the amount[34] and distribution[35] of the recovery or fund in controversy, and must dispose of the entire subject-matter of the litigation and the rights of the parties therein.[36] A voluntary nonsuit,[37] an order overruling a demurrer,[38] and, in the absence of an accompanying decree of dismissal, an order sustaining a demurrer,[39] are not final judgments, though a default judgment may be.[40]

(§ 2) *E. Personam or in rem.*—A judgment in rem is an adjudication upon the status of some person or thing,[41] while a judgment in personam is one against the person.[42] Thus judgments in actions to set aside deeds[43] for the

judgment was a legatee in the estate. Manley v. Mayer [Kan.] 75 P. 550.

27. See article Default, 3 Curr. L. 1069, also as to opening defaults, see post, § 7.

28. See 2 Curr. L. 583, n. 43-47; also see Default, 3 Curr. L. 1069, 1071, n. 51-53. Mode of procedure in West Virginia to take office judgment and how the same becomes final or is opened, see 1 Curr. L. 914.

29, 30. Wm. James' Sons & Co. v. Gott [W. Va.] 47 S. E. 649.

31. Courts of record have inherent power to so do. Stratton's Independence v. Dines, 126 F. 968.

32. Brown v. Leary, 91 N. Y. S. 463.

33. See article Appeal and Review, 3 Curr. L. 167, as to final judgments for the purposes of appeal.

34. Judgments are interlocutory where a commissioner is necessary to assess damages (Leonard v. Sibley [Vt.] 56 A. 1015), or where a final accounting is necessary (Osborn v. Cardeza [N. Y.] 72 N. E. 625).

35. Judgments are interlocutory where they order that the fund in court be appropriated after the determination of certain issues between two of the parties and that the cause be continued until such determination (Wilson Hardware Co. v. Duff [Tex. Civ. App.] 83 S. W. 907), or where the balance of the fund realized by sale is to be held subject to the further order of the court (American Trading & Storage Co. v. Gottstein, 123 Iowa, 267, 98 N. W. 770).

36. Must contain a statement that "it is considered by the court that the plaintiff take nothing by his writ and that the defendants go hence without day," or words of similar import. Wenom v. Fossick [Ill.] 72 N. E. 732. A decree finding that the allegations of a bill are not true, and denying complainant the relief asked, is a final disposition of the bill, though it does not explicitly dismiss it. Kozacek v. Kozacek, 105 Ill. App. 180. A judgment decreeing debts against the estate of a decedent and subjecting its lands to their payment is a final decree. Trail v. Trail [W. Va.] 49 S. E. 431. In an equitable proceeding to enforce stockholders' liability, a decree determining amount of corporation's debts, and creditor's rights to an assessment is final. Bennett v. Thorne [Wash.] 78 P. 936. A judgment entered against defendant after demurrer to reply to a separate defense had been overruled, dismissing the separate defense and providing for the recovery of costs and the issuance of execution is interlocutory. Maeder v. Wexler, 43 Misc. 19, 87 N. Y. S. 402. Judgment, entered on day of intervention by a third person, reciting that all matters between all parties, except the rights of the intervenor, had been fully disposed of, held no final judgment had been rendered in the suit prior to the intervention. Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358. A judgment in an action of ejectment dismissing the complaint upon the merits is a final judgment within Code Civ. Proc. § 1674, providing for the cancellation of a notice of lis pendens. Jarvis v. American Forcite Powder Mfg. Co., 93 App. Div. 234, 87 N. Y. S. 742.

37. Where suit was dismissed for want of prosecution. Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371.

38. Under Code §§ 254, 255, a decision of the judge on reversing a ruling of the clerk sustaining a demurrer is not a final judgment. Allred v. Smith, 135 N. C. 443, 47 S. E. 597.

39. Livingston County Bldg. & Loan Ass'n v. Keach [Ill.] 72 N. E. 769.

40. In action to determine title to realty held final. Lindquist v. Maurespas Land & Lumber Co., 112 La. 1030, 36 So. 843.

41. Sorensen v. Sorensen [Neb.] 93 N. W. 837. Partition proceeding is one in rem. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76.

42. Where the lien of a street improvement may be enforced by suit against the owner a suit to foreclose such lien is not a proceeding in rem. Page v. Chase Co. [Cal.] 79 P. 278.

43. They merely operate on the title conveyed by the deed as between the parties to the suit. Allred v. Smith, 135 N. C. 443, 47 S. E. 597.

specific performance of a contract to convey realty[44] are judgments in personam. Probate decrees are generally treated as judgments in rem.[45] Personal service of notice on defendant is essential to a judgment in personam,[46] while a judgment in rem may be based upon constructive service.[47]

§ 3. *Requisites. A. In general.*[48]—In order to have a valid judgment, the court must have jurisdiction of the parties and subject-matter,[49] but an inexcusable departure from established procedure is not jurisdictional unless it seriously interferes with the efficiency of judicial instrumentalities to administer justice.[50] The petition must contain a prayer for relief,[51] though the fact that it does not state a cause of action does not render the judgment void.[52] The judgment must be based on a legal service of valid process,[53] but irregular or defective process only renders the judgment voidable.[54]

A decision substantially and in form like statutory requirements, if any,[55] and, in jury cases, a valid verdict,[56] are prerequisite, but judgment need not await the recording of verdict unless so provided.[57] For mere irregularities in

44. Silver Camp Min. Co. v. Dickert [Mont.] 78 P. 967.

45. A decree assigning the residue of the estate of a deceased person. Chadbourne v. Hartz [Minn.] 101 N. W. 68. The proceeding to call in, audit and allow claims against a decedent's estate is said to be in rem. See MacGowan v. Jones, 142 Cal. 593, 76 P. 503.

46. Korman v. Grand Lodge of the U. S., 44 Misc. 564, 90 N. Y. S. 120; Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603; Silver Camp Min. Co. v. Dickert [Mont.] 78 P. 967. Where defendant was a nonresident. Goodwin v. Claytor [N. C.] 49 S. E. 173.

47. Korman v. Grand Lodge of the U. S., 44 Misc. 564, 90 N. Y. S. 120.

48. See 2 Curr. L. 583.

49. Where court had no jurisdiction because of amount. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580. An appeal being invalid, the judgment cannot be said to be that of the appellate court. State v. Sommerville, 112 La. 1091, 36 So. 864. Appellate court having no jurisdiction of an appeal, the judgment of the appellate court is void. Wilbourn v. Hurt, 139 Ala. 557, 36 So. 768.

See article Jurisdiction, 2 Curr. L. 604.

50. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Defendant was found guilty of fraud in circuit court. Through error the question was again before the jury under the insolvent debtors' act. He was again found guilty by the county court and remanded to the sheriff's custody. The proceedings in the latter court did no harm and may be regarded as superfluous. Penoyer v. People, 105 Ill. App. 481.

51. Civ. Code, § 90. Bowman v. Ray, 25 Ky. L. R. 2131, 80 S. W. 516. See article Pleading, 2 Curr. L. 1178.

52. Kubesh v. Hanson [Minn.] 101 N. W. 73.

53. Rule applies to judgment on cross bill. Schwartzlose v. Wagner [Tex. Civ. App.] 81 S. W. 70. Personal judgment on citation by publication is void. Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603. Where defendant was a nonresident. Goodwin v. Claytor [N. C.] 49 S. E. 173. Citation and service of answer are necessary before the court can render judgment on a counterclaim. Field v. O'Connor [Tex. Civ. App.] 80 S. W. 872. Personal service on one of several joint debtors authorizes judgment against all, under Comp. Laws, § 840. Hirsh v. Fisher [Mich.] 101 N. W. 48. Under Rev. St. 1895, art. 1347, service on a partner will authorize a judgment against the partnership. State v. Cloudt [Tex. Civ. App.] 84 S. W. 415. Failure of clerk to affix his seal to the citation as required by Rev. St. 1895, art. 1447 (Robinson v. Horton [Tex. Civ. App.] 81 S. W. 1044), or failure of sheriff in returning the citation to show the date of service therein as required by Rev. St. 1895, art. 1225 (Id.), is fatal to a default judgment. Judgment rendered on service by publication without the statutory affidavit is void. Osborne v. Schlichenmeier [Kan.] 75 P. 474.

See article Process, 2 Curr. L. 1259.

54. Failure of justice to sign original notice as required by Code, § 4488, does not render the judgment void. Loughren v. Bonniwell & Co. [Iowa] 101 N. W. 287. Omission of the seal of the court from citation does not render the judgment void. Newman v. Mackey [Tex. Civ. App.] 83 S. W. 31. But see Robinson v. Horton [Tex. Civ. App.] 81 S. W. 1044.

55. Neither an entry in the clerk's minutes nor an opinion of the court can take the place thereof. Electric Boat Co. v. Howey, 96 App. Div. 410, 89 N. Y. S. 210. Oral decision taken down by stenographer and included in judgment roll without being entitled, dated or signed is not a decision sufficient to support a judgment. Dobbs v. Brinkerhoff, 90 N. Y. S. 480. An unsigned opinion by the trial judge, concluding with the statement that the plaintiff is entitled to the relief demanded, and "judgment is granted accordingly with costs," is not a sufficient compliance with Code Civ. Proc. § 1022. Kent v. Common Council of Binghamton, 90 App. Div. 553, 86 N. Y. S. 411. See 2 Curr. L. 583, n. 48, 49.

56. Judgment entered on verdict received by clerk is void, though so received under direction of court and without objection to the parties. Morris v. Harburger, 91 N. Y. S. 409.

57. Judgment in condemnation proceedings was entered after verdict assessing the damages was filed but before it was re-

these particulars, the judgment is only voidable.[58] The requisite decision not being found in the judgment roll it will be assumed that none was filed.[59] A judgment not being based upon a decision it should be vacated, a decision made and proper judgment entered,[60] but even in the absence of a motion to vacate, the judgment will be reversed on appeal and the case remitted for decision.[61]

Signing[62] and entry[63] are essential, though an unsigned judgment has been held to be valid when entered on the signed minutes of the court.[64] There being a clear intention to sign the judgment, it is immaterial that the signatures appear on the right or left hand side of the page on which it is entered,[65] and being signed by both the judge and attorney for the prevailing party, it is immaterial whether or not it is one requiring the signature of the judge or that of the attorney.[66] Irregularities, in that the clerk failed to mark answers as filed,[67] or failed to enter a decree pro confesso in tax proceedings,[68] do not generally affect the validity of the final judgment entered in the cause.

(§ 3) *B. Parties.*[69]—There must be parties in court standing as litigants[70] and competent to sue or defend.[71] A necessary party being omitted, the court may withhold its judgment,[72] but being rendered it is voidable only.[73] An erroneous entry of joint judgment against a defendant, not brought into the jurisdiction of the court, renders it erroneous[74] as to all defendants. Jurisdiction having been acquired over a party, a judgment rendered against him after his death is not void, though his heirs and representatives be not cited.[75]

corded. This under Rev. Code Civ. Proc. § 875, providing that on the return of the verdict the court shall order it to be recorded, and shall enter judgment thereon. Weiland v. Ashton [S. D.] 100 N. W. 737.

58. Where verdict awarded punitive damages without any actual damages. Brennan v. Paul [Mo. App.] 83 S. W. 283.

59. Under Code Civ. Proc. § 1022, requiring that the decision, when filed, shall form part of the judgment roll. Kent v. Common Council of Binghamton, 90 App. Div. 553, 86 N. Y. S. 411.

60. Electric Boat Co. v. Howey, 96 App. Div. 410, 89 N. Y. S. 210. Where judgment was amended and plaintiff appealed from that part of the amendment which was favorable to defendant, held entire judgment should be vacated. Id.

61. Kent v. Common Council of Binghamton, 90 App. Div. 553, 86 N. Y. S. 411.

62. A judgment is not appealable until signed. Orleans & J. R. Co. v. International Const. Co. [La.] 37 So. 10. The registry of an unsigned judgment will not create a judicial mortgage. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408. See 2 Curr. L. 583, n. 50, 51.

63. Was signed but not entered. Hull v. Eby, 123 Iowa, 257, 98 N. W. 774. See post, § 5.

64. Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76. In the absence of proof to the contrary it will be presumed that the judge signed the minutes. Id.

65, 66. Arrowwood v. McKee, 119 Ga. 623, 46 S. E. 871.

67. The answers having been in the hands of the court and considered in making the decree. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

68. Under Acts 1881, pp. 66-68, §§ 5, 8, 9, such failure is a mere irregularity which does not deprive the court of jurisdiction to render the final decree, nor subject that decree to collateral attack. Beasley v. Equitable Securities Co. [Ark.] 84 S. W. 224.

69. See 2 Curr. L. 583.

70, 71. There must be a cause of action, see 3 Curr. L. 663. The party must have an interest cognizable in the suit. See Parties, 2 Curr. L. 1092. The party affected must not be a person disabled to sue or defend. See Aliens, 3 Curr. L. 138; Husband and Wife, 3 Curr. L. 1669; Infants, 4 Curr. L. 92; Insane Persons, 4 Curr. L. 126. An incompetent party must be represented by guardian or next friend. See Guardians ad Litem, etc., 3 Curr. L. 1567.

72. Jewett v. Schmidt, 45 Misc. 34, 90 N. Y. S. 848. This is so though under Code Civ. Proc. §§ 488, 499, defect of parties unless raised by answer or demurrer is deemed to have been waived. Id.

73. Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686. See Former Adjudication, 3 Curr. L. 1476; Parties, 2 Curr. L. 1092.

74. Cannot be reversed in part. Hutchinson v. Sine, 105 Ill. App. 638. See 2 Curr. L. 583, n. 58.

75. Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358. Failure to so cite the heirs and representatives is generally treated as an irregularity sufficient to justify the setting aside of the judgment. Id.

NOTE. Judgment after death of a party: A judgment rendered against a person dying after the action has begun is not void on that account. New Orleans v. Gaines' Adm'rs, 138 U. S. 595; Mitchell v. Schoonover, 16 Or. 311. It is an irregularity and may be attacked directly, but the judgment is valid until set aside by the court. Stocking v. Hanson, 22 Minn. 542; Giddings v. Steebe, 28 Tex. 732. Black, Judgments [2nd Ed.] § 199. The contrary view, that in the absence of any statutory provision on the subject, a judgment against a dead person,

(§ 3) *C. Conformity to process, pleading, proof, verdict or findings.*[76]—The judgment must be against the identical party named in the process,[77] and must conform to the pleadings; thus it must not decide matters not in issue,[78] nor grant relief not prayed for or exceeding what was sought;[79] but included and

either natural or artificial, is absolutely void, irrespective of whether jurisdiction has been acquired or not, has some support. Life Ass'n v. Fassett, 102 Ill. 315. 4 Columbia L. R. 513.

76. See 2 Curr. L. 584.

77. Default judgment. Korman v. Grand Lodge of the United States, 44 Misc. 564, 90 N. Y. S. 120. Citation issued for and served upon G. W. S. will not support a default judgment against J. W. S. Shook v. Laufer [Tex. Civ. App.] 84 S. W. 277. Where a railroad company was served with process in its true corporate name, but omitting the word "company," and a default judgment was taken against it by its true name, held judgment could not be attacked on ground of misnomer. Brassfield v. Quincy O. & K. C. R. Co. [Mo. App.] 83 S. W. 1032.

78. Where complaint did not allege that the land could not be sold in parcels, it is error to render a judgment providing that the land should be sold as a whole, and that it was not susceptible of division. Richcreek v. Russell [Ind. App.] 72 N. E. 617. Complaint admitting defendant's rights in a highway to a limited extent, and the answer claiming rights by prescription, decree that defendant's rights were extinguished by abandonment, held a fatal variance. Sowles v. Clawson [Utah] 76 P. 1067. A judgment on a written contract cannot be founded on a finding that it was obtained by fraud, where the defendant did not plead that fact, though no objection is taken to evidence in support thereof. New Idea Pattern Co. v. Whelan, 75 Conn. 455, 53 A. 953. Complaint being insufficient as to sureties on bond, a judgment against them is erroneous. Felonicher v. Stingley, 142 Cal. 630, 76 P. 504.

79. Defendant admitted the allegations of the complaint and its prayer cannot have unsought relief. Cauthen v. Cauthen [S. C.] 49 S. E. 321. In replevin, absence of plea requiring return of chattel, a final judgment cannot award possession. Construing Laws 1902, p. 1528, c. 580. Levy v. Hohweisner, 91 N. Y. S. 552. A judgment based entirely upon a cause of action found in a complaint, but on account of which no relief is asked, is more favorable than that demanded in the complaint. Hasbrouck v. New Paltz, H. & P. Traction Co., 90 N. Y. S. 977. Complaint being for false representations and deceit, held error to render judgment as for breach of warranty. Moore v. Giddings [Conn.] 59 A. 36. A judgment decreeing one-half of appellee's recovery to his attorney, held erroneous, the appellee being a minor, the attorney not being a party and the pleading not warranting such a finding. White v. Simonton [Tex. Civ. App.] 79 S. W. 621. Defendant setting up a counterclaim for the difference between the value of a chattel and the unpaid purchase price, he is not entitled to recover the full value of the chattel. McCormick Harvesting Mach. Co. v. Hill, 102 Mo. App. 544, 79 S. W. 745. Held error to vacate an order of cancellation under an order to show cause why the order should not be "reargued and resettled," so as to show appearance of attorney and the filing of certain affidavits and such other relief as the court shall deem necessary. Schiller v. Weinstein, 91 N. Y. S. 76. A prayer for a conveyance justifies a judgment requiring a sealed deed. Gen. St. 1902, § 4029, defining a conveyance to be a sealed instrument. Jenner v. Brooks [Conn.] 59 A. 508. Where legal and equitable causes of action are stated in one form of complaint, judgment may be rendered for the relief demanded upon any right of action which the facts alleged are sufficient to support. Cole v. Jerman [Conn.] 59 A. 425. Where, in a proceeding to enforce an assessment for an improvement, plaintiff asked for all proper relief, defense was made, and the proof authorized the apportionment made by the court, held, the judgment would not be disturbed as not warranted by the pleading. Specht v. Barber Asphalt Pav. Co. [Ky.] 80 S. W. 1106.

Under prayer for general relief, equity may grant such as is incidental and proper to the case made. May grant a personal judgment. American Trading & Storage Co. v. Gottstein, 123 Iowa, 267, 98 N. W. 770. This question is immaterial where confessed by demurrer. Id. See Equity, 3 Curr. L. 1235.

Must not exceed amount claimed. Dundon v. Interurban St. R. Co., 87 N. Y. S. 452; Muller v. Barker, 90 N. Y. S. 388; Droege v. Interurban St. Ry. Co., 91 N. Y. S. 71; Wulfart v. Weinstein, 91 N. Y. S. 359.

See, also, 2 Curr. L. 584, n. 61.

Allegations as to execution, transfer, demand and nonpayment of note held sufficient to support a judgment for the amount of the note, interest and attorney's fees. McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857. Petition praying for judgment in sum of $1,200 for costs and general relief held error to grant judgment for $1,200 and interest. First Nat. Bank v. Cleland [Tex. Civ. App.] 82 S. W. 337. Where plaintiff alleged that his earning capacity was $5 per day and testified that it was $6 to $10, held, he not amending his petition, that the recovery should have been limited to the amount therein claimed. Impkamp v. St. Louis Transit Co. [Mo. App.] 84 S. W. 119. Where the amount sued for represents the alleged value of 162 saw logs, on the basis of $4.50 per M. feet of board measure, plaintiff cannot recover for 125 logs on the basis of $6.38 per M, and, failing to amend his petition, he must lose the overplus. W. W. Carre & Co. v. Massie [La.] 37 So. 530.

Interest cannot be recovered as an element of damages sustained unless it is specifically pleaded, or the amount sued for is sufficient to cover the damages allowed as interest and such other sum as may be included in the recovery. Missouri, K. & T. R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298. In an action for the wrongful death of a mule, plaintiff having prayed for the value of the mule, $100, and interest from the date of his death, $100 is the limit of recovery. Houston, E. & W. T. R. Co. v. McMillan [Tex. Civ. App.] 84 S. W. 296.

partial relief may be given.[80] The judgment being in excess of the amount claimed, it is merely erroneous[81] and may be modified on review,[82] or the filing of a remittitur is proper,[83] or the grant of the excessive relief being clearly a clerical error, it may be corrected on motion.[84] A judgment being excessive, it will be presumed on collateral attack that the pleadings were amended so as to include the relief granted;[85] but on direct attack the opposite rule prevails.[86] Defendant admitting plaintiff's right to recover, it is immaterial that the ground of the admission is not pleaded as a ground for relief,[87] and facts of which the court will take judicial notice need not be alleged in order to recover thereon.[88] The judgment must also conform to the proof[89] and the verdict,[90] and failing in this regard, one may object thereto, though it is more favorable to him than the findings warrant;[91] but the fact that the verdict in his favor is excessive does not entitle him to so object.[92] Judgment on the merits cannot follow a termination of trial for failure of proof.[93] In Montana, actions being consolidated, a single judgment should be rendered.[94]

Judgment awarding interest from a time prior to that from which interest is prayed is excessive. Carter Brick Co. v. Clement [Tex. Civ. App.] 84 S. W. 434.

80. That plaintiffs are suing for the entire fee does not prevent their recovering an undivided fractional part, and to so do they need not amend their pleadings. Georgia I. & C. Co. v. Allison [Ga.] 49 S. E. 618.

81. Brought v. Cherokee Nation [C. C. A.] 129 F. 192; Kelly v. Gebhart, 180 Mo. 588, 79 S. W. 427; Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358. See 2 Curr. L. 584, n. 62.

82. Georgia I. & C. Co. v. Allison [Ga.] 49 S. E. 618; Miller v. Georgia R. Bank, 120 Ga. 17, 47 S. E. 525; Droege v. Interurban St. R. Co., 91 N. Y. S. 71; Dundon v. Interurban St. R. Co., 87 N. Y. S. 452. [In this case the amount was reduced without costs to either party.] Cause need not be remanded on account of such error. Missouri, K. & T. R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298. Judgment in replevin erroneously awarding defendants possession of the chattel. Levy v. Hohweisner, 91 N. Y. S. 552.

83. Where clerk wrongfully entered judgment for unwarranted sum. Redinger v. Jones [Kan.] 75 P. 997. Where plaintiff recovered on two causes of action, one recovery being erroneous and he entering a remittitur for the amount thereof, held not error to enter judgment on the first cause of action for the difference between the sum remitted and the amount of the verdict. Blum v. Edelstein [Colo. App.] 79 P. 301.

84. Binion v. Woolery, 25 Ky. L. R. 1802, 78 S. W. 898.

85. Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358.

86. A definite sum being claimed by the written pleadings, it cannot be presumed on appeal that there were oral pleadings sufficient to authorize a judgment for more than that amount. Missouri, K. & T. R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298.

87. Defendant admitting satisfaction of judgment, plaintiff is entitled to have its enforcement enjoined, although he has not pleaded payment as a ground for relief. Abee v. San Antonio Brew. Ass'n [Tex. Civ. App.] 78 S. W. 973.

88. In an action on a note stipulating for 10 per cent attorney's fees in case suit was brought, held unnecessary to allege bringing of suit in order to recover such attorney's fees. McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857.

89. Plaintiff suing two defendants for services, held not entitled to a judgment against both, there being a failure to show a joint liability. Stein v. Woodward Pub. Co., 91 N. Y. S. 17.

90. Where a judgment should be entered non obstante, a judgment entered on the general verdict is irregular. Seeds v. American Bridge Co. [Kan.] 75 P. 480. Verdict being for costs, a judgment for costs and damages is erroneous. Duane v. Molinak [Mont.] 78 P. 588. Verdict for damages, in an action for possession and damages, will not warrant a judgment for possession. Hines v. Shafer [Tex. Civ. App.] 74 S. W. 562. Defendant's remittitur of overpayment of note sued on held not to warrant judgment for plaintiff in conflict with verdict that note had been paid. Eastham v. Patty & Brockinton [Tex. Civ. App.] 83 S. W. 885. Jury not responding to the issue vel non of a lien, it is error to enter judgment establishing such lien. Goldstein v. Leake [Ala.] 36 So. 458. Where no issue of community liability was submitted to the jury, a verdict in favor of plaintiffs does not authorize a judgment against the community. Swenson v. Stoltz [Wash.] 78 P. 999. Judgment cannot be rendered giving plaintiff only one-half of the amount recovered by the verdict and giving the other half to plaintiff's attorneys who were not named in the verdict nor connected with the cause by pleadings or evidence, and the reasonableness of whose fees had not been judicially determined. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032. See 2 Curr. L. 584, n. 63.

91, 92. Eastham v. Patty [Tex. Civ. App.] 83 S. W. 885.

93. A judgment of dismissal on the merits after a nonsuit for failure of proof is erroneous. Hedenberg v. Manhattan R. Co., 91 N. Y. S. 68.

94. Construing Code Civ. Proc. § 1894. Handley v. Sprinkle [Mont.] 77 P. 296.

Note: The consolidation of actions under this statute merges all the actions consolidated into one suit, and must be distin-

§ 4. *Form and interpretation.*[95]—As far as practical, the judgment should be in statutory form,[96] and, in the absence of such statutory provisions, the form of an equitable judgment is governed by the established principles of equity jurisprudence.[97] In some states the judgment may be entered in the name of the plaintiff, though he has assigned his interest in the action.[98] It must show against which party it is rendered,[99] and such party must be described so that he can be identified.[1] In the absence of proof that a person has ever received or executed conveyances of land by using the initial letter or letters of his name, the judgment must set forth the first or Christian name of both plaintiff and defendant.[2] It must expressly grant the relief awarded,[3] and hence should not be a mere recital of an account.[4] A memorandum filed by a trial judge, stating the grounds of his decision, is no part of the judgment.[5] A judgment contradictory in its terms is erroneous.[6] The verdict awarding interest, the judge should compute and include it in the judgment.[7] The signature of the judge is essential.[8]

The judgment should be construed[9] with reference to the whole record,[10]

guished from what is known as the "consolidation rule," which was first devised and established by Lord Mansfield. Under that rule, where many cases were pending between the same parties, in which the same issues were involved, one case was tried, and all proceedings in the other cases were stayed until after such trial. It must also be distinguished from the old practice in equity of consolidating equity cases. Under such practice, each case was decided upon its own pleadings and evidence. The consolidation in equity cases under this practice was practically consolidating them for the purpose of trial alone. See Handley v. Sprinkle [Mont.] 77 P. 296.

95. See 2 Curr. L. 584.

96. Judgment for sale in general tax proceedings. Gage v. People, 207 Ill. 377, 69 N. E. 840.

97. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Wisconsin statutes, with a few exceptions, do not provide forms for judgments [Rev. St. 1898, §§ 3217, 2883, 3245, referred to]. Id.

98. Code, § 3476. Assignment was to secure attorney's fees. Mayo v. Halley [Iowa] 100 N. W. 529.

99. Goldberg v. Markowitz, 94 App. Div. 237, 87 N. Y. S. 1045. The record failing to show against whom the judgment was rendered, there is no presumption that it was against the defendant. Id. Where, after the death of the defendant, his administrator voluntarily enters and defends the action, the latter cannot complain of the form of the judgment running against "the defendant." Cole v. Jerman [Conn.] 59 A. 425.

1. Though summons may be issued against the defendant by a fictitious name where his real name is unknown. Goldberg v. Markowitz, 94 App. Div. 237, 87 N. Y. S. 1045. Default judgment must be entered against one by his real name. Durst v. Ernst, 91 N. Y. S. 13.

2. Suit to quiet title to land. Vincent v. Means [Mo.] 82 S. W. 96.

3. In an action for damages for a tort, the court finding for the defendant on the merits, "Judgment that the action be dismissed upon the merits, with costs" should be entered. Laws 1902, p. 1561, c. 580. Flato v. Interurban St. R. Co., 88 N. Y. S. 931. A judgment in these words: "It is therefore considered and adjudged by the court that this cause be dismissed and that the defendant recover from the plaintiff all costs herein expended" is a proper one to be entered on an order dismissing the action with costs to defendant. Casto v. Eigeman, 162 Ind. 506, 70 N. E. 807.

4. An instrument sued on, headed, "Account made by R.," indorsed, "Within account approved," over the signature of the judge and recorded over the signature of the clerk, is not a judgment but an account. Howell v. Brown [Ind. T.] 83 S. W. 170.

5. Forgotson v. Raubitschek, 87 N. Y. S. 503.

6. Judgment dismissing action for lack of prosecution, awarding costs against defendants, and ordering issuance of a writ procedendo, held erroneous. Vickers v. Chisholm [Colo. App.] 79 P. 302.

7. Louisville & N. R. Co. v. Fort [Tenn.] 89 S. W. 429.

8. See ante, § 3 A.

9. See 2 Curr. L. 584.

10. Parties claiming rights under the judgment should set up the entire record. Allred v. Smith, 135 N. C. 443, 47 S. E. 597. In the municipal court the minutes of the trial may be looked to. Stecher v. Independent Order F. S. of J., 90 N. Y. S. 332. All the essential facts appearing from the affidavits in attachment, the judgment will not be declared void. Jones v. Danforth [Neb.] 99 N. W. 495. A judgment reciting that the "defendants had been duly cited," and that "since they were cited by publication" and the attorney's affidavit showing that defendants were nonresidents, held to show a citation by publication. Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603. Land charged to parties to partition suit being fully identified in exhibits attached to the petition and by the court's findings, held judgment not void for failure to describe the same. Hanrick v. Hanrick [Tex.] 83 S. W. 181. Will set out in petition and referred to in decree is substantially set out in decree establishing will. Glover v. Coit [Tex. Civ. App.] 81 S. W. 136. Where petition alleged date when each item became due, held judgment awarding interest "from and after * * * each item in plaintiff's

the language used[11] and customary procedure,[12] and, if reasonably possible, so as to guard the rights of all the parties,[13] and to sustain its validity.[14] In so doing the judgment of a domestic court of general jurisdiction[15] is presumptively valid.[16] All matters in issue essential to the recovery are presumed to have been passed on,[17] and in the absence of evidence to the contrary, the necessary proof is presumed.[18] These presumptions are only prima facie.[19] Recitals are presumed to be correct,[20] even though they show the nonexistence of jurisdictional facts,[21] but they may be impeached,[22] though being matters of record, their validity or

petition shall become due," was not void for uncertainty. Hill v. Lyles [Tex. Civ. App.] 81 S. W. 559.

11. Recital that the judgment debtor appeared by a certain attorney is conclusive as to the fact of the attorney's appearance, but not on the question of his authority to appear. Korman v. Grand Lodge of the U. S., 44 Misc. 564, 90 N. Y. S. 120. Judgment granting widow's allowance is not conclusive evidence that there are sufficient assets with which to pay it. Wood v. Brown [Ga.] 49 S. E. 295.

12. Recital that certain defendants appeared by guardian held to refer to a guardian appointed by the court to represent minor defendants under Pasch. Dig. art. 1446. Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603.

13. Decree foreclosing the equity of a judgment lienor, held, in the absence of a sale, to simply fix the priority of the liens. First Nat. Bank v. Campbell, 123 Iowa, 37, 98 N. W. 470.

14. A judgment not in terms awarding costs against one served only outside the court's territorial jurisdiction cannot have such error imported into it by construction. Maxcy v. McCord [Wis.] 98 N. W. 529.

15. Jurisdiction of an inferior court must be proved. City court of New York. Frees v. Blyth, 91 N. Y. S. 103.

16. Rule applies to a tax judgment. Chadbourne v. Hartz [Minn.] 101 N. W. 68. Decree based on findings as to jurisdiction. Bennett v. Roys [Ill.] 72 N. E. 380. Default judgment presumed to have been marked in default after first term and before answer was made. Norman v. Great Western Tailoring Co. [Ga.] 49 S. E. 782. To sustain a judgment it will be presumed that the heirs of a deceased party were in court, chargeable with knowledge of the judgment. Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358. Judgment in favor of an intervenor, reciting that plaintiff and some of the intervenors failed to appear, but did not mention defendants, held it would be inferred, in order to sustain the judgment against defendants, that they appeared at the trial. Id. Where the entry did not show any adjournments, nor give the date of the summons but recited an appearance by defendant, held sufficient in an action on the judgment. Tomlin v. Woods [Iowa] 101 N. W. 135. A judgment against executors is not void, it not appearing from the pleadings that it was rendered within a year of the death of the decedent, and before the executors could be required to plead under the statute. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. A judgment finding that a county is "organized," it will be presumed in aid of the judgment that every act necessary to be done to constitute the county a legally organized county was done. McCaleb v. Rector [Tex. Civ. App.] 78 S. W. 956. Where a petition praying for possession or value of property was amended so as to eliminate the prayer for possession, held that it would be presumed in support of a judgment for plaintiff, that a tender of possession was not made until after the amendment. First Nat. Bank v. Cleland [Tex. Civ. App.] 82 S. W. 337.

17. A personal judgment against a married woman is not void because the record fails to show that the court passed on the issue as to whether or not she had any separate property, but is thereby rendered voidable only. Hart v. Manahan [Ohio] 71 N. E. 696.

18. In the absence of evidence as to the nature and character of injuries, it will be presumed that a default judgment in a certain sum was supported by the testimony heard by the trial judge. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. The record failing to show that it contains all the evidence upon which the cause was heard, the presumption is that the decree is correct. Simpson v. John H. Talbot & Co. [Ark.] 79 S. W. 761. A finding that the documentary evidence was sufficient to justify the order of a nunc pro tunc judgment entry is conclusive if supported by competent evidence. Sperling v. Stubblefield, 105 Mo. App. 489, 79 S. W. 1172.

19. Presumption of validity of tax judgment overcome by finding an improperly certified resolution in judgment roll. Chadbourne v. Hartz [Minn.] 101 N. W. 68. Does not avail one suing on a judgment based on an insufficient affidavit of service. Frees v. Blyth, 91 N. Y. S. 103.

20. As to when order for redocketing proceedings was entered. Thompson v. People, 207 Ill. 334, 69 N. E. 842. Recitals of jurisdictional facts. Nolan v. Arnot [Wash.] 78 P. 463. A finding that publication was legal. Beasley v. Equitable Securities Co. [Ark.] 84 S. W. 224. Recital of service of summons. Parsons v. Weis [Cal.] 77 P. 1007. Recital as to sufficiency of proof. Coulbourn Bros. v. Bolton [Md.] 59 A. 711. Recital of residence. Young v. Hiner [Ark.] 79 S. W. 1062. Recital of notice, the law not requiring evidence of publication to be made part of the record. Johnson v. Hunter, 127 F. 219. Recital that order was made by court held conclusive, and it could not be attacked on the ground that it was made by the judge. Young v. Hiner [Ark.] 79 S. W. 1062. Allowance of damages on dissolution of injunction may be supported by recital in decree that it was agreed. Salzenstein v. Hettrick, 105 Ill. App. 99.

21. Providence County Sav. Bank v. Hughes [R. I.] 58 A. 254.

22. Parsons v. Weis [Cal.] 77 P. 1007.

effect cannot be overcome by evidence of any lower degree.[23] A judgment is not void upon its face unless its invalidity is apparent from an inspection of the judgment roll,[24] and the question of such invalidity is purely one of law.[25] Explanatory parol evidence is sometimes admissible,[26] but it should be consistent with the record.[27] As to the character of the judgment, the record controls over the bill of exceptions.[28]

§ 5. *Rendition, entry and docketing; contents of judgment roll.*[29]—The prevailing party must see that judgment is entered,[30] the judgment debtor being justified in assuming that an ordinary judgment will be entered.[31] Judgment should be entered for the amount of the verdict plus interest where the judgment debtor delays its rendition.[32] A defendant who has not appeared is not

Where citation issued for and was served upon G. W. S., a recital that J. W. S. had been duly cited will not render a judgment against the latter valid. Shook v. Laufer [Tex. Civ. App.] 84 S. W. 277. Recital that one was regularly served is not rebutted where the judgment roll merely contains the original summons, the return of the sheriff that he was unable to find defendant, the affidavit of publication, and does not show that an alias summons was not issued prior to the publication. People v. Davis, 143 Cal. 673, 77 P. 651. See 2 Curr. L. 584, n. 73.

23. Parsons v. Wels [Cal.] 77 P. 1007.

24. People v. Davis, 143 Cal. 673, 77 P. 651; Parsons v. Weis [Cal.] 77 P. 1007.

25. Does not depend upon any determination of the court as to what the judgment roll shows. People v. Davis, 143 Cal. 673, 77 P. 651.

26. Parol evidence is admissible to show that a judgment for a third party was in fact rendered by virtue of defendant's right, under an agreement between such third party and defendant. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

27. Parol testimony that a judgment for an intervenor was taken under defendant's right by virtue of an agreement is not inconsistent with a recital that the claim of plaintiff was without right or foundation. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395. Parol evidence held inadmissible to show that certain notice had been lost from files when the record of the court shows due notice as required by statute had been given. Gage v. People, 207 Ill. 377, 69 N. E. 840.

28. Vickers v. Chisholm [Colo. App.] 79 P. 302.

29. See 2 Curr. L. 585, § 6.

30. Nonsuit. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

31. Phillips v. Norton [S. D.] 101 N. W. 727. May show that the judgment was not authorized by the summons and complaint in a suit to restrain its enforcement. Id.

32. Oliver v. Love, 104 Mo. App. 73, 78 S. W. 335.

NOTE. Is interest allowable after verdict and before rendition of judgment? Interest to verdict is always given on an interest-bearing demand, even if the trial is delayed on the court's motion, and there is as good reason for giving interest after verdict, if the court delays judgment. The point has received the attention of the courts and while the decisions are not uniform, the weight of authority is to allow interest in the circumstances stated. Discussions of the question will be found in Griffith v. Railway Co., 44 F. 574, 584, and in Gibson v. Enquirer, 2 Flip. 88, Fed. Cas. No. 5,391. Both of these cases allow interest to the date of judgment. The subject was fully gone into by the court of King's Bench on a case reserved expressly to consider it with a view to altering the prevailing rule. The decision was that interest should be given to the date of judgment. Robinson v. Bland, 2 Burr. 1077. The opinion, which was by Lord Mansfield, says "the practice in the English courts had been to allow interest only until writ brought," namely, to the commencement of the action, a rule which has never prevailed in this country, the uniform practice here being for the jury to add interest to the date of verdict, or, in trials by the court, to the date of entering judgment. In Robinson v. Bland, supra, the rule was deliberately altered because of its inherent injustice and inconsistency with the general doctrine that damages or rights accruing on a cause of action in suit for which a new suit will not lie shall be redressed or satisfied by the judgment in the pending suit. In Johnson v. Railroad, 43 N. H. 410, it was said: "No solid reason, we think, can be given for withholding the interest between the finding of the jury and the rendering of judgment, as it is quite clear, under our law and practice, interest should be allowed at all other times from the commencement of the suit, at least, until judgment and satisfaction of the judgment." See, also, Sproat's Ex'r v. Cutler, Wright, 157; Winthrop v. Curtis, 4 Me. 297. Cases have been decided by the supreme court of the United States, wherein the jurisdiction of that court depended on the validity of the interest added by the trial court to the jury's verdict, as without the added interest the amount of the judgment was for a sum below the minimum jurisdiction of the supreme court. Quebec Steamship Co. v. Merchant, 133 U. S. 375, 33 Law. Ed. 656; New York El. R. Co. v. Bank, 118 U. S. 608, 30 Law. Ed. 259. In these cases the point was noticed, and the jurisdiction retained. Most of the decisions allowed interest on the verdict because judgment had been postponed by some motion or procedure of the unsuccessful party; but the decision by Lord Mansfield, and some of the other authorities cited, did not rely on such a circumstance, which, indeed, had not occurred. If the party asking interest has not himself caused delay, it seems to be just that he should have interest. Usually his adversary may pay the amount of the verdict if he pleases, and thus prevent interest from running on it. Taking account of the essential

entitled to notice of the application for judgment.[33] In computing the time within which a notice for judgment must be returned, the first day is included and the last day excluded.[34] The judgment must generally be rendered in term,[35] though it is held that the court trying the case without a jury may take it under advisement until the next term, judgment being then rendered in open court.[36] In the absence of statutory provisions, it cannot be rendered at chambers.[37] The time within which a default judgment may be entered often depends on the character of the action; as one ex contractu or ex delicto.[38] In some states the appellate court on reversing the judgment of the trial court may enter final judgment,[39] and it directing that the judgment be amended in a designated way, a formal order making the judgment of the appellate court the judgment of the trial court is an indispensable prerequisite to the amendment.[40] A judgment being entered at the same term but subsequent to a less formal order, it supersedes the latter though no reference is made to it.[41] In the absence of a motion for a new trial, judgment may be entered the day after the findings of fact are filed;[42] but in the absence of a memorandum in the judge's docket or other record evidence, it cannot be entered after the adjournment of the term.[43] The prevailing party or his attorney[44] or the judge[45] may have the judgment entered. Nunc pro tunc judgments may be entered to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors.[46] An order vacating a judgment cannot be considered a nunc pro tunc entry of judgment in the absence of a statement as to what the judgment should have been.[47] Until judgment be pronounced or made known, the clerk cannot enter it, e. g., a decree dismissing a bill after the court has sustained a demurrer there-

equity of the matter, it would seem that the adjudications referred to are a sufficient sanction for ruling that interest should be added to the verdict to the date of final judgment. This rule will accord exactly with the ancient practice to render judgment as of an earlier date when the delay in giving the judgment was caused by the court. Mitchell v. Overman, 103 U. S., loc. cit. 64, 26 Law. Ed. 369.—From Oliver v. Love, 104 Mo. App. 73, 78 S. W. 335.

33. John Meunier Gun Co. v. Lehigh Valley Transp. Co. [Wis.] 101 N. W. 386.

34. Notice served on the 21st and returned on the 26th of the same month is not returned within five days after service. Swift & Co. v. Wood [Va.] 49 S. E. 643. Sunday is to be included unless the last day falls on Sunday. Id.

35. Judgment rendered in vacation upon a verdict previously rendered at a regular term is void. Thomas County Com'rs v. Hopkins, 119 Ga. 909, 47 S. E. 319.

36. Barnes v. Benham, 13 Okl. 582, 75 P. 1130.

37. See Mau v. Stoner [Wyo.] 76 P. 584.

38. Action to enforce a stockholder's liability is an action to enforce a contract within Act 1886, p. 307, c. 184, § 170, providing that in such an action default judgment may be entered at any time after 15 days after return day. Coulbourn Bros. v. Boulton [Md.] 59 A. 711. As to whether or not entry of default judgment while defendant's motion for relief is pending is sufficient to have it set aside, quaere. See Braseth v. Bottineau County [N. D.] 100 N. W. 1082 and cases cited. See, also, Defaults, 1 Curr. L. 913; 3 Curr. L. 1069.

39. Under Code, § 957. Such judgment rendered on reversal of order of corporation commission as to time for arrival of trains. North Carolina Corp. Commission v. Atlantic Coast Line R. Co. [N. C.] 49 S. E. 191.

40. Rusk v. Hill [Ga.] 49 S. E. 261. See Appeal and Review, 3 Curr. L. 291 et seq.

41. Appeal from the order will be dismissed. Specht v. Barber Asphalt Pav. Co. [Ky.] 80 S. W. 1106.

42. Lewis v. First Nat. Bank [Or.] 78 P. 990.

43. Where judgment was approved by judge in his private office, but was never pronounced the judgment of the court. Lake v. Hood [Tex. Civ. App.] 79 S. W. 323. Recital, in motion of arrest, of an existing judgment, held sufficient. Id. Nunc pro tunc record entry of judgment previously rendered cannot be made on oral testimony. Sperling v. Stubblefield, 105 Mo. App. 489, 79 S. W. 1172. See 2 Curr. L. 585, n. 83.

44. Civ. Code, § 5339. Levadas v. Beach, 119 Ga. 613, 46 S. E. 864. Where court directed judgment and entered the minutes thereof in the court docket in term time, held proper for attorney to write judgment out in full and have clerk enter it on the record after term. Pelz v. Bollinger, 180 Mo. 252, 79 S. W. 146.

45. This includes a justice of the peace. Levadas v. Beach, 119 Ga. 613, 46 S. E. 864.

46. A judgment dismissing a petition without prejudice may not be amended by a nunc pro tunc judgment so as to award costs. In re Potter's Estate, 141 Cal. 424, 75 P. 850.

47. Aetna Ins. Co. v. Thompson, 34 Wash. 610, 76 P. 105.

to.[48] Delay in entering judgment is merely an irregularity,[49] and it being the duty of the court to enter it, it will be presumed to have been entered.[50] Appearance of an unauthorized attorney is a sufficient excuse to delay entry.[51] The entry must be complete,[52] but omission from the journal entry of a judgment of the date of its rendition does not render it void.[53] Failure of the clerk to mark the papers composing the judgment roll as filed does not prevent the filing from being effectual.[54] The party offering the papers in evidence must prove that they were properly filed.[55]

Writing judgments on separate sheets and placing them in chronological order in an enclosed box in the form of a book is as effective as though entered in a bound volume.[56] Use of the word "Same" immediately below the name of a judgment debtor on the index constitutes a sufficient index of the judgment next listed against him.[57]

Neither the order of publication of summons[58] nor a certificate of the secretary of state as to service on him for a foreign corporation, judgment being taken by default,[59] are parts of the judgment roll.[60]

§ 6. *Arrest of judgment; new trial;*[61] *judgment non obstante;*[62] *writ of error coram nobis.*[63]—A motion for judgment non obstante must be made shortly after the verdict is filed.[64] The grounds for the motion must appear on the face of the record.[65] The motion will be denied unless special findings are so inconsistent with the general verdict that both cannot stand together,[66] as where the special findings show the absence of a material fact,[67] and being granted for in-

48. Livingston County B. & L. Ass'n v. Keach [Ill.] 72 N. E. 769. An approval by the clerk of the court of an appeal bond, containing a recital that the bill was dismissed does not make it true that there was such dismissal. Id. Clerk may not enter an undeclared default which lies only in insufficiency of a responsive pleading. Knight v. Dunn [Fla.] 36 So. 62; Gulf Lumber Co. v. Dunn [Fla.] 36 So. 63.

49. Under Laws 1902, p. 1660, c. 580, declaring that the judgment must be entered immediately after the verdict. Lyons v. Gavin, 43 Misc. 659, 88 N. Y. S. 252. Where default judgment was not entered on return day. Tomlin v. Woods [Iowa] 101 N. W. 135.

50. It being fairly inferable that the court ordered it, and that through error of the clerk it was not recorded. Fitzgerald v. Gore, 105 Ill. App. 242.

51. Tomlin v. Woods [Iowa] 101 N. W. 135.

52. Where, in the minutes of the clerk, there was the following: "H. J. Boatman v. P. D. Jewitt. Judgment for plaintiff for $714 against property attached described as follows" (describing the land). On the court records of the same day the title of the cause was entered, followed by a blank space in which a judgment might have been written but was not, held such record showed no judgment. Jewett v. Boardman, 181 Mo. 647, 81 S. W. 186.

53. It is not void by reason of Gen. St. 1901, § 5142. Phillips v. Phillips [Kan.] 76 P. 842.

54. Hart v. Jos. Schlitz Brew. Co. [Wis.] 98 N. W. 526.

55. Turner Tp. v. Williams [S. D.] 97 N. W. 842.

56. Under Rev. Codes N. D. 1899, §§ 5479, 5487, 5488, requiring clerk to enter judgments in a judgment book. Lynch v. Burt [C. C. A.] 132 F. 417.

57. Construing Code 1887, § 3561, requiring every judgment to be indexed in the name of each defendant. Fulkerson's Adm'x v. Taylor, 102 Va. 314, 46 S. E. 309.

58. Its absence from the record does not show a failure to obtain jurisdiction. McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036.

59. Under Code Civ. Proc. § 670. Willey v. Benedict Co. [Cal.] 79 P. 270.

60. **On appeal, the record** proper and the matters not properly of record but made so by exception or the like constitute the "record on appeal." See 3 Curr. L. 204 et seq.

61. See **New Trial and Arrest of Judgment,** 2 Curr. L. 1037.

62. See 2 Curr. L. 584, § 4 D.

63. This remedy is now much disused but its analogue is found in the modern procedure by motion to correct or review the judgment, see post, § 7.

64. 17 days thereafter is too late. Marshalltown Stone Co. v. Des Moines Brick Mfg. Co. [Iowa] 101 N. W. 1124.

65. Evidence cannot be considered. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552; Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183; United States v. Gardner [C. C. A.] 133 F. 285.

66. Moeser v. Lewis [Kan.] 75 P. 512; Seeds v. American Bridge Co. [Kan.] 75 P. 480; Stoy v. Louisville, E. & St. L. Consol. R. Co., 160 Ind. 144, 66 N. E. 615. See 2 Curr. L. 584, n. 65.

67. Showed absence of malice in prosecution for malicious prosecution. Lawrence v. Leathers, 31 Ind. App. 414, 68 N. E. 179. In a suit for damages from construction of a railroad track on a way, defendant held not entitled to a judgment non obstante the special verdict not negativing that the way was legal, nor inconsistent with other rights.

sufficiency of the evidence it must be shown that there is not a reasonable probability that the defects in the proof may be remedied on another trial.[68] A finding of fact being specifically submitted to the jury, it is error to render such a judgment.[69] The circumstances warranting the direction of a verdict a judgment non obstante may be entered, an improper verdict being returned,[70] though this is not always ground for such a judgment.[71] An unfavorable verdict being obtained as against one co-defendant it does not afford a ground for a judgment non obstante as against the other.[72] Though a motion for a judgment non obstante be made, the case cannot on reversal be finally disposed of without a new trial.[73] One not being entitled to judgment on answers to special interrogatories, refusal of the court to require an answer to be rendered more specific is harmless.[74]

§ 7. *Opening, amending, vacating, and other relief.*[75]*—There must be a valid subsisting judgment.* This includes an interlocutory decree.[76] The judgment must not be such as it is against public policy to have re-opened.[77] One may become estopped, or may waive his right, to say that it still subsists.[78]

Power of court during and after term.[79]—A court has the inherent,[80] exclusive[81] and discretionary[82] power to vacate[83] or modify[84] its judgments, final or

Cincinnati, R. & M. R. Co. v. Miller [Ind. App.] 72 N. E. 827.

68. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183. [In the absence of such a showing a new trial will be granted.]

69. Proper procedure is to grant a new trial. Confer v. Pennsylvania R. Co., 209 Pa. 425, 58 A. 811.

70. Casety v. Jamison [Wash.] 77 P. 800.

71. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183.

72. Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635.

73. Standard Mfg. Co. v. Slot [Wis.] 98 N. W. 923.

74. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552.

75. See 2 Curr. L. 586.

Judgment entered without any decision being rendered cannot be amended. Electric Boat Co. v. Howey, 96 App. Div. 410, 89 N. Y. S. 210.

76. Palmer v. Terwilliger, 95 App. Div. 35, 88 N. Y. S. 526.

77. Divorce decree. Rev. St. § 5355, does not apply to such judgment. Solomon v. Solomon, 4 Ohio C. C. [N. S.] 321. But see McDonald v. McDonald, 34 Wash. 293, 75 P. 865, and Scribner v. Scribner [Minn.] 101 N. W. 163, where divorce decrees are considered from the standpoint that they may be re-opened.

78. Allowing statements of defenses and pleas to be filed nunc pro tunc, and the actions of the parties in treating the judgment as set aside held to estop plaintiff from denying that it had been set aside. Rocky Mount L. & T. Co. v. Price [Va.] 49 S. E. 73.

79. See 2 Curr. L. 586.

80. People v. Ward, 141 Cal. 628, 75 P. 306. Such power is not affected by Code Civ. Proc. §§ 724, 1282, limiting the time for vacating the judgment for mistake, surprise, or excusable neglect. Riley v. Ryan, 91 N. Y. S. 952; Scribner v. Scribner [Minn.] 101 N. W. 163. This is independent of Gen. St. 1894, §§ 5204, 5267, which do not apply to actions for divorce. Id. To supply missing papers. Warder, Bushnell & Glessner Co. v. Libby, 104 Mo. App. 140, 78 S. W. 338; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724. See 2 Curr. L. 586, n. 94.

81. Judgment being valid on its face, the court rendering it is the only one that can annul it. State v. Sommerville, 112 La. 1091, 36 So. 864. Suit to set aside for irregularities in procurement of judgment must be brought in court of rendition. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. Affidavits to open a default judgment in the Municipal Court cannot be considered by the supreme court in the first instance. Guase v. Sterling Piano Co., 95 App. Div. 115, 88 N. Y. S. 532. Under Mansf. Dig. § 3751 (Ind. T. Ann. St. 1899, § 2510), a suit in equity cannot be maintained to vacate a default judgment entered by another court. Stewart v. Snow [Ind. T.] 82 S. W. 696. The fact that the judgment sought to be vacated had been allowed and classified by the county judge, sitting as a court of probate, as a valid claim against the estate of the debtor, held not to deprive the county court of jurisdiction of the suit to set aside the judgment. Eatwell v. Roessler [Tex. Civ. App.] 82 S. W. 796. Amendments of records will not be made in appellate courts. Wm. James' Sons & Co. v. Gott [W. Va.] 47 S. E. 649; Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724. Laws 1902, p. 1563, c. 580. Electrical Equipment Co. v. Feuerlicht, 90 N. Y. S. 467. Under Civ. Code Prac. § 516, a clerical misprision is not a ground for appeal till presented and acted upon by the circuit court. Lyon's Ex'x v. Logan County Bank's Assignee, 25 Ky. L. R. 1668, 78 S. W. 454. Under Civ. Code Proc. § 763, a void judgment cannot be reversed on appeal until a motion to set it aside has been made and acted upon by the trial court. Id.

Contra. California: Under Code Civ. Proc. § 473, a superior court has power to vacate or modify an order in probate setting apart a homestead. Cahill v. Superior Court of City and County of San Francisco [Cal.] 78 P. 467.

82. Bowen v. Wyeth, 119 Ga. 687, 46 S. E. 823. Such discretion will not be disturbed on appeal unless manifestly abused. Id. Where a general demurrer was sustained,

interlocutory,[85] during the term of rendition. After such term, or in some states after the expiration of the time for appeal,[88] it has only such power as rests on the common-law modes of review, or on equitable and statutory grounds.[87] Clerical mistakes,[88] but not omissions,[89] or judicial mistakes,[90] may be corrected nunc pro tunc[91] at a subsequent term, and this power extends to criminal as well as civil cases.[92] The rule is different when applied to probate proceedings the court there having the power to annul the decree at any time prior to the final settlement of the estate.[93]

The taking of an appeal does not lessen the court's power to correct the judgment in a manner not affecting a substantial right,[94] though it terminates the power of the court to vacate the same.[95]

A wholly void judgment may be vacated at any time,[96] and by the court upon its own motion.[97]

As a general proposition, the above rules as to amendments apply to the restoration of lost or destroyed papers.[98]

and the plaintiff during the same term moved to reinstate, offering to amend, held appellate court would not interfere with the refusal to permit reinstatement. Id.

83. Mahler v. Animarium Co. [C. C. A.] 129 F. 897. See 2 Curr. L. 586, n. 94.

84. Amending judgment so as to conform to facts held proper where made after announcing judgment but before signing order. Harmon v. Thompson [Ky.] 84 S. W. 569. Under Code § 243, court may amend record at any time during the term of rendition, held proper to allow amendment after signing but before entry. Hull v. Eby, 123 Iowa, 257, 98 N. W. 774. See 2 Curr. L. 586, n. 95.

Equity: In Perkins v. Castleberry, 119 Ga. 702, 46 S. E. 825, it is stated that this power did not exist in courts of equity, though it is there held that under the uniform procedure acts this distinction is abolished and equity courts possess the power.

As to power of appellate court to modify a judgment not conforming to the process, pleading, etc., see ante, § 3 C.

85. Mahler v. Animarium Co. [C. C. A.] 129 F. 897.

86. Probate court cannot vacate decree, not entered by reason of a mistake of fact or clerical error, after that time. Gen. St. 1894, §§ 4730, 5267. In re Phelps' Estate [Minn.] 101 N. W. 496.

87. Motion to set aside being based on a stipulation made in pais by the attorneys after the adjournment of the term, held, could not be considered. Brown v. Arnold, 127 F. 387. It not being claimed that the judgment was void as the result of a clerical error, and the motion to vacate not being based on any of the grounds set out in Rev. St. 1898, § 2832, nor on § 2879 authorizing a new trial, held error to grant such motion after the term in which the judgment was rendered. Dufur v. Home Inv. Co. [Wis.] 100 N. W. 831. See 2 Curr. L. 586, n. 98-1. As to what constitutes such grounds see succeeding paragraphs.

88. People v. Ward, 141 Cal. 628, 75 P. 306. Orders and proceedings of probate court omitted from the minutes may be entered nunc pro tunc. Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71. See 2 Curr. L. 586, n. 5-7.

89. A record cannot be amended after term unless there is something in the record to amend. Gagnon v. U. S., 38 Ct. Cl. 10; Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.

90. Fitzgerald v. Gore, 105 Ill. App. 242. Costs being taxed against the wrong party it cannot be amended after term so as to retax them.' Smallwood v. Love [Tex. Civ. App.] 78 S. W. 400. See 2 Curr. L. 586, n. 4.

91. Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71; Gagnon v. U. S., 38 Ct. Cl. 10.

92. People v. Ward, 141 Cal. 628, 75 P. 306.

93. In re Cote's Estate, 98 Me. 415, 57 A. 584. Administrator's petition for an order of distribution setting forth the undisputed facts which differ from the former petition and decree, held to contain by necessary implication a sufficient prayer for the revocation of the previous decree. Id. See Estates of Decedents, 3 Curr. L. 1319, n. 90, where the recent authorities are collected.

94. Initial letter prefixed to proper name in decree and summons. Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174. May be amended so as to conform to the verdict. City of Denver v. Bradbury [Colo. App.] 75 P. 1077. Where charge had been changed so as to decide an issue of fact, held correction could be made. Johnston v. Arrendale [Tex. Civ. App.] 71 S. W. 44.

95. As to persons over whom it had no jurisdiction, the court signing the judgment against them by inadvertence. Aetna Ins. Co. v. Thompson, 34 Wash. 610, 76 P. 105.

96. Hart v. Manson, 119 Ga. 865, 47 S. E. 345. Void part may be vacated. Jennings v. Bennett [W. Va.] 49 S. E. 23. May be set aside on motion, defendant appearing specially. Foster v. Cimarron Valley Bank [Okl.] 76 P. 145. See 2 Curr. L. 586, n. 99. Neither lapse of time nor failure of a party to appeal can render it valid. People v. Davis [Cal.] 77 P. 651.

97. People v. Davis [Cal.] 77 P. 651.

98. The power is inherent. Warder, Bushnell & Glessner Co. v. Libby, 104 Mo. App. 140, 78 S. W. 338. Lost evidence, held court could order it retaken 60 days after judgment a statute giving it power to make necessary orders to secure a perfect record. Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724.

A judge pro tempore hearing and determining an action has authority to hear and determine a motion to vacate the decree rendered.[99] A bill of review may be entertained by a court of general equity jurisdiction to vacate and set aside decrees rendered by its predecessor.[1]

The motion being made at the term of rendition, it may be considered at a subsequent term without any order of continuance.[2] Also, a change of venue being granted the court to which the cause is transferred may amend the record after the term of rendition.[3] In all cases in order to amend at a subsequent term notice must be given the adverse party.[4] The motion need not be filed before the notice is served, nor at any specified time preceding the date named in the notice for making the motion,[5] and the record being silent the presumption is that notice was given.[6] Nothing appearing to the contrary it will be presumed that a decree was vacated at term.[7]

Parties applicant.[8]—Creditors,[9] sureties,[10] successors in interest,[11] and generally all persons injured thereby,[12] may petition to have a judgment vacated, modified, or its enforcement enjoined. An injury suffered is, however, an essential element in all cases.[13] A partnership cannot move to vacate a judgment running against the individuals composing the partnership.[14]

A judgment will be corrected or amended on the ground of mistake when clearly shown.[15] The amendment must be based on the records of the court,[16] though explanatory parol evidence is admissible to show actual ruling.[17] The amendment is not allowable if it destroy the conformity between the judgment and the pleading and process.[18]

A judgment will be opened or vacated[19] on the grounds of fraud,[20] surprise,[21]

99. Fisher v. Puget Sound Brick, Tile & Terra Cotta Co., 34 Wash. 578, 76 P. 107.

1. Ball v. Clothier, 34 Wash. 299, 75 P. 1099. The superior court has jurisdiction to vacate judgments or orders of the territorial probate courts in the cases specified in Ballinger's Ann. Codes & St. § 5153. Id.

2. Motion to set aside a default judgment. Rev. St. 1899, § 1611. Harkness v. Jarvis [Mo.] 81 S. W. 446.

3. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145.

4. Equity. Simpson v. John H. Talbot & Co. [Ark.] 79 S. W. 761; Fitzgerald v. Gore, 105 Ill. App. 242. See 2 Curr. L. 586, n. 8.

5. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145.

6. Simpson v. John H. Talbot & Co. [Ark.] 79 S. W. 761.

7. Mahler v. Animarium Co. [C. C. A.] 129 F. 897.

8. See 2 Curr. L. 591, § 7 D.

9. Where judgment by confession amounts to a preference. Nuzum v. Herron, 52 W. Va. 499, 44 S. E. 257. If not docketed, the creditor is not limited to four months. Quare, does docketing change this? Id.

10. Surety on note secured by a mortgage held entitled to sue to cancel the foreclosure decree in the hands of an assignee of a bona fide holder of the note and mortgage and to enjoin its enforcement as a cloud on plaintiff's title to realty. Smith v. Nelson [Or.] 78 P. 740.

11. Service being made by publication either a party or his transferee may petition to open the judgment. Brown v. Massey [Okl.] 76 P. 226. See 2 Curr. L. 591, n. 84.

12. A stranger may sue. Crippen v. X. Y. Irrigating Ditch Co. [Colo.] 76 P. 794. A purchaser pending a suit to foreclose an alleged judgment lien is entitled to have such judgment lien annulled, it being invalid. Austin v. Lauderdale [Tex. Civ. App.] 83 S. W. 413. See 2 Curr. L. 591, n. 85.

13. One who suffers no loss by a decree of distribution of the proceeds of a sale has no right to have the same modified. Heidbreder v. Superior Ice & Cold Storage Co. [Mo.] 83 S. W. 469. One not a party to the record cannot move to set aside a judgment which is not against him. Jones v. Smith, 120 Ga. 642, 48 S. E. 134.

14. Charles P. Kellogg & Co. v. Spargur [Neb.] 100 N. W. 1025.

15. See 2 Curr. L. 588, n. 39.

The undisputed evidence held to establish definitely the amount of defendant's set-off for the purpose of a subsequent suit in equity to have the judgment corrected on the ground of mistake in computing the amount of such set-off. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 F. 343. See 2 Curr. L. 587, n. 20-23.

16. Must be something to amend. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385; Gagnon v. U. S., 38 Ct. Cl. 10.

17. On a motion for a nunc pro tunc entry, written memorandum "Dem'r. to complaint overruled; answer filed," held sufficient to admit parol evidence showing actual ruling of court. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145.

18. Judgment cannot be amended so as to change the defendant from the one sued and served to another even though the latter admits his liability and informally consents. Thompson v. American Mortg. Co. [Ga.] 49 S. E. 751.

19. See 2 Curr. L. 588.

accident,[22] mistake of fact,[23] payment,[24] excusable neglect,[25] or generally for any error which it would be inequitable to conclude the applicant from asserting.[26]

20. Decree of divorce may be vacated where, in case of service by publication plaintiff fraudulently gave a wrong address as residence of defendant. In this case application was denied on the ground of defendant's laches. McDonald v. McDonald, 34 Wash. 293, 75 P. 865. Where administrator discontinued his appeal subsequent to an application by the next of kin for leave to intervene but prior to the granting of such application, held that, irrespective of fraud, the judgment would be vacated on motion of next of kin unless the attorneys consent to the appeal. Riley v. Ryan, 91 N. Y. S. 952. That material witness was not sworn is insufficient to show fraud per se, but constitutes a mere error. Mutual Reserve Fund Life Ass'n v. Scott [N. C.] 48 S. E. 581.

21. Where cause was transferred from general to equity calendar without notice to defendant's attorney, held default would be opened. Rosenberg v. Hassett, 86 N. Y. S. 865. Where case was placed on "absence docket" by agreement and was taken therefrom and placed on trial calendar without notice to defendant. Roberts v. Kuhrt, 119 Ga. 704, 46 S. E. 856. A judgment rendered against a party contrary to an understanding or agreement with his adversary is taken against him by surprise. Durham v. Commercial Nat. Bank [Or.] 77 P. 902. Agreement to postpone. Rabinowitz v. Halmowitz, 91 N. Y. S. 11. Judgment on report of referee entered contrary to stipulations, case referred back. Mercantile Nat. Bank v. Sire, 91 N. Y. S. 419. Reliance on the statements of the opposing counsel. Savings Bank of Santa Rosa v. Schell, 142 Cal. 505, 76 P. 250. Custody of minor being a matter of agreement between her parents, held mother could have guardianship decree set aside, she commencing proceedings within six months after appointment of guardian. In re Van Loan, 142 Cal. 423, 76 P. 37. Where it appears that before a judgment for sale of land for delinquent taxes defendant inquired and paid the amount she was informed was delinquent, which amount was erroneous and insufficient, held such surprise as to entitle defendant to relief under Burns' Ann. St. 1901, § 399. Richcreek v. Russell [Ind. App.] 72 N. E. 617. Where judgment was taken by confession through power of attorney, while defendant was in another state and had no notice of the proceeding, within three days after payment was due, defendant having provided money for the payment, held judgment would be opened and restitution ordered, defendant paying sum due with interest and attorney's fees. Jones v. Scott [Pa.] 58 A. 281. The surprise that will justify the vacating of a judgment after motion to conform the pleadings to the proof, is inability to produce evidence otherwise available. Carlisle v. Barnes, 45 Misc. 6, 90 N. Y. S. 810. See 2 Curr. L. 588, n. 35. In such case the surprise is unavailable defendant being in court at the time of the motion to conform and failing to make such claim. Id.

22. Where plaintiff resided 60 miles from place of trial, sudden death of one counsel and sickness of the other held sufficient grounds for opening default judgment and permitting the filing of a reply. Snelling's Adm'r v. Lewis, 25 Ky. L. R. 1856, 78 S. W. 1124. Illness of attorney held no ground for opening judgment. Tschohl v. Machinery Mut. Ins. Ass'n [Iowa] 101 N. W. 740. Where there was no showing but that, by the use of reasonable diligence, the client might not have secured a continuance. Ayer v. James [Ga.] 48 S. E. 154. Allegations that party was prevented from attending trial by serioue illness of mother and that her attorneys withdrew from her employment without notice and she had no knowledge thereof at the time of trial held insufficient to warrant opening of judgment. Glover v. Dimmock, 119 Ga. 696, 46 S. E. 824. In an action for libel it being apparent that the defendant could not justify, and she appeared by attorney and endeavored to keep the damages from being excessive, held the judgment would not be opened to allow the defendant to plead. Barlow v. Burns [N. J. Law] 67 A. 262. But where defendant did not employ counsel, her mother undertaking to attend to it for her, a rule to show cause why the judgment should not be opened, enabling her to file a plea, will be granted. Id. Code § 602 et seq. is inapplicable to a proceeding to have the judgment set aside on the ground that by unavoidable casualty and misfortune the complainant has been deprived of his right to appeal. Ritchey v. Seeley [Neb.] 102 N. W. 256. The time within which such action may be brought is fixed by Code § 16. Id. See 2 Curr. L. 688, n. 44.

23. Where through mistake as to date of service of summons, answer was served a day late, held default judgment would be opened. Braseth v. Bottineau County [N. D.] 100 N. W. 1082.

Mistake of law is no ground. Failure of counsel to know that special appearance did not extend time for general appearance and answer. Mantle v. Casey [Mont.] 78 P. 591. Where defendant erroneously believed that payment of delinquent taxes was essential to her right to defend. Keenan v. Daniells [S. D.] 99 N. W. 853.

24. Payment authorizes the opening of a subsequent default judgment, the interposition of an answer and the dismissal of the complaint. United Wine & Trading Co. v. Platz, 86 N. Y. S. 260. Where note was held for 20 years before judgment was entered thereon, and execution was not issued for 13 years, during which time the judgment was collectible, held judgment would be opened, the note being collateral to another note the evidence as to the payment of which was contradictory. Woodward v. Carson, 208 Pa. 144, 57 A. 342.

25. Where second copy of summons and complaint was personally served 2 days before default and defendant's family was so sick at the time the answer should have been served that defendant was unable to leave home to consult his attorney, held no error in opening default. Farmers' & Mechanics' Mercantile & Mfg. Co. v. Smith [S. C.] 49 S. E. 226.

26. Petition or service being so defective as not to support a judgment by default.

Matter properly for appeal or error which might have been thereby challenged,[27] waived irregularities,[28] a mere conflict of evidence,[29] inexcusable delay or neglect,[30] or negligence,[31] or unwise procedure[32] on part of one's attorney, are insufficient to warrant the opening or vacating of the judgment. Where, owing to the acquisition of new rights, a decree operates as an injustice on one of the parties, it will frequently be vacated.[33] A consent decree is no more sacred than the ordinary judgment.[34]

The petitioner must show that he had a meritorious defense.[35]

As a condition to opening and vacating a default judgment, the defendant should be required to pay all costs of the action to the date of granting the order.[36]

The opening or vacating of the judgment is a matter resting in the sound discretion of the court,[37] and an appellate court will only interfere when a clear abuse of such discretion is shown.[38] Discretion being exercised in setting aside

El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

27. See Appeal and Review, 3 Curr. L. 167; Saving Questions for Review, 2 Curr. L. 1590.

28. Failure to file affidavit of demand held not ground for opening judgment. Baums Castorine Co. v. Kimpel [Del. Super.] 58 A. 1035.

29. Where the affidavit on a rule to open judgment on a note is to the effect that the note was given as collateral and no default has taken place, which plaintiff denies under oath the judgment will not be vacated. Cruzan v. Hutchison [Pa.] 59 A. 485.

30. Delay or negligence held inexcusable: Two years delay no excuse being offered. McClure v. Clark [Minn.] 101 N. W. 961. That attorney had no authority, defendant being in default in any case. Tomlin v. Woods [Iowa] 101 N. W. 135. Where no attempt was made to locate the alleged absent "material" witness until three weeks after cause was marked ready. O'Meara v. Interurban St. R. Co., 87 N. Y. S. 405. Defect in affidavit for publication of summons held insufficient five years after rendition of judgment. People v. Wrin, 143 Cal. 11, 76 P. 646. Negligence of attorney; long delay on part of defendants in ascertaining that a judgment had been entered. White v. Gurney [Minn.] 99 N. W. 889. Where there had been a long series of mistakes, and useless and expensive litigation, and the motion was not made until ten months after entry of judgment. Stoll v. Pearl [Wis.] 99 N. W. 906. Where service was made by publication, and plaintiff fraudulently gave defendant's address erroneously, application denied, defendant having actual knowledge of suit but failing to make inquiry. McDonald v. McDonald, 34 Wash. 293, 75 P. 865. Legislature changing time for term of court, defendant's counsel being notified by mail of the change and date of trial, held no error in refusing to open judgment, defendant's counsel not denying receipt of notice. McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857.

31. Negligence of attorney in failing to ascertain that action was against both members of the firm. Alferitz v. Cahen [Cal.] 78 P. 878. See 2 Curr. L. 588, n. 49.

32. That material allegations in complaint were false to plaintiff's knowledge is no ground for opening a default judgment, the default being allowed on the advice of counsel. Mutual Reserve Fund Life Ass'n v. Scott [N. C.] 48 S. E. 681.

33. Where a decree required the removal of an obstruction in a public street and subsequently a state of facts arose rendering the maintenance of the obstruction lawful and proper, held it would be vacated. Marietta Chair Co. v. Henderson [Ga.] 49 S. E. 312.

34. Marietta Chair Co. v. Henderson [Ga.] 49 S. E. 312.

35. Copper King of Arizona v. Johnson [Ariz.] 76 P. 594; Jones v. Bibb Brick Co. [Ga.] 48 S. E. 25; Jewell v. Martin [Ga.] 48 S. E. 929; Tschohl v. Machinery Mut. Ins. Ass'n [Iowa] 101 N. W. 740; Delaney v. Updike Grain Co. [Neb.] 99 N. W. 660; Egan v. North American Sav., L. & B. Co. [Or.] 76 P. 774. It is sufficient to establish good faith and a seriously litigable issue. Ritchey v. Seeley [Neb.] 102 N. W. 256. Under Civ. Code §§ 620, 621, proceedings in cause in which judgment was rendered must be set out. Louisville Tobacco Warehouse Co. v. Wood [Ky.] 82 S. W. 456.

36. Marcus v. Pomeranz, 90 N. Y. S. 139. This includes a trial fee. Id.

37. Tschohl v. Machinery Mut. Ins. Ass'n [Iowa] 101 N. W. 740; White v. Gurney [Minn.] 99 N. W. 889; Scribner v. Scribner [Minn.] 101 N. W. 163; Woodward v. Carson, 208 Pa. 144, 57 A. 342; Miller v. Miller [Pa.] 58 A. 886; El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855; Fisher v. Puget Sound Brick, Tile, & Terra Cotta Co., 34 Wash. 578, 76 P. 107.

38. Copper King v. Johnson [Ariz.] 76 P. 594; Alferitz v. Cahen [Cal.] 78 P. 878; Hoyt v. Lightbody [Minn.] 101 N. W. 304; Rickaly v. John O'Brien Boiler Works Co. [Mo. App.] 82 S. W. 963; O'Meara v. Interurban St. R. Co., 87 N. Y. S. 405; McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857; El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855; McDonald v. McDonald, 34 Wash. 293, 75 P. 865; Fisher v. Puget Sound Brick, Tile & Terra Cotta Co., 34 Wash. 578, 76 P. 107. Construing Rev. St. 1898, § 3832. Stoll v. Pearl [Wis.] 99 N. W. 906. Action of trial court on contradictory affidavits on a motion to open default is conclusive. Savings Bank of Santa Rosa v. Schnell, 142 Cal. 505, 76 P. 250; Scribner v. Scribner [Minn.] 101 N. W. 163. The appellate court will not review the decision, except where the judgment below is a deduction from facts, and the result of

a judgment, it is less apt to be interfered with on appeal than if the motion had been denied.[39]

Equity has jurisdiction to set aside a judgment at law[40] for willful fraud in the very act of procurement,[41] or when through lack of process one has been denied an opportunity to be heard,[42] though mere irregularity or defect in the service of the process is insufficient.[43] The fraud must be clearly shown.[44] As to whether perjury constitutes such fraud there is a conflict.[45] As to whether a bill in equity will lie to set aside a default judgment based on a false return, there is a conflict,[46] and

reasoning upon the same. Woodward v. Carson, 208 Pa. 144, 57 A. 342.

39. Harkness v. Jarvis [Mo.] 81 S. W. 446.

40. See 2 Curr. L. 589, n. 50-55.

False statements as to ownership of land held willful. Parsons v. Weis [Cal.] 77 P. 1007.

41. Pelz v. Bollinger, 180 Mo. 252, 79 S. W. 146; Smoot v. Judd [Mo.] 83 S. W. 481; Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322. Wife making no defense to divorce suit, relying on assurances of husband that he would not prosecute same, held judgment would be set aside. Womack v. Womack [Ark.] 83 S. W. 937. Decree confirming organization of irrigation district will be set aside, it being obtained by false affidavits and bribery. People v. Perris Irr. Dist., 142 Cal. 601, 76 P. 381. Complaint to set aside a judgment because plaintiff was fraudulently joined in the action and her rights cut off held sufficient when it set up that they had falsely alleged that she had lived apart from deceased for some time and would have received no support from him. De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 275. Unfulfilled promises for the payment of money by the widow of a testator to a caveator who withdrew from the contest in reliance thereon is not such fraud as will afford ground for setting aside a decree of probate of the will. In re Meyers' Estate [N. J. Eq.] 59 A. 259. Where plaintiff's attorney failed to call a material witness, and by stipulating certain facts virtually defeated his client's right of action, held judgment would be set aside. Sanford v. White, 132 F. 531. Where attorneys compromised the suit without having express authority to so do, held such agreed judgment would be set aside. Benedict v. Wilhoite [Ky.] 80 S. W. 1155. In the absence of fraud on the part of an agent of a foreign corporation on whom service was made, equity will not set aside the default judgment rendered against it. Bankers' Union v. Nabors [Tex. Civ. App.] 81 S. W. 91. See Scoville v. Brock [Vt.] 57 A. 967, where it is held that the record is not conclusive as against a direct attack for fraud. See 2 Curr. L. 589, n. 51.

42, 43. Parsons v. Weis [Cal.] 77 P. 1007.

44. Evans v. Woodsworth [Ill.] 72 N. E. 1082. See 2 Curr. L. 589, n. 55.

45. **That it does:** Avocato v. Dell' Ara [Tex. Civ. App.] 84 S. W. 443.

That it is not: Wabash R. Co. v. Mirrielees [Mo.] 81 S. W. 437.

False affidavit: Evans v. Woodsworth [Ill.] 72 N. E. 1082.

46. **That it will not:** Smoot v. Judd [Mo.] 83 S. W. 481, overruling Smoot v. Judd, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738. That plaintiff became the purchaser at the execution sale makes no difference. Id.

NOTE. Will equity set aside a default judgment at law because based on a false return? The answers to this question have been various and the courts are almost equally divided upon the subject. The following courts hold that a court of equity will relieve against a judgment at law upon a showing that a return is false.

Connecticut: Watson v. Watson, 6 Conn. 334, and Jeffery v. Fitch, 46 Conn. 601.

Iowa: Newcomb v. Dewey, 27 Iowa, 381; Ins. Co. v. Waterhouse, 78 Iowa, 674, 43 N. W. 611.

Minnesota: Magin v. Lamb, 43 Minn. 80, 44 N. W. 675, 19 Am. St. Rep. 216.

Mississippi: Quarles v. Hiern, 70 Miss. 891, 14 So. 23. But see Walker v. Gilbert, Freem. Ch. 85, where it was held necessary to also show a meritorious defense.

Oregon: Huntington v. Crouter, 33 Or. 408, 54 P. 208, 72 Am. St. Rep. 726.

Tennessee: Ridgeway v. Bank, 11 Humph. 523; Ingle v. McCurry, 1 Heisk. 26.

Texas: Cooke v. Burnham, 32 Tex. 129; Glass v. Smith, 66 Tex. 548, 2 S. W. 195.

Wisconsin: Pollard v. Wegener, 13 Wis. 569. But in this connection it is proper to note that the case of Johnson v. Coleman, 23 Wis. 452, 99 Am. Dec. 193, proceeded upon the ground that relief in equity can be obtained only for fraud of the plaintiff in the procuring of the judgment. In that case it was alleged and shown that the plaintiff knew that the summons had not been served upon the defendant, yet he took advantage of the false return.

In the following cases it has been held that, in order to obtain relief in equity, it is necessary to show not only that the return was false, but also that the defendant has a meritorious defense to the action.

Alabama: Rice v. Tobias, 89 Ala. 214, 7 So. 765. Though in Stubbs v. Leavitt, 30 Ala. 352, such element was held to be unnecessary.

Arkansas: State v. Hill, 50 Ark. 458, 8 S. W. 401. At first it was held in Arkansas that the relief would be granted upon a simple showing that the return was false. Ryan v. Boyd, 33 Ark. 778. But in State v. Hill, supra, it was held that this was not enough, and that a meritorious defense must also be shown.

California: Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639. But in this connection the case of Martin v. Parsons, 49 Cal. 94, should be read, where relief was granted upon the sole ground that the return was false, without showing a meritorious defense.

Colorado: Wilson v. Hawthorne, 14 Colo. 530, 24 P. 548, 20 Am. St. Rep. 290.

Montana: Hauswirth v. Sullivan, 6 Mont. 203, 9 P. 798.

Nebraska: Janes v. Howell, 37 Neb. 320, 55 N. W. 965, 40 Am. St. Rep. 494; Wilson v.

in states where such a bill is held to lie, the courts have refused to grant relief where there is only the oath of one party against the oath and return of the officer.[47] Equity will not exercise this power except to prevent a great injustice,[48] and even then only when the petitioner is without fault[49] or an adequate remedy at law,[50] and alleges[51] and shows[52] that he has a meritorious defense, though it is not neces-

Shipman, 34 Neb. 573, 52 N. W. 576, 33 Am. St. Rep. 660. And see Johnson v. Jones, 2 Neb. 126.

Pennsylvania: Miller v. Gorman, 38 Pa. 309.

From this it appears that in eight states the rule is that equity will grant relief against a judgment at law upon the sole ground that the sheriff's return is false, without any showing of a meritorious defense, while in seven states it is held to be necessary to show a meritorious defense in addition to the falsity of the return. To these must be added Story's Equity Jurisprudence, Pomeroy's Equity Jurisprudence, High on Injunctions, Freeman on Judgments (4th Ed.) vol. 2, § 495; Black on Judgments (2d Ed.) vol. 1, § 377; 16 Am. & Eng. Enc. Law (2d Ed.) p. 388.

On the other hand, it is held in the following states that equity will not restrain the enforcement of a judgment, regular on its face, unless it was procured by fraud, and the plaintiff in the action participated in the fraud.

Georgia: Stites v. Knapp, Ga. Dec. pt. 11, p. 36.

Illinois: *Hunter v. Stoneburner, 92 Ill. 75.

Indiana: *Cully v. Shirk, 131 Ind. 76, 30 N. E. 882, 31 Am. St. Rep. 414.

Kansas: *Goddard v. Harbour, 56 Kan. 744, 44 Pac. 1055, 54 Am. St. Rep. 608. In this case the court said: "Counsel for defendants in error cite Bond v. Wilson, 8 Kan. 228, 12 Am. Rep. 466; Starkweather v. Morgan, 15 Kan. 274; Chambers v. Bridge Mfg. Co., 16 Kan. 270; McNeill v. Edie, 24 Kan. 108; and Jones v. Marshall [Kan. App.] 43 P. 840—as supporting the proposition that a sheriff's return may be disputed even in regard to personal service. In the cases heretofore decided by this court the right to controvert the sheriff's return has been expressly limited to matters not coming within his personal knowledge, and the opinions in all cases, including, also, Mastin v. Gray, 19 Kan. 458, 27 Am. Rep. 149, recognize this distinction."

Kentucky: *Taylor v. Lewis, 2 J. J. Marsh 400, 19 Am. Dec. 135; *Thomas v. Ireland, 88 Ky. 581, 11 S. W. 653, 21 Am. St. Rep. 356. This rule has now been changed by statute, see Bramlett v. McVey, 91 Ky. 151, 15 S. W. 49.

Maryland: *Gardiner v. Jenkins, 14 Md. 58.

Missouri: McClanahan v. West, 100 Mo. 309, 13 S. W. 674; Smoot v. Judd, 83 S. W. 481 overruling Smoot v. Judd, 161 Mo. 673, 61 S. W. 854, 84 Am. St. Rep. 738.

New Hampshire: Bolles v. Bowen, 45 N. H. 124.

Virginia: *Preston v. Kindrick, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777.

West Virginia: *Stewart v. Stewart, 27 W. Va. 167.

In addition to the decisions of these states the decisions of the supreme court of the United States (Walker v. Robbins, 14 How. [U. S.] 584, 14 Law. Ed. 552; Knox Co. v. Harshman, 133 U. S. 152, 33 Law. Ed. 586) and the English cases (see Baker v. Morgan, 2 Dow. 526; also 19 Vin. Abr. 196, 199, 201) must be added.

The sum of the whole matter is this: That in those states that hold that equity will interfere upon a showing that the return is false, or that it is false and that the defendant therein had a meritorious defense, the ruling is based upon the ground that the return of the sheriff is only prima facie evidence, and hence may be attacked by motion before judgment in the original case, or in equity after judgment. Whereas in those states wherein relief in equity is granted only where fraud in the very concoction of the judgment is shown, the English rule that the return of the sheriff is conclusive, except when attacked for fraud or in a direct suit against the sheriff, both before judgment in the original case and after judgment in equity, is followed.—From the opinion of Marshall, J., in Smoot v. Judd [Mo.] 83 S. W. 481.

Starred (*) cases are criticised by counsel, analyzed and accepted by the court in the principal case as supporting the proposition cited to.

47. Smoot v. Judd [Mo.] 83 S. W. 481. [The above point was raised in this case and decided on the strength of Gatlin v. Dibrell, 74 Tex. 36, 11 S. W. 908, and Randall v. Collins, 58 Tex. 282; the principal case holds, however, that such a bill in equity will not lie.]

48. Father being legally bound to support minor children, held not entitled to have judgment for necessaries furnished children during his incarceration for life set aside on the ground of fraudulent concealment. Finn v. Adams [Mich.] 101 N. W. 533.

49. Zweibel v. Caldwell [Neb.] 102 N. W. 84. One answering and delaying one and a half years after answer was stricken out, held could not maintain bill on the ground that return was false. Smoot v. Judd [Mo.] 83 S. W. 481. Petition must show diligence on part of petitioner or that he was prevented from exercising such diligence by the fraud of the successful party. Wabash R. Co. v. Mirrielees [Mo.] 81 S. W. 437.

50. Will not be entertained so long as there is a remedy by motion before the original tribunal. Parsons v. Weis [Cal.] 77 P. 1007. Where plaintiff refused to abide by a stipulation that a judgment should abide the event of a writ of error in another suit. Brown v. Arnold, 127 F. 387.

51. Parsons v. Weis [Cal.] 77 P. 1007. In a suit to quiet title and set aside a judgment in which title to real estate had been quieted in defendant, allegations that defendant's statements as to ownership were false and that plaintiff was at all times the owner of the property, held to sufficiently allege a meritorious defense. Id.

52. People v. Perris Irr. Dist., 142 Cal. 601, 76 P. 381; McCall v. Miller, 120 Ga. 262,

sary to prove that this defense is not barred by limitations.[53] A judgment will not be set aside for matters which might have been urged on the trial of the action.[54] In order to have the judgment set aside on the ground that petitioner was fraudulently deprived of his right to be heard on appeal, it must appear that there was a genuine controversy in the law action,[55] determined adversely to the petitioner without fault on his part;[56] but the facts set out showing the nature of the rulings complained of it is not necessary to allege error,[57] although it should allege that a new trial has been duly filed and overruled, though failing in this the defect may be supplied by evidence.[58] In the absence of some special equitable grounds,[59] a suit in equity to set aside the judgment will not lie after a motion to vacate it has been overruled,[60] unless such motion to vacate was defeated by fraud,[61] in which case the right is not lost by failure to appeal,[62] though it may be defeated by laches.[63] Failure of proof[64] that petitioner has failed to receive adequate compensation at law,[65] or the neglect or carelessness of one's attorney,[66] are not grounds for setting aside the judgment. The purpose of the Louisiana action for nullity is to furnish relief against fraud which makes no appearance in the record and for which an appeal will afford no remedy.[67]

Grounds for enjoining enforcement.[68]—Equity has jurisdiction to enjoin the enforcement of a judgment at law whenever an equitable ground of relief,[69] such as fraud in procuring the judgment,[70] is shown. The enforcement of the judg-

47 S. E. 920; Parsons v. Weis [Cal.] 77 P. 1007. Court will not presume that there was not sufficient evidence outside of alleged perjured testimony to sustain the verdict. Wabash R. Co. v. Mirrielees [Mo.] 81 S. W. 437. That both parties were equally at fault held a valid defense to divorce suit. Womack v. Womack [Ark.] 83 S. W. 937. Where demurrer was sustained, held petition failed to state a cause of action, hence there was no reason for setting aside judgment. Glover v. Dimmock, 119 Ga. 696, 46 S. E. 824.

53. People v. Perris Irr. Dist., 142 Cal. 601, 76 P. 381.

54. The claim that the judgment was not authorized by the evidence cannot be considered in the absence of showing a sufficient reason why it was not urged on the trial of the action. Bankers' Union v. Nabors [Tex. Civ. App.] 81 S. W. 91. Suit cannot be resorted to as a substitute for a demurrer to a defective pleading. Kubesh v. Hanson [Minn.] 101 N. W. 73.

55. Zweibel v. Caldwell [Neb.] 102 N. W. 84. It must appear that the pleadings in the law action presented an issue involving the substantial rights of the parties and that the evidence was such as to present a fair question for the determination of a jury. Id.

56. Zweibel v. Caldwell [Neb.] 102 N. W. 84.

57. Zweibel v. Caldwell [Neb.] 102 N. W. 84. If the petition is defective in that regard and evidence is given showing the substantial issue and the nature of the ruling complained of, the party offering such evidence cannot be heard to object to such defect in the petition. Id.

58. Where assignments were errors of law. Parker v. Parker [Neb.] 102 N. W. 85.

59. That the cause of action has been satisfied, or, if not satisfied, it was brought in the name of the wrong plaintiff, are not purely equitable grounds. Hofmann v. Burris, 210 Ill. 587, 71 N. E. 584.

60. Stewart v. Snow [Ind. T.] 82 S. W. 696; Hofmann v. Burris, 210 Ill. 587, 71 N. E. 584. Where motion for new trial was overruled because not filed within the statutory period. Wabash R. Co. v. Mirrielees [Mo.] 81 S. W. 437. Where the bill alleged facts showing that a court of law had already denied a similar application, such facts may be considered in determining the equity court's jurisdiction, though former adjudication is not alleged in the answer. Hofmann v. Burris, 210 Ill. 587, 71 N. E. 584.

61, 62. Whitney v. Hazzard [S. D.] 101 N. W. 346.

63. Mortgagor being a corporation, stockholders residing in a different state held not barred by laches where they did not commence the suit until 3 years after the entry of the decree, nor evidence of the fraud for 2 years more, they being residents of a distant state. Whitney v. Hazzard [S. D.] 101 N. W. 346.

64. Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Pridemore [W. Va.] 47 S. E. 258.

65. Where only nominal damages were awarded. Smoot v. Judd [Mo.] 83 S. W. 481.

66. MacRitchie v. Stevens [Ariz.] 76 P. 478.

67. Hence the action of nullity and appeal may be maintained at the same time without conflict. State v. Sommerville, 112 La. 801, 36 So. 864.

68. See 2 Curr. L. 592.

69. Hart v. Manahan [Ohio] 71 N. E. 696. It must clearly appear that it will be contrary to equity or good conscience to allow the enforcement of the judgment. Little Rock & H. S. W. R. Co. v. Newman [Ark.] 84 S. W. 727.

70. May enjoin the collection of a judgment entered by virtue of a warrant of at-

ment will be enjoined in any case where an action for nullity of the judgment will lie,[71] or where the judgment debtor has an equitable defense which was not available at law,[72] or where the law court failed to obtain jurisdiction over the defendant,[73] and in the latter case the petitioner need not allege merits.[74] In all cases danger of damage must be shown.[75] The suit must be against the owner of the judgment.[76] The defendant having an adequate remedy at law, he will not be given affirmative relief on a cross bill.[77]

Time for application.[78]—The judgment not being void upon its face,[79] all of the above remedies must be promptly pursued,[80] and within the statutory time, if one be fixed,[81] and in construing this time, a motion to set aside is sometimes, though not always, considered a motion for a new trial.[82] Limitations against ac-

torney for confessing judgment contained in a bond procured by the obligee's fraud. Norwood v. Richardson [Del. Ch.] 57 A. 244. The collection of the judgment cannot be enjoined on the ground that the execution of the contract on which the action was brought was procured by fraud. Loughren v. B. F. Bonniwell & Co. [Iowa] 101 N. W. 287.

71. Though a suspensive appeal therefrom has been dismissed, and a devolutive appeal has been subsequently taken and perfected and is still pending. State v. Sommerville, 112 La. 801, 36 So. 864.

72. McMahan v. Wheelan, 44 Or. 402, 75 P. 715.

73. Process served on a foreign corporation being insufficient and it being given no notice of demand, a judgment against it for a debt it did not owe will be set aside. Mullins v. Central Coal & Coke Co. [Ark.] 84 S. W. 477.

74. Crippen v. X. Y. Irrigating Ditch Co. [Colo.] 76 P. 794.

75. The enforcement of a judgment will not be restrained pending establishment of set-off or counterclaim, the complainant being fully secured (Montgomery Water Power Co. v. Chapman, 128 F. 197), and the fact that an affidavit alleges that it is proposed to apply for a certain increase of the ad damnum in the second action is no ground for the injunction (Id.).

76. In an action to restrain enforcement, an allegation in the complaint "that plaintiff is informed and believes that the defendant * * * now claims to own said judgment" is a sufficient allegation of ownership in the absence of a motion to make more certain. Phillips v. Norton [S. D.] 101 N. W. 727.

77. Defendant cannot by cross bill recover a sum paid for attorney's fees in connection with the assignment to him of one of the judgments, it not being included in any judgment and being recoverable at law. Miller v. De Yoe [N. J. Eq.] 58 A. 179.

78. See 2 Curr. L. 587, n. 12-15.

79. Void judgment may be vacated at any time. See ante, § 7, Power of court during and after term.

80. **Opening and vacating:** Petitioner being sui juris at time of death of testator and having knowledge thereof, held six years' delay would bar opening probate decree. In re Meyers' Estate [N. J. Eq.] 59 A. 259. Where plaintiff knew nothing of suit, though service was made on an adult member of her family, until 11 years after judgment was entered by default, held no laches, and the fact that her husband without her knowledge or consent authorized an appearance to be entered in her behalf makes no difference. Aldrich v. Crump, 128 F. 984. Entering into arrangement for the postponement of execution, held could not four months after entry of decree and after issuance of execution and advertisement for sale first move to vacate the decree for technical insufficiency. Coast Land Co. v. Oregon Pac. Colonization Co., 44 Or. 483, 75 P. 884. See 2 Curr. L. 587, n. 12, 13.

Equitable suits to set aside: Knowledge of suit and delay of two and one-half years after divorce decree, the rights of third parties intervening, held such laches as to bar right. Evans v. Woodsworth [Ill.] 72 N. E. 1082. Allegation that applicant never lived in city to which summons was directed, and had no notice of judgment until over a year after its rendition, held sufficient to show no laches. Parsons v. Weis [Cal.] 77 P. 1007.

81. **California:** Under Code Civ. Proc. § 473, a court cannot vacate a judgment on motion a year after rendition. People v. Davis, 143 Cal. 673, 77 P. 651.

Indiana: A suit to set aside a judgment for lack of jurisdiction is not barred by the six-year statute of limitations, though fraud is an incidental cause of action. Underwood v. Deckard [Ind. App.] 70 N. E. 383.

Minnesota: Gen. St. 1894, §§ 5267, 5842 apply to actions to determine adverse claims to realty in which jurisdiction was obtained by publication over parties described as other persons or parties unknown. Hoyt v. Lightbody [Minn.] 101 N. W. 304.

Nebraska: Acts 1901, p. 475, c. 82, amending § 592 of the Code of Civ. Proc. limiting the time for commencing proceedings to vacate or modify judgments, is valid and not in conflict with § 11, art. 3 of the constitution. Chicago, R. I. & P. R. Co. v. Sporer [Neb.] 100 N. W. 813.

South Dakota: Ten years delay after a mortgagor's default held to bar relief under Rev. Code Civ. Proc. § 112, subd. 5, providing for opening of cause within one year after rendition of judgment on good cause being shown. Keenan v. Daniells [S. D.] 99 N. W. 853.

82. **That it is such a motion:** Must be filed within two days after the rendition of judgment, or a sufficient excuse must be shown for the delay. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

That it is not: Need not be filed within four days after the rendition of judgment. Harkness v. Jarvis [Mo.] 81 S. W. 446.

tions to annul for fraud generally date from the discovery of the fraud,[83] and the burden of proof is on the plaintiff to show when the discovery was made.[84] A mere general statement that it was made within the prescribed period is insufficient.[85] An order purporting to vacate the decree, being made after the expiration of such time, is void,[86] the only remedy which the aggrieved party has being a new suit in equity.[87] Amendments may in some cases be made in the appellate court.[88] A default judgment cannot be opened at any subsequent term at which the case is called for trial.[89]

Modes and manner of procedure.[90]—Motion lies to set aside a judgment rendered without jurisdiction,[91] and in some states is the exclusive remedy where mistake, surprise or excusable neglect are the grounds upon which relief is prayed.[92] In Georgia a motion to set aside must be predicated upon some defect apparent upon the face of the record.[93] Where it is sought to vacate a judgment after term on the ground of fraud, the remedy is by petition or action or suit rather than by motion,[94] the suit being either a bill of review or a bill to impeach for fraud;[95] but it will only lie in the case of an emergency which will prevent the questions from being effectively determined on appeal.[96] A bill of review will ordinarily not lie against a consent decree.[97]

A judgment may be attacked for fraud by answer and cross complaint.[98]

The petition or bill[99] should allege the former judgment and wherein it is impeachable;[1] if fraud, it must be directly alleged.[2]

83. Succession of Dauphin, 112 La. 103, 36 So. 287. Compare Limitation of Actions, 2 Curr. L. 746.

84. If the evidence leave this date in doubt, the prescription will be maintained, especially where the information of the alleged fraud was communicated by letter, and the letter is not produced or accounted for. Succession of Dauphin, 112 La. 103, 36 So. 287.

85. Particularly where from the circumstances of the case, the probability is strong that it was made sooner. Succession of Dauphin, 112 La. 103, 36 So. 287.

86. People v. Davis, 143 Cal. 673, 77 P. 651. Is subject to direct or collateral attack. Id.

87. People v. Davis, 143 Cal. 673, 77 P. 651.

88. Under Rev. St. 1899, §§ 672, 673, where word "company" was omitted from name of corporate defendant in the summons and petition, held word could be added in appellate court. Brassfield v. Quincy O. & K. C. R. Co. [Mo. App.] 83 S. W. 1032.

89. Civ. Code 1895, § 5072 does not authorize such a proceeding. Cauley v. Wadley Lumber Co., 119 Ga. 648, 46 S. E. 852. The defendant being permitted to file an answer at such subsequent term, all the subsequent proceedings are nugatory. Id.

90. See 2 Curr. L. 592.

91. Ex parte Haynes [Ala.] 37 So. 286.

92. Not by an independent action. Code, § 274. Mutual Reserve Fund Life Ass'n v. Scott [N. C.] 48 S. E. 581.

93. Sweat v. Latimer, 119 Ga. 615, 46 S. E. 835; Ayer v. James [Ga.] 48 S. E. 154; Drake v. Brown Mfg. Co. [Ga.] 49 S. E. 590. The record showing that the warrant has never been served with proper process, the judgment should be set aside. Id. [A motion to set aside in this state is similar to a motion in arrest, hence the above rule.]

94. Not by motion. Delaney v. Updike Grain Co. [Neb.] 99 N. W. 660. By an original bill in a new suit. Law v. Law [W. Va.] 46 S. E. 697. A bill of review being filed, it may be amended so as to be taken and treated as an original bill for the purpose of setting aside such decree. Law v. Law [W. Va.] 46 S. E. 697.

In Kentucky a final judgment can only be opened by petition. A motion to set it aside and grant a new trial held properly overruled. Snelling's Adm'r v. Lewis, 25 Ky. L. R. 1856, 78 S. W. 1124.

95. In Washington a bill of review is the proper method of obtaining the vacation or annulment of a decree for errors apparent on the face of the record or for fraud. Ball v. Clothier, 34 Wash. 299, 75 P. 1099.

But contra, see Law v. Law [W. Va.] 46 S. E. 697, where the remedy after term is by original bill to impeach for fraud. In the opinion the several equitable bills are distinguished.

96. Ball. Ann. Codes & St. § 5741. State v. Superior Court of King County, 34 Wash. 248, 75 P. 809.

97. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

98. Relender v. Riggs [Colo. App.] 79 P. 328.

99. See 2 Curr. L. 593, n. 22 et seq.

1. Allegation of facts held sufficient. Benedict v. Wilhoite, 26 Ky. L. R. 178, 80 S. W. 1155.

2. Plaintiff alleged forgery of note supporting judgment and long delay in enforcing judgment and it was held insufficient. Graham v. Loh, 32 Ind. App. 183, 69 N. E. 474. Allegations of collusive settlement with some of the persons entitled to share in judgment held sufficient (action for wrongful death). De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 275.

The facts constituting the proposed defense must be distinctly averred.[3] A bill of review must state the error with particularity.[4]

A motion to vacate[5] should be accompanied by an affidavit of merits,[6] except where the judgment is alleged to have been rendered without jurisdiction;[7] good practice also requires a verified answer, though this latter is not indispensable.[8] The statements in the affidavit are admitted unless denied by counter-affidavit.[9] The affidavits must negative contingencies[10] and must allege facts,[11] and their existence must be sworn to if they are within the personal knowledge of the affiant.[12] If they are not within his personal knowledge, the name and residence of the witness by whom he expects to prove them must be stated, and, if practicable, the affidavit of the witness, setting out the very facts he will testify to, must accompany the motion.[13] It must also reasonably appear that proof of such facts will be made upon another trial, and that they reasonably constitute a defense to every theory of the case made by plaintiff's pleadings upon which the judgment could have been rendered.[14] Amendments to the motion are allowed when necessary to further justice.[15] An objection which goes to the merits[16] affords no ground for the refusal of the court to consider and act upon the motion to vacate.[17] A refusal to entertain the motion to vacate being based solely on want of jurisdiction as a matter of law, mandamus may issue;[18] but this right may be lost by laches.[19]

Burden of proof and evidence.[20]—Unless a defect appears of record, the burden is on the movant or petitioner to affirmatively show its existence,[21] but the

3. Jewell v. Martin [Ga.] 48 S. E. 929. Petition stating that declaration had been lost, that movant could not state the substance of the same, held petition insufficient. Id.

4. Lightcap v. Konovosky, 161 Ind. 609, 69 N. E. 396.

5. **Power after term,** see ante, this section.

6. Braseth v. Bottineau County [N. D.] 100 N. W. 1082. Affidavits of merits by county attorney, stating that defendant has a good and sufficient defense as shown by its answer which is attached, is sufficient. Id.

7. Ex parte Haynes [Ala.] 37 So. 286. See 2 Curr. L. 593, n. 31.

8. Braseth v. Bottineau County [N. D.] 100 N. W. 1082. Is not necessary where the complaint is not verified. Code Civ. Proc. 1902, § 195. Farmers' & Mechanics' Mercantile & Mfg. Co. v. Smith [S. C.] 49 S. E. 226. See 2 Curr. L. 593, n. 28.

9. Code Civ. Proc. § 473. In re Van Loan, 142 Cal. 423, 76 P. 37. Additional evidence is not essential to support a finding of the court that such statements are true. Code Civ. Proc. § 2009. Id.

10. Affidavits to have default judgment set aside on the ground that the summons was served on a clerk in the office of the defendant and not on the president, as it purported to be, must show that it was not served on the president. Guase v. Sterling Piano Co., 95 App. Div. 115, 88 N. Y. S. 532.

11. Judgment on the merits will not be set aside on the opinion of one of the defeated parties that their attorney acted unwisely and improperly in not putting in evidence upon the trial in their behalf. Application must state facts. Early v. Bard, 93 App. Div. 476, 87 N. Y. S. 650. An affidavit that defendants could have disproved generally every material allegation contained in the petition, and that plaintiff's injuries were not of such a serious permanent character as to justify a judgment, held insufficient as stating mere conclusions. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. See 2 Curr. L. 593, n. 30.

12. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. Affidavit stating that while facts alleged are not within the personal knowledge of the affiant, yet he has made a full investigation and found them to be true, is insufficient. Id.

13. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. An affidavit as to what some one else may have heard the witness relate as to the matters in controversy will not do. Id.

14. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

15. Allowed where motion was legally insufficient, but showed a miscarriage of justice. Ayer v. James, 120 Ga. 578, 48 S. E. 154.

16. That the facts stated in the motion do not justify the granting of the relief prayed is an objection which goes to the merits. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467.

17. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467.

18. Code Civ. Proc. § 1085. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467. The contrary rule prevails where the court bases its want of jurisdiction on evidence or the determination of any question of fact. Id.

19. Where proceedings were instituted within a year after dismissal of appeal, held no laches. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467.

20. See, also, ante, **A motion to vacate.**

21. Must show invalidity of judgment

record affording satisfactory evidence of the mistake it may be corrected without extraneous proof.[22] The motion to vacate being based upon the record, all papers not a part thereof are presumed to have been sufficient.[23]

Issues to jury.—On a rule to vacate if there is any matter of substantial doubt, the court should send it to the jury.[24]

Removal of application is proper when not denied on the merits and not involving the same points decided in the former dismissal.[25] The order denying the motion may sometimes contain permission to renew the application.[26]

Extent and effect of relief.[27]—The court may reopen the whole matter,[28] and will generally grant relief co-extensive with the necessities of the situation.[29] The judgment should be opened rather than vacated, though in guardianship proceedings this not reversible error.[30] The judgment being opened without conditions, the plaintiff is put to the proof of his cause of action precisely as if no judgment had been entered.[31] The correction of a clerical mistake does not make a new judgment.[32] A decree being set aside, it is void.[33] The suit to enjoin the enforcement of a judgment, being in effect one for a new trial, a court of equity may finally dispose of the merits of the cause, or it can enjoin the enforcement until defendant consents to a new trial in the law action,[34] but it cannot order such new trial.[35] A void order does not affect the proceedings.[36]

Appeal or review.—Judgments vacating[37] another judgment are generally

valid on face. Briseno v. International & G. N. R. Co. [Tex. Civ. App.] 81 S. W. 579. Must affirmatively show defective service. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. Allegation of reliance upon supposed agreement with opposing counsel held unavailing, the petition nowhere stating that the expected notice was not in fact given. Tschohl v. Machinery Mut. Ins. Ass'n [Iowa] 101 N. W. 740.

22. The above includes not only that there was a mistake but also in what it consisted. People v. Ward, 141 Cal. 628, 75 P. 306. That the defendant be imprisoned in "the State at F." held could be corrected so as to read in "the state prison at F." Id.

23. People v. Davis [Cal.] 77 P. 651.

24. It may do so. Cruzan v. Hutchison [Pa.] 59 A. 485. One denying that he had ever authorized the making of a motion to open his default, the question is for the jury. Durst v. Ernst, 91 N. Y. S. 13.

25. Dismissed for defects in answer. The record must affirmatively show that the grounds of the second motion were not considered on their merits. Oakes v. Ziemer [Neb.] 98 N. W. 443. See 2 Curr. L. 593, n. 35. See topic Former Adjudication, 3 Curr. L. 1476.

26. Order denying defendant's motion to open a second default may properly contain permission to renew upon payment of costs where the order to show cause was based upon affidavits verified two days after the date of the order. Liquari v. Abramson, 91 N. Y. S. 768.

27. See 2 Curr. L. 591.

28. Prior order, directing receiver to pay money, opened. In re Nat. Gramophone Corp., 87 App. Div. 76, 83 N. Y. S. 1087.

29. The holder of a water right priority being entitled to the annulment of a decree awarding a prior priority is entitled to an entire annulment of such decree, though intervening priorities are not complaining of it. Crippen v. X. Y. Irrigating Ditch Co. [Colo.] 76 P. 794.

30. That the court set aside and dismissed all proceedings in the matter of guardianship, instead of merely vacating the guardianship and setting the original petition for rehearing, is not ground for reversal. In re Van Loan, 142 Cal. 423, 76 P. 37. [This proceeding is different from an ordinary civil action.]

31. A writ of scire facias to revive the judgment had been entered and to that writ a plea of payment was filed, but this proceeding ended there, the judgment being opened. Miller v. Miller, 209 Pa. 511, 58 A. 886.

32. Within Rev. St. 1898, §§ 3162, 3165. Where court found that original findings provided for only $50 solicitor's fees, which had been erased and $100 inserted, but subsequently restored to the original amount, held such reduction did not make a new judgment. Hart v. Jos. Schlitz Brew. Co. [Wis.] 98 N. W. 526.

33. Though the clerk file it by mistake. Mahler v. Animarium Co. [C. C. A.] 129 F. 897.

34. Headley v. Leavitt [N. J. Eq.] 57 A. 510. It not being claimed that any evidence has been newly discovered nor that complainant was deprived of any defense through the conduct of the defendant, but the only ground being an equitable defense which existed at the time the action was tried, held not a suit for a new trial. Id.

35. Little Rock & H. S. & W. R. Co. v. Newman [Ark.] 84 S. W. 727.

36. That the order vacating the judgment is void is immaterial where the court at the term of rendition had made an order suspending the judgment. Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284.

37. Held appealable where it determined all questions which could be tried upon a retrial, although no formal order of the dis-

held to be appealable, the contrary rule applying in some cases where the court refuses relief.[38] A party failing to appeal from a decree modifying the judgment, cannot prosecute error from an adverse ruling on a motion to vacate which he has previously made.[39] On appeal from the dismissal of a petition to set aside a judgment, the record of the suit in which the judgment sought to be opened was rendered must be copied in the transcript.[40]

§ 8. *Operation and effect in general.*[41]—The doctrines of estoppel by judgment and the merger and bar of causes in judgment have been discussed in a former topic.[42] A judgment is a matter of public record and, as to all matters appearing on the face thereof,[43] binds all parties dealing with the property affected thereby.[44]

§ 9. *Collateral attack. What is collateral.*[45]—A suit to enjoin enforcement,[46] a motion to set aside a default for want of jurisdiction,[47] a motion for a writ of restitution and to quash a writ of assistance,[48] and an attack that the judgment is void either in an action on the judgment[49] or in an action involving the judgment,[50] are all held to be collateral attacks thereon. An attack on a judgment on the ground that it was procured by fraud[51] or an application to have the judgment set aside[52] is a direct attack thereon. In order to be a direct attack, the plaintiff in the first suit must be a party to the subsequent proceeding.[53] That the judge of the court rendering the judgment is disqualified from determining a suit to set it aside renders the latter none the less a direct attack because transferred to another court.[54] Suits in equity to set aside judgments at law while not collateral are always indirect.[55] Attacks not involving the validity of the judgment cannot be called collateral.[56]

missal of the action was made. Nolan v. Arnot [Wash.] 78 P. 463. Probate decrees. In re Cote's Estate, 98 Me. 415, 57 A. 584; In re Phelps' Estate [Minn.] 101 N. W. 496. See 2 Curr. L. 594, n. 36, 37.

38. Order refusing to vacate or modify order setting apart a homestead. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467. An order denying a motion to vacate an injunctional order. Tracy v. Scott [N. D.] 101 N. W. 905.

39. Charles P. Kellogg & Co. v. Spargur [Neb.] 100 N. W. 1025.

40. Jones v. Conway, 25 Ky. L. R. 2017, 79 S. W. 239.

41. See 2 Curr. L. 584.

42. See Former Adjudication, 3 Curr. L. 1476.

43. Distributee of an estate will be deemed to have notice of recitals in judgment discharging administrator. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417. A general judgment which has long been satisfied is not notice of an equity of those not parties to the suit. Goodwynne v. Bellerby, 116 Ga. 901, 43 S. E. 275. One purchasing in reliance on judgment regular on its face and having no knowledge of fraud or irregularity in the procurement thereof is an innocent purchaser. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126. Judgment for defendant in a suit for land, not reciting that it was rendered by agreement, one buying the land of defendant after judgment gets a good title as against one buying it of the plaintiff pending the action. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

44. London & San Francisco Bank v. Dexter Horton & Co. [C. C. A.] 126 F. 593. The doctrine of **constructive notice by record** is treated in Notice and Record of Title, 2 Curr. L. 1053.

45. **Definition:** "A direct attack is a proceeding in the action in which the judgment was rendered, either by a motion before the court which rendered it, or an appeal therefrom; whereas an attempt to impeach the judgment by matters dehors the record is a collateral attack." Parsons v. Weis [Cal.] 77 P. 1007. See 2 Curr. L. 594.

46. Loughren v. B. F. Bonniwell & Co. [Iowa] 101 N. W. 287.

47. People v. Norris [Cal.] 77 P. 998.

48. Appellant having been removed from possession under such writ after a decree had been rendered against him. Bennett v. Roys [Ill.] 72 N. E. 380.

49. In that the seal of the court was omitted from the citation. Newman v. Mackey [Tex. Civ. App.] 83 S. W. 31.

50. Trespass to try title, attack on judgment under which plaintiff claimed. Scudder v. Cox [Tex. Civ. App.] 80 S. W. 872. Where former adjudication was set up as a defense. Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729.

51. Parsons v. Weis [Cal.] 77 P. 1007.

52. Grannis v. Superior Court of San Francisco [Cal.] 77 P. 647.

53. Johnson v. Hunter, 127 F. 219.

54. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241.

55. Le Mesnager v. Variel [Cal.] 77 P. 988.

Note: In such case "the judgment is not under review, but an issue is being tried as to whether the plaintiff is entitled to have a court of equity interpose in his behalf. * * * It may be said that in such a case the legal validity of the judgment is admitted, and it is because of the validity, or

Grounds.[57]—The right to collaterally attack a judgment is one of general law, and state and federal decisions are not binding as to each other.[58] It may be made by strangers to the judgment,[59] and in this connection the question of privity is important.[60] One contesting the jurisdiction of the court[61] or submitting thereto[62] cannot collaterally attack the judgment rendered for want of jurisdiction. The judgment may be collaterally attacked for want of jurisdiction[63] affirmatively[64] appearing on the face of the record.[65] Hence, in the absence of a special statutory procedure,[66] all jurisdictional facts as to which the record is silent will be presumed,[67] as will the fact that the proper method for the service of process

apparent validity, that the plaintiff requires to be relieved from it." Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 48 Am. St. Rep. 110.

56. An execution being invalid, a suit to set aside the deed given on execution sales is not a collateral attack on the judgment. Cox v. Spurgin, 210 Ill. 398, 71 N. E. 456. A suit to quiet title as against those claiming under a will is not a collateral attack on the judgment admitting the will to probate. Best v. Gralapp [Neb.] 99 N. W. 837. Where the court in confirming a sale can only pass on the regularity thereof, an objection that the property is exempt is not a collateral attack on the judgment of confirmation. Lewis v. Mauerman, 35 Wash. 156, 76 P. 737.

57. See 2 Curr. L. 594.

58. Attack for want of jurisdiction. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175.

59. Surrogate's decree granting letters of administration on the estate of a nonresident may be attacked collaterally, in an action to recover for the intestate's wrongful death, on the ground of legal fraud in obtaining the letters. Ziemer v. Crucible Steel Co., 90 N. Y. S. 962. A total stranger not being bound may always attack it. See Former Adjudication, 3 Curr. L. 1476.

60. Purchaser of land is in privity with judgment concerning such land rendered against his vendor. Scudder v. Cox [Tex. Civ. App.] 80 S. W. 872. Persons claiming under grantee who was privy to a decree in an action to rescind deed of grantor held to stand in same position as the grantee under whom they claim in respect to a collateral attack on such decree. Wilkins v. McCorkle [Tenn.] 80 S. W. 834.

61. A decree of divorce obtained on a cross bill, a motion to dismiss which for want of jurisdiction was denied, is not open to collateral attack by plaintiff's heirs. Aldrich v. Steen [Neb.] 98 N. W. 445.

62. Where corporation was sued by wrong name but did not challenge the court's jurisdiction. Richardson & Boynton Co. v. Utah Stove & Hardware Co. [Utah] 77 P. 1.

63. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738; Cizek v. Cizek [Neb.] 99 N. W. 28, rvg. 96 N. W. 657. Court having jurisdiction, the attack cannot be sustained. Haines v. Hall, 209 Pa. 104, 68 A. 125. Children of beneficiaries of trust held incapable of attacking, in an action of ejectment, the appointment of a substituted trustee. Id. In view of Rev. St. 1895, art. 2574 and art. 2742, giving the county court jurisdiction to appoint, of its own motion, guardians for persons of unsound mind, a judgment appointing such a guardian cannot be collaterally attacked. Flynn v. Hancock [Tex. Civ. App.] 80 S. W. 245. Judgment on defective verdict (punitive damages without actual) is voidable. Brennan v. Paul [Mo. App.] 83 S. W. 283.

64. Parsons v. Weis [Cal.] 77 P. 1007. In the absence of anything in the record to impeach the right of the court to determine the question involved, there is a conclusive presumption that it had such right. Wilthe attack cannot be sustained. Haines v.

65. Johnson v. Hunter, 127 F. 219; McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036; Jones v. Smith, 120 Ga. 642, 48 S. E. 134; Jewett v. Boardman, 181 Mo. 647, 81 S. W. 186; Smoot v. Judd [Mo.] 83 S. W. 481; Aldrich v. Steen [Neb.] 100 N. W. 311; State v. Cloudt [Tex. Civ. App.] 84 S. W. 415. Tax judgment, void citation appearing in record. Babcock v. Wolffarth [Tex. Civ. App.] 80 S. W. 642. A decree against a receiver of another court cannot be collaterally attacked because the record fails to affirmatively show that permission to sue was obtained. Ridge v. Manker [C. C. A.] 132 F. 599. Order of probate court appointing a guardian based on a petition which did not state any statutory ground. Pub. St. 1882, tit. 23, c. 181, § 5 construed. Providence County Sav. Bank v. Hughes [R. I.] 58 A. 254. In order to sustain a collateral attack on a judgment of foreclosure against the heirs of a deceased mortgagor, it must appear from the record that other debts of the estate existed, rendering administration necessary. Floyd v. Watkins [Tex. Civ. App.] 79 S. W. 612. In such case, the plaintiffs introducing a pleading by the mortgagee alleging probate proceeding and failure of administrator to qualify, held insufficient to rebut presumption of validity of judgment, since the pleading may have been amended to show that there were no debts and hence administration was unnecessary. Id. Evidence dehors the record cannot be looked to. People v. Norris [Cal.] 77 P. 998; Wilkins v. McCorkle [Tenn.] 80 S. W. 834. If the bill or other pleading make a case, and the court in its judgment or decree assume the case to have been established, it is sufficient to defeat the attack. Id. Proof aliunde that a minor had attained his majority and was dead at the date of a judgment in a proceeding against his guardian held not to affect the judgment. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. See 2 Curr. L. 594, n. 45.

66. Decree under Acts Ark. 1895, p. 88, No. 71, providing for sales of land for nonpayment of levee taxes, cannot be so attacked. Johnson v. Hunter, 127 F. 219.

67. Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603; Cizek v. Cizek [Neb.] 99 N. W. 28, rvg. 96 N. W. 657; Godfrey v. White, 32 Ind. App. 265, 69 N. E. 688. Probate de-

was selected,[68] and the exercise of jurisdiction warrants the presumption that all necessary facts were proved.[69] Recitals,[70] findings of fact,[71] and the record[72] are presumed to be true. This presumption does not favor inferior or special tribunals.[73]

A judgment may be collaterally attacked for fraud only when such fraud enters into the procurement thereof.[74]

An erroneous judgment[75] or one voidable for mere irregularities of procedure[76] cannot be collaterally attacked. Nor will illegalities which might have been

crees. Alexander v. Barton [Tex. Civ. App.] 71 S. W. 71; Clark v. Rossier [Idaho] 78 P. 358. The court of ordinary. Jones v. Smith, 120 Ga. 642, 48 S. E. 134. A final judgment rendered after the grant of a motion for a new trial cannot be collaterally attacked for failure of the record to show a compliance with Code, § 3796, requiring defendant who moves for a new trial to give security for costs. English v. Otis [Iowa] 101 N. W. 293. Service by leaving a copy at place of abode held conclusive against affidavit of illegality against default judgment on the ground that there was no personal service. Brown v. Webb [Ga.] 48 S. E. 917. That judgment against unknown heirs did not show on its face that the proper affidavit for citation by publication was made, that it was a proceeding in the district court of any county, in what paper, if any, publication was made, nor that an attorney had been appointed to represent unknown heirs, nor that land certificates were in the possession of a party to the suit, held insufficient to support a collateral attack. Houston & T. C. R. Co. v. De Berry [Tex. Civ. App.] 78 S. W. 736. See 2 Curr. L. 596, n. 71-75.

68. This presumption does not depend upon the way in which the summons was required to be served. McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036. Where service was by publication, judgment cannot be collaterally attacked by showing that defendant was a resident. McHenry v. Brackin [Minn.] 101 N. W. 960. Where judgment reciting that defendant had been duly and legally cited to appear. Scudder v. Cox [Tex. Civ. App.] 80 S. W. 872. See 2 Curr. L. 596, n. 71.

69. Order of state court of general jurisdiction cannot be collaterally attacked on ground that court did not have jurisdiction of the corporation. Blue Mountain Iron & S. Co. v. Portner [C. C. A.] 131 F. 57. The fact that justice heard cause held, by necessary implication, to constitute a finding that an order of publication had been made and executed. Hammond v. Darlington [Mo. App.] 84 S. W. 446.

70. See ante, § 4, Form and Interpretation, also, 2 Curr. L. 596, n. 82.

71. A decree of annulment of a judicial sale, based upon the finding as a matter of fact that the sale had not been completed, and that title had not passed, determines the status of the title as between the parties, and its validity cannot be collaterally attacked. International Wood Co. v. National Assur. Co. [Me.] 59 A. 544.

72. Record showing order for publication of process, the judgment is not subject to collateral attack on the ground that there was no such order. Vincent v. Means [Mo.] 82 S. W. 96.

73. See 2 Curr. L. 596, n. 68-69. Compare Justices of the Peace, 2 Curr. L. 651, 4 Curr. L. ——. Jurisdiction, 2 Curr. L. 604.

74. Where jurisdiction was fraudulently invoked. Divorce decree rendered against nonresident. Beeman v. Kitzman [Iowa] 99 N. W. 171. Cannot be collaterally attacked on the ground that action was fraudulently instituted. Rankin v. Hooks [Tex. Civ. App.] 81 S. W. 1006. Legatees cannot collaterally attack judgment entered into by administrator, such judgment being a fraud upon their rights, no fraud entering into the procurement thereof. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738. Children suing to recover land which was the separate property of their father and which they have inherited from him, may, in the same suit, attack the validity of judgments in partition dividing the land between them and their mother by showing fraud or irregularity in their procurement. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126; Hinton v. Board of Sup'rs of Perry County [Miss.] 36 So. 565. See 2 Curr. L. 594, n. 51.

75. Hart v. Manahan [Ohio] 71 N. E. 696; Clevenger v. Figley [Kan.] 75 P. 1001; Le Mesnager v. Variel [Cal.] 77 P. 988. One not a party cannot take advantage of an erroneous judgment. Allred v. Smith, 135 N. C. 443, 47 S. E. 597. That petition was demurrable (Selby v. Pueppka [Neb.] 102 N. W. 263) in that it did not state a cause of action (Johnson v. Hunter, 127 F. 219) is insufficient. That judgment was rendered without sufficient evidence. Brown v. Webb [Ga.] 48 S. E. 917. Erroneous adjudication that the facts of a particular case were such as make it cognizable in equity. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267. Question of law whether bill warranted personal judgment. American Trading & Storage Co. v. Gottstein, 123 Iowa, 267, 98 N. W. 770. Judgment of probate court on an unverified claim. Gutierrez v. Scholle [N. M.] 78 P. 60, overruling pro tanto Clancey v. Clancey, 7 N. M. 405, 37 P. 1105, 38 P. 168. Nonappealable judgment awarding costs against a school district is not subject to collateral attack on the ground that the district is not liable for costs. Howe v. Southrey [Cal.] 78 P. 259. A widow recovering a judgment under a codicil to her husband's will, held such judgment could be set up as a counterclaim in an action on the reversal of the probate of the codicil to recover rents she had received thereunder. Couchman v. Bush [Ky.] 83 S. W. 1039. Judgment rendered without substituted service on the defendant in an attachment case against a nonresident whose property had been seized in the state of the forum. Jones v. Danforth [Neb.] 99 N. W. 495. Decree in partition and for sale of

set up in the action form the basis for such an attack by a party thereto.[77] In some states an adjudication of title is not conclusive as against one against whom plaintiff claiming title under such decree sues respecting title.[78]

The same general rules apply to foreign judgments,[79] probate decrees,[80] the determination of official boards,[81] and discharges in bankruptcy.[82]

§ 10. *Lien.*[83]—The judgment does not create a lien on choses in action,[84] leasehold interests,[85] property in custodia legis,[86] or property to which the debtor has simply the bare legal title,[87] or, being a judgment at law, on that in which he has a mere equitable interest.[88] It is a lien on a debtor's interest in land conveyed by security deed.[89] A judgment may specify the fund out of which it is to be paid; if not so specified the judgment is a general one.[90]

land to satisfy a mortgage held not subject to collateral attack by mortgagee or purchaser who were parties to the suit. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253. See 2 Curr. L. 595, n. 54.

76. Smith v. Hardesty [Ky.] 83 S. W. 646. Tax sale. Beasley v. Equitable Securities Co. [Ark.] 84 S. W. 224; Arbuckle v. Mathews [Ark.] 83 S. W. 326. Irregularity in notice. Loughren v. B. F. Bonniwell & Co. [Iowa] 101 N. W. 287. Irregularity in minute entry. Lindquist v. Maurepas Land & Lumber Co., 112 La. 1030, 36 So. 843. Error in return day in the summons. Jones v. Danforth [Neb.] 99 N. W. 495. Omission from return of service of an attachment as to whether copy of an order was left with occupant. Stillman v. Hamer [Kan.] 78 P. 836. Irregularity in verdict. Brennan v. Paul [Mo. App.] 83 S. W. 283. Absence of oath to bill held insufficient to show that court had no jurisdiction of the person of defendant. Wilkins v. McCorkle [Tenn.] 80 S. W. 834. Judgment against minor not served but represented by guardian ad litem is not void. Penn v. Case [Tex. Civ. App.] 81 S. W. 349. Judgment removing minor's disabilities, register failed to publish notice of the filing of the petition. Boykin v. Collins [Ala.] 37 So. 248. Where court allowed the commissioner making the sale greater fees than were allowed by law. Johnson v. Hunter, 127 F. 219. That administrator was dismissed before final judgment, appeal being dismissed by consent of counsel. Vicksburg, S. & P. R. Co. v. Tibbs, 112 La. 51, 36 So. 223. After judgment validating an issue of municipal bonds, an injunction will not lie to restrain the sale on the ground that the notice of the election was not published as required by statute. Rountree v. Rentz, 119 Ga. 885, 47 S. E. 328. Judgment rendered against a party after his death held not subject to collateral attack, though his heirs and representatives were not cited. Campbell v. Upson [Tex. Civ. App.] 81 S. W. 358. A judgment rendered for more than is asked in the pleading is merely irregular. Id. See 2 Curr. L. 594, n. 53.

77. Judgment debtor cannot attack the levy of execution on the ground that his debt was infected with usury. Wilkinson v. Holton, 119 Ga. 557, 46 S. E. 620. Judgment debtor cannot resist execution by an affidavit of illegality setting up that the judgment is void as against the securities named as co-defendants therein. Levadas v. Beach, 119 Ga. 613, 46 S. E. 864.

78. The defendant in a partition suit may inquire into the validity of the proceeding whereby the plaintiff acquired the title upon which he sues. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800. Under Burns' Ann. St. 1901, § 1067, defendant in ejectment may attack the judgment under which plaintiff claims title by showing that it was rendered on matters not in issue. Richcreek v. Russell [Ind. App.] 72 N. E. 617.

79. Federal and state courts are foreign to each other, although sitting within the same state. Decree was attacked for want of jurisdiction. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175.

80. Tobin v. Larkin [Mass.] 72 N. E. 985. Final decree of surrogate barring all claims against a decedent's estate not presented within a certain time. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

81. Nonjurisdictional defects in action of county board of supervisors are not grounds for collateral attack. Hinton v. Board of Sup'rs of Perry County [Miss.] 36 So. 565. Minutes of such body must set forth jurisdictional facts, but its judgment need not set forth the evidence. Id.

82. Ross-Lewin v. Goold, 211 Ill. 384, 71 N. E. 1028; Young v. Stevenson [Ark.] 84 S. W. 623. See Bankruptcy, 3 Curr. L. 488, n. 92.

83. See 2 Curr. L. 597. The modes for enforcing the judgment are treated elsewhere; see Creditors' Suit, 3 Curr. L. 976; Executions, 3 Curr. L. 1397; Sequestration, 2 Curr. L. 1622; Supplementary Proceedings, 2 Curr. L. 1774. Also as to questions of notice, see articles on Lis Pendens, 2 Curr. L. 762, and Notice and Record of Title, 2 Curr. L. 1053.

84. Armour Packing Co. v. Wynn, 119 Ga. 683, 46 S. E. 865.

85. Construing Code Civ. Proc. §§ 14, 17, 671, 761, 765. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243; Summerville v. Kelliher [Cal.] 77 P. 889. Contra, see 2 Curr. L. 597, n. 92.

86. The registry of a judgment after the appointment of a receiver produces no legal effect. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

87. As against the purchaser in possession, judgment against grantor who held the bare legal title held not a lien on the land. Fleming v. Wilson [Minn.] 100 N. W. 4.

88. Judgment of district court. Flint v. Chaloupka [Neb.] 99 N. W. 825.

89. O'Connor v. Georgia R. Bank [Ga.] 48 S. E. 716.

90. Judgment on contract for street improvement. The town neglected to have the judgment payable out of the special assess-

Judgment liens before levy are general and indefinite, vesting no estate,[91] and in some states are given priority in the order in which executions are issued,[92] and hence are inferior to specific liens acquired before that time.[93] In others, as against the judgment debtor, the judgment is a lien on all realty then owned or subsequently acquired from the date of its rendition;[94] but as against a bona fide purchaser for value, it is a lien only from the date on which it is docketed.[95] The lien of a recorded judgment extends only to such property within the county where recorded as is subject to levy and sale under execution.[96] A decree directing a party to pay a specific fund into court for distribution is not a lien upon the real estate of such party unless it is provided by the decree that the claimants recover of the party holding the fund, and that in default of payment execution may issue.[97] In Ohio a judgment creditor failing to issue and levy execution within one year from rendition, his lien is lost as against the lien of a subsequent judgment.[98] Opening a default judgment on condition that it shall stand as security restrains the issuance of execution within the meaning of the Illinois statutes.[99] In Tennessee the judgment debtor paying off a mortgage on his property, the title reinvests in him and immediately passes under the judgment lien, though the judgment be then over a year old.[1] In Alabama the certificate of judgment must state the name of the owner of the judgment.[2] In Oregon, in order to become a lien on realty, the judgment lien docket must state the time when the judgment was docketed.[3]

The judgment lien is superior to rights of third parties subsequently acquired,[4] and takes precedence over the lien of an attorney for services in an un-

ment for such improvement. Town of Cicero v. People, 105 Ill. App. 406.

91. Meeker v. Warren [N. J. Eq.] 57 A. 421. Effect of bankruptcy of judgment debtor on creditor's rights. In re David, 44 Misc. 516, 90 N. Y. S. 85.

92. Meeker v. Warren [N. J. Eq.] 57 A. 421. Beginning of a creditors' action is in the nature of an equitable execution. Flint v. Chaloupka [Neb.] 99 N. W. 825. Judgment creditors by intervening in creditors' suits acquire equitable liens on the property and income of the corporation from the date of their filing. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

93. The holder of a junior judgment on which execution has issued before issuance of execution on the senior judgment is not entitled to priority over a mortgage recorded before rendition of the junior judgment, but after the senior judgment. Meeker v. Warren [N. J. Eq.] 57 A. 421.

94. Justice's judgment. Nuzum v. Herron, 52 W. Va. 499, 44 S. E. 257. Land being treated as personalty under the principles of equitable conversion, held an election to treat the property as realty rendered the land subject to the lien of a judgment. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889.

Code 1887, § 3567. A judgment rendered against a contingent remainderman binds his interest upon its vesting. Wilson v. Langhorne, 102 Va. 631, 47 S. E. 871.

95. Justice's judgment. Nuzum v. Herron, 52 W. Va. 499, 44 S. E. 257. Grantees of judgment debtor putting improvements on the premises after such time do so at their peril. Flanary v. Kane, 102 Va. 547, 46 S. E. 312, rehearing denied, 46 S. E. 681. Purchaser at foreclosure sale held to take property subject to the lien of prior docketed judgments. Judgments were against one of two tenants in common. Fidelity Loan & Inv. Ass'n v. Lash, 135 N. C. 405, 47 S. E. 479.

96. Under Code 1896, §§ 1891, 1921, the lien does not extend to a growing crop. Gaston v. Marengo Imp. Co., 139 Ala. 465, 36 So. 738.

97. Where creditors of an insolvent obtained decree canceling fraudulent mortgage and ordering mortgagee to pay fund into court. State v. Chamberlain Banking House of Tecumseh [Neb.] 100 N. W. 205.

98. Charbonneau v. Roberts, 4 Ohio C. C. (N. S.) 574.

99. Within the meaning of Hurd's Rev. St. 1903, c. 77, § 2, so that the limitation of § 1 ceased to run until his recovery of a subsequent judgment. Wenham v. International Packing Co. [Ill.] 72 N. E. 1079.

1. Though the judgment be more than a year old. Wamble v. Gant [Tenn.] 79 S. W. 801.

2. Travis v. Rhodes [Ala.] 37 So. 804.

3. In the absence of such statement, a transcript of such lien docket in another county is ineffectual to create a lien on land located in such county. Wood v. Fisk [Or.] 77 P. 128.

4. Lien on debtor's interest in property conveyed by security deed is superior to rights of subsequent transferee of bond to reconvey. O'Connor v. Georgia R. Bank [Ga.] 48 S. E. 716. Decree that one is the equitable owner of land is binding on purchaser under an execution against the holder of the legal title without regard to whether the decree contained a provision that it should operate as a conveyance as authorized by Code, § 426, or whether it was recorded as directed. Skinner v. Terry, 134 N. C. 305, 46 S. E. 517.

successful attempt to defeat the lien,[5] but is inferior to the rights of prior bona fide purchasers,[6] and prior equitable liens of which the judgment creditor has notice.[7] The general lien of a judgment is inferior to a prior unrecorded deed,[8] but the contrary is true after the judgment has become a specific lien on the property.[9] A judgment obtained against a husband for a community debt is a lien on community property awarded the wife in a subsequent suit for a divorce.[10] Only those dealing with property on which the judgment is a lien are deemed to have constructive notice of the judgment.[11]

The lien is destroyed by the satisfaction or dormancy of the judgment,[12] or by bankruptcy proceedings instituted against the judgment debtor within four months of the acquiring of the lien,[13] but not by a sale by the debtor or his assignee,[14] nor by a foreclosure decree under which there is no sale.[15]

§ 11. *Suspension, dormancy and revival.*[16]—A court has power in its discretion to temporarily suspend the operation of its judgments,[17] and such suspension is not an amendment of the judgment, but only a regulation of the manner in which it should be enforced.[18]

For the purposes of dormancy, judgments may be resolved into their component parts.[19] Generally the issuance of execution[20] or beginning a creditors' action[21] is sufficient to prevent the judgment from becoming dormant. In some states the judgment debtor's death,[22] or if a corporation, its dissolution,[23] renders the judgment dormant. In Illinois, a judgment debtor dying, execution may issue and a sale be made without reviving the judgment against his heirs.[24]

Revivor restores the judgment to full force, making it as effective as ever,[25]

5. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889.

6. As against a purchaser of a purchase-money note for land, without notice of a prior claim, a judgment in a subsequent action against the vendor and purchaser of the land, declaring a claim to be a lien on the land to be credited on the purchase-money note is of no binding force or effect. Goldsmith v. Clark, 25 Ky. L. R. 1618, 78 S. W. 405.

7. Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284.

8. In re David, 44 Misc. 516, 90 N. Y. S. 85.

9. Judgments against individual partners take precedence over unrecorded deed of firm property. London v. Bynum [N. C.] 48 S. E. 764.

10. Notwithstanding an order in the divorce suit setting aside the property as security for the satisfaction of any judgment therein for plaintiff, Civ. Code, § 140 authorizes such security only for maintenance and alimony. Mayberry v. Whittier [Cal.] 78 P. 16.

11. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243.

12. The satisfaction or dormancy of a judgment are the only contingencies under which a judgment lien created under § 5375, Rev. St. ceases to exist against the real estate of the debtor. A. J. Steel v. Katzenmeyer, 5 Ohio C. C. (N. S.) 25.

13. Hillyer v. LeRoy [N. Y.] 72 N. E. 237. See Bankruptcy, 3 Curr. L. 451, n. 62. But see Smith v. Zachry [Ga.] 49 S. E. 286, afg. McKenney v. Cheney, 118 Ga. 387, 45 S. E. 433, where it is held that such proceedings only affect judgment liens acquired within four months of the adjudication.

14. In re White's Estate [Pa.] 69 A. 271.

15. First Nat. Bank v. Campbell, 123 Iowa, 37, 98 N. W. 470.

16. See 2 Curr. L. 598.

17. Sponenburgh v. Gloversville, 42 Misc. 563, 87 N. Y. S. 602.

18. Action for damages for pollution of stream by sewage, injunctive relief granted and suspended for one year, held the court had power to grant a second suspension. Sponenburgh v. Gloversville, 42 Misc. 563, 87 N. Y. S. 602.

19. A mere money decree in the judgment may become dormant without affecting that part of the decree which adjudges the title to specific property. Conway v. Caswell [Ga.] 48 S. E. 956.

20. The issuing of a second foreign execution and placing it in the hands of the sheriff. Such execution need not be entered upon the foreign execution docket. Steel v. Katzenmeyer, 5 Ohio C. C. (N. S.) 25. A special execution, if it or the order of sale mentions the money judgment. Watson v. Keystone Iron Works Co. [Kan.] 78 P. 156. In the absence of issuance of process, a judgment for the sale of specific property becomes dormant by the lapse of five years. Kilien v. Nebraska L. & T. Co. [Kan.] 78 P. 159.

21. A creditors' action being begun, it is unnecessary to levy a legal execution upon the judgment during the pendency of the creditors' action so far as the specific property is concerned. Flint v. Chaloupka [Neb.] 99 N. W. 825.

22. Manley v. Mayer [Kan.] 75 P. 550.

23. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

24. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683.

and it is immaterial whether the dormancy be caused by the death of the judgment debtor or by want of an execution.[26] The judgment can only be revived by a judicial order,[27] but the proceedings to revive may be in a division of the court other than the one by which the judgment was rendered.[28] A proceeding to revive cannot be brought in the name of a deceased judgment creditor,[29] nor at common law in the name of an assignee of the judgment,[30] and in construing statutes on this subject, the proceeding to revive is not an action.[31] The judgment may be revived on motion,[32] and, when necessary in an equity case, may be had on cross petition.[33] A decree ordering the sale of land and application of proceeds to existing judgment revives such judgment.[34] Statutes generally prescribe the time within which the proceeding to revive must be instituted[35] and the method of such procedure.[36] The proper form of the judgment in revivor is to award execution for the amount of the original judgment, with interest from its rendition and costs.[37] A judgment of revivor is an adjudication between the parties and their privies that the judgment was dormant and not barred by limitations at the time the proceeding was instituted, and they will not be allowed to subsequently deny such facts.[38] The right to prosecute revivor proceedings and the right to maintain an action upon a dormant judgment are cumulative remedies.[39]

In order to validate a judgment, the rights must be acquired in the same capacity as the judgment.[40] Judgment taken against husband alone cannot be revived against husband and wife.[41]

25. Manley v. Mayer [Kan.] 75 P. 550. Gives it original force as a lien on the judgment debtor's property. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683. In Kansas the revival of a judgment which has not become dormant under Gen. St. 1901, § 4895, is not a condition precedent to an action thereon against a deceased judgment debtor's estate [Gen. St. 1901, §§ 4884, 4885, 4889]. First Nat. Bank v. Hazie [R. I.] 56 A. 1032. It seems that the revivor serves only to preserve the judgment lien on the real estate of the judgment debtor. Id.

26. Where it was revived by representative of deceased judgment creditor. Manley v. Mayer [Kan.] 75 P. 550.

27. Wilson's Rev. & Ann. St. 1903, c. 66, art. 19. Letter concerning the judgment held insufficient. Neal v. Le Breton [Okl.] 78 P. 376.

28. Where the different divisions are only parts of one court. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

29. Goreth v. Shipherd, 92 App. Div. 611, 86 N. Y. S. 849. In Missouri a judgment cannot be revived under scire facias in the name of a deceased judgment creditor to the use of his assignee. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

30. Bick v. Tanzey, 181 Mo. 515, 80 S. W. 902. Scire facias. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886. But see 2 Curr. L. 599, n. 21, 22.

31. Bick v. Tanzey, 181 Mo. 515, 80 S. W. 902.

32. It is not necessary in scire facias proceedings to revive a judgment that any petition accompany the writ. Polnac v. State [Tex. Cr. App.] 80 S. W. 381.

33. The court having acquired jurisdiction over property for the purpose of adjusting a lien upon it. German Nat. Bank v. Bode, 5 Ohio C. C. (N. S.) 30.

34. Anderson v. Baughman [S. C.] 48 S. E. 38.

35. In **Missouri** a scire facias may issue to revive a judgment at any time within 10 years from the date of its rendition or that of its last revival. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

Oklahoma: A dormant judgment cannot be revived without the consent of the defendant, unless such revivor is applied for within one year after the same has become dormant. Neal v. Le Breton [Okl.] 78 P. 376.

36. Missouri: Under Rev. St. 1899, §§ 4023, 4024, the filing of the affidavit is necessary to give the justice authority to proceed with the proceedings to revive. Bick v. Tanzey, 181 Mo. 515, 80 S. W. 902. In the absence of an entry in the transcript of the docket entries showing a filing of the affidavit, it is presumed that it was not filed. Id.

Texas: Failure to sign the petition for scire facias to revive the judgment is not a defect, but a mere irregularity amendable on motion, and may be signed nunc pro tunc. Polnac v. State [Tex. Cr. App.] 80 S. W. 381. In Texas such petition is unnecessary. Id.

37. Kinkade v. Gibson, 209 Ill. 246, 70 N. E. 683.

38. Helms v. Marshall [Ga.] 49 S. E. 733.

39. Snell v. Rue [Neb.] 101 N. W. 10. Code Civ. Proc. §§ 10, 16, known as the Statute of Limitations, does not apply to actions upon domestic judgments. Id.

40. A judgment in favor of an administrator, on a note deposited with a trust company under Code Civ. Proc. § 2595, invalid because there was no order of the surrogate, is not validated by the administrator subsequently acquiring title to the note as an individual. Ditmas v. McKane, 92 App. Div. 344, 86 N. Y. S. 1083.

41. Clark v. Staber [Iowa] 98 N. W. 560.

§ 12. *Assignments.*[42]—A judgment may be assigned[43] by an agent under oral authority,[44] and the certificate of judgment need not be transferred in order to transfer the judgment.[45] So far as the judgment debtor is concerned, the assignee is the real party in interest.[46] He takes all of the assignor's title, regardless of whether any consideration passes or not,[47] and the assignor has nothing which he can subsequently assign, unless there be left in him some equitable interest by reason of a trust existing in his favor;[48] hence the assignee need not record his assignment in order to be protected.[49] In an action by an assignee, the complaint alleging the assignment, it is not necessary to allege that the plaintiff was the owner at the time the action was commenced.[50]

§ 13. *Payment, discharge and satisfaction; interest.*[51]—A judgment is presumed not to have been paid,[52] though lapse of time may create a contrary presumption, which presumption is rebutted by a decree ordering the sale of land and the application of the proceeds to the judgment.[53]

In some states judgments for torts are allowed priority of payment.[54] Judgments against a corporation for injuries to third persons are not to be classed

42. See 2 Curr. L. 599.

43. Under Civ. Code, § 1044, providing that property of any kind, except a possibility not coupled with an interest, may be transferred. Curtin v. Kowalsky [Cal.] 78 P. 962. Contract whereby the original judgment creditor transferred to plaintiff all judgments standing of record in his name, together with fact that judgment sued on was entered prior to the date of the assignment, held sufficient. Id. See 2 Curr. L. 599, n. 26, 27. **Evidence held sufficient** to show that the assignee held the judgments absolutely for himself. Miller v. De Yoe [N. J. Eq.] 58 A. 179.

44. Though written assignment of judgment to the principal is lost. Snyder v. Malone [Wis.] 102 N. W. 354.

45. Travis v. Rhodes [Ala.] 37 So. 804.

46. Is entitled to sue, notwithstanding the existence of a trust between him and the assignor. Curtin v. Kowalsky [Cal.] 78 P. 962.

47. Curtin v. Kowalsky [Cal.] 78 P. 962. See 2 Curr. L. 599, n. 33, 35.

48. Curtin v. Kowalsky [Cal.] 78 P. 962. In an action on an assigned judgment, the question whether any equitable interest was left in the assignor cannot be litigated under a denial of the fact of the assignment. Id.

49. Subsequent assignees take nothing as against him. Curtin v. Kowalsky [Cal.] 78 P. 962.

50. Curtin v. Kowalsky [Cal.] 78 P. 962.

51. See 2 Curr. L. 600.

As to amount for which judgment should be entered, including interest, see ante, § 5, Rendition, entry, and docketing.

52. The burden under the pleadings, resting on plaintiff to prove such fact, is met by proving the rendition of the judgment. Campbell & Zell Co. v. American Surety Co., 129 F. 491.

NOTE. Rule as to presumption of payment: As a general rule, the unexplained lapse of twenty years from the time that a judgment is rendered raises a legal presumption that it has been paid. Campbell v. Carey, 5 Harr. [Del.] 427; Burton v. Cannon, 5 Harr. [Del.] 13; Clark v. Clement, 33 N. H. 563, 66 Am. Dec. 745; Thomas v. Hunnicutt, 54 Ga. 337; Willingham v. Long, 47 Ga. 540; Bird v. Inslee, 23 N. J. Eq. 363; Thayer v. Mowry, 36 Me. 287; Chapman v. Loomis, 36 Conn. 459. The presumption thus arising is, however, always rebuttable. Knight v. McComber, 55 Me. 132; Biddle v. Girard Nat. Bank, 109 Pa. 349; Burt v. Casey, 10 Ga. 178; Scott v. Isaacs, 85 Va. 712; and evidence of payments on the judgment within that time, or admissions that it is due, will rebut the presumption. Burton v. Cannon, 5 Harr. [Del.] 13; Bissell v. Jandon, 16 Ohio St. 498, 91 Am. Dec. 95. Any lapse of time less than twenty years will not generally, per se, raise the presumption of payment. Murphy v. Philadelphia Trust Co., 103 Pa. 380; Daly v. Erricsson, 45 N. Y. 786. It is, however, well settled that a shorter period when aided by circumstances which contribute to strengthen the presumption may furnish sufficient grounds to justify the jury in inferring the fact of payment. Brigg's Appeal, 93 Pa. 485; Moore v. Smith, 81 Pa. 183; West v. Brison, 99 Mo. 684. The presumption is a general one and applies as well between the parties to the judgment as between the plaintiff and subsequent creditors. In the absence of countervailing proof, it is a good defense to a scire facias to revive a judgment. Van Loon v. Smith, 103 Pa. 283.—From note to Alston v. Hawkins, 18 Am. St. Rep. 874, 883.

53. Anderson v. Baughman [S. C.] 48 S. E. 38. See 2 Curr. L. 600, n. 41, as to presumption of payment.

Finding of payment to assignee held not against the weight of the evidence. Cobb v. Doggett, 142 Cal. 142, 75 P. 785.

54. Code N. C. § 1255, giving judgments for torts priority, does not apply to a judgment against a lessee of a railroad so as to render it a lien on the property superior to a mortgage given by the lessor prior to the lease (Hampton v. Norfolk & W. R. Co. [C. C. A.] 127 F. 662), nor has it priority of payment from earnings of the road while in the hands of a receiver appointed in a foreclosure suit, all rights and interests of the lessee being extinguished by such appointment and the subsequent sale (Id.).

as operating expenses,[55] nor are they entitled to priority of payment over the mortgage debts of the corporation from the earnings of a receivership initiated subsequent to the date of the injuries.[56]

A court will protect one interested in a judgment to be obtained and who has control of same by counsel against any unjust discharge by the plaintiff of record.[57]

The judgment debtor may take advantage of a satisfaction by a guarantor,[58] and a judgment on a note deposited as collateral is satisfied by a satisfaction of the principal judgment.[59] An unperfected bid at the execution sale is not a satisfaction of the judgment.[60] Release of the principal on the obligation on which the judgment is rendered does not release his surety, both being ostensibly principals and the creditor having no notice of the actual relationship existing between them.[61] A judgment debtor furnishing money to a third person to buy up the judgment, and he buying it at less than its face value, the creditor not knowing the facts, it only amounts to a part payment of the judgment.[62] Satisfaction of judgment extinguishes it.[63] One is not entitled to have satisfaction entered until he pays his costs.[64] A court of law is powerless to cause the satisfaction of a judgment to be entered, after the term at which it was rendered, for matters which existed at the time the judgment was rendered, and which might have been pleaded and proven in bar of the action.[65] In Alabama an assignee is subject to the statutory penalty for failure to credit partial payments on the record.[66] Where, after transfer, suit may be continued in the name of the original plaintiff, the assignee may assign the receipt and satisfaction in the name of such plaintiff.[67]

Where payment has been coerced on a judgment which is afterwards reversed, the party paying has an absolute right to restitution,[68] with interest from the time that the reversal occurred,[69] and the assignee of the judgment creditor is in no better position than the latter would have been.[70] This right may be enforced by an independent action,[71] and the judgment debtor is not required to submit to seizure or distress of his property in order to preserve this right.[72] Receiving the money from an attorney ratifies his conduct.[73]

55. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

56. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209; Hampton v. Norfolk & W. R. Co. [C. C. A.] 127 F. 662.

57. Sowles v. First Nat. Bank, 133 F. 846.

58. German Bank v. Iowa Iron Works, 123 Iowa, 516, 99 N. W. 174.

59. Sale of property thereunder after such satisfaction is wholly void. Lynch v. Burt [C. C. A.] 132 F. 417.

60. Does not prevent the judgment creditor from maintaining a bill to subject the land to the judgment. Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112.

61. Harrier v. Bassford [Cal.] 78 P. 1038.

62. Dickerson v. Campbell [Fla.] 35 So. 986. A plea to a scire facias to revive a judgment, alleging the above facts, is not good as a plea in bar, but tends, at most, to plead a payment pro tanto. Id.

63. The payee of a note wrongfully allowing it to go to judgment against him and the maker becomes the principal judgment debtor and his payment of the judgment extinguishes it, though he took a formal assignment. Snyder v. Malone [Wis.] 102 N. W. 354. Reservation, in contract for satisfaction of judgment, of right to declare contract void, held not to give judgment creditor right to reassert judgment. German Bank v. Iowa Iron Works, 123 Iowa, 516, 99 N. W. 174.

64. Where, after libel in admiralty had been filed, respondent made default and settled case out of court. Naretti v. Scully, 133 F. 828.

65. McDonald v. Holdom, 208 Ill. 128, 70 N. E. 21.

66. Although he acquires title after the filing by the original owner and did not refile it himself [Code 1896, §§ 1920, 1923, 1065]. Travis v. Rhodes [Ala.] 37 So. 804. The certificate being defective, the judgment debtor cannot complain of such failure to credit such payments. Id.

67. Cobb v. Doggett, 142 Cal. 142, 75 P. 785.

68. Chambliss v. Hass [Iowa] 101 N. W. 153. Has this right without regard to the merits of the suit, or to the question of whether the dismissal operated as a retraxit. Florence Cotton & Iron Co. v. Louisville Banking Co. [Ala.] 36 So. 456.

69, 70. Florence Cotton & Iron Co. v. Louisville Banking Co. [Ala.] 36 So. 456.

71. Chambliss v. Hass [Iowa] 101 N. W. 153.

72. A payment made on execution is in-

Courts have the power,[74] in their discretion[75] to set off mutual judgments between the parties or their privies. The assignment of a demand before judgment ordinarily prevents the accruing of the right as against the assignor,[76] though the rule has been changed by statutes in some states.[77] One not having assigned his judgment[78] may plead it as a counterclaim,[79] the remedy for denial of such right being in equity.[80]

Judgments bear simple[81] interest[82] from the date of final rendition.[83]

§ 14. *Executions, other final process and creditors' suits* are treated elsewhere.[84] Besides these remedies the court may grant equitable relief.[85]

§ 15. *Actions on judgment; merger.*[86]—An action or proceeding on the judgment[87] is the only way of enforcing property rights which have been merged in the judgment.[88] An action at law lies upon a decree in equity from another state for the payment of money.[89] The right to sue on a judgment and have execution[90] and the right of revivor[91] are cumulative. A judgment is not final so as to support an action thereon while subject to review.[92] Statutes limit the time to sue.[93]

Judgment on the judgment being vacated, no question of merger arises.[94]

voluntary and sufficient. Chambliss v. Hass [Iowa] 101 N. W. 153.

73. Florence Cotton & Iron Co. v. Louisville Banking Co. [Ala.] 36 So. 456.

74. Franks v. Edinberg, 185 Mass. 49, 69 N. E. 1058. Where one was set off against the administrator of one of the judgment debtors. Martin County Nat. Bank v. Bird [Minn.] 99 N. W. 780. In such case it is not necessary that the judgment sought to be set off be proved and allowed in the probate court. Id.

75. At common law and under Rev. Laws, c. 170, § 2. Franks v. Edinberg, 185 Mass. 49, 69 N. E. 1058. After a hearing on the merits. Martin County Nat. Bank v. Bird [Minn.] 99 N. W. 780.

76. L. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 F. 332.

77. Franks v. Edinberg, 185 Mass. 49, 69 N. E. 1058.

78. Goldman v. Tobias, 88 N. Y. S. 991.

79. Under Rev. St. 1898, § 4258, though defendant possess the right to have it applied to any judgment recovered. Hart v. Godkin [Wis.] 100 N. W. 1057.

80. Potter v. Lohse [Mont.] 77 P. 419.

81. A judgment should be entered as of date of rendition; when entered subsequently, interest cannot be computed on the amount then due. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 75 P. 564.

82. 6 per cent. under Rev. St. 1901. Howard v. Perrin [Ariz.] 76 P. 460. Under Rev. St. 1899, § 5682, a general judgment against a city on special tax bills for the city's proportionate part in improving a street bears interest at 10 per cent. per annum. Barber Asphalt Pav. Co. v. St. Joseph [Mo.] 82 S. W. 64. See 2 Curr. L. 600, n. 54.

83. Where the cause was remanded with directions to enter a money judgment for a specified sum in appellant's favor, which sum was unliquidated until established by a special verdict of the jury, notwithstanding which the court entered judgment against him. Johnston v. Gerry [Wash.] 77 P. 503.

84. See separate articles, Executions, 3 Curr. L. 1397; Creditors' Suit, 3 Curr. L. 976.

85. Court ordering sale of property may enjoin parties to the litigation from interfering with the sale, slandering the title. McClellan v. Kerby [Ind. T.] 76 S. W. 295.

86. **Complaints and states of demand held sufficient:** Complaint alleging that plaintiff claims of defendant a certain sum due on a judgment rendered in favor of plaintiff against defendant on a certain day in a certain court, which judgment is still unsatisfied, due, and unpaid, is sufficient. Kaufman v. Richardson [Ala.] 37 So. 673. State of demand which alleges that the plaintiff recovered judgment upon personal service on an appearance of defendant before the appellate department of the supreme court of N. Y., a court of competent jurisdiction, as costs and disbursements of an appeal from a judgment recovered below is sufficient. Chemical Nat. Bank v. Kellogg [N. J. Law] 58 A. 397. See 2 Curr. L. 600.

87. Proceeding to obtain order on administrator to pay claim is not an action on the judgment of allowance. Gutierrez v. Scholle [N. M.] 78 P. 50.

88. Divorce decree. Jackson v. Jackson [Mich.] 98 N. W. 260. Judgment creditor buying debtor's property on execution for a sum less than the amount of the judgment, by agreeing before the expiration of the period of redemption to accept, and accepting the fee simple title in satisfaction of his judgment merges his interest under the sale and his claim for the unpaid balance in the fee simple title. German Bank v. Iowa Iron Works, 123 Iowa, 516, 99 N. W. 174.

89. Action of debt will lie. It is immaterial that the decree is for an accruing allowance for alimony in a suit for divorce. Wagner v. Wagner [R. I.] 57 A. 1058.

90. Kaufman v. Richardson [Ala.] 37 So. 673.

91. Snell v. Rue [Neb.] 101 N. W. 10.

92. Does not become final until six months from the date of its entry. Harrier v. Bassford [Cal.] 78 P. 1038.

93. Action upon a judgment is not barred until 5 years from the time at which it became final. Harrier v. Bassford [Cal.] 78 P. 1038.

94. Abbott v. Abbott [Kan.] 78 P. 827.

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JUDICIAL NOTICE, see latest topical Index.

JUDICIAL SALES.

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A. Defects and Collateral Attack (323).
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C. Rights Under Sale and in Proceeds (324).

§ 1. *Occasion for and nature of judicial sales.*[95]—The judicial sales here discussed do not embrace those pursuant to foreclosure decrees[96] or execution,[97] or in proceedings to sell a decedent's lands[98] and the like.[99] A sale is improper if not prayed and not necessary.[1]

§ 2. *The order, writ or decree.*[2]

§ 3. *Levy, seizure or the like*[3] is essential before sale can take effect.[4]

§ 4. *Notice and advertisement of sale*[5] in a socialist newspaper otherwise legal is valid.[6]

§ 5. *Sale and conduct of it.*[7]—The qualified officers of a new county erected after order of sale may execute the order.[8] The court may enjoin any interference by slandering title and the like.[9]

The sale must be fair and on full competition.[10] If all parties in interest join, an agreement to control bidding is valid.[11] A court rule requiring a "good-faith" deposit of the purchaser is reasonable.[12]

No more than statutory fees can be allowed.[13]

§ 6. *Confirmation and setting aside sales.*[14]—A creditor or the receiver as well as a purchaser may move for confirmation.[15] The better practice is to serve notice that at a time and place certain, decree nisi will be asked.[16] Proof of service should be made with the motion.[17] If a party die after the sale, the action not the judgment should be revived for confirmation.[18] Objections to defeat confirmation should be made to the report[19] or at the hearing of the motion to set aside[20] and not on appeal. The decree should be supported either by a certificate of evidence or by recitals of facts found.[21]

95. See 2 Curr. L. 601.

96. See Foreclosure of Mortgages, 3 Curr. L. 1447.

97. See Executions, 3 Curr. L. 1404.

98. See Estates of Decedents, 3 Curr. L. 1282.

99. Those sales have many general points of similarity, but being largely governed by statutory rules, the cases cannot with safety be cited to general principles. The topics cited should be compared.

1. Partition suit, sale for costs. Waldron v. Harvey, 54 Ga. 608, 46 S. E. 603.

2, 3. See 2 Curr. L. 601.

4. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243.

5. See 2 Curr. L. 601.

6. There was no showing of an inadequate price. Michigan Mut. Life Ins. Co. v. Klatt [Neb.] 98 N. W. 436.

7. See 2 Curr. L. 602.

8. Rushton v. Woodham [S. C.] 46 S. E. 943.

9. McClellan v. Kerby [Ind. T.] 76 S. W. 295.

10. Agreement by two creditors during sale to abstain from further bidding was invalid. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012.

11. Fairey v. Kennedy [S. C.] 47 S. E. 138.

12. Michigan Mut. Life Ins. Co. v. Klatt [Neb.] 98 N. W. 436. Citing several precedents.

13. In New York a referee appointed to sell real estate is not entitled to 50 cents for receiving judgment (Code Civ. Proc. § 3307, subd. 6, 11); and to $10 only as commission where the price does not pass through his hands (section 3297). Kant v. Bergman, 97 App. Div. 118, 89 N. Y. S. 593.

14. See 2 Curr. L. 602.

15. Coltrane v. Baltimore Bldg. & L. Ass'n, 126 F. 839.

16, 17. Taking decree nisi which is then served is a less favored method. Coltrane v. Baltimore Bldg. & L. Ass'n, 126 F. 839, following Williamson v. Berry, 8 How. 546, 12 Law. Ed. 1170.

18. Judgment had been executed. Applying Code, § 507, not section 407, subsec. 3. Montz v. Schwabacher [Ky.] 83 S. W. 569.

19, 20. Error in amount. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

21. Day v. Davis [Ill.] 72 N. E. 682.

To set aside a sale is discretionary,[22] and a bond may be exacted as a condition of so doing.[23] A mere offer of an increased price does not suffice in Maryland or the District of Columbia.[24] It may be done where a sale was unnecessarily en masse, and where there was a gross inadequacy of price.[25] Inadequacy must be so great that to confirm the sale would be great injustice.[26] The rights of lienors must be considered where the sale is one free of their liens which attach instead to the purchase money.[27]

Application should be prompt.[28] The champertous nature of applicant's employment of his attorney is no defense,[29] nor are remaindermen whose land was sold on proceedings against the particular tenant concluded.[30]

There must be a showing of facts to assail a sale en masse[31] or to contradict a report showing due advertisement[32] or to impeach an appraisal.[33] Applicants for a resale on the ground of inadequacy should show the probability of an increased price.[34]

The motion should be based on facts and not mere conclusions of law.[35] A cross bill against such proceedings to remove a cloud on title created by applicants may be stayed until after decree on the original bill.[36]

The annulment of a sale is conclusive on the parties and their privies.[37]

If a sale is reversed or set aside, there should ordinarily be restitution,[38] but no reconveyance is necessary.[39] There should be an accounting of mesne profits.[40] The buyer is entitled to refund of the price paid with interest and the enhancement of value due to permanent improvements made in good faith,[41] and should be charged the fair rental value.[42] Failure to supersede judgment pending appeal from order of confirmation does not show bad faith.[43] He is not chargeable with costs of the main action paid out of the purchase money.[44]

Costs may be adjusted as in other equitable cases.[45]

Proceedings on resale need not be on notice to a purchaser at first sale who has appeared to contest enforcement of the first sale and to except to the second.[46]

22. Sustained where $2,250 and deposit was made before confirmation of sale for $1,350. Auerbach v. Wolf, 22 App. D. C. 538.

23. Bond was required and made to cover possibility of increased expense ensuing from appeal by bidder. Porch v. Agnew Co. [N. J. Eq.] 57 A. 726.

24. Auerbach v. Wolf, 22 App. D. C. 538.

25. One-tenth value on a cost-bill. Henderson v. Kibbe, 211 Ill. 556, 71 N. E. 1091.

26. Sale for $33,000 of property worth $60,000 to $100,000 disapproved. Porch v. Agnew Co. [N. J. Eq.] 57 A. 726. Not for mere inadequacy. Costigan v. Truesdell [Ky.] 83 S. W. 98.

27. Sale under Corporation Act, § 81. Porch v. Agnew Co. [N. J. Eq.] 57 A. 726.

28. Five years delay held not laches, there being irregular procedure, unchanged possession and applicant, a remainderman, being ignorant. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

29, 30. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

31. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

32. Direction for advertisement by decree and commissioner's return that it was advertised suffices against mere denial. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

33. Appraisement will not be overthrown by mere affidavits of greater value which do not show affiant's knowledge of values. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

34. Porch v. Agnew Co. [N. J. Eq.] 57 A. 726.

35. That sale is "erroneous and contrary to law" is a conclusion. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196. That it "was not advertised according to law" is a conclusion. Id.

36. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

37. Insurer cannot dispute insured's title so decided. International Wood Co. v. National Assur. Co. [Me.] 59 A. 544.

38, 39. Executor compelled erroneously to sell under power. Code Civ. Proc. § 1323. Holly v. Gibbons, 177 N. Y. 401, 69 N. E. 731. That new trial was granted is immaterial. Id.

40. Holly v. Gibbons, 177 N. Y. 401, 69 N. E. 731.

41. Interest only on what was paid. Hall v. Dineen [Ky.] 83 S. W. 120.

42. It is determined by interest on consideration and the value of improvements. Hall v. Dineen [Ky.] 83 S. W. 120.

43, 44. Hall v. Dineen [Ky.] 83 S. W. 120.

45. Divided where applicant resisted reasonable conditions and respondent denied his right on any conditions; and if complainants failed to comply they to pay all costs. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

Service of a rule to complete the first purchase[47] and the taking of appeal from the second confirmation[48] also bring him in court for all purposes of sale. A second appraisement on a resale for purchaser's default is not required.[49] It may be proper for the purchaser at a former invalid sale to buy and be credited according to his equity.[50] A refusal to permit a defaulting purchaser to bid at resale is harmless to him unless he intended to bid and was prevented.[51] A defaulting first purchaser cannot redeem from a second sale[52] and has no interest to entitle him to resist confirmation of a resale because of inadequacy of the bid.[53] A motion by a defaulting purchaser to set aside a resale must show an equity in his favor for such relief and diligence in asserting it.[54]

§ 7. *Completion of sale; deeds.*[55]—In judicial sales, execution and delivery of instruments of conveyance, especially if so ordered, is essential to transmutation of title.[56] If it be not done the sale is void;[57] but the failure to convey formally is harmless where title of all parties was adjudicated in a later suit to which objector was party.[58] The deed should identify and not merely include in its description the land sold.[59] A probate court with incidental equitable powers may order a guardian to execute a deed where a former one was defective.[60]

A first bidder makes no contract with the court[61] on which he can be held for the difference where his bid was ignored and another confirmed.[62] He need not take an unmerchantable title.[63] The burden is on him seeking to be relieved, to prove nonmerchantability.[64] He can be compelled to take a deed as of the day of sale and not later.[65] An order to take title on a certain day means to complete sale on that day.[66]

§ 8. *Title and rights under sales and under deed. A. Defects and collateral attack.*[67]—A matter merged in judgment[68] or an irregularity will not affect the validity of a judicial sale,[69] and the presumption favors regularity.[70] A prescriptive statute against formal irregularities does not cover those which are also substantial.[71] A sale under a void decree is void,[72] and the purchaser's payment of taxes inures to the owner;[73] but it may be color of title.[74]

46, 47, 48, 49. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

50. He was credited with the amount remaining of his former purchase money, deducting what he had realized from a resale of part. Smitton v. Seibert [Mich.] 99 N. W. 381.

51, 52, 53. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

54. Motion held insufficient to show agreement for more time. Wigginton v. Nehan, 25 Ky. L. R. 617, 76 S. W. 196.

55. See 2 Curr. L. 602.

56, 57. International Wood Co. v. National Assur. Co. [Me.] 59 A. 544.

58. Connor v. Home & Savings Fund Co. Bldg. Ass'n [Ky.] 80 S. W. 797.

59. Edrington v. Hermann [Tex. Civ. App.] 74 S. W. 936. Presumptions not indulged to aid description. Id.

60. Mock v. Chalstrom, 121 Iowa, 411, 96 N. W. 909.

61. See 2 Curr. L. 602, n. 88.

62. Cowper v. Weaver's Adm'r [Ky.] 84 S. W. 323.

63. Not proper to compel acceptance of title suggestive of serious litigation. Getman v. Harrison, 112 La. 435, 36 So. 486. What is such is for the court on the facts. Id. Discrepancy of few inches on city lot unquestioned for 40 years is not such. Id.

64. Dana v. Jones, 91 App. Div. 496, 86 N. Y. S. 1000.

65. Parish v. Parish, 87 App. Div. 430, 84 N. Y. S. 506.

66. Not that title should date thence. Parish v. Parish, 87 App. Div. 430, 84 N. Y. S. 506.

67. See 2 Curr. L. 603.

68. Sale cannot be attacked for vice in the obligation which was satisfied by sale. Relender v. Riggs [Colo. App.] 79 P. 328.

69. Mistake in the title and number of the case in an advertisement of property to be sold at judicial sale. Brickell v. Miles, 2 Ohio N. P. (N. S.) 153.

70. Return of publication in "Workers' Gazette" and publishers' affidavit calling it "Tri-City Workers' Gazette" shows no defect. Michigan Mut. L. Ins. Co. v. Klatt [Neb.] 98 N. W. 436. It will not be presumed on a record bearing no such evidence that an action was on a note secured by mortgage or that the decree was one of foreclosure merely to aid a sheriff's deed which lacks a good description. Edrington v. Hermann [Tex. Civ. App.] 74 S. W. 936.

71. Sale at first offering for less than one-tenth of appraised value is substantial and not formal irregularity. $4,500 appraised value sold for $200. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800.

72. Selling married woman's land for

(§ 8) *B. As against outstanding claims.*[75]—The rule of caveat emptor applies to all judicial sales,[76] but a greater estate than defendant has and than is in court cannot be sold.[77] No right can antedate the attaching of the lien.[78] When a sale is made in bankruptcy free of liens, statutory liens for taxes are cut off,[79] and as to those the lien whereof accrued subsequently, the proceeds are not liable.[80]

(§ 8) *C. Rights under sale and in proceeds.*[81]—A formal purchase may be enforced as a mortgage to the purchaser if it be such in fact[82] or as a trust.[83] If the buyer became such under a fair agreement to reconvey and at a price below value, he may be compelled to perform.[84]

In Kentucky, redemption may be made if the price is less than two-thirds the appraisal.[85] When the terms of redemption are in the statute, they must be fully met.[86]

Liability for proceeds.—The bond required of special commissioners in some cases must be construed if possible so as to serve the objects of the statute.[87]

JURISDICTION.

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§ 1. *Definitions and distinctions.*[88]—Jurisdiction is the power and authority constitutionally conferred upon a court or judge to pronounce the sentence of the

debts either not a charge on separate estate or not made after her disability was removed. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603. It is a cloud on title. Id. The purchaser's transferee is bound to take notice and cannot be a bona fide purchaser. Id. Judgment entered by attorneys who were the only representatives of infants, and purchase by the attorneys. Phillips v. Phillips' Adm'r [Ky.] 80 S. W. 826.

73. Saves tax sale and forfeiture. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603.

74. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603.

75. See 2 Curr. L. 603.

76. Walkau v. Manitowoc Seating Co., 105 Ill. App. 130. See Weir v. Cordz-Fisher Lumber Co. [Mo.] 85 S. W. 341. Purchaser under foreclosure proceedings did not get good title because of defects in publication of notice of sale and a mortgage on the property. Brickell v. Miles, 2 Ohio N. P. (N. S.) 153.

77. Sale of fee when there was but an easement and fee was not in court. Wood v. Grayson, 22 App. D. C. 432. Compare Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

78. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243.

79, 80. In re Prince & Walter, 131 F. 546.

81. See 2 Curr. L. 603.

82. Liskey v. Snyder [W. Va.] 49 S. E. 515. See also Mortgages, 2 Curr. L. 905.

83. An attorney who buys in is presumed to do so for his client despite the absence of implied authority to do so. Phillips v. Phillips' Adm'r [Ky.] 80 S. W. 826.

84. Fairey v. Kennedy [S. C.] 47 S. E. 138. See, also, Trusts, 2 Curr. L. 1924; Specific Performance, 2 Curr. L. 1678.

85. Combs v. Combs [Ky.] 82 S. W. 298.

86. Laws 1893, c. 109, p. 188, provides mode. Stewart v. Trustees of Park College, 68 Kan. 465, 75 P. 491. Must be within year. Costigan v. Truesdell [Ky.] 83 S. W. 98.

87. Where sale was partly on credit, it covers moneys collected on deferred as well as cash payments. State v. Wotring [W. Va.] 49 S. E. 365. The words—"All moneys which shall come to his hands," "collect and disburse the proceeds,"—construed. Id.

88. See 2 Curr. L. 604.

law or to award the remedies provided by law on a state of facts proven or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal in favor of or against persons who present themselves or who are brought before the court in some manner sanctioned by law as proper and sufficient.[89] This title deals with the powers of courts to entertain causes of particular kinds brought before them in particular manners on particular grounds, but does not include a discussion of their powers to grant particular kinds of relief or the relief peculiar to certain courts.[90]

Courts of common-law jurisdiction within the meaning of the naturalization act are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or courts which are governed by the principles, rules and usages of the common law in the determination of some of the causes of which they have jurisdiction, the term being used to distinguish courts which have some common-law jurisdiction from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law.[91]

§ 2. *Elements and constituents in general.*[92]—Jurisdiction does not depend upon the character of the decision or judgment, for when suit is brought in a court of competent jurisdiction by a competent party by legal process, jurisdiction exists and no subsequent error of law will affect it.[93]

The want of necessary parties does not deprive the court of jurisdiction,[94] and where a court has jurisdiction of the subject-matter, the form of application to invoke the same is not material.[95]

Primarily, every court has the power, and it is its duty, to decide as to its

89. Ingram v. Fuson [Ky.] 82 S. W. 606. "Jurisdiction" as used in the law is the right to hear and determine a matter and carries with it the idea of exercising judicial or quasi judicial functions. Stein v. Morrison [Idaho] 75 P. 246. Jurisdiction, unqualified, is the sovereign authority to make, decide on, and execute laws; in its popular sense it is authority to apply the law to the acts of men. Wedding v. Meyler, 192 U. S. 573, 48 Law. Ed. 570. Jurisdiction over the subject-matter of an action means the power to determine legal controversies of the same class or sort. Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64. Within the broad meaning of the term a court is without jurisdiction of the subject-matter, either where it is without judicial power as to such subject-matter, or where, having such power, it ought not to be exercised, by settled principles at all or in the given case. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

90. See Admiralty, 1 Curr. L. 22; Bankruptcy, 1 Curr. L. 311; Equity, 1 Curr. L. 1048; Indictment and Prosecution, 2 Curr. L. 307.

91. It is sufficient that the court has some common law jurisdiction. The St. Louis court of appeals is such a court [Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329)]. Levin v. U. S. [C. C. A.] 128 F. 826.

92. See 2 Curr. L. 604.

93. See 2 Curr. L. 604, n. 14. Where the court has jurisdiction of the parties and the subject-matter, and legal authority to make the order, the party cannot refuse to obey it, however improvidently made. Swedish-American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768. Where the court has jurisdiction over the subject-matter and the parties, its judgment is not absolutely void, though error is committed in holding the petition on which judgment is based sufficient on demurrer. Logan County v. Carnahan, 66 Neb. 685, 95 N. W. 812. Where the court has jurisdiction over the subject-matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure to state a cause of action or the defective statement of a good cause of action in no way affects the jurisdiction of the court. Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020. Whenever there is such a violation of established practice or principles in regard to the exercise of judicial authority as to seriously interfere with the efficiency of judicial instrumentalities to administer justice, the error is jurisdictional. Harrigan v. Gilchrist [Wis.] 99. N. W. 909. The trial of a case against a minor whose guardian has not filed a general denial as required by statute is not a jurisdictional defect. Swartwood v. Sage, 68 Kan. 817, 75 P. 508. Irregularity in transferring a case from one division to another of the same court cannot be fatal to the jurisdiction. Stripling v. Maguire [Mo. App.] 84 S. W. 164.

94. The decree binding the parties to it until set aside in a direct proceeding. Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686.

95. Application to county court in form of bill in equity to enforce contract made by deceased. Wheeler v. Wheeler, 105 Ill. App. 48.

own jurisdiction, including the existence of facts which must exist as a foundation for its jurisdiction,[96] and where a tribunal is clothed with jurisdiction of the class of cases to which the controversy belongs, and its right to adjudicate the controversy depends on certain facts which it must ascertain, and it makes an express finding on them, the parties are precluded from reopening it afterward except on appeal or writ of error.[97] Not because jurisdiction of the subject-matter can be waived or conferred by consent or estoppel, as it cannot,[98] but because it is conferred by law,[99] and the facts on which it may be exercised have been found to exist in the particular controversy.[1] If the decision that they exist is erroneous, the remedy is the same as when other erroneous decisions occur, review by an appellate court to which the cause may be carried and the decision reversed.[2]

Process and service, personal,[3] by publication,[4] or otherwise, are necessary,[5] though process and service may be waived, whence an appearance in person or by

96. The supreme court of Louisiana has jurisdiction to determine questions of fact affecting its own jurisdiction in any case before it. Dannenmann v. Charlton [La.] 36 So. 965. An appellate court may determine matters affecting its jurisdiction which arise pending appeal and are set up by supplemental petition. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986. Where the finding of jurisdictional facts is based on a conflict of testimony, the lower court will be sustained because it weighs testimony and the appellate courts do not (Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64), but if the fact was found against all the testimony, the error in exercising jurisdiction can be corrected by a reversal of the judgment (Id.).

97. If the defect of jurisdiction of a court springs from inexcusable departure from established principles governing the exercise of judicial power, its judgment is erroneous and may and ought to be set aside on appeal. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

98. Jurisdiction of the subject-matter can never be conferred by consent. Board of Com'rs v. Denver Union Water Co. [Colo.] 76 P. 1060; Illinois Cent. R. Co. v. Jones' Adm'r [Ky.] 80 S. W. 484; Midler v. Lese, 91 N. Y. S. 148; Board of Chosen Freeholders v. Central R. Co. [N. J. Eq.] 59 A. 303; Hobbs v. German-American Doctors [Okl.] 78 P. 356; Harrigan v. Gilchrist [Wis.] 99 N. W. 909. That the parties to a divorce decree assented to the judgment transferring the husband's real estate to his wife as alimony cannot validate it, the court having no jurisdiction to make such a decree. Cizek v. Cizek [Neb.] 99 N. W. 28. Where an affidavit for appeal is insufficient to confer jurisdiction, appellee cannot waive it nor confer it by estoppel. Arkansas & O. R. Co. v. Powell, 104 Mo. App. 362, 80 S. W. 336. Jurisdiction cannot be conferred by estoppel. Aldrich v. Steen [Neb.] 100 N. W. 311; Arkansas & O. R. Co. v. Powell, 104 Mo. App. 362, 80 S. W. 336.

99. Jurisdiction of the subject-matter of a bankruptcy proceeding is conferred by law. In re Brett, 130 F. 981.

1. Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64; Young v. Hiner [Ark.] 79 S. W. 1062.

2. State v. Evans [Mo.] 83 S. W. 447. The evidence being preserved in the record in a way that enables the appellate court to pass on it. Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64.

3. Personal service within the state is necessary to a decree in personam (Hildreth v. Thibodeau [Mass.] 71 N. E. 111; Korman v. Grand Lodge of U. S., 44 Misc. 564, 90 N. Y. S. 120; Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603); but no notice other than the construction service prescribed by law is necessary to a judgment in rem where the res is within the jurisdiction (Korman v. Grand Lodge, 44 Misc. 564, 90 N. Y. S. 120). Jurisdiction of the person in a proceeding in involuntary bankruptcy is acquired by the filing of a petition and due service of a copy of the petition and of a subpoena. In re Brett, 130 F. 981. Service of justices' summons without copy of complaint gives no jurisdiction of defendant. State v. Harrington [Mont.] 78 P. 484. On a motion for a money judgment, notice of the motion must be served and return filed in the clerk's office before the proceeding can be considered instituted. Furst Bros. v. Banks, 101 Va. 208, 43 S. E. 360. Where the wrong corporation is sued and served, the proceedings cannot be amended by substituting another of similar name. Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155. And see Process, 2 Curr. L. 1259.

4. Publication based on affidavit showing no diligence in attempting personal service confers no jurisdiction over person of defendant. Simensen v. Simensen [N. D.] 100 N. W. 708. Publication or service on defendant outside the state where no affidavit has been filed is void. Osborne v. Schlichenmeier, 68 Kan. 421, 75 P. 474. Publication of tax sale held sufficient. Graves v. Thompson, 35 Wash. 282, 77 P. 384. Service by publication is authorized where defendant resides out of the state [Code Civ. Proc. § 412]. Parsons v. Weis, 144 Cal. 410, 77 P. 1007. Service by publication gives no jurisdiction to render a judgment in personam. Goodwin v. Claytor [N. C.] 49 S. E. 173.

5. Personal service or attachment of property is necessary in admiralty. Walker v. Hughes, 132 F. 885. If an officer serving a garnishee summons makes an error in computing the mileage fees tendered, and the amount is not refused for that reason, the

attorney for any purpose other than to object to the jurisdiction of the person waives the point and confers jurisdiction over the person of defendant.[6] Issuance and service of process cannot be waived before commencement of proceedings,[7] but acceptance of service of a petition before it was filed will not invalidate the judgment founded thereon.[8] Pleading to the merits does not waive the objection that the court has no jurisdiction over the subject-matter.[9]

Jurisdiction cannot be acquired over plaintiff by a cross action if he is not served with process and does not appear,[10] but where he appears by counsel at the trial, citation to him is unnecessary.[11]

In several states the supreme court is required to give opinions on questions of public law at the request of the governor, legislature and other state officers, but the court in Massachusetts answers such questions only to the extent the opinion is desired as an aid in the performance of judicial duties in regard to a matter then pending.[12]

An appellate court has not only power to determine its own jurisdiction but may also inquire into the jurisdiction of the court from which the appeal is taken,[13]

jurisdiction of the court is not thereby ousted. McAnaney v. Quigley, 105 Ill. App. 611. Minor beneficiaries under a will cannot be divested of title without service on their guardian, or the appointment of a guardian ad litem. Ball v. Clothier, 34 Wash. 299, 75 P. 1099.

6. Butman v. Butman [Ill.] 72 N. E. 821; Hobbs v. German-American Doctors [Okl.] 78 P. 356; Ray v. Trice [Fla.] 37 So. 582; Harrison v. Murphy [Mo. App.] 80 S. W. 724; Hibernia Sav. & Loan Soc. v. Cochran, 141 Cal. 653, 75 P. 315; Haseltine v. Messmore [Mo.] 82 S. W. 115; Young v. Hiner [Ark.] 79 S. W. 1062; Rodney v. Gibbs [Mo.] 82 S. W. 187. Application for permission to file answer accompanying motion to vacate default for want of jurisdiction of person amounts to a general appearance. Simensen v. Simensen [N. D.] 100 N. W. 708. A plea of misnomer not challenging the jurisdiction is a general appearance. Richardson & B. Co. v. Utah Stove & Hardware Co. [Utah] 77 P. 1. An appearance for the purpose of objecting to the jurisdiction of the subject-matter in any form waives all objections to jurisdiction of the person, whether so intended or not (Perrine v. Knights Templar & Masons' Life Indemnity Co. [Neb.] 101 N. W. 1017, afg. 98 N. W. 841); but an appearance solely for the purpose of objecting to the jurisdiction of the person waives nothing (Osborne v. Schlichenmeier, 68 Kan. 421, 75 P. 474; Logan County v. Carnahan, 66 Neb. 685, 95 N. W. 812). An appearance in the supreme court for any purpose other than to object to jurisdiction of the person waives that question as relating either to the supreme court or the court below. Ray v. Trice [Fla.] 37 So. 582. Bond and petition for removal to Federal court are not an appearance or waiver of objection to jurisdiction. Louden Mach. Co. v. American Malleable Iron Co., 127 F. 1008. Defendant waives the objection that the court has no jurisdiction of his person where he appears to make the objection, but after failing to get a ruling thereon answers and goes to trial. Garrett v. Herring Furniture Co. [S. C.] 48 S. E. 254. Defendant does not waive his rights under plea in abatement where after it is overruled he answers, setting up the special matter and also matter in bar. Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155. The inclusion of a plea to the merits with a plea to the jurisdiction waives the latter where no ruling on the latter is requested or obtained. Harrison v. Murphy [Mo. App.] 80 S. W. 724. Where timely objection is made before the justice to jurisdiction of the person and overruled, neither the filing of a motion for security for costs nor an appeal to the circuit court is a waiver of the objection. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479. The execution of a forthcoming bond in attachment proceedings does not amount to a general appearance. Hilton v. Consumers' Can Co. [Va.] 48 S. E. 899. State statutes prohibiting special appearance held not binding on Federal court to which the case is removed. Louden Mach. Co. v. American Malleable Iron Co., 127 F. 1008. Intervenors cannot object to the jurisdiction of their persons. State v. Nennan, 35 Wash. 52, 76 P. 516. In Montana a special appearance to object to jurisdiction of the person does not extend the statutory time within which a general appearance must be entered to avoid default. Mantle v. Casey [Mont.] 78 P. 591. Technical defects in a summons are immaterial after a party has submitted to the jurisdiction of the court. Stryker v. Pendergast, 105 Ill. App. 413. And see Appearance, 3 Curr. L. 300.

7. See 2 Curr. L. 605, n. 24.

8. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

9. Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156.

10. In a cross action jurisdiction over plaintiff in the original action is not acquired unless he is served with a citation or appears. Boyce v. Concho Cattle Co. [Tex. Civ. App.] 70 S. W. 356; Field v. O'Connor [Tex. Civ. App.] 80 S. W. 872.

11. Smithers v. Smith [Tex. Civ. App.] 80 S. W. 646.

12. In re Bounties to Veterans [Mass.] 72 N. E. 95.

13. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558.

because if the court in which a case originates has no jurisdiction of the subject-matter, none can be obtained by appeal;[14] but where the court of first instance has jurisdiction of the general subject-matter, and a proper proceeding is had to invoke it, no subsequent error of law can be jurisdictional nor affect the right of a court to which an appeal de novo lies to decide the case according to the right of the matter.[15]

§ 3. *Legislative power respecting jurisdiction.*[16]—Legislatures can neither limit nor enlarge the jurisdiction of constitutional courts unless expressly authorized by the constitution to which both owe their existence,[17] and state legislation can neither directly enlarge nor contract the jurisdiction of the Federal courts;[18] but congress may lawfully empower courts of the states to admit qualified aliens to citizenship, and the courts of the states may exercise such powers without legislative authority or permission from the state which created them.[19] A state constitution directing the election of justices of the peace, repeals statutes that vest other persons with similar judicial powers.[20]

§ 4. *Territorial limitations.*[21]—The orders of a court have no extraterritorial force or effect,[22] and a justice of the peace in Kansas outside a city in which a city court has been established has no jurisdiction over a corporation having its general office in the city.[23] But in Ohio, jurisdiction may be conferred on the mayor of one village to try offenses committed in another.[24]

The states lying north of, and bounded by, the Ohio river have concurrent jurisdiction with Kentucky to serve process beyond low-water mark.[25]

A change of county lines by the state legislature after the establishment of Federal districts according to them cannot change the Federal district.[26]

§ 5. *Limitations resting in situs of subject-matter or status of litigants.*[27]—

14. Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594; Hesser v. Johnson, 13 Okl. 747, 76 P. 181; Times Pub. Co. v. Hill [Tex. Civ. App.] 81 S. W. 806; Board of Com'rs v. Denver Union Water Co. [Colo.] 76 P. 1060; Parker Grain Co. v. Chicago, etc., R. Co. [Kan.] 78 P. 406. See 2 Curr. L. 605, n. 38.

15. Bennett v. Hall [Mo.] 83 S. W. 439.

16. See 2 Curr. L. 605.

17. Supreme Court of U. S. Stevenson v. Fain, 195 U. S. 165, 49 Law. Ed. ——. The legislature in New York has no power to add to the jurisdiction of surrogates. In re Bunting's Estate, 90 N. Y. S. 786. Jurisdiction may be conferred upon the probate court in Kansas to commit vagrant girls to the State Industrial School. In re Gassaway [Kan.] 79 P. 113. A statute allowing a justice's judgment to be filed in circuit court does not contravene the constitutional provision limiting the jurisdiction of the circuit court to cases involving over $50. Joseph Speidel Grocery Co. v. Warder [W. Va.] 49 S. E. 534. In Louisiana the legislature can restrict the jurisdiction of the district court on appeal in criminal cases, but cannot enlarge it. State v. Judge of First District Court [La.] 37 So. 546. Under the constitution of Kentucky the legislature has no power to confer upon a police court authority to try and determine offenses arising outside the corporate limits of the town or city in which it is established. Ingram v. Fuson [Ky.] 82 S. W. 606. A corporation court act is not unconstitutional because it gives such courts some of the jurisdiction of justices of the peace. Ex parte Freedman [Tex. Cr. App.] 83 S. W. 1125.

18. Greenwich Ins. Co. v. Carroll, 125 F. 121; Land Title & Trust Co. v. Asphalt Co., 127 F. 1.

19. Levin v. U. S. [C. C. A.] 128 F. 826. The constitution does not prohibit the Congress from vesting judicial power in other cases than those expressly confided in the Federal courts, in courts or magistrates of the states, or in executive officers, where the exercise of such power by them is a necessary or appropriate means by which to use the powers granted by the constitution to the legislative department or to the executive department of the government. Levin v. U. S. [C. C. A.] 128 F. 826.

20. Constitution of 1870, art. 6, § 21, repeals section of city charter giving the president of the city council exclusive jurisdiction in cases of violation of city ordinances and concurrent jurisdiction with justices in other cases. City of Windsor v. Cleveland, etc., R. Co., 105 Ill. App. 46.

21. See 2 Curr. L. 614, § 6.

22. Ingram v. Fuson [Ky.] 82 S. W. 506; Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816. District court cannot issue habeas corpus to one outside the district. In re Jewett [Kan.] 77 P. 567.

23. Parker Grain Co. v. Chicago, etc., R. Co. [Kan.] 78 P. 405.

24. Carey v. State, 70 Ohio St. 121, 70 N. E. 955.

25. Wedding v. Meyler, 192 U. S. 573, 48 Law. Ed. 570.

26. Hyde v. Victoria Land Co., 125 F. 970.

27. See 2 Curr. L. 615, § 7.

Jurisdiction over persons and property by the courts of any state or district is confined to the persons and property within the territorial bounds of the state or district,[28] though jurisdiction over the owner may bring in his personal property having its actual existence elsewhere,[29] and actual presence of personal property may bring in its owner to the extent that the judgment will bind him in so far as the property is concerned.[30] Jurisdiction over one of several co-parties will suffice to confer it on others,[31] but jurisdiction cannot rest solely on the residence of a nominal party,[32] and where the petition states no cause of action against defendants residing within the county, no jurisdiction is acquired by service out of the county, over those who reside out of the county.[33] A British subject can maintain an action for libel against the proprietors of a newspaper in the city of New York,[34] and the county court of Kings county has jurisdiction of an action in a municipal court of the city of New York in the borough of Brooklyn against a nonresident of Kings county, removed by defendant to the county court, where the municipal court had jurisdiction.[35] There is no objection to a stipulation agreeing that trial may be held at another of the two places in the county at which the court is usually held.[36] The court to which a cause was transferred on change of venue has jurisdiction of defendant's person after the term at which judgment was rendered to amend the record to make it speak the truth, notice of the motion having been given.[37]

There is no doubt that courts have jurisdiction of transitory actions between nonresidents arising without their territorial jurisdictions,[38] but such jurisdiction is declined in New York in the absence of special reasons for entertaining it,[39] it not being one of the privileges of a citizen of the United States to bring an action in any state against any person upon whom service can be had, regardless of

28. See 2 Curr. L. 615, n. 65. Jurisdiction cannot be obtained of a partnership, its property beyond the limits of the state, nor the nonresident members thereof, by service on a resident member and attachment of his individual property within the state, the partnership doing no business within the state. People's Nat. Bank v. Hall [Vt.] 56 A. 1012. The situs of a patent for an invention follows the person of its record owner, and no jurisdiction to adjudicate his ownership can be obtained in the absence of personal service within the state on such record owner. Hildreth v. Thibadeau [Mass.] 71 N. E. 111. The city court of New Haven has no jurisdiction of a cause where both parties are nonresidents of the city and no property within the city limits is attached. Slade v. Zeitfuss [Conn.] 59 A. 406. The situs of a debt is ordinarily at the domicile of the debtor. High v. Padrosa, 119 Ga. 648, 46 S. E. 859.

29. See 2 Curr. L. 615, n. 71.

30. See 2 Curr. L. 615, n. 74. A promissory note is "personal property" within the statute authorizing the Federal court to bring in nonresidents by publication in any suit to enforce any legal or equitable lien upon or claim to real or personal property [Act Mch. 3, 1875, c. 137, § 8, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513)]. Manning v. Berdan, 132 F. 382. Shares of stock in a foreign corporation not alleged to be held by any resident of the state are not "personal property within the district." McKane v. Burke, 132 F. 688. The New Jersey orphans' court has no jurisdiction of an assignment for benefit of creditors made in another state, though assets exist in New Jersey and the assignment is recorded there. In re Browning [N. J. Prerog.] 57 A. 869.

31. In Oklahoma an action against two joint obligors is properly brought in any county where one of them may be summoned, and in such case summons may properly be issued to and served upon the other in any county of the territory. First Nat. Bank v. Hesser [Okl.] 77 P. 36.

32. Trustee proceeding to sell lands in another county on trust deed. Meeks v. Roan, 117 Ga. 865, 45 S. E. 252. See 2 Curr. L. 615, n. 72.

33. Haseltine v. Messmore [Mo.] 82 S. W. 115.

34. Crashley v. Press Pub. Co. [N. Y.] 71 N. E. 258.

35. Raynes v. Bloom, 44 Misc. 81, 89 N. Y. S. 732.

36. Ferguson v. Wheeler [Iowa] 101 N. W. 638.

37. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145.

38. Leman v. Baltimore & O. R. Co., 128 F. 191; Lee v. Baird, 139 Ala. 526, 36 So. 720; Miller v. Rickey, 127 F. 573. See 2 Curr. L. 615, n. 75. A foreign corporation doing business in Texas may be sued there for an injury to a nonresident outside the state. St. Louis & S. F. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 340.

39. That plaintiff had been to large expense of suit before question was raised is not sufficient. Collard v. Beach, 93 App. Div. 339, 87 N. Y. S. 884.

residence or of the nature of the cause of action, or where it arose.[40] A common-law action cannot be maintained in a circuit court of the United States for a tort committed in a foreign country where the right of recovery given by the foreign country is so dissimilar to that given by the law of the state in which the action is brought as to be incapable of enforcement in such state.[41] Where an intestate was domiciled in Vermont at the time he was killed in New Hampshire, the cause of action for his alleged wrongful death accrued to him in Vermont, not in New Hampshire.[42]

Jurisdiction is not conferred by service within the state on a nonresident corporation garnishee, all the parties being nonresident and none of them present in the state,[43] nor by attachment of the car of a nonresident railroad corporation doing no business within the state, the car being merely sent into the state laden.[44]

Nonresidence of both parties to a local cause of action is a common statutory ground of jurisdiction.[45] A domestic corporation may be sued in the county of its domicile or in that where the cause of action arose,[46] and foreign corporations can be sued in any county where they do business.[47]

Actions concerning real estate are generally triable where the land lies,[48] but if the suit is purely personal, the action is transitory, though real estate is involved.[49]

Suits in the Federal court must be brought in the district of the residence

40. Collard v. Beach, 93 App. Div. 339, 87 N. Y. S. 884.

41. Slater v. Mexican Nat. R. Co., 194 U. S. 120, 48 Law. Ed. 900.

42. Stockwell v. Boston & M. R. Co., 131 F. 153.

43. Northwestern Life & Sav. Co. v. Gippe [Minn.] 99 N. W. 364. See 2 Curr. L. 616, n. 81-84. Stautes authorizing attachment and garnishment of property and credits of nonresidents must be strictly pursued. Adams v. Osborne [Mich.] 101 N. W. 220.

44. Conners v. Quincy, etc., R. Co. [Minn.] 99 N. W. 365.

45. See 2 Curr. L. 616, n. 85. Where the breach of a contract between a nonresident and a foreign corporation occurred in the state of New York, its courts have jurisdiction irrespective of where the contract was made. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816. In an action brought by a nonresident against a foreign corporation in New York, the question whether the cause of action arose within the state so as to give the court jurisdiction is determined solely by the pleadings. Id.

46. Suit may be brought against a private domestic corporation in any county where a fraud was committed in its behalf by its agent, though it has no local agency in that county. Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793. A domestic corporation may be sued before a justice of the peace either in the county of its principal office or in the county where the cause of action arose if service can be made in that county on an officer or director, whether he resides in that county or not. Joseph Speidel Grocery Co. v. Warder [W. Va.] 49 S. E. 534. A corporation is an inhabitant of the state and district where its principal office is. Wolff & Co. v. Choctaw, O. & G. R. Co., 133 F. 601.

47. A foreign insurance company may be sued in Missouri in any county or township of the state. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479. A foreign corporation having offices in two districts in New York may be sued in either without regard to the relative importance of the two offices. Goldzier v. Central R. Co., 43 Misc. 667, 88 N. Y. S. 214. Where the principal place of business of a foreign corporation is within the state, the court may at the instance of a stockholder appoint a receiver of its assets to preserve them for creditors. Reusens v. Manufacturing & Selling Co., 90 N. Y. S. 1010. Corporation not domiciled nor having office in state may be sued there when it has made several sales there including the one in question. New Haven Pulp & Board Co. v. Downingtown Mfg. Co., 130 F. 605. Service on president of foreign corporation temporarily in state held invalid. Louden Mach. Co. v. American Malleable Iron Co., 127 F. 1008.

48. See 2 Curr. L. 617, n. 95. A court has no jurisdiction of an action for damages caused by trespass on lands outside its jurisdiction. Hill v. Nelson [N. J. Law] 57 A. 411.

49. The courts of the state of the parties' residence have jurisdiction to cancel a note and mortgage made in that state and enjoin foreclosure, though the land covered thereby lies in another state. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494. Where a suit to enjoin a foreclosure sale makes no attack on the validity of the decree, but is merely anciliary to a proceeding to have a lien claimed by plaintiff declared superior to that of plaintiff in the foreclosure suit, it need not be brought in the county in which the foreclosure decree was rendered. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402. The courts of one state have jurisdiction of assumpsit for trees cut from land in another. West v. McClure [Miss.] 37 So. 752.

either of the plaintiff or defendant;[50] but defendant's right to be sued in the district where he resides may be waived.[51]

Courts of equity have power to act in personam upon persons within their jurisdictions by restraining them from doing wrongful or oppressive acts, though the res of the controversy, be it real or personal property, is beyond their jurisdiction.[52]

The residence of one of the parties in the county in which suit is brought is necessary to jurisdiction of divorce proceedings.[53]

The administration of an estate begun in the probate court of the county in which the decedent was resident at the time of his death cannot be removed into the chancery court of another county.[54]

The supreme court of New York will not entertain a summary petition to obtain custody of a minor for the purpose of gain, regardless of his own interests, where the parties are all residents of another state and a decision involves the construction of laws of that state.[55] A suit against a guardian for specific performance of a contract to locate land is properly brought in the county in which he was appointed, though not in the county in which the land lies nor in which the parties reside.[56]

§ 6. *Limitations resting in amount or value in controversy.*[57]—To give the circuit court of the United States jurisdiction of a case on account of the existence of a Federal question or diversity of citizenship, the matter in dispute must exceed $2,000, exclusive of interest and costs.[58] Similar provisions are to be found in the constitutions and statutes of the states defining the jurisdiction of their several courts.[59] The amount is not controlling if other jurisdictional facts or

50. Manning v. Berdan, 132 F. 382. See 2 Curr. L. 617, n. 97.

51. Von Voight v. Michigan Cent. R. Co., 130 F. 398; Baltimore & O. R. Co. v. Doty [C. C. A.] 133 F. 866; Wolff & Co. v. Choctaw, etc., R. Co., 133 F. 601.

52. Miller v. Rickey, 127 F. 573. See 2 Curr. L. 617, n. 3-5. A suit may be brought in one state by a lower riparian proprietor to enjoin the wrongful diversion of waters in another state through which the stream also flows, the suit being transitory in its nature and service being obtained on defendant in the state of the forum. Miller v. Rickey, 127 F. 573. See 2 Curr. L. 617, n. 6.

53. Aldrich v. Steen [Neb.] 100 N. W. 311. See 2 Curr. L. 618, n. 11.

54. Patton v. Monroe, 139 Ala. 482, 36 So. 512. See 2 Curr. L. 618, n. 13-17.

55. Reiss v. Plicque, 42 Misc. 350, 86 N. Y. S. 704.

56. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

57. See 2 Curr. L. 618.

58. Hyde v. Victoria Land Co., 125 F. 970; Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 Law. Ed. 911; Butters v. Carney, 127 F. 622; Eisele v. Oddie, 128 F. 941; Wines v. Cobb Real Estate Co., 128 F. 198; United States v. Hay, 194 U. S. 373, 48 Law. Ed. 1025; Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1; Purnell v. Page, 128 F. 496; Winchester Repeating Arms Co. v. Butler Co., 128 F. 976. See 2 Curr. L. 618, n. 22. The Federal court has jurisdiction of a suit in equity brought by the receiver of a national bank where the amount involved exceeds $500. Rankin v. Herod, 130 F. 390.

59. **Arkansas:** Circuit court $100. Harris-Damon Lumber Co. v. Craddock [Ark.] 80 S. W. 228.

Colorado: The supreme court has no jurisdiction of certain cases unless the judgment is in excess of $2,500. Clear Creek, L. Min. & Mill. Co. v. Comstock G. S. Min. & Mill. Co. [Colo.] 78 P. 682.

Illinois: The supreme court's jurisdiction, where the amount is controlling, is limited to suits involving $1,000 or over. Murphy v. Murphy, 207 Ill. 250, 69 N. E. 966.

Kansas: The supreme court has no jurisdiction in equity cases unless $100 or more is involved or the case is within an excepted class. Chicago, etc., R. Co. v. Haviland Grain & Live Stock Ass'n [Kan.] 78 P. 408.

Kentucky: Court of appeals $200. Montgomery v. Montgomery, 25 Ky. L. R. 1682, 78 S. W. 465; Kefauver v. Kefauver [Ky.] 83 S. W. 119.

Michigan: The chancery court has no jurisdiction of a suit concerning property where the matter in dispute does not exceed one hundred dollars. Suit to foreclose land contract "concerns property." Amount due less than $100. Sands & M. Lumber Co. v. Gay [Mich.] 101 N. W. 53.

Missouri: Justices' courts and circuit courts have concurrent jurisdiction of notes for $50 to $250. If the interest brings the note above $50, the latter courts have jurisdiction. Bay v. Trusdell, 92 Mo. App. 377. The municipal court of **New York** has no jurisdiction of a suit against a nonresident corporation surety on the bond of a marshal, where the amount involved is over $500. Frieland v. Union Surety & Guaranty Co., 43 Misc. 38, 86 N. Y. S. 937.

North Carolina: The superior court has

conditions concur to confer or divest jurisdiction,[60] e. g. judgment on a cross complaint can be rendered for an amount less than the jurisdiction, where demanded in reference to a matter properly within the jurisdiction on another ground,[61] or where the original bill stated a case within the jurisdiction, though it has been voluntarily dismissed.[62] A cross action should be dismissed where it sets up a claim exceeding the jurisdiction of the court,[63] notwithstanding a credit of the amount claimed by plaintiff and admitted by defendant would reduce the claim below the jurisdictional amount;[64] but where the jury allow nothing on the plea in reconvention, the error in assuming jurisdiction of it is harmless.[65] Jurisdiction of ancillary bills is not limited by the amount involved.[66] If equity is involved, a justice of the peace has no jurisdiction, whatever the amount.[67] Where the amount is controlling, the amount plaintiff in good faith claims,[68] irrespective of the amount of recovery, and irrespective of amendments,[69] set-offs and counterclaims, furnishes the test of jurisdiction; but the amount demanded is not controlling if other averments show it to be overstated.[70] Where the jurisdiction depends upon a particular sum, suits in which the damages cannot be calculated in money are not within it.[71]

The value of the right affected, not merely the damage to it, is considered by the Federal courts;[72] but a bill to enjoin a tax of less than the jurisdictional

no jurisdiction in an action on a note for $275 on which the balance due was less than $200. Harvey, Blair & Co. v. Johnson, 133 N. C. 352, 45 S. E. 644. An action against a surety on an attachment bond in the penal sum of $200 is not within the jurisdiction of the superior court. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234.

Ohio: The common pleas court has no jurisdiction over suits for fifty cents. Hobing v. Enquirer Co., 2 Ohio N. P. (N. S.) 205.

Texas: County court, not more than $1,000. Standefer v. Aultman & T. Machinery Co. [Tex. Civ. App.] 78 S. W. 552; Philips v. Sanders [Tex. Civ. App.] 80 S. W. 567. Nor less than $200. Philips v. Sanders [Tex. Civ. App.] 80 S. W. 567.

Washington: The superior court is the court of last resort in civil actions for an amount not exceeding $200. State v. Superior Court, 35 Wash. 200, 77 P. 33.

West Virginia: Circuit courts have jurisdiction only where $50 or more is involved. Joseph Speidel Grocery Co. v. Warder [W. Va.] 49 S E. 534.

60. Where other rights besides the money judgment rendered are involved, the amount of the judgment is not controlling. Illinois Cent. R. Co. v. Ross [Ky.] 83 S. W. 635. The statutory limit as to amount in justices' courts does not apply to forcible detainer actions, nor can a cross demand of any kind be set up therein. Mark v. Schumann Piano Co., 105 Ill. App. 490.

61. Sullivan v. California Realty Co., 142 Cal. 201, 75 P. 767.

62. Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 Law. Ed. 911.

63. Sullivan & Co. v. Owens [Tex. Civ. App.] 78 S. W. 373; Williamson v. Bodan Lumber Co. [Tex. Civ. App.] 82 S. W. 340.

64, 65. Rylie v. Elam [Tex. Civ. App.] 79 S. W. 326.

66. Rochester German Ins. Co. v. Schmidt, 126 F. 998.

67. Fidelity & Deposit Co. v. Jordan, 134 N. C. 236, 46 S. E. 496.

68. In tort actions, the amount in controversy as conferring jurisdiction on courts of first instance is tested solely by the averments of the complaint. Eisele v. Oddie, 128 F. 941. Whether the amount in controversy is within the jurisdiction of the county court is to be determined by the amount put in controversy by the plaintiff. Standefer v. Aultman & T. Machinery Co. [Tex. Civ. App.] 78 S. W. 552. Suit on bond for $100 with no averment that damage was in less sum involves over $50. Wall v. Mount [Ga.] 49 S. E. 778.

69. A sham amendment increasing the amount claimed by plaintiff will not give the court of appeals jurisdiction. Smith v. Chesapeake & O. R. Co. [Ky.] 82 S. W. 410. Where plaintiff waives part of his demand and the residue is less than the jurisdictional amount of the appellate court, no appeal lies. Edward Thompson Co. v. Fenley, 25 Ky. L. R. 1577, 78 S. W. 416.

70. Wines v. Cobb Real Estate Co., 128 F. 198. See 2 Curr. L. 619, n. 29.

71. The "matter in dispute" as respects a money demand has relation to justiciable demands, and where the right claimed is manifestly purely conjectural and not susceptible of a pecuniary estimate, it has not the value essential to jurisdiction. United States v. Hay, 194 U. S. 373, 48 Law. Ed. 1025.

72. Where a railroad company sues to enjoin interference with its right of way by the several landowners through whose lands it runs, the amount in controversy is the value of the right to be protected and not the value of the land involved. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1. In ejectment, the amount in controversy to sustain Federal jurisdiction is not the value of defendant's claim, but the value of the whole property described in plaintiff's complaint. Butters v. Carney, 127 F. 622.

amount will not lie, though it is a lien on property much greater in value than the amount necessary to give the court jurisdiction.[73] Cases involving the question whether the value of the property or fund involved or the claims asserted thereto control are discussed below.[74]

Interest, when demanded, is reckoned as a part of the amount involved in New York,[75] but in Illinois accumulations of interest since suit was begun are not considered,[76] and generally where the cause was within the jurisdiction of the court at the time it was begun, the fact that by reason of delay the interest and damages have increased the sum recoverable beyond the jurisdictional limit will not oust jurisdiction.[77] If a court has jurisdiction to give a judgment for a certain amount "with legal interest," it may give a judgment for that amount, and any interest due thereon according to the law as it stood when the contract was made.[78]

Whether there is evidence in the case legally sufficient to entitle plaintiff to recover for a certain item is a question of fact for the court, sitting as a jury, to pass on although the amount of the item is below the jurisdiction of the court.[79]

Several distinct demands cannot be joined to make up the amount necessary to give the court jurisdiction,[80] neither can a single demand be split up to confer jurisdiction on an inferior court;[81] but in a suit properly brought against several, the total amount claimed tests jurisdiction, though less than the jurisdictional amount is claimed against each.[82] Taxes claimed by the state cannot be added to those claimed by local municipalities for the purpose of obtaining the necessary jurisdictional amount, the state not being suable.[83] The jurisdictional amount must be alleged to be involved either directly or by necessary inference;[84] but the amount of damages alleged, and not the judgment prayed, determines jurisdiction,[85] and an averment of exemplary damages in a case where they may be recovered will be looked to to make up the jurisdictional amount.[86]

73. Purnell v. Page, 128 F. 496.

74. An action of replevin against one who claims a special lien involves only the amount of the lien (Blank v. Powell, 68 Kan. 556, 75 P. 486); but in an action en declaration de simulation pure and simple, the question of jurisdiction is determined by the value of the property which is the subject of the alleged simulated transfer, and not by the amount claimed by the party attacking such transfer (Cusachs v. Dugue [La.] 36 So. 960). Where a case properly in court is settled for a sum greater than the minimum jurisdiction of the court, the court has jurisdiction of the claim of an intervenor claiming part of the sum, though his claim is less than the jurisdictional amount. Missouri, etc., R. Co. v. Bacon [Tex. Civ. App.] 80 S. W. 572. The amount of commissions of the administrator is the amount involved in an application to revoke letters of administration, not the amount of assets of the estate, or of petitioner's legacy. State v. Guinotte, 180 Mo. 115, 79 S. W. 166. A judgment denying an injunction to abate a dam as a nuisance is not within the jurisdiction of the supreme court, as it is the value of plaintiff's right and not the cost of defendant's dam that determines the amount involved. Scheurich v. Southwest Mo. Light Co. [Mo.] 81 S. W. 1226. Where the suit is to set aside a deed, or if that be denied, to redeem therefrom, the amount in controversy is the value of the land, not the amount required to redeem. Greenfield v. U. S. Mortg. Co., 133 F. 784.

75. Suit in municipal court for $500 and interest. Pierson v. Hughes, 88 N. Y. S. 1059; Hamburger v. Hellman, 90 N. Y. S. 1060; Richardson & B. Co. v. Schiff, 93 App. Div. 368, 87 N. Y. S. 672.

76. Murphy v. Murphy, 207 Ill. 250, 69 N. E. 966.

77. St. Louis S. W. R. Co. v. Dolan [Tex. Civ. App.] 84 S. W. 393.

78. Smith v. Ridley [Tex. Civ. App.] 70 S. W. 235.

79. Leviness v. Kaplan [Md.] 59 A. 127.

80. Louisville & N. R. Co. v. Smith [C. C. A.] 128 F. 1.

81. Hesser v. Johnson, 13 Okl. 747, 76 P. 181.

82. Texas & P. R. Co. v. Smith [Tex. Civ. App.] 79 S. W. 614.

83. Coulter v. Fargo [C. C. A.] 127 F. 912.

84. Claim that trade name is worth $5,000 but not stating extent of injury or that it will be totally destroyed is not enough. Winchester Repeating Arms Co. v. Butler Co., 128 F. 976. See 2 Curr. L. 620, n. 37. A general claim of $1,000 damages confers jurisdiction on the district court, though there is no special averment of the amount of damage for each item. Foster v. Roseberry [Tex.] 81 S. W. 521.

85. Times Pub. Co. v. Hill [Tex. Civ. App.] 81 S. W. 806.

§ 7. *Limitations resting in character of subject-matter or object of action.*[87] —Justices of the peace,[88] county,[89] municipal,[90] and other inferior courts, are generally denied jurisdiction of actions involving title to land, though where the question arises only collaterally, jurisdiction is not ousted.[91] Neither have such courts any equitable jurisdiction.[92] Several cases discussing the jurisdiction of particular courts over certain matters are mentioned in the note.[93] A statute conferring jurisdiction to examine title to lands and decree sale and partition does not empower it to try title between adverse claimants.[94] A bankruptcy court has jurisdiction in the first instance to determine whether an asserted adverse claim to property claimed by the bankrupt's trustee is colorable or actual.[95]

Courts in general have no jurisdiction of questions merely political, and such questions are usually left to the decision of the party or other tribunal appointed for that purpose;[96] but where an act is one expressly enjoined by law upon a public officer, it may be controlled, though the decision of a political question is necessary to the result.[97]

Jurisdiction in matters relating to divorce and alimony is given by the statute, and every power exercised by the court with reference thereto must look for its source in the statute or it does not exist.[98]

86. McCutcheon v. Malin [Tex. Civ. App.] 83 S. W. 849.

87. See 2 Curr. L. 620.

88. Actions of ejectment are not within jurisdiction of justice of the peace. McMahon v. Howe, 40 Misc. 546, 82 N. Y. S. 984. A justice of the peace has no jurisdiction of an action for breach of covenant in a deed consisting of an eviction by paramount title. Holmes v. Seaman [Neb.] 101 N. W. 1030; rvg. 100 N. W. 417.

89. Hollis v. Finks [Tex. Civ. App.] 78 S. W. 555. The county fiscal court in Kentucky has no jurisdiction to try a litigated question whether a turnpike company has abandoned its road. Bardstown & L. Turnpike Co. v. Nelson County, 25 Ky. L. R. 1900, 78 S. W. 851.

90. Action to recover $300 advance payment on a contract to purchase land for failure of conditions is not founded "on a contract for real estate" so as to oust city court's jurisdiction. Fry v. Dunn [Kan.] 78 P. 814.

91. An action to recover money paid for land and to cancel a note and mortgage for part of the price on the ground of fraud inducing the purchase does not involve title. Hollis v. Finks [Tex. Civ. App.] 78 S. W. 555. The title to real estate may be involved in an action of trespass **quare clausum fregit,** but if brought before a justice of the peace, his judgment would not adjudicate the question of ownership of the freehold. It would be a fact in controversy but not in issue. Weidner v. Lund, 105 Ill. App. 454.

92. Surrogate's courts in New York. In re Bunting's Estate, 90 N. Y. S. 786. Municipal court of New York has no jurisdiction to set aside an assignment of money for fraud. Midler v. Lese, 91 N. Y. S. 148. The county court has jurisdiction to cancel an indebtedness evidenced by note secured by a vendor's lien the amount of which is within its jurisdiction. Hollis v. Finks [Tex. Civ. App.] 78 S. W. 555. A city court cannot grant affirmative equitable relief. Pound v. Williams, 119 Ga. 904, 47 S. E. 218.

93. The circuit courts have jurisdiction at law in proceedings for the condemnation of crossings by one railroad company over the real estate and line of another. Grafton & B. R. Co. v. Buckhannon & N. R. Co. [W. Va.] 49 S. E. 532.

Under Rev. Laws, c. 159, § 1, the supreme court of Massachusetts has full equity jurisdiction. Gargano v. Pope, 184 Mass. 571, 69 N. E. 343. A state court of general jurisdiction having original cognizance of cases at law and in equity has jurisdiction of the subject-matter of a suit to cancel a mortgage on real property within its jurisdiction. Ridge v. Manker [C. C. A.] 132 F. 599. The circuit court in Indiana has no jurisdiction of a prosecution for a violation of a town ordinance, the jurisdiction of the town clerk in such cases being exclusive [Burns' Ann. St. 1901, §§ 4346-4346d]. Chicago, etc., R. Co. v. Salem, 162 Ind. 428, 70 N. E. 530. The courts of Oregon have jurisdiction of an action for damages against the owner of a vessel for injury to a bridge between high and low tide. Astoria, etc., R. Co. v. Kern. 44 Or. 538, 76 P. 14. The formation of towns and cities or the change of their boundaries is not a "local concern" of which the county court has original exclusive jurisdiction. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785. The circuit court has jurisdiction to entertain a proceeding under Code, art. 23, § 122, subsec. 7, to wind up an insolvent insurance company. Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125.

94. Graham's Heirs v. Kitchen, 25 Ky. L. R. 2224, 80 S. W. 464.

95. In re Kane, 131 F. 386.

96. State v. Foster [La.] 36 So. 32. A canvass of votes commanded by statute cannot be enjoined. State v. Carlson [Neb.] 101 N. W. 1004. See 2 Curr. L. 622, n. 72.

97. State v. Houser [Wis.] 100 N. W. 964.

98. Cizek v. Cizek [Neb.] 99 N. W. 28; Aldrich v. Steen [Neb.] 100 N. W. 311.

The jurisdiction of the bankruptcy court over assets of bankrupts is necessarily exclusive and supreme, except as to such portions thereof as may have been seized in some suit in a state court more than four months before the adjudication in bankruptcy,[99] though proceedings in bankruptcy do not have the effect to abate a suit in the state court to subject certain property of the bankrupt to a specific lien.[1] The state courts have jurisdiction concurrent with the Federal courts of actions to recover property transferred to a creditor by a bankrupt,[2] and a state court has jurisdiction of an action of trover brought against a trustee in bankruptcy to recover the value of property alleged to have been converted by him as part of the assets of the estate.[3] Statutory rights of action not penal will be enforced in the courts of another state,[4] and in determining whether a statute is penal, the decisions of the state where it exists are not binding.[5]

§ 8. *Limitations resting in character or capacity of parties litigant.*[6]—Generally speaking, executors and trustees can be sued as such only in the courts of the state appointing them;[7] but an executor who carries away the property of the estate may be followed by the beneficiaries and sued to improve the trust on the property in the state to which he carries it.[8] No state court can issue an attachment, injunction or execution against a national bank before final judgment.[9]

§ 9. *Original jurisdiction. A. Exclusive, concurrent and conflicting.*[10]—Concurrent jurisdiction on rivers means the jurisdiction of two powers over one and the same place.[11]

In states which have probate courts, their jurisdiction over administration proceedings and other proceedings committed to them is generally exclusive.[12] The district courts of Oklahoma possess common-law jurisdiction and may proceed according to its rules wherever the statutory directions are silent or inadequate,[13] and the constitutional jurisdiction of the circuit courts of Wisconsin is substantially coextensive with that of the English courts of King's Bench, Common Pleas and Chancery combined.[14]

Cases in which there are two or more courts to which resort may be had for relief are numerous,[15] e. g. between equity and courts of probate,[16] it being a familiar rule that when there exist two tribunals possessing concurrent and complete jurisdiction of the subject-matter, the jurisdiction becomes exclusive in the

99. Bloch v. Bloch, 42 Misc. 278, 86 N. Y. S. 1047.

1. Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121.

2. Bankruptcy act of 1898, § 60b. Stern v. Mayer, 99 App. Div. 427, 91 N. Y. S. 292.

3. In re Spitzer [C. C. A.] 130 F. 879.

4. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

5. Cause of action for death by wrongful act is not penal. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

6. See 2 Curr. L. 621.

7. Falke v. Terry [Colo.] 75 P. 425. Mere residence of the trustee in another jurisdiction will not confer jurisdiction. Schwartz v. Gerhardt, 44 Or. 425, 75 P. 698.

8. Falke v. Terry [Colo.] 75 P. 425; Schwartz v. Gerhardt, 44 Or. 425, 75 P. 698.

9. Rev. St. U. S. § 5242. Meyer v. First Nat. Bank [Idaho] 77 P. 334.

10. See 2 Curr. L. 622.

11. Wedding v. Meyler, 192 U. S. 573, 48 Law. Ed. 570.

12. The court of common pleas has no jurisdiction to fix the costs and expenses of administration of an estate of a decedent, since the probate court has exclusive jurisdiction to settle accounts of executors and administrators. Tidd v. Bloch, 4 Ohio C. C. (N. S.) 216. In West Virginia the county courts and the clerks thereof in vacation have exclusive original jurisdiction in all probate matters involving the probate of wills and the ordinary administrative proceedings involved in the administration of estates. Stone v. Simmons [W. Va.] 48 S. E. 841.

13. Moran v. Territory [Okl.] 78 P. 111.

14. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

15. Jurisdiction of trespass and ejectment against one in possession is concurrent in the district and common pleas when the damages are $300 or less. Holman v. Steadman [R. I.] 58 A. 630.

16. Partition proceedings. McCarty v. Patterson [Mass.] 71 N. E. 112. Chancery has jurisdiction of suit for accounting by a beneficiary against administrator of deceased trustee, notwithstanding P. L. 758, authorizing settlement in orphans' court Evans v. Evans [N. J. Eq.] 57 A. 872.

one before which proceedings are first instituted,[17] and that such court will be permitted to pursue its jurisdiction to the end and will not permit its jurisdiction to be impaired by resort to some other tribunal.[18] The rule, however, does not apply to actions to enforce an independent claim or right, though between the same parties and about the same subject-matter,[19] and after dismissal in one court, resort may be had to another, though the time for appeal has not expired.[20] Scire facias to revive a judgment may be heard in a division of the same court different from the one that rendered the judgment.[21] The statute giving the county court of Kentucky jurisdiction to open private ways by condemnation does not impair the jurisdiction of the circuit court to enjoin obstructions.[22]

It is a settled rule that when both state and Federal courts have jurisdiction of a matter, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted.[23] While the rule is not limited to cases where the property has been actually seized under judicial process before a second suit is instituted in another court,[24] it is limited to actions which deal either actually or potentially with specific property or objects, and does not apply to actions strictly in personam.[25]

17. See 2 Curr. L. 622, n. 75. Probate court first issuing letters has jurisdiction in South Carolina, though petition was first filed in another court. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175. New Jersey court will not take jurisdiction of an assignment for creditors executed in Pennsylvania, though assets exist in New Jersey. In re Browning [N. J. Prerog.] 57 A. 869. The circuit court may not take by writ of replevin goods in the hands of an assignee appointed by the county court. Hillis v. Assay, 105 Ill. App. 667.

18. Receivers cannot be sued in the same or some other court without permission. Ridge v. Manker [C. C. A.] 132 F. 599. Though they may waive privilege. Id. Two courts cannot take jurisdiction of the same person and the same subject-matter at the same time. Applied to "made to order" prosecutions of violators of the liquor laws. Kappes v. State, 5 Ohio C. C. (N. S.) 183.

19. Reems v. Dielmann, 111 La. 96, 35 So. 473. The settlement of accounts of trustees in the orphans' court does not make all their subsequent accountings subject to its exclusive jurisdiction. Evans v. Evans [N. J. Eq.] 57 A. 872. A stay of proceedings in an action will not be granted on the ground that another prior action is pending, even where the prior action is between the same parties and is in reference to the same subject-matter, where it appears that whatever be the result of the prior action, a trial of the second one will be necessary. Jenkins v. Baker, 91 App. Div. 400, 86 N. Y. S. 958.

20. McCarty v. Patterson [Mass.] 71 N. E. 112.

21. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

22. Damron v. Damron [Ky.] 84 S. W. 747.

23. Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801; Louisville Trust Co. v. Knott [C. C. A.] 130 F. 820. See 2 Curr. L. 623, n. 78. Where at the time a bill is filed in the Federal court to compel an accounting by an executor, a suit had been begun in the state court to marshal the assets of deceased, the bill must be dismissed. Thiel Detective Service Co. v. McClure, 130 F. 55. That plaintiff had a right because of diversity of citizenship to maintain suit in the Federal court against a corporation does not entitle him to have its assets distributed by that court where prior proceedings for that purpose are pending in a state court, because it will be presumed that his claim if established in the Federal court will be given due faith and credit by the state court. Louisville Trust Co. v. Knott [C. C. A.] 130 F. 820. After an adjudication of bankruptcy, an action of replevin cannot be maintained in the state court as to property in the trustee's hands, though an adverse claimant may bring suit in the state court to try title to the property. Crosby v. Spear, 98 Me. 542, 57 A. 881.

Where a Federal receiver has undertaken to sequestrate all the assets of an insolvent corporation and has taken all the assets into the custody of its receiver, a New Jersey court will not permit the appointment of a receiver under its insolvent corporation act and allow him to bring a suit to enforce stockholders' liability which the Federal receiver has refused to bring. Gallagher v. Asphalt Co. [N. J. Eq.] 58 A. 403. State court will suspend trial pending trial in Federal court of case involving same issues. City of Ashland v. Wisconsin Cent. R. Co. [Wis.] 98 N. W. 532. Where subsequent to the forfeiture of a corporate charter in a proceeding by the state and before the appointment by a liquidator to administer the assets, a United States court takes possession of the assets through a receiver appointed in the suit of a mortgage debtor, the state has no standing in a state court to secure a decree awarding it possession, especially when the liquidator is not a party, the state having no standing to represent him. State v. New Orleans Water Supply Co. [La.] 36 So. 117.

24. Receiver in state court had not actually seized the property. Louisville Trust Co. v. Knott [C. C. A.] 130 F. 820. See 2 Curr. L. 623.

25. Guaranty Trust Co. v. North Chicago

Neither does it apply to actions brought to enforce an entirely distinct claim or right.[26] A state court and a Federal court sitting in the same state are foreign to each other within the rules governing collateral attack on judgments.[27] The courts of Massachusetts will not entertain a suit against the purchaser of a railroad from receivers appointed by the Federal court for an injury occurring before the sale.[28]

When a court once gets jurisdiction of a case, it retains it and proceeds to pass upon and determine all matters incident thereto,[29] especially if it be a court of equity, as it is well settled that once a court of equity has obtained jurisdiction upon any equitable ground, it will retain it to do complete justice between the parties, though in so doing it will become necessary to establish purely legal rights or grant legal remedies.[30]

A state court cannot enjoin proceedings in a Federal court,[31] and as a general rule no court can set aside, modify, control, or enjoin the decree of another of concurrent jurisdiction, though it may restrain the enforcement of the decree by acting in personam on the parties,[32] and courts of equity may enjoin proceedings at law in proper cases.[33]

(§ 9) *B. Ancillary or assistant.*[34]—Ancillary bills are ordinarily maintained in the same court where the original bill is filed, with a view to protecting the rights adjudicated by the court in reference to the subject-matter of the litigation, and in aid of the jurisdiction of the court, with a purpose of carrying out its decree, and rendering effectual rights to be secured or already adjudicated.[35] Jurisdic-

St. R. Co. [C. C. A.] 130 F. 801; Louisville Trust Co. v. Knott [C. C. A.] 130 F. 820; Crosby v. Spear, 98 Me. 542, 57 A. 881; Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945; Patterson v. Barber Asphalt Pav. Co. [Minn.] 101 N. W. 1064.

26. See 2 Curr. L. 623, n. 80. Suit to enjoin fraudulent lease by street railroad company is not barred by prior proceedings in Federal court by creditors and appointment of receiver. Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801. A receiver will not be appointed by a state court for an insolvent corporation where receivership proceedings are already begun in the Federal court. Gallagher v. Asphalt Co. [N. J. Eq.] 58 A. 403; rvg. 55 A. 259.

27. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175.

28. Tobin v. Central Vermont R. Co., 185 Mass. 337, 70 N. E. 431.

29. Where the Federal court takes jurisdiction because of a Federal question, regardless of citizenship, it will retain jurisdiction over all questions in the case, including those not Federal, regardless of the citizenship of the parties. Greenwich Ins. Co. v. Carroll, 125 F. 121.

30. Racquette Falls Land Co. v. Buyce, 43 Misc. 402, 89 N. Y. S. 359. Where equity has jurisdiction to restrain a grade crossing on the ground that the railroad had evinced an intention to refuse to safeguard it according to law, it will retain the cause to define the mode and manner of crossing. Board of Chosen Freeholders v. Central R. Co. [N. J. Eq.] 59 A. 303.

31. Cannot enjoin contempt proceedings in Federal court in another state, though it has jurisdiction over all the parties in other proceedings in the Federal court. Johnston Min. Co. v. Morse, 44 Misc. 504, 90 N. Y. S. 107.

32. Under Gen. St. 1902, § 537, the superior court in one county may enjoin in an independent action the use of a judgment rendered by the superior court of another county. Allis v. Hall, 76 Conn. 322, 56 A. 637. Courts of equity will relieve a party from an unjust judgment against him by another tribunal, through fraud, or where, for want of service of process, he has had no opportunity to defend. Parsons v. Weis, 144 Cal. 410, 77 P. 1097.

33. The circuit court cannot enjoin the proceedings of the probate court in matters belonging peculiarly to probate jurisdiction. Stone v. Simmons [W. Va.] 48 S. E. 841. The district court in Texas cannot enjoin the prosecution of actions at law in the county court within the jurisdiction of that court. Gulf, etc., R. Co. v. Cleburne Ice & Cold Storage Co. [Tex. Civ. App.] 83 S. W. 1100. In cases of concurrent jurisdiction, proceedings at law will not be enjoined unless equity can give a more perfect remedy or the case can be better tried by the procedure of that court. Grafton & B. R. Co. v. Buckhannon & N. R. Co. [W. Va.] 49 S. E. 532.

34. See 2 Curr. L. 624. Supplementary and ancillary proceedings and relief in Federal courts, see note to Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

35. Raphael v. Trask, 194 U. S. 272, 48 Law. Ed. 973. A supplemental bill may be filed in the Federal court with a view to protecting the prior jurisdiction of that court and to render effectual its decree. Julian v. Central Trust Co., 193 U. S. 93, 48 Law. Ed. 629. Where an action against an insurance company liable if at all only pro rata with several others not removable is removed to the Federal court, a bill to enjoin the actions in the other cases in the

tion of ancillary bills does not depend on diversity of citizenship[36] or the amount involved,[37] but an ancillary bill cannot be maintained against a corporation on the theory that its rights were foreclosed by a decree to which it was not a party and could not have been made a party without ousting the jurisdiction of the original bill.[38] The supreme court of Ohio, though without original jurisdiction to grant injunctions will grant one in aid of its original jurisdiction in quo warranto.[39]

(§ 9) *C. Inferior and limited.*[40]—Statutes conferring jurisdiction upon inferior courts are strictly construed and will not by construction be aided or extended by inference or implication beyond their express terms.[41] Jurisdiction equal to a circuit court carries equal equity powers.[42] Cases applying the statutes are collected in the note.[43] All facts necessary to give such courts jurisdiction must affirmatively appear of record and no presumptions are indulged in their favor.[44] The probate courts,[45] and those county courts which exist in some states between the magistrate's and justice's courts and the courts of general jurisdiction often possess a civil jurisdiction subject to specified limits, usually excluding trial of title to land.[46] Where the probate courts are given superior jurisdiction

state court and to adjudicate the liability of all in the Federal case is ancillary, not original. Rochester German Ins. Co. v. Schmidt, 126 F. 998. A bill to enjoin a pending action at law in the same court is not ancillary thereto where a necessary party defendant to the bill is neither a party to the original action nor a citizen of the state where the bill is filed. Manning v. Berdan, 132 F. 382.

36. Julian v. Central Trust Co., 193 U. S. 93, 48 Law. Ed. 629; Rochester German Ins. Co. v. Schmidt, 126 F. 998; Hampton Roads R. & Elec. Co. v. Newport News & O. P. R. & Elec. Co., 131 F. 534; Leigh v. Kewanee Mfg. Co., 127 F. 990. Suit in equity to enforce attachment lien is ancillary to suit in which attachment was procured. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

37. Rochester German Ins. Co. v. Schmidt, 126 F. 998.

38. Alabama & G. Mfg. Co. v. Riverdale Cotton Mills [C. C. A.] 127 F. 497.

39. State v. Board of Deputy State Sup'rs, 70 Ohio St. 341, 71 N. E. 717.

40. See 2 Curr. L. 625.

41. The municipal court of New York is purely a creature of statute and has no jurisdiction not specially conferred thereby. Leavitt v. Katzoff, 43 Misc. 26, 86 N. Y. S. 495. Likewise the city court. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. S. 103.

42. Cape Girardeau common pleas. Rodney v. Gibbs [Mo.] 82 S. W. 187. Jurisdiction in all civil cases concurrent with a court of equity powers includes partition suits. Romy v. State, 32 Ind. App. 146, 67 N. E. 998.

43. The municipal court of New York has no jurisdiction of an action arising on a chattel mortgage, except to foreclose the lien [action for conversion based on default. Dorfman v. Weiler, 88 N. Y. S. 669] but is not deprived where the mortgage is only collaterally material. Goodman v. Baumann, 43 Misc. 83, 86 N. Y. S. 287. Replevin is not maintainable after condition broken, but on general appearance amendment is allowable changing replevin to action to foreclose. Horowitz v. Decker, 88 N. Y. S. 217. Actions for false imprisonment cannot be maintained. Bellezzire v. Camardella, 95 App. Div. 176, 88 N. Y. S. 807. Has jurisdiction of actions on judgments only when rendered by courts not of record. Weisel v. Old Dominion S. S. Co., 99 App. Div. 568, 91 N. Y. S. 140. City courts in Illinois are inferior courts of record. Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082. The city court of Moultrie has no authority to hear and determine an issue formed by a counter affidavit to a warrant issued against a tenant holding over, the superior courts having exclusive jurisdiction over such matters. Stephenson v. Warren, 119 Ga. 504, 46 S. E. 647. The county judge, and not the quarterly court has jurisdiction of an election contest between candidates for a county office. Johnson v. Brice [Tenn.] 83 S. W. 791. Sections 190, 191, and 192 of act of October 22, 1902, being a nullity, and said act having repealed certain previous acts creating police courts and conferring jurisdiction, the jurisdiction of the police court, of the city of Columbus, after said act, was the same as that of a justice of the peace. Backenstoe v. State, 2 Ohio N. P. (N. S.) 178. An action to sell realty conveyed in trust by a residuary legatee for the protection of his surety has all the essentials of a civil action. Common pleas has jurisdiction. Tidd v. Bloch, 4 Ohio C. C. (N. S.) 216.

44. See post, § 14.

45. If the municipal authorities and the telegraph or telephone companies cannot agree, or the municipality delays for an unreasonable time, the probate court has jurisdiction to direct the mode in which such telegraph or telephone line shall be constructed along the streets. Fitzsimmons Tel. Co. v. Cincinnati, 2 Ohio N. P. (N. S.) 51. In **Oklahoma** the probate court has jurisdiction to try suits against railroad companies whose negligence in not fencing their line caused injury to domestic animals. Choctaw, etc., R. Co. v. Deperade, 12 Okl. 367, 71 P. 629. Probate court has no jurisdiction to issue an order of attachment to be levied on real estate. Goodfellow Shoe Co. v. Griffith, 13 Okl. 51, 74 P. 109.

46. In Nebraska a county judge has the same jurisdiction and powers in taking depositions that are conferred by law on a

over matters within their cognizance, they exercise equitable powers so far as to make their jurisdiction efficient,[47] but they are generally denied the power to adjudicate the title to property though necessary to the exercise of their probate jurisdiction.[48] In other states, the probate courts possess only such powers as are expressly conferred by statute or constitution,[49] among which equity powers are not enumerated.[50]

(§ 9) *D. Original jurisdiction of courts of last resort.*[51]—The supreme court of the United States has original jurisdiction of all controversies between states or between a state and a foreign state.[52] Courts of last resort, and some intermediate appellate courts are invested with jurisdiction to issue the several original writs known to the common law,[53] including habeas corpus,[54] quo warranto,[55] mandamus,[56] certiorari,[57] prohibition,[58] and other remedial writs and to hear and determine the same; but in Nebraska it is within the discretion of the supreme court to issue or refuse the writ of mandamus even when a prima facie right is shown,[59] and the writ will not generally be issued except in aid of the court's jurisdiction otherwise acquired.[60] The supreme court of Ohio is without

notary public, including full authority to commit a witness for refusing to be sworn or give testimony in a proper case. Olmsted v. Edson [Neb.] 98 N. W. 415. In Florida the county judge has jurisdiction to entertain the complaint and inaugurate the proceedings in a bastardy case and refer the same to the circuit court for trial. Edwards v. Edwards [Fla.] 37 So. 569.

47. The probate court is a judicial tribunal. In re Gassaway [Kan.] 79 P. 113. Where the facts are not in dispute, the county court of the county in which the estate of the husband is settled has jurisdiction to assign dower. Only an issue of fact which the court is unable to try will oust it. Tyson v. Tyson [Neb.] 98 N. W. 1076. The county court in Oregon having the jurisdiction pertaining to probate courts has jurisdiction to hear and determine claims against an estate which have been presented to and rejected by the administrator. In re Morgan's Estate [Or.] 78 P. 1029. The rights of parties arising from a postnuptial contract cannot be decided in probate court. McWhorter v. O'Neal [Ga.] 49 S. E. 592.

48. A probate court cannot try title to real estate. Best v. Gralapp [Neb.] 99 N. W. 837. The probate court has no jurisdiction to try title to property as between the personal representative and a stranger. In re Overton's Estate [Ind. T.] 82 S. W. 766; Caron v. Old Reliable Gold Min. Co. [N. M.] 78 P. 63. In proceedings for the settlement of an administratrix's account, the surrogate cannot pass on the issue of title to property arising between third parties and the administratrix individually. In re Finn's Estate, 44 Misc. 622, 90 N. Y. S. 159. The probate court in a proceeding merely to set aside a homestead to the surviving wife has no jurisdiction to adjudicate the question in whom the remainder vests. In re Firth's Estate [Cal.] 78 P. 643. Probate court cannot entertain suit by widow against heirs to recover homestead of which heirs are in possession claiming title. James v. James [Ark.] 80 S. W. 148. Jurisdiction cannot be acquired in a will case over property specially devised under the will, nor can process issue to enforce the judgment or obtain possession of property regardless of the right of the executor to administer the estate. Burgess v. Sullivant, 2 Ohio N. P. (N. S.) 327. Where a probate court assumes unlawful jurisdiction its proceedings are void. Real estate not a firm asset conveyed to the survivor. Jones v. De Camp, 2 Ohio N. P. (N. S.) 133.

49. Probate courts possess no powers other than those expressly conferred by statute. Davidson v. Wampler, 29 Mont. 61, 74 P. 82. The surrogate in New York can adjudicate rights against the estate of an executor or administrator arising from his administration of the prior estate (In re Hull, 97 App. Div. 258, 89 N. Y. S. 939), but can construe a will only when necessary to the exercise of the powers conferred by statute (In re Burdick's Estate, 90 N. Y. S. 161).

50. The surrogate has no authority to determine whether a transfer by the testator was void as a fraud on creditors. In re Bunting's Estate, 90 N. Y. S. 786.

51. See 2 Curr. L. 626.

52. South Dakota v. North Dakota, 192 U. S. 286, 48 Law. Ed. 448.

53. The St. Louis court of appeals has original jurisdiction to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other remedial writs, and to hear and determine the same. Levin v. United States [C. C. A.] 128 F. 826.

54. See Habeas Corpus, 3 Curr. L. 1576.

55. See Quo Warranto, 2 Curr. L. 1377.

56. See, also, Mandamus, 2 Curr. L. 771. Where the district court has concurrent jurisdiction application should be first made there. State v. Moores [Neb.] 99 N. W. 842. Where the petition and return raise a question of fact which the supreme court cannot try, the petition will be dismissed. Sheppard v. Terrell [Tex.] 79 S. W. 23; Angle v. Terrell [Tex.] 80 S. W. 231.

57. See Certiorari, 3 Curr. L. 667.

58. Leach v. Misters [Wyo.] 79 P. 28. The writ of prohibition authorized by the constitution of Idaho, § 9, art. 5, is the writ known to the common law. Stein v. Morrison [Idaho] 75 P. 246.

59, 60. State v. Moores [Neb.] 99 N. W. 842.

original jurisdiction to grant injunctions but will grant one in aid of its original jurisdiction in quo warranto.[61] The supreme court of Nebraska has not original jurisdiction to cancel and annul a levy of taxes by a city against insurance companies on the ground that it involves the revenue, that term in the constitution referring only to state revenue.[62] A controversy between two bodies, each claiming to be the regular organization of a political party within the state, and entitled to have its nominees for state offices certified as the nominees of the party sufficiently concerns the prerogatives of the state and affects the liberties of the people to be within the original jurisdiction of the supreme court of Wisconsin.[63] The supreme court of North Carolina has original jurisdiction to hear claims against the state and report to the legislature thereon,[64] but the grant does not include cases involving no question of law and the facts of which the legislature has already passed upon.[65]

The highest courts of the several states, and lesser courts which are of last resort as to inferior jurisdictions, have general supervision and control of proceedings in lower courts; and in the exercise of that supervision have jurisdiction to issue the several original writs known to the common law,[66] among them being prohibition,[67] mandamus,[68] and certiorari,[69] whenever necessary to restrain or compel action by the inferior tribunals within their jurisdictional bounds. The original jurisdiction of the appellate courts either by prohibition,[70] or supervisory control will not be exercised unless an injury is apparent for which an appeal will not furnish an adequate remedy.[71] Where a suit in district court is appealable to the court of appeals, an application for a writ of prohibition with respect to any order or proceeding therein which would be carried up for review by such appeal should be made to the appellate, not to the supreme court.[72]

§ 10. *Appellate jurisdiction.*[73]—The right of appeal is strictly statutory, existing only where expressly conferred,[74] and generally speaking, appellate courts

61. State v. Board of Deputy State Sup'rs, 70 Ohio St. 341, 71 N. E. 717.

62. Aachen & M. Fire Ins. Co. v. Omaha [Neb.] 100 N. W. 137.

63. State v. Houser [Wis.] 100 N. W. 964.

64, 65. A claim of the clerk of a court for fees in suits instituted by the state is not such a claim [Const. art. 4, § 9]. Miller v. State, 134 N. C. 270, 46 S. E. 514.

66. The superintending control of the supreme court of Wyoming cannot be exercised by motion to dissolve an injunction issued by the lower court. Smith v. Healy [Wyo.] 75 P. 430.

67. Joseph Speidel Grocery Co. v. Warder [W. Va.] 49 S. E. 534; State v. Evans [Mo.] 83 S. W. 447. Where the court has jurisdiction of the subject-matter prohibition will not lie to prevent the erroneous exercise of it. State v. Kennan, 35 Wash. 52, 76 P. 516; Schubach v. McDonald, 179 Mo. 163, 78 S. W. 1020; State v. Superior Court of King County [Wash.] 79 P. 29.

68. Hill v. Morgan [Idaho] 76 P. 323; Shirley v. Connor [Tex.] 80 S. W. 984; Id., 81 S. W. 284.

69. Right to proceeds of life insurance policy does not present such a special case of great public importance as to require review by supreme court of decision of court of appeals. People v. Court of Appeals of Colo. [Colo. App.] 75 P. 407.

70. Leach v. Misters [Wyo.] 79 P. 28.

71. State v. Second Judicial Dist. Court [Mont.] 76 P. 1005.

72. State v. Machen [La.] 37 So. 175.

73. See 2 Curr. L. 627.

74. The power of the appellate term to entertain appeals is purely statutory. Leavitt v. Katzoff, 43 Misc. 26, 86 N. Y. S. 495. Not being provided by statute, no appeal lies from an order of the probate court refusing to revoke letters testamentary. Graves v. Bond [Kan.] 78 P. 851. The appellate term in New York has no jurisdiction to entertain a motion for a new trial on exceptions ordered to be heard by it in the first instance before judgment. Dickson v. Manhattan R. Co., 91 N. Y. S. 36. In an action for money not requiring a decree granting some mode of equitable relief an appeal cannot be taken from the court of common pleas to the circuit court under Rev. St. § 5226, though the determination of the rights of the parties involves equitable principles. Lange v. Lange, 69 Ohio St. 346, 69 N. E. 611. The court of common pleas has jurisdiction to review an order of the probate court denying the right to administer the estate of a decedent which the statute (Rev. St. § 6005) confers on the next of kin if a suitable person. Schumacher v. McCallip, 69 Ohio St. 500, 69 N. E. 986. In Indiana jurisdiction of vacation appeals is obtained only when all parties against whom the judgment was rendered are made appellants. Newman v. Gates [Ind.] 72 N. E. 638. In Maryland no review is provided in eminent domain proceedings if the judgment be pronounced upon a subject-matter within the limits of

derive their jurisdiction over any case from the law and parties cannot confer it by consent,[75] and if the lower court had no jurisdiction the appellate court can have none.[76] A court of general jurisdiction obtains by appeal from an inferior court only such jurisdiction as was possessed by the court of first instance, and though the trial be de novo can inquire into only such questions as were within the jurisdiction below.[77] The law which gives a court jurisdiction to review proceedings in error because a constitutional question is involved does not give it jurisdiction to review other questions occurring in the trial.[78] The right of appeal is generally limited to cases involving a certain amount,[79] or presenting certain questions, such as the constitutionality of a statute or ordinance,[80] or the title to real estate or question of freehold.[81] In Wyoming, important constitutional questions may be certified to the supreme court for decision pending judgment below.[82] In Louisiana the supreme court has authority to review conclusions of fact reached by the court of appeal but only does so in exceptional cases.[83] On appeal from the county court in an action to compel the listing for taxation of omitted property the circuit court of Kentucky has no original jurisdiction to assess or value omitted property.[84]

Jurisdiction as between courts of intermediate and last resort depends on statutory limitations resting in amount or value,[85] franchise,[86] freehold,[87] revenue,[88]

the court's jurisdiction. New York Min. Co. v. Midland Min. Co. [Md.] 58 A. 217. Neither the supreme court nor the court of appeals in Colorado has jurisdiction to review the decision of the district court in review of a tax assessment. Pilgrim Consol. Min. Co. v. Teller County Com'rs [Colo. App.] 78 P. 617. Prior to the act of congress June 30, 1902, the decision of the supreme court of the District of Columbia on appeal from a justice of the peace was final. Key v. Roberts, 20 App. D. C. 391; Groff v. Miller, 20 App. D. C. 353.

75. See 2 Curr. L. 627, n. 23.

76. Chicago, etc., R. Co. v. Salem, 162 Ind. 428, 70 N. E. 530; Baily v. Berkhofer, 123 Iowa, 59, 98 N. W. 594; Hesser v. Johnson, 13 Okl. 747, 76 P. 181; Times Pub. Co. v. Hill [Tex. Civ. App.] 81 S. W. 806; Board of Com'rs v. Denver Union Water Co. [Colo.] 76 P. 1060; Parker Grain Co. v. Chicago, etc., R. Co. [Kan.] 78 P. 406.

77. Title to land cannot be tried on appeal from ordinary. Mulherin v. Kennedy, 120 Ga. 1080, 48 S. E. 437.

78. Coghlan v. Williams [Kan.] 76 P. 394.

79. Colorado: Supreme court, $2,500. Clear Creek Leasing, Min. & Mill. Co. v. Comstock Gold-Silver Min. & Mill. Co. [Colo.] 78 P. 682.

Illinois: Supreme court, $1,000. Murphy v. Murphy, 207 Ill. 250, 69 N. E. 966.

Kansas: Supreme court, $100. Blank v. Powell, 68 Kan. 556, 75 P. 486; Edinburgh Lombard Inv. Co. v. Cooper, 68 Kan. 517, 75 P. 488; Graves v. Bond [Kan.] 78 P. 851. The supreme court is without jurisdiction in a case where the only relief sought is an injunction and there is nothing to show that the amount involved exceeds $100, and there is no certificate showing that the case belongs to an excepted class. Chicago, etc., R. Co. v. Haviland Grain & Live Stock Ass'n [Kan.] 78 P. 408.

Kentucky: Court of appeals, $200. Montgomery v. Montgomery, 25 Ky. L. R. 1682, 78 S. W. 465. The costs allowed the commissioner of the court are excluded from the amount of the judgment in determining whether the court of appeals has jurisdiction. Rhodes v. Frankfort Chair Co., 25 Ky. L. R. 2042, 79 S. W. 768.

Louisiana: $2,000. Bacas v. Adler, 112 La. 806, 36 So. 739; Netter v. Reggio [La.] 37 So. 620.

Washington: Cases involving more than $200. State v. Superior Court of Lincoln County, 35 Wash. 201, 77 P. 33.

80. Clear Creek Leasing, Min. & Mill. Co. v. Comstock Gold-Silver Min. & Mill. Co. [Colo.] 78 P. 682. The supreme court of Texas has jurisdiction of an action involving the validity of a statute though it might have been brought in the county court. Texas & P. R. Co. v. Mahaffey [Tex.] 84 S. W. 646.

81. Clear Creek Leasing, Min. & Mill. Co. v. Comstock Gold-Silver Min. & Mill. Co. [Colo.] 78 P. 682. Title to land is not involved where the judgment for the recovery of money recites that on plaintiff's motion the lien created by the levy is waived. Rhodes v. Frankfort Chair Co., 25 Ky. L. R. 2042, 79 S. W. 768. A supplemental judgment on a rule deciding which of three horses should be released from execution as homestead exemption involves a homestead right and is appealable to the supreme court. Durke v. Crane, 112 La. 156, 36 So. 306. A suit to set aside a tax deed under which defendant claims title involves a freehold. Glos v. Stern, 213 Ill. 325, 72 N. E. 1057.

82. State v. Cahill [Wyo.] 75 P. 433; Smith v. Healy [Wyo.] 75 P. 430.

83. Brignac v. Pacific Mut. Life Ins. Co., 112 La. 574, 36 So. 595.

84. Commonwealth v. Morehead, 25 Ky. L. R. 1927, 78 S. W. 1105.

85. Illinois: $1,000. Murphy v. Murphy, 207 Ill. 250, 69 N. E. 966.

Missouri: Scheurich v. Southwest Mo. Light Co. [Mo.] 81 S. W. 1226; Berkemeier v. Peters [Mo.] 83 S. W. 750.

constitutional,[89] or public questions, and cases in which the state or a political subdivision thereof is a party.[90] In Illinois an order adjudging a party in contempt for refusal to obey an order passed for the benefit of his adversary is appealable direct to the supreme court.[91] In Maryland, where a petition in the orphans' court improperly combines matters of which that court has jurisdiction with others of which it has none, and the order of the court determines both, the appeal lies not to the circuit court but to the court of appeals.[92] The supreme court of Colorado has no cognizance of a case unless there is present some one or more of the elements which the court of appeals act requires shall be present in order to invoke its appellate jurisdiction.[93] In actions founded on fraud and deceit, the district court of Oklahoma has jurisdiction on appeal from the probate court where the amount sought to be recovered is $1,000 or less.[94] Cases appealed to

86. Where territory has been transferred from one township to another, the right of officers to exercise their offices raises a question of franchise. People v. Vermilion County, 210 Ill. 209, 71 N. E. 368. Controversy as to powers granted a corporation by its charter is not a question of franchise. Rostad v. Chicago Suburban Water & Light Co., 211 Ill. 248, 71 N. E. 978. Right under city ordinance to maintain passageway connecting elevated railway with store building limited to fifty years does not involve franchise. City of Chicago v. Rothschild & Co., 212 Ill. 590, 72 N. E. 698.

87. Appeals where a freehold is involved must be taken directly to the supreme court and not to the Illinois appellate court. The final determination of a suit resulting in the gain or loss of an estate, involves a freehold. Kellogg Newspaper Co. v. Corn Belt Nat. Bldg. & Loan Ass'n, 105 Ill. App. 62. Decree in suit to set aside conveyance of land involves freehold. Hursen v. Hursen, 209 Ill. 466, 70 N. E. 904. Plea of liberum tenementum in trespass quare clausum fregit raises question. Illinois Cent. R. Co. v. Hatter, 207 Ill. 88, 69 N. E. 751. Suit to set aside contract to convey held not to involve freehold. Payne v. White, 207 Ill. 562, 69 N. E. 856. An ordinary petition to sell real estate of a decedent to pay debts does not involve a freehold. Frier v. Lowe, 207 Ill. 410, 69 N. E. 899; Thomas v. Waters, 213 Ill. 141, 72 N. E. 820. Right under city ordinance to maintain passageway connecting elevated railway with store building does not involve freehold. City of Chicago v. Rothschild & Co., 212 Ill. 590, 72 N. E. 698. Injunction against obtaining easement to build railroad track involves freehold. Stratton's Independence v. Midland Terminal R. Co. [Colo.] 77 P. 247. Motion to vacate judgment for taxes held not to involve title. State v. Gawrouski, 179 Mo. 549, 78 S. W. 807. An action to collect delinquent real estate taxes does not involve title. State v. Elliott, 180 Mo. 658, 79 S. W. 696. Where a trust deed is sought to be canceled solely on the ground that the debt secured thereby has been paid, title is not involved. Christopher v. People's Home & Sav. Ass'n, 180 Mo. 568, 79 S. W. 899. Suit to impress real estate with lien or to set aside deed thereto on ground of fraud involves title. Chrisman v. Linderman [Mo. App.] 81 S. W. 461. An action to have special tax bills paid out of a portion of the proceeds of condemnation of the land against which the bills were issued does not involve title. Ross v. Kendall [Mo.] 81 S. W. 1107. A proceeding by an unsuccessful defendant in ejectment to recover the value of improvements is a continuation of the ejectment suit of which the court of appeals has no jurisdiction. Bristol v. Thompson [Mo. App.] 83 S. W. 780. A suit to annul conveyances in which the decree would have the effect to transfer the title to a system of waterworks from one party to the other involves a freehold justifying transfer from the court of appeals to the supreme court. Venner v. Denver Union Water Co. [Colo.] 75 P. 412.

88. City of St. Joseph v. Metropolitan Life Ins. Co. [Mo.] 81 S. W. 1080. A bill to compel a township treasurer to turn over to the school inspectors of a city certain money collected by taxation does not involve the revenue. Trustees of Schools v. Board of School Inspectors of Peoria, 208 Ill. 73, 69 N. E. 781. Motion to vacate judgment for taxes and quash execution thereon, on the ground that defendant was only ten years old when judgment was rendered and no guardian ad litem was appointed does not involve construction of revenue laws of state. State v. Gawronski, 179 Mo. 549, 78 S. W. 807.

89. City of Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797; City of St. Joseph v. Metropolitan Life Ins. Co. [Mo.] 81 S. W. 1080; City of St. Joseph v. Truckenmiller [Mo.] 81 S. W. 1116. Constitutionality of jury law permitting verdict on concurrence of nine is not involved in a case where all concurred. Portwright v. St. Louis Transit Co. [Mo.] 81 S. W. 1091; Kimble v. St. Louis & S. R. Co. [Mo.] 81 S. W. 887. A motion for new trial on the ground that a section of the state constitution conflicts with the Federal constitution raises a question reviewable only in the supreme court. Lehner v. Metropolitan St. R. Co. [Mo. App.] 83 S. W. 1028.

90. A city is not such a political subdivision. City of Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797. School district is not. School Dist. v. Boyle, 182 Mo. 347, 81 S. W. 409.

91. Swedish American Tel. Co. v. Fidelity & Casualty Co., 208 Ill. 562, 70 N. E. 768.

92. Stonesifer v. Shriver [Md.] 59 A. 139.

93. Construction merely of a statute does not confer it. Pilgrim Consol. Min. Co. v. Teller County Com'rs [Colo.] 76 P. 364; Board of Com'rs of Arapahoe County v. Denver Union Water Co. [Colo.] 76 P. 1060.

94. Newell v. Long-Bell Lumber Co. [Okl.] 78 P. 104.

the wrong court may be on motion or suo motu certified to the other court.[95] The existence of such a controversy as will confer jurisdiction on the highest court must appear on the record to have been properly raised and decided below,[96] but where a constitutional question is raised in a case, it remains so as to give the supreme court jurisdiction, though the court pending the appeal decides that particular question in another case.[97] Where plaintiff's claim brings the case within the jurisdiction of the supreme court, to which he appeals, a cross appeal to the court of appeals by defendant is properly certified up to the supreme court though itself within the jurisdiction of the appellate court.[98] In Louisiana an appeal from a judgment rendered on a reconventional demand must be to the court having jurisdiction of the original demand.[99]

Further appeal.—Similar matters, e. g., the amount,[1] or a conflict of opinion, or doubt,[2] or importance,[3] may be ground for jurisdiction of a further appeal. A constitutional question to be ground of further appeal must have been decided adversely to appellant.[4] On application for further appeal in Indiana, the supreme court looks only to the opinion of the appellate court and not to the record.[5]

§ 11. *Federal jurisdiction. A. Generally.*[6]—The supreme court has jurisdiction of all controversies between states,[7] and that court alone possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it, the jurisdiction of the circuit courts depending upon some act of congress.[8] The jurisdiction of the Federal courts is limited in the sense that they have none except that conferred by the constitution and laws of the United States, and a cause is presumed to be without their jurisdiction unless the contrary affirmatively appears,[9] the question of jurisdiction being self assertive in every

95. Dennison v. Keasbey [Mo. App.] 78 S. W. 1041; State v. Guinotte, 180 Mo. 115, 79 S. W. 166; Kimble v. St. Louis & S. R. Co. [Mo.] 81 S. W. 887; Meng v. St. Louis & S. R. Co. [Mo.] 81 S. W. 907; Scheurich v. Southwest Mo. Light Co. [Mo.] 81 S. W. 1226.

96. Jurisdiction. Harrison v. National Bank of Monmouth, 207 Ill. 630, 69 N. E. 871. Constitutionality of statute may appear to be in issue without express averment in the bill. Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082. Decision based on several grounds, constitutional question not controlling. City of Tarkio v. Loyd, 179 Mo. 600, 78 S. W. 797. Constitutionality of jury law held not in issue. Portwright v. St. Louis Transit Co. [Mo.] 81 S. W. 1091; Kimble v. St. Louis & S. R. Co. [Mo.] 81 S. W. 887; Meng v. St. Louis & S. R. Co. [Mo.] 81 S. W. 907. A general claim that a law is unconstitutional without a designation of the provision contravened will not raise a constitutional question. Shaw v. Goldman [Mo.] 81 S. W. 1223.

97. Meng v. St. Louis & S. R. Co. [Mo.] 81 S. W. 907; Lee v. Jones, 181 Mo. 291, 79 S. W. 927.

98. Snoqualmi Realty Co. v. Moynihan, 179 Mo. 629, 78 S. W. 1014.

99. Netter v. Reggio [La.] 37 So. 620.

1. An appeal lies from the appellate court to the supreme court in a suit to enjoin the collection of a judgment regardless of the amount and without a certificate of importance such a suit not being one to recover money or chattels. Torsell v. Eiffert, 207 Ill. 621, 69 N. E. 761.

2. Mandamus to compel certification of a case from the court of appeals to the supreme court on the ground of conflict of decision will be denied where the supreme court finds the alleged conflicting decisions plainly distinguishable. Shirley v. Connor [Tex.] 80 S. W. 984. The petition should show the facts and be verified. Too late on motion for rehearing. Shirley v. Conner [Tex.] 81 S. W. 284; Id., 80 S. W. 984.

3. Torsell v. Eiffert, 207 Ill. 621, 69 N. E. 761.

4. State v. Brockmiller [Mo. App.] 81 S. W. 214.

5. City of Huntington v. Lusch [Ind.] 71 N. E. 647.

6. See 2 Curr. L. 606.

7. South Dakota v. North Carolina, 192 U. S. 286, 48 Law. Ed. 448.

8. Stevenson v. Fain, 195 U. S. 165, 49 Law. Ed. —.

9. Thomas v. Trustees of Ohio State University, 195 U. S. 207, 49 Law. Ed. —; Pooler v. U. S. [C. C. A.] 127 F. 519; Goodwin v. Boston & M. R. Co., 127 F. 986; Yocum v. Parker [C. C. A.] 130 F. 770; State v. Felts, 133 F. 85. See 2 Curr. L. 606, n. 45. The judiciary act of 1887-88 was intended to contract their jurisdiction. St. Louis, etc., R. Co. v. Davis, 132 F. 629. The judicial power granted to the Federal courts by the constitution is the power to try the 10 classes of cases specified in section 2 of article 3 thereof (Levin v. U. S. [C. C. A.] 128 F. 826); but they have no jurisdiction to collect taxes for the Creek nation (Buster v. Wright [Ind. T.] 82 S. W. 855). The United States courts in the Indian Territory have jurisdiction of an action by a Cherokee Indian and the Cherokee nation to recover lands and improvements from an in-

case and arising though litigants are silent.[10] The general rule, however, is that when the jurisdiction of a circuit court of the United States has once attached, it will not be ousted by subsequent change in conditions.[11] Consent of parties can never confer jurisdiction on a Federal court,[12] except in the case of persons sued by a trustee in bankruptcy to recover a fund for the estate.[13] Federal courts only grant the writ of mandamus in aid of an existing jurisdiction.[14] When a foreign state submits itself to our courts, it must be taken to do so on the same terms as other litigants.[15] A Federal court of equity sitting within a state is without authority to compel a corporation of that state to permit another corporation of another state, which has not complied with the state laws authorizing it to do business therein, to make a use of its property which would amount to doing business within the state.[16]

The Federal courts have no jurisdiction of suits against a state,[17] and a state statute providing the procedure in and naming officials who are necessary parties to actions to set aside tax sales, the language of which clearly indicates that suit in the state courts is intended, will not be construed as permitting such actions in the Federal court;[18] but a municipal corporation is not an agency of the state entitled to immunity,[19] and a suit against it, involving contract rights merely, may be entertained.[20] A suit against the attorney general of a state to enjoin a proceeding by him on behalf of the state is a suit against the state;[21] but a state railroad commission may be restrained from putting in force an order which would cause irreparable damage, the ordinary grounds of Federal jurisdiction being present.[22]

The Federal courts are prohibited by statute from staying proceedings of a state court or its officers,[23] except in bankruptcy cases;[24] but a bill to enjoin as

truder. Price v. Cherokee Nation [Ind. T.] 82 S. W. 893. A Federal court can have jurisdiction of an action for death of a servant only on the ground of diversity of citizenship. Stockwell v. Boston & M. R. Co., 131 F. 152. A claim for future alimony under a judgment of a state court is an action of a civil nature within the jurisdiction of the Federal courts, other jurisdictional requisites being present. Israel v. Israel, 130 F. 237. The question whether a Federal court acquired jurisdiction over a foreign corporation defendant by the service made is one of general jurisprudence, to be determined by the Federal law unaffected by a state statute. New Haven Pulp & Board Co. v. Downingtown Mfg. Co., 130 F. 605.

10. Yocum v. Parker [C. C. A.] 130 F. 770. That plaintiff was an assignee whose assignor could not have maintained suit is a jurisdictional fact which cannot be waived. Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113.

11. Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 Law. Ed. 911; Bloomingdale v. Watson [C. C. A.] 128 F. 268.

12. State v. Northern Securities Co., 194 U. S. 48, 48 Law. Ed. 870; Thomas v. Trustees of Ohio State University, 195 U. S. 207, 49 Law. Ed. —; Yocum v. Parker [C. C. A.] 130 F. 770.

13. Federal court there has no jurisdiction except on consent of defendants. Gregory v. Atkinson, 127 F. 183; Ryttenberg v. Schefer, 131 F. 313. And where the claimant of property in the hands of a trustee submits his claim to the bankruptcy court, the trustee cannot object to the jurisdiction. In re McBride & Co., 132 F. 285.

14. Wiemer v. Louisville Water Co., 130 F. 246; Barber Asphalt Pav. Co. v. Morris, 132 F. 945; In re Coleman, 131 F. 151; Mystic Mill. Co. v. Chicago, etc., R. Co., 132 F. 289.

15. Ex parte Republic of Colombia, 195 U. S. 604, 49 Law. Ed. —.

16. Evansville & H. Traction Co. v. Henderson Bridge Co., 132 F. 402.

17. Suit to set aside tax sales where property has been bought by state [U. S. Const. Amend. 11]. Chandler v. Dix, 194 U. S. 590, 48 Law. Ed. 1129. Suit to restrain suit by attorney general of state to forfeit corporate charter. Morenci Copper Co. v. Freer, 127 F. 199. Suit to restrain enforcement of tax. Coulter v. Fargo [C. C. A.] 127 F. 912.

18. Chandler v. Dix, 194 U. S. 590, 48 Law. Ed. 1129.

19. Camden Interstate R. Co. v. Catlettsburg, 129 F. 421.

20. Palatka Waterworks v. Palatka, 127 F. 161.

21. Morenci Copper Co. v. Freer, 127 F. 199. See 2 Curr. L. 606, n. 50.

22. Railroad Commission v. Rosenbaum Grain Co. [C. C. A.] 130 F. 110.

23. Rev. St. § 720. Palatka Waterworks Co. v. Palatka, 127 F. 161; Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801. Proceedings already begun prosecuting under an invalid ordinance cannot be enjoined. Camden Interstate R. Co. v. Catlettsburg, 129 F. 421. That plaintiff in the state court after removal by defend-

illegal the enforcement of an ordinance violative of contract rights, and which refers to no pending suit, is not objectionable,[25] and the statute does not extend to ancillary suits necessary to protect the jurisdiction of the court previously obtained.[26] The fact that a bill filed in the state court incidentally prays for relief which, if granted, might interfere with the constructive possession of property by receivers of a Federal court, does not authorize the latter court to enjoin where the principal relief sought therein does not trench on the prior jurisdiction.[27] Where several suits, some of which are removable and some not, are brought against insurers liable only pro rata, they may be enjoined by bill in the Federal court to have the liability of the several insurers determined and adjusted by that court as a court of equity.[28]

Federal courts have no original jurisdiction in respect to the administration and general settlement of the estates of deceased persons,[29] nor can they determine the right to the custody of an infant not imprisoned,[30] and a creditor establishing the validity of his claim by suit in the Federal court must, to secure payment, ordinarily seek relief by a marshaling of assets in the state court having jurisdiction of the settlement of estates.[31]

While state legislation cannot directly enlarge or contract the jurisdiction of the Federal courts,[32] it can create rights that are justiciable in such courts which, without such legislation, were not cognizable therein,[33] though the procedure for enforcing such rights will be that applicable to similar rights in the Federal courts, and not that provided by the state law;[34] but the rule that a Federal court may enforce a remedy either equitable or legal, given by a state statute, presupposes that the cause is one of which the Federal court has jurisdiction.[35]

The district court has jurisdiction of an action by the United States to recover money fraudulently obtained by defendant in payment of a false claim for a pension.[36]

The court of claims was established to relieve congress of the necessity of adjudicating private claims against the government through its committees. Gen-

ant dismissed his action and brought a new one in the state court, claiming a sum less than the Federal court's jurisdiction, does not make a case for injunction. Texas Cotton Products Co. v. Starnes, 128 F. 183. Federal courts enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575.

24. In re Mertens, 131 F. 507.

25. Palatka Waterworks Co. v. Palatka, 127 F. 161.

26. Massie v. Buck [C. C. A.] 128 F. 27; Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801. Where the Federal court acts in aid of its own jurisdiction and to render its decree effectual, it may, notwithstanding the statute, restrain all proceedings in a state court which have the effect of defeating or impairing its jurisdiction [Rev. St. § 720]. Julian v. Central Trust Co., 193 U. S. 93, 48 Law. Ed. 629.

27. Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801.

28. Rochester German Ins. Co. v. Schmidt, 126 F. 998.

29. Thiel Detective Service Co. v. McClure, 130 F. 55. See 2 Curr. L. 607, n. 55.

30. Clifford v. Williams, 131 F. 100. See 2 Curr. L. 607, n. 56.

31. Thiel Detective Service Co. v. McClure, 130 F. 55. A Federal court has jurisdiction equally with a state court of general jurisdiction of a suit to establish a lien on the interest of defendants in funds belonging to the estate of a decedent and in the hands of an administrator, whatever action it may take, however, being subject to that of the probate court within its proper jurisdiction. Ingersoll v. Coram, 127 F. 418.

32. Greenwich Ins. Co. v. Carroll, 125 F. 121; Barber Asphalt Pav Co. v. Morris, 132 F. 945; Land Title & Trust Co. v. Asphalt Co. [C. C. A.] 127 F. 1; New Haven Pulp & Board Co. v. Downingtown Mfg. Co., 130 F. 605.

33. Land Title & Trust Co. v. Asphalt Co., 127 F. 1; Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945. See 2 Curr. L. 607, n. 60. Statute abrogating rule of fellow servant refused enforcement. Kane v. Erie R. Co., 128 F. 474. Proceeding by stockholder of corporation for injunction and receiver. Jacobs v. Mexican Sugar Co., 130 F. 589.

34. Land Title & Trust Co. v. Asphalt Co., 127 F. 1; Jacobs v. Mexican Sugar Co., 130 F. 589.

35. Anthony v. Burrow, 129 F. 783; Jacobs v. Mexican Sugar Co., 130 F. 589.

36. Rev. St. § 563, par. 4. Pooler v. U. S. [C. C. A.] 127 F. 519.

eral authority, however, was never granted to pass on collision cases, as they sound in tort, and special legislation is necessary in every such case.[37] If the military occupation of real property began while it was within hostile territory, the court is prohibited from exercising jurisdiction.[38]

The courts of the *District of Columbia* are courts of the United States and have judicial power as permanent and lasting as others, and possess those subjects of jurisdiction constitutionally given to them.[39]

(§ 11) *B. As affected by diversity of citizenship.*[40]—The circuit courts of the United States have original jurisdiction of suits of a civil nature at law and in equity, where the matter in dispute exceeds $2,000 and an alien is a party,[41] or the controversy is between a citizen of the state where suit is brought and a citizen of another state,[42] and where necessary to give effect to its decrees and judgments, the jurisdiction of the national court may be invoked by supplemental or ancillary bill, irrespective of the citizenship of the parties.[43] A state is not a citizen within the meaning of the constitution or the acts of congress.[44]

It is the court's duty to see that this jurisdiction is not invoked collusively,[45] but whether a suit coming fairly within equity rule 94 was collusively brought cannot be determined on demurrer.[46] That plaintiff removed from one state to another for the purpose of acquiring the right to sue in a Federal court in the state of his late residence will not defeat the jurisdiction, the removal being actual and with the bona fide intention of acquiring citizenship,[47] nor will an assignment of the cause of action with like motive.[48]

Regard is always had to the real rather than the nominal party,[49] and the citizenship of a merely formal party will not control,[50] neither will the court require the joinder of an unnecessary party where the effect would be to oust the jurisdiction;[51] but where it appears that indispensable parties have been omitted, they must be brought in, and if bringing them in deprives the court of jurisdiction, the plaintiff must abide the consequences.[52] The jurisdiction is determined by actual as distinguished from constructive citizenship,[53] and citizenship, not the place of residence, is the test.[54] Jurisdiction based on diversity of citizenship

37. Watts v. U S., 129 F. 222.

38. Berkeley County Ct. v. U. S., 38 Ct. Cl. 205.

39. James v. U. S., 38 Ct. Cl. 615.

40. See 2 Curr. L. 608.

41. Von Voight v. Michigan Cent. R. Co., 130 F. 398.

42. Rochester German Ins. Co. v. Schmidt, 126 F. 998. See 2 Curr. L. 608, n. 69.

43. Julian v. Central Trust Co., 193 U. S. 93, 48 Law. Ed. 629; Rochester German Ins. Co. v. Schmidt, 126 F. 998; Leigh v. Kewanee Mfg. Co., 127 F. 990; Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267; Hampton Roads R. & Elec. Co. v. Newport News & O. P. R. & Elec. Co., 131 F. 534.

44. Minnesota v. Northern Securities Co., 194 U. S. 48, 48 Law. Ed. 870.

45, 46. Mills v. Chicago, 127 F. 731.

47. Wiemer v. Louisville Water Co., 130 F. 244.

48. Where a transfer of a mining claim is real and not simulated, it is immaterial that the motive was to give Federal jurisdiction on account of diverse citizenship. Willitt v. Baker, 133 F. 937. Where suit is by the assignee of a claim, Federal jurisdiction depends on the residence of the assignor at the time suit is begun, not at the time of the assignment. Noyes v. Crawford, 133 F. 796. Where the cause of action grew only indirectly from the assignment and never existed in the assignor, his residence is immaterial. Id.

49. See 2 Curr. L. 608, n. 72.

50. Groel v. United Elec. Co., 132 F. 252; Hyde v. Victoria Land Co., 125 F. 970.

51. Interested party but not one necessary to adjudication need not be joined in such case. Ex parte Haggerty, 124 F. 441. See 2 Curr. L. 608, n. 73.

52. City of Seymour v. Farmers' Loan & Trust Co., 128 F. 907. See 2 Curr. L. 608, n. 74. Where it is alleged that a domestic corporation is under the dominance of a foreign corporation holding a majority of its stock, it is an indispensable party to a bill asserting that the foreign corporation was a trustee for minority stockholders, and a Federal court is ousted of jurisdiction of suit by a stockholder domiciled in the same state as the domestic corporation. Redfield v. Baltimore & O. R. Co., 124 F. 929.

53. A state statute providing that a nonresident cannot be appointed administrator does not make one so appointed a citizen. McDuffie v. Montgomery, 128 F. 105.

54. Temporary residence does not change citizenship. Eisele v. Oddie, 128 F. 941.

having been once obtained is not divested by the appearance of a party as to whom the suit could not have originally been maintained.[55]

Jurisdiction is not conferred where citizens of the state where suit is brought are to be found on both sides of the controversy,[56] and the arraignment of the parties in the bill for the purpose of showing jurisdiction is not controlling on the court, it being the court's duty, for jurisdictional purposes, to ascertain the necessary parties to the suit and align them upon the one side or the other according to their true interests and attitude, irrespective of their designations in the bill.[57] In a suit in equity instituted by a stockholder in his own name, but upon a right of action existing in his corporation, the stockholder's corporation will be aligned with the defendants whenever the officers or persons controlling the corporation are shown to be opposed to the object sought by complainant; but when such opposition does not appear, the stockholder's corporation will be aligned with the complainant in the suit.[58] The only new thing required in a stockholder's bill by equity rule 94 is that its allegations shall be verified by oath.[59]

Suit cannot be maintained in a Federal court by an assignee based on diversity of citizenship, unless the assignor might have maintained it;[60] but the right to maintain suit where the original parties were citizens of different states is not lost by assignment to one who is also a citizen of a different state from defendant, though the effect of the assignment is to change venue of the action.[61] Where the alleged assignor was in legal effect the maker, the assignee may sue, though the assignor and the person actually making the note were citizens of the same state.[62]

For the purpose of suing and being sued in the Federal courts, the members of a local "corporation" are conclusively presumed to be citizens of the state by whose laws it was created and in which alone the corporate body has a legal ex-

55. The appearance in receivership proceedings of a creditor resident of the same state with plaintiff will not oust jurisdiction Bloomingdale v. Watson [C. C. A.] 128 F. 268. A resident receiver of a local corporation appointed by a state court, the successor of a nonresident receiver, cannot maintain suit after the state court has annulled the authority to sue. Hubert v. New Orleans [C. C. A.] 130 F. 21.

56. In a suit against co-partners, jurisdiction fails if one or more of them are citizens of the same state with complainant. Raphael v. Trask, 194 U. S. 272, 48 Law. Ed. 973. See 2 Curr. L. 608, n. 76. Assignors held neither proper nor necessary parties so as to defeat jurisdiction. Ingersoll v. Coram, 127 F. 418.

57. Redfield v. Baltimore & O. R. Co., 124 F. 929; Waller v. Coler, 125 F. 821; Groel v. United Elec. Co., 132 F. 252; Mills v. Chicago, 127 F. 731. See 2 Curr. L. 608, n. 77.

58. Groel v. United Elec. Co., 132 F. 252. Reviewing many cases. Mills v. Chicago, 127 F. 731. Where a corporation by control of the majority of stock of another is enabled to work a fraud on that corporation and its minority stockholders, it is antagonistic in interest for purposes of Federal jurisdiction of a suit by minority stockholders for redress. Redfield v. Baltimore & O. R. Co., 124 F. 929. Where the case is not brought within the 94th rule, the parties are aligned according to interest. Corporation and stockholder are aligned together where their similar interests appear from the bill. Waller v. Coler, 125 F. 821. Equity rule 94 in no way affects the rule that in determining Federal jurisdiction the corporation is to be aligned with complainant or defendant according to the facts. Groel v. United Elec. Co., 132 F. 252. Refusal of corporation to bring suit because of mistaken view of the law will sustain jurisdiction under rule 94. Mills v. Chicago, 127 F. 731.

59. Groel v. United Elec. Co., 132 F. 252.

60. Act Aug. 13, 1888, c. 866, § 1; 25 St. 433 [U. S. Comp. St. 1901, p. 508]. Bolles v. Lehigh Valley R. Co., 127 F. 884; Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113. See 2 Curr. L. 608, n. 79. Suit to foreclose trust deeds securing notes, with relief incidental thereto, is a suit to collect money on notes within the statute. Hoadley v. Day, 128 F. 302. Suit by trustee of water company against city held not within statute. City of Seymour v. Farmers' Loan & Trust Co. [C. C. A.] 128 F. 907. Where a mortgage was given to secure a prior indebtedness from the mortgagor to the mortgagee, who were citizens of different states, the jurisdiction of a Federal court of a suit to foreclose the mortgage is not affected by the fact that it also secured another indebtedness owing by the mortgagor to a third person, who was a citizen of the same state, which had been assigned to the mortgagee. Peacock, Hunt & West Co. v. Thaggard, 128 F. 1005.

61. Bolles v. Lehigh Valley R. Co., 127 F. 884.

62. Hoadley v. Day, 128 F. 302.

istence;[63] this doctrine, however, goes to the very verge of judicial power, and will not be so extended as to raise an indisputable presumption that the stockholders are also citizens of any other state which authorizes it to do business within its borders, and authorize suit in the Federal court against it by a citizen of the state which incorporated it;[64] neither will it be presumed in a suit to which the corporation is not a party that its president is a citizen of the state in which it was organized.[65] It is beyond the power of one state to so combine a corporation created by it with one of another state as to make it a citizen of the other state for jurisdictional purposes, and so likewise is it beyond the power of the corporations themselves to accomplish the same result by their manner of conducting their business.[66] In a suit by a stockholder of a public service corporation against the corporation and the city to restrain the enforcement of an invalid ordinance regulating tolls, the fact that the corporation is organized under the laws of the state in which the city is situated does not deprive the court of jurisdiction.[67]

Diversity of citizenship will not of itself confer jurisdiction of habeas corpus proceedings.[68]

(§ 11) *C. As affected by existence of a Federal question.*[69]—The Federal courts have jurisdiction in cases where the United States are a party,[70] trade-mark cases,[71] suits by Indians to recover lands allotted by any Federal law or treaty,[72] and suits at common law or in equity arising under the constitution or laws of the United States.[73]

A case arises under the constitution or laws of the United States whenever, upon the whole record, there is a controversy involving the construction of either.[74] A case does not necessarily arise under the constitution or laws of the United States every time a writ of error would lie to the judgment of the state court,[75] neither does it so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution or some law or treaty of

63. Thomas v. Trustees of Ohio State University, 195 U. S. 207, 49 Law. Ed. —. To take advantage of this rule the corporation must have been legally incorporated. That as to some persons and for some purposes it is a corporation de facto is insufficient. Gastonia Cotton Mfg. Co. v. Wells Co. [C. C. A.] 128 F. 369.

64. Alabama & G. Mfg. Co. v. Riverdale Cotton Mills [C. C. A.] 127 F. 497; Goodwin v. Boston & M. R. Co., 127 F. 986. See 2 Curr. L. 609, n. 83.

65. Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113.

66. Alabama & G. Mfg. Co. v. Riverdale Cotton Mills [C. C. A.] 127 F. 497.

67. Mills v. Chicago, 127 F. 731; New Albany Waterworks v. Louisville Banking Co. [C. C. A.] 122 F. 776.

68. Custody of child. Clifford v. Williams, 131 F. 100. See 2 Curr. L. 609, n. 85.

69. See 2 Curr. L. 609.

70. Concurrent jurisdiction with court of claims of suit to recover tax illegally collected (Christie-Street Commission Co. v. U. S., 126 F. 991), but such jurisdiction does not extend to cases sounding in tort. Suit to recover tax illegally collected under duress sounds in tort (Id., 129 F. 506). The United States as trustee is a necessary party to a suit to recover lands belonging to an Indian by virtue of Federal law or treaty. Patawa v. U. S., 132 F. 893; Parr v. U. S., 132 F. 1004.

71. A Federal court has jurisdiction of a suit between citizens of different states to enjoin infringement of a trade-mark, though the actual value of the trade-mark is not alleged, and it is not averred that it will be destroyed by defendant's unlawful use. Griggs, Cooper & Co. v. Erie Preserving Co., 131 F. 359.

72. Parr v. U. S., 132 F. 1004; Patawa v. U. S., 132 F. 893.

73. Impairment of contract by city with water company. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 F. 152; Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180. If it appears from the bill that in any aspect which the case may assume a right under the constitution or laws of the United States may be involved, and that the claim is not merely colorable, jurisdiction is conferred. St. Louis, etc., R. Co. v. Davis, 132 F. 629. State officers cannot be enjoined from committing an act which it is alleged will be contrary to the fifth amendment, since that amendment limits the powers of congress only. Id. The state courts have no jurisdiction of actions for violation of the interstate commerce act. Gulf, etc., R. Co. v. Moore [Tex.] 83 S. W. 362.

74. Anthony v. Burrow, 129 F. 783. A suit to settle adverse claims to mining ground is not necessarily of Federal cognizance if no diversity of citizenship exists. Willitt v. Baker, 133 F. 937.

75. Bradley v. Lightcap, 195 U. S. 25, 49 Law. Ed. —.

the United States, upon the determination of which the result depends, and which appears on the record by plaintiff's own statement of his case in legal and logical form, such as is required in good pleading;[76] and if it does not appear at the outset that the suit is one of which the circuit court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed.[77] An action against a Federal corporation is one arising under the laws of the United States.[78] Where a Federal court obtains jurisdiction of property by appointment of a receiver in dissolution proceedings, it has jurisdiction of a bill by the receiver to foreclose a mortgage on property within the district irrespective of diversity of citizenship.[79] A familiar rule commits to the courts of the state the interpretation of its laws and constitution.[80]

Where the jurisdiction of the circuit court is invoked on the ground of violation of the Fourteenth amendment, it must appear at the outset that the alleged violation was by act of the state,[81] and where it appears on the face of plaintiff's own statement that the act complained of was not only unauthorized but forbidden by the state legislation in question, the circuit court does not acquire jurisdiction,[82] though the plaintiff alleges that by reason of such disobedience of the law he has been denied the equal protection of the laws.[83] A contention by a city that the ordinance complained of could not violate the obligation of a contract because the city was without authority to pass it is untenable.[84]

76. Sloan v. U. S., 193 U. S. 614, 48 Law. Ed. 814; Minnesota v. Northern Securities Co., 194 U. S. 48, 48 Law. Ed. 870; Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 48 Law. Ed. 484; Underground R. Co. v. New York, 193 U. S. 416, 48 Law. Ed. 733. See 2 Curr. L. 612, n. 32, 33. Jurisdiction of the circuit court does not arise simply because an averment is made that the case is one arising under the constitution or laws of the United States, if it plainly appears that such averment is not real or substantial but is without color of merit. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 Law. Ed. 795.

77. Minnesota v. Northern Securities Co., 194 U. S. 48, 48 Law. Ed. 870.

78. Wolff & Co. v. Choctaw, etc., R. Co., 133 F. 601.

79. Gunby v. Armstrong [C. C. A.] 133 F. 417.

80. Mohl v. Lamar Canal Co., 128 F. 776; West v. Louisiana, 194 U. S. 258, 48 Law. Ed. 965; Fischer v. St. Louis, 194 U. S. 361, 48 Law. Ed. 1018. The validity of an act of the state legislature withdrawing one county and adding another to a congressional district presents no question of Federal law. Anthony v. Burrow, 129 F. 783. The construction of state election laws cannot be considered a Federal question on the theory that by being employed in the selection of congressmen those laws become a part of the Federal law. Id. A prayer for the cancellation of certain writings fraudulently obtained by a receiver appointed by a Federal court does not raise a Federal question. A release of conditions in a deed. Monnett v. Columbus, etc., R. Co., 4 Ohio C. C. (N. S.) 369. The contention that under the laws of a state it was essential to the legality of service upon an alleged agent of a corporation that the corporation should have been doing business within the state and the agent residing within the county named as his place of residence in the appointment simply calls for the construction of the constitution and laws of the state or the application of the principles of general law. Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 Law. Ed. 749.

The citizen's right to personal liberty and security is within the primary jurisdiction of the state and an indictment for interference therewith states no offense within the jurisdiction of the Federal courts. United States v. Eberhart, 127 F. 254. The 14th amendment adds nothing to the rights of one citizen against another but merely prevents encroachments by the states upon fundamental individual rights. United States v. Moore, 129 F. 630.

81. Deprivation without due process. Barney v. New York, 193 U. S. 430, 48 Law. Ed. 737. See 2 Curr. L. 610, n. 97.

82. Barney v. New York, 193 U. S. 430, 48 Law. Ed. 737. A municipal ordinance not passed in accordance with the statutory authority is not law, and acts thereunder cannot be enjoined as deprivation without due process. City of Savannah v. Holst [C. C. A.] 132 F. 901.

83. St. Louis, etc., R. Co. v. Davis, 132 F. 629.

84. Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102. Where a city claims the right to regulate street car fares under the original franchise ordinance, and the company claims that by subsequent ordinances the original right has been surrendered, and that the obligations of the subsequent ordinances are being impaired by the proposed regulation, there is a Federal question, though it be undisputed that there is no impairment so far as the original ordinance is concerned. City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102; City of Cleveland v. Cleveland Elec. R. Co., 194 U. S. 538, 48 Law. Ed. 1109.

The power of the Federal courts to intervene by habeas corpus in a case where a disregard of Federal law is charged is beyond doubt;[85] but except in instances of peculiar urgency, or where there is no jurisdiction in the state court to try the prisoner, the court should not discharge the prisoner in advance of his trial in the state court,[86] and even after final determination of the case in the state court should generally leave him to his remedy by writ of error from the supreme court of the United States.[87] The writ will not be granted to determine the right to custody of a child not imprisoned.[88]

The full faith and credit clause of the constitution[89] and the statute based thereon[90] establish a rule of evidence rather than of jurisdiction,[91] and under these provisions a judgment of a state court can only be made effective elsewhere within the United States through the instrumentality of a court having local jurisdiction.[92] Hence where an action is brought in a Federal court on a judgment of a state court, the Federal court will look to the original cause of action to determine whether it is otherwise an action of Federal cognizance.[93] Until equal faith and credit has been refused by a court, there can be no ground for complaining of any violation of the constitution, and no cause of action which will entitle a petitioner to invoke the jurisdiction of a national court for the preservation of a constitutional right.[94]

(§ 11) *D. Averments and objections as to jurisdiction.*[95]—The facts essential to give a Federal court jurisdiction, either on the ground of diversity of citizenship[96] or of the existence of a Federal question,[97] must be distinctly alleged and not left to argument or mere inference,[98] and jurisdiction cannot be invoked by anticipating a defense.[99] The mere allegation of the existence of a Federal question is not sufficient if it plainly appears that such averment is not real and substantial but is without color of merit,[1] and, whether presented on motion to dismiss

85. May intervene to inquire into the detention of a person held by a state court where it is alleged that he is held for an act done or omitted in pursuance of the authority of the United States (United States v. Lewis, 129 F. 823), or a Federal right has been denied (Ex parte Powers, 129 F. 985).

86. Ex parte Powers, 129 F. 985. Where the evidence conflicts and a military officer and soldier are charged with murder not on a reservation, the court will not interfere. United States v. Lewis, 129 F. 823.

87. United States v. Lewis, 129 F. 823. See 2 Curr. L. 610, n. 98. Habeas corpus cannot be made to perform the office of a writ of error to the state court. Ex parte Powers, 129 F. 985. Federal court will not discharge on habeas corpus a prisoner confined under criminal process of a state court where appeal and stay or bail is provided for. In re Reeves, 123 F. 343. See 2 Curr. L. 610, n. 98.

88. Clifford v. Williams, 131 F. 100.

89. Art. 4, § 1.

90. Rev. St. § 905.

91. Israel v. Israel, 130 F. 237; Clifford v. Williams, 131 F. 100; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 32 Law. Ed. 239.

92. Clifford v. Williams, 131 F. 100.

93. Israel v. Israel, 130 F. 237.

94. Clifford v. Williams, 131 F. 100.

95. See 2 Curr. L. 610.

96. Sun Print. & Pub. Ass'n v. Edwards. 194 U. S. 377, 48 Law. Ed. 1027. Defect in averment cannot be waived or healed by consent. Thomas v. Trustees of Ohio State University, 195 U. S. 207, 49 Law Ed. —; Yocum v. Parker [C. C. A.] 130 F. 770. An averment of residence is not an averment of citizenship. Yocum v. Parker, 130 F. 770; Stockwell v. Boston & M. R. Co., 131 F. 152. An allegation that plaintiff is a citizen of the British Empire is not a sufficient averment of alienage. Von Voight v. Michigan Cent. R. Co., 130 F. 398.

97. Sloan v. U. S., 193 U. S. 614, 48 Law. Ed. 814; Minnesota v. Northern Securities Co., 194 U. S. 48, 48 Law. Ed. 870; Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 48 Law. Ed. 484; Underground R. Co. v. New York, 193 U. S. 416, 48 Law. Ed. 733.

98. Thomas v. Trustees of Ohio State University, 195 U. S. 207, 49 Law. Ed. —. An averment of "residence" is insufficient to support a jurisdiction based on diverse citizenship. Trustees of Mohican Tp. v. Johnson [C. C. A.] 133 F. 524. An averment that plaintiff is a citizen of the state where suit is brought and defendant a citizen of another state is sufficient without alleging that either resides in the district. Baltimore & O. R. Co. v. Doty [C. C. A.] 133 F. 866.

99. Ejectment. Filhiol v. Torney, 194 U. S. 356, 48 Law. Ed. 1014.

1. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 Law. Ed. 795; St. Louis, etc., R. Co. v. Davis, 132 F. 629. The averments of the complaint cannot be helped out by resort to the other pleadings or to judicial knowledge. Bankers' Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 48 Law. Ed 484.

or on demurrer, the question depends primarily on the allegations of the bill and not upon the facts as they may subsequently turn out.[2] The whole record may be looked to, however, to cure a defective averment of citizenship, and if the requisite citizenship is anywhere expressly averred in the record, or facts are therein stated which in legal intendment constitute such allegation, that is sufficient.[3] The bill need not state the amount in controversy if it appears to be within the jurisdictional limit from the allegations or otherwise from the record, or from evidence taken on hearing objections to the jurisdiction.[4] A Federal court is without jurisdiction of an action at law where the answer contains a general denial, which under the state practice puts in issue the jurisdictional allegations of the complaint, and there is no proof to sustain such allegations.[5] After demurrer for defective averment of citizenship is sustained, plaintiff is entitled to amend the writ to show diversity according to the fact.[6] The burden of disproving the allegations as to diversity of citizenship[7] or the amount in controversy rests on defendant.[8] The merits cannot be tried on the hearing of a plea to the jurisdiction.[9]

§ 12. *Federal appellate jurisdiction.*[10] *A. Inquiry into jurisdiction.*[11]—All federal courts,[12] including the supreme court, will look into the question of their own jurisdiction in all cases whether propounded by counsel or not;[13] but the supreme court does not consider itself bound by a case in which jurisdiction was entertained in the absence of any suggestion as to the want of it.[14]

(§ 12) *B. Appeals between Federal courts.*[15]—Where the jurisdiction of the circuit court rests solely on the ground that the cause of action arose under the constitution, laws, or a treaty of the United States,[16] and where the order appealed from involves no question but that of jurisdiction, the appeal lies direct to the supreme court,[17] and under the proviso in section 3 of the Act of February 19, 1903,

2. Pacific Elec. R. Co. v. Los Angeles, 194 U. S. 112, 48 Law. Ed. 896.

3. Evidence preserved in bill of exceptions looked to. Sun Print. & Pub. Ass'n v. Edwards, 194 U. S. 377, 48 Law. Ed. 1027.

4. Robinson v. Suburban Brick Co. [C. C. A.] 127 F. 804.

5. Yocum v. Parker [C. C. A.] 130 F. 770.

6. Stockwell v. Boston & M. R. Co., 131 F. 153; Von Voight v. Michigan Cent. R. Co., 130 F. 398.

7. Eisele v. Oddie, 128 F. 941; Weimer v. Louisville Water Co., 130 F. 244.

8. Wiemer v. Louisville Water Co., 130 F. 244. In ejectment the burden of proof to sustain a plea in abatement to the jurisdiction on the ground of insufficient amount in controversy is upon defendant. Butters v. Carney, 127 F. 622.

9. On a plea in abatement in ejectment on the ground that the amount in controversy is insufficient to confer jurisdiction on the court, defendant's contention that the dispute concerns only his particular interest is unsustainable. Butters v. Carney, 127 F. 622.

10. See 2 Curr. L. 611.

11. See, also, Appeal and Review, 3 Curr. L. 167.

12. Utah-Nevada Co. v. De Lamar [C. C. A.] 133 F. 113.

13. South Dakota v. North Carolina, 192 U. S. 286, 48 Law. Ed. 448; United States v. Texas, 143 U. S. 621, 642, 36 Law. Ed. 285; Continental Nat. Bank v. Buford, 191 U. S. 119, 48 Law. Ed. 119; Defiance Water Co. v. Defiance, 191 U. S. 184, 48 Law. Ed. 140; Giles v. Teasley, 193 U. S. 146, 48 Law. Ed. 655; Thomas v. Trustees of Ohio State University, 195 U. S. 207, 49 Law. Ed. ——.

14. Louisville Trust Co. v. Knott, 191 U. S. 225, 48 Law. Ed. 159; New v. Oklahoma, 195 U. S. 252, 49 Law. Ed. ——.

15. See 2 Curr. L. 611.

16. Deprivation of property without due process by giving unwarranted effect to a judgment of a state court. Fayerweather v. Ritch, 195 U. S. 276, 49 Law. Ed. ——. The jurisdiction of the circuit court is established when it is shown that complainant had, or claimed to have a contract with a state or municipality which the latter had attempted to impair, and so long as the claim is apparently made in good faith and is not frivolous the case can be heard and decided on the merits. Pacific Elec. R. Co. v. Los Angeles, 194 U. S. 112, 48 Law. Ed. 896. A case may be brought direct to the supreme court for review if the construction of a treaty is drawn in question. Pettit v. Walshe, 194 U. S. 205, 48 Law. Ed. 938. A suit by an Indian to determine his rights under an Indian treaty is appealable direct to the supreme court and the circuit court of appeals has no jurisdiction. Terry v. Bird [C. C. A.] 129 F. 592.

17. Underground R. Co. v. New York, 193 U. S. 416, 48 Law. Ed. 733. Where a demurrer to an ancillary bill is sustained for want of jurisdiction and demurrant appeals from the order which also grants relief in the main case, appellee cannot object that the appeal involves only the jurisdiction and should have gone direct to the supreme

a direct appeal may be taken in a proceeding brought by the interstate commerce commission, under the direction of the attorney general, to obtain orders requiring the testimony of witnesses and the production of books and documents.[18] If a case does not really involve the construction or application of a treaty,[19] or the constitution in the sense in which that phrase is employed in the judiciary act of 1891,[20] or where the constitutional rights set up below are so attenuated and unsubstantial as to be absolutely devoid of merit, there is no jurisdiction;[21] and matters of defense that are not and cannot be resorted to by plaintiff to obtain jurisdiction will not confer it.[22] The question of jurisdiction which may under the statute be certified direct to the supreme court must be one involving the jurisdiction of the circuit court as a Federal court, and not in respect of its general authority as a judicial tribunal.[23] If the record does not affirmatively show jurisdiction in the circuit court, the supreme court on its own motion will so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute;[24] and where the contention as to want of jurisdiction below is well founded, the supreme court does not merely dismiss the appeal from a decree dismissing the bill on the merits but reverses the decree below at appellant's costs, with instructions to the circuit court to dismiss the bill for want of jurisdiction.[25] Whether the case should go to the circuit court of appeals or directly to the supreme court is determined from the record, there being no authority for the trial judge making a certificate that the application and construction of the constitution were involved in the action.[26]

Writs of error do not lie from the supreme court of the United States to the supreme court of Oklahoma in capital cases,[27] notwithstanding error lies to review a criminal case not capital in the circuit court of appeals.[28]

A rule of practice promulgated by the commissioner of patents is an "authority under the United States" giving the supreme court jurisdiction to review a case involving it in the court of appeals of the District of Columbia.[29]

The supreme court may review on writ of error a final judgment of a district court of Porto Rico, in a case in which "an act of congress brought in question and the right claimed thereunder is denied,"[30] or where the amount in dispute

court. Viquesney v. Allen [C. C. A.] 131 F. 21. The question whether a corporation is principally engaged in manufacturing and mercantile pursuits so as to be declared an involuntary bankrupt is within the jurisdiction of the district court, so that an appeal properly lies to the circuit court of appeals rather than to the supreme court. Columbia Iron Works v. National Lead Co. [C. C. A.] 127 F. 99.

18. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 Law. Ed. 860.

19. Actions brought against the United States for allotments of land in which both parties rely upon a statute, and the construction of Indian treaties is not substantially or in any other than a merely incidental or remote manner drawn in question, do not involve the construction of such treaties within the meaning of the statute of 1891. Sloan v. U. S., 193 U. S. 614, 48 Law. Ed. 814.

20. Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 Law. Ed. 749. Suits though involving the constitution or laws of the United States are not suits arising under the constitution or laws where they do not turn on a controversy between the parties in regard to the operation of the constitution or laws on the facts. Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 48 Law. Ed. 484.

21. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 Law. Ed. 795.

22. Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 48 Law. Ed. 484.

23. Bache v. Hunt, 193 U. S. 523, 48 Law. Ed. 774; Louisville Trust Co. v. Knott, 191 U. S. 225, 48 Law. Ed. 159. Whether district court sitting in bankruptcy could proceed in a summary way is not such a question. Schweer v. Brown, 195 U. S. 171, 49 Law. Ed. ——.

24. State v. Northern Securities Co., 194 U. S. 48, 48 Law. Ed. 870.

25. Newburyport Water Co. v. Newburyport, 193 U. S. 561, 48 Law. Ed. 795; Gloucester Water Supply Co. v. Gloucester, 193 U. S. 580, 48 Law. Ed. 801.

26. Cosmopolitan Min. Co. v. Walsh, 193 U. S. 460, 48 Law. Ed. 749.

27, 28. New v. Oklahoma, 195 U. S. 252, 49 Law. Ed. ——.

29. United States v. Allen, 192 U. S. 543, 48 Law. Ed. 555.

30. Claim that qualifications of grand jurors should be controlled by local laws

exceeds $5,000 and a final judgment in a like case in the supreme court of one of the territories of the United States could be reviewed by the court.[31] Review in such cases is not restricted to those cases in which the constitution or a treaty of the United States or an act of congress is brought in question and the right claimed under it denied.[32] Unless a case decided in the district court of Porto Rico can be reviewed by the supreme court, the judgment is final for no such case can be carried to the circuit court of appeals.[33]

Where the circuit court of appeals is unable by reason of conflicting authority to determine the proper construction of a state constitution, and there is no decision of the highest court of the state in point, the question will be certified to the supreme court.[34]

Where the jurisdiction of the Federal court is invoked on the ground of diverse citizenship alone, the judgment of the circuit court of appeals is final and no appeal lies to the supreme court,[35] notwithstanding the fact that the suit involves defendant's relations with the government as a carrier of the mails.[36] The circuit court of appeals has jurisdiction to review a judgment of a district or circuit court finding a person guilty of contempt for violation of its order and imposing a fine for the contempt.[37] An appeal to the circuit court of appeals does not bring before it the question of jurisdiction of the circuit or district court, that question being reviewable only by the supreme court,[38] but where a case involved constitutional questions and could have been taken direct to the supreme court, but was appealed to the circuit court of appeals, that court in the absence of objection considered the constitutional as well as the other questions in the case.[39]

(§ 12) *C. Control over state courts.*[40]—The right of the supreme court of the United States to review the decisions of the highest court of a state is circumscribed by the rules established by law and in every case the question of jurisdiction must be answered whether propounded by counsel or not.[41]

When the jurisdiction depends upon a right, privilege, or immunity under the constitution, laws, or treaties of the United States, the right on which the party relies must have been called to the attention of the court in some proper way and the decision of the court must have been against the right claimed;[42] or at all events it must appear from the record by clear and necessary intendment that the

[Act Apr. 12, 1900 (31 St. 85, c. 191) § 35]. Crowley v. U. S., 194 U. S. 461, 48 Law. Ed. 1075.

31. Hijo v. U. S., 194 U. S. 315, 48 Law. Ed. 994. See 2 Curr. L. 611, n. 21.

32, 33. Amado v. U. S., 195 U. S. 172, 49 Law. Ed. ——.

34. Whether provision for individual liability of corporate stockholders is self-executing. Middletown Nat. Bank v. Toledo, etc., R. Co. [C. C. A.] 127 F. 85.

35. The circuit courts do not possess original jurisdiction over controversies between citizens of different states claiming lands under grants of different states by reason of the subject-matter, and the decree of a circuit court of appeals in such a case is final [Act Mch. 3, 1891]. Stevenson v. Fain, 195 U. S. 165, 49 Law. Ed. ——.

36. Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 48 Law. Ed. 484.

37. Bessette v. Conkey Co., 194 U. S. 324, 48 Law. Ed. 997. Mandamus will issue from the supreme court to compel hearing of writ of error. In re Christensen Engineering Co., 194 U. S. 458, 48 Law. Ed. 1072.

38. Fisheries Co. v. Lennen [C. C. A.] 130 F. 533.

39. Duluth Brewing & Malting Co. v. Superior [C. C. A.] 123 F. 353.

40. See 2 Curr. L. 613.

41. Giles v. Teasley, 193 U. S. 146, 48 Law. Ed. 655.

42. Giles v. Teasley, 193 U. S. 146, 48 Law. Ed. 655; Southern R. Co. v. Carson, 194 U. S. 136, 48 Law. Ed. 907. A mere claim that the decision violates the Fifth amendment raises no Federal question. Winous Point Shooting Club v. Caspersen, 193 U. S. 189, 48 Law. Ed. 675. Right under interstate commerce act held properly asserted. Mathew v. Wabash R. Co. [Mo. App.] 81 S. W. 646; Chicago, etc., R. Co. v. McGuire, 25 S. Ct. 200. Denial of effect as res adjudicata to a decree in bankruptcy does not present a Federal question. Smalley v. Laugenour, 25 S. Ct. 216. The immunity of a United States senator from arrest is a Federal question. Burton v. U. S., 25 S. Ct. 243. Whether a state statute violates the state constitution is not a Federal question. Hodge v. Muscatine County, 25 S. Ct. 237.

Federal question was directly involved so that the state court could not have given judgment without deciding it.[43] Where the state court decides the case for reasons independent of the Federal right claimed,[44] or upon a ground broad enough to sustain it without deciding the Federal question raised, the supreme court has no jurisdiction;[45] but where a decision by the state court of the Federal question appears to have been the foundation of the judgment, a writ of error lies,[46] and the supreme court will not decline jurisdiction of a case which would never have been brought but for the passage of unconstitutional laws because the state court put forward an untenable construction of a corporate charter more than the unconstitutional statutes in its judgment.[47] That a Federal question was so raised and decided must affirmatively appear from the record.[48]

Great weight is attached to the decision of the state court regarding questions of taxation or exemption therefrom under the constitution or laws of its own state,[49] and the highest court of a state may administer the common law, and interpret its own statutes and constitution according to its understanding thereof without raising any question of Federal law reviewable in the supreme court.[50]

A denial in Kentucky of the validity of an Indiana judgment because the place of service of process is claimed to be on the Kentucky side of the boundary presents a Federal question.[51] Contrary to the rule governing appeals between Federal courts, the power of the supreme court to review a decision of a state court may arise from a Federal right first set up and claimed by defendant in his

43. Giles v. Teasley, 193 U. S. 146, 48 Law. Ed. 655.

44. Giles v. Teasley, 193 U. S. 146, 48 Law. Ed. 655. Where a Federal question was not necessarily involved and the state court refused to consider it because it was not argued, the Federal courts have no jurisdiction. Harding v. Illinois, 25 S. Ct. 176.

45. Giles v. Teasley, 193 U. S. 146, 48 Law. Ed. 655. An averment that the provisions of a state constitution under which registrars of election are acting violates the Fourteenth amendment, and demurrer thereto sustained on the ground that if the averment be true the board has no legal existence and relator has no ground to demand registration, involves no Federal question. Id. Seizure of liquors alleged to be subjects of interstate commerce, sustained in state court on ground that the transaction was all in one state. Held that a Federal question was necessarily involved. American Exp. Co. v. Iowa. 25 S. Ct. 182; Adams Exp. Co. v. Iowa, 25 S. Ct. 185.

46. Wedding v. Meyler, 192 U. S. 573, 48 Law. Ed. 570. Where the determination by the state court of an alleged ground of estoppel embodied in the ground of demurrer to an answer necessarily involves a consideration of the claim set up in the answer of a contract protected by the constitution of the United States, a Federal question arises on the record which gives the court jurisdiction. Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 Law. Ed. 598.

47. Terre Haute & I. R. Co. v. State, 194 U. S. 579, 48 Law. Ed. 1124.

48. Certificate of judge of state court cannot take place of showing in record. Fullerton v. Texas, 25 S. Ct. 221. A general assertion in the motion for new trial that a statute violates the Federal constitution does not present a Federal question of record. Harding v. Illinois, 26 S. Ct. 176. Petition, assignments, or brief cannot cure omission. Id.

49. Chicago Theological Seminary v. People, 188 U. S. 662, 47 Law. Ed. 641.

50. Reading depositions of witnesses in criminal trials. West v. Louisiana, 194 U. S. 258, 48 Law. Ed. 965. See 2 Curr. L. 614. Whether a police regulation has been violated. Fischer v. St. Louis, 194 U. S. 361, 48 Law. Ed. 1018; Schefe v. St. Louis, 194 U. S. 373, 48 Law. Ed. 1024; Mohl v. Lamar Canal Co., 128 F. 776. A determination of who are merchants within a state tax law involves no Federal question. American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 Law. Ed. 538. Whether a deed given by a bankrupt a year prior to the adjudication is fraudulent, or whether it was absolute or intended merely as a mortgage are not Federal questions. Cramer v. Wilson, 195 U. S. 408, 49 Law. Ed. ——. Whether a state statute conflicts with the state constitution is settled by a decision of the highest court of the state. Carstairs v. Cochran, 193 U. S. 10, 48 Law. Ed. 596. Whether illegal provisions in a pilotage statute granting discriminatory exemptions to vessels of that state can be eliminated without destroying the other provisions of the statute is a state and not a Federal question. Olsen v. Smith, 195 U. S. 332, 49 Law. Ed. ——. The supreme court decides for itself as to the existence and meaning of the contract, but in deciding questions of taxation where it cannot be said that the decision below is in itself unreasonable or in violation of the plain language of the statute it will in cases engendering a fair doubt, follow the state court in its interpretation of the statutes of its own state. Chicago Theological Seminary v. People, 188 U. S. 662, 47 Law. Ed. 641.

51. Wedding v. Meyler, 192 U. S. 573, 48 Law. Ed. 570.

defense,[52] and where the claim is first made on motion for rehearing in the highest court of the state, it is sufficiently raised; the state court entertaining the motion and deciding against the right claimed.[53]

The writ runs to the court in which the record remains.[54]

The supreme court cannot review the conclusions of the highest court of a state upon questions of fact.[55]

§ 13. *Acquisition and divestiture.*[56]—Jurisdiction, especially of inferior courts, may be lost by delay or interruption of the proceedings;[57] but generally a judgment of a court of general jurisdiction rendered after the time limited by statute is merely erroneous, not void for want of jurisdiction.[58] Where a new district is created out of a part of the territory of an old one, jurisdiction over pending causes remains with the old court or not as the statute provides.[59] The Act of Congress of 1900, reorganizing the judicial system of Alaska, saved to litigants the right to prosecute pending suits to final judgment under either the old or the new law.[60] The mere filing of an application for change of venue does not oust jurisdiction,[61] and a void order attempting to transfer jurisdiction is of no force and the exercise of jurisdiction may be resumed without the issuance or service of new process.[62] A stay of proceedings for failure to pay costs does not deprive the court of jurisdiction,[63] and an order consolidating actions may properly reserve jurisdiction over the question of costs and expenses in the suits superseded.[64] A voluntary settlement before judgment does not oust jurisdiction;[65]

52. Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 192 U. S. 371, 48 Law. Ed. 484. After a plea of the general issue, a motion to amend by setting up the Federal right, and asking an instruction based on rights thereunder, is in time. National Mut. Bldg. & Loan Ass'n v. Brahan, 193 U. S. 635, 48 Law. Ed. 823.

53. Leigh v. Green, 193 U. S. 79, 48 Law. Ed. 623.

54. Judgment entered in circuit court of Kentucky on mandate from court of appeals. Wedding v. Meyler, 192 U. S. 573, 48 Law. Ed. 570. Court of civil appeals of Texas. Olsen v. Smith, 195 U. S. 332, 49 Law. Ed. ——.

55. Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 48 Law. Ed. 944; Hill v. McCord, 195 U. S. 395, 49 Law. Ed. ——; Cramer v. Wilson, 195 U. S. 408, 49 Law. Ed. ——. See 2 Curr. L. 614, n. 59. Whether the payee of a bankrupt had reasonable grounds to believe a preference was intended. Kaufman v. Tredway, 195 U. S. 271, 49 Law. Ed. ——.

56. See 2 Curr. L. 630.

57. Municipal court act requires judgment to be entered within 14 days from submission of case. Moscowitz v. New York City R. Co., 91 N. Y. S. 352. See 2 Curr. L. 620, n. 65. The limitation does not apply to the decision of a motion for new trial. Collins v. Lamson Consol. Store Service Co., 85 N. Y. S. 1110. Adjournment by justice more than 8 days over defendant's objection. Wright v. Shepherd, 44 Misc. 454, 90 N. Y. S. 154. Dismissal by justice on adjournment held erroneous. Field v. Heckman, 118 Wis. 461, 95 N. W. 377. Failure to act on motion for new trial on date set in vacation carries it over to next term. Miller v. Thigpen [Ga.] 49 S. E. 286.

58. Lawrence v. Cannavan, 76 Conn. 303, 56 A. 556; Demaris v. Parker, 33 Wash. 200, 74 P. 362.

59. See 2 Curr. L. 631, n. 68. Where new counties with new courts are organized out of territory of existing counties, the old courts have jurisdiction over actions real and personal until the new courts are fully organized and their officers elected and qualified. Rushton v. Woodham [S. C.] 46 S. E. 943. Where a new county or jurisdiction is established after the commission of a crime, the defendant must be indicted, tried and sentenced in the jurisdiction comprising the territory in which the offense was committed, and not in the county to which the unorganized territory was attached for judicial purposes. Moran v. Territory [Okl.] 78 P. 111. Where an act provided that all causes pending in the circuit court at one town when the act took effect should be transferred to the same court at another town and be triable there, a cause originally tried in the circuit court of the former town which, when the act took effect, was awaiting determination on appeal was, when the appeal was dismissed, within the jurisdiction of the court at the latter town. Sperling v. Stubblefield, 105 Mo. App. 489, 79 S. W. 1172. The circuit court of a county having jurisdiction under a special statute of a suit involving title to certain lands continues to hold it, notwithstanding a subsequent statute, creating a county, cuts off a portion of such lands. Graham's Heirs v. Kitchen, 25 Ky. L. R. 2224, 80 S. W. 464.

60. Shoup v. Marks [C. C. A.] 128 F. 32. See 2 Curr. L. 631, n. 70.

61. State v. Evans [Mo.] 83 S. W. 447.

62. Armour Packing Co. v. Howe, 68 Kan. 663, 75 P. 1014. See 2 Curr. L. 631, n. 73.

63. Proceedings taken during the stay being merely irregular and cured by payment. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. S. 824.

64. German Nat. Bank v. Best & Co. [Colo.] 75 P. 398.

65. But in such case the court should

but cases properly dismissed in the municipal court for nonappearance cannot be reinstated except on defendant's express consent or his voluntary appearance without objection after notice.[66] In order to transfer an action brought before a justice of the peace to the circuit court on the ground that the title to real estate is in question, the statutory directions must be strictly observed.[67] The city court of New York does not lose jurisdiction by the entry of an order of interpleader under the banking law where the object of the suit is to recover money on deposit.[68] The Pennsylvania statute of 1901, transferring jurisdiction of railway crossings over highways to the common pleas, nullified pending proceedings in the quarter sessions.[69] Cases involving questions of citizenship of the Choctaw tribe of Indians must be transferred to the citizenship court established by congress to decide such questions.[70]

§ 14. *Objections to jurisdiction and presumptions respecting it.*[71]—Courts notice their want of jurisdiction of their own motion,[72] and when at any time or in any manner it is in good faith represented to the court by a party or amicus curiae that it has not jurisdiction, it will examine the grounds of its jurisdiction before proceeding further.[73] This is the rule whether counsel raise the question, or presently waive it or expressly assent to the jurisdiction,[74] and the question must be determined though not insisted on.[75] The court cannot decline to consider an objection to the jurisdiction merely because it is characterized by plaintiff as "technical."[76]

A plea to the jurisdiction must set forth the facts from which the lack of jurisdiction appears;[77] but in New Jersey such a plea need not designate a court which has jurisdiction.[78] A defense to an action on a bond that it was extorted in proceedings void for want of jurisdiction is the subject of a plea in bar and not of a plea to the jurisdiction,[79] and where defendant's objections all appear of record, his remedy is by appearance to move for dismissal and not by plea in abatement.[80] An officer's return to a writ cannot be falsified by plea in abatement.[81] The question of jurisdiction may be raised by motion to dismiss the suit,[82] and the question of jurisdiction of the subject-matter may be raised by demurrer or answer.[83] On a demurrer to a plea to the jurisdiction, the declaration is not brought in question.[84] Under the Code, whether a plaintiff plants his cause of action at law or in equity from the aspect of common-law procedure does not, if properly planted, raise a jurisdictional question in the strict sense of the term;

enter judgment dismissing both complaint and counterclaim. Dr. Shoop Family Medicine Co. v. Schowalter [Wis.] 98 N. W. 940.

66. Eichner v. Cohen, 91 N. Y. S. 357.

67. Costs must be paid in full. Hinchman v. Spaulding [Mich.] 100 N. W. 901.

68. Gottschall v. German Sav. Bank, 90 N. Y. S. 896.

69. Act June 7, 1901, P. L. 531. Pennsylvania R. Co. v. Bogert [Pa.] 59 A. 100.

70. Dawes v. Cundiff [Ind. T.] 82 S. W. 228.

71. See 2 Curr. L. 631.

72. Netter v. Reggio [La.] 37 So. 620. See 2 Curr. L. 631, n. 74.

73. Perry v. Griefen [Me.] 59 A. 601. A challenge to the jurisdiction of the court of the subject-matter is proper at any time in the progress of a case. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

74. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

75. Monnett v. Columbus, etc., R. Co., 4 Ohio C. C. (N. S.) 369.

76. Stein v. Morrison [Idaho] 75 P. 246.

77. A plea to the jurisdiction averring that the cause of action arose upon navigable waters and is within the exclusive jurisdiction of the courts of the United States is bad on demurrer for not averring that the waters were navigable waters of the United States. Such plea should set forth the facts so that the court may determine whether the waters are state or national. Birch v. King [N. J. Law] 59 A. 11.

78. Trespass. Hill v. Nelson [N. J. Law] 57 A. 411. See 2 Curr. L. 631, n. 77.

79. Birch v. King [N. J. Law] 59 A. 11.

80. Hilton v. Consumers' Can Co. [Va.] 48 S. E. 899.

81. McDaniels v. De Groot [Vt.] 59 A. 166; Perry v. Griefen [Me.] 59 A. 601.

82. City of Windsor v. Cleveland, etc., R. Co., 105 Ill. App. 46.

83. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816.

84. Birch v. King [N. J. Law] 59 A. 11.

only a question of practice.[85] Where the service papers do not affirmatively show jurisdiction and it is questioned, the burden is on plaintiff to show it.[86] The judgment on demurrer to plea to the jurisdiction, if in favor of plaintiff, is respondeat ouster.[87]

After a court which has general jurisdiction over a certain class of cases proceeds without objection to the hearing and determination of a cause belonging to that class, it is too late on appeal to raise objections to the irregular exercise of jurisdiction.[88] But whether the court had jurisdiction of the subject-matter,[89] and questions of jurisdiction arising on the face of the record, may be raised at any time.[90] The trial of an action at a place where the court had no power to sit is jurisdictional and is not waived by failure to raise the question in the trial court.[91] A plea to the jurisdiction as to the person as well as to the subject-matter may be united with a plea to the merits without waiving the question of the jurisdiction.[92] Knowledge of persons not served that the court is about to proceed against them without jurisdiction is not a waiver.[93]

A court of general jurisdiction will be presumed to have acted within its jurisdiction,[94] and in the absence of anything in the record showing the lack of it, will be presumed to have had jurisdiction over parties against whom judgment was rendered.[95] As to courts of special and limited jurisdiction, no presumptions are indulged,[96] but once it appears jurisdiction has attached, the usual presumptions are indulged in favor of its continuance.[97] Presumptions will be indulged in favor of the jurisdiction of probate as well as other superior courts, in matters within probate jurisdiction.[98] Presumptions indulged to sustain a record against collateral attack can only be made to supply the record in matters regarding which it is silent, and cannot be permitted to contradict the record in matters in which it speaks for itself.[99]

85. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

86. Dalton v. Mills, 91 N. Y. S. 733.

87. Birch v. King [N. J. Law] 59 A. 11.

88. Change of venue to wrong court. Rodney v. Gibbs [Mo.] 82 S. W. 187.

89. Midler v. Lese, 91 N. Y. S. 148. May be first raised on appeal (Kalyton v. Kalyton [Or.] 78 P. 332), though waived below (Fidelity & Deposit Co. v. Jordan, 134 N. C. 236, 46 S. E. 496).

90. Defect in proof of service of process. Skinner v. Jordan, 91 N. Y. S. 322. Where it appears from the record that the trial court had no jurisdiction, the objection can be raised for the first time on appeal. Furst Bros. v. Banks, 101 Va. 208, 43 S. E 360. Where the misjoinder of defendants residing within and without the county appears on the face of the petition, the question of jurisdiction over the nonresident defendants may be raised after judgment. Haseltine v. Messmore [Mo.] 82 S. W. 115.

91. Armstrong v. Loveland, 90 N. Y. S. 711.

92. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479; High v. Padrosa, 119 Ga. 648, 46 S. E. 859.

93. Floto v. Floto, 213 Ill. 438, 72 N. E. 1092.

94. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. Superior court. Parsons v. Weis, 144 Cal. 410, 77 P. 1007; Grannis v. Superior Court of San Francisco, 143 Cal. 630, 77 P. 647. Nothing shall be intended to be out of the jurisdiction of a superior court but which specially appears to be so. Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64; Smoot v. Judd [Mo.] 83 S. W. 481. Averment as to jurisdiction of court rendering foreign judgment held sufficient. Murphy v. Murphy [Cal.] 78 P. 1053. Order of adoption presumed regular and founded on proper jurisdictional facts. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350.

95. Godfrey v. White, 32 Ind. App. 265, 69 N. E. 688. Where a judgment against a minor is in question and nothing appears as to his age, it will be presumed for the purpose of testing the jurisdiction that he was under 14. Melcher v. Schluter [Neb.] 98 N. W. 1082. Extrinsic evidence is not admissible in a collateral proceeding to show that a domestic court of general jurisdiction had not jurisdiction of the parties against whom a judgment was rendered. Greenway v. De Young [Tex. Civ. App.] 79 S. W. 603. Presumption of regularity extends to judgments founded on substituted service. McHatton v. Rhodes, 143 Cal. 275, 76 P. 1036.

96. Justice of the peace. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558. Jurisdiction of New York city court is not presumed. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. S. 103.

97. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558.

98. Hadley v. Bernero, 103 Mo. App. 549, 78 S. W. 64. In Wyoming the presumption of regularity of proceedings of the district court attaches to its proceedings in probate matters. Lethbridge v. Lauder [Wyo.] 76 P. 682.

99. Cizek v. Cizek [Neb.] 99 N. W. 28; Aldrich v. Steen [Neb.] 100 N. W. 311.

JURY.

§ 1. Necessity or Occasion for Jury Trial (358).
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Custody and conduct of the jury during the trial[1] and practice at the rendition of the verdict[2] are elsewhere treated.

§ 1. *Necessity or occasion for jury trial. A. Under the constitution.*[3]—The common-law right of trial by jury is guaranteed by the Federal constitution and by the constitutions of the several states.[4]

In the absence of specific enlargement or limitation, the guaranteed right is that which existed at common law,[5] or prior to the adoption of the constitution,[6] and includes issues of fact in cases at law.[7] It is not a matter of right in probate proceedings or appeal therefrom,[8] or in suits in equity,[9] or in quo warranto

1. See Trial, 2 Curr. L. 1907.
2. See Verdict and Findings, 2 Curr. L. 2009.
3. See 2 Curr. L. 633.
4. See 2 Curr. L. 633. Jones v. Mutual Fidelity Co., 123 F. 526; Tomlinson v. Bianaka [Ind.] 70 N. E. 155; Chessman v. Hale [Mont.] 79 P. 254. Sentence to infamous punishment without the privilege of a jury trial is void as to deprivation of liberty without due process of law. Plaintiff who petitions for a writ of habeas corpus was sentenced to seven months' service on a ball and chain gang. Jamison v. Wimbish, 130 F. 351.
5. See 1 Curr. L. 597, n. 97. See 2 Curr. L. 633. Kirkland v. State [Ark.] 78 S. W. 770; Tomlinson v. Bianaka [Ind.] 70 N. E. 155; Chessman v. Hale [Mont.] 79 P. 254. Not in probate appeals. Moody v. Found, 208 Ill. 78, 69 N. E. 831. Does not exist in favor of a remedy that did not exist at common-law. Suit to enforce stockholders' individual liability for corporate debts. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.
6. Wheeler v. Caldwell, 68 Kan. 776, 75 P. 1031; Tomlinson v. Bianaka [Ind.] 70 N. E. 155; Chessman v. Hale [Mont.] 79 P. 254. See 1 Curr. L. 597, n. 98. Prosecution before justice of the peace for violation of ordinance held a summary proceeding not entitling defendant to jury. Unger v. Fanwood Tp., 69 N. J. Law, 548, 55 A. 42. The constitutional guaranty of the right of trial by jury refers only to such right as it existed prior to the constitution, and hence does not extend to actions of an equitable nature. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. The statute relating to partition (Rev. St. 1892, §§ 1490-1497) having been enacted before the constitution went into effect is valid, although it deprives parties of the right to trial by jury. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.
7. Weaver v. Arkansas Nat. Bank [Ark.] 84 S. W. 510. In civil actions at law when a jury has been demanded, the trial court has no authority to try the case without a jury. Hanson v. Carlblom [N. D.] 100 N. W. 1084. If no relief peculiar to equity practice is demanded or authorized by the proof, the parties are entitled to a jury trial. New Harmony Lodge v. Kansas City, etc., R. Co., 100 Mo. App. 407, 74 S. W. 5. The bill of rights provides that the parties to a controversy shall be entitled to trial by jury save where the value of the controversy does not exceed $100. The ad damnum is $1,000. At two prior trials of the case the juries returned verdicts for $25 and $20, respectively, the plaintiff having testified that his loss was $100. Motion by the defendant for trial by the court was properly denied. Horan v. Byrnes, 72 N. H. 600, 58 A. 42. Questions as to title to real estate depending upon adverse possession or abandonment are triable to a jury, and in an injunction proceeding appeal only to the grace of a court of equity. Tudor Boiler Mfg. Co. v. Greenwald Co., 5 Ohio C. C. (N. S.) 37.
8. Moody v. Found, 208 Ill. 78, 69 N. E. 831. Admission to probate of will spoliated or destroyed. Gallon v. Haas, 67 Kan. 225,

proceedings;[10] and a statute abolishing school districts and transferring their property to towns is not invalid for failure to provide jury trial as to the value of the property.[11] Summary proceedings,[12] prosecutions under municipal ordinances,[13] and statutory actions,[14] are not included. A suit may be one at law notwithstanding a prayer for equitable relief,[15] and whenever a court of law is competent to

72 P. 770. Proceedings to contest claim against a decedent's estate in the district court sitting in probate. Esterly v. Rua [C. C. A.] 122 F. 609. Matter resting in the discretion of the probate court. Removal of administrator. Stevens v. Larwill [Mo. App.] 84 S. W. 113.

9. Harrigan v. Gilchrist [Wis.] 99 N. W. 909; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007; Gallon v. Haas, 67 Kan. 225, 72 P. 770; Esterly v. Rua [C. C. A.] 122 F. 609; Shields v. Johnson [Idaho] 79 P. 391; Parmelee v. Price, 208 Ill. 544, 70 N. E. 725; Woodrough v. Douglas County [Neb.] 98 N. W. 1092. Suit to set aside transfer of corporate stock for fraud, for injunction, restraint on disposal, etc., is equitable. Morrison v. Snow, 26 Utah, 247, 72 P. 924. Proceedings to sell land for nonpayment of tax. Woodrough v. Douglas County [Neb.] 98 N. W. 1092. A complaint whose essential requirement is an accounting between alleged partners is of equitable cognizance. Shipley v. Belduc [Minn.] 101 N. W. 952. In an action for redemption and accounting, defendant was not entitled to have a jury to estimate damages. Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171. The rule that equity relief will be granted in aid of a legal remedy only after plaintiff has exhausted such remedy precludes violation of the seventh amendment of the United States constitution. Jones v. Mutual Fidelity Co., 123 F. 526. Section 20, art. 1 of Indiana St. Const. applies only to cases treated as civil cases when the constitution was adopted and not to cases of equitable jurisdiction. Tomlinson v. Bainaka [Ind.] 70 N. E. 155. A suit in which injunctive relief is demanded is equitable although the circumstances have so changed during the pendency of the action that at the time of the trial the plaintiff is not entitled to injunctive relief. Tucker v. Edison Elec. Illuminating Co., 91 N. Y. S. 439. Where the action is to recover money and to foreclose a lien on personalty, and the defendant set up by way of affirmative defense, alleged fraud, misrepresentation, failure of consideration, and noncompliance with the terms of the contract, and asked that the contract be rescinded, held that he was not entitled to demand a jury trial. Pratt v. Timmerman [S. C.] 48 S. E. 255. A suit to have a deed declared a mortgage or to enforce a vendor's lien, may be tried by the court. Yancey v. People's Bank, 101 Mo. App. 605, 74 S. W. 117. Where equitable issues are involved, and indebtedness is set up in the complaint if the answer admits the indebtedness there is no right to a jury trial. Bank of Spartanburg v. Chickasaw Soap Co. [S. C.] 49 S. E. 845. The plaintiff sued in law asking among other things certain relief which could only be granted in equity, and at the same time sued in equity for apparently the same relief. Held that an order for consolidation and denial of jury trial were proper, since the relief could only be granted in equity. Twogood v. Allee [Iowa] 99 N. W. 288.

10. Wheeler v. Caldwell, 68 Kan. 776, 75 P. 1031.

11. In re School Committee of North Smithfield [R. I.] 58 A. 628.

12. To abate liquor nuisance. Kirkland v. State [Ark.] 78 S. W. 770. Prosecution before justice for violation of ordinance. Unger v. Fanwood Tp., 69 N. J. Law, 548, 55 A. 42. A statute providing a summary remedy against a sheriff for failure to execute a writ is not interfering with the right to jury trial. Johnson v. Price [Fla.] 36 So. 1031. A criminal prosecution before a justice is a summary proceeding which may be tried without a jury. Unger v. Fanwood Tp., 69 N. J. Law, 548, 55 A. 42.

13. Bray v. State, 140 Ala. 172, 37 So. 250. Summary proceedings before municipal courts for the punishment of petty offenders are permissible; but where the crime involves sentence to hard labor on the public chain gang, the right to trial by jury is inviolate. Jamison v. Wimbish, 130 F. 351.

14. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Whether or not a statutory action is to be tried by jury is to be determined, in the absence of a statutory declaration on the point, by reference to whether it is in nature an action at law or in equity. Harrigan v. Gilchrist [Wis.] 99 N. W. 909; New Harmony Lodge v. Kansas City, etc., R. Co., 100 Mo. App. 407, 74 S. W. 5.

15. Action for trespass and injunction, answer claiming highway. State v. Hart, 26 Utah, 229, 72 P. 938. A statutory action is not necessarily to be tried by jury. Whether it is or is not is to be determined, in the absence of statutory declarations on the subject, with reference to whether its general characteristics are those of an action at law or one in equity from the aspect of the old remedies. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. In an action asking for an injunction to abate a nuisance and that damages be awarded, the fact that equitable relief is sought does not bar the right to a jury trial, since at common law, and prior to the adoption of the constitutions of the state and nation, damages caused by the maintenance of a nuisance were triable by jury. Chessman v. Hale [Mont.] 79 P. 254. In an action to enforce a mechanic's lien if it is shown by counterclaim that there is a demand for affirmative relief, either party is entitled to a jury trial on that issue if it is in the nature of an action at law. Robertson v. Moore [Idaho] 77 P. 218. Actions involving title depending upon questions of abandonment or adverse possession are triable to a jury, and a court of equity will rarely assume the burden of determining them, even though equitable remedies are necessary. Tudor Boiler Mfg. Co. v. Greenwald Co., 5 Ohio C. C. (N. S.) 37. Where the plaintiff alleges damages spe-

take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because defendant has a constitutional right to a trial by jury.[16] But when the court orders two causes one an equity cause the other a law cause to be consolidated, and there is no objection, the court properly trics the issues of law and fact together.[17] That issues of fact in an equity case were tricd by a jury as in a case at law is not prejudicial where the right result was reached, as it is unimportant that the court had the assistance of a jury.[18]

There is no constitutional right in Maine to a jury trial to assess damages for property taken by eminent domain.[19] There is, however, in Illinois.[20] But where such proceedings are taken and no objection to the denial of trial by jury is made, the right is waived.[21] Statutes providing that insurance companies shall be estopped to deny that property was of the value for which it was insured are not violative of the right.[22] Statutes providing for special findings at the request of the parties[23] authorizing direction of verdict where there is no conflict in the evidence, and that introduced demands a particular verdict,[24] and providing for a new trial for insufficiency of evidence or excessive damages do not interfere, such power having always been exercised by common-law courts irrespective of statute.[25] A statute providing that if special interrogatories are requested by a party he must submit them to his adversary before argument does not violate the ancient mode of trial by jury.[26] Where a jury trial is a matter of constitutional right, it is a sufficient compliance with this guaranty that the statute provides a jury trial on appeal;[27] and a person who owns property sufficient to secure costs is not deprived of the right of a trial by jury, because required to give security.[28] A statute providing for a change of venue in criminal cases by the state, on application of its attorney,[29] and that a crime committed in two counties may be prosecuted in either, is not unconstitutional as violating the right of trial by a jury of the vicinage,[30] nor is the right violated by drawing a jury from an adjoining county when the court deem it impossible to get an impartial jury from the county where the case is to be tried.[31] When one party properly demands a jury within the

cifically unless his complaint sets out sufficient allegations to render the case exclusively one of equitable cognizance, the right to jury trial remains. Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882.

16. Jones v. Mutual Fidelity Co., 123 F. 506, citing Hipp v. Babin, 19 How. [U. S.] 271, 15 Law. Ed. 679; Insurance Co. v. Bailey, 13 Wall. (U. S.) 616, 20 Law. Ed. 501; Grand Chute v. Winegar, 15 Wall. [U. S.] 373, 21 Law. Ed. 174; Buzard v. Houston, 119 U. S. 347, 30 Law. Ed. 451; Whitehead v. Shattuck, 138 U. S. 151, 34 Law. Ed. 873.

17. Chandler v. Franklin, 65 S. C. 544, 44 S. E. 70.

18. Humphrey Hardware Co. v. Herrick [Neb.] 99 N. W. 233.

19. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893. The mill act of Maine making the finding of the commissioners conclusive as to the damage for flowage unless impeached is not invalid as depriving the trial of its character as a common-law jury trial, the parties not being entitled to such a trial. Id

20. A statute providing for the assessment of damages for land taken for a drainage ditch by commissioners instead of a jury is to that extent invalid. Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440.

21. Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440.

22. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

23. Request is also mandatory when made by the court of its own motion. Pittsburg, etc., R. Co. v. Smith, 207 Ill. 486, 69 N. E. 873.

24. Tilley v. Cox, 119 Ga. 867, 47 S. E. 219.

25. Ingraham v. Weidler, 139 Cal. 588, 73 P. 415.

26. Pittsburg, etc., R. Co. v. Smith, 207 Ill. 486, 69 N. E. 873.

27. Shively v. Lankford, 174 Mo. 535, 74 S. W. 835. One having a right to appeal from a decision of a justice of the peace cannot complain that he has been denied the right of jury trial. Carlin v. Hower & Higbee, 5 Ohio C. C. (N. S.) 70.

28. Wood v. Bailey, 122 F. 967.

29. Rev. Codes 1899, § 8122. Barry v. Truax [N. D.] 99 N. W. 769.

30. Commonwealth v. Jones [Ky.] 82 S. W. 643.

31. Const. § 11; Cr. Code Prac. § 194. Mosely v. Com. [Ky.] 84 S. W. 748.

required time and later waives the right, the other party still has a right to demand a jury by tendering the jury fees.[32]

Cases of contempt of court were never triable by jury.[33]

Character of jury guaranteed.[34]—Unless otherwise provided by constitutional enactment, the jury guaranteed means a jury of twelve,[35] whose verdict must be unanimous.[36] Unanimity, however, has been dispensed with in some states.[37] And in Kansas in a prosecution for a misdemeanor, defendant, with consent of the prosecuting attorney and the court, may waive trial by a full jury and consent to be tried by a jury of eleven persons.[38]

Mandamus to compel a jury trial.[39]

(§ 1) *B. In cases not covered by constitution.*[40]—In many states, provision is made for the submission of issues of fact in equity cases to a jury. In such cases it is generally a matter of discretion whether a jury shall be called,[41] and when called their verdict is merely advisory, the court being free to accept or reject it.[42] The statutes of several states provide that all actions to recover money or specific personalty shall be tried by a jury unless the same is waived or the issues referred.[43] In Michigan disputed questions of fact on appeal from decisions of the probate court must, if either party so asks, be tried by a jury,[44] and in Illinois a defaulted defendant is entitled on asking it to have his damages assessed by a jury; the statute being imperative and not open to construction.[45] The right to a jury trial on issues raised before an auditor in the distribution of a fund is based entirely on the statute.[46] Where the statutory right is based on the existence of certain facts, they must appear from the record to entitle to it;[47] but where claims are set up that entitle to a jury trial it is error for the court to pass upon the facts, even in equity cases, unless jury is waived.[48]

32. Sherwood v. New York Tel. Co., 91 N. Y. S. 387.

33. See 2 Curr. L. 635. Drady v. District Court [Iowa] 102 N. W. 115.

34. See 2 Curr. L. 635.

35. Right to trial by an impartial jury means a jury of twelve impartial men. State v. Mott, 29 Mont. 292, 74 P. 728. A trial jury at common law and under most American constitutions is a jury of twelve men in the presence, and under the superintendence of, a judge empowered to instruct them on the law and advise them as to the facts, and, except on acquittal of a criminal charge, to set aside their verdict when contrary to the law and evidence. Archer v. Board of Levee Inspectors, 128 F. 125.

36. An erroneous instruction that a less number may return a good verdict is immaterial when the verdict is unanimous. Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6; Fitzhugh v. Nicholas [Colo. App.] 77 P. 1092.

37. The amendment in Missouri dispensing with unanimity was legally adopted [Act 2, § 28] (Gabbert v. Chicago, etc., R. Co., 171 Mo. 84, 70 S. W. 891; Smith v. Sovereign Camp of Woodmen, 179 Mo. 119, 77 S. W. 862; McClure v. Feldmann [Mo.] 84 S. W. 16; Shaw v. Goldman [Mo.] 81 S. W. 1223), and applied to pending suits (Roenfeldt v. St. Louis & S. R. Co., 180 Mo. 554, 79 S. W. 706).

38. State v Wells [Kan.] 77 P. 547.

39. See 2 Curr. L. 635, n. 22.

40. See 2 Curr. L. 635.

41. Wurster v. Armfield, 90 N. Y. S. 699.

42. Applies in suit for separate maintenance. Kozacek v. Kozacek, 105 Ill. App. 180; Brock v. Kirkpatrick [S. C.] 48 S. E. 72.

43. Rev. St. 1899, § 691. Yancey v. People's Bank, 101 Mo. App. 605, 74 S. W. 117; Lincoln Trust Co. v. Nathan, 175 Mo. 32, 74 S. W. 1007. The criterion by which the right to a jury trial is determined is the character of the action,—that is the relief sought,—not the distinction between legal and equitable properties. This does not mean that the right depends on the prayer for relief, but that it depends on whether the contents of the pleadings call for a legal judgment, or for one in the nature of a decree in chancery, whether the issues to be tried are legal or equitable. New Harmony Lodge v. Kansas City, etc., R. Co., 100 Mo. App. 407, 74 S. W. 5. Where an action is brought in a state court under authority given by the bankruptcy act and is an action to recover a sum of money only, and where no equitable relief is asked it is an action within section 968 of N. Y. Code and the issues of fact therein are triable by a jury. Stern v. Mayer, 99 App. Div. 427, 91 N. Y. S. 292.

44. Nowland v. Rice's Estate [Mich.] 101 N. W. 214.

45. Blizzard v. Epkens, 105 Ill. App. 117.

46. In re Powel's Estate, 209 Pa. 76, 57 A. 1111.

47. Defendant claimed that being his second offense he was entitled to a jury trial; held, that it was not error to refuse a jury trial since it did not appear of record that it was his second offense. Kappes v. Ohio, 4 Ohio C. C. (N. S.) 14, 25 Ohio Circ. R. 723.

48. Code W. Va. 1873, c. 148, § 25. Lips-

(§ 1) *C. Loss or waiver of right.*[49]—The right may be waived, in civil cases,[50] and a statute providing that unless a jury is demanded in accordance with its provisions it shall be deemed waived does not impair the right;[51] but defendant in a criminal case cannot consent to a trial by the court,[52] and where persons sui juris are, without any action on their part, secure in the right of a jury trial, an act that makes the right of one under 14 years of age depend upon his demand for it, violates the constitutional guaranty.[53] Persons accused of petty offenses may, however, waive jury trial,[54] and one who waives trial by jury and consents to be tried by the judge will not be heard after trial and conviction to say that the method of selecting a jury is unconstitutional, nor that he has been deprived of his liberty "without due process of law."[55] When a party has been granted a jury trial upon his own request, he cannot complain that damages were assessed by this jury, instead of by the jury provided for in condemnation proceedings.[56] Although jury has been waived by failure to comply with the statute, the court may, in its discretion, grant a jury trial.[57]

What constitutes waiver. In general.[58]—Any unequivocal acts or conduct which show a willingness or intention to forego the right, and are so treated by the trial court without objection, will amount to a waiver. Thus, consent to a reference,[59] failure or delay in moving to have a cause transferred to the law docket,[60] admitting or stipulating the facts,[61] and a plea of guilty,[62] have been held to waive the right to a jury trial. In some states the statutes prescribe the manner in which waiver may be shown.[63] An express waiver is necessary in the

comb's Adm'r v. Condon [W. Va.] 49 S. E. 392. Under Code 1899, c. 105, § 18, trial by jury is a matter of right in a proceeding by the state to sell forfeited lands when conflicting titles are to be tried, if there is a controversy of fact depending upon oral evidence, but not where there is no controversy of fact or the controversy depends upon documentary evidence. State v. Jackson [W. Va.] 49 S. E. 465.

49. See 2 Curr. L. 636.

50. Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440; Frank v. Bauer [Colo. App.] 75 P. 930. A statute compelling fire insurance contracts to embody the compulsory arbitration clause is not an interference with the right, since it may be waived, as it is, by the making of such a contract. In re Opinion of Justices, 97 Me. 590, 55 A. 828. After jury trial has been waived, a change of the issues by amendment revives the right to demand a jury. Reese v. Baum, 83 App. Div. 550, 82 N. Y. S. 157.

51. State v. Neterer, 33 Wash. 535, 74 P. 668. Statutes requiring a party to request a jury trial in writing within certain specified periods do not deprive him of the right nor impose any arbitrary or unreasonable requirements. McKay v. Fair Haven & W. R. Co., 75 Conn. 608, 54 A. 923.

52. Iowa Const. art. 1, § 10, declares that in all criminal cases the accused shall have a right to a trial by an impartial jury. State v. Rea [Iowa] 101 N. W. 507; Michaelson v. Beemer [Neb.] 101 N. W. 1007.

53. Mansfield's Case, 22 Pa. Super. Ct. 224. The Juvenile Court act of Pennsylvania violates the guaranty of trial by jury. Id.

54. Plaintiff was charged with violation of the statute which provides that any person receiving oleomargarine for sale shall be liable to a penalty of $50. Having waived jury trial it was not in conflict with the law for him to be tried by the court. Schick v. U. S., 195 U. S. 65, 49 Law. Ed. ——.

55. Lamar v. Prosser [Ga.] 48 S. E. 977.

56. This was an action to restrain defendant from grading a street in front of plaintiff's premises [see Ballinger's Ann. Codes & St. § 775]. Swope v. Seattle [Wash.] 78 P. 607.

57. See Rev. St. Utah 1898, § 3129. Wood v. Rio Grande Western R. Co. [Utah] 79 P. 182. After the time for filing notice for a jury under the general rule has expired. Dolan & Boott Cotton Mills, 185 Mass. 576, 70 N. E. 1025; Knapp v. Order of Pendo [Wash.] 79 P. 209.

58. See 2 Curr. L. 636.

59. Where the parties consent to an order of reference to take testimony, they must be held to consent to the incidents of such an order, one of which is trial by the court. Williams v. Weeks [S. C.] 48 S. E. 619.

60. Case involved only legal rights. Two and one-half years after suit was brought in equity, it was held too late to entertain a motion to transfer to the law docket. Chenault v. Eastern Kentucky Timber & Lumber Co. [Ky.] 83 S. W. 552. The right is waived by failure to move for a transfer of the cause from the equity to the law docket. Gerstle v. Vandergriffe [Ark.] 79 S. W. 776.

61. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

62. Before a mayor having complete jurisdiction. Hillier v. State, 5 Ohio C. C. (N. S.) 245, 26 Ohio Circ. R. 777.

63. In W. Va. by consent of the parties or their counsel entered of record. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

Federal court, but a stipulation clearly contemplating a finding of the facts by the court is sufficient.[64]

Waiver by nonassertion of right.[65]—Failure to seasonably demand a jury may work a waiver of the right.[66] So may a voluntary submission of issues of fact to the court,[67] or failure to appear.[68]

Effect of failure to pay cost of jury.[69]—In the absence of a statute so providing, refusal by a party to pay in advance the cost of a venire does not constitute a waiver,[70] but a statute providing for a reasonable jury fee is valid, and a party failing to advance it as the statute provides will be held to have waived his right.[71]

Estoppel.[72, 73]—A plaintiff who invokes the privilege of the statute relieving him from giving security for costs on filing a plea of poverty is bound by its other provision subjecting the case to dismissal if the plea be found to be untrue and cannot insist on his right to trial by jury.[74]

Renewal of demand; subsequent trials.[75]

§ 2. *Eligibility to and exemption from jury service.*[76]—At common law one convicted of a felony is disqualified from serving as a juror,[77] and in some states jurors are disqualified if they have not paid their poll tax,[78] are unable to read and write, or if they have served at a preceding term, within the year;[79] but a new trial cannot be granted because a juror incompetent propter defectum assisted

64. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

65. See 2 Curr. L. 637; see, also, Saving Questions for Review, 2 Curr. L. 1590.

66. Horton v. Simon [Neb.] 97 N. W. 604. Before the trial written demand for a jury was filed. When the case was about to be called it was transferred to a judge who was hearing equity cases. No objection having been raised, higher court would not review. Zilke v. Woodley [Wash.] 78 P. 299. Where the practice permits a plaintiff to amend his pleadings so as to change the issue from a fictitious one to one of contract or tort, defendant may demand a jury for the second trial [Code Civ. Proc. § 2990]. Reese v. Baum, 83 App. Div. 550, 82 N. Y. S. 157; Miller v. Georgia R. Bank, 120 Ga. 17, 47 S. E. 525. In New York under Code Civ. Proc. § 2990, jury shall be demanded at the time of joining issue. Issue is not joined until the answer is filed. Levy v. Roossin, 93 App. Div. 387, 87 N. Y. S. 707. Where under a mechanics' lien, the owner of property was served with the answer of a co-defendant, which gave no notice that a judgment would be demanded, failure of the owner to ask for a jury did not constitute waiver. Deane Steam Pump Co. v. Clark, 84 App. Div. 450, 82 N. Y. S. 902. In Illinois, under the drainage act, unless a property owner files an objection setting forth specifically the denial of the right to a trial by jury, the right is waived and the judgment of confirmation is conclusive. Juvinall v. Jamesburg Drainage Dist., 204 Ill. 106, 68 N. E. 440. Right to trial by jury as to satisfactory proof moving a court to order a partition instead of a sale is waived by failure to make request until after the clerk had decided that decree can be made without injury to the party. Albemarle Steam Nav. Co. v. Worrell, 133 N. C. 93, 45 S. E. 466.

67. Permitting the court to dispense with the jury and pass upon all the issues. Bernheim v. Bloch, 91 N. Y. S. 40.

68. Mills' Ann. Code Colo. § 178. Frank v. Bauer [Colo. App.] 75 P. 930.

69. See 2 Curr. L. 637.

70. In New Jersey where the statute provides that in certain cases in the higher courts the party demanding a jury shall advance the cost of venire, it is held that a justice of the peace upon refusing a jury until cost of venire is advanced thereby loses jurisdiction. Story v. Walker [N. J. Law] 58 A. 349.

71. State v. Neterer, 33 Wash. 535, 74 P. 668.

72, 73. See 2 Curr. L. 637.

74. Woods v. Bailey, 122 F. 967.

75. See 2 Curr. L. 637.

76. See 2 Curr. L. 638.

77. Statutes prescribing disqualifications supersede the common law. Commonwealth v. Wong Chung [Mass.] 71 N. E. 292.

78. In Texas (Laws 1903, First Called Sess. p. 15, c. 9) court may dispense with this requirement, if there are not jurors enough in the county who have paid their poll tax. San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401; Carter v. State [Tex. Cr. App.] 76 S. W. 437. Art. 3139, Revised St. of Tex. 1895, as amended by acts of 28th Legislature Special Session, p. 16, c. 9. Makes payment of poll tax a qualification, under which it is error to refuse challenge for cause when asked on the ground juror has not paid his poll tax. Taylor v. State [Tex. Cr. App.] 81 S. W. 933; San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401; Carter v. State [Tex. Cr. App.] 76 S. W. 437; State v. Greenland [Iowa] 100 N. W. 341.

79. Jordan v. State, 119 Ga. 443, 46 S. E. 679; Michigan City v. Phillips [Ind.] 71 N. E. 205. Bystanders called to fill a vacancy in the regular panel become part of it and are not subject to challenge on the ground of prior service at that term. Michigan City v. Phillips [Ind.] 71 N. E. 205.

in making the verdict where no challenge was interposed,[80] or his examination on voir dire did not extend to the matter in question,[81] and in such case on appeal it will be presumed that the proceedings were regular, and that the jurors were good and lawful men.[82] A juror may be excused on account of illness.[83]

§ 3. *Disqualification pertaining to the particular cause. Constitutional right to unbiased and unprejudiced jurors.*[84]—The constitution of the United States and of the several states guarantees right to trial by an impartial jury;[85] but a verdict will not be set aside on the ground of bias of a juror, in the absence of a positive showing,[86] and objections on that ground are waived if the juror is not examined with regard to them before trial, notwithstanding the fact of incompetency was not known until after trial.[87]

Conscientious scruples against capital punishment[88] are ground for challenge in some states where that punishment is inflicted.[89]

Prejudice against class of litigants or actions.[90]—A party should be permitted to ask jurors if they have any prejudice against the class of litigants to which he belongs;[91] but the existence of a special desire on the part of a juror to have a particular law enforced does not disqualify him to sit as a juror, where a person is to be tried for violation of that law,[92] and a juror not otherwise disqualified will not be, in a perjury case, because he had some feeling in the related case.[93] Prejudice against insanity as a defense, does not disqualify jurors, if they testify that they will follow the instructions of the court as to the law,[94] nor if the prejudice does not extend to cases where proof of real insanity is made.[95] The testimony of a juror on examination that it would take less testimony to prove malice in the killing of a woman than if the person killed were a man is not ground for a challenge for cause where the accused is being tried for the murder of a woman.[96]

Knowledge of issues involved.[97]—A juror who has intimate knowledge of the material issues involved may be properly excluded;[98] but a juror is not disquali-

80. Jordan v. State, 119 Ga. 443, 46 S. E. 679.

81. State v. Greenland [Iowa] 100 N. W. 341. Defendants in criminal cases should upon the voir dire examination of talesmen discover the grounds for challenge for cause and generally cannot after verdict rely upon his ignorance, as a ground for reversal. McNish v. State [Fla.] 36 So. 176; Carter v. State [Tex. Cr. App.] 76 S. W. 437.

82. State v. Kellison [W. Va.] 47 S. E. 166.

83. After he has been sworn on his voir dire but before he is sworn as a juror. Collins v. State [Tex. Cr. App.] 83 S. W. 806.

84. See 2 Curr. L. 638.

85. People v. Mol [Mich.] 100 N. W. 913; Riley v. State [Tex. Cr. App.] 81 S. W. 711. Jurors should not only be impartial at the time they are selected but they should remain so throughout the trial. Juror accompanied one of defendant's attorneys to the house of one of defendant's witnesses who used a pass over defendant company's road. Albers v. San Antonio, etc., R. Co. [Tex. Civ. App.] 81 S. W. 828. A new trial cannot be granted because a juror incompetent propter defectum assisted in making the verdict. On the other hand statutory qualification does not cure personal bias, and when the parties are ignorant of such defects propter affectum, the verdict may be set aside. Jordan v. State, 119 Ga. 443, 46 S. E. 679.

86. An affidavit alleging bias is not sufficient showing to warrant a reversal. Webster v. State [Fla.] 36 So. 584.

87. State v. Carpenter [Iowa] 98 N. W. 775.

88. See 2 Curr. L. 639.

89. Brewer v. State [Ark.] 78 S. W. 773. Where a juror after he had been accepted and sworn informed the court that he had conscientious scruples against capital punishment, but had misunderstood the question and answered wrong it was not error to excuse him. Black v. State [Tex. Cr. App.] 81 S. W. 302.

90. See 2 Curr. L. 639.

91. Patrick v. State [Tex. Cr. App.] 78 S. W. 947.

92. State v. Kelley [Kan.] 78 P. 151. It was not error to refuse the question whether certain jurors belonged to a law and order society that had held a mass meeting and raised money for the suppression and detection of crime. Dodd v. State [Tex. Cr. App.] 82 S. W. 510.

93. State v. Brownfield, 67 Kan. 627, 73 P. 925.

94. State v. Howard [Mont.] 77 P. 50.

95. People v. Sowell [Cal.] 78 P. 717. At least not in the case of insanity resulting from disease, where that is the nature of the insanity relied upon. Gammons v. State [Miss.] 37 So. 609.

96. People v. Ochoa, 142 Cal. 268, 75 P. 847.

97. See 2 Curr. L. 639.

98. Johnson v. Park City, 27 Utah, 420, 76 P. 216.

fied because he sat upon a panel that convicted another defendant of a like but different crime upon the same prosecutrix;[99] though where several defendants are charged with an offense arising out of the same conspiracy and the same evidence is relied upon to sustain a conviction of each, jurors who sat in the trial of one previously indicted are subject to challenge for cause.[1] Where a jury found against the defendant in a special issue, it is not disqualified thereby to hear the main issue if the trial is one continuous proceeding.[2] After the trial of an accused for murder it is not sufficient ground for reversal to show that a juror had given some thought or made some individual investigation affecting the provable guilt or innocence of the accused.[3]

Opinion on issues involved.[4]—A juror must not have formed an opinion as to the guilt of the defendant[5] that will affect his verdict,[6] and generally an unqualified opinion is ground for challenge for cause,[7] if upon a material issue.[8] The courts, however, distinguish between an opinion which it will require evidence to remove and a mere impression;[9] the trend of recent decisions being to limit rather than extend the rule disqualifying jurors for opinion.[10] And in several states, by express provision of the code, a qualified opinion based on rumor and newspaper accounts that can be removed by evidence[11] or that can be laid

99. State v. Van Waters [Wash.] 78 P. 897; People v. Albers [Mich.] 100 N. W. 908. It is not cause for a new trial that the panel from which the jury was selected was the same from which a previous jury had been drawn which convicted a brother of the accused of a similar crime, under a different indictment, no objection having been made before going to trial. Birdsong v. State, 120 Ga. 850, 48 S. E. 329.

1. People v. Mol [Mich.] 100 N. W. 913.

2, 3. Schissler v. State [Wis.] 99 N. W. 593.

4. See 2 Curr. L. 639.

5. Jurors testified on their voir dire that if the defendant was the same Mr. Stevens of whom they had heard, they would be of the opinion as far as that fact appears that he was engaged in violating the prohibitory liquor laws. State v. Stevens, 68 Kan. 576, 75 P. 546

6. Tardy v. State [Tex. Cr. App.] 78 S. W. 1076.

7. State v. John [Iowa] 100 N. W. 193; State v. Roberts [Nev.] 77 P. 598. Refusal to challenge for expressed prejudice is ground for reversal. When a juror testifies that he has a prejudice against the defendant and that it demands a stronger defense in case of this defendant than that of another, refusal to challenge is a ground for reversal. Billmeyer v. St. Louis Transit Co. [Mo. App.] 82 S. W. 536.

8. A juror is not disqualified in a homicide case by the statement that he had formed an opinion which it would take evidence to remove, where the only issue to be tried is the insanity of the defendant. Keffer v. State [Wyo.] 73 P. 556. The legal disqualifications of a juror must be tested by something more certain than the bare possibility that he may be prejudiced by his belief of an immaterial fact. A juror was challenged in a perjury trial upon the ground of bias because he had previously sat as juror in the case of another member of the city council, who had been convicted of accepting a bribe in pursuance of the same conspiracy. People v. Albers [Mich.] 100 N. W. 908.

9. The juror testified on his voir dire that he had formed an opinion which it would take evidence to remove, but that he believed that he could disregard this opinion and try the case according to the law and the evidence. Held that he should have been excused on challenge for cause. State v. Riley [Wash.] 78 P. 1001.

10. McCue v. Com. [Va.] 49 S. E. 623. Juror having read newspaper accounts but not having formed any opinion is a competent juror. State v. Lewis, 181 Mo. 235, 79 S. W. 671; Taylor v. State [Ark.] 82 S. W. 495. It is not error to deny a challenge to a juror for bias where the juror's opinion was based on mere hearsay testimony, and he considered himself competent to act as juror. State v. Armstrong, 43 Or. 207, 73 P. 1022. Especially when the defendant's peremptories were not exhausted. State v. Hayes [S. C.] 48 S. E. 251; People v. Nunley, 142 Cal. 441, 76 P. 45. In California although the witness testified on voir dire that it would require evidence to prove the accused innocent of the charge of murder, it was held not good ground for challenge for cause, the juror having later testified that he would not favor conviction of the defendant unless his guilt be established. People v. Ochoa, 142 Cal. 268, 75 P. 847. When a juror's opinion or impressions are founded upon rumor or newspaper reports which he feels conscious he can dismiss and try the prisoner on the evidence, it is no error to overrule a challenge for cause. Capital case. Lindsay v. Ohio, 4 Ohio C. C. (N. S.) 409. For the court to decline to ask a juror if it would require evidence to remove his opinion is not error. State v. Hayes [S. C.] 48 S. E. 251.

11. Pen. Code, § 1076. People v. Sowell [Cal.] 78 P. 717. Code Miss. 1892, § 2355, provides in substance that a juror shall not be disqualified by reason of the fact that he has an opinion or impression as to the guilt or innocence of the accused, if it shall appear to the court that he is not biased and will be governed by the evidence. Impressions gained from newspapers that can be removed by testimony do not disqualify. Gam-

aside, does not disqualify.[12] Erroneous opinions as to the law governing the case do not disqualify a juror,[13] and the fact that a juror has certain notions as to his duty in fixing punishment does not affect his competency to sit.[14]

Interest.[15]—Where defendant is indemnified by an accident insurance company it is not error to permit a juror upon his voir dire to be asked if he is a stockholder or in any way interested in such company.[16]

Relationship or acquaintance.[17]—There are certain degrees of consanguinity and affinity within which bias will be presumed, from the fact of such relationship,[18] and very intimate friendship may be ground for challenge for cause;[19] but courts will not usually indulge in arbitrary or technical rules which may have the effect of excluding competent men from the jury.[20] An objection on the ground of relationship is waived if known and not taken before verdict.[21]

Proof of disqualification.[22]—Grounds of disqualification must clearly appear,[23] and where the evidence conflicts the findings of the trier are conclusive.[24] When the veracity of a juror is attacked upon the ground that he swore falsely upon his voir dire, it is not error for the judge to consider affidavits sustaining his character.[25] The fact that a juror asks questions of a witness tending to show which way he leaned is not ground for discharging the jury.[26]

§ 4. *Discretion of court to excuse juror.*[27]—The judgment of the trial court must govern very largely in the matter of the selection of a jury,[28] and a court of review will not interfere unless there is a clear violation of law or abuse of

mons v. State [Miss.] 37 So. 609. A statute providing that a juror shall not be disqualified for an opinion formed or expressed based on public rumor and articles in public journals, provided he can act impartially is not unconstitutional. State v. Mott, 29 Mont. 292, 74 P. 728.

12. Pen. Code § 2051. State v. Howard [Mont.] 77 P. 50.

13. Johnson v. Park City, 27 Utah, 420, 76 P. 216.

14. State v. Snyder [Mo.] 82 S. W. 12.

15. See 2 Curr. L. 641.

16. It is no answer to this to say that the indemnity company is not named as a party to the action. Bias is not determined by this fact. Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079.

17. See 2 Curr. L. 641.

18. Chesapeake & O. R. Co. v. Smith [Va.] 49 S. E. 487. A juror is not disqualified by reason of the fact that his wife is a second cousin of the wife of one of the parties to the suit. Baldwin v. State, 120 Ga. 188, 47 S. E. 558. Court may discharge a juror on account of kinship even after he has been accepted and sworn. Dorman v. State [Fla.] 37 So. 561.

19. Plaintiff had been juror's attorney in important litigation, and juror testified on voir dire that he had such high regard for plaintiff that he named a child for him. Texas Cent. R. Co. v. Blanton [Tex. Civ. App.] 81 S. W. 537. Juror swore on voir dire that the fact that defendant was an intimate friend of juror's brother would have effect upon his judgment in rendering a verdict. Held that challenge for cause was properly sustained. State v. Faulkner [Mo.] 84 S. W. 967.

20. Plaintiff was the family physician of certain jurors. Held, it was not error to refuse challenges on this ground. Chesapeake & O. R. Co. [Va.] 49 S. E. 487. A juror is not disqualified by reason of having been a client of one of the attorneys, the relation having expired. Brown v. McNair [Ind. T.] 82 S. W. 677. The fact that a juror has performed some clerical work for one of the parties is insufficient to sustain a challenge on the ground of implied bias. Swope v. Seattle [Wash.] 78 P. 607. The fact that the beneficial plaintiff had previously voluntarily contributed to helping care for a juror's father-in-law, who had been carelessly injured by said beneficial plaintiff's minor daughter, is not ground for challenge, it having been shown that the daughter was not engaged in her father's affairs. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200.

21. State v. Pray [Iowa] 99 N. W. 1065.

22. See 2 Curr. L. 642.

23. The fact that a juror signed the verdict by making his mark is not sufficient evidence of his inability to read and write to disqualify him under a statute making ability to read and write a qualification. Parman v. Kansas City, 105 Mo. App. 691, 78 S. W. 1046. After verdict error in admitting a juror must be affirmatively shown. State v. Mott, 29 Mont. 292, 74 P. 728.

24. In case of contradictory testimony by a juror upon his voir dire the finding of the trial court is conclusive. People v. Sowell [Cal.] 78 P. 717. When a juror's competency is in question it is for the trial judge to determine whether he shall believe the juror's statements or the statements of those testifying against his competency. State v. Kelly [Kan.] 78 P. 151.

25. State v. Levy [Idaho] 75 P. 227.

26. Kentucky & I. Bridge & R. Co. v. Shrader [Ky.] 80 S. W. 1094.

27. See 2 Curr. L. 642.

28. State v. Smith [Iowa] 100 N. W. 40; State v. Armstrong, 43 Or. 207, 73 P. 1022.

discretion.[29] The action of the court in excusing a talesman will not be reviewed when it does not appear that the juror drawn in his place was biased or acted corruptly.[30] The court may excuse a juror upon his own motion,[31] and he may in his discretion excuse a juror after he has been sworn if he believes him to be disqualified.[32]

§ 5. *The jury list and drawing the panel.*[33]—Failure to conform to the statutory requirements in selecting the names for the jury list or drawing the panel is ground for challenge to the array,[34] though generally the provisions of the statutes are held to be directory merely,[35] and statutes prescribing who shall constitute the panel are not to be construed to deprive the judges of discretion to excuse jurors or invalidate the panel if some of its members are lost through death, sickness, or other sufficient cause.[36] The conclusion of county commissioners in making up a list of properly qualified jurors is not open to question or review in the absence of evidence of bad faith.[37] Statutes creating jury commissions to select names from which jurors shall be drawn are upheld.[38] The participation of a commissioner before receiving his commission is not fatal,[39] and the participation of the sheriff is a ministerial function which may be performed by a deputy.[40] The records of the jury commissioners are not open for public inspection and a general request by the attorney for one accused of crime to be allowed to examine the list of names is properly denied.[41] The including of one or more unqualified persons in the list is not fatal, the defendant having the right to examine all jurors drawn as to their qualifications.[42] In the criminal prosecution of a negro, the fact that

29. A juror on his voir dire testified that he had talked with the defendant that morning and had formed an opinion but would not be governed by it upon the trial. Held that it was not error for the court to excuse him. State v. Smith [Iowa] 100 N. W. 40. Prejudice will not be presumed from the ruling of a court excusing a juror. State v. Pray [Iowa] 99 N. W. 1065.

30. Felsch v. Babb [Neb.] 101 N. W. 1011.

31. Cochran v. U. S. [Okl.] 76 P. 672. Illness. Collins v. State [Tex. Civ. App.] 83 S. W. 806.

32. Dorman v. State [Fla.] 37 So. 561.

33. See 2 Curr. L. 642.

34. Names selected by prosecuting attorney instead of county judge. State v. Austin, 183 Mo. 478, 82 S. W. 5. It is error for a judge to select jurors from names drawn from the wheel for previous months, instead of drawing new names from the wheel as required by Ky. St. 1903, § 2243. Covington & C. Bridge Co. v. Smith, 25 Ky. L. R. 2292, 80 S. W. 440; South Covington & C. St. R. Co. v. Schilling [Ky.] 80 S. W. 510. Where the court intentionally fails to appoint jury commissioners as required by statute, it is ground for a motion to quash the venire, and this notwithstanding Code Cr. Proc. arts. 661, 696 of Texas Code giving causes for challenge to the array does not include the failure to appoint jury commissioners [Styles' Rev. St. arts. 3155-3173]. White v. State [Tex. Cr. App.] 78 S. W. 1066; Ray v. State [Tex. Cr. App.] 79 S. W. 535. Names of jurors who have been assigned to other branches of the court need not be placed in the box from which defendant's jury is drawn. Wistrand v. People, 213 Ill. 72, 72 N. E. 748. Time to draw in Louisiana. State v. Aspara [La.] 37 So. 883. When the statute provides that the duty of drawing the jury is to be performed by the county clerk it is error to permit the sheriff to do it. Brogden v. State [Tex. Cr. App.] 80 S. W. 378. It is error to overrule a challenge when the juror's name did not appear upon the regular list. Faulkner v. Snead [Ga.] 49 S. E. 747. In Illinois, Hurd's Ann. St. ch. 78, § 8 applies only to drawing juries in term time. Drawing of jurles in vacation time is governed by ch. 47, § 6. St. Louis & O. R. Co. v. Union Trust & Sav. Bank, 209 Ill. 457, 70 N. E. 651.

35. State v. Daniels, 134 N. C. 641, 46 S. E. 743; Sharp v. U. S., 13 Okl. 522, 76 P. 177. The fact that the jury was drawn by the jury commissioners for another term of court was not error, the term having been changed by the legislature. Carter v. State [Tex. Cr. App.] 76 S. W. 437. Names drawn from the wheel, of persons who do not perform the service, are properly returned, and should then be relisted; but failure to relist them will not require setting aside the verdict where no prejudice results. State v. Aspara [La.] 37 So. 883. Where a law went into effect between the commencement of the prosecution and the trial, which changed the method of drawing jurors, it was held not to be error that the jurors' names were drawn from the box in the old way. State v. Barlow, 70 Ohio St. 363, 71 N. E. 726.

36. State v. Aspara [La.] 37 So. 883.

37. State v. Daniels, 134 N. C. 641, 46 S. E. 743.

38. Acts 1880, No. 98, 1894, No. 170, confer no judicial powers on commission, and are not invalid for that reason. State v. Aspara [La.] 37 So. 883. The Wayne county jury act does not conflict with the fourteenth amendment. People v. Gardner [Mich.] 100 N. W. 126.

39. Spraggins v. State, 139 Ala. 93, 35 So. 1000.

40, 41, 42. State v. Aspara [La.] 37 So. 883.

no negroes were drawn on the panel is not sufficient to show discrimination,[43] and where there is strong testimony tending to show that there are no negroes in the county qualified to sit as jurors objections founded on race discrimination in the selection of juries are without merit.[44] Drawings need not be secret, and are not invalidated because of the presence of persons having no duty in regard thereto.[45] Certiorari does not lie under Sec. 1068 of Cal. Code of Civil Procedure to review the action of a police judge in ordering the sheriff to summon a jury for the trial of a misdemeanor.[46]

§ 6. *The venire and like process.*[47]—The method of summoning jurors is regulated by statute in the several states,[48] many of the provisions thereof being regarded as directory merely,[49] though a substantial compliance is always required,[50] and some provisions are mandatory.[51] A special venire may be ordered before the regular panel is exhausted,[52] and notwithstanding the presence of additional names in the jury box of the county.[53] A party relying upon a statute in support of his motion for a special venire must file his motion within the time limited by statute.[54]

§ 7. *Empaneling trial jury.*[55]—A person on trial for a crime has a right to insist that the legal number of properly drawn jurors be tendered him,[56] but he

43. Carter v. State [Tex. Cr. App.] 76 S. W. 437; State v. Daniels, 134 N. C. 641, 46 S. E. 743.

44. Fugett v. State [Tex. Cr. App.] 77 S. W. 461.

45. State v. Aspara [La.] 37 So. 883.

46. Wittman v. Police Court of San Francisco [Cal.] 78 P. 1052.

47. See 2 Curr. L. 643.

48. Mo. Rev. St. 1899, § 2616. State v. Faulkner, 175 Mo. 546, 75 S. W. 116. In Minnesota the discretion given the district court as to summoning juries for the April term extends as well to the April term 1904 as to subsequent years [Laws 1903, ch. 46, p. 54]. Marr v. Sherry [Minn.] 102 N. W. 220.

49. State v. Lehman, 182 Mo. 424, 81 S. W. 1118. Mo. Rev. St. 1899, § 2616, provides that a list of the special venire be served on the counsel for the parties before the jury is sworn. Held to be sufficient if a proper list is handed to them by the clerk. State v. Faulkner, 175 Mo. 546, 75 S. W. 116. The fact that one person was drawn and ordered to be summoned and another summoned presumably by mistake is not ground for quashing a special venire. Gregory v. State [Ala.] 37 So. 259. The court may in its discretion deny a motion to complete a list of jurors from the first venire instead of from the second. State v. Faulkner, 175 Mo. 546, 75 S. W. 116.

50. Where the statute provides that the clerk of court shall make out a venire facias and deliver the same to the sheriff of Wayne county, commanding him or his deputies to summon the persons therein named to appear as jurors, judge of the Recorder's court has no authority to direct the venire facias to be given to the chief of police. Dickson v. Phelan [Mich.] 99 N. W. 405.

51. Alabama Code of 1896, § 5004, provides that the names shall be drawn from the box by the presiding judge. Held that a record which recites that the court drew from a box of 50 names, etc., does not show sufficient compliance with the statute, as it does not affirmatively show that the presiding judge drew the names. Scott v. State [Ala.] 37 So. 366. Mills' Ann. St. § 869, providing that when any party shall make and file with the clerk of the proper court affidavit of prejudice against the sheriff of the county the clerk shall direct the original or other process to the coroner, is mandatory and does not give the court discretionary power to grant or refuse the motion to have the coroner summon a jury. Litch v. People [Colo. App.] 75 P. 1083.

52. Elias v. Territory [Ariz.] 76 P. 605.

53. Under the Cal. Code of Civil Procedure which provides that not enough jurors having been drawn or not enough being present to form a panel the court may either direct that enough be drawn or direct the sheriff to summon the required number, it was held to be no abuse of the court's discretion after a drawn jury had been discharged to order the sheriff to summon jurors, although there were 740 names in the jury box of the county. People v. Suesser, 142 Cal. 354, 75 P. 1093.

54. Rev. St. Mo. 1899, § 3791. Basham v. Hammond Packing Co. [Mo. App.] 81 S. W. 1227.

55. See 2 Curr. L. 643.

56. A party cannot complain that the court has excused jurors from the regular venire before his case was actually called. Thomas v. State [Fla.] 36 So. 161. It is not error for the court while the jury is being formed, to bring into court at the instance of the defendant a special jury trying another case, on which were three of the veniremen, who were tendered to the defendant, but were disqualified or challenged. The court explaining that if either of the jurors had been taken he would have discharged the special jury and placed the jurors in the box to try the defendant. Reyna v. State [Tex. Cr. App.] 75 S. W. 25. The names of additional jurors drawn by the commission upon order of the judge are a part of the panel and their names should be placed in the jury box. State v. Bordelon [La.] 37 So. 603.

is not prejudiced because some drawn in excess of the regular number are excused.[57] The names of all the jurors in the regular panel need not be in the box when drawing is commenced,[58] and a party may not complain because not allowed the entire panel from which to select a jury, where some of the jurors are serving in another case.[59] In Illinois jurors drawn for the various branches of a criminal court are drawn for but one court and may serve in any branch;[60] but in California it is reversible error to call in and empanel in one department jurors drawn for another.[61] The fact that a juror was erroneously discharged is not ground for reversal, if no prejudice is shown.[62] The jury in quo warranto proceedings in Georgia may be selected in the manner usual to other civil cases.[63] It is not necessary to a legal conviction of a felony that the order empaneling the jury recite that they are good and lawful men.[64]

§ 8. *Arraying and challenging. A. Challenge to the array.*[65]—A challenge to the array is a proper objection to the mode of summoning jurors,[66] but not to the qualifications of individual jurors,[67] nor to irregularities in preparing the jury list.[68] After the jury has been sworn, challenge to the array comes too late.[69]

(§ 8) *B. Challenge for cause. Right to a list of jurors.*[70]—There are statutes in some states providing that parties shall be served with a list of jurors a certain length of time before trial.[71]

The challenge.[72]—The right to challenge a juror for cause may be waived,[73] as by failure to object or challenge the juror before verdict,[74] or failure to extend the examination on his voir dire to the matter in question;[75] and there is no ground for reversal in the absence of a positive showing that the disqualification of the juror was not known to the defendant nor his counsel at the time the jury was empaneled,[76] but discovery of disqualifications is ground for a new trial, when the juror fails to disclose material facts in answer to questions sufficient to elicit the same.[77] A challenge for cause must be supported by sufficient grounds.[78]

57. Two panels were properly drawn. Two jurors in excess of the number required were excused. Chelsey v. State [Ga.] 49 S. E. 258.

58. When the case was called for trial some of the jurors on the regular panel had been drawn to serve on a jury in another department of the court, the names of the jurors remaining in the box being insufficient to complete the jury. Held that it was proper for the judge to order the names of the jurors, excused from the jury previously drawn, to be restored to the box and drawn to complete the second jury. State v. Houghton [Or.] 75 P. 887.

59. Rev. St. 1898, § 1313, does not prohibit jurors drawn on the general panel from serving in any division of such court in the county where drawn. Connor v. Salt Lake City [Utah] 78 P. 479.

60. See Hurd's Rev. St. Ill. 1903, c. 78, § 29. Wistrand v. People, 213 Ill. 72, 72 N. E. 748.

61. People v. Wong Bin, 139 Cal. 60, 72 P. 505.

62. Stevens v. Union R. Co. [R. I.] 58 A. 492.

63. Hathcock v. McGouirk, 119 Ga. 973, 47 S. E. 563.

64. State v. Kellison [W. Va.] 47 S. E. 166.

65. See 2 Curr. L. 644.

66. See 2 Curr. L. 645, n. 30.

67. The fact that there are one or two objectionable jurors in a panel is not ground for challenge to the array; the objection should be raised by challenge to the poll. Nixon v. State [Ga.] 48 S. E. 966; Taylor v. State [Ga.] 49 S. E. 303.

68. Rhodes v. Southern R. Co. [S. C.] 47 S. E. 689. Mere irregularity in selecting and drawing grand jurors which does not affect their qualifications as such must be taken advantage of by challenge for cause. Swearing and instruction of before return of venire facias. Lindsay v. Ohio, 4 Ohio C. C. (N. S.) 409.

69. St. Louis & O. R. Co. v. Union Trust & Sav. Bank, 209 Ill. 457, 70 N. E. 651.

70. See 2 Curr. L. 644.

71. A list that shows all jurors and jurors not served is sufficient. Wiggins v. State [Tex. Cr. App.] 84 S. W. 821. List of talesmen should be served. State v. Bordelon [La.] 37 So. 603.

72. See 2 Curr. L. 644.

73. Jordan v. State, 119 Ga. 443, 46 S. E. 679; State v. Greenland [Iowa] 100 N. W. 341.

74. State v. Pray [Iowa] 99 N. W. 1065; State v. Carpenter [Iowa] 98 N. W. 775.

75. State v. Greenland [Iowa] 100 N. W. 341; State v. Carpenter [Iowa] 98 N. W. 775.

76. State v. Morrison, 67 Kan. 144, 72 P. 554.

77. Tarpey v. Madsen, 26 Utah, 294, 73 P. 411.

78. State v. Wilson [Iowa] 99 N. W. 1060.

Overruling a challenge for cause is harmless where the party challenging had not exercised all his peremptories when the panel was complete.[79]

(§ 8) *C. Peremptory challenges and standing jurors aside. Peremptory challenges.*[80]—The object of peremptory challenges is to insure a fair trial, not to permit the accused to choose his own jury.[81]

Number allowed.[82]—The statutes of the several states and the United States provide what number of peremptory challenges are allowable in their several courts, the number varying in different cases.[83] In civil cases, persons jointly interested constitute one party and generally are allowed only one party's peremptory challenges.[84] The like is true of persons jointly indicted for misdemeanor.[85] The rule, however, is different in felony,[86] and where several separate indictments are tried together, the accused is entitled to the full number of peremptory challenges for each indictment; but a greater or less number of counts contained in the same indictment does not affect the right to challenge.[87]

Time for challenge.[88]—Generally, peremptory challenges will be entertained any time before jury is accepted and sworn,[89] but must be interposed before it is sworn.[90]

Where a juror informs the court that he has conscientious scruples about capital punishment there is no error in allowing the state to peremptorily challenge him after he has been accepted and taken on the jury.[91]

Jurors out of court room.[92]

Order of challenges.[93]—The order of challenging is frequently regulated by statute,[94] but state statutes providing the order in which jurors shall be challenged are not binding upon Federal courts sitting in that state.[95]

(§ 8) *D. Examination of jurors and trial of challenges. Challenge should precede the examination. The scope of the examination.*[96]—The trial court exercises a broad discretion in the matter of ascertaining the fitness of persons for jury service,[97] though the counsel for each party must confine their examination within reasonable limits by pertinent questions subject to the court's reasonable control.[98]

79. Stowell v. Standard Oil Co. [Mich.] 102 N. W. 227.

80. See 2 Curr. L. 645.

81. In Rhode Island where the statute provides for peremptory challenges in proportion to the whole number of jurors drawn, this does not include jurors challenged for cause. Stevens v. Union R. Co. [R. I.] 58 A. 492.

82. See 2 Curr. L. 645.

83. In Ohio a defendant in a criminal case for other than a capital offense is entitled to but two peremptory challenges. Rev. St. § 5177, as amended Apr. 29, 1902, does not apply to criminal cases. Stevenson v. State, 70 Ohio St. 11, 70 N. E. 510.

84. When land involved in condemnation proceedings consists of but one tract owned by several persons, they are entitled to only three peremptory challenges, under a statute providing that each party interested shall be entitled to three peremptories. Illinois, etc., R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444.

85. Cochran v. U. S. [Okl.] 76 P. 672.

86. Each of two or more defendants in a criminal charge is entitled to the full number of peremptory challenges [provided under Mills' Ann. St. Colo. § 2596]. Carpenter v. People, 31 Colo. 284, 72 P. 1072.

87. Betts v. U. S. [C. C. A.] 132 F. 228.

88. See 2 Curr. L. 646.

89. State v. Crea [Idaho] 76 P. 1013.

90. Where defendant offered to substantiate his objection by evidence, but was not then able to produce it, the evidence cannot be heard after the jury is sworn (State v. Lyons, 70 N. J. Law, 635, 58 A. 398; People v. Borgstrom, 178 N. Y. 254, 70 N. E. 780), and after the clerk has commenced to administer the oath they come too late (State v. Lyons, 70 N. J. Law, 635, 58 A. 398).

91. Brewer v. State [Ark.] 78 S. W. 773.

92, 93. See 2 Curr. L. 646.

94. N. Y. Code Cr. Proc. § 385. Radford v. U. S. [C. C. A.] 129 F. 49.

95. Although it may properly be followed, it is too late for defendant to object to order of challenging after he has exhausted his own challenges [Code Cr. Proc. N. Y. § 385]. Radford v. U. S. [C. C. A.] 129 F. 49.

96. See 2 Curr. L. 647.

97. South Covington & C. St. R. Co. v. Weber [Ky.] 82 S. W. 986.

98. A party should to enable him to exercise his peremptories be permitted to ask if any business relations exist between the juror and the opposite party to the action. But its refusal is not reversible error in the absence of a showing of prejudice. South Covington & C. St. R. Co. v. Weber [Ky.] 82 S. W. 986.

A juror cannot upon his voir dire be questioned about his verdict in a prior case,[99] nor as to his conception of a reasonable doubt,[1] nor as to whether he would believe a certain witness on oath.[2] They may be asked if they are stockholders in a company which indemnifies defendant.[3] Prosecutor may waive his right to examine jurors on their general qualifications,[4] and the question cannot be raised after verdict found.[5] A juror is not guilty of misconduct by making an answer claimed to be untrue, where he did not intend to lie, but the question of counsel was leading.[6] It is not error for the court to receive affidavits of the character of a juror who had sworn falsely on his voir dire, and whose credit and veracity was attacked.[7]

Further examination after jurors are passed discretionary with court.[8]—The court may permit a juror to be examined again and challenged for cause after he has been passed, where the court and parties have been misled by his answers and it is found that he is disqualified,[9] but permission to re-examine is not of right.[10] Where a jury has found against the defendant in a special issue, defendant is not entitled to re-examine the jury as to its qualifications to sit and try the remaining issues.[11]

Tribunal for trial of challenges.[12]—When the disqualification of a grand juror is raised by plea in abatement, a jury may be called to determine upon the truth of the alleged disqualifications.[13]

Review on appeal of findings of trial court.[14]—The statutes in some states provide that the decisions of the trial court upon challenge to the panel and for cause upon motion to set aside an indictment or upon motion for new trial shall not be subject to review,[15] and generally the appeal court will not review lower court's holding in refusing a challenge where the persons challenged did not serve on the jury,[16] or an exception has not been taken,[17] or the parties do not allege that their cause was prejudiced by the ruling.[18]

When improperly overruling challenge is ground for setting aside verdict.[19]—Refusal to sustain a challenge is not ground for reversal where a jury is secured before defendant exhausts his peremptories.[20]

§ 9. *Talesmen and additional jurors. Authority to procure additional jurors.*[21]—There are, in most states, statutes providing for obtaining jurors where those on the regular panel are insufficient.[22] In Iowa where names in addition to

99. People v. Mol [Mich.] 100 N. W. 913. Under Comp. Laws 1897, § 10,239, prohibiting a juror from being questioned respecting his verdict, it was proper to exclude a question to a juror who had sat in a previous prosecution arising out of the same matter whether he had formed an opinion as to the truth or falsity of the testimony of a witness at that trial who was also a proposed witness in the present trial. People v. Albers [Mich.] 100 N. W. 908.

1, 2. Fugitt v. State [Miss.] 37 So. 557.

3. Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079.

4, 5. State v. Clark, 34 Wash. 485, 76 P. 98.

6. Rapp v. Becker, 4 Ohio C. C. (N. S.) 139.

7. State v. Levy [Idaho] 75 P. 227.

8. See 2 Curr. L. 648.

9. He informed the court that he had misunderstood a question and answered wrong. Black v. State [Tex. Cr. App.] 81 S. W. 302.

10. Parrish v. State, 139 Ala. 16, 36 So. 1012.

11. Nor will he be permitted to re-examine the jurors as to their qualifications to sit originally unless the request is accompanied by a clear showing of facts upon which it is based. Schissler v. State [Wis.] 99 N. W. 593.

12. See 2 Curr. L. 648.

13. McCue v. Com. [Va.] 49 S. E. 623.

14. See 2 Curr. L. 648.

15. Cr. Code Prac. Ky. § 281. Hathaway v. Com. [Ky.] 82 S. W. 400; Hensley v. Com. [Ky.] 82 S. W. 456. In absence of a showing to the contrary it will be conclusively presumed that they followed the law in selecting the jury. Moseley v. Com. [Ky.] 84 S. W. 748; State v. Kellison [W. Va.] 47 S. E. 166.

16. Brewer v. State [Ark.] 78 S. W. 773.

17. Comp. Laws Mich. § 10,247, does not cover review of a challenge. People v. Albers [Mich.] 100 N. W. 908.

18. San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401.

19. See 2 Curr. L. 649.

20. Hierholzer v. State [Tex. Cr. App.] 83 S. W. 836.

21. See 2 Curr. L. 649.

22. Code, § 347. State v. John [Iowa] 100 N. W. 193. Code Civ. Proc. §§ 226, 227. People v. Suesser, 142 Cal. 354, 75 P. 1093. The court may order additional names to be

the regular panel are drawn from the petit jury box for a particular case, they become, as to that case, a part of the regular panel, and talesmen are not authorized until they are exhausted.[23] In Louisiana although jurors are ordered by the court to be drawn from the parish at large and not from the bystanders, they are nevertheless talesmen,[24] and their names are not to be placed in the box with the regular panel.[25]

Method of selecting talesmen.[26]—Where the statute authorizes it, there is no abuse of discretion in refusing a second drawn jury and ordering the sheriff to summon talesmen though the trial is for the murder of another sheriff.[27] The fact that officers who selected talesmen were not sworn, will not be considered on review, where no exception has been saved.[28] In Indiana the manner of filling vacancies occurring in the regular panel of a petit jury is within the discretion of the court.[29]

§ 10. *Special and struck juries and juries of less than twelve.*[30]—Where the statutes provide for special juries, the demand therefor must be seasonably made,[31] and in West Virginia the motion is addressed to the sound discretion of the court.[32] In several states the statutes provide for special venires in capital cases,[33] but the right to a special venire is waived by consent to have the jury drawn from the regular panel.[34]

§ 11. *Swearing.*[35]—Where one or more jurors have, by mistake, been sworn with the others, if before proceeding farther with the case they are discharged and others who have been agreed upon are sworn in their places, there is a good jury.[36] It is not necessary that the oath prescribed for jurors in civil cases should have been administered to a jury empaneled to try criminal cases,[37] nor is it necessary that the form of oath be entered on record.[38] It is sufficient if the record shows that the jury was duly sworn.[39]

§ 12. *Compensation, sustenance, and comfort of jurors.*[40]

JUSTICES OF THE PEACE.

§ 1. **The Office (373).**
§ 2. **Compensation, Duties and Liabilities (373).**
§ 3. **Civil Jurisdiction (374).** Residence Appellate Process and Appearance (383). Transfer of Jurisdiction by Appeal (384). Determining Jurisdiction (375).
§ 4. **Procedure in Justices' Courts (376).**

drawn after the term begins, it appearing that those drawn at the regular drawing and a previous additional drawing will be insufficient [Gen. St. 1901, § 3815]. State v. Davis, 67 Kan. 545, 73 P. 87. Whether summoned from the body of the county or drawn from the talesman's box is discretionary with the court [Code, § 349]. State v. John [Iowa] 100 N. W. 193. Jurors drawn from the wheel are talesmen within the meaning of Rev. St. § 6425, providing for the filling of vacancies. Hosbrook v. Loveland & C. T. Co., 5 Ohio C. C. (N. S.) 209.

23. State v. John [Iowa] 100 N. W. 193.

24, 25. State v. Bordelon [La.] 37 So. 603.

26. See 2 Curr. L. 650.

27. People v. Suesser, 142 Cal. 354, 75 P. 1093.

28. Chism v. State [Tex. Cr. App.] 78 S. W. 949.

29. Michigan City v. Phillips [Ind.] 71 N. E. 205.

30. See 2 Curr. L. 650.

31. A case once placed on the calendar to be tried by a general jury cannot be tried by special jury except by consent. Rauche v. Blumenthal, 4 Pen. (Del.) 521, 57 A. 368.

32. No reversal for refusal in absence of abuse of discretion [Code 1887, § 3158]. Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862.

33. In a prosecution for homicide, the special venire having been exhausted it was error to call the jury for the week and select additional jurors therefrom. Riley v. State [Tex. Cr. App.] 81 S. W. 711. A special panel is not vitiated by the inclusion of one or more ineligible jurors. State v. Bectsa [N. J. Err. & App.] 58 A. 933.

34. Collins v. State [Tex. Cr. App.] 83 S. W. 806.

35. See 2 Curr. L. 651.

36. The effect is the same as if the whole jury had been discharged and a new one empaneled. Lillie v. American Car & Foundry Co., 209 Pa. 161, 58 A. 272.

37. Pen. Code Ga. 1895, § 856, prescribes the oath of jurors in civil cases. Pen. Code Ga. 1895, § 979, prescribes the oath to be administered to jurors in criminal cases. Taylor v. State [Ga.] 49 S. E. 303.

38, 39. State v. Kellison [W. Va.] 47 S. E. 166.

40. See 2 Curr. L. 651.

Tranfer of Causes (377). Contempt (377). Process and Appearance (377). Pleadings and Issues (378). Evidence (379). Verdict and Judgment (380). Judgment by Confession (381). Costs (381).
§ 5. **Appeal and Error (381).** Bonds (382). Dismissal (384). Pleadings on Appeal (385). Further Appeal or Error (386).
§ 6. **Certiorari (386).** Judgment (388). Liability on Bond (388).
§ 7. **Criminal Jurisdiction and Procedure (388).**

§ 1. *The office.*[1]—A justice is commonly a civil magistrate, but has duties imposed upon him in connection with the administration of the criminal law.[2] It is within the power of the legislature to abolish his office[3] unless its existence is constitutional.[4] When a justice's district is abolished, his office necessarily ceases to exist;[5] but a county court made up of justices is not abolished by extinguishing the office of a part of the justices composing it.[6] In some states he is required to be commissioned by the governor.[7] The legislature can provide for the appointment of no more justices than is allowed by the constitution.[8] A state constitution directing the election of justices of the peace repeals statutes that vest other persons with similar judicial powers.[9] In a justice's court an attorney is one of fact and not of law.[10] In Connecticut his court is a court of record.[11]

§ 2. *Compensation, duties and liabilities.*[12]—Though compensated by salary for entertaining a certain class of cases, he is entitled to the fees provided by law when he hears a cause not exclusively within his jurisdiction.[13] Changing the method of ascertaining his compensation from fees to salary is not a violation of a constitutional provision prohibiting an increase after election, it not being shown that compensation was thereby increased;[14] but providing that he shall receive not to exceed a certain amount in fees violates a provision that compensation of public officers shall be regulated in proportion to their duties.[15] In Oregon he is entitled to fees for services performed by him as a committing magistrate,[16] and an action at law may be maintained to recover them.[17]

In disposing of any cause properly before him, he acts as a judicial officer[18] and is not personally liable for erroneous judicial acts,[19] and if in exercising a jurisdiction which does not belong to him, he issues an illegal order, it is not to be treated as so absolutely void as to afford him no protection for what may be done under it;[20] but where he acts wholly without jurisdiction, he is a trespasser.[21]

1. See 2 Curr. L. 651.
2. See Indictment and Prosecution, 2 Curr. L. 307. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.
3. The legislature has power to redistrict a county and abolish the office of justice in districts extinguished. State v. Akin [Tenn.] 79 S. W. 805. Legislation abolishing the district of a justice abolishes his office. State v. Sawyer, 139 Ala. 138, 36 So. 545.
4. Under a constitutional provision that there shall be a justice's court in every township, a statute abolishing townships and creating another from the territory is not void on the ground that it attempts to abolish justices' courts. Proulx v. Graves, 143 Cal. 243, 76 P. 1025.
5. Acts 1903, abolishing civil districts in certain counties. Grainger County v. State [Tenn.] 80 S. W. 750.
6. State v. Akin [Tenn.] 79 S. W. 805.
7. Abrams v. State [Ga.] 48 S. E. 965.
8. Grainger County v. State [Tenn.] 80 S. W. 750.
9. Section 21, art. 6, of Constitution of 1870, repeals section of city charter giving the president of the city council exclusive jurisdiction in cases of violation of city ordinances and concurrent jurisdiction with justices in other cases. City of Windsor v. Cleveland, etc., R. Co., 105 Ill. App. 46.
10. Cutting v. Jessmer, 91 N. Y. S. 658.
11. McVeigh v. Ripley [Conn.] 58 A. 701. See 2 Curr. L. 655.
12. See 2 Curr. L. 652.
13. City justice. Timmony v. Salt Lake City [Utah] 78 P. 799.
14. McCauley v. Culbert, 144 Cal. 276, 77 P. 923.
15. Statute classifying townships according to population and fixing the amount. Tucker v. Barnum, 144 Cal. 266, 77 P. 919.
16. Examination of a charge of criminal libel for which he has power to issue a warrant. Wallowa County v. Oakes [Or.] 78 P. 892.
17. Wallowa County v. Oakes [Or.] 78 P. 892.
18. He holds a court of record. McVeigh v. Ripley [Conn.] 58 A. 701.
19. Paying over money paid into court before expiration of time for appeal. Sorensen v. Wellman [Kan.] 77 P. 536. Erroneous imprisonment. McVeigh v. Ripley [Conn.] 58 A. 701. Not liable for false imprisonment because he reaches an erroneous conclusion in issuing a warrant for an arrest. Gardner v. Couch [Mich.] 101 N. W. 802.
See, also, Judges, 4 Curr. L. 284.
20. A complaint charged assault and theft. The justice had jurisdiction of the complaint for assault. Nothing was done

He is not liable on his official bond for an act done in a different capacity,[22] but sureties on his bond are liable for wrongful acts committed under color of office.[23]

§ 3. *Civil jurisdiction.*[24]—Jurisdiction of a justice is statutory.[25] Its exercise is usually confined to his district,[26] but may embrace extra-limitary causes of action or parties,[27] if either the subject-matter or the parties be within the jurisdiction.[28] Special jurisdiction is limited to the terms of the act.[29] He has no equity jurisdiction.[30] In Missouri he has no jurisdiction of a motion to quash an execution.[31] Where a justice is provided for a new district, the whole jurisdiction pertaining to his office attaches.[32] If he assumes jurisdiction in cases not authorized, his acts are void;[33] but the bringing of an action in an improper court is not a jurisdictional defect where the court has general jurisdiction of the subject-matter.[34]

with this charge but a fine was imposed for the theft and defendant committed until the fine should be paid. Held, the justice was not liable for false imprisonment. McVeigh v. Ripley [Conn.] 58 A. 701.

21. Liable for false imprisonment. Heller v. Clarke [Wis.] 98 N. W. 952.

22. Justices who ex officio constitute the fiscal court, in levying taxes, act in a legislative capacity. Not liable on their official bond for levying an unconstitutional tax. Commonwealth v. Kenneday [Ky.] 82 S. W. 237.

23. Falsely certifying that the wife of the mortgagor acknowledged the mortgage before him [Code 1896, § 3087]. Crosthwait v. Pitts, 139 Ala. 421, 36 So. 83.

24. See 2 Curr. L. 652.

25. In Georgia by the constitution. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

26. NOTE. Place at which he may act: Generally his official acts must be done within the territorial limits of his district. He cannot, in Kansas, hold court outside his township. Phillips v. Thralls, 26 Kan. 780. See, also, School Dist. No. 50 v. Roach, 41 Kan. 531. In Texas his acts are void where he holds court outside his district by consent of the parties. Foster v. McAdams, 9 Tex. 542. See, also, to the same effect in other states. Learned v. Riley, 14 Allen [Mass.] 109; Hughes v. Melville, 60 Ill. App. 419.

In People v. Keeler, 25 Barb. [N. Y.] 426, it was said that he cannot try civil causes outside his town, though his jurisdiction is coextensive with the county in which he resides. If rendered within his district, a judgment may be written out and signed in another place. Ryals v. McArthur, 92 Ga. 378. From note to Harris v. State [Miss.] 33 L. R. A. 90.

27. In New York, justices of towns provided by general legislation have no jurisdiction of a cause unless one of the parties he a resident of such town. People v. Miller, 97 App. Div. 35, 89 N. Y. S. 601. Charter of the city of Hornellsville, providing that justices of said city should have the jurisdiction of justices of the several towns of the state, and where either of the parties resided in any town in Steuben county adjoining the town of Hornellsville, is constitutional. Lantz v. Galpin, 44 Misc. 356, 89 N. Y. S. 1096. Such a court is not an inferior local court within the meaning of Const. art. 6, § 18. Id. Service of summons on a defendant residing in a town adjoining the town of Hornellsville, out of which the city was created, in such adjoining town confers jurisdiction. Id.

28. Has jurisdiction of an action against a domestic corporation either in the county of its principal office or in the county where the cause of action arose if service can be had in that county, whether the person served resides therein or not. Joseph Speidel Grocery Co. v. Warder [W. Va.] 49 S. E. 534. A statute providing that actions before justices on written contracts stipulating the place of payment may be brought in any township where payment was agreed to be made does not authorize an action in a county other than the residence of a defendant, where by implication only he was to make payment in such other county. Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594. In order to render judgment he must have jurisdiction of the subject-matter. Hobbs v. German-American Doctors [Okl.] 78 P. 356.

29. Acts 1832, p. 207, relating to obstructions in streets of Indian Spring Reserve in Butts County, has no application to the locality not then a part of that reserve. Scoville Bros. v. Varner [Ga.] 49 S. E. 713.

30. Rev. St. 1899, § 3337, prescribing his jurisdiction. Johnson v. Stephens [Mo. App.] 82 S. W. 192. Action to enforce payment of a debt contracted by the debtor subsequent to his having conveyed all his property in trust for the payment of debts previously contracted. Smith v. Taylor [Ind. App.] 72 N. E. 651.

31. Carr v. Pennsylvania R. Co. [Mo. App.] 83 S. W. 981.

Note: A different rule, however, prevails in some states. Atkins v. Siddons, 66 Ala. 453; Wordehoff v. Evers, 18 Fla. 339; Luco v. Brown, 73 Cal. 3, 2 Am. St. Rep. 772; 1 Freeman, Executions, § 73, p. 2. See Carr v. Pennsylvania R. Co. [Mo. App.] 83 S. W. 981.

32. The fact that he is given certain criminal jurisdiction does not limit his jurisdiction to that class of cases enumerated. Matthews v. Cotton, 83 Miss. 473, 35 So. 937.

33. In Illinois there is no authority for filing in the circuit court a transcript of a judgment imposing a fine and levying on real estate thereunder. Cox v. Spurgin, 210 Ill. 398, 71 N. E. 456.

34. By appearing specially on another ground this defect is waived [Mills' Ann. St.

Jurisdiction may be gained by process against persons[35] or property,[36] or by appearance.[37] Once gained, it continues until legal disposition of the case.[38] Any postponement or continuance outside the terms of statutory authority divests it.[39] He loses jurisdiction by absence on the trial day,[40] unless the parties appear and stipulate for a continuance,[41] but not by nonappearance of the parties,[42] and where jurisdiction of the person is lost by defective proceedings or irregularities, it may be restored by appearance or waiver.[43] Jurisdiction lost because of unlawful adjournment is not restored by a party's subsequent participation in the trial.[44]

Residence determining jurisdiction.[45]—Under some statutes residence of either party suffices,[46] and one may sue though not a resident.[47] Generally a party has a right to be sued in the county of his residence.[48]

The amount in controversy[48a] is measured by the amount of the demand of the pleading or action[49] or of a set-off[50] or plea of reconvention,[51] and the amount thereof is not lessened by credits admitted.[52] In Texas it is held that jurisdiction is determined by the amount alleged and not the amount prayed for,[53] hence by praying less than is due, jurisdiction cannot be given.[54] If on every construction of the demand the amount with the interest claimed exceeds the jurisdic-

§ 2632]. School Dist. No. 38 v. Waters [Colo. App.] 77 P. 255. Prohibition will not lie to restrain a justice from exercising jurisdiction in a particular case, in a class of cases of which he has jurisdiction. Cincinnati, etc., Packet Co. v. Belleville [W. Va.] 47 S. E. 301.

35. See post, § 4; also Process, 2 Curr. L. 1259.

36. Where attachment is all that sustains jurisdiction, if that fails, jurisdiction goes with it. Harris v. Meredith [Mo. App.] 81 S. W. 203. A garnishment proceeding to reach money in bank is properly brought in the township where the cashier may be found, though the money is in another county, under a statute providing that such action may be brought in the township where the property may be found. Id.

37. See post, § 4; also Appearance, 3 Curr. L. 300. Johnson v. Grand Fountain of True Reformers, 135 N. C. 385, 47 S. E. 463.

38. Presley v. Dean [Idaho] 79 P. 71.

39. Could not be resumed 14 days after ordering transfer to district court, even though transfer was erroneous. Code, §§ 4496, 4497, do not sanction it. Schiele v. Thede [Iowa] 102 N. W. 133.

40. Absent on the day to which the case was adjourned. Johnson v. Reilly [N. J. Law] 57 A. 133.

41. Hobbs v. German-American Doctors [Okl.] 78 P. 356.

42. Barlow v. Riker [Mich.] 101 N. W. 820.

43. A party who appears on the trial day and in the absence of the justice stipulates for a continuance and agrees that the case may be then tried will not when the case is called be heard to object that the justice lost jurisdiction by his absence on the first trial day. Hobbs v. German-American Doctors [Okl.] 78 P. 356.

44. Adjournment for more than eight days over defendant's objection. Wright v. Shepherd, 44 Misc. 454, 90 N. Y. S. 154.

45. See 2 Curr. L. 654.

46. Under a statute providing that an action may be brought in a township, where either of the parties reside, a justice has no jurisdiction of an action brought where neither reside. Harris v. Meredith [Mo. App.] 81 S. W. 203.

47. That one of several plaintiffs is not a resident of the county where suit was brought does not affect his right to sue. Scribner v. Smith, 104 Mo. App. 542, 79 S. W. 181.

48. Rev. St. 1895, art. 1535, provides that suits before a justice shall be in the county of the defendant's residence. Art. 1589 provides that if there is no qualified justice in such county the suit may be brought before the nearest justice. Held, that a plea of privilege need not negative the idea that there was no qualified justice in defendant's precinct. Aspermont Drug Co. v. Crowdus Drug Co. [Tex. Civ. App.] 80 S. W. 258. Under Code 1892, § 2395, providing that a householder shall be sued in the district in which he resides, an action on a judgment is properly brought in such district rather than in the district in which the judgment was procured. Wise v. Keer Thread Co. [Miss.] 36 So. 244. Under Rev. St. 1899, §§ 3838, 3839, a foreign insurance company is a resident of every county and township in the state. Statutes construed. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479.

48a. See 2 Curr. L. 653.

49. Where the complaint alleges the property to be worth $15 to $25 and the answer simply denies the allegation, there is no issue as to its being worth over $50. Pasterfield v. Sawyer, 133 N. C. 42, 45 S. E. 524. The fact that a garnishee owes defendant a sum in excess of jurisdiction is immaterial. Davis Bros. v. Choctaw, etc., R. Co. [Ark.] 83 S. W. 318.

50. Williamson v. Bodan Lumber Co. [Tex. Civ. App.] 82 S. W. 340.

51, 52. Not affected by the fact that the defendant credits the amount sued for. Rylie v. Elam [Tex. Civ. App.] 79 S. W. 326. **Assuming jurisdiction** in such case, however, is **rendered harmless** where there is no recovery on such plea. Rylie v. Elam [Tex. Civ. App.] 79 S. W. 326.

53, 54. Plea in reconvention set up an amount beyond the jurisdiction, but the prayer was for an amount within. Times Pub. Co. v. Hill [Tex. Civ. App.] 81 S. W. 806.

tional amount, the justice of the peace is ousted.[55] A single cause of action cannot be split so as to make the amount within the jurisdiction,[56] but where items of a claim have been incurred under different contracts and the aggregate exceeds the statutory amount, an action may be maintained on each item separately.[57] In the absence of statute, jurisdiction cannot be ousted by filing a counterclaim for an amount beyond his jurisdiction.[58] The statutory limit as to amount in justice courts does not apply to forcible detainer actions, nor can a cross demand of any kind be set up therein.[59]

Title to realty[60] is involved in action for damages for breach of a personal covenant, where such breach consists of an eviction by one having a paramount title,[61] but not in replevin for a deed.[62] An action to recover the purchase price paid, after the contract is at an end, is not an action founded "on a contract for real estate."[63] Where allegations of title[64] can be put in issue only in a specified way, the failure to do so leaves them admitted and the jurisdiction unaffected.[65]

Objections to the jurisdiction[66] are waived by pleading and submitting to a trial on the merits of the case.[67] A special appeal on the ground of want of jurisdiction is waived by pleading to the merits and going to trial in the circuit court.[68] An objection that an action was commenced in the wrong county may raise not only a question of law but one of fact, and entitle defendant to a judgment of nonsuit, though he does not defend on the merits.[69] Where jurisdiction is asserted by one party and denied by the other, the evidence should be heard.[70] The facts involved may be decided by the justice on plea to his jurisdiction by reason of nonresidence.[71]

§ 4. *Procedure in justices' courts.*[72]—*The docket*[73] need not be kept with the particularity required of courts of general jurisdiction.[74]

55. Oppenheimer v. Regan [Mont.] 79 P. 695, citing 2 Curr. L. 653, on the question whether remittitur or amendment as to amount will be efficacious to confer jurisdiction. Action to recover $100 interest and attorneys' fees is more than $100. Forbes Piano Co. v. Owens, 120 Ga. 449, 47 S. E. 938.

56. Hesser v. Johnson, 13 Okl. 747, 76 P. 181.

57. Copland v. American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501.

58. Corley v. Evans [S. C.] 48 S. E. 459.

59. Mark v. Schumann Piano Co., 105 Ill. App. 490.

60. See 2 Curr. L. 654, also Appeal and Review, 3 Curr. L. 186, and Jurisdiction, 4 Curr. L. 324.

61. Covenant of quiet enjoyment. Holmes v. Seaman [Neb.] 101 N. W. 1030, **overruling** [Neb.] 100 N. W. 417.

62. Pasterfield v. Sawyer, 133 N. C. 42, 45 S. E. 524.

63. Where $300 was paid down but it was further agreed that if the proposed purchaser failed to procure a loan by a certain date the payment should be returned. Fry v. Dunn [Kan.] 78 P. 814.

64, 65. See Hinchman v. Spaulding [Mich.] 100 N. W. 901; Reynolds v. Maynard [Mich.] 100 N. W. 174.

66. See 2 Curr. L. 655.

67. Keeley Institute v. Riggs [Neb.] 99 N. W. 833.

68. Clute v. Everhart [Mich.] 100 N. W. 124.

69. Under Rev. St. 1887, § 4726, if it appears that the court has no jurisdiction, a nonsuit should be granted. Purdum v. Neil [Idaho] 77 P. 631.

70. Where the defendant appears and denies jurisdiction and the plaintiff files counter-affidavits setting up facts showing jurisdiction. Purdum v. Neil [Idaho] 77 P. 631.

71. Anderson v. Morton, 21 App. D. C. 444.

72, 73. See 2 Curr. L. 655.

74. Need not show that a defendant against whom judgment was entered by default was notified of the day and hour of appearance. "Whereupon I issued summons returnable" at a certain date and hour is sufficient. Keeley Institute v. Riggs [Neb.] 99 N. W. 833. Improper entries of an otherwise valid attachment have no effect on jurisdiction. First Nat. Bank v. Hesser [Okl.] 77 P. 36.

NOTE. Dockets: The strictness required in keeping the docket of a superior court need not be observed. Failure of the justice to sign his name does not render the judgment void (Fulton v. State, 103 Wis. 238, 74 Am. St. Rep. 854), nor does the fact that he signs with his initials (Gunn v. Tackett, 67 Ga. 725). A statute requiring the entry of a judgment on the docket is merely directory. Hickey v. Hinsdale, 8 Mich. 267, 77 Am. Dec. 450. Hence failure to enter does not render the judgment void. Fish v. Emerson, 44 N. Y. 376. If the docket contains the names of the parties and the amount of the judgment, it is sufficient. Stokes v. Coonis, 4 N. J. Law, 159; Elliott v. Jordan, 7 Baxt. [Tenn.] 376; Wahrenberger v. Horan, 18 Tex. 57. A statute requiring the judgment to be entered forthwith

Change of venue[75] must be taken to the place prescribed by law.[76] On refusing to pay costs of transcript made prerequisite for change of venue, the original justice should proceed to trial.[77] In such case oral notice to attorney that the trial will proceed suffices.[78]

Transfer of causes.—In New York a justice has no power to transfer an action from himself to another justice unless his term of office is about to expire,[79] and in no event can he transfer a cause without notice to the defendant.[80] Notice of date of trial of a transferred cause should be served on the parties, not on their attorneys.[81] In Nebraska the sickness or necessary absence which authorizes the calling in of another justice is such as occurs at the time appointed for trial.[82] After a transfer, parties are not charged with notice of what the justice does in the case.[83]

Contempt.[84]—In Massachusetts a justice cannot commit for contempt a witness who refuses to answer an interrogatory put to him.[85]

Attachment and garnishment[86] have in their general features been treated of in other topics.[87] Public notice of the goods and chattels attached must be posted as required by law.[88] An affidavit of attachment cannot be amended so as to state a cause of action different from that stated in the original affidavit.[89] Where an attachment is properly issued and property taken thereunder, the lien is not lost by failure of the justice to make proper docket entries of the issuance of such order of attachment.[90] A fi. fa. issued on a judgment is sufficient evidence of the judgment against the principal debtor.[91] A judgment rendered against a garnishee before judgment rendered the principal defendant is void.[92]

Process and appearance.[93]—Process must be served as required by law,[94] and if the manner of serving is mandatory, it must be strictly pursued.[95] New notice is necessary after continuance beyond the statute.[96] Ministerial duties relative

requires only substantial compliance, and an entry within two or three days is sufficient. Hall v. Tuttle, 6 Hill [N. Y.] 38, 40 Am. Dec. 382; Conwell v. Kuykendall, 29 Kan. 707. From note to Western Sav. Co. v. Currey [Or.] 87 Am. St. Rep. 672.

75. See 2 Curr. L. 655.

76. Gen. Laws 1897, c. 151, p. 285, providing that a change of venue may be taken to a justice of the same village or to a justice of the town adjoining the village, does not mean to a justice of a town adjoining the town in which the village is located. Wadena Cracker Co. v. Gaylord [Minn.] 101 N. W. 72. The town within which the village is located is an adjoining town. Id.

77. Rev. St. 1887, § 4643, subd. 1. Presley v. Dean [Idaho] 79 P. 71.

78. Presley v. Dean [Idaho] 79 P. 71.

79. The mere appointment to the office of city recorder does not cause his term to expire. De Zur v. Provost, 90 N. Y. S. 1016. Nor is his resignation an expiration of his term. Id.

80. Though no statutory provision is made therefor. De Zur v. Provost, 90 N. Y. S. 1016.

81. Notice required by Rev. St. 1899, § 3974. Cullen v. Callison [Mo. App.] 80 S. W. 290.

82. Has no application to a proceeding to revive a dormant judgment. Keeley Institute v. Riggs [Neb.] 99 N. W. 833.

83. Schiele v. Thede [Iowa] 102 N. W. 133.

84. See 2 Curr. L. 655.

85. Statutes construed. Lawson v. Rowley, 185 Mass. 171, 69 N. E. 1082. Gen. St. 1860, c. 120, § 50, giving justices power to punish for disorderly conduct, interrupting judicial proceedings, if applicable to taking depositions, was made to apply only to trial justices by Pub. St. 1882, c. 155. Id.

86. See 2 Curr. L. 656.

87. See Attachment, 3 Curr. L. 353; Garnishment, 3 Curr. L. 1550.

88. Where the record does not show this, the judgment is void. Burton v. Frame [Del. Super.] 58 A. 804.

89. Westover & Co. v. Van Dorn Iron Works Co. [Neb.] 98 N. W. 598.

90. First Nat. Bank v. Hesser [Okl.] 77 P. 36.

91. Travis v. Chambers [Ga.] 48 S. E. 356.

92. Burton v. Frame [Del. Super.] 58 A. 804.

93. See 2 Curr. L. 656. Also the general topics Appearance, 3 Curr. L. 300; Process, 2 Curr. L. 1259.

94. Wood v. Callaway, 119 Ga. 801, 47 S. E. 178.

95. Copy of complaint must be served with the summons in order to acquire jurisdiction of the defendant [Code Civ. Proc. § 1510 and §§ 635, 636]. State v. Harrington [Mont.] 78 P. 484. Code Civ. Proc. § 1688, providing for the appointment of a special constable where no constable is elected, did not affect § 1510, authorizing an unofficial person to serve a justice's summons. Id.

96. Mailing and parol notices do not suffice. Schiele v. Thede [Iowa] 102 N. W. 133.

to process may be delegated.[97] A facsimile signature is a sufficient subscription.[98] In Michigan, service of process on one joint debtor is sufficient to give jurisdiction of all.[99] There must be a legal return of service.[1] The return may be amended after the action has begun,[2] but not after judgment without notice to the parties.[3] Under a statute providing that where an action is brought upon a contract against two or more persons, one of whom shall not be found in the county where suit was brought, the justice may at any time within four days from the return day of a writ by which the action was commenced issue one or more alias writs of summons, the return day of the writ should be counted as one of the four,[4] and it is not necessary in order that the alias writs should issue that the officer's return should state that he had used due diligence to obtain personal service and that being unable to find defendant, he left a copy of the summons at his last place of abode.[5]

An appearance[5a] in the sense of being present is sufficient.[6] Where joint debtors are sued on the theory of the existence of a partnership between them, a special appearance by one to have the proceeding against him dismissed on the ground that he is not a partner is not equivalent to a plea in abatement.[7] Lack of service is cured by general appearance.[8] A statute providing for nonsuit in case a party fail to appear within a specified time does not apply to cases of adjournment.[9] In New York a plaintiff cannot be nonsuited for nonappearance at return day if he has filed a verified complaint to which there is no verified answer.[10]

A dismissal[10a] of a counterclaim does not dismiss the cause of action under a statute providing that the dismissal of a cause of action does not dismiss a counterclaim already filed.[11]

Pleadings and issues.[12]—Pleadings not provided for by statute cannot be interposed.[13] Particularity in pleading is not required.[14] The cause of action must,

97. Such notice may be signed in blank and filled out by one of the parties under authority of the justice. Loughren v. Bonniwell & Co. [Iowa] 101 N. W. 287.

98. A stamp is a sufficient signature by the justice to an original notice under a statute requiring such notice to be subscribed. Loughren v. Bonniwell & Co. [Iowa] 101 N. W. 287.

99. Only one member of a partnership served with process issued against all [Comp. Laws, § 840]. Hirsh v. Fisher [Mich.] 101 N. W. 48.

1. Where a return is a return of personal service and the evidence shows there was not personal service, there is no jurisdiction. Wood v. Callaway, 119 Ga. 801, 47 S. E. 178. The return is presumed to show all that was done by the person making the service. State v. Harrington [Mont.] 78 P. 484.

2. To make it conform to an existing fact in order to show jurisdiction. Martin v. Castle, 182 Mo. 216, 81 S. W. 426.

3. Newby v. Miller [Neb.] 98 N. W. 1066.

4. Comp. Laws, § 720. Brown v. Knop [Mich.] 100 N. W. 466.

5. Brown v. Knop [Mich.] 100 N. W. 466.

5a. See 2 Curr. L. 657.

6, 7. Hirsh v. Fisher [Mich.] 101 N. W. 48.

8. Coming into court, asking for a recordari and trying the case on its merits. Johnson v. Grand Fountain of True Reformers, 135 N. C. 385, 47 S. E. 463.

9. Comp. Laws, § 836. Brown v. Knop [Mich.] 100 N. W. 466.

10. Code Civ. Proc. § 3013, subd. 2, does not apply. Lent v. Moyer, 45 Misc. 139, 91 N. Y. S. 975.

10a. See 2 Curr. L. 658.

11. McCormick Harvesting Mach. Co. v. Hill, 102 Mo. App. 544, 79 S. W. 745.

12. See 2 Curr. L. 657.

13. Code Civ. Proc. § 2935, makes no provision for a reply, hence no error can be predicated on a failure to interpose it. Mott v. Edwards, 90 N. Y. S. 303.

14. Plea in reconvention alleging that goods purchased were guarantied to be worth $1,800, whereas the value was only $900, held sufficient. Times Pub. Co. v. Hill [Tex. Civ. App.] 81 S. W. 806. A bill of particulars is sufficient if it states the nature of the claim in general terms or states substantially the facts constituting the cause of action. Squires v. Martin, 5 Ohio C. C. (N. S.) 313. A **state of demand** containing a copy of the account as charged upon the vendor's books where goods are purchased and marked and charged by lot numbers according to the custom of the business and known and understood by both vendor and vendee is sufficient. Weill v. Jacoby [N. J. Law] 58 A. 80. Complaint held sufficient, though it did not particularize the account in question. If not full enough, defendant should have asked for a bill of particulars. Turner v. McKee [N. C.] 49 S. E. 330. Complaint to recover damages for misuse of a livery team held sufficient. Cunningham v. Dickerson, 104 Mo. App. 410, 79 S. W. 492. Statement "T. debtor to S. for services rendered as real estate agent. Procuring purchaser for land, commission two and one-

however, be set forth with some degree of certainty.[15] An informal or defective statement will be held sufficient after judgment.[16] No prayer for relief not specifically asked for will be read into a pleading,[17] but in the absence of a reply, a general denial to a counterclaim will be presumed.[18] A defendant is not required to file a written pleading;[19] without it he is entitled to show all facts tending to negative the plaintiff's right to recover,[20] and on appeal, a general denial is not a departure from the issues presented,[21] but if an answer is filed it will limit the issues as under the ordinary rules of pleading.[22] A plea of guilty can properly be put in only when the offense charged is one within his final jurisdiction.[23] Suit on an unverified account may be met by an unverified plea.[24] In Georgia, to admit disproof of a sworn open account sued on, the answer must be verified.[25] A statute providing that in certain actions against a corporation the plaintiff may take judgment by default unless the defendant serves with his pleading a copy of the order of the judge directing that the issues be tried does not apply to an action before a justice.[26] Under a statute providing that where title comes in question the defendant shall give bond, pay a fee for certifying the cause, etc., the justice does not lose jurisdiction unless the bond is approved and amount sufficient to pay the costs deposited.[27]

Evidence.[28]—Where suit on an unverified account has been personally served and the same is met by no defense, silence is to be treated as an admission of the correctness of the account.[29] A verified account attached to the summons performs the office of evidence.[30]

Trial by jury[30a] as a matter of right or propriety is fully treated in another place.[31] Under the Georgia practice of appealing to a jury, an appeal from a judgment against a municipal corporation must be entered in the name of the corporation.[32] A plea cannot be filed on an appeal to the jury when it appears

half per cent on selling price, $4,300, $107.50" is sufficient. Smith v. Truitt [Mo. App.] 80 S. W. 686.

15. Civ. Code 1895, § 4116. Macon & B. R. Co. v. Walton [Ga.] 48 S. E. 940. When action is brought on an account, a copy thereof must be attached to the summons. Thomas v. Forsyth Chair Co., 119 Ga. 693, 46 S. E. 869. Complaint to enforce a mechanics' lien which does not allege an indebtedness is insufficient to sustain a judgment by default. Smith v. Frank Gardner Hardware Co., 83 Miss. 654, 36 So. 9.

16. Action for damages by trespassing cattle. Young v. Prentice, 105 Mo. App. 563, 80 S. W. 10. Complaint held sufficient when attacked for the first time after judgment. Kubesh v. Hanson [Minn.] 101 N. W. 73.

17. Where no written pleadings are filed, the amount in controversy is the amount fixed by the stated demand. Western Union Tel. Co. v. Garner [Tex. Civ. App.] 83 S. W. 433. No charge for interest would be read into the account so as to confer jurisdiction on the appellate court. Id.

18. Schergen v. Baerweldt Const. Co. [Mo. App.] 83 S. W. 281.

19, 20, 21. Mullins v. South Omaha Street Fair Ass'n [Neb.] 99 N. W. 521.

22. Ultra vires not being specially pleaded could not be availed of. Royal Fraternal Union v. Crosier [Kan.] 78 P. 162.

23. McVeigh v. Ripley [Conn.] 58 A. 701.

24. Under a practice requiring a verified copy of an account sued upon to be served with the summons. Peeples v. Sethness, 119 Ga. 777, 47 S. E. 170.

25. Civ. Code 1895, § 413. Stafford v. Wilson [Ga.] 49 S. E. 800.

26. Center v. Hoosick River Pulp Co., 43 Misc. 247, 88 N. Y. S. 548.

27. Comp. Laws, §§ 782-784. Hinchman v. Spaulding [Mich.] 100 N. W. 901. Complaint under Comp. Laws 1897, § 11204, to recover treble damages for cutting down and carrying away trees, alleging that defendant cut down trees on the land of said plaintiff, is not an allegation of title to the land within § 786, providing that a claim of title made by plaintiff shall be deemed admitted by defendant unless he files a bond, pays fees and costs, etc. Reynolds v. Maynard [Mich.] 100 N. W. 174. If the complaint alleges title and the defendant fails to file a bond, pay fees and costs, he must be deemed to admit title in plaintiff. Id.

28. See generally, Evidence, 3 Curr. L. 1334; Witnesses, 2 Curr. L. 2163, and the topics relating to that which evidence is offered to prove.

29. Plaintiff is entitled to judgment on the call of the docket without the case being assigned for trial. Peeples v. Sethness, 119 Ga. 777, 47 S. E. 170.

See, also, Accounts Stated and Open Accounts, 3 Curr. L. 27.

30. Plaintiff is entitled to judgment unless a verified defense is filed. Peeples v. Sethness, 119 Ga. 777, 47 S. E. 170.

30a. See 2 Curr. L. 658.

31. See Jury, 4 Curr. L. 358.

32. Not in the name of the mayor. Morgan v. Cohutta, 120 Ga. 423, 47 S. E. 971.

that no defense was made at or before the first term of the case.[33] Omission of the juror's name from the list is ground for challenge in Georgia,[34] but advantage cannot be taken of it after verdict, even if the party was ignorant of the omission.[35]

Verdict and judgment.[36]—A general verdict rendered in a case where the evidence fails to support one of the causes of action alleged is bad.[37] Ordinarily, the judgment must be entered within the time provided by statute.[38] The period does not commence to run until after final submission of the cause.[39] The entry being a purely ministerial act,[40] failure to do so does not render the judgment void,[41] especially when by consent of the parties the case is taken under advisement for a time,[42] unless the statute makes entry part of rendition. This requirement may be waived by the parties.[43] A statute under which an attorney may enter judgment on a verdict does not deprive the justice of power to do so.[44] Judgment entered without notice before return day is erroneous, though it was not permissible to set a day so late.[45] Where there is a duty to enter judgment, mandamus will lie to compel him to do so.[46] A judgment founded on a complaint not stating a cause of action is a nullity.[47] A judgment cannot be rendered for plaintiff for the sum demanded and in favor of the defendant for costs.[48] Questions as to the description or misjoinder of the parties[49] and the fact of personal service are concluded by the judgment.[50] A judgment is not rendered subject to collateral attack by reason of a nonprejudicial defect in the original notice,[51] nor by the fact that it was prematurely entered.[52] The statutory requirements necessary to revive a judgment must be complied with in order to give the justice jurisdiction.[53] Suit to set aside a judgment must be brought within the prescribed period.[54]

33. Morgan v. Cohutta, 120 Ga. 423, 47 S. E. 971.

34, 35. Faulkner v. Snead [Ga.] 49 S. E. 747.

36. See 2 Curr. L. 659. See, also, Judgments, 4 Curr. L. 287.

37. New trial will be granted as to all causes alleged. Jones v. Atlantic Coast Line R. Co. [S. C.] 49 S. E. 568.

38. Otherwise there is no jurisdiction. Young v. Joseph Bros. & Davidson [Neb.] 99 N. W. 522.

39. Keeley Institute v. Riggs [Neb.] 99 N. W. 833.

40. Cincinnati, etc., Packet Co. v. Bellville [W. Va.] 47 S. E. 301.

41. Statute required the judgment to be entered within 24 hours. It was not entered for three days. Cincinnati, etc., Packet Co. v. Bellville [W. Va.] 47 S. E. 301. Substantial compliance with the statute is all that is required. Id.

42. Under a statute requiring the judgment to be filed within 4 days, a justice does not lose jurisdiction to enter judgment. Westover & Co. v. Van Dorn Iron Works Co. [Neb.] 97 N. W. 598.

43. Record contained a statement that the case was deemed submitted as of a date later than that of trial. No objection was made. Bastable v. Cuba Supply Co., 43 Misc. 89, 86 N. Y. S. 791.

44. Civ. Code, § 5339. Levadas v. Beach, 119 Ga. 613, 46 S. E. 864.

45. Odom v. Carmona [Tex. Civ. App.] 83 S. W. 1100.

46. Where a justice orally announced his determination to enter judgment in accordance with the statute because of nonappearance of plaintiff, mandamus will issue to compel him to do so on his subsequent refusal. Barlow v. Riker [Mich.] 101 N. W. 820. Under Comp. Laws, § 836, it is his duty to enter judgment of nonsuit where the parties fail to appear. Id.

47. Nenno v. Chicago, etc., R. Co., 105 Mo. App. 540, 80 S. W. 24.

48. Burton v. Frame [Del. Super.] 58 A. 804.

49. Peeples v. Sethness Co., 119 Ga. 777, 47 S. E. 170.

50. Where service was by leaving a copy at the abode of defendant who did not appear, a judgment for plaintiff is conclusive against an affidavit of illegality based on the ground that no evidence was introduced and want of personal service. Brown v. Webb [Ga.] 48 S. E. 917. See, also, Former Adjudication, 3 Curr. L. 1476.

51. Failure to sign an original notice as prescribed by statute. Loughren v. Bonniwell & Co. [Iowa] 101 N. W. 287.

52. Judgment rendered on a transferred cause without notice to the parties of date of trial as required by Rev. St. 1899, § 3974. Cullen v. Callison [Mo. App.] 80 S. W. 290. Judgment within ten days (Rev. St. 1899, § 3862) is not void, but erroneous. Fry v. Armstrong [Mo. App.] 84 S. W. 1001.

53. Filing of an affidavit stating that the judgment sought to be revived has not been paid [Rev. St. 1896, § 4023]. Bick v. Tanzey, 181 Mo. 515, 80 S. W. 902.

54. Barred after four years. During all this period defendant had knowledge of the judgment. Warren v. Foust [Tex. Civ. App.] 81 S. W. 323.

In Mississippi judgment may be enrolled in any county in the state.[55]

A default judgment[55a] must be based on the relief demanded by the pleadings.[56] If not, the defect may be shown in a suit to restrain its enforcement.[57] A judgment entered for nonappearance is not a judgment by default where the defendant has filed an answer putting in issue the material allegations of the complaint.[58]

Judgment by confession.—Where defendant, in obedience to process, appears and orally admits his liability, the judgment entered is a judgment by confession.[59] In Missouri, confession of judgment need not be in writing if defendant appear.[60]

Execution[61] must be issued within the time limited by statute after judgment entered,[62] and be executed as provided by law.[63] An execution may be issued from the district court, though the amount is not within such court's jurisdiction.[64] Under the Tennessee law a levy from a justice is not a lien on land as to third persons after ten days, unless the execution and papers are filed and docketed in the circuit court.[65] In Georgia, in order to arrest the running of the dormancy statute, entries on the execution must be recorded on the execution docket of the superior court of the county of the defendant's residence.[66]

Costs.[67]—A general statute limiting costs is not applicable to a special proceeding in which the justice is given jurisdiction.[68] Failure to give security for costs is not ground for reversal where such failure was the result of conduct of the other party.[69] A statute preventing a reversal for improper allowance of fees does not cover a case expressly governed by another statute for costs generally, where the question does not come up on particular allowances which the justice had power to consider.[70]

§ 5. *Appeal and error.*[71]—The right of appeal may be exercised only in obedience to statutory regulations.[72]

55. On filing an abstract with the clerk of court [Code 1892, § 2413]. Wise v. Keer Thread Co. [Miss.] 36 So. 244.

55a. See 2 Curr. L. 659, n. 48.

56. A claim on an account for services rendered will not authorize the entry of a default judgment for laborers' wages. Phillips v. Norton [S. D.] 101 N. W. 727.

57. Phillips v. Norton [S. D.] 101 N. W. 727.

58. Notwithstanding the justice's record contains an entry to that effect. State v. Justice Court of Tp. No. 1 [Mont.] 78 P. 498. Justice heard the evidence and entered judgment on the proof adduced by plaintiff. Clark v. Great Northern R. Co. [Mont.] 76 P. 1003. Even though the docket recited notice and entry of defendant's default. Id.

59. Wade v. Swope [Mo. App.] 81 S. W. 471. Judgment by confession held to show on its face every essential required to render it valid. Id. And see Confession of Judgment, 3 Curr. L. 719.

60. Rev. St. 1899, § 406. Wade v. Swope [Mo. App.] 81 S. W. 471.

61. See Executions, 3 Curr. L. 1397.

62. This period is not extended by filing a transcript in the circuit court. Phillips v. Norton [S. D.] 101 N. W. 727. Execution issued held sufficient. Wilcher v. Pool [Ga.] 48 S. E. 956.

63. Under Mills' Ann. St. § 2668, providing that all executions shall be directed to the proper constable, a constable alone can execute such writs. He cannot deputize another to make the sale. Stacy v. Bernard [Colo. App.] 78 P. 615.

64. The execution of a judgment being ministerial. Joseph Speidel Grocery Co. v. Warder [W. Va.] 49 S. E. 534.

65. Mere deposit of the execution with the circuit clerk is not enough. Thompson v. Blanks [Tenn.] 84 S. W. 804.

66. Columbus Fertilizer Co. v. Hanks, 119 Ga. 950, 47 S. E. 222.

67. See 2 Curr. L. 660.

68. Attachment. La Goo v. Seaman [Mich.] 99 N. W. 393.

69. Where offer to give security was made, he made no response. Hirsh v. Fisher [Mich.] 101 N. W. 48. Statute providing that if a party refuses to accept an offer to allow judgment he shall be liable for costs unless the recovery should be more favorable to him than the offer. Lawson v. Speer, 91 App. Div. 411, 86 N. Y. S. 915.

70. La Goo v. Seaman [Mich.] 99 N. W. 393.

71. See 2 Curr. L. 660.

72. Appeal after the time allowed by statute gives the district court no jurisdiction. State v. District Court of Second Judicial Dist. [Mont.] 75 P. 862. Under § 4838, Rev. St. 1887, an appeal may be taken within 30 days by filing notice with the justice and serving a copy on the adverse party. Perkins v. Bridge [Idaho] 77 P. 329. The rules regulating appeals from justices' courts are applicable to an appeal from the action of the board of county commissioners. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804. Return must be made to the appellate court and papers filed with the clerk within 10 days. Id.

There must be an appealable judgment.[73] Appeal lies from final judgments[74] and orders,[75] and is sometimes restricted in particular cases.[76] By trying the merits an appeal reaching jurisdiction is waived.[77] Appeal lies from the overruling of plea to the jurisdiction.[78]

Only parties affected by the judgment appealed from are necessary.[79] One co-defendant may appeal without joining the others.[80] The affidavit of appeal must be filed as required by law.[81]

Bonds.[82]—In some states an appeal bond is necessary to give the appellate court jurisdiction.[83] In others, jurisdiction may not be ousted, but may be rendered ineffectual by want of a sufficient bond.[84] The bond must correctly describe the judgment appealed from[85] and undertake to do what is prescribed by the statute,[86] and where the case is heard by a substitute justice, should be perfected before the one originally having jurisdiction.[87] The appellant should, in good practice, sign the appeal bond;[88] but where the bond is given at his instance and signed by the surety, the appeal should not be dismissed because of his failure to sign.[89] Unless so provided it need not be approved by the justice,[90] in which case he may require some evidence of the solvency of the sureties before granting the appeal.[91] A party is entitled to a reasonable time to provide bondsmen.[92] When excepted to, the sureties must justify within the time allowed by law.[93]

73. Query whether quashal of landlord's attachment for rent before judgment is final and appealable. Robertson v. Southerland, 22 App. D. C. 595.

74. No appeal lies from an order denying a motion to quash an execution. Carr v. Pennsylvania R. Co. [Mo. App.] 83 S. W. 981. The debtor of a judgment debtor against whom proceedings in aid of execution have been brought before a justice of the peace has the right of appeal from the finding of the justice as to the fact of his indebtedness. Carlin v. Hower, 5 Ohio C. C. (N. S.) 70. A judgment is final when it determines the rights of the parties. Subsequent proceedings to ascertain the amount of costs are immaterial. Lemmons v. Huber [Or.] 77 P. 836. A judgment dismissing a cause because plaintiff refuses to plead is a final judgment. Moore Hayfield Co. v. Missouri, etc., R. Co. [Tex. Civ. App.] 80 S. W. 881.

75. An order made in proceedings in aid of execution that a third party who appears on notice for that purpose and admits his indebtedness shall pay into court the amount of such indebtedness to apply on the judgment is a final order. Duffey v. Reardon, 70 Ohio St. 328, 71 N. E. 712.

76. An appeal lies from a judgment entered in an action to enforce an agister's lien. Statutes construed. State v. Johnson [Mo. App.] 82 S. W. 962.

77. Clute v. Everhart [Mich.] 100 N. W. 124.

78. Anderson v. Morton, 21 App. D. C. 444.

79. In an appeal from a justice's judgment against one partner who was served, it is not necessary to bring into the circuit court another partner who was not served. Gormley v. Hartray, 105 Ill. App. 625.

80. Jesse French Piano & Organ Co. v. Mears [Tex. Civ. App.] 83 S. W. 401.

81. A prosecution for the violation of a city ordinance is a civil action. Affidavit of appeal must be filed with the justice and not with the court to which the appeal is taken as in criminal prosecutions. Fortune v. Wilburton [Ind. T.] 82 S. W. 738.

82. See 2 Curr. L. 662.

83. A bond running to the wrong obligee cannot be amended after time for filing the bond has expired. Sutton v. Bower [Iowa] 99 N. W. 104.

84. Under Code Civ. Proc. § 1763, where the sureties fail to justify within the time allowed. Morin v. Wells [Mont.] 75 P. 688. Such period may be extended by stipulation. Id. In Idaho the appeal is ineffectual unless an undertaking be filed with two or more sureties [Rev. St. 1887, § 4842]. Perkins v. Bridge [Idaho] 77 P. 329.

85. Appeal properly dismissed where the bond misdescribed the judgment in a material matter. East Liverpool Potters' Co. v. Hill [Tex. Civ. App.] 81 S. W. 568.

86. "Satisfy and pay all intervening damages and costs" of appeal is not equivalent to "satisfy and pay any final judgment." Schrot v. Schoenfeld, 23 App. D. C. 421.

87. Justice temporarily disabled. Sickness. Meyers v. Dwight, 4 Ohio C. C. (N. S.) 431.

88, 89. Sanders v. Matthewson [Ga.] 48 S. E. 946.

90. If it is not sufficient, the adverse party may except and have it strengthened or the appeal dismissed. Dieter v. Ragsdale, 120 Ga. 417, 47 S. E. 942.

91. Hagerty v. Lierly [Mo. App.] 83 S. W. 542. Even where the justice may be compelled to allow an appeal by rule and attachment. Id.

92. Spencer v. Broughton [Conn.] 58 A. 236.

93. The district court is not required to permit them to justify after such time. Peterson v. Kjellin [Minn.] 101 N. W. 948. Upon denial of the district court to allow them to justify after such time, judgment was properly entered against the appellant. Id. Such judgment, however, could not be entered against the sureties declined by the prevailing party. Id.

Where the interests of co-defendants are not adverse, one may appeal without making the others parties to the bond.[94] A bond is not rendered invalid by a clerical error.[95]

Appellate process and appearance.—Unless required by statute, new process is not necessary;[96] but notice of appeal required by statute must be given.[97] An appeal constitutes a general appearance, and want of service of process,[98] notice of appeal,[99] and irregularities in taking an appeal, are thereby waived;[1] but an appeal does not constitute a waiver of an objection to the jurisdiction of the person,[2] nor does the fact that after the justice overruled the objection he filed a motion for security of costs.[3] Process may be amended where substantial justice will be thereby promoted.[4]

The transcript[4a] must be filed within the time prescribed.[5] A rule of court requiring the transcript to be filed within a certain time after the appeal is perfected is not jurisdictional.[6] An offer to confess judgment need not be included in the transcript.[7] A motion to compel a justice to correct his record must show that it is erroneous.[8] In Montana a defective transcript may be corrected by the appellate court.[9]

The record must show[9a] jurisdictional facts, e. g., that an order granting an appeal was issued;[10] the timely performance of jurisdictional acts;[11] the giv-

94. Slayton & Co. v. Horsey [Tex. Civ. App.] 79 S. W. 1086. Under Rev. St. 1895, art. 1670, providing that the party appealing shall give bond payable to the appellee. Id. [Tex.] 78 S. W. 919. A co-defendant as against whom the action had been dismissed before judgment rendered need not be made a payee on an appeal bond executed by the other. Houston & T. C. R. Co. v. Ivy [Tex. Civ. App.] 82 S. W. 195.

95. Omission of "Company" from the name of a corporation defendant. Jesse French Piano & Organ Co. v. Mears [Tex. Civ. App.] 83 S. W. 401.

96. The appeal being taken as required by law, judgment against appellee who did not appear is valid. Rowe v. Cannon, Jr. & Co. [Miss.] 36 So. 146.

97. Mills' Ann. St. § 2685, providing that when an appeal is taken by one of several parties the other parties shall be notified of the appeal, and unless served with notice the case shall be continued to the second term, is mandatory and no judgment can be rendered at the first term against parties not served. Miller v. Kinsel [Colo. App.] 78 P. 1075.

See 2 Curr L. 662.

98. Under Mills' Ann. St. § 2687, providing that the appellate court shall hear and determine the cause according to the justice of the case, and that no exception shall be taken to the form of service of process nor to any of the proceedings before him. School Dist. No. 38 v. Waters [Colo. App.] 77 P. 255.

99. Agreeing that two causes of action pending on appeal from a justice's court should be tried together constitutes an appearance. Morgan v. Garretson-Greason Lumber Co., 105 Mo. App. 239, 79 S. W. 997. Under Rev. St. 1899, § 4073, providing that appeals allowed 10 days before the first day of the next term of the appellate court shall be determined at such term, and § 4070, providing for notice to appellee if the appeal be not allowed the same day judgment is rendered, an appellant cannot complain of a judgment of affirmance at a subsequent term on the ground that he had no notice when he knew the appeal was triable at such term. St. Louis World Pub. Co. v. Rialto Grain & Securities Co. [Mo. App.] 83 S. W. 781.

1. Appearing and permitting the case to remain in court for more than a year without objection. Spencer v. Broughton [Conn.] 58 A. 236.

2, 3. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479.

4. Insufficient description of property in unlawful detainer. Drinkard v. Heptinstall [W. Va.] 47 S. E. 72.

4a. See 2 Curr. L. 663.

5. Miller v. Walker [Neb.] 101 N. W. 332.

6. Right of dismissal should be exercised with discretion. Perkins v. Bridge [Idaho] 77 P. 329.

7. It is sufficient if it be filed and certified to the district court with the other papers. State v. Ellsworth [Neb.] 100 N. W. 314.

8. Statute providing that when a court is satisfied that the return is defective it may compel the justice to amend the same. Fortune v. Wilburton [Ind. T.] 82 S. W. 738.

9. Under B. & C. Comp. § 2246, declaring that on filing a transcript the appeal is perfected, where notice of appeal has been given and a transcript filed which was defective for failing to contain certain original papers filed with the justice, the circuit court had jurisdiction to correct the transcript, even to supplying the entire original papers filed with the justice. Hager v. Knapp [Or.] 78 P. 671.

9a. See 2 Curr. L. 663, 665.

10. State v. Machen, 112 La. 556, 36 So. 589.

11. Where the appeal bond recites that the appellant came "within the time allowed by law" and entered his appeal and the record shows nothing to the contrary, the appeal will be held to be in time. Dieter v. Ragsdale, 120 Ga. 417, 47 S. E. 942. The record must not show a tardy filing of an appeal undertaking. Schrot v. Schoenfeld, 23 App. D. C. 421. Bond must be filed within six days [D. C. Code. §§ 30, 31]. Id.

ing of bond or excuse for not doing so;[12] and that the case is appealable;[13] but it will be presumed that notice of appeal has been served.[14] If review is by error, the record or bill of exceptions must show the errors.[15] No presumptions are indulged in favor of jurisdiction,[16] therefore every fact essential to the jurisdiction must affirmatively appear.[17] But where jurisdiction has once attached, the usual presumptions are entertained as to all subsequent proceedings.[18] A loss of jurisdiction by lapse of time will not be presumed against a record sufficient on its face.[19] In Texas, however, it is held that since justices' courts are created by the constitution and exercise certain exclusive jurisdiction, it is not necessary that every fact essential to jurisdiction should affirmatively appear from the record.[20]

Transfer of jurisdiction by appeal.[21]—The district court takes merely appellate jurisdiction by sending up the case[22] and takes none if the justice had none.[23]

The failure to pay trial costs in Georgia entitles the magistrate to dismiss but does not concern appellee.[24] Mere clerical acts may be performed after jurisdiction below is terminated.[25]

In New York an offer of judgment signed by attorney and made after service of notice of appeal but before the return by the justice to the appellate court and before a general appearance on appeal has been made by appellee or the cause is at issue above is good,[26] and the general provision requiring affidavit by an attorney subscribing an offer does not apply.[27]

Dismissal.[28]—Where either party may appeal, an appellant may dismiss against

12. Where the record does not contain the testimony, it will be presumed on appeal that a pauper's oath that he was unable to give a bond for costs was disproved. Cook v. Burson [Tex. Civ. App.] 80 S. W. 871.

13. Under V. S. 129, a judgment, in an action involving $20 or less is final. Porter v. Bishop [Vt.] 59 A. 176. Declaring on penal bond for $100 shows appellate jurisdiction where it does not appear that recovery must have been limited to $50. Wall v. Mount [Ga.] 49 S. E. 778.

14. Statute providing that appeal may be taken by filing notice with the justice and serving a copy on the adverse party. Morin v. Wells [Mont.] 75 P. 688.

15. Affidavits upon which he decided an objection were not incorporated [§ 311, Code Civ. Proc., amended by c. 72, Sess. L. 1895]. Zeigler v. Sonner [Neb.] 98 N. W. 1028.

16. Justices' courts being courts of limited jurisdiction, jurisdiction of parties and subject-matter must affirmatively appear. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558.

17. Recitation that a judgment entered after the time allowed by statute was entered pursuant to an order of the district court is insufficient, being a mere conclusion. Young v. Joseph Bros. [Neb.] 99 N. W. 522. Record merely showing "For violation of promises. Demand $100" is insufficient. Judgment reversed. Ball v. Hall [Del. Super.] 58 A. 1024.

18. Error for the district court to dismiss because the record failed to disclose that a continuance for more than 90 days was with the consent of the parties. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558. Where the transcript shows that proceedings were regular, every presumption is in favor of the judgment. Squires v. Martin, 5 Ohio C. C. (N. S.) 313; Zelgler v. Sonner [Neb.] 98 N. W. 1028.

19. Record showing appeal from justice to jury on the fifth day after judgment upheld because there may have been an intervening Sunday reducing the time to the statutory one of four days. Puett & Co. v. McCall & Co. [Ga.] 48 S. E. 960.

20. It will be presumed that process has been served. Warren v. Foust [Tex. Civ. App.] 81 S. W. 323.

21. See 2 Curr. L. 661, n. 83 et seq.

22, 23. Where the justice was without jurisdiction, the district court is also without jurisdiction. Hesser v. Johnson, 13 Okl. 747, 76 P. 181; Times Pub. Co. v. Hill [Tex. Civ. App.] 81 S. W. 806; State v. Justice Court of Tp. No. 1 [Mont.] 78 P. 498; Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594. Where the justice assumed jurisdiction over an equitable action. Johnson v. Stephens [Mo. App.] 82 S. W. 192. Jurisdiction of the subject-matter cannot be conferred by appeal. Parker Grain Co. v. Chicago, etc., R. Co. [Kan.] 78 P. 406. Gen. St. 1901, § 5228, divests a justice of jurisdiction where defendant resides within a city having a city court. Id. A domestic corporation having a general office in such city is a resident thereof. Id.

24. He cannot complain of refusal to dismiss. Stafford v. Wilson [Ga.] 49 S. E. 800.

25. After notice of appeal has been given, the taking of the recognizance and the allowing the appeal and making up the record are clerical acts. Spencer v. Broughton [Conn.] 58 A. 236.

26, 27. Construing Code Civ. Proc. §§ 3070-3072, 740 and 421. Cutting v. Jessmer, 91 N. Y. S. 658.

See generally Confession of Judgment, 3 Curr. L. 719.

28. See 2 Curr. L. 663.

the objection of the opposite party.[29] A judgment of affirmance entered at the instance of the appellee is equivalent to a dismissal.[30]

Pleadings on appeal.[31]—The rules of pleading in the justice's court govern on appeal.[32] It will not be presumed that there were oral pleadings sufficient to authorize the recovery of a sum greater than demanded by the written pleadings.[33] The case may be tried on such pleadings as will secure substantial justice, whether such pleadings were made up in court or before the justice.[34] The main issues and object of action are the same,[35] hence pleadings may not be amended so as to state a new defense,[36] and a counterclaim not filed before the justice cannot be availed of.[37] General denial on appeal is not departure.[38] Motion may be made to dismiss because the complaint does not state a cause of action.[39]

The case is usually tried de novo when appealed,[40] and certain actions treated as if originating in the appellate court.[41] The practice in the district court is applicable to actions appealed.[42]

In order to be available, error must have been objected to in the justice's court.[43] An objection to the admission of evidence cannot be raised for the first time on appeal.[44]

The appellate court may inquire into the jurisdiction of justice's court,[45] though the appeal is erroneously taken to such court.[46] Where it is determined

29. Hart v. Minneapolis, etc., R. Co. [Wis.] 99 N. W. 1019.

30. Statute providing that if the appellant fails to docket his appeal in time, the appellee may docket the case and have the judgment of the justice affirmed. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804. If a recordari granted as substitute for an appeal be not docketed at that or the succeeding term, plaintiff may at a subsequent term docket the case and have it dismissed. Johnson v. Grand Fountain of United Order of True Reformers, 135 N. C. 385, 47 S. E. 463.

31. See 2 Curr. L. 664.

32. Where no demurrer was provided for in the justice's court, an objection that plaintiff had not legal capacity to sue is not waived by appealing. Wendleton v. Kingery [Mo. App.] 84 S. W. 102. Where a reply could not be filed below, it was not necessary in the district court. Duane v. Molinak [Mont.] 78 P. 588.

33. Interest. Missouri, etc., R. Co. v. Dawson Bros. [Tex. Civ. App.] 84 S. W. 298.

34. Drinkard v. Heptinstall [W. Va.] 47 S. E. 72. The appellate court, in its discretion, may allow new pleadings to be filed. Boyce v. Augusta Camp, No. 7,429, M. W. A. [Okl.] 78 P. 322. Such amendments as will promote justice and a fair trial may be allowed. Drinkard v. Heptinstall [W. Va.] 47 S. E. 72. Leave to amend having been obtained by plaintiff while defendant was in court, defendant was entitled to no other notice. Fowler v. Michael [Tex. Civ. App.] 81 S. W. 321.

35. Cannot dismiss a cause on pleadings filed in the district court without determining the issues made by the pleadings below. Duane v. Molinak [Mont.] 78 P. 588. On appeal from a justice in an action of trespass quare clausum fregit, the judgment of the superior court cannot be an adjudication as to ownership of the freehold. Aliter if the case be begun in the superior court. Weidner v. Lund, 105 Ill. App. 454.

36. Naftzker v. Lantz [Mich.] 100 N. W. 601. Under Code Civ. Proc. § 1761, providing that on appeal the cause must be tried anew, where there was no showing that a motion was made to set aside the judgment and dismiss the case, the district court properly tried the issues as presented by the pleadings. Clark v. Great Northern R. Co. [Mont.] 76 P. 1003.

37. Cedar Hill Orchard & Nursery Co. v. Heiney [Mo. App.] 80 S. W. 278.

38. Mullins v. South Omaha Street Fair Ass'n [Neb.] 99 N. W. 521.

39. Macon & B. R. Co. v. Walton [Ga.] 48 S. E. 940.

40. On appeal from a magistrate's decision determining an attachment, both parties are entitled to produce testimony de novo. McLane v. Colburn, 2 Ohio N. P. (N. S.) 257. See 2 Curr. L. 665, n. 48, et seq.

41. In Alabama, as regards recovery of interest, an action for rent. Anderson v. Winton, 136 Ala. 422, 34 So. 962.

42. Cir. Ct. Rule 7, subd. b, relating to proof admissible under the general issue, applies to an action appealed from a justice's court. Carter & Co. v. Weber [Mich.] 101 N. W. 818. A statute providing that a defect of parties must be raised by demurrer or answer and if not so raised is waived. Miller v. Kinsel [Colo. App.] 78 P. 1075.

43. That questions to witnesses were objectionable. Hellinger v. Marshall, 92 App. Div. 607, 86 N. Y. S. 1051. That certain evidence was inadmissible under the pleadings. Id. A motion for nonsuit on the ground that the evidence did not establish a cause of action raised the point that there was no contract. Bement & Sons v. Rockwell, 92 App. Div. 44, 86 N. Y. S. 876.

44. First Nat. Bank v. Carter [Mich.] 101 N. W. 585.

45. In order to determine its own jurisdiction. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558.

46. The district court in Oklahoma has no jurisdiction to entertain an appeal from the probate court. Rhyne v. Manchester Assur. Co. [Okl.] 78 P. 558.

that the magistrate has no jurisdiction, the cause should be dismissed.[47] In Nebraska, if the judgment of the justice is reversed, the case should be set down for trial.[48] The case should be remanded and not finally decided where evidence was erroneously received under an unsworn answer which however might have been amended in this respect.[49]

Judgment[49a] rendered as provided by statute is proper.[50] Where the appellant dismisses his appeal, the judgment entered should correspond to the judgment of the justice.[51] On dismissal, judgment may be entered against appellant for costs.[52] It is improper to refuse a new trial on appeal from a default which is excusable and where there is a good defense, even though the affidavit is denied and not corroborated.[53]

Further appeal or error.[53a]—The judgment on appeal from a default is itself appealable, being final and affecting a substantial right.[54] Where the court of first appeal wrongly refuses to entertain it on the ground of nonappealability, the remedy is mandamus and not further appeal.[55] When the cause goes further up, the record must show the steps necessary to transfer jurisdiction to the court of first appeal.[56] The jurisdiction of the circuit court must be determined from the record.[57] The supreme court will not interfere with the first grant of a new trial where it does not appear that the law and facts required a judgment in favor of the plaintiff.[58] Objections to appeal proceedings cannot be raised for the first time in the supreme court.[59]

§ 6. *Certiorari.*[60]—Appeal is the more appropriate remedy to review errors,[61] and if appeal lies, certiorari will not;[62] but certiorari is independent of appeal and it is not obligatory upon an applicant in resorting to the former to assign reason or excuse for not adopting the latter.[63]

The justice is the proper respondent, the adverse party an improper one.[64] Refusal to join will not defeat a co-party's right to certiorari,[65] and if the case is no longer pending as to one, he cannot join.[66]

The petition should be sustained where it brings up only questions of law;[67] where it affirmatively appears that petitioner was not accorded a fair trial;[68] where

47. Should not remand it for that purpose. Riley v. Mutual Life Ins. Co. [S. C.] 47 S. E. 708.

48. Code Civ. Proc. § 601. Westover & Co. v. Van Dorn Ironworks Co. [Neb.] 97 N. W. 598.

49. Stafford v. Wilson [Ga.] 49 S. E. 800.

49a. See 2 Curr. L. 666, n. 63, et seq.

50. Rev. St. 1899, § 4081, providing that if judgment be against appellant it shall be rendered against him and his securities, a judgment entered against appellant for $200 and against the securities for $75, the amount of the bond, is proper. Gwinnup v. Sibert [Mo. App.] 80 S. W. 589.

51. For a like amount. Jacobs v. Johnson [Miss.] 36 So. 544.

52. Hager v. Knapp [Or.] 78 P. 671.

53. Kilts v. Neahr, 91 N. Y. S. 945.

53a. See generally Appeal and Review, 3 Curr. L. 167.

54. Kilts v. Neahr, 91 N. Y. S. 945.

55. Robertson v. Southerland, 22 App. D. C. 595.

56. Must show bond or affidavit in lieu of it. Penn Fire Ins. Co. v. Pounders [Tex. Civ. App.] 84 S. W. 666.

57. On appeal from the circuit in an action appealed from the justice's court and tried de novo, whether the circuit court was without jurisdiction of the subject-matter because the justice did not obtain it is to be solved from the record. This does not include the justice's docket or the minutes of his proceeding, unless made a part thereof by the bill of exceptions. Town of Washburn v. Washburn Waterworks Co. [Wis.] 98 N. W. 539.

58. Bell v. Felt, 119 Ga. 498, 46 S. E. 642.

59. The sufficiency of an affidavit of appeal. Gerhart Realty Co. v. Weiter [Mo. App.] 83 S. W. 278.

60. See 2 Curr. L. 666.

61. Computing Scale Co. v. Tripp [Mich.] 101 N. W. 803. Not certiorari. State v. Walker, 112 La. 429, 36 So. 482.

62. State v. Justice Court of Tp. No. 1 [Mont.] 78 P. 498. It must appear that there is no other plain, speedy and accurate remedy. Id. Entering judgment less than ten days after service. Fry v. Armstrong [Mo. App.] 84 S. W. 1001.

63. Under Sayles' Ann. Civ. St. 1897, arts. 344, 345, providing that an applicant for certiorari must show lack of jurisdiction or injustice. Parlin & Orendorff Co. v. Keel [Tex. Civ. App.] 78 S. W. 1082.

64. Anderson v. Morton, 21 App. D. C. 444.

65. Bradford v. Brown, 22 App. D. C. 455.

66. Judgment had gone against him. Bradford v. Brown, 22 App. D. C. 455.

67. Dotson v. Hawes, 120 Ga. 369, 47 S. E. 900.

68. Trial by a prejudiced jury. Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124.

the verdict is wholly without evidence to support it,[69] or is for an amount greater than was claimed;[70] but may be denied in so far as it brings under review the verdict of the jury, where a finding in favor of the claimant was not demanded by the evidence adduced in the magistrate's court.[71] Certiorari to correct a transcript will be denied where it appears that because of negligence of the petitioner it is too imperfect to show the grounds of error on which he relies.[72] It must be in the name of a party to the proceeding in the justice's court.[73] In Georgia the petition must be accompanied by a certificate of the magistrate that all costs have been paid;[74] but absence of such certificate is not ground for dismissal of the appeal.[75] Objection that the petition is not verified should be made before it has been sanctioned or the answer of the justice filed.[76]

The notice of the sanction of the writ must identify the case.[77]

The return of the justice, being responsive and covering points of error appearing in the affidavit, is conclusive,[78] and will not be construed to contain all the testimony adduced where it impliedly negatives such fact,[79] but will be construed in harmony with the record,[80] and his affidavit cannot be read to explain what his answer meant.[81] Where the petition attacks a judgment on the ground that it is contrary to the evidence, it is necessary that the record should clearly state the facts on which the judgment was based.[82] In Texas the allegations in the petition should be taken as true.[83] It will be presumed that the authority of the agent who appeared for the plaintiff was proven.[84]

The reviewing court[84a] should correct errors of law,[85] and in common law certiorari such only as are in the record.[86] Irregular proceedings should be made the subject of a motion for a new trial at the time.[87] In the District of Columbia, certiorari removes the case to all intents as if instituted above,[88] wherefore a nonjoining party may be brought in by process or attachment may issue against his

69. Morgan v. Cohutta, 120 Ga. 423, 47 S. E. 971.

70. Kenyon v. Brightwell, 120 Ga. 606, 48 S. E. 124.

71. Hill v. Julian, 119 Ga. 607, 46 S. E. 834.

72. Hager v. Knapp [Or.] 78 P. 671.

73. A petition will be dismissed though the wrong name was placed in the petition inadvertently. Berendt v. McHugh [Ga.] 48 S. E. 691.

74. Receipt signed by the justice that plaintiff has paid him a named sum in full of all costs to date is sufficient. Western & A. R. Co. v. Carder, 120 Ga. 460, 47 S. E. 930.

75. Dieter v. Ragsdale, 120 Ga. 417, 47 S. E. 942.

76. Williams v. Mangum, 119 Ga. 628, 46 S. E. 835.

77. Notice describing a case tried before one magistrate is not notice of a case tried before another in a different court, though there may be a coincidence between the names of the parties. Bramlitt v. Kulman [Ga.] 48 S. E. 713.

78. Hinchman v. Spaulding [Mich.] 100 N. W. 901.

79. A return stating "No stenographer was present at the trial; not all the evidence was taken down by me; I am unable to state all the evidence given" negatives the idea that the affidavit for the writ contained substantially all the testimony. Computing Scale Co. v. Tripp [Mich.] 101 N. W. 803. Answer that verified petition contains "evidence as near as [justice] could state it from memory" is sufficient. Harris v. Daly [Ga.] 49 S. E. 609.

80. Statement that juror was accepted was referred to other than the one stricken from list. Faulkner v. Snead [Ga.] 49 S. E. 747.

81. Faulkner v. Snead [Ga.] 49 S. E. 747.

82. The appellate court cannot act upon an agreement that the petition and answer which are not in conflict shall be taken as true, as this involves the comparison of two different statements and tends to create confusion. Central of Georgia R. Co. v. Potter, 120 Ga. 343, 47 S. E. 924. Evidence held to warrant refusal to sustain certiorari. Id.

83. County court should not hear evidence attacking the facts stated therein. Odom v. Carmona [Tex. Civ. App.] 83 S. W. 1100.

84. No showing to the contrary in the justices' return. Brown v. Knop [Mich.] 100 N. W. 466.

84a. See 2 Curr. L. 667, n. 84, et seq.

85. Failure to dismiss plaintiff's cause of action because he had not served a copy of the account sued on with the summons as required by statute. Thomas & Blake v. Forsyth Chair Co., 119 Ga. 693, 46 S. E. 869.

86. A writ of review brings up only such questions as appear on the judgment roll. State v. Justice Court of Tp. No. 1 [Mont.] 78 P. 498.

87. Improper argument of counsel. Southern R. Co. v. Rollins [Ga.] 49 S. E. 290.

88, 89. Bradford v. Brown, 22 App. D. C. 455. The attachment bond should be made to such defendant and not to his co-defendants. Id.

property.[89] Error in overruling plea to jurisdiction by reason of nonresidence cannot be reached by certiorari[90] nor can the right of the justice to his office.[91]

Judgment.[92]—Final judgment should be entered by the reviewing court where it appears that the justice was without jurisdiction;[93] but otherwise where the final determination of the case does not depend upon a question of law and there are issues of fact involved.[94] This is true though a former certiorari in the same case complaining of the same defect may have been sustained.[95] If discretion is not abused the judgment of remand for new trial will stand.[96]

Liability on bond.—Where a certiorari has been sustained and the case sent back for another hearing, the certiorari bond becomes functus officio.[97]

§ 7. *Criminal jurisdiction and procedure.*—The power of a justice of the peace to issue warrants and as a committing magistrate and the procedure looking thereto[98] and his jurisdiction of prosecutions for crime[99] and the procedure therein[100] are fully treated elsewhere. Under the Wisconsin constitution the legislature has power to deprive justices of all jurisdiction of criminal cases.[101]

KIDNAPPING.[1]

A wife who has been abandoned cannot be said to kidnap a child of whom she is solely in custody.[2] The crime of taking, decoying or enticing a child from its parents as defined in Nebraska may be founded on any representation inducing the child to leave its father,[3] coupled with intent to detain or conceal the child maliciously, forcibly, or fraudulently.[4] The child's consent is no defense.[5] Six years, the maximum being twenty, is not excessive punishment for an aggravated and immoral case.[6] The child may testify that it left because of the arts and inducements of accused.[7]

90, 91. Anderson v. Morton, 21 App. D. C. 444.

92. See 2 Curr. L. 668.

93. Should not remand the case. Forbes Piano Co. v. Owens, 120 Ga. 449, 47 S. E. 938.

94. Though it appear that the verdict rendered in the justice's court was without evidence to support it. Patterson v. Central of Georgia R. Co., 117 Ga. 827, 45 S. E. 250. See, also, Bryan v. Central of Georgia R. Co., 117 Ga. 827, 45 S. E. 72.

95. Patterson v. Central of Georgia R. Co., 117 Ga. 827, 45 S. E. 250.

96. New trial after two verdicts is not necessarily an abuse of discretion where the case is close and errors harmed the losing party. Faulkner v. Snead [Ga.] 49 S. E. 747.

97. The security is discharged and may become security on a subsequent bond in the same case. Western & A. R. Co. v. Carder, 120 Ga. 460, 47 S. E. 930.

98. See Arrest and Binding Over, 3 Curr. L. 312.

99. Indictment and Prosecution, § 2, 2 Curr. L. 308.

100. Indictment and Prosecution, § 18, 2 Curr. L. 391.

101. Laws 1895, p. 7, creating the police court of Milwaukee, is valid. Heller v. Clarke [Wis.] 98 N. W. 952.

1. See 2 Curr. L. 608.

2. She removed it from the state. Biggs v. State [Wyo.] 77 P. 901.

Note: The common law crime consisted in "the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another." 4 Bl. Comm. 219; 1 Clark & M. Crimes, 456; note 4 Am. St. Rep. 447. There must be actual or constructive force, actual or constructive nonconsent, and a taking into another country. 1 Clark & M. Crimes, 456; note 4 Am. St. Rep. 444. A New Hampshire case (State v. Rollins, 8 N. H. 550) holds that taking into another country is not necessary. In that case, however, the intention to take the child into another state was present and acts had been done looking thereto. Some of the American cases on force, fraud, intimidation and consent are: Moody v. People, 20 Ill. 315; People v. De-Leon, 109 N. Y. 226, 4 Am. St. Rep. 444, and note; Hadden v. People, 25 N. Y. 372; Schnicker v. People, 88 N. Y. 192; State v. Rollins, 8 N. H. 550; State v. Farrar, 41 N. H. 53; Com. v. Nickerson, 87 Mass. [5 Allen] 518.

The elements differ more or less under the statutory forms of kidnapping. See note 4 Am. St. Rep. 449; 2 Curr. L. 608.

3. "Entice" defined. Gould v. State [Neb.] 99 N. W. 541.

4, 5. Gould v. State [Neb.] 99 N. W. 541.

6. Minister enticed a girl of 15, he being married and a father and much her senior. Gould v. State [Neb.] 99 N. W. 541.

7. Enticement of a girl for immoral purposes. Gould v. State [Neb.] 99 N. W. 541. Compare Abduction, 3 Curr. L. 12.

Labels; Labor Unions; Laches; Lakes and Ponds, see latest topical index.

LANDLORD AND TENANT.

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§ 1. *Definitions and distinctions.*[8]—The reservation of rent and allegiance to the title are distinguishing characteristics of the relation of landlord and tenant;[9] but to be a landlord one must be the owner or quasi owner of the property.[10] "Occupation" means a possession pursuant to an agreement sufficient to create the relation of landlord and tenant.[11] A purchaser at foreclosure of a mortgage on a lease is an "assign,"[12] and an executor is included in the term "successor."[13] A lease of real estate for years is personal estate.[14] An unassigned dower interest may not be the subject of a lease containing covenants running with the land.[15] Public wharves may be temporarily leased by the municipality.[16]

§ 2. *Creation of the relation; leases; parties.*[17]—Tenants in common may by express agreement establish the relation of landlord and tenant between them;[18] but a lease by one tenant in common of the entire estate is void as to the interest of his co-tenant,[19] and so of a demise by one who owns jointly with his wife and another.[20] A wife joining with her husband as lessees of property will be liable for the rent thereof.[21] In Connecticut a married woman may execute a lease containing covenants of right to convey and for quiet enjoyment,[22] and in Indiana a lease by a wife of her property for not longer than three years is not an encumbrance or a conveyance, and may be made without the husband's consent.[23] The unauthorized execution of a lease by an agent may be ratified by the principal under the ordinary rules of agency.[24] An administrator has no authority to lease

8. See 2 Curr. L. 668.
9. Andrews v. Erwin, 25 Ky. L. R. 1791, 78 S. W. 902.
10. Assignee of rent is not a landlord. State v. Elmore [S. C.] 46 S. E. 939.
11. Sterling v. Heimann [Mo. App.] 82 S. W. 539.
12, 13. West Shore R. Co. v. Wenner, 70 N. J. Law, 233, 57 A. 408.
14. And voidable by an infant married woman upon reaching her majority. Shipley v. Smith, 162 Ind. 526, 70 N. E. 803.
15. Jackson v. O'Rorke [Neb.] 98 N. W. 1068.
16. Town of Morgan City v. Dalton, 112 La. 9, 36 So. 208.
17. See 2 Curr. L. 669.
18. Evidence held not to show such a relation. Smith v. Smith, 98 Me. 597, 57 A. 999.
19. Lessee held to be a tenant by sufferance. Jackson v. O'Rorke [Neb.] 98 N. W. 1068.
20. Snyder v. Harding, 34 Wash. 286, 75 P. 812.
21. Property for business purposes. Kriz v. Peege, 119 Wis. 105, 95 N. W. 108.
22. Winestine v. Ziglatzki-Marks Co. [Conn.] 59 A. 496.
23. Shipley v. Smith, 162 Ind. 526, 70 N. E. 803.
24. Anderson v. Conner, 43 Misc. 384, 87 N. Y. S. 449; Kriz v. Peege, 119 Wis. 105, 95 N. W. 108.

the lands of his intestate after final settlement and payment of the debt of the estate,[25] nor may a guardian let his ward's property for a longer term than the guardianship.[26] A surety of the lessee has no interest in the leasehold,[27] and is entitled to have his obligation strictly construed.[28]

Establishment of the relation.[29]—Any agreement showing a meeting of minds and including the necessary elements will establish the relation of landlord and tenant.[30] An agreement to give a lease is not a lease unless followed by occupation.[31] Mere possession of the property of another does not necessarily imply the relation,[32] though slight facts tending to show a lessee's dealing with the property may establish an acceptance by the tenant.[33] One cannot claim as tenant while he holds adversely,[34] and material alterations in a lease, unknown and unaccepted by one party thereto are not binding upon him.[35] Tenancies for years or for life may both be created by will.[36]

Actionable use and occupation.[37]—The relation of landlord and tenant may be implied as a matter of law,[38] and if the plaintiff makes out his title as he would in ejectment,[39] he may recover in assumpsit.[40]

The statute of frauds.[41]—An oral agreement to lease for two and a half years[42] or for the extension of a lease,[43] or permission to make alterations in a building, in effect giving ingress and egress for five years, is void under the statute of frauds,[44] as is a lease for more than a year, unsigned by the lessor.[45] But because of part performance by the lessee, equity may enforce against the lessor a lease invalid under the statute.[46]

Breach of agreement to make lease.[47]—The principle of estoppel will be con-

25. Jackson v. O'Rorke [Neb.] 98 N. W. 1068.

26. Any excess thereof is voidable at the election of the ward on coming of age. Jackson v. O'Rorke [Neb.] 98 N. W. 1068.

27. Seattle Brew. & Malt. Co. v. Jensen [Wash.] 78 P. 1007.

28. Surety on an attempted lease for five years not liable under a contract held to be a lease from year to year. Jewett v. Griesheimer, 91 N. Y. S. 654.

29. See 2 Curr. L. 669.

30. An agreement between a purchaser on a mortgage foreclosure and the former owner by which the latter remains in possession for two years after the time to redeem, paying rent with the privilege of redemption, creates the relation of landlord and tenant. Eldridge v. Hoefer [Or.] 77 P. 874. A written agreement under which one enters and takes possession of a strip of land, constructs a tramway thereon and occupies it for three years for a stipulated sum per year is a lease. Asher v. Johnson [Ky.] 82 S. W. 300. Facts held to show the relation of landlord and tenant. Alexander v. Zeigler [Miss.] 36 So. 536. Illinois Cent. R. Co. v. Ross [Ky.] 83 S. W. 635. Contra, evidence held not to show an oral lease for a fixed period of hotel rooms. Marcotte v. Sheridan, 91 N. Y. S. 744.

31. Goldberg v. Wood, 90 N. Y. S. 427.

32. Defendant held not to be a tenant of his wife's executor. Cook v. Klenk, 142 Cal. 416, 76 P. 57.

33. Smith v. Barber, 96 App. Div. 236, 89 N. Y. S. 317. Evidence held to show an acceptance of premises, though improvements had not been completed as covenanted by the landlord. O'Brien v. Jaffe, 88 N. Y. S. 1009.

34. Snyder v. Harding, 34 Wash. 286, 75 P. 812.

35. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346.

36. Foss v. Stanton, 76 Vt. 365, 57 A. 942.

37. See 2 Curr. L. 670.

38. Story v. McCormick [Kan.] 78 P. 819. A trustee in bankruptcy of a farm tenant, occupying the farm buildings until the crops are sold, is liable to the landlord for his use and occupation thereof. In re Luckenbill, 127 F. 984.

39, 40. Illinois Cent. R. Co. v. Ross [Ky.] 83 S. W. 635.

41. See 2 Curr. L. 670.

42. Dechenbach v. Rima [Or.] 78 P. 666.

43. Landt v. Schneider [Mont.] 77 P. 307.

44. Peer v. Wadsworth [N. J. Eq.] 58 A. 379.

45. Entry into possession held to create a tenancy from year to year. Jewett v. Greisheimer, 91 N. Y. S. 654.

46. Dechenbach v. Rima [Or.] 78 P. 666. The acceptance of a lease by occupying the demised premises will take the lease out of the statute of frauds, though such lease be not signed by the party sought to be charged. Noland v. Cincinnati Cooperage Co. [Ky.] 82 S. W. 627. The surrender of a lease, being a part of the consideration for purchase, constitutes part performance. Yule v. Feil, 123 Iowa, 662, 99 N. W. 559. Merely taking possession and making the payments of current rent does not constitute part performance under the statute of frauds. Otherwise of payment of rent for the entire term or of making valuable improvements. Humphrey Hardware Co. v. Herrick [Neb.] 99 N. W. 233.

47. See 2 Curr. L. 671.

sidered in the construction of an agreement to make a lease,[48] and one may sue for specific performance, without a formal tender of the lease.[49] Under an agreement for a lease, to be submitted to attorneys for approval, there must be some reasonable ground for a refusal to sanction the lease as drawn.[50]

Construction of leases and proof of the terms of tenancy.[51]—A lease must describe the land[52] and the term,[53] state when the rents are payable,[54] and be signed by the parties.[55] A seal imports a consideration as in other instruments.[56] A lease will be construed as a whole,[57] and though words of present demise will be held to give a lease, if no inconsistent purpose appears,[58] the courts will in general adopt the construction which the parties have placed upon it,[59] though under seal.[60]

Express covenants abrogate the operation of implied covenants,[61] and it is only where covenants are dependent that the performance by each party of his own covenant is a condition precedent to his right to recover on the covenant of the other party.[62]

Covenants by the tenant to pay taxes and water charges,[63] to repair,[64] and not to use the premises for the sale of intoxicating liquors, run with the land.[65]

A written lease is presumed to express the whole agreement of the parties thereto up to its execution,[66] and the usual rules on parol testimony to vary a written instrument apply;[67] but an independent oral contract collateral to a lease, for making repairs prior to the beginning of the term, is not merged in the lease.[68] Interpretations of some specific lease provisions are given in the notes.[69] The

48. American Security & Trust Co. v. Walker, 23 App. D. C. 583.

49, 50. Pittsburgh Amusement Co. v. Ferguson, 91 N. Y. S. 666.

51. See 2 Curr. L. 671.

52. Kuntz v. Mahrenholz, 88 N. Y. S. 1002. A lease containing an imperfect and indefinite description of the premises will be held invalid. Dixon v. Finnegan, 182 Mo. 111, 81 S. W. 449.

53. Kuntz v. Mahrenholz, 88 N. Y. S. 1002. It should be definite and certain as to the commencement and duration of the term (Pope v. Miller, 4 Ohio C. C. [N. S.] 564); but where no time is mentioned and no annual rent is reserved, the time will be controlled by the interval of payment (Albey v. Weingart [N. J. Law] 58 A. 87).

54. Kuntz v. Mahrenholz, 88 N. Y. S. 1002.

55. A memorandum will not be considered a lease where it is not signed by the lessee. Kuntz v. Mahrenholz, 88 N. Y. S. 1002.

56. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

57. Method of termination of tenancy. Schwoerer v. Connolly, 44 Misc. 222, 88 N. Y. S. 818.

58. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346. Lease held to not in effect be a mortgage. Stockton v. Dillon [N. J. Eq.] 57 A. 487.

59. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127; Slack v. Knox, 213 Ill. 190, 72 N. E. 746; Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346; Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758. A strict construction of covenants will not be adopted where a clear intention of the parties to the contrary appears. Anzolone v. Paskusz, 96 App. Div. 188, 89 N. Y. S. 203.

60. Daly v. Piza, 90 N. Y. S. 1071.

61. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127.

62. The general rule is that the landlord's covenant to repair and the tenant's covenant to pay rent are independent. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127.

63. Lehmaier v. Jones, 91 N. Y. S. 687.

64. Lehmaier v. Jones, 91 N. Y. S. 687; Foss v. Stanton, 76 Vt. 365, 57 A. 942.

65. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

66. Gerry v. Siebrecht, 88 N. Y. S. 1034; Moore-Cortes Canal Co. v. Gyle [Tex. Civ. App.] 82 S. W. 350; Woodward v. Ft. W. & D. C. R. Co. [Tex. Civ. App.] 79 S. W. 896. Custom of the country will be called in to aid in the interpretation of the contract only where it is silent or obscure. Whorley v. Karper, 20 Pa. Super. Ct. 347; Morningstar v. Querens [Ala.] 37 So. 825.

67. Okie v. Person, 23 App. D. C. 170; Donaldson v. Uhlfelder, 21 App. D. C. 489; Richmond Ice Co. v. Crystal Ice Co. [Va.] 49 S. E. 650. The whereabouts of a lease not being known, parol evidence of its contents is admissible (Cooley v. Collins [Mass.] 71 N. E. 979), but a lease of land for a year may be proved by testimony of the contracting parties (Yule v. Fell, 123 Iowa, 662, 99 N. W. 559).

68. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127.

69. The giving the tenant a refusal of the premises from month to month so long as he may desire to occupy them is a grant of preference if the landlord continue to let them. Drinkard v. Hepinstall [W. Va.] 47 S. E. 72. A lease of land "for the purpose of building and maintaining an ice house thereon" does not include the right to cut ice from the adjacent mill pond. Oliphant v. Richman [N. J. Eq.] 59 A. 241. Right to take ice from and to turn hot water into a pond. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937. A lease containing permission to connect with a steam supply pipe does not give a use of the steam with-

renting of a building, without an explicit restriction carries with it the subjacent land.[70] Provisions for purchase at the option of the lessee are treated elsewhere.[71] The landlord and the co-tenants are necessary parties to a bill to settle the leasehold right of two sets of lessees.[72] A court of equity having cognizance of a case involving the possession of leased premises, with all interested parties in court, will place in possession the one equitably entitled thereto.[73]

§ 3. *The different kinds of tenancies and their incidents.*[74] *Estate for years.*—One in possession under an agreement that if he pay the taxes and the insurance, he may do as he likes with the property except sell it, is a tenant for life, not a tenant at will.[75] In California an estate for years is a chattel real and is not reached by a judgment rendered subsequent to the creation of the estate.[76]

Periodical tenancies.[76a]—One taking possession and paying rent under an oral lease for a term of years becomes a tenant from year to year, in the absence of a limitation upon the term.[77] A verbal lease of city property for a term of eleven months constitutes a tenancy from month to month,[78] and such a tenancy may be created by a holding over of city property,[79] or by the continuance in possession by a purchaser who is in default under an instalment contract.[80] The statute by which tenancies in New York City are deemed to continue until May 1st next after possession commences has no application to a tenancy from month to month.[81] In a month to month tenancy, taking of possession upon the 6th and payment of rent to the 1st of next month constitutes a tenancy from the first of one month to the first of the next month.[82]

Tenancy at will.[83]—A tenancy at the will of the lessee is also at the will of the lessor;[84] but is determined by the termination of the lessor's estate.[85] Entry under a parol lease for five years constitutes a tenancy at will,[86] and one holding over after the expiration of his term is a tenant at will with all the rights which had been annexed to the premises.[87] A tenancy at will is not converted into a

out compensation. Smith v. Wenz, 184 Mass. 229, 70 N. E. 57. A provision for payment of penalty by lessor in case of a conveyance refers only to such a transfer as terminates the tenancy. Foley v. Constantino, 43 Misc. 91, 86 N. Y. S. 780. Damage by water in extinguishing a fire is within a provision relating to damage by fire. Roman v. Taylor, 93 App. Div. 449, 87 N. Y. S. 653. A lease granting the right to operate for oil and gas, "the terms of" the "grant shall not exceed 12 years." Held, the word "terms" did not refer to collateral matters attached to the grant, but to the grant itself. Griner v. Ohio Oil Co., 5 Ohio C. C. (N. S.) 126. A provision as to rent "during occupancy" held to mean during the term. Bickford v. Kirwin [Mont.] 75 P. 518. Allowance of damages for total failure to supply water. Moore-Cortes Canal Co. v. Gyle [Tex. Civ. App.] 82 S. W. 350.

70. Nashville, etc., R. Co. v. Herkens [Tenn.] 79 S. W. 1038.

71. Vendors and Purchasers, 2 Curr. L. 1976; Contracts, 3 Curr. L. 805.

72. Pyle v. Henderson [W. Va.] 46 S. E. 791.

73. Gaffey v. Northwestern Mut. Life Ins. Co. [Neb.] 98 N. W. 826.

74. See 2 Curr. L. 672.

75. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857.

76. Summerville v. Stockton Mill. Co., 142 Cal. 529, 76 P. 243.

76a. See 2 Curr. L. 672.

77. Humphrey Hardware Co. v. Herrick [Neb.] 99 N. W. 233; Jewett v. Greisheimer, 91 N. Y. S. 654. That such an entry creates a tenancy at will, see Walter v. Transue, 22 Pa. Super. Ct. 617.

78. Gerhart Realty Co. v. Weiter [Mo. App.] 83 S. W. 278.

79. Sterling v. Heinmann [Mo. App.] 82 S. W. 539.

80. Not a tenant by sufferance. McCrillis v. Benoit [R. I.] 59 A. 108.

81. Laws 1896, p. 591, c. 547, § 202. Olson v. Schevlovitz, 91 App. Div. 405, 86 N. Y. S. 834.

82. Ver Steeg v. Becker-Moore Paint Co. [Mo. App.] 80 S. W. 346.

83. Evidence held not to show defendant to be a tenant at will. Cook v. Klenk, 142 Cal. 416, 76 P. 57; Salas v. Davis, 120 Ga. 95, 47 S. E. 644. Evidence held not to show a tenancy at will under Burns' Rev. St. 1901, § 7089. Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149. See 2 Curr. L. 672.

84. Beauchamp v. Runnels [Tex. Civ. App.] 79 S. W. 1105.

85. Lyons v. Philadelphia & R. R. Co., 209 Pa. 550, 58 A. 924.

86. Walter v. Transue, 22 Pa. Super. Ct. 617. That such a tenancy is one from year to year, see Humphrey Hardware Co. v. Herrick [Neb.] 99 N. W. 233; Jewett v. Greisheimer, 91 N. Y. S. 654.

87. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937. But see Sterling v. Heinmann [Mo. App.] 82 S. W. 539.

tenancy from year to year by the mere payment of rent, or its duration for more than one year.[88]

Tenancy at sufferance.[89]—Under some statutes all holding over or occupations of premises without express contract or lease constitute tenancies by sufferance.[90] A lessee of the entire estate, from one tenant in common, holds as a tenant by sufferance as to the other tenants in common.[91] Continuance in possession after adverse judgment in an action of trespass to try title does not constitute a tenancy at sufferance.[92]

§ 4. *Rights and interests remaining in the landlord. A. Reversion.*[93]—A lessor may assign the rent to become due without granting the reversion or may grant the reversion and reserve the rent,[94] but a grant of the reversion carries with it the right to rent thereafter accruing;[95] though a mortgagee does not succeed to the landlord's rights in a lease until he acquires the fee of the property.[96] Upon the severance, by conveyance, of the reversion of lands under lease, the rent will be apportioned among the reversion owners.[97] A purchaser of property "subject to existing tenancies" is presumed to know the nature, terms, and extent of such tenancies,[98] but he may not oust the tenant because of such purchase.[99] One whose deed contained a reservation of a portion of the property to the use of a third party for a specified time cannot claim rent therefor,[1] but he may maintain an action against the tenant for damage accruing after the transfer of the reversion, without an assignment of the cause of action from the vendor.[2] Neither a right of entry nor a right of action for a prior breach can be transferred.[3]

(§ 4) *B. Right of re-entry and control.*[4]—The term "re-enter" means such re-entry as an action of ejectment and not the statutory proceedings for possession,[5] though it is not restricted to the common-law action of ejectment.[6] A covenant giving the landlord the right to "resume possession" is enforceable though the lease had been terminated by summary proceedings.[7] A right of re-entry for condition broken is good against a purchaser of the leasehold interest upon execution.[8] Re-entry by a landlord after abandonment is not a bar to a recovery of rent due theretofore.[9]

(§ 4) *C. Estoppel of tenant to deny title.*[10]—During the continuance of a

88. Lyons v. Philadelphia & R. R. Co., 209 Pa. 550, 58 A. 924.

Contra: Continuance of the tenancy for two years, payment and acceptance of rent. Walter v. Transue, 22 Pa. Super. Ct. 617.

89. Evidence held to prove a tenancy at sufferance and not at will. Salas v. Davis, 120 Ga. 95, 47 S. E. 644. Not a tenant by sufferance. McCrillis v. Benoit [R. I.] 59 A. 108. See 2 Curr. L. 672.

90. D. C. Rev. St. § 680. American Security & Trust Co. v. Walker, 23 App. D. C. 583.

91. Jackson v. O'Rorke [Neb.] 98 N. W. 1068.

92. Thomson v. Weisman [Tex.] 82 S. W. 503.

93. See 2 Curr. L. 673.

94. Shea v. McCauliff, 186 Mass. 569, 72 N. E. 69. Writing held to be a conveyance of the reversion. Winestine v. Ziglatzki-Marks Co. [Conn.] 59 A. 496. To constitute a good assignment there must be delivery. Malloy v. Benway, 34 Wash. 315, 75 P. 869.

95. Winestine v. Ziglatski-Marks Co. [Conn.] 59 A. 496.

96. Stewart v. Parcher, 91 Minn. 517, 98 N. W. 650.

97. Apportion it according to values not areas. Gribbie v. Toms, 70 N. J. Law, 522, 57 A. 144.

98. Anderson v. Conner, 43 Misc. 384, 87 N. Y. S. 449; Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co. [C. C. A.] 121 F. 524; Corre Hotel Co. v. Wells-Fargo Co. [C. C. A.] 128 F. 587.

99. Engler v. Garrett [Md.] 59 A. 648; Yule v. Fell, 123 Iowa, 662, 99 N. W. 559.

1. Evidence held not to show the relation of landlord and tenant. Becker v. Davis, 87 N. Y. S. 422.

2. Shinn v. Guyton & H. Mule Co. [Mo. App.] 83 S. W. 1015.

3. Foss v. Stanton, 76 Vt. 365, 57 A. 942.

4. See 2 Curr. L. 673.

5. Lyons v. Gavin, 43 Misc. 659, 88 N. Y. S. 252.

6. Recovery of possession for nonpayment of rent did not terminate the relation of landlord and tenant, so as to entitle the latter to recover a deposit for rent. Anzolone v. Paskusz, 96 App. Div. 188, 89 N. Y. S. 203.

7. Landesman v. Hauser, 91 N. Y. S. 6.

8. Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 P. 296.

9. Harding v. Austin, 93 App. Div. 564, 87 N. Y. S. 887.

10. See 2 Curr. L. 673.

tenancy, the lessee is estopped from controverting the lessor's title,[11] as of the date of his lease,[12] though he acquire an adverse and better title,[13] but possession under an alleged lease cannot form the basis of title by adverse possession.[14] One claiming under an alleged purchase may show that the relation of landlord and tenant did not exist.[15] The acceptance of a void lease raises a mere presumption of the recognition of the lessor's title.[16]

§ 5. *Mutual rights and liabilities in demised premises. A. Occupation and enjoyment.*[17]—In the absence of statute, express agreement or fraudulent concealment by the landlord, he is not answerable to the tenant for the condition of the premises demised,[18] since a rule similar to that of caveat emptor applies,[19] and there is no implied warranty that the property is suitable for the purpose intended,[20] except in the letting of a furnished house for a summer.[21] A landlord is not required to place his tenant in possession, yet he should give a legal right of entry unencumbered by any act of his own,[22] and there is an implied obligation that leased premises shall be completed and ready for occupancy at the commencement of the term.[23] For failure to deliver possession the tenant may recover rent paid in advance,[24] or damages limited to the excess of the rental value over the rent reserved.[25] A covenant of quiet enjoyment relates to unlawful interference with the demised premises by the lessor,[26] and a covenant against molestation of "any other persons" refers only to others deriving their right through the lessor or by a paramount title.[27] To constitute a breach of covenant for possession and enjoyment, there must be an actual,[28] or constructive eviction resulting in surrender.[29]

11. Cambridge Lodge No. 9 K. P. v. Routh [Ind.] 71 N. E. 148. A tenant in possession may not dispute his landlord's title. Harvin v. Blackman, 112 La. 24, 36 So. 213; Meeske v. Miller [Mich.] 101 N. W. 52; Weide v. St. Paul Boom Co. [Minn.] 99 N. W. 421; Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049. Where plaintiff, two years after receiving a deed, leased to defendant in a writing describing plaintiff as owner, the lessee is estopped to claim ownership. Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856.

12. Tenant may show that landlord's title has subsequently been extinguished. Sherman v. Fisher [Mich.] 101 N. W. 572.

13. Town of Morgan City v. Dalton, 112 La. 9, 36 So. 208.

14. Dixon v. Finnegan, 182 Mo. 111, 81 S. W. 449. Possession under a tax on assessment lease is not adverse to the title of the fee owner. Miller v. Warren, 94 App. Div. 192, 87 N. Y. S. 1011.

15. Horne v. Mullis, 119 Ga. 534, 46 S. E. 663.

16. Presumption overcome by proof of lessee's claim of ownership by adverse possession at execution of the lease. Broad v. Beatty [Ark.] 83 S. W. 339.

17. See 2 Curr. L. 674.

18. Roth v. Adams, 185 Mass. 341, 70 N. E. 445; Shinkle, Wilson & Kreis Co. v. Birney, 23 Ohio Circ. R. 525.

19. Roth v. Adams, 185 Mass. 341, 70 N. E. 445; Prahar v. Tousey, 93 App. Div. 507, 87 N. Y. S. 845.

20. Ducker v. Del Genovese, 93 App. Div. 575, 87 N. Y. S. 889; Prahar v. Tousey, 93 App. Div. 507, 87 N. Y. S. 845; Landt v. Schneider [Mont.] 77 P. 307. A lessee's covenant to use premises only for a lyceum or dancing hall does not imply a covenant by the lessor as to their fitness for such purpose. Lyons v. Gavin, 43 Misc. 659, 88 N. Y. S. 252. A provision of "ready for occupancy" does not necessarily mean fitted by the lessor with fixtures rendering it ready for the lessee's business. Gerry v. Siebrecht, 88 N. Y. S. 1034. Lease held to imply a warranty of fitness for the intended use. Hunter v. Porter [Idaho] 77 P. 434.

21. Rubens v. Hill [Ill.] 72 N. E. 1127.

22. Smith v. Barber, 96 App. Div. 236, 89 N. Y. S. 317. He is not bound to eject a trespasser wrongfully in possession for the benefit of a lessee about to enter. Sullivan v. Schmitt, 93 App. Div. 469, 87 N. Y. S. 714.

23. Pough & Co. v. Cerimedo, 44 Misc. 246, 88 N. Y. S. 1054; Albey v. Weingart [N. J. Law] 58 A. 87. No obligation on a lessee to accept a portion only of the property demised. Smith v. Barber, 96 App. Div. 236, 89 N. Y. S. 317.

24. Meyers v. Liebeskind, 91 N. Y. S. 725.

25. Belding Bros. & Co. v. Blum, 88 N. Y. S. 178. For breach of contract to repair prior to commencement of term, the tenant may recover the rental value of rooms of the boarding house demised, during the time the landlord's default prevented their use. Daly v. Piza, 90 N. Y. S. 1071.

26. Pabst Brew. Co. v. Thorley, 127 F. 439. To impose the penalty of suspension of rent during eviction, it must appear that such eviction was brought about by the landlord or by his agency. Gribbie v. Toms, 70 N. J. Law, 522, 57 A. 144. A covenant for quiet enjoyment is not broken by the entry of a city in the exercise of its power of eminent domain. Pabst Brew. Co. v. Thorley, 127 F. 439.

27. Does not include trespassers. Pabst Brew. Co. v. Thorley, 127 F. 439.

28. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049.

29. Olson v. Schevlovitz, 91 App. Div. 405,

For wrongful eviction or breach of covenant for quiet enjoyment, a tenant may recover the damages proximately resulting therefrom,[30] but the landlord does not forfeit his rights accruing under the lease and statutes.[31] A lessee may maintain his possession as well against his lessor,[32] or the transferee of the lessor acquiring rights subsequent to the lease, as against strangers.[33] Within reasonable limits restrictions may be made upon the use of leased property,[34] but notice of an intention to vacate is not notice requiring a landlord to enforce a provision for ejecting tenants violating the rules of the house.[35] One may compel his co-tenant to refrain from obstructing the light and air.[36]

(§ 5) *B. Assignment and subletting.*[37]—As a general rule the power of assignment is incident to a leasehold estate,[38] unless restrained by statute,[39] or by the terms of the lease, in which case an assignment without the assent of the landlord is not void, but voidable at the latter's option;[40] but a rental upon shares is regarded as personal.[41] A tenant subletting without proper authority and thereafter inducing the landlord to oust the sublessee is liable for damages sustained by such sublessee.[42] The purchase of a leasehold operates as an assignment thereof,[43] and the foreclosure of the mortgage of a lease is a breach of a condition against alienation,[44] but otherwise as to the mere giving of a mortgage.[45] The assignment of a lease and the subletting for part of the term are different transactions,[46] and an agreement by a lessee to convey any interest less than all of his is an agreement to execute a sublease and not to assign his lease.[47] A mortgage of a leasehold can have no duration beyond the term of the lease,[48] but an assigument may be shown by parol to be a mortgage security for a debt.[49] Where a person

86 N. Y. S. 834; Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049.

30. Tenant may demand an issue on the damages upon the appeal of summary proceedings or may maintain a separate action [Code, § 1776]. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47. The measure of damages for breach of covenant for quiet enjoyment is the value of the use of the property less the rent paid (Prochaska v. Fox [Mich.] 100 N. W. 746; Goldstein v. Asen, 91 N. Y. S. 783), but recovery of such damages cannot be had upon the common counts (Prochaska v. Fox [Mich.] 100 N. W. 746). Assumpsit will not lie for the breach of a covenant in a lease under seal. Crandall v. Johnson [R. I.] 58 A. 765. The harrassing and annoying of a tenant by a landlord is not a breach of the contract of leasing though it may support an action in tort. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049. One alleging a wrongful eviction cannot recover both for the actual loss occasioned by the breach of contract and for wounded feelings caused by the commission of the tort. Harris v. Cleghorn [Ga.] 48 S. E. 959. A landlord wrongfully removing buildings and other chattels from leased premises is liable for the damage resulting to the tenant, regardless of the motive involved. Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 P. 839. In Washington no attorney fee, additional to that allowed by statute can be awarded in an action for breach of covenant by the landlord. Spencer v. Commercial Co. [Wash.] 78 P. 914. Judgment in an action for rent, defended on the ground of boarding up certain windows is not res judicata in a subsequent action for eviction for the same cause, where the premises were not abandoned by the tenant until after judgment in the action for rent. Goldstein v. Asen, 91 N. Y. S. 783.

31. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

32, 33. State v. De Baillon [La.] 37 So. 481.

34. Lessor entitled to specific performance. Peer v. Wadsworth [N. J. Eq.] 58 A. 379.

35. Practicing on musical instrument. Sefton v. Juilliard, 91 N. Y. S. 348.

36. Oehme v. Shotland, 90 N. Y. S. 958.

37. See 2 Curr. L. 676. Parol evidence is admissible to identify a leasehold interest conveyed in an indefinite assignment. Ascarete v. Pfaff [Tex. Civ. App.] 78 S. W. 974.

38. Meyer v. Livesley [Or.] 78 P. 670; Schenkel v. Lischinsky, 90 N. Y. S. 300.

39. Sayles' Ann. Civ. St. 1897, § 3250. Ascarete v. Pfaff [Tex. Civ. App.] 78 S. W. 974; Waggoner v. Cnody [Tex. Civ. App.] 82 S. W. 355.

40. Scott v. Slaughter [Tex. Civ. App.] 80 S. W. 643. Lessor held under the evidence to have waived a breach of covenant against assignment by lessee. Warner v. Cochrane [C. C. A.] 128 F. 553.

41. Meyer v. Livesley [Or.] 78 P. 670.

42. Calvert v. Hobbs [Mo. App.] 80 S. W. 681.

43. Incorporated Town of Ozark v. Adams [Ark.] 83 S. W. 920.

44, 45. West Shore R. Co. v. Wenner, 70 N. J. Law, 233, 57 A. 408.

46. A covenant against one does not include the other. West Shore R. Co. v. Wenner, 70 N. J. Law, 233, 57 A. 408.

47. Schenkel v. Lischinsky, 90 N. Y. S. 300.

48. Miller v. Warren, 94 App. Div. 192, 87 N. Y. S. 1011.

49. Providence, F. R. & N. Steamboat Co. v. Fall River [Mass.] 72 N. E. 338.

other than the lessee is in possession of leasehold premises, the law presumes the lease has been assigned to him in a manner not violating the statute of frauds.[50] In equity but not at law,[51] a subtenant is chargeable with knowledge of the terms of the lessee's lease,[52] but he is not liable upon the covenants of the contract between the owner and lessee, unless he has contracted to become so.[53] One holding as assignee of a lessee and recognized as a lawful tenant by the landlord may insist on the lease provision for renewal.[54] An assignee is not permitted to question the validity of a sublease where it is not attacked by the lessor.[55]

(§ 5) *C. Repairs and improvements.*[56]—In the absence of statute or agreement to repair by the landlord,[57] or fraud or concealment as to the condition of the premises on his part,[58] the tenant takes the risk of safe occupancy;[59] but as is provided by statute in some states,[60] this rule does not extend to an outbuilding, appurtenant to the demised premises constructed and maintained for the use in common of the tenants,[61] nor after notice, to that portion of the property not exclusively demised to the tenant,[62] nor to repairs of an extraordinary nature,[63] but refers only to repairs necessitated by the acts of the lessee or his employes.[64] Under a covenant to "keep" and surrender the premises "in as good state and condition as reasonable use and wear thereof will permit" the tenant must put, keep, and leave them in good repair,[65] and a covenant to repair by the tenant runs with the land.[66] For a breach of a tenant's covenant to make repairs and improvements, the landlord may recover the cost of repairing the resulting damage from such failure, also the rental value during the period of repairs,[67] and a landlord is liable for his breach of an agreement to repair, made during the continuance of the tenancy, and based upon a good consideration.[68] Upon breach of a landlord's covenant to repair, a tenant should make the repairs and deduct therefor from the rent,[69] or vacate and sue for damages ex contractu.[70] That a landlord made repairs is not evidence of a promise to keep the premises in repair.[71] A notice to repair need not

50. Weinhandler v. Eastern Brew. Co., 89 N. Y. S. 16; Weide v. St. Paul Boom Co. [Minn.] 99 N. W. 421.

51. Peer v. Wadsworth [N. J. Eq.] 58 A. 379.

52, 53. Missouri, etc., R. Co. v. Keahy [Tex. Civ. App.] 83 S. W. 1102. Upon assignment of a lease, the assignee is bound to the landlord by privity of estate and the lessee remains liable by virtue of privity of contract. Gutman v. Conway, 90 N. Y. S. 290.

54. Warner v. Cochrane [C. C. A.] 128 F. 553.

55. Teater v. King, 35 Wash. 138, 76 P. 688.

56. See 2 Curr. L. 677.

57. Lehmaier v. Jones, 91 N. Y. S. 687. Civ. Code, §§ 2620, 2621, does not apply to business places. Landt v. Schneider [Mont.] 77 P. 307. Roof protecting one tenant only and not the landlord's tenants generally. Margolius v. Muldberg, 88 N. Y. S. 1048; Whitehead v. Comstock & Co. [R. I.] 56 A. 446; Lyon v. Buerman, 70 N. J. Law, 620, 57 A. 1009. Repairs to elevator used exclusively by tenant. Gray, Estey & Co. v. Corn, 91 N. Y. S. 745; Triplett v. Fauver [Va.] 48 S. E. 875. Water pipes. Spero v. Levy, 43 Misc. 24, 86 N. Y. S. 869.

58. Whitehead v. Comstock & Co. [R. I.] 56 A. 446.

59. Whitehead v. Comstock & Co. [R. I.] 56 A. 446. Excavations on adjacent lot. Serio v. Murphy [Md.] 58 A. 435.

60. Code, § 2455. Richmond Ice Co. v. Crystal Ice Co. [Va.] 49 S. E. 650.

61. Edwards v. Rissler, 5 Ohio C. C. (N. S.) 44.

62. Roof pipe and its sewer connections. Levine v. Baldwin, 87 App. Div. 150, 84 N. Y. S. 92. Water system just above the ceiling. Rubenstein v. Hudson, 86 N. Y. S. 750.

63. Rebuilding a wall condemned for defects from time and wear. Street v. Central Brew. Co., 91 N. Y. S. 547. Tenant liable for repair of fence damaged by rains. Jones v. Felker [Ark.] 80 S. W. 1088.

64. Does not refer to a defective pipe for conveying water from the roof to the sewer. Levine v. Baldwin, 87 App. Div. 150, 84 N. Y. S. 92; Ducker v. Del Genovese, 93 App. Div. 575, 87 N. Y. S. 889.

65. Lehmaier v. Jones, 91 N. Y. S. 687.

66. But an assignee of the lessor cannot sue for a breach which occurred before such assignee acquired title. Foss v. Stanton, 76 Vt. 365, 57 A. 942; Lehmaier v. Jones, 91 N. Y. S. 687.

67. Loughlin v. Carey, 21 Pa. Super. Ct. 477. The measure of damages for a breach of covenant is the necessary cost of making the repairs. Lehmaier v. Jones, 91 N. Y. S. 687.

68. Frey v. Vignier [Cal.] 78 P. 733. No consideration. Altsheler v. Conrad [Ky.] 82 S. W. 257.

69, 70. Spero v. Levy, 43 Misc. 24, 86 N. Y. S. 869.

71. Galvin v. Beals [Mass.] 72 N. E. 969.

state the particulars and extent of the repairs required.[72] The changing of windows into doors is a violation of a covenant against alteration,[73] and constitutes waste,[74] and in the absence of a covenant to the contrary, a tenant is liable to the landlord for waste, by whomsoever committed.[75] An injunction to prevent waste will not be granted where the alleged wrongful acts are trifling in their nature.[76]

(§ 5) *D. Insurance and taxes.*[77]—Unless otherwise agreed, the duty to pay taxes rests upon the holder of the legal title,[78] but a lessee may legally bind himself to pay the increase in taxes on insurance because of improvements.[79] A covenant to pay taxes and water charges runs with the land;[80] and under a covenant to pay taxes assessed during the term, a tenant's liability extends to a tax for which the rolls are completed during the term.[81] A lessor cannot recover of his lessee premiums advanced for insurance according to the lease, where the insurance procured was void because of the lessor's misstatement.[82]

(§ 5) *E. Injuries from defects and dangerous condition. To tenant or his servant.*[83]—In general the rule of caveat emptor applies,[84] and the tenant takes the risk of safe occupancy;[85] but a landlord is liable for injuries from fraudulently concealed defects,[86] though not for those arising from defects of which he had no previous knowledge and of which he could not have known[87] by the exercise of reasonable care.[88] He is not bound to call the attention of his tenant to defects coming into existence during the term,[89] and a tenant knowing the defective condition of the premises may continue a use thereof if exercising due care.[90] A landlord is not liable to one tenant for the negligence of a co-tenant,[91] and may by express agreement shift to his tenant the responsibility to the public for injuries from snow and ice upon the premises.[92] Under a covenant to keep in repair, a lessor is liable in an action ex contractu,[93] for personal injuries to the lessee,[94] or

72. Foss v. Stanton, 76 Vt. 365, 57 A. 942.

73, 74. Peer v. Wadsworth [N. J. Eq.] 58 A. 379.

75. Nashville, etc., R. Co. v. Heikens [Tenn.] 79 S. W. 1038.

76. Butts v. Fox [Mo. App.] 81 S. W. 493.

77. See 2 Curr. L. 678.

78. Clinton v. Shugart [Iowa] 101 N. W. 785. Evidence held to show lessee not liable for the taxes. Security Trust Co. v. Liberty Bldg. Co., 96 App. Div. 436, 89 N. Y. S. 340.

79. Gridley v. Einbigler, 90 N. Y. S. 721.

80. Lehmaier v. Jones, 91 N. Y. S. 687.

81. Though they could not be paid before expiration of tenancy. Ogden v. Getty, 91 N. Y. S. 664.

82. Shirk v. Adams [C. C. A.] 130 F. 441.

83. See 2 Curr. L. 679.

84. Steefel v. Rothschild [N. Y.] 72 N. E. 112; Sherlock v. Rushmore, 99 App. Div. 598, 91 N. Y. S. 152. Under a lease reserving the control of the ceiling to the landlord, a tenant may recover for injuries from falling plaster. Golob v. Pasinsky, 178 N. Y. 458, 70 N. E. 973.

85. Flaherty v. Nieman [Iowa] 101 N. W. 280. Ceiling. Kushes v. Ginsburg, 99 App. Div. 417, 91 N. Y. S. 216. A petition not alleging that the fall of a house was due to defects in other parts of the building than those held by plaintiff under a lease does not state a cause of action. Franklin v. Tracey, 25 Ky. L. R. 1909, 78 S. W. 1112.

86. Smith v. Donnelly, 93 App. Div. 569, 87 N. Y. S. 893. Premises infected with contagious disease. Davis v. Smith [R. I.] 58 A. 630. Building known to be unsafe by landlord at time of lease and condemned directly thereafter. Steefel v. Rothschild [N. Y.] 72 N. E. 112; Kushes v. Ginsburg, 99 App. Div. 147, 91 N. Y. S. 216; Lovitt v. Creekmore [Ky.] 80 S. W. 1184.

87. Rear porch railing. Whiteley v. McLaughlin [Mo.] 81 S. W. 1094; Joshua v. Breithaupt, 90 N. Y. S. 1053; Galvin v. Beals [Mass.] 72 N. E. 969. Falling ceiling. Boden v. Scholtz, 91 N. Y. S. 437. Overflow pipe. Bertsch v. Unterberg, 88 N. Y. S. 983.

88. Hedekin v. Gillespie [Ind. App.] 72 N. E. 143; Smith v. Donnelly, 93 App. Div. 569, 87 N. Y. S. 893; Udden v. O'Reilly, 180 Mo. 650, 79 S. W. 691. Injury to tenant's servant by elevator. Bogendoerfer v. Jacobs, 97 App. Div. 355, 89 N. Y. S. 1051. Railing of rear balcony. Clarke v. Welsh, 93 App. Div. 393, 87 N. Y. S. 697. Negligent maintenance of common yard. Garrett v. Somerville, 90 N. Y. S. 705.

89. Lyon v. Buerman, 70 N. J. Law, 620, 57 A. 1009. Ice forming in cellar. Whitehead v. Comstock & Co. [R. I.] 56 A. 446.

90. Keating v. Mott, 92 App. Div. 156, 86 N. Y. S. 1041; Hedekin v. Gillespie [Ind. App.] 72 N. E. 143. Contributory negligence of subtenant. Margolius v. Muldberg, 88 N. Y. S. 1048.

91. Overflow of water. Sheridan v. Forsee [Mo. App.] 81 S. W. 494. A provision of exemption of liability by a landlord to a tenant for certain acts of negligence of other tenants affords the landlord no protection for his own negligence of like character. Levin v. Habicht, 90 N. Y. S. 349.

92. Tenant not liable under the covenant but because of his continuance of nuisance. Wixon v. Bruce [Mass.] 72 N. E. 978.

93. Boden v. Scholtz, 91 N. Y. S. 437; Davis v. Smith [R. I.] 58 A. 630; Spero v. Levy, 43

his family, arising from breach of such contract,[95] but where a landlord has agreed to repair, he must be given reasonable notice of the defects.[96] Under a lease with covenants to repair by the tenant, and an ordinance requiring city inspectors to repair dangerous buildings and charge to the landlord, the latter is not liable to tenant for the cracking of the walls unless negligence is shown.[97]

To stranger.[98]—A lessor being obliged by the terms of his lease to keep the premises in repair is liable for injuries to third persons occasioned by the property becoming out of repair and dangerous after the demise,[99] or for injuries from an existing nuisance at the time of leasing, resulting from defects inherent in the original construction.[1] A licensee cannot recover for injuries from existing defects.[2] In general a tenant's guest cannot sue in tort for injuries from the landlord's breach of covenant to repair, but has an action on the contract.[3] A tenant may be liable to one receiving injuries resulting from the continuance of a nuisance by the tenant,[4] but not to an occupant of an adjoining building for damage from defective plumbing.[5]

(§ 5) *F. Emblements and fixtures.*[6]—Failure by a tenant to remove, within a reasonable time after expiration of his tenancy, crops which had become his personal property, did not vest title thereto in the succeeding tenant.[7] By custom in Pennsylvania the tenant is entitled to way-going crops.[8] In Missouri, contrary to the general rule, a purchaser upon foreclosure does not acquire the growing crops as against a tenant holding under a lease of later date than the incumbrance.[9] A trespasser has no right to harvest the crop he has planted on the land of another.[10] In Alabama an employe of a tenant on shares cannot maintain trover or trespass against a landlord for taking the crop where no force or violence was used.[11] The common-law right of a tenant to estovers is in force in Iowa.[12]

Manure.[13]

Fixtures.[14]—The law presumes that a tenant does not intend to make trade fixtures a part of the realty,[15] and the general rule is that trade fixtures may be removed before the expiration of the term,[16] if it can be done without injury to the premises;[17] but the right of removal does not subsist under a renewal contract

Misc. 24, 86 N. Y. S. 869; Stelz v. Van Dusen, 93 App. Div. 358, 87 N. Y. S. 716. Failure to make special and urgent repairs. Measure of damages is the loss sustained, not including speculative profits. Ehinger v. Bahl, 208 Pa. 250, 57 A. 572.

94, 95. Schoppel v. Daly, 112 La. 201, 36 So. 322.

96. Galvin v. Beals [Mass.] 72 N. E. 969.

97. Serio v. Murphy [Md.] 58 A. 435.

98. See 2 Curr. L. 680.

99. Edwards v. Rissler, 5 Ohio C. C. (N. S.) 44; Schoppel v. Daly, 112 La. 201, 36 So. 322. Where an employe of a tenant of a building was injured by falling down the shaft of an elevator, the door of which was open, the landlord being obligated by lease to carry tenants only, held the landlord owed the employe the duty of exercising reasonable care in guarding the shaft. Breuer v. Frank, 2 Ohio N. P. (N. S.) 69.

1. Edwards v. Rissler, 5 Ohio C. C. (N. S.) 44. The maintenance of an unsafe ceiling in a dwelling apartment exclusively in the possession of the tenant is not a nuisance. Kushes v. Ginsburg, 99 App. Div. 417, 91 N. Y. S. 216.

2. Flaherty v. Nieman [Iowa] 101 N. W. 280.

3. Davis v. Smith [R. I.] 58 A. 630. Strangers may in certain cases sue, in tort, a landlord for failure to repair. Id.

4. Wixon v. Bruce [Mass.] 72 N. E. 978.

5. McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678, 81 S. W. 189.

6. See 2 Curr. L. 680.

7. Meffert v. Dyer [Mo. App.] 81 S. W. 643.

8. Whorley v. Karper, 20 Pa. Super. Ct. 347.

9. Nichols v. Lappin, 105 Mo. App. 401, 79 S. W. 995.

10. Stebbins v. Demorest [Mich.] 101 N. W. 528.

11. Farrow v. Wooley [Ala.] 36 So. 384.

12. Anderson v. Cowan [Iowa] 101 N. W. 92.

13, 14. See 2 Curr. L. 681.

15. Donnelly v. Frick & Lindsay Co., 207 Pa. 597, 57 A. 60.

16. Cohen v. Wittemann, 91 N. Y. S. 493. But the right continues in a tenant holding over without a formal lease. Donnelly v. Frick & Lindsay Co., 207 Pa. 597, 57 A. 60; City of St. Louis v. Nelson [Mo. App.] 83 S. W. 271. **West Virginia** allows a reasonable time after the termination of the tenancy. Gartlan v. Hickman [W. Va.] 49 S. E. 14.

17. Cohen v. Wittemann, 91 N. Y. S. 493.

of lease where such right of removal is not specified.[18] Whether property is a trade fixture is generally a question of fact.[19] A landlord consenting to removal of shutters from a leased building cannot thereafter claim damages for such removal.[20] One who has failed to pay any rent will not be allowed to remove fixtures according to the lease, upon his offer to pay all arrears.[21]

§ 6. *Rent and the payment thereof.*[22]—Rent is an incident of the reversion,[23] and can only be recovered where the conventional relation of landlord and tenant exists.[24] One who occupies the premises of another is liable for the rent during such occupancy,[25] irrespective of the validity of his lease,[26] but a lessee assigning his interest with consent of the landlord is discharged from further liability for rent.[27] In Arkansas a tenant wrongfully holding over after statutory notice is liable for double rent.[28] Notice before termination of a lease of a raise in rent in case of holding over is binding upon the tenant though objected to,[29] and such a notice may be left at tenant's place of business with the person in charge if of suitable age and discretion.[30] To hold a tenant who abandons his term for the loss of rent thereby entailed, a landlord is not bound to let the premises remain idle during the remainder of the term; the tenant is acquitted of liability only when the lessor accepts the surrender.[31] A mere protest accompanying a payment of rent does not change its character.[32] A lessee having no knowledge of a transfer of the reversion is not in default for paying rent to the original lessor,[33] and under a lease providing for the deposit of rent in a certain bank, such a deposit constituted payment of the rent.[34] A provision for an annual rent payable in equal monthly instalments on the first of each month does not require payments in advance.[35] Monthly payments to a landlord by a subtenant on behalf of a tenant cannot be regarded as payments on rent previously due so as to affect the running of the statute of limitations.[36] In the absence of proof to the contrary, the court presumed that checks given for rent were in full payment of rent then due.[37] Upon the conveyance of lands under lease, an apportionment of rent is properly based upon rental values, not mere areas.[38] Under a lease providing for rent at 5% of the valuation less improvements by lessee, the premises should be considered as vacant property with clear title in fee simple.[39]

18. City of St. Louis v. Nelson [Mo. App.] 83 S. W. 271.

19. Planking and stringers. Crerar v. Daniels, 209 Ill. 296, 70 N. E. 569. Oil derricks and machinery are not fixtures becoming part of the freehold. Gartlan v. Hickman [W. Va.] 49 S. E. 14. Flouring mill machinery is in general an irremovable fixture. Incorporated Town of Ozark v. Adams [Ark.] 83 S. W. 920.

20. Cohen v. Wittemann, 91 N. Y. S. 493.

21. Little Falls Water Power Co. v. Hausdorf, 127 F. 442.

22. See 2 Curr. L. 681.

23. Winestine v. Ziglatzki-Marks Co. [Conn.] 59 A. 496.

24. Parties adversely claiming title. Murphy v. Hopcroft, 142 Cal. 43, 75 P. 567.

25. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127; Ascarete v. Pfaff [Tex. Civ. App.] 78 S. W. 974. A tenant who has moved out but not surrendered the keys may be liable for rent during a period of reconstruction following a fire. Schloss v. Schloss [Mich.] 100 N. W. 392.

26. Noland v. Cincinnati Cooperage Co. [Ky.] 82 S. W. 627; Ascarete v. Pfaff [Tex. Civ. App.] 78 S. W. 974.

27. Though the assignee be insolvent. Ascarete v. Pfaff [Tex. Civ. App.] 78 S. W. 974.

28. That removal would cause great inconvenience and injury to business is not a defense. Driver v. Edrington & Co. [Ark.] 84 S. W. 783.

29. Stees v. Bergmeier, 91 Minn. 513, 98 N. W. 648.

30. Delivered to tenant's bookkeeper by registered mail. Stees v. Bergmeier, 91 Minn. 513, 98 N. W. 648.

31. Gerhart Realty Co. v. Brecht [Mo. App.] 84 S. W. 216.

32. Gerry v. Siebrecht, 88 N. Y. S. 1034.

33, 34. Indiana Natural Gas & Oil Co. v. Lee [Ind. App.] 72 N. E. 492.

35. Goldsmith v. Schroeder, 93 App. Div. 206, 87 N. Y. S. 558.

36. Boughton v. Boughton [Conn.] 58 A. 226.

37. Bon v. Fenlon, 89 N. Y. S. 961.

38. Gribbie v. Toms, 70 N. J. Law, 522, 57 A. 144.

39. Springer v. Borden, 210 Ill. 518, 71 N. E. 345; Columbia Theatre Amusement Co. v. Adsit, 211 Ill. 122, 71 N. E. 868.

Defenses, set-offs and reductions.[40]—Failure to deliver possession of the entire premises leased may amount to a failure of consideration for the lease;[41] and an eviction is a good defense to an action for rent,[42] if occurring before the rent becomes due,[43] but it is no defense that knowing of a conveyance of the reversion the tenant thereafter paid rent to his original lessor,[44] neither is it a defense that he has rendered himself unable to perform stipulations agreed upon in lieu of rent.[45] Re-entry under a defeasance clause terminates a tenant's liability for rent, but not his liability upon covenants surviving the re-entry.[46] The mere long continued receipt of rent when overdue does not constitute an equitable defense.[47] Payment is a matter of defense,[48] and must be pleaded to entitle it to be proved.[49] The lessee may recoup damages arising from fraud by the landlord,[50] but a counterclaim for damages in tort may not be interposed in an action upon a lease for rent.[51] A defense of breach of agreement by the lessor can be shown only under a plea of recoupment or set-off.[52] As an offset to rent, the measure of damages for lessor's failure to repair after a fire is the difference between the rental value of the premises as left by the fire and its condition if repaired as covenanted.[53] Under a written lease binding the tenant to make repairs, etc., he cannot show as a counterclaim a breach of a prior oral agreement by which the landlord was to put the premises in perfect condition.[54] A tenant may be liable to a receiver for the value of occupation after the receiver's appointment, though there be an offset as against the landlord.[55] Failure of a limited partnership to ratify its sublease other than as a subtenant is a good defense relative to rent accruing after its assignment for creditors and its vacation of the premises.[56] Promise by the owner of property leased for stock raising to make good any losses due to a lack of proper fencing is not without consideration.[57]

§ 7. *Rental on shares.*[58]—In general the parties to a lease providing that a certain portion of the crops go to each are tenants in common,[59] but where the relation of landlord and tenant is created, the title to the crops remains in the landlord until he has received his due proportion;[60] and he may require an accounting

40. See 2 Curr. L. 682.

41. Occupation of portion of premises did not constitute a waiver of his rights. Sullivan v. Schmitt, 93 App. Div. 469, 87 N. Y. S. 714.

42. Goetschius v. Shapiro, 88 N. Y. S. 171; Filkins v. Steele [Iowa] 100 N. W. 851; Gribbie v. Toms, 70 N. J. Law, 522, 57 A. 144; Okie v. Person, 23 App. D. C. 170; Chisolm v. Kilhreth, 88 N. Y. S. 364. Deprivation of light and air from adjoining property is no defense unless it involved the beneficial use of the premises as an appurtenant to the lease. Solomon v. Fantozzi, 43 Misc. 61, 86 N. Y. S. 754.

43. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049; Klinker v. Guggenheimer, 93 App. Div. 393, 87 N. Y. S. 474.

44. Sullivan v. Lueck, 105 Mo. App. 199, 79 S. W. 724.

45. Noland v. Cincinnati Cooperage Co. [Ky.] 82 S. W. 627.

46. Vogel v. Piper, 89 N. Y. S. 431.

47. Carpenter v. Wilson [Md.] 59 A. 186.

48. Plaintiff not required to show nonpayment. Montgomery v. Leuwer [Minn.] 102 N. W. 367.

49. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049.

50. Bauer v. Taylor [Neb.] 96 N. W. 268. That the landlord relet on the tenant's account, in a manner not in good faith, is properly pleaded as a defense and not a counterclaim. Vogel v. Piper, 89 N. Y. S. 431.

51. Gerry v. Siebrecht, 88 N. Y. S. 1034.

52. Morningstar v. Querens [Ala.] 37 So. 825.

53. Saffer v. Levy, 88 N. Y. S. 144. For the jury to determine whether lessor repaired after fire according to his covenant. Id. The executrix having pleaded a set-off for rent, evidence of the fair rental value of the premises is admissible, though it does not establish the relation of landlord and tenant. Wright v. Davis, 72 N. H. 448, 57 A. 335.

54. Thomas v. Dingelman, 90 N. Y. S. 436.

55. Receiver appointed under a mortgage executed prior to the lease. Derby v. Brandt, 90 N. Y. S. 980.

56. In re Campbell's Estate, 21 Pa. Super. Ct. 424.

57. Ensign v. Park [Kan.] 77 P. 583.

58. See 2 Curr. L. 683. See, also, Agriculture, 3 Curr. L. 137, as to Croppers' Contracts.

59. Fagan v. Vogt [Tex. Civ. App.] 80 S. W. 664.

60. De Loach v. Delk, 119 Ga. 884, 47 S. E. 204. Under a lease upon shares, the portion reserved to the landlord is rent. Randall v. Ditch, 123 Iowa, 582, 99 N. W. 190.

after each yearly sale.[61] A tenant upon shares is not a mere laborer working for wages, but has an interest in the crops,[62] and upon the death of such a tenant, his estate is entitled to remuneration quantum meruit.[63] A lease upon shares made in reliance on the personal character of the lessee is not assignable without consent of the lessor.[64] An oil lease in consideration of royalties contains an implied covenant for diligent operation after oil is struck.[65]

§ 8. *The term, termination of tenancy, renewals, holding over.*[66]—A provision for termination of tenancy for breach of covenant may be a condition or a conditional limitation,[67] but in general a default by the lessee in the conditions of the lease, ipso facto terminates his rights thereunder.[68] Upon the termination of a tenancy by the landlord, the tenant may recover a deposit made by him as a guarantee of his fulfillment of the covenants,[69] but not if recovery of possession is had for nonpayment of rent.[70] Conveyance of property by a lessor does not per se terminate a tenancy,[71] and changes in the personnel of a tenant, acquiesced in by the lessor do not terminate a tenancy at will.[72] Under a lease that will expire after three years from a given date if the property be sold, the tenancy is terminated by a sale after the date specified.[73] In Mississippi a tenancy "by the month" can only be terminated at the end of a monthly term after proper notice.[74] The homestead interest of a widow being that of occupancy only, her abandonment of such interest terminates an unexpired lease she had previously made.[75] A subtenant's right of possession falls with a termination of the principal lease according to its terms.[76]

A lease may be rescinded,[77] if reasonable diligence be shown,[78] for failure of a lessor to deliver possession at the beginning of the specified term,[79] or for fraud by the lessor.[80] Suit by a lessee to enforce his claims as equitable owner of part of the land is a rescission of the lease,[81] and an action by the landlord to recover the land and quiet title is an acceptance of such rescission.[82]

Surrender, abandonment and eviction.[83]—A surrender may occur by operation of law.[84] Where after abandonment, the landlord relets in his own name, the tenancy is terminated;[85] but where a right to abandon premises arises, the tenant must

61. Price v. Grice [Idaho] 79 P. 387.

62. Parker v. Brown, 136 N. C. 280, 48 S. E. 657. Tenant on shares may assert his rights against his landlord by a laborer's lien, but cannot maintain trover. De Loach v. Delk, 119 Ga. 884, 47 S. E. 204. Failure of a tenant to sue for recovery of possession after entry, dispossession and seizure of crops by the landlord does not defeat the tenant's right to recover the value of the crops. Fagan v. Vogt [Tex. Civ. App.] 80 S. W. 664. In an action for breach of a lease upon royalties, evidence as to what the owner would take for the property, is inadmissible as relating to the measure of damages. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

63. Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

64. Meyer v. Livesley [Or.] 78 P. 670.

65. Acme Oil & Mining Co. v. Williams, 140 Cal. 681, 74 P. 296.

66. See 2 Curr. L. 684.

67. Martin v. Crossley, 91 N. Y. S. 712.

68. Gartlan v. Hickman [W. Va.] 49 S. E. 14.

69. Hecklau v. Hauser [N. J. Law] 59 A. 18.

70. Anzolone v. Parkusz, 96 App. Div. 188, 89 N. Y. S. 203.

71. Foley v. Constantino, 43 Misc. 91, 86 N. Y. S. 780.

72. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937.

73. Hickox v. Seegner [Wis.] 101 N. W. 357.

74. Wilson v. Wood [Miss.] 36 So. 609.

75. Jones v. Green [Ky.] 83 S. W. 582.

76. Bove v. Coppola, 91 N. Y. S. 8. One having desk privileges in the room of a tenant has no right of action against the landlord for dispossession of himself with the tenant for the latter's nonpayment of rent. Eaton v. Hall, 43 Misc. 153, 88 N. Y. S. 260.

77. See 2 Curr. L. 684.

78. Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899.

79. Meyers v. Liebeskind, 91 N. Y. S. 725. Evidence showed a waiver of right of cancellation. Smith v. Barber, 96 App. Div. 236, 89 N. Y. S. 317.

80. Bauer v. Taylor [Neb.] 96 N. W. 268.

81, 82. Snyder v. Harding, 34 Wash. 286, 75 P. 812.

83. See 2 Curr. L. 685.

84. Gerhart Realty Co. v. Brecht [Mo. App.] 84 S. W. 216.

85. Gutman v. Conway, 90 N. Y. S. 290; Fleischmann Realty & Construction Co. v. Morison, 88 N. Y. S. 128.

remove with reasonable promptitude.[86] Manual delivery is often material in determining surrender,[87] though in general the acceptance of a new lease by the lessee constitutes a surrender of the preceding one.[88] The acceptance of surrender of a lease terminates the relation of landlord and tenant,[89] is a bar to recovery for a breach of covenant,[90] and though in case of surrender between rent days, the tenant is discharged from liability for rent from the last rent day,[91] it has no effect upon accrued rent, though payable in advance.[92] An acceptance may be by the secretary of a corporation,[93] or by an agent having authority to modify a lease, though it provide for surrender only upon the written consent of the landlord.[94] Formal notice of an intention to vacate is not necessary.[95] An eviction may consist of the exclusion of the tenant from a substantial portion of the demised premises,[96] the renting of a part of the building for lewd purposes,[97] the arbitrary exclusion of a tenant's servant from the use of the elevator,[98] failure to heat as agreed,[99] or the alteration,[1] or damage by fire of the premises destroying their usefulness;[2] but allowing premises to fall into a state of decay does not necessarily constitute an eviction, nor a breach of a covenant for quiet enjoyment,[3] nor do alterations, improvements and repairs made with the consent of the tenant,[4] nor an assault upon a tenant by a hall boy, even if imputable to the landlord;[5] neither does violation by a co-tenant, of a lease provision against practicing upon musical instruments.[6] Whether the acts of a landlord amount to an eviction is frequently a question of fact.[7]

Destruction of premises.[8]—Since the renting of a building carries with it the subjacent land, the destruction of the building does not necessarily terminate the relation of landlord and tenant.[9]

Forfeiture.[10]—The general rule is that forfeitures are discountenanced by the

86. Butler v. Carillo, 88 N. Y. S. 941. The New York statute permits a tenant to surrender a building if it becomes untenantable and releases him from liability for the rent [Laws 1896, p. 589, c. 547]. Roman v. Taylor, 93 App. Div. 449, 87 N. Y. S. 653. Unless there be a specific agreement to the contrary. Id.

87. Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247. The turning over of property by the tenant to designated persons at the request of the landlord's agent and secretary constitutes a surrender of a lease under seal. Commercial Hotel Co. v. Brill [Wis.] 101 N. W. 1101. Evidence held not to show a surrender of a lease. Weil v. Witte, 90 N. Y. S. 287.

88. But not where accepted by the president of a corporation acting beyond his authority. Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247.

89. Okie v. Person, 23 App. D. C. 170. Leaving the key at lessor's place of business and under his protest does not constitute an acceptance. Landt v. Schneider [Mont.] 77 P. 307. The giving by a landlord of a license of way to city, similar to that granted by the tenant, after abandonment of the premises by the tenant, does not constitute an acceptance of the abandonment. Pierson v. Hughes, 87 N. Y. S. 223.

90. Cohen v. Wittemann, 91 N. Y. S. 493.

91, 92. Okie v. Person, 23 App. D. C. 170.

93. Commercial Hotel Co. v. Brill [Wis.] 101 N. W. 1101.

94. Goldsmith v. Schroeder, 93 App. Div. 206, 87 N. Y. S. 558.

95. Filkins v. Steele [Iowa] 100 N. W. 851.

96. Perniciaro v. Veniero, 90 N. Y. S. 369.

97. Weiler v. Pancoast [N. J. Law] 58 A. 1084.

98. Eschmann v. Atkinson, 91 N. Y. S. 319.

99. Filkins v. Steele [Iowa] 100 N. W. 851.

1. Gribbie v. Toms, 70 N. J. Law, 522, 57 A. 144.

2. Goetschius v. Shapiro, 88 N. Y. S. 171.

3. Roth v. Adams, 185 Mass. 341, 70 N. E. 445.

4. Olson v. Schevlovitz, 91 App. Div. 405, 86 N. Y. S. 834.

5. Haas v. Ketcham, 87 N. Y. S. 411.

6. Enforcement of such a provision is optional with the landlord. Sefton v. Juilliard, 91 N. Y. S. 348.

7. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127. Whether the giving of singing lessons in an adjoining apartment was a constructive eviction may be for the jury. Chisolm v. Kilbreth, 88 N. Y. S. 364. As to whether the elevator service was interrupted for an unreasonable time for repairs was for the jury. Ardsley Hall Co. v. Sirrett, 86 N. Y. S. 792. Constructive eviction. Chisolm v. Kilbreth, 88 N. Y. S. 364. No eviction where landlord, before expiration of lease serves notice to vacate or legal measures would be taken, and tenant thereupon moves out without protest. Greenberg v. Murphy, 4 Ohio C. C. (N. S.) 531.

8. See 2 Curr. L. 685.

9. Nashville, etc., R. Co. v. Heikens [Tenn.] 79 S. W. 1038. But see Goetschius v. Shapiro, 88 N. Y. S. 171.

10. See 2 Curr. L. 686.

courts,[11] and the requirements of a lease must be strictly followed by the lessor before a forfeiture will be enforced against the lessee.[12] The right of forfeiture may be exercised by the covenantee only,[13] who may waive his rights;[14] but the assignee of a lessor who has waived a forfeiture cannot enforce such forfeiture.[15] Generally the acceptance of rent is a recognition of a continuation of the tenancy and a waiver of forfeiture;[16] but the acceptance of rent after an alleged breach of a continuing condition is no bar to a recovery for subsequent breaches.[17] A tender, after forfeiture, of royalties due under a lease, is not a bar to the lessor's right to insist on the forfeiture.[18] Forfeiture of oil and gas lease is worked by failure to drill within the prescribed time or to pay the rental;[19] but such a forfeiture does not carry with it the oil derricks and machinery.[20]

Notice to vacate and demand of possession.[21]—A notice to vacate for breach of covenants must be sufficiently specific to inform the tenant of the breach complained of,[22] but in general a substantial compliance with the statute as to notice is sufficient.[23] Service upon one of two or more partners,[24] or in the tenant's absence, upon his wife,[25] or upon his agent who on the same day delivered the notice to his principal, is sufficient.[26] The reasonableness of a notice to vacate must depend upon the surrounding circumstances.[27] Permission to a tenant to remain, notice to quit having been served, may constitute a withdrawal of the notice,[28] as may the giving of a second notice.[29] One holding by claim of adverse title is not entitled to notice to remove before suit is brought.[30] Under a lease giving the tenant a refusal of the premises from month to month, the tenancy terminates at the end of each month and no notice to quit is necessary.[31] A tenant claiming to hold a lease for a definite term is not estopped from claiming as a tenant at will

11. Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 P. 296; In re Adams, 134 F. 142; Johnson v. Lehigh Valley Traction Co., 130 F. 932. A court of equity will relieve a lessee of a forfeiture caused by the neglect of the landlord. Pyle v. Henderson [W. Va.] 46 S. E. 791. Equity will relieve from forfeiture under an oil lease for failure to pay rentals when compensation can be fully made. Id. Equity will not grant relief against forfeiture for failure to pay taxes unless the breach occurred by accident or mistake. Landlord's estate sold to pay the taxes. Webb v. King, 21 App. D. C. 141; Gordon v. Richardson, 185 Mass. 492, 70 N. E. 1027.

12. Johnson v. Lehigh Valley Traction Co., 130 F. 932. A lease will not be declared forfeited for failure to pay water rent unless it has been demanded. Carpenter v. Wilson [Md.] 59 A. 186. The breach of a negative covenant may be ground for forfeiture. West Shore R. Co. v. Wenner, 70 N. J. Law, 233, 57 A. 408.

13. Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149; Bickford v. Kirwin [Mont.] 75 P. 518.

14. In re Adams, 134 F. 142.

15. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

16. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649. But not when a statutory bond is given to pay the rent, pending ejectment proceedings. Id.

17. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

18. Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 P. 296.

19. Meek v. Cooney, 5 Ohio C. C. (N. S.) 266.

20. Acme Oil & Min. Co. v. Williams, 140 Cal. 681, 74 P. 296.

21. See 2 Curr. L. 686.

22. Byrkett v. Gardner, 35 Wash. 668, 77 P. 1048. A notice to vacate for nonpayment of rent must specify the amount claimed. Id.

23. Rev. St. 1887, §§ 5093, 5094. Hunter v. Porter [Idaho] 77 P. 434. Description of a place by its reputed name is sufficient in the demand for possession. Story v. Walker [N. J. Law] 58 A. 349. Notice signed by a law clerk in the name of the owner and her attorneys is sufficient. Bond v. Chapman, 34 Wash. 606, 76 P. 97. Form of notice [Burns' Ann. St. 1901, § 7093]. Cheek v. Preston [Ind. App.] 72 N. E. 1048.

24. Maneely v. Mayers, 43 Misc. 380, 87 N. Y. S. 471.

25. Tenant absent from the state. Gerhart Realty Co. v. Weiter [Mo. App.] 83 S. W. 278.

26. Ewing v. O'Malley [Mo. App.] 82 S. W. 1087.

27. Wheeler v. Wheeler [Vt.] 59 A. 842. Lease held to give landlord the right to terminate the tenancy upon five days' notice only on breach of covenant as to manner of use by the lessee. Schwoerer v. Connolly, 44 Misc. 222, 88 N. Y. S. 818.

28. Brown v. Montgomery, 21 Pa. Super. Ct. 262.

29. Not when suit is pending upon the first notice. Ewing v. O'Malley [Mo. App.] 82 S. W. 1087.

30. Davis v. Clinton, 25 Ky. L. R. 2021, 79 S. W. 259.

31. Drinkard v. Hepinstall [W. Va.] 47 S. E. 72.

and entitled to the statutory notice, where by the landlord's own case a tenancy at will exists.[32] A demand for possession is sufficient to prevent a renewal by continued occupancy,[33] and proof of service of notice to quit will overcome a presumption that a tenant is holding over with permission of the landlord.[34] A notice served on the 2nd to quit on the 23rd of the same month, being the end of the monthly rent period, is sufficient in Washington.[35] In Nebraska a tenant in default of rent is entitled to but three days' notice.[36] In Vermont no notice to quit is necessary in case of a lessee holding over after termination of a lease by its own limitation or after breach by him of a stipulation contained therein.[37]

Renewal under express agreement.[38]—Unless otherwise provided a renewal is for the term and according to the conditions of the original agreement;[39] but the law does not favor agreements for perpetual renewal.[40] Provisions relating to renewals are generally construed against the landlord,[41] and upon his breach of covenant for renewal, the lessee may require specific performance,[42] where the conduct of the tenant as such has not been inequitable,[43] or he has not waived his right to a renewal.[44] A lease for a term of years with option to the lessor to renew for another like period or else pay for buildings erected by the lessee is satisfied by one renewal.[45] The acceptance of a new lease is equivalent to a surrender of possession and a re-entry under the new tenancy,[46] and releases a surety on the prior agreement.[47] Where a lease provides for renewal upon notice, the tenant must affirmatively express his election unless waived by the landlord;[48] but under a demise allowing renewal without requiring a written notice thereof, mere holding over may be sufficient.[49] A holding over pursuant to a new verbal letting constitutes a tenancy from month to month of a city leasehold.[50]

Holding over without agreement.[51]—A holding over without a new lease is pre-

32. Comp. Laws 1897, § 9257. Simons v. Detroit Twist Drill Co. [Mich.] 99 N. W. 862.

33. Drinkard v. Hepinstall [W. Va.] 47 S. E. 72.

34. Thull v. Allen [Neb.] 101 N. W. 1024.

35. Teater v. King, 35 Wash. 138, 76 P. 688.

36. Hutzel v. Draper [Neb.] 99 N. W. 263.

37. Wheeler v. Wheeler [Vt.] 59 A. 842.

38. See 2 Curr. L. 687.

39. Gerhart Realty Co. v. Brecht [Mo. App.] 84 S. W. 216. Does not carry with it a parol contract made subsequent to the former lease. Slack v. Knox, 213 Ill. 190, 72 N. E. 746.

40. "With the privilege of renewal at the same rate and terms each year thereafter from year to year" constituted letting from month to month after expiration of terms specified. Tischner v. Rutledge, 35 Wash. 285, 77 P. 388.

41. Kaufmann v. Liggett, 209 Pa. 87, 58 A. 129. A lessor violating a covenant for renewal cannot require a strict compliance with the lessee's covenants. Warner v. Cochrane [C. C. A.] 128 F. 553. The covenants of an existing lease may furnish consideration for a contract of renewal. Brown v. Montgomery, 21 Pa. Super. Ct. 262. Upon renewal equity will not compel an arbitration, though provided for in the lease, but will order an appraisement. Disagreement of arbitrators does not divest a tenant of his rights. Kaufmann v. Liggett, 209 Pa. 87, 58 A. 129.

42. Warner v. Cochrane [C. C. A.] 128 F. 553; Neiderstein v. Cusick, 178 N. Y. 543, 71 N. E. 100.

43. Bankruptcy of tenant not sufficient ground for annulling the renewal clause. Olden v. Sassman [N. J. Eq.] 57 A. 1075.

44. Whitaker v. Hughes [Okl.] 78 P. 383.

45. Powell v. Pierce [Va.] 49 S. E. 666.

46. City of St. Louis v. Nelson [Mo. App.] 83 S. W. 271.

47. Reading Trust Co. v. Jackson, 22 Pa. Super. Ct. 69.

48. Spangler v. Rogers, 123 Iowa, 724, 99 N. W. 580; Keppler Bros. v. Heinrichsdorf, 5 Ohio C. C. (N. S.) 112; Gerhart Realty Co. v. Brecht [Mo. App.] 84 S. W. 216. Mere holding over is not sufficient, though the lessee covenanted not to relinquish the premises without the written consent of the lessor. Spangler v. Rogers, 123 Iowa, 724, 99 N. W. 580. Evidence held to show the necessity of a new lease to operate as a renewal under an option therefor. Werlein v. Janssen, 112 La. 31, 36 So. 216.

49. Gerhart Realty Co. v. Brecht [Mo. App.] 84 S. W. 216; Quade v. Fitzloff [Minn.] 100 N. W. 660.

50. But mere temporary use may be but a license. Sterling v. Heimann [Mo. App.] 82 S. W. 539.

51. See 2 Curr. L. 688.

NOTE. Tenants in common; holding over: A and B leased a building of which they were co-tenants, to a firm composed of B and C. Upon the expiration of the lease, B, against the will of A, gave the firm written permission to occupy the premises temporarily pending removal. The lessees accordingly held over, whereupon A sued for his fraction of rent for the new year. Held, that the defendants are to be regarded as occupying

sumed to be upon the conditions of the expired agreement,[52] though in some states a one-year term is thereby implied.[53] Payment of a specified increase of rent constitutes an acceptance of the premises at such amount for another term.[54] The holding over of one under authority of the lessee is binding upon the latter.[55]

§ 9. *Landlord's remedies for recovery of rent. Parties and procedure generally.*[56]—A lessee and one joint lessor may be estopped from objecting to a recovery by the other lessor, of the rent due.[57] In Missouri to entitle a purchaser of land under lease to bring suit for the rent, a demand therefor must be made together with an exhibit of the deed under which he claims.[58] The relation of landlord and tenant is a prerequisite to an action for use and occupation,[59] and there can be no recovery in the absence of proof as to the rental value[60] and its nonpayment by the tenant;[61] but whether or not rent was demanded is immaterial.[62] Assumpsit quantum meruit will not lie for a recovery of rent under an express contract to pay at a particular time or in a particular way,[63] and upon an attempted recovery for use and occupation at an agreed monthly rent or a reasonable rate, no recovery can be had on the theory of a tenancy at will with payments of rent annually due.[64] To compel election between inconsistent remedies both must exist at the time of resort to one of them.[65] An action for recovery of rent is not barred by previous action for recovery of possession and for mesne profits,[66] nor is it a waiver of the right of forfeiture of the lease for nonpayment of such rent, nor a bar to a forceable detainer action.[67] A tenant abandoning his term is acquitted of liability only when the lessor accepts the surrender.[68]

the premises after the expiration of the lease as co-tenants of the plaintiff, and are liable, at most, only for occupation rent. Valentine v. Healy, 178 N. Y. 391.

The tendency of the more recent decisions, as well as the English practice, is opposed to the New York rule that a tenant in common who has taken a lease of the moiety of his co-tenant, is not liable as under a new lease for holding over. See O'Connor v. Delaney, 53 Minn. 247, 39 Am. St. Rep. 601; Leigh v. Dickeson, L. R. 15 Q. B. Div. 60. The New York court has, however, extended the principle by including within it the case stated. It is clear that the firm of B and C occupied the premises purely by virtue of the relationship of landlord and tenant which the lease established between it on the one side and A and B on the other; and it is difficult to see how it can be held to shift to the position of co-tenant, especially since one of its members had no interest in the property. If a partnership may properly be considered a distinct legal entity, the view advanced becomes more difficult to support. See Henry v. Anderson, 77 Ind. 361; Valentine v. Healy, 86 Hun [N. Y.] 259. Furthermore, to attain the result reached here one must do violence to the rule that one tenant in common cannot bind his co-tenant without the latter's consent. Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234.—18 Harvard L. R. 70.

52. Woodward v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 79 S. W. 896.

53. Flomerfelt v. Dillon, 88 N. Y. S. 132; Pierson v. Hughes, 87 N. Y. S. 223. In Kentucky a tenant holding over for 90 days without the institution of proceedings to dispossess him may hold for a year [Ky. St. 1903, § 2295]. Asher v. Johnson [Ky.] 82 S. W. 300.

54. Laws 1901, p. 31, c. 31, held constitutional. Stees v. Bergmeier, 91 Minn. 513, 98 N. W. 648.

55. Morgenthau v. Beaton, 88 N. Y. S. 359.

56. See 2 Curr. L. 688.

57. Foreman v. Saunders [Minn.] 100 N. W. 93.

58. Rev. St. 1899, §§ 4136-4138. Sullivan v. Luech, 105 Mo. App. 199, 79 S. W. 724.

59. Cambridge Lodge No. 9, K. P. v. Routh [Ind.] 71 N. E. 148. One suing upon a verbal lease made by an agent must adopt the whole of the contract, regardless of agent's authority to make some of its provisions. Shinn v. Guyton & H. Mule Co. [Mo. App.] 83 S. W. 1015.

60. Ambrose v. Hyde [Cal.] 79 P. 64.

61. But such defect may be waived by defendant's admission of nonpayment. Butler v. Carillo, 88 N. Y. S. 941.

62. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049.

63. Illinois Cent. R. Co. v. Ross [Ky.] 83 S. W. 635.

64. Boughton v. Boughton [Conn.] 58 A. 226.

65. Forcible detainer and action for rent under lease. Mark v. Schumann Piano Co., 105 Ill. App. 490.

66. Linke v. Walcott, 5 Ohio Circ. R. (N. S.) 54.

67. Mark v. Schumann Piano Co., 105 Ill. App. 490.

68. Gerhart Realty Co. v. Brecht [Mo. App.] 84 S. W. 216. The measure of a lessee's liability for unlawful abandonment can only be determined after re-entry, at the end of the rent periods. Vogel v. Piper, 89 N. Y. S. 431. Under a right to relet and apply the proceeds to the lessee's credit, a recovery may be had before the expiration of the term for the rent due before re-entry.

A lessee is responsible for the rent of property in possession of his subtenants not in privity of contract with the lessor,[60] and it will not be presumed that the tenant had assigned his lease in the absence of proof that another was in possession of the entire premises.[70] A guaranty of rent, under seal, imports a consideration and suit may be brought thereon for a default in the rent.[71] In Kansas a recovery of rent, where the relation of landlord and tenant is implied as a matter of law, is limited to a period of three years prior to commencement of the action.[72] The general rules as to procedure and evidence apply.[73] Judgment for rent and eviction is conclusive of the existence of the relation of landlord and tenant, the validity of the lease and the landlord's right to regain possession.[74]

Stipulated right to relet.[75]

Distress.[76]—In general, at common law, all goods and chattels upon the premises were liable to distress for rent;[77] among the many exceptions to this rule are the exemptions of goods entrusted to an agent to be sold on commission,[78] property held by the tenant as bailee,[79] goods of the tenant taken in execution though remaining on the premises,[80] and household goods belonging to a stranger not in a house but temporarily standing on the sidewalk in course of removal to a wagon.[81] The filing of a counter-affidavit to a distress warrant is a plea to the merits,[82] and converts the warrant into mesne process, the proceeding then amounting to a suit for rent.[83] For a wrongful distress, a tenant in Pennsylvania may bring replevin, or an action under the state statute, or the statute of Marlbridge or under the common law.[84] The creation of another lien upon the property is not effectual to defeat the landlord's right to distress for one year's rent;[85] and by statute in Virginia a landlord may distrain for more than one year's rent if no lien has been created upon the property before levy of the distress warrant.[86]

Harding v. Austin, 93 App. Div. 564, 87 N. Y. S. 887.

69, 70. Ely v. Winans, 88 N. Y. S. 929.

71. Roth v. Adams, 185 Mass. 341, 70 N. E. 445.

72. Story v. McCormick [Kan.] 78 P. 819.

73. In an action for rent, plaintiff is not entitled to an adjournment on the ground of surprise where the evidence complained of is in fact immaterial. Nieberg v. Greenberg, 91 N. Y. S. 83. Appearance and answer, without objection in the trial court, is a waiver of irregularity in service of process. Martin v. Crossley, 91 N. Y. S. 712. The complaint must sufficiently describe the property. Morningstar v. Querens [Ala.] 37 So. 825. Amendment of petition. Schmidt v. Brittain [Tex. Civ. App.] 84 S. W. 677. An answer pleading a set-off for improvements is demurrable if it fails to allege a lien on the rents or a personal liability of the plaintiff or an effort to follow the real estate for enforcing any lien. Bell v. Bitner [Ind. App.] 70 N. E. 549. A landlord may upon cross-examination inquire into the authority of one alleged to be his agent by defendant. Flomertfelt v. Dillon, 88 N. Y. S. 132. Parol evidence held admissible to show intended use of leased premises, and its condition and description. Landt v. Schneider [Mont.] 77 P. 307. Whether parol evidence of an alleged subsequent lease should be admitted was within the discretion of the trial court. Cooley v. Collins [Mass.] 71 N. E. 979. Under a written lease, parol evidence of a contemporaneous verbal agreement regarding repairs is inadmissible. Hallenbeck v. Chapman [N. J. Law] 58 A. 1096. In an action for rent and steam used, evidence held insufficient to show the value or amount of excess steam taken. Goetschius v. Shapiro, 88 N. Y. S. 171.

74. Harvin v. Blackman, 112 La. 24, 36 So. 213. A judgment roll of prior summary proceedings relative to the same parties and property is conclusive evidence of all facts alleged in the petition on affidavit forming the basis of such proceedings. Goetschius v. Shapiro, 88 N. Y. S. 171.

75, 76. See 2 Curr. L. 689.

77. Clothier v. Braithwaite, 22 Pa. Super. Ct. 521; Wanamaker v. Carter, 22 Pa. Super. Ct. 625.

78. Wanamaker v. Carter, 22 Pa. Super. Ct. 625.

79. Clothier v. Braithwaite, 22 Pa. Super. Ct. 521.

80. Sprinkel v. Rosenheim & Son [Va.] 48 S. E. 883.

81. Pickering v. Breen, 22 Pa. Super. Ct. 4.

82. Brooke v. Augusta Warehouse & Banking Co., 119 Ga. 946, 47 S. E. 341.

83. Hardy v. Poss, 120 Ga. 385, 47 S. E. 947; Brooke v. Augusta Warehouse & Banking Co., 119 Ga. 946, 47 S. E. 341.

84. Thomas v. Gibbons, 21 Pa. Super. Ct. 635.

85, 86. Code 1887, §§ 2787-2791. Sprinkel v. Rosenheim & Son [Va.] 48 S. E. 883.

Attachment.[87]—The procuring of an attachment instead of a distress warrant is not a ground for exemplary damages.[88]

Liens and securities for payment of rent.[89]—Upon the removal of property pledged for rent, it is for the landlord to determine as to the sufficiency of the property remaining.[90] A landlord's lien upon the crops for rent is for a debt so in the nature of purchase money that it is superior to the statutory exemptions,[91] and takes precedence over purchases or incumbrances accruing subsequent to the attaching of the lien;[92] it extends to the crops of the tenant,[93] or those raised by his sublessee or assignee,[94] and may be asserted against the products or the purchaser thereof,[95] but does not attach to crops shipped out of the state.[96] An assignee of rent cannot claim a right to a lien upon crops as a landlord.[97] Some statutory provisions are considered in the notes.[98] A landlord waives his lien upon the crops or animals of his tenant by consenting to their sale,[99] or being a witness thereof without objection.[1] A waiver in favor of materialmen to a specified amount inures to the benefit of all furnishers in their order of service up to that amount.[2] A crop against which a landlord has a claim for advances is considered in the possession of the landlord so long as it remains upon the rented premises,[3] but a mere direction by a tenant to a landlord, claiming a lien upon the crops, to go and attach them does not make the landlord owner thereof.[4] A landlord's lien cannot be foreclosed on the trial of the right to property attached as that of the tenant and claimed by the landlord.[5] In Georgia a tenant's creditor may contest by affidavit, the alleged lien, whereupon the issue is tried as in other causes.[6] Failure by a tenant to file a counter-affidavit in proceedings to foreclose a landlord's lien and a subsequent private sale after levy

87. See 2 Curr. L. 690.

88. Lawson v. Goodwin [Tex. Civ. App.] 84 S. W. 279.

89. See 2 Curr. L. 690.

90. If he believes himself insecure, the landlord may sieze for the rent whether due or to become due. Millot v. Conrad, 112 La. 928, 36 So. 807.

91. Exemption. Civ. Code 1895, § 2866 et seq. Shirling v. Kennon, 119 Ga. 501, 46 S. E. 630. A landlord's lien upon the crop is superior to the claim for an allowance for the tenant's widow. Walker v. Patterson's Estate [Tex. Civ. App.] 77 S. W. 437. But see Parker v. Brown, 136 N. C. 280, 48 S. E. 657.

92. Staber v. Collins [Iowa] 100 N. W. 527. It cannot be affected by the tenant's false statements to a purchaser of the crop [lien by Rev. St. 1899, § 4115]. Williams v. De Lisle Store Co., 104 Mo. App. 567, 79 S. W. 487.

93. Edwards v. Anderson [Tex. Civ. App.] 82 S. W. 659. Not for an indebtedness arising from the pasturage of stock or hire of a team not used in cultivating the farm. Tucker, Zeve & Co. v. Thomas [Tex. Civ. App.] 80 S. W. 649.

94. Edwards v. Anderson [Tex. Civ. App.] 82 S. W. 659.

95, 96. Ball v. Sledge, 82 Miss. 749, 35 So. 447.

97. State v. Elmore [S. C.] 46 S. E. 939.

98. In Mississippi a landlord has a lien on all agricultural products raised on the premises, as security for rent and supplies for the current year. Ball v. Sledge, 82 Miss. 749, 35 So. 447. A landlord will not be allowed a lien for a year's rent under the Pennsylvania statute where upon a sale of a bankrupt liquor dealer's stock and license, the proceeds from the stock can not be distinguished [Laws Pa. 1891 (P. L. 122)]. Keyser v. Wessel [C. C. A.] 128 F. 281. In Iowa a landlord has a lien on the crops and all the personal property kept or used on the premises during the term, and a seizure and sale of the tenant's property under a general execution on a judgment for rent is authorized though the property be in possession of a bona fide purchaser, he having knowledge of the lien [Code, § 2992]. Staber v. Collins [Iowa] 100 N. W. 527. A landlord's lien for advances extends only to the crop for the year for which they were furnished. Walker v. Patterson's Estate [Tex. Civ. App.] 77 S. W. 437.

99. Randall v. Ditch, 123 Iowa, 582, 99 N. W. 190. Receipt by landlord of portion of proceeds of sale show a ratification of such sale. Planters' Compress Co. v. Howard [Tex. Civ. App.] 80 S. W. 119. Under the evidence, landlord held to have waived his lien upon the crops. Alexander v. Zeigler [Miss.] 36 So. 536; Dreyfus v. Gage & Co. [Miss.] 36 So. 248.

1. Johnson & Son v. Kincaid [Tex. Civ. App.] 81 S. W. 536.

2. Southern Grocer Co. v. Adams, 112 La. 60, 36 So. 226.

3. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.

4. Burke v. Holmes [Tex. Civ. App.] 80 S. W. 564.

5. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.

6. Martin v. Nichols [Ga.] 49 S. E. 613.

is not a bar to an action of trover by the tenant.[7] The South Carolina landlord lien act has been held constitutional.[8]

§ 10. *Landlord's remedies for recovery of premises.*[9]—Ejectment is the proper action for re-entry under a lease, when possession and a right to a deficiency from reletting on account is sought,[10] and "justice ejectment" is available where a tenancy for life, created by contract, is involved.[11] Summary proceedings are available upon default in the rent,[12] though the lease give a right of re-entry.[13] After the giving of notice to terminate a tenancy for breach of covenant, the landlord may resort to summary proceedings,[14] and a lease provision requiring the lessor to give thirty days' notice to enforce forfeiture because of breach of covenants is not a bar to an action for possession for nonpayment of rent.[15] A landlord cannot maintain summary proceedings against a tenant holding under an invalid lease where there has been no termination of tenancy by notice or limitation,[16] nor for a failure to pay a specified penalty for a breach of covenants for improvements.[17] Failure to farm land in a good and husbandlike manner is not waste entitling the landlord to a recovery of possession.[18] Where a tenant is in possession, equity has no jurisdiction to enforce a forfeiture of the lease, the lessor having an adequate remedy at law.[19] An action of forceable detainer will not lie where only questions of title are involved;[20] the question of possession can alone be determined.[21] The mere delivery of the key by the tenant to the landlord does not entitle the latter to enter and expel by force the tenant who continues in actual possession.[22]

Procedure.[23]—In summary proceedings for possession, the owner must show a strict compliance with the statute,[24] and the person lawfully entitled to the possession must appear as plaintiff.[25] The affidavit should allege facts from which the court may find the existence of the relation of landlord and tenant,[26] and the plaintiff must show such facts as bring the case within the statute,[27] and establish a tenancy.[28] It is sufficient to show that any portion of the rent is unpaid,[29] or that the premises are used for immoral purposes.[30] The question of title will not be tried in this proceeding,[31] the issue being on the existence of

7. Knowles v. Stegall, 120 Ga. 451, 47 S. E. 902.

8. Code of Laws 1902, § 3057. State v. Elmore [S. C.] 46 S. E. 939.

9. See 2 Curr. L. 692.

10. Fleishauer v. Bell, 44 Misc. 240, 88 N. Y. S. 922.

11. Foss v. Stanton, 76 Vt. 365, 57 A. 942.

12. Lyons v. Gavin, 43 Misc. 659, 88 N. Y. S. 252. Landlord held not to have waived his right to summary proceedings. Foster v. Foster, 98 App. Div. 24, 90 N. Y. S. 451.

13. Fleishauer v. Bell, 44 Misc. 240, 88 N. Y. S. 922.

14. Code Civ. Proc. § 2231, subd. 1. Martin v. Crossley, 91 N. Y. S. 712.

15. Hunter v. Porter [Idaho] 77 P. 434.

16. Gossett v. Fox, 90 N. Y. S. 477.

17. Sipp v. Reich, 88 N. Y. S. 960.

18. Ball. Ann. Codes & St. § 5527. Byrkett v. Gardner, 35 Wash. 668, 77 P. 1048.

19. Johnson v. Lehigh Valley Traction Co., 130 F. 932.

20, 21. Jones v. Seawell, 13 Okl. 711, 76 P. 154.

22. Giffin v. Martel [Vt.] 58 A. 788.

23. See 2 Curr. L. 693.

24. Flewellen v. Lent, 91 App. Div. 430, 86 N. Y. S. 919. One invoking the harsh remedy of summary proceeding for the recovery of land must comply strictly with the statute. Failure to prove notice to quit as alleged; proceeding prematurely brought. Wilson v. Wood [Miss.] 36 So. 609.

25. Story v. Walker [N. J. Law] 58 A. 349.

26. Amendments allowable. Bowles v. Dean [Miss.] 36 So. 391.

27. V. S. § 1560. Wheeler v. Wheeler [Vt.] 59 A. 842.

28. Civ. Code 1895, § 4813 et seq. Patrick v. Cobb [Ga.] 49 S. E. 806.

29. Belding Bros. & Co. v. Blum, 88 N. Y. S. 178. That the landlord violated an agreement for keeping in force a liquor license for his tenant's benefit is not available as a defense in a proceeding to dispossess for nonpayment of rent. Liebmann's Sons Brewing Co. v. De Nicolo, 91 N. Y. S. 791. In an action for possession, for breach of covenant, that the covenant was personal or that it was not a continuing covenant should be raised by demurrer, but that plaintiff had not consented to an assignment is debatable under the general issue. That rent was accepted after forfeiture was properly pleaded specially. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

30. Sullivan v. Schatzel, 88 N. Y. S. 352.

31. Meeske v. Miller [Mich.] 101 N. W. 52.

a tenancy.[32] In an action for possession for nonpayment of rent, counterclaims or set-offs are not admissible,[33] nor can defendant set up his equitable title,[34] nor justify possession under a lease which he has repudiated by his plea,[35] but he may show the conditions under which he holds.[36] An unrecorded written memorandum of a lease for four years is insufficient to support the possession of a tenant against summary proceedings brought by a subsequent bona fide purchaser.[37] Proceedings begun before the complete expiration of the time allowed for payment of rent will be dismissed.[38] Judgment for tenant is an estoppel on the landlord only as to what was or what should have been decided.[39] Jurisdiction to try an action for possession depends upon the existence of the landlord and tenant relation at commencement of suit,[40] and not the amount involved.[41] In New Jersey a justice loses jurisdiction by refusing to summon a jury unless the costs therefor are advanced or secured.[42] In Georgia exclusive jurisdiction of proceedings against a tenant holding over is vested in the superior court.[43] A court of equity may restrain summary proceedings.[44] A writ of restitution issued at the commencement or during the pendency of an action is in general governed by the same principles of law as a writ of attachment on other ancillary process in the main cause.[45] An order of dispossession is not entered by default and subject to vacation by the court where one of a firm properly served appeared and consented to its issuance.[46] Assumpsit for rent will not bar an action for possession unless the rent be paid within the time specified by the notice.[47] Some statutory provisions are considered in the notes.[48] An equitable defense is not available in a common-law action of ejectment.[49] Where a lease expires by its own limitation, no written demand by the landlord for possession is necessary before bringing an action for forcible detainer.[50] Under a lease providing for the immediate issuance of a hab. fa. poss. upon failure to surrender possession,

32. Civ. Code 1895, § 4813 et seq. Patrick v. Cobb [Ga.] 49 S. E. 806.

33. Hunter v. Porter [Idaho] 77 P. 434.

34. Cottrell v. Moran [Mich.] 101 N. W. 561; Bond v. Chapman, 34 Wash. 606, 76 P. 97; Jones v. Seawell, 13 Okl. 711, 76 P. 154.

35. Rausch v. Briefer [Mich.] 101 N. W. 523.

36. Wheeler v. Wheeler [Vt.] 59 A. 842.

37. Laws 1896, p. 607, c. 547, §§ 240, 241. Jokinsky v. Miller, 44 Misc. 239, 88 N. Y. S. 928.

38. Cheek v. Preston [Ind. App.] 72 N. E. 1048.

39. Does not prevent landlord from showing value of crops in subsequent action. Burwell v. Brodie, 134 N. C. 540, 47 S. E. 47.

40. Jurisdiction not affected so far as costs are concerned by demolition of the building during an appeal and subsequent retrial. Simmons v. Pepe, 43 Misc. 661, 88 N. Y. S. 120.

41. Schumann Piano Co. v. Mark, 208 Ill. 282, 70 N. E. 226.

42. Story v. Walker [N. J. Law] 58 A. 349.

43. But judge of City Court of Moultrie may administer oath to affiants in such proceedings and may issue a warrant to be returned to the Superior Court. Stephenson v. Warren, 119 Ga. 504, 46 S. E. 647.

44. Kaufmann v. Liggett, 209 Pa. 87, 58 A. 129.

45. Teater v. King, 35 Wash. 138, 76 P. 688.

46. Laws 1902, p. 1562, c. 580. Maneely v. Mayers, 43 Misc. 380, 87 N. Y. S. 471.

47. Schumann Piano Co. v. Mark, 208 Ill. 282, 70 N. E. 226.

48. In **Washington** judgment may be rendered for double the damages found by the jury [2 Ball. Ann. Codes & St. § 5542]. Bond v. Chapman, 34 Wash. 606, 76 P. 97. In **Indiana** a new trial cannot be demanded as of right in an action for possession where a tenant unlawfully holds over. Cambridge Lodge, No. 9, K. P. v. Routh [Ind.] 71 N. E. 148. In **New York** a failure for 25 days to enter a judgment for possession is a mere irregularity. Lyons v. Gavin, 43 Misc. 659, 88 N. Y. S. 252. Appeal does not lie from a dismissal of summary proceedings where no final order granting possession or awarding costs was made [Code Civ. Proc. § 2249]. Sipp v. Reich, 88 N. Y. S. 960. "Judgment for tenant" without a final order in his favor is irregular [Code Civ. Proc. § 2249]. Gossett v. Fox, 90 N. Y. S. 477. Tenant may stay the issuance of an order of removal by payment of the rent and costs. Not necessary to await the issuance of a formal order of removal [Code Civ. Proc. § 2254]. Flewellen v. Lent, 91 App. Div. 430, 86 N. Y. S. 919. N. Y. Civ. Code § 2254, does not authorize a stay of proceedings after issuance of a warrant of dispossession. Maneely v. Mayers, 43 Misc. 380, 87 N. Y. S. 471.

49. Rausch v. Briefer [Mich.] 101 N. W. 523.

50. Andrews v. Erwin, 25 Ky. L. R. 1791, 78 S. W. 902.

one is not liable in trespass for failing to wait five days after termination of the lease before the issuance of such writ.[51]

§ 11. *Liability of third persons to landlord or tenant.*[52]—Both the tenant and the landlord may sue for injuries to their estate in the premises[53] proximately resulting from one's negligence.[54] A tenant rightfully removing the goods of his predecessor has no control over such goods after their removal,[55] and if instead of delivering them upon demand, he moves and stores them he is guilty of conversion.[56] In Missouri one knowingly purchasing crops grown upon demised lands is liable to the landlord for the unpaid rent, to the value of such purchase,[57] but not as for a conversion unless purchasing with knowledge of a lien.[58] A recorded lease is notice to everyone of its existence.[59]

§ 12. *Crimes and penalties.*[60]—In some states it is a misdemeanor for a tenant to remove crops without consent of the landlord or five days' notice of an intention to make such removal,[61] but disposal of crops without consent of an assignee of rent is not criminal, such assignee not being a landlord and entitled to a lien.[62] It is no defense that the tenant had suffered damage by the landlord's breach of contract, equal to the rents and advancements.[63] An officer removing goods from premises upon execution of a writ of restitution is not amenable for their remaining upon the sidewalk for an unreasonable time.[64]

LAND PATENTS, see latest topical index.

LARCENY.

§ 1. **Common Law Larceny (410).**
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A. Indictment (412).
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§ 1. *Common law larceny.*[1]—Larceny is the felonious taking and carrying away[2] of the personal property[3] of another,[4] with intent to convert it to the use

51. Dickson v. Wood, 209 Pa. 345, 58 A. 668.

52. See 2 Curr. L. 695.

53. Nashville, etc., R. Co. v. Heikens [Tenn.] 79 S. W. 1038. Whether plaintiff in an action for damage to property exercised ordinary care was for the jury. Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 72 N. H. 546, 58 A. 242. Whether the officer executing a writ of restitution removed goods from other than the "store floor" of certain premises was for the jury. Morlarity v. Wagner, 88 App. Div. 612, 84 N. Y. S. 864.

54. Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 72 N. H. 546, 58 A. 242.

55, 56. McGonigle v. Belleisle Co. [Mass.] 71 N. E. 569.

57. Rev. St. 1899, § 4123. Williams v. De Lisle Store Co., 104 Mo. App. 567, 79 S. W. 487.

58. Crane v. Murray [Mo. App.] 80 S. W. 280.

59. Laws 1896, p. 615, c. 547, § 266. Reid v. Long Lake, 44 Misc. 370, 89 N. Y. S. 993. No fraudulent or wrongful act of the recording officer can change its character as a recorded instrument. Id.

60. See 2 Curr. L. 696.

61. Code, § 1759. State v. Bell [N. C.] 49 S. E. 163. Evidence held insufficient to sustain a conviction for disposing of property to defraud a landlord of his lien for rent. Proceeds of property applied upon a mortgage given by tenant and landlord. Smith v. State, 139 Ala. 115, 36 So. 727.

62. State v. Elmore [S. C.] 46 S. E. 939.

63. State v. Bell [N. C.] 49 S. E. 163.

64. Williams v. District of Columbia, 22 App. D. C. 471.

1. See 2 Curr. L. 696.

2. State v. Carr [Del. Gen. Sess.] 57 A. 370. See 2 Curr. L. 696, n. 1. No evidence of asportation. State v. Boatright, 182 Mo. 33, 81 S. W. 450. Cutting a rope attaching a jug of whiskey to the saddle horn of witness' horse and carrying off the whiskey, without the use of any other force and without any putting in fear, is larceny, not robbery. Bowlin v. State [Ark.] 81 S. W. 838. See 2 Curr. L. 697, n. 26. It is not necessary where one is charged with stealing public records that the removal be from the office of the custodian; it is sufficient if the defendant took them animo furandi from any place, or from any person, either with or without consent. People v. Mills, 178 N. Y. 274, 70 N. E. 786.

3. State v. Carr [Del. Gen. Sess.] 57 A. 370. See 2 Curr. L. 697, n. 22, 23, 24. Records or documents filed in a public office may be the subject of larceny. People v. Mills, 178 N. Y. 274, 70 N. E. 786. Oysters or clams, planted under public water, in a bed, where they do not exist naturally, and

of the taker,[5] without consent of the owner.[6] Where the taking is under circumstances showing a want of felonious intent,[7] such as a claim of ownership in one's self,[8] or for any purpose excluding the presumption of intent to deprive the owner of his property,[9] there is no larceny. A bailee who has lawful possession cannot commit larceny.[10] The subsequent wrongful conversion of property by one who has received it from the owner in good faith does not constitute larceny.[11] Where possession is obtained by means of a trick or device, the offense is made out;[12] but false representations inducing one to part unconditionally with the title to goods do not constitute larceny.[13] If defendant came into possession in good faith with the owner's consent, a subsequent conversion will not amount to larceny;[14]

which is inclosed by stakes or otherwise, sufficiently to show private possession, are not part of realty, but chattels, and therefore the subject of larceny. People v. Wanzer, 43 Misc. 136, 88 N. Y. S. 281. As to **larceny of fixtures,** see Bronson, Fixtures, § 112a.

4. State v. Carr [Del. Gen. Sess.] 57 A. 370. The superintendent of a land and cattle company having complete charge and control of the company's property was for the purpose of a prosecution for theft of such cattle their owner. Barnes v. State [Tex. Cr. App.] 81 S. W. 735. See, also, Kennon v. State [Tex. Cr. App.] 82 S. W. 518. So also the general manager of a partnership owning horse and other chattels. People v. Nunley, 142 Cal. 105, 75 P. 676. Mere temporary absence from home of one of two joint owners of cattle running on a range and so not in their actual possession is not enough to constitute separate possession in the other joint owner, under an indictment alleging the ownership in the latter. Merit v. State [Ark.] 83 S. W. 330. The possession of a bailee is sufficient to sustain a conviction of larceny. Griffiths v. State [Ind.] 72 N. E. 563; Bone v. State [Ga.] 48 S. E. 986. A man may be guilty of larceny of his wife's property. Hunt v. State [Ark.] 79 S. W. 769.

5. State v. Carr [Del. Gen. Sess.] 57 A. 370. One is guilty of theft although it is not his purpose to appropriate the property stolen to his own use, but to divest the owner of his property and place the ownership in another. Lopez v. State [Tex. Cr. App.] 80 S. W. 1016. The finding of property and retention thereof, knowing the rightful owner, is larceny. Flemister v. State [Ga.] 48 S. E. 910. See 2 Curr. L. 697, n. 20.

6. The asportation must be against the will of the owner. In this connection a distinction is to be taken between the ownership of the public and that of an individual. If an individual voluntarily delivers his property to another, there is no trespass, but the property of the public is always in the possession of a custodian, who has it for that purpose and no other, and cannot yield rightful possession. People v. Mills, 178 N. Y. 274, 70 N. E. 786. To constitute the crime there must be a trespass; that is, a taking of the property without the consent of the owner. State v. Teller [Or.] 78 P. 980.

7. In larceny it is essential to a conviction that the property was taken "animo furandi." Where it clearly appears that the taking was perfectly consistent with honest conduct, though the person may have been mistaken, he cannot be convicted of larceny. Bird v. State [Fla.] 37 So. 525. That the taking was open and unconcealed is inconsistent with a felonious intent. Removal of loose plank from a public building and voluntary restoration of substantially the same kind and value. Fletcher v. Com. [Ky.] 80 S. W. 1089. Retention of deposition by deponent for purpose of submission to his attorney. Parr v. Loder, 97 App. Div. 218, 89 N. Y. S. 823.

8. McCary v. State [Tex. Cr. App.] 80 S. W. 373; Hull v. State [Tex. Cr. App.] 80 S. W. 380. See 2 Curr. L. 696, n. 6. Can be no larceny where one takes property under bona fide belief that it is his own. State v. Wasson [Iowa] 101 N. W. 1125.

9. Jackson v. State [Tex. Cr. App.] 79 S. W. 521. See 2 Curr. L. 697, n. 11. Where one is seen taking goods from a building adjoining one that is on fire, it is a question for the jury whether it was with an intent to remove the goods to a place of safety or to steal them. People v. Smith, 143 Cal. 597, 77 P. 449.

10. State v. Seeney [Del. Gen. Sess.] 59 A. 48. See 2 Curr. L. 697, n. 13.

11. State v. Teller [Or.] 78 P. 980.

12. See 2 Curr. L. 697, n. 16. Short changing. Flynn v. State [Tex. Cr. App.] 83 S. W. 206. Where persons conspire to cheat a man under color of a bet, and he simply deposits his money as a stake with one of them, not meaning thereby to part with the ownership therein, they, by taking the money, commit larceny. Hindman v. State [Ark.] 81 S. W. 836; State v. Boatright, 182 Mo. App. 33, 81 S. W. 450. Where the ownership of the property is not parted with but possession alone is obtained by a fraud or trick with intent to convert the property and permanently deprive the owner of it, and it is converted to the use of the taker without the owner's consent, the offense is larceny at common law and under the Missouri statute. State v. Copeman [Mo.] 84 S. W. 942. Lock game held to constitute larceny where prosecutor never intended to part with title to his money, and not obtaining money by trick or confidence game prohibited by Mo. Rev. St. 1899, § 2213. Id. Inducing one to deposit money as security. State v. Buck [Mo.] 84 S. W. 951.

13. See 2 Curr. L. 697, n. 17. Otherwise where the testimony shows that the title has not passed. Hunt v. State [Ark.] 79 S. W. 769; State v. Buck [Mo.] 84 S. W. 951; State v. Copeman [Mo.] 84 S. W. 942.

14. Abrams v. State [Ga.] 48 S. E. 965. See 2 Curr. L. 697.

but if an intent to convert was present at the time of coming into possession, it is larceny.[15] One attempting to steal a horse, but frustrated after procuring the bridle and saddle, may be convicted of stealing these but not the horse.[16] One aiding and abetting another in the commission of the offense is equally guilty.[17] Where defendant in the course of an hour and a half obtained from prosecutor money with which to buy liquor, in all amounting to $80, this was one continuous transaction, constituting a felony.[18] Under the Kentucky statute, making it an offense for any carrier, porter or other person to whom money is confided for carriage, to embezzle the same, the offense consists in the fraudulent appropriation, without reference to the amount, of the money.[19]

§ 2. *Statutory larceny, theft, etc.*[20]—Notwithstanding that larceny from a railroad car be made a specific offense, yet if at the time of the larceny, the car is within a house, the same act would also be larceny from the house.[21] Loose lumber not a part of the building or fixtures is not within a statute prohibiting the felonious removal from any church, chapel or other public building of any goods, chattels or other thing of value belonging thereto.[22] That a statute defining and classifying the offense of larceny from the house did not provide a penalty is not fatal to a conviction thereunder.[23] Several statutory definitions and distinctions are discussed in the note.[24]

§ 3. *Indictment and prosecution. A. Indictment.*[25]—As in other cases an

15. Hiring livery. Johnson v. State, 119 Ga. 563. 46 S. E. 839; State v. Blay [Vt.] 58 A. 794. The question of such intent is for the jury. People v. Smith, 143 Cal. 597, 77 P. 449; State v. Blay [Vt.] 58 A. 794.

16. Ex parte Thrasher [Tex. Cr. App.] 80 S. W. 1142.

17. See 2 Curr. L. 698. Where cattle were stolen with the knowledge of defendant, who helped to drive them away and sell them, he is guilty of larceny. Murray v. State [Miss.] 36 So. 541.

19. Stat. of 1903, § 1203. Commonwealth W. 206.

19. Stat. of 1903, § 1203. Commonwealth v. Smith [Ky.] 82 S. W. 236.

20. See 2 Curr. L. 698.

21. Bone v. State [Ga.] 48 S. E. 986.

22. Fletcher v. Com. [Ky.] 80 S. W. 1089.

23. Penal Code 1895, § 178. Heard v. State, 120 Ga. 848, 48 S. E. 311.

24. The **Arkansas** statute making it a felony to steal a cow, hog or other animal contemplates live animals [Sand. & H. Dig. § 1700]. Hutchinson v. State [Ark.] 83 S. W. 331. The title to chap. 4395, Acts of 1895, **Florida,** held to be broad enough to embrace grand larceny. Ex parte Bush [Fla.] 37 So. 177. The **Georgia** Penal Code of 1895 was intended to make the stealing of baled cotton a felony, regardless of value or of the place where the cotton was stored. Hall v. State, 120 Ga. 142, 47 S. E. 519. In **Louisiana** the statutory crime of horse stealing includes no lesser offense. State v. Gouvernale. 112 La. 956, 36 So. 817. The Louisiana statute of 1902, to the extent that it assumes to grade the offense of larceny, is unconstitutional [Act No. 107 of 1902]. State v. Dalcourt, 112 La. 420, 36 So. 479. **Missouri** Rev. St. 1899, § 1898, providing for punishment of those stealing, taking and carrying away property of another, does not pretend to embrace elements of offense of larceny, which remain same as at common law. State v. Copeman [Mo.] 84 S. W. 942. Rev. St. 1899, § 2213, providing punishment for obtaining property by confidence game, does not apply where property is obtained by trespass, but only where victim consents to parting with title and possession. Id. In **New York,** files in the custody of a public official may be the subject of larceny [Pen. Code, § 531, subd. 3]. People v. Mills, 178 N. Y. 274, 70 N. E. 786, afg. 91 App. Div. 331, 86 N. Y. S. 529. See 2 Curr. L. 698, n. 45. Defendant's statement that he has an order from a well known corporation for a large number of garments, and that he desires to purchase goods from which to manufacture them, thereby inducing their delivery, is a false statement of an existing fact and not a warranty of his financial standing within a statute requiring false pretenses in regard to a purchaser's financial responsibility to be in writing. N. Y. Pen. Code, § 544. Prosecution for grand larceny for obtaining goods by false pretenses. People v. Rothstein [N. Y.] 72 N. E. 999. Larceny is defined in the **Oklahoma** statutes to be "the taking of personal property, accomplished by fraud or stealth, and with intent to deprive another thereof." Distinction between larceny and embezzlement pointed out. Flohr v. Territory [Okl.] 78 P. 565. The **Texas** statute against theft from the person creates two characters of theft, one of property taken privately without the knowledge of the prosecutor, and the other where property is taken so suddenly as not to allow time to make resistance [art. 880, subd. 2, Pen. Code 1895]. Steele v. State [Tex. Cr. App.] 81 S. W. 962. See Carroll v. State [Ga.] 48 S. E. 909, for similar statute. In order to constitute theft there must be a fraudulent taking. Young v. State [Tex. Cr. App.] 83 S. W. 808.

25. See 2 Curr. L. 698.

indictment for larceny should be sufficiently definite to enable the accused to ascertain the specific charge he is called on to meet, and, in the event of a second prosecution, to plead his former acquittal or conviction;[26] but the intent to deprive the owner of his property need not be specifically alleged, if the language otherwise imports such intent.[27]

The description of the property must be such as to enable the defendant to know the specific charge he is to meet,[28] and the state will be held to proof of the description as laid, though it be unnecessarily minute;[29] but it is not necessary to minutely describe each particular bill or coin alleged to have been stolen,[30] neither is it necessary to allege that the money converted was lawful money of the United States.[31] The name of the owner of the building from which the property was taken need not be alleged.[32] A description of animals presumes live animals.[33] Unless immaterial under the statute, the value must be alleged;[34] but time[35] and place[36] are not material and need not be truly laid further than to show venue

26. Melvin v. State, 120 Ga. 490, 48 S. E. 198. An indictment alleging that accused advised and encouraged his principal to commit a theft of horses which he had hired is not defective for failure to allege that accused was a party to the contract of hiring. Harrold v. State [Tex. Cr. App.] 81 S. W. 728. An indictment charging the unlawful, willful and felonious taking and driving away of a horse from the possession of the owner, naming him, giving a description of the property, and fixing the time and venue, is sufficient. State v. Rooke [Idaho] 79 P. 82.

27. See 2 Curr. L. 699, n. 53. To charge that one did "unlawfully and wrongfully take and carry away" certain property sufficiently alleges an intent to steal. Taylor v. State, 120 Ga. 484, 48 S. E. 158. Where, in an indictment, property is alleged to have been taken by fraud and stealth, it is not necessary to set out the fraudulent acts relied on as constituting the fraud. Conversion by bailee. Flohr v. Territory [Okl.] 78 P. 565.

28. State v. Minck [Minn.] 102 N. W. 207. Describing property as "one shovel, of the value of one dollar," is too general. Melvin v. State, 120 Ga. 490, 48 S. E. 198. Description held sufficient. Bone v. State, 120 Ga. 866, 48 S. E. 356. Indictment for simple larceny charging accused with stealing "one black and white male hog, of the personal goods" of a named person sufficiently describes the property. Harvey v. State [Ga.] 49 S. E. 674.

29. McLendon v. State [Ga.] 48 S. E. 902; Hall v. State, 120 Ga. 142, 47 S. E. 519. Courts will judicially notice the denominational value of money proven to have been stolen. Ector v. State, 120 Ga. 543, 48 S. E. 315. A variance between a complaint charging the theft of a "steel strap" and an information stating that the article stolen was a "steel trap" is fatal to a conviction. Snoga v. State [Tex. Cr. App.] 80 S. W. 625. Where the allegation is general, in a charge of theft, that the money taken was lawful current money of the United States, the evidence must show that it was legal tender coin or legal tender currency of the United States. Nickels are legal tender. Black v. State [Tex. Cr. App.] 79 S. W. 311. It is no variance that the larceny was of a check, the indictment being for larceny of money. Hunt v. State [Ark.] 79 S. W. 769.

30. Ector v. State, 120 Ga. 543, 48 S. E. 315. Testimony which identified money stolen as eight silver dollars and three silver dimes sufficiently identified the money described in the indictment as "gold and silver coin * * * money of the United States." Johnson v. State [Ark.] 83 S. W. 651. Where an indictment charges theft of bills, currency or current money of the United States, giving the denomination and value, proof of legal tender treasury notes, demand notes, gold or silver certificates, or of national bank bills, is admissible. Berry v. State [Tex. Cr. App.] 80 S. W. 630.

31. Ector v. State, 120 Ga. 543, 48 S. E. 315.

32. Where building is sufficiently described. State v. Minck [Minn.] 102 N. W. 207.

33. If the animal be dead, the fact must be stated, else there will be a variance, fatal to conviction. Hutchinson v. State [Ark.] 83 S. W. 331.

34. An indictment is good if it alleges merely the aggregate value of articles. It is, however, better practice to set out the value of each article. Bone v. State, 120 Ga. 866, 48 S. E. 356. Under the Oklahoma statute the value of a domestic animal need not be alleged [art. 1, c. 20, p. 104, Session Laws 1895]. Woodring v. Territory [Okl.] 78 P. 85. Allegation of value immaterial under 2 Ball. Ann. Codes & St. Wash. § 7113, making punishable the theft of a horse or colt of any value. State v. Washing [Wash.] 78 P. 1019. Indictment for bringing stolen horses into state held sufficient, though no value alleged. Theft of horses criminal under Wilson's Rev. & Ann. St. Okl. 1903, § 2480. Beard v. State [Tex. Cr. App.] 83 S. W. 824.

35. Proof of the offense at any time before the indictment is found will sustain it. State v. Carr [Del. Gen. Sess.] 57 A. 370.

36. An indictment charging larceny from a "residence" is sufficient under a statute prohibiting larceny from a "building." People v. Klammer [Mich.] 100 N. W. 600. So charging larceny "from" a building on fire sufficiently charges an offense within a

and avoidance of limitations; but ownership must be alleged.[37] Allegations of ownership are material and must be proven as alleged.[38] The misspelling of the owner's name is not a fatal variance if it is idem sonans with the true spelling.[39] Possession cannot be charged to be in the owner where the property is being held as lost property by one who does not know the true owner.[40] Several means of committing the offense may be charged in the conjunctive,[41] and where the act may be one of several statutory offenses, they may all be charged in different counts to meet the proof.[42] Clerical errors are immaterial.[43]

(§ 3) *B. Admissibility of evidence.*[44]—Declarations by accused,[45] his conduct,[46] other and different thefts,[47] the condition of cattle stolen,[48] circumstances

statute against stealing "in" a building on fire. Id. Venue sufficiently laid and established. Theft of money from person of prosecutor without his knowledge. Carroll v. State [Ga.] 48 S. E. 909. No locality except venue need be charged in prosecutions under the Georgia Penal Code of 1895, § 186, which was intended to make the stealing of baled cotton a felony, regardless of value or of the place where the cotton was stored. Hall v. State, 120 Ga. 142, 47 S. E. 519. Evidence held to sustain finding that offense was committed in G. county as alleged. Cage v. State [Ark.] 84 S. W. 631.

37. Whether larceny is simple or compound. State v. Wasson [Iowa] 101 N. W. 1125.

38. Merrit v. State [Ark.] 83 S. W. 330. An information for the theft of goods belonging to a minor who lives with his parents may properly allege ownership either in the minor or his parents. Jackson v. State [Tex. Cr. App.] 79 S. W. 521. Indictment laying ownership in husband and proof that it belonged to him and his wife are not variant. Kirby v. State, 139 Ala. 87, 36 So. 721. There is no substantial variance between an indictment charging larceny of property from a firm, and proof of larceny from a warehouse of another firm, the members of both firms being common. Lowry v. State [Tenn.] 81 S. W. 373. Where a statute providing that where an offense is charged for injury to person or property, an erroneous allegation as to the person or owner shall not be material, an indictment need not allege that a corporation was incorporated. Commonwealth v. Vineyard [Ky.] 82 S. W. 289. Evidence that the cotton "had been raised by the family" and was in possession of the husband who subsequently sold it and received the proceeds was sufficient to sustain an allegation that the cotton belonged to the husband. Johnson v. State, 120 Ga. 509, 48 S. E. 199. There is no variance between an indictment which alleges the ownership of property in one, and proofs which show that the general property therein was in that one and another, the special property being in the former. Payne v. State [Ala.] 37 So. 74. Proof of the larceny of property from the agent of the owner sustains an indictment charging a larceny from the owner. Lowry v. State [Tenn.] 81 S. W. 373. The fact that the information alleges that the property belonged to C. W. D. and the proof shows that it belonged to Chas. D. does not warrant a new trial, where the verdict shows that it belonged to C. W. D., and it does not appear that they are different persons. State v. Rooke [Idaho] 79 P. 82. Where the indictment charges the stealing of seed cotton, the property of J, and the proof shows it to have been the property of A, the variance is fatal. Young v. State [Ark.] 83 S. W. 934.

39. Proof showing larceny from one Shuter is not a variance from an indictment charging larceny from one Shutter. State v. Johnson [Wash.] 78 P. 903.

40. Proof that defendant obtained the horse from one L, who had taken him up as an estray without knowing his real owner, is a fatal variance from an indictment charging the ownership and possession of the horse to be in D, the real owner. Williams v. State [Tex. Cr. App.] 84 S. W. 829.

41. Larceny without the knowledge of the person affected, or so suddenly as not to allow time for resistance. Steele v. State [Tex. Cr. App.] 81 S. W. 962.

42. A count for theft from the person, and one for theft of property over the value of fifty dollars may be joined. Flynn v. State [Tex. Cr. App.] 83 S. W. 206.

43. The omission of the word "of" between the words "goods and chattels" and the name of the prosecutor. Bennett v. State [Ark.] 84 S. W. 483.

44. See 2 Curr. L. 701.

45. See 2 Curr. L. 701, n. 93. Where defendant had been previously arrested for horse stealing, and while under arrest for a similar offense subsequently committed was asked why he stole "these horses" replied it was "habit," his reply is admissible, though there is no evidence what horses were referred to by questioner. State v. Blay [Vt.] 58 A. 794. Contradictory statements made by accused while under arrest, and without being warned, as to how he got possession of the stolen property, are of an inculpatory character, and are not admissible, not being offered for purposes of impeachment. Parks v. State [Tex. Cr. App.] 79 S. W. 301. Confession made without warning before arrest held admissible. Gibson v. State [Tex. Cr. App.] 83 S. W. 1119.

46. See 2 Curr. L. 701, n. 94. Bain v. State [Tex. Cr. App.] 79 S. W. 814. Upon proof of defendant's admission to having taken money and his offer to pay it back, he may tender evidence that he was timid and easily frightened, to rebut the presumption of guilt from the alleged proposal to return the money. State v. Lewis, 136 N. C. 626, 48 S. E. 654.

47. See 2 Curr. L. 701, n. 95. If system is

bearing on the question of intent involved in the main charge,[49] statements made to the prosecutor by one with whom defendant was acting in concert when the offense was committed, though made in defendant's absence,[50] and all facts connected with the larceny, when part of the res gestae,[51] are admissible. A local custom in regard to the rights of persons taking up and holding stray cattle cannot be shown.[52] Any fact having a legitimate tendency to prove that a larceny has been committed,[53] or to identify accused with the person in possession of the property, may be shown.[54] A confession of one of two joint defendants is admissible only as against him.[55] The state must show that defendant took the property animo furandi.[56] The prosecutor may testify as to his ownership of the property.[57]

(§ 3) *C. Effect of possession of stolen property.*[58]—The possession of recently stolen property is evidence of guilt.[59] Such possession raises a presumption that

thereby shown. Buck v. State [Tex. Cr. App.] 83 S. W. 387. But evidence of other distinct larcenies, committed at least a year after the offense charged, by different persons under different circumstances and by different means, is inadmissible. Betting at races. State v. Boatright, 182 Mo. 33, 81 S. W. 450. Admission of evidence as to other charges of larceny held proper, where closely interwoven with that on which defendant was being tried. State v. Rooke [Idaho] 79 P. 82.

48. On a theft of cattle, one qualified by long experience may testify at the trial that when found in defendant's possession, the condition of the cattle showed they had been driven hard. Kennon v. State [Tex. Cr. App.] 82 S. W. 518. So one who has testified that in tracking cattle he found evidence that they were scouring may testify that fast driving of fat cattle makes them scour frequently. Id.

49. Evidence of false representation that defendants would assign bills to prosecuting witness admissible in prosecution for grand larceny by embezzlement, though not pleaded in indictment. People v. Rothstein [N. Y.] 72 N. E. 999.

50. State v. Copeman [Mo.] 84 S. W. 942. Admission of statements made to prosecutor by W. before offense was committed and before they met defendant and in no way referring to him, held not prejudicial. Id.

51. Where a buggy harness was with a lap robe and was shown to have been taken at the same time, evidence concerning it was admissible in a prosecution for theft of the lap robe, as part of the res gestae, though it was not traced to the possession of the accused. Thompson v. State [Tex. Cr. App.] 78 S. W. 941. On a prosecution for cattle theft committed in a particular county, evidence of accused's purpose in going to that county three years before the commission of the offense is too remote. People v. Green, 143 Cal. 8, 76 P. 649.

52. Cannot operate to suspend criminal statute, or to overthrow rules of evidence by which commission of offense is proven. Crockford v. State [Neb.] 102 N. W. 70.

53. Testimony of a witness that he had heard that prosecutor had lost certain clothing was admissible when offered solely to show why he had carefully examined goods found in defendant's possession. Stafford v. State [Ga.] 48 S. E. 903. But in a prosecution for horse theft, it was not competent for the state to show what an alleged detective, who had testified for the state, told the officers about the theft of the horse. Lightfoot v. State [Tex. Cr. App.] 78 S. W. 1075. On prosecution for larceny of $20 gold piece, testimony that after arrest witness and policeman found $20 gold piece in room where crime was committed is admissible, though witness cannot identify particular coin as his. State v. Johnson [Wash.] 78 P. 903. On trial for larceny of $100 bill, evidence that accused's wife was in possession of bill of same denomination and description shortly after commission of alleged crime, and that she sent it to the bank to be changed, is admissible as circumstance tending to throw light on the transaction. Buckine v. State [Ga.] 49 S. E. 257.

54. Testimony that a saddle found in defendant's house resembled the saddle that was on the stolen horse when defendant riding the horse called at witness' house was properly admitted. People v. Nunley, 142 Cal. 441, 76 P. 45. Where the greater part of property stolen consisted of money in small denominations, nickels and dimes, it was not error to admit in evidence money of the kind and denomination stolen, and shown to have been in the possession of defendant soon after the crime was committed, though not identified as the money stolen. State v. Coover [Kan.] 76 P. 845. It is not error to admit in evidence articles of clothing traced to the possession of accused, there being sufficient evidence that they are the ones stolen from prosecutor. Williams v. State, 119 Ga. 564, 46 S. E. 837.

55. Court should so instruct jury at time of its admission. Howson v. State [Ark.] 83 S. W. 933. Other defendant should ask instruction limiting scope of confession. Id.

56. Where it was claimed that prosecuting witness by mistake gave accused $100 bill instead of $10 bill, evidence held to authorize jury to find that he took it with knowledge that it was a larger amount than he was authorized to receive. Buckine v. State [Ga.] 49 S. E. 257.

57. Bennett v. State [Ark.] 84 S. W. 483.

58. See 2 Curr. L. 702.

59. Hudson v. State [Ga.] 48 S. E. 903; Stafford v. State [Ga.] 48 S. E. 903; Bone v. State [Ga.] 48 S. E. 986. To be considered

the person having possession is the one who stole it,[60] unless he accounts satisfactorily for his possession,[61] in which case it is incumbent upon the state to show that his explanation is false.[62] The property found in defendant's possession must be identified as that belonging to the prosecuting witness.[63]

(§ 3) *D. Sufficiency of evidence.*[64]—It is incumbent upon the state to sustain each element of the crime by satisfactory proof.[65] Cases turning on the sufficiency of the evidence to support a verdict of guilty are collected in the note.[66]

(§ 3) *E. Instructions.*[67]—Instructions on the liability of principals of the second degree,[68] prosecutor's custody of the property,[69] defendant's good faith in taking,[70] and the presumption arising from possession of the stolen property, are

and weighed by the jury in connection with the other evidence. If a reasonable doubt of guilt is raised even by inconclusive evidence of the innocent possession of stolen goods, the defendant is entitled to the benefit of it. State v. Lax [N. J. Law] 59 A. 18.

60. State v. Carr [Del. Gen. Sess.] 57 A. 370. Such possession together with false statements as to source of its possession is sufficient to make out prima facie case of larceny. Scott v. State, 119 Ga. 425, 46 S. E. 637.

61. State v. Carr [Del. Gen. Sess.] 57 A. 370. One having possession of stolen property may explain the circumstances under which he got possession, showing that his possession is an innocent one. Jackson v. State [Tex. Cr. App.] 79 S. W. 521.

62. State v. Carr [Del. Gen. Sess.] 57 A. 370; State v. Lax [N. J. Law] 59 A. 18. Where the evidence is conflicting as to whether defendant who was not present at the taking, but received the article from the person who took it, had anything to do with the original taking, he was entitled to a charge that if he had nothing to do therewith the jury should acquit him, though he obtained it from the thief, knowing it had been stolen. Jackson v. State [Tex. Cr. App.] 80 S. W. 631.

63. Watson v. State [Tex. Cr. App.] 82 S. W. 514.

64. See 2 Curr. L. 703.

65. State v. Carr [Del. Gen. Sess.] 57 A. 370. Where title to animals, subject to larceny, is sought to be established by brand, a certificate of the recorded brand must be shown. Territory v. Smith [N. M.] 78 P. 42. Value of a domestic animal under the Oklahoma statute need not be proven [art. 1, ch. 20, p. 104, Session Laws 1895]. Woodring v. Territory [Okl.] 78 P. 85. The accused having been charged with the larceny of two articles, and the evidence being insufficient to make out the offense as to one, and there being no proof of the value of the other, a new trial should have been granted. White v. State, 120 Ga. 145, 47 S. E. 547. Where on a trial for theft of a lap robe, there was no controversy that it was worth a dollar, and the court submitted a misdemeanor to the jury, there was no error in failing to submit to the jury some proved value. Thompson v. State [Tex. Cr. App.] 78 S. W. 941.

66. Evidence held **sufficient** to sustain a conviction for theft of cattle. (State v. Greenland [Iowa] 100 N. W. 341; Crockford v. State [Neb.] 102 N. W. 70), horses (Lopez v. State [Tex. Cr. App.] 80 S. W. 1016; Blanco v. State [Tex. Cr. App.] 80 S. W. 370), hogs (Pollard v. State [Tex. Cr. App.] 79 S. W. 26; Jackson v. State [Tex. Cr. App.] 80 S. W. 83; Pate v. State [Tex. Cr. App.] 83 S. W. 695; Gibson v. State [Tex. Cr. App.] 83 S. W. 1119; Bennett v. State [Ark.] 84 S. W. 483; Harvey v. State [Ga.] 49 S. E. 674), and money (Ector v. State, 120 Ga. 543, 48 S. E. 315; Berry v. State [Tex. Cr. App.] 80 S. W. 630; Gill v. State [Ark.] 83 S. W. 912; Buckine v. State [Ga.] 49 S. E. 257; State v. Johnson [Wash.] 78 P. 903). Larceny of money by means of lock game. State v. Copeman [Mo.] 84 S. W. 942. By inducing one to deposit money as security. State v. Buck [Mo.] 84 S. W. 951. Cement. State v. Minck [Minn.] 102 N. W. 207. Larceny from person. People v. Clark [Cal.] 79 P. 434. Likewise to authorize the jury to find that the larceny of a ring, committed by a married woman in company with her husband, was the result of a preconcerted scheme to steal, and that the wife was equally guilty with her husband and was not acting under coercion. Commonwealth v. Adams [Mass.] 71 N. E. 78. Evidence **insufficient** to establish value of property to be over $50.00. Howell v. State [Tex. Cr. App.] 83 S. W. 185. To show fraudulent taking of horse. Young v. State [Tex. Cr. App.] 83 S. W. 808. To sustain conviction for theft of horses (State v. Gordon [Utah] 76 P. 882), cattle (Barnes v. State [Tex. Cr. App.] 81 S. W. 735; Waters v. State [Tex. Cr. App.] 82 S. W. 654), hogs (Walker v. State [Tex. Cr. App.] 81 S. W. 716; Watson v. State [Tex. Cr. App.] 82 S. W. 514), bale of cotton (Edwards v. State [Tex. Cr. App.] 79 S. W. 542), steel trap (Snoga v. State [Tex. Cr. App.] 80 S. W. 625). No sufficient corroboration of accomplice. Buck v. State [Tex. Cr. App.] 83 S. W. 387, 390.

67. See 2 Curr. L. 704.

68. That defendant could be convicted if found guilty of the larceny charged or if he merely aided or abetted therein. People v. Ruiz, 144 Cal. 251, 77 P. 907.

69. An instruction which omitted to state that the complaining witness had the "actual" care, control and management of the cattle stolen is not fatal to a conviction. Kennon v. State [Tex. Cr. App.] 82 S. W. 518.

70. A charge that even though the jury believed that the hog belonged to prosecuting witness, yet that if at the time defendant took the animal he did so under a claim of right and in good faith, honestly believing that it belonged to him, he would not be guilty is proper. Hull v. State [Tex.

referred to below.[71] No instruction on the question of the value of the property stolen is necessary where it is immaterial under the statute.[72] In Texas, failure to instruct as to a particular issue is not error in a misdemeanor case unless a proper request in writing is presented thereon and refused.[73] A defendant who has produced evidence tending to sustain the issues on his part is entitled to have the jury instructed on his theory of the case.[74] It is proper to refuse an instruction distinguishing between grand larceny and robbery.[75] The failure of the court on a prosecution for grand larceny to give the jury a form of verdict permitting it to find defendant guilty of petit larceny is favorable to the accused, and is not a ground for reversal on appeal,[76] particularly where defendant did not request an instruction permitting a conviction for the lesser crime, and the evidence showed that he was guilty of grand larceny if he was guilty of any crime.[77] It is proper to refuse a charge that the jury could not find defendant guilty unless he committed the crime alone, where he is jointly indicted with another for the commission of the crime charged.[78] An instruction defining the difference between larceny and obtaining money under false pretenses is not necessary where there is no evidence that the prosecutor parted with the ownership of the property or consented to defendant's conversion of it.[79]

(§ 3) *F. Trial, sentence and review.*[80]—Where there was a question whether or not witness was a detective or an accomplice with defendant in the theft, the question should have been submitted to the jury.[81] Under an information for larceny from the person of a named individual in the nighttime, a verdict of guilty of larceny from "a" person in the nighttime is insufficient.[82] In Louisiana a sentence of imprisonment in the penitentiary cannot be imposed where the accused has entered a plea of guilty of petit larceny.[83] Notwithstanding the provision in Connecticut that one who steals chattels not exceeding $15 in value shall be given a money fine, a person stealing a horse of less than that value may be given a jail sentence.[84] Sentence of 20 years under statute applicable to third offenses affirmed.[85] One indicted for robbery may be convicted of larceny from the person.[86]

Cr. App.] 80 S. W. 380. A charge that one who, acting on the faith of a statutory provision, takes charge of an animal abandoned by its owner, cares for it, and at the end of three months sells the animal, is guilty of larceny, even though the statute proves unconstitutional, is bad. Kueney v. Uhl [Iowa] 98 N. W. 602. Charge held to have fairly submitted question whether accused took calf into his possession with felonious intent to steal it. Crockford v. State [Neb.] 102 N. W. 70.

71. Murray v. State [Miss.] 36 So. 541; State v. Lax [N. J. Law] 59 A. 18. Charge directing the jury not to consider defendant's recent possession of the property unless the evidence showed that he had personal and actual possession involving a distinct and conscious ownership, held favorable to defendant. Beard v. State [Tex. Cr. App.] 83 S. W. 824.

72. Theft of horse of any value punishable under 2 Ball. Ann. Codes & St. Wash. § 7113. State v. Washing [Wash.] 78 P. 1019.

73. Hull v. State [Tex. Cr. App.] 80 S. W. 380. Code Cr. Proc. art. 723, did not change the rule. Llcett v. State [Tex. Cr. App.] 79 S. W. 33.

74. Evidence insufficient to show that property came into defendant's hands lawfully, so as to entitle him to charge that he could not be convicted if the jury so found. State v. Teller [Or.] 78 P. 980.

75. Robbery involves grand larceny, and jury could not acquit of larceny from person if facts showed robbery. People v. Clark [Cal.] 79 P. 434.

76, 77, 78. People v. Clark [Cal.] 79 P. 434.

79. State v. Copeman [Mo.] 84 S. W. 942.

80. See 2 Curr. L. 705.

81. Lightfoot v. State [Tex. Cr. App.] 78 S. W. 1075.

82. State v. McGee, 181 Mo. 312, 80 S. W. 899.

83. State v. Coston [La.] 37 So. 619.

84. Gen. St. 1902, § 1204. McVelgh v. Ripley [Conn.] 58 A. 701.

85. In re Butler [Mich.] 101 N. W. 630.

86. Under Iowa Code, § 4753, making it robbery to steal and take from the person of another any property, the subject of larceny, by violence, etc. State v. Wasson [Iowa] 101 N. W. 1125.

LASCIVIOUSNESS; LATERAL RAILROADS; LATERAL SUPPORT; LAW OF THE CASE; LAW OF THE ROAD; LEASES; LEGACIES AND DEVISES; LEGAL CONCLUSIONS; LEGATEES; LETTERS; LETTERS OF CREDIT; LEVEES; LEWDNESS, see latest topical index.

LIBEL AND SLANDER.

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§ 1. *Definitions and distinctions.*[87]—The common law definitions[88] are substantially adhered to by statutory definitions, they differing only in minor particulars.[89] A libelous utterance may also be "insulting words" under a statute, but the two are distinct.[90] A libel is a trespass on the case.[91]

§ 2. *Actionable words. A. In general.*[92]—Words, when construed according to their natural and ordinary meaning, may be actionable, either because defamatory upon their face,[93] in which case they are actionable per se,[94] that is without proof of actual damage, the injury being presumed;[95] or because under the circumstances attending their publication, they were capable of a special meaning, rendering them defamatory, in which case special damage must be averred and proved.[96] In determining whether a publication is libelous, the words must

87. See 2 Curr. L. 705.

88. See Cyc. Law Dict. "Libel," "Slander," and see note Actionable Words, 2 Curr. L. 706.

89. See 2 Curr. L. 705, n. 57. Libel is a false and unprivileged publication in writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation [Civ. Code Mont. § 32]. Paxton v. Woodward [Mont.] 78 P. 215. Libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy, tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence or social intercourse [Iowa Code, § 5086]. Morse v. Times-Republican Printing Co. [Iowa] 100 N. W. 867.

90. Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

91. At common law trespass on the case was the form of action to recover damages for libel, and persons charged with a joint libel are joint trespassers within the meaning of the Georgia constitution, and suable within the county of the residence of any one of such joint "trespassers." Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

92. See 2 Curr. L. 706.

93. **Words defamatory on their face:** See monographic note, 2 Curr. L. 707. Where a wrong sued for is the violation of plaintiff's right to go to and remain in a place of public resort, it is immaterial, except on the question of damages, whether the words accompanying the exclusion of such person were of themselves defamatory. Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209.

94. In determining whether particular words are actionable per se, the same rules do not apply to libel as to slander. What would not be actionable without alleging and proving special damage, if merely spoken, may be actionable per se if written, or printed, or otherwise published in a libel. See monographic note, 2 Curr. L. 709.

95. When a false and unprivileged publication possessing the ingredients that stamp it as libelous per se is established, injury is presumed to ensue therefrom, as the direct product of such publication, and affords ground for the allowance of at least nominal damages. Paxton v. Woodward [Mont.] 78 P. 215.

96. **Words actionable on proof of special damage only.** See monographic note, 2 Curr. L. 712. Watters & Son v. Retail Clerks' Union No. 479, 120 Ga. 424, 47 S. E.

be taken in accordance with their general acceptance,[97] and given that meaning which under all the circumstances of their publication may be presumed to have been conveyed to those to whom the publication is made.[98] It is not necessary that the defamatory charge or imputation shall be made in direct and positive terms, or that it shall be made as of the knowledge of the person making it.[99] Mere words of abuse are not actionable in themselves.[1]

(§ 2) *B. Words imputing crime or want of chastity.*[2]—Slanderous words which impute the commission of some crime by the plaintiff involving moral turpitude, or which would subject the offender to an infamous punishment, are actionable per se,[3] and this is true whether such crime is one at common law or has been made so by statute.[4]

At the early common law it was not regarded as actionable to charge a female with unchastity without showing special damage;[5] but by reason of statutory changes and the trend of modern judicial opinion, it is now almost universally held actionable per se to charge another with adultery or fornication.[6]

(§ 2) *C. Words exposing to contempt or ridicule.*[7]—Any false statement

911. Words injuring in business or trade. Jaeger v. Beberdick [N. J. Law] 57 A. 157.

97. See 2 Curr. L. 706, n. 62. Morse v. Times-Republican Printing Co. [Iowa] 100 N. W. 867.

98. See 2 Curr. L. 706, n. 63. Paxton v. Woodward [Mont.] 78 P. 215. It is not necessary that the words make a charge in express terms, for they are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime. Quist v. Klichli [Minn.] 99 N. W. 642. See, also, monographic note, 2 Curr. L. 706, Construction of words.

99. See monographic note, 2 Curr. L. 709, Defamation by irony, insinuation, etc. The assertion of a libel, either by insinuation, irony, question or allusion, is the same as if asserted directly in terms. Wilkens v. Hammann, 43 Misc. 21, 86 N. Y. S. 744. It is a sound rule that the publisher of libelous matters attributed to others is liable to the person injured if such matters are published with evident sanction and are made the basis of offensive insinuations, derogatory expressions of opinion, and injurious characterizations. Mertens v. Bee Pub. Co. [Neb.] 99 N. W. 847.

1. The words spoken were not of themselves the basic wrong. The complaint was for wrongful exclusion from public resort, accompanied by loud and boisterous language. Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209.

2. See 2 Curr. L. 714.

3. Shepherd v. Piper, 98 Me. 384, 57 A. 84. See, also, monographic note, 2 Curr. L. 714, words imputing crime. The words "You damned old ——— you broke in P's house and stole the coal" charge a crime and are actionable per se. Short v. Acton [Ind. App.] 71 N. E. 505. So to charge one with keeping a house of prostitution (Wilkens v. Hammann, 43 Misc. 21, 86 N. Y. S. 744), or a disorderly house, imputes an indictable offense, and is actionable per se (Moore v. Beck [N. J. Law] 58 A. 166). The words "He is a chippy-chaser" impute to plaintiff, he being a married man, the crime of adultery, and are actionable per se. McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506. In an action for libel in charging complainant with taking part in a rebellion against the government of Brazil, where there is no allegation and proof of a statute making such an act a treasonable offense and providing penalties therefor, the court cannot assume that the laws of Brazil are similar to the common law so as to provide a punishment for treason. Crashley v. Press Pub. Co. [N. Y.] 71 N. E. 258.

4. Shepherd v. Piper, 98 Me. 384, 57 A. 84. To say of one's former clerk that he "has robbed me out of all I made. * * * He has robbed me of all the profits, which amounted to several hundred dollars," charges a fraudulent conversion of property within the meaning of the Kentucky Act of 1902, p. 151, c. 66, making such conversion a crime, and is actionable per se. Allen v. Brady [Ky.] 83 S. W. 565. In New York, to charge another with being an anarchist is slanderous. In that state the Penal Code defines criminal anarchy as the doctrine that organized government should be overthrown by force or violence [sections 468a, 468b]. Von Gerichten v. Seitz, 94 App. Div. 130, 87 N. Y. S. 968. Double voting upon a question merely calling for an expression of opinion, and where those voting have no power to determine the question voted upon, is not an offense either at common law or by statute. A declaration declaring upon such conduct does not impute an offense and is demurrable. Shepherd v. Piper, 98 Me. 384, 57 A. 84.

5. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077. See, also, monographic note, 2 Curr. L. 716, Words imputing unchastity or immoral conduct.

6. In Texas, since the passage of Pen. Code 1895, art. 645, spoken words falsely and maliciously or wantonly imputing a want of chastity are actionable without showing special damage. Hatcher v. Range [Tex.] 81 S. W. 289. To accuse another of adultery is slanderous per se. McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506. To say of one that he is living in sin with his housekeeper, an unmarried woman, is actionable per se. Kersting v. White [Mo. App.] 80 S. W. 730.

7. See 2 Curr. L. 715.

published of or concerning another which tends to injure his reputation and thereby expose him to public hatred, contempt, scorn, obloquy or shame, is libelous per se;[8] thus to charge another with being afflicted with venereal disease is slanderous.[9]

(§ 2) *D. Words injuring in business or occupation.*[10]—Any false and malicious statement published concerning another is libelous per se when it tends to injure him in his business,[11] and so of publications reflecting on the character or qualifications of a professional man,[12] or of a public officer in the conduct of his office.[13] But words to be actionable on this ground must touch the plaintiff in his office, profession or trade,[14] and be shown to have been spoken of the party in relation thereto and to be such as would prejudice him therein.[15]

8. Morse v. Times-Republican Printing Co. [Iowa] 100 N. W. 867. Newspaper publication that a man is a eunuch (Eckert v. Van Pelt [Kan.] 76 P. 909, 66 L. R. A. 266), that he is a common liar (Paxton v. Woodward [Mont.] 78 P. 215), that plaintiff's wife had announced that her life had been made unhappy because plaintiff neglected everything, her included, in his absorbing pursuit of millions and that he sacrificed everything to his one passion (Woolworth v. Star Co., 97 App. Div. 525, 90 N. Y. S. 147). To accuse one of being a secret slanderer and a scandal monger, with betraying his friends, and telling lodge secrets (Patton v. Cruce [Ark.] 81 S. W. 380), to say of one that in attempting to collect a bill he threatened violence with a pistol and was arrested (Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041). So to publish of plaintiff: "Savant cannot make a living. Old Oxford professor and family in sad straits. He is living with his young wife and two small children in a house which has not a single door or window inclosed. He is too poor to finish his dwelling and too proud to ask aid" is libelous per se. Martin v. Press Pub. Co., 93 App. Div. 531, 87 N. Y. S. 859. A publication describing plaintiff as "an Englishman of more or less indifferent repute" is not libelous per se where there is no innuendo alleging the libelous meaning of such words. Crashley v. Press Pub. Co. [N. Y.] 71 N. E. 258. It is not necessary that crime be imputed to the plaintiff to constitute libel. It is enough if the printed article be such that its publication naturally tends to brand him with dishonesty or other conduct or characteristic deserving the contempt or reprobation of right minded people. To say that "Charles was not in Boone for his health. Charles was in Boone for the other fellow's health. The other fellow's health is all that Charles left in Boone. He took everything else the other had. * * * Cholly was strictly onto his job just the same. He got away with over $500 good hard currency" is libelous per se. Morse v. Times-Republican Printing Co. [Iowa] 100 N. W. 867.

9. McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506. See 2 Curr. L. 717, monographic note, Words imputing disease.

10. See 2 Curr. L. 717.

11. For a mercantile agency to report of a business house that its bank account "is not classed as an entirely desirable one," if false, is actionable. Mower-Hobart Co. v. Dun & Co., 131 F. 812. A publication beginning "Hints to Advertisers—This is from the fake trade journal published at St. Louis" is libelous per se. Midland Pub. Co. v. Implement Trade Journal Co. [Mo. App.] 83 S. W. 298. While to characterize another as extravagant may not be actionable per se, yet to charge that one's extravagance has brought to bankruptcy a company or enterprise may be actionable when said of one whose business it is to act as manager of large enterprises in which others are interested. Daily v. De Young, 127 F. 491; Daily v. Engineering & Min. Journal, 94 App. Div. 314, 88 N. Y. S. 6. A mere libel or defamation of business reputation, unaccompanied by threats, intimidation or coercion, or by any direct attack upon property or conduct of business, or by any direct or indirect creation of liability on the part of the complainant, is not within the equitable jurisdiction of the circuit court of the United States. Edison v. Thomas A. Edison Jr., Chemical Co., 128 F. 957. The placing of a firm of merchants on an "unfair list" by Clerks' Union is not libelous per se. Watters & Son v. Retail Clerks' Union No. 479, 120 Ga. 424, 47 S. E. 911. So of "blacklisting" an employe. Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003. To charge one with being a member of a labor organization and that he is a labor agitator is not libelous per se. Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003. To allege that a trade journal is a fake is to charge theft, and since a corporation cannot be guilty of theft, the libel is on the manager of the paper. Midland Pub. Co. v. Implement Trade Journal Co. [Mo. App.] 83 S. W. 298.

12. Where a newspaper publication ridicules the private life of an author, and represents him as a presumptuous literary freak, and is manifestly an attack upon his reputation or business, it is libelous per se and cannot be justified on the ground that it is a jest. Triggs v. Sun Print. & Pub. Ass'n [N. Y.] 71 N. E. 739.

13. To publish of a director of the state prison that he bought mules for $27 per head more than they were worth, and paid for horses double what they were worth charges a breach of official duty and is actionable per se. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

14. See monographic note, 2 Curr. L. 718; Cranfill v. Hayden [Tex.] 80 S. W. 609. See same case 75 S. W. 573, 2 Curr. L. 717, n. 73. A minister of the gospel is one following a profession within the meaning of the Georgia Code, which makes a person liable with-

(§ 2) *E. Disparagement of property or title.*[16]—A bona fide claim of title to plaintiff's property is not actionable.[17] Words disparaging property, to be actionable on that basis, must be spoken of the property and not of the person of plaintiff,[18] and a publication relating to the value of shares of stock which plaintiff had advertised to sell at public sale must be shown to have been false and malicious to have caused special pecuniary damage.[19]

§ 3. *Malice.*[20]—Malice, express or implied, is an essential ingredient of libel,[21] but where the language complained of is actionable per se, both malice and injury are presumed.[22] But the malice which the law thus implies and presumes to exist is malice in law, or legal malice, as distinguished from malice in fact, or actual malice.[23] Where the publication is not actionable per se, actual malice must be shown.[24] The presence or absence of actual malice becomes material only as a circumstance affording a basis for increasing or diminishing the amount of recovery, and in cases involving the defense of privileged publication.[25]

§ 4. *Privilege and privileged communications.*[26]—Not all communications which may tend to injure are actionable. Thus any matter or thing pertinent[27] and material[28] to a judicial proceeding is for reasons of state policy absolutely privileged,[29] even if uttered maliciously.[30] The privilege extends to a full and

out proof of special damage for words spoken of another in reference to his "profession" calculated to injure him therein. Flanders v. Daley, 120 Ga. 885, 48 S. E. 327. It is not necessary that such minister should at the time the words are spoken be receiving compensation for his services. Id. To say of a school teacher that he is "noted," though used in an invidious sense, and, referring to a particular district, "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher, "this district knows when it has had enough, so it turned the gentleman down," does not disparage him or impute to him a lack of any qualities or qualifications which are prerequisites to the due fulfillment of the duties of a school teacher, and is not actionable per se. Paxton v. Woodward [Mont.] 78 P. 215.

15. Paxton v. Woodward [Mont.] 78 P. 215. To say of plaintiff that he had an adopted daughter whom he was accustomed to go off and live with for periods of a week at a time, leaving his wife at home alone, is not actionable per se, in the absence of an allegation that the words were spoken of plaintiff in reference to any occupation or business. Cassavoy v. Pattison, 93 App. Div. 370, 87 N. Y. S. 658.

16. See 2 Curr. L. 720.

17. Plaintiff must show the words were maliciously published. Butts v. Long [Mo. App.] 80 S. W. 312.

18. A publication to the effect that a hotel kept by plaintiff was a resort for questionable characters, and that one of such characters probably committed a certain murder, referred to the property of plaintiff and not to plaintiff himself. Maglio v. New York Herald Co., 93 App. Div. 547, 87 N. Y. S. 927. A publication stating that "Mr. Crooked [Calvin] K. Reifsnider gets it in the neck again" is a libel of the named person individually and cannot be enlarged by innuendo to apply to a corporation of which he is manager, in the absence of an allegation that he and the corporation are one and the same, or that people generally so understood. Midland Pub. Co. v. Implement Trade Journal Co. [Mo. App.] 83 S. W. 298.

19. Young v. Geiske, 209 Pa. 515, 58 A. 887.

20. See 2 Curr. L. 720.

21. See 2 Curr. L. 720, n. 76. Under the Montana statute, defining libel, the existence of malice is not a necessary ingredient to entitle the plaintiff to recover. Paxton v. Woodward [Mont.] 78 P. 215.

22. See 2 Curr. L. 720, n. 77. Butler v. Barret, 130 F. 944; Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867; Short v. Acton [Ind. App.] 71 N. E. 505; McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506.

23. Wrege v. Jones [N. D.] 100 N. W. 705. Malice as that word is used in cases of slander and libel does not necessarily imply actual evil intent, but rather the want or absence of any legal excuse for the speaking or publication of the injurious words. McDonald v. Nugent, 122 Iowa, 651, 98 N. W. 506; Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867.

24. It is sufficient to justify a recovery for a libel conditionally privileged if there is any degree of actual malice in the motives inspiring it, though there may also be a lawful motive. Cranfill v. Hayden [Tex.] 80 S. W. 609. Evidence that defendant did not intend to charge or be understood as charging plaintiff with the crime imputed is admissible to negative malice in fact as distinguished from malice in law. Short v. Acton [Ind. App.] 71 N. E. 505.

25. Paxton v. Woodward [Mont.] 78 P. 215. The right to recover being shown, and the presence of malice wanting, actual or compensatory damages only can be awarded; but join to such right of recovery the element of malice, and punitive or exemplary damages may be added. Id.

26. See 2 Curr. L. 721.

27. Laing v. Mitten, 185 Mass. 233, 70 N. E. 128.

28. Monroe v. Davis [Ky.] 82 S. W. 450.

29. Statements made to a magistrate, having jurisdiction to entertain a complaint,

correct report of judicial proceedings, but there must be no prejudicial comment,[31] and where there is inaccuracy in the report of a judicial case, defendant may show that reasonable care was used.[32]

Again, whenever an author or publisher acts in the bona fide discharge of a public[33] or private duty,[34] legal or moral,[35] or in the prosecution of his own rights,[36] his statements are privileged, but only qualifiedly so.[37] When a communication is privileged, it does not lose its privileged character by reason of incidentally coming to the attention of others than those for whom it was intended.[38] Whether an alleged slanderous communication is privileged is a matter of law for the court to determine, when the circumstances and the occasion of the communication are undisputed.[39]

that defendant had inflicted an assault and battery, and testimony to the same effect upon a trial, are spoken in the course of judicial proceedings, and privileged. Laing v. Mitten, 185 Mass. 233, 70 N. E. 128. But libelous matter published of a court after the conclusion of a cause is not within the privilege. Burdett v. Com. [Va.] 48 S. E. 878.

30. Laing v. Mitten, 185 Mass. 233, 70 N. E. 128.

31. Striking headlines to a newspaper report characterizing plaintiff as a "traitor, seducer and perjurer" are actionable. Dorr v. U. S., 195 U. S. 138, 49 Law. Ed. —.

32. Use of opinion filed by the court as the source of the newspaper's information sustained. O'Connell v. Boston Herald Co., 129 F. 839.

33. Newspaper reports or criticisms: It is universally understood that when a citizen offers himself as a candidate for public suffrage he invites criticism of his character to the extent that such criticism is directed to his qualifications for the office to which he aspires. His obligation to submit to such criticism cannot be determined by his own feelings or belief as to the fairness and justness of the criticism. The rule is based upon considerations of public policy, namely, that the merits and demerits of public men, including candidates for public office, shall be freely canvassed, to the end that the voters may make a safe and intelligent selection. Mertens v. Bee Pub. Co. [Neb.] 99 N. W. 847. But this privilege extends only to criticisms or expressions of opinion based upon sufficient foundation, such as admitted or proven facts, and not to false allegations of fact. The better opinion is to the effect that when a publisher undertakes to state a fact with reference to another person which would be defamatory of the person and injurious to his reputation, there is no doctrine of privilege to shield the publisher for such misstatement of fact. If, on the other hand, the publisher, upon certain proved or admitted facts, expresses his opinion, however severe or uncomplimentary such opinion may be, the rule of privilege will extend its protection in the absence of express malice. Id. An insurance agent as such is not a public officer, nor is his character a matter of such general public interest as to bring him within the scope of the privilege extended in this class of cases. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867. If allegations of fact in a newspaper charging a candidate for office with a criminal offense are false, they are not privileged, and good faith and probable cause are not a defense. Star Pub. Co. v. Donahoe [Del.] 58 A. 513, 65 L. R. A. 980. "Liberty of the press" discussed and defined. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867.

34. Reports of a mercantile agency will be privileged when furnished to those having an interest in the matter. But the privilege is lost when the report is furnished to subscribers generally. Mower-Hobart Co. v. Dun & Co., 131 F. 812. A statement made by a husband to a friend, to whom the husband had applied to care for the children, that he was about to leave his wife because of infidelity, is not privileged. Stayton v. State [Tex. Cr. App.] 78 S. W. 1071. The statement of a railroad company that a person was a labor agitator could not amount to a libel where the statement was made in answer to an inquiry addressed to it by another railroad which contemplated employing him. Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003. Communications made in the course of ecclesiastical discipline are not of the absolutely privileged class [Code 1896, § 5065]. Grant v. State [Ala.] 37 So. 420.

35. A communication to a society of persons associated for the promotion of morals that one of its members is living in sin with an unmarried woman is privileged. Kersting v. White [Mo. App.] 80 S. W. 730. And it is not material that the statement was made, not at a meeting of the society, but to one of the members the day previous to a meeting. Id. Nor is it material that the society was not a church but a voluntary association of persons pledged to maintain good morals. Id.

36. Statements published in good faith by one to protect his own interests in a matter where he is concerned, as well as to protect the interests of another whom he represents as agent, are privileged when the character of the publication is such as makes it reasonably necessary under the circumstances to accomplish the desired purpose. A willful falsehood cannot be uttered in good faith, and therefore can never be the subject of a privileged communication. Holmes v. Clisby [Ga.] 48 S. E. 934.

37. Flanders v. Daley, 120 Ga. 885, 48 S. E. 327.

38. Mertens v. Bee Pub. Co. [Neb.] 99 N. W. 847.

39. Kersting v. White [Mo. App.] 80 S. W. 730.

§ 5. *Publication.*[40]—Publication is an essential element of libelous defamation,[41] and the sending of a letter through the mail is not a publication.[42] But it has been said there may be publication before or after the mailing of the letter, as by dictation to a stenographer.[43] Every repetition or republication of a libel is a new libel,[44] and a suit may be maintained in any county in which the newspaper is circulated, though published in another county.[45]

§ 6. *Justification.*[46]—That the libelous matter was copied from another paper is no justification.[47] Good faith, when so pleaded, is available in mitigation of damages, but not as a defense,[48] nor is it a defense that defendant did not intend to make the charge which he did in fact make,[49] nor can actionable words be justified on the ground that they were intended as a jest.[50] That plaintiff has libeled defendant does not defeat his cause of action.[51]

§ 7. *Damages,*[52] *and the aggravation and mitigation thereof. A. Actual or compensatory damages.*[53]—Upon proof of words actionable per se and their application to plaintiff, he is entitled to such compensatory damages as are attributable to the publication,[54] without proof of special damage,[55] though in an action of slander in one's business, prospective profits are speculative and cannot be considered.[56] Shame and mortification are elements of and may constitute grievous mental suffering, and are elements of actual damage.[57] Where only compensatory damages can be recovered, the standing of the defendant is immaterial.[58]

(§ 7) *B. Punitive or exemplary damages.*[59]—To warrant a recovery of punitive or exemplary damages, the presence of actual malice must be established,[60] though a newspaper publisher may be cast in punitive damages, though unaware

40. See 2 Curr. L. 722.

41. Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

42. Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692. Especially if sent to the person libeled, with no reason to suppose that it will be opened and read by any one else before he has received and read it. Rumney v. Worthley [Mass.] 71 N. E. 316. See 2 Curr. L. 723, n. 97.

43. This may be by dictation of the letter to the stenographer, writing out on typewriter and subsequent signature by the author, or by making contents of the letter known to others before or after it was mailed, or in a number of other ways (dictum). Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

Note: The same was held in Gambrill v. Schooley, 93 Md. 48, following Pullman v. Hill, 1 Q. B. Div. 524; but was denied in Owen v. Ogilvie Pub. Co., 32 App. Div. [N. Y.] 465. The negative seems supported by better reason. See comment in 8 Law Notes, 467.

44. Each publisher is liable to the same extent as if the calumny originated with him. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867; Kersting v. White [Mo. App.] 80 S. W. 730. But a repetition of defamatory words, though in the presence of others made at the special request of plaintiff, does not constitute such a legal injury as will give rise to an action. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077.

45. Tingley v. Times Mirror Co., 144 Cal. 205, 77 P. 918.

46. See 2 Curr. L. 723.

47. Butler v. Barrett, 130 F. 944; Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867.

48. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867; Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165. The question whether defendant exercised good faith, made an honest mistake and had reasonable grounds for believing the publication true, is under the North Carolina statute for the jury. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

49. Short v. Acton [Ind. App.] 71 N. E. 505.

50. Triggs v. Sun Print. & Pub. Ass'n [N. Y.] 71 N. E. 739.

51. See 2 Curr. L. 722, n. 90. Patton v. Cruce [Ark.] 81 S. W. 380.

52. See, generally, Damages, 3 Curr. L. 997.

53. See 2 Curr. L. 723.

54. See 2 Curr. L. 723. Wrege v. Jones [N. D.] 100 N. W. 705.

55. See 2 Curr. L. 723. Paxton v. Woodward [Mont.] 78 P. 215.

56. Hume v. Kusche, 42 Misc. 414, 87 N. Y. S. 109.

57. Graybill v. De Young, 140 Cal. 323, 73 P. 1067. Mental suffering may be considered by the jury from their general knowledge in assessing damages. Butler v. Barret, 130 F. 944; Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209.

58. Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

59. See 2 Curr. L. 723.

60. Wrege v. Jones [N. D.] 100 N. W. 705; Hume v. Kusche, 42 Misc. 414, 87 N. Y. S. 109.

of the publication.[61] Where the slander was unprivileged, plaintiff need not prove the words spoken were false to authorize a recovery of smart money.[62]

(§ 7) *C. Aggravation of damages.*[63]—The circulation of defendant's newspaper is material on the question of aggravated damages.[64] Where the defendant interposes substantial evidence tending to support a plea of justification, that the proof fails to support the plea does not warrant a holding as matter of law that the plea was made in bad faith.[65]

(§ 7) *D. Mitigation of damages.*[66]—The fact that before the publication on which suit is brought plaintiff libeled defendant,[67] that defendant honestly believed the published charge was true,[68] that the libelous matter was copied from another newspaper,[69] and an offer to retract, if made before the commencement of suit, may all be considered in mitigation of damages.[70] Likewise it is open to defendant to show the bad character of plaintiff.[71] The mitigating circumstances, however, must have been known to defendant at the time of publication.[72]

(§ 7) *E. Inadequate and excessive damages.*[73]—Appellate courts will not interfere with the award of a jury unless the amount awarded is so grossly inadequate or excessive as to shock the moral sense and raise a reasonable presumption that the jury was actuated by passion or prejudice.[74]

§ 8. *Persons liable.*[75]—A corporation may be liable for libel,[76] and under the Texas statute, the wife may maintain an action of slander against the husband.[77] It is no defense that the defamatory matter was published by another person or newspaper, and merely copied, with or without credit,[78] for one who circulates it is also liable.[79]

61. Graybill v. DeYoung, 140 Cal. 323, 73 P. 1067. See 2 Curr. L. 724, n. 10.

62. Hume v. Kusche, 42 Misc. 414, 87 N. Y. S. 109.

63. See 2 Curr. L. 724.

64. Graybill v. DeYoung, 140 Cal. 323, 73 P. 1067, citing Gilman v. McClatchy, 111 Cal. 614.

65. Moore v. Beck [N. J. Law] 58 A. 166.

66. See 2 Curr. L. 724.

67. Patton v. Cruce [Ark.] 81 S. W. 380.

68. As affecting the amount of exemplary damages, the truth of the charge or defendant's honest belief therein may be offered in mitigation. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811; Morse v. Times-Republican Printing Co. [Iowa] 100 N. W. 867; Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165. See 2 Curr. L. 724, n. 18.

69. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867.

70. Dinkelspiel v. New York Evening Journal Pub. Co., 42 Misc. 74, 85 N. Y. S. 570.

71. Morning Journal Ass'n v. Duke [C. C. A.] 128 F. 657. A cross-examination therefore which elicited that plaintiff had been a gambler for large stakes was proper, and its exclusion from consideration by the jury is reversible error. Best v. Kessler [C. C. A.] 130 F. 24.

72. Butler v. Barret, 130 F. 944; Dinkelspiel v. New York Evening Journal Pub. Co., 42 Misc. 74, 85 N. Y. S. 570. In order that the publisher of a libel may show in mitigation of damages the publication of similar libelous articles in other newspapers, it must be shown that he saw the articles in such newspapers, and was influenced thereby or believed them to be true. Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263.

73. See 2 Curr. L. 725.

74. Morning Journal Ass'n v. Duke [C. C. A.] 128 F. 657. $750 held excessive for attempted wrongful exclusion from public resort. Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209. $4,500 excessive for charging county election commissioners with misconduct in making appointments. Evening Post Co. v. Rhea [Ky.] 81 S. W. 273. $1,000 not excessive for accusing another with being a swindler, a forger, and a double thief in the sum of $70,000. Graybill v. DeYoung, 140 Cal. 323, 73 P. 1067. $500 not excessive where merchant followed customer into street and excitedly accused her of not having paid for goods taken from store, thereby attracting large crowd. Dunlevy v. Wolferman [Mo. App.] 79 S. W. 1165.

75. See 2 Curr. L. 725.

76. By agent acting within scope of his employment and in the course of business of the corporation. Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

77. Stayton v. State [Tex. Cr. App.] 78 S. W. 1071.

78. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867; Butler v. Barret, 130 F. 944. Nor is the rule in any manner changed or its effect avoided by the fact that the party who republishes the libel adds thereto "palliative" comments. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867. There is a distinction between the liability of a publisher who states upon his own authority and under his own sanction libelous matters which are proven to be false, and the liability of one who merely pretends to quote false and libelous mat-

§ 9. *Conditions precedent.*[80]—A precedent demand for retraction is required in some states,[81] but the right to recover cannot be abridged by a legislative enactment that a retraction shall be full compensation for the injury.[82] In Colorado an action for libel cannot be maintained unless commenced within one year after the cause of action accrued.[83]

§ 10. *Pleading; declaration, complaint, or petition.*[84]—The declaration or complaint must set out the particular words used,[85] allege that they were published of and concerning plaintiff,[86] with reference to his business or occupation where that is the basis of the suit,[87] and where the matter complained of is not actionable per se, must allege special damage,[88] specifically setting forth the facts.[89] Plaintiff in an action for slander to title must show title.[90] A petition which states the actual damages at $1,000 and the punitive damages at $9,000 sufficiently complies with a code provision that where exemplary damages are recoverable, the petition shall state separately the amount thereof.[91] A complaint that fails to charge publication in the state will not justify service on a foreign corporation within the state.[92] Common-law libel and an action for insulting words under the statute cannot be blended in one count; but a publication containing insulting words may be declared on under the statute, although it is libelous at common law.[93]

Colloquium and innuendo.[94]—When the words are unequivocal in their import and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning;[95] but if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended,

ters spoken by others. Mertens v. Bee Pub. Co. [Neb.] 99 N. W. 847.

79. See Mack v. Sharp [Mich.] 101 N. W. 631.

80, 81. See 2 Curr. L. 725.

82. Chapter 249, p. 439, Laws 1901 of Kansas, requiring a retraction by newspapers, is unconstitutional. Hanson v. Krehbiel, 68 Kan. 670, 75 P. 1041. But a statute which provides that a retraction upon notice shall entitle a plaintiff to but actual damages is constitutional. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

83. Mills' Ann. St. § 2901; Evans v. Republican Pub. Co. [Colo. App.] 78 P. 311.

84. See 2 Curr. L. 725. Complaint for libel held sufficient. Quist v. Kiichli [Minn.] 99 N. W. 642.

85. See 2 Curr. L. 725, n. 33.

86. See 2 Curr. L. 725, n. 34. An allegation that the printed language was used of and concerning the plaintiff imports that those who read it so understood. Eckert v. Van Pelt [Kan.] 76 P. 909.

87. An allegation that the words complained of were spoken in reference to plaintiff's "office or profession of a minister of the gospel, he being then and there a local preacher of M. E. Church South," is a sufficient averment as against a demurrer raising the objection that the plaintiff was not following a profession. Flanders v. Daley, 120 Ga. 885, 48 S. E. 327. In an action for slander of one in his business, it must be alleged that the words were spoken of plaintiff in connection with his occupation or business. Hume v. Kusche, 42 Misc. 414, 87 N. Y. S. 109; Cassavoy v. Pattison, 93 App. Div. 370, 87 N. Y. S. 658.

88. See 2 Curr. L. 725. Watters & Son v. Retail Clerks' Union No. 479, 120 Ga. 424, 47 S. E. 911. Where it is necessary to allege special damages in order to set out a cause of action, the particular loss or injury must be distinctly stated. The ad damnum clause is not the equivalent of such an averment. Id.

89. See 2 Curr. L. 725, n. 35. Statutes dispensing with the necessity of showing by the statement of extrinsic facts, the application to the plaintiff of alleged defamatory words published in an alleged libel do not dispense with the allegation of such facts as are necessary to show the meaning or publication of ambiguous language or language not actionable per se. Hamilton v. Lowery [Ind. App.] 71 N. E. 54.

90. Butts v. Long [Mo. App.] 80 S. W. 312.

91. Midland Pub. Co. v. Implement Trade Journal Co. [Mo. App.] 83 S. W. 298.

92. Averments that the libel was published in a certain state and other states are not sufficient. Doherty v. Evening Journal Ass'n, 90 N. Y. S. 671.

93. Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692.

94. See 2 Curr. L. 726.

95. Paxton v. Woodward [Mont.] 78 P. 215. See 2 Curr. L. 726, n. 44. The purpose of an innuendo is to set forth by necessary averments extrinsic facts, or to explain the meaning of doubtful words; but such averments are not useful or controlling where the meaning of the language is plain and the explanation of the words immaterial and unnecessary. Quist v. Kiichli [Minn.] 99 N. W. 642.

or set forth such extraneous facts by proper averments.[96] Where the plaintiff by innuendo ascribes a particular meaning to the words complained of, he is bound by such meaning and cannot at the trial resort to another.[97]

Plea or answer.[98]—Under the North Dakota statute[99] a defendant in an action for slander or libel may answer by way of justification and mitigation, either or both, or may plead mitigating circumstances in connection with a general denial.[1] The justification must be as broad as the libel.[2] Allegations in an answer that plaintiff has unsuccessfully sued other publishers for libel are immaterial,[3] and one slander cannot be set up as a counterclaim against another slander.[4]

Demurrer.[5]—It is ground for demurrer that it does not appear that the statutory notice for retraction was given,[6] and a demurrer raising the question whether the publication complained of is libelous per se is not frivolous.[7] Where an answer contained first a general denial, then "for a first, separate, and distinct defense to the complaint herein" matter solely by way of justification, and finally alleged in a distinct paragraph a reiteration of the matter stated under the separate defense of justification "as a partial defense in mitigation," plaintiff had the right to test on demurrer the sufficiency of the plea of justification as a complete defense, apart from the partial defense in mitigation.[8]

Bill of particulars.[9]

Issues, proof and variance.[10]—In slander it is unnecessary for plaintiff to prove that the words alleged to have been spoken were false,[11] and where the publication is libelous per se, malice and injury are presumed, and no other proof need be offered than the publication itself and the identification of the plaintiff as the person assailed.[12] To constitute justification, the supporting proof must be as broad as the charge.[13]

§ 11. *Evidence.*[14]—Where matters alleged to be libelous are conditionally privileged, the onus of proving their falsity,[15] and that they were published with malice,[16] is on plaintiff; but where the published matter is actionable per se, the burden is on defendant to prove its truth or matters in mitigation.[17]

96. Paxton v. Woodward [Mont.] 78 P. 215. Sec 2 Curr. L. 726, n. 48. Complaint alleging that defendant by whom plaintiff had previously been employed had "blacklisted" plaintiff showed no cause of action in absence of allegation that blacklisting imputed the commission of a crime or other conduct exposing to public hatred and disgrace. Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003.

97. Hamilton v. Lowery [Ind. App.] 71 N. E. 54. See 2 Curr. L. 726, n. 46. Whenever a specific meaning is given to the terms of a libel or slander by connecting it with previous matter, the whole must be proved as being essential to the nature and identity of the charge. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077. And where the extrinsic matter is required to be proved with its connection with the words spoken as a whole in order to support the cause of action, it is indispensable that such matter should be submitted to and found by the jury to exist as alleged. Id.

98. See 2 Curr. L. 727.

99. Rev. Codes 1899, § 5289.

1. Wrege v. Jones [N. D.] 100 N. W. 705.

2. See 2 Curr. L. 727, n. 53. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867; Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 262. Where the imputation complained of is a conclusion from certain facts, the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge. Paxton v. Woodward [Mont.] 78 P. 215.

3. Burnham v. Franklin, 44 Misc. 299, 89 N. Y. S. 917.

4. Wrege v. Jones [N. D.] 100 N. W. 705.

5. See 2 Curr. L. 727.

6. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811.

7. Daily v. De Young, 127 F. 491.

8. Jansen v. Fischer, 90 N. Y. S. 346.

9, 10. See 2 Curr. L. 727.

11. Hume v. Kusche, 42 Misc. 414, 87 N. Y. S. 109.

12. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867.

13. Mere evidence that plaintiff's record was pigeonholed at police headquarters is not sufficient to show that he was a "rogue's gallery man." Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263.

14. See 2 Curr. L. 728.

15. Hume v. Kusche, 42 Misc. 414, 87 N. Y. S. 109; Cranfill v. Hayden [Tex.] 80 S. W. 609.

16. Mertens v. Bee Pub. Co. [Neb.] 99 N. W. 847; Kersting v. White [Mo. App.] 80

Any fact tending to establish malice,[18] or the lack of it,[19] the truth or falsity of the charge,[20] and the extent of plaintiff's injury proximately resulting from the publication, may be shown,[21] and evidence of plaintiff's general, social and business standing is admissible.[22]

§ 12. *Trial.*[23]—Whether a publication is actionable on its face,[24] or when given a particular meaning ascribed to it by the plaintiff or defendant,[25] or whether the matter complained of will bear the meaning ascribed to it by innuendo,[26] and whether it was privileged,[27] are questions of law; but whether ambiguous

S. W. 730. The doctrine of privilege operates to change the ordinary rules with respect to libelous matter to this extent only: it removes the presumption of malice, and makes it incumbent on the party complaining to show malice. This may be done by the construction of the written matter constituting the alleged libel, or by extrinsic facts and circumstances from which the existence of malice may fairly be inferred. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867.

17. Osborn v. Leach, 135 N. C. 628, 47 S. E. 811. Where the truth of words alleged to be slanderous is pleaded as a defense, the burden is on defendant to prove them true. Hume v. Kusche, 42 Misc. 414, 87 N. Y. S. 109.

18. Where defendant sought to extenuate the publication by showing that the article was copied from another paper, evidence was admissible to show that such paper published a full retraction five days before the publication by defendants. Butler v. Barret, 130 F. 944. Utterances made by defendant prior to the one prosecuted for, imputing to prosecutrix adulterous conduct, are relevant as tending to prove that like utterances with which he is charged, if made in fact, were malicious. Grant v. State [Ala.] 37 So. 420. A man's record at police headquarters is admissible in an action for libelling him only on the question of malice. It is not evidence of the facts therein stated so as to constitute justification. Carpenter v. New York Evening Journal Pub. Co., 96 App. Div. 376, 89 N. Y. S. 263. Plaintiff may, if he elect to do so, rely solely upon the libelous character of the publication to show malice, but he is not limited to it. Evidence is admissible of other defamatory charges, and of statements made by defendant, even though after the commencement of the action, which may tend to evince a wish to vex, annoy or injure plaintiff, but for the purpose only of proving malice, and not as affording a basis of extra compensation therefor. Paxton v. Woodward [Mont.] 78 P. 215. Statements made by defendant at the same time, or shortly before or after, those charged in the indictment, are admissible to show intent. Stayton v. State [Tex. Cr. App.] 78 S. W. 1071.

19. In an action for libel or slander, the right to recover punitory damages depends upon the presence of actual malice; and where such damages are claimed, the presence or absence of actual malice, and its degree, is a vital and material question. In such cases the defendant may, under a sufficient answer, testify directly to his intent or motive, and also as to facts and circumstances which were within his knowledge and relied upon by him which tend to characterize his motive. Wrege v. Jones [N. D.] 100 N. W. 705. In an action for libel in charging plaintiff, president of an insurance company, with perjury in making his report, allegations of answers that defendant has examined the books containing the reports of the company and found the questions answered differently in different reports for the same year, are admissible on the question of malice and in mitigation of damages. Burnham v. Franklin, 44 Misc. 299, 89 N. Y. S. 917. But an allegation that the company had been excluded from doing business in certain states is immaterial, where such exclusion did not relate to the libelous charge. Id.

20. Where, in an action for a libel charging plaintiff with failure to sufficiently provide for his family, the main issue was such suitable provision, the opinion of a witness from whom plaintiff had purchased certain bills of clothing for his sons as to whether the clothing purchased was a liberal provision for the sons was inadmissible. McCloskey v. Pulitzer Pub. Co. [Mo. App.] 80 S. W. 723.

21. In an action for insulting words, evidence to the effect produced by an article other than that alleged, and for which the defendant was not shown to be responsible, is inadmissible. Sun Life Assur. Co. v. Bailey, 101 Va. 443, 44 S. E. 692. Plaintiff to prove special damages from a libel may show what his income from his business had been up to the time of the libel, and how it had fallen off immediately thereafter. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867.

22. Morning Journal Ass'n v. Duke [C. C. A.] 128 F. 657.

23. See 2 Curr. L. 729.

24. See ante, § 2A; see, also, 2 Curr. L. 729, n. 79. It is not error that the trial court submitted to the jury the question whether the libelous article complained of was actionable on its face, there having been no request that the court determine the question as a matter of law. Olson v. Aubolee [Minn.] 99 N. W. 1128.

25. Monographic note, see 2 Curr. L. 706, Province of court and jury. Morning Journal Ass'n v. Duke [C. C. A.] 128 F. 657. In Missouri, under the constitution, art. 2, § 14, the jury is made the judge of whether a publication is libelous. Duncan v. Williams [Mo. App.] 81 S. W. 1175.

26. Hamilton v. Lowery [Ind. App.] 71 N. E. 54.

27. Kersting v. White [Mo App.] 80 S. W. 730. See 2 Curr. L. 729, n. 80.

words, or words decided by the court to be capable of the special meaning ascribed to them, were in fact used and understood in such special sense, is a question of fact for the jury, taking into consideration all the circumstances under which they were uttered or published.[28]

It is unnecessary in instructing in a libel suit to point out the particular words in a written article which constitute the libel, but it is sufficient to charge that the article as a whole was libelous,[29] and an instruction that in estimating damages the jury have a right to consider the natural and necessary consequences of the publication upon plaintiff is correct.[30]

§ 13. *Criminal* slander in Texas must be uttered maliciously and wantonly as well as falsely.[31] One who circulates a libel may be guilty of the offense denounced by the Michigan statute,[32] making it a misdemeanor to falsely charge another with the commission of a crime.[33]

LICENSES.[34]

§ 1. Power to Require and Validity of Statutes (428).
§ 2. Interpretation of Statutes and Ordinances and Persons Subject (430).
§ 3. Assessment and Recovery; Prosecutions for Failure to Pay (431).
§ 4. Effect of Failure to Obtain (432).

§ 1. *Power to require and validity of statutes.*[35]—License regulations are ordinarily justified as an exercise of the police power,[36] and the fact that some classes of persons are excepted does not make the regulation void,[37] though it was

28. Morning Journal Ass'n v. Duke [C. C. A.] 128 F. 657. See 2 Curr. L. 706, note. The meaning intended to be given to the alleged libelous words by the defendant as averred by the innuendo is a question of fact for the jury. Hamilton v. Lowery [Ind. App.] 71 N. E. 54. If the words are ambiguous, the jury are to determine, not what the defendant intended to charge, but what in fact he did charge, and what the reading public reasonably supposed or understood. Morse v. Times-Republican Print. Co. [Iowa] 100 N. W. 867. In Holmes v. Clisby [Ga.] 48 S. E. 934, the general rule is stated to be that the question of libel or no libel is one of fact for the jury, the court observing: "Especially is this true where the writing is not a libel per se, but its character as such depends upon the circumstances under which it was published."

29. Cranfill v. Hayden [Tex.] 80 S. W. 609.

30. Graybill v. DeYoung, 140 Cal. 323, 73 P. 1067.

31. A requested charge that in order to convict the jury must believe beyond a reasonable doubt not only that the alleged false words were uttered by defendant, but that such words were uttered maliciously or wantonly; that the expression "maliciously" meant that the words were so uttered as to imply an evil intent or legal malice, or without reasonable ground for believing that they were true, or that the woman had a bad reputation for chastity; and that the expression "wantonly" meant that the words were uttered regardless of consequences, in a reckless manner, or under such circumstances as evidenced a wicked and mischievous intent, and without excuse, should have been given, as it is a part of the statutory definition of slander in Texas. Rainwater v. State [Tex. Cr. App.] 81 S. W. 38.

32. Comp. Laws 1897, § 11,762.

33. Mack v. Sharp [Mich.] 101 N. W. 631.

34. See, also, Intoxicating Liquors, 4 Curr. L. 252; Foreign Corporations, 3 Curr. L. 1455; Insurance, 4 Curr. L. 157 (right to do business).

35. See 2 Curr. L. 730.

36. An annual tax on places where inflammables are stored is a police regulation. Standard Oil Co. v. Com. [Ky.] 82 S. W. 1020. A contract with a city allowing erection of telephone poles does not divest it of its police power to require a license. City of Ft. Smith v. Hunt [Ark.] 82 S. W. 163. A license fee for each telegraph pole erected in the street is valid. It is not a rental for use of the streets, and is sustainable under the police power. Id.

The state, under its police power, has the right, in the absence of constitutional limitation or inhibition, to subject all occupations to a reasonable regulation, by the imposition of license fees, where such regulation is required for the public welfare. This right applied to the use of bicycles. Simpson v. Whatcom, 33 Wash. 392, 74 P. 577.

37. An exception of the sale of farm products is valid. In re Abel [Idaho] 77 P. 621. A license tax on hawkers is not invalid because it excepts persons selling their own products. Kansas City v. Overton, 68 Kan. 560, 75 P. 549. An ordinance requiring a less fee where meals are cooked and served by the proprietor or his family than where they are not so cooked and served is not unjustly discriminating. Ex parte Lemon, 143 Cal. 558, 77 P. 455. An exception of persons taking orders which is confined to the taking of orders from "merchants" is class legislation (In re Abel [Idaho] 77 P 621), but such a provision does not invalidate the remainder of the act (Id.).

otherwise held where the exceptions were numerous and unreasonable,[38] nor are they ordinarily construed as restraint of interstate commerce;[39] but to be so sustained, they must be in some manner designed to subserve public comfort or safety,[40] and must be reasonable in character.[41] License laws, however, are often passed in the exercise of the taxing power,[42] and as such must conform to the constitutional provisions relating to taxation.[43] Where the subject-matter is within the taxing power, neither the propriety[44] nor the amount[45] of the tax is subject to judicial review. Municipal power to impose license taxes must be derived expressly or by necessary implication from legislative grant,[46] and in California

38. A great number of exceptions based on no classification to a statute forbidding peddling. State v. Whitcom [Wis.] 99 N. W. 468.

39. Imposition of privilege tax for the selling of liquor on a boat making regular trips to a port within the state is not a regulation of interstate commerce. Foppiano v. Speed [Tenn.] 82 S. W. 222. Statute imposing a license tax on packing houses doing business in the state held not to be an interference with interstate commerce. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53. A tax on sawmills excepting those who do not export, interferes with interstate commerce. Adams v. Mississippi Lumber Co. [Miss.] 36 So. 68. Statute imposing tax on packing houses held not to violate the constitutional provision that taxes must be laid by a uniform rule. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53. Imposition of a merchant's tax on a nonresident dealing through a resident agent in goods deposited in store within the state does not interfere with interstate commerce. American Steel & Wire Co. v. Speed, 192 U. S. 500, 48 Law. Ed. 538. A municipal ordinance imposing a license tax on the agent of a citizen of a foreign state for the privilege of selling goods is unconstitutional because it imposes a burden on interstate commerce. Fee required of agent of a portrait company of Illinois canvassing for orders in Ohio. In re Julius, 4 Ohio C. C. (N. S.) 604. The requirement of a license from the agent of a nonresident selling property which he has in the state for delivery is not a regulation of interstate commerce. In re Abel [Idaho] 77 P. 621.

40. The trade of horseshoeing is not one subject to license regulation. In re Aubry [Wash.] 78 P. 900; People v. Beattie, 96 App. Div. 383, 89 N. Y. S. 193. The practice of dentistry is a business subject to regulation. In re Thompson [Wash.] 78 P. 899. An ordinance taxing water companies for each plug is not an exercise of the police power. Commissioners of Cambridge v. Cambridge Water Co. [Md.] 58 A. 442.

41. A requirement of a deposit of $500 by itinerant vendors is not unreasonable. State v. Feingold [Conn.] 59 A. 211. An annual tax of $250 for each pool table is not unreasonable, where the power to prohibit exists. Wysong v. Lebanon [Ind.] 71 N. E. 194. $100 on employment agencies is not excessive. State v. Robertson, 136 N. C. 587, 48 S. E. 595. A requirement of a license for a single act of hiring a conveyance is unreasonable. Town of Plymouth v. Cooper, 135 N. C. 1, 47 S. E. 129. $35 for each six months for hucksters and $15 additional for each assistant is not unreasonable. Kansas City v. Overton, 68 Kan. 560, 75 P. 549.

42. A license tax required for the sale of goods is in effect a tax upon the goods themselves. In re Julius, 4 Ohio C. C. (N. S.) 604. The act licensing employment agencies is sustainable as an exercise of the taxing power. State v. Robertson, 136 N. C. 587, 48 S. E. 595. The payment by a tobacco factory of $1 on the marketable value of $1,000 of product up to $100,000 and at the rate of 50 cents thereafter, is not a property tax but a license tax. Strater Bros. Tobacco Co. v. Com., 25 Ky. L. R. 1717, 78 S. W. 871. The reciprocal tax is a privilege or license tax. Condition upon which the company is admitted to do business does not violate Nebraska constitution. State v. Insurance Co. [Neb.] 99 N. W. 36. Reciprocal tax laws are generally held valid. Statutes providing that whenever by the laws of another state a home corporation doing business in such state shall be required to pay a tax or license fee greater than the amount required in other states, then corporation from such state will be required to pay the same tax in the former. Id. Colorado statute providing for a license fee from every one selling intoxicating liquors is a statute for securing revenue and not for the regulation of the liquor traffic. Parsons v. People [Colo.] 76 P. 666.

43. Colorado law providing for a license tax on all persons selling liquor does not violate the constitutional provision guarantying to each citizen the equal protection of the laws. Parsons v. People [Colo.] 76 P. 666. Colorado law providing for a license fee payable to the state does not violate the constitutional provision inhibiting all taxation of trades or occupations for purpose of securing revenue. Id. Colorado law providing for a tax to the state for persons selling liquor does not violate the constitutional provision relative to uniformity. Id. A license law exempting persons who do not export their product invades the provision against unequal taxation. Adams v. Mississippi Lumber Co. [Miss.] 36 So. 68.

44. Gordon Bros. v. Newport News, 102 Va. 649, 47 S. E. 828.

45. State v. Robertson, 136 N. C. 587, 48 S. E. 595.

46. Commissioners of Cambridge v. Cambridge Water Co. [Md.] 58 A. 442. A grant of power to regulate water plugs and to license certain persons not including water companies gives no power to tax water companies for each plug used. Id. The city of Winston is limited by its charter to a requirement of a tax not over $10 a year on a business other than those enumerated in

the Constitution provides that the grant must be by general statute;[47] but a law relative to cities of one class is general within such provision,[48] and the provision does not relate to cities incorporated by special act.[49] A license tax ordinance does not embrace two subjects because it contains both police and revenue features.[50]

In respect to some professions and skilled trades, the granting of licenses is often referred to a board of examiners,[51] and such acts are not invalid as a delegation of legislative power.[52] The powers of such boards, however plenary the grant, are not arbitrary.[53] It is sometimes required that the applicant be a graduate of some institution,[54] and the board is usually made the judge of the good standing thereof.[55]

Enforcement of an invalid license tax may be enjoined.[56]

§ 2. *Interpretation of statutes and ordinances and persons subject.*[57]—License laws being penal are to be strictly construed,[58] and one cannot be convicted thereunder unless clearly of the class of persons designated by the act.[59] Where

the charter. City of Winston v. Beeson, 135 N. C. 271, 47 S. E. 457. A power to define who shall be considered **"transient merchants"** does not give power to include persons who are not merchants. Itinerant optician. City of Waukon v. Fisk [Iowa] 100 N. W. 475. One who takes orders for himself and has the goods shipped to the buyers is a transient merchant. City of Cedar Falls v. Gentzer, 123 Iowa, 670, 99 N. W. 561. Nor does a power to license **peddlers,** etc., include itinerant opticians. City of Waukon v. Fisk [Iowa] 100 N. W. 475.

47. Licenses for revenue are taxes within a constitutional provision that municipalities can be vested with taxing power only by general law. Ex parte Jackson, 143 Cal. 564, 77 P. 457. If the authorizing statute be general, it is immaterial that other cities have not acted under it. Id.

48. Ex parte Jackson, 143 Cal. 564, 77 P. 457.

49. Ex parte Helm, 143 Cal. 553, 77 P. 453. The city of Marysville has power under its special act of incorporation to impose license taxes for revenue. Ex parte Lemon, 143 Cal. 558, 77 P. 455.

50. Kansas City v. Overton, 68 Kan. 560, 75 P. 549.

51. An act making the approval of a board of examiners necessary to the carrying on of a trade need not prescribe a standard of proficiency. Barber's license law. State v. Briggs [Or.] 77 P. 750. The power of determining such standard vested in the board may not be an arbitrary power, but subject to an implied limitation of fair exercise. State v. Briggs [Or.] 77 P. 750; Id., 78 P. 361.

52. Dentistry act not unconstitutional as conferring legislative power on board. In re Thompson [Wash.] 78 P. 899.

53. In Oregon the commissioners for licensing sailors' boarding houses have no arbitrary power to deny a license. Laws 1903, p. 238, § 3, giving power to reject, is to be construed in connection with the prior clause (White v. Mears, 44 Or. 215, 74 P. 931), and as so construed, the statute is valid (Id.).

54. A requirement that applicants for license to practice dentistry shall have a diploma from a dental college in good standing is not unreasonable. In re Thompson [Wash.] 78 P. 899.

55. The licensing of barber schools is within the scope of the title of Laws 1903, p. 27, relating to the licensing of barbers. State v. Briggs [Or.] 78 P. 361. The veterinary board has no power to pass on the regularity of a veterinary college duly organized under the laws of the state. Wise v. State Veterinary Board [Mich.] 101 N. W. 562.

56. Hewin v. Atlanta [Ga.] 49 S. E. 765.

57. See 2 Curr. L. 732.

58. Kloss v. Com. [Va.] 49 S. E. 655.

59. Illustrations. A salesman carrying samples and taking orders which are filled and shipped from a factory is not a peddler. Kloss v. Com. [Va.] 49 S. E. 655. A statute taxing traveling vendors of patent medicines, jewelry, soap, paper "or other merchandise" does not include salesmen selling illuminating oil in large quantities. Standard Oil Co. v. Swanson [Ga.] 49 S. E. 262. A nonresident manufacturing company who has an agent in another state to whom it ships goods in bulk, to be by him assorted and distributed among its customers, is a merchant within the tax statutes of such state. American Steel & Wire Co. v. Speed, 110 Tenn. 524, 75 S. W. 1037, afd. 192 U. S. 500, 48 Law. Ed. 538. North Carolina statute providing for license tax for every corporation organized or doing business within the state applies to foreign as well as domestic corporations. State v. Armour Packing Co., 135 N. C. 62, 47 S. E. 411. Statute imposing tax on packing houses held to apply to a foreign corporation which shipped its product into the state. Lacy v. Armour Packing Co., 134 N. C. 567, 47 S. E. 53. An exemption of persons "taking orders" for wholesale houses does not apply to a solicitor who has the goods for immediate delivery to the purchaser. In re Abel [Idaho] 77 P. 621. Evidence held insufficient to show that defendant was an itinerant medical practitioner. Howe v. State [Tex. Cr. App.] 78 S. W. 1064. Vehicle used by the owner in performing services for hire is "used or let for hire." Swetman v. Covington [Ky.] 82 S. W. 386. Selling of oil to dealers in quantities of not less than 25 gallons is a selling "at re-

a license is required for the carrying on of a business, single or occasional acts,[60] or acts merely incidental to another business,[61] are not within the statute. A boat making regular trips to a port within a state is within the jurisdiction of such state for the imposition of privilege tax on the sale of liquor on such boat.[62] Where both state and municipality tax a business, one engaged therein must pay both taxes.[63]

§ 3. *Assessment and recovery; prosecutions for failure to pay.*[63a]—Privilege taxes for past years may be collected without any reassessment.[64] A statute providing for the back assessment of taxes on property which has escaped taxation applies to privilege taxes.[65] Classification of a railroad by the railroad commission as one claiming charter exemption from state control is necessary to the imposition of additional privilege tax on that account.[66] Under North Carolina statutes providing for a license tax, it was held a tax could be collected by the state as well as by the county.[67] Where no adequate remedy is provided for collecting a tax, the city may sue therefor.[68] Limitations run against a license created by contract.[69] Proceedings for violation of a city license tax ordinance are civil and need not be on information.[70] An indictment alleging sale of "coal oil, a lubricating oil" is good, it being a question for the jury whether coal oil is a lubricating oil.[71] An indictment for selling one kind of oil without a license is not sustained by proof of sale of another kind.[72] The exception as to products of defendant's farm need not be negatived.[73] An indictment that defendant "engage in procuring laborers" sufficiently avers that he engaged in the business of so doing.[74] An indictment for acting without a license as agent for a foreign corporation is not defective for failing to allege the incorporation of the principal, its name as alleged being one appropriate to a corporation.[75] A complaint charging the keeping of a "livery or feed" stable without license is good after conviction.[76] Where the tax is an annual one on the carrying on of a business, a conviction of doing business without a license bars further prosecution for carrying on such business during the current year.[77] The "certificate of registration" required by section 1 of the barber's license law of Washington is the same as the "certificate" mentioned in section 10 and is sub-

tall" (Standard Oil Co. v. Com. [Ky.] 82 S. W. 970), while if the sale is to others than dealers it is peddling (Standard Oil Co. v. Commonwealth [Ky.] 83 S. W. 557, citing Standard Oil Co. v. Com. [Ky.] 80 S. W. 1150). Giving of trading stamps is not a "gift enterprise" within a charter power to license such enterprises. City of Winston v. Beeson, 135 N. C. 271, 47 S. E. 457.

60. A single sale is not within an ordinance licensing itinerant vendors. State v. Feingold [Conn.] 59 A. 211.

61. One employed to post bills is "engaged in the business" of bill posting, but one employed as a salesman who occasionally posts bills as an advertisement of his wares is not. Rogers v. Sandersville, 120 Ga. 192, 47 S. E. 557. The furnishing of trading stamps in connection with the sale of merchandise is not a separate business. Hewin v. Atlanta [Ga.] 49 S. E. 765. Hiring of laborers in one's own business is not within the statute relating to employment agencies. Carr v. Duplin's Com'rs, 136 N. C. 125, 48 S. E. 597.

62. Foppiano v. Speed [Tenn.] 82 S. W. 222.

63. In Colorado druggists are liable for the state tax as well as the municipal tax levied for the privilege of selling intoxicating liquors. Parsons v. People [Colo.] 76 P. 666.

63a. See 2 Curr. L. 733, n. 36, et seq.

64, 65. Foppiano v. Speed [Tenn.] 82 S. W. 222.

66. Gulf & S. I. R. Co. v. Adams, 83 Miss. 306, 36 So. 144.

67. State v. Armour Packing Co., 135 N. C. 62, 47 S. E. 411.

68. A penalty for failure to take out license is not an adequate remedy. City of Lexington v. Wilson [Ky.] 80 S. W. 811.

69. Jersey City v. Jersey City & B. R. Co. [N. J. Law] 59 A. 15.

70. City of Billings v. Brown [Mo. App.] 80 S. W. 322.

71, 72. Commonwealth v. Standard Oil Co., 25 Ky. L. R. 2116, 80 S. W. 206.

73. City of Billings v. Brown [Mo. App.] 80 S. W. 322.

74. State v. Roberson, 136 N. C. 587, 48 S. E. 595.

75. Leps v. State, 120 Ga. 139, 47 S. E. 572.

76. Cannot be attacked on habeas corpus. Ex parte Jackson, 143 Cal. 564, 77 P. 457.

77. State v. Roberson, 136 N. C. 591, 48 S. E. 596.

ject to revocation under section 14.[78] The section of the barber's license law forbidding practice without having obtained a license includes one who practices after revocation of his license.[79]

§ 4. *Effect of failure to obtain.*[80]—Though it is generally held that no recovery can be had by an unlicensed person on a contract for the doing of an act for which a license is required,[81] it has been held that failure of a broker to take out a license does not avoid his contract for compensation,[82] and a foreign corporation may sue, though it has not paid the license tax.[83]

LICENSES TO ENTER ON LAND.

§ 1. Nature, Creation and Indicia of a License and Distinction from Easements and Other Estates (432). Licenses Coupled with an Interest (433).

§ 2. Rights and Liabilities of Licensees (433).

§ 1. *Nature, creation and indicia of a license and distinction from easements and other estates.*[84]—A license is authority to enter on another's land or to do some act thereon which without authority would be wrong, and which is not an estate in the land.[85] It is in the absence of an estate in the lands that it differs from easement.[86] A lease differs in being an irrevocable (except by its own terms) interest in the use or profits of the lands.[87] A license must emanate from one having authority to grant it.[88] It may arise by implication,[89] but is not necessarily implied from unrestrained user.[90] An attempted sale by parol of standing timber amounts to a license to cut and remove it.[91] Since a license does not create an estate, it need not be in writing.[92] It is revocable at will[93] and by the weight of

78, 79. State v. Chaney [Wash.] 78 P. 915.

80. See 2 Curr. L. 734.

81. See Hammon, Cont. p. 347.

82. Tooker v. Duckworth [Mo. App.] 80 S. W. 963.

83. Box, Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. S. 836.

84. See 2 Curr. L. 734.

85. Cyc. Law Dict. "Licenses;" 1 Tiffany Real Prop. 678.

Licenses are executory and executed and express and implied. Cyc. Law Dict. "Licenses," 1 Tiffany Real Prop. 678.

86. Note: In a number of cases collected in note to Waldron's Petition [R. I.] 67 L. R. A. 120, it is held that the right in a burial lot is a mere license, not an easement. See Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377; Windt v. German Ref. Church, 4 Sandf. Ch. [N. Y.] 471; Richards v. Northwest Protestant Dutch Church, 32 Barb. [N. Y.] 42; Craig v. First Pres. Church, 82 Pa. 42, 32 Am. Rep. 417; Buffalo City Cemetery v. Buffalo, 46 N. Y. 503; McGuire v. St. Patrick's Cathedral, 54 Hun [N. Y.] 207; Page v. Symonds, 63 N. H. 17, 56 Am. Rep. 481; Partridge v. First Indep. Church, 39 Md. 631; Rayner v. Nugent, 60 Md. 515; Catholic Cathedral Church v. Manning, 72 Md. 116; Dwenger v. Geary, 113 Ind. 106. The facts and reasoning in the foregoing cases are well set out in the note referred to.

87. See Landlord and Tenant, 4 Curr. L. 389.

88. There is no presumption that railroad employes have authority to give a license to cross the track. St. Louis S. W. R. Co. v. Shiflet [Tex.] 83 S. W. 677.

89. The fact that there is a door in a partition between adjoiners creates a license to use it as a passway. Belser v. Moore [Ark.] 84 S. W. 219.

90. Not from the fact that persons habitually cross a railroad track at a certain place. St. Louis S. W. R. Co. v. Shiflet [Tex.] 83 S. W. 677.

91. When cut it becomes the property of the licensee. Welever v. Advance Shingle Co., 34 Wash. 331, 75 P. 863. After the timber is cut the licensor is estopped to assert that he had no title. Id.

92. A license burdening real estate with a servitude may be created by parol. Brantley v. Perry, 120 Ga. 760, 48 S. E. 332. Such a license is not affected by reason of not being in writing, provided it is founded upon a definite understanding between competent parties. Smith v. P., C. C. & St. L. R. Co., 5 Ohio C. C. (N. S.) 194.

93. A door in a partition between adjoining owners may be closed by either. Belser v. Moore [Ark.] 84 S. W. 219. The fact that the owner of a pond allows an ice man to cut ice one year creates no obligation on his part to allow him to do so again. Oliphant v. Richman [N. J. Eq.] 59 A. 241.

Note: The fact that a consideration is to be paid does not render the license irrevocable (Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203; Dodge v. McClintock, 47 N. H. 383; Duenneen v. Rich, 22 Wis. 550; Baldwin v. Taylor, 166 Pa. 507), nor does the fact that expense is incurred (Minneapolis Mill. Co. v. Minneapolis, etc., R. Co., 51 Minn. 304; Hathaway v. Yakima Water, Light & Power Co., 14 Wash. 469, 53 Am. St. Rep. 874; Lambe v. Manning, 171 Ill. 612). And the act that the agreement has been

authority, notwithstanding an express promise to the contrary and expense incurred on faith thereof,[94] especially where based on no valuable consideration;[95] but authority is not wanting for the proposition that if the enjoyment is preceded necessarily by the expenditure of money, it becomes irrevocable,[96] especially after it is executed.[97]

Licenses coupled with an interest.[98]—The license of a tenant of an apartment house to use a portion of a porch not attached to his rooms is not a license coupled with an interest.[99]

§ 2. *Rights and liabilities of licensees.*[1]—The authority is for the doing of only the act specifically licensed.[2] It cannot ripen into an easement by user.[3] Rights under an unrevoked license cannot be interfered with.[4] A licensee may maintain trespass.[5] He must exercise ordinary care to avoid injury,[6] and cannot recover for injuries caused by existing defects.[7]

LIENS.

§ 1. Definition and Nature (434).
§ 2. Common-Law, Equitable and Statutory Liens (434).
A. Common-Law Liens (434).
B. Equitable Liens (434).
C. Statutory Liens (435).
§ 3. Priorities Between Liens (435).
§ 4. Waiver, Extinguishment, Discharge and Revival (436).
§ 5. Enforcement and Protection of Liens (437). Statutory Proceedings to Enforce or Foreclose (437). Equitable Remedies and Procedure (437).

This article treats only of liens in general, specific liens being treated under the specific topics to which they relate.[8] The effect of insolvency[9] or death[10] and the means by which priorities are worked out[11] are treated elsewhere.

performed will be of no avail in a court of law. Banghart v. Flummerfelt, 43 N. J. Law, 28; Hitchens v. Shaller, 32 Mich. 496; Owen v. Field, 12 Allen [Mass.] 457; Fryer v. Warne, 29 Wis. 511. **The rule in equity** is otherwise in some jurisdictions. Lacy v. Arnett, 33 Pa. 169; Adams v. Patrick, 30 Vt. 516; Dempsey v. Kipp, 61 N. Y. 462; Morton Brew. Co. v. Morton, 47 N. J. Eq. 158, 20 A. 268; Wilson v. Chalfant, 15 Ohio, 248, 45 Am. Dec. 574; Baldock v. Atwood, 21 Or. 73, 26 P. 1058; Test v. Larsh, 76 Ind. 462. These cases rest on the proposition that it would be a fraud to permit a revocation. From note to Pifer v. Brown, 43 W. Va. 412, 49 L. R. A. 497.

94. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990. A local custom that prospectors would be allowed to work out the prospect against the will of the owner cannot prevail over this rule. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990.

95. Regardless of whether when the permission was given the parties contemplated the privilege would be permanent, and money was expended to facilitate the enjoyment of it. Huber v. Stark [Wis.] 102 N. W. 12. Where without consideration permission was given an adjoining owner to connect his drain with the drain of the owner granting the permission, a license, revocable at will, was acquired. Knoll v. Baker [Ind. App.] 72 N. E. 480.

96. License to dig a ditch across land. Brantley v. Perry, 120 Ga. 760, 48 S. E. 332. Such a license is binding on a grantee who takes with notice. Id. A license granted to a telephone company, under which money is expended and which is not abused, is not revocable at the pleasure of the municipality. Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146.

97. Smith v. P., C. C. & St. L. R. Co., 5 Ohio C. C. (N. S.) 194.

98. See 2 Curr. L. 736.

99. Flaherty v. Nieman [Iowa] 101 N. W. 280.

1. See 2 Curr. L. 735.

2. A license to construct a roadbed creates no rights in the land beyond the embankment, though the railroad company was authorized by statute to acquire a right of way of a certain width. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490.

3. Owner of a saloon adjoining a hotel had a permissive license to use the rotunda of the hotel as a passageway. Belser v. Moore [Ark.] 84 S. W. 219. Long user with acquiescence of the owner. Little v. American Tel. & T. Co., 96 App. Div. 559, 89 N. Y. S. 136.

4. Declaration alleging that plaintiff with the assent of the owners of the land had maintained a line of pipes thereon and that the owner carried such pipes away is good against demurrer. Despeaux v. Delano [N. J. Law] 59 A. 10.

5. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490.

6. Licensee in a switchyard held guilty of contributory negligence. Nichols v. Gulf, etc., R. Co., 83 Miss. 126, 36 So. 192.

7. Tenant of an apartment house using a porch other than that attached to his own apartments. Flaherty v. Nieman [Iowa] 101 N. W. 280.

8. See Agency, 3 Curr. L. 68; Attachment, 3 Curr. L. 353; Attorneys and Counselors, 3 Curr. L. 376; Auctions and Auctioneers, 3 Curr. L. 394; Brokers, 3 Curr. L. 535; Car-

§ 1. *Definition and nature.*—A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge.[12] From its very nature it takes priority over the claims of simple creditors[13] and inferior liens.[14]

§ 2. *Common-law, equitable and statutory liens. A. Common-law liens.*[15]—A common-law lien consists in the mere right to retain possession[16] until the debt or charge is paid.[17] The sellers of fruit trees under a contract of payment out of crops raised therefrom have no lien on the land whereon the trees are planted.[18]

(§ 2) *B. Equitable liens.*[19]—A written[20] contract showing an intention to charge identified property with a debt or other obligation[21] creates an equitable lien thereon. The principles of equity requiring it, such lien will be upheld, though the contract be invalid;[22] but the invalidity of an agreement for a common-law lien does not of itself give rise to an equitable lien, though the agreement be made in good faith.[23]

Equity will, in the absence of an express agreement, create a lien when the rights of the parties cannot be otherwise secured;[24] but it will not declare such a lien where to do so would destroy the protection the law affords infants.[25]

Where there is an exchange of lands, a breach of a covenant of warranty by

riers, 3 Curr. L. 591; Chattel Mortgages, 3 Curr. L. 682; Executions, 3 Curr. L. 1397; Factors, 3 Curr. L. 1415; Inns, Restaurants and Lodging Houses, 4 Curr. L. 123; Judgments, 4 Curr. L. 287; Landlord and Tenant, 4 Curr. L. 389; Mechanics' Liens, 2 Curr. L. 869; Mortgages, 2 Curr. L. 905; Railroads, 2 Curr. L. 1382; Taxes, 2 Curr. L. 1786; Vendors and Purchasers, 2 Curr. L. 1976; Agisters' Liens (see Animals, 3 Curr. L. 159); Logging Liens (see Forestry and Timber, 3 Curr. L. 1468); Crop Liens (see Agriculture, 3 Curr. L. 137, and Landlord and Tenant, 4 Curr. L. 389); Maritime Liens (see Shipping and Water Traffic, 2 Curr. L. 1648).

9. See Bankruptcy, 3 Curr. L. 434; Insolvency, 4 Curr. L. 129.

10. See Estates of Decedents, 3 Curr. L. 1238.

11. See Marshaling Assets and Securities, 2 Curr. L. 798.

12. Gilmor v. Dale, 27 Utah, 372, 75 P. 932; Cyc. Law Dict., "Lien." A personal claim against a bankrupt's estate does not constitute a lien. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800.

13. An equitable mortgage takes precedence of the rights of creditors in proceedings to administer the property of the mortgagor for the benefit of his creditors. Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Under tax law requiring assessment of taxes against the person, and requiring collection out of personal property if possible, the lien of a real estate mortgage executed prior to a tax assessment and levy, is superior to the assessment. Ferguson v. Kaboth, 43 Or. 414, 73 P. 200.

14. See post, § 3, Priorities between liens.

15. See 2 Curr. L. 737.

16. A factor's lien does not attach until he acquires possession. Ryttenberg v. Schefer, 131 F. 313. See titles Agency, 3 Curr. L. 68; Attorneys and Counselors, 3 Curr. L. 376; Factors, 3 Curr. L. 1415.

17. Cyc. Law Dict. "Liens."

18. Butler v. Stark, 25 Ky. L. R. 1886, 79 S. W. 204.

19. See 2 Curr. L. 737. For specific equitable liens, see Chattel Mortgages, 3 Curr. L. 682; Mortgages, 2 Curr. L. 905; Vendors and Purchasers, 2 Curr. L. 1976.

20. An oral agreement to make land answerable for services to be rendered does not create a lien on the land in the hands of grantees of the promisor. Wagner v. Weyhe [Ind. App.] 71 N. E. 915.

21. A mortgagor expressly agreeing to keep up insurance for the security of the mortgagee, the latter has an equitable lien upon the proceeds of the insurance. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325. A deed by which the grantee assumes and agrees to pay existing mortgages, liens, taxes and claims of any and every description creates a charge on the land. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204. See 2 Curr. L. 737, n. 74-81.

22. Where a debtor undertook to convey an interest in land in payment of a just debt, but the deed was inoperative for failure of delivery in the lifetime of the grantor, held equity would declare a lien on the land for the amount of the debt. Sutton v. Gibson [Ky.] 84 S. W. 335.

23. An agreement for a factor's lien being invalid because possession remained in the debtor. Ryttenberg v. Schefer, 131 F. 313.

24. A divorced wife is entitled to a lien on an insurance policy on the life of her former husband to secure premiums paid by her during the existence of the marriage relation. Hatch v. Hatch [Tex. Civ. App.] 80 S. W. 411. See 2 Curr. L. 737, n. 85.

25. One loaning money to a minor to redeem mortgaged land on the representations of the minor that the lender would be subrogated to the rights of the mortgagee, held insufficient to entitle the lender to a lien on the land for the amount loaned. Burton v. Anthony [Or.] 79 P. 185.

one party entitles the other to a lien on the land conveyed to the former for damages sustained by reason of such breach.[26] One entering on land with knowledge that it belongs to another acquires no lien for improvements.[27]

(§ 2) *C. Statutory liens.*[28]—The special lien given laborers on the product of their labor generally attaches to the property of their employers only.[29] In some states one lawfully in possession of personal property of another has a lien thereon for any services rendered the owner in the protection, improvement or safe-keeping of such property.[30]

Construction.[30a]—The ordinary rules of statutory construction apply,[31] and the statutes are to be construed so as to be rendered effective if possible.[32]

§ 3. *Priorities between liens.*[33]—The determination of priorities is usually sought as incidental to other relief, but it may be sought by an original bill, and it is no objection to such a proceeding that the plaintiff is not likely to be benefited thereby.[34] As between equitable liens, priority is determined by the equities of the case.[35] Statutory liens being involved, the priority is often dependent upon the nature of the lien, as for instance, a purchase-money lien;[36] but lacking this intrinsic superiority, the priority depends upon record[37] or the equivalents thereof.[38]

26. Newburn v. Lucas [Iowa] 101 N. W. 730.

27. Wade v. Keown, 25 Ky. L. R. 1787, 78 S. W. 900.

28. See 2 Curr. L. 738.

For specific statutory liens, see titles Attachment, 3 Curr. L. 353; Executions, 3 Curr. L. 1397; Inns, Restaurants and Lodging Houses, 4 Curr. L. 123; Landlord and Tenant, 4 Curr. L. 389; Mechanics' Liens, 2 Curr. L. 869; Railroads, 2 Curr. L. 1382; Taxes, 2 Curr. L. 1786; Warehousing and Deposits, 2 Curr. L. 2029; Crop Liens (see Agriculture, 3 Curr. L. 137, and Landlord and Tenant, 4 Curr. L. 389); Agisters' Liens (see Animals, 3 Curr. L. 159); Logging Liens (see Forestry and Timber, 3 Curr. L. 1468).

29. Employe repairing property of one other than his employer has no lien thereon, though the result of such repairs be to make practically a new article [Civ. Code 1895, § 2793]. Lanier v. Bailey [Ga.] 48 S. E. 324.

30. Under Rev. Civ. Code, § 2153, one contracting to cut, stack, bale and haul hay from another's farm is entitled to a special lien on the unhauled hay, dependent on possession for their compensation, and, as between the parties, the lienor is in possession until the hay is voluntarily surrendered. Woodford v. Kelley [S. D.] 101 N. W. 1069.

30a. See 2 Curr. L. 739.

31. The words "continued possession" in the lien law [Laws 1897, c. 418, § 112] refer to a case where the continued possession of the chattel is intended to remain with the vendee. Mott Iron Works v. Reilly, 39 Misc. 833, 81 N. Y. S. 323.

32. The provision in Burns' Rev. St. 1901, § 6566, relative to erection of partition fences, requiring the township trustee's statement to be recorded in the "mechanic's lien record," is not ineffective because there is no such record, there being a record in which mechanics' liens are required to be recorded. Tomlinson v. Bainaka [Ind.] 70 N. E. 155.

33. This section treats only of priorities between liens of different classes; for priority between liens of the same class or kind, see separate articles as Attachment, 3 Curr. L. 353; Garnishment, 3 Curr. L. 1550; Judgments, 4 Curr. L. 287; Mortgages, 2 Curr. L. 905, etc. It does not discuss priorities depending on the defectiveness of one or the other of the two hostile liens. As to priority between a lienor and a simple creditor, see ante, § 1, Definition and nature. See 2 Curr. L. 739.

34. Judgment lienor may bring action to marshal liens, although prior liens will exhaust the fund arising from the sale of the property. Knox v. Carr, 5 Ohio C. C. (N. S.) 81.

35. The seller under an unrecorded conditional sale is entitled to priority as against prior creditors of the bankrupt buyer, but not as against subsequent creditors without notice, though they have no lien on the property other than the caveat afforded by the bankruptcy adjudication [Ky. St. 1903, § 496 and Bankr. Act, § 64, cl. 5, construed]. In re Ducker, 133 F. 771. See 2 Curr. L. 739, n. 5.

36. Landlord's special lien for rent upon crops raised on rented premises held superior to a claim of exemption. Shirling v. Kennon, 119 Ga. 501, 46 S. E. 630.

37. Recorded mortgage held superior to an unrecorded bond for a deed, with the deed in escrow. Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 P. 680. See 2 Curr. L. 739, n. 7, 8.

38. Chattel mortgagee having knowledge of prior deed of trust, held purchaser at sale under latter taking possession has right to growing crop as against mortgagee. Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643, 76 P. 484. In a suit for partition, judgment liens existing at the commencement of the suit against one of the shares are entitled to preference over the lien of attorneys for their services in an unsuccessful attempt to defeat the liens. Atlee v. Bullard, 123 Iowa, 274, 98 N. W. 889. Judgment creditors by intervening in a pending creditor's suit in which a receiver is appointed acquire equitable liens on the property of the corporation as of the date of filing. Atlantic Trust Co. v. Dana

Compliance with statutory provisions which do not affect the rights of the contesting parties as between themselves need not be proven.[39] The lien of an ordinary recorded mortgage is not subordinate to mechanics' liens merely because the money which it was given to secure was loaned for the purpose of improving the mortgaged premises, and under an express contract that it should be so used.[40] As between himself and the mortgagee, a judgment creditor is entitled to all the surplus proceeds of the sale after the payment of the mortgage debt, with such expenses only as are provided for in the mortgage or are necessarily incident thereto.[41]

In order to obtain a decision on the question of priority, such question must be within the scope of the action.[42] The property being in the custody of one court, general creditors cannot pursue it in another court by means of an action at law, judgment and execution.[43] On a question of priority, a court will not set aside its state statutes for the benefit of foreigners and to the prejudice of its own citizens.[44] The word "creditor," as used in statutes declaring unrecorded chattel mortgages to be void as against creditors, means creditors having some sort of lien fixed by law or legal proceedings upon the particular property, and does not include a mere general creditor.[45]

§ 4. *Waiver, extinguishment, discharge and revival.*[46]—One may waive his lien, and the waiver being for a specified amount, it operates in favor of subsequent lienors in the order of their priority, up to the amount specified,[47] and the burden of showing the waiver rests on the subsequent lienor.[48] The ordinary rules of construction apply,[49] and the breach of an independent condition in another contract does not entitle one to avoid his waiver.[50] By the acceptance of a substitute lien, the former one is extinguished.[51] In California a lien upon collateral is ex-

[C. C. A.] 128 F. 209. A mortgagee by intervening in a receivership suit acquires a prior right to the income thereafter earned by the receiver as against ordinary judgment creditors subsequently intervening, and whose judgments were obtained during the receivership. Id. See 2 Curr. L. 739, n. 7, 8.

39. In a contest between lienors, failure to prove allegation that no proceeding at law was had in a suit to foreclose a real estate mortgage, held to be, at most, error without prejudice. Chaffee v. Sehestedt [Neb.] 96 N. W. 161.

40. Chaffee v. Sehestedt [Neb.] 96 N. W. 161.

41. Staton v. Webb [N. C.] 49 S. E. 55. Attorney's fees cannot be allowed the mortgagee without proof of necessity or authority in the mortgage. Id. Mortgagor cannot by subsequent agreement with the mortgagee give the latter the entire proceeds under the guise of exorbitant commissions. Id.

42. The priority of liens will not be determined on the trial of the right to property attached as that of a tenant and claimed by the landlord. Groesbeck v. Evans [Tex. Civ. App.] 83 S. W. 430.

43. Where, during action to foreclose a mortgage, a temporary injunction issued restraining the defendant from disposing of the property, held the latter was in the custody of the law. Ryan v. Donley [Neb.] 96 N. W. 234.

44. Chattel mortgage executed and recorded in one state on property afterwards transferred to another will not be given priority over the liens of local attaching creditors in the latter. Snyder v. Yates [Tenn.] 79 S. W. 796.

45. Eason v. Garrison [Tex. Civ. App.] 82 S. W. 800.

46. See 2 Curr. L. 740.

As to the effect of bankruptcy, see Bankruptcy, 3 Curr. L. 434.

47. Southern Grocer Co. v. Adams, 112 La. 60, 36 So. 226.

48. Citizens' State Bank v. Smith [Iowa] 101 N. W. 172.

Evidence held insufficient to sustain statement that judgment creditor had agreed to waive the benefit of a stipulation giving him priority. Stover v. Hellyer [N. J. Eq.] 59 A. 470.

49. An indorsement on the margin of a mortgage that it is given to secure so much of the purchase money is not inconsistent with a stipulation in it that the mortgage lien should be subsequent to certain judgment liens. Stover v. Hellyer [N. J. Eq.] 59 A. 470.

50. Breach of contract by which a subcontractor was entitled to a certificate from chief engineer so that he could collect money due him, held not to entitle him to avoid his waiver of his statutory lien. McCabe v. Rapid Transit Subway Const. Co., 127 F. 465.

51. One accepting a legal lien cannot, upon its becoming unavailable, go back to the initiation of the transaction and claim an equitable lien. Gove v. Morton Trust Co., 96 App. Div. 177, 89 N. Y. S. 247. Persons furnishing articles for a building waive any right of lien they may have on their particular article by taking in payment a bond secured by a mortgage on the

tinguished by the lapse of the time within which an action can be brought upon the principal obligation.[52] A court of equity does not, by the appointment of a receiver, acquire authority to displace contract liens.[53]

A recital in a deed will revive a vendor's lien so as to give it priority over a judgment lien subsequently accruing.[54]

§ 5. *Enforcement and protection of liens.*[55]—In most cases of statutory liens, the statute expressly provides a mode for its enforcement.[56] In a suit to establish a lien on land, all persons against whom any relief is sought should be made parties.[57] The owner's right to redeem being barred, junior lienors not parties to the first proceeding are only entitled to a decree allowing them a reasonable time within which to redeem.[58] A debtor being adjudged a bankrupt pending an action in a state court to enforce a specific lien against his property, the state court is not thereby, nor by failure of the trustee in bankruptcy to intervene, divested of jurisdiction.[59]

Statutory proceedings to enforce or foreclose.[60]—A suit to foreclose a statutory lien against real property is one calling for the exercise of the equity powers of the court.[61] The holder of a lien on real property is not denied due process of law by failure to personally serve him with notice of the pendency of proceedings in rem affecting his lien.[62] The plaintiff need not negative provisos not contained in the enacting clause of the statute,[63] and there being a general denial, must prove all essential facts.[64] The commencement of an action of foreclosure suspends the running of the statute of limitations in favor of the defendants in the action; but it continues to run so far as others are concerned.[65] The jury not responding to the issue of the existence vel non of a lien, it is error to enter judgment establishing such lien.[66] An execution issued on the foreclosure of a laborer's lien operates as final process until arrested by a valid counter affidavit.[67]

Equitable remedies and procedure.[68]—A receiver may be appointed when neces-

entire property and made to a trustee to secure the bondholders. Security Trust Co. v. Temple Co. [N. J. Eq.] 58 A. 865.

52. Where an action on a debt for which insurance policies on the life of the debtor were pledged as security was barred before policies matured, the lien was extinguished [Civ. Code, § 2911]. Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 P. 67. The above rule is contrary to that existing at the common law. Id.

53. Mortgage on property and income of corporation. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

54. Austin v. Lauderdale [Tex. Civ. App.] 83 S. W. 413.

55. See 2 Curr. L. 740.

56. For specific statutory enforcement of liens, see specific articles previously referred to.

57. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562.

58. Are not entitled to another sale. Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722.

59. Vance v. Lane's Trustee [Ky.] 82 S. W. 297.

60. See 2 Curr. L. 740.

61. Court may deny jury trial. Suit to foreclose partition fence lien under Burns' Rev. St. 1901, § 6568. Tomlinson v. Bainaka [Ind.] 70 N. E. 155. Const. art. 1, § 20, as to right of jury trial, does not appiy to this proceeding. Id.

62. Proceeding to enforce tax lien, notice by publication was given to all interested parties. Leigh v. Green, 193 U. S. 79, 48 Law. Ed. 623.

63. Action under Burns' Rev. St. 1901, § 6568, to enforce a lien for building a partition fence. need not allege that the lands therein described were enclosed by a fence to retain stock. Tomlinson v. Bainaka [Ind.] 70 N. E. 155.

64. In an action to foreclose a statutory lien for building a partition fence, the answer being a generai denial, plaintiff must prove all the facts necessary to give the township trustee authority to contract for the building of the fence and issuing the certificate provided for by Burns' Rev. St. 1901, § 6566. Tomlinson v. Bainaka [Ind.] 70 N. E. 155.

65. Lien for a street improvement. Page v. Chase Co. [Cal.] 79 P. 278.

66. Code 1896, § 2739, construed. Goldstein v. Leake [Ala.] 36 So. 458.

67. Moultrie Lumber Co. v. Jenkins [Ga.] 49 S. E. 678. Where attorney acted as notary public for client, held affidavit void [construing Civ. Code 1895, § 4417]. Id. In such case held the court properly refused to consider the sufficiency of the levy, and the case was properly dismissed. Id.

68. See 2 Curr. L. 741.

NOTE. Enforcement of equitable liens: A court of chancery may enforce an equitable lien on an equitable legal estate in

sary to preserve the lien.[69] Where a lienor acquires the legal title to the property, he may maintain a bill of strict foreclosure to cut off the equity and right of junior incumbrancers to redeem.[70] When confirmation of a judicial sale discharging prior liens on the land and relating them to the purchase money is asked, the court will consider the equities of such lienholders.[71]

LIFE ESTATES, REVERSIONS AND REMAINDERS.

§ 1. Nature and Definitions (438).
§ 2. Mutual and Relative Rights and Remedies of Life Tenants, Future Tenants and Their Privies (441). Taxes and Incumbrances and Contribution (442). Mutual Dealings (443). Increment to Funds (443). Protection to Expectant Interest (444).
§ 3. Rights and Remedies Between Third Persons and Life Tenants, Remaindermen or Reversioners (444).

The scope of this topic does not embrace modes of creating life and future estates or the creative instruments,[72] or the particular freeholds of dower, curtesy and the like;[73] but is confined to the general principles of all life and future estates.[74]

§ 1. *Nature and definitions.*[75]—*A life estate is a freehold*[76] *limited to determine with the life or lives of particular persons, or at an uncertain period which may continue for life.*[77] The power of alienation is not a necessary incident to a life estate,[78] but to render it inalienable, the instrument creating it must expressly so declare.[79] A condition of forfeiture upon alienation[80] or failure to occupy[81] may be annexed to it. Such conditions are construed strictly against the grantor.[82]

A reversion is that estate remaining by operation of law in the grantor or his heirs to commence in possession after a lesser particular estate granted out by him is determined.[83] The validity of a life estate is not affected by the possibility that the remainder over may fail for want of takers.[84]

lands, and if the law creates a lien upon a legal interest in realty, a similar lien may sometimes be declared and enforced in chancery upon equitable estates by analogy, but equity cannot extend a pure legal lien created by statute upon estates purely legal to cases not provided by statute, and of the latter class is a judgment lien. Buchan v. Sumner, 2 Barb. Ch. [N. Y.] 165, 47 Am. Dec. 305. From note to Aldine Mfg. Co. v. Phillips [Mich.] 74 Am. St. Rep. 380, 388.

69. Lien on hay for cutting, stacking and baling the same held not error to appoint receiver after answer was served and though defendant was not insolvent. Woodford v. Kelley [S. D.] 101 N. W. 1069.

70. Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722.

71. Porch v. Agnew Co. [N. J. Eq.] 57 A. 726.

72. See Deeds of Conveyance, 3 Curr. L. 1056; Wills, 2 Curr. L. 2076.

73. See Curtesy, 3 Curr. L. 987; Dower, 3 Curr. L. 1144.

74. Compare Real Property, 2 Curr. L. 1462.

75. See 2 Curr. L. 741.

Note: As to the fundamental principles and distinguishing features of life estates, reversions, remainders and conditional limitations, see Tiffany Real. Prop. §§ 70, 113, 118.

76. A life tenant is the owner of a freehold interest, notwithstanding conditional defeasance, and may give a valid consent to the building of a street railway. Ireton Brothers v. Ft. Wayne, V. W. & L. Traction Co., 2 Ohio N. P. (N. S.) 317. A contract that one may use a building so long as he pays taxes and insurance is not a mere tenant at will as to his insurable interest. He has a life estate subject to be defeated by noncompliance with the conditions. Schaefer v. Anchor Mut. Fire Ins. Co. [Iowa] 100 N. W. 857. A husband by whom a wife has issue becomes when she inherits land tenant by curtesy initiate. He is seised of a freehold estate. The interest of the wife is a reversion. Winestine v. Ziglatzki-Marks Co. [Conn.] 59 A. 496.

77. Estate to one so long as she remains a widow is a defeasible life estate. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451.

See 1 Tiffany Real Prop., 71, for definition and incidents of life estates.

78. Equitable estate for life. Wenzel v. Powder [Md.] 59 A. 194.

79. Provision that all the income should be applied to the support of settler, wife and children did not create a spendthrift trust. Wenzel v. Powder [Md.] 59 A. 194. Provision of forfeiture in case remaindermen incumbered the fee held not to prevent the estate of the life tenant from becoming liable for his debts. Flaherty v. Stephenson [W. Va.] 49 S. E. 131.

80, 81. Lewis v. Lewis, 76 Conn. 586, 57 A. 735.

82. Civ. Code, § 1442. Reclamation Dist No. 551 v. Van Loben Sels [Cal.] 78 P. 638

83. See 1 Tiffany Real Prop. 269; Cyc.

A remainder is an estate expressly limited to take effect in possession immediately on the expiration of the particular estate,[85] *not in derogation thereof and created by the same instrument.*[86]

A remainder is vested if there is a present fixed right to future enjoyment,[87] though subject to defeasances and substitutions.[88] It is inheritable[89] though not yet in possession.[90]

It is contingent when limited to a dubious or uncertain person,[91] or upon a dubious and uncertain event,[92] or upon an event which may not happen until after

Law Dict. "Reversion." The wife's interest in lands subject to curtesy initiate is a reversion. Winestine v. Ziglatzki-Marks Co. [Conn.] 59 A. 496. If the remaindermen die prior to the termination of the particular estate, it reverts to the grantor. Archer v. Jones [Iowa] 101 N. W. 195. See 2 Curr. L. 744, n. 53.

84. Loyd v. Loyd's Ex'r, 102 Va. 519, 46 S. E. 687

85. A remainder must be supported by a particular estate: If the particular estate determines before the remainderman is qualified to take, the remainder expires. Archer v. Jacobs [Iowa] 101 N. W. 195. Estate in trust, the income to children for a specified period when the estate was to be conveyed in fee to certain remaining beneficiaries, held to create equitable remainders or cross remainders in fee and entitled to the legal title on the termination of the trust. Loomer v. Loomer, 76 Conn. 522, 57 A. 167.

86. Deed with reservation to grantor for life. Dozier v. Toalson, 180 Mo. 546, 79 S. W. 420. See 2 Curr. L. 742, n. 49 et seq.

87. Remainder to one on termination of life estate. Archer v. Jacobs [Iowa] 101 N. W. 195. A warranty deed to "A" with a reservation of the rents and profits to the grantor for life creates a vested remainder in fee in "A." Dozier v. Toalson, 180 Mo. 546, 79 S. W. 420.

88. Estate to a wife for life remainder to children, and if any child died before testator or life tenant, his children should take the share of their parent, gives children living at testator's death a vested remainder. Wicker v. Wicker [S. C.] 49 S. E. 10. Estate to "A" for life, remainder to certain named persons, or if any of such persons died before the life tenant, leaving children, such children should take the share of their parents, creates a vested remainder in persons named. Woodley v. Calhoun [S. C.] 48 S. E. 272. Estate to "A" for life, remainder to "B," if "B" die before distribution, to his issue if any, otherwise to his heirs, gives "B" a vested remainder. Callison v. Morris, 123 Iowa, 297, 98 N. W. 780. An estate to "A" for life with power to sell if necessary for her support, remainder to "B," gives "B" a vested remainder, subject to be divested by sale but not otherwise. Hare v. Congregational Soc. [Vt.] 57 A. 964. Remainder to "A" and if she die without issue to "B" gives "A" a defeasible remainder in fee. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451.

89, 90. A remainderman's heirs are such as are living at his death. A half-brother born after his death but before the death of the life tenant does not inherit from him. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97. Estate to "A" for life, remainder to grantor's heirs, creates a vested remainder in the heirs. Where before termination of the life estate, one heir died leaving a child, such child took its parents' estate. Porter v. Osmun [Mich.] 98 N. W. 859. Will descend to heirs of remainderman, though he die before coming into possession; may be aliened by him or subjected to claims of creditors. Archer v. Jacobs [Iowa] 101 N. W. 195.

91. One in contemplation of marriage deeded property in trust to pay the income to himself for life, remainder to his widow and issue. Held, on marriage and birth of issue, the remainder became vested. In re Craig's Estate, 97 App. Div. 289, 89 N. Y. S. 971. A remainder to an unborn child vests at its birth. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97. Estate "to A for life and immediately on her death to children then living or the issue of a deceased child." Mulliken v. Earnshaw, 209 Pa. 226, 58 A. 286. Estate to "A" for life, remainder to his issue then living, and the issue of any then dead. If "A" die without issue, then to "B." Held, the period of vesting was fixed as of the date of the death of "A," and no estate vested in a grandchild who died before him. In re Adams' Estate, 208 Pa. 500, 57 A. 979. Estate in trust to pay income to daughters or if any died to her issue, or failing issue to her sisters surviving, with the right in trustee to sell and to withhold shares of income and to be divided as in intestacy at majority of youngest child of daughters, held contingent till distribution. In re Knowles' Estate, 208 Pa. 219, 57 A. 518. A gift over to the life tenant's children "or their children who may be living at that time" (life tenant's death) is contingent until the life tenant's death. But they are "owners" who may be impleaded in condemnation proceedings and they may be compensated. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476. A remainder to a class at the death of the life tenant is contingent until his death. Wenzel v. Powder [Md.] 59 A. 194. Estate to "A" for life, save in case she remarries, to a class creates a contingent remainder. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1.

92. Estate to "A" for life and if she die without children to be divided among heirs of the grantor creates a contingent remainder in children living at the death of the grantor. Hauser v. Craft, 134 N. C. 319, 46 S. E. 756. Where the right of the remainderman to succeed to the possession at the termination of the life tenancy is not or may never be ascertained. Archer v. Jacobs [Iowa] 101 N. W. 195. Estate to "A" for life, remainder to "B" if he is then alive, if not to "C" with the same provision, creates a contingent remainder, but

the termination of the particular estate. The uncertainty whether a remainderman will outlive the life tenant does not make a remainder contingent.[93] It is the present capacity of taking effect in possession if the possession becomes vacant,[94] not the certainty that such will exist that marks a vested remainder.[95] Remainders may "cross" or alternate.[96]

Vested remainders are favored in construction.[97]

A vested fee-simple estate in remainder is "property" within a statute giving a husband a life estate in his wife's property if she died intestate.[98] Even contingent remaindermen may be "owners" within statutory definitions.[99] Ordinarily only vested future estates are leviable.[1]

Under the rule in Shelley's Case a limitation to "heirs" of a life tenant converts the particular estate into a fee.[2]

At common law a valid conditional limitation[3] *could be made only by way of executory devise;*[4] but statutes now generally make them valid if created by deed.[5] However, it is said that a conditional limitation does not cut down nor accelerate the prior estate in fee.[6] Under a statute providing that such an estate may be limited to the "right heirs" of the grantor, it may be limited to a specified person, a right heir.[7]

the first in the order named who is alive at the death of the life tenant takes a fee. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451.

93. Devise to "A" for life, and at her death to her children and grandchildren, if she left neither, to "B," "A's" children and grandchildren in being at the death of testator took a vested remainder, though they might not survive their mother. Archer v. Jacobs [Iowa] 101 N. W. 195. Provision in will to "A" on death of "B" does not indicate an intention to postpone the vesting of the estate until "B's" death. Id.

94. Archer v. Jacobs [Iowa] 101 N. W. 195. If the class to whom a remainder is devised is certain and only the time of enjoyment is postponed, the estate is vested; thus an estate to "A" for life or during widowhood, then to grantor's children. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

95. Archer v. Jacobs [Iowa] 101 N. W. 195.

96. Remainder to one if he survive the life tenant if not to another vests in the order named as they shall survive. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451.

97. See Deeds of Conveyance, 3 Curr. L. 1056; Wills, 2 Curr. L. 2076. Will be held vested if it can be done with manifest violation of the intention of a donor. Archer v. Jacobs [Iowa] 101 N. W. 195.

98. Snyder v. Jones [Md.] 59 A. 118.

99. Condemnation proceedings. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476.

1. See Executions, 3 Curr. L. 1397.

Note: A vested remainder in fee may be taken in execution and sold by virtue thereof under a judgment against the remainderman (Den v. Hillman, 7 N. J. Law, 218; Wilkinson v. Chew, 54 Ga. 602; Davis v. Goforth, 1 Lea [Tenn.] 31; Murrell v. Roberts, 33 N. C. 424, 53 Am. Dec. 419), so also, a reversionary interest may be sold on execution, though it is contingent upon the happening of events which may never occur, and though the extent of the interest cannot be ascertained (Woodgate v. Fleet, 44 N. Y. 1). Contingent remainders, however, in which the takers cannot be identified until the termination of the particular estate cannot be so taken (Hayward v. Peavey, 128 Ill. 430; Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Roundtree v. Roundtree, 26 S. C. 450), unless under a statute providing that all interests in land shall be subject to seizure (White v. McPheeters, 75 Mo. 292). Conditional limitations and executory devises not being assignable were not, at common law, subject to sale on execution. Watson v. Dodd, 68 N. C. 528.—From note to Young v. Young [Va.] 23 L. R. A. 645.

2. See fuller treatment of the rule in Real Property, 2 Curr. L. 1462; Deeds, 3 Curr. L. 1056; Wills, 2 Curr. L. 2076. Estate to one during his natural life and then to his heirs gives the first taker a fee. Doyle v. Andis [Iowa] 102 N. W. 177. The rule in Shelley's Case is part of the common law of Iowa. Id.

The word "heirs" is essential to justify the application of this rule. Does not apply where an estate is left to one for life remainder to her unborn child. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97. Devise to "A" for life and if she die without leaving a child or children to "B" is not a case for the application of the rule. Hauser v. Craft, 134 N. C. 319, 46 S. E. 756.

3. Estate to "A" for life, then to "B" and "C," cross remainders to the surviver if either die without issue, and if both die without issue, to "D," creates a life estate in "A," determinable fees in "B" and "C" and a conditional limitation in "D." Middlesex Banking Co. v. Field [Miss.] 37 So. 139.

4. See discussion of this doctrine, which is not universally accepted, in 1 Tiffany Real Prop. p. 324, n. 210. Compare Real Property, 2 Curr. L. 1462; Wills, § 6, 2 Curr. L. 2162, n. 98.

5. Code 1880, § 1190, providing what conditional limitation is valid, is applicable to deeds as well as to devises. Middlesex Banking Co. v. Field [Miss.] 37 So. 139. The grantee of a conditional limitation takes by purchase. Id.

6. Middlesex Banking Co. v. Field [Miss.] 37 So. 139.

What words will define the estates is a question of interpretation of the instrument wherein they are used.[8]

Personalty may be limited in life estates[9] *and future estates, if it be of a durable and nonconsumptive kind,*[10] by the same language that would create similar estates in realty.[11]

The total of all estates is a fee,[12] hence the grant of a life estate and remainder passes the fee out of the grantor,[13] and when they unite in the same person, he takes a fee;[14] and contingent remainders limited to persons who are not and may never be in being are destroyed.[15]

§ 2. *Mutual and relative rights and remedies of life tenants, future tenants and their privies.*[16]—The life tenant should not deal with property in a manner prejudicial to the remainderman's interest.[17] A remainderman has no present interest during the existence of the life estate,[18] but is entitled to the property at its termination,[19] and a remainder may be accelerated if so intended where an intervening devise fails.[20] Possession after the termination of the life estate is not necessary to complete his title.[21] A reversioner entitled to re-enter on breach of condition subsequent cannot re-enter after conveyance of his reversionary interest.[22] His grantee cannot re-enter for a breach occurring prior to the conveyance.[23] Waste if willful and wanton will work a forfeiture of the life estate,[24] or a lesser degree will support action for damages.[25] Being liable to the remainderman for waste

7. Rev. Code 1880, § 1190. Middlesex Banking Co. v. Field [Miss.] 37 So. 139.

8. **Words construed:** Deed of trust held to create a **life estate in the income** in wife and children of the grantor, remainder in fee to the issue of such children. In re Eyre's Estate, 205 Pa. 561, 55 A. 541.

Consent judgment in partition of community property between a widow and heirs of her deceased husband held insufficient to reduce her fee to a life estate. Drew v. Morris [Tex. Civ. App.] 82 S. W. 321. A reservation of the **sole use, control and occupation.** Chicago, etc., R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. Estate to "A," following other devises and bequests to her was a provision that it was for life only. Held, such limitation applied to the first devise. Hauser v. Craft, 134 S. C. 319, 46 S. E. 756. A devise to one **"and to his children"** held to create a life estate in the son, remainder to his children living at testator's death. Crawford v. Forest Oil Co., 208 Pa. 5, 57 A. 47.

9. Overton v. Nashville Trust Co., 110 Tenn. 50, 72 S. W. 108. Bequests to one "for her use during her natural life" in one-third the residue of the personal estate of a testator is a life estate. Dickinson v. Griggsville Nat. Bank, 209 Ill. 350, 70 N. E. 593. See 2 Curr. L. 744.

10. Personalty and realty to "A," providing that both kinds of property are given her for life, remainder to "B," gives "A" a life estate in both kinds of property. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451.

11. Stallcup v. Cronley's Trustee, 25 Ky. L. R. 1675, 78 S. W. 441.

12. As to merger, see Real Property, 2 Curr. L. 1462.

13. A subsequent deed passes nothing. Smith v. Smith, 25 Ky. L. R. 1960, 79 S. W. 223. A grantor after providing for an annuity for himself for life, the principal to his children, subsequently agreed with the trustee that in consideration for the payment of the annuity in another way the principal might be divided. Held, that if the annuitant had a reversion, contingent on his outliving his children under the original trust, his substituted agreement disposed of it. Baltes v. Union Trust Co. [N. Y.] 72 N. E. 1005.

14. Graham v. Whitridge [Md.] 58 A. 36.

15. Archer v. Jacobs [Iowa] 101 N. W. 195.

16. See 2 Curr. L. 744.

17. Should not take title to realty purchased with the proceeds of the sale of personalty in the name of third persons. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

18. Where a grantor reserved a life estate, the surviving husband of a grantee who died during the life of the grantor has no present interest. Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673.

19. Where distributees under a will agreed with the widow that she should have the use of certain property for life with power to use the principal but not to dispose of it by will, they were at the death of the widow entitled to the remaining property. No necessity for the legal representative of the testator's estate to act as a conduit. Hinn v. Gersten [Wis.] 99 N. W. 338.

20. By expunging an invalid trust. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

21. Morrison v. Fletcher [Ky.] 84 S. W. 548.

22. Lewis v. Lewis, 76 Conn. 586, 57 A. 735.

23. Under Gen. St. 1902, § 4051, declaring that he shall have the same right of entry as the original reversioner. Lewis v. Lewis, 76 Conn. 586, 57 A. 735.

24. Under Civ. Code 1895, § 3090, must be both permissive and voluntary and the voluntary waste must be committed wantonly. Roby v. Newton [Ga.] 49 S. E. 694.

25. Roby v. Newton [Ga.] 49 S. E. 694. Where a prayer for relief was for forfeiture and in the alternative for damages, both issues should be submitted. Id.

committed by a stranger, he may recover full indemnity for an injury to the freehold,[26] notwithstanding a statutory right of action in the remainderman.[27]

Taxes and incumbrances and contribution.[27a]—It is the duty of the life tenant to keep down the taxes,[28] and he is personally liable therefor,[29] notwithstanding the estate is also bound.[30] A remainder cannot be sold for taxes due on the life estate.[31] The duty to preserve the premises from waste includes the obligation to keep down interest on existing incumbrances. If he is obliged to pay off an incumbrance, he is entitled to contribution.[32]

The possession of a life tenant is not adverse[33] to a remainderman or reversioner,[34] nor is the possession of one holding under him[35] during the existence of

26. Including loss to remainderman. Dix v. Jaquay, 94 App. Div. 554, 88 N. Y. S. 228. Complaint against subtenant for cutting timber held sufficient. Id.

27. Dix v. Jaquay, 94 App. Div. 554, 88 N. Y. S. 228.

27a. See 2 Curr. L. 744, n. 58, 67.

28. A life tenant is not entitled to deduct from a payment which is an annual charge upon the land a proportionate share of the taxes. Angle v. Angle [N. J. Eq.] 57 A. 425. By permitting the estate to be sold for taxes and buying in the tax title, he acquires no rights against the remainderman. Crawford v. Meis, 123 Iowa, 610, 99 N. W. 186.

The duty as between life tenant and remainderman to pay **transfer taxes** is treated in the topic, Taxes, 2 Curr. L. 1786.

29. Morrison v. Fletcher [Ky.] 84 S. W. 548. A life tenant is liable for taxes which become a lien during the existence of his tenancy. In re Corbin's Will, 91 N. Y. S. 797.

30. Morrison v. Fletcher [Ky.] 84 S. W. 548. A life tenant is liable for taxes which taxes. It should be sold first. Fenley v. Louisville [Ky.] 84 S. W. 582.

31. After judgment entered for sale for taxes which were a lien on both life estate and remainder, the remainderman deposited with the court the amount due by them. Held, the judgment of sale should be modified. Woolley v. Louisville [Ky.] 82 S. W. 608.

NOTE. Effect on reversion or remainder of a tax sale during the existence of the life estate: There are two distinct doctrines. Under one the sale, if valid, extinguishes all prior titles of whatsoever nature or kind. Turner v. Smith, 14 Wall. [U. S.] 553, 20 Law. Ed. 724; Osterberg v. Union Trust Co., 93 U. S. 424, 23 Law. Ed. 964; Gross v. Taylor, 81 Ga. 86; Dunlap v. Gallatin County, 15 Ill. 7; Lewis v. Pleasants, 143 Ill. 271; Miami County Com'rs v. Brackenridge, 12 Kan. 114; Parker v. Baxter, 2 Gray [Mass.] 185; Langley v. Chapin, 134 Mass. 87; Sinclair v. Learned, 51 Mich. 335; Westbrook v. Miller, 64 Mich. 129. In several states it would seem that the reversioner or remainderman must be made a party to the tax suit. Gitchell v. Kreidler, 84 Mo. 472; Allen v. McCabe, 93 Mo. 138; Smith v. Messer, 17 N. H. 420; Jackson v. Babcock, 16 N. Y. 426; Jones v. Devore, 8 Ohio St. 430; Fager v. Campbell, 5 Watts [Pa.] 287. See, also, Yocum v. Zahner, 162 Pa. 468; Brown v. Austin, 41 Vt. 262; Jarvis v. Peck, 19 Wis. 74. The other doctrine limits the sale to the estate of the life tenant. Dyer v. Branch Bank, 14 Ala. 622; White v. Portland, 67 Conn. 272; Payne v. Arthur, 16 Ky. L. R. 784; Dunn v. Winston, 31 Miss. 135; Morrow v. Dows, 28 N. J. Eq. 459; Weaver v. Arnold, 15 R. I. 53; Nashville v. Cowan, 10 Lea [Tenn.] 209; Yenda v. Wheeler, 9 Tex. 408. The first doctrine is followed in those states where the tax is a charge upon the land alone where no resort is contemplated against the owner or his personal estate, and where the proceeding is strictly in rem. In such case the tax law is notice to the world of the liability of the land for public assessments. The latter doctrine is followed where the law requires the land to be listed in the name of the owner of the fee or of any other interest in the estate; provides for a personal demand for the tax, and authorizes a seizure of the body or goods of the delinquent, and authorizes a sale of the land only when all other remedies have been exhausted. In such cases the title is a derivative one and the purchaser takes only the interest of the defaulter.—From note to Ferguson v. Quinn [Tenn.] 33 L. R. A. 689.

32. Tindall v. Peterson [Neb.] 98 N. W. 688. In case he pays the principal, the burden is apportioned between him and the remainderman in such manner that the tenant will pay the present value of the amount of interest he would have paid during his life if the incumbrance had continued in existence, afd. on rehearing, 99 N. W. 659. The life tenant can recover from the remainderman his proportion of the purchase price of an outstanding title. Keller v. Fenske [Wis.] 101 N. W. 378.

33. See 2 Curr. L. 745.

34. Lewis v. Lewis, 76 Conn. 586, 57 A. 735; Hays v. Marsh, 123 Iowa, 81, 98 N. W. 604. However long continued. Morrison v. Fletcher [Ky.] 84 S. W. 548; Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091; Joyner v. Futrell, 136 N. C. 301, 48 S. E. 649; Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97.

Note: It being the duty of the party in possession of the rents and profits to pay the taxes, he will not be permitted to acquire title by refusing or neglecting to pay the same and purchasing the premises at tax sale or subsequently acquiring them from a purchaser at such sale. Pleasants v. Scott, 21 Ark. 370, 76 Am. Dec. 403; McMinn v. Whelan, 27 Cal. 300; Busch v. Huston, 75 Ill. 343; Stears v. Hollenbeck, 38 Iowa, 550; Leppo v. Gibbert, 26 Kan. 138; Willard v. Strong, 14 Vt. 532, 39 Am. Dec. 240; Williamson v. Russell, 18 W. Va. 612; Perkins v. Wilkinson, 86 Wis. 538; Hagen v. Varney, 147 Ill. 281; Stewart v. Matheny, 66 Miss.

the life estate, unless the owner of the future estate is by statute, given a right of action.[36] But a life tenant by devise who gets in an outstanding paramount claim thereafter holds adverse to the remainderman[37] who is affected with notice by the recording of the deed,[38] though the remainderman may ordinarily contribute so it shall enure to him.[39] A co-tenant in remainder may purchase for his exclusive benefit an outstanding title,[40] and one may hold adversely to the others after the life estate terminates;[41] but improvements made by one inure to the benefit of all.[42] The possession of a life tenant cannot be tacked to that of a remainderman for the purpose of barring rights in third persons.[43]

Mutual dealings.—A contract of settlement between a life tenant as executor and remaindermen, if fair at the time, will not be set aside at their instance after his death.[44] Unauthorized advancements made to a remainderman do not constitute a lien on his interest.[45]

Increment to funds.[45a]—Surplus and undivided profits on hand when the stock was purchased[46] and stock dividends go to the corpus.[47]

Unconsumed income given for a specific purpose falls back into the corpus,[48] and a power not exercised in any manner affords no basis for a lien to cover other moneys devoted to its purpose.[49]

The right of partition[49a] is often given by statute to remaindermen and reversioners,[50] unless in the terms of the instrument creating the estate, a condition to the contrary prior to the time of enjoyment is implied.[51] This right may be denied if prejudicial to infant remaindermen.[52]

A power[53] *to consume the principal* may by terms of the grant[54] or by agree-

21, 14 Am. St. Rep. 538. See note to Estabrook v. Royon [Ohio] 32 L. R. A. 805.

35. Hauser v. Craft, 134 N. C. 319, 46 S. E. 756; Chicago, etc., R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113; Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476. An action against a grantee of a life tenant within the period of limitations after the life tenant's death is not barred. Ousler v. Robinson [Ark.] 80 S. W. 227.

36. Where a remainderman, with notice that his rights are disputed is given a right of action to settle disputed questions, notwithstanding the existence of the life estate, the bar of limitations may be invoked against him. Crawford v. Meis, 123 Iowa, 610, 99 N. W. 186.

37, 38. Commonwealth v. Clark [Ky.] 83 S. W. 100.

39. His proportionate share of the price paid. Keller v. Fenske [Wis.] 101 N. W. 378.

40. Crawford v. Meis, 123 Iowa, 610, 99 N. W. 186.

41. Co-remaindermen had become owners of the life estate. McCullough v. Finley [Kan.] 77 P. 696.

See Tenants in Common and Joint Tenants, 2 Curr. L. 1862.

42. He is not entitled to an allowance therefor on partition after the termination of the life estate. Porter v. Osmun [Mich.] 98 N. W. 859.

43. Under Code, § 152, providing that an action to foreclose shall be barred after ten years if the mortgagor has been in possession. Woodlief v. Wester, 136 N. C. 162, 48 S. E. 578. Code, § 158, has no application, relief being provided for in § 152. Id.

44. They having been old and unlikely to outlive him, released for a small portion, but he died very soon. Almon v. Ellison [Ky.] 81 S. W. 245.

45. Where a life tenant, trustee of a fund, without authority makes advancements. Wilson v. Longhorne, 102 Va. 631, 47 S. E. 871.

45a. See 2 Curr. L. 744, n. 60.

46. This is a part of the principal. Tuttle v. First Nat. Bank, 44 Misc. 318, 89 N. Y. S. 820.

47. Blinn v. Gillett, 208 Ill. 473, 70 N. E. 704. Such a dividend is not intestate property. Id.

48. When a life estate is given for support at discretion of trustees, all which is not necessary or proper for support, falls into the remainder. Demeritt v. Young, 72 N. H. 202, 55 A. 1047.

49. Life tenant had power to sell if necessary for her support. She waived the right by obtaining sustenance elsewhere. Held she was not entitled to an equitable lien on the property. Hare v. Congregational Soc. [Vt.] 57 A. 964.

49a. See 2 Curr. L. 745.

50. See Partition, 2 Curr. L. 1097.

Under Hurd's Rev. St. 1901, ch. 106, § 1, providing that co-tenants have a right of partition. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115. Though they are not entitled to possession. Id. Remaindermen may partition during the existence of the life estate. McCullough v. Finley [Kan.] 77 P. 696.

51. Will provided for a division at the death or marriage of the life tenant. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

52. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

53. See Powers, 2 Curr. L. 1257; Wills, 2 Curr. L. 2076.

54. A power in the life tenant "to use ac-

ment between life tenant and remainderman[55] be added to the life interest. The intention to grant the power must clearly appear.[56]

Protection to expectant interest.[56a]—The owner of a defeasible title need not,[57] but a life tenant may be required to give bond that personal property will be forthcoming when his estate terminates,[58] unless the property be of such nature that enjoyment thereof cannot be had without possession or consumption in whole or part.[59] Remaindermen in a fund may procure the appointment of a trustee to take possession of and preserve it.[60] A contingent remainderman's interest,[61] if not too remote,[62] must be protected when the property is converted, and in South Carolina he must be made a party to condemnation proceedings.[63] Equity may authorize a sale for the purpose of preserving the estate,[64] but the necessity therefor must be apparent.[65] Where the principal falls into the remainder as fast as life interests in the income determine, investments should be apportioned into as many parts as there are life tenants.[66]

§ 3. *Rights and remedies between third persons and life tenants, remaindermen or reversioners.*[67]—A life tenant can convey no greater interest than he owns,[68] unless vested with a power of disposal.[69] His deed carries any equities in the land which he has against the remainderman.[70] In North Carolina his covenant of general warranty has the effect only of a personal covenant.[71] The administrator, of a

cording to her desire" creates a right to use all; the remainderman takes only such part as is undisposed of. McGuire v. Gallaghen [Me.] 59 A. 445. Implied from terms "To A, my wife, all my property, to be used by her according to her desire," at her death property remaining to B. Id.

55. Distributees under a will agreed with the widow that she should have the use of certain property for life with power to dispose of the principal, but not by will; held, the widow had power to incur indebtedness for living expenses payable out of the property either before or after her death. Hinn v. Gersten [Wis.] 99 N. W. 338. A clause that the widow should not dispose of the property by will did not change the effect of the agreement. Id.

56. Provision for the disposition of property "then remaining" at the death of the life tenant did not authorize the life tenant to sell. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1.

56a. See 2 Curr. L. 744, n. 61.

57. If not so provided in the instrument creating the title. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451.

58. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451. As a general rule all usufructuaries must give bond. Maguire v. McGuire, 110 La. 279, 34 So. 443. The fact that she is appointed as executrix without bond does not relieve her. Id.

59. McKee v. McKee's Ex'r [Ky.] 82 S. W. 451.

60. Graham v. Whitridge [Md.] 58 A. 36.

61. Estate to "A" and his children, remainder to the descendants of "A" living at the time of his death. On a sale of the property during the life of "A," the judgment of sale should be so framed as to protect the interests of minor children if they survive their father. Bullock v. Bullock [Ky.] 84 S. W. 738.

62. Remaindermen not in being [Pub. Laws 1903, p. 122]. Smith v. Gudger, 133 N. C. 627, 45 S. E. 955.

63. Is entitled to compensation when the estate is taken. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476.

64. Though no such power is given by the instrument creating the life estate. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1.

65. Thompson v. Adams, 205 Ill. 552, 69 N. E. 1.

66. So that as each life interest terminates that fraction may be turned over. Graham v. Whitridge [Md.] 58 A. 36.

67. See 2 Curr. L. 745.

68. Commissioners of Yazoo & Mississippi Valley Delta v. Nelms [Miss.] 37 So. 116. A dowress cannot convey the reversion. Ousler v. Robinson [Ark.] 80 S. W. 227. The grantee of a life tenant takes no greater interest than the grantor owns. Chicago, etc., R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. Where a legatee had a life estate in certain stock and the trustee was authorized by the will to give him possession and control of it, and the legatee pledged it under his authority, held, that in so doing the legatee acted as the trustee's agent, and the latter, after the legatee's death, could alone demand the return of the stock on payment of the notes which it was pledged to secure. Bristol Sav. Bank v. Holley [Conn.] 58 A. 691. One who purchases from the life tenant without consideration or with notice of the nature of his title acquires no rights against the remainderman. Dickinson v. Griggsville Nat. Bank, 209 Ill. 350, 70 N. E. 593.

69. By the statute in Wisconsin, a grantee under warranty deed by a life tenant with absolute power of disposal free from trust is a "purchaser" as to whom the power raises the life estate to a fee. Auer v. Brown [Wis.] 98 N. W. 966.

70. Lien acquired by paying off a mortgage. Keller v. Fenske [Wis.] 101 N. W. 1055.

71. Express provision of Code, § 1334. Hauser v. Craft, 134 N. C. 319, 46 S. E. 756.

life tenant, can have no interest.[72] The lien of a mortgage executed by him ceases[73] and his tenant becomes a trespasser;[74] but it is held that his grantee of a right of way does not,[75] and that he may recover his improvements from the reversioner,[76] especially if in possession in good faith.[77]

A vested remainder is alienable.[78] At common law, a contingent remainder was not subject to conveyance,[79] otherwise under a statute providing that any interest or claim to real estate may be disposed of by deed.[80] Such a statute also includes a conditional limitation.[81] It may be released to the tenant.[82] While it is assignable in equity, it will not be enforced as against the assignor unless based on a valuable consideration.[83]

The grantee of an expectancy acquires only his grantor's interest.[84] A reversionary interest is subject to sale on execution.[85] A possibility of reverter is not assignable.[86] The legislature may provide for the sale of property so as to divest the interest of persons having contingent remainders and executory devises.[87]

LIFE INSURANCE; LIGHT AND AIR, see latest topical index.

LIMITATION OF ACTIONS.

§ 1. Statutes of Limitation, Validity, Interpretation and Law Governing (446).
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This title relates to the general statutes of limitations and relegates to more

72. Borum v. Gregory, 119 Ga. 766, 47 S. E. 192.

73. Bryan v. Dupoyster [C. C. A.] 130 F. 83.

74. A lease given by a life tenant terminates at his death. Crawford v. Forest Oil Co., 208 Pa. 5, 57 A. 47.

75. Chicago, etc., R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113. A railroad company holding a deed from a life tenant to a right of way should on termination of the life estate be given a reasonable time within which to condemn. Id.

76. In case of condemnation a railroad company need not pay the reversioner for improvements on a right of way acquired from the life tenant. Chicago, etc., R. Co. v. Vaughn, 206 Ill. 234, 69 N. E. 113.

77. If such tenant is in possession in good faith he is entitled to an accounting. He is chargeable with the income less taxes and improvements. Keller v. Fenske [Wis.] 101 N. W. 378.

78. Coats v. Harris [Idaho] 75 P. 243.

79. Conveyance by debtor of all his property would not pass a contingent remainder. Wilson v. Langhorne, 102 Va. 631, 47 S. E. 871. Neither at common law nor under a statute allowing conditional limitations to pass by deed. Stallcup v. Cronley's Trustees, 25 Ky. L. R. 1675, 78 S. W. 441.

80. Code 1887, § 2418. Wilson v. Langhorne, 102 Va. 631, 47 S. E. 871. Under Code, § 2914. McDonald v. Bayard Sav. Bank, 123 Iowa, 413, 98 N. W. 1025. Under a statute providing that a judgment shall be a lien on real estate acquired after the date of the judgment, a contingent remainder then held is liable when it subsequently vests. Wilson v. Langhorne, 102 Va. 631, 47 S. E. 871.

81. Ky. St. § 2341. Stallcup v. Cronley's Trustees, 25 Ky. L. R. 1675, 78 S. W. 441.

82. It is such a present and existing interest as is susceptible of release to the life tenant. Stallcup v. Cronley's Trustees, 25 Ky. L. R. 1675, 78 S. W. 441; McDonald v. Bayard Sav. Bank, 123 Iowa, 413, 98 N. W. 1025.

83. Stallcup v. Cronley's Trustees, 25 Ky. L. R. 1675, 78 S. W. 441.

84. Acquires nothing if the remainder never vests. Smith v. Smith, 25 Ky. L. R. 1960, 79 S. W. 223.

85. Land assigned as dower. Rusk v. Hill [Ga.] 49 S. E. 261.

86. Helms v. Helms [N. C.] 49 S. E. 110.

87. P. L., 503. In re Smith's Estate, 207 Pa. 604, 57 A. 37. Under Code 1887, § 2616, authorizing guardians to procure a sale of real estate of an incompetent whether or not there be limited thereon any other estate, equity may order a sale not only of a life estate of an incompetent but also any estate vested or contingent, limited to other incompetents. Rhea v. Shields [Va.] 49 S. E. 70. See Faulkner v. Davis, 18 Grat. [Va.] 652, 98 Am. Dec. 698, for full discussion. Under Gen. St. p. 2992, providing for the sale of land free from contingent remainders limited to persons not in esse, an

specific titles the various special limitations on particular kinds of actions and obligations,[88] and on those proceedings which do not fall within the general meaning given to the terms "actions" and "suits."[89] Limitations on a statutory liability where the statute prescribes the period within which the actions must be brought[90] are not, strictly speaking, statutes of limitations, and are treated in titles pertaining thereto. The doctrine of laches is treated in the title Equity.[91]

§ 1. *Statutes of limitation, validity, interpretation and law governing.*[92]—It is within legislative power to fix limitations on actions subject to the constitutional guaranties of property contracts and vested rights,[93] and if retroactive legislation is allowable, to provide that existing causes of action shall be barred unless brought within the period prescribed,[94] or to cut down[95] or extend[96] the presently prescribed period with respect to existing causes. A state may prescribe a limitation for actions on foreign judgments different from that prescribed for actions on domestic judgments.[97] A limitation may be specially prescribed for actions on written instruments executed outside the state.[98] The operation of the statute may be suspended as to a class.[99] There is a conflict of authority as to whether a barred obligation can be revived by statute.[1]

Statutes of limitation are statutes of repose, not of cancellation or payment.[2] They affect the remedy, not the right,[3] and apply to actions, not to defenses.[4] The general statutes are applied generally and in all cases where ex-

estate to "A" for life, to "B" his wife for life, remainder to their children is a future estate, limited in part to persons not in esse, though the first life tenant has attained the age of 68 years. In re Clement [N. J. Eq.] 57 A. 724.

88. See Estates of Decedents, § 6 B (statutes of nonclaim) 3 Curr. L. 1270; Bankruptcy, § 14 (statutes of nonclaim) 3 Curr. L. 434; Corporations, § 16 (stockholder's liability) 3 Curr. L. 935; Death by Wrongful Act, 3 Curr. L. 1042.

89. See Appeal and Review, 3 Curr. L. 167; New Trial and Arrest of Judgment, 2 Curr. L. 1037, and similar titles.

90. See Death by Wrongful Act, 3 Curr. L. 1034; Corporations, 3 Curr. L. 880; Estates of Decedents, 3 Curr. L. 1238.

91. See Equity, 3 Curr. L. 1210.

92. See 2 Curr. L. 746. See, also, Adverse Possession, 3 Curr. L. 51.

93. Edelstein v. Carlile [Colo.] 78 P. 680. See, generally, Constitutional Law, 3 Curr. L. 730.

94. Congress legislating for the District of Columbia. Givin v. Brown, 21 App. D. C. 295. See, also, Town of Koshkonong v. Burton, 104 U. S. 668, 26 Law. Ed. 886.

95. 21 James I, ch. 16, giving a person under disability the right to sue within 10 years after the disability was removed was repealed by Code D. C., § 1265, limiting such period to five years. Gwin v. Brown, 21 App. D. C. 295.

96. A statute may be changed to extend the period of a right already accrued and take away the allowance for absence from the state [Mont. Code Civ. Proc. § 554]. Davis v. Mills, 194 U. S. 451, 48 Law. Ed. 1067. The four-year limitation provided by Comp. Laws 1888, § 3143, was extended to six years by Rev. St. 1898, § 2484. Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628.

97. The only limitation on this power is that a reasonable time must be allowed. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

98. A provision that actions must be maintained within two years is not unconstitutional. Not as an interference with interstate commerce nor as a violation of the privileges and immunities granted to the citizens of the several states nor as a denial of equal protection of the laws [Code Civ. Proc. § 339, subd. 1]. Higgins v. Graham, 143 Cal. 131, 76 P. 898.

99. Ky. St. 1903, § 2525, does not run against married women during coverture regardless of their ability to maintain action during such period. Terrell v. Maupin [Ky.] 83 S. W. 591.

1. The right to defeat a debt by a plea of the statute is neither a vested nor a property right, and may be taken away by the legislature. Orman v. Van Arsdell [N. M.] 78 P. 48. After the bar of the statute is complete, the cause of action cannot be revived by legislative action. Edelstein v. Carlile [Colo.] 78 P. 680.

2. A barred vendor's lien will not be canceled as cloud on title. Cassell v. Lowry [Ind.] 72 N. E. 640. Limitations will not perfect title to land in one not in possession. Row v. Johnston, 25 Ky. L. R. 1799, 78 S. W. 906.

3. Ex parte Smith, 134 N. C. 495, 47 S. E. 16. Fraud may be set up as a defense though an action based thereon is barred. Jackson v. Martin [Tex. Civ. App.] 84 S. W. 603. A deed omitted the recital that the grantee assumed a mortgage. Held, the fact that an action to reform the deed was barred was no defense to an action on the mortgage. Fender v. Hazeltine [Mo. App.] 79 S. W. 1018.

4. To an action on a note defendant set up discharge in bankruptcy. Plaintiff replied to this discharge that the note was procured by fraud, therefore was unaffected by the discharge. The defendant then set up limitations. Held, the rejoinder did not

ception to their operation is not specifically made.[5] The enumeration of specific exceptions by implication excludes all others.[6] Special statutes control general ones.[7]

If it was so intended[8] and a reasonable time within which to bring action is allowed to those whose demands have accrued,[9] a retroactive operation will be given them. But following the usual construction statutes of limitation will not be given a retrospective effect unless the legislature so intended and such intention is unequivocally expressed.[10] What is a reasonable time is a legislative question and the wisdom of its decision will not be inquired into unless the period allowed is manifestly insufficient.[11] A limitation is unreasonable which does not afford full opportunity for the enforcement of the rights upon which it operates.[12]

state a defense. Louisville Banking Co. v. Buchanan, 25 Ky. L. R. 2167, 80 S. W. 193. Where, in an action on a note, the defendant set up that he had delivered lumber to the plaintiff in part payment, the defense was not barred, though an action to recover for the lumber or set up its delivery as a counterclaim would be barred. Blackshear v. Dekle [Ga.] 48 S. E. 311.

5. Though under Code Civ. Proc. § 1569, limitations do not run against a claim against the estate of a decedent pending proceedings for the settlement of the estate, held, where a homestead was mortgaged and the husband died and the widow conveyed her interest, limitations did not cease to run in favor of the wife's grantee as against foreclosure because of the fact that the claim had been presented. Vandall v. Teague, 142 Cal. 471, 76 P. 35.

6. Atchison, etc., R. Co. v. Atchison Grain Co., 68 Kan. 585, 75 P. 1051.

NOTE. Concealment of a cause of action must be made an exception to the statute, otherwise it will not suspend the operation, however harsh or inequitable the enforcement may be. Fee's Adm'r v. Fee, 10 Ohio, 469, 36 Am. Dec. 103; Lathrop v. Shellbaker, 6 Ohio St. 276; Howk v. Minnick, 19 Ohio St. 462, 2 Am. Rep. 413; Smith v. Bishop, 9 Vt. 110, 31 Am. Dec. 607; Peak v. Buck, 3 Baxt. [Tenn.] 71; Troup v. Smith's Ex'rs, 20 Johns. [N. Y.] 33; Allen v. Mille, 17 Wend. [N. Y.] 202; Exhorn v. Exhorn, 37 N. Y. S. 68; Miller v. Wood, 116 N. Y. 351; Board of Chosen Freeholders v. Veghte, 44 N. J. Law, 509; Mast v. Easton, 33 Minn. 161, 22 N. W. 253; Jacobs v. Frederick, 81 Wis. 254; Blount v. Parker, 78 N. C. 128; Wood on Limitations [3rd Ed.] § 274. See Atchison, etc., R. Co. v. Atchison Grain Co., 68 Kan. 585, 75 P. 1051.

7. An action for dower under Code Civ. Proc. § 1596 unaffected by the General Statutes. Wetyen v. Fick, 178 N. Y. 223, 70 N. E. 497.

8. Act Colo. April 29, 1895, as amended by Act April 6, 1899, being a re-enactment of a prior statute which it repealed, was intended to operate on judgments rendered prior to its passage. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434. Act March 14, 1903, construed to be retrospective in its operation. Orman v. Van Arsdell [N. M.] 78 P. 48.

9. Gwin v. Brown, 21 App. D. C. 295; Edelstein v. Carlile [Colo.] 78 P. 680; Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

10. Edelstein v. Carlile [Colo.] 78 P. 680; Curtis v. Boquillas Land & Cattle Co. [Ariz.] 76 P. 612. Acts 1895, ch. 4375, p. 14, providing that a new promise to be effective must be in writing and signed, has no application to a promise made before the passage of the act. Vinson v. Palmer [Fla.] 34 So. 276. Rev. St. 1901, par. 2938, being the first legislation limiting the period within which actions for the recovery of real estate must be brought, has no application to an action commenced before the statute took effect. Curtis v. Boquillas Land & Cattle Co. [Ariz.] 76 P. 612. The provision in Rev. St. 1901, pars. 2974, 4243, providing that where the limitation prescribed in a repealed act had begun to run the time should be deemed a part of the period prescribed in the new statute, applies only to repealed statutes and not to new legislation where none had previously existed. Id. Mills' Ann. St. § 2923, providing that an action for the recovery of land must be brought within 20 years after the right of action accrues, is prospective. Edelstein v. Carlile [Colo.] 78 P. 680.

11. Whether it is manifestly insufficient is a question of law. Gwin v. Brown, 21 App. D. C. 295.

NOTE. Periods held reasonable: In Terry v. Anderson, 95 U. S. 628, 24 Law. Ed. 365, nine and one-half months; Vance v. Vance, 108 U. S. 245, 27 Law. Ed. 808, eight and one-half months; Wheeler v. Jackson, 137 U. S. 245, 34 Law. Ed. 659, six months; Turner v. New York, 168 U. S. 90, 42 Law. Ed. 392, six months; Stine v. Bennett, 13 Minn. 153, four and one-half months; Russell v. Akley Lumber Co., 45 Minn. 376, six months; Bigelow v. Bemis, 2 Allen [Mass.] 496, five months; Smith v. Packard, 12 Wis. 371, eight and one-half months; Horback v. Miller, 4 Neb. 31, four and one-half months; Myers v. Wheelock, 60 Kan. 747, six months; Power v. Kitching, 10 N. D. 254, 88 Am. St. Rep. 691, seven months. But in McGahey v. Virginia, 135 U. S. 662, 34 Law. Ed. 304, a limitation of one year was held **unreasonable** and in Berry v. Ransdall, 4 Metc. [Ky.] 292, the same was held of a limitation of thirty days. In Bank v. Braithwaite, 7 N. D. 358, 66 Am. St. Rep. 653, it was doubted whether three and one-half months was a reasonable time, but thirteen months was held reasonable. See Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

12. Act Colo. April 29, 1895, as amended by Act April 6, 1899, prescribing a general limitation of six years for actions on for-

The statute is a positive rule of law and must be enforced when applicable,[13] regardless of seeming harshness or unwisdom[14] if properly invoked,[15] and not otherwise.[16] An equitable reason for granting relief from the bar will not be considered at law.[17]

Admiralty[18] *and equity,* in the absence of exceptional circumstances, usually act in analogy to the statute;[19] but they are not bound by it and will not follow it where conditions render it inequitable,[20] except in cases of concurrent jurisdiction,[21] and under a system where there is but one form of action and the statute is directed to the substance not to the forum.[22]

Limitation is governed by the law of the forum;[23] but where a statute creates a liability and annexes a limitation thereto, such limitation will follow the right wherever the cause is sued upon,[24] and the fact that the limitation is contained in a different statute is immaterial, provided it is directed at the newly created liability.[25] A law applying the lex loci to foreign causes will bar a suit

eign judgments and also declaring that if the judgment be based on a cause which accrued more than six years prior to the action on such judgment, the action, if against a bona fide resident, must be commenced within three months after rendition of the judgment sued on, is unreasonable. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

13. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Where the defendant procured an injunction under Rev. Code 1899, § 5845 against the foreclosure of a mortgage under a power of sale contained therein, he is not estopped thereby to plead the bar of the statute against an action to foreclose. Feigen v. Drake [N. D.] 101 N. W. 893. A judgment establishing the validity of a mortgage rendered in an action to quiet title is not res adjudicata against a plea of the statute interposed in a subsequent action between the same parties to foreclose the same mortgage, where it does not appear that the conditions were such that the statute could not have been made available as a defense to the former action. Id. In the prescription liberandi causa, the question of good or bad faith plays no part. Munholland v. Fakes, 111 La. 931, 35 So. 983.

14. A court in its instructions is not required to comment on the wisdom and beneficence of the statute. Nelson v. Brisbin [Neb.] 98 N. W. 1057.

15. A debtor is under no obligation to call his creditors' attention to the statute. Paul v. Fidelity & Casualty Co. [Mass.] 71 N. E. 801.

16. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

17. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801.

18. The fact that pending a suit in rem to recover for breach of contract of affreightment the damages sustained by libellant have increased to a sum in excess of the stipulation given for the release of the vessel is not such an exceptional circumstance as will permit an amendment of the libel to bring in the ship owner and add a new cause of action. The Southwark, 128 F. 149.

19. See Equity, 3 Curr. L. 1210. Federal court of equity. Stevens v. Grand Central Min. Co. [C. C. A.] 133 F. 28. Accounting by stockholders against the directors of a corporation may extend back over six years from the time of bringing suit. Barry v. Moeller [N. J. Eq.] 59 A. 97. Where a demand ordinarily cognizable at law is because of special conditions enforceable only in equity, limitations will be applied in the same way as at law, either in obedience to the statute or by analogy. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132. Laches is not charged against a party for failure to bring an action on an equitable claim if he acts within the time allowed by the statute. Michigan Trust Co. v. Red Cloud, 3 Neb. Unoff. 722, 92 N. W. 900.

20. In this case the Utah statute was not followed. Stevens v. Grand Central Min. Co. [C. C. A.] 133 F. 28. Statutes of limitation as such are not enforced by courts of admiralty. The Southwark, 128 F. 149.

21. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132. If an action is barred at law, it is barred in equity. Tucker v. Linn [N. J. Eq.] 57 A. 1017.

22. Burns' Ann. St. 1901, § 294, prescribing a 10-year limitation for actions on notes, bars an action to enforce a vendor's lien incident to the note. Cassell v. Lowry [Ind.] 72 N. E. 640.

23. The courts of one state will not as a matter of comity enforce a contract made in another state as to the time when suit shall be brought. Adams Exp. Co. v. Walker [Ky.] 83 S. W. 106. See 2 Curr. L. 747, n. 96.

See, generally, Conflict of Laws, 3 Curr. L. 720.

24. Mont. Code Civ. Proc. § 554, providing that an action against directors of a corporation to recover a penalty or enforce a liability created by law must be brought within three years, may be availed of by a defendant in another state. Davis v. Mills, 194 U. S. 451, 48 Law. Ed. 1067. A liability created by a statute which prescribes the time within which action must be brought will not be enforced in another state after the expiration of such period. Ross v. Kansas City S. R. Co. [Tex. Civ. App.] 79 S. W. 626. Action for wrongful death. Negaubauer v. Great Northern R. Co. [Minn.] 99 N. W. 620.

25. The fact that the limitation is contained in the same section is material only

against a corporation foreign to the lex loci where, however, it was at all times suable and could sue there.[26] Federal courts follow the statute of the state in which the action is tried.[27]

§ 2. *Period of limitation.*[28]—The various periods of limitation are entirely dependent on statutes, which usually prescribe times for the general classes of actions known as actions involving title to[29] or the rents and profits of, realty;[30] actions on contract;[31] sometimes specially on written contracts[32] and specialties;[33] liabilities arising out of contract;[34] actions for tort;[35] actions for usury;[36] ac-

as bearing on construction. Davis v. Mills, 194 U. S. 451, 48 Law. Ed. 1067.

26. Hence transitory cause of action running four years in Nebraska was barred there, though it run only over the two years prescribed in Iowa, where it arose. Taylor v. Union Pac. R. Co., 123 F. 155.

27. Green v. Barrett, 123 F. 349.

28. See 2 Curr. L. 747.

29. See Adverse Possession, 3 Curr. L. 51. An action to determine title to one-half cubic foot per second of water claimed under a deed is governed by Code Civ. Proc. § 318. Five years. South Tule Independent Ditch Co. v. King, 144 Cal. 450, 77 P. 1032. An action for breach of covenant running with the land is governed by the 20-year statute, not the 6-year. Chicago, etc., R. Co. v. McEwen [Ind. App.] 71 N. E. 926. An action to set aside a tax deed because the land was purchased at a tax sale by the agent of the delinquent owner relative to the land is barred after five years [Code, § 1448]. Bemis v. Plato, 119 Iowa, 127, 93 N. W. 83. The nullity of a sale made by the wife in payment of her husband's debts is cured by the prescription of five years, dating from the dissolution of the marriage or the majority of the heir of the wife. Munholland v. Fakes, 111 La. 931, 35 So. 983. Five-year statute does not apply to actions concerning real estate [Code Civ. Proc. § 518]. Grogan v. Valley Trading Co. [Mont.] 76 P. 211. Code Civ. Proc. § 1499, requiring an action to recover not more than six inches of realty upon which the wall of a building stands to be maintained within a year, applies only to boundary walls where each adjoiner has erected a building, not to a wall erected by one. Bergman v. Kelin, 97 App. Div. 15, 89 N. Y. S. 624. One in possession under a decree for specific performance of a contract and partition, and with no reason to believe his title would be questioned, cannot be deprived of his title by the rule of limitation applicable to suits for specific performance. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. Right to enforce a railroad mortgage held barred under the Wisconsin 10-year statute. Defendants had occupied the road adversely to the mortgagee. Gunnison v. Chicago, etc., R. Co. [C. C. A.] 130 F. 259.

30. Not more than three years' rent can be recovered in ejectment [Sand. & H. Dig. § 2592]. Shirey v. Clark [Ark.] 81 S. W. 1057.

31. Breach of contract to pay for support must be brought within five years. Whitley v. Whitley's Adm'r [Ky.] 80 S. W. 825. Claim against a parent for services rendered his minor child is barred after five years. Barnett's Adm'r v. Adams [Ky.] 82 S. W. 406. Claim for services held barred. Rodgers v. Lamb's Estate [Mich.] 100 N. W. 440. An action for damages for failure to record a mortgage left with a person where no fraud is set up is within the six-year statute [Code Civ. Proc. § 382, subd. 2]. Crowley v. Johnston, 96 App. Div. 319, 89 N. Y. S. 258. An action on a common-law bond is within the provision of Code, § 155, providing that an action upon a contract, obligation, or liability arising out of contract must be commenced within three years. Jackson v. Martin, 136 N. C. 196, 48 S. E. 672. Ball. Ann. Codes & St. § 4800, subd. 3, limiting actions on contract or liability, express or implied, not in writing or which does not arise out of any written instrument, applies only to actions arising out of contractual liability. Suter v. Wenatchee Water Power Co., 35 Wash. 1, 76 P. 298.

32. Ky. St. § 2515, providing the period of limitations for actions created by statute, does not apply to a contract between a city and a contractor for a street improvement, whereby the city agreed in writing to pay for so much of the cost as was not collectible from abutting owners. City of Louisville v. McNaughton, 24 Ky. L. R. 1153, 70 S. W. 841. A note given a bank in payment of a debt and interest thereon is not discounted, so as to be placed on a footing with foreign bills of exchange and within the operation of the five-year statute. Bramblette v. Deposit Bank, 25 Ky. L. R. 1850, 79 S. W. 193. A wife signed a note expecting her husband to sign as principal. He did not sign, but delivered the note in payment of four other notes previously executed by him. Held, she was a principal and St. 1903, § 2514 applied and not the section relative to actions against sureties. Deering & Co. v. Veal, 25 Ky. L. R. 1809, 78 S. W. 886. A deed reciting a consideration which it is shown by parol was not paid is a promise in writing on the part of the grantee to pay it. Fowlkes v. Lea [Miss.] 36 So. 1036. Statute relative to an unwritten contract express or implied does not apply. Id. Comp. St. § 41, as amended by Sess. Laws 1889, p. 172, provides that an action on a liability founded on a written instrument must be commenced within eight years. Held, an action to enforce a liability evidenced by a declaration of trust commenced within eight years after a certain payment was commenced in time. Goodell v. Sanford [Mont.] 77 P. 522.

33. In New York a contract under seal is not governed by the six-year statute. City of New York v. Third Ave. R. Co., 42 Misc. 599, 87 N. Y. S. 584.

34. Where a tenant's servant was injured by reason of the landlord's failure to repair premises as he had agreed to do and the tenant was held liable to the servant, his action against the landlord was not based

tions on a liability created by statute;[37] actions on a judgment;[38] and an omnibus section covering all actions not specifically provided for.[39] Parties to a contract may by the terms thereof limit the period within which an action must be brought.[40] In Kentucky, however, such a limitation is void as an attempt to vary the statute.[41]

In New York the day on which the cause accrued is included,[42] as is the last day, though it fall on Sunday.[43]

§ 3. *Disability and exceptions. A. Trusts.*[44]—The statute does not run in favor of the trustee of an express[45] or continuing trust[46] until repudiation thereof

on personal injury, but was one arising out of breach of contract to which the five-year statute was applicable. Altsheler v. Conrad [Ky.] 82 S. W. 257. In Kentucky, proceedings for the assessment of land which the owner failed to list must be brought within five years. Falls Branch Jellico Land & Imp. Co. v. Com. [Ky.] 83 S. W. 108. An action for wrongful ejection from a street car without force is not an action for assault and battery within Rev. St. 1899, § 4275, limiting the right to bring actions for assault and battery to two years. Summerfield v. St. Louis Transit Co. [Mo. App.] 84 S. W. 172. Under Const. art. 7, § 6, providing that no person acting on behalf of the state shall allow any claim which as between citizens would be barred, a transfer tax illegally assessed need not be refunded. In re Hoople's Estate [N. Y.] 72 N. E. 229. Action for fraud in inducing parties to lease a cotton press is governed by the four-year statute. American Cotton Co. v. Frank Heierman & Bro. [Tex. Civ. App.] 83 S. W. 845.

35. Trespass: An action against a city for damages resulting from the fact that the city engineer gave a property owner an erroneous statement as to the grade of a street in reliance upon which he built is barred in six years. Moore v. Lancaster [Pa.] 58 A. 890. Ball. Ann. Codes & St. § 4800, limiting the time within which an action for trespass must be brought, governs only such actions as were trespass at common law. Suter v. Wenatchee Water Power Co., 35 Wash. 1, 76 P. 298. Action for negligent construction and maintenance of an irrigation canal from which water overflowed plaintiff's land is not within its purview. Id.

Negligence: The five-year statute is applicable to an action by a receiver for negligence of directors in managing a bank. Stone v. Rottman [Mo.] 82 S. W. 76.

Action for libel: Under Mills' Ann. St. § 2901, must be commenced within one year. Complaint showed on its face that the cause accrued more than one year prior. Evans v. Republican Pub. Co. [Colo. App.] 78 P. 311.

36. One year in Kentucky. Burnside v. Mealer [Ky.] 80 S. W. 785. One year in Louisiana. Dannenmann v. Charlton [La.] 36 So. 965.

37. The individual liability of a stockholder for corporate indebtedness is within Code Civ. Proc. § 338, requiring an action to be brought within three years. Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 P. 939. An action for an accounting to require an executor to set apart exempt property from the estate of a decedent is to enforce a liability created by statute, and is barred after six years. In re Campbell's Estate, 96 App. Div. 561, 89 N. Y. S. 569. The 10-year statute applicable to equitable actions does not apply. Id.

In South Dakota: An action under Rev. Code Civ. Proc. § 807, by the mother of a bastard child to compel the father to support it is not for a penalty barred after two years, but may be maintained within six years. State v. Patterson [S. D.] 100 N. W. 162.

38. The Nebraska General Statute of Limitations, §§ 10, 16. Four years does not apply to actions on domestic judgments. Snell v. Rue [Neb.] 101 N. W. 10. A bill to impeach for fraud a decree discharging a guardian, though not within the terms of the statute which bars a bill of review, is by analogy governed by the same limitations. Willis v. Rice [Ala.] 37 So. 507.

39. Action for negligent construction of an irrigation canal, lawfully built, from which water overflowed adjoining land, is within Ball. Ann. Codes & St. § 4805. Suter v. Wenatchee Water Power Co., 35 Wash. 1, 76 P. 298.

40. In Marshalltown Stone Co. v. Louis Drach Const. Co., 123 F. 746, a six-months limitation was held reasonable. In Southern Exp. Co. v. Caldwell, 21 Wall. [U. S.] 264, 22 Law. Ed. 556, 90 days was held a reasonable limitation.

41. Adams Exp. Co. v. Walker [Ky.] 83 S. W. 106. The rule which forbids common carriers to contract away liability for negligence precludes them from limiting the time within which an action must be brought. Id.

42. Under Code, §§ 380, 383, the day on which the cause of action accrued is included in reckoning the period. Benoit v. New York, etc., R. Co., 94 App. Div. 24, 87 N. Y. S. 951.

43. Benoit v. New York, etc., R. Co., 94 App. Div. 24, 87 N. Y. S. 951.

44. See 2 Curr. L. 750.

45. Potter v. Kimball [Mass.] 71 N. E. 308. A trustee cannot continue as such, and whenever he makes a sale of trust property repudiate his trust as to the proceeds. Felkner v. Dooly, 27 Utah, 350, 75 P. 854. If the period for redemption of a pledge is not limited by contract, the right continues in the pledgor during his lifetime and descends to his heirs. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. Where immediately after a pledge of corporate stock the pledgor notified the corporation thereof, limitations did not run as against the pledgee's right to enforce his pledge in favor of the corporation which acquired a subsequent lien. Id. Swamp

by the trustee,[47] and notice to the beneficiary[48] or until the trust relation is dissolved,[49] or terminated by statute.[50] The statute runs against an action to enforce a constructive trust from the date of notice.[51] If an action by a trustee is barred, the right of the beneficiary is also gone, though he may have been under disability when the cause accrued,[52] providing the trustee is vested with the legal title.[53]

(§ 3) *B. Insanity and death.*[54]—Limitations do not run against insane persons until the disability is removed.[55] The death of a debtor does not suspend the operation of the statute.[56] In Arkansas the death of a debtor causes a substitution of statutes.[57]

(§ 3) *C. Infancy and coverture.*[58]—The statute does not run against infants,[59] but an infant may be barred by the bar against his trustee or representative.[60] In many states statutes provide a period within which an action may be

land funds held by the state for the benefit of purchasers who have expended a certain amount to reclaim land. Miller v. Batz, 142 Cal. 447, 76 P. 42. Locative interest of land held in trust. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

46. An executor who took possession of the personal property of the testator. In re Meyer's Estate, 98 App. Div. 7, 90 N. Y. S. 185. The statute does not run against a right of action in a guardian and administrator of an insane person against the decedent's estate until the relation is terminated. Cauthen v. Cauthen [S. C.] 49 S. E. 321. Debt due a decedent from an executrix. Sprague v. Walton [Cal.] 78 P. 645.

47. An executor in order to defeat a proceeding to compel him to account on the ground of limitations must allege that limitations have run since he repudiated his trust. In re Meyer's Estate, 98 App. Div. 7, 90 N. Y. S. 185. Where he denies the trust and the beneficiary has notice of such repudiation. Felkner v. Dooly [Utah] 78 P. 365.

48. Barnett v. Barnett [Tex. Civ. App.] 80 S. W. 537.

49. A trustee took an assignment of a bond and mortgage to enable him to raise funds for the mortgagee and account to him. After such accounting, the trust relation was at an end and limitation commenced to run in favor of the trustee. Hayes v. Walker [S. C.] 48 S. E. 989.

50. Code, §§ 1402, 1488, provides that an action may be maintained against an executor or administrator any time after two years from qualification. Held, limitations commenced from that date. Edwards v. Lemmond, 136 N. C. 329, 48 S. E. 737.

51. Money received by one which belongs to another. Bridgens v. West [Tex. Civ. App.] 80 S. W. 417. An admission that one has received money which belongs to another does not change a constructive trust into a continuing one. Id. One who had not the legal title to real estate devised it to one for life, remainder over. The life tenant thereafter acquired the legal title. Held, he became a constructive trustee and limitations began to run in his favor from that date. Commonwealth v. Clark [Ky.] 83 S. W. 100. His recording of the deed was notice to the remaindermen that he repudiated their claim. Id.

52. Wiess v. Goodhue [Tex.] 83 S. W. 178 If an action by trustees holding the legal title is barred as to them, it is barred as to beneficiaries. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563.

53. A testatrix devised the fee of land to her children and appointed her husband executor and trustee to partition the land among them in his discretion. Held, though an action by the trustee to recover land held adversely was barred, the statute did not run against the children during minority. Wiess v. Goodhue [Tex.] 83 S. W. 178.

54. See 2 Curr. L. 750.

55. In Georgia a woman who is insane at the time of her husband's death may apply for dower at any time within seven years after the disability is removed. La Grange Mills v. Kener [Ga.] 49 S. E. 300.

56. Cause of action accruing on note during lifetime of holder, the statute of limitations begins to run from that date, and the death of the holder and failure to appoint an administrator of his estate does not suspend it. Tobias v. Richardson, 5 Ohio C. C. [N. S.] 74.

57. The statute applicable to the debt ceases and is succeeded by the two-year statute of nonclaim which runs from grant of letters of administration. Ross v. Frick Co. [Ark.] 83 S. W. 343.

58. See 2 Curr. L. 751.

59. Testatrix devised real property to her children. She constituted her husband trustee with power to execute deeds to the children when in his discretion the estate should be delivered to them. Held, the children were vested with the legal title and limitations did not run against an action to recover it during their minority. Wiess v. Goodhue [Tex.] 83 S. W. 178. Under Code, § 3453, limitations do not run against an infant, except for penalties and forfeitures until one year after majority. Rice v. Bolton [Iowa] 100 N. W. 634. Bill to set aside a judgment may be brought within two years after the majority of a plaintiff who was a minor when his right of action accrued. Ferguson v. Morrison [Tex. Civ. App.] 81 S. W. 1240. Under Ky. St. 1903, §§ 2521, 2550, an infant nonresident distributee at date of distribution may enforce his right to a distributive share by an action on the executor's official bond within five years after attaining majority. Smith v. Hardesty [Ky.] 83 S. W. 646.

60. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563; Wiess v. Goodhue [Tex.] 83 S. W. 178.

brought after majority is attained,[61] and if the action is not brought within such period, it is barred.[62]

The statute does not run against married women during coverture.[63] In Kentucky their right to maintain an action is immaterial.[64] The statute does not operate as between husband and wife.[65]

(§ 3) *D. Absence and nonresidence.*[66]—Generally speaking, the statute is tolled during nonresidence[67] or absence of defendant from the state,[68] no matter how long continued,[69] providing such nonresidence precludes the bringing of the action.[70] In some states the absence must be continuous and exceed a prescribed

61. Burns' Ann. St. 1901, § 297, providing that a cause of action accruing to a person under legal disability may be maintained within two years after the disability is removed. Bryson v. Collmer [Ind. App.] 71 N. E. 229. In Alabama the bar of the statute is not effective against minors until three years after disability is removed. Bradford v. Wilson [Ala.] 37 So. 295. Land owned in common by infants and adults was sold for less than its value to one of the adults and the proceeds partitioned. The infants were represented by guardian ad litem. Held, within one year after attaining majority the infants could have their portion of the land set aside to them on returning the money received [Civ. Code Proc. §§ 391. 518]. Taylor v. Webber [Ky.] 83 S. W. 567. Where land of infants was wrongfully sold to innocent purchasers, an action to recover the proceeds brought within two years after the eldest infant attains majority is timely. Schneider v. Sellers [Tex.] 84 S. W. 417.

62. Under Code Civ. Proc. § 388, providing that an action not otherwise provided for must be brought within ten years from the time the cause accrued, and § 396, providing that time of disability is not a part of the time limited but that the period cannot be extended more than one year after disability ceases, a cause of action in an infant against his guardian arising from constructive fraud is barred one year after the infant attains majority. Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. S. 1009. Under Starr & C. Ann. St. 1896, p. 2620, an infant must sue within 2 years after attaining majority. Mason v. Odum, 210 Ill. 471, 71 N. E. 386. Where a deed executed by one of several executors was void but the grantee went into possession thereunder, limitations commenced to run against the executors and against infant beneficiaries at that date, and where such infants did not bring action within 10 years after attaining majority (Code Civ. Proc. §§ 365, 375), their action was barred. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563. The doctrine that one under disability is entitled to a reasonable time after the disability is removed to disaffirm or ratify his acts does not give him a period other than that provided by the statute for maintaining an action. Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. S. 1009.

63. Where married women executed a deed which was void because their husbands did not join, limitations did not run against them during coverture. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734. Limitations do not run against a wife's estate in her husband's land during coverture. Waldron v. Harvey, 54 W. Va. 608, 46 S. E. 603. Coverture is good answer to the plea of limitations. Schmidt v. Brittain [Tex. Civ. App.] 84 S. W. 677. Under Rev. St. 1895, art. 3352, limitations run against married women after they attain majority. Their disability to continue until one year after the passage of the act which went into effect August 1, 1895. Held, an action commenced in 1902 by a married woman 60 years of age was barred. Broom v. Pearson [Tex. Civ. App.] 81 S. W. 753. An action commenced in 1902 by the heirs of a married woman who would, had she lived been 56 years old is barred. Id.

64. Ky. St. 1903, § 2525. Ferrell v. Maupin [Ky.] 83 S. W. 591.

65. Collins v. Babbitt [N. J. Eq.] 58 A. 481. Statute of limitations does not begin to run in favor of husband until death of wife as to an action to recover her land occupied by them in common. Snyder v. Elliott, 171 Mo. 362, 71 S. W. 826.

66. See 2 Curr. L. 751.

67. Under Burns' Rev. St. 1901, § 298, property fraudulently conveyed to a nonresident may be subjected to the satisfaction of a personal judgment against the grantor procured more than six years before. Balph v. Magaw [Ind. App.] 70 N. E. 188. Where the evidence as to the residence of a defendant in the state was conflicting, the issue should have been submitted. Eldredge v. Mathews, 93 App. Div. 356, 87 N. Y. S. 652. Conflicting evidence held to show that after the cause of action accrued the defendant moved from the state. Under Civ. Code 1895, § 3783, the operation of the statute was suspended during his absence. Simpson v. Wicker, 120 Ga. 418, 47 S. E. 965. Gen. St. 1894, §§ 5145, 5146, construed and held that the first applies to actions, the subject-matter of which arises or originates in this state and the debtor is out of the state when the cause accrues or subsequently departs; the second section applies to actions, the subject-matter of which arises out of the state. Powers Mercantile Co. v. Biethen, 91 Minn. 339, 97 N. W. 1056.

68. Where one purchased land with funds belonging to another, took title in his own name and left the state, limitations against an action to declare a resulting trust did not run while he was absent [Rev. St. 1899, § 4282]. McMurray v. McMurray, 180 Mo. 526, 79 S. W. 701.

69. Though he remains away more than the full period of limitation. Bemis v. Ward [Tex. Civ. App.] 84 S. W. 291.

70. Under Code, § 1597, an action for dower may be maintained against the occupant or person exercising ownership. Held, limitations are not suspended because of nonresidence of the life tenant and owner of

period,[71] but a change of residence is not necessary.[72] A statute which suspends the operation during temporary absence does not apply to one who has never been a resident[73] In Wisconsin[74] nonresidence may be taken advantage of by a foreign corporation. A different rule prevails in New York.[75] In Nebraska and Iowa,[76] but not in Kansas,[77] they may avail of limitations.

§ 4. *Accrual of cause of action. In general.*[78]—A cause of action[79] accrues where there exists a demand capable of present enforcement, a suable party against

the fee. Wetyen v. Fick, 178 N. Y. 223, 70 N. E. 497.

71. Code Civ. Proc. § 401, suspends the statute during the time of a continuous absence from the state of over a year's duration. Miller v. Warren, 94 App. Div. 192, 87 N. Y. S. 1011.

72. Under Rev. St. 1895, art. 3367, the statute is suspended whenever the defendant is absent from the state on business or pleasure. Bemis v. Ward [Tex. Civ. App.] 84 S. W. 291.

73. A note payable in Minnesota was executed in New York by a resident of that state who before it came due moved to New South Wales, where the note was outlawed by the laws of that country. Held, not being a resident of Minnesota at any time, the note is not enforceable against him while temporarily within this state. Drake v. Bigelow [Minn.] 100 N. W. 664. This opinion does not conflict with Powers Mercantile Co. v. Blethen, 91 Minn. 339, 97 N. W. 1056.

74. Rev. St. 1898, §§ 4222, 4223, suspending the statute while a defendant is absent from the state, may be taken advantage of by a foreign corporation under § 3207, giving it a right to sue. Weyburn & Briggs Co. v. Bemis [Wis.] 99 N. W. 1050.

75. Where a domestic corporation assumed the indebtedness of a foreign corporation, limitations commenced only from the date of assumption. Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857. Stockholders of a foreign corporation are, however, suable on their liability. Platt v. Wilmot, 193 U. S. 602, 48 Law. Ed. 809.

76. Taylor v. Union Pac. R. Co., 123 F. 155.

77. Williams v. Metropolitan St. R. Co., 68 Kan. 17, 74 P. 600.

78. See 2 Curr. L. 751.

79. See Causes of Action and Defenses, 3 Curr. L. 663. An insurance policy provided that action thereon must be maintained within one year from loss; that in case of disagreement the loss should be submitted to arbitration; that the company should not be deemed to have waived any provision by any act relating to appraisement. Held, where without fault of the insured the appraisers failed to agree within a year, his right of action was not barred. Fritz v. British America Assur. Co., 208 Pa. 268, 57 A. 573; Tobias v. Richardson, 5 Ohio C. C. (N. S.) 74. Under the Oregon Boat Lien Law, limiting the commencement of an action to one year after the cause of action shall have accrued, limitations run from the expiration of the credit allowed, not from the furnishing of the material. Barstow v. The Aurelia [Or.] 77 P. 835. A father executed a deed to his son. The son without recording it returned it to his father. Held, the right to have the deed canceled did not accrue until the son several years later secretly obtained possession of it and had it recorded. Arnold's Heirs v. Arnold [Ky.] 82 S. W. 606. Limitations run against a cause of action for **money had and received** from the date of receipt. Murphy v. Omaha, 1 Neb. Unoff. 488, 95 N. W. 680. Money belonging to one school district erroneously paid by the county treasurer to another. This is not a payment under mistake. Independent School Dist. of Union v. Independent School Dist., 123 Iowa, 455, 99 N. W. 106.

Ejectment will not lie until the boundaries of land can be determined; therefore not as to public domain until survey. Suksdorf v. Humphrey [Wash.] 77 P. 1071. Where only one of several executors signed a deed and the grantee went into possession, limitations commenced to run against a right of action in ejectment from that date [Code Civ. Proc. § 415]. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563. A right of action for **unlawful levy** accrues at the date the judgment under which it was made is set aside. Fenner v. Kime [Neb.] 99 N. W. 483. For **breach of warranty of title by eviction** under a paramount title, the right of action accrues at the time of eviction. Chenault v. Thomas [Ky.] 83 S. W. 109. A parent's cause of action for the **seduction** of his child accrues at the time of the seduction, not when the fact is discovered. Davis v. Boyett, 120 Ga. 649, 48 S. E. 185. Against a right of action in a wife for an **invasion of homestead rights** from the time of such invasion. McWhorter v. Cheney [Ga.] 49 S. E. 603. After the death of a wife, the husband is entitled to control the **community property** for the reasonable time necessary to pay community debts. Limitations against her heirs run after the lapse of a reasonable time without a repudiation of their claim. Miller v. Miller [Tex. Civ. App.] 78 S. W. 1085. The right of action on a **debt payable in instalments** when each instalment becomes due. Washington Loan & Trust Co. v. Darling, 21 App. D. C. 132. Where a judgment is for the payment of money in instalments at fixed periods, limitation runs against each instalment only from date due. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16. A claim for boarding a person under an agreement for **weekly compensation** accrues from week to week. In re Goss, 90 N. Y. S. 769. Limitations do not run against a note given to secure the performance of a **contract to pay money within two years** until after the expiration of such period. Bonbright v. Bonbright, 123 Iowa, 305, 98 N. W. 784. An action for **neglect to perform a duty arising from contract** accrues at the time of the negligence. A money loaner agreed with a borrower to pay money loaned to a mortgagee, which he did without taking up the mortgage. This

whom it may be enforced,[80] and a party who has a present right to enforce it.[81] The plaintiff must have a title enabling him to maintain action.[82] Where a claim is not due until a certain time[83] or the happening of a certain event,[84] or where an affirmative act[85] or a demand is necessary to perfect a cause of action, it does not accrue until the conditions are fulfilled.[86] Where a contract is silent as to when a future act is to be done, the law implies that it will be within reasonable time.[87] A right of action cannot accrue as against a municipal corporation until it has a legal existence,[88] and has provided a fund out of which payment of the

mortgage was subsequently foreclosed by a bona fide assignee. Held, the action for neglect in paying money to the wrong party was barred in five years from payment. O'Connor v. Aetna Life Ins. Co. [Neb.] 93 N. W. 137. Upon a **contract to indemnify** against an obligation, when damage results. Id. [Neb.] 99 N. W. 845. On a **promise to pay an existing obligation,** on breach of the latter. A ranch owner agreed to pay a tenant a certain amount if he would move. While this promise was still enforceable, he promised to pay him as soon as the amount could be realized from the ranch. Morehouse v. Morehouse, 140 Cal. 88, 73 P. 738. A cause of action **for failure to record a mortgage** accrues on the failure to record irrespective of demand or discovery of the default. Crowley v. Johnstone, 96 App. Div. 319, 89 N. Y. S. 258. A cause of action accrues on a **contract to pay off an obligation for another** upon a failure to pay the same within the time contemplated. O'Connor v. Aetna Life Ins. Co. [Neb.] 99 N. W. 845. Limitations on the **liability of a grantee who assumes a mortgage** begins to run from the maturity of the note. Fender v. Hazeltine [Mo. App.] 79 S. W. 1018. Action on an **implied contract** accrues when the contract is executed. Must be brought within five years. Citizens' Bank v. Spencer [Iowa] 101 N. W. 643. In an action for the services of an architect for drawing two sets of plans, one in September, 1897, and one in March, 1898, evidence held insufficient to show an **open account** so as to make Code Civ. Proc. § 386 inoperative on the separate items. Meehan v. Figliuolo, 88 N. Y. S. 920.

80. Note becoming due after death of payee, limitation runs from administrator's appointment. Tobias v. Richardson, 5 Ohio C. C. (N. S.) 74.

81. See ante, § 3, Disability and Exceptions.

82. Ejectment for public lands will not lie until patent issues. Tegarden v. Le Marchel, 129 F. 487. An action brought within the statutory period after issuance of patent is in time. Code Civ. Proc. § 318, requiring seisin or possession within five years before the commencement of the action, does not apply. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

83. Where one promises to compensate a servant for services by a provision in her will, limitations do not commence to run until her death. Bair v. Hager, 97 App. Div. 358, 90 N. Y. S. 27. The statute of limitations does not run from the date of a compact to make twin wills, inasmuch as it cannot be consummated until the death of the survivor. Minor v. Minor, 2 Ohio N. P. (N. S.) 439. Where, by the terms of a contract to repay loans to a mining company advanced by stockholders, the repayment was not to be made until a reasonable time after the creation of the debt, limitations would not commence until such time. White v. Century Gold Min. & Mill. Co. [Utah] 78 P. 868.

84. Where compensation for services is not to be made until a certain date or until the happening of a certain event, limitations do not begin to run until such time. Cooper v. Colson [N. J. Err. & App.] 58 A. 337. A child was not to be compensated for services until her parent's indebtedness was paid off. [The parent died before the indebtedness was paid.] Limitations did not commence until his death. Harrison v. Harrison [Iowa] 100 N. W. 344.

85. Where a landlord converted the movables left by an evicted tenant, the question of diligence and promptness in removing same after eviction does not arise. Trover by a tenant is not barred until the statute of limitations interposes. Eldridge v. Hocfer [Or.] 77 P. 874.

86. Where a note provided that default in payment of interest should mature the whole debt, at the option of the holder, limitations will not commence to run until the option is exercised or the original date of maturity. Kennedy v. Gibson, 68 Kan. 612, 75 P. 1044. Provisions for acceleration of the maturity of the entire debt on default in payment of interest and taxes are not self-operative, so as to cause the statute of limitations to begin to run before the creditor has in some manner exercised his option. Keene Five Cent. Sav. Bank v. Reid [C. C. A.] 123 F. 221. Under Shannon's Code, § 4477, where a demand is necessary to entitle a party to a right of action, limitations commence to run from the time the right to make the demand is complete. Jenkins v. Dewar [Tenn.] 82 S. W. 470. The right to make demand on a note payable on demand accrues at its date. Id. Not against a **certificate of deposit** payable on demand and bearing interest if left six months until presentation for payment. In re Cook, 86 App. Div. 586, 83 N. Y. S. 1009.

87. Where land the title of which was in dispute was sold with the understanding that purchase money was not to be due until ownership was determined. Bryant v. Atlantic Coast Line R. Co., 119 Ga. 607, 46 S. E. 829. A suit to recover the purchase money 25 years after the sale was barred. Id.

88. A village attempted to incorporate under a void act and collected license money which it was required to pay over. Held, as the curative act validating the statute under which it incorporated was not retrospective, an action to recover this money did not accrue until its enactment. Town of

claim can be made.[89] Where a permanent nuisance is created and damages occasioned can be ascertained immediately, limitations run from the time it is created,[90] but if the total damage is not ascertainable but depends on forces set in motion by it, the statute runs only from the time actual damage results.[91] A prescriptive right to use real property bars an action to recover for permanent injuries to adjoining property;[92] but is no defense to an action for injuries to property beyond the limits of the right acquired.[93] Federal courts follow the decisions of the state courts in determining when a cause of action created by a statute accrues.[94]

The statute does not run against an action for accounting between partners until dissolution of the firm,[95] nor against a remainderman until the termination of the particular estate;[96] but this principle has no application where the right of occupancy in the life tenant is personal and he assigns such right.[97] It does not run against a right of action for partition between co-tenants,[98] but may be resorted to so far as it establishes interests in the property.[99]

As between stockholder, corporation and creditors.[1]—Limitations run in favor of a stockholder as to an unpaid portion of his subscription from the date it is due.[2] By the weight of authority it commences to run at this time as against

Winneconne v. Winneconne [Wis.] 99 N. W. 1055.

89. Barnes v. Turner [Okl.] 78 P. 108.

90. The right of action in abutting owners for damages caused by the construction of an elevated railroad in the street whereby light and air are shut off accrues when the structure is completed. De Geofroy v. Merchants' Bridge Terminal R. Co., 179 Mo. 696, 79 S. W. 386.

91. In Texas, where a railroad is constructed without necessary culverts as provided by Rev. St. 1895, art. 4436, limitations against an action for the overflow of land occasioned thereby do not run until the occurrence of each overflow. St. Louis S. W. R. Co. v. Beck [Tex. Civ. App.] 80 S. W. 538. The fact that a system of sewers by which sewage was discharged into a stream was of a permanent character did not render the nuisance occasioned by such discharge permanent. Limitations did not run from date of construction. Vogt v. Grinnell, 123 Iowa, 332, 98 N. W. 782.

92. Damages caused an abutting owner by constructing a railroad in the street. Tietze v. International & G. N. R. Co. [Tex. Civ. App.] 80 S. W. 124. Subjecting the right to an additional servitude. Id. Diversion of surface water. Id.

93. Throwing dirt on abutting property. Fietze v. International & G. N. R. Co. [Tex. Civ. App.] 80 S. W. 124. Trimming trees beyond the limits of the prescriptive right. Id.

94. And what conditions authorize its enforcement. Whitman v. Atkinson [C. C. A.] 130 F. 759.

95. Weber v. Zacharias, 105 Ill. App. 640.

96. To recover land from one claiming under the life tenant. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97.

97. The right of a survivor to occupy the community homestead is personal. When this interest is disposed of, the heirs of the owner of the other community have a right to the property. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

98. Code Civ. Proc. § 343, barring actions for relief not otherwise provided for, has no application to suits for partition. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. The action of partition cannot be prescribed against so long as the thing remains in common and such community is acknowledged [Civ. Code, art. 1304]. Rhodes v. Cooper [La.] 37 So. 527.

99. Adverse possession. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. An ouster will be implied from an ultimate finding that rights of co-tenants in partition have been barred. But may be barred by adverse possession of one co-tenant [Civ. Code, art. 1304]. Rhodes v. Cooper [La.] 37 So. 527. Specific finding of ouster is not necessary. Adams v. Hopkins, 144 Cal. 19, 77 P. 12.

1. See Corporations, 3 Curr. L. 880.

2. Weed v. Gainsville, etc., R. Co., 119 Ga. 576, 46 S. E. 885. On an absolute stock subscription, contract limitations run from the date instalments become due. Williams v. Taylor [Md.] 57 A. 641. A subscription for shares of corporate stock provided for the payment of one dollar at date of subscription, one dollar at the call of the directors, and one dollar every sixty days thereafter, if needed. Held "if needed" did not render time of payment indefinite, but the instalments became due automatically every 60 days after the first call, and the cause of action accrued when due. Williams v. Matthews [Va.] 48 S. E. 861. From the time the assessment becomes due. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

NOTE. When liability of stockholder accrues: Liability to the corporation on the stock subscription accrues, according to the great weight of authority, when the call or demand is made, if such call is necessary (Taggart v. Western M. R. Co., 24 Md. 563, 89 Am. Rep. 760; Glenn v. Williams, 60 Md. 93; New England Fire Ins. Co. v. Haynes, 71 Vt. 306, 76 Am. St. Rep. 771; Great Western Tel. Co. v. Gray, 122 Ill. 630; Hawkins v. Glenn, 131 U. S. 319, 33 Law. Ed. 184; Glenn v. Marbury, 145 U. S. 499, 36 Law. Ed. 790; Glenn v. Macon, 32 F. 7; Glenn v. Semple, 80 Ala. 159, 60 Am. Rep. 92; Lehman v. Glenn, 87 Ala. 618; Semple v. Glenn, 91 Ala. 245,

creditors of the corporation.[3] The endurance of the statutory liability depends largely on the terms of the statute, which often provides a special limitation but not always.[4]

24 Am. St. Rep. 894; Western R. Co. v. Avery, 64 N. C. 491; Glenn v. Howard, 81 Ga. 383, 12 Am. St. Rep. 318; Lewis v. Glenn, 84 Va. 947; Vanderwerken v. Glenn, 85 Va. 9; In re Haggert Bros. Mfg. Co., 19 App. R. Ont. [Can.] 582) though in some states it is held that the period of limitations runs from the date of subscription, or from a reasonable time after the subscription within which to call for payment (see Pittsburgh & C. R. Co. v. Byers, 32 Pa. 22, 72 Am. Dec. 770; McCully v. Pittsburgh & C. R. Co., 32 Pa. 26; Shackamaxon Bank v. Dougherty, 20 Wkly. Notes Cas. [Pa.] 297; Hamilton v. Clarion, etc., R. Co., 144 Pa. 34; Great Western Tel. Co. v. Purdy, 83 Iowa, 430; Id., 162 U. S. 329, 40 Law. Ed. 986); where no call is necessary or the subscription is payable on a day certain, the statute runs from the date of subscription or from the date when it is payable as the case may be. Curry v. Woodward, 53 Ala. 371; Hamilton v. Railroad Co., 144 Pa. 34. See Clark & M. Corp. § 490.

3. In Virginia. Gold v. Paynter, 101 Va. 714, 44 S. E. 920. Where the subscription is not written, limitations run in favor of the subscriber or assignee in 3 years [Code 1887, § 2920]. Gold v. Paynter, 101 Va. 714, 44 S. E. 920. Limitation against overdue payments on a stock subscription is not arrested by the appointment of a receiver for the corporation. It not being shown that such proceeding sought to subject stockholders to any liability for the amount unpaid. Williams v. Taylor [Md.] 57 A. 641. Under Act Va. Dec. 22, 1897, declaring that actions for unpaid stock subscriptions shall be brought at law and where resort is had to equity to wind up a corporation, a receiver may be appointed to recover assessments, a decree calling for the appointment of a receiver with power to collect is not a decree against the stockholders so as to stop limitations on overdue instalments. Williams v. Taylor [Md.] 57 A. 641.

NOTE: As against a receiver seeking to collect subscriptions after insolvency or dissolution of the corporation, it was said in an early Mississippi case that subscribers for stock in a corporation cannot oppose the statute of limitations to a claim in equity by creditors to have the stock paid up, on the ground that, before payment, the stockholders are chargeable with a trust in favor of creditors, and this trust "is a continuing, subsisting trust and confidence to which the statute of limitations has no application." Payne v. Bullard, 23 Miss. 88, 55 Am. Dec. 74. And there are decisions or dicta to this effect in other states. See Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Allibone v. Hager, 46 Pa. 48; Appeal of Mack [Pa.] 7 A. 481; McGinnis v. Barnes, 23 Mo. App. 413; Brown v. Union Ins. Co., 3 La. Ann. 177; Stark v. Burke, 9 La. Ann. 341; Succession of Shropshire, 12 La. Ann. 527. And see dictum in Crofoot v. Thatcher, 19 Utah, 212, 75 Am. St. Rep. 725. This, however, is contrary to the very decided weight of authority. Unpaid subscriptions to the capital stock of a corporation are not, in any proper sense, a trust fund for creditors, but simply create, as to the amount due thereon, the relation of debtor and creditor between the subscribers and the corporation (see Clark & M. Corp. § 768) and if the statute of limitations runs against an action by the corporation to collect a subscription, as it may (see cases supra), it also runs, in the absence of fraud, against a suit in equity by creditors to compel payment, or an action by a receiver or assignee. See South Carolina Mfg. Co. v. Bank of South Carolina, 6 Rich. Eq. [S. C.] 227; Curry v. Woodward, 53 Ala. 371; Hamilton v. Clarion, etc., R. Co., 144 Pa. 34; In re Haggert Bros. Mfg. Co., 19 App. R. Ont. [Can.] 582; Great Western Tel. Co. v. Gray, 122 Ill. 630; Williams v. Taylor, 120 N. Y. 244, rvg. Williams v. Meyer, 41 Hun [N. Y.] 545; Crofoot v. Thatcher, 19 Utah, 212, 75 Am. St. Rep. 725; Thompson v. Reno Sav. Bank, 19 Nev. 171, 3 Am. St. Rep. 881. The only difficulty is in determining when the statute begins to run as against creditors.

By the weight of authority, when subscriptions are payable upon call only, the statute of limitations does not begin to run, either as against the corporation or as against creditors, until a call is made, either by the directors or by a court of competent jurisdiction, although the corporation has ceased to do business, and has made an assignment of all its property, including unpaid subscriptions, for the benefit of creditors; and it does begin to run from the time of such a call. Glenn v. Semple, 80 Ala. 159, 60 Am. Rep. 92; Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894; Lehman, Durr & Co. v. Glenn, 87 Ala. 618; Curry v. Woodward, 53 Ala. 371; Glenn v. Williams, 60 Md. 93; Glenn v. Saxton, 68 Cal. 353; Glenn v. Howard, 81 Ga. 383, 12 Am. St. Rep. 318; Washington Sav. Bank v. Butchers' & Drovers' Bank, 107 Mo. 133, 28 Am. St. Rep. 405; Lewis' Adm'r v. Glenn, 84 Va. 947; Vanderwerken v. Glenn, 85 Va. 9; Hawkins v. Glenn, 131 U. S. 319; Glenn v. Liggett, 135 U. S. 533; Glenn v. Marbury, 145 U. S. 499; Glenn v. Macon, 32 F. 7; Glenn v. Soule, 22 F. 417; Glenn v. Foote, 36 F. 824. Compare Christensen v. Quintard, 36 Hun [N. Y.] 334, and Christensen v. Colby, 43 Hun [N. Y.] 362. This is true of demand stock notes given by the stockholders of an insurance company. Crofoot v. Thatcher, 19 Utah, 212, 75 Am. St. Rep. 725; Kilbreath v. Gaylord, 34 Ohio St. 305. In some cases it has been held that, in the case of an insolvency or an assignment for the benefit of creditors, the statute runs from the time of the insolvency or assignment. Glenn v. Dorsheimer, 23 F. 695; Glenn v. Priest, 28 F. 907; Franklin Sav. Bank v. Bridges [Pa.] 8 A. 611; Swearingen v. Sewickley Dairy Co., 198 Pa. 68.

But the Federal cases cited are reversed or overruled by the cases in the supreme court of the United States above cited. See Glenn v. Liggett, 135 U. S. 533. When a subscription is payable upon call of the directors only, and they make no call before the corporation becomes insolvent and goes into the hands of a receiver, and the court then or-

Mistake.[5]—The statute does not run against a right of action growing out of mistake until discovery thereof.[6]

Fraud.[7]—It is generally provided that a cause of action arising out of fraud does not accrue until the fraud is[8] or ought to have been discovered.[9] Concealed fraud if not within the statutory exceptions does not suspend the operation of the statute.[10] Concealment of a cause of action becomes fraudulent when it is the

ders an assessment to be paid to the receiver, and, if not paid, to be collected by him, the statute of limitations runs from the date of such order only. Great Western Tel. Co. v. Gray, 122 Ill. 630. If a receiver is required by statute to collect unpaid subscriptions at once, and no order of court is necessary to entitle him to sue, the statute runs from the date of his appointment. Webber v. Hovey, 108 Mich. 49.

It has been held, however, that, when a corporation is dissolved, the statute runs against the right to collect unpaid subscriptions from the date of the dissolution. Gareschi v. Lewis, 15 Mo. App. 565; Id., 93 Mo. 197.

Bonus or Watered Stock. The statute of limitations does not begin to run against a suit by creditors of a corporation to compel payment by holders of bonus or watered stock before the insolvency of the corporation. Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 31 Am. St. Rep. 637, 15 L. R. A. 470, 2 Keener's Cases, 1890, 1 Cum. Cas. 885; Jones v. Whitworth, 94 Tenn. 602. Compare Wilson v. St. Louis & Western R. Co., 120 Mo. 45, where a creditor was held to be barred by laches in a case in which stock was issued for services at an overvaluation. See Clark & M. Corp. § 490.

4. For full discussion see Clark & M. Corp. § 828.

5. See 2 Curr. L. 753.

6. Assignee of a void life policy paid premiums thereon believing it to be valid. American Mut. Life Ins. Co. v. Bertram [Ind.] 70 N. E. 258.

7. See 2 Curr. L. 753.

8. Failure of an officer to transfer stock held fraudulent as to a stockholder who had transferred it to him to be transferred to a capitalist to induce him to uphold the credit of the corporation. Slayback v. Raymond, 93 App. Div. 326, 87 N. Y. S. 931. Where an agent misappropriates funds of his principal, the statute does not commence to run until notice to the principal. Guernsey v. Davis, 67 Kan. 378, 73 P. 101. Under Code Civ. Proc. § 338, subd. 4, limitations do not run against a cause of action for fraud until the fraud is discovered. People v. Perris Irr. Dist., 142 Cal. 601, 76 P. 381. The fact that a statute providing for the organization of irrigation districts declares that no action affecting the validity of the organization shall be maintained after two years subsequent to organization does not bar an action to have set aside for fraud the decree of confirmation. Id. Attachment and levy upon real estate fraudulently transferred, all the parties being nonresidents. Coulson v. Galtsman, 1 Neb. Unoff. 502, 96 N. W. 349. An action to set aside for fraud a decree confirming the organization of an irrigation district is not within the provisions of Code Civ. Proc. § 343. The omnibus clause. People v. Perris Irr. Dist., 142 Cal. 601, 76 P. 381. Where a widow did not discover that the title to lands purchased by her son with money belonging to her husband's estate was taken in his name until within ten years prior to action brought to declare a resulting trust, the statute of limitations had not run. McMurray v. McMurray, 180 Mo. 526, 79 S. W. 701. Where the cashier of a bank to whom its assets were turned over for the purpose of winding up its affairs conceals an abstraction of the bank's funds by fraudulent entries on the books. Central Bank of Kansas City v. Thayer [Mo.] 82 S. W. 142. The statute does not run against a cause of action against a city for the diversion of a special fund designated for the payment of improvement warrants until the holder of the warrants has notice of such wrongful diversion. Northwestern Lumber Co. v. Aberdeen, 35 Wash. 636, 77 P. 1063.

9. A mother took money left by her deceased husband, invested in land and divided the land with their child on the basis that the money was, as she falsely informed her child, community property. Limitations do not run against a right of action to set aside the partition until the fraud is discovered. Pitman v. Holmes [Tex. Civ. App.] 78 S. W. 961. Evidence held sufficient to excuse a director's not discovering fraud. The Telegraph v. Loetscher [Iowa] 101 N. W. 773. Where one procures a deed by fraud and allows the grantor to remain in possession when the party in possession brings an action to quiet the title in themselves, he cannot set up St. 1903, §§ 2515, 2519, providing that no action for fraud shall be maintained after ten years. Row v. Johnston, 25 Ky. L. R. 1799, 78 S. W. 906.

10. Pietsch v. Milbrath [Wis.] 102 N. W. 342. The right of action against the promoters of a corporation to recover illegal profits made by them in buying for the corporation, at an excessive price, land on which they had obtained a secret option, is barred six years after accrual. Rev. St. 1898, § 4222. Not within the exception which postpones the operation of the statute until the right of action is discovered. Id. [Wis.] 101 N. W. 388. The provision in subd. 3, § 18, Civil Code, that a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud has no application to an action founded on contract. Atchison, etc., R. Co. v. Atchison Grain Co., 68 Kan. 585, 75 P. 1051. One who buys a county warrant, which is void because issued to cover a discount to which such warrants were subject has a right of action at once. In the absence of actual intention to conceal the nature of the transaction, there is no fraudulent concealment sufficient to suspend the operation of the statute. Stewart v. Bank of Indian Territory [Kan.] 75 P. 1055.

duty of the party having knowledge of the facts to discover them to the other.[11] The recording of a deed fraudulently procured amounts to a discovery of the fraud,[12] providing it is under such circumstances as to put an ordinarily prudent man on inquiry.[13] The action must be brought within the time limited after discovery of the fraud,[14] and ignorance thereof until a time within the period must be established.[15]

Accounts.—Payments on a running account unless made to apply on specific items will be deemed general and stop limitations as to the entire account.[16] A payment upon a book account which has never been recognized in its entirety, without a showing that the payment was made in recognition of the whole claim, will not stop limitations as to the unpaid portion.[17]

§ 5. *Tolling.*[18]—Besides the commencement of an action,[19] only the circumstances enumerated in the statute suspend its operation.[20] This principle applies to limitations by contract.[21] The failure to appoint an administrator will not suspend the operation of the statute as to a cause of action accrued at the date of the death of his decedent.[22] A statutory prohibition staying the commencement of an action tolls the statute;[23] but ignorance of the existence of a

11. Where an agent conceals the true state of facts relative to transactions between himself and principal. Arkins v. Arkins [Colo. App.] 77 P. 256.

12. Rogers v. Richards, 67 Kan. 706, 74 P. 255. Starts limitations against the grantor as to any fraud in procuring the deed. McDonald v. Bayard Sav. Bank, 123 Iowa, 413, 98 N. W. 1025.

13. Not where debtor and creditor live 5,000 miles apart and the property is situated where neither live. Jones v. Danforth [Neb.] 99 N. W. 495.

14. Ball. Ann. Codes & St. § 4800, provides that an action for fraud must be commenced within four years after the discovery of the fraud. Held an action for relief against a fraudulent corporate reorganization scheme in which the sacrifice of mortgaged property on foreclosure was complained of was barred where the complaint showed notice more than four years prior to commencement of the action. Griffith v. Seattle Consol. St. R. Co. [Wash.] 79 P. 314. Reasonable deduction from the complaint was that plaintiff had knowledge of the fraud for eighteen years. McWhorter v. Cheney [Ga.] 49 S. E. 603.

15. Action to set aside a fraudulent conveyance. Fuller v. Horner [Kan.] 77 P. 88. If the evidence leave the date in doubt, prescription will be maintained, especially where there is evidence that the fraud was discovered. Succession of Dauphin, 112 La. 103, 36 So. 287. A mere allegation that discovery was within the period is insufficient where from the circumstances of the case the probabilities are that it was made before. Id.

16. Howe v. Hammond [Vt.] 58 A. 724.

17. Rogers v. Newton [N. J. Law] 58 A. 1100.

18. See ante, § 4, as to effect of **fraud** and **mistake.**

19. See post, § 6.

20. Where a creditor of a dissolved corporation may maintain action against stockholders on the dissolution of the corporation without recovering judgment against the corporation, limitations as to a stockholder are not suspended while suit is being maintained against the corporation [actions under Kan. St. 1899, c. 23, § 32]. Whitman v. Atkinson [C. C. A.] 130 F. 759.

21. Limitation provided in an insurance policy not suspended by an injunction against an action thereon. Paul v. Fidelity & Casualty Ins. Co. [Mass.] 71 N. E. 801. The defense of limitations is not waived by setting up another reason for refusal to pay when a demand was made after the bar was complete. Id. Evidence held insufficient to show that a claim for labor and services was postponed until the death of the debtor. Rodgers v. Lamb's Estate [Mich.] 100 N. W. 440.

22. Note: Plaintiff brought this action as administratrix under a code provision twenty months after decedent's death, but within five months of the issuance of letters of administration. A statute provides that actions of this nature must be brought within one year after the cause of action has accrued. Laws N. Y. 1886, p. 801. Held, that such cause of action accrued not on the issuing of letters of administration, but upon decedent's death, and was therefore barred. Crapo v. Syracuse, 90 N. Y. S. 553.

This precise question involved has not, as yet, been adjudicated by the court of appeals. A different department of the supreme court held in an earlier case that such a cause of action did not accrue until the issuing of letters of administration. Barnes v. City of Brooklyn, 22 App. Div. 320. There are dicta supporting the principal case. Meekin v. B. H. R. R. Co., 164 N. Y. 145, 79 Am. St. Rep. 635; Cavenagh v. Ocean Steam Nav. Co., 13 N. Y. S. 540. The principal case seems the better interpretation of the legislative intent. The contrary view would make it possible to defeat the purpose of the statute by delay in taking out the letters of administration. 5 Columbia L. R. 166.

23. B. & C. Comp. § 387, staying an action against an administrator until six months after the granting of letters of administration, and § 388 until a claim has been disallowed by him. In re Morgan's

cause of action does not,[24] nor does the transfer of a cause of action[25] or the transfer of money from an open account to a savings account.[26] The filing of an action in partition wherein rights may be litigated tolls the statute as to all parties interested respecting such rights.[27]

A new promise to pay after the cause has accrued tolls the statute and starts it running anew.[28] There must be a promise,[29] but it may be implied from an acknowledgment.[30] An administrator may by a promise toll the statute as to a debt of the decedent so as to bind personalty;[31] but a promise by an heir is necessary to bind the realty.[32]

A partial payment tolls the statute,[33] but it must have been made by the debtor or under his authority,[34] and on account of the debt in controversy.[35] The burden of proving such payment is on the creditor.[36]

§ 6. *Commencement of action. A. In general.*[37]—The commencement of an action tolls the statute.[38] Presenting a claim to an administrator is an action.[39]

Action is begun by service of process[40] or by voluntary appearance[41] or issuance of process[42] and filing complaint,[43] or by filing complaint[44] and issuance of summons followed by legal service.[45]

Estate [Or.] 77 P. 608. The setting of a homestead tolls the statute as to a judgment creditor until the property ceases to be a homestead. Anderson v. Baughman [S. C.] 48 S. E. 38.

24. A parent's cause of action for the seduction of his child accrues at the time of seduction, not when he discovers the fact. Davis v. Boyett, 120 Ga. 649, 48 S. E. 185.

25. A widow standing in the shoes of her deceased husband is bound by the same limitation. Page v. Page, 143 Cal. 602, 77 P. 452. The consolidation of Greater New York did not toll the statute as to the liabilities of constituent municipalities [Laws 1897, p. 3, c. 378]. Kahrs v. New York, 90 N. Y. S. 793.

26. Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 P. 939.

27. Under Code Civ. Proc. § 382, providing that where questions are of common interest and the parties are numerous, one may sue for all, and § 759, providing that in partition the rights of all parties may be ascertained. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

28. Letter stating that debtor could not pay the obligation when due but was willing to make a due bill as an acknowledgment which he would feel as much bound to pay when he was able, held a new promise under Code Civ. Proc. § 395, requiring an acknowledgment or new promise in writing signed by the party charged. Benedict v. Slocum, 95 App. Div. 602, 88 N. Y. S. 1052.

29. The expression that "An honest man's note never goes out of date" is insufficient. No promise. Alexander v. Muse [Tenn.] 79 S. W. 117. A mortgagee offered to cancel the mortgage if a certain amount less than the face was paid. Held, an acceptance of the offer was not such a recognition of the debt as would toll the statute. Carr v. Carr [Mich.] 101 N. W. 550.

30. A payment made to the agent of the creditor accompanied by a statement by the person making the payment that he is liable for one-half the debt is a sufficient acknowledgment to toll the statute as to him, although he is neither maker or indorser. Miller v. McDowell [Kan.] 77 P. 101.

31, 32. Divine v. Miller [S. C.] 49 S. E. 479.

33. It need not be indorsed on instrument. Hastie v. Urrage [Kan.] 77 P. 268. The crediting on a note, with the consent of the parties of an indebtedness of the payee to a partnership of which the maker is a member, with entries thereof on the books of the payee and of the partnership, is a partial payment, such as will toll the statute. Vinson v. Palmer [Fla.] 34 So. 276.

34. Evidence held insufficient to show agency or special authority to make payment. Schofield v. Twining, 127 F. 488. Where a creditor collects proceeds of collateral after the death of the debtor and applies it to a payment of the obligation, the statute is not tolled. Divine v. Miller [S. C.] 49 S. E. 479.

35. Payment of rent by a subtenant cannot be regarded a payment of rent previously due from the tenant. Boughton v. Boughton [Conn.] 58 A. 226.

36. Evidence held insufficient. Gregory v. Filbeck's Estate [Colo. App.] 77 P. 369.

37. See 2 Curr. L. 755.

38. Filing of petition and issuance of process in an action to recover for the board and maintenance of an alleged lunatic. Norman v. Central Kentucky Asylum, 25 Ky. L. R. 1846, 79 S. W. 189.

39. In Washington the presentation of a claim to the administrators of an estate is equivalent to the commencement of an action. Frew v. Clark, 34 Wash. 561, 76 P. 85.

40. In Michigan, in actions commenced by declaration, where the defendant has been personally served with a copy. Wilton v. Detroit [Mich.] 100 N. W. 1020. Express provision of Code Civ. Proc. § 398. Metz v. Metz, 90 N. Y. S. 340.

41. When so, it dates from appearance and not from issuance of process not served. Reliance Trust Co. v. Atherton [Neb.] 93 N W. 150.

42. For all purposes but limitations an

If a complaint is good as against general demurrer, it is sufficient to toll the statute.[46]

(§ 6) *B. Amendment of pleading.*[47]—An amendment which does not state a new cause of action, but is filed after the bar of the statute is complete, relates back to the date of filing the original complaint.[48] Whether a new cause of action is stated is to be determined by the rule against departures in pleading.[49] Thus it is held that an amendment which merely amplifies the allegations of the original complaint,[50] so as to state the cause with more certainty,[51] or corrects a statement therein,[52] or restates the same cause,[53] or which works a substitution of parties,[54] or which adds a material allegation,[55] does not state a different cause of

action in personam is not commenced until process is served; but for that purpose issuance with intent to have it served begins it [V. S. § 1214]. Tracy v. Grand Trunk R. Co. [Vt.] 57 A. 104.

43. In Washington the service of summons must be followed by a filing of the complaint within the time prescribed. Under 2 Ball. Ann. Codes & St. § 4807, providing an action is commenced when the complaint is filed, the service of summons is not sufficient. Cresswell v. Spokane County, 30 Wash. 620, 71 P. 195.

44. In Georgia, when the petition is filed, irregularities of the process or service is waived by appearance. Bentley v. Reid [C. C. A.] 133 F. 698.

45. Service on several joint defendants was delayed six months. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912. In Nebraska an action is not commenced when summons is issued unless it is actually served. The mere issue of summons without return of service is insufficient. Reliance Trust Co. v. Atherton [Neb.] 93 N. W. 150.

46. Though it might be open to attack through special demurrer. Schmidt v. Brittain [Tex. Civ. App.] 84 S. W. 677.

47. See 2 Curr. L. 756.

48. Cogswell v. Hall, 185 Mass. 455, 70 N. E. 461; Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 108, 69 N. E. 1000.

NOTE: An amendment to a complaint which sets up no new cause of action or claim and makes no new demand but simply varies or expands the allegations in support of the cause already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different demand not before introduced or made in the pending suit does not relate back to the beginning of the action so as to stop the running of the statute until the amendment is filed. Whalen v. Gorden, 95 F. 305; Railway Co. v. Wyler, 158 U. S. 285, 289, 298, 39 Law. Ed. 938; Railway Co. v. Cox, 145 U. S. 593, 601, 606, 36 Law. Ed. 829; Sicard v. Davis, 6 Pet. [U. S.] 124, 8 Law. Ed. 342; Van De Haar v. Van Domseler, 56 Iowa, 671; Jacobs v. Insurance Co., 86 Iowa, 145; Buel v. Transfer Co., 45 Mo. 563; Scovill v. Glasner, 79 Mo. 449; Crofford v. Cothran, 2 Sneed [Tenn.] 492; Railway Co. v. Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; Eylenfeldt v. Steel Co., 165 Ill. 185; Railroad Co. v. Campbell, 170 Ill. 163; Christy v. Farlin, 49 Mich. 319, 13 N. W. 607; Flatley v. Railroad Co., 9 Heisk. [Tenn.] 230; Buntin v. Railroad Co., 41 F. 744; Newton v. Allis, 12 Wis. 378; Railroad Co. v. Smith, 81 Ala. 229. See Patillo v. Allen-West Commission Co. [C. C. A.] 131 F. 681.

49. A count declaring for money had and received cannot be amended by adding a count on a special contract and for goods sold and delivered, even though the amendment avers that the additional counts are for the same cause of action. Nelson v. First Nat. Bank, 139 Ala. 578, 36 So. 707.

50. A complaint stated facts from which the law raises a presumption of a promise to pay the balance of an account stated. An amendment added an averment of a promise to pay. Patillo v. Allen-West Commission Co. [C. C. A.] 131 F. 680. A new count filed to correct a cause not stated with certainty does not set up a new cause of action. Hinchliff v. Rudnik, 212 Ill. 569, 72 N. E. 691.

51. Filed merely for the purpose of supplying omissions in the original complaint, and to state the cause with more certainty. Marshalltown Stone Co. v. Louis Drach Const. Co., 123 F. 746. An amendment setting up that a railroad company "carelessly" permitted litter to accumulate on the right of way does not set up a new cause of action. Southern R. Co. v. Horine [Ga.] 49 S. E. 285. Where the allegations in a complaint on a note and on an account for rent were so general that the defendant could have shown that he had possession with or without consent of the owner and had or had not agreed to pay rent, an amendment whether declaring on an implied or express promise to pay rent did not state a new cause of action. Schmidt v. Brittain [Tex. Civ. App.] 84 S. W. 677. Omitting the count on the note and praying for a larger sum on the remaining cause of action does not constitute a new cause of action. Id. In partition an amendment including lands omitted from the original complaint, but forming a part of the same grant did not introduce a new cause of action. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

52. Amendment asking that an inheritance be computed at different specified rates does not set up a new cause of action. Connell v. Crosby, 210 Ill. 380, 71 N. E. 350.

53. Original declaration alleged negligence in allowing a sidewalk to be in an unsafe condition; the additional count that the sidewalk was broken and full of holes. Town of Cicero v. Bartelme, 212 Ill. 256, 72 N. E. 437.

54. Defendant in the original action had leased his property to another who assumed all obligations. McLaughlin v. West End

action. But if an amendment states a new cause of action, it does not relate back;[56] so if the original complaint does not state a cause of action,[57] or the amendment sets up a new and different cause,[58] the action is deemed commenced as of the date of filing the amendment.[59]

(§ 6) *C. After nonsuit or dismissal.*[60]—In most states it is provided that if an action fail otherwise than on the merits, a new action may be commenced within a prescribed period.[61] Such statutes being remedial are liberally construed[62] and apply where a suit is dismissed for want of jurisdiction,[63] or because a plaintiff mistook his form of remedy;[64] but not where a complaint is dismissed

St. R. Co. [Mass.] 71 N. E. 317. Complaint against a partnership may be amended so as to declare against one individually. Padden v. Clark [Iowa] 99 N. W. 152. Under Code Civ. Proc. § 723, providing that an amendment correcting or adding or striking out the name of a party may be allowed, a complaint against one as trustee may be amended so as to be against him personally. Boyd v. United States Mortg. & Trust Co., 94 App. Div. 413, 88 N. Y. S. 289. A wrong party was named as defendant. The real party answered by general denial and on the merits. The pleadings were signed "Attorney for defendant." After the period of limitations had elapsed, the plaintiff by amendment corrected the misnomer. Held, that the circumstances warranted a finding that the real defendant had appeared in the case prior to the bar of limitations. McCord-Collins Co. v. Prichard [Tex. Civ. App.] 84 S. W. 388.

55. Under Code, §§ 243, 273, an amendment may insert in a complaint for wrongful death that in the state in which the death occurred a statute was in force allowing an action, though at the time of the amendment the cause of action under such statute was barred. Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642. A bill by beneficiaries to set aside a sale of trust property sold under a judgment against the trustee may be amended to allege that the property was held in trust. Ferguson v. Morrison [Tex. Civ. App.] 81 S. W. 1240. An amendment setting forth essential statutory allegations in a bill to redeem an estate from a mortgage will be allowed where it appears that without such amendment a second bill could not be commenced before the mortgagor would be forever foreclosed. Doe v. Littlefield [Me.] 59 A. 438. Original petition in conversion against a bailee for sale was defective for lack of an allegation that a reasonable time had elapsed within which he might sell, before demand for return of the property. Gourley v. Prokop [Neb.] 100 N. W. 949, afg. 99 N. W. 243.

56. Bentley v. Crummey, 119 Ga. 94, 47 S. E. 209.

57. Mackey v. Northern Mill. Co., 210 Ill. 115, 71 N. E. 448. Original complaint in a statutory action against a railroad where a recovery could be had for injuries to stock regardless of negligence contained no allegation of demand as required by the statute. Held, such action did not toll the statute. Becker v. Atchison, etc., R. Co. [Kan.] 78 P. 408.

58. A petition under the act of March 3, 1891 [26 Stat. at L. 851, U. S. Comp. St. 1901, p. 758], for Indian depredations, alleging that the depredations were committed by a particular tribe, cannot be amended after the period of limitations prescribed by that act to bring in a different tribe as the sole wrongdoer. United States v. Martinez, 25 S. Ct. 80. An amendment changing a statutory to a common-law cause states a new cause. Despeaux v. Pennsylvania R. Co., 133 F. 1009. The original petition stated a cause of action by a going partnership for a conversion; the amendment sought to state a cause in favor of one member for an accounting. Thompson v. Beeler [Kan.] 77 P. 100.

59. Cause of action was barred at this date. Bentley v. Crummey, 119 Ga. 94, 47 S. E. 209.

60. See 2 Curr. L. 756.

61. 2 Starr & C. Ann. St. 1896, pp. 2642, 2643, provides that if a plaintiff be nonsuited, and the statute has run during pendency of the action, he may bring a new action within one year after judgment reversed. Held, that when a demurrer to the original complaint was sustained on the ground that it failed to state a cause of action with certainty, and plaintiff suffered an involuntary nonsuit, he was entitled to bring a new action within one year. Hinchliff v. Rudnik, 212 Ill. 569, 72 N. E. 691. Rev. St. 1898, § 2893, providing that if a plaintiff fail otherwise than on the merits he may bring a new action within one year for the same cause is applicable where judgment of nonsuit was entered. Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628. After verdict objection to the complaint was sustained and plaintiff given an election to amend or submit to an arrest of judgment. Held, his election to submit to an arrest of judgment did not bar a new action authorized by V. S. 1214, providing that if after verdict for plaintiff the judgment is arrested, he may commence a new action for the same cause within one year. Baker v. Sherman [Vt.] 59 A. 167. Code Civ. Proc. §§ 542, 543, where judgment is set aside on the ground that the summons was void and the alias summons was not issued within one year from that date, the cause was barred. Bank of Topeka v. Clark [Kan.] 77 P. 92.

62. Civ. Code 1895, § 3786. Atlanta, etc., R. Co. v. Wilson, 119 Ga. 781, 47 S. E. 366.

63. The court had jurisdiction of the subject-matter but not of the person. Atlanta, etc., Ry. Co. v. Wilson, 119 Ga. 781, 47 S. E. 366. Such an action is notice of the plaintiff's intent to enforce his cause of action and warns the defendant to preserve his evidence. Id.

64. Comp. Laws, § 9738, provides that if an action be defeated for any matter of form or if after verdict for plaintiff judgment be reversed, he may commence a new

because it does not state a cause of action,[65] or the original action was barred for want of service of process,[66] nor to a distinct action commenced while the prior action is pending.[67] While the second suit must be for substantially the same cause,[68] it does not have to be a literal copy.[69] It must be by the same plaintiff or his legal representatives,[70] and against all defendants who were necessary parties to the first action.[71] Such statutes have no reference to the law of venue.[72]

§ 7. *Revival of obligation.*[73]—A debt barred by limitations may be revived by a new promise to pay.[74] The new promise need not be express.[75] It may be implied from an acknowledgment of the existence of a debt,[76] providing it is of such a character that a new promise can be fairly inferred.[77] The "unconditional promise in writing" required by statute must be clear and explicit.[78] It must be to the creditor or his agent, over the signature of the debtor.[79] A promise is

action for the same cause within one year. Held, where suit was dismissed because of mistake in the form of remedy, a new action could be instituted within a year. McMillan v. Reaume [Mich.] 100 N. W. 166.

65. A statute allowed a recovery for animals killed by a railroad company regardless of negligence, but there must have been a demand within 30 days. The original complaint did not allege a demand and plaintiff dismissed his action without prejudice. Held, another could not be maintained after the statute had run. Becker v. Atchison, etc., R. Co. [Kan.] 78 P. 408.

66. This statute does not apply where the action was barred for want of service of process. Comp. Laws, § 9985, including in the things constituting commencement of suit the service of a copy of the declaration on the defendant personally. Wilton v. Detroit [Mich.] 100 N. W. 1020.

67. Sand. & H. Dig. § 4841, providing that if plaintiff suffer a nonsuit or judgment is arrested after verdict or is reversed on appeal, a new action may be commenced within one year, does not apply where defendant died while the action was pending and there was no nonsuit, arrest of judgment or reversal and after the bar was complete, another action was commenced in the probate court. Hill v. Pipkins [Ark.] 81 S. W. 1216.

68. A copy of the record of the prior action should be attached so that it may be determined that the prior action was for the same cause and between the same parties, especially where the point is raised by special demurrer. Atlanta, etc., R. Co. v. Wilson, 119 Ga. 781, 47 S. E. 366.

69, 70. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

71. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912. Where the liability of the defendants is joint and several, with no right of contribution, a second action against all defendants to the first action served upon some of those jointly suable is within Civ. Code 1895, § 3786. Id.

72. Under Civ. Code 1895, § 3786, the new action may be brought in any court in the state. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

73. See 2 Curr. L. 757.

74. Where a debtor at one interview acknowledged the debt and promised to pay it, and at a subsequent interview made several propositions of settlement, none of which were accepted, held, that the acknowledgment and new promise were unconnected with the unaccepted propositions. Miller v. Kinsel [Colo. App.] 78 P. 1075. A letter by the maker of a note to the surety who had paid it stating that he, the principal, would make settlement next month, held a sufficient new promise. O'Neill v. Ellis [Tex. Civ. App.] 78 S. W. 1083. The written contract evidencing the original obligation is admissible in evidence. Trustees of St. Mark's Evangelical Lutheran Church v. Miller [Md.] 57 A. 644. Evidence held to show an express promise. Id. Under a statute providing that after a specialty is barred it shall not be admissible, it becomes admissible when the cause of action is revived by an express promise. Id. The recital in a conveyance executed to the holder of a vendor's lien note that the note was unpaid, due and owing the grantee, was sufficient to revive the debt to the extent of the holder's right to payment out of the land as against the lien of a subsequent judgment against the maker of the note. Austin v. Lauderdale [Tex. Civ. App.] 83 S. W. 413. One who gives security for barred obligations must, in order to redeem, pay interest from the time the security was given. Clark v. Seagraves [Mass.] 71 N. E. 813.

75. If the debt is admitted and language indicating intention to pay is used, it will be considered an implied promise. Walker v. Freeman, 209 Ill. 17, 70 N. E. 595.

76. A second mortgage recited that it was given subject to a prior mortgage. Held sufficient to revive the debt the prior mortgage was given to secure, though there was no express promise made to the prior mortgagee. Hahl v. Ellwood [Tex. Civ. App.] 79 S. W. 829. "We owe it, and I will have to pay it" is sufficient. Miller v. Kinsel [Colo. App.] 78 P. 1075. A letter by the maker of a note, stating lack of means to pay it at the time, but that he intended to pay it when he could and offering a horse in part payment, is a sufficient acknowledgment. Vogelsang v. Taylor [Tex. Civ. App.] 80 S. W. 637.

77. In Indiana there must be a signed acknowledgment in writing of such a character that a new promise sufficient to revive the debt can be fairly inferred [Burns' Rev. St. 1901, § 302]. Park v. Park, 32 Ind. App. 642, 70 N. E. 493.

78. "Due 'A' Jan. 12, 1892, 5000, May 15, 1893, 3000, June 11, 1894, 2500. Value received. 'B,'" held insufficient under Code Ala. 1896, § 2811. In re McGuire & Hanlein, 132 F. 394.

79. Under Rev. Code Civ. Proc. 1903, § 79,

not rendered conditional by stating the reasons why the obligation could not be liquidated presently.[80] If a new promise may be made by parol, it is provable by parol regardless of changes made in the rules of evidence.[81] Whether certain evidence constitutes a new promise sufficient to raise the bar is a question of law.[82]

A partial payment revives a barred obligation of its own vigor, not as evidence of an express promise.[83] Such payment must have been authorized by the debtor.[84] A payment by the maker of an overdue negotiable instrument will not remove the bar as to an indorser.[85]

An action of tort once barred cannot be revived.[86]

§ 8. *Operation and effect of bar. A. Bar of debt as affecting security.*[87]—That the action on the principal obligation is barred does not affect a creditor's right against the security,[88] unless otherwise provided by statute,[89] nor does the fact that a personal judgment against the debtor becomes barred render dormant that part of a decree declaring that the creditor has a valid title to the security to the extent specified.[90] A power of sale contained in a trust deed may be exercised, though an action on the debt it was given to secure is barred,[91] and an action for possession by the purchaser is not such an effort to enforce the collec-

a letter from one joint maker to another enclosing the amount of the note is insufficient. Dorsey v. Gunkle [S. D.] 101 N. W. 36. An acknowledgment of a barred debt at the trial is not sufficient. Kahrs v. New York, 90 N. Y. S. 793. At the trial the defendant's counsel admitted the allegations of the complaint but maintained that the claim was barred. The answer had denied all the material allegations. Held not an admission of absolute liability despite the statute. Id.

80. That the debtor had other indebtedness; that he expected a raise of salary. Walker v. Freeman, 209 Ill. 17, 70 N. E. 595.

81. Shelley v. Wescott, 23 App. D. C. 135. If a statute professing only to affect procedure does in fact impair the right, it is void. Id. A provision that an oral promise is deemed insufficient evidence of a new or continuing contract does not render evidence of an oral promise inadmissible. Id.

82. Letters. Walker v. Freeman, 209 Ill. 17, 70 N. E. 595. All letters written by a debtor relative to the payment of a barred obligation may be considered in determining whether there was a new promise. Id.

83. Creditor held justified in applying a payment in part on a barred obligation [Code Civ. Proc. § 22]. Ebersole v. Omaha Nat. Bank [Neb.] 99 N. W. 664. Payment of interest on a note tolls the statute. Mac Millan v. Clements [Ind. App.] 70 N. E. 997. Where money is delivered by way of payment without directing its application, the creditor may apply it on any due claim whether barred or not. McDowell v. McDowell's Estate, 75 Vt. 401, 56 A. 98. Notwithstanding Vermont statute requiring handwriting of payor as proof of payment to avoid limitations, an indorsement not written by payor is admissible in evidence, whether made before or after the statute has run. Id.

84. An unauthorized payment by a widow on a mortgage on property in which she has but a homestead interest will not remove the bar of the statute as against an heir, the owner of the fee. Nickell v. Tracy, 91 N. Y. S. 287. See, also, Aetna Life Ins. Co. v. McNeely, 166 Ill. 540, 46 N. E. 1130.

85. Mason v. Kilcourse [N. J. Law] 59 A. 21.

86. Neither by express or implied agreement. Holtham v. Detroit [Mich.] 98 N. W. 754.

87. See 2 Curr. L. 759.

88. A note given as security was never barred. The note which it was given to secure was. German-American Sav. Bank v. Hanna [Iowa] 100 N. W. 57. Civ. Code 1895, § 2735. Conway v. Caswell [Ga.] 48 S. E. 956.

89. Under Civ. Code, § 2911, providing that if the principal obligation is barred, the lien on security is extinguished where a debt for which life policies had been pledged as security was barred before the policies matured, the lien on the policies was extinguished. Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 P. 67. A debt resting in parol is barred in two years. A mortgage given to secure it is also barred [Code Civ. Proc. § 2911]. San Jose Safe Deposit Bank v. Bank of Madera, 144 Cal. 574, 78 P. 5.

Note: Where by virtue of statute the lien on security in possession of the creditor becomes barred where an action on the principal debt is barred, the creditor no longer has a right to possession of the property, and an action to recover it accrues to the debtor and limitations against such action commence to run. See dissenting opinion Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 P. 67.

90. Conway v. Caswell [Ga.] 48 S. E. 956.

91. Brinkerhoff v. Goree [Tex. Civ. App.] 79 S. W. 592; Peacock v. Cummings [Tex. Civ. App.] 78 S. W. 1002. As to whether a right to foreclose a mortgage by advertisement under a power of sale continues after the action to foreclose is barred is not decided. Teigen v. Drake [N. D.] 101 N. W. 893.

tion of the debt secured as to be barred by the limitations which have run against the debt.[92] A right to foreclose the security may be barred, though the principal debt is not,[93] though in Iowa and Indiana it is held that so long as the principal debt remains enforceable, the lien of the security continues unimpaired.[94] A limitation contained in a bond to secure performance of a contract is not applicable to an action based on the contract.[95] The death of a mortgagor does not toll the statute as to a co-mortgagor.[96]

(§ 8) *B. Against whom available.*[97]—The statute runs against a prior lienor in favor of a subsequent lienor.[98] It does not run against the state.[99] The fact that a defendant is permitted by statute to interplead an indemnitor does not make the limitation application to the plaintiff's cause of action applicable to his action over against the indemnitor.[1]

(§ 8) *C. To whom available.*[2]—As a general rule, the right to plead the statute is a personal privilege,[3] but is available to one who stands in the place of the party in whose favor it runs.[4] There is conflict as to whether a foreign corporation may plead it.[5] Persons interested in an estate may in certain cases plead it, though the personal representative fails to do so.[6]

§ 9. *Pleading and evidence.*[7]—As a general rule, the statute as a defense must be pleaded by plea or answer,[8] but may be raised by demurrer[9] or by motion

92. Brinkerhoff v. Goree [Tex. Civ. App.] 79 S. W. 592.

93. Under Ball. Ann. Codes & St. § 4810 the lien of a mortgage can be enforced even after the death of the mortgagor, and is not within the exception that an action may be maintained against personal representatives within one year after death of a debtor. Frew v. Clark, 34 Wash. 561, 76 P. 85. Code Civ. Proc. § 1475, providing that secured claims against the estate of a decedent must be presented as other claims, does not forbid the foreclosure of a mortgage on the homestead so as to suspend the operation of the statute as to foreclosure. Vandall v. Teague, 142 Cal. 471, 76 P. 35. Under Act 1885, p. 49, c. 9, providing that a mortgage shall be barred unless suit is brought within 10 years from maturity of the debt. Alexander v. Muse [Tenn.] 79 S. W. 117.

94. A payment of interest upon a note secured by a mortgage revives the mortgage. MacMillan v. Clements [Ind. App.] 70 N. E. 997. Action to foreclose a mortgage is not barred so long as the debt secured may be enforced. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118.

95. Marshalltown Stone Co. v. Louis Drach Const. Co., 123 F. 746.

96. Hibernia Sav. & Loan Soc. v. Boland [Cal.] 79 P. 365.

97. See 2 Curr. L. 760.

98. Where the first mortgagee foreclosed without making a second mortgagee a party, and at the time action was brought to foreclose the second mortgage limitations had run against the right to sue on the first mortgage, the second mortgagee could set up the statute as against any rights acquired under the first mortgage. Frates v. Sears, 144 Cal. 246, 77 P. 905.

99. State v. Paxson, 119 Ga. 730, 46 S. E. 872. Action by the state to recover costs taken out of her funds. State v. New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205.

1. One injured by a defect in the sidewalk for which the property owner was primarily liable sued the city. Held, the fact that the city did not interplead the property owner until two years after the injury did not bar its action. City of San Antonio v. Talerico [Tex.] 81 S. W. 518.

2. See 2 Curr. L. 760.

3. A first mortgagee foreclosing made a second mortgagee a party. The latter did not contest the former's claim nor priority, but filed a cross complaint for the foreclosure of his mortgage. Held, the second mortgagee could not set up the statute as against the first mortgagee's right to foreclose. Tinsley v. Lombard [Or.] 78 P. 895.

4. One who, by either private or judicial sale has become owner of interests in real estate belonging to one or more heirs of a mortgagor, may plead the statute in bar of an action to foreclose the mortgage, although such heirs are parties and refuse to interpose the plea. Hopkins v. Clyde [Ohio] 72 N. E. 846.

5. See ante, § 3.

6. See Estates of Decedents, 3 Curr. L. 1267 et seq.

7. See 2 Curr. L. 760.

8. By express provisions of Rev. Code Civ. Proc. § 39 must be taken by answer. State v. Patterson [S. D.] 100 N. W. 162. Under the express provisions of Code Civ. Proc. § 558, the statute must be pleaded. Grogan v. Valley Trading Co. [Mont.] 76 P. 211; Shirey v. Clark [Ark.] 81 S. W. 1057. By omitting to do so, the defense is deemed waived. Borghart v. Cedar Rapids [Iowa] 101 N. W. 1120. The question cannot be raised by demurrer. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

9. Hibernia Sav. & Loan Soc. v. Boland [Cal.] 79 P. 365; Chemung Min. Co. v. Hanley [Idaho] 77 P. 226. Under Pub. Acts 1903, p. 114, c. 149, requiring actions for wrongful death to be brought within one year. Radezky v. Sargent & Co. [Conn.] 58 A. 709.

to dismiss if the complaint shows that the cause stated is barred.[10] Objection that an amendment sets up a barred cause of action may be raised by plea.[11] In some states a general demurrer is sufficient.[12] In others the defense must be raised by special demurrer.[13] The defense cannot be raised by a motion to quash process.[14] If a complaint does not affirmatively show the cause stated to be barred,[15] or if it indicates some circumstance which may have suspended the operation of the statute,[16] it is good against demurrer. A bare averment to the contrary will not make good a complaint otherwise barred.[17]

The facts constituting the bar should be set out;[18] but where a statute creating a cause of action prescribes the period within which it must be brought, the defense is available under a general denial, the complaint having alleged that cause accrued within the period.[19]

If the insufficiency of the plea is apparent, it is demurrable.[20] A general plea to a complaint containing several counts is bad unless all are barred.[21] Generally, matter avoiding the operation of the statute may be set up by reply.[22] Under a practice where new matter set up is deemed controverted, a reply is not neces-

10. Davis v. Boyett, 120 Ga. 649, 48 S. E. 185.

11. Right not lost by failing to except to the amendment. Mackey v. Northern Mill. Co., 210 Ill 115, 71 N. E. 448.

12. Objection may be raised by demurrer on the general ground that a cause of action is not stated. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708; Arkins v. Arkins [Colo. App.] 77 P. 256.

13. Must be specially pleaded [Rev. St. 1887, § 4213]. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226.

14. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857. A motion to quash the process on such ground is a waiver of all other defects. Id.

15. To sustain a demurrer the facts to warrant the defense must distinctly appear. Bragg v. Wiseman [W. Va.] 47 S. E. 90. Action was on a claim incurred 16 years prior to filing the bill, but there was nothing to show when it became due. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664. Where a petition shows the date of accrual but not when the action was commenced, the objection cannot be raised by demurrer on the general ground that a cause of action is not stated. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708. Where an amended complaint shows that the bar of the statute was complete at the time it was filed, a demurrer does not raise the question whether the summons issued on filing the original petition was a sufficient commencement of the action to entitle plaintiff to a new action within one year under Rev St. 1899, § 3465. Id.

16. A complaint which shows on its face that the period of limitations has elapsed, but which alleges that defendant has continuously resided out of the state since the cause of action accrued, is good against demurrer. Reed v. Humphrey [Kan.] 76 P. 390. A plea of prescription liberandi causa, filed as an exception in limine but which contains no averments to break the force of the plaintiff's allegations, but relies on admissions in his petition, should not be sustained if the pleadings present matters of fact which affect the question. Rhodes v. Cooper [La.] 37 So. 527. A complaint in an action on a note against joint makers, alleging "that there has been nothing paid on said note except as follows," setting forth payments and date thereof, such action being barred unless the payments arrested the operation of the statute, is not demurrable. Gehres v. Orlowski [Wash.] 78 P. 792. Where a statute provides that an acknowledgment must be in writing, a complaint alleging acknowledgment will be construed as alleging that it is in writing [Code Civ. Proc. § 360]. Higgins v. Graham, 143 Cal. 131, 76 P. 898.

17. Griffith v. Seattle Consol. St R. Co. [Wash.] 79 P. 314.

18. Where the plea of limitations depends on adverse possession and other facts, they should be set forth. Rhodes v. Cooper [La.] 37 So. 527. A motion to direct a verdict on the ground of limitations is not sufficient under Code, § 3557, which enumerates a motion as a pleading. Borghart v. Cedar Rapids [Iowa] 101 N. W. 1120. An answer in an action to foreclose a mortgage, alleging that "no payment has been made since [a certain date], more than 20 years have elapsed since the last payment and said mortgage is no longer a legal claim under the statutes made and provided," sufficiently pleads the statute. Nickell v. Tracy, 91 N. Y. S. 287.

19. Rev. St. § 4921, amended by Act March 3, 1897, giving an action at law for damages and profits for infringement of a patent. Peters v. Hanger [C. C. A.] 127 F. 820.

20. Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857. Where the complaint shows that the cause is not barred, a plea of the statute of limitations is frivolous. Moore v. First Nat. Bank, 139 Ala. 595, 36 So 777.

21. Meyers v. Meyers [Ala.] 37 So. 451. A plea of limitations interposed as to all the counts of a declaration, and which does not constitute a defense as to all of them, is demurrable. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737

22. One sued on a note, on its face barred. Before the bar was complete, the debtor had made a new promise. Vinson v. Palmer [Fla.] 34 So. 276.

sary;[23] but where a reply is not allowed, intervening causes to take the case out of the statute must be set up in the original complaint.[24]

One setting up limitations has the burden of showing that the action is barred,[25] his opponent the burden of showing that his cause falls within an exception.[26] In an action to vacate a judgment obtained by fraud, it is not necessary to show that the defense to the original action is not barred.[27]

LIMITED PARTNERSHIP, LIQUIDATED DAMAGES, see latest topical index.

LIS PENDENS.

General rule.[28]—A "purchaser pendente lite" acquires only those rights which his grantor had,[29] and takes the same subject to any order[30] or judgment[31] that may thereafter be rendered in the case. The purchaser is not a necessary party to the proceeding,[32] though he may, on motion, be made a party,[33] and, the recovery being by virtue of the rights of one of the original parties, the fact that judgment is for one who became a party after the purchase does not change the rule.[34] Such purchaser is also bound by agreements made by his vendor in the course of the litigation,[35] and, in the absence of statutory provisions, is not entitled to notice of the pendency of the action.[36] The rule has no application to one acquiring rights prior to the bringing of the suit.[37]

23. Under Code Civ. Proc. § 522, providing that new matter set up in the answer not requiring a reply is deemed controverted, a plaintiff may prove that his case comes within an exception of the statute. Metz v. Metz, 90 N. Y. S. 340. Where a cause of action is stated and the answer pleads the bar of the statute, judgment cannot be entered for defendant on the pleadings, though from the face of the complaint the cause appears to be barred. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226.

24. In Tennessee, chancery evidence of nonresidence, disability, new promise, partial payment, etc., is inadmissible where not alleged. Jenkins v. Dewar [Tenn.] 82 S. W. 470. Facts relied on to remove the bar must be specially pleaded. Shirey v. Clark [Ark.] 81 S. W. 1057. The pendency of another action must be pleaded, otherwise it cannot be relied on. Citizens' Bank v. Spencer [Iowa] 101 N. W. 643.

25. White v. Century Gold Min. & Mill. Co. [Utah] 78 P. 868. In trespass for cutting trees, limitations being pleaded, the defendant must show the date of the trespass, and where part of the cutting was barred and part was not, must show what part is barred. Buck v. Newberry [W. Va.] 47 S. E. 889.

26. The assignee must show that his assignor had not discovered the fraud within the period of limitations. Hooker v. Worthington, 134 N. C. 283, 46 S. E. 726.

27. People v. Perris Irr. Dist., 142 Cal. 601, 76 P. 381.

28. See 2 Curr. L. 762.

29. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236; Martin v. Abbott [Neb.] 100 N. W. 142. Takes subject to rights of other party. Di Nola v. Allison, 143 Cal. 106, 76 P. 976. Mortgagee pendente lite is not, on eviction of his mortgagor, entitled to an equitable lien on the property on the ground that the money was spent in improvements, the mortgage was recorded, and no notice of the pendency of the action was given him by the successful party. Armstrong v. Ashley, 22 App. D. C. 368.

30. A purchaser of mining property pendente lite is bound by a subsequent order of the court permitting the adverse party to inspect and survey the mine. Heinze v. Butte & B. Consol. Min. Co. [C. C. A.] 129 F. 274.

31. Hargrove v. Cherokee Nation [C. C. A.] 129 F. 186; Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236; Martin v. Abbott [Neb.] 100 N. W. 142; Di Nola v. Allison, 143 Cal. 106, 76 P. 976. A purchaser pendente lite is equally bound with the parties by the estoppel of the judgment. Lockhart v. Leeds [N. M.] 76 P. 312.

32. Sinclair v. Auxiliary Realty Co. [Md.] 67 A. 664. Rule applies whether he is made a party or not. Hargrove v. Cherokee Nation [C. C. A.] 129 F. 186.

33. A purchaser pendente lite being made a party on his own motion is not in a position to complain on the ground that he was not made a party on the motion of plaintiff. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664. Where the pending suit was to set aside a fraudulent conveyance, the purchaser is not prejudiced by joining with him as co-defendant the heir of the deceased fraudulent vendee. Id.

34. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

35. Change of venue by agreement held not to destroy the force of the suit in the county where originally brought. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

36. See Armstrong v. Ashley, 22 App. D. C. 368 [supra, n. 29]. See 2 Curr. L. 762, n. 7. As to statutory provisions, see post, n. 49-58. Johnson v. McKay [Ga.] 49 S. E. 757.

37. Such person is not affected unless he be made a party. See Wilkins v. McCorkle [Tenn.] 80 S. W. 834; 2 Curr. L. 762, n. 9;

One purchasing pending an appeal[38] and a grantee in a trust deed[39] are purchasers pendente lite. Recording deed is equivalent to purchasing.[40]

A party asserting lis pendens must prosecute the suit with reasonable diligence,[41] and as to what constitutes such diligence is a question to be determined with reference to the circumstances of each particular case.[42]

Essential elements.[43]—It is essential to the rule of lis pendens that the property be of a character subject to the rule, that the court have jurisdiction, that the property be sufficiently described,[44] be then in litigation,[45] and that title be claimed under a party to the suit.[46]

[This rule is materially narrowed in its application by the registration laws; see above case for an example.]

38. In this case the appellate court tried the case upon the merits de novo Martin v. Abbott [Neb.] 100 N. W. 142, modifying Parker v. Courtnay, 28 Neb. 605, 44 N. W. 863, 26 Am. St. Rep. 360. Where no supersedeas bond was filed and the purchaser had constructive notice of the pendency of the appeal. Construing Code Civ. Proc. § 1049. Di Nola v. Allison, 143 Cal. 106, 76 P. 976.

NOTE: Appellate proceedings: Though a final judgment or decree has been entered, the losing party has the right to seek relief therefrom by an appeal or writ of error or other appellate proceeding, and sometimes by a bill of review. Where the law gives a right of review in an appellate court, it would seem that the cause ought to be deemed pending until the right has been lost. Hence it has been held that if an appeal be prosecuted within the time allowed by law, all persons acquiring an interest in the subject of the litigation after the commencement of the action must be bound by such judgment as shall ultimately be rendered therein, and that this rule is applicable to persons purchasing before an appeal has, in fact, been taken, though after the entry of the judgment subsequently appealed from. Smith v. Brittenham, 109 Ill. 540; Dunnington v. Elson, 101 Ind. 373; Real Estate, etc., Inst. v. Collonius, 63 Mo. 290; Carr v. Cates, 96 Mo. 271; Macklen v. Allenberg, 100 Mo. 337. A writ of error is in form an independent suit or proceeding. It has, therefore, been held to be subject to the rule that lis pendens does not begin until the service of the writ, and therefore it has been thought that a purchaser after entry of judgment sought to be reviewed but before the service of the writ of error was not barred by the result of the proceedings in error. Cheever v. Minton, 12 Colo. 559, 13 Am. St. Rep. 258; Eldridge v. Walker, 80 Ill. 270; McCormick v. McClure, 6 Blackf. [Ind.] 466, 39 Am. Dec. 441; Macklin v. Allenberg, 100 Mo. 337; Taylor v. Boyd, 3 Ohio, 337, 17 Am. Dec. 603; Ludlow v. Kidd, 3 Ohio, 541; Woolridge v Boyd, 13 Lea [Tenn.] 151; and there have been cases extending this rule to appeals. Cheever v. Minton, 12 Colo. 559, 13 Am. St. Rep. 258. While there may be a distinction in form, the object of the pleadings is the same and the distinction does not seem meritorious. See Smith v. Brittenham, 109 Ill. 553; Debell v. Foxworthy, 9 B. Mon. [Ky.] 228; Clarey v. Marshall, 4 Dana [Ky.] 95; Sarle v. Crouch, 3 Metc. [Ky.] 450; Clark v. Farrow, 10 B. Mon. [Ky.] 446, 52 Am. Dec. 552; Ludlow v. Kidd, 3 Ohio 541; Harle v. Langdon. 60 Tex. 555; Bishop of Winchester v. Beaver, 3 Ves. Jr. 314. Among the decisions affirming that purchasers before a bill of review is filed are nevertheless bound by the result thereof are Debell v. Foxworthy, 9 B. Mon. [Ky.] 228; Clarey v. Marshall, 4 Dana [Ky.] 95; Sarle v. Crouch, 3 Metc. [Ky.] 450; Clark v. Farrow, 10 B. Mon. [Ky.] 446, 52 Am. Dec. 552; Gore v. Stackpoole, 1 Dow. 31. And among the decisions affirming a contrary doctrine are Ludlow v. Kidd, 3 Ohio, 541; Rector v. Fitzgerald, 59 F. 808; Lee County v. Rogers, 7 Wall. [U. S.] 181, 19 Law. Ed. 160.—From note to Stout v. Phillippi Mfg. & Mercantile Co. [W. Va.] 56 Am. St. Rep. 843, 876.

39. A grantee in a trust deed, to secure a debt executed after the entry of a decree of a sale of the land under mortgage foreclosure and before the sale, is in the position of a purchaser pendente lite, and whatever interest he acquires is subject to the lien of the foreclosure decree. Senft v. Vanek, 209 Ill. 361, 70 N. E. 720.

40. Where deed was recorded after entry of decree foreclosing mortgage, held grantee was a purchaser pendente lite. Jones v. Standiferd [Kan.] 77 P. 271. One who withholds his deed from record until proceedings to foreclose a lien for taxes under Laws 1901, p. 705, ch. 392 result in a decree and sale of the land is subject to the rules governing a purchaser pendente lite. Commissioners of Atchison County v. Lips [Kan.] 76 P. 851.

41, 42. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395. Failure to press a suit between the years 1866 and 1870 held, in view of the disturbed condition existing in Texas at that time, not such negligence as to destroy its force as a pending suit. Id. See 2 Curr. L. 762, n. 10.

43. See 2 Curr. L. 762.

44. Petition describing a tract of a designated number of acres by naming co-terminus owners and alleging manner in which plaintiff acquired title held sufficient to operate as a lis pendens. Johnson v. McKay [Ga.] 49 S. E. 757. A petition giving the outside boundaries of a tract of a designated number of acres is sufficient to operate as lis pendens as against a subsequent mortgagee of a portion of the tract. Id. See 2 Curr. L. 762, n. 13.

45. The holder of notes given a mortgagor for the price of one of three tracts of land embraced in the mortgage by filing a notice that in an action by such purchaser against the mortgagor he had filed a cross action affecting the other two tracts, held not to give him a lien on such tracts as against subsequent purchasers. Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284. See 2 Curr. L. 762, n. 14.

Property within the rule.[47]—The doctrine has no application to negotiable instruments.[48]

Statutory lis pendens.[49]—In some states the common-law rule of notice arising from the action itself is abrogated and the filing of a notice is required;[50] but a case not coming within the statute, the common-law rule obtains.[51] A lis pendens filed in a purely personal action is a nullity.[52] This filing is only required in the absence of actual[53] or constructive[54] notice of the pendency of the action. The right to file a statutory lis pendens is an absolute one,[55] the notice being effective only from the time of filing,[56] and the judgment in the action has no retroactive power in favor of such notice.[57]

A notice of lis pendens in a divorce suit is not effective as against a judgment lien obtained on community property pending the determination of the divorce suit.[58]

Continuity of lis pendens.[59]—Where the death of a party does not abate the action, its force as a pending suit continues until lost by the laches of the litigants in failing to make new parties.[60]

A statutory notice cannot be canceled other than in the manner prescribed by statute,[61] the court having no discretion in the matter,[62] and on a motion to cancel, the court cannot consider whether the action can be maintained.[63]

Rights of purchaser and parties.—A purchaser pending a suit to foreclose an alleged judgment lien is entitled to have such judgment lien annulled, it being

46. An intervener, by consent of all parties, withdrawing his intervention before hearing, a subsequent purchaser from him is not a purchaser pendente lite. Rogers v. Winds Lumber Co. [Ark.] 80 S. W. 584. The doctrine that an entry by a stranger to the suit, pendente lite, affects him by the judgment as if he were a party to the record applies only when the stranger enters on the land under some person who is a party to the suit. Graham's Heirs v. Kitchen, 25 Ky. L. R. 2224, 80 S. W. 464. See 2 Curr. L. 762, n. 15.

47. See 2 Curr. L. 763.

48. Shannon's Code, §§ 5260, 5267 as to attachments considered as a statutory lis pendens. Kimbrough v. Hornsby [Tenn.] 84 S. W. 613. See 2 Curr. L. 763, n. 19.

49. See 2 Curr. L. 763.

50. California: Page v. Chase Co. [Cal.] 79 P. 278.

Mississippi: The provisions of the Mississippi statutes regarding lis pendens do not apply to a suit to set aside a fraudulent conveyance under Code 1892, § 503. Fernwood Lumber Co. v. Meehan-Rounds Lumber Co. [Miss.] 37 So. 502. See 2 Curr. L. 763, n. 20, 21.

51. Indiana: In a suit to reform a deed executed by one having the legal title and the record title being in defendant, complainant is not required to file a notice under Burns' Ann. St. 1901, § 328. Rothschild v. Leonhard [Ind. App.] 71 N E. 673. See 2 Curr. L. 763, n. 24.

52. Bayley v. Bayley [N. J. Eq.] 57 A. 271.

53. Martin v. Abbott [Neb.] 100 N. W. 142, modifying Parker v. Courtnay, 28 Neb. 605, 44 N. W. 863, 26 Am. St. Rep. 360. Purchaser for value without notice held not affected by levy of attachment, the statutory notice not being given. White v. Manning [Ky.] 82 S. W. 607.

54. The pendency of the action appearing in the record of one's title, he is presumed to have notice thereof. Di Nola v. Allison, 143 Cal. 106, 76 P. 976.

55. Under Code Civ. Proc. § 1670. Shandley v. Levine, 44 Misc. 23, 89 N. Y. S. 717.

56. Code Civ. Proc. § 153. Greenwood Loan & Guarantee Ass'n v. Childs [S. C.] 45 S. E. 167. Under Gen. St. 1894, § 4180, such notice does not affect the rights of a prior unrecorded conveyance. West Missabe Land Co. v. Berg [Minn.] 99 N. W. 209 [see case for brief history of lis pendens statutes in Minnesota]. Code Civ. Proc. § 409. Page v. Chase Co. [Cal.] 79 P. 278. Such section applies to suits to foreclose the lien of street assessments. Id. See 2 Curr. L. 763, n. 22.

57. Cannot affect the rights of the holder of a conveyance acquired prior to, but recorded after, the filing of the notice. Construing Gen. St. 1894, § 4180. West Missabe Land Co. v. Berg [Minn.] 99 N. W. 209.

58. Mayberry v. Whitter, 144 Cal. 322, 78 P. 16.

59. See 2 Curr. L. 763.

60. Jones v. Robb [Tex. Civ. App.] 80 S. W. 395.

61. Cannot be canceled except pursuant to Code Civ. Proc. § 1674. Shandley v. Levine, 44 Misc. 23, 89 N. Y. S. 717. See 2 Curr. L. 764, n. 30.

62. Under Code Civ. Proc. § 1674, the court has no discretion to refuse the cancellation of the notice after final judgment has been rendered. Jarvis v. American Forcite Powder Mfg. Co., 93 App. Div. 234, 87 N. Y. S. 742. A judgment in an action of ejectment dismissing the complaint upon the merits is such a final judgment, though it may be subsequently vacated. Id. See 2 Curr. L. 764, n. 29.

63. Shandley v. Levine, 44 Misc. 23, 89 N. Y. S. 717.

invalid.[64] The purchaser acquiring possession of the property may be dispossessed precisely as the person from whom he acquired possession might have been dispossessed,[65] and, he having purchased the property from the purchaser at execution pending an appeal, the appellant on securing a reversal does not need a writ of restitution to enable him to assert his rights.[66]

LITERARY PROPERTY; LIVERY STABLE KEEPERS; LIVE STOCK INSURANCE; LLOYD'S; LOAN AND TRUST COMPANIES; LOANS; LOCAL IMPROVEMENTS AND ASSESSMENTS; LOCAL OPTION; LOGS AND LOGGING; LOST INSTRUMENTS; LOST PROPERTY, see latest topical index.

LOTTERIES.

What constitutes.[67]—A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance.[68] It does not cease to be such and become a mere contest because its result may be affected to some slight extent by the exercise of judgment.[69] An event presents the elements of chance in so far as, after the exercise of research, investigation, skill and judgment, it is impossible to foresee its occurrence or non-occurrence, or the forms and conditions of its occurrence.[70] One purchasing commodities entitling him to compete for prizes pays a valuable consideration for the chance.[71]

Advertising a lottery,[72] contriving or assisting to contrive a lottery scheme or gift enterprise,[73] or offering for distribution property, the title to which is to

64. Austin v. Lauderdale [Tex. Civ. App.] 83 S. W. 413.

65. Hargrove v. Cherokee Nation [C. C. A.] 129 F. 186.

66. Di Nola v. Allison, 143 Cal. 106, 76 P. 976. A purchaser from the prevailing party pending an appeal is not entitled on reversal to claim protection from the restitution which plaintiff would have been required to make under Code Civ. Proc. § 957, if the sale had been ordered by the judgment or under process issued upon the judgment. Id.

67. See 2 Curr. L. 764. See, also, titles Betting and Gaming, 3 Curr. L. 499; Gambling Contracts, 3 Curr. L. 1546.

68. Whether called lottery, raffle, gift enterprise, or by some other name [N. Y. Pen. Code, § 323]. People v. Lavin [N. Y.] 71 N. E. 753, rvg. 93 App. Div. 614, 87 N. Y. S. 776. A scheme for the distribution of prizes by lot or chance, especially a gaming scheme in which one or more tickets bearing particular numbers draw prizes and the rest do not. McRea v. State [Tex. Cr. App.] 81 S. W. 741. In order to constitute a lottery or gift enterprise, there must be a purchase of a right, contingent to receive something greater than that purchased, the contingency depending upon lot or chance. City of Winston v. Beeson, 135 N. C. 271, 47 S. E. 457.

Schemes constituting lotteries: Distribution of money and cigars among persons sending in bands from certain cigars who estimate most closely the number of cigars of all brands on which the government will collect taxes during a certain month. People v. Lavin [N. Y.] 71 N. E. 753, rvg. 93 App. Div. 614, 87 N. Y. S. 776. Suit club whose members pay tailor certain sum per week, and which holds weekly drawings, the member holding the lucky number receiving a suit of clothes and ceasing to be a member, is lottery, though unlucky members paying $1 per week for 30 weeks receive $30 suit regardless of result of drawings. De Florin v. State [Ga.] 49 S. E. 699. A scheme whereby an investment company issued bonds numbered as the applications were received, the time of payment, and consequently their value depending on the numbers they happened to receive. Siver v. Guarantee Inv. Co. [Mo.] 81 S. W. 1098. Notes given in payment of part of the amount due under matured bonds invalid. Did not constitute loan. Id.

Schemes not lotteries: Operating knife rack consisting of inclined table with knives stuck therein, over which persons endeavored to throw rings sold by the operator, they being entitled to the knives when they did so. McRea v. State [Tex. Cr. App.] 81 S. W. 741. The giving of trading stamps is not a "gift enterprise" or lottery within the meaning of charter authorizing license tax. City of Winston v. Beeson, 135 N. C. 271, 47 S. E. 457. For note as to whether the giving of trading stamps is a lottery, see Betting and Gaming, § 1, 3 Curr. L. 500, n. 99.

69, 70. People v. Lavin [N. Y.] 71 N. E. 753, rvg. 93 App. Div. 614, 87 N. Y. S. 776.

71. Purchase of cigars, the bands on which entitle him to estimate number of cigars to be sold. People v. Lavin [N. Y.] 71 N. E. 753, rvg. 93 App. Div. 614, 87 N. Y. S. 776.

72. Made a misdemeanor by N. Y. Penal Code, § 327. People v. Lavin [N. Y.] 71 N. E. 753, rvg. 93 App. Div. 614, 87 N. Y. S. 776.

73. No evidence to show violation. Error to permit jury to find defendant guilty under count charging its violation on evidence showing violation of another section, which had been taken from their consideration because court had no jurisdiction to try it [N. Y. Pen. Code, § 325]. People v. Pickert, 96 App. Div. 637, 89 N. Y. S. 183.

be determined by lot or chance, upon the drawing of a lottery, are generally forbidden.[74]

Lottery is a gaming device,[75] and a city council having power to prevent and suppress gaming and gambling houses may pass an ordinance prohibiting the setting up or keeping of a house for the purpose of selling lottery tickets.[76]

Policy.—Statutes generally forbid the operation of policy lotteries,[77] or the having in one's possession of any tickets or slips pertaining thereto.[78] It is proper to permit an expert to testify that the papers in question are such as pertain to policy, where they are not, on their face, sufficient to give information of their true character to the members of the jury as men of common understanding.[79]

MAIMING; MAYHEM.

No cases have been found for this subject since the last article.[80]

MALICE; MALICIOUS ABUSE OF PROCESS, see latest topical index.

MALICIOUS MISCHIEF. [81]

The act must be malicious, and accident[82] or claim of right[83] is a defense. A street railroad is not within a statute relating to injury to "railroad" rolling stock.[84] A charge of injury to property of four persons is not sustained by proof that one had an easement therein and the others no interest.[85] On a prosecution for injury to real property, a defendant out of possession may show title in himself.[86] A provision for increased punishment where the value of the property exceeds $50 refers to the value of the property injured.[87]

MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

[SPECIAL ARTICLE* BY GEO. F. LONGSDORF.]

§ 1. Nature and Elements of the Wrongs (471).
A. Malicious Criminal Prosecutions (471).
B. Malicious Civil Proceedings and Abuse of Process (472). Ordinary Civil Actions (472). Actions or Proceedings Involving Injury to Reputation or Credit (475). Malicious Arrest in a Civil Action (476). Malicious Proceedings to Have One Declared Insane (476).

74. N. Y. Pen. Code, § 328, makes it misdemeanor. Evidence held to show violation of this section. People v. Pickert, 96 App. Div. 637, 89 N. Y. S. 183. Supreme court has no jurisdiction of prosecutions for violations of section 328. Id.

75. City of Portland v. Yick, 44 Or. 439, 75 P. 706.

76. Ordinance valid. City of Portland v. Yick, 44 Or. 439, 75 P. 706.

77. Evidence sufficient to sustain conviction for operating policy lottery. O'Dell v. State, 120 Ga. 152, 47 S. E. 577. Instructions as to reasonable doubt and impeachment approved. Id.

78. In order to constitute the offense of knowingly having in possession "any paper, document, slip, or memorandum that shall pertain in any way to the business of lottery policy, so called," it is not essential that there be in truth such a game or business conducted. N. J. Crimes Act 1898, § 58, as amended in 1899 (P. L. 1898, p. 810; P. L. 1899, p. 215). The pretended or "so called" business is equally prohibited. State v. Arthur [N. J. Law] 57 A. 156. Evidence sufficient to show that defendant knew the character of the tickets, and to sustain conviction. Id.

79. Officer qualified as expert. State v. Arthur [N. J. Law] 57 A. 156.

80. See 2 Curr. L. 765.

81. See 2 Curr. L. 766. See, also, Animals, 3 Curr. L. 159 (injury to animals); Highways and Streets, 3 Curr. L. 1593 (injury to highways).

82. Stone flung at person struck house. Niblo v. State [Tex. Cr. App.] 79 S. W. 31.

83. Destruction of fence under claim of right. Giddings v. State [Tex. Cr. App.] 83 S. W. 694; Shrouder v. State [Ga.] 49 S. E. 702. Digging of ditch on land which defendant believed he owned. Adams v. State [Tex. Cr. App.] 81 S. W. 963.

84. State v. Caln [Kan.] 76 P. 443.

85. Grant v. State, 120 Ga. 199, 47 S. E. 524.

86. Adams v. State [Tex. Cr. App.] 81 S. W. 963.

87. Injury to small corner of tract of land not within statute. Adams v. State [Tex. Cr. App.] 81 N. W. 963.

*All late cases are included and marked by a dagger (†).

Actions or Proceedings Involving Interference With the Possession, Use, or Enjoyment of Personal Property (476). Attachment (477). Garnishment (477). Execution (177). Replevin (477). Bankruptcy and Insolvency Proceedings (477). Action to Wind up a Partnership (478). Actions or Proceedings Involving Interference With the Possession, Use, or Enjoyment of Real Property (478). Malicious Use of Injunction (479). Other Cases of Malicious Abuse of Process (479).

C. Search Warrants (480).

§ 2. Responsibility of Defendant for the Prosecution or Suit and His Participation Therein (480).

§ 3. The Prosecution of the Plaintiff (483). Want of Jurisdiction and Defects or Irregularities in Proceedings (484). Effect of Want of Jurisdiction or Irregularities in Civil Actions (485).

§ 4. Termination of Prosecution in Plaintiff's Favor (485). Favorable Termination or Innocence of the Plaintiff (487). Rule in Respect to Civil Prosecutions and Abuse of Process (488).

§ 5. Want of Reasonable and Probable Cause (489).

A. In Malicious Criminal Prosecution (489). Effect of Malice (490). "Probable Cause" Defined (491). Evidence (492). Province of Court and Jury (495).

B. In Malicious Civil Prosecution (496).

C. In Case of Abuse of Process (498).

§ 6. Malice (498).

§ 7. Advice of Private Counsel, Prosecuting Attorney, or Magistrate (500). In Civil Suits (502).

§ 8. Advice of a Physician on Insanity (503).

§ 9. Damages (503).

§ 10. General Matters of Practice and Pleading (505).

§ 11. Malicious Prosecution as a Crime (506).

§ 1. *Nature and elements of the wrongs. A. Malicious criminal prosecutions.*[88]—For a person to prosecute another, or cause him to be prosecuted, for an offense of which he is innocent, when he acts maliciously and without reasonable and probable cause, is a tort, for which the person so prosecuted may maintain an action on the case, known as an action for malicious prosecution.[89] As we shall hereafter see, an action may also be maintained, subject to some limitations, for the malicious prosecution of a civil suit without probable cause, and for malicious abuse of criminal or civil process not amounting to a prosecution at all. Malicious criminal prosecution often co-exists with false imprisonment which is distinct in being grounded on an unlawful detention or restraint of one's person.[90]

To sustain such an action, it may be said generally, and subject to explanations hereafter given, that the plaintiff must show the following facts, and that the failure of proof as to any one of them will be fatal:

(1) That the plaintiff has been prosecuted.
(2) That the defendant was the prosecutor, or instigated the prosecution.
(3) That the defendant had no probable cause to do so.
(4) That defendant acted with malice.
(5) That the prosecution has terminated in favor of the now plaintiff.[91]

The expression that "malice and want of probable cause must concur" means simply that they must both be present, and it is usually said in reference to the possibility that the inference of malice from want of probable cause may be overthrown.[92] Wrongfulness is not imparted to a prosecution on probable cause by making averments needlessly harsh.[93] It is said by the Illinois courts that such suits tend to discourage criminal prosecutions and should not be favored.[94]

88. See 2 Curr. L. 767.

89. Pollock, Torts (Webb's Ed.) 392; Delegal v. Highley, 3 Bing. N. C. 950; Carl v. Ayers, 53 N. Y. 14, Chase's Cas. 94; Vinal v. Core, 18 W. Va. 1; Merriam v. Mitchell, 13 Me. 439, 29 Am. Dec. 514; Pullen v. Glidden, 66 Me. 202, Chase's Cas. 99, Erwin's Cas. 462; Stewart v. Thompson, 51 Pa. 158.

90. See False Imprisonment, 3 Curr. L. 1417; Cyc. Law Dict. "False Imprisonment."

91. Pollock, Torts (Webb's Ed.) 392-396; Abrath v. North Eastern R. Co., 11 Q. B. Div. 440, 11 App. Cas. 247; Grant v. Devel, 3 Rob. [La.] 17, 38 Am. Dec. 228; Miller v. Milligan, 48 Barb. [N. Y.] 30, Chase's Cas. 98; Vinal v. Core, 18 W. Va. 1. For a valuable note on "Malicious Prosecution of Criminal Charges," see 26 Am. St. Rep. 127-164.

92. See post, § 5.

93. Bartlett v. Brown, 6 R. I. 37, 75 Am. Dec. 675.

94. Hurd v. Shaw, 20 Ill. 354; Ames v. Snider, 69 Ill. 376; Thomas v. Muehlmann, 92 Ill. App. 571; Chicago, etc., R. Co. v. Pierce, 98 Ill. App. 368.

(§ 1) *B. Malicious civil proceedings and abuse of process.*[95]—For convenience the rules in respect to ordinary civil actions and those entailing special injury to the person or seizure of his property will be considered separately without attempting any generalization further than to say that the tortiousness of such acts is well recognized within the limits hereafter stated.[96]

Ordinary civil actions.—It is an established doctrine in England that, since the statutes giving costs to the defendant,[97] an action for malicious prosecution will not lie for the prosecution of a civil action, although it be shown that there was not reasonable and probable cause, and that the action was instituted and prosecuted maliciously, unless there is some special injury to reputation, or by reason of a seizure of property or arrest of the person. "In the present day, and according to our present law," said Bowen, L. J., in an English case, "the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."[98] The reason given for this doctrine is that "in contemplation of law the defendant if unreasonably sued is sufficiently indemnified by a judgment in his favor, which gives him his costs against the plaintiff. And special damage beyond the expense to which he has been put cannot well be so connected with the suit as a natural and probable consequence that the unrighteous plaintiff, on the ordinary principles of liability for indirect consequences, will be answerable for them."[99]

This doctrine has also been recognized by many of the courts in the United States, following the English decisions. These courts hold that, while an action may be maintained for the malicious prosecution without probable cause of a civil action or proceeding causing special damage to reputation or credit, or to the person, or to property, such an action cannot be maintained when there is no such special damage, but merely the expenses of a defense.[1] "If the person be not arrested, or his property seized," said the Pennsylvania court, "it is unimportant how futile and unfounded the action may be, as the plaintiff, in consideration of law, is punished by the payment of costs."[2] And in a New Jersey case it was said: "Merely for the expenses of a civil suit, however malicious

95. See 2 Curr. L. 767, and as to abuse of process, see 2 Curr. L. 1277.

96. See the following portions of this section, and see McCormick H. M. Co. v. Willan [63 Neb. 391, 88 N. W. 497], 93 Am. St. Rep. 449, with extensive monographic note 454.

97. See infra, this section, notes 98, 99, 5.

98. Quartz Hill Gold Min. Co. v. Eyre, 11 Q. B. Div. 674, 690. See, also, Savil v. Roberts, Salk. 15.

99. Pollock, Torts (Webb's Ed.) 398-400.

1. McNamee v. Minke, 49 Md. 122 (and see Clements v. Odorless Excavating Apparatus Co., 67 Md. 461, 1 Am. St. Rep. 409; Bartlett v. Christhilf, 69 Md. 219); Potts v. Imlay, 4 N. J. Law, 330, 7 Am. Dec. 603; Bitz v. Meyer, 40 N. J. Law, 252, 29 Am. Rep. 233; Mayer v. Walter, 64 Pa. 285; Muldoon v. Rickey, 103 Pa. 110, 49 Am. Rep. 117; Norcross v. Otis Bros. & Co., 152 Pa. 481, 34 Am. St. Rep. 669; Mitchell v. Southwestern R. Co., 75 Ga. 398 (but see the Georgia cases in note 4, infra); Wetmore v. Mellinger, 64 Iowa, 741, 52 Am. Rep. 465; Smith v. Michigan Buggy Co., 175 Ill. 619, 67 Am. St. Rep. 242; Dooley v. Meisenbach, 83 Ill. App. 75; Willard v. Holmes Booth & Hayden, 142 N. Y. 492; Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 76 Am. St. Rep. 433 (seemingly a clear departure from the earlier case of Pope v. Pollock, 46 Ohio St. 367, 15 Am. St. Rep. 608, 4 L. R. A. 255, Chase's Cas. 104, although an attempt to distinguish it was made); McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109; Ely v. Davis, 111 N. C. 24; Terry v. Davis, 114 N. C. 31. See, also, Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897, 56 L. R. A. 261 (where, however, the question, although discussed at length, was not decided); Eslava v. Jones, 83 Ala. 139, 3 Am. St. Rep. 699.

See a valuable monographic note, "Liability for Malicious Prosecution of Civil Actions," 93 Am. St. Rep. 454. See, also, note 10 L. R. A. 621.

There must be arrest of person or seizure of property or a special injury beyond that incident to every suit of like kind. †Abbott v. Thorne, 34 Wash. 692, 76 P. 302. For a malicious abuse of injunction whereby sale of goods was restrained, there can be no recovery if no proof of purpose or desire to sell while enjoined and in the face of proof of salability afterwards at higher price. †Williams v. Ainsworth [Wis.] 99 N. W. 327.

2. Mayer v. Walter, 64 Pa. 285. Accord. Norcross v. Otis, 152 Pa. 481, 34 Am. St. Rep. 669.

and however groundless, this action does not lie, nor ever did, so far as I can find, at any period in our judicial history. It must be attended, besides ordinary expenses, with other special grievance or damage, not necessarily incident to a defense, but superadded to it by the malice and contrivance of the plaintiff; and of these an arrest seems to be the only one spoken of in our books,"—and in another place: "Formerly the amercement, now the costs, are the only penalty the law has given against the plaintiff for prosecuting a suit in a court of justice in the regular and ordinary way, even though he fail in such prosecution. The courts of law are open to every citizen, and he may sue, toties quoties, upon the penalty of lawful costs only. These are considered as a sufficient compensation for the mere expenses of the defendant in his defense."[3]

In other states, however, this doctrine is repudiated as not based upon any sound reason, for the recovery of costs by the defendant in an action, as is clear, does not in fact indemnify him, and also as being contrary to the general principles upon which the right of action for malicious abuse of process is based; and in these states it is held that an action for malicious prosecution will lie for the prosecution, maliciously and without probable cause, of an ordinary civil action, although commenced by summons only, where the defendant therein has in fact sustained damage by being put to expense, etc., although there may have been no arrest of his person or seizure of his property, and his only damages may be the expense to which he has been put by the groundless suit.[4] "Whatever," said the Connecticut court, "might have been true when the several statutes giving costs were enacted,[5] we cannot, at this day, shut our eyes to the truth known to everybody, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received; and the common law declares, that for every injury there is a remedy. Before the statutes entitling defendants to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause.[6] And this principle is, and ought to be, operative still, in all cases where the taxation of costs is not an ample remedy."[7]

All of the courts,—both in England and in the United States,—probably agree that an action for malicious prosecution or abuse of process will lie where

3. Potts v. Imlay, 4 N. J. Law, 330, 7 Am. Dec. 603.

4. Woods v. Finnell, 13 Bush [Ky.] 628; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Whipple v. Fuller, 11 Conn. 582, 29 Am. Dec. 330; Smith v. Smith, 26 Hun [N. Y.] 573; Pangburn v. Bull, 1 Wend. [N. Y.] 345; Marbourg v. Smith, 11 Kan. 554; McCardle v. McGinley, 86 Ind. 538, 44 Am. Rep. 343; Lockenour v. Sides, 57 Ind. 360, 26 Am. Rep. 58; Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329; Eastin v. Bank of Stockton, 66 Cal. 123, 56 Am. Rep. 77; O'Neill v. Johnson, 53 Minn. 439, 39 Am. St. Rep. 615; McPherson v. Runyon, 41 Minn. 524, 16 Am. St. Rep. 727; Lipscomb v. Shafner, 96 Tenn. 112; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615; Slater v. Kimbro, 91 Ga. 217, 44 Am. St. Rep. 19; Roberts v. Keeler, 111 Ga. 181; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362; McCormick Harvester Mach. Co. v. Willan, 63 Neb. 391, 88 N. W. 497, 93 Am. St. Rep. 449, 56 L. R. A. 338 (explaining dictum apparently to the contrary in Rice v. Day, 34 Neb. 100). See also. Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 10 L. R. A. 621; Wade v. Nat. Bank of Commerce, 114 F. 377. That the malicious assertion of a counterclaim known to be groundless might be made the ground of an action to recover damages sustained was intimated in Kolka v. Jones, 6 N. D. 461, 470, 66 Am. St. Rep. 615, 621. Suing out a money rule against a levying officer is in effect the bringing of an action within this doctrine. Roberts v. Keeler, 111 Ga. 181.

5. Statute of Marlbridge, 52 Hen. III; Stat. 4 Jac. I, c. 3.

6. Citing Co. Litt. 161a; 3 Lev. 210; 2 Wils. 305, 379; Hob. 266; 4 Mod. 13; 3 Chit. Bl. 125. See, also, Waterer v. Freeman, Hob. 205.

7. Whipple v. Fuller, 11 Conn. 582, 29 Am. Dec. 330. "While it may perhaps be said that the weight of authority denies the action in such cases, the weight of reason certainly approves it. And latterly the American authorities are tending strongly and increasing rapidly in favor of the maintenance of the suit." Morse, J., in Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362.

a civil action, prosecuted maliciously and without probable cause, results in special damage to the defendant in addition to the expenses of his defense, whether in reputation or credit,[8] as in the case of bankruptcy proceedings, or to the person, as in the case of an arrest in a civil action, or to property, as in the case of attachment, replevin, etc.[9] "The action lies," it was said in a New York case, "against any person who maliciously and without probable cause prosecutes another, whereby the party prosecuted sustains an injury either in person, property, or reputation."[10]

If a person maliciously and without probable cause prosecutes a civil action in the name of a third person, the defendant therein may maintain an action against him if he has sustained actual damage, but not otherwise;[11] but one not a party is not injured.[12] In so far as the elements of malicious civil prosecution differ from those of criminal prosecutions,[13] they will be discussed hereafter.[14]

Abuse of process[15] is the malicious or unfounded use of some regular legal proceeding to obtain an advantage over an opponent[16] which it is not the purpose of the law to effect thereby.[17] Neither actual malice, except possibly under statutory definitions,[18] want of probable cause, nor a determination of the action,[19] is essential; but probable cause makes innocuous the issuance of unfounded process,[20] and the abuse implies malice,[21] that is, an ulterior purpose,[22] whilst advice of counsel may show good faith and disprove an ulterior purpose.[23] As in other torts there must be damage, i. e., arrest or seizure of property.[24] Some authorities regard malice as essential,[25] but it would be more accurate speech to say that only an ulterior purpose must exist.[26] The improper use of process made after issuance and not the mere fact of an improper motive in causing issuance or in using it for a proper purpose affords the test.[27] The use of it for a proper purpose howsoever maliciously is not a wrong.[28] A direct action lies for the wrong.[29]

8. Compare, however, Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 76 Am. St. Rep. 433, referred to in note 31, infra.

9. Co. Litt. 161a; Savil v. Roberts, 1 Salk. 14; Austin v. Dibnam, 3 Barn. & C. 139; Gyfford v. Woodgate, 11 East, 297; Quartz Hill Gold Min. Co. v. Eyre, 11 Q. B. Div. 674; Wells v. Noyes, 12 Pick. [Mass.] 324; Savage v. Brewer, 16 Pick. [Mass.] 453, 28 Am. Dec. 255; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Morton v. Young, 55 Me. 24, 92 Am. Dec. 565. And see post, § 1B, where these cases are specifically treated.

10. Nelson, C. J., in Bump v. Betts, 19 Wend. [N. Y.] 421, Chase's Cas. 107, Erwin's Cas. 452.

11. Cotterell v. Jones, 11 C. B. 713.

12. Duncan v. Griswold, 92 Ky. 546, 18 S. W. 354.

13. See ante, this section.

14. See post, § 2 et seq.

15. See Process, § 9, 2 Curr. L. 1277.

16. Cyc. Law Dict. "Abuse of Process" citing Wharton.

17. Mayer v. Walter, 64 Pa. 283, cited 1 Am. & Eng. Enc. Law [2d Ed.] 222; Johnson v. Reed, 136 Mass. 421; Bartlett v. Christhilf, 69 Md. 219; Doctor v. Riedel, 96 Wis. 158, 71 N. W. 119, 65 Am. St. Rep. 40. The "perversion" of process. Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434. "Two elements are necessary * * * (1) the exististence of an ulterior purpose, (2) an act in the use of process not proper in the regular prosecution of the proceeding." Bonney v. King, 201 Ill. 47, 66 N. E. 377; Jeffrey v. Robbins, 73 Ill. App. 353. A valuable and exhaustive monographic note "Abuse of Process" will be found in 86 Am. St. Rep. 398.

18. Jeffery v. Robbins, 73 Ill. App. 353; Phoenix Mut. Life Ins. Co. v. Arbuckle, 52 Ill. App. 33; Wicker v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75.

19. Hazard v. Harding, 63 How. Pr. [N. Y.] 326; Wicker v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Emery v. Ginnan, 24 Ill. App. 65; Mark v. Merz, 53 Ill. App. 458; Page v. Cushing, 38 Me. 523, and many cases cited in note 86 Am. St. Rep. 398. Termination need not be pleaded. Sneeden v. Harriss, 109 N. C. 349, 14 L. R. A. 389.

20. Distress warrant. Hammond v. Will, 60 Ill. 404. Attachment. Humphreys v. Sutcliffe, 192 Pa. 336, 73 Am. St. Rep. 819.

21. Schaper v. Sutter, 63 Ill. App. 257; Phoenix Mut. Life Ins. Co. v. Arbuckle, 52 Ill. App. 33; Wicker v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75.

22. Jeffrey v. Robbins, 73 Ill. App. 353; Barrett v. White, 3 N. H. 210, 14 Am. Dec. 352.

23. Phoenix Mut. Life Ins. Co. v. Arbuckle, 52 Ill. App. 33.

24. See ante, this section.

25. Humphreys v. Sutcliffe, 192 Pa. 336, 73 Am. St. Rep. 819; 19 Am. & Eng. Enc. Law [2d Ed.] 632, citing numerous cases.

26. Stewart v. Cole, 46 Ala. 646; Page v. Cushing, 38 Me. 523, cited in note 86 Am. St. Rep. 398.

27. Bonney v. King, 201 Ill. 47, 66 N. E.

Actions or proceedings involving injury to reputation or credit.—Even in England and other jurisdictions where the general rule that an action will not lie for the malicious prosecution of an ordinary civil action is settled, it is held that an action will lie for prosecuting, maliciously and without probable cause, a civil action or proceeding which directly and naturally involves injury to the reputation or credit.[30] Thus, the prosecution, maliciously and without probable cause, of bankruptcy proceedings against a trader, or the analogous proceedings against a corporation to wind it up for insolvency, since it "is in itself a blow struck at the credit of the person or company whose affairs are thus brought in question," is an actionable wrong.[31] There was a somewhat similar decision in a late Wisconsin case, where it was held that an action would lie for the malicious prosecution of a civil action brought ostensibly for the purpose of winding up a partnership, but in reality for the purpose of obtaining possession and control of the partnership property.[32] An action for suing out an attachment maliciously and without probable cause, and levying on property, may be sustained on this ground, in so far as the defendant's reputation, credit, and business are injured thereby.[33] Ordinarily, however, the action is based on the injury to property.[34] Merely tak-

377; Rogers v. O'Barr [Tex. Civ. App.] 76 S. W. 593; Foy v. Barry, 87 App. Div. 291, 84 N. Y. S. 335; Jeffrey v. Robbins, 73 Ill. App. 353; Phoenix Mut. Life Ins. Co. v. Arbuckle, 52 Ill. App. 33; Hibbard, Spencer, Bartlett & Co. v. Ryan, 46 Ill. App. 313.

Held an abuse: Serving summons on sick person by entering locked house. Foley v. Martin [Cal.] 71 P. 165. Bail process abused. Woodley v. Coker, 119 Ga. 226, 46 S. E. 89. Service on one lured into state by trick and deception. Wanzer v. Bright, 52 Ill. 35. Subpoena for defendant as witness and attachment for nonattendance designed to coerce payment of a small demand. Dishaw v. Wadleigh, 15 App. Div. [N. Y.] 205. Issuing execution and levying after satisfaction of judgment. Buffalo Lubr. Oil Co. v. Everest, 30 Hun [N. Y.] 586. Coercing execution of mortgage by threat of arrest under warrant. Bane v. Detrick, 52 Ill. 19. Arrest solely to collect debt. Mayer v. Oldham, 32 Ill. App. 233. Arresting one to coerce settlement by his father. Foy v. Barry, 87 App. Div. 291, 84 N. Y. S. 335. Causing garnishment of exempt wages to coerce payment through fear of discharge from employment. †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751. **Not an abuse** of garnishment process to honestly assign claim (if not prohibited) in order to evade exemption laws of one's own state. Leeman v. McGrath, 116 Wis. 49, 92 N. W. 425. Suing for more than is due after promise to forbear but without malice. Hendricks v. Middlebrooks Co., 118 Ga. 131, 44 S. E. 835. Going out of state to sue by foreign attachment. Mitchell v. Shook, 72 Ill. 492.

28. Doctor v. Riedel, 96 Wis. 158, 65 Am. St. Rep. 40, 37 L. R. A. 580.

29. Cantine v. Clark, 41 Barb. [N. Y.] 629; Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 10 L. R. A. 621; Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434; Johnson v. Reed, 136 Mass. 421. And see Rosenthal v. Circuit Judge, 98 Mich. 208, 39 Am. St. Rep. 535, 22 L. R. A. 693.

30. Bowen, L. J., in Quartz Hill Gold Min. Co. v. Eyre, 11 Q. B. Div. 674, 691. And see Wade v. National Bank of Commerce, 114 F. 377.

31. Pollock, Torts [Webb's Ed.] 400; Quartz Hill Gold Min. Co. v. Eyre, 11 Q. B. Div. 674; Brown v. Chapman, 1 W. Bl. 427; Chapman v. Pickersgill, 2 Wils. 145; Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253. But see Liquid, etc., Mfg. Co. v. Convert, 82 Ill. App. 39, wherein a suit for receivership was the basis of the action. In a late Ohio case it was held that a corporation has no cause of action for the malicious prosecution of a suit against it by one of its stockholders, on a false averment of its insolvency, for its dissolution and the appointment of a receiver, to the great injury of its credit and business. Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 76 Am. St. Rep. 433. In this case, however, the court based its decision on the ground that "no recovery can be had by a defendant against a plaintiff for the malicious prosecution of a civil action where there has been no arrest of the person or seizure of property," apparently ignoring the fact that injury to reputation or credit is such special damage as will sustain an action. The case is directly opposed by the English case of Quartz Hill Gold Min. Co. v. Eyre, 11 Q. B. Div. 674, in which it was held that an action for malicious prosecution will lie for falsely and maliciously, and without reasonable and probable cause, presenting (by a stockholder) a petition under a statute to wind up a trading company on the ground of insolvency, although no pecuniary loss or special damage to the company can be proved, since the presentation of the petition is, from its very nature, calculated to injure the credit of the company.

32. Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897, 56 L. R. A. 261.

33. Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Kyd v. Cook, 56 Neb. 71, 71 Am. St. Rep. 661. Garnishing exempt wages to harass plaintiff's relations with employer. Nix v. Goodhill, 95 Iowa, 282, 63 N. W. 701, 58 Am. St. Rep. 434; †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751.

34. See post, this section, notes 43-45.

ing out execution for an excessive amount but not willfully or maliciously is not a wrong,[35] nor is merely suing for an excessive sum.[36]

In a late Federal case it was held that an action will lie for prosecuting, maliciously and without probable cause, a civil action in which the pleadings contain defamatory allegations injurious to the defendant's reputation and business.[37]

Malicious arrest in a civil action.—It is well settled in all jurisdictions that an action for malicious prosecution will lie, or an action for malicious abuse of process in the nature of an action for malicious prosecution, if a civil action is brought maliciously and without probable cause, and the defendant is arrested therein or held to bail, or if a defendant is maliciously arrested or held to bail, when there is no probable cause therefor, or held to bail in a larger sum than is due, in an action for which there is good cause, or where he is maliciously arrested on an execution against the person which is not void but which is wrongfully issued.[38] The action will lie for thus procuring ne exeat.[39]

Malicious proceedings to have one declared insane.—An action for malicious prosecution, or for abuse of process, will lie in favor of one against whom another has instituted or instigated, maliciously and without probable cause, proceedings under a statute to have him declared insane, after such proceedings have been determined in his favor and he has been discharged.[40]

Actions or proceedings involving interference with the possession, use, or enjoyment of personal property.—All of the courts agree that an action for malicious prosecution or malicious abuse of process will lie for the prosecution, maliciously and without probable cause, of a civil action or proceeding, or the suing out of civil process, where the defendant sustains special damage by reason of a seizure of or levy upon his property, or other interference with his use and enjoyment thereof. The particular means by which such damage is effected are not material, so long as it is accomplished by a malicious abuse of process. "Any particular method of interfering with property rights," said the Wisconsin court in a late case, "as by attachment, is not material. An equitable levy upon property, as in garnishee proceedings, or the deprivation of the defendant of his property by means of the appointment of a receiver, or any other means whereby his property is taken into the custody of the court or taken out of the custody of the owner and out of his free control, * * * which, in the ordinary course of things, causes damage not reached by a mere judgment of vindication or for costs, is sufficient."[41] It is no defense that one has a legal right to process if he uses it to knowingly levy on exempt property for an ulterior purpose.[42]

35. Hall v. Leaming, 31 N. J. Law, 321, 86 Am. Dec. 213.

36. Grant v. Moore, 29 Cal. 644.

37. Wade v. Nat. Bank of Commerce, 114 F. 377.

38. Goslin v. Wilcock, 2 Wils. 302; Smith v. Cattel, 2 Wils. 376; Pierce v. Street, 3 Barn. & Ad. 397; Grainger v. Hill, 4 Bing. N. C. 212, Chase's Cas. 107; Morton v. Young, 55 Me. 24, 92 Am. Dec. 565; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Herman v. Brookerhoff, 8 Watts [Pa.] 240; Adams v. Lisher, 3 Blackf. [Ind.] 241, 25 Am. Dec. 102; Wells v. Noyes, 12 Pick. [Mass.] 324; Lauzon v. Charroux, 18 R. I. 467; Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 682, Chase's Cas. 102, Erwin's Cas. 453; Block v. Buckingham, 174 Mass. 102; Dishaw v. Wadleigh, 15 App. Div. [N. Y.] 205; Burt v. Place, 4 Wend. [N. Y.] 591; Besson v. Southard, 10 N. Y. 236. See Breck v. Blanchard, 20 N. H. 323, 51 Am. Dec. 222.

39. Burnap v. Wight, 14 Ill. 301.

40. Lockenour v. Sides, 57 Ind. 360, 26 Am. Rep. 58; †Griswold v. Griswold, 143 Cal. 617, 77 P. 672. As to probable cause, malice, and effect of advice of physician, see post, §§ 5-9.

41. Luby v. Bennett, 111 Wis. 613, 627, 87 Am. St. Rep. 897, 908, 56 L. R. A. 261, and see Noonan v. Orton, 30 Wis. 356; Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434.

The liability for wrongful levy on property not the debtor's or exempt or otherwise not within the writ is a trespass (see 2 Curr. L. 1892) or conversion (see 3 Curr. L. 866) and is not germane to this title. But see Attachment, 3 Curr. L. 374; Execution, 3 Curr. L. 1402; Sheriffs and Constables, 2 Curr. L. 1645.

Attachment.—Thus it is well settled that such an action will lie for attaching property maliciously and without probable cause, whether there is want of probable cause for the action in which the attachment is sued out, or want of probable cause for suing out the attachment in an action for which there is good cause.[43] The fact that an attachment bond was given as required by the statute, and that the plaintiff might maintain an action thereon, does not prevent him from maintaining his action on the case at common law for maliciously suing out the attachment.[44] The action may be maintained even though there may have been no actual seizure of the property, if it was levied on and thus put in custodia legis, for the defendant is thereby virtually dispossessed during the time the levy is in force.[45]

Garnishment.—Malicious abuse of the process of garnishment is actionable. Thus, it has been held that an action will lie against one who maliciously and without probable cause garnishes wages which are due to his debtor, but which are exempt,[46] or one who brings successive garnishment proceedings against exempt wages hoping to coerce a settlement through fear of discharge from employment.[47]

Execution.—An action on the case for malicious abuse of process will lie for maliciously and wrongfully causing the issue and levy of an execution on a judgment, if the judgment and execution are not void, as where an execution is issued on a judgment for a debt known to have been paid before entry of the judgment,[48] or for a greater amount than is due on the judgment at the time the execution is issued,[49] or on a judgment procured by fraud.[50]

Replevin.—In all jurisdictions, no doubt, an action for malicious prosecution or malicious abuse of process will lie for prosecuting, maliciously and without probable cause, an action for the possession of personal property and suing out a writ of replevin therein, where the property is taken under the writ from the defendant's possession.[51] In some jurisdictions the action will lie even though the defendant's possession of the property is not disturbed,[52] but as to this, as we have seen, the decisions are conflicting.[53]

Bankruptcy and insolvency proceedings.—An action will lie for maliciously and

42. †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751.

43. Savage v. Brewer, 16 Pick. [Mass.] 453, 28 Am. Dec. 255; Bump v. Betts, 19 Wend. [N. Y.] 421, Chase's Cas. 107, Erwin's Cas. 452; Boon v. Maul, 3 N. J. Law, 863; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Id., 17 Ala. 689, 52 Am. Dec. 194; Stewart v. Cole, 46 Ala. 646; Spengler v. Davy, 15 Grat. [Va.] 381; Burkhart v. Jennings, 2 W. Va. 242; Tomlinson v. Warner, 9 Ohio, 104; Fortman v. Rottier, 8 Ohio St. 548, 72 Am. Dec. 606; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362; Foster v. Pitts, 63 Ark. 387; Humphreys v. Sutcliffe, 192 Pa. 336, 73 Am. St. Rep. 819; Friel v. Plumer, 69 N. H. 498, 76 Am. St. Rep. 190. As to the liability of an attorney, see Higgins v. Russo, 72 Conn. 238, 77 Am. St. Rep. 307.

44. Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10. Contra, Veiths v. Hagge, 8 Iowa, 163; Abbott v. Whipple, 4 G. Greene [Iowa] 320.

45. Rice v. Miller, 70 Tex. 613, 8 Am. St. Rep. 630; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362.

46. Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434. See, also, Noonan v. Orton, 30 Wis. 356.

47. †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751.

48. Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574. And see Gyfford v. Woodgate, 11 East, 297, 2 Camp. 117. If the judgment or execution is void, the remedy is an action of trespass, and an execution on a void judgment, or, according to some of the decisions, an execution issued on a judgment after it has been satisfied, is void. But an execution on a judgment entered after payment of the debt is not void. Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574.

49. Hall v. Leaming, 31 N. J. Law, 321, 86 Am. Dec. 213.

50. Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 10 L. R. A. 621.

51. Co. Litt. 161a; O'Brien v. Barry, 106 Mass. 300, 8 Am. Rep. 329; McPherson v. Runyon, 41 Minn. 524, 16 Am. St. Rep. 727.

52. McPherson v. Runyon, 41 Minn. 524, 16 Am. St. Rep. 727.

53. Ante, this section, notes 1-10, and cases there cited.

without probable cause suing out a commission in bankruptcy, or prosecuting insolvency proceedings, against a person or corporation, where the possession or enjoyment of his property is thereby interfered with, for "wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself."[54] Such an action may also be maintained, as we have seen, because of the injury to reputation and credit, and the resulting injury to business.[55]

Action to wind up a partnership.—In a late Wisconsin case, while it was strongly intimated that the court would follow the English doctrine against the right to maintain an action for malicious prosecution of an ordinary civil action, it was held that an action could be maintained for the malicious prosecution of a civil action brought ostensibly for the purpose of winding up a partnership, but the real purpose and the effect of which were to take the possession of the property from the defendant therein for the benefit of the plaintiff, and to enable the latter, through the forms of law, to control such property and thereby obtain title thereto.[56]

Actions or proceedings involving interference with the possession, use, or enjoyment of real property.—An action for malicious prosecution or malicious abuse of process will lie against one who, maliciously and without probable cause, prosecutes a civil action, or causes the issue and execution of civil process, whereby another's possession, use, or enjoyment of real property is interfered with to his damage.[57] Thus, there would seem to be no doubt that an action will lie to recover any special damages resulting as a proximate consequence from the malicious and wrongful issue and levy of valid attachment or execution upon real property,[58] as for instance, where it was done with no reason to believe defendant indebted but to extort money from him.[59]

An action lies for maliciously and without probable cause prosecuting an action for forcible entry and detainer, where the defendant therein is ousted from possession,[60] or even though his actual possession is not disturbed.[61]

It has also been held that an action will lie for prosecuting a bastardy proceeding maliciously and without probable cause, where by statute the proceeding operates as a lien on the defendant's land from its commencement;[62] for prosecut-

54. Chapman v. Pickersgill, 2 Wils. 145.

55. Ante, this section.

56. Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897, 56 L. R. A. 261.

57. Newark Coal Co. v. Upson, 40 Ohio St. 17; Green v. Cochran, 43 Iowa, 544; Slater v. Kimbro, 91 Ga. 217, 44 Am. St. Rep. 19.

58. See Wetsell v. Tillman, 3 Tex. Civ. App. 559. And see supra, notes 43-50. It was held, however, in an Iowa case, that an action would not lie for the levy of an attachment on real estate, where the possession and use of the property was not interfered with, and the only special damages alleged were for depreciation in value while the attachment was in force, and mental suffering. Tisdale v. Major, 106 Iowa, 1, 68 Am. St. Rep. 263. See, also, Trawick v. Martin-Brown Co., 79 Tex. 461. Compare, however, Wetsell v. Tillman, 3 Tex. Civ. App. 559. It has also been held that inability to sell or mortgage land is not the proximate cause of the wrongful levy of an attachment thereon, so as to entitle the debtor to recover damages therefor in an action for wrongful attachment. Elder v. Kutner, 97 Cal. 490. And it was held in an Alabama case, that an action would not lie for wrongfully issuing an execution commanding the sheriff to sell certain lands in the plaintiff's possession previously levied on under an execution against another, as the issue of the writ and sale thereunder did not affect the right, title, or possession of the plaintiff, and the costs, expenses, and attorney's fees in defending a suit brought by the purchaser to recover possession of the land, alleged as special damages, were not the natural and proximate consequence of issuing the writ. Eslava v. Jones, 83 Ala. 139, 3 Am. St. Rep. 699.

59. †Harr v. Ward [Ark.] 84 S. W. 496.

60. Moffatt v. Fisher, 47 Iowa, 473.

61. It was so held in Ohio (Pope v. Pollock, 46 Ohio St. 367, 15 Am. St. Rep. 608, Chase's Cas. 104), although in that state the English doctrine is recognized, that an action will not lie for the malicious prosecution of an ordinary civil action in which the only damage is the expense of defense. Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489, 76 Am. St. Rep. 433.

62. Green v. Cochran, 43 Iowa, 544. It

ing maliciously and without probable cause a summary statutory process against a tenant, whereby special damages are sustained, although there may have been no actual eviction;[63] or for prosecuting maliciously and without probable cause a suit for an injunction, whereby the defendant therein is temporarily deprived of the use and enjoyment of his land,[64] or for prosecuting an action affecting title and serving notices on tenants to withhold rent.[65]

It has been held that an action will not lie for the malicious prosecution of an action of ejectment, where the only damages are the expenses of defense, and alleged inability to borrow money on the premises.[66] In some states, however, such an action will lie.[67]

Malicious use of injunction.—To sue out an injunction is actionable, if it is sued out maliciously and without probable cause,[68] and if it results in special damage in addition to the expenses of the suit,[69] as in cases where it interferes directly with the possession, use, or enjoyment of real or personal property, or naturally and approximately injures the defendant in his credit and business, etc.[70] And it would seem that the right to maintain an action for suing out an injunction maliciously and without probable cause is not affected by the fact that there is a remedy on a bond given to procure the injunction.[71]

Other cases of malicious abuse of process.—The cases above mentioned are not to be taken as covering all the circumstances under which an action will lie for the malicious abuse of process. For every malicious wrong there is a remedy by an action of trespass on the case, when other remedies are not applicable; and the rule is general that every malicious abuse of legal process, criminal or civil, is a wrong for which an action will lie, where there is damage.[72] "If process is willfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie."[73]

was so held in this case, although the Iowa court holds the English doctrine against the right to maintain an action for the malicious prosecution of an ordinary civil action. Wetmore v. Mellinger, 64 Iowa, 741, 52 Am. Rep. 465.

63. Slater v. Kimbro, 91 Ga. 217, 44 Am. St. Rep. 19 (where special damages were sustained by a tenant occupying premises as a boarding house). See, also, Porter v. Johnson, 99 Ga. 275. Compare Vinson v. Flynn, 64 Ark. 453.

64. Newark Coal Co. v. Upson, 40 Ohio St. 17; Hubbell v. Cole, 88 Va. 236, 29 Am. St. Rep. 716.

See, also, post this section **Malicious abuse of injunction.**

65. Gore v. Condon, 87 Md. 368, 67 Am. St. Rep. 352, 40 L. R. A. 382.

66. Muldoon v. Rickey, 103 Pa. 110, 49 Am. Rep. 117; McNamee v. Minke, 49 Md. 122. But see Johnson v. Meyer, 36 La. Ann. 333, cited note 93 Am. St. Rep. 457.

67. See ante, this section, note 4.

68. Post, § 5B, note 46; Short v. Spragins, 104 Ga. 628.

69. Compare ante, this section, notes 1-10, and conflicting cases there cited. The suing out of injunction to harass and coerce the plaintiff must have wrought injury to him. Restraining sale of produce which on dissolution of order was salable at higher price and where there was no proof of purpose or desire to sell during restraint, shows no damage. †Williams v. Ainsworth [Wis.] 99 N. W. 327.

70. Newark Coal Co. v. Upson, 40 Ohio St. 17; Crate v. Kohlsaat, 44 Ill. App. 460; Hubbell v. Cole, 88 Va. 236, 29 Am. St. Rep. 716, 13 L. R. A. 311; Mitchell v. Southwestern R. Co., 75 Ga. 398; Cox v. Taylor, 10 B. Mon. [Ky.] 17; Beach v. Williams [Iowa] 79 N. W. 393; Robinson v. Kellum, 6 Cal. 399; Lambert v. Haskell, 80 Cal. 611.

71. See the cases in respect to malicious attachment, ante, note 44. It was so held in Hubbell v. Cole, 88 Va. 236, 29 Am. St. Rep. 716. Contra, Gorton v. Brown, 27 Ill. 489, 81 Am. Dec. 245.

72. Grainger v. Hill, 4 Bing. N. C. 212. Chase's Cas. 107, Bigelow's Cas. 67; Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574; Eberly v. Rupp, 90 Pa. 259; Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 10 L. R. A. 621; White v. Apsley Rubber Co. [Mass.] 63 N. E. 885; Wood v. Graves, 144 Mass. 365, 59 Am. Rep. 95, Burdick's Cas. 192; Bartlett v. Christhilf, 69 Md. 219; Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434; Dishaw v. Wadleigh, 15 App. Div. [N. Y.] 205; Bradshaw v. Frazier [Iowa] 85 N. W. 752. One is not liable for abuse of process by an officer to which he is not privy. Teel v. Miles, 51 Neb. 542; People's Bldg. & Loan Ass'n v. McElroy, 79 Ill. App. 266.

73. Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 10 L. R. A. 621. "Whoever makes use of the process of the court for some private purpose of his own, not warranted by the exigency of the writ or the order of the court, is answerable to an ac-

Where sheriff's officers, having a writ for the arrest of a defendant in an action, came to him while he was sick in bed and told him that, unless he would deliver up a certain document or find bail, they must either take him or leave a man with him, and he delivered the document, it was held that there was a malicious abuse of process for which an action would lie.[74]

An action for malicious abuse of process may lie even where the defendant has recovered a judgment against the plaintiff and obtained satisfaction thereof by execution. Thus in a late Michigan case a complaint setting out a conspiracy between the defendants to defraud the plaintiff, and the fact that he was defrauded out of his money by the means of a void judgment obtained by them through fraud, and an execution thereon, was held to state a good cause of action for malicious abuse of process.[75] If in executing a writ of removal a sick child be injuriously exposed, there is an abuse[76] to which neither the advice of a physician[77] nor contributory negligence of parents[78] affords a complete defense. Successive malicious vexatious suits not prosecuted to trial constitute actionable wrong.[79]

(§ 1) *C. Search warrants.*—Search warrants for goods alleged to have been stolen or criminally concealed generally also direct the arrest of the person named therein, and in such a case if sued out maliciously and without probable cause, an action for malicious prosecution will lie.[80] But a search warrant merely directing a search, and under which the person named is not arrested or prosecuted, cannot support an action for malicious prosecution, for there is no prosecution.[81] In that case the issuance and execution of the warrant is an abuse of process for which an action will lie, although the party is not charged with any crime and is not arrested,[82] or if arrested, is not prosecuted.[83]

§ 2. *Responsibility of defendant for the prosecution or suit and his participation therein.*—To sustain an action for malicious prosecution, it is necessary for the plaintiff to show, not only that there has been a prosecution, but also that the defendant was the prosecutor,—that he instituted the prosecution himself,—or else that he caused it to be instituted.[84] One who merely assents passively is not charged.[85] One is not liable who merely states facts to the prosecuting attorney, or a police officer, who then acts on his own motion in instituting a prosecution,[86]

tion for damages for an abuse of the process of the court." 2 Addison, Torts, 868.

74. Grainger v. Hill, 4 Bing. N. C. 212, Chase's Cas. 107, Bigelow's Cas. 67.

75. Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 10 L. R. A. 621.

76, 77, 78. Bradshaw v. Frazier, 113 Iowa, 579, 86 Am. St. Rep. 394.

79. Payne v. Donegan, 9 Ill. App. 566.

80. Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322; Page v. Citizens' Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144. And see Carey v. Sheets, 67 Ind. 375; Elsee v. Smith, 16 Eng. Com. Law Rep. 19; Cooper v. Booth, 3 Esp. 135.

81, 82. Carey v. Sheets, 67 Ind. 375; Witson v. May, 71 Ind. 269; Flora v. Russell, 138 Ind. 153; Harlan v. Jones, 16 Ind. App. 398; Bell v. Clapp, 10 Johns. [N. Y.] 263, 6 Am. Dec. 339; Elsee v. Smith, 16 Eng. Com. Law Rep. 212; Boot v. Cooper, 3 Esp. 144; Term R. 535. "This action is to redress any damages * * * sustained in his reputation by the scandal, in his person by the imprisonment, or in his property by the expense incurred." Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; Olson v. Tvete, 46 Minn. 225, so holding where no goods were found.

83. In this case there was an arrest but no prosecution was instituted. †Spangler v. Booze [Va.] 49 S. E. 42, collecting and commenting on numerous authorities to the same effect.

84. Yocum v. Polly, 1 B. Mon. [Ky.] 358, 36 Am. Dec. 583; Miller v. Milligan, 48 Barb. [N. Y.] 30, Chase's Cas. 98; Babcock v. Merchants' Exchange, 159 Mo. 381; Smith v. Austin, 49 Mich. 286; Breneman v. West, 21 Tex. Civ. App. 19; †Sundmaker v. Gaudet [La.] 37 So. 865. Suing in another's name. Bond v. Chapin, 8 Metc. [Mass.] 31. Merely appearing before the grand jury in obedience to a subpoena, and testifying, is not sufficient connection with a prosecution to render one liable. Richter v. Koster, 45 Ind. 440. It is not necessary that joint actors both sign the complaint. Conroy v. Townsend, 69 Ill. App. 61. But contributing nonparticipating members of an association to prosecute crime were absolved. Johnson v. Miller, 63 Iowa, 535, 50 Am. Rep. 758; Id., 69 Iowa, 562, 58 Am. Rep. 231.

85. Search warrant. Mark v. Merz, 53 Ill. App. 458.

or who acts, although maliciously, in subordination to the prosecuting attorney in a prosecution instituted by the latter's direction, on information derived from others.[87] The prosecution, though instigated by defendant, must be specifically directed by him at plaintiff or there is no liability.[88] A mere surety is not liable for malicious civil prosecution.[89] In the case of abuse of process, defendant must have been the author of the abuse or a participator, not merely the procurer of the process; nor is an attorney liable who prosecutes for a contingent fee, where that is legal, unless he acts maliciously and without probable cause.[90] It will not lie against one who acts in a privileged official capacity[91] or against a municipal corporation.[92] A private corporation may be liable,[93] and its agent who advises it is also liable.[94] The imputation to the corporation of its agent's act in instituting a prosecution is governed by rules more pertinent to the law of agency and corporations than to this topic. Suffice it to say that it must be done pursuant to express or apparent special authority, or by one whose general duties include such an authority, such as a general manager, law officer, custodian of property affected by crime, or officer generally charged to detect and apprehend criminals.[95] If complainant acted under particular direction of a corporate officer and not in pursuance of general authority, it must be shown that the officer had authority to give such directions.[96] Neither is the corporation bound by an attorney who had no authority to institute or direct institution of a prosecution and who did not direct it but did advise and attend the preliminary hearing of plaintiff.[97]

In accordance with the usual rules,[98] the superior is liable for a prosecution emanating from performance of delegated service or action.[99] The liability of one who acts in person on information rendered by agent presents a question of probable cause.[1]

86. Smith v. Austin, 49 Mich. 286; Burnham v. Collateral Loan Co. [Mass.] 60 N. E. 617. Evidence held to show that prosecution was instituted by advice of county attorney. †Mundal v. Minneapolis & St. L. R. Co. [Minn.] 100 N. W. 363. One is not privy to a prosecution merely for having called an officer and testified at the hearing. †Boden v. St. Louis Transit Co. [Mo. App.] 84 S. W. 181.

87. Yocum v. Polly, 1 B. Mon. [Ky.] 358, 36 Am. Dec. 583.

88. Warrant procured for keeper of a disorderly house and "all vile and improper persons found" there does not render informant liable to person not named. Briggs v. Berls, 2 City Ct. R. [N. Y.] 171.

89. Surety on attachment bond. Harr v. Ward [Ark.] 84 S. W. 496; †Smits v. Hogan, 35 Wash. 290, 77 P. 390.

90. Foy v. Barry, 87 App. Div. 291, 84 N. Y. S. 335; Snydacker v. Brosse, 51 Ill. 357; Bradshaw v. Frazier, 113 Iowa, 579, 86 Am. St. Rep. 394, 55 L. R. A. 258.

91. Member of grand jury. Sidener v. Russell, 34 Ill. App. 446. Mayor of a city not acting ministerially. Goodwin v. Guild, 94 Tenn. 486, 45 Am. St. Rep. 743, 27 L. R. A. 660.

92. Brown v. Cape Girardeau, 90 Mo. 377, 59 Am. Rep. 28.

93. Boogher v. Life Ass'n. 75 Mo. 319, 42 Am. Rep. 413; Springfield Engine & T. Co. v. Green, 25 Ill. App. 106; Jordan v. Alabama, etc., R. Co., 74 Ala. 85, 49 Am. Rep 800; Reed v. Home Sav. Bank, 130 Mass. 443, 39 Am. Rep. 468. See other cases cited note 26 Am. St. Rep. 131, and see note 34 Am. Rep. 495-499.

94. Whitney v. New York Cas. Ins. Ass'n, 27 App. Div. 320, 50 N. Y. S. 227.

95. See note 26 Am. St. Rep. 132; Clark & M. Private Corp. Cf. Corporations, 3 Curr. L. 880; Clark & Skyles, Agency. Cf. Agency, 3 Curr. L. 68.

96. †Beiswanger v. American Bonding & Trust Co., 98 Md. 287, 57 A. 202; Gillett v. Missouri Valley R. Co., 55 Mo. 315, 17 Am. Rep. 653.

97. †Beiswanger v. American Bonding & Trust Co., 98 Md. 287, 57 A. 202.

98. See Agency, 3 Curr. L. 68; Master and Servant, 4 Curr. L. 533. See, also, Clark & Skyles' Agency.

99. The mere fact of agency does not charge the principal. Dally v. Young, 3 Ill. App. 39; Oberne v. O'Donnell, 35 Ill. App. 180; Cleveland, etc., Store Co. v. Koch, 37 Ill. App. 595. Mere selling agent has no authority to prosecute for malicious mischief. Hancock v. Singer Mfg. Co., 174 Ill. 503. Collecting agent cannot prosecute for forgery. Springfield Engine & T. Co. v. Green, 25 Ill. App. 106. Arresting passenger for refusal to pay fare held within conductor's employment. †Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303. In Missouri, conductor may call on policeman to arrest as well as to himself eject passenger. Id. The company being liable, improper evidence of ratification is harmless. Id.

1. See post, § 5.

A partner who does not consent is not liable[2] if the prosecution be not for the purpose of furthering the firm business[3] or within its scope.[4]

A creditor and levying officer are jointly and severally liable for abusing garnishment process by successive issues to induce payment of exempt wages or cause discharge from employment.[5]

Infancy and coverture are not an absolute defense but as in case of other torts may in combination with circumstances afford one.[6]

A person is sufficiently a prosecutor, however, or connected with a prosecution, to be liable in such an action, if the prosecution was instituted on his affidavit or complaint before a magistrate, or if it was instituted at his instance or request by the attorney for the state.[7] And a person who maliciously and without probable cause induces another person to make a complaint and institute a criminal prosecution is liable.[8]

One who merely makes a true statement of facts to a magistrate is not liable in an action for malicious prosecution because of the error of the magistrate in deciding that the facts stated constitute a crime, and issuing a warrant of arrest on his own motion.[9] But this does not apply where a person maliciously makes a false statement of facts to a magistrate for the purpose of causing the institution of a criminal prosecution.[10] And even the making of a true statement of the facts

2. Gilbert v. Emmons, 42 Ill. 143, 89 Am. Dec. 412; Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169. And see generally Partnership, 2 Curr. L. 1106.

3. Page v. Citizens' Bank, 111 Ga. 73, 78 Am. St. Rep. 144, 51 L. R. A. 463.

4. Prosecution for larceny is not within the scope of a mercantile firm. Noblett v. Bartsch, 31 Wash. 24, 96 Am. St. Rep. 886.

5. †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751.

6. Compare Infants, 4 Curr. L. 92; Husband and Wife, 3 Curr. L. 1669, and see note 26 Am. St. Rep. 133.

7. Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228; Kline v. Shuler, 8 Ired. L. [N. C.] 484, 49 Am. Dec. 402; Weil v. Israel, 42 La. Ann. 955; Dennis v. Ryan, 65 N. Y. 385, 22 Am. Rep. 635; Cole v. Andrews, 70 Minn. 230; Ward v. Sutor, 70 Tex. 343, 8 Am. St. Rep. 606; McLeod v. McLeod, 75 Ala. 483; Walser v. Thies, 56 Mo. 89; Reisterer v. Lee Sum [C. C. A.] 94 F. 343; Peck v. Chouteau, 91 Mo. 140, 60 Am. Rep. 236; Burnap v. Marsh, 13 Ill. 538; Bicknell v. Dorion, 16 Pick. [Mass.] 478. Liability of public officer. Reisterer v. Lee Sum [C. C. A.] 94 F. 343. Liability of an attorney swearing to information. Whitney v. New York Casualty Ins. Ass'n, 27 App. Div. [N. Y.] 320. That the defendant's name was not indorsed on the indictment, as required by law, as prosecutor, and the absence of proof that defendant gave evidence at the trial, are not conclusive that he was not the prosecutor. Kline v. Shuler, 8 Ired. L. [N. C.] 484, 49 Am. Dec. 402. Complainant not exempt from liability because arrest was under an alias writ. McLeod v. McLeod, 75 Ala. 483.

The fact that the prosecution was instituted by the defendant under the order of a court is no defense, if the court was moved to make the order by the defendant's false evidence, and the prosecution involved the repetition of the same falsehood, "for otherwise the defendant would be allowed to take advantage of his own fraud upon the court which ordered the prosecution." Pollock, Torts [Webb's Ed.] 397; Fitzjohn v. Mackinder, 9 C. B. (N. S.) 505.

A judge or justice of the peace may be liable to an action for maliciously conspiring with others to institute in his court a malicious prosecution. Stewart v. Cooley, 23 Minn. 347, 23 Am. Rep. 690.

8. Mowry v. Miller, 3 Leigh [Va.] 561, 24 Am. Dec. 680; Stansbury v. Fogle, 37 Md. 369; Coffey v. Myers, 84 Ind. 105; Mauldin v. Ball, 104 Tenn. 597; Holden v. Merritt, 92 Iowa, 707; Southern Express Co. v. Couch [Ala.] 32 So. 167. In such case both may be liable. Conroy v. Townsend, 69 Ill. App. 61. A person may be thus liable because he instigated or procured the prosecution to be instituted by an officer. Holden v. Merritt, 92 Iowa, 707; Dann v. Wormser, 38 App. Div. [N. Y.] 460. As to the competency and the sufficiency of evidence to show defendant's connection with the prosecution, see Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Gettinger v. McRae, 89 Md. 513.

9. Leigh v. Webb, 3 Esp. 165; Cohen v. Morgan, 6 D. & R. 8; Carratt v. Morley, 1 Q. B. 18; Teal v. Fissel, 28 F. 351; Bennett v. Black, 1 Stew. (Ala.) 495; Hahn v. Schmidt, 64 Cal. 284; McNeely v. Driskill, 2 Blackf. [Ind.] 259; Newman v. Davis, 58 Iowa, 447; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322; Oakley v. Tate, 118 N. C. 361; Finn v. Frink, 84 Me. 261, 30 Am. St. Rep. 348; Chambliss v. Blau [Ala.] 28 So. 602. But see Barton v. Kavanaugh, 12 La. Ann. 332. As to the effect of want of jurisdiction, see post, § 3. One who applies for a search warrant only, stating facts which do not show larceny, is not liable for malicious prosecution because the magistrate of his own motion, and without authority to do so, also issues a warrant of arrest for larceny. McNeely v. Driscoll, 2 Blackf. [Ind.] 259.

10. Dennis v. Ryan, 65 N. Y. 385, 22 Am. Rep. 635; Navarino v. Dudrap [N. J. Law] 50 A. 353.

to a magistrate will not exonerate the prosecutor from liability, if he afterwards signs and swears to a complaint or affidavit erroneously charging such facts as a crime, or otherwise actively participates in the issuance of the warrant.[11]

A prosecutor is not liable for an indictment brought in by the grand jury in disregard of his evidence, as where they find an indictment for one offense, when his evidence before them was of the commission of another.[12] The rule is otherwise where he, though testifying to a different offense from that presented, was nevertheless instrumental in procuring the indictment.[13]

§ 3. *The prosecution of the plaintiff. In general.*—To support an action for malicious prosecution, as distinguished from mere abuse of process, the first essential is that the plaintiff shall have been subjected to what the law regards as a prosecution. If for any reason the alleged prosecution had no existence, the plaintiff must pursue some other remedy for the injury done him,—as an action of trespass for false imprisonment, action on the case for malicious abuse of process, etc., according to the circumstances. He cannot sue for malicious prosecution.[14]

To constitute a "prosecution" the proceedings need not go to a trial on the charge. There is a sufficient prosecution where a person is arrested on a complaint made before a magistrate, although he may be discharged by the magistrate for want of sufficient evidence to hold him, or for failure of the complainant to appear, etc.[15] And there is a prosecution where a person is arrested and held or committed for the grand jury, and afterwards discharged because of a failure of the grand jury to find an indictment.[16] But, as a general rule, there is no such prosecution as will sustain an action for malicious prosecution, where a person is arrested without a warrant, and brought before a magistrate and discharged, without the filing of any complaint,[17] or where a complaint is made, but is not followed by an arrest or the issue of any process.[18] The mere calling of a policeman and appearing as a witness is not a prosecution by defendant.[19]

11. Anderson v. Buchanan, Wright [Ohio] 725; Finn v. Frink, 84 Me. 261, 30 Am. St. Rep. 348; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322. It has been held, however, that one who truly states to a magistrate facts showing a particular crime, and signs and swears to an affidavit or complaint drawn up by the magistrate, supposing it to charge the crime intended by him, is not liable because the magistrate by mistake drew up the affidavit or complaint so as to charge a different crime. O'Brien v. Frazier, 47 N. J. Law, 349, 54 Am. Rep. 170.

12. Leidig v. Rawson, 1 Scam. [Ill.] 272, 29 Am. Dec. 354.

13. The indictment was for perjury not pursuant to defendant's testimony, but on an affidavit made by one since deceased to a different perjury. Candler v. Petit, 2 N. Y. Super. Ct. 315.

14. Cockfield v. Braveboy, 2 McMull. [S. C.] 270, 39 Am. Dec. 123; Bixby v. Brundage, 2 Gray [Mass.] 129, 61 Am. Dec. 443; Kramer v. Lott, 50 Pa. 495, 88 Am. Dec. 556; Turnin v. Remy, 3 Blackf. [Ind.] 210; Barry v. Third Ave. R. Co., 51 App. Div. [N. Y.] 385; Swift v. Witchard, 103 Ga. 193; Satilla Mfg. Co. v. Cason, 98 Ga. 14, 58 Am. St. Rep. 287; Whaley v. Lawton, 57 S. C. 256; Cooper v. Armour, 42 F. 215, 8 L. R. A. 47.

15. Venafra v. Johnson, 10 Bing. 301; Page v. Citizens' Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144, 51 L. R. A. 463; Sayles v. Briggs, 4 Metc. [Mass.] 421; Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35, and other cases cited post, § 4, note 41.

16. Morgan v. Hughes, 2 Term R. 225; Graves v. Dawson, 130 Mass. 78, 39 Am. Rep. 429, Bigelow's Cas. 62; Shock v. McChesney, 4 Yeates [Pa.] 507, 2 Am. Dec. 415; Apgar v. Woolston, 43 N. J. Law, 22, and cases cited post, § 4, note 40.

17. Barry v. Third Ave. R. Co., 51 App. Div. [N. Y.] 385.

18. Cooper v. Armour, 42 F. 215, 8 L. R. A. 47; Cockfield v. Braveboy, 2 McMullen [S. C.] 270, 39 Am. Dec. 123; Bartlett v. Christhilf, 69 Md. 219; Swift v. Witchard, 103 Ga. 193, under a statute requiring that the prosecution shall have been instituted and "carried on." In Page v. Citizens' Bank, 111 Ga. 73, 78 Am. St. Rep. 144, an arrest under a search warrant arraignment and discharge on the prosecutor's announcement of inability to make a case is held to be a prosecution "carried on." That an arrest is generally essential, see note 26 Am. St. Rep. 130 and cases cited. But it has been held that no arrest is necessary to support an action for the malicious institution of bastardy proceedings. Coffey v. Myers, 84 Ind. 105. And in the case of an ordinary criminal prosecution, an actual arrest of the plaintiff is not necessary to give him a right of action, if he was informed by an officer that there was a warrant for his ar-

Want of jurisdiction and defects or irregularities in proceedings.—An attempted prosecution before a person or tribunal having no existence as a judge or court, either de jure or de facto, is clearly a mere nullity, and cannot give rise to an action for malicious prosecution, the remedy being an action of trespass for false arrest and imprisonment, or an action on the case for libel or slander, and all concerned therein being liable. But difficulty arises in determining the effect of mere want of jurisdiction or irregularities where the prosecution was instituted or carried on before a regularly constituted magistrate or court, and to some extent the decisions are conflicting. If an affidavit or complaint is made, for the purpose of instituting a criminal prosecution, before a magistrate having no jurisdiction of the offense, or if an affidavit or complaint so made does not state any offense, and the magistrate nevertheless issues a warrant at the request of the complainant, and the accused is arrested, the proceeding is coram non judice and void, and both the complainant and the magistrate are liable in trespass for false imprisonment.[20] Some of the courts, therefore, hold that if there is nothing further in the way of a prosecution than an arrest and discharge by a magistrate, the person accused must sue in trespass, and cannot maintain an action for malicious prosecution.[21] Other courts hold, however, that he may sue either in trespass or case.[22] Some courts go even further, and apply the same rule, where there is no jurisdiction, although the plaintiff may not only have been arrested, but afterwards prosecuted for the alleged offense, on the ground that the proceedings are a nullity, and there is therefore no prosecution in contemplation of law.[23] Most courts, however, hold that if the plaintiff has been in fact prosecuted, and not merely arrested and discharged, and the malicious and false prosecution is alleged as the ground of action, and not the arrest, an action for malicious prosecution may be maintained, notwithstanding the fact that the magistrate or court had no jurisdiction at all to entertain the prosecution, or the fact that the complaint or indictment on which the prosecution was based did not charge any crime.[24] If the court had jurisdiction of the offense charged, an action for malicious prosecution cannot be defeated by showing that the complaint or indictment was so defective, or the proceedings otherwise so irregular, that, if there had been a conviction, the judgment would have been erroneous, or even a nullity.[25]

rest, and to appear, and he did appear and submit to the jurisdiction of the magistrate. Strehlow v. Pettit, 96 Wis. 22.

19. Police preferred charges. †Boden v. St. Louis Transit Co. [Mo. App.] 84 S. W. 181.

See ante, § 2.

20. Ante, § 2, notes 9, 10.

21. Krause v. Spiegel, 94 Cal. 370, 28 Am. St. Rep. 137; Maher v. Ashmead, 30 Pa. 344. 72 Am. Dec. 708; Baird v. Householder, 32 Pa. 168; Kramer v. Lott, 50 Pa. 495, 88 Am. Dec. 556; Lewin v. Uzuber, 65 Md. 341; Satilla Mfg. Co. v. Cason, 98 Ga. 14, 58 Am. St. Rep. 287; Collum v. Turner, 102 Ga. 534. A mere arrest under a warrant which is void on its face is nothing but a trespass, and will not support an action for malicious prosecution. Lewin v. Uzuber, 65 Md. 341; Collum v. Turner, 102 Ga. 534.

22. Hays v. Youngiove, 7 B. Mon. [Ky.] 545; Parli v. Reed, 30 Kan. 534; Bell v. Keepers, 37 Kan. 64; Streight v. Bell, 37 Ind. 550; Stocking v. Howard, 73 Mo. 25; Barton v. Kavanaugh, 12 La. Ann. 332.

23. Bixby v. Brundage, 2 Gray [Mass.] 129, 61 Am. Dec. 443; Whiting v. Johnson, 6 Gray [Mass.] 247; Kramer v. Lott, 50 Pa. 495, 88 Am. Dec. 556 (but see Stewart v. Thompson, 51 Pa. 158); Whaley v. Lawton, 57 Cal. 256; Collum v. Turner, 102 Ga. 534.

24. Goslin v. Wilcock, 2 Wils. 302; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Morris v. Scott, 21 Wend. [N. Y.] 281, 34 Am. Dec. 236; Dennis v. Ryan, 63 Barb. [N. Y.] 149; Id., 65 N. Y. 389, 22 Am. Rep. 635; Finn v. Frink, 84 Me. 261, 30 Am. St. Rep. 348; Shaul v. Brown, 28 Iowa, 37, 4 Am. Rep. 151; Stancliff v. Palmeter, 18 Ind. 321; Hays v. Youngiove, 7 B. Mon. [Ky.] 545; Apgar v. Woolston, 43 N. J. Law, 57; Navarino v. Dudrap [N. J. Law] 50 A. 353; Strehlow v. Pettit, 96 Wis. 22; Schattgen v. Holnback, 149 Ill. 646; Minneapolis Threshing Mach. Co. v. Regier, 51 Neb. 934 (compare Painter v. Ives, 4 Neb. 122); Stubbs v. Mulholland [Mo.] 67 S. W. 650; Stewart v. Thompson, 51 Pa. 158. See, also, Sweet v. Negus, 30 Mich. 406; Ward v. Sutor, 70 Tex. 343, 8 Am. St. Rep. 606. As to liability for error of magistrate on facts stated to him, see ante, § 2, notes 9-11.

25. Ward v. Sutor, 70 Tex. 343, 8 Am. St. Rep. 606; Sweet v. Negus, 30 Mich. 406; Gibbs

An action for malicious prosecution cannot be maintained where the only thing done was to arrest the defendant under a warrant, and afterwards discharge him, and the warrant was so defective that the alleged prosecution had no existence.[26] The remedy is trespass for false imprisonment.[27] But fatal defects in a warrant of arrest will not prevent an action for malicious prosecution under an indictment afterwards presented.[28] And where a complaint on which the plaintiff was tried before a magistrate was sufficient, defects in the warrant issued thereon, and under which the plaintiff was arrested, are immaterial.[29]

A search warrant without an arrest would seem not to be a prosecution but otherwise if there is an arrest and consequent proceedings.[30] It is important chiefly as a matter of pleading for in either event the malicious issuance and execution of it is actionable.[31]

Effect of want of jurisdiction or irregularities in civil actions.—According to the weight of authority, if a person prosecutes a civil action maliciously and without probable cause, or maliciously and without probable cause procures the arrest of the defendant or an attachment of his property, he cannot defeat an action on the case for malicious prosecution or abuse of process by setting up that the court had no jurisdiction of the action, or that the capias or attachment issued therein was void for want of jurisdiction or otherwise.[32] Some of the cases, however, hold that the remedy in such a case, if there is any, is by an action of trespass.[33] One who falsely and maliciously sues out an attachment, which is executed, cannot escape liability on the ground that the affidavits on which it was issued were insufficient.[34] And the same is true of a search warrant.[35]

§ 4. *Termination of prosecution in plaintiff's favor.*[36]—Since an action for malicious prosecution cannot be maintained if the plaintiff was in fact guilty of the offense with which he was charged, and since there is a possibility of a conviction so long as the prosecution is pending, it necessarily follows that an action cannot be maintained for malicious prosecution until the prosecution has terminated, and in the plaintiff's favor; and this fact must be alleged in the declaration or complaint to make it state a cause of action.[37] It has been said that the plaintiff

v. Ames, 119 Mass. 66, 20 Am. Rep. 315; Stewart v. Thompson, 51 Pa. 158; Malone v. Huston, 17 Neb. 107; Minneapolis Threshing Mach. Co. v. Rigier, 51 Neb. 402; Schattgen v. Holnback, 149 Ill. 646. False pretenses as to future facts. †Harrington v. Tibbet, 143 Cal. 78, 76 P. 816. Technical defects in the complaint are no defense where it was treated as sufficient. †Kerstetter v. Thomas [Wash.] 79 P. 290. A complaint that one "failed, neglected, and refused" to pay over money, is not false though there was no demand and actual refusal. Construed as averring omission to pay over. †Bankell v. Weinacht, 99 App. Div. 316, 91 N. Y. S. 107.

26. Cockfield v. Braveboy, 2 McMullen [S. C.] 270, 39 Am. Dec. 123; Maher v. Ashmead, 30 Pa. 344, 72 Am. Dec. 708; Baird v. Householder, 32 Pa. 168; Kramer v. Lott, 50 Pa. 495, 88 Am. Dec. 556.

27. Ante, note 14.

28. Kline v. Shuler, 8 Ired. L. [N. C.] 484, 49 Am. Dec. 402.

29. Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644.

30. See 4 Minor Inst. part 1, p. 393, cited Spangler v. Booze [Va.] 49 S. E. 43.

31. See ante, § 1 C.

32. Goslin v. Wilcock, 2 Wils. 302; Boon v. Maul, 3 N. J. Law, 863; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533, 10 L. R. A. 621. Compare, however, Montgomery v. Houston, 4 J. J. Marsh. (Ky.) 488, 20 Am. Dec. 223, wherein it was held that damages are given on the dissolution of an injunction, only where it was granted by competent authority.

33. Marshall v. Betner, 17 Ala. 832; Vinson v. Flynn, 64 Ark. 453; Berger v. Saul, 113 Ga. 869. See ante, this section, note 14.

34. Forrest v. Collier, 20 Ala. 175, 56 Am. Dec. 190.

35. Harlan v. Jones, 16 Ind. App. 398.

36. See 2 Curr. L. 769.

37. Buller N. P. 12; Fisher v. Bristow, 1 Doug. 215; Morgan v. Hughes, 2 Term R. 225; Bacon v. Towne, 4 Cush. [Mass.] 217; Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 682, Chase's Cas. 102, Erwin's Cas. 453; Knott v. Sargent, 125 Mass. 95; White v. Apsley Rubber Co. [Mass.] 63 N. E. 885; Whaley v. Lawton, 57 S. C. 256; Apgar v. Woolston, 43 N. J. Law, 57; Lowe v. Wartman, 47 N. J. Law, 413; Vinal v. Core, 18 W. Va. 1; Blalock v. Randall, 76 Ill. 224; Haglen v. Apple, 65 Ark. 274; Forster v. Orr, 17 Or. 447; Steel v. Williams, 18 Ind. 161; Stark v. Bindley, 152 Ind. 182; Hartshorn v. Smith, 104 Ga. 235; Schippel v. Norton, 38

must show "that his innocence was pronounced by the tribunal before which the accusation was made;"[38] but this is not strictly true. "Any proceeding," said the New Jersey court, by which the particular prosecution is disposed of in such a manner that it cannot be revived, or that the prosecutor, if he intends to proceed further, must institute proceedings de novo, is a sufficient termination of the prosecution to enable the plaintiff to bring his action."[39]

Thus a sufficient termination of the prosecution in favor of the plaintiff is established, when it is shown that, after being committed or bound over by a magistrate, he was discharged, or the prosecution abandoned, because of refusal or failure of the grand jury to find an indictment against him;[40] that he was discharged by a magistrate, either because of insufficiency of the evidence against him, or because the defendant withdrew the prosecution or failed to make any complaint or to appear;[41] or by the court in which the indictment was pending, for want of prosecution;[42] that he was discharged on a writ of habeas corpus if the circumstances are such that the prosecution is thereby ended,[43] but not otherwise;[44] or that he was acquitted by direction of the court because of a defect in the indictment,[45] or because the facts stated in the indictment, and which were the same as were stated by the defendant to the prosecuting attorney and before the grand jury, did not constitute a crime.[46]

Kan. 567; Von Koehring v. Witte, 15 Tex. Civ. App. 646; Hinds v. Parker, 11 App. Div. [N. Y.] 327; Carpenter v. Nutter, 127 Cal. 61. Merely to allege that the plaintiff was discharged from his imprisonment is not enough, for this does not necessarily imply that the prosecution is at an end. Morgan v. Hughes, 2 Term R. 225.

This rule does not apply in an action for maliciously and without probable cause suing out a peace warrant, under which the plaintiff was committed or bound over to keep the peace, the proceedings having been wholly ex parte, and the magistrate having been required by law to act upon the facts stated to him, without the plaintiff having any opportunity or right to contest the proceeding. Stewart v. Gromett, 7 C. B. (N. S.) 191; Hyde v. Greuch, 62 Md. 577. And the rule does not require that a criminal prosecution shall be terminated before the defendant may maintain an action for abuse of process therein, as for use of criminal process to compel him to abandon a claim to property or pay a disputed claim, etc. White v. Apsley Rubber Co. [Mass.] 63 N. E. 885.

38. Abrath v. North Eastern R. Co., 11 Q. B. Div. 440, 11 App. Cas. 247.

39. Apgar v. Woolston, 43 N. J. Law, 57.

40. Morgan v. Hughes, 2 Term R. 225; Mitchell v. Williams, 11 Mees. & W. 205; Bacon v. Waters, 2 Allen [Mass.] 400; Graves v. Dawson, 130 Mass. 78, 39 Am. Rep. 429, Bigelow's Cas. 62; Murray v. Lackey, 2 Murph. [N. C.] 368; Rice v. Ponder, 7 Ired. L. [N. C.] 390; Shock v. McChesney, 4 Yeates [Pa.] 507, 2 Am. Dec. 415; Gilbert v. Emmons, 42 Ill. 143, 89 Am. Dec. 412; Potter v. Casterline, 41 N. J. Law, 22; Apgar v. Woolston, 43 N. J. Law, 57; Proctor Coal Co. v. Moses [Ky.] 40 S. W. 681. A formal order of the court discharging him is not necessary. Potter v. Casterline, 41 N. J. Law, 22. But failure or refusal of the grand jury to find an indictment is not such a termination of the prosecution as will support an action, where it appears that the particular grand jury had no jurisdiction or authority to pass on the indictment (Stark v. Bindley, 152 Ind. 182), or that the prosecution was not in fact discontinued, but an indictment was found at a subsequent term (Von Koehring v. Witte, 15 Tex. Civ. App. 646); or that the case has been merely continued before the grand jury because of the absence of a witness (Knott v. Sargent, 125 Mass. 95).

41. Venafra v. Johnson, 10 Bing. 301; McDonald v. Rooke, 2 Bing. N. C. 217; Sayles v. Briggs, 4 Metc. [Mass.] 421; Moyle v. Drake, 141 Mass. 238; Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35; Page v. Citizens' Banking Co., 111 Ga. 73, 78 Am. St. Rep. 144, 51 L. R. A. 463; Rider v. Kite, 61 N. J. Law, 8; Fay v. O'Neill, 56 N. Y. 11; Secor v. Babcock, 2 Johns. (N. Y.) 203; Jones v. Finch, 84 Va. 204; Strehlow v. Pettit, 96 Wis. 22; Coffey v. Myers, 84 Ind. 105. Compare, however, Ward v. Reasor [Va.] 36 S. E. 470. The rule applies to a discharge by a United States commissioner. Jones v. Finch, 84 Va. 204. But a prosecution is not terminated by discharge by a magistrate, so as to permit an action for malicious prosecution, if the prosecutor with due diligence follows up and continues the prosecution in a court having jurisdiction to try the case on its merits. Hartshorn v. Smith, 104 Ga. 235; Schippel v. Norton, 38 Kan. 567.

42. But this does not apply to a discharge of one from imprisonment, or recognizance for failure to bring on an indictment for trial at the term at which issue is joined or the next term, where under the statute the accused is not thereby discharged from the indictment or liability to prosecution under it. Apgar v. Woolston, 43 N. J. Law, 57.

43. McMahan v. Armstrong, 2 Stew. & P. [Ala.] 151, 23 Am. Dec. 304; Zebley v. Storey, 117 Pa. 478; Holliday v. Holliday, 123 Cal. 26.

44. Walker v. Martin, 43 Ill. 508; Merriman v. Morgan, 7 Or. 68; Hinds v. Parker, 11 App. Div. [N. Y.] 327.

45. Wicks v. Fentham, 4 Term R. 247; Pippet v. Hearn, 5 B. & A. 634.

In some of the cases it has been held that when a complaint has been made before a magistrate for an offense which he has jurisdiction to try, or an indictment has been found, and presented to a court having jurisdiction to try the offense, there must be a trial and acquittal, at least unless the complainant consents to a dismissal, and that a dismissal or nolle prosequi entered on motion of the prosecuting attorney is not a sufficient termination of the prosecution to permit an action for malicious prosecution, as this does not tend to show the innocence of the accused, and another complaint may be made, or another indictment found, on the same complaint.[47] Other courts hold that a dismissal without trial or entry of a nolle prosequi, if not by the procurement or consent of the accused, while it does not determine the innocence of the accused, and may not prevent another indictment or complaint, is nevertheless a sufficient termination of the particular prosecution in favor of the accused to entitle him to maintain an action. This view is undoubtedly supported by the weight of authority.[48] This does not apply, however, where a complaint charging an offense is dismissed without a trial, or a nolle prosequi entered on a good indictment, because of a settlement or compromise between the accused and the complainant, or otherwise by the procurement or with the consent of the accused.[49]

A search warrant is ended when it proves ineffective and the proceeding is discontinued.[50] There need be no trial on merits and acquittal.[51]

Favorable termination or innocence of the plaintiff.—To enable one to maintain an action for the malicious prosecution of a criminal charge against him, he must so far as the prosecution is concerned stand innocent of the offense charged, that is it must have terminated in his favor.[52] While unnecessary to prove innocence, it may be proved in rebuttal,[53] and a judgment of conviction is conclusive as to his guilt until it is set aside or reversed.[54] If he was in fact guilty of the

46. Dennis v. Ryan, 65 N. Y. 385, 22 Am. Rep. 635. As to the effect of want of jurisdiction, and the conflict of authority on the question, see ante, § 3.

47. Buller N. P. 14; Bacon v. Towne, 4 Cush. [Mass.] 217; Parker v. Farley, 10 Cush. [Mass.] 279; Coupal v. Ward, 106 Mass. 289; Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 682, Chase's Cas. 102, Erwin's Cas. 453; Garing v. Fraser, 76 Me. 37; Ward v. Reasor [Va.] 36 S. E. 470. The Massachusetts cases above cited, however, were limited in Graves v. Dawson, 130 Mass. 78, 39 Am. Rep. 429, Bigelow's Cas. 62; Id., 133 Mass. 419, and it was held that while a nolle prosequi is not necessarily such a termination of a prosecution as will permit an action for malicious prosecution,—as where it was procured by the plaintiff,—yet it may be under some circumstances.

48. Moulton v. Beecher, 1 Abb. N. C. [N. Y.] 193, Chase's Cas. 103; Yocum v. Polly, 1 B. Mon. [Ky.] 358, 36 Am. Dec. 583; Hatch v. Cohen, 84 N. C. 602, 37 Am. Rep. 630; Apgar v. Woolston, 43 N. J. Law, 57; Lowe v. Wartman, 47 N. J. Law, 413; Richter v. Koster, 45 Ind. 440; Holliday v. Holliday, 123 Cal. 26; Douglas v. Allen, 56 Ohio St. 156; Driggs v. Burton, 44 Vt. 124; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135; †Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 P. 168. And see Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35; Page v. Citizens' Banking Co., 111 Ga. 73, 85, 78 Am. St. Rep. 144, 155. 51 L. R. A. 463; Stanton v. Hart, 27 Mich. 539, and dictum in cases cited in the note following. But striking of a criminal case from the docket on motion of the state's attorney, with leave to reinstate the same, is not a sufficient termination. Blalock v. Randall, 76 Ill. 224.

49. Langford v. Boston & A. R. Co., 144 Mass. 431; Coupal v. Ward, 106 Mass. 289; Craig v. Ginn [Del.] 45 A. 842, afd. 48 A. 192; Welch v. Cheek, 125 N. C. 353; Russell v. Morgan [R. I.] 52 A. 809, and dictum in the cases cited in the note preceding. Compare Driggs v. Burton, 44 Vt. 124.

50, 51. Trial and acquittal need not be pleaded. †Spangler v. Booze [Va.] 49 S. E. 42.

52. Abrath v. North Eastern R. Co., 11 Q. B. Div. 440; afd. 11 App. Cas. 247; Basebe v. Matthews, L. R. 2 C. P. 684; Bartlett v. Brown, 6 R. I. 37, 75 Am. Dec. 675; Whitehurst v. Ward, 12 Ala. 264; Bigelow v. Sickles, 80 Wis. 98, 27 Am. St. Rep. 25; Johnson v. Chambers, 10 Ired. L. [N. C.] 287; Parkhurst v. Masteller, 57 Iowa, 474; Threefoot v. Nuckols, 68 Miss. 116. And see Newton v. Weaver, 13 R. I. 616. But where a person is maliciously prosecuted on several charges, the fact that he was guilty of some of them will not prevent him from recovering as to others, of which he was innocent. Reed v. Taylor, 4 Taunt. 616; Ellis v. Abrahams, 8 Q. B. 709.

53. Arrest for drunkenness. †Kerstetter v. Thomas [Wash.] 79 P. 290.

54. Mellor v. Baddeley, 6 Car. & P. 374; Basebe v. Matthews, L. R. 2 C. P. 684; Griffis v. Sellars, 2 Dev. & B. (N. C.) 492, 31

crime for which he was prosecuted, he cannot recover, although the defendant did not know of his guilt when he instituted the prosecution, or of facts establishing probable cause for the prosecution.[55] The fact that the plaintiff was acquitted on the prosecution or discharged by a magistrate, or because of the failure of the grand jury to find an indictment, is not conclusive evidence of his innocence, and does not preclude the defendant from showing that he was in fact guilty.[56] A very recent opinion in dissent favors allowing recovery despite a conviction which was merely technical and procured by false facts for an ulterior purpose.[57]

Rule in respect to civil prosecutions and abuse of process.—It is the general rule, in order that an action may be maintained for malicious prosecution of a civil action or proceeding, that the action or proceeding must have terminated, and in favor of the present plaintiff, for until its determination it cannot be known that it was unfounded; and this fact must be alleged in the declaration or complaint.[58] But this rule does not require that all proceedings that may be had or are required in an action to finally work out or enforce the rights of the parties shall occur before a cause of action will accrue to the defendant therein for maliciously prosecuting such action. "It requires only that the issues material to the question of the bona fides of such action shall be tried and closed by final judgment."[59] The general rule that determination of the action or proceeding complained of is necessary certainly applies where it is sought to recover for the prosecution of an ordinary civil action as having been brought maliciously and without probable cause;[60] or for the prosecution of an action of replevin,[61] or of bankruptcy or insolvency proceedings,[62] or of a suit for a receiver,[63] or of statutory proceedings to dispossess a tenant,[64] etc. The rule also applies to an action for malicious prosecution of a suit in which a capias or attachment was issued, if it is based on the ground that there was no cause of action at all, or no cause of action for the whole amount sued for.[65] But if the action is based on the ground that there was no cause for the issue of the capias or attachment, it may be maintained as

Am. Dec. 422; Severance v. Judkins, 73 Me. 376. The fact that there is no appeal from the conviction is immaterial. Basebe v. Matthews, L. R. 2 C. P. 684.

55. Adams v. Lisher, 3 Blackf. [Ind.] 241, 25 Am. Dec. 102; Parkhurst v. Masteller, 57 Iowa, 474; Johnson v. Chambers, 10 Ired. L. [N. C.] 287; Plummer v. Gheen, 3 Hawks [N. C.] 66, 14 Am. Dec. 572; Threefoot v. Nuckols, 68 Miss. 116; Bigelow v. Sickles, 80 Wis. 98, 27 Am. St. Rep. 25. But the defendant cannot establish probable cause merely, by proof of facts which were not known to him. See post, § 5, note 85.

56. Plummer v. Gheen, 3 Hawks [N. C.] 66, 14 Am. Dec. 572; Bigelow v. Sickles, 80 Wis. 98, 27 Am. St. Rep. 25, and other cases above cited. †Mack v. Sharp [Mich.] 101 N. W. 631.

57. †In Lipowicz v. Jervis, 209 Pa. 315, 58 A. 619, Mitchell, J., dissenting, says there is no probable cause even in case of conviction where the offense was a wholly technical one found on facts which the prosecutor had caused to appear and the prosecution for an ulterior purpose.

58. Metropolitan Bank v. Pooley, 10 App. Cas. 210; Wood v. Laycock, 3 Metc. [Ky.] 192, Paige's Cas. 355; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Jones v. Kirksey, 10 Ala. 839; Burt v. Place, 4 Wend. [N. Y.] 591; O'Brien v. Barry, 106 Mass. 300, 8 Am. Rep. 329; Wilson v. Hale [Mass.] 59 N. E. 632; Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897, 56 L. R. A. 261; Dowdell v. Carpy, 129 Cal. 168. And see Fulton Grocery Co. v. Maddox, 111 Ga. 260, also, the valuable note 93 Am. St. Rep. 470.

59. Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897, 56 L. R. A. 261.

60. Wood v. Laycock, 3 Metc. [Ky.] 192, Paige's Cas. 355, and other cases above cited.

61. O'Brien v. Barry, 106 Mass. 300, 8 Am. Rep. 329.

62. One who has been adjudicated a bankrupt cannot maintain an action for instituting the proceedings maliciously and without probable cause, until the adjudication has been set aside. Metropolitan Bank v. Pooley, 10 App. Cas. 210.

63. Liquid Carbonic Acid Mfg. Co. v. Convert, 82 Ill. App. 39.

64. But dismissal of the dispossessory warrant in such proceedings after it has coerced the defendant therein to give bond to avoid eviction terminates the proceeding sufficiently to entitle him to maintain an action. Slater v. Kimbro, 91 Ga. 217, 44 Am. St. Rep. 19.

65. Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Jones v. Kirksey, 10 Ala. 839; Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 682, Chase's Cas. 102, Erwin's Cas. 453; Wilson v. Hale [Mass.] 59 N. E. 632.

soon as the capias or attachment has been vacated, or according to several decisions, even before it has been vacated.[66] In case of injunction the action must first be finally determined.[67]

The action complained of need not necessarily have been determined in the plaintiff's favor by a judgment of the court. There is a sufficient termination where it was voluntarily dismissed or withdrawn by the defendant, or discontinued by his failure to appear and prosecute it.[68] A verdict or final determination on the merits is not necessary.[69] An action is not determined in favor of the defendant therein by a judgment in his favor, so as to entitle him to maintain an action for malicious prosecution, if the plaintiff has appealed, and the appeal is still pending and undetermined,[70] or if the judgment has been reversed and the case remanded for a new trial, which has not been had;[71] but the fact that he has a right to appeal or to move for a new trial does not render an action premature, if it does not appear that any appeal has been taken or motion for a new trial made.[72] If there was a judgment against the defendant (the present plaintiff) in the suit complained of, and it has not been reversed or set aside, it is conclusive against him in an action for malicious prosecution,[73] unless it appears that there was no opportunity to defend.[74] And a judgment against him is conclusive, even though reversed or set aside, unless it is shown, as it may be, that it was procured by fraud or other unfair means.[75]

Termination of a civil action or criminal prosecution is not necessary to entitle the defendant therein to maintain an action, not for malicious prosecution, but for abuse of process[76] in the action or prosecution,—as for illegally making use of a writ of arrest in a civil action to compel the defendant to surrender property,[77] or for illegally using criminal process to compel the defendant to pay a disputed claim or surrender property.[78] An action for malicious abuse of process will lie even where the defendant recovered a judgment in the suit complained of, and has obtained satisfaction thereof by the issue of an execution, where the judgment was recovered by fraud in a court having no jurisdiction of the plaintiff.[79]

§ 5. *Want of reasonable and probable cause. A. In malicious criminal prosecution.*[80]—A person cannot maintain an action for malicious prosecution unless he shows "that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause."[81] It is not enough for the plaintiff to allege and prove that

66. Fortman v. Rottler, 8 Ohio St. 548, 72 Am. Dec. 606; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362; Alsop v. Lidden [Ala.] 30 So. 401. See, also, Bump v. Betts, 19 Wend. [N. Y.] 421, Chase's Cas. 107, Erwin's Cas. 452; but see Kelley v. Osborn, 86 Mo. App. 239. If the capias or attachment is void, the action may be maintained before it is vacated. Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329.

67. †Williams v. Ainsworth [Wis.] 99 N. W. 327.

68. Pierce v. Street, 3 Barn. & Ad. 397; Arundell v. White, 14 East, 216; Cardinal v. Smith, 109 Mass. 158, 12 Am. Rep. 682, Chase's Cas. 682, Erwin's Cas. 453. A dismissal suffices. †Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 P. 168.

69. †Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 P. 168.

70. Reynolds v. De Geer, 13 Ill. App. 113; Nebenzahl v. Townsend, 61 How. Pr. [N. Y.] 353.

71. Dowdall v. Carpy, 129 Cal. 168.

72. Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897, 56 L. R. A. 261; Marks v. Townsend, 97 N. Y. 590 (compare Ingram v. Root), 51 Hun [N. Y.] 238).

73. Jones v. Kirksey, 10 Ala. 839.

74. Bump v. Betts, 19 Wend. [N. Y.] 421, Chase's Cas. 107, Erwin's Cas. 452.

75. Burt v. Place, 4 Wend. [N. Y.] 591; Welch v. Boston & P. R. Co., 14 R. I. 609.

76. As stated in a previous section, no termination of the action or suit is necessary to support a right to recover for abuse of process. See ante, § 1B "Abuse of Process."

77. Grainger v. Hill, 4 Bing. N. C. 212, Chase's Cas. 107, Bigelow's Cas. 67.

78. White v. Apsley [Mass.] 63 N. E. 885.

79. Antcliff v. June, 81 Mich. 477, 21 Am. St. Rep. 533.

80. See 2 Curr. L. 767.

81. Abrath v. Northeastern R. Co., 11 Q. B. Div. 440, afd. 11 App. Cas. 247.

he was innocent, and the charge false, and that the defendant instituted the prosecution with actual malice, but he must go further, and both allege[82] and prove that the defendant did not believe him to be guilty, or, if he did, that he had no reasonable and probable grounds for his belief. In other words, as it is generally expressed, malice and want of probable cause must concur.[83] And the burden of proving that the prosecution was without probable cause is primarily on the plaintiff.[84] It is no defense that there was probable cause for supposing the plaintiff guilty, if the defendant did not, at the time, know of the facts constituting the probable cause.[85] And even if he did know all the facts, yet if he did not believe the plaintiff guilty, the defense of probable cause cannot avail.[86]

Effect of malice.—As stated above, the fact that the defendant acted maliciously in causing the prosecution does not render him liable, unless he also acted without probable cause, both of these elements being essential;[87] and it has repeatedly been held that want of probable cause cannot be inferred from any degree of malice that may be shown.[88] "From the want of probable cause, malice may be

82. Box v. Taylor, 2 Shower, 154; Muriell v. Tracy, 6 Mod. 169; Kirtley v. Deck, 2 Munf. [Va.] 10, 5 Am. Dec. 445; Young v. Gregorie, 3 Call [Va.] 446, 2 Am. Dec. 556; Dennehey v. Woodsum, 100 Mass. 195; Turner v. Turner, 85 Tenn. 387; Palmer v. Palmer, 8 App. Div. [N. Y.] 331; Cousins v. Swords, 14 App. Div. [N. Y.] 338, 162 N. Y. 625; Haglen v. Apple, 65 Ark. 274; †Lipowicz v. Jervis, 209 Pa. 315, 58 A. 619. Compare Wall v. Toomey, 52 Conn. 35.

83. Box v. Taylor, 2 Shower, 154; Abrath v. Northeastern R. Co., 11 Q. B. Div. 440, afd. 11 App. Cas. 247; Hicks v. Falkner, 8 Q. B. Div. 167; Turner v. Ambler, 10 Q. B. Div. 252; Kirtley v. Deck, 2 Munf. [Va.] 10, 5 Am. Dec. 445; Foshay v. Ferguson, 2 Denio [N. Y.] 617, Chase's Cas. 100; Miller v. Milligan, 48 Barb. [N. Y.] 30, Chase's Cas. 98; Walter v. Sample, 25 Pa. 275, Chase's Cas. 101, Paige's Cas. 358; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228; Medcalfe v. Brooklyn Life Ins. Co., 45 Md. 198, Paige's Cas. 349; Cockfield v. Braveboy, 2 McMullen [S. C.] 270, 39 Am. Dec. 123; Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322; Vinal v. Core, 18 W. Va. 1; Apgar v. Woolston, 43 N. J. Law, 57; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Smith v. Austin, 49 Mich. 286; Wilson v. Bowen, 64 Mich. 133; Lunsford v. Dietrich, 86 Ala. 250, 11 Am. St. Rep. 37; Id., 93 Ala. 565, 30 Am. St. Rep. 79; Foster v. Pitts, 63 Ark. 387; Haglen v. Apple, 65 Ark. 274; Goldstein v. Foulkes, 19 R. I. 291; †Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155; †Lipowicz v. Jervis, 209 Pa. 315, 58 A. 619. Charge construed as holding defendant only if malice concurred with want of probable cause and not as permitting recovery in the face of probable cause. †Adkin v. Pillen [Mich.] 100 N. W. 176.

The fact that the defendant had probable cause for some of several charges on which the prosecution was based does not prevent the plaintiff from recovering with respect to others, as to which there was not probable cause. Reed v. Taylor, 4 Taunt. 616; Ellis v. Abrahams, 8 Q. B. 709.

84. Miller v. Milligan, 48 Barb. [N. Y.] 30, Chase's Cas. 98; Kutner v. Fargo, 34 App. Div. [N. Y.] 317; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Walter v. Sample, 25 Pa. 275, Chase's Cas. 101, Paige's Cas. 358; Foster v. Pitts, 63 Ark. 387; Apgar v. Woolston, 43 N. J. Law, 57; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Monroe v. Weston Lumber Co., 50 La. Ann. 158; †Sundmaker v. Gaudet [La.] 37 So. 865, and other cases above cited. In some jurisdictions proof by the plaintiff that he was acquitted by a jury, or discharged or acquitted by a magistrate, etc., is held to make out a prima facie case of want of probable cause, so as to shift the burden of proof to the defendant. See infra, this section.

85. Turner v. Ambler, 10 Q. B. 252; Delegal v. Highley, 3 Bing. N. C. 959; Galloway v. Stewart, 49 Ind. 156, 19 Am. Rep. 677; Josselyn v. McAllister, 25 Mich. 45; McIntyre v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594; Harkrader v. Moore, 44 Cal. 144, Erwin's Cas. 456; Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174; Threefoot v. Nuckols, 68 Miss. 116.

86. Broad v. Ham, 5 Bing. N. C. 722; Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174; Harkrader v. Moore, 44 Cal. 144, Erwin's Cas. 456; Jackson v. Linnington, 47 Kan. 396, 27 Am. St. Rep. 300; Johnson v. Miller, 82 Iowa, 693, 31 Am. St. Rep. 514; Burk v. Howley, 179 Pa. 539, 57 Am. St. Rep. 607. And see post, § 7, note 24.

87. Foshay v. Ferguson, 2 Denio [N. Y.] 617, Chase's Cas. 100; Miller v. Milligan, 48 Barb. [N. Y.] 30, Chase's Cas. 98; Travis v. Smith, 1 Pa. 234, 44 Am. Dec. 125; Bartlett v. Brown, 6 R. I. 37, 75 Am. Dec. 675; Staunton v. Goshorn [C. C. A.] 94 F. 52; Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; Adams v. Lisher, 3 Blackf. [Ind.] 241, 25 Am. Dec. 102; Yocum v. Polly, 1 B. Mon. [Ky.] 358, 36 Am. Dec. 583; Smith v. Austin, 49 Mich. 286; Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 449; Seamans v. Hoge, 105 Ga. 159; Hicks v. Brantley, 102 Ga. 264; Jackson v. Linnington, 47 Kan. 396, 27 Am. St. Rep. 300; Strehlow v. Pettit, 96 Wis. 22; †Burks v. Ferriell [Ky.] 80 S. W. 809.

88. Miller v. Milligan, 48 Barb. [N. Y.] 30, Chase's Cas. 98; Murray v. Long, 1 Wend. [N. Y.] 140; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; Sharpe v. Johnston, 76 Mo.

implied;[89] but the want of probable cause can never be implied from the proof of malice. The direct proof of the most intense malice is not sufficient; there must be proof also of the want of probable cause, or the suit must fail. The want of probable cause is never implied."[90] Its absence cannot be inferred from evidence of a motive generating malice.[91]

"Probable cause" defined.—Reasonable and probable cause, or "probable cause," as it is generally expressed, means "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged."[92] It follows that mere suspicion, or even a bona fide belief, as to the plaintiff's guilt, is no defense, unless there were reasonable grounds for such belief and the defendant acted with due caution in entertaining it,[93] but the prosecutor may rely on

660; Ulmer v. Leland, 1 Greenl. [Me.] 135, 10 Am. Dec. 48; Yocum v. Polly, 1 B. Mon. [Ky.] 358, 36 Am. Dec. 583; Adams v. Lisher, 3 Blackf. [Ind.] 241, 25 Am. Dec. 102; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85; Medcalfe v. Brooklyn Life Ins. Co., 45 Md. 198, Paige's Cas. 349; Stewart v. Sanneborn, 98 U. S. 187, Burdick's Cas. 253; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Plummer v. Gheen, 3 Hawks [N. C.] 66, 14 Am. Dec. 572; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Hicks v. Brantley, 102 Ga. 264, and other cases cited in the note preceding. Compare, however, Wenger v. Phillips, 195 Pa. 214, 78 Am. St. Rep. 810.

But proof of express malice may be taken into consideration on the question and may render slight evidence in addition sufficient to establish want of probable cause. Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228.

89. See post, § 6, note 81 et seq.

90. Adams v. Lisher, 3 Blackf. [Ind.] 241, 25 Am. Dec. 102. Clear proof is required. †Fox v. Smith [R. I.] 57 A. 932.

91. Competition in business. †Bankell v. Weinacht, 99 App. Div. 316, 91 N. Y. S. 107.

92. Foshay v. Ferguson, 2 Denio [N. Y.] 617, Chase's Cas. 100. See, also, Munns v. Dupont, 3 Wash. C. C. [U. S.] 37; Carl v. Ayers, 53 N. Y. 14, Chase's Cas. 94; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Cockfield v. Braveboy, 2 McMull. [S. C.] 270, 39 Am. Dec. 123; Ritchie v. McBean, 17 Ill. 63; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Ash v. Marlow, 20 Ohio, 119; Wilson v. Bowen, 64 Mich. 133; Vinal v. Core, 18 W. Va. 1; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Id., 86 Ala. 250, 11 Am. St. Rep. 37; Thompson v. Beacon Valley, etc., Co., 56 Conn. 493; Hays v. Blizzard, 30 Ind. 457; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832. "Probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation." Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322. Probable cause "is constituted by such facts and circumstances as, when communicated to the generality of men of ordinary and impartial minds, are sufficient to raise in them a belief, or real grave suspicion of the guilt of the person." Griffis v. Sellars, 2 Dev. & B. [N. C.] 492, 31 Am. Dec. 422.

The question is to be considered, according to the better opinion, from the standpoint of the defendant, and he should not be held liable because of natural partiality and prejudice. As was said in a Wisconsin case, "some allowance may be made when the prosecutor is so injured by the offense that he could not likely draw his conclusions with the same impartiality and absence of prejudice that a person entirely disinterested would deliberately do. All that can be required of him is that he shall act as a reasonable and prudent man would be likely to do in like circumstances." Spear v. Hiles, 67 Wis. 350. And see Carter v. Sutherland, 52 Mich. 597. Complaint for slander of female lodged after taking other witnesses before magistrate and there presumptively hearing them on oath. †Shafer v. Hertzig [Minn.] 99 N. W. 796. Three examinations disclosing apparent deficit followed by consultation with counsel and prosecution for embezzlement and acquittal does not show want of probable cause. †Berger v. Wild [C. C. A.] 130 F. 882. Larceny from corporation and prosecution begun by agent after investigation and consultation with prosecuting attorney. †Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155.

Facts submitted to jury. Prosecution for attempted train wrecking by placing ties near which plaintiff had been seen moving ties. †Mundal v. Minneapolis & St. L. R. Co. [Minn.] 99 N. W. 273. Plaintiff arrested for larceny had collected money of one and examination and inquiry at defendant's office showed no indication of its payment over; and there had been previous misappropriation by plaintiff from same source. †Bankell v. Weinacht, 99 App. Div. 316, 91 N. Y. S. 107. Probable cause properly left to jury though plaintiff was seemingly the only person who had opportunity to be accomplice to an embezzler and though he was so charged in a confession by the principal and resigned to engage in business with him. †Rawson v. Leggett, 97 App. Div. 416, 90 N. Y. S. 5. Arrest for cutting timber from public lands. †Charlton v. Markland [Wash.] 78 P. 132.

93. Merriam v. Mitchell, 13 Me. 439, 29 Am. Dec. 514; Carl v. Ayers, 53 N. Y. 14, Chase's Cas. 94; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Shaul v. Brown, 28 Iowa, 37, 4 Am. Rep. 151; Billingslea v. Maas, 93 Wis. 176, and other cases above cited. Proof that property, for the larceny of which the plaintiff was prosecuted by the defendant, was all the time in the defendant's own possession, and was overlooked by him by

the testimony of others and need not be an eye or ear witness.[94] The fact that the defendant might have ascertained facts showing that the plaintiff was not guilty, or that on the facts known to him a person of extreme or unusual caution would not have proceeded, does not render him liable. All that can be required is that he shall have exercised reasonable care under the circumstances, and shall have acted as an ordinarily cautious and prudent man would act under like circumstances.[95] On the other hand, innocence is not the test of want of probable cause.[96] Facts which manifestly fall short of criminality afford no probable cause,[97] and the presumption favors legality rather than criminality of an act.[98] It suffices that there was probable cause for that crime informed of though the officer misnamed it in the warrant and the arrest was for one without cause.[99] There is not only probable cause but a duty to prosecute one whom an officer knows has violated the law[1] and his connivance at the offense makes no difference.[2]

Evidence.—All the circumstances bearing on probable cause may be received; for example a dispute between parties,[3] threats,[4] the substance, completeness and manner of the disclosure to counsel,[5] good faith in acting on advice.[6]

For the purpose of establishing reasonable and probable cause, where the plaintiff's evidence tends to show want of such cause, the defendant may introduce evidence of the testimony, including his own, given on the trial or other proceedings against the plaintiff, even though such testimony may have been incompetent.[7] And he may prove the general bad character of the plaintiff, known to him,[8] but not specific acts of misconduct not connected with the charge complained of.[9] On the other hand the good character of the plaintiff, and the defendant's knowledge thereof, may be shown and considered with other evidence as tending to show want of probable cause.[10] The defendant may also prove statements

reason of carelessness in his search, shows want of reasonable and probable cause. Merriam v. Mitchell, 13 Me. 439, 29 Am. Dec. 514.

94. Not necessary that he should have heard utterances of criminal slander of wife. †Shafer v. Hertzig [Minn.] 99 N. W. 796.

95. Eggett v. Allen, 106 Wis. 633; Ellis v. Simonds, 168 Mass. 316; Spitzer v. Friedlander, 14 App. D. C. 556. It has been held erroneous, therefore, to define probable cause as a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a "really cautious" man in the belief that the person accused is guilty, as this requires more than ordinary caution and prudence. Eggett v. Allen, 106 Wis. 633. But to charge that probable cause is such a state of facts as would induce in the mind of an ordinarily prudent person a "strong" suspicion of guilt, is not erroneous by reason of the use of the word "strong." George v. Johnson, 25 App. Div. [N. Y.] 125.

96. †Mundal v. Minneapolis, etc., R. Co. [Minn.] 100 N. W. 363. And see post, notes 19-32.

97. Withholding a deposition long enough to consult an attorney held not larceny. †Parr v. Loder, 97 App. Div. 218, 89 N. Y. S. 823. There is no probable cause to prosecute for larceny one who took up and sold estrays pursuant to a statute later declared to be unconstitutional. †Kueney v. Uhl [Iowa] 98 N. W. 602. One who circulates a libel may falsely charge another with crime [Comp. Laws, § 11,762]. †Mack v. Sharp [Mich.] 101 N. W. 631.

98. Detaching fixtures from house belonging to wife presumed to have been with her consent. †Adkin v. Pillen [Mich.] 100 N. W. 176.

99. Information for obstructing a highway and arrest for obstructing passway. †Burks v. Ferriell [Ky.] 80 S. W. 809.

1, 2. Prosecution of restaurant keeper for selling impure milk sold to him by dairy commissioner's connivance. †McKenzie v. Royal Dairy, 35 Wash. 390, 77 P. 680. Semble that a cause of action exists for his wrong. Id.

3, 4. Threats by plaintiff against all agents of a claimant and not specifically against defendant. †Thurkettle v. Frost [Mich.] 100 N. W. 283.

5, 6. †Thurkettle v. Frost [Mich.] 100 N. W. 283.

7. Buller, N. P. 14; McMahan v. Armstrong, 2 Stew. & P. [Ala.] 151, 23 Am. Dec. 304; Goodrich v. Warner, 21 Conn. 432.

8. Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; Peck v. Chouteau, 91 Mo. 138, 60 Am. Rep. 236; Martin v. Hardesty, 27 Ala. 458, 62 Am. Dec. 773; Israel v. Brooks, 23 Ill. 575; Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169; McIntyre v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594; O'Brien v. Frasier, 47 N. J. Law, 349, 54 Am. Rep. 170.

9. Gregory v. Thomas, 2 Bibb [Ky.] 286, 5 Am. Dec. 608; Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; McIntyre v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594; Chrisman v. Carney, 33 Ark. 316; Carson v. Edgeworth, 43 Mich. 241; Williams v. Casebeer, 126 Cal. 77; Anderson v. Cowles, 72 Conn. 335, 77 Am. St. Rep. 310. Hearsay and opinion evidence based on specific acts is not admissible. Hart v. McLaughlin, 51 App. Div. [N. Y.] 411.

made to him by third persons tending to induce belief in the plaintiff's guilt,[11] but not statements which were not communicated to him;[12] and the plaintiff may show that the defendant knew of the bad character of the person on whose information he relies as tending to show probable cause.[13] Mere failure to inquire of one who would have furnished more cause is not evidence of want of probable cause.[14] Delay while investigating does not raise an inference of want of probable cause,[15] likewise forbearance to claim embezzled money does not show its absence.[16] It has been held that proof that the defendant instituted the prosecution for the purpose of coercing payment of a debt is prima facie evidence of want of probable cause, although not conclusive.[17] On the question whether one prosecuted for forcibly defending certain alleged rights of occupancy was entitled to such rights, former transfers of that to which the right pertained but containing no reference to it may be received.[18]

All of the courts agree that want of probable cause is not conclusively shown by the fact that the prosecution was abandoned, or that the grand jury failed to find an indictment, or that the plaintiff was acquitted or discharged by a magistrate, or by the verdict of a jury.[19] Most of the courts have gone further than this, and have held that no implication of want of probable cause is raised, even prima facie, so as to warrant a recovery without other evidence on the question, by proof that the prosecution was abandoned,[20] or that the plaintiff was acquitted by a petit jury on a trial of the charge,[21] or by a magistrate on a trial before him.[22]

10. McIntyre v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594; Bacon v. Towne, 4 Cush. [Mass.] 217, 240; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Israel v. Brooks, 23 Ill. 575; Blizzard v. Hays, 46 Ind. 166, 15 Am. Rep. 291; Woodworth v. Mills, 61 Wis. 44, 50 Am. Rep. 135; Jones v. Morris, 97 Va. 43; †Thurkettle v. Frost [Mich.] 100 N. W. 283. Contra, Kennedy v. Holladay, 25 Mo. App. 503. And see Skidmore v. Bricker, 77 Ill. 164.

11. French v. Smith, 4 Vt. 363, 24 Am. Dec. 616; Lamb v. Galland, 44 Cal. 609; Widmeyer v. Felton, 95 F. 926. The fact that the prosecution was instituted on evidence or statements of an alleged accomplice does not establish want of probable cause. Widmeyer v. Felton, 95 F. 926.

12. McIntyre v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594.

13. McIntyre v. Levering, 148 Mass. 546, 12 Am. St. Rep. 594; Anderson v. Friend, 71 Ill. 475; Chapman v. Dunn, 56 Mich. 31.

14. †Bankell v. Weinacht, 99 App. Div. 316, 91 N. Y. S. 107.

15. Eight months' delay. †Bankell v. Weinacht, 99 App. Div. 316, 91 N. Y. S. 107.

16. †Bankell v. Weinacht, 99 App. Div. 316, 91 N. Y. S. 107.

17. Wenger v. Phillips, 195 Pa. 214, 78 Am. St. Rep. 810. See, also, Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832; Strehlow v. Pettit, 96 Wis. 22. But while this is evidence of malice (post, § 7, notes 86, 87), to hold that it is prima facie evidence of want of probable cause would seem to be in conflict with the rule that want of probable cause cannot be inferred from malice. See supra, this section, and cases in notes 88-91.

18. Bill of sale of ferry admitted because it was silent as to right to occupy land on which ferry house stood. †Thurkettle v. Frost [Mich.] 100 N. W. 283.

19. Abandonment of prosecution, Cockfield v. Braveboy, 2 McMullen [S. C.] 270, 39 Am. Dec. 123; McLeod v. McLeod, 75 Ala. 483. Discharge by magistrate. Ritchie v. McBean, 17 Ill. 63; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322; Bigelow v. Sickles, 80 Wis. 98, 27 Am. St. Rep. 25; Vinal v. Core, 18 W. Va. 1; Smith v. Ege, 52 Pa. 419; Heldt v. Webster, 60 Tex. 207; Barhight v. Tammany, 158 Pa. 545, 38 Am. St. Rep. 853; Hidy v. Murray, 101 Iowa, 65. Failure of grand jury to find indictment. Magowan v. Rickey [N. J. Law] 45 A. 804; Apgar v. Woolston, 43 N. J. Law, 57. Acquittal by magistrate. Sherwood v. Reed, 35 Conn. 450, 95 Am. Dec. 284. Acquittal by a petit jury. Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228; Adams v. Lisher, 3 Blackf. [Ind.] 241, 25 Am. Dec. 102; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85.

20. Cockfield v. Braveboy, 2 McMullen [S. C.] 270, 39 Am. Dec. 123; Wallis v. Alpine, 1 Camp. 204, note. But such evidence may be considered with other evidence. McLeod v. McLeod, 75 Ala. 483.

21. Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228; Bitting v. Ten Eyck, 82 Ind. 421, 42 Am. Rep. 505; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832; Apgar v. Woolston, 43 N. J. Law, 57; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322; Eastman v. Monastes, 32 Or. 291, 67 Am. St. Rep. 531; Sweeney v. Perney, 40 Kan. 102. And see Thompson v. Beacon Rubber Co., 56 Conn. 493; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85; †Bekkeland v. Lyons, 96 Tex. 255, 64 L. R. A. 474, with exhaustive note "Acquittal or discharge as evidence of want of probable cause;" †Tandy v. Riley [Ky.] 80 S. W. 776; †Sundmaker v. Gaudet [La.] 37 So. 865; †Burks v. Ferriell [Ky.] 80 S. W. 809. The jury may be told not to consider the fact

And some courts have held that there is no implication of want of probable cause even from proof that a magistrate discharged the plaintiff on preliminary hearing because of insufficiency of the evidence to show probable cause for holding him, or from proof of failure of a grand jury to find an indictment against him.[23] Other courts, however, have taken a different view, on the latter proposition, and have held that, since the very question of probable cause, and not that of innocence or guilt, is before a committing magistrate and a grand jury, the plaintiff makes out a prima facie showing of want of probable cause, and shifts the burden of proof to the defendant, by proof that he was discharged by the magistrate sitting as a committing magistrate, or that the grand jury failed to find an indictment against him.[24]

By the weight of authority, reasonable and probable cause, is conclusively shown, at least in the absence of proof of fraud and perjury or other unfair means,[25] by proof that the plaintiff was convicted of the offense charged, by a jury, or on a trial before a magistrate or other tribunal having jurisdiction, although the verdict was afterwards set aside and a new trial granted,[26] or the judgment of conviction was vacated or reversed on appeal, and the plaintiff was acquitted on another trial, or discharged without a trial.[27] In some jurisdictions, however, this

of acquittal but to deal with the case as though it were new before them. †Laing v. Mitten, 185 Mass. 233, 70 N. E. 128.

But see Cockfield v. Braveboy, 2 McMullen [S. C.] 270, 39 Am. Dec. 123; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79. A verdict and judgment of the court finding that the prosecution was malicious and without probable cause is not admissible to show want of probable cause. Sweeney v. Perney, 40 Kan. 102.

22. Philpot v. Lucas, 101 Iowa, 478; Eastman v. Monastes, 32 Or. 291, 67 Am. St. Rep. 531. Discharge by magistrate who had jurisdiction to try and not merely to commit for trial. †Fox v. Smith [R. I.] 57 A. 932. But see Sherwood v. Reed, 35 Conn. 450, 95 Am. Dec. 284.

23. Israel v. Brooks, 23 Ill. 575; Thompson v. Beacon Rubber Co., 56 Conn. 493; Ganea v. Southern Pac. R. Co., 51 Cal. 140; Farwell v. Laird, 58 Kan. 402; Apgar v. Woolston, 43 N. J. Law, 57 (disapproving the dictum to the contrary in Potter v. Casterline, 41 N. J. Law, 22). A finding by the magistrate that the prosecution was malicious and without probable cause is not admissible to show want of probable cause. Farwell v. Laird, 58 Kan. 402.

24. Ambs v. Atchison, etc., R. Co., 114 F. 317; Bostick v. Rutherford, 4 Hawks [N. C.] 83; Vinal v. Core, 18 W. Va. 1; Smith v. Ege, 52 Pa. 419; Madison v. Pennsylvania R. Co., 147 Pa. 509, 30 Am. St. Rep. 756; Barhight v. Tammany, 158 Pa. St. 545, 38 Am. St. Rep. 853; Straus v. Young, 36 Md. 246; Williams v. Norwood, 2 Yerg. [Tenn.] 329; Frost v. Holland, 75 Me. 108; Barnholdt v. Souillard, 36 La. Ann. 103; Bigelow v. Sickles, 80 Wis. 98, 27 Am. St. Rep. 25; Hidy v. Murray, 101 Iowa, 65 (without introduction of any evidence on plaintiff's behalf); Stubbs v. Mulholland [Mo.] 67 S. W. 650 (compare Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322). And see Cockfield v. Braveboy, 2 McMullen [S. C.] 270, 39 Am. Dec. 123, as to failure to find indictment. Dismissal for failure of the prosecuting attorney to appear is not sufficient to show want of probable cause. Wakely v. Johnson, 115 Mich. 285.

25. Ross v. Hixon, 46 Kan. 550, 26 Am. St. Rep. 123; Burt v. Place, 4 Wend. [N. Y.] 591; Holliday v. Holliday, 123 Cal. 26; Payson v. Caswell, 22 Me. 212; Adams v. Bicknell, 126 Ind. 210, 22 Am. St. Rep. 576; Phillips v. Village of Kalamazoo, 53 Mich. 33; Welch v. Boston & P. R. Corp., 14 R. I. 609. Conviction become final is conclusive. It was affirmed on appeal. †Kruegel v. Stewart [Tex. Civ. App.] 81 S. W. 365. Some courts hold that a conviction is conclusive evidence of probable cause even where it was procured by perjured testimony. Parker v. Huntington, 7 Gray [Mass.] 36, 66 Am. Dec. 455. But see Cloon v. Gerry, 13 Gray [Mass.] 201.

26. Parker v. Huntington, 7 Gray [Mass.] 36, 66 Am. Dec. 455. A reversed conviction is conclusive of probable cause unless procured on false testimony or unlawfully. Conviction suffered to test validity of ordinance. †Thick v. Washer [Mich.] 100 N. W. 394. The contrary was held in Indiana where the court in which the plaintiff was tried granted a new trial. Richter v. Koster, 45 Ind. 440.

27. Reynolds v. Kennedy, 1 Wils. 232; Whitney v. Peckham, 15 Mass. 243; Parker v. Huntington, 7 Gray [Mass.] 36, 66 Am. Dec. 455; Cloon v. Gerry, 13 Gray [Mass.] 201; Griffis v. Sellars, 2 Dev. & B. [N. C.] 492, 31 Am. Dec. 422; Payson v. Caswell, 22 Me. 212; Adams v. Bicknell, 126 Ind. 210, 22 Am. St. Rep. 576; Blucher v. Zonker, 19 Ind. App. 615; Kaye v. Kean, 18 B. Mon. [Ky.] 839; Ross v. Hixon, 46 Kan. 550, 26 Am. St. Rep. 123; Root v. Rose, 6 N. D. 575 (proceeding to punish for contempt of court); Hartshorne v. Smith, 104 Ga. 235; Hollilday v. Holliday, 123 Cal. 26; Phillips v. Village of Kalamazoo, 53 Mich. 33. The leading case is Reynolds v. Kennedy, 1 Wils. 232, wherein it was held that a conviction on an information before sub-commissioners of excise, was conclusive on the question of probable cause,

doctrine is not recognized, but it is held that when a conviction has been vacated or reversed, and the plaintiff afterwards acquitted, it is prima facie evidence of probable cause, but not conclusive.[28]

Probable cause is prima facie established, but not conclusively, by proof that the plaintiff was committed or bound over by a magistrate for trial, although he may have been afterwards tried and acquitted, or discharged without a trial,[29] or that an indictment was found against him by the grand jury, although he was afterwards acquitted.[30] Disgreement of a jury on a trial of the plaintiff is prima facie evidence of probable cause, although he was again tried and acquitted.[31] And proof that a verdict of acquittal was rendered only after deliberation, and that the jury entertained a doubt on the evidence, is evidence in favor of the existence of probable cause.[32]

Province of court and jury.—Although there are some decisions to the contrary, or apparently so, the overwhelming weight of authority is to the effect that the question of probable cause is a question of law for the court. If there is any dispute as to the facts going to show probable cause or the want of probable cause, those facts must be left to be found by the jury, either in a special verdict, or by finding a general verdict under instructions for the court, according to the practice in the particular jurisdiction; but whether particular facts show probable cause or want of probable cause is a question of law to be determined by the court after a special verdict on the facts, or by giving instructions on the subject to the jury, when they are to find a general verdict only; instructions that if they find certain facts to have existed or not to have existed, then there was or was not probable cause.[33] Thus where the defendant claims that he acted on the advice of counsel, it is for the court to instruct the jury as a matter of law, that if

although reversed on appeal to higher commissioners. But where a prosecution for felony is withdrawn, and the defendant is convicted of a misdemeanor included in it, and afterwards acquitted on appeal, the conviction is not such evidence of probable cause as will defeat an action for malicious prosecution of the charge of felony. Labar v. Crane, 49 Mich. 561.

28. Goodrich v. Warner, 21 Conn. 432; Maffatt v. Fisher, 47 Iowa, 473; Bowman v. Brown, 52 Iowa, 437; Olson v. Neal, 63 Iowa, 214; Johnson v. Miller, 63 Iowa, 529, 50 Am. Rep. 758; Maynard v. Sigman [Neb.] 91 N. W. 576; and see Burt v. Place, 4 Wend. [N. Y.] 591. In Womack v. Circle, 29 Grat. [Va.] 192, the court was evenly divided on this question.

29. Maddox v. Jackson, 4 Munf. [Va.] 462; Ash v. Marlow, 20 Ohio, 119; Ross v. Hixon, 44 Kan. 550, 26 Am. St. Rep. 123; Ewing v. Sanford, 19 Ala. 605; Spalding v. Lowe, 56 Mich. 366; Hale v. Boylen, 22 W. Va. 234; Ganea v. Southern Pac. R. Co., 51 Cal. 140; Diemer v. Herber, 75 Cal. 287; Holliday v. Holliday, 123 Cal. 26; Wholing v. Wells, 50 La. Ann. 562; Hess v. Oregon German Banking Co., 31 Or. 503; Sharpe v. Johnston, 76 Mo. 660; Raleigh v. Cook, 60 Tex. 438. Waiver by the plaintiff of preliminary examination, for the purpose of giving bail for his appearance, has been held an admission of probable cause. Jones v. Wilmington & W. R. Co., 125 N. C. 227.

30. Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228; Garrard v. Willet, 4 J. J. Marsh. [Ky.] 628; Ricord v. Central Pac. R. Co., 15 Nev. 167; Sharpe v. Johnston, 76 Mo. 660; Peck v. Chouteau, 91 Mo. 138, 60 Am. Rep. 236; Raleigh v. Cook, 60 Tex. 438. Contra, Motes v. Bates, 80 Ala. 382.

31. Johnson v. Miller, 63 Iowa, 529, 50 Am. Rep. 758.

32. Smith v. McDonald, 3 Esp. 7; Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228.

33. Panton v. Williams, 2 Q. B. 193; Johnstone v. Sutton, 1 Term R. 545; Stone v. Crocker, 24 Pick. [Mass.] 84; Bulkeley v. Ketcltas, 6 N. Y. 387; Id., 2 Duer [N. Y.] 261; Miller v. Brown, 3 Mo. 127, 23 Am. Dec. 693; Vinal v. Core, 18 W. Va. 1; Nash v. Orr, 3 Brev. [S. C.] 94, 5 Am. Dec. 547; Travis v. Smith, 1 Pa. 234, 44 Am. Dec. 125; Crabtree v. Horton, 4 Munf. [Va.] 59; Leggett v. Blount, N. C. Term R. 123, 7 Am. Dec. 702; Ulmer v. Leland, 1 Greenl. [Me.] 135, 10 Am. Dec. 48; Bell v. Keepers, 37 Kan. 64; Drum v. Cessmun, 58 Kan. 331; Plummer v. Gheen, 3 Hawks [N. C.] 66, 14 Am. Dec. 572; Schofield v. Ferrers, 47 Pa. 194, 86 Am. Dec. 532; Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174; Gulf, Colorado, etc., R. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743; Barhight v. Tammany, 158 Pa. 545, 38 Am. St. Rep. 853; Burk v. Howley, 179 Pa. 539, 57 Am. St. Rep. 607; Rogers v. Olds, 117 Mich. 368; Hess v. Oregon German Banking Co., 31 Or. 503; Stricker v. Pennsylvania R. Co., 60 N. J. Law, 230; Palmer v. Palmer, 8 App. Div. [N. Y.] 331; †Krause v. Bishop [S. D.] 100 N. W. 434. Compare, however, Hamilton v. Davey, 28 App. Div. [N. Y.] 457; Heldt v. Webster, 60 Tex. 207.

they find as facts that the defendant acted in good faith on the advice of counsel, after submitting a full and fair statement of the facts known to him, there was probable cause, and it is for the jury to say whether the defendant did act in good faith on the advice of counsel after such a submission of facts.[34] What are the facts bearing on probable cause is for the jury[35] and what they constitute in law is for the court.[36] Whether the defendant believed the plaintiff guilty is a question of fact for the jury.[37] Whether one who instituted proceedings to keep the peace was really in fear is for jury.[38]

(§ 5) *B. In malicious civil prosecution.*—To sustain an action on the case for the prosecution of a civil action, it is generally necessary for the plaintiff to show, as in an action for a malicious criminal prosecution,[39] that the action was prosecuted, or the process caused to be issued or used, both maliciously and without reasonable and probable cause. "These two ingredients," it has been said, "are invariably held to be indispensable."[40] And the burden of showing both malice and want of probable cause is on the plaintiff.[41] This rule certainly applies in all jurisdictions where it is sought to recover damages for the prosecution of an ordinary civil action.[42] And by the weight of authority it also applies, in the absence of a statute to the contrary, where it is sought to recover damages sustained by reason of a wrongful attachment,[43] execution,[44] arrest of the person,[45] injunction,[46] garnishment,[47] distress warrant,[48] writ of estrepement,[49] or bankruptcy

34. See the cases cited post, § 7. As to the proper mode of submitting the facts to the jury and instructing them as to the existence of probable cause, see, particularly, Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174.

35, 36. All reasonable inferences favorable to the prosecutor are also for the jury. †Shafer v. Hertzig [Minn.] 99 N. W. 796.

37. Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174.

38. †Thurkettle v. Frost [Mich.] 100 N. W. 283.

39. Ante, § 5a.

40. Hall v. Leaming, 31 N. J. Law, 321, 86 Am. Dec. 213. See, also, Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253; Vanduzor v. Linderman, 10 Johns. [N. Y.] 106; Mathews v. Baldwin, 101 Ga. 318; Sledge v. McLaven, 29 Ga. 64; Shell v. Moody, 103 Ga. 248; O'Grady v. Julian, 34 Ala. 88; Eslava v. Jones, 83 Ala. 139, 3 Am. St. Rep. 699; Morton v. Young, 55 Me. 24, 92 Am. Dec. 565; Ferguson v. Arnow, 142 N. Y. 580, Erwin's Cas. 467; Humphreys v. Sutcliffe, 192 Pa. 336, 73 Am. St. Rep. 819; Porter v. Mack, 50 W. Va. 581; Doctor v. Riedsl [Wis.] 71 N. W. 119; King v. Henderson [1898] App. Cas. 720, and other cases cited in the notes following. Sec, also, a valuable note 93 Am. St. Rep. 458. Neither want of probable cause without malice, nor malice without want of probable cause, is enough. Vanduzor v. Linderman, 10 Johns. [N. Y.] 106; Lindsay v. Larned, 17 Mass. 190; McKellar v. Couch, 34 Ala. 336; Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253, and other cases above cited.

41. Morton v. Young, 55 Me. 24, 92 Am. Dec. 565, and other cases above cited.

42. Vanduzor v. Linderman, 10 Johns. [N. Y.] 106; Stone v. Swift, 4 Pick. [Mass.] 389, 16 Am. Dec. 349; O'Neill v. Johnson, 53 Minn. 439, 39 Am. St. Rep. 615; Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329, 13 L. R. A. 59; Clements v. Odorless Excavating Apparatus Co., 67 Md. 461, 1 Am. St. Rep. 409; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615; Eikhoff v. Fidelity & Casualty Co., 74 Minn. 139.

43. Williams v. Hunter, 3 Hawks [N. C.] 545, 14 Am. Dec. 597; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Dickinson v. Maynard, 20 La. Ann. 66, 96 Am. Dec. 379; Lindsay v. Larned, 17 Mass. 190; Beyersdorf v. Sump, 39 Minn. 495, 12 Am. St. Rep. 678; McKellar v. Couch, 34 Ala. 336; Spengler v. Davy, 15 Grat. (Va.) 381; Burkhart v. Jennings, 2 W. Va. 242; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362; McFadden v. Whitney, 51 N. J. Law, 391; Humphreys v. Sutcliffe, 192 Pa. 336, 73 Am. St. Rep. 819; Collins v. Shannon, 67 Wis. 441. Compare, however, Kirkham v. Coe, 1 Jones L. [N. C.] 423; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

44. Hall v. Learning, 31 N. J. Law, 321, 86 Am. Dec. 213; Eslava v. Jones, 83 Ala. 139, 3 Am. St. Rep. 699; Docter v. Riedel [Wis.] 71 N. W. 119.

45. Goslin v. Wilcock, 2 Wils. 302, 305; Snow v. Allen, 1 Stark. 502; Besson v. Southard, 10 N. Y. 236; Ferguson v. Arnow, 142 N. Y. 580, Erwin's Cas. 467; Adams v. Lisher, 3 Blackf. [Ind.] 241, 25 Am. Dec. 102; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Morton v. Young, 55 Me. 24, 92 Am. Dec. 565; Davis v. McLaulin [Mich.] 81 N. W. 257; Forbes v. Hagman, 75 Va. 168. Evidence held sufficient. †Bank of Miller v. Richmon [Neb.] 94 N. W. 998.

46. Lexington & O. R. Co. v. Applegate, 8 Dana [Ky.] 289, 33 Am. Dec. 497; Clements v. Odorless Excavating Apparatus Co., 67 Md. 461, 1 Am. St. Rep. 409; Short v. Spragins, 104 Ga. 628.

47. Under the facts a debtor held entitled to his wages as exempt under Rev. St. 1899, §§ 3435, 3162. †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751.

48. Hamilton v. Dupre, 111 Ga. 819.

49. Eberly v. Rupp, 90 Pa. 259.

proceedings.[50] "Probable cause" to arrest seems to be included in "reasonable ground" to apprehend departure of a debtor from the state.[51] It is not justified by his mere intention to depart where the statute warrants arrest only if he departs to avoid citation.[52]

According to the weight of authority a voluntary dismissal by the plaintiff is prima facie evidence of want of probable cause;[53] but not conclusive.[54] The fact that there was a verdict for the defendant (the present plaintiff) in the action complained of is not prima facie evidence that the action was without probable cause, nor is it such evidence of want of probable cause as to render slight additional evidence on that point sufficient.[55] The suit having been prosecuted by an assignee for collection, he may be asked if the dismissal was at request of the assignor now defendant.[56] An offer to compromise is not evidence of want of probable cause.[57] In malicious prosecution of attachment, want of probable cause is not a necessary inference from payment of the debt,[58] but it does follow where a satisfaction by conveyance has been agreed on and a conveyance made and delivered lacking only a stamp.[59] Admitting the nonexistence of insanity does not amount to proof of want of probable cause for an inquest of sanity.[60] The finding of the arresting court that an alleged absconding debtor had no intention to depart is admissible,[61] but what were the debtor's real intentions is immaterial if not known to an arresting creditor,[62] and is prejudicially admitted if of sympathetic tendency.[63] Where damages are counterclaimed for wrongful attachment, evidence why the plaintiff's demand was refused will be admitted if bearing on the propriety of suing out attachment.[64] If there was a judgment for the plaintiff (the present defendant) in the action complained of, it is conclusive evidence of probable cause until reversed or set aside,[65] or even though reversed on appeal,[66] unless it appears that it was procured by fraud or perjury, or other unfair means,[67] or that there was no opportunity to defend.[68]

A defendant who settles a suit voluntarily, instead of allowing it to proceed to a determination by the court, cannot maintain an action for the institution of the suit as malicious and without probable cause; he is estopped from claiming that it was without probable cause.[69] But this does not apply where the settlement is made under duress. The payment of money under protest to procure release from arrest in a civil action is paid under duress, and not voluntarily, and does not estop the defendant from afterwards bringing an action for malicious prosecution and arrest, and recovering the money so paid in such action.[70] The

50. Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253.

51, 52. †Bank of Miller v. Richmon [Neb.] 94 N. W. 998.

53. Nicholson v. Coghill, 4 Barn. & C. 21; Burhans v. Sanford, 19 Wend. [N. Y.] 417; Green v. Cochran, 43 Iowa, 544; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615. Contra, Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329, 13 L. R. A. 59.

54. Asevado v. Orr, 100 Cal. 293; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615.

55. Brant v. Higgins, 10 Mo. 728; Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253.

56. Defendant being in control of the suit his procurement of a dismissal is relevant. †Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 P. 168.

57. Emerson v. Cochran, 111 Pa. 619.

58, 59. †Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

60. †Griswold v. Griswold, 143 Cal. 617, 77 P. 672.

61, 62, 63. †Bank of Miller v. Richmon [Neb.] 94 N. W. 998.

64. †Kleinsmith v. Kempner [Tex. Civ. App.] 83 S. W. 409.

65. Jones v. Kirksey, 10 Ala. 839.

66. Burt v. Place, 4 Wend. [N. Y.] 591. See Dowdell v. Carpy, 129 Cal. 168. And see ante, § 4.

67. Burt v. Place, 4 Wend. [N. Y.] 591; Welch v. Boston & Prov. R. Corp., 14 R. I. 609.

68. Bump v. Betts, 19 Wend. [N. Y.] 421, Chase's Cas. 107, Erwin's Cas. 452.

69. Morton v. Young, 55 Me. 24, 92 Am. Dec. 565; Sartwell v. Parker, 141 Mass. 405.

70. Morton v. Young, 55 Me. 24, 92 Am. Dec. 565.

same is true where a settlement or payment is made under duress of goods, to procure the release of goods from an unwarranted attachment.[71]

Whether or not there was probable cause, the facts being undisputed, is purely a question of law for the court;[72] but he who procures special interrogatories going to this question cannot complain of its submission.[73]

(§ 5) *C. In case of abuse of process* probable cause is not in the same sense material.[74] Hence the fact that there was probable cause for a civil action, as where it was brought for a debt really due, does not prevent the defendant therein from maintaining an action for malicious abuse of process in such action.[75]

§ 6. *Malice.*[76]—It is also necessary, in order to maintain an action for malicious prosecution, that the plaintiff shall show that the defendant instituted the prosecution, or caused it to be instituted, maliciously,—"that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice."[77] The action cannot be maintained, although it may appear that there was no probable cause for the prosecution, unless it also appears that it was instituted maliciously;[78] and the burden of proving malice, or of proving facts from which malice may be inferred, is on the plaintiff.[79] If there are several defendants, malice must be brought to each.[80]

Malice may be inferred, and according to the better opinion it is to be presumed, in the absence of proof to the contrary, from want of reasonable and probable cause;[81] but the want of probable cause does not raise a conclusive implication of malice as a matter of law. The inference is one of fact which may be rebutted by circumstances showing that there was in fact no malice.[82] "If prob-

71. Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Fortman v. Rottler, 8 Ohio St. 548, 72 Am. Dec. 606; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362.

72. Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615; Davis v. McLaulin [Mich.] 81 N. W. 257; †Bank of Miller v. Richmon [Neb.] 94 N. W. 998, and see ante, § 5a

73. †Bank of Miller v. Richmon [Neb.] 94 N. W. 998.

74. See ante, § 1B.

75. Herman v. Brookerhoff, 8 Watts [Pa.] 240.

76. See 2 Curr. L. 769.

77. Abrath v. North Eastern R. Co., 11 Q. B. Div. 440, 11 App. Cas. 247.

78. Abrath v. North Eastern R. Co., 11 Q. B. Div. 440, 11 App. Cas. 247; Vanderbilt v. Mathis, 5 Duer [N. Y.] 304, Bigelow's Cas. 58, Erwin's Cas. 448; Vinal v. Core, 18 W. Va. 1; Bell v. Graham, 1 Nott & McC. [S. C.] 278, 9 Am. Dec. 687; Carson v. Edgeworth, 43 Mich. 241; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Harkrader v. Moore, 44 Cal. 144, Erwin's Cas. 456; Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174; Dietz v. Langfitt, 63 Pa. 234; Madison v. Pennsylvania R. Co., 147 Pa. 509, 30 Am. St. Rep. 756; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 449; Leldig v. Rawson, 1 Scam. [Ill.] 272, 29 Am. Dec. 354; Sandoz v. Veazie, 106 La. 212; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85.

79. Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Foster v. Pitts, 63 Ark. 387; †Judy v. Gifford [Ind. App.] 71 N. E. 504, and other cases above cited. The termination of the prosecution in favor of the plaintiff is not prima facie evidence that it was maliciously instituted by the defendant. Helwig v. Beckner, 149 Ind. 131.

80. Principles impleaded with an agent are not liable unless malice may be imputed to them personally. There was no probable cause but malice was proven against the agent only. †Judy v. Gifford [Ind. App.] 71 N. E. 504.

81. Torsch v. Dell, 88 Md. 459; Toth v. Greisen [N. J. Law] 51 A. 927; Pullen v. Glidden, 66 Me. 202; Chase's Cas. 99, Erwin's Cas. 462; Merriam v. Mitchell, 13 Me. 439, 29 Am. Dec. 514; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; Grant v. Deuel, 3 Rob. [La.] 17, 38 Am. Dec. 228; †Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Roy v. Goings, 112 Ill. 656; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85; Cole v. Andrews, 70 Minn. 230; Smith v. Walter, 125 Pa. 453; Madison v. Pennsylvania R. Co., 147 Pa. 509, 30 Am. St. Rep. 756; McNamee v. Nesbitt, 24 Nev. 400; †Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155; †Sundmaker v. Gaudet [La.] 37 So. 865.

82. Mitchell v. Jenkins, 5 Barn. & Ad. 588; Bell v. Graham, 1 Nott & McC. [S. C.] 278, 9 Am. Dec. 687; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Madison v. Pennsylvania R. Co., 147 Pa. 509, 30 Am. St. Rep. 756; Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 449; Vanderbilt v. Mathis, 5 Duer [N. Y.] 304, Bigelow's Cas. 58, Erwin's Cas. 448; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85; Lunsford v. Dietrich, 86 Ala. 250, 11 Am. St. Rep. 37; Id., 93 Ala. 565, 30 Am. St. Rep. 79; O'Neal v. McKinna, 116 Ala. 606; Sharpe v. Johnston, 76 Mo. 660; McGowan v. McGowan, 122 N. C. 145; Vinal v. Core,

able cause and malice are both present, there can be no recovery; if they are both absent, there can be none. In this class of actions, it is only where malice is present and probable cause is absent that there can be a recovery."[83] It is not so readily found as between parties unacquainted,[84] or where due investigation was first made.[85] It is presumed[86] by some courts conclusively[87] to be malicious if done to coerce compliance with a civil demand. The relations between the parties may be shown if not too remote.[88] Motive may appear from the fact that defendants were also offenders in the same kind of crimes whereof plaintiff was accused;[89] and there being a conspiracy the letters and declarations of co-conspirators with defendant may be admitted as in other cases,[90] though the particular one of the authors be not identified[91] or it was uttered before the conspiracy was formed.[92] Business disagreements[93] or plaintiff's engagement in a competitive business may bear on malice.[94] Conversations with the now plaintiff at or before prosecution are admissible on good faith.[95] Mere delay in lodging complaint is not conclusive of malice.[96] Where plaintiff was arrested for forcibly defending possession of another's land it does not tend to prove malice that the owner had other land more suitable to his purpose.[97]

The malice necessary to support an action for malicious prosecution is malice in fact, as distinguished from the malice in law which is established by mere legal presumption from proof of certain facts,[98] as the malice presumed as a matter of law from the publication of a libel,[99] but it is not necessary to prove "express malice," in the popular signification of the term, as that the defendant was prompted by malevolence, or acted from ill-will, resentment, or hatred towards the defendant. It is sufficient to prove malice in fact in its enlarged legal sense, by which is meant the state of mind of a person who willfully and purposely does

18 W. Va. 1; Baker v. Hornick, 57 S. C. 213; Harkrader v. Moore, 44 Cal. 144, Erwin's Cas. 456.

83. Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 449. Since malice is not a necessary inference from want of probable cause, it has been held that a special verdict finding want of probable cause only will not authorize a judgment for the plaintiff. Helwig v. Beckner, 149 Ind. 131.

84. Prosecution by agent of corporation not acquainted with accused. †Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155. Prosecution on advice of county attorney by an agent of defendant who was unacquainted with plaintiff. †Mundal v. Minneapolis & St. L. R. Co. [Minn.] 99 N. W. 273.

85. Several examinations and advice of counsel before arrest for embezzlement. †Berger v. Wild [C. C. A.] 130 F. 882.

86. Proof that a criminal prosecution was commenced for the purpose of coercing payment of a claim, or of recovering possession of property, shows malice, in the absence of rebutting evidence. Prough v. Entriken, 11 Pa. 81; Schofield v. Ferrers, 47 Pa. 194, 86 Am. Dec. 532; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832; Jackson v. Linnington, 47 Kan. 396, 27 Am. St. Rep. 300; Ross v. Langworthy, 13 Neb. 422; Krug v. Ward, 77 Ill. 603; Reed v. Morris Western Beef Co., 197 Pa. 261; Peterson v. Reisdorph, 49 Neb. 529. Prosecuting for selling without license in order to force a settlement. †Lasher v. Littell, 202 Ill. 551, 67 N. E. 372.

87. Prosecuting in order to gain possession of property without intending punishment for crime is an abuse of process conclusive of malice and advice of counsel is no protection. †Rulison v. Collins [Ind. T.] 82 S. W. 748. Such proof is not conclusive evidence of malice. Williams v. Kyes, 9 Colo. App. 220.

88. Certain letters which passed between the parties as members of the militia held too remote on the question of bias. †Laing v. Mitten, 185 Mass. 233, 70 N. E. 128.

89. Illicit distilling. †Ramsey v. Flowers [Ark.] 80 S. W. 147.

90, 91, 92. See Evidence, 3 Curr. L. 1334; cf. Indictment & Prosecution, 4 Curr. L. 1. Ramsey v. Flowers [Ark.] 80 S. W. 147. One said that plaintiff was an objectionable man in the community. Id.

93. Prosecution held malicious where a shipper unable to agree with consignee on commission sold the goods and was arrested and tried at consignee's instance for selling without license. †Lasher v. Littell, 202 Ill. 551, 67 N. E. 372.

94. †Bankell v. Weinacht, 99 App. Div. 316, 91 N. Y. S. 107.

95. †Mundal v. Minneapolis & St. L. R. Co. [Minn.] 99 N. W. 273.

96. It is for the jury. †Shafer v. Hertzig [Minn.] 99 N. W. 796.

97. †Thurkettle v. Frost [Mich.] 100 N. W. 283.

98. Mitchell v. Jenkins, 5 Barn. & Ad. 588; Pullen v. Glidden, 66 Me. 202, Chase's Cas. 99, Erwin's Cas. 462; Carson v. Edgeworth, 43 Mich. 241.

99. Ante, Libel and Slander, 4 Curr. L. 421.

an act to the injury of another, knowing at the time that it is unlawful.[1] Good faith is such freedom from partiality and prejudice as can fairly be expected from an ordinarily prudent man acting without malice.[2]

Whether the defendant acted maliciously is a question of fact for the jury,[3] but it is for the court to instruct the jury as to the kind of malice which is necessary and sufficient.[4] Malice is for the court where there is no evidence but an acquittal;[5] good faith being there presumed.[6]

In case of civil suits the malice necessary to sustain an action for malicious prosecution need not necessarily be ill-will; but it may be any other unjustifiable or wrongful motive.[7] There is malice, as well as want of probable cause, where an action is brought or process caused to be issued with knowledge that there is no sufficient cause, or without an honest belief that there is sufficient cause.[8]

Malice may be inferred from the want of probable cause,[9] but it does not necessarily follow as a matter of law. The inference is one of fact, which may be rebutted by other evidence showing good faith, and the question, therefore, is for the jury under all the circumstances.[10] An offer of compromise does not show malice.[11] Anything showing knowledge of baselessness of a demand is admissible to show malice in suing thereon.[12] An admission that insanity did not exist in fact is not an admission that probable cause for insanity proceedings did not exist or prima facie evidence that it did not exist and that there was malice.[13] Whether there was malice is a question of fact for the jury.[14]

§ 7. *Advice of private counsel, prosecuting attorney, or magistrate.*—It is well settled in most jurisdictions that, in an action for malicious prosecution, the defendant may show, not only for the purpose of rebutting evidence of malice,[15]

1. Pullen v. Glidden, 66 Me. 202, Chase's Cas. 99, Erwin's Cas. 462; Wills v. Noyes, 12 Pick. [Mass.] 324; Johnson v. Ebberts, 6 Sawy. 538, 11 F. 129; Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 449; Lunsford v. Dietrich, 93 Ala. 565, 30 Am. St. Rep. 79; Vinal v. Core, 18 W. Va. 1; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832; Spear v. Hiles, 67 Wis. 350; Shannon v. Jones, 76 Tex. 141; Johns v. Marsh, 52 Md. 323; Gee v. Culver, 13 Or. 598; Stubbs v. Mulholland [Mo.] 67 S. W. 650. An instruction defining the malice necessary to support an action for malicious prosecution as "such a state of mind as leads to the doing of some act, knowing it to be without just cause or legal excuse,"—is correct. Noble v. White, 103 Iowa, 352.

2. †Shafer v. Hertzig [Minn.] 99 N. W. 796.

3. Mitchell v. Jenkins, 5 Barn. & Ad. 588; Stone v. Stevens, 12 Conn. 219, 30 Am. Dec. 611; Ellis v. Simonds, 168 Mass. 316; Bartlett v. Hawley, 38 Minn. 308; Reisan v. Mott, 42 Minn. 49, 18 Am. St. Rep. 489; Barhight v. Tammany, 158 Pa. 545, 38 Am. St. Rep. 853; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Torsch v. Dell, 88 Md. 459; Strickler v. Greer, 95 Ind. 596; Indiana Bicycle Co. v. Willis, 18 Ind. App. 525.

4. Pullen v. Glidden, 66 Me. 202, Chase's Cas. 99, Erwin's Cas. 462.

5, 6. †Krause v. Bishop [S. D.] 100 N. W. 434.

7. Wills v. Noyes, 12 Pick. [Mass.] 328; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615; Forbes v. Hagman, 75 Va. 168. And see ante, notes 98, 99, 1, 2.

8. Austin v. Debnam, 3 Barn. & C. 143; Alexander v. Harrison, 38 Mo. 258, 90 Am. Dec. 431; Nix v. Goodhill, 95 Iowa, 282, 58 Am. St. Rep. 434; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615; Foster v. Pitts, 63 Ark. 387.

9. Savage v. Brewer, 16 Pick. [Mass.] 453, 28 Am. Dec. 255; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362; Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615.

10. Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Smith v. Burrus, 106 Mo. 94, 27 Am. St. Rep. 329. Malice is not a necessary but a permissible inference from want of probable cause. †Griswold v. Griswold, 143 Cal. 617, 77 P. 672.

11. Emerson v. Cochran, 111 Pa. 619.

12. The plaintiff's letter to defendant asserting fraud in the claim out of which the prosecution grew is admissible to show knowledge of its baselessness, the facts communicated being such as to prompt inquiry. †Hurgren v. Union Mut. Life Ins. Co., 141 Cal. 585, 75 P. 168.

13. †Griswold v. Griswold, 143 Cal. 617, 77 P. 672.

14. Stewart v. Sonneborn, 98 U. S. 187; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329. And see ante, notes 3-6. Whether the defendant believed that there was sufficient cause goes to the question of malice, and is for the jury. Brand v. Hinchman, 68 Mich. 590, 13 Am. St. Rep. 362.

15. As to this the courts no doubt agree. See 2 Curr. L. 769.

but also for the purpose of showing probable cause,[16] that he submitted to disinterested[17] private counsel, being a regularly admitted attorney or counsellor at law,[18] of good standing,[19] a full and fair statement of all the facts which he knew were capable of proof, or believed to be so, and acted in good faith on his advice in instituting the prosecution; and if he shows this, he is not liable, although it may appear that the facts did not warrant the advice and the prosecution.[20] And for the same purpose, and with like effect, he may show that he acted in good faith on the advice of the prosecuting attorney, after submitting to him a full and fair statement of the facts.[21] Where probable cause involves no question of fact, advice of counsel is immaterial except on the question of malice.[22]

But proof that the defendant acted on the advice of counsel is not conclusive. On the contrary, it is no defense at all if it appears that he did not seek and act upon the advice in good faith, but merely as a cover for the prosecution, or that his statement of the facts to the counsel, upon which the advice was based, was unfair and partial, and inconsistent with an honest purpose.[23] Advice of counsel is no

16. But see Vinal v. Core, 18 W. Va. 1; Hazzard v. Flurry, 120 N. Y. 223. See, also, 2 Curr. L. 769.

17. White v. Carr, 71 Me. 555, 36 Am. Rep. 353. See, also, Watt v. Corey, 76 Me. 87.

18. Olmstead v. Partridge, 16 Gray [Mass.] 381; Stanton v. Hart, 27 Mich. 539; Murphy v. Larson, 77 Ill. 172; Burgett v. Burgett, 43 Ind. 78.

19. This qualification is made in some states. Murphy v. Larson, 77 Ill. 172; Roy v. Goings, 112 Ill. 656; Schattgen v. Holnback, 149 Ill. 646; Stubbs v. Mulholland [Mo.] 67 S. W. 650. Compare Horne v. Sullivan, 83 Ill. 30.

20. Ravegna v. Mackintosh, 2 Barn. & Cr. 693; Walter v. Sample, 25 Pa. 275, Chase's Cas. 101, Paige's Cas. 358; Barhight v. Tammany, 158 Pa. 545, 38 Am. St. Rep. 853; Blunt v. Little, 3 Mason [U. S.] 102; Stanton v. Goshorn [C. C. A.] 94 F. 52; Wills v. Noyes, 12 Pick. [Mass.] 327; Bartlett v. Brown, 6 R. I. 37, 75 Am. Dec. 675; Goldstein v. Foulkes, 19 R. I. 291; Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373; Wicker v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Griffin v. Chubb, 7 Tex. 603, 58 Am. Dec. 85; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832; Adams v. Bicknell, 126 Ind. 210, 22 Am. St. Rep. 576; Johnson v. Miller, 69 Iowa, 562, 58 Am. Rep. 231; Jackson v. Linington, 47 Kan. 396, 27 Am. St. Rep. 300; O'Neal v. McKinna, 116 Ala. 606; Huntington v. Gault, 87 Mich. 144; Tryon v. Pingree, 112 Mich. 338, 67 Am. St. Rep. 398, 37 L. R. A. 222; Wakely v. Johnson, 115 Mich. 285; †Lipowicz v. Jervis, 209 Pa. 315, 58 A. 619. Advised by counsel and county attorney. †Krause v. Bishop [S. D.] 100 N. W. 434. Evidence held to show that complaint was signed at instance of county attorney after disclosure and investigation by him. †Mundal v. Minneapolis & St. L. R. Co. [Minn.] 100 N. W. 363. The fact that counsel did not act in good faith is immaterial, if the defendant did not know this. Seabridge v. McAdam, 119 Cal. 460. The defendant, being himself a lawyer, cannot set up his own advice as counsel. Epstein v. Berkowsky, 64 Ill. App. 498. But the fact that the defendant was himself an able lawyer does not prevent him from setting up the defense that he acted on the advice of counsel. Terre Haute & I. R. Co. v. Mason, 148 Ind. 578. In Kentucky advice and good faith in acting thereon are a complete defense. †Tandy v. Riley [Ky.] 80 S. W. 776.

21. Wenger v. Phillips, 195 Pa. 214, 78 Am. St. Rep. 810; Paddock v. Watts, 116 Ind. 146, 9 Am. St. Rep. 832; Wicker v. Hotchkiss, 62 Ill. 107, 14 Am. Rep. 75; Ambs v. Atchison, etc., R. Co., 114 F. 317; Gilbertson v. Fuller, 40 Minn. 413; Johnson v. Miller, 69 Iowa, 562, 58 Am. Rep. 231; Sandoz v. Veazie, 106 La. 202; Hicks v. Brantley, 102 Ga. 264; Magowan v. Rickey [N. J. Law] 45 A. 804; Smith v. Austin, 49 Mich. 286; Wakely v. Johnson, 115 Mich. 285; Hess v. Oregon German Banking Co., 31 Or. 503; Schippel v. Norton, 38 Kan. 567. And see Yocum v. Polly, 1 B. Mon. [Ky.] 358, 36 Am. Dec. 583. In Illinois he must be an attorney in good standing; and this does not necessarily follow from the fact that he is state's attorney. Roy v. Goings, 112 Ill. 656.

22. †Parr v. Loder, 97 App. Div. 218, 89 N. Y. S. 823.

23. Hewlett v. Crutchley, 5 Taunt. 277; Walter v. Sample, 25 Pa. 275, Chase's Cas. 101, Paige's Cas. 358; Barhight v. Tammany, 158 Pa. 545, 38 Am. St. Rep. 853; Smith v. Walter, 125 Pa. 453; Wills v. Noyes, 12 Pick. [Mass.] 327; Ash v. Marlow, 20 Ohio, 119; Blunt v. Little, 3 Mason [U. S.] 102; O'Neal v. McKinna, 116 Ala. 606; Glasgow v. Owen, 69 Tex. 167; Gulf, Colorado, etc., Ry. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743; Torsch v. Dell, 88 Md. 459; Roy v. Goings, 112 Ill. 656; Mesher v. Iddings, 72 Iowa, 553; Peterson v. Reisdorph, 49 Neb. 529; Sharpe v. Johnston, 76 Mo. 660; Maulfin v. Ball, 104 Tenn. 597; Thurston v. Wright, 77 Mich. 96; Kehl v. Hope Oil-Mill, etc., Co., 77 Miss. 762. And see Forbes v. Hagman, 75 Va. 168. Failure of the defendant to disclose to counsel that he had found the plaintiff's character to be good was held to render his statement unfair. Strube-Estabrooke Merc. Co. v. Kyes, 9 Colo. App. 190. It has been held that the defendant may avail himself of the defense that he acted on advice of counsel if he submitted all the facts known to him, although he might have ascertained other facts by the exercise of reasonable diligence. John-

defense if it appears that the defendant did not believe the plaintiff to be guilty.[24] It is no protection against the abuse of criminal process to coerce civil demands without desire to vindicate law.[25] Gratuitous advice may be a protection.[26] It is not necessary to show that the counsel was honest in giving the advice[27] but if the prosecutor knew that such was not the fact the advice would avail nothing,[28] and if an interested attorney advises contrary to what other reputable disinterested ones have advised it is no protection.[29]

According to the weight of authority, advice of a magistrate as to the existence of probable cause, at least if he is not also a regularly admitted attorney or counsellor at law, is not on the same footing as advice of private counsel and of the prosecuting attorney, for magistrates are not supposed to be learned in the law, and it is no part of their duty to give such advice; and such advice, therefore, is not admissible as showing or tending to show probable cause for the prosecution,[30] although it would seem to be admissible as tending to show absence of malice.[31] It has been held, however, that this rule does not apply where the magistrate is also a regularly admitted attorney at law.[32]

Truthfulness of disclosure to attorney,[33] and whether advice was honestly relied on by prosecutor is for the jury.[34]

In civil suits.—In an action for malicious prosecution of a civil action or abuse of civil process, the defendant may show, as in an action for a malicious criminal prosecution,[35] that he acted upon the advice of disinterested counsel, and thus rebut evidence of malice and want of probable cause, provided he acted in good faith and after a full disclosure of all the facts,[36] but not otherwise.[37] Advice of counsel who was known to be personally interested is not within this rule.[38] Advice of counsel

son v. Miller, 69 Iowa, 562, 58 Am. Rep. 231; Holliday v. Holliday, 123 Cal. 26; Hess v. Oregon German Banking Co., 31 Or. 503. But since the law does not exempt a prosecutor from liability where he does not act with reasonable caution and prudence, other courts have held the contrary. Sappington v. Watson, 50 Mo. 83; Hill v. Palm, 38 Mo. 13; Cooper v. Utterbach, 37 Md. 282; Ahrens & Ott Mfg. Co. v. Hoeher [Ky.] 51 S. W. 194; Stubbs v. Mulholland [Mo.] 67 S. W. 650.

The burden of showing that the statement of facts submitted to counsel was full and fair is on the defendant. Williams v. Casebeer, 126 Cal. 77. Whether there was a full and fair disclosure of facts, and whether the advice of counsel was obtained and acted on in good faith, are questions for the jury. Anderson v. Friend, 71 Ill. 475; Connery v. Manning, 163 Mass. 44; Smith v. Walter, 125 Pa. 453; Thompson v. Price, 100 Mich. 558; Seabridge v. McAdam, 108 Cal. 345.

24. Hewlett v. Crutchley, 5 Taunt. 277; Wills v. Noyes, 12 Pick. [Mass.] 327; Vann v. McCreary, 77 Cal. 434; Johnson v. Miller, 82 Iowa, 693, 31 Am. St. Rep. 514, and other cases in the note preceding.

25. †Rulison v. Collins [Ind. T.] 82 S. W. 748.

26. †Mack v. Sharp [Mich.] 101 N. W. 631.

27, 28. †Shea v. Cloquet Lumber Co. [Minn.] 100 N. W. 111.

29. †Adkin v. Pillen [Mich.] 100 N. W. 176.

30. Brobst v. Ruff, 100 Pa. 91, 45 Am. Rep. 358; Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644; Mauldin v. Ball, 104 Tenn. 597; Finn v. Frink, 84 Me. 261, 30 Am. St. Rep. 348; Straus v. Young, 36 Md. 246; Olmstead v. Partridge, 16 Gray [Mass.] 381; Sutton v. McConnell, 46 Wis. 269; Dolbe v. Norton, 22 Kan. 101; Gee v. Culver, 12 Or. 228; Potter v. Casterline, 41 N. J. Law, 22. Contra, Ball v. Rawles, 93 Cal. 222, 27 Am. St. Rep. 174; Sisk v. Hurst, 1 W. Va. 53.

31. See, however, Williams v. Vanmeter, 8 Mo. 339, 41 Am. Dec. 644.

32. Monaghan v. Cox, 155 Mass. 487, 31 Am. St. Rep. 555; Turner v. Dinnegar, 20 Hun [N. Y.] 465. Compare, however, Mauldin v. Ball, 104 Tenn. 597.

33. †Thurkettle v. Frost [Mich.] 100 N. W. 283.

34. †Shea v. Cloquet Lumber Co. [Minn.] 100 N. W. 111.

35. Ante, this section.

36. Snow v. Allen, 1 Stark. 502; Ravegna v. Mackintosh, 2 Barn. & Cr. 693; Stewart v. Sonneborn, 98 U. S. 187, Burdick's Cas. 253; Stone v. Swift, 4 Pick. [Mass.] 389, 16 Am. Dec. 349; Block v. Buckingham, 174 Mass. 102; Turner v. Walker, 3 Gill & J. [Md.] 377, 22 Am. Dec. 329; Newton v. Weaver, 13 R. I. 616; Collins v. Hayte, 50 Ill. 337, 99 Am. Dec. 521; Pawlowski v. Jenks [Mich.] 73 N. W. 238; Emerson v. Cochran, 111 Pa. 619; Eikhoff v. Fidelity & Casualty Co., 74 Minn. 139; †Harr v. Ward [Ark.] 84 S. W. 496. It suffices to state all one knows or might by reasonable diligence have known. †Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

37. Ravegna v. Mackintosh, 2 Barn. & Cr. 693; Forbes v. Hagman, 75 Va. 168.

38. White v. Carr, 71 Me. 555, 36 Am. Rep. 353.

may be considered as bearing on probable cause to sue out attachment if the liability is doubtful or is a question of law,[39] but it is immaterial where on incomplete disclosure counsel advised correctly.[40] Disclosure fully and fairly to counsel[41] and good faith in acting thereon are for the jury.[42]

§ 8. *Advice of a physician on insanity* is admissible in disproof of malice and want of probable cause in instituting insanity proceedings[43] and it need not amount in law to probable cause to be admissible on malice.[44]

§ 9. *Damages.*[45]—The liability is for the natural consequences only,[46] and if there be no actual or express malice[47] by way of compensation only,[48] which includes attorneys' fees and expenses,[49] loss of time,[50] loss of liberty and society of family,[51] mental anguish, pain and suffering of mind,[52] loss of social standing and good repute,[53] loss of employment[54] or injury to business[55] or credit.[56] Suffering and bad conditions while in custody are according to the better supported opinion recoverable;[57] but in some states it is said that bad jail conditions ought not to be attributed to the defendant's act.[58] While the mental suffering caused by knowledge of the helplessness or suffering of plaintiff's family is admissible as a consequential injury to him,[59] the injurious consequences to his family are not recoverable.[60] The injury to reputation will be lessened by the fact that before the prosecution plaintiff's repute was not good.[61] If there be a battery or personal injury, damages are recoverable for it in a different cause of action if at all.[62]

39, 40. †Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

41, 42. †Harr v. Ward [Ark.] 84 S. W. 496.

43, 44. After describing plaintiff's actions to physician, the physician advised that plaintiff was insane. †Griswold v. Griswold, 143 Cal. 617, 77 P. 672.

45. See 2 Curr. L. 770.

46. Not for all the results "no matter what happened." †Laing v. Mitten, 185 Mass. 233, 70 N. E. 128. But error was cured by stating correct rule in another paragraph. Id. General consequences enumerated. Hamilton v. Smith, 39 Mich. 222; Savill v. Roberts, 1 Ld. Raym. 374; Lavender v. Hudgens, 32 Ark. 763.

47. See post, this section, Exemplary damages.

48. Goodbar v. Lindsley, 51 Ark. 380, 14 Am. St. Rep. 54; Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574, and other cases cited note 93 Am. St. Rep. 465.

49. Kolka v. Jones, 6 N. D. 461, 66 Am. St. Rep. 615; Hamilton v. Smith, 39 Mich. 222; Marshall v. Betner, 17 Ala. 832; Ziegler v. Powell, 54 Ind. 173; Krug v. Ward, 77 Ill. 603; Landa v. Obert, 45 Tex. 539; Gregory v. Chambers, 78 Mo. 294; Magner v. Renk, 65 Wis. 364. Also money paid sureties on bond. Wheeler v. Hanson, 161 Mass. 370, 42 Am. St. Rep. 408.

Not including taxable costs. Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Whiting v. Johnson, 6 Gray [Mass.] 246. Not unnecessary expense. Eastin v. Bank of Stockton, 66 Cal. 123, 56 Am. Rep. 77.

50. Hamilton v. Smith, 39 Mich. 222.

51. Peath v. Braunsdorff, 40 Wis. 107; Hamilton v. Smith, 39 Mich. 222.

52. Lunsford v. Dietrich, 86 Ala. 250, 11 Am. St. Rep. 37; Wheeler v. Hanson, 161 Mass. 370, 42 Am. St. Rep. 408; Hamilton v. Smith, 39 Mich. 222; Parkhurst v. Masteller, 57 Iowa, 474; McWilliams v. Hoban, 42 Md. 56; †Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303; Ruth v. St. Louis Transit Co., 98 Mo. App. 1, 71 S. W. 1055.

53. Flam v. Lee, 116 Iowa, 289, 93 Am. St. Rep. 242; Sheldon v. Carpenter, 4 N. Y. 579, 55 Am. Dec. 301; Rockwell v. Brown, 36 N. Y. 207. Injury to his fame. Hamilton v. Smith, 39 Mich. 222.

54. †Stoecker v. Nathanson [Neb.] 98 N. W. 1061.

55. Wheeler v. Hanson, 161 Mass. 370, 42 Am. St. Rep. 408. In civil suits. Goldsmith v. Picard, 27 Ala. 142; Gunderman v. Buschner, 73 Ill. App. 180; State v. Thomas, 19 Mo. 613, 61 Am. Dec. 580; Wade v. National Bank, 114 F. 377, and other cases cited note 93 Am. St. Rep. 465. If a partnership be sued it is only injury to the firm business that can be recovered. Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59.

56. Wheeler v. Hanson, 161 Mass. 370, 42 Am. St. Rep. 408.

57. Stoecker v. Nathanson [Neb.] 98 N. W. 1061; Flam v. Lee, 116 Iowa, 289, 93 Am. St. Rep. 242; Spear v. Hiles, 67 Wis. 350; Abrahams v. Cooper, 81 Pa. 232. Bad jail conditions may in Alabama be shown in case of false imprisonment. Fuqua v. Gambill [Ala.] 37 So. 235.

58. Zebley v. Storey, 117 Pa. 478. It does not in Massachusetts cover those damages arising from untimely arrest or unsanitary jails or repulsive surroundings while arrested, or the condition of plaintiff or his family. Arrested in nighttime, put with drunken people and in cold cell. Laing v. Mitten, 185 Mass. 233, 70 N. E. 128.

59. Davis v. Seeley, 91 Iowa, 583, 51 Am. St. Rep. 356, where plaintiff when arrested was obliged to leave a sick and dependent family. Flam v. Lee, 116 Iowa, 289, 93 Am. St. Rep. 242, where the shock to the plaintiff's mother distressed him.

60. Reisan v. Mott, 42 Minn. 49, 18 Am. St. Rep. 489; Hampton v. Jones, 58 Iowa, 317, where wife's health was impaired.

61. Rosekrans v. Barker, 115 Ill. 331, 56

In the case of civil suits maliciously prosecuted or process abused, the rule that natural consequences measure the damages will be varied according to the nature and action of the suit or writ.[63] Certain consequences follow in any case.[64] From malicious and unwarranted attachment the law will presume some damage at least nominal.[65] Says the Iowa court in a late case, the rule is that injuries to credit, character and business are too remote[66] and the rule is the same whether suit be brought on the bond or for malicious abuse of the writ.[67] This, however, would be entirely inconsistent with those precedents which hold that attachment may be an injury to credit or reputation as well as to property.[68] Attorneys' fees and expenses of attending court are proper elements.[69] In case of abusive garnishment, losses due to want of the garnished money[70] and loss of time while unable to find employment after a discharge,[71] are not natural consequences. Every injury to credit, business or feelings may be recovered for malicious ne exeat.[72]

Loss from inability to sell property or the value of the use of it during the time possession was withheld is a proper element.[73] In the absence of malice or oppression, the difference in value of property when taken and at any subsequent time which plaintiff may elect before action brought is the measure.[74]

Exemplary damages may be recovered as in other cases.[75] Pecuniary circumstances of defendant may be considered where the statute permits recovery beyond actual damages.[76] There should be actual personal malice or reckless disregard of plaintiff's rights.[77] And of course there must be actual damages,[78] but no special plea is necessary if malice be charged and proved.[79] Express malice appears from arrest without cause.[80] The general rule that the measure of exemplary damages varies with the tort feasor's wealth applies.[81] To mitigate or defeat exemplary damages anything disproving express malice is proper.[82] A charge on exemplary damages must not include punitive damages in those states that recognize a distinction.[83]

Am. Rep. 169; O'Brien v. Frazier, 47 N. J. Law, 349, 54 Am. Rep. 170; Fitzgibbon v. Brown, 43 Me. 169; Bacon v. Towne, 4 Cush. [Mass.] 217.

62. Charge held not to include recovery for physical pain. †Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303.

63. See the text and notes following.

64. See ante, this section. See, also, note 93 Am. St. Rep. 465.

65. †Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918.

66, 67. †Dorr Cattle Co. v. Des Moines Nat. Bank [Iowa] 98 N. W. 918. But see ante this section note 56.

68. See ante, § 1B, and ante, this section notes 55, 56, post notes 68, 72.

69. Malicious attachment. †Harr v. Ward [Ark.] 84 S. W. 496.

70. O'Neill v. Johnson, 53 Minn. 439, 39 Am. St. Rep. 615.

71. A debtor whose discharge was caused by abusive garnishment cannot recover for loss of time because of inability to find other employment. †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751.

72. Burnap v. Wight, 14 Ill. 301.

73. Lord v. Guyot [Colo.] 70 P. 683; Moffatt v. Fisher, 47 Iowa, 473; Newark Coal Co. v. Upson, 40 Ohio St. 17.

74. Fish v. Nethercutt, 14 Wash. 582, 53 Am. St. Rep. 892.

75. Hamilton v. Smith, 39 Mich. 222; Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 449 (under a statute); McWilliams v. Hoban, 12 Md. 56; Parkhurst v. Mastetter, 57 Iowa, 474; Davis v. Seeley, 91 Iowa, 583, 51 Am. St. Rep. 356; Spaids v. Barrett, 57 Ill. 289, 11 Am. Rep. 10; Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574, and cases cited note 93 Am. St. Rep. 465.

Contra, Wilson v. Bowen, 64 Mich. 133.

76. Coleman v. Allen, 79 Ga. 637, 11 Am. St. Rep. 499.

77. †Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303; Rosenkrans v. Barker, 115 Ill. 331, 56 Am. Rep. 169; Burnett v. Reed, 51 Pa. 191, and other cases cited in note 26 Am. St. Rep. 164.

78. Schippel v. Norton, 38 Kan. 567, and see Damages, 3 Curr. L. 997.

79. Davis v. Seeley, 91 Iowa, 583, 51 Am. St. Rep. 356.

80. †Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303.

81. See the rule stated in Damages, 3 Curr. L. 997, and see note 26 Am. St. Rep. 164.

82. Bradner v. Faulkner, 93 N. Y. 515; Carter v. Sutherland, 52 Mich. 597.

83. Charge in addition to compensation that exemplary damages to a certain sum to punish defendant might be awarded held not to admit of punitive damages. †Cooper v. Scyoc, 104 Mo. App. 414, 79 S. W. 751.

A few illustrative cases on *adequate and excessive damages* have been collected.[84]

§ 10. *General matters of practice and pleading.*[85]—The venue of such an action is transitory unless there be a statute localizing it in the county where it arose.[86] Where the distinction in forms of action is preserved, the proper remedy is case and not trespass.[87] Under the codes, the pleadings must exhibit the real nature of the action and not incorporate in the same count allegations which introduce some other cause such as false imprisonment.[88] In most states it is now proper to join counts for malicious prosecution and false imprisonment, slander and other causes resting in the one transaction.[89] If two or more persons have a cause of action, they should bring separate actions and not joint.[90] Defendants should be impleaded as in other torts.[91] Allegations of conspiracy do not prevent dismissal as to all but one defendant.[92] All the material elements of the cause of action must be well pleaded,[93] and issue joined thereon or on properly pleaded matter of defense.[94] If defendant tenders issue that he made a full disclosure to counsel and acted on advice and in good faith, it must be traversed by reply.[95] The preliminary practice on the pleadings,[96] trial and adduction and reception of evidence,[97] rules of evidence,[98] argument of counsel,[99] instructions,[100] verdicts and findings,[101] are

84. $5,000 not excessive to woman prosecuted for adultery as culmination of continued persecution. Bigelow v. Sickles, 80 Wis. 98, 27 Am. St. Rep. 25. $25,000 not excessive where plaintiff 55 years old and earning $4,500 a year paid $5,000 to counsel to procure acquittal of embezzlement. †Rawson v. Leggett, 97 App. Div. 416, 90 N. Y. S. 5. $600 not excessive where old man was arrested and greatly humiliated, grieved and disturbed in mind, though confined but a few hours. †Charlton v. Markland [Wash.] 78 P. 132. $4,000 criticised as excessive. †Shea v. Cloquet Lumber Co. [Minn.] 100 N. W. 111. Consult generally Damages, 3 Curr. L. 997.

85. See 2 Curr. L. 770.

86. 13 Enc. Pl. & Pr. 420.

87. See note 93 Am. St. Rep. 469, and cases cited.

88. Pleading the fact of an arrest with the other facts does not introduce a cause of action for false imprisonment. †Jones v. Louisville & N. R. Co. [Ky.] 82 S. W. 416. And see 13 Enc. Pl. & Pr. 422.

89. In Kentucky malicious prosecution cannot be joined with slander. †Tandy v. Riley [Ky.] 80 S. W. 776. Can be joined with false imprisonment. Haskins v. Ralston, 69 Mich. 63, 13 Am. St. Rep. 376.

See 13 Enc. Pl. & Pr. 424.

See generally Pleading, 2 Curr. L. 1178.

90. See cases cited note 93 Am. St. Rep. 469.

91. Page v. Citizens' Bank Co., 111 Ga. 73, 78 Am. St. Rep. 144.

92. †Lasher v. Littell, 202 Ill. 551, 67 N. E. 372.

93. See preceding sections.

It is no objection that the complaint alleges what would have been the outcome of a successful prosecution. †Ramsey v. Flowers [Ark.] 80 S. W. 147.

94. An allegation that the former action was terminated by a nolle prosequi and a denial thereof for want of knowledge raises the issue as to its termination. †Lieblang v. Cleveland El. R. Co., 4 Ohio C. C. [N. S.] 516. In an action for malicious prosecution, the plaintiff is put upon proof of a nolle prosequi when the defendant denies it for want of knowledge. †Lieblang v. Cleveland El. R. Co., 4 Ohio C. C. [N. S.] 516.

A peremptory charge for defendant is proper if there is neither traverse nor disproof of his pleadings and proof of advice and good faith. †Tandy v. Riley [Ky.] 80 S. W. 776.

That an **appeal is pending is defensive.** Luby v. Bennett, 111 Wis. 613, 87 Am. St. Rep. 897.

95. †Tandy v. Riley [Ky.] 80 S. W. 776.

96. See Pleading, 2 Curr. L. 1178.

97. See Trial, 2 Curr. L. 1907. If **evidence** tends to **negative malice** and **mitigate damage, it should be offered for both purposes.** †Adkin v. Pillen [Mich.] 100 N. W. 176.

98. See Evidence, 3 Curr. L. 1334.

If the prosecution was done by **conspiracy,** the **acts of all conspirators** are admissible. †Lasher v. Littell, 202 Ill. 551, 67 N. E. 352.

Mode of proving proceedings in prosecuting court: A transcript of the docket of the justice setting forth proceedings generally is admissible. †Kerstetter v. Thomas [Wash.] 79 P. 290. It is harmless to exclude the decision discharging plaintiff where the whole record showing a regular and proper decision was introduced. †Parr v. Loder, 97 App. Div. 218, 89 N. Y. S. 823. A United States court commissioner is an officer, quasi judicial, whose record of the prosecution is provable by certified copy. †Ramsey v. Flowers [Ark.] 80 S. W. 147.

99. See Argument of Counsel, 3 Curr. L. 306. Argument as to burden of proof held improper and erroneous. †Rulison v. Collins [Ind. T.] 82 S. W. 748.

100. See Instructions, 4 Curr. L. 133. A charge on respondeat superior is proper if the prosecution was by agent. †Mundal v. Minneapolis, etc., R. Co. [Minn.] 99 N. W. 273. If probable cause be generally defined, a more specific charge must be sought by request. †Stoecker v. Nathanson [Neb.] 98 N. W. 1061. A charge on the right of plaintiff prosecuted for larceny to take up abandoned animals is error where they were not

subject to general rules which are pertinent to other topics. Only a few illustrative late cases have been cited.[102] The conclusiveness of a judgment affirmed adverse to plaintiff precludes him from suing the clerk of court as a conspirator to withhold papers necessary to appeal successfully.[103]

§ 11. *Malicious prosecution as a crime* is recognized in Texas[104] and perhaps other states.

MANDAMUS.

§ 1. Nature and Office of Remedy in General (506). Other Adequate Remedy (509). "Laches" or Delay (509).
§ 2. Duties and Rights Enforceable by Mandamus (509).
A. Judicial Procedure and Process (509).
B. Administrative and Legislative Functions of Public Officers (512). Duties Relating to Allowance and Payment of Claims Against Municipalities (516). Duties of Election Officers and Boards (517). Enforcement of Rights to Public Office (518).
C. Quasi Public and Private Duties (518).
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A. Parties Plaintiff (521).
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§ 5. Pleading and Procedure in General (523).
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§ 8. Demurrer to Petition or Writ; Answer or Return; Subsequent Pleadings (524).
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A. Trial and Hearing (526).
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§ 10. Peremptory Writ (527).
§ 11. Performance (527).
§ 12. Review (527).

§ 1. *Nature and office of remedy in general.*[1]—Mandamus is an extraordinary[2] remedy in the nature of a civil action at law,[3] to compel performance of a duty imposed by law.[4] The writ may issue to enforce a continuing duty, as well as to direct performance of specific acts.[5] But it merely directs performance; the court which issues it does not acquire the custody or care of property involved.[6]

Mandamus is the common-law remedy to compel action; injunction is the equitable remedy to prevent action.[7] But the remedies of mandamus and mandatory injunction are closely analogous.[8]

abandoned or taken up as such. †Kueney v. Uhl [Iowa] 98 N. W. 602. More specific charge that there must be want of probable cause besides malice held needless. †Rulison v. Collins [Ind. T.] 82 S. W. 748. Charge on inference of malice, etc., held not contradictory of other charges defining elements of liability. Id.

101. See Verdicts and Findings, 2 Curr. L. 2009.

Interpretation of special findings: See Gulf, etc., R. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743; Johnson v. Miller, 82 Iowa, 693, 31 Am. St. Rep. 514.

102. See preceding notes.

103. †Kruegel v. Stewart [Tex. Civ. App.] 81 S. W. 365.

104. See Dempsey v. State, 27 Tex. App. 269, 11 Am. St. Rep. 193.

1. See 2 Curr. L. 771.

2. "The remedy by mandamus is extraordinary, and if the right is doubtful, or the duty discretionary, or the power to enforce the duty wanting or inadequate, or if there be any other specific and legal remedy, the writ will not, in general, be allowed." Bay State Gas Co. v. State [Del.] 56 A. 1120.

3. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514.

4. "The function of mandamus is to compel performance of a legal duty, to command action, not to review action, to complete the unfinished. It is the remedy for nonfeasance, not for misfeasance. It does not lie to correct mistakes that have been made or to remedy wrongs that have been done, or to undo that which is done." Corbett v. Naylor [R. I.] 57 A. 303.

5. State v. Atlantic Coast Line R. Co. [Fla.] 37 So. 652.

6. Where mandamus was granted compelling payment of unpaid taxes for prior years, the court did not acquire custody or care of property, so that it could authorize payment of attorney's fees out of it. Milster v. City Council of Spartanburg [S. C.] 47 S. E. 141.

7. The proper remedy, if any, to prevent a gas company from taking up a pipe line, is injunction, not mandamus. State v. Connersville Natural Gas Co. [Ind.] 71 N. E. 483, citing 19 Am. & Eng. Enc. Law [2nd Ed.] 721; High on Extra. Leg. Rem. § 6; Merrill on Mandamus, § 43.

8. Illustrations: Mandamus is not the remedy by which to compel a telephone company to install a telephone at the instance of a citizen at the same rate as that given other subscribers since that writ issues only to "executive and ministerial officers;" if there is a right to relief, it must be by mandatory injunction. Williams v. Maysville Tel. Co. [Ky.] 82 S. W. 995. The principle is well established that a mandatory

Mandamus was originally a prerogative writ, and it does not issue now as a matter of legal right, but at the discretion of the court, though this discretion is to be exercised in accordance with the rules that have been established concerning the remedy.[9] The writ will not issue when it would work injustice,[10] or introduce confusion or disorder,[11] or aid illegal acts or business,[12] or compel a respondent to violate the law.[13] Nor will a court ordinarily command the doing of an act which another court of competent jurisdiction has enjoined, and thereby subject the defendant to punishment for contempt.[14] But the mere fact that the act, performance of which is sought to be compelled, has been enjoined by another court is no defense to an application for mandamus, if it appears conclusively from the record, or from the conceded facts of the case, that the court which issued the injunction order had no power to enjoin the act in question.[15]

The writ will not be issued unless it appears that the relator has a clear legal right thereto,[16] and that the act sought to be enforced is one of absolute obligation

injunction will not lie against an officer to compel the performance of a duty which is in its nature judicial, but only when the duty is ministerial. Bennett v. Richards [Ky.] 83 S. W. 154. Under the Kentucky Code, mandamus will not lie to compel a private corporation engaged in the business of supplying water to the public, to furnish water to a person. Wiemer v. Louisville Water Co., 130 F. 251.

9. State v. Board of Com'rs, 162 Ind. 580, 70 N. E. 373. See, also, as to "discretion," Gay v. Tarrance [Cal.] 78 P. 540, 541, 542.

A ruling on an application for the writ will be reversed on appeal only when a clear abuse of discretion is shown. Granting of mandamus to compel mayor and chief of police to use their summary powers to prevent open violation of gambling law by maintenance of a "poolroom," held a proper exercise of the power. Moores v. State [Neb.] 99 N W. 249. Where election officers failed to adopt the statutory procedure in canvassing the vote, and proof was not clear that the count was honest and correct, the discretion of the court in issuing mandamus to compel a recanvass will not be reversed on appeal. People v. Way, 92 App. Div. 82, 86 N. Y. S. 892.

NOTE. Mandamus under statutes: The statutory remedy in some states differs from the common-law remedy. Thus under the Washington statute "mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action." The writ cannot be said to be "in any sense a prerogative writ, or a writ to be issued at the discretion of the court." "The statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of willful violations of recognized rights, or denials, made in good faith, that the rights contended for exist. The right to sue out the writ is not made to depend on the character of the dispute, but on what answer is given to the question, can the ordinary course of law afford a plain, speedy and adequate remedy?" See State v. McQuade [Wash.] 79 P. 207; State v. Cranney, 30 Wash. 594, 71 P. 50.

10. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

11. State v. Board of Com'rs, 162 Ind. 580, 70 N. E. 373.

12. Mandamus will not lie to compel installation of a telephone in a house admitted to be used as a bawdy house. Godwin v. Carolina Tel. & T. Co., 136 N. C. 258, 48 S. E. 636.

13. Mandamus to compel a township committee to put a road and causeway in repair denied when there were no funds available, and to exceed their appropriation was made a crime. Justice v. Gloucester County [N. J. Law] 58 A. 74.

14. A board of county commissioners will not be compelled by mandamus to order the collection of a railroad aid tax when another court has enjoined such action, especially where the personnel of the board has changed since the injunction suit. State v. Board of Com'rs, 162 Ind. 580, 70 N. E. 373. Afd. and petition for rehearing denied [Ind.] 70 N. E. 984. For former opinion see 68 N. E. 295.

15. State v. Carlson [Neb.] 101 N. W. 1004.

16. A de facto police patrolman cannot compel restoration of his name to the pay roll by mandamus without showing that he was also an officer de jure at the time his name was dropped. Held, this did not appear. McNeill v. Chicago, 212 Ill. 481, 72 N. E. 450. Mandamus to compel secretary of state to certify name of relator as political nominee denied, no legal authority for the calling of the convention being shown. People v. Rose, 211 Ill. 252, 71 N. E. 1124. The commissioner of the general land office cannot be compelled by mandamus to make a sale of lands, when there is a dispute between the state and another party as to the title thereto. Juencke v. Terrell [Tex.] 82 S. W. 1025. Where a claim for a refund for an excess paid to redeem land sold for taxes was not filed within six months after it accrued, the board of supervisors had no power to allow it (St. 1897, p. 470, § 40); hence mandamus would not lie to compel the auditor to issue a warrant for the sum, even though it had been allowed. Perrin v. Honeycutt, 144 Cal. 87, 77 P. 776. An ordinary action and not mandamus was the proper remedy to enforce payment of county warrants, where liability was denied on the ground that part of the warrants were paid, and on the further ground that they were

on the part of the person or officer sought to be coerced.[17] Conditions precedent to the vesting of relator's legal right must have been performed,[18] and there must have been some actual default in respect to the duty of the respondent.[19] But an objection that mandamus proceedings were prematurely brought is waived by the parties appearing and participating in the proceedings.[20] The right to the remedy rests upon the legal rights of the relator and the legal duties of the respondent; equities between the parties are not to be considered.[21]

It is ordinarily held that the writ will not be granted unless its issuance will serve some useful legal purpose,[22] and be of some benefit to the relator;[23] but when it appears that a legal duty has not been performed, there is no abuse of

illegal and void. Custer County Bank v. Custer County [S. D.] 100 N. W. 424. Mandamus to compel an appropriation of money for a school building by common councils was denied where the requisition was made in ambiguous form by the board of education, and was misunderstood by the common councils. Commonwealth v. Pittsburg, 209 Pa. 333, 58 A. 669. Where there was a bona fide question raised as to a teacher's right to unpaid wages, and no authority by the board to issue a warrant on the treasurer was shown, mandamus would not lie to compel a director to sign such warrant. Davis v. Jewett [Kan.] 77 P. 704. To entitle a relator to a mandamus he must show himself legally entitled to some right properly the subject of the writ, that it is legally demandable from the respondent, and that respondent has power to perform the required duty. People v. Greene, 95 App. Div. 397, 88 N. Y. S. 601.

17. Writ will not lie to compel a county auditor to bring up and enter on a current delinquent tax duplicate delinquent personal taxes omitted by his predecessors, such duty not being one especially enjoined on him by law. State v. Smith [Ohio] 72 N. E. 300. An act created a special provisional fund and ordered the treasurer to transfer to it sums credited to certain other funds. Held, mandamus would not lie to compel the treasurer to transfer to the provisional fund any other moneys than those in the funds designated in the act. Regents of Agricultural College v. Vaughn [N. M.] 78 P. 51. Mandamus will not issue to compel one to arrest, or cause the arrest of, one charged with violation of gambling laws, without a complaint or warrant, unless the violation of law was in the presence of the person to be coerced; since arrest for a misdemeanor without a warrant is not authorized by law. State v. Williams [Or.] 77 P. 965. Where a petition for mandamus to compel the state treasurer to transmit to the clerk of the circuit court funds for payment of jurors and witnesses fails to show that the comptroller's endorsement of the requisition has been countersigned by the governor, the alternative writ of mandamus will be denied. State v. Knott [Fla.] 37 So. 307.

18. A petition seeking two kinds of relief one of which must be obtained before there can be a clear legal right to the other is demurrable. A discharged police officer cannot collect salary by mandamus until he has been reinstated. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. City bonds need not be reduced to judgment before mandamus will lie to compel a tax levy to pay the same, the validity of the bonds not being in issue. Territory v. Socarro [N. M.] 76 P. 283. A civil service clerk who has been taken off the suspended list, and has become entitled to reinstatement, a vacancy having occurred, need not demand reinstatement before bringing mandamus therefor. People v. Grout, 45 Misc. 47, 90 N. Y. S. 861. A petition for mandamus to compel collection of taxes from a corporation illegally exempted will not be dismissed for lack of a demand and refusal, since the obligation to collect such taxes existed without a demand. Milster v. Spartanburg [S. C.] 46 S. E. 539.

19. Mandamus would not lie to compel the secretary of state of Wisconsin to certify the names of the nominees of one of the two state Republican conventions; a suit in equity for a mandatory injunction was held the proper remedy. State v. Houser [Wis.] 100 N. W. 964.

20. State v. Weston [Mont.] 78 P. 487.

21. Thus an equitable defense cannot be set up as against a plain legal right. Davis v. Miller Signal Co., 105 Ill. App. 657. Mandamus will not lie to compel a circuit judge to continue an injunction restraining a corporation from making a contract unless it appear that the relator has a clear legal right to the relief asked, regardless of equitable considerations. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

22. Enforcement of abstract right to inspect poll books refused where relator's purpose in asking it could not thereby be served. Hall v. Staunton [W. Va.] 47 S. E. 265. A literal compliance with a writ of mandamus commanding the issuance of bench warrants for persons whose bail had been forfeited would not reach persons who had deposited money in lieu of bail, since a distinction is made in the statutes; hence, writ not granted. State v. Williams [Or.] 77 P. 965. Mandamus will not be granted where it would prove unavailing or where the act sought to be enforced is legally impossible at the time. Thus the writ was not granted to compel a board of elections to grant a petition of a majority of voters for the providing of a voting machine, where it did not appear that there were funds on hand for such purpose. State v. Board of Elections, 4 Ohio C. C. (N. S.) 398.

23. State v. Sommerville [La.] 36 So. 104. Mandamus will not issue to compel a judge to punish for contempt for violation of a preliminary injunction restraining criminal prosecutions, where the bill for an injunction has been dismissed for want of equity, and the injunction dissolved; since petitioner no longer has any interest in the contempt proceedings. Old Dominion Tel. Co. v. Powers [Ala.] 37 So. 195.

discretion in issuing the writ, though it is doubtful if it will result in any substantial benefit.[24]

Other adequate remedy.[25]—Mandamus will not lie when there is any other plain, speedy, specific and adequate remedy at law.[26] But the fact that the party applying for the writ might have redress in a court of equity does not affect the right to mandamus.[27]

"Laches" or delay.[28]—Mandamus, like other remedies, may be barred by delay, but mere lapse of time, without resulting prejudice to the defendants, is not sufficient to bar the remedy,[29] if the right or claim sought to be enforced is not barred by limitations.[30]

§ 2. *Duties and rights enforceable by mandamus. A. Judicial procedure and process.*[31]—While mandamus will not issue to control discretion or revise judicial action,[32] it is the proper remedy to compel a court to proceed and try a

24. State v. Boyden [S. D.] 100 N. W. 763. The fact that colored children had been excluded from a certain public school so long that a writ to compel their admission would do them no good is no excuse for denying it, they having a legal right to attend such school. People v. Alton, 209 Ill. 461, 70 N. E. 640.

25. See 2 Curr. L. 773.

26. Bay State Gas Co. v. State [Del.] 56 A. 1120; State v. Sommerville [La.] 36 So. 104. A clerk of the circuit court has a plain, adequate and complete remedy, under Code 1896, § 13, by which to recover on a claim against the county, disallowed by the commissioners, and mandamus will not lie to compel payment. Scarbrough v. Watson [Ala.] 37 So. 281. Mandamus will not lie to compel a board of education to admit a pupil to a school as a free pupil, where the law provides a speedy and adequate remedy by appeal to the county superintendent of schools. Preston v. Board of Education of Independent School Dist. [Iowa] 100 N. W. 54. A school teacher having a right of action on contract to collect salary may not have mandamus to compel a director to sign a warrant on the treasurer. Davis v. Jewett [Kan.] 77 P. 704. Before an officer dismissed from the police force by judgment of the police board can obtain a mandamus to compel the board to reinstate him, he must show he exhausted his legal remedies before the board by applying for a new trial. State v. Board of Police Com'rs [La.] 37 So. 16.

Remedy at law held inadequate: A law student, wrongfully expelled without notice, and asking mandamus to compel reinstatement, has no other adequate legal remedy. Baltimore University v. Colton, 98 Md. 623, 57 A. 14. A school teacher may compel a school board to draw a warrant for his salary, the action on contract not affording an adequate remedy, since after getting judgment he might still be compelled to have mandamus to get the warrant signed. State v. McQuade [Wash.] 79 P. 207. Where the county auditor, after executing a warrant for a claim, procured the money thereon by a forged indorsement, the fact that an action on the official bond of the county treasurer was available, did not bar the claimant's right to mandamus to compel issuance of a warrant to it. American Bridge Co. v. Wheeler, 35 Wash. 40, 76 P. 534. Where several prosecutions had failed to result in the closing of a "poolroom" maintained in violation of the gambling laws, the existence of the remedy of arrest of the offenders, on warrant, was held not to preclude the right of a mandamus to compel the mayor and chief of police to arrest all persons detected in violating the law at the designated place. Moores v. State [Neb.] 99 N. W. 249.

27. Baltimore University v. Colton, 98 Md. 623, 57 A. 14.

28. See 2 Curr. L. 773.

29. A right to mandamus was held not barred by laches where the parties, having attempted to appeal, the appeal being dismissed, and having asked for a rehearing, which was denied, thereupon at once brought mandamus. Cahill v. Superior Court of San Francisco [Cal.] 78 P. 467. A policeman, transferred to a "headquarters squad," demanded recognition as a detective sergeant under the New York charter. Having brought mandamus to enforce his demand 10 days after refusal of the police commissioner to grant it, he was not guilty of laches. People v. Greene, 95 App. Div. 397, 88 N. Y. S. 601.

30. Mandamus to compel issuance of county orders on claims legally allowed by county supervisors will not be denied on the ground of laches, the claim not being barred by limitations. Hanna v. Chalker [Mich.] 98 N. W. 732. Where mandamus was sought to enforce collection of taxes for 13 years past, the analogy of the statute of limitations was adopted in fixing the line of unreasonable delay amounting to laches, and collection was enforced for a period of six years prior to the bringing of the action. Milster v. Spartanburg [S. C.] 46 S. E. 539.

31. See 2 Curr. L. 774.

32. A court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed or shall decide a specified question. Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945. Mandamus does not lie to compel a court of common pleas to vacate an order discharging a rule to show cause why an auditor should not be dismissed, and to order a trial in open court. In re Powel's Estate, 209 Pa. 76, 57 A. 1111. Where a railroad company having begun appropriation proceedings in probate court appealed to the court of common pleas from the judgment

cause when it refuses to do so upon the erroneous decision that it has no jurisdiction,[33] or to set aside a wholly void order.[34] Purely ministerial duties[35] of courts or judges imposed by law[36] may be controlled by mandamus. The duty of the court must be clearly apparent,[37] and the occasion fully mature.[38]

rendered on the verdict, the probate judge cannot be required to order the railroad company to pay the amount of the verdict into court or to landowners pending proceedings in error. State v. Waite, 70 Ohio St. 149, 71 N. E. 286. Court having denied a motion that plaintiff should not be allowed to prosecute an action because he had not paid the costs of other actions, mandamus would not lie to compel the court to reverse its judgment and grant the motion. Ex parte Colley [Ala.] 37 So. 232. An action to remove a sheriff was prosecuted on the relation of the attorney general and motion was made to suspend the sheriff pending the action. The district court dismissed the action and motion. Held, a judicial determination of a matter properly before it, not reviewable by mandamus. State v. District Ct. of Fourth Judicial Dist. [N. D.] 100 N. W. 248. Mandamus will not lie to compel vacation of an order striking a stipulation of discontinuance from the files, since plaintiff was in such case merely required to proceed with the cause or pay costs. Thompson v. Bay Circuit Judge [Mich.] 101 N. W. 61. Mandamus will not lie to compel a judge to transfer a cause from the law to the equity docket; the remedy for refusal to do so is by appeal. Horton v. Gill [Ind. T.] 82 S. W. 718.

Note. Says a writer in the Columbia Law Review, commenting on the case last cited: "Where a court improperly refuses to act or unreasonably delays its action, mandamus will lie to force it to proceed. High, Extr. Legal Remedies, § 147. Mandamus is, however, never employed to determine what the judgment of a court should be, nor to make it take a particular action. Ex parte Loring, 94 U. S. 418, 24 Law. Ed. 165; Sprague v. Fawcett, 53 Cal. 408. The sole purpose of the writ is to force the doing of a ministerial, not a judicial act. Hence a court may be forced to take jurisdiction, where such is its duty (Temple v. Superior Court, 70 Cal. 211); or having jurisdiction it will be compelled to proceed; but having done this, its proceedings cannot be reviewed, nor its rulings revised by mandamus. Under these generally recognized doctrines the principal case was correctly decided. The court heard the motion to transfer the case to the equity side of the court, and overruled it. Here was an exercise of discretion which cannot be reviewed by mandamus, nor does the wording of the statute on which the dissenting opinion relies seem to justify the conclusion that the determination of the question was ministerial rather than judicial." 5 Columbia L. R. p. 160.

33. State v. District Court of Fourth Judicial Dist. [N. D.] 100 N. W. 248. As where refusal to act was based on belief that service of summons was insufficient. Hill v. Morgan [Idaho] 76 P. 323. Where the refusal of a superior court to vacate an order in probate was based solely on the ground of want of jurisdiction as a matter of law, mandamus proceedings will lie in the supreme court to compel him to entertain a motion to vacate the order. Cahill v. Superior Court [Cal.] 78 P. 467. The writ was issued where the Federal court stayed proceedings until the controversy had been determined by the state court in which also action had been brought. The Federal judge was directed to proceed, since the party was entitled to maintain actions in both Federal and state courts. Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945. Mandamus to compel a judge to proceed with trial of a case will not lie at the instance of a plaintiff, when it would be the court's duty upon such trial to direct verdict for defendants. Hatch v. Frazer [Mich.] 101 N. W. 228.

34. A purchaser of land, after a decree quieting title thereto, may have mandamus to compel vacation of an order setting aside such decree, granted without notice to or knowledge of such purchaser. Vincent v. Benzie Circuit Judge [Mich.] 102 N. W. 369.

35. The remedy for an erroneous refusal of an appeal or supersedeas is by mandamus and not by writ of error. Gutierrez v. Territory [N. M.] 79 P. 299. The duty to fix a supersedeas to stay operation of a decree pending an appeal is a merely ministerial duty, and the remedy for refusal to fix it is by mandamus. McBride v. Whitaker [Neb.] 98 N. W. 847. Where an administrator appealed from an order of a probate judge removing him, and the judge required an appeal bond in an unwarranted sum, the administrator was entitled to mandamus to compel the judge to accept a proper bond, though such bond has not been presented for approval. Fleming v. Kirby [Mich.] 100 N. W. 272. A judicial determination of a controversy having been made by a justice of the peace, necessitating a judgment of nonsuit and return of property, mandamus lies to compel the entry of such judgment. Barlow v. Riker [Mich.] 101 N. W. 820. Mandamus lies to compel a court to sign a bill of exceptions, if refusal to do so is improper. But an equity court will not be required to sign a bill of exceptions omitting the evidence, though the court has found the facts and stated conclusions of law thereon. State v. Jarrott [Mo.] 81 S. W. 876. Mandamus will lie to compel a judge to sign a bill of exceptions containing an application for change of venue and the evidence and proceedings thereon, where the remedy by Rev. St. 1899, §§ 727-736 is not applicable, there being no question as to the truth of the bill. State v. Gibson [Mo.] 83 S. W. 472. Where a conditional order refusing a new trial was made absolute by the defendant's refusing to perform the condition, thus leaving the judgment rendered in force, mandamus was held a proper remedy to compel issuance of execution by the judge, but not by the clerk. Holtum v. Greif, 144 Cal. 521, 78 P. 11. The duty of issuing execution for costs allowed by the supreme court in affirming a judgment is not a merely ministerial duty of the clerk so as to preclude direction of a writ to the judge to compel issuance of execution. State v. Hatch [Wash.] 78 P. 796.

Mandamus will not lie where there is another adequate remedy,[39] as by certiorari,[40] appeal or writ of error;[41] nor will the writ issue where the court from which it is sought is given no revisory control over that against which it is asked;[42] but the writ will issue to compel a trial court to obey the mandate of an appellate court.[43]

36. It is the duty of the clerk of the Portland municipal court to issue bench warrants (city charter, § 331); mandamus will not issue to compel the judge to issue such warrants. State v. Williams [Or.] 77 P. 965. Mandamus lies to compel a judge and clerk of court to deliver a venire facias for the summoning of jurors to the county sheriff, under a law making it the duty of the sheriff to summon jurors for the court in question, said judge having directed his clerk to deliver such venire to the city superintendent of police. Dickson v. Phelan [Mich.] 99 N. W. 405. Mandamus will not lie to compel a trial judge to include in a bill of exceptions an affidavit made on information and belief, since an affidavit so made cannot be considered. Gay v. Torrance [Cal.] 78 P. 540. Mandamus will not lie to compel a district judge to make an order staying execution pending an appeal, where the record has not been filed in the supreme court within 90 days as required by law. Youngberg v. Smart [Kan.] 78 P. 422. On application to a judge to certify his disqualification to preside in a given case, his determination of his qualifications is not discretionary; his action, if erroneous, may be controlled by mandamus. Application held not to show disqualification, and writ denied. State v. Pitts, 139 Ala. 152, 36 So. 20.

37. An information for uttering a forged check being quashed, the prosecuting attorney swore out a complaint for obtaining money by false pretenses, and had accused bound over for trial on that charge. Held, prosecuting attorney was not entitled to mandamus to compel the judge to vacate the order quashing the first information, after acquiescing in such order, the motion for the order to vacate being made orally in the absence of accused. Louisell v. Benzie Circuit Judge [Mich.] 102 N. W. 371. Mandamus to compel a judge to dissolve an injunction restraining the building of a drain which would result in injury to plaintiff's land denied, though it appeared that plaintiff was not the owner in fee but held a contract only. Emery v. Ionia Circuit Judge [Mich.] 101 N. W. 801.

38. A writ of mandamus or certiorari will not be granted to review a motion to quash contempt proceedings before a final determination therein. Toepel v. Donovan [Mich.] 102 N. W. 369.

39. Mandamus will not lie to compel the circuit court of appeals to file conclusions of fact, since there is a remedy by motion to have the record returned with instructions to include such conclusions. Nowlin v. Hall [Tex.] 79 S. W. 806.

40. Where a district judge exceeded his jurisdiction in quashing a panel and discharging a jury, on motion of a prosecuting attorney, certiorari and not mandamus is the proper remedy to correct such improper action. Heitman v. Morgan [Idaho] 79 P. 225.

41. Supreme court of Texas will not issue the writ to a court of appeals in cases where an appeal or writ of error lies. Smith v. Conner [Tex.] 84 S. W. 815. An order of the probate court denying a petition to require a guardian to account is an appealable order and hence not reviewable on mandamus. Hopper v. Stowe [Mich.] 100 N. W. 266. Mandamus to compel vacation of an order denied, when such order was reviewable on writ of error. Skutt v. Wolcott [Mich.] 99 N. W. 405. Writ denied to review action of circuit judge in quashing a writ of capias ad respondendum, a writ of error affording an adequate remedy. Cattermole v. Ionia Circuit Judge [Mich.] 99 N. W. 1. Mandamus to compel a circuit judge to strike an amended declaration from the files denied, the ruling of the trial court being reviewable on writ of error. Blackburn v. Alpena Circuit Judge [Mich.] 98 N. W. 754. Former Michigan practice was to review such questions in mandamus proceedings, but a different practice was settled in St. Clair Tunnel Co. v. St. Clair Circuit Judge, 114 Mich. 417, 72 N. W. 249, which has since been followed. Id. The right to appeal from an order denying a motion for execution on a judgment is not such a plain, speedy and adequate remedy as will bar issuance of a writ of mandamus to compel the granting of execution. Holtum v. Greif, 144 Cal. 521, 78 P. 11. Where judgment of the superior court has been affirmed with costs in the supreme court and execution directed to issue therefor, issuance of such execution may be compelled by mandamus, since the right to appeal from an order quashing execution issued by the clerk is not such a plain, speedy and adequate remedy as to bar mandamus. State v. Hatch [Wash.] 78 P. 796. Mandamus, and not error is the proper remedy to review a retaxation of costs by a circuit court on appeal from the clerk. This rule differs from that in other states, but is followed in deference to precedent. Schmidt v. Donovan [Mich.] 99 N. W. 877. It was urged that error would not reach costs. Id.

42. Thus where the decision of a court of appeals is final, the supreme court has no general power to issue mandamus to the lower court in cases where mandamus would ordinarily lie. Smith v. Conner [Tex.] 84 S. W. 815. The supreme court of Illinois cannot by mandamus review the action of county judges to whom objections to certificates of nomination have been referred, under the Illinois statute (Laws 1891, p. 110), nor can such action be ignored, so that the supreme court may take original jurisdiction on mandamus; under the statute the action of the county judges is final. People v. Rose, 211 Ill. 249, 71 N. E. 1123.

43. State v. Douglass [Mo. App.] 83 S. W. 87. On appeal from judgment of dismissal at close of plaintiff's evidence, it was held that such evidence made a prima facie case and the cause was remanded. The trial court, at the close of the opening remarks

Under the Texas statute requiring a court of civil appeals to certify to the supreme court a question in the decision of which it fails to concur with the opinion of another court of appeals,[44] it is held that mandamus to compel such certification will not be granted where the decisions alleged to be in conflict are easily distinguishable,[45] or where the conflict is between a court of appeals and the supreme court, and not another court of appeals.[46]

A writ of supervisory control will not issue to review and annul an order holding a defendant guilty of contempt and directing his punishment, where it does not appear that the court acted in an arbitrary or unlawful manner.[47]

(§ 2) *B. Administrative and legislative functions of public officers.*[48]—The writ of mandamus lies only to enforce a purely ministerial duty and to protect a plain, admitted and unquestioned legal right which has been arbitrarily or without due warrant of law denied.[49] It never lies to interfere with a legitimate exercise of discretion by executive or administrative officers.[50] Illustrative holdings applying the general rule to the acts or duties of various municipal[51] and state[52]

by counsel for plaintiffs, again dismissed the case. Held, mandamus issued to compel the trial court to proceed and try the case. Kroetch v. Morgan [Idaho] 77 P. 19. Judgment for defendant in a circuit court being reversed on a writ of error and the cause remanded with directions to award a new trial and to issue execution against defendant for costs in appellate court, the circuit court erroneously granted a stay of execution and sustained a plea in the nature of a plea in abatement, without entering a final order or judgment from which a writ of error would lie. Held, mandamus would lie to compel obedience to the mandate for execution. Bucki & Son Lumber Co. v. Atlantic Lumber Co. [C. C. A.] 128 F. 332.

44. Acts 26th Leg. p. 170, c. 98.

45. Shirley v. Connor [Tex.] 80 S. W. 984. See, also, opinion filed on rehearing, Id., 81 S. W. 284.

46. Smith v. Conner [Tex.] 84 S. W. 815.

47. As where defendant failed to show a bona fide attempt to comply with an order to pay alimony and counsel fees. State v. District Court of Eighth Judicial Dist. [Mont.] 79 P. 401.

48. See 2 Curr. L. 775.

49. Riverside Oil Co. v. Hitchcock, 21 App. D. C. 252. When the law requires a public officer to do a specified act in a specified way upon a conceded state of facts, without regard to his own judgment as to the propriety of the act, and with no power to exercise discretion, the duty is ministerial in character, and performance may be compelled by mandamus if there is no other remedy. In re Troy Press Co., 94 App. Div. 514, 88 N. Y. S. 115.

50. **Federal officers:** As to compel the postmaster general, who had prohibited circulation of a newspaper through the mails, to permit its circulation. In re Coleman, 131 F. 151. Refusal of the secretary of the interior to issue a patent to land, protests having been filed, was not reviewable by mandamus. Riverside Oil Co. v. Hitchcock, 21 App. D. C. 252. Mandamus will not lie to compel the secretary of the interior and the Indian commissioner to require a subordinate Indian agent to perform a purely ministerial duty, such as countersigning a check. If the duty be purely ministerial no order of his superiors would protect him in refusing to perform it. Hitchcock v. U. S., 22 App. D. C. 275. Where the meaning of a regulation of the Bureau of Indian Affairs requiring the local Indian agent to countersign checks of Indians on money obtained from sale of land allotted to them by the government was in dispute, the act of countersigning a check could not be considered a purely ministerial act such that mandamus would lie to compel its performance. Id. Denial by the commissioner of patents of an application for registration of a label on the ground that it is not descriptive of the article for which it used is a decision requiring the exercise of discretion, and is not reviewable by mandamus. Allen v. U. S., 22 App. D. C. 271. Mandamus lies to compel the commissioner of patents to require the primary examiner to forward to the examiners-in-chief the appeal to which an inventor is by law entitled, where the primary examiner has twice rejected his claims. United States v. Allen, 192 U. S. 543, 48 Law. Ed. 555, reversing court of appeals of the District of Columbia. See Id., 22 App. D. C. 56. From a refusal of the commissioner to require such action by the examiner, no appeal lies to the court of appeals of the District of Columbia. Hence mandamus is the proper remedy. Ex parte Frasch, 192 U. S. 566, 48 Law. Ed. 564.

51. **CITY OFFICERS. Duties held enforceable:** The duty of a mayor of a city to sign and seal bonds fixed by ordinance and charter is purely ministerial. Halsey v. Nowrey [N. J. Law] 59 A. 449. Under 1 Ball. Ann. Codes & St. § 1012, mayors of cities of the fourth class have no veto power, and mandamus lies to compel a mayor to sign an ordinance, this being a mere ministerial duty. State v. Taylor [Wash.] 79 P. 286. Where telephone companies are authorized to construct lines on public roads, and to erect poles thereon, mandamus is the proper remedy to compel a city council to designate the location of poles in the streets of the city, where the council requires the use of conduits for wires. State v. Red Lodge [Mont.] 76 P. 758. Mandamus will lie to compel a park commissioner to issue a proper permit to a railroad to cross a parkway, where he refuses to issue such permit ex-

officers, of court officers,[53] of licensing boards,[54] and of civil service commissioners,[55] are given in the notes.

cept upon conditions which he has no power to impose. People v. Kennedy, 97 App. Div. 103, 89 N. Y. S. 603. Since the statutes require a mayor and chief of police of a city to actively interfere to prevent open violation of law, mandamus lies to compel them to exercise their summary powers to prevent violation of the gambling law by maintenance of a public "poolroom," prosecutions of individual offenders having failed to close the place. Moores v. State [Neb.] 99 N. W. 249. Under a statute (Acts 1903, p. 365), making it unlawful to permit certain animals to run at large in cities of a certain size, and requiring such cities to adopt ordinances to prevent such animals so running at large, mandamus lies to compel the proper city authorities to adopt the required ordinances on their refusal to do so. Huey v. Waldrop [Ala.] 37 So. 380. Mere inconvenience in complying with a duty imposed by statute on a municipality is not a sufficient reason for refusing to enforce obedience by mandamus. Commonwealth v. Pittsburg, 209 Pa. 333, 58 A. 669. The official paper of a city may by mandamus compel publication of a notice of tax sale, as required by law. Register Newspaper Co. v. Yeizer, 25 Ky. L. R. 2186, 80 S. W. 478. Mandamus to compel a chief of police to arrest and prosecute gamblers will not be denied on the ground that such action was prohibited by his superiors, if such prohibition was the result of an unlawful combination or conspiracy to license public gambling. State v. Williams [Or.] 77 P. 965.

Duties held not enforceable: The power of the police commissioner of New York to grant a pension to a member of the force who has served twenty years is discretionary. Friel v. McAdoo, 91 N. Y. S. 454. The duties of the inspector of buildings and board of public works, under the ordinances of Seattle, are quasi judicial, and mandamus will not lie to review a decision made by them. Hester v. Thomson, 35 Wash. 119, 76 P. 734. Where there was evidence before a city council tending to support charges against the mayor, the removal of the mayor was a discretionary act. Riggins v. Richards [Tex. Civ. App.] 79 S. W. 84. A court will enforce by mandamus performance of a mandatory ministerial act, but has no authority to compel a municipal corporation to execute an agreement which is a discretionary act, or to take any steps towards the consummation of such an agreement. Held, mandamus would not lie to compel publication of an ordinance embodying a contract between a borough and private parties, such publication being necessary to render the contract operative. Carpenter v. Yeadon Borough, 208 Pa. 396, 57 A. 837. Mandamus will not issue to compel collection by a city of omitted taxes for past years for which an assessment of property would be necessary, since a city has no power to assess for past years in the absence of express legislative authority; but collection may be compelled for years in which the state and county assessment was the basis for city taxes; that is since the constitution of 1895 in the case of Spartanburg. Milster v. Spartanburg [S. C.] 46 S. E. 539.

COUNTY OFFICERS. Duties held enforceable: Mandamus will lie to compel a county treasurer to deposit funds in different depositary banks of the county in the proportionate amounts required by law. State v. Cronin [Neb.] 101 N. W. 325, approved and followed in 101 N. W. 327. Mandamus lies to compel a clerk of a board of supervisors to certify to the secretary of state a certain paper designated by the supervisors as the one in which session laws are to be published. In re Troy Press Co., 94 App. Div. 514, 88 N. Y. S. 115. If the refusal of a commissioners' court to accept a bond tendered be arbitrary, mandamus lies to compel the commissioners to exercise their discretion and consider the sufficiency of such bond. Gouhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104. Under Rev. Code Civ. Proc. § 764, providing that mandamus lies to compel performance by any board or person of an official duty enjoined by law, a county board of supervisors may be compelled to amend its records by including therein the fact that a petition for removal of a county seat, presented to it, was signed by a majority of the legal voters of the county. State v. Boyden [S. D.] 100 N. W. 763. A county treasurer's duties being wholly ministerial, he may be compelled by mandamus to accept and receipt for an instalment of the purchase price of school lands on presentation of a proper transcript of a judgment of the probate court allowing the purchase of such lands, even though he has already accepted an instalment from another person for the same land, a proper transcript having been presented. Scott v. Schwab [Kan.] 78 P. 443. Mandamus lies to compel a county clerk to extend levies and make an assessment for a school district. The existence of the right to certiorari does not preclude a resort to mandamus. State v. Patton [Mo. App.] 82 S. W. 537.

Duties held not enforceable: Mandamus will not lie to control the exercise of discretion by a commissioners' court in approving or rejecting the official bond of a county judge. Gouhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104. Mandamus will not lie to compel inspection of the county clerk's records by a private individual for the sole purpose of obtaining evidence for the institution of criminal prosecution. Payne v. Staunton [W. Va.] 46 S. E. 927. A general demand for permission to inspect the county treasurer's public records will not be enforced by mandamus when it appears that relator may have all the information he may require "as owner, agent or otherwise," for which he specifically asks. State v. Reed [Wash.] 79 P. 306. A demand by a private citizen for permission to examine "any and all books of public records in said treasurer's office that he might desire to examine, or which relator's business, duty or interest might require," is too general to be made the basis of a writ of mandamus to a county treasurer; to warrant such writ, the demand must be for specific records, to be examined at such times and in such manner as not to interfere with public business. Id. It is not the plain ministerial duty of the board of assessors to assess a tract of land as be-

As to whether a ministerial officer may, in a mandamus proceeding, urge as a defense the unconstitutionality of the statute imposing the duty sought to be

longing to an individual and as having a certain measurement and boundary, when the title exhibited by him fails to show that he owns any property answering such description. State v. Board of Assessors [La.] 37 So. 878.

School officers: The duty of a county superintendent to record the description of the boundaries of a school district, and to prepare a map of the same, under Mills' Ann. St. §§ 3988, 3992, is purely ministerial and enforceable by mandamus. People v. Vanhorn [Colo. App.] 77 P. 978. The character of such duty is not changed by an appeal to and a decision by the state board of education. Id. The selection of text books for schools, entrusted to a board of education, is a purely legislative function requiring the exercise of discretion and judgment, and the action of such board cannot be controlled by mandamus. State v. Wilson [Iowa] 99 N. W. 336. The determination of the question of residence of a pupil being one of fact, which involves the discretionary power of a board of education, its action will not be reviewed by mandamus proceedings to compel it to accept a pupil as a free pupil. Preston v. Board of Education [Iowa] 100 N. W. 54.

Duties relative to public highways: The power of a county commissioners' court to open and establish public roads is discretionary, and its exercise is not subject to control by mandamus. Howe v. Rose [Tex. Civ. App.] 80 S. W. 1019. The act of a highway commissioner, under Highway Law, § 99, in certifying as abandoned a highway which has not been used as such for six years, is not a discretionary act, hut is reviewable by mandamus. People v. Marlette, 94 App. Div. 592, 88 N. Y. S. 379. Hence the filing of such certificate in regard to a highway which has in fact been used continuously for the six years preceding is not a defense to an action of mandamus to compel him to attach such highway to a certain road district, or make a separate district of it, and open it for public travel [under Highway Law, § 4]. Id. Mandamus is the appropriate remedy to compel the performance of statutory duties of township trustees with respect to the opening of established highways. Allegations of alternative writ held, on demurrer, sufficient to require a trustee to open a road. Welch v. State [Ind.] 72 N. E. 1043. Township officers cannot be compelled by mandamus to repair a bridge, when they are of the honest opinion that such repairs cannot be made for a sum such as they have the power to expend. Kingsley v. Nylan [Mich.] 99 N. W. 744. The statutory duty of a county court in the matter of building bridges with adjoining counties is discretionary, and mandamus will not lie to compel the court to join with another county in the building of a particular bridge. State v. Thomas, 183 Mo. 220, 82 S. W. 106. Where one of two counties charged jointly with the maintenance of a bridge across the stream dividing such counties notifies the other to join in a contract for repairs, the county so notified may be compelled by mandamus to comply with the notice by joining in the contract or refusing so to do. Iske v. State [Neb.] 100 N. W. 315.

52. Where the right to purchase school lands depends on a question of fact, the supreme court will not, by mandamus, compel the commissioner of the general land office to accept an application for a purchase. Clark v. Terrell [Tex.] 81 S. W. 4. Mandamus will not lie to compel the land office commissioner to issue a certificate showing a homestead entry, since the commissioner is vested with discretionary power to determine whether an application to homestead land is in good faith, and his judgment is not reviewable on mandamus. Beebe v. Commissioner of State Land Office [Mich.] 100 N. W. 128. A petition for mandamus to compel a district attorney to institute quo warranto proceedings for usurpation of a franchise must show an arbitrary refusal to act, and not merely a mistake of judgment. Buggeln v. Doe [Ariz.] 78 P. 367; Id., [Ariz.] 76 P. 458. The attorney general of New York is vested with discretion in approving contracts between receivers and attorneys under Laws 1902, p. 114, c. 60, § 4, and hence cannot be compelled by mandamus to approve a contract wherein compensation is provided for without any amount being fixed. Candee v. Cunneen, 92 App. Div. 71, 86 N. Y. S. 723.

53. Mandamus lies to compel a clerk of the district court to search the records in his custody, upon tender of the fees prescribed by law, at the request of persons engaged in the business of abstracting, and certify and deliver to such persons transcripts of judgments entered upon his docket. The fact that the information so obtained is to be used in private business indiscriminately is immaterial. State v. Scow [Minn.] 100 N. W. 382. Under Laws Fla. 1901, c. 4914, p. 48, an officer who has in his hands an unsatisfied execution, and who refuses to levy it upon property liable thereto, may be compelled by mandamus to do so. But he cannot be compelled to sell the property on which he has levied; for refusal so to do, he is liahle to a party injured, and this being an adequate remedy, mandamus will not lie. The doctrine of State v. Cone, 40 Fla. 409, 25 So. 279, 74 Am. St. Rep. 150, to this extent remains unchanged by the Laws of 1901. Armstrong v. Stansel [Fla.] 36 So. 762. Where an order granting a new trial was made on the condition that defendant pay plaintiff the costs, the fact that defendant refused to make payment, thus making the refusal to grant a new trial absolute and leaving the judgment in force, did not make the duty of the clerk of the court to issue execution on the judgment so plain that mandamus would issue to enforce it. Holtum v. Greif, 144 Cal. 521, 78 P. 11.

54. Where a board of dental examiners has examined an applicant and refused a certificate on account of incompetency, mandamus will not lie to compel issuance of a certificate. Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508. The granting of a liquor license under the liquor laws of North Carolina is a discretionary act not controllable by mandamus. Barnes v. Wilson County Com'rs, 135 N C. 27, 47 S. E. 737. Where the people in a precinct of a city of the fourth class have voted that the local option

enforced, before the validity of the act has been judicially determined, the authorities are apparently in hopeless conflict.[56]

law should become inoperative in that precinct, mandamus will lie to compel the council to issue a license, if it arbitarily refuses so to do. George & Bro. v. Winchester [Ky.] 80 S. W. 1158. The issuance of a certificate to a graduate of a "regular" veterinary school is not discretionary with the Michigan State Veterinary Board, under Pub. Acts 1899, No. 191, and Comp. Laws 1897, c. 218. Wise v. State Veterinary Board [Mich.] 101 N. W. 562.

55. Acts held discretionary: Reclassification of a position in a fire department would involve a quasi judicial act by the civil service commission; hence it was not compellable by mandamus. Dill v. Wheeler, 91 N. Y. S. 686. State civil service commission of New York acted in a quasi judicial character in changing the rules so as to make it possible to relieve relator from the office of comparison clerk in county clerk's office, and that act cannot be reviewed on mandamus. People v. Hamilton, 44 Misc. 577, 90 N. Y. S. 97. See, also, Id., 90 N. Y. S. 547. In the absence of charges of bad faith or illegal action, the determination of civil service commissioners in rating candidates in competitive examinations cannot be reviewed either by mandamus or certiorari. People v. McCooey, 91 N. Y. S. 436. Under the civil service provisions of the New York charter, an employe whose position was regularly abolished, his name duly certified to the commission, and who received an appointment to the first vacancy, is not entitled to mandamus to compel reinstatement to his original position by reason of a notice stating he was removed from service, instead of stating merely that he was suspended. People v. Monroe, 90 N. Y. S. 907.

Acts held reviewable by mandamus: Where a board of fire commissioners abolished an office in the department and at the same time created a new office with the same duties for the purpose of removing relator, he was entitled to mandamus to compel reinstatement. People v. Coleman, 99 App. Div. 88, 91 N. Y. S. 432. A disbursing clerk in the finance department was put on the suspended list and an accountant, without examination, was given the duties of disbursing clerk. Held, mandamus would lie to compel reinstatement of the suspended clerk. People v. Grout, 45 Misc. 47, 90 N. Y. S. 861. A public officer in the civil service cannot by mandamus try title to the office from which he has been removed while another occupies it under color of title and is in receipt of the salary. People v. Hamilton, 44 Misc. 577, 90 N. Y. S. 97. But one who merely holds a position and is not a public officer may have his right to reinstatement tested by mandamus. Id., 90 N. Y. S. 547. Complaint clerk in the police department is not a public officer, and when removed without a hearing, mandamus and not an action to try title is his remedy. People v. McAdoo, 90 N. Y. S. 689. The comparison clerk in the county clerk's office is not a public officer. People v. Hamilton, 90 N. Y. S. 547, rvg. 44 Misc. 577, 90 N. Y. S. 97. A demand for recognition as a detective sergeant by a member of a "headquarters squad" is enforceable by mandamus, the right to the office not being in issue, the only question being the salary and the title and grade which it was the police commissioner's duty to accord to him. People v. Greene, 95 App. Div. 397, 88 N. Y. S. 601.

56. Note: "State v. Heard, 47 La. Ann. 1679 [47 L. R. A. 512], and Van Horn v. State, 46 Neb. 62, 64 N. W. 365, fairly represent the opposite views which the courts have taken on this question. In the former case the court holds that laws are presumed to be, and must be, treated and acted upon by subordinate executive functionaries as constitutional and legal until their unconstitutionality or illegality has been judicially established.

"In the latter case it is held that ministerial officers upon whom the legislature has sought to impose a duty by statute may assert the unconstitutionality of the statute as a defense to an application for mandamus to require him to perform the supposed duty," since the constitution is the fundamental law of the land, and a statute repugnant thereto is not law for any purpose.

If a law has been judicially declared unconstitutional, an officer is not, of course, bound to follow it. State v. Comptroller General, 4 S. C. 185; State v. Jumel, 32 La. Ann. 60. So the adoption of a constitution may change the law so that mandamus will not lie to compel its enforcement. People v. Brooks, 57 Ill. 142.

A subordinate officer, whose rights are not affected and who has no interest in defeating the enforcement of a law, cannot raise its unconstitutionality as a defense. Franklin County Com'rs v. State, 24 Fla. 55, 3 So. 471, 12 Am. St. Rep. 183; Commonwealth v. James, 135 Pa. 480, 19 A. 950.

The editor of the note to State v. Heard, 47 La. Ann. 1679, in 47 L. R. A. 512, remarks that while the conflict in the authorities is irreconcilable, there is a thread running through the decisions "which would furnish a logical and satisfactory rule * * * if finally adopted. That is that statutes are generally presumed valid, and ministerial officers must treat them as such until their invalidity is established; but that if the nature of the office is such as to require the officer to raise the question, or if his personal interest is such as to entitle him to do so, he may contest the validity of the statute in a mandamus proceeding brought to enforce it. In other cases he must perform his duty as the statute requires, and leave those whose rights are affected by it to take steps to annul it." See this note for other cases.

An interesting discussion of the question will also be found in Payne v. Staunton [W. Va.] 46 S. E. 927. It is there said that the prevailing rule is that if direct enforcement of a law, claimed to be invalid, is sought, mandamus will not issue. The following cases are there given as recognizing this rule: A mandamus was sought to compel a town clerk to assess a tax; but the court holding that the statute commanding it was unconstitutional, it was refused. State v. Tappan, 29 Wis. 664, 9 Am. Rep. 622. A statute required supervisors to divide counties into districts. Mandamus refused to

Duties relating to allowance and payment of claims against municipalities.[57] —The act of auditing and passing upon claims against a municipality is a quasi judicial proceeding, not reviewable by mandamus.[58] But after a claim has been duly established and allowed,[59] mandamus lies to compel the proper officer or officers to take the necessary steps preliminary to payment,[60] if there is a refusal to do so.[61]

Mandamus lies to compel distribution of a fund for the purpose for which it was created,[62] but not for some other purpose.[63] That no appropriation for the fund has been made, or if made has been lawfully exhausted, is a good defense to

compel them. Van Horn v. State, 46 Neb. 62, 64 N. W. 365. Mandamus refused to compel canvassing board to count ballots as directed by the statute. Maynard v. Board, 84 Mich. 228, 47 N. W. 756, 11 L. R. A. 332. Mandamus refused to compel controller to draw warrant to pay a demand allowed by a statute. Patty v. Colgan, 97 Cal. 251, 31 P. 1133, 18 L. R. A. 744. Mandamus refused to pay bond. Brandenstein v. Hoke, 101 Cal. 131, 35 P. 562. Mandamus refused to compel payment of judge's salary. McDermont v. Dinnie, 6 N. D. 278, 69 N. W. 294. So to compel issue of town bonds to build a railroad. People v. Bachellor, 53 N. Y. 128, 13 Am. Rep. 480.

But in State v. Commissioners, 18 Neb. 506, 26 N. W. 315, the court refused to pass on the validity of a statute, and compelled an act going straight to its enforcement.

See, also, 19 Am. & Eng. Enc. Law [2nd Ed.] 764.

57. See 2 Curr. L. 778.

58. Auditing and disallowance of a claim by a town board of auditors is a quasi judicial proceeding; mandamus does not lie to compel a re-examination of a claim rejected as illegal. People v. Matthies [N. Y.] 72 N. E. 103; People v. Matthies, 92 App. Div. 16, 87 N. Y. S. 196.

59. **Mandamus will not issue pending an appeal:** Mandamus will not lie to compel delivery of a warrant by a city comptroller during the pendency of an appeal by a taxpayer from the order of a city council approving and allowing the claim. Lobeck v. State [Neb.] 101 N. W. 247. A peremptory writ of mandamus will not issue to compel a city to levy a tax for the payment of a judgment at the first opportunity after the rendition of such judgment, where proceedings in error were brought in good faith, though no stay bond was given. Pherson v. Young [Kan.] 77 P. 693.

60. The duty of a county auditor to issue warrants for claims allowed by county commissioners is purely ministerial and enforceable by mandamus. American Bridge Co. v. Wheeler, 35 Wash. 40, 76 P. 534. Mandamus will lie to compel county commissioners to take the necessary steps to provide for payment of negotiable county orders issued for construction of a public highway. State v. Gunn [Minn.] 100 N. W. 97. After a claim against the state has been litigated and final judgment against the state rendered, and it is admitted that there are available funds, the act of the state auditor in drawing a warrant for the amount of the judgment is a ministerial act, compellable by mandamus. State v. Weston [Neb.] 99 N. W. 520. A contractor who has constructed and delivered to the city of New York certain scows, which the city has accepted without objection, may compel payment of the amount due him by mandamus. The fact that he did not comply with the eight-hour law as applied to public works is immaterial, that law being unconstitutional. People v. Grout [N. Y.] 72 N. E. 464. Mandamus will lie to compel the mayor and city council of a city to set aside a sufficient amount of the surplus revenue to pay a judgment (for personal injuries) recovered against the city. Such writ is in the nature of an execution without which the fund could not be reached, since ordinary execution would not issue. City of Anniston v. Hurt [Ala.] 37 So. 220. In mandamus proceedings against a county treasurer to compel payment of warrants it was held that he was precluded from setting up that mandamus was not the proper remedy, where a previous suit against the county on the warrants had been dismissed on the ground that mandamus against the treasurer was the proper remedy. Neal Loan & Banking Co. v. Chastain [Ga.] 49 S. E. 618.

61. The duty of drawing a warrant for payment of a claim against a city which has been properly established and allowed is one the discharge of which may be compelled by mandamus. But where there is no refusal to draw a warrant, but it appears only that relator's claim has not been reached in due course, and that a warrant will be drawn when the claim is reached, mandamus will not issue. Altgelt v. Campbell [Tex. Civ. App.] 78 S. W. 967.

62. A ministerial officer who has in his hands a specific fund may be compelled by mandamus to make lawful distribution of the fund. County commissioners may be compelled to bring about payment of the contract price for the construction of a county road. King v. Board of Com'rs [Ind. App.] 72 N. E. 616. The fact that interest coupons on municipal bonds are merged in a judgment does not affect the character of the indebtedness, and the holder of such judgment may by mandamus compel application of funds raised by taxation to pay interest on bonds on the judgment. Ward v. Piper [Kan.] 77 P. 699.

63. Mandamus will not lie to compel payment of money raised by township officers for current expenses, upon bonded indebtedness, or judgments based on such indebtedness, where it does not appear that the indebtedness arose out of the ordinary expenses of the township, nor that the fund raised for current expenses is more than sufficient for that purpose. Ward v. Piper [Kan.] 77 P. 699.

such a proceeding.[64] That there are other creditors entitled to share in a fund is no defense.[65]

Duties of election officers and boards.[66]—Since political conventions have exclusive jurisdiction over their own proceedings,[67] the regular nominee for a political office may by mandamus compel the proper officials to place his name on the ballots as such nominee.[68] The relator must in such case show his nomination[69] by a legal convention.[70] In so far as election officers or boards, charged with the duty of canvassing returns, act judicially, their action is not subject to control by mandamus;[71] but they may be compelled to perform duties clearly imposed by law.[72] While there is a conflict on the question,[73] the weight of authority seems to be that an election board which has ceased to exist as such by reason of the expira-

64. Discharged police officer could not collect salary by mandamus when no appropriation for his salary had been made, or when that appropriated had been paid to others who had performed his duties. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. Mandamus will not issue to compel a comptroller to issue a warrant for, and the treasurer to pay, a salary in an amount not fixed by the constitution or a permanent statute, and for which no appropriation has been made. In such case, the legislature having acted, the action for a sum greater than that appropriated is against the state; and of such action the court has no jurisdiction. State v. Jennings [S. C.] 47 S. E. 683.

65. Ward v. Piper [Kan.] 77 P. 699.

66. See 2 Curr. L. 779. Upon a mandamus from the supreme court of appeals in West Virginia, in election cases, the action of election officers may be reviewed and controlled to the same extent as upon the statutory writ of certiorari in the circuit courts. Goff v. Board of Canvassers [W. Va.] 49 S. E. 588.

67. Jennings v. Board of Election Com'rs [Mich.] 100 N. W. 995.

68. Where the action of a state central committee in deciding which of two county conventions was regular has been affirmed by the state convention, it is the legal duty of the county auditor to certify the names of the nominees so declared to be the regular nominees of the party, and mandamus will lie to compel the performance of such duty. State v. Larson [N. D.] 101 N. W. 315. The supreme court of South Dakota issued a writ of mandamus directing a county auditor which of two sets of nominees to place on the ballots as the regular nominees of a political party, on the ground that the law required him to place thereon such names as have been certified "in the manner provided by law;" and the time being too short for application to the county court to correct errors of the auditor, and a subsequent appeal. State v. Metcalf [S. D.] 100 N. W. 923.

69. Mandamus will not lie to compel an election board to place upon the ballots as a nominee the name of one not declared nominated by the convention. Jennings v. Board of Election Com'rs [Mich.] 100 N. W. 995; Stephenson v. Election Com'rs, 118 Mich. 396, 76 N. W. 914, 74 Am. St. Rep. 402, 42 L. R. A. 214, followed.

70. People v. Rose, 211 Ill. 252, 71 N. E. 1124. A petition for mandamus to compel election commissioners to place relator's name on a ballot as nominee is fatally defective if it does not show proper publication of the notice of the primary election (Acts 1901, p. 153, § 12) and that the delegates in the convention which nominated him were entitled to participate in its acts. State v. McCaffery [Mo. App.] 82 S. W. 1104.

71. Election inspectors, in determining what ballots shall be counted for or against any candidate, or any question voted on, or what ballots shall be rejected, act judicially; and common-law mandamus will not lie to compel them to act in a particular manner. People v. Hanes, 44 Misc. 475, 90 N. Y. S. 61. Mandamus will not lie to compel a canvassing board which has performed its duties, to reassemble and restore a certificate which it had changed. People v. Mattinger, 212 Ill. 530, 72 N. E. 906. Under Rhode Island laws governing election and qualification of members of the legislature, mandamus will not lie to compel the moderator, after the ballots have been counted and the result announced, to open the ballots and count as legal one that he has marked "defective." The moderator has exercised his discretion and done what the law requires. There is nothing left to be done on which a writ of mandamus could operate. Corbett v. Naylor [R. I.] 57 A. 303.

72. Under the election law it is the imperative duty of election judges to place on the registration lists the names of persons vouched for by one judge, and the performance of that duty may be compelled by mandamus proceedings in the district court. People v. District Court of Third Judicial Dist. [Colo.] 78 P. 679. A mandamus may issue to compel an election canvassing board to count a plainly marked ballot in a particular way for a particular candidate [Election law (Code 1887, c. 3, § 13) and Code 1899, c. 3, § 89]. Stanton v. O'Kane [W. Va.] 47 S. E. 245. Where a board of election canvassers refused to consolidate the votes cast for a sole candidate for an office the remedy was by mandamus to compel them to consolidate the returns and declare the result, and not a proceeding to contest the election, though the defense was that the office had been abolished by law. Morris v. Glover [Ga.] 49 S. E. 786.

73. For discussion, see Holdermann v. Schane [W. Va.] 48 S. E. 512; State v. Board of State Canvassers [Mont.] 79 P. 402.

tion of the terms of office of its members,[74] or which has acted and dissolved[75] cannot by mandamus be compelled to reassemble and recanvass returns.

Enforcement of rights to public office.[76]—Mandamus lies to compel admission or restoration to office of one having a clear prima facie right thereto, shown by a commission, certificate, or other legal evidence thereof;[77] and in such case the writ may be invoked directly against the person holding the office, requiring him to admit his successor thereto, and to turn over the records, property and insignia of the office.[78] But if relator's title is not clear, his remedy is not mandamus, but quo warranto.[79]

(§ 2) *C. Quasi public and private duties.*[80]—*Corporations* may be compelled by mandamus to perform quasi public duties growing out of the acceptance of municipal grants[81] or expressly imposed by law,[82] unless the situation is so complicated as to make relief in a court of law impracticable.[83]

74. Mandamus will not lie to compel a mayor and councilmen of a city who constituted an election canvassing board, to reconvene and recanvass an election for city recorder, after their terms of office have expired. Holdermann v. Schane [W. Va.] 48 S. E. 512. Nor can an alternative writ directed to such former officers, by name, be converted into a suit against their successors, so as to compel them to convene as a canvassing board for the purpose desired. Id. When the terms of office of election inspectors have expired, they cannot, independently of the election law, be compelled by mandamus to reconvene and recanvass the ballots. People v. Hanes, 44 Misc. 475, 90 N. Y. S. 61. Where prior to the hearing in a mandamus proceeding against the state board of canvassers (state treasurer and attorney general) their terms of office expired, the proceeding was dismissed on the ground that they could no longer perform official duties; and a judgment, if rendered, would be void as to their successors in office, who had no notice of any proceeding against them. State v. Board of State Canvassers [Mont.] 79 P. 402.

75. A canvassing board which has acted and dissolved cannot be compelled to reassemble and restore a certificate which it had changed. People v. Mattinger, 212 Ill. 530, 72 N. E. 906. A board of election canvassers which has dissolved before properly performing its functions may be compelled to reconvene and recanvass the vote. (Conflict in authorities noted.) Morris v. Glover [Ga.] 49 S. E. 786.

76. See 2 Curr. L. 777.

77. Kline v. McKelvey [W. Va.] 49 S. E. 896.

78. Writ awarded against one holding over after expiration of term for which he was elected or appointed, until his successor should be elected or appointed (Code 1889, c. 7, § 2), relator being an appointee. Kline v. McKelvey [W. Va.] 49 S. E. 896. A clerk of the circuit court died before the expiration of his term, and the judge appointed a clerk ad interim, and later the governor filled the vacancy by regular appointment. Held, mandamus would lie to compel the judge's appointee to deliver the office, with its records, to the governor's appointee. State v. Givens [Fla.] 37 So. 308.

Note: See, also, Walter v. Belding, 24 Vt. 658; Burr v. Norton, 25 Conn. 103; Warner v. Myers, 4 Or. 72; People v. Head, 25 Ill. 325. And authority is not wanting for the proposition that the writ will go, not only against one holding over, but also against an intruder under color of authority. Banton v. Wilson, 4 Tex. 400; Lindsey v. Luckett, 20 Tex. 516; People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769; Kimball v. Lamprey, 19 N. H. 215; Schmulbach v. Speidel, 50 W. Va. 553, 40 S. E. 424, 55 L. R. A. 922.

79. Clear legal title to an office is necessary to entitle a person claiming it to mandamus to compel a city clerk to receive and file his official oath. Thus it was held that where the eligibility of a mayor-elect turned on the construction of a statute, his remedy to try title to the office was by quo warranto and not by mandamus. People v. Hinsdale, 43 Misc. 182, 88 N. Y. S. 206. Mandamus will not issue to compel a duly elected city marshal to surrender the property and paraphernalia of his office on a mere showing that the city council had removed him, said council having no power to remove him, of which fact the court would take judicial notice. Christy v. Kingfisher [Okl.] 76 P. 135.

Note: "It has often been judicially declared that mandamus is a proper remedy for the trial of title to office, and will lie where there is another appropriate remedy, because it is a more speedy, and therefore a more adequate remedy. Banton v. Wilson, 4 Tex. 400; Lindsey v. Luckett, 20 Tex. 516; Harwood v. Marshall, 9 Md. 83; Strong's Case, 20 Pick. [Mass.] 484; Conlin v. Aldrich, 98 Mass. 557; Dew v. Judges, 3 Hen. & M. [Va.] 1, 3 Am. Dec. 639. On the contrary, it is more generally declared that mandamus is not the remedy for trial of title to office. People v. Olds, 3 Cal. 167, 58 Am. Dec. 398; Meredith v. Supervisors, 50 Cal. 433; Warner v. Myers, 4 Or. 72; People v. New York, 3 Johns. Cas. [N. Y.] 79; People v. Stevens, 5 Hill [N. Y.] 616; Matter of Gardner, 68 N. Y. 467; Denver v. Hobart, 10 Nev. 28; Brown v. Turner, 70 N. C. 93; Fitch v. McDiarmid, 26 Ark. 482; Underwood v. White, 27 Ark. 382; People v. Treasurer, 36 Mich. 416; State v. Auditor, 34 Mo. 375; People v. Detroit, 18 Mich. 338; People v. Head, 25 Ill. 325; State v. Dunn, 12 Am. Dec. 25."—See Kline v. McKelvey [W. Va.] 49 S. E. 896.

80. See 2 Curr. L. 781.

81. A water company owning a franchise

Mandamus has also been held the proper remedy to enforce the duties which corporations owe to stockholders.[84] Thus the right to inspect the books,[85] by-laws,[86] and membership list[87] of the corporation, has been so enforced. As to the right to compel registration of a transfer of stock, there is a conflict in the authorities.[88] The right to mandamus to compel officers to make calls upon unpaid subscriptions is doubtful.[89] If the right to an office is clear, or has been adjudicated, mandamus will lie to seat the person entitled, but not if there is a question as to the right to the office.[90] Mandamus lies to compel delivery of books and records of the corporation to officers entitled to them.[91] The remedy has been held

may be compelled to supply water of such quality and in such quantity as its contract requires. Mandamus, and not an action for rescission of the contract is the proper remedy. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514. A gas company possessing a franchise and virtual monopoly may be compelled by mandamus to furnish light to a city at a reasonable price. Public Service Corp. v. American Lighting Co. [N. J. Eq.] 57 A. 482.

For full treatment of the duties of private corporations enforceable by mandamus, see note to City of Potwin Place v. Topeka R. Co. [51 Kan. 609] in 37 Am. St. Rep. 317.

82. The duty of a railroad company to construct and maintain such farm crossings as the court shall determine to be suitable (under Rev. St. 1898, § 1810) is a clear legal duty enforceable by mandamus. State v. Wisconsin Cent. R. Co. [Wis.] 102 N. W. 16. Mandamus is an appropriate remedy to compel observance of a valid rate regulation of the railroad commissioners imposing specific public duties on railroad companies. State v. Atlantic Coast Line R. Co. [Fla.] 37 So. 652.

83. Where it was sought to compel railroad companies to build viaducts across and along the streets of a city, and it appeared that the location of tracks was such that in some places such viaducts must be built jointly and in others by separate roads, it was held that a court of law could not, by mandamus, give the relief demanded; only a court of equity, with all the parties before it, could properly adjust their rights and duties. Burlington & C. R. Co. v. People [Colo. App.] 77 P. 1026.

84. The fact that officers of a corporation are by law made personally liable for its debts when they fail to file the certificate showing payments on capital stock, does not afford such a remedy as to preclude the right to mandamus to compel filing of the certificate. Bay State Gas Co. v. State [Del.] 56 A. 1120.

Note: As to enforcement of by-laws of corporations by mandamus, see note in 32 L. R. A. 575. The principal case there given, Bassett v. Atwater, 65 Conn. 353, holds that mandamus lies to compel the officers to call a special meeting of stockholders, when requested so to do in accordance with the by-laws, if a statute prescribes the mode of calling such meetings.

85. See 2 Curr. L. 781, n. 8.

Note: And that mandamus is the proper remedy of a stockholder who is denied the right to inspect the books of a corporation is held in State v. St. Louis, etc., R. Co., 29 Mo. App. 301; Cockburn v. Union Bank, 13 La. Ann. 289; State v. Swift, 7 Houst. [Del.] 137; Stettauer v. New York & S. Const. Co., 42 N. J. Eq. 46; People v. Pac. Mail S. S. Co., 50 Barb. [N. Y.] 280; People v. Throop, 12 Wend. [N. Y.] 183; Weihenmayer v. Bitner [Md.] 45 L. R. A. 446.—See note to case last cited in 45 L. R. A. 457, from which cases here cited are taken.

86. See 2 Curr. L. 782, n. 9.

87. A member of a political club—a private corporation—may maintain mandamus to compel the proper officers to permit him to inspect the list of members, for the purpose of carrying out the objects of the organization, when such inspection is refused him after a proper demand. McClintock v. Young Republicans [Pa.] 59 A. 691.

88. Note: In some jurisdictions, it has been held that mandamus will lie to compel a corporation to register a transfer of stock, and issue a new certificate to the transferee. People v. Crockett, 9 Cal. 112; Green Mount & State Line Turnpike Co. v. Bulla, 45 Ind. 1; State v. McIver, 2 Rich. [S. C.] 25; In re Klaus, 67 Wis. 401. The better opinion and the weight of authority is to the contrary, on the ground that a transferee has an action at law for damages or a suit in equity to enforce his rights. Rex v. Bank of England, 2 Doug. 526; Kimball v. Union Water Co., 44 Cal. 173, 13 Am. Rep. 157; American Asylum v. Phoenix Bank, 4 Conn. 172, 10 Am. Dec. 112; Tobey v. Hokes, 54 Conn. 274; Lamphere v. Grand Lodge, 47 Mich. 429; Baker v. Marshal, 15 Minn. 177; State v. Rombauer, 46 Mo. 155; Shipley v. Mechanics' Bank, 10 Johns. [N. Y.] 484; People v. Miller, 39 Hun [N. Y.] 557; Stackpole v. Seymour, 127 Mass. 104; Durham v. Mon. Silver Min. Co., 9 Or. 41; State v. Guerrero, 12 Nev. 105; Wilkinson v. Providence Bank, 3 R. I. 22.—From Clark & M. Private Corp. § 606.

89. There are dicta in some cases to the effect that the remedy is available. Clark & M. Private Corp. § 798d, citing Patterson v. Lynde, 112 Ill. 196, 206; Hatch v. Dana, 101 U. S. 205, 215, 25 Law. Ed. 885, 2 Keener's Cas. 1880, 1886.

90. Clark & M. Private Corp. § 668b, citing American R. Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377; Cross v. West Virginia, etc., R. Co., 35 W. Va. 174.

91. Mandamus is the proper remedy to compel delivery of the property and records of an incorporated academy, and surrender of the offices of trustees, to trustees-elect. Ward v. Sasscer, 98 Md. 281, 57 A. 208. See Clark & M. Private Corp. § 668b, and State v. Riedy, 50 La. Ann. 258; In re Journal Pub. Club, 30 Misc. [N. Y.] 326, there cited.

available to compel reinstatement of persons wrongfully expelled,[92] and deprived of rights and privileges.[93]

Mandamus will not issue against individuals as such, but only against a person or persons clothed with authority to do the act sought to be compelled.[94] The writ will not be granted to enforce contract obligations,[95] or to afford relief for fraud or mistake.[96]

§ 3. *Jurisdiction.*[97]—In some states a mandamus proceeding cannot be heard by a judge in vacation at chambers;[98] in others the contrary rule prevails.[99] Statutory provisions authorizing proceedings by mandamus in election cases do not divest the court of its common-law jurisdiction to issue the writ.[1] Jurisdiction of an appellate court[2] may be determined by the amount in controversy.[3] A peremptory writ of mandamus will not be issued except with the view of the enforcement of its mandates, if necessary, by the court issuing it.[4] Where different courts have concurrent jurisdiction, application should be made to that court which can most conveniently and best enforce the decree rendered.[5]

Federal courts.—In the federal courts mandamus is not allowed as original

92. Nelson v. Board of Trade, 58 Ill. App. 399.

93. A law student, deprived of the rights and privileges of membership of the school without notice and wrongfully, has a right to mandamus to compel restoration to such rights and privileges, whether the school is organized for profit or not. Baltimore University v. Colton, 98 Md. 623, 57 A. 14.

94. A canvassing board which had performed its duties ceased to exist as a board; mandamus would not lie to compel the board to reassemble and restore a certificate it had changed. People v. Mattinger, 212 Ill. 530, 72 N. E. 906. **An adjudicatee at a tax sale** may be compelled to allow redemption on tender of the amount fixed by law, and mandamus will issue to cause him and the register of conveyances to erase from the records the inscription of the tax deed. State v. Register of Conveyances [La.] 36 So. 900.

95. Thus where judgment did not call for interest, mandamus to perform the judgment cannot compel payment of interest. Howe v. Southrey, 144 Cal. 767, 78 P. 259.

96. As to recover excess paid to redeem land sold for taxes, such payment being under mistake. Perrin v. Honeycutt, 144 Cal. 87, 77 P. 776.

97. See 2 Curr. L. 782, and see generally Jurisdiction, 4 Curr. L. 324.

98. Mandamus can only issue by a court, not by a judge in vacation. Sand. & H. Dig. § 4891. A circuit judge may, during vacation, make temporary orders to prevent damage or injury to a petitioner pending a hearing of mandamus by the court. Reese v. Steele [Ark.] 83 S. W. 335. Under Mills' Ann. Code § 408, a judge in vacation at chambers has no jurisdiction to deny, on the merits, a petition for mandamus. People v. Hebel [Colo. App.] 76 P. 550. The issuance by a judge at chambers of an alternative writ, with an order to respondent to show cause at the next regular term why a peremptory writ should not issue is not prejudicial to respondent. Thus where county treasurer was sought to be compelled to pay a warrant out of a special fund, the issuance of the alternative writ gave him an opportunity to show why a peremptory writ should not issue. Martin v. Clark, 135 N. C. 178, 47 S. E. 397.

99. Summons in mandamus proceedings to compel a county treasurer to pay a warrant out of a special fund may be returnable before the judge at chambers, the action not being one to enforce a money demand. Martin v. Clark, 135 N. C. 178, 47 S. E. 397. Where an action was solely for a writ of mandamus, plaintiff making no claim for damages, the judge's jurisdiction at chambers was not affected by the incidental averment that plaintiff had been damaged in a certain sum. Ewbank v. Turner, 134 N. C. 77, 46 S. E. 508.

1. So mandamus may issue to compel election inspectors to convene and perform duties prescribed by law. People v. Way, 92 App. Div. 82, 86 N. Y. S. 892.

2. For extended treatment of original jurisdiction of courts of last resort in mandamus cases, see note to People v. Chicago [193 Ill. 507] 58 L. R. A. 833.

3. Supreme court of Missouri has no jurisdiction of proceedings to compel appointment of an administrator where the latter's commissions—his only pecuniary interest in the proceeding, though he was also a legatee—amounted to less than $4,500. State v. Guinotte, 180 Mo. 115, 79 S. W. 166.

4. State v. Moores [Neb.] 99 N. W. 842. The courts of one state have no jurisdiction to grant a writ of mandamus on application by a stockholder of a foreign corporation to compel an inspection of the books and records of such corporation, such right being enforceable only by the courts of the state in which the corporation has its legal existence. Mitchell v. Northern Security Oil & Transp. Co., 44 Misc. 514, 90 N. Y. S. 60.

5. Where an original application was made to the supreme court of Nebraska for a writ of mandamus to compel the mayor and other officers of Omaha to prevent violations of the liquor laws, it was held that the district court had concurrent jurisdiction of the matter; that it was not the duty of the supreme court to undertake to compel performance of the acts contemplated; and hence application should have been made to the district court. State v. Moores [Neb.] 99 N. W. 842.

process but is employed only in aid of jurisdiction already acquired, and is a species of execution for enforcing the judgment in the principal case.[6] They cannot take jurisdiction of such suits by removal from the state courts under the removal acts.[7] Each federal court has jurisdiction to issue the writ to a subordinate court or judge in the exercise of and in aid of its appellate jurisdiction, and this power may be exercised though its appellate jurisdiction has not been actually invoked by appeal or writ of error.[8] It is without power to issue it in a case not reviewable in that court by appeal or writ of error,[9] or to issue it to create a case for the exercise of its appellate jurisdiction.[10]

Venue in mandamus cases is determined by the statutes fixing the venue of other civil actions.[11]

§ 4. *Parties. A. Parties plaintiff.*[12]—The writ of mandamus will issue only at the instance of one "beneficially,"[13] or pecuniarily interested in the action sought to be coerced.[14] Where several persons are interested they may unite in bringing the action.[15] Where their rights are several and relief must be separately granted, one may maintain the action and obtain individual relief without joining the others;[16] but he cannot in such action obtain relief for the others, not joined as relators.[17] A private individual cannot maintain mandamus to compel the performance of a purely public duty,[18] unless he can show some peculiar interest greater than that which he has with the general public.[19] If one relator has a

6. City of Cleveland v. U. S. [C. C. A.] 127 F. 667; In re Coleman, 131 F. 151; Mystic Mill. Co. v. Chicago, etc., R. Co., 132 F. 289.

7. An action for mandamus under the Iowa statutes held not removable to the Federal court, though damages may be recovered in the same action. Mystic Mill. Co. v. Chicago, etc., R. Co., 132 F. 289.

8, 9, 10. Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945.

11. An issue in mandamus proceedings cannot be tried in any other county than the one in which the respondent resides [Gen. St. 1882, § 2344]. State v. Scarborough [S. C.] 49 S. E. 860.

12. See 2 Curr. L. 783.

13. Under Code Civ. Proc. § 1086, application must be by a party "beneficially interested." Ellis v. Workman, 144 Cal. 113, 77 P. 822. Hence where plaintiff's land was sold for failure to pay instalments of a street improvement bond, the writ would not issue to compel the city treasurer to cancel the bond, since the bond could not affect the right to redeem from the sale, and could not injure the owner prior to redemption. Id.

14. Purchasers of municipal bonds are parties in interest, and, though nonresidents, may maintain mandamus to compel a mayor to sign and seal the bonds. Halsey v. Nowrey [N. J. Law] 59 A. 449. An individual cannot maintain mandamus to compel performance of an act unless he has a pecuniary interest in the act to be compelled. Payne v. Staunton [W. Va.] 46 S. E. 927. Where, pending an appeal from an order denying an application for mandamus by a stockholder to compel the corporation to permit him to inspect its books, relator sold his stock and the corporation dissolved, the case could not be further prosecuted. State v. New Orleans Maritime & Merchants' Exch., 112 La. 868, 36 So. 760.

15. Several persons who make common application to a clerk of a county court for inspection of public records, and are refused it, if entitled to such inspection, may unite in mandamus to compel such inspection. Payne v. Staunton [W. Va.] 46 S. E. 927.

16. It is no defense to an action of mandamus to compel a city to levy a tax to pay bonds that relator owns only a portion of the bonds; since other bondholders may, in a proper proceeding, assert their right to share in the fruits of the mandamus. Territory v. Socorro [N. M.] 76 P. 283.

17. Where awards for damages sustained by the laying out of a road are several, one property owner cannot maintain mandamus to compel the auditing of the claims of all the property owners to whom awards were made. People v. Morgan, 89 N. Y. S. 832.

18. Private citizen could not bring mandamus to compel town wardens to certify to the district court complaints for alleged illegal voting, on the ground that the wardens were disqualified to hear the case, being members of the board of canvassers of elections. Williams v. Champlin [R. I.] 59 A. 75.

19. Unless a private individual has some peculiar interest independent of that which he holds with the public at large, he is not a party beneficially interested within the meaning of Code Civ. Proc. § 1086, entitled to maintain mandamus to compel a justice of the peace to issue a warrant for the arrest of one for unlawfully running a slot machine. Fritts v. Charles [Cal.] 78 P. 1057. Mandamus to compel the removal of a dam across a navigable stream will not lie at the instance of individual relators who cannot show any special or peculiar damage not common to the general public. State v. Charleston Light & Water Co. [S. C.] 47 S. E. 979.

Contra: One or more individuals may maintain mandamus to compel the doing of an act in which the public at large, including them, have a common interest. Payne

sufficient interest to enable him to maintain the action, the motive of a co-relator will not be cause for dismissal.[20]

(§ 4) *B. Parties defendant.*[21]—The only necessary parties defendant in a mandamus proceeding are those whose duty it is to perform the act demanded,[22] or without whom the relief demanded cannot be granted.[23] Other interested persons may be properly joined, though not necessary.[24] The state is not a necessary party to a petition for mandamus presented by a citizen to enforce a right in which the state in its sovereign capacity is not concerned.[25]

v. Staunton [W. Va.] 46 S. E. 927. A male inhabitant of the state, over 21 years of age and a qualified voter, may bring mandamus to compel election officers to perform their duties under the law, the purpose being to test the validity of such law [action to test Acts 1897, p. 65, c. 51, fixing the number and apportionment of state senators and representatives]. Brooks v. State, 162 Ind. 568, 70 N. E. 980. A clerk of the circuit court is a proper party, as relator, in a mandamus proceeding to require the comptroller to honor a requisition by the clerk for money to pay jurors and witnesses payable by the state. State v. Croom [Fla.] 37 So. 303.

20. The mere fact that one of two relators in mandamus proceedings, instituted to close a public "poolroom," was actuated by a belief that a certain citizen was interested in its profits, and by the desire to drive him out of business, was held no reason for dismissal of the proceedings. Moores v. State [Neb.] 99 N. W. 249.

21. Sec 2 Curr. L. 784.

22. Since a relator is entitled to an effective writ, it is proper to include in its commands all those whose co-operation is by law required, even though it be by separate and successive steps, in the performance of the official duties which is necessary to secure to him his legal right. State v. Williams [Or.] 77 P. 965. But if the law requires a single officer to perform such duties, there is no necessity for joining other officers. Thus a mayor and executive board ought not to be joined in mandamus to compel arrest and prosecution of gamblers, where, under the law, the chief of police is a prosecuting officer. Id. The only necessary defendants in a mandamus proceeding to test the constitutionality of a law fixing the number and apportionment of state senators and representatives are the clerk, sheriff and auditor of the county where the proceeding is brought. Brooks v. State, 162 Ind. 568, 70 N. E. 980. The officers of a corporation are not necessary parties to mandamus proceedings to compel the corporation to file a certificate showing payments on capital stock as required by Gen. Corp. Law 1901, § 23, even though § 24 makes them personally liable for debts if they fail to file such certificate. Bay State Gas Co. v. State [Del.] 56 A. 1120. Where there were two vacancies, either of which a suspended civil service clerk was entitled to occupy, and one vacancy was by death of the occupant, it was not necessary to make the clerk illegally holding the other position a party to mandamus proceedings by the suspended clerk to compel reinstatement. People v. Grout, 45 Misc. 47, 90 N. Y. S. 861. The mayor of Buffalo and the state civil service commission were necessary parties to a mandamus proceeding to compel a reclassification of the position of battalion chief in the fire department. Dill v. Wheeler, 91 N. Y. S. 686. A proceeding in mandamus against an official body like a commissioners' court is not defeated by resignation of any or all the members. The authorities are not agreed as to the necessity to cite the succeeding members and make them formal parties, but in Texas this is necessary. But the resigning members are not thereby relieved from liability, but must remain before the court to abide judgment for costs. Gauhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104.

23. Where a judge directed the clerk of the court to deliver a venire for the summoning of jurors to the city superintendent of police, the law requiring the sheriff to summon jurors for that court, the clerk is a proper party in mandamus proceedings by the sheriff to compel delivery of the venire to him, since relator could obtain relief only if both the judge and clerk were respondents. Dickson v. Phelan [Mich.] 99 N. W. 405. Under Kentucky law (Laws 1868, p. 622, c. 548), authorizing counties to issue bonds in aid of railroads, and requiring the county judge to levy, and the sheriff to collect (having given bond) taxes to meet the principal and interest of such bonds, the sheriff is a proper party to mandamus proceedings to compel levy of a tax, though no duty devolved on him until the levy had been made; it being alleged that he had pledged himself not to give bond or collect the taxes. Guthrie v. Sparks [C. C. A.] 131 F. 443. Where a commissioner's court refused to approve the official bond of a county judge, declared a vacancy and appointed another judge, and resigned, the new judge appointing their successors, the new judge and commissioners were necessary parties to an action of mandamus by the former judge to compel the former commissioners to approve his bond. Gouhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104.

24. The president of a corporation is properly joined as defendant in mandamus proceedings to compel the corporation to open its books for the inspection of stockholders. State v. Bay State Gas Co. [Del. Super.] 57 A. 291. Though not a necessary party, joining him does not vitiate the proceedings. Bay State Gas Co. v. State [Del.] 56 A. 1114. In mandamus proceedings to compel county auditor to issue a warrant for a claim allowed by the county commissioners, it is not improper to join the commissioners as parties, on the ground that the county would be ultimately affected by the result. American Bridge Co. v. Wheeler, 35 Wash. 40, 76 P. 534.

§ 5. *Pleading and procedure in general.*[26]—The proceeding for mandamus being an action at law, the rules of pleading are the same as in other actions at law.[27] The rule that a demurrer reaches back to the first fault committed by either party applies with special force to cases of mandamus.[28]

The procedure varies. The action is sometimes instituted by petition, sometimes by motion, supported by affidavit, while in some states the alternative writ is regarded as the first pleading.[29] The various steps in the proceeding are treated in chronological order in the succeeding sections.

§ 6. *Petition or affidavit.*[30]—The petition must be verified.[31] All the facts properly set forth in the petition[32] or affidavit[33] and not expressly denied are taken as true. The petition or affidavit must show that the act sought to be compelled is the duty and within the power of the person sought to be commanded.[34] A petition to compel reinstatement to a public office must show the creation or existence of the office, and relator's legal right to hold it.[35] The action required must be definitely stated.[36] The performance of conditions precedent to the right demanded need not be alleged if the law presumes their performance.[37] Objections to a petition reachable by demurrer are waived by answering after the demurrer has been overruled.[38]

§ 7. *Alternative writ. Issuance in first instance.*[39]—Where a peremptory writ is asked in the first instance, notice of application therefor must be given.[40]

25. As to enforce collection of illegally omitted taxes. Milster v. Spartanburg [S. C.] 46 S. E. 539.

26. See 2 Curr. L. 782, § 4, Procedure in general; contents of alternative writ.

27. Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967.

28. State v. Sams [Neb.] 99 N. W. 544.

29. See 2 Curr. L. 782; Enc. Pl. & Pr. 13, pp. 671-673. Under the **Illinois** statute it is held that the petition performs the office of the alternative writ, the answer that of the return; and the succeeding pleading should be a common-law replication and designated as a replication. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816; McNeill v. Chicago, 212 Ill. 481, 72 N. E. 450.

Indiana: If no alternative writ has been issued, the verified petition or affidavit and motion for the writ is treated as the complaint; but when an alternative writ is issued, it is treated as in the nature of a complaint. Welch v. State [Ind.] 72 N. E. 1043.

Missouri: The alternative writ is regarded as the first pleading and must set forth by recital the allegations of the petition. State v. Board of Police Com'rs [Mo. App.] 82 S. W. 960.

30. See 2 Curr. L. 784.

31. Shirley v. Conner [Tex.] 81 S. W. 284.

32. Averments in the answer that defendants have no knowledge of, and neither admit nor deny allegations of the petition are unavailing. Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967.

33. Statements in an affidavit for mandamus will be taken as true if no issue is joined thereon. Barlow v. Riker [Mich.] 101 N. W. 820.

34. Town of Cicero v. People, 105 Ill. App. 406. A petition for mandamus to compel payment of a discharged policeman's salary merely states conclusions in averring that the action of the city officials was unauthorized, etc., and in disregard of his legal rights; facts should have been alleged from which his legal rights could be determined. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. An affidavit for mandamus to the governor to issue a certificate of election to relator as district judge alleged that the law provided for three judges in the district, that there were six candidates, and that relator received the third largest number of votes. Held insufficient to show ground for relief asked, since the governor's proclamation called for the election of only two judges, and there was nothing to show that the voters intended to fill more than two judgeships. State v. Toole [Mont.] 79 P. 403.

35. Petition for mandamus to compel reinstatement of police sergeant in Chicago held demurrable in these respects. People v. Chicago, 210 Ill. 479, 71 N. E. 400.

36. A petition for mandamus to compel reduction of railroad crossings to the street level, which states the height of the embankment at each crossing, and demands that the crossing be made level, is a sufficiently definite statement of the action required. Houston & T. C. R. Co. v. Dallas [Tex.] 84 S. W. 648.

37. A petition for mandamus to compel a county treasurer to pay warrants need not allege the performance by officers concerned in the drawing of the warrants of duties imposed on them by law. Such duties are presumed to have been performed, and the defense that they have not been performed must be raised by answer, and cannot be taken advantage of by a demurrer. Neal Loan & Banking Co. v. Chastain [Ga.] 49 S. E. 618.

38. As an objection that a petition showed the right barred by laches. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816.

39. See 2 Curr. L. 786.

40. Where petition was for peremptory writ under Code 1899, c. 3, § 89, and no previous notice given, an "answer and return"

Where issues of fact are raised by denials of allegations of the petition, an alternative, not a peremptory writ, should issue.[41] But if the return is not in such form that it can be considered, the peremptory writ may issue.[42]

Contents; manner of pleading.[43]—An alternative writ should purport on its face to have been issued on order of the court.[44] But an objection that a writ is defective in this respect is waived by an appearance to the proceedings and a demurrer to the writ on the ground that the facts stated do not constitute a cause of action.[45] It must show a clear right to the relief demanded, by alleging distinctly the material facts on which the relator relies.[46] The including in the mandatory clause of an alternative writ of a command for greater relief than relator is entitled to under the allegations of his petition and writ renders it insufficient as against a demurrer for want of facts or a motion to quash.[47] Allegations of the alternative writ which are well pleaded and not denied by the answer are to be taken as true.[48]

Service[49] of the writ must be in accordance with the statutes governing service of process.[50]

§ 8. *Demurrer to petition or writ; answer or return; subsequent pleadings.*[51] —A demurrer to an alternative writ of mandamus is treated as a demurrer in other actions at law.[52] A demurrer to a petition, though it admits facts alleged, does not necessarily grant relator's right to maintain mandamus proceedings:[53]

filed was treated as an answer to the petition, and defendant given a right to defend. Stanton v. O'Kane [W. Va.] 47 S. E. 245.

41. People v. Cullinan, 95 App. Div. 598, 88 N. Y. S. 1022; People v. Hamilton, 90 N. Y. S. 547; People v. Coleman, 99 App. Div. 88, 91 N. Y. S. 432; People v. McAdoo, 91 N. Y. S. 553. A petition for a peremptory writ of mandamus will be denied where the return to the petition raises an issue of fact, entitling respondent to a jury trial. Territory v. Brown [Okl.] 78 P. 319.

42. Where the return of a circuit court to a rule nisi commanding him to hear and determine a motion for a new trial was on ordinary legal cap instead of the transcript paper required by the rules, the return was not considered, and the petition making a prima facie case, a peremptory writ was issued. Ex parte Geter [Ala.] 37 So. 341.

43. See 2 Curr. L. 782.

44, 45. Indiana Natural Gas & Oil Co. v. State, 162 Ind. 690, 71 N. E. 133.

46. An alternative writ to a judge commanding him to issue bench warrants, which alleges that he neglects to issue warrants "as required by law" states a mere legal conclusion; no duty to issue warrants is shown. State v. Williams [Or.] 77 P. 965. A mere allegation "on information and belief" that a payment of an instalment or call of capital stock has been made, is not sufficiently certain to warrant a writ of mandamus to compel the corporation to file the certificate regarding such payments required by law. Bay State Gas Co. v. State [Del.] 56 A. 1120. The alternative writ is regarded as the first pleading in a mandamus proceeding and must set forth by way of recital the allegations of the petition. State v. Board of Police Com'rs [Mo. App.] 82 S. W. 960. Alternative writ of mandamus to compel corporation to permit inspection of books by stockholders held to contain all essential allegations of fact, including proper demand and refusal. Bay State Gas Co. v. State [Del.] 56 A. 1114. In mandamus certainty of allegation is required, but if the alternative writ states the facts on which the demand is based with sufficient precision to express the right of the relator and the duties of the respondent in such manner that the ordinary mind may easily apprehend them, this is all the certainty required to defeat a demurrer. State v. Atlantic Coast Line R. Co. [Fla.] 37 So. 652. When recitals and allegations of an alternative writ of mandamus construed together charge a general violation of the duty of respondent railroad company to put into operation a rate regulation of the railroad commissioners, the writ is not demurrable because it does not allege a specific instance of the violation of the regulation. Specific instances are matter of evidence rather than pleading. Id. Where the demand and refusal pleaded in a writ was for one-half a certain sum, the fact that the answer admitted that respondent had such sum and was willing to pay it was no reason for awarding a mandamus for a different sum as to which no demand and refusal was alleged. State v. Sams [Neb.] 99 N. W. 544.

47. State v. Connersville Natural Gas Co. [Ind.] 71 N. E. 483.

48. State v. Jennings [Fla.] 35 So. 986.

49. See 2 Curr. L. 786.

50. Service of an alternative writ of mandamus on a corporation by leaving a copy at the president's dwelling, in the presence of a white adult person, and also by making service on the president in the same manner, six days before the return, was sufficient, under Corporation Act 1901, § 48. State v. Bay State Gas Co. [Del. Super.] 57 A. 291. Such service held sufficient as to the corporation, though the president was not in fact in the state. Bay State Gas Co. v. State [Del.] 56 A. 1114.

51. See 2 Curr. L. 786, § 8.

The answer or return must tender well defined issues.[54] If the return be regarded as insufficient in law, the proper practice is to demur;[55] or if regarded as untrue in respect of its allegations of fact, to join issue upon it.[56] Allegations of the answer or return which are not put in issue by a reply are deemed admitted,[57] unless the statute provides to the contrary.[58] On demurrer to the answer, the facts alleged are to be taken as true.[59] Such demurrer reaches back to faults in the writ or petition.[60]

There must be no departure from the petition in relator's subsequent pleadings.[61] Where after a demurrer to a petition has been overruled, respondents an-

52. State v. Jennings [Fla.] 35 So. 986. A demurrer to an alternative writ, stating that "the matter of law intended to be argued is that the facts stated in such writ do not show the relator is entitled to relief by mandamus" is so general that the court need only determine whether there are such essential and vital defects in the writ that no cause of action is stated, and that it cannot be cured by amendment. Id. When a demurrer to an alternative writ of mandamus is sustained on the ground that the acts sought to be enforced are improperly joined, relator can proceed only by an amended writ showing the particular cause of action which relator elects to pursue. State v. Williams [Or.] 77 P. 965. It is proper to enter judgment of dismissal where, after a motion to quash the alternative writ has been sustained, plaintiff elects to stand on his amended petition and refuses to plead further. Hester v. Thomson, 35 Wash. 119, 76 P. 734.

53. Thus where a demurrer admitted facts which showed an erroneous judgment by a board of education on the question of a pupil's residence, it did not admit the right to maintain the action, since that judgment was within the power of the board and was not reviewable by mandamus, though erroneous. Preston v. Board of Education [Iowa] 100 N. W. 54.

54. Where in mandamus to compel a corporation to clear out ditches, the answer and counter answer presented several points of controversy, but the issues were not well defined, an alternative writ was allowed. Lock v. Repaupo Meadow Co. [N. J. Law] 57 A. 423. The return to an alternative writ of mandamus, seeking to compel a railroad company to put into operation a schedule of tariffs prescribed by the railroad commissioners, which alleges positively that the prescribed rates are unreasonable and do not afford fair compensation, is sufficient to tender the issue of the reasonableness of the rates without supporting such allegation by the averment of particular facts. State v. Seaboard Air Line R. Co. [Fla.] 37 So. 314. A return to an alternative writ should, for the purpose of making an issue, set up a positive denial of the facts stated, or should state facts in confession and avoidance with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass judgment upon the sufficiency of the return, and the return should not be evasive. State v. Jennings [Fla.] 35 So. 986. A return to an alternative writ of mandamus to compel a corporation and its president to permit stockholders to inspect its books, which denies that the specified books were at any time in the possession of the president, is insufficient. State v. Bay State Gas Co. [Del. Super.] 57 A. 291.

55. City of Cleveland v. U. S. [C. C. A.] 127 F. 667. A **motion to strike** from the answer all matter not shown to be within the personal knowledge of respondent, or based on the records and files in the case will be denied. The better practice is to call the attention of the court, on the hearing, to such parts of the answer as are not entitled to consideration. Erickson v. Alpena Circuit Judge [Mich.] 101 N. W. 63.

56. City of Cleveland v. U. S. [C. C. A.] 127 F. 667.

57. Material parts of a petition for mandamus which were the basis of the prayer for relief, being denied by the answer and no replication being filed to that part of the answer, the relief sought could not be granted. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. No issue being joined in mandamus to a circuit judge, his answer is taken as conclusive on the facts. Fletcher & Sons v. Alpena Circuit Judge [Mich.] 99 N. W. 748.

58. Under the Washington code provision that an applicant is not precluded by the answer from any valid objection to its sufficiency, nor from countervailing it by proofs on the trial, either by direct denial or by way of avoidance, it is held that the return is deemed denied without a reply. State v. McQuade [Wash.] 79 P. 207.

59. An answer should not be stricken out on demurrer if its allegations, taken as true, state a good defense and entitle defendant to a hearing on the evidence. Houston, etc., R. Co. v. Dallas [Tex.] 84 S. W. 648. A motion for mandamus on the pleadings and admissions of defendant is in the nature of a demurrer ore tenus to the answer and involves the admission of facts set out in the answer. Barnes v. Wilson County Com'rs, 135 N. C. 27, 47 S. E. 737.

60. Thus a demurrer to the answer to a writ will be overruled if the writ fails to show refusal or neglect to perform an official duty, the act demanded not appearing, either by the writ or answer, to be a duty of respondent. State v. Sams [Neb.] 99 N. W. 544. In such case the trial court may dismiss the action and render judgment against relator for costs upon overruling such demurrer, no offer or request for leave to amend the writ being made. Id.

61. Where a petition for mandamus to compel payment of salary alleged that relator was a police officer after a certain date, and the answer sets up his discharge

swer, relator replies, and respondents demur to the replication, the last demurrer cannot be carried back beyond the answer.[62]

§ 9. *Trial, hearing and judgment. A. Trial and hearing.*[63]—Issues of fact, to be tried at the hearing,[64] must be tried by jury, unless a jury is waived.[65] The proceeding being at law, a reference to a master to report on the facts and law involved is improper.[66] If the respondent on trial fails to meet the burden of proof on the issues raised by the pleadings, a peremptory writ will issue.[67]

Where mandamus was brought to enforce the mandate of the circuit court of appeals, the entire record being before the court, the circuit court having entered no order from which a writ of error would lie, it was held proper to deal with the case as though properly before it on writ of error, in order to expedite justice.[68]

On original application for mandamus in the supreme court of Washington, if the sufficiency of the petition is challenged by demurrer, and respondents also desire to raise issues of fact, both demurrer and answer are filed at the same time, and final disposition of the case made at one hearing.[69]

Abatement and dismissal.[70]—Mandamus proceedings against continuing boards are not abated by the expiration of the term of office of one member, and the appointment of his successor.[71] Relator may dismiss without prejudice before trial, if respondent makes no counterclaim.[72] Dismissal is proper if the controversy has ceased to exist.[73]

on that date, and the reply admits his discharge but alleges that the discharge was wrongful, the reply is not a departure from the petition. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816.

62. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816.

63. See 2 Curr. L. 788.

64. Where on mandamus to compel a county superintendent to record a description of boundaries of a school district, and make a map of the same, a decision by the state board of education is pleaded as a defense, and the jurisdiction of that body, and the correctness of its decision are questioned by the reply, the issues so raised are to be determined on the hearing for mandamus. People v. Vanhorn [Colo. App.] 77 P. 978.

65. Since under Code Civ. Proc. § 2082, proceedings are the same as in an action. Hence where the trial was by the court, and it was impossible to tell whether a reversal of judgment was for an error of law or because the facts found were not supported by evidence, owing to the confused state of the record, a new trial was granted. People v. Wells, 178 N. Y. 411, 70 N. E. 926. Jury trial being waived, the court should determine the facts only, and at special term the parties should move for such final order as the law applied to the facts found will warrant [Code Civ. Proc. §§ 2082-2084]. People v. Grout, 45 Misc. 181, 91 N. Y. S. 900. Where in mandamus proceedings commenced in the supreme court and referred to a circuit court for trial of issues of fact, no motion was there made to set aside the verdict rendered, the relator is not entitled to a peremptory writ, though the averments of the petition were clearly proven and the verdict contrary to the evidence, requiring the supreme court to set it aside. The issues must be submitted to another jury. People v. Alton, 209 Ill. 461, 70 N. E. 640.

66. City of Cleveland v. U. S. [C. C. A.] 127 F. 667.

67. Railroad did not show rate fixed by commissioners unreasonable; mandamus issued to enforce observance of the rate. State v. Seaboard Air Line R. Co. [Fla.] 37 So. 658. Where on trial of an issue of the reasonableness of a rate fixed by the railroad commissioners, in mandamus proceedings, the respondent fails to show such rate materially less than the one voluntarily charged, or any fact from which it can be said that the rate fixed is unreasonable, mandamus will issue to enforce it. State v. Atlantic Coast Line R. Co. [Fla.] 37 So. 657. Peremptory writ issued also against the Jacksonville & S. W. R. Co., its line having been acquired by the Atlantic Coast Line Co., and no evidence especially applicable to it having been introduced, and counsel having agreed to same action regarding both lines. State v. Jacksonville & S. W. R. Co. [Fla.] 37 So. 658.

68. The circuit court of appeals had jurisdiction, since, under the circumstances, mandamus to enforce its order for execution would have been proper. Bucki & Son Lumber Co v. Atlantic Co. [C. C. A.] 128 F. 332.

69. State v. Hatch [Wash.] 78 P. 796.

70. See 2 Curr. L. 788.

71. Mandamus against board of fire commissioners of Elmira to compel reinstatement of a member of the fire department. People v. Coleman, 99 App. Div. 88, 91 N. Y. S. 432.

72. Comp. Laws 1900, § 3246. The case is the same, though a counterclaim is filed which counsel admitted could not be set up in such proceeding. State v. Wedge [Nev.] 78 P. 760.

73. Mandamus proceeding to compel a

(§ 9) *B. Judgment. Scope of relief.*[74]—The petitioner is entitled to all that he seeks, or nothing.[75] Being concluded by the terms of the alternative writ, where such writ is awarded for a purpose partly proper and partly improper, the court will not enforce it by peremptory mandamus as to that which is proper, but will give judgment for the respondent.[76] That alternative relief is asked is not fatal to a petitioner's right to the writ.[77]

Costs.[78]—The prevailing party is entitled to costs.[79] Costs cannot be awarded against one not a party.[80]

§ 10. *Peremptory writ.*[81]—The writ should be directed to the officers who have the power and whose duty it is to do the act required.[82] A writ which peremptorily requires the execution of an enterprise involving a complication and variety of detail, without any plan upon which to work, will not be sustained.[83]

§ 11. *Performance.*[84]—A writ commanding a chief of police to arrest and prosecute gamblers will not be construed as a command to make such formal charges against such persons as will make their arrest for misdemeanor lawful.[85] After service of an alternative writ of mandamus ordering a city council to levy a tax for a certain purpose, the mandamus proceeding cannot be defeated by making the annual tax levy and omitting the levy ordered by the writ.[86] In such case it is competent for the court to compel the council to reconvene and correct the levy.[87]

§ 12. *Review.*[88]—Appeals and writs of error are taken in mandamus proceedings in the same manner and to the same court as in other civil actions at law.[89]

judge to proceed with a case, he having refused to do so pending an appeal from an order granting a temporary injunction, dismissed, where such appeal was determined before the hearing on the application for mandamus. State v. Superior Court of Spokane County [Wash.] 79 P. 483.

74. See 2 Curr. L. 789.

75. Where the relief demanded was broader than the duty fixed by statute the writ will not issue. Bay State Gas Co. v. State [Del.] 56 A. 1120.

76. Gay v. Torrance [Cal.] 78 P. 540.

77. Where no alternative writ was issued, but a peremptory writ issued grants improper relief, if petitioner or relator is entitled to some kind of relief which was included in his prayer, he should receive it, and the necessary amendments in pleadings and processes may be made to conform thereto. School Dist. No. 1 in Denver v. School Dist. No. 7 in Arapahoe County [Colo.] 78 P. 690.

78. See 2 Curr. L. 789.

79. A mandamus proceeding is an action within the Wisconsin Code definition (§ 2595), and the prevailing party is entitled to costs. State v. Board of Trustees of Policemen's Pension Fund [Wis.] 98 N. W. 954. Code Civ. Proc. § 2086, providing that where application for mandamus is granted or denied without a previous alternative writ, costs may be allowed either party as upon motion, does not contemplate awarding costs to an unsuccessful party. People v. Common Council, 95 App. Div. 75, 88 N. Y. S. 493. Relator himself being without fault, the costs of mandamus proceedings must be adjudged against public officers compelled by the writ to perform statutory duties, although such officers were acting in obedience to an injunction believed by them to be valid, but which was in fact void. State v. Carlson [Neb.] 101 N. W. 1004.

80. Where judgment against a city was vacated pending mandamus proceedings to compel city officers to issue a warrant for payment of the judgment, whereupon the mandamus proceedings were dismissed, it was error to award costs against the city, which was not a party. People v. Common Council, 95 App. Div. 75, 88 N. Y. S. 493.

81. See 2 Curr. L. 790.

82. Peremptory writ to compel permission to inspect list of members of a political club held properly directed to the corporation and corresponding secretary [P. L. 347, 349]. McClintock v. Young Republicans [Pa.] 59 A. 691. A writ of mandamus to compel a tax levy to pay city bonds is properly directed to the mayor and city council. Territory v. Socorro [N. M.] 76 P. 283.

83. A writ commanding railroad companies to construct viaducts over tracks across and along city streets, specifying only the width and height above the tracks of such viaducts is not sufficiently definite. Burlington & C. R. Co. v. People [Colo. App.] 77 P. 1026.

84. See 2 Curr. L. 790.

85. State v. Williams [Or.] 77 P. 965.

86, 87. City Council of Denver v. Board of Com'rs [Colo.] 77 P. 858.

88. See 2 Curr. L. 790.

89. Jurisdiction of appellate court: No constitutional question being involved, and the validity of no statute being questioned, the appeal is to the appellate, not the supreme court, in Illinois. Watts v. Sangamon County, 212 Ill. 86, 72 N. E. 11. Supreme court of Louisiana has no jurisdiction of an appeal in mandamus unless the amount in controversy exceeds $2,000. State

Mandamus proceedings in the Federal courts being strictly legal in nature, final orders made thereon are reviewable only by writ of error.[90] None lies until a final order has been made.[91] An appeal will not lie from an order granting an alternative writ,[92] or from an order denying a motion for a peremptory writ.[93] The approved and correct procedure in Minnesota to obtain a review of a decision in mandamus cases is to appeal from the judgment or an order denying a motion for a new trial.[94] In Wisconsin an order is not appealable unless it affects a substantial right.[95] Questions must be properly saved for review.[96]

MANDATE; MARINE INSURANCE; MARITIME LIENS; MARKETS; MARKS, see latest topical index.

MARRIAGE.[97]

§ 1. Nature of Marriage; Capacity of Parties, Fraud, and Duress (528).
§ 2. Licenses and Ceremonial or Formal Essentials of a Valid Contract of Marriage (529). Burden of Proof (529).
§ 3. Validity and Effect (530).
§ 4. Proceedings for Annulment (531).
§ 5. Criminal Offenses (531).

§ 1. *Nature of marriage; capacity of parties, fraud, and duress.*[98]—Marriage is a civil status resulting from contract whereby the parties sustain to each other and to society the relation of husband and wife.[99] There is no duress avoiding it where a man marries to escape prosecution for seduction,[1] or to avoid bastardy proceedings,[2] and no presumption of fraud is indulged thereupon.[3] It is fraudulent to fail to disclose a fact that there is a duty to disclose.[4] The fact that the

v. Board of Assessors [La.] 37 So. 878. An alleged claim against the German government for $500,000 for false imprisonment is not an actionable claim of any ascertainable value, so as to give the supreme court of the United States jurisdiction of an appeal from a judgment of the court of appeals of the District of Columbia, denying a writ of mandamus to compel the secretary of state to press the claim against the German Empire. The matter in dispute must have a money value exceeding $5,000. United States v. Hay, 194 U. S. 373, 48 Law. Ed. 1025.

90. City of Cleveland v. U. S. [C. C. A.] 127 F. 667.

91. In a hearing on plaintiff's demurrer to defendant's return in mandamus proceedings, the court made an order to which plaintiffs excepted in part. Thereafter plaintiffs put in a reply to the return, and the court required defendant to file a rejoinder within a certain time. Held, since plaintiffs had elected to stand by their demurrer, and the court had allowed further pleading, there had been no final order from which a writ of error would lie. Writ dismissed as premature. Jabine v. Sparks [C. C. A.] 131 F. 440.

92. The granting of such writ is a matter of discretion and the remedy of a person aggrieved thereby is by appeal from the final order in the proceeding. People v. O'Donnell, 90 N. Y. S. 961.

93. State v. McKellar [Minn.] 99 N. W. 807.

94. An appeal from an order directing the peremptory writ to issue is irregular practice and should not be encouraged. State v. McKellar [Minn.] 99 N. W. 807. (The opinion collects all the Minnesota mandamus cases since State v. Copeland, 74 Minn. 371, 77 N. W. 221, and classifies them according to the manner in which the appeal was taken. The correct rule is then laid down as above.)

95. An order denying relator's application for an order "prescribing what particular questions arising in said action shall be tried by a jury" was not an order "affecting a substantial right" within Rev. St. 1898, § 3069, and not appealable. Flannigan v. Lindgren [Wis.] 100 N. W. 818.

96. An objection that a finding in mandamus proceedings was erroneous because contrary to an averment in respondent's answer on which no issue was taken was held not reviewable on certiorari, when the point was not raised by an assignment of error in the affidavit for the writ. City of Monroe v. Board of Sup'rs [Mich.] 100 N. W. 896. Where one of several landowners awarded damages for laying out of a road brought mandamus proceedings to compel the auditing of all of such claims on the ground that it was a public duty, and, on appeal, did not offer to amend so as to require the auditing of his claim alone, his right to such individual relief was not considered on appeal. People v. Morgan, 89 N. Y. S. 832.

97. **This topic relates** strictly to the law of marriage, the law of Alimony (3 Curr. L. 146); Divorce (3 Curr. L. 1127); Husband and Wife (3 Curr. L. 1669), which includes coverture being the subject of specific topics.

98. See 2 Curr. L. 794.

99. Cyc. Law Dict. "Marriage."

1. Blankenmiester v. Blankenmiester [Mo. App.] 80 S. W. 706.

2, 3. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806.

4. Chronic venereal disease. Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120.

parties were of different color raises the presumption that the relation between them was not marriage,[5] and in some states prevents the existence of that relation at all,[6] for in many states a marriage between a white person and a negro is void.[7]

§ 2. *Licenses and ceremonial or formal essentials of a valid contract of marriage.*[8]—A marriage may be valid though the consent of a guardian of one of the parties is not obtained as required by statute.[9]

A common-law marriage[10] is formed by cohabitation with intention to assume the relation of marriage,[11] as no particular form is necessary, but it is enough if what was said and done shows that a contract was made.[12] Marriage per verba de futuro cum copula is not consummated, unless the copula is had in fulfillment of the future agreement.[13] The question of the existence of the marriage is for the jury.[14] A ceremonial marriage which is invalid because of the disability of one of the parties may be validated by the continued cohabitation of the parties after the removal of the disability,[15] unless neither of the parties contracted the marriage in good faith.[16] But where there was a meretricious commencement of the cohabitation, there will be no presumption of marriage from its mere continuance.[17] In Kentucky there is no common law marriage.[18]

Burden of proof.[19]—Marriage is presumed from cohabitation in the apparent

5. Rutledge v. Tunno [S. C.] 48 S. E. 297.

6. Not valid between a white person and a negress though they continued to live together after her emancipation in 1865. Keen v. Keen [Mo.] 83 S. W. 526.

7. Evidence that the reputed husband of a white woman was a negro, and that she married him believing him to be a white man. Locklayer v. Locklayer, 139 Ala. 354, 35 So. 1008. Common-law marriage not valid between a white person and a negro, though they continued to live together after her emancipation in 1865. Keen v. Keen [Mo.] 83 S. W. 526.

8. See 2 Curr. L. 795.

9. Pub. Laws 1898-99, p. 49, c. 549, § 11, merely provides certain formalities, but nowhere declares that the marriage will be void if they are not observed; and Gen. Laws 1896, c. 196, § 16, providing that all contracts made by a ward shall be void, does not refer to a contract of marriage. Ex parte Chace [R. I.] 58 A. 978.

10. See 2 Curr. L. 795.

11. Where parties merely agreed to "go to housekeeping," though the woman went by his name, lived with him, and he supported her, there was no marriage. Makel v. Hancock Mut. Life Ins. Co., 95 App. Div. 241, 88 N. Y. S. 757.

12. Cohabitation, recognition of the parties and their friends as husband and wife and holding themselves out as such for 20 years was not sufficient to show marriage and overcome the presumption of innocence in a prosecution for bigamy. State v. Hansbrough, 181 Mo. 348, 80 S. W. 900. Evidence of cohabitation, declarations, and reputation among friends sufficient to show marriage. Klenke v. Noonan [Ky.] 81 S. W. 241. Evidence held insufficient to overcome the presumption of marriage. Tracy v. Frey, 95 App. Div. 579, 88 N. Y. S. 874.

13. The parties had sexual intercourse, but did not live together, and still expected to be married at some future date. Sorensen v. Sorensen [Neb.] 100 N. W. 930.

14. Evidence that parties had sexual intercourse after they were engaged, and that after the woman was with child they registered as man and wife under an assumed name, was sufficient to take the case to the jury. Burnett v. Burnett [Tex. Civ. App.] 83 S. W. 238.

15. The parties were married in the belief that the wife's husband was dead, and before a suit for her divorce, which she had instructed counsel to bring, had been started, a decree was obtained a year later, and the parties lived together for over twenty years, the first husband all the while being alive. Chamberlain v. Chamberlain [N. J. Eq.] 59 A. 813. The woman married a man in good faith, not knowing that he had a wife living in a foreign country, and they lived together as husband and wife for thirteen years after the death of the first wife, and their child could inherit. In re Schmidt, 42 Misc. 463, 87 N. Y. S. 423.

16. But where a woman was divorced from her husband and within two years in defiance of the statute married again, the marriage was not validated though the parties continued to live together after the two years expired [Rev. Laws, c. 151, § 6]. Tozier v. Haverhill & A. St. R. Co. [Mass.] 72 N. E. 953.

17. Evidence insufficient to show that the cohabitation between a white and a negress was marital, so that their child could inherit property. Rutledge v. Tunno [S. C.] 48 S. E. 297. After the parties had cohabited together, the wife secured a divorce from her husband, and the subsequent continued holding of themselves as husband and wife was held not to establish a marriage. Edelstein v. Brown [Tex. Civ. App.] 80 S. W. 1027.

18. All marriages must be contracted in the presence of authorized persons. Klenke v. Noonan [Ky.] 81 S. W. 241.

19. See 2 Curr. L. 795.

relation of husband and wife,[20] and once shown to exist it is presumed to continue.[21] Marriage may be shown by the certificate of marriage,[22] the testimony of an eyewitness of the ceremony,[23] entries in a parish register,[24] evidence of general repute, or the declarations of the parties,[25] and may be inferred,[26] but not conclusively, from the grant of letters of administration.[27] In a suit for divorce, defendant may show in defense to an application for temporary alimony, that there was no marriage.[28]

§ 3. *Validity and effect.*[29]—The validity of a marriage is determined by the law of the state where the ceremony was performed,[30] and the contract made,[31] at least in the absence of affirmative proof of fraudulent evasion of the laws of the domicile.[32] A foreign marriage though invalid while a decree divorcing one of the parties from a former marriage remains interlocutory[33] is thereafter valid despite a prohibition in the decree to remarry.[34] The presumption in favor of innocence raises a presumption against a former marriage,[35] but a marriage will not be presumed to have been dissolved merely because the parties are living apart.[36]

20. The common law presumes marriage as it presumes every man innocent; it is one of the strongest presumptions known to the law. Tracy v. Frey, 95 App. Div. 579, 88 N. Y. S. 874.

21. State v. Eggleston [Or.] 77 P. 738.

22. The certificate of the marriage of Shaw might in connection with other evidence be admissible to identify the parties, though plaintiff's father's name was Sharpe. Dailey v. Frey, 206 Pa. 227, 55 A. 962.

23. Prosecution for adultery. State v. Eggleston [Or.] 77 P. 738.

24. The laws of the state where kept did not authorize their admission; they were not admissible without proof of the clergyman's handwriting. Murphy v. People, 213 Ill. 154, 72 N. E. 779.

25. Prosecution for adultery. State v. Still [S. C.] 46 S. E. 524. In a prosecution for bigamy, evidence that 3 weeks before his second marriage defendant had declared that he wished he could hear that his first wife was dead and that he was a free man, was admissible. State v. Goulden, 134 N. C. 743, 47 S. E. 450.

26, 27. Phillips v. Heraty [Mich.] 100 N. W. 186.

28. Evidence that at time of alleged marriage plaintiff was the undivorced wife of another. Reed v. Reed [Miss.] 37 So. 642.

29. See 2 Curr. L. 796.

30. Divorce from previous husband valid. McHenry v. Brackin [Minn.] 101 N. W. 960. Incestuous marriage of uncle and niece. Stapleberg v. Stapleberg [Conn.] 58 A. 233.

Capacity of parties decided by law of place of celebration: The statutes of Rhode Island made a guardian's written consent requisite for obtaining a marriage license and also provided that all contracts made by a ward should be void. A Rhode Island man, under guardianship, married a Rhode Island woman in Massachusetts, without the consent of his guardian. Held, that whether a marriage so celebrated in the state would be valid or not, this one as it was lawfully celebrated in Massachusetts, must be regarded as valid. Ex parte Chace [R. I.] 58 A. 978.

Note. This is a decision of a new jurisdiction on a question on which there is a square conflict of authority. The general rule in this country is that a marriage, valid where celebrated, is valid everywhere even if it would have been invalid if performed in the domicile of the parties. Commonwealth v. Lane, 113 Mass. 458. In England the law formerly was the same. Dalrymple v. Dalrymple, 2 Hag. Con. 54. But it is now settled in England that the law of the domicile of the parties determines the capacity to marry. Sottomayor v. De Barros, 3 P. D. 1. The English view has some support here, but most of the cases can be brought within the admitted exception that such foreign marriages will not be recognized if against the policy of the law or contrary to good morals. See Commonwealth v. Lane, 113 Mass. 458. The doctrine of the principal case seems preferable to the English view, which is apt frequently to result in marriages being held good in some countries and void in others. Brook v. Brook, 9 H. L. Cas. 193. The American view accords with the earlier cases, and greatly lessens the probability of such disastrous conflicts.—18 Harvard L. R. 226.

See note on the **validity of foreign marriages,** 2 Curr. L. 796.

31. Klenke v. Noonan [Ky.] 81 S. W. 241.

32. The adult man, who had been placed under guardianship in R. I. as likely to bring himself to want, and woman, both residents of R. I., went to Mass. and were married without the consent of the guardian which the laws of R. I. required, and then returned and lived in R. I. The woman was allowed a writ of habeas corpus in behalf of her husband, against his guardian. Ex parte Chace [R. I.] 58 A. 978.

33, 34. Petit v. Petit, 45 Misc. 155, 91 N. Y. S. 979.

35. Opposed to the evidence of a marriage certificate was the fact that the husband of the alleged latter marriage treated his child as legitimate, that the husband of the alleged previous marriage never made any objection, and that there was a possible confusion of names in the first marriage certificate. Dailey v. Frey, 206 Pa. 227, 55 A. 962. The will referred to the child of the first union as illegitimate and the mother never made any claim, while the second union was celebrated with the lawful forms. Murphy v. People, 213 Ill. 154, 72 N. E. 779.

36. Evidence sufficient to show petitioner

The marriage contract of an infant is voidable only at his election.[37] Evidence of mental weakness alone is not enough to show that a marriage was void.[38] The marriage of the parents renders the offspring legitimate.[39]

§ 4. *Proceedings for annulment.*[40]—Marriage may be annulled, where entered into through duress[41] or fraud, and the action will not be dismissed for collusion where no such issue was determined by the trial court.[42] Though invalid because formed while a divorce decree against a party was not yet final it will not be annulled if the parties have for a long time recognized it.[43] In an action for divorce or separation, defendant cannot, by way of counterclaim, demand the annulment of the marriage.[44] A suit may be brought in behalf of a lunatic to annul the marriage,[45] but a father cannot bring suit for the annulment of the marriage of his infant daughter without making her a party to the action.[46] In a suit to annul the marriage, the court will allow the woman counsel fees, expenses,[47] or alimony.[48] But a judgment in favor of the wife for separation is a bar to any action to annul the marriage.[49]

§ 5. *Criminal offenses.*[50]—An indictment for falsely swearing to a marriage license affidavit made before a deputy clerk is sustainable.[51]

MARRIAGE SETTLEMENTS, see latest topical index.

MARSHALING ASSETS AND SECURITIES.[52]

The doctrine of marshaling assets and securities is that, where there are two funds, one creditor having security in both and another in one of them, equity will compel the former to first exhaust the security in which his interest is exclusive.[53] It is the duty of the junior incumbrancer to demand that resort be

was the husband of deceased, though they had lived apart for many years. In re Cote's Estate, 98 Me. 415, 57 A. 584.

37. Not voidable because of nonconsent of parent. Wood v. Baker, 43 Misc. 310, 88 N. Y. S. 854.

38. Aldrich v. Steen [Neb.] 98 N. W. 445.

39. The right of the bastard to inherit depends on the law of the place where the property is. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806.

40. See 2 Curr. L. 798.

41. No duress where married to escape prosecution for seduction. Blankenmiester v. Blankenmiester [Mo. App.] 80 S. W. 706.

42. Chronic venereal disease from which the party had practically recovered, but there had been no cohabitation. Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120.

43. Petit v. Petit, 45 Misc. 155, 91 N. Y. S. 979.

44. Code Civ. Proc. § 1770, provides that a cause of action against the plaintiff for divorce or separation may be interposed. Durham v. Durham, 99 App. Div. 450, 91 N. Y. S. 295.

45. It is properly instituted by a "next friend," but the committee or guardian should be made a party defendant and it is not necessary that the party should have been declared insane at the time of the marriage. Mackey v. Peters, 22 App. D. C. 341. Evidence insufficient to show defendant insane at the time of the marriage. Smith v. Smith [Ala.] 37 So. 638.

46. The right to maintain the action is in behalf of the infant, the marriage contract being only voidable at her election, and cannot be annulled merely for the nonconsent of the parent. Wood v. Baker, 43 Misc. 310, 88 N. Y. S. 854.

47. Suit to annul for defendant's physical incapacity. Gore v. Gore, 44 Misc. 323, 89 N. Y. S. 902. Must be allowed by the trial court. Blankenmiester v. Blankenmiester [Mo. App.] 80 S. W. 706.

48. Incestuous marriage of uncle and niece, and the latter though not without fault was allowed $1,100, the defendant being worth $10,000. Stapleberg v. Stapleberg [Conn.] 58 A. 233.

49. The validity of the marriage is res judicata. Durham v. Durham, 99 App. Div. 450, 91 N. Y. S. 295.

50. See 2 Curr. L. 798.

51. Charge that it was made before A. L. K. deputy clerk, while it was sworn to before A. K. clerk by A. L. K. deputy; but conviction reversed because erroneous evidence admitted as to identity of defendant. Mahon v. State [Tex. Cr. App.] 79 S. W. 28.

52. See 2 Curr. L. 798. As to marshaling liens, see topic Liens, 4 Curr. L. 433.

53. See Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284; Harrigan v. Gilchrist [Wis.] 99 N. W. 909. Vendor reserving lien on land sold and taking mortgage on other property of the vendee as security for purchase price will be compelled, as against junior lienor on mortgaged premises, to first resort to the land sold. Id. An agent drawing a check on a trust fund to pay charter hire on a vessel, and, before the check was paid, depositing in the same account money received as freight from such vessel, held such deposit should be first applied to the

irst had to property upon which the paramount lien is exclusive,[54] and the burlen is upon him to show that he will receive a benefit from the proceeding, and hat the senior lienors will not be materially prejudiced thereby.[55] The doctrine ias been invoked in bankruptcy cases,[56] and in proceedings to wind up insolvent :orporations.[57]

Limitations of doctrine.[58]—The rule cannot be applied to the prejudice of the :enior lienor[59] or third parties,[60] nor can it be enforced against others than the :ommon debtor.[61] A suit to marshal assets will not lie where there is a pending :quity suit in which the right to relief must be necessarily determined.[62]

Liability of paramount creditor.[63]—Unless the remaining security is sufficient :o satisfy all claims,[64] a senior lienor by releasing his right to the singly charged)roperty with notice of a junior lienor's right will be deemed to have waived his 'ight to the doubly charged property to the extent of the amount so released.[65]

)ayment of the check as far as it would go. Bank of British North America v. Freights, etc., of The Ansgar, 127 F. 859. See 2 Curr. L. 798, n. 13.

54. In absence of such a demand junior nortgagee cannot object to first mortgagee)roceeding against property covered by both. Rev. Civ. Code, § 2033 [which is merely declaratory of the equity rule] considered. Blanchette v. Farsch [S. D.] 99 N. W. 79.

55. Gibson v. Honnett [Ark.] 82 S. W. 38. Bill by purchaser showing mortgages amounting to $8,000, and that the value of he property was only $7,700, and failing o show that plaintiff could attack any of the nortgages for fraud held demurrable. Id.

56. Secured creditors will be required to exhaust collateral before receiving dividends, ind are entitled to dividends only on the)alance due after they have credited the proceeds of the collateral on their claim. In re Matthews, 132 F. 274. See 2 Curr. L. 799, n. 15.

57. In equity a creditor of an insolvent whose estate is in process of administration under judicial supervision, having a secured claim against such insolvent, may)rove it to the full amount, and in such case he is entitled to share with general creditors upon that basis in every general distribution of trust funds till the dividends, ogether with the receipts, if any, from the ecurity, are sufficient to fully pay such laim, the residue of the security remaining to belong to the trust fund or to the)wner of the equity. Harrigan v. Gilchrist Wis.] 99 N. W. 909. The plaintiff having lent to the defendant's assignor ten housand dollars, and received as collateral security notes held by the debtor, petitioned for its share of the dividends declared after the general assignment. Held, hat the plaintiff may surrender the collatrals and share in the distribution upon its ntire claim or deduct the face value of the ecurity from the debt and receive dividends pon the balance. Union & Planters' Bank v. Duncan [Miss.] 36 So. 690.

Note: The decision is opposed to the esult in a majority of jurisdictions, though he cases are in conflict. See Merrill v. National Bank of Jacksonville, 173 U. S. 131; Wurtz v. Hart, 13 Iowa, 515. The holder of collateral security does not by accepting it surrender his primary right against the debtor personally. When the debtor makes a general assignment, the personal right is converted into an equitable claim against the assets in the hands of the assignee, which remains equally distinct from the right against the security. Paddock v. Bates, 19 Ill. App. 470. Hence the creditor should be permitted to collect dividends upon his entire claim and to supply any deficiency out of the proceeds of the collaterals. Should the dividends plus the proceeds exceed the amount of the debt, the creditor will hold the balance in trust for the assignee. See Graeff's Appeal, 79 Pa. 146. If in consequence the secured creditor recovers his entire claim while other creditors do not, this is but the natural result of foresight in obtaining security. Statutes, however, in some jurisdictions require the surrender of collaterals as a condition to receiving dividends upon the whole claim. See Swedish-American Nat. Bank v. Davis, 64 Minn. 250.—18 Harvard L. R. 144.

58. See 2 Curr. L. 799.

59. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

60. Where a mortgage covers three tracts of land, the holder of purchase-money notes for one of the tracts cannot compel the mortgagee to first resort to the other two tracts, the latter having both been sold to third parties. Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284.

61. A senior lienor cannot be required to look first to indorsers, guarantors or sureties before resorting to the property on which he is secured in common with junior lienors. Bennett v. First Nat. Bank [Iowa] 102 N. W. 129. That bonds are indorsed does not make the rule applicable. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885. See 2 Curr. L. 799, n. 19. Wife's property being mortgaged to secure debt of husband, the latter's curtesy, after death of wife, should be applied to the payment of the debt to the exoneration of the wife's interest. Harrington v. Rawls, 136 N. C. 65, 48 S. E. 571.

62. Suit to make prior mortgagee look to land for compensation before resorting to condemnation award. Bates v. Boston El. R. Co. [Mass.] 72 N. E. 1017.

63. See 2 Curr. L. 800.

64. Where first mortgagee released premises exclusively covered by his mortgage. Blanchette v. Farsch [S. D.] 99 N. W. 79.

65. Where senior chattel mortgagee with knowledge of junior mortgagee's rights sur-

MARSHALING ESTATE; MARTIAL LAW, see latest topical index.

MASTER AND SERVANT.

§ 1. The Relation of Statutory Regulations (533). Termination of the Relation (534). Notice of Termination (534). Actions for Wrongful Discharge (534). Actions for Breach by Employer (536). Labor Laws (536).

§ 2. The Right of Master in Services of Employe and Compensation Therefor; Assignments of Wages; Trade Secrets; Statutory Provisions (537).

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C. Methods of Work, Rules and Regulations (553). Operation of Trains (554).

D. Warning and Instructing Servant (555).

E. Fellow-Servants (557). Determination of Relation (559). Employers' Liability Acts (566).

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H. Actions (584).

1. In General (584).
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A. In General (608).

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§ 5. Interference with Relation by Third Person (612).

§ 6. Crimes and Penalties (612).

§ 1. *The relation and statutory regulations.*[1]—The relation of master and servant rests upon contract, express or implied, and the existence of the relation is to be determined by reference to the principles applicable to other contracts.[2] Whether the relation established is that of master and servant, or employer and independent contractor, depends upon the terms of the contract, the test being, in general, the degree of control exercised by the one over the other, in the performance of the particular service or work contracted for.[3] Where services originally rendered under an express contract are continued after expiration of the term, without objection by the employer, an implied contract of service is created;[4] the law presuming a renewal of the original agreement.[5] But this presumption does not apply unless it appears that there was, in fact, a prior contract and that the servant rendered services thereunder for a full term;[6] nor does the presumption arise from the fact that a servant's immediate predecessor had a definite contract.[7] The parties are bound by the construction which they have themselves placed

rendered proceeds of singly charged property, held to have waived his right to a paramount lien. First Nat. Bank v. Taylor [Kan.] 76 P. 425. See 2 Curr. L. 800, n. 34.

1. See 2 Curr. L. 801.

2. See Contracts, 3 Curr. L. 805; Implied Contracts, 3 Curr. L. 1690. To create the relation of master and servant there must be some contract or some act by one person recognizing the other as a servant. Atlanta & W. P. R. Co. v. West [Ga.] 49 S. E. 711.

3. The relation of employer and independent contractor is separately treated. See Independent Contractors, 3 Curr. L. 1702.

4. Professor in agricultural college. State Board of Agriculture v. Meyers [Colo. App.] 77 P. 372. That an employe had a contract with a corporation the previous year, and had continued to work and receive the same wages until discharged, was evidence of a contract express or implied, sufficient to go to the jury on that issue. Dunton v. Derby Desk Co. [Mass.] 71 N. E. 91.

5. Civ. Code Cal. § 2012. Gabriel v. Bank of Suisun [Cal.] 78 P. 736.

6. Caldwell v. Caldwell, 88 N. Y. S. 970.

7. Higgins v. Shepard [Mass.] 70 N. E. 1014.

upon their contract.[8] A labor organization cannot, as an organization, make contracts of employment for its members;[9] and an agreement to work under the rules of an organization as to compensation and time of payment cannot be inferred from the mere fact of membership and knowledge of the rules.[10]

Termination of the relation.[11]—If the contract of employment is for an indefinite time, the employer may discharge the employe at any time;[12] but if the contract is for a definite term, the employe has a right of action for his discharge before the end of such term,[13] unless the right of discharge is reserved by the employer by the terms of the contract,[14] or the discharge is for sufficient cause, such as disobedience of lawful and reasonable orders connected with his employment.[15] The right to discharge does not include the right to destroy the employe's property, if not promptly removed.[16] Any form of words which conveys to the servant the idea that his services are no longer required is sufficient to constitute a discharge.[17] An employe who has been discharged either in accord with or in violation of the terms of the contract of service, and has accepted or acquiesced in such discharge, is not required to return to the service at the request or importunity of the master.[18]

Notice of termination.[19]—A rule of a company requiring employes to work a six days' notice before leaving the service is reasonable.[20] Where a contract for a term provided for a continuance of the relation, if services proved satisfactory, the employer was held not bound to give the employe notice of his dissatisfaction with the services rendered, when such dissatisfaction ought reasonably to have been inferred from the employer's conduct.[21]

Actions for wrongful discharge.[22]—A servant wrongfully discharged may treat the contract as terminated and sue as upon a quantum meruit,[23] or may stand upon his contract, and recover under its terms, and for damages for its breach.[24]

8. Where parties had agreed upon higher wages for services as engineer, the agreement was a construction of the original contract as not including services as engineer, but only general services around sawmill. Wilson v. Godkin [Mich.] 98 N. W. 985.

9. Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S. W. 136.

10. Rules of Miners' Union held not binding on a miner. Burnetta v. Marceline Coal Co., 180 Mo. 241, 79 S. W. 136.

11. See 2 Curr. L. 803.

12. Contract with local agent of commission company held to be for an indefinite time. Harrington v. Brockman Commission Co. [Mo. App.] 81 S. W. 629. A contract of employment is not enforceable unless the term is definitely fixed at the time the contract is made. Held, contract not for a definite term. Hickey v. Kiam [Tex. Civ. App.] 83 S. W. 716. Evidence held not to show hiring for any definite term. Lertora v. Central Fruit Co., 87 N. Y. S. 425. Evidence in action for breach of contract of employment held insufficient to prove that plaintiff was employed as a milliner for a season. Walker v. McCormick, 88 N. Y. S. 106. An agreement to pay for future services at a certain rate per month is not as a matter of law a hiring for a month. Kososki v. Kelly [Wis.] 100 N. W. 1037.

13. Evidence sufficient to show a contract of employment for a definite term. Johnson v. Crookston Lumber Co. [Minn.] 100 N. W. 225.

14. Evidence held to show contract subject to right of master to discharge for incompetency. McKeithan v. American Tel. & T. Co., 136 N. C. 213, 48 S. E. 646.

15. Kenner v. Southwestern Oil Co. [La.] 36 So. 895.

16. Landlord had right at any time to dismiss janitress or servant, but had no right to destroy her belongings though she did not remove them; he had the right only to put them out. Behm v. Damm, 91 N. Y. S. 735.

17. Johnson v. Crookston Lumber Co. [Minn.] 100 N. W. 225.

18. Youngberg v. Lamberton, 91 Minn. 100, 97 N. W. 571.

19. See 2 Curr. L. 803, n. 58.

20. Willis v. Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177.

21. As where employer neither obtained nor sought any benefit from the contract. Carter & Co. v. Weber [Mich.] 101 N. W. 818. Nor was defendant estopped, by silence and failure to answer letters, to set up such dissatisfaction. Id.

22. See 2 Curr. L. 804.

23. James v. Parsons, Rich & Co. [Kan.] 78 P. 438. An action for damages for breach of contract because of wrongful discharge is entirely distinct from an action for wages. Allen v. Glen Creamery Co., 91 N. Y. S. 935.

24. James v. Parsons, Rich & Co. [Kan.] 78 P. 438. A professor in a college is an employe entitled to damages for breach of his contract of service if wrongfully dis-

But he cannot pursue both remedies; an election of one bars the other.[25] Whether a discharge was wrongful, in a given instance, is usually a question of fact,[26] and the burden is upon the master to prove a justification.[27] The motive, or the reason assigned, for a discharge, is wholly immaterial if at the time there existed a sufficient ground for the discharge.[28] An employe wrongfully discharged before the expiration of his term may recover the contract price for the remainder of the term, less what he has earned or might earn by reasonable diligence.[29] It is the duty of a wrongfully discharged employe to endeavor in good faith to find other work of a like kind to that he agreed to perform,[30] and if he fails to procure it, having made reasonable efforts to do so, he may recover the contract price of his services for the period of his employment, or up to the time of trial.[31] But if he fails to use such reasonable diligence to procure other employment, his damages should be mitigated to the extent of compensation which he might have received by proper effort.[32] An employer, in order to show himself entitled to a reduction of the agreed compensation, must allege and prove that the employe could have earned wages at similar work;[33] he need not show that the employe actually

charged. State Board of Agriculture v. Meyers [Colo. App.] 77 P. 372.

25. Discharged salesman recovered, immediately after his discharge, the amount due him, and for three days' work for which his compensation was not due. Held, this recovery barred subsequent action on the contract, and for damages for breach. James v. Parsons, Rich & Co. [Kan.] 78 P. 438. Plaintiff, by suing for damages for breach of contract to employ him as manager of an opera house, leased by defendant for five years, plaintiff to receive half the profits, elected to accept the repudiation of the contract; hence the measure of his damages was half the prospective profits, and not half the value of the lease. Greenwall Theatrical Circuit Co. v. Markowitz [Tex.] 79 S. W. 1069.

26. Whether contract was terminated by mutual consent, or whether discharge was wrongful, held for jury. Webb v. Whitesell, 87 N. Y. S. 454. Where an employe was injured and incapacitated, and procured a substitute who remained until the regular employe returned, the mere fact that the latter did not return as soon as he promised, would not absolutely justify his discharge. Johnson v. Crookston Lumber Co. [Minn.] 100 N. W. 225. Discharge of creamery employe justified where he allowed cream to sour in cans, his duty being to separate it from the milk and deliver it sweet. Allen v. Glen Creamery Co., 91 N. Y. S. 935.

Evidence: Held sufficient to support verdict that employe was wrongfully discharged, under terms of contract. Turnbull v. Frey [Neb.] 99 N. W. 648. Evidence of a loss in defendant's business generally is irrelevant on the issue of a superintendent's misconduct, and to show he was rightfully discharged. Dunton v. Derby Desk Co. [Mass.] 71 N. E. 91.

27. As to prove incompetency when that is relied on as a defense. McKeithan v. American Tel. & T. Co., 136 N. C. 213, 48 S. E. 646.

28. So where servant was incompetent, master was not obliged to show that this was the cause or reason for the servant's discharge. McKeithan v. American Tel. & T. Co., 136 N. C. 213, 48 S. E. 646.

29. Forked Deer Pants Co. v. Shipley, 25 Ky. L. R. 2299, 80 S. W. 476; Jones v. Oppenheim, 91 N. Y. S. 343. The measure of damages for breach of a contract of service is what the plaintiff would actually have earned under the contract; and to ascertain the amount the acts of both parties before and after the breach may be considered. Dunham v. Hastings Pavement Co., 95 App. Div. 360, 88 N. Y. S. 835. Evidence insufficient to prove right to commissions on profits in action to recover damages for wrongful discharge. Brightson v. Claflin Co. [N. Y.] 72 N. E. 920.

30. Weber Gas & Gasoline Engine Co. v. Bradford [Tex. Civ. App.] 79 S. W. 46. Must use reasonable diligence to find other employment of a similar nature. Alaska Fish & Lumber Co. v. Chase [C. C. A.] 128 F. 886; Forked Deer Pants Co. v. Shipley, 25 Ky. L. R. 2299, 80 S. W. 476. Evidence that a director of defendant company was also connected with other salt plants was admissible on issue whether discharged employe was able to secure other employment as superintendent of such plants Lone Star Salt Co. v. Wilderspin [Tex. Civ. App.] 81 S. W. 327.

31. Weber Gas & Gasoline Engine Co. v. Bradford [Tex. Civ. App.] 79 S. W. 46. One employed for a term to perform such services, in regard to mining claims in Alaska, as his employer should require, was not obliged to remain in Alaska, after his discharge, after having used reasonable diligence in procuring other employment, in order to recover damages; especially since his employer consented to his leaving and paid his expenses home. Gillespie v. Ashford [Iowa] 101 N. W. 649.

32. Since the measure of his damages is the actual damage suffered—not the amount contracted to be paid, the action being solely for breach of the contract. Alaska Fish & Lumber Co. v. Chase [C. C. A.] 128 F. 886. The deduction must not exceed the amount the employe could and should have earned. Weber Gas & Gasoline Engine Co. v. Bradford [Tex. Civ. App.] 79 S. W. 46.

33, 34, 35. Weber Gas & Gasoline Engine

worked at other employment.[34] A claim for damages up to the time of trial is a relinquishment of any claim for the remainder of the term.[35] The value of plaintiff's services is immaterial on the question of damages for breach of the contract, if no cause for the discharge is alleged or proven.[36] To recover for breach of the contract, the employe must prove performance by himself.[37] In an action for damages for wrongful discharge, plaintiff need not allege and show affirmatively that he sought and could not obtain other employment, or that he stood in readiness to perform after the contract had been terminated.[38] The burden rests upon defendant to show that other employment might have been found, or that it had been offered and declined.[39] That a complaint in an action for wrongful discharge demands money as due rather than as damages does not render it defective.[40]

Actions for breach by employer.—An employer cannot recover damages from an employe for failure to perform, if he himself has not fully performed,[41] or if the contract was broken by fault of both parties.[42] Contract provisions for liquidated damages for breach by the servant are enforceable.[43]

Labor laws.[44]—The New York eight-hour law;[45] the Kansas act providing for the recovery of damages by a servant discharged because he belongs to a labor

Co. v. Bradford [Tex. Civ. App.] 79 S. W. 46.

36. Gillespie v. Ashford [Iowa] 101 N. W. 649. Where there is no evidence tending to show the servant's incompetency or unfaithfulness, the fact that his services may not have been profitable is immaterial on the question of damages. Weber Gas & Gasoline Engine Co. v. Bradford [Tex. Civ. App.] 79 S. W. 46.

37. Jones v. Oppenheim, 91 N. Y. S. 343.

38, 39, 40. Allen v. Glen Creamery Co., 91 N. Y. S. 935.

41. Plaintiff employed defendant as insurance solicitor, agreeing, as a part of the contract between them to make certain advancements to defendant. Held, plaintiff's failure to make the promised advancements was a breach of the contract, so that plaintiff could not recover from defendant thereafter, for failure to perform. Arbaugh v. Shockney [Ind. App.] 71 N. E. 232.

42. Where employer sought damages for breach of contract, and it appeared the employment ceased through fault of both parties, the employe was allowed what he had actually earned, and neither party was allowed damages. Braun v. Weill [La.] 36 So. 87.

43. A provision in a contract for a definite term that the employer is to retain six days' pay until the contract is fully performed is a valid provision for liquidated damages for a breach, and not a penalty. Wilson v. Godkin [Mich.] 98 N. W. 985. An agreement that a fixed sum is to be deducted from wages each week as a guaranty for the observance of an agreement by the servant not to strike or leave the employment without the master's consent, is not invalid for want of mutuality or consideration. Silberman v. Schwarcz, 90 N. Y. S. 382.

44. See 2 Curr L. 802.

NOTE. Validity of statutes limiting hours of labor: The Federal supreme court has held that state laws are not invalid as in violation of the 14th amendment, since that amendment was not designed to interfere with the police power of the states. Barbier v. Connolly, 113 U. S. 27, 28 Law. Ed. 923. But the decision of the supreme court of the United States that a statute does not conflict with the 14th amendment is not binding on the courts of other states in favor of the constitutionality of the statute under the state constitutions. In re Morgan, 26 Colo. 415, 58 P. 1071, 77 Am. St. Rep. 269, 47 L. R. A. 52. Eight-hour laws were held invalid because infringing freedom of contract in Seattle v. Smyth, 22 Wash. 327, 60 P. 1120, 79 Am. St. Rep. 939; Fiske v. People, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291. Elsewhere such laws are held not to infringe freedom of contract. Atkin v. Kansas, 191 U. S. 207, 48 Law. Ed. 148. Statutes limiting the hours of labor of females are held not an unlawful interference with life, liberty, or property in State v. Buchanan, 29 Wash. 602, 70 P. 52, 92 Am. St. Rep. 930, 59 L. R. A. 342; and Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825.

The Kansas statute limiting hours of labor on public works is constitutional, being a direction of the state to its agents. In re Dalton, 61 Kan. 257, 59 P. 336, 47 L. R. A. 380. Eight-hour laws were held unconstitutional in Law v. Rees Printing Co., 41 Neb. 127, 59 N. W. 362, 43 Am. St. Rep. 670, 24 L. R. A. 702; In re Eight Hour Law, 21 Colo. 29, 39 P. 328; Ritchie v. People, 155 Ill. 98, 40 N. E. 457, 46 Am. St. Rep. 315, 29 L. R. A. 79. Such statutes were held valid as an exercise of the police power of the state in Holden v. Hardy, 169 U. S. 366, 42 Law. Ed. 780 (affirming Utah decisions); Short v. Bullion-Beck & C. Min. Co., 20 Utah, 20, 57 P. 720, 45 L. R. A. 603; Commonwealth v. Beatty, 15 Pa. Super. Ct. 5; In re Ten-Hour Law, 24 R. I. 603, 54 A. 602, 61 L. R. A. 612; State v. Cantwell [Mo.] 78 S. W. 569.—See note to People v. Orange County Road Const. Co., 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33. And see decision of Federal supreme court on New York statute limiting hours of labor of bakers. People v. Lochner, (not yet reported). See, also, 2 Curr. L. 802.

45. Laws 1897, p. 462, c. 415, § 3, as amended by Laws 1899, p. 1172, c. 567, which limits hours of work of employes of inde-

organization;[46] part of the Indiana act directed against blacklisting;[47] the Alabama act relative to the abandonment of contracts by employes and renters of lands;[48] and the California act limiting the compensation to be received by employment agents,[49]—have been held unconstitutional. Decisions construing the California and New York eight-hour laws are treated in the note.[50]

§ 2. *The right of master in services of employe and compensation therefor; assignments of wages; trade secrets; statutory provisions.*[51]—Where there is a contract,[52] the amount of the servant's compensation[53] and the time of payment[54] de-

pendent contractors for public works to eight hours per day, except in emergencies, is unconstitutional because in conflict with the rights of municipal corporations conferred by the state constitution. People v. Grout [N. Y.] 72 N. E. 464.

Note: See, also, People v. Coler, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814; People v. Orange County Road Construction Co., 175 N. Y. 84, 67 N. E. 129, 65 L. R. A. 33; Atkin v. Kansas, 191 U. S. 207, 48 Law. Ed. 148; and Ryan v. New York, 177 N. Y. 271, 69 N. E. 599, discussed and distinguished. See, also, 2 Curr. L. 802.

46. The right to terminate a contract of service is within the protection of constitutional provisions which guaranty to every citizen protection of life, liberty, and property [Laws 1897, c. 120, is void]. Coffeyville Vitrified Brick & Tile Co. v. Perry [Kan.] 76 P. 848.

47. Burns' Rev. St. 1894, § 7077 (Act March 9, 1889) providing for the recovery of damages by a servant who has been blacklisted by a corporation, is unconstitutional in so far as it includes employes who have voluntarily left their employment, since the title only includes discharged employes. Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003.

48. Act March 1, 1901, making it a penal offense for an employe or renter of lands, already under contract, to abandon such contract and make another of a similar nature with a third person, without the consent of the other party, or without sufficient excuse, or without giving notice of the prior contract, is repugnant to the state constitution and the 14th amendment of the federal constitution. Toney v. State [Ala.] 37 So. 332.

49. St. 1903, p. 14, c. 11, § 4, makes it unlawful for an employment agent to receive as compensation more than 10 per cent of the first month's wages in the employment furnished. Held, that the statute is not within the police power, and contravenes the constitutional guarantee of protection to property. Ex parte Dickey, 144 Cal. 234, 77 P. 924.

Note. A writer in the Harvard Law Review, commenting on the last cited California case, says: "The constitutional right to make contracts is not unlimited, and interference by the police power seems increasing. Limitations may be imposed where public health or safety is concerned, and in business affected with a public interest so as to be virtually a monopoly, charges may be fixed. Munn v. Illinois, 94 U. S. 113, 24 Law. Ed. 77. A conflict, however, exists as to the state's right to interfere to prevent oppression where people only nominally on an equality are contracting. Thus weekly payment acts and 'truck acts' have been sustained. Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 Law. Ed. 55. See Opinion of the Justices, 163 Mass. 589, 28 L. R. A. 344. Other courts have denounced them as destroying the constitutional liberty of contract. Republic, etc., Co. v. State, 160 Ind. 379. See Vogel v. Pekoc, 157 Ill. 339, 30 L. R. A. 491. Usury laws, the validity of which is unquestioned, look toward the prevention of oppression doctrine, but the argument is weakened by the fact that historically they are restrictions on a privilege, and that they existed before the Constitution. Employment agencies do not seem within the doctrine of Munn v. Illinois, 94 U. S. 113, 24 Law. Ed. 77. It is true they may be regulated to prevent fraud. Price v. People, 193 Ill. 114, 86 Am. St. Rep. 306, 55 L. R. A. 588. But as to fixing rates the present decision seems correct; the doctrine of protection from oppression, if valid at all, seems one to be strictly confined if everybody is not to be put under legislative tutelage."—18 Harv. L. R. 151.

50. Under St. 1899, p. 149, c. 114, prohibiting public contractors from requiring more than eight hours of work per day from their workmen, and providing for penalties for nonobservance of the law, such penalties can only be withheld by the person or officer whose duty it is to pay the money due under the contract; and the amount stipulated in the contract is all that can be withheld. Worthington v. Breed, 142 Cal. 102, 75 P. 675. A national guard armory is a state institution within the meaning of the labor law exempting employes of state institutions from the provision that eight hours shall constitute a day's work. Burns v. Fox, 90 N. Y. S. 254.

51. See 2 Curr. L. 805.

52. An offer of service at a certain price may be accepted by action of the employer, allowing the employe to render services without objection to the offer. Pettis v. Green River Asphalt Co. [Neb.] 99 N. W. 235.

53. Contract of employment of advertising solicitor construed as providing for a minimum compensation of $50 per week. Weik v. Williamson-Gunning Advertising Co. [Mo. App.] 84 S. W. 144. Whether compensation received from third parties, who furnished peas to a canning factory, was to be applied on compensation to plaintiff for work for defendants, held a question of fact. Genco v. Remington, 91 N. Y. S. 898.

54. Salesman's contract construed as calling for payment of commissions as sales were made during the year, and not an entire contract under which nothing became due until the end of the year. Bair v. Hilbert, 84 App. Div. 621, 82 N. Y. S. 1010. Under a contract of service whereby a salesman was to be allowed to draw $50 per

pend upon its terms. Where the contract does not specify the rate of compensation, the law implies a promise to pay what the services are reasonably worth.[55] The right to compensation ceases at the expiration of the term.[56] A promise to pay for services rendered under an abandoned contract must be supported by a sufficient consideration.[57] A servant may become personally liable for advances in excess of his commissions, though his contract does not provide for such liability, where he quits the employment.[58]

To recover the agreed compensation, the servant must prove full performance of the contract by himself; a breach of his contract by engaging in other employment, when his master is entitled to his exclusive services,[59] or by quitting the service, without excuse, before the end of his term,[60] will defeat a recovery and give the master a cause of action for damages for the breach.[61] Wrongful conversion of his master's property will defeat a recovery,[62] unless the right to insist on a forfeiture of wages on this ground has been waived by the master's retaining the servant in his employ.[63] Holdings as to the sufficiency of pleadings,[64] the sufficiency[65] and admissibility[66] of evidence in actions to recover compensation, are given in the notes.

week for his personal use, such withdrawals to be charged to his commission account, the salesman was entitled to be paid $50 each week regardless of the amount of accrued commissions then due him, and his commissions were payable to him only at the end of his term of employment. Schwerin v. Rosen, 90 N. Y. S. 407.

55. Elwell v. Roper, 72 N. H. 585, 58 A. 507. Findings construed to mean that contract of employment was continued during a certain month, and that services thereafter were to be paid for on quantum meruit. De La Cuesta v. Montgomery, 144 Cal. 115, 77 P. 887.

56. An employe by the month is not entitled to pay after his discharge at the end of the month. Whitmore v. Werner, 88 N. Y. S. 373.

57. A baker, hired for a month, left without excuse after 18 days; was rehired at a weekly rate, but quit after 2 days. Held, he could not recover for the 18 days' work, even though a promise be implied to pay therefor. Natalizzio v. Valentino [N. J. Law] 59 A. 8.

58. Kupfer v. Holtzmann, 88 N. Y. S. 362.

59. Under a contract for a term of six months, whereby a salesman agreed to sell a certain amount of goods at a salary payable in weekly instalments, the employer was entitled to the salesman's exclusive services during that time, and engaging in other additional employment would amount to a breach by the salesman. Seaburn v. Zachmann, 90 N. Y. S. 1005.

60. Natalizzio v. Valentino [N. J. Law] 59 A. 8. Where salesman, payable in weekly instalments, left his employment without cause, he could not recover for the week during which the breach occurred, nor for any future week. Seaburn v. Zachmann, 90 N. Y. S. 1005. An employe by the month, not paid the first month, who leaves in the middle of the second month, can recover only for the actual wages earned; nonpayment for the first month was not a discharge. Wheaton v. Higgins, 90 N. Y. S. 1041.

61. Where employe, after breach of his contract, sued for prior weekly instalments, his employer could counterclaim for damages for the breach. Seaburn v. Zachmann, 90 N. Y. S. 1005.

62. Lahr v. Kraemer, 91 Minn. 26, 97 N. W. 418. Where failure to account for funds is not willful, he is entitled to recover wages, less amount of shortage. Id. A servant who has stolen his master's property may be discharged at once, without his wages. Person v. McCargar [Minn.] 99 N. W. 885.

63. Farm laborer stole wrench and saw, but was retained to end of term; right to insist on forfeiture lost. Person v. McCargar [Minn.] 99 N. W. 885.

64. An allegation of performance of services held sufficient without specific allegation of allowing name to be used as promised, the contract being presumed to be entire. Gillespie v. Montgomery, 93 App. Div. 403, 87 N. Y. S. 701. Where in an action for a share of profits as compensation for services, an accounting was asked, the fact that the complaint was insufficient to warrant equitable relief did not make it insufficient as stating a cause of action at law. Id. Complaint held to state cause of action for salary earned by traveling salesman during year and not for damages for wrongful discharge. Dibble v. Roberts [Ind. App.] 72 N. E. 1136.

65. Sufficient evidence to go to jury on issue of employment and value of services. Martin v. Milwaukee, etc., R. Co. [Mich.] 101 N. W. 219. Evidence held to show express contract and that defendants had paid what was due thereunder. Broaker v. Morrill, 88 N. Y. S. 937.

66. Evidence of a custom is inadmissible simply for the purpose of making one party's testimony as to what the contract was more probable. Kosloski v. Kelly [Wis.] 100 N. W. 1037. Evidence as to manner and amount of compensation under an alleged contract being conflicting, plaintiff could show his relation to defendants in prior years and on what his compensation was based. Rosenberg v. Heldelberg, 98 App. Div. 17, 90 N. Y. S. 684. Where parties both claim a spe-

Where extra services are performed with the expectation and on the promise that the servant should receive a certain sum at the death of the employer, such promise is enforceable, though the services would have been performed without it.[67] The presumption that a deceased master has regularly paid the wages of a servant according to the custom of the locality applies only where the relation between deceased and claimant was that of master and servant only.[68]

Extra compensation.[69]—The right to extra compensation for work in excess of eight hours per day, given by the New York statute, may be waived by receiving regular wages without objection.[70]

Medical treatment.[71]—A conductor of a railroad train has no implied authority to contract for medical services, shelter and food for an injured employe, except in case of an emergency.[72]

Assignments of wages.[73]—One in the actual employment of another, receiving wages under a subsisting contract, may make a valid assignment of future earnings, though the time of employment is uncertain,[74] and the consideration is not fixed in amount. Thus an extension of credit is a valuable consideration sufficient to support such an assignment.[75] The burden is upon a creditor of an employe, attacking an assignment, to prove that it lacked consideration.[76] No formality is necessary to the acceptance by the employer of an assignment of wages; paying wages to the assignee is a sufficient acknowledgment of liability.[77] Knowledge or want of knowledge of the assignees cannot affect the employer's liability, nor is their knowledge a matter of discovery by the employer.[78] Where a person makes two assignments of wages to different assignees, and the assignments are recorded at the same place, at the same hour and minute of the same day, the employer is not liable to either assignee.[79]

Trade secrets and inventions.[80]—Information acquired by a servant in the course of his employment relative to the master's property belongs exclusively to the employer and cannot rightfully be imparted to others.[81] The duty of the employe, arising by contract or confidence reposed in him, to preserve a trade

cial contract of service, but differ as to compensation to be paid thereunder, evidence of the value of plaintiff's services is admissible as affecting the probability of the respective claims of the parties. Id. Under a complaint alleging a five-year contract, and a continuance of the same for another term of five years, proof of breach of a contract from year to year was inadmissible. Brightson v. Claflin Co. [N. Y.] 72 N. E. 920.

67. Graham v. Rapp's Estate, 105 Mo. App. 590, 80 S. W. 42. Evidence sufficient to sustain finding that extra services were rendered with expectation on part of both master and servant that they would be paid for, and that payment had not been made. Elwell v. Roper, 72 N. H. 254, 56 A. 342.

68. It has no application where decedent, by his conduct, showed an intention to marry the claimant, his housekeeper. Schrader v. Beatty, 206 Pa. 184, 55 A. 958.

69. See 2 Curr. L. 806.

70. Burns v. Fox, 90 N. Y. S. 254.

71. See 2 Curr. L. 806.

72. When a brakeman was injured at a town where company was ready and willing to supply adequate treatment, but was moved elsewhere at his own request, it was held that conductor had no implied authority to contract for services and lodging at the latter place. Hunt v. Illinois Cent. R. Co. [Ind.] 71 N. E. 195.

73. See 2 Curr. L. 805.

74. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922. Such assignment is not void as against public policy, nor is it rendered invalid by the statute exempting wages from execution. Mallin v. Wenham, 209 Ill. 252, 70 N. E. 564.

75. Assignment for wages to be earned from month to month in consideration of supplies to be furnished on credit each month as required. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922.

76, 77. Colorado Fuel & Iron Co. v. Kidwell [Colo. App.] 76 P. 922.

78. Whitcomb v. Waterville [Me.] 58 A. 68.

79. Under Rev. St. 1903, c. 113, § 6, requiring such assignments to be recorded. Whitcomb v. Waterville [Me.] 58 A. 68.

80. See 2 Curr. L. 805. Property rights in trade secrets generally, see Property, 2 Curr. L. 1279.

81. Court of equity refused to set aside a conveyance for fraud of grantees, when part of consideration was imparting of information to which complainants were not entitled. Clark v. Buffalo Hump Min. Co. [C. C. A.] 122 F. 243.

secret, is owed primarily to his employer;[82] but when the trade secret is assigned, the assignee acquires the right to protect his property by restraining the former employes of the assignor from revealing the secret.[83] The obligation of an employe to assign to his employer an invention made in the course of his employment does not arise from the existence of the relation of employe and employer alone; there must be a contract to assign.[84]

Statutory regulations.—The Kentucky statute requiring mine operators to pay employes on the fifteenth and thirtieth of each month, to within fifteen days of those dates,[85] and that giving manufacturing employes liens for wages superior to prior mortgage liens,[86] are held constitutional. The special lien given by statute in Georgia to laborers, on the product of their labor, attaches to property of their employers only.[87] Labor claims are entitled to stand as preferred debts against insolvent estates, under the Indiana statute, only when the labor was performed in connection with the business in which the insolvent debtor was engaged.[88] The South Carolina act prohibiting payment of wages in checks redeemable only in merchandise is constitutional.[89] The act does not apply to such a check issued as a credit only and not as payment.[90] Under the Indiana act requiring corporations to settle in full with employes once a month, and providing a penalty for failure to do so, such penalty, and attorney's fees, can be recovered only where there is no written contract of employment.[91]

§ 3. *Master's liability for injuries to servants.*[92] *A. Nature and extent in general.*[93]—It is the duty of the master to exercise ordinary care for the safety of his servants by providing a reasonably safe place to work,[94] and reasonably safe and suitable tools and appliances,[95] and by maintaining all these in a reasonably suitable condition and state of repair.[96] It is also his duty to exercise ordinary care in supplying reasonably safe materials,[97] and a reasonably sufficient number[98]

82, 83. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 58 A. 290.

84. Evidence held not to show a contract to assign patent rights in an invention. Pressed Steel Car Co. v. Hansen, 128 F. 444.

85. The statute (Ky. St. 1903, § 2739a) is not an improper exercise of the police power, nor does its enforcement interfere with vested rights or contract obligations, nor does it impose a penalty for nonpayment of debt. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287. Subsec. 1 of this statute, being an amendment to the original act of 1899, is not unconstitutional on the ground that it was improperly enacted. Id.

86. Ky. St. 1903, §§ 2487, 2488. Graham v. Magann, Fawke Lumber Co. [Ky.] 80 S. W. 799.

87. Under Civ. Code 1895, § 2793, an employe in a machine shop acquired no lien on a locomotive, which he had practically made over, which belonged to a third person, and not the owner of the shop. Lanier v. Bailey [Ga.] 48 S. E. 324. Where in proceeding to foreclose a special lien on the locomotive, an execution in favor of the employe against his employer was issued, an ordinary claim by the owner of the locomotive is a proper remedy. Lanier v. Bailey [Ga.] 48 S. E. 324.

88. Under Burns' Ann. St. 1901, §§ 7051, 7058. McDaniel v. Osborne [Ind. App.] 72 N. E. 601. A receiver appointed in a foreclosure action is not an assignee or receiver within the meaning of §§ 7051, 7058 of this statute, so that labor claims may be made preferred debts against the property in his hands. Id.

89. Code 1902, §§ 2719, 2720, does not deny equal protection of law. Johnson, Lytle & Co. v. Spartan Mills [S. C.] 47 S. E. 695.

90. Hence an action cannot be maintained on such check for a money judgment. Johnson, Lytle & Co. v. Spartan Mills [S. C.] 47 S. E. 695.

91. In an action based on Burns' Rev. St. 1901, § 7056, the complaint must allege the absence of a written contract. Baltimore, etc., R. Co. v. Harmon, 161 Ind. 358, 68 N. E. 589.

92. For extended note on the right of a servant to recover damages from persons other than his master for injuries received in the performance of his duties, see 46 L. R. A. 33.

93. See 2 Curr. L. 808.

94. Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Kirk v. Sturdy [Mass.] 72 N. E. 349; Wallace v. Boston & M. R. Co., 72 N. H. 504, 57 A. 913. See subsection B.

95. Wallace v. Boston & M. R. Co., 72 N. H. 504, 57 A. 913; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Kirk v. Sturdy [Mass.] 72 N. E. 349. See subsection B herein.

96. Wallace v. Boston & M. R. Co., 72 N. H. 504, 57 A. 913.

97. Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Kirk v. Sturdy [Mass.] 72 N. E. 349.

of reasonably competent and safe fellow-workmen.[99] It is, further, the duty of the employer to warn and instruct his servants as to latent or unknown dangers of the employment,[1] especially if such servants are young, ignorant or inexperienced.[2] Where a business is sufficiently extended and complicated to require it, the master owes his servants the duty of framing and promulgating reasonable rules and regulations, looking to their safety.[3]

The master is not an insurer of the safety of his employes;[4] all that the law requires is the exercise of reasonable or ordinary care, to provide for their safety.[5] Reasonable or ordinary care is that used by reasonable and prudent men under like circumstances.[6] It cannot be determined abstractly, but only by the facts of each particular case.[7] Thus, what is due care in a particular instance may be determined by the age[8] or experience[9] of the employe, or the dangers inherent in or incident to the employment.[10]

The duties of the master above enumerated are personal to him, and he cannot relieve himself from liability for negligence in their performance by delegating them to others.[11]

Statutes.—The degree of care required of masters in performing duties imposed by statute must be determined on common-law principles, when not fixed by

98. Such a number that the servants' task may be performed with reasonable safety. Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808; Texas & P. R. Co. v. Miller [Tex. Civ. App.] 81 S. W. 535; Hilton v. Fitchburg R. Co. [N. H.] 59 A. 625; Dell v. McGrath [Minn.] 99 N. W. 629.

99. Elliott v. Canadian Pac. R. Co., 129 F. 163; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Wells v. O'Hare, 209 Ill. 627, 70 N. E. 1056. See subsection E herein.

1. Shickle-Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423; Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569.

2. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908; Jancko v. West Coast Mfg. & Inv. Co., 34 Wash. 556, 76 P. 78. See subsection D herein.

3. Wallace v. Boston & M. R. Co., 72 N. H. 504, 57 A. 913. See subsection C herein.

4. McCabe v. Montana Cent. R. Co. [Mont.] 76 P. 701; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537.

5. Glasscock v. Swofford Eros. Dry Goods Co. [Mo. App.] 80 S. W. 364; Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787; Ryan v. Third Ave. R. Co., 92 App. Div. 306, 86 N. Y. S 1070. Thus, only ordinary care is required of railway companies in furnishing reasonably safe cars and appliances and a reasonably safe track. Culver v. South Haven, etc., R. Co. [Mich.] 101 N. W. 663; McCabe v. Montana Cent. R. Co. [Mont.] 76 P. 701; St. Louis S. W. R. Co. v. Corrigan [Tex. Civ. App.] 81 S. W. 554; San Antonio, etc., R. Co. v. Hahl [Tex. Civ. App.] 83 S. W. 27.

Contra: A charge that it was the absolute duty of a railway company to provide an engineer with safe appliances and a safe place to work, upheld. Richey v. Southern R. Co. [S. C.] 48 S. E. 285.

6. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. The test of negligence in methods, machinery and appliances is the ordinary usage of the business. Weed v. Chicago, etc., R. Co. [Neb.] 99 N. W. 827. If conditions are shown to be similar. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. Testimony that tracks used only to carry molten metal to a slag pile were not like tracks of well-regulated railroads was irrelevant, since the two roads were not similar. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. An order by a conductor to a brakeman to catch and mount a moving car is not negligence imputable to the company, since such an order is customary and incidental to the employment. Weed v. Chicago, etc., R. Co. [Neb.] 99 N. W. 827. Failure to place lights at a curve in a street railway track cannot be held negligence without proof that it was the usage of well-managed companies to take such precautions. Godfrey v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1230.

7. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089; Kirk v. Sturdy [Mass.] 72 N. E. 349. "Reasonable" care and "ordinary" care are synonymous terms. What is such care depends upon the circumstances. Coven v. Bodwell Granite Co. [Me.] 59 A. 285.

8. Thus the degree of care due by the master to an infant employe is much greater than is due to an adult. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908.

9. Greater care is required of a master where the servant is working outside the line of his regular employment under the master's direction. Virginia Portland Cement Co. v. Luck's Adm'r [Va.] 49 S. E. 577.

10. Richards v. Riverside Ironworks [W. Va.] 49 S. E. 437. The degree of care required of one whose business requires the use of explosives is greater than that required of one who does not employ such dangerous instrumentalities. Lonza v. La Grand Quarry Co. [Iowa] 100 N. W. 488.

11. Wallace v. Boston & M. R. Co., 72 N. H. 504, 57 A. 913; Rogers v. Cleveland, etc., R. Co., 211 Ill. 126, 71 N. E. 850; Franck v. American Tartar Co., 91 App. Div. 571, 87 N. Y. S. 219; Burns v. Delaware & A. Tel. & T. Co. [N. J. Err. & App.] 59 A. 220. See subsection E herein.

statute.[12] But the legislature may, in its discretion, set up definite standards of duty to be observed by employers, which are uncontrolled by common-law rules.[13] Failure to perform a positive duty fixed by statute is negligence per se, for which an injured employe may recover,[14] if such failure was the proximate cause of the injury.[15] Decisions construing statutes are referred to in the note.[16]

The relation of master and servant must exist.[17]—To warrant a recovery for personal injuries caused by a breach of the master's duties, as master, it must appear that the person injured was at the time his servant,[18] and was engaged in the performance of the duties for which he was employed.[19] The employe must con-

12. Applied Rev. St. Ohio 1892, § 6871, requiring mine owners to keep supply of timber on hand and to deliver it where needed by miners. Cecil v. American Sheet Steel Co. [C. C. A.] 129 F. 542.

13. Green v. American Car & Foundry Co. [Ind.] 71 N. E. 268.

14. Violation of ordinance relative to method of moving cars. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218. Failure to guard a machine as required by law, or a removal of the guard except for repairs, prohibited by law. Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239. Failure to cover set screws after an order by the factory inspector to guard them, as required by Comp. Laws, § 5349. Sipes v. Michigan Starch Co. [Mich.] 100 N. W. 447. Failure to comply with a statutory building regulation. Holzman v. Katzman, 87 N. Y. S. 478. Failure to give statutory signal at crossings is negligence as to a section man on a hand car rightfully on the track. Illinois Cent. R. Co. v. McIntosh [Ky.] 80 S. W. 496. The act requiring "telltales" at a distance of 150 feet from the approaches of an overhead railroad bridge places on railroad companies the duty of so warning unequivocally the employes. Hailey v. Texas & P. R. Co. [La.] 37 So. 131.

15. Failure to maintain ambulance at mine not shown to be cause of miner's death, when evidence showed immediate and proper treatment, and physician testified he might have saved miner's life if called sooner. Davis v. Pennsylvania Coal Co., 209 Pa. 153, 58 A. 271.

16. Any knowing and intentional violation of the Illinois coal mine act is a "willful" violation, and proof of a wrongful intent is not essential to render a mine owner liable [Ill. Laws 1899, p. 325, §§ 33, 19]. Fulton v. Wilmington Star Min. Co. [C. C. A.] 133 F. 193. The provision of this act requiring mine owners to employ as managers only such persons as hold certificates from a state board of examiners does not exempt the owners from liability for negligence of managers (Id.); and the statute, thus construed, is constitutional (Id.). A belt line railroad, maintained in a city as a connecting line between various roads, and for convenience in receiving and transferring freight, is a steam railroad within the terms of Burns' Ann. St. 1901, § 5173a et seq. requiring switch stands to be equipped with signal lights, and giving employes a right of action for injuries caused by failure to observe the statute. Toledo, etc., R. Co. v. Bond [Ind. App.] 72 N. E. 647. The fact that the parent or guardian of a minor knows of the latter's employment will not excuse the employer from obtaining the affidavit regarding such minor required by Burns' Ann. St. 1901, § 7087b. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. The sections of the labor law prohibiting employment of children under 15 to operate elevators in factories, and of children under 16 to operate or assist in operating dangerous machinery (Laws 1899, p. 353, c. 192, §§ 81, 89), apply only to factories, not to mercantile establishments. Distinction made in Laws 1897, p. 462, c. 415, § 2. Lowry v. Anderson Co., 96 App. Div. 465, 89 N. Y. S. 107. Laws Miss. 1898, p. 84, c. 66, amending Laws 1896, p. 97, c. 87, relating to actions by employes against corporations, being unconstitutional, no action is maintainable thereunder. Yazoo & M. V. R. Co. v. Schraag [Miss.] 36 So. 193.

17. See 2 Curr. L. 808. See 37 L. R. A. 33, for an exhaustive note on the question which of two or more persons is the master of another who is conceded to be the servant of one of them.

18. Where two railway companies were sued and the evidence showed exclusive ownership of the road in the employer of plaintiff's intestate, the variance was fatal to any recovery. Northern Ala. R. Co. v. Mansell [Ala.] 36 So. 459. One who assisted in repairing a coupling at the unauthorized request of an employe is a mere volunteer. Atlanta, etc., R. Co. v. West [Ga.] 49 S. E. 711.

19. Mitchell v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 289. A servant injured while voluntarily performing work outside the scope of his employment cannot recover. Ehmett v. Mitchell-Tranter Co. [Ky.] 80 S. W. 1148. Boy 14 years old, employed to take bobbins off a spinning machine, was injured while putting on weights, the latter duty belonging to others. Master held not liable. Michael v. Henry, 209 Pa. 213, 58 A. 125. A scourer in a carpet mill voluntarily assisted other employes after hours, and was killed by falling into a vat of boiling caustic soda. Held, no recovery against the master for his death. Durst v. Bromley Bros. Carpet Co., 208 Pa. 573, 57 A. 986. One sent by superior to repair steam reservoir in brewery is not a volunteer, though his usual employment did not include such a task. Krueger v. Bartholomay Brew. Co., 94 App. Div. 58, 87 N. Y. S. 1054.

A master owes a servant, not at the time engaged in the performance of his duty, only the duty to avoid injuring him after discovering him in a perilous position. Freight brakeman, killed in a collision while on engine of another train to get a drink of water, was not in performance of his duties,

fine himself to the scope of his employment.[20] To entitle one to the protection due a servant, an actual contract of employment is not necessary; it is sufficient if the workman performs services for the employer, with the latter's consent.[21] A master owes a volunteer only the duty not to willfully injure him, and to use care not to injure him after notice of his position of peril; youth and inexperience of the volunteer do not change the relation or rights and duties of the parties.[22] A railway company owes the same duty to an express messenger as it owes to its own employes.[23]

One for whom work is being done by an independent contractor is not liable to the contractor's servants for negligence of the contractor;[24] nor is a contractor liable to a servant of a subcontractor for injuries, unless he has been guilty of some act of personal negligence, which caused such injuries, independently of all other causes.[25]

The test commonly applied in determining whether the relation exists is the degree of control exercised over the workman.[26] A servant loaned to a third person for the performance of special services becomes the servant of that person, though in the general employ of the one who loaned him,[27] if he becomes subject to the control and direction of such third person.[28]

and there could be no recovery for his death. Shadoan's Adm'r v. Cincinnati, etc., R. Co. [Ky.] 82 S. W. 567.

20. Engine hostler who voluntarily exchanged work with a switchman could not recover for injuries received while performing switchman's duties. Baltimore & O. R. Co. v. Doty [C. C. A.] 133 F. 866. Section hand on street railway attempting to replace a trolley wheel on the wire held not acting as a volunteer, though it is the conductor's duty to replace such wheel. Toledo, etc., R. Co. v. Pfisterer, 5 Ohio C. C. (N. S.) 359.

21. Boy assisting father in mine with knowledge and consent of employer of father, entitled to protection and safe place to work, though no actual contract was made with him. Ringue v. Oregon Coal & Navigation Co., 44 Or. 407, 75 P. 703. Evidence sufficient to warrant finding that plaintiff was employed with knowledge and consent of defendant or one who had authority to act for him. Palmer v. Coyle [Mass.] 72 N. E. 844. Where a minor was put to work on trains, contrary to his father's instructions, it was held that the company would be liable for the minor's death, if caused solely by negligence of the company, though the relation of master and servant did not exist. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981. A boy, assisting his father in a mine is deemed to be on the premises by invitation of the owner, who owes him the duty to keep the premises reasonably safe. Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802. A custom, observed by a mine operator, of requiring a father, desiring his son to assist him in the mine, to obtain from the bookkeeper an order on the blacksmith for tools, is a regulation which may be waived; and the operator cannot deny that a duty was owed to a minor furnished with tools without such an order. Ringue v. Oregon Coal & Navigation Co., 44 Or. 407, 75 P. 703.

22. Atlanta & W. P. R. Co. v. West [Ga.] 49 S. E. 711.

23. Chicago & N. W. R. Co. v. O'Brien, 132 F. 593. This relation and duty was not affected by a statute making invalid contracts releasing railway companies from liability for negligence of employes resulting in injuries to other employes (Id.), nor did such statute change the rules of evidence in actions for negligence based on the relation (Id.).

Note: The various reasons for the holding that an expressman carried on a passenger train by contract between the express and railroad companies is a passenger are arrayed in a note in 4 Columbia Law Rev. 592, commenting on Long v. Lehigh Valley R. Co. [C. C. A.] 130 F. 870. In that case releases of liability had been exchanged so as to look wholly to the express company. See Carriers, 3 Curr. L. 591.

24. Bridge company not liable to independent contractor's servant for injury caused by defective tool furnished him by the contractor. Omaha Bridge & Terminal Co. v. Hargadine [Neb.] 98 N. W. 1071. Where one who employs an independent contractor retains the right to inspect and oversee the work so far as is necessary to see that it conforms to the specifications, the relation of master and servant is not created between the one for whom the work is being done and servants of the independent contractor. Id.

25. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. It is the duty of a contractor to attend to shoring a building in course of reconstruction, though the actual work is sublet. Id. See title Independent Contractors, 3 Curr. L. 1702.

26. The relation of master and servant exists where the employer selects the workman, may remove or discharge him for misconduct and may order what work shall be done and the mode and manner of its performance. Walsh v. Reisenberg, 89 N. Y. S. 58.

27. Delory v. Blodgett, 185 Mass. 126, 69 N. E. 1078; Grace & H. Co. v. Probst, 208 Ill. 147, 70 N. E. 12. A driver in the general employ of third persons, but engaged in

While the owner of a railroad owes the servants of another company, operating trains on the road, the duty of ordinary care to keep the roadbed reasonably safe,[29] such owning corporation will not be liable if the injury arose solely from negligence in operating trains, and not from defects in the roadbed.[30] A servant in the employ of a lessee railroad company, and injured solely through negligence of his employer, has no cause of action against the lessor company.[31] But the contrary is held in Missouri.[32] A railway corporation operating a road jointly with another corporation is liable for injuries to employes as a member of a partnership.[33]

The master's negligence must have been the proximate cause[34] *of the servant's injuries.*[35]—Illustrative holdings are grouped in the notes.[36] If negligence of the

loading a vessel under control of defendants, was the servant of the latter during that special service. Breslin v. Sparks, 97 App. Div. 69, 89 N. Y. S. 627.

28. The test being whether he remains subject to the control of his general master, or becomes subject to the control of the third party, the issue presented is one of fact for the jury if the evidence is in dispute. Grace & Hyde Co. v. Probst, 208 Ill. 147, 70 N. E. 12. Held that elevator operator did not become the servant of a company putting fire extinguisher system in the building and using the elevator in its work. Walsh v. Reisenberg, 89 N. Y. S. 58.

29. This is true whether or not the injured employe was also an employe of the owning corporation. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038.

30. Ederle v. Vicksburg, etc., R. Co., 112 La. 728, 36 So. 664. Where servant of a grain company was killed on a switch track, owned and operated by the grain company, the railway company which constructed the track was not liable for the death. Sauls v. Chicago, etc., R. Co. [Tex. Civ. App.] 81 S. W. 89.

31. Lewis v. Maysville, etc., R. Co., 25 Ky. L. R. 948, 76 S. W. 526.

32. Under the Missouri statute relative to the leasing of roads by railroad corporations of the state, a lessor company is liable for injuries to a servant of the lessee, caused by the lessee's negligence. Markey v. Louisiana, etc., R. Co. [Mo.] 84 S. W. 61.

33. Harrill v. South Carolina & G. Extension R. Co., 135 N. C. 601, 47 S. E. 730. That the partnership agreement of the corporations is ultra vires does not relieve them of such liability. Id.

34. For doctrine of proximate cause see Negligence, 2 Curr. L. 996.

35. Bailey v. Cascade Timber Co., 35 Wash. 295, 77 P. 377; Gulf, etc., R. Co. v. Davis [Tex. Civ. App.] 80 S. W. 253; Godfrey v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1230.

36. In the following cases, negligence of the master, or of one for whose negligence the master was responsible, was held the proximate cause of the injuries complained of. Rotten condition of wooden tank, and not the turning on of steam, held proximate cause of injury from escaping steam. Franck v. American Tartar Co., 91 App. Div. 571, 87 N. Y. S. 219. Proximate cause of injury held to be swinging of scale board and not ordering employe to go under the scale board. Simonds v. Georgia Iron & Coal Co., 133 F. 776. Finding that defective break on car was cause of its derailment and death of motorman held justified by evidence. Terre Haute Elec. Co. v. Kieley [Ind. App.] 72 N. E. 658. Failure to properly light mine and cars held proximate cause of a collision, and not the act of fellow-servants in leaving a car on the track. Central Coal & Iron Co. v. Pierce, 25 Ky. L. R. 2269, 80 S. W. 449. Proximate cause of injury from cogs held to be failure to instruct plaintiff as to danger, and not the act of a fellow-servant in moving the crane. Shickle-Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423. Failure of company to sand rails of street railway tracks held proximate cause of injury to motorman, the car becoming unmanageable and colliding with another on a grade. Union Traction Co. v. Buckland [Ind. App.] 72 N. E. 158. Defendant's negligence in permitting running board on engine to become defective was proximate cause of fireman's death. Ellington v. Great Northern R. Co. [Minn.] 100 N. W. 218. Defect in top rung of ladder on car, which gave way under brakeman's weight, was proximate cause of his fall and injury, and not the absence of the bottom rung which caused him to use the top one. El Paso N. E. R. Co. v. Ryan [Tex. Civ. App.] 81 S. W. 563. Evidence sufficient to warrant finding that brake bar on steam hoist was defective, which defect caused the injury. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396. Evidence sufficient to support finding that footboard and handhold on tender of engine were defective and that these defects were proximate cause of servant's death. Leduc v. Northern Pac. R. Co. [Minn.] 100 N. W. 108. Engineer's negligence in failing to keep a lookout, or to stop passenger train after notice of section foreman's position, the latter being in the act of attempting to remove a push car to prevent a collision, held proximate cause of foreman's death. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. Negligence of a section foreman in running a hand car on the schedule time of, and close to, a passenger train, held proximate cause of injury to a hand assisting to remove the hand car. San Antonio, etc., R. Co. v. Stevens [Tex. Civ. App.] 83 S. W. 235. Proximate cause of injury by falling of wall of kiln held to be defective state of wall and not negligent order of foreman. Browning v. Kasten [Mo. App.] 80 S. W. 354. Negligence of foreman of section crew in delaying unloading of rails from hand car, so that when ordered, it had to be done hastily to avoid a collision, held contributing cause of

master be shown as a proximate or efficient cause, the existence of contributing negligence of a fellow servant[37] or other causes, operating with the master's negligence, will not relieve him from liability,[38] the injured employe being himself in the exercise of due care.[39] Where the master has been guilty of negligence liable to cause injury, the fact that an injury occurred in an unusual or unexpected manner will not preclude a recovery;[40] but there can be no recovery for the consequences of an act or omission, which the master did not anticipate, and ought not, in reason, to have anticipated, would result in injury.[41]

Contractual exemption from liability.—Contracts relieving masters from their common-law liability for negligence[42] or from statutory duties[43] are contrary to

plaintiff's injury from being struck by a rail. Hicks v. Southern Pac. Co., 27 Utah, 526, 76 P. 625. Section foreman's negligence in running a hand car on the time of a regular train, and not failure to give statutory signal at crossings held the proximate cause of injury to section hand while lifting car off track to avoid collision. Illinois Cent. R. Co. v. McIntosh [Ky.] 80 S. W. 496. Negligence of a switchman in attempting to uncouple cars while in motion, at a time when cars were slippery with snow, was not the proximate cause of his being knocked from the car by a switch handle. Chicago & A. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15.

In the following cases the master's negligence was held not the proximate cause of injury. Defect in appliance. Hoehn v. Lautz, 94 App. Div. 14, 87 N. Y. S. 921. Defective clutch which would not stop a machine when loaded. Desosiers v. Bourn [R. I.] 57 A. 935. Noncompliance with a city ordinance respecting elevators. Middendorf v. Schulze, 105 Ill. App. 221. Failure to keep blast furnace in repair not proximate cause of plaintiff's being overcome by gas. Stenger v. Buffalo Union Furnace Co., 90 N. Y. S. 222. Failure to block guard rails in railroad yard not proximate cause of switchman's death. Ray v. Vicksburg, etc., R. Co. [La.] 37 So. 43. Failure to furnish extra man not proximate cause of injury to bridge repairer. McKenna v. Chicago, etc., R. Co. [Minn.] 100 N. W. 373. Alleged defect in a cant hook not the cause of fall and death of plaintiff's husband. Laudeman v. Ryan, 209 Pa. 3, 57 A. 1118. Where seaman was killed by being struck by mast broken by a loaded bucket in unloading vessel, the rotten condition of the mast was held not the proximate cause of the injury, especially since it was strong enough for its ordinary uses. Robinson v. Pittsburg Coal Co. [C. C. A.] 129 F. 324. Where a workman was injured while attempting to mend a belt, the causes which produced the break in the belt are not the proximate cause of the injury. Schoultz v. Eckardt Mfg. Co., 112 La. 568, 36 So. 593.

In these cases there was no recovery because the sole proximate cause was shown to have been negligence of fellow-servants. Negligence of brakeman, and not failure to provide signals, held proximate cause of injury of an inspector of air brakes. Hence no recovery. Fullmer v. New York, etc., R. Co., 208 Pa. 598, 57 A. 1062. Death in collision not caused by defective track but by negligent occupation of it by switch engine crew. Yazoo & M. V. R. Co. v. Schraag [Miss.] 36 So. 193. Proximate cause of falling of staging built on a wheel of a vessel was use of unsafe rope in fastening the wheel and not failure to detach the pitmans. Herbert v. Wiggins Ferry Co. [Mo. App.] 80 S. W. 978. Fellow-servant's negligence in reversing hoisting machinery, and not failure of company to supply a brake, held proximate cause of injury to miner struck by falling bucket. Luman v. Golden Ancient Channel Min. Co. [Cal.] 74 P. 307. Sole proximate cause of street car conductor's injury held to be mistake of his fellow-servant, the motorman, in mistaking position of lights and striking a curve at too high a rate of speed. Godfrey v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1230.

37. Unguarded cogs caused injury. Buehner v. Creamery Package Mfg. Co. [Iowa] 100 N. W. 345. See subsection E herein.

38. Where plaintiff slipped on the floor and, losing his balance, struck an unguarded saw, the negligence in leaving the saw unguarded, in violation of the statute, and not plaintiff's slipping, was the efficient and proximate cause. Espenlaub v. Ellis [Ind. App.] 72 N. E. 527.

39. See subsection G herein.

40. El Paso & N. W. R. Co. v. McComas [Tex. Civ. App.] 81 S. W. 760; Jensen v. Commodore Min. Co. [Minn.] 101 N. W. 944. Where an employe was injured by drinking water in which potash had been placed, to clean the cooler, by order of the foreman, no precautions being taken to prevent such injury, the injury was not an unexpected accident, but an event to be anticipated. Geller v. Briscoe Mfg. Co. [Mich.] 99 N. W. 281.

41. No liability for injury to boy caused by explosion of bottle of carbonated water. Duerler Mfg. Co. v. Dullnig [Tex. Civ. App.] 83 S. W. 889. Leaving a wornout wrench on floor of roundhouse was not negligence, where tool box was provided, containing proper tools, and it could not reasonably be anticipated that plaintiff would use the defective tool and be injured thereby. O'Brien v. Missouri, etc., R. Co. [Tex. Civ. App.] 82 S. W. 319.

42. Contract whereby servant assumed all risks of accidents or injuries he would sustain in course of employment, however caused, and agreed to execute and deliver a release at once, in case of injury, is void. Johnson v. Fargo, 90 N. Y. S. 725.

43. A contract, if made, whereby a train hand exempted a railway company from the duty of having a flagman on the leading car of a train being pushed by the engine, would be void [Priv. Laws 1897, p. 83, c. 56]. Lassiter v. Raleigh & G. R. Co. [N. C.] 49 S.

public policy and void. Contracts between railway and express companies, releasing the former from liability for negligence resulting in injury to employes of the latter, are not enforceable in states where such contracts are contrary to public policy.[44]

(§ 3) *B. Tools, machinery, appliances, and places for work.*[45]—The master is not required to furnish the safest machines and appliances, of the newest and best kind,[46] but only such as are reasonably safe,[47] and of a kind in general use for the same purpose.[48] An employer may, when necessary, use agencies and appliances which are particularly dangerous, providing such precautions can be and

E. 93. Employe cannot excuse noncompliance by the master with a statutory duty of guarding machines. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. A "lintner" in an oil mill is not engaged in a profession or trade, within the meaning of Civ. Code 1895, § 3650, so as to be bound by his contract in regard thereto, as a release for damages, the same as an adult. Southern Cotton Oil Co. v. Dukes [Ga.] 49 S. E. 788.

44. Iowa Code, § 2071, makes contracts restricting liability of railroads for negligence of employes resulting in injury to other employes invalid. Chicago & N. W. R. Co. v. O'Brien, 132 F. 593.

45. See 2 Curr. L. 810.

46. Marks v. Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432; Wamble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493; Koon v. Southern R. Co. [S. C.] 48 S. E. 86.

47. San Antonio & A. P. R. Co. v. Klauss [Tex. Civ. App.] 79 S. W. 58; Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 82 S. W. 343; Metzler v. McKenzie, 34 Wash. 470, 76 P. 114; Twombly v. Consolidated Elec. Light Co. [Me.] 57 A. 85; Marks v. Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432; Babcock Bros. Lumber Co. v. Johnson, 120 Ga. 1039, 48 S. E. 438; Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428; Cudahy Packing Co. v. Roy [Neb.] 99 N. W. 231.

Note: The rule as to the duty of the master relative to providing machinery and appliances is variously stated. The statement sometimes is that it is the master's duty to "exercise reasonable care to furnish safe machinery and appliances;" and sometimes courts say it is the duty of the master to furnish "reasonably safe machinery and appliances." The distinction between the two statements, when practically applied, is discussed, and cases, in which the rule has been stated in the two ways, are cited, in Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524.

Illustrative applications of general rule: An employer is bound to use due care to see that a water cooler furnished to employes is a reasonably safe receptacle for drinking water. Geller v. Briscoe Mfg. Co. [Mich.] 99 N. W. 281. A shipowner owes seamen the duty of ordinary care to see that the ship is not rendered a dangerous place by the manner in which repairs are made by the employes of a contractor. In re Michigan S. S. Co., 133 F. 577. Employer liable when belt, the breaking of which injured employe, was shown to have been negligently joined. McCaughey v. Jenckes Spinning Co. [R. I.] 59 A. 110. Cooking retort not furnished with waste pipe of sufficient capacity whereby plaintiff was scalded. Cudahy Packing Co. v. Sedlack [Kan.] 77 P. 102. Finding that air brake was a necessary appliance on a heavy car, heavily loaded, justified. Terre Haute Elec. Co. v. Kiely [Ind. App.] 72 N. E. 658. Company guilty of negligence in not furnishing a suitable and safe appliance for reversing rollers on machine in saw mill. Hendricks v. Lesure Lumber Co. [Minn.] 99 N. W. 1125. An injury, caused by unguarded cogs, to a boy who was required to pick up boards near them, was one which ought reasonably to have been anticipated. Buehner v. Creamery Package Mfg. Co. [Iowa] 100 N. W. 345. Where a building was maintained close to a switch track, giving barely enough room for the passing of tenders of the ordinary size, the use of a tender so large that one riding thereon in the usual way was crushed between the building and the tender, was negligence. Norfolk & W. R. Co. v. Cheatwood's Adm'x [Va.] 49 S. E. 489.

There is no duty to hood or guard the inner and inaccessible parts of machinery, such as portion of a circular saw under a table. Schoultz v. Eckardt Mfg. Co., 112 La. 568, 36 So. 593. Held not negligence to fail to guard a small circular saw which protruded only half its diameter through the table. Chicago Veneer Co. v. Walden [Ky.] 82 S. W. 294. Use of handhold fastened on cars by lag screws is not negligence since handholds so fastened are safe if attached to sound wood. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 82 S. W. 343.

48. Tompkins v. Marine Engine & Mach. Co., 70 N. J. Law, 330, 58 A. 393; Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569. The test of reasonable safety of a machine or appliance is whether it is such as is ordinarily used for the same purpose. Desosiers v. Bourn [R. I.] 57 A. 935. A master performs his duty if he furnishes such devices as are used at the time by ordinarily prudent and careful people under like circumstances. Carr v. American Locomotive Co. [R. I.] 58 A. 678. An employer who uses a freight elevator in his business discharges his duty by furnishing one reasonably safe for the purposes intended, of a kind ordinarily used for such purposes. Young v. Mason Stable Co., 96 App. Div. 305, 89 N. Y. S. 349. Use of step on caboose which projected 15 inches, in common use on various roads, held not negligence. Turner v. Detroit Southern R. Co. [Mich.] 100 N. W. 268.

But general usage of a machine of the same kind does not justify the master in furnishing a machine that is defective. Dean v. St. Louis Woodenware Works [Mo. App.] 80 S. W. 292.

are taken as to reduce the necessary dangers to a condition of reasonable safety.[49] Under such circumstances, the degree of care required of the master is correspondingly great.[50] The master, having provided reasonably safe and suitable machines or appliances, is not liable for injuries resulting from their negligent use by an employe,[51] or from their use for a purpose for which they were not intended,[52] or from the selection by an employe of such as are defective, others, reasonably safe, being available.[53] It is the duty of the master to use ordinary care to maintain the tools, machinery, and appliances provided by him in a reasonably safe condition by proper repairs[54] and reasonable inspection.[55] What is a reasonable inspection is to be determined from surrounding facts and circumstances.[56] The master is under no duty to inspect simple or common tools,[57] or to discover and remedy

49, 50. Welch v. Bath Ironworks, 98 Me. 361, 57 A. 88.

51. Kasadarian v. James Hill Mfg. Co., 130 F. 62.

52. Where servants in the master's absence rigged up a stiff-leg derrick with a guy line, to give it a longer reach than it was intended to have, the master was not liable for an injury resulting from such use of the derrick. Maxfield v. Graveson [C. C. A.] 131 F. 841. Where a hoist rope in mine was used for a purpose other than that for which it was provided, without the employer's knowledge, whereby it became weakened and unsafe, the employer was not liable for an injury resulting from such improper use. Gribben v. Yellow Aster Mln. & Mill. Co., 142 Cal. 248, 75 P. 839. Complaint held not to state actionable negligence where it showed use of a brace, intended to support a roof, as a handhold. Babcock Bros. Lumber Co. v. Johnson, 120 Ga. 1030, 48 S. E. 438. But if a master requires a servant to use, or knows that he will necessarily use, for one purpose, an appliance intended for another purpose, he will be responsible for its defective condition. Id.

53. Needham v. Stone, 186 Mass. 565, 72 N. E. 80. Where plaintiff was injured by reason of old spikes being used in laying steel, the company was not liable, having furnished plenty of good spikes, and the use of old ones was negligence of its foreman. Gauges v. Fitchburg R. Co., 185 Mass. 76, 69 N. E. 1063. Where mine operator furnished a sufficient number of linch-pins for cars, he was not liable for an accident caused by failure of deceased's fellow-servant to put one in, whereby a wheel fell from a car, striking deceased. Jackson v. Lincoln Min. Co. [Mo. App.] 80 S. W. 727. Plaintiff, assistant to driver of delivery wagon, could not recover if injury was caused by driver's failure to select a safe harness. Palmer v. Coyle [Mass.] 72 N. E. 844. The rule that the master's duty to provide safe tools and appliances extends only to such as are in fact furnished by the master has no application to safeguards against dangers arising out of the work. Burns v. Delaware & A. Tel. & T. Co. [N. J. Err. & App.] 59 A. 220.

54. Twombly v. Consolidated Elec. Light Co., 98 Me. 353; 57 A. 85; Gulf, etc., R. Co. v. Davis [Tex. Civ. App.] 80 S. W. 253; Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183; Foster v. New York, etc., R. Co. [Mass.] 72 N. E. 331. Tongs for handling hot ingots of iron defective. Mulligan v. Colorado Fuel & Iron Co. [Colo. App.] 77 P. 977.

55. Newton v. New York, etc., R. Co., 96 App. Div. 81, 89 N. Y. S. 23. Failure to use ordinary care to inspect all cars is negligence. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099. Ship's crew held guilty of negligence in permitting cable used in unloading to become defective, and in not making periodical inspections of it. Ship liable for resulting injury to stevedore. The King Gruffydd [C. C. A.] 131 F. 189.

56. Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493. If a railway company adopts the ordinary, customary, and approved means and tests for the discovery of defects in its appliances, it discharges its duty in this regard, and an employe who is injured notwithstanding must bear the loss as one of the risks of his occupation. Illinois Cent. R. Co. v. Coughlin [C. C. A.] 132 F. 801. Evidence held to show sufficient inspection of cable supporting elevator. Young v. Mason Stable Co., 96 App. Div. 305, 89 N. Y. S. 349. Evidence justified finding that master was negligent in not discovering that a timber used in safe-moving apparatus was defective by reason of dry rot. Meehan v. Atlas Safe Moving & Mach. Truckage Co., 94 App. Div. 306, 87 N. Y. S. 1031. Where water containing chlorides was used in boiler, which was corroded and weakened thereby, the master owed the servants in charge the duty of warning them, inspecting the boiler to see that it was kept reasonably safe, or otherwise protecting them. Nelson v. New York, 91 N. Y. S. 763. Company not bound to inspect a worn-out wrench, left on roundhouse floor, and given plaintiff by a helper, where a toolhouse was provided, where good tools were kept when not in use. O'Brien v. Missouri, etc., R. Co. [Tex. Civ. App.] 82 S. W. 319. Inspection of elevator by skilled engineer held not called for, when employer had had it examined and put in order by two experts a short time before the accident. Young v. Mason Stable Co., 96 App. Div. 305, 89 N. Y. S. 349. A master is not required to make such an inspection as to discover whether an appliance intended for a given use is reasonably safe for another unintended use to which it is unexpectedly put by an employe. Babcock Bros. Lumber Co. v. Johnson, 120 Ga. 1030, 48 S. E. 438.

57. Master may assume that a workman will discover that a simple tool is defective by reason of being worn out. O'Brien v. Missouri, etc., R. Co. [Tex. Civ. App.] 82 S. W. 319. Company under no duty to inspect engine lantern globe, especially when it

defects arising necessarily from the ordinary use of the servant's instrumentalities;[58] the servant is presumed to be the first to discover such defects, and it is a part of his duty to remedy them.[59] Nor does the duty of inspection always rest upon the master, even in regard to appliances and premises under his sole control.[60] One who is a mere tenant has a right to assume that the owner has used due care in rendering the premises reasonably safe for his tenant's purposes.[61] The master may discharge his duty of keeping himself informed of the condition of machinery, so as to keep it in repair, by requiring the servant in charge to report defects discoverable by him in its use to the master or the master's representative.[62] The master is not liable for defects of which he had no notice, and which the exercise of ordinary care would not have disclosed.[63] Actual notice will not render him liable unless he could thereafter have warned the servant or made repairs.[64] Notice of a defect in the original construction of an appliance is presumed.[65] The duty of the master to furnish reasonably safe instrumentalities, and to maintain them in such condition, applies to instrumentalities used and controlled by him, though owned by others.[66]

Temporary appliances; scaffolds.[67]—In regard to temporary structures, such

was under exclusive control and care of the fireman, who was injured while cleaning it. Gulf, etc., R. Co. v. Larkin [Tex.] 82 S. W. 1026, rvg. 80 S. W. 94. A forty-foot extension ladder is not a common tool or appliance within the meaning of the rule. Twombly v. Consolidated Elec. Light Co., 98 Me. 353, 57 A. 85. A hand car cannot be said as a matter of law to be a "tool" of the sectionmen, in the sense that a railway company is relieved from the duty of inspecting it. Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524.

58. The master is not liable for a defect in appliances resulting solely from use unless he has, or is charged with, notice of the defect. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183.

59. As where knives of a buzz planer become dull and the belt loose. Helling v. Schindeler [Cal.] 78 P. 710. The replacing of a dozy or rotten round in a ladder is not an "ordinary repair" which the servant is expected to make. Twombly v. Consolidated Elec. Light Co., 98 Me. 353, 57 A. 85. A telephone pole used by a lineman in removing wires is only an appliance, not a place to work; hence, the lineman could not rely on the assumption that it had been inspected for him. Britton v. Central Union Tel. Co. [C. C. A.] 131 F. 844.

60. Kirk v. Sturdy [Mass.] 72 N. E. 349.

61. Manufacturer of jewelry leased building and furnished only tools and chairs. Employe was injured by bucket falling from steam pipe, placed there to prevent dripping. Held, no duty rested on master to inspect, though the bucket had hung there several weeks. Kirk v. Sturdy [Mass.] 72 N. E. 349.

62. Buey's Adm'x v. Chess & Wymond Co. [Ky.] 84 S. W. 563.

63. Stackpole v. Wray, 90 N. Y. S. 1045; Hirsch Bros. v. Ashe [Tex. Civ. App.] 80 S. W. 650; Cudahy Packing Co. v. Roy [Neb.] 99 N. W. 231. Knowledge of a defect by an employer may be proved by circumstantial as well as direct evidence. That an elevator had been working improperly for some time warrants an inference that the employer knew of the defect which caused the trouble. Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 80 S. W. 364. Failure of a railroad company to remedy a defect in a coupling pin, of which it either knew or in the exercise of ordinary care ought to have known, held negligence. San Antonio, etc., R. Co. v. Hahl [Tex. Civ. App.] 83 S. W. 27. In a suit by a servant who, in the course of his employment, was kicked by a horse, it is not necessary to show knowledge on the part of the master that the horse would kick under the particular circumstances in which the injury was received. Hagen v. Ice Delivery Co., 2 Ohio, N. P. (N. S.) 592.

64. Illinois Cent. R. Co. v. Smith, 208 Ill. 608, 70 N. E. 628.

65. Structural defect in coupling apparatus. Brinkmeier v. Missouri Pac. R. Co. [Kan.] 77 P. 586. Master liable for risks arising from original defects. Foster v. New York, etc., R. Co. [Mass.] 72 N. E. 331.

66. Defective gate and fence across railway track, owned by third person, but under control of company and constantly used by employes. Central of Georgia R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590. A common carrier, receiving and transferring cars of another company as required by law, is under the duty to inspect such cars and to guard its employes against defects or want of repairs and unusual and hidden dangers. Woods v. Northern Pac. R. Co. [Wash.] 79 P. 309; Wood v. Rio Grande Western R. Co. [Utah] 79 P. 182; Strauss v. New York, etc., R. Co., 91 App. Div. 583, 87 N. Y. S. 67. A freight car belonging to another company used, as was the custom, as a way or platform in unloading freight from another car, was a part of the equipment of the company which it was in duty bound to use reasonable care to keep in a safe condition. Foster v. New York, etc., R. Co. [Mass.] 72 N. E. 331. For an injury resulting from a defect in it, the company would be liable both under the common law and St. 1887, p. 899, c. 270, § 1, cl. 1, and the amendment thereto by St. 1893, p. 993, c. 359, relating to ways, works, and machinery. Id.

67. See 2 Curr. L. 815, n. 18.

as scaffolds, built and used by the employes in the course of their ordinary duties, the master fully performs his duty by supplying a sufficient quantity of suitable materials, and he is not liable for injuries caused by negligent construction[68] or failure to use the suitable materials supplied.[69] As to scaffolds, this rule has been changed by statute in New York.[70] If the master, instead of leaving the details of construction to the servants who are to use it, undertakes to furnish them with a completed structure, he owes them the same degree of care as in furnishing other appliances, and is liable for injuries resulting from negligence of those selected to construct it.[71] It has also been held that though the construction of staging is left to employes, the master will be liable if he furnishes palpably unsafe materials therefor;[72] and the fact that a fellow-servant was negligent in selecting defective materials for use will not relieve the master from liability.[73]

Statutes.—Holdings under the Indiana,[74] Minnesota,[75] New York,[76] Maine,[77]

68. McCarthy v. Claflin [Me.] 59 A. 293. Employe used single boards, when he might have used more; master not liable for not furnishing planks. Lockwood v. Tennant [Mich.] 100 N. W. 562. Where painters constructed the scaffolding on which they worked, their failure to add a safety rail, as required by statute, was not negligence imputable to the master. Rotondo v. Smyth, 92 App. Div. 153, 86 N. Y. S. 1103. Workmen used unsafe rope to fasten wheel on which staging was built to dismantle it; no recovery. Herbert v. Wiggins Ferry Co. [Mo. App.] 80 S. W. 978.

69. Lockwood v. Tennant [Mich.] 100 N. W. 562; Landowski v. Chapoton [Mich.] 100 N. W. 564. Where such an appliance is unsafe through failure to use materials, or to use them properly, the master is not liable. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175. As where freight truckman failed to use materials furnished for cleats for skids, by reason of which a skid slipped and plaintiff was injured. Hayes v. New York, etc., R. Co. [Mass.] 72 N. E. 841. No recovery where two workmen built scaffold, and one picked out a plank, half sawed through, which broke, injuring plaintiff. Metzler v. McKenzie, 34 Wash. 470, 76 P. 114.

70. Labor law (Laws 1897, p. 461, c. 415). Holloway v. McWilliams, 97 App. Div. 360, 89 N. Y. S. 1074. Laws 1897, p. 467, c. 415 (Labor Law, § 18), prohibiting furnishing of unsafe scaffolds, etc., applies only to scaffolds used in the erection, repairing, altering, or painting of a house, building, or structure. Platform used to reach a pipe of a boiler, to disconnect it with another boiler, held not within the statute. Conley v. Lackawanna Iron & Steel Co., 94 App. Div. 149, 88 N. Y. S. 123. Evidence held sufficient to show it a completed structure, intended to be used as a scaffold, and that it was not properly constructed for that purpose; hence, master was liable to servant injured by a fall from it. Id. A timber lashed by ropes to upright columns to be used by steel workers in construction of a building held a scaffold within Labor Law, § 18. Welk v. Jackson Architectural Ironworks, 90 N. Y. S. 541. Defendants' foreman directed two workmen to build a scaffold for independent contractors, whom they were ordered to assist, without giving them instructions as to how to build it. Held, defendants were not thereby liable for an injury to a workman caused by a defect in the scaffold, under Labor Law, § 18. Wingert v. Krakauer, 92 App. Div. 223, 87 N. Y. S. 261. Defendants, employing independent contractors to install machinery in a piano factory, were not bound to erect scaffold for their use, under Labor Law, § 18. Wingert v. Krakauer, 92 App. Div. 223, 87 N. Y. S. 261.

71. Richards v. Riverside Iron Works [W. Va.] 49 S. E. 437. Evidence sufficient to show that a superintendent in charge of construction of a staging was negligent in permitting men to use it before an inspection which would have disclosed its insecurity. Solari v. Clark [Mass.] 72 N. E. 958. Evidence held to show that defendants undertook to furnish a staging complete to masons, and that such staging was unsafe, and that its unsafe condition was discoverable by use of ordinary care. McCarthy v. Claflin [Me.] 59 A. 293. Master employed a boss carpenter and men to build scaffold for use of bricklayers, and a bricklayer was injured because of the negligent construction of the scaffold. Chambers v. American Tin Plate Co. [C. C. A.] 129 F. 561. Where defendants knew of and acquiesced in the use of a staging by employes as a means of going from a vessel to the dock, it was their duty to exercise ordinary care and diligence for the safety of the employes using it. Hunting & Co. v. Quarterman, 120 Ga. 344, 47 S. E. 928.

72. Among the planks set aside for staging were some obviously defective by reason of knots. Held, master liable for injuries caused by breaking of a plank. Farrell v. Eastern Machinery Co. [Conn.] 59 A. 611. Master furnished rotten ropes to support a platform put up by servants. Held, liable to one who used it, injured by reason of the poor materials. Beal v. Bryant [Me.] 58 A. 428.

73. Plaintiff's fellow-servant put a knotty plank in staging. Farrell v. Eastern Machinery Co. [Conn.] 59 A. 611. Nor did the fact that permission had been obtained to use lumber of another relieve the master. Id.

74. A steel drop hammer, weighing 1,500 pounds, used to crush iron (Green v. American Car & Foundry Co. [Ind.] 71 N. E. 268), and an emery belt (La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922), held to be machines within meaning of Burns' Ann.

and Alabama[78] factory acts, and the Iowa mines law,[79] are given in the notes. The *act of congress* requiring cars engaged in interstate commerce to be equipped with automatic couplers[80] applies not only to cars actually being used in interstate commerce, but also to cars being made up into trains for the purpose of moving interstate traffic,[81] and a locomotive is a "car" within the statute.[82] A car is engaged in interstate traffic, within the meaning of the act, until its actual transit ceases.[83] The act prohibits the use of couplers which require the employe to place himself between the ends of the cars either to prepare the coupler for the impact, or to make the actual coupling;[84] and this prohibition applies to the act of uncoupling, as well as the act of coupling, cars.[85] The act is not complied with by providing couplers of dissimilar types, which will not work together so as to remove the necessity of going between the cars.[86] Failure to equip cars

St. 1901, § 7087i, requiring machines to be properly guarded. The Indiana factory act of 1899 (Burns' Ann. St. 1901, § 70,871), applies to a machine shop maintained by a railway company to make repairs and manufacture materials for its own use. Baltimore & O. S. W. R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239. Failure to provide a chute by which to convey slabs and refuse from one floor to another in a sawmill is not a violation of the statute requiring machinery to be safeguarded [Acts 1899, p. 234, c. 142]. Crum v. North Vernon Pump & Lumber Co. [Ind. App.] 72 N. E. 193. Where a fellow-servant disobeyed orders to keep a saw guarded, and his employers knew of his disobedience yet retained him, they acquiesced in the violation of the statute requiring the saw to be properly guarded, and became liable for an injury caused thereby. Espenlaub v. Ellis [Ind. App.] 72 N. E. 527. Where a statute fixes the duty to properly guard machinery, such duty is not dependent upon a request of the workman to have a particular machine guarded, or to have a guard which has been furnished properly adjusted. Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. 398, 69 N. E. 1032.

75. The statute requiring machines in factories and shops to be properly guarded (Gen. St. 1894, § 2248) requires the master, not only to furnish, but to maintain, guards or shields over the machines mentioned. McGinty v. Waterman [Minn.] 101 N. W. 300.

76. A direction not to change guards on a planer, when changing from one kind of work to another, is a violation of the statute [Laws 1897, p. 480, c. 415, § 81], requiring machines to be properly guarded. Klein v. Garvey, 94 App. Div. 183, 87 N. Y. S. 998.

77. The statute requiring hotels and buildings where any "trade, manufacture or business is carried on requiring the presence of workmen above the first story" to be equipped with suitable fire escapes (Rev. St. c. 28, § 38), held not to apply to a building in which a restaurant was carried on on the first floor, the kitchen being on the third floor, where there were three employes. Carrigan v. Stillwell [Me.] 59 A. 683. The statute applies only where workmen are employed above the first story in such numbers as to render escape difficult in case of fire. Id.

78. Where locomotive and switch engines were operated in connection with a blast furnace, a defective headlight in an engine was a defect in the "ways, works, machinery or plant," for which the master would be liable under Code 1896, § 1749, subsec. 1. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. And timbers used to scotch or chock hot pots and hold them on tracks on slag piles while cooling off are a part of "the plant." Id.

79. Under Iowa Code, § 2849, requiring experienced engineers to be placed in charge of engines used in operating mines, the mine owner was liable for the act of a superintendent who, knowing his own incompetency, attempted to operate the cage engine in the absence of the regular engineer, as a result of which an accident occurred, killing a miner. Beresford v. American Coal Co. [Iowa] 98 N. W. 902. Iowa Code, § 2489, requiring safety gates at mine shafts does not require a covering over the shaft, since cages are required to have safe coverings. Jacobson v. Smith, 123 Iowa, 263, 98 N. W. 773.

80. For rule of construction of automatic coupler act, and scope of act as determined by contemporary public documents and surrounding circumstances, see Johnson v. Southern P. Co., 25 S. Ct. 158.

81. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

82. Johnson v. Southern Pac. Co., 25 S. Ct. 158.

83. A car loaded with coal, temporarily sidetracked, held within the act. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522. A dining car in constant use, but dropped at a station to await a later train, which was to pick it up, was "engaged in interstate traffic" within the meaning of the act, and should have been equipped with an automatic coupler. Johnson v. Southern Pac. Co., 25 S. Ct. 158.

84. The entire process of making a coupling is included within the meaning of this prohibition. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522. The words used in the act, "without the necessity of men going between the ends of the cars," the test of compliance with the act, apply not only to the act of uncoupling, but also to the act of coupling. Johnson v. Southern Pac. Co., 25 S. Ct. 158.

85. The same is held as to the similar Iowa statute, Code 1897, §§ 2097, 2080. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

86. Johnson v. Southern Pac. Co., 25 S. Ct. 158.

with automatic couplers[87] or to keep such couplers in proper repair[88] is actionable negligence.

Places for work.[89]—The rule that it is the duty of the master to use ordinary care to provide and maintain a reasonably safe place to work[90] applies to the track,[91] yards,[92] and right of way[93] of railroads, to street railway tracks,[94] to mines,[95] and entries thereto and passageways therein.[96] Other illustrative applications are given in the note.[97]

87. Carson v. Southern R. Co. [S. C.] 46 S. E. 525.

88. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. Permitting an automatic coupler to become so defective as to require the employe to go between the cars to make it work, is actionable negligence. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

89. See 2 Curr. L. 814.

90. Sachau v. Milner & Co., 123 Iowa, 387, 98 N. W. 900; Libby v. Banks, 209 Ill. 109, 70 N. E. 599. Floor over which heavy machinery was being moved unsafe. Thompson v. American Writing Paper Co. [Mass.] 72 N. E. 343. Master liable if he sends servant into place of known danger. Babcock Bros. Lumber Co. v. Johnson, 120 Ga. 1030, 48 S. E. 438. It is the absolute, nondelegable duty of the master to provide a reasonably safe place in which the servant shall work, having regard to the kind of work and the conditions under which it must necessarily be performed. Thus, mine chambers must be properly timbered. Bunker Hill & Sullivan Min. & Concentrating Co. v. Jones [C. C. A.] 130 F. 813.

91. Chicago, etc., R. Co. v. Benton [C. C. A.] 132 F. 460; Rogers v. Cleveland, etc., R. Co., 211 Ill. 126, 71 N. E. 850. It is the duty of those operating engines to exercise reasonable care in keeping a lookout to discover employes on or near the track, and when employes are discovered in such position, to use every means in their power to prevent injury to them. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. A railway company must use ordinary care to see that cars on the track are not moved down upon a workman in a pit, who is so situated that he cannot see the track ahead. New York, etc., R. Co. v. Roe, 4 Ohio C. C. (N. S.) 284. In action for death of bridge watchman, company held negligent, through engineer, in running train over bridge at excessive rate, and in not keeping proper lookout. San Antonio, etc., R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422. Backing cars down on brakeman engaged in adjusting coupler, held negligence. Ft. Worth & R. G. R. Co. v. Caskey [Tex. Civ. App.] 84 S. W. 264. To start a train suddenly and without warning, thus injuring a brakeman, attempting to uncouple cars, is actionable negligence. Illinois Cent. R. Co. v. Jones' Adm'r [Ky.] 80 S. W. 484. Failure of hostler to keep a lookout while running an engine in yards where 200 men were employed was negligence. Louisville & N. R. Co. v. Lowe, 25 Ky. L. R. 2317, 80 S. W. 768. Railway company is liable for negligent operation of engine on its road, though the engine was owned and operated by another company permitted to use the road. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 80 S. W. 112.

92. Railway company negligent in leaving a stone in yards near a track, and leaving a frog unblocked. Texarkana & Ft. S. R. Co. v. Toliver [Tex. Civ. App.] 84 S. W. 375. Under Rev. St. 1899, § 1123, requiring railroad companies to block switches and frogs at all yards, divisional and terminal stations and where trains are made up, and § 1125, excluding the defense of contributory negligence where an injury is caused by failure to comply with the statute, there can be no recovery unless the accident is shown to have occurred at a place where such precautions are required by the statute. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981. It must also appear that the act causing the injury or death was done in the discharge of the servant's duty. Id.

93. Railway company was negligent in permitting a telegraph pole to be placed and to remain, with notice of its position, in dangerous proximity to passing cars, so that a brakeman was struck by it. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328. The company was liable for the injury resulting regardless of whether or not it owned the premises, since it controlled them and permitted the pole to be placed and to remain in the dangerous place. Id. Railroad company must use reasonable care in locating stock gaps, so as not to endanger employes by proximity to track. Northern Ala. R. Co. v. Mansell [Ala.] 36 So. 459.

94. Where street car track remained in defective condition a month, company was negligent either in not knowing of it, or in not repairing the track if it knew of its condition. Houts v. St. Louis Transit Co. [Mo. App.] 84 S. W. 161. Street railway company's failure to sand rails on a grade where sanding was necessary to make running of cars safe, was negligence. Union Traction Co. v. Buckland [Ind. App.] 72 N. E. 158.

95. Falling of coal and rock from roof of mine showed want of proper inspection and care to keep it reasonably safe. Wilson v. Alpine Coal Co. [Ky.] 81 S. W. 278. Plaintiff, to recover for injury caused by defective mine roof, not required to prove timbering necessary to support the roof and that timbers had been requested by the miners. Weston v. Lackawanna Min. Co. [Mo. App.] 78 S. W. 1044.

96. Garity v. Bullion-Beck & Champion Min. Co., 27 Utah, 534, 76 P. 556; East Jellico Coal Co. v. Golden, 25 Ky. L. R. 2056, 79 S. W. 291; Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802; Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863. 4 Starr & C. Ann. St. 1902, p. 845, c. 93, § 2b, requiring a passageway to be maintained at landing place of cage in mines, held to be violated, where after a cave-in, the passage was blocked and remained in that condition for six weeks, though it could have been cleared in two or three days. Chicago-Coul-

The rule does not require the master to guard against dangers inherent in the business,[98] and has no application where the employment consists in making a dangerous place safe,[99] or where the place of work is being created,[1] or is being constantly changed in character by the labor of men working upon it.[2] Dangers in the place of work are not necessary or inherent within the meaning of the exception to the rule if they could have been avoided by a slight increase in the cost of the work.[3] While the master cannot delegate the duty of furnishing a reasonably safe place,[4] he is not responsible if the suitable place provided by him is rendered unsafe solely by negligence of fellow-workmen,[5] or by the manner in which the work is performed.[6] The responsibility of the master, under this rule, does not extend to temporary appliances, the construction, maintenance, and adjustment of which is a part of the general work of the employes themselves;[7] nor does the rule apply to buildings in course of construction, in the same way as to completed buildings, ready for permanent use.[8]

The master is required to make a reasonable inspection of the place of work,[9]

terville Coal Co. v. Fidelity & Casualty Co., 130 F. 957.

97. Defendant negligent in not furnishing sufficient light for crew engaged in clearing debris from trestle. Stewart v. Texas & P. R. Co., 113 La. 525, 37 So. 129. Failure to properly light bottom of elevator shaft where plaintiff was sent to remove obstructions, held negligence. Nash v. Kansas City Hydraulic Press Brick Co. [Mo. App.] 83 S. W. 90. Where a ship watchman was charged with duty of lighting the hold of the ship while it was being unloaded, and there was no special contract governing the manner of unloading, the ship was liable for injuries to a stevedore resulting proximately from failure to light the ship so as to make it a safe place of work. The Santiago, 131 F. 383. Shipowners liable for negligence of master of vessel which resulted in making unsafe the place where a seaman was working. The Westport, 131 F. 815. A telephone company which allowed an electric light company to use its poles, was under the duty to use reasonable care to see that such use of the poles did not expose its employes to unusual risks. Barto v. Iowa Tel. Co. [Iowa] 101 N. W. 876.

A street railway company is not chargeable with negligence in permitting a telephone company to place poles on land, not owned or controlled by the railway company, so close to the track as to make performance of the duties of the employes dangerous. Chattanooga Elec. R. Co. v. Moore [Tenn.] 82 S. W. 478.

98. Such as in rock quarrying. Kentucky Freestone Co. v. McGee, 25 Ky. L. R. 2211, 80 S. W. 1113. Or where a section man is employed in clearing away a wreck on a railroad. Baltimore, etc., R. Co. v. Hunsucker [Ind. App.] 70 N. E. 556. There was no duty to give warning signals as to location of a burning bridge to employes on a train sent there to make repairs, the engineer and fireman knowing its location and the danger. Kath v. Wisconsin Cent. R. Co. [Wis.] 99 N. W. 217.

99. Indiana & C. Coal Co. v. Batey [Ind. App.] 71 N. E. 191.

1. Driving tunnel in mine. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515.

2. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515. Gravel pit of railway. Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 P. 202.

3. Barnett & Record Co. v. Schlapka, 208 Ill. 426. 70 N. E. 343.

4. Employe left unexploded dynamite in an excavation without informing plaintiff, who was ordered to complete the digging of the hole; master liable. Harp v. Cumberland Tel. & T. Co., 25 Ky. L. R. 2133, 80 S. W. 510. See subsection E.

5. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515. The master is not responsible when the place becomes dangerous only by reason of the carelessness of a fellow-servant. Koszlowski v. American Locomotive Co., 96 App. Div. 40, 89 N. Y. S. 55.

6. Belt v. Henry Du Bois' Sons Co., 97 App. Div. 392, 89 N. Y. S. 1072. No duty to so light premises that any and all repair work could be done without extra light, when repairman could obtain additional light if required. Schoultz v. Eckardt Mfg. Co., 112 La. 568, 36 So. 593. Where a miner, informed of the danger of his work, was engaged in removing pillars or "stumps," his employer was under no duty to protect him from dangers arising from his manner of doing the work. East Jellico Coal Co. v. Golden, 25 Ky. L. R. 2056, 79 S. W. 291.

7. Master not liable for falling of planks from a partition put up and kept in condition by the workmen as a part of their work. Galow v. Chicago, etc., R. Co. [C. C. A.] 131 F. 242.

8. The character of temporary floorings and supports depends upon the use to which they are put and the judgment of mechanics engaged on the premises must govern their construction. Fournier v. Pike, 128 F. 991.

9. The master is required to use ordinary care and prudence to acquaint himself with the condition of premises where he sets his employe to work. Kentucky Freestone Co. v. McGee, 25 Ky. L. R. 2211, 80 S. W. 1113. A master is liable for an injury caused by a defective place, after discovery of the defect; he is not entitled to a period of immunity, after such notice, in which to make repairs. Franck v. American Tartar Co., 91 App. Div. 571, 87 N. Y. S. 219.

and is chargeable with knowledge of defects or dangers which such an inspection would disclose.[10] The servant has a right to assume that his place of work is safe and free from all dangers which are not obvious and necessary.[11]

Neither the duty to provide reasonably safe instrumentalities,[12] nor the duty to provide a reasonably safe place to work,[13] can be delegated.[14]

(§ 3) *C. Methods of work, rules and regulations.*[15]—The master is under the duty to provide a reasonably safe method of doing the work.[16] He will be liable for injuries caused by the method employed, if he knew of the danger involved,[17] or in the exercise of ordinary care, ought to have known of it.[18] The master, having provided a plan, will not be liable for the consequences of an unauthorized departure from it by his servants.[19] Where work is not such as to require special skill, and the master fails to devise a plan for doing it, the servants may adopt any plan which is usual and customary under similar circumstances.[20] But if the plan adopted unnecessarily requires the services of one specially skilled, the

10. Master charged with knowledge that there was unexploded dynamite in an excavation which plaintiff was ordered to finish digging, its presence being concealed and unknown to plaintiff. Harp v. Cumberland Tel. & T. Co., 25 Ky. L. R. 2133, 80 S. W. 510.

11. Lanza v. Le Grand Quarry Co. [Iowa] 100 N. W. 488; Bunker Hill & S. Min. & Concentrating Co. v. Jones [C. C. A.] 130 F. 813. He is under no duty to make an examination to discover latent or hidden dangers. Barnett & Record Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343. See subsections F and G.

12. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183; Chisholm v. New England Tel. & T. Co., 185 Mass. 82, 69 N. E. 1042; Wood v. Rio Grande Western R. Co. [Utah] 79 P. 182; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 P. 377. Procuring an independent contractor to repair a boiler held not to relieve master from liability for injuries caused by its explosion. Shea v. Pacific Power Co. [Cal.] 79 P. 373. A master cannot escape responsibility for an injury caused by the breaking of a rotten round in a ladder on which his servant was working by showing that he had a foreman who had general oversight of appliances and necessary repairs. Twombly v. Consolidated Elec. Light Co., 98 Me. 353, 57 A. 85. The master cannot relieve himself of his duty to maintain appliances in a reasonably safe condition by promulgating rules requiring employes to inspect appliances and report defects; when such rules will bar a recovery by a servant depends upon the character of the employment, the specific duties required, and the means and opportunity afforded to make the required inspection. Recovery not barred by inspection rule, where switchman fell under engine, owing to defective footboard and handhold. Leduc v. Northern Pac. R. Co. [Minn.] 100 N. W. 108.

13. The duty to provide a safe place to work and to maintain it in a reasonably safe condition by inspection and repair cannot be delegated so as to relieve the master. One to whom the duty is delegated is a vice-principal. Lillie v. American Car & Foundry Co., 209 Pa. 161, 58 A. 272.

14. See subsection E.

15. See 2 Curr. L. 816.

16. Burns v. Delaware & A. Tel. & T. Co. [N. J. Err. & App.] 59 A. 220. Where it was necessary in mining shale to throw down masses of it into a pit where men were at work, at irregular intervals, it was the duty of the master to provide a permanent and efficient system of warning employes. Coffeyville Vitrified Brick & Tile Co. v. Shanks [Kan.] 76 P. 856.

17. Evidence that fewer men than usual were used in moving timbers, and that men complained among themselves but not to superintendent, was not sufficient to show that superintendent was charged with knowledge that the strain on the men was beyond their strength. Bertholet v. Bishop Co. [Mass.] 72 N. E. 342.

18. Employes may recover for injuries resulting from shock of electricity caused by contact of wires they were stringing with feed wire, the injury being preventable by use of safe method of handling the wires. Burns v. Delaware & A. Tel. & T. Co. [N. J. Err. & App.] 59 A. 220.

19. Plaintiff, injured by engine in cinder pit, could not recover for lack of a warning, when proper signals and safeguards were provided by master but disregarded by fellow-servants. Chicago & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754. Where servants engaged in tearing down building departed from the master's plan and orders for the work, during his absence, and battered down a pier, thus causing the building to collapse, injuring plaintiff, the negligence which caused the injury was that of fellow-servants, not of the master. Beatty v. Weed [Mass.] 70 N. E. 1008. A car manufacturing and repair company, having provided a system of warning car repairers at work, was not liable for an injury caused by the yardmaster's failure to give a warning. State v. South Baltimore Carworks [Md.] 58 A. 447.

20. Riverside Mills v. Jones [Ga.] 48 S. E. 700. To show a custom, substituted for a regulation or rule of the employer, it must appear that the practice of the employes was habitual, not occasional, and was known or ought to have been known by the employer, and assented to by him. Evidence insufficient to show a custom whereby switchmen and engine hostlers exchanged work. Baltimore & O. R. Co. v. Doty [C. C. A.] 133 F. 866.

master will not be liable for failure to provide a skilled servant.[21] A specific direction to do certain work in a dangerous manner is actionable negligence, unless the danger was so obvious that the servant must be held to have assumed the risk,[22] or to have been guilty of negligence in incurring it.[23]

If the nature of the business is such as to require it,[24] it is the duty of the master to adopt, promulgate and enforce such rules as will afford reasonable protection to servants while in the discharge of their duties.[25] He is under no duty to promulgate rules to govern servants acting outside the scope of their employment,[26] or to avoid open and apparent dangers,[27] or such dangers as could not have been anticipated by the exercise of ordinary care.[28] Failure to promulgate a particular rule does not constitute negligence unless it appears that the master should have foreseen the necessity for it,[29] and that such rule would have been practicable,[30] and, if observed, would have afforded reasonable protection.[31] If rules are so promulgated that servants have a reasonable opportunity to ascertain their terms, the method of promulgation is immaterial.[32]

Operation of trains.—The necessity of promulgating and enforcing rules of work is well illustrated in the case of railways.[33] A failure to observe rules for the operation of trains, which results in injury to an employe, is usually held actionable negligence.[34] The rules of a railroad company for the government of its

21. In building a bridge between two buildings, the men selected a method of raising timbers by ropes, requiring an expert "rigger." Master held not liable for injury from falling timber caused by improper tying by a carpenter. Riverside Mills v. Jones [Ga.] 48 S. E. 700.

22. Jones v. American Warehouse Co. [N. C.] 49 S. E. 355. See subsection F.

23. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737. See subsection G.

24. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. As where it is dangerous and complex, such as operation of a street railway. Moran v. Rockland, etc., R. Co. [Me.] 58 A. 676. An employer engaged in a hazardous business has the right, and it is his duty, to formulate reasonable rules regarding its conduct to secure protection of property and the public and reduce the risks assumed by the employes. Smith v. Centennial Eureka Min. Co., 27 Utah, 307, 75 P. 749. The duty to prescribe rules for the protection of employes is to be determined by the conduct of men in general engaged in like occupations. Hill v. Boston & M. R. Co., 72 N. H. 518, 57 A. 924. A master need not make rules to govern his workmen if his business is such that personal supervision by him is practicable. Punkowski v. New Castle Leather Co., 4 Pen. [Del.] 544, 57 A. 559. Where the practice followed in cleaning out engines was such that the employes engaged in that work and knowing the practice were in no danger so long as they were not careless, no rules were necessary as a matter of law. Lane v. New York, etc., R. Co., 93 App. Div. 40, 86 N. Y. S. 947.

25. Moran v. Rockland, etc., R. Co. [Me.] 58 A. 676; Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. The New York Employers' Liability Act creates no liability for failure to make proper rules and regulations; hence an action based on such failure is based on common law. Ward v. Manhattan R. Co., 95 App. Div. 437, 88 N. Y. S. 758.

26. Moran v. Rockland, etc., R. Co. [Me.] 58 A. 676.

27. Danger of repairing electrical fleshing machine obvious. Austin v. Fisher Tanning Co., 96 App. Div. 550, 89 N. Y. S. 137.

28. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515; Dooling v. Deutcher Verein, 97 App. Div. 39, 89 N. Y. S. 580.

29. Koszlowski v. American Locomotive Co., 96 App. Div. 40, 89 N. Y. S. 55.

30. A given rule may not be said to be practicable, though it may appear desirable, unless it appears that it has been adopted and used by others, or has been proven efficient by experience and use. Koszlowski v. American Locomotive Co., 96 App. Div. 40, 89 N. Y. S. 55.

31. Koszlowski v. American Locomotive Co., 96 App. Div. 40, 89 N. Y. S. 55.

32. Moran v. Rockland, etc., R. Co. [Me.] 58 A. 676.

33. Construction of particular rules: The meaning of a rule in force at the time of an accident may not be shown by an amendment adopted after the accident. Quinn v. Galveston, etc., R. Co. [Tex. Civ. App.] 84 S. W. 395. A railroad rule requiring cars on grade sidings to be coupled together when practicable required only the coupling of cars in contact, and did not prohibit leaving spaces between sets of cars. St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 82 S. W. 360. A rule providing that engine men must not leave their engines on sidings, with steam on, except in charge of an employe, and providing what precautions must be taken when an engine is in such situation, has no application to an engine at a coaling station, in charge of the engineer. Cleveland, etc., R. Co. v. Bergshicker, 162 Ind. 108, 69 N. E. 1000.

34. The violation of a rule prohibiting placing of torpedoes on the track at or near stations is negligence per se, for which an employe, injured thereby, may recover. Illinois Cent. R. Co. v. Burton, 25 Ky. L. R.

employes are obligatory upon those who know them, and to whom they have been promulgated.[35] In providing for the safety of employes, a railway company may assume that its rules are being observed.[36] Rules may be abrogated by disregard of them with knowledge of the company's officers.[37] An express contract whereby an employe agrees to be bound by the rules of the company and waives liability for injuries caused by disregard of such rules, can be rescinded only by mutual disregard of the rules subsequent to the date of the contract.[38]

(§ 3) *D. Warning and instructing servant.*[39]—It is the master's duty to properly warn and instruct young and inexperienced employes as to the dangers of the employment,[40] if the work required of such servants is such that either

1916, 79 S. W. 231. Sudden increase in speed of train, at a point where it was expected to stop to let workmen off, was negligence. Whisenhant v. Southern R. Co. [N. C.] 49 S. E. 559. Company chargeable with negligence where employes ran a freight train at an excessive rate and engineer failed to sound whistle at a curve, though he had been ordered to look out for hand car, a collision with the hand car resulting and causing death of employe. International & G. N. R. Co. v. Jacobs [Tex. Civ. App.] 84 S. W. 288. Defendant was negligent where cars on a sidetrack not clear of another track were "cornered," instead of being "shoved" down the track, rules of the company being thereby violated, and switchman thereby injured while making a coupling with defective coupler could recover. Missouri, etc., R. Co. v. Gearheart [Tex. Civ. App.] 81 S. W. 325. Failure of one section, when delayed and standing, to send back a flagman or put out lights to warn the rear section of a train, would be negligence rendering the company liable for injuries proximately caused thereby. San Antonio, etc., R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401. Where under the terms of a contract between a lumber company and a railroad, permitting the former to use the railway tracks for its logging trains, the operatives of such trains were to be under the direct orders of the railroad superintendent, and were to display flags to protect themselves from extra trains, running trains without orders or flags was negligence. Roganville Lumber Co. v. Gulf, etc., C. R. Co. [Tex. Civ. App.] 82 S. W. 816.

35. Little v. Southern R. Co., 120 Ga. 347, 47 S. E. 953.

36. Failure to inform employes in charge of rear section of a train running in two sections that the forward section had been delayed was not negligence, when the collision would have been avoided had the crew of the first section observed the rules (Quinn v. Galveston, etc., R. Co. [Tex. Civ. App.] 84 S. W. 395), nor would the company be liable for having a freight box car caboose on the rear of the first section, when observance of its rules would have avoided the accident (Id.).

37. A rule requiring great care in the use of hand cars, and the placing of flagmen for their protection where risk of collisions was great, was held to have been abrogated where it had been disregarded for years with the knowledge and acquiescence of roadmasters. International & G. N. R. Co. v. Jacobs [Tex. Civ. App.] 84 S. W. 288.

38. Disregard of rule requiring use of coupling stick prior to date of plaintiff's employment could not be shown. Central of Georgia R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641.

39. See 2 Curr. L. 819.

40. Operator of dangerous machine. Creachen v. Bromley Bros. Carpet Co., 209 Pa. 6, 57 A. 1101. Inexperienced operator of knee bolter in shingle mill. Jancko v. West Coast Mfg. & Inv. Co., 34 Wash. 556, 76 P. 78. Employe set to work near dangerous machine. Sachau v. Milner & Co., 123 Iowa, 387, 98 N. W. 900. Failure to instruct ignorant foreigner how to clean out and start a clogged cotton picking machine held negligence. Kasjeta v. Nashua Mfg. Co. [N. H.] 58 A. 874. Failure to instruct young and inexperienced girl employed to operate a wire-cutting machine held negligence. Bowden v. Marlborough Elec. Mach. & Lamp Co., 185 Mass. 549, 70 N. E. 1016. Failing to instruct young and inexperienced girl set to work cleaning machine held negligence. Dolan v. Boott Cotton Mills, 185 Mass. 576, 70 N. E. 1025. Boy of 12, injured while playing with belts in factory where employed, should have been instructed. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908. Petition alleging failure to warn employe—a child of 10—and lack of knowledge of the child held not demurrable. Canton Cotton Mills v. Edwards, 120 Ga. 447, 47 S. E. 937. Failure to instruct inexperienced boy of 10 known by foreman to be working near dangerous machinery, held negligence. Vanesler v. Moser Cigar & Paper Box Co. [Mo. App.] 84 S. W. 201. Defendant negligent in failing to explain danger and warn employe engaged in clearing debris in stream from trestle. Stewart v. Texas & P. R. Co., 113 La. 525, 37 So. 129. Boy 14½ years old, employed as office boy, whose duty it was to operate a freight elevator when taking books from office to vault, should have been instructed as to operation of elevator. Lowry v. Anderson Co., 96 App. Div. 465, 89 N. Y. S. 107. Inexperienced operator recovered when he was injured by reason of failure to readjust or instruct him how to readjust his machine after knives in it had been changed without his knowledge. James v. Ames & Co. [Ky.] 82 S. W. 229. Ordering a young and inexperienced boy to remove a hopper of a planing machine, immediately after the power was turned off but before the knives had stopped revolving, with no reason to suppose the boy had knowledge of the danger, was negligence in the general manager. Horne v. La Crosse Box Co. [Wis.] 101 N. W. 935.

experience or instruction is necessary to enable them to do it with safety.[41] Thus the duty exists where the servant is sent to perform dangerous duties outside the scope of his usual service.[42] The sufficiency of such instruction is to be determined by the age, intelligence and experience of the employe.[43] The master must also warn and instruct his servants as to special risks arising from peculiar conditions,[44] and as to those hidden or latent dangers, known or which ought to be known, to the master,[45] but unknown to the servant[46] and not discoverable by him by the use of ordinary care.[47] Failure of a vice-principal to warn a servant of an impending danger is negligence[48] unless the vice-principal was not aware of the danger.[49]

No instruction is necessary as to obvious dangers[50] fully known to the employe[51] or which ought to have been known to him by reason of his experience,[52]

41. Ford v. Bodcow Lumber Co. [Ark.] 83 S. W. 346.

42. Bonnin v. Crowley, 112 La. 1025, 36 So. 842. Telephone employe, inexperienced as lineman, injured by falling of a pole which he was working on, which he had not been instructed to test. Cumberland Tel. & T. Co. v. Bills [C. C. A.] 128 F. 272. Common laborer in iron works ordered to assist carpenters in replacing pillars supporting a track. Tennessee Coal, Iron & R. Co. v. Jarrett [Tenn.] 82 S. W. 224.

43. Creachen v. Bromley Bros. Carpet Co., 209 Pa. 6, 57 A. 1101; Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569; Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908. A young and inexperienced employe must be instructed even as to apparent and incidental dangers, if he does not know of and appreciate them. Ford v. Bodcaw Lumber Co. [Ark.] 83 S. W. 346.

44. Work of piling logs in high tiers by horse power is specially dangerous to man on the pile. Dell v. McGrath [Minn.] 99 N. W. 629. A master who, from necessity, uses dangerous agencies or appliances, must give his servants full information regarding the danger, and full instructions as to the manner of avoiding it. Day laborer excavating for foundation injured by explosion of dynamite which had been used in blasting to loosen frozen soil. Welch v. Bath Ironworks, 98 Me. 361, 57 A. 88.

45. Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569. Either actual or imputed knowledge of a dangerous condition of materials furnished a workman is sufficient to render the master liable. Currelli v. Jackson [Conn.] 58 A. 762.

46. Carter v Duvach Lumber Co. [La.] 36 So. 952. Hidden or special dangers involved in the use of appliances. Crane v. Chicago, etc., R. Co. [Iowa] 99 N. W. 169. Employer negligent in not warning employe, putting new punches on hydraulic machine, of liability of machine to start up suddenly. Klaffke v. Bettendorf Axle Co. [Iowa] 100 N. W. 1116. Danger from cogs in machinery connected with crane, the place where they were being dark. Shickle-Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423. Mine foreman told driver of dangerous grade, and said he would accompany driver and show him where to sprag the wheels of the car. Failure to make good the assurance was held negligence. Collingwood v. Illinois & I. Fuel Co. [Iowa] 101 N. W. 283. Where dangers incident to an employment are not apparent, the servant may presume that it is reasonably safe, and that he will be notified of special danger not open to ordinary observation but known to the master. Lebeau v. Dyerville Mfg. Co. [R. I.] 57 A. 1092. Foreman's order to put potash in the water cooler, without precautionary directions to prevent employes drinking the poisoned water, was negligence. Geller v. Briscoe Mfg. Co. [Mich.] 99 N. W. 281.

47. Standard Oil Co. v. Fordeck [Ind. App.] 71 N. E. 163.

48. Failure of a foreman standing near to warn a car inspector of danger would be negligence if it was customary to give such warning or the foreman's duty to do so. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. Where it was customary to shut down a mill for repairs daily, and to give warning to employes before starting it, it was gross negligence for a superintendent to order it to start without a warning, having previously shut it down and directed plaintiff to make repairs. Mathews v. Daly West Min. Co., 27 Utah, 193, 75 P. 722.

49. The conductor of a gravel train was under no duty to warn the servant in charge of the steam shovel of the approach of the engine, when he did not see the latter's position of danger, and the latter servant knew of the method of doing the work. Campbell v. Illinois Cent. R. Co. [Iowa] 100 N. W. 30.

50. Harrison v. Detroit, etc., R. Co. [Mich.] 100 N. W. 451. Dangers patent to persons of ordinary intelligence. Chicago & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754. As danger incident to taking a derrick apart. Mayer v. Ramsay-Brisbane Stone Co., 119 Ga. 734, 46 S. E. 844. Danger to lineman engaged in stringing cables on street railway poles. Meehan v. Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61. Danger to telephone lineman stringing wires on building. Fremont Tel. Co. v. Keeler [Neb.] 101 N. W. 245.

51. Wendler v. Red Wing Gas & Elec. Co. [Minn.] 99 N. W. 625. Risk of chest falling from inclined shelf obvious and necessarily known to clerk. Hofnauer v. White Co. [Mass.] 70 N. E. 1038. Servant held to have had such knowledge of a machine that failure to instruct him regarding it was not negligence. McMamus v. Davitt, 94 App. Div. 481, 88 N. Y. S. 55. An allegation of a duty to warn insufficient without allegation of facts showing the duty to warn existed, as want of knowledge, and inexperience.

or by the exercise of ordinary care.[53] There is no duty to instruct as to dangers incident to the employment, and which the servant assumes by his contract.[54] The master will not be liable for failure to instruct unless he himself is chargeable with notice of the danger[55] and of the servant's ignorance of the danger;[56] and a servant who has the same knowledge of the danger as the master cannot recover.[57] In the absence of notice to the contrary, the master may assume that a servant understands the ordinary risks of his employment[58] and that he has the capacity of the average servant of the same age and experience.[59]

The duty to warn and instruct cannot be delegated.[60]

(§ 3) *E. Fellow-servants.*[61]—The master is charged with the duty of exercising ordinary care to employ and retain only such servants as are reasonably competent to perform their intended duties.[62] He is accordingly liable for injuries to a servant resulting proximately from the incompetency of a fellow-servant,[63] if he had either actual or implied knowledge of such incompetency.[64]

Fortin v. Manville Co., 128 F. 642. Railway employe held to have either actual or imputed knowledge of location of a culvert in a freight yard, so that a warning to him was not necessary. Central of Georgia R. Co. v. Price [Ga.] 49 S. E. 683.

52. Conductor under no duty to instruct experienced brakeman as to how to mount a moving car. Weed v. Chicago, etc., R. Co. [Neb.] 99 N. W. 827. Handhold on top of circus car was placed nearer the end than usual. Held, its position was obvious to a brakeman of experience. Woods v. Northern Pac. R. Co. [Wash.] 79 P. 309. Held that decedent, by experience and observation, had adequate knowledge of danger of standing in front of a circular saw when in operation. St. Jean v. Tolles & Co., 72 N. H. 587, 58 A. 506. No necessity for warning a miner of several years' experience in blasting of the danger in charging holes with dynamite. Northern Alabama Coal, Iron & R. Co. v. Beacham, 140 Ala. 422, 37 So. 227.

53. No duty to instruct a minor of intelligence and experience as to dangers readily ascertainable by him. Tucker v. National Loan & Investment Co. [Tex. Civ. App.] 80 S. W. 879.

54. Shickle-Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423.

55. Diehl v. Standard Oil Co., 70 N. J. Law, 424, 57 A. 131. No duty to warn against use of dull chisel in cutting iron, when foreman had no reason to suppose, from workman's conduct, that he would use one. San Antonio Sewer Pipe Co. v. Noll [Tex. Civ. App.] 83 S. W. 900.

56. Tompkins v. Marine Engine & Mach. Co., 70 N. J. Law, 330, 58 A. 393.

57. Tennessee C., I. & R. Co. v. Jarrett [Tenn.] 82 S. W. 224. Nonsuit proper where no defects were shown, and plaintiff had equal opportunity with defendant to know of dangers. Cartledge v. Pierpont Mfg. Co., 120 Ga. 221, 47 S. E. 586. Employer held not liable for death of servant caused by explosion of varnish when deceased had as much knowledge as employer of the danger and of the proper manner of handling the varnish. Vallie v. Hall, 184 Mass. 358, 68 N. E. 829.

58. Murphy v. Rockwell Engineering Co., 70 N. J. Law, 374, 57 A. 444. A conductor may assume that his brakeman understands his ordinary and customary duties and need not instruct him in regard thereto. Virginia & S. W. R. Co. v. Bailey [Va.] 49 S. E. 33.

59. Punkowski v. New Castle Leather Co., 4 Pen. [Del.] 57 A. 559.

60. Rogers v. Cleveland, etc., R. Co., 211 Ill. 126, 71 N. E. 850; Coffeyville Vitrified Brick & Tile Co. v. Shanks [Kan.] 76 P. 856; Welch v. Bath Ironworks, 98 Me. 361, 57 A. 88. Where the master has negligently caused a servant to do work outside his regular employment, without instructing him as to the danger, he cannot escape liability on the ground that a fellow-servant failed to warn him. Grace & Hyde Co. v. Probst, 208 Ill. 147, 70 N. E. 12.

61. See 2 Curr. L. 820.

62. But he does not warrant their competency to fellow-servants. Hilton v. Fitchburg R. Co. [N. H.] 59 A. 625. The master is not always responsible for the conduct of an incompetent servant; he has performed his duty if he has exercised proper care in selecting his servants and in ascertaining their fitness and competency. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. A negligent person in a position requiring care and caution is incompetent; thus a ship was liable for injuries occasioned by negligence of a winchman. The Elton, 131 F. 562. It is not against public policy to permit a railroad company to employ persons who have been injured in its service at such labor as they may be able to perform. Bowers v. Detroit S. R. Co., 4 Ohio C. C. (N. S.) 479.

63. Declaration alleging employment of incompetent die setter of power press held good against demurrer. Kasadarian v. James Hill Mfg. Co., 130 F. 62. Master liable for death of employe caused by incompetent boss ordering employe into pit full of hot ashes and then turning water on them. Hunt v. Desloge Consol. Lead Co., 104 Mo. App. 377, 79 S. W. 710. Evidence regarding incompetency of servant held insufficient to show defendant negligent in employing him. Delory v. Blodgett, 185 Mass. 126, 69 N. E. 1078.

64. Havens v. Rhode Island S. R. Co. [R. I.] 58 A. 247. Evidence held to show a general manager of a coal yard had power to hire and discharge servants, so that his knowledge of a servant's incompetency was imputable to the master. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366. No negli-

The master is entitled to a reasonable time in which to investigate the alleged incompetency of a servant;[65] but actual or implied knowledge of incompetency renders him at once liable.[66] It has been held that where the master has furnished a sufficient number of competent workmen, he will not be liable for the selection of a servant incompetent to perform a particular duty,[67] such selection being the act of a fellow-servant.[68] It is elsewhere held that where the act of selecting servants for particular duties is necessarily delegated, the act is nevertheless that of the master,[69] and if an incompetent servant is selected, and the master or his authorized agent knew, or ought to have known, of such incompetency, the master is liable.[70] But he will not be liable if the selection was made by one who was in fact a mere fellow-servant, and had no authority to make it.[71]

A master who has used due care in the selection of servants is not, at common law,[72] liable for the negligence of fellow-servants,[73] such negligence being

gence of section boss proved, where fellow-laborer, ordered to assist in pulling out a tie, struck plaintiff with his pick, when fact that negligent employe was drunk was not known to the boss. Rose v. Louisville & N. R. Co. [Ky.] 81 S. W. 248.

65. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366.

66. Where a master has knowledge of a servant's incompetency, he is liable for the death of a servant proximately caused by such incompetency, regardless of whether ordinarily prudent men would have retained such a servant, knowing his incompetency, under the same circumstances. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366.

NOTE. Negligence in retention of incompetent servants: While the conditions of the master's liability to a servant for negligence of an incompetent fellow-servant have generally been stated as the negligent employment or retention of such servant, most cases have sustained liability solely upon the ground that the incompetent was known to be such before the injury, without a consideration of the question whether the retention of the servant after such knowledge, constituted negligence. But the distinction between negligent employment and negligent retention was carefully considered in L. S., etc., R. Co. v. Stupak, 123 Ind. 210, 23 N. E. 246, where it was held that the mere fact of knowledge by the master was not sufficient to charge him for results of a servant's incompetency without a further finding or conclusive proof that the retention after knowledge was inconsistent with due care. It was said that after information of a servant's incompetency was received by a master, it might well be consistent with reasonable care and diligence to postpone his summary discharge long enough to investigate as to the truth of such information, and, even after being convinced of the incompetency, some reasonable time might be imperatively necessary before the discharge; hence that some delay might be consistent with ordinary care. It was also said, however, that if it appeared that unnecessary delay intervened, the court could declare the negligence as a matter of law. This case is followed by L. S., etc., R. Co. v. Breedlove, 10 Ind. App. 657, 38 N. E. 357, and Schreiber v. U. T. Co., 153 Ind. 609, 613, 55 N. E. 742.

This "Indiana doctrine" is repudiated by the Wisconsin court in Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 370, 371, where the true rule is said to be that the master who negligently or knowingly employs or retains an incompetent servant is liable for injuries thereby resulting to fellow-servants who are not themselves negligent, and have not assumed the risk. If he is not negligent in ascertaining the fitness of such an employe when selected, nor in discovering his unfitness afterwards, he is excused; but when he has, or in the exercise of ordinary care ought to have, knowledge of incompetency, he is liable. After such actual or implied knowledge, the question of due care cannot arise. Baulic v. Railroad, 59 N. Y. 356, 359, 17 Am. Rep. 325; Maitland v. Gilbert Co., 97 Wis. 476, 490, 72 N. W. 1124, 65 Am. St. Rep. 137; Whittaker v. Canal Co., 126 N. Y. 544, 549, 27 N. E. 1042; Hilts v. C., etc., R. Co., 55 Mich. 437, 21 N. W. 878, are cited as supporting the Wisconsin view.

67. Where plaintiff, a blacksmith, applied for a helper, and foreman furnished a righthanded striker, who attempted to strike lefthanded blows and injured plaintiff, the master was not liable. Hilton v. Fitchburg R. Co. [N. H.] 59 A. 625.

68. Hilton v. Fitchburg R. Co. [N. H.] 59 A. 625.

69, 70. Hilton & D. Lumber Co. v. Ingram, 119 Ga. 652, 46 S. E. 895.

71. Where the master has furnished competent servants he is not responsible for the act of a fellow-servant, who without authority transfers a servant from work he is competent to do, to work for which he is unfitted. Hilton & D. Lumber Co. v. Ingram, 119 Ga. 652, 46 S. E. 895.

72. Common-law fellow-servant rule is in force in Indian Territory, under Mansf. Dig. § 566 and Act Cong. May 2, 1890, c. 182, of which the court will take judicial notice. St. Louis & S. F. R. Co. v. Arnett [Tex. Civ. App.] 84 S. W. 599; Overton v. McCabe [Tex. Civ. App.] 79 S. W. 861; Missouri, etc., R. Co. v. Keefe [Tex. Civ. App.] 84 S. W. 679. Driver of a wagon carrying rock and a foreman in charge of unloading, who ran the hoisting engine in the engineer's absence, were fellow-servants; hence for the latter's negligence, the former could recover only under the statute [Laws 1902, p. 1748, c. 600]. Randall v. Holbrook, C. & D. Contracting Co., 95 App. Div. 336, 88 N. Y. S. 681.

73. Peterson v. New York, etc., R. Co. [Conn.] 59 A. 502; Wells v. O'Hare, 209 Ill. 627, 70 N. E. 1056; Gillen v. McAllister, 97

an assumed risk.[74] But if negligence of a fellow-servant is not the sole cause of injury, but merely concurs with negligence of the master to produce it, the master is liable.[75]

Determination of relation. Common-law rules.[76]—What constitutes the relation of fellow-servants is a question of general law,[77] and state courts need not apply the rule adopted by Federal courts,[78] nor will a state statute create a right of action in a Federal court,[79] though the construction placed on an employers' liability act by the state court will be followed by the Federal courts sitting in the state.[80] After the adoption of the English employers' liability act of 1880, English common law had no relation to a master's liability for injuries to a servant; hence, the decisions of English courts prior to 1880 have no binding force, in determin-

App. Div. 310, 89 N. Y. S. 953. Inspector of air brakes, injured through a brakeman's negligence in opening and closing switches could not recover. Fullmer v. New York, etc., R. Co., 208 Pa. 598, 57 A. 1062. Where section man was injured by a tie which was struck by projecting step on caboose, the only negligence was of a fellow-servant in placing the tie too near the track. Turner v. Detroit S. R. Co. [Mich.] 100 N. W. 268. No recovery where injury was caused by slippery floor resulting from the spilling of rubber cement by a fellow-workman. McRea v. Hood Rubber Co. [Mass.] 72 N. E. 1015. Death of servant occasioned by breaking of eyebolt of staging held to be proximately caused by negligence of a fellow-servant, and not by defective appliances. Ennis v. Little & Co. [R. I.] 55 A. 884.

74. Collingwood v. Illinois & I. Fuel Co. [Iowa] 101 N. W. 283; Murphy v. Grand Trunk R. Co. [N. H.] 58 A. 835; Wells v. O'Hare, 209 Ill. 627, 70 N. E. 1056; Breslin v. Sparks, 97 App. Div. 69, 89 N. Y. S. 627; Sartin v. Oregon Short Line R. Co., 27 Utah, 447, 76 P. 219; Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674. See subsection F.

75. Klaffke v. Bettendorf Axle Co. [Iowa] 100 N. W. 1116; Lockwood v. Tennant [Mich.] 100 N. W. 562; Swanson v. Oakes [Minn.] 101 N. W. 949; Strauss v. New York, etc., R. Co., 91 App. Div. 583, 87 N. Y. S. 67; Hicks v. Southern Pac. Co., 27 Utah, 526, 76 P. 625; Virginia & S. W. R. Co. v. Bailey [Va.] 49 S. E. 33; Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 80 S. W. 112; Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847; Texas Cent. R. Co. v. Pelfrey [Tex. Civ. App.] 80 S. W. 1036; Cole v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1138; Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808. Where a palpably defective plank was furnished, its use by a fellow-servant in construction of a staging did not relieve the master from liability. Farrell v. Eastern Machinery Co. [Conn.] 59 A. 611. If railway track was defective at curve, negligence of the engineer contributing to cause derailment and death of fireman, would be no defense. Shugart v. Atlanta, etc., R. Co. [C. C. A.] 133 F. 505. Where passageway in factory was allowed to become unsafe, concurring negligence of a fellow-servant did not relieve the master. Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932. Injury to miner being caused by negligence in leaving the roof in an entry in an unsafe condition, the negligence of a fellow-servant which caused him to be in the entry, could not defeat a recovery by him. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38. Where an injury resulted from the omission of a necessary protective attachment and the act of a foreman in starting it, such act of the foreman was not that of a fellow-servant so as to relieve the master. Bradford v. Taylor [Miss.] 37 So. 812. Where an injury was caused by a negligent act of a foreman, together with an order given by him, there was a recovery against the master, though the negligent act was the act of a fellow-servant. Illinois Southern R. Co. v. Marshall, 210 Ill. 562, 71 N. E. 597. Though fellow servants were negligent in leaving hatchway open, the concurring negligence of the master in not properly lighting the hallway where the hatchway was situated made the latter liable. Schwarzschild v. Drysdale [Kan.] 76 P. 441. If the order of a mine superintendent to carry planks down a stairway in a shaft was negligent, concurring negligence of fellow-servants in executing the order would be no defense to an action by an employe injured. Jensen v. Commodore Min. Co. [Minn.] 101 N. W. 944. That a fellow-servant put up a car door would not defeat a recovery, if the proximate cause of plaintiff's injury was not the improper manner of handling it, but the defective fastening and want of inspection. Missouri, etc., R. Co. v. Hutchens [Tex. Civ. App.] 80 S. W. 415. Plaintiff engaged in attaching logs to a cable to be hauled to a logging camp by an engine 60 rods away, was injured by negligence of the engineer in starting the engine. Held, negligence of the engineer concurred with negligence of defendant in not providing a means by which the engineer could signal the plaintiff, and defendant was liable. Conine v. Olympia Logging Co. [Wash.] 78 P. 932.

76. See 2 Curr. L. 823.

77. Kane v. Erie R. Co., 128 F. 474.

78. Even though such Federal rule has been applied to the same facts. Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371.

79. Rev. St. Ohio, § 3365-22, nonenforceable in Federal court. Kane v. Erie R. Co., 128 F. 474.

80. Statutory notice required in New York is condition precedent to maintenance of action. Crosby v. Lehigh Valley R. Co., 128 F. 193.

ing the relation of fellow-servants, upon courts of a state which adopted the common law after 1880.[81]

Courts differ not only as to the rules by which the relation is to be determined, but also in the application of those rules where there is a similarity of facts.[82] It is commonly held that persons intrusted with the management of work,[83] and who have power to control or direct subordinates,[84] are vice-principals, for whose negligent acts, while exercising their authority, the master is respon-

81. Common law was adopted in Wyoming in 1899 (Rev. St. 1899, § 2695), hence English decisions, though entitled to respect, have no binding force in that state. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. (The opinion treats of English cases and the English act of 1880 at some length.)

82. **Note:** "Judicial efforts to find a criterion of general application in determining when one employe so far represents the employer that he is a vice-principal, and the employer responsible for his negligence resulting in injury to a co-employe, have yielded one of the conspicuous failures of latter-day jurisprudence. * * * The fundamental principle, and one generally accepted, is that, for an employe to be held a vice principal, he must have represented the master in performing the act relied on as a cause of action against the master." Bien v. St. Louis Transit Co. [Mo. App.] 83 S. W. 986.

"The question as to when a servant or agent may be considered the vice-principal or direct representative of the employer has been variously answered. In some cases it has been held that a superior servant is, by virtue of his rank, a vice-principal as to an inferior servant of the same employer; in others his representative character is made to depend on his authority to employ and discharge his subordinates; according to others, to be a vice-principal, the superior servant must have the entire charge and control of a distinct department of the master's business; and in still others, that relation is made to turn upon the character of the act or service concerning which negligence is charged, rather than upon the rank of the employe by whom such act is done or such service is performed." Beresford v. American Coal Co. [Iowa] 98 N. W. 904.

83. This is the rule in Wyoming. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. Where foreman and assistant foreman of mine were present, the latter assisting, when rails were loaded on a car to be sent into the mine, negligence in the manner of loading the rails was chargeable to the master. Id. A "green hand" was ordered by employe in charge to enter an ash pit, and did so believing it safe, when water was turned on ashes causing his death by scalding from steam. Hunt v. Desloge Consol. Lead Co., 104 Mo. App. 377, 79 S. W. 710.

84. Freight train conductor is a vice-principal. Alabama G. S. R. Co. v. Baldwin [Tenn.] 82 S. W. 487. Employe in electric plant not fellow-servant of manager. Bonnin v. Crowley, 112 La. 1025, 36 So. 842. Conductor of train and employes under his direction are not fellow-servants. Rhodes v. Southern R. Co. [S. C.] 47 S. E. 689. Foreman at brickyard, who had authority to direct employes in proprietor's absence, was not deprived of his authority when proprietor was in the yard but 100 yards away and not in sight. Browning v. Kasten [Mo. App.] 80 S. W. 354. A street car conductor, who directs another conductor, off duty, to ride on the front platform, is not a "superintendent" within the meaning of the Employer's Liability Act. McLaughlin v. Interurban St. R. Co., 91 N. Y. S. 883. Girl employed in woolen mill to empty baskets of the weavers, directed in her work wholly by the weavers and not by a boss or floor walker, was not a fellow-servant of the weavers. Mayfield Woolen Mills v. Frazier, 25 Ky. L. R. 2263, 80 S. W. 456. Conductor and brakeman on construction train are not fellow-servants. Grant v. Tacoma E. R. Co., 33 Wash. 524, 74 P. 665. One who has authority to control another is not the fellow-servant of the latter, though he himself is subject to the orders of a third person. Illinois Cent. R. Co. v. Elliott [Ky.] 82 S. W. 374. Street car barn foreman who controlled the running out of cars, and had authority to lay off men, was a vice-principal. Bien v. St. Louis Transit Co. [Mo. App.] 83 S. W. 986. Head sawyer, who directed operations of tail sawyer—plaintiff—and others in saw mill, held not fellow-servant of plaintiff. Hendricks v. Lesure Lumber Co. [Minn.] 99 N. W. 1125. A contractor who furnished labor and materials to his men and directed them in work of grading and ballasting bed of railway was not a fellow-servant of the men under him, though his work was subject to the direction and acceptance of the engineer. Hooe v. Boston & N. St. R. Co. [Mass.] 72 N. E. 341. If foreman in brewery negligently ordered plaintiff into a tub, to clean it, plaintiff could recover from master. Baier v. Selke, 211 Ill. 512, 71 N. E. 1074. Master liable where one with authority to direct servants and conduct the business in the absence of his superiors knowingly furnished a servant a vicious horse. Wysocki v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 950.

Street railway conductor, not shown to have delegated authority over the motorman, was not a vice-principal, for whose negligence in signaling motorman at railway crossing, the company would be liable. McLeod v. Chicago & N. W. R. Co. [Iowa] 101 N. W. 77. Prior to the fellow-servant statute of Texas, it was held in that state, construing the common law, that an employe in charge of a special department, with power to employ and discharge in his department, was a vice-principal. St. Louis, etc., R. Co. v. Arnett [Tex. Civ. App.] 84 S. W. 599; Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. But where a foreman ordered a workman to remove sawdust near a moving circular saw, the act rendered the master liable, though the foreman had no power to employ or discharge. Id.

sible. The mere fact that one intrusted with the exercise of discretionary authority sometimes, or habitually, works as a common hand, does not alone change his relation from that of vice-principal to that of fellow-servant.[85] Whether, in doing a particular act, of which complaint is made, such servant represented the master, depends upon the nature of the act.[86] If the negligence complained of arises out of and is the direct result of the authority conferred on him by the master, the master is liable;[87] but if the negligence charged is an act done by the servant in his capacity as a co-laborer, and not as foreman, the master is not liable.[88] If the act be one which such servant could do in either capacity, it will be held to have been done in the capacity in which it was his special duty to act.[89] An employe can recover from the master for negligence of a superior, with whom he was working at the time, only on proof of gross negligence.[90]

The rule adopted by many courts is that the relation is to be determined by the nature of the service in which the servant was engaged at the time, without reference to rank or title.[91] Since the master's duty to exercise ordinary care

85. Illinois Southern R. Co. v. Marshall, 210 Ill. 562, 71 N. E. 597. As where mine boss drove mule hauling cars of coal at time of an accident, but gave orders to the workman killed. Consolidated Coal Co. v. Fleischbein, 207 Ill. 593, 69 N. E. 963. Superintendent of underground work in mine who directed the work of the men was a vice-principal, though he worked with his men at the same kind and grade of work. Carter v. Baldwin [Mo. App.] 81 S. W. 204.

86. Fogarty v. St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664; Alabama G. S. R. Co. v. Baldwin [Tenn.] 82 S. W. 487.

87. Fogarty v. St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664. The act of a bridge building foreman in selecting an unsafe method of shortening piles, kept in alignment by the use of caps, was in his capacity as foreman. Depuy v. Chicago, etc., R. Co. [Mo. App.] 84 S. W. 103. Street car barn foreman negligently ran a car out, crushing the motorman against a sand box; he might have ordered the car run out by an employe. Held, he was a vice-principal while running out the car. Bien v. St. Louis Transit Co. [Mo. App.] 83 S. W. 986. The fact that a general manager was feeding a planer when he ordered a boy to remove the hopper from the machine, did not change his character from that of vice-principal since it was not the duty of the feeder to give such orders. Horne v. La Crosse Box Co. [Wis.] 101 N. W. 935. Where a superintendent in charge of operations at a mine shaft, attempted to operate the cage in the absence of the engineer, knowing his own incompetency, the mine owner was liable for the resulting death of a miner, thrown from the cage. Beresford v. American Coal Co. [Iowa] 98 N. W. 902.

88. "Dual capacity doctrine" discussed and authorities recognizing it cited and classified, in Fogarty v. St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664; Baier v. Selke, 211 Ill. 512, 71 N. E. 1074. If superior servant undertakes the duties of a mere operator, the master is not responsible for his acts while so employed. Collingwood v. Illinois & I. Fuel Co. [Iowa] 101 N. W. 283. Plaintiff and his foreman, engaged in oiling and resetting cable wheels, took turns standing guard to watch for cars. Held, foreman while so watching, was fellow-servant of plaintiff, engaged in oiling. Ryan v. Third Ave. R. Co., 92 App. Div. 306, 86 N. Y. S. 1070. Where several servants in a brewery were accustomed to stop and start machinery, the negligent act of the foreman in throwing off a clutch and starting a tub, thereby injuring plaintiff, was the act of a fellow-servant. Baier v. Selke, 211 Ill. 512, 71 N. E. 1074. A foreman in charge of workmen represents the master only so far as he directs their acts and gives them orders. When the foreman and his men are engaged in a common employment, the master is not liable for the foreman's acts of negligence. Thus, where a foreman, in charge of construction, permitted men to do work in a manner more dangerous than the one in which he had directed it to be done, the master was not liable for the resulting injury. Since the act was not directed to be so done by the foreman, he was a fellow-servant for the time being, and even if negligent, did not represent the master. Fournier v. Pike, 128 F. 991.

89. Freight conductor was vice-principal in signaling engineer to join cars, by which a brakeman, preparing to couple cars, was injured. Alabama G. S. R. Co. v. Baldwin [Tenn.] 82 S. W. 487.

90. Illinois Cent. R. Co. v. Elliott [Ky.] 82 S. W. 374.

91. Kane v. Erie R. Co., 128 F. 474; Wallace v. Boston & M. R. Co., 72 N. H. 504, 57 A. 913; Coffeyville Vitrified Brick & Tile Co. v. Shanks [Kan.] 76 P. 856. So far as shift boss in mine had charge of the safety of miners he was a vice-principal, not their fellow-servant. Bunker Hill & Sullivan Min. & Concentrating Co. v. Jones [C. C. A.] 130 F. 813. Boss driver in mine was vice-principal in calling attention of a driver to a dangerous grade, promising to accompany the driver and show him where to sprag the wheels of the car, and in failing to carry out such promise. Collingwood v. Illinois & I. Fuel Co. [Iowa] 101 N. W. 283. Workmen, in constructing a platform, are the fellow-servants of one who afterwards uses it; but in the selection of materials for it, they represent the master. Beal v. Bryant [Me.] 58 A. 428.

to provide for the safety of his servants cannot be delegated,[92] any person engaged in the performance of any part of that duty is a vice-principal for whose negligence the master is liable.[93]

92. Dill v. Marmon [Ind. App.] 71 N. E. 669; Collingwood v. Illinois & I. Fuel Co. [Iowa] 101 N. W. 283. The common-law rule of Arkansas, which is in force in Indian Territory, is that the character of the act performed, and not the grade or rank of a servant, determines whether he is a fellow-servant or vice-principal. Where an employé under an engine, preparing it for use, was struck and injured by reason of another employe engaged in similar work, running another engine against the one under which he was working, the two employes were fellow-servants. St. Louis & S. F. R. Co. v. Arnett [Tex. Civ. App.] 84 S. W. 599. Negligence in performance of master's duties renders him liable regardless of the rank or authority of the negligent employe. One who had considerable control of men and at times had charge of a department, was yet a fellow-servant of an employe while holding a ladder for him while working on it. Ruemmeli-Braun Co. v. Cahill [Okl.] 79 P. 260. Failure of a road-master to keep track clear of clinkers is negligence imputed to master, and not that of a fellow-servant of a brakeman injured thereby. Missouri, etc., R. Co. v. Keefe [Tex. Civ. App.] 84 S. W. 679.

NOTE. Nondelegable duties: "The duties for which the master cannot escape liability by delegating their performance to an officer, agent, or servant, may be said to include the obligation to furnish the servant a reasonably safe place to work; to exercise reasonable care to avoid injury to the servant while engaged in his service; to exercise like care to furnish and maintain suitable and safe machinery, tools, and appliances with and about which the servant is required to work; to give the servant timely warning of dangers which are known or ought to be known to the master, but are neither known nor patent to the servant; to supply a sufficient number of competent workmen for the safe conduct of the particular labor in which the servant is engaged, and to exercise such direction, control, and supervision over the work as may be required to carry on the same with reasonable safety to all employed therein. Any failure in respect to these duties, whether by the master in person or by any employe to whom their performance is committed, is negligence for which the master may be held liable. This negligence may consist in matters of omission or commission, which latter will include the giving of an improper order. Hankins v. R. R., 142 N. Y. 416, 37 N. E. 466, 40 Am. St. Rep. 616, 25 L. R. A. 396; Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298; Con. Coal Co. v. Wambacher, 134 Ill. 57, 24 N. E. 627; Newbury v. Mfg. Co., 100 Iowa, 441, 69 N. W. 743, 62 Am. St. Rep. 582."—Beresford v. American Coal Co. [Iowa] 98 N. W. 902.

93. Burns v. Delaware & A. Tel. & T. Co. [N. J. Err. & App.] 59 A. 220; Dill v. Marmon [Ind. App.] 71 N. E. 669; Baler v. Selke, 211 Ill. 512, 71 N. E. 1074. In Indiana a foreman is held to be a fellow-servant unless the master's duties are delegated to him. Ft. Wayne Gas Co. v. Nieman [Ind. App.] 71 N. E. 59. Though there is a conflict, the weight of authority and reason support the proposition that a train dispatcher in issuing orders for the movement of trains, represents the master, and the master is responsible for his acts and negligence. Wallace v. Boston & M. R. Co., 72 N. H. 504, 57 A. 913. But a local telegraph operator and station agent, through whose negligence in reporting a train to the dispatcher a fireman was killed, was held the fireman's fellow-servant, and there was no recovery for the fireman's death, no negligence of the dispatcher being shown. Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 Law. Ed. 1006.

Note: In Beresford v. American Coal Co. [Iowa] 98 N. W. 904, the court remarks that the rule last given in the text is supported by the preponderance of cases, and cites Newbury v. Mfg. Co., 100 Iowa, 441, 69 N. W. 743, 62 Am. St. Rep. 582; McQueeny v. R. R. [Iowa] 94 N. W. 1124, as showing that it is the Iowa rule. The opinion continues: "The substance of the doctrine thus approved is that any employe who is intrusted with the performance of a duty which the law enjoins as a personal duty upon the master is, as to such service, the vice-principal of the master, and in such service his negligence is the master's negligence. This conception of the rule has the advantage over some others, in that while, under some circumstances, more difficult of application, it is less artificial and arbitrary. For other statements of the same rule, see Curley v. Hoff, 62 N. J. Law, 758, 42 A. 731; Ross v. Walker, 139 Pa. 42, 21 A. 157, 159, 23 Am. St. Rep. 160; Lafayette B. Co. v. Olsen [C. C. A.] 108 F. 335, 54 L. R. A. 33. But in applying this rule the word 'rank' is not used as the equivalent of 'authority'; for while it is true that mere rank of a superior servant will not make him a vice-principal, the authority of such servant in respect to the act alleged to be negligent is at all times a matter of prime importance. If he has no authority from the master, then in the very nature of things he cannot be a vice-principal. If he has authority, whether express or implied, his vice-principalship depends upon whether the scope of such authority includes attention to or performance of any of the nondelegable duties of the master; and, if so, then whether the alleged negligent act is referable to any of those duties. Illustrative of the fundamental inquiry into the scope of authority vested in the foreman, boss, superintendent, or superior servant charged as a vice-principal, see Hathaway v. Des Moines, 97 Iowa, 333, 66 N. W. 188; Foley v. Railway, 64 Iowa, 644, 21 N. W. 124; Baldwin v. R. R., 68 Iowa, 41, 25 N. W. 918; Wilson v. Dunreath, 77 Iowa, 429, 42 N. W. 360, 14 Am. St. Rep. 304; Newbury v. Mfg. Co., 100 Iowa, 441, 69 N. W. 743, 62 Am. St. Rep. 582; Swift v. Bleise [Neb.] 89 N. W. 310, 57 L. R. A. 147; Island Coal Co. v. Swaggerty [Ind.] 65 N. E. 1026.

ILLUSTRATIONS. Duty to provide safe

A rule frequently applied is that persons in the service of a common mas-

place: Millwright who put up permanent shafting in a negligent manner was the master's agent, and not the fellow-servant of an oiler injured because of such negligence. Lininger v. Westinghouse Air Brake Co. [Pa.] 59 A. 430. Where plaintiff was directed by a coal yard foreman to clear out a clogged coal chute, the foreman promising to attend to the gate of the chute while it was being cleared, the master was liable for an injury caused by the foreman's failure to attend to the gate. Fleming v. Tuttle, 90 N. Y. S. 661. A rear brakeman in charge of signals on rear of train, such signals being required by statute, is not a fellow-servant of one killed in a collision caused by absence of the signals through the brakeman's negligence. Chicago, etc., R. Co. v. Wicker [Ind. App.] 71 N. E. 223. The duty to use due care not to locate stock gaps too near the track cannot be delegated by a railway company and notice of such a defect need not be brought home to the company's executive officers to make it liable. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. An employe who is engaged in assisting a foreman in inspecting blast holes for unexploded dynamite is performing part of the master's duty and is not a fellow-servant of employes who drill the holes or remove the rock after the explosion. Hooe v. Boston & N. St. R. Co. [Mass.] 72 N. E. 341. Whether neglect to keep a blast furnace in repair was that of a superintendent, foreman or common workman, was immaterial, since the duty to keep it in a safe condition devolved on the master. National Steel Co. v. Lowe [C. C. A.] 127 F. 311. Held, by divided court, that a brakeman setting a switch is performing the master's duty to provide a safe track, and hence is not, while so engaged, the fellow-servant of the engineer. Richey v. Southern R. Co. [S. C.] 48 S. E. 285.

Note: This last decision is criticized by the Columbia Law Review as "bad law." The writer says (4 Columbia L. R. 602): "The operation of a switch is not a personal, nonassignable duty of a master, rendering the person operating it his representative instead of a fellow-servant of one injured through its misuse. Daves v. So. Pac. Co., 98 Cal. 19; St. Louis, etc., R. Co. v. Needham, 63 F. 107. Notes 54 L. R. A. 129. The court in the principal case fails to distinguish between the furnishing of safe instrumentalities, and the use of safe instrumentalities. The same court relieved the master from liability where notice of an obstructing train was not given by an employe, the latter being held to act as a fellow-servant in such case. Jenkins v. R. R., 39 S. C. 507. The master's duty of providing a safe place to work was performed by furnishing a good track with safe appliances, and it seems bad law to hold him responsible for the negligent operation of such appliances by a fellow-employe."

Duty to provide and maintain safe appliances: Mulligan v. Colorado Fuel & Iron Co. [Colo. App.] 77 P. 977; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537. Duty to keep 40-foot extension ladder in repair by replacing a rotten round could not be delegated. Twombly v. Consolidated Elec. Light Co., 98 Me. 353, 57 A. 85. A machinist who furnished his helper a defective punch was a vice-principal, though he himself used the punch at times and did the same kind of work with it. Gulf, etc., R. Co. v. Whisenhunt [Tex. Civ. App.] 81 S. W. 332. In arranging and adjusting a pile driver for the use of employes, a foreman represented the master, who would be liable for death of an employe caused by negligent omission of a safety device. Swanson v. Oakes [Minn.] 101 N. W. 949. Car starter, who ordered a motorman to start out a defective car, whereby a repairer was injured, was a vice-principal. Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883. A station agent who selected an unsafe, open-rack car for transportation of mill refuse, was not the fellow-servant of an employe who was injured by the derailment of a handcar by striking a block which fell from the car so selected. McLean v. Pere Marquette R. Co. [Mich.] 100 N. W. 748. Failure of a sealer, whose duty it was to fasten and inspect car doors when cars were being unloaded, to use ordinary care in fastening a door, is negligence of the company for which a truckman may recover. Missouri, K. & T. R. Co. v. Hutchens [Tex. Civ. App.] 80 S. W. 415. If the door was negligently fastened by a breaker, who assisted plaintiff in unloading, the breaker's act in fastening the door, was not the act of a fellow-servant of plaintiff. Id.

Duty to inspect: Failure to inspect cars is negligence of the railway company, though the duty to inspect is delegated. Newton v. New York, etc., R. Co., 96 App. Div. 81, 89 N. Y. S. 23. Negligence of engineer in failing to test boiler after repairs was negligence of the master. Shea v. Pacific Power Co. [Cal.] 79 P. 373. A rule requiring brakemen to inspect trains at division points does not make the brakemen fellow-servants of the regular car inspectors. Newton v. New York, etc., R. Co., 96 App. Div. 81, 89 N. Y. S. 23. If duty of inspecting telephone poles belonged to foreman, he was a vice-principal, and lineman, injured by breaking of pole, could recover from master. Cumberland Tel. & T. Co. v. Bills [C. C. A.] 128 F. 272.

Duty to warn: Coffeyville Vitrified Brick & Tile Co. v. Shanks [Kan.] 76 P. 856. Where negligence charged was that of a superintendent of a quarry in failing to give a warning of danger, the defense of fellow-servant was not available. Turrentine v. Wellington, 136 N. C. 308, 48 S. E. 739.

Negligence held that of fellow-servant: The absolute duty imposed upon the master does not require him to oversee and supervise the executive details of the mechanical work carried on by his employes. For negligence of a fellow-servant in the doing of such details, the master is not liable. Dill v. Marmon [Ind. App.] 71 N. E. 669. Foreman of section crew is fellow-servant of section hands, and there can be no recovery for his negligence in failing to send signal ahead of hand car, that act not being an act of delegated authority. Whittlesey v. New York, etc., R. Co. [Conn.] 58 A. 459.

ter,[94] engaged in common service, directed to the same general end, are fellow-servants,[95] and for their negligence in the performance of a mere detail of their common employment,[96] the master is not answerable. This test is applied in some courts without reference to the grade of service, or power or authority of the servants,[97] or the fact that they may be employed in different departments;[98] but

Failure of foreman to light lamps, provided by master, in hold of a vessel, was the negligent act of a fellow-servant, for which a stevedore, injured through it, could not recover. Madigan v. Oceanic Steam Nav. Co., 178 N. Y. 242, 70 N. E. 785. Where company furnished safe and suitable materials, and foreman did not cause a safe temporary support for girders in bridge building to be constructed, foreman was held fellow-servant, not a vice-principal. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175. Engineer, moving cars on turntable, was not performing a duty of the master, and an employe loading cars on the turntable, could not recover for negligence of the engineer. Peterson v. New York, etc., R. Co. [Conn.] 59 A. 502. The act of a street railway car starter, putting a defective car, marked for repairs, into service, is the act of a fellow-servant, for which a conductor cannot recover from the company. Shaw v. Manchester St. R. Co. [N. H.] 58 A. 1073.

94. Bell boy and elevator boy in hotel are fellow-servants. Kitchen Bros. Hotel Co. v. Dixon [Neb.] 98 N. W. 816.

95. Plaintiff, employed in loading ashes on a car on a turntable, and the engineer and his assistant, in charge of the engine which turned the table, both under same master mechanic, were fellow-servants. Peterson v. New York, etc., R. Co. [Conn.] 59 A. 502. Longshoreman on lighter and driver on dock, both under same control and engaged in loading vessel, were fellow-servants, though latter was in general employ of third parties. Breslin v. Sparks, 97 App. Div. 69, 89 N. Y. S. 627. Blacksmith helpers in machine shop, engaged in common employment at adjoining forges, are fellow-servants. Duff v. Willamette I. & S. Works [Or.] 78 P. 363. Employes charging holes and exploding dynamite in blasting operations are fellow-servants of employes who drilled the holes for the charges. Hooe v. Boston & N. St. R. Co. [Mass.] 72 N. E. 341. A roadmaster in charge of work of wrecking train, and conductor of the train, engaged in removing a wreck, are fellow-servants; and where train was divided by agreement between them, and roadmaster was injured by reason of the train in charge of the conductor striking the detached car on which he was standing, he could not recover from the company. McDaniel v. Charleston, etc., R. Co. [S. C.] 49 S. E. 2. Engine wiper and round-house hostler, engaged together in cleaning an engine were while so engaged fellow-servants. Cloyd v. Galveston, etc., R. Co. [Tex. Civ. App.] 84 S. W. 408. Millwright employed to make repairs in mill, and a hand employed to discharge bales of cotton from second to first floor were fellow-servants, and former could not recover for injury caused by being struck by cotton thrown by latter. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Workman unloading ties from front car of construction train is fellow-servant of the engineer. Overton v. McCabe [Tex. Civ. App.] 79 S. W. 861. Crew of locomotive engine and employes moving a boiler across a switch track are not engaged in a common employment, and hence not fellow-servants. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 80 S. W. 112.

96. Where a machine is used in common by several employes and one of them is charged with the duty of keeping it in running order, the negligence of such servant in failing to remedy defects arising in the operation of the machine is negligence of a fellow-servant for which one of the other of such employes could not recover. Helling v. Schindeler [Cal.] 78 P. 710. Failure of a railroad yard foreman to keep promise to watch for trains, whereby an employe clearing a switch was struck, was negligence of a fellow-servant engaged in performing a mere detail of their common employment. Riola v. New York, etc., R. Co., 97 App. Div. 242, 89 N. Y. S. 945. Plaintiff engaged in placing a fender between a pile driver and a dredge was the fellow-servant of the captain of a tug, which caused plaintiff to be crushed, both plaintiff and the tug captain being engaged in the same general enterprise. Belt v. Henry Du Bois' Sons Co., 97 App. Div. 392, 89 N. Y. S. 1072. The act of a laundrywoman in turning an electric switch connected with fans, instead of the one connected with the laundry, thereby injuring one inspecting a fan, was the act of a fellow-servant. Dooling v. Deutscher Verein, 97 App. Div. 39, 89 N. Y. S. 580. One engaged in locomotive shops in repairing a crane, not to make it safe, but in order to carry on the ordinary work of the shop, is a fellow-servant of a common laborer in the shop. Koszlowski v. American Locomotive Co., 96 App. Div. 40, 89 N. Y. S. 55. Failure of an employe to stop a saw when he saw another attempting to remove sawdust from near it would be the act of a fellow-servant for which there could be no recovery unless the injured man was acting under orders of a superior. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. Where several men were engaged in limestone quarrying, and blasting, the failure of a servant engaged in blasting to warn another servant who was struck by a rock thrown by the explosion, was negligence of a fellow-servant for which there could be no recovery. Kelly Island Lime & Transport Co. v. Pachuta, 69 Ohio St. 462, 69 N. E. 988.

97. Shift boss in mine, with authority to suspend but not to discharge, did not represent the master, so that notice to him of a servant's incompetency would be notice to the master. Weeks v. Scharer [C. C. A.] 129 F. 333. Under this rule, as applied in Idaho, a foreman of a fence gang, riding on a hand car, was held the fellow-servant of

in Texas, it seems that such servants must be of the same grade;[99] and in Kentucky, employes engaged in distinct departments, are not fellow-servants.[1] Servants under the control of separate masters are not fellow-servants.[2]

Other courts hold that to constitute the relation of fellow-servants, employes must so directly co-operate in the particular business in hand,[3] or their usual duties must be so related,[4] or must bring them into such habitual association, that they may exercise upon each other an influence promotive of caution.[5]

Employes going to or from work,[6] or prospective employes on trains to learn their duties,[7] are fellow-servants of the operatives of trains. But express mes-

a member of the gang on a hand car a short distance ahead. Sartin v. Oregon Short Line R. Co., 27 Utah, 447, 76 P. 219.

98. Colley v. Southern Cotton Oil Co., 120 Ga. 258, 47 S. E. 932.

99. Fireman of engine operating steam shovel, being under engineer's orders, was not in the same grade of employment as the engineer. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

1. Hostler of engines, and assistant inspector of cars in the yard, not fellow-servants, and latter may recover for negligence of former. Louisville & N. R. Co. v. Lowe, 25 Ky. L. R. 2317, 80 S. W. 768. Railway engineer and his fireman are fellow-servants. Shugart v. Atlanta, etc., R. Co. [C. C. A.] 133 F. 505. Servants of elevator company engaged in moving cars on its switch track, fellow-servants. Sauls v. Chicago, etc., R. Co. [Tex. Civ. App.] 81 S. W. 39.

2. A winchman employed by a ship is not the fellow-servant of a gangwayman employed by stevedores, though both are engaged in unloading a vessel. The Gladestry [C. C. A.] 128 F. 591. A sailor placed at a winch by officers of a vessel is not a fellow-servant of a stevedore's employes. The Elton, 131 F. 562. Seaman not fellow-servant of a derrick engineer employed by coal company in unloading vessel. Robinson v. Pittsburg Coal Co. [C. C. A.] 129 F. 324. Employe of contractor not fellow-servant of subcontractor. Dale v. Hill-O'Meara Construction Co. [Mo. App.] 82 S. W. 1092. An engineer furnished by defendant to run an engine and operate a hod elevator for a contractor was not the fellow-servant of an employe of the contracter. Moran v. Carlsen, 95 App. Div. 116, 88 N. Y. S. 520.

3. Chicago City R. Co. v. Leach, 208 Ill. 298, 70 N. E. 222; Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387. Men runing engine to cinder pit and man in the pit, fellow-servants, engaged in common employment of cleaning out engines. Chicago & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754. "Tub hustlers" in mine, one at surface and one at bottem of shaft, both engaged in raising material from mine and transperting it to mill are fellow-servants. Jackson v. Lincoln Min. Co. [Mo. App.] 80 S. W. 727.

4. Conductor and motorman on same car are fellow-servants. Houts v. St. Louis Transit Co. [Mo. App.] 84 S. W. 161; Godfrey v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1230. Conductor of one street car and motorman of another are fellow-servants. Stocks v. St. Louis Transit Co. [Mo. App.] 79 S. W. 1176. Conductor of a street car is the fellow-servant of the gripman on the train following. Chicago City R. Co. v. Leach, 208 Ill. 198, 70 N. E. 222. Engineer in charge of engine by which cage in mine was raised and lowered is not the fellow-servant of a coal miner, who uses the cage in getting to his work. Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371. Engineer, operating engine 60 rods from plaintiff, who was attaching cable to logs to haul them in, was not plaintiff's fellow-servant. Conine v. Olympia Legging Co. [Wash.] 78 P. 932. Whenever co-employes under the control of one master are engaged in the discharge of duties directed to one common end, such duties being so closely related that each employe must know he is exposed to the risk of being injured by the negligence of another, they are fellow-servants, and each assumes the risk to which he has thus exposed himself. Donnelly v. Cudahy Packing Co., 68 Kan. 653, 75 P. 1017.

5. Such servants are fellow-servants, theugh net engaged in the same department. Chicago, etc., R. Co. v. White, 209 Ill. 124, 70 N. E. 588. Personal acquaintance or the length of time during which the men have worked together is immaterial; when the conditions resulting in habitual association begin, the relation is established. Id. One employed to take engines from depots to roundhouse is net as a matter of law a fellow-servant of a section hand though they were accidentally associated at some times. Indiana, etc., R. Co. v. Otstat, 212 Ill. 429, 72 N. E. 387.

6. An employe of a street railway company is net a passenger while being carried to his work on a "work car," but is the fellow-servant of the operators of the car and cannot recover from the master fer their negligence. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145. A railroad flagman, employed at crossings, is fellow-servant of employes running trains there, and remains such until he has left the tracks after his heurs of work are over, hence, he could not recover when struck by train as he was leaving his work. O'Neil v. Pittsburg, etc., R. Co., 130 F. 204. An employe of a common carrier, riding free because of his employment, but not at the time engaged in service, cannot recover for injuries sustained by reason of the negligence of a fellow-servant. McLaughlin v. Interurban St. R. Co., 91 N. Y. S. 883. A conductor, off duty, riding free on the platform of a street car, cannot recover for negligence of the driver, the two being fellow-servants. Id.

7. Huntzicker v. Illinois Cent. R. Co. [C. C. A.] 129 F. 548.

sengers,[8] mail agents, and other persons, carried on trains under special contracts between the company and their employers, are held not fellow-servants of the train crews.[9]

Employers' Liability Acts.[10]—The operation of the common law rule that there can be no recovery for negligence of a fellow-servant has been limited by statute in many states, the limitation being frequently confined to employes of railroad corporations. Decisions under these statutes are grouped, by states, in the notes.[11] Statutes excepting railroad risks from the operation of the fellow-serv-

8. Chicago, etc., R. Co. v. O'Brien, 132 F. 593.

9. Plaintiff, being conveyed to stock houses of his employer to clean out defendant's cars in which stock belonging to plaintiff's employer had been hauled, was a passenger, and not a fellow-servant of defendant's servants. Holmes v. Birmingham Southern R. Co., 140 Ala. 208, 37 So. 338.

10. See 2 Curr. L. 821.

11. Alabama: Where recovery is sought on ground of negligence of one in charge of a locomotive on the track (under employers' liability act), proof of an intent to injure plaintiff is not necessary, even though plaintiff is guilty of contributory negligence. Alabama Great Southern R. Co. v. Williams, 140 Ala. 230, 37 So. 255. An action by an administrator to recover for the wrongful death of his intestate, in which no negligence or other wrongful act is imputed to a fellow-servant of the intestate is not brought under the employers' liability act, but under the statute giving a right of action to a personal representative for death of his intestate, if the intestate could have himself maintained the action if the wrong had not resulted in his death. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. Hence the right of recovery in such action is controlled by common-law principles, including the doctrine that no recovery can be had for negligence of a fellow-servant. Id.

Indiana: Burns' Rev. St. 1901, § 7083. The act applies only when the party charged with negligence is a corporation. Ft. Wayne Gas Co. v. Nieman [Ind. App.] 71 N. E. 59. Subd. 2 gives a cause of action for negligence of a superior servant who has authority to give an order, in the execution of which the servant claiming damages was injured. Muncie Pulp Co. v. Davis, 162 Ind. 558, 70 N. E. 875. Thus there was a recovery where an unskilled workman was injured while attempting to move an iron bar between jaws of shears, to cut it at a different point, in obedience to foreman's order, negligently given at a time when to do the act was dangerous. Republic I. & S. Co. v. Berkes, 162 Ind. 517, 70 N. E. 815. And where an inexperienced trackman was struck and injured by a buckled rail which he loosened under orders from the foreman, the company was held liable. Southern R. Co. v. Blevins [C. C. A.] 130 F. 688. A railway company is liable for an injury to a fireman resulting from negligence of the engineer in charge, while taking on coal, though the fireman has power to direct the point at which the engine is to be stopped. Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 108, 69 N. E. 1000. The act creates no liability for negligence of persons in charge of switches. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145. Under subd. 4, a conductor may recover from a railway company for injuries caused by negligence of the engineer in charge of the engine on the same train. Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661. An electric street car is not a "locomotive engine or train upon a railway" within the meaning of subd. 4; and a street railway company is not liable for injuries to employes caused by negligence of servants operating electric cars. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145.

Iowa: Street railways are not railroads within the meaning of Code § 2071 exempting employes of railroad corporations from operation of the fellow-servant rule. McLeod v. Chicago & N. W. R. Co. [Iowa] 101 N. W. 77. Under the Missouri construction of the Iowa fellow-servant law as applied to railroads, one employe cannot recover for the negligence of another, unless such negligence was connected with the moving of a train. Hence a member of a bridge gang, injured by negligence of other members while loading a standing train has no right of recovery. Williams v. Chicago, etc., R. Co. [Mo. App.] 79 S. W. 1167. Nor could he recover under the Iowa construction of the law, viz., that the negligence must be in the actual movement of trains, or in some manner directly connected therewith. (See Akeson v. R. Co., 106 Iowa, 54, 75 N. W. 676.) Williams v. Chicago, etc., R. Co. [Mo. App.] 79 S. W. 1167. Iowa statute does not apply to bridge building operations. Depuy v. Chicago, etc., R. Co. [Mo. App.] 84 S. W. 103.

Massachusetts: St. 1887, p. 899, c. 270, makes the master liable for negligence of a superintendent. Evidence held to support finding that person in charge of work of loading machine into a wagon was a superintendent within the meaning of the act. Cunningham v. Atlas Tack Co. [Mass.] 72 N. E. 325. Evidence sufficient to support finding that person in charge of work of unloading freight cars was a superintendent. Murphy v. New York, etc., R. Co. [Mass.] 72 N. E. 330. A superintendent who puts a servant to work in a place dangerous if machinery therein is started owes the servant the duty of reasonable care to see that the machinery does not start. Greenstein v. Chick [Mass.] 72 N. E. 955. Where a servant in charge of a job of painting, who also worked with the other painters, let go of a ladder which he was holding for another workman, whereby the latter fell and was injured, such act was held not an act of superintendence, for which the master was

ant rule are constitutional,[12] if they afford equal protection to the employes to

liable. Hoffman v. Holt, 186 Mass. 572, 72 N. E. 87.

Minnesota: Gen. St. 1894, § 2701, excepting railroad risks from the operation of the fellow-servant rule is not unconstitutional as class legislation, since it makes no distinction between the liability of railroad corporations, as such, and that of other employers; it applies to a peculiar class of risks, namely, hazards incidental to the operation of railroads. Kline v. Minnesota Iron Co. [Minn.] 100 N. W. 681. (Discussing former Minnesota decisions on the point.) The proviso in this statute, limiting its operation to completed roads, does not exclude private railroads, such as logging and mining roads, from its operation. Thus a narrow gauge private road used in stripping an iron mine, is a railroad within the meaning of the act, and an employe, injured by a fellow-servant's negligence, in the operation of the road, may recover. Id. The danger to a section man of being struck by waste matter thrown by the fireman while sorting coal is a hazard peculiar to the operation of the railroad, within the meaning of the statute. Section man, so struck and injured may recover, though the fireman is his fellow-servant. Swartz v. Great Northern R. Co. [Minn.] 101 N. W. 504.

Mississippi: Under Const. 1890, § 193, providing for recovery for injuries to railroad employes caused by the negligent act of one having a right to direct their services, an employe's right of recovery is not limited to cases where the injury results while he is excuting a special command of his superior; but such right exists wherever the injury results from the negligence of a superior, though he is at the time discharging his ordinary duties, and not the duties of the master, the employe being at the time engaged in his ordinary duties. Southern R. Co. v. Cheaves [Miss.] 36 So. 691.

Missouri: Rev. St. 1899, § 2873, making railway corporations liable to employes for injuries caused by negligence of fellow-servants in the operation of the railway does not apply to street railways. Stocks v. St. Louis Transit Co. [Mo. App.] 79 S. W. 1176.

North Carolina: Priv. Laws 1897, c. 56, p. 83. The statute does not make an independent contractor, employed by a railroad company, liable to his employe for injuries caused by a fellow-servant's negligence. Avery v. Oliver [N. C.] 49 S. E. 91. A railway employe, injured by negligence of a fellow-servant while repairing a railway bridge is within the terms of the statute exempting railway employes injured in the course of their employment from the operation of the fellow-servant rule. Sigman v. Southern R. Co., 135 N. C. 181, 47 S. E. 420.

New York: Laws 1902, p. 1748, c. 600. One who gave orders to men unloading stone, and was understood by them to be a foreman in charge of the work, was held a superintendent under the act. Randall v. Holbrook, C. & D. Contracting Co., 95 App. Div. 336, 88 N. Y. S. 681. The failure of a person who had been, and was at the time, acting as a train dispatcher, to see that a servant who was making a coupling had finished and was out from between the cars, before he started the train, was negligence of a superintendent, and not in a mere detail of the work, and the master is liable for the death of the servant so caused, under § 1 of the statute. McHugh v. Manhattan R. Co. [N. Y.] 72 N. E. 312.

Ohio: Bates' Ann. St. § 3365-22. Engineer and brakeman on same train, which is in charge of a conductor, are not in separate branches or departments within the meaning of the statute, and are fellow-servants. Cleveland, etc., R. Co. v. Shanower, 70 Ohio St. 166, 71 N. E. 279. They remain fellow-servants though the train parts, leaving them on one section and the conductor on another, since the conductor is still the superior, and in charge of the train. Id. Engineer of coal tipple and hooker of hoisting apparatus are not fellow-servants. Froelich v. Toledo & O. Cent. R. Co., 5 Ohio C. C. (N. S.) 6. 87 Ohio Laws, p. 150, § 3, providing that every employe of a railroad company having authority to direct any other employe is not a fellow-servant, but the superior, of such other employe, and also the superior of subordinate servants in other branches or departments is constitutional. Kane v. Erie R. Co. [C. C. A.] 133 F. 681, rvg. 128 F. 474, the court below having held the act unconstitutional because its benefits were restricted to such servants as have no power to control. The law could not be evaded by a sham classification by a road; the court would look to the real grade of service of employes. Id.

Pennsylvania: Under Act 1868 (P. L. 58) one employed by a coke company to shift cars on side tracks in front of its ovens, and a railroad crew engaged in switching empties on those tracks, are co-employes, and the former cannot recover from the railway company for an injury caused by the crew's negligence in leaving a switch open. Laporte v. Pittsburg & L. E. R. Co., 209 Pa. 469, 58 A. 860.

Texas: The fellow-servant law of Texas does not protect employes of street railways. Godfrey v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1230. The act giving a right of action for wrongful death caused by negligence of employes applies only to common carriers, and not to telephone companies. Fisher v. Texas Tel. Co. [Tex. Civ. App.] 79 S. W. 50. Under Batt's Ann. St., art. 4560ea, one railroad employe may recover for negligence of a co-employe only when both were engaged in operating trains, etc., at the time of the negligence. Hence a hostler, struck by engine in charge of his assistants, while he was walking to the engine, could not recover, he not being engaged in the operation of the engine at the time. Gulf, etc., R. Co. v. Howard [Tex.] 80 S. W. 229. Crew of men loading flat cars with steam shovel and hauling gravel to a fill were operating a train within the meaning of the statute. Texas Cent. R. Co. v. Pelfrey [Tex. Civ. App.] 80 S. W. 1036. Section crew, placing a hand car on the track is engaged in operation of a car. Houston, etc., R. Co. v. Jennings [Tex. Civ. App.] 81 S. W. 822. Section foreman did not assume risk of negligence of engineer and fireman in charge of engine hauling a passenger

whom they apply.[13] Such laws are usually held not applicable to street railways[14] or private railroads.[15] Constitutional provisions relaxing the stringency of the common-law fellow-servant doctrine in the interest of railway employes are to be reasonably, not strictly, construed.[16]

(§ 3) *F. Risks assumed by servant. Nature of defense.*[17]—Assumption of risk is a matter of contract; contributory negligence is a question of conduct.[18] This distinction, carefully observed and pointed out by some courts,[19] is ignored

train. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. Negligence of a foreman in running a hand car on the schedule time of a train is negligence of an employe engaged in operating a car, for which a section hand injured while assisting to remove the car from the track, may recover [Sayles' Ann. Civ. St. 1897, art. 4560h]. San Antonio, etc., R. Co. v. Stevens [Tex. Civ. App.] 83 S. W. 235. Under Sayles' Civ. St. 1889, art. 4560f making a railroad company liable for injuries to an employe caused by negligence of another employe operating an engine, a fireman may recover for failure of the engineer to use ordinary care to keep a lookout. Missouri, etc., R. Co. v. Keaveney [Tex. Civ. App.] 80 S. W. 387. Under the same section, a company is liable to a switchman for an injury caused by a defective handhold, notwithstanding ordinary care to discover the defect, providing the defect was due to negligence of the company's servants engaged with the switchman at the time in the operation of the train. St. Louis S. W. R. Co. v. Corrigan [Tex. Civ. App.] 81 S. W. 554. Under Batt's Ann. St. art. 4560f, making railroad employes entrusted with superintendence of other servants vice-principals, a roundhouse hostler was held a vice-principal as to his two assistants. Gulf, etc., R. Co. v. Howard [Tex.] 80 S. W. 229. But under art. 4560g, they were his fellow-servants, while engaged in moving engines, since all three were working together in a common work at the same time and place. Hence he could not recover for their negligence. Gulf, etc., R. Co. v. Howard [Tex.] 80 S. W. 229. A car sealer, whose duty it was to fasten doors of cars being unloaded, was not a fellow-servant of a truckman employed in unloading, under Rev. St. 1895, art. 4560g, defining as fellow-servants all employes of railroads in the same grade of employment, etc. Missouri, etc., R. Co. v. Hutchens [Tex. Civ. App.] 80 S. W. 415. Under Gen. Laws 1897, Sp. Sess. p. 14, c. 6, amending laws of 1891 and 1893, the test is whether the railway employes were in the same grade or department of employment. Hence a station porter, under control of station master, and brakeman, under conductor's orders, are not fellow-servants, though both are engaged in unloading freight. Gulf, etc., R. Co. v. Elmore [Tex. Civ. App.] 79 S. W. 891. Plaintiff, engaged in changing link bills on cars, held not fellow-servant of other employes engaged in operating cars in switching. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. Fellow-servant rule held no defense if plaintiff was engaged with other servants in operating the train. Id.

Virginia: Under Const. § 162, providing for recovery by a railway employe for the negligence of any servant charged with dispatching trains or transmitting telegraphic or telephonic orders therefor, a locomotive engineer may recover for injuries caused by failure of a telegraph operator to transmit an order sent from the dispatcher's office. Virginia, etc., R. Co. v. Clower's Adm'x, 102 Va. 867, 47 S. E. 1003.

Wisconsin: Complaint by fireman charging engineer with negligence in not stopping engine before reaching a burning bridge held to state a cause of action under Rev. St. 1898, § 1816, making railroads liable for injuries to employes on engine caused by negligence of co-employe. Kath v. Wisconsin Cent. R. Co. [Wis.] 99 N. W. 217.

12. Gen. St. Minn. 1894, § 2701, held not class legislation. Kline v. Minnesota Iron Co. [Minn.] 100 N. W. 681. The Ohio statute is not invalid for lack of uniform operation because it applies to railroads only and to a particular class of employes. Froelich v. Toledo & O. Cent. R. Co., 5 Ohio C. C. (N. S.) 6.

13. Kane v. Erie R. Co. [C. C. A.] 133 F. 681, rvg. 128 F. 474. See decisions under Ohio statute, supra.

14. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145; McLeod v. Chicago & N. W. R. Co. [Iowa] 101 N. W. 77; Stocks v. St. Louis Transit Co. [Mo. App.] 79 S. W. 1176. The Texas statute is held by Missouri court not applicable to street railways. Godfrey v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1230. See decisions in notes under various states, supra.

15. Rev. St. 1898, § 1816, making railroad corporations liable for injuries to employes caused by the negligence of other employes has no application to a private railroad operated in connection with a logging and lumber business. McKivergan v. Alexander & E. Lumber Co. [Wis.] 102 N. W. 332.

16. Const. Va. § 162, construed. Virginia, etc., R. Co. v. Clower's Adm'x, 102 Va. 867, 47 S. E. 1003. See same case in notes above.

17. See 2 Curr. L. 827.

18. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828.

19. **Note:** "Assumption of risk rests upon contract. Negligence rests on tort. Assumption of risk is the voluntary act of an ordinarily prudent man, who, for hire, takes the chance of a known or obvious danger incident to his employment. Contributory negligence is the casual action of a servant without ordinary care, or the omission to do something for his self-protection that an ordinarily prudent person would have done." Dale v. Hill O'Meara Const. Co. [Mo. App.] 82 S. W. 1092. See, also, Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1035; Davis Coal Co. v. Polland, 158 Ind. 607, 62 N. E. 495; Buehner Chair Co. v.

by others.[20] Whether a given risk is assumed is to be determined by reference to the contract between master and servant: the servant, by entering the master's service, impliedly contracts to assume such risks as are obviously incidental and necessary to the particular employment; he also impliedly contracts to assume dangers of which he learns while engaged in his employment, by continuing therein after acquiring such knowledge.[21]

Since a master cannot, by contract, relieve himself from liability for breach of a positive statutory duty,[22] and a servant cannot contract to assume the risk of such breach,[23] it is commonly held that the defense of assumption of risk is not available where the negligence complained of is a violation of a positive statute.[24] But under some statutes, the defense is admissible.[25]

That a risk was assumed will not defeat a recovery unless such risk was the sole proximate cause of the injury.[26]

Fuelnor, 28 Ind. App. 479, 63 N. E. 239; Smith v. Armour & Co. [Tex. Civ. App.] 84 S. W. 675, 676.

20. Thus in Beymer v. Hammond Packing Co. [Mo. App.] 80 S. W. 685, the court refused to discuss the "distinction sometimes made between what is known as 'assuming the risk' and ordinary contributory negligence," saying that it could make no difference whether plaintiff's conduct amounted to one or the other, since either would defeat a recovery, and plaintiff was certainly guilty of such conduct as would defeat a recovery. In this case plaintiff was injured by a ham conveyor in a packing house running off the track. He had been similarly injured before, and did not ascertain positively whether the switch had been closed, though he knew the danger of leaving it open.

21. Avery v. Nordyke & M. Co. [Ind. App.] 70 N. E. 888. Acceptance of employment shows willingness to assume ordinary risks. Dunkerley v. Webendorfer Mach. Co. [N. J. Law] 58 A. 94.

22. Under Comp. Laws, § 5349, requiring set screws to be guarded when factory inspector so orders, defense of assumption of risk is not available. Sipes v. Michigan Starch Co. [Mich.] 100 N. W. 447.

23. As breach of a statute requiring machinery to be guarded. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922.

24. Green v. American Car & Foundry Co. [Ind.] 71 N. E. 268. So held under Burns' Ann. St. 1901, § 7087. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828. A servant does not assume the risk of negligence of a superintendent, where the statute provides for recovery for negligence of a superintendent. Murphy v. New York, etc., R. Co. [Mass.] 72 N. E. 330. That miner knew there was no light at the bottom of a shaft would be no defense to an action based on negligence in having no light there, in violation of the statute. Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371. Defense not available where Illinois mining statute, requiring passageway to be maintained at landing place of cage, was violated. Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co., 130 F. 957. Defense of assumption of risk not open to defendant railway company, under Priv. Laws 1897, p. 83, c. 56, in action for injuries due to defective sand drier. Walker v. Carolina Cent. R. Co., 135 N. C. 738, 47 S. E. 675. Knowledge by the servant of defects in machinery, alleged as the cause of injury, is no defense under Const. S. C. 1895, art. 9, § 15. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. Defense is not available in an action based on a violation of automatic coupler act. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. Under the act of Congress employes of carriers engaged in interstate traffic do not assume the risk of handling cars not equipped with automatic couplers, even after the unlawful use of such car has been brought to his knowledge. Switchman held not to have assumed risk of coupling car with a defective automatic coupler, when the car was on a sidetrack commonly used for trains, though sometimes used for cars to be repaired. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

25. Minnesota Gen. St. 1894, § 2248, making it the duty of employers to guard dangerous machinery, does not change the common law as to assumption of risk. Swenson v. Osgood-Blodgett Mfg. Co., 91 Minn. 509, 98 N. W. 645. Defense admissible, though Gen. Laws 1896, c. 68, § 6, requiring gearing and belting to be guarded, has been violated. Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910. Employers' Liability Act, § 3, defining the necessary risks which the act provides a servant shall be held to have assumed, is applicable to all actions by servants based on master's negligence, whether based on liability created by statute or not. Ward v. Manhattan R. Co., 95 App. Div. 437, 88 N. Y. S. 758. Risks incident to the operation of machinery, arising from or augmented by, failure to comply with the labor law, may be assumed, so as to discharge the employer from liability. Plaintiff, though an infant, held to have capacity to assume risk of operating mangle. Sitts v. Waiontha Knitting Co., 94 App. Div. 38, 87 N. Y. S. 911.

26. Though risk of insufficient light in roundhouse was assumed, this would not defeat recovery for injury caused by negligently leaving a shovel in the gangway. Galveston, etc., R. Co. v. Manns [Tex. Civ. App.] 84 S. W. 254. Knowledge that hand car had no brake would not defeat recovery when a collision would not have occurred but for an obstruction on the track of which plaintiff had no knowledge. Texas, etc., R. Co. v. Kelly [Tex.] 80 S. W. 79. Though

The defense is available against minors as well as adults;[27] but some courts hold that children under fourteen do not assume the risk of negligence of fellow-servants.[28] Convicts, leased out by the state to employers, do not assume the ordinary risks of the employment, with the assumption of which free men would be charged.[29]

Dangers incidental to business.[30]—The servant assumes the ordinary risks of his employment,[31] of which he either knows or would have known if he had used ordinary care,[32] including those arising from the customary manner of conducting it, when he knows of such custom;[33] and this is so though the employment is necessarily dangerous.[34] The negligence of fellow-servants is an ordinary risk, within the meaning of the rule.[35]

an engineer assumed risk of using a headlight known to him to be defective, he did not assume the risk of negligence of an incompetent flagman in giving a signal to proceed with a train, even though the resulting derailment in a washout could have been avoided, had he had a perfect headlight. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 83 S. W. 406. Switchman did not assume risk of injury while making a coupling, caused by defendant's negligently "cornering" cars down a track, instead of "shoving" them down, even though he knew the coupler was defective and was trying to fix it. Missouri, etc., R. Co. v. Gearheart [Tex. Civ. App.] 81 S. W. 325.

27. Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910; Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802.

28. Conflict in authoritles on this point noted and cases cited pro and con. Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674.

29. Simonds v. Georgia Iron & Coal Co., 133 F. 776.

30. See 2 Curr. L. 828.

31. Marks v. Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537. Locomotive engineer. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435; Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. Brakeman assumes risks of mounting moving cars. Weed v. Chicago, etc., R. Co. [Neb.] 99 N. W. 827. Motorman. Union Traction Co. v. Buckland [Ind. App.] 72 N. E. 158; Garity v. Bullion-Beck & Champion Min. Co., 27 Utah, 534, 76 P. 556. Motorman assumed danger of electric shock when fixing trolley pole. Harrison v. Detroit, etc., R. Co. [Mich.] 100 N. W. 451. Mine boss assumed risk of being struck by missile falling from above when engaged in making repairs in shaft of mine. Jacobson v. Smith, 123 Iowa, 263, 98 N. W. 773.

32. Murphy v. Grand Trunk R. Co. [N. H.] 58 A. 835; Hightower v. Gray [Tex. Civ. App.] 83 S. W. 254. Servant of ordinary intelligence hired to do whatever he was directed to do, assumed risk of being struck by derrick boom, swung around by a high wind, the effect of the wind being obvious. Frangiose v. Horton [R. I.] 58 A. 949. Miner 19 years old, with experience, assumed ordinary risks of mining and also risks obvious to one of his experience. Carter v. Baldwin [Mo. App.] 81 S. W. 204.

33. Gravel pit foreman, familiar with manner and time of moving cars, assumed risk of being crushed when going between them. Campbell v. Illinois Cent. R. Co. [Iowa] 100 N. W. 30. Plaintiff employed running extra cars on single line extension of trolley system, operated without danger signals, assumed risk of being struck by a car when putting trolley of his own car on wire. Simmons v. Southern Traction Co., 207 Pa. 589, 57 A. 45. Oiler of cable wheels in excavations along cable road, consenting to employment with knowledge of danger, assumed risks of being struck by cars. Ryan v. Third Ave. R. Co., 92 App. Div. 306, 86 N. Y. S. 1070. If a car inspector knew that it was customary not to set the brake shoes on cars he was inspecting, or in the exercise of ordinary care ought to have known it, he assumed the risk of inspecting cars without the brakes being set. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. Employe who knew the custom of using a ratchet jack in bridge work assumed the risk incident to the use of such a jack. Ft. Worth & R. G. R. Co. v. Robinson [Tex. Civ. App.] 84 S. W. 410. Experienced railroad yard employe assumed risk from well known custom of handling cars when switching. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522. Servant of grain company who knew method used by employes in moving cars on company's switch track, without guards or barriers, assumed risk of stepping between cars on the track. Sauls v. Chicago, etc., R. Co. [Tex. Civ. App.] 81 S. W. 89. Lineman, familiar with method of putting street railway electric cables on poles, assumed the risk of injury from use of that method. Meehan v. Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61. When telephone company had not assumed the duty of inspecting poles, but it was customary for linemen to inspect them before climbing them, linemen assumed the risks incident to climbing poles after examining them, in the course of their employment. Britton v. Cent. Union Tel. Co. [C. C. A.] 131 F. 844. A car repairer who had worked two years in yard where employes were warned personally by yardmaster and were not protected by blue flag signal system, assumed the risk of working under that system. State v. South Baltimore Carworks [Md.] 58 A. 447.

34. Richards v. Riverside Ironworks [W. Va.] 49 S. E. 437. Servant assumes risk of dangers inherent in rock quarrying which the master cannot reasonably be expected to guard against. Kentucky Freestone Co. v. McGee, 25 Ky. L. R. 2211, 80 S. W. 1113.

The servant does not assume risks which exceed those ordinarily connected with his usual work, such as sudden and unexpected danger,[36] arising from unusual conditions,[37] or dangers encountered in work outside the line of his usual[38] or expected[39] employment. Extraordinary hazards are assumed only when thoroughly comprehended and freely accepted.[40] A servant does not assume the risk of extraordinary and unexpected danger encountered in a voluntary effort to save life.[41]

Known or obvious dangers.[42]—Besides the ordinary risks incident to his employment, the servant assumes such as are plain and obvious;[43] or actually

Child of 14, operating stamping machine, who understood the machine, and was warned to look out for his fingers, assumed the risk of getting them caught, the machine being neither defective nor out of repair. Cohen v. Hamblin-Russell Mfg. Co. [Mass.] 71 N. E. 948. Employes on train sent to repair burning bridge assumed incidental risks; hence no duty to warn them of bridge's location. Kath v. Wisconsin Cent. R. Co. [Wis.] 99 N. W. 217. Servant assumed risks of employment while engaged in rebuilding a railway bridge, the use of which was continued during such work. McKenna v. Chicago, etc., R. Co. [Minn.] 100 N. W. 373. Dangers incident to the employment of making a place of known danger safe are assumed; hence a miner, ordered to fix part of roof in mine, assumed risk of such work. Indiana & C. Coal Co. v. Batey [Ind. App.] 71 N. E. 191.

Note: If a servant chooses to enter into an employment involving danger, he assumes the risk, even though the master might have avoided the danger. This being true of an unskilled laborer, the rule is even more strictly enforced against a skilled laborer. Foley v. Jersey City Elec. Light Co., 54 N. J. Law, 411, 24 A. 487; Chandler v. Coast City Elec. R. Co., 61 N. J. Law, 380, 39 A. 674; Johnson v. Devoe Snuff Co., 62 N. J. Law, 417, 41 Am. Rep. 936; McDonald v. Standard Oil Co., 69 N. J. Law, 445, 55 A. 289; Coyle v. Griffing Iron Co., 63 N. J. Law, 609, 44 A. 665, 47 L. R. A. 147. See, also, Beal v. Bryant [Me.] 58 A. 428; Dill v. Marmon [Ind. App.] 71 N. E. 669.—3 Mich. L. R. 164.

35. See supra, subsection E.

36. Brakeman did not assume risk of injury by the shifting of the platform on a car of peculiar construction. Hewitt v. East Jordan Lumber Co. [Mich.] 98 N. W. 992. Operator of steam ironing machine did not as matter of law assume risk of injury by sudden swaying of machine due to its instability as shown by the evidence. Thomas v. Exeter, etc., R. Co. [N. H.] 58 A. 838. Sectionman does not assume risk of being struck by refuse slate thrown by fireman while sorting coal. Swartz v. Great Northern R. Co. [Minn.] 101 N. W. 504. Inexperienced railroad laborer did not assume risk of getting off a moving flat car. Mitchell v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 289.

37. Brakeman did not assume risk of defective crossing gates which projected into his path along the track when he was engaged in his duties. Fearns v. New York, etc., R. Co., 186 Mass. 529, 72 N. E. 68.

38. Grace & H. Co. v. Probst, 208 Ill. 147, 70 N. E. 12. An employe does not assume the risk of doing work outside the line of his employment, when ordered to do it by his superior. Bonnin v. Crowley, 112 La. 1025, 36 So. 842. Operator of planing mill, ordered to run woodworker, did not assume risks of latter employment. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828. Where common laborer in a quartz mill was put to work near dangerous machinery, it could not be said as a matter of law that all the risks he could see and guard against were incident to his employment, so that he assumed them. Merrifield v. Maryland Gold Quartz Min. Co., 143 Cal. 54, 76 P. 710.

39. Consent to employment of a minor at shoveling sand in molding flasks is not a consent to accept risks attending work of wheeling sand to pits in barrows. Dimmick Pipe Works v. Wood, 139 Ala. 282, 35 So. 885.

40. Dean v. St. Louis Woodenware Works [Mo. App.] 80 S. W. 292. A servant is not presumed to understand and assume every character of peril or danger that may possibly arise in the performance of his duty; he assumes only known or obvious dangers, knowledge of which is to be fairly presumed. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. Brakeman does not assume extraordinary hazards, unless he had knowledge of them when he entered the employment, or continued in the employment after learning of them. McCabe v. Montana Cent. R. Co. [Mont.] 76 P. 701.

41. As where section foreman attempted to prevent collision of a passenger train and push car and was killed. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991.

42. See 2 Curr. L. 832.

43. Schickle-Harrison & H. Iron Co. v. Beck, 212 Ill. 268, 72 N. E. 423; Chicago & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754; Jones v. American Warehouse Co. [N. C.] 49 S. E. 355; Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787.

ILLUSTRATIONS. Risks held obvious: Danger from revolving set screw. Archibald v. Cygolf Shoe Co. [Mass.] 71 N. E. 315. Walking behind car with defective wabbling wheel, which caused lumber loaded on car to become disarranged, so that it struck a post and was knocked off, injuring plaintiff. Truly v. North Lumber Co., 83 Miss. 430, 36 So. 4. Clerk held to have assumed risk of chests falling from inclined shelf, the defect being obvious and necessarily known to her. Hofnauer v. White Co. [Mass.] 70 N. E. 1038. Operator of circular saw, of simple construction, protruding half its diameter through the table, assumed

known to him,[44] or which he ought to know, in the exercise of ordinary care,[45]

risk of using such saw without a guard. Chicago Veneer Co. v. Walden [Ky.] 82 S. W. 294. Experienced farm hand, between 19 and 20 years old, assumed risk of bundles of oats slipping off loaded wagon, causing him to fall. Tucker v. National Loan & Investment Co. [Tex. Civ. App.] 80 S. W. 879. Inexperienced employe digging under rock assumed risk of pieces of it falling on him when he struck it with his sledge. Hightower v. Gray [Tex. Civ. App.] 83 S. W. 254. Experienced brakeman assumed risk of working on foreign car on which handhold was nearer the end of the top of the car than on ordinary cars, such difference in construction being obvious. Woods v. Northern Pac. R. Co. [Wash.] 79 P. 309. Experienced switchman, who had worked some months in the yard where injured, assumed the risk of injury from a switch, the construction of which was obvious. Loushay v. Erie R. Co., 88 N. Y. S. 446. Petition did not show that danger of working around an ironer not provided with a fender was not so open and obvious that plaintiff, a woman of mature age, assumed the risk. Klutts v. Gibson Bros. [Tex. Civ. App.] 83 S. W. 404.

Risk held not obvious: Danger in cleaning wool carding machine held not so obvious that plaintiff assumed it as a matter of law. Sauvageau v. River Spinning Co., 129 F. 961. Defect in ladder on car held not so obvious that brakeman assumed risk of its use, as a matter of law. El Paso N. E. R. Co. v. Ryan [Tex. Civ. App.] 81 S. W. 563. A foreigner, of less than average intelligence, did not, as matter of law, assume the risk attending the cleaning of a cotton picker, when he had not been instructed, had never seen the inside of the machine, and the danger was not obvious. Kasjeta v. Nashua Mfg. Co. [N. H.] 58 A. 874.

44. Kentucky Freestone Co. v. McGee, 25 Ky. L. R. 2211, 80 S. W. 1113. The servant assumes risks which he actually knows, though such risks may not be obvious or discoverable by ordinary care. Southern Ind. R. Co. v. Moore [Ind. App.] 72 N. E. 479. Mere familiarity with surroundings and circumstances may be sufficient to create assumption of risk, although there might not be entire familiarity with all circumstances and conditions surrounding the place of accident. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Where a servant was injured by the falling of a pile of iron near the track where he was working, it was held that the fact that his duties did not relate to the department of his master's work which embraced the piling of the iron, would not prevent the application of the doctrine of assumed risk; since whether he was charged with or had actual knowledge of a defect in the pile depended on surrounding circumstances. Avery v. Nordyke & M. Co. [Ind. App.] 70 N. E. 888.

Illustrations: Engineer assumed risk of using a headlight which he knew to be defective. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 83 S. W. 406. Clerk, familiar with slippery condition of marble steps to the building where she worked, assumed risk of that condition. Kline v. Abraham, 178 N. Y. 377, 70 N. E. 923. Street car conductor assumes risk of working with a motorman whom he knows to be incompetent by reason of intemperance. White v. Lewiston & Y. F. R. Co., 94 App. Div. 4, 87 N. Y. S. 901. A cranesman on a derrick car who knew the danger of not properly anchoring the car assumed the risk of working on it without so anchoring it. Wagner v. New York, etc., R. Co., 93 App. Div. 14, 86 N. Y. S. 921. Plaintiff held to have assumed risk in use of wheelbarrow runway which he had used and was familiar with. Daily v. Fiberloid Co. [Mass.] 71 N. E. 554. Plaintiff knew that an elevator could be moved by some one outside the same while he was in it, and therefore assumed that risk. Middendorf v. Schulze, 105 Ill. App. 221. One who attempted to repair a fleshing machine, and directed an assistant not to start the machine, assumed the danger arising from the character of the machine and the assistant's inability to understand English. Austin v. Fisher Tanning Co., 96 App. Div. 550, 89 N. Y. S. 137. Where workmen knew of and consented to use of unsafe rope in fastening a wheel on which staging was built to dismantle it, they assumed the risk. Herbert v. Wiggins Ferry Co. [Mo. App.] 80 S. W. 978. Evidence insufficient to prove knowledge of condition of steam reservoir by servant, so that he assumed risk in making repairs on it. Krueger v. Bartholomay Brew. Co., 94 App. Div. 58, 87 N. Y. S. 1054. Brakeman held not to have assumed risk of being struck by pole too near track. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328.

45. Punkowski v. New Castle Leather Co., 4 Pen. [Del.] 544, 57 A. 559; Standard Oil Co. v. Fordeck [Ind. App.] 71 N. E. 163; Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524; Babb v. Oxford Paper Co. [Me.] 59 A. 290; Dowd v. Erie R. Co., 70 N. J. Law, 451, 57 A. 248.

Illustrations: Servant whose duty it was to watch descending buckets of an endless chain of a coal conveyor assumed risk of clinkers and ashes falling from a bucket and striking him. Babb v. Oxford Paper Co. [Me.] 59 A. 290. A servant familiar with a machine but who did not know that it could not be stopped by a clutch when loaded, assumed the risk of injuries resulting from placing his fingers between its rollers. Desosiers v. Bourn [R. I.] 57 A. 935. Plaintiff assumed risk of a chisel bar, used in lining rails, slipping, causing him to fall. Gulf, etc., R. Co. v. Smith [Tex. Civ. App.] 83 S. W. 719. Mature employe, who, though inexperienced, showed that he knew the difference in the use of dull or sharp chisels in cutting iron, assumed the risk of using a dull one. San Antonio Sewer Pipe Co. v. Noll [Tex. Civ. App.] 83 S. W. 900.

Where the servant has the same opportunity as the master to ascertain and avoid danger, he has no recourse against the master for an injury caused by such danger, and he accepts employment upon this implied condition. Engineer could not recover for injury caused by gases from fuses carried in a box in the cab and ignited by friction, since he knew and appreciated the danger. Crane v. Chicago, etc., R. Co. [Iowa], 99 N.

and in view of his experience.[46] He also assumes the risk of dangers of which he becomes aware in the course of his employment, if he continues to work[47]

W. 169. No recovery for an injury alleged to have been caused by a defective condition of an appliance where it appeared that the servant had equal means with the master of ascertaining such condition. Hobbs v. Bowie [Ga.] 49 S. E. 285. A locomotive fireman, whose duty it was to inspect the locomotive's lights was injured by their leaking. It was not shown that the defects were known to the company, or were such that they ought to have been known. Held, he assumed the risk. Kelley v. Chicago & A. R. Co., 105 Mo. App. 365, 79 S. W. 973.

A servant cannot be said as a matter of law to have assumed a risk unless it is clear that he knew, or by the exercise of ordinary care ought to have known, of the danger. Chicago & A. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15. One who did not know and had no occasion to know of a defect did not assume risks arising therefrom. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396. Lowering by hand a heavy circular piece of cast iron not so inherently dangerous as to create assumption of risk by laborer assisting. Harris v. Williams Cocperage Co. [Mo. App.] 80 S. W. 924. The fact that an employe hooked a guy into an eyebolt did not charge him with the assumption of the risk of using the tackle, it not appearing that he knew or by reasonable care ought to have known of its defective condition. Caven v. Bodwell Granite Co. [Me.] 59 A. 285. Evidence did not show that plaintiff had, or should have had, such knowledge of the danger of using a brass punch that he assumed the risk of its splitting and putting out his eye. Gulf, etc., R. Co. v. Whisenhunt [Tex. Civ. App.] 81 S. W. 332. Employe did not assume risk arising from shovel lying in gangway between engine and tank, unless it was habitually placed there by employes, so that he was charged with knowledge of its position, or unless he had actual knowledge of its position. Galveston, etc., R. Co. v. Manns [Tex. Civ. App.] 84 S. W. 254. Mere knowledge of a defect in a chain, not such as to indicate that its use would be dangerous, does not make its use an assumed risk. International, etc., R. Co. v. Jourdan [Tex. Civ. App.] 84 S. W. 266. Conductor, struck by pole while collecting fares from the running board, held not to have assumed the risk as a matter of law, it not being conclusively shown that he had actual knowledge of the danger, or that it was so obvious that he was charged with such knowledge. Hoffmeier v. Kansas City-Leavenworth R. Co., 68 Kan. 831, 75 P. 1117. Where a scaffold of simple construction, with which plaintiff was familiar, fell because of hammering on support by plaintiff and fellow-servants, plaintiff assumed the risk. Hughes v. Schnavel [Colo. App.] 78 P. 623. Employe not bound to know danger from flying particles of steel when holding a rail that was being cut. Vohs v. Shorthill Co. [Iowa] 100 N. W. 495. A railway company held liable for an injury to an inexperienced brakeman, on ground that he could not be charged with notice of danger incurred or location of a switch staff which caused the injury. Lake Shore & M. S. R. Co. v. Fisher, 4 Ohio C. C. (N. S.) 593.

46. Experienced workman assumed risk of getting caught in cogs of machine he was operating. Swenson v. Osgood & B. Mfg. Co., 91 Minn. 509, 98 N. W. 645. Operator of mangler in laundry, thoroughly familiar with machine, assumed risk of removing cloth from it without stopping it. Jensen v. Regan [Minn.] 99 N. W. 1126. Experienced employe, with knowledge of such matters, assumed the risk of attempting to move a heavy oak tie with only one helper. Texas & P. R. Co. v. Miller [Tex. Civ. App.] 81 S. W. 535. Woman of 25, who had worked at mangle for three months, assumed risk of injury by reason of its having no guard. Bier v. Hosford [Wash.] 77 P. 867. Where a train was broken up by a defective coupler, and a conductor was injured while assisting to reassemble it, it was held he assumed the risk incident thereto. Murphy v. Grand Trunk R. Co. [N. H.] 58 A. 835. Mature, experienced mechanic assumed risk of standing on a plank placed on steam chests in engine room, and of such plank tipping up and causing him to fall. Mathias v. Kansas City Stockyards Co. [Mo.] 84 S. W. 66.

47. Illinois Cent. R. Co. v. Smith, 208 Ill. 608, 70 N. E. 623; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537. Where a servant has equal knowledge with the master of danger incident to his work, and appreciates the danger, he assumes the risk if he continues in the employment. Giebell v. Collins Co., 54 W. Va. 518, 46 S. E. 569. The risk of a new, obvious, danger, arising in the course of employment, discoverable by the use of ordinary care, is assumed by the servant's continuing in the employment without complaint. Dunkerley v. Webendorfer Mach. Co. [N. J. Law] 58 A. 94. It is immaterial when a servant learned of danger, or how the danger arose, whether from natural causes or through the master's negligence, if he remains after learning of it, he assumes the risk incident to remaining. Murphy v. Grand Trunk R. Co. [N. H.] 58 A. 835. That master was negligent in furnishing a teamster with too short lines and a wagon without a seat was immaterial where the teamster continued to work with them and assumed the risk of their use. Limberg v. Glenwood Lumber Co. [Cal.] 78 P. 728. Servant who ran a circular wood saw, complained of defect, had it repaired, expressing satisfaction with repairs, and continued to use it, assumed the risk incident thereto. Masterson v. Eldridge, 208 Pa. 242, 57 A. 515. Brakeman who continued in employment after knowing that an insufficient number of brakemen were employed assumed the risk arising therefrom. Grout v. Tacoma E. R. Co., 33 Wash. 524, 74 P. 665. Street railway conductor who, knowing of company's failure to furnish a sufficient number of cars, continues in the employment, assumes the risks incident to the service under those conditions. Shaw v. Manchester St. R. Co. [N. H.] 58 A. 1073. Platform used by plaintiff became unsafe by reason of cotton bales being

without complaint.[48] Mere knowledge of a defective condition will not charge a servant with the assumption of a risk; it must also appear that he appreciated the danger arising from the defect,[49] unless the defect is so apparent and the danger so glaring as to permit no other inference than that the servant, knowing of the defect, knew and appreciated the danger also.[50] Appreciation of the whole extent of the danger is not necessary.[51] The rule that known and appreciated risks are assumed applies to minors.[52]

Reliance on care of master.[53]—In the absence of actual or implied knowledge to the contrary,[54] the servant has a right to rely on the presumption that the master has performed his duties, and supplied a reasonably safe place,[55] reason-

thrown on it from third story; held, he assumed the risk. Fortin v. Manville Co., 128 F. 642. Plaintiff, who knew that laundry-women themselves switched on electric current for the laundry, and had expressed dissatisfaction with the custom, assumed risk of injury while inspecting fan, caused by mistake in switching on wrong current. Dooling v. Deutscher Verein, 97 App. Div. 39, 89 N. Y. S. 580. Employe, working under bridge deck which had been raised by jacks assumed the risk of remaining there after being warned that it was to be let down. Ft. Worth, etc., R. Co. v. Robinson [Tex. Civ. App.] 84 S. W. 410.

48. Iowa Gold Min. Co. v. Diefenthaler [Colo.] 76 P. 981; Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632. A switchman who continues to work, after knowledge of a defect in the track, of which he does not give notice, assumed the risk of danger therefrom. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. Experienced employe using emery belts, who knew they frequently broke, and could discover and report defects as they became apparent to the repairer, assumed the risk of such belts breaking, when he had not reported a defect and asked for repairs. Taylor v. Withington & Cooley Mfg. Co. [Mich.] 99 N. W. 873.

49. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888; Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524; Coles v. Union Terminal R. Co. [Iowa] 99 N. W. 108; Depuy v. Chicago, etc., R. Co. [Mo. App.] 84 S. W. 103. Thus mere knowledge of a lack of precautionary measures, without knowledge of a latent danger, will not charge the employe with liability. Burns v. Delaware & A. Tel. & T. Co. [N. J. Err. & App.] 59 A. 220. Brakeman did not as a matter of law assume risk of using a coupler structurally defective, not being shown to have actual or imputed knowledge of the danger in using it as he did. Brinkmeier v. Missouri Pac. R. Co. [Kan.] 77 P. 586. That plaintiff knew there were live wires near him did not preclude recovery for injury caused by them when he thought they were insulated and had been told they were safe. Haworth v. Mineral Belt Tel. Co., 105 Mo. App. 161, 79 S. W. 727. Employe, whose usual duties were different, ordered to set bricks on wall of kiln, held not to have assumed risk of its falling, though there were visible defects in it. Browning v. Kasten [Mo. App.] 80 S. W. 354. Engineer and fireman not shown to have knowledge of danger of using water containing chlorides in the boiler, so as to have assumed the risk. Nelson v. New York, 91 N. Y. S. 763. Knowledge that a boiler plug leaked did not work an assumption of the risk of its blowing out. Missouri, etc., R. Co. v. Crum [Tex. Civ. App.] 81 S. W. 72. Plaintiff did not assume risk of attempting to carry a rail with an insufficient number of men when he was inexperienced, did not know number required, and acted under a foreman's orders. Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808. A brakeman injured by falling from cars on a grade siding by reason of the disregard of a rule requiring cars in contact to be coupled together, could not be held to have assumed the risk because he knew of occasional violations of the rule. St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 82 S. W. 360.

50. Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524. Proof that an ordinarily prudent and reasonable man would have appreciated the danger under the same circumstances is sufficient. Chicago, etc., R. Co. v. Benton [C. C. A.] 132 F. 460; Babb v. Oxford Paper Co. [Me.] 59 A. 290; Young v. O'Brien [Wash.] 79 P. 211. But the age, intelligence, and experience of the servant concerned must be considered. Avery v. Nordyke & Marmon Co. [Ind. App.] 70 N. E. 888.

51. Morrow v. Gaffney Mfg. Co. [S. C.] 49 S. E. 573.

52. Youth and immaturity of a servant are insufficient to rebut the presumption that a risk was assumed, raised by knowledge of a danger. Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910. Boy 15½ years old, of ordinary intelligence, assumed risk of going through dark tunnel from coal mine, where motors were run, having passed through several times before. Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802. Children under 14 assume risk of dangers which they know and appreciate only. Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674.

53. See 2 Curr. L. 829.

54. He is, however, bound by such knowledge of defects as he has acquired, or ought to have acquired, in the ordinarily careful performance of his usual duties, and to that extent may not rely on the presumption that the master has performed his duty. Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524; Kentucky Freestone Co. v. McGee, 25 Ky. L. R. 2211, 80 S. W. 1113; Coven v. Bodwell Granite Co. [Me.] 59 A. 285.

55. Servant going through poorly lighted hallway to his work for the first time did

ably safe appliances,[56] and a sufficient number[57] of competent fellow-workmen,[58] and need not make an inspection to discover latent defects.[59] In other words, negligence of the master, or of his representatives, is not one of the ordinary risks of the employment, which the servant assumes.[60] But this rule is frequently

not assume risk of falling through open hatchway. Schwarzschild v. Drysdale [Kan.] 76 P. 441. Employe had right to assume that floor over which he was moving heavy machinery was safe. Thompson v. American Writing Paper Co. [Mass.] 72 N. E. 343. A servant, sent into a place where discovery of a dangerous defect would be difficult, has a right to rely on the presumption that his safety has been reasonably provided for. Clark v. Wolverine Portland Cement Co. [Mich.] 101 N. W. 845. One employed to assist engineer in locating entry in mine was entitled to assume that master had properly inspected the roof and made it reasonably safe. Wilson v. Alpine Coal Co. [Ky.] 81 S. W. 278. Inexperienced mucker in mine may assume that mine is properly timbered. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1. Where it had been the custom to sand the rails on a certain grade to make it safe, a motorman had the right to assume that this duty was being continuously performed. Union Traction Co. v. Buckland [Ind. App.] 72 N. E. 158. Car inspector sent between tender and baggage car to inspect chains had the right to assume that the company had furnished a reasonably safe place to work. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. Brakeman may assume that his place of work is safe; does not assume risk from low cattle chute over track. Coles v. Union Terminal R. Co. [Iowa] 99 N. W. 108. Bridge foreman did not assume risk of injury from obstructions on track while riding on hand car to and from work. Texas & N. O. R. Co. v. Keily [Tex. Civ. App.] 80 S. W. 1073. Plaintiff did not assume risk of derailment of a hand car by striking a block which fell from a train ahead, though he saw the car on which the block was loaded in the alleged negligent manner. McLean v. Pere Marquette R. Co. [Mich.] 100 N. W. 748. Engineer may assume that company has used ordinary care in inspecting track and keeping it in a reasonably safe condition. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445; Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038.

56. Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428; Klaffke v. Bettendorf Axle Co. [Iowa] 100 N. W. 1116; Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787. Roundhouse helper did not assume risk of using defective truck. Gulf, etc., R. Co. v. Davis [Tex. Civ. App.] 80 S. W. 253. Brakeman under no duty to inspect handhold on caboose. Missouri, etc., R. Co. v. Hoskins [Tex. Civ. App.] 79 S. W. 369; San Antonio & A. P. R. Co. v. Klauss [Tex. Civ. App.] 79 S. W. 58. Locomotive fireman under no duty to inspect a lantern globe furnished him to discover defects. Gulf, etc., R. Co. v. Larkin [Tex. Civ. App.] 80 S. W. 94. Fireman held not to have assumed risk of going out on defective running board of engine. Ellington v. Great Northern R. Co. [Minn.] 100 N. W. 218. Operator of freight elevator did not assume risk of its falling, having no knowledge of any defect, and being under no duty to inspect it. Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493. Telephone lineman did not assume risk of coming in contact with live electric light wires, strung on the telephone poles, being under no duty to inspect, and having no knowledge of their condition. Barto v. Iowa Tel. Co. [Iowa] 101 N. W. 876.

57. Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808.

58. And that such servants will obey instructions given them. Consumers' Cotton Oil Co. v. Ionte [Tex. Civ. App.] 80 S. W. 847. Workmen in shale pit instructed to rely wholly on foreman for warnings as to when masses of shale were to be thrown down from above had a right to rely on the observance of the rule. Coffeyville Vitrified Brick & Tile Co. v. Shanks [Kan.] 76 P. 856. A miner may assume that the cage by which he is carried to the surface is being operated by a competent engineer, and does not assume the risk arising from its operation by an incompetent person in the absence of the regular engineer. Beresford v. American Coal Co. [Iowa] 98 N. W. 902.

59. Belt R. Co. v. Confrey, 209 Ill. 344, 70 N. E. 773; Caven v. Bodwell Granite Co. [Me.] 59 A. 285; Standard Oil Co. v. Fordeck [Ind. App.] 71 N. E. 163; Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524; Carter v. Duvach Lumber Co. [La.] 36 So. 952.

60. National Steel Co. v. Lowe [C. C. A.] 127 F. 311; Bunker Hill & Sullivan Min. & C. Co. v. Jones [C. C. A.] 130 F. 813; Dean v. St. Louis Woodenware Works [Mo. App.] 80 S. W. 292; Depuy v. Chicago, etc., R. Co. [Mo. App.] 84 S. W. 103; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099; International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. The servant assumes only those risks of his employment which arise after the employer has performed all the duties placed upon him by law. Jenks v. Thompson [N. Y.] 71 N. E. 266. Brakemen assume risk from existence of necessary permanent structures, such as crossing gates, near the track, but do not assume risks arising from their defective construction or lack of repair. Fearns v. New York, etc., R. Co., 186 Mass. 529, 72 N. E. 68. Danger from defective break on street car not assumed by gripman. Cole v. St. Louis Transit Co. [Mo. App.] 81 S. W. 1138. Switchman does not assume a risk arising from the company's negligence in not keeping its track in a reasonably safe condition. Montgomery v. Chicago G. W. R. Co. [Mo. App.] 83 S. W. 66. Evidence of South Carolina law held to sustain instruction that if a trestle was unsafe to the knowledge of the railway company, knowledge of its dangerous condition by deceased would not prevent recovery. Harrill v. South Carolina & G. Extension R. Co., 135 N. C. 601, 47 S. E. 730. A railway employe

limited in its application to negligence unknown to the servant,[61] or which was not discoverable by the use of ordinary care in the performance of his duties.[62] It is held in Missouri that knowledge of a neglect of duty by the master does not convert the danger arising therefrom into an assumed risk, if the servant believes, and is justified in believing, that danger may be avoided by the use of due care.[63]

Reliance on orders or assurances of safety.[64]—A servant does not assume a risk involved in executing a direct order of his superior, unless in so doing he acts as no ordinarily prudent person would act,[65] as where the danger is perfectly obvious.[66] So also a servant may rely upon a positive assurance of safety by his

does not assume risks of defective appliances. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. Risk of injury caused by defective fastening of car door and failure to properly inspect it not assumed. Missouri, etc., R. Co. v. Hutchens [Tex. Civ. App.] 80 S. W. 415. A risk arising from negligence of a railroad company or its servants is not a risk "ordinarily incident to the employment." Texas, etc., R. Co. v. Kelly [Tex.] 80 S. W. 79. It is the doctrine in Illinois that a servant does not assume risks incident to his employment, if the master, by the exercise of reasonable care, could have prevented or removed or lessened the risk. Wells v. O'Hare, 209 Ill. 627, 70 N. E. 1056. Brakeman did not assume risk of switching crew handling cars in a negligent manner, such manner not being customary, and the members of the switching crew not being his fellow-servants. Chicago, etc., R. Co. v. White, 209 Ill. 124, 70 N. E. 588. A section hand does not assume the risk of gross negligence of his foreman in running the hand car on the time of a regular train. Illinois Cent. R. Co. v. McIntosh [Ky.] 80 S. W. 496. Bridge watchman did not assume risk of engineer failing to observe usual custom of running train on bridge and failing to keep lookout. San Antonio, etc., R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422. Member of crew engaged in operating train of flat cars and loading them with steam shovel did not assume risk of foreman's negligence in ordering machinery moved when employe was in a place of danger. Texas Cent. R. Co. v. Pelfrey [Tex. Civ. App.] 80 S. W. 1036. The fact that work was not unusually dangerous would not defeat recovery if plaintiff's foreman was negligent in the performance of the work. Vicars v. Gulf, etc., R. Co. [Tex. Civ. App.] 84 S. W. 286.

61. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183; Gulf, etc., R. Co. v. Davis [Tex. Civ. App.] 80 S. W. 253; Quinn v. Galveston, etc., R. Co. [Tex. Civ. App.] 84 S. W. 395. Ordinances limiting rate of speed of trains within the city limits are for the benefit of employes as well as others, and hence the risk of violating such an ordinance is not assumed unless the employe continues in the employment with knowledge that the ordinance is habitually violated. Camp v. Chicago G. W. R. Co. [Iowa] 99 N. W. 735. The servant does not assume unusual and extraordinary risks caused by the master's negligence, unless the dangers so created are open and visible, or the servant has knowledge of them. Garity v. Bullion-Beck & Champion Min. Co., 27 Utah, 534, 76 P. 556. A servant assumes risks and dangers of his employment which he knows, appreciates and takes without objection, although they result from the master's negligence. Chicago, etc., R. Co. v. Benton [C. C. A.] 132 F. 460. One who knows of a risk, which is obvious, and continues to work, assumes the risk, and cannot recover though the defect arises through the master's negligence. Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910.

62. International, etc., R. Co. v. Shaughnessy [Tex. Civ. App.] 81 S. W. 1026; San Antonio, etc., R. Co. v. Klauss [Tex. Civ. App.] 79 S. W. 58.

63. Knowledge of defect in mine roof considered on the issue of contributory negligence; it did not of itself defeat a recovery. Weston v. Lackawanna Min. Co. [Mo. App.] 78 S. W. 1044. A workman does not assume the risk of an appliance, suitable in itself, getting out of order, if he is justified in believing it can be used safely in the exercise of due care. Studenroth v. Hammond Packing Co. [Mo. App.] 81 S. W. 487. Mere knowledge of defective condition of track would not defeat recovery unless it was such as to threaten immediate danger, or conductor was not justified in assuming that he could use it safely, in the exercise of due care. Hauts v. St. Louis Transit Co. [Mo. App.] 84 S. W. 161.

64. See 2 Curr. L. 833.

65. Evidence held sufficient to show plaintiff did not assume risk of driving a vicious mule over dangerous roadway in mine, under a special command. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863. Where a servant places himself in a position of danger in obedience to a command of his superior, his knowledge of the danger will not defeat his right of recovery for an injury if he acted with ordinary prudence. Barnett & Record Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343. Unless danger from use of unsafe hydraulic jack was so glaring that no prudent man would encounter it, plaintiff, ordered to use it, did not assume the risk. Wurtenburger v. Metropolitan St. R. Co., 68 Kan. 642, 75 P. 1049. Plaintiff struck by train while attempting to remove hand car under foreman's orders did not assume the risk. Kansas City, etc., R. Co. v. Thornhill [Ala.] 37 So. 412. An inexperienced lineman doing particular work under the immediate supervision of a superior did not assume a risk, not obvious, in doing the work. Lord v. Inhabitants of Wakefield, 185 Mass. 214, 70 N. E. 123. An employe who obeys his foreman cannot be charged with having assumed the peril when nothing shows that he knew of the danger to which he was exposing himself. Stewart v. Texas & P. R. Co. [La.] 37 So. 129.

66. An experienced sawyer stood at the side, instead of the end, of a saw while

superior, even though he knows there is some danger;[67] but he cannot rely upon such assurances absolutely, so as to avoid the consequences of incurring obvious and special dangers,[68] or such as are ordinarily incident to the employment.[69]

Reliance on promise to repair, after complaint.[70]—Where the servant has complained of a defective condition, and the master has promised to render it safe by repairs, the servant may continue in the employment, without assuming the risk,[71] for such length of time as is reasonably necessary for the making of the required repairs,[72] unless the appreciated danger is so imminent that a man of ordinary prudence would refuse to encounter it,[73] as where the machine or ap-

shifting a belt, an obviously dangerous position, while the other would have been safe. The fact that the employer told him to stand at the side was held no excuse. Luckey v. Sofield [N. J. Law] 57 A. 870. Employe, under orders of foreman, assumed risk of going under derailed car supported by jacks, if the situation was such that the danger of so doing was apparent. International, etc., R. Co. v. Royal [Tex. Civ. App.] 83 S. W. 713.

67. Servants injured, while removing tamping for blasting holes, the superintendent having told them there was no danger, though the charges had not been exploded by the battery. Master held liable. Allen v. Gilman, McNeil & Co., 127 F. 609. Miner who observed a crevice in the mine and called attention of superintendent to it did not as a matter of law assume risk of a boulder falling, his superior assuring him it was safe. Carter v. Baldwin [Mo. App.] 81 S. W. 204. Brakeman did not assume risk from defect in coupler, though it was so apparent as to cause discussion, where the conductor assured him it was safe. Grout v. Tacoma E. R. Co., 33 Wash. 524, 74 P. 665.

68. Allen v. Gilman, McNeil & Co., 127 F. 609.

69. Experienced quarryman, sent to remove tamping from drill holes and injured by an explosion, could not shift responsibility on master by showing he relied on foreman's statement that charges had all been exploded. McKane v. Marr [Vt.] 58 A. 721.

70. See 2 Curr. L. 834.

71. Dunkerley v. Webendorfer Mach. Co. [N. J. Law] 58 A. 94; Neeley v. S. W. Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537. Where mine boss had promised to prop up a dangerous roof on being notified of its condition, miner, injured by fall of rock, did not assume the risk. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38. Where servant complained of unguarded cogs, and foreman promised to have them fixed, and servant relied on the promise, and guards could have been furnished, the master was liable for an injury resulting from failure to guard them. Buehner v. Creamery Package Mfg. Co. [Iowa] 100 N. W. 345. Where plaintiff had complained of a careless servant and refused to work with him, evidence held to show he did not assume risk of continuing to work near him, because he had no knowledge of his proximity at the time of his injury, and the master had assured him that he need not work near the careless servant. Allcot v. Kirkham, 91 N. Y. S. 775.

72. Anderson v. Fielding [Minn.] 99 N. W. 357; Studenroth v. Hammond Packing Co. [Mo. App.] 81 S. W. 487; Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 81 S. W. 67; Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632. Held, that a motorman who had returned a car and complained of a defective brake, and received an assurance that it would be repaired next day, continued to use the car in reliance on the promise to repair. Terre Haute Elec. Co. v. Kiely [Ind. App.] 72 N. E. 658.

NOTE. Risk assumed after reasonable time to repair: "If the promise is to repair by a fixed time, then after the expiration of the time fixed, the servant assumes the risk from the defects complained of. If the promise to repair is without fixing the time within which the repairs shall be made, the servant may continue the work for a reasonable time, taking the character of the defects into consideration, within which the repairs could or ought to be made, and at and after the expiration of such reasonable time within which to make the repairs, if they are not made, and if the defects are open and known to the servant, and no new promise to repair is made, and the servant continues the work, he assumes the risks incident to the defects of which he complained. Illinois Steel Co. v. Mann, 170 Ill. 200, 48 N. E. 417, 62 Am. St. Rep. 370, 40 L. R. A. 781; Swift v. Madden, 165 Ill. 41, 45 N. E. 979; Counsell v. Hall, 145 Mass. 468, 14 N. E. 530; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Stephenson v. Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806; Gowan v. Hardy, 56 F. 974; Corcoran v. Milwaukee Gaslight Co., 81 Wis. 191, 51 N. W. 328."—Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 393. In this case a servant complained of a defect in a scaffold and after a promise to repair, continued to use it three days, though the repairs could have been made in two or three hours. Held, he assumed the risk. See, also, Dowd v. Erie R. Co., 70 N. J. Law, 451, 57 A. 248, where the same rule is followed.

73. Anderson v. Fielding [Minn.] 99 N. W. 357. Employe in sawmill assumed risk of being struck by slabs thrown from floor above, where the master promised to build a chute and servant continued to work, knowing the danger. Crum v. North Vernon Pump & Lumber Co. [Ind. App.] 72 N. E. 193. Danger of walking on slippery cement floor of laundry not so imminent and apparent that none but a reckless person would encounter it. Louisville Hotel Co. v. Kaltenbrun [Ky.] 80 S. W. 1163. Rule adhered to on rehearing, 82 S. W. 378. Continuing to operate a machine on which gear-

pliance complained of as defective is simple, and the defect and danger obvious.[74] The promise to repair must have been relied on by the servant.[75] To entitle a servant to rely upon it, the promise must be positive,[76] and made by one having authority to make it;[77] and must remain unrevoked.[78] The promise need not fix any definite time within which the repairs are to be made;[79] a general promise is construed to mean that the repairs will be made within such time as is reasonably necessary for the purpose.[80] If a definite time is named, the servant may continue in the service until the expiration of the time named.[81]

Where, in an action for injuries, the complaint sets out a promise to repair the defect which caused the injury, the action is in tort, and not in contract.[82]

Risks created by servant.[83]—A servant assumes the risk of a dangerous condition which he himself creates, without authority,[84] or in performing his work in a dangerous manner when a reasonably safe way has been provided for him.[85]

(§ 3) *G. Contributory negligence. Nature of defense.*[86]—Negligence of a servant which is a contributing[87] or the sole[88] cause of his injury defeats a re-

ing was not guarded held not negligence per se so as to require the case to be taken from the jury. Dowd v. Erie R. Co., 70 N. J. Law, 451, 57 A. 248.

74. Danger from defect in axle pin of wagon used to wheel coal was assumed, notwithstanding promise to repair. Baumwald v. Trenkman, 88 N. Y. S. 182.

NOTE. Nature of defective instrument: "It is not in all cases that the servant may relieve himself from the assumption of the risk incident to defects and dangers of which he has full knowledge by exacting from the master a promise to repair. The cases where the rule of assumed risk is suspended and the servant exempted from its application under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor, or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master. Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936; Illinois Steel Co. v. Mann, 170 Ill. 200, 48 N. E. 417, 62 Am. St. Rep. 370, 40 L. R. A. 781; Meador v. Lake Shore & M. S. R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384; Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56; Power Co. v. Murphy, 115 Ind. 570, 18 N. E. 30; St. Louis, etc., R. Co. v. Kelton [Ark.] 18 S. W. 933; Bailey on Master and Servant, § 3103; Barrows on Negligence, pp. 121, 122."—From Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 393. See, also, Crum v. North Vernon Pump & Lumber Co. [Ind. App.] 72 N. E. 193, where the same distinction is made.

But it is held in Kentucky that an employe may rely on the promise to repair, even though the defective instrument is simple in construction; thus the master was held liable after promising to repair a box used in a laundry, which leaked, making the cement floor slippery, so that the plaintiff fell and was injured. Louisville Hotel Co. v. Kaltenbrun [Ky.] 80 S. W. 1163.

75. Daily v. Fiberloid Co. [Mass.] 71 N. E. 554.

76. Foreman, on complaint being made as to light, said it would soon be light enough Held, not a promise to supply more light. Buehner v. Creamery Package Mfg. Co. [Iowa] 100 N. W. 345.

77. Foreman of gang of carpenters had no authority to promise the foreman of gang of riveters to fix a defect in a scaffold so as to bind their common master. Hempstock v. Lackawanna I. & S. Co., 90 N. Y. S. 663.

78. Neeley v. S. W. Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537.

79. Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 81 S. W. 67. A promise by a foreman to put a guard on gearing "as soon as he could" was sufficiently definite to warrant reliance on it. Dowd v. Erie R. Co., 70 N. J. Law, 451, 57 A. 248.

80. Louisville Hotel Co. v. Kaltenbrun [Ky.] 80 S. W. 1163. Rule adhered to on rehearing, 82 S. W. 378.

81. As where promise was to have carpenter make repairs as soon as certain other repairs were finished. Louisville Hotel Co. v. Kaltenbrun [Ky.] 80 S. W. 1163.

82. Louisville Hotel Co. v. Kaltenbrun [Ky.] 80 S. W. 1163.

83. See 2 Curr. L. 835.

84. One who cut a hole in the floor to get quicker access to basement, by ladder, assumed risk of attendant dangers, though the master, on discovering it, took no steps to safeguard it. Sharp v. Durand [N. J. Law] 59 A. 7.

85. Plaintiff could not recover for injury received in running jointer in woodworking shop without the guard which was provided for it. McGinty v. Waterman [Minn.] 101 N. W. 300. Employe was directed to use a stick to clean a corn-shredder in operation, but used his hand instead. Frink v. Potts, 105 Ill. App. 92.

86. See 2 Curr. L. 835. For distinction between contributory negligence and assumption of risk see ante, § 3F and note. Though convicts, leased out, do not assume ordinary risks, they cannot recover if they voluntarily and negligently place themselves in a position of danger. Simonds v. Georgia Iron & Coal Co., 133 F. 776.

87. Baltimore, etc., R. Co. v. Hunsucker [Ind. App.] 70 N. E. 556; McIntire v. Pittsburg Steel Foundry Co., 208 Pa. 34, 57 A.

covery. It will not be presumed that a statute, charging a master with positive duties, intended to change this rule of the common law, unless the statute expressly so provides.[89] Accordingly it is usually held that contributory negligence is available as a defense though the action be based on a violation of a statutory duty.[90] But a contrary doctrine is applied where mining regulations are violated, owing to the great danger in that occupation.[91]

Degree of care required of servant.[92]—Only ordinary care is required;[93] that

61; International, etc., R. Co. v. Walters [Tex. Civ. App.] 80 S. W. 668. If a servant's negligence contributed in any degree or to any extent to bring about his injury, he cannot recover. Camp v. Chicago G. W. R. Co. [Iowa] 99 N. W. 735; Little v. Southern R. Co., 120 Ga. 347, 47 S. E. 953.

Where the proximate cause of an injury is a negligent act of the employe, the fact that an act of the master was concurrent with that of the servant, will not render the master liable. Tomaczewski v. Dobson, 208 Pa. 324, 57 A. 718; Meily v. St. Louis, etc., R. Co. [Mo. App.] 81 S. W. 639; Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. Brakeman who went between cars instead of using safety coupler appliance could not recover though the more proximate cause of his injury was getting caught in an unblocked guard rail. Gilbert v. Burlington C. R. & N. R. Co. [C. C. A.] 128 F. 529. If plaintiff is guilty of contributory negligence, the mere fact that negligence of the defendant was gross will not render him liable; nothing but a willful act or willful or intentional neglect of duty will authorize a recovery. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38.

On the other hand, negligence not shown to have contributed to produce the injury will not defeat recovery. Texas, etc., R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073; Consumers' Cotton Oil Co. v. Gentry [Tex. Civ. App.] 80 S. W. 394. Where the act of using the foot in making a coupling while standing on engine footboard was customary and ordinarily safe, such act is not causally connected with the crushing of the switchman's foot, while so making a coupling. Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13. Knowledge that bottom rung of a ladder was gone would not defeat recovery for injury caused by defect in top rung, of which plaintiff had no knowledge, if he otherwise acted with due care. El Paso Northeastern R. Co. v. Ryan [Tex. Civ. App.] 81 S. W. 563. Instruction held to properly charge that intoxication alone would not preclude a recovery unless it caused or contributed to cause the accident. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. Failure of a workman to obtain a statutory permit for use of dynamite will not defeat his action against his master for injuries received through its use, the servant not having been properly warned or instructed; since the failure to procure the permit in no way contributed to the injury [Gen. St. 1902, § 2618]. Currelli v. Jackson [Conn.] 58 A. 762.

88. Plaintiff's own negligence and not defendant's failure to instruct him held the proximate cause of injury. O'Donnell v. American Mfg. Co., 112 La. 720, 36 So. 661.

89. Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910.

90. So held under Minnesota Gen. St. 1894, § 2248, making it the duty of employers to guard dangerous machinery. Swenson v. Osgood & Blodgett Mfg. Co., 91 Minn. 509, 98 N. W. 645. Also under Indiana employers' liability act. Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218. Violation of Gen. Laws 1896, c. 68, § 6, requiring belting and gearing to be properly guarded did not give right of action, where plaintiff knew gearing to be unguarded. Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910. Const. § 162 and Acts 1901-02, p. 335, c. 322, providing that knowledge of defects shall not bar recovery by a railroad employe for injuries caused by the defects, does not take away the defense of contributory negligence, nor render such knowledge unimportant in determining the question; but under it, mere knowledge does not bar recovery, without other circumstances indicating negligence. Norfolk & W. R. Co. v. Cheatwood's Adm'x [Va.] 49 S. E. 489. Contributory negligence will defeat a recovery under the automatic coupler act of Congress, though assumption of risk is not an available defense. An experienced brakeman, making a coupling with the link and pin, who used his hand and negligently left it too long between the drawheads, and was so injured, could not recover on the ground that the cars were not equipped with automatic couplers. Denver, etc., R. Co. v. Arrighi [C. C. A.] 129 F. 347.

91. Distinction pointed out and authorities on both propositions cited in Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910. See Riverton Coal Co. v. Shepard, 207 Ill. 395, 69 N. E. 921. See, also, 2 Curr. L. 836, n. 83. The defense of contributory negligence does not lie to an action founded on the willful failure of a mine operator to comply with the Illinois mine statute requiring a passageway to be maintained around landing place of cage. Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co., 130 F. 957. Construction placed on Laws 1899, p. 325, § 33, by Illinois supreme court, is bindir g on federal court. Fulton v. Wilmington Star Min. Co. [C. C. A.] 133 F. 193.

92. See 2 Curr. L. 836.

93. Central of Georgia R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590. The fact that a motorman, employed by a carrier, impliedly contracts to exercise a very high degree of care for the safety of passengers, does not impose on him the duty of more than ordinary care for his own safety. Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138. A section hand, working on the track, is under the duty of using ordinary care to discover the approach of trains, but need not keep a constant lookout, the track being clear for some distance. International, etc., R. Co. v. Villareal [Tex. Civ. App.] 82

is, such care as ordinarily prudent persons would exercise under the same circumstances.[94] In determining whether due care was used in a given instance, not only the surrounding circumstances,[95] but the age,[96] experience,[97] and capacity[98] of the servant, must be considered. Mere knowledge of a defective condition which caused the injury is not conclusive on the question of contributory negligence;[99] it must appear that the danger arising from it was appreciated,[1]

S. W. 1063. Negligence is not imputable to a person for failing to look for a danger when, under the circumstances, he had no reason to apprehend danger. Missouri Pac. R. Co. v. Johnson [Kan.] 77 P. 576.

94. Baltimore, etc., R. Co. v. Hunsucker [Ind. App.] 70 N. E. 556; Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239; Espenlaub v. Ellis [Ind. App.] 72 N. E. 527; Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396; Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883; Creech v. Wilmington Cotton Mills, 135 N. C. 680, 47 S. E. 671; Hedrick v. Southern R. Co., 136 N. C. 510, 48 S. E. 830; Turrentine v. Wellington, 136 N. C. 308, 48 S. E. 739; Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038; Galveston, H. & S. A. R. Co. v. Manns [Tex. Civ. App.] 84 S. W. 254; San Antonio, etc., R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401. That it was customary to run passenger trains on the main line did not excuse the station agent from exercise of ordinary care when walking on sidetrack. Morehead v. Yazoo & M. V. R. Co. [Miss.] 36 So. 151. Whether it was a section hand's duty to use reasonable care to discover the approach of a train should not have been submitted to the jury, since that was his duty as a matter of law. International, etc., R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063.

95. Board placed over hole by truckman slipped, and his foot was injured in a screw. The fact that a hammer and nails lay beside the board, so that it could have been nailed, could be considered on contributory negligence issue. Virginia Portland Cement Co. v. Luck's Adm'r [Va.] 49 S. E. 577. Held not negligence to use a certain bucket, used to hoist excavated materials in railroad work, to hoist a rock, plaintiff being injured when unloading the bucket. Parotte v. Holbrook, Cabot & Rollins, 127 F. 1013.

96. [It will be seen from the following cases that the courts are not in entire harmony as to the degree of care required of children.—Ed.] A child of very tender years is not chargeable with contributory negligence under any circumstances. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981. The law presumes that an infant between seven and fourteen years of age cannot be guilty of contributory negligence, and in an action by such a plaintiff, the burden is on defendant to overcome this presumption by proof of intelligence and capacity. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908. All children, even though under fourteen, are chargeable with the result of failing to exercise the due care which their physical and mental capacity fits them to exercise. Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674. Due care in a child of tender years is such care as its mental and physical capacity fits it to exercise in the particular circumstances [Civ. Code 1895, § 2901]. Canton Cotton Mills v. Edwards, 120 Ga. 447, 47 S. E. 937. Average capacity of others of the same age is the standard. Applied to boy of 13, caught in dangerous machine. Dynes v. Bromley, 208 Pa. 633, 57 A. 1123. Minority of servant does not excuse want of that degree of care to prevent injury to himself which one of his age and intelligence would ordinarily use under similar circumstances. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. Error, in instructions, to make no distinction between "ordinarily prudent persons" and plaintiff, a minor 18½ years old. Merrifield v. Maryland Gold Quartz Min. Co., 143 Cal. 54, 76 P. 710. Error to instruct that boy of 18 was not required to use same care as required of an adult. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981.

97. Where the work of a servant required him to place his hand within 13 or 14 inches of an unguarded saw, the jury could properly consider his youth and inexperience on the issue of contributory negligence, though he did not operate the machine. Sachau v. J. H. Milner & Co., 123 Iowa, 387, 98 N. W. 900.

98. A foreigner of less than average intelligence cannot be held to the same degree of care as that required of men of average intelligence. Kasjeta v. Nashua Mfg. Co. [N. H.] 58 A. 874. An immature, inexperienced employe, incapable of appreciating the danger incident to working around machinery, is not chargeable with contributory negligence. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922.

99. The mere fact that a servant works at a defective machine is not conclusive on the question of contributory negligence. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828; Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239. Const. § 162 and acts 1901-02, p. 335, c. 322, provides that mere knowledge of defects by a railroad employe shall not bar a recovery for injuries caused by such defects. Norfolk & W. R. Co. v. Cheatwood's Adm'x [Va.] 49 S. E. 489. An employe will not be held guilty of contributory negligence as a matter of law though it appears that he knew that the defective appliance he used had failed to stop the machine on prior occasions. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. So mere knowledge of existence of an overhead bridge by brakeman did not defeat a recovery for his death caused by his coming in contact with the bridge while on the cars. Hedrick v. Southern R. Co., 136 N. C. 510, 48 S. E. 830.

1. Lebeau v. Dyerville Mfg. Co. [R. I.] 57 A. 1092. The fact that an employe hooked a guy into an eyebolt did not charge him with contributory negligence, unless it appeared that he saw, or by reasonable care ought to have seen, that the tackle was de-

or was so obvious that no prudent man would have encountered it.[2] Failure to discover a latent defect is not negligence.[3] But failure to remedy a known defect, or give notice of it to the master, is.[4]

Choice of methods.[5]—Needless exposure to danger is negligence.[6] Hence, a voluntary choice of an obviously dangerous way of doing work, when a reasonably safe way is provided, is negligence,[7] if the work could have been as well

fective. Caven v. Bodwell Granite Co. [Me.] 59 A. 285, Where a hostler had ridden on ordinary engine tenders past a building in the yards without injury, he was not necessarily negligent in riding on a larger tender, unless he knew it was of unusual size. Norfolk & W. R. Co. v. Cheatwood's Adm'x [Va.] 49 S. E. 489.

2. Weston v. Lackawanna Min. Co. [Mo. App.] 78 S. W. 1044; Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138; Ahrens & Ott Mfg. Co. v. Rellihan [Ky.] 82 S. W. 993. That employe knew that a hammer used in crushing ore was defective from long use, did not as a matter of law, charge him with negligence in using it. Robbins v. Big Circle Min. Co., 105 Mo. App. 78, 79 S. W. 480. Mere knowledge of a structural defect in a coupler held not to bar recovery. Brinkmeier v. Missouri Pac. R. Co. [Kan.] 77 P. 586. Use of a defective chain is not contributory negligence merely because the employe knew of the defect, when the defect was not such as of itself to indicate danger. International, etc., R. Co. v. Jourdan [Tex. Civ. App.] 84 S. W. 266. One may be guilty of contributory negligence though not entirely familiar with all the circumstances and conditions surrounding the place of accident. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847.

3. A timber, part of apparatus used in moving safes, defective from dry rot, broke, killing servant. Meehan v. Atlas Safe Moving & Machinery Truckage Co., 94 App. Div. 306, 87 N. Y. S. 1031.

4. Defect in rope and appliance by which elevator door was managed. Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 80 S. W. 364.

5. See 2 Curr. L. 837, 838.

6. Conductor stepped on track in front of moving train. Libbey v. Atchison, etc., R. Co. [Kan.] 77 P. 541. Railroad watchman who went to sleep lying on ends of ties, held guilty of gross negligence. Illinois Cent. R. Co. v. Mencer, 25 Ky. L. R. 2250, 80 S. W. 816. Elevator operator held to have deliberately exposed himself to danger. Droney v. Doherty [Mass.] 71 N. E. 547. Operator of mangler attempted to remove cloth from machine without stopping it. Jensen v. Regan [Minn.] 99 N. W. 1126. Servant unnecessarily walked over platform of wagon elevator while another servant was starting it upward. Karch v. Kipp, 90 N. Y. S. 404. Brakeman, running along side of roofs of cars, instead of on running board, and falling by reason of hole cut in roof of car of special make, could not recover. Benson v. New York, etc., R. Co. [R. I.] 59 A. 79. Car repairer stepped in front of a switch engine. Bennett v. St. Louis S. W. R. Co. [Tex. Civ. App.] 82 S. W. 333. Employe working under bridge deck which had been jacked up was negligent in remaining there after a warning that it was to be let down, though he did not fully realize his danger. Ft. Worth & R. G. R. Co. v. Robinson [Tex. Civ. App.] 84 S. W. 410. The fact that when plaintiff was caught in unboxed cogs, she was after filling for her loom, which she was permitted, but not required to get, held not to defeat recovery. Creech v. Wilmington Cotton Mills, 135 N. C. 680, 47 S. E. 671.

7. Avery v. Oliver [N. C.] 49 S. E. 91; Illinois Steel Co. v. McNulty, 105 Ill. App. 594. Employe used hoist rope to descend into mine shaft, though ladders were supplied, and the rope broke. Gribben v. Yellow Aster Min. & Mill. Co., 142 Cal. 248, 75 P. 839. Brakeman went between cars to couple them, instead of using lever on side of car provided for the purpose. Gilbert v. Burlington, etc., R. Co. [C. C. A.] 128 F. 529. Plaintiff removed some of the guy ropes from a pile driver, before taking off a piece of tackle and pulley, and was injured by its falling. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737. In repairing a belt, workman did not stop machinery, and went under table on dangerous side, unnecessarily. Schoultz v. Eckhardt Mfg. Co., 112 La. 568, 36 So. 593. Workman passed under suspended lumber instead of going up by ladder provided for him. Slade v. Beattie [Mass.] 71 N. E. 540. Plaintiff, instead of going round by safe path, stepped on a brace in a pit—not made or intended for a bridge—and so fell into the pit, the brace giving way. Gillette v. General Electric Co. [Mass.] 72 N. E. 255. Engineer caught by set screw in revolving shaft and injured guilty of negligence, since danger was apparent and he could have done the act in a safer way. Kennedy v. Merrimack Pav. Co., 185 Mass. 442, 70 N. E. 437. Station agent could not recover for injuries caused by train striking him when he walked on the bed of the sidetrack, though he might have used space between the tracks, and did not watch for train. Morehead v. Yazoo & M. V. R. Co. [Miss.] 36 So. 151. Switchman rode on brake beam of car instead of using stirrup and handhold provided at other end of car. Montgomery v. Chicago G. W. R. Co. [Mo. App.] 83 S. W. 66. Brakeman stood between the drawheads in attempting to make a coupling, when he might easily have stood at either side. Caldwell v. Missouri Pac. R. Co., 181 Mo. 455, 80 S. W. 897. Brakeman had five ways to mount a moving car and chose the most dangerous. Weed v. Chicago, etc., R. Co. [Neb.] 99 N. W. 827. Brakeman went between cars, though automatic coupler was provided. Filbert v. New York, etc., R. Co., 95 App. Div. 199, 88 N. Y. S. 438. Employe chose unsafe way of going to and from boiler room. Patterson v. V. J. Hedden & Sons Co., 90 N. Y. S. 1069. Failure to use safe passage way in going to mill negligence, if there was such passage convenient. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Failing to

and efficiently performed in one way as in the other.[8] But if more than one reasonably safe method is open, choice of one rather than the other is not negligence,[9] especially if the one chosen is customary, and ordinarily safe.[10]

Reliance on master's care.[11]—Ordinarily, failure of a servant to inspect does not charge him with negligence, since he may assume that the master's duties relative to his tools, appliances, and place of work have been performed,[12] and that the rules of his employer will be observed.[13] A servant is not chargeable with negligence as a matter of law, when he acts in reliance on an assurance of safety by a superior,[14] or when he is executing orders given him by a superior;[15] but

stop printing press before attempting to fix it. Newport News Pub. Co. v. Beaumeister, 102 Va. 677, 47 S. E. 821. Choice of dangerous way to operate machinery. Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632.

8. Brakeman not chargeable with negligence in making a coupling on the inside of a curve instead of on the outside, when he could not make the coupling as well on the outside. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

9. The mere fact that plaintiff might have traveled by different paths, and was injured in passing over the one chosen, does not make him guilty of negligence. Aetna Powder Co. v. Earlandson [Ind. App.] 71 N. E. 185. Evidence that plaintiff, injured by falling into trench on way to work, might have come by another path, is not of itself conclusive on issue of contributory negligence. Norris v. Cudahy Packing Co. [Iowa] 100 N. W. 853. Not necessary for brakeman to choose absolutely safe method of making a coupling, if the method chosen was one which a reasonably prudent person would have selected. Brinkmeier v. Missouri Pac. R. Co. [Kan.] 77 P. 586. Brakeman was not negligent in making a coupling on the inside and not on the outside of a curve in the track, if such a coupling could have been safely made, had the car not been defective. Hewitt v. East Jordan Lumber Co. [Mich.] 98 N. W. 992. Switchman not negligent in adjusting coupler at one spot rather than another, where there was danger from a rock and an unblocked frog, of which he had no knowledge. Texarkana, etc., R. Co. v. Toliver [Tex. Civ. App.] 84 S. W. 375.

10. As where switchman attempted to make a coupling with his foot while standing on the footboard of the engine, this being the customary way. Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13. Motorman in mine not negligent in riding on front of car backwards, when his helper had the only other seat and could keep a lookout, and this was the customary way of riding. Central Coal & Iron Co. v. Pierce, 25 Ky. L. R. 2269, 80 S. W. 449.

But the fact that an act was customary will not alone excuse negligence. That other employes used a hoist rope instead of ladders provided to descend into shaft of mine did not excuse plaintiff's negligence in so doing. Gribben v. Yellow Aster Min. & Mill. Co., 142 Cal. 248, 75 P. 839.

11. See 2 Curr. L. 840.

12. Ahrens & Ott Mfg. Co. v. Rellihan [Ky.] 82 S. W. 993. Servant may rely on presumption that railroad company would not furnish defective car to be used in unloading freight. Foster v. New York, etc., R. Co. [Mass.] 72 N. E. 331. Truckman, employed in unloading cars, under no duty to inspect fastening of car door, when such inspection was the duty of the car sealer. Missouri, etc., R. Co. v. Hutchens [Tex. Civ. App.] 80 S. W. 415. Knowledge that a shovel was lying in a gangway would not make an employe guilty of contributory negligence as a matter of law, if the master was chargeable with negligence in leaving it there. Galveston, etc., R. Co. v. Manns [Tex. Civ. App.] 84 S. W. 254. Miner not negligent as a matter of law in attempting to walk across a lagging in a passageway, put in since he last passed the place. Garity v. Bullion-Beck & Champion Min. Co., 27 Utah, 534, 76 P. 556. A miner, thrown from a cage in which he was being carried to the surface, and killed, was not guilty of contributory negligence, since he was in a place where he had a right to be and had a right to assume the cage was being operated by a competent engineer. Beresford v. American Coal Co. [Iowa] 98 N. W. 902. Brakeman riding on unusually high furniture car was not necessarily negligent in failing to stoop, to avoid an overhead bridge, when the statutory warning by "tell-tales" was not given. Hailey v. Texas & P. R. Co., 112 La. 533, 37 So. 131. Where plaintiff was injured by explosion of dynamite left in an excavation which he was ordered to finish digging, he having no knowledge of the presence of the dynamite which was concealed by mud and water, he was not negligent, and an instruction on contributory negligence was error. Harp v. Cumberland Tel. & T. Co., 25 Ky. L. R. 2133, 80 S. W. 510.

13. Bridge watchman justified in assuming that train would be run at usual rate, that usual signals would be given, and reasonable lookout kept. San Antonio, etc., R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422. A brakeman had the right to assume that a rule of the company requiring cars on side tracks to be coupled would be observed, unless a violation of the rule was discoverable by the use of ordinary care; he was under no duty to inspect, to see if it was observed. St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 82 S. W. 360.

14. A mill repairman had a right to rely on the superintendent's statement that he was going to shut down for repairs. Mathews v. Daly West Min. Co., 27 Utah, 193, 75 P. 722. Use of street car with a defective brake was not necessarily negligence, when the motorman was assured by those who selected the cars that it was fit for use. Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138. Inexperienced and ignorant employe in distillery relied on assurance of miller that he

such assurance'[16] or order[17] of a superior does not excuse the lack of due care on the part of the servant. If the danger incurred in executing an order is so great and apparent that no prudent man would have encountered it, the fact that the order was given will not relieve the servant from the consequences of his negligence.[18] The question is usually one for the jury,[19] and the fact that an act was done in obedience to orders is pertinent on the issue of the servant's care.[20]

Disobedience of orders,[21] or instructions of a superior,[22] or failure to observe the rules of the employer,[23] or a penal statute or municipal ordinance,[24] will defeat a recovery for injuries proximately caused thereby.

Emergencies.[25]—Unwise or incautious conduct of a servant in attempting to extricate himself from a dangerous position in which he has been placed by negligence chargeable to the master is not negligence;[26] nor will negligence be imputed to a servant who attempts to save life, unless his conduct is rash and reckless.[27]

could safely do certain work without a light. He could recover for the resulting injury. Dryden v. H. E. Pogue Distillery Co. [Ky.] 82 S. W. 262.

15. Plaintiff held not guilty of negligence in obeying engineer's directions as to manner of doing work. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396. That a brakeman took part in making a flying switch in violation of the company's rules held not to prevent a recovery by him, when the act was ordered by his superiors. Illinois Cent. R. Co. v. Jones' Adm'r [Ky.] 80 S. W. 484. Evidence held to show plaintiff attempted to make a coupling by direction of a superior; hence there was no choice of methods in which to do the act. Fenn v. Seaboard Air Line R. Co., 120 Ga. 664, 48 S. E. 141. Brakeman, under instructions from conductor, went between cars to couple them; held not negligence though rules were violated. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. Railroad laborer, with only a few days' experience, had a right to presume that getting off a flat car in motion was not dangerous, when ordered to do so by his foreman. Mitchell v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 289. The servant may assume that the master, in ordering him to do particular work will not expose him to unnecessary danger, and if he acts with ordinary care under the circumstances, and is nevertheless injured, he may recover though he had some knowledge of the danger. Jancko v. West Coast Mfg. & Inv. Co., 34 Wash. 556, 76 P. 78.

16. One who continues to operate an unguarded saw, relying upon a promise to guard it, must use reasonable care to protect himself. Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632.

17. Texas, etc., R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073.

18. Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869; Truly v. North Lumber Co., 83 Miss. 430, 36 So. 4. Danger of being struck by pieces of rock under which employe was tunneling. Hightower v. Gray [Tex. Civ. App.] 83 S. W. 254. Where plaintiff was injured by a collision between a train and a push car, if his conduct in remaining in a position of danger was not that of an ordinarily prudent person he could not recover, though he claimed he relied on a command of his superior. International, etc., R. Co. v. Tisdale [Tex. Civ. App.] 81 S. W. 347.

19. Texas, etc., R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073. Servant ordered to use unsafe hydraulic jack. Wurtenberger v. Metropolitan St. R. Co., 68 Kan. 642, 75 P. 1049. Where foreman directed employe to set bricks at a kiln, he was not negligent in obeying the direction unless the danger of a wall of the kiln falling was so palpable that no person of ordinary prudence would have encountered it. Browning v. Kasten [Mo. App.] 80 S. W. 354. Contributory negligence is not chargeable to an employe who used a dangerous trestle, if its defective condition was known to the company, and he was required to use it in the way he did; but if he was culpably negligent, and acted contrary to his duty, in going on the trestle, he could not recover. Harrill v. South Carolina, etc., R. Co., 135 N. C. 601, 47 S. E. 730.

20. Texas, etc., R. Co. v. Kelly [Tex.] 80 S. W. 79.

21. See 2 Curr. L. 839. Western Mattress Co. v. Ostergaard [Neb.] 99 N. W. 229.

22. Where boy learning duties as railroad employe disobeyed engineer's instructions and was killed, the company was not liable. McMillan v. Grand Trunk R. Co. [C. C. A.] 136 F. 827.

23. Morrow v. Gaffney Mfg. Co. [S. C.] 49 S. E. 573. Disregard of reasonable rules and regulations and of special instructions regarding handling of cars on a grade. Smith v. Centennial Eureka Min. Co., 27 Utah, 307, 75 P. 749. Brakeman violated rules by retiring to caboose instead of guarding switch, and was killed in consequence. Holland v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 359.

24. Even though such violation was directed or sanctioned by the master. Collision with switch engine; violation of railroad crossing law. Little v. Southern R. Co., 120 Ga. 347, 47 S. E. 953.

25. See 2 Curr. L. 840.

26. San Antonio, etc., R. Co. v. Stevens [Tex. Civ. App.] 83 S. W. 235. Plaintiff, engaged in making repairs in mill, was placed in sudden danger by the superintendent's ordering the mill to start up, without a warning. Held, plaintiff not negligent in selecting the mode of making the repairs, nor in giving the wrong order when machinery started. Mathews v. Daly West. Min. Co., 27 Utah, 193, 75 P. 722.

27. Section foreman held not negligent in attempting to get a push car off the track

Discovery of servant's peril; intervening negligence.[28]—Though a servant has been guilty of negligence in placing himself in a position of peril, the master owes him the duty of ordinary care for his safety, after discovering his peril;[29] and the master will be liable if negligence chargeable to him intervenes and proximately causes an injury:[30]

The sufficiency and admissibility of evidence on the issue of contributory negligence is treated in a succeeding section.[31]

(§ 3) *H. Actions.* 1. *In general.*[32]—The law of the place where the injury occurred governs the right of recovery.[33] Venue is statutory.[34]

to avoid a collision with a passenger train. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. Recovery permitted for death of telephone lineman killed while attempting to cut a live wire which had come in contact with a fellow-employe. Whitworth v. Shreveport Belt R. Co., 112 La. 363, 36 So. 414.

28. See 2 Curr. L. 840.

29. Engineer owed a switchman the duty of trying to save him after discovering him in a position of peril in front of his engine. Alabama Great Southern R. Co. v. Williams, 140 Ala. 230, 37 So. 255. Where station agent was on the level roadbed of a sidetrack, there being a space between tracks, which he could use, the engineer of a train coming down sidetrack owed him only the duty of ordinary care, even after discovering him. Morehead v. Yazoo, etc., R. Co. [Miss.] 36 So. 151. Failure to escape from under a derailed car after knowledge of negligence of a foreman, liable to result in injury, would be negligence; but an employe in such a situation may rely on the foreman's exercising due care and failure to look out for and discover his negligence would not be contributory negligence. International, etc., R. Co. v. Royal [Tex. Civ. App.] 83 S. W. 713.

30. Brakeman, negligently walking in front of an engine, stumbled and fell; engineer could have discovered his peril and stopped his engine in time to prevent an accident. Davenport v. F. B. Dubach Lumber Co., 112 La. 943, 36 So. 812. Company liable if engineer could have avoided striking section hand on the track by the exercise of ordinary care after discovering his dangerous position. Hinzeman v. Missouri Pac. R. Co., 182 Mo. 611, 81 S. W. 1134. Engineer owed section hand the duty not only of trying to stop the train, but also of sounding the whistle. Id. Complaint alleging that engineer carelessly moved a train after a brakeman had placed himself in a perilous position between cars held to state a cause of action. Cleveland, etc., R. Co. v. Lindsay [Ind. App.] 70 N. E. 283. Defense of contributory negligence held not available when conductor's negligence in signaling to start an engine by which gravel train was unloaded was the proximate cause of plaintiff's injury by sudden flying up of cable, the conductor having notice at the time of plaintiff's position of danger. Southern Indiana R. Co. v. Fine [Ind.] 72 N. E. 589.

This rule regarding discovered peril is of course not applicable where the perilous position of the servant was not in fact known, and there was no reason to suppose the servant would put himself in such position. Thus the "last chance" doctrine was held not applicable where a brakeman placed himself in a dangerous position by violating rules and going to the caboose, instead of guarding the switch, since the engineer was not obliged to foresee such violation. Holland v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 359. Railroad watchman left lantern on track and went to sleep on ends of ties; engineer and firemen testified to seeing lantern, and whistling, and that they could not see watchman until within 50 or 60 feet of him, too late to stop. Held, defendant not liable. Illinois Cent. R. Co. v. Mencer, 25 Ky. L. R. 2250, 80 S. W. 816. Trainmen who saw a section hand near the track, but not in a position of peril, were under no duty to check or stop a train on the assumption that he might place himself in a dangerous position. Helm v. Missouri Pac. R. Co. [Mo.] 84 S. W. 5.

31. See post, subd. H, 4.

32. See 2 Curr. L. 841. The action given by the employers' liability act is merely cumulative of the common-law remedy and the allegations in support of each are the same except the allegation of notice necessary under the statute. Monigan v. Erie R. Co., 99 App. Div. 603, 91 N. Y. S. 657.

33. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. Common-law fellow-servant rule, as applied in Idaho, where injury occurred, followed in Utah. Sartin v. Oregon Short Line R. Co., 27 Utah, 447, 76 P. 219. Texas law governs right to recover for injury occurring in Texas, caused by negligent loading of lumber on a car, though the car was loaded in New Mexico. El Paso, etc., R. Co. v. McComas [Tex. Civ. App.] 81 S. W. 760. Where contract of employment was made in Illinois, to be, and in fact, there performed, and the accident occurred there, defendant's liability was to be determined by Illinois law. Fogarty v. St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664. A right of action in Missouri for an injury inflicted in Iowa is governed by Iowa law. Williams v. Chicago, etc., R. Co. [Mo. App.] 79 S. W. 1167. But the court of appeals of Missouri will follow the construction placed on the Iowa fellow-servant statute by the supreme court of Missouri, and not that placed upon it by the highest court of Iowa. Id. In an action brought in Vermont against a Canadian corporation for injuries received in Canada, proof of the law of Quebec as to contributory negligence was admissible because it related to the right of action, not the remedy. Morrisette v. Canadian Pac. R. Co., 76 Vt. 267, 56 A. 1102. The law of Quebec that contributory negligence of the servant will not bar a recovery against the master but will only reduce damages is not

Notice of the action must be given if required by statute;[35] but such notice is unnecessary if the action is based on the common law[36] or on a statute under which a notice is not required.[37]

(§ 3H) 2. *Parties.*[38]—The law as to parties to the action is the same as that applicable to other actions, and need not be here stated.[39]

(§ 3H) 3. *Pleading and issues.*[40]—The *complaint or petition* must show the existence of the relation of master and servant,[41] and the existence of a duty owed by the master to the servant at the time of the injury alleged.[42] Knowledge of a defect by the master[43] and want of knowledge by the person injured[44] must be

contrary to pure morals or abstract justice, nor so inconsistent with the public policy of Vermont that it will not be enforced in that state. Id.

34. Under Acts 27th Leg. p. 31, c. 27, § 1, making the venue of an action against a railroad corporation for personal injuries the county in which the injury occurred or in which plaintiff resided at the time of the injury, an employe for an indefinite term must sue in the county where he boarded and was injured though his domicile was outside the state. Gulf, etc., R. Co. v. Rogers [Tex. Civ. App.] 82 S. W. 822.

35. Statutory notice of injury to master held sufficient when given by one retained for the purpose, who dictated the same to a stenographer, the latter signing his name by his authority. Greenstein v. Chick [Mass.] 72 N. E. 955. Under the employers' liability act (Laws 1902, p. 1749, c. 600), requiring notice of the injury by the servant within 120 days, or in case of his death, by his executor within 60 days, notice by the latter within 120 days after the accident is in time, though not within 60 days after his appointment. Hoehn v. Lautz, 94 App. Div. 14, 87 N. Y. S. 921.

Contra: Deceased having given no notice, and administrator not having given notice within 60 days after his appointment, a notice within 120 days after the accident was unavailing. Randall v. Holbrook, Cabot & Daly Contracting Co., 95 App. Div. 336, 88 N. Y. S. 681.

36. Gmaehle v. Rosenberg, 178 N. Y. 147, 70 N. E. 411. Notice required by Laws 1902, p. 1749, c. 600, § 2, is not applicable to an action for failure to provide a safe place to work. Schermerhorn v. Glens Falls Portland Cement Co., 94 App. Div. 600, 88 N. Y. S. 407.

37. An action based on Laws 1897, p. 467, c. 415, § 18, making an employer liable for injuries caused by unsafe scaffolding provided by him, is maintainable without the notice required under the employers' act [Laws 1902, p. 1748, c. 600]. Williams v. Roblin, 94 App. Div. 177, 87 N. Y. S. 1006.

38. See 2 Curr. L. 841.

39. See Parties, 2 Curr. L. 1092; Death by Wrongful Act, 3 Curr. L. 1034.

40. See 2 Curr. L. 842.

41. Alabama Great Southern R. Co. v. Williams [Ala.] 37 So. 255. A count of a complaint in an action for wrongful death of a servant, which fails to show that intestate was at the time a servant of defendant, or that defendant owed him any duty, is demurrable. Logan v. Central Iron & Coal Co., 139 Ala. 548, 36 So. 729.

42. Facts must be alleged from which the law will imply a duty of the master to exercise care toward the servant; a direct allegation of the existence of a duty, without such facts, is a mere conclusion of law. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218, afd. on petition for rehearing, 71 N. E. 660; Kasadarian v. James Hill Mfg. Co., 130 F. 62. Characterization of an act, in a pleading, as "negligent" will not supply averments of facts showing the existence of a duty to exercise care. Muncie Pulp Co. v. Davis, 162 Ind. 558, 70 N. E. 875. Where facts pleaded sufficiently disclosed the duty to warn plaintiff owed by a conductor, a specific allegation of the duty was unnecessary. Southern Indiana R. Co. v. Fine [Ind.] 72 N. E. 589. Under Burns' Rev. St. 1901, § 7083, subd. 2, the existence of a duty of a superior to protect the servant while executing a command must be alleged. Muncie Pulp Co. v. Davis, 162 Ind. 558, 70 N. E. 875. A complaint alleging a duty to use a certain appliance must allege that it is one practicable to operate in the manner suggested. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218. Complaint held not to state a cause of action at common law on theory that foreman was negligent in not warning employe, when it was not alleged that it was the foreman's duty to warn, or that a warning could have been given which would have avoided the injury. Ft. Wayne Gas Co. v. Nieman [Ind. App.] 71 N. E. 59. Where negligent acts of servants are relied on, it must be alleged that such servants at the time were acting in the line of their duty. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604. Complaint not showing plaintiff to be rightfully on a sidetrack, performing duties owed to the master, and that master had reason to know his dangerous position, is demurrable. Mackey v. Northern Milling Co., 210 Ill. 115, 71 N. E. 448.

43. Consolidated Stone Co. v. Staggs [Ind. App.] 71 N. E. 161. Knowledge of defect in coupler. Cleveland, etc., R. Co. v. Lindsay [Ind. App.] 70 N. E. 283. Knowledge of a defect by the master being alleged the exact length of time the master has had such knowledge is immaterial, and need not be alleged. Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524. An allegation that a railroad yard had been so carelessly and negligently left as to be broken and rotted by time is not open to the objection that it does not allege that defendant had, or was charged with, knowledge of the defective condition of the yard. Cleveland, etc., R. Co. v. Lindsay [Ind. App.] 70 N. E. 283. An allegation that the master knew or ought to have known of a defect will be construed as an allegation of implied notice. Babcock Bros. Lumber Co. v. Johnson, 120

alleged. A complaint is demurrable if it shows on its face that the servant assumed the risk[45] or was guilty of contributory negligence,[46] or that the negligence complained of was that of a fellow-servant for which the master was not liable,[47] though these defenses need not be anticipated by specific allegations.[48]

Though a general allegation of negligence may be sufficient as against a general demurrer,[49] or after verdict,[50] it is usually necessary to allege specific acts

Ga. 1030, 48 S. E. 438. Allegation that foreman "knew" of danger in loosening a buckled rail, construed to include the allegation that he ought to have known. Southern R. Co. v. Blevins [C. C. A.] 130 F. 688. Where mine roof was alleged to be unsafe by reason of defendant's negligence, an averment that defendant knew of its unsafe condition was unnecessary. Wilson v. Alpine Coal Co. [Ky.] 81 S. W. 278.

44. Want of knowledge of defect in coupler. Cleveland, etc., R. Co. v. Lindsay [Ind. App.] 70 N. E. 283. Averments of want of knowledge of the servant must be as broad as the averments of knowledge on the part of the master. Consolidated Stone Co. v. Staggs [Ind. App.] 71 N. E. 161. A complaint on the theory that the injury was caused by the incompetency and inexperience of a boy in charge of a switch, and that the master had been negligent in employing the boy for that purpose, must allege that plaintiff had no knowledge of the boy's incompetency before the injury. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145. A general allegation of want of knowledge of dangers will not avail, as against a demurrer, when other allegations show that the servant must have known of the dangers or defects complained of, or had an equal opportunity with the master of knowing of them. Baltimore, etc., R. Co. v. Hunsucker [Ind. App.] 70 N. E. 556. A petition showing on its face that plaintiff knew or ought to have known of defects alleged, and hence that he assumed the risk, is demurrable notwithstanding an allegation "that said defects and dangers * * * were not so apparent and imminent as to justify a reasonably prudent man" in refusing to obey a peremptory order of his foreman. Smith v. Armour & Co. [Tex. Civ. App.] 84 S. W. 675. Failure to allege want of knowledge by plaintiff of dangerous condition of mine roof cured by allegations of notice in the answer. Wilson v. Alpine Coal Co. [Ky.] 81 S. W. 278. In Rhode Island a declaration for injuries from a dangerous condition must negative assumption of risk by setting up want of knowledge of the danger or an excuse for continuing to work after acquiring such knowledge. Dalton v. Rhode Island Co. [R. I.] 57 A. 383.

Contra: In an action for injuries caused by defects in appliances, plaintiff need not allege want of knowledge of the defects. Cole v. St. Louis Transit Co. [Mo.] 81 S. W. 1138.

45. Declaration showing that plaintiff must have known of defective car wheel and disarrangement of lumber on car, demurrable, because showing that he assumed risk of being struck by lumber falling on the car when struck by a post. Truly v. North Lumber Co., 83 Miss. 430, 36 So. 4. An allegation of want of knowledge of danger was unavailing when complaint showed on its face that deceased was ordered to render safe a dangerous roof in a mine, and hence knew of, and assumed the danger incidental thereto. Indiana & C. Coal Co. v. Batey [Ind. App.] 71 N. E. 191. A petition in action for death by falling into an improperly guarded cistern held to state a cause of action, when amended by allegations of want of knowledge by deceased of cause of defective light. Steele v. Georgia Iron & Coal Co. [Ga.] 49 S. E. 291. Declaration alleging that there was a loose stone on a ledge where plaintiff was working, liable to fall, and which did fall, injuring plaintiff, and that plaintiff did not know and could not have known by the exercise of ordinary care, of the danger, and that defendant knew of it, not demurrable. Gince v. Beland [R. I.] 57 A. 300.

46. Complaint held good where it appeared plaintiff was struck by train while attempting to remove hand car under foreman's orders. Kansas City, etc., R. Co. v. Thornhill [Ala.] 37 So. 412. Complaint in action for injury from alleged defective machinery held not to show contributory negligence. Skipper v. Southern Cotton Oil Co., 120 Ga. 940, 48 S. E. 359. Complaint held not to disclose contributory negligence, though lacking in definiteness. Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239.

47. An allegation that defendants caused and permitted cotton bales to be thrown, etc., construed as an allegation that the act was done by a fellow-servant; hence no cause of action stated. Fortin v. Manville Co., 128 F. 642. Where the facts pleaded showed that plaintiff, an employe, was being carried to his work, on a "work car" of the street railway company, when injured through negligence of servants in charge of cars, the allegation that plaintiff's work was not incident to, or connected with, or a part of, the motorman's work, was a mere conclusion and unavailing. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145.

48. Contributory negligence is matter of defense, and no allegation of proper conduct or lack of knowledge by plaintiff need be made in the complaint. Elliott v. Canadian Pac. R. Co., 129 F. 163. Want of contributory negligence need not be alleged by plaintiff. See Indiana cases under "Pleading statutory causes of action," post.

49. In action for death of engineer, an allegation that the killing was "negligent, wrongful, and inexcusable" was good as against a general demurrer; but special demurrer sustained, no specific acts being alleged. Seaboard Air Line R. Co. v. Pierce, 120 Ga. 230, 47 S. E. 581.

50. Where complaint charged negligence, generally, in employing incompetent servants, it was held sufficient after verdict, no

of negligence.[51] A general allegation of negligence which directly indicates the act or omission complained of is sufficient to withstand a demurrer for want of facts.[52] A court cannot infer that appliances were unsafe,[53] or that the master was at fault.[54] Less certainty and particularity are required where the facts, from their nature, are peculiarly within the knowledge of the other party.[55] The negligent acts relied on must be pleaded directly and not by way of recital.[56] Merely pleading facts showing a violation of a rule does not necessarily constitute a showing of negligence.[57] Wrongful negligence, and wantonness and willfulness, cannot be joined in the same count.[58] It must appear from the pleading that the negligence alleged was the proximate cause of the injury.[59]

proper objection having been raised on the trial, and contributory negligence having been then relied on as the sole defense. Yazoo, etc., R. Co. v. Schraag [Miss.] 36 So. 193.

51. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329. Petition demurrable because it did not sufficiently allege either that plaintiff was not furnished with a suitable tool with which to put a belt on a pulley, or that he was furnished with one that was unsuitable. Ballew v. Broach & McCurry [Ga.] 49 S. E. 297. Petition in action for injuries to engine hostler held to state facts sufficient to constitute a cause of action. Baltimore & O. R. Co. v. Doty [C. C. A.] 133 F. 866. Allegations that the injured employe knew the defective condition of the machine and continued to work an unreasonable length of time is a sufficient plea of assumed risk. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. In action for injuries caused by derailment, an allegation that the engineer was running the train at a reckless and dangerous rate of speed is a sufficient allegation of negligence. Northern Alabama R. Co. v. Shea [Ala.] 37 So. 796. An allegation that a defect in the track "arose from, or had not been discovered or remedied owing to, defendant's negligence, or the negligence of some person in the service of defendant, and intrusted with the duty of seeing that said track was in proper condition," is a necessary averment under the statute, is sufficient when it follows the language of the statute, and need not allege the name of the person intrusted with the duty. Id. A count alleging negligence of an engineer, giving his surname and alleging that his Christian name is unknown to plaintiff, is sufficient without an allegation that diligent effort had been made, without success, to learn his full name. Id.

52. Allegation that engineer "negligently ran said engine and train into, and causing them to collide with," etc., held sufficient. Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661. A complaint showing the existence of the relation of master and servant, of a defective appliance rendering the servant's work unnecessarily hazardous, a promise to repair the defect, and an injury caused by the defect states a cause of action as against a demurrer for want of facts. Terre Haute Elec. Co. v. Kiely [Ind. App.] 72 N. E. 658. A complaint alleging that defendant street railway company failed to adopt the customary means of making a certain grade safe by sanding the rails, whereby plaintiff's car slipped and collided with another car, injuring plaintiff (the motorman) is sufficient without alleging other means by which the track could have been rendered safe. Union Traction Co. v. Buckland [Ind. App.] 72 N. E. 158. Complaint held to sufficiently allege that a window, which plaintiff was engaged in cleaning under defendant's orders, was defective. Hix v. Belton Mills [S. C.] 48 S. E. 96. Where alleged cause of injuries was defective machinery and appliances, an amendment to the complaint stating particulars in which machinery was defective was held unnecessary. Moore v. Catawba Power Co. [S. C.] 46 S. E. 1004. Declaration charging, in substance, as the cause of the injury, the running of several cars in charge of an incompetent brakeman, held sufficient as against a motion in arrest of judgment. Elliott v. Canadian Pac. R. Co., 129 F. 163.

53. Defect must be distinctly and definitely alleged. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482.

54. The respect in which a method of work was unsafe must be alleged with clearness. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482.

55. Allegations to the effect that an iron or steel driftpin was of defective material and construction held to charge negligence with sufficient particularity and definiteness. Rickaly v. John O'Brien Boiler Works Co. [Mo. App.] 82 S. W. 963.

56. Cleveland, etc., R. Co. v. Lindsay [Ind. App.] 70 N. E. 283.

57. Violation of the rule would be negligence only where one was injured who relied on the assumption that it would be observed. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218.

58. Allegations of negligence construed. Alabama Great Southern R. Co. v. Williams [Ala.] 37 So. 255.

59. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482; Consolidated Stone Co. v. Staggs [Ind. App.] 71 N. E. 161; Langlois v. Dunn Worsted Mills [R. I.] 57 A. 910. Complaint held sufficient in this respect where defect in track alleged. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. Defective condition of street car not shown to be proximate cause of collision on a switch track. Indianapolis & G. Rapid Transit Co. v. Andis [Ind. App.] 72 N. E. 145. A complaint alleging that plaintiff's intestate was killed by reason of defendant's negligence in failing to have signals out on a train, need not show by special averment that the collision causing the death would not have occurred had the signals in question been out. Chicago, etc., R. Co. v.

A complaint alleging negligence of the master in furnishing appliances and negligence of his servants in using them states a cause of action for joint and several negligence.[60]

The answer.—It is usually held that the defense of assumption of risk,[61] contributory negligence,[62] or that the negligence was that of a fellow-servant[63] must be specially pleaded. If both assumption of risk and contributory negligence are relied on they must be separately pleaded.[64] Where due care is alleged in the complaint, a denial of the allegation is sufficient to raise the issue;[65] and if the complaint alleges that the person charged with negligence was a foreman or vice-principal, the defendant may prove that he was a fellow-servant under a general denial.[66] If plaintiff's own evidence shows assumption of risk, the defense is available though not specially pleaded.[67]

Issues, proof, and variance.[68]—Recovery, if at all, must be for the negligence alleged[69] and proof of negligence not alleged is inadmissible.[70] An allegation of

Wicker [Ind. App.] 71 N. E. 223. Where complaint alleged that negligent acts of an engineer, which constituted a violation of an ordinance, were the sole cause of the injury, it was not necessary to allege that the injury would not have resulted if the ordinance had been obeyed. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218.

60. Carson v. Southern R. Co. [S. C.] 46 S. E. 525.

61. A plea that the dangers which resulted in injuries to the deceased were incident to his occupation and services as a brakeman is sufficient to raise the issue of assumption of risk. Adams v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 79 S. W. 79.

62. Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493. Answer held to contain general averment of contributory negligence in use of benches or trestles in unloading car under which any fact showing negligence in such use could be shown. Bell v. Gulf, etc., R. Co. [Tex. Civ. App.] 81 S. W. 134.

Under Code 1896, § 3295, in all personal injury actions, the general issue "not guilty" puts in issue all material allegations of the complaint. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. Sustaining a demurrer to a special plea of contributory negligence is harmless error where there is a general plea under which any phase of contributory negligence may be proven. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

63. Bonnin v. Crowley, 112 La. 1025, 36 So. 842. Conflict of authority on the point recognized. Duff v. Willamette Iron & Steel Works [Or.] 78 P. 363.

64. A plea setting up both is duplicitous. Kansas City, etc., R. Co. v. Thornhill [Ala.] 37 So. 412.

65. Hutchings v. Mills Mfg. Co. [S. C.] 47 S. E. 710.

66. Johnson v. Heath [Neb.] 98 N. W. 832.

67. Iowa Gold Min. Co. v. Diefenthaler [Colo.] 76 P. 981; White v. Lewiston & Y. F. R. Co., 94 App. Div. 4, 87 N. Y. S. 901.

68. See 2 Curr. L. 847.

69. Recovery, if at all, must be upon the case made by the pleadings and evidence introduced thereunder. Allen v. Chicago, etc., R. Co. [Iowa] 101 N. W. 863. Negligence alleged being defect in track, an instruction authorizing recovery for defective coupler was erroneous. Culver v. South Haven & E. R. Co. [Mich.] 101 N. W. 663. Where cause of injury alleged was negligence of a section foreman while hand car was running, there could not be recovery on ground of company's failure to provide rules as to when cars should be run. Whittlesey v. New York, etc., R. Co. [Conn.] 58 A. 459. On a count based on negligence of the superintendent there can be no recovery for defective machinery. Davis v. Kornman [Ala.] 37 So. 789. Where the cause of injury alleged was the mode in which a furnace itself worked, it was error to submit to the jury the owner's negligence in the manner of operating it, such as a failure to make rules. O'Leary v. Buffalo Union Furnace Co., 91 N. Y. S. 579. Where there are general allegations of negligence, followed by allegations of specific acts of negligence, there can be no recovery unless one or more of the specific acts alleged are established, though other acts are proved as a part of the res gestae. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329. Where it was alleged that a servant was ordered to go into a dangerous place, which he did without knowledge of the danger, and the answer admitted that the place was dangerous and alleged that the servant knew of the danger and was an experienced and skilled workman, mere proof that the place was dangerous, without proof that the servant was unskillful, inexperienced, or ignorant, and had not been properly instructed was insufficient to warrant a recovery. Turner v. Southern Pac. Co., 142 Cal. 580, 76 P. 384.

Variance held not fatal: Where the negligence alleged as the cause of injury from the explosion of a tube in a furnace was the placing of the tube, containing dangerous materials therein, and the evidence showed the materials were not in themselves dangerous but that the explosion was caused by the absence of vents in the tube, the variance was not material. Cameron v. B. Roth Tool Co. [Mo. App.] 83 S. W. 279. Where a complaint stated a cause of action upon the theory that defendant failed to provide a proper guard for machines, and this theory was the one adopted on the trial, the complaint is sufficient as against a demurrer, though the facts pleaded may be construed as proceeding upon the theory that no guard whatever was furnished.

negligence of the master will admit proof of the negligence or incompetency of a vice-principal, that he was a vice-principal, and that his incompetency was known to the master, and these facts need not be specially alleged.[71]

Pleading statutory causes of action.[72]—A statutory cause of action may be joined with one based on the common law,[73] but not in one count.[74] In New York, a complaint stating a cause of action at common law may be amended by allega-

Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032. A declaration alleging injury of a brakeman by coming in contact with a telegraph pole negligently permitted to stand near a switch track is sufficient without referring to the party who placed the pole there. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328. And proof that the pole was originally erected by a party other than the railway company which owned the premises is not a variance, when it is alleged that the railway company permitted the erection of the pole. Id. An allegation that rails were "insecurely fastened to the cross-ties" is supported by proof that the ties were rotten. Northern Ala. R. Co. v. Shea [Ala.] 37 So. 796.

Amendment of complaint: A complaint which sets up failure to instruct as the actionable negligence may not be amended by adding allegations of a failure to provide suitable and safe machinery and appliances. Moyer v. Ramsay-Brisbane Stone Co., 119 Ga. 734, 46 S. E. 844. Where negligence charged was unsafe fastening of a particular door, which fell on plaintiff, a longshoreman, it was error to allow an amendment, over objection, charging a general dilapidated condition of the dock. New trial granted though no application for a postponement was made. Oats v. New York Dock Co., 90 N. Y. S. 878.

70. Where negligence complained of in an action by a teamster was that the lines were too short and the wagon had no seat, evidence of the lack of a brake was inadmissible. Limberg v. Glenwood Lumber Co. [Cal.] 78 P. 728. In an action based solely on negligence of a servant in operating a grain dump at an elevator, evidence regarding the condition of the dump was irrelevant. Healy v. Patterson, 123 Iowa, 81, 98 N. W. 576. Evidence that defendant acted in good faith in putting a servant to work with frozen dynamite and believed him capable of using it inadmissible, when plaintiff did not allege or claim willful or wanton conduct or punitive damages. Currelli v. Jackson [Conn.] 58 A. 762. Where the negligence alleged as the cause of a cave-in in a mine was improper timbering, evidence of other particular causes of a cave-in was inadmissible, when there was no evidence of the existence of such causes in the mine in question. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1. Under an allegation that it was a conductor's duty to have such a reasonable knowledge of the location of cars as to make a coupling safely, a question whether it was not his duty to know the exact spot where certain cars were when a coupling was being made, was improper. Virginia, etc., R. Co. v. Bailey [Va.] 49 S. E. 33.

Evidence held admissible: Facts showing imputed knowledge of dangerous condition of materials furnished a workman, under an allegation of knowledge. Currelli v. Jackson [Conn.] 58 A. 762. An allegation that "appliances and devices necessary and used for and in aid of coupling were in a dangerous, defective, and unsafe condition," was sufficiently broad to admit evidence that the car in question had no grabiron. Belt R. Co. v. Confrey, 209 Ill. 344, 70 N. E. 773. Under an allegation that plaintiff was exercising due care, he may prove that he was doing his work in the manner in which he had been directed to do it, though he has not alleged that he was acting under a special order. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863. Under an allegation that plaintiff, as the result of a plug in the boiler of the engine being blown out, was blown from the cab by the escaping steam, evidence that he jumped or fell out was admissible. Missouri, etc., R. Co. v. Crum [Tex. Civ. App.] 81 S. W. 72.

71. This is intimated to be the rule though the court refused to squarely overrule a contrary holding on a former appeal, the question not being properly raised. Harris v. Balfour Quarry Co. [N. C.] 49 S. E. 95. Where a complaint alleges negligence of a conductor and of the railroad company, a recovery may be had upon proof of negligence of servants other than the conductor. Richey v. Southern R. Co. [S. C.] 48 S. E. 285. An allegation in a common-law action that the negligence complained of was that of the defendant master is sufficient as against demurrer, though the negligence was in fact that of a servant for whom the master is responsible (Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 660); but it will not suffice to show facts which merely suggest that a fellow-servant may have owed a duty which he neglected (Id.).

72. See 2 Curr. L. 843, n. 60; Id. 844, n. 66, 74, 75.

73. Common-law count based on duty owed to one on premises by invitation of owner joined with counts under the employers' liability act [Code 1896, § 1749]. Sloss Iron & Steel Co. v. Tilson [Ala.] 37 So. 427. A cause of action for negligence in failing to provide a safe place to work, may be joined with a cause of action based on the same facts for willful violation of a statute prohibiting employment of minors in mines [Hurd's Rev. St. 1899, c. 93]. Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17.

74. A declaration charging negligence in failing to provide a safe place to work and attempting, in the same count, to state a cause of action for negligence of a fellow-servant under the employers' liability law, is insufficient to sustain a judgment for plaintiff. Causes inconsistent. Illinois Cent. R. Co. v. Abrams [Miss.] 36 So. 542.

tions bringing the cause within the employers' liability act.[75] Where the facts alleged bring the action under an employers' liability act, due service of the statutory notice must be alleged.[76] Other decisions as to pleadings in actions based on statutes are treated in the notes.[77]

(§ 3H) 4. *Evidence. Burden of proof and presumptions.*[78]—The burden

75. Laws 1902, p. 1748, c. 600, merely extends the master's common-law liability; it does not give a new remedy. Mulligan v. Erie R. Co., 99 App. Div. 499, 91 N. Y. S. 60.

76. Under New York act (Laws 1902, p. 1748, c. 600), notice of the time, place, and cause of the injury must be given within 120 days. Crosby v. Lehigh Valley R. Co., 128 F. 193. But if the action is at common law, and is not based on the statute, no allegation of notice is necessary. Gmaehle v. Rosenberg, 178 N. Y. 147, 70 N. E. 411.

77. Alabama: In an action based on a violation of the automatic coupler act, the complaint need not allege the manner in which such violation caused the injury. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. In an action under Code 1896, § 1749, subsec. 5, to recover from the company for negligence of an engineer resulting in the fireman's death, the complaint was held insufficient for not alleging the engine was on the railway; but held to sufficiently specify negligence of the engineer. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. A count under Code 1896, § 1749, subd. 5, alleging that plaintiff's injuries were caused by the negligence of one at the time operating a locomotive on the track of defendant's road, is insufficient if it does not allege that such person was at the time an employe of the defendant. Alabama Great Southern R. Co. v. Williams [Ala.] 37 So. 255. In an action under Code 1896, §§ 1749, 1751, for death of an engineer, caused by a defective track, an allegation that the railway was defective at or near the point where the engine was derailed was sufficient. E. E. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445.

Illinois: An averment that defendant "wrongfully and unlawfully" employed plaintiff, a minor under 14 years of age, who had not produced an affidavit that he was 14, in a mine, is a sufficient allegation of a willful or conscious violation of a statute prohibiting such employment of minors and giving a right of action to such a person, if injured [Hurd's Rev. St. 1899, c. 93]. Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17.

Indiana: Under the Indiana employers' liability act, the plaintiff need not allege or prove want of contributory negligence. Acts 1899, p. 58 (Burns' Ann. St. 1901, § 359a), providing that plaintiff in actions for personal injuries need not allege he was in the exercise of due care, applies to actions based on employers' liability act. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218; Chicago & E. R. Co. v. Lain [Ind. App.] 72 N. E. 539; Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661. A complaint alleging negligence of defendant as the proximate cause of the injury is sufficient, unless contributory negligence is disclosed on its face. Cleveland, etc., R. Co. v. Goddard [Ind. App.] 71 N. E. 514. Nor need the complaint negative assumption of risk. Espenlaub v. Ellis [Ind. App.] 72 N. E. 527. It is also held to be unnecessary for the defendant to set up that the risk alleged as the cause of the injury was assumed in order to take advantage of that fact. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828. A complaint alleging failure to guard machinery as required by Burns' Rev. St. 1901, § 7087 [Horner's Rev. St. 1901, § 5169k) is sufficient if it follows the language of the statute. Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032. In an action based on failure to guard an emery belt, a complaint stating the purpose for which the belt was used is sufficient, though it does not describe it, or allege that it was dangerous, or that it was such a machine that it could have been guarded. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922.

Under Burns' Rev. St. 1901, § 7083, the complaint must allege that the superior servant had authority to give orders, and that plaintiff was bound to conform to the orders given. Ft. Wayne Gas Co. v. Nieman [Ind. App.] 71 N. E. 59. Complaint based on § 7083, held sufficient. Baltimore, etc., R. Co. v. Hunsucker [Ind. App.] 70 N. E. 556. Complaint alleging in substance that plaintiff was bound to conform to the order and direction of a foreman, who had knowledge of a defect in a brake while plaintiff had not, and that the foreman carelessly and negligently ordered plaintiff to apply the defective brake, held sufficient. Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524. A complaint alleging that the negligence charged was that of defendant's superintendent, "having full charge and control of defendant's work in and about said quarry," does not disclose that the negligence was that of a fellow-servant. Southern Indiana R. Co. v. Moore [Ind. App.] 71 N. E. 516. A complaint is not demurrable if, stating a cause of action under subdivision 2 of § 7083, Burns' Ann. St. 1901, it also incidentally states a cause of action under subdivision 4. Chicago & E. R. Co. v. Lain [Ind. App.] 72 N. E. 539. Under Burns' Ann. St. 1901, § 7083, subd. 4, making railway companies liable for negligence of a coemploye in charge of a locomotive, a complaint is not defective for alleging negligence of more than one employe in charge of the locomotive. Id.

Where a complaint alleged, as the sole cause of injury, failure to provide a switch stand with a signal light, the action was held to be based on Burns' Ann. St. 1901, § 5173 A et seq. and not on the common law. Toledo, etc., R. Co. v. Bond [Ind. App.] 72 N. E. 647. A complaint designating defendant as the "Ft. Wayne Gas Co." sufficiently alleges that defendant was a corporation, since the name so imports, and no specific averment is necessary. Ft. Wayne Gas Co. v. Nieman [Ind. App.] 71 N. E. 59.

78. See 2 Curr. L. 847.

is upon a servant, seeking to recover for injuries, to prove negligence of the master,[79] the presumption being that the latter's duties have been duly performed.[80] It is usually held that mere proof of the occurrence of an accident does not warrant an inference of negligence on the part of the master,[81] but some courts hold that the doctrine *res ipsa loquitur* applies in some cases,[82] as where the appliance from which the injury results is one required by law to be furnished by the master,[83] and the circumstances attending the injury are such as to warrant the inference that the accident would not have occurred if the master had used due care.[84] The burden is also on the plaintiff to prove that the negligence alleged was the proximate cause of the injury.[85]

79. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 P. 202; Moore Lime Co. v. Johnston's Adm'r [Va.] 48 S. E. 557. Burden is upon plaintiff to prove he was directed to work on a machine other than the one he was employed to operate. McManus v. Davitt, 94 App. Div. 481, 88 N. Y. S. 55. The employe must show that a defect was known to the employer, or that he could have known of it by the exercise of ordinary care. Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 80 S. W. 364. Plaintiff, alleging the vicious and unruly disposition of a horse furnished him, and defendant's knowledge thereof, had the burden of proof thereon. Palmer v. Coyle [Mass.] 72 N. E. 844.

80. Chicago, etc., R. Co. v. O'Brien [C. C. A.] 132 F. 593; Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 80 S. W. 364. As that a sufficient number of competent servants has been provided. Hilton v. Fitchburg R. R. [N. H.] 59 A. 625. The presumption is that such rules as were necessary were prescribed. Hill v. Boston, etc., R. Co., 72 N. H. 518, 57 A. 924.

81. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482; Chicago, etc., R. Co. v. O'Brien [C. C. A.] 132 F. 593; Droney v. Doherty [Mass.] 71 N. E. 547; Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 80 S. W. 364; Rickaly v. John O'Brien Boiler Works Co. [Mo. App.] 82 S. W. 963; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Moore Lime Co. v. Johnston's Adm'r [Va.] 48 S. E. 557; Young v. O'Brien [Wash.] 79 P. 211. The res ipsa loquitur doctrine is rarely applied in master and servant cases. G. A. Duerler Mfg. Co. v. Dullnig [Tex. Civ. App.] 83 S. W. 889. Proof merely of breaking apart of pipe, without any evidence as to the cause, does not warrant an inference of negligence. Edgens v. Gaffney Mfg. Co. [S. C.] 48 S. E. 538. The fact of an accident, injuring a brakeman, occasioned by the operation and stopping of a train does not give rise to a presumption of negligence. Allen v. Chicago, etc., P. R. Co. [Iowa] 101 N. W. 863.

82. It is said that while there is a conflict, the trend of American authority is toward the support of the text. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329.

83. Breaking of ladder under hod carrier is presumptive evidence of negligence, under Labor Law § 18, warranting recovery if unexplained. Cummings v. Kenny, 97 App. Div. 114, 89 N. Y. S. 579. Evidence that a plank was split and broke when employe stepped on it, makes prima facie case of negligence in furnishing scaffold under Labor Law, §§ 18, 19. Tierney v. Vunck, 97 App. Div. 1, 89 N. Y. S. 612. Proof of the fall of a derrick furnished by the master is prima facie evidence of negligence of the master. Gorman v. Milliken, 42 Misc. 336, 86 N. Y. S. 699.

84. Stackpole v. Uray, 90 N. Y. S. 1045. The rule that the mere happening of an accident is not of itself evidence of negligence is applicable to facts which admit only one probable theory of the cause of the accident. McLean v. Pere Marquette R. Co. [Mich.] 100 N. W. 748. Thus it was held not applicable where an injury caused by the falling of a pile driver did not result from the condition in which it was when the servant began his task, but from changes in its condition made by the servant himself. Illinois Cent. R. Co. v. Swift [Ill.] 72 N. E. 737. Whether such an inference shall be drawn is a question exclusively for the jury. It cannot be drawn unless the circumstances overcome the presumption that the master has performed his duties. The inference is slight and overcome by the slightest evidence supporting an explanation of the occurrence on any theory other than that of the negligence of the master. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329. The happening of an accident through negligence of a servant does not give rise to any presumption of negligence of the master in selecting the servant. Hilton & Dodge Lumber Co. v. Ingram, 119 Ga. 652, 46 S. E. 895. While negligence of the defendant is not to be inferred from the mere fact that an accident occurred, in consequence of which plaintiff was injured, proof of an accident, and of the surrounding circumstances may make a prima facie case sufficient to carry to the jury the issue of defendant's negligence. Thus proof of the fall of a freight elevator and the surrounding circumstances was held evidence of defective construction. Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493. The doctrine of res ipsa loquitur does not apply where death of a brakeman was caused by a collision on a sidetrack, the brakeman's duties being connected with the management of the train. In such case, the mere happening of the accident does not tend to show whether master or servant was negligent. Holland v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 359. Rev. St. 1899, § 2873, making railroad corporations liable for injuries to employes caused by other agents or employes does not raise a presumption of neg-

Most courts hold that the burden of proof of assumption of risk[88] and contributory negligence[87] is on the defendant, but there are contrary holdings.[88] The defendant is entitled to the benefit of evidence on these issues, though introduced by plaintiff.[89] Where the defendant denies the existence of the relation of master and servant, the burden is upon the plaintiff to prove such relation,[90] and if the injury is alleged to have been caused by negligence of other servants, the burden is upon plaintiff to allege and prove that the relation of fellow-servants did not exist.[91]

Admissibility in general.[92]—On the issue of the master's negligence, evidence

ligence of the company, where a brakeman was killed while attempting to couple cars, and there was no proof of negligence of any other servant. Caldwell v. Missouri Pac. R. Co., 181 Mo. 455, 80 S. W. 897.

85. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681; Illinois Cent. R. Co. v. Coughlin [C. C. A.] 132 F. 801; G. A. Duerler Mfg. Co. v. Dullnig [Tex. Civ. App.] 83 S. W. 889. Plaintiff failed to prove that a defect in an engine indicated by a pounding in the cross head was the cause of the breaking of the eccentric rod, which caused his injury. Kirstead v. Bryant, 98 Me. 523, 57 A. 788. Where assistant engineer was found dead after an accident to engine, but there was no evidence to show how he was killed, an alleged defect in the engine was not proven to have been the proximate cause of his death. Reynolds v. Burgess Sulphite Fibre Co. [N. H.] 59 A. 615. Where the evidence shows that an accident could have resulted from either of two causes, for only one of which defendant would be responsible, plaintiff cannot recover where it is just as probable that the damage was done by one cause as by the other. Nelson v. New York, 91 N. Y. S. 763. Where plaintiff's injury resulted from the parting of the train, the burden was upon him to show that such parting was due to the automatic coupler being out of repair, and not to other causes, for which defendant would not be responsible. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183. Burden on plaintiff to show that machine was not stopped as quickly by method actually employed as it could have been had it been equipped with a proper clutch. Desrosiers v. Bourn [R. I.] 58 A. 627.

86. E. E. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445; Jenks v. Thompson [N. Y.] 71 N. E. 266; Hunt v. Dexter Sulphite Pulp & Paper Co., 91 N. Y. S. 279; Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852; Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808.

87. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218; Chicago, etc., R. Co. v. Wicker [Ind. App.] 71 N. E. 223; Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681; Peoples v. North Carolina R. Co. [N. C.] 49 S. E. 87; International, etc., R. Co. v. Pina [Tex. Civ. App.] 77 S. W. 979; Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847; Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808; Currans v. Seattle, etc., R. & Nav. Co., 34 Wash. 512, 76 P. 87.

88. Contributory negligence. Hunt v. Dexter Sulphite Pulp & Paper Co., 91 N. Y. S. 279; Carley v. Gair, 93 App. Div. 614, 87 N. Y. S. 709; Goodhines v. Chase, 91 N. Y. S. 313; Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 80 S. W. 364. Plaintiff must show want of contributory negligence under act creating liability for injury caused by defects in ways, works, and machinery [Laws 1902, p. 1748, c. 600]. Hoehn v. Lautz, 94 App. Div. 14, 87 N. Y. S. 921. Substantial compliance with the statute prohibiting employment of children under sixteen unless the certificate required by the act is filed is sufficient to place upon an injured employe the burden of proving want of negligence. Lowry v. Anderson Co., 96 App. Div. 465, 89 N. Y. S. 107. No recovery for death of boy in elevator shaft, when no one saw the accident, and there was no evidence of want of contributory negligence. Lowry v. Anderson Co., 96 App. Div. 465, 89 N. Y. S. 107. The rule in 49 O. S. 598 as to the burden of proving contributory negligence in case of defective appliances or unsafe places of work, is an exception to the general rule, and should not be extended to other cases. Cleveland, etc., R. Co. v. Tehan, 4 Ohio C. C. (N. S.) 145. A presumption of negligence arises which it is the duty of the administrator to rebut, when it appears that the decedent might, by the exercise of ordinary care, have seen the train by which he was struck, or by listening would have heard it, in time to have stepped from his place of danger. Green v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 497.

Assumption of risk: Employe must show that the alleged defect was not obvious and was not one of the ordinary risks of his employment. Glasscock v. Swofford Bros. Dry Goods Co. [Mo. App.] 80 S. W. 364. Burden is upon an infant plaintiff, seeking to show non-assumption of risk by reason of illegality of employment, to show she had not filed certificate required by Laws 1897, p. 477, c. 415, § 70. Sitts v. Waiontha Knitting Co., 94 App. Div. 38, 87 N. Y. S. 911.

89. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681; Bier v. Hosford [Wash.] 77 P. 867. Where a minor plaintiff on cross-examination proved herself of such mental capacity and experience as to show she was guilty of contributory negligence, in placing herself in danger, she could not recover. Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674.

90. This does not require proof of an actual contract of employment. Ringue v. Oregon Coal & Nav. Co., 44 Or. 407, 75 P. 703.

91. Chicago City R. Co. v. Leach, 208 Ill. 198, 70 N. E. 222.

92. See 2 Curr. L. 849.

of other similar accidents[93] and of subsequent repairs[94] is usually excluded; but the condition of the place of work or appliances prior[95] or subsequent to[96] the accident is admissible, provided such condition is shown to have remained unchanged. Condition of other places or appliances cannot be shown.[97] The customary method of doing work,[98] common and general use of an appliance[99] or of safeguards[1] may

93. Evidence of other similar accidents to children like plaintiff, attempting to operate same machine. Cohen v. Hamblin-Russell Mfg. Co. [Mass.] 71 N. E. 948. It is sometimes permissible to prove prior similar accidents; such evidence cannot be excluded when it is brought out as a part of a proper cross-examination. Schwarzschild v. Drysdale [Kan.] 76 P. 441. Evidence tending to show other accidents and manner in which machine worked admissible as descriptive of the machine. Davis v. Kornman [Ala.] 37 So. 789.

94. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. Evidence that knives of a planer were sharpened and a belt tightened after an accident, inadmissible. Helling v. Schindeler [Cal.] 78 P. 710. Evidence of the manner in which an emery wheel was safeguarded after an injury held admissible to show that safeguards were possible, though evidence of subsequent repairs or precautions is usually inadmissible to prove negligence. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. Precautionary measures taken after an accident to prevent injury to other employes inadmissible. Davis v. Kornman [Ala.] 37 So. 789.

95. Evidence by quarry superintendent as to condition of quarry on day of accident admissible. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857. Evidence of condition of circular saw several months before accident admissible when there was other evidence that its condition had remained unchanged during the interval. Dunekake v. Beyer, 25 Ky. L. R. 2001, 79 S. W. 209. Condition of packing rings and their efficiency in keeping oil out of a boiler two years before an accident could be shown, when plaintiff agreed to prove such condition had remained unchanged. Shea v. Pacific Power Co. [Cal.] 79 P. 373. Evidence that a brake, the alleged defective condition of which was alleged as the cause of accident, was defective three or four days before it was used by decedent, admissible. Terre Haute Elec. Co. v. Kiely [Ind. App.] 72 N. E. 658. Condition of building six weeks before may be shown to prove its condition at time it collapsed; at least its admission in this case was not reversible error. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. In action for death of car driver by material falling on him in mine entry, evidence of condition of entry and how its unsafe condition could have been ascertained was admissible. McFarland's Adm'r v. Harbison & Walker Co. [Ky.] 82 S. W. 430. Exclusion of evidence that an alleged defective machine had been repaired eleven weeks before the accident held proper, in the discretion of the court, on the ground of remoteness. Gregory v. American Thread Co. [Mass.] 72 N. E. 962. In an action for wrongful death of engineer caused by explosion of engine boiler, proof of when the engine was built, the number of miles it had run, and that it had collided with another engine in a certain year, was admissible to show its condition at the time of the accident. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

96. Evidence of the condition of rails and timbers of a railway shortly after a derailment, admissible; also evidence of changes, to identify decayed timbers taken from the roadbed. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445. Witness permitted to give observations and measurements of railway crossing, made after accident, when it appeared no change had been made subsequent to accident. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. Evidence regarding position of plank on coal bin three hours after accident admissible when no change of conditions meanwhile was shown. Meyers v. Highland Bay Gold Min. Co. [Utah] 77 P. 347. Evidence that several years after accident cable was fastened to elevator with two clamps, while at the time of the accident only one was used, erroneously admitted, without limiting its force and effect. Young v. Mason Stable Co., 96 App. Div. 305, 89 N. Y. S. 349. Evidence of the condition of safety clutches on elevator the day after the elevator fell, injuring plaintiff, admissible, as tending to show condition at time of accident when defendant did not suggest there had been any change in their condition. Droney v. Doherty [Mass.] 71 N. E. 547. Evidence of manner in which brake worked a year after accident inadmissible, when it was shown that a new catch plate had been attached. Bernard v. Pittsburg Coal Co. [Mich.] 100 N. W. 396.

97. Where no causal connection was shown between an accident caused by breaking of a belt and the removal of a "tightener" on the machine, the latter fact could not be shown. Davis v. Kornman [Ala.] 37 So. 789.

98. Customary method of cleaning out ash pits and danger in entering them without first turning on water. Hunt v. Desloge Consol. Lead Co., 104 Mo. App. 377, 79 S. W. 710. Evidence of a custom in the mines of Utah and in defendant's mines of putting an inexperienced man to work with an experienced miner is admissible on the question of due care of defendant, without a showing that such custom was a technical common-law custom. Pence v. California Min. Co., 27 Utah, 378, 75 P. 934. As method of uncoupling cars when the coupling appliance is defective. Pierson v. Chicago & N. W. R. Co. [Iowa] 102 N. W. 149. In an action for death caused by falling of a bridge timber, evidence of the customary manner of lowering braces was admissible. Alabama & V. R. Co. v. Overstreet [Miss.] 37 So. 819. Evidence of number of men commonly employed in piling logs and of number necessary to do the work with safety is competent. Dell v. McGrath [Minn.] 99 N. W. 629. In an action for injuries to fireman, while coaling, alleged to be caused by the

usually be shown. Other holdings as to the admissibility of evidence on the issue of the master's negligence,[2] contributory negligence of the servant,[3] and assump-

negligence of the engineer in allowing the engine to move, it was competent to show what the custom of firemen running with this particular engineer had been. Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 108, 69 N. E. 1000. Proof of a general method of letting rails into a mine is inadmissible without proof of a similarity of conditions at the time and place of the accident to conditions generally. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. Proof of general custom as to the time and manner of inspecting locomotive engines and boilers is admissible, if confined to the custom of well regulated and prudently managed companies. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

99. Custom and usage of well regulated shops to have no set screws on the handles of shifters attached to drill presses is admissible, but not conclusive on negligence in omitting such screws. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. The fact that the appliance used was similar to that used by many other prudent persons in the same business may be shown, but does not exempt the employer from liability. Davis v. Kornman [Ala.] 37 So. 789. While a negligent act will not be excused by the fact that it is customary, proof of common and general use of an appliance is admissible on the issue of negligence in selecting and furnishing such appliance. Evidence that a block and hook of a certain construction was in common and general use admitted. Anderson v. Fielding [Minn.] 99 N. W. 357. After testimony that switch stands of a certain kind had been in use for 20 years, it was proper to show on cross-examination that they were being replaced by others of a later pattern. Chicago & A. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15.

1. Evidence that it was customary to place guards or spreaders on rip saws to protect the operator admissible. Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632. Where evidence as to the custom of using guards on rip saws was in conflict, testimony of one who had visited mills that 24 out of 27 such saws examined were guarded was admissible. Id. Under a general averment of negligence of the master in not placing guards on a rip saw, evidence of a custom of using such guards was admissible. Id. Evidence of the usage of well regulated railroads as to the maintenance of stock gaps by them is relevant in an action for wrongful death of a brakeman struck by such a structure, but is not conclusive on issue of defendant's negligence in maintaining it. Northern Ala. R. Co. v. Mansell [Ala.] 36 So. 459. On the question whether the use of a machine without a guard is negligence, the admission of evidence regarding the practice in other mills in regard to similar machines is discretionary with the court. Such evidence is relevant, but may be excluded because introducing collateral issues. Dolan v. Boott Cotton Mills, 185 Mass. 576, 70 N. E. 1025. Evidence that a guard rail had been erected at a culvert near a coal chute irrelevant on issue whether that was a necessary precaution at other points. Central of Georgia R. Co. v. Price [Ga.] 49 S. E. 683.

2. Where the negligence charged is failure to provide a reasonably safe place and reasonably safe appliances, the actual condition of the place and appliances, the absence of safeguards, and every fact relevant to the question of the reasonable safety of the place and appliances may be shown. Diamond v. Planet Mills Mfg. Co., 97 App. Div. 43, 89 N. Y. S. 635. Proof that an accident might have been prevented by a different course of conduct is not of itself evidence of a master's negligence. Hill v. Boston, etc., R. Co., 72 N. H. 518, 57 A. 924. Record entry of inspection of a car by an inspector of the company owning it, showing such inspection to have been made three days after the accident, inadmissible. Wood v. Rio Grande Western R. Co. [Utah] 79 P. 182. In an action for injuries from the explosion of a tube in a furnace in the course of an experiment, where it appeared that similar experiments had never been made on the premises, a question how often the tube and its materials had been used was properly excluded as irrelevant. Cameron v. Roth Tool Co. [Mo. App.] 83 S. W. 279. Evidence that the one conducting the experiment had never given previous warnings to plaintiff or others as to danger of his work was relevant. Id. Evidence that employes consulted a person regarding their duties, and looked after and furnished instruments used by them is admissible on the authority of such person to represent the master. Wysocki v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 950. In an action for injuries caused by removing a plank from a staging on which plaintiff was required to work, leaving the remaining plank unsafe, evidence that the staging might have been made safe by nailing the plank to posts was admissible. Gratz v. Worden [Ky.] 82 S. W. 395. Evidence that defendant's manager ordered plaintiff, a minor under 14, out of the mine a month before the minor was injured, was irrelevant in an action for the injury, based on violation of statute prohibiting such employment of minors. Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17. In a suit for negligence for allowing inexperienced minor to operate machinery, the admission of questions as to the length of time it would require one of ordinary intelligence to acquire sufficient experience to operate such machinery is error. Such questions are not only indefinite in meaning, but are too broad in application; they should have been directed to the particular act, which might in fact have required little or no experience. Bowe v. Bowe, 5 Ohio C. C. (N. S.) 233. In a suit for negligence for allowing inexperienced minor to operate machinery, evidence as to whether defendant employed "child labor," concerning his financial responsibility, as to subsequent promises of employment made to plaintiff, and as to his conduct toward plaintiff, is inadmissible. Id. Portion of answer which admitted that death of a brakeman was caused by his coming in contact with overhead bridge held properly admitted in evi-

tion of risk,[4] and the admissibility of declarations as res gestae,[5] are treated in the notes.

dence, without the latter part of the sentence which alleged proper construction of the bridge and proper warning; but the evidence was not admissible to prove negligence, but only as an admission of the manner in which death was caused. Hedrick v. Southern R. Co., 136 N. C. 510, 48 S. E. 830. On an issue of the safety of a burner valve, another valve of different construction is inadmissible as an exhibit, since its construction would not necessarily prove the burner valve in question defective. Carr v. American Locomotive Co. [R. I.] 58 A. 678. Torn pants worn by deceased admissible to show how accident occurred. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459. Disposition of a horse may be shown by single instances when such disposition has been exhibited. Palmer v. Coyle [Mass.] 72 N. E. 844. And after such evidence, proof of the reputation of the horse was admissible to prove knowledge of the owner. Id. For the same purpose, the fact that the horse was usually driven with another could be shown. Id. Also that the horse had been referred to as a "runaway" in defendant's presence. Id.

Knowledge of master: Knowledge by engineer of switchman's danger may be shown by circumstantial evidence. Alabama Great Southern R. Co. v. Williams [Ala.] 37 So. 255. Letter from factory inspector held admissible to show notice that machines were not properly guarded under the statute, though the corporation changed its name before receipt of the letter, which was addressed to it by its former name, and though the letter did not convey the technical notice required by statute. Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032. Where subcontractor's servant was injured, evidence of notice by the building superintendent to the contractor that the building was unsafe is admissible to prove notice of the defect by such contractor. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. Evidence admissible that plaintiff's father informed foreman that plaintiff was inexperienced and requested that he be not put to work on dangerous machines. Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029. In an action by an engineer for injuries caused by derailment in a washout, evidence that he had asked the train dispatcher to sidetrack his train, informing him of the condition of the track, was admissible to show knowledge regarding such condition by the dispatcher and hence by the company. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 83 S. W. 406. In action for injuries from explosion while cleaning out a blast hole, evidence tending to show foreman's knowledge of the danger from a load which had failed to explode, including what was said by him in plaintiff's presence, was admissible. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857.

Failure to instruct: Where negligence charged was failure to instruct plaintiff, evidence that a superintendent and a fellow-servant had been instructed was irrelevant. Klaffke v. Bettendorf Axle Co. [Iowa] 100 N. W. 1116. Where failure to instruct was the alleged negligence, evidence regarding the instructions given and plaintiff's action thereon was competent. Kasjeta v. Nashua Mfg. Co. [N. H.] 58 A. 874. Evidence of instructions by defendant's son to superintendent in mine held inadmissible as self-serving and immaterial. Weeks v. Scharer [C. C. A.] 129 F. 333. Evidence regarding instructions to superior servants as to making inquiries of applicants for work was irrelevant when it appeared that defendant had not obtained an affidavit regarding plaintiff, as required by statute. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. In action for injuries to plaintiff struck by cars while changing link bills in couplers, evidence as to the yard foreman's orders regarding switching operations, and the situation of cars, was admissible on plaintiff's contributory negligence. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. On issue of brakeman's contributory negligence, evidence that when he entered upon the employment he was sent out to observe the methods employed and had seen men use the method he employed in uncoupling cars was admissible. Pierson v. Chicago & N. W. R. Co. [Iowa] 102 N. W. 149. Rule of company requiring a man on cars being backed over crossings is admissible on issue of contributory negligence, plaintiff having knowledge of the rule, and having testified that he looked and saw no man on the cars. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076. Parts of a brakeman's application for employment, tending to show his appreciation of the generally dangerous nature of his employment, and the necessity to exercise care, and his agreement to familiarize himself with the location of structures along the line, held inadmissible on the question of the assumption of risk arising from location of a scale box close to the the rails, when he was later employed as a switchman. Texas & P. R. Co. v. Swearingen, 25 S. Ct. 164. A railway employe cannot, in a personal injury suit, compel the company to disclose, in answer to interrogatories filed by plaintiff, confidential reports by agents regarding the accident [2 Ball. Ann. Codes & St. § 6009 construed]. Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 P. 202. Evidence of a settlement with an engineer is inadmissible in a suit by the fireman, injured at the same time. Missouri, etc., R. Co. v. Keaveney [Tex. Civ. App.] 80 S. W. 387.

Incompetency of servants: Testimony of foreman that he regarded man charged with negligence as reliable man admissible. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Where incompetency of alleged negligent servants was averred, a question to the foreman whether he assigned any but experienced men to a certain gang concerned was proper. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857. In action for injuries to miner based on alleged defects in hoisting apparatus, evidence regarding experience of superintendent is inadmissible, though offered to account for the defects.

Luman v. Golden Ancient Channel Min. Co. [Cal.] 74 P. 307.

Evidence descriptive of machinery: A diagram of an alleged defective pile driver and appliances is admissible, if shown to be correct, though not made by the witness using it. Koon v. Southern R. Co. [S. C.] 48 S. E. 86. Evidence as to whether it was possible for one's hand to come in contact with cog wheels of a spinning frame when the cover was on was admissible to describe the machine. Gomes v. New Bedford Cordage Co. [Mass.] 72 N. E. 840. After evidence that a particular car on which plaintiff was injured was one of a series, evidence regarding the measurements of cars of that series was admissible. Chicago & A. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15. Evidence that drawbar in coupler had too much lateral play, and showing the reasons for the defect to be a lack of retaining bolts, admissible as tending to show coupler defective. Belt R. Co. v. Confrey, 209 Ill. 344, 70 N. E. 773.

Rules: In an action for injuries to an engineer caused by derailment in a washout, the company's rules relative to the placing of watchmen at dangerous points in stormy weather were admissible. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 83 S. W. 406. A book of alleged rules, admitted to contain rules adopted since an accident, is inadmissible as a whole to prove rules alleged to have been in force at the time of the accident. Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883. In an action by fireman for injuries received through backing of engine while taking on coal, the court should have construed and passed on the relevancy of a rule relative to the care of engines on sidetracks, etc. Cleveland, etc., R. Co. v. Bergschicker, 162 Ind. 108, 69 N. E. 1000.

Experiments: Permission to perform experiments before the jury is discretionary with the court. Carr v. American Locomotive Co. [R. I.] 58 A. 678. Evidence of experiments with an emery belt inadmissible when no effort was made to prove conditions were the same as those attending the accident. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922.

3. An employe may testify that he relied on a superintendent's statement that a mill in which he was making repairs was to be shut down. Mathews v. Daly-West Min. Co., 27 Utah, 193, 75 P. 722. Where negligence alleged was defective condition of track, evidence of brakeman's (plaintiff's) knowledge of such condition at the place of the accident and at other points was admissible. International, etc., R. Co. v. Penn [Tex. Civ. App.] 79 S. W. 624. Evidence as to location of nearest turntable admissible to show why engine was run backward on a certain part of the road. Southern Kansas R. Co. of Texas, v. Sage [Tex. Civ. App.] 80 S. W. 1038. Evidence that no notice was posted at a blast hole, which plaintiff was cleaning out, that it was loaded, was admissible. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857. Evidence of schedule time of trains at a certain point admissible to show section foreman not negligent in using the track with his push car at a certain time. International, etc., R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991. A rule requiring brakemen to be out on trains when they are approaching stations admissible on issue whether plaintiff was acting in line of duty when injured. Morrisette v. Canadian Pac. R. Co., 76 Vt. 267, 56 A. 1102. Trainmen's interpretation of dispatcher's orders admissible as res gestae as showing why they moved their trains as they did; but not to aid in their interpretation or to show that the orders were ambiguous. Wallace v. Boston, etc., R. Co., 72 N. H. 504, 57 A. 913. The general reputation of a servant as a careful and competent engineer and sober man is admissible as tending to show he exercised ordinary care on a particular occasion, when only circumstantial evidence is available. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

Customary conduct of other servants: Custom of brakemen in making couplings under certain conditions. International, etc., R. Co. v. Penn [Tex. Civ. App.] 79 S. W. 624. Evidence that another brakeman coupled cars on the inside of a curve admissible on issue of contributory negligence. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. Customary use of passway by plaintiff and other employes was admissible on issue of contributory negligence and also due care of servant charged with negligence. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Where plaintiff was injured by falling into a trench on her way to work before daylight, evidence of what others did when they came to the obstruction the same morning was admissible on issue of plaintiff's care. Norris v. Cudahy Packing Co. [Iowa] 100 N. W. 853.

4. Testimony by plaintiff that "he took chances" in going along a passageway was admissible as tending to show a knowledge of danger. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Evidence of a custom in defendant's shop for employes to sign rules promulgated by the foreman is inadmissible to prove such signing by plaintiff, where the existence of rules is in dispute. Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883. That a servant exposed himself to an abnormal risk because he feared he would be discharged if he did not do so is not evidence of legal constraint. Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808. Evidence describing the stirrup and grabiron on a box car admissible as descriptive of a brakeman's place to work, and on the issue whether he assumed the risk of being struck by a switch when riding on the side of the car. Morrisette v. Canadian Pac. R. Co., 76 Vt. 267, 56 A. 1102.

5. Conversation between other employes and injured man five minutes after accident and three hours before he died, as to how accident occurred, admissible. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. Admission of defendant's superintendent, a few minutes after the accident, that he had not instructed the servant charged with negligence, who was a new man, admissible. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Statements by mining superintendent, and by fellow-servant, after an injury, as to its cause, inadmissible. Luman v. Golden Ancient Channel Min. Co. [Cal.] 74 P. 307. Admission of manager to plaintiff's wife, after accident, that accident did not occur through fault of plaintiff, inadmissible. Alquist v. Eagle

Expert and opinion evidence.[6]—If witnesses are shown to be properly qualified,[7] they may testify as experts in regard to matters requiring special skill and knowledge,[8] such as the danger attending particular methods of doing work,[9] or the use of certain instrumentalities[10] or machines,[11] and whether such danger could be avoided.[12] But mere conclusions of fact[13] or opinions are inadmissible

Ironworks [Iowa] 101 N. W. 520. An admission of a general sales agent, after an accident causing a servant's death, was a mere narration of a past event, inadmissible to prove the servant charged with negligence was incompetent, and that the master knew of his incompetency. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366. Admissions of a superintendent, after an accident, incompetent to prove notice of motorman's incompetency. White v. Lewiston, etc., R. Co., 94 App. Div. 4, 87 N. Y. S. 901. Statement of bank boss of mine, some time after accident, regarding efforts to pull down material which fell and killed an employe, inadmissible. McFarland's Adm'r v. Harbison & Walker Co. [Ky.] 82 S. W. 430.

6. See 2 Curr. L. 851.

7. Qualification of experts is a question of fact for the trial court. Burns v. Delaware & A. Tel. & T. Co. [N. J. Err. & App.] 59 A. 220. Experienced engineer and section boss qualified to give opinion on weight of locomotive engine. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445. Foreman of railroad bridge building competent to testify as to safety of appliances used on pile drivers. Koon v. Southern R. Co. [S. C.] 48 S. E. 86. One experienced in track construction is competent to testify that a track at a certain place was in a defective and unsafe condition. Northern Ala. R. Co. v. Shea [Ala.] 37 So. 796. An experienced brakeman may give an opinion as to a train's rate of speed at a particular place and time and whether or not it was dangerous. Id. Practical railroad man with experience as a yardman and brakeman and in operating switches competent to testify that a switch could have been placed on the other side of the track at a certain point, claimed to be a safer place. Morrisette v. Canadian Pac. R. Co., 76 Vt. 267, 56 A. 1102. A witness, otherwise qualified, may testify as an expert regarding burner valves, though he had never used one with crude oil, as the valve in question was used. Carr v. American Locomotive Co. [R. I.] 58 A. 678. Engineer with 14 months' experience could testify how far ahead of his engine he could see an object on the track, when going at a certain rate. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. One who had used dynamite in blasting for twenty years but had only used frozen dynamite once is not qualified to testify as to whether frozen dynamite is more liable than plastic to explode under pressure. Currelli v. Jackson [Conn.] 58 A. 762.

8. Condition of roadway in a mine as to safety. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863. Proper manner of putting in a switch point. Buckalew v. Quincy, etc., R. Co. [Mo. App.] 81 S. W. 1176. Whether 27 feet is an unusually long building span. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. Usual methods of constructing oil mill plants and way in which cotton should be discharged from second to first floors. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. The method employed in stringing cables on street railway poles is a matter of common knowledge on which expert testimony is not proper. Meehan v. Holyoke St. R. Co., 186 Mass. 511, 72 N. E. 61.

9. Expert testimony competent on danger of coupling hot pots to engine on incline track used in connection with blast furnace. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. Evidence of experienced, practical machinist admissible on danger from flying particles of steel when rails are being cut, and customary methods of avoiding danger. Vohs v. Shorthill Co. [Iowa] 100 N. W. 495.

10. Expert testimony that forcing frozen dynamite into a hole with a stick was a dangerous operation admissible on dangerous condition of dynamite when frozen, as alleged in complaint. Currelli v. Jackson [Conn.] 58 A. 762. Expert evidence as to the usual method of building scaffolds and whether a particular scaffold was safe is competent and relevant on the issue of negligence in furnishing the scaffold. Jenks v. Thompson [N. Y.] 71 N. E. 266. Whether a block and hook of certain construction, used to support a painter at work on a high bridge, was reasonably safe. Anderson v. Fielding [Minn.] 99 N. W. 357.

11. Expert testimony regarding danger from particles flying from emery belt. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. Expert testimony admissible on danger connected with operation of a certain machine and whether it was customary to put any but experienced men to operate them. Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029. The opinion of a person with many years' experience working a machine admissible on question of its danger for a boy of sixteen, and the proper course to pursue in running it. Punkowski v. New Castle Leather Co., 4 Pen. [Del.] 544, 57 A. 559.

12. Expert testimony that an emery belt could have been guarded so as to protect persons from flying particles proper. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922.

13. Witness who has examined a building may only describe it; he cannot give conclusions regarding what he saw. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. Question to plaintiff whether he "just assumed the risk" called for mere conclusion. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Opinion on an issue of fact, based on the occurrence of the accident, inadmissible. Ennis v. Little & Co. [R. I.] 55 A. 884. Whether workman could have worked in railroad yards for 30 days without seeing lumber piled on cars in a certain way called for conclusion. Central of Georgia R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641. Testimony that one could not acquire knowledge of the handling of iron

on issues which, under the evidence, are exclusively for the jury,[14] such as proximate cause,[15] negligence,[16] and contributory negligence.[17]

Sufficiency of evidence; question for jury.[18]—Unless the evidence is so conclusive that only one inference can be reasonably drawn therefrom,[19] it is for the jury to determine the existence of the relation of master and servant;[20] the issue of the master's negligence, in all its various phases,[21] such as the competency[22]

rails by working in and around railroad shops and yards was a mere conclusion. Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808. On an issue as to the distance between a switch handle and passing cars, a hypothetical question not based on actual measurement, but assuming certain measurements, was improper. Chicago & A. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15.

Evidence that an approaching train was making less noise than usual held not objectionable as stating a mere conclusion. International & G. N. R. Co. v. Villareal [Tex. Civ. App.] 82 S. W. 1063. Testimony by plaintiff that his duties did not include taking care of horse and wagon and inspecting harness not a conclusion. Robert Portner Brew. Co. v. Cooper, 120 Ga. 20, 47 S. E. 631. Testimony that it was switchmen's duty to couple cars together and set air brakes when train was to be inspected was not objectionable as a conclusion. St. Louis S. W. R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428. Whether cracks and breaks in staybolts of a boiler which exploded were old or new could be testified to by nonexperts. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

14. Proper to refuse to permit witness to testify to what one's duty was in operating a machine, when all the facts relating to the operation of it were before the jury. Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 398, 69 N. E. 1032. An expert cannot give his opinion on the judgment of other competent workmen as to the practicability of guarding a saw. Espenlaub v. Ellis [Ind. App.] 72 N. E. 527. Which of two methods of letting rails into a mine was the safer is not the subject of expert testimony, but is for the jury. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089.

15. As whether parting of train was due to worn condition of automatic coupler. Meehan v. Great Northern R. Co. [N. D.] 101 N. W. 183. Whether an accident would have occurred if servant had reported defect in coupler. Carson v. Southern R. Co. [S. C.] 46 S. E. 525. Improper for physicians to testify whether plaintiff's foot was caught between even or uneven surfaces, since this went directly to the issue, how the injury was caused. Illinois Cent. R. Co. v. Smith, 208 Ill. 608, 70 N. E. 628. But where there was proof of two accidents to plaintiff and a conflict as to which caused the injuries complained of, the opinion of a physician was held admissible as to which was the probable cause. Jones v. American Warehouse Co. [N. C.] 49 S. E. 355.

16. Sufficiency of light in coal bin. Meyers v. Highland Boy Gold Min. Co. [Utah] 77 P. 347. Whether an appliance was safe at the time of an accident. Luman v. Golden Ancient Channel Min. Co. [Cal.] 74 P. 307. Whether cogwheels should have been covered. Marks v. Harriet Cotton Mills, 135 N. C. 287, 47 S. E. 432. Necessity of rules governing work of employes engaged in cleaning out engines. Lane v. New York, etc., R. Co., 93 App. Div. 40, 86 N. Y. S. 947.

17. Necessity for plaintiff to use a path over a pit into which he fell. Aetna Powder Co. v. Earlandson [Ind. App.] 71 N. E. 185. Testimony of engineer that he would have avoided accident under the same circumstances incompetent. Quinn v. Galveston, etc., R. Co. [Tex. Civ. App.] 84 S. W. 395.

18. See 2 Curr. L. 853, 854.

19. Foster v. New York, etc., R. Co. [Mass.] 72 N. E. 331; Maurer v. Gould [N. J. Law] 59 A. 28; Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537; Bonn v. Galveston, etc., R. Co. [Tex. Civ. App.] 82 S. W. 808; Pence v. California Min. Co., 27 Utah, 378, 75 P. 934. Not error to refuse to submit question of foreman's knowledge of plaintiff's position when foreman's testimony showed he had such knowledge. Texas Cent. R. Co. v. Pelfrey [Tex. Civ. App.] 80 S. W. 1036. Where defendant, on court's refusal to nonsuit plaintiff, offered no evidence, and plaintiff submitted the case on charge of the court, defendant's negligence became a question for the jury. Kepler v. Lackawanna Lumber Co., 209 Pa. 244, 58 A. 284. And see, Discontinuance, Dismissal and Nonsuit, 3 Curr. L. 1097; Directing Verdict and Demurrer to Evidence, 3 Curr. L. 1093.

20. Evidence sufficient to show that plaintiff's intestate was defendant's servant at time of accident. Vallie v. Hall, 184 Mass. 358, 68 N. E. 829.

21. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816; Belt R. Co. v. Confrey, 209 Ill. 344, 70 N. E. 773; Fremont Brew. Co. v. Schulz [Neb.] 101 N. W. 234; Bering Mfg. Co. v. Femelat [Tex. Civ. App.] 79 S. W. 869. Issues on which that of negligence depends, together with the ultimate fact of negligence, are for jury. Merrifeld v. Maryland Gold Quartz Min. Co., 143 Cal. 54, 76 P. 710. Where joint and several negligence of the master and a servant is charged, a nonsuit cannot be granted if there is evidence as to negligence of one defendant. Carson v. Southern R. Co. [S. C.] 46 S. E. 525.

Evidence of negligence sufficient: Plaintiff injured while driving vicious horse to mower. Roberti v. Anderson [Nev.] 76 P. 30. Evidence sufficient to warrant finding that defendant was negligent, that plaintiff was injured while in the discharge of his duties and that he was free from fault. Atlanta & B. Air Line R. Co. v. Weaver [Ga.] 49 S. E. 291. Injury by explosion of digester in paper mill. Hunt v. Dexter Sulphite Pulp & Paper Co., 91 N. Y. S. 279. Miner injured by falling of cage. Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 72 N. E. 1060. Brakeman injured by breaking of air hose, which caused the train to stop and following train to collide with it. Newton

and conduct of other employes of defendant;[23] the reasonable safety of the place of work[24] or appliances,[25] or methods of work adopted;[26] the necessity and rea-

v. New York, etc., R. Co., 96 App. Div. 81, 89 N. Y. S. 23. In leaving signal bell exposed so that signal was accidentally given; and in failing to instruct as to how to clean machine. Moyes v. Ogden Sewer-Pipe & Clay Co. [Utah] 77 P. 610. Where evidence showed an injury caused by starting of machine owing to shifting of belt kept in place by defective appliance there was a prima facie showing of negligence to go to jury. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784. Coal packets collapsed, injuring plaintiff, directed to work under them, after defendant had been twice warned that structure was unsafe. O'Donnell v. Welz, 97 App. Div. 286, 89 N. Y. S. 959. Planks ordered to be carried down stairway in mine shaft; one slipped down and struck plaintiff. Jensen v. Commodore Min. Co. [Minn.] 101 N. W. 944. Where defendant set plaintiff to work, requiring him to keep his arms in fur dye all day, assuring him it was harmless, plaintiff being thereby injured. Segal v. Padlasky [Wis.] 101 N. W. 381. Evidence held to justify submission to jury of issue whether defendant and another corporation were operating as partners the portion of the railroad on which plaintiff was killed. Harrill v. South Carolina & G. Extension R. Co., 135 N. C. 601, 47 S. E. 730. In an action based on a violation of the automatic coupler act, proof that deceased was coupling cars when killed, that the cars were not provided with automatic couplers, and that the accident was the result of old-fashioned couplers slipping by one another, makes a prima facie case. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395.

Evidence of negligence insufficient. Baumwald v. Trenkman, 88 N. Y. S. 182; Williams v. Belmont Coal & Coke Co. [W. Va.] 46 S. E. 802. Brakeman killed between drawheads while making a coupling. Caldwell v. Missouri Pac. R. Co., 181 Mo. 455, 80 S. W. 897. Injury from explosion of blasting powder in mine. Shaw v. New Year Gold Mines Co. [Mont.] 77 P. 515. Injury to shoveler in gravel pit. Cully v. Northern Pac. R. Co., 35 Wash. 241, 77 P. 202. Whether mining company was negligent in failing to keep mine properly timbered so as to prevent a cave-in. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1. Boy's eye destroyed by explosion of bottle of carbonated water. Duerler Mfg. Co. v. Dullnig [Tex. Civ. App.] 83 S. W. 889. Boy of 17 taken to railroad yard to be "broken in" and instructed, by experienced man, killed between cars, making a coupling. McMillian v. Grand Trunk R. Co. of Canada [C. C. A.] 130 F. 827. Where mine boss was struck by a missile, the nature of which was unknown, from above, while working on top of a cage in a mine shaft. Jacobson v. Smith, 123 Iowa, 263, 98 N. W. 773. Trainmen not negligent in running train at too great a rate of speed, or in failing to stop, where section hand fell on pilot of engine from position near the track. Helm v. Missouri Pac. R. Co. [Mo.] 84 S. W. 5. Switching crew had no knowledge of inspector's position between cars, and were not negligent in shunting cars down the track. Whitley v. Chicago, etc., R. Co. [Mo. App.] 83 S. W. 68.

22. Whether defendant exercised proper care in employing experienced and competent servants, and in instructing them as to their duties. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Servant charged with negligence was careless and incompetent, to the knowledge of the employer. Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366.

23. Where injury was caused by sudden whipping of cable caused by starting of engine by conductor without notice to plaintiff. Southern Ind. R. Co. v. Fine [Ind.] 72 N. E. 589. Brakeman injured by moving of cars when he was fixing a defective uncoupling rod. Cincinnati, etc., R. Co. v. Cook's Adm'r [Ky.] 83 S. W. 580. Plaintiff, in hold of vessel, struck by heavy object thrown through open and unguarded hatchway, hatch tender having been called away. Merchants' & Miners' Transp. Co. v. Jackson, 120 Ga. 211, 47 S. E. 522. Recovery for death of employe who was struck by engine at coal sheds. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. Brakeman fell between cars, owing to sudden stop. Holland v. Great Northern R. Co. [Minn.] 101 N. W. 608. Engineer negligent in lowering a steam hoist too soon. Moran v. Carlson, 95 App. Div. 116, 88 N. Y. S. 520. Plaintiff, car inspector, struck by switch engine in yards. Chesapeake & O. R. Co. v. Pierce [Va.] 48 S. E. 534. Injuries caused by release of heavy iron casting by order of foreman of men handling it. Harris v. Williams Cooperage Co. [Mo. App.] 80 S. W. 924. Section foreman's negligence in running hand car on regular train's time. Illinois Cent. R. Co. v. McIntosh [Ky.] 80 S. W. 496. Whether railroad employes discovered or should have discovered plaintiff's perilous situation. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248. Plaintiff injured in machine which should have been stopped while he was instructing new man in its use. Hutchings v. Mills Mfg. Co. [S. C.] 47 S. E. 710. Evidence sufficient to warrant finding that engineer was negligent in running train at an excessive rate of speed at a certain point. Northern Ala. R. Co. v. Shea [Ala.] 37 So. 796. Section hand struck by engine while at work. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387. Whether negligence of a superior servant was gross so as to permit a recovery from the master by the inferior servant injured. Illinois Cent. R. Co. v. Elliott [Ky.] 82 S. W. 374. Where train hand about to mount engine was struck by cars kicked down track behind him. Peoples v. North Carolina R. Co. [N. C.] 49 S. E. 87. Whether engineer and fireman saw section man on track in time to have stopped the train by the exercise of ordinary care. Hinzeman v. Missouri Pac. R. Co., 182 Mo. 611, 81 S. W. 1134. Employe struck by cars being pushed by engine when train was being made up. Lassiter v. Raleigh & G. R. Co. [N. C.] 49 S. E. 93.

24. Evidence held for jury: Libby v. Banks, 209 Ill. 109, 70 N. E. 599. Whether roadway in mine, on which miner was ordered to drive vicious mule, reasonably safe. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71

sonableness of rules,[27] warnings and instruction,[28] and whether rules were made[29]

N. E. 863. Maintaining unguarded a ditch and pile of earth across path on premises by which employes came to work. Norris v. Cudahy Packing Co. [Iowa] 100 N. W. 853. Whether condition of blocking between main and guard rail was defective through company's negligence. Pierson v. Chicago & N. W. R. Co. [Iowa] 102 N. W. 149. Whether railway company was negligent in maintaining a scale box within 2 feet of rails, where tracks were standard distance apart, held for the jury. Texas & P. R. Co. v. Swearingen, 25 S. Ct. 164. Failure of master to provide a reasonably safe crucible in foundry. Ahrens & O. Mfg. Co. v. Rellihan [Ky.] 82 S. W. 993. Hatchway of ship insufficiently lighted. Earle v. Clyde S. S. Co., 43 Misc. 535, 89 N. Y. S. 500. Steam pipes improperly fastened to boilers. Bonnin v. Crowley, 112 La. 1025, 36 So. 842. Leaving cog wheels unboxed. Gomes v. New Bedford Cordage Co. [Mass.] 72 N. E. 840. Cog wheel of machine uncovered. Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428. Failure to inspect blast holes to discover unexploded pieces of dynamite. Hooe v. Boston & N. St. R. Co. [Mass.] 72 N. E. 341. Injury caused by stepping on scrap of sheet iron in pathway leading to factory. Finn v. Ironclad Mfg Co., 90 N. Y. S. 887. Construction, repairs and inspection of a steam reservoir in brewery. Krueger v. Bartholomay Brew. Co., 94 App. Div. 58, 87 N. Y. S. 1054. Minor servant fell down elevator shaft. Brager v. Austin [Md.] 58 A. 432. Plaintiff injured by falling through trap door. Bateman v. New York, etc., R. Co., 178 N. Y. 84, 70 N. E. 109. Miner struck by rock falling from roof. Tennessee Coal, Iron & R. Co. v. Garrett [Ala.] 37 So. 355. Condition of railway track. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445. Car driver in mine killed by material falling from roof. McFarland's Adm'r v. Harbison & Walker Co. [Ky.] 82 S. W. 430. Death of servant caused by loose plank in walk along a coal conveyor he was required to oil. Clark v. Wolverine Portland Cement Co. [Mich.] 101 N. W. 845. Telephone company sued for injuries to lineman caused by live electric light wire strung on defendant's poles. Barto v. Iowa Telephone Co. [Iowa] 101 N. W. 876. Where vice-principal ordered plaintiff to clean out blast hole, without examination, and an explosion resulted. Harris v. Balfour Quarry Co. [N. C.] 49 S. E. 95. Whether inspection of railroad track was sufficient in the exercise of due care. Jackson Lumber Co. v. Cunningham [Ala.] 37 So. 445.

Evidence insufficient to prove negligence of railway company in maintaining railroad frog with excavation underneath. Riley v. Louisville & N. R. Co. [C. C. A.] 133 F. 904.

25. Diamond v. Planet Mills Mfg. Co., 97 App. Div. 43, 89 N. Y. S. 635. Whether a machine was properly guarded. Green v. American Car & Foundry Co. [Ind.] 71 N. E. 268; Dowd v. Erie R. Co., 70 N. J. Law, 451, 57 A. 248. Evidence held to support finding that defendant was negligent in failing to furnish suitable materials for construction of sewer, and that such negligence was the proximate cause of a servant's death. Kurstelska v. Jackson [Minn.] 101 N. W. 606. Negligence in original construction of freight elevator. Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493. Whether master could have discovered defect in a lever by exercise of ordinary care. Cudahy Packing Co. v. Roy [Neb.] 99 N. W. 231. Defendant negligent in that tackle supporting staging was defective; and plaintiff did not know and was not bound to know of its defective condition. Caven v. Bodwell Granite Co. [Me.] 59 A. 285. Evidence sufficient to support finding of negligence in furnishing defective scaffold. Louisville & E. R. Co. v. Poulter's Adm'r [Ky.] 84 S. W. 576. Brakes on engine and cars defective. Robertson v. Cayard [Tenn.] 77 S. W. 1056. Railway company had knowledge of defective condition of locomotive boiler. Markey v. Louisiana & M. R. Co. [Mo.] 84 S. W. 61. Finding that a winding machine had not been repaired, or had been improperly repaired, was justified by the fact that it had started up of itself. Gregory v. American Thread Co. [Mass.] 72 N. E. 962. Safety clutches on elevator defective. Droney v. Doherty [Mass.] 71 N. E. 547. Tire-bending machine defective, the clutch by which it was thrown into and out of gear being worn. Fries v. Bettendorf Axle Co. [Iowa] 101 N. W. 859. Failure to test boiler after repairs. Shea v. Pacific Power Co. [Cal.] 79 P. 373. Whether a saw was properly guarded. Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239. Evidence sufficient to warrant finding that derailment was caused by defective track. Northern Ala. R. Co. v. Shea [Ala.] 37 So. 796. Whether set screw was properly guarded. Walker v. Newton Falls Paper Co., 90 N. Y. S. 630. Whether a particular machine was of such construction that it could be guarded. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. Whether harness was defective. Palmer v. Coyle [Mass.] 72 N. E. 844. Whether a saw was reasonably safe for use. Dean v. St. Louis Woodenware Works [Mo. App.] 80 S. W. 292. Whether it was negligence to furnish a certain kind of fuse for blasting in coal mines. Currans v. Seattle & S. F. R. & Nav. Co., 34 Wash. 512, 76 P. 87. Whether defendant was negligent in furnishing defective sand drier. Walker v. Carolina Cent. R. Co., 135 N. C. 738, 47 S. E. 675. Furnishing defective sling for hoisting pump on deck of lighter. Carter v. Boston Towboat Co., 185 Mass. 496, 70 N. E. 933. Superintendent's negligence in adjusting movable platform used by men in unloading freight. Murphy v. New York, etc., R. Co. [Mass.] 72 N. E. 330. Whether defendants were negligent in furnishing a block and hook of certain construction. Anderson v. Fielding [Minn.] 99 N. W. 357. Whether scaffold used by employe in sawing off piles was a reasonably safe place. Depuy v. Chicago, etc., R. Co. [Mo. App.] 84 S. W. 103. Furnishing defective coal bucket. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 82 S. W. 787. Whether there was a sufficient inspection of freight elevator. Womble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493. Whether substitution of other appliances for a chock usually used on pile drivers to prevent falling of a "follower" made it unsafe. Swanson v. Oakes [Minn.] 101 N. W. 949.

or warning or instruction given;[30] and what was the proximate cause of the injury alleged.[31] The same rule applies as to the issues of the existence of the re-

Evidence held insufficient: To prove a valve and stem used in oil burning rivet heater unsafe. Carr v. American Locomotive Co. [R. I.] 58 A. 678. Brakeman fell from car owing, as alleged, to a defective ladder thereon. Carleton v. Great Northern R. Co. [Minn.] 101 N. W. 501. To support finding that defendant had not furnished proper appliances for anchoring a derrick car. Wagner v. New York, etc., R. Co., 93 App. Div. 14, 86 N. Y. S. 921. To show hammer and spikes used in laying steel were defective and unsafe. Gauges v. Fitchburg R. Co., 185 Mass. 76, 69 N. E. 1063. Injury from electric shock not caused by any negligence of master in furnishing unsafe appliances. Wendler v. Red Wing Gas & Elec. Co. [Minn.] 99 N. W. 625.

26. Whether method of lowering caps by which piles were held in alignment, adopted by foreman, was reasonably safe. Depuy v. Chicago, etc., R. Co. [Mo. App.] 84 S. W. 103. Whether a system of protecting car repairers by blue flag signals is more efficient in protecting workmen than a system of personal warning by the yardmaster. State v. South Baltimore Carworks [Md.] 58 A. 447.

27. Whether a business is such as to require promulgation of rules, and whether rules adopted are proper, for the purpose for which they were intended. Johnson v. Union Pac. Coal Co. [Utah] 76 P. 1089. The reasonableness of rules promulgated by the master is for the court; but where there is doubt as to the applicability of rules to particular duties, a question of fact is presented. Rules requiring inspection of appliances, and reports on defects discovered, held not applicable to an engine, on which the footboard and handhold were defective, so as to bar recovery by a switchman obliged to use them without opportunity for inspection. Leduc v. Northern Pac. R. Co. [Minn.] 100 N. W. 708.

28. The necessity and adequacy of instructions to servants in a particular instance. Creachen v. Bromley Bros. Carpet Co., 209 Pa. 6, 57 A. 1101. Necessity of instructing employe, engaged to hold rails while being cut, as to danger from flying particles of steel, and how to avoid it. Vohs v. Shorthill Co. [Iowa] 100 N. W. 495. Whether railway company was negligent in failing to put out signal or giving other warning regarding an obstruction on track. Rogers v. Cleveland, etc., R. Co., 211 Ill. 126, 71 N. E. 850. Whether master was negligent in failing to instruct and warn inexperienced operator of kneebolter in shingle factory. Jancko v. West Coast Mfg. & Inv. Co., 34 Wash. 556, 76 P. 78. Whether the lack of experience of a telephone employe was such as to make it the master's duty to warn and instruct him before putting him to work as a lineman. Britton v. Cent. Union Tel. Co. [C. C. A.] 131 F. 844. Where a boy of 13 years was injured by a dangerous machine which had not been explained to him, defendant's negligence was for the jury. Dynes v. Bromley, 208 Pa. 633, 57 A. 1123.

29. Evidence being in conflict as to whether rules governing work of car repairing had been made and promulgated, plaintiff was entitled to go to jury on the issue whether a safe place to work had been provided. Quinn v. Brooklyn Heights R. Co., 91 App. Div. 489, 86 N. Y. S. 883. Submission to the jury of the issue whether rules of a railway company governing employes and dispatchers were reasonably sufficient and clear was error, when there was no evidence to show they were not so. Landon v. Boston & M. R. Co., 72 N. H. 600, 57 A. 920. The question of the sufficiency of rules governing the movement and management of cars was erroneously submitted to the jury when there was no evidence to show other rules in use by other companies, or that other rules would be more practicable or render the movement of trains safer. Ward v. Manhattan R. Co., 95 App. Div. 437, 88 N. Y. S. 758.

30. Whether instructions were given young and inexperienced employe regarding danger from saw near which he worked. Lachau v. Milner & Co., 123 Iowa, 387, 98 N. W. 900. Whether brige over railway track was properly constructed and proper warnings provided by "tell-tales" to avoid injuries to brakemen on trains. Hedrick v. Southern R. Co., 136 N. C. 510, 48 S. E. 830.

31. The question of proximate cause is for the court if the facts are not disputed. Defective pipe on engine held not proximate cause of engineer's injury. Douglass v. New York, etc., R. Co., 209 Pa. 128, 58 A. 160. Plaintiff need not prove the cause alleged to be the proximate cause of his injury by demonstrative evidence; proof of its probability is sufficient to warrant submission to the jury. Cecil v. American Sheet Steel Co. [C. C. A.] 129 F. 542. Whether the negligence alleged caused the accident is for the jury unless the proof thereof is no stronger than that plaintiff's own negligence, or other causes, produced it. Whether death of brakeman was caused by his being knocked off his car by projecting arm of telegraph pole held for jury. Louisville & N. R. Co. v. Mulfinger's Adm'x [Ky.] 80 S. W. 499. Evidence held to support finding that superintendent's negligence in failing to secure wheel of machine before loading it into a wagon was proximate cause of plaintiff's injury. Cunningham v. Atlas Tack Co. [Mass.] 72 N. E. 325. That boiler explosion was caused by action of chlorides in water, and not by negligent acts of engineer or fireman. Nelson v. New York, 91 N. Y. S. 763. Evidence insufficient to prove that defect in blow-off, attached to boiler, was the cause of an explosion. Goodhines v. Chase, 91 N. Y. S. 313. Where plaintiff was injured by falling of a chest from a shelf, shown to be inclined and hence defective, proof that a chest had fallen from the shelf three months before, and that on the day in question, it fell of itself, was held insufficient to establish negligence of the defendant without showing that the falling of the chest could not have been caused otherwise. Hofnauer v. White Co. [Mass.] 70 N. E. 1038. Where a complaint alleges several causes of injury, it is for the jury to say whether any or all of them constituted the proximate cause of the injury, and it is error to grant

lation of fellow-servants,[32] contributory negligence,[33] particularly where the servant is a minor,[34] and assumption of risk.[35]

a nonsuit for failure to prove one as the proximate cause. Carson v. Southern R. Co. [S. C.] 46 S. E. 525.

In the following cases the evidence was held to require submission of the issue to the jury. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181. Whether defective track at curve or negligence of engineer in operating engine caused derailment and fireman's death. Shugart v. Atlanta, etc., R. Co. [C. C. A.] 133 F. 505. Whether falling of stone was caused by defective pillar cap in mine. Cecil v. American Sheet Steel Co. [C. C. A.] 129 F. 542. Whether failure to furnish reasonably safe appliances caused an injury. Anderson v. Fielding [Minn.] 99 N. W. 357. Whether straightened condition of hook used in unloading vessel was sole cause of injury. Martin v. Merchants' & Miners' Transp. Co., 185 Mass. 487, 70 N. E. 934. Whether unprotected cogwheel in mill was proximate cause. Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428. Whether erratic motion of loaded bucket or negligence of derrick engineer in swinging it to dock at the time caused the accident. Robinson v. Pittsburg Coal Co. [C. C. A.] 129 F. 324. Whether plaintiff's condition was due to disease or a fall caused by use of an alleged defective wrench. O'Brien v. Missouri, etc., R. Co. [Tex. Civ. App.] 82 S. W. 319. Whether section foreman's negligence in running hand car on a train's time was cause of injury to a hand while lifting car off to avoid collision. Illinois Cent. R. Co. v. McIntosh [Ky.] 80 S. W. 496. Whether defective condition of automatic stop on elevator was proximate cause of injury to operator. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50. Whether particle which struck plaintiff's eye came from unguarded emery belt. La Porte Carriage Co. v. Sullender [Ind. App.] 71 N. E. 922. Whether the cause of injury was the furnishing of a defective appliance, or improper use of a proper appliance. Koon v. Southern R. Co. [S. C.] 48 S. E. 86. Where a servant was last seen going between cars to make a coupling, and his body was found near the place, the time and manner of his death were for the jury. McHugh v. Manhattan R. Co. [N. Y.] 72 N. E. 312. Whether injury to quarry employe driving a load of stone was caused by a defective brake. Allison v. Long Clove Trap Rock Co., 92 App. Div. 611, 86 N. Y. S. 833. Whether injury was caused by defective sand drier. Walker v. Carolina Cent. R. Co., 135 N. C. 738, 47 S. E. 675. Whether requiring employe to work near live wire without informing him that it was uninsulated was proximate cause of his injury. Haworth v. Mineral Belt Tel. Co., 105 Mo. App. 161, 79 S. W. 727. Whether negligence of fellow-servants solely caused the accident, or was combined with actionable negligence of the master. Swanson v. Oakes [Minn.] 101 N. W. 949. Whether train hand's failure to keep a sharp lookout for cars was proximate cause of his death. Peoples v. North Carolina R. Co. [N. C.] 49 S. E. 87. Whether sudden jerking of train, or contributory negligence of workman in being on step of caboose, was proximate cause of his fall and injury. Whisenhant v. Southern R. Co. [N. C.] 49 S. E. 559. Whether failure of first section of train running in two sections to send back a flagman was proximate cause of injury to engineer who jumped from engine of second section when sections collided. San Antonio & A. P. R. Co v. Lester [Tex. Civ. App.] 84 S. W. 401. Where a statute prohibiting employment in mines of minors under 14, and giving a right of action to a minor injured while so employed, is violated, the questions of willful violation of the statute and the proximate cause of the injury are questions of fact for the jury. Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17. A verdict will be directed for defendant where the procuring cause of the servant's injury is uncertain. Where evidence failed to establish that the lifting of a piece of timber was the cause of another piece rolling down and injuring plaintiff, held verdict will be directed. Weliver v. Williams, 5 Ohio C. C. (N. S.) 407.

32. What facts will constitute the relation of fellow-servants is a question of law, and if the facts are undisputed the existence of the relation in a particular case is a question solely for the court. Chicago City R. Co. v. Leach, 208 Ill. 198, 70 N. E. 222; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; Illinois Southern R. Co. v. Marshall, 210 Ill. 562, 71 N. E. 597; Consolidated Coal Co. v. Fleischbein, 207 Ill. 593, 69 N. E. 963. But if the facts are in dispute, the question may be one for jury, under proper instructions. Consolidated Coal Co. v. Fleischbein, 207 Ill. 593, 69 N. E. 963; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371.

Evidence held to require submission of issue to jury. Johnson v. Heath [Neb.] 98 N. W. 832. Whether a brakeman, a member of a yard switching crew, were at the time of an accident co-operating in common work, or were so habitually associated as to be fellow-servants. Chicago & E. I. R. Co. v. White, 209 Ill. 124, 70 N. E. 588. Whether the act of a foreman of a transfer company, in backing horses hitched to loaded wagon, was done in his capacity as foreman or as common laborer. Fogarty v. St. Louis Transfer Co., 180 Mo. 490, 79 S. W. 664. Whether an employe whose duties were to take engines to roundhouse was the fellow-servant of a section hand who did considerable work in the yards, the two being accidentally associated part of the time, was a question for the jury [under Illinois association rule]. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387. A boss of the shipping department of a mill, who had complete charge of the movement of cars, ordered plaintiff to go behind a car and assist in moving it, and while so doing plaintiff was struck by another car, being moved by orders from the boss. Held, facts required submission to jury on issue whether boss and plaintiff were fellow-servants. Dill v. Marmon [Ind. App.] 71 N. E. 669.

33. Evidence held for jury: Texas & P. R. Co. v. Dashiell [C. C. A.] 128 F. 23; Cumberland Tel. & T. Co. v. Bills [C. C. A.] 128

F. 272; Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816; Belt R. Co. v. Confrey, 209 Ill. 344, 70 N. E. 773; Baltimore, etc., R. Co. v. Cavanaugh [Ind. App.] 71 N. E. 239; Carter v. Boston Towboat Co., 185 Mass. 496, 70 N. E. 933; Martin v. Merchants' & Miners' Transp. Co., 185 Mass. 485, 70 N. E. 934; McKinnon v. Riter-Conley Mfg. Co. [Mass.] 71 N. E. 296; Droney v. Doherty [Mass.] 71 N. E. 547; Sipes v. Michigan Starch Co. [Mich.] 100 N. W. 447; Maurer v. Gould [N. J. Law] 59 A. 28; Franck v. American Tartar Co., 91 App. Div. 571, 87 N. Y. S. 219; Krueger v. Bartholomay Brew. Co., 94 App. Div. 58, 87 N. Y. S. 1054; Kamp v. Coxe Bros. & Co. [Wis.] 99 N. W. 366. The question of contributory negligence is for the jury unless the evidence so conclusively discloses it that reasonable men in the exercise of impartial judgment could draw no other conclusion. Gilbert v. Burlington, etc., R. Co. [C. C. A.] 128 F. 529; Fremont Brew. Co. v. Schulz [Neb.] 101 N. W. 234; Lebeau v. Dyerville Mfg. Co. [R. I.] 57 A. 1092; Jancko v. West Coast Mfg. & Inv. Co., 34 Wash. 556, 76 P. 78. Where an employe continues in the employment after a promise to remedy a defective appliance, and the promise is then revoked, expressly or impliedly. Neeley v. Southwestern Cotton Seed Oil Co., 13 Okl. 356, 75 P. 537. Whether a situation into which a servant is ordered to go is so dangerous that no prudent man would have risked it, even under orders, is for the jury. Wurtenberger v. Metropolitan St. R. Co., 68 Kan. 642, 75 P. 1049. Where plaintiff was injured by caving of walls of trench in which he was at work. Shea v. Manning [Ala.] 37 So. 632. Employe fell into empty coal bin. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681. Plaintiff fell into unguarded pit. Aetna Powder Co. v. Earlandson [Ind. App.] 71 N. E. 185. Where truckman got foot caught in screw in trough, in the floor, a board which he placed over it slipping. Virginia Portland Cement Co. v. Luck's Adm'r [Va.] 49 S. E. 577. Experienced ironworker went upon timber lashed to uprights and used as scaffold, and fell on account of the beam turning. Welk v. Jackson Architectural Ironworks, 90 N. Y. S. 541. Employe fell into ditch dug across path on premises used by employes to get to their work. Norris v. Cudahy Packing Co. [Iowa] 100 N. W. 853. Whether motorman was negligent in leaving his controller handle where the foreman could get it and run a car out. Bien v. St. Louis Transit Co. [Mo. App.] 83 S. W. 986. Telephone lineman injured by live electric light wire strung on telephone company's poles. Barto v. Iowa Telephone Co. [Iowa] 101 N. W. 876. Where the defense is disobedience of orders, which if obeyed would have avoided the injury, the giving of such orders is for the jury. Western Mattress Co. v. Ostergaard [Neb.] 99 N. W. 229. Whether use of structure as a scaffold was negligence, or whether it was negligence not to prevent workmen going upon it. Conger v. Wiggins, 208 Pa. 122, 57 A. 341. Whether miner was negligent in use of certain fuse, and in examining it to discover cause of failure to explode a charge. Currans v. Seattle & S. F. R. & Nav. Co., 34 Wash. 512, 76 P. 87. Negligence of miner in going to an entry, not intended for work, to saw props. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38. Quarry employe injured by explosion of charge of dynamite left, without his knowledge, in blast hole. Lanza v. Le Grand Quarry Co. [Iowa] 100 N. W. 488. Plaintiff injured by stroke of foreman's maul when assisting him to put in a switch point, under the foreman's orders. Buckalew v. Quincy, etc., R. Co. [Mo. App.] 81 S. W. 1176. Whether sawyer was negligent in attempting to operate defective reversing appliance on machine, when directed to do so. Hendricks v. Lesure Lumber Co. [Minn.] 99 N. W. 1125. Cleaning wool carding machine. Sauvageau v. River Spinning Co., 129 F. 961. Cleaning machine. Moyes v. Ogden Sewer Pipe & Clay Co. [Utah] 77 P. 610. Whether steel hammer had been rendered so defective from long use in crushing ore that plaintiff was negligent in continuing to use it. Robbins v. Big Circle Min. Co., 105 Mo. App. 78, 79 S. W. 480. Where injury was caused by defective laundry machine and it appeared superintendent had promised to repair it. Calhoun v. Holland Laundry, 208 Pa. 139, 57 A. 350. Where plaintiff slipped on floor and came in contact with saw. Aspenlaub v. Ellis [Ind. App.] 72 N. E. 527. Inexperienced boy employed to empty hoppers injured by revolving knives of planer, issue being whether he had knowledge of the danger. Horne v. La Crosse Box Co. [Wis.] 101 N. W. 935. Servant's hand caught in unguarded cogs. Buehner v. Creamery Package Mfg. Co. [Iowa] 100 N. W. 345. Use of defective tongs in handling iron ingots. Mulligan v. Colorado Fuel & Iron Co. [Colo. App.] 77 P. 977. Whether use of saw in certain way was negligence. Dean v. St. Louis Woodenware Works [Mo. App.] 80 S. W. 292. Contributory negligence of servant who used an unsafe block and hook. Anderson v. Fielding [Minn.] 99 N. W. 357. Whether plaintiff was in charge of moving machine and was negligent in manner of doing it. Thompson v. American Writing Paper Co. [Mass.] 72 N. E. 343. Use of ripsaw without a guard—whether safer method was adopted by operator. Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632. Whether workman chose a reasonably safe place to stand on flat car on which machinery operating steam shovel was placed. Texas Cent. R. Co. v. Pelfrey [Tex. Civ. App.] 80 S. W. 102. Whether plaintiff was negligent in not discovering absence of guard from cogwheels of spinning frames. Gomes v. New Bedford Cordage Co. [Mass.] 72 N. E. 840. Whether employe was negligent in operation of winding machine, which started up of itself and injured her, the superintendent having told her the machine had been repaired. Gregory v. American Thread Co. [Mass.] 72 N. E. 962.

Injuries to railway employes: Brakeman struck by overhead cattle chute. Coles v. Union Terminal R. Co. [Iowa] 99 N. W. 108; Chicago G. W. R. Co. v. Roddy [C. C. A.] 131 F. 712. Manner of using wrench. O'Brien v. Missouri, etc., R. Co. [Tex. Civ. App.] 82 S. W. 319. Plaintiff, injured by hole in car used in unloading freight. Foster v. New York, etc., R. Co. [Mass.] 72 N. E. 331. Whether failure to observe a rule was negligence. Quinn v. Galveston, etc., R. Co. [Tex. Civ. App.] 84 S. W. 395. Manner of uncoupling cars when coupling appliance was defective. Pierson v. Chicago & N. W. R. Co. [Iowa] 102 N. W. 149. Condition of

railway track, causing derailment and fireman's death. Shugart v. Atlanta, etc., R. Co. [C. C. A.] 133 F. 505. Section hand lifting car off track to avoid collision where handcar was running on train's time by foreman's orders. Illinois Cent. R. Co. v. McIntosh [Ky.] 80 S. W. 496. Employe was thrown off step of caboose by sudden jerk of train due to increase in speed at a point where train was expected to stop. Whisenhant v. Southern R. Co. [N. C.] 49 S. E. 559. Whether brakeman should have known of proximity of switch stand to track and was negligent in attempting to mount an engine passing it. McCabe v. Montana Cent. R. Co. [Mont.] 76 P. 701. Whether an engine "hostler" crushed between a tender and a building in the yards was at his post of duty when killed. Norfolk & W. R. Co. v. Cheatwood's Adm'x [Va.] 49 S. E. 489. Whether brakeman had notice of, and appreciated danger from, a pole near the track, so that, under the circumstances, he exercised due care. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328. Section man struck by train while attempting to remove handcar under foreman's orders. Kansas City, etc., R. Co. v. Thornhill [Ala.] 37 So. 412. Contributory negligence of engineer killed in collision. Yazoo & M. V. R. Co. v. Schraag [Miss.] 36 So. 193. Engineer of switch engine got out to look for hot box on engine, and was killed by collision with cars which had been kicked up a grade, in charge of a brakeman, who failed to set brakes. Missouri Pac. R. Co. v. Johnson [Kan.] 77 P. 576. Fireman injured by engine going through bridge which train was sent with crew to repair. Kath v. Wisconsin Cent. R. Co. [Wis.] 99 N. W. 217. Brakeman injured by running into defective crossing gates which projected in his path as he ran along beside the cars. Fearns v. New York, etc., R. Co., 186 Mass. 529, 72 N. E. 68. Unloading freight with use of movable "brow" or platform. Murphy v. New York, etc., R. Co. [Mass.] 72 N. E. 330. Evidence sufficient to show deceased negligent in attempting to uncouple cars without cutting off the air or giving a stop signal. Gulf, etc., R. Co. v. Powell [Tex. Civ. App.] 84 S. W. 670. Section hand struck by engine while at work. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387. Whether brakeman was negligent in using his foot in making a coupling, the coupler being structurally defective. Brinkmeier v. Missouri Pac. R. Co. [Kan.] 77 P. 586. Brakeman's use of defective handhold on old caboose. Missouri, etc., R. Co. v. Hoskins [Tex. Civ. App.] 79 S. W. 369. Whether brakeman was negligent in making a coupling in a certain manner. International & G. N. R. Co. v. Penn [Tex. Civ. App.] 79 S. W. 624. Whether danger in obeying order of section foreman and assisting to remove a hand car from before a passenger train was so glaring that no prudent man would have encountered it. San Antonio & A. P. R. Co. v. Stevens [Tex. Civ. App.] 83 S. W. 235. Brakeman killed while adjusting coupler, other cars being backed against him without warning. Ft. Worth & R. G. R. Co. v. Caskey [Tex. Civ. App.] 84 S. W. 264. Where evidence was conflicting as to switchman's movements, whether his own negligence contributed to cause his injury by being struck by a projecting roof of a freighthouse. Hawley v. Chicago, etc., R. Co. [C. C. A.] 133 F. 150. Train hand killed by being struck by cars kicked down a track while he was mounting a switch engine. Peoples v. North Carolina R. Co. [N. C.] 49 S. E. 87. Whether employe's act in stepping across a track in front of an approaching loaded car contributed proximately to his falling through a hole in the track. Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306. Elevator operator free from negligence. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50. Plaintiff not guilty of negligence in driving a vicious mule over an alleged dangerous roadway in mine. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863. Where trackman looked for a train and then started for a toolhouse, and would have arrived there before a train could have reached him, if running within the speed limit, he was not negligent in not looking again or in walking on the ends of the ties. Camp v. Chicago Great Western R. Co. [Iowa] 99 N. W. 735. Plaintiff had no knowledge that hydraulic machine was liable to start suddenly and hence was not negligent. Klaffke v. Bettendorf Axle Co. [Iowa] 100 N. W. 1116. Hand car derailed by striking block fallen from train ahead; plaintiff not negligent though he had seen the car loaded with mill refuse, and had followed on the hand car. McLean v. Pere Marquette R. Co. [Mich.] 100 N. W. 748. Fireman not negligent in going on running board of engine. Ellington v. Great Northern R. Co. [Minn.] 100 N. W. 218 Switchman free from negligence in riding on footboard on tender. Leduc v. Northern Pac. R. Co. [Minn.] 100 N. W. 108. Sectionman, back 18 feet from engine, not negligent, when struck by slate thrown by fireman sorting coal. Swartz v. Great Northern R. Co. [Minn.] 101 N. W. 504. Where fireman, injured in collision caused by engineer's being asleep, was at the time busy firing in response to engineer's previous order to keep the engine "red-hot." Southern R. Co. v. Cheaves [Miss.] 36 So. 691. Injury by explosion of digester in paper mill. Hunt v. Dexter Sulphite Pulp & Paper Co., 91 N. Y. S. 279. Fireman stepped on drum of stationary engine, having no notice that it would be moved. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. Bridge watchman struck by train while crossing bridge on velocipede. San Antonio & A. P. R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422. Switchman stumbled over rock and caught foot in frog, and was struck by car, having no notice of presence of the rock or that frog was unblocked. Texarkana & Ft. S. R. Co. v. Toliver [Tex. Civ. App.] 84 S. W. 375. Plaintiff struck by rail being unloaded in haste from hand car under direction of section foreman. Hicks v. Southern Pac. Co., 27 Utah, 526, 76 P. 625. Car inspector struck by switch engine in yards. Chesapeake & O. R. Co. v. Pierce [Va.] 48 S. E. 534.

Evidence held to show contributory negligence: Hoehn v. Lautz, 94 App. Div. 14, 87 N. Y. S. 921. Plaintiff's hand injured in winding machine in woolen factory. Debro v. James Lee's Sons Co., 130 F. 385. Flagman, struck by train when leaving work, did not stop, look, and listen. O'Neil v. Pittsburg, etc., R. Co., 130 F. 204. Injury by falling of ram of hydraulic press. Pa-

lato v. International Silver Co., 129 F. 652. Telephone lineman, killed by contact with live electric light wire on telephone company's pole, knew, or with ordinary care should have known, that the insulation was worn off the wire at that point. Columbus R. Co. v. Dorsey, 119 Ga. 363, 46 S. E. 635. Plaintiff removed certain guy ropes before climbing a pile driver to take down a piece of tackle, so that the driver fell and injured him. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737. Brakeman killed by train which struck him as a result of his having turned a switch which was already turned. Cleveland, etc., R. Co. v. Goddard [Ind. App.] 71 N. E. 514. Gravel pit foreman negligent in going between cars, knowing the manner and time of moving the cars. Campbell v. Illinois Cent. R. Co. [Iowa] 100 N. W. 30. Engineer, injured by gases from fuses carried in the cab, which were ignited by friction, negligent in not having them packed in good order, ready for use, and so that they could not be so ignited. Crane v. Chicago, etc., R. Co. [Iowa] 99 N. W. 169. Switchman fell from moving car, which was kicked down a side track. Ederle v. Vicksburg, etc., R. Co., 112 La. 728, 36 So. 664. Flagman and switchman struck by engine while throwing a switch. Gilgan v, New York, etc., R. Co., 185 Mass. 139, 69 N. E. 1062. Plaintiff allowed hand to be drawn into snatch block. Gavin v. Fall River Automatic Tel. Co., 185 Mass. 78, 69 N. E. 1055. Servant whose duty it was to watch buckets on an endless chain of a coal and ashes conveyor negligent in standing where material falling from a bucket would strike him. Babb v. Oxford Paper Co. [Me.] 59 A. 290. Car inspector, caught between cars, negligent in failing to inform switching crew of his position, and in going between cars when switching was going on. Whitley v. Chicago, etc., R. Co. [Mo. App.] 83 S. W. 68. Employe tried to board a train moving "pretty fast." Southern R. Co. v. Williams [Miss.] 36 So. 394. Section hand, injured by getting foot caught between wheel of push car and loose tie, while propelling car by "kicking ties," guilty of contributory negligence, having himself left the ties too close to track. Fielding v. Chicago, B. & Q. R. Co. [Neb.] 101 N. W. 1022. Plaintiff allowed fingers to be caught in meat-cutting machine. Voegele v. Bardusch, 90 N. Y. S. 735. Cranesman on derrick car, who had been employed a week, and had assisted in anchoring the car each day, negligent in not anchoring it on the day of his injury. Wagner v. New York, etc., R. Co., 93 App. Div. 14, 86 N. Y. S. 921. No emergency or impending peril such as to excuse forgetfulness of a defect which was known. Langlois v. Dunn Worsted Mills [R. I.] 67 A. 910. Plaintiff negligent in using certain three-legged benches or trestles in moving heavy sill from car. Bell v. Gulf, etc., R. Co. [Tex. Civ. App.] 81 S. W. 134. Evidence insufficient to warrant recovery on ground that leg of a horse supporting a plank broke, thereby causing a loaded wheelbarrow to fall on plaintiff; evidence tended rather to show uneven loading of barrow by plaintiff. Browning v. Chicago, etc., R. Co. [Mo. App.] 80 S. W. 591. Section hand went between cars without looking for engine. Dishon v. Cincinnati, etc., R. Co. [C. C. A.] 133 F. 471.

34. Girl of 14 injured by getting hair caught in machinery. Mayfield Woolen Mills v. Frazier, 25 Ky. L. R. 2263, 80 S. W. 456. The capacity of a child of tender years and the care required of it is for the jury. Canton Cotton Mills v. Edwards, 120 Ga. 447, 47 S. E. 937. Whether a servant was of sufficient mental capacity to be guilty of contributory negligence was for the jury, the evidence being conflicting. Marrow v. Gaffney Mfg. Co. [S. C.] 49 S. E. 573.

35. Where there is no dispute as to the facts, the question of assumption of risk is one of law; but if there is a conflict in the evidence, it is one of fact. Chicago & A. R. Co. v. Howell, 208 Ill. 155, 70 N. E. 15; Avery v. Nordyke & M. Co. [Ind. App.] 70 N. E. 888. What is a reasonable time for a workman to continue the use of an unsafe appliance after a promise of the master to make it safe, is usually a question of fact. Anderson v. Fielding [Minn.] 99 N. W. 357; Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 81 S. W. 67. Whether sixteen days was a reasonable time for fulfillment of a promise to put a guard on gearing on a machine, so that servant assumed risk after that time. Dowd v. Erie R. Co., 70 N. J. Law, 431, 57 A. 248.

In the following cases the evidence was held to require submission of the issue to the jury. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387; Chicago, etc., R. Co. v. Benton [C. C. A.] 132 F. 460. Whether brakeman assumed risk of being struck by telegraph pole too near track. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328. Whether deceased had notice of defect in tongs. Mulligan v. Colorado Fuel & Iron Co. [Colo. App.] 77 P. 977. Whether a risk is an obvious one so that continuing to work, after a promise to repair, will relieve the master. Schermerhorn v. Glens Falls Portland Cement Co., 94 App. Div. 600, 88 N. Y. S. 407. Evidence not such as to charge plaintiff with knowledge of danger from empty coal bin as matter of law. Nord v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 75 P. 681. Whether plaintiff knew or ought to have known of a defect in a scaffold, so that he assumed the risk of going upon it. Hempstock v. Lackawanna Iron & Steel Co., 90 N. Y. S. 663. Whether miner assumed risk in using a certain fuse and in examining it when it failed to explode a charge. Currans v. Seattle & S. F. R. & Nav. Co., 34 Wash. 512, 76 P. 87. Whether telephone lineman assumed risk of defect in step on pole. Chisholm v. New England Tel. & T. Co., 185 Mass. 82, 69 N. E. 1042. Whether brakeman had such notice of proximity of switch stand to track that he assumed risk of being struck by switch when attempting to mount a moving engine. McCabe v. Montana Cent. R. Co. [Mont.] 76 P. 701. Whether a brakeman assumed the risk from a cattle chute built over the track, low enough to strike him when on a box car. Coles v. Union Terminal R. Co. [Iowa] 99 N. W. 108. Whether comparatively inexperienced operator of a planer, directed to run it without readjusting the guard, assumed the risk of so operating it. Klein v. Garvey, 94 App. Div. 183, 87 N. Y. S. 998. Whether employe had actual or implied knowledge of the fact that a shovel was lying in a gangway between an engine tender and tank,

(§ 3H) 5. *Instructions.*[36]—Only a few illustrative holdings are here given, the general principles governing the giving of instructions being treated fully elsewhere.[37]

Instructions must be confined to the issues raised by the pleadings,[38] and the evidence.[39] They should include all acts of negligence relied on by the plaintiff, and supported by evidence,[40] and where more than one ground is relied on, error in instructing on either aspect of the case is reversible.[41] The defendant is en-

so that he assumed the risk of falling by stepping on it. Galveston, etc., R. Co. v. Manns [Tex. Civ. App.] 84 S. W. 254. Whether plaintiff assumed risk by going back to work after complaining to superintendent of danger and a promise by the latter to look after it. McKinnon v. Riter-Conley Mfg. Co. [Mass.] 71 N. E. 296. Whether a defect in a crucible was known to or should have been known to plaintiff. Ahrens & O. Mfg. Co. v. Rellihan [Ky.] 82 S. W. 993. Whether operator of saw assumed risk of being struck by piece of timber, and of putting his hand on the saw in consequence. Dean v. St. Louis Woodenware Works [Mo. App.] 80 S. W. 292. Whether girl of 14 assumed risk of working in woolen factory, and getting caught in machinery. Mayfield Woolen Mills v. Frazier, 25 Ky. L. R. 2263, 80 S. W. 456. Whether miner assumed risk of a boulder falling, having seen a crevice in it, but having been assured by his superintendent that it was safe. Carter v. Baldwin [Mo. App.] 81 S. W. 204. Whether workman was justified in assuming that promised repairs had been made in a valve, when they could have been in 15 minutes and he did not resume work for three hours, was for jury. Studenroth v. Hammond Packing Co. [Mo. App.] 81 S. W. 487. Whether defect in street car track was open and obvious and threatened immediate danger, or was such that conductor was justified in assuming he could use it safely in the exercise of due care. Houts v. St. Louis Transit Co. [Mo. App.] 84 S. W. 161. Where switchman had worked in two yards, but only 20 or 25 days in one of them, whether he had such knowledge of a freight house roof which projected over a switch track in such yard that he assumed the risk of being struck by it while on a car. Hawley v. Chicago, B. & Q. R. Co. [C. C. A.] 133 F. 150. Whether young and inexperienced employe had a right to assume that his employer expected him to clean a machine with his hands, in which case he could not be held to have assumed the risk of so doing. Mayes v. Ogden Sewer Pipe & Clay Co. [Utah] 77 P. 610. Where a workman, in performing his services, places himself in a position of probable danger, so that he has a right to be warned of an approach of danger, the question whether he has assumed the risk of working without such warning, cannot be decided by the court, but is for the jury. Albanese v. Central R. Co., 70 N. J. Law, 241, 57 A. 447. Evidence sufficient to show that servant assumed risk of using certain three-legged benches and trestles in moving heavy sill from car. Bell v. Gulf, etc., R. Co. [Tex. Civ. App.] 81 S. W. 134. Evidence sufficient to show that switchman had no knowledge of presence of rock in yards, and that frog was unblocked, and did not assume risk of stumbling and getting caught in frog. Texarkana, etc., R. Co. v. Toliver [Tex. Civ. App.] 84 S. W. 375. Where employe testified that he had told superintendent of the defect in appliance and that a promise to repair had been made. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784.

36. See 2 Curr. L. 859.

37. See Instructions, 4 Curr. L. 133.

38. Error to instruct on duty of railroad company to make rules and regulations when no negligence in failing to do so was alleged. Texas Short Line R. Co. v. Patton [Tex. Civ. App.] 80 S. W. 881. In an action for damages for alleged premature discharge from a hospital, where an employe was being treated for an injury, as required by his contract, instructions should be confined to the issue of defendant's liability for such premature discharge; instructions permitting recovery for the original injury, or on the degree of care required in giving medical treatment are improper. International, etc., R. Co. v. Logan [Tex. Civ. App.] 81 S. W. 812. Where negligence of the master in furnishing a superintendent or foreman is not alleged, the court should not give a general charge as to the duty of the master in that regard. But such instruction was harmless in view of special findings of the jury. Kurstelska v. Jackson [Minn.] 101 N. W. 606. Requested charge on assumed risk properly refused when the defense was not pleaded. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852.

39. Where only issue was safety of a burner valve, an instruction covering the valve and "pipe and connections" was erroneous. Carr v. American Locomotive Co. [R. I.] 58 A. 678. Failure to charge on contributory negligence is not error when the defense is not pleaded and the evidence does not disclose it as a matter of law. Hirsch Bros. v. Ashe [Tex. Civ. App.] 80 S. W. 650. Where a claim as to defective rollers in a packing plant was abandoned on the trial and defect in a steadying board relied on, instructions which might be construed as including both grounds were erroneous. Rendlich v. Hammond Packing Co. [Mo. App.] 80 S. W. 683.

40. St. Louis Southwestern R. Co. v. Rea [Tex. Civ. App.] 84 S. W. 428; Vicars v. Gulf, etc., R. Co. [Tex. Civ. App.] 84 S. W. 286. If plaintiff rests his right of recovery on two concurring acts of negligence as the proximate causes of his injury, he is entitled to instructions as to each as though recovery was based on that alone. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522. It is not error to separate the grounds of negligence relied on by plaintiff in charging the jury. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076.

41. Wamble v. Merchants' Grocery Co., 135 N. C. 474, 47 S. E. 493.

titled to proper instructions on assumption of risk,[42] contributory negligence,[43] and fellow-servants,[44] if these defenses are relied on.[45] An instruction which may lead the jury to believe that the issue of contributory negligence can only be raised by affirmative evidence introduced for the defendant is erroneous, since it takes from the jury the consideration of plaintiff's evidence in chief on this issue.[46]

Instructions should be given upon the theories adopted at the trial.[47] The instructions given must be warranted by the evidence;[48] they should not be on

42. Where there is evidence tending to show a known risk, ordinarily incident to the employment, defendant is entitled to a charge on the doctrine of assumed risks. McKane v. Marr & Gordon [Vt.] 58 A. 721. Where it was in issue whether a defective headlight or negligent act of a flagman in giving a signal to proceed was the proximate cause of the injury, it was error to refuse to instruct as to the assumption of the risk of using the defective headlight. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 83 S. W. 406. Instructions regarding assumption of risks are erroneous if they do not include the rule as to assumption of actually known, as well as obvious, risks. Southern Indiana R. Co. v. Moore [Ind. App.] 72 N. E. 479. Instructions as to the assumption of particular risks must include the necessary causal relation between such danger or hazard and the accident causing the injury. Cobb Chocolate Co. v. Knudson, 207 Ill. 452, 69 N. E. 816. Entitled to instruction on defense that plaintiff had actual or implied knowledge of the location and condition of culvert in yards which caused his injury. Central of Georgia R. Co. v. Price [Ga.] 49 S. E. 683. Certain instructions held not prejudicial to defendant because not including assumption of open and obvious risks, though unknown. Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306.

43. Instructions on contributory negligence held not to improperly limit the jury as to the circumstances to be considered. Texas, etc., R. Co. v. Kelly [Tex. Civ. App.] 80 S. W. 1073. Charge on contributory negligence held broad enough to cover all circumstances attending the wrecking of a train by which engineer was injured. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038. Where the evidence did not show just how an employe got caught in a cotton seed conveyor, defendant was entitled to a specific charge on his theory of contributory negligence. Consumers' Cotton Oil Co. v. Gentry [Tex. Civ. App.] 80 S. W. 394. Error to instruct that contributory negligence will not be presumed where there was evidence of negligence of plaintiff. Newport News Pub. Co. v. Beaumeister, 102 Va. 677, 47 S. E. 821.

44. Where it appeared that a wire on a stock gap by which a brakeman was struck and killed might have been placed there voluntarily by a bridge foreman, the company was entitled to a charge on the fellow-servant rule. Northern Alabama R. Co. v. Mansell [Ala.] 36 So. 459.

45. Where it appeared without dispute that neither master nor servant knew of the alleged defect or the resulting danger, failure to instruct as to assumption of risk was harmless. Southern Indiana R. Co. v. Moore [Ind. App.] 71 N. E. 516.

46. An instruction said, in substance, that contributory negligence being matter of defense, plaintiff need not offer any evidence in chief as to his own negligence, but was required to meet that issue only after defendant had introduced some proof regarding it; and that thereafter it was plaintiff's right to offer evidence on that proposition. Held reversible error. Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661. Substantially same instruction held erroneous in Pittsburgh, etc., R. Co. v. Leightheiser [Ind. App.] 71 N. E. 218.

47. Instructions given upon a theory adopted at the trial will not be held erroneous on appeal, though the facts pleaded admit another theory. Blanchard-Hamilton Furniture Co. v. Colvin, 32 Ind. App. 395, 69 N. E. 1032. Where defendant denies liability and offers evidence that the injury alleged was the result of an accident, he is entitled to an instruction on that theory, even without a request therefor. Hilton & Dodge Lumber Co. v. Ingram, 119 Ga. 652, 46 S. E. 895. It is proper to insert in a requested instruction that plaintiff cannot recover if his injury was the result of an accident, a definition of the word "accident." Barnett & Record Co. v. Schlapka, 208 Ill. 426, 70 N. E. 343. Where the evidence was such that the jury was warranted in finding that the place where plaintiff was at work was unsafe, and that its unsafe condition was known or ought to have been known to the employe, and was unknown to plaintiff, and could not have been known to him by the exercise of ordinary care, an instruction should have been given covering the law governing such a case. Logsden v. Western Brick Co., 25 Ky. L. R. 2060, 79 S. W. 290. Where there was no evidence that defendant had knowledge of an alleged defect in a machine, the court should have so charged when requested so to do. Jones v. John Kroeder & Henry Reubel Co., 88 N. Y. S. 870.

48. Fisher v. Texas Tel. Co. [Tex. Civ. App.] 79 S. W. 50. If there is no evidence to show that one guilty of negligence was anything but a co-employe, it is error to so instruct the jury that they may find he was not a co-employe. Koszlowski v. American Locomotive Co., 96 App. Div. 40, 89 N. Y. S. 55. Instructions to find for plaintiff if not enough men were furnished to load car wheels, or if skids furnished were not safe, erroneously given, there being no evidence to support corresponding allegations Meily v. St. Louis, etc., R. Co. [Mo. App.] 81 S. W. 639. Where there was no evidence that any effort had been made to discover dangerous condition of mine roof, an instruction that defendant would not be liable if the danger could not have been discovered by exercise of reasonable care was properly refused. Tennessee Coal, Iron &

the weight of evidence,[49] and should not assume facts in issue.[50] They are sufficient if, construed as a whole, they properly present the law.[51] In actions based on statutes,[52] instructions may properly follow the statutory language.[53]

(§ 3H) 6. *Verdicts and findings.*[54]—In an action against a master and servant for joint and concurring negligence, there may be a recovery against the master alone,[55] and a verdict for the servant but against the master will not be set aside.[56]

§ 4. *Liability for injuries to third persons. A. In general.*[57]—A master is liable for the acts of his servant within the general scope of his employment, while about his master's business, though the act be negligent,[58] wanton, willful,[59]

R. Co. v. Garrett [Ala.] 37 So. 355. An instruction that contributory negligence would be no defense if plaintiff's position of peril was known, or by the exercise of ordinary care might have been known to the defendants, was error, when there was no evidence tending to show actual of implied knowledge by defendant's servants of plaintiff's peril. Illinois Cent. R. Co. v. Jones' Adm'r [Ky.] 80 S. W. 484. Held sufficient basis in evidence for instruction that if a railroad yard conductor, knowing a brakeman sent to flag a train had not done so, could have had it flagged in time to prevent injury to plaintiff, defendant would be liable. Southern R. Co. v. Oliver, 102 Va. 710, 47 S. E. 862.

49. Missouri, etc., R. Co. v. Stinson [Tex. Civ. App.] 78 S. W. 986.

50. Real question being whether a structure through which plaintiff's decedent fell was a scaffold or simply a covering for a skylight, it was error for the court to assume that it was a scaffold. Couger v. Wiggins, 208 Pa. 122, 57 A. 341. In an action for injuries resulting from the explosion of a tube during an experiment conducted on the defendant's premises by one neither an officer nor employe, an instruction assuming that such person was on the premises by invitation was proper. Cameron v. B. Roth Tool Co. [Mo. App.] 83 S. W. 279.

51. Instructions as a whole held to properly present law regarding master's duty. Merchants' & Miners' Transp. Co. v. Jackson, 120 Ga. 211, 47 S. E. 522. An instruction that it was the duty of the master to provide reasonably safe appliances is not erroneous on the ground that it is the master's duty only to exercise reasonable care to provide safe appliances, since though the rule be stated in either form, "the duty of the master in one case is not different from his duty in the other." Chicago, etc., R. Co. v. Tackett [Ind. App.] 71 N. E. 524. Instructions construed and held to require jury to find plaintiff free from contributory negligence, and not to assume that he was free from negligence. Missouri, etc., R. Co. v. Jones [Tex. Civ. App.] 80 S. W. 852. Instructions considered and held to present as the law that plaintiff's negligence would necessitate verdict for defendant. Chicago, etc., R. Co. v. Wicker [Ind. App.] 71 N. E. 223.

52. Where a common-law count for negligence is joined with a count based on liability under a statute, instructions as to negligence should be confined to the first count. Marquette Third Vein Coal Co. v. Dielie, 208 Ill. 116, 70 N. E. 17. Where an attempt was made to combine in a single count of a declaration a cause of action at common law for failure to provide a safe place to work, with a cause under an employer's liability law, it was error for the court, after instructing on the common-law ground of liability, to give a peremptory instruction for plaintiff on the statutory ground. Illinois Cent. R. Co. v. Abrams [Miss.] 36 So. 542. An instruction which may lead the jury to believe that the factory act has made no change in the common-law right of recovery for personal injuries is properly refused. Espenlaub v. Ellis [Ind. App.] 72 N. E. 527.

53. A charge in the language of the statute relative to properly guarding saws is proper. Espenlaub v. Ellis [Ind. App.] 72 N. E. 527.

54. See 2 Curr. L. 862.

55. Southern R. Co. v. Carson, 194 U. S. 136, 48 Law. Ed. 907.

56. Carson v. Southern R. Co. [S. C.] 46 S. E. 526.

57. See 2 Curr. L. 863.

58. When the servant has authority to do a given thing and in attempting to do it he does a wrong, the master is liable. Houston, etc., R. Co. v. Bowen [Tex. Civ. App.] 81 S. W. 80. Employe going from work on railroad tricycle was struck by engine being run to the water tank without orders, and at an unusual time. Held, company liable, since engineer's act, though without special authority, or in violation of orders, was in the line of his employment. Payne v. Missouri Pac. R. Co., 105 Mo. App. 155, 79 S. W. 719. Defendants liable for automobile accident, when machine was proved to have been under their control at the time, and their servant was sent with the operator to assist and instruct him in its operation. Parker v. Homan, 88 N. Y. S. 137.

59. Kessler v. Deutsch, 44 Misc. 209, 88 N. Y. S. 846. Gas company liable for trespass of its servant in breaking into a house to remove a meter. Reed v. New York & R. Gas Co., 93 App. Div. 453, 87 N. Y. S. 810. Defendant liable for acts of its watchmen, authorized to watch its property and search for and recover stolen property, in entering and going through plaintiff's house, acting brutally and frightening plaintiff, causing her to become sick. Lesch v. Great Northern R. Co. [Minn.] 101 N. W. 965. A landowner is liable to a trespasser for a reckless and wanton injury committed by a watchman of the property while engaged in protecting it. Magar v. Hammond, 95 App. Div. 249, 88 N. Y. S. 796. Owner of dray liable for injury to ten-year old boy who caught on and was made to fall off by be-

or malicious,[60] and this is so though the act complained of has been expressly forbidden by the master.[61] If an act be within the scope of the servant's employment, proof of antecedent authority or subsequent ratification is unnecessary.[62] He is not liable for unauthorized[63] acts outside the course or scope of the servant's employment,[64] even though the act be done with the intent to benefit and serve the master.[65]

ing struck at by driver, who was owner's servant. Hyman v. Tilton, 208 Pa. 641, 57 A. 1124. An engineer in care of railway torpedoes put one on the track and exploded it with his engine, solely for his own amusement, thus injuring a boy standing near. Held, company liable, the engineer being at the time in the conduct of the railroad's business. Euting v. Chicago, etc., R. Co. [Wis.] 98 N. W. 944.

60. Street railway company liable for malicious prosecution where its conductor wrongfully caused the arrest of a passenger. Dwyer v. St. Louis Transit Co. [Mo. App.] 83 S. W. 303.

61. The mode in which a servant performs the duty for which he is employed, if wrongful and willful and injurious to another, renders the master liable, though he has expressly forbidden the particular act. St. Louis Southwestern R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365. Defendant company liable for injuries caused to boy of 13 by negligence of its servant, placed in exclusive control and management of its pump house, the boy being on the dangerous premises by invitation or permission of the servant; and it was immaterial that the servant had been instructed to keep persons off the premises. Houston, etc., R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557. Authority from the master to servants to eject trespassers from the former's premises charges the master with liability for the act of the servant using excessive or inappropriate force, even though the use of such force is expressly prohibited. A declaration alleging an assault with a pistol (as a result of which the person assaulted died), in the execution of servant's duty, states a cause of action. Letts v. Hoboken R., Warehouse & S. S. Connecting Co., 70 N. J. Law, 358, 57 A. 392.

62. As where railroad special policeman shot a trespasser on a freight train. Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650.

63. A master is liable for the assault committed by his servant only if the servant was expressly or impliedly authorized to commit it. Collins v. Butler [N. Y.] 71 N. E. 746.

64. Healy v. Patterson, 123 Iowa, 73, 98 N. W. 576; Houston, etc., R. Co. v. Bowen [Tex. Civ. App.] 81 S. W. 80. Hotel servant accidentally or willfully discharged pistol, injuring boy who was guest, the servant being off duty at the time. Innkeeper not liable. Clancy v. Barker [C. C. A.] 131 F. 161. Assault by hotel waiter on guest is not within the scope or course of waiter's employment or duties. Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659. An assault by railway employes, sent to build a fence, on the servant of the owner of the premises sent to remonstrate, is an act outside the scope of their employment. Waaler v. Great Northern R. Co. [S. D.] 100 N. W. 1097. A janitor of a tenement house while driving away boys creating a disturbance in front of the building threw a stick at plaintiff's son, a mere onlooker, standing across the street, and injured him. Held, the act was not in the course of his employment. Kennedy v. White, 91 App. Div. 475, 86 N. Y. S. 852. Company not liable where teamster, unloading coal under purchaser's directions, injured purchaser's hand by negligently throwing coal upon it. Atherton v. Kansas City Coal & Coke Co. [Mo. App.] 81 S. W. 223. Defendant not liable for act of his collecting agent in assaulting plaintiff without provocation, when plaintiff came to amicably settle an account. Collette v. Rebori [Mo. App.] 82 S. W. 552. Company not liable for act of employes in charge of freight train carrying one injured in attempting to get off, to another station and leaving him there. St. Louis Southwestern R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365. Railroad company not liable for an assault and battery committed by its trainmaster on a person on the company's premises, the trainmaster's act being wholly outside the scope of his general authority. Central of Georgia R. Co. v. Morris [Ga.] 49 S. E. 606. Defendant's servant caused plaintiff to jump from a gangway to deck of barge, by mischievously giving a warning cry of danger. Master not liable. Mace v. Ashland Coal & Iron R. Co. [Ky.] 82 S. W. 612. Street railway company not liable for false arrest and imprisonment of a person by a conductor, though he was a special company officer, when the arrest was not on the company's premises. Cordner v. Boston, etc., R. Co., 72 N. H. 413, 57 A. 234. Where servant, employed for other purposes, voluntarily and without knowledge of the master or servant whose duty it was, undertook to operate a grain dump at an elevator, the master was not liable for an injury caused by his negligence. Healy v. Patterson, 123 Iowa, 73, 98 N. W. 576. Where truckmen sent to get a piano committed an assault, an instruction that defendants would be liable only if the acts of the truckmen were necessary in getting the piano was proper. Canton v. Grinnell [Mich.] 101 N. W. 811. Plaintiff, a trespasser, was struck by missile thrown by defendant's servant. Master not liable. Benton v. James Hill Mfg. Co. [R. I.] 58 A. 664. A master is liable for willful and deliberate wrongs committed by his servant only when they are done on his account or for his purpose. St. Louis Southwestern R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365. Even though a servant's act be done while he is engaged in the master's work, the master is not liable therefor, if the act is done solely for the independent, malicious or mischievous purpose of the servant, and is entirely disconnected from the accomplishment of the work of the master. Boy sprinkling lawn turned hose on

To render the master liable, the relation of master and servant must have existed at the time,[66] and in respect to the very transaction out of which the injury arose.[67] Authority at the time to control is the test by which the existence of the relation is to be determined.[68] If control is in the master and another jointly, the master is liable.[69]

Knowledge of a servant may[70] or may not[71] be imputable to the master so as to render him liable. Contributory negligence is no defense to a count in case for the willful and wanton acts of agents or servants of a corporation.[72] A master owes no duty to a trespasser to provide careful, competent and prudent servants.[73]

Damages.—For the willful tort of its servant a corporation may be liable in punitive damages.[74]

Joint liability.[75]—Master and servant are jointly liable for negligence of the servant while engaged in the master's business.[76] But such joint liability is sometimes limited to cases in which there was actual, not merely imputed, negligence of the master, concurring with negligence of the servant.[77]

horse which ran away. Father held not liable for resulting damage. Evers v. Krouse, 70 N. J. Law, 653, 58 A. 181. Flagman and brakeman who threw torpedo back and forth, and then left it on planking of a crossing where it was found by a boy, were acting outside the scope of their employment. Obertoni v. Boston, etc., R. Co. [Mass.] 71 N. E. 980.

65. Railway company not liable for act of cashier in local office in causing the arrest of and instituting prosecution against a person suspected of stealing money. Daniel v. Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. 816.

66. Evidence held not to show driver of coach by which plaintiff was struck and injured to be servant of defendant at the time. De Grazia v. Rudden, 88 N. Y. S. 397. One who used his own wagons and horses to haul beer bought by him from defendant to his customers, and to return to defendant empty boxes and bottles, was not defendant's servant. Bryson v. Philadelphia Brewing Co., 209 Pa. 40, 57 A. 1105. One employed by the Standard Oil Co. to sell and distribute oil to customers and paid by a commission according to the amount of his sales, is a servant or agent for whose negligence, in the course of his employment, the company is liable. Riggs v. Standard Oil Co., 130 F. 199. Under contract whereby a safe was to be moved up three floors in building by use of elevator at risk of owners of building, the janitor operating the elevator was the agent of the owners of the building and not of the contractor; hence the owners were liable for injury to contractor's servant caused by janitor's negligence. Thayer v. Checkley [C. C. A.] 127 F. 556.

An employer is not liable to third persons for the negligent acts of an independent contractor. One employed to paint a house for a lump sum, under no directions as to the manner of doing the work, was an independent contractor. Francis v. Johnson [Iowa] 101 N. W. 878. Contractor building a house left pile of sand in street unguarded. Owner of lot not liable to person injured by driving over it. Hoff v. Shockley, 122 Iowa, 720, 98 N. W. 573. Where employes of lumber company operated trains on sidetracks of a railway company, under general orders of the railway superintendent, the railway company was held not liable for negligent operation causing a collision, the operatives being the servants of the lumber company. Roganville Lumber Co. v. Gulf, etc., R. Co. [Tex. Civ. App.] 82 S. W. 816.

Note: An able monograph on "Master's Liability for Acts of a Third Person Assisting a Servant" by Prof. Floyd R. Mechem in 3 Mich. L. Rev. 198 analyzes the doctrine and points out how the cases may be referred either to a class wherein the master owes a duty and has himself been in default, or to a class wherein the default is that of one either directly made a servant or made so by sub-appointment expressly or impliedly authorized.

67. Where servant borrowed master's horse and wagon and was driving on his own account, master not liable for collision. Thurn v. Williams, 84 N. Y. S. 296.

68, 69. Garven v. Chicago, etc., R. Co., 100 Mo. App. 617, 75 S. W. 193.

70. Knowledge of a servant employed to drive a team of horses of the propensity of the horses to run away is imputable to the owner of the team. Lynch v. Kineth [Wash.] 78 P. 923.

71. Knowledge of an employe as to a dangerous condition is not knowledge of his employer, so as to make the latter liable for an injury resulting from such condition. Greeley Bros. Co. v. Zeithaml, 4 Ohio C. C. (N. S.) 25.

72. Southern R. Co. v. Yancy [Ala.] 37 So. 341.

73. Benton v. James Hill Mfg. Co. [R. I.] 58 A. 664.

74. Alleged willful disregard by engineer of signal to stop a train. Reeves v. Southern Ry. [S. C.] 46 S. E. 543.

75. See 2 Curr. L. 865.

76. Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. [Ind. App.] 72 N. E. 183.

77. Shaffer v. Union Brick Co., 128 F. 97; Gustafson v. Chicago, etc., R. Co., 128 F. 85; McIntyre v. Southern R. Co., 131 F. 985.

(§ 4) *B. Actions; pleading.*[78]—The complaint must show that the servant's act was authorized or was within the general scope of his employment.[79] A direct allegation that the servant was acting within the scope of his employment is unnecessary if the facts alleged are sufficient to show that he was so acting.[80] On the other hand such an allegation is unavailing if not supported by the facts alleged.[81] The defendant may be entitled to a bill of particulars.[82]

Evidence.[83]—*The burden* is upon a plaintiff to prove by a preponderance of evidence that the servant was acting within the general scope of his employment.[84] A count in trespass on the willful and wanton act of a corporation is not supported by evidence that the injury complained of was inflicted by servants, even though the acts were willful or wanton.[85]

Questions of law and fact.[86]—Whether the act alleged was within the scope of the servant's employment is a question of fact.[87]

Actions against master and servant jointly.—Under the Indiana statute an action to enforce the joint liability of master and servant may be brought in the county where either resides; and service may be made on the other in the county of his residence.[88] In an action against a master and servant jointly, the fact that no verdict was rendered for or against the servant,[89] or that a verdict was rendered for the servant,[90] will not invalidate a verdict against the master.

78. See 2 Curr. L. 865.

79. Action for assault by servant. Sekator v. Lannon [R. I.] 58 A. 456. Plaintiff struck by piece of iron thrown by defendant's servant; complaint held demurrable. Benton v. James Hill Mfg. Co. [R. I.] 58 A. 664.

80. Indianapolis & G. Rapid Transit Co. v. Derry [Ind. App.] 71 N. E. 912.

81. Allegation that servant of defendant attacked plaintiff in a public street. Letts v. Hoboken R. Warehouse & S. S. Connecting Co., 70 N. J. Law, 358, 57 A. 392. Action for assault. Waaler v. Great Northern R. Co. [S. D.] 100 N. W. 1097.

82. In an action for injuries caused by being struck by wagon, defendants were entitled to a bill of particulars, specifying which of its wagons and drivers was concerned, and describing the wagon and horse, and telling what injuries were permanent; but the rate of speed of the wagon, being matter of evidence, need not be pleaded. Lachenbruch v. Cushman, 87 N. Y. S. 476.

83. See 2 Curr. L. 865.

In an action against a railroad by one shot by its special police officer, after testimony that he was employed and paid by defendant company, his testimony that he held a commission from the state, and his commission, were admissible in evidence. Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650.

84. Defendant's servants charged with assault and battery while removing property bought on installment plan. Kessler v. Deutsch, 44 Misc. 209, 88 N. Y. S. 846. The burden is upon one seeking to hold a master liable for an alleged wrongful act of his servant to prove the act alleged was within the scope of the agent's authority. St. Louis Southwestern R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365. The mere fact that a signal torpedo was found on a railway crossing is not evidence that it came there through negligence of the company's servants, acting in the scope of their employment. Obertoni v. Boston & M. R. Co. [Mass.] 71 N. E. 980. The burden is upon plaintiff injured by the torpedo, to prove it came there through negligence of the defendant company or its servants while in the course of the company's business. Id.

85. Southern R. Co. v. Yancy [Ala.] 37 So. 341.

86. See 2 Curr. L. 865.

87. St. Louis Southwestern R. Co. v. Mayfield [Tex. Civ. App.] 79 S. W. 365. Whether an invitation to come upon premises was within scope of a servant's authority so that master would be liable for an injury to plaintiff while there. Foley v. Y. M. C. A., 90 N. Y. S. 406. Whether brakeman who shot a trespasser on a train was attempting to do his duty, and whether he had authority to eject trespassers. Houston, etc., R. Co. v. Bowen [Tex. Civ. App.] 81 S. W. 80. Where a special policeman who was employed and paid by a railroad company shot a trespasser on a train, and there was evidence that he also held a commission from the state, whether he was at the time of the shooting acting in his capacity as private or as public police officer was for the jury. Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650. There is a distinction between agents of corporations, such as conductors, who are vested with a discretion, and servants not so vested, as clerks. Collins v. Butler [N. Y.] 71 N. E. 746.

88. Under Burns' Ann. St. 1901, § 314, an action against a corporation and its employe may be maintained in the county where the employe resides, though the corporation has no agent in the county on whom service could be made. Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. [Ind. App.] 72 N. E. 183.

89. Under Burns' Ann. St. 1901, § 579, providing that judgment may be against defendants severally, if plaintiff would have been entitled to several judgments in several actions. Indiana Nitroglycerin & Tor-

§ 5. *Interference with relation by third person.*[91]—A civil action cannot, in general, be maintained for inducing a third person to break his contract.[92] A person is not liable for an act which he had a legal right to do, though it results in a servant's discharge.[93] But maliciously and willfully procuring the discharge of a servant gives a cause of action to the injured party for damages.[94] To constitute malice in such a case, actual ill will or hatred need not be shown; it is sufficient if the act was without legal justification.[95] Under a complaint charging a conspiracy to procure plaintiff's discharge, proof of the conspiracy was essential.[96]

One who knowingly and willfully entices away the servant of another, inducing him to violate his contract with his master, thereby depriving the master of the services of a person actually in his service, or bound by contract to render him service, is liable to the master for the actual loss which he sustains therefrom.[97]

§ 6. *Crimes and penalties.*[98]—The act of Congress abolishing and prohibit-

pedo Co. v. Lippineott Glass Co. [Ind. App.] 72 N. E. 183.

90. Where, in an action against a railroad company and its engineer for injuries, a verdict is rendered against the master and for the engineer, such verdict will not be set aside on the ground that since it found the engineer not guilty of negligenee, the master eannot be held liable. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53. See, also, Carson v. So. R. Co. [S. C.] 46 S. E. 525, under Verdict and findings, supra, where the action was by a servant.

91. See 2 Curr. L. 865.

92. Where the employe stated to defendants that he would not return to the service of plaintiffs, defendants were not liable for not releasing him, though they had been notified of his contract with plaintiffs. B. J. Wolf & Sons v. New Orleans Tailor-Made Pants Co., 113 La. 388, 37 So. 2.

93. A patron of a street railway company ineurs no liability to a conduetor by reporting misconduct of the latter, while on duty, to the superintendent, as a result of which the conductor is diseharged, regardless of the patron's motive in making the report. Lancaster v. Hamburger, 70 Ohio St. 156, 71 N. E. 289.

94. Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481. An agreement among employers to adopt a rule requiring employes to work a six days' notice before leaving the service, and to report to each other, and refuse to hire employes who had violated the rule is not an unlawful combination if not entered into malieiously; and the act of properly reporting an employe in accordance with the agreement would not constitute a tort. Willis v. Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177. But a party to such agreement will be liable for falsely and wrongfully reporting an employe. Id. Whether a company was justified in reporting an employe to other employers for violation of a eommon rule requiring six days' notiee before leaving the service, and whether the report caused plaintiff's failure to secure other employment, was for the jury. Id. General averments that defendant prevented plaintiff from obtaining employment, and caused his discharge from employment obtained, do not state a eause of aetion, because too indefinite and uneertain. Wabash R. Co. v. Young, 162 Ind. 102, 69 N. E. 1003. Allegations that defendant aeeused plaintiff of being a labor agitator, and that it blacklisted him, do not state a eause of action without allegations showing sueh conduct to be actionable as libelous, or that the charge was not true or was made maliciously. Id. To eharge one with being a labor agitator is not libelous per se. Id. Nor would a complaint eontaining such allegations ereate a common-law liability for malicious interferenee with plaintiff's oecupation. Id.

95. Where the aet was alleged to have been done "maliciously, willfully and unlawfully," allegations that it was done by eonspiracy and by false and fraudulent representations were unnecessary. Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481. The fact that plaintiff went on a strike and refused to make up time when in defendant's employ did not justify defendant in procuring plaintiff's diseharge from a subsequent employment by another employer. Id.

96. Instructions covering the several liability of defendants for false and malicious statements were not alone sufficient; instructions submitting the issue of a conspiracy were essential, though not requested. Hines v. Whitehead [Iowa] 99 N. W. 1064.

97. **Note:** Wood's Law of Master and Servant, 450; Jones v. Blocker, 43 Ga. 331; Hightower v. State, 72 Ga. 482; Dickson v. Dickson, 33 La. Ann. 1261; Walker v. Cronin, 107 Mass. 567; Bixby v. Dunlap, 56 N. H. 456, 22 Am. Rep. 475; Noice v. Brown, 39 N. J. Law, 569; Haskins v. Royster, 70 N. C. 601, 16 Am. Rep. 780; Daniel v. Swearengen, 6 S. C. 297, 24 Am. Rep. 471.

The action for enticing away a servant cannot be maintained unless it be shown that at the time of the enticement there existed an obligation on the part of the servant enticed to render service to the plaintiff. Peters v. Lord, 18 Conn. 337; Caughey v. Smith, 47 N. Y. 244; Butterfield v. Ashley, 2 Gray [Mass.] 256. It must also appear that the defendant knew of this obligation of the person enticed. Lee v. West, 47 Ga. 311; Morgan v. Smith, 77 N. C. 37; Butterfield v. Ashley, 2 Gray [Mass.] 254.—See note to Webber v. Barry [66 Mich. 127] 11 Am. St. Rep. 466.

98. See 2 Curr. L. 866.

ing peonage, and providing a punishment for violation of its provisions, is a valid exercise of the power conferred by the thirteenth amendment to the constitution.[99] The "condition of peonage" prohibited by the act of Congress is not a system of peonage only; but the condition of a citizen held by illegal means to involuntary servitude in order to extinguish a real or alleged debt to the person holding him.[1] Federal courts have jurisdiction of the crime of peonage as defined by the act of Congress, though state courts may have jurisdiction of the same crime under the name of kidnapping or false imprisonment.[2]

The Georgia statute providing that one who contracts for services with intent to obtain money or something of value, and not to perform the services, to the loss of the hirer, shall be deemed a common cheat and guilty of a misdemeanor, is constitutional.[3] The punishment provided is not imprisonment for debt, since it is not the failure to comply with the obligation, but the fraudulent intent with which it is undertaken, that is punished.[4] Besides alleging the procuring of advances with the fraudulent intent not to perform the services contracted for, an accusation under this statute must specifically allege what the advances consisted of.[5] That defendant was prevented by serious physical injuries from performing the services contracted for is a good defense.[6]

The North Carolina act, imposing a license tax upon persons engaged in the business of procuring laborers for employment outside the state and making it an indictable offense to engage in the business without paying the tax,[7] is a valid exercise of the taxing power, and is not a police regulation.[8] Since the tax imposed is annual, a conviction for engaging in the business without paying it is a bar to another prosecution in the current year.[9] The North Carolina act prohibiting the enticing or retaining from the service of another one who has contracted with him applies only where the servant has actually entered the service of the other, and not where he is only preparing to do so.[10]

An affidavit for breach of a service contract with a surety for a fine,[11] reciting a confessed judgment for a fine and costs, is not supported by a contract showing confession of judgment for costs alone.[12] Statutes prohibiting the employment of minors by "any person" apply to corporations as well as natural persons.[13] Hence where the acts of a corporation agent, within the scope of his general authority, amount to a violation of such a statute, the corporation is guilty of the offense, though the agent was acting contrary to specific instructions.[14] The

99. Act March 2, 1867, c. 187, § 1; 14 Stat. 546. United States v. McClellan, 127 F. 971.

1, 2. United States v. McClellan, 127 F. 971.

3. Acts 1903, p. 90. Lamar v. State, 120 Ga. 312, 47 S. E. 958.

4. Lamar v. State, 120 Ga. 312, 47 S. E. 958.

5. Campbell v. State [Ga.] 48 S. E. 920.

6. Hart v. State [Ga.] 48 S. E. 925.

7. An indictment charging that defendant "engaged in procuring" laborers sufficiently charges the offense [Pub. Laws 1903, p. 347, c. 247, § 74]. State v. Roberson, 136 N. C. 591, 48 S. E. 596; State v. Roberson, 136 N. C. 587, 48 S. E. 595.

8. Annual tax of $100 imposed by Pub. Laws 1903, p. 347, c. 247, § 74 is not excessive or prohibitive, in the absence of evidence as to the extent of the business or its profits. State v. Roberson, 136 N. C. 587, 48 S. E. 595. Hence the courts have no power to review the amount of the tax so imposed. Id.

9. State v. Roberson, 136 N. C. 591, 48 S. E. 596.

10. Code, §§ 3119, 3120. Sears v. Whitaker, 136 N. C. 37, 48 S. E. 517.

11. Affidavit held sufficient on general demurrer. McQueen v. State, 138 Ala. 63, 35 So. 39.

12. McQueen v. State, 138 Ala. 63, 35 So. 39.

13. So held under Mills' Ann. St. § 413, making the employment of children under 14 a misdemeanor punishable by a fine, or imprisonment if the fine be not paid. Overland Cotton Mill Co. v. People [Colo.] 75 P. 924.

14. Officer with power to employ hired child under 14 to work in mill, contrary to Mills' Ann. St. § 413. Overland Cotton Mill Co. v. People [Colo.] 75 P. 924.

agent by whose acts the offense is committed is himself guilty of the same offense.[15]

Decisions construing the Texas statute penalizing the act of a surety company causing an employe to lose a position by canceling his bond,[16] and the Kentucky act requiring payment of miners on certain days of the month,[17] are treated in the notes.

MASTERS AND COMMISSIONERS.[18]

§ 1. Office, Eligibility, Appointment, and Compensation (614).
§ 2. Proceedings for Reference (614).
§ 3. Proceedings on Reference and Hearing by Master (615).
§ 4. Report of Master, Exceptions, and Objections (615).
§ 5. Powers of Court and Proceedings on Review (615).
§ 6. Re-reference (615).

§ 1. *Office, eligibility, appointment, and compensation.*[19]—The report of the master should give an itemized statement of the services rendered and the statutory fees allowed therefor,[20] or, no statutory fees being allowed, if the chancellor fixes the compensation,[21] it should state the services rendered, the action of the court, whether such costs have been paid, and, if so, by whom.[22]

In Kentucky a court commissioner is not entitled to compensation unless he file a statement under oath showing the number of days he was employed,[23] and such affidavit, if not rebutted, is sufficient evidence to establish the time of employment.[24] A statute providing the compensation due commissioners in certain cases is exclusive.[25]

The fee must be proportionate to the services rendered.[26]

§ 2. *Proceedings for reference.*[27]—The master is a ministerial officer and the exercise of judicial power cannot be delegated to him,[28] hence, without the

15. Overland Cotton Mill Co. v. People [Colo.] 75 P. 924.

16. Under Acts 1897, p. 247, c. 165, §§ 8-10, an employer, through whom an employe is bonded by a surety company is not liable for the penalty unless he has done an act which, if done by the surety company, would have rendered it liable. Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635. Evidence held insufficient to show any act by the defendant car company which would render it liable under the law. Id.

17. Under Ky. St. 1903, § 2739a, subsec. 1, requiring mine operators to pay employes on the 15th and 30th of each month to within 15 days of those dates, and making failure or refusal to do so a misdemeanor, an indictment charging a violation of the statute on the 15th and 30th of a certain month does not charge two offenses. Commonwealth v. Reinecke Coal Min. Co., 25 Ky. L. R. 2027, 79 S. W. 287. An indictment under this act need not allege that the employe was present at the time his wages were payable, or that, if absent, he demanded them on his return. Id. Indictment held sufficiently specific. Id.

18. This article includes all matter relating to masters in chancery and court commissioners. Analogous matter may be found in titles Reference, 2 Curr. L. 1484; Restoring Instruments and Records (examiners of title under burnt record act), 2 Curr. L. 1520; Notice and Record of Title, 2 Curr. L. 1053 (referees under Torrens act).

19. See 2 Curr. L. 867.

20. A charge in a lump sum is improper. Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678; Karsten v. Winkelman, 209 Ill. 547, 71 N. E. 45. See 2 Curr. L. 867, n. 4.

21. In counties of the third class for examining questions of law and making reports. Karsten v. Winkelman, 209 Ill. 547, 71 N. E. 45.

22. Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678.

23. Ky. St. 1903, § 396. Fidelity Nat. Bank's Receiver v. Youtsey [Ky.] 81 S. W. 263.

24. Hely v. Fred Hoertz & Co. [Ky.] 82 S. W. 985.

25. Construing Ky. St. 1903, § 1740. Fidelity Nat. Bank's Receiver v. Youtsey [Ky.] 81 S. W. 263.

26. A charge of $125.20 by a master for taking testimony and reaching a conclusion in the case, held excessive, the amount in dispute being only $200. Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678. Court commissioner. $2,200 held ample compensation for taking care of $100,000 and taking testimony for 15 days. Fidelity Nat. Bank's Receiver v. Youtsey [Ky.] 81 S. W. 263.

27. See 2 Curr. L. 867.

28. In a suit for specific performance of a contract to convey, the determination of the amount to be deducted from the purchase price because of a defect in the title cannot be referred to a master. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097. See 2 Curr. L. 867, n. 7.

consent of the parties, the court cannot refer the entire decision of the case to him.[20] There being no assignee, a master commissioner may be appointed to take charge of books and uncollected claims and to attend to the collection of the latter.[30]

§ 3. *Proceedings on reference and hearing by master.*[31]—In Minnesota, court commissioners have and exercise the judicial power of a district court at chambers.[32] There being a doubt as to the relevancy or propriety of a question asked on cross-examination, the witness should be required to answer.[33]

§ 4. *Report of master, exceptions, and objections.*[34]—It is the duty of the master to find facts,[35] and his report should clearly and concisely state his conclusions of law and fact,[36] but he is not required to decide what decree shall be rendered thereon.[37] He not being required to report the evidence,[38] it is open to either party during the hearing before him to move in court that he be required to report the whole testimony, or any part of it,[39] but an application made subsequent to that time is never looked upon with favor.[40] In the absence of an exception the ruling[41] or finding[42] cannot be reviewed. Exceptions to the opinion of the master upon questions of law are unnecessary.[43] To be available the objection and exception must be specific.[44] Exceptions are to be confined to objections disallowed or overruled.[45] A master who, in disregard of court rules, files his report without giving a party an opportunity to file objections to it, the latter's remedy is to move to recommit.[46]

§ 5. *Powers of court and proceedings on review.*[47]—The conclusion of a master in chancery will not be disturbed unless clearly against the weight of the evidence.[48]

§ 6. *Re-reference.*[49]—Upon the reversal and remanding of a cause, the trial court has power to re-refer the cause to a master to take further testimony.[50]

MASTERS OF VESSELS, see latest topical index.

MECHANICS' LIENS.

§ 1. Nature of Lien and Right to It in General (616).

§ 2. Services, Materials, and Claims for Which Lien may be Had (617).

29. Garinger v. Palmer [C. C. A.] 126 F. 906. See 2 Curr. L. 867, n. 7.

30. He should not be appointed if a competent person will accept the position of receiver. Andrews v. Wilson's Assignees [Ky.] 82 S. W. 391.

31. See 2 Curr. L. 867.

32. They still retain the authority conferred upon them by Gen. St. 1894, § 5288, to authorize the issuance of writs of attachment, notwithstanding the enactment of Laws 1897, p. 576, c. 311, § 2. Clements v. Utley, 91 Minn. 352, 98 N. W. 188.

33. Whitehead & Hoag Co. v. O'Callahan, 130 F. 243.

34. See 2 Curr. L. 868.

35. Clark v. Seagraves [Mass.] 71 N. E. 813.

36. It is not proper practice for the master to present a treatise on the law, with citations of cases and quotations from reports. Steger v. Traveling Men's B. & L. Ass'n, 208 Ill. 236, 70 N. E. 236.

37. Clark v. Seagraves [Mass.] 71 N. E. 813.

38. Under a rule directing the master "to hear the parties and their evidence, and report his findings of fact and law to the court" he need not report the evidence. Moore v. Dick [Mass.] 72 N. E. 967.

39. Moore v. Dick [Mass.] 72 N. E. 967.

40. Where the losing party came in for the first time after the hearing was closed and the draft report was known. Moore v. Dick [Mass.] 72 N. E. 967.

41. Moore v. Rawson, 185 Mass. 264, 70 N. E. 64. Though party objected to evidence when admitted. In Massachusetts exception must be written. Hillier v. Farrell, 185 Mass. 434, 70 N. E. 424.

42. Hillier v. Farrell, 185 Mass. 434, 70 N. E. 424.

43. Williams v. Spitzer, 203 Ill. 505, 68 N. E. 49.

44. Holdroff v. Remlee, 105 Ill. App. 671.

45, 46. Hillier v. Farrell, 185 Mass. 434, 70 N. E. 424. Master's objection does not entitle the party to a consideration of unfiled objections. Id.

47. See 2 Curr. L. 868.

48. Assets Realization Co. v. Wightman, 105 Ill. App. 618.

49. See 2 Curr. L. 868.

50. Assets Realization Co. v. Wightman, 105 Ill. App. 618.

§ 3. Properties and Estates Therein Which may be Subjected to the Lien (618). Sale of Property (619). Homestead (620). Public Buildings (620).
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B. Parties (632).
C. Pleading, Practice, and Evidence (633).
D. Judgment, Costs, and Attorney's Fees (634).
E. Sale (634).
§ 11. Indemnification Against Liens (635).

Scope of title.—This article treats only of statutory mechanics' liens. The general principles governing liens in general are treated under the title Liens.[51] Specific liens are treated under the topics to which they relate.[52]

§ 1. *Nature of lien and right to it in general.*[53]—Lien proceedings are suits in rem against the land.[54]

A mechanic's lien is purely of statutory creation, and the statutory provisions in relation thereto must be substantially complied with.[55] It is generally held that such statutes are remedial in character and should be liberally construed,[56] at least in so far as they grant liens;[57] but persons claiming the benefit of the statute must bring themselves clearly within its purview as belonging to some class in whose favor the remedy is allowed.[58] Some courts require a strict compliance,[59] at least in so far as concerns the method by which such liens are claimed and enforced.[60]

Mechanic's lien laws are not unconstitutional as unreasonably interfering with liberty of contract or taking property without due process of law.[61]

51. See 2 Curr. L. 736; 4 Curr. L. 433.

52. See Attachment, 3 Curr. L. 353; Agency, 3 Curr. L. 68; Attorneys and Counselors, 3 Curr. L. 376; Auctions and Auctioneers, 3 Curr. L. 394; Brokers, 3 Curr. L. 535; Carriers, 3 Curr. L. 591; Chattel Mortgages, 3 Curr. L. 682; Executions, 3 Curr. L. 1397; Factors, 3 Curr. L. 1415; Inns, Restaurants and Lodging Houses, 4 Curr. L. 123; Judgments, 4 Curr. L. 287; Landlord and Tenant, 4 Curr. L. 389; Mortgages, 2 Curr. L. 905; Railroads, 2 Curr. L. 1382; Taxes, 2 Curr. L. 1786; Vendors and Purchasers, 2 Curr. L. 1976; Agisters' Liens (see Animals), 3 Curr. L. 159; Logging Liens (see Forestry and Timber), 3 Curr. L. 1468; Crop Liens (see Agriculture, 3 Curr. L. 137, and Landlord and Tenant, 4 Curr. L. 389); Maritime Liens (see Shipping and Water Traffic), 2 Curr. L. 1648.

53. See 2 Curr. L. 869.

54. Hunt v. Darling [R. I.] 59 A. 398.

55. Russell v. Hayner [C. C. A.] 130 F. 90; Campbell v. Wm. Cameron & Co. [Ind. T.] 82 S. W. 762; Knelly v. Horwath, 208 Pa. 487, 57 A. 957. There is no intendment in its favor, and it must show on its face that it is such a lien as the statute authorizes the claimant to file. Knelly v. Howarth, 208 Pa. 487, 57 A. 957.

56. Campbell v. Wm. Cameron & Co. [Ind. T.] 82 S. W. 762; Russell v. Hayner [C. C. A.] 130 F. 90. Cal. Code Civ. Proc. § 4. Notice filed. Continental B. & L. Ass'n v. Hutton, 144 Cal. 609, 78 P. 21. Lien statutes will be liberally construed to further their equity and efficacy, when it is clear that the lien has been honestly earned, and that the claimant is within their provisions. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581. When a lien has been lawfully acquired, the statute will be liberally construed for the purpose of its enforcement. Pitschke v. Pope [Colo. App.] 78 P. 1077.

57. Description in claim sufficient. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413.

58. Pitschke v. Pope [Colo. App.] 78 P. 1077.

59. Must show time for performance and if contract was oral that it was to be performed within a year. Richardson v. Central Lumber Co., 105 Ill. App. 358.

60. Western Iron Works v. Mont. Pulp & Paper Co. [Mont.] 77 P. 413.

61. Statutes giving a lien on the property as against the owner to subcontractors, laborers, and those furnishing materials to be used by the contractor in the execution of his contract with the owner [Ohio Rev. St. §§ 3184-3185a]. Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532, 48 Law. Ed.

Liens are sometimes given to the contractor by the contract itself.[62] They would ordinarily be equitable liens,[63] or possibly, in some cases, mortgages.[64] The description of the property in a contract giving a lien is sufficient if it can be identified therefrom.[65] Equity will correct a mutual mistake in the description,[66] notwithstanding the fact that the lien has been foreclosed and the property sold.[67] One purchasing the original judgment may maintain the suit.[68] The amount of the indebtedness[69] and the fact that costs and attorney's fees are secured by the lien, having been determined in the foreclosure suit, cannot be inquired into.[70] A provision in a contract for the erection of a house on a homestead providing for an attorney's fee in case of the foreclosure of a mechanic's lien given thereby is invalid.[71]

§ 2. *Services, materials, and claims for which liens may be had.*[72]—Material for which the lien is claimed must have actually been used in the construction of the building.[73]

A materialman is not entitled to a lien for money advanced to the contractor to purchase certain material in which the materialman did not deal,[74] nor for tools furnished the contractor with which to work on the building.[75] There can be no lien for materials furnished for sidewalks.[76] In Pennsylvania a lien is given for materials furnished for the construction of a substantial addition to a building.[77] Machinery for manufacturing purposes is covered by the New Jersey law.[78] To authorize a mechanic's lien for repairs to machinery, the repairs must be in the nature of fixtures and not small parts of a machine which are constantly wearing out and have to be replaced.[79] Under a statute giving a lien to anyone

778. The Federal court may exercise an independent judgment as to the validity of such laws under a state constitution, notwithstanding state courts have declared them unconstitutional in judgments rendered before the commencement of the suit in the federal court, but after the rights of the parties have been fixed by their contracts. Id.

62. Where a lien on a homestead is given by a contract purporting to be signed by the wife, the burden is on defendant to establish by a preponderance of the evidence that she did not sign it. Instruction erroneous. Moreno v. R. B. Spencer & Bro. [Tex. Civ. App.] 82 S. W. 1054. Contract for lien held not to give lien for attorney's fees. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

63. See Liens, 4 Curr. L. 433; 2 Curr. L. 736.

64. See Mortgages, 2 Curr. L. 905; Foreclosure of Mortgages, 3 Curr. L. 1438.

65. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

66. Silliman v. Taylor [Tex. Civ. App.] 80 S. W. 651.

67. Foreclosure will be set aside and new one ordered. Silliman v. Taylor [Tex. Civ. App.] 80 S. W. 651.

68, 69, 70. Silliman v. Taylor [Tex. Civ. App.] 80 S. W. 651.

71. Summerville v. King [Tex.] 84 S. W. 643. On rehearing. For former opinion see 83 S. W. 680.

72. See 2 Curr. L. 869.

73. Evidence sufficient to show that lumber went into house. Darlington Lumber Co. v. Harris [Mo. App.] 80 S. W. 688. Evidence sufficient to sustain finding that materials furnished went into defendant's building. Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184.

74, 75. Evans v. Lower [N. J. Eq.] 58 A. 294.

76. Bradley Co. v. Gaghan, 208 Pa. 511, 57 A. 985.

77. Act June 4, 1901 (P. L. 433) § 3. Dunbar v. Washington Foundry & Mach. Co. [Pa.] 59 A. 434. What is such an addition is a question of fact. Structure held "substantial addition" to foundry. Id.

78. Production and control of electric power by mechanical means and its adaptation for use on trolley system is "manufacturing purpose" within N. J. P. L. 1898, p. 538, § 8. Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. Law, 684, 58 A. 935.

Note: Possibly from a purely technical point of view the generating of electricity is not a manufacturing process, it is, to be more exact, a making available a form of energy which already exists. Yet it is the common expression, the sense of legislatures and the universal thought, that electricity is manufactured and it has been so held by most of the courts. Beggs v. Edison Elec. Illuminating Co., 96 Ala. 295, 38 Am. St. Rep. 94; Brush Elec. Mfg. Co. v. Wemple, 129 N. Y. 543, 14 L. R. A. 708. There are, however, decisions in two states where exemptions from taxation have been denied to electric light companies upon the ground that they were not included under the term "Corporations carrying on manufacturing within the state." Commonwealth v. Edison Elec. Co., 170 Pa. 231; Frederick Elec. Light Co. v. Frederick City, 84 Md. 599, 36 L. R. 130.

79. Under N. M. Comp. Laws 1897, § 2217. Not for roll shells, chucks, and arm bolts for use in mills, when they are attached by

improving a lot at the request of the owner, a contractor building a sewer under a contract with property owners along the street has a lien therefor.[80]

The expense of hauling certain machinery from the freight station is properly included in a claim for labor in erecting it at a power house.[81]

A superintendent is entitled to a lien for services rendered as such,[82] but not for services in traveling about to hasten deliveries of material ordered by the contractors.[83]

In some states persons doing work for or furnishing material to railroads are given a lien therefor.[84]

§ 3. *Properties and estates therein which may be subjected to the lien.*[85]—A mechanic's lien cannot ordinarily be imposed upon a building unless in connection with some estate or interest in the land on which it was erected.[86] By statutes in some states, however, the lien may be foreclosed upon the house alone, and the purchaser at the sale may remove it.[87] In such case a lien claimant has a right of action against one preventing the removal of improvements to which the lien attaches, by destroying the same.[88] The measure of damages is their reasonable value before their destruction, where it would not have been necessary to tear them down in order to remove them.[89]

Leasehold estates may be subject to mechanic's liens, since they are interests in lands.[90] Hence, any structure becoming a part of such estate is also subject to the liens, though it may be treated for other purposes as personalty.[91] The leasehold may be sold in the usual way, unless the lease forbids involuntary assignments.[92] The purchaser acquires only such estate as was held by the lessee, subject to the terms and conditions of the lease.[93]

The interest of a tenant in common is subject to a lien for repairs necessary to the preservation of the common property, where he knows that they are being

buyers, particularly where evidence does not show that they were to be used in any particular mill. Ripley v. Cochiti Gold Min. Co. [N. M.] 76 P. 285.

80. Cal. Code Civ. Proc. § 1191. Lien extends to construction of branch sewers. Williams, Belser & Co. v. Rowell [Cal.] 78 P. 725.

81. Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. Law, 684, 58 A. 935.

82. Colo. Sess. Laws 1899, p. 261, c. 118 (Mills' Ann. St. Rev. Supp. p. 769). Pitschke v. Pope [Colo. App.] 78 P. 1077.

83. Pitschke v. Pope [Colo. App.] 78 P. 1077. The burden is on one claiming a lien for work as superintendent to establish the amount earned by him in that capacity. Not entitled to lien where he cannot separate amount of time spent in superintendence from that spent at other work for which he was not entitled to lien. Id.

84. See Railroads, § 6, 2 Curr. L. 1407. See, also, Bagnell Timber Co. v. Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130; Eastern Tex. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 883. Washington Laws 1893, p. 32, c. 24, § 1, giving a lien for provisions furnished to any contractor on any railroad is void under Const. art. 2, § 19, because embracing more than one subject, not expressed in its title. Armour & Co. v. Western Const. Co. [Wash.] 78 P. 1106.

85. See 2 Curr. L. 871.

86. Leaver v. Kilmer [N. J. Err. & App.] 59 A. 643.

87. Texas Rev. St. 1895, arts. 3294, 3301, 3302. Summerville v. King [Tex.] 83 S. W. 680. Such improvements do not become a part of the realty as against the lienholder, but are treated as though made under a contract for removal. Husband and wife contracted for erection of house on community property, to be paid for out of community funds, and gave notes and mechanic's lien in payment. After his death contractor foreclosed and third person, by agreement with wife, paid notes and received conveyance of property. Held purchaser entitled to benefits of improvements, since they were personalty. Id.

88. Hammond v. Darlington [Mo. App.] 84 S. W. 446.

89. Tearing down and removing buildings from leased premises, for constructing which, under contract with the lessee, the plaintiff has acquired a lien. Instruction approved. Hammond v. Darlington [Mo. App.] 84 S. W. 446.

90. Subject to lien in so far as any structure erected thereon by lessee enhances its value or otherwise benefits estate [W. Va. Code 1899, c. 75, § 3]. Showalter v. Lowndes [W. Va.] 49 S. E. 448. For improvements made thereon by the lessee. Reed v. Estes [Tenn.] 80 S. W. 1086.

91. Oil-well derrick. Showalter v. Lowndes [W. Va.] 49 S. E. 448.

92. Stipulation that premises shall be used as saloon and that lessee will not underlet does not prevent sale. Reed v. Estes [Tenn.] 80 S. W. 1086.

93. Reed v. Estes [Tenn.] 80 S. W. 1086.

made, assents to and approves of them, and induces the contractor to enter into the contract with his co-tenant therefor, even though he is not in terms a party to such contract.[94]

Whether mechanics' liens attach to the separate property of married women depends upon the married women's acts of the various states.[95]

The amount of land on which a lien may be claimed is regulated by statute.[96] Parties contracting for a builder's lien will be deemed to have used the words in their statutory sense as including the land.[97]

The lien can be preserved only as to the particular house or houses to which the material delivered within the statutory period goes, and not to the entire property embraced within the contract.[98] Among several lots, parts of one block, a claimant may apportion without having made his deliveries separately to each lot,[99] but between separate blocks, separated by public streets, no apportionment can be good except that which is made in fact at the time of delivery.[1] A subcontractor for the erection of two houses, who has fully performed his contract, is entitled to a lien for the amount remaining due thereunder as against the owners, without regard to the fact that subcontractors under him did work and furnished material for both houses under joint contract indiscriminately, without keeping a separate account as to each.[2] A single lien may cover no more than a single building, except where two or more buildings are joined together and owned by the same person.[3]

Sale of property.—A sale of the property pending the performance of the

94. Tom Sweeney Hardware Co. v. Gardner [S. D.] 99 N. W. 1105.

95. In Florida lien statutes are not applicable. MacFarlane v. Southern Lumber & Supply Co. [Fla.] 36 So. 1029. Equity will not charge her estate for materials used in constructing buildings on her separate property, where they were not furnished to her or her agent, but to a contractor, who was fully paid under his contract before a claim was asserted against her or her property, and neither she nor her husband, who made the contract for the erection of the building ordered the material, or in any way made her liable therefor. Id.

In Kentucky a married woman has the same power to create liens on her property for the improvement thereof as though she were unmarried. Ky. St. 1903, § 2128 repealed that part of § 2479 requiring written contract signed by her before lien would attach. Jefferson v. Hopson Bros. [Ky.] 84 S. W. 540. Hence, where the husband transfers the property to the wife after making a contract for improvements, the question of his fraudulent intent is immaterial. Id.

New York. Knowledge on the part of a wife that materials furnished her husband were used in the construction of buildings on land owned by her makes them subject to a mechanic's lien therefor. Evidence held to show knowledge. Hurd v. Wing, 86 N. Y. S. 907. A materialman's right to file a lien against property owned by wife for materials furnished her husband for use in buildings erected thereon is a liability of the wife, giving her an interest in having the indebtedness paid, so as to support an agreement on the part of her grantee under a warranty deed to pay it. Husband conveyed to wife while supplies were being furnished, and both afterwards conveyed to grantee. Id. Materialman may enforce such agreement though the period for filing a lien has expired without his doing so. Id. Plaintiffs held entitled under pleadings to show that, while lumber was sold and delivered under contract with husband, some of it was used after wife became owner of property. Id.

96. In Idaho the land upon which the building is situated, with a convenient space about the same, or so much as may be necessary for its convenient use and occupation [Idaho Sess. Laws 1899, p. 148, § 4]. Robertson v. Moore [Idaho] 77 P. 218. The amount so necessary must be determined by the trial court. Error not to do so. Id.

97. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

98, 99, 1. Bradley Co. v. Gaghan, 208 Pa. 511, 57 A. 985. Claimant may not apportion among a number of blocks the amount of his charge against a whole operation, but the charge against each block must be in exact accord with the materials furnished to it. Id.

2. Smith v. Wilcox, 44 Or. 323, 75 P. 710. Being within the scope and authority of the original contract, the consideration agreed upon between the original contractor and the subcontractor will be deemed to have been reasonable, and the latter has his lien to the extent of such agreed consideration. Id. The subcontractor may make application of payments made by the original contractor to his subcontractors, materialmen, and employes to the contract for each house as he sees fit, where the original contractor makes no such application. Id.

3. Dist. Col. Code §§ 1237-1264, construed. Alfred Richards Brick Co. v. Trott, 23 App. D. C. 284.

work will not deprive the contractor of his lien for work and material already furnished, whether he completes the contract or not, if failure in that regard is without fault on his part.[4] An offer to perform is equivalent to performance as regards the preservation of his lien.[5] A conveyance before the completion of the building, made for the purpose of defrauding the grantor's creditors, does not defeat liens, unless the vendee is a bona fide purchaser, without knowledge of the fraud.[6] A subsisting right of lien is not rendered unenforceable by the conveyance of the property to a corporation for railroad purposes, even though no lien is given on buildings belonging to railroads which are essential to the operation of the road.[7]

Homestead.—In Texas where the owner of a homestead is the head of a family, neither the contractor nor those claiming under him can acquire a lien thereon, unless the contract for the improvements is signed by the wife and privately acknowledged by her.[8]

Public buildings.[9]—Mechanic's lien statutes do not extend to public buildings in the absence of an express provision to that effect.[10]

Liens given laborers and materialmen on contracts for public works and improvements are treated elsewhere.[11]

§ 4. *The contract supporting the lien and the privity of the landowner thereto. A. In general.*[12]—The basis of a materialman's or laborer's lien for improvements on land is the contract between the contractor and the landowner.[13] Where the written contract is void, the contractor may establish a lien by showing a new contract,[14] or, in its absence, by showing the reasonable value of the labor and materials which went into the house.[15]

No lien will be allowed where the contract provides for certain payments as the work progresses and the balance upon completion, but fixes no time for such completion.[16] Neither the contract price, nor the precise details of the work, need be fixed in advance,[17] but it is sufficient as to work and material alleged to have been furnished under one contract to show that it was in fact so furnished.[18] Where one accepts material furnished for making improvements in property belonging to him, the law implies a promise to pay for it so as to entitle the materialman to a lien therefor.[19]

4, 5. Hutchins v. Bautch [Wis.] 101 N. W. 671.

6. Evidence held to show that conveyance was fraudulent and that vendee was not bona fide purchaser. Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. S. 689.

7. Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. Law, 684, 58 A. 935.

8. Tex. Rev. St. 1895, art. 3304. Muller v. McLaughlin [Tex. Civ. App.] 84 S. W. 687.

9. See 2 Curr. L. 871.

10. Me. Rev. St. 1883, c. 91, § 30 et seq., giving liens in certain cases on "a house, building or appurtenances," does not apply to a Carnegie library. A. L. & E. F. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581. Lien does not attach to buildings held by trustees of academy for educational purposes. Neal-Millard Co. v. Trustees of Chatham Academy [Ga.] 48 S. E. 978. No lien for boring well for city. Albany v. Lynch, 119 Ga. 491, 46 S. E. 622.

11. See Public Contracts, § 6E, 2 Curr. L. 1295; Public Works and Improvements, § 5, 2 Curr. L. 1339.

12. See 2 Curr. L. 872.

13. Mo. Rev. St. 1899, § 4203. Hengstenberg v. Hoyt [Mo. App.] 83 S. W. 539.

14. Made on Sunday. Sherry v. Madler [Wis.] 101 N. W. 1095.

15. Sherry v. Madler [Wis.] 101 N. W. 1095.

16. Blanks for time of completion in printed form not filled in. Bolter v. Kozlowski, 211 Ill. 79, 71 N. E. 858. Conversation between owner and contractor held not to constitute contract to complete work at certain time. Id. Defendant held not precluded on hearing of exceptions to master's report from objecting to contract because of fraudulent alterations made after it left master's hands, because made no objection thereto before the master. Id.

17. Hutchins v. Bautch [Wis.] 101 N. W. 671. In Wisconsin it is not essential that the terms of the contract be so precise that the amount agreed to be paid for work and material furnished thereunder can be definitely determined therefrom [Rev. St. 1898, c. 143]. Id.

18. Hutchins v. Bautch [Wis.] 101 N. W. 671.

19. Jefferson v. Hopson Bros. [Ky.] 84 S. W. 540.

The contract must be substantially complied with.[20]

The fact that an individual executes a contract under a firm name contrary to law does not deprive him of his lien.[21] Contractors completing a building after the death of the owner, for the construction of which no enforceable contract existed, are not entitled to a lien.[22]

In New Jersey, a building is not subject to lien for a debt owing for work or materials used in repairing or altering it, unless the owner contracted the debt, or consented in writing to its being contracted by some other person.[23]

(§ 4) *B. Contracts by vendors, purchasers, lessors, and lessees.*[24]—The title of the owner of land cannot be encumbered with a lien unless he expressly or implicdly consents thereto.[25] Thus, land cannot be subjected to a lien for materials furnished to be used in altering and repairing a building under a contract with the lessee, where the owner did not consent to the improvements.[26] As a general rule his consent thereto must be affirmative,[27] mere knowledge and acquiescence being insufficient.[28] This rule has been changed by statute in some states.[29] In some states the lien is confined to cases where the contractor has a special contract with the owner or his agent.[30]

A vendee in possession of real estate under a conditional contract of sale cannot defeat or cloud the vendor's title by suffering a mechanic's lien to be filed against the property for repairs to buildings situate upon it,[31] particularly where the contract is of record.[32] The person making the repairs cannot enforce his lien, as against the holder of the legal title, after forfeiture of the contract.[33]

20. A substantial compliance is sufficient, especially where the amount required to complete the building is trifling, and the contractor offers to complete any incomplete work and to make slight repairs or corrections. Windham v. Independent Tel. Co., 35 Wash. 166, 76 P. 936. Failure to substantially comply with the terms of the contract prevents recovery. Sherry v. Madler [Wis.] 101 N. W. 1095. Evidence held to sustain finding of damages due to poor material and workmanship in excess of amount due on contract. Fletcher v. Sandusky [Ky.] 83 S. W. 644. Evidence in action by one furnishing materials to subcontractor held insufficient to support finding as to value of work remaining uncompleted when work was abandoned by subcontractor. Miller v. Norcross, 92 App. Div. 352, 87 N. Y. S. 56. Evidence sufficient to sustain finding that the owner forcibly ejected plaintiffs from the work before the completion of the contract. Cochran v. Yoho, 34 Wash. 238, 75 P. 815.

21. Individual cannot take contract under firm name [N. Y. Pen. Code, § 363]. Vandegrift v. Bertron, 83 App. Div. 548, 82 N. Y. S. 153.

22. Probate court has no authority to direct administrator to borrow money to complete building, and to execute trust deed therefor. Person furnishing money subrogated only to rights of contractors, and as they had no right to lien, he acquired none. Waldermeyer v. Loebig [Mo.] 81 S. W. 904.

23. N. J. P. L. 1898, p. 541, c. 226, § 10. No lien where owner contracted verbally with builder, who contracted in writing with plaintiff. Murphy v. Hussa, 70 N. J. Law, 381, 57 A. 388.

24. See 2 Curr. L. 873.

25, 26. Reppard, Snedeker & Co. v. Morrison, 120 Ga. 28, 47 S. E. 554.

27, 28. Eichler v. Warner, 91 N. Y. S. 793.

29. In New Mexico where the owner of property acquires knowledge that materials are being furnished and repairs made on a house situated thereon, under contract with the lessee, he must, within three days, post a notice on the property stating that he will not be responsible for the same [Comp. Laws 1897, § 2226]. Pearce v. Albright [N. M.] 76 P. 286. Where the materials and labor are furnished at the instance of the lessee, it is error to order that execution issue against the owner for any deficiency in the absence of a showing of personal liability on his part. Id.

30. **Tennessee** [Shannon's Code, § 3531]. Reed v. Estes [Tenn.] 80 S. W. 1086.

31. Contract of purchase and title bond. Rusche v. Pittman [Ind. App.] 72 N. E. 473, rvg. former opinion, Rusche v. Pittman [Ind. App.] 70 N. E. 382. Under the Alaska statute it must be alleged and proved that the work or labor was done at the instance of the owner of the building or his agent [Civ. Code Alaska, § 262 (31 Stat. at L. 534, c. 786] (Russell v. Hayner [C. C. A.] 130 F. 90), or that the owner had knowledge of its construction (Id.). § 265 provides that when constructed with owner's knowledge it shall be held to have been constructed at his instance. Id. It is not sufficient to allege that it was done at the instance of one in possession of the land under a contract of purchase with the owner, in the absence of an allegation that the owner had knowledge of the contract. Id.

32. One furnishing labor and materials to a vendee in possession under a conditional contract of sale theretofore recorded is not entitled to enforce his lien against the vendor

A lien for work performed in making improvements on property, which a vendee or tenant agrees to make, becomes superior to the vendor's or landlord's rights only when the contract contemplates that such improvements are to be ultimately for the benefit of the landlord or will enhance and benefit the security of the vendor,[34] or when the vendor or landlord, by affirmatively engaging in or encouraging the improvement, has misled the mechanic so that it would be inequitable to allow him to change his position.[35] There must be an affirmative consent on the part of the vendor, mere acquiescence being insufficient.[36]

A purchaser who, with knowledge of all the facts, consents to performance of work upon a building, thereby subjects himself to liability therefor.[37] An assignee of a leasehold interest in realty upon which a building is being completed is put upon inquiry and bound to take notice that statutory liens may be asserted and enforced thereon for materials and labor furnished in its construction.[38]

(§ 4) *C. Subcontractors and materialmen.*[39]—A subcontract is one made under a previous contract,[40] and a subcontractor is one who takes a portion of the contract from the principal contractor.[41] Where the principal contractor is released from his contract by the owner, who assumes liability for all labor and materials furnished and proceeds to complete the building, a materialman furnishing material used therein, under a contract with the original contractor, is entitled to a lien as principal contractor with the owner.[42]

In the absence of conflicting claims between the person performing the labor and the person causing it to be performed, the latter has a lien for the labor so furnished.[43] No privity or knowledge on the part of the owner is necessary to give a subcontractor a lien for materials furnished to the principal contractor.[44]

When a subcontractor knows that a building contract contains a provision that no subcontractor shall file any lien, the mere acceptance of such employment will bar him from asserting a lien in opposition thereto.[45]

on forfeiture of the contract for failure to comply with its terms [2 Ball. Ann. Codes & St. Wash. § 5901, construed]. Northwest Bridge Co. v. Tacoma Shipbuilding Co. [Wash.] 78 P. 996.

33. Does not come within Burns' Ann. St. Ind. 1901, § 7256, whereby lien subsists against buildings in case of forfeiture of lease or foreclosure of mortgage. Rusche v. Pittman [Ind. App.] 72 N. E. 473, rvg. former opinion, 70 N. E. 382.

34. Bernard v. Adjoran, 43 Misc. 276, 88 N. Y. S. 859.

35. Contract held not to show intent that work on hotel should begin at once. Bernard v. Adjoran, 43 Misc. 276, 88 N. Y. S. 859.

36. Where owner contracted for sale and payment within 60 days, giving immediate possession, and contract provided that vendee should erect a hotel thereon, held contract was not consent on part of vendor that work should begin at once, so as to give contractor commencing foundation on lot a lien as against him on default of vendees. Bernard v. Adjoran, 43 Misc. 276, 88 N. Y. S. 859.

37. Evidence held to show knowledge. Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. S. 689.

38. Lessee can convey no interest superior to his own. Hammond v. Darlington [Mo. App.] 84 S. W. 446.

39. See 2 Curr. L. 874.

40, 41. Ryndak v. Seawell, 13 Okl. 737, 76 P. 170. A materialman entering into a contract with a contractor to furnish materials for a building which the latter has agreed to build, having knowledge of the principal contract and contracting with relation thereto, on the understanding that the material is to be used in such building, thereby becomes a subcontractor within the meaning of the lien law, and is entitled to a lien for materials actually used in such building. Id. In Indian Territory all persons furnishing the materials or doing the work provided for by the lien statutes are deemed subcontractors, unless they have contracts therefor directly with the owner or proprietor, or his agent or trustee [Mansf. Dig. § 4422; Ind. T. Ann. St. 1899, § 2889]. Materialman furnishing lumber to contractor without arrangement with other person held subcontractor. Campbell & Williams v. William Cameron & Co. [Ind. T.] 82 S. W. 762.

42. Okl. Civ. Code 1903, § 620. Ryndak v. Seawell, 13 Okl. 737, 76 P. 170.

43. Under N. J. P. L. 1898, p. 538, subcontractor may have lien for labor furnished by its agents or employes. Bates Mach. Co. v. Trenton & N. B. R. Co., 70 N. J. Law, 684, 58 A. 935.

44. Wilson's Okl. St. 1903, c. 66, § 4819. Complaint need not allege it. Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184.

45. Bates Mach. Co. v. Trenton N. B. R. Co., 70 N. J. Law, 684, 58 A. 935.

§ 5. *Acts and proceedings necessary to acquire lien. A. Notice and demand, statement of claim and affidavit.*[46]—A notice, statement of claim or affidavit is usually required to be filed.[47] It must substantially comply with all the requirements of the statute,[48] and must be sufficient in itself without reference to extrinsic proof.[49]

Its contents are prescribed by statute, but it must generally contain some statement of the contract,[50] the amount claimed, the names of the owner, contractor and claimant,[51] and a correct description of the property,[52] and must be verified.[53] Any description of the property which will enable one acquainted with the locality to identify it is sufficient.[54] The fact that the land described exceeds the amount on which the statute allows a lien is immaterial.[55] In the absence of fraud the fact that the statement claims larger amount than is found by the court to be due does not invalidate the lien,[56] nor does the inclusion in the account of some items which did not go into the building affect the validity of the lien for the other items, where they are small and easily separated.[57] Where a subcontractor claiming a lien for work, labor and materials is only entitled to a lien for materials, not the subject of a separate book account, the fact that the lien claimed was for the full contract price does not prevent its amendment so as to set up the reasonable value of such materials.[58] A claim good in part will be held wholly bad if it cannot be determined, or is not shown, what part is valid.[59]

46. See 2 Curr. L. 875.

47. Armstrong v. Chisholm, 99 App. Div. 465, 91 N. Y. S. 693.

48. Russell v. Hayner [C. C. A.] 130 F. 90; Armstrong v. Chisholm, 99 App. Div. 465, 91 N. Y. S. 693. Notices held sufficient. Windham v. Independent Tel. Co., 35 Wash. 166, 76 P. 936. Statement. Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184.

49. Armstrong v. Chisholm, 99 App. Div. 465, 91 N. Y. S. 693.

50. Wis. Rev. 1898, §§ 3320-3322. Sherry v. Madler [Wis.] 101 N. W. 1095. Notice must contain a statement of the terms, time given, and conditions of plaintiff's contract. Notice sufficient. Pearce v. Albright [N. M.] 76 P. 286.

51. Statement sufficient [Wilson's St. Okl. 1903, c. 66, § 4819]. Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184. Notice sufficient [Idaho Sess. Laws 1899, p. 148, § 6]. Robertson v. Moore [Idaho] 77 P. 218. Civ. Code Alaska, § 266 (31 St. 534, c. 786) requires notice to state name of owner, or reputed owner if known. Russell v. Hayner [C. C. A.] 130 F. 90. If unknown, that fact must be stated and the name of the reputed owner given. Id. These facts should be stated in a direct, clear and positive manner, independently of the description of the property. Id.

52. Robertson v. Moore [Idaho] 77 P. 218; Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184. Mont. Code Civ. Proc. § 2131. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413. Affidavit under 2 Sayles' Civ. St. 1897, art. 3339b. Merchants' & Planters' Bank v. Hollis [Tex. Civ. App.] 84 S. W. 269.

53. Robertson v. Moore [Idaho] 77 P. 218; Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184. The failure of the deputy clerk of court, before whom the statement was verified, to attach thereto an impression of his seal, does not invalidate it. Wheelock v. Hull [Iowa] 100 N. W. 863. In Texas, affidavit must be made on affiant's knowledge. 2 Sayles' Civ. St. 1897, art. 3339b. Insufficient where made to best of his knowledge and belief. Merchants' & Planters' Bank v. Hollis [Tex. Civ. App.] 84 S. W. 269.

54. Description sufficient [Mont. Code Civ. Proc. § 2131]. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413; Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184. The property to be identified is the building or structure upon which the lien is given. Mont. Code Civ. Proc. §§ 2130, 2131, 2133, construed. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413.

55. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413. Where the lien is asked on a platted lot in an incorporated city, which is definitely described, and contains slightly more than such amount. Darlington Lumber Co. v. Harris [Mo. App.] 80 S. W. 688. The amount and specific description of the property against which the lien should be adjudged is a matter to be tried and determined by the court. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413.

56. Alabama & G. Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618. Notice of lien filed, which correctly states whole amount due but is inaccurate in stating that whole amount was due on original contract where some of materials were furnished under later orders, is valid as to amount of materials actually furnished under original contract. Continental Bldg. & Loan Ass'n v. Hutton, 144 Cal. 609, 78 P. 21.

57. Ulrich v. Osborn [Mo. App.] 81 S. W. 228.

58. Murphy v. Guisti [R. I.] 58 A. 952.

59. As where claimant fails to show what part of the materials went for sidewalks and what part for other purposes. Bradley v. Gaghan, 208 Pa. 511, 57 A. 985.

Items beyond the dates included in the notice cannot be proved as part of the plaintiff's lien claim.[60] A notice is not defective because claimant's Christian name is designated by initials instead of being written out in full.[61]

The wording of the statute need not be followed where it does not purport to prescribe a form of statement.[62] A notice which follows the full language of the statute, and thereby renders it impossible to determine whether the claim is for labor or material already performed or furnished or to be performed or furnished,[63] whether performed or furnished as a contractor or otherwise,[64] or whether the amount claimed was the agreed price or the value, is insufficient.[65]

Two separate and distinct buildings or groups of buildings cannot be treated as one and the same building for the purpose of the statutory notice of lien, where rights other than those of the principal contractor are affected.[66] Where the claim states that the materials were furnished and the work done at the request of an agent, it must show his authority.[67] In Pennsylvania the claimant must set forth a copy of his contract, if in writing, or a statement of the terms and conditions thereof, if any of them are verbal.[68] Where the specifications are expressly made a part of the contract, or are referred to as a part of it, they must be filed with it, in so far as they apply to the work for which the lien is claimed.[69] Building plans need not be filed.[70]

An account is required to be attached to the notice in some states.[71]

Service of notice on owner.[72]—Persons claiming a lien are in many states required to give a notice to that effect to the owner,[73] within a certain time after

60. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

61. Pearce v. Albright [N. M.] 76 P. 286.

62. Under Alabama Code, § 2727, requiring filing of statement containing a just and true account of the demand, the omission of the words "after all the just credits have been given," contained in such section, does not render the lien invalid. Alabama & G. Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618.

63. Notice stating "the labor performed or to be performed, and the materials furnished or to be furnished" etc., is insufficient. Armstrong v. Chisholm, 99 App. Div. 465, 91 N. Y. S. 693. Defect not cured by subsequent statement that amount unpaid "for labor and materials" is a fixed sum. Armstrong v. Chisholm, 99 App. Div. 465, 91 N. Y. S. 693; Ryan v. Train, 95 App. Div. 73, 88 N. Y. S. 441; Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. S. 689.

64. Ryan v. Train, 95 App. Div. 73, 88 N. Y. S. 441; Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. S. 689.

65. Ryan v. Train, 95 App. Div. 73, 88 N. Y. S. 441; Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. S. 689.

66. Dist. Col. Code, §§ 1237-1264 construed. Richards Brick Co. v. Trott, 23 App. D. C. 284.

67. 2 Ball. Ann. Codes & St. Wash. § 5900 construed. Northwest Bridge Co. v. Tacoma Shipbuilding Co. [Wash.] 78 P. 996.

68. Act June 4, 1901 (P. L. 436). Knelly v. Horwath, 208 Pa. 487, 57 A. 957.

69. Lien could not be sustained where specifications not filed, though he filed bill for materials sold and work done in order to support claim for extra work, and annexed it to lien, there being no statement of the terms and conditions under which they were furnished, and only a few items being subject to the lien. Knelly v. Horwath, 208 Pa. 487, 57 A. 957.

70. Knelly v. Horwath, 208 Pa. 487, 57 A. 957.

71. Maroni v. Junty [R. I.] 58 A. 450. Where account has no heading and nothing to show from whom it is due, the notice is insufficient. Id. Second notice held not to relate to same delivery of materials as first one. Id. Account for sand furnished held sufficient. Jose v. Hoyt [Mo. App.] 81 S. W. 468.

72. See 2 Curr. L. 875, n. 98 et seq.

73. **Oklahoma:** Evidence sufficient to sustain finding that notice of filing lien was given to owner as required by Civ. Code 1903, § 621. Ryndak v. Seawell, 13 Okl. 737, 76 P. 170.

In Indian Territory a materialman must, at or before the time he furnishes the material, give notice to the owner of his intention to claim a lien [Mansf. Dig. § 4403; Ind. T. Ann. St. 1899, § 2870]. Campbell v. Cameron & Co. [Ind. T.] 82 S. W. 762. After serving such notice he must procure a written settlement of his account certified by the contractor, serve the same on the owner, and file a copy thereof with the clerk of court [Mansf. Dig. § 4403]. Id. In case the contractor refuses to make and sign the settlement, the subcontractor may make it himself. Cannot do so unless attempt to procure contractor to do so is shown [Mansf. Dig. § 4404]. Id. In case he does not serve the notice but complies with the provisions in regard to the account, he acquires a lien only to the extent that the owner can safely withhold any amount owing the subcontractor [Mansf. Dig. § 4421; Ind. T. Ann. St. 1899, § 2888]. Id.

In Wisconsin the notice must be served on

the performance of the labor, or the furnishing of the material.[74] In some states no notice is necessary where the lien is claimed by the principal contractor.[75]

In New Jersey no liens can be filed against a building if a copy of the contract between the owner and the contractor is filed with the city clerk, but materialmen and laborers may obtain a lien on funds in the owner's hands belonging to the contractor by serving him with a stop notice.[76] In order to entitle one to a lien for work under this statute he must be a laborer or journeyman employed by the contractor.[77] A materialman is one who simply furnishes to the building, or for use therein, material which some one else is to incorporate into it by his labor.[78] A demand must be made upon the contractor prior to the serving of notice on the owner.[79] It may be made by the claimant in person, or by his duly authorized agent or attorney.[80] In the case of a materialman the notice must show that the claimant has furnished materials which have been used in the building,[81] that an amount of money is due him on account thereof,[82] and that payment has been refused.[83] The cases do not appear to be in harmony on the question whether it must specifically state that a demand has been made.[84] The signature of the noticing party is not essential to its validity.[85] A notice stating that a certain amount is due for work done and materials furnished is fatally defective if it does not differentiate the amount due for each.[86] The notice is not defective because items which are not lienable claims are, by mistake and in good faith, included therein.[87] Actual service on the owner must be proved.[88] Service may be made in any form, or by any method which in effect

the owner or his agent, if to be found in the county in which the property is situated, and if neither can be found therein, by filing it in the office of the clerk of the circuit court of such county [Rev. St. 1898, § 3315]. Laev Lumber Co. v. Auer [Wis.] 101 N. W. 425. Service on one in the employ of an owner, who is out of the state, who has full authority to represent him in his business affairs, is sufficient. Id. A notice setting forth that plaintiff was employed by the principal contractor to furnish, and did furnish, material as specified for the erection and construction of the building is sufficient [Wis. Rev. St. 1898, § 3315]. Id. The terms and conditions under which it was furnished need not be specified. Id.

74. A laborer must give notice within thirty days after the beginning of the work. Laborer working by the day who began work more than 30 days before serving notice and afterwards left but returned less than 30 days before giving notice, held entitled to lien only for work done after commencing second time. Aubin v. Darling [R. I.] 59 A. 390.

75. Notice of filing lien under Okl. Civ. Code 1903, § 620. Ryndak v. Seawell, 13 Okl. 737, 76 P. 170. The Florida statute requiring one contracting with any person other than the owner to give notice to such owner that he is about to perform labor upon the property and intends to claim a lien thereon applies only to contracts with lessees, operators and the like, and not to those made with the owner of the property, or to contracts for labor and material made with one who contracts with the owner to erect or repair the building [Act May 30, 1901, p. 97, c. 4955, § 2 construed]. Futch v. Adams [Fla.] 36 So. 575.

76. Laws 1898, p. 538, c. 226. Beckhard v. Rudolph [N. J. Eq.] 59 A. 253. N. J. Mechanic's Lien Act, § 3 (P. L. 1898, p. 538, c. 226). Fehling v. Goings [N. J. Eq.] 58 A. 642.

77. Beckhard v. Rudolph [N. J. Eq.] 59 A. 253. The remedy applies only to creditors of the contractor named in the filed contract, and not to subcontractors. Fehling v. Goings [N. J. Eq.] 58 A. 642.

78. Beckhard v. Rudolph [N. J. Eq.] 59 A. 253. One making a contract to supply material and himself incorporate it into the building is not a materialman. Subcontractors, such as painters, plumbers and plasterers cannot. Id.

79. Sufficient evidence of a demand to support notice. Evans v. Lower [N. J. Eq.] 58 A. 294.

80. Fehling v. Goings [N. J. Eq.] 58 A. 642. May be appointed in writing or by parol. Id.

81, 82, 83. Beckhard v. Rudolph [N. J. Eq.] 59 A. 253.

84. Notice defective where it merely states a refusal to pay, and not a refusal upon demand. Beckhard v. Rudolph [N. J. Eq.] 59 A. 253. The notice need not recite that a demand for payment has been made. Act requires only written notice that contractor refuses to pay. Fehling v. Goings [N. J. Eq.] 58 A. 642.

85. Signature "B. & Co., W. I. G., their attorney" sufficient. Fehling v. Goings [N. J. Eq.] 58 A. 642.

86. Beckhard v. Rudolph [N. J. Eq.] 59 A. 253.

87. Of claim for tools furnished contractor with which to work on building. Evans v. Lower [N. J. Eq.] 58 A. 294. Of claim for money advanced to contractor to purchase millwork in which materialman did not deal. Id.

88. Fehling v. Goings [N. J. Eq.] 58 A. 642.

gives the written notice prescribed by statute.[89] The rights acquired by the claimant are not invalidated by the bankruptcy of the contractor within four months thereafter.[90] If the owner makes a payment on the building contract in advance of its terms, and the amount remaining due is insufficient to satisfy notices served according to law, he is liable as though such payment had not been made.[91]

In New York, payments made by an owner before they become due by the terms of the contract, for the purpose of avoiding the provisions of the lien law, are ineffectual as against the lien of a subcontractor.[92] Only collusive payments are forbidden, the statute not applying to those made before the owner knew, or had reason to know, that any one had a claim against, or had furnished materials to, the contractor.[93] Payments made after notification of a claim will be regarded as made for the purpose of avoiding the lien law.[94]

In Alabama, liens of persons furnishing material to the contractor extend only to the amount of any unpaid balance due him from the owner when notice of an intention to claim a lien is served on the latter, or which shall thereafter become due.[95] An owner making payments to the contractor after such notice is not relieved from the effects of the lien, though the contractor abandons the work and he is compelled to pay more than the contract price for the completion of the building.[96]

(§ 5) *B. Filing and recording claim and statement thereof.*[97]—The statutory requirements for preserving the lien must be complied with.[98] The claim or statement must be filed within the prescribed time.[99] In Texas the lien is

89. Fehling v. Goings [N. J. Eq.] 58 A. 642. May be given by the claimant's agent. Id.

90. Not assignments or transfers by bankrupt to defraud his creditors within Bankruptcy Act of 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]. Fehling v. Goings [N. J. Eq.] 58 A. 642.

91. N. J. Gen. St. p. 2074, § 5. Veitch v. Clark [N. J. Eq.] 57 A. 272. Held no advance payment, though instalment was paid before all the doors and trim were on, it appearing that words "when the trim is on and the doors hung," as used in the contract, were ordinarily not construed strictly, but indicated a certain stage of the work, which had been reached. Id.

92. Laws 1897, p. 517, c. 418, § 7. Wolf v. Mendelsohn, 87 N. Y. S. 465.

93, 94. Wolf v. Mendelsohn, 87 N. Y. S. 465.

95. Code 1896, § 2723 construed. Alabama & G. Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618.

96. Alabama & G. Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618.

97. See 2 Curr. L. 878.

98. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

99. Maine: Notice of the lien claim must be filed within forty days after the lienor ceases to furnish materials [Rev. St. 1883, c. 91, § 32]. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

Missouri: Subcontractors have four months under Mo. Rev. St. 1899, § 4207. R. J. Schwab & Sons Co. v. Frieze [Mo. App.] 81 S. W. 1174; Lecoutour Bros. Stair Mfg. Co. v. Maddox [Mo. App.] 84 S. W. 99. Where it was not disputed that the last item was furnished within the time required, and evidence was conflicting as to whether the material was made necessary to completion of building, which had not been tendered or accepted, owing to change in plans, held error to give declaration of law in favor of defendant without finding whether the extras were necessary to complete the building. Lecoutour Bros. Stair Mfg. Co. v. Maddox [Mo. App.] 84 S. W. 99. Evidence held to show that account was filed within statutory period after furnishing last item which went into house. Ulrich v. Osborn [Mo. App.] 81 S. W. 228. The time begins to run from the time when the goods sold were delivered and accepted and the indebtedness accrued. From time furnaces furnished by subcontractor were delivered and accepted. Furnishing of new part to replace one broken in transit, without charge, held not to extend time. Schwab & Sons Co. v. Frieze [Mo. App.] 81 S. W. 1174.

In Nevada original contractors must file their claims with the county recorder within sixty days after the completion of the contract [Cutting's Comp. Laws, § 3885]. Salt Lake Hardware Co. v. Chainman Min. & Elec. Co., 128 F. 509. And all others claiming liens, within thirty days after the completion of the work. Id. One contracting to furnish machinery, materials, and appliances, and install the same in a mill erected by defendant without any other contractor, is an original contractor within the meaning of this statute. Id.

New Jersey: Evidence held to show filing of claim within four months after materials were furnished. Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. Law, 684, 58 A. 935.

In Oklahoma the lien statement must be

given by the constitution, and no registration of claim is necessary in cases arising between the original contractor and the owner.[1]

Where there are separate contracts between the contractor and the owner for different jobs, the lien account must be filed within the statutory period after the completion of the work under each contract, in order to be good for the entire work.[2] The question whether the materials were furnished and the labor performed under one general contract or under separate contracts is one of fact.[3] When materials are furnished for the same improvement, in instalments and at intervals, but the parties intend them to be included in one account and settlement, the entire account will be treated as a continuous and connected transaction, and the lien limitation begins to run from the last item of it.[4] When the building is substantially completed, and is tendered to and accepted by the owner as complete, the contractor cannot thereafter, at his own instance, and against the will of the owner, perform some part that was called for by the contract, and thereby extend the time for filing the lien.[5] When extra work is done or material furnished by a contractor during the preformance of his agreement, as a part of or in furtherance of the same general object, it will be deemed, for lien purposes, a part of the same general contract, and the time for filing the lien for the amount due on the contract and the extra work will commence to run on completion of the work as a whole.[6] But the performance of other or additional work after the completion of the contract cannot operate to extend such time.[7]

Contract liens.[8]—Statutory provisions as to filing and registration do not apply to liens provided for by contract between the parties, but they are binding on them and persons having knowledge of them, whether filed or not.[9] The rule is not changed because they are called builders' liens.[10]

filed within sixty days after the material is furnished. Wilson's St. 1903, c. 66, § 4819. Evidence held to show filing within time. Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184.

In Pennsylvania no lien for materials furnished can endure longer than six months after the time at which the materials were furnished to the property against which it is claimed, unless a claim be filed within such time. As there was no proof that material delivered on certain date went to any particular house, there was no proof that any material was furnished to any particular houses within the legal period, and claim could not be supported as to any portion of the property. Bradley v. Gaghan, 208 Pa. 511, 57 A. 985.

In Utah an original contractor has sixty days after the completion of his contract in which to file for record a claim in writing containing a notice of his intention to hold and claim a lien for any balance that may be due him for materials furnished or work done by him in the construction of a building [Rev. St. 1898, § 1386]. Elwell v. Morrow [Utah] 78 P. 605. No lien is in fact created until he does so. Id.

1. Const. art. 16, § 37. Statutory provisions for registration are only for the protection of the lien against subsequent purchasers and incumbrancers without notice. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

2. E. R. Darlington Lumber Co. v. Harris [Mo. App.] 80 S. W. 688.

3. Evidence held to sustain finding that they were furnished under single contract on open, continuous account. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413.

4. Evidence held to show that all lumber was furnished pursuant to the original contract. E. R. Darlington Lumber Co. v. Harris [Mo. App.] 80 S. W. 688. Forty-five days between the date of furnishing the last item for the completion of the building as originally planned, and the time of furnishing lumber for extras is not such an interval as to affect a materialman with constructive notice that the extras were furnished under a new contract between the owner and the contractor, or to raise a presumption that the materialman sold it under a separate agreement. Id.

5. No evidence to show tender and acceptance. Lecoutour Bros. Stair Mfg. Co. v. Maddox [Mo. App.] 84 S. W. 99.

6. Hobkirk v. Portland Nat. Baseball Club, 44 Or. 605, 76 P. 776.

7. Time not extended. Hobkirk v. Portland Nat. Baseball Club, 44 Or. 605, 76 P. 776.

8. See Notice and Record of Title, 2 Curr. L. 1053.

9. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402. A contract creating a lien need not be registered or recorded as between the original parties thereto. Lien on homestead. Moreno v. R. B. Spencer & Bro. [Tex. Civ. App.] 82 S. W. 1054. Notes called for in the contract need not be acknowledged or recorded. Id.

10. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

§ 6. *Amount of lien and priority thereof.*[11]—Where the erection of a building is one continuous undertaking without abandonment, a mortgage originating subsequent to the commencement of its construction is subordinate to the lien claims of all who have contributed to the completion of the structure.[12] In such case a mortgagee purchasing on foreclosure sale does not become a bona fide purchaser, but is substituted only to the rights of the mortgagor, and takes subject to the liens.[13] A mortgage executed prior to the commencement of the work must be recorded in order to render it superior to lien claims for labor and materials.[14]

Mechanics' liens are superior to the homestead claims of the owner's minor children.[15]

Where machinery was sold on condition that a building be erected to put it in, notice to an agent of the seller, engaged in promoting a contract for erecting the building, of the building contractor's lien, was notice to the seller.[16] Knowledge of the agent that the building is being built on credit and that the statute gives a lien to the contractor and materialmen under such circumstances is sufficient to charge the seller with notice of the contractor's lien.[17]

An assignee for the benefit of creditors of a general contractor takes the property subject to the right of laborers and materialmen to subsequently file mechanics' liens for work performed prior to the assignment.[18]

The rights of a subcontractor are not limited to the balance due the contractor, but by filing his claim and serving the required notice he becomes entitled to a lien for the full amount due him,[19] of which he cannot be deprived by any adjustment between the owner and the principal contractor.[20] This is particularly true where the owner has actual notice of his employment, and fails to protect himself by withholding from the contract price a sufficient sum to pay his claim, as he has a right to do under the contract.[21]

In some states laborers, materialmen, and subcontractors are entitled to liens as against the owner only to the extent to which the latter is liable to the contractor under the contract.[22] In Kentucky the aggregate amount of liens allowed cannot exceed the contract price, and if those claimed are in excess of such price it will be distributed pro rata among the claimants.[23] Where the cost of the

11. See 2 Curr. L. 879.

12. Minn. Laws 1895, p. 224, c. 101, does not change this rule. City of Ortonville v. Geer [Minn.] 101 N. W. 963. Liens take precedence of mortgages given subsequent to the commencement of the work [Mont. Code Civ. Proc. § 2133]. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413.

13. Mortgage executed after a part of the material was furnished. Western Iron Works v. Montana Pulp & Paper Co. [Mont.] 77 P. 413.

14. Laws 1895, p. 224, c. 101. City of Ortonville v. Geer [Minn.] 101 N. W. 963.

15. Tex. Const. art. 16, §§ 37, 50. Summerville v. King [Tex.] 83 S. W. 680.

16, 17. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

18. In such case laborers have inchoate right to lien which becomes perfected when notice is filed. Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299.

19, 20. Wheelock v. Hull [Iowa] 100 N. W. 863. Record held to contain sufficient proof of the fact that a statement for lien was made and filed as alleged. Id.

21. Wheelock v. Hull [Iowa] 100 N. W. 863.

22. Not entitled to lien where contractor indebted to owner because of breach of contract. Rowell v. Harris [Ga.] 48 S. E. 948. Contractor agreed to erect building for actual cost and 5 per cent. additional, payments to be made from time to time in sums not to exceed ninety per cent of the value of work and materials and half of his commission, and the balance after completion. Held that, where contractor abandoned work and owner completed it, liens could only attach to 90 per cent and commissions due until work was completed, and then only to additional amount found due, after deducting cost of completion from contract price. New Jersey Steel & Iron Co. v. Robinson, 92 App. Div. 436, 87 N. Y. S. 151.

23. Ky. St. 1903, § 2463. Canady, Gillum & Key v. Webb, 25 Ky. L. R. 2107, 80 S. W. 172.

building exceeds the contract price, the fact that others have not filed claims for liens does not entitle one who has done so to more than his pro rata share.[24]

A subcontractor relying on an unaccepted order given him by the principal contractor and neglecting to take advantage of the mechanics' lien law stands in the position of an ordinary creditor with no specific rights as against the owner or the property except under the order.[25] Serving notice of such order on the owner works an equitable assignment of so much of the amount to become due the contractor.[26] It is the duty of an owner, who has, under his contract, the right to retain from the contract price a sum sufficient to indemnify himself against any claims for which he may be liable, when he has notice that parties furnishing necessary materials and labor are unpaid, to withhold all further payments until such bills are settled.[27] The right of the contractor is to the balance remaining after all such claims have been satisfied, and the subcontractor taking an unaccepted order from him has no rights except as to such balance, and takes his chances as to there being any balance.[28]

The New York lien law provides that no assignment of the contractor of the money due or to become due thereunder, nor any order drawn by the contractor on the owner shall be valid until the contract, or a statement containing its substance and the assignment, or a copy of each, or a copy of such order, shall be filed with the county clerk.[29] This act does not affect payments made by the owner on account of labor performed or materials furnished under the contract.[30] An assignee for the benefit of creditors of a general contractor takes the property subject to the right of subcontractors having orders drawn on the owner in their favor, and payable out of a particular fund due on the contract, to file the same.[31] Thus orders given before such assignment and filed thereafter give the subcontractor priority over the assignee.[32]

§ 7. *Assignment or transfer of lien.*[33]—In Indian Territory liens are transferable and assignable by statute.[34]

§ 8. *Waiver, loss, or forfeiture of lien or right to acquire it.*[35]—A builder may waive his right to a statutory lien,[36] and does so by agreeing not to exercise it,[37] and such a contract binds a subcontractor with notice.[38] Where the terms of the contract are ambiguous, the doubt should be resolved against the waiver.[39] A stipulation agreeing to deliver the building free from all claims, liens, and charges is not a waiver of the contractor's right to a statutory lien.[40] Nor does

24. Under Ky. St. 1903, § 2468, all have liens, which are dissolved unless claims are filed within six months. Canady, Gillum & Key v. Webb, 25 Ky. L. R. 2107, 80 S. W. 172.

25, 26. Wheelock v. Hull [Iowa] 100 N. W. 863.

27. Iowa Code, § 3093. Wheelock v. Hull [Iowa] 100 N. W. 863.

28. Cannot assert personal claim against owner superior to claims of those holding liens. Wheelock v. Hull [Iowa] 100 N. W. 863.

29. Laws 1897, p. 521, c. 418, § 15. Harvey v. Brewer, 178 N. Y. 5, 70 N. E. 73; Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299. Acceptance by owner of order drawn by contractor in favor of subcontractor who had filed a lien, and acceptance by subcontractor of owner's written promise to pay it in satisfaction of lien, which was thereupon discharged, held to constitute payment, so that filing of order not necessary to make it valid as against subsequent lienors. Harvey v. Brewer, 178 N. Y. 5, 70 N. E. 73.

30. Harvey v. Brewer, 178 N. Y. 5, 70 N. E. 73.

31. Analogous to rule allowing laborers and materialmen to file liens for work and material furnished before assignment. Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299.

32. Armstrong v. Chisolm, 99 App. Div. 465, 91 N. Y. S. 299.

33. See 2 Curr. L. 881.

34. Mansf. Dig. § 4423; Ind. T. Ann. St. 1899, § 2890. Campbell v. Wm. Cameron & Co. [Ind. T.] 82 S. W. 762.

35. See 2 Curr. L. 881.

36, 37. Davis v. La Crosse Hospital Ass'n [Wis.] 99 N. W. 351.

38. Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. Law, 684, 58 A. 935, citing 20 Enc. Law, 361, where the authorities pro and con are collated.

39, 40. Davis v. La Crosse Hospital Ass'n [Wis.] 99 N. W. 351.

one furnishing and installing machinery waive his right to a lien by stipulating in the contract that title thereto shall not pass to the purchaser until all payments shall be fully made in cash.[41] The acceptance of the owner's notes is not a waiver of the lien unless they are taken as a payment.[42]

The fact that the materialman becomes surety on a bond of the contractor, conditioned to save the owner harmless from liens, does not estop him from suing the owner to enforce his lien, in the absence of a showing that the latter would be injured thereby.[43]

No representations of defendants can operate to estop them to deny that claimants may file claims against any of the property until a specified time.[44]

§ 9. *Discharge and satisfaction.*[45]—In some states one having an interest in property upon which a mechanic's lien is claimed may give bond to dissolve such lien upon his interest.[46] The mere fact that the property was conveyed to him with a view to his giving such bond does not affect his right to do so.[47] Where the sureties falsely impersonate others and give false answers in regard to their property when examined before the master in chancery, the bond is void and does not work a dissolution, though signed and approved by the master.[48] The bond may, of course, be canceled if obtained through fraud.[49]

In an action on an undertaking given to procure the discharge of a lien filed by plaintiff's assignor, and running to the county clerk, plaintiff must allege that he has obtained leave to sue.[50]

§ 10. *Remedies and procedure to enforce lien. A. Remedies. Form of action.*[51]—In Utah at the time of filing a complaint for a lien and issuing the summons, plaintiff is required to publish a notice to all persons claiming liens on the premises to appear on a specified day and prove them.[52] All liens not then exhibited are waived.[53] Failure of a contractor whose time for filing a lien has not expired, and who is neither made a party, nor served with process, and has no knowledge of the proceedings, to appear and prove his claim, is not a waiver.[54] The statute is remedial, and should be liberally construed.[55]

41. Salt Lake Hardware Co. v. Chalnman Min. & Elec. Co., 128 F. 509.

42. Notes held not to have been given and accepted in payment of account pro tanto, and plaintiff had a right to apply amounts received by him subsequently to their payment rather than to the payment of his general account. Hence, he did not thereby release his lien on the building. Bryant v. Grady, 98 Me. 389, 57 A. 92. Payment by owner directly to plaintiff on assignment to him of architect's order held in effect a payment by defendant, and plaintiff could apply the amount so received on the notes, defendant having consented thereto. Id. Right not waived by the acceptance of a note on the owner's indebtedness, with the understanding that the materialman shall hold it until the owner can make a payment on account and then surrender it, no payment having been made, and the note being produced for cancellation at the trial. E. R. Darlington Lumber Co. v. Harris [Mo. App.] 80 S. W. 688.

43. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546.

44. Estoppel inapplicable where property and not persons are to be charged. Bradley v. Gaghan, 208 Pa. 511, 57 A. 985.

45. See 2 Curr. L. 882.

46. Mass. Rev. Laws, c. 197, § 28. Breed v. Gardner [Mass.] 72 N. E. 983.

47, 48. Breed v. Gardner [Mass.] 72 N. E. 983.

49. Where the owner fraudulently conveys the property to an irresponsible person, and procures him, as principal, and two other irresponsible persons, who fraudulently justified as sureties, to execute such a bond, equity will, on petition of the lienor, cancel the bond, enjoin the grantor and grantee from claiming any rights by reason thereof, and compel them to execute a release of such rights. Keyes v. Brackett [Mass.] 72 N. E. 986.

50. Necessary under N. Y. Code Civ. Proc. § 814. Goldstein v. Michelson, 91 N. Y. S. 33. Averment that undertaking ran to plaintiff's assignor rendered nugatory by annexation of instrument showing contrary. Id.

51. See 2 Curr. L. 882.

52, 53. Rev. St. 1898, § 1391. Elwell v. Morrow [Utah] 78 P. 605.

54. No lien created until contractor files claim for record [Rev. St. 1898, § 1386]. Evidence held to show that failure was without prejudice to plaintiff's rights. Elwell v. Morrow [Utah] 78 P. 605.

55. Elwell v. Morrow [Utah] 78 P. 605.

In Georgia the execution issued on the foreclosure of a laborer's lien operates as final process until arrested by a valid counter-affidavit.[56] The counter-affidavit converts this final process into mesne process, and raises an issue which must then be passed upon by the proper court.[57] Until a valid counter-affidavit is filed there is no case and no issue to be tried, and hence when it is void, defendant cannot have a ruling as to the validity of the foreclosure or levy.[58]

By attachment.[59]—In Maine, in an action to enforce a lien on land and buildings for materials furnished in the construction of the buildings, the attachment must be made within ninety days after the last materials are furnished.[60] Sundays are included in the computation of such time,[61] and when the last day falls on Sunday an attachment on the following Monday is not seasonably made.[62]

Time of bringing action.[63]—Statutes generally limit the time within which actions to enforce the lien may be brought.[64] There need not be visible continuity of work from first to last in order that the last item may relate back to its commencement.[65] Delay in completing the work sufficient to so clearly indicate completion or abandonment as to excuse third parties dealing with the property from making inquiries in regard to the matter may affect the right of lien upon principles of estoppel in pais.[66] An action to enforce a lien, filed on the day on which the lien was filed, but thereafter, is not premature.[67]

Concurrent remedies.[68]—The fact that the statute provides a summary method for enforcing liens does not, in the absence of a provision to the contrary, prevent their enforcement by a bill in equity.[69]

The remedy upon a mechanics' lien and that upon the debt are distinct and concurrent and may be pursued at the same time,[70] or separately.[71] In states where the distinction between proceedings at law and in equity have been abolished, both remedies may be pursued in the same action,[72] including all provisional and

56. Civ. Code 1895, § 2816. Moultrie Lumber Co. v. Jenkins [Ga.] 49 S. E. 678.

57. Moultrie Lumber Co. v. Jenkins [Ga.] 49 S. E. 678.

58. Where affidavit invalid because taken before defendant's attorney, there is nothing to amend, and proceedings are properly dismissed. Moultrie Lumber Co. v. Jenkins [Ga.] 49 S. E. 678.

59. See 2 Curr. L. 883, n. 95.

60. Pub. Laws 1897, p. 251, c. 232, § 1. Oakland Mfg. Co. v. Lemieux, 98 Me. 488, 57 A. 795. Suit must be commenced within ninety days after the last materials are furnished [Rev. St. 1883, c. 91, § 34]. Foss v. Desjardins, 98 Me. 539, 57 A. 881.

61, 62. Oakland Mfg. Co. v. Lemieux, 98 Me. 488, 57 A. 795.

63. See 2 Curr. L. 878, § 5 B.

64. In Wisconsin the lien petition must be filed within six months after the last charge for furnishing material or work [Rev. St. 1898, § 3318]. Hutchins v. Bautch [Wis.] 101 N. W. 671. Evidence held to show commencement of suit within four months after materials were furnished. Bates Mach. Co. v. Trenton, etc., R. Co., 70 N. J. Law, 684, 58 A. 935.

65. Allowed for deepening well and repairing pump and equipping it with frostproof cock. Hutchins v. Bautch [Wis.] 101 N. W. 671.

66. Hutchins v. Bautch [Wis.] 101 N. W. 671.

67. Mo. Rev. St. 1899, § 4160, providing that the time within which an act shall be done shall be computed by excluding the first day and including the last does not apply to Id., § 4218, requiring actions for foreclosure of liens to be brought within 90 days of the filing of the lien. Phoenix Planing Mill Co. v. Harrison [Mo. App.] 84 S. W. 174.

68. See 2 Curr. L. 883, n. 1, 2.

69. Fla. Act May 30, 1901, p. 96, c. 4955, § 1, does not prevent bill in equity under Rev. St. 1902, §§ 1510, 1744. Futch v. Adams [Fla.] 36 So. 575.

70. By express provisions of Mills' Ann. St. Colo. § 2897. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267. A petition for a mechanic's lien may be prosecuted simultaneously with a suit at common law to recover the same debt from the contractor. Suit by subcontractor. Part of contract price still in hands of owner for satisfaction of liens attached. Hunt v. Darling [R. I.] 59 A. 398. Both remedies may be necessary to procure a full payment of the debt. Right to lien does not abrogate other remedies, since it is proceeding in rem, while others in personam. Id.

71. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267; Silliman v. Taylor [Tex. Civ. App.] 80 S. W. 651.

72. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267. In Nebraska plaintiff may in the same action pray for and receive a personal judgment against a defendant for any amount found due under the contract and may also have a decree, adjudicating the existence and validity of

auxiliary remedies obtainable in an action on the debt.[73] In the Federal courts proceedings to foreclose mechanics' liens are suits in equity, even though the state statutes creating the liens designate such proceedings as actions at law,[74] and where the case is removed, the pleadings should be recast so as to separate the two causes of action.[75]

Except in jurisdictions where the distinction between actions at law and suits in equity is preserved,[76] the fact that plaintiff is unable to establish his right to a lien does not prevent him from recovering a personal judgment.[77]

(§ 10) *B. Parties.*[78]—The original contractor is a necessary party to a suit by a subcontractor, laborer, or materialman.[79]

The wife is a necessary party to the foreclosure of a lien on community real estate,[80] and where she is not made a party until after the statutory time for commencing suit has expired, the court has no jurisdiction to foreclose.[81] She is also a proper but not a necessary party to a suit to foreclose a lien on a homestead, title to which was in the husband alone, for work done under a contract made with him.[82] Where she does not apply to intervene before judgment, it is not an abuse of discretion to refuse her subsequent application to vacate the judgment and permit her to defend on the same ground as that urged by her husband.[83]

There is a conflict of authority as to the necessity or propriety of joining sureties on the contractor's bond.[84]

a mechanic's lien, and an order of sale of the property on which it exists to satisfy the amount due upon the contract. In such an action an appeal bond in the form prescribed in case of appeal from judgment for the payment of money held sufficient. Maloney v. Johnson McLean Co. [Neb.] 100 N. W. 423. The sale does not extinguish the judgment or debt unless the proceeds are sufficient to pay it in full. Id.

73. As attachment and garnishment. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267.

74. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267.

75. Where suit was proceeded with on original pleadings as suit in equity, without objection, a money judgment against defendant is not void, even if erroneous, and cannot be collaterally attacked. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. [C. C. A.] 133 F. 267.

76. In the federal courts where the complaint in a suit to foreclose a mechanic's lien is insufficient for that purpose, it cannot be sustained for the purpose of allowing plaintiffs to recover a personal judgment against the person liable on the contract. Distinctions between law and equity preserved. Russell v. Hayner [C. C. A.] 130 F. 90.

77. In New York if the lienor fails for any reason to establish a valid lien in an action brought under the provisions of the lien law, he may recover judgment therein for such sums as are due him, or which he might recover on an action on a contract against any party to the action [Code Civ. Proc. § 3412]. Koeppel v. Macbeth, 97 App. Div. 299, 89 N. Y. S. 969. The statute is not mandatory and plaintiff may, if he so desires, enforce contract claims not covered by a valid lien in a subsequent suit. Judgment in foreclosure suit held not res adjudicata as to right to recover for breach of contract, and for work and materials for which plaintiff was not entitled to lien. Id. Though notice insufficient, may recover under claim for deficiency. Prayer demanding that plaintiffs "may have judgment against the defendant for any deficiency that may remain due them after such sale," held sufficient. Ryan v. Train, 95 App. Div. 73, 88 N. Y. S. 441; Gilmour v. Colcord, 96 App. Div. 358, 89 N. Y. S. 689.

78. See 2 Curr. L. 884.

79. Mo. Rev. St. 1899, § 4211, requires all parties to the contract to be made parties and provides that all interested may be made parties. Id., § 4223, requires contractor to defend such actions. Rumsey & Sikimeier Co. v. Pieffer [Mo. App.] 83 S. W. 1027. In proceedings to adjust the rights of parties claiming liens and the right of a subcontractor under an unaccepted order on the owner for the amount of his claim. Wheelock v. Hull [Iowa] 100 N. W. 863.

80. Northwest Bridge Co. v. Tacoma Shipbuilding Co. [Wash.] 78 P. 996.

81. Action must be commenced against both spouses within time limited. Northwest Bridge Co. v. Tacoma Shipbuilding Co. [Wash.] 78 P. 996.

82. Lien for drilling well, defended on ground of nonperformance. Hunt v. McDonald [Wis.] 102 N. W. 318.

83. Hunt v. McDonald [Wis.] 102 N. W. 318.

84. **In Texas:** Sureties on a bond against liens are proper, though not necessary, parties and their rights may be adjusted therein. Haberzettie v. Dearing [Tex. Civ. App.] 80 S. W. 539.

In Oklahoma are not proper parties to an action by a materialman. Ferguson v. Stephenson-Brown Lumber Co. [Okl.] 77 P. 184.

The proceedings are not binding on one not a party thereto,[85] but are prima facie proof, and admissible in evidence against him.[86]

The petition cannot be amended so as to include a necessary omitted party after the time for commencing suit to enforce the lien has expired.[87]

(§ 10) *C. Pleading, practice, and evidence. Pleading.*[88]—Applications of the general rules of pleading will be found elsewhere.[89]

The complaint must set forth the substance of the contract under which the work was done,[90] must allege that defendant owned the land when the contract was executed,[91] and must directly allege that the material was used in the construction of the building.[92] A complaint sufficiently describing the property, fixing the time and manner of the labor, the amount due, and that the lien was filed within the statutory time, and complying with the requirement of ordinary suits in equity, is sufficient.[93] The description of the property is sufficient if it points out and indicates the premises so that they can be identified.[94]

Liquidated damages provided for in the contract for delay in completing the work, defects in the work, and damages caused by its abandonment, may be set off against the builder's claim.[95]

In Alabama any defendant may put in issue the existence of a lien.[96] It is error to enter judgment establishing the existence of the lien claimed when the jury does not respond to such issue, but renders a verdict for plaintiff on the issue of indebtedness only.[97]

Practice.[98]—In an action to enforce a lien, where it is shown by counterclaim or cross-complaint that there is a demand for affirmative relief, either party is entitled to a trial by jury on that issue, if in the nature of an action at law.[99] A suit to enjoin a foreclosure suit need not be brought in the county where the decree was rendered, where it is merely ancillary to proceedings to have plaintiff's lien declared superior, and the validity of the decree is not attacked.[1]

85. Hammond v. Darlington [Mo. App.] 84 S. W. 446.

86. In action for damages for destruction of buildings to which lien attached. Hammond v. Darlington [Mo. App.] 84 S. W. 446.

87. Rumsey & Sikimeier Co. v. Pieffer [Mo. App.] 83 S. W. 1027.

88. See 2 Curr. L. 882, 883, §§ 10a, 10b.

89. See Pleading, 2 Curr. L. 1178. Where the right of the owner to recoup damages is permissive an amendment operating to compel an election should be refused (See Comp. Laws, § 10710). Likewise where it will compel splitting a cause. Kilby Mfg. Co. v. Menominee Circuit Judge [Mich.] 101 N. W. 522. Complaint held to sufficiently show that plaintiffs furnished labor and materials in building houses which defendants accepted, and that defendants knew that plaintiffs were the parties with whom they were dealing, so that they were liable therefor, notwithstanding the withdrawal of one of the parties to the contract. Cochran v. Yoho, 34 Wash. 238, 75 P. 815. General denial held to put in issue question whether house had been completed according to contract, and to allow proof of nonperformance. Sherry v. Madler [Wis.] 101 N. W. 1095. In any event amendment should have been allowed if necessary. Id.

90. Rev. St. 1898, §§ 3320-3322. Where neither complaint or claim set forth new contract on which plaintiff finally recovered, but evidence of new contract was not disputed or objected to, both will be considered amended to conform to proofs as effectually as though formal amendments had been offered. Sherry v. Madler [Wis.] 101 N. W. 1095.

91. Petition sufficient. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546.

92. Ryndak v. Seawell, 13 Okl. 737, 76 P. 170. Since the foreclosure of the lien is only ancillary to the main cause of action, a general demurrer will not challenge a defect in this particular. No proper objection being taken either before or after pleading, it will be deemed to have been waived, and petition will be treated as amended on appeal. Id.

93. Robertson v. Moore [Idaho] 77 P. 218.

94. Description sufficient. Hammond v. Darlington [Mo. App.] 84 S. W. 446.

95. Amendments properly allowed. Tenney v. Anderson Water, Light & Power Co. [S. C.] 48 S. E. 457.

96. Code 1896, § 2739. Goldstein v. Leake [Ala.] 36 So. 458.

97. Goldstein v. Leake [Ala.] 36 So. 458.

98. See 2 Curr. L. 882, 883, §§ 10A, 10B.

99. As on question of damages for unskillful construction. Not error to refuse it where it is demanded on ground that no facts were shown creating a lien. Robertson v. Moore [Idaho] 77 P. 218.

1. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

Evidence.[2]—The burden is on plaintiff to make good his lien against any or all of the properties against which he seeks to enforce it.[3] He must prove the existence of the contract between defendant and the owner,[4] that defendant owned the land when the contract was executed,[5] and that the materials were used and actually went into the land.[6]

An allegation that plaintiff executed a bond conditioned to save defendant harmless from liens and is thereby estopped to maintain the action amounts to an admission of the existence and validity of his lien.[7]

(§ 10) *D. Judgment, costs, and attorney's fees.*[8]—A judgment in an action to foreclose a lien for labor and materials furnished under a written contract that plaintiff is not, upon the merits, entitled to foreclosure, or to a personal judgment for a balance claimed to be due him, is a bar to an action to recover for the same work and materials upon the theory of an implied contract.[9] Where the petition to enforce a lien for materials furnished a contractor fails to allege that the owner is personally liable therefor, or that the owner was indebted to the contractor in any sum when notified of plaintiff's claim, a judgment against the owner by default is void.[10]

In Indiana a suit to foreclose a mechanic's lien may be appealed notwithstanding the fact that the amount claimed does not equal the amount necessary to give jurisdiction to the appellate court.[11]

Personal judgments against the owner of property on which a lien exists are, in the absence of privity of contract, allowed only when authorized by statute.[12] In the absence of privity of contract, the right to a personal judgment under the statute depends upon the existence of a right to a lien.[13]

Costs and attorney's fees.[14]—In some states, attorney's fees may be allowed in the foreclosure of mechanic's and laborer's liens.[15] Where a junior lienor makes no objection to the erroneous inclusion of attorney's fees in the amount of the prior lien, he is not entitled to costs on appeal on modification of the judgment so as to exclude them.[16]

(§ 10) *E. Sale.*—Where one person has a prior lien on a building and lot

2. See 2 Curr. L. 882, 883, §§ 10A, 10B.

3. Bradley v. Gaghan, 208 Pa. 511, 57 A. 985.

4. Evidence sufficient. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546. Demurrer to evidence should be sustained where it is not. Hengstenberg v. Hoyt [Mo. App.] 83 S. W. 539. Evidence insufficient to show contract. Jose v. Hoyt [Mo. App.] 81 S. W. 468. Statement of counsel in making objection held not an admission that there was an original contractor. Id. The lien paper itself is not evidence of such a contract. Does not prove itself. Id.

5, 6. Evidence sufficient. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546. Evidence held to justify peremptory instruction for plaintiff. Id. Evidence sufficient to support finding that material furnished by subcontractor was sold and delivered to be used by the contractor for the several buildings of the defendant owner. Laev Lumber Co. v. Auer [Wis.] 101 N. W. 425.

7. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546.

8. See 2 Curr. L. 882, 883, §§ 10A, 10B.

9. Maeder v. Wexler, 90 N. Y. S. 598.

10. Proceedings before justice under Miss. Code 1892, c. 77. Smith v. Frank Gardener Hardware Co., 83 Miss, 654, 36 So. 9.

11. Acts 1901, p. 566, c. 247 (Burns' Ann. St. 1901, § 1337f), as amended by Acts 1903, p. 280, c. 156, applies only to civil cases in which the essential object is the recovery of a money judgment. Knowlton v. Smith [Ind.] 71 N. E. 895. Suit is not within jurisdiction of justice of the peace, and hence Acts 1901, p. 566, c. 247 (Burns' Ann. St. 1901, § 1337f), prohibiting appeals to supreme and appellate courts in suits within justice's jurisdiction does not apply. Id.

12. Muller v. McLaughlin [Tex. Civ. App.] 84 S. W. 687.

13. Provisions of Tex. Rev. St. 1895, arts. 3305, 3307, authorizing retention of amount due contractor on notice of claim, and its payment to claimant in certain cases, do not authorize personal judgment against owner unless right to lien exists. Muller v. McLaughlin [Tex. Civ. App.] 84 S. W. 687.

14. See 2 Curr. L. 883, § 10B.

15. Robertson v. Moore [Idaho] 77 P. 218. May be fixed by court in absence of evidence as to their value. Pearce v. Albright [N. M.] 76 P. 286.

16, 17. D. June & Co. v. Doke [Tex. Civ. App.] 80 S. W. 402.

and another has a prior lien on machinery therein, it is proper to order the building and the machinery to be sold separately.[17]

§ 11. *Indemnification against liens.*[18]—Laborers and materialmen may maintain an action on a bond given to secure the performance of a contract, wherein the contractor agrees to pay their claims, when the parties evidently intended to secure them as well as the owner, even though they are not specifically named, and no consideration passes directly from them to the surety.[19] A subcontractor injured by a breach of the contract cannot be deprived of his right to recover on the bond by any act of the owner.[20]

The surety is not released because the owner withholds a part of the contract price in accordance with the terms of his contract, or a sum due him as damages for delay in completing the contract,[21] nor because of mere irregularities in the manner of making payments.[22] Where the obligation runs to the owner and all persons who may be injured by the breach of the contract, the only limit to the surety's liability is the penalty named in the bond.[23] Interest may be recovered on the claims though the amount of recovery is thereby made to exceed the penalty.[24]

Where the contractor gives bond to secure the performance of the conditions of the contract, which requires him to furnish all materials and labor, the owner may sue thereon without having first paid, or suffered judgment for, the claims of materialmen asserting liens against the property for failure of the contractor to pay them.[25] A compensated surety company cannot escape liability for the failure of the owner to pay the contractor in full where he receives due credit for the balance due, which inures to the benefit of the surety.[26] A judgment obtained, in good faith and without fraud or collusion, by the owner against the contractor for breach of contract, estops his sureties in an action on the bond.[27]

Sureties on a contractor's bond furnishing him materials and becoming responsible for labor to be used by him in completing the contract have no prior lien on the amount due him, but stand in the same position as any other person furnishing labor and material.[28]

The filing of a mechanic's lien does not injure a landowner who is indebted to the contractor on the contract price in an amount equal to or greater than the lien, since he has it in his power to protect himself.[29] The law will not presume that the owner is injured and so given a right to resort to the indemnity from the mere fact that a lien has been filed,[30] but he must allege and show that he does not owe the contractor an amount equal to, or greater than, the amount of the lien.[31]

One furnishing provisions to a railroad contractor cannot recover on a bond given to the railroad to pay persons supplying such provisions, there being no privity.[32]

18. See 2 Curr. L. 886.

19. As where bond runs to owner and all persons who may be injured by any breach of its conditions. Getchell & Martin Lumber & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550.

20, 21. Getchell & Martin Lumber & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550.

22. Irregularities in manner of making payments held not to have released surety. Getchell & Martin Lumber & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550.

23, 24. Getchell & Martin Lumber & Mfg. Co. v. Peterson [Iowa] 100 N. W. 550.

25. May regard the allowing claims to become charge on property as a breach. Friend v. Ralston, 35 Wash. 422, 77 P. 794.

26. Credited in action between owner and contractor. Friend v. Ralston, 35 Wash. 422, 77 P. 794.

27. Friend v. Ralston, 35 Wash. 422, 77 P. 794.

28. Contract not abandoned to owner. Evans v. Lower [N. J. Eq.] 58 A. 294.

29, 30, 31. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546.

32. Armour & Co. v. Western Const. Co. [Wash.] 78 P. 1106.

MEDICINE AND SURGERY.[33]

§ 1. Public Regulation of the Business of Treating Disease (636).
§ 2. Regulation of the Keeping and Sale of Drugs and Medicines (638).
§ 3. Recovery of Compensation (638).
§ 4. Malpractice (638).
§ 5. Negligent Homicide by Physician (639).

§ 1. *Public regulation of the business of treating disease.*[34]—It is within the power of the state to prescribe such restrictions and regulations for the practice of dentistry[35] or medicine and surgery[36] as shall protect the people from the consequences of ignorance or incapacity, deception or fraud. This includes the power to determine what acts shall constitute the practice of the healing art, and to impose conditions on the exercise of the privilege.[37] Certificates or license

33. See 2 Curr. L. 887. See, also, Health, 3 Curr. L. 666; Census and Statistics, 3 Curr. L. 1590 (reporting births and deaths).

34. See 2 Curr. L. 887.

NOTE. What constitutes "practice of medicine" under regulating statutes: The solution of the question depends in part upon the particular statute involved, especially if such statute includes a definition of the term. Statutes requiring a license or certificate have been held to apply to magnetic healers (State v. Heath [Iowa] 101 N. W. 429; State v. Parks, 159 Ind. 211, 59 L. R. A. 190); empirics (Musser v. Chace, 29 Ohio St. 577; Nelson v. State, 22 Ky. L. R. 438, 57 S. W. 501, 50 L. R. A. 383); obstetricians (State v. Welch, 129 N. C. 579, 40 S. E. 120); midwives (People v. Arendt, 60 Ill. App. 89). As to Christian scientists and osteopaths, there is a conflict. The Nebraska statute is held to apply to Christian scientists (State v. Buswell, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68); the contrary is held under the Rhode Island statute (State v. Myloid, 20 R. I. 632, 40 A. 753, 41 L. R. A. 428).

The following cases hold that osteopaths must comply with statutory requirements as to the practice of medicine: Little v. State, 60 Neb. 749, 84 N. W. 248, 51 L. R. A. 717; State v. Gravett, 65 Ohio St. 289, 87 Am. St. Rep. 605, 55 L. R. A. 791; Bragg v. State [Ala.] 58 L. R. A. 925; Jones v. People, 84 Ill. App. 453; People v. Jones, 92 Ill. App. 445; People v. Gordan, 194 Ill. 560, 62 N. E. 858, 88 Am. St. Rep. 165. The following hold that such statutes do not apply to osteopaths: State v. Biggs, 133 N. C. 729, 46 S. E. 401, 98 Am. St. Rep. 731, 64 L. R. A. 139; State v. Liffring [Ohio] 46 L. R. A. 334; Nelson v. State Bd. of Health, 22 Ky. L. R. 438, 57 S. W. 501, 50 L. R. A. 383; Hayden v. State, 81 Miss. 291, 33 So. 653, 95 Am. St. Rep. 471; State v. McKnight, 131 N. C. 717, 42 S. E. 850, 59 L. R. A. 187.

As to state regulation of the practice of osteopathy and Christian science as such, see note to State v. Biggs [N. C.] 98 Am. St. Rep. 751, 753.

A traveling optician who fitted and sold spectacles did not "treat, operate on or prescribe for any physical ailment" or injury or deformity, within the meaning of § 7 of Laws of 1899, p. 275, nor did his advertisements profess to cure or treat disease or injury by any drug or appliance, within the meaning of § 8 of the law, so as to subject him to the penalty of practicing thereunder without a license. People v. Smith, 208 Ill. 31, 69 N. E. 810.

35. California: Legislative regulations under which persons possessing proper qualifications shall be admitted to the practice of dentistry are a valid exercise of the police power to protect the public against incompetent persons. Ex parte Whitley, 144 Cal. 167, 77 P. 879. California dentistry law (St. 1901, p. 564, c. 175) is not unconstitutional because it exempts from the operation of its requirements those engaged in the practice of dentistry at the time of the passage of the act. Id. Nor does the act make an arbitrary or unconstitutional classification of persons permitted to practice after examination; the classification into graduates of reputable dental colleges, graduates of high schools who have served apprenticeships of four years, and licensed dentists who have practiced five years in other states, is within the power of the legislature to fix a reasonable standard of competency. Id. Judicial power is not conferred on the board of dental examiners by the provision that graduates of reputable dental colleges shall be admitted to examination on furnishing satisfactory evidence of graduation; nor is the board by this provision given arbitrary power to determine what colleges are "reputable." Id.

Kentucky: The provision of the laws creating the State Dental Association and regulating the practice of dentistry, which requires dentists then practicing to register and obtain certificates, and penalizes a violation thereof, is constitutional. Wilson v. Com. [Ky.] 82 S. W. 427.

Washington: The act regulating the practice of dentistry does not confer legislative power on the state board of dental examiners. [Sess. Laws 1893, c. 55, p. 90]. In re Thompson [Wash.] 78 P. 899. The requirement of this act that applicants for examination must have diplomas from some dental college in good standing is reasonable and valid. Id.

36. Iowa: State v. Heath [Iowa] 101 N. W. 429; State v. Edmunds [Iowa] 101 N. W. 431.

The **California** act (Feb. 27, 1901), establishing a State Board of Medical Examiners, is not unconstitutional, though it authorizes the appointment of members by various medical societies of the state; no special or exclusive right, privilege or immunity, within the meaning of Const. art. 1, § 21, or art. 4, § 25, subd. 19, is granted by the act. Ex parte Gerino, 143 Cal. 412, 77 P. 166.

37. Code, §§ 2579, 2580, 2581, defining "physicians," "practice of medicine," and

fees may be required.[38] Statutory provisions fixing standards of proficiency of applicants for certificates, which do not discriminate between different schools of medicine, are valid.[39] Constructions of various regulatory acts are given in the note.[40]

Prosecutions for violations of regulatory acts.[41]—The offense of practicing without a certificate is of a continuing nature, and a conviction for a particular act of practice bars prosecutions for previous acts.[42] Under an indictment for practicing medicine without a license, the crime is proven by proving special acts of practice of the defendant, and the state need not elect a particular act on which to base the prosecution.[43] If a statute regulating the practice of medicine does not declare the acts which shall constitute "practicing medicine" or "publicly professing to do so," it is for the courts to say what facts or proof bring a particular case within the statute.[44] Under statutes which denounce the public profession of skill in the art of healing by persons who do not hold the required certificate, proof of actual treatment is not in all cases necessary.[45] Holdings on the sufficiency[46] and relevancy[47] of evidence and on the sufficiency of the indictment[48] are given in the notes.

"itinerant physicians," and requiring a certificate or license, construed and upheld. State v. Edmunds [Iowa] 101 N. W. 431.

38. State v. Edmunds [Iowa] 101 N. W. 431. The annual license fee of $250, imposed on itinerant physicians by § 2581, is not unreasonable. Id. The title of the act, "Of the practice of medicine," is broad enough to include the license provision. Id. If the license be treated as a tax, the declaration that it is to be paid to the state treasurer for the use of the state sufficiently states its object and purpose, within Const. art. 7, § 7. Id.

39. Section 2576 of the Iowa Code, prescribing examinations, is valid. Under this section magnetic healers who do not use medicines are not required to show proficiency in materia medica and therapeutics. State v. Heath [Iowa] 101 N. W. 429. Act Feb. 27, 1901, § 5, requiring for a certificate to practice medicine, a diploma from a college requiring the same standard of scholarship as that required by the Association of American Medical Colleges for that year, does not require that college to have the same course of study or other requirements as the colleges of the association; there is no discrimination against other schools. Ex parte Gerino, 143 Cal. 412, 77 P. 166. The standard thus fixed is sufficiently definite and certain. Id.

40. The Michigan State Veterinary Board has no power, under Pub. Acts 1899, No. 191, to determine whether a veterinary school or college is "regular," since any institution organized in compliance with Comp. Laws 1897, c. 218, is regular. The issuance of certificates to graduates of such schools is not discretionary with the board. Wise v. State Veterinary Board [Mich.] 101 N. W. 562. One who prior to 1902 had not obtained the required certificate for the practice of dentistry is not of the excepted class, but is included in the express terms of the act of that year, raising the standard for the granting of a certificate. Ohio v. Board of Dental Examiners, 5 Ohio C. C. [N. S.] 55. Sayles' Rev. Civ. St. art. 5049, imposing an occupation tax on traveling medical specialists held not to apply to a physician who had his home and headquarters at a certain place and maintained offices and clerks at three other towns which he visited periodically. Adams v. State [Tex. Cr. App.] 78 S. W. 935.

41. See 2 Curr. L. 888, n. 76.

42. The offense denounced by the Kentucky act regulating dentistry, which requires dentists practicing at the time of the enactment of the law to register and obtain a certificate, is of a continuing nature. Wilson v. Com. [Ky.] 82 S. W. 427.

43. Evidence sufficient to show that accused "practiced" without a license, contrary to Acts 1901, p. 115, c. 78. Payne v. State [Tenn.] 79 S. W. 1025.

44. 29 Stat. at L. 198, c. 313. Springer v. District of Columbia, 23 App. D. C. 59.

45. Where a "magnetic" healer was accused of practicing without a certificate, under Code, § 2580, and there was proof that he professed to treat a great number of diseases, the question of his guilt should have gone to the jury, though there was no evidence of actual treatment of any patient in the county. State v. Heath [Iowa] 101 N. W. 429.

46. Evidence insufficient to prove defendant a traveling specialist and not an ordinary practicing physician. Howe v. State [Tex. Cr. App.] 78 S. W. 1064. A prosecution for violating 29 Stat. at L. 198, c. 313, regulating the practice of medicine in the District of Columbia, is supported by evidence that defendant held himself out as an expert in the treatment of alcoholism, maintained a sanitarium, and employed physicians who attended the patients under his direction. Springer v. District of Columbia, 23 App. D. C. 59.

47. Where defendant was charged with following the occupation of traveling specialist in 1903 without having paid the required license tax, the record of the commissioners' court showing the levy of such tax for 1902 was inadmissible. Howe v. State [Tex. Cr. App.] 78 S. W. 1064. An advertising circular of a sanitarium for the treatment of alcoholism, referring to the

§ 2. *Regulation of the keeping and sale of drugs and medicines.*[49]—Statutes must be fully complied with.[50]

§ 3. *Recovery of compensation.*[51]—There can be no recovery for professional services by one who has not complied with statutory requirements.[52] Qualification of the physician under the statute will be presumed and the burden is upon him who denies license to practice.[53] In order to recover back money paid for treatment by one alleged to have been practicing in violation of law, the person treated must prove that he was induced to employ such person by the false representation that he was a practicing physician.[54] Evidence points are given in the note.[55]

§ 4. *Malpractice.*[56] *Degree of care required.*—The implied contract of a physician or surgeon is not to cure, but to treat the case with that degree of diligence and skill ordinarily used by the average physician in good standing, having regard to the state of the medical profession at the time.[57] Whether proper skill and care were used in the treatment of a particular case is to be determined by the testimony of medical experts,[58] and by reference to the doctrines of the particular school of practice to which the defendant belongs.[59] Failure to effect a cure is not necessarily evidence of negligence.[60] Failure to use reasonable care or skill in ascertaining the real cause of a patient's suffering, or the real nature of an injury, renders a physician liable.[61] Frequency or infrequency of visits is not alone conclusive on the question of negligence.[62] Custom or practice in the locality in the treatment of similar cases is the test.[63] A physician whose employment has terminated is under no further obligation to the patient.[64]

manager as an "M. D.," and the fact that he registered at a hotel as a "doctor," while not conclusive, are evidence on the issue whether he held himself out as a practitioner. Springer v. District of Columbia, 23 App. D. C. 59.

48. Indictment following the language of Code, § 2581, prohibiting itinerant physicians from practicing without a license, held not duplicitous, and to state an offense under the statute. State v. Edmunds [Iowa] 101 N. W. 431.

49. See 2 Curr. L. 888.

50. Under Laws 1900, p. 1479, c. 667, § 196, requiring druggists, among other things, to make statements to the State Board of Pharmacy showing their employes' registration and qualifications, and to pay a fee for a certificate, payment of the fee without filing the required statement is no defense to an action for the statutory penalty. Bigelow v. Drummond, 90 N. Y. S. 913.

51. See 2 Curr. L. 888.

52. Physician who has failed to register according to Pol. Code 1895, §§ 1479, 1480 cannot recover. Murray v. Williams [Ga.] 48 S. E. 686.

53. Allegation, in action to recover for services, that plaintiff was a "regular, practicing physician," held sufficient without alleging compliance with statutory provisions. Cather v. Damerell [Neb.] 99 N. W. 35.

54. Gaither v. Lindsey [Tex. Civ. App.] 83 S. W. 225.

55. Evidence insufficient to warrant verdict for plaintiff in action to recover for services rendered as physician. Abrahams v. Koch, 88 N. Y. S. 148. Evidence in action against county for medical services held to sustain verdict for $750, the amount claimed reasonable by the county. Rutherford v. Bath County [Ky.] 80 S. W. 815. In an action for services, evidence of services to another patient at the same house during the same period is irrelevant. Kwiecinski v. Newman's Estate [Mich.] 100 N. W. 391. A physician is competent to testify as to the reasonable value of services and medicines for a person since deceased, the items being proven by an account book. Id.

56. See 2 Curr. L. 889.

57. Evidence held not to show improper treatment of fractured limb. Bigney v. Fisher [R. I.] 59 A. 72. In an action for malpractice by a dentist, the aggravation of plaintiff's injury by delay in consulting a physician, the delay being advised by the defendant, may be considered. Mernin v. Cory [Cal.] 79 P. 174.

58. Bigney v. Fisher [R. I.] 59 A. 72. If a method of treatment is shown to be as suitable and proper for a dislocation of the clavicle as for a fracture, it cannot be said to be negligent, though there was an erroneous diagnosis. Tomer v. Aiken [Iowa] 101 N. W. 769.

59. Spead v. Tomlinson [N. H.] 59 A. 376.

60. As where it is shown that reduction of a dislocation of the clavicle is difficult and the results not always satisfactory under any kind of treatment. Tomer v. Aiken [Iowa] 101 N. W. 769.

61. Failure to discover a fracture of elbow and dislocation of shoulder. Manser v. Collins [Kan.] 76 P. 851.

62, 63, 64. Tomer v. Aiken [Iowa] 101 N. W. 769.

Malpractice by nonmedical treatment.—Any person who holds himself out as a healer of disease and accepts employment as such is held to the duty of reasonable skill in the exercise of his vocation.[65] Thus one holding himself out as a magnetic healer is liable for damages resulting from a want of ordinary care or skill in treating a patient,[66] and in such case plaintiff need not prove that the method of treatment used was not proper or usual in magnetic healing.[67] An ordinary physician who does not claim or pretend to know anything of the practice of magnetic healing is competent to testify as to whether the treatment given by a magnetic healer was proper in any case.[68] But it is held that the standard of care to be applied to a Christian science healer is the care, skill and knowledge of the ordinary Christian scientist, not that of the ordinary physician.[69] There can be no recovery for injuries resulting from treatment by Christian science methods, on the ground that such treatment is contrary to public policy, if it appears that the giving of such treatment was not illegal, and that plaintiff voluntarily and intelligently consented to the use of such methods.[70]

A few holdings as to pleading,[71] evidence,[72] damages,[73] and questions of law and fact[74] peculiarly applicable to actions for malpractice, are given in the notes. See appropriate title for full treatment.

§ 5. *Negligent homicide by physician.*[75]—Negligence resulting in the death of the patient may render the practitioner criminally liable.[76]

65, 66, 67, 68. Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655.

69. Evidence held not to show a departure from Christian science methods in treatment of appendicitis. Spead v. Tomlinson [N. H.] 59 A. 376. Held, also, that an action for deceit based on defendant's statement that he could and would cure plaintiff could be successfully maintained only on allegation and proof of a false representation made with a fraudulent intent. Id.

Note: In Spead v. Tomlinson, supra, the court seems to extend to Christian scientists the rule that, in cases involving the liability of medical practitioners, where there are distinct and differing schools of practice, treatment given by a physician in a given case is to be tested by the general doctrines of his school, and not by those of other schools. See Patten v. Wiggin, 51 Me. 594, 81 Am. Dec. 593; Carpenter v. Blake, 60 Barb. 488, 513, 514.

In Longan v. Weltmer, supra, the court apparently refuses to extend this rule to magnetic healers, and holds that an ordinary physician may testify whether the treatment by a magnetic healer was proper in any case. A general rule of negligence is applied and it is said that if defendants "undertook to cure plaintiff of her maladies, and by negligent and unskillful treatment * * * she sustained the injuries sued for, she was entitled to recover just as she would be entitled to recover damages for the negligent or unskillful performance of any other kind of contract."

70. Spead v. Tomlinson [N. H.] 59 A. 376.

71. A petition alleging that defendant "is a physician and surgeon engaged in the practice of medicine and surgery * * * and has been so engaged for several years last past" is sufficient without alleging that he was a physician at the time he treated the plaintiff. Bower v. Self, 68 Kan. 825, 75 P. 1021. A complaint in an action against a dentist which charges negligence in (1) removing two teeth unnecessarily, (2) allowing portions to remain in gum, and (3) putting in defective and improperly fitted bridgework, and alleges that these acts caused abscesses on the gum and necrosis of the jawbone, states but one cause of action and the various acts are properly set forth in one count. Brown v. Cady, 91 App. Div. 415, 86 N. Y. S. 959. The complaint is sufficiently definite and certain. Id.

72. In malpractice the treatment given plaintiff after defendant gave up the case may be shown. Bower v. Self, 68 Kan. 825, 75 P. 1021. Photographs by the X-ray process are admissible to describe injuries, though admitted not to be infallible. Miller v. Minturn [Ark.] 83 S. W. 918. Where plaintiff claimed a "clicking" jaw was caused by dentist's malpractice, evidence by defendant showing other persons similarly afflicted was irrelevant. Mernin v. Cory [Cal.] 79 P. 174. Where it appeared that defendant did not immerse his instruments in boiling water, a hypothetical question as to the effect of a puncture by an instrument not properly sterilized was not without foundation in the evidence. Bower v. Self, 68 Kan. 825, 75 P. 1021.

73. Damages may be recovered for mental suffering which is an element or consequence of physical pain caused by a negligent failure to ascertain the cause of suffering and to alleviate it. Manser v. Collins [Kan.] 76 P. 851. But mental suffering arising wholly in the mind and not a part of the pain naturally attendant on an injury is not an element of damage. Id.

74. Whether a diagnosis was correct, and the treatment given proper, are questions to be determined by the jury, from the expert testimony; as whether an injury was a dislocation or fracture of the clavicle. Tomer v. Aiken [Iowa] 101 N. W. 769.

75. Only a few illustrative cases are here

MERCANTILE AGENCIES.[77]

MERGER IN JUDGMENT; MERGER OF CONTRACTS; MERGER OF ESTATES, see latest topical index.

MILITARY AND NAVAL LAW.[78]

§ 1. Military and Naval Organization, Maintenance and Enlistment (640).
A. Regular Army and Navy (640). Pay and Subsistence (640). Commutation for Quarters (642). Sea Rations (643). Expenses and Mileage (643). Retirement (644).
B. Militia (645).
§ 2. Regulations and Discipline; Promotion and Discharge (645).
§ 3. Military and Naval Tribunals (647).
§ 4. Civil Status, Rights and Liabilities of the Military and Navy (649).
§ 5. Martial Law (649).
§ 6. Soldiers' Homes, and Indigent Soldiers (649).

§ 1. *Military and naval organization, maintenance and enlistment. A. Regular army and navy.*[79] *Enlistment.*[80]—A minor cannot lawfully be enlisted in any branch of the military or naval service without the consent of his parents,[81] and one who has so enlisted by misrepresenting his age will be discharged by writ of habeas corpus at their suit.[82]

Pay and subsistence.[83]—The act of March 3, 1899, provides that naval officers shall receive the same rate of pay as army officers of corresponding rank,[84] but this does not operate to reduce the pay which, but for its passage, would have been received by any such officer at the time of its passage or thereafter.[85] The latter provision applies only to officers in the navy at the time of its passage,[86]

given; for full treatment, see Homicide, 3 Curr. L. 1643.

NOTE. Ordinary physicians: It is held by some courts that a person who prescribes for or gives medicine to another with the honest intention and expectation of curing him is not guilty of manslaughter, though death, unexpected by him, results. State v. Schulz, 55 Iowa, 628, 8 N. W. 469, 39 Am. Rep. 187; Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561; Robbins v. State, 8 Ohio St. 138; Coywood v. Com., 7 Ky. L. Rep. 224; State v. Reynolds, 42 Kan. 320, 22 P. 410, 16 Am. St. Rep. 483. But if the physician was guilty of gross negligence, or foolhardy presumption, and death results, he is guilty of manslaughter. Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264. See, also, State v. Power, 24 Wash. 34, 63 P. 1112; Dresbach v. State, 38 Ohio St. 365; State v. Wagner, 78 Mo. 644, 47 Am. Rep. 131; State v. Gile, 8 Wash. 12, 35 P. 417.—See note in 61 L. R. A. 289, from which cases here cited are taken.

76. "Prayer of faith" healers, and Christian scientists: Where the leader of a community was indicted for manslaughter for causing the death of a member by neglecting to give him proper attention and care, and it appeared that prayer was relied on exclusively to cure the disease, diphtheria, from which he was suffering, an instruction which permitted the jury to act upon their own beliefs as to the efficacy of prayer to cure disease, in determining whether or not the accused was negligent, either in relying exclusively upon such prayers, or in omitting to use them, was held erroneous. "If a person charged with crime were to be convicted or acquitted according to the belief of a jury upon such questions, it would be in direct opposition to our theory that government is one of law, not of men." State v. Sandford [Me.] 59 A. 597.

In Spead v. Tomlinson [N. H.] 59 A. 376, which was an action for negligence against a Christian science healer, it was held that an intelligent and voluntary consent to treatment by Christian science methods would preclude recovery of damages, but would not prevent conviction of manslaughter, if the patient had died from the negligent treatment.

77. No cases have been found for this subject since the last article. See 2 Curr. L. 890.

78. See 2 Curr. L. 890. See, also, War, 2 Curr. L. 2025; Pensions, 2 Curr. L. 1170.

79. See 2 Curr. L. 890, 891.

80. See 2 Curr. L. 890.

81. Rev. St. U. S. § 1117 (U. S. Comp. St. 1901, p. 813). Ex parte Houghton, 129 F. 239.

82. Ex parte Houghton, 129 F. 239.

83. See 2 Curr. L. 890.

84. 30 Stat. at L. 1007, c. 413 (U. S. Comp. St. 1901, p. 1072). United States v. Thomas, 25 S. Ct. 102; rvg. 38 Ct. Cl. 113, 719; Irwin's Case, 38 Ct. Cl. 87. The aid to a rear-admiral is entitled to the additional pay allowed aids to major-generals in the army. Rev. St. § 1261 gives aids to major-generals $200 per year in addition to the pay of their rank. United States v. Crosley, 25 S. Ct. 261, afg. 38 Ct. Cl. 82.

85. Act March 3, 1899, as amended by Act June 7, 1900, 30 St. L. 697. Richardson's Case, 38 Ct. Cl. 182.

86. "Thereafter" does not mean persons who thereafter become officers, but refers to pay which might thereafter accrue to persons in the navy under any law then in existence. Richardson's Case, 38 Ct. Cl. 182; Taylor's Case, 38 Ct. Cl. 155.

[To be concluded.]

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and was intended to preserve intact the right of such officers to navy pay where it is more than army pay.[87]

Army officers serving in the insular possessions of the United States and in Alaska, or serving beyond the limits of the United States, are entitled to ten per cent increased pay, over and above the rates of pay proper as fixed by law in times of peace,[88] and naval officers detailed for shore duty beyond seas are entitled to the same pay as army officers of equal rank detailed for duty in similar places.[89] Naval officers discharging their ordinary sea duties in such places are not, however, entitled to the increase.[90] Beyond the seas means beyond the continental limits of the United States.[91] Officers appointed to the navy from civil life are entitled to be credited with five years' constructive service on the date of their appointment for the purpose of determining their pay.[92]

Naval officers on shore duty receive fifteen per cent less pay than when on sea duty.[93] No service is to be regarded as sea service unless performed at sea under the orders of a department, and in vessels employed by authority of law.[94] Such vessels are only those owned or chartered by the government, or otherwise engaged in the service of the United States.[95] Whether an officer is on sea or shore duty must be determined by the order of assignment by the navy department in so far as it does not change the character of the service as defined by statute.[96] Hence an officer is not entitled to sea pay while occupied in traveling on duty partly on land and partly on a merchant vessel, for the purpose of reporting to the navy department, nor while traveling to join the ship to which he has been assigned for duty.[97] Where the duty partakes of sea service and shore

87. Colhoun's Case, 38 Ct. Cl. 198. Hence a naval officer in service when the act was passed is entitled to navy pay when on leave if it exceeds army pay. Commander entitled to pay under Rev. St. § 1556. Act of 1899 and amendment did not affect right under this section. Id. An assistant surgeon in the temporary service of the navy when the act was passed and who is thereafter given a permanent commission is not entitled to the benefits of the act. Appointed under Act May 4, 1898 (30 Stat. L. 369, 380). Permanent commission under Act June 7, 1900 (31 Stat. L. 697). Taylor's Case, 38 Ct. Cl. 155.

88. Act May 26, 1900, 31 Stat. L. 211, c. 586; 31 Stat. L. 903, c. 803 (U. S. Comp. St. 1901, p. 896). United States v. Thomas, 25 S. Ct. 102, rvg. 38 Ct. Cl. 113, 719. Pay proper means the fixed amount given to officers as distinguished from pay and emoluments, and the ten per cent should be computed on the officer's longevity pay, if any. Irwin's Case, 38 Ct. Cl. 87.

89. 30 Stat. L. 1007, c. 413, § 13 (U. S. Comp. St. 1901, p. 1072). United States v. Thomas, 25 S. Ct. 102, rvg. 38 Ct. Cl. 113, 719.

90. United States v. Thomas, 25 S. Ct. 102, rvg. Thomas's Case, 38 Ct. Cl. 113, on rehearing 38 Ct. Cl. 719. Naval officers who served in Chinese waters during the Boxer troubles were not. Ryan's Case, 38 Ct. Cl. 143.

91. Act March 3, 1901 (30 Stat. at L. 1108). Relates back to original act. Irwin's Case, 38 Ct. Cl. 87. Term must receive the interpretation usually given to it in this country and England, and means outside the United States. Thus an officer on shore duty in the Philippine Islands is beyond seas within the meaning of the act. Must be interpreted as of the time it was enacted. Id.

92. Surgeon in temporary service of navy not entitled to such credit nor to mounted pay [Act March 3, 1899, § 13]. Taylor's Case, 38 Ct. Cl. 155.

93. 30 Stat. at L. 1007, c. 413; U. S. Comp. St. 1901, p. 1072. United States v. Thomas, 25 S. Ct. 102, rvg. 38 Ct. Cl. 113, 719.

94. U. S. Rev. St. § 1571; U. S. Comp. St. 1901, p. 1079. United States v. Thomas, 25 S. Ct. 102, rvg. 38 Ct. Cl. 113, 719. Act of 1899 does not repeal or in any way modify this section. Ryan's Case, 38 Ct. Cl. 143.

95. United States v. Thomas, 25 S. Ct. 102, rvg. 38 Ct. Cl. 113, 719, on other grounds.

96. United States v. Engard, 25 S. Ct. 322, in which the shore duty was referred to in the order of assignment as temporary and in addition to present duties. Ryan's Case, 38 Ct. Cl. 143. The secretary of the navy has no authority to declare sea service to be shore service or vice versa. General order of July 23, 1849, relating to coast survey service. Taussig's Case, 38 Ct. Cl. 104.

97. United States v. Thomas, 25 S. Ct. 102, rvg. 38 Ct. Cl. 113, 719, on other grounds. Officer detached from one vessel and assigned to duty on another is on shore duty while traveling from one to the other. Ryan's Case, 38 Ct. Cl. 143. When an officer is detached from duty on a vessel in which he has performed sea service, his sea pay ceases and his shore pay begins, though he may thereafter travel by sea on

duty, the facts of each particular case must be considered, and if from the whole case there is a preponderance in favor of either service, it must constitute the basis for fixing the rate of pay.[98] An officer temporarily absent from a ship in commission, to which he is attached, is entitled to sea pay.[99]

The classification of mounted and unmounted pay was intended in a general way to mark a distinction between the pay of cavalry and infantry officers.[1] Mounted pay is not an allowance, but pay proper, and the officer to whom it is assigned receives it whether he is actually mounted or not.[2] A naval officer is not entitled to it, though an army officer of corresponding rank would be.[3]

In time of war every army officer serving with troops operating against an enemy who exercises, under assignment in orders issued by competent authority, a command above that pertaining to his grade, is entitled to receive the pay and allowances of the grade appropriate to the command exercised.[4] The statute applies only to cases where such an order is necessary to impose the burden of the higher command upon the officer,[5] and not to those where the command temporarily devolves upon an officer without an order of assignment.[6]

By the Act of April 26, 1898, the pay proper of enlisted men is increased twenty per cent in time of war.[7]

By Act May 26, 1899, officers and enlisted men in the army who served during the war with Spain and were honorably discharged without furlough, are given extra pay at the rate of two months to those who served beyond the limits of the United States, and one month to those who did not.[8] The extra pay given to volunteers on muster out extends only to those who actually sever their connection with the military service, and not to one discharged for the purpose of enabling him to accept an appointment in the regular army.[9]

Commutation for quarters.—At all places where there are not public quarters, commutation therefor may be allowed.[10] Commutation for quarters is a form of reimbursement, and not a part of an officer's compensation.[11] Hence where he

a merchant vessel from one post of duty at sea to another. Traveling to San Francisco and thence to Manila. Id. An officer in 1867 was not entitled to sea pay after being detached from his vessel on a foreign station and ordered to report to the secretary of the navy. Bishop's Case, 38 Ct. Cl. 473.

98. Taussig's Case, 38 Ct. Cl. 104; Ryan's Case, 38 Ct. Cl. 143. The test of his right to sea pay is, was he deprived of the ease, comfort and economies of shore duty? Engard's Case, 38 Ct. Cl. 712, afd. United States v. Engard, 25 S. Ct. 322. A naval officer on shore duty assigned to the temporary command of a vessel in the coast survey service, who continues on shore duty, does not live continuously on board, and is not subject to the restrictions, requirements and regulations of sea service, is not entitled to sea pay. Taussig's Case, 38 Ct. Cl. 104.

99. Chief engineer of vessel in navy yard ordered to report for "temporary duty in connection with the inspection of steel tubes for boilers," in addition to his other duties, is entitled to sea pay while so engaged. Engard's Case, 38 Ct. Cl. 712, afd. United States v. Engard, 25 S. Ct. 322.

1. Richardson's Case, 38 Ct. Cl. 182.

2. Richardson's Case, 38 Ct. Cl. 182; Crosley's Case, 38 Ct. Cl. 82.

3. United States v. Crosley, 25 S. Ct. 261, rvg. 38 Ct. Cl. 82, and overruling Richardson's Case, 38 Ct. Cl. 182.

4. Act April 26, 1898 (30 Stat. at L. p. 364, § 7). Humphrey's Case, 38 Ct. Cl. 689. The term command refers not to the commander but to the commanded, i. e., the body of troops constituting the command. Id.

5. Humphrey's Case, 38 Ct. Cl. 689. Assignment must be necessary and for the good of the service, and not merely for the purpose of increasing the officer's pay. Major in command assigned to command regiment not entitled. Id.

6. Humphrey's Case, 38 Ct. Cl. 689.

7. 2 Sup. Rev. St. 746. Does not apply to those on retired list. Murphy's Case, 38 Ct. Cl. 511.

8. 31 Stat. at L. 217. Hunt's Case, 38 Ct. Cl. 704. Colonel of volunteers to whom no furlough was granted, and who remained at place of regimental enrollment in command of officers and men detailed for guard, and in charge of regimental property while rest of regiment was on furlough, is entitled to such extra pay. Id.

9. Acts Jan. 12, 1899 (30 Stat. at L. 784) and May 26, 1900 (31 Stat. at L. 217). Hull's Case, 38 Ct. Cl. 407.

10. Acts June 18, 1878 (20 Stat. at L. p. 145, § 9) and June 23, 1879 (21 Stat. at L. 30). Hunt's Case, 38 Ct. Cl. 704. By the army regulations it will be allowed only where an officer is detailed for duty without troops [Army Reg. 1336]. Id.

11. Odell's Case, 38 Ct. Cl. 194; Irwin's Case, 38 Ct. Cl. 87.

occupies government quarters, no commutation can be allowed him, even though they were not regularly assigned to him,[12] or the number of rooms assigned is less than the number to which he is entitled under the regulations.[13]

Sea rations.—Naval officers are not entitled to an allowance for sea rations.[14]

To fix liability upon the government for additional pay to officers appointed to staff duty under the Act of April 22, 1898, the president must appoint them, or assign them thereto in his discretion.[15] The secretary of war may act for him as his constitutional organ in making such assignments, but cannot delegate such authority to a subordinate.[16]

An act appropriating money for payment of arrears of pay of volunteers in the Civil War that may be certified to be due by the accounting officers of the treasury is a promise to pay such claims, and removes the bar of the statute of limitations.[17] The court of claims has jurisdiction to adjust such claims by judicial investigation.[18]

An act referring a claim of a naval officer for pay during the period of his dismissal to the court of claims, and waiving the statute of limitations, leaves the cause of action precisely as it would have been had suit been brought within six years after the cause of action accrued.[19]

Expenses and mileage.[20]—By the Act of March 3, 1899, army and naval officers traveling under orders are entitled to mileage at the rate of seven cents a mile, to be computed over the shortest usually traveled routes,[21] except that they are only entitled to their actual expenses when traveling to and from our island possessions in the Atlantic and Pacific oceans.[22] From our island possessions to the United States means to the officer's destination.[23] By the Act of March 3, 1901, only actual expenses are allowed for travel outside the limits of the United States in North America.[24]

12. Not allowed where occupies room in marine barracks as guest, with understanding that he will vacate when required. O'Dell's Case, 38 Ct. Cl. 194.

13. Irwin's Case, 38 Ct. Cl. 87.

14. Allowance provided for by U. S. Rev. St. §§ 1578, 1585 (U. S. Comp. St. 1901, pp. 1083, 1085), impliedly repealed by navy personnel act of March 3, 1899 (30 Stat. at L. 1007, c. 413, § 13; U. S. Comp. St. 1901, p. 1072), providing that naval officers shall receive same pay and allowances, except forage, as received by army officers of corresponding rank. Gibson v. U. S., 194 U. S. 182, 48 Law. Ed. 926; Lowe v. U. S., 194 U. S. 193, 48 Law. Ed. 931, afg. 38 Ct. Cl. 170. Provision in last act and in act June 7, 1900 (31 Stat. at L. 684, 697), that it shall not operate to reduce pay, do not extend to allowances. Thomas's Case, 38 Ct. Cl. 113, 719, rvd. 25 S. Ct. 102, on other grounds; Id., 38 Ct. Cl. 70; Richardson's Case, 38 Ct. Cl. 182; Taylor's Case, 38 Ct. Cl. 155; Ryan's Case, 38 Ct. Cl. 143.

15. 30 Stat. at L. p. 362, § 10. Truitt's Case, 38 Ct. Cl. 398.

16. Officer appointed to staff duty as adjutant general under order issued "by command" of the major-general of the army, but "by direction of the secretary of war," not assigned by president, and not entitled to staff rank and pay of major, though order recites it was made under the provisions of the statute. Truitt's Case, 38 Ct. Cl. 398.

17. Act June 11, 1896 (30 Stat. L. 448). Sowle's Case, 38 Ct. Cl. 525.

18. Sowle's Case, 38 Ct. Cl. 525. The fact that act directs payment of such claims as "may be certified to be due by the accounting officers" does not give them exclusive jurisdiction. Simply act in usual capacity as auditing officers, leaving claimant his judicial remedy. Id.

19. Bishop's Case, 38 Ct. Cl. 473. The fact that the act refers to claimant as a lieutenant-commander is not an admission that he was such officer in law or in fact during the period of his dismissal. Merely descriptive of the service claimed to have been rendered. Id.

20. See 2 Curr. L. 891, n. 9, 10.

21. 30 Stat. at L. 1068. Made applicable to naval officers by 30 Stat. at L. 1007. Thomas's Case, 38 Ct. Cl. 70; Id., 38 Ct. Cl. 113, 719, rvd. 25 S. Ct. 102, on other grounds.

22. 30 Stat. at L. 1068. Thomas's Case, 38 Ct. Cl. 70. Proviso became effective immediately on its approval, though contained in appropriation act. Chance's Case, 38 Ct. Cl. 75. An officer ordered from Manila to Shanghai for duty there, and when such duty is performed to proceed to San Francisco, is not traveling from our island possessions, and is entitled to mileage. Thomas's Case, 38 Ct. Cl. 70.

23. Officer traveling from Manila to his home in Illinois for discharge not entitled to mileage for land journey after reaching United States. Chance's Case, 38 Ct. Cl. 75.

24. 2 Supp. R. S. 1533. Thomas's Case, 38 Ct. Cl. 70.

An officer otherwise entitled thereto is not deprived of his right to mileage because he is ordered to proceed on transportation to be furnished him,[25] nor because he accepts such transportation and his expenses.[26] The secretary of the navy may direct that actual and necessary expenses only be allowed in cases where orders are given for travel to be performed repeatedly between places in the same vicinity.[27] It is within his discretion to determine what places are in the same vicinity, and his decision cannot be reviewed by the court.[28]

An officer honorably discharged from the service is entitled to transportation and subsistence from the place of his discharge to the place of his residence,[29] but this does not apply to one who immediately re-enters the service under a new appointment.[30]

It is the duty of the commanding officer of a fleet, squadron or vessel to send enlisted men to an Atlantic or Pacific port of the United States as their terms of enlistment expire, unless their detention for a longer period is, in his opinion, essential to the public interest.[31] This is not equivalent to a statutory salary and may be voluntarily waived by the enlisted man.[32]

Retirement. Officers.—Naval officers who served during the Civil War are entitled, on retirement, to the rank and three-fourths of the sea pay of the next higher grade.[33] The act applies only to actual officers who actually served during the war, or who at least voluntarily offered and obligated themselves to encounter its hardships and dangers.[34] The decision of a naval retiring board that claimant is not entitled to the benefits of the act on an agreed state of facts is subject to review by the courts.[35]

An officer on the retired list owes no duty to the government and his pay is not compensation for discharging the duties of that office, but is in the nature of an honorary pension.[36] Hence he may hold the office of chief clerk of the Department of Agriculture and draw the salaries of both offices.[37]

Enlisted men are entitled to be retired after thirty years of service with the rank which they then hold, and to receive three-quarters of the pay and allowances of such rank.[38] After retirement they are not a part of the army,[39] and are

25, 26. Thomas's Case, 38 Ct. Cl. 70.

27. Act June 7, 1900 (30 Stat. at L. 685). Willitts's Case, 38 Ct. Cl. 534.

28. Willits's Case, 38 Ct. Cl. 534. When the travel between two places is not repeated, the officer is entitled to mileage. Id.

29. Rev. St. § 1289. Hull's Case, 38 Ct. Cl. 407.

30. Volunteer officer discharged for purpose of, and who does, accept commission under Act March 2, 1899 (30 Stat. at L. p. 980, § 4), not entitled to commutation for constructive travel. Hull's Case, 38 Ct. Cl. 407.

31. Rev. St. § 1422. Hunt's Case, 38 Ct. Cl. 135.

32. Enlisted man who, in consideration of his being allowed to remain on vessel then about to sail for Asiatic waters, gives a waiver of all claim to transportation home should he refuse to re-enlist and be discharged in a foreign port, cannot maintain an action for cost of such transportation on being so discharged. Hunt's Case, 38 Ct. Cl. 135.

33. 30 Stat. L. 1007, c. 413, § 11 (U. S. Comp. St. 1901, p. 1025). Gibson v. U. S., 194 U. S. 182, 48 Law. Ed. 926, afg. 38 Ct. Cl. 170. A captain who so served is entitled, on retirement, to three-fourths of the sea pay of rear-admirals of the nine lower numbers of that grade, and not of the pay of those of the higher numbers. Rear-admirals of nine lower numbers entitled to same pay as brigadier-general in army [30 Stat. at L. 1005, c. 413 (U. S. Comp. St. 1901, p. 982)]. Gibson v. U. S., 194 U. S. 182, 613, 48 Law. Ed. 926; Lowe v. U. S., 194 U. S. 193, 48 Law. Ed. 931, afg. 38 Ct. Cl. 170.

34. Jasper's Case, 38 Ct. Cl. 202. Not to one who was undergraduate at the Naval Academy. Id.

35. Jasper's Case, 38 Ct. Cl. 202.

36. Geddes's Case, 38 Ct. Cl. 428.

37. Not prevented by proviso in appropriation for department that no part of the money shall be paid to any one as additional salary. Geddes's Case, 38 Ct. Cl. 428. Not forbidden by Act July 31, 1894 (28 Stat. at L. pp. 162, 205, § 2) and duties not incompatible. Id. A renunciation of his pay as a retired officer exacted by the accounting officers as a condition of his receiving the pay of the other office is no defense. Officers cannot increase, diminish or take away his salary. Officer also expressly retained right to test question. Id.

38. Act Feb. 14, 1885 (23 Stat. at L. 305), as amended by Act Sept. 30, 1890 (26 Stat. at L. 504). Murphy's Case, 38 Ct. Cl. 511.

not entitled to the additional pay for length of service,[40] nor to the increase given enlisted men in time of war.[41]

. (§ 1) *B. Militia.*[42]—In Kentucky the militia can be ordered into active service only by the governor in the exercise of his discretion.[43] His determination in this regard is conclusive and the necessity for such action cannot be inquired into.[44] When they have been so called out they are in active service and entitled to pay, and also to subsistence,[45] which must come out of the general fund in the state treasury.[46] Expenses are properly paid on warrant of the auditor of public accounts, on vouchers signed by the adjutant general and the governor.[47] The auditor is not liable on his official bond for payments made on vouchers signed by persons purporting to be the governor and adjutant general, though they were wrongfully so acting, if the amount paid was in fact a just claim against the state.[48] Such expenses incurred while the militia remains in active service, and until regularly discharged from duty by order of their superior officer, are valid and just claims against the state.[49]

The soldiers must receive orders from their superiors.[50] They cannot be required to leave their posts, and take the risk of becoming deserters, until orders are issued to them through the regular channels of which they may take notice and properly obey.[51] In cases of doubt they are justified in remaining on duty.[52]

§ 2. *Regulations and discipline; promotion and discharge.*[53]—Subject to the constitution and the laws of congress, the president may establish such rules and regulations for the government of the army as he may deem essential to the maintenance of efficiency, discipline and honor.[54] The power to establish such rules necessarily implies a power to modify or repeal them.[55] A modification is effected and shown by the promulgation of a new or different rule or regulation upon the same subject.[56] The secretary of war is the regular constitutional organ of the president for the administration of the army,[57] and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority.[58] He need not state that they emanate from the president, since he will be presumed to be acting with his approbation and under his direction.[59] Such

39. Murphy's Case, 38 Ct. Cl. 511.

40. Given by Rev. St. § 1284. Does not remain continuously in army. Murphy's Case, 38 Ct. Cl. 511.

41. By Act April 26, 1898, 2 Supp. Rev. St. 746. Murphy's Case, 38 Ct. Cl. 511.

42. See 2 Curr. L. 891.

43. Ky. St. 1903, § 2672. Sweeney v. Com. [Ky.] 82 S. W. 639.

44. Sweeney v. Com. [Ky.] 82 S. W. 639.

45. Ky. St. 1903, § 2705. Sweeney v. Com. [Ky.] 82 S. W. 639.

46. Expenditures not limited to amount of military fund provided for by St. 1903, § 2704. Sweeney v. Com. [Ky.] 82 S. W. 639.

47. Under Ky. St. 1903, § 2707, adopting acts of Congress for government of the army in so far as they are applicable to the militia, and § 2705, payments of expenses are properly made on requisitions certified by adjutant general, and approved by governor, on warrant of auditor of public accounts. Sweeney v. Com. [Ky.] 82 S. W. 639.

48, 49. Sweeney v. Com. [Ky.] 82 S. W. 639.

50. Through adjutant general. Sweeney v. Com. [Ky.] 82 S. W. 639.

51. Sweeney v. Com. [Ky.] 82 S. W. 639.

52. Justified in remaining on duty in spite of proclamation of contestant for office of governor, who was thereafter declared elected, where they received no regular orders discharging them from active service, and state liable for their pay and expenses. Sweeney v. Com. [Ky.] 82 S. W. 639.

53. See 2 Curr. L. 892.

54, 55. In re Brodie [C. C. A.] 128 F. 665.

56. Par. 490, army regulations, requiring court to designate whether prisoner shall be confined at post or in penitentiary held qualified by footnote in court-martial manual of 1895, directing court to order confinement in such place as reviewing officer may direct in certain cases. In re Brodie [C. C. A.] 128 F. 665.

57, 58. In re Brodie [C. C. A.] 128 F. 665.

59. Where order promulgating army regulations stated that they were published by order of president for government of all concerned, and that promulgating manual for courts-martial made no reference to president, but stated that it was published for information and guidance of all con-

regulations cannot be questioned because they may be thought unwise or mistaken.[60] A footnote to a rule or regulation is not less authoritative than the principal text, where the language and character of the two point to a single authorship and an intention to that effect.[61]

The mere designation of lineal or relative rank in the official army register does not fix and determine an officer's rank in the army and his right to promotion.[62] Hence an officer who does not claim to be entitled to any higher rank for the present cannot be held to have been deprived of any legal or vested right because he is deprived of a lineal or relative rank or position in such register that might be of benefit to him in a future claim to promotion.[63]

The president may summarily dismiss a cadet at West Point without a previous trial and conviction by court martial.[64]

Desertion.—One deserting from the army in time of peace and not in the face of the enemy cannot be tried or punished therefor after the expiration of two years from the time when the offense was committed.[65] One deserting in time of war deserts in the face of the enemy, even though not in the immediate presence of the opposing force.[66]

cerned, both orders will be deemed to speak by same authority and to be of equal dignity. In re Brodie [C. C. A.] 128 F. 665.

60. In re Brodie [C. C. A.] 128 F. 665. The courts cannot substitute their own discretion and judgment for that of the executive department in matters properly confided to it. United States v. Root, 22 App. D. C. 419. Thus they will not interfere by mandamus to control and reverse the action of the president and war department in their work of reorganizing the army under the army reorganization act, in the absence of a plain and unmistakable departure from its provisions. Though there may be some question as to construction adopted by them, yet court will not reverse their action as against construction adopted by secretary of war, and by which rights of others may be affected. Duties discretionary [31 Stat. at L. 748, c. 192; U. S. Comp. St. 1901, p. 748]. Id.

61. Footnote in court-martial manual 1895, requiring court to order imprisonment in such place as reviewing authority may direct. In re Brodie [C. C. A.] 128 F. 665.

62. United States v. Root, 22 App. D. C. 419.

63. Petition for mandamus in which it was claimed that, by violation of army reorganization act, relative rank of petitioner had been reduced, denied because acts were discretionary and petitioner had been deprived of no vested legal right. United States v. Root, 22 App. D. C. 419. Such right is of a prospective nature only. Id.

64. Hartigan v. U. S., 25 S. Ct. 204, afg. 38 Ct. Cl. 346. Cadets are not army officers within the meaning of a statute prohibiting dismissals in time of peace except after trial and conviction by court-martial. U. S. Rev. St. § 1229 (U. S. Comp. St. 1901, p. 868). Word "officer" means commissioned officer [Rev. St. § 1342, art. 99 (U. S. Comp. St. 1901, p. 944)]. Id.

65. Limitation does not begin to run until expiration of term of enlistment and time during which he was absent from United States after desertion is to be deducted [26 Stat. at L. 54, c. 78 (U. S. Comp. St. 1901, p. 968)]. In re Cadwallader, 127 F. 881; Ex parte Townsend, 133 F. 74.

66. In re Cadwallader, 127 F. 881. A soldier deserting after the signing of the protocol between the United States and Spain but before the signing of the treaty deserted in time of peace. State of peace actually existed. Id. But see Ex parte Townsend, 133 F. 74.

NOTE. Habeas corpus—Jurisdiction of courts over deserter from army: A deserter was arrested more than two years after the expiration of the term of his enlistment. A statute prescribed that there should be no punishment after two years. Held, although the statute of limitations would probably be a good defense before the court-martial, yet a civil court could not grant a writ of habeas corpus, since the deserter had never been discharged from the army and was therefore still subject to the jurisdiction of a military tribunal. In re Cadwallader, 127 F. 881. By the early English statutes, desertion was a felony punishable in the civil courts. King v. Beal, 3 Mod. 124; see, also, Tyler v. Pomeroy, 8 Allen [Mass.] 480. But after the Revolution of 1688, the old statutes were superseded by the Mutiny Act, St. 1 W. & M. 5, § 2, which made desertion a purely military crime, punishable, even in time of peace, by a court-martial. In the United States the line between civil and military jurisdiction has always been maintained. Kurtz v. Moffitt, 115 U. S. 487, 29 Law. Ed. 458. The fifth amendment to the constitution of the United States expressly excepts "cases arising in the land and naval forces" from the general provision requiring the indictment of a grand jury before a person can be convicted of a capital or infamous crime. Thus these cases are to be dealt with by the Federal government. Art. 1, § 8, U. S. Const. An act of Congress (Rev. St. § 1342, art. 47) provides that deserters from the army are to be tried by court-martial. Courts-martial form no part of the judicial system of the United States and their proceedings within the limits of their jurisdiction can-

§ 3. *Military and naval tribunals.*[67]—The law governing courts-martial is found in the statutory enactments of congress, particularly in the articles of war, in regulations prescribed by executive authority, and in military usage and procedure.[68] Where charges have been issued and a court-martial having jurisdiction has been ordered, and the person charged has been held to answer, the jurisdiction attaching in favor of the court-martial will exclude that of a civil tribunal in which proceedings for a writ of habeas corpus may afterwards be commenced.[69] Where the petition for a writ of habeas corpus for the discharge of a minor, enlisting without his parent's consent, has been served, the court is not deprived of jurisdiction by his subsequent arrest by the military authorities on the charge of fraudulent enlistment.[70]

One becoming part of the naval service thereby subjects himself to the lawfully constituted courts-martial of such service, and clothes them with jurisdiction over his person and conduct.[71] A deserter who has never been discharged from the service is subject to the jurisdiction of a military tribunal,[72] and the civil court will not interfere before such tribunal has acted upon and decided the case.[73] The rule is not changed by the fact that the deserter pleads the statute of limitations.[74]

The supreme court of the District of Columbia has no jurisdiction in a habeas corpus proceeding to inquire into the grounds of the detention of a person unlawfully restrained of his liberty by officers of the navy or army outside of such district merely because the respective heads of the navy and war departments may be found and personally served with process therein.[75]

Statutory regulations governing the proceedings of courts-martial must be complied with.[76] In the navy a man may be arrested and confined for a period not exceeding ten days without an assigned reason being given.[77] A longer confinement can be imposed only by sentence of a court-martial, unless further confinement is necessary in the case of a prisoner to be tried by court-martial.[78] The accused is entitled to be furnished with a true copy of the charges, with specifications, at the time of his arrest, and no other charges than those so furnished can be urged against him at the trial.[79] When the commander of a

not be controlled or revised by the civil courts. Dynes v. Hoover, 20 How. [U. S.] 65, 15 Law. Ed. 278; Ex parte Mason, 105 U. S. 696, 26 Law. Ed. 1213; Wales v. Whitney, 114 U. S. 564, 29 Law. Ed. 277. When the court-martial has no jurisdiction, its sentence is absolutely void, and the civil courts may by a writ of habeas corpus discharge the prisoner detained under such sentence. Ex parte Mason, supra. But that writ cannot be made to perform the functions of a writ of error. To warrant the discharge of the prisoner the sentence must not only be erroneous but absolutely void. Barrett v. Crane, 16 Vt. 246; Ex parte Reed, 100 U. S. 13, 25 Law. Ed. 538; Wales v. Whitney, 114 U. S. 564, 29 Law. Ed. 277. It would seem, therefore, that the court properly refused to interfere, for the petitioner, not having been discharged from the army, was still subject to the military jurisdiction.—4 Columbia L. R. 601.

67. See 2 Curr. L. 892.

68. In re Brodie [C. C. A.] 128 F. 665.

69. Ex parte Houghton, 129 F. 239. The civil tribunal must wait until the court-martial has concluded its proceedings and until the sentence imposed by it has been worked out. Id.

70. Ex parte Houghton, 129 F. 239.

71. Bishop's Case, 38 Ct. Cl. 473.

72, 73, 74. In re Cadwallader, 127 F. 881.

75. Enlisted man in marine corps alleged to be unlawfully imprisoned by naval officer acting as governor of Guam. McGowan v. Moody, 22 App. D. C. 148. The officers of the navy are not the agents of the secretary of the navy, but both he and they are the agents and representatives of the president. Any authority exercised by secretary is solely as his representative. Allegation that prisoner is detained by his agents and in his control, though in custody of person unknown, who exercises his authority under secretary's orders is conclusion of law. Id. The court will take judicial notice of the powers and duties of the secretary of the navy under the constitution and laws. Id.

76. Smith's Case, 38 Ct. Cl. 257.

77. Rev. St. p. 281, art. 24. Smith's Case, 38 Ct. Cl. 257.

78. Smith's Case, 38 Ct. Cl. 257.

79. Rev. St. p. 283, art. 43. Statute is mandatory, and unless furnished at time of arrest, sentence forfeiting prisoner's pay is void [Rev. St. p. 283, art. 43]. Smith's Case, 38 Ct. Cl. 257.

squadron on a foreign station convenes a court to try an officer, it will be presumed on collateral attack, and nothing to the contrary appearing on the face of the order, that he properly exercised his discretion and that such trial could not be avoided without inconvenience to the service.[80]

One convicted by a court-martial cannot be confined in a penitentiary unless he could be so confined if convicted in a civil court for the same offense.[81] When the sentence prescribes imprisonment, the court is required to state whether the prisoner is to be confined in a penitentiary or at a post,[82] except that, where it is impossible to determine which form of imprisonment should be imposed under the articles of war, because of the absence of the statutes of the state or territory where the court is sitting, the court may, in case of doubt, order that the imprisonment be in such place as the reviewing authority may direct.[83] Whether the local law is impossible of ascertainment is a matter for the court itself to decide in each instance,[84] and its determination in this particular is conclusive and not open to collateral attack.[85]

The trial and acquittal of a soldier by the civil authorities on a charge of murder for killing a fellow soldier is no bar to his subsequent arrest and trial by court-martial for conduct to the prejudice of good order and military discipline, though based on the same act.[86] The suspension of an officer for a few hours and his restoration to duty does not relieve him from arrest and conviction for the same offense at a subsequent period.[87]

A court-martial has jurisdiction of the case of a provost-marshal charged with embezzling money received from drafted men to be turned over to their substitutes, though he had no express authority to receive it and assumed to act in his individual capacity in that regard.[88] Such courts also have jurisdiction to sentence a prisoner to imprisonment for a term extending beyond the period of his enlistment.[89]

Courts-martial are lawful tribunals with power to finally determine any case over which they have jurisdicton.[90] They act only in response to the call of a superior authority, and their judgments are inoperative until approved by it.[91] When so approved they are not open to review by civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter,[92] or whether it has exceeded its powers in the sentence pro-

80. Bishop's Case, 38 Ct. Cl. 473.

81. 97th article of war (Rev. St. p. 239). In re Brodie [C. C. A.] 128 F. 665.

82. Army Reg. 1895, par. 940 (Regulations 1901, par. 1040). To be guided in its determination by 97th article of war. In re Brodie [C. C. A.] 128 F. 665.

83. Army Reg. 1895, par. 940, note (Reg. 1901, par. 1040). In re Brodie [C. C. A.] 128 F. 665. Nothing in character of court to prevent such regulation. Id.

84, 85. In re Brodie [C. C. A.] 128 F. 665.

86. Trial under 62nd article of war [U. S. Comp. St. 1901, p. 957]. In re Stubbs, 133 F. 1012. Charge of assault with rifle and infliction of mortal wound on fellow soldier held to sufficiently allege an offense within such article. Id.

87. Suspension not a punishment but an arrest. Bishop's Case, 38 Ct. Cl. 473.

88. Sentence of court that money be turned over to military authorities valid. Colman's Case, 38 Ct. Cl. 315. Where only a part of the money seized by the military authorities was found by the court-martial to have been embezzled, government has no right to retain the balance. Id.

89. Where president has fixed 10 years as maximum imprisonment pursuant to Act Sept. 27, 1890, c. 998, 26 Stat. at L. 991 (Comp. St. 1901, p. 969). In re Stubbs, 133 F. 1012.

90. Ex parte Townsend, 133 F. 74; Bishop's Case, 38 Ct. Cl. 473.

91. Until then are interlocutory and inchoate only. In re Brodie [C. C. A.] 128 F. 665.

92. Ex parte Townsend, 133 F. 74; Bishop's Case, 38 Ct. Cl. 473. Its judgments are not open to review by habeas corpus on the ground that prosecution for the offense of which the prisoner was convicted was barred by limitations. Defense is one to the merits, not affecting jurisdiction. Limitation on prosecutions for desertion prescribed by 103rd article of war. Ex parte Townsend, 133 F. 74. The limitation is not absolute, and whether it applies is a matter to be determined by the court-martial. Id.

nounced.[93] Neither are they open to collateral attack, where the court has cognizance of the charges and jurisdiction of the person of the accused.[94]

The judicial power of the president in passing on the sentence of a court-martial cannot be delegated, but he may avail himself of the services of a subordinate officer to aid him in the consideration of the proceedings and sentence.[95] His personal knowledge of the facts disclosed by the record will be presumed from his approval.[96] The officer convening the court-martial need not approve or disapprove the sentence, where the action of the president is required by law.[97]

§ 4. *Civil status, rights and liabilities of the military and navy.*[98]—Civil courts of a state have, in time of peace, general jurisdiction over persons in the military service of the United States who are accused of a capital crime or of any offense against the person of a citizen committed within such state.[99] On a habeas corpus hearing a Federal court will not, on conflicting evidence, determine the guilt or innocence of the accused.[100]

One enlisting in the navy does not thereby lose his actual or legal residence.[101]

§ 5. *Martial law.*[102]

§ 6. *Soldiers' homes, and indigent soldiers.*[103]

MILITIA; MILLS AND DAMS, see latest topical index.

MINES AND MINERALS.

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93. Ex parte Townsend, 133 F. 74; Bishop's Case, 38 Ct. Cl. 473.

94. In re Brodie [C. C. A.] 128 F. 665. Not for alleged errors and irregularities in its proceedings. Colman's Case, 38 Ct. Cl. 316. Judgment as to whether statute of limitations applies. Ex parte Townsend, 133 F. 74.

95. Bishop's Case, 38 Ct. Cl. 473.

96. Where he wrote on abstract of case "Approved," with his signature, and secretary of the navy notified officer that sentence had been approved by the president, his personal action will be inferred. Bishop's Case, 38 Ct. Cl. 473.

97. Under Act July 17, 1862 (12 Stat. at L. 605). Bishop's Case, 38 Ct. Cl. 473.

98. See 2 Curr. L. 892.

99. Rev. St. U. S. § 1342, art. 59 (U. S. Comp. St. 1901, p. 955). United States v. Lewis, 129 F. 823.

100. United States v. Lewis, 129 F. 823. Soldiers under indictment for murder in a state court for shooting a civilian, who had been stealing from a military post, will not be discharged where the evidence as to their guilt is conflicting. Id.

A Federal court or judge has authority to grant a writ of habeas corpus for the purpose of inquiring into the cause of the restraint of the liberty of any prisoner held in custody under the authority of a state, under an indictment or otherwise, whenever it is alleged that he is in custody for an act done or omitted in pursuance of a law of the United States, or is in custody in violation of the constitution, or a law or treaty of the United States, and to proceed in a summary way to determine the facts, and thereupon to dispose of the party as law and justice requires. United States v. Lewis, 129 F. 823. The prisoner should not, however, be discharged in advance of his trial in the state court except in cases of peculiar urgency, or where the state court has no jurisdiction (Id.), and even after final determination of his case in the state court should be left to his remedy by writ of error from the supreme court of the United States (Id.).

101. For purpose of suing for divorce. Radford v. Radford [Ky.] 82 S. W. 391.

102. See 2 Curr. L. 892. See note to Commonwealth v. Shortall, 65 L. R. A. 193, and see 2 Curr. L. 800.

103. See 2 Curr. L. 892.

§ 6. Private Conveyances or Grants of Mineral Rights in Lands (663).
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§ 11. Remedies and Procedure Peculiar to Mining Rights (673).

§ 1. *General common law principles. A. Public ownership.*[1]

(§ 1) *B. Private ownership; right of freehold tenants of less than fee.*[2]—Petroleum and natural gas are minerals, and are a part of the realty so long as they remain in the ground.[3] Hence they belong to the owner of the tract from which they are taken.[4] But when they escape and go into other lands, or come under another's control, the title of the former owner is gone.[5]

Injuries to a coal mine caused by the issuance of an injunction restraining its working are injuries to the realty for which the equitable owner thereof may recover.[6]

§ 2. *Acquisition of mining rights in public lands. A. What lands may be located.*[7]—A location under the Federal statutes can only be made upon unappropriated mineral land[8] belonging to the United States.[9]

Two locations cannot legally occupy the same space at the same time.[10] However regular in form a junior location may be, it is of no effect as against the rights conferred by a prior subsisting location,[11] or against one who has previously otherwise acquired title to the land.[12]

Statutory license to locate mining claims thereon does not prevent the disposition or reservation of the public lands prior to the acquisition of vested rights.[13]

1, 2. See 2 Curr. L. 893.

3. Belong to the owner of the land so long as they are on it, or in it, or subject to the owner's control. Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 P. 995. While in place. Rymer v. South Penn. Oil Co., 54 W. Va. 530, 46 S. E. 559.

See, also, Tiffany on Real Property, p. 516, § 219.

4. Even though contract under which well was drilled included other tracts. Rymer v. South Penn. Oil Co., 54 W. Va. 530, 46 S. E. 559.

5. Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 P. 995.

See, also, Tiffany on Real Property, p. 516, § 219.

6. Grantee in deed becomes equitable owner of property intended to be conveyed, though it is misdescribed. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552. Instruction in action on injunction bond authorizing recovery of damages for falling in of mine pending writ held supported by evidence of condition of mine before and after its issuance. Id.

7. See 2 Curr. L. 894.

8. Gwiney v. Brown [Colo.] 77 P. 357.

9. Valid location cannot be made on land claimed by one under conveyance from Northern Pacific Railroad Co., which held it as part of its land grant, even though patent to company and its conveyance exempted minerals in the soil. Traphaagen v. Kirk [Mont.] 77 P. 58.

10. Porter v. Tonopah North Star Tunnel & Development Co., 133 F. 756. A valid location in full force is a bar to a subsequent location. Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944. An entry and location on a claim which is in the possession of others actually engaged in doing assessment work thereon is a mere trespass and no rights are acquired thereby. Willitt v. Baker, 133 F. 937.

11. Porter v. Tonopah North Star T. & D. Co., 133 F. 756. The rights acquired by a valid location are wholly unaffected by subsequent conflicting locations, the first in time being the first in right. Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co. [C. C. A.] 131 F. 579. Where defendant took steps to appropriate land as a lode claim before plaintiff's grantor staked it out as a placer claim, and there is evidence of mineral bearing rock on the surface and no proof of an entire absence of a vein of metallic ore, his right to possession is superior to plaintiff's. Bevis v. Markland, 130 F. 226.

12. Evidence sufficient to sustain verdict for defendant in action of ejectment to recover part of claim used by defendant city for public streets. Murray v. Butte [Mont.] 77 P. 527. Stipulation held admission that ground was occupied as public highway prior to location of claim. Id.

13. U. S. Rev. St. § 2319 (U. S. Comp. St. 1901, p. 1424), declaring mineral deposits in public lands and lands containing same open to exploration, and purchase does not deprive the president of the right to reserve a portion of the unoccupied public lands for an Indian reservation. Gibson v. Anderson [C. C. A.] 131 F. 39. Where location was made on Indian reservation on day statute was passed subjecting land in reservation to entry (Act May 27, 1902, c. 888, 32 Stat. at L. 245), but operation of act was postponed by joint resolutions passed on same day (32 Stat. at L. pt. 1, 742, 744), complainant acquired no rights. Id. Record showing that resolutions were approved on such date could not be impeached by showing that they were not approved until later date. Id.

All mineral land, whether known or unknown, was excluded from the grants to the Northern Pacific Railroad Company.[14] The statute provides for an examination and classification of the land as nonmineral before any patent therefor shall issue to the company.[15] The determination of the interior department as to the character of such land is conclusive, in the absence of fraud, imposition or mistake.[16]

(§ 2) *B. Who may locate.*[17]—Mining locations may only be made by citizens of the United States and those who have declared their intention to become such.[18] Locations made by aliens are not illegal or void, but are voidable only,[19] and the fact that the locator is an alien can be taken advantage of only by the government.[20] A subsequent declaration of intention by the locator, or one having an interest in the claim prior to the inception of any adverse rights, relates back to the date of the location or acquisition of the alien's interests therein, and validates the transaction.[21]

§ 3. *Mode of locating and acquiring patent. A. Making and perfecting location.*[22]—State legislatures may enact laws supplemental to the acts of congress relative to the location, possession and working of claims, and may prescribe requirements in addition to those fixed by such acts, so long as they are not inconsistent therewith,[23] and a substantial compliance with both the Federal and state statutes in regard to location and recording is necessary;[24] but a location fully complying with the Federal statute, and defective only because not complying with the state statutes, becomes a valid location upon repeal of the latter before the accrual of an adverse claim.[25]

When every act necessary to the completion of a location has been done before an adverse claim accrues, the order of their performance is immaterial.[26] The fact that many years have elapsed since the original location of a placer claim, without any patent having been issued therefor, does not affect its validity.[27]

14. Act July 2, 1864, c. 217 (13 Stat. at L. 365). Traphaagen v. Kirk [Mont.] 77 P. 58.

15. Act Feb. 26, 1895, c. 136 (28 Stat. at L. 683). Traphaagen v. Kirk [Mont.] 77 P. 58.

16. Traphaagen v. Kirk [Mont.] 77 P. 58.

17. See 2 Curr. L. 894.

18. U. S. Rev. St. § 2319 (Comp. St. 1901, p. 1424). Shea v. Nilima [C. C. A.] 133 F. 209.

19, 20. Shea v. Nilima [C. C. A.] 133 F. 209.

21. Agreement by two aliens to locate claims in Alaska. One subsequently declaring his intention of becoming citizen may enforce contract and recover his interest in claim located by other. Shea v. Nilima [C. C. A.] 133 F. 209.

22. See 2 Curr. L. 894.

23. Mont. Pol. Code, § 3610 et seq. not in violation of U. S. Const. art. 4, § 3, giving congress power to dispose of public lands. Mares v. Dillon [Mont.] 75 P. 963. Such regulations are not invalid on theory that they were enacted in the exercise of an unlawful delegation by congress of legislative power. Butte City Water Co. v. Baker, 25 S. Ct. 211. Requirement of the Montana Statute (Ann. Codes, § 3612) that declaratory statement filed with clerk must contain the dimensions and location of the discovery shaft, and the location and description of each corner with the markings thereon, is not invalid as conflicting with Federal statutes. Id. B. & C. Comp. Or. §§ 3975-3977, prescribing manner of marking and recording claim and amount of development work, not in conflict with U. S. Rev. St. §§ 2319, 2322, 2324 (Comp. St. 1901, pp. 1424, 1426). Wright v. Lyons [Or.] 77 P. 81.

24. Failure to comply with B. & C. Comp. Or. §§ 3975-3977, relating to marking and recording notice of claim, and to development work held to render location invalid. Wright v. Lyons [Or.] 77 P. 81. Statutes are mandatory and must be strictly complied with. U. S. Rev. St. § 2324, relating to marking boundaries. Worthen v. Sidway [Ark.] 79 S. W. 777.

25. Location failing to comply with Cal. St. 1897, p. 214, c. 159, became valid on its repeal (St. 1899, p. 148, c. 113; St. 1900, p. 9, c. 6), locators having remained in possession. Dwinnell v. Dyer [Cal.] 78 P. 247. Evidence sufficient to sustain finding that defendant was in possession of claim at time of plaintiff's location. Id. New trial granted for failure to make finding as to whether defendant had good olaim at time of plaintiff's location. Findings not sufficient to dispose of this issue. Id.

26. Defendant performed all acts necessary under Federal statute, but omitted those required by state statute, which were still performable without infringement of intervening claims when state statute was repealed. Dwinnell v. Dyer [Cal.] 78 P. 247.

27. Clipper Min. Co. v. Eli Min. & Land Co., 194 U. S. 220, 48 Law. Ed. 944.

The Federal statute authorizing the location and acquisition of mining claims on the public lands does not dispose of any estate in such lands, or create any burden thereon or right therein, until the actual inception and assertion of mining rights thereunder.[28]

Lode claims.[29]—In order to make a location, surface ground, including the vein or lode, must be appropriated,[30] and a vein or lode must be discovered within the limits of the claim.[31] A discovery means the finding of mineralized rock in place, as distinguished from float rock.[32] Whether or not it has been made is a question of fact.[33] Claims may not exceed fifteen hundred feet in length along the vein or lode, nor extend more than three hundred feet on each side of the middle of the vein at the surface. The end lines must be parallel.[34] The right of location in no respect depends upon the course of the vein beyond the limits of the claim.[35] The location must be distinctly marked on the ground so that its boundaries may be readily traced.[36] Any marking which will enable the boundaries to be so traced is sufficient.[37]

Statutes in some states require the filing of certificates of location,[38] or a copy of the notice of location.[39]

In some states amended location certificates may be filed within a specified time.[40] No amended certificate is necessary where the original notice is clear, definite and certain, and the boundaries of the claim so marked and monumented that the same can readily be traced and determined.[41] In such case the original

28. Gibson v. Anderson [C. C. A.] 131 F. 39.

29. See 2 Curr. L. 894, § 3A.

30. Rev. St. § 2319 (Comp. St. 1901, p. 1424). Traphaagen v. Kirk [Mont.] 77 P. 58.

31. U. S. Rev. St. § 2320 (Comp. St. 1901, p. 1424). Columbia Copper Min. Co. v. Duchess M., M. & S. Co. [Wyo.] 79 P. 385.

32. Location may be made whenever prospector has discovered such indications of mineral that he is willing to spend time and money in following with the expectation of finding ore. Columbia Copper Min. Co. v. Duchess M., M. & S. Co. [Wyo.] 79 P. 385.

33. Evidence sufficient to sustain finding of discovery by plaintiff's grantors. Columbia Copper Min. Co. v. Duchess M., M. & S. Co. [Wyo.] 79 P. 385.

34. U. S. Rev. St. § 2320 (Comp. St. 1901, p. 1424). Empire M. & M. Co. v. Tombstone M. & M. Co., 131 F. 339; Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 579.

35. U. S. Rev. St. § 2320 (Comp. St. 1901, p. 1424). Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co. [C. C. A.] 131 F. 579. A bill to establish extralateral rights and quiet title need not allege the general course of the vein beyond the limits of the claim. Id.

36. Rev. St. § 2324 (Comp. St. 1901, p. 1426). Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111.

37. Stakes placed at supposed section corners and marked held sufficient to locate quarter section as placer claim, if marking boundaries was necessary, even though they were not on true line. Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111; Worthen v. Sidway [Ark.] 79 S. W. 777.

38. **In Wyoming** must be filed within sixty days from the date of discovery. Rev. St. 1899, § 3423. Where last day is Sunday, may be filed on next day. Columbia C. M. Co. v. Duchess M., M. & S. Co. [Wyo.] 79 P. 385. Notices held to substantially comply with Rev. St. Wyo. 1899, § 2546. Id. The fact that the certificate was not filed within the required time does not defeat an action for trespass where defendant acquired no rights between the expiration of such time and the date on which the certificate was filed. Id.

In Montana the declaratory statement for a claim must be verified by the oath of the locator [Pol. Code, § 3612]. Mares v. Dillon [Mont.] 75 P. 963. The fact that the oath is absolute in form while in fact it was made on information and belief does not invalidate it. Id.

39. A statute requiring the recording of the notice of location within a specified time does not work a forfeiture of the claim for failure to do so in the absence of a provision to that effect. Idaho Rev. St. 1887, § 3103, requires filing within 15 days. Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co. [C. C. A.] 131 F. 579. A substantial compliance with the statute is sufficient. Cal. St. 1875-76, p. 853, c. 562, relating to recording of locations in Calaveres county. Mitchell v. Hutchinson, 142 Cal. 404, 76 P. 55. Description of the property sufficient if complete enough to enable one examining it to ascertain therefrom that the land actually claimed was included therein. Description held sufficient though last course and distance omitted. Id.

40. Nevada statute was enacted for the benefit of locators, and gives them ninety days to perfect their location and to cure any defects in the original notice or the marking of the boundaries, mistakes in the directions and courses, and the like [Cutting's Comp. Ann. Laws, §§ 210, 213]. Porter v. Tonopah North Star T. & D. Co., 133 F. 756.

41, 42. Porter v. Tonopah North Star T. & D. Co., 133 F. 756.

notice may be filed within the prescribed time as the certificate of location.[42] The filing of amended certificates in no way changes or enlarges a claimant's rights as against persons making locations after the filing of his first certificate.[43]

Placer claims[44] are subject to entry under like circumstances and conditions as lode claims and upon similar proceedings.[45] If on surveyed lands they should conform to the lines of such survey,[46] if it is reasonably practicable to do so.[47] Where the notice states that a legal subdivision has been located as a placer claim, it need not further state its boundaries.[48] There is a conflict of authority as to the necessity of marking the boundaries of such claims located on surveyed lands.[49]

Oil land.[50]—Under the Federal statutes the location and sale of oil land is governed by the laws applicable to the location and sale of placer mining claims.[51] Discovery need not precede or coexist with the posting of the notice and the marking of the claim,[52] and a subsequent discovery perfects the title except in so far as the rights of others may have intervened.[53]

(§ 3) *B. Maintaining location; forfeiture, loss or abandonment.*[54]—Under the Federal statute an unpatented lode mining claim becomes liable to forfeiture and relocation on failure of the original locators to do the required assessment work in any one year, provided the latter have not resumed work upon the claim after failure and before such relocation.[55] The work must be resumed in good faith and be prosecuted with reasonable diligence until the requirement for annual labor is satisfied.[56]

Assessment work may be done by one having a contract with the locator for

43. Not as against person locating premises when they were open to location. Gwiney v. Brown [Colo.] 77 P. 357. Defects in the location certificates of defendants, who relocated plaintiff's claim on the ground that he had forfeited his rights, cannot be cured, as against plaintiff, by filing amended certificates after he has re-entered. Field v. Tanner [Colo.] 75 P. 916.

44. See 2 Curr. L. 894, § 3A.

45. U. S. Rev. St. § 2329. Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111. The purpose of this section is to place the location of placer claims on an equality both in procedure and rights with lode claims. Clipper M. Co. v. Eli Min. & Land Co., 194 U. S. 220, 48 Law. Ed. 944.

46. Rev. St. §§ 2329-2331 (Comp. St. 1901, p. 1432). Mitchell v. Hutchinson, 142 Cal. 404, 76 P. 55; Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111.

47. When not practical, conformity as near as is reasonably practical is sufficient. Mitchell v. Hutchinson, 142 Cal. 404, 76 P. 55. Findings held to sufficiently establish valid location in so far as conformity to survey lines was concerned, and not to be inconsistent. Id. In an action to quiet title it is not necessary to allege such conformity. Complaint held to sufficiently tender issue as to making location in conformity to statute. Id.

48. Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111.

49. In California it is held not to be necessary. Kern Oil Co. v. Crawford, 143 Cal. 298, 76 P. 1111.

In Arkansas it is held to be necessary. § 2324 applies to placer claims by virtue of § 2329. Posting notice on tree claiming exclusive right to prospect on certain quarter section, without effort to mark location on ground, insufficient. Worthen v. Sidway [Ark.] 79 S. W. 777. § 2321 does not dispense with requirements of § 2324. Id.

50. See 2 Curr. L. 894, § 2A.

51. Act Feb. 11, 1897, c. 216 (29 Stat. at L. 526); Comp. St. 1901, p. 1434. Weed v. Snook, 144 Cal. 439, 77 P. 1023.

52, 53. Weed v. Snook, 144 Cal. 439, 77 P. 1023.

54. See 2 Curr. L. 895.

55. U. S. Rev. St. § 2324, as amended by Act Jan. 22, 1880, c. 9, § 2 (21 Stat. at L. 61) U. S. Comp. St. 1901, p. 1426. Where locators worked on Dec. 31st, and left their tools in cut that night, and intended to and did resume work next morning, their possession and work were continuous, and one making relocation during the night was a mere trespasser. Willitt v. Baker, 133 F. 937. Evidence held to show that defendants had not made a valid location before plaintiff, whose rights under a prior location were alleged to have been forfeited, resumed and did required assessment work. Field v. Tanner [Colo.] 75 P. 916. Such failure does not ipso facto work a forfeiture, but it does not take place until the rights of third persons accrue, and the forfeiture is avoided if the original locator resumes work before such rights attach. Id. No complete forfeiture until third person acquires title, and until acts necessary to a valid relocation are performed, locator may resume work and prevent forfeiture. Evidence held to show such resumption. Worthen v. Sidway [Ark.] 79 S. W. 777.

56. Worthen v. Sidway [Ark.] 79 S. W. 777.

the purchase of the claim.[57] The burden of proving a forfeiture for failure to do such work is on the person alleging it,[58] and it must be established by clear and convincing evidence.[59] Evidence of the amount of money paid for work done, though not conclusive, is admissible.[60] Persons wrongfully holding possession of another's claim and preventing him from doing the required work thereon cannot set up his failure to support their title as against him.[61]

One tenant in common does not lose his interest in the claim by not contributing to the assessment work of his co-tenant.[62] Under the Federal statute where a co-owner fails or refuses to contribute his proportion of the cost of the required work after a personal notice or notice by publication to do so, his interest in the claim becomes the property of his co-owners who have made the required expenditures.[63] A notice addressed to a deceased co-owner by name, and "his heirs, administrators, and to all whom it may concern," is sufficient without specifically naming the heirs.[64] The fact that there is no administrator does not render the notice invalid where, under the local law, title vests in the heirs, and the administrator has only a lien for administrative purposes.[65] Claims for expenditures for several years may be grouped in the same notice.[66]

By Act July 2, 1898, volunteers in the army and navy during the war with Spain were relieved from the performance of assessment work on filing a notice of their enlistment, and their desire to hold the claim in the clerk's office where their location certificate was recorded, and their claims were not forfeitable for nonperformance of the required work until six months after they were mustered out of the service, or six months after their death in the service.[67] The filing of such notice by the owner of an unpatented claim which has been regularly located and recorded is equivalent in all respects to, and is attended with the same consequences that result from, the actual performance of the work.[68] Thus, where no work has been done for the year prior to that for which the notice is filed, its filing operates as a resumption and full performance of the required work, and avoids a forfeiture.[69]

Abandonment.[70]—Abandonment is a matter of intention, and operates instanter.[71] It takes place when the locator gives up the claim and goes away from it, without any intention of repossessing it, and regardless of what may become

57. Godfrey v. Faust [S. D.] 101 N. W. 718. Work done by a company, the superintendent of which has a contract with the locator of the claim for its purchase, inures to the benefit of the locator, though the superintendent is not shown to have assigned the contract to the company which furnished the money, since it will be considered as holding the contract in trust for it. Id. Sufficient competent evidence to support finding that annual representation work was done. Id.

58. Work required by U. S. Rev. St. § 2324 (U. S. Comp. St. 1901, p. 1426). Whalen Consol. Copper Min. Co. v. Whalen, 127 F. 611; Willitt v. Baker, 133 F. 937.

59. Willitt v. Baker, 133 F. 937; Field v. Tanner [Colo.] 75 P. 916.

60. Whalen Consol. Copper Min. Co. v. Whalen, 127 F. 611. Proof that receiver borrowed money to do assessment work, and reported that it had been done, and that report was approved by court, held sufficient to establish prima facie that work was performed. Id. Evidence insufficient to show that work, labor and expenses incurred were not reasonably worth the amount required by the statute. Id.

61. Field v. Tanner [Colo.] 75 P. 916.

62. Faubel v. McFarland, 144 Cal. 717, 78 P. 261.

63. Rev. St. § 2324, Comp. St. 1901, p. 1426. Elder v. Horseshoe M. & M. Co., 194 U. S. 248, 48 Law. Ed. 960. Publication every day except Sunday, beginning Monday, Jan. 7, and concluding Tuesday, April 2, complies with provision requiring publication "for at least once a week for ninety days." Id. The law does not recognize the acquisition from the government of fractional parts of a claim. Worthen v. Sidway [Ark.] 79 S. W. 777. Where one co-tenant abandons his interest, it does not revert to the government, but the others acquire the entire claim on compliance with the statutes. Evidence held to show such abandonment. Id.

64, 65, 66. Elder v. Horseshoe Min. & Mill. Co., 194 U. S. 248, 48 Law. Ed. 960.

67. C. 563, 30 Stat. at L. 651 (U. S. Comp. St. 1901, p. 1428). Field v. Tanner [Colo.] 75 P. 916.

68, 69. Field v. Tanner [Colo.] 75 P. 916.

70. See 2 Curr. L. 896, n. 79.

71. Conn v. Oberto [Colo.] 76 P. 369.

of it or who may appropriate it.[72] On abandonment the claim reverts to its original status as a part of the unoccupied public domain, and is open to location by the first comer.[73] An abandonment by two of three tenants in common does not affect the interest of the other.[74] A statute providing that no interest in lands shall be created except by operation of law or by deed has no application to an abandonment of a claim by locators and the giving of permission to another to locate thereon.[75]

An amended location of a lode claim does not operate as an abandonment of all rights under the original location, where the new location notice expressly states that no abandonment is intended.[76]

(§ 3) *C. Relocation.*[77]—Mining claims are not open to relocation until the rights of a former locator have come to an end.[78]

(§ 3) *D. Proceedings to obtain patent; adverse claims.*[79]—A patent of a placer claim will not convey the title to a known vein or lode within its area, unless such vein or lode is specifically applied and paid for;[80] but if no vein or lode is known to exist within the placer claim at the time the patent is issued, then the patentee takes title to any which may be subsequently discovered.[81]

The judgment of the land department respecting matters which it must determine in ascertaining whether or not an applicant is entitled to a patent can only be assailed by direct proceedings, and is not open to collateral attack.[82] The issuance of a patent is conclusive evidence of the sufficiency of the steps taken by the locator.[83] A patent issued to a named company establishes the fact that it is a corporation.[84]

72. Action of two of the owners in granting permission to third person to enter into possession of and relocate claim held an abandonment of their interest. Statement of other owner that he did not care to have anything more to do with claim held abandonment of his interest and ratification of acts of others. Conn v. Oberto [Colo.] 76 P. 369. Where lode claim crossed placer claim theretofore patented, the filing of a declaration electing to take a patent for that part on north side of placer claim in pursuance of decree refusing to patent whole and requiring election, operated as abandonment of south tract and took effect immediately on its filing. Gurney v. Brown [Colo.] 77 P. 357.

73, 74, 75. Conn v. Oberto [Colo.] 76 P. 369.

76. Where end lines of amended location did not coincide with those of original held proper, in determining extralateral rights, to draw vertical planes through original lines and amended lines, extending both in the direction of the dip of the vein, and to award to the claim extralateral rights to so much of the vein on its dip as lay within both of such extensions, treating as abandoned only so much of the original claim, with its planes so extended, as lay without the extended end line planes of the amended claim. Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 591.

77. See 2 Curr. L. 896.

78. Porter v. Tonopah North Star T. & D. Co., 133 F. 756. Not until the discoverer has in law abandoned his claim and left the property open for another to take up. Willitt v. Baker, 133 F. 937. Land in possession of one who has made a valid discovery and location is not subject to location by another until after abandonment or forfeiture. Conn v. Oberto [Colo.] 76 P. 369.

79. See 2 Curr. L. 896.

80. U. S. Rev. St. § 2333 (Comp. St. 1901, p. 1433). Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944.

81. U. S. Rev. St. § 2333. Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944.

82. A judgment that a lode vein had not been shown to exist and pass through a conflicting patented placer claim when the latter patent was applied for is not a judgment that such vein does not pass through such placer claim. Gurney v. Brown [Colo.] 77 P. 357. The decision of the Interior Department in annulling an entry on coal land, permitting the amendment of another entry and issuing a patent in pursuance of the latter entry. Judgment is that of a special tribunal and unassailable except in direct proceedings for its annulment or limitation. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552.

83. Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co. [C. C. A.] 131 F. 579. Conclusive as to fact that claim was located and boundaries marked on ground, that notice was recorded and that discovery of mineral was actually made. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 P. 901. Where defendant, over plaintiff's objection, is permitted to go behind the patents to show the dates of the location of the respective claims, which the patents do not disclose, it cannot complain of oral testimony introduced by plaintiff in rebuttal showing that its claim was in fact senior. New trial on ground of surprise properly refused. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

An erroneous description of the land does not render the patent void where it can be easily located by reference to the monuments therein referred to.[85] Where an entry is permitted to be amended, to take effect as of the date of the original entry, the patent issued in pursuance thereof relates back to such date.[86] The mere suspension of a mineral entry for the purpose of requiring compliance with departmental regulations does not destroy the force of the certificate evidencing such entry, or enable third parties to attack its validity.[87]

Suits to determine adverse claims.[88]—The Federal statute provides for the giving of notice of the filing of an application for a patent, which is equivalent to a summons in a judicial proceeding.[89] Where an adverse claim is filed during the publication, the adverse claimant must within thirty days commence proceedings in a court of competent jurisdiction to determine the question of his right to possession, and a failure to do so is a waiver of his claim.[90] The statute applies only to adverse claims arising from independent and conflicting locations of the same ground, and not to a controversy between co-owners or others claiming under the same location.[91]

The owner of a prior placer location may maintain an adverse suit against an application for a patent for a subsequent lode location within its boundaries, made by persons entering against his will for the purpose of prospecting for unknown veins or lodes.[92] The burden is on adverse claimants to show that any part of the ground sought to be patented by defendant is within the boundaries of a claim as previously located by them.[93]

The mere fact that the suit is brought pursuant to the requirements of this statute to determine the right to the possession of a mining claim does not confer jurisdiction on a Federal court.[94] The character of the action is not provided for and depends upon the practice in the state in which it is brought.[95] Where a state statute authorizes a suit to quiet title regardless of possession, a Federal court of equity in such state is a court of competent jurisdiction, though

84. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 P. 901.

85. Not subject to relocation because erroneous length given to calculated tying line. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 P. 901.

86. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552.

87. Gurney v. Brown [Colo.] 77 P. 357. Lode claim crossed previously patented placer claim, and judgment of interior department required claimant to elect within sixty days whether he would take patent for tract on north or south side of placer claim, and provided that on default of election or appeal within such time the department would cancel entry as to south tract. Claimant did not appeal but instituted proceedings against conflicting claimant which were decided in favor of latter. Complainant then, and after expiration of sixty days, filed election to take north tract. Held that, department having taken no steps to enforce provision requiring election within 60 days, south tract did not revert to government and become subject to relocation until election was filed. Id.

88. See 2 Curr. L. 896, § 3D.

89. Rev. St. § 2326. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

90. U. S. Rev. St. § 2326 (Comp. St. 1901, p. 1430). Willitt v. Baker, 133 F. 937. One having conflicting claim who does not protest or adverse the application for a patent is concluded on the question of seniority by the issuance of a patent. Applies where senior location has portion of apex of same vein as junior, and there is a conflict on the surface between the two locations. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

91. U. S. Rev. St. § 2325 (Comp. St. 1901, p. 1429). Does not apply to suit by one coowner against other to establish constructive trust. Stevens v. Grand Central M. Co. [C. C. A.] 133 F. 28.

92. Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944.

93. Evidence insufficient. Porter v. Tonopah North Star T. & D. Co., 133 F. 756.

94. Jurisdiction depends on citizenship. Willitt v. Baker, 133 F. 937. Where sale of claim is real and not simulated, fact that it was made to give Federal court jurisdiction is immaterial. Id.

95. May be in equity, at law or special statutory proceeding. Mares v. Dillon [Mont.] 75 P. 963. The act of March 3, 1881, providing that if title to the property is not established by either party the jury shall so find, does not change the method of trial, or require an action at law or trial by jury [Act March 3, 1881, c. 140 (21 Stat. at L. 505); Comp. St. 1901, p. 1430]. Id.

neither claimant is in possession.[96] A part owner, joining with the others in filing an adverse claim, who afterwards acquires their interests, may maintain the suit in his own name.[97]

In such action the title of each party is brought in question, and, even where plaintiff's case fails, defendant is not entitled to a judgment or decree unless he establishes his title.[98]

In Montana it is immaterial which party is in possession, and it is sufficient to confer jurisdiction on the court if it appears from the pleadings that an application for a patent has been made and that an adverse claim has been filed and allowed in the proper land office.[99] It is not necessary, no matter in what form the action is brought, for plaintiff to particularly set forth the nature of defendant's claim.[1] If the action is brought in time, it proceeds to effective judgment in the same manner as other actions, and the court has the same power to allow amendments as in other cases.[2] The verdict or decision must find which party is entitled to the property in dispute.[3] Where plaintiff has two claims, both of which conflict with defendant's claim, but which do not conflict with each other, he may maintain a separate action to determine adverse claims based on each location, and the pendency of one such action is no bar to the other.[4] The court only has jurisdiction to determine the right to the possession of the particular portion of the tract in controversy.[5] Disbursements necessary to the filing of the adverse claim in the land office, but not for the procurement of anything necessary to the maintenance of the suit, cannot be taxed as costs.[6]

The judgment of the court as to which of the adverse claimants is entitled to the possession of the claim does not settle the right of the successful claimant to a patent.[7]

§ 4. *Ownership or estate obtained by claim, location and patent; apex*

96. Sand. & H. Ark. Dig. § 6120, authorizes suits to quiet title regardless of possession. Willitt v. Baker, 133 F. 937.

97. Willitt v. Baker, 133 F. 937.

98. Must prove that he did assessment work for each year as required by statute. Willitt v. Baker, 133 F. 937. Action is in the nature of a suit to quiet title, and plaintiff can recover, if at all, only on the strength of his own title. If he does not show title, condition of defendant's title is immaterial. Schroder v. Aden Gold Min. Co., 144 Cal. 628, 78 P. 20. Evidence sufficient to support finding that mine extended in direction indicated by lead as far as it could be traced upon the surface, and that its location corresponded with written notice rather than with evidence of location of monuments. Id.

99. Pleadings held to show that action was equitable in its nature. Also case was tried on that theory and hence parties cannot object in oral argument on appeal [Code Civ. Proc. § 1322]. Mares v. Dillon [Mont.] 75 P. 963. Party who is estopped to question that suit is equitable cannot object to instructions to jury. Verdict merely advisory. Id.

1. Duty to do so rests on defendant. Woody v. Hinds [Mont.] 76 P. 1. Complaint showing possession of plaintiff under claim of title, application of defendant for patent, filing of adverse claim in land office and its allowance, and commencement of suit within 30 days thereafter, is sufficient whether suit is one to quiet title under Mont. Code Civ. Proc. § 1310, or a special statutory proceeding under Id. § 1322. Id. A complaint is not bad for uncertainty or ambiguity, though it is alleged that a "protest" was filed with the statement of adverse claim in the land office. Immaterial whether this was done or not. Id. The complaint need only allege that plaintiff is the owner of the premises, and that defendant claims some right adverse to him, without specifying of what such adverse claim consists. Complaint held sufficient as action to remove cloud from plaintiff's title and to cancel certain contracts, and also to warrant decree quieting title. Merk v. Bowery M. Co. [Mont.] 78 P. 519. Bill to remove cloud held not bill to enforce forfeiture of lease, but merely to require court to ascertain whether a completed forfeiture existed, and if so, to remove cloud caused thereby. Id.

2. May do so after expiration of 30 days. Woody v. Hinds [Mont.] 76 P. 1.

3. Code Civ. Proc. § 1322. Mares v. Dillon [Mont.] 75 P. 963.

4. Mares v. Dillon [Mont.] 75 P. 963.

5. Cannot determine extent of surface location outside of area in conflict. Mares v. Dillon [Mont.] 75 P. 969.

6. For surveying, making plat, and for abstract of title [Mont. Code Civ. Proc. § 1866]. Mares v. Dillon [Mont.] 75 P. 969.

7. Remains for interior department to determine whether he is entitled to one. Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944.

rights.[8]—A valid location has the effect of a grant from the government of the right to the exclusive possession to the lands located,[9] and no rights can be initiated by a trespass thereon.[10]

Until the patent is issued, the actual title to the fee remains in the government, but the locator has a qualified title which may be conveyed or inherited.[11] His exclusive right of possession is as much his property as the vein or lode located.[12] A conveyance from the original locator of a part of claim and possession thereunder does not ripen into a perfect title until such locator secures title from the government.[13] The right to possession remains in the grantees only while the locator or his vendees with notice remain in possession and terminates as soon as he abandons the claim.[14]

Joint tenants.[15]—The general rule that co-tenants stand in a relation to one another of mutual trust and confidence, that one will not be permitted to act in hostility to the others in respect of the joint estate, and that a distinct title acquired by one will inure to the benefit of all applies with full force to the joint owners of a mining claim.[16] Hence a co-owner who amends the location notice, relocates the claim, or procures the issuance of a patent in his name, will be declared to hold the right or title thereby acquired in trust for all.[17] The fact that a stranger to the original claim joins him in acquiring such title is immaterial.[18] A co-tenant who excludes the other and takes out mineral will be liable without deduction for the cost of mining.[19]

One tenant in common may recover possession of the entire claim as against all persons except his co-tenants.[20]

8. See 2 Curr. L. 897.

9. Worthen v. Sidway [Ark.] 79 S. W. 777; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944. Rule applies to placer claims. Id. Error, if any, in a ruling that possession of plaintiff by occupancy merely was insufficient to show right of possession was harmless and waived by his proving valid statutory locations. Field v. Tanner [Colo.] 75 P. 916. Evidence sufficient to show valid locations by plaintiff. Id.

10. Dwinnell v. Dyer [Cal.] 78 P. 247. Not by location on land acquired by Northern Pacific Railroad Company under land grant and by it conveyed to defendant, though conveyance and patent exempted minerals in soil. Traphaagen v. Kirk [Mont.] 77 P. 58. Not by entry on land previously appropriated as placer claim. Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944. One who in good faith makes a location, remains in possession, and with due diligence prosecutes his work towards a discovery is protected against all forms of forcible, fraudulent, surreptitious or clandestine entries and intrusions upon his possession. Another party cannot locate on land in peaceable possession of defendant on which he is preparing to drill well. Weed v. Snook, 144 Cal. 439, 77 P. 1023. Plaintiff's location of 80 acres is not, after making a discovery of oil thereon, available for the purpose of perfecting a consolidated claim to 160 acres, including the original 80 and an adjoining 80 in possession of defendants. Id. One may not go upon a prior valid placer location to prospect for unknown lodes, and get title to lode claims thereafter so discovered and located within the placer boundaries, unless the placer owner has abandoned his claim, waives the trespass, or is, by his conduct, estopped to complain of it. Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944. An entry under such circumstances is a mere trespass under which no rights can be acquired. Id.

11. Worthen v. Sidway [Ark.] 79 S. W. 777; Elder v. Horseshoe M. & M. Co., 194 U. S. 248, 48 Law. Ed. 960. May sell or lease interest in oil claim. Weed v. Snook, 144 Cal. 439, 77 P. 1023.

12. Placer. Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944.

13. Conn v. Oberto [Colo.] 76 P. 369.

14. Claimed only under conveyance and not by virtue of compliance with mining laws. Conn v. Oberto [Colo.] 76 P. 369.

15. See 2 Curr. L. 896, n. 84.

16. Stevens v. Grand Cent. M. Co. [C. C. A.] 133 F. 28. Co-tenant cannot acquire exclusive possession by adverse possession without notice to co-tenant that such possession is hostile or adverse. Faubel v. McFarland, 144 Cal. 717, 78 P. 261. Tenant in common not estopped to assert his interest against plaintiff to whom co-tenant sold property where he did not know that deed purported to convey entire property. Id.

17. Stevens v. Grand Cent. M. Co. [C. C. A.] 133 F. 28, and cases cited. Under circumstances co-owner held not guilty of laches regardless of state statute of limitations. Id.

18. Stevens v. Grand Cent. M. Co. [C. C. A.] 133 F. 28.

19. Sweeney v. Hanley [C. C. A.] 126 F. 97.

20. Field v. Tanner [Colo.] 75 P. 916.

Extralateral rights.[21]—A lode location confers on the locator both intraliminal and extraliminal or extralateral rights.[22] The intraliminal right embraces a right to all the ore within the boundaries of the claim down to the center of the earth.[23] Extralateral rights do not attach until after, in pursuit of his vein on its dip, the locator crosses the side lines of his location.[24]

The locator has the exclusive right to the possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface location.[25] But his right of possession to such outside parts of such veins or ledges is confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of his location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.[26]

Where there are surface outcroppings of the same vein within the boundaries of two lode mining claims which conflict on the surface, the claim first located carries the right to work the vein.[27] Where the vein does not, on its dip, pass beyond the side lines of the junior location, but the disputed ore body is wholly within the surface lines of both the junior and senior locations, it belongs to the senior location.[28]

Though small pieces of quartz, narrow seams, and little pockets of ore embedded in prophyry be deemed sufficient to sustain a location, they do not give the owner any greater rights against veins apexing on other claims dipping under this ground than he would have if his location were based upon a substantial and well defined ledge.[29]

The end lines alone define the extralateral rights,[30] and they must be straight lines.[31] The end lines of a claim for the purpose of its extralateral rights are those laid upon the ground when it is located,[32] and the legal end lines of the

21. See 2 Curr. L. 897, § 4.

22, 23, 24. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

25. U. S. Rev. St. § 2322 (Comp. St. 1901, p. 1425). Empire M. & M. Co. v. Tombstone M. & M. Co., 131 F. 339; Clipper M. Co. v. Eli M. & L. Co., 194 U. S. 220, 48 Law. Ed. 944. An owner of a claim is entitled to all veins apexing within its boundaries, but not to those apexing in the locations of other claimants, on the theory applied to blanket ledges, and prevailing in regard to others under the civil law. Golden v. Murphy [Nev.] 75 P. 625.

26. U. S. Rev. St. § 2322 (Comp. St. 1901, p. 1425). Empire M. & M. Co. v. Tombstone M. & M. Co., 131 F. 339; Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 579. The doctrine of extralateral rights refers to that part of a vein which, on the dip, lies outside of the side lines of the location within whose surface lines the apex of the vein appears, and not to any part of such vein, either the outcrop or segments on the dip thereof, which lies wholly within planes drawn downward coincident with its surface boundaries. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

This section confers no rights whatever if the land has been previously patented to another. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

27. Ore in dispute on dip of vein within extended vertical planes of the end lines of one claim and also within side lines of other claim and on dip of vein as it passes through that claim. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

28. Doctrine of extralateral rights does not apply, but case is governed by that of intraliminal rights. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070. Where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict with respect to the dip rights within the surface lines of the two locations, the senior location must prevail. Id.

29. Held not error for lower court to grant new trial on ground that verdict was not sustained by evidence. Golden v. Murphy [Nev.] 75 P. 625.

30. Not lines drawn parallel to them at point where vein crosses side line. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

31. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

32. Big Hatchet C. M. Co. v. Colvin [Colo. App.] 75 P. 605.

original or discovery vein are the end lines of all veins within the surface boundaries with respect to extralateral rights.[33]

If the locators mistake the direction of the vein, lode, or ledge manifested by the outcrops of ore upon the surface, and lay out their claim crosswise instead of lengthwise of the vein, lode, or ledge, then the original side-lines become the legal end-lines, and the original end-lines the legal side-lines.[34]

The owner of a lode claim laying an end-line on the surface of a prior claim of course acquires no rights as against the owner of the latter,[35] but he may extend his lines over the latter's claim in the absence of any objection on his part, and by so doing acquires, as against the government and subsequent locators, the same rights, both surface and extralateral, as if all his lines were on unappropriated ground.[36] Though one end-line crosses land belonging to other older valid locations, it is nevertheless its end-line for the purpose of securing to it underground extralateral rights not in conflict with the senior locations.[37]

The extralateral right to a vein or lode outcropping on the surface is fixed by the course of such vein or lode at the surface, and not by its course on a level.[38] Such rights exist without regard to the angle at which the end-lines cross the general course of the vein,[39] and it is immaterial that the locator follows the vein underground more upon its strike than upon its dip.[40]

The fact that a vein or lode is of such width on the surface as to extend beyond the side-lines of the claim does not affect the extralateral rights of the claim as against a junior locator.[41]

The ownership and possession of a vein at the surface carries with it the ownership and possession of all that pertains to the location.[42] The mining right is an integral one, and is secured by a single location, and the title thereto is conveyed by a single patent.[43] This includes the extralateral rights and no adverse rights can be acquired as to them that could not be acquired as to the rest of the right.[44] The fact that the same person, company, or corporation acquires other claims is immaterial.[45]

A patent conveys the subsurface as well as the surface of a claim, subject only to the extralateral rights of adjoining owners.[46] Hence, the right to pursue a vein on its dip outside the lines of a claim does not include a right to run a horizontal tunnel from it into an adjoining patented lode claim for the purpose of reaching the vein in its descent through such adjoining claim.[47]

There is a presumption that one owns all ores found beneath the surface of his claim.[48] Such presumption cannot be overcome by speculative conjecture, or even intelligent guess.[49]

33. Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070.

34. Empire M. & M. Co. v. Tombstone M. & M. Co., 131 F. 339. Where the lines originally located as the side lines of the claim are parallel, and it appears that the apex of the vein or lode in question crosses them. Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 579; Jefferson M. Co. v. Anchoria-Leland M. & M. Co. [Colo.] 75 P. 1070. Locators have the right to follow the vein lode or ledge, outcropping within the surface lines of their claim, upon its downward course, if it so far departs from the perpendicular as to carry it underground beyond the legal side lines to a point where it will be cut off by its legal end lines vertically extended in their own direction perpendicularly. Empire M. & M. Co. v. Tombstone M. & M. Co., 131 F. 339.

35, 36. Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 591.

37. Big Hatchet C. M. Co. v. Colvin [Colo. App.] 75 P. 605. Instruction that end lines must be parallel erroneous as submitting question not in case, and hence tending to mislead jury. Id.

38, 39. Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 579.

40, 41. Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 579; Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 591.

42, 43, 44, 45. Last Chance Min. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 579.

46, 47. St. Louis M. & M. Co. v. Montana M. Co., 194 U. S. 235, 48 Law. Ed. 953.

48. Heinze v. Boston & M. C. C. & S. M.

Boundary lines and monuments.[50]—In cases of conflicts between monuments called in a conveyance or patent and the courses and distances there noted, the former, if standing in their original positions, prevail.[51] If removed, the places where they originally stood may be shown by parol or documentary evidence, and, if proved to the jury by a fair preponderance of the evidence, they prevail over courses and distances.[52] If their location is not proved the courses and distances control the description, and must be followed in its application to the land.[53] Parol evidence is incompetent to substitute a call for another monument in place of the call for the original monument contained in the conveyance.[54]

The mere fixing of one monument is insufficient to indicate a boundary line so as to charge subsequent purchasers or locators with notice thereof.[55]

The wrongful taking of ore from the claim of another, in the absence of all other evidence, raises a disputable presumption that the taking was intentional and willful.[56] The measure of damages for the intentional, willful, or reckless taking of ore from the land of another without right is the enhanced value of the ore where it is finally converted to the use of the trespasser.[57] In case the taking is through inadvertence or mistake, or in the honest belief that one is acting within his legal rights, the measure of damages is the value of the ore in the mine.[58]

Lessees of a mine continuing to work it after notice of forfeiture under the mistaken belief that there has been no valid forfeiture are not willful tres-

Co. [Mont.] 77 P. 421. The owner of the surface is prima facie entitled to everything beneath the surface and may prevent the intrusion of anyone not showing a paramount right to enter within the vertical planes of his boundaries. Maloney v. King [Mont.] 76 P. 4. Where plaintiffs prove their ownership of the surface and that defendants have taken ore from beneath it, the burden is on the latter to prove that they were the owners of the vein from which it was taken. Hence have right to rebut any new matter set up by plaintiffs. Id. In action for removal of ore from plaintiffs' claim, where issue was the point where a certain vein departed from side line of defendants' location, and defendants introduced evidence that it departed at the point claimed by them, and plaintiffs in rebuttal introduced evidence that it departed at different place as shown by fact that vein was exposed in certain cellar, held error not to permit defendants to show in rebuttal that vein in cellar was along course or strike which would bring it out at point other than claimed by plaintiffs. Id. Held no error in refusing to admit glass model. Id. Instructions as to admissions in answer held not misleading. Id. Allowing the jury to view the premises is a matter in the discretion of the trial court. Mont. Code Civ. Proc. § 1081. Action for removing ore. Id.

49. Not by opinion of engineer that if vein having apex in adjoining ground continues to dip at same angle it will reach point where defendant is conducting its operations. Heinze v. Boston & M. C. C. & S. M. Co. [Mont.] 77 P. 421.

50. See 2 Curr. L. 898, n. 23.

51. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668. Monuments control courses and distances. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement of lines, angles, or surfaces, the boundaries or monuments are paramount. Cal. Code Civ. Proc. § 2077, subd. 2. Particularly where line is calculated one. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 P. 901.

52, 53. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668.

54. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668. Round stake inscribed with lead pencil held not to fit description of post in patent. Id.

55. Fixed by agreement. Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co. [C. C. A.] 131 F. 591. An oral agreement between the owners of two overlapping lode claims, whereby a monument was fixed as a point on the line between them, does not affect the extralateral rights of one of the claims which has passed into the hands of third parties having no notice thereof, as against third parties owning junior claims and having no interest in the other claim or privity with the agreement. Id.

56. See 2 Curr. L. 903, n. 90, 91. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668. Where plaintiff takes the ground that defendant was a naked trespasser, it cannot thereafter contend that defendant was estopped to claim the right to remove the ore under a contract between the parties for the development of the mine. Empire M. & M. Co. v. Tombstone M. & M. Co., 131 F. 339.

57. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668.

58. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668. The value of the ore is the amount received from the smelter or ore buyer after deducting the cost of mining treatment, sampling, hauling, railroad freight, and concentrating. Taken by one under claim of right. Montrozona G. M. Co. v. Thatcher [Colo. App.] 75 P. 595.

passers.[59] Upon the question whether the taking was intentional, evidence of the knowledge and information which defendant's managing officers had relative to the location of the disputed boundary lines and corners of such claim before and during the removal of the ore,[60] evidence of their relevant acts and omissions during such time,[61] and testimony of their intent and purpose in taking the ore,[62] is competent. Negligence in ascertaining the limits of the land or the rights of the owner is competent evidence on the question,[63] but negligence amounting to mere inadvertence, without evil intent or recklessness, is not in itself sufficient proof to sustain a finding of fraud, bad faith, willfulness, or evil intent in committing the trespass.[64] An intentional or reckless omission to exercise care to ascertain the boundaries of another's land or rights for the purpose of maintaining ignorance in regard to them, or a reckless disregard of them, is equivalent to a willful trespass in so far as the measure of damages is concerned.[65]

In an action for damages for the removal of ore, plaintiffs must in the first instance make a prima facie showing of the amount of ore extracted.[66] They can, of course, recover no more than the value of such an amount.[67] If defendants claim that the ore was taken from some other place they must prove that fact.[68] Defendant has the means of showing the amount taken, and if he does not do so he cannot complain that the verdict against him is too large.[69]

Duty to protect owner of surface.—One who, by the removal of minerals, causes the surface of the ground to subside, is liable to the owner for the resulting damages, even though he uses the most approved system of mining.[70] An injunction will not issue to prevent the removal of coal under complainant's land, nor will the court assume charge of the operation of the mine, and direct the manner in which the work may be done, where it cannot be determined from the evidence whether the land will further subside, or whether complainant will be injured, and no rule appears by which the court can specify the manner in which the work shall be done.[71] Each subsidence is a trespass giving rise to a new and distinct cause of action, and hence injunction will not issue to restrain the removal to prevent a multiplicity of suits.[72]

§ 5. *Right to mine on private land thrown open to public.*—By statute in Missouri the owners or lessees of mining land may post rules and regulations for mining the lots platted thereon.[73] Persons thereafter mining on such lands will be deemed to have assented to and accepted such rules and will be bound thereby. Upon their failure or refusal to comply therewith they forfeit all rights, and the owner may re-enter and take possession.[74] The receipt of any ore or mineral by the owner after a forfeiture is not a waiver thereof.[75]

59. Montrozona G. M. Co. v. Thatcher [Colo. App.] 75 P. 595.

60, 61, 62, 63, 64. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668.

65. Resurrection G. M. Co. v. Fortune G. M. Co. [C. C. A.] 129 F. 668. One may be so far negligent as to warrant an inference that he acted knowingly and intentionally, and to warrant the jury in finding his trespass to be willful. Id.

66. Maloney v. King [Mont.] 76 P. 4.

67. Instruction as to recovery in case ore commingled with other ore erroneous. Maloney v. King [Mont.] 76 P. 4.

68, 69. Maloney v. King [Mont.] 76 P. 4.

70. Land acquired subject to right to mine. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335.

71. Land acquired subject to right to operate mine. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335.

72. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. Injunction refused because complainant's damages will be less than defendant's would be if it were granted. Id. Injunction will not issue on ground of irreparable injury where nothing to show that complainant cannot be adequately compensated for subsidence of farm by recovery of damages. Id.

73. Rev. St. 1899, § 8766. Ashcraft v. Englewood Min. Co. [Mo. App.] 81 S. W. 469; Jack Harvard Zinc M. Co. v. Continental Zinc & Lead M. & S. Co. [Mo. App.] 80 S. W. 12.

74, 75. Currey v. Harden [Mo. App.] 83 S. W. 770.

The act does not itself require the licensee to sign the register or rules of the company, but it may make a rule requiring him to do so.[76] If the owner knowingly permits him to enter without requiring him to sign, he cannot forfeit the miner's rights without giving him an opportunity to do so.[77]

The rules may specify the time during which the right acquired shall continue.[78] In case no time is specified, it continues for three years.[79]

The owner must not unnecessarily interfere with the licensee's use of the property.[80]

§ 6. *Private conveyances or grants of mineral rights in lands.*[81]—Mineral underlying the surface of the ground is subject to absolute conveyance,[82] and one person may own the mineral and another the surface.[83] Title thereto may be acquired by adverse possession,[84] but after a severanee has taken place possession of the surface is not possession and occupancy of the underlying minerals.[85]

One owning underlying minerals who stands by and sees another sell them, and says nothing when it is his duty to speak, will be estopped from thereafter claiming the property, especially when he receives a part or all of the purchase price.[86]

A conveyance of all the minerals in or under a tract of land passes an estate in fee, having all the incidents of other like estates.[87] It is a legal estate of freehold and is subject to partition.[88]

The right to open and work a mine is property in which an estate in fee may be granted.[89]

76. Currey v. Harden [Mo. App.] 83 S. W. 770. Any one desiring to mine must sign the register kept for that purpose, and thereby has the privilege of beginning mining as a licensee for the time, and under the restrictions and conditions of the rules. Ashcraft v. Englewood M. Co. [Mo. App.] 81 S. W. 469.

77. Currey v. Harden [Mo. App.] 83 S. W. 770. In action on note, part of the consideration of which was the transfer of a license acquired under this statute, the defense was a false representation on the part of the payee that he had signed the register of the mine owner in accordance with rule adopted by him. It appeared that owner never objected to mining because register was not signed, and that defendants carried on operations without objection until mine became unprofitable. Held, that as defendants would themselves have had right to sign, the fact that plaintiff had not done so was immaterial and no defense. Id.

78. Rev. St. 1899, § 8766. Ashcraft v. Englewood Min. Co. [Mo. App.] 81 S. W. 469.

79. Rev. St. 1899, § 8767. Ashcraft v. Englewood M. Co. [Mo. App.] 81 S. W. 469. Where lessee failed to fix in rules the time during which right should continue, and plaintiff registered and then assigned his rights to defendant, in consideration of a royalty so long as the latter should operate, and defendant, after expiration of three years, mined under registration and agreement with owner, held that plaintiff's right to royalties ceased on expiration of three years from date of his registration. Id.

80. Injunction issued to prevent draining of pond across licensee's lot. Jack Harvard Zinc M. Co. v. Continental Zinc & Lead M. & S. Co. [Mo. App.] 80 S. W. 12.

81. See 2 Curr. L. 898.

82, 83. Moore v. Price [Iowa] 101 N. W. 91.

See also Tiffany on Real Property, p. 516, § 219.

84. One secretly mining coal under another's land through an opening on land other than that on which the coal is situated cannot obtain title to it by adverse possession, even by continuous mining. Not open, notorious, continuous and exclusive manner. Pierce v. Barney, 209 Pa. 132, 58 A. 152.

85. Acts of ownership exercised over underlying coal must be distinct from those exercised over surface. Manning v. Kansas & T. Coal Co., 181 Mo. 359, 81 S. W. 140.

86. Manning v. Kansas & T. Coal Co., 181 Mo. 359, 81 S. W. 140.

87. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

88. Where owner conveyed minerals to one in fee and later gave new deed to same person and another, the latter took no interest, though deed recited that it was given to correct former one. Hence he could not have partition. Nor could he have partition of alleged equitable interest under bill alleging legal title only. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622. Bill could not be regarded as one to remove cloud on title because plaintiff was not in possession and land was not vacant and unoccupied, nor could it be regarded as seeking such relief as incidental to partition because right to partition does not exist. Id.

89. New Haven v. Hotchkiss [Conn.] 58 A. 753. An estate of inheritance may be created therein, by reservation in a deed, without the use of the word "heirs." Id. Whether it is so created is to be determined from the language employed, in the light of the surrounding circumstances. Reservation

A right, reserved in a deed, to work a mine may be lost by abandonment,[90] but not the title to underlying minerals.[91]

Where the grantee under a deed conveying mineral rights executes a mortgage thereon, which is foreclosed, the purchaser at the foreclosure sale acquires only the grantee's interest in the property, and cannot exercise any right which is determined by the decree not to have been conveyed by the deed.[92]

By statute in California it is unlawful for the directors of any mining corporation to in any way dispose of any mining ground owned by it, or to obtain any additional ground, unless such act is ratified by the holders of two-thirds of the capital stock.[93] A previous consent or direction by the required number of stockholders, although purporting to have been made in their capacity as directors, is, at least as against creditors, equivalent to a subsequent ratification.[94]

The ordinary rules in regard to the execution and validity,[95] interpretation,[96] avoidance,[97] and enforcement of deeds and contracts of sale apply to those affecting mineral rights.[98]

for five years of right to open supposed paint mine on land conveyed to city for park, and to work the same thereafter to its full extent, unless the right to do so was purchased within six years from the date of the deed held to create state of inheritance. Id.

90. The question whether a right reserved in a deed to work a mine has been abandoned is mainly one of fact. Fact that no work was done by grantor's son for eight years after grantor's death held not to show abandonment as matter of law. New Haven v. Hotchkiss [Conn.] 58 A. 753. Limitation of five years in deed reserving mine held to apply to right to open mine and not to right to work it after it had been opened. Id. Deed held not to require continuous working of mine after it was opened. Id. Where tenant in common conveyed his interest in land for park purposes, reserving right to open and operate mine thereon, and his cotenant conveyed his interest to same grantee without reservation, held that former had sole and exclusive right to work mine. Id.

91. Coal. Barrett v. Kansas & T. Coal Co. [Kan.] 79 P. 150.

92. Duncan v. American Standard Asphalt Co. [Ky.] 83 S. W. 124.

93. St. 1880, p. 131, c. 118, § 1 is constitutional. Lacy v. Gunn, 144 Cal. 511, 78 P. 30. Assignment for creditors lacking such ratification is void as to mining ground as against corporation, and hence assenting creditors not estopped to contest its validity. Id. The consent of the actual owners of the stock, and not of those who appear to be so, is required. Id. Only stockholders can raise question that corporation's deed was unauthorized. Galbraith v. Shasta Iron Co., 143 Cal. 94, 76 P. 901.

94. Statute for benefit of stockholders. Lacy v. Gunn, 144 Cal. 511, 78 P. 30.

95. Contract whereby plaintiff agreed to transfer to defendant undivided interest in lode on land claimed by former in consideration of defendant's transfer to him of balance held not supported by adequate consideration so as to entitle him to specific performance, where complainant's entry was wholly ineffectual. Traphaagen v. Kirk [Mont.] 77 P. 58.

96. Under contract whereby defendant having oil and gas leases conveyed gas rights to plaintiff, held that on discovery of gas while drilling for oil defendant was bound to deliver possession to plaintiff at its election upon its payment of cost of drilling well, and could not continue operations in effort to find oil in lower stratum. Carnegie Natural Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. Contract will be enforced, and injunction will issue to prevent waste of gas pending suit and to enforce final decree. Id. Provision in deed held to constitute exception and not reservation, and that title to coal underlying land remained in grantor and not mere easement to go upon land and mine it. Barrett v. Kansas & T. Coal Co. [Kan.] 79 P. 150. Deed held not ambiguous. Id. Under a contract providing that a deed to a certain mine, which had been placed in escrow, was to be delivered to defendants on payment of certain sums at specified times, that all payments were to be forfeited if the purchase was not completed and requiring defendants to pay a royalty on smelter returns from ores removed by them, to be applied on the purchase price, a failure to make the payments merely terminates defendants' right to purchase, but does not work a rescission of the contract or prevent a recovery of the royalties. Frank v. Bauer [Colo. App.] 75 P. 930. In the absence of any evidence as to the meaning of the words "smelter returns," it will be construed as meaning the returns from the ore less the smelting charges, without deducting hauling, freight and switching charges. Construction of parties adopted. Id.

Under a deed conveying mineral rights, authorizing the grantee to use any timber on the land conveyed for the purpose of constructing works which might be desired in the development of the property, the grantee is entitled to use timber in the construction of a necessary tramway and chute and in building a platform for a crusher and a mill house. Duncan v. American Standard Asphalt Co. [Ky.] 83 S. W. 124. Under a provision giving the grantee a right of way for a railroad, and authorizing him to cut timber for cross-ties, with the exception of chestnut oak, he is not authorized to use wood cut from the right of way, or chestnut trees for fuel. Id.

97. Contract for sale of an oil well in-

In its ordinary commercial sense a mineral is any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake, or its own specific uses.[99] The word will be presumed to have been used in this sense in deeds reserving all minerals in, under, and upon the land conveyed.[1]

Under a contract for the sale of coal providing that the agreement or option shall be binding for a specified period only, the purchaser may acquire an equitable title by the acceptance of the coal within such time without a tender of the purchase price.[2] A delay of two years on the part of the vendee in seeking to enforce the contract is not such laches as will deprive him of the right to specific performance.[3]

Time is of the essence of an option to purchase mining property.[4] Persons having claims to mining locations are bound to the utmost diligence in enforcing them.[5] The refusal of a trustee to deed an interest in a mining location in compliance with the trust agreement is a repudiation of the trust which entitles complainants to immediate relief, and, if known to them, opens the door to the defense of laches to a suit to enforce the trust.[6]

§ 7. *Leases.*[7]—The question whether an instrument is a conveyance of the minerals in the land described or a mining lease is one of intention, to be gathered from the whole instrument.[8] A lessor who conveys the land by a deed reciting that it is made subject to the lease thereby recognizes its existence and validity at that time.[9]

An oil mining corporation may lease its lands to others for the purpose of mining for oil, reserving to itself a royalty on the product.[10]

duced by false representations as to its production, made by one who was agent of both parties to the transaction, decreed void, and money restored with interest, and lien given for improvements made. Jones v. Draper, 4 Ohio C. C. (N. S.) 105.

98. Complaint in action for specific performance held to insufficiently describe property. Traphaagen v. Kirk [Mont.] 77 P. 58. In action to recover portion of mining claim, evidence held not to show contents of lost deed by such direct and positive evidence as to enable court to say that there was in fact a conveyance. Capell v. Fagan [Mont.] 77 P. 55. Evidence held to establish complainant's right to an undivided interest in certain claims held in trust by one of the defendants under an agreement that the property should be divided on repayment of advances made by him, and to entitle complainant to an accounting for the value of claims which he had sold. Fox v. Gunn [C. C. A.] 133 F. 131.

99. Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 A. 486; Hendler v. Lehigh Valley R. Co., 209 Pa. 263, 58 A. 488.

1. Ordinary sand merely worth removing as material for grading not within deed reserving "coal and other minerals." Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 A. 486. Nor is sand a mineral within Pa. Act May 8, 1876 (P. L. 142) making anyone digging minerals on the land of another without his consent liable for double their value. Hendler v. Lehigh Valley R. Co., 209 Pa. 263, 58 A. 488.

2. Pennsylvania M. Co. v. Smith [Pa.] 59 A. 316. Contract held a nine months' option to purchase coal on specified terms. Pennsylvania M. Co. v. Martin [Pa.] 59 A. 436. Where vendor tenders deed and demands payment on last day, delay of vendee in paying price because of defects in title will not enable the vendor to rescind. Penalty not a forfeiture but payment of interest. Pennsylvania M. Co. v. Smith [Pa.] 59 A. 316.

3. Pennsylvania M. Co. v. Martin [Pa.] 59 A. 436.

4. Merk v. Bowery Min. Co. [Mont.] 78 P. 519. Extension of time of payment of purchase price under option held not to extend duration of lease. Id. Plaintiffs held not required to return instalments paid on forfeiture of option to purchase claim on failure to pay price as required by contract. Id. Supplemental agreement held to modify original one and to make failure to pay instalments at time stated a cause of forfeiture of both contracts. Id.

5. Laches may defeat suit in equity to enforce rights in location, though statute of limitations has not run. Patterson v. Hewitt, 25 S. Ct. 35. Delay of eight years after right to a deed to interest in claim has accrued by reason of contribution to work and expense necessary to secure patent will defeat suit to enforce right, where complainants have contributed nothing further to subsequent development resulting in discovery of rich ore deposit. Id.

6. Patterson v. Hewitt, 25 S. Ct. 35.

7. See 2 Curr. L. 899.

8. Agreement held a mining lease and not a conveyance. Tenn. Oil, Gas & Mineral Co. v. Brown [C. C. A.] 131 F. 696.

9. Cannot claim that he has theretofore forfeited it. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

10. Under Tex. Rev. St. 1895, art. 651, giving corporations power to lease lands

In Minnesota the duties of the state auditor, ex officio commissioner of lands, in issuing mining leases of state lands are purely ministerial, and hence his action in refusing a lease cannot be reviewed by certiorari.[11]

An oil and gas lease is, in effect, a sale of the portion of the land.[12] It is not, strictly speaking, a lease in the ordinary sense of the word, but rather in the nature of a written license with a conditional grant conveying the grantor's interest in the gas or oil well on condition that it is found in paying quantities.[13] When gas or oil is found the right to produce it becomes a vested right, and the lessee will be protected in exercising it according to the terms and conditions of his contract.[14]

The lease is not void for uncertainty because its duration extends so long as gas or oil may be found in paying quantities.[15] A lease requiring the lessee to sink a well within a certain time, or to pay a stipulated rental during the time drilling is delayed, and to pay a certain royalty on all gas and oil, is not void for want of mutuality.[16]

There is a conflict of authority as to whether a mining lease terminable at the will of the lessee is terminable at the will of the lessor.[17] It has been held that a provision that if the lessee shall at any time become satisfied that wells put in operation are not paying he may surrender the lease and remove the machinery and be released from all further obligations does not give him an arbitrary right to terminate the lease at pleasure, or make him a tenant at will.[18] If the well is actually paying, he cannot terminate the lease by merely asserting that it is not.[19] Under such a clause the lease is terminated as to unprofitable wells only.[20]

when not inconsistent with the corporate purpose. Not ultra vires as rendering it impossible to further prosecute corporate business. Stark v. Guffey Petroleum Co. [Tex. Civ. App.] 80 S. W. 1080.

11. Lease under Laws 1895, c. 105, p. 227, as amended by Laws 1903, c. 225, p. 330. Refusal to grant application for mineral lease of land under bed of meandered lake, constituting public waters. State v. Iverson [Minn.] 100 N. W. 91.

12. Held, in view of circumstances and surroundings at time will was made, that it was not testator's intention to authorize executor to make such a lease. Where, prior to its execution, he had acquired interest of some legatees, he was estopped to deny validity of lease in so far as his interest was concerned. Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 75 P. 995.

13. Dickey v. Coffeyville Vitrified Brick & Tile Co. [Kan.] 76 P. 398.

14. Carr v. Huntington Light & Fuel Co. [Ind. App.] 70 N. E. 552; Dickey v. Coffeyville Vitrified Brick & Tile Co. [Kan.] 76 P. 398.

15. Dickey v. Coffeyville Vitrified Brick & Tile Co. [Kan.] 76 P. 398. Defendant held not estopped to claim ownership of lease assigned to it by original lessee, where plaintiff took deed to land subject to lease, which was recorded, and had notice of assignment. Id.

16. Armitage v. Mt. Sterling Oil & Gas Co., 25 Ky. L. R. 2262, 80 S. W. 177.

17. A mining lease terminable at the will of the lessee is terminable at the will of either party. Tenn. Oil, Gas & Mineral Co. v. Brown [C. C. A.] 131 F. 696.

Texas: Terminable at will of either applies where terminable by lessee on payment of nominal consideration. Guffey Petroleum Co. v. Oliver [Tex. Civ. App.] 79 S. W. 884. The lessor in such case must pay or tender to the lessee the value of all labor done and services rendered by him. Id.

Ohio: Oil and gas lease for indefinite period providing for reconveyance by lessee held terminable at will of lessee only. Central Ohio Nat. Gas & Fuel Co. v. Eckert, 70 Ohio St. 127, 71 N. E. 281. A grant of all the oil and gas under and in a certain tract of land to a corporation, its successors and assigns, without limitation as to time, the latter agreeing to drill a well within a specified time, or to pay an annual rental until it does so or reconveys the property, and providing that the corporation may reconvey the property at any time is, after the expiration of such period, and until a well is drilled, a lease at the specified annual rental, at the will of the lessee only. Lessor cannot terminate for failure to drill well within time specified. Id. One dollar and an agreement to pay an annual rental is a good consideration for an option on the part of the lessee to terminate the lease or keep it in force indefinitely by payment of the stipulated rental. Id.

In Indiana a contract giving one the right to explore for and remove natural gas and oil for an indefinite period does not create a tenancy at will within Burns' Rev. St. 1901, § 7089. Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149.

18. Hence not terminable at will of lessor. Dickey v. Coffeyville Vitrified Brick & Tile Co. [Kan.] 76 P. 398.

19. Can be determined by deducting cost of production from market value of product. Dickey v. Coffeyville Vitrified Brick & Tile Co. [Kan.] 76 P. 398.

As in the case of other contracts, the court in construing a mineral,[21] or oil and gas lease, will, if possible, give effect to all its parts, and its meaning will be determined from a consideration of all its provisions taken together as a whole.[22] The construction placed upon it by the parties will, if possible, be followed.[23] One purchasing land with knowledge of the existence of a contract for the sale of the oil and gas therein, and the construction which the parties have placed thereon, is not an innocent purchaser, and is bound by such construction.[24]

Under a lease providing that the rent, when due, shall be deposited in the bank, a deposit therein is a payment of the rent.[25] The lessee, knowing nothing of the conveyance of the premises, is not in default where he pays rent to the original lessor, where the deed has not been recorded.[26]

The intention of the parties governs as to whether time is of the essence of the contract.[27] It will be considered to be so where the contract provides that it shall be void if its conditions are not fulfilled within the prescribed time.[28]

Applications of the ordinary rules in regard to covenants for title will be found elsewhere.[29]

Oil and gas leases are construed most strongly against the lessee and in favor of the lessor.[30] Under a lease providing that it is to be void unless the lessee sinks a test well within a certain time, or pays a stipulated rental during the time drilling is delayed, the rights of the lessee will not be extended, on failure

20. Declaration that one well is unprofitable does not avoid entire lease. Dickey v. Coffeyville Vitrified Brick & Tile Co. [Kan.] 76 P. 398.

21. Evidence in action by administrator to recover royalty on ore mined under lease held to show that no royalty was due. Defendant not liable for royalty on tailings. Steer v. Dwyer, 104 Mo. App. 523, 79 S. W. 738. Mining lease held not to give lessee right to use timber to build houses for employes. Lewis v. Virginia Carolina Chemical Co. [S. C.] 48 S. E. 280.

22. Under lease for 12 years and so long thereafter as petroleum "can be produced in paying quantities," or certain annual payments, provided for in case of delay in commencing operations, are made, and providing for payment of royalties on oil and gas, held that actual consideration contemplated was the development of the property, and lessee could not, by making annual payments, hold property for more than 12 years without commencing to drill well. Indiana Natural Gas & Oil Co. v. Granger [Ind. App.] 70 N. E. 395. Under lease giving lessees right to remove machinery and fixtures at any time, they do not become part of realty but may be removed within reasonable time after forfeiture of lease for nonpayment of rental. Gartlan v. Hickman [W. Va.] 49 S. E. 14. What is reasonable time to be determined from all the facts and circumstances. Id. Oil lease construed and lessor held chargeable with half cost of drilling unproductive well, including preliminary work of preparing ground, erecting derrick, etc. (Far West Oil Co. v. Witmer Bros. Co., 143 Cal. 306, 77 P. 61), and half actual cost reasonably incurred in pumping productive wells, though it might have been possible to have had work done for less money (Id.). Evidence held not to show account stated. Id. A provision in a gas lease whereby the lessee is to equip the house of the lessor for the use of natural gas and to furnish natural gas free does not require the furnishing of free gas for lights outside of the house. Gillespie v. Iseman [Pa.] 59 A. 266.

23. Gillespie v. Iseman [Pa.] 59 A. 266. The construction adopted by the lessor and his successor cannot be changed by one purchasing the property more than six years after it was made. Id.

24. Indiana Natural Gas & Oil Co. v. Leer [Ind. App.] 72 N. E. 283.

25. Averment that rent was not paid includes by implication an averment that it was not deposited. Indiana Natural Gas & Oil Co. v. Lee [Ind. App.] 72 N. E. 492. Complaint in action for damages for failure to furnish gas under gas lease held to aver sufficient facts from which measure of damages could be determined. Id.

26. Indiana Natural Gas & Oil Co. v. Lee [Ind. App.] 72 N. E. 492. An averment that no rents have been paid since a certain date will be construed as an averment that none have been paid to plaintiff, and not as negativing payments to his grantor, who was the original lessor. Id. In suit to quiet title against gas lease, complaint held insufficient in failing to properly set out provisions in lease requiring payment of rent and furnishing of gas, so as to show right of forfeiture. Lease not being basis of suit, a copy of it made an exhibit could not be considered in aid of complaint. Id.

27. Montrozona Gold M. Co. v. Thatcher [Colo. App.] 75 P. 595.

28. Time of essence of covenant in lease to sink shaft 100 feet by day named. Montrozona Gold M. Co. v. Thatcher [Colo. App.] 75 P. 595.

29. See Covenants for Title, 3 Curr. L. 973; Landlord and Tenant, § 5, 4 Curr. L. 394. Jennings-Heywood Oil Syndicate v. Home Oil & Devel. Co., 113 La. 383, 37 So. 1.

30, 31. Armitage v. Mt. Sterling Oil & Gas Co., 25 Ky. L. R. 2262, 80 S. W. 177.

to drill the well within the stipulated time, by a mere offer to pay such rental, if the lessor elects to treat the lease as terminated.[31]

Where contiguous tracts are leased by their owners as one tract and the lease is silent as to the division of the royalty between the lessors, parol evidence is admissible to show an agreement in regard to such division.[32]

A provision that the lease shall continue until a certain date and as much longer thereafter as oil or gas shall be found in paying quantities requires that the oil or gas shall be actually discovered and produced in paying quantities within the term.[33] A finding of indications of oil, or the existence of conditions rendering it probable that oil in paying quantities will be found if the well is operated in a certain way, is not sufficient, of itself, to extend the term.[34] An agreement to pay rental or royalty until, in the judgment of the lessee, oil or gas cannot be found on the premises, or, having been found, has ceased to exist, does not contemplate an arbitrary judgment as to its existence,[35] but there must be an honest judgment justifiable by the results of a bona fide investigation.[36]

The duty of exploring for minerals requires a search for all those named in the lease which may reasonably be expected to be found, considering the known geological conditions.[37] The testing must be so thoroughly done as to determine, not only their presence, but their commercial value, considering their abundance and accessibility.[38] Where the lessee contracts to operate the mine in a workmanlike manner and to pay the lessor a royalty, there is an implied covenant to work the mine with reasonable diligence.[39] So too under a lease requiring the lessee to search for minerals he must do so within a reasonable time or he will be deemed to have abandoned his rights.[40]

An agreement giving one the right to explore for and mine oil and gas under certain property implies a duty on his part to make the exploration within a reasonable time, and a failure to do so entitles the owner to a forfeiture,[41] notwithstanding the expenditure of money and labor by the lessee.[42] It is proper in such case to show the amount of oil land under lease by defendant, and its efforts to acquire other tracts.[43]

32. To show that it should be paid to owner of particular tract from which oil is produced. Rymer v. South Penn Oil Co., 54 W. Va. 530, 46 S. E. 559.

33. Murdock-West Co. v. Logan, 69 Ohio St. 514, 69 N. E. 984.

34. Murdock-West Co. v. Logan, 69 Ohio St. 514, 69 N. E. 984. Even if certain payments were payments of rent and operated to extend the time within which oil might be sought for, the failure to thereafter make payments operated to terminate lease. Id.

35. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363. The court, in construing such a contract, will take judicial notice of the fact that gas or oil does not exist in paying quantities under all the lands within a recognized district, and that the only generally acknowledged way to determine whether it exists or not is by putting down a well. Id.

36. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363.

37. Tenn. Oil, Gas & Mineral Co. v. Brown [C. C. A.] 131 F. 696.

38. Information resulting should be such as prudent and experienced investor would require before developing mine. Superficial exploration held insufficient. Tenn. Oil, Gas & Mineral Co. v. Brown [C. C. A.] 131 F. 696.

39. Price v. Black [Iowa] 101 N. W. 1056.

40. Failure to make more than superficial search for over fifteen years held abandonment. Tenn. Oil, Gas & Mineral Co. v. Brown [C. C. A.] 131 F. 696.

41. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; Indiana Natural Gas & Oil Co. v. Leer [Ind. App.] 72 N. E. 283; Consumers' Gas Trust Co. v. Worth [Ind.] 71 N. E. 489. The mere fact that defendant has broken the implied covenant to develop and operate the land for oil does not give the owner the right to have the contract forfeited and canceled. Carr v. Huntington Light & Fuel Co. [Ind. App.] 70 N. E. 552. Complaint praying that plaintiff's title to the land be quieted "except a one-half acre tract surrounding each of said three wells" insufficiently describes the property. Id. The law implies a condition in an oil and gas lease, executed in consideration of royalties reserved to the lessor, for diligence, good faith, and reasonable development, and lease is subject to forfeiture for breach thereof. Instructions approved. Petition held to state good cause of action. Guffey Petroleum Co. v. Oliver [Tex. Civ. App.] 79 S. W. 884.

42, 43. Guffey Petroleum Co. v. Oliver [Tex. Civ. App.] 79 S. W. 884.

A contract giving one the exclusive right to put down a gas well, and providing that it shall terminate when natural gas shall cease to be used for manufacturing purposes, or when the rental shall not be paid for a certain period, is not terminated by the mere failure to pay such rental.[44] The owner of the property in such case may either elect to put an end to the contract and recover what is due him, or may waive the forfeiture and enforce payments as provided for in the contract.[45]

Forfeitures are not favored and contracts looking to them will be strictly construed.[46] If the causes for a forfeiture of a lease are distinctly specified and recited therein, courts will not decree a forfeiture for breaches of other provisions for which the parties themselves have not prescribed that penalty.[47] The owner must give a reasonable notice of his intention to declare a forfeiture.[48] A demand for a forfeiture at a time when he is not entitled to it is without legal significance.[49] It is equivalent to a denial of the company's right to enter on the land for the purpose of making explorations and hence cannot operate as a notice to it to do so.[50] The failure of the lessee to commence operations after the owner declares the lease forfeited cannot be regarded as a lack of diligence resulting in a forfeiture.[51] In the absence of a provision to that effect, the mere abandonment of an unproductive well will not work a forfeiture of an oil and gas lease.[52] The fact that the owner takes possession after such abandonment is not inconsistent with continuing the contract in force.[53]

A mere refusal to accept a sum which the contract requires to be paid annually until gas or oil is found does not work an immediate termination of the contract, but is an objection to further delay and requires the operator to proceed to drill for gas or oil within a reasonable time.[54] What is a reasonable time depends upon the circumstances of the particular case.[55] An agreement for de-

44. Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149.

45. Mere naked default or nonperformance of agreement to pay certain sum for delay does not discharge operator. Hancock v. Diamond Plate Glass Co., 162 Ind. 146, 70 N. E. 149. Complaint in action for damages for breach of contract whereby defendant, in consideration of exclusive right to put down gas well, agreed to pay certain sum yearly until well was bored, and to furnish plaintiff with free gas, held sufficient. Id.

46. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622; Price v. Black [Iowa] 101 N. W. 1056. Will not be decreed in favor of one who has assented to or induced the condition of which he complains. Consumers' Gas Trust Co. v. Ink [Ind.] 71 N. E. 477; Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; Logansport & Wabash Valley Gas Co. v. Ross, 32 Ind. App. 638, 70 N. E. 544; Consumers' Gas Trust Co. v. Crystal Window Glass Co. [Ind.] 70 N. E. 366.

47. Where company was to commence operations in county within six months, but only provision for forfeiture was in case well was not completed in three years, a suit brought before expiration of three years was premature, where there was no averment that company could not have performed latter condition within time specified. Armitage v. Mt. Sterling Oil & Gas Co., 25 Ky. L. R. 2262, 80 S. W. 177.

48. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; Consumers' Gas Trust Co. v. Howard [Ind.] 71 N. E. 493; Consumers' Gas Trust Co. v. Crystal Window Glass Co. [Ind.] 70 N. E. 366. Complaint in suit to cancel contract insufficient because not showing any breach by defendant. Logansport & Wabash Valley Gas Co. v. Ross, 32 Ind. App. 638, 70 N. E. 544. Must show that conduct was not such as to mislead company to reasonable belief that further postponement would be granted. Consumers' Gas Trust Co. v. Ink [Ind.] 71 N. E. 477.

49. Consumers' Gas Trust Co. v. Ink [Ind.] 71 N. E. 477.

50. Oil and gas lease. Consumers' Gas Trust Co. v. Ink [Ind.] 71 N. E. 477.

51. Consumers' Gas Trust Co. v. Worth [Ind.] 71 N. E. 489.

52, 53. Logansport & Wabash Valley Gas Co. v. Ross, 32 Ind. App. 638, 70 N. E. 544.

54. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363; Consumers' Gas Trust Co. v. Howard [Ind.] 71 N. E. 493; Consumers' Gas Trust Co. v. Crystal Window Glass Co. [Ind.] 70 N. E. 366. On failure to do so forfeiture may be declared. Consumers' Gas Trust Co. v. Worth [Ind.] 71 N. E. 489. Cannot commence suit to cancel contract within 15 days after refusal to accept annual payment for delay provided for in contract. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363.

55. Consumers' Gas Trust Co. v. Worth [Ind.] 71 N. E. 489.

lay procured through fraud does not prevent a forfeiture.[56] Equity will not relieve a party from a forfeiture unless he can show good and sufficient reasons for noncompliance with the terms of the contract.[57]

The owner may waive his right to a forfeiture.[58] The right to forfeit an oil and gas lease is waived by accepting in advance an annual payment required by the contract to be made until oil or gas is found.[59] Where the lessor has done acts amounting to a waiver, his assignee acquires no right to declare a forfeiture for the same cause.[60]

Abandonment of a lease is a question of intent, to be arrived at from all the evidence.[61] Lapse of time is evidence of abandonment, but is not conclusive.[62]

The death of the owner does not terminate the lease, though possession has not been taken thereunder.[63] A tenant, under an oil lease from a life tenant, who continues to take oil after the latter's death, is liable to the remainderman in trespass.[64]

Injunction will lie to prevent the invasion by a stranger of a tract on which plaintiff has the exclusive right to bore oil and gas wells, under an unexpired lease, and the threatened boring of a well by him for the purpose of extracting oil and gas without plaintiff's consent, whether he has actually made the entry or not, since the damages resulting therefrom would be difficult of ascertainment.[65]

The measure of damages for taking oil from the land of another unlawfully but under claim of right is the difference between what it sold for in the market and the cost of production.[66] The measure of damages for the use of timber by

56. By concealing fact that oil had been found in paying quantities. Instructions approved. Guffey Petroleum Co. v. Oliver [Tex. Civ. App.] 79 S. W. 884. Held question for jury whether there was an obligation on part of defendant to prosecute development and fraudulent purpose to delay, notwithstanding agreement between plaintiff and defendant as to settlement of title. Id.

57. Equity will not relieve from forfeiture were work was not commenced until 11 months after lease was made, or though it was sunk 100 feet 9 days after time expired. Montrozona G. M. Co. v. Thatcher [Colo. App.] 75 P. 595.

58. Evidence held to sustain finding that there was no waiver of covenant to sink shaft by certain date. Montrozona G. M. Co. v. Thatcher [Colo. App.] 75 P. 595. Lessor of asphalt land held to have assented to assignment and thereby waived breach of lease. Warner v. Cochrane [C. C. A.] 128 F. 553. Where lease of asphalt land provided that if on certain date lessees had not paid royalty on certain number of tons, they should then pay difference between amount paid and amount equal to royalty on such number, and if lessees had then performed all conditions, lessor covenanted to renew at lessees' option, held that conditions for renewal and payment were concurrent, and lessor refusing to renew could not recover such differential payment. Id. On such refusal lessees could either tender such payment and insist on renewal, or refuse payment and treat contract as at an end. Id.

59. Consumers' Gas Trust Co. v. Littler, 162 Ind. 320, 70 N. E. 363. Acceptance of payment for year is waiver of performance for that year. Consumers' Gas Trust Co. v. Worth [Ind.] 71 N. E. 489; Consumers' Gas Trust Co. v. Howard [Ind.] 71 N. E. 493. Where contract provides for furnishing free gas in lieu of rental, its acceptance prevents forfeiture, though gas was not furnished from wells developed on premises and no other rent was paid. Indiana Natural Gas & Oil Co. v. Leer [Ind. App.] 72 N. E. 283. The acceptance of such sum annually in advance for several years precludes the owner from claiming a forfeiture before the expiration of the year for which the last payment has been made. Consumers' Gas Trust Co. v. Ink [Ind.] 71 N. E. 477.

60. Waived right to forfeit mineral lease by recognizing its validity in conveyance of the property. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

61. Price v. Black [Iowa] 101 N. W. 1056. Question of fact. Evidence sufficient to sustain finding that there was no abandonment of oil and gas lease. Dickey v. Coffeyville Vitrified Brick & Tile Co. [Kan.] 76 P. 398. There may be such conduct on the part of the lessee as amounts to an abandonment which will work a forfeiture of the lease. Evidence held not to show abandonment of coal lease. Price v. Black [Iowa] 101 N. W. 1056.

62. Price v. Black [Iowa] 101 N. W. 1056.

63. Indiana Natural Gas & Oil Co. v. Leer [Ind. App.] 72 N. E. 283.

64. Crawford v. Forest Oil Co., 208 Pa. 5, 57 A. 47.

65. Complaint held to show that lease had not been terminated and to be sufficient on demurrer. American Steel & Wire Co. v. Taté [Ind. App.] 71 N. E. 189.

66. Crawford v. Forest Oil Co., 208 Pa. 5, 57 A. 47.

a lessee under a mining lease for unauthorized purposes, but under a mistaken belief that he had a right to use it, is its value on the stump with interest from the date of the conversion.[67]

§ 8. *Working contracts.*[68]—The right to enter upon real estate and dig for and remove ore is an interest in land, and hence the statute of frauds requires contracts concerning it to be in writing.[69]

The terms of a contract giving one the right to sink a shaft on and mine coal under the lands of another control the extent of such right.[70]

An agreement giving one an option to purchase certain property with the privilege of prospecting and mining thereon for a certain period is a license coupled with an interest.[71] Where the licensees go into possession, perform labor, and make expenditures in pursuance thereof, it becomes irrevocable, and they are entitled to exclusive possession while the agreement remains in force.[72] A parol license to mine on the land of another is revocable at the option of the licensor, notwithstanding the fact that an express promise was made at the time it was granted that it would not be revoked, and that expense has been incurred and improvements made on the strength thereof.[73] The fact that a custom or usage exists allowing the licensee to remain and work out his prospect against the will of the owner does not change the rule.[74]

Under an agreement giving one an option to purchase certain property with a license to prospect and mine thereon, for a certain period, all ore susceptible of milling to be sold by the owner and the net proceeds to be applied on the purchase price, the net proceeds are to be computed by deducting the cost of mining from the gross sum produced, and, in case it is shipped and reduced, also deducting the expense of freighting, sacking, and milling.[75] The rule is the same whether the action is on the contract for damages for failure to turn over the ore to the owner, or for the recovery of ore sold by the licensees to another.[76]

An agreement between two or more persons to explore the public domain and discover and locate a mining claim or claims, for the joint benefit of all, is not within the statute of frauds, and need not be in writing.[77] In determining whether it constitutes a partnership, the intention of the parties as disclosed by the nature and effect of the whole contract and acts done thereunder must control.[78] If, in pursuance of the agreement, one of the parties locates a claim in his own name, he holds the legal title to the interests of the others in trust for them.[79]

The existence of a grub-stake agreement need not be proved beyond a reasonable doubt.[80] The ordinary rules of construction apply to such contracts.[81]

67. Lewis v. Virginia-Carolina Chemical Co. [S. C.] 48 S. E. 280.

68. See 2 Curr. L. 902.

69. See Frauds, Statute of, § 7, 3 Curr. L. 1529. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990.

70. Contract held to give no right to remove coal mined on other land through shaft on plaintiff's land. Moore v. Price [Iowa] 101 N. W. 91. Evidence insufficient to authorize reformation of contract in that regard. Id.

71, 72. Hall v. Abraham, 44 Or. 477, 75 P. 882.

73. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990.

74. Evidence conflicting as to existence of custom. Entwhistle v. Henke, 211 Ill. 273, 71 N. E. 990.

75, 76. Hall v. Abraham, 44 Or. 477, 75 P. 882.

77, 78. Shea v. Nilima [C. C. A.] 133 F. 209.

79. Agreement between aliens not void, and one subsequently declaring his intention of becoming citizen may recover his interest in claim located in name of other. Shea v. Nilima [C. C. A.] 133 F. 209. Complaint sufficient. Id. Delay of between one and two years held not such laches as to bar recovery, where defendants not prejudiced thereby. Id.

80. Action to establish trust in claim. Rule requiring one seeking to establish trust contrary to express terms of deed to make out case clearly and satisfactorily beyond a reasonable doubt does not apply. Location notice not of dignity and solemnity of sealed

Money paid under a contract to develop a mine may be recovered if it is not used for the purposes specified.[82]

Drainage.—Where mines have a common drainage, and the draining of one necessarily drains the other, the cost of such drainage should be divided in proportion to the benefits derived therefrom.[83]

§ 9. *Public mining regulations.*[84]—The statutes of Pennsylvania authorize the summary removal of an inspector of mines for neglect of duty, incompetency, or malfeasance in office, on petition of fifty reputable coal miners, after a hearing by the court.[85] The proceedings must show clear statutory authority and follow the statutory provisions strictly.[86] The statute does not authorize a petition for removal because of ineligibility for the appointment, or want of confidence in the inspector by the miners.[87] The remedy for ineligibility or want of jurisdiction to appoint is by quo warranto.[88]

The statutes of Indiana provide both a criminal and a civil liability for the failure of owners of land or persons in control of wells to plug abandoned wells sunk for natural gas or oil.[89] In so far as the statute provides for criminal liability it must be strictly construed.[90] The act does not apply to one having a mere right to explore and operate on such land for oil and gas, and no duty rests on him to plug abandoned wells which he finds there.[91]

Matters relating to the liability of mine owners for injuries to their employes are treated elsewhere.[92]

§ 10. *Statutory liens and charges.*[93]—The statutes of California give a lien on mining claims to any person performing work thereon,[94] and make anyone having charge of any mining or of the erection or alteration of any building thereon, the agent of the owner for the purposes of such act.[95] The labor must be performed

instrument. Morrow v. Mathew [Idaho] 79 P. 196. Evidence sufficient to sustain findings that contract was entered into, and was performed by plaintiff on his part, and that defendant was seeking to avoid its terms. Id. Plaintiff held not guilty of such laches as to bar recovery. Id. Where one of the defendants had disposed of his interest held proper to take plaintiff's interest out of holdings of other, both being guilty of fraud and conspiracy. Id.

81. Contract between plaintiff and defendant held not to entitle former to interest in mining lease purchased by latter in company with others, where he had notice of facts but failed to claim interest until claim had been developed. McKenzie v. Coslett [Nev.] 78 P. 976.

82. Money expended in cutting inclines, drifts and winzes, which either helped defendant directly in getting at its own ore, or developed workings which might have shown ore belonging to defendant if they had not proved barren. Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co., 131 F. 339.

83. Cost equally divided. Fisk M. & M. Co. v. Reed [Colo.] 77 P. 240. A contract by defendant to pay "its just and proper proportion" of draining contiguous mines held sufficiently definite. Complaint held to sufficiently state amount for which defendant was liable. Id. Averment that pumping was at defendant's request held unnecessary. Id. Contract having been executed held not void for want of mutuality. Id. Evidence held to support findings that mines had common drainage and that plaintiff, by draining its own mine, drained that of defendant. Id. Evidence sufficient to establish contract sued on, and defendant liable for half cost incurred both before and after it was made. Id. Fact that defendant had no control over plaintiff's pumping operations held not to prevent its entering into binding agreement to have them carried on for its benefit. Id. Defendant estopped to deny authority of agent to make contract. Id.

84. See 2 Curr. L. 902.

85. Act June 8, 1901, § 19 (P. L. 545). In re Martin, 209 Pa. 266, 58 A. 478.

86, 87, 88. In re Martin, 209 Pa. 266, 58 A. 478.

89. Acts 1893, pp. 300, 301, c. 36, §§ 2-5, as amended by Acts 1899, p. 82, c. 61; Burns' Ann. St. 1901, §§ 7511-7514. McDonald v. Carlin [Ind.] 71 N. E. 961.

90. McDonald v. Carlin [Ind.] 71 N. E. 961.

91. McDonald v. Carlin [Ind.] 71 N. E. 961. Where a lessee plugged an abandoned well and firm which had sunk it agreed that, if he would furnish them with work in sinking other wells, he could deduct from the amount due therefor the cost of such plugging, held that the furnishing of such work was a sufficient consideration for such agreement, whether or not the plugging was done in the manner prescribed by law. Nothing to show that agreement required it to be so plugged. Id.

92. See Master and Servant, 4 Curr. L. 533.

93. See 2 Curr. L. 902. See, also, Mechanics' Liens, 4 Curr. L. 615.

94, 95. Code Civ. Proc. § 1183. Williams v Hawley, 144 Cal. 97, 77 P. 762.

in the actual work of mining or developing the claim.[96] One not expressly authorized by the owner cannot be held to be his agent under this act unless he is engaged in doing some work upon the mine itself for the purpose of extracting ores therefrom.[97]

§ 11. *Remedies and procedure peculiar to mining rights.*[98]—In an action to recover possession of a mining claim, plaintiff cannot prevail against a defendant having prior possession under color of title, who did not by actual force oust him of actual possession.[99]

Where neither party has a perfected right to have a conveyance of title from the government, and the requirements of the statute providing for suits to determine questions respecting conflicting mining claims have not been complied with, the court can only adjudicate plaintiff's right to the exclusive possession of the land.[1] The struggle is for possession only, and the parties cannot have a judicial determination as to which shall ultimately prevail in a contest for title.[2]

One suing to recover legal and actual possession of a claim which his grantor located as a placer claim assumes the burden of establishing a right of possession superior to the rights of defendants evidenced by their prior actual possession.[3] He must prove affirmatively that his grantor complied technically with all of the requirements of the law in locating it, and that the land embraced in the claim was in fact public land of the United States which the law authorized him to locate and take into his exclusive possession as a placer claim.[4] Where defendant has not molested plaintiff or interfered with his possession otherwise than by continuing to hold possession in the same manner as before plaintiff attempted to lay out his claim, the burden is on the latter to show that defendant was a mere intruder, having no color of title or right to possession.[5]

Where one of two joint tenants of a mining claim fraudulently surrenders possession to third parties, his co-tenant cannot maintain ejectment against them, but his remedy is in equity.[6] A bill averring that defendants' title was acquired under a relocation made in pursuance of a fraudulent conspiracy with plaintiff's partner, whereby the latter was to fail in his duty to perfect the original location, is sufficient to entitle plaintiff to treat defendants as trustees ex maleficio, and to recover from them as such trustees the materials taken from the mine.[7] An injunction restraining further mining during the pendency of the suit will issue where it appears that some of the defendants are insolvent.[8]

Under a statute providing that ejectment may be maintained by pleading and proving that plaintiff is entitled to possession and that defendant dispossessed him before the commencement of the action, one in possession of a mining claim under a lease, and claiming possession to the boundary lines may maintain ejectment against one entering on a part of the claim not actually occupied because the lessee did not know where the lines were.[9]

96. No lien for services of watchman caring for mine while it is idle. Williams v. Hawley, 144 Cal. 97, 77 P. 762.

97. Not sufficient to show that he was in possession under contract with owner under which he was empowered to make improvements and prosecute development work. Contracts inadmissible. Williams v. Hawley, 144 Cal. 97, 77 P. 762.

98. See 2 Curr. L. 903.

99. Under Rev. St. U. S. § 910 (U. S. Comp. St. 1901, p. 697), the case is to be determined by the law of possession. Bevis v. Markland, 130 F. 226.

1. Bevis v. Markland, 130 F. 226.

2. Bevis v. Markland, 130 F. 226; Columbia C. M. Co. v. Duchess M., M. & S. Co. [Wyo.] 79 P. 385. Award of damages held supported by evidence. Columbia C. M. Co. v. Duchess M., M. & S. Co. [Wyo.] 79 P. 385.

3, 4, 5. Bevis v. Markland, 130 F. 226.

6. Lockhart v. Leeds, 25 S. Ct. 76. Bill held to sufficiently aver time of discovery of fraudulent conspiracy, and that it was not discovered until after expiration of time within which complainant could file location notice. Id.

7, 8. Lockhart v. Leeds, 25 S. Ct. 76.

9. Under Ariz. Rev. St. 1887, pars. 3135, 3137, 3139. Such entry is an ouster. Com-

In an action to quiet title to an oil claim, plaintiffs must recover, if at all, on the strength of their own title.[10]

An order granting the right to inspect the underground workings of a mine should determine and fix the means of access thereto,[11] and should limit the examination to the workings of which it is necessary for the plaintiffs to have knowledge and to make surveys and maps.[12] Requiring the owner to lower and hoist the inspectors into the mine by means of its own appliances is not objectionable as a taking or damaging of its property without first making just compensation therefor.[13] The person seeking it must pay the cost of such inspection.[14] It is improper for the court to fix the cost of lowering the inspectors into and hoisting them from the mine without hearing evidence in regard to it.[15]

MINISTERS OF STATE; MINUTES; MISJOINDER, see latest topical index.

MISTAKE AND ACCIDENT.[16]

§ 1. Definitions; Elements (674).
§ 2. Relief Against (675).
§ 3. Procedure to Obtain Relief (676).

§ 1. *Definitions; elements.*[17]—A mistake of fact is always a mental condition or conception.[18] A mutual mistake is one reciprocal and common to both parties, where each alike labored under the same misconception in respect to the terms of the written instrument.[19] Mistake, to be ground for equitable relief, must be of a material nature, and must be the determining ground of the transaction.[20] A mistake arising from an erroneous view of the legal effect of a deed in the chain of title is a mistake of fact against which equity will grant relief.[21]

plaint and evidence sufficient to support judgment for plaintiff. Molina v. Luce [Ariz.] 76 P. 602. Evidence sufficient to sustain finding that part of claim located by defendants was within boundaries of previously located claim owned by plaintiffs. Id.

10. Weed v. Snook, 144 Cal. 439, 77 P. 1023.

11, 12, 13. State v. District Court [Mont.] 76 P. 206.

14. Mont. Code Civ. Proc. § 1317. State v. District Court [Mont.] 76 P. 206.

15. State v. District Court [Mont.] 76 P. 206.

16. This article treats only of mistake or accident as ground for equitable relief, affirmative or defensive. As ground for new trial, see New Trial and Arrest of Judgment, 2 Curr. L. 1037. See, also, the topics Equity, 3 Curr. L. 1210; Cancellation of Instruments, 3 Curr. L. 584; Reformation of Instruments, 2 Curr. L. 1492; Specific Performance, 2 Curr. L. 1678; also such titles as Contracts, 3 Curr. L. 805; Deeds of Conveyance, 3 Curr. L. 1056; Gifts, 3 Curr. L. 1560.

17. See 2 Curr. L. 903.

18. It may be either active or passive. When active, the mental condition or belief may be that a certain matter or thing exists which really does not exist, or that a subject-matter or thing existed at some past time which did not really exist. Barker v. Fitzgerald, 204 Ill. 525, 68 N. E. 430.

19. Coleman v. Illinois Life Ins. Co., 82 S. W. 616.

20. Where a mistaken belief that an adopted daughter would inherit from her adopted parents, under a legislative act which was in fact never passed, did not determine the adopted mother's action in giving property to the daughter, the property could not be recovered after the daughter's death. White v. Dotter [Ark.] 83 S. W. 1052. A party is entitled to relief on the ground of mistake, only if such mistake was material to the transaction affecting its substance, and so important that it determined the conduct of the mistaken party or parties. Relief granted where a lease was made under the mistaken belief that the walls of the building were strong enough to support contemplated additional stories. Barker v. Fitzgerald, 204 Ill. 525, 68 N. E. 430. A mutual mistake of 23 feet in the depth of a city lot would be sufficiently substantial to warrant the intervention of equity, if established by the required proof. Albro v. Gowland, 90 N. Y. S. 796. An alien may not have a contract for the exchange of lands rescinded on the ground that he was mistaken as to his legal right to acquire and hold realty and the other party's mistake as to his alienage, since such contract was not void, but could have been perfected by his naturalization. Pembroke v. Huston, 180 Mo. 627, 79 S. W. 470. A sale of growing timber was at a stipulated price per acre, and a certain sum was paid in advance. Upon the survey it was found that the total acreage amounted to less than the sum already paid. Held, Civ. Code 1895, §§ 3974, 3983, 3984, as to when equity will grant relief for mistake, do not apply; and that vendee may recover the excess paid vendor. Martin v. Peddy, 120 Ga. 1079, 48 S. E. 420.

21. As where the parties to a mortgage intended to cover husband's interest in land,

While reasonable diligence is required, relief on the ground of a mutual mistake will not be denied where it appears only that complainant might, had he done all in his power, have ascertained the truth.[22]

§ 2. *Relief against.*[23]—Reformation of a written instrument will be decreed by a court of equity only where the mistake is mutual;[24] or where there is a mistake on one side, and either fraud, surprise, undue influence, misapprehension, imposition, or like cause on the other;[25] or where the contract, as written, does not express the intended agreement of both.[26] Rescission or cancellation of the contract may be decreed either for a mutual[27] or unilateral mistake,[28] provided the situation is such that the parties may be placed in statu quo.[29] Equity will not grant relief for mistake of one party resulting from his own negligence.[30] Thus failure to read a written instrument executed by a party precludes relief,[31] unless he was unable to read,[32] or the other party was guilty of fraud.[33]

erroneously supposed a deed to the wife, pursuant to an execution sale against the husband, was valid. Livingstone v. Murphy [Mass.] 72 N. E. 1012.

22. Barker v. Fitzgerald, 204 Ill. 525, 68 N. E. 430.

23. See 2 Curr. L. 904.

24. Coleman v. Illinois Life Ins. Co., 82 S. W. 616; Jones v. Warren, 134 N. C. 390, 46 S. E. 740. Where by mutual mistake of parties, certain lands included in a contract were expressly reserved and excepted in the deed, equity gave the appropriate relief. Pinchback v. Bessemer Min. & Mfg. Co. [N. C.] 49 S. E. 106.

25. Jones v. Warren, 134 N. C. 390, 46 S. E. 740. Neither law nor equity will relieve against mistakes unless they are mutual, or unless the mistake of one party was brought about by the conduct of the other. Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463.

26. Equity has jurisdiction to reform a deed which by mistake of the draftsman does not convey the estate intended. Nutall v. Nutall [Ky.] 82 S. W. 377. Where parties through ignorance, inadvertence or lack of appreciation of their acts, have executed a writing which when legally construed does not contain the intended contract, the instrument may be reformed by equity so as to embody the intended agreement. Deed reformed so as not to release a covenant against use of the property for saloon purposes. Uihlein v. Matthews, 93 App. Div. 57, 86 N. Y. S. 924.

27. A mutual mistake as to the extent, to a material degree, of the interest to be conveyed, is ground for relief. Castleman v. Castleman [Mo.] 83 S. W. 757. Where both parties to a conveyance executed it under the mistaken belief that their grandmother had made an election to take a child's part of an estate, and not a half interest for life given her by will, there was a mutual mistake of fact, for which equity would set aside the deed. Id.

28. Coleman v. Illinois Life Ins. Co., 82 S. W. 616. A bidder on a public building who, by excusable mistake, omitted an estimate on a part of the work and made a bid several thousand dollars lower than he intended, is entitled to have his bid rescinded, and to recover his deposit, having notified the board receiving bids promptly and that board having awarded the contract to the next lowest bidder. Board of School Com'rs of Indianapolis v. Bender [Ind. App.] 72 N. E. 154.

29. To entitle a party to rescission of a contract on the ground of a mutual mistake, the situation must be such that the parties can be placed in statu quo. Barker v. Fitzgerald, 204 Ill. 525, 68 N. E. 430.

30. One who fails through culpable inertness to make inquiry when it is his duty to inquire, and through such failure loses a valuable right is not entitled to relief in equity on the ground of mistake. Plaintiff failed to examine records before releasing mortgage. Farrell v. Bouck [Neb.] 101 N. W. 1018.

Note: Equity will not relieve against mistake, by way of reformation, when the party complaining had within his reach the means of ascertaining the true state of facts, and, without being induced thereto by the other party, neglected to avail himself of his opportunities for information. Roundy v. Kent, 75 Iowa, 662; Marshall v. Westrope, 98 Iowa, 324; New York Life Ins. Co. v. McMaster, 87 F. 63, 67; Quimby v. Shearer, 56 Minn. 534; Persinger v. Chapman, 93 Va. 349, 352; Brown v. Fagan, 71 Mo. 563; Voorhis v. Murphy, 26 N. J. Eq. 434; Bishop v. Allen, 55 Vt. 423; Pearce v. Suggs, 85 Tenn. 724; Massey v. Cotton States Life Ins. Co., 70 Ga. 794; Bonney v. Stoughton, 122 Ill. 536.—From note in 65 Am. St. Rep. 500.

31. Where a party without fraud practiced on him signs a contract, he is conclusively presumed to know its contents, and to accept its terms, and the fact that he did not read it does not change the rule. Mortgagor could not defend against a note on the ground that he did not read it or know its contents, when he could have read it. Catterlin v. Lusk, 98 Mo. App. 182, 71 S. W. 1109. One who signed a written compromise agreement without reading it could have no relief. Rutherford v. Rutherford [W. Va.] 47 S. E. 240. That some of the parties to a family settlement signed the document embodying it without reading it is no ground for setting it aside. Burnes v. Burnes, 132 F. 485. One able to read who signs an instrument without knowing its contents cannot avoid liability thereon unless his failure to learn the contents was induced by some action or representation of the other party amounting to fraud. Georgia Medicine Co. v. Hyman & Co., 117 Ga. 851,

A mistake of only one party, whereby the written contract does not express his intention, is unavailing to him in an action thereon.[34] A mistake as to a separable portion of a contract does not affect its validity as a whole.[35]

As to relief for mistake of law, see note.[36]

§ 3. *Procedure to obtain relief.*[37]—Evidence of a mutual mistake, such as to warrant reformation, must be clear, satisfactory, and convincing.[38] A mere preponderance of evidence is not enough,[39] and a direct conflict of testimony is conclusive against reformation.[40] Where it appears that through mistake the intended contract is not expressed by the writing, parol evidence is admissible to show what the real agreement was.[41] But when the contract pursuant to which a deed is executed is inserted therein as an essential recital, and the description of the property is inconsistent with such recital, equity will make the correction upon inspection of the deed.[42]

There is a conflict as to whether a pleading setting up fraud may be amended so as to allege mistake.[43] A merely defective allegation of a mutual mistake, if there be not a total failure to allege such mistake, is cured by verdict.[44]

45 S. E. 238. Failure to read lumber contract; party bound. Harrison v. Wilson Lumber Co., 119 Ga. 6, 45 S. E. 730.

32. One who does not know what he signs, because unable to read, is not bound by the contract. Melle v. Candelora, 88 N. Y. S. 385.

33. The doctrine that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing its contents is not applicable in a suit between the original parties thereto, or where the defense is that, by reason of fraud, it does not embrace the contract actually made. Spelts v. Ward, 2 Neb. Unoff. 177, 96 N. W. 56.

34. Contract for sale of land. Harmon v. Thompson [Ky.] 84 S. W. 569.

35. Including one item, not owned by the policy holder, among the items insured, by mistake, does not affect the validity of the contract of insurance as to the other items. Herzog v. Palatine Ins. Co. [Wash.] 79 P. 287.

36. Note: For a mistake of law, pure and simple, there is generally no remedy. Lane v. Holmes, 55 Minn. 379, 43 Am. St. Rep. 508; McDaniels v. Bank of Rutland, 29 Vt. 230, 70 Am. Dec. 406. But if the mistake is caused by fraud, imposition or misrepresentation, etc., relief may be had in a court of equity. Kyle v. Fehley, 81 Wis. 67, 29 Am. St. Rep. 866; Haviland v. Willetts, 141 N. Y. 35, 50; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556; Benson v. Markoe, 37 Minn. 30, 5 Am. St. Rep. 816; Hardigree v. Mitchum, 51 Ala. 151; Moreland v. Atchison, 19 Tex. 303; Dile v. Shahan, 25 Ala. 694, 60 Am. Dec. 540.

Mistake of law and fact combined is a good ground for equitable relief, especially if it does not result in injury to the opposite party. Lane v. Holmes, 55 Minn. 379, 43 Am. St. Rep. 508; Estate of Woodburn, 138 Pa. 606, 21 Am. St. Rep. 932; Freeman v. Curtis, 51 Me. 140, 81 Am. Dec. 564; Haviland v. Willetts, 141 N. Y. 35.—From note to Alabama, etc., R. Co. v. Jones [Miss.] 55 A. S. R. 503, 517.

37. See 2 Curr. L. 905.

38. Evidence that agents who made contract of insurance understood the agreement to be different from that embodied in the writing did not show mutual mistake on part of principals who signed the contract. Barker v. Pullman [C. C. A.] 134 F. 70. Evidence insufficient to prove mistake or misunderstanding in executing a trust deed omitting power of revocation. Dayton v. Stewart [Md.] 59 A. 281. Evidence insufficient to warrant reformation of a description in a contract of sale so as to cure an alleged shortage in quantity to be conveyed. Albro v. Gowland, 90 N. Y. S. 796. Evidence sufficient to show mutual mistake of parties to lease in regard to strength of walls of leased building. Barker v. Fitzgerald, 204 Ill. 525, 68 N. E. 430. Evidence sufficient to show a mutual mistake whereby a policy of insurance described a stock of goods as located in a building other than that in which they really were, so as to require reformation of the policy. Warner, Moore & Co. v. Western Assur. Co. [Va.] 49 S. E. 499. Evidence of mutual mistake of parties who executed a duebill, held in action thereon, sufficient to take case to jury. Wheeler v. Seamans [Wis.] 102 N. W. 28.

39, 40. Coleman v. Illinois Life Ins. Co., 82 S. W. 616.

41. Pinchback v. Bessemer Min. & Mfg. Co. [N. C.] 49 S. E. 106. Parol evidence is competent to show a mistake of a draftsman by reason of which a deed does not convey the intended estate. Nutall v. Nutall [Ky.] 82 S. W. 377. Parol evidence admissible to show what the real contract was, and that a portion of it was omitted from the writing by mistake of the scrivener and the parties. Evidence sufficient to support verdict for plaintiff. Kitchens v. Usry [Ga.] 48 S. E. 945. Parol evidence is admissible to show the real contract, when a party signs an instrument the contents of which he does not know, being unable to read. Melle v. Candelora, 88 N. Y. S. 385.

42. Pinchback v. Bessemer Min. & Mfg. Co. [N. C.] 49 S. E. 106.

43. A petition to have a deed canceled, on the ground that it was procured by fraud, may be amended by allegations that it was executed under a mutual mistake of fact, such amendment not introducing a new and

MONEY COUNTS; MONEY LENT; MONEY PAID; MONEY RECEIVED; MONOPOLIES; MORTALITY TABLES, see latest topical index.

MORTGAGES.

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§ 14. **Subrogation (703).**

Scope of topic. This article is devoted to the mortgage as an instrument and the substantive rights growing from it. An earlier topic[45] has fully treated the procedure by which mortgages are foreclosed. The doctrine of notice and the operation of the recording acts,[46] the application of the statute of frauds,[47] the effect of the mortgage as an incumbrance,[48] and the purchase of lands subject to mortgage,[49] are treated elsewhere.[50] Mortgage within this topic means only those of land or interests therein.[51] A mortgage may be regarded as one on land which having been given as money has been "mortgaged" by the heirs.[52] A mortgage of a leasehold of more than three years is a "real estate" mortgage in New York[53] and when recorded as such need not be refiled as a chattel mortgage.[54]

Judicial mortgage in Louisiana signifies the lien which a judgment creditor has.[55] A judicial mortgage does not result from the registry of an unsigned judgment.[56]

inconsistent cause of action. Castleman v. Castleman [Mo.] 83 S. W. 757. Where the cause of action pleaded and relied upon at the trial was for fraudulent misrepresentations, an erroneous judgment rendered on that ground cannot be sustained on appeal on the ground of mutual mistake. An amendment to the pleading, setting up mutual mistake could not have been made over defendant's objection. Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677.

44. Where the inclusion of 11 acres in a deed was alleged to be due to "some mistake, inadvertence, accident or miscalculation," the averment was held good after verdict. Lewis v. Batten [Tex. Civ. App.] 80 S. W. 389.

45. See Foreclosure of Mortgages on Land, 3 Curr. L. 1438.

46. See Notice and Record of Title, 2 Curr. L. 1053.

47. See Frauds, Statute of, 3 Curr. L. 1527.

48. See Covenants for Title, 3 Curr. L. 973; Vendors and Purchasers, 2 Curr. L. 1976.

49. See Vendors and Purchasers, 2 Curr. L. 1976.

50. Rights and liabilities between life tenant and remainderman. See Life Estates, etc., 4 Curr. L. 438. Between heirs and personal representatives, see Estates of Decedents, 3 Curr. L. 1238. Rights of mortgagee in eminent domain proceedings, see Eminent Domain, 3 Curr. L. 1189.

51. Chattel Mortgages, see 3 Curr. L. 682; Railroad Mortgages, see Railroads, 2 Curr. L. 1382.

52. By suing to foreclose, the property may be regarded as equitably reconverted from personalty. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

53, 54. Westchester Trust Co. v. Kelly, 92 N. Y. S. 482.

55. See generally Judgments, § 10 (lien) 4 Curr. L. 314. See Hardy v. Pecot [La.] 36 So. 992.

56. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

§ 1. *Nature and elements of mortgages.*[57]—A mortgage is a conveyance by way of pledge defeasible by the payment of the debt or obligation.[58] It does not in most states create or alienate an estate in the land.[59] Under a statute declaring it to be a conveyance, it is a conveyance of a mere chattel interest.[60] The debt is the principal obligation,[61] the mortgage merely an incident,[62] and when the debt secured is declared void, the mortgage ceases to be a lien.[63] The relation of debtor and creditor must exist.[64] Any transfer of property as security regardless of the form by which it is characterized creates the relation.[65] No particular form of words is necessary to create a mortgage.[66]

Property subject to mortgage.[67]—A bare possession may be mortgaged.[68] In Texas the homestead cannot be mortgaged.[69]

57. See 2 Curr. L. 906.

Note: See Tiffany, Real Property, p. 1165, **History and evolution of mortgage.**

58. Fabrique v. Cherokee & P. Coal & Min. Co. [Kan.] 77 P. 584. And see Cyc. Law Dict. "Mortgage."

59. Civ. Code, § 3810, declaring it to be a contract whereby specific property is hypothecated for the performance of an act without necessity for a change of possession. Mueller v. Renkes [Mont.] 77 P. 512. The mortgagor continues the real owner, and may grant a light and air easement over the property so long as mortgagees are not prejudiced. Wood v. Grayson, 22 App. D. C. 432. The execution of a mortgage upon insured property is not a violation of the covenant against change of title. Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283. Where a prospective vendee refuses to complete the sale, the vendor can maintain an action for damages, pending which he may mortgage the premises. Such act will not constitute an abandonment of the contract. Harmon v. Thompson [Ky.] 84 S. W. 569. See statement of the varying doctrines and alignment of states adhering to each. Cyc. Law Dict. "Mortgage."

60. Mueller v. Renkes [Mont.] 77 P. 512.

61. A deed of trust executed to secure the repayment of money to be advanced at a future date on condition that if the money was not advanced the deed should be canceled would not create a llen if the money was never advanced. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126. Where the execution of the secured note is denied, it is not admissible in an action to foreclose without proof of execution. Stoddard v. Lyon [S. D.] 99 N. W. 1116. Where the maker denies the genuineness of notes secured by a mortgage, the burden is on the mortgagee to prove the notes are in existence and that they were in fact executed by the mortgagor. Bruce v. Wanzer [S. D.] 99 N. W. 1102. Recital in the mortgage of execution and delivery of such notes is insufficient where the notes are not produced. Id. In an action to foreclose where no judgment against the makers of the mortgage note is desired, it is necessary that the note be produced in evidence if its execution is denied. Stoddard v. Lyon [S. D.] 99 N. W. 1116.

62. An outstanding mortgage or deed of trust before foreclosure is not a bar to recovery in ejectment as between persons not claiming under such deed or mortgage, though the conditions have been broken. Benton Land Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193. So long as the debt is enforceable, the mortgagee has an equity in the land. Goddard v. Clarke, 1 Neb. Unoff. 769, 96 N. W. 350.

63. Note given by a married woman secured by a mortgage on her property given to secure the debts of her husband. Under Burns' Ann. St. 1901, § 6964, a contract of suretyship by a married woman is void. Held, the note and mortgage were void. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494.

64. Fabrique v. Cherokee & P. Coal & Min. Co. [Kan.] 77 P. 584; Beebe v. Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103. Evidence held to show that a lease was not intended as a mortgage. No enforceable debt. Stockton v. Dillon [N. J. Eq.] 57 A. 487. A perpetual lease with privilege of purchase at lessee's option being unlimited in time and not predicated upon a loan is not a mortgage. Kraay v. Gibson, 2 Ohio N. P. (N. S.) 537. Evidence held to show that a mortgage was executed to secure the mortgagee from loss under an agreement that the mortgagor would be responsible for certain of her funds loaned by him as her agent. Conlon v. Minor, 89 N. Y. S. 860. The fact that no legal proceedings have been had to collect a debt secured by a mortgage is insufficient to warrant a finding that the mortgage is void. Goddard v. Clarke, 1 Neb. Unoff. 769, 96 N. W. 350.

65. Beebe v. Wisconsin Mortg. Loan Co., 117 Wis. 328, 93 N. W. 1103. Where pursuant to an agreement a party acquires legal title to property at a sheriff's sale under a parol agreement that he is to hold title for the judgment debtor as security for the amount paid, the relation of debtor and creditor is created. Dickson v. Stewart [Neb.] 98 N. W. 1085.

66. Beebe v. Wisconsin Mortgage Loan Co., 117 Wis. 328, 93 N. W. 1103. It may be established by parol that the purpose of a writing or several writings was intended as a mortgage, though they bear on their face no semblance thereof. Providence, F. R. & N. Steamboat Co. v. Fall River [Mass.] 72 N. E. 338. An assignment of a lease as security for a loan is a mortgage. Id.

67. See 2 Curr. L. 906, n. 26 et seq.

68. A conveyance as security by a person having no interest except bare possession is a mortgage. Schneider v. Reed [Wis.] 101 N. W. 682. See, also, Schriber v. LeClair, 66 Wis. 579, 29 N. W. 570.

69. Even though the mortgagors had

In proceedings to establish a mortgage, all persons having an interest in the property must be made parties.[70] Evidence of the circumstances surrounding the transaction is admissible.[71]

§ 2. *General requisites and validity.*[72]—The mortgagor must have some interest in the property mortgaged,[73] and authority to execute the mortgage.[74] If a probable interest is apparent, the mortgage is not void on its face.[75]

Description.[76]—As a general rule any description by which the premises may be identified[77] or ascertained by investigation aliunde is sufficient.[78]

The consideration[79] need not be furnished by the mortgagee.[80] An equitable mortgage is a good consideration and justification for the giving of a formal mortgage, where in the absence of the equitable right, a valid security could not be given because of the rights of creditors.[81]

formed an intention to and were preparing to abandon it. Delaney v. Walker [Tex. Civ. App.] 79 S. W. 601.

Homestead can be mortgaged in most states, but the wife must join else the mortgage is junior to it. See post, § 2 and Homesteads, 3 Curr. L. 1630.

70. Contingent remaindermen. New York Security & Trust Co. v. Schoenberg, 87 App. Div. 262, 84 N. Y. S. 359.

71. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

72. See 2 Curr. L. 906.

73. A trust deed by one who has no title is void. Whitlock v. Cohn [Ark.] 80 S. W. 141. Where one executes a deed as security and takes a bond for a reconveyance which is transferred to another who pays the debt and takes a conveyance from the trustee, the right of a mortgagee in a mortgage executed by the original owner after the execution of the security deed depends upon the mortgage antedating the transfer of the bond for a reconveyance. Rountree v. Finch, 120 Ga. 743, 48 S. E. 132. In the absence of special authority, a grantor has no power to mortgage the property conveyed after delivery of the deed. Ewers v. Smith, 90 N. Y. S. 575. A. conveyed land to B. As part of the consideration C. deeded land to A. upon which A. held a mortgage for its full value. It was agreed that if C. should pay A. a certain part of the purchase price of the land conveyed by A. to B. that B. would convey the land to C. Held the deed from A. to B. did not constitute a mortgage from C. to B. Conkey v. Rex, 212 Ill. 444, 72 N. E. 370. Evidence held to show that a mortgagee knew or should have known that the mortgagor had no title. Whitlock v. Cohn [Ark.] 80 S. W. 141. A mortgagee from one who has no title acquires no rights. Jefferson Loan & Bldg. Ass'n v. McHugh, 208 Pa. 246, 57 A. 577.

74. Act March 11, 1893, amending Act March 7, 1887, gives the board of directors of an irrigation district power to execute a mortgage foreclosable in the ordinary way, so as to convey to the purchaser the legal and equitable title. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937.

75. A mortgage executed by a widow who had been in possession since the death of her husband and who might have a dower interest in the land or might have inherited it from her husband in the absence of other surviving heirs of the husband. Penny v. Weems, 139 Ala. 270, 35 So. 883.

76. See 2 Curr. L. 914, n. 55 et seq.

77. Description by government subdivision is sufficient. Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889. "A certain tract or parcel of land known as 'D' farm on the left hand fork of Troublesome Creek" is sufficient where the farm can be identified. Watts v. Parks, 25 Ky. L. R. 1908, 78 S. W. 1125. A description by governmental subdivisions in the proper township and range is sufficient notwithstanding the fact that it was further designated as situated in the wrong county. Risch v. Jensen, 92 Minn. 107, 99 N. W. 628. Mortgage on machinery and on land on which it will be located, describing the land, held sufficient to cover a tract subsequently purchased by the mortgagor and upon which the machinery was placed. Ferguson v. Walter Connally & Co. [Tex. Civ. App.] 76 S. W. 609.

78. "My entire undivided one-tenth interest in about 265 acres of land and my entire undivided one-tenth interest in the personalty of R., deceased, of H. county, Kentucky," is not void for indefiniteness. Fields v. Fish & Co. [Ky.] 82 S. W. 376. "Our interest in the land held in trust" by a certain trustee, is sufficient where the property can be identified. Edmonston v. Carter, 180 Mo. 515, 79 S. W. 459.

79. See 2 Curr. L. 906, n. 33.

80. The mortgagee can enforce the mortgage in equity notwithstanding. Palmer v. Bray [Mich.] 98 N. W. 849.

Note: If given for an illegal purpose, as the price of future sexual intercourse (W—— v. B——, 32 Beav. 574, Kirchwey's Cas. 219), or to obtain the suppression of a criminal prosecution (Atwood v. Fisk, 101 Mass. 363; Pearce v. Wilson, 111 Pa. 14, 56 Am. Rep. 243; Hyatt v. James' Adm'r, 2 Bush [Ky.] 463, 92 Am. Dec. 505), neither party can obtain relief; the mortgagee cannot enforce (McQuade v. Rosecrans, 36 Ohio St. 442; Gilbert v. Holmes, 64 Ill. 548), nor can the mortgagor have it canceled (Atwood v. Fisk, 101 Mass. 363). If given to secure a debt incurred for liquors sold in violation of law (Baker v. Collins, 9 Allen [Mass.] 253), or a gambling debt (International Bank of Chicago v. Vankirk, 39 Ill. App. 23; Barnard v. Backhaus, 52 Wis. 593), it will not be enforced.—See Tiffany, Real Property, p. 1190.

81. Harrigan v. Gilchrist [Wis.] 99 N. W. 905.

A stipulation[82] *that maturity may be accelerated for default* in payment of interest is valid,[83] but is deemed waived by acts tending to mislead the mortgagor.[84] A mortgagor who leaves his usual place of abode without giving the mortgagee notice of his future whereabouts waives his right to notice of the mortgagee's election to declare the entire debt due.[85] A stipulation that a power of sale may be executed in another state is valid.[86] A void stipulation does not affect the validity of the mortgage.[87]

Recitals which constitute mere surplusage may be disregarded.[88]

The signature.[89]—If the signature is denied,[90] the burden of proving it to be genuine is on the party claiming it to be valid.[91] A mortgage of the homestead must be signed by the wife,[92] but an acknowledgment of a mark as her signature is sufficient.[93]

A seal is not necessary.[94]

Acknowledgment[95] as a general rule is not necessary to the validity of a mortgage,[96] except to make it recordable against subsequent takers.[97] But when required it must be taken by a disinterested officer[98] in the manner prescribed by law.[99]

There must be an acceptance,[1] but if beneficial an acceptance will be presumed.[2]

Recordation.—A statute requiring a mortgage to be recorded does not apply to an agreement extending the time of payment of the mortgage debt.[3] Where

82. See 2 Curr. L. 907, n. 43.

83. First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 70 P. 726.

84. The mortgage note provided that on default in payment of interest, all principal and interest should become due at the option of the holder. An assignee requested the mortgagor not to pay the interest at the appointed place, stating that he would call for it. Lawrence v. Ward [Utah] 77 P. 229.

85. Julien v. Model Bldg., Loan & Investment Ass'n, 116 Wis. 79, 92 N. W. 561.

86. Express provision in a deed of trust. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348. A sale in such place is valid, notwithstanding it is of a quasi judicial character. Id.

87. A void stipulation for the payment of taxes on the mortgage debt does not render the mortgage void for usury. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

88. "This mortgage is just to include a sufficient amount of said farm to secure the debt" does not render the mortgage void. Watts v. Parks, 25 Ky. L. R. 1908, 78 S. W. 1125.

89. See 2 Curr. L. 906, n. 29 et seq.

90. Where a mortgagor disputed his signature for the reason that it was blurred, evidence held insufficient to show that it was forged. Colbert v. Moore, 185 Mass. 227, 70 N. E. 42.

91. Under Rev. St. 1898, § 4192, that such a signature is presumed valid until denied under oath. Ellis v. Hof [Wis.] 101 N. W. 368. Evidence held insufficient to prove the genuineness of a signature. Id. Possession by the mortgagee of a mortgage note is insufficient proof of its execution where such execution is denied. Stoddard v. Lyon [S. D.] 99 N. W. 1116.

92. If not, it is void. Lester v. Johnston, 137 Ala. 194, 33 So. 880.

93. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

94. Where the execution of a mortgage is admitted, the fact that it is not under seal is not ground to exclude it from evidence. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

95. See 2 Curr. L. 906, n. 30, 46.

96. See Acknowledgments, 3 Curr. L. 31.

97. See Notice and Record of Title, 2 Curr. L. 1053.

98. Acknowledgment taken by a director and stockholder of a building and loan association mortgagee is void. The instrument creates no lien. Fugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N. E. 644. A mortgage on a homestead must be acknowledged. An acknowledgment taken by an officer and stockholder of a building and loan association mortgagor is void and the mortgage created no lien. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236. This acknowledgment was made valid by the curative act (Laws 1903, p. 120). Id.

99. Under Rev. St. § 2770, the wife must sign and acknowledge separately and apart from her husband before an officer who shall appraise her of her right. First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 70 P. 726.

1. Evidence held to show that a mortgage was accepted. Holders of the debt secured had caused it to be foreclosed. Huber v. Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889. A grantee in a deed containing a mortgage assumption clause who never accepts the deed is not bound by it. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986.

2. An absent person has the benefit of a mortgage in his favor executed and recorded by the mortgagor, though not accepted by the mortgagee. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

3. Under Hurd's Rev. St. 1901, p. 427, providing that until filed for record mortgages

a separate book is provided for the recordation of mortgages, the instrument entitled to record must be a mortgage in form.[4] A written assignment is a conveyance within the recording act of New York.[5] So is an agreement for an extension and reduction of interest rate.[6]

Fraud, illegality and duress.[7]—A mortgage may be set aside for fraud,[8] if established,[9] illegality of consideration,[10] or duress,[11] and the fact that in executing the mortgage the mortgagor was guilty of compounding a felony, will not preclude him from seeking this relief.[12] The right to cancellation for duress passes to a purchaser of the land.[13]

The law of pledges is distinct from that of mortgages and receives separate treatment.[14] In Kansas the lien of a pledgee is subject to strict foreclosure; that of a mortgagee is not.[15]

In mortgages by married women,[16] the husband must join.[17] Her mortgage may be valid, though the bond it is given to secure is void.[18] A mortgage charging her separate estate with a debt due from herself and husband is valid in equity,[19] unless by statute she is forbidden to enter into contracts of suretyship.[20] Under such a statute, a mortgage of property held by husband and wife as tenants by entirety is void.[21] And where a conveyance to the husband was resorted to as a subterfuge to evade this law, the mortgage will not be allowed to stand.[22] The fact that she made false representations and is bound by an estoppel in pais does

shall be void as against subsequent purchasers and creditors. Kraft v. Holzman, 206 Ill. 548, 69 N. E. 574.

4. Civ. Code, § 1171 provides that absolute deeds shall be recorded in one book and mortgages in another. Held that the fact that an absolute deed can be shown to be a mortgage does not authorize its recordation in the mortgage book. Kent v. Williams [Cal.] 79 P. 527.

5. Weideman v. Pech, 92 N. Y. S. 493.

6. Void if not recorded. Weideman v. Pech, 92 N. Y. S. 493.

7. See 2 Curr. L. 906, n. 32 et seq.

8. Where necessities of the mortgagors known to the mortgagee were taken advantage of by him and the instrument executed without due consideration. Lappin v. Crawford [Mo.] 85 S. W. 535. A deed of trust from a client to his attorney may be canceled for fraud and return of the money advanced is not a condition precedent. Jinks v. Moppin [Tex. Civ. App.] 80 S. W. 390.

9. Evidence held to show that a mortgage was not procured by fraud. Simmons v. Reinhardt, 25 Ky. L. R. 1804, 78 S. W. 890.

10. Evidence held to show that a mortgage was not a part of an illegal lobbying contract. Reynolds v. Britton, 92 N. Y. S. 2. Where partaking of the nature of a scheme of chance, the purchase of debentures, as a condition for obtaining a loan, renders the mortgage securing the loan not enforceable. Heintz v. Sawyer, 5 Ohio C. C. (N. S.) 249. The mortgage, the enforcement of which would amount to a penalty, will not be entertained in equity. Greenville Bldg. & Loan Ass'n v. Wholey [N. J. Eq.] 59 A. 341.

11. Threats to send the mortgagor's son to the penitentiary unless the father secured a debt of the son by a mortgage. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105. Evidence held to show that a mortgage was executed under duress. Id.

12. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

13. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105. The deed from the mortgagor is admissible. Id. The original petition by the mortgagor for the same relief is admissible. Id.

14. See Pledges, 2 Curr. L. 1243. Where a chose in action secured by mortgage is pledged, the mortgage foreclosed and title taken by the pledgee under the sheriff's deed and possession taken by him, the title is vested in him and is substituted for the pledged choses in action and is governed by the law of pledges, not of mortgages. Blood v. Shepard [Kan.] 77 P. 565.

15. Blood v. Shepard [Kan.] 77 P. 565.

16. See 2 Curr. L. 907.

17. Under § 2208, Rev. St. 1892, the bond given by a married woman and mortgage on her separate estate to secure a loan must be joined in by the husband in order to render it valid. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

18. The amount of the loan could be established without reference to the bond. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

19. Being voidable, not void. Pape v. Ludeman [N. J. Eq.] 59 A. 9.

20. Burns' Rev. St. 1901, § 6964, forbidding them to make contracts of suretyship. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006.

21. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006.

22. Conveyance through a trustee to the husband. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006. Where the mortgagee knew of this transaction, he was charged with knowledge that it was resorted to for the purpose of evading the law. Id.

not preclude her from asserting the invalidity of such a mortgage where the mortgagee was not deceived.[23] A mortgagee having notice of facts sufficient to put him on inquiry is chargeable with this as with all facts his investigation would have disclosed.[24]

The burden is on the mortgagor to prove her coverture, that the mortgage was executed as security for the debt of another and notice thereof by the mortgagee.[25]

§ 3. *Absolute deed as mortgage.*[26]—An absolute deed intended by both parties as security for a debt or the performance of a duty is a mortgage.[27] In some states this doctrine is affirmed by statute.[28] A deed absolute can be declared a mortgage only when intended by the parties[29] at its inception to have such effect.[30] It must have been made to secure the payment of a debt or the performance of a duty.[31] In determining the intention of the parties, each case depends upon its own circumstances.[32] The surrounding conditions,[33] amount of consideration,[34]

23. Though the mortgage recites that the debt is hers and she makes affidavit that the consideration is for her sole use [Burns' Ann. St. 1901, § 6964]. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494.

24. See, generally, Notice and Record of Title, 2 Curr. L. 1053. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006. A mortgagee knowing that mortgagors were husband and wife and that the premises had been held by them as tenants by entirety is charged with notice of the protection afforded by the wife's tenancy. Id. He is chargeable with such notice when he takes a second mortgage. Id.

25. Notice to the mortgagee that the mortgagor was married when he acquired title to the premises is not notice that such conjugal relations existed four years later. Webb v. Hancock Mut. Life Ins. Co. [Ind.] 69 N. E. 1006.

26. See 2 Curr. L. 908.

27. Evidence held to show that deed was really a mortgage. Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283; Falkner v. Powell [Neb.] 100 N. W. 937; Faulkner v. Cody, 45 Misc. 64, 91 N. Y. S. 633; Dillon v. Dillon, 24 Ky. L. R. 781, 69 S. W. 1099. Intended as a mortgage to secure the amount named therein as consideration. Dean v. Radford [Mich.] 101 N. W. 598. A deed to secure the grantee as surety for the grantor. Meeker v. Warren [N. J. Eq.] 57 A. 421. An absolute deed and a written agreement to reconvey on payment of the debt secured. Wells v. Scanlan [Wis.] 102 N. W. 571. An instrument in form a common-law deed of mortgage, reciting a loan on a sale of real estate to secure the sum duly recorded in the mortgage office, is a mortgage as against third persons. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408, but see Thibodaux v. Anderson, 34 La. Ann. 797. An act of sale in form held to be a mere security. In re Schmidt [La.] 38 So. 26.

28. An absolute deed made for the purpose of securing a debt is a mortgage [Rev. St. 1892, § 1981]. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

29. A deed containing full covenants of warranty was executed and delivered. The grantee took possession and it was agreed that she could retain title by paying the balance of the purchase price, the amount paid to be treated as a loan in case she decided not to purchase. Held, the deed was not intended as a mortgage. Reich v. Dyer [N. Y.] 72 N. E. 922.

30. If it was intended as a mortgage, it continues as such until the equity of redemption is extinguished. Hursey v. Hursey [W. Va.] 49 S. E. 367.

31. The relation of debtor and creditor did not exist. Morrison v. Jones [Mont.] 77 P. 507. The test is, was there a subsisting debt after the execution of the deed. Holmes v. Warren [Cal.] 78 P. 954.

32. Where a grantee in an absolute deed and a subsequent release of all claims by the grantor has been in possession, made improvements, paid taxes, etc., so that he cannot be placed in statu quo, the grantor cannot assert that the conveyance was a mortgage and the subsequent release insufficient to transfer the title. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268.

33. Deed taken under an agreement that amount due on the debt should be ascertained in the future; grantor remains in possession and is given further credit. McGill v. Thorne [S. C.] 48 S. E. 994. Given as security and the grantee gives a bond for reconveyance on payment of the debt. Grogan v. Valley Trading Co. [Mont.] 76 P. 211. At the time of the execution of a deed, the grantee paid a debt for the grantor and the parties intended that the sum so paid should continue a debt and be secured by the deed. Hursey v. Hursey [W. Va.] 49 S. E. 367. At the time of the conveyance the grantee admitted his willingness to receive back at any time within five years the amount advanced, the retention of possession and payment of taxes by the grantor and the conduct of the parties of such a nature as to indicate a recognition of an interest in the grantor. Id. Explanation of the retention of possession by the grantor is insufficient to overcome the other circumstances. Id. At the time the deed was executed to the grantee he executed a deed to the grantor of the same premises which stated that it was made pursuant to an agreement to pay the grantors a sum of money. Held, both deeds were to be construed as one; the first as a deed, the second as a mortgage. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

34. Where a mortgagee uses the power

and relationship of the parties, are to be considered.[35] It is not essential that the grantor be the mortgagor,[36] nor that the grantee be the creditor.[37] An agreement by the purchaser at a judicial sale to hold the property subject to the debtor's right to redeem, if entered into after the sale, must be in writing.[38]

Defeasance.[39]—Where the transfer is in fact one for security, a promise to return is not essential.[40]

Once a mortgage always a mortgage.[41]—A deed intended as a mortgage[42] will remain a mortgage until the equity of redemption is cut off,[43] and the parties cannot by stipulation, however express or positive, render it anything else.[44]

Mortgage or conditional sale.—If the nature of the conveyance is doubtful, it will be considered a mortgage rather than a conditional sale.[45] Whether an absolute deed and an agreement to reconvey constitutes a mortgage[46] or a conditional sale[47] depends upon the intention of the parties,[48] the nature of the transaction,[49] and the mutuality of the contract.[50] If time is of the essence of the contract, it is usually regarded as a conditional sale.[51] The test of the mortgage is the relation of debtor and creditor and the subsistence of a debt to be secured.[52]

his mortgage has given him to obtain the equity of redemption at less than its value. Noble v. Graham, 140 Ala. 413, 37 So. 230. Executed by illiterate persons to the wife of the attorney for the grantors for a consideration less than the value of the property. Burch v. Nicholas [Ky.] 80 S. W. 1132.

35. Deed absolute executed under duress. Bryan v. Hobbs [Ark.] 83 S. W. 341.

36. A sheriff's deed may be declared a mortgage. Dickson v. Stewart [Neb.] 98 N. W. 1085. Parol agreement between purchaser at sheriff's sale and judgment debtor, that former is to hold title as security for a loan. Id. Where one borrows money to pay for land and causes the deed to be made to the lender and gives his note reciting that it is secured by such deed. Fleming v. Georgia R. R. Bank, 120 Ga. 1023, 48 S. E. 420; Borrow v. Borrow, 34 Wash. 684, 76 P. 305.

37. Debt due a stranger. Clark v. Seagraves [Mass.] 71 N. E. 813.

38. First Nat. Bank v. Moor [Tex. Civ. App.] 79 S. W. 53.

39. See 2 Curr. L. 909.

40. Evidence held to show that an assignment of a contract for the purchase of land was not absolute but intended as security. Fifer v. Fifer [N. D.] 99 N. W. 763.

41. See 2 Curr. L. 910, n. 97 et seq.

42. Mortgagee cannot maintain ejectment until after foreclosure. Faulkner v. Cody, 45 Misc. 64, 91 N. Y. S. 633.

43. A subsequent agreement by the parties canceling the evidence of indebtedness and orally stipulating that it shall operate to pass title is ineffective. Keller v. Kirby [Tex. Civ. App.] 79 S. W. 82. In an action to redeem a defense that the deed was made for the purpose of delaying the grantor's creditors will not be sustained unless the intent to do so is established. Faulkner v. Cody, 45 Misc. 64, 91 N. Y. S. 633. Where a creditor agreed to bid in the property at foreclosure of a trust deed and hold it subject to the debtor's right of redemption, he cannot avoid his agreement on the ground that it was void as to other creditors, the debtor having retained sufficient property to satisfy other claims. First Nat. Bank v. Moor [Tex. Civ. App.] 79 S. W. 53.

44. Once a mortgage always a mortgage. Faulkner v. Cody, 45 Misc. 64, 91 N. Y. S. 633.

45. A purchaser at a judicial sale assigned his bid under a contract that on payment by him within a specified time of a certain sum together with taxes, etc., his assignee should reconvey to him. Held a mortgage. Fulwiler v. Roberts [Ky.] 80 S. W. 1148.

46. Where a purchaser at a judicial sale obtained money from another to whom the deed was made under an agreement that such person would convey to the purchaser or at his order on repayment of the amount advanced, the transaction constituted a mortgage. Guenther v. Wisdom [Ky.] 84 S. W. 771.

47. One having an option on land about to expire applied to another for a loan. The party refused to take a mortgage but agreed to advance money, take title in his own name and convey upon the terms and conditions set forth in a bond for a deed. Held, the transaction constituted a conditional sale. Conner v. Clapp [Wash.] 79 P. 929.

48. That the instruments of conveyance do not sufficiently convey the legal title is not sufficient to defeat an intention that they should effect such a conveyance. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268.

49. Where a deed shows on its face that it is to secure an indebtedness, it is a mortgage, not a conditional sale. Land v. May [Ark.] 84 S. W. 489.

50. Where there is no continuing debt, the execution of a deed with a simultaneous contract to reconvey upon the payment of a certain sum within a specified time, the payment being optional with the grantor, is a conditional sale. Fabrique v. Cherokee & P. Coal & Min. Co. [Kan.] 77 P. 584.

51. The parties may intend that the conveyance shall be absolute on default after the expiration of the period for payment. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268. Agreement to reconvey within a specified period. Time was of the essence

Mortgage or assignment.—The test is, was it intended to divest the debtor of his title. If not, it is a mortgage.[53] The validity of the transaction is to be determined by the law of preferences.[54]

The proceeding to establish a mortgage[55] is equitable, and cannot be maintained unless the grantor shows a willingness and ability to redeem[56] and do equity.[57] A bill to have a deed absolute in form declared a mortgage may be entertained, though the land is outside the state.[58]

Evidence.[59]—The burden is on the party claiming it to be a mortgage to establish that fact.[60] It may be established by parol evidence.[61] The evidence must be clear and specific,[62] satisfactory as to credibility, unequivocal,[63] and reasonably conclusive.[64] A preponderance of evidence is sufficient.[65] Evidence of concurrent circumstances,[66] and acts of the parties relative to the transaction, are admissible.[67] Where the instrument is not ambiguous, the interpretation placed upon it by one of the parties is immaterial,[68] but if the nature of the transaction is doubtful, such interpretation may be looked to.[69] The fact that an absolute deed was

of the contract. On default the agreement was to be void. Smyth v. Reed [Utah] 78 P. 473. If the right to repurchase is not exercised within the time specified, it is foreclosed. McElmurray v. Blodgett, 120 Ga. 9, 47 S. E. 531. Conveyance is absolute, notwithstanding a separate written contract to reconvey within a certain time upon certain terms. Bates v. Sherwood, 5 Ohio C. C. (N. S.) 63.

52. Fabrique v. Cherokee & P. Coal & Min. Co. [Kan.] 77 P. 584. See, also, ante, §§ 1, 2.

53. A corporation while insolvent but in control of its property executed an instrument conveying its property to secure certain debts on the condition that when the debts were paid the instrument should be void. The trustee to take possession, sell and hold the proceeds until the debt became due, pay them and return the surplus to the grantor. Held a mortgage. Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066. Such an instrument executed in Missouri is a mortgage within Sand. & H. Dig. §§ 5090, 5091, relating to execution and recording of mortgages. Id.

54. In Missouri a corporation in control of its property may secure a creditor by a deed of trust, and a general assignment immediately thereafter will not invalidate the preference. Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066. Such a deed is not void in Arkansas, notwithstanding a statute providing that none except certain preferences shall be allowed. Id.

55. See 2 Curr. L. 911. On motion for a nonsuit the court may decree an instrument to be a deed, though there is no technical nonsuit in equity. Morrison v. Jones [Mont.] 77 P. 507. A probate court has no jurisdiction to declare a deed absolute to be a mortgage. Rook v. Rook, 111 Ill. App. 398.

56. Gerhardt v. Tucker [Mo.] 85 S. W. 552.

57. One seeking to have a contract to convey and a deed to be declared a mortgage cannot complain that the contract is void for usury. Malone v. Danforth [Mich.] 100 N. W. 445.

58. It being an action for relief from fraud, not an action dealing with title. Clark v. Seagraves [Mass.] 71 N. E. 813.

59. See 2 Curr. L. 912, n. 16 et seq.

60. Evidence insufficient. Holmes v. Warren [Cal.] 78 P. 954.

61. Welborn v. Dixon [S. C.] 49 S. E. 232; Borrow v. Borrow, 34 Wash. 684, 76 P. 305. That a deed in which a grantee assumed a mortgage on the land was itself a mortgage. Hurd's Rev. St. 1903, c. 95, providing that every absolute deed intended as a mortgage shall be so considered. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986. That a purchaser at a sheriff's sale agreed to reconvey. Dickson v. Stewart [Neb.] 98 N. W. 1085; Foster v. Rice [Iowa] 101 N. W. 771. That party advancing money for another and taking title in his own name agreed to reconvey. Borrow v. Borrow, 34 Wash. 684, 76 P. 305.

62. Absolute deed held to be what its face purported. Northwestern Fire & Marine Ins. Co. v. Lough [N. D.] 102 N. W. 160.

63. Testimony of one witness that the grantee promised to reconvey on repayment of a sum paid by him on notes which he assumed, held insufficient after the grantee's death. Gerhardt v. Tucker [Mo.] 85 S. W. 552.

64. Evidence held insufficient. Dwyer Pine Land Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362.

65. First Nat. Bank v. Moor [Tex. Civ. App.] 79 S. W. 53.

66. An agreement to reconvey on certain conditions, executed concurrently with a deed is properly admitted in an action to have an absolute deed declared a mortgage. Morrison v. Jones [Mont.] 77 P. 507.

67. A contract whereby the grantor agreed to sell the land to the grantee is admissible. Holmes v. Warren [Cal.] 78 P. 954. A receipt given the grantor by the grantee stating that it was for the final payment of the purchase price as per the deed in question is admissible. Id. Evidence that a purchaser at a foreclosure sale agreed with the mortgagor that he could hold the land and that it was not to be affected by the sale is admissible. Stovall v. Haynes, 25 Ky. L. R. 1789, 78 S. W. 895.

68. McElmurray v. Blodgett, 120 Ga. 9, 47 S. E. 531.

69. A reference to it as a mortgage by

intended as a mortgage cannot be shown in an action for breach of warranty of title unless specially pleaded.[70]

Relief granted.—The land may be ordered sold if the mortgagor fail to reimburse the mortgagee.[71] The court will determine the right to possession.[72]

Costs.—The mortgagor is entitled to recover costs,[73] but if the mortgagee must enforce a sale of the property for the amount due him, the mortgagor must pay costs resulting therefrom.[74]

§ 4. *Equitable mortgages.*[75]—An equitable mortgage is a transaction to which equity attaches the character of a mortgage.[76] It may arise from any writing,[77] act,[78] contract,[79] or transaction[80] from which can be read an intention to charge property with the payment of a debt; for example, where pursuant to contract one acquires title to property for the purpose of holding it as security.[81] The fact that title is acquired through legal proceedings does not divest the transaction of its character.[82] A contract to execute a mortgage upon the happening of a certain contingency is not an equitable mortgage,[83] nor will an equitable mortgage be read into several instruments having a distinct legal significance.[84]

the mortgagee. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

70. Cates v. Field [Tex. Civ. App.] 85 S. W. 52.

71. Guenther v. Wisdom [Ky.] 84 S. W. 771.

72. Where the mortgagee's possession was based on the deed only. Grogan v. Valley Trading Co. [Mont.] 76 P. 211.

73. 74. Guenther v. Wisdom [Ky.] 84 S. W. 771.

75. See 2 Curr. L. 908.

76. The owner of an equity of redemption contracted with another for an advancement sufficient to redeem, and agreed that such person might within two years sell the land, pay the amount advanced, and account for the balance in case the owner did not repay the amount within that time. He thereafter without other consideration executed a deed to the wife of the person making the advancements. Held the transaction amounted to an equitable mortgage. Malone v. Danforth [Mich.] 100 N. W. 445. A written agreement by the owner of the equity of redemption that if the mortgagee would discontinue foreclosure proceedings he would execute a bond and mortgage to secure the debt. Matthews v. Damainville, 43 Misc. 546, 89 N. Y. S. 493. After the foreclosure of a first mortgage and expiration of the period of redemption, an accounting was had and it was found that the mortgagor still owed $705, $175 of which was due under a second mortgage. It was agreed that if the mortgagor would pay this indebtedness the mortgagee would deed the land back to him. Wenzel v. Weigand, 92 Minn. 152, 99 N. W. 633. Creditors who reduce their claim to judgment between the time their debtor executes a security deed and the time he transfers the bond to reconvey acquire a lien superior to the transferee of the bond. O'Connor v. Georgia R. Bank [Ga.] 48 S. E. 716.

77. Not constituting a formal mortgage. Feely v. Bryan [W. Va.] 47 S. E. 307.

78. Such as an imperfect attempt to give a mortgage, sufficient being done to enable a court of equity to deal with the matter. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

79. Where one contracts to execute a mortgage to secure a debt long overdue and then refuses to do so, he cannot complain of a decree charging the indebtedness on the land and ordering a sale thereof. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535. A loan was made for the purpose of enabling the borrower to purchase a home. It was agreed that the premises purchased should be held by the lender as security for the debt. Held that when the borrower refused to furnish the security the lender was entitled to have his claim decreed a lien on the premises. Hughes v. Mullaney, 92 Minn. 485, 100 N. W. 217.

80. A purchaser at judicial sale and contemporaneous resale by executory contract to the debtor whereby he is charged with a sum in addition to the amount for which it was sold, all pursuant to a prior verbal agreement, is a mortgage. Liskey v. Snyder [W. Va.] 49 S. E. 515.

81. Potter v. Kimball [Mass.] 71 N. E 308. Where one agrees to advance money for the purchase of land, take title in his own name and convey to the real purchaser upon repayment of the sum advanced, the transaction creates an express trust. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335. That no time is fixed for repayment does not render the transaction void. Id.

82. By writ of summons and attachment and then by writ of entry, the fact that in the summons and attachment suit the execution was returned satisfied by levy on the property and in the writ of entry, execution for possession was issued, served and returned. Potter v. Kimball [Mass.] 71 N. E. 308.

83. Agreement to execute a mortgage if foreclosure proceedings were discontinued. Mathews v. Damainville, 91 N. Y. S. 524.

84. Where a person in feeble health contracted with a brother to care for her during life; that she would will him all her property, and in case she desired to be released from the contract she would pay him a reasonable compensation. The contract, will, and a power of attorney to manage her property was executed. Spence v. Huckins, 208 Ill. 304, 70 N. E. 289.

Limitations do not run against the right to redeem from an equitable mortgage until it is repudiated,[85] especially where the real nature of the transaction has been recognized by the parties and no prejudice has resulted.[86]

The statute of frauds is no defense to an action to enforce a mortgagor's rights under an equitable mortgage.[87]

§ 5. *Nature and incidents of trust deeds as mortgages.*[88]—A deed of trust to secure a debt though sometimes called a mortgage is essentially different.[89] Statutes applicable to mortgages may be inapplicable to trust deeds.[90] The doctrine that the cessation of the duties and powers of a trustee operates to carry title to the beneficiary has no application to a deed of trust to secure a debt.[91] The trustee holds the legal title as security only, and when the debt is paid it reverts without a reconveyance,[92] and while a satisfaction of the debt determines his power to sell, his deed thereafter will convey the apparent legal title;[93] but his grantee with notice of the trust is liable to the beneficiaries for the value of the land.[94] A trust deed can pass no greater interest than the grantor has.[95] The deed will be construed according to the import of its terms.[96] A pre-existing debt is a sufficient consideration.[97] The grantor cannot defeat the operative effect of the instrument.[98]

Powers and duties of the trustee.[99]—A trustee is the agent for both debtor and creditor,[1] and should not be a contesting litigant in the matter of which he is trustee.[2] Under a mortgage securing bonds he represents the bondholders.[3] His rights, powers and duties are defined and limited by the instrument,[4] and cannot

85, 86. Potter v. Kimball [Mass.] 71 N. E. 308.

87. Potter v. Kimball [Mass.] 71 N. E. 308. But see 2 Curr. L. 907, n. 44.

88. See 2 Curr. L. 913.

89. A conveyance by the debtor to the creditor in payment of the debt will not operate to divest the trustee of his legal title. Leech v. Karthaus [Ala.] 37 So. 696.

90. A statute providing that payment of the mortgage debt divests the title under the mortgage. Leech v. Karthaus [Ala.] 37 So. 696.

91. Since the payment of the debt operates to divest the cestui que trust, the creditor, of any interest. Leech v. Karthaus [Ala.] 37 So. 696.

92. Benton Land Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193.

93. His grantee can convey good title to a bona fide purchaser. Schneider v. Sellers [Tex.] 84 S. W. 417.

94. Schneider v. Sellers [Tex.] 84 S. W. 417.

95. Executed by one who had but a one-fourth interest. Berner v. German State Bank [Iowa] 101 N. W. 156.

96. A conveyance to trustees to sell and pay certain parties "the amounts they were bound for on certain notes" does not secure the notes. Taylor v. Skiles [Tenn.] 81 S. W. 1258. A conveyance containing full covenants of warranty and purporting to convey all the interest of the grantor, but subject to the condition that the land be held in trust, to be sold and the proceeds applied to the payment of the grantor's debts, the balance, if any, returned to the grantor, passed the fee. Thompson v. Price [Wash.] 79 P. 951. The grantor was not a necessary party to an action to foreclose a mortgage executed prior to the trust deed. Id. A provision in a trust deed that in case of the absence of the trustee "the then sheriff of the county" should succeed to his powers and sell the property in case of default in payment of interest means the person who was sheriff at the time of the default. McNutt v. Mutual Ben. Life Ins. Co., 181 Mo. 94, 79 S. W. 703.

97. Such a deed if not executed with fraudulent intent known to the trustee is valid as against all secret prior liens and subsequent alienations or incumbrances. Gilbert Bros. & Co. v. Lawrence Bros. [W. Va.] 49 S. E. 155.

98. Evidence of want of consideration is inadmissible, though Rev. St. 1899, § 645 provides that want or failure of consideration may be shown in an action on a written contract for the payment of money. Wishart v. Gerhart, 105 Mo. App. 112, 78 S. W. 1094.

99. See 2 Curr. L. 913, n. 41 et seq.

1. If the trustee obtains possession before foreclosure, he is bound to collect and apply the rents and profits to the payment of the debt. Benton Land Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193.

2. Contest with the creditor the amount or validity of the trust debt. Bryan v. McCann [W. Va.] 47 S. E. 143.

3. Where holders of bonds secured by a mortgage are allowed to intervene in foreclosure proceedings and one of the class dies before the decree, the case does not abate nor is it necessary to have the deceased bondholder's representative made a party before the litigation can proceed. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

4. If the deed contains a power of sale he cannot resort to a court of equity to have a sale made under its decree unless he

be delegated unless under express authority.[5] He does not control the debt and cannot assert the rights and equities of the beneficiary to any extent beyond the powers expressly conferred.[6] Powers conferred by a deed of trust are strictly construed. Substitute trustees must be appointed,[7] the powers executed,[8] and the proceeds of a sale applied in the manner prescribed.[9] If he is the beneficiary he may extend the time for payment of the debt.[10] Under a provision that on failure of the trustee to act the owner of the debt may appoint a substitute trustee, an administrator of the owner of the debt may appoint a substitute trustee to execute the power in another state.[11]

Sale of the premises.[12]—It is the duty of the trustee when requested to execute the power of sale contained in the deed.[13] When a postponement of an accrued right to exercise the power of sale would prejudice the beneficiaries, it may be refused.[14] Where there is an agreement for an extension of time between the owner of the debt and the grantor, an action for damages may be maintained against the creditor for a breach of such agreement,[15] or an action may be maintained against a purchaser with notice to set aside the sale.[16] In Maryland he cannot exercise the power of sale before giving a bond.[17] He is personally responsible for breach of his duty.[18]

The security deed peculiar to Georgia[19] has had its status fixed by the judicial decisions of that state.[20] It conveys the absolute legal title,[21] which the grantee holds for the owner of the debt.[22] The interest of the grantor is not affected by

shows such an impediment to the exercise of his power as renders it inequitable for him to proceed without the authority of the court. George v. Zinn [W. Va.] 49 S. E. 904. The existence of prior or subsequent liens on the property is not such an impediment where there is no such dispute as to the amount as would deter bidders from offering a full and fair price. Id. Nor is the possibility of a right of subrogation and marshaling of assets in the trust creditor desiring the sale. Id.

5. Polliham v. Reveley, 181 Mo. 622, 81 S. W. 182.

6. George v. Zinn [W. Va.] 49 S. E. 904.

7. A provision that on failure or refusal of the trustee to act the beneficiaries or their legal representatives might appoint another trustee gives the attorney in fact of a beneficiary no power to appoint a substitute trustee. Allen v. Alliance Trust Co. [Miss.] 36 So. 285.

8. The personal representative of a deceased trustee authorized by statute to execute the powers contained in the deed upon request of a cestui que trust cannot do so unless he is so requested. Eason v. Dortch, 136 N. C. 291, 48 S. E. 741.

9. Where land is conveyed under an agreement that it may be sold and the proceeds applied to the payment of a debt, the proceeds cannot be applied to the payment of any other debt. Berner v. German State Bank [Iowa] 101 N. W. 156. Evidence held to show that the grantee in a deed of trust agreed to pay the grantor the proceeds of a sale of the premises in excess of the debt without regard to when a sale was effected. Id.

10. Dunnaway v. O'Reilly, 102 Mo. App. 718, 79 S. W. 1004.

11. Owner of the debt died in Kentucky. His administrator can appoint a substitute trustee in Texas without taking out letters of administration in that state. Peacock v. Cummings [Tex. Civ. App.] 78 S. W. 1002.

12. See fuller treatment in Foreclosure of Mortgages on Land, 3 Curr. L. 1438.

13, 14. Weir v. Jones [Miss.] 36 So. 533.

15. The power of sale was executed before the expiration of the period of extension. Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006.

16. Owner of the debt was the purchaser. Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006.

17. Under Code Pub. Gen. Laws, art. 16, § 205a, re-enacted by Act 1900, p. 128, c. 114, a filing at any time before ratification is not sufficient. Union Trust Co. v. Ward [Md.] 59 A. 192.

18. A partnership of which a trustee is a member is not liable for his wrongful acts as trustee. Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036.

19. See 2 Curr. L. 913, n. 40.

20. Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10.

21. Leaves the grantor no interest which is subject to levy and sale on execution. Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10. A security deed to a guardian vests title in him, and a reconveyance under Code 1895, § 2771, for the purpose of levy and sale put title in the grantor in the security deed as completely as it had been prior to the execution of such deed. Arrowwood v. McKee, 119 Ga. 623, 46 S. E. 871. A purchaser at the execution sale would acquire title as against both the guardian and his ward, and the ward, in case his money was lost, would look to the guardian on his bond. Id.

22. If he own the debt he holds for his own benefit, if he transfers the debt he holds for the benefit of the transferee. Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10.

the transfer of the debt or title.[23] Where the maker and holder of a security deed agree on a sale of the land partly for cash and partly on time and for a division of the purchase money, and the prospective grantee fails to complete the purchase, the creditor is not liable to the maker of the deed for breach of such contract.[24] The debtor or his subsequent judgment creditor may redeem.[25] If a creditor redeem he can compel a reconveyance to the debtor and make the land subject to sale under his judgment.[26] Redemption can be accomplished only by payment of the secured debt in full.[27]

§ 6. *Construction and effect of mortgages in general.*[28]—The intention of the parties may be looked to in determining the meaning of terms employed.[29] A word importing a singular number may extend to and be applied to several.[30] If executed to secure overdue debts, it will be deemed payable presently.[31] Reasonable expenses incurred in the making of the loan will not render the transaction usurious.[32] A mortgage given to secure one against loss as a surety is not usurious because for a sum in excess of the liability secured.[33] A purchase money mortgage is not made contingent because it is to be paid in part by proceeds of a resale.[34]

Conflict of laws.—A mortgage is governed by the law in force at the date of execution, and a law which affects rights acquired thereunder impairs the obligation of a contract.[35] The law of the place of execution governs the construction.[36] The law of the place where the property is situated governs its effect,[37] but the courts of a state where a note secured by mortgage on property in another state is executed have jurisdiction on declaring the note to be void to enjoin foreclosure in the state where the property is located.[38]

Property and interests conveyed.[39]—A mortgage executed pursuant to a prior agreement relates back to the date of such agreement.[40] It creates a lien on all

23. He acquires no leviable interest until the debt is paid. Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10.

24. Hudson v. Hudson, 119 Ga. 637, 46 S. E. 874. The owner of the equity does not lose his interest in the land until he has been paid the purchase price of his equity. Id.

25, 26. Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10.

27. A partial payment does not give the grantor a leviable interest. Shumate v. McLendon, 120 Ga. 396, 48 S. E. 10.

28. See 2 Curr. L. 914.

29. "I doth hereby agree to give unto A a mortgage lien to have and to hold said property as security, to be void on condition that the note be paid" is a mortgage and not an agreement to give a mortgage. Bray v. Ellison [Ky.] 83 S. W. 96. A patent ambiguity in a trust deed which is corrected by other expressions therein will be construed according to the manifest intent of the parties. Noe v. Witbeck, 105 Ill. App. 502.

30. A mortgage reciting "I" and "my," being signed by both husband and wife, included the wife, though she was not named in the body of the instrument and was sufficient as a mortgage of the homestead. Bray v. Ellison [Ky.] 83 S. W. 96.

31. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535.

32. The mortgagee may be allowed reasonable expenses incurred in negotiating the loan, examination of the title, and inspection of the premises. Liskey v. Snyder [W. Va.] 49 S. E. 515.

33. A mortgage was given to secure a loan of the mortgagee's credit. Held, the fact that the mortgage was for a sum in excess of the note indorsed did not show the mortgage to be usurious, it being accepted as a mere indemnity against loss. Bouker v. Galligan [N. J. Eq.] 57 A. 1010.

34. Iberia Cypress Co. v. Christen, 112 La. 451, 36 So. 491.

35. Law requiring a master's deed to be taken out within a specified time after the equity of redemption expires and on failure to do so, allowing the mortgagor to recover possession, applied to a mortgage executed when there was no statutory limitation and no loss of right by reason of failure to do so. Bradley v. Lightcap, 195 U. S. 1, 24, 25, 49 Law. Ed.

36. Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066. A mortgage executed and recorded in the state where the premises are located to secure bonds issued and payable in another state is governed by the law of the state where executed. Bramblet v. Commonwealth Land & Lumber Co. [Ky.] 83 S. W. 599.

37. Bowdle v. Jencks [S. D.] 99 N. W. 98.

38. Mortgage executed in Indiana on property in Missouri. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494.

39. See 2 Curr. L. 914.

40. Is antecedent to a homestead claim arising on the date of the agreement and execution of the mortgage. Ferguson v. Walter Connally & Co. [Tex. Civ. App.] 76 S. W. 609.

property falling fairly within the description,[41] and if it purports to cover more than the mortgagor owns is valid as his interest.[42] Fixtures calculated to be for the permanent use of the realty[43] and appurtenances necessary to its enjoyment pass.[44] Where the extent of the right is not defined, it may be determined by what the parties have recognized as reasonably necessary.[45] In order that the lien may attach to after-acquired property, the terms of the instrument must be clear.[46] If because of mistake a mortgage does not include all the interests in the land intended to be included, the mortgagee has a right as against the mortgagor to have a new mortgage covering the omitted portion;[47] but he is not entitled thereto as against subsequent mortgagees and purchasers without notice.[48]

Debts secured.[49]—A mortgage is not security for any debt other than the one it was executed to secure.[50] A mortgage to secure funds to be advanced at a future date is not one to secure a liability contracted after the execution of the mortgage.[51]

Reformation.[52]—A mortgage will not be reformed to the prejudice of creditors without notice.[53]

41. A married woman who executed with her husband a mortgage conveying all their interest is estopped to assert after his death that it was intended to convey only his life estate and not a life estate in her if she survived him. Simons v. Reinhardt, 25 Ky. L. R. 1804, 78 S. W. 890.

42. Integral fraction owned by the mortgagor. Risch v. Jensen, 92 Minn. 107, 99 N. W. 628.

43. Hot water heating apparatus, copper tank and fixtures. Young v. Hatch [Me.] 59 A. 950.

NOTE: All fixtures whether actually or constructively annexed ordinarily are carried by a mortgage of the freehold unless expressly excepted. Sands v. Pfeiffer, 10 Cal. 259; Cunningham v. Cureton, 96 Ga. 492; Kleoss v. Kath, 40 Ill. App. 99; Arnold v. Crowder, 81 Ill. 56, 25 Am. Rep. 260; Johnson's Ex'r v. Wiseman's Ex'r, 4 Metc. [Ky.] 321; Woodham v. First Nat. Bank, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. Rep. 622; Thomas v. Davis, 76 Mo. 42; Tate v. Blackburne, 48 Miss. 1; Kettredge v. Woods, 3 N. H. 503, 14 Am. Dec. 393; Snedeker v. Warren, 12 N. Y. 170; Foote v. Gooch, 96 N. C. 265, 60 Am. Rep. 411; Preston v. Briggs, 16 Vt. 124; Tillman v. De Lacy, 80 Ala. 103. The common-law rule that whatever is annexed to the freehold becomes a part thereof has been held to apply in all its strictness (Gardner v. Finley, 19 Barb. [N. Y.] 317), although there is at present a tendency in the states where the mortgage is regarded as a mere security to modify the harshness of its application in relation to fixtures annexed subsequent to the execution of the mortgage. See Bronson, Fixtures, § 58 et seq.

Fixtures annexed subsequent to the execution of the mortgage are according to the weight of authority a part of the realty and cannot be removed during the life of the mortgage. Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 631; Seedhouse v. Broward, 34 Fla. 509; Wood v. Whelan, 93 Ill. 153; Smith v. Goodwin, 2 Me. 537; Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310; Harlan v. Harlan, 15 Pa. 507, 53 Am. Dec. 612; Frankland v. Moulton, 5 Wis. 1; Gunderson v. Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860; Langdon v. Buchanan, 62 N. H. 660; Lord v. Detroit Sav. Bank [Mich.] 93 N. W. 1063; Curry v. Schmidt, 54 Mo. 515. See Bronson, Fixtures, § 60 et seq.

44. Easement for light and air over an adjacent lot belonging to the mortgagor. Wood v. Grayson, 22 App. D. C. 432.

45. Wood v. Grayson, 22 App. D. C. 432.

46. Mortgage on a manufacturing plant held not to cover after-acquired merchandise manufactured by the mortgagor. Mallory v. Maryland Glass Co., 131 F. 111.

47. It was supposed the land mortgaged belonged to the mortgagor, and her husband joined merely to release his curtesy. It subsequently appeared that title to a part of the land was in the husband. It was understood that the mortgage was to cover all his interest. Livingstone v. Murphy [Mass.] 72 N. E. 1012.

48. The husband's land was sold under execution against him. Livingstone v. Murphy [Mass.] 72 N. E. 1012. Grantee in a quitclaim deed takes title free from equitable right of the mortgagee. Id. The fact that a husband releases his curtesy in land mortgaged by his wife is not notice that he has agreed to convey his own interest in the fee if it should subsequently appear that he and not she is the owner. Id.

49. See 2 Curr. L. 914.

50. Fleming v. Georgia R. R. Bank, 120 Ga. 1023, 48 S. E. 420. A stipulation in a note given for subsequent indebtedness containing no reference to a mortgage was not secured thereby. Id. Evidence held insufficient to show that a mortgage given to secure the performance of a lease was also given to secure the performance of a collateral contract of the lessee to purchase all his supplies from the lessor. Neumann v. Moretti [Cal.] 79 P. 510.

51. The mortgage takes effect at the time the advancement is made and is not within Pub. St. 1891, c. 139, § 103. Staniels v. Whitcher, 72 N. H. 451, 57 A. 678.

52. See Reformation of Instruments, 2 Curr. L. 1492.

53. German Nat. Bank v. Bode, 5 Ohio C. C. (N. S.) 30. Description will not be corrected. Id.

§ 7. *Title and rights of parties. Nature of the mortgagor's interest.*[54]—The mortgagor is regarded as the owner of the premises, and may as against all except his mortgagee or his assigns impose a servitude upon the premises.[55] He is entitled to possession[56] and to the rents and profits until his equity of redemption is cut off,[57] unless the premises are insufficient security for the debt,[58] or by the terms of the mortgage the mortgagee is entitled to possession.[59]

The mortgagee's interest is an insurable one.[60] He may recover on his policy regardless of any other security he may hold.[61]

Estoppel as to title.[62]—Payment of interest on the loan does not estop the mortgagee to deny the validity of the mortgage.[63]

Assumption of possession by mortgagee.[64]—A mortgagee who purchases and goes into possession under a void foreclosure sale is a mortgagee in possession,[65] whether he takes possession with or without consent of the mortgagor.[66] A mortgagee in possession may maintain an action to have his rights adjudicated.[67] He stands in the place of and represents the mortgagor respecting the care of the property and the obligation of the tenant to make repairs.[68] On accounting,[69] he is liable only for the amount of rent actually received.[70] He cannot charge for repairs not essential to the preservation of the premises.[71] He is not chargeable for

54. See 2 Curr. L. 915.

55. Contract with adjoining owners that intoxicating liquors shall not be manufactured or sold on the premises. Scudder v. Watt, 90 N. Y. S. 605.

56. After sale on foreclosure he may recover rents and profits. Costigan v. Truesdell [Ky.] 83 S. W. 98.

57. One to secure his debt to an estate assigned personal property which was his interest in the estate to the administrator. On redeeming he is entitled to the income of such property. Clark v. Seagraves [Mass.] 71 N. E. 813. The person advancing the money and taking title is liable to the true owner for rents and profits collected. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335.

58. After the filing of a bill for the dissolution of a building and loan association which was in possession as mortgagor under a mortgage providing for such right until default, the mortgagee set up the default and prayed foreclosure and other relief. The receivers collected the rent for eight days after the petition for foreclosure was filed. Upon foreclosure, the proceeds were insufficient to satisfy the debt. Held, the mortgagee was entitled to have the rents collected by the receiver after her petition was filed applied to the payment of the deficiency. Baker v. Hill [Md.] 59 A. 275.

59. A tenant in possession under a lease subsequent to a mortgage which authorizes the mortgagee to collect the rents in case of default is liable to the mortgagee for the rental value, though as against the mortgagor he is entitled to a set off. Derby v. Brandt, 90 N. Y. S. 980.

60, 61. Kent v. Aetna Ins. Co., 84 App. Div. 428, 82 N. Y. S. 817.

62. See 2 Curr. L. 915.

63. On the ground that the mortgagor had no title. Whitlock v. Cohn [Ark.] 80 S. W. 141.

64. See 2 Curr. L. 915.

65. Investment Securities Co. v. Adams [Wash.] 79 P. 625. Heirs of the deceased mortgagor who were not made parties to the foreclosure suit could not defeat the mortgage without paying the debt. Id.

66. Investment Securities Co. v. Adams [Wash.] 79 P. 625.

67. To compel the holder of the legal title to redeem or on failure to redeem to have the right of redemption barred. Henthorn v. Security Co. [Kan.] 79 P. 653.

68. He cannot charge the mortgagor for repairs which he was under no obligation to make. The mortgagor's tenant had expressly covenanted to make repairs. Eggensperger v. Lanpher, 92 Minn. 503, 100 N. W. 372. A mortgagee who sues for foreclosure and pending litigation obtains the appointment of a receiver is chargeable as a mortgagee in possession. Land v. May [Ark.] 84 S. W. 489. The grantee of a security deed after having obtained possession may maintain an action to compel an accounting for the rents received, determine the amount due and have the property sold in satisfaction. Ray v. Pitman, 119 Ga. 678, 46 S. E. 849.

69. On accounting between a mortgagor and mortgagee who had assumed a prior mortgage and was in possession, moneys paid by the mortgagee on the prior incumbrance are to be treated as further advances and interest allowed on each payment to the next annual rest. At the time of each rest the mortgagee is to be charged with rentals for the previous year and credited with repairs, taxes, etc., and interest allowed on the new balance until the next rest. Chapman v. Cooney, 25 R. I. 657, 57 A. 928.

70. The fact that he reduced the rent in order to retain a tenant does not render him liable for the difference between the original rate and the rate after reduction. Chapman v. Cooney, 25 R. I. 657, 57 A. 928.

71. Barnard v. Paterson [Mich.] 100 N. W. 893. In an action to procure a reconveyance of lands conveyed as security, the mortgagee can recover for improvements made only during the period he proved he

a reduced rental acquiesced in by the mortgagor,[72] nor for an amount of the rents applied to the payment of back taxes and insurance which the mortgagor had failed to pay.[73] He cannot, in the absence of an express stipulation, recover compensation for his services in caring for the premises,[74] nor commissions on rents collected for his own benefit.[75]

Limitations do not run against the mortgage debt while he is in possession.[76]

Right to possession.—A mortgagee in a mortgage given to secure his support is entitled to possession,[77] unless from the terms of the mortgage a contrary intention can be inferred.[78]

Payment of taxes.—The mortgagee is under no legal duty to pay the taxes on the premises,[79] but if he has paid them under the belief that he had a valid lien, he is entitled to recover the amount paid with interest,[80] and where he has the option of paying taxes and adding the sum to the amount of the claim, he may recover all sums necessarily expended,[81] but not sums he is not required to pay.[82]

Insurance.—Insurance procured by the mortgagee for his own benefit does not inure to the benefit of the mortgagor.[83] Fraud of the mortgagor in procuring insurance on mortgaged premises for the benefit of the mortgagee is no defense to the mortgagee's claim under the policy.[84] Conflicting interests between mortgagor and mortgagee in an insurance policy insuring both their interests should be determined by one party suing on the policy and making the other defendant.[85]

Waste.—A mortgagee can recover for waste committed by strangers on the mortgaged premises.[86] The insolvency of the mortgagor is immaterial.[87] A mort-

was in possession. Spangenberg v. Schneider, 97 App. Div. 200, 89 N. Y. S. 859.

72. Where the mortgagee was to collect rent and apply it to the payment of taxes, etc., and to the payment of the debt, and the rent was reduced with the consent of the mortgagor, the difference between the original and substituted rental should not be credited on the debt. Wilmarth v. Johnson [Wis.] 102 N. W. 562.

73. Wilmarth v. Johnson [Wis.] 102 N. W. 562.

74. Chapman v. Cooney, 25 R. I. 657, 57 A. 928.

75. No agreement that he should be paid for such services. Barnard v. Paterson [Mich.] 100 N. W. 893.

Note: It is held by some courts (Brown v. South Boston Sav. Bank, 148 Mass. 300, 19 N. E. 382; Bradley v. Merrill, 91 Me. 340, 40 A. 132; Waterman v. Curtis, 26 Conn. 241) that a mortgagee in possession is entitled to such commissions, or as it is sometimes called, charges, for taking care of the estate; but the great weight of authority is against their allowance (French v. Baron, 2 Atk. 120; Elmer v. Loper, 25 N. J. Eq. 475; Turner v. Johnson, 95 Mo. 341, 7 S. W. 570; Allen v. Robbins, 7 R. I. 33; Benham v. Rowe, 2 Cal. 261; Harper v. Ely, 70 Ill. 581; Neptune Ins. Co. v. Dorsey, 3 Md. Ch. 334. See Barnard v. Paterson [Mich.] 100 N. W. 893).

76. He may foreclose as soon as he discovers that the prior foreclosure was void. Investment Securities Co. v. Adams [Wash.] 79 P. 625.

77. He may recover such possession whether there has been a breach of the condition or not. Davis v. Poland [Me.] 59 A. 520.

78. Where it is provided that support shall be furnished upon the mortgaged premises. Possession in the mortgagor in such case being necessary to enable him to perform the condition of the mortgage. Davis v. Poland [Me.] 59 A. 520.

79. The existence of a tax lien does not constitute a breach of a personal covenant suffered by the mortgagee as grantor in the foreclosure deed. Stewart v. Wilson [Ala.] 37 So. 550.

80. Koerner v. Pfaff, 2 Ohio N. P. (N. S.) 597.

81. Additional burden resulting in delay, interest, penalties and costs. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

82. Cost of procuring a tax deed and recording it. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14. A stipulation that the mortgagor should repay all money paid by the mortgagee for taxes or on account of outstanding liens does not apply to expense incurred in litigating unfounded claims adverse to the mortgage. Norris v. Belcher Land Mortg. Co. [Tex.] 83 S. W. 799.

83. Where a creditor secured by a deed of trust procured insurance on the property for his own benefit, the debtor cannot require him to account to him for money received on the policy. Dunbrack v. Neall [W. Va.] 47 S. E. 303.

84. Agner v. Firemen's Ins. Co., 2 Ohio N. P. (N. S.) 254. A mortgagor procuring insurance on mortgaged premises for the mortgagee as his interest may appear, in accordance with an agreement to do so, is not in any sense the agent of the mortgagee. Id.

85. Kent v. Aetna Ins. Co., 84 App. Div. 428, 82 N. Y. S. 817.

86. Removal of steel beams and lintels

gagee in possession cannot be held liable for waste where the mortgagor recovers his property in a somewhat worse condition, but recovers money which might have been used in making repairs.[88]

Right to the compensation in condemnation proceedings.[89]—At law the compensation fund for property taken under the power of eminent domain belongs to the mortgagor; but the mortgagee can recover the award so far as necessary to repair the impairment of the security.[90] This principle applies where the land is not taken, but is damaged.[91] The right to reach the fund is an equitable right distinct from the rights under the mortgage on the remaining land.[92] If the mortgagee waives his right the mortgagor may recover.[93] The mortgagee cannot recover an amount not awarded as compensation.[94] Where a part of the premises are taken, nothing remains subject to the mortgage except the land not taken.[95]

Acquisition of outstanding title by a co-mortgagee inures to the benefit of all.[96] Mortgagees cannot permit the land to be sold for taxes and acquire title as against the mortgagor,[97] unless permitted to do so by statute.[98]

Rights of successive mortgagees.—A junior mortgagee may require property on which a senior mortgagee's lien is exclusive to be first resorted to by him, un-

inserted in a building before the execution of the mortgage is waste impairing the security. Ogden Lumber Co. v. Busse, 92 App. Div. 143, 86 N. Y. S. 1098. Evidence held sufficient to prove defendant's knowledge of the mortgage before committing the waste. Id.

87. In an action for waste his insolvency need not be alleged. Ogden Lumber Co. v. Busse, 92 App. Div. 143, 86 N. Y. S. 1098.

88. Chapman v. Cooney, 25 R. I. 657, 57 A. 928.

Note: There are two lines of holding upon the question of waste as applied to a mortgagee in possession; one line of cases holding that he must keep the property in as good condition as when he receives it. Barrett v. Nelson, 54 Iowa, 41, 6 N. W. 49, 37 Am. Rep. 183, and cases cited; Shaeffer v. Chambers, 6 N. J. Eq. 548, 47 Am. Dec. 211. The other that he is liable only for voluntary waste and cannot be charged for deterioration arising in ordinary waste and decay from lapse of time. 4 Kent, Comm. [12th Ed.] p. 167. See, also, Dozier v. Mitchell, 65 Ala. 511.—See Chapman v. Cooney, 25 R. I. 657, 57 A. 928.

89. See Eminent Domain, 3 Curr. L. 1189.

90. Bolton v. Seamen's Bank for Savings, 99 App. Div. 581, 91 N. Y. S. 122. The compensation fund remains land (Bates v. Boston El. R. Co. [Mass.] 72 N. E. 1017); but in equity the fund may be subjected to a lien for the payment of the mortgage debt (Id.). A third mortgagee is a mortgagee within St. 1894, p. 764, c. 548, § 8, providing for compensation of mortgagees having an estate in premises abutting on a street in which an elevated railroad is constructed. Id.

91. Under St. 1894, p. 764, where an elevated railway is constructed in the street on which the premises abut. Bates v. Boston El. R. Co. [Mass.] 72 N. E. 1017.

92. The rights of a third mortgagee in the compensation fund are not affected by the fact that his right to redeem from a prior mortgage is cut off. Bates v. Boston El. R. Co. [Mass.] 72 N. E. 1017.

93. Holder of a trust deed waived his right to be heard on the assessment of damages relative to the abolition of grade crossings. Providence, F. R. & N. Steamboat Co. v. Fall River [Mass.] 72 N. E. 338.

94. An amount guarantied by adjacent owners if the mortgagor would withdraw his opposition to a bill to establish a uniform court yard line and commence the construction of a building on the premises so as not to interfere with such line. Bolton v. Seaman's Bank for Savings, 99 App. Div. 581, 91 N. Y. S. 122.

95. Only that portion is subject to sale on foreclosure. Bates v. Boston El. R. Co. [Mass.] 72 N. E. 1017.

96. He takes title to such property in trust for co-bondholders on condition that they contribute their share of the price paid. Booker v. Crocker [C. C. A.] 132 F. 7. The proportionate share he is required to pay is measured by the par value of the bonds he holds, not by the amount he paid for them. Id. When the liens or titles purchased cover property not subject to the common mortgage, he acquires a like share in such property. Id.

97. He may pay the taxes and claim reimbursement. Ross v. Frick Co. [Ark.] 83 S. W. 343. Where the mortgagee has merely a lien, so long as the relation of mortgagor and mortgagee exists, the latter cannot as against the former acquire title to the property by means of tax sale where by the terms of his mortgage he is permitted to pay the taxes and add the amount to his claim. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

98. In Massachusetts a mortgagee may redeem from tax sale. Express provisions of St. 1898, c. 390, § 57. Hawks v. Davis, 185 Mass. 119, 69 N. E. 1072. An assignee of the mortgagee is a mortgagee of record within the meaning of this law. Id. An assignee whose assignment was made previously but not recorded at the time of the sale, is entitled to redeem on subsequently recording his assignment. Id.

less the premises subject to both liens are sufficient to satisfy them,[99] or the premises on which the superior lien is exclusive have been transferred[1]; but he must give the senior mortgagee notice that he intends to claim an equity through him,[2] since it is not the duty of the senior mortgagee to ascertain his status.[3] A second mortgagee who does not assume the first mortgage is not precluded from attacking its validity, though it is exempted from the covenants of the second mortgage;[4] but he cannot set up limitations as against a prior mortgagee's right to foreclose where there is no privity between them.[5] Where a senior mortgagee brings action to correct the description in his mortgage, a subsequent mortgagee whose mortgage is subject to the same defect is entitled to be made a party and to the same relief.[6]

The right to foreclose[7] is dependent on maturity of the obligation or its equivalent. No demand for payment is necessary.[8] If the debt is payable on demand he may foreclose at any time.[9] He is entitled to foreclose pro tanto on maturity of one of several notes secured.[10] The mortgagee in foreclosing under a power of sale must exercise extreme good faith.[11]

An extension of time for payment of the debt is a contract affecting an incumbrance on land and applies in whosesoever hands the title goes during such period.[12] It may be oral,[13] but must be based on a consideration.[14] It is binding according to its terms.[15] The mortgagee may be estopped from foreclosing before the expiration of the period of extension.[16]

§ 8. *Lien and priorities.*[17]—As between the parties the lien attaches at the time the mortgage is delivered;[18] as to third persons, from the date it is recorded.[19] A mortgagee's lien is inferior to all equities of which he has notice,[20] actual[21]

99. Blanchette v. Farsch [S. D.] 99 N. W. 79.

1. Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284.

2. Demand that the property on which the paramount lien is exclusive be first resorted to. Blanchette v. Farsch [S. D.] 99 N. W. 79.

3. A first mortgagee is not required before releasing a portion of the premises on which his lien is exclusive to ascertain whether the mortgagor has subsequently incumbered the portion not released. Blanchette v. Farsch [S. D.] 99 N. W. 79.

4. Livingstone v. Murphy [Mass.] 72 N. E. 1012.

5. The subsequent mortgagee did not contest the senior mortgagee's right to priority, but filed a cross bill to foreclose his own mortgage. Tinsley v. Lombard [Or.] 78 P. 895.

6. Scott v. Gordon [Mo. App.] 83 S. W. 550.

7. See Foreclosure of Mortgages on Land, 3 Curr. L. 1438.

8, 9. Kebabian v. Shinkle [R. I.] 59 A. 743.

10. Land v. May [Ark.] 84 S. W. 489.

11. If he mislead intending purchasers, employ agents to bid against each other, the sale may be set aside. Kebabian v. Shinkle [R. I.] 59 A. 743.

12. Missouri Real Estate Syndicate v. Sims, 179 Mo. 679, 78 S. W. 1006.

13. Evidence held sufficient to establish such an agreement. Hauser v. Capital City Brew. Co. [N. J. Eq.] 57 A. 722. An original answer held sufficient evidence of an agreement for an extension of time of payment of the mortgage debt. Briggs v. Weeks, 90 N. Y. S. 853.

14. An extension of time in consideration of another's purchase of stock in the corporation mortgagor, and paying the money into the corporation treasury, is based on a sufficient consideration. Hauser v. Capital City Brew. Co. [N. J. Eq.] 57 A. 722.

15. When a mortgagee after the maturity of the mortgage induces the mortgagor to remain his debtor in expectation that a reduced rate of interest will be accepted, he is thereafter estopped from exacting a rate provided for by the mortgage. Barnard v. Paterson [Mich.] 100 N. W. 893.

16. Where a third person purchased shares of stock of a corporation mortgagor on the assurance of the mortgagee that the time of payment of the mortgage debt should be extended. Hauser v. Capital City Brew. Co. [N. J. Eq.] 57 A. 722.

17. See 2 Curr. L. 918.

18. If one loan money to a solvent person with an agreement that a mortgage to secure it is to be executed, and later when the borrower becomes insolvent he executes a mortgage, it is not a good preference as to other debts existing at the date of the mortgage. Code 1899, § 2, c. 74, requiring the loan and mortgage to be made at the same time. Feely v. Bryan [W. Va.] 47 S. E. 307.

19. Mortgages simultaneously executed will take precedence according to the dates of their recording. Kohn v. Warner, 105 Ill. App. 321.

20. A grantee in a trust deed executed after a decree of a sale of the land under mortgage foreclosure but before the sale

or constructive,[22] but superior to equities with notice of which he is not charged.[23] One holding an equitable interest in property cannot stand by while the person holding the legal title executes a mortgage and afterwards set up his interest to defeat the mortgage.[24]

Liens for laborer's services[25] in connection with the mortgaged premises take priority over the mortgage.[26] In Minnesota a lien for labor or building materials furnished after the execution of a mortgage may be superior to it.[27] The lien of a subsequent mortgage is inferior to a lien for the purchase price of chattels purchased under conditional sale and annexed to the realty.[28]

is a purchaser pendente lite and whatever interest he acquires is subject to the lien of the foreclosure decree. Senft v. Vanet, 209 Ill. 361, 70 N. E. 720; Griffin v. Gingell, 25 Ky. L. R. 2031, 79 S. W. 284. The record of an instrument which does not constitute a mortgage is not notice to subsequent purchasers or mortgagees. Mathews v. Damainville, 91 N. Y. S. 524. The fact that the record shows the source of a mortgagor's title to be a voluntary conveyance from her husband and a judgment against the husband subsequent to the deed is not notice to the mortgagee of any defect in the title. Glassburn v. Wireman [Iowa] 102 N. W. 421.

21. A mortgagee with actual notice that a third person is in possession. Crooks v. Jenkins [Iowa] 100 N. W. 82. Mortgagee of a crop of hemp took with notice of an agreement that certain advances to harvest the crop were to be a first lien. Dickenson v. Columbus State Bank [Neb.] 98 N. W. 813. Assignees of a trust deed are charged with notice of the rights of parties in possession. Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737.

22. See Notice and Record of Title, 2 Curr. L. 1053. A mortgagee who is charged with constructive notice that there is a defect in the title of his mortgagor will acquire a lien subject to that of which he has constructive notice. Parker v. Parker [N. J. Eq.] 56 A. 1094. The record of a description so imperfect as to make its correction proper is notice to subsequent lienors. Scott v. Gordon [Mo. App.] 83 S. W. 550. Mortgages executed subsequent to the recordation of an instrument constituting an equitable mortgage. Matthews v. Damainville, 43 Misc. 546, 89 N. Y. S. 493. If an examination of the records would disclose that a mortgagor had no title, the mortgagee cannot claim priority over prior mortgages in the record of which there was a misnomer of the mortgagor. Glenovich v. Zurich [S. D.] 101 N. W. 1103. A mortgage given by an incoming to a retiring partner, on the land transferred, with the consent of the co-partners, takes priority over a trust deed given by the new partnership for indebtedness incurred after the recording of the mortgage. Tobias v. Commercial Sav. Bank [Mich.] 98 N. W. 984.

The record of assignment may be notice of the existence of a mortgage. Revision 1898, § 53 (Laws 1898, p. 690) makes the record of an assignment of a mortgage constructive notice of its existence. Higgins v. Jamesburg Mut. Bldg. & Loan Ass'n [N. J. Eq.] 58 A. 1078.

23. Walker v. Walker [Iowa] 102 N. W. 435. Where the mortgagor, in whom title was, was in possession with his mother who held a lease of the premises for a term of years, held, the mother's possession was equivocal and consistent with the mortgagor's ownership and not notice of her rights under the lease. Phillips v. Owens, 90 N. Y. S. 947. A bona fide mortgagee from a trustee acquires a lien superior to the beneficiary. Scott v. Isaacsen [W. Va.] 49 S. E. 254. A debtor who gives an extension of time for the payment of a debt and takes a mortgage as security is a bona fide purchaser under Laws 1896, p. 608, c. 547, providing that an unrecorded conveyance is void as to such purchasers. O'Brien v. Fleckenstein [N. Y.] 73 N. E. 30. The lien of a mortgage given to secure future advances is superior to the lien of a subsequent mortgage executed before the advances were made, but of which the prior mortgagee had no notice. Peacock, Hunt & West Co. v. Thaggard, 128 F. 1005.

24. Atlanta Nat. Bldg. & Loan Ass'n v. Gilmer, 128 F. 293. Where the owners of the legal title and one having an equity in the premises are in joint occupancy, a mortgagee is not charged with notice of the rights of the owner of the equity. Id.

25. See 2 Curr. L. 918, n. 23 et seq.

26. To establish a preference over a mortgage under Burns' Ann. St. 1901, §§ 7051, 7058, making debts of an insolvent owing to laborers or employes preferred claims against the estate, it must be shown that the labor was connected with the mortgaged property. McDaniel v. Osborn [Ind. App.] 72 N. E. 601.

27. Where the erection of a building is one continuous undertaking without anything to suggest during the progress of the work an abandonment, a mortgage executed subsequent to the commencement of the construction is subordinate to the lien claims of all who have contributed to the completion of the structure. City of Ortonville v. Geer [Minn.] 101 N. W. 963. See, also, Glass v. Freeburg, 50 Minn. 386, 52 N. W. 900; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746. Laws 1895, c. 101, p. 224, has not changed this rule further than to require the recording of a mortgage executed prior to the commencement of the work. City of Ortonville v. Geer [Minn.] 101 N. W. 963.

28. Duntz v. Granger Brew. Co., 41 Misc. 177, 83 N. Y. S. 957. Lien Law, § 112, providing that a conditional sale of chattels shall be void as against a subsequent mortgagee unless recorded, does not apply to a conditional sale of chattels to be manufactured. Id.

Nature of the right of priority.—Priority of lien is a vested right and cannot be interfered with by the legislature,[29] nor affected by subsequent transfers or transactions concerning the premises to which the mortgagee is not a party.[30] The fact that a prior judgment lien is postponed in favor of a subsequent one will not operate to postpone his lien.[31]

Waiver.[32]—A mortgagee may waive his right to priority.[33] A waiver will be construed according to the legal effect of its terms,[34] but not to apply to claims not falling fairly within its meaning.[35]

A mortgage to include future acquired property[36] attaches to an equitable title thereafter acquired.[37] It is inferior to a lien for the purchase money, but not to a lien for services rendered the grantee by the grantor after the sale.[38]

§ 9. *Assignments of mortgages.*[39]—No formal assignment is necessary;[40] a delivery accompanied by an intention to transfer is sufficient.[41]

29. Act May 15, 1903, validating acknowledgments taken by an officer and stockholder of a building and loan association mortgagee, has no retrospective operation as against the holder of a lien acquired before the act was passed. Jugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N. E. 644. A curative act validating the acknowledgment cannot deprive a subsequent mortgagor of his right to priority over the first mortgage. Steger v. Traveling Men's Bldg. & Loan Ass'n, 208 Ill. 236, 70 N. E. 236. Act Pa. June 4, 1901, § 2, providing that taxes shall be a first lien, is prospective and does not give priority to taxes over a mortgage which was a lien before the law was passed. In re Prince & Walter, 131 F. 545.

30. A mortgagee in a mortgage subsequent to a deed of trust cannot be prejudiced by any agreement between the grantor and others made subsequent to the execution of the mortgage. Leech v. Karthaus [Ala.] 37 So. 696. The beneficiary in a deed of trust is not affected by an agreement unknown to him between the grantor and the beneficiary of a subsequent trust deed that such beneficiary's interest would be protected by the grantor. New York Store Mercantile Co. v. Thurmond [Mo.] 85 S. W. 333. One who furnishes money to a mortgagor with which to pay taxes does not acquire a lien superior to the mortgagee, though the mortgagor agrees that he shall have. Mersick v. Hartford, etc., R. Co., 76 Conn. 11, 55 A. 664. An agreement that a first mortgage shall stand as security for additional indebtedness incurred after the execution of a second mortgage creates a lien secondary to the second mortgage. Crooks v. Jenkins [Iowa] 100 N. W. 82. The fact that a member of a firm agreed to release a mortgage given by another member of the firm for the benefit of the firm does not affect the rights of a mortgagee not a party. Griffin v. Stone River Nat. Bank [Tex. Civ. App.] 80 S. W. 254.

31. Under a statute giving judgments priority in the order in which executions are issued thereon, the holder of a junior judgment on which execution is issued before issuance of execution on the senior judgment is not entitled to priority over a mortgage recorded before rendition of the junior judgment but after rendition of the senior. Meeker v. Warren [N. J. Eq.] 57 A. 421.

32. See 2 Curr. L. 918, n. 25.

33. An indorsement on the margin of a mortgage reciting that it is given to secure the payment of the purchase price is not inconsistent with an agreement that certain judgments should constitute a prior lien. Stover v. Hellyer [N. J. Eq.] 59 A. 470. Advances were made by a mortgagee to harvest a crop, under an oral agreement with the owner and another mortgagee that they should be paid out of the proceeds of the crop before the mortgages were paid. Dickenson v. Columbus State Bank [Neb.] 98 N. W. 813. In an action brought after the death of the judgment creditor, evidence held sufficient to establish the priority of this mortgage and to show that the judgment creditor had agreed that his lien should be inferior or to overthrow this written agreement. Stover v. Hellyer [N. J. Eq.] 59 A. 470.

34. A first mortgagor executed an instrument reciting "I hereby waive the lien of my mortgage and make it inferior to the lien" of a mortgage to secure a loan with which to build a house on the mortgaged premises." The house to be of a certain cost, free from liens and insured. Held, the waiver was absolute and did not depend for validity on the performance of the conditions recited as a consideration. Claypool v. German Fire Ins. Co., 32 Ind. App. 540, 70 N. E. 281.

35. A waiver of priority in favor of a mortgage given to secure a loan to build a house on the premises will not include expenses incident to the loan nor insurance premiums. Claypool v. German Fire Ins. Co., 32 Ind. App. 540, 70 N. E. 281.

36. See 2 Curr. L. 918.

37. Lot purchased by oral contract. Monmouth County Elec. Co. v. McKenna [N. J. Eq.] 60 A. 32.

38. Monmouth County Elec. Co. v. McKenna [N. J. Eq.] 60 A. 32.

39. See 2 Curr. L. 919.

40. Where a principal elected to hold his agent who procured the mortgage personally liable and told him he could have the mortgage, it constituted an assignment. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118. Evidence held to show an assignment of a note and mortgage. The note could

An equitable assignment[42] results from the transfer of the debt[43] or a void foreclosure sale.[44] The transfer of a portion of the debt operates as an assignment pro tanto.[45]

Rights and duties of the assignee.—It is the duty of the assignee to inquire of the mortgagor the status of the debt.[46] He acquires no greater interest than his assignor had,[47] but he acquires all his rights.[48] Where a release appears of record, he takes at his peril, though the power of attorney to release is not of record.[49] Where it is optional with the mortgagee to require the mortgagor to take out insurance, the assignee is not required to take the initiative.[50] The fact that he does not will not relieve the assignors from their liability as guarantors of the debt,[51] nor does the fact that he does not recover the amount of a policy taken out by the mortgagors for their own benefit,[52] though he attempted to recover and failed.[53] An agreement by the assignee to indemnify his assignor against liability on account of the mortgage renders him liable for a deficiency judgment.[54]

A tender by the purchaser of the land to an assignee is a recognition of his ownership of the mortgage.[55]

§ 10. *Transfer of title of mortgagor and assumption of debt.*[56]—A grantee of mortgaged premises acquires only the estate of his grantor;[57] an equity of redemption.[58] Rights of the mortgagee are not affected,[59] unless he has failed

not be found. Bloomer v. Burke [Minn.] 101 N. W. 974.

41. Mahnken Co. v. Pelletreau, 93 App. Div. 420, 87 N. Y. S. 737.

42. See 2 Curr. L. 919.

43. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118; Guthrie v. Treat, 66 Neb. 415, 92 N. W. 595. The indorsee of notes is entitled to a mortgage subsequently executed to secure them. Griffin v. Stone River Nat. Bank [Tex. Civ. App.] 80 S. W. 254.

44. A stranger who purchases at a void foreclosure sale takes an equitable assignment of the mortgage. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

45. Transfer of one of several notes secured by the same mortgage. Guthrie v. Treat, 66 Neb. 415, 92 N. W. 595. The detachment of interest coupons from bonds secured by a mortgage does not deprive the coupons of the security of the mortgage. Long Island Loan & Trust Co. v. Long Island City & N. R. Co., 85 App. Div. 26, 82 N. Y. S. 644.

46. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

47. Where junior mortgagees claimed that a senior mortgage had been fully paid before assignment, the burden is on the assignee to show that a check given for the assignment was not subsequently paid. Conlon v. Minor, 94 App. Div. 458, 88 N. Y. S. 224. Assignee of an assignor's interest as remainderman in a fund held chargeable with notice that the assignment was merely a mortgage. Dixon v. Bentley [N. J. Eq.] 59 A. 1036.

48. Failure to fix the liability of indorsers on the mortgage notes does not affect his right to enforce the mortgage. Griffin v. Stone River Nat. Bank [Tex. Civ. App.] 80 S. W. 254.

49. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. A power of attorney to release a mortgage need not be recorded. Id.

50. The fact that an assignee was to approve the amount of the insurance is immaterial. Willard v. Welch, 94 App. Div. 179, 88 N. Y. S. 173.

51, 52, 53. Willard v. Welch, 94 App. Div. 179, 88 N. Y. S. 173.

54. Smith v. Nelson [Or.] 78 P. 740.

55. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

56. See 2 Curr. L. 920.

57. Where the mortgagees took a deed from the mortgagor subsequent to and with notice of a grant of standing timber by the mortgagor. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785. A grantee with notice that his grantor's interest is only a mortgage acquires no greater rights. Dixon v. Bentley [N. J. Eq.] 59 A. 1036. Where an heir mortgaged his interest in his ancestor's estate pending settlement thereof and the land was sold in administration to pay debts, the mortgagee had a lien only on the heir's interest in the surplus proceeds in the hands of the administrator. Gutter v. Dallamore [Cal.] 79 P. 383.

58. Takes title subject to a mortgage of record. Griffin v. Stone River Nat. Bank [Tex. Civ. App.] 80 S. W. 254: Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118.

59. Execution against a mortgagor will pass his interest in the land, but rights of the mortgagee are unaffected. Carrasco v. Mason, 72 N. H. 158, 54 A. 1101. A judgment creditor of the mortgagor who has levied execution cannot maintain a writ of entry against the mortgagee in possession. Id. Where a first mortgage stipulates that the mortgagor may with the mortgagee's consent sell portions of the property free from the mortgage, and subsequent mortgages, given to other parties, do not contain such a stipulation, a sale under the first mortgage conveys the property subject to the rights of subsequent mortgagees,

to record his mortgage.[60] An heir of the mortgagor acquires no greater estate.[61] In order to preserve his rights, the grantee must record his deed.[62]

Assumption of the mortgage.[63]—A purchaser of mortgaged premises does not become personally liable for the mortgage indebtedness,[64] unless he assumes it.[65] The right to enforce the mortgagor's liability for a deficiency may be lost by laches.[66] Precise and formal terms of assumption are not necessary.[67] Where the amount of the mortgage is to be paid by the grantee as a part of the purchase price, it is an assumption of the debt.[68]

The agreement to assume[69] a mortgage must rest on a consideration.[70] A grantee who never accepts a deed is not bound by an assumption clause,[71] but if he does accept, he is bound by its contents;[72] hence an assuming grantee is liable, though he procures the leaving of a blank in the deed, wherein the name of his grantee is inserted,[73] and the latter not having really assumed it is not liable.[74] The mortgagee may enforce the agreement for his own benefit.[75] The assumption creates a charge upon the land.[76] An agreement to assume,[77] and the identity of the mortgage assumed, may be shown by parol.[78]

Where the grantee assumes a mortgage, it is presumed that such payment is a part of the consideration,[79] and he cannot set up as a defense that the mortgage is usurious,[80] unless the amount was not estimated in fixing the price of the land.[81]

who cannot be compelled to release their rights in the property sold and look to the fund for protection. Mt. Adams & E. P. I. R. Co. v. Central Trust & Safe Dep. Co., 2 Ohio N. P. (N. S.) 529.

60. Rev. St. 1895, art. 4060, providing that unrecorded conveyances are void as to subsequent bona fide purchasers. Garner v. Boyle [Tex.] 79 S. W. 1066.

61. The heir of a mortgagor to whom mortgaged property descends must be held to have knowledge of the terms of the mortgage. Fleming v. Hager, 121 Iowa, 205, 96 N. W. 752. An heir who accepts partition of property subject to a mortgage executed by the administrator, who was heard when the application to mortgage was made, and assented to the approval of the administrator's final account, is estopped to question the regularity of the proceedings by which such mortgage was authorized. Wisconsin Trust Co. v. Chapman [Wis.] 99 N. W. 341.

62. Under Code Civ. Proc. § 726, if he does not record, a judgment on foreclosure proceedings, is as valid against him as if he were a party. Hibernia Sav. & Loan Soc. v. Cochran, 141 Cal. 653, 75 P. 315.

63. See 2 Curr. L. 920.

64. Mueller v. Renkes [Mont.] 77 P. 512. Evidence held insufficient to show a grantee orally agreed to assume a mortgage. Mortgagee not entitled to a deficiency judgment against him. Grover v. Bishop [Mich.] 101 N. W. 627. If a grantee purchases only the grantor's equity of redemption, he is not personally liable to pay the mortgage debt unless he expressly assumes and agrees to pay it. Roy v. Lobdell, 213 Ill. 389, 72 N. E. 1076.

65. Where the grantee assumes a mortgage covering other land as well as the land conveyed, the mortgage should be enforced as against the portion conveyed first. Mowry v. Mowry [Mich.] 100 N. W. 388.

A feme covert grantee is personally liable. Vizard v. Moody, 119 Ga. 918, 47 S. E. 348.

66. A mortgagor conveyed the land subject to the mortgage. Subsequent grantees paid interest on the mortgage for 30 years after it came due and for 3 years after the mortgagor died his executors voluntarily paid legacies without taking refunding bonds. No claim was made against the estate by the mortgagee. Held he could not recover from the legatees or executors a deficiency resulting on a subsequent sale. In re Piper's Estate, 208 Pa. 636, 57 A. 1118.

67. Evidence held to show that the grantee of mortgaged property assumed the indebtedness by including it in the purchase price. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

68. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901; Ray v. Lobdell, 213 Ill. 389, 72 N. E. 1076.

69. See 2 Curr. L. 920.

70. Where a deed is made as a mortgage, that fact alone is insufficient consideration for a promise of the grantee to pay a previous mortgage. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986.

71. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986. A conveyance of the premises by him is not a ratification of such clause. Id.

72. Though the execution took place through an agent of the grantee. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

73, 74. Santee v. Keefe [Iowa] 102 N. W. 803.

75. Merriman v. Schmitt, 211 Ill. 263, 71 N. E. 986.

76. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

77. Mowry v. Mowry [Mich.] 100 N. W. 388. Though it was not mentioned in the deed which contained full covenants of warranty. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

78, 79. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

80. Frost v. Pacific Sav. Co., 42 Or. 44, 70 P. 814.

Status of mortgagor as surety.[82]—Where the grantee assumes the mortgage, the mortgagor's liability becomes that of a surety.[83] He may compel the grantee to satisfy the debt.[84] An extension of time granted by the mortgagee without his consent,[85] if valid,[86] and if established,[87] operates to discharge him from liability for a deficiency judgment. In Illinois he becomes a joint debtor,[88] but in Missouri he does not; therefore a payment of interest by a grantee does not toll the statute of limitations as to him,[89] nor does a payment of the proceeds of a foreclosure sale indorsed on the mortgage note.[90]

§ 11. *Transfer of premises to mortgagee and merger.*[91]—An agreement by a mortgagor to regard the title of the mortgagee as absolute on payment by the latter of a consideration is valid.[92] Such an agreement negatives the acquiescence of the mortgagee in the mortgagor's claim of an equity of redemption.[93] The mortgagee can acquire the equity of redemption only by a fair contract,[94] based upon a new consideration,[95] and if it was obtained by artifice and was based on no consideration except the original debt, it will be set aside.[96] The mortgagee has the burden to show that the contract was fair and that he paid what the equity was worth.[97]

Merger[98] is largely a question of intent.[99] To work a merger by operation of law the interests sought to be merged must be of the same nature.[1] A provision in the deed that the mortgage is not to be considered as merged but is to be held as "protection to title" is to be construed as intended to protect the grantee against such liens as intervened between the execution of the mortgage and the deed and not to prevent merger where there are no such liens.[2] A parol agreement that a conveyance by the mortgagor to the mortgagee shall not effect a merger is valid.[3]

81. Lewis v. Farmers' Loan & Bldg. Ass'n [Mo.] 81 S. W. 887.

82. See 2 Curr. L. 921.

83. Germania Life Ins. Co. v. Casey, 90 N. Y. S. 418; Regan v. Williams [Mo.] 84 S. W. 959.

84. The mortgagor being surety, this right is necessary for his protection. Gage v. Cameron, 212 Ill. 146, 72 N. E. 204.

85. Acceptance by the mortgagee of interest one day before it became due operated as an extension. Germania Life Ins. Co. v. Casey, 90 N. Y. S. 418; Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

86. An extension which is not binding does not release the mortgagor. Regan v. Williams [Mo.] 84 S. W. 959.

87. The fact that the grantee of mortgaged premises voluntarily pays an increased rate of interest on the debt is insufficient to show an agreement between the mortgagee and grantee to change the rate without the knowledge of the mortgagor so as to discharge him as surety. New York Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916. The fact that a mortgagee receives from the grantee of the mortgaged premises, interest on the debt three days before the debt is due is insufficient to show an extension so as to discharge the mortgagor from his liability as surety. Id.

88. A mortgagee may treat and may have a personal joint and several decree against them. Arneson v. Haldane, 105 Ill. App. 589.

89, 90. Regan v. Williams [Mo.] 84 S. W. 959.

91. See 2 Curr. L. 922.

92. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268. A release discharging the mortgagee from "all claims in law or equity and from all manner of claims upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the deed of these presents" is broad enough to embrace a release of the equity of redemption. Id.

93. Luesenhop v. Einsfeld, 93 App. Div. 68, 87 N. Y. S. 268.

94. Faulkner v. Cody, 45 Misc. 64, 91 N. Y. S. 633.

95. Hursey v. Hursey [W. Va.] 49 S. E. 367.

96, 97. Liskey v. Snyder [W. Va.] 49 S. E. 515.

98. See 2 Curr. L. 922, n. 83 et seq.

99. Where a mortgage and deed of the same premises were executed contemporaneously to the same party, evidence held to show that there was no intention that they should merge. Bloomer v. Burke [Minn.] 101 N. W. 974.

1. An interest in a mortgage will not merge with an estate in the land. Fenton v. Fenton, 208 Pa. 358, 57 A. 758. Especially where the intent not to merge is plainly apparent. Id.

2. Coon v. Smith, 43 Misc. 112, 88 N. Y. S. 261. The mortgagee and grantee having subsequently devised this property, her executrix could not foreclose this mortgage. Id.

3. Glenn v. Rudd [S. C.] 46 S. E. 555.

§ 12. *Payment, release or satisfaction.*[4]—Purchasers of separate parcels of land subject to a common mortgage must contribute ratably to the discharge of the incumbrance.[5] The act of executors in paying off a mortgage on the estate of their decedent where funds are appropriated for that purpose cannot be construed otherwise than as a payment.[6] Their duty to pay it off is not affected by the fact that the funds are also applicable to the payment of other debts.[7]

Sufficiency of payment.[8]—A mortgage is discharged by payment of the amount it was given to secure.[9] The fact that a mortgagor acts as agent in procuring an assignment of the mortgage does not operate as a payment.[10] Whether a deed of the mortgaged premises executed contemporaneously with the mortgage operates as a payment depends on the intention of the parties.[11] The transfer to the mortgagee of a property consideration which moved from the assuming grantee to the mortgagor does not, unless intended as a payment and so received, discharge the assumed liability.[12] A gift to the mortgagor of the debt[13] or an agreement that the mortgage should not be binding according to its terms can be established only by clear proof.[14] A provision for payment from the income is not satisfied by a failure of the source of income.[15] The burden of proving payment is on the mortgagor.[16]

The mortgage is extinguished by foreclosure.[17] Where a party has two claims

4. See 2 Curr. L. 923.

5. Purchasers at a judicial sale. Senft v. Vanek, 209 Ill. 361, 70 N. E. 720.

6. Though they intend that the lien shall be preserved. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154. Where they took an assignment of the mortgage and reassigned it, their assignee with notice acquired no greater rights. Id.

Note: On the principle that the security follows the obligation, courts have held that payment of the debt by the debtor discharges the mortgage and leaves the mortgagee nothing which he can assign. Brown v. Lapham, 3 Cush. [Mass.] 551; Androscoggin Savings Bank v. McKenney, 78 Me. 442. It would seem, however, that since a mortgage gives an interest in rem, a merger, destroying the legal interest of the mortgagee, could occur only when the estates of the mortgagor and mortgagee are united in one person. See Mickles v. Townsend, 18 [N. Y.] 231. Again, the extinguishment of chaser of the mortgaged property from an assignee of the mortgage who has fulfilled an obligation to pay the debt for the benefit of the mortgagor's estate is protected. See Real, etc., Co. v. Rader, 53 How. Pr. [N. Y.] 231. Again, the extinguishment of the claim by the statute of limitations does not discharge the mortgage. Norton v. Palmer, 142 Mass. 433. In neither case could the holder of the mortgage be protected if the pledge were released upon the discharge of the obligation. The true doctrine would seem to be that the one bound to pay the debt must, upon getting the security, hold it in trust for the mortgagor. The same result would be reached in the principal case, since the assignee from the executor was not an innocent purchaser. 18 Harv. L. R. 150.

7. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

8. See 2 Curr. L. 923.

9. Evidence held to show that a mortgage was given to secure only a part of a debt due and that its cancellation was authorized on payment of such part. Pape v. Ludeman [N. J. Eq.] 59 A. 9. A mortgage was given to secure the mortgagee's liability as indorsers on the mortgagor's note. At the maturity of the note the mortgagees paid it, part in cash and part by their individual notes. Held, the mortgage was not thereby satisfied but was security for the amount paid and for the amount for which they were still liable. Bouker v. Galligan [N. J. Eq.] 57 A. 1010. Where mortgage notes were given in payment of the land purchased which was represented to contain 160 acres and the tract was 60 acres short, the mortgagor is entitled to an abatement. Harsey v. Busby [S. C.] 48 S. E. 50. Where a senior mortgage was fully paid prior to assignment for the purpose of securing previous indebtedness to the assignee, the lien became inferior to the lien of a junior mortgage. Conlon v. Minor, 94 App. Div. 458, 88 N. Y. S. 224.

10. Stradley v. Cargill Elevator Co. [Mich.] 97 N. W. 775.

11. Bloomer v. Burke [Minn.] 101 N. W. 974.

12. Santee v. Keefe [Iowa] 102 N. W. 803.

13. Collins v. Maude, 144 Cal. 289, 77 P. 945.

14. Trombly v. Klersy [Mich.] 102 N. W. 638.

15. A mortgage was executed to secure the payment of money to be used in developing coal lands. The money was to be repaid at the rate of 15 cents for each ton of coal delivered to the mortgagee, who was to purchase it. The coal was exhausted before the amount of the debt was fully paid from the 15 cents for each ton delivered. Held the mortgagee was entitled to the balance in cash. New York & S. Const. Co. v. Winton, 208 Pa. 467, 57 A. 955.

16. Davis v. Poland [Me.] 59 A. 520.

17. Cannot be reformed thereafter. Hood v. Clark [Ala.] 37 So. 550.

secured by trust deeds of the same land, a foreclosure of one without reservation of the other lien discharges it,[18] even though the purchaser has notice of the other lien and pays less than the actual value of the land.[19] A sale by a trustee in bankruptcy subject to the lien of a first mortgage discharges subsequent mortgages.[20]

The substitution of a new mortgage[21] does not necessarily operate as an extinguishment of the old one,[22] unless so intended,[23] nor does a substitution of debts.[24] The quitclaim deed of a mortgagee discharges a mortgage.[25] It is discharged where a grantor who conveys with full covenants of warranty subsequently acquires the mortgage,[26] or where given as security for the debt of another, there is a material change in the contract without the consent of the mortgagor,[27] or where property of the real debtor included in the mortgage is released,[28] but not by obtaining a judgment on the debt secured,[29] nor by the purchase of a mortgage by a corporation of which the mortgagors were the principal stockholders.[30] Mortgages on a leasehold have no duration beyond the term of the lease.[31] The extinguishment of a mortgage does not extinguish the debt.[32] As against subsequent bona fide creditors without notice,[33] a mortgage largely reduced by payment cannot by mere agreement be left standing to secure a new consideration.[34]

An agreement to release[35] must be based on a consideration.[36] In the absence of evidence, a sufficient consideration will be presumed.[37]

The proper form of release[38] is by conveyance when the mortgage is in the form of an absolute deed,[39] and may be rendered necessary by the terms of the defeasance.[40] It must be recorded as required by law in order to be effectual as against subsequent assignees of the mortgage.[41]

18, 19. Alston v. Piper [Tex. Civ. App.] 79 S. W. 357.

20. The subsequent mortgagee is entitled to have his claim satisfied out of the proceeds of the sale. In re Prince & Walter, 131 F. 546.

21. See 2 Curr. L. 925, n. 18.

22. See, also, Novation, 2 Curr. L. 1061. Evidence held insufficient to show that a mortgage was taken in satisfaction of a former one. White v. Stevenson, 144 Cal. 104, 77 P. 828. Subsequent incumbrancers cannot because thereof claim priority. First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 70 P. 726.

23. A second deed of trust given and accepted in lieu of a prior one discharges the former. Benton Land Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193.

24. The debtor never executed the new mortgage. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118.

25. To the successor in interest of the mortgagor. Nickell v. Tracy, 91 N. Y. S. 287.

26. The lien cannot be revived by a transfer of the mortgage to another. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

27. Stipulation for a higher rate of interest and increase of the note secured. Casey-Swasey Co. v. Anderson [Tex. Civ. App.] 83 S. W. 840.

28. Where a wife executed a deed of trust of her land to secure a debt of her husband which deed also covered property belonging to the husband, a release of his property without her consent operated to release hers. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126. Where land of a wife was included in a deed of trust with property of her husband to secure his debt, a release of his property from the lien of the deed released the land of the wife. Id. [Tex.] 84 S. W. 417.

29. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118.

30. Mortgage on land of the wife was purchased by a corporation of which the husband and wife were principal stockholders. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

31. The fact that mortgagees are in possession gives them no greater rights. Miller v. Warren, 94 App. Div. 192, 87 N. Y. S. 1011.

32. Where a second mortgagee becomes owner of the premises through foreclosure sale of the first mortgage and release by the debtor to the prior mortgagee. Sullivan v. Neary [Mass.] 71 N. E. 193.

33. See Notice and Record of Title, 2 Curr. L. 1053.

34. Whitney v. Metallic Window Screen Mfg. Co. [Mass.] 73 N. E. 663.

35. See 2 Curr. L. 924.

36. The mortgagor's promise to pay the debt is no consideration for an agreement to release. Watts v. Parks, 25 Ky. L. R. 1908, 78 S. W. 1125. An allegation in an answer in foreclosure proceedings "that there had been a settlement and that the mortgagor is willing that the mortgagee have judgment for the amount, as the mortgage lien was released" is not an allegation that the mortgagee agreed to release. Id.

37. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

38. See 2 Curr. L. 924.

39. Grogan v. Valley Trading Co. [Mont.] 76 P. 211.

40. An absolute deed was given as security for an indorsement. A contempo-

Discharge of record.[42]—A mortgage may be discharged of record at any time[43] in the manner prescribed.[44] The discharge is not conclusive proof of its satisfaction,[45] nor an acknowledgment by the mortgagee that he has no interest in the premises.[46] A discharge procured by fraud or mistake is unavailing for any purpose.[47] A discharge whether before or after a conveyance,[48] with or without consideration,[49] and with or without the consent of the mortgagor,[50] discharges the premises in the hands of a bona fide purchaser from the lien of the mortgage.[51] One attacking the release of a mortgage executed by himself has the burden of proving the existence of facts sufficient to warrant the court in setting it aside.[52] One who is not a bona fide owner of the debt cannot assert the invalidity of the release as against a subsequent bona fide lienor.[53] A condition precedent to the right of an agent to release will not be read from terms in his power plainly descriptive of the mortgage.[54]

Release by bar of limitations.[55]—A mortgage is not barred so long as the debt secured may be enforced,[56] and in the absence of statute, it is not barred though the debt may be;[57] but if the mortgage is barred, the premises are free from the lien.[58]

§ 13. *Redemption.*[59] *Who may redeem.*—As a general rule, any one who has an interest in the mortgaged premises derived through the right of the mort-

raneous agreement provided that when the note was paid the grantee would on demand retransfer said land. Knowles v. Knowles [R. I.] 56 A. 775. A cause of action in the mortgagor would arise only after a demand and a refusal to reconvey. Id.

41. A mortgagor conveyed a right of way through the mortgaged premises after having obtained a release of such tract which he gave to the railroad company, but was not recorded. Gibson v. Thomas [N. Y.] 73 N. E. 484.

42. See 2 Curr. L. 925, n. 19 et seq.

43. Mueller v. Renkes [Mont.] 77 P. 512.

44. In Montana by entry in the margin of the record thereof [Civ. Code, § 3845]. Mueller v. Renkes [Mont.] 77 P. 512.

45. It may be shown that the discharge was obtained by fraud or mistake. White v. Stevenson, 144 Cal. 104, 77 P. 828.

46. Under Civ. Code, § 3845, providing that it shall have the same effect as a deed of release, it releases the premises from the lien of the mortgage only and is not inconsistent with his ownership. Swain v. McMillan [Mont.] 76 P. 943.

47. It is not necessary to obtain a decree canceling it prior to foreclosure. White v. Stevenson, 144 Cal. 104, 77 P. 828. The assignee of a mortgage is not estopped to set up its existence where by false representations the mortgagor obtained possession of the mortgage, had it canceled of record and gave another mortgage. Higgins v. Jamesburg Mut. Bldg. & Loan Ass'n [N. J. Eq.] 58 A. 1078.

48, 49. Mueller v. Renkes [Mont.] 77 P. 512.

50. Mueller v. Renkes [Mont.] 77 P. 512. Under Hurd's Rev. St. 1893, c. 95, providing that mortgages or trust deeds may be released by the mortgagee or trustee, it is immaterial as against the holder of a subsequent trust deed that a release by the trustee of a prior one was without the knowledge of the grantor of the released deed. Havighorst v. Bowen [Ill.] 73 N. E. 402. The fact that the record showed that the debt secured by the released deed had not matured does not charge a subsequent lienholder with notice that it had been improperly discharged. Id.

51. The lien is strictly in rem and when the mortgage is released a bona fide purchaser holds free from the lien, whether the purchase was prior or subsequent to the release. Mueller v. Renkes [Mont.] 77 P. 512.

52. Under Civ. Code, § 2170, providing that one attacking a written instrument has the burden of showing want of consideration. Mueller v. Renkes [Mont.] 77 P. 512.

53. Havighorst v. Bowen [Ill.] 73 N. E. 402.

54. Authorizing release of a mortgage "on the Sabrante Tract for forty thousand dollars" does not condition the release on the payment of such sum. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

55. See Limitation of Actions, 4 Curr. L. 445.

56. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118; Kraft v. Holzman, 206 Ill. 548, 69 N. E. 574. A payment by the widow of the mortgagor who was not a co-obligor and who had only a dower interest in the premises will not toll the statute of limitations as to the heirs of the mortgagor. Nickell v. Tracy, 91 N. Y. S. 287. A letter accepting a proposition to cancel a mortgage if a certain portion of the indebtedness was paid held not such a recognition of the debt as would toll the statute of limitations. Carr v. Carr [Mich.] 101 N. W. 550.

57. Peacock v. Cummings [Tex. Civ. App.] 78 S. W. 1002.

58. A tenant in possession who purchases a mortgage after the right to foreclose is barred is not entitled to the rights of a mortgagee in possession. Morford v. Wells, 68 Kan. 122, 74 P. 615. Where one sale is void, a new one cannot be had after the debt secured is barred. Ford v. Nesbitt [Ark.] 79 S. W. 793.

59. See 2 Curr. L. 926.

gagor and subject to foreclosure may redeem, though the interest extend only to part of the equity of the mortgagor.[60]

The right to redeem[61] is not affected by agreements between the mortgagor and other lienors,[62] nor by the fact that strict conditions agreed upon have not been performed,[63] nor by a void foreclosure sale.[64] At common law the right to redeem from an absolute deed intended as a mortgage survives the grantor.[65] The right survives to his heir not to his administrator.[66] If the indebtedness is payable on demand, the mortgage is redeemable at any time before strict foreclosure.[67] An agreement that the mortgagor might redeem by payment within one year of a less sum than the amount of the debt is of no avail if not complied with.[68]

The right to redeem and the right to foreclose are reciprocal and are barred by the same limitations.[69] The right to redeem is barred only by the period necessary to acquire title by adverse possession.[70] Limitations do not run against the right to redeem so long as the relation of mortgagor and mortgagee exists.[71]

In Massachusetts, an administrator may redeem from an absolute deed given as a mortgage without a license to sell to pay debts.[72]

Procedure to redeem.[73]—Payment of the debt[74] or tender of the amount,[75] together with such incidental expenses as are provided for,[76] is a condition precedent to the right to redeem. On payment the grantor is entitled to a reconveyance.[77]

60. Grantees of trees standing on the premises may redeem. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785. Such right to redeem is not prejudiced by the fact that subsequently the mortgagor deeded to the mortgagee. Id.

A tenant for years of a portion may redeem the whole. Kebabian v. Shinkle [R. I.] 59 A. 743.

"Owner of an equity of redemption" in Rev. Laws, c. 187, § 33, providing that if such person dies his administrator may redeem, being substituted for "a person entitled to redeem" in the original act, includes the **grantor in an absolute deed** intended as a mortgage. Clark v. Seagraves [Mass.] 71 N. E. 813.

Attaching creditors of the mortgagor may redeem. Whitney v. Metallic Window Screen Mfg. Co. [Mass.] 73 N. E. 663.

61. See 2 Curr. L. 926, n. 32 et seq.

62. Where mortgagees took a deed with an agreement that the mortgagor might redeem at any time within two years, the right of redemption in a grantee of the mortgagor of standing timber is not dependent on such agreement. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785.

63. Wilson v. Mulloney, 185 Mass. 430, 70 N. E. 448.

64. The mortgagor may redeem at any time before title against him has been acquired by adverse possession. The doctrine of laches has no application. Moore v. Dick [Mass.] 72 N. E. 967. Proceedings to which he was not a party. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087. Where the power of sale in the mortgage requires publication of notice to be made in a particular paper, a publication in any other paper renders the sale void. Moore v. Dick [Mass.] 72 N. E. 967; Sherman v. Fisher [Mich.] 101 N. W. 572; Adams v. Hopkins, 144 Cal. 19, 77 P. 712. In order for a tenant to set aside a mortgage sale for fraud he must offer to redeem. Kebabian v. Shinkle [R. I.] 59 A. 743.

65. On the ground that the grantee has property in his hands as distinguished from liability to respond in damages. Clark v. Seagraves [Mass.] 71 N. E. 813. A bill against an administratrix to have an absolute deed declared a mortgage and to redeem therefrom may be maintained without a prior trial in the probate court of the issue whether this deed belonged to her individually or as administratrix. Id.

66. Clark v. Seagraves [Mass.] 71 N. E. 813.

67. Kebabian v. Shinkle [R. I.] 59 A. 743.

68. A tender by a purchaser after the expiration of such period is of no effect. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

69. Action to redeem may be brought at any time within 10 years. Dickson v. Stewart [Neb.] 98 N. W. 1085. See 2 Curr. L. 910, n. 97.

70. The question of laches does not enter. Grogan v. Valley Trading Co. [Mont.] 76 P. 211.

71. Catlin v. Murray [Wash.] 79 P. 605.

72. The result inures to the benefit of the widow and heirs [Rev. Laws, c. 187, § 33]. Clark v. Seagraves [Mass.] 71 N. E. 813.

73. See 2 Curr. L. 926.

74. Borrow v. Borrow, 34 Wash. 684, 76 P. 305.

75. A tender made after commencement of a suit to foreclose in order to be effectual must be kept good. Healy v. Protection Mut. Fire Ins. Co. [Ill.] 72 N. E. 678.

76. If a mortgage or trust deed provides for attorneys' fees in case of foreclosure, a tender after commencement of an action to foreclose should include the amount of fees earned up to the time of tender. Healy v. Protection Mut. Fire Ins. Co. [Ill.] 72 N. E. 678.

77. Welborn v. Dixon [S. C.] 49 S. E. 232. In a bill to redeem from a transfer of the mortgagor's equity of redemption, which transaction was held to be a mortgage, a return of the amount paid is not necessary, it appearing that the mortgagee had received

Where each of several conveyances to the same person as security is a separate transaction, the mortgagor may redeem from each on paying the debt it was given to secure.[78] One redeeming is required to pay only the amount of the debt and incidental expenses necessary to preserve the title.[79] Void foreclosure proceedings cannot augment this amount.[80]

Costs are taxed against the mortgagor unless he establishes a prior tender.[81]

Damages for refusal to reconvey.—Punitive as well as compensatory damages may be recovered from a grantee who fraudulently refuses to reconvey.[82] Where the grantee has sold the land the grantor may recover the proceeds but not punitive damages.[83]

Penalties for failure to release.[84]—No particular form of words is necessary to constitute a sufficient request to entitle one to maintain an action for failure to comply therewith.[85] It is sufficient if the language reasonably construed informs the mortgagee that satisfaction is demanded.[86] Separate causes of action to recover penalties for failure to discharge mortgages of record after payment may be joined in different counts in the same complaint.[87]

§ 14. *Subrogation.*[88]—To entitle one to the right of subrogation, it must appear that the original debt was extinguished,[89] and that there are rights to which the doctrine will apply.[90] A mere transfer of the debt is insufficient.[91] A life tenant compelled, in order to preserve the estate, to pay a mortgage is subrogated to the rights of the mortgagee.[92] A mortgagee in a void mortgage is subrogated to the lien which his money was used to discharge.[93] Where a principal elects to hold an agent, who procures a mortgage, personally liable for the loan, and the agent pays the principal the amount of the loan, he is subrogated to the rights of the principal in a mortgage.[94] The doctrine does not apply to a junior mortgagee who pays interest and makes payments on the principal of the prior incumbrance.[95] A purchaser at foreclosure sale is not subrogated to the rights of a mortgagor against a tenant of the premises for breach of covenant of his lease.[96]

other property in excess of the amount paid. Noble v. Graham, 140 Ala. 413, 37 So. 230.

78. Clark v. Seagraves [Mass.] 71 N. E. 813.

79. Taxes, interest on the mortgage and necessary repairs. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

80. The owner of the equity of redemption was not made a party to foreclosure proceedings. On redeeming he is not liable for costs of such foreclosure. Rodman v. Quick, 211 Ill. 546, 71 N. E. 1087.

81. Liskey v. Snyder [W. Va.] 49 S. E. 515.

82, 83. Welborn v. Dixon [S. C.] 49 S. E. 232.

84. See 2 Curr. L. 926.

85. A written demand signed by a mortgagor whose debt had been paid to "please cancel of record all mortgages against me" is sufficient under Code 1896, § 1066. Partridge v. Wilson [Ala.] 37 So. 141.

86. A request, signed by the mortgagor and his wife, to the mortgagee, to go to the "probate office" and mark mortgages held open there, "Satisfied." Henderson v. Wilson, 139 Ala. 327, 36 So. 516.

87. Partridge v. Wilson [Ala.] 37 So. 141.

88. See 2 Curr. L. 927; Subrogation, 2 Curr. L. 1768.

89. A mortgage being paid off by a member of the household of the administrator of the mortgagee, the payor being under the impression that he was obtaining security, the doctrine of subrogation applies. Knox v. Carr, 5 Ohio C. C. (N. S.) 81.

90. Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785.

91. Where holders of a junior trust deed paid off the debt secured by a senior deed before it was due, without having sufficient ground to believe that they would be compelled to pay it to protect their security. Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126.

92. A widow compelled to pay a mortgage on the homestead in order to preserve it and the interests of the heirs has a lien on the interests of the heirs for their share of the debt. Dinsmoor v. Rowse, 211 Ill. 317, 71 N. E. 1003.

93. Where a guardian of minor heirs mortgaged their interest to secure money to pay off a mortgage given by their ancestor. Connor v. Home & Sav. Fund Co. Bldg. Ass'n [Ky.] 80 S. W. 797.

94. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118.

95. Chapman v. Cooney, 25 R. I. 657, 57 A. 928.

96. The lessee convenanted to pay taxes. The lessor thereafter mortgaged the premises. The lessee failed to pay the taxes and the mortgagee paid them and on foreclosure of the mortgage included the amount paid as was agreed in the mortgage. There

A second mortgagee may to protect himself pay defaulted prior liens and charges and add them to his own,[97] but he cannot call on the owner of the equity of redemption who was not personally liable for reimbursement.[98]

MOTIONS AND ORDERS.[1]

The office of a motion[2] is, accurately speaking, to obtain a rule or order incident to a cause or proceeding of which the court has cognizance.[3] It will not lie to present and dispose of that which is part of the main issues in the cause,[4] or which of itself is a cause of action,[5] or which involves difficult and contested issues.[6] But the fact that an action would also lie is not exclusive of motion.[7]

The term "motion" is now much extended and comprehends many proceedings whose closest analogue is a petition in chancery.[8]

Stage of case when proper.—An adversary motion cannot be made until there are adverse parties in court,[9] and a motion for final judgment on the pleadings cannot be made till trial.[10]

The moving papers.[11]—The form of a motion being not technical, a petition sufficient in substance may be so regarded.[12] A rule that the moving party shall state the term when the cause is triable has no application to a motion, e. g. one to declare whether a default exists, which depends on whether the case is at issue.[13] If a motion and brief contain unfounded and disrespectful criticisms of a judge in the case, it will be stricken on the court's motion.[14] The affidavits served are admitted if not denied by counter-affidavits[15] and no further evidence is requisite.[16]

Notice[17] is not required where an order made without notice is to be vacated.[18] It is often required that papers must be served with the motion else they cannot be read on the hearing;[19] but leave to serve additional ones covering newly discovered facts may be given.[20] Unless a proper excuse is shown for not originally serving proofs, they will, however, not be heard.[21] If less than the regular notice be given, proof of necessity for a shorter notice should be made.[22]

was no redemption from the foreclosure sale. Stewart v. Parcher, 91 Minn. 517, 98 N. W. 650.

97, 98. Brethauer v. Schorer [Conn.] 60 A. 125.

1. This topic treats only the principles common to all motions. Motions for particular rules or orders are discussed in topics to which the relief specifically pertains, such as Pleadings, 2 Curr. L. 1178; Discontinuance, Dismissal, and Nonsuit, 3 Curr. L. 1097.

2. See 2 Curr. L. 929.

3. Note: See Cyc. Law Dict. "Motion," and see People v. Ah Sam, 41 Cal. 645, 650; Prall v. Hunt, 41 Ill. App. 140; Reilly v. Wilkins, 67 Ill. App. 104.

4. Note: Sands v. A Cargo of 227 Tons of Coal, 3 N. J. Law J. 361; Dietz v. Dietz, 2 Hun [N. Y.] 339.

5. Note: Curtis v. Engle, 4 Edw. Ch. [N. Y.] 117; Timan v. Leland, 6 Hill [N. Y.] 237; Camp v. McCormick, 1 Denio [N. Y.] 641; West v. His Creditors, 8 Rob. [La.] 123; Succession of Mielkee, 8 La. Ann. 11; People v. Judge of Calhoun Circuit, 24 Mich. 408. See, also, Mutual Life Ins. Co. v. Balknap, 19 Abb. N. C. [N. Y.] 345.

6. Note: See New York El. R. Co. v. Manhattan R. Co., 63 How. Pr. [N. Y.] 14; Mutual Life Ins. Co. v. Balknap, 19 Abb. N. C. [N. Y.] 345.

7. Note: See Moore v. Muse, 47 Tex. 210.

8. See 2 Curr. L. 929, and compare Judgments (opening and vacating on motion), 4 Curr. L. 308.

9. A motion to dismiss a suit after filing of a praecipe, but before service of summons, or a general appearance on the part of defendant, is premature. Collier v. Grey, 105 Ill. App. 485.

10. Durham v. Durham, 99 App. Div. 450, 91 N. Y. S. 295.

11. See 2 Curr. L. 929.

12. Hunter v. Porter [Iowa] 100 N. W. 53.

13. Sweeney v. O'Dwyer, 45 Misc. 43, 90 N. Y. S. 806.

14. Fred Krug Brew. Co. v. Healey [Neb.] 101 N. W. 329.

15, 16. In re Van Loan, 142 Cal. 423, 76 P. 37.

17. See 2 Curr. L. 929, n. 81-83.

18. Alpers v. Bliss [Cal.] 79 P. 171.

19. So in New York by Sup. Ct. Gen. Rule 21. Northrop v. Sidney, 97 App. Div. 271, 90 N. Y. S. 23.

20, 21. Northrop v. Sidney, 97 App. Div. 271, 90 N. Y. S. 23.

22. Schiller v. Weinstein, 91 N. Y. S. 76.

Hearing and rehearing[23] *and relief.*—Motions are addressed to the court and not to a judge.[24] The court may determine how it shall satisfy itself of the facts bearing on a motion.[25] The hearing may be postponed to allow service of additional newly discovered proofs.[26]

The relief granted on an order to show cause must not exceed that prayed.[27]

On a default the court may grant the relief prayed for[28] in so far as it is lawful or proper;[29] but when the relief prayed is excessive or unlawful, the adversary should attend and advise the court,[30] else he will be obliged to excuse his default before he will be relieved from an excessive order.[31]

A motion may be renewed[32] which is interlocutory and not final,[33] and it may be regarded as interlocutory despite a statutory right of appeal.[34] If the grounds of a motion do not appear, the ruling thereon does not bar a renewal.[35] If a motion be denied because not proper procedure, a petition or proper proceeding may then be instituted.[36] Leave to renew is not necessary if reserved in the former ruling[37] or if the motion be made in a different proceeding.[38]

The order[39] should show by what authority, whether court or judge, it is made.[40] It must be evidenced in the records of the court,[41] but a separate signature is not essential.[42] It will be regarded as an order of court rather than of a judge if it internally purports to be so, though lacking a caption,[43] and the addition of a caption to a judge's order does not make it a court order.[44]

An order operates as conclusive only according to the fair import of its terms[45] read with the motion.[46] Recitals of fact in a judicial order should be taken as true if they can reasonably be so held.[47] One who was dismissed by final judgment is not concluded by an interlocutory ruling.[48] A rule to show cause adjudges nothing.[49]

Orders regarded as final for purposes of appeal are discussed in another topic.[50]

23. See 2 Curr. L. 929.

24. Motion to vacate rule to show cause why attachment should not be quashed is not one for a single justice. Garbett v. Mountford, 70 N. J. Law, 577, 57 A. 257.

25. Rule 7, § 4, Circuit Court, E. D. of Pa., providing for taking depositions in motions, is valid and in harmony with the Federal conformity act. Importers' & Traders' Nat. Bank v. Lyons, 134 F. 510.

26. Northrop v. Sidney, 97 App. Div. 271, 90 N. Y. S. 23.

27. Vacation of an order canceling a judgment is not within a prayer to "reargue and resettle" it and for general relief. Schiller v. Weinstein, 91 N. Y. S. 76.

28, 29. Gen. Prac. Rule 37 provides that on default it shall be granted "unless the court otherwise directs." People v. Miller, 92 App. Div. 116, 87 N. Y. S. 341.

30, 31. People v. Miller, 92 App. Div. 116, 87 N. Y. S. 341.

32. See 2 Curr. L. 930.

33. Motion to dissolve attachment is interlocutory. Simmons v. Simmons [W. Va.] 48 S. E. 833; Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893.

34. Simmons v. Simmons [W. Va.] 48 S. E. 833; Elkins Nat. Bank v. Simmons [W. Va.] 49 S. E. 893. Motion to set aside judgment is final and may not be renewed by suit. Appeal is remedy. Stewart v. Snow [Ind. T.] 82 S. W. 696.

35. Bethany Hospital Co. v. Hale [Kan.] 77 P. 537.

36. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277.

37, 38. People v. Paine, 92 App. Div. 303, 86 N. Y. S. 1109.

39. See 2 Curr. L. 930.

40. Roncoroni v. Gross, 92 App. Div. 366, 86 N. Y. S. 1113.

41. Must be at the time or nunc pro tunc. Redhead v. Iowa Nat. Bank, 123 Iowa, 336, 98 N. W. 806.

42. Order to tutor to deposit funds need not be signed. Succession of Wegmann, 110 La. 930, 34 So. 878.

43. Lawson v. Speer, 91 App. Div. 411, 86 N. Y. S. 915. Recital in the body of the order that it was at special term makes it a court order. In re Munson, 95 App. Div. 23, 88 N. Y. S. 509.

44. In re Munson, 95 App. Div. 23, 88 N. Y. S. 509.

45. See 2 Curr. L. 930, and Former Adjudication, 3 Curr. L. 1476.

46. Motion for jury trial held not renewable without leave because not limited to first trial. Tracy v. Falvey, 92 N. Y. S. 625.

47. It must be presumed that the truth of facts so recited were known to or established to the satisfaction of the court making the order. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

48. Fred Krug Brew. Co. v. Healey [Neb.] 101 N. W. 329.

49. Sims v. Davis [S. C.] 49 S. E. 872.

50. See Appeal and Review, § 4, 3 Curr. L. 177 et seq.

Amendment and vacation.[51]—Courts of law have always had the power to set aside their own orders rendered in a proceeding before them, during the pendency of such proceeding upon showing that such orders were procured by fraud.[52] Equity, if it may change an order to effectuate the intent of the parties,[53] will do so only on clear proof.[54] If a judge is clearly satisfied that an order was granted by his predecessor, without the exercise of judgment, or through mistake or fraud practiced on the court, or manifest indiscretion, or through the fact that adverse parties were not heard, he may set such order aside.[55] Misrecitals of fact may be corrected.[56] A motion to vacate must be made during term,[57] or while the case is pending,[58] or during the prescribed time[59] if any.

"Motion costs"[60] within the New York Code include costs of an appeal from the order.[61]

MULTIFARIOUSNESS; MULTIPLICITY; MUNICIPAL AIDS AND RELIEFS, see latest topical index.

MUNICIPAL BONDS.[62]

§ 1. **Power to Issue (706).** Refunding Bonds (707). Railroad Aid Bonds (708). Limitation of Indebtedness (708). Curative Acts (709).
§ 2. **Conditions Precedent; Submission to Vote; Provision for Payment (709).** Assent of Voters or Taxpayers (710). Notice of Election (711). Providing for Payment of Bonds (711).
§ 3. **Execution (712).**
§ 4. **Form and Requisites (712).**
§ 5. **Issue and Sale (712).**
§ 6. **Rights and Liabilities Arising Out of Illegal Issue (713).**
§ 7. **Transfer (714).** Subrogation (714). Recitals (714) (with Special Article, p. 717). Estoppel (714).
§ 8. **Payment (715).** Payment from Special Fund or Tax (716).
§ 9. **Scaling Overissue (717).**
§ 10. **Enforcement of Improvement Bonds Against Abutters (717).**

"Municipal bonds" includes bonds issued by every public corporation or department of government and not alone those of cities and villages. There are many collateral questions pertaining to the topics dealing with the particular class of public corporations which issues the bonds. These topics may be consulted.[63] They also treat of warrants for payment of public moneys.[64]

§ 1. *Power to issue.*[65]—Constitutional[66] or legislative authority is necessary to authorize municipalities to issue bonds; there is no implied power to issue bonds in aid of a work of internal improvement,[67] or to issue bonds payable on demand.[68]

51. See 2 Curr. L. 930, n. 8 et seq.
52. James' Estate v. O'Neill [Neb.] 97 N. W. 22.
53, 54. Houghteling v. Stockbridge [Mich.] 99 N. W. 759.
55. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.
56. Northwestern Life & Sav. Co. v. Gippe, 92 Minn. 36, 99 N. W. 364.
57. Born v. Schneider, 128 F. 179.
58. Interlocutory orders may be vacated at a subsequent term. Huffman v. Rhodes [Neb.] 100 N. W. 159.
59. Six months in case of inadvertence or mistake. State v. District Court of Second Judicial Dist. [Mont.] 79 P. 410.
60. See Costs, 3 Curr. L. 940.
61. Wasserman v. Benjamin, 91 App. Div. 547, 86 N. Y. S. 1022.
62. See 2 Curr. L. 931.
63. See Municipal Corporations, 4 Curr. L. 720; Counties, 3 Curr. L. 959; Sewers and Drains (drainage districts) 2 Curr. L. 1628; Common and Public Schools (school districts) 1 Curr. L. 544; Towns; Townships, 2 Curr. L. 1877; Waters and Water Supply (water and irrigation districts) 2 Curr. L. 2034.
64. See the last note.
65. See 2 Curr. L. 931.
66. Police juries of parishes have no authority to incur a debt for road purposes under Const. 1898, art. 281, as their authority is controlled by art. 291. Favalora v. Police Jury of Parish of St. Bernard, 112 La. 384, 36 So. 467.
67. Session Laws 1887, c. 12, § 69, authorizing the issue of bonds for waterworks, does not authorize the issue of bonds to private parties for the construction of waterworks, and they are utterly void in hands of bona fide holder. Village of Grant v. Sherrill [Neb.] 98 N. W. 681. Statutes of Kansas in regard to the rights of cities to issue bonds for the purpose of purchasing waterworks construed [Laws 1897, c. 82, §§ 8 and 10, pp. 171, 172; Laws 1901, c. 107, p. 210]. State v. Topeka, 68 Kan. 177, 74 P. 647.
68. Mills' Ann. St. § 4403, subd. 6, authorizing the issue of bonds payable in not less than ten nor more than fifteen years, does not authorize the issue of bonds payable on demand, and they are void even in the hands of an innocent holder. Sauer v. Gillett [Colo. App.] 78 P. 1068.

An act authorizing bonds for street work is not inconsistent with an act passed at the same session authorizing bonds for local improvements, and is not repealed by it.[69] A municipality incorporated under a special law may be authorized to issue bonds under a subsequent general law.[70] Authority to municipalities of a certain class to issue bonds is good where a substantial distinction exists between those municipalities within the class and those without.[71] An ordinance does not embrace more than one subject where it proposes the issue of bonds for various purposes.[72] Bonds, which were valid when issued under law of the state as declared by its courts will not be held invalid, though the state courts have subsequently reversed their decisions, as that would impair the obligation of the contract;[73] but the courts of North Carolina reach a different result on the ground that such decisions were not a part of the contract of purchase.[74] Where a city has the power to issue bonds, in the absence of any showing to the contrary, it will be presumed that they were issued in accordance therewith.[75] A county may bond itself for the cost of highways which it is empowered to build, one-half cost to be a county charge and no other means of payment being prescribed,[76] and it being chargeable "in the first instance," it may include in them the amount which it is authorized to charge to the respective towns.[77]

Refunding bonds.[78]—The legislature may empower municipalities to issue refunding bonds[79] and may apply such a law to such only as are indebted in a certain sum.[80] Acts authorizing the refunding of indebtedness will not be construed as mandatory, requiring such refunding.[81] Refunding bonds are a continuation of the former liability and are not a new indebtedness within the constitutional meaning,[82] consequently, bonds which were void for lack of power in municipality to issue them cannot constitute the basis of valid refunding bonds.[83] The

69. St. 1901, p. 27, c. 32, not repealed by St. 1901, p. 34, c. 38, as repeals by implication are not favored, and latter act does not cover all the ground of the earlier one. Town of Mill Valley v. House, 142 Cal. 698, 76 P. 658.

70. Under Village Law (Laws 1897, p. 455, c. 414, § 128), if authorized by an election and not inconsistent with its special charter, a village may issue bonds. Village of Canandaigua v. Hayes, 90 App. Div. 336, 85 N. Y. S. 488.

71. Act authorizing cities of the first class to issue bonds for an armory where they had not issued bonds for the same purpose under a previous act is valid. State v. Rogers [Minn.] 100 N. W. 659.

72. For city hospital; for sewer system; for new school houses and playgrounds; for repair of streets; for construction of a jail; for a public library, and for public parks in various designated localities. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

73. Board of Com'rs of Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 F. 817; State v. Bristol, 109 Tenn. 315, 70 S. W. 1031.

74. Const. art. 2, § 14, required that acts authorizing the incurring of indebtedness must be passed on three separate readings; and bonds issued under an act not so passed were held void, notwithstanding previous decisions that the fact that an act was signed by the officers of both houses was conclusive evidence that it was constitutionally passed. Graves v. Moore County Com'rs, 135 N. C. 49, 47 S. E. 134.

75. A taxpayer sued for taxes cannot set up irregularities in the issue of bonds refunding waterworks bonds. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex.] 81 S. W. 2.

76, 77. Ontario County v. Shepard, 91 N. Y. S. 611.

78. See 2 Curr. L. 932.

79, 80. It is not class legislation to allow villages indebted in a minimum sum to issue bonds to fund such debt. Laws 1903, p. 659, c. 364. Villages having a floating debt exceeding $3,000 at the time of the passage of the act were authorized to fund the same. Kaiser v. Campbell, 90 Minn. 375, 96 N. W. 916.

81. Mandamus will not issue at the request of a bondholder requiring the county commissioners to issue such bonds; the act merely "authorized and empowered" them to issue the bonds. Jones v. Madison County Com'rs, 135 N. C. 218, 47 S. E. 753.

82. Act authorizing refunding bonds need not be passed as one authorizing the incurring of indebtedness under Const. art. 2, § 14, requiring bills for such acts to be read and voted on three separate times. Board of Com'rs of Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 F. 817.

83. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex. Civ. App.] 82 S. W. 1066. See 2 Curr. L. 932, n. 26, 29. Where part of the warrants were void and part good, the county will not be restrained from issuing bonds to fund the legitimate indebtedness. Nelson v. Harrison County [Iowa] 102 N. W. 197.

right to issue refunding bonds is usually not dependent on a popular vote.[84] If a debt cannot be refunded in the denominations provided in the refunding act, the bonds cannot be issued for other denominations.[85]

Railroad aid bonds.[86]—Under authority to issue bonds to aid in the construction of railroads, bonds may issue to purchase land for a station,[87] and where there is authority to subscribe to stock, the change of the name of the railway will not deprive the county of the right to subscribe to the same.[88] The beginning[89] or completion[90] of the railroad may be a condition precedent to the issue of bonds.

Limitation of indebtedness.[91]—The debt of a municipality is usually limited to a fixed percentage of its assessed valuation,[92] but sometimes another practical limit is a provision limiting the amount of the tax therefor that may be imposed in any one year.[93] In New York, municipalities may issue water bonds in excess of the ten per cent limit fixed by the constitution provided that the term of the bonds shall not exceed twenty years and an adequate sinking fund shall be provided.[94] A constitutional amendment authorizing an "additional indebtedness not exceeding ten per centum" of the assessed valuation will be construed to mean that much additional to what was previously authorized and not that much additional to what was previously incurred.[95] Where bonds are voted to be issued on the happening of a future event, the last assessed valuation before the bonds are actually issued is the one that limits the amount of the issue.[96] In determining the debt limit of a county, bonds payable from the assessment of a certain district therein need not be considered.[97] Contracts to pay for water or light annually or monthly as furnished if the current revenues are sufficient do not create an in-

84. But where the question is submitted to vote, the method prescribed by the act must be followed. City of Asheville v. Webb, 134 N. C. 72, 46 S. E. 19.

85. Laws 1895, p. 63, c. 7, art. 1, as amended by Laws 1897, p. 47, c. 5, provided that bonds "may be issued in any denomination from $100 to $1,000," and to be in series so that they might be paid in ten equal annual payments; and an issue of ten bonds of $80 to refund an $800 debt could not be made, the debt not being refundable under the act. School Dist. No. 44 of Caddo County v. Baxter [Okl.] 78 P. 386.

86. See 2 Curr. L. 931, n. 21.

87. Jennings Banking & Trust Co. v. Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005, afg. 79 S. W. 876.

88. The bonds issued in payment for the stock were valid. Board of Com'rs of Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 F. 817.

89. Authority to issue bonds to aid in the completion of a railroad does not authorize the issue of bonds in aid of a railroad not yet begun, nor can township bonds be sustained under an act authorizing county commissioners to issue bonds. Graves v. Moore County Com'rs, 135 N. C. 49, 47 S. E. 134.

90. Where a railroad was to be constructed across the county, the construction of 4½ miles by its successor was not such a substantial compliance as to authorize the issue of bonds. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

91. See 2 Curr. L. 932.

92. Where the debt limit is 15 per cent of the assessed value, and the assessed valuation is $420,000,000, bonds to the amount of $18,000,000 will not exceed the limit. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

93. Const. 1874, art. 16, § 9, prohibited counties from levying a tax in excess of ½ per cent, except to pay indebtedness then existing for which an additional ½ per cent might be levied, the holder of bonds issued to take up prior indebtedness had the same right to the benefit of this tax as the original holder. Desha County v. State [Ark.] 84 S. W. 625. Const. 1898, art. 281, limiting the tax to secure the payment of municipal bonds to "not exceeding five mills on the dollar in any one year." Town of Crowley v. Fulton & Co., 112 La. 234, 36 So. 334.

94. Const. art. 8, § 10; Laws 1904, c. 629; act authorizing bonds in excess of ten per cent and running longer than twenty years was void. Cahill v. Hogan, 44 Misc. 360, 89 N. Y. S. 1022.

95. The previous limit was 5 per cent and the City of Sioux Falls was already indebted nearly 15 per cent, and so was not authorized to incur the 10 per cent additional for water purposes, though the state courts had held otherwise. Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 890.

96. At time of vote in 1871 the assessed valuation of county was $3,184,036; and the debt including proposed issue $430,000, the limit being 10 per cent; but the bonds were not issued until after the assessment for 1872 which was for $4,482,117. Colburn v. McDonald [Neb.] 100 N. W. 961.

97. Certain ditch bonds had been issued by the county, but assessments on the district benefited had been made to pay them. Johnson v. Board of Com'rs of Norman County [Minn.] 101 N. W. 180.

debtedness for the aggregate sum of such payments within the meaning of the constitution, but contracts for the construction of a water or light plant,[98] or the issue of warrants on the annual income to pay for a court house,[99] do create a debt. Municipal corporations cannot evade the constitutional limitation of indebtedness by making their bonds payable from the proceeds of a special tax, or from the income of a water or light plant, or by buying property subject to liens, though they do not agree to assume the same, but provide that such liens shall be paid out of the income of the property, or by incurring liabilities through a dummy corporation;[1] but in Kansas it was held that a city may purchase property subject to a lien payable in the future.[2] When a city has reached the limit of indebtedness, it may continue to transact its business on a cash basis, and pay its current expenses.[3]

Curative acts.[4]—If the charter under which bonds were issued is invalid, a subsequent legislative recognition of it will validate the bonds.[5] An act legalizing certain county orders issued under an unconstitutional statute and authorizing the county to provide for their payment is constitutional, as the legislature has the power to require its public agencies to discharge imperfect legal obligations which rest upon value received.[6] A constitutional amendment requiring laws as to municipal indebtedness to be passed in a particular manner does not affect the validity of previous laws or of bonds issued thereunder.[7]

§ 2. *Conditions precedent;*[8] *submission to vote; provision for payment.*—Since bonds must rest on a valid debt, it is important in the case of improvement bonds that the procedure to authorize, contract for and make a public work or improvement have at least such validity as that it will support an indebtedness.[9] Where by act a general law is made inapplicable to a special class, the case covered by the special law may be read as an exception to the general law.[10] The estimate of cost by the city engineer,[11] or the fixing of the rate of interest,[12] are sometimes conditions precedent to the issue of special improvement bonds.

98. The first is an ordinary and necessary expense, the latter is an extraordinary one. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

99. Where issue will be enjoined at the suit of a taxpayer, as it was a mere evasion of the debt limit. Johnson v. Board of Com'rs of Norman County [Minn.] 101 N. W. 180.

1. The town was to be the main stockholder in a water company, which was organized for the purpose, and which was to issue bonds in excess of the town's debt limit, the town pledging to it a certain sum for 25 years for hydrant rentals, and issuing bonds to its debt limit in payment for the stock. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

2. Though the city cannot directly mortgage its property, it may make the most advantageous contract of purchase of waterworks possible, and it will not be considered an evasion of the debt limit. State v. Topeka, 68 Kan. 177, 74 P. 647.

3. But it cannot provide for the installation of waterworks as a reasonable and necessary current expense, where there was already a private company furnishing an adequate service [Sess. Laws 1903, p. 42]. Helena Waterworks Co. v. Helena [Mont.] 78 P. 220.

4. See 2 Curr. L. 932.

5. The charter of 1889 was illegal, but an act of 1893 authorized the town to issue the bonds, and another act extended its limits, and in 1901 its charter was repealed and another granted with proviso that all claims against the former town should be assumed by the new one. Muse v. Lexington, 110 Tenn. 655, 76 S. W. 481.

6. A highway was built under Laws 1895, c. 302, authorizing the cost to be assessed on neighboring property which was declared unconstitutional, and Laws 1901, c. 181 authorized counties to pay for the orders issued under the prior act. State v. Gunn, 92 Minn. 436, 100 N. W. 97.

7. Const. art. 2, § 14 required all such acts to be read on three several days and the yeas and nays each time to be entered on the journal. Board of Com'rs Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 F. 817.

8. See 2 Curr. L. 932.

9. Consult Public Contracts, 2 Curr. L. 1280; Public Works and Improvements, 2 Curr. L. 1328.

10. Construing Burns' Law (Rev. St. § 2702) and 94 Ohio Laws, p. 119. City of Mt. Vernon v. State [Ohio] 73 N. E. 515.

11. Street improvement bonds may be issued by the city council upon the estimates of the city engineer that the cost of the improvement will exceed one dollar a front foot [St. 1893, p. 33, c. 21]. O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020.

Assent of voters or taxpayers.[13]—It has been held that a municipality may issue bonds without an election when it is for a necessary expense, and there is no limitation in the charter and it can pay interest without exceeding the tax limit;[14] but where a municipality is authorized to issue bonds provided the question is submitted to the voters, such submission is a prerequisite, and such mode is the exclusive way in which the municipality may bind itself;[15] consequently special assessment bonds, issued without an election, are not binding on the municipality, though the land is still liable for the assessment.[16] An existing obligation is not in general a condition precedent to the power to vote on bonds for the purchase or construction of a public utility.[17] Where it is required that the resolution submitted should state the purpose of the issue or the number of instalments in which it is to be paid, it must be followed;[18] if they are to be issued for several purposes, the amount for each purpose must be stated;[19] and if it is required that the resolution submitted shall state the rate of interest, a statement that it is not to exceed a certain rate is not sufficient.[20] Several separate propositions may be submitted to the electors, and the failure of one to carry does not affect the validity of the others which carried.[21] Propositions must not be coupled together so that a voter is given no choice,[22] else the election will be rendered void.[23] The fact that the proposition submitted to the voters contains another and illegal proposition will not render the bonds issued thereunder absolutely void;[24] but an affirmative vote on a proposition to issue railroad aid bonds to an amount in excess of the debt limit does not authorize the issue of bonds to an amount within the limit.[25] The proposition may be submitted at a special election,[26] but a vote taken before the adoption of a constitutional amendment authorizing the bond

12. Where the council fixed the rate of interest in the ordinance directing the issue of improvement bonds that was a sufficient compliance with the statute (Burns' Ann. St. 1894, § 4294), requiring the council to establish the rate on unpaid installments. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

13. See 2 Curr. L. 933.

14. Providing a system of electric lighting declared a necessary expense. Davis v. Fremont, 135 N. C. 538, 47 S. E. 671.

15. The issue of bonds authorized only by a vote of the aldermen will be enjoined, though they were to be issued for necessary expenses in providing water and light. Robinson v. Goldsboro, 135 N. C. 382, 47 S. E. 462. Charter of San Francisco, art. 16, § 29. Where the improvements which the public interest requires in addition to other expenses will exceed the income for any year, the council must by ordinance submit a proposition to incur a bonded indebtedness to the electors; and such provision does not conflict with art. 2, c. 2, § 22, as to bonds for sewers. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

16. The pledge of the city's credit was void, but it acted as trustee for the bondholders in collecting the assessment. Gedge v. Covington [Ky.] 80 S. W. 1160.

17. State v. Topeka, 68 Kan. 177, 74 P. 647.

18. Bonds held invalid in a controversy between the village and the successful bidder for them [Charter, tit. 7, § 2]. Village of Canandaigua v. Hayes, 90 App. Div. 336, 85 N. Y. S. 488.

19. But stating a gross amount for two purposes is sufficient where one of the purposes is that of refunding and so fixed. Hillsborough County v. Henderson [Fla.] 33 So. 997.

20. The issue was enjoined, though the resolution stated that the bonds were to bear "interest at a rate of not more than four per cent per annum—payable semi-annually." Hillsborough County v. Henderson [Fla.] 33 So. 997.

21. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

22. Under Sess. Laws S. D. 1899, c. 53, §§ 1, 2, the submission of the question of issuing bonds "for the purpose of constructing or purchasing" a system of waterworks was ineffective. Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 890. Proposition for public building bonds and for improvements to water and light plant. State v. Allen [Mo.] 85 S. W. 531.

23. Proposition to issue bonds to purchase waterworks or to construct them. City of Leavenworth v. Wilson [Kan.] 76 P. 400.

24. Proposition to issue $100,000 in bonds to aid in construction of railway and to authorize county to receive $100,000 in railway stock. Colburn v. McDonald [Neb.] 100 N. W. 961.

25. Proposition to issue $10,000 in bonds which was over limit, and $9,000 in fact issue which was supposed to be within the limit; but the bona fide holder was protected. Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049.

26. Charter of San Francisco, art. 16, § 29 is mandatory. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

issue is ineffectual.[27] It is sometimes a condition precedent to the right to call an election on the question of issuing bonds that the municipality shall have a certain population.[28] A majority or two-thirds vote of all the votes cast at the election is usually required to carry the proposition.[29] The ballots found in the ballot box at the close of the polls upon which the voter has intelligently expressed himself control the question.[30] Where it is required that two-thirds of the qualified voters of the municipality must assent, reference must be had to the registration list.[31]

Notice of election.[32]—The statutory procedure for calling an election must be followed,[33] thus if the notice fails to specify all the particulars required by statute, it will not have the effect of calling a valid election;[34] but the notice of an election to be held at the time of the annual election of municipal officers to vote on the question of issuing bonds is valid, though the notice failed to specify the place where the election was to be held.[35] No notice is required where the election is required to be held in the same manner as elections for officers where no notice is given.[36] If the notice of election refers to the statute, it is not necessary that it enumerate all the details of the proposed issue.[37] Irregularities in publishing the notice of election does not always render the election void,[38] and the bonds issued may be valid, though they do not conform exactly to the proposition adopted by the voters.[39] An election is not rendered invalid because the officers who called it were only de facto officers.[40] In some states it is required that the question shall be printed on the official ballot.[41]

Providing for payment of bonds.[42]—Where the statute[43] or the constitution

27. Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 890.

28. Act Cong. March 4, 1898, c. 35, § 1 (30 Stat. at L. 252), requiring a population of not less than 1,000 persons; the requirement that a school census should be taken was sufficiently complied with when a census was taken of the entire district, and an assessor's census had been taken of the town therein. Territory v. Whitehall, 13 Okl. 534, 76 P. 148.

29. Where several propositions were submitted and one received two-thirds of the votes cast on it, but not two-thirds of all the votes cast, it failed. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

30. Ballots which are illegally cast or which are defective should not be counted. State v. Topeka, 68 Kan. 177, 74 P. 647.

31. Or if there is no system of registration to the tally sheets of the last general election. Wilkins v. Waynesboro, 116 Ga. 359, 42 S. E. 767.

32. See 2 Curr. L. 934.

33. A petition asking the mayor to issue a proclamation for an election need not be submitted to the council [Laws 1897, c. 82, § 10]. State v. Topeka, 68 Kan. 177, 74 P. 647.

34. Amount, purpose, interest, and how much to be paid off annually required to be stated (Pol. Code, §§ 377-381); but stating that the overplus if any will be applied to sinking fund was not sufficiently definite. Wilkins v. Waynesboro, 116 Ga. 359, 42 S. E. 767.

35. The question might be submitted at an annual or special election, and the inference here was that the election was to be held at the same place as the election for officers, and the fact that separate ballot boxes were used did not render it a special election. Fletcher v. Collingswood [N. J. Law] 59 A. 90.

36. When the charter was revised the election of officers was directed to be held under provisions of general election law which required no notice. City of Asheville v. Webb, 134 N. C. 72, 46 S. E. 19.

37. The notice failed to state the denomination, rate of interest, or date of maturity of the bonds, but the statute provided that the denomination should be between $10 and $1,000, that the interest should not exceed 6 per cent, and that they should not run longer than 20 years, and the council had power to fix the terms within the statutory limits. State v. Topeka, 68 Kan. 177, 74 P. 647.

38. A judgment of a court may validate the bonds. Rountree v. Rentz, 119 Ga. 885, 47 S. E. 328.

39. Though the denomination of bonds was subsequently changed by the council from what was stated in the notice for special election, it will not affect their validity. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

40. Persons living outside the school district but within limits supposed to have been added to the district voted for officers, two of whom lived outside of district. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

41. Such provisions are merely directory, and here boroughs were expressly exempted [P. L. 1898, p. 264, § 52]. Fletcher v. Collingswood [N. J. Law] 59 A. 90.

42. See 2 Curr. L. 934.

43. Binding even in the hands of an innocent holder [Mill's Ann. St. § 4402, subd. 6]. Sauer v. Gillett [Colo. App.] 78 P. 1068.

require provision to be made for the payment of the bonds by an annual tax, that is a condition precedent to their issue, and no other plan for raising the necessary revenue can be substituted.[44] The amount of the tax must be specified in the resolution submitted.[45] Debts incurred for current expenditures are valid, though no such provision is made.[46] The power to issue bonds impliedly gives the power to tax therefor,[47] and express provisions that the city have the power to impose a special tax for the payment of the bonds do not make the validity of bonds dependent on the imposition of such a tax.[48]

§ 3. *Execution.*[49]—Where bonds have been duly authorized and duly sold to the highest bidder by the council, and the mayor without legal reason or having any discretion in the matter, refuses to sign or seal them, mandamus will issue to compel him to sign and seal the same.[50] It is no defense that the seal of the clerk instead of the seal of the city is affixed to bonds, when they are in the hands of an innocent holder.[51]

§ 4. *Form and requisites.*[52]—A bond is not made a conditional promise to pay by incorporating in its condition an obligation to pay interest according to its terms.[53] The power to issue "bonds" authorizes the issue of negotiable bonds or bonds payable to bearer,[54] and includes the power to make them payable in the gold coin of the United States.[55] The bonds are negotiable, though the name of the payee and the word "bearer" are left in blank,[56] and are valid, though they do not conform exactly to the authority under which they are issued.[57]

§ 5. *Issue and sale.*[58]—Where separate propositions for the issue of bonds for different purposes have received a majority of votes, separate bonds need not be issued for each purpose, but the total amount may be in one issue together.[59] An act requiring public officers to issue bonds on the certificate of their necessity by other officers gives the former no discretion in the matter.[60] An act authoriz-

44. The levying of an annual tax of $500 to pay bonds to the amount of $30,000 due in 30 years is insufficient, as the municipality has no authority to assume that that sum when compounded will yield the necessary sum. Wilkins v. Waynesboro, 116 Ga. 359, 42 S. E. 767.

45. It is not enough to follow the language of the statute; the provision was designed to enlighten the voters. Village of Canandaigua v. Hayes, 90 App. Div. 336, 85 N. Y. S. 488.

46. Such may be validly refunded, though at the time of their issuance the city had no power to levy a tax sufficient to pay them. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex. Civ. App.] 82 S. W. 1066.

47. Where there is no constitutional restriction. State v. Bristol, 109 Tenn. 315, 70 S. W. 1031.

48. Nor does the setting aside of a certain part of the annual revenue for that purpose vitiate the bonds. City of Jefferson v. Jennings Banking & Trust Co. [Tex. Civ. App.] 79 S. W. 876.

49. See 2 Curr. L. 935.

50. It was no excuse that the relators and purchasers were nonresidents of the state, or that the mayor had vetoed the resolution for the sale of bonds, as the act of March 23, 1892 (P. L. 1892, p. 202), giving the mayors of cities of the second class the right to veto measures was unconstitutional. Halsey v. Nowrey [N. J. Law] 59 A. 449.

51. Equity would order the city to affix the proper seal, or enjoin it from setting up the lack of a seal as a defense. City of Defiance v. Schmidt [C. C. A.] 123 F. 1. See 2 Curr. L. 935, n. 64, 65, 66.

52. See 2 Curr. L. 935.

53. Ontario County v. Shepard, 91 N. Y. S. 611.

54. Jennings Banking & Trust Co. v. Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005, afg. 79 S. W. 876. See 2 Curr. L. 935, n. 68. Bonds payable to bearer may be sued on by any one to whom they are delivered, though he is not the equitable owner. Jennings Banking & Trust Co. v. Jefferson, 30 Tex. Civ. App. 534, 70 S. W. 1005.

55. Hillsborough County v. Henderson [Fla.] 33 So. 997. See 2 Curr. L. 935, n. 69.

56. The bonds were payable "to —— or —— at the office of the treasurer." Gamble v. Rural Independent School Dist., 132 F. 514. Negotiability generally, see Negotiable Instruments, 4 Curr. L. 790.

57. The denomination of the bonds issued was not the same as was provided for in the resolution submitted to the voters. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

58. See 2 Curr. L. 935.

59. Propositions (1) to issue $37,000 for street purposes (2) to issue $2,000 for fire apparatus (3) to issue $7,000 for sewers, and (4) to issue $4,000 for bridges, passed by voters, authorized the issue of $50,000 in one issue of bonds by the municipality. Town of Mill Valley v. House, 142 Cal. 698, 76 P. 658.

60. Laws 1896, p. 1013, c. 769 directed the village trustees to issue bonds for the

ing the issue and sale of bonds or their issue in payment of property necessary for an irrigation system did not authorize their exchange for water right certificates or for warrants drawn for salaries of the officers of the district.[61] In Georgia a special proceeding by petition is provided by which a decree of a court may be obtained validating the bonds before they are issued,[62] and such validation is good where there is a substantial compliance with the provisions of the statute.[63] Under the Nebraska refunding law a special proceeding is provided for determining the validity of the proceedings from which an appeal lies to the supreme court.[64] For a purchaser to rescind the contract and recover the consideration paid, he must return or be able to return all of the bonds.[65]

§ 6. *Rights and liabilities arising out of illegal issue.*[66]—A resident taxpayer may enjoin the issue of bonds when the question of issuing them had not been fairly submitted to the voters,[67] unless they have already been validated by a decree of court.[68] In such an action the burden is on the plaintiff to establish their illegality.[69] A taxpayer may enjoin the levy of a tax to pay interest on bonds issued under an unconstitutional statute, without restoring to bona fide holders the consideration which they gave therefor,[70] or in a suit to collect taxes, he may defend on the ground of the invalidity of the bonds.[71] Where bonds have been delivered to the purchaser, a taxpayer cannot sue the town to have the bonds declared invalid and to restrain the levy of taxes therefor, without joining the purchaser[72] or the holders.[73] An adjudication that part of an issue of bonds was invalid does not annul the rest of the same issue sold to other persons and not parties to the action.[74] Where bonds have been illegally issued, but for a lawful purpose, the city is bound in equity to return the consideration.[75]

amounts required by the water commissioners, and mandamus issued on the relation of a water commissioner. People v. Trustees of White Plains, 93 App. Div. 599, 88 N. Y. S. 506.

61. One was not a bona fide purchaser who had knowledge that they were exchanged for warrants, though he did not know for what purpose the warrants were issued. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 P. 24.

62. Order granting the petition reversed. Wilkins v. Waynesboro, 116 Ga. 359, 42 S. E. 767. Acts 1897, p. 82; Van Epps, Code Supp. § 6074 et seq. Such judgment is res judicata and a taxpayer cannot thereafter enjoin the issue because the notice of election was not properly published. Rountree v. Rentz, 119 Ga. 885, 47 S. E. 328. See 2 Curr. L. 933, n. 38.

63. The misnomer of the municipality "The Town of Louisville" instead of "The City of Louisville" in the petition to validate bonds was not fatal where the city answered under its proper name, the judgment set forth its correct name, and it appeared that a notice in such form fairly notified the citizens of the proceedings. Rhodes v. Louisville [Ga.] 49 S. E. 681.

64. Laws 1899, c. 8 (Cobbey's Ann. St. § 10,780); but the decision relates to the validity of the bonds, and does not affect rights of innocent purchasers who are not parties of record. Colburn v. McDonald [Neb.] 100 N. W. 961.

65. Here bonds which had been declared invalid in another suit were in part pledged to other persons, so purchaser was unable to return them all. City of Ironwood v. Wickes, 93 App. Div. 164, 87 N. Y. S. 554.

66. See 2 Curr. L. 936.

67. Question of issuing for the purpose of purchasing or of constructing water works joined. City of Leavenworth v. Wilson [Kan.] 76 P. 400.

68. Though it was admitted that the notice of election was published only twice instead of four times as required by law. Rountree v. Rentz, 119 Ga. 885, 47 S. E. 328.

69. Nothing in record to prove the allegation that nine illegal votes were cast at the election, which changed the result. Territory v. Whitehall, 13 Okl. 534, 76 P. 148.

70. The burden is on the county commissioners to show that the bonds were valid under some other act. Graves v. Moore County Com'rs, 135 N. C. 49, 47 S. E. 134.

71. Though the bondholders are not parties; but the burden is on the taxpayer to show the falsity of the recitals in the bond. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex. Civ. App.] 82 S. W. 1066.

72. Here the city, the mayor, and council alone were made defendants and nothing to show but what the construction of the waterworks for which the bonds were issued was an accomplished fact. Ramsay v. Marble Rock, 123 Iowa, 7, 98 N. W. 134. Suit between county and county treasurer and warrants were already issued. Nelson v. Harrison County [Neb.] 102 N. W. 197.

73. As the judgment would in effect render the school district bonds worthless. Boesch v. Byron [Tex. Civ. App.] 83 S. W. 18.

74. City of Ironwood v. Wickes, 93 App. Div. 164, 87 N. Y. S. 554.

75. The right to recover passes from the original purchaser to the present holders, and

§ 7. *Transfer.*[76]—There is no implied warranty on the part of the seller of the validity of bonds,[77] or of the truth of his statement that they will net a certain rate of interest.[78] The fact that the seller guarantees the bonds does not prevent the buyer from being a bona fide purchaser.[79]

Subrogation.[80]—A purchaser in the open market is a volunteer and is not subrogated to any equities existing in favor of the original holders.[81]

Recitals.[82]—Recitals are binding only as to matters of fact, and not as to matters of law,[83] and will not protect a purchaser where he has knowledge that they are in fact untrue.[84] A recital showing a bond was issued for an unlawful purpose will be notice to all purchasers.[85] A recital that bonds were issued in conformity with a designated act is in effect a certification that all provisions of law have been complied with.[86] Where it is the duty of the mayor and clerk to sign and seal bonds, their recital that all requirements of law have been complied with is binding on the city.[87] Bonds will not be void, though they recite that they were issued under an unconstitutional statute, if there was a general law authorizing their issue;[88] but where bonds recited that they were issued under an act where the preliminary steps required to be taken were entirely different from those required by the general law, they could not be sustained under the latter, though the former act was unconstitutional.[89]

Estoppel.[90]—If the debt be under an unconstitutional law but the subject-matter be neither illegal, ultra vires nor prohibited, there may be an estoppel.[91] Where bonds recited that they were issued for a lawful purpose,[92] or in conformity with statutory authority, there is an estoppel, as against an innocent holder, to show that they were illegally issued.[93] A purchaser of bonds will be charged with notice of conditions appearing of record, though not recited in the bonds.[94] An innocent holder[95] of bonds illegally issued has the burden of proving that he ob-

they may intervene in a suit brought by the original holder and hold him as a trustee for any judgment which he may recover. Chelsea Sav. Bank v. Ironwood [C. C. A.] 130 F. 410.

76. See 2 Curr. L. 936.

77. School bonds. First Nat. Bank v. Columbus Sav. & Trust Co., 2 Ohio N. P. (N. S.) 525.

78. There is no warranty of fact in the statement that bonds "if purchased at 102 would net 4.65." Such a statement is a mere arithmetical deduction. First Nat. Bank v. Columbus Sav. & Trust Co., 2 Ohio N. P. (N. S.) 525.

79. The guaranty is no evidence that the buyer did not act honestly. Schmid v. Frankfort [Mich.] 96 N. W. 1056.

80. See 2 Curr. L. 937.

81. School bonds. Beardsley v. Lampasas [C. C. A.] 127 F. 819.

82. See 2 Curr. L. 937. See, also, special article, post, p. 717.

83. Recital that a bond was issued in compliance with law will not protect an innocent holder of a bond issued under an act requiring provision to be made for their payment and determining their date of payment, where these requirements were not complied with. Sauer v. Gillett [Colo. App.] 78 P. 1068.

84. Recitals that the bond was duly issued will not protect one who knew that they were exchanged for warrants instead of being sold for cash. Leeman v. Perris Irr. Dist., 140 Cal. 540, 74 P. 24.

85. Recital that bond was issued "to aid in construction of waterworks" when the only statutory authority was to issue bonds to construct waterworks. Village of Grant v. Sherrill [Neb.] 98 N. W. 681.

86. The act authorized refunding bonds, and the district was estopped to set up that they were issued in excess of the constitutional debt limit. Gamble v. Rural Independent School Dist., 132 F. 514.

87. Even though the ordinance directing the issue did not authorize the recitals. City of Defiance v. Schmidt [C. C. A.] 123 F. 1.

88. City of Defiance v. Schmidt [C. C. A.] 123 F. 1.

89. The recitals will not import full compliance with the statute, even in favor of innocent holders. Graves v. Moore County Com'rs, 135 N. C. 49, 47 S. E. 134.

90. See 2 Curr. L. 938.

91. City of Mt. Vernon v. State [Ohio] 73 N. E. 515.

92. Bonds recited that they were issued to build a bridge and were in fact issued to aid a railroad which was illegal, but no taxpayer interposed. City of Defiance v. Schmidt [C. C. A.] 123 F. 1.

93. Board of Com'rs of Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 F. 817.

94. The condition of the subscription which appeared of record was that the county should be first exonerated from its subscription to a certain other road. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

95. One who purchases bonds who knows nothing about them except what appears on

tained the same for value and without notice.[96] One does not have to rely entirely on the recitals of a bond to constitute one a bona fide holder, for that would be putting a premium on omission to inquire further.[97] One who obtains title by descent, from one who is not a bona fide holder, is not a bona fide holder,[98] but any subsequent transferee under an innocent holder is a bona fide holder,[99] except the purchaser for a nominal consideration of a past due and dishonored municipal bond, which was fraudulently issued;[1] he cannot recover their face value, though the seller, an innocent holder, might have.[2] Payment of interest by itself will not prevent a bond from being held invalid,[3] but where a municipality had compromised a suit on its bonds and paid interest for many years, it will not be allowed to repudiate them unless they were absolutely void when issued.[4] Likewise long delay and laches and continued payment of interest on bonds in the hands of innocent holders will defeat an action of a taxpayer to restrain their payment.[5] Where a purchaser acquires bonds after they have been held valid by a decision of the highest court in the state, his rights are not affected by a subsequent different interpretation of the law.[6]

§ 8. *Payment.*[7]—The authority to issue bonds by necessary implication confers authority to levy the tax necessary to pay the debt.[8] In Louisiana the tax that may be levied to pay municipal bonds is limited by the constitution.[9] Where a city has no authority to make the interest on bonds a governmental and current expenditure, the fund raised therefor may be secured by a judgment creditor.[10] After a judgment is obtained, no demand is necessary before filing a petition for mandamus to compel the making of an assessment,[11] or the levy of a tax, where

their face is an innocent holder, and his right to recover cannot be defeated by any defect in the consideration received from the original purchaser. City of Jefferson v. Jennings Banking & Trust Co. [Tex. Civ. App.] 79 S. W. 876.

96. Where holder of bonds in excess of limit, which contained no recitals, had them exchanged for bonds containing recitals that they were issued in accordance with the constitution, he was not protected, but a subsequent bona fide transferee was protected. Salmon v. Rural Independent School Dist., 125 F. 235. One who obtained them in payment for legal services rendered to full value of bond and without notice of infirmities is a bona fide holder for value. Gamble v. Rural Independent School Dist., 132 F. 514.

97. Here purchasers examined the proceedings of the council in purporting to issue "park bonds," but which were in fact issued for a private purpose and also the letter of the prosecuting attorney affirming that the proceedings were valid. Schmid v. Frankfort [Mich.] 96 N. W. 1056.

98. Salmon v. Rural Independent School Dist. [C. C. A.] 125 F. 235.

99. City of Jefferson v. Jennings Banking & Trust Co. [Tex. Civ. App.] 79 S. W. 876.

1, 2. He can only recover the consideration paid as he has notice of the fraud, and in Iowa the statute is express on the point [Code Iowa 1897, § 3070]. Gamble v. Rural Independent School Dist., 132 F. 514.

3. Green County v. Shortell, 25 Ky. L. R. 357, 75 S. W. 251.

4. A suit on the bonds was compromised by the interest being reduced from 10 per cent to 5½ per cent and the interest had been paid thereon for about 15 years before the compromise and for 15 years thereafter. Colburn v. McDonald [Neb.] 100 N. W. 961.

5. Interest had been paid for 13 years and taxpayer had for 6 years resided in the municipality, and there was statutory authority to issue railroad aid bonds, but the "agreement" was for $10,000, while only $9,000 were issued because of the debt limit. Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049.

6. Mandamus issued to compel the levy of a tax to pay judgment. State v. Bristol, 109 Tenn. 315, 70 S. W. 1031; Board of Com'rs of Henderson County v. Travelers' Ins. Co. [C. C. A.] 128 F. 817. But see, contra, Graves v. Moore County Com'rs, 135 N. C. 49, 47 S. E. 134.

7. See 2 Curr. L. 939.

8. There was no provision in the constitution requiring a grant of power to levy taxes to be in express terms. State v. Bristol, 109 Tenn. 315, 70 S. W. 1031.

See generally on the taxing power, Taxes, 2 Curr. L. 1786.

9. Const. 1898, art. 281, limits the tax to five mills on the dollar in any one year; where a tax of 2½ mills had already been levied for a previous issue, a tax of 5 mills in addition cannot be imposed. Town of Crowley v. Fulton & Co., 112 La. 234, 36 So. 334.

10. The payment of interest was not under its charter a necessary current expense, so a judgment creditor on a personal injury claim could obtain a writ of mandamus that his judgment should be paid out of the interest fund. City of Anniston v. Hurt, 140 Ala. 394, 37 So. 220.

11. Board of supervisors may make a levy to meet interest on bonds of an irrigation district corporation when the directors refuse or neglect to do so [Acts

there is a statute authorizing the same.[12] A writ of mandamus is properly directed to the mayor and city council to compel a tax levy,[13] or to a sheriff, where it is his duty to collect the tax,[14] or to county commissioners to compel them to take steps to provide for the payment of county orders.[15] Where no fact is asserted against the validity of bonds, mandamus may be had by the holder of all, or of a part of the bonds, to compel a tax levy to pay the same, without first reducing them to judgment.[16] The fact that a township has been transferred to another county after bonds are issued does not affect its obligation to pay.[17] A state constitutional amendment abolishing the corporate existence of certain townships which had issued bonds impairs the obligation of contracts,[18] but a Federal court cannot adjudge a county liable for the debts of a township included therein which has been dissolved.[19] Where the boundary between counties has been changed, a portion of the debt of the county from which territory was taken may be apportioned by the legislature to that part added to the other county.[20]

Payment from special fund or tax.[21]—Owners of street improvement bonds payable out of assessments may sue to enforce collection by foreclosure or otherwise, and an attorney's fee may be included in the judgment.[22] Though the bonds are only payable out of assessments to be levied and collected by the municipality, the municipality will be liable for the amount lost by its negligence in failing to file and enforce the liens for the same.[23] The bonds are still a valid charge on the special assessments, though there is a void provision that the city's credit was pledged.[24] Mandamus will lie to compel the payment of interest out of a special fund raised for that purpose,[25] but it will not lie to compel payment out of the general fund.[26]

1897, p. 267, c. 189, § 39]. Board of Sup'rs of Riverside County v. Thompson [C. C. A.] 122 F. 860.

12. Ky. Laws 1868, p. 622, c. 548, authorizing the county judge to levy taxes for railroad aid bonds, was not repealed by Constitution of 1891 or Ky. St. 1894, § 1882, which confers the power of levying taxes on the fiscal court except in the case of railroad bond indebtedness. Guthrie v. Sparks [C. C. A.] 131 F. 443.

13. Comp. Laws 1897, § 2529, limiting tax levies to one per cent for all purposes, did not apply to cities organized under prior acts. Territory v. Socorro [N. M.] 76 P. 283.

14. It was proper to join the sheriff where it was his duty to collect the tax, and it was alleged that he had pledged himself not to do so. Guthrie v. Sparks [C. C. A.] 131 F. 443.

15. The fact that the language of the act imposing the duty on the county commissioners was not mandatory but permissive in form is not conclusive, as the rule is that where public or individual rights call for the exercise of a power the language is in effect imperative. State v. Gunn, 92 Minn. 436, 100 N. W. 97.

16. The only denial of their validity consisted of the erroneous conclusion as to the legal requirements of an ordinance directing their issue. Territory v. Socorro [N. M.] 76 P. 283.

17. Mandamus issued against officers of county to which township was transferred. Ex parte Folsom, 131 F. 496; Planters' & Sav. Bank v. Huiett Tp., 132 F. 627.

18. Consequently the county officers who were originally authorized to levy a tax for the bonds were not deprived of that right and duty. Ex parte Folsom, 131 F. 496.

19. Though no provision has been made for the payment of the township debts, the corporate existence of the town having been destroyed by constitutional amendment, after the U. S. supreme court had declared the bonds valid. Folsom v. Greenwood County, 130 F. 730.

20. Where no provision was made in the act changing the boundary, the legislature may by subsequent act apportion the debt and provide by means of legal proceedings for the ascertainment thereof. Desha County v. State [Ark.] 84 S. W. 625.

21. See 2 Curr. L. 939.

22. A demand on the city to pay or collect the bonds is not necessary, nor is any resolution of council necessary to enable the holders of the bonds to sue to enforce the liens. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879. Charter of Dennison construed as not requiring the payment of bonds issued by the city for school purposes, out of the special tax voted for school purposes. Kennedy v. Birch [Tex. Civ. App.] 74 S. W. 593.

23. The bonds stipulated that it was expressly understood that the city was only liable for the amount collected, but there is implied condition that the city make lawful assessments, file lawful liens, and preserve them by lawful proceedings. Dime Deposit & Discount Bank v. Scranton, 208 Pa. 383, 57 A. 770.

24. Const. § 157, provided that debts could not be incurred without the consent of two-thirds of the voters, which was not obtained. Gedge v. Covington [Ky.] 80 S. W. 1160.

§ 9. *Scaling overissue.*[27]—Bonds issued by a municipality in excess of the amount prescribed by statute are void only to the extent of the excess.[28]

§ 10. *Enforcement of improvement bonds against abutters.*—In some states the person contracting to make local improvements or the holder of bonds for same is given a remedy direct or secondary against abutting owners.[29]

RECITALS OF LAW IN MUNICIPAL BONDS.

[Special Article.]*

Constitutional authority.—A recital that bonds are issued "in conformity with," "by virtue of, or under authority of," a constitutional provision, puts the purchaser upon inquiry as to the meaning of all those provisions, and at his peril he must ascertain whether they have been fulfilled. The earlier cases tried to make a distinction between a statutory and a constitutional provision, taking the ground that constitutional provisions were absolute in their nature, and that no recital could work an estoppel.[30] Dillon, in his work on Municipal Corporations (vol. 1, p. 607), makes the statement that there is "no estoppel by recital to set up defense of an overissue contrary to a constitutional limitation." And he cites Buchanan v. Litchfield, 102 U. S. 278, 26 Law. Ed. 138, and Dixon Co. v. Field, 111 U. S. 83, 28 Law. Ed. 360. The first case has no recital on the constitution. The second case contained the recital that the bonds were issued "under and by virtue of the constitution." But here the face of the bonds showed that they did not comply with the constitution. However, nearly all the cases involving constitutional authority have arisen on an issuance of bonds beyond the limit of indebtedness prescribed by the constitution. In all these cases a general recital has worked no estoppel.[31] But in later cases, where the bonds have expressly recited that the limitation of indebtedness prescribed by the constitution has not been exceeded, this recital has been held to work an estoppel to prove the contrary.[32]

Legislative authority.—Recitals on legislative authority refer the purchaser to the statute, and put him upon inquiry as to all the terms and conditions of the

25. Notwithstanding that the claim has been reduced to judgment, and that there are other creditors, who have not intervened, who are interested. Ward v. Piper [Kan.] 77 P. 699. Where the statute requires the officers to make an annual levy sufficient to pay the interest on bonds, and that all such taxes shall be paid in cash only and kept as a special fund, the holder can enforce the payment of interest by mandamus, but cannot have a money judgment therefor. Board of Com'rs of Gunnison County v. Sims, 31 Colo. 483, 74 P. 457.

26. It did not appear that the fund raised for ordinary expenses was more than sufficient for that purpose. Ward v. Piper [Kan.] 77 P. 699.

27. See 2 Curr. L. 940.

28. Railroad aid bonds; and it did not appear that there was an excessive issue. Schmitz v. Zeh, 91 Minn. 290, 97 N. W. 1049.

29. See Public Works and Improvements, 2 Curr. L. 1328. The owner of street improvement bonds issued under the Barrett Law of Indiana may sue thereon without giving notice to the city or securing the consent of the council [Burns' Ann. St. 1894, §§ 4290-4296]. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

30. Marsh v. Fulton County, 10 Wall. [U. S.] 676, 19 Law. Ed. 1040; Buchanan v. Litchfield, 102 U. S. 278, 26 Law. Ed. 138; Carroll County v. Smith, 111 U. S. 556, 28 Law. Ed. 517; Merchants' Exch. Nat. Bank v. Bergen County, 115 U. S. 384, 29 Law. Ed. 430; Hooper v. Covington, 118 U. S. 148, 30 Law. Ed. 190; Lake County v. Graham, 130 U. S. 674, 32 Law. Ed. 1065.

31. Buchanan v. Litchfield, 102 U. S. 278, 26 Law. Ed. 138; Harshman v. Bates County, 92 U. S. 569, 23 Law. Ed. 747; Lake County v. Graham, 130 U. S. 674, 32 Law. Ed. 1065; Sutliff v. Board of County Com'rs, 147 U. S. 135, 37 Law. Ed. 112; Hedges v. Dixon County, 150 U. S. 187, 37 Law. Ed. 1047; Francis v. Howard Co., 4 C. C. A. 460; Shaw v. Independent School Dist., 23 C. C. A. 169; Geer v. School Dist. No. 11, 38 C. C. A. 392; Wesson v. Mt. Vernon, 39 C. C. A. 301.

32. Chaffee County v. Potter, 142 U. S. 355, 35 Law. Ed. 1040; Gunnison County v. Rollins, 173 U. S. 260, 43 Law. Ed. 693; Na-

*From Bronson Recitals in Municipal Bonds.

same.[33] He is chargeable with and bound to know whether the legislative grant is valid or not.[34] Where the legislative act refers the purchaser to certain records to ascertain the fulfillment of certain prescribed conditions, the purchaser is put upon inquiry as to the contents thereof,[35] and in such cases no recitals will estop the defense of the facts shown by the public record.

Legislative authority through ordinance of city.—Recitals in bonds that they are issued under legislative authority, and in compliance with an ordinance of the city, would, in accordance with the earlier cases, put the purchaser upon inquiry as to the terms of that ordinance, and would not estop any defense of lack of compliance with the same.[36] But the later decisions are to the effect that recitals in a bond that they are issued in pursuance of an act of the legislature and an ordinance of the city council passed in pursuance thereof does not put the purchaser upon inquiry as to the terms of the ordinances under which the bonds are issued.[37]

Legislative authority through order of the county court.—In Post v. Pulaski Co., it is held that a recital in county bonds that they are issued pursuant to an order of the county court puts all persons dealing in the bonds upon inquiry as to the terms of the order.[38] This case was one where the defense was that bonds had been given as donation, and the records showed that fact, and it was held that the recital did not estop the facts of the record. This case, and the doctrine there laid down, will appear to be much modified by later cases, if in fact it is not overruled.[39]

Where the legislature has applied curative legislation.—The curative power of the legislature has been exercised in many cases. It has been held that a legislature has the power to subsequently ratify and give validity to an illegal bond issue, or to cure all irregularities in any issuance of bonds.[40]

Lis pendens.—Bonds being negotiable paper, the lis pendens does not act as constructive notice to the bona fide purchaser.[41]

tional Life Ins. Co. v. Board of Education, 10 C. C. A. 637.

33. Ogden v. County of Daviess, 102 U. S. 634, 26 Law. Ed. 263; Anthony v. Jasper County, 101 U. S. 693, 25 Law. Ed. 1006; Northern Bank of Toledo v. Porter Tp., 110 U. S. 608, 28 Law. Ed. 258.

34. German Sav. Bank v. Franklin County, 128 U. S. 526, 32 Law. Ed. 519; Board of Com'rs v. Union Bank, 37 C. C. A. 492.

35. Dixon County v. Field, 111 U. S. 83, 28 Law. Ed. 360; Sutliff v. Lake County Com'rs, 147 U. S. 230, 37 Law. Ed. 145; National Bank of Commerce v. Granada, 4 C. C. A. 212; Nesbit v. Independent Dist., 144 U. S. 610, 36 Law. Ed. 562; Coffin v. Board of Com'rs, 6 C. C. A. 288; Hinkley v. Arkansas City, 16 C. C. A. 395.

36. Dixon County v. Field, 111 U. S. 83, 28 Law. Ed. 360; Bank of Commerce v. Granada, 4 C. C. A. 212; Hinkley v. Arkansas City, 16 C. C. A. 395; Coffin v. Board of Com'rs, 6 C. C. A. 288.

37. Evansville v. Dennett, 161 U. S. 434, 40 Law. Ed. 760; City of South St. Paul v. Lamprecht Bros., 31 C. C. A. 585; City of Lamprosos v. Talcott, 36 C. C. A. 318; Board of Com'rs v. National Life Ins. Co., 32 C. C. A. 591; Hackette v. Ottawa, 99 U. S. 86, 25 Law. Ed. 363; Ottawa v. National Bank, 105 U. S. 342, 26 Law. Ed. 1127; Van Hostrup v. Madison City, 68 U. S. 291, 17 Law. Ed. 538.

38. Post v. Pulaski Co., 1 C. C. A. 405.

39. Board of Com'rs v. National Life Ins. Co., 32 C. C. A. 591; Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, 42 Law. Ed. 1156; Wesson v. Saline Co., 20 C. C. A. 227; Evansville v. Dennett, 161 U. S. 434, 40 Law. Ed. 76; Orleans v. Platt, 99 U. S. 676, 25 Law. Ed. 404.

40. Warren County v. Marcy, 97 U. S. 96, 97 Law. Ed. 977; Carroll County v. Smith, 111 U. S. 556, 28 Law. Ed. 517; Scotland Co. v. Hill, 132 U. S. 107, 33 Law. Ed. 261; Lytle v. Lansing, 147 U. S. 59, 37 Law. Ed. 78; State v. Wichita County Com'rs, 59 Kan. 512.

41. Ritchie v. Franklin County, 89 U. S. 67, 22 Law. Ed. 825; Lee County v. Rogers, 74 U. S. 181, 19 Law. Ed. 160; Campbell v. Kenosha, 72 U. S. 194, 18 Law. Ed. 610; Gelpecke v. Dubuque, 68 U. S. 175, 17 Law. Ed. 520; Otoe County v. Baldwin, 111 U. S. 1, 28 Law. Ed. 331; Quincy v. Cook, 107 U. S. 549, 27 Law. Ed. 549; Thompson v. Perrine, 103 U. S. 806, 26 Law. Ed. 612; Jonesboro v. Cairo, 110 U. S. 192, 28 Law. Ed. 116; Rogers v. Keokuk, 154 U. S. 546, 18 Law. Ed. 74; Thompson v. Lee County, 70 U. S. 327, 18 Law. Ed. 177. State cases under curative legislation: Bass v. Columbus, 30 Ga. 845; Black v. Cohen, 52 Ga. 621; Keithsburg v. Frick, 34 Ill. 405; Gage v. Nichols, 135 Ill. 128; Williams v. People, 132 Ill. 574; Schneck v. Jeffersonville, 152 Ind. 204; State v. Osawkee, 14 Kan. 418; People's Bank v. Pomona, 48 Kan. 351; McConnel v. Hammond, 16 Kan.

General recitals.—Recitals that a bond was issued "by virtue of," "under the authority of," "in compliance with," or "in conformity with," a specific legislative act were held in the earlier cases to import a full compliance with the precedent conditions of the legislative act; the only question then being, "What authority did those issuing the bonds have in making the recitals?"[42] This question being answered that they possessed full authority to determine upon the precedent conditions, then the recitals acted as an estoppel to set up want of compliance with the conditions prescribed, but afterwards, when certain precedent conditions came to be recognized as absolute or nearly absolute, such as the constitutional limitations or statutory limitations in the creation of indebtedness, and when records became more and more of a public nature, the necessity arose of having express recitals on these quasi absolute conditions in order to raise an estoppel, so that a general recital at the present day covers only mere irregularities, and is often treated as a conclusion of law.[43] This has been most apparent in the cases where the issuance exceeded the legal indebtedness. The late cases hold that a general recital does not create an estoppel, to prove by the assessment rolls a contrary fact,[44] but that an express recital does create an estoppel to prove the contrary of the fact recited.[45] But a general recital that bonds are issued "under and pursuant to the laws and constitution" of a state, and referring to no specific authoritative legislative enactment, raises no estoppel whatsoever, and is treated as a mere conclusion of law.[46]

Where bonds are issued for an illegal purpose.—It is clear, where bonds are issued for an illegal purpose, and there is no recital upon the purpose of the issuance, that the defense of a nonpublic purpose is available, and that the bonds are invalid.[47] But where the statute granting the power to issues states the purpose for which bonds may be issued, and there is a recital in the bonds issued of due compliance with the precedent conditions of the statute, this recital acts as an estoppel to set up an issuance for an illegal purpose.[48] Likewise, where there is an express recital in the bonds of the purpose for which they are issued, this acts as an estoppel to set up the contrary.[49]

228; Central Branch U. P. R. Co. v. Smith, 23 Kan. 745; Smith v. Stephen, 66 Md. 381; Bradley v. Franklin Co., 65 Mo. 638; Stiens v. Franklin Co., 48 Mo. 166; Rogers v. Railway Co., 21 Hun [N. Y.] 44; In re Byrnes, 11 N. Y. S. 113; Alexander v. McDowell's Com'rs, 70 N. C. 208; Duke v. Williamsburg Co., 21 S. C. 419; State v. Whitesides, 30 S. C. 579; State v. Harper, 30 S. C. 586; State v. Neely, 30 S. C. 587; Knapp v. Grant, 27 Wis. 147; Kimball v. Rosendale, 42 Wis. 407; Baker v. Seattle, 2 Wash. St. 576; State v. Winter, 15 Wash. 407.

42. Knox Co. v. Aspinwall, 21 How. [U. S.] 539, 16 Law. Ed. 208; Mercer County v. Hacket, 68 U. S. 83, 17 Law. Ed. 548; Humboldt Tp. v. Long, 92 U. S. 642, 23 Law. Ed. 752; Marcy v. Oswego Tp., 92 U. S. 638, 23 Law. Ed. 749; Town of Coloma v. Eaves, 92 U. S. 484, 23 Law. Ed. 579.

43. Francis v. Howard Co., 4 C. C. A. 460.

44. Dixon County v. Field, 111 U. S. 83, 28 Law. Ed. 360; Sutliff v. Board of Com'rs, 147 U. S. 230, 37 Law. Ed. 147; Geer v. School Dist. No. 11, 38 C. C. A. 392.

45. Board of Com'rs v. Sutliff, 38 C. C. A. 167; Gunnison County v. Rollins, 173 U. S. 256, 43 Law. Ed. 691.

46. Hopper v. Covington, 118 U. S. 148, 118 Law. Ed. 190; Katzenberger v. Aberdeen, 121 U. S. 177, 30 Law. Ed. 913.

47. Barnet v. Denison, 145 U. S. 135, 36 Law. Ed. 652. It is certainly a reasonable requirement that the bonds issued shall express upon their face the purpose for which they were issued. In any event it was a requirement of which the purchaser was bound to take notice, and if it appeared upon their face that they were issued for an illegal purpose, they would be void. If they were issued without any purpose appearing at all upon their face, the purchaser took the risk of their being issued for an illegal purpose, and, if that proved to be the case, they are as void in his hands as if he had received them with express notice of their illegality.

48. Hackett v. Ottawa, 99 U. S. 86, 25 Law. Ed. 363; Village of Kent v. Dana, 40 C. C. A. 281; Ottawa v. National Bank, 105 U. S. 342, 26 Law. Ed. 1127; Evansville v. Dennett, 161 U. S. 434, 40 Law. Ed. 760.

49. Hackett v. Ottawa, 99 U. S. 86, 25 Law. Ed. 363; Ottawa v. National Bank, 105 U. S. 342, 26 Law. Ed. 1127; City of Cadillac v. Woonsocket Inst. for Savings [C. C. A.] 58 F. 935; Risley v. Howell [C. C. A.] 64 F. 453.

MUNICIPAL CORPORATIONS.

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Scope of title. This article is designed to treat, as strictly as may be proper, the law of municipalities as distinguished from that of streets and other public ways,[50] parks and public grounds,[51] bridges,[52] public utilities, works and improvements,[53] health and sanitation,[54] buildings and injuries therein and building regulations,[55] the local taxing power,[56] licenses and licensing,[57] the granting of franchises,[58] and the law of public officers generally.[59] The particular applications of the general law of municipalities to these several subjects should be sought in the titles just cited. There also will be discussed cases under laws and regulations peculiar to streets and the like. The body of laws relating to each of these largely involves powers and duties of counties, towns, and of the public generally, as well as powers of municipalities. All this has been brought together into those respective titles relating to the subject-matter of such powers and duties.

50. Highways and Streets, 3 Curr. L. 1593.
51. See Parks and Public Grounds, 4 Curr. L. ——.
52. Bridges, 3 Curr. L. 529.
53. Public Works and Improvements, 2 Curr. L. 1328; Sewers and Drains, 2 Curr. L. 1628; Waters and Water Supply, 2 Curr. L. 2034.
54. Health, 3 Curr. L. 1590.
55. Buildings and Building Restrictions, 3 Curr. L. 572.
56. Taxes, 2 Curr. L. 1786.
57. Licenses, 4 Curr. L. 428.
58. Franchises, 3 Curr. L. 1495. Compare titles treating of various sorts of franchised public service.
59. Officers and Public Employes, 2 Curr. L. 1069.

§ 1. *Nature, attributes and elements.*[60]—The term municipal is appropriately applied to all corporations exercising governmental functions, either general or special.[61]

A municipal corporation, although a political division of the state, possesses two separate and distinct powers, one of which may be termed governmental or public,[62] and the other private, corporate or ministerial.[63] In the exercise of the first of these powers, the city or village is invested with delegated powers of sovereignty,[64] while in the second instance it occupies the same relation to the individual that any corporate body does.[65]

Name.[66]

§ 2. *Creation and corporate existence. A. Creation and organization.*[67]—The creation, definition of boundaries and dissolution of municipal corporations, and the powers to be exercised by them are subject to the legislative control of the state creating them.[68] They may be created by special enactment of the legislature;[69] but in most states the power to pass special acts of incorporation has been greatly restricted, or altogether abolished.[70] Under some laws incorporation may also be by an order of court.[71] Such an order having the full force and effect of a judgment,[72] and not being open to collateral attack.[73]

Incorporation is consummated by acceptance, usually signified by election,[74] or petition,[75] by the prescribed number of voters,[76] upon proper notice.[77]

60. See 2 Curr. L. 941.

61. An irrigation district is a municipal corporation. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937. But delimiting a specified district and creating a board to relieve certain natural streams from pollution detrimental to the health of the neighboring population does not create a municipality. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

62. Williams v. Port Chester, 97 App. Div. 84, 89 N. Y. S. 671; Veraguth v. Denver [Colo. App.] 76 P. 539; Hourigan v. Norwich [Conn.] 59 A. 487.

Governmental functions: Extinguishment of fires and providing apparatus therefor. Aschoff v. Evansville [Ind. App.] 72 N. E. 279. Imposing license taxes. City of Birmingham v. Birmingham Waterworks Co., 139 Ala. 531, 36 So. 614. Determination of street grades. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168. Control and management of parks. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. Lighting of streets, parks and public buildings. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531.

63. Private or corporate powers: Management and operation of electric light plant. City of Henderson v. Young [Ky.] 83 S. W. 583. Construction or maintenance of sewers and drains. Aschoff v. Evansville [Ind. App.] 72 N. E. 279.

64. Williams v. Port Chester, 97 App. Div. 84, 89 N. Y. S. 671. But as to this see discussion in Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. This class of powers must be strictly construed. City of Henderson v. Young [Ky.] 83 S. W. 583.

65. Upon this distinction rests the liability of municipalities in the state of New York for injuries from defective highways. Williams v. Port Chester, 97 App. Div. 84, 89 N. Y. S. 671.

66. See 2 Curr. L. 941, n. 13.

67. See 2 Curr. L. 941.

68. Pepin Tp. v. Sage [C. C. A.] 129 F. 657. Placing in the hands of the governor of the state the power to pass on the right to incorporate cities and towns is not repugnant to the Mississippi constitution as submitting to the discretion of the executive questions which properly belong to the legislative department. City of Jackson v. Whiting [Miss.] 36 So. 611.

69. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. Chapter 366, Acts 1903 of Tennessee, relating to the local government of Memphis, was not repealed by chapter 258, Acts 1903, which is a general act. Goodbar v. Memphis [Tenn.] 81 S. W. 1061.

70. Sheehan v. Scott [Cal.] 79 P. 350. See 2 Curr. L. 941, n. 15. Since constitutions as well as statutes are construed to act prospectively. The Virginia amendment forbidding incorporation by special act held not to apply to cities already incorporated. Arey v. Lindsey [Va.] 43 S. E. 889. City existing by virtue of special law not affected by a constitutional provision thereafter adopted that all cities must operate under general laws. Ex parte Helm, 143 Cal. 553, 77 P. 453.

71. State v. Huff, 105 Mo. App. 354, 79 S. W. 1010.

72. State v. Huff, 105 Mo. App. 354, 79 S. W. 1010. See 2 Curr. L. 942, n. 23.

73. State v. Huff, 105 Mo. App. 354, 79 S. W. 1010.

74. In Tennessee since the passage of the act of 1897, p. 139, c. 16, elections to incorporate towns must be held by the commissioners of registration and not by the sheriff of the county. Gotten v. Gowen [Tenn.] 80 S. W. 1087. Under the California constitution, an order of a board of supervisors defining the boundaries of a proposed town and providing for an election therein

While an appellate court may not take judicial notice of the fact that a city was incorporated under a designated act, yet it may look to the act in order to support a judgment of mandamus against the city.[78]

(§ 2) *B. Consolidation, succession, and dissolution.*[79]—The legislature has plenary power over the dissolution and consolidation of municipalities,[80] though their subsisting obligations be impaired.[81] Upon the dismemberment, dissolution, or consolidation of municipal corporations, it is for the legislature to apportion their obligations[82] and assets, the proceedings of commissioners appointed for that purpose being subject to review by the courts.[83] The surrender of a city charter and the incorporation under a general law do not destroy the right of a city to collect taxes and other debts due it under the old charter, nor prevent the enforcement of debts due by the city.[84] In the absence of a statute, the courts, on the grounds of public policy, will refuse to annul the charter of a municipal corporation which has stood unchallenged for a period of ten or fifteen years, when the municipality has acquired property and assumed jurisdiction over the streets and alleys of the city.[85] A consolidation does not become effective under a law if some act as a proclamation remains to be done.[86]

(§ 2) *C. Classes and classification.*[87]—For the purposes of legislation municipalities may be classified, and, if the classification be proper, laws may be passed affecting only a single class.[88] The fact that at the time of a particular enactment

may be rescinded by the board at any time before the election has been held. Vernon v. San Bernardino County Sup'rs, 142 Cal. 513, 76 P. 253.

75. State v. Oakland [Kan.] 77 P. 694. See 2 Curr. L. 941, n. 17. Where the petition must state the population "as nearly as may be" an allegation that it states the population "as nearly as the same can be stated by your petitioners" is sufficient. Borchard v. Ventura County Sup'rs, 144 Cal. 10, 77 P. 708.

76. It is essential that there be a sufficient number of signers having the requisite qualifications, else the petition is ineffectual to inaugurate the proceedings, and forms no valid basis for any subsequent step. West End v. State [Ala.] 36 So. 423.

77. See 2 Curr. L. 941, n. 18. A statute providing for the posting of "printed" notices of the presentation of a petition for incorporation is met by posting typewritten notices. State v. Oakland [Kan.] 77 P. 694. And where the notice must be either by publication or by posting, it is sufficient, where the notice is given both ways, if it is properly given either way. Borchard v. Board of Sup'rs of Ventura County Sup'rs, 144 Cal. 10, 77 P. 708.

78. Territory v. Socorre [N. M.] 76 P. 283.

79. See 2 Curr. L. 942.

80. The Arkansas statute permitting the consolidation of municipalities within one mile of each other sustained [Acts 1903, p. 148]. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

81. Note: The dissolution of a municipal corporation by legislative action has been held valid, though contracts be thereby impaired. Merlwether v. Garrett, 102 U. S. 472, 26 Law. Ed. 197. This result has led to question and criticism. Ex parte Folsom, 131 F. 496. But no such criticism of the rule applies where one is changed into another corporate existence. Mobile v. Watson, 116 U. S. 289, 29 Law. Ed. 620. From note to 4 Columbia L. R. 596.

82. Carpenter v. Central Covington [Ky.] 81 S. W. 919; City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785; Pepin Tp. v. Sage [C. C. A.] 129 F. 657; City Council of Denver v. Adams County Com'rs [Colo.] 77 P. 858. But in the absence of such legislation, the municipal corporations receiving the territory of the one dissolved will be severally liable for its then subsisting legal debts in the proportion that the taxable property within it falls within them respectively. Pepin Tp. v. Sage [C. C. A.] 129 F. 657. And the power of taxation to be exercised to pay such debts will extend to all the taxable property within their respective jurisdictions, and will not be restricted to the property and persons within the territory annexed. Id. Under the scheme of the Greater New York charter the liability of that city for debts of constituent municipalities is only the same as the liability of such municipalities would have been but for the consolidation. Kahrs v. New York, 90 N. Y. S. 793.

83. Washington Tp. v. Etna [N. J. Law] 58 A. 1086.

84. Milster v. Spartanburg, 68 S. C. 26, 46 S. E. 539.

85. State v. Huff, 105 Mo. App. 354, 79 S. W. 1010.

86. The town of Argo did not become merged in the city and county of Denver until the first day of December, 1902, the day the proclamation was issued. Boston & C. Smelting Co. v. Elder [Colo. App.] 77 P. 258.

87. See 2 Curr. L. 943.

88. Such laws will be general and uniform in their operation within the meaning of constitutional provisions. Gentsch v. State [Ohio] 72 N. E. 900. Empowering cities and towns within one mile of each other to

applicable thereto there is only one member of the class does not militate against the validity of the legislation.[89] But an act which is limited to those cities which were within the class at the time of its passage, and which is not applicable to those which may thereafter come into the class, is unconstitutional.[90]

(§ 2) *D. Remonstrances; quo warranto.*[91]—The organization and existence of a municipal corporation cannot be challenged except in a direct proceeding at the instance of the state,[92] and for this purpose quo warranto is the appropriate remedy.[93] While the municipality is a necessary party,[94] an information will not lie against it in its corporate name.[95] The inhabitants of the town need not be joined.[96]

§ 3. *The charter; adoption, amendment, repeal and abrogation.*[97]—The charter of a municipality is its constitution.[98] A general incorporation act is the charter of all municipalities organized under it,[99] and any attempt to amend the organic law can only result successfully by a strict compliance with the law governing the subject.[1] A statute repealing the laws under which the charter of a municipality was obtained does not repeal the charters themselves.[2] The constitutions of some states, notably California and Minnesota, provide that cities of a given class may frame their own charters, subject to the constitution and general laws of the state.[3] Such a provision forbids only the adoption of charter provisions contrary to the public policy of the state as declared by general laws, or to its Penal Code,[4] and does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may

consolidate is proper classification, and does not violate constitutional prohibition against incorporation by special enactment. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

Population is a proper basis of classification. State v. Policemen's Pension Fund Trustees [Wis.] 98 N. W. 954; State v. Tower [Mo.] 84 S. W. 10; L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399. Where cities of over 10,000 inhabitants have power to raise taxes, a taxpayer, in a suit to recover such taxes, cannot raise the question whether the city has 10,000 inhabitants. City of Tyler v. Tyler Bldg. & Loan Ass'n [Tex.] 81 S. W. 2.

The essentials of a constitutional classification are stated to be these: (1) All classification must be based upon substantial distinctions which make one class really different from another; (2) the classification adopted must be germane to the purpose of the law; (3) the classification must not be based upon existing circumstances only; it must not be so constituted as to preclude addition to the numbers included within a class; (4) to whatever class a law may belong it must apply equally to each member thereof. To which may be added a fifth rule, that the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation. State v. Policemen's Pension Fund Trustees [Wis.] 98 N. W. 954. See, also, Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

89. State v. Policemen's Pension Fund Trustees [Wis.] 98 N. W. 954; City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785; Hager v. Gast [Ky.] 84 S. W. 556.

90. In re Fagan, 70 N. J. Law, 341, 57 A. 469.

91. See 2 Curr. L. 943.

92. Agner v. Com. [Va.] 48 S. E. 493; City of Topeka v. Dwyer [Kan.] 78 P. 417.

93. West End v. State [Ala.] 36 So. 423. See 2 Curr. L. 943, n. 45.

94. Where the sole purpose of a quo warranto proceeding to oust from office the mayor and aldermen of a city is to test the validity of the city's incorporation, the city is a necessary party, it being the real party in interest. State v. Huff, 105 Mo. App. 354, 79 S. W. 1010.

95. To sue the city in its name is to admit its existence. The suit must be against the persons who assume to act in a corporate capacity. State v. South Park, 34 Wash. 162, 75 P. 636.

96. West End v. State [Ala.] 36 So. 423.

97. See 2 Curr. L. 943.

98. Dollar Sav. Bank v. Ridge, 183 Mo. 506, 82 S. W. 56.

99. Amendatory acts become a part of such charters. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399.

1. Dollar Sav. Bank v. Ridge, 183 Mo. 506, 82 S. W. 56.

2. State v. Huff, 105 Mo. App. 354, 79 S. W. 1010.

3. Grant v. Berrisford [Minn.] 101 N. W. 940. Under a constitutional requirement that a freeholder's charter must be submitted to the voters at a general or a special election and receive an affirmative vote of two-thirds of the voters thereat, a two-thirds majority of the voters voting **on the charter** is not sufficient. City of Santa Rosa v. Bower, 142 Cal. 299, 75 P. 829.

4. Grant v. Berrisford [Minn.] 101 N. W. 940.

differ in details from those of existing general laws.[5] The California constitution provides that a city charter may be amended at intervals of not less than two years by proposals therefor submitted by the legislative authority of the city at a general or special election. Under this provision it is discretionary with the city's legislature to call a special election on petition for submission of amendments, or to wait until the next general election,[6] and charter amendments need not be concurred in by the mayor, or presented to him for approval, as prerequisites to their submission to the electors.[7]

Judicial notice is taken of municipal charters.[8]

§ 4. *The territory. Annexations and severances; wards and divisions.*[9]—The legislature having power to change the boundaries of a municipal corporation,[10] may impose conditions,[11] and determine the rights and liabilities of the respective jurisdictions,[12] and the power to fix territorial limits may be delegated.[13] Real estate situate in disconnected territory is no longer subject to taxation by the municipality.[14]

The propriety of annexation is often reposed wholly or partly in discretion.[15] Whether a city is entitled to annex unincorporated adjacent territory pursuant to an ordinance passed to that end, or whether the inhabitants of the territory are entitled to incorporate as a town, pursuant to procedure to accomplish incorporation, depends on the priority of the initial step taken by the respective sides.[16]

The procedure.[17]—In Nebraska a judgment of a court in a proceeding to detach territory from a municipal corporation will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law.[18]

Division into wards.[19]

Plats.[20]—A regulation that no plat of any addition shall be approved when any part of the land is subject to liens for city taxes is not unreasonable.[21] Where an act creating a village refers to a map thereof, shown to have been the only map in existence, and incorporates the village according to such map, the village agreeing to the same, all owning property in such village are bound thereby.[22] A statute

5. The subject of city contracts for public improvements and bonds to secure performance of them and the payment of laborers and materialmen is such an one. Grant v. Berrisford [Minn.] 101 N. W. 940.

6. Const. art. 12, § 8. Lubliner v. Board of Sup'rs of San Francisco [Cal.] 78 P. 722.

7. Harrison v. Roberts [Cal.] 78 P. 537.

8. City of Poplar Bluff v. Hill, 92 Mo. App. 417.

9. See 2 Curr. L. 944.

10. Laws 1895, p. 1314, c. 617, extending the boundary of Rochester, is valid. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518.

11. It may make it a condition upon which the law shall take effect that the people or the council representing them shall assent to the proposed change. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

12. Pepin Tp. v. Sage [C. C. A.] 129 F. 657; Kahrs v. New York, 90 N. Y. S. 793; City Council of Denver v. Adams County Com'rs [Colo.] 77 P. 858. Under a statute that a town annexing another shall be bound for all the debts of the annexed town, a town annexing unincorporated territory assumes no obligation. Carpenter v. Central Covington [Ky.] 81 S. W. 919. The fact that a city from which territory has been detached is left to pay all debts previously incurred does not affect the validity of an act detaching a portion of such city. City of Little Rock v. Town of North Little Rock [Ark.] 79 S. W. 785.

13. See 2 Curr. L. 944, n. 71. A city council may by general law be required upon petition of voters to submit a proposition extending or restricting boundaries. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785. The decision of a common council refusing a petition for the curtailment of the territorial limits is presumptively correct, and should not be overruled by the court unless it is clearly shown that no injustice would be done to remaining portion of city. Qualey v. Brookings [S. D.] 101 N. W. 713.

14. Gillmor v. Dale, 27 Utah, 372, 75 P. 932.

15. See 2 Curr. L. 945.

16. City of Jackson v. Whiting [Miss.] 36 So. 611.

17. See 2 Curr. L. 945.

18. Michaelson v. Tilden [Neb.] 101 N. W. 1026.

19, 20. See 2 Curr. L. 945.

21. Hillman v. Seattle, 33 Wash. 14, 73 P. 791. See 2 Curr. L. 945, n. 93.

22. Wright v. Oberlin, 23 Ohio Circ. R. 509.

imposing a penalty for selling lots without first having a plat of the town or subdivision recorded should be construed to apply only to towns thereafter incorporated.[23]

§ 5. *Officers and employes. A. In general.*[24]—The municipal officers are those prescribed by charter, statute, or ordinance pursuant to statute, all subject to the constitution.[25] One may, however, be an officer de facto, notwithstanding the unconstitutionality of the statute under which he has been appointed.[26] That a commissioner of public works was without a sufficient engineering force did not justify his assumption of power to employ additional assistants.[27]

Who are city officers.[28]—Local boards having corporate attributes are separate corporations, and not officers of a city.[29] A policeman is an agent of the state for some purposes, but when required to enforce an ordinance of the city, is an agent of the city.[30] A street sweeper is not an officer whose salary is an incident to his office.[31]

(§ 5) *B. Election or appointment.*[32]—The manner of choosing officers is within the legislative province,[33] unless prescribed by the constitution.[34] The affirmative vote of a majority of a quorum is sufficient to elect.[35] But a blank ballot cannot be considered in summing up a total vote, a majority of which a candidate must receive to be elected.[36] Where the provisions of a city code contain authority for the election of a police captain, the adoption of an ordinance is an unnecessary formality.[37]

Though a bond be required, failure to file his bond within the specified time does not deprive an officer of his right to the office.[38] The bond of a municipal officer is a valid obligation as against the official and his surety, notwithstanding that it is not approved by the mayor or city attorney.[39]

(§ 5) *C. Term of office or employment. Abolishment of position.*[40]—When not within any constitutional prohibition,[41] the legislature may at will abolish, limit or extend the term of any municipal office created by it.[42] An administrative

23. Welborn v. Muller [Miss.] 36 So. 544.

24. Consult the general law in topic Officers and Public Employes, 2 Curr. L. 1069.

25. See 2 Curr. L. 949.

26. Watson v. McGrath [La.] 36 So. 204.

27. Drumheller v. Mt. Vernon, 93 App. Div. 596, 88 N. Y. S. 536.

28. See 2 Curr. L. 948.

29. The Detroit board of education is of legislative creation, performing state functions, and therefore not liable, in the absence of statute, for the acts of its agents or servants. Whitehead v. Board of Education [Mich.] 11 Det. Leg. N. 923. The trustees of the Carnegie Library of Atlanta, some of whom were selected by the mayor and council of Atlanta, and others by the library association, held not to be authorized agents of the city empowered to contract for a library building. Miles v. Atlanta, 120 Ga. 972, 48 S. E. 355.

30. Kittredge v. Cincinnati, 2 Ohio N. P. (N. S.) 6.

31. Downs v. New York, 173 N. Y. 651, 66 N. E. 1107, afg. 75 App. Div. 423, 78 N. Y. S. 442.

32. See 2 Curr. L. 948.

33. See 2 Curr. L. 948, n. 42. A city of the third class in Missouri may appoint a city engineer. Weesner v. Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

34. See 2 Curr. L. 948, n. 43. Under the Texas constitution the governor does not have authority, even though authorized by the legislature, to appoint purely local officers. Ex parte Levine [Tex. Cr. App.] 81 S. W. 1206. In Nebraska the legislature may, by statute, confer upon the governor the power to appoint the board of fire and police commissioners for cities of the first class. State v. Nolan [Neb.] 98 N. W. 657.

35. In re Brearton, 44 Misc. 247, 89 N. Y. S. 893.

36. Murdoch v. Strange [Md.] 57 A. 628.

37. A resolution is sufficient. Huey v. Jones, 140 Ala. 479, 37 So. 193. See 2 Curr. L. 951, n. 78.

38. Failure to file because of pending judicial decision. Murdoch v. Strange [Md.] 57 A. 628. See 2 Curr. L. 950, n. 66.

39. City of Oakland v. Snow [Cal.] 78 P. 1060.

40. See 2 Curr. L. 951.

41. Under the Texas constitution, limiting the terms of all officers not otherwise fixed to two years, a policeman holds for that term subject to removal for cause. City of Houston v. Estes [Tex. Civ. App.] 79 S. W. 848.

42. Reduction of term on grant of new charter. Attorney General v. Shekell [Mich.] 101 N. W. 525. See, also, State v. Board of Trustees of Policemen's Pension Fund [Wis.] 98 N. W. 954.

department created by ordinance could not survive as a bureau entrusted with like duties created by an amended charter which abolished the department.[43] The term of office is not limited to the term of the appointing power.[44] The tender and acceptance of an unqualified resignation terminates the term of office.[45]

(§ 5) *D. Vacancies and hold-overs.*[46]

(§ 5) *E. Transfers on amendment or adoption of new charter.*[47]—On the adoption of the charter of Greater New York, the office of water registrar of the former city of Brooklyn was abolished;[48] but a teacher in the schools of Brooklyn was continued in the same position when the city in question became a part of the city of New York, until removed for cause.[49] Under a statute changing the composition of common councils of cities of a given class, the council in existence at the passage of the act continued until the election of its succeeding members.[50]

(§ 5) *F. Removal, reductions and reinstatement.*[51]—The power to remove municipal officers is statutory.[52] As a rule ministerial agents or officers employed durante bene placito are removable at will.[53] But if the removal be for cause the act of removal is judicial,[54] and the person involved is entitled to a hearing.[55] Removal by police commissioner, the proofs having been taken before his deputy, is irregular.[56] Incompetency,[57] neglect of duty,[58] or misconduct,[59] are sufficient grounds for removal. Where a reclassification involves a quasi-judicial determination, mandamus will not lie to compel it.[60] A suspension being made after the term of office expired by limitation, it is immaterial that the suspension was not in accordance with city charter.[61] In Kentucky, peace officers being an arm of the state cannot be suspended a given number of days in each month in order to keep within an appropriation.[62]

Reinstatement.[63]—A relator is not entitled to reinstatement because of error in the notice of his suspension, his rights having been preserved in a communication

43. Inspection of buildings. Cutshaw v. Denver [Colo. App.] 75 P. 22.

44. Supervising architect. Withers v. New York, 92 App. Div. 147, 86 N. Y. S. 1105.

45. A subsequent withdrawal of the resignation, though with consent, does not operate to reinstate the officer. State v. Grace [Tenn.] 82 S. W. 485. And provisions that an officer shall hold until his successor is selected and qualified do not prevent such resignation from becoming effective. Id.

46, 47. See 2 Curr. L. 952.

48. People v. Oakley, 93 App. Div. 535, 87 N. Y. S. 856.

49. By force of Laws 1897, pp. 403, 404, c. 378, §§ 1114, 1117. Bogert v. Board of Education, 44 Misc. 10, 89 N. Y. S. 737.

50. Hilgert v. Barber Asphalt Pav. Co. [Mo. App.] 81 S. W. 496.

51. See 2 Curr. L. 952.

52. See 2 Curr. L. 952, n. 2. The legislature may grant to a city council the right to remove any city officer, whether elected or appointed. Christy v. Kingfisher [Okl.] 76 P. 135. Where sewer commissioners have authority in general terms to appoint a supervising engineer, the power of removal exists unless restrained by some provision of law. Mack v. New York, 82 App. Div. 637, 80 N. Y. S. 1139, afg. without opinion 37 Misc. 371, 75 N. Y. S. 809.

53. Carling v. Jersey City [N. J. Law] 58 A. 395. City assessor in cities of the third class in Kentucky may be removed at pleasure. Rogers v. Congleton [Ky.] 84 S. W. 521.

54. It is the manner in which the officer's removal is accomplished, and not the nature of his right, which establishes the character of the act. Christy v. Kingfisher [Okl.] 76 P. 135. The determination of the removing officer or board, when judicial, will not be controlled by mandamus. Riggins v. Richards [Tex. Civ. App.] 79 S. W. 84.

55. Christy v. Kingfisher [Okl.] 76 P. 135. Discharge from police force without opportunity to be heard. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816.

56. People v. Partridge, 93 App. Div. 473, 87 N. Y. S. 680.

57. See 2 Curr. L. 953, n. 8.

58. See 2 Curr. L. 953, n. 9. A member of New York police force absent without leave for five consecutive days ceases to be such and is not entitled either to trial or notice of dismissal. People v. York, 174 N. Y. 610, 66 N. E. 1114, afg. without written opinion 73 App. Div. 445, 77 N. Y. S. 43.

59. Inexcusable refusal of a mayor to issue or sign check for payment of official's salary is such misconduct as will authorize his removal under a statute providing for removal for misconduct. Riggins v. Richards [Tex. Civ. App.] 79 S. W. 84.

60. Dill v. Wheeler, 91 N. Y. S. 686.

61. City of Houston v. Albers [Tex. Civ. App.] 73 S. W. 1084.

62. City of Louisville v. Corley, 25 Ky. L. R. 2174, 80 S. W. 203.

63. See 2 Curr. L. 955.

to the civil service commission in pursuance of which he was appointed to the first vacancy thereafter occurring.[64]

(§ 5) *G. Compensation.*[65]—A municipality being an arm of the state, its officers derive their compensation by virtue of law and not contract.[66] Unless restrained by constitutional provisions,[67] the power authorized to fix the compensation[68] may, even during the term of an incumbent,[69] alter or amend his future compensation.[70] Salaries of mere employes are subject to reductions,[71] but where an officer has been unlawfully discharged and reinstated, he is entitled to his salary during the interim.[72] Where the offices of auditor and assessor were combined, the declaration of the incumbent that he intended to claim commissions on the sums collected as assessor did not confer on him a right thereto,[73] nor did the fact that he previously retained such commissions,[74] nor that some of the city officials had approved of his act or consented thereto,[75] nor the fact that it was a matter of common notoriety.[76] Additional compensation for unanticipated or extraonerous services may be granted.[77] Whether an architect's compensation was fixed at 5 per cent. of the estimated cost of the building was a question for the jury.[78] One who by mandamus has compelled the payment of the principal of his salary cannot thereafter recover the interest thereon.[79] Under the Greater New York charter an action to recover a teacher's salary was properly against the board of education and not against the city.[80] It is against public policy to subject the salaries of public officers and employes to garnishee or trustee process.[81]

(§ 5) *H. Pensions and reliefs.*[82]—In some municipalities policemen and firemen may, after expiration of their term, or when incapacitated from injuries received in the service, be retired on a pension,[83] or assigned to nonactive duties;[84] in some instances the pension extends to the benefit of the widow.[85] To entitle

64. People v. Monroe, 90 N. Y. S. 907.

65. See 2 Curr. L. 955.

66. City of Louisville v. Gorley, 25 Ky. L. R. 2174, 80 S. W. 203.

67. Laws 1894, p. 1141, c. 543, making the city of New York liable for the unpaid salary of a de jure officer, is unconstitutional. Stemmler v. New York [N. Y.] 72 N. E. 581.

68. Salaries of inspector and assistant inspector of Brooklyn fire department are fixed by board of estimate and not by fire commissioners. Flynn v. New York, 174 N. Y. 521, 66 N. E. 1109, afg. without written opinion 69 App. Div. 433, 75 N. Y. S. 15. Likewise salaries of uniformed members of the department. People v. Scannell, 171 N. Y. 690, 64 N. E. 1124, afg. without opinion 71 App. Div. 491, 75 N. Y. S. 904.

69. Where a city ordinance increasing the salary of an official was passed after the election of the official, but before his qualification, the increase was not during the term of office. Riggins v. Richards [Tex. Civ. App.] 79 S. W. 84.

70. No vested right to salary. State v. Policemen's Pension Fund Trustees [Wis.] 98 N. W. 954. The compensation of officers or agents employed durante bene placito may, with the consent of such officer, be lawfully altered or changed at any time. Carling v. Jersey City [N. J. Law] 58 A. 395.

71. See 2 Curr. L. 957, n. 58. Where the reduction of a salary rested with a deputy commissioner, the fact that the commissioner directed the reduction is immaterial, the act being that of the deputy. Hartmann v. New York, 44 Misc. 272, 89 N. Y. S. 912.

72. City of Houston v. Estes [Tex. Civ. App.] 79 S. W. 848; City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. The provision the New York law (Laws 1904, p. 1513, c. 637), that where a veteran has been unlawfully removed and restored his compensation shall date as though no removal had been made, is constitutional. People v. Grout, 44 Misc. 526, 90 N. Y. S. 122.

73, 74, 75, 76. City of Oakland v. Snow [Cal.] 78 P. 1060.

77. Congdon v. Nashua, 72 N. H. 468, 57 A. 686.

78. Withers v. New York, 92 App. Div. 147, 86 N. Y. S. 1105.

79. Gordon v. Omaha [Neb.] 99 N. W. 242.

80. Gunnison v. Board of Education of New York, 80 App. Div. 480, 81 N. Y. S. 181.

81. But the legislature has power to determine its own policy in this regard. Ruperich v. Baeher, 142 Cal. 190, 75 P. 782.

82. See 2 Curr. L. 957.

83. See 2 Curr. L. 957, n. 62. A policeman by reason of the holding of his office after the passage of an act providing for such a pension does not thereby acquire a vested right to such pension which cannot be affected by subsequent legislative enactment. State v. Policemen's Pension Fund Trustees [Wis.] 98 N. W. 954. Nor does the fact that the act provides for the contribution to the pension fund of a certain sum per month from the officer's salary create such a vested right. Id.

84. See 2 Curr. L. 957, n. 63.

85. State v. Policemen's Pension Fund Trustees [Wis.] 98 N. W. 954.

the beneficiary to recover, decedent must at his death have been a member of the force.[86]

§ 6. *Municipal records and their custody and examination.*[87]—Where it appears that a person claiming office has received a certificate of election or appointment from the proper person, he is entitled to an order for the possession of the books and papers pertaining to that office.[88]

§ 7. *Authority and power of municipality. A. Legislative control.*[89]—Unless specially restricted, a municipal corporation possesses the general powers of a municipality at common law.[90] But the right to have all matters of local concern intrusted to municipal corporations is not inherent.[91] Within constitutional limits,[92] the people of a state, acting through the general legislature, may delegate to municipalities,[93] or to any particular boards thereof,[94] such portions of political power as they may deem expedient, may withhold other powers,[95] and may withdraw or resume the whole or any part of that which has been delegated.[96] But the legislature, while free to grant such powers and impose such duties as it will, may not relieve the municipality of the liability to be sued for a breach of duty,[97] nor may it compel a municipality or its inhabitants by taxation to establish a work of purely local concern.[98] For the preservation of the public health, however, the state may exercise compulsory authority, and may enforce performance of local duties either by employing local officers or through agents of its own appointment.[99] The legislature is powerless to authorize the expenditure of public funds by a municipal subdivision of the state, except for a public purpose.[1]

86. Price v. St. Louis Police Relief Ass'n, 90 Mo. App. 219.

87. See 2 Curr. L. 964. See, also, post, § 8C.

88. A certificate is not essential in every instance; it is only necessary to establish a prima facie title to office. In re Brearton, 44 Misc. 247, 89 N. Y. S. 893.

89. See 2 Curr. L. 946.

90. Under such common law powers it may authorize and pay for special legal services. City of Moorhead v. Murphy [Minn.] 102 N. W. 219.

91. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. The power to impose license taxes is not inherent in municipal corporations, and will never be held to exist unless it has been conferred by the state either in express terms or by necessary implication. Commissioners of Cambridge v. Cambridge Water Co. [Md.] 58 A. 442.

92. The general assembly has no power to create a city court and provide for a direct writ of error therefrom to the supreme court in any municipality other than an incorporated city. White v. State, 121 Ga. 592, 49 S. E. 715. The constitutional prohibition of special legislation is absolute with respect to that which regulates the internal affairs of municipalities. But the word "internal" here means governmentally, and not territorially, internal. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. The general assembly of Louisiana is without authority to choose officers to administer the affairs of the city of New Orleans or to control the appropriation of its revenues. Act No. 37, of 1902, is unconstitutional. Board of Com'rs of Jackson Square v. New Orleans, 112 La. 957, 36 So. 817. The California provisions prohibiting the legislature from creating municipalities by special laws and giving to certain cities the right to frame charters for their own government, which if approved by the legislature shall become the organic act of such cities, withdrew from the senate and assembly the legislative authority of the state with reference to municipal government for such cities until after the proposed charter was prepared for submission, and then limited such authority to the mere approval or rejection of the charter formulated. Sheehan v. Scott [Cal.] 79 P. 350.

93. See 2 Curr. L. 946, n. 1.

94. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. Administration of banks of Mississippi river in city of New Orleans. Board of Com'rs for Port of New Orleans v. New Orleans & S. F. R. Co., 112 La. 1011, 36 So. 837.

95. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

96. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. See 2 Curr. L. 946, n. 3.

97. Williams v. Port Chester, 97 App. Div. 84, 89 N. Y. S. 671.

98. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. But it is within the power of the legislature to create special taxing districts and to charge the cost of local improvements in whole or in part upon the property in said districts by special assessments, either according to valuation, superficial area or frontage. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874; Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955.

99. Construction of trunk sewers by state board. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

1. The reimbursement by the city coun-

Statutes affecting municipal corporations should be general,[2] and when general clauses are followed by special clauses, the latter prevail.[3] One dealing with the officers of a municipality is bound at his peril to take notice of the limitations upon their power and authority.[4]

(§ 7) *B. Express, implied, customary and prescriptive powers.*[5]—Incorporated cities and towns have only the following powers: Those granted in express words;[6] those necessarily implied or incident to the powers expressly granted;[7] those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.[8] Grants of power are strictly construed, so as not to extend them beyond the purpose of the legislature.[9] Yet the construction must not be so strict or technical as to defeat the evident objects and purposes of their creation.[10] While power may be granted to municipal corporations to acquire water[11] or lighting[12] plants for municipal purposes, a city or town has no power to become a stockholder in a waterworks or other corporation, or to borrow money by

cil of a defeated candidate for a public office for expenses incurred in conducting an election contest is an expenditure of public funds for a private purpose and therefore illegal. Castner v. Minneapolis, 92 Minn. 84, 99 N. W. 361.

2. To make the law general it is not necessary that it should operate upon all cities and towns of the state. It is sufficient if it applies to all cities and towns within the class named in the statute. City of Little Rock v. North Little Rock [Ark.] 79 S. W. 785.

3. City of St. Louis v. Kaime & Bro. Real Estate Co., 180 Mo. 309, 79 S. W. 140. See 2 Curr. L. 946, n. 10. Removal of city marshal. Christy v. Kingfisher [Okl.] 76 P. 135. Provisions in a charter as to closing saloons not abrogative of similar provisions of the state law. Moore v. Kelley [Mich.] 98 N. W. 989.

4. Bennett v. Mt. Vernon [Iowa] 100 N. W. 349; Citizens' Bank v. Spencer [Iowa] 101 N. W. 643; Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626.

5. See 2 Curr. L. 946.

6. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208. Fourth class cities in Washington may grant franchises to erect and maintain electric light and power plants. State v. Taylor [Wash.] 79 P. 286. The power of a municipal corporation to grant license for the sale of spirituous liquors within its incorporate limits must be denied from its charter, and unless such power is therein clearly conferred, it does not exist. Walker v. McNelly, 121 Ga. 114, 48 S. E. 718.

7. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208. The power to provide lights for streets, public buildings and places implies the power to erect a plant for the purpose (Fawcett v. Mt. Airy, 134 N. C. 125, 45 S. E. 1029), or to enter into a contract for the purchase of such light. 25-year contract sustained (Davenport Gas & Elec. Co. v. Davenport [Iowa] 98 N. W. 892). Power to establish fire department, and equip and run the same includes power to purchase coal and employ help to transport same. Manske v. Milwaukee [Wis.] 101 N. W. 377. A charter provision that a city may hold and convey real property authorizes the giving a warranty deed. Abbott v. Galveston [Tex.] 79 S. W. 1064.

8. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208; City of St. Louis v. Kaime & Bro. Real Estate Co., 180 Mo. 309, 79 S. W. 140. See 2 Curr. L. 946, n. 7. In Smith v. Hightstown [N. J. Law] 57 A. 901, it is said that the power to license inns and taverns is not one of the necessary powers of boroughs, but that it is ordinarily granted to municipalities of the higher grade.

9. State v. Allen, 183 Mo. 283, 82 S. W. 103. See 2 Curr. L. 946, n. 8. Doubtful claims of power, or any doubt or ambiguity in the terms used by the legislature are resolved against the corporation. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208; City of St. Louis v. Kaime & Bro. Real Estate Co., 180 Mo. 309, 79 S. W. 140.

10. Ordinance submitting proposition to buy an existing plant and for an addition thereto sustained. State v. Allen, 183 Mo. 283, 82 S. W. 103.

11. See 2 Curr. L. 946, n. 4. Any municipal corporation in the Territory of Oklahoma, having a population of not less than 1,000 persons, is authorized, by act of congress to call an election to issue bonds for waterworks. Territory v. Whitehall, 13 Okl. 534, 76 P. 148. That city has power to contract for a water supply and to include in the contract an option to purchase the plant of the water company. Livermore v. Millville [N. J. Law] 59 A. 217.

NOTE. "Establishment and regulation of municipal water supply:" Extensive note 61 L. R. A. 33, and therein see municipal power, pp. 34, 44, 61; bonding and taxation, pp. 49-52; use of highways, p. 76; control of rates, pp. 99-104; rights and duties of municipality, pp. 116-119.

12. Missouri Rev. St. 1899, § 6275, granting power to cities to purchase or erect and maintain electric lighting plants and authorizing the acquisition of property for the purpose by purchase or exercise of the right of eminent domain, is not violative of a constitutional provision against taking private property for public use. State v. Allen, 178 Mo. 555, 77 S. W. 868. An act allowing a municipality to set up a lighting plant, and providing for a commission to adjudicate upon the value of any existing plant which its owners may elect to sell to the city, is not unconstitutional. Norwich Gas & Elec. Co. v. Norwich, 76 Conn. 565, 57 A. 746.

issuing bonds to pay for such stock, unless expressly authorized.[13] In absence of prohibitive charter provisions, a municipality has power to reimburse a police officer for expenses and attorney's fees incurred in the defense of an action for false imprisonment.[14]

Extraterritorial powers.[15]—A municipal court may not try an offender for offense committed outside of the city.[16]

The power to legislate.[17]—The power to legislate upon local matters must be exercised consistently with general laws and fundamental rights.[18]

(§ 7) *C. Delegation of powers.*[19]—Functions or powers involving the exercise of judgment or discretion granted to legislative or administrative bodies cannot be delegated to an individual or committee thereof.[20] Absolute, fixed, and purely ministerial functions, however, may be delegated,[21] and the principle that delegated power may not be delegated is not violated where the delegation is expressly authorized.[22] In cases of the delegation of a public authority to a committee, the authority conferred, if ministerial in character, may be exercised and performed by a majority of the whole number.[23] But if the act to be done requires the exercise of discretion and judgment, the duty cannot be discharged by a majority unless upon notice to the minority and opportunity to be present.[24]

(§ 7) *D. Exercise of powers.*[25]—Where the mode of exercise of an express power is prescribed, it must be followed.[26] If the manner of exercise is not prescribed, the power must be exerted in a manner that will not create a nuisance or cause injury.[27] When a city or village council has acted, the presumption is that it has acted lawfully, and had before it sufficient facts to warrant it in acting.[28]

13. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

14. City of Moorhead v. Murphy [Minn.] 102 N. W. 219.

15. See 2 Curr. L. 946.

16. Selling liquor within two miles of city. Agner v. Com. [Va.] 48 S. E. 493.

17. See 2 Curr. L. 946.

18. See 2 Curr. L. 947. A city in its corporate capacity, without special charter privileges, is not invested, either by statutory provisions or by the exercise of the authority necessarily incident to the discharge of its corporate rights and the performance of its duties, with the power to lay out and construct drains and sewers in such a manner as to impose any legal liability upon the city for a nuisance created thereby. Atwood v. Biddeford [Me.] 58 A. 417.

19. See 2 Curr. L. 947.

20. See 2 Curr. L. 947. But authority to delegate to a board appointed for the purpose a discretion in granting permits or licenses has been sustained. Fischer v. St. Louis, 194 U. S. 361, 48 Law. Ed. 1018; Schefe v. St. Louis, 194 U. S. 373, 48 Law. Ed. 1024. The board of trustees of a city may not by ordinance or otherwise divest itself for any length of time of legislative and discretionary powers vested in it by the general law. Submission of proposed public works to voters. Thompson v. Board of Trustees of Alameda, 144 Cal. 281, 77 P. 951. The purpose for which any municipal indebtedness is to be increased, whether within or above the constitutional limit, is for the municipal authorities to whom the electors have delegated the power to act for them. Major v. Aldan Borough, 209 Pa. 247, 58 A. 496. That city appointed two commissioners and water company a like number, whose determination as to value the city might accept or reject, in exercising an option to purchase the company's water plant, did not amount to a delegation of power. Livermore v. Millville [N. J. Law] 59 A. 217. Matters requiring exercise of discretion are legislative in character and cannot be delegated to under officers. Draper v. Fall River, 185 Mass. 142, 69 N. E. 1068.

21. See 2 Curr. L. 947. The park department of the city of Buffalo may delegate the actual performance of the work of reenforcing and diverting sewers passing through a public square to the department of public works of said city. Locke v. Buffalo, 97 App. Div. 483, 90 N. Y. S. 550. Directing a city engineer to fix the grade of a sewer does not constitute a delegation of power. Rich v. Woods [Ky.] 82 S. W. 578. The power to vacate streets may be delegated to the municipal corporation. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

22. Statute authorizing common council to call upon a court to appoint excise board. Schwarz v. Dover, 70 N. J. Law, 502, 57 A. 394.

23. Kavanaugh v. Wausau, 120 Wis. 611, 98 N. W. 550.

24. The selection and purchase of a horse is such a duty. Kavanaugh v. Wausau, 120 Wis. 611, 98 N. W. 550.

25. See 2 Curr. L. 947.

26. See 2 Curr. L. 947, n. 18.

27. See 2 Curr. L. 947, n. 19. Construction of sewer. Rand Lumber Co. v. Burlington, 122 Iowa, 203, 97 N. W. 1096. Establishing grades. Gallaher v. Jefferson [Iowa] 101 N. W. 124. The court is not permitted to consider whether the determination to grade

(§ 7) *E. Mandatory and directory.*[29]—The rules for determination of this question pertain to the title statutes.[30] Several instances of statutory provisions declared to be mandatory are given in the notes.[31]

(§ 7) *F. Judicial control over exercise of powers.*[32]—The power of the court to restrain city councils depends on the character of the business they are transacting. When they are considering matters of a purely legislative character, the court has no power to restrain them.[33] When their proposed action relates to the ordinary business affairs of the city, they are subject to the control of the court in the same way and to the same extent as other administrative officers or bodies.[34] The general principle that legislative acts within the power of the legislative body to pass are not subject to revision or control by the courts on the ground of inexpediency, injustice or impropriety applies to municipal legislatures as well.[35] But when there is a question of fraud[36] or want of power,[37] or where the power or discretion is being manifestly abused to the injury or oppression of the citizen,[38] the rule has no application.[39] A city council is a unit; it cannot be divided into parts one of which may be restrained as to acts pertaining to it as a whole.[39a] Whether devoting a park to baseball purposes is a reasonable use of the premises, and whether the erection of structures incident to such use would be any reasonable interference with the right of the public to use the park, are questions of fact.[40]

§ 8. *Legislative functions of municipalities and their exercise. A. Nature and extent of legislative power.*[41]—Ordinances which have for their object the car-

any particular street is reasonable or unreasonable, but it does have power to say that the city do the work in a manner to avoid unnecessary injury to private property. Kemp v. Des Moines [Iowa] 101 N. W. 474.

28. This presumption is in the nature of evidence, and until overcome by other evidence it stands as proof of the fact in question. Dalrymple v. State, 5 Ohio C. C. (N. S.) 185.

29. See 2 Curr. L. 947.

30. See Statutes, 2 Curr. L. 1707.

31. See 2 Curr. L. 947, n. 20. Statute authorizing ordinances to prevent animals running at large. Huey v. Waldrop [Ala.] 37 So. 380. Requirement of Rochester charter that warrant for the collection of taxes shall be issued under the hand of the mayor and the seal of the city. City of Rochester v. Bloss, 173 N. Y. 646, 66 N. E. 1105, afg. 77 App. Div. 28, 79 N. Y. S. 236. The provision of the San Francisco charter (art. 16, § 29), that when the supervisors shall determine that the public interest requires the acquisition of any land, the cost of which in addition to other expenses will exceed the revenue provided for in any one year, they must by ordinance submit a proposition to incur a bonded indebtedness for such purpose to the electors at a special election to be held for that purpose, is mandatory. Law v. San Francisco, 144 Cal. 384, 77 P. 1014. Act providing for the publication of ordinances before time of taking effect. Carpenter v. Yeadon Borough, 208 Pa. 396, 57 A. 837.

32. See 2 Curr. L. 947.

33. Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38; Downing v. Des Moines [Iowa] 99 N. W. 1066. The authority of a city to establish the grade of sidewalks is legislative in character, and when exercised within prescribed limits cannot be controlled. Kemp v. Des Moines [Iowa] 101 N. W. 474. Levy of money to meet current expenses. Ward v. Piper [Kan.] 77 P. 699. It is for city authorities to determine to what extent improvements shall be made and the time of making thereof. Destruction of shade trees in construction of grade. Gallaher v. Jefferson [Iowa] 101 N. W. 124. Where the legislature, with the consent of a city, has provided for the erection of a monument in a certain square, the court may not interfere on the ground that the square is not a suitable place. Locke v. Buffalo, 97 App. Div. 483, 90 N. Y. S. 550.

34. The proposed action must be illegal and complainant must bring himself within one of the heads of equitable relief. Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38.

35. Tilly v. Mitchell & Lewis Co. [Wis.] 98 N. W. 969. Action of a city council in denying petition of residents to curtail boundaries is presumptively correct, and should not be controlled by court in absence of showing of great injustice. Qualey v. Brookings [S. D.] 101 N. W. 713.

36. Fraud found not to exist. Carling v. Jersey City [N. J. Law] 58 A. 395.

37. A city council has no right to authorize a private party to bridge over a portion of a street not vacated, leaving merely a tunnel for the passage of vehicles and pedestrians. Tilly v. Mitchell & Lewis Co. [Wis.] 98 N. W. 969.

38. Change in terms of employment. Carling v. Jersey City [N. J. Law] 58 A. 395.

39. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

39a. Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082.

40. Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38.

41. See 2 Curr. L. 957.

rying into effect of the charter powers granted to a city are legislative in character.[42]

Power to legislate having been conferred and the method of its exercise not prescribed, ordinances passed in pursuance thereof must be in harmony with state statutes,[43] and they must be reasonable, or courts will set them aside.[44] This is upon the presumption that the legislature did not intend by the general terms of the statute to authorize the making of such an ordinance.[45] Extraneous facts showing the motives for passing an ordinance cannot be inquired into.[46] In respect to all matters legislative in character, a municipality has power to act only through the medium of an ordinance,[47] whereas all acts that are done in a ministerial capacity and for a temporary purpose may be put in the form of resolutions.[48] The necessity for an improvement may be declared and an order therefor made in the same resolution.[49]

(§ 8) *B. Meetings, votes, rules and procedure.*[50]—When municipal officers or boards are called upon to perform acts requiring discretion or judgment in administering public affairs, they can only act at authorized meetings duly held,[51] and authority to call special sessions does not emanate from ordinance; it springs from charter provision.[52] To convene and transact business a legal quorum must be present,[53] and less than a quorum have no power to adjourn,[54] nor may a presiding officer arbitrarily declare an adjournment.[55] A statutory requirement that

42. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313. The granting of a franchise to use the streets, alleys and public places of a municipality to erect poles for lighting or lay pipes for gas, water or heat, is the exercise of a legislative power. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146. But when the municipality enters into a contract with a party having such franchise to furnish it with such utilities, it exercises a business and not a legislative power. Id. The subject of contractors' bonds, to secure the performance of contracts with a city, and the payment of laborers and materialmen, including the contents of the bonds and conditions and limitations as to their enforcement, is germane to the subject of municipal legislation. Grant v. Berrisford [Minn.] 101 N. W. 940.

43. Under the Kentucky constitution, an ordinance which fixes the penalty for violation thereof at less than that imposed by the state statute is invalid. Penalty for unlawful sale of intoxicating liquor. Kehr v. Com. [Ky.] 83 S. W. 633.

44. Paving ordinance. Chicago Union Traction Co. v. Chicago, 208 Ill. 187, 70 N. E. 234. See 2 Curr. L. 958, n. 73. An ordinance forbidding public meetings on streets without consent of municipal authorities not void for unreasonableness (Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793), nor is an ordinance that no plat of any addition to city shall be approved when any part of the land is subject to lien for taxes (Hillman v. Seattle, 33 Wash. 14, 73 P. 791). But an ordinance requiring that signal to be given to an approaching locomotive engine that street crossing is free from danger must be given by a member of the crew operating such engine is unreasonable. Central R. Co. v. Elizabeth, 70 N. J. Law, 578, 57 A. 404.

45. Weigand v. District of Columbia, 22 App. D. C. 559.

46. Tilly v. Mitchell & Lewis Co. [Wis.] 98 N. W. 969. See 2 Curr. L. 958, n. 82.

47. Taking private property for public use. Martin v. Oskaloosa [Iowa] 99 N. W. 557. Where the provisions of a city code contain authority for the election of a captain of police, the enactment of an additional ordinance is unnecessary. Huey v. Jones, 140 Ala. 479, 37 So. 193.

48. Ordering repair of pavement. Shelby v. Burlington [Iowa] 101 N. W. 101. The granting of the right to use streets and alleys by village authorities otherwise than by ordinance is not illegal. Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146. Appropriations may be made by resolution under the New Jersey statute relating to cities governed by the Act of 1897, p. 46. Fox v. Clark [N. J. Law] 59 A. 224. It is not necessary to the validity of notes given to evidence an existing indebtedness that they should have been authorized by ordinance (City of Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359), and a contract between a city and water company for water supply is valid, though made by resolution instead of ordinance (Ogden City v. Bear Lake & River Waterworks & Irr. Co. [Utah] 76 P. 1069).

49. Pennsylvania Co. v. Cole, 132 F. 668.

50. See 2 Curr. L. 958.

51. Kleimenhagen v. Dixon [Wis.] 100 N. W. 826.

52. Publication of mayor's proclamation calling special session. Dollar Sav. Bank v. Ridge, 183 Mo. 506, 82 S. W. 56. An ordinance unanimously passed at a special meeting of a council is not rendered void by one member being absent and not having been notified of the meeting. Council composed of seven members. State v. Bowers, 4 Ohio C. C. (N. S.) 345.

53. See 2 Curr. L. 958, n. 86.

54. Pennsylvania Co. v. Cole, 132 F. 668.

55. Whether the disorder is so great that

appointments by a council shall be by a viva voce vote is complied with when a nomination is made and each member announces his vote for or against it by his voice.[56] While a city council is not bound by parliamentary law as recognized and applied in the state legislature or in congress,[57] it is nevertheless a legislative body, and its legislative acts, if valid, must be disclosed in a manner consistent with legislative procedure.[58] Where certain of the councilmen leave the chamber, the remainder may reorganize and proceed to business.[59] The fact that a temporary clerk was not sworn does not render proceedings void.[60]

(§ 8) *C. Records and journals.*[61]—Judicial acts of boards which may result in taking for public use private property must be done with due formality and entered of record.[62] The record by presumption of law shows the full proceedings,[63] and parol evidence of the proceedings of a municipal body required to be made matters of record is not admissible to supply, extend, modify or contradict the record.[64]

(§ 8) *D. Titles and ordaining clauses.*[65]—Statutes frequently provide that no ordinance shall contain more than one object which shall be clearly expressed in its title.[66] If a title, when taken by itself, relates to a unified subject or object, it is single in its subject, however much such unified subject is capable of division.[67] Such a provision has been held to be directory merely.[68] An ordinance is not rendered invalid by the fact that an excepting proviso is found in the enact-

the assembly ceases to be a deliberative body, and whether the chairman is unable to preserve order, are questions of fact. Attorney General v. Remick [N. H.] 58 A. 871.

56. In re Brearton, 44 Misc. 247, 89 N. Y. S. 893.

57. The nature and extent of the authority of a mayor as the presiding officer of the council in the absence of rules of procedure adopted by the council and of statutory provisions upon the subject can only be determined by such principles of parliamentary usage as have been generally adopted or preserved in deliberative assemblies. Attorney General v. Remick [N. H.] 58 A. 871.

58, 59, 60. Attorney General v. Remick [N. H.] 58 A. 871.

61. See 2 Curr. L. 959.

62. Kidson v. Bangor [Me.] 58 A. 900. Resolutions of a council ordering the widening of a road do not prove acquisition of title in absence of evidence that any proceedings were taken under the resolution. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608.

63. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608. The record of a vote of a city council appointing an incumbent to office does not import a verity, so as to preclude attack in a proceeding by quo warranto on behalf of another candidate for such office to try the incumbent's title thereto. Daniels v. Newbold [Iowa] 100 N. W. 1119.

64. Kidson v. Bangor [Me.] 58 A. 900; Gove v. Tacoma, 34 Wash. 434, 76 P. 73. If the record of such proceedings shows that a meeting was adjourned to a particular day, parol evidence that it in fact was adjourned to a different day and proceedings then had is inadmissible. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

65. See 2 Curr. L. 959. All above the ordaining clause in the instant case held to be title and not preamble. Silva v. Newport [Ky.] 84 S. W. 741.

66. See 2 Curr. L. 960. An ordinance which provides for supplying a city with heat, light and power, either by means of gas alone, or by means of gas and hot water, or by means of gas and steam, or by means of gas, hot water and steam, provides for three distinct franchises, and violates such a statutory provision. Silva v. Newport [Ky.] 84 S. W. 741.

67. See 2 Curr. L. 959, n. 8. The title to an ordinance, viz.: "An ordinance regulating and licensing liquor dealers within the village of St. Anthony," is sufficient, where the ordinance provides for the payment of a fixed sum for retail liquor dealers only, and prohibits the business of running a restaurant or lunch counter in connection therewith, or in the same room, and also requires the doors to be closed on Sunday, and also prohibits music, singing and dancing in the room occupied as a saloon. Village of St. Anthony v. Brandon [Idaho] 77 P. 322. The introduction into an ordinance limiting the speed of automobiles within certain municipal limits, of a section providing that automobiles must be provided with lamps and horns, is germane to the subject of the ordinance, and not in contravention of § 1694, Rev. St. Chittenden v. Columbus, 5 Ohio C. C. (N. S.) 84. Title of an ordinance being "the extension of a certain street railway" violates Rev. St. § 1964, where provision is made for the repeal of a portion of one ordinance, the renewal of a portion of another, and the amendment of a third. Belle v. Glenville, etc., R. Co., 5 Ohio C. C. (N. S.) 461.

68. Law v. City and County of San Francisco, 144 Cal. 384, 77 P. 1014. But see **to the contrary,** 2 Curr. L. 960, n. 12.

ing clause, or in some other clause, or that the offense is defined in one section and the proviso making the exception is found in another.[69]

(§ 8) *E. Passage, adoption, amendment, and repeal of ordinances and resolutions.*[70]—An ordinance may be taken up on its third reading and passed at a special meeting, though not specially mentioned in the call for the special meeting.[71] The reading of an ordinance by its title, where the title does not express the object, is not a compliance with a statute requiring the ordinance to be read three times before its passage.[72] Two or more ordinances may be voted on at the same time.[73] In the absence of any statutory or charter restriction, a majority of a quorum is sufficient for the adoption or passage of any resolution or order.[74] On an issue as to whether an ordinance was properly passed, parol evidence by a member of the council is admissible to show the actual vote by which it passed.[75] The approval or signature of the mayor is generally essential,[76] but where there is no charter provision granting him any veto or equivalent power, none can be accorded him by the courts.[77] The signing or attesting of an ordinance by the city auditor is not essential to its validity, the charter not requiring it.[78]

Publication.[79]—An act providing for the publication of ordinances before they shall take effect is mandatory.[80] But failure to publish an ordinance providing for an improvement for the required time after it became effective will not invalidate the assessment for the improvement in the absence of a showing that some property owner was thereby prejudiced.[81] Courts will not by mandamus compel a borough to publish an ordinance containing a contract by the borough with an individual so as to complete the contract.[82] Publication is presumed after the lapse of many years.[83]

Amendment, suspension, and repeal.[84]—An ordinance cannot be repealed save through the medium of a subsequent ordinance providing therefor in terms or by necessary implication.[85] One is not rendered amendatory by the fact that it contains a reference to a prior ordinance.[86] A resolution suspending during a

69. Bramley v. Euclid, 2 Ohio N. P. (N. S.) 508.

70. See 2 Curr. L. 960.

71. National Life Ins. Co. v. Omaha [Neb.] 102 N. W. 73.

72. Bill Posting Sign Co. v. Atlantic City [N. J. Law] 58 A. 342.

73. City of Louisville v. Gast [Ky.] 81 S. W. 693.

74. Thurston v. Huston, 123 Iowa, 157, 98 N. W. 637. See 2 Curr. L. 960, n. 16. Where a statute requires the "unanimous vote of all the members of the council" to pass an ordinance, it is not satisfied by the unanimous vote of a quorum, or even of all the members present. Crickenberger v. Westfield [N. J. Law] 58 A. 1097.

75. Gove v. Tacoma, 34 Wash. 434, 76 P. 73.

76. See 2 Curr. L. 960, n. 18. Whether the signature of the mayor is indispensable to the validity of a municipal ordinance, and whether such signature may be affixed as well at one time as at another, depend upon the language of the charter under which he exercises his functions. Town of New Iberia v. Moss Hotel Co. [La.] 36 So. 552.

77. Mayor may not refuse to sign ordinances in fourth class cities in Washington. State v. Taylor [Wash.] 79 P. 286.

78. City of Portland v. Yick, 44 Or. 439, 75 P. 706.

79. See 2 Curr. L. 961.

80. An ordinance is wholly inoperative where such provisions have not been complied with. Carpenter v. Yeadon Borough, 208 Pa. 396, 57 A. 837. Under the Indiana statutes an ordinance granting a franchise to establish a lighting plant is void where no publication is made. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146.

81. Burke v. Wapakoneta, 4 Ohio C. C. (N. S.) 482.

82. Carpenter v. Yeadon Borough, 208 Pa. 396, 57 A. 837.

83. Ullman v. District of Columbia, 21 App. D. C. 241.

84. See 2 Curr. L. 961.

85. Gallaher v. Jefferson [Iowa] 101 N. W. 124. A charter provision restraining the city from passing a later ordinance inconsistent with a general one already in force without expressly repealing the latter is valid and must be given effect. Asphalt & Granitoid Const. Co. v. Haeussler [Mo. App.] 80 S. W. 5.

86. A second valid ordinance bestowing a franchise by reference to a former invalid one grants all rights intended to be granted by the defective ordinance. Columbus v. Federal Gas Co., 2 Ohio N. P. (N. S.) 277.

political campaign the operation of an ordinance relating to discharge of fireworks is not a repeal of the ordinance.[87]

Suspension under a referendum.[88]

(§ 8) *F. Construction and operation of ordinances in general.*[89]—Ordinances must be given a reasonable construction,[90] and this is a question for the courts,[91] although the presumption of reasonableness is always indulged.[92] Where a general municipal ordinance, applying to all citizens and property holders, provided for the granting of permits for the erection of buildings, the city council could not, during the life of the ordinance, cancel a permit duly granted in conformity with its provisions.[93] Part of an ordinance may be void without affecting the validity of the remaining portion.[94] An ordinance will not be given effect retrospectively unless the intent is clear.[95] Under a statute forbidding a city to grant any franchise for a longer period than 20 years, an ordinance granting a franchise for 20 years from the date of its taking effect is not rendered invalid by the fact that it was passed several months before that date.[96]

(§ 8) *G. Pleading and proving ordinances and proceedings.*[97]—An ordinance may be pleaded by merely counting upon it and attaching a copy thereof as an exhibit.[98] Courts will take such judicial notice of ordinances and of such journals and records of the common council as affect their validity, meaning and construction as state courts take of public statutes.[99] The certificate of the clerk of the city council that an ordinance has been adopted affords prima facie proof that the ordinance was regularly adopted.[1] An extract from the minutes of a municipal corporation certified by a person described as "clerk of council" is admissible in evidence over an objection that the extract is not certified by the person holding the office of clerk to the corporate authorities, who are described in the charter as the "mayor and council" of the city.[2]

87. Landau v. New York [N. Y.] 72 N. E. 631.

88, 89. See 2 Curr. L. 962.

90. In an ordinance providing that "vertical curves of grade may be used when necessary to facilitate drainage," etc., the word "may" held to be equivalent to shall. Kelly v. Cedar Falls, 123 Iowa, 660, 99 N. W. 556. Uncertainty as to boundaries to which an ordinance is made to apply will be solved by a court by considering streets mentioned as boundaries, which do not meet, as if extended to the meeting point, and by regarding the first river on the west as intended, where a river in that direction is mentioned without naming it. Chittenden v. Columbus, 5 Ohio C. C. (N. S.) 84. An ordinance providing that on petition of a designated per cent of the voters the board of trustees "shall" submit to the voters the subject-matter specified in the petition, is not mandatory, but is a mere rule of procedure for the guidance of the board. Thompson v. Board of Trustees of Alameda, 144 Cal. 281, 77 P. 951.

91. City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877; City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co. [N. J. Law] 58 A. 343.

92. City of New York v. Hewitt, 91 App. Div. 445, 86 N. Y. S. 832.

93. Gallagher v. Flury [Md.] 57 A. 672.

94. Hillman v. Seattle, 33 Wash. 14, 73 P. 791; Imes v. Chicago, etc., R. Co., 105 Ill. App. 37. See 2 Curr. L. 962, n. 44. Where the parts are not so connected in subject-matter or inseparable in their provisions as to warrant the conclusion that the council would not have passed the ordinance without the invalid portion, the valid part will be upheld and the invalid portion rejected. Sterling v. Bowling Green, 5 Ohio C. C. (N. S.) 217. The incorporating of conditions, which may be unlawful in an ordinance granting a franchise does not render the ordinance invalid where it does not appear that the ordinance would not have been passed had the conditions been omitted. Columbus v. Federal Gas Co., 2 Ohio N. P. (N. S.) 277. The introduction of a second subject into the second section of an ordinance will not render the first section invalid, where that section is complete in itself. Chittenden v. Columbus, 5 Ohio C. C. (N. S.) 84.

95. Even in the absence of constitutional limitation. Martin v. Oskaloosa [Iowa] 99 N. W. 557. Penal ordinance cannot be made retroactive. Fire shutters. Frontier Steam Laundry Co. v. Connolly [Neb.] 101 N. W. 995.

96. State v. Excelsior Coke & Gas Co. [Kan.] 76 P. 447.

97. See 2 Curr. L. 962.

98. City of Lexington v. Woolfolk, 25 Ky. L. R. 1817, 78 S. W. 910.

99. City of Portland v. Yick, 44 Or. 439, 75 P. 706.

1. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836.

2. Anderson v. Blair, 121 Ga. 120, 48 S. E. 951.

(§ 8) *H. The remedy against invalid legislation.*[3]—The remedy to set aside a franchise irregularly or fraudulently granted, where the party to whom it has been granted is in the exercise of the privileges it confers, is by quo warranto at the suit of the state and not by an equitable action at the suit of private parties.[4] Taxpayers may maintain an action to have an ordinance illegally appropriating money declared invalid, though no levy has yet been made for the tax provided by it.[5] Where a street improvement is being made under a valid resolution adopted by the city, a general taxpayer cannot interfere, whether the work is repairs or reconstruction, though it is provided that the cost of the work shall be paid out of the general fund.[6] A municipal corporation has no power to sue out an injunction to prevent the collection of a tax claimed by the police jury of the parish from one of the residents of the town on property situated within the limits of the town.[7] So far as a writ of certiorari issued for the purpose of reviewing a municipal ordinance is a proceeding in rem, the governmental officers of the town, being custodians of the record, are the only necessary parties.[8]

§ 9. *Administrative functions, their scope and exercise.*[9]—The mayor,[10] police,[11] clerical and other administrative officers,[12] have such authority as the charter and ordinances confer. If modes of official procedure are prescribed, they must be followed.[13] A rule forbidding the participation of members of the police force in a political caucus or canvass is a reasonable exercise of authority conferred to make rules for government of the police force.[14] The power to license inns and taverns is administrative rather than judicial, and the right in New Jersey to

3. See 2 Curr. L. 963.

4. Clark v. Interstate Independent Telephone Co. [Neb.] 101 N. W. 977.

5. Ramsey v. Shelbyville [Ky.] 83 S. W. 116.

6. Shelby v. Burlington [Iowa] 101 N. W. 101.

7. Town of Donaldsonville v. Police Jury of Ascension Parish [La.] 36 So. 873.

8. Schwarz v. Dover, 70 N. J. Law, 502, 57 A. 394.

9. See 2 Curr. L. 963.

10. Mayor may accept service of notice of claim against city. McCartney v. Washington [Iowa] 100 N. W. 80. A deed of realty signed by the mayor rather than by a special commissioner will not defeat grantee's title. Wright v. Morgan, 191 U. S. 55, 48 Law. Ed. 89. Where money had been willed to the poor of a city, the mayor, on a contest of the will, had no power to compromise for less than the whole amount. Lake v. Hood [Tex. Civ. App.] 79 S. W. 323. See 2 Curr. L. 963, n. 73.

11. A police captain may station officers in or about hotel premises claimed to be disorderly, but such officers may not interfere with customers by stating to them that the house is likely to be raided at any time. Delaney v. Flood, 45 Misc. 97, 91 N. Y. S. 672. For a case where such espionage was enjoined on the ground of injury to business, see Hale v. Burns, 91 N. Y. S. 929. An ordinance providing that if the keeper of any public resort shall refuse the marshal admittance thereto, the marshal may enter and any person resisting him shall be fined, is valid. People v. Croot [Colo. App.] 78 P. 310. New York police department rule 44, requiring police captains to transmit monthly reports of the location of suspicious places, vests in such captains a discretion in determining what is a suspicious place. People v. Greene, 92 App. Div. 243, 87 N. Y. S. 172. See 2 Curr. L. 963, n. 74.

12. Park commissioners may sign petition for proposed saloon where frontage rule is criterion. Theurer v. People, 211 Ill. 296, 71 N. E. 997. A statute authorizing park commissioners to make rules for government of park confers power to fix maximum rate of speed at which one may drive in such park. Commonwealth v. Crowninshield [Mass.] 72 N. E. 963. Under present New York civil service law, a veteran's fitness is conclusively determined by the civil service commissioners. People v. Stratton, 174 N. Y. 531, 66 N. E. 1114, afg. without written opinion, 79 App. Div. 149, 80 N. Y. S. 269. See 2 Curr. L. 963, n. 75.

13. A board having power to make requisitions must do so in proper form and at proper times. Commonwealth v. Pittsburg, 209 Pa. 333, 58 A. 669. Report of commissioners of estimate and assessment in proceeding to acquire title to lands for street opening purposes held sufficient. In re City of New York, 178 N. Y. 421, 70 N. E. 924. The acts of a de facto government must conform to law. A franchise granted must be approved by a board of public works [Rev. St. § 1545-195]. Columbus v. Federal Gas & Fuel Co., 2 Ohio N. P. (N. S.) 277. See 2 Curr. L. 964, n. 79.

14. Brownell v. Russell, 76 Vt. 326, 57 A. 103. Violation by member of New York fire department by retaining membership in proscribed association justifies dismissal. People v. Scannell, 173 N. Y. 606, 66 N. E. 1114, afg. without written opinion 74 App. Div. 406, 77 N. Y. S. 704.

impose it on the courts rests on long continued usage.[15] A sheriff may be reimbursed for expenses in attempting to recover poundage fees,[16] but a city attorney cannot at the expense of the city defend a policeman for inflicting personal injuries in making an arrest.[17] Ordinary repairs to streets required to keep them in a condition reasonably safe for travel are matters of administrative nature, and may be ordered by the mayor;[18] but specific repairs,[19] and changes of grade in streets, are for the legislative branch.[20]

Constabulary power.[21]—Under the Nebraska statutes the mayor and chief of police are charged with the duty to actively interfere to prevent open violations of the statutes,[22] and mandamus lies to compel the performance of this duty.[23] A de facto marshal of a municipal corporation may make an arrest.[24]

Fire protection.—Municipalities are authorized to expend money and incur expense for fire protection,[25] and may impose reasonable restrictions on property owners to the same end.[26] A city may purchase land for a fire engine house without previously or at the time providing for the erection of the building,[27] and a city empowered to establish a fire department and to purchase material and equip the same may purchase coal necessary for such department and employ men to transport the same from coal docks to the place of use.[28] In the extinguishment of fires and in making arrangements therefor, a municipal corporation acts in a governmental capacity, and is not liable for the negligent construction, maintenance or use of its appliances.[29] But in maintaining a fire station, it performs a ministerial public duty, and is liable for injuries sustained from a neglect to furnish an employe a reasonably safe place to work.[30]

§ 10. *Police power and public regulations. A. In general.*[31]—In the absence of constitutional limitations, the legislature may invest municipal corporations with the police power of the state in whole or in part;[32] but municipal by-laws and ordinances are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of police power.[33] The enactment of an

15. Smith v. Hightstown [N. J. Law] 57 A. 901.

16. Dos Passos v. New York, 90 N. Y. S. 398.

17. Donahue v. Keeshan, 91 App. Div. 602, 87 N. Y. S. 144.
Contra, Briggs v. Lahey, 91 N. Y. S. 576.

18. Draper v. City of Fall River, 185 Mass. 142, 69 N. E. 1068.

19. Putting granite block paving on street macadamized or substituting brick on street paved with cobblestone are specific repairs. Draper v. City of Fall River, 185 Mass. 142, 69 N. E. 1068.

20. Draper v. City of Fall River, 185 Mass. 142, 69 N. E. 1068.

21. See 2 Curr. L. 964, n. 82.

22, 23. Running gambling room. Moores v. State [Neb.] 99 N. W. 249.

24. McDuffie v. State, 121 Ga. 580, 49 S. E. 708.

25. The committee on fire and water of a village may incur expense in making needed repairs to fire apparatus. Clapp v. Titus [Mich.] 100 N. W. 1005. Gen. Laws 1895 of Minn., ch. 257, p. 638, authorizing certain villages to incur an indebtedness in the purchase of fire extinguishing apparatus is not void for uncertainty. A contract entered into under this statute was not ultra vires and void because the village and the town in which it is located constituted one taxing district. Du Toit v. Belview [Minn.] 102 N. W. 216.

26. An ordinance which requires the placing of fireproof shutters upon the windows of brick buildings within a city imposes a duty for the purpose of giving to the public protection against fire which the common law did not provide. Frontier Steam Laundry Co. v. Connolly [Neb.] 101 N. W. 995. Ordinance regulating the construction of fire escapes held valid. Louisville Public Library Co. v. Louisville [Ky.] 80 S. W. 1169.

27. City of Santa Barbara v. Davis, 142 Cal. 669, 76 P. 495.

28. Manske v. Milwaukee [Wis.] 101 N. W. 377.

29. A water plant is such an appliance. Aschoff v. Evansville [Ind. App.] 72 N. E. 279.

30. Stumbling of horse on defective floor in fire station at alarm of fire. Bowden v. Kansas City [Kan.] 77 P. 573. The court refers to the line of cases which hold that municipal corporations are only liable for the negligent performance of such ministerial public duties as are imposed upon them by law, and are not liable for the negligent performance of assumed duties which are permissive only, but refuse to subscribe to the doctrine announced by them. Id.

31. See 2 Curr. L. 965.

32. See 2 Curr. L. 965, n. 6.

33. Circumscribing field of operation of gas works. Dobbins v. Los Angeles, 25 S. Ct. 18; Daly v. Elton, 25 S. Ct. 22. An ex-

ordinance regulating the erection of poles does not exhaust the police power of the city and prevent it from afterwards prescribing other rules for the same object.[34] An ordinance making eight hours a day's work on any work of municipal construction is constitutional.[35]

(§ 10) *B. For public protection.*[36]—For public protection a city may regulate the speed of trains,[37] the operation of locomotives,[38] the storage of gasoline,[39] prohibit the carrying of concealed weapons,[40] compel the erection of fire escapes,[41] and provide for the inspection and cleaning of chimneys.[42] It may likewise forbid persons to let animals run at large and provide for impounding such animals.[43]

Buildings and other structures.[44]—The city may also in furtherance of the same purpose regulate the erection and repair of buildings,[45] cause removal or destruction of dangerous buildings,[46] make provision for the safety of theatres[47] and hotels,[48] and may control the erection of sign boards where the public safety requires it.[49]

(§ 10) *C. Health and sanitation.*[50]—Everything which from its nature and surroundings is, or is liable to become, a menace to the public health, is a proper subject to be dealt with under the police power.[51] The removal of the carcass of a dead animal beyond the limits of the city and its sale does not violate an ordinance against selling it in the city,[52] but if the carcass be deposited so close to the border as to become a nuisance, a prosecution would lie.[53] The granting permission to

action of a license fee for water plugs cannot be sustained as an exercise of police power. Cambridge Com'rs v. Cambridge Water Co. [Md.] 58 A. 442.

34. City of Ft. Smith v. Hunt [Ark.] 82 S. W. 163.

35. In re Broad [Wash.] 78 P. 1004.

36. See 2 Curr. L. 966.

37. Imes v. Chicago, etc., R. Co., 105 Ill. App. 37. See 2 Curr. L. 966, n. 21. That president of council had no jurisdiction to punish violation of such ordinance. City of Windsor v. Cleveland, etc., R. Co., 105 Ill. App. 46.

38. State v. Tower [Mo.] 84 S. W. 10; Central R. Co. of New Jersey v. Elizabeth, 70 N. J. Law, 578, 57 A. 404. See 2 Curr. L. 966, n. 22.

39. District of Columbia v. Weston, 23 App. D. C. 363.

40. Town of Orrick v. Akers [Mo. App.] 83 S. W. 549.

41. Louisville Public Library Co. v. Louisville [Ky.] 80 S. W. 1169.

42. Cooper v. Lawson [Mich.] 12 Det. Leg. N. 34.

43. Crum v. Bray, 121 Ga. 709, 49 S. E. 686; Huey v. Waldrop [Ala.] 37 So. 380; Williams v. Sewell, 121 Ga. 665, 49 S. E. 732. See 2 Curr. L. 966, n. 26.

44. See 2 Curr. L. 967. See, also, Buildings and Building Restrictions, 3 Curr. L. 572.

45. Under a statute giving a city power to regulate the construction of buildings, a city has no authority to prohibit the erection of a brick church with slate roof. Boyd v. Board of Councilmen of Frankfort, 25 Ky. L. R. 1311, 77 S. W. 669. See 2 Curr. L. 967, n. 27.

46. City of St. Louis v. Kaime & Bro. Real Estate Co., 180 Mo. 309, 79 S. W. 140. An elevated structure, containing several rooms, joining two houses, and built over an alley, which obstructed to some extent light and air in the alley, and which invited vehicles and persons to gather under it in wet weather, was not a nuisance justifying its destruction with declaration by competent court. Town of Frostburg v. Hitchins [Md.] 59 A. 49.

47. Regulating entrance doors. Mertz v. District of Columbia, 18 App. D. C. 434. See 2 Curr. L. 967, n. 28.

48. A fire commissioner's order directing defendant, a hotel proprietor, to adopt "direct means" for communicating alarms of fire, without specifying the means to be adopted, is insufficient to enable commissioners to recover a penalty for failure to comply. Hays v. Brennan, 90 N. Y. S. 453.

49. But such control must be reasonable, and of this the courts may judge. City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co. [N. J. Law] 58 A. 343. See 2 Curr. L. 967, n. 29. An ordinance which forbids the erection of signs upon private property, without regard to whether such signs may be dangerous to public safety, is invalid. Bill Posting Sign Co. v. Atlantic City [N. J. Law] 58 A. 342.

50. See 2 Curr. L. 967. See, also, Health, 3 Curr. L. 1590.

51. Establishment of plant for the purification of sewage is a measure for the public health. Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326. The services of a physician being rendered to a patient may be recovered of a municipality by another municipality, under the Massachusetts statute (Rev. Laws, c. 75, § 57); but the services of policemen to enforce quarantine measures are incurred in the preservation of the public health and are not recoverable. City of Haverhill v. Marlborough [Mass.] 72 N. E. 943.

52. Mann v. District of Columbia, 22 App. D. C. 138. See 2 Curr. L. 969, n. 41.

53. Mann v. District of Columbia, 22 App. D. C. 138.

erect stables where no reasonable objection is made thereto imposes a discretionary function, and mandamus will not lie.[54] Prohibiting the emission of dense smoke is a proper subject of municipal police control.[55]

(§ 10) *D. Regulation and inspection of business.*[56]—The sale of intoxicating liquors,[57] prescribing saloon limits,[58] the inspection and sale of milk,[59] the location of markets,[60] the regulation of weights,[61] and the licensing and regulation of hackmen,[62] liverymen,[63] hawkers,[64] and junk dealers,[65] requiring that only licensed persons shall enter into certain employments,[66] the fixing of gas rates,[67] are proper subjects of police power. The giving of "trading stamps" may be subjected to license tax,[68] and the sale of lottery tickets be prohibited.[69] Accommodating a neighbor with water does not constitute a business within the meaning of New York laws, giving commissioner of water supply discretion to require meters in all places where water is used "for business consumption."[70] The regulation of the business of supplying light and water to inhabitants and of service rates therefor is fully treated elsewhere.[71]

(§ 10) *E. Control of streets and public places.*[72]—Municipal corporations have no inherent power to regulate and control streets therein, since streets and highways belong to the state and are under its control.[73] Such power is only

54. Hester v. Thomson, 35 Wash. 119, 76 P. 734.

55. City of St. Paul v. Haugbro [Minn.] 100 N. W. 470, 66 L. R. A. 441. That such an ordinance omits from its operation railroad locomotives does not render it objectionable to the Fourteenth Amendment. State v. Tower [Mo.] 84 S. W. 10. An ordinance that the owner of premises on which an engine or locomotive is used shall not permit any cinders, dust, gas or smoke to escape, is unreasonable and void as to a railroad company. Jersey City v. Abercrombie [N. J. Law] 58 A. 73.

56. See 2 Curr. L. 968. See, also, Licenses, 4 Curr. L. 428, and the topics treating of particular kinds of trades and occupations.

57. Town of New Iberia v. Moss Hotel Co. [La.] 36 So. 552. Not only sale, but the giving away, may be prohibited. Litch v. People [Colo. App.] 75 P. 1079. Ordinance making local agent of common carrier amenable to ordinance prohibiting sales of intoxicating liquors held unreasonable and void. Munsell v. Carthage, 105 Ill. App. 119. A promissory note cannot take place of cash payment in procuring saloon license. Meyer-Marx Co. v. Ensley [Ala.] 37 So. 639. In Georgia, jurisdiction to try violation of such ordinance is vested in mayor and aldermen. Robinson v. Americus, 121 Ga. 180, 48 S. E. 924. While a city ordinance may not forbid a saloonkeeper to permit females to enter his place of business, it may prohibit their entry for immoral purposes. State v. Nelson [Idaho] 79 P. 79; Walker v. McNelly, 121 Ga. 114, 48 S. E. 718. See 2 Curr. L. 968, n. 47.

58. Ex parte Levine [Tex. Cr. App.] 81 S. W. 1206.

59. Furnishing sample of milk to health department. Weigand v. District of Columbia, 22 App. D. C. 559. An ordinance forbidding the establishment or maintenance of a dairy or cow stable within city limits without a permit is not violative of the Fourteenth Amendment. Fischer v. St. Louis, 194 U. S. 361, 48 Law. Ed. 1018; Schefe v. St. Louis, 194 U. S. 373, 48 Law. Ed. 1024. See 2 Curr. L. 968, n. 48.

60. Selling at a fixed place without payment of license. Ex parte Helm, 143 Cal. 553, 77 P. 453. See 2 Curr. L. 968.

61. City of New York v. Hewitt, 91 App. Div. 445, 86 N. Y. S. 832. See 2 Curr. L. 968, n. 50.

62. Ordinance requiring an omnibus driver to wear in a permanent position on his clothing a number the same as that issued for his omnibus. Atlantic City v. Feretti, 70 N. J. Law, 489, 57 A. 259. Conviction for refusal to pay rate fixed by ordinance sustained. Bray v. State, 140 Ala. 172, 37 So. 250. See 2 Curr. L. 968, n. 51.

63. Ex parte Jackson, 143 Cal. 564, 77 P. 457. An ordinance attempting to require a license for a single act of carrying is void for unreasonableness. Town of Plymouth v. Cooper, 135 N. C. 1, 47 S. E. 129.

64. Use of bells to attract business. Bray v. Damato, 70 N. J. Law, 583, 57 A. 394.

65. Ullman v. District of Columbia, 21 App. D. C. 241; Neifeld v. State, 23 Ohio Circ. R. 246.

66. Steam engineers. Smoot v. District of Columbia, 23 App. D. C. 266.

67. Denninger v. Recorder's Court of Pomona [Cal.] 79 P. 360.

68. Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765.

69. City of Portland v. Yick, 44 Or. 439, 75 P. 706.

70. Laws 1897, p. 165, c. 378, § 475. Foster v. Monroe, 40 Misc. 449, 82 N. Y. S. 653.

71. Waters and Water Supply, 2 Curr. L. 2034.

72. See 2 Curr. L. 969, and post, § 11.

See, also, Highways and Streets, 3 Curr. L. 1593; Parks and Public Grounds, 4 Curr. L. ——.

73. Nor has a city power to regulate and control the construction and operation of street railways therein merely upon a grant of power to establish, regulate and control streets given at a time when street railways

obtained under statutes expressly conferring the power, and then only under the limitations and conditions attached thereto.[74] Municipalities charged with the duty of regulating the use of their streets may impose a reasonable charge in the nature of a rental for the occupation of certain portions of the streets by telephone and telegraph companies,[75] and while they may require lot owners to keep the streets in front of their premises in repair and free from obstructions,[76] an ordinance which requires a mere tenant so to do is invalid.[77] In exercising control over streets and public places, they may also require the registration of automobiles[78] and regulate the speed at which they may be driven;[79] and may regulate public meetings and speaking.[80] A city does not lose control of its streets by consenting or acquiescing in the planting of trees within the limits thereof.[81] An ordinance providing that no person shall play any game of ten pins, ball, wicket, or other games in a street does not prohibit boys from merely running on a street.[82]

(§ 10) *F. Definition of offenses and regulation of criminal procedure.*[83]—Municipal ordinances and regulations to support prosecution must be as definite and certain as penal statutes;[84] but an ordinance prohibiting an act and prescribing a penalty for violation is not defective for not declaring the prohibited act to be a crime.[85] An ordinance punishing one engaging in the bunco business by a fine of not less than $101 and not more than $500 is repealed by a subsequent ordinance against gambling providing a lesser fine.[86] An offense may be against the state and a municipal corporation at the same time; but before the municipality can prosecute, it must show a valid ordinance.[87] The prosecution of one for violation of a city ordinance is a civil proceeding; therefore jurisdiction can be gained by

were not contemplated. Raynolds v. Cleveland, 24 Ohio Circ. R. 215.

74. Raynolds v. Cleveland, 24 Ohio Circ. R. 215. See 2 Curr. L. 969, n. 65.

75. City of Pensacola v. Southern Bell Tel. Co. [Fla.] 37 So. 820; Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146. The general police powers of cities of the first class in Kansas may be exercised by such cities over telegraph and telephone companies within their corporate limits. City of Wichita v. Missouri & K. Tel. Co. [Kan.] 78 P. 886. A statute granting to telegraph and telephone companies the right to construct lines in the public highways is not rendered nugatory by charter provision, giving cities the right to prevent the obstruction of streets by poles. State v. Red Lodge [Mont.] 76 P. 758. A contract between a city and an electric company prescribing terms for the erection of poles does not divest the city of its police power nor prevent it from exacting a license to defray the expense of regulating the use of such poles. City of Ft. Smith v. Hunt [Ark.] 82 S. W. 163.

76. Repair of sidewalk. Lentz v. Dallas, 96 Tex. 253, 72 S. W. 59. An animal tied to a stake in a public street for the purpose of grazing is an obstruction of such street, within the meaning of an ordinance authorizing the removal of obstructions. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732. A carriage block is not an obstruction to street. Wolf v. District of Columbia, 21 App. D. C. 464; Wolff v. District of Columbia, 25 S. Ct. 198.

77. Ford v. Kansas City, 181 Mo. 137, 79 S. W. 923.

78. People v. Schneider [Mich.] 12 Det. Leg. N. 32.

79. See 2 Curr. L. 970, n. 70. A general statute regulating the speed of automobiles throughout the state does not abrogate a regulation as to speed in a city park. Commonwealth v. Crowninshield [Mass.] 72 N. E. 963. An ordinance limiting speed may also require that lamps and horns be used. Chittenden v. Columbus, 5 Ohio C. C. (N. S.) 84.

80. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. See 2 Curr. L. 969, n. 66.

81. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

82. Defective sidewalk. Beaudin v. Bay City [Mich.] 99 N. W. 285.

83. See 2 Curr. L. 970. See, also, Criminal Law, 3 Curr. L. 979; Indictment and Prosecution, 4 Curr. L. 1.

84. Hays v. Brennan, 90 N. Y. S. 453. A park regulation that "no person shall ride or drive" in excess of a given rate of speed is sufficiently definite to support a criminal prosecution for operating an automobile. Commonwealth v. Crowninshield [Mass.] 72 N. E. 963.

85. City of Portland v. Yick, 44 Or. 439, 75 P. 706.

86. Clark v. State [Tex. Cr. App.] 81 S. W. 722.

87. Whatever the legislature may punish as a misdemeanor it may authorize a municipal corporation to punish as a misdemeanor. Denninger v. Recorder's Court of Pomona [Cal.] 79 P. 360. Municipality cannot maintain prosecution for violation of state law. Town of McMinnville v. Stroud, 109 Tenn. 569, 72 S. W. 949.

voluntary appearance.[88] An information need not be filed,[89] and the city, as well as defendant, may appeal.[90] In South Dakota such a proceeding is said to be quasi criminal in its nature.[91] A municipal charter which imposes upon the mayor the duty of seeing that the ordinances of the town are faithfully executed, and confers upon him jurisdiction to try all persons charged with violating the ordinances, authorizes the mayor to issue a warrant for the arrest of an offender, and this is true, notwithstanding the charter does not in express terms authorize the mayor to issue a warrant for such purpose.[92] But a president pro tem of a village council has no power to hear and determine a misdemeanor, although the mayor in whose stead he is acting has.[93] Under the Indiana law (Burns' Ann. St. 1901, § 4346) constituting the town clerk a court and giving that court exclusive jurisdiction of all prosecutions for the violation of town ordinances, the circuit court has no original jurisdiction of such cases.[94] Persons sued under an ordinance will not be heard to assert that the ordinance was not passed by de jure trustees,[95] and want of notice of an ordinance other than that given the general public is no defense to a prosecution for violation thereof.[96]

§ 11. *Property and public places.*[97]—The authority which a municipal corporation exercises over streets, public parks and places is not derived from the citizens of the municipality within the limits of which the streets and parks are situated, but is derived from the legislature representing the state.[98] Municipalities in controlling and managing such parks act as governmental agencies, exercising an authority delegated by the state, and are always subject to legislative control.[99] Such streets, parks and places are held by the municipality in trust, not for the sole use of the municipality or any individual thereof, but for the benefit of the general public.[1] A distinction is to be observed between cases where a public park has been created and established by a municipality under statutory provisions and cases where the dedication has been by the original owner.[2] And

88. In re Jones, 90 Mo. App. 318.

89. City of Billings v. Brown, 106 Mo. App. 240, 80 S. W. 322. Complaint for violation of ordinance fixing gas rates held sufficient. Denninger v. Recorder's Court of Pomona [Cal.] 79 P. 364.

90. City of Poplar Bluff v. Hill, 92 Mo. App. 17.

91. An oral notice therefore is sufficient to validate an appeal [Comp. Laws 1887, § 6177]. City of Centerville v. Olson, 16 S. D. 626, 94 N. W. 414.

92. Robinson v. Americus, 121 Ga. 180, 48 S. E. 924; Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

93. Rev. St. § 1536-864 (violation of Beal Law). State v. Hance, 4 Ohio C. C. (N. S.) 541. Mayors of cities in Ohio are entitled to retain fees and costs collected in criminal cases tried before them, and a city ordinance requiring such fees and costs to be paid into the city treasury is invalid as in conflict with the statute (Rev. St. § 1309). City of Piqua v. Cron, 2 Ohio N. P. (N. S.) 165.

94. Chicago, etc., R. Co. v. Salem, 162 Ind. 428, 70 N. E. 530.

95. It is enough that they were de facto trustees. Town of Susanville v. Long, 144 Cal. 332, 77 P. 987.

96. Sands v. Trenton [N. J. Law] 57 A. 267.

97. See 2 Curr. L. 970. See, also, Highways and Streets, 3 Curr. L. 1593; Parks and Public Grounds, 4 Curr. L. ——.

98. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. Hence statute of limitations does not run against the rights of a city in its streets. Wright v. Oberlin, 23 Ohio Circ. R. 509. The legislature representing the state has paramount authority over its public ways, including those in the cities, and can at any time resume the power previously granted to municipal subdivisions. United R. & Canal Co. v. Jersey City [N. J. Law] 58 A. 71. In the absence of constitutional restrictions, the lawmaking power of a state may vacate a street in a municipality. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

99. Placing of monument by state in public park. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. They may not dispose of land dedicated to them, nor restrict use, without express legislative sanction. District of Columbia v. Cropley, 23 App. D. C. 232.

1. Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626; Village of Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408; City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740; Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38; Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. Title to so much of shore and soil under Mobile river as is within boundary of Mobile lies in trust and cannot be conveyed by the city for the benefit of riparian owners. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

2. Village of Riverside v. MacLain, 210

again, where the municipality holds by reason of dedication, a distinction is to be taken between cases where the dedication is without restriction, and where the dedication is restricted to a particular purpose.[3] In the former case any reasonable public use may be made of the dedicated land,[4] but in the latter it must be devoted to the particular purpose indicated by the dedicator.[5] An exclusive use of streets cannot be granted in the face of a statute contemplating the continuance of the public use,[6] nor can the public use be impaired for purely private benefit.[7]

Municipalities may acquire lands for legitimate purposes.[8] Having acquired real estate it may hold it by the same tenures, yet in two different capacities (1) for uses strictly public;[9] (2) for uses not strictly public.[10] In the latter instance the municipality has a beneficial interest, for which compensation must be made if it is taken for another public use by the state or nation.[11] Mere informalities in the execution of a deed by a municipal corporation will not invalidate it.[12]

A municipal corporation has power in the first instance to determine how space within the bounds of highway shall be appropriated to various uses of the highway.[13] It may set aside portions of its streets or sidewalks for boulevards, grass plots or other purposes, useful or ornamental only, and protect the same from the encroachment of travel.[14] While the public are entitled to the use of highways for purposes of travel its entire width, there are instances where the occupation of a highway for purposes other than travel has been held lawful.[15]

Ill. 308, 71 N. E. 408. Land may be acquired for park purposes. Children's playgrounds are properly a part of park purposes. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

3. Law v. San Francisco, 144 Cal. 384, 77 P. 1014. Persons dedicating land to the public are not authorized to rely upon the individual statements of trustees of a village as to the use to which the land should be devoted. Pickett v. Mercer, 106 Mo. App. 689, 80 S. W. 285.

4. Leasing part of a public park for training race horses held not to be an unlawful diversion of such park. Bryant v. Logan [W. Va.] 49 S. E. 21. Devoting park to baseball purposes. Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38.

5. Where land has been dedicated as a public park and accepted as such by the village, it has no power thereafter to use a portion of the park for a public highway. Village of Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408; New York Contracting & Trucking Co. v. New York, 42 Misc. 425, 87 N. Y. S. 100.

6. See 2 Curr. L. 971, n. 1.

7. See 2 Curr. L. 971, n. 2. Lowery v. Pekin, 210 Ill. 575, 71 N. E. 626. No implied power to grant privileges to use the streets for private purposes. Draining of cellar. Bennett v. Mt. Vernon [Iowa] 100 N. W. 349. The laying of a spur-track in the street, as distinguished from a track for general railroad purposes, is not such a diversion of the street from its ordinary uses as to interfere with the private rights of abutting owners or beyond the power of council to authorize. Gunning v. P. C. C. & St. L. R. Co., 2 Ohio N. P. (N. S.) 411.

8. They may receive property in trust for educational purposes. State v. Toledo, 23 Ohio Circ. R. 327. May buy land for culvert in connection with sewer. City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877. May acquire lands for "children's playgrounds." Law v. San Francisco, 144 Cal. 384, 77 P. 1014. Acquirement of land for public park. In re City of New York, 95 App. Div. 552, 89 N. Y. S. 6. Resolution of council that title to real estate on which was situate a free public library should stand in library trustees illegal; city proper custodian. Keuffel v. Hoboken [N. J. Law] 59 A. 20.

9. For example, streets, parks, schoolhouses. In re Condemnation of Land at Nahant, 128 F. 185.

10. A city hall or cemetery. In re Condemnation of Land of Nahant, 128 F. 185.

11. Easement of aqueduct for water pipes. In re Condemnation of Land at Nahant, 128 F. 185.

12. See 2 Curr. L. 972, n. 4, 5. Deed signed by mayor instead of special commissioner. Wright v. Morgan, 191 U. S. 55, 48 Law. Ed. 89.

13. General ordinance prescribing width of sidewalk modified by subsequent ordinance making different provision for a particular street. Budd v. Camden Horse R. Co., 63 N. J. Eq. 804, 52 A. 1130, afg. without opinion, 61 N. J. Eq. 543, 48 A. 1028. Under a code provision for parking a street or any part thereof, the parking need not be confined to that part of the street between the lot line and the driveway, but the driveway may be divided by a strip of parking along the center line. Downing v. Des Moines [Iowa] 99 N. W. 1066.

14. Use of wire. Martin v. Williamsport, 208 Pa. 590, 57 A. 1063.

15. 24-inch columns of a building. Sautter v. Utica City Nat. Bank, 45 Misc. 15, 90 N. Y. S. 833.

Thus a court,[16] areaway,[17] and a vault under the sidewalk,[18] have been recognized as a legitimate use of street, subject to proper safeguards and restrictions. Permission to lay tracks in a city street may be revoked, the right to do so having been reserved in the resolution of permission.[19] The public authorities may specify such a pavement as the present or prospective traffic of a street may require, and provide varying foundations according to circumstances.[20] An agreement between a city and a railroad under which the city is to keep in repair that portion of a street occupied by the railroad does not relieve the railroad from the duty to repair imposed by the railroad law.[21] A city does not engage in a work of internal improvement by agreeing with a street railway to pave and repair the streets used by the street railway at its own expense, and without requiring any assistance from the company.[22] Where the power to vacate streets and public grounds is given by statute, when all property owners are affected alike by a vacation, though in different degrees, they have no remedy.[23] Title to municipal property cannot be acquired by adverse possession.[24] The opening, maintenance and use of streets, and the improvement of the same, are fully treated in other titles.[25] Where it appears that an abutting owner with the consent or acquiescence of the city has caused shade trees to be set out in the street along or near the line of his property, the municipal authorities will not be permitted to wantonly or without reasonable cause destroy the same. And this is true, notwithstanding the fact that such trees upon being planted inherently become a part of the realty, and title thereto vests in the city as owner in fee of the street. Yet this cannot be extended so as to interfere with the proper exercise of municipal powers in respect of that care, supervision and control of the streets which the statute imposes on cities.[26]

§ 12. *Contracts.*[27] *A. Power and authority in general.*[28]—The power to erect or operate public service plants warrants a contract with private persons to furnish such service,[29] and the acceptance of a franchise ordinance conferring rights in a public street or place constitutes a contract.[30] The validity of a con-

16. Gutting v. Brennan, 97 App. Div. 23, 89 N. Y. S. 574.

17. Devine v. National Wall Paper Co., 88 N. Y. S. 704.

18. Wolff v. New York, 92 App. Div. 449, 87 N. Y. S. 214; Lincoln Safe Deposit Co. v. New York, 96 App. Div. 624, 88 N. Y. S. 912. An open space under a stoop is not a vault within the meaning of § 319 of the Revised Ordinances of New York. City of New York v. Beuk, 43 Misc. 663, 88 N. Y. S. 180.

19. Delaware, etc., R. Co. v. Oswego, 92 App. Div. 551, 86 N. Y. S. 1027.

20. City of Detroit v. Detroit United R. Co., 133 Mich. 608, 95 N. W. 736, 10 Det. Leg. N. 320.

21. Butin v. New York, etc., R. Co., 90 N. Y. S. 909.

22. City of Detroit v. Detroit United R. Co., 133 Mich. 608, 95 N. W. 736, 10 Det. Leg. N. 320.

23. But where the injury is peculiar, an abutting owner is entitled to damages. Borghart v. Cedar Rapids [Iowa] 101 N. W. 1120.

24. But it has been held that the acceptance of a lease from the city does not estop defendant from asserting adverse user. Broad v. Beatty [Ark.] 83 S. W. 339. See 2 Curr. L. 972, n. 6.

25. See Highways and Streets, 3 Curr. L. 1593; Dedication, 3 Curr. L. 1050; Public Works and Improvements, 2 Curr. L. 1328.

26. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

27. See, also, Contracts, 3 Curr. L. 805; Public Contracts, 2 Curr. L. 1280; Public Works and Improvements, 2 Curr. L. 1328.

28. See 2 Curr. L. 972.

29. A city being granted the power to contract for lights for 25 years, a contract for their supply for the whole of such period is valid. Davenport Gas & Elec. Co. v. Davenport [Iowa] 98 N. W. 892. Contract for an exclusive supply of water for 60 years sustained. Incorporated Town of Tahlequah v. Guinn [Ind. T.] 82 S. W. 886. See 2 Curr. L. 973, n. 19.

30. Attempt to reduce street railway fares enjoined. City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102; City of Cleveland v. Cleveland Elec. R Co., 194 U. S. 538, 48 Law. Ed. 1109. Where a municipal corporation, in pursuance of legislative authority, grants a valid franchise, privilege, or right to use or occupy a public street, common or levee, or navigable water, adjacent thereto, for a public purpose, and the grantee, in reliance on such grant, expends money in the prosecution of his enterprise, he thereby acquires a property interest or right, which can only be

tract of a municipal corporation which can only be fulfilled by resort to taxation depends on the power to levy a tax for that purpose;[31] but the fact that a village was not a separate district for purposes of taxation and that no separate levy of taxes upon village property to pay the debt could be made does not render a contract for fire apparatus void.[32] An obligation assumed by the owner of property to sell it at a valuation fixed by appraisers, one of them to be chosen by such owner, cannot be made the basis of a subsequent statute requiring a sale to be made at a valuation fixed by appraisers in the selection of whom the owner had no voice.[33] A contract to do a thing committed solely to the public is not specifically enforceable.[34]

(§ 12) *B. Mode of contracting and proof of contracts.*[35]—The charter mode must be followed if one is prescribed,[36] and a city cannot be held liable for services rendered upon the theory of an implied contract.[37] Under the system of inviting proposals,[38] contracts should ordinarily be awarded to the lowest responsible bidder,[39] after having legally advertised.[40] Grants of franchise do not fall within provisions applying this system to contracts generally.[41]

taken away under the power of eminent domain after proper compensation. Mead v. Portland [Or.] 76 P. 347 In such case the grantee acquires a right or easement different in kind from that enjoyed by the general public, and the building or structure put therein by him is under his control, subject to the paramount authority of the municipality. Rights in wharf held not to have been granted by a certain ordinance. Id. Water works system. Ogden City v. Bear Lake & River Waterworks & Irr. Co. [Utah] 76 P. 1069. As to such ordinances as were passed by the city council of Chicago prior to the counting of the vote at the charter election in 1875 and accepted and acted upon by the street railway companies, there exists between the companies and the city a contract relation terminable by neither party without the consent of the other until the period named in the legislative act expires. Govin v. Chicago, 132 F. 848. Where a municipality has by resolution granted to a public service company the use of its streets and alleys, and where the licensee with the knowledge and tacit consent of the municipal authorities has accepted and acted upon such resolution, the license so granted becomes a contract, not revocable by the city. Telephone lines. Village of London Mills v. White, 208 Ill. 289, 70 N. E. 313. The grant of the right to lay pipes in the streets and to supply inhabitants with water for a term of years, after it has been acted on by the company, creates a contract and the city may not impair the same by entering into competition. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 F. 152.

31. Bridge not located on legal highway. Manning v. Devils Lake [N. D.] 99 N. W. 51.

32. Du Toit v. Belview [Minn.] 102 N. W. 216.

33. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 P. 451.

34. By street railway to pave streets Farson v. Fogg, 205 Ill. 326, 68 N. E. 755.

35. See 2 Curr. L. 974. See, also, Public Contracts, 2 Curr. L. 1280.

36. Carpenter v. Yeadon Borough, 208 Pa. 396, 57 A. 837; Becker v. New York, 176 N. Y. 441, 68 N. E. 855. Contract between city and water company for water supply is valid, though made by resolution instead of ordinance. Ogden City v. Bear Lake & River Waterworks & Irr. Co. [Utah] 76 P. 1069. See 2 Curr. L. 974, n. 33.

37. Even though, where a citizen employed an attorney to compel performance of duty by the public officers, such services resulted in bringing funds into city treasury. Park v. Laurens, 68 S. C. 212, 46 S. E. 1012. A city is not liable upon an implied contract to pay the reasonable value of professional services rendered by an attorney other than the city attorney in advising the mayor and aldermen, where his employment has not been authorized or ratified by yea and nay vote of the common council. Bosard v. Grand Forks [N. D.] 102 N. W. 164. Persons at whose suit a large amount of money is covered into the city treasury are not such representatives of the city as would make their contract for attorney's services binding on the city. Milster v. City Council of Spartanburg, 68 S. C. 243, 47 S. E. 141. When a city charter requires public work to be let in a particular way and the city is prohibited from letting the same in any other manner, a violation thereof and the performance of the work involved does not impose any obligation upon the city to pay therefor. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

38. See Public Contracts, 2 Curr. L. 1280.

39. The word "work" in a city charter, providing that all work exceeding in cost a specified sum shall be let to the lowest responsible bidder, includes structures such as buildings and bridges. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603. No contract can be let for a patented article unless there was opportunity for competitive bidding. Water meters. Kay v. Monroe, 93 App. Div. 484, 87 N. Y. S. 831. See 2 Curr. L. 975, n. 40.

40. Giving notice of the adoption of a resolution, as a prerequisite for receiving bids, in which resolution date was left blank but was filled in by a city officer confers no jurisdiction and renders contract invalid.

(§ 12) *C. Construction and effect.*[42]—A contract lawfully made is inviolable, either by the legislature,[43] or by the municipality;[44] but, as in the case of other contracts, if an agreement is invalid in part only, the part which is good may be enforced if it can be separated from the part which is bad.[45] A provision in a paving contract that the contractor shall keep the paving in repair for five years is not void on the ground that the city charter does not permit the charging of abutting owners for repairs,[46] and the contract of one who has done certain work for a municipality is not affected because he failed to observe a provision of his contract limiting the hours of laborers to eight hours.[47] The stipulation in a contract for water that the city shall not for 30 years exact a license tax in excess of a stated sum is void.[48]

(§ 12) *D. Ultra vires and unauthorized contracts.*[49]—The ultra vires contract of a municipality is unenforceable,[50] and where the city is entirely without authority, recovery cannot be had for material or services rendered it.[51] Otherwise, however, where it had authority but imperfectly exercised it.[52] That a contract is ultra vires in part will not necessarily invalidate the entire contract.[53] The power of the legislature to ratify a contract, entered into by a municipality for a public purpose which is ultra vires, results from its power to have originally authorized the very contract which was made.[54] If a contract, in form, by a municipality, which it is prohibited from making except in a particular manner, is invalid for want of substantial compliance with such manner, it cannot be made valid by acts of ratification short of such as would render a new contract valid.[55] There can be no ratification in the absence of knowledge by the city of the infirmities which invalidate the contract.[56]

Pennsylvania Co. v. Cole, 132 F. 668. See 2 Curr. L. 975, n. 41.

41. The acceptance of a bid already made when the successful bidder defaults is necessitated by the provisions of California Act, March 11, 1901, for the granting of street railway franchise by a municipality to the next highest bidder therefor in case the successful bidder fails to make the requisite deposit. Pacific Elec. R. Co. v. Los Angeles, 194 U. S. 112, 48 Law. Ed. 896. See 2 Curr. L. 975, n. 45.

42. See 2 Curr. L. 976.

43. A contract under which a street railway is to maintain the surface of the street inside of the rails, but that the expense of a permanent improvement of the street is to be borne by the city, cannot be affected by subsequent legislation. City of Rochester v. Rochester R. Co., 98 App. Div. 521, 91 N. Y. S. 87. See 2 Curr. L. 976, n. 66.

44. A city cannot escape payment for lights upon the plea of a prior existing contract under which the council had appropriated all of the taxes laid for lighting purposes, where it appeared that such appropriation was not compulsory by the terms of the former contract. Kennedy v. New York, 99 App. Div. 588, 91 N. Y. S. 252. See 2 Curr. L. 976, n. 67.

45. Ordinance contracting for street lights held indivisible. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146.

46. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

47. People v. Grout [N. Y.] 72 N. E. 464.

48. City of Birmingham v. Birmingham Waterworks Co., 139 Ala. 531, 36 So. 614.

49. See 2 Curr. L. 977.

50. Construction of waterworks. Smith v. Stoughton, 185 Mass. 329, 70 N. E. 195. See 2 Curr. L. 977, n. 70. Damages cannot be recovered for breach of a contract made by a corporation ultra vires. Contract to construct waterworks for use of water to which town had no legal right. Smith v. Stoughton, 185 Mass. 329, 70 N. E. 195.

51. Citizens' Bank v. Spencer [Iowa] 101 N. W. 643. Though a city may have contracted beyond its limit, if there be some funds, plaintiff may recover to that extent. Lines v. Otego, 91 N. Y. S. 785.

52. Lines v. Otego, 91 N. Y. S. 785; City of Tyler v. Lester & Co. [Tex.] 78 S. W. 1058.

53. Where a city in consideration of its agreement to make certain street improvements has obtained a deed of land from plaintiff for a street, and has drawn from such land earth for use on other streets, so that plaintiff cannot be placed in statu quo, the fact that an insignificant part of the contract is ultra vires will not defeat the whole contract. Spier v. Kalamazoo [Mich.] 101 N. W. 846. See 2 Curr. L. 977, n. 82.

54. City of Leavenworth v. Leavenworth City & Ft. L. Water Co. [Kan.] 76 P. 451. See 2 Curr. L. 978, n. 88.

55. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603. Contract void because entered into at an illegally adjourned meeting cannot be validated by subsequently approving minutes of such meeting. Pennsylvania Co. v. Cole, 132 F. 668.

56. Disallowance by council of claim for price of horse. Kavanaugh v. Wausau, 120 Wis. 611, 98 N. W. 550.

Unauthorized contracts.[57]—Unauthorized contracts cannot be supported by an estoppel,[58] but where a lessee had enjoyed the benefit of wharf leases, he was estopped to plead that the premises were locus publicus and the leases ultra vires.[59]

(§ 12) *E. Effect of interest of officers in municipal contracts.*[60]—A contract in which a member of a city government is interested, directly or indirectly, is void.[61] But this does not prevent a member of a city council being employed to attend small pox patients for whose care the county is liable.[62] A contract entered into between a private corporation and a city is void if at the time of its execution one of the members of the council was also a stockholder in such private corporation.[63] Such a contract does not become valid and legal when subsequently the interested member of council sells the stock which he owned at the execution of the contract.[64]

§ 13. *Fiscal affairs and management.*[65]—Public funds and public credit can be devoted to public purposes only.[66] Payment out of a particular fund cannot be compelled when there has been no appropriation for that fund or that made has been exhausted.[67] The purchase of a cemetery is not such a debt as a city may incur without complying with a constitutional provision forbidding the creation of a debt unless provision be made at the same time for a sinking fund.[68] A city may for the purpose of paying existing indebtedness levy and collect taxes in excess of the rate limited for general purposes,[69] and an imperative duty as to a levy imposed by an earlier statute may be superseded by discretionary power granted in a later enactment.[70] Under a levy of municipal taxes for general purposes, the fund so obtained cannot in Kentucky be deflected for street sprinkling.[71] Under the present Kentucky constitution more than one proposition to bond a municipality may be voted on at one and the same time.[72] The Maryland statute authorizing the city of Baltimore to create a loan for the purpose of extending the city's water service did not have the effect, together with the provisions of the charter, of causing the amount appropriated by ordinance for the purpose of a reservoir to pass into the city's general sinking fund.[73] Interest on municipal bonds may not be treated as an item of governmental expense, thus enabling a municipality to defeat creditors in an effort to subject excess over necessary current expenditures to satisfaction of demands.[74] The purchase of voting

57. See 2 Curr. L. 977.
58. See 2 Curr. L. 977, n. 84.
59. Town of Morgan City v. Dalton, 112 La. 9, 36 So. 208.
60. See 2 Curr. L. 978.
61. The city is under no liability in such case, and trustee process against it will not lie. O'Neil v. Flannagan, 98 Me. 426, 57 A. 591.
62. Dewitt v. Mills County [Iowa] 101 N. W. 766.
63. 64. Hardy v. Gainesville, 121 Ga. 327, 48 S. E. 921.
65. See 2 Curr. L. 978. See, also, Municipal Bonds, 4 Curr. L. 706; Taxes, 2 Curr. L. 1786.
66. Mt. Sinai Hospital v. Hyman, 92 App. Div. 270, 87 N. Y. S. 276. See 2 Curr. L. 978, n. 98. The borrowing of money by the issuance of bonds to pay a judgment indebtedness is a pledge of the city's credit for corporate purposes. Stone v. Chicago, 207 Ill. 492, 69 N. E. 970. Section 135 of the Municipal Code of 1902, giving the council authority to provide for the deposit of public funds in a bank, is not unconstitutional on the ground that the city loans its credit to the bank. State v. Bowers, 4 Ohio C. C. (N. S.) 345.
67. Patrolman's salary. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. It is competent for the General Assembly to provide that the expenses connected with an election covering a particular locality shall be paid out of the general revenue funds of the municipality. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85.
68. City of Tyler v. Jester & Co. [Tex. Civ. App.] 74 S. W. 359.
69. City of St. Joseph v. Pitt [Mo. App.] 83 S. W. 544.
70. Trustees of Free Public Library of Atlantic City v. City Council of Atlantic City [N. J. Law] 58 A. 1101.
71. City of Louisville v. Button [Ky.] 82 S. W. 293.
72. Woolfolk v. Paducah, 25 Ky. L. R. 2149, 80 S. W. 186.
73. Acts 1902, p. 445, c. 333. Callaway v. Baltimore [Md.] 57 A. 661.
74. City of Anniston v. Hurt, 140 Ala. 394, 37 So. 220.

machines constitutes an appropriation within a charter prohibition upon the appropriation of money except by affirmative vote of two-thirds of members of council.[75]

Limitation of indebtedness.[76]—Almost without exception the states have constitutional provisions enjoining the incurring of indebtedness in excess of a specified sum.[77] Judgments against a city, unprovided for, should be included in determining a city's indebtedness with reference to the constitutional limitation.[78] But the amount held in a city treasury with which to pay special assessment bonds,[79] the amount of anticipation tax bonds,[80] amount held by a city treasurer as due the sinking fund,[81] are not debts within the sense of a constitutional limitation. Contracts calling for periodical payments do not create an indebtedness for the aggregate sums within the meaning of an inhibition upon indebtedness,[82] but a contract to pay for lighting at a certain amount monthly in "valid warrants" creates an indebtedness within a charter provision that indebtedness "must never exceed" a stated amount.[83] The expense of water and light is an ordinary expense; the construction of a waterworks station or electric light plant is an extraordinary expense.[84] The issue of municipal bonds and the creation of indebtedness so evidenced are treated in a separate article.[85] The manner in which municipal corporations must exercise their taxing power is likewise treated elsewhere.[86]

§ 14. *Torts and crimes.*[87]—A municipal corporation is not liable for torts committed in the exercise of public or governmental functions,[88] nor in the exer-

75. People v. Geneva, 90 N. Y. S. 275.

76. See 2 Curr. L. 980.

77. The provision of the New Jersey constitution declaring that the legislature shall not create any debt or liability of the state, exceeding $100,000, without the previous approval of the people at a general election, has no application to municipal indebtedness. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. An ordinance accepting a gift for a library building offered on condition that the city guaranty $1,000 annually for maintenance contravenes the Kentucky constitutional provision that no city shall become indebted for an amount exceeding in any year the revenue provided for such year without assent of the voters. Ramsey v. Shelbyville [Ky.] 83 S. W. 116.

78. So also the "water fund debt" is debt of a city. Stone v. Chicago, 207 Ill. 492, 69 N. E. 970.

79, 80, 81. Stone v. Chicago, 207 Ill. 492, 69 N. E. 970.

82. The debt of each month or year does not come into existence until earned. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208. The making of a contract by a city for water for a number of years does not create a debt, but the liability thereunder arises only from year to year. City of Tyler v. Jester & Co. [Tex.] 78 S. W. 1058. A contract by a city to pay a stated sum semi-annually as hydrant rentals during a term of years for water to be furnished by a water company for fire purposes does not create a debt within the meaning of a constitutional provision prohibiting the incurring of debts beyond a certain limit. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 F. 152.

83. At least where the amount is not made payable out of a fund on hand or provided for. Brockway v. Roseburg [Or.] 79 P. 335.

84. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208.

85. See Municipal Bonds, 4 Curr. L. 706.

86. Local assessments is treated in Public Works and Improvements, 2 Curr. L. 1328; other taxation in Taxes, 2 Curr. L. 1786.

87. See 2 Curr. L. 982. See, also, Torts, 2 Curr. L. 1875, and topics treating of particular kinds of torts, e. g. Negligence, 4 Curr. L. 996, or of torts in respect of a particular thing, e. g. Highways and Streets, 3 Curr. L. 1593. As to criminal capacity generally see Criminal Law, 3 Curr. L. 979.

88. When the state imposes on an incorporated city the absolute duty of performing some act, which the state may lawfully perform and pertaining to the administration of government, the city in the performance of that duty may be clothed with the immunities of the state; but when the city is merely authorized by way of special privilege to perform such an act in part for its corporate benefit, it is not clothed with these immunities and is liable for negligence. Hourigan v. Norwich [Conn.] 59 A. 487. In determining what part of a street it will improve or grade, a municipality acts in a governmental capacity, and is not liable (Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168), even though shade trees are destroyed (Gallaher v. Jefferson [Iowa] 101 N. W. 124). But after the ordinance for an improvement has been passed and the city undertakes the work of construction required by the ordinance, it acts in a ministerial capacity, and if in that capacity it is guilty of negligence to the injury of an individual, it is liable. Ely v. St. Louis, 181 Mo. 723, 81 S. W. 168. In the laying out of a sewer or drain the city acts under authority from the state and

cise of the police power for the protection of health.[89] Neither is it liable for failure to exercise charter powers to abate nuisances,[90] nor for failure to enact or enforce ordinances.[91] A railroad company having a right to elevate its track without liability to adjoining owners, the city cannot be made liable for requiring such elevation for the public safety.[92]

But for torts committed in the performance of private or nongovernmental functions, a municipality is liable.[93] So is it liable for injuries caused by unsafe

is not liable; but the maintenance or repair thereof is not a continuance of the same work, and the city is liable. Kidson v. Bangor [Me.] 58 A. 900. The lighting of the streets of a city is a governmental function for the failure to perform which the city is not liable. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531. Destruction of private sewer through laying of water mains is damnum absque injuria. Bennett v. Mt. Vernon [Iowa] 100 N. W. 349. Nor is it liable for the negligent construction, maintenance or use of appliances for the extinguishment of fires. A water plant is such an appliance. Aschoff v. Evansville [Ind. App.] 72 N. E. 279. In the absence of express contract a water company which contracts only for general fire protection to a municipality is not liable to it for property destroyed by fire for failure to provide a sufficient water supply at the time of the fire. Town of Ukiah City v. Ukiah Water & Improvement Co., 142 Cal. 173, 75 P. 773. See 2 Curr. L. 982, n. 50.

NOTE. Liability for deficient water supply: Where a city establishes or acquires its own system of waterworks, it is not liable to citizens whose property is destroyed by fire for failure to provide an adequate supply. Patch v. Covington, 17 B. Mon. [Ky.] 722, 66 Am. Dec. 186; Van Horne v. Des Moines, 63 Iowa, 447, 19 N. W. 293, 50 Am. Rep. 750; Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90; Insurance Co. v. Keeseville, 148 N. Y. 46, 42 N. E. 405, 51 Am. St. Rep. 667, 30 L. R. A. 660; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 665; Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368; Brinkmeyer v. Evansville, 29 Ind. 137; Black v. Columbia, 19 S. C. 412, 45 Am. Rep. 785; Foster v. Lookout Water Co., 3 Lea [Tenn.] 42; Sievers v. San Francisco, 115 Cal. 654, 47 P. 687, 56 Am. St. Rep. 153. Nor, where, instead of acquiring its own system and attempting to itself provide the water for such purpose, the city contracts with a water company to furnish such service, is such water company liable, at the suit of a third person for property destroyed under like circumstances. Becker v Water Works, 79 Iowa, 419, 44 N. W. 694, 18 Am. St. Rep. 377; Davis v. Water Works, 5[illegible] Iowa, 59, 6 N. W. 126, 37 Am. Rep. 185; Bri[illegible]on v. Water Co., 81 Wis. 48, 51 N. W. 84, 29 Am. St. Rep. 856; Ferris v. Water Co., 16 Nev. 44, 40 Am. Rep. 485; Beck v. Water Co. [Pa.] 11 A. 300; Nickerson v. B. Ry. Co., 46 Conn. 24, 33 Am. Rep. 1; Fowler v. Water Works, 83 Ga. 219, 9 S. E. 673, 20 Am. St. Rep. 313; Atkinson v. Newcastle, 2 Exch. Div. 441; Foster v. Water Co., 3 Lea [Tenn.] 42; Eaton v. Fairburg Water Works Co., 37 Neb. 546, 56 N. W. 201, 40 Am. St. Rep. 510, 21 L. R. A. 653; Fitch v. Water Co., 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; Mott v. Water Co., 48 Kan. 12, 28 P. 989, 30 Am. St. Rep. 267, 15 L. R. A. 375; Howsmon v. Water Co., 119 Mo. 304, 24 S. W. 784, 41 Am. St. Rep. 654, 23 L. R. A. 146.

Contra, Gorrell v. Water Co., 124 N. C. 328, 32 S. E. 720, 70 Am. St. Rep. 598, 46 L. R. A. 513; Paducah Lumber Co. v. Water Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 25 Am. St. Rep. 536, 7 L. R. A. 77. Nor is such company liable at the suit of the city for the loss of municipal property. Town of Ukiah City v. Ukiah Water & Improvement Co., 142 Cal. 173, 75 P. 773. But a water company may so bind itself by express contract as to render itself liable for failure to furnish a sufficient supply of water under the circumstances indicated. Railroad Co. v. Water Works Co. [C. C. A.] 72 F. 227; Knappman Co. v. Water Co. [N. J. Err. & App.] 45 A. 692, 49 L. R. A. 572; Paducah Lumber Co. v. Water Co., 89 Ky. 340, 12 S. W. 554, 13 S. W. 249, 25 Am. St. Rep. 536, 7 L. R. A. 77; Town of Ukiah City v. Ukiah City Water & Improvement Co. [Cal.] 75 P. 773. From opinion Town of Ukiah City v. Ukiah Water & Improvement Co., 142 Cal. 173, 75 P. 773. As to liability of water company for insufficient supply to afford fire protection, see article in 3 Michigan Law Review, 501.

89. In operating and maintaining a contagious disease bospital, a city acts in a governmental capacity and is not liable for the torts of its officers in charge thereof in maltreating patients. City of Lexington v. Batson's Adm'r [Ky.] 81 S. W. 264. A statute providing for the establishment of a plant for the purification of sewage is a measure for the benefit of public, and city is not liable to riparian owner on stream into which sewage was discharged for failure to erect adequate plant. Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326. See 2 Curr. L. 982, n. 52.

90. See 2 Curr. L. 932, n. 53. But where an exhibition of fireworks was authorized and given under circumstances which would permit a jury to find it a public nuisance, the city was held liable for damages caused by premature explosion. Landau v. New York [N. Y.] 72 N. E. 631, rvg. same case 90 App. Div. 50, 85 N. Y. S. 616, represented in 2 Curr. L. 983, n. 55.

91. Failure to enforce removal of ash pit, whereby child fell on hot ashes. Veraguth v. Denver [Colo. App.] 76 P. 539. Failure to prevent bicycle riding on sidewalk. Bryant v. City Council of Orangeburg [S. C.] 49 S. E. 229.

92. Osburn v. Chicago, 105 Ill. App. 217.

93. A municipal corporation is performing a ministerial public duty in maintaining a fire station, and is liable in damages to an employe for personal injuries sustained from a neglect to furnisb him a reasonably safe

public structures, although the defect exists in the plan adopted for their construction.[94]

A municipal corporation is liable for the torts of its officers, servants or agents only when the act is within the scope of their authority.[95] But unless the act complained of is expressly authorized or ratified or within the scope of the servant's or agent's authority, the city will not in general be liable.[96] Damages are not recoverable because of delay or neglect of officers in performance of ministerial duty.[97]

A municipality is liable only for its own negligence or for the negligence of some one for whose conduct it is legally responsible.[98] The principle of respondeat superior does not extend to cases of independent contractors where the city for whom the work is done is not the immediate superior of those guilty of the wrongful act, and has no control over the manner of doing the work under the contract.[99] But this doctrine does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed,[1] and

place to work. Bowden v. Kansas City [Kan.] 77 P. 573. A city is not relieved from liability for negligence in connection with the construction of a dam from which it secures its water supply on the ground that the supplying of water is a governmental function. Town of Southeast v. New York, 96 App. Div. 598, 89 N. Y. S. 630. Where a city operates a ferry for hire it is liable as other carriers. Townsend v. Boston [Mass.] 72 N. E. 991. City owning waterworks liable for bursting of pipes under extra pressure during fire. Aschoff v. Evansville [Ind. App.] 72 N. E. 279. Where, in grading a street abutting plaintiff's lot, the work was so done as to bring the surface of the street to grade for its full width, whereby, in the absence of a retaining wall, the foot of the grade extended onto the adjoining premises, the municipality was liable. Bunker v. Hudson [Wis.] 99 N. W. 448. See also for injuries from change of grade, United New Jersey R. & Canal Co. v. Lewis [N. J. Eq.] 59 A. 227. Evidence held to sustain a judgment that city had improperly placed curb stones on plaintiff's premises. City of Latonia v. Hall [Ky.] 83 S. W. 556. The fact that a system of sewers by means of which sewage was discharged into a stream, was of permanent construction did not render the nuisance occasioned by such discharge a permanent one. Vogt v. Grinnell, 123 Iowa, 332, 98 N. W. 782.

94. Railing on bridge. McDonald v. Duluth [Minn.] 100 N. W. 1102. Defective plan of street crossing. Carroll's Adm'r v. Louisville, 25 Ky. L. R. 1888, 78 S. W. 1117. Construction of inadequate culverts. Davelaar v. Milwaukee [Wis.] 101 N. W. 361. Where there are obstacles to be overcome in the construction of any public work, and reasonable minds may differ as to whether the plan adopted therefor by the municipality was the best and safest one, the decision of the municipality cannot be reviewed by the courts. McDonald v. Duluth [Minn.] 100 N. W. 1102. Hospital. Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484.

95. Where an enlargement of a city water reservoir was being carried on under supervision of board of water commissioners, city is liable for negleot of such commissioners. Hourigan v. Norwich [Conn.] 59 A. 487. City liable for negligent act of servant of park commissioners in stretching rope across street to injury of bicycle rider. Kleopfert v. Minneapolis [Minn.] 100 N. W. 669. Negligence of operator of elevator in city building. Fox v. Philadelphia, 208 Pa. 127, 57 A. 356. Error of engineer in locating place to sink crib in the construction of waterworks system. O'Neill v. Milwaukee [Wis.] 98 N. W. 963. Establishment of plant for purification of water system. Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326.

96. City not liable to subsequent purchaser for act of city engineer in giving erroneous grade of street. Moore v. Lancaster [Pa.] 58 A. 890. A contractor grading a street is not entitled to recover from the city for errors of the city surveyor in giving him the grade, his contract expressly stipulating to the contrary, though he doubted the correctness of the grade and only proceeded on positive instructions of the superintendent. Becker v. New York, 176 N. Y. 441, 68 N. E. 855. City not liable for injuries caused by servant throwing snow from roof of city hall (Kelly v. Boston [Mass.] 71 N. E. 299), nor for negligence of its employe engaged in transporting coal to its fire station (Manske v. Milwaukee [Wis.] 101 N. W. 377). The act of a city in laying out and constructing a sewer which creates a nuisance upon plaintiff's land is ultra vires and city not liable. Atwood v. Biddeford [Me.] 58 A. 417.

97. Gordon v. Omaha [Neb.] 99 N. W. 242.

98. It is not legally responsible for a contractor who is not its agent or servant, nor engaged in performing a duty imposed by law upon it. Thompson v. West Bay City [Mich.] 100 N. W. 280.

99. City not liable for negligence of contractor doing work under legislative direction. Morris v. Interurban St. R. Co., 91 N. Y. S. 479.

1. Excavating tunnel with dynamite. City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46. A city is responsible for damage resulting from the acts of an independent contractor employed by it where the matter involved is one of positive duty owed by the city, or where the work in itself is intrinsically dangerous, or liable, even when properly done, to create a nuisance. Severance

where an individual or a corporation does work pursuant to a special franchise or charter power, the doctrine of respondeat superior is applicable.[2]

At the common law, municipalities were not liable for injuries resulting from defective streets. But under statutes they are now responsible for failure, after notice,[3] to remove obstructions produced by other than natural causes,[4] as well as for permitting excavations to remain unguarded.[5] So, a municipal corporation is liable for the consequences of an unlawful use of its streets, sanctioned by its permit,[6] for damage to property caused by collapse of a culvert which it was its duty to maintain,[7] and for personal injuries resulting from telephone wires having fallen into street.[8]

For faults or imperfections in its system of sewers, a city or town is not liable;[9] but it is liable for negligence in the work of construction,[10] or in the maintenance or repair of a sewer,[11] unless such construction is entirely unauthorized.[12] A municipality may not collect surface water in a channel and cast it on land of abutter.[13] But the fact that a city has macadamized the surface of a street and constructed catch basins and conduits whereby the flow of surface water is accelerated will not render it liable for the overflowing of a stream into which the drainage water empties.[14] A city is not liable for the death of a child from typhoid fever contracted from drinking impure water of a well on the ground that the city had deposited the contents of a sewer into an open stream, the same percolating through gravelly soil to the well.[15] The remedy given by the South Carolina Code, 1902, §§ 2008, 2012, to a private person whose property outside

of private sewer through laying water mains. Bennett v. Mt. Vernon [Iowa] 100 N. W. 349.

2. City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46. Injury from paving blocks left on sidewalk during construction of public improvement. Recovery denied against city because cause of action improperly predicated as against it. Hesselbach v. St. Louis, 179 Mo. 505, 78 S. W. 1009.

3. Knowledge of a policeman of a defect in a sidewalk, which it is his duty to report, is knowledge of the city. Payne v. Cleveland, 4 Ohio C. C. (N. S.) 37. Police officers may become agents of a city by reason of a custom to use them that way. Customary to report defects in street. Notice of defect to police officer held notice to city. Kittredge v. Cincinnati, 2 Ohio N. P. (N. S.) 6.

4. Such holdings are not in conflict with the line of cases that a municipality is not liable for failure to remove snow and ice. McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006.

5. Defective temporary bridge over excavation. Coolidge v. New York, 90 N. Y. S. 1078. Failure to provide railing or guard at excavation. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531. Falling through trap door in sidewalk in course of reconstruction. McClammy v. Spokane [Wash.] 78 P. 912.

6. Discharge of fireworks during political parade under suspension of ordinance. Landau v. New York [N. Y.] 72 N. E. 631, rvg. 90 App. Div. 50, 85 N. Y. S. 616. See 2 Curr. L. 982, n. 55.

7. City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

8. West Kentucky Tel. Co. v. Pharis, 25 Ky. L. R. 1838, 78 S. W. 917.

9. Failure of sewer to carry off great accumulation of water due to heavy rainfall. Manning v. Springfield, 184 Mass. 245, 68 N. E. 202. Whether manholes were in working order just prior to a storm which caused the flooding presents a question of fact for the jury. Sundheimer v. New York, 176 N. Y. 495, 68 N. E. 867. A municipality is not responsible for damages caused by unexpected and unusual rainfalls, but only for those which experience has shown are liable to occur. Lakey Co. v. Kalamazoo [Mich.] 101 N. W. 841. Nor is it liable for obstructions in a creek over which it has no control except for purposes of sanitation. Id.

10. Municipality liable for damages from overflow of sewer caused by draining larger area than sewer originally intended for. Ahrens v. Rochester, 97 App. Div. 480, 90 N. Y. S. 744. City liable for diverting water on abutting land through new pavement of street and not providing sufficient outlets. City of Houston v. Hutcheson [Tex. Civ. App.] 81 S. W. 86.

11. Kidson v. Bangor [Me.] 58 A. 900.

12. The act of a city, in its corporate capacity, in laying out and constructing sewers which creates a nuisance upon plaintiff's land, is ultra vires. Atwood v. Biddeford [Me.] 58 A. 417.

13. Miles v. Brooklyn, 90 N. Y. S. 702 (by changing grade of street); Johnson v. White [R. I.] 58 A. 658, 65 L. R. A. 250, with note "Rights and Duties of Municipalities with Respect to Surface Water."

14. Smith v. Auburn, 88 App. Div. 396, 84 N. Y. S. 725.

Contra: That a city is liable for collection and discharge of sewage in a volume into creek to injury of lower owner. Smith v. Sedalia, 182 Mo. 1, 81 S. W. 165.

15. Wharton v. Bradford City, 209 Pa. 319, 58 A. 621.

of a city is damaged by the sewerage emptied into a stream, is exclusive, and such person cannot sue the city for torts nor to abate the nuisance.[16] A city street commissioner employing laborers paid for by the city is responsible only for reasonable care in the selection of men and materials.[17]

§ 15. *Claims and demands.*[18]—This section relates to claims and demands but not to the subject-matter thereof nor to those liabilities incurred in particular functions.[19] Where it is provided that claims against municipal corporations shall first be presented,[20] it is generally held that presentment is a condition precedent to suit,[21] that presentment must be in the prescribed form and manner,[22] on the proper officers,[23] by the proper person,[24] and within the prescribed time,[25] unless the failure to do so is excused for good cause,[26] or the city has already made notice or claim useless.[27] In the matter of presentment of claims, however, only substantial compliance is required,[28] and defects in the notice may be waived.[29] Acceptance of service of such a notice may be by the mayor,[30] and the city clerk

16. Matheny v. Aiken, 68 S. C. 163, 47 S. E. 56.

17. Bowden v. Derby [Me.] 58 A. 993.

18. See 2 Curr. L. 984.

19. See Highways and Streets, 3 Curr. L. 1593; Sheriffs and Constables, 2 Curr. L. 1640.

20. The general statute of Washington does not require demands for personal injuries to be filed. Gallamore v. Olympia, 34 Wash. 379, 75 P. 978. Montana Pol. Code, § 4811, requiring all demands against city to be presented to council, itemized and verified, does not apply to a claim for personal injuries. Dawes v. Great Falls [Mont.] 77 P. 309. Claim for damages from overflow of sewer not within provisions for notice in cases affecting cities of second class in New York. Ahrens v. Rochester, 97 App. Div. 480, 90 N. Y. S. 744.

21. That the filing of notice is a condition precedent to maintenance of action and must be pleaded and proved. Biggs v. Geneva, 90 N. Y. S. 858. In Kansas the effect of a failure to file claim is to prevent the recovery of costs. City of Garnett v. Hamilton [Kan.] 77 P. 583. Under the Wisconsin statute, where the council does not act on a claim within 60 days, and an appeal must be taken within 20 days, limitations do not run until notice to claimant. Lyon v. Grand Rapids [Wis.] 99 N. W. 311. And in that state it is not essential to the court's jurisdiction that the complaint allege the making and filing of the clerk's return in response to the appeal from disallowance. Horan v. Eau Claire [Wis.] 100 N. W. 1063. See 2 Curr. L. 984, n. 79.

22. Where notice of claim for damages was given and acted on by the city, the fact that it did not state amount of claim can not be availed of in an action on the claim. Spier v. Kalamazoo [Mich.] 101 N. W. 846. The Iowa statute does not require the causes which produced the injury to be enumerated [Code, § 3447]. McCartney v. Washington [Iowa] 100 N. W. 80. Statement of cause of accident held sufficient. McCarthy v. Syracuse, 96 App. Div. 566, 89 N. Y. S. 89. A requirement of verification may be waived. Hunter v. Durand [Mich.] 100 N. W. 191. Under New Jersey Act of 1904, p. 259, claims must be first presented to mayor for his approval. Fox v. Clark [N. J. Law] 59 A. 224. See 2 Curr. L. 984, n. 80.

23. Presentation to and consideration by the common council of the claim is not a waiver of the notice, none having been served on the proper officer. Wilton v. Detroit [Mich.] 100 N. W. 1020; Holtham v. Detroit [Mich.] 98 N. W. 754. Where, as a condition precedent to action for injuries on defective sidewalk, written notice must be given to the head of the city's legal department, notice to an assistant in such department is not sufficient. Holtham v. Detroit [Mich.] 98 N. W. 754. Where it is required that the notice be filed with the corporation counsel, a complaint which alleges that the notice was filed with the comptroller will not warrant a showing that the notice was transmitted to the corporation counsel and acted on by him. Bedell v. New York, 90 N. Y. S. 936. See 2 Curr. L. 984, n. 81.

24. Where parent and child are both injured, notice on behalf of each must be filed. Seliger v. New York, 88 N. Y. S. 1003. See 2 Curr. L. 984, n. 82.

25. In computing the time of notice, the day of the injury is to be excluded. McEvoy v. Sault Ste. Marie [Mich.] 98 N. W. 1006. But see Biggs v. Geneva, 90 N. Y. S. 858, where a notice given March 11, the injury having occurred February 10, is held insufficient. Time computed from death of decedent and not granting of letters of administration. Crapo v. Syracuse, 90 N. Y. S. 553. See 2 Curr. L. 984, n. 83.

26. See 2 Curr. L. 984, n. 84.

27. See 2 Curr. L. 985, n. 85.

28. Where during the period allowed for filing notice one is disabled from doing so, but does so on recovery, this is sufficient. Williams v. Port Chester, 97 App. Div. 84, 89 N. Y. S. 671. Statute requiring filing of claim said to be in derogation of common law and therefore to be liberally construed. City of Denver v. Bradbury [Colo. App.] 75 P. 1077. In determining the sufficiency of such a notice the court is not bound by its terms alone, but may examine it in the light of extraneous evidence, showing the situation and surroundings, and thus determine whether it sufficiently apprised the municipality of the location and nature of the alleged defect or obstruction which caused the accident. Connor v. Salt Lake City [Utah] 78 P. 479.

29. Verification may be waived. Hunter

may testify that a claim was presented to the council.[31] That a cause of action is barred because of want of notice is an affirmative defense, and to be available the facts constituting it must be pleaded.[32] The provision of a city charter prohibiting the payment of a claim pending an appeal from the disallowance thereof does not restrict the jurisdiction of the Federal courts over claims of citizens of other states.[33] After a city assessment for sewering has been judicially declared invalid, and a curative act has been passed purporting to cure such assessment, the city should be given an opportunity to reassess before instituting suit.[34] A partial estimate made by the city engineer on a paving contract, and reported by him to the board of public works and the city council for approval, is a claim against the city.[35] The work of lining up and repairing a curb by replacing rotten stones with new ones where necessary is repair work, which must be paid for by the city under the St. Louis city charter.[36]

Audit and approval.[37]

Interest.[38]—Where under a charter provision that warrants shall be drawn on the treasury presentation is made to one who has none of the funds or access thereto, such warrant will not bear interest, irrespective of whether the one to whom presentment was made had any claim to the office of treasurer.[39] Where both damages and benefits were assessed on real estate in street opening proceedings, and the city was liable for interest on the damages, interest should also be charged against the owner on the unpaid benefits.[40]

Warrants and judgments.[41]—Charter provisions as to the signature of warrants must be observed.[42] An appeal suspends the order of the council, and during its pendency the comptroller is not required to deliver the warrant.[43] A municipal warrant is not negotiable.[44] The acceptance by the treasurer or comptroller of an order drawn on the city operates as not only an equitable but legal assignment.[45] The statute of limitations does not run in favor of a municipal corporation, upon its outstanding obligations evidenced by warrants, until the corporation has provided a fund out of which payment of the same may be made.[46] On the other hand, limitations do not begin to run against an action against a city for wrongful diversion of a special fund until the holder of warrants against

v. Durand [Mich.] 100 N. W. 191. But presentation to and consideration by the city's council is not a waiver in the absence of notice on proper officer. Wilton v. Detroit [Mich.] 100 N. W. 1020. See 2 Curr. L. 985, n. 90.

30. McCartney v. Washington [Iowa] 100 N. W. 80.

31. Jewell City v. Van Meter [Kan.] 79 P. 149.

32. Borghart v. Cedar Rapids [Iowa] 101 N. W. 1120; Bunker v. Hudson [Wis.] 99 N. W. 448. See 2 Curr. L. 985, n. 89.

33. Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945.

34. Citizens' Bank v. Spencer [Iowa] 101 N. W. 643.

35. See 33 Omaha charter. Lobeck v. State [Neb.] 101 N. W. 247.

36. Perkinson v. Schnake [Mo. App.] 83 S. W. 301.

37, 38. See 2 Curr. L. 985.

39. Valley Bank v. Brodie [Ariz.] 76 P. 617.

40. In re City of New York, 91 App. Div. 553, 87 N. Y. S. 123.

41. See 2 Curr. L. 985.

42. Where a city charter provided that warrants must be signed by the mayor and auditor, a warrant not signed by the mayor is of no validity. Valley Bank v. Brodie [Ariz.] 76 P. 617. And the fact that formalities were not observed in the presentation of an account to the president of a village does not prevent mandamus in a proper case to compel him to sign warrants therefor, where he did not put his refusal to sign on that ground. Clapp v. Titus [Mich.] 100 N. W. 1005. Where a city charter provides that the vice chairman of the council may act as president where the latter is incapacitated, his signature to a tax warrant will be presumed to have been necessitated. City of New York v. Streeter [N. Y.] 72 N. E. 631.

43. Nor during the pendency of such appeal will mandamus lie to compel a delivery. Lobeck v. State [Neb.] 101 N. W. 247.

44. Though made so in form. Bona fide holder not protected in purchase from one without authority to sell. First Nat. Bank v. Gates, 66 Kan. 505, 72 P. 207.

45. Third Nat. Bank v. Atlantic City [C. C. A.] 130 F. 751.

46. Barnes v. Turner [Okl.] 78 P. 108. See 2 Curr. L. 985, n. 99.

the fund had notice of the diversion.[47] The fact that the moneys appropriated have been expended is no defense to an action on a warrant.[48] In support of a judgment it will be presumed that an ordinance was introduced the prescribed time before it was passed.[49] Statute passed after the rendition of judgments may be applicable to those judgments if they are still pending in appellate courts on review.[50] Under statute permitting appeal on bill of exceptions from judgment of municipal authorities, the appeal cannot be heard on oral testimony.[51]

§ 16. *Actions by and against.*[52] *A. In general.*[53]—A city may maintain ejectment to recover a portion of one of its public streets,[54] and may sue to recover taxes due it irrespective of charter provisions.[55] An action for injury to the bridges and highways of a town is properly brought in the name of the town.[56] A citizen and taxpayer of a municipality is not entitled to maintain a suit to recover funds of the city alleged to have been misappropriated, without first having demanded that the suit should be brought by the public officers, or without alleging and proving facts affirmatively indicating that such demand would be unavailing.[57]

Where the act of incorporation expressly provides that suit against a city shall be brought in its corporate name, a suit against the mayor and council thereof is not maintainable.[58] Property belonging to a municipal corporation and which is in use for the public or held for future use is not subject to levy and sale under an execution.[59] But property held by a city in its proprietary capacity is liable for the city's debt.[60]

(§ 16) *B. Suits in equity.*[61]—If the closing of a street results in damaging private property, the owner of the property thus damaged, by allowing the street

47. Northwestern Lumber Co. v. Aberdeen, 35 Wash. 636, 77 P. 1063.

48. Griffith v. New York, 173 N. Y. 612, 66 N. E. 1109, afg. without written opinion, 73 App. Div. 549, 77 N. Y. S. 136.

49. Town of Susanville v. Long, 144 Cal. 362, 77 P. 987.

50. Writ of mandamus to compel disconnection of land from a city was granted. While pending on appeal, statute was passed making such proceeding discretionary. Held, that the statute applied to the judgment, the ordinance of disconnection not having been passed. City of Roodhouse v. Briggs, 105 Ill. App. 116.

51. Order adopting map of streets. City of Greenwood v. Henderson [Miss.] 37 So. 745.

52. Practice questions usually involve principles more pertinent to the general practice titles than to this. They should be consulted.

53. See 2 Curr. L. 985.

NOTE. Running of limitations against municipal corporations: "The authorities do not seem to be harmonious on the question whether municipal corporations are affected by statutes of limitations under all circumstances. Of course, the matter is regulated by statute to a large extent. The courts often say, in a general way, that statutes of limitations run against municipal corporations in the same manner as against individuals. City of Alton v. Illinois Transportation Co., 12 Ill. 38, 52 Am. Dec. 479; City of Pella v. Scholte, 24 Iowa, 283, 95 Am. Dec. 729; Clements v. Anderson, 46 Miss. 581; St. Charles Tp. School Directors v. Goerges, 50 Mo. 196; Knight v. Heaton, 22 Vt. 480. Other courts draw a distinction and state that statutes of limitations run against municipal corporations except as to property devoted to a public use or held upon a public trust, and except as to contracts of a public nature. City of Ft. Smith v. McKibben, 41 Ark. 49, 48 Am. Rep. 19; Logan County v. Lincoln, 81 Ill. 158; Bedford v. Willard, 133 Ind. 562, 33 N. E. 368, 36 Am. St. Rep. 563; Ralston v. Weston, 46 W. Va. 544, 33 S. E. 326, 76 Am. St. Rep. 834. But this distinction has also been repudiated as unsound. See City of Cincinnati v. First Presbyterian Church, 8 Ohio, 298, 32 Am. Dec. 718. The rule and reasons for it and the distinction where the litigation involves rights of the whole public, from that where the litigation involves merely municipal rights are considered more fully in a note to 101 Am. St. Rep. 144, entitled "The Maxim, Nullum Tempus Occurrit Regi," from which at page 157 this is quoted.

54. City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982.

55. Adoption of new charter and repealing former without saving clause. Bennison v. Galveston [Tex. Civ. App.] 78 S. W. 1089.

56. Town of Southeast v. New York, 96 App. Div. 598, 89 N. Y. S. 630.

57. Reed v. Cunningham [Iowa] 101 N. W. 1055.

58. Augusta Southern R. Co. v. Tennille, 119 Ga. 804, 47 S. E. 179.

59. Walden v. Whigham, 120 Ga. 646, 48 S. E. 159.

60. Dunham v. Angus [Cal.] 78 P. 557.

61. See 2 Curr. L. 987.

to be closed without instituting proceedings to prevent it, waives his right to demand compensation as a condition precedent to the closing of the street, and is remitted to his action at law for damages.[62] The principle that one who seeks to abate a public nuisance must show a special interest does not apply to a taxpayer who seeks to enjoin an illegal or wrongful act,[63] and owners of land abutting on land dedicated and accepted as a public park may enjoin a village from using a portion of such park for a highway, though they show no damage to their lands.[64] But to entitle one to an injunction to prevent an obstruction to a public way, it must appear that he has sustained a peculiar damage differing, not merely in degree, but in kind, from that of the general public.[65] A taxpayer cannot maintain a suit to prevent city from granting franchise to telephone lines unless franchise constitutes such a wrongful squandering of money or property as to increase taxation.[66]

MUNICIPAL COURTS; MURDER; MUTUAL ACCOUNTS; MUTUAL INSURANCE, see latest topical index.

NAMES, SIGNATURES AND SEALS.

§ 1. Names (754). Business Names (755). Idem Sonans (755).
§ 2. Signatures (756).
§ 3. Seals (757).

§ 1. *Names.*[1]—One may be particularly described by the initial letter of his given name, as well as by the name in full,[2] especially where he is commonly so designated, answers to that name, and makes a practice of so writing it in ordinary business transactions.[3] A signing by the surname in full and the Christian name by its initial is generally regarded as sufficient in official signatures.[4]

The law recognizes but one given name.[5] Hence it is not essential to give the middle name or initial.[6] There is a conflict of authority as to the effect of a mistake therein, when it is given.[7]

62. Marietta Chair Co. v. Henderson, 121 Ga. 399, 49 S. E. 312.

63. Suit to enjoin carrying out ordinance contracting for street lights. Meyer v. Boonville, 162 Ind. 165, 70 N. E. 146.

64. Village of Riverside v. MacLain, 210 Ill. 308, 71 N. E. 408.

65. A person whose lot fronts upon the block next to one to be obstructed by the closing of the street, and whose lot will be greatly depreciated in value thereby, suffers such a peculiar injury. Tilly v. Mitchell & Lewis Co. [Wis.] 98 N. W. 969. Where a city and certain abutting owners attempted to widen the sidewalk and boulevard of a street within a certain half block, the owners of property further up the street could not maintain an injunction to restrain such action, since their rights in the street were held in common with the public and other residents thereon. Mitchell v. Peru [Ind.] 71 N. E. 132. Obstruction of sidewalk by abutting owner resulting in inconvenience to pedestrians and loss to business of adjoining owner may be enjoined. Brauer v. Baltimore Refrigerating & Heating Co. [Md.] 58 A. 21.

66. Clark v. Interstate Independent Tel. Co. [Neb.] 101 N. W. 977.

1. See 2 Curr. L. 988.

2. Cox v. Durham [C. C. A.] 128 F. 870. Notice of mechanic's lien not invalid because Christian name of signer designated by initials. Pearce v. Albright [N. M.] 76 P. 286.

3. Warrant commanding arrest of J. I. Cox held to protect officer in arrest thereon of James T. Cox, commonly known as J. T. Cox. Cox v. Durham [C. C. A.] 128 F. 870. Fact that replevin affidavit described plaintiff as "Charles Oleson," but was signed "Charley Olson," does not render it insufficient where justice certified that it was subscribed and sworn to before him. Olson v. Peabody [Wis.] 99 N. W. 458. Fact that replevin affidavit gave defendant's first name as "Wimmian" instead of "William," as it appeared in warrant, held immaterial, where he appeared in cause and name appeared in affidavit for removal as given in warrant. Id.

4. Transcript of judgment recovered in another state held admissible in evidence, though only initials of Christian names of clerk and judge are given in signatures of certificates. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

5. Cox v. Durham [C. C. A.] 128 F. 870.

6. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604; Cox v. Durham [C. C. A.] 128 F. 870. Middle initial not necessary or material part of name. Lucas v. Current River Land & Cattle Co. [Mo.] 85 S. W. 359.

7. Mistake in name or initial constitutes fatal variance. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604.

Mistake in middle initial of accused's name in warrant immaterial. Cox v. Durham [C. C. A.] 128 F. 870.

A widow using the initials of her deceased husband and known by his name may be so described in an assessment.[8]

By statute in Missouri if one is indicted by the wrong name he may be proceeded against by the name in the indictment unless he declares his true name before pleading.[9]

The fact that the descriptive term "Jr." attached to the name of one summoned as a juror is omitted in the copy of the jury list served on the accused is inconsequential, and does not affect the legality of the service, in the absence of a showing of prejudice.[10]

The omission of the Christian name of the complaining witness from a criminal warrant does not render defendant's preliminary examination nugatory.[11]

The words vice president,[12] trustee and the like are generally regarded as descriptio personae.[13]

Business names.[14]—In New York, carrying on business under an assumed name is forbidden by statute, unless a certificate is filed in conformity with the act.[15] The assumption of a corporate name by individuals for the purpose of soliciting business thereunder is forbidden in Illinois.[16] An individual or a corporation may use his or its name as a trade mark, but may be enjoined from so doing if some other has previously acquired the right to so use it.[17] The adoption of a name by a corporation gives it no greater right to its use than an individual would have.[18]

Certiorari will not lie to review the action of the secretary of state in permitting a certificate of incorporation to be filed by a company having a name so nearly resembling that of an existing corporation as to be calculated to deceive, but the latter has his remedy in equity.[19]

Idem sonans.[20]—Idem sonans means sounding the same or substantially iden-

8. "Mrs. D. J. Doyle." Tieman v. Johnston [La.] 38 So. 75.

9. Where accused misled state at time of his arrest by giving fictitious name, fact that he was proceeded against under that name did not relieve sureties on forfeited recognizance for his appearance, in which he was designated by his true name [Rev. St. 1899, § 2533]. State v. Ballentine [Mo. App.] 80 S. W. 317. Evidence of officer making arrest was admissible to show what name accused gave to show his identity with principal in recognizance. Id.

10. Presumption is that it was omitted through clerical error. State v. Cafiero, 112 La. 453, 36 So. 492. Evidence is admissible to show that the juror drawn and summoned was the only person of that name in the ward, and that his father died more than a year before the drawing of the jury. Id.

11. Preliminary examination for having assaulted "—— Bert" will sustain an information and warrant a trial thereon for having assaulted "Joseph Burt." State v. Johnson [Kan.] 79 P. 732.

See Indictment and Prosecution, § 4 C, 4 Curr. L. 11.

12. Warranty deed to "E. H. P., vice president of the National Bank of the Republic," conveys title to him individually, and where such deed recites that it is given to secure a debt, a power of sale therein cannot be exercised by "C. H. S., cashier" of said bank. Greenfield v. Stout [Ga.] 50 S. E. 111.

13. In action on bond running to trustees of incorporated society held that so much of title of complaint as followed their names could be treated as descriptio personarum. Hecker v. Cook [Colo. App.] 78 P. 311.

14. See 2 Curr. L. 988; see, also, Trade-Marks and Trade-Names, 2 Curr. L. 1881.

15. Laws 1900, p. 452, c. 216, § 363b. Devlin v. Peek, 135 F. 167. Law does not forbid the institution of an action by one who has assumed a trade-name. Id.

16. "Imperial Mfg. Co.—I. Schwartz, proprietor" is such a modification of a name such as usually applied to corporations as to deceive no one and is not a violation of the statute. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

17. The public are entitled to protection from deception by the use of previously appropriated names or symbols. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

18. Where it is apparent that it was adopted to obtain by fraud and deception the trade and good will of another built up under the same name, its use may be restrained. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

19. Should refuse to file certificate under N. Y. Laws 1892, c. 687, p. 1802, as amended by Laws 1902, c. 9, p. 12. People v. O'Brien, 91 N. Y. S. 649.

20. See 2 Curr. L. 988.

For comprehensive discussion of this subject, and alphabetical list of names which have been held to be and not to be idem sonans, see 100 Am. St. Rep. 322.

tical in sound.[21] If the names may be sounded alike, without doing violence to the power of the letters found in the variant orthography, then the variance is immaterial.[22]

§ 2. *Signatures.*[23]—Typewritten signatures[24] and signatures made by mark, when the party cannot write, are valid.[25]

A signature may be made by a duly authorized attorney,[26] and one may adopt a signature made by another as his own.[27] Thus, delivery of a note by the apparent maker as his note is an adoption of the signature by whomsoever made.[28]

The signature of a corporate officer, with the corporate seal attached, is prima facie that of the corporation.[29]

Comparison of signatures.[30]—Comparisons of genuine signatures with an alleged spurious one are ordinarily for the jury,[31] but by statute in some states experts may make them.[32] A genuine lead pencil signature may be used for the purpose.[33] A statute authorizing expert comparison and opinion of genuine and disputed signatures when placed in juxtaposition does not authorize the comparison of simulations thereof.[34] The Florida statute authorizing a comparison of

21. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604. Rule requires only that there be a practical identity of sound, or even so close a similarity that the attentive ear finds difficulty in distinguishing the names when pronounced. Armstead v. Jones [Kan.] 80 P. 56.

22. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604.

Names idem sonans: "L. Krowder" and "L. Krower." Alexis v. U. S. [C. C. A.] 129 F. 60. "Bert" and "Burt." State v. Johnson [Kan.] 79 P. 732. "Shuter" and "Shutter." Person from whom property was stolen. Id. [Wash.] 78 P. 903. "Stirr" and "Stier." Change of name of party in record on appeal. City of New Albany v. Stirr [Ind. App.] 72 N. E. 275. "Forshee" and "Foshee." Amendment of transcript, on change of venue in criminal case, by changing name of person killed immaterial. Taylor v. State [Ark.] 82 S. W. 495. A conveyance by the heirs of one "Clark" of property inherited from him is not defeated by the fact that they signed their names as "Clarke." Altschul v. Casey [Or.] 76 P. 1083. Where plaintiff's name was properly spelled "Jarrett" in body of original petition, but was written Jarvitt in backing of petition, in caption of process annexed by clerk and in copy of petition and process served on defendant, and on trial court allowed name to be corrected after answer to merits, it was not necessary to serve amended process on defendant. Jarrett v. City Elec. R. Co., 120 Ga. 472, 47 S. E. 927. In action of ejectment against "Ned Armstead," in which plaintiff claims title through judgment against one designated in summons as "Ned Almstead" on notes purporting to be executed by "Ned Olmstead" by use of a mark, testimony of officer who served summons in former suit held to justify treating "Almstead" and "Olmstead" as different spellings of "Armstead." Armstead v. Jones [Kan.] 80 P. 56.

Not idem sonans: One suing as administratrix of the estate of "Ferdinand N." A. cannot maintain an action for the death of "Fernando W." A. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604. Question properly raised by demurrer to complaint for want of facts sufficient to constitute cause of action. Id.

23. See 2 Curr. L. 989. For sufficiency of signature to particular instruments see Bonds, 3 Curr. L. 507; Deeds of Conveyance, 3 Curr. L. 1056; Negotiable Instruments, 2 Curr. L. 1013; Wills, 2 Curr. L. 2076.

24. Attorney in fact authorized to sign remonstrance against issuance of liquor license for and in behalf of voters may do so on typewriter. No question as to redelegation of authority is involved. Ardery v. Smith [Ind. App.] 73 N. E. 840.

25. In Idaho signature or subscription includes mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as witness. Rev. St. 1887, § 16. Notary's certificate that person making mark acknowledged execution of instrument is equivalent to signature of witness. First Nat. Bank v. Glenn [Idaho] 77 P. 623.

26. When he has written authority, may sign names of voters to remonstrance against the issuance of a liquor license. Ardery v. Smith [Ind. App.] 73 N. E. 840.

27. Harris v. Tinder [Mo. App.] 83 S. W. 94. See Tiffany on Real Property, § 402, p. 919.

28. Evidence that maker delivered it as his note and so adopted the signature is admissible without any plea of ratification or estoppel. Instructions approved. Harris v. Tinder [Mo. App.] 83 S. W. 94. Evidence that defendant delivered note as his own in substitution for another note held to make prima facie case for plaintiff. Id.

29. Wilson v. Neu, 1 Neb. Unoff. 42, 95 N. W. 502.

30. See Forgery, 3 Curr. L. 1474.

31. Groff v. Groff, 209 Pa. 603, 59 A. 65.

32. Pa. Act May 15, 1895 (P. L. 69). Groff v. Groff, 209 Pa. 603, 59 A. 65.

33. Groff v. Groff, 209 Pa. 603, 59 A. 65. Where witnesses testify that they can tell a person's signature on sight, it is proper, on cross-examination, to ask their opinions of the genuineness of a signature without showing them the whole document to which it is appended. Id.

34. Cannot compare copies on blackboard. Groff v. Groff, 209 Pa. 603, 59 A. 65. Party calling expert must satisfy court as to his competency. Id.

handwriting applies to both civil and criminal cases, and its provisions cover, for the purpose of comparison, not only the genuine writings of the party whose signature is alleged to be forged, but also the genuine writings of the alleged forger.[35]

§ 3. *Seals.*[36]—Whether an instrument has been executed under seal or not is a question to be determined by the court upon an inspection.[37] Its character may be determined by the use of a seal in signing it, though the purpose in affixing it is not indicated by any recital or declaration therein.[38] In case of uncertainty stress is ordinarily laid upon the form and character of the paper, and the purpose of its execution.[39]

A seal, to be given effect as such, need not necessarily be in juxtaposition with the signature,[40] but the mere impression of a seal, at some time and upon some unusual part of the instrument, is not to be accepted as necessarily determining its character.[41] Attested does not mean sealed.[42]

The use of the letters "L. S." in the record of a deed is a sufficient representation of the corporate seal of the grantor.[43]

NATURALIZATION, see latest topical index.

NAVIGABLE WATERS.

§ 1. **What Are Navigable (757).**
§ 2. **Relative, Private and Public Rights (758).** Tide Waters (758). Nontidal Waters (758). Right of Access (760).
§ 3. **Regulation, Control and Use (760).** Political Jurisdiction (761). Bridges, etc. (761). Wharves (762). Booms, Dams and Logging Rights (763). Filling Tide Lands (763).
§ 4. **Remedies for Injuries Relating to (764).**

The rights of riparian owners,[44] consuming uses of the water,[45] and matters relating to navigation, are treated elsewhere.[46]

§ 1. *What are navigable.*[47]—Salt rivers, or those in which the tide ebbs and flows, and tide waters generally, are navigable as a matter of law.[48]

Fresh water rivers are navigable or non-navigable as a matter of fact.[49] Navigability in fact for commercial purposes makes a stream a navigable one.[50] The test is its capability of being used for purposes of trade and travel in the usual and ordinary modes,[51] and not the extent and manner of such use.[52]

35. Rev. St. 1892, § 1121. Wooldridge v. State [Fla.] 38 So. 3.

36. See 2 Curr. L. 989.

As to what constitutes a seal, see Tiffany on Real Property, p. 918, § 403.

37, 38, 39, 40. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

41. Impression of alleged corporate seal over figures on top corner of insurance policy, not forming any part thereof, held not to make it sealed instrument. Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

42. "In witness whereof this company executed and attested these presents." Brown v. Commercial Fire Ins. Co., 21 App. D. C. 325.

43. Altschul v. Casey [Or.] 76 P. 1083.

44. See Riparian Owners, 2 Curr. L. 1522.

45. See Waters and Water Supply, 2 Curr. L. 2034.

46. Shipping and Water Traffic, 2 Curr. L. 1648.

47. See 2 Curr. L. 989. See, also, Waters and Water Supply, § 1, 2 Curr. L. 2035.

48. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646.

See, also, Waters and Water Supply, § 6, 2 Curr. L. 2042.

49. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646. Is a question of fact for the jury. Depends upon depth of water, etc. Stream used by public for purposes of fishing, as passway, and as harbor in time of storms, held navigable. State v. Twiford, 136 N. C. 603, 48 S. E. 586.

50. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813. A stream navigable in fact is navigable in law. State v. Twiford, 136 N. C. 603, 48 S. E. 586. A stream capable in its natural state of being practicably used for the floatage of shingle bolts to market at certain seasons of the year is navigable. Evidence sufficient to sustain finding. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813. Complaint held to sufficiently allege that stream was floatable or navigable in its natural condition. Id.

51. Not affected by conditions of adjacent land, as that one riparian owner has monopoly of shore, with no public road to the water, thus cutting off access by land. State v. Twiford, 136 N. C. 603, 48 S. E. 586. Freshwater streams are navigable if they are capable of affording navigation. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646.

§ 2. *Relative, private and public rights.*[53]—By the common law of England, the fee of all land covered by navigable waters was in the king, subject only to the public rights of fishing and navigation,[54] and no one had a right to erect and maintain a wharf or other structure below high-water mark.[55]

Tide waters.[56]—Absolute property in, and dominion and sovereignty over, the soils under tide water belongs to the state in which the land is situated.[57] It holds the land under the navigable part of tidal waters in trust for the public,[58] but may, in the absence of a statute to the contrary,[59] sell or lease land lying between high and low-water mark to whomsoever it sees fit, without compensation to the riparian proprietors.[60]

A littoral proprietor has a right of access to and from his land to the ocean as against a stranger,[61] and any obstruction thereto is a private nuisance for the abatement of which he may maintain an action.[62] The secretary of war has no authority to authorize such obstructions.[63]

Nontidal waters.[64]—There is a conflict of authority as to the ownership of the soil under nontidal waters lying wholly within a state.[65] In some states it is held to belong to the state, to be controlled by it, in its own discretion, for the benefit of the public.[66] The riparian owners have a fee to low-water mark only, and

52. The fact that a riparian owner makes a charge for fishing in a creek is not proof of its non-navigability. State v. Twiford, 136 N. C. 603, 48 S. E. 586.

53. See 2 Curr. L. 990.

54. In 1693. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646; San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823. Had right to grant land to riparian owners, subject to public easement of navigation. Smith v. Bartlett [N. Y.] 73 N. E. 63. Separate devises, by one to whom king granted land under tidal river, of land on each side thereof, carries title to thread of stream. Id.

55. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646. Rule applies in Illinois to lands under Lake Michigan. Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N. E. 5.

56. See 2 Curr. L. 990, § 2.

57. San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823; Muckle v. Good [Or.] 77 P. 743.

58. Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 44.

59. Under New Jersey Statute (P. L. 1869, p. 1022, § 8), no grant or license can be made to other than riparian owner until six months after he has been given written notice. Shamberg v. Board of Riparian Com'rs [N. J. Law] 60 A. 43. The right of riparian owners, under Virginia Code 1887, § 2137, to have tracts of land assigned to them for oyster planting grounds, must, if possible, be exercised in the manner least injurious to others, and not capriciously and arbitrarily. Taylor v. Com., 102 Ky. 759, 47 S. E. 875.

60. Shamberg v. Board of Riparian Com'rs [N. J. Law] 60 A. 43. Grantee's title is as absolute as grant imports. Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. [N. J. Law] 60 A. 44. Land may be taken by railroad under power of eminent domain. Id. Under N. J. Act March 21, 1871 (Gen. St. p. 2790), riparian commission has power to make deed vesting all rights of state in grantee. Burkhard v. Heinz Co. [N. J. Err. & App.] 60 A. 191. Deed conveying land below high water mark of Atlantic Ocean "with the right and privilege to exclude the tide water from so much of the land as lies under water by filling in or otherwise improving the same, and to appropriate the lands under water to her and their exclusive private uses," held to give assigns of grantee right to maintain ejectment against one occupying pier erected upon the land under water. Id. Where board of school land commissioners found it to be tide land and conveyed it as such, grantees acquired good title as against one claiming by adverse possession. Muckle v. Good [Or.] 77 P. 743.

Right of state to grant tide land so as to destroy wharfage right of shore owner. See note 63 L. R. A. 264.

61. See 2 Curr. L. 991, n. 40, 47. Erection of platforms in Pacific Ocean in front of plaintiff's property for purpose of boring oil wells enjoined. San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823.

62. San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823.

63. Letter held not to give authority. San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823.

See, also, Nuisance, § 2, 4 Curr. L. 839.

64. See 2 Curr. L. 990, § 2.

65. See also Riparian Owners, § 1, 2 Curr. L. 1522; Waters and Water Supply, § 2, 2 Curr. L. 2035.

66. Va. Code 1887, § 1338 is not an arbitrary assumption of title to such lands, but is declaratory of the common law. Taylor v. Com., 102 Va. 759, 47 S. E. 875. Waters under Lake Michigan belong to state. Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264 and note. The state of Alabama, when admitted to the Union, became entitled to the soil under the navigable waters below high-water mark within the limits of the state, not previously granted.

merely have certain rights beyond it, such as the right to build wharves, a right of access to the water, and a right of way over it.[67] Such rights are property and cannot be taken or interfered with.[68] The state may grant to a city so much of the shore and such underlying lands as lie within the latter's boundaries, as trustee for the public.[69] Under such a grant the city cannot convey the same for the benefit of riparian owners,[70] nor can it be estopped to assert its rights thereto by a mere failure to exercise them.[71] But where a riparian proprietor has constructed expensive works thereon with the city's knowledge and has paid taxes and fees for the privilege of maintaining them, the city must pay him a reasonable compensation therefor before it can recover the land.[72]

In New York the commissioners of the land office are authorized to make grants of lands under the waters of navigable rivers or lakes to the proprietors of the adjacent lands as they may deem neeessary to promote the commerce of the state, or proper for the beneficial enjoyment of the same by the adjacent owner.[73] A grant of this nature for the purpose of erecting a dock or wharf appropriates it to the use of all who are engaged in promoting the purpose of the grant, which is the commerce of the state, subject only to the owner's right to collect a reasonable compensation for the use.[74]

Lands covered by navigable waters are not subject to entry under the North Carolina code.[75]

In other states the riparian proprietors own the soil to the center of the stream, subject only to the right of the public to the free and undisturbed navigation of the river.[76] Hence a grant of riparian lands, without limitation or reservation as to adjacent islands, vests in the purchaser the title to any unsurveyed island lying between the bank and the thread of the stream.[77] Where a river flowing over government land changes its course, the abandoned bed becomes a part of the surrounding land and passes by a subsequent patent.[78]

In states where the riparian proprietor owns the bed of the stream, he holds it subject to the right of navigation.[79] He is entitled to no compensation for

City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

67. Taylor v. Com., 102 Ky. 759, 47 S. E. 875. In Illinois it is held that lands under Lake Michigan belong to the state, and that the legislature may grant title to submerged lands along the shore so as to prevent riparian owner from constructing wharves out to line of navigability without consent of grantee. Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264.

68. Va. Acts 1899-1900, p. 797, c. 757, leasing tract under York River below low-water mark, including artesian well thereon, not objectionable as interfering with rights of adjacent proprietors. Taylor v. Com., 102 Va. 759, 47 S. E. 875.

69. Act Jan. 31, 1867 (Laws 1866-67, p. 307) constitutional. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

70. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

71. Custom allowing riparian owners to use them for erection of wharves, etc., not available to support contention that city had thereby been divested of title. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298. Fact that neither city nor river commission objected to construction of expensive bulkheads, etc., does not estop city to deny riparian proprietor's right to occupy same. Id.

72. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

73. Laws 1850, c. 283, p. 621. Thousand Island Steamboat Co. v. Visger [N. Y.] 71 N. E. 764.

74. Grant "for the purpose of promoting the commerce of our state and for no other object or purpose whatsoever," does not confer on proprietors exclusive right to use dock erected thereon. Thousand Island Steamboat Co. v. Visger [N. Y.] 71 N. E. 764. The commissioners are not authorized to make an unqualified grant. Unqualified grant held not to have enlarged previous limited grant. Id.

75. Code, § 2751 (1). State v. Twiford, 136 N. C. 603, 48 S. E. 586.

76. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118; Sliter v. Carpenter [Wis.] 102 N. W. 27; West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393.

77. Ownership passes under original government patent, and interest then attaches and becomes appurtenant to bank until separated by deed. Sliter v. Carpenter [Wis.] 102 N. W. 27.

78. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

79. Holds the bed of unmeandered streams subject to the easement of driving timber products over the land. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813. The public

injuries resulting from either the navigation itself or from work done for the purpose of improving it.[80] This is only true, however, in case the work is done for the purpose of facilitating the navigation of the stream itself, or a stream or body of water naturally emptying into it, or into which it naturally empties.[81] Thus he is entitled to compensation where the waters are taken and their general level is reduced for the purpose of making navigable an artificial channel.[82]

Right of access.[83]—The proprietors of lands upon navigable waters are entitled to the right of access to their navigable parts.[84] Every shore owner, as against other owners, is entitled to his proportion of the line bounding navigable water for contact with navigation, and to a direct course over intervening shallows to construct piers or other structures connecting the shore with such navigable line.[85] When the irregularities or curvature of the shore are such that lines cannot be drawn at right angles to the shore to accomplish this, then the whole cove is to be treated as a unit of the shore line by drawing such vertical lines from its two boundary points or headlands to the line of navigability, and then apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between such headlands, and by drawing straight lines from the two termini of navigable water line to the respective termini of shore line pertaining to each owner.[86]

§ 3. *Regulation, control and use.*[87]—Navigable streams are public highways, open to the use of all.[88] They belong to the public, and their use cannot be sold, or monopolized by individuals,[89] nor has anyone a right to obstruct them or to interfere with their navigation.[90] Such interference is a public nuisance.[91]

right in a navigable stream is paramount, and one owning the soil under it may only use and enjoy it in so far as is consistent with such right, and in a manner which will leave it free and unobstructed. Tunnel held obstruction. West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393.

80, 81. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118.

82. Lowering water in canals connecting with Chicago River by construction of drainage canal, not constructed principally for purposes of navigation. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118.

83. See 2 Curr. L. 991, n. 40-47.

84. Thousand Island Steamboat Co. v. Visger [N. Y.] 71 N. E. 764. Right of shore owner to accretions is based upon his right of access. Webber v. Axtell [Minn.] 102 N. W. 915.

See, also, Riparian Owners, § 3, 2 Curr. L. 1523.

85. This is the dominant rule, and all rules for apportionment and division are subject to such modification as may be necessary to accomplish substantially this result. Thomas v. Ashland, etc., R. Co. [Wis.] 100 N. W. 993.

86. Thomas v. Ashland, etc., R. Co. [Wis.] 100 N. W. 993.

87. See 2 Curr. L. 991.

88. State v. Charleston Light & Water Co. [S. C.] 47 S. E. 979; State v. Dundee Water Power & Land Co. [N. J. Law] 58 A. 1094. Freshwater streams are made highways by law for limited purposes. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646. By statute in Louisiana, all navigable rivers are public highways, and the use of the banks is public. Civ. Code, 453, 455. Mississippi River made a public highway, and free for use of all by Acts of Congress under which state was admitted [Act Feb. 20, 1811, c. 21, § 3; Act April 14, c. 57 (2 Stat. at L. 642, 703)]. Board of Com'rs for Port of New Orleans v. New Orleans & S. F. R. Co., 112 La. 1011, 36 So. 837. The state administers such property for the benefit of the public and may confide such administration to municipal corporations in proper cases. Id. The state or such corporation may, by way of, and for the purpose of, such administration, improve the property by the construction of wharves, landings, and other facilities, for the use of which a charge may be made. City of New Orleans has no jurisdiction over wharves and landings on Mississippi, and cannot authorize construction of railroad thereon without the consent of the board of commissioners of the port. Id.

89. Defendant convicted of obstructing stream. State v. Twiford, 136 N. C. 603, 48 S. E. 586.

90. As to right to erect and maintain dams, see Waters and Water Supply, § 12, 2 Curr. L. 2046; Nuisance, § 2, 4 Curr. L. 839; Small v. Harrington [Idaho] 79 P. 461; Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813. In Idaho it is held that everyone is entitled to the free and reasonable use of navigable streams, and may place such reasonable obstructions therein as serve a useful and beneficial purpose, provided they leave a reasonable use to others interested. Piers held not to unreasonably obstruct navigation. Small v. Harrington [Idaho] 79 P. 461. An individual has no right to insist on the best possible

An owner erecting a structure in the soil under the navigable water does so at his peril, and may be compelled to remove it if it becomes an obstruction to navigation.[92] The fact that there are other obstructions below defendant's is no defense.[93] The right of navigation means the right to pass over waters freely and without obstruction.[94] It does not include the right to construct docks.[95]

No riparian owner can acquire by prescription a right to interfere with navigation,[96] but he may acquire a right to use and divert the water in canals as against other riparian owners.[97] The owner of lots abutting on canals cut from a river for purposes of navigation may acquire by prescription the same rights therein that he could have acquired had they been natural waterways.[98]

A riparian proprietor may use the water provided he does not thereby interfere with the public right of navigation, nor substantially diminish or impair the rights of other riparian owners.[99] The latter right is property and cannot be taken for public use without just compensation.[1]

Political jurisdiction.[2]—The public laws of New Jersey are in force in the littoral waters of Sandy Hook peninsula below low-water mark, whether enacted prior or subsequently to the cession to the United States of jurisdiction over a portion of that peninsula for military purposes.[3]

Bridges, etc.[4]—The power of congress over the navigable waters of the United States is exclusive and paramount;[5] but until it is exercised, full power resides in the states to regulate the erection of bridges and other works in navigable waters wholly within their jurisdiction.[6] Under existing laws, however, the consent of both the state and the Federal government is necessary.[7] The Federal statute

accommodation, and hence cannot complain of an obstruction which merely impairs navigation or renders it more difficult without destroying it. Id. A city has no right to permit the obstruction of a navigable river, and cannot bind itself to permit anything which has become an obstruction to be continued. May require lowering of tunnel, though no such right was reserved in granting license to construct it. West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393.

91. See Nuisance, § 2, 4 Curr. L. 839. Unless authorized by the legislature. Indictment for maintaining dam across Passaic river without constructing canal and locks held to show indictable offense. State v. Dundee Water Power & Land Co. [N. J. Law] 58 A. 1094. A temporary obstruction while remodeling a defective lock in a dam is not a public nuisance. State v. Charleston Light & Water Co. [S. C.] 47 S. E. 979. Maintenance of pound nets so as to interfere with access to plaintiff's island under certain conditions of tide and weather. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761.

92. Compelling street railway to lower tunnel under Chicago river not a taking or damaging of its property, whether it was attempting to exercise its rights as private owner, or rights conferred by Hurd's Rev. St. Ill. 1903, p. 1833, c. 131a. West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393.

93. West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393. Failure to deny that there were other tunnels as near surface as defendant's not an admission that it was not an obstruction. Id.

94, 95. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646.

96, 97, 98, 99. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118.

1. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118.

For right of riparian proprietor to use of water, see Waters and Water Supply, § 3, 2 Curr. L. 2035. For right to use it for irrigation purposes, see Id., § 13, 2046.

4. See 2 Curr. L. 992, 994.

3. Ceded by N. J. Act March 12, 1846. Hamburg-American S. S. Co. v. Grube, 25 S. Ct. 352. Whether act vested exclusive legislative jurisdiction over waters within three-mile limit presents Federal question, which will sustain writ of error from Federal supreme court to state court. Id. Contention that Act Cong. June 28, 1834 (4 Stat. at L. 708, c. 126) consenting to agreement of New York and New Jersey fixing their boundary lines vested exclusive jurisdiction over adjoining sea, in Federal government does not. Id.

4. See 2 Curr. L. 992, 994.

5. Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264.

6. Maine Water Co. v. Knickerbocker Steam Towage Co. [Me.] 59 A. 953. Secretary of war has authority to authorize laying of water pipe. Special act of congress unnecessary. Id.

A state has plenary powers over navigable waters wholly within its boundaries, subject only to the power of congress to regulate interstate commerce. Montgomery v. Portland, 190 U. S. 89, 47 Law. Ed. 965.

7. Act Cong. March 3, 1899, c. 425, §§ 9, 10 (30 Stat. at L. 1151), Comp. St. 1901, pp. 3540, 3541. Maine Water Co. v. Knickerbocker Steam Towage Co. [Me.] 59 A. 953; Montgomery v. Portland, 190 U. S. 89, 47 Law. Ed. 965. Hurd's Rev. St. Ill. 1903, p. 292, c. 24, giving city of Chicago authority to deepen or change channels of water-

prohibiting the construction of any structures in navigable waters without the consent of the secretary of war is a mere regulation for the benefit of commerce and navigation,[8] and his consent does not authorize the construction of wharves and the like on land belonging to others.[9] One who has built a bridge under authority of an act of congress can be deprived of the right to maintain it only by another act of the same body, and upon payment of just compensation.[10] The right to build a bridge includes the right to repair it, when necessary, without substantially changing its structure.[11]

By statute in Oregon the owner of any vessel which has through negligence caused injuries to bridges when within the waters of the state is liable for the resulting damages,[12] recoverable in the circuit court of any county in which such vessel may be found.[13]

Wharves.[14]—The proprietors of lands upon navigable waters may make a landing, wharf, or pier for their own use, or that of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public;[15] but a riparian owner has no right to build a dock on lands below high-water mark owned by another.[16] A dock may be private or public, though owned by an individual.[17] The owners of a pier are entitled to its unrestricted use, subject only to the power of the legislature to make reasonable rules and regulations for its use in connection with the commerce of the port.[18] Owners and lessees of piers in New York City may erect and maintain sheds thereon, provided they obtain a license to do so from the department of docks.[19] They then become lawful structures and the license is irrevocable.[20]

courses, gives it authority, so far as state is concerned, to require lowering of tunnel in bed of Chicago River. West Chicago St. R. Co. v. People [Ill.] 73 N. E. 393. River & Harbor Bill March 3, 1899, c. 425, 30 St. U. S. 1156, gave city authority to require such lowering. Such action not violation of statute prohibiting alteration of channel without approval of secretary of war. Id.

8. Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264. The secretary of war may not interfere with harbor lines established by local authorities where the navigable waters in question are entirely within the limits of a state. Extension of wharves beyond harbor lines cannot be justified by relocation of lines under Act Sept. 19, 1890, § 12 (25 Stat. at L. 400, 425, c. 860). Congress did not intend to wholly ignore rights of states. Montgomery v. Portland, 190 U. S. 89, 47 Law. Ed. 965.

Harbor lines, etc., see 2 Curr. L. 993.

9. On land granted by state to park commissioners. Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264.

10. Vested right of which it cannot be deprived by courts on ground that it is obstruction to navigation. United States v. Parkersburg Branch R. Co., 134 F. 969. Right of railroad company to maintain bridge over Ohio River, built under Act July 14, 1862, c. 167 (12 Stat. at L. 569), which contained no reservation of right to alter or amend it, not affected by subsequent acts relating to bridges over same river. Id.

11. Court will not enjoin replacing of superstructure by new one resting on same piers, when obstruction to navigation not increased. United States v. Parkersburg Branch R. Co., 134 F. 969. Act Cong. Aug. 5, 1886 (24 Stat. at L. 324, c. 929), relating to building of certain bridges, and Act April 2, 1888, c. 53 (25 Stat. at L. 74), do not apply to the rebuilding of old bridges. United States v. Cincinnati & M. V. R. Co. [C. C. A.] 134 F. 353.

See, also, Bridges, § 1, 3 Curr. L. 529.

12. State court has jurisdiction of action for damages to trestle constructed on piles driven in bed of navigable river between high and low water mark [B. & C. Comp. § 4627]. Astoria & C. R. R. Co. v. Kern, 44 Or. 538, 76 P. 14.

Contributory negligence in case of injuries by collision with obstruction in stream, see note to Crookston Waterworks, P. & L. Co. v. Sprague [Minn.] 64 L. R. A. 977.

See, also, 2 Curr. L. 994, n. 79, 80.

13. Astoria & C. R. R. Co. v. Kern, 44 Or. 538, 76 P. 14. Testimony of witness 15 miles seaward as to character of storm causing barges to break loose held admissible. Id. Evidence sufficient to sustain finding that barges were not left in charge of watchman, and finding as to stress of weather. Id.

14. See 2 Curr. L. 991, n. 40-47; Id. 994.

For a full discussion of the right to erect, maintain, and use wharves, see title Wharves, 2 Curr. L. 2074.

15. Thousand Island Steamboat Co. v. Visger [N. Y.] 71 N. E. 764.

16. On land under bay granted to town by King of England. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646.

17. Use it has been put to furnishes basis for inference of owner's intention in this regard. Thousand Island Steamboat Co. v. Visger [N. Y.] 71 N. E. 764.

18. In re Pier 15, East River, 95 App. Div. 501, 88 N. Y. S. 906.

19. Laws 1875, c. 249, p. 243, as amended

A provision of the license that it shall not affect any right of the city to the pier or any structure legally erected thereon, including such shed, does not affect the rights acquired by the owners under the statute and license.[21] A city may build a dock at the end of one of its streets.[22] Where it has authority to do so under its charter, it may lease the land and authorize the lessee to build it.[23] Such a dock is not a public highway.[24] A city owning a wharf may use it as other wharves, except as the right is limited by its charter, and may make regulations governing its use by the public.[25]

Booms, dams and logging rights.[26]—One using a stream for floatage purposes has no right to interfere with its navigability or to interfere with the rights of riparian owners by diverting or restraining its waters,[27] nor to trespass upon the lands of riparian owners.[28] One may use the channel of a navigable stream for the purpose of floating logs at all stages of water,[29] and such use when the water is above the line of mean high tide is not a trespass on the adjoining lands.[30]

In many states statutes allow the construction of dams and booms for logging purposes in navigable streams, under prescribed restrictions.[31] The reasonable use of dams and booms necessary to the navigation of streams for logging purposes is permissible, and other navigators can complain of them only when such right is misused or abused.[32] In Washington, the owner of timber lands has no right to condemn the right to float logs in a stream by means of dams at times when it is not naturally navigable for that purpose.[33]

Filling tide lands.—The statutes of Washington authorize the excavation of waterways through public lands, and the filling in of tide lands by private con-

by Laws 1883, c. 435, p. 616. In re Pier 15, East River, 95 App. Div. 501, 88 N. Y. S. 906.

20. On condemnation of pier owners entitled to compensation based on its value with sheds upon it. In re Pier 15, East River, 95 App. Div. 501, 88 N. Y. S. 906.

21. In re Pier 15, East River, 95 App. Div. 501, 88 N. Y. S. 906.

22. Kemp v. Stradley [Mich.] 97 N. W. 41.

23. Under Mich. Local Acts 1887, p. 805, Act No. 533, c. 14, § 3. Kemp v. Stradley [Mich.] 97 N. W. 41.

24. Constructed under Mich. Local Acts 1887, p. 805, Act No. 533, c. 14, § 3. Kemp v. Stradley [Mich.] 97 N. W. 41.

25. Kemp v. Stradley [Mich.] 97 N. W. 41.

26. See 2 Curr. L. 994.

27. Injunction issued to restrain maintenance of dam whereby waters were collected and then let loose. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813. Fact that riparian owner used water so collected (Id.), and assisted owner in clearing out stream did not estop him from objecting. Id. The right to float logs on a stream does not give one a right to interfere with its use by other navigators or cause damage to riparian proprietors. Liable for damages resulting from allowing them to jam on plaintiff's property, and seeking to remove them by artificial freshets, thereby flooding lands and destroying crops. Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 P. 34. May not float logs at seasons when stream not naturally navigable by creation of artificial freshets, thereby damaging property of others. Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 P. 1046.

Injuries resulting from collision with logs, etc., see note to Crookston Waterworks, P. & L. Co. v. Sprague [Minn.] 64 L. R. A. 977. Complaint in action for obstructing stream with logs held sufficiently specific to entitle plaintiff to recover for idleness of logging engine and men, and for damages for being compelled to discharge men and employ others at higher pay. Creech v. Humptulips Boom & River Imp. Co. [Wash.] 79 P. 633. Obstruction held natural and proximate cause of such damage. Id. Where defendant claimed stream was not navigable, and that he had absolute right to obstruct it, plaintiff's damages not limited to cost of removing obstructions, and those resulting from delay during period necessary for removal. Id.

28. Cannot go upon land for purpose of breaking jams of shingle bolts. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813. Verdict for plaintiff sustained by evidence. Lownsdale v. Gray's Harbor Boom Co. [Wash.] 78 P. 904. Evidence held not to show maintenance of nuisance. Id.

29. Lownsdale v. Gray's Harbor Boom Co. [Wash.] 78 P. 904. A stream navigable for the purpose of floating logs at certain seasons may be used by anyone for that purpose at such times. Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 P. 1046.

30. Instructions approved. Lownsdale v. Gray's Harbor Boom Co. [Wash.] 78 P. 904.

31. Must provide way for passage of timber [Idaho Rev. St. 1887, § 835]. Small v. Harrington [Idaho] 79 P. 461.

32. Evidence insufficient to show that dam was nuisance. Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 P. 1046.

33. Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 P. 1046.

tract,[34] and give the contractor a lien on the tide lands so filled in.[35] The right to such lien in no way depends upon the appraisement of such land.[36]

§ 4. *Remedies for injuries relating to.*[37]—Injunction will lie at the instance of one specially injured thereby, to prevent the obstruction of a navigable stream.[38] Injunction will also lie to prevent an abuse of the right of navigation.[39]

In order to be entitled to an injunction, plaintiff must establish by a fair preponderance of the evidence that the use made of the stream by defendants is unauthorized, unreasonable, or unnecessary.[40] The trial and acquittal of the defendant under a statute making such acts criminal is not a bar to such suit.[41]

In order to recover for damages resulting from a misuse of the stream or an abuse of the rights of navigation, it is not necessary to allege that the acts were done negligently.[42-86]

NE EXEAT.[87]

Where the court has no jurisdiction of the action in aid of which the writ is sought, ne exeat should not of course issue.[88] Defendant may before answer move on affidavit to discharge the writ as improperly issued.[89]

NEGLIGENCE.[90]

§ 1. **Definitions (764).**
§ 2. **Acts or Omissions Constituting Negligence (766).**
A. Personal Conduct in General (766).
B. Use of Property in General (767).
C. Use of Lands, Buildings and Other Structures (768).
§ 3. **Proximate Cause (770).**
§ 4. **Contributory Negligence (773).** Due Care by a Plaintiff (773). Children (774). Comparative Negligence (775). Last Clear Chance Doctrine (776). Imputed Negligence (777).
§ 5. **Actions (779).** Evidence (782). Presumptions and Burden of Proof (783). Questions of Law and Fact (785). Instructions (786). Verdicts (787).

§ 1. *Definitions.*[91]—Negligence can in law only be predicated upon a failure

34. Sess. Laws 1893, p. 246, c. 99. Hays v. Callvert [Wash.] 78 P. 793.

35. When the lands have been sold by the state, the contractor must look for remuneration to the foreclosure of his lien. Hays v. Callvert [Wash.] 78 P. 793.

36. Hays v. Callvert [Wash.] 78 P. 793.

37. See 2 Curr. L. 995.

38. See, also, Injunction, § 2I, 4 Curr. L. 108; Nuisance, § 4a, 4 Curr. L. 845. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761. A private person specially injured thereby may maintain an action to restrain the construction or maintenance of a nuisance in a navigable stream. Idaho Rev. St. 1887, § 3633, gives right to restrain public nuisance under such circumstances. Small v. Harrington [Idaho] 79 P. 461. Mandamus to compel removal of dam denied where no allegations of special injury. State v. Charleston Light & Water Co. [S. C.] 47 S. E. 979. Fact that plaintiff has built up steamboat business and that bridge prevents navigation does not show special damage. Thomas v. Wade [Fla.] 37 So. 743.

39. Injunction held not too sweeping. Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 P. 1046.

40, 41. Small v. Harrington [Idaho] 79 P. 461.

42-86. Sufficient to set out acts showing misuse or abuse. Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 P. 34. The plaintiff may testify as to the value of the realty before and after the injury and the value of the personalty at the time it was destroyed. Permitting him to state amount of damages in money held harmless. Id. Evidence sufficient to sustain verdict for plaintiff. Id. Instruction as to necessity of finding that defendant was responsible for damage approved. Id.

87. See Fletcher, Equity Pl. & Pr. §§ 483-492.

88. Court held without jurisdiction of matrimonial action because of nonresidence of both parties. Dithmar v. Dithmar [N. J. Eq.] 59 A. 644.

89. Want of equity in the bill, insufficiency of affidavits, or any other thing by reason of which the writ should not have been granted may be so raised. Dithmar v. Dithmar [N. J. Eq.] 59 A. 644.

90. Scope.—This article treats the subject of negligence in a general way without attempting a specific application of principles. Such application is reserved for the topics devoted to the particular relation or subject-matter, as Animals, 3 Curr. L. 159; Bridges, 3 Curr. L. 529; Carriers, 3 Curr. L. 591; Corporations, 3 Curr. L. 880; Counties, 3 Curr. L. 959; Electricity, 3 Curr. L. 1181; Explosives and Inflammables, 3 Curr. L. 1412; False Imprisonment, 3 Curr. L. 1417; Fires, 3 Curr. L. 1425; Gas, 3 Curr. L. 1556; Highways and Streets, 3 Curr. L. 1593; Independent Contractors, 3 Curr. L. 1702; Inns, Restaurants and Lodging Houses, 4 Curr. L. 123; Intoxicating Liquors, 4 Curr. L. 252; Landlord and Tenant, 4 Curr. L. 389; Master and Servant, 4 Curr. L. 533;

to use the degree of care required of one by law in the discharge of a duty imposed thereby.[92] A breach of an existent duty must appear.[93]

Some courts do not now recognize any legal distinction between negligence and gross negligence.[94] In some states such distinction is made by statute, and must in such case be observed by the courts,[95] though it is said that the line cannot be drawn with accuracy.[96]

It has been held that the term "negligence" by itself suggests only inadvertence or want of ordinary care;[97] the term "gross negligence" signifies willfulness and involves intent, actual or constructive.[98] Hence gross negligence does not include ordinary negligence, and proof of the former does not prove, but rather disproves, the latter.[99]

Willful or wanton negligence has been defined as a reckless disregard of the safety of the person or property of another by failing, after discovery of the peril, to exercise ordinary care to prevent the impending injury.[1]

The terms "carelessly" and "negligently,"[2] and the terms "reasonable care," "reasonable diligence" and "ordinary care,"[3] are commonly used interchangeably.

Medicine and Surgery, 4 Curr. L. 636; Mines and Minerals, 4 Curr. L. 649; Municipal Corporations, 4 Curr. L. 747; Nuisance, 4 Curr. L. 839; Party Walls, 2 Curr. L. 1134; Railroads, 2 Curr. L. 1382; Shipping and Water Traffic, 2 Curr. L. 1648; Street Railways, 2 Curr. L. 1742; Telegraphs and Telephones, 2 Curr. L. 1843.

91. See 2 Curr. L. 996.

92. Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 A. 688.

93. A manufacturer who has furnished petroleum to a merchant is under no duty to continue furnishing it and to refrain from supplying gasoline, though it knows that the merchant's customers obtain petroleum from him. Hence a person injured in the store by a gasoline explosion has no cause of action against the manufacturer. Marples v. Standard Oil Co. [N. J. Law] 59 A. 32. A shipper had control of the interior of a car in which he maintained a fire. The car burned, and set fire to a nearby warehouse, and the railway company was mulcted in damages, and sued to recover from the shipper. Held, the railway company owed the shipper no duty as to management of the car, and hence the shipper could not set up contributory negligence in this action as a defense. Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 A. 688. Railroad company which built a draw bridge with a foot path thereon and turned over control of it to the city owed no duty to pedestrians except to give signals. No liability for death of boy who walked off, the draw being open. Desure v. New York, etc., R. Co., 94 App. Div. 251, 87 N. Y. S. 988. In an action for negligence in handling a scow, it appeared that one defendant had no interest in the scow, and that the other had no control of it at the time, having turned it over to the city. No recovery. Dooley v. Healey, 95 App. Div. 271, 88 N. Y. S. 965. Defendants, operating a temporary elevator, under no obligation to warn plaintiff, employed by others in decorating, as to the danger from operation of elevator, when plaintiff built staging over the shaft. Durell v. Hartwell [R. I.] 58 A. 448.

94. The distinction between negligence and gross negligence is to a great extent merely verbal; legally speaking, there can be no degrees of negligence. Atchison v. Wills, 21 App. D. C. 548. No exact dividing line can be drawn between "ordinary" and "gross" negligence. Each case must be decided according to its peculiar features and the question is one for the jury. Evensen v. Lexington & B. St. R. Co. [Mass.] 72 N. E. 355.

95. Under the Georgia Code, "ordinary neglect" and "gross neglect" have a definite meaning, and in case where a defendant was bound to use ordinary diligence, it is error, as against the plaintiff, to charge that defendant is liable for gross negligence only. Brown Store Co. v. Chattahoochee Lumber Co. [Ga.] 49 S. E. 839. In Massachusetts, in actions for wrongful death, if personal negligence of defendant is relied on, proof of ordinary negligence is sufficient; but if negligence relied on is that of a servant, gross negligence must be shown. Brennan v. Standard Oil Co. [Mass.] 73 N. E. 472.

96. Even where the statute recognizes a difference between negligence and gross negligence, the degree of difference cannot be stated with mathematical accuracy. Brennan v. Standard Oil Co. [Mass.] 73 N. E. 472.

97. However great the degree of such want of care, willfulness is excluded so long as the element of inadvertence remains. Rideout v. Winnebago Traction Co. [Wis.] 101 N. W. 672.

98. If one is guilty of inadvertence causing injury to another, his fault is called want of ordinary care; if guilty of willful misconduct, causing actionable injury, his conduct is called "gross negligence." Rideout v. Winnebago Traction Co. [Wis.] 101 N. W. 672.

99. Rideout v. Winnebago Traction Co. [Wis.] 101 N. W. 672.

1. Alger Smith & Co. v. Duluth-Superior Traction Co. [Minn.] 101 N. W. 298. Gross negligence such as to warrant recovery notwithstanding precedent negligence of plaintiff exists only where plaintiff's negligence must have been discovered or the defendant must have neglected the most ordinary precaution in failing to discover it. Buxton v. Ainsworth [Mich.] 101 N. W. 817.

2. Southern R. Co. v. Horine [Ga.] 49 S. E. 285.

§ 2. *Acts or omissions constituting negligence. A. Personal conduct in general.*[4]—The degree of care required by law is such as an ordinarily prudent person would use under like or similar circumstances,[5] and a failure to use that degree of care constitutes negligence.[6] Whether the required degree of care has been exercised in a particular instance depends upon the circumstances,[7] and the danger to be apprehended.[8]

Failure to obey a public safety regulation may be evidence of negligence,[9] and is sometimes held negligence per se.[10] Private rules of a master governing the action of his servants cannot affect the master's duties to the public.[11] Hence violation of such a rule is not negligence per se but may be evidence of negligence.[12]

3. Greene v. Louisville R. Co. [Ky.] 84 S. W. 1154.

4. See 2 Curr. L. 997.

5. Missouri, etc., R. Co. v. Wood [Tex. Civ. App.] 81 S. W. 1187; Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245; Ford v. Kansas City, 181 Mo. 137, 79 S. W. 923. In an action for damages for loss by fire caused by sparks from defendant's mill, the measure of defendant's care in the use of appliances to prevent fires is the general conduct or use of people of ordinary care and prudence (or the great majority of people) engaged in the same or similar business under the same or similar circumstances; it is improper to limit the measure to the usage of such persons in a given small locality. Rylander v. Laursen [Wis.] 102 N. W. 341. A street commissioner who employed men who were paid by the city was responsible only for reasonable care in the selection of men and instrumentalities and materials. Bowden v. Derby [Me.] 58 A. 993.

6. Meng v. St. Louis & S. R. Co. [Mo. App.] 84 S. W. 213. See collection of definitions of "negligence" by textwriters and courts in Holden v. Missouri R. Co. [Mo. App.] 84 S. W. 133. The test of negligence is what a person of ordinary prudence would or would not do, not what ordinarily intelligent and prudent men would or would not do. Houston & T. C. R. Co. v. Brown [Tex. Civ. App.] 85 S. W. 44. Negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317. The standard of conduct takes no account of the personal equation of the man concerned; even an expert, doing what his judgment approves at the time, may be found negligent. Id.

7. The same degree of care is required toward infants as toward adults, but that conduct which comes up to that degree of care when exercised toward adults may fall short of it when exercised toward infants under the same circumstances. Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 A. 5. In determining whether one acts with reasonable care in a sudden emergency, the fact that he is obliged to act quickly and without an opportunity for deliberation is to be taken into consideration. One is not to be deemed careless merely because he failed to do that which would have been best as shown by subsequent events. Tozier v. Haverhill & A. St. R. Co. [Mass.] 72 N. E. 953. A motorman may assume that a person on the track, apparently of full age and sound mind, is so in fact, and may act accordingly. Simpson v. Rhode Island Co. [R. I.] 58 A. 658. See Street Railroads, 2 Curr. L. 1754. Defendant bound to exercise due care in shifting staging and discovering its condition after moving it. Parsons v. Hecla Iron Works [Mass.] 71 N. E. 572. Crew of steamboat, with lights out, held not negligent, where collision with rowboat occurred on dark night, and occupants of small boat gave no warning. Yarnold v. Bowers [Mass.] 71 N. E. 799. Defendant was not negligent in placing or maintaining a lamp where a trolley pole, slipping from the wire, would strike it, since it was presumably placed there by lawful authority from the city. Nelson v. Narragansett Elec. Lighting Co. [R. I.] 58 A. 802.

8. Where the danger to be apprehended is great, reasonable care requires the exercise of a high degree of diligence. Gilbert v. Duluth General Elec. Co. [Minn.] 100 N. W. 653; Norfolk & W. R. Co. v. Fritts [Va.] 49 S. E. 971. Reasonable care requires a higher degree of care in handling electric wires liable to become charged than in handling ordinary substances or things. Nagle v. Hake [Wis.] 101 N. W. 409. The degree of care required in the use of agencies such as electricity and steam is proportionate to the danger. Parsons v. Charleston Consol. R. Gas & Elec. Co. [S. C.] 48 S. E. 284. See topic Electricity, 3 Curr. L. 1182.

9. Failure to ring locomotive bell at crossing as required by Pub. St. 1901, c. 159, § 6. Tucker v. Boston & M. R. Co. [N. H.] 59 A. 943. Violation of valid city ordinance regulating speed of vehicles in streets is prima facie evidence of negligence. United States Brew. Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081.

10. Violation of city ordinance requiring ringing of locomotive bells at street crossings held negligence per se. Reed v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 919. Violation of statutes prohibiting the sale of poisonous liquors or substances without labeling the same as poisons held negligence per se. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793.

11. McKernan v. Detroit Citizens' St. R. Co. [Mich.] 101 N. W. 812.

12. Violation of a street railway rule re-

Whether a liability arising from breach of a duty prescribed by a statute or ordinance accrues for the benefit of an individual specially injured thereby, or whether such liability is exclusively of a public character must depend upon the nature of the duty enjoined and the benefits to be derived from its performance.[13]

One not a servant cannot maintain an action for violation of a factory act passed to protect employes.[14] The defense of fellow-servant is available only to the master of an injured servant. A stranger to the contract of service is a joint tort feasor with the servant with whom he acts to cause an injury, and both are liable.[15]

An inevitable accident, such as will constitute a defense to an action for negligence, is something that human skill and foresight could not in the exercise of ordinary prudence have provided against.[16] An act of God does not relieve from liability one whose own negligent acts concur in or contribute to the injury.[17]

When the party who was in fault as to the person injured is without fault as to the party whose actual negligence is the cause of injury, recovery over may be had.[18]

(§ 2) *B. Use of property in general.*[19]—One must employ ordinary care to use his own so as not to unnecessarily injure another.[20]

quiring cars to run only four miles an hour in front of engine houses is not negligence per se, but is evidence on the question whether a faster rate was negligence. McKernan v. Detroit Citizens' St. R. Co. [Mich.] 101 N. W. 812.

13. Violation of an ordinance by failure to provide fire-proof shutters on a building does not render one liable for goods destroyed by fire communicated through unprotected windows. Frontier Steam Laundry Co. v. Connolly [Neb.] 101 N. W. 995. The violation of a statutory or valid municipal regulation established for the protection of persons or property from injury is such a breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197. Violation of a statute requiring trains to stop at railroad crossings did not render defendant liable to a trespasser on one of its trains. Wickenburg v. Minneapolis, etc., R. Co. [Minn.] 102 N. W. 713.

14. Fireman who fell through unguarded elevator shaft could not recover for violation of factory act [Gen. St. p. 2345, § 5]. Kelly v. Henry Muhs Co. [N. J. Law] 59 A. 23.

15. Kentucky & I. Bridge & R. Co. v. Sydor [Ky.] 82 S. W. 989.

16. Where there was sufficient warning of the approach of a storm so that a master should have moored his vessel more securely, the breaking away of the vessel in the storm and its collision with another moored vessel was not an inevitable accident. The Drumcraig, 133 F. 804. Where in an action for damages caused by blasting, owing to the force of an explosion going obliquely upward through a seam of soft rock, plaintiff did not show by a fair preponderance that the contractor could have discovered the soft rock by the exercise of ordinary care, it was held that the accident was one that could not have been foreseen and guarded against by the use of ordinary care. Necker v. Frank, 43 Misc. 159, 88 N. Y. S. 250. In an action against a vessel for collision to establish the defense of inevitable accident, it must be made to appear that the collision occurred without any fault on the part of the vessel and notwithstanding the exercise of due care and caution and a proper display of nautical skill. The Surf, 132 F. 880.

17. Greely v. State, 94 App. Div. 605, 88 N. Y. S. 468. An unusual freshet did not relieve a municipality from liability for damages caused by overflow of a creek used as a trunk sewer. O'Donnell v. Syracuse, 92 N. Y. S. 555. Where one has negligently failed to perform a duty which he has contracted to do, he will not be allowed to take refuge in an inquiry whether his own negligence or a vis major has been the proximate cause of the injury. Sharp v. Cincinnati, 4 Ohio C. C. (N. S.) 19.

18. Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 A. 688.

19. See 2 Curr. L. 998, 999.

20. The measure of care in respect to animals and other property is the same. Bostock-Ferari Amusement Co. v. Brocksmith [Ind. App.] 73 N. E. 281. Though defendant had the right to have a whistle in its car shops, it was bound to use it so as not to injure others, as by frightening horses. Powell v. Nevada C. & O. R. Co. [Nev.] 78 P. 978. One who owns or controls the power which operates machinery is bound to use ordinary care to protect men obliged to work near. Kentucky Stove Co. v. Bryan's Adm'r [Ky.] 84 S. W. 537. Oil company maintained a pipe connecting a tank and building so close to a railway that an employe was killed by it while riding by on the side of a box car. Held, company liable, though there was no contract relation between it and deceased, since it owed the railway employes the duty of not endangering them while in performance of their duties. Young v. Waters-Pierce Oil Co. [Mo.] 84 S. W. 929. One operating a gasoline engine is under no duty to adopt any particular method or device for muffling

Dangerous machinery and substances.[21] *Liability of manufacturers.*[22]—The manufacturer and seller of an article of commerce ordinarily harmless is not liable to one with whom he has no contractual relation for injuries caused by such article,[23] if he has no knowledge of its dangerous character and did not practice deceit in its sale.[24] But he is liable if the article sold is inherently dangerous,[25] or if he puts a dangerous article on the market under the name of one which is not dangerous, even though no contractual relation exists between the user and manufacturer.[26] He is also liable, though a machine be not inherently dangerous, if it is made so by his neglect, with notice and knowledge that it is to be used by others than the purchaser, and injury results to such a third person from such negligence.[27] The rule last stated applies to one who contracts to repair a machine and put it in perfect order.[28]

(§ 2) *C. Use of lands, buildings and other structures.*[29]—The owner or occupant of premises is bound to use ordinary care to provide for the safety of persons coming thereon by express or implied invitation.[30] He must also exercise

the sound of the exhaust, or any method; whether operation of the machine was negligent is a general question of negligence, on which the method used, if any, and the usage of others, may be considered; the mere fact that a device used was ineffective is not conclusive. Wolf v. Des Moines Elevator Co. [Iowa] 102 N. W. 517. Iceman negligent in allowing team to proceed along street unguided, whereby they ran into street cleaner. Turtenwald v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 948.

21. See 2 Curr. L. 998.

22. See 2 Curr. L. 998, n. 26.

23. Rule applied to machinery and appliances. Kahner v. Otis Elevator Co., 96 App. Div. 169, 89 N. Y. S. 185.

24. Bartender injured by explosion of bottle of champagne cider could not recover from the manufacturer who sold it to plaintiff's employer, when defendant had no knowledge of any defect in the bottle and believed the cider to be properly charged. O'Neill v. James [Mich.] 101 N. W. 828. Barber could not recover damages for loss of patronage by reason of excess of alkali in soap used by him. Slattery v. Colgate [R. I.] 55 A. 639.

Note: The rule as stated in the text seems to be supported by the weight of authority, but there is considerable conflict. See 2 Curr. L. 993, n. 26.

25. Kahner v. Otis Elevator Co., 96 App. Div. 169, 89 N. Y. S. 185.

26. As mixture of kerosene and gasoline sold as kerosene. Riggs v. Standard Oil Co., 130 F. 199.

27. This is recognized as an extension of the exception to the rule of a manufacturer's nonliability, but is said to be supported by authority. Kohner v. Otis Elevator Co., 96 App. Div. 169, 89 N. Y. S. 185.

28. Elevator company which did not manufacture or put in an elevator originally, but contracted to put it in thorough repair, held liable for injury to third person resulting from negligence in making repairs which rendered the elevator dangerous. Kahner v. Otis Elevator Co., 96 App. Div. 169, 89 N. Y. S. 185.

29. See 2 Curr. L. 999.

30. Sloss Iron & Steel Co. v. Tilson [Ala.] 37 So. 427. One on premises to seek employment by invitation of the owner's foreman is entitled to the exercise of ordinary care for his safety. McDonough v. James Reilly Repair & Supply Co., 90 N. Y. S. 358. Owners of building liable for injuries to a customer brought in by brokers to look the building over, the injury being caused by negligence of the brokers. Boyd v. U. S. Mortg. & Trust Co., 94 App. Div. 413, 88 N. Y. S. 289. The owner and occupant of premises on which there is an open way between a public street and a public saloon owes the duty to any person lawfully coming upon the premises along such open way of ordinary care to prevent injury by a dangerous structure, such as a partly burned wall liable to fall. Haack v. Brooklyn Labor Lyceum Ass'n, 93 App. Div. 491, 87 N. Y. S. 814. Where a merchant invites a customer to place packages containing purchases behind the counter, and thereafter the customer, by implied invitation of the merchant goes behind the counter after the packages and falls through a trap door, left open in the meantime, the merchant is liable for resulting injuries. League v. Stradley [S. C.] 47 S. E. 975. A petition alleging that decedent while on defendant's premises, which were maintained as a public resort, by defendant's invitation, fell into an unguarded and unlighted stairway while going to a room where defendant invited him, stated a cause of action, and did not show plaintiff to be a mere licensee. Robinson v. Howard [Mo. App.] 83 S. W. 1031. Defendant liable for injury caused by defective sidewalk used by public and maintained by defendant. Marsh v. Minneapolis Brewing Co., 92 Minn. 182, 99 N. W. 630. See Highways and Streets, 3 Curr. L. 1621, 1622. Owner of a department store owes customers the duty of reasonable care to keep safe stairway which the public is tacitly invited to use. Graham v. Bauland Co., 97 App. Div. 141, 89 N. Y. S. 595. Where it appeared that a servant whose duty it was to clean the stairs left a duster thereon on which a customer stepped and fell, jury was warranted in finding a violation of this duty. Id. Owner of building owed duty of warning one invited therein of danger from unguarded elevator shaft in dark corner. Massey v. Seller [Or.]

reasonable care to prevent children coming upon his premises, if such premises are dangerous,[31] and is liable for injuries caused by traps or attractive nuisances maintained thereon by him.[32] But the tendency of the modern authorities is said to be against the extension of the theory of the "turntable cases" to other situations.[33]

Trespassers[34] and mere licensees[35] take the premises as they find them;[36] the

77 P. 397. The court may judicially notice that ordinary double swinging storm doors are not dangerous appliances. Dolan v. Callender, McAuslan & Troup Co. [R. I.] 58 A. 655. When swinging doors used in a department store were similar to these in use in other like establishments, and there was nothing in their construction or operation to make them dangerous, use of them was net negligence. Pardington v. Abraham, 93 App. Div. 359, 87 N. Y. S. 670. Not negligence per se to maintain a stairway, with proper railings, from main floor to basement of store. Dunn v. Kemp [Wash.] 78 P. 782. Minor employes in defendant's pewer house, who talked to children and asked them to stay and blow the whistle at close ef work, had no autherity to invite strangers on premises, and defendant held not liable for injury to one of the children. Curtis v. Tenino Stone Quarries [Wash.] 79 P. 955. Owner ef apartment house net liable fer injuries caused by accumulation of ice and snow on steps, when weather had not permitted its removal, and ashes had been put on to make them safe, which caused an uneven surface. Laufers-Weiler v. Borchardt, 88 N. Y. S. 985.

31. Houston, etc., R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557. It is the duty of the owner of premises to use ordinary care to prevent children from approaching machinery thereon known to be dangerous. North Tex. Const. Co. v. Bostick [Tex. Civ. App.] 80 S. W. 109. Where a servant was placed in exclusive possessien and control of a railway pumping station, and invited a boy of 13 thereon, the fact that such servant had no authority to give such an invitation was held no defense to an action against the master for injuries to the boy through the servant's negligence. Heuston, etc., R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557. If boy of 8 was warned to keep out of a gin house, and was ejected, but returned and was injured before defendant's servants could by the exercise of ordinary care prevent it, defendant would not be liable. North Tex. Const. Co. v. Bostick [Tex.] 83 S. W. 12. Lessee of lot, en which he had piles ef lumber, not liable fer injuries to child resulting from the fall of a pile of lumber en which he was playing, children having been warned to stay off the premises. Pewers v. Owego Bridge Co., 97 App. Div. 477, 89 N. Y. S. 1030.

32. Leaving a wheel scraper on the street unguarded, whereby children were attracted to play with it, and a girl ef five injured, held negligence. Kelley v. Parker-Washington Co. [Mo. App.] 81 S. W. 631. Doctrine ef traps er ef attractive nuisances held inapplicable where boy went under sidewalk while at play and came in contact with poerly insulated electric cable. Commonwealth Elec. Co. v. Melville, 210 Ill. 70, 70 N. E. 1052. A shed, inclesed except that it had no door, and used to store bags of nitrate of soda, was net an attractive nuisance, so as to make the owner liable fer injuries to trespassing animals. Tennessee Chemical Ce. v. Henry [Tenn.] 85 S. W. 401.

33. For discussion of this subject see Delaware, etc., R. Ce. v. Reich, 61 N. J. Law, 635, 40 A. 682, 68 Am. St. Rep. 727, 41 L. R. A. 831. Also Curtis v. Tenino Stone Quarries [Wash.] 79 P. 955. Pewer house and machinery on premises of defendant, used in quarry business, held not so attractive or alluring to children, as to render defendant liable for an injury to a child of six, a trespasser, who put his foot through a hole in a platferm and got it caught in cogs. Curtis v. Tenino Stone Quarries [Wash.] 79 P. 955.

34. A passenger who left his car, and then went through the train to get to the ether side of the track was while so doing a trespasser. Ratteree v. Galveston, etc., R. Ce. [Tex. Civ. App.] 81 S. W. 566. The owner of a store building owes no common law duty to trespassers to guard an elevator shaft on his premises; nor is such a duty in favor of trespassers imposed by Detroit City Charter 1893, p. 383, § 714, providing for the protection of elevater shafts in stores and buildings. Flanagan v. Sanders [Mich.] 101 N. W. 581. Where building operations on a private wharf showed that public use of the wharf had been discontinued, one who knowingly placed himself in a position of obvious danger thereon and was injured by the lawful operations carried on could not recover. Downes v. Elmira Bridge Co. [N. Y.] 71 N. E. 743. Owners net bound to maintain iceheuse in safe condition so as to prevent its falling on and demolishing a boathouse near, when the latter was net placed en the land under any contract, invitation or permission of the ewner. St. Joseph Ice Co. v. Bertch, 33 Ind. App. 491, 71 N. E. 56. The same rule applies to trespassing animals. Owner of shed, inclosed except that it had no door, in which he stered bags of nitrate of soda, not liable for death of cow which got in and ate some of the chemical. Tennessee Chemical Co. v. Henry [Tenn.] 85 S. W. 401.

Held not trespassers. Where a boy while playing went under a sidewalk and came in contact with an electric cable and was injured, the boy's relation to defendant was neither that of a trespasser or licensee. Commonwealth Elec. Co. v. Melville, 210 Ill. 70, 70 N. E. 1052. One who had a ticket to ride on the electric road between Tacoma and Seattle was left at a statien, when changing frem the front step of the car, on which he was standing by mistake, to the proper rear entrance. He then started to walk on the track and came in contact with the third rail and received injuries from an electric sheck. Held not a trespasser while so on the track, but entitled to reasonable protectien. Anderson v. Seattle-Tacema Interurban R. Co. [Wash.] 78 P. 1013.

35. Held that children had no invitation to play en roof ef tenement, but were mere

only duty owed them by the owner or occupant is to avoid wanton or willful injury.[37] In the absence of any ordinance or statute changing the rule, a fireman who enters upon property without any special authority or invitation of the owner is a bare licensee.[38] The action for injuries to firemen, under the New York statute, can be maintained only by the fire commissioners.[39]

One who invites the public on his premises to witness an entertainment is liable to one injured only for his own negligence or that of his servants, not for negligence of a third person or of an independent contractor.[40]

The owner of land is bound to exercise reasonable care and skill, both in the original construction and in the inspection and repair of structures thereon, to see that the owner of neighboring land, or one occupying it lawfully by agreement with the owner, is not damaged.[41]

§ 3. *Proximate cause.*[42]—The law looks to the proximate, not the remote cause of an injury, and unless the negligence charged was the proximate cause, there can be no recovery.[43] A proximate cause is that which, in natural and con-

licensees and there could be no recovery for injuries from falling through skylight. McCoy v. Walsh [Mass.] 71 N. E. 792. Person in a building on business who requested and obtained permission to use closet, and went to basement and fell into elevator pit, held a mere licensee. Glaser v. Rothschild [Mo. App.] 80 S. W. 332. One who went into defendant's cellar, by permission of the janitor, to use defendant's grindstone, was a licensee who could not recover for injuries caused by falling of defective floor. Forbrick v. General Elec. Co., 92 N. Y. S. 36. A person, admitted to a cemetery on request, held a mere licensee; no recovery for injuries from stepping into a hole while not walking on a walk or roadway. Barry v. Calvary Cemetery Ass'n [Mo. App.] 80 S. W. 709. Plaintiff, who came on premises after buildings had been burned, and was picking up tickets from the ruins when injured by a falling wall, was a bare licensee and could not recover from owner. Haack v. Brooklyn Labor Lyceum Ass'n, 44 Misc. 273, 89 N. Y. S. 888. Contractor of subway not liable for injury to a sewer inspector, struck by slack cable when on a beam over the tunnel, bridges having been built by the contractor. Dooley v. Degnon-McLean Contracting Co., 91 N. Y. S. 30. The occasional use of bracing beams in a tunnel by contractor's servants to walk on did not work an implied invitation to a sewer inspector to use them, when bridges were provided for the public. Id.

36. Massey v. Seller [Or.] 77 P. 397; Glaser v. Rothschild [Mo. App.] 80 S. W. 332.

37. Sloss Iron & Steel Co. v. Tilson [Ala.] 37 So. 427. The owner of a private park owes no duty to a trespasser except to see that he is not wantonly, willfully or maliciously injured by servants employed to protect the property and drive off intruders. Magar v. Hammond, 95 App. Div. 249, 88 N. Y. S. 796. The owner or occupant of premises is not liable to a trespasser for injuries resulting from negligence attributable to him, unless the presence of the trespasser where he was liable to be injured was known, or ought to have been known. Rome Furnace Co. v. Patterson, 120 Ga. 521, 48 S. E. 166. Railway company owed to trespassers only the duty of ordinary care to avoid injury after discovery of peril. Hortensteine v. Virginia Carolina R. Co., 102 Va. 914, 47 S. E. 996. The only common-law obligation owed by the owner or occupant of land to a mere licensee or trespasser was that he should not keep thereon dangerous appliances which might operate as a trap, or willfully inflict injury. Eckes v. Stetler, 90 N. Y. S. 473.

38. No recovery where fireman received electric shock through ladder resting on poorly insulated wires. New Omaha Thomson-Houston Elec. Light Co. v. Anderson [Neb.] 102 N. W. 89. A fireman on the premises in performance of his duty is a mere licensee at common law. Eckes v. Stetler, 90 N. Y. S. 473.

39. The New York act (Laws 1882, p. 116, c. 410, § 453; Laws 1897, p. 263, c. 378, § 781), providing that for injuries to firemen resulting from failure to close hoistways, trapdoors, etc., of buildings at close of day, the board of fire commissioners may maintain an action for the fireman injured, gives an exclusive remedy; a fireman cannot maintain an action thereunder in his own name. Eckes v. Stetler, 90 N. Y. S. 473.

40. Owner of amusement park not liable to one injured by a rocket during a display of fireworks, a third person having charge of the discharge of such fireworks. Deyo v. Kingston Consol. R. Co., 94 App. Div. 578, 88 N. Y. S. 487. Amusement association not liable for injury to person in grand stand caused by fall of bottle from band stand above, the use of beer by the band being without the scope of the band member's employment. Williams v. National City Park Ass'n [Iowa] 102 N. W. 783.

41. Principle recognized but held inapplicable where a boathouse, placed on land without permission, invitation or contract, was demolished by fall of an icehouse owned by the owner of the land. St. Joseph Ice Co. v. Bertch, 33 Ind. App. 491, 71 N. E. 56.

42. See 2 Curr. L. 1001.

43. Claypool v. Wigmore [Ind. App.] 71 N. E. 509. Proximate cause of plaintiff's injury being fright of his horse, he could not recover from a municipality because he was thrown into an unguarded ditch on the highway. Nichols v. Pittsfield Tp., 209 Pa. 240, 58 A. 283. Evidence of circumstances held

tinuous sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred.[44] The proximate cause of an injury is not necessarily the immediate cause, but must be the efficient cause, and the efficient cause is that which sets in motion the chain of circumstances leading up to the injury.[45] The necessary causal connection between the original negligence and the injury is interrupted, so as to relieve the original wrongdoer, by the wrongful[46] intervening act of a responsible human agency,[47] unless the circumstances are such that the intervention ought to have been foreseen; in such case the original wrongdoer is nevertheless responsible,[48] since a person is liable for the natural and probable consequences of his negligent acts or omissions.[49] This doctrine of intervening responsible negli-

to render alleged cause of plaintiff's injuries, being struck by a rock in blasting operations, so improbable that judgment was reversed on appeal and new trial ordered. Quigley v. Naughton, 91 N. Y. S. 491. Where a station agent was injured by falling into a trench built on his premises by a railroad company, the claim that he would have been injured in the same way had the trench been on the right of way was no defense. Wood v. New York, etc., R. Co., 93 App. Div. 53, 86 N. Y. S. 817. A boy of 9, running in the street, collided with a bicycle. Held, no negligence of the bicyclist being shown, and the act of the child being the sole cause of his injury, he could not recover, whether or not his act was negligent, or whether or not he could be considered capable of negligence. Lee v. Jones, 181 Mo. 291, 79 S. W. 927.

44. Claypool v. Wigmore [Ind. App.] 71 N. E. 509. The proximate cause of an injury is that which operates to produce particular consequences without the intervention of any independent or unforeseen cause or event, without which the injury would not have occurred; such consequences as might reasonably have been anticipated as likely to occur from the alleged negligent act. Strobeck v. Bren [Minn.] 101 N. W. 795. Where several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to any or all of such causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793.

45. Cleveland, etc., R. Co. v. Carey, 33 Ind. App. 275, 71 N. E. 244. Causes that are merely incidental to a superior or controlling agency are not proximate causes, though they may be nearer in time to the result. Id. Negligence may be regarded as the proximate cause of an injury of which it may not be the sole and immediate cause. If defendant's negligent, inconsiderate and wanton, though not malicious, act, concurred with any other thing, person or event, other than plaintiff's own fault, to produce the injury, so that it clearly appears that but for defendant's act the injury would not have occurred, defendant is responsible, though his negligent act may not have been the nearest cause in the chain of events or the order of time. Bowden v. Derby [Me.] 58 A. 993.

46. The original wrongdoer is not relieved from the consequences of his acts unless the intervening act of a third person was wrongful. A blow struck at an intoxicated person in self-defense, not being wrongful, does not relieve the person who sold the liquor causing the intoxication. Currier v. McKee [Me.] 59 A. 442.

47. Nickey v. Steuder [Ind.] 73 N. E. 117; Indianapolis St. R. Co. v. Schmidt [Ind. App.] 71 N. E. 663. Owner of premises not liable for injury in swinging door when such injury was caused by the act of a third person. Pardington v. Abraham, 93 App. Div. 359, 87 N. Y. S. 670. Proximate cause of plaintiff's injuries resulting from falling down elevator shaft held to be, not defendant's negligence in leaving door to shaft partly open, but the intervening act of plaintiff's companion in opening the door through which plaintiff walked without seeing that the car was not there. Claypool v. Wigmore [Ind. App.] 71 N. E. 509. Negligence of telephone company in maintaining wire on chimney which became defective held only remote cause of injury to plaintiff, struck by parts of chimney thrown down by derrick boom allowed by negligent workmen to swing out into street and strike the wire. Leeds v. New York Tel. Co., 178 N. Y. 118, 70 N. E. 219.

48. Indianapolis St. R. Co. v. Schmidt [Ind. App.] 71 N. E. 663; Claypool v. Wigmore [Ind. App.] 71 N. E. 509; Nickey v. Steuder [Ind.] 73 N. E. 117. The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 72 N. H. 546, 58 A. 242. Defendant built an inclined gangway across a street, in violation of law, and a workman wheeling a truck down the gangway frightened a passing horse which ran away, the accident resulting in the death of plaintiff's husband. Held, proximate cause of death was defendant's unlawful act in constructing the gangway, and not the workman's act. Shippers' Compress & Warehouse Co. v. Davidson [Tex. Civ. App.] 80 S. W. 1032.

49. Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co., 72 N. H. 546, 58 A. 242. A person is responsible for such consequences of his acts as ought to have been apprehended according to the usual experience of mankind. Currier v. McKee [Me.] 59 A. 442. The test of proximate cause is whether the injury and damage exhibited are such

gence applies whether the original negligence was that of defendant or plaintiff.[50] If defendant's negligence was a direct and proximate cause of an accident, he is liable, even if the negligence of a third person contributed to the injury.[51] The general principles are further illustrated in the note.[52]

in character as that in view of the cause originally set in motion, such injury and damage ought to have been anticipated as likely to occur. Watters v. Waterloo [Iowa] 101 N. W. 871. Among the natural and probable consequences of negligently letting a pair of horses run away, it is competent to find that they will swerve to one side or the other on account of the acts of persons who try to stop them in an imprudent manner, including waving a rake and hitting one of the horses on the head with it. Turner v. Page, 186 Mass. 600, 72 N. E. 329. A person charged with negligence is liable only for those injuries which a prudent man in the exercise of care could have reasonably foreseen or expected as the natural and probable consequences of his act or his omission of duty. Drum v. Miller, 135 N. C. 204, 47 S. E. 421. But this principle does not require that he should have been able to foresee the injury in the precise form in which it resulted or to anticipate the particular consequence which actually flowed from his act or omission. Id. A wrongdoer is liable for the natural and probable consequences of his acts, though the particular result is not such that it should have been foreseen. Vendor of sulphuric acid, not labeled as poison, to a creamery, liable for death of one who drank it, supposing it was buttermilk. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793.

50. Indianapolis St. R. Co. v. Schmidt [Ind. App.] 71 N. E. 663.

51. Townsend v. Boston [Mass.] 72 N. E. 991. Where a plaintiff was injured by a failure to perform a duty resting in the first instance on a third person, and not defendant, the proximate cause of the injury is the failure of the person owing a duty immediately to plaintiff. Failure of the person whose duty is to the third person, as by contract, may be a cause of the injury but is not the proximate cause. Applied where contractor building bridge for county contracted to relieve it of liability for injuries from use of temporary bridge. Styles v. Long Co., 70 N. J. Law, 301, 57 A. 448.

52. Violation of tenement house act not shown to be proximate cause of alleged injury. Kuhnen v. White, 92 N. Y. S. 104. Violent opening of gate in fence along public highway held proximate cause of injury, and not failure to give notice. Edwards v. Brayton [R. I.] 57 A. 784. Defective condition of eaves trough which fell, because of snow and ice sliding into it from roof, and injured plaintiff, was proximate cause; owner of building liable. Keeler v. Lederer Realty Corp. [R. I.] 59 A. 855. The striking of a buggy by a backing train is a proximate cause of injury, where the result is a runaway and the occupant is thrown out, and hurt some distance away. Wabash R. Co. v. Billings, 105 Ill. App. 111. The noncompliance with a city ordinance respecting elevators, though negligence, was not the cause of the injury. Middendorf v. Schulze, 105 Ill. App. 221. Street railway servants left empty reel for wire on unused portion of highway and boys rolled it down the street striking plaintiff's carriage, whereby she was injured. Held, street railway company's negligence was remote, not proximate cause. Glassey v. Worcester Consol. St. R. Co., 185 Mass. 315, 70 N. E. 199. Employe of contractor engaged in plastering shaft of elevator struck by elevator, though operator had been instructed not to run the car below a certain floor. Held, negligence in running elevator was proximate cause of injury, and not contractor's negligence in failing to block the shaft. Siegel, Cooper & Co. v. Norton, 209 Ill. 201, 70 N. E. 636. A windstorm blew down a tree which fell on and broke down a fence between plaintiff's and defendants' lands. Plaintiff's cattle went through the hole so made, and through an open gate in a fence between defendants' land and a railway right of way, and were killed on the track by a train. Held, failure of defendants to keep gate in fence on right of way closed was not the proximate cause of plaintiff's loss by death of the cattle. Strobeck v. Bren [Minn.] 101 N. W. 795. Passenger, injured in railroad collision, suffered attacks of dizziness. While examining leak in pipe in sink she fell as a result of an attack of dizziness and broke her wrist. Held, collision not proximate cause of broken wrist, and no recovery therefor allowed. Snow v. New York, etc., R. Co., 185 Mass. 321, 70 N. E. 205. In December, 1900, plaintiff was thrown from a buggy by a defect in the street and his head injured, spells of dizziness resulting. In January, 1901, he became dizzy, slipped and fell on an icy walk and suffered the loss of an eye. Held, the last injury was not the proximate result of the first act of negligence, not being the natural and probable result, and an adequate cause, the icy walk, having intervened. Watters v. Waterloo [Iowa] 101 N. W. 871. If defendant sold plaintiff's son the liquor which caused his intoxication, and if by reason of his intoxication he made an assault on another person, who, in self-defense, struck and injured the intoxicated person, plaintiff may recover from defendant damages for injury to her means of support under the civil damage law [Rev. St. 1903, c. 29, § 58]. Currier v. McKee [Me.] 59 A. 442. Where a trolley slipped from the wire, breaking an electric lamp, a piece of which struck plaintiff, the slipping off of the trolley was not an "accident" for which no one was liable, within the meaning of the rule, that where two causes combine to produce an injury, and one is a pure accident, the other cause is the proximate cause of the injury. Nelson v. Narragansett Elec. Lighting Co. [R. I.] 58 A. 802. Where a trolley pole slipped from the wire and struck an electric lamp near, and plaintiff was struck by a piece of the lamp, even if the electric light company was negligent in maintaining the lamp where it was, the street railway company's negligence intervened and was the

§ 4. *Contributory negligence.*[53]—Contributory negligence is a want of ordinary care[54] on the part of plaintiff or the person injured, which was a proximate cause of, or proximately contributed to, the injury;[55] and, when shown, defeats a recovery.[56]

Due care by a plaintiff[57] or person injured is that usually exercised by ordinarily prudent persons under the same circumstances.[58] Intoxication is no excuse.

proximate cause of the injury. Id. Averments that defendant negligently set fire to and burned the house in which plaintiff resided, with the members of the family, that he was in the house when it was ignited, and that he was burned while escaping therefrom, sufficiently shows that defendant's negligence was the proximate cause of plaintiff's personal injuries. Birmingham R. Light & Power Co. v. Hinton [Ala.] 37 So. 635. The fact that plaintiff, an infant, was taken out, and brought back on account of the cold, and then received the injuries, did not break the line of causation. Id.

53. See 2 Curr. L. 1003.

54. See definitions of "negligence" and "ordinary care" above.

55. St. Louis S. W. R. Co. v. Crabb [Tex. Civ. App.] 80 S. W. 408; Brewster v. Elizabeth City [N. C.] 49 S. E. 885; Nelson v. Georgia, etc., R. Co. [S. C.] 47 S. E. 722. Negligence of a plaintiff does not bar recovery unless it contributed to produce the injury. Lyon v. Grand Rapids [Wis.] 99 N. W. 311. Plaintiff's negligence defeats recovery if it was the sole cause of his injuries, or if it concurred with defendant's negligence so that without it, the injury would not have occurred. Lynch v. Waldwick [Wis.] 101 N. W. 925; Pim v. St. Louis Transit Co. [Mo. App.] 84 S. W. 155. If plaintiff's negligence directly contributed to produce his injury he cannot recover, though defendant's negligence was the more proximate cause. Gilbert v. Burlington, etc., R. Co. [C. C. A.] 128 F. 529. Plaintiff's want of ordinary care will not defeat his action unless his negligence was a proximate cause (not necessarily the proximate cause) of his injury. To establish the causal relation it must be made to appear that his act or omission and his injury are known by common experience to be naturally and usually in sequence. Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13.

56. Lee v. Foley, 113 La. 663, 37 So. 594; Moulton v. Sanford & C. P. R. Co. [Me.] 59 A. 1023; O'Neill v. Interurban St. R. Co., 86 N. Y. S. 208. Negligence of decedent defeats recovery for his death [St. 1891, p. 438, c. 124]. McDonough v. Grand Trunk R. Co., 98 Me. 304, 56 A. 913. Where there is but one injury contributory negligence of plaintiff will defeat a recovery, whether he sues defendants jointly or severally. Fletcher v. Boston & M. R. Co. [Mass.] 73 N. E. 552. The rule is without exception in Indiana, that where the injury is not willfully inflicted, the injured person must himself be without fault contributing to produce the injury. Quinn v. Chicago & E. R. Co., 162 Ind. 442, 70 N. E. 526. Statutes making it unnecessary for plaintiffs in actions for negligence to plead want of contributory negligence do not change the effect of contributory negligence as a defense, whether it be shown in the complaint or by the evidence [Burns' Ann. St. 1901, §§ 359a, 7083, construed]. Pittsburgh, etc., R. Co. v. Collins [Ind.] 71 N. E. 661. Where mining employe negligently, and in violation of the rules of the mining company, let cars down a grade and was killed, the defense of contributory negligence was available to the railway company, though the relation of master and servant did not exist between it and deceased. Smith v. Centennial Eureka Mln. Co., 27 Utah, 307, 75 P. 749.

57. See 2 Curr. L. 1003, n. 67, 68, 69; Id. 1004.

58. A plaintiff is not required to exercise more care than is usual under similar circumstances among careful persons of the class to which said plaintiff belongs. Normile v. Wheeling Traction Co. [W. Va.] 49 S. E. 1030. Mere carelessness does not defeat recovery by a plaintiff unless it be negligence; that is unless an ordinarily prudent man would have anticipated the probability of some injury. Lynch v. Waldwick [Wis.] 101 N. W. 925. A person is not negligent in failing to look for danger when under the surrounding circumstances he had no reason to apprehend danger. Missouri Pac. R. Co. v. Johnson [Kan.] 77 P. 576.

ILLUSTRATIONS. Held not negligence: Person who fell into elevator pit in dark basement while going to closet held not guilty of contributory negligence in not getting a light. Glaser v. Rothschild, 106 Mo. App. 418, 80 S. W. 332. Customer in store who stepped on duster on stairs and fell held not guilty of contributory negligence as matter of law. Graham v. Bauland Co., 97 App. Div. 141, 89 N. Y. S. 595. Street cleaner struck by unguided team held not guilty of contributory negligence. Turtenwald v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 948.

Held negligence: Walking on street railway track while intoxicated. Bugbee v. Union R. Co. [R. I.] 59 A. 165. Failure to look and listen for a car which could have been seen and heard. Indianapolis St. R. Co. v. Zaring, 33 Ind. 297, 71 N. E. 270. Attempting to cross in a row boat in front of a tug with two car floats. Klutt v. Philadelphia & R. R. Co., 133 F. 1003. Rowing a boat in the course of a steamboat, knowing its course and time schedule, and seeing it when 150 feet away. Yarnold v. Bowers [Mass.] 71 N. E. 799. Lighting a fire in a stove where there are live coals or a blaze, by the use of kerosene oil, even of the statutory standard. Riggs v. Standard Oil Co., 130 F. 199. No recovery by barber for loss of patronage by reason of soap sold him containing alkali, when he used the soap on a "large number" of customers, knowing the effects. Slattery v. Colgate [R. I.] 55 A. 639. No recovery for injuries caused by fall through unguarded hole in floor, when plaintiff did not use ordinary entrance to building but used a door on which there was

for want of such care,[59] but the fact of intoxication will not alone bar recovery.[60] Voluntary exposure to danger is negligence.[61] Where one is placed in a position of peril through fault of another, that fact must be considered in judging his conduct.[62] The duty to exercise due care to avoid the consequences of another's negligence does not arise until the negligence of the other exists or is apparent, or the circumstances are such that an ordinarily prudent person would have reason to apprehend its existence.[63] Mere knowledge or notice of danger is not conclusive.[64]

In purely statutory actions, the rules as to what constitutes due diligence on the part of plaintiff may not be the same as in ordinary actions; the language of the particular statute governs.[65]

Children.[66]—A child of very tender years is presumed incapable of negligence under any circumstances,[67] but the defense is available when applied to the con-

a warning notice to keep out. Greis v. Hazard Mfg. Co., 209 Pa. 276, 58 A. 474. Woman who fell down stairway in store, which she said she could not see, though she could see articles on tables beyond the stairway, held guilty of contributory negligence. Dunn v. Kemp [Wash.] 78 P. 782 One who walked into a dark corner in a building, thinking there might be a public closet there, and fell into an open elevator shaft, was guilty of contributory negligence as a matter of law. Massey v. Seller [Or.] 77 P. 397.

59. Vizacchero v. Rhode Island Co. [R. I.] 59 A. 105.

60. The mere fact that plaintiff was intoxicated will not bar recovery for negligence, unless his conduct, resulting from such condition, was not that of an ordinarily prudent and careful man, and contributed directly to produce his injury. Clarke v. Philadelphia & R. Coal & Iron Co., 92 Minn. 418, 100 N. W. 231.

61. As where purchaser of coal remained in coal shed while teamster was unloading and was struck by a piece of coal. Atherton v. Kansas City Coal & Coke Co., 106 Mo. App. 591, 81 S. W. 223. One who voluntarily and unnecessarily exposes himself to injury from a known and imminent danger cannot recover, though concurrent negligence of defendant made the danger greater than he supposed it. Gilbert v. Burlington, etc., R. Co. [C. C. A.] 128 F. 529. When two ways are open to a person, one obviously safe and the other plainly dangerous, voluntary choice of the latter is ordinarily negligence. St. Louis, etc., R. Co. v. Brock [Kan.] 77 P. 86.

62. One placed in such a position is not required to exercise the same degree of care that a person of ordinary prudence would have exercised. Saunders v. Missouri, etc., R. Co. [Tex. Civ. App.] 80 S. W. 387. If an injudicious choice of methods is made in an emergency, and results from fear or bewilderment from being placed in a position of danger through negligence of another, there is no contributory negligence as a matter of law. St. Louis & S. F. R. Co. v. Brock [Kan.] 77 P. 86. To excuse contributory negligence on the ground of danger, there must either be a real danger, or the circumstances must be such as to create in the mind of the person a reasonable apprehension of danger. Texas Midland R. Co. v. Booth [Tex. Civ. App.] 80 S. W. 121.

63. Freeman v. Nashville, etc., R. Co., 120 Ga. 469, 47 S. E. 931.

64. Hollingsworth v. Ft. Dodge [Iowa] 101 N. W. 455. Where appellee, under great excitement, fell over obstructions placed in the road by the city during its repair of the street, appellee having known of the obstructions but having for the moment forgotten them, there being no lights nor other warnings of the danger, forgetfulness of the appellee under the circumstances was held not to constitute contributory negligence. City of Lancaster v. Walter [Ky.] 80 S. W. 189.

Note: The knowledge of the defective condition of the sidewalk does not show as a matter of law the existence of contributory negligence where the party forgets such state of facts, it being only evidence for the jury. City of Maysville v. Guilfoyle, 110 Ky. 670; Virgin v. Saginaw, 125 Mich. 499. The courts, however, draw a distinction between forgetfulness and heedlessness. King v. Colon, 125 Mich. 511. Where such knowledge is shown to be present at the time of injury, an assumption of the risk can be made out, and where such knowledge existed before, its presence might be presumed as a matter of law in the absence of extraordinary facts, as excitement, fright, etc. The use of the word "forget" must lead to confusion. The question is ultimately whether the plaintiff acted as an ordinarily prudent man would be expected to act under the circumstances. Beach, Contributory Negligence, § 9.—4 Columbia, L. R. 605.

65. Thus under Mass. St. 1886, p. 117, c. 140, allowing recovery from a street railway corporation for death of a passenger or one not a passenger, being in the exercise of due care, the same proof of diligence is required as in a proceeding by indictment for the death. It was held that one carried from a car in an unconscious condition and laid beside the track and afterwards run over by a car was not in the exercise of due care within the meaning of the statute. Hudson v. Lynn & B. R. Co., 185 Mass. 510, 71 N. E. 66.

66. See 2 Curr. L. 1004.

67. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981; Buechner v. New Orleans, 112 La. 599, 36 So. 603. Child 2 years 6 months

duct of a child not of tender years.[68] Negligence of such a child is want of such care as children of his age, experience and intelligence are capable of using under like circumstances;[69] the question of capacity is usually one of fact,[70] though the age at which an infant's responsibility should be presumed to commence has been held a question of law.[71] The burden of proving capacity is on defendant.[72]

Comparative negligence.[73]—The doctrine of comparative negligence, that if plaintiff's negligence is slight as compared with that of defendant, recovery may be had notwithstanding, is generally disapproved,[74] most courts holding that contributory negligence, however slight, defeats recovery.[75] But contributory negligence is no defense if defendant was guilty of wanton or willful negligence.[76] In some states the rule is that plaintiff's negligence will not defeat a recovery unless

old. Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995. Child 2 years 8 months old. Indianapolis St. R. Co. v. Schomberg [Ind.] 72 N. E. 1041. Child 4 years 6 months old. Macdonald v. O'Reilly [Or.] 78 P. 753. Boy of 6 presumed non sui juris. Kaplan v. Metropolitan St. R. Co., 90 N. Y. S. 585.

68. Child 8½ years old. Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689. 58 A. 5. Child of 12, permitted to go on streets alone, presumed to have sufficient intelligence to avoid injury in a double swinging storm door by getting his hand caught. Dolan v. Callender, McAuslan & Troup Co. [R. I.] 58 A. 655. Bright boy of 15, partially blind, held guilty of contributory negligence in going on draw bridge after warning not to do so, which resulted in his walking off and being drowned. Desure v. New York, etc., R. Co., 94 App. Div. 251, 87 N. Y. S. 988. Boy of 16, with knowledge of and experience in riding on box cars, held capable of contributory negligence in riding on such a car. Cockrell v. Texas & N. O. R. Co. [Tex. Civ. App.] 82 S. W. 529.

69. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981; Dynes v. Bromley, 208 Pa. 633, 57 A. 1123. Rule applied to child 9 years and 3 months old. Dempsey v. Brooklyn-Heights R. Co., 90 N. Y. S. 639. To child of 6. Heinzle v. Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848. To child of 8. Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 A. 5. To bright boy of 10 or 11. Freeman v. Carter [Tex. Civ. App.] 81 S. W. 81. To dull boy of 13. Houston, etc., R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557.

70. Dynes v. Bromley, 208 Pa. 633, 57 A. 1123. Jury at liberty to find that a boy 7½ years old was not chargeable with contributory negligence. Fritsch v. New York & Q. R. R. Co., 93 App. Div. 554, 87 N. Y. S. 942. Whether negligence may be imputed to a child under 12 is a question of fact. Dempsey v. Brooklyn Heights R. Co., 90 N. Y. S. 639. Evidence being conflicting as to capacity of plaintiff, a weak minded child, whether he had capacity to be guilty of contributory negligence was for the jury. Morrow v. Gaffney Mfg. Co. [S. C.] 49 S. E. 573. The rule that contributory negligence will defeat a recovery does not apply to a child of tender years unless it is possessed of that degree of intelligence, prudence and caution which will cause it to know and to appreciate and to understand the dangers incident to itself from its wrongful acts and omissions. North Tex. Const. Co. v. Bostick [Tex. Civ. App.] 80 S. W. 109. There is no arbitrary rule fixing the age when a youth may be declared wholly capable of understanding and avoiding danger; but a boy of 18, of ordinary intelligence and experience, should show some incapacity, in addition to his minority, to warrant a court in instructing as a matter of law that he was not required to use the same care as an adult. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981.

71. 12 years is commonly taken as such age. Dempsey v. Brooklyn Heights R. Co., 90 N. Y. S. 639. 7 or 8 years suggested. Coleman v. Himmelberger-Harrison Land & Lumber Co., 105 Mo. App. 254, 79 S. W. 981.

72. The law presumes a child between 7 and 14 years of age incapable of contributory negligence, and in an action by such infant the burden is on defendant to overcome this presumption by proof of intelligence and capacity. Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908. Plaintiff is entitled to presumption that child 9 years and 3 months old is non sui juris. Dempsey v. Brooklyn Heights R. Co., 90 N. Y. S. 639. A child of 7 is presumed incapable of personal negligence in the absence of evidence as to his knowledge, intelligence or capacity. Watson v. Southern R. Co., 66 S. C. 47, 44 S. E. 375.

73. See 2 Curr. L. 1006.

74. Alabama. Birmingham R. Light & Power Co. v. Bynum [Ala.] 36 So. 736. Illinois. Imes v. Chicago, etc., R. Co., 105 Ill. App. 37; Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38. Kentucky. Kentucky & I. Bridge & R. Co. v. Sydor [Ky.] 82 S. W. 989. Michigan. Buxton v. Ainsworth [Mich.] 101 N. W. 817. Washington. Franklin v. Engel, 34 Wash. 480, 76 P. 84; Woolf v. Washington R. & Nav. Co. [Wash.] 79 P. 997.

75. Roy v. Interurban St. R. Co., 90 N. Y. S. 1077.

76. Alger, Smith & Co. v. Duluth-Superior Traction Co. [Minn.] 101 N. W. 298; Southern R. Co. v. Yancy [Ala.] 37 So. 341. Contributory negligence is no defense if defendant was guilty of gross negligence. But in Wisconsin "gross" and "willful" negligence are practically held the same. Rideout v. Winnebago Traction Co. [Wis.] 101 N. W. 672. But nothing short of wanton or willful negligence excuses negligence of plaintiff. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38.

it was equal to or greater than the negligence of the defendant, or unless plaintiff by the exercise of ordinary care could have avoided the consequences of defendant's negligence;[77] but the damages recoverable will be diminished in proportion to the extent of plaintiff's fault.[78]

Last clear chance doctrine.[79]—The party who has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible.[80] Thus negligent failure to avoid injury, after discovery of plaintiff's peril, renders the defendant liable, even though the plaintiff was first negligent;[81] and, similarly, plaintiff cannot recover, if, subsequent to defendant's negligence, he negligently fails to avoid the injury.[82] But this doctrine of prior

77. Christian v. Macon R. & Light Co., 120 Ga. 314, 47 S. E. 923. If plaintiff neglects a clear chance to avoid injury from prior negligent acts of defendant, his conduct is not mere contributory negligence lessening damages, but failure to avoid danger, which defeats the right to recover. Simmons v. Seaboard Air Line R. Co., 120 Ga. 225, 47 S. E. 570.

78. Florida statute, providing that in actions against railroads, where both plaintiff and servants of the company are at fault, the former may recover, but the damages may be diminished or increased in proportion to the amount of the default attributable to him, held properly construed. Savannah, etc., R. Co. v. Evans [Ga.] 49 S. E. 308.

79. See 2 Curr. L. 1004, n. 78.

80. Vizacchero v. Rhode Island Co. [R. I.] 59 A. 105.

81. Floyd v. Paducah R. & Light Co., 24 Ky. L. R. 2364, 73 S. W. 1122; Louisville & N. R. Co. v. Lowe, 25 Ky. L. R. 2317, 80 S. W. 768; Butler v. Rockland, etc., R. Co. [Me.] 58 A. 775; Meng v. St. Louis & S. R. Co. [Mo. App.] 84 S. W. 213; Murray v. St. Louis Transit Co. [Mo. App.] 83 S. W. 995; El Paso Elec. R. Co. v. Kendall [Tex. Civ. App.] 85 S. W. 61. The essence of the "last clear chance" doctrine is that negligence of the plaintiff is no defense unless it is the proximate cause of the injury and that it is not such proximate cause when the defendant, after becoming aware of the danger plaintiff is in, or is evidently about to place himself in, could avert the consequence by the exercise of reasonable care. Green v. Los Angeles Terminal R. Co., 143 Cal. 31, 76 P. 719. Negligence of one person, whereby he is placed in a perilous position, does not excuse a reckless disregard of his safety by another. Under such conditions even a trespasser is entitled to protection from wanton or willful acts; and when the danger to which he is exposed is apparent, the duty exists to exercise ordinary care to avoid injuring him. Rawitzer v. St. Paul City R. Co. [Minn.] 100 N. W. 664. Evidence held to justify finding that train employes failed to use ordinary care to prevent a collision at a crossing after discovery of plaintiff's peril. Central Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862. A failure of the operators of trains to keep a lookout for persons on the track at points where they have a right to be is actionable negligence, notwithstanding contributory negligence of a person injured through failure to keep such lookout. Kentucky & I. Bridge & R. Co. v. Sydor [Ky.] 82 S. W. 989. Though a person was negligent in getting into his buggy when near a locomotive, but after he got in and had control of his horse, negligence of the engineer in blowing off steam occurred and proximately caused the injury, defendant was liable. Hord v. Gulf, etc., R. Co. [Tex. Civ. App.] 76 S. W. 227. Truck driver recovered for injuries caused by being caught between pole of his wagon and load ahead, where, though he negligently placed himself in a dangerous position, negligence of the driver of the team in the rear was the proximate cause of his injury. Steinacker v. Hills Bros. Co., 91 App. Div. 521, 87 N. Y. S. 33. Failure to use ordinary care to avoid injury to a person discovered in a perilous position, or failure to use ordinary care to discover a person in a dangerous position, is negligence on the part of a motorman. The "last clear chance" doctrine applies whether or not the motorman had actual knowledge of the injured person's situation. Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 169.

Doctrine held not applicable: The last clear chance doctrine cannot be applied unless knowledge of plaintiff's position by those charged with negligence is shown. Dotta v. Northern Pac. R. Co. [Wash.] 79 P. 32. Brakeman was killed by collision, having failed to guard a switch. The engineer of coming train could not see brakeman's train until too near to stop. Held, "last clear chance" doctrine not applicable as against company. Holland v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 359. Doctrine of discovered peril held not applicable where brakeman found boy asleep on top of box car, and told him to get off at next stop. Cockrell v. Texas & N. O. R. Co. [Tex. Civ. App.] 82 S. W. 529.

82. Where a passenger's station was not announced, but the train stopped, and the passenger attempted to alight after it had started, and was thrown off by a sudden jerk of the train; held, he had a clear chance to avoid injury by returning to his car, and could not recover. Simmons v. Seaboard Air Line R. Co., 120 Ga. 225, 47 S. E. 570. The law of contributory negligence is not applicable where the person injured did not fail to exercise ordinary care before the negligence of the defendant was apparent or should have been apprehended by him, and could not after that time have avoided the consequences of such negligence by the exercise of ordinary care. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818.

and subsequent negligence is not applicable when the negligence of plaintiff and that of defendant are practically simultaneous.[83]

Imputed negligence.[84]—Negligence of the driver of a private vehicle is not imputable to one riding in the vehicle as guest, with no authority or control over the driver,[85] the relation between them not being such as to make them responsible for each other's acts.[86] But there are holdings to the contrary.[87] Conduct

83. Butler v. Rockland, etc., R. Co. [Me.] 58 A. 775; Green v. Los Angeles Terminal R. Co., 143 Cal. 31, 76 P. 719.

84. See 2 Curr. L. 1005.

85. Mack v. Shawangunk, 90 N. Y. S. 760; Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245. Negligence of driver not imputable to infant guest. Hampel v. Detroit, etc., R. Co. [Mich.] 100 N. W. 1002. Negligence of father not imputable to adult daughter. Central Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862. Negligence of husband not imputable to wife. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571.

86. As where they are not shown to be engaged in a common undertaking, and where the relation of master and servant, or principal and agent, does not exist. Central Texas & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862. Negligence of the driver of a wagon not imputable to his helper, in the rear of the wagon, where helper was injured by collision with street car. Le Blanc v. Interurban St. R. Co., 88 N. Y. S. 150. Where plaintiff, when injured in collision with street car, was riding gratuitously on a wagon driven by one who was carting ice for plaintiff and his customers and others, it was held that the driver was not plaintiff's servant, and since plaintiff exercised no control over the wagon, negligence of the driver could not be imputed to the plaintiff. Scarangello v. Interurban St. R. Co., 90 N. Y. S. 430.

87. The driver of a private conveyance is the agent of the person in such conveyance, so that his negligence contributing to the injury complained of by such person, will defeat the action. Lightfoot v. Winnebago Traction Co. [Wis.] 102 N. W. 30. The right of recovery of one driving with another, who owns and drives the team, and to whose care as driver plaintiff intrusted himself, depends upon whether the driver exercised due care to prevent the accident which is the ground of the action. Evensen v. Lexington & B. St. R. Co. [Mass.] 72 N. E. 355. Where one of two persons in a rowboat with the other's consent does all the rowing and manages the boat, his negligence in so doing, which results in a collision, is imputable to the other occupant of the boat. Yarnald v. Bowers [Mass.] 71 N. E. 799.

NOTE. Imputed negligence in the case of a gratuitous passenger: "It is generally settled that a passenger in a public conveyance does not so identify himself with the carrier that the latter's negligence, contributing to the passenger's injury, prevents his recovery from a negligent third party. Little v. Hackett, 116 U. S. 366, 29 Law. Ed. 652. The position of a gratuitous passenger in a private conveyance not controlled by his own servant, though seemingly based upon similar principles, is perhaps more in dispute. Many cases of the sort, apparently involving imputed negligence, have in reality gone off upon other grounds. For example, the passenger himself may be negligent in permitting an incompetent person to drive him. More frequently a plaintiff is guilty of actual negligence at the time of the accident; for if he has any control over his host or his driver he is not absolved from a duty to take reasonable care in noticing and pointing out dangers. Whitman v. Fisher, 98 Me. 575; Allyn v. Boston, etc., R. Co., 105 Mass. 77. But for imputed negligence itself we find a well-recognized field in cases of joint enterprise. Familiar instances are where a number of men hire a barge for an excursion, or where they are using a team for their own pecuniary profit, not for that of their employer, in moving furniture. Cass v. Third Ave. R. Co., 47 N. Y. S. 356. In such an undertaking each is authorized to act for all with respect to the means employed in executing the common purpose. Koplitz v. St. Paul, 86 Minn. 373. Each, as principal, has a corresponding right of control and direction. From this community of interest and control it may easily and justly follow that one of the participants impliedly assumes a liability to third persons for the negligence of his fellows, and at the same time a disability to sue for injuries to which they have contributed. Stroher v. Elting, 97 N. Y. 102, 49 Am. Rep. 515. See Elting Land Co. v. Mingea, 89 Ala. 521, 529. The sole basis for imputed negligence so called would then seem to be some such privity as that existing between principal and agent, one dependent upon an express appointment or upon an appointment implied from such an interest and control as may properly make one responsible for the negligent acts of another. The Bernina, L. R. 13 App. Cas. 1, 16. In Michigan, although contributory negligence is still imputed to the ordinary gratuitous passenger in line with the now overruled English case of Thorogood v. Bryan, 8 C. B. 115, a recent decision in that jurisdiction, recognizing that such imputation of negligence is founded upon a "fiction" of agency, refuses to impute to a child the negligence of its driver, for the excellent reason that an infant is incapable of having an agent. Hampel v. Detroit, etc., R. Co. [Mich.] 100 N. W. 1002. Consistency would appear to demand that the adult passenger in Michigan, and wherever contributory negligence is imputed, be liable directly, upon this doctrine of agency, for his driver's negligence. These two results, the liability and the disability, seem inseparable in any case of imputed negligence. It is difficult to conceive of such a privity as will bring about the one and not the other. Beach, Contrib. Neg. § 103 et seq. If the negligence of A is to be treated as the negligence of B it must be so treated for all purposes. The majority of courts, however,

of a driver may be considered on the question of negligence of the person injured in becoming a guest in the vehicle.[88] If the relation of master and servant exists, negligence of the servant is imputable to the master.[89]

Where two fellow-servants with distinct duties to perform are severally engaged in the performance of such duties, negligence of one cannot be imputed to the other.[90]

By weight of modern authority, negligence of a parent or custodian is not imputable to a child non sui juris,[91] so as to bar an action for or on its behalf.[92] Contributory negligence of the parent, or a custodian acting as the parent's agent will defeat a recovery for the wrongful death of a child non sui juris brought for the parent's benefit.[93] The degree of care required of parents is that which persons of reasonable prudence of the same class and with the same means ordinarily

fail to find any privity or agency in the usual case of a gratuitous passenger and his host or driver. Union, etc., R. Co. v. Lapsley, 51 F. 174; Cunningham v. City, 84 Minn. 21. **Contra,** Prideaux v. City, 43 Wis. 513, 28 Am. Rep. 558; Lightfoot v. Winnebago Traction Co. [Wis.] 102 N. W. 30. They are coming to treat in the same way the gratuitous passenger and his host, the paying passenger and his carrier, and the infant and his custodian. Consequently in each of these cases where they find no such privity as should directly tax the one for the other's fault he is not indirectly taxed by means of imputed negligence for the other's contribution."—18 Harv. L. R. 219.

88. As rapid driving and intoxication, if known to the guest when he entered the vehicle. Thuis v. Vincennes [Ind. App.] 73 N. E. 41.

89. Markowitz v. Metropolitan St. R. Co. [Mo.] 85 S. W. 351.

90. Negligence of the driver of a fire engine is not imputable to the engineer riding on the rear of the engine, who was struck and injured by a street car. McKernan v. Detroit Citizens' St. R. Co. [Mich.] 101 N. W. 812.

91. Watson v. Southern R. Co., 66 S. C. 47, 44 S. E. 375. No negligence was imputable to an infant of tender years who was left on a veranda, in the cold, when the house was on fire inside. Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635. Negligence of a parent or custodian cannot be imputed to a child to support a plea of contributory negligence. Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

92. Macdonald v. O'Reilly [Or.] 78 P. 753. **Contra** doctrine recognized, though point not raised, in Cameron v. Duluth-Superior Traction Co. [Minn.] 102 N. W. 208, and Finkelstein v. American Ice Co., 88 N. Y. S. 942.

Note: The doctrine stated in the text is known as the "Vermont rule," the leading case being Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67. See, besides the recent cases cited to the text, Bottoms v. Railroad, 114 N. C. 699, 19 S. E. 730, 41 Am. St. Rep. 799, 25 L. R. A. 784; Smith v. Railroad, 114 N. C. 749, 19 S. E. 863, 25 L. R. A. 287; Duval v. Railroad, 134 N. C. 349, 46 S. E. 750; Shearman & Redf., Neg. § 78. The last authority holds that the Vermont rule "is the true rule and is abundantly justified by the reasoning of the courts which in more than 20 states have adopted it."

The contrary rule was laid down in Hartfield v. Roper, 21 Wend. [N. Y.] 615, 34 Am. Dec. 273, and is commonly known as the "New York rule." This has been severely criticized, and is rejected by a majority of the states. Newman v. R. R., 52 N. J. Law, 446, 19 A. 1102, 8 L. R. A. 842; Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67; Beach, Con. Neg. § 42; Bishop, Non-Contract Law, § 582.

What is known as the "English rule" was laid down in Waite v. Railroad, 1 E., B. & E. 719, and denies recovery only in cases where the parent or custodian is present and controlling the infant, and negligently contributes to the injury. This is followed in this country only by the Massachusetts courts.

93. Richmond, F. & P. R. Co. v. Martin's Adm'r, 102 Va. 201, 45 S. E. 894. Negligence of the father is a defense to an action for damages for death of his minor child, where the father is the beneficiary. Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591. In action for wrongful death of a child four years and eight months old, it was incumbent on plaintiff to show that there was no contributory negligence on the part of deceased, or of those who had charge of him. Brennan v. Standard Oil Co. of New York [Mass.] 73 N. E. 472.

NOTE. Imputed negligence in actions for wrongful death: The rule given in the text is also supported by Westerberg v. R. R., 142 Pa. 471, 21 A. 878, 24 Am. St. Rep. 510; R. R. v. Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; Tiffany, Death by Wrongful Act, § 69; Beach, Con. Neg. § 44; Wolf v. R. R., 55 Ohio St. 530, 45 N. E. 708, 36 L. R. A. 812. The same rule applies where the parent is suing as administrator, but is also the beneficial plaintiff, or the cestui que trust of the action, as distributee of the child's estate. 3 Thompson, Neg. § 3077; Beach, Contrib. Neg. § 44; Tiffany, Death by Wrongful Act, § 69; Smith v. Railroad, 92 Pa. 450, 37 Am. Rep. 705; Reilly v. Railroad, 94 Mo. 600, 7 S. W. 407; Railroad v. Freeman, 36 Ark. 41; Bamberger v. Railroad, 95 Tenn. 30, 31 S. W. 163, 49 Am. St. Rep. 909, 28 L. R. A. 486. In Railroad v. Wilcox, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76, the whole subject is admirably discussed, with a full review of the authorities, and the conclusion is reached that, while the negligence of parents, or others in loco parentis, cannot be imputed to a child to support the plea of contributory negligence, when the action is for his benefit, yet when the action is by the parent, or the parent is the real beneficiary of the action, as distributee of the deceased child, the con-

exercise and deem adequate to protect their children from danger.[94] In Oregon, negligence of the mother will not be imputed to the father so as to defeat an action brought by him to recover as administrator for the death of their minor child.[95]

The mere fact that an insane person is at large is not necessarily evidence of negligence of the custodian.[96]

§ 5. *Actions.*[97] *Pleading and issues.*[98]—The complaint or petition must allege facts disclosing a duty owed by defendant to the person injured.[99] But where the law imposes and defines a duty, there is no necessity to plead it specially.[1] Where a petition sets out certain acts of negligence to show a violation of a particular right, it may be amended by setting out additional acts to show substantially the same violation of the same right.[2]

tributory negligence of the parent can be shown in evidence in bar of the action.

In Iowa, Virginia, and Louisiana, negligence of the parent is no defense where the action is brought by the administrator. But in these states the damages arising from the wrongful death survive and become a part of the estate of the deceased. Wymore v. Mahaska, 78 Iowa, 396, 16 Am. St. Rep. 449; N. & W. R. R. v. Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718; Westerfield v. Levi Bros., 43 La. Ann. 66.

That the negligence of one member of a family will not be imputed to another is applied in actions under statutes giving a right of action for death by wrongful act for the benefit of parents or next of kin, it being held in such cases that the negligence of one of the beneficiaries cannot be imputed to the others to bar a recovery. Cleveland, etc., R. Co. v. Crawford, 24 Ohio St. 631, 15 Am. Rep. 633; Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548; Wolf, Adm'r v. Lake Erie & W. R. Co., 55 Ohio St. 517, 45 N. E. 708, 36 L. R. A. 812; R. R. v. Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145, 26 L. R. A. 553. See, also, Macdonald v. O'Reilly [Or.] 78 P. 753; Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

The doctrine that contributory negligence of beneficiaries defeats the action for wrongful death is abundantly supported by the authorities. Strutzel v. St. Paul, 47 Minn. 543; McMahon v. Mayor, 33 N. Y. 642; Schierhold v. North Beach, 40 Cal. 447; Chicago City R. Co. v. Robinson, 127 Ill. 9, 11 Am. St. Rep. 87; Dahl v. Milwaukee City R. Co., 62 Wis. 652; Birkett v. Knickerbocker Ice Co., 101 N. Y. 504; Baltimore, etc., R. Co. v. State, 24 Md. 84, 87 Am. Dec. 600; A. & C. A. L. Co. v. Gravitt, 93 Ga. 369; Chicago City R. Co. v. Wilcox, 138 Ill. 370; City of Pekin v. McMahon, 154 Ill. 153; Bellefontaine R. Co. v. Snyder, 24 Ohio St. 670; Smith v. Railroad Co., 92 Pa. 450, 37 Am. Rep. 705; Pratt Coal Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751; Bamberger v. Citizens' Street R. Co., 95 Tenn. 18, 49 Am. St. Rep. 909; Ploof v. Burlington Traction Co. [Vt.] 41 A. 1017. Tiffany on Death by Wrongful Act, § 69.—The cases last cited are taken from Richmond, F. & P. R. Co. v. Martin's Adm'r, 102 Va. 201, 45 S. E. 894. On general subject, see Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591, and Macdonald v. O'Reilly [Or.] 78 P. 753, from which most of the above matter is taken.

94. Where yard was fenced, children not allowed on streets, father, a rag gatherer, was gone all day, and mother had care of three children, held, no contributory negligence to preclude recovery for death of child of four, killed by wagon in street. Del Rossi v. Cooney, 208 Pa. 233, 57 A. 514. Parents held not negligent in intrusting children to older sister 11 years old; and child, struck by car held not negligent. Cameron v. Duluth-Superior Traction Co. [Minn.] 102 N. W. 208. Where mother of child less than 4 years old allowed it to go across a street crowded with people and vehicles, and the child stopped in the street and stooped down, there was such imputed and actual negligence as to defeat a recovery. Finkelstein v. American Ice Co., 88 N. Y. S. 942.

95. Macdonald v. O'Reilly [Or.] 78 P. 753.

96. Simpson v. Rhode Island Co. [R. I.] 58 A. 658.

97, 98. See 2 Curr. L. 1006.

99. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 660. A general allegation is insufficient; facts showing duty must be alleged. Whitten v. Nevada Power, Light & Water Co., 132 F. 782. Characterization of an act or omission as negligent will not supply averments of facts showing the existence of a duty to exercise care. Muncie Pulp Co. v. Davis, 162 Ind. 558, 70 N. E. 875. Where facts alleged show danger was obvious, an allegation that plaintiff was ignorant of it was unavailing, and did not show a duty to warn. Durell v. Hartwell [R. I.] 58 A. 448. An allegation of custom for the purpose of showing a duty must be sufficiently definite to show the extent and nature of the custom relied on to show negligence. Id. A declaration by a trespasser against a railway company must allege that the company could have avoided injury by the use of ordinary care, after discovering plaintiff's peril. Hortenstein v. Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996. A mere allegation that plaintiff is the owner and in lawful occupation of a boathouse on land does not show a duty of the owner of the land to maintain structure near it in a safe condition; there is nothing to show that the owner of the boathouse was more than a mere trespasser or licensee. St. Joseph Ice Co. v. Bertch, 33 Ind. App. 491, 71 N. E. 56.

1. Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6.

2. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318.

General allegations of negligence[3] are sufficient as against a general demurrer,[4] but insufficient as against a special demurrer for want of facts[5] or other proper exception.[6] A petition containing both general and special averments presents only such issues as are raised by the special allegations.[7] The allegation of negligence in the doing of an act is the statement of an ultimate and issuable fact, and when the act is sufficiently described, the general characterization of it as negligent is enough.[8] The negligence charged must be alleged to have been that of defendant.[9] There is a conflict as to whether allegations of ordinary negligence[10] and of gross or wanton and willful negligence are so inconsistent as to require an election,[11] and as to whether proof of the former will support allegations of the latter.[12]

Contributory negligence being matter of defense, it need not be negatived in the complaint[13] unless the facts pleaded tend to show it.[14] An allegation of due

3. See 2 Curr. L. 1006, 1007, n. 4, 5, 6.

4. If a legal duty and a violation thereof are disclosed, a general averment of negligence will be sufficient on demurrer. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91.

5. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329; Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818.

6. A general allegation of negligence is sufficient if no proper exception is taken to it; but on the proper motion, plaintiff should be required to allege specific acts of negligence. Sommers v. St. Louis Transit Co. [Mo. App.] 83 S. W. 268. A general allegation of negligence is sufficient to withstand a demurrer for want of facts. Remedy is motion to make more specific, not a demurrer. Nickey v. Steuder [Ind.] 73 N. E. 117. A mere allegation that the injury complained of was received through and by negligence of defendant is without effect unless applied to some act or omission stated in the same or preceding allegations. Pennsylvania Co. v. Fertig [Ind. App.] 70 N. E. 834.

7. Chicago, etc., R. Co. v. Wheeler [Kan.] 79 P. 673.

8. Where plaintiff was thrown from bicycle by collision with wagon, an allegation that defendant's servant "so carelessly and negligently managed the horse and wagon, that," etc., was sufficient as against a motion to require specific facts to be alleged. Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6. It is not necessary to aver the minor circumstances which go to establish the negligence; it is sufficient to allege that the defendant negligently committed the act which led to the injury. Wehrenberg v. Cincinnati Traction Co., 2 Ohio N. P. (N. S.) 271. Amendment setting up that death was caused by failing to repair fastenings of swinging sign does not state a new cause of action where it was originally alleged that he was negligent in maintaining the sign. Haines v. Pearson [Mo. App.] 81 S. W. 645.

9. A petition fails to state a cause of action if it does not allege negligence nor facts showing it as a matter of law, nor that the injury complained of was caused by any act of defendant. Chicago, B. & Q. R. Co. v. Clinebell [Neb.] 99 N. W. 839.

10. A complaint alleging that plaintiff was shot and wounded through the negligence and improper and unlawful conduct of defendants is for negligence only. Magar v. Hammond, 95 App. Div. 249, 88 N. Y. S. 796.

11. "Negligence" and "intentional" are contradictory terms. Gibeline v. Smith, 106 Mo. App. 545, 80 S. W. 961. A complaint using language appropriate to the description of both ordinary and gross negligence as if both occurred at the same time, and as if the latter included the former, is indefinite and uncertain, and confuses the element of advertence and inadvertence. Rideout v. Winnebago Traction Co. [Wis.] 101 N. W. 672. Such a complaint should be construed and plaintiff's claim confined on the trial to one species of wrongdoing. Id. Where the clauses of the complaint containing the gist of the cause of action charged simple negligence, it was proper to strike out the words "willful, wanton and reckless" in subsequent clauses, because they tended to confuse and to state an inconsistent cause of action. Williams v. North Wis. Lumber Co. [Wis.] 102 N. W. 589.

Contra: Under the South Carolina statute, regulating practice in actions ex delicto, an act may be alleged as negligent and also as willful, and plaintiff will not be required to elect or make more definite and certain, but under such allegations may prove all the facts of his alleged wrong. Du Pre v. Southern R. Co., 66 S. C. 124, 44 S. E. 580. And see 2 Curr. L. 1007, n. 14, citing Schumpert v. So. R. Co., 65 S. C. 332.

12. Allegations of gross negligence or willful or wanton injury are not supported by proof of ordinary or mere actionable negligence. Turtenwald v. Wisconsin Lakes Ice & Cartage Co. [Wis.] 98 N. W. 948. But where both parties treated a case on trial as one for ordinary negligence, it was so treated on appeal, though the complaint alleged reckless and willful conduct. Id. Proof of negligence will not support an allegation of intentional battery, but it would support an allegation of an "unlawful and wrongful" battery. Gibeline v. Smith, 106 Mo. App. 545, 80 S. W. 961. Where gross and wanton negligence was alleged, proof of ordinary negligence held not a fatal variance. Atchison v. Wills, 21 App. D. C. 548.

13. Birmingham R. Light & Power Co. v. Hinton [Ala.] 37 So. 635; Pittsburgh, etc., R. Co. v. Browning [Ind. App.] 71 N. E. 227; City of Lancaster v. Walter, 25 Ky. L. R. 2189, 80 S. W. 189; Pryor v. Walkerville [Mont.] 79 P. 240; Elliott v. Canadian Pac.

care, being unnecessary, adds no force to the complaint,[15] and need not be supported by affirmative proof, unless the issue is raised by defendant.[16] An amendment adding such an allegation is merely formal.[17] Where the petition unnecessarily alleges exercise of ordinary care, an allegation of want of care in the answer is new matter, admitted by plaintiff by failure to traverse by reply.[18] In some jurisdictions plaintiff must allege due care,[19] unless the wrong charged is a willful one.[20]

In a common law action for negligence, an averment that the negligence relied on was that of defendant is good, at least as against a demurrer, although in fact the negligence was that of a servant for whom defendant as master was responsible.[21] A count upon willful and wanton acts of a corporation is in trespass and is not supported by evidence of wanton and willful acts of servants.[22] A count upon wanton and willful acts of servants, as distinguished from acts of the corporation, is in case.[23] A count at common law for injuries to one on the defendant's premises by invitation may be joined with counts under the employers' liability act.[24]

The defense of contributory negligence is not available if not specially pleaded,[25] unless plaintiff's evidence discloses such negligence.[26] The facts claimed to constitute negligence on the part of plaintiff should be set out.[27] The law presuming a child of tender years incapable of contributory negligence, defendant must allege and prove exceptional capacity and maturity.[28] The plea of contributory negligence is a defense that confesses and avoids;[29] hence an allegation that

R. Co., 129 F. 163. The Indiana statute (Burns' Ann. St. § 539a) provides that a plaintiff in an action for damages for negligence need not allege or prove want of contributory negligence. Cleveland, etc., R. Co. v. Goddard, 33 Ind. App. 321, 71 N. E. 514. Under this statute a complaint which alleges that negligence of defendant proximately caused the injuries complained of is sufficient if it does not disclose contributory negligence as a matter of law. Id.

14. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036. Petition for wrongful death demurrable because disclosing contributory negligence of decedent. Dorsey v. Columbus R. Co. [Ga.] 49 S. E. 698. In Indiana, in actions for negligence not brought for personal injuries or death, the statute of 1899 does not apply, and the complaint must show freedom from contributory negligence. There need be no direct averment; it is sufficient if such freedom from negligence appears from the facts alleged. Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. [Ind. App.] 72 N. E. 183.

15. Southern R. Co. v. Davis [Ind. App.] 72 N. E. 1053.

16. Atchison v. Wills, 21 App. D. C. 548.

17. Milliken v. St. Clair [Mich.] 99 N. W. 7.

18. Louisville & N. R. Co. v. Paynter's Adm'x [Ky.] 82 S. W. 412.

19. Defective allegations of want of contributory negligence cured where trial proceeded upon theory that plaintiff must show herself free from contributory negligence. Hobbs v. Marion, 123 Iowa, 726, 99 N. W. 577.

20. Continental Ins. Co. v. Clark [Iowa] 100 N. W. 524.

21. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 660.

22. Southern R. Co. v. Yancy [Ala.] 37 So. 341. A complaint alleging that defendant, a corporation, "wantonly or intentionally caused the death of plaintiff's intestate by wantonly or intentionally causing one or more of said cars to run upon or against," etc., charges a wrong against the corporation itself and not a wrong of its servant for which it would be responsible. It is supported only by proof that the corporation committed or actually participated in the commission of the wrong. Birmingham So. R. Co. v. Gunn [Ala.] 37 So. 329.

23. Southern R. Co. v. Yancy [Ala.] 37 So. 341.

24. Code 1896, § 1740. Sloss Iron & Steel Co. v. Tilson [Ala.] 37 So. 427.

25. Atchison v. Wills, 21 App. D. C. 548. Doctrine that plaintiff must allege and prove freedom from fault in personal injury actions overruled so far as it has been recognized in Louisiana. Buechner v. New Orleans, 112 La. 599, 36 So. 603. Defendant is not entitled to the verdict, though evidence shows contributory negligence when that defense has not been pleaded. Strickland v. Capital City Mills [S. C.] 49 S. E. 478. Under Code, § 260, as to construction of pleadings, an allegation of contributory negligence of "plaintiff" in an action by a father as administrator for wrongful death of a child will be construed as alleging contributory negligence by the father. Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

26. Pim v. St. Louis Transit Co. [Mo. App.] 84 S. W. 155.

27. Gadonnex v. New Orleans R. Co., 128 F. 805.

28. Buechner v. New Orleans, 112 La. 599, 36 So. 603.

29. Under it the issue is whether the

the injury occurred from plaintiff's "own carelessness and negligence" does not raise the issue of contributory negligence.[30]

The defense that an injury was caused by the act of God must be pleaded.[31] In Alabama the plea of "not guilty" is the only proper general traverse of the complaint in actions for personal injuries based on negligence.[32]

Plaintiff must prove his case as pleaded,[33] but if several acts of negligence are relied on, proof of one or more of those well pleaded, as the cause of injury, is sufficient.[34]

Evidence.[35]—Negligence, like any other fact, may be proven by direct or circumstantial evidence.[36] Proof of previous similar accidents may be admissible on the question of notice,[37] as is evidence of previous warnings by defendant.[38] Evidence that the condition resulting in injury had existed previously without causing accidents is inadmissible.[39] Evidence as to the condition of machinery must refer to a time approximately near the time of the accident.[40] Proof of

damages were caused solely by defendant's negligence or whether the person injured contributed to his injury. Newport, L. & A. Turnpike Co. v. Pirmann [Ky.] 82 S. W. 976.

30. Newport, L. & A. Turnpike Co. v. Pirmann [Ky.] 82 S. W. 976.

Note: Whether an allegation that an injury was "caused" by plaintiff's negligence is equivalent to pleading that his negligence "contributed" to it is discussed in a note in 3 Mich. Law Rev. 223, citing to the negative Newport, L. & A. Turnpike Co. v. Pirmann [Ky.] 82 S. W. 976; Cogdell v. Railroad, 132 N. C. 852, 44 S. E. 618 [on rehearing of same case, 130 N. C. 319, 41 S. E. 541, wherein affirmative was held]; Kennedy v. Railway Co., 59 S. C. 535, 38 S. E. 169. To the affirmative is cited Western Union Tel. Co. v. Jeanes, 88 Tex. 230, 31 S. W. 186. On the proposition that a general averment of contributory negligence is sufficient, the annotator cites Chesapeake & O. R. Co. v. Smith, 101 Ky. 104, 42 S. W. 538; but to the contrary are Price v. Water Co., 58 Kan. 551, 50 P. 450, and McInerney v. Virginia-Carolina Chem. Co., 118 F. 653 [which repudiates the state (South Carolina) rule upholding general averments]. [It is submitted that the reason for regarding as bad a general averment that plaintiff's own negligence caused the injury is because it pleads no issuable facts but only a conclusion. See 5 Enc. Pl. & Pr. 12.—Editor C. L.]

31. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036.

32. Under Code 1896, § 3295. Sloss-Sheffield Steel & Iron Co. v. Mobley, 139 Ala. 425, 36 So. 181.

33. Plaintiff must recover if at all upon the theory pleaded and adhered to on the trial. Coleman v. Robert Graves Co., 97 App. Div. 411, 89 N. Y. S. 1040. Where complaint alleged that plaintiff when struck by a brick was in front of the premises in question and the proof showed he was in the cellar of the building at work, the variance was fatal. Reilly v. Vought, 87 N. Y. S. 492. Where negligence charged was use of defective shifting rod in elevator, ordinances requiring inspection and repair of elevators were inadmissible, no violation of the duty owed under them being shown. Ubelmann v. American Ice Co., 209 Pa. 398, 58 A. 849. If the causal connection is established between the general negligence alleged and the injury, it is also established between the special acts of negligence alleged, limiting the general allegation. Cleveland, etc., R. Co. v. Tehan, 4 Ohio C. C. (N. S.) 145.

34. Chicago I. & L. R. Co. v. Barnes [Ind.] 73 N. E. 91; Savannah, F. & W. R. Co. v. Evans [Ga.] 49 S. E. 308. See 2 Curr. L. 1008, n. 25.

35. See 2 Curr. L. 1009.

36. Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995; United States Brew. Co. v. Stoltenberg, 211 Ill. 531, 71 N. E. 1081.

37. Where plaintiff was struck by piece of electric lamp broken by trolley of car, which slipped from wire, evidence that other lamps had before been broken in the same way was relevant and material. Nelson v. Union R. Co. [R. I.] 58 A. 780. Evidence that an elevator had fallen twice before admissible to prove notice of defect, even though there was no evidence of want of repairs after such prior accidents. Crigler v. Ford [Ky.] 82 S. W. 599. Evidence that a steam whistle at a certain place had frightened a team on a former occasion admissible to show dangerous character of the whistle. Powell v. Nevada, C. & O. R. Co. [Nev.] 78 P. 978.

38. Evidence that a trap door through which plaintiff fell had been open many times before and that defendants had given warnings was admissible on issue of notice to defendant. Franklin v. Engel, 34 Wash. 480, 76 P. 84.

39. Evidence that a coal chute close to a side track had existed in same condition 5 or 6 years properly excluded. Mobile & O. R. Co. v. Vallowe [Ill.] 73 N. E. 416. Where contractor was sued for injuries to a child from playing on a wheel scraper negligently left unguarded in the street, evidence that such scrapers had always been so used and left and no injury to children had resulted was inadmissible. Kelley v. Parker-Washington Co. [Mo. App.] 81 S. W. 631.

40. Fire from locomotive sparks. Evidence that during the preceding winter the spark arresters were defective is entirely too remote. Toledo, etc., R. Co. v. Needham, 105 Ill. App. 25.

repairs or other precautions subsequent to the accident is incompetent.[41] Diagrams[42] or photographs[43] are admissible. Where there is a dispute as to which of two accidents produced plaintiff's injuries, the opinion of a physician is relevant.[44]

Presumptions and burden of proof.[45]—The general rule is that negligence is never presumed[46] from the mere fact of injury,[47] except in the case of one injured while a passenger.[48] But the manner of the occurrence of the injury or the attendant circumstances may well warrant an inference of negligence,[49] as where the instrumentality causing the injury is under sole control of the defendant,[50] and the accident is one which does not ordinarily happen if due care is used.[51] The plaintiff cannot avail himself of the doctrine *res ipsa loquitur* where it appears

41. Repairs. Going v. Alabama Steel & Wire Co. [Ala.] 37 So. 784; Davis v. Kornman [Ala.] 37 So. 789. Repairs to a machine after accident. Helling v. Schindler [Cal.] 78 P. 710. Subsequent repair of railroad crossing. See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106. Evidence that toolhouse was moved farther from track after an accident. Russell v. New York, etc., R. Co., 96 App. Div. 151, 89 N. Y. S. 429. Precautions adopted after an accident to prevent its recurrence are not to be interpreted as admissions of prior neglect, and hence are inadmissible. Schermer v. McMahon [Mo. App.] 82 S. W. 535.

42. Diagram showing location in store of a trapdoor. Franklin v. Engel, 34 Wash. 480, 76 P. 84.

43. See 2 Curr. L. 1010, n. 60.

44. Jones v. American Warehouse Co. [N. C.] 49 S. E. 355.

45. See 2 Curr. L. 1008, 1009.

46. Negligence of the adverse party is not presumed in favor of one on whom the burden of establishing it rests. Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995. Contributory negligence not presumed. Texas & P. R. Co. v. Shoemaker [Tex.] 84 S. W. 1049. The rule that the instinct of self-preservation forbids the imputation of recklessness to anyone applies only where there is no evidence tending to show negligence. Newport News Pub. Co. v. Beaumeister, 102 Va. 677, 47 S. E. 821. The presumption that one killed at a railway crossing was in the exercise of due care is not to be invoked where there is competent, material evidence on the question. Woolf v. Washington R. & Nav. Co. [Wash.] 79 P. 997.

47. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329. The mere happening of an accident raises no presumption of negligence; if the weight of the evidence is for defendant, or if the evidence is evenly balanced, plaintiff cannot recover, since the burden is on him to prove negligence. Wells v. Utah Const. Co., 27 Utah, 524, 76 P. 560. Doctrine of res ipsa loquitur not applicable where pedestrian collided with railway truck on walk in front of depot in the nighttime. Tiborsky v. Chicago, etc., R. Co. [Wis.] 102 N. W. 549. Where only testimony as to manner of accident was that of plaintiff who testified that she fell, as she supposed, into an elevator shaft, just after entering a doorway, the doctrine of res ipsa loquitur was not applicable. Boyd v. United States Mortg. & Trust Co., 94 App. Div. 413, 88 N. Y. S. 289. Where plaintiff, watching a fireworks display, was struck by the stick of a rocket, and it appeared that other sticks fell where they did no harm, the mere happening of such accident did not warrant an inference of negligence in the manner of firing off the rockets. Crowley v. Rochester Fireworks Co., 95 App. Div. 13, 88 N. Y. S. 483. Mere fact that machinist's heavy battering ram fell injuring plaintiff held not to raise presumption of negligence by owner of premises. McDonough v. James Reilly Repair & Supply Co., 90 N. Y. S. 358. Mere fact that a collision between a bicyclist and plaintiff occurred, resulting in plaintiff's injury, did not warrant inference of negligence in bicyclist. Lee v. Jones, 181 Mo. 291, 79 S. W. 927. Mere proof of an unexplained killing of persons on the track and of the fact that the engineer's sight was defective did not give rise to presumption of negligence. Texas & P. R. Co. v. Shoemaker [Tex.] 84 S. W. 1049. The doctrine res ipsa loquitur held inapplicable where plaintiff's intestate was struck by lumber which fell from a pile on a car which defendant was unloading. Laforrest v. O'Driscoll [R. I.] 59 A. 923. Mere proof that a railroad torpedo was found by a boy on the planking of a crossing does not raise the presumption that it came there through negligence of the railway company's servants while acting in the scope of their employment. Obertonl v. Boston & M. R. Co. [Mass.] 71 N. E. 980.

The doctrine res ipsa loquitur is rarely applicable in master and servant cases. See topic Master and Servant, 2 Curr. L. 801.

48. See Carriers, 3 Curr. L. 650, n. 66, 67. There is no presumption of a carriage for hire in the case of one who rides in a private conveyance. Proof therefore is necessary beyond mere presence in the vehicle to establish defendant's duty. Lydon v. Robert Smith Ale Brew. Co., 133 F. 830.

49. This is all that is meant by the maxim res ipsa loquitur, which is simply a rule of evidence. Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S. E. 329.

50. Maxim res ipsa loquitur held applicable where steam roller used by defendant in street work was run over plaintiff's fence and lawn and against his house. Harlow v. Standard Imp. Co. [Cal.] 78 P. 1045.

51. Where street car with no one in control ran into plaintiff's wagon from the rear and plaintiff was injured, proof of the accident gave rise to presumption of negligence of company. Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624. See 2 Curr. L. 1008, n. 32.

that negligence of a third person intervened,[52] or that negligence of plaintiff himself was a proximate cause of his injury,[53] or where the defendant explains the cause of the accident.[54]

The burden of proving negligence of the defendant,[55] and that such negligence caused the injury[56] is on plaintiff, but a preponderance of the evidence is all that is required.[57] The fact that the person injured is a child and defendant an adult does not shift burden of proof as to negligence.[58] A plaintiff who claims he was on premises by invitation of the owner has the burden of proof thereon.[59] If the injury may have resulted from either of two causes, for only one of which defendant is responsible, plaintiff must show by a preponderance of evidence that the injury resulted from that for which defendant is responsible.[60]

The burden of proof on the issue of contributory negligence is on defendant in most jurisdictions,[61] but the rule that plaintiff must show due care, as an element of his case, prevails in some states.[62] Though defendant is entitled to the benefit of all the evidence in the case on the issue, including plaintiff's,[63] the fact that plaintiff's own evidence tends to show contributory negligence does not place upon him the burden of proving due care,[64] nor does an unnecessary allegation of want of negligence by plaintiff have that effect.[65]

52. Where guest in hotel was injured by contact with an electric wire, but the evidence did not show a dangerous current knowingly or negligently sent through the wire by defendant, but did show that the wiring was done by a third person, the maxim was held not applicable. Harter v. Colfax Elec. Light & Power Co. [Iowa] 100 N. W. 508.

53. Brakeman was killed in collision caused by his failure to guard a switch. Res ipsa loquitur not applicable. Holland v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 359.

54. Cause of fall of staging was shown and was not in dispute. Parsons v. Hecla Ironworks [Mass.] 71 N. E. 572. Where the presumption of negligence raised by the fact of accident is completely rebutted by evidence for defendant, a verdict for plaintiff should be set aside. Southern R. Co. v. Cook [Ga.] 49 S. E. 287.

55. Chesapeake & O. R. Co. v. Heath [Va.] 48 S. E. 508. Where joint tort feasors are charged with negligence causing injuries, the burden is on plaintiff to show by a preponderance of evidence that the injury was caused by negligence of defendant, or by his negligence concurring with that of the joint tort feasor. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258. Verdict for plaintiff held not supported by evidence in action for injuries from falling into excavation. Copeland v. Degnon-McLean Contracting Co., 88 N. Y. S. 827. Evidence insufficient to support verdict where plaintiff was struck by automobile. Polsky v. New York Transp. Co., 96 App. Div. 613, 88 N. Y. S. 1024. Evidence sufficient to show negligence where child was injured by fall of door while playing on walk. Drinkwater v. Quaker City Cooperage Co., 208 Pa. 649, 57 A. 1107.

56. Coolbroth v. Pennsylvania R. Co., 209 Pa. 433, 58 A. 808. Causal connection between negligence and injury charged cannot be presumed. Texas & P. R. Co. v. Shoemaker [Tex.] 84 S. W. 1049.

57. Serra v. Brooklyn Heights R. Co., 95 App. Div. 159, 88 N. Y. S. 500. Error to charge that plaintiff must make out his case to a moral and reasonable certainty. Brown Store Co. v. Chattahoochee Lumber Co. [Ga.] 49 S. E. 839.

58. Child running in street collided with man on bicycle. Burden on plaintiff to prove bicyclist's negligence as cause of injury. Lee v. Jones, 181 Mo. 291, 79 S. W. 927.

59. Sloss Iron & Steel Co. v. Tilson [Ala.] 37 So. 427.

60. Chesapeake & O. R. Co. v. Heath [Va.] 48 S. E. 508.

61. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395; Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245; Jefferson Hotel Co. v. Warren [C. C. A.] 128 F. 565; Clark v. Kansas City, etc., R. Co. [C. C. A.] 129 F. 341; See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106; Houston & T. C. R. Co. v. Bulger [Tex. Civ. App.] 80 S. W. 557; Currans v. Seattle & S. F. R. & Nav. Co., 34 Wash. 512, 76 P. 87. Doctrine that burden is on plaintiff to allege and prove want of contributory negligence is overruled so far as it has been recognized in Louisiana. Buechner v. New Orleans, 112 La. 599, 36 So. 603.

62. New York. Lowry v. Anderson Co., 96 App. Div. 465, 89 N. Y. S. 107. Where circumstances were not such as to require a high degree of care in alighting from a train, freedom from contributory negligence need not be shown by direct evidence, but the inference may be drawn from the general tendency of all the evidence in favor of the plaintiff. Hancock v. New York, etc., R. Co., 91 N. Y. S. 601. Though a train was running at an unusually high rate of speed in violation of an ordinance, the burden is still on plaintiff to show ordinary care on his part. Imes v. Chicago, B. & Q. R. Co., 105 Ill. App. 37.

63. Rupp v. Sarpy County [Neb.] 98 N. W. 1042; Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985.

64. Rupp v. Sarpy County [Neb.] 98 N. W. 1042.

Contra: Burden of proving contributory negligence is on defendant, unless plaintiff's

Questions of law and fact.[66]—Unless the facts are undisputed, and are such that only one reasonable conclusion can be drawn therefrom,[67] the questions of negligence,[68] contributory negligence,[69] and proximate cause,[70] are for the jury.

evidence discloses it. Coolbroth v. Pennsylvania R. Co., 209 Pa. 433, 58 A. 808. Burden of proof is upon the plaintiff in an action for damages on account of an injury, where testimony has been introduced tending to show contributory negligence. Peat v. Norwalk, 5 Ohio C. C. (N. S.) 614.

65. Pennsylvania Co. v. Fertig [Ind. App.] 70 N. E. 834.

66. See 2 Curr. L. 1011.

67. As to when **negligence** is for the court, see City of Lancaster v. Walter, 25 Ky. L. R. 2189, 80 S. W. 189; Foy v. Winston, 135 N. C. 439, 47 S. E. 466; Bostock-Ferari Amusement Co. v. Bracksmith [Ind. App.] 73 N. E. 281; Kelley v. Parker-Washington Co. [Mo. App.] 81 S. W. 631. A trial judge should not instruct the jury what facts do or do not constitute negligence except where declared by statute. City of Rome v. Sudduth [Ga.] 49 S. E. 300; Augusta R. & Elec. Co. v. Smith [Ga.] 48 S. E. 681. To justify taking the question of negligence from the jury, the facts and circumstances must be not only undisputed, but also unambiguous, so that only one reasonable conclusion may be drawn therefrom. Tibarsky v. Chicago, etc., R. Co. [Wis.] 102 N. W. 549. It is proper for the court to declare that if certain facts are established, culpable or actionable negligence follows as a matter of law, leaving such facts to be found by the jury. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245. There is no question for the jury when facts are not controverted, or it clearly appears what course a person of ordinary prudence would pursue, or where the standard of duty is fixed, or the negligence is clearly defined or palpable. Gallowshaw v. Lonsdale Co. [R. I.] 55 A. 932. Question of negligence is one of law for the court, first, where the circumstances are such that the standard of duty is fixed and the measure of duty is defined by law, and is the same under all circumstances; second, where the facts are undisputed and only one reasonable conclusion can be drawn therefrom. Woolf v. Washington R. & Nav. Co. [Wash.] 79 P. 997.

Contributory negligence need not go to jury if the evidence so conclusively discloses it that all reasonable men in the exercise of impartial judgment must draw that conclusion. Gilbert v. Burlington, etc., R. Co. [C. C. A.] 128 F. 529; Riggs v. Standard Oil Co., 130 F. 199; Gress v. Missouri Pac. R. Co. [Mo. App.] 84 S. W. 122; Hecker v. Chicago & A. R. Co. [Mo. App.] 84 S. W. 126.

Proximate cause.—Same rule applies. Douglass v. New York, etc., R. Co., 209 Pa. 128, 58 A. 160; Glassey v. Worcester Consol. St. R. Co., 185 Mass. 315, 70 N. E. 199. Proximate cause is for the jury if there is an issue thereon in a trial of the facts; but is a question of law when presented on a demurrer to the declaration. Schulte v. Schleeper, 210 Ill. 357, 71 N. E. 325.

68. Holmes v. Birmingham So. R. Co., 140 Ala. 208, 37 So. 338; McClammy v. Spokane [Wash.] 78 P. 912; Economy Light & Power Co. v. Hiller, 211 Ill. 568, 71 N. E. 1096; Collingwood v. Illinois & I. Fuel Co. [Iowa] 101 N. W. 283; Jones v. United Railways & Elec. Co. [Md.] 57 A. 620; Foster v. New York, etc., R. Co. [Mass.] 72 N. E. 331; Steindorff v. St. Paul Gaslight Co., 92 Minn. 496, 100 N. W. 221; Reed v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 919; Meng v. St. Louis & Suburban R. Co. [Mo. App.] 84 S. W. 213; Holden v. Missouri R. Co. [Mo. App.] 84 S. W. 133; City of Omaha v. Houlihan [Neb.] 100 N. W. 415; Ward v. Metropolitan St. R. Co., 90 N. Y. S. 897; Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429; Pence v. California Min. Co., 27 Utah, 378, 75 P. 934. Failure to give notice of blasting operations. Smith v. Day [C. C. A.] 128 F. 561. Maintaining an exposed vat of hot grease 11 feet from street line. Duffy v. Sable Ironworks [Pa.] 59 A. 1100. Plaintiff injured in collision between two trucks. Powles v. Halstead, 93 App. Div. 549, 87 N. Y. S. 928. Whether injury to adjoining walls caused by excavation ought to have been foreseen. Samuel v. Novak [Md.] 58 A. 19. Plaintiff, struck by a falling brick showed that defendants were throwing bricks on a platform on an upper floor and that there were no other persons in that part of building. Held, prima facie case of negligence sufficient to go to jury. Booth v. Dorsey, 208 Pa. 276, 57 A. 562. Whether the situation was such that the peril of one who has placed himself in danger should have been discovered, and the injury avoided by the use of ordinary care, held for jury. Rawitzer v. St. Paul City R. Co. [Minn.] 100 N. W. 664. There being evidence, which if believed, would warrant a verdict for plaintiff, it was error to take case from jury. Farrell v. Interurban St. R. Co., 90 N. Y. S. 345. Whether a prima facie case of negligence, made by plaintiff, is successfully rebutted by defendant, is for jury. Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624. An inference of negligence having arisen from a prima facie case made by plaintiff, the question is for the jury, notwithstanding a preponderance of evidence for the defendant. Rauch v. Smedley, 208 Pa. 175, 57 A. 359.

69. Town of Florence v. Snook [Colo. App.] 78 P. 994; Cary Bros. v. Morrison [C. C. A.] 129 F. 177; Earl v. Cedar Rapids [Iowa] 102 N. W. 140; Wacker v. St. Louis Transit Co. [Mo. App.] 84 S. W. 138. Whether under all circumstances passenger was negligent in jumping from moving street car. Mannon v. Camden Interstate R. Co. [W. Va.] 49 S. E. 450. Negligence of railway employe struck and killed by oil pipe maintained by defendant near track. Young v. Waters-Pierce Oil Co. [Mo.] 84 S. W. 929. Whether plaintiff by the exercise of ordinary care could have avoided the consequences of defendant's negligence. Christian v. Macon R. & Light Co., 120 Ga. 314, 47 S. E. 923. Station agent fell into trench constructed on his own premises by a railroad. Wood v. New York, etc., R. Co., 93 App. Div. 53, 86 N. Y. S. 817. Negligence of a trespasser shot by a watchman in a private park, when he knew it was a private park and that the watchman carried a gun, but did not know what precautions were

Instructions.[71]—They should cover all issues raised by the pleadings and evidence,[72] including all the acts of negligence relied on by plaintiff,[73] but should not submit issues not so raised.[74] Instructions should be given defining "ordinary care,"[75] "contributory negligence,"[76] "negligence,"[77] and the various terms used to modify these expressions,[78] when used in the charge. A definition of "proximate cause" may not be necessary.[79] Decisions construing particular instructions on

taken to protect the property. Magar v. Hammond, 95 App. Div. 249, 88 N. Y. S. 796. Person fell into cellarway in pavement, having driven out of it before, but never walked in or out. McHugh v. Kerr, 208 Pa. 225, 57 A. 520. Negligence of boy between 8 and 9, who fell through bridge, for jury, considering his maturity and capacity and the circumstances of the case. Buechner v. New Orleans, 112 La. 599, 36 So. 603. Negligence of mother who allowed child 2 years and 9 months old to play in street unattended. Burke v. Borden's Condensed Milk Co., 90 N. Y. S. 527. Negligence of mother, who went to a park with her children and permitted two of them to go and play with others, warning them not to go near a river, where they went and one was killed by a street car. Kaplan v. Metropolitan St. R. Co., 90 N. Y. S. 585. Where it appeared that mother did not allow children to go into street, and cautioned them to stay in yard and not go through gate, but a boy of 5 went through and fell into vat of hot grease on defendant's premises, negligence of parents was for jury. Duffy v. Sable Ironworks [Pa.] 59 A. 1100.

70. Bowden v. Derby [Me.] 58 A. 993; Rock Island Sash & Door Works v. Pohlman, 210 Ill. 133, 71 N. E. 428; Watters v. Waterloo [Iowa] 101 N. W. 871; Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197; Whisenhant v. Southern R. Co. [N. C.] 49 S. E. 559; Brewster v. Elizabeth City [N. C.] 49 S. E. 885. Question of proximate cause is the same whether it relates to negligence of the defendant or plaintiff, and in either case it is primarily a question for the jury. Indianapolis St. R. Co. v. Schmidt [Ind. App.] 71 N. E. 663.

71. See 2 Curr. L. 1012.

72. Where pleadings and evidence raise the issue of contributory negligence, there should be a charge under the general principle as covered in Code, § 3830, though such charge is not requested. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818. A charge under Code, § 2322, as to contributory negligence in actions against railroads, does not render unnecessary a charge under § 3830. Id. When contributory negligence is pleaded, plaintiff is entitled to have any matter affecting such question submitted. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099. Where an answer included a plea of contributory negligence and the reply alleged that decedent was 10 years of age and incapable of appreciating danger, the issue of his contributory negligence was raised and an instruction should have been given. Freeman v. Carter [Tex. Civ. App.] 81 S. W. 81. An instruction on plaintiff's right of recovery which ignored the issue of contributory negligence, which was raised by the evidence, prejudicially erroneous. Chicago, etc., R. Co. v. Wicker [Ind. App.] 72 N. E. 614.

73. Thuis v. Vincennes [Ind. App.] 73 N. E. 141; Freeman v. Nashville, etc., R. Co., 120 Ga. 469, 47 S. E. 931; Rylander v. Laursen [Wis.] 102 N. W. 341.

74. Instructions should confine jury to acts of negligence shown by proof. Sommers v. St. Louis Transit Co. [Mo. App.] 83 S. W. 268. Question of capacity of boy of 12 erroneously submitted to jury where there was no evidence thereon. St. Louis S. W. R. Co. v. Shiflet [Tex. Civ. App.] 84 S. W. 247. Evidence held not to justify instruction on theory that plaintiff should have used ordinary care to avoid injury after discovery of danger. Richmond Locomotive Works v. Ramsey [C. C. A.] 131 F. 197. Failure to charge on contributory negligence held not error where such defense was not pleaded and plaintiff's evidence did not disclose it as a matter of law. Hirsch Bros. v. Ashe [Tex. Civ. App.] 80 S. W. 650. An instruction permitting recovery on a theory not pleaded held erroneous. Heller v. Donellan, 90 N. Y. S. 352.

75. It is proper for the court to define to the jury the term "ordinary care" as applied to the conduct of either party. Chicago City R. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294. Where there is no instruction defining negligence, the question submitted to the jury should be, not whether the act was done negligently, but whether, in doing it, the defendant observed the degree of care required; and that degree should be stated in the instruction. Magrane v. St. Louis & S. R. Co., 183 Mo. 119, 81 S. W. 1158. Instruction on negligence erroneous which left it to jury to say what degree of care was required by the circumstances without furnishing a standard. Missouri, etc., R. Co. v. Wood [Tex. Civ. App.] 81 S. W. 1187.

76. Where plaintiff's testimony tended to show contributory negligence, but no instruction defining such negligence was given, an instruction placing the burden of proof on such issue on defendant was error. Texas Portland Cement & Lime Co. v. Ross [Tex. Civ. App.] 81 S. W. 94.

77. Instructions to find for the party whose witnesses were believed, without charging on the law of negligence or contributory negligence, are erroneous. Haggerty v. New York City R. Co., 90 N. Y. S. 336.

78. Where the terms "wanton," "willful" or "reckless" are used in an instruction, they should be properly defined, in order that they may not be understood by the jury as terms of emphasis used in describing comparative negligence. Buxton v. Ainsworth [Mich.] 101 N. W. 817.

79. Use of term "proximate cause" in an instruction without otherwise defining it held not error. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793.

ordinary care,[80] negligence,[81] and contributory negligence,[82] are treated in the notes.

Verdicts.[83]—Where the gist of the action is negligence, and several acts of negligence are relied on, a recovery is warranted if all the jurors agree that there was negligence, though they do not concur in their finding as to any particular act.[84] A finding that the damage was the result of an accident eliminates the question of negligence.[85]

NEGOTIABLE INSTRUMENTS.

§ 1. **Elements and Indicia (788).**

§ 2. **Form and Interpretation (790).**

§ 3. **Anomalous Signatures and Indorsements (791).**

§ 4. **Liabilities and Discharge of Primary Parties (792).** Liability for Stipulated Attorney's Fees (793). Defenses Between Original Parties (794).

§ 5. **Liabilities and Discharge of Sureties; Guarantors or Other Anomalous Parties (795).**

§ 6. **Negotiation and Transfer Generally (796).**

80. An instruction stating ordinary care to be that care and foresight to avoid danger, which a person of ordinary prudence, caution and intelligence would usually exercise under the same or similar circumstances, is not erroneous because of the use of the word "usually." Chicago Union Traction Co. v. Chugren, 209 Ill. 429, 70 N. E. 573. An instruction that reasonable care is such care as persons of ordinary prudence and intelligence would ordinarily exercise for their own safety under the same circumstances is not erroneous for including the word "intelligence" as well as "prudence." Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28. Adding to a requested instruction on ordinary care, in the usual form, the words "and failure to exercise such care is negligence in the sense in which that term is used in these instructions" did not impair the instruction, nor prejudice defendant. Linder v. St. Louis Transit Co., 103 Mo. App. 574, 77 S. W. 997. An instruction on ordinary care which states that "such care is required to be in proportion to the danger to be avoided and the fatal consequences that might result from the neglect" is not erroneous. Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 169. An instruction that the test of ordinary care is the conduct ordinarily used by persons "under the facts and circumstances surrounding them at the time" is erroneous because omitting the element that such facts and circumstances must be the same or similar to those surrounding the person whose conduct is being tested. Williams v. North Wis. Lumber Co. [Wis.] 102 N. W. 589.

81. An instruction that negligence "means the failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances" is not erroneous for omitting the word "usually" before the word "exercise" where used the second time. Kentucky & I. Bridge & R. Co. v. Shrader [Ky.] 80 S. W. 1094. An instruction defining negligence as want of such care as an "ordinary prudent man" would use is not prejudicially erroneous for using the word "ordinary" instead of "ordinarily." Ft. Worth & D. C. R. Co. v. Partin [Tex. Civ. App.] 76 S. W. 236.

82. Instruction erroneous which failed to bring out the rule that any contributory negligence, however slight, will defeat a recovery. Ray v. Interurban St. R. Co., 90 N. Y. S. 1077. Instruction on contributory negligence held not to have unduly emphasized the word "contributed." Predmore v. Consumers' Light & Power Co., 99 App. Div. 551, 91 N. Y. S. 118. A charge that contributory negligence would defeat a recovery if "such negligence was the proximate cause of * * * or contributed thereto" held erroneous; "contributed" should have been modified by "proximately." St. Louis S. W. R. Co. v. Crabb [Tex. Civ. App.] 80 S. W. 408. The words "caused or contributed" instead of "proximately contributed" held not error in a charge on contributory negligence. Ratteree v. Galveston, etc., R. Co. [Tex. Civ. App.] 81 S. W. 566. Instruction that "contributory negligence is negligence on the part of the person injured or by another whose acts are imputable to such person, combining and concurring with negligence of the person inflicting the injury complained of, and contributing to such injury, and but for which the injury would not have occurred," approved as substantially correct. Central Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862. An instruction that it devolves on defendant to establish contributory negligence by a "preponderance of the evidence in the case" held not liable to mislead the jury, so that defendant's evidence only would be considered by them on that issue. Gulf, etc., R. Co. v. Elmore [Tex. Civ. App.] 79 S. W. 891. An instruction which merely "authorizes" the jury to reduce plaintiff's damages for contributory negligence is insufficient; the jury should be required to do so. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818.

83. See 2 Curr. L. 1013.

84. Holden v. Missouri R. Co. [Mo. App.] 84 S. W. 133; Wacker v. St. Louis Transit Co. [Mo. App.] 84 S. W. 138.

85. Where jury was instructed, if the finding was for plaintiff, to state whether certain foreign matter in stock feed sold by defendant to plaintiff got into such feed through defendant's negligence or by accident, and the jury found that the foreign matter got there by accident, such finding eliminated the question of negligence. National Cotton Oil Co. v. Young [Ark.] 85 S. W. 92.

§ 7. **Acceptance (796).**
§ 8. **Indorsement (798).** Indorser's Liability (798). Discharge of Indorser (799).
§ 9. **Presentment and Demand (800).**
§ 10. **Protest and Notice Thereof (800).**
§ 11. **New Promise After Discharge and Waiver of Non-presentment or the Like (802).**
§ 12. **Accommodation Paper (802).**
§ 13. **The Doctrine of Bona Fides (803).** Once Bona Fide Holdership Always Bona Fide Holdership (803). Notice and Knowledge (804). Taking in Due Course of Business (804). Taking Before Maturity (804). Parting with Value (804). Rights of a Bona Fide Holder (804). Burden of Proof (806).
§ 14. **Remedies and Procedure Peculiar to Negotiable Paper (806).** Parties (806). Pleading (807). The Answer (807). Defenses (808). Evidence (809). Evidence Admissible Generally (809). Indemnifying Maker of Lost Instrument (810).

This topic treats of the law of negotiable instruments as a special class of contracts and incidentally discusses cases wherein general principles of contract are applied to facts as to which the feature of negotiability is peculiarly significant or its relation intimate. But the law of contracts is distinct and has been so treated.[86] The law of banking is also the subject of a separate article.[87]

§ 1. *Elements and indicia.*[88]—A negotiable instrument is a writing which may be transferred by indorsement or delivery so as to give the indorsee the legal title and enable him to sue in his own name.[89] There must be an unconditional promise[90] or order,[91] but a promise may be read from terms susceptible of no other construction.[92]

The amount[93] to be paid at maturity must be certain, but the degree of certainty required is commercial, not mathematical,[94] and the weight of authority is to the effect that provisions for exchange,[95] or for attorneys' fees in case the paper is not paid at maturity, do not destroy negotiability,[96] but a provision for "other

86. See, generally, Contracts, 3 Curr. L. 805, and such related topics as Fraud and Undue Influence, 3 Curr. L. 1520; Frauds, Statute of, 3 Curr. L. 1527; Usury, 2 Curr. L. 1966.

87. See Banking and Finance, 3 Curr. L. 403.

88. See 2 Curr. L. 1013.

89. Cyc. Law Dict. 619.

90. A simple certificate of deposit containing no words of promise to pay is nothing more than a receipt. Young v. American Bank, 44 Misc. 305, 89 N. Y. S. 913.

91. Under the negotiable instruments law a check is regarded as a bill of exchange. State Bank v. Weiss, 91 N. Y. S. 276.

92. "Will be cashed." Young v. American Bank, 44 Misc. 308, 89 N. Y. S. 915.

93. See 2 Curr. L. 1014, n. 86.

94. Cudahy Packing Co. v. State Nat. Bank [C. C. A.] 134 F. 538.

95. The insertion of the words "with exchange" does not destroy negotiability where it is executed at one place and payable at another. First Nat. Bank v. Nordstrom [Kan.] 78 P. 804.

96. Cudahy Packing Co. v. State Nat. Bank [C. C. A.] 134 F. 538. Stipulation for 10 per cent. attorneys' fees does not destroy negotiability. White v. Harris [S. C.] 48 S. E. 41, Gary, A. J., dissenting. Baird v. Vines [S. D.] 99 N. W. 89. Stipulation for attorney's fees and compound interest not decided. Cherry v. Sprague [Mass.] 72 N. E. 456.

Note: There has been considerable conflict in the courts of the different states on the subject, but the clear weight of authority at the present time sustains the doctrine that the incorporation of a provision for the payment of attorneys' fees in negotiable paper does not destroy its commercial character. The following states have so held: Alabama (Montgomery v. Crossthwait, 90 Ala. 553, 8 So. 498, 24 Am. St. Rep. 832, 12 L. R. A. 140); Arkansas (Trader v. Chidester, 41 Ark. 242, 48 Am. Rep. 38); Georgia (Stapleton v. Louisville Banking Co., 95 Ga. 802, 23 S. E. 81); Illinois (Dorsey v. Wolfe, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, 18 L. R. A. 428); Indiana (Stoneman v. Pyle, 35 Ind. 104, 9 Am. Rep. 637); Iowa (Shenandoah National Bank v. Marsh, 89 Iowa, 273, 56 N. W. 458, 48 Am. St. Rep. 381); Kansas (Seaton v. Scovill, 18 Kan. 433, 21 Am. Rep. 212, note, 26 Am. Rep. 779); Kentucky (Gaar v. Louisville Banking Co., 11 Bush [Ky.] 180, 21 Am. Rep. 209); Louisiana (Dietrich v. Bayhi, 23 La. Ann. 767); Mississippi (Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 So. 394); Nebraska (Heard v. Bank, 8 Neb. 10, 30 Am. Rep. 811); Oregon (Benn v. Kutzschan, 24 Or. 28, 32 P. 763); Tennessee (Oppenheimer v. Farmers' & Merchants' Bank [Tenn.] 36 S. W. 705); Texas (Hamilton Gin & Mill Co. v. Sinker, 74 Tex. 51, 11 S. W. 1056); Washington (Colfax Second Nat. Bank v. Anglin, 6 Wash. 403, 33 P. 1056). No decision has been rendered by the supreme court of the United States on this subject, but the question has been frequently before the circuit courts, and the negotiability of the instruments sustained. Howenstein v. Barnes, 5 Dill. 482, Fed. Cas. No. 6,786; Bank of British North America v. Ellis, 2 F. 44. The same doctrine has been approved by the circuit court of appeals of the sixth circuit. Farmers' Nat. Bank v. Sutton Mfg. Co. [C C. A.] 52 F. 191, 17 L. R. A. 595.

The following state decisions have held that such a stipulation renders the note **non-negotiable:** California (Chase v. Whitmore, 68 Cal. 545, 9 P. 942); Montana (Stadler v. First Nat. Bank, 22 Mont. 190, 56 P.

costs" in addition thereto,[97] or a provision rendering the amount of his fee uncertain, does.[98] The instrument and collateral security executed at the same time must be construed together,[99] and if the collateral contains a provision rendering the amount uncertain, the instrument is non-negotiable;[1] but provisions in a mortgage intended only to qualify it do not affect the negotiability of the note,[2] and a provision in the note is not controlled by a similar provision in a mortgage.[3]

The payee.[4]—It must be payable to a certain person,[5] but it is not necessary to specify the name of the payee,[6] though a contrary rule would seem to prevail in some jurisdictions.[7]

Words of negotiability[8] may be implied if not used.[9]

The time of payment[10] is certain if the date upon which the holder can demand payment is fixed,[11] or if a certain date is named, though payable before on

111, 74 Am. St. Rep. 582); North Dakota (Decorah First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473). These decisions all rest upon a statute, being the same statute that was construed by this court in Second Nat. Bank v. Basuier [C. C. A.] 65 F. 58. Maryland (Maryland Fertilizing Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750); Michigan (Altman v. Rittershofer, 68 Mich. 287, 36 N. W. 74, 13 Am. St. Rep. 341); Minnesota (Jones v. Radatz, 27 Minn. 240, 6 N. W. 800); Missouri (Trenton First Nat. Bank v. Gay, 63 Mo. 33, 21 Am. Rep. 430, and other cases above cited); North Carolina (New Windsor First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am. Rep. 604); Pennsylvania (Woods v. North, 84 Pa. 407, 24 Am. Rep. 201); South Carolina (Carroll Co. Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313); Wisconsin (Kimball Co. v. Mellon, 80 Wis. 133, 48 N. W. 1100). The decisions which sustain the negotiability of notes containing a provision for the payment of attorneys' fees have in the main been justified upon the ground that prior to the maturity of the note, and while it was current in the business world, the provision was inoperative; that it did not take effect until after the dishonor of the note, so that in any case the transferee would take subject to all the defenses existing between the original parties. This reasoning cannot be applied to provisions for the payment of exchange, and upon that ground notes containing such provisions have by many courts been held to be non-negotiable. Hughitt v. Johnson, 28 F. 865. See Cudahy Packing Co. v. State Nat. Bank [C. C. A.] 134 F. 538.

97. Baird v. Vines [S. D.] 99 N. W. 89.

98. Fee of $10 and ten per cent. of the amount recovered. Cotton v. John Deere Plow Co. [Okl.] 78 P. 321.

99. Purchaser of the note is charged with notice of the contents of the mortgage. Allen v. Dunn [Neb.] 99 N. W. 680.

1. Provision in the mortgage that if taxes shall be levied against the legal holder the party of the first part shall pay them. Allen v. Dunn [Neb.] 99 N. W. 680.

2. Provision that insurance premiums paid by the mortgagee should constitute a lien added to the note. Thorpe v. Mindeman [Wis.] 101 N. W. 417. It was not meant that the amount of the note should be increased, but simply that an additional lien should be acquired. Id.

3. Morrison v. Ornbaun [Mont.] 75 P. 953.

4. See 2 Curr. L. 1014, n. 85.

5. A blank payee in order paper is not supplied by a provision for confessing judgment in favor of the holder where the note showed on its face that the payee's name was omitted by mistake. Smith v. Willing [Wis.] 101 N. W. 692. In an action for contribution between co-makers, it was held error to allow one who had paid the note to insert in a blank space in the presence of the jury the name of the payee after the question as to the relation of the parties to the note had been raised. Keyser v. Warfield [Md.] 59 A. 189.

6. Bond payable "to ——— or ———" is negotiable. Gamble v. Rural Independent School Dist., 132 F. 514. A check payable to "the order of cash" is bearer paper. Hale v. State, 120 Ga. 138, 47 S. E. 547.

NOTE. The holder has prima facie authority to fill blanks: Neg. Inst. Law. He may insert his own name in a blank space left for the name of the payee (Boyd v. McCann, 10 Md. 118; Thompson v. Rathbun, 18 Or. 202; Mitchell v. Culver, 7 Cow. [N. Y.] 336), and may fill a blank left for time (McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372; Johns v. Harrison, 20 Ind. 317), or the place (Redlich v. Doll, 54 N. Y. 234; Winter v. Pool, 104 Ala. 580), or amount of payment) Hoopes v. Collingwood, 10 Colo. 107, 3 Am. St. Rep. 565; First Nat. Bank v. Carson, 60 Mich. 432; Weyerhauser v. Dunn, 100 N. Y. 150). See Selover Negotiable Instruments Law, § 18 et seq.

7. The omission of the name of a payee is not in practical effect the leaving of a blank which any person in possession is impliedly authorized to fill. Smith v. Willing [Wis.] 101 N. W. 692.

8. See 2 Curr. L. 1014, n. 85.

9. Bond payable "to ——— or ———" is negotiable. Gamble v. Rural Independent School Dist., 132 F. 514.

10. See 2 Curr. L. 1014, n. 87.

11. A right in the maker to make payments at certain time before maturity does not destroy negotiability. Cunningham v. McDonald [Tex.] 83 S. W. 372. A mortgage note is not rendered uncertain by the fact that in the mortgage act the faculty is reserved in the debtor to pay the debt by delivery of timber before maturity. Iberia Cypress Co. v. Christen, 112 La. 451, 36 So. 491.

a contingency.[12] "The makers and indorsers hereof waive protest, demand and notice of non-payment and agree to all extensions and partial payments before or after maturity without prejudice to the holder" does not destroy negotiability.[13]

If a countersignature is required the instrument is of no effect until countersigned.[14] An obliterated countersignature is of no force.[15]

§ 2. *Form and interpretation.*[16]—Coupon bonds are negotiable.[17] A mortgage securing a negotiable instrument so far partakes of its character as to pass to a bona fide indorsee free from the equities between the original parties.[18] Municipal warrants negotiable in form are not, in the absence of express legislation authorizing such paper, negotiable in fact.[19] Instruments drawn on a particular fund are not.[20] At common law a bill of lading was quasi negotiable only.[21] In Kentucky a promissory note is not negotiable[22] until discounted at a bank incorporated under the laws of that state.[23] In Indiana the instrument must be payable in bank.[24]

An instrument becomes non-negotiable after maturity,[25] and its commercial character is not continued by an independent collateral agreement extending the time of payment.[26] It may be rendered non-negotiable by any provision from which such an intent can be inferred.[27] A seal[28] or a transfer or order paper without indorsement destroys negotiability;[29] but an indorsement "without recourse" does not.[30] A forgery making a bill seem negotiable does not confer attributes of negotiability.[31]

Negotiability is determined by the law of the state where the instrument is executed,[32] unless it is made payable in another state, in which case the laws of

12. Neg. Inst. Law. Where on default in payment of interest the entire debt may be declared due. Thorpe v. Mindeman [Wis.] 101 N. W. 417.

13. Time of payment not rendered uncertain. National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368, overruling 80 S. W. 555.

14. Traveler's cheque. Samberg v. American Exp. Co. [Mich.] 99 N. W. 879.

15. Line drawn through it. Samberg v. American Exp. Co. [Mich.] 99 N. W. 879.

16. See 2 Curr. L. 1016. Negotiability of municipal bonds, see Municipal Bonds, § 4, 4 Curr. L. 712.

17. Cochran v. Fox Chase Bank, 209 Pa. 34, 58 A. 117.

18. Cudahy Packing Co. v. State Nat. Bank [C. C. A.] 134 F. 538.

19. Rule as to bona fide holder does not apply. Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109.

20. Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109.

21. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

22. It is open to equitable defenses available as between the parties, though in the hands of a bona fide holder. Deffen v. German-American Title Co., 24 Ky. L. R. 1110, 70 S. W. 868.

23. Complaint alleging that the note in suit was discounted by plaintiff bank at its regular place of business, before maturity, etc., held sufficient to place it on a footing with foreign bill under Ky. St. 1903, § 483. Davis v. Boone County Deposit Bank, 25 Ky. L. R. 2078, 80 S. W. 161.

24. Otherwise it is open to all defenses available as between the parties. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287.

25. See Non-Negotiable Instruments, post, 827.

26. Agreement between the maker and holder at time of maturity. Swan v. Craig [Neb.] 102 N. W. 471.

27. See, also, Non-Negotiable Instruments, post, 827. Negotiability of a bill of lading is destroyed by stamping it non-negotiable. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134. "Non-negotiable or transferable" written across the face of an instrument destroys negotiability. Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466. A certificate of deposit payable on return of the certificate but assignable only on the books of the company is non-negotiable. Zander v. New York Security & Trust Co., 178 N. Y. 208, 70 N. E. 449.

28. The assignee takes subject to all defenses available against it in the hands of the original payee. Stevenson & Co. v. Bethea [S. C.] 47 S. E. 71.

29. Check. Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83. In an action for fraud based on defendant's misrepresentation that he had funds on deposit with a certain banking institution and inducing plaintiff to cash a check for him, whether the instrument was a check or draft held immaterial. Hengen v. Lewis, 91 N. Y. S. 77.

30. Laws 1899, p. 701, c. 356, §§ 1676-1678. Thorpe v. Mindeman [Wis.] 101 N. W. 417.

31. Holder cannot sue as on misdelivery under negotiable bill. Mairs v. Baltimore & O. R. Co., 175 N. Y. 409, 67 N. E. 901.

32. Bill of lading issued in Virginia. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

the latter control as to negotiability,[33] character,[34] and validity.[35] The law of the state in which an instrument is executed is presumed to be the same as that of the state in which rights under it are being litigated,[36] unless proof to the contrary is introduced.[37] Where there is no statute on the subject, the law may be shown by the decisions of the highest court of such state.[38]

"I promise" signed by several is their joint and several obligation.[39] If the instrument appear on its face to have been executed in a representative capacity, it will be regarded as the obligation of the principal.[40] Parol evidence is admissible to show the real nature of the transaction.[41] The burden is on the holder to show that it is the individual obligation of the signer.[42]

A note executed as a renewal of a note tainted with usury is itself usurious.[43] Where less than the legal rate of interest is fixed by the terms of an instrument, it applies up to maturity; thereafter the legal rate will prevail.[44]

While a note is current as negotiable paper, the debt may not be garnished by a creditor of the payee.[45] Paper placed by the payee in the hands of the maker before maturity ceases to be current paper.[46]

An instrument falls due according to its terms.[47]

A promissory note is not divested of its character because not dated,[48] or because it recites the nature of the consideration supporting it,[49] or contains a provision for attorney's fees.[50]

§ 3. *Anomalous signatures and indorsements. Maker or indorser, or surety or guarantor.*[51]—In some states one who indorses an instrument before delivery is

33. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

34. Cherry v. Sprague [Mass.] 72 N. E. 456.

35. As to rate of interest and usury. Simpson v. Hefter, 42 Misc. 482, 87 N. Y. S. 243.

36. See, also, Conflict of Laws, 3 Curr. L. 720. National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368; Baird v. Vines [S. D.] 99 N. W. 89.

37. Where it is shown that under the law of the state where executed, paper transferred as collateral security is subject to defenses existing between the parties, it will be construed as referring only to defenses existing at the time of transfer, not at the time of trial. National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368. Proof that a stipulation for attorney's fees does not destroy negotiability is not proof that a stipulation for "other costs" in addition does not. Baird v. Vines [S. D.] 99 N. W. 89.

38. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

39. Ullery v. Brohm [Colo. App.] 79 P. 180.

40. Signature followed by "Prest. Mt. Carmel Lgt. & Water Co." and the imprint of the corporate seal held notes of the corporation. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667, rvg. 102 Ill. App. 668, cited in 2 Curr. L. 1016, n. 18.

41. "Agent" affixed to the name of the signor. Instrument held the obligation of the firm. Taylor v. Angel, 162 Ind. 670, 71 N. E. 49. A note signed H. W. & Co. per W. T. M. and indorsed W. T. M. makes H. W. & Co. and W. T. M. joint makers. McGraw v. Union Trust Co. [Mich.] 99 N. W. 758.

42. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667.

43. Evidence held insufficient to show that it was given as a renewal note. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

44. The term "until paid" means until maturity. Wright v. Hanna [Pa.] 59 A. 1097.

45. Kimbrough v. Hornsby [Tenn.] 84 S. W. 612.

46. It is subject to garnishment by a creditor of the owner so long as the owner has title to it. Hutcheson v. King [Tex. Civ. App.] 83 S. W. 215. Title does not pass until the person for whom the maker holds it pays for it. Id.

47. The entire amount of a note providing that one-tenth thereof shall become due annually until paid in full does not become due on failure to make the first payment. Hinton v. Jones, 136 N. C. 53, 48 S. E. 546.

48. A writing setting forth that "I hereby certify to have received of D a loan for three months, $500," with date and place of execution and name of maker, is a promissory note. Orlopp v. Schueller, 4 Ohio C. C. (N. S.) 611.

49. Recital that it was given for an amount due for goods furnished the maker by the payee, title to which was not to pass until the notes were paid. Pyron & Son v. Ruohs, 120 Ga. 1060, 48 S. E. 435.

50. Cherry v. Sprague [Mass.] 72 N. E. 456.

51. See 2 Curr. L. 1017.

NOTE. Character and liability of irregular indorser: In Massachusetts one who indorses before delivery is a maker and he is held to his liability as such where at the request of the maker he indorsed in New York, returned the instrument to the maker in Massachusetts, where it was delivered by him. Lawrence v. Bassett, 5 Allen [Mass.] 140. In New York he stands as a first indorser and this rule governs where the in-

held to be a joint maker.[52] This rule is not changed by a statute providing that every person becoming a party to an instrument by signature on the back thereof is entitled to notice of nonpayment.[53] He is held to the same liability if he signs after delivery pursuant to a prior agreement.[54] In other states[55] and under the negotiable instrument law[56] he is only presumed to be a joint maker,[57] and the time when or the order in which indorsements were made,[58] and the capacity in which he signed,[59] whether as indorser,[60] surety,[61] or guarantor, may be established by parol.[62] No presumption of the capacity in which he signed arises from the fact that the terms "indorse" and "indorser" were used.[63] A presumption of the capacity in which he signs arises from the circumstances attending the transaction,[64] and from the order of indorsement;[65] if his signature is above that of the payee, he is presumed to be a surety;[66] if below, an indorser.[67] Persons familiar with negotiable instruments are presumed to know this.[68]

§ 4. *Liabilities and discharge of primary parties.*[69]—It is the duty of the maker of a note to seek it and pay it at maturity.[70] His liability is not affected

strument was drawn in Tennessee, executed in West Virginia by a corporation of that state, indorsed by an officer of such corporation and forwarded to New York in payment of goods purchased in that state. Carnegie Steel Co. v. Chattanooga Constr. Co. [Tenn. Ch. App.] 38 S. W. 102. From note to Spies v. National City Bank [174 N. Y. 193] 61 L. R. A. 200, where cases on the entire range of conflict of laws relative to negotiable instruments are collected and discussed.

52. Negotiable instruments act was not in force when this contract was executed. Downey v. O'Keefe [R. I.] 59 A. 929. Not entitled to demand or notice of nonpayment. Cherry v. Sprague [Mass.] 72 N. E. 456.

53. National Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444.

54. National Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444. If it is part of the agreement that he should sign before the paper would be acceptable. Downey v. O'Keefe [R. I.] 59 A. 929.

55. Oexner v. Loehr, 106 Mo. App. 412, 80 S. W. 690. Where the indorser's signature is admitted, the introduction of the note in evidence establishes a prima facie case without proof that the indorser signed before delivery. Id.

56. Where one not otherwise a party to paper payable to a third person signs before delivery and before the indorsement of the payee, he is liable as indorser to the first taker and all subsequent parties [Neg. Inst. Law]. Leonard v. Draper [Mass.] 73 N. E. 644.

57. Where the signer was told by the maker that he would be notified by the payee in case the paper was not paid at maturity and the payee was informed of this fact, the presumption is rebutted. Oexner v. Loehr, 106 Mo. App. 412, 80 S. W. 690. A petition charging one as indorser does not preclude him from pleading and proving that he signed in a different capacity. Saussy v. Weeks [Ga.] 49 S. E. 809.

58. Redden v. Lambert, 112 La. 740, 36 So. 668. The relative position of the names is immaterial. Trammell v. Swift Fertilizer Works [Ga.] 49 S. E. 739. There is no presumption that the first signer is principal. Id.

59. That a note **signed by members of a partnership** represented a partnership debt. Young v. Stevenson [Ark.] 84 S. W. 623; In re Weisenberg & Co., 131 F. 517. May be shown by parol to be a partnership debt. Young v. Stevenson [Ark.] 84 S. W. 623. Parol evidence is admissible to show whether he signed as maker, surety, guarantor or indorser. Saussy v. Weeks [Ga.] 49 S. E. 809.

60. Circumstances surrounding the signing held to show that one was an indorser, not a surety. Redden v. Lambert, 112 La. 740, 36 So. 668.

61. Evidence that two parties executed a joint note, that one of them took the proceeds and the other paid it, does not prove that the one who paid it was a surety and entitled to recover from the other. Bettinger v. Scully [Wash.] 79 P. 203.

62. Where one signed a note deposited by the principal as collateral for a debt represented by an open account, evidence held to show that he was a surety, not a guarantor, and was not released when the creditor extended credit in excess of an amount stipulated in an accompanying contract. Rouss v. King [S. C.] 48 S. E. 220.

63. The term "indorse" and "indorser" have a popular as well as a technical meaning (Redden v. Lambert, 112 La. 740, 36 So. 668), and the fact that the signers spoke about "indorsers" and "indorsements" at the time of signing does not evidence such an understanding when it is manifest that they did not use the terms in their technical sense (Keyser v. Warfield [Md.] 59 A. 189).

64. A presumption of joint liability arises when the signers deal with the payee jointly and were joint recipients of the consideration. Ross v. De Campi [Ala.] 36 So. 1003.

65. Redden v. Lambert, 112 La. 740, 36 So. 668, but see Trammell v. Swift Fertilizer Works [Ga.] 49 S. E. 739, supra.

66, 67. Redden v. Lambert, 112 La. 740, 36 So. 668.

68. When a bank president, the payee of a note, places his signature above the name of another indorser, it raises an inference that he knew such other to be an indorser, not a surety. Redden v. Lambert, 112 La. 740, 36 So. 668.

69. See 2 Curr. L. 1018.

70. Statement of the place of payment in

by the fact that mortgagé security is void.[71] Makers of a joint and several note are severally liable.[72] Their liability is not affected by an agreement between themselves unknown to the payee or his transferee.[73] Where one dies the payee is not required to pursue his remedy against the estate.[74] Where one joint maker files a defense which goes to the plaintiff's right of recovery against all, there can be no recovery against the others if the plea is well taken.[75]

A maker who has been held liable to a bona fide holder may recover from the original payee for fraud[76] or usury,[77] but not until he has been adjudged to pay or has paid it.[78] The specific facts constituting fraud need not be alleged.[79]

A material alteration[80] after execution and delivery[81] discharges those primarily liable,[82] but an alteration prior to delivery does not.[83] The burden is on the maker to prove that the instrument has been altered.[84]

A spoliation does not discharge those primarily liable.[85]

Payment[86] of an instrument lost by the payee discharges the maker from liability to an assignee of the claim.[87] If the source of the fund from which payment is to be made is designated, there is no liability aside from such source.[88]

Liability for stipulated attorney's fees.—The provision for attorney's fees is

note does not affect the liability of the maker. Ray v. Anderson, 119 Ga. 926, 47 S. E. 205.

71. Mortgage of the homestead. Fontaine v. Nuse [Tex. Civ. App.] 85 S. W. 852.

72. See 2 Curr. L. 1019. Newhall v. Field [N. M.] 79 P. 711.

73. McCullough v. Pritchett, 120 Ga. 585, 48 S. E. 148. Evidence of an agreement between makers of a note that a part of them should pay it and the others should be released and that the payee agreed to such an arrangement, held insufficient to show a release where there was evidence tending to show that the payee's assent was conditional on the giving of new notes which were never executed. Jackson v. Lalicker [Neb.] 99 N. W. 32. Evidence held to show that a payee's agreement that a release of some of the makers of a note was conditional upon the execution of new notes which were never executed. Id. Agreement of the principals to release a surety entered into without payee's consent does not affect his rights. Id.

74. Newhall v. Field [N. M.] 79 P. 711. His action is not barred as against another because the time bas expired within which he might have presented his claim to the estate for allowance. Id.

75. Schofield v. Palmer, 134 F. 753.

76. Davis v. Boone County Bank, 25 Ky. L. R. 2078, 80 S. W. 161.

77. He may recover from the original payee to the extent of the usury. Harbaugh v. Tanner [Ind.] 71 N. E. 145.

78. Cannot file a cross petition against the payee in an action against himself by the indorsee. Davis v. Boone County Deposit Bank, 25 Ky. L. R. 2078, 80 S. W. 161.

79. If desired the defendant may demand a bill of particulars. Harbaugh v. Tanner [Ind.] 71 N. E. 145.

80. See 2 Curr. L. 1020.

81. Illustrations: Where a statute requires place of payment to be designated, the insertion of the place. Carroll v. Warren [Ala.] 37 So. 687. Striking a clause providing for attorney's fees for collection. White v. Harris [S. C.] 48 S. E. 41. A change of the name of a bank on which a check is drawn. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36. The insertion of the words "with exchange" is not. First Nat. Bank v. Nordstrom [Kan.] 78 P. 804.

82. Instruction where an indorser sets up alteration by the maker after he had indorsed, formulated. Towles v. Tanner, 21 App. D. C. 530.

83. Evidence held insufficient to show an alteration by a change of the rate of interest. Mathews v. De Werff [Ark.] 83 S. W. 327. Evidence held to show that bonds were not altered after delivery. Rocky Mount Loan & Trust Co. v. Price [Va.] 49 S. E. 73. Allegation that it was altered after "signing" is insufficient. Bowen v. Woodfield, 33 Ind. App. 687, 72 N. E. 162. Affidavit of defense by an accommodation indorser setting up material alteration but not stating when the alteration was made, etc., held insufficient. Bryan v. Harr, 21 App. D. C. 190. On an issue as to whether an instrument had been altered after the indorsers had signed, evidence that the maker was agent for the indorsers to raise money is irrelevant. Towles v. Tanner, 21 App. D. C. 530. Evidence held insufficient to show that a check had been altered after it was signed. Barranco v. Law, 87 App. Div. 626, 84 N. Y. S. 421.

84. Fudge v. Marquell [Ind.] 72 N. E. 565.

85. Striking a clause providing for attorney's fees for collection by a stranger. White v. Harris [S. C.] 48 S. E. 41. Whether the striking of a clause was an alteration or a spoliation held for the jury. Id.

86. See Payment and Tender, 2 Curr. L. 1158.

87. A master who pays his servant in wage coupons payable to bearer is not liable where seven months after having lost such coupons the servant assigned his claim and had given the master no notice of his loss. Clayton v. Knox, 80 App. Div. 631, 80 N. Y. S. 242.

88. Due bill was to be paid with amounts collected from a certain source. Allen & Co. v. Maxwell [W. Va.] 49 S. E. 242.

a provision for indemnity,[89] but a stipulated fee cannot be assailed as unreasonable after the holder has retained an attorney and agreed to pay him such amount.[90] The holder is entitled to recover the fee where the paper is placed in an attorney's hands for collection, though no action is brought.[91] A demand prior to bringing action is unnecessary,[92] though the maker was willing and ready to pay had demand been made.[93] In Georgia a provision for attorney's fees may be enforced if the holder gives notice of his intention to sue as required by statute.[94] The maker may prevent a recovery by paying the debt on or before the return day.[95]

A renunciation of his rights by the holder must, under the negotiable instruments law, be expressed in unequivocal terms.[96]

Defenses between original parties.—Except as affected by the doctrine of bona fides,[97] a negotiable instrument is a contract and subject to all defenses. Thus the consideration may be inquired into.[98] Fraud,[99] want,[1] illegality,[2] total[3] or partial failure[4] of consideration, or want of delivery,[5] constitute a defense. The burden is on those primarily liable to establish the defenses.[6]

89. Though 10 per cent was stipulated for, but the holder had not agreed to pay such amount, he was limited to a recovery of the reasonable value of such services. Texas Land & Loan Co. v. Robertson [Tex. Civ. App.] 85 S. W. 1020.

90. Robertson v. Holman [Tex. Civ. App.] 81 S. W. 326; Dunovant's Estate v. Stafford & Co. [Tex. Civ. App.] 81 S. W. 101.

91. Under Neg. Inst. Law. Morrison v. Ornbaun [Mont.] 75 P. 953.

92. A provision in a deed of trust securing several notes falling due on different dates that if default be made in the payment of any the holder may declare the entire debt due and collect attorney's fees authorizes an action to recover the entire debt and attorney's fees without a demand. Dieter v. Bowers [Tex. Civ. App.] 84 S. W. 847.

93. Dieter v. Bowers [Tex. Civ. App.] 84 S. W. 847.

94. The statute declares the provision void but recognizes a right to enforce it on performance of certain conditions. Browne v. Edwards [Ga.] 50 S. E. 110.

95. Browne v. Edwards [Ga.] 50 S. E. 110.

96. "I wish the note to be canceled in case of my death" is insufficient. Leask v. Dew, 92 N. Y. S. 891.

97. See post, § 13. A note may be shown to be a receipt for an advancement. Strode v. Beall, 105 Mo. App. 495, 79 S. W. 1019.

98. Evidence held insufficient to justify the court in reducing the amount stated on the face of the note. Bryan v. Hobbs [Ark.] 83 S. W. 341. Note given by a nominee to a campaign committee held based on a sufficient consideration. Day v. Long [Ky.] 80 S. W. 774. Evidence held to show a **sufficient consideration.** Southern Loan & Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435; Yarwood v. Trust & Guarantee Co., 94 App. Div. 47, 87 N. Y. S. 947; Sharp v. Bowie, 142 Cal. 462, 76 P. 62; Rohrbacher v. Aitken [Cal.] 78 P. 1054; Shiretzki v. Julius Kessler & Co. [Ala.] 37 So. 422; Hatcher v. Branch, Powell & Co. [Ala.] 37 So. 690. Evidence held for the jury whether a note was an accommodation note for the indorser or was based on a consideration. Cody v. Hadcox, 90 N. Y. S. 873.

99. Mueller v. Buch [N. J. Law] 58 A. 1092; McRae v. Lonsby [C. C. A.] 130 F. 17; Morris v. Brown [Tex. Civ. App.] 85 S. W. 1015; Smith v. McDonald [Mich.] 102 N. W. 738; Hall v. Grayson County Nat. Bank [Tex. Civ. App.] 81 S. W. 762. Fraud and undue influence. Burwell v. Burwell [Va.] 49 S. E. 68. Evidence held not to show fraud. Graham v. Mercantile Town Mut. Ins. Co. [Mo. App.] 84 S. W. 93. A representation as to a future contingency is insufficient to form a basis of a charge of fraud. State Bank v. Mentzer [Iowa] 100 N. W. 69. Agreement that notes would be collected only from dividends of stock of which they constituted the purchase price. State Bank of Indiana v. Cook [Iowa] 100 N. W. 72. A charge on fraud must designate the particular facts claimed to constitute it. State Bank v. Mentzer [Iowa] 100 N. W. 69.

1. Boblett v. Barlow [Ky.] 83 S. W. 145; Carman v. Carrico, 25 Ky. L. R. 2143, 80 S. W. 216; Smith v. Southern Exp. Co., 139 Ala. 519, 36 So. 621; Nowack v. Lehmann [Mich.] 102 N. W. 992; Wells v. Potter, 120 Ga. 889, 48 S. E. 354; Batterman v. Butcher, 95 App. Div. 213, 88 N. Y. S. 685; Mason v. Gardiner [Mass.] 71 N. E. 952; Campbell v. Park [Iowa] 101 N. W. 861. Want of consideration held a question for the jury. State Bank v. Mentzer [Iowa] 100 N. W. 69.

2. Meyer-Marx Co. v. Ensley [Ala.] 37 So. 639; Corbett v. Clute [N. C.] 50 S. E. 216. Illegality in part of the consideration taints the whole. Padget v. O'Connor [Neb.] 98 N. W. 870.

3. Conner v. Andrews Land, Home & Improvement Co., 162 Ind. 338, 70 N. E. 376; McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Hardy Packing Co. v. Sprigg [Ky.] 84 S. W. 532; Kenney Co. v. Ruff [Ind. App.] 72 N. E. 622.

4. Stribling v. Gray [Tex. Civ. App.] 81 S. W. 789; Hathorn v. Wheelwright [Me.] 59 A. 517. The rule in Maine that partial failure of consideration of a note given for land is no defense was abrogated by Rev. St. c. 84, § 40, and has never been held applicable to a note given for other considerations. Hathorn v. Wheelwright [Me.] 59 A. 517; Williams v. Neely [C. C. A.] 134 F. 1.

§ 5. *Liabilities and discharge of sureties, guarantors or other anomalous parties.*[7]—As between husband and wife, no liability can be created by an indorsement.[8] In Indiana a married woman's contract of suretyship is void.[9]

The right of contribution exists between co-sureties.[10] A surety,[11] indorser or guarantor who pays paper secured by collateral is subrogated to all the rights of the maker relative to it,[12] and the fact that the maker violated an agreement with the owner of the collateral when he pledged it is no defense as against the surety where he seeks to have a lien established.[13] It is the duty of the holder of the note when paid by one secondarily liable to deliver the note and collateral.[14]

Discharge of sureties.[15]—The execution of a new note by the maker of the one secured in payment of it,[16] a release of collateral security,[17] or an extension of the time of payment,[18] discharges a surety. The length of the period of extension is immaterial,[19] but it must be valid and enforceable.[20] Refusal of the holder to take certain collateral security of the principal does not discharge the surety.[21] A surety cannot set off a claim due his principal from the holder and assigned to him after action commenced.[22] The contract of the drawer of an inland bill is in the nature of a contract of suretyship.[23]

The guarantor's contract is to pay if the maker cannot.[24] The guaranty of an instrument when transferred by the guarantor is an original undertaking.[25] The nature of the transaction is not changed by the negotiable instrument law.[26]

It is error to direct a verdict for the face value of a note bearing indorsements of admitted partial payments. Russell v. Cassidy [Mo. App.] 84 S. W. 171.

5. Evidence held to show that a note was never delivered. Gasquet v. Pechin, 143 Cal. 515, 77 P. 481. Evidence held to show that there had been a delivery to an agent. Indiana Trust Co. v. Byram [Ind. App.] 72 N. E. 670.

6. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575. When no evidence was introduced, it was error to dismiss the complaint at close of plaintiff's evidence. Harris v. Buchanan, 91 N. Y. S. 484.

7. See 2 Curr. L. 1020.

8. A note made by one to the other is void. National Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444.

9. Burns' Ann. St. 1901, § 6964. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494. The courts of Indiana may cancel such a contract payable in another state. Id.

10. Sand. & H. Dig. § 7314. Wilks v. Vaughan [Ark.] 83 S. W. 913. When stockholders indorse a note for the accommodation of the corporation, they are sureties and entitled to contribution under Civ. Code, § 2848. Kellogg v. Lopez [Cal.] 78 P. 1056.

11. A surety who pays and takes an assignment is entitled to foreclose mortgage security. Cook v. Landrum [Ky.] 82 S. W. 585.

12. Mankey v. Willoughby, 21 App. D. C. 314. A surety on a note paying the same becomes a surety as to the maker's wife, she assuming for a consideration to pay the same so that the note fixed the rate of interest on which he might recover under Burns' Ann. St. 1901, § 1233. Hamilton v. Hamilton, 162 Ind. 430, 70 N. E. 535.

13, 14. Mankey v. Willoughby, 21 App. D. C. 314.

15. See 2 Curr. L. 1021.

16. In an action against a surety where the defense was a new note extending time of payment, entries on the books of the holder tending to show that the new note was regarded as payment of the former is admissible. Citizens' Nat. Bank v. Wilson, 121 Iowa, 156, 96 N. W. 727. The entries in the books are independent of the testimony of the holders. Id.

17. Release of mortgage. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901. Evidence held insufficient to show that a bank payee was negligent in failing to charge deposits of the makers against a note. Sureties not released. Fordville Banking Co. v. Thompson [Ky.] 82 S. W. 251.

18. By grantee who assumed a mortgage debt. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

19. Lehnert v. Lewey [Ala.] 37 So. 921.

20. Must be based on a consideration and sufficient to preclude the debtor during the period from enforcing the obligation against the principal debtor. National Citizens' Bank v. Toplitz, 178 N. Y. 464, 71 N. E. 1. Surety must plead and prove the consideration. Id. Must be based on a consideration. Ferris v. Johnson [Mich.] 98 N. W. 1014. Based on a consideration. Lehnert v. Lewey [Ala.] 37 So. 921.

21. Rouss v. King [S. C.] 48 S. E. 220.

22. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

23. He is released under the same circumstances as would release a surety but only to the extent of damage sustained. Bank of Richland v. Nicholson, 120 Ga. 622, 48 S. E. 240. Proof of the drawing of the bill and failure of the drawer or acceptor to pay establishes a prima facie case and matter relied on by the drawer to discharge him must be set up by way of defense. Id.

24. Evidence held to show a demand on the maker prior to action commenced against the guarantor. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

25. Not within the statute of frauds. Swenson v. Stoltz [Wash.] 78 P. 999.

§ 6. *Negotiation and transfer generally.*[27]—A transferee of order paper by indorsement and delivery takes title free from the equities existing between the parties,[28] but a transferee by delivery without indorsement,[29] except in Texas,[30] an assignee[31] or an indorsee with notice,[32] takes subject to defenses existing between the original parties before notice to the makers of the assignment,[33] and where before notice of the assignment the maker had paid overdue interest to the payee, the assignees were precluded from enforcing a clause in the note maturing the same in case of default in payment of interest.[34] There must be a delivery.[35] Under negotiable instrument law a transferee by delivery is entitled to his transferror's indorsement.[36] A reservation by an indorser who guarantees of a right to take up the paper on the happening of certain conditions, a denial of such right to discharge him from liability, does not reserve any control over the instrument.[37] As between an indorser and his indorsee, a consideration is necessary to support the contract[38] and is open to inquiry.[39]

§ 7. *Acceptance.*[40]—An acceptance, as between acceptor and payee is an original undertaking.[41] It is an admission of the genuineness of the bill and that the acceptor has funds of the drawer in his hands.[42] Until acceptance[43] in the manner prescribed by law,[44] the drawee is not in privity and is not liable thereon;[45]

26. Negotiable instrument law, providing that no person whose signature does not appear on an instrument shall be liable thereon, has no application where the payee transferred the paper and orally guaranteed it. Swenson v. Stoltz [Wash.] 78 P. 999.

27. See 2 Curr. L. 1022.

28. Evidence held sufficient to show that a lost note had been indorsed and delivered. The indorser's executor could not recover on it. French v. French [C. C. A.] 133 F. 491. A bank holding negotiable paper has power to transfer it regardless of the authority of its officers. Carson v. Old Nat. Bank [Wash.] 79 P. 927.

29. Title passes under Neg. Inst. Law. Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83.

30. In Texas, though a transfer be not evidenced by writing, it is placed on the same footing as a transfer by indorsement. A bona fide transferee takes free from equities between the parties. National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368.

31. Assignee of a promissory note under Ky. St. 1903, § 474. Harrigan v. Advance Thresher Co. [Ky.] 81 S. W. 261. One who purchases from a creditor the obligation of his debtor and takes the note of the latter payable to bimself. Williams v. Neely, 134 F. 1. False representation held to be as to an immaterial matter and no defense. Currey v. Harden [Mo. App.] 83 S. W. 770. Proof of partial failure of consideration does not justify an instruction on the hypothesis of total failure. Id.

32. Fraud. State Bank of Ind. v. Mentzer [Iowa] 100 N. W. 69.

33. Code, § 3461. Hecker v. Boylan [Iowa] 101 N. W. 755.

34. Hecker v. Boylan [Iowa] 101 N. W. 755.

35. An indorsement without a delivery and with no intention to pass title is ineffective. French v. French [C. C. A.] 133 F. 491. Where one secondarily liable pays the holder, he cannot recover for a mutilation of the paper by the holder after payment but before delivery. Chapman v. Niantic Nat. Bank [R. I.] 57 A. 934.

36. Negotiable instruments law, providing the manner in which paper may be transferred, does not affect the subsequent section providing that where order paper is transferred without indorsement the transferror's title passes and the transferee has the right to have the transferror's indorsement. Swenson v. Stoltz [Wash.] 78 P. 999.

37. Cunningham v. McDonald [Tex.] 83 S. W. 372.

38. The guarantor of a note on failure of the maker to pay it gave his own note to the payee, whereupon the payee indorsed the original note to him. The payee was not liable to the guarantor on this indorsement. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006.

39. Whether the transfer of a note from husband to wife was based on a sufficient consideration held for the jury. Southern Loan & Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435; Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006.

40. See 2 Curr. L. 1023.

41. Not a promise to pay the debt of another. Ragsdale v. Gresham [Ala.] 37 So. 367.

42. Ragsdale v. Gresham [Ala.] 37 So. 367.

43. The holder of an unaccepted draft not framed so as to operate as an assignment cannot maintain action against the drawee. Gamer v. Thomson [Tex. Civ. App.] 79 S. W. 1083. An action against nonaccepting drawees cannot be maintained in a country other than that of their domicile against a plea in abatement asserting their privilege of being sued in the county of their residence. Dougherty v. Dilworth [Tex. Civ. App.] 81 S. W. 573. See, also, Gamer v. Thomson [Tex. Civ. App.] 79 S. W. 1083. The holder of a check has no contract with the bank on which it is drawn and no legal right to exact payment. National Bank v. Berrall [N. J. Law] 58 A. 189.

44. Under Neg. Inst. Law a complaint against the drawee which does not allege a

but after acceptance he becomes the principal debtor,[46] though at the time he accepted he did not know who was the owner of the bill.[47] An acceptance on condition is rendered nugatory by nonperformance of the condition.[48] The indorsee who induces the drawee to accept is liable to him for damage sustained.[49] A payment by the drawee concludes him. He cannot afterwards avoid the transaction by showing that he was mistaken in supposing he had funds of the drawer,[50] except where a bill bears evidence that the drawee is not to pay it with funds of the drawer and an indorsee is negligent in not ascertaining whether or not the prior indorsements are genuine.[51] Delay in bringing the action is no defense, he having no cause for suspicion in the meantime and rights of the indorser not being prejudiced.[52] An acceptor who sets up want of consideration has the burden of proving it.[53]

The simple drawing of a check does not operate as an assignment of the fund against which it is drawn,[54] unless the circumstances surrounding the transaction indicate an intention that it shall have such effect;[55] but the certification of a check does.[56] As between depositor and banker, the latter is held to a knowledge of the signature of the former,[57] and a forged check, whether the forgery is of the signature or consists of a material alteration, is honored by the bank at its peril.[58] A custom to pay checks where the name of the bank on which it was drawn has been changed cannot render a forged check valid.[59] A depositor who has changed

written acceptance does not state a cause of action. Wadhams v. Portland, etc., R. Co. [Wash.] 79 P. 597; Baltimore & O. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837. Complaint which does not allege acceptance to be in writing does not state a cause of action. Wadhams v. Portland, etc., R. Co. [Wash.] 79 P. 597.

45. The holder of an unaccepted check cannot maintain action against the bank. New York Life Ins. Co. v. Patterson [Tex. Civ. App.] 80 S. W. 1058. An unaccepted draft is no evidence of indebtedness on the part of the drawee. Gamer v. Thomson [Tex. Civ. App.] 79 S. W. 1083. The indorsement of a payee's name on the back of a check without his authority creates no privity between drawee and drawer. Merchants' Bank v. Prudential Ins. Co. [Mo. App.] 84 S. W. 101.

46. Ragsdale v. Gresham [Ala.] 37 So. 367. Under Neg. Inst. Law, certification of a check. Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83.

47. Check was presented by one who had title without indorsement. Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83.

48. Glidden v. Massachusetts Hospital Life Ins. Co. [Mass.] 73 N. E. 538.

49. Consignee of goods not ordered, refused to receive the goods or accept the drafts attached to the bill of lading. Under agreement he sold the goods to the best advantage. Groos & Co. v. Brewster [Tex. Civ. App.] 78 S. W. 359.

50. Bank of Indian Territory v. First Nat. Bank [Mo. App.] 83 S. W. 537. Where a bank pays the amount of a check to a bona fide holder, it cannot recover it on the ground of mistake. National Bank v. Berrall, 70 N. J. Law, 757, 58 A. 189.

51. On the back of the draft was evidence that the drawee would pay from his own funds. La Fayette & Bro. v. Merchants' Bank [Ark.] 84 S. W. 700.

52. La Fayette & Bro. v. Merchants' Bank [Ark.] 84 S. W. 700.

53. Under Code 1896, § 1800, providing that the consideration of every written instrument may be impeached. Ragsdale v. Gresham [Ala.] 37 So. 367. Where a builder accepted a contractor's order for a certain amount and subsequently learned that it was for more than the amount due, and the drawee lost no rights by reason of his refusal to pay the balance, the acceptance therefore was held without consideration. Canady v. Webb, 25 Ky. L. R. 2107, 80 S. W. 172.

54. See 2 Curr. L. 1029, n. 79 et seq. New York Life Ins. Co. v. Patterson [Tex. Civ. App.] 80 S. W. 1058. Under the negotiable instruments law. Baltimore & O. R. Co. v. First Nat. Bank, 102 Va. 753, 47 S. E. 837. An unaccepted check drawn in the ordinary form, not describing any particular fund or using words of transfer is not an assignment either at law or in equity. Reviere v. Chambliss, 120 Ga. 714, 48 S. E. 122. The fund may be garnished by a creditor of the drawer. Love v. Ardmore Stock Exch. [Ind. T.] 82 S. W. 721.

55. Where a debtor informed his creditor that he had funds on deposit at a certain bank and desired to pay the debt from that fund and it was agreed that the debtor should issue a check payable to another bank so that it could collect and pay over the amount to the creditor, which was done and a receipt given by the creditor. New York Life Ins. Co. v. Patterson [Tex. Civ. App.] 80 S. W. 1058.

56. Neg. Inst. Law, § 325. Meuer v. Phoenix Nat. Bank, 94 App. Div. 331, 88 N. Y. S. 83.

57. See Banking and Finance, 3 Curr. L. 403.

58, 59. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36.

his account from one bank to another is under no duty to notify the latter of outstanding checks against the former.[60] A bank accepting a corporation check in payment of the personal liability of the officer drawing it is charged with notice of the extent of his authority.[61]

§ 8. *Indorsement.*[62]—An indorsement in blank passes the legal title,[63] and converts order paper into bearer paper.[64] The holder may maintain an action without showing the capacity in which he holds.[65] It may be shown by parol that he holds as trustee.[66] If the genuineness of an indorsement is denied, it must be established.[67]

Indorser's liability.[68]—An indorser warrants the capacity of all prior parties,[69] and the genuineness of their signatures.[70] Provisions incorporated into the body of the instrument form a part of his contract.[71] As between successive indorsers the first is ultimately but not primarily liable in the sense that as between principal and surety the principal is primarily liable.[72] It is not his duty as between himself and a subsequent indorser to pay the note in the first instance.[73] He is entitled to the delay consequent on demand for payment being first made on the subsequent indorser.[74] If at maturity he promises to pay and induces the holder to forego action against the maker, he is primarily liable.[75] His liability to the holder is not affected by an agreement between himself and his immediate indorsee,[76] nor by the fact that the paper is secured,[77] though the collateral security

60. Give notice that the payee is liable to change the name of the drawee. Morris v. Beaumont Nat. Bank [Tex. Civ. App.] 83 S. W. 36.

61. It is liable to the corporation if inquiry would have disclosed that the check was not authorized. Manhattan Web Co. v. Aquidneck Nat. Bank, 133 F. 76.

62. See 2 Curr. L. 1023.

63. Graham v. Troth [Kan.] 77 P. 92.

64. Direct provisions of Rev. Laws, c. 73, § 207. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959.

65. Graham v. Troth [Kan.] 77 P. 92. An indorsee may maintain action in his own name regardless of the interest of a third person in the note. Barber v. Stroub [Mo. App.] 85 S. W. 915.

66. Graham v. Troth [Kan.] 77 P. 92. A member of a firm to whom notes purchased by the firm are indorsed and who recovers thereon holds the proceeds in trust. Barber v. Stroub [Mo. App.] 85 S. W. 915.

67. Zlotnick v. Greenfeld, 90 N. Y. S. 1086. Evidence held to show that indorsements were genuine. Doty v. Dellinger, 94 App. Div. 610, 87 N. Y. S. 1001. Where a person purchases a check from the payee who is known to him and whose name is indorsed thereon, proof of such facts establish prima facie a valid indorsement. Goetting v. Day, 87 N. Y. S. 510.

68. See 2 Curr. L. 1024.

69. Under Rev. Laws, c. 73, §§ 83, 84, he cannot deny the authority of a corporation maker. Leonard v. Draper [Mass.] 73 N. E. 644. Want of capacity of a prior corporation indorser to indorse is no defense to a subsequent indorser. Willard v. Crook, 21 App. D. C. 237.

70. Merchants' Bank v. Prudential Ins. Co. [Mo. App.] 84 S. W. 101. Liabilities of indorsers on notes prior to the enactment of negotiable instruments law were not affected by that law. Jefferson County Nat. Bank v. Dewey [N. Y.] 73 N. E. 569.

71. A waiver of demand, protest and notice. German-American Sav. Bank v. Hanna [Iowa] 100 N. W. 57.

72. Bank of America v. Wilson [Mass.] 71 N. E. 312. The holder may release a second indorser by suing a prior party, and the obliteration of a subsequent indorser's name would not give a cause of action to a prior indorser as against the holder. Chapman v. Niantic Nat. Bank [R. I.] 57 A. 934. Where the payee of a check whose indorsement has been forged brings action against the bank for conversion and the bank gives notice to a subsequent indorser to defend, the bank cannot recover from such subsequent indorser the costs of the suit and attorney's fees, though their defense was approved by such subsequent indorser and was partially successful. Muller v. National Bank of Cortland, 96 App. Div. 71, 89 N. Y. S. 62.

73. Where it does not appear that the relation between them is that of principal and surety. Bank of America v. Wilson [Mass.] 71 N. E. 312. The holder may look to the last indorser for the payment of the note who in turn may look to a prior indorser. Id.

74. He may arrange with the holder to secure such delay by procuring such demand. Bank of America v. Wilson [Mass.] 71 N. E. 312.

75. Code 1896, § 894, subd. 7. Marshall v. Bishop, 140 Ala. 206, 37 So. 324.

76. Fraud of such indorsee is no defense. Green v. Stewart, 23 App. D. C. 570.

77. A holder may sue an indorser without first resorting to his remedy against mortgage security. Williams Bros. v. Rosenbaum [Tex. Civ. App.] 79 S. W. 594. Especially if it be worthless. German-American Sav. Bank v. Hanna [Iowa] 100 N. W. 57.

is procured by himself.[78] To enlarge his liability from that implied by law from the position of his signature requires an express contract.[79] An indorsement qualified by "payment guaranteed" makes him an indorser with enlarged liability.[80] An indorsement of a duplicate instrument does not create any different liability than that assumed by an indorsement of the original;[81] if made after he has been discharged it does not renew his obligation as indorser.[82]

An indorsement without recourse is a commercial indorsement and not a mere assignment.[83] Where a note is given as purchase price of personal property title to which is reserved in the vendor until payment of the notes and the vendor indorses the note without recourse, the makers of the note thereby become invested with the title of the property.[84]

An indorsement for collection cannot be impeached by parol.[85] The indorsee takes the paper subject to the equities existing between the maker and his indorser.[86] He is agent for his indorser, not a purchaser,[87] but may maintain an action in his own name.[88] His agency is terminated by the insolvency of his indorser.[89]

Discharge of indorser.[90]—Payment by one primarily liable discharges the indorser,[91] but not if made with funds upon which creditors of the maker had a lien and which were required to be refunded.[92] The holder's lack of diligence to endeavor to collect from the maker at maturity discharges the indorser.[93] A pay-

78. Green v. Stewart, 23 App. D. C. 570.

79. To make him a co-surety. Chapman v. Pendleton [R. I.] 59 A. 928.

80. He is not a guarantor. German-American Sav. Bank v. Hanna [Iowa] 100 N. W. 57.

81. The original was lost and by reason of laches in presenting it the indorser was discharged. Held, he was discharged from liability on the duplicate. Lewis v. Commercial Nat. Bank [Tex. Civ. App.] 83 S. W. 423.

82. Drawee of a check had been discharged by delay in presentment. The original was lost. Aebi v. Bank of Evansville [Wis.] 102 N. W. 329.

83. Thorpe v. Mindeman [Wis.] 101 N. W. 417. An indorser claimed that his indorsement was "without recourse." Such words were not on the notes. Held, the evidence whether such was the nature of the indorsement raised a question for the jury. Blue v. Hunt, 208 Pa. 248, 57 A. 576.

84. McCullough v. Pritchett, 120 Ga. 585, 48 S. E. 148.

85. In an action by an indorsee for collection, evidence to show that he is in fact a part owner of the paper is inadmissible as tending to contradict the indorsement. Smith v. Bayer [Or.] 79 P. 497.

86. Smith v. Bayer [Or.] 79 P. 497. Where the payee of a check on another bank indorses to the bank with which he has an account and receives credit of the amount as cash, the bank becomes the owner of the check and not a mere agent for collection. Aebi v. Bank of Evansville [Wis.] 102 N. W. 329. "Pay to any bank or banker or order" is an indorsement for collection. Bank of Indian Territory v. First Nat. Bank [Mo. App.] 83 S. W. 537. Where he is informed that his indorser is not the real and beneficial owner of the fund on which the draft is drawn, he is not entitled to credit the proceeds against a debt due him from his indorser. Josiah Morris & Co. v. Alabama Carbon Co., 139 Ala. 620, 36 So. 764.

87. Josiah Morris & Co. v. Alabama Carbon Co., 139 Ala. 620, 36 So. 764. A draft drawn in favor of the cashier of a bank to enable the latter to collect for the drawer does not divest the drawer of his equitable ownership of the fund on which the draft was drawn. Id. A payment by the maker to the indorser is a defense, though plaintiff proved that he was in fact a part owner. Smith v. Bayer [Or.] 79 P. 497.

88. Under B. & C. Comp. § 4439, providing that a restrictive indorsement confers the right to receive payment and maintain any action the indorser might maintain. Smith v. Bayer [Or.] 79 P. 497.

89. Josiah Morris Co. v. Alabama Carbon Co., 139 Ala. 620, 36 So. 764. The drawer who is the real owner may recover the proceeds where the indorser prior to collection became insolvent. Id.

90. See 2 Curr. L. 1024.

91. The payee of a note transferred the same by indorsement. He was held liable as indorser, paid the note, collected the amount from the maker who borrowed the sum from one to whom he assigned the note. Held, an assignee of the transferee could not recover from the payee. Rich v. Goldman, 90 N. Y. S. 364.

92. Where the holder was required to refund payments by the maker, payment by the indorsers to discharge the debt, made with full knowledge that the payments by the maker might have to be refunded, did not constitute a payment in full and bar the holder from enforcing the balance due against the indorser. Jefferson County Nat. Bank v. Dewey [N. Y.] 73 N. E. 569.

93. The extension of time is entirely inconsistent with the exercise of diligence in attempting to collect it. Spears v. Thompson's Estate, 30 Ind. App. 267, 65 N. E. 928. A showing that the maker was insolvent when an action was brought against the indorser long after maturity is insufficient. Id.

ment by the maker will not take the case out of the statute of limitations as against the indorser.[94]

§ 9. *Presentment and demand.*[95]—Demand for payment is not necessary to fix the liability of parties primarily liable.[96] Delay in presentment does not discharge the drawer unless he suffers damage,[97] but if there is an unreasonable delay the burden is on the holder to show that the drawer has not suffered loss.[98] Presentment and demand are necessary to fix the liability of an indorser.[99] The loss of a bill does not dispense with the necessity of it.[1] Presentment must be made by one with authority[2] and within a reasonable time.[3] What is a reasonable time is to be determined by the circumstances of each particular case.[4] Presentation of demand paper is presumptively within a reasonable time,[5] and if an indorser desires to raise the question whether it was or not he must plead and prove such matter as a defense.[6] Delay in presentment is no defense if the drawer had no funds on deposit with which to meet it and no expectation that it would be paid.[7] Presentment at the place named in the instrument is sufficient.[8] No personal demand on the maker is necessary.[9]

A certificate of deposit is not due until demand,[10] by presentment at the bank properly indorsed.[11]

§ 10. *Protest and notice thereof.*[12]—All negotiable instruments may be pro-

94. Mason v. Kilcourse [N. J. Law] 59 A. 21.

95. See 2 Curr. L. 1025, also Id. 1033, n. 74.

96. It is the duty of the maker of a promissory note, not payable at a particular place, to find his paper and take it up. Gormley v. Hartray, 105 Ill. App. 625. Makers. Keyser v. Warfield [Md.] 59 A. 189.

97, 98. Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730.

99. Sessions & Co. v. Isabel, 2 Ohio N. P. (N. S.) 288. A judgment against an indorser cannot be sustained in the absence of evidence of presentment for payment. Zlotnick v. Greenfeld. 90 N. Y. S. 1086.

1. Lewis v. Commercial Nat. Bank [Tex. Civ. App.] 83 S. W. 423.

2. Hofrichter v. Enyeart [Neb.] 99 N. W. 658.

3. Under Neg. Inst. Law. Laws 1899, p. 746, c. 356, § 1684-2. Aebi v. Bank of Evansville [Wis.] 102 N. W. 329.

4. Under Neg. Inst. Law. German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. S. 142. Where a bank received a check on another bank and placed the amount as cash to the credit of the depositor, forwarded it by mail to the bank on which it was drawn, but it was lost and no inquiry was made for 10 days and the depositor was not notified for a month, the bank had not used the diligence required by Neg. Inst. Law, and the depositor was discharged from liability on his indorsement. Aebi v. Bank of Evansville [Wis.] 102 N. W. 329. Neg. Inst. Law. A check was drawn on plaintiff which it paid by allowing credit at the clearing house. Subsequently it was learned that the drawer had no funds on deposit. No demand was made on an indorser until action brought six days later. Held, the bank could not recover from him. State Bank v. Weiss, 91 N. Y. S. 276.

5. German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. S. 142.

6. It being analogous to the statute of limitations. German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. S. 142.

7. Carson, Pirie, Scott & Co. v. Fincher [Mich.] 101 N. W. 844. Where there is evidence that the drawer at the time a check was uttered had a balance on deposit insufficient to meet it and had notice of the dishonor of other of his checks, a question of fact whether he had expectation that it would be paid was raised, though the drawer was negligent in making presentment. Id.

8. Nelson v. Grondahl [N. D.] 100 N. W. 1093. Oral testimony is admissible to show facts occurring on a presentment which are not stated in the notary's certificate. Id. A notary's testimony that he invariably presented notes for payment at the place where they were made payable is admissible to establish the place of payment where the certificate of protest fails to show the place of presentment and the notary has no recollection of the specific presentment. Id.

9. Nelson v. Grondahl [N. D.] 100 N. W. 1093.

10. Until demand no cause of action accrues. Young v. American Bank, 44 Misc. 308, 89 N. Y. S. 915. An affidavit alleging demand and refusal on information and belief is insufficient if it fails to state the sources of information and belief. Id.

11. Young v. American Bank, 44 Misc. 308, 89 N. Y. S. 915.

12. See 2 Curr. L. 1026.

NOTE. Notice to assignee or other representative of insolvent: Notice to the general agent employed to liquidate the affairs of the indorser (Fassin v. Hubbard, 55 N. Y. 465), or to the voluntary assignee of an accommodation indorser, though the whole of his estate is not assigned and he is not in fact insolvent, is sufficient (Calahan v. Bank of Kentucky, 82 Ky. 231). Notice addressed to the indorsers at their former place of business where their affairs are being settled up by an assignee is sufficient (Casco Bank v. Shaw, 79 Me. 376, 10 A. 67,

tested.[13] Protest does not affect the liability of the maker.[14] In order to be effectual, protest must be made and notice given by one with authority[15] on the date of maturity.[16]

The certificate of protest as evidence.[17]—The certificate must show that proper presentment was made and due notice of dishonor given.[18] The certificate is evidence of a demand,[19] but not of collateral facts stated therein.[20] Statutes generally indicate the value of the certificate as evidence.[21] In New York if an affidavit of nonservice is not filed,[22] it is presumptive evidence of facts certified therein.[23] In New Jersey it is only admissible as to facts therein certified, when a copy has been annexed to the complaint,[24] and not then when the other party gives notice that he intends to dispute the fact of due presentment and dishonor.[25]

Form and sufficiency of notice.[26]—Notice to the indorser must expressly or impliedly show presentment to and dishonor by the maker, but need not state that the indorser is looked to for payment.[27] Notice may be served by mail.[28]

Parties entitled to notice.[29]—Parties primarily liable are not entitled to protest and notice thereof,[30] but if they are misled by the holder they will be discharged to the extent of damage sustained.[31]

An agent for collection who fails to fix the liability of an indorser by giving him notice of nonpayment is liable to his principal for such loss as is sustained.[32] The measure of damages depends on the inability of the principal to collect from the maker.[33] Evidence of the maker's inability to pay is admissible.[34]

1 Am. St. Rep. 319), since it is held that the assignee stands in the shoes of his assignor (American Nat. Bank v. Junk Bros. Lumber & Mfg. Co., 94 Tenn. 624, 30 S. W. 753, 28 L. R. A. 492). The court in the above case, saying that the question under discussion had prior to that time arisen in only three American cases, citing House v. Vinton Nat. Bank, 43 Ohio St. 346, 1 N. E. 129, 54 Am. Rep. 813, and Casco Nat. Bank v. Shaw, and Callahan v. Bank, supra.

Notice to insolvent maker, indorser or accommodation payee: Notice to the drawer of a bill, after being adjudged a bankrupt, none being given to the trustee then appointed is sufficient. Ex parte Baker, L. R. 4 Ch. Div. 795. Notice to the indorser and not to his assignee where the holder resides in another state and has no knowledge of the assignment was held sufficient in Donnell v. Lewis County Sav. Bank, 80 Mo. 165.—From note to Taylor v. Citizens' Sav. Bank [Ky.] 61 L. R. A. 900.

13. In land bills. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

14. An indorser who pays the paper at maturity on failure of the maker to do so can recover from the maker, though the note was not protested. McGowan v. Hover, 45 Misc. 138, 91 N. Y. S. 892.

15. See 2 Curr. L. 1026, n. 83 et seq. Hofrichter v. Enyeart [Neb.] 99 N. W. 658.

16. In this case it was made one day too late. Redden v. Lambert, 112 La. 740, 36 So. 668.

17. See 2 Curr. L. 1026.

18. Mason v. Kilcourse [N. J. Law] 59 A. 21.

19. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575.

20. Under Rev. St. 1899, § 463, providing that it is evidence of demand, and refusal to pay it is not evidence of the fact stated therein that the reason for refusal was lack of funds of the drawer. Nelson v. Kastle, 105 Mo. App. 187, 79 S. W. 730. Under the law merchant it is not the notary's duty to give notice of dishonor, and his certificate that he did is not even prima facie evidence of such fact. Schofield v. Palmer, 134 F. 753.

21. See 2 Curr. L. 1026, n. 79.

22. Recovery cannot be had against one entitled to notice of dishonor who has filed an affidavit of nonservice with his answer without proof of service. Singer v. Pollock, 91 N. Y. S. 755.

23. When the defendant, indorser, does not file an affidavit to the effect that he has not received notice as shown by the certificate in evidence, service on him will be deemed to have been made. German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. S. 142.

24. Section 21 (Revision of 1900, p. 367). Mason v. Kilcourse [N. J. Law] 59 A. 21.

25. Mason v. Kilcourse [N. J. Law] 59 A. 21.

26. See 2 Curr. L. 1026.

27. Sessions & Co. v. Isabel, 2 Ohio N. P. (N. S.) 288.

28. Certificate of protest mailed to the indorser. German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. S. 142.

29. See 2 Curr. L. 1026, also 2 Curr. L. 1025, n. 61.

30. Makers. Keyser v. Warfield [Md.] 59 A. 189. The drawer of an inland bill. Bank of Richland v. Nicholson, 120 Ga. 622, 48 S. E. 240.

31. Holder of an inland bill told the drawer that it had been paid. Bank of Richland v. Nicholson, 120 Ga. 622, 48 S. E. 240.

32, 33. Howard v. Bank of Metropolis, 95 App. Div. 342, 88 N. Y. S. 1070.

§ 11. *New promise after discharge and waiver of non-presentment or the like.*[35]—Presentment and demand may be waived orally, in writing or by conduct.[36] If an indorser waives diligence in pursuing the maker, any delay short of the period of limitations does not relieve him.[37]

§ 12. *Accommodation paper.*[38]—Accommodation paper has no legal inception until title has passed from the accommodated party.[39] An accommodation indorser is a creditor of the party accommodated before payment.[40] The benefit accruing to the person accommodated is a sufficient consideration to sustain the liability of an accommodation maker or indorser.[41] The terms of the indorsement cannot be varied by parol.[42]

As a general rule a corporation has no power to issue accommodation paper.[43]

Liability of accommodation parties.[44]—An accommodation maker is liable to the holder[45] or to an indorsee with notice of the character of his indorsement,[46] unless he have notice of the want of capacity of the indorser.[47] One taking accommodation paper is bound by the terms of his contract with the indorser,[48] and

34. Evidence that the maker was heavily indebted, names of his creditors and amount of their claims. Howard v. Bank of Metropolis, 95 App. Div. 342, 88 N. Y. S. 1070.

35. See 2 Curr. L. 1027.

36. Sessions & Co. v. Isabel, 2 Ohio N. P. (N. S.) 288.

37. Williams Bros. v. Rosenbaum [Tex. Civ. App.] 79 S. W. 594.

38. See 2 Curr. L. 1027.

39. Where discounted at a usurious rate of interest, it is void in the hands of the party discounting it. Simpson v. Hefter, 42 Misc. 482, 87 N. Y. S. 243.

40. A transfer of property to him as security by the debtor is an act of bankruptcy. In re O'Donnell, 131 F. 150.

41. First Nat. Bank v. Lang [Minn.] 102 N. W. 700, citing 2 Curr. L. 1027, 1028. The signing of accommodation paper by joint makers is a sufficient consideration to support each other's promise to pay his proportion of the debt, but the secondary liability of such joint makers as sureties for the others' proportion of the debt is without consideration [Code Civ. Proc. § 1605]. Kellogg v. Lopez [Cal.] 78 P. 1056.

42. A parol agreement by a bank which discounted an accommodation note that it would look to the person for whose benefit it was made for payment cannot be shown to defeat an action on the note. Earle v. Enos, 130 F. 467.

43. See 2 Curr. L. 1027, n. 94. A manufacturing corporation was not given this power by Negotiable Instruments Law. Oppenheim v. Simon Reigel Cigar Co., 90 N. Y. S. 355.

NOTE: A corporation has no power to issue or indorse accommodation paper. National Park Bank of New York v. German-American Mut. Warehousing & Security Co., 116 N. Y. 281; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Pick v. Ellinger, 66 Ill. App. 570, but it cannot set up its want of power as against a bona fide purchaser. Jacobs Pharmacy Co. v. Southern Banking & Trust Co., 97 Ga. 573. Compare Ex parte Estabrook, 2 Low. 547, Fed. Cas. No. 4,534. See Clark & M. Corp. § 218.

44. See 2 Curr. L. 1028.

45. A executed a note for the accommodation of B, payable to a bank. The bank refused to discount it and C did. Held, C could recover from "A" as could the bank had it discounted it. Bull v. Latimer [Tex. Civ. App.] 80 S. W. 252.

Note: The result of the principal case is open to the technical objection, deemed fatal in many jurisdictions, that the note in the hands of the plaintiff is really not a valid instrument, since it has never been delivered to the payee. First Nat. Bank of Centralia v. Strange, 72 Ill. 559. Some courts, however, hold that it is desirable to let the plaintiff recover on the note, because the object of the note being merely to raise money, it must ordinarily be immaterial to the maker by whom it is discounted. Accordingly, a number of jurisdictions allow recovery, but require the suit to be brought in the name of the payee. Bank of Rutland v. Buck, 5 Wend. [N. Y.] 66. If recovery is to be allowed at all in such a case, the Texas court seems logical in allowing the plaintiff to bring the action in his own name; for the bank having refused to discount the note can have no more property in it than the plaintiff, and so no technical consistency is gained by requiring the action to be brought in its name.—18 Harv. L. R. 145.

46. German-American Sav. Bank v. Hanna [Iowa] 100 N. W. 57. Notice to an indorsee does not entitle the maker to set up want of consideration. Earle v. Enos, 130 F. 467.

47. Where one takes paper from the maker bearing the indorsement of the payee manufacturing corporation, he is charged with notice that it is accommodation paper. Oppenheim v. Simon Reigel Cigar Co., 90 N. Y. S. 355.

48. A president of a corporation made his personal note as collateral for a loan to the corporation under an agreement that the bank discounting the note should look to the corporation for payment. Held, that before demand for payment from the corporation the maker was not liable. Kennett Square Nat. Bank v. Shaw, 209 Pa. 313, 58 A. 622. Where an affidavit of defense sets up a collateral contract and facts de hors, the record tending to show nonliability rights of the parties will not be determined on a rule for judgment. Gallice v. Crilly,

an indorsee who takes it as collateral security is limited in his recovery to the amount of the debt secured.[49] An officer of a bank discounting accommodation paper in which he himself is interested cannot bind the bank by an agreement with the accommodation maker or indorser.[50] One accommodation indorser is not liable to another except on his contract to give credit to the maker.[51] Where the agreement between a maker and one accommodation indorser was entirely separate from his agreement with another, there was no privity between such indorsers, and a judgment against one who gave notice to the other to defend did not estop the latter from claiming nonliability by reason of a diversion of the paper.[52] An accommodation indorser may set up defenses available to the maker.[53]

§ 13. *The doctrine of bona fides. Who may be a holder.*[54]—To be a bona fide holder one must take in the usual course of business[55] before maturity,[56] for a valuable consideration,[57] without knowledge of facts impeaching the validity of the paper as between the original parties and his indorser,[58] and without knowledge of facts that would lead a prudent man to suspect its invalidity.[59] The paper must be properly indorsed,[60] unless it be payable to bearer.[61]

Once bona fide holdership always bona fide holdership.[62]—An indorsee from a bona fide holder takes free from the equities existing between the original parties, though he have notice of them,[63] and acquires the paper after maturity;[64] but this principle does not apply where one with notice of equities which would be a defense as to him transfers to a bona fide holder and subsequently acquires the paper.[65]

134 F. 983. An accommodation indorser is not liable to the payee except on his special agreement to give the maker credit. Corn v. Levy, 93 App. Div. 618, 87 N. Y. S. 768.

49. Mersick v. Alderman [Conn.] 60 A. 109.

50. Where the president of a bank agrees with the maker of a note discounted by the bank for the benefit of a corporation, of which the maker and bank president were both officers, that the maker shall not be held liable, such agreement is no defense to an action on the note. The maker knowing that the interest of the president in the corporation was in conflict with his duties to the bank. Bank of Le Roy v. Purdy, 91 N. Y. S. 310.

51. In an action by one accommodation indorser who had paid the note to the payee against another, an answer alleging that it was not indorsed for the purpose of making it payable to the payee but for another purpose states a defense. Corn v. Levy, 93 App. Div. 618, 87 N. Y. S. 768. In an action by one accommodation indorser who had been compelled to pay the note against another, an answer alleging that the note was indorsed under circumstances which showed a diversion is bad unless it specifies when plaintiff became aware of the diversion. Id., 97 App. Div. 48, 89 N. Y. S. 658.

52. Corn v. Levy, 93 App. Div. 618, 87 N. Y. S. 768.

53. Want of consideration. Leonard v. Draper [Mass.] 73 N. E. 644.

54. See 2 Curr. L. 1028.

55. Evidence held to show one a bona fide holder. National Bank of Commerce v. Kenney [Tex.] 83 S. W. 368.

56. One taking overdue paper is not a bona fide holder. Board of Sup'rs of Issaquena County v. Anderson [Miss.] 38 So. 47.

57. Want of consideration is a defense as against an indorsee with notice. Mayes v. McElroy [Tex. Civ. App.] 81 S. W. 344. One taking paper for but a fraction of its face value is not. Board of Sup'rs of Issaquena County v. Anderson [Miss.] 38 So. 47.

58. Evidence held to show that an indorsee had notice of equities of the maker constituting a defense against his indorser. Andrews v. Fidelity Loan & Trust Co. [Va.] 48 S. E. 884.

59. One held not a bona fide holder who receives paper from a person who four days prior had perpetrated a fraud upon him. Capitol Sav. Bank & Trust Co. v. Montpelier Sav. Bank & Trust Co. [Vt.] 59 A. 827.

60. See 2 Curr. L. 1030, n. 29. One who takes by assignment as security for a debt is not a bona fide holder. Sathre v. Rolfe [Mont.] 77 P. 431.

61. A note to bearer is not subject to equities between the maker and transferees of the payee. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 A. 285.

62. See 2 Curr. L. 1028.

63. Weil v. Carswell, 119 Ga. 873, 47 S. E. 217. An answer alleging that an indorsee had notice of a defense but not alleging that his indorser had does not state a defense. Pryon & Son v. Rouhs, 120 Ga. 1060, 48 S. E. 434. One who has derived his title from a bona fide holder and was not himself a party to any fraud has all the rights of his indorser. Bryan v. Harr, 21 App. D. C. 190.

64. Under Neg. Inst. Law, § 97 (Laws 1897, p. 732, c. 612). Jennings v. Carlucci, 87 N. Y. S. 475.

65. One of the partners of a partnership payee acquired the paper after it had been in the hands of a bona fide holder. Weil v. Carswell, 119 Ga. 873, 47 S. E. 217.

Notice and knowledge.[66]—The paper must be taken without notice of infirmities[67] or defenses.[68] The notice must be of facts sufficient to impute bad faith.[69] A mere suspicion,[70] knowledge of his indorser's dishonesty in business matters,[71] or notice that the instrument is accommodation paper,[72] is insufficient. Notice of an agent is imputed to his principal,[73] unless their interests are adverse.[74] The doctrine of lis pendens has no application.[75] Notice may be established by facts and circumstances as well as by direct evidence.[76]

Taking in due course of business.[77]—A pledgee[78] or one discounting paper acquires it in due course.[79] A bank receiving from a depositor a check on another bank and giving him credit for the amount does not.[80]

Taking before maturity.[81]—One who takes paper after maturity is not a bona fide holder.[82]

Parting with value.[83]—An indorsee must part with value.[84] Paper transferred in settlement of a pending suit is for value.[85]

Rights of a bona fide holder.[86]—A bona fide holder takes free from equities between or defenses available to the original parties. Therefore paper in his hands is not subject to a set-off in favor of the maker.[87] Fraud,[88] want or failure[89]

66. See 2 Curr. L. 1029.

67. Notice of an alteration destroys his character as a bona fide holder. Fudge v. Marquell [Ind.] 72 N. E. 565. Good faith of a purchaser of promissory notes, from a guardian not material, where the sale was unauthorized. Merchants' & Clerks' Sav. Bank Co. v. Schirk, 5 Ohio C. C. (N. S.) 569.

68. Instruction ignoring defense of fraud and directing a verdict for defendant if paper had been materially altered is bad. John Stewart & Co. v. Andes [Mo.] 84 S. W. 1134.

69. Rev. Laws, c. 73, § 73. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959. A merchant who takes a check indorsed in blank from a customer he does not know without further indorsement or inquiry within a week after its issue is a bona fide holder under Neg. Inst. Law. Unaka Nat. Bank v. Butler [Tenn.] 83 S. W. 655. The fact that intermediate indorsement is scratched out and obliterated does not charge an indorsee with bad faith, such occurrence being explained. Goetting v. Day, 87 N. Y. S. 510. Bank receiving notes from a broker as collateral for his debts held a bona fide holder. Not charged with notice that the broker did not own the paper. Hamilton Nat. Bank v. Upton, 91 N. Y. S. 475.

70. The fact that an indorsee has a suspicion that his indorser is not an honest man is sufficient. Bank of Indian Territory v. First Nat. Bank [Mo. App.] 83 S. W. 537.

71. Evidence that the firm of which the indorser was a member had its place of business next door is immaterial. Setzer v. Deal, 135 N. C. 428, 47 S. E. 466.

72. First Nat. Bank v. Lang [Minn.] 102 N. W. 700.

73. Evidence held to show that an indorsee was not the principal of the payee so as to charge him with notice of equities existing against the paper. Thorpe v. Mindeman [Wis.] 101 N. W. 417.

74. Where the interest of the president of a bank in the discount of a note was adverse to the bank, his notice of an infirmity is insufficient to charge the bank. Davis v. Boone County Deposit Bank, 25 Ky. L. R. 2078, 80 S. W. 161.

75. Statute permitting the attachment of choses in action, whether due or not, and declaring void any transfer after filing of attachment bill, does not affect a bona fide holder. Kimbrough v. Hornsby [Tenn.] 84 S. W. 613.

76. John Stewart & Co. v. Andes [Mo. App.] 84 S. W. 1134. Letter written by the payee to the maker after transfer of the paper held admissible as showing that the indorsee did not take for value. Morris v. Brown [Tex. Civ. App.] 85 S. W. 1015.

77. See 2 Curr. L. 1030.

78. Watzlavzick v. Oppenheimer [Tex. Civ. App.] 85 S. W. 855.

79. Rev. Laws, c. 73, §§ 69-76, defining holders in due course. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959.

80. So long as the depositor's account remains sufficient to pay the check [Laws 1897, p. 732, c. 612, § 19]. Citizens' State Bank v. Cowles [N. Y.] 73 N. E. 33.

81. See 2 Curr. L. 1030.

82. Note given to the payee to be used as collateral is without consideration. Brown v. Smedley [Mich.] 98 N. W. 856.

83. See 2 Curr. L. 1030.

84. Under the Negotiable Instruments Law, where after execution of a note and mortgage the mortgagee refused to make the loan and the agent of the mortgagor who had endeavored to negotiate the loan caused an assignment of the mortgage to be made to him. Keegan v. Rock [Iowa] 102 N. W. 805. The maker having set up that the holder was not a bona fide indorsee, he may show want of consideration for the note. Morris v. Brown [Tex. Civ. App.] 85 S. W. 1015.

85. Tollman v. Quincy, 129 F. 974.

86. See 2 Curr. L. 1031.

87. As against the payee. Levy v. Avery, 91 N. Y. S. 67.

88. Benedict v. Kress, 97 App. Div. 65, 89 N. Y. S. 607. Neg. Inst. Law (Rev. Laws, c. 73, §§ 69-74). White v. Dodge [Mass.] 73 N. E. 549. Fraud or misrepresentation as be-

or illegality of consideration,[89] unless so declared by statute,[91] is no defense as against him, nor is the fact that the instrument is tainted with usury,[92] or has been paid to the original payee,[93] or is void as between the original parties,[94] or is accommodation paper.[95] Incapacity of an accommodation indorser to enter into such a contract is no defense,[96] nor is want of delivery[97] or the fact that the paper had been stolen.[98] That the certification of a check constituted a crime is no defense.[99]

Forgery,[1] unless ratified,[2] or a material alteration,[3] unless made possible by the negligence of the maker,[4] are defenses available against a bona fide holder. In Massachusetts[5] and under the Negotiable Instruments Law, if materially altered, it may be enforced according to its original tenor.[6]

A bona fide transferee takes title to collateral.[7] An indorsee who subsequently learns that paper was transferred to him for the purpose of freeing it from defenses must exercise available means to protect the maker.[8]

tween the parties. Martindale v. Stotler [Kan.] 77 P. 700.

89. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290. A plea setting up want of consideration but not averring that the indorsee took them with notice of such fact does not state a defense. Pyron & Son v. Ruohs, 120 Ga. 1060, 48 S. E. 434.

90. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

91. A note given for the right to sell a patented invention and not bearing on its face the words "Given for a patent right" as required by statute is void. Pinney v. First Nat. Bank [Kan.] 78 P. 151.

92. Civ. Code 1895, § 3694. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

93. Loizeaux v. Fremder [Wis.] 101 N. W. 423. The fact that a bona fide holder led the maker to believe that his indorser still owned the note does not estop the holder from denying the payee's ownership at a subsequent period. Id.

94. Payee was a foreign corporation and had not complied with § 3265, Rev. Code 1899, providing that every contract made without first having filed a copy of its articles with the secretary of state should be wholly void in its hands. National Bank of Commerce v. Pick [N. D.] 99 N. W. 63. Word "assigns" in this statute does not include a bona fide holder of a negotiable instrument. Id.

95. Mersick v. Alderman [Conn.] 60 A. 109. Under Negotiable Instruments Law. Willard v. Crook, 21 App. D. C. 237; Metropolitan Print. Co. v. Springer, 90 N. Y. S. 376; Tollman v. Quincy, 129 F. 974.

96. Willard v. Crook, 21 App. D. C. 237.

97. The payee of a check who indorses and loses it cannot recover from the bank who has paid it to a bona fide holder, though he has notified the bank of his loss. Unaka Nat. Bank v. Butler [Tenn.] 83 S. W. 655. The provision of Rev. Laws, c. 73, § 33, "Every contract on a negotiable instrument is revocable until delivery, has no application after delivery. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959.

98. Cochran v. Fox Chase Bank, 209 Pa. 34, 58 A. 117. Rev. Laws, c. 73, § 73, providing that in the hands of a bona fide holder a valid delivery by all prior parties is conclusively presumed. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959.

99. Prohibited and made a crime unless there are funds in bank sufficient to satisfy it. Union Trust Co. v. Preston Nat. Bank [Mich.] 99 N. W. 399.

1. Where the treasurer of a corporation without authority forges the name of the general manager who has authority to execute negotiable paper. Merchants & Farmers Cotton Oil Co. v. Lufkin Nat. Bank [Tex. Civ. App.] 79 S. W. 651. The fact that a party who forged another's name was deeply indebted to him and could set off the claim would not be grounds on which to entitle a bona fide holder of the paper to recover. Id.

2. The secretary of a corporation had authority to attest and affix its seal to negotiable instruments. The treasurer forged the name of the official authorized to execute and the secretary affixed the seal. Held, a bona fide holder could recover. Merchants & Farmers Cotton Oil Co. v. Lufkin Nat. Bank [Tex. Civ. App.] 79 S. W. 651.

3. Under a statute requiring place of payment to be designated, an insertion in compliance therewith is a material alteration. Carroll v. Warren [Ala.] 37 So. 687.

4. Leaving blanks which were filled in. Humphrey Hardware Co. v. Herrick [Neb.] 101 N. W. 1016. See, also, Yocum v. Smith, 63 Ill. 321, 14 Am. Rep. 120.

5. Rev. Laws, c. 73, § 141. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959.

6. Where payee of a check represented that it was lost and received and cashed another in place of it and then changed the first check to make it payable 10 days later, the holder can recover. Moskowitz v. Deutsch, 92 N. Y. S. 721.

7. White v. Dodge [Mass.] 73 N. E. 549.

8. After dishonor but prior to action he learned that the note was without consideration and had at the time in his hands sufficient funds of an indorser who ought to pay it, which could have been applied. State Bank v. Blakely & Co. [Tex. Civ. App.] 79 S. W. 331.

A non-negotiable instrument requires no compliance with statute in order to let in equitable defenses available between the parties.[9]

Burden of proof.[10]—The holding of one in possession of paper regularly indorsed is presumed to be bona fide,[11] and unless the paper bears on its face notice of infirmities, the holder need not prove in the first instance that his holding is bona fide;[12] but where the defendant sets up fraud or illegality,[13] that the instrument has been negotiated in violation of a contract between the parties,[14] that the consideration was illegal,[15] denies under oath the genuineness of his indorsement,[16] or it is shown that the title of one negotiating the instrument is defective,[17] the burden is on the holder to show that he is a bona fide indorsee.[18] On conflicting evidence, the question whether or not one is a bona fide holder is for the jury.[19] The maker setting up failure of consideration has the burden of proving it.[20]

§ 14. *Remedies and procedure peculiar to negotiable paper.*[21]—Equity will not restrain the transfer of a negotiable instrument,[22] but may decree the cancellation of a forged instrument if its existence will cause embarrassment.[23] An action at law may be maintained on a lost instrument.[24]

Parties.[25]—An action cannot be maintained on a note to which neither plaintiff nor defendant is a party.[26] Where makers are severally liable, any or all of them may be sued.[27]

9. See Non-Negotiable Paper, 4 Curr. L. 827.

That a note not payable in bank did not bear on its face notice that it was given for a patent right. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287.

10. See 2 Curr. L. 1032.

11. In due course. Towles v. Tanner, 21 App. D. C. 530. Negotiable Instruments Law construed. Bryan v. Harr, 21 App. D. C. 190. And where the maker claims he is not a bona fide holder, the burden is on him to prove it. Price v. Winnebago Nat. Bank [Okl.] 79 P. 105. In the absence of a verified denial of an indorsement or of testimony to the contrary, an indorsee is presumed to be a bona fide holder. Scott v. Geiser Mfg. Co. [Kan.] 78 P. 823. A bill of lading with draft attached for price of goods transferred by unrestricted endorsement raises a presumption that the indorsee is a bona fide purchaser of the draft for value without notice of defenses in favor of the drawee or consignee. Willard Mfg. Co. v. Tierney, 133 N. C. 630, 45 S. E. 1026.

12. Alterations. Towles v. Tanner, 21 App. D. C. 530. A plea of forgery does not place on the holder the burden of showing that it was not forged. Id.

13. Stewart & Co. v. Andes [Mo.] 84 S. W. 1134; Kennedy v. Gibson, 68 Kan. 612, 75 P. 1044. Under Neg. Inst. Law. Consolidation Nat. Bank v. Kirkland, 99 App. Div. 121, 91 N. Y. S. 353. Evidence held insufficient to show that plaintiff was a bona fide holder. Did not pay a consideration. Id.

14. Under Neg. Inst. Law. German-American Bank v. Cunningham, 97 App. Div. 244, 89 N. Y. S. 836.

15. Askegaard v. Dalen [Minn.] 101 N. W. 503; Orr v. South Amboy Terra Cotta Co., 92 N. Y. S. 521.

16. James v. Blackman, 68 Kan. 723, 75 P. 1017.

17. Under Neg. Inst. Law, where it is shown that the title of a person who has negotiated an instrument is defective, the burden is on the holder to show that he acquired title in due course. Keegan v. Rock [Iowa] 102 N. W. 805.

18. It having been shown that as between the original parties the note had been fraudulently put in circulation. Mendenhall v. Ulrich [Minn.] 101 N. W. 1057; State Bank of Indiana v. Cook [Iowa] 100 N. W. 72. Where the indorser from whom he received it had perpetrated a fraud on him four days before the transfer of the paper in question, evidence held to show he was not a bona fide holder. Capital Sav. Bank & Trust Co. v. Montpelier Sav. Bank & Trust Co. [Vt.] 59 A. 827. Without notice that the paper is usurious. Simpson v. Hefter, 42 Misc. 482, 87 N. Y. S. 243.

19. Error to direct a verdict. Padget v. O'Connor [Neb.] 98 N. W. 870. Question of bona fide holdership held one for the jury. State Bank of Ind. v. Cook [Iowa] 100 N. W. 72.

20. He having failed to sustain the burden, it was proper to direct verdict for plaintiff. Gould v. Small [Ga.] 49 S. E. 723. Evidence held not to show fraud or mistake where one signed notes without reading them. Poindexter v. McDowell [Mo. App.] 84 S. W. 1133. Directed verdict proper. Id.

21. See 2 Curr. L. 1033.

22. Where an instrument is transferred to a bona fide holder in violation of an agreement not to negotiate it, the maker has a cause of action at law against the transferror. Detwiler v. Bainbridge Grocery Co., 119 Ga. 981, 47 S. E. 553.

23. Though there is a perfect defense. Ritterhoff v. Puget Sound Nat. Bank [Wash.] 79 P. 601.

24. It is doubtful whether Gen. St. p. 2605, providing that a court of law may entertain an action on a lost "promissory note" and give the same judgment as if the note had not been lost, applies to instruments other than promissory notes. Clinton Nat. Bank v. Stiger [N. J. Eq.] 58 A. 1055.

25. See 2 Curr. L. 1034.

A citation which states the nature of the demand is sufficient.[28]

Pleading.—The complaint[29] may set out the instrument by copy[30] or plead it according to its legal effect.[31] It is not necessary to file the original note with the declaration.[32] A note filed with the original complaint is still a part of the complaint when amended by making a copy with the amendatory words added, though not refiled.[33] It is not necessary to allege that it was executed in the usual course of business,[34] nor the nature of the debt evidenced.[35] If pleaded by copy an allegation of a promise to pay is unnecessary,[36] as is an allegation of consideration if the instrument contain "value received."[37] It is not necessary to allege facts made apparent by the action.[38] The payee need not allege that he is the owner.[39] An allegation that the paper was duly "assigned, indorsed and delivered" is an allegation that it was transferred in the usual course of business for value before maturity.[40] An allegation that the instrument was executed is an allegation that it was signed.[41] Payment as a defense must be pleaded.[42] The complaint must be good on the theory upon which the action is brought.[43] A declaration by an indorsee failing to state that the instrument was payable to order may be aided by a bill of particulars setting forth the instrument.[44]

The answer.[45]—The answer must be sufficient as against the instrument declared on.[46] The general issue is not a denial of the execution of an instrument under a statute providing that execution is deemed admitted unless denied.[47] Under a statute providing that the consideration is open to inquiry, an answer need not set up facts showing want of consideration.[48] An answer setting up new

26. Defendant handed a stranger's note to plaintiff, who had it discounted and loaned the proceeds to defendant; an action to recover the money could not be maintained on the note. Kapiloff v. Feist, 91 N. Y. S. 27.

27. Code Civ. Proc. § 44. Palmer v. McFarlane [Neb.] 102 N. W. 256.

28. Citation which gives date and amount of note, when due, and states that it stipulates for 10 per cent interest and also for attorney's fees and sets up the execution of a chattel mortgage, is sufficient [Batts' Ann. St. art. 1214]. McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857.

29. See 2 Curr. L. 1034.

30. Complaint on promissory note held sufficient. Palmer v. McFarlane [Neb.] 102 N. W. 256.

31. Complaint by the indorsee of a promissory note held sufficient. McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857.

32. It is sufficient if it be produced at the trial or other proceeding. Finney v. Penn. Iron Works Co., 22 App. D. C. 476.

33. Abbott v. Bowers, 98 Md. 525, 57 A. 538.

34. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

35. Note executed by a corporation. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

36. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

37. Ullery v. Brohm [Colo. App.] 79 P. 180.

38. In an action on a note providing for attorney's fees in case suit be brought, it is not necessary to allege that action has been brought. McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857.

39. In an action by the payee. Ullery v. Brohm [Colo. App.] 79 P. 180.

40. Under a general denial the defendant can show that the holder had knowledge of defenses between the original parties or that he took it after maturity. Hodgson v. Mather, 92 Minn. 299, 100 N. W. 87.

41. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

42. A general denial does not raise the issue. First Nat. Bank v. Jennings, 44 Misc. 374, 89 N. Y. S. 995.

43. A complaint seeking to establish the negotiable character of a note under the law of the state where it is payable is not good as stating a cause on a non-negotiable note. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

44. Finney v. Penn. Iron Works Co., 22 App. D. C. 476.

45. See 2 Curr. L. 1034. Where an indorsee guarantied an instrument and was required to pay it, in an action to recover from the maker an affidavit of defense which states that plaintiff should have declared as guarantor and not as an indorser does not state a defense. Finney v. Penn. Iron Works Co., 22 App. D. C. 476. Answer attempting to plead a breach of contract in which notes sued on were given held insufficient. No allegation of any specific breach or set-off. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903.

46. General allegations denying that the copy note attached to the complaint is not an exact copy of the note defendant gave plaintiff and denying that defendant is indebted to plaintiff presents no valid defense to the note sued on. Camp v. Young, 119 Ga. 981, 47 S. E. 560.

47. Code Pub. Gen. Laws, art. 75, § 24. Abbott v. Bowers, 98 Md. 525, 57 A. 538.

48. Under Code 1896, § 1800, an answer

matter not constituting a defense is frivolous.[49] An answer alleging no consideration, but setting up specific facts from which it is apparent that there is a consideration, is demurrable.[50] Denial of delivery or that there is anything due does not set up new affirmative matter making a reply necessary.[51] An answer setting up fraud and denying the plaintiff's ownership states a defense,[52] and is not inconsistent with a plea of non est factum.[53]

Defenses.—The maker cannot defend on the ground that it was beyond the powers of the payee to take the paper,[54] nor because of breach of a contract of the payee not to negotiate.[55] A claim arising ex delicto cannot be set up.[56] Where several signers are jointly liable, but one is principal and the others are sureties, the principal may set off any claim due him from the holder.[57] A defense that an assignee is not the real party in interest is established only by showing that payment to him would not protect the maker against further liability.[58] The establishment of a lost instrument is no bar to any defense that might be set up to the original note.[59]

Forgery, if established,[60] constitutes a complete defense,[61] unless the signature is ratified[62] or adopted;[63] but the forgery of the signature of one joint maker is no defense to the others.[64] The assertion of forgery by the alleged maker is not conclusive.[65] Evidence of the circumstances of the parties at the time of the alleged execution is admissible.[66] Comparison of genuine with alleged spurious

by an acceptor. Ragsdale v. Gresham [Ala.] 37 So. 367.

49. Where a complaint alleges execution by defendant and the answer contains a general denial and new matter not constituting a defense, such answer is frivolous if it clearly appears that the defendant did execute the instrument. First Nat. Bank v. Lang [Minn.] 102 N. W. 700. Where a complaint by an indorsee alleges that the payee indorsed the instrument to him and that he is the owner thereof, an answer denying that defendant has information or belief whether plaintiff is the lawful holder or that they were transferred to him is frivolous. First Nat. Bank v. Jennings, 44 Misc. 374, 89 N. Y. S. 995.

50. Metz v. Winne [Okl.] 79 P. 223.

51. Bode v. Werner, 4 Ohio C. C. (N. S.) 158.

52. That plaintiff's name was erroneously written in the note as payee. The defendants' illiteracy. Broyles v. Absher [Mo. App.] 80 S. W. 703.

53. Broyles v. Absher [Mo. App.] 80 S. W. 703.

54. Corporation payee denied this power. Russell v. Cassidy [Mo. App.] 84 S. W. 171.

55. No defense to the note in the hands of one with notice of the promise, it not appearing that the maker had any other defense. State Bank v. Mentzer [Iowa] 100 N. W. 69.

56. Ray v. Anderson, 119 Ga. 926, 47 S. E. 205.

57. Comp. Laws 1897, § 10,075, subd. 6. McGraw v. Union Trust Co. [Mich.] 99 N. W. 758.

58. Evidence held to show that the maker would have been protected from further liability. Greene v. McAuley [Kan.] 79 P. 133.

59. Payment made prior to the judgment establishing the copy may be pleaded. Jenkins v. Forbes, 121 Ga. 383, 49 S. E. 284.

60. Evidence held to show that a corporation had authorized its general manager to execute negotiable paper. Merchants & Farmers Cotton Oil Co. v. Lufkin Nat. Bank [Tex. Civ. App.] 79 S. W. 651. Evidence held to show that the manager of a firm had authority to sign notes. Fordville Banking Co. v. Thompson [Ky.] 82 S. W. 251.

61. Evidence held to show that a check was forged. Evidence insufficient to show agent's authority to execute. Schoor v. Doctor, 88 N. Y. S. 130.

62. Where parties whose names had been signed by another were immediately notified by the payee and they did not repudiate the same until after maturity of the paper and the principal maker had died hopelessly insolvent, it was held that they had ratified such signatures. Corner Stone Bank v. Rhodes [Ind. T.] 82 S. W. 739.

63. Delivery by the apparent maker is an adoption of the signature by whoever made. Harris v. Tinder [Mo. App.] 83 S. W. 94. Evidence that the alleged maker delivered it as his note and thereby adopted the signature is admissible without a plea of ratification or estoppel. Id.

64. Rocky Mount Loan & Trust Co. v. Price [Va.] 49 S. E. 73.

65. Instruction to such effect does not give undue prominence to such testimony. Sanders v. North End Bldg. & Loan Ass'n, 178 Mo. 674, 77 S. W. 833.

66. That the maker was in need of funds. Gandy v. Bissell's Estate [Neb.] 100 N. W. 803. In an action by the assignee, evidence of the payee's poverty soon after the note was executed is inadmissible where the note had been assigned prior to such time. Miller v. Stebbins [Vt.] 59 A. 844. Where the genuineness is denied and the subscribing witness testifies that he saw the maker sign and that he and others signed as subscribing witnesses, the question is for the jury. Groff v. Groff, 209 Pa. 603, 59 A. 65.

signature in issue is for the jury.[67] Genuine lead pencil signature may be used for comparison.[68] Payment of other alleged forged notes may be rebutted by proof that it was made in ignorance of rights.[69]

Evidence. Presumptions and burden of proof.[70]—Every negotiable instrument is presumed to have been issued for a valuable consideration,[71] though it does not contain "value received."[72] One in possession of paper is presumed to be the owner.[73] The maker cannot inquire into the title of the holder unless necessary for his protection or to let in a defense which he seeks to make.[74] Nonpayment is presumed from the payee's possession.[75] Proof of execution of the notes establishes a prima facie case[76] and casts the burden of proving payment on the maker;[77] but if execution is denied under oath, it must be shown that the alleged maker either signed or authorized his signature to be affixed.[78] Payments indorsed on a note are presumed to have been made by the maker,[79] and an extension agreement, a part of the contract evidenced.[80]

An instrument is admissible as tending to show an indebtedness and to rebut any presumption or claim of a greater indebtedness.[81] An admission by the holder that the face of the note is in excess of the true indebtedness discredits it as evidence.[82]

Evidence admissible generally.[83]—A material alteration[84] or fraud and substitution of instruments may be shown under a plea of non est factum.[85] A

Upon defense of forgery, evidence that payee had placed money with maker is admissible. Sanders v. North End Bldg. & Loan Ass'n, 178 Mo. 674, 77 S. W. 833.

67, 68. Groff v. Groff, 209 Pa. 603, 59 A. 65.

69. Kingsbury v. Waco State Bank, 30 Tex. Civ. App. 387, 70 S. W. 551.

70. See 2 Curr. L. 1033, n. 76; Id. 1035.

71. Towles v. Tanner, 21 App. D. C. 530. In an action on a check by the payee, evidence held insufficient to overcome the presumption of delivery and consideration created by Neg. Inst. Law, Laws 1897, pp. 725, 727, c. 612, §§ 35, 50. Moak v. Stevens, 45 Misc. 147, 91 N. Y. S. 903. In an action on a lost note, evidence held to show that it was executed by defendant. Day v. Long [Ky.] 80 S. W. 774. Evidence that the alleged maker delivered it as his note in substitution for another note of like amount establishes a prima facie case. Harris v. Tinder [Mo. App.] 83 S. W. 94.

72. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832.

73. Possession of a negotiable note is prima facie evidence of delivery and ownership. Gandy v. Bissell's Estate [Neb.] 100 N. W. 803; Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959. A bearer is the person in possession [Rev. Laws, c. 73, § 207]. Massachusetts Nat. Bank v. Snow [Mass.] 72 N. E. 959.

74. Ray v. Anderson, 119 Ga. 926, 47 S. E. 205.

75. Sarraille v. Calmon, 142 Cal. 651, 76 P. 497. Presumption of nonpayment from possession of the paper unindorsed by the payee is not overcome by unsupported testimony of the maker that it had been paid. Collins v. Maude, 144 Cal. 289, 77 P. 945. Possession of a note and evidence of collateral security by the creditor's representatives placed on the debtor's representatives the burden of showing payment and explaining such possession. Brown v. Bronson, 93 App. Div. 312, 87 N. Y. S. 872.

76. There being no proof of want of consideration, the plaintiff did not have the burden of proving it. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Where the maker admits execution, he has the burden of proving payment. Royster Guano Co. v. Marks, 135 N. C. 59, 47 S. E. 127. In Michigan, if the instrument is sued on in the justice court and is filed with the complaint, its execution is deemed admitted unless denied under oath. Naftzker v. Lantz [Mich.] 100 N. W. 601. Putting a promissory note in evidence in a suit thereon establishes a prima facie case and casts the burden on defendant. Bode v. Werner, 4 Ohio C. C. (N. S.) 158. An admission that a note signed by a firm name was executed is an admission that a co-partnership existed. Naftzker v. Lantz [Mich.] 100 N. W. 601.

77. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Where execution of notes was denied by the estate of the maker, evidence held for the jury. Id.

78. Harris v. Tinder [Mo. App.] 83 S. W. 94; Fudge v. Marquell [Ind.] 72 N. E. 565.

79. For the purpose of tolling the statute of limitations. Gehres v. Orlowski [Wash.] 78 P. 792.

80. An entry on the back of the note purporting to have been made at date of maturity "This note is stayed for twelve months by agreement" signed by the surety is presumed to be a part of the contract evidenced. Cook v. Landrum [Ky.] 82 S. W. 585. An inference of its genuineness arises from the fact that the indulgence was given. Id.

81. Leask v. Dew, 92 N. Y. S. 891.

82. Hollins v. American Union Elec. Co. [N. J. Eq.] 56 A. 1041.

83. See 2 Curr. L. 1035.

84. Fudge v. Marquell [Ind.] 72 N. E. 565.

85. Under the plea of non est factum the defendant may prove that through his illiteracy, by misreading the paper to him or

fraudulent alteration may be shown under a general denial.[88] An indorser cannot impeach his indorsee's title by testifying to a defect in his own.[87] The terms of a written contract of which it was the consideration cannot be varied by parol.[88]

A judgment will bear interest at the rate specified in the instrument; if no rate is specified, at the legal rate of the state where the instrument is payable.[89]

Indemnifying maker of lost instrument.[90]—A statute providing for an indemnity bond where action is brought on a lost instrument does not apply to non-negotiable paper.[91] Equity will enjoin an action if there has been an offer of payment, if indemnity be given.[92]

NEUTRALITY; NEW PROMISE, see latest topical index.

NEWSPAPERS.

Rendition of services as official newspaper without legal selection as such gives no right to compensation.[93] Where the selection of two papers is required by statute, the selection of eight does not operate as a selection of the two first named, but is wholly void.[94] Where a selection to cure a prior invalid one fixed a lower price, such reduction is not accepted under duress because the publisher is told that another paper will be selected if he does not accept.[95] Under the New York statute, the compensation of papers publishing election notices is not subject to the limitation imposed on papers publishing session laws.[96]

NEW TRIAL AND ARREST OF JUDGMENT.[1]

§ 1. Nature of the Remedy by New Trial and Right to It (811).
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A. In General (812).
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The grant of new trials by reviewing courts,[2] the necessity of objection and exception,[3] the determination whether error has been in fact committed,[4] and of

other fraudulent device, an instrument other than the one he intended to sign was wrongfully substituted. Broyles v. Absher [Mo. App.] 80 S. W. 703.

86. Gandy v. Bissell's Estate [Neb.] 100 N. W. 803.

87. Declarations of a person to whom a note was given, that it was given as a memorandum and not to be negotiated, are not admissible against his indorsee. Mitchell v. Baldwin, 88 App. Div. 265, 84 N. Y. S. 1043.

88. Blanks v. Moore, 139 Ala. 624, 36 So. 783.

89. Schofield v. Palmer, 134 F. 753.

90. See 2 Curr. L. 1036.

91. Action to compel the reissue of a lost non-negotiable certificate of deposit. Zander v. New York Security & Trust Co., 39 Misc. 98, 78 N. Y. S. 900, affd. 81 N. Y. S. 1151.

92. Clinton Nat. Bank v. Stiger [N. J. Eq.] 58 A. 1055.

93. Services were rendered pending an appeal from a selection of plaintiff, on which appeal a competitor was selected. Smith v. Van Buren County [Iowa] 101 N. W. 186. The fact that the paper selected was denied compensation because it performed no services does not alter the case. Id.

94, 95. Ford v. Board of Sup'rs of Delaware County, 92 App. Div. 119, 87 N. Y. S. 407.

96. Laws 1892, p. 1750, provides that the compensation for publishing session laws shall be fixed within certain limits, and in a subsequent section that the board shall "in like manner" designate the papers to publish election notices and fix their compensation. Ford v. Board of Sup'rs of Delaware County, 92 App. Div. 119, 87 N. Y. S. 407.

1. See 2 Curr. L. 1037.

2. See Appeal and Review, 3 Curr. L. 167.

3. See Saving Questions for Review, 2 Curr. L. 1590.

whether error is harmless or was cured by subsequent proceedings,[5] are elsewhere treated.

§ 1. *Nature of the remedy by new trial and right to it.*[6]—The right to grant a new trial is to be exercised to promote justice,[7] as to protect a party's constitutional right to a review by the supreme court,[8] when it is impossible to perfect the record[9] so as to give the appellate court a chance to review.[10] A new trial may be refused in a court case,[11] but it will be granted though the case is necessarily for the jury,[12] unless there is a clear preponderance of testimony, when judgment will be directed.[13] It may be ordered on one issue,[14] or allowed where there was a mistrial,[15] unless it was such that there was no trial.[16] Where the jury was discharged at the close of the testimony and the court took the case under advisement as one involving only questions of law, it is proper for the court to order a new trial on becoming convinced that an issue of fact is involved.[17] A motion to set aside a judgment by default is not a motion for a new trial,[18] though in the nature of one.[19] Motion for a new trial does not raise the question of conflict between the general verdict and the special findings, where there has been no motion for a judgment non obstante veredicto.[20] The order granting a new trial will not be disturbed on appeal unless abuse is shown,[21] as the appellate courts are more reluctant to interfere where one is granted than where one is refused;[22] but the ruling of the successor of the trial judge does not carry the usual presumption on appeal.[23] Failure to demand a new trial precludes consideration by a reviewing court of many matters for which a new trial might have been had.[24]

4. See Argument of Counsel, 3 Curr. L. 306; Evidence, 3 Curr. L. 1334; Instructions, 4 Curr. L. 133; Trial, 2 Curr. L. 1907, and like topics.

5. See Harmless and Prejudicial Error, 3 Curr. L. 1579.

6. See 2 Curr. L. 1038.

7. New trial in divorce, where guardian ad litem of opponent's selection failed to make a proper defense. Frieseke v. Frieseke [Mich.] 101 N. W. 632.

8. Where right to review lost by his inability to procure a transcript. Zweibel v. Caldwell [Neb.] 99 N. W. 843.

9. The trial judge and parties were unable to return the minutes, and the stenographer could not be found. Doane Steam Pump Co. v. Roch, 92 N. Y. S. 35.

10. Acts 1903, p. 341, c. 193, § 8, providing that the appellate courts shall in cases not triable by jury, carefully consider the weight of evidence, if required to by an assignment of error, does not contemplate a trial de novo, but the judgment below will be presumed correct until the contrary is affirmatively shown. Parkison v. Thompson [Ind.] 73 N. E. 109.

11. The remedy lies in an appeal from the judgment [Code Civ. Proc. § 1346]. Simpson v. Hefter, 43 Misc. 608, 88 N. Y. S. 282.

12. Walker v. Newton Falls Paper Co., 90 N. Y. S. 530. Granting a new trial involves discretion; directing a verdict is a matter of right. Larkin v. United Traction Co., 76 App. Div. 238, 78 N. Y. S. 538.

13. Any other verdict would be set aside. Gunn v. Union R. Co. [R. I.] 58 A. 452.

14. In a case of great magnitude a new trial of all of the issues will not be ordered where one issue of minor importance is not supported by the evidence. Rose v. Mesmer, 142 Cal. 322, 75 P. 905. Action to recover commissions on collecting rents and on sales of property, and no contest made on first cause. Satterthwaite v. Goodyear [N. C.] 49 S. E. 205.

15. Case was withdrawn from jury as court thought no question of fact presented, but subsequently concluded it was in error. Process Copper & Brass Co. v. Perfect Arc Lamp & Mfg. Co., 94 App. Div. 198, 87 N. Y. S. 987.

16. Court permitted a juror to withdraw against objection of party. Rosengarten v. Central R. Co., 69 N. J. Law, 220, 54 A. 564.

17. Process Copper & Brass Co. v. Perfect Arc Lamp & Mfg. Co., 94 App. Div. 198, 87 N. Y. S. 987.

18. Need not be filed within four days of judgment. Harkness v. Jarvis, 182 Mo. Sup. 231, 81 S. W. 446.

19. And must be made within 2 days after the rendition of judgment or sufficient excuse shown. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

20. Drake v. Justice Gold Min. Co. [Colo.] 75 P. 912.

21. Hooper v. Fletcher [Cal.] 79 P. 418. The order rests in the discretion of the trial court and is not reviewable in the appellate courts. Walker v. Moser [C. C. A.] 117 F. 230. Exercise of the court's discretion will not be reviewed unless it was clearly abused. Lazier Gas Engine Co. v. Du Bois [C. C. A.] 130 F. 834. The order of the trial court in granting a new trial will not be reversed, though the appellate court might have acted differently. Hunter v. Porter [Iowa] 100 N. W. 53. Except in a clear case, appellate court will not interfere. Chambliss v. Hass [Iowa] 101 N. W. 153.

22. Hydinger v. Chicago, etc., R. Co. [Iowa] 101 N. W. 746.

23. Tyler v. Haggart [S. D.] 102 N. W. 682.

24. See Saving Questions for Review, 2 Curr. L. 1590.

§ 2. *Grounds. A. In general.*[25]—A new trial will not be granted for errors which could not be corrected on another trial, as want of jurisdiction,[26] failure of a judgment to follow a verdict,[27] defects in pleadings,[28] erroneous conclusions of law,[29] or for mere technical objections to proof of bankruptcy.[30] New trial will not be granted for any cause which the moving party might have avoided by diligence.[31] A new trial may be granted to a defendant who was a nonresident and was served by publication only,[32] or where a report of a referee is contrary to law.[33] The grounds are usually a matter of statute.[34]

(§ 2) *B. Misconduct of parties, counsel or witnesses.*[35]—Remarks of counsel clearly outside of the record and highly prejudicial, though not at the time objected to, require a new trial;[36] but in some states they are waived if not excepted to,[37] and the court in its discretion may refuse one where counsel desists after warning from the court.[38] A party is responsible for the misconduct or indiscretion of his friends in conveying information to the jurors.[39] A new trial was not granted for false statement in an affidavit for continuance as to what an absent witness would testify, which was admitted by the opposite party.[40]

(§ 2) *C. Rulings and instructions at trial.*[41]—A new trial will be granted for errors in the admission[42] or exclusion[43] of relevant evidence,[44] if duly objected

25. See 2 Curr. L. 1038.

26. Hawkins v. Chambliss, 120 Ga. 614, 48 S. E. 169.

27. Eubanks v. West, 119 Ga. 804, 47 S. E. 194.

28. Failure to attack a bill of particulars. Simpson v. Wicker, 120 Ga. 418, 47 S. E. 965. Refusal to require a complaint to be made more certain. Knickerbocker Ice Co. v. Gray [Ind.] 72 N. E. 869.

29. Only questions raised on appeal from order are as to sufficiency of evidence, and of errors of law excepted to. Williams v. Hawley, 144 Cal. 97, 77 P. 762.

30. In an involuntary bankruptcy proceeding there was no denial of defendant's indebtedness, but he raised objections because it was not proved with the technical exactness required if the same had been denied. In re McGowan, 134 F. 498.

31. New trial for confusion as to issues by errors in copy of petition established in place of lost original denied where the copy was accessible to defendant long before the trial. Vickers v. Graham [Ga.] 50 S. E. 59.

32. A judgment rendered after the new trial cannot be collaterally attacked because the record does not show that defendant gave security for costs. English v. Otis [Iowa] 101 N. W. 293.

33. His report stands as decision in case until set aside, which is not prevented by the stipulation of counsel that it be accepted, and adopted, which merely refers to its regularity. Babcock v. Ormsby [S. D.] 100 N. W. 759.

34. Bass v. Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400.

35. See 2 Curr. L. 1039.

36. In a personal injury action plaintiff's counsel referred to plaintiff's discharge from the company, though he had worked all his life for it. Houston, etc., R. Co. v. Rehm [Tex. Civ. App.] 82 S. W. 526. Rev. St. 1889, § 2302, providing no exceptions shall be taken except such as have been expressly decided by the trial court, does not prevent court in its discretion awarding a new trial. Schuette v. St. Louis Transit Co. [Mo. App.] 82 S. W. 541. See Argument of Counsel, 3 Curr. L. 306.

37. Though it is the duty of the trial court to control counsel without waiting for an objection. Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43. See Saving Questions for Review, 2 Curr. L. 1590.

38. Counsel alluded to the difficulty of getting answers to certain interrogatories from the defendant and which were not in evidence, but immediately complied with the court's direction to confine his argument to the evidence. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64.

39. A witness of prevailing party discussed the merits of the case with a juror. Belcher v. Estes [Me.] 59 A. 439.

40. Affiant was innocent of wrongful intent. Louisville R. Co. v. DeGore [Ky.] 84 S. W. 326.

41. See 2 Curr. L. 1039.

42. Baird v. Vines [S. D.] 99 N. W. 89. Where new trial asked because of error in admission of evidence, it must be shown what the evidence was. Long v. Powell, 120 Ga. 621, 48 S. E. 185. Errors in admission of evidence will not be considered where no objection made at the time. Atlantic & B. R. Co. v. Rabinowitz, 120 Ga. 864, 48 S. E. 326. Will not be considered unless the evidence is so set forth in the motion that the question can be decided without reference to other parts of the record. McTier v. Crosby, 120 Ga. 878, 48 S. E. 355.

43. For the exclusion of evidence to be a ground for a new trial, it must appear that a pertinent question was asked, and that the court refused to allow an answer, after a statement showing what the answer would be, and that it was material. Allen v. Kessler, 120 Ga. 319, 47 S. E. 900. For erroneous rulings rejecting evidence tending to show a waiver of certain conditions of a contract to saw lumber. Hawkins v. Chambliss, 120 Ga. 614, 48 S. E. 169. Party had served notice to produce a writing and the court refused

to at the trial.[45] It will also be granted for improper rulings as to venue,[46] or where the court has improperly instructed the jury,[47] and the error has been excepted to,[48] though this last is not essential.[49] But where an erroneous instruction was given that was favorable to appellant,[50] or where there could be no verdict for the other party,[51] or where there was only an immaterial omission to charge,[52] or refusal to instruct jury to disregard immaterial evidence that had been admitted,[53] or the charge was correct, but inaptly worded,[54] there will be no new trial awarded. The discretion of court in granting a new trial for erroneous instruction will not be reversed where there is any doubt as to the propriety of the instruction.[55] Modifying instructions,[56] failure to give charges in absence of written request,[57] the erroneous submission of a question to the jury,[58] the permitting the jury to take interrogatories with them when they retired,[59] the court's expressing opinion on the facts,[60] are grounds for new trial; but the refusal of the court to allow counsel to read law to the jury,[61] harmless errors, or error prejudicial to respondent,[62] cannot be relied on to sustain the judgment.[63]

Misconduct of court.[64]—The absence of the judge from court room may be,[65] and his personal misconduct is a ground for a new trial.[66]

to require the production of the paper as required by Civ. Code 1895, § 5253. Carrington v. Brooks, 121 Ga. 250, 48 S. E. 970.

44. Testimony relating to an alleged breach of contract that was no defense to an action on the notes. Swindell & Co. v. First Nat. Bank, 121 Ga. 714, 49 S. E. 673. Allegation that plaintiff did not have opportunity of presenting certain testimony is insufficient where it is not shown that the testimony was relevant and was excluded by the court. O'Connell v. King & Son [R. I.] 59 A. 926.

45. Weller v. Wagner, 181 Mo. 151, 79 S. W. 941. See Saving Questions for Review, 2 Curr. L. 1590.

46. Ruling on motion to remand case to the court from which the venue had been changed. Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 169.

47. Court gave instructions under a mistaken view of the law as to contingent fees. Dorr v. Camden [W. Va.] 46 S. E. 1014. Instructing jury as to an issue not in the case. Hydinger v. Chicago B. & Q. R. Co. [Iowa] 101 N. W. 746. As to liability of city in seizing a hotel for quarantine during a small pox epidemic. Barton v. Odessa [Mo. App.] 82 S. W. 1119. That burden was on defendant to establish his defense by a preponderance of evidence, where he had set up no affirmative defense. Strickland v. Capital City Mills [S. C.] 49 S. E. 478. Where evidence was conflicting as to the ownership of property, it was error to charge that the property belonged to plaintiff. Weller v. Hilderbrandt [S. D.] 101 N. W. 1108.

48. Erroneous instruction is an error of law under Code. St. Louis & S. F. R. Co. v. Werner [Kan.] 78 P. 410.

49. Court in its discretion may grant a new trial, irrespective of statute, it being a common law power. Nulton v. Croskey [Mo. App.] 85 S. W. 644.

50. Highly favorable instruction as to a boundary line. Vincent v. Willis [Ky.] 82 S. W. 583.

51. Even on the party's own evidence. Markowitz v. Metropolitan St. R. Co. [Mo.] 85 S. W. 351.

52. Court did not expressly limit the damages for future pain to such as plaintiff was reasonably certain to endure, though the whole tenor of the instructions called for such limitation. Nyback v. Champagne Lumber Co., 130 F. 784.

53. In an action against a city for polluting a watercourse, evidence to show that slaughter houses, etc., operated along the creek many years before was admitted. Smith v. Sedalia, 182 Mo. 1, 81 S. W. 165.

54. As to whether motorman saw the frightened condition of the horse. Atlanta R. & Power Co. v. Johnson, 120 Ga. 908, 48 S. E. 389.

55. Abstract proposition as to duty of cities to keep streets in a safe condition. Delaplain v. Kansas City [Mo. App.] 83 S. W. 71.

56. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50.

57. Atlanta R. & Power Co. v. Johnson, 120 Ga. 908, 48 S. E. 389. Not demanded by the evidence. Cooper v. Nisbet, 119 Ga. 752, 47 S. E. 173.

58. Question whether elevator operator was the servant of the owner of the building, or the servant of one putting in a fire extinguisher system, at the time of the accident. Walsh v. Reisenberg, 89 N. Y. S. 58. Suit to establish a lost deed as a will. Lincoln v. Felt, 132 Mich. 49, 92 N. W. 780.

59. Though they had been read in evidence. Shedden v. Stiles, 121 Ga. 637, 49 S. E. 719.

60. Where the decided weight of the evidence was on one side, the expression was not improper, as that it was not a case for punitive damages. Butler v. Barret, 130 F. 944.

61. Not error for judge to decline to permit counsel to read a supreme court decision as not being applicable; nor to so state the last fact to the jury. Martin v. Peddy, 120 Ga. 1079, 48 S. E. 420.

62. See Harmless and Prejudicial Error, 3 Curr. L. 1579.

63. Virginia-Carolina Chemical Co. v. Kirven, 65 S. C. 197, 43 S. E. 658.

64. See 2 Curr. L. 1040.

(§ 2) *D. Misconduct of or affecting jury.*[67]—In civil cases proof merely of separation of jurors,[68] or of distant relationship to a party,[69] or a mistaken or careless answer on the juror's voir dire,[70] or of his expressing an opinion during trial,[71] or that the verdict rendered at a former trial was taken out of the jury room,[72] or of a juror's talking to an outsider, is no ground for a new trial, where no objection was made at the time.[73] But proof that they went on their own personal knowledge,[74] or the recitals of one of their number,[75] or that they viewed the scene,[76] or that they rendered a chance or average verdict,[77] or made a mistake,[78] may be sufficient to set the verdict aside. A party may by his conduct waive his right to a new trial on account of the misconduct of jurors;[79] but where the misconduct is known before verdict, the party cannot wait and take his chances of a favorable verdict, or in default ask that it be set aside.[80] On the question of misconduct[81] or as to matters not inhering in the verdict, the affidavits of jurors will be received,[82] but they will not be received to show that comments were made on fact that defendants were Jews.[83] Though a new trial for disqualification of a juror by immorality is not of right, the court may in its discretion order a new trial on that ground.[84]

65. Should be supported by affidavits and is not reversible error where with the consent of the parties. Dehougne v. Western Union Tel. Co. [Tex. Civ. App.] 84 S. W. 1066.

66. Judge having case under advisement. Gay v. Torrance [Cal.] 78 P. 540.

67. See 2 Curr. L. 1040.

68. Through oversight of bailiff one of jurors remained behind the other jurors in a urinal for about two minutes. In re McKenna's Estate, 143 Cal. 580, 77 P. 461.

69. In a will contest no new trial will be given because the grandfather of a juror was a second cousin of the grandfather of the husband of a contestee, and he was not acquainted with her. Rice's Ex'rs v. Wyatt, 25 Ky. L. R. 1060, 76 S. W. 1087.

70. A juror is not guilty of misconduct by making an answer claimed to be untrue, where he did not intend to lie, but the question of counsel was leading. Rapp v. Becker, 4 Ohio C. C. (N. S.) 139.

71. Not ground where it was in favor of party desiring a new trial. Rice's Ex'rs v. Wyatt, 25 Ky. L. R. 1060, 76 S. W. 1087.

72. Verdict of former trial was endorsed on pleadings, and there was no request to detach or conceal it. Russell v. Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528.

73. Juror conversed with an adjuster of defendant railroad at a noon recess, but for all that was shown, it may have been a mere exchange of courtesies. Werner v. Interurban St. R. Co., 99 App. Div. 592, 91 N. Y. S. 111.

74. Jurors also talked with outsiders. Hydinger v. Chicago, etc., R. Co. [Iowa] 101 N. W. 746. A juror followed the plaintiff during a recess to see whether he was pretending to be crippled and convinced himself that the injury was genuine, but it was not shown that he communicated the information to the other jurors. Gratz v. Worden [Ky.] 82 S. W. 395.

75. In a seduction case foreman told jury plaintiff stayed at his house and stated that the first intercourse occurred in her bed and not in a barn as she had testified. Douglass v. Agne [Iowa] 99 N. W. 550. Misconduct of juror in stating to jury facts from personal knowledge. Id.

76. But a motion based on ground that the jury visited the electric plant in question, before they were impaneled, or the unsworn allegation that they discussed the case before it was submitted to them, was too vague. Wofford v. Buchel Power & Irrigation Co. [Tex. Civ. App.] 80 S. W. 1078.

77. Rev. St. 1898, § 3292, provides for a new trial; but where after the chance verdict was arrived at, there was further deliberation and it was accepted as a fair verdict, a new trial will be refused. Pence v. California Min. Co., 27 Utah, 378, 75 P. 934.

78. Affidavits of jurors received to show that the verdict returned was not the one they reached. Wolfgram v. Schoepke [Wis.] 100 N. W. 1054.

79. A witness of prevailing party had talked with a juror before submission of case, and this was known by the counsel of the other side before its submission, and he made no objection. Belcher v. Estes [Me.] 59 A. 439.

80. A juror falsely stated that he had never had any suit against a corporation; after the jury was out defendant discovered that a person of the same name was plaintiff in a pending suit against a street railway and moved to set aside the verdict when it was rendered 3 hours later, which was refused, as he had not made inquiries by telephone, and applied before verdict was rendered. Cleveland, etc., R. Co. v. Osgood [Ind. App.] 73 N. E. 285.

81. Insufficient to show jurors agreed to abide by an average verdict. Pence v. California Min. Co., 27 Utah, 378, 75 P. 934.

82. That foreman stated to the jury that the prosecutrix in a seduction case had made different statements to his wife. Douglass v. Agne [Iowa] 99 N. W. 550.

83. And that one had attempted to defraud an insurance company by burning his property. Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698.

84. Manning v. Boston El. R. Co. [Mass.] 73 N. E. 645. The fact that a juror alleged to be disqualified by immorality had worked for a party does not show that such party should have known of the facts. The party employed many hundred men. Id.

(§ 2) *E. Irregularities or defects in verdict or findings.*[85]—A general verdict will not necessarily be set aside where some of the special findings are contradictory to it,[86] nor will a verdict be set aside where it was returned promptly,[87] or where there was only a slight variance and there was no surprise;[88] but one not responsive to the issues will be set aside though there was evidence to support it.[89] New trial was granted where a court made a single finding where there were other issues.[90]

(§ 2) *F. Verdict or findings contrary to law or evidence.*[91]—A new trial may be granted because the verdict[92] or decision[93] is contrary to law, as given in the instructions of the court,[94] the jury having disregarded[95] or misunderstood the same, or rendered a compromise verdict,[96] or it otherwise appears that they must have based their verdict on a probability,[97] or have guessed at the facts,[98] or must have been influenced by seemingly equitable influences instead of weighing the evidence under the rules of law given them.[99] Where there is no evidence to support the verdict, a new trial must be granted,[1] or judgment directed, notwithstanding the verdict.[2] The parties are entitled to the independent judgment of the court as to whether the verdict is supported by the evidence, as it is the duty of the court, where the decision is against the weight[3] or the great preponderance of evidence,[4] or it has the discretion, to grant a new trial, which should be on terms.[5]

85. See 2 Curr. L. 1041.

86. It was not enough to show that the jury misunderstood the issues. Drake v. Justice Gold Min. Co. [Colo.] 75 P. 912.

87. No reason for a new trial that the jury returned a verdict in five minutes. Farnsworth v. Fraser [Mich.] 100 N. W. 400.

88. Declaration was that defendant agreed to procure stock for plaintiff in payment of his services; proof was that plaintiff agreed to pay 51 cents a share on receipt of the stock. Cleasby v. Reynolds [R. I.] 58 A. 786.

89. The verdict chancerized the bond before judgment. Bowen v. White [R. I.] 58 A. 252.

90. Court found that the defendants had no right, title or interest in the land, but found nothing on question of estoppel or adverse use. McCarty v. Southern Pac. Co., 144 Cal. 677, 78 P. 260.

91. See 2 Curr. L. 1041.

92. That it is contrary to a given charge of the court is a sufficient ground. Spearman v. Sanders, 121 Ga. 468, 49 S. E. 296. The answer admitted a partial liability to plaintiff, yet the jury found for defendant. Virginia-Carolina Chemical Co. v. Kirven, 65 S. C. 197, 43 S. E. 658. The verdict brought in was directly contrary to the charge of the judge. Robert Buist Co. v. Lancaster Mercantile Co., 68 S. C. 523, 47 S. E. 978.

93. But not that decision is contrary to the evidence. Bass v. Citizens' Trust Co., 32 Ind. App. 583, 70 N. E. 400.

94. Verdict not contrary to instructions where the latter, though conflicting, justified it, and no other verdict could have been rendered on the evidence. Cotter v. Butte & R. Valley Smelting Co. [Mont.] 77 P. 509. Instruction as to counterclaim of sale of land not followed. Strong v. Eggert [Neb.] 99 N. W. 647.

95. Without regard to the propriety of the instructions. McAllister v. Rocky Fork Coal Co. [Mont.] 78 P. 595.

96. Dispute over a contract for sale of shoes worth $550, and verdict was for $200. Falkenberg v. O'Neill, 88 N. Y. S. 378. Plaintiffs claimed $398.18, and no conflicting evidence except as to $76, and verdict for $100 set aside. Tuxedo Automobile Station v. Lyman, 88 N. Y. S. 1008.

97. Whether a reference in a letter referred to the check in question. Seavey v. Laughlin, 98 Me. 517, 57 A. 796.

98. On an issue of damage to a dress as the result of an accident, there was evidence as to its value when new, but none as to its value at the time of the accident, and new trial properly granted. Leigh v. Interurban St. R. Co., 88 N. Y. S. 959.

99. Furber v. Fogler, 97 Me. 585, 55 A. 514.

1. People v. Alton, 209 Ill. 461, 70 N. E. 640; Mobile & O. R. Co. v. Reeves, 25 Ky. L. R. 2236, 80 S. W. 471; Cullinan v. Kisselbrack, 43 Misc. 103, 87 N. Y. S. 1025; People v. Alton, 209 Ill. 461, 70 N. E. 640; Strong v. Eggert [Neb.] 99 N. W. 647. The plaintiff relied solely on presumption of negligence which the uncontradicted evidence of defendant rebutted; new trial should have been granted. Central of Georgia R. Co. v. Mote, 120 Ga. 593, 48 S. E. 136.

2. Against the clear preponderance of the evidence. Gunn v. Union R. Co. [R. I.] 58 A. 452.

3. If he is clearly satisfied the verdict is wrong, but not where he would merely decide otherwise. Green v. Soule [Cal.] 78 P. 337.

4. Question as to whether a deed was forged. Phillips v. Laughlin [Me.] 58 A. 64. Impossible for any person accustomed to weigh evidence to read record in action for violation of bond given under liquor tax law, and not conclude that the verdict for defendant was not in accordance with the facts. Cullinan v. Kisselbrack, 43 Misc. 103, 87 N. Y. S. 1025. Error to refuse new trial where presumption of negligence fully rebutted by showing that where accident occurred and

Where the judge does not exercise the discretion[6] or exercises it arbitrarily, his ruling will be reversed.[7] The trial court has large discretion,[8] and its exercise will seldom be reviewed.[9] Its action in granting a new trial will not be interfered with, though there was some evidence to support the verdict,[10] unless a verdict for the one to whom a new trial was given would not be allowed to stand,[11] as a stronger case must be made to justify the reversal of an order granting, than one refusing, a new trial.[12] The decision of a judge who did not preside at the trial in refusing a new trial is not entitled to the same weight.[13] A new trial will not be granted where the verdict is sustained,[14] though the evidence is conflicting,[15] or though it slightly preponderates in favor of the other party,[16] or where the credibility of the witnesses is the main factor.[17] Some courts refuse a new trial if there is any evidence to support a verdict,[18] or it is not clearly and palpably wrong.[19] An appellate court will not set aside a verdict, though it seems to be against the decided weight of the evidence,[20] if the evidence favorable to the prevailing party is sufficient to sustain the verdict.[21] An inadequate[22] or excessive verdict[23] is or-

train was going 60 miles an hour, there was no public crossing. Central of Georgia R. Co. v. Williams Buggy Co., 121 Ga. 293, 48 S. E. 939. Verdict for obligor of attachment bond set aside, as there was uncontradicted evidence that party had expenses for attorney's fees, though the evidence was conflicting as to damage caused by the levy. Oakes v. Smith, 121 Ga. 317, 48 S. E. 942. Question as to whether a set screw was properly guarded. Walker v. Newton Falls Paper Co., 90 N. Y. S. 530.

5. Wolfgram v. Schoepke [Wis.] 100 N. W. 1054.

6. In a will case the order denying a new trial recited that the judge did not approve of the verdict, but that he had no right to change it, as the jury were the exclusive judges of the fact. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501. Where the new trial did not appear to have been granted in the exercise of the court's discretion, and the verdict is clearly sustained, the order will be reversed. Briggs v. Rutherford [Minn.] 101 N. W. 954.

7. Where there was no evidence that a deed was procured by fraud, and the court so found, it erred in granting a new trial on ground of insufficiency of evidence. Gustafson v. Gustafson, 92 Minn. 139, 99 N. W. 631. The power to grant a new trial for insufficiency of evidence is not arbitrary, but must be based on a sound judicial discretion. Id.

8. The appellate court will not interfere, though trial judge made some hasty expressions. Schuette v. St. Louis Transit Co. [Mo. App.] 83 S. W. 297. Order general in terms and the testimony substantially conflicting. Mock v. Los Angeles Traction Co., 139 Cal. 616, 73 P. 455. Where evidence to support, discretion will be seldom controlled. Blackshear v. Dekle, 120 Ga. 766, 48 S. E. 311.

9. Trial judge has the advantage of observing the witnesses. Surkin v. New York City R. Co., 90 N. Y. S. 342.

10. Great preponderance of evidence against the verdict. Stephens v. Deatherage Lumber Co., 98 Mo. App. 365, 73 S. W. 291.

11. Verdict for defendant in personal injury case set aside and trial judge by his questions to witnesses showed clearly he thought plaintiff ought to recover. Fitzjohn v. St. Louis Transit Co., 183 Mo. 74, 81 S. W. 907. Though it may disagree with the ruling. Casey v. St. Louis Transit Co. [Mo.] 85 S. W. 357.

12. Here clear conflict of testimony on question of payment of note. Kunz v. Dinneen [S. D.] 100 N. W. 165.

13. Spearman v. Sanders, 121 Ga. 468, 49 S. E. 296.

14. Deal v. Barnes, 117 Ga. 441, 43 S. E. 695; Macon R. & Light Co. v. Barnes, 121 Ga. 443, 49 S. E. 282; Revis v. Roper, 121 Ga. 428, 49 S. E. 291. Where burden of proof on plaintiff and evidence insufficient to sustain a judgment for him, it is improper to grant a new trial on ground evidence did not support a judgment for defendant. Philadelphia Underwriters' Ins. Co. v. Bigelow [Fla.] 37 So. 210. Conflict of evidence as to whether a lease was from year to year or at will. Watt-Harley Hardware Co. v. Redding, 120 Ga. 904, 48 S. E. 350.

15. Vincent v. Willis [Ky.] 82 S. W. 583. Verdict not set aside where there was a contrariety of evidence, though the weight of the testimony was against it. Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103.

16. Foreclosure of a saw mill man's lien. Eubanks v. West, 119 Ga. 804, 47 S. E. 194.

17. Verdict not inconsistent with any controlling physical, admitted or established facts. Fulton v. Crosby & Beckley Co. [W. Va.] 49 S. E. 1012.

18. Strickland v. Capital City Mills [S. C.] 49 S. E. 478.

19. Lebeau v. Dyerville Mfg. Co. [R. I.] 57 A. 1092. Disregard of evidence or instructions must be plain and palpable to warrant a new trial. Eades v. Trowbridge, 143 Cal. 25, 76 P. 714. Evidence in negligence case does not convince the court that the jury was clearly wrong. Stone v. Lewiston, etc., R. Co. [Me.] 59 A. 56. Not where there is merely a preponderance of evidence against it, or the court would have made a different decision. Morien v. Norfolk & A. Terminal Co., 102 Va. 622, 46 S. E. 907.

20. St. Louis S. W. R. Co. v. Byrne [Ark.] 84 S. W. 469.

21. Fudge v. Marquell [Ind.] 72 N. E. 565.

22. Verdict of $200, where testimony showed medical attendance alone amounted to $200; and the loss of income amounted to

dinarily ground for new trial. The court may,[24] and some courts hold it error not to, first give the other party[25] the option[26] of remitting an excessive,[27] or increasing an inadequate, verdict,[28] though it was rendered in an action ex delicto,[29] or the evidence shows that the conditions have changed,[30] unless there was no evidence for the court to act on,[31] or the jury clearly were influenced by passion or prejudice.[32] The practice is in the interest of public and private justice,[33] and in Wisconsin the option will be given to either party to finally dispose of the case,[34] though the verdict is fatally excessive from perversity or other cause. The basis for determining the correct amount is the probable finding of an impartial jury resolving doubts against the party to whom the option is given.[35] Second verdicts are seldom disturbed,[36] as it takes a stronger case to order another new trial.[37] The practice is sometimes regulated by statute.[38] A new trial may be granted on one of several issues;[39] it may be granted in an equity case, but it is error to thereupon enter

much more than that. Hill v. Union R. Co. [R. I.] 57 A. 374. Verdict of $3,250 to a widow and young child for death of husband and father who was earning $1,200 a year was inadequate. Usher v. Scranton R. Co., 132 F. 405. Evidence conflicting and damages held not inadequate. Hellyer v. Trenton City Bridge Co., 133 F. 843.

23. See Damages, 3 Curr. L. 997, for determination of excessiveness of recovery.

24. Sayles' Civ. St. 1897, art. 1029a. Ft. Worth, etc., R. Co. v. Linthicum [Tex. Civ. App.] 77 S. W. 40.

25. Verdict of $6,000 for injuries, where they were slight and it was shown that plaintiff's condition was a result of tuberculosis. Pesant v. Metropolitan St. R. Co., 96 App. Div. 634, 89 N. Y. S. 314.

26. Error to reduce a verdict of $462.50 for services to $300, and to enter judgment for that sum, without giving the plaintiff the option to take a new trial. Barber v. Maden [Iowa] 102 N. W. 120. A subsequent order making the previous order absolute is void on refusal of plaintiff to accept the amount when he intends to appeal. Holtum v. Greif, 144 Cal. 521, 78 P. 11. Plaintiff failed to remit part of verdict and new trial ordered. Barton v. Odessa [Mo. App.] 82 S. W. 1119.

27. Verdict of $600 for dislocating ankle and plaintiff required to remit all but $350 or the court would grant a new trial. North v. New Britain [Conn.] 58 A. 699. Where the amount of interest found was excessive, plaintiffs were given option of remitting $566.57 of the $2,983 allowed them as interest or of having a new trial. Teasley v. Bradley, 120 Ga. 373, 47 S. E. 925. Verdict of $10,000 for death of intestate reduced to $2,500. Landry v. New Orleans Shipwright Co., 112 La. 550, 36 So. 548. All of damages in excess of $5,000 remitted. McDonald v. Rhode Island Co. [R. I.] 59 A. 391. Verdict for breaking of forearm of $6,000 reduced to $4,000. Bailey v. Cascade Timber Co., 35 Wash. 295, 77 P. 377.

28. Verdict of $50 for injuries from defective sidewalk, court ordered set aside unless appellant would consent to raise it to $175. Marsh v. Minneapolis Brew. Co., 92 Minn. 182, 99 N. W. 630.

29. Verdict of $12,500 in personal injury action reduced to $6.000. Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43.

30. Evidence produced on motion showed plaintiff was recovering from his injuries more rapidly than the physicians, who testified at the trial, expected; excess over $2,000 remitted. Darnell v. Krouse, 134 F. 509.

31. Where there was no evidence as to value of goods destroyed, and conflicting evidence as to value of goods injured, court unable to make order as to remission of excess over any evidence as to damage to injured property and new trial ordered. Kennedy v. Portmann, 97 Mo. App. 253, 70 S. W. 1099.

32. Where a remittitur was allowed, it will be presumed that the court found the evidence insufficient and not that the verdict was the result of passion or prejudice. Adcock v. Oregon R. & Nav. Co. [Or.] 77 P. 78.

33. Whether verdict perverse or otherwise. Heimlich v. Tabor [Wis.] 102 N. W. 10.

34. Where there was an excessive verdict of $9,500 for fracture of leg, defendant was given right to consent to judgment against him for $5,000 within 20 days, or in default plaintiff had the right to consent to take judgment for $2,500 within 10 days thereafter, thus giving to either party the power to finally dispose of the case. Rueping v. Chicago & N. W. R. Co. [Wis.] 101 N. W. 710.

35. Where option to plaintiff to take judgment for a less sum, such sum should be placed as low as an impartial jury would find, and where option is given to defendant regardless of attitude of plaintiff, it should be as large as such a jury would find. Heimlich v. Tabor [Wis.] 102 N. W. 10.

36. A second verdict for plaintiff was not disturbed where there was conflicting evidence. Russell v. Brunswick Grocery Co., 120 Ga. 38, 47 S. E. 528.

37. A second new trial ordered in an action on a marine insurance policy where the evidence was stronger than at the first as to the unseaworthiness of the vessel. Morse v. St. Paul Fire & Marine Ins. Co., 129 F. 233.

38. Civ. Code Prac. § 3211, provides that no more than two new trials can be granted on the ground that the verdict is not sustained by the evidence. Illinois Cent. R. Co. v. McManus' Adm'r [Ky.] 82 S. W. 399.

39. The trial involved great expense and only a single minor issue was unsupported by the evidence. Rose v. Mesmer, 142 Cal. 322, 75 P. 905.

judgment for the other party.[40] The new trial must be conditioned on the payment of costs and disbursements.[41]

(§ 2) *G. Surprise, accident or mistake.*[42]—A new trial will be granted on the ground of surprise where the party was unprepared for the evidence introduced,[43] or for certain rulings of the court, by which he was misled to his hurt,[44] and against which he could not have protected himself by the use of ordinary prudence;[45] but it will not be granted for a party's mere neglect, where no excuse is shown.[46] When by reason of the accident or mistake of the trial judge the defeated party is precluded from having his bill of exceptions filed within the statutory time,[47] or by reason of the illness of an attorney[48] or party,[49] or other mistake, a default is suffered, a new trial will be ordered.[50] A party going voluntarily to trial does so at his peril, and cannot have a new trial merely to impeach a witness,[51] where no continuance is asked for.[52] The fact that by reason of the illiteracy

40. Where court satisfied that its first conclusions were wrong. Hurley v. Kennally [Mo.] 85 S. W. 357.

41. Murphy v. Interurban St. R. Co., 88 N. Y. S. 187; Falkenberg v. O'Neill, 88 N. Y. S. 378.

42. See 2 Curr. L. 1044.

43. In action to rescind a contract for fraud it was not alleged that one of the defendants was guilty of fraud, but proof of fraudulent conduct was received at the trial. Merritt v. Mayfield, 89 App. Div. 470, 85 N. Y. S. 801. Where defendant, being sued for having collected certain sums, and plaintiffs produced a memorandum at the trial which they alleged defendant dictated, admitting the same, the latter claiming surprise and that the evidence was manufactured, defendant was entitled to a new trial, though he did not ask for an adjournment. Seligman v. Sivin, 91 N. Y. S. 395. Action on note, and testimony of a witness called to defendant's mind a draft which he had forgotten. Connally v. Peble, 105 Mo. App. 407, 79 S. W. 1006.

44. Plaintiff, relying on a statement of the judge as to his view of the law, consented to discharge of jury, but the judge making his decision at variance with his statement, the former was entitled to move for a new trial. Simpson v. Hefter, 43 Misc. 608, 88 N. Y. S. 282. Mistake in construing the decision of another state for which plaintiff was largely responsible, and which resulted in a different verdict from what otherwise would have been given. Baird v. Vines [S. D.] 99 N. W. 89.

45. In an action on a note, where non est factum had been pleaded 3 months before trial, plaintiff could not have a new trial, because of defendant's testimony that he did not execute the note [Burns' Ann. St. 1901, § 568]. Fudge v. Marquell [Ind.] 72 N. E. 505. Where the only question was as to the extent of injuries received in an accident, the admission of testimony that curvature of the spine might develop was no ground for new trial. Harvey v. Fargo, 99 App. Div. 599, 91 N. Y. S. 84. Absence of a witness who had promised to attend but had not been subpoenaed not a ground where no motion for continuance made, when defendant during trial learned of witness' sickness [Rev. Codes 1899, § 5472, subd. 3]. Josephson v. Sigfusson [N. D.] 100 N. W. 703.

46. Party failed to comply with statute in filing in time his petition for a new trial. Dillon v. O'Neal [R. I.] 58 A. 455. Appeal lost because the reporter was unable by illness to complete transcript. Unwarrantable delay in ordering transcript. McKinley v. McKinley, 123 Iowa, 574, 99 N. W. 162. Failure to procure a transcript within six months of trial because of defect in reporter's eyesight, but application had been made to him only a short time before the time expired. Id. Legislature changed term of court, and affidavit of defendant was that he had good defense, but did not know when the case was set, but his counsel had notice. McAnally v. Vickry [Tex. Civ. App.] 79 S. W. 857.

47. This without regard to the sufficiency of the exceptions. Nelson v. Marshall [Vt.] 58 A. 793. Where a party, without fault on his part, is prevented from obtaining a transcript for review on error, a new trial will be granted to protect his constitutional right to a review by the supreme court, though no error is alleged in the trial court. Zweibel v. Caldwell [Neb.] 99 N. W. 843. Granted on ground of unavoidable casualty by which complainant was deprived of his constitutional right of review. Ritchey v. Seeley [Neb.] 102 N. W. 256.

48. But application insufficient where no affidavit of merits made by party. Copper King of Arizona v. Johnson [Ariz.] 76 P. 594. Cannot be granted for absence of counsel because of sickness, unless diligence of party shown to obtain a continuance. Ayer v. James, 120 Ga. 578, 48 S. E. 154. The failure of one attorney to notify another when a case will be called not a ground, unless attorney used due diligence after learning from other sources when the case is to be called. Josephson v. Sigfusson [N. D.] 100 N. W. 703.

49. Defendant was conducting her own defense in a divorce suit, and was ill, and sent letter to judge asking an adjournment, but did not have time to procure the certificate of a physician. Smith v. Smith [Cal.] 79 P. 275.

50. Where defendant was defaulted as his counsel withdrew, but he was negligent in not promptly employing another, a new trial would be granted conditional on his paying $50 counsel fees to plaintiff. Miller v. McCormick [R. I.] 60 A. 48.

51. Should have been apprised of his testimony, so there could be no surprise. Farm-

of the person with whom a summons was left defendant never received it is not "unavoidable casualty and misfortune."[53] The matter is largely addressed to the discretion of the court,[54] and it will not be granted unless it is shown that the moving party can better his case on a new trial.[55] It is improper to require the moving party to pay an extra allowance of 5%.[56]

(§ 2) *H. Newly-discovered evidence.*[57]—A new trial will not be granted for newly-discovered evidence which is merely cumulative,[58] corroborative,[59] or contradictory to a party,[60] or a witness' testimony,[61] or which is incompetent[62] or immaterial,[63] and which would not probably lead to a different result,[64] nor for that

ers' & Shippers' Leaf Tobacco Warehouse Co. v. Pridemore [W. Va.] 47 S. E. 258.

52. Failure of witness to testify as expected. Presidio County v. Clarke [Tex. Civ. App.] 85 S. W. 475.

53. Hass v. Leverton [Iowa] 102 N. W. 811.

54. Judicial discretion. Wingen v. May, 92 Minn. 255, 99 N. W. 809. Refused on allegation that trial went by default because attorney relied on being notified by opposing attorney, as no allegation that notice not given. Tschohl v. Machinery Mut. Ins. Ass'n [Iowa] 101 N. W. 740.

55. Surprise in plaintiff's showing that his mining claim was prior in time to defendant's. Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co. [Colo.] 75 P. 1070.

56. Simpson v. Hefter, 91 N. Y. S. 326.

57. See 2 Curr. L. 1045.

58. Bower v. Self, 68 Kan. 825, 75 P. 1021; Taylor v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 83 S. W. 738; Northern Tex. Traction Co. v. Lewis [Tex. Civ. App.] 83 S. W. 894. Additional evidence not newly discovered. Ryder v. Leach, 3 Ariz. 129, 77 P. 490. Further entry discovered by defendants in plaintiff's journal which had already been closely examined by them. Selleck v. Head [Conn.] 58 A. 224. Evidence as to time adverse possession began could have been discovered before by the exercise of due diligence, and that witnesses at trial had since refreshed their memory, was not an absolute ground for a new trial. Greer & Co. v. Raney, 120 Ga. 290, 47 S. E. 939.

59. No difference between corroboration of witness or of party. O'Toole v. Faulkner, 34 Wash. 371, 75 P. 975.

60. As to who was conductor of train on which accident occurred. St. Louis S. W. R. Co. v. Byrne [Ark.] 84 S. W. 469.

61. That a witness did not remember having attested a certain release, which others had testified that he attested. Conant v. Jones, 120 Ga. 568, 48 S. E. 234. Where one was convicted of harboring an unmarried female at a house of prostitution, a new trial would not be granted on her affidavit that she was married, when she and her parents had testified to the contrary on the trial. Harter v. People, 204 Ill. 158, 68 N. E. 447. Additional witnesses to testify that a bill was filed with the secretary of state, before it was vetoed by the governor. People v. McCullough, 210 Ill. 448, 71 N. E. 602. New evidence went merely to credibility of party as a witness, not to her right to recover. Harvey v. Ivory, 35 Wash. 397, 77 P. 725.

62. The record of the case on appeal must show the competency of the evidence. Rice's Ex'rs v. Wyatt, 25 Ky. L. R. 1060, 76 S. W. 1087. Mostly hearsay, and was known to party before the final submission of the case. McNeal v. Hunter [Neb.] 101 N. W. 236. Hearsay. Russell v. Anderson [Tex. Civ. App.] 83 S. W. 237.

63. After plaintiff had recovered civilly for the seduction of his daughter, defendant was tried under an indictment and found guilty of fornication. Saunders v. Miller, 119 Ga. 873, 47 S. E. 338. A motion for a new trial will be denied where it is based on a showing that certain witnesses would testify as to what the contract really was, as the real question at issue was whether plaintiff could recover under defendant's construction of the contract. Gibson v. Hunt [Iowa] 94 N. W. 277. New trial of action for seduction not granted because defendant was subsequently acquitted on criminal charge. Saunders v. Miller, 119 Ga. 873, 47 S. E. 338. Where defendant suffered a default, there was no fraud, though plaintiff did not disclose the fact that he was adjudged a bankrupt. Coulson v. Ferree [Ky.] 82 S. W. 1000. Action against a surety and the new evidence as to an extension of time failed to show that it was for a definitely fixed time. Commercial Bank v. Brinkerhoff [Mo. App.] 85 S. W. 121. In an action for rent of a dock, that plaintiff had given permission to the city to move a floating bath, at the end of the dock. Pierson v. Hughes, 88 N. Y. S. 1065. In a suit involving boundaries, it appeared that plaintiffs' line was established by a certain survey, and the discovery of a map of earlier date was immaterial. Litchfield v. Sisson, 43 Misc. 411, 89 N. Y. S. 338. In a suit for the price of cotton, evidence that there were no attachments against the cotton mill. Turner v. Lyles, 68 S. C. 392, 48 S. E. 301.

64. Howard v. Terminal R. Ass'n [Mo. App.] 85 S. W. 608. The new testimony would not affect the liability of the defendant making the affidavit, and the other defendant made no affidavit. Mazor v. Springer [Cal.] 78 P. 474. Motion denied where the evidence might have been produced at the trial except for defendant's oversight, and where it would not change the verdict, but only go in mitigation of damages. Wilson v. Freedley, 129 F. 835. Affidavits filed to show plaintiff was injured in alighting from a street car, and not for defects in a sidewalk, but which were rebutted by other affidavits. City of Louisville v. Oberle [Ky.] 82 S. W. 626. The new witness was of such a character that he would not probably be be- N. Y. S. 914. Merely cumulative, and not of such a character as would probably affect

which was known,[65] or might have been discovered by the use of due diligence, before or at the trial,[66] and for which the party might have had a continuance.[67] Where a witness without whose testimony recovery could not have been had made conflicting affidavits after the trial, a new trial will be granted.[68] Diligence must be shown by alleging specifically what acts of diligence were performed,[69] but a new trial will not be denied for lack of a guardian's diligence.[70] Evidence is not newly discovered where the witness was at the trial, though he had refused to disclose his testimony.[71] For newly-discovered evidence that is material or controlling,[72] and which will probably change the result,[73] or will sustain a verdict

the verdict. McDonald v. Rhode Island Co. [R. I.] 59 A. 391.

65. No affidavit that evidence was not known of at the time of the trial. Spencer v. Spencer [Mont.] 79 P. 320. The record of a former proceeding for divorce for desertion discovered before the close of a trial in which the question was as to the legitimacy of a child of the parties to the divorce suit. Kennington v. Catoe, 68 S. C. 470, 47 S. E. 719. Known to plaintiff before trial of the case concluded, but after it was submitted to jury, but attention of court was not called to it; nor was it an excuse that the witness did not have certain memoranda with which to refresh his memory with him. Oakes v. Prather [Tex. Civ. App.] 81 S. W. 557. The affidavit of an agent of a corporate party is insufficient where it was not shown that the other officers or the attorneys did not know of the evidence. Campbell Real Estate Co. v. Wiley [Tex. Civ. App.] 83 S. W. 251.

66. Due diligence not shown in the following cases. Armstrong v. Aragon [N. M.] 79 P. 291. Discovery of documents which could have been obtained for the trial by an inquiry from movant's brother insufficient. Tilley v. Cox, 119 Ga. 867, 47 S. E. 219. In an action for loss of a trunk where it was subsequently discovered and did not contain the articles alleged, though the affidavit stated that all trace of it had been lost at a certain station, but did not state the acts claimed to constitute the diligence. St. Louis S. W. R. Co. v. Goodwin [Ark.] 84 S. W. 728. Evidence as to a judgment debtor's interest in his late father's estate, where the inventory had been on file for a number of years. Sowles v. First Nat. Bank, 133 F. 846. Affidavit that policy in question had been found under seat of buggy after the trial. Tilley v. Cox, 119 Ga. 867, 47 S. E. 219. No allegation of fraud by which the petitioners were misled. Kringle v. Kringle, 123 Iowa, 365, 98 N. W. 883. No error in refusing where witness was present during trial and his statement is flatly contradicted by the other party. Barber v. Maden [Iowa] 102 N. W. 120. Affidavits of persons who lived in front of the place where the accident occurred that the sidewalk was in good condition. City of Covington v. Bostwick [Ky.] 82 S. W. 569. Application in equity to set aside verdict on ground that plaintiff had committed perjury at the trial denied where the judgment had been affirmed in the supreme court, and there was no showing of diligence in preparing to meet the false testimony, and it related solely to the question of the amount of damages. Wabash R. Co. v. Mirrielees, 182 Mo. 126, 81 S. W. 437. Petition not showing that fraud was not discovered within time limited for statutory proceeding will be dismissed. Van Antwerp v. Lathrop [Neb.] 98 N. W. 35. Defendant knew name and address of witness long before trial, and the affidavit did not state what she would testify to. Lane v. Brooklyn Heights R. Co., 85 App. Div. 85, 82 N. Y. S. 1057. Affidavit that neither plaintiff nor his witnesses had knowledge of the existence of the new witness until after trial was insufficient. Margolius v. Muldberg, 88 N. Y. S. 1048. Affidavit of defendant stated that after the trial he found the check which he had paid plaintiff, but did not show that he had made any search before. Levy v. Hatch, 92 N. Y. S. 287. No affidavit of plaintiff or his counsel, and affidavit of agent did not show that the evidence was not communicated to plaintiff before the trial. Kenson v. Gage [Tex. Civ. App.] 79 S. W. 605.

67. Physical and mental disability of plaintiff. Chapman v. Pendleton [R. I.] 59 A. 928. Though attorney made ineffectual effort to obtain witness, but no application to the court for a postponement. San Antonio Foundry Co. v. Drish [Tex. Civ. App.] 85 S. W. 440.

68. Chapman v. Delaware, etc., R. Co., 92 N. Y. S. 304.

69. Affidavit that plaintiff did not know of certain evidence and could not have discovered it by reasonable diligence was insufficient [Code Civ. Proc. § 1171]. Nicholson v. Metcalf [Mont.] 78 P. 483. The affidavits must state facts which show diligence, and not merely assert that diligence was used; here affidavit did not state the name of the new witness. Flersheim Mercantile Co. v. Gillespie [Okl.] 77 P. 183. Affidavit by defendant that since trial he has found check which he had paid to plaintiff without any showing of search before trial is insufficient. Levy v. Hatch, 92 N. Y. S. 287.

70. Plaintiff was an infant. Hagen v. New York, etc., R. Co., 44 Misc. 540, 90 N. Y. S. 125.

71. A physician who had attended plaintiff and who had been subpoenaed by both parties and was present at the trial but was not called because of his refusal to disclose his testimony, now in his affidavit alleged plaintiff had violated his instructions, and so was in a bad condition. Gratz v. Worden [Ky.] 82 S. W. 395.

72. In an action against a carrier for delays in the carriage of cattle, evidence produced that plaintiff stated to four persons that his cattle arrived in good condition. Missouri, etc., R. Co. v. Clark [Tex. Civ. App.] 79 S. W. 827.

which must otherwise be set aside,[74] though largely cumulative,[75] if supported by competent affidavits, a new trial will be granted,[76] and this will be done, though there have been several trials,[77] or the application is by an extraordinary motion,[78] but in such cases much greater diligence must be shown.[79] The trial court has large discretion,[80] and may grant a new trial, though the evidence is largely cumulative.[81] An appellate court will seldom interfere,[82] and never in the case of the first grant of a new trial,[83] or with the disposition of a motion on conflicting affidavits,[84] unless a clear abuse of its discretion appears.[85] Where the matter is res judicata, the only remedy is by applying for a new trial in the original action.[86] Costs of the motion should abide the event of a new trial.[87]

(§ 2) *I. As matter of right in ejectment.*[88]—In actions for the recovery of real estate or for quieting title thereto,[89] or in a suit to annul a conveyance for

73. Rossin v. Petiger, 88 N. Y. S. 350. Party failed to prove an essential point which the new evidence tends to prove. Williams v. Miles [Neb.] 102 N. W. 482. New trial granted to defendant in divorce case where judgment was mainly on plaintiff's evidence which by affidavit he now says was given under a mistake. Kennedy v. Kennedy [Nev.] 77 P. 597.

74. Newly discovered evidence to show that plaintiff's intestate had paid his fare and was a passenger. Usher v. Scranton R. Co., 132 F. 405.

75. Verdict against the weight of evidence. Hagen v. New York, etc., R. Co., 44 Misc. 540, 90 N. Y. S. 125.

76. Moving papers are defective where there is no affidavit of the newly-discovered witness of his readiness to swear to the facts, or reason for the absence of the same. Armstrong Mfg. Co. v. Thompson, 88 N. Y. S. 151. Plaintiff recovered largely on the evidence of one who testified that plaintiff's intestate had not been guilty of contributory negligence, but made subsequent affidavits that conflicted with his testimony given at the trial. Chapman v. Delaware, etc., R. Co., 92 N. Y. S. 304.

77. Where the verdict depended on whether defendant's employes knew that the street car was off the track, a new trial would be granted, though there had been three already, where the newly-discovered witnesses at the time of the accident were riding bicycles behind the car, and the affidavits disclosed that every effort was used to discover the witnesses. Beers v. West Side R. Co., 91 N. Y. S. 957.

78. A new trial was refused where the verdict was against the marriage, though the new evidence was the marriage license and the certificate of the minister, as plaintiff should have known of their existence. Norman v. Goode, 121 Ga. 449, 49 S. E. 268.

79. Was refused where the case had been tried four times, and the witness was accessible and his testimony known to be material, but was not produced because it was not known until after the last trial that his testimony would be favorable. Nyback v. Champagne Lumber Co., 130 F. 784. The case had been tried five times and the newly discovered witnesses resided in a small village where plaintiff resided, and plaintiff before the last trial had talked the matter over with one of the witnesses. Hagen v. New York, etc., R. Co., 91 N. Y. S. 914.

80. The newly-discovered evidence was merely contradictory to the statement of defendant as to where he obtained the money to make an alleged payment. Whitehead v. Breckenridge [Ind. T.] 82 S. W. 698. New trial where a letter of the intestate was discovered referring to the notes in controversy. Chambliss v. Hass [Iowa] 101 N. W. 153. This is held to be a judicial discretion, and evidence here merely cumulative. Wingen v. May, 92 Minn. 255, 99 N. W. 809. Due diligence not shown. Clithero v. Fenner [Wis.] 99 N. W. 1027.

81. Kreielsheimer v. Nelson, 31 Wash. 406, 72 P. 72.

82. Connally v. Pehle, 105 Mo. App. 407, 79 S. W. 1006.

83. Peed v. Hamilton, 117 Ga. 449, 43 S. E. 702. Although it was put upon a single ground, which the appellate court will not inquire into, Cordray v. Savannah, etc., R. Co., 117 Ga. 464, 43 S. E. 755.

84. Esler v. Wabash R. Co. [Mo. App.] 83 S. W. 73. On conflicting affidavits, motion for new trial for newly discovered evidence that plaintiff's injuries were received before the assault sued on held properly denied. Carlson v. Hall [Iowa] 99 N. W. 571. Motion denied where the witness' statement was denied by the adverse party and the witness had testified to other matters at the trial. Barber v. Maden [Iowa] 102 N. W. 120.

85. Selleck v. Head [Conn.] 58 A. 224. Affidavit of physician that injuries complained of did not exist before the alleged assault, but the evidence at the trial was not on record. Carlson v. Hall [Iowa] 99 N. W. 571. Court abused discretion in refusing to grant a new trial in a will contest, where the question was whether testator had destroyed his will, when a witness was produced who had seen it in the hands of an attesting witness after testator's death. In re Colbert's Estate [Mont.] 78 P. 971.

86. Plaintiff recovered in a suit for an installment of rent, and newly discovered evidence could not be introduced in suits for a subsequent installment. Franke v. Adams, 86 N. Y. S. 293.

87. Chapman v. Delaware, etc., R. Co., 92 N. Y. S. 304.

88. See 2 Curr. L. 1048.

89. Hofferbert v. Williams, 32 Ind. App. 593, 70 N. E. 405.

fraud,[90] a party is entitled to a new trial, the statute being mandatory.[91] In Indiana the tendency is not to extend the statutes except to cases clearly within their meaning, and where title to real estate is but incidentally involved or another cause of action is joined to it, the right will not be allowed;[92] but in Minnesota the substance, not the form, of the pleadings control, and it makes no difference that other issues were tried which are concluded by the first trial.[93]

§ 3. *Proceedings to procure new trial.*[94]—The application must be by motion or petition,[95] to the special term,[96] though a protest to an entry of judgment may amount to a motion for a new trial,[97] or it may be granted on the court's own motion.[98] A defendant, who was served by publication must file security for costs, when he moves for a new trial.[99] Only the parties to the judgment are necessary parties to a petition for a new trial,[1] and the notice need only be served on the parties affected.[2] The motion may be joined with a motion for judgment on the findings,[3] or it may be made in the alternative in case court holds that the defendant is entitled to judgment notwithstanding the verdict,[4] or may be made in the alternative with a motion for judgment notwithstanding verdict.[5] Filing motion for judgment notwithstanding the verdict or in arrest of judgment is not a waiver of the right to move for a new trial.[6] The application must be made within the time limited by statute,[7] and it will not be granted after the time has expired, where mere neglect to make motion in time shown,[8] as the privilege is lost, unless within the time the court makes an order extending the time,[9] except where by statute the

90. Burns' Ann. St. 1901, § 1076, is mandatory and court has no discretion. Tomlinson v. Tomlinson, 162 Ind. 530, 70 N. E. 881.

91. The party is entitled to it as a matter of right, the court having no discretion in the matter [Burns' Ann. St. 1901, § 1076]. Tomlinson v. Tomlinson, 162 Ind. 530, 70 N. E. 881.

92. Error to give new trial in a suit to quiet title and to enjoin defendant from trespassing on the land, nor was the error cured by the filing of an amended complaint, nor were defendants estopped because they failed to except at the time. Hofferbert v. Williams, 32 Ind. App. 593, 70 N. E. 405. Refused where count to recover possession from a tenant joined with the count in ejectment. Cambridge Lodge No. 9, K. P., v. Routh [Ind.] 71 N. E. 148.

93. Right to second trial in action to recover possession of land, though other issues presented. Gray Cloud Land Co. v. Security Trust Co. [Minn.] 101 N. W. 605.

94. See 2 Curr. L. 1048.

95. If the petition contains all the facts necessary to constitute a good motion, it may be treated as such where necessary. Hunter v. Porter [Iowa] 100 N. W. 53.

96. Where on the ground of misconduct of juror. Werner v. Interurban St. R. Co., 99 App. Div. 592, 91 N. Y. S. 111.

97. Defendant protested because a continuance had been refused where there had been a change of counsel during trial. McInnes v. Sutton, 35 Wash. 384, 77 P. 736.

98. Code Civ. Proc. § 662, allowing new trial where plain disregard of instructions, or of the evidence as to show influence of passion or prejudice; there is no such gross disobedience where the judge leaves the jury free to find as to a certain fact. Eades v. Trowbridge, 143 Cal. 25, 76 P. 714.

99. Code, § 3796; but the order cannot be collaterally attacked for failure of record to show it. English v. Otis [Iowa] 101 N. W. 293.

1. But if it develops that other parties are necessary, they may be brought in. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562.

2. In an action brought by an executor, it need not be served on an executor who was made defendant merely because he would not join as plaintiff. Sprague v. Walton, 145 Cal. 228, 78 P. 645.

3. Granting of new trial disposes of the other motion. McInnes v. Sutton, 35 Wash. 384, 77 P. 736.

4. It was in the interest of justice for the court to exercise its discretion. Usher v. Scranton R. Co., 132 F. 405.

5. New trial granted as verdict not sustained by the evidence. Holland v. Great Northern R. Co. [Minn.] 101 N. W. 608.

6. Code, § 3759; but a motion for judgment on special findings does waive right. Schulte v. Chicago, etc., R. Co. [Iowa] 99 N. W. 714.

7. Johnson Bros. v. Wright [Iowa] 99 N. W. 103; Van Buskirk v. Stover, 162 Ind. 448, 70 N. E. 520. The court is without jurisdiction of a motion made after the time limited. Clements v. Buckner [Tex. Civ. App.] 80 S. W. 235.

8. Forgetfulness, but no accident, mistake or unforeseen cause shown. McDermott v. Rhode Island Co. [R. I.] 60 A. 48.

9. Gen. Laws 1896, c. 251, requires the petition for new trial to be filed within 15 days after statement; defendant's time for filing statement was extended to Aug. 27, and on Sept. 26, as no petition was filed, judgment was rendered for plaintiff, and defendant could not file a petition for a new trial on Dec. 18. Blaisdell v. Harvey [R. I.] 57 A. 371. Order made in October term per-

motion is deemed denied if not determined within the term,[10] in which case the act of the court in extending the time,[11] or in considering the motion subsequently, is void.[12] The motion must usually be made within a fixed number of days of,[13] or at the term at which, the verdict, report, or decision was rendered,[14] or by the first day of the next term.[15] For newly discovered evidence the time allowed is longer.[16] Where special findings of a jury are obtained in an equitable case, the time for moving for a new trial does not begin to run until they have been adopted by the court.[17] Where the case is tried in a higher court, the time runs from the date of judgment of the higher court.[18] A motion is prematurely made, if made before the return of the verdict.[19] An amendment may be made to a motion for a new trial,[20] within the statutory time allowed for making the motion,[21] or the court may allow it.[22] The motion must specify a statutory ground,[23] though it need not state one of the statutory grounds where the ruling complained of is designated,[24] and it is not necessary to state the grounds of the motion at length.[25] An assignment of error will not be considered which does not point out the specific error complained of,[26] a general allegation that the trial was unfair[27] or that a verdict is contrary

mitting the motion to be filed in the November term. Walker v. Moser [C. C. A.] 117 F. 230.

10. Notwithstanding that it was continued to another term by the order of the judge, Ariz. Rev. St. 1887, § 837, being constitutional. James v. Appel, 192 U. S. 129, 48 Law. Ed. 377.

11. Oral understanding of parties to which the court consented, and it was immaterial that the bill of exceptions showed the motion was made in time when it was not so in fact. Griffin v. Wabash R. Co. [Mo. App.] 85 S. W. 111.

12. Motion made in time; but not acted on, but continued to next term [Rev. St. 1895, art. 1374]. Clements v. Buckner [Tex. Civ. App.] 80 S. W. 235.

13. Where counsel was not present when verdict was returned, he has 24 hours in which to except. Goodrum v. Grimes, 185 Mass. 80, 69 N. E. 1053. Motion must be made within 4 days of rendition of judgment. Harkness v. Jarvis, 182 Mo. 231, 81 S. W. 446.

14. Where motion was under consideration, and its final consideration continued to the next term, it will be considered filed in time, though in fact not in the clerk's hands before adjournment. Glover v. Ratcliff [Kan.] 77 P. 89. Ind. T. Ann. St. 1899, § 3358, requiring motion except for one cause, within 3 days of verdict; a motion made 45 days after judgment, not filed in term, and no excuse presented, was properly denied. Mann v. Carson [Ind. T.] 82 S. W. 692.

15. Van Buskirk v. Stover, 162 Ind. 448, 70 N. E. 520.

16. Code, § 4092; application on ground of newly-discovered evidence may be made within one year of rendition of verdict. Hunter v. Porter [Iowa] 100 N. W. 53. Party brought into court on the same notice and pleadings as in ordinary actions, and notwithstanding an appeal has been decided by the supreme court [Code, §§ 4094, 4095]. Chambliss v. Hass [Iowa] 101 N. W. 153.

17. Otherwise party might be required to file two motions. Jenkins v. Kirtley [Kan.] 79 P. 671. Findings returned Feb. 6; notice of intention to move for new trial Feb. 10; court adopted findings March 22; motion overruled as not filed within 10 days after decision of court. Spencer v. Hersam [Mont.] 77 P. 418.

18. Action tried in district court on appeal from county court. Williams v. Miles [Neb.] 102 N. W. 482.

19. A motion filed with the clerk when the jury was sent back to make one of the findings more definite, but where there was some evidence that a request was made at the time for the clerk to hold it until the return of the jury, was not prematurely made. Atchison, etc., R. Co. v. Davis [Kan.] 79 P. 130.

20. Though trial court refused to allow amendment, the appellate court treated it as allowed. McLeod v. Morris, 120 Ga. 756, 48 S. E. 188. An amendment to a motion for a new trial may be allowed at any time before the motion is finally disposed of. Tifton, etc., R. Co. v. Chastain [Ga.] 50 S. E. 105.

21. Newly-discovered evidence. Thompson v. Thompson [Mo. App.] 84 S. W. 1022.

22. Newly-discovered evidence. Kreielsheimer v. Nelson, 31 Wash. 406, 72 P. 72.

23. Motion in action on contract "because the damages assessed are excessive" which is a statutory ground for new trial in actions for tort only, is insufficient. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608.

24. Motion on following ground, viz.: In granting defendant's motion for judgment on the pleadings. King v. Burnham [Minn.] 101 N. W. 302.

25. But it is the duty of the clerk to enter motion and order, stating the grounds upon which it was made or granted, and referring to any document referred to by counsel, as the bill or statement of particulars. Williams v. Hawley, 144 Cal. 97, 77 P. 762.

26. Assignment of error in refusing a new trial for newly-discovered evidence. Taylor v. San Antonio, etc., R. Co. [Tex. Civ. App.] 83 S. W. 738.

27. O'Connell v. King & Son [R. I.] 59 A. 926.

to law is too indefinite to be considered.[28] A specification or motion for new trial that the evidence is insufficient to justify the verdict is sufficient.[29] In some jurisdictions it is required that where a motion for new trial is made because of the insufficiency of the evidence, the statement shall specify the particulars in which the evidence is alleged to be insufficient,[30] and when complaint is made over the admission of any evidence, it must be set out,[31] as the motion can only be based on what appears of record.[32] In Georgia a motion for a new trial for admission or exclusion of evidence must set out the evidence.[33] Grounds assigned in the motion but not argued are not necessarily waived,[34] though where the motion is made on one ground, the party cannot change his position on appeal.[35] In a case of default the petition should show that there was a good defense.[36] The statement on a motion for new trial is only required to contain such evidence as is necessary for the determination of the points raised,[37] and the opposite party may file amendments thereto.[38] Where a party fails to object to a statement of the case which shows that the motion for a new trial was made in time, he is precluded from asserting the contrary.[39] A bill of exceptions unless made a part of the statement on a motion for new trial cannot be considered on appeal;[40] in the absence of a bill of exceptions, the judgment will not be reversed merely because of allegations in the motion for a new trial.[41] Statements or bills of exceptions may be made up, though transcripts of the evidence are not obtained from the official stenographer.[42] Where there has been a reference, the bill of exceptions must nevertheless be settled by the court.[43] Where the motion is made on a bill of exceptions, it need not contain a specification of errors.[44] An order overruling the motion giving party thirty days to prepare a bill of exceptions is sufficient to cover a bill relating to the original trial,[45] and where the motion is continued, it preserves the right of the movant to present a

28. Hoskins' Adm'r v. Brown [Ky.] 84 S. W. 767.

29. Where statement recites that it contains substantially all of the evidence. Di Nola v. Allison, 143 Cal. 106, 76 P. 976. Assignment that the "findings" are not supported by the evidence is sufficient under Burns' Ann. St. 1901, § 568, cl. 6, specifying as one of the grounds for a new trial that the "verdict or decision" is not sustained by the evidence. Parkison v. Thompson [Ind.] 73 N. E. 109.

30. Specification that court erred in making a certain finding, there being insufficient evidence to justify it, is not good [Code Civ. Proc. § 1173]. Schilling v. Curran [Mont.] 76 P. 998.

31. So that the question can be decided without reference to other parts of the record. McTier v. Crosby, 120 Ga. 878, 48 S. E. 355.

32. The granting of new trial because of absence of counsel reversed because record did not show due diligence. Ayer v. James, 120 Ga. 578, 48 S. E. 154.

33. Reference to other parts of record insufficient. Buck v. Nicholls Mfg. Co. [Ga.] 50 S. E. 82. Where error in admission of evidence, the evidence must be set out in motion. Long v. Powell, 120 Ga. 621, 48 S. E. 185.

34. Other additional circumstances must be shown to make out a waiver. Atchison, etc., R. Co. v. Davis [Kan.] 79 P. 130.

35. Motion made on ground of insufficiency of the evidence, and party on appeal cannot maintain that there was error of law. Schilling v. Curran [Mont.] 76 P. 998.

36. Tschohl v. Machinery Mut. Ins. Ass'n [Iowa] 101 N. W. 740.

37. Not necessary to contain a transcript of the reporter's notes. Vatcher v. Wilbur, 144 Cal. 536, 78 P. 14.

38. Error for court to require full transcript at expense of $275, where only $500 involved, where slight amendments would have presented all the facts that were necessary. Vatcher v. Wilbur, 144 Cal. 536, 78 P. 14.

39. Rev. Code Civ. Proc. § 303, subd. 3, provides that if no amendments to the proposed statement are served, or, if served, are allowed, the proposed statement may be presented for settlement without notice. Juckett v. Fargo Mercantile Co. [S. D.] 100 N. W. 742.

40. In re Colbert's Estate [Mont.] 78 P. 971.

41. Affidavit that the facts stated in the motion "are true to the best of affiant's knowledge and belief" is insufficient, though not controverted. Scheffel v. Scheffel [Tex. Civ. App.] 84 S. W. 408.

42. When once settled it is a part of the record, not subject to correction, except upon a showing of mistake. York v. Steward [Mont.] 76 P. 756.

43. Babcock v. Ormsby [S. D.] 100 N. W. 759.

44. It differs therein from a statement of facts [Code Civ. Proc. § 1155]. Bond v. Hurd [Mont.] 78 P. 579.

45. Gaston v. Marengo Imp. Co., 139 Ala. 465, 36 So. 738.

brief of the evidence for approval.[46] Where the motion is made on the minutes of the court, a statement must be subsequently prepared;[47] but a motion for a new trial on the minutes cannot be made in an action tried by the court.[48] In Massachusetts the court may hear the motion on affidavits with or without additional oral testimony.[49] If made for irregularities of trial, it must be made on affidavits.[50] A new trial should be granted on all of the issues, unless verdict cannot be apportioned.[51] Where a new trial is granted on part only of the issues, the costs may be apportioned in the discretion of the court.[52] The granting of a new trial sets aside the judgment as to all the parties.[53] No ruling of law will be made on a motion for a new trial on any question not raised at the trial.[54] The order setting aside the verdict can only be made on grounds asked for,[55] and it should specify the grounds on which it was made,[56] and where it explicitly states the ground, reference cannot be made to the memorandum;[57] but where the record or order does not show on what ground it was made, it will be sustained if any ground assigned in motion is good.[58] Where an order was made on the minutes denying a new trial, another application may be made on other grounds.[59] The order is not a part of the statement,[60] and one may be charged with notice of it when it is served on him, though the files are defective.[61] The order granting a new trial may be made conditional on the payment of costs.[62] An order refusing or allowing a new trial is not assignable as error on appeal,[63] but an order denying a motion to relieve a party from default in not making his motion for a new trial in time is appealable,[64] and on an appeal from an order granting a new trial, the refusal to dismiss a recordari is reviewable.[65]

§ 4. *Proceedings at new trial.*[66]—The trial will be had under the limitations

46. Error to enter an order dismissing the motion for new trial. Miller v. Thigpen, 121 Ga. 475, 49 S. E. 286.

47. Where a document purporting to be a statement was not signed by the judge, there could be no review of the order denying the new trial. Kent v. Williams [Cal.] 79 P. 527.

48. No appeal will lie from order denying motion. Bosworth v. Kinghorn, 94 App. Div. 187, 87 N. Y. S. 983.

49. Manning v. Boston El. R. Co. [Mass.] 73 N. E. 645.

50. One on information and belief insufficient; an appeal lies from the order striking out the affidavits, as personally offensive, and scandalous. Gay v. Torrance, 145 Cal. 144, 78 P. 540.

51. General verdict rendered before a magistrate and evidence did not support the second cause. Jones v. Atlantic Coast Line R. Co. [S. C.] 49 S. E. 568.

52. Code 527 (2). Satterthwalte v. Goodyear [N. C.] 49 S. E. 205.

53. Notwithstanding a recital in the findings of fact that it was of no effect as between plaintiff and one of the defendants. Kent v. Williams [Cal.] 79 P. 527.

54. Murphy v. Com. [Mass.] 73 N. E. 524.

55. Where plaintiff asked for new trial because of inadequate verdict, the court would not consider whether the verdict was otherwise justified by the evidence. Hill v. Union R. Co. [R. I.] 57 A. 374.

56. If because it was contrary to the evidence, it must be conditioned on payment of costs and disbursements. Murphy v. Interurban St. R. Co., 88 N. Y. S. 187.

57. Order on ground evidence did not sustain the verdict; the memorandum referred to failure to prove a Wisconsin statute. Holland v. Great Northern R. Co. [Minn.] 101 N. W. 608.

58. Glover v. Ratcliff [Kan.] 77 P. 89; Weller v. Hilderbrandt [S. D.] 101 N. W. 1108. That the evidence was conflicting does not prevent the exercise of the court's discretion. Cooper v. Spring Valley Waterworks, 145 Cal. 207, 78 P. 654.

59. It is not necessary to have the order resettled. Garofalo v. Prividi, 43 Misc. 359, 87 N. Y. S. 467.

60. Statement used on motion for new trial may be used on appeal from order or from the final judgment [Code Civ. Proc. § 1736]. Mahoney v. Dixon [Mont.] 77 P. 519.

61. New trial: Reasonable diligence to discover evidence for grant of new trial in suit to require issue of a certificate of state land to claimant as affecting rights of alleged innocent purchaser under a void patent. The files contained no motion for a new trial. Kempner v. State, 31 Tex. Civ. App. 363, 72 S. W. 888.

62. Where no time is specified it is payable on demand. Holtum v. Greif, 144 Cal. 521, 78 P. 11.

63. Adcock v. Oregon R. & Nav. Co. [Or.] 77 P. 78.

64. The merits of the motion cannot be determined on a motion to dismiss the appeal. Steen v. Santa Clara Valley Mill & Lumber Co., 145 Cal. 564, 79 P. 171.

65. Johnson v. Grand Fountain of United Order of True Reformers, 135 N. C. 385, 47 S. E. 463.

66. See 2 Curr. L. 1051.

imposed by the order granting it,[67] but the court in its discretion may allow an amendment of the pleadings.[68] Even in equity cases the new trial must be held,[69] though the parties may rely on testimony taken at former hearing, or may move for an order allowing additional testimony.[70]

§ 5. *Arrest of judgment. A. Grounds.*[71]—A motion in arrest of judgment may be made, though there was no demurrer interposed,[72] where the complaint,[73] the petition,[74] or the pleadings wholly fail to state a cause of action,[75] or on the ground the judgment was nunc pro tunc.[76] Where there is one good count, the motion will be denied.[77] On a motion in arrest of judgment for defects in pleadings, every intendment will be made in favor of the pleadings,[78] and judgment will not be arrested for a formal error of pleading,[79] which is amendable,[80] or which has been corrected by the proof.[81]

(§ 5) *B. Motions and proceedings thereon.*[82]—The motion must be made at the same term, and a nunc pro tunc order cannot be made.[83] In some jurisdictions when a motion in arrest of judgment is made, it must be certified to the appellate court for decision.[84] A motion to set aside a judgment will raise the question of the court's failure to appoint a guardian ad litem for an infant defendant,[85] and in some cases it may amount to an admission by the party.[86]

67. New trial was allowed for newly-discovered evidence merely on the question of damages, and it was proper to enter the limitation on the docket when the case was continued. Ela v. Ela, 72 N. H. 598, 57 A. 921.

68. In an action to recover a loan, defendant was allowed to amend his answer by stating that the sum represented "poker chips." Collet v. Beutler, 27 Utah, 540, 76 P. 707.

69. Error to enter judgment for other party without a new trial. Hurley v. Kennally [Mo.] 85 S. W. 357.

70. This is in discretion of judge, and may be determined by inspection of pleadings. Pratt v. Timmerman [S. C.] 48 S. E. 255.

71. See 2 Curr. L. 1051.

72. Declaration for wrongful death, failed to show that there was any widow, next of kin, or beneficiaries. Southern R. Co. v. Maxwell [Tenn.] 82 S. W. 1137.

73. Messenger v. Woge [Colo. App.] 78 P. 314.

74. Action on an injunction bond; motion overruled. Williams v. Ballinger [Iowa] 101 N. W. 139.

75. Suit on injunction bond for damages, with no allegation that the original action had been disposed of. Lacey v. Davis [Iowa] 102 N. W. 535.

76. Sperling v. Stubblefield, 105 Mo. App. 489, 79 S. W. 1172.

77. Motion because the first count would not sustain the judgment, but denied as second and third counts were good. Chicago, W. & V. Coal Co. v. Moran, 210 Ill. 9, 71 N. E. 38.

78. Declaration for nuisance in depositing noxious substances near plaintiff's premises which emitted odors and caused sickness in plaintiff's family, raised a fair inference that the odors came upon plaintiff's premises. Fairbank Co. v. Bahre [Ill.] 73 N. E. 322.

79. Omission of formal concluding words of declaration, and of an essential averment which was contained by implication in the other averments. Bowen v. White [R. I.] 58 A. 252. Declaration failed to allege the trespass was committed "with force and arms and against the peace" and amendment will be allowed. Barlow v. Tierney [R. I.] 59 A. 930. That the petition pleads evidence rather than ultimate conclusions is not a ground for motion for arrest of judgment. Williams v. Ballinger [Iowa] 101 N. W. 139. Where count merely inartificially drawn the motion was overruled. Carpenter v. Hamilton [Mo. App.] 84 S. W. 863.

80. Motion to arrest judgment in a garnishment proceeding cannot be based on alleged invalidity of the judgment in attachment, on which the proceedings were based, as they constitute no part of the record in the garnishment proceedings. Leffler v. Union Compress Co., 121 Ga. 40, 48 S. E. 710.

81. The declaration alleging the running of cars against other cars at a high rate of speed in charge of an inexperienced and incompetent brakeman so that plaintiff's intestate was thrown under car and killed was sufficient. Elliott v. Canadian Pac. R. Co., 129 F. 163.

82. See 2 Curr. L. 1051.

83. Though pursuant to oral understanding consented to by the court. Griffin v. Wabash R. Co. [Mo. App.] 85 S. W. 111.

84. Gen. Laws 1896, p. 760, c. 222, § 3 and p. 865, c. 251, §§ 10, 11, requiring certification from district court, or common pleas division of supreme court, to the appellate division of the latter. Barlow v. Tierney [R. I.] 59 A. 930.

85. Judgment for delinquent taxes. State v. Gawronski [Mo. App.] 85 S. W. 126.

86. A landowner who moved to arrest judgment in a suit to recover an assessment on the ground of an inaccurate description, which was not an issue, he was authorized to tender, nevertheless admitted the defect in the description. Ager v. State, 162 Ind. 538, 70 N. E. 808.

(§ 5) *C. Effect.*[87]—The objection that the testimony failed to establish an instrument testamentary in its character cannot be raised for the first time on motion for a new trial.[88]

NEXT FRIENDS; NEXT OF KIN, see latest topical index.

NON-NEGOTIABLE PAPER.

The term "non-negotiable paper" comprehends those contracts[89] for the payment of money which possessing the form and other essentials of bills and notes lack their negotiability. This topic treats strictly of non-negotiable instruments, the indicia of negotiability and the elements which destroy it having been treated in a prior topic.[90]

Title to a non-negotiable instrument passes by assignment,[91] and the right of a holder to assign cannot be taken away by the maker.[92] The assignment should be made in the same manner as any other chose in action is assigned.[93] An assignee acquires precisely the same title that his assignor had,[94] and takes subject to the defenses existing in favor of the maker,[95] but is not affected by equities existing in favor of strangers whose interest in no way appears.[96] Fraud in its inception[97] or want of consideration[98] are good defenses, and it requires no compliance with statutes relating to negotiable paper in order to let them in.[99] Payment to the payee before maturity and without notice of a transfer discharges the maker,[1]

87. See 2 Curr. L. 1052. Carney v. People, 210 Ill. 434, 71 N. E. 365; Zander v. New York Security & Trust Co., 81 App. Div. 635, 81 N. Y. S. 1151; Hofferbert v. Williams, 32 Ind. App. 593, 70 N. E. 405; Crawford v. Watkins, 118 Ga. 631, 45 S. E. 482; State v. Judge of First District Court, 113 La. 654, 37 So. 546; Fitzjohn v. St. Louis Transit Co., 183 Mo. 74, 81 S. W. 907. Properly denied where the witness offered was present at the trial. Barber v. Maden [Iowa] 102 N. W. 120. Question whether a release of a mortgage was forged. Kringle v. Kringle, 123 Iowa, 365, 98 N. W. 883; Dunk v. Dunk, 95 App. Div. 617, 88 N. Y. S. 419; Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Pridemore [W. Va.] 47 S. E. 258.

88. Suit to establish lost deed as will. Lincoln v. Felt, 132 Mich. 49, 92 N. W. 780.

89. Respecting the general doctrines of contract, see the title Contracts, 3 Curr. L. 805.

90. See Negotiable Instruments, 4 Curr. L. 788 et seq.

91. See 2 Curr. L. 1052. Bill of lading. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

92. A memorandum on a note providing that it shall not be transferred or used as collateral without the written consent of the maker does not destroy assignability. Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466.

93. A mere indorsement is insufficient. Young v. American Bank, 44 Misc. 305, 89 N. Y. S. 913.

94. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

95. Note not payable in bank. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287; Cotton v. John Deere Plow Co. [Okl.] 78 P. 321. Damages for breach of warranty of goods for which it was given may be recouped against an assignee [Ky. St. 1903, § 474]. Harrigan v. Advance Thresher Co. [Ky.] 81 S. W. 261. That the maker acknowledges his liability on the instrument does not estop his defending, it not appearing that the assignee was prejudiced by his admission. Id.

96. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

97. Answer setting up fraud held sufficient. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287.

98. Averment in answer that a note was given without consideration is an averment that the defense existed at the date of assignment. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287. That the note was given for money to be loaned to the maker's son personally cannot be enforced for money loaned to a corporation of which he was president. Smith v. Willing [Wis.] 101 N. W. 692. A receipt given by the maker of a note for goods for which the note was given does not estop the maker to show the true consideration of the note. That it was a peddler's note. Burns v. Sparks [Ky.] 82 S. W. 425.

99. Patent right notes. First Nat. Bank v. Beach [Ind. App.] 72 N. E. 287. In Kentucky a note not discounted at a bank and not bearing on its face "Peddler's note" as required by statute can be shown to be void, though it is necessary to contradict the written agreement evidencing the transaction. Burns v. Sparks [Ky.] 82 S. W. 425.

1. Notice subsequent to payment does not affect the validity of such payment. Sykes v. Citizens' Nat. Bank [Kan.] 76 P. 293. Evidence held to show that the maker had no notice of the transfer and was justified in making payment, though the payee did not present and did not have the paper. Swan v. Craig [Neb.] 102 N. W. 471. The holder held estopped from denying owner-

and payment to an assignee of record will discharge him, though he have notice that another claims a right to collect;[2] but payment to an assignee who has not possession will not.[3] An assignee who takes for the purpose of bringing action, himself to pay expenses of litigation and divide the proceeds with the assignor is not a bona fide holder.[4] The owner can recover on a lost instrument without giving an indemnity bond to the maker.[5] A non-negotiable instrument is not entitled to grace,[6] and an indorser is not entitled to demand protest or notice;[7] but the assignee must use diligence in collecting it if he would hold the assignor.[8]

NONRESIDENCE, see latest topical index.

NOTARIES AND COMMISSIONERS OF DEEDS.[9]

A notary has power at common law to take depositions.[10]

It is held in many states that a corporate officer or stockholder is incompetent to take the acknowledgment of a corporate instrument,[11] and the Illinois act legalizing such acknowledgments is not retroactive.[12]

Oaths before a foreign notary are of no effect except as authorized by statute.[13]

ship and authority of his assignor to receive payment. Id. Query: Whether the mortgagor of a mortgage securing a non-negotiable debt can after an assignment of the mortgage, by any dealings with the mortgagee short of actual payment, though in ignorance of the assignment, raise an equity as against the assignee. Cudahy Packing Co. v. State Nat. Bank [C. C. A.] 134 F. 538.

2. Casner v. Johnson, 66 Kan. 404, 71 P. 819.

3. Not a defense as against one to whom he had assigned it. Maguire v. Donovan [Mo. App.] 84 S. W. 156.

4. So as to come within Gen. St. 1902, § 631, authorizing a bona fide assignee to maintain action in his own name. Slade v. Zeitfuss [Conn.] 59 A. 406.

5. Certificate of deposit payable to the depositor or his assigns. Zander v. New York Security & Trust Co., 178 N. Y. 208, 70 N. E. 449. But see Maguire v. Donovan [Mo. App.] 84 S. W. 156.

6. Non-negotiable because of uncertainty of amount. Davis v. Brady [S. D.] 97 N. W. 719.

7. Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466.

8. **NOTE. "The assignee of a non-negotiable instrument must use diligence against the maker in an attempt to collect it in order to hold the assignor liable:** Kampmann v. Williams, 70 Tex. 568, 8 S. W. 319. The diligence required of the holder of such an instrument, in order to subject the indorser, consists in a demand for payment from the maker, as soon as the note becomes due, and, in case of nonpayment, an immediate suit against him. Huntington v. Harvey, 4 Conn. 124. Such diligence is dispensed with only by the insolvency of the maker, or some other valid reason. Fulford v. Johnson, 15 Ala. 385. Suit must generally be brought against the maker of the note at the next succeeding term after it falls due, in order to fix the liability of the indorser. Matchett v. Anderson, etc., Works, 29 Ind. App. 210, 64 N. E. 229, 94 Am. St. Rep. 272. The mere fact that the maker of the note has a set-off against the payee does not dispense with the necessity for the indorsee to sue to the first term of court after the maturity of the note in order to charge an indorser who is not the payee. Hagerthy v. Bradford, 9 Ala. 567. The neglect of the holder to put such note in suit against the maker for four months after its maturity is such laches as, in the absence of any excuse or waiver, will discharge the indorser. Prentiss v. Danielson, 5 Conn. 175, 13 Am. Dec. 52. And, of course, such delay for several years is fatal. Matchett v. Anderson, etc., Works, 29 Ind. App. 210, 64 N. E. 229, 94 Am. St. Rep. 272. If the holder of a non-negotiable note, indorsed in blank, has without excuse neglected until long after its maturity to bring suit, it is not necessary for the indorser insisting upon the laches of the holder as a discharge from liability, to show that he has sustained actual damage. Prentiss v. Danielson, 5 Conn. 175, 13 Am. Dec. 52. A different rule seems to prevail in California, as it has there been held that mere delay of the payee to proceed against the principal or to pursue any other remedy is not available as a defense to one who has put his name on the back of such a note to give it credit. First Nat. Bank v. Babcock, 94 Cal. 96, 29 P. 415, 28 Am. St. Rep. 94. We confess our inability to find any legal reason for such a decision."—From monographic note "Liability of Indorser of Non-Negotiable Instrument," 97 Am. St. Rep. 985, 989, accompanying Young v. Sehon, 53 W. Va. 127, 44 S. E. 136, 97 Am. St. Rep. 970, cited 2 Curr. L. 1052, n. 93.

9. As to particular duties see Acknowledgments, 3 Curr. L. 31; Depositions, 3 Curr. L. 1074; Negotiable Instruments, 2 Curr. L. 1013.

10. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

11. Fugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N. E. 644. See 2 Curr. L. 1053, n. 6.

12. Fugman v. Jiri Washington Bldg. & Loan Ass'n, 209 Ill. 176, 70 N. E. 644.

13. Foreign notary has no power to administer oath in forma pauperis. Fawcett v. Chicago, etc., R. Co. [Tenn.] 81 S. W. 839.

Where a state statute provides that depositions without the state may be taken before a notary, they may be taken for use in such state, though the law of the state where they are taken gives notaries no such power.[14]

There can be no recovery against a notary for falsely certifying an acknowledgment unless the loss resulted from a reliance on such certificate.[15] The measure of damages is the value of the security which would have been received had the instrument been valid,[16] and the burden of showing this value is on the plaintiff.[17] Limitation of actions on notarial bonds is governed in Kentucky by a special three-year statute.[18] Fraudulent concealment by the notary of a false certification prevents the running of the statute against an action on his bond.[19] Whether the person injured could by due diligence have discovered the facts notwithstanding such fraud is for the jury,[20] not only as to him but as to his sureties.[21]

NOTES AND ISSUE; NOTICE, see latest topical index.

NOTICE AND RECORD OF TITLE.

§ 1. Bona Fide Purchasers and the Doctrine of Notice (829). Valuable Consideration (830). Good Faith (830). Notice or Knowledge (830).
§ 2. Statutory Records or Filings as Constructive Notice (833).
A. In General (833).
B. Deed and Mortgage Records (833). Necessity, Operation and Effect of Recording (834). Sufficiency, Operation and Effect of Record (835). Recording Officers and Administration of the Acts (836).
C. Wills and Their Probate and Administration Proceedings (836).
D. Chattel Mortgages, Conditional Sales, and Other Liens (836).
§ 3. Registration and Certification of Land Titles Under the Torrens System (836).

This title deals only with public records affecting title; other public records[22] and private records[23] are treated elsewhere, as is also the method of restoring lost or destroyed records.[24] The term bona fide purchaser or occupant as used in the betterments[25] or occupying claimant's acts[26] is distinct from the term as used in this article.

§ 1. *Bona fide purchasers and the doctrine of notice.*[27]—In equity the doctrine is that a bona fide purchaser takes title free from equities of third persons,[28] and the defense that one is such a purchaser may be asserted against the state.[29] Though the deed is unrecorded, one who has notice takes subject to it[30] unless it is

14. Midland Steel Co. v. Citizens' Nat. Bank [Ind. App.] 72 N. E. 290.

15. Mahoney v. Dixon [Mont.] 77 P. 519. Refusal to direct a verdict against the notary in a case where the person making the acknowledgment was an imposter held proper where plaintiff testified that he acted on his own information. People v. Cole [Mich.] 102 N. W. 856.

16, 17. Mahoney v. Dixon [Mont.] 77 P. 519.

18, 19, 20, 21. State v. Hawkins, 103 Mo. App. 251, 77 S. W. 98.

22. See Census and Statistics, 3 Curr. L. 666; Death and Survivorship, 3 Curr. L. 1033; and Records, 2 Curr. L. 1482.

23. See Corporations, 3 Curr. L. 880; and Partnership, 2 Curr. L. 1106.

24. See Restoring Instruments and Records, 2 Curr. L. 1520.

25. See Accession and Confusion of Property, 3 Curr. L. 15.

26. See Ejectment (And Writ of Entry), 3 Curr. L. 1157.

27. See 2 Curr. L. 1053.

28. Prior voluntary conveyance. West v. Wright, 121 Ga. 470, 49 S. E. 285. Executory contract for the purchase of land. Martin v. Thomas [W. Va.] 49 S. E. 118. Equitable right of third person to a mortgage. Purchaser took under quitclaim deed. Livingstone v. Murphy [Mass.] 72 N. E. 1012. Unrecorded deed [Rev. St. Tex. art. 4640]. Lee v. Wysong, 128 F. 833. Fixtures pass to a grantee without notice of agreement for removal between landlord and tenant. Smyth v. Stoddard, 105 Ill. App. 510. That release of trust on land is void. Schneider v. Sellers [Tex.] 84 S. W. 417. Bona fide purchasers without notice that grantor purchased property while guardian in socage of owner are protected against the claim of such owner. Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. S. 1009. A partly discharged mortgage cannot by mere agreement be retained as security for a new consideration as against subsequent bona fide creditors without notice. Whitney v. Metallic Window Screen Mfg. Co. [Mass.] 73 N. E. 663. See 2 Curr. L. 1054, n. 13, 14.

29. The defense of innocent purchaser under a certificate of occupancy is good against an attack of the state upon the sale of the land on the ground of nonoccupancy. State v. Hughes [Tex.] 80 S. W. 524.

30, 31. Shannon's Code, § 3752, providing

wholly void.[31] As a general rule the rule of caveat emptor applies to judicial sales,[32] though there are cases holding the contrary.[33]

The sole requisites of a bona fide purchaser are (1) a valuable consideration; (2) good faith; and (3) the absence of notice or knowledge.[34] The instrument reciting the payment of a valuable consideration, such recital, in the absence of contradictory evidence, establishes one's character as a bona fide purchaser.[35]

Valuable consideration.[36]—The consideration must be actually paid[37] before the purchaser has notice of the other party's rights,[38] unless some existing right be surrendered.[39] An antecedent indebtedness is not a valuable consideration.[40] A mortgagee is a purchaser for a valuable consideration,[41] as is one who obtains title in payment of services to be rendered,[42] and an attaching creditor;[43] but a passive trustee is not such a purchaser.[44] The fact that the consideration is inadequate does not per se destroy one's character as a bona fide purchaser.[45]

Good faith.[46]—Usual care being exercised, good faith becomes a question of fact.[47] One has the right to rely upon an unreversed judgment,[48] and upon tax proceedings which are regular upon their face.[49] That the acquisition of property by a corporation is unauthorized does not destroy its character as a bona fide purchaser.[50]

Notice or knowledge.[51]—In order that one may, as a bona fide purchaser, claim priority over the equities of third persons, he must not, at the time of purchase, have had either actual or constructive notice of such equities.[52] Registration or

that unregistered deeds shall be void as to bona fide purchasers, means purchasers without notice. Wilkins v. McCorkle [Tenn.] 80 S. W. 834.

32. Walkau v. Manitowoc Seating Co., 105 Ill. App. 130. Neither the attorneys of plaintiff who purchased the property, nor plaintiff to whom such attorneys assigned a part interest, nor assignees of the certificate of purchase prior to the execution of the sheriff's deed are purchasers in good faith. See 2 Curr. L. 1054, n. 17. English v. Otis [Iowa] 101 N. W. 293. See Judicial Sales, 4 Curr. L. 321.

33. Purchaser at judicial sale is not obliged to take notice of notice of appeal filed in clerk's office prior to the sale. State Mut. Bldg. & Loan Ass'n v. O'Callaghan [N. J. Eq.] 57 A. 496. Purchaser at foreclosure sale of a recorded mortgage will be protected against an unrecorded prior grant of a right of way. Dahlberg v. Haeberle [N. J. Law] 59 A. 92. A purchaser at a foreclosure sale takes title free from the claim of the assignee of a junior mortgagee, the assignment being unrecorded. Pinney v. Merchants' Nat. Bank [Ohio] 72 N. E. 884.

34. Derrett v. Britton [Tex. Civ. App.] 80 S. W. 562. The validity of the acknowledgment to one's deed is not essential. Id. See 2 Curr. L. 1054, n. 19. See, also, the topic Fraudulent Conveyances, 3 Curr. L. 1535, as to the rights of the grantor's creditors.

35. Assignment of mortgage. Weideman v. Pech, 92 N. Y. S. 493.

36. See 2 Curr. L. 1054.

37. One person being an officer and active manager of both a bank and the grantee corporation, a deposit of the latter's money in the bank held not to constitute a payment to the grantor. Halloran v. Holmes [N. D.] 101 N. W. 310. See Payment and Tender, 2 Curr. L. 1158.

38. Halloran v. Holmes [N. D.] 101 N. W. 310. See 2 Curr. L. 1055, n. 22.

39. Held sufficient where one suspended right of action and released parties secondarily liable. Douglas v. Miller, 102 App. Div. 94, 92 N. Y. S. 514. See 2 Curr. L. 1055, n. 25.

40. Bard v. Meiser [Ark.] 82 S. W. 836. See 2 Curr. L. 1055, n. 24.

41. Atlanta Nat. Bldg. & Loan Ass'n v. Gilmer, 128 F. 293. Creditor extending the time of payment and taking mortgage as security becomes a bona fide purchaser. O'Brien v. Fleckenstein [N. Y.] 73 N. E. 30.

42. Lawyer acquiring title in consideration of his services in clearing title. Garner v. Boyle [Tex.] 79 S. W. 1066.

43. Whitney v. Metallic Window Screen Mfg. Co. [Mass.] 73 N. E. 673.

44. Even though he sign a note and mortgage on the land for the unpaid portion of the purchase price. Halloran v. Holmes [N. D.] 101 N. W. 310.

45. Booker v. Booker, 208 Ill. 529, 70 N. E. 709.

46. See 2 Curr. L. 1055.

47. Syracuse Sav. Bank v. Merrick, 96 App. Div. 581, 89 N. Y. S. 238.

48. Thaxter v. Thain, 91 N. Y. S. 729; Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126.

49. A purchaser from one holding under a tax deed is a bona fide purchaser, the proceedings being regular and the deed conveying the legal title. Atlanta Nat. Bldg. & Loan Ass'n v. Gilmer, 128 F. 293.

50. Schneider v. Sellers [Tex.] 84 S. W. 417, modifying 81 S. W. 126.

51. See 2 Curr. L. 1055.

52. Keachele v. Henderson [Tex. Civ. App.] 78 S. W. 1082; Derrett v. Britton [Tex. Civ. App.] 80 S. W. 562. Persons having notice of mortgage are not innocent purchas-

record[53] or notice or knowledge of facts which would have put an ordinarily prudent man on inquiry,[54] and such as upon reasonable investigation would have revealed the claims of the other party,[55] are equivalent to actual notice. Exclusive

ers, there being no release or cancellation of record. Griffin v. Stone River Nat. Bank [Tex. Civ. App.] 80 S. W. 254. Their only right is to redeem from the foreclosure of the mortgage. Freeburg v. Eksell, 123 Iowa, 464, 99 N. W. 118. Purchaser having knowledge that another has an enforceable option on land may be required to convey to the holder of such option. Cummins v. Beavers [Va.] 48 S. E. 891. Parties to an action in which the judgment rendered operates to pass title are charged with notice of the transfer of title. Kelly v. Bramblett [Ky.] 81 S. W. 249. Knowledge of contract whereby third persons had interests in all patents of an inventor held sufficient to put the purchaser on inquiry. National Cash Register Co. v. New Columbus Watch Co. [C. C. A.] 129 F. 114. Party to fraud on incompetent is not a bona fide purchaser. Sterling v. Sterling, 90 N. Y. S. 306. Oral agreement affecting one's title held inadmissible, there being no proof tending to show that he had knowledge thereof. Carlisle v. Libby, 185 Mass. 445, 70 N. E. 423. A mortgagee receiving notice after receiving mortgage to secure a note, the consideration of which consists largely of services to be thereafter rendered, is not one having "actual" notice within the meaning of Civ. Code, § 2950. Payne v. Morey, 144 Cal. 130, 77 P. 831.

Evidence held insufficient to show that mortgagee had notice that deed to mortgagor was fraudulent. Allen v. Riddle [Ala.] 37 So. 680. Evidence held insufficient to show actual notice. Booker v. Booker, 208 Ill. 529, 70 N. E. 709. Evidence held insufficient to show want of notice. Keachele v. Henderson [Tex. Civ. App.] 78 S. W. 1082; Alexander v. Goetz [Ala.] 37 So. 630. See 2 Curr. L. 1055, n. 27-29.

53. See post, § 2, subd. B. Sufficiency and effect.

54. Derrett v. Britton [Tex. Civ. App.] 80 S. W. 562; Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. S. 1009; Rankin Mfg. Co. v. Bishop, 137 Ala. 271, 34 So. 991. See 2 Curr. L. 1056, n. 30; Id. 1057, n. 35.

ILLUSTRATIONS. Facts Constituting Constructive Notice: Recital that mortgage is subject to the provisions of a named contract. Church v. Lapham, 94 App. Div. 550, 88 N. Y. S. 222.

Disclaimer of record owner constitutes notice of unrecorded transfer. Rankin Mfg. Co. v. Bishop, 137 Ala. 271, 34 So. 991.

Visible user or possession: Using road for seven years held constructive notice of its existence, though report of viewers had never been recorded [Gen. St. 1883, § 2953, and Gen. Laws 1877, § 2384 construed] Board of Com'rs of Weld County v. Ingram, 31 Colo. 319, 73 P. 37. Payment of **inadequate price** by remote assignee of a remainder interest, and various facts and conversations held sufficient to charge the assignee with notice that the assignment was merely a mortgage. Dixon v. Bentley [N. J. Eq.] 59 A. 1036. It is the duty of the assignee of a **trust deed** to inquire of the maker thereof as to the status of the debt. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901. Purchasers held charged with notice that trust deed to grantor did not bind minor heirs. Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737. One **present at meeting of corporate board** of directors held charged with knowledge that transaction authorized was constructively fraudulent as to corporation and stockholder. Coombs v. Barker [Mont.] 79 P. 1.

Gap in chain of abstract title: Where, when plaintiff purchased certain land he had an abstract containing deeds that recited all the conveyances down to defendant but failed to show any conveyance by the common source of title, held charged with the notice of such conveyance, the existence of which would have been disclosed by inquiry. Masterson v. Harris [Tex. Civ. App.] 83 S. W. 428.

Facts Held Insufficient to Constitute Notice: Erection of walls along sea coast held not constructive notice of deed to city constructing same. Atlantic City v. New Auditorium Pier Co. [N. J. Err. & App.] 59 A. 158.

Payment of taxes by the grantee in an unrecorded conveyance is not notice of his rights. Sheldon v. Powell [Mont.] 78 P. 491. That deed to mortgagor was **only based on a good consideration** and that judgment was subsequently entered against the grantor held not notice to mortgagee of defect in title. Glassburn v. Wireman [Iowa] 102 N. W. 421.

Relationship between grantor and others: That infant's uncle, with whom minor resided, purchased property at foreclosure sale, is insufficient to excite inquiry as to any impropriety in his conduct. Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. S. 1009.

Judgment roll recitals showing that the owner was a minor orphan and lived with her uncle does not require purchasers to inquire if her uncle was her guardian in socage. Cahill v. Seitz, 93 App. Div. 105, 86 N. Y. S. 1009.

That patentee was an assignee of the certificate on which patent issued did not charge a subsequent purchaser with notice of latent defects in the transfer. Bogart v. Moody [Tex. Civ. App.] 79 S. W. 633. Vendor **refusing to put in writing statements** to the effect that there was no rebate on rent held insufficient to put vendee on inquiry. Ettlinger v. Well, 94 App. Div. 291, 87 N. Y. S. 1049.

Failure to deliver bond to assignee of bond and mortgage held, in view of statements by the assignor, not to put the assignee on notice of former assignment. Syracuse Sav. Bank v. Merrick, 96 App. Div. 581, 89 N. Y. S. 238. That **fence inclosed other** than mortgagor's **land** or that there was more land plowed than he estimated is not notice of an unrecorded deed. Sheldon v. Powell [Mont.] 78 P. 491.

55. Derrett v. Britton [Tex. Civ. App.] 80 S. W. 562. Evidence of a fraudulent purpose, or of conduct amounting to moral turpitude, is not necessary. National Cash Register Co. v. New Columbus Watch Co. [C.

and unambiguous[56] possession of land by a third party is constructive notice of his rights,[57] unless the possession be consistent with the record title,[58] though the contrary has been held.[59] The sufficiency of possession to constitute notice is a question of fact.[60] In some states possession by a tenant is equivalent to the possession of his landlord.[61] In others the tenant's possession is not only notice of all his rights and interests connected with or growing out of the tenancy itself, but is also notice of all interests acquired by collateral or subsequent agreements.[62] While a purchaser is charged with notice of the interest of one in possession, his diligence is sufficient if he finds on the record a deed from the possessor to his vendor.[63] The purchaser is chargeable with notice of the inconclusiveness of judicial decrees.[64] The duty to take notice of taxes includes void ones subsequently reassessed.[65] Purchasers need not go behind a patent unless put upon inquiry by

C. A.] 129 F. 114. Fruit centract held void where owner could have, by reasonable investigation, discovered that the seller had no title. Thompson v. Stark, 25 Ky. L. R. 1882, 79 S. W. 202. See 2 Curr. L. 1057, n. 35.

56. Butler v. Wheeler [N. H.] 59 A. 935. That one boards on the premises is not notice of an equitable claim. Derrett v. Britton [Tex. Civ. App.] 80 S. W. 562. Mother living with son, held her possession was not notice of an unrecorded life lease in her favor. Phillips v. Owens, 90 N. Y. S. 947. Joint occupation of claimant of equity with holder of legal title is not notice of claim of former. Atlanta Nat. Bldg. & Loan Ass'n v. Gilmer, 128 F. 293. See 2 Curr. L. 1056, n. 32.

57. Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737. Under claim of title. Rothschild v. Leonhard, 33 Ind. App. 452, 71 N. E. 673. Where purchaser had knowledge of possession. Elsbury v. Shull, 32 Ind. App. 556, 70 N. E. 287. See 2 Curr. L. 1056, n. 31. Laws 1885, p. 233, c. 147 protects titles acquired and held under unregistered deeds prior to Dec. 1, 1885, if the holders of such titles were in the actual possession of the lands, or if the purchasers had actual or constructive notice of such unregistered deed. Laton v. Crowell, 136 N. C. 377, 48 S. E. 767. Under such law an unrecorded deed is not available as color of title as against a mortgage subsequently executed by the common grantor and recorded, though the deed after record conferred a perfect title. Id.

58. Martin v. Thomas [W. Va.] 49 S. E. 118. The mere sole possession of one coparcener or tenant in common is not notice to subsequent purchasers of shares of other coparceners or tenants in common of the right of such occupant to those shares under a prior unrecorded purchase. Id. See 2 Curr. L. 1056, n. 33.

59. Plaintiff and four brothers owned a tract of land as tenants in common under a deed of record. Plaintiff bought the interest of two of the co-owners, receiving warranty deeds but not recording them. Tenant lived on her three-fifths and cultivated the land. Defendant obtained judgment against one of plaintiff's grantors, levied execution on his one-fifth interest and purchased it at the sale. Plaintiff brings action to set the execution and sale aside. Held, she was entitled to the relief sought. Collum v. Sanger Bros. [Tex.] 82 S. W. 459.

Note: The court considered that the defendant was not relieved of the duty of inquiring of the person in possession, notwithstanding that possession was consistent with the record title, thus reversing the decisions of the civil court of appeal. Sanger Bros. v. Collum [Tex. Civ. App.] 78 S. W. 401. The decision is contrary to the weight of authority, though its doctrine is followed in National Bank v. Sperling, 113 Ill. 273. It is well settled that a tenant in common has a right to occupy the whole or any part of the common property, the possession being presumed to be for the benefit of all. Freeman Coten, §§ 166, 167. The doctrine is also generally accepted that the "actual, visible, notorious, continuous, and exclusive" possession of land by one rightfully there is constructive notice to subsequent purchasers or creditors of whatever estate or interest in the land is held by the occupant. Jones Real Prop. § 1563; Wade, Notice § 273; 48 Cent. Dig. 540. (Though a few states reject it. Moore v. Jourdan, 14 La. Ann. 414; Farral v. Leverty, 50 Conn. 46, 47 Am. Rep. 608; Lamb v. Pearce, 113 Mass. 72.) This doctrine is qualified, however, by what Pomeroy says is a universal rule "that when a title under which the occupant holds has been put on record and his possession is consistent with that record, it shall not be constructive notice of any additional or different title or interest, to a purchaser or creditor who has relied on that record." 2 Pom. Eq. § 616; Schumacher v. Truman, 134 Cal. 430; Rogers v. Hussey, 36 Iowa, 664; Wickes v. Lake, 25 Wis. 71; Mullins v. Hardware Co., 25 Mont. 525, 87 Am. St. Rep. 430, and cases cited.—3 Mich. L. R. 246.

60. Decision of trial court is not reviewable in supreme court. Butler v. Wheeler [N. H.] 59 A. 935.

61. Collum v. Sanger Bros. [Tex.] 82 S. W. 459.

62. Crooks v. Jenkins [Iowa] 100 N. W. 82.

63. Jinks v. Moppin [Tex. Civ. App.] 80 S. W. 390. Fact that such deed is of record is insufficient unless he makes inquiry or knows of its being recorded. Id.

64. That divorce decree may be impeached for fraud, and that dismissal of divorce suit was not an adjudication of wife's rights. Beeman v. Kitzman [Iowa] 99 N. W. 171.

65. Defense of bona fide purchaser is not effectual as against a new tax assessment, where the purchase was made after the

some extraneous fact or by the recitals in the patent or some subsequent link in their chain of title.[66] There is a conflict as to whether or not the grantee in a quitclaim deed is a bona fide purchaser.[67] Notice to one is imputed from certain representative relations wherein he may stand;[68] but a grantor's knowledge cannot be imputed to a bona fide purchaser.[69] The grantee of a bona fide purchaser takes clear of equities, though he himself knew thereof.[70] Recitals in an instrument being ambiguous, one is not entitled to rely upon a construction favorable to himself, but is deemed to have notice of all facts which a reasonable inquiry would have disclosed.[71]

There is a direct conflict as to whether or not the burden of showing notice or the lack thereof rests upon the purchaser,[72] and in states which hold that it does not, the rule does not apply to one redeeming from a judicial sale.[73] Payment of a valuable consideration and lapse of time may operate to raise a prima facie presumption of good faith.[74]

§ 2. *Statutory records or filings as constructive notice. A. In general.*[75]—Instruments affecting the title to personalty, not presently passed in possession and so remaining,[76] and title to realty are recordable only in records prescribed. In some states a mortgage covering real and personal property is sufficient if recorded as a real estate mortgage,[77] in others it is not.[78]

(§ 2) *B. Deed and mortgage records. Eligibility to record.*[79]—A written assignment of a mortgage is a conveyance within the meaning of the recording acts.[80] That a deed absolute on its face may be shown to be a mortgage does not authorize its recordation among mortgages.[81] A deed which conveys an easement in fee conveys an estate in land and is recordable.[82] All deeds,[83] leases[84] or con-

original attempt to assess had been declared void and before the new assessment was authorized. City of Seattle v. Kelleher, 25 S. Ct. 44.

66. Bogart v. Moody [Tex. Civ. App.] 79 S. W. 633.

See, also, Public Lands, 2 Curr. L. 1295.

67. That he is. Livingstone v. Murphy [Mass.] 72 N. E. 1012. See 2 Curr. L. 1058, n. 51. That he is not. Fowler v. Will [S. D.] 102 N. W. 598 [There is a dissenting opinion.]

68. Agency, 3 Curr. L. 68; Corporations, 3 Curr. L. 880; Partnership, 2 Curr. L. 1106; Trusts, 2 Curr. L. 1924. See 2 Curr. L. 1055, n. 28, 29.

69. Thompson v. Stark, 25 Ky. L. R. 1882, 79 S. W. 202; West v. Wright, 121 Ga. 470, 49 S. E. 285. Knowledge of grantors will not be charged to corporation purchasing property, though the grantors are directors thereof. Schneider v. Sellers [Tex.] 84 S. W. 417.

70. Livingstone v. Murphy [Mass.] 72 N. E. 1012. See 2 Curr. L. 1057, n. 36.

71. Masterson v. Harris [Tex. Civ. App.] 83 S. W. 428.

72. That it does: Crumrine v. Reynolds [Wyo.] 78 P. 402; Bell v. Pleasant, 145 Cal. 410, 78 P. 957. That the other party alleges such fact does not shift the burden of proof. Id. Where one claimed under a deed from the patentee which was subsequent to the deed from the same person to another, the burden was on him to show that he was an innocent purchaser. Bogart v. Moody [Tex. Civ. App.] 79 S. W. 633.

That it rests upon claimant of equity: Sheldon v. Powell [Mont.] 78 P. 491; Wilkins v. McCorkle [Tenn.] 80 S. W. 834. Interveners claiming community interest. Eddy v. Bosley [Tex. Civ. App.] 78 S. W. 565. One seeking to defeat the rights of a bona fide purchaser must allege that he took title with notice. Martin v. Thomas [W. Va.] 49 S. E. 118.

Where one claimed an equitable title under the holder of a certificate on which the patent was issued which had been conveyed under void probate proceedings to the patentee, the burden was on him to prove that one holding the legal title under the patentee was not a bona fide holder. Bogart v. Moody [Tex. Civ. App.] 79 S. W. 633.

73. Coombs v. Barker [Mont.] 79 P. 1.

74. So held where 40 years had elapsed and all the parties to the transaction were dead. Dean v. Gibson [Tex. Civ. App.] 79 S. W. 363. Proof that bona fide purchaser was related to common grantor is insufficient to overcome such presumption. Id.

75. See 2 Curr. L. 1057.

76. Fruit contract held not recordable if pertaining to personal property. Thompson v. Stark, 25 Ky. L. R. 1882, 79 S. W. 202.

77. Laws 1897, p. 536, c. 418. Such registration held sufficient where mortgage included a leasehold interest in real estate for a term of 10 years. Westchester Trust Co. v. Kelly, 92 N. Y. S. 482.

78. Is ineffectual in so far as the chattels are concerned. Knickerbocker Trust Co. v. Penn Cordage Co. [N. J. Err. & App.] 58 A. 409.

79. See 2 Curr. L. 1057.

80. Weideman v. Pech, 92 N. Y. S. 493.

81. Kent v. Williams [Cal.] 79 P. 527.

82. Deed granting water power privilege.

tracts to convey land,[85] must be executed, acknowledged, or in lieu of acknowledgment proved, with the proper statutory formalities.[86]

Necessity, operation and effect of recording.[87]—Contracts for the sale of standing timber,[88] the grant of a right of way,[89] and an instrument reducing the terms of payment of a mortgage,[90] must all be recorded; but a power of attorney to sell land,[91] or to release a mortgage,[92] or an executory, contingent agreement to execute a mortgage,[93] need not be.

The only purpose of recordation is to give notice,[94] failure to record not affecting the validity of the instrument as between the parties,[95] or those having knowledge thereof.[96] Unless specifically provided for by law, registration is not for the protection of creditors.[97] The decisions are conflicting as to whether record is necessary in order to make possession of a part extend to the limits of a lot or known tract described in the deed;[98] but the grantee recording the deed and entering into possession, the record is notice to the world of the extent of his possession.[99] As to the grantor, the recording of a deed starts limitations running as to any fraud in procuring the deed.[1] The record showing that a lien has been acquired upon land, it devolves upon the purchaser to ascertain whether that lien has been kept alive or lost.[2]

Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337.

83. In Florida foreign deed must be acknowledged or proof of its execution made before a notary public or justice of the peace having an official seal. Norris v. Billingsley [Fla.] 37 So. 564. Where an assignment of a patent and a deed signed by the grantor only contained a justice's certificate, "Witness my hand and seal," etc., such instruments are not entitled to record [Pasch. Dig. art. 5007]. Schultz v. Tonty Lumber Co. [Tex. Civ. App.] 82 S. W. 353. See 2 Curr. L. 1057, n. 38.

84. Must be acknowledged and proved. Strong v. Smith [N. J. Eq.] 60 A. 66.

85. Under Code, § 1246, subd. 9, where all the makers of an instrument are alive, and all except one are nonresidents, such one may make the requisite proof of the handwriting of the others. Leroy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

86. Consult Deeds of Conveyance, 3 Curr. L. 1056; Acknowledgments, 3 Curr. L. 31.

87. See 2 Curr. L. 1057; also, next subdivision, Sufficiency, operation and effect of record.

88. Not being recorded a subsequent purchaser without notice acquires a paramount title. Neils Lumber Co. v. Hines [Minn.] 101 N. W. 959.

89. Dahlberg v. Haeberle [N. J. Law] 59 A. 92.

90. Agreement extending time of payment and reducing rate of interest. Weideman v. Pech, 92 N. Y. S. 493.

91. Rownd v. Davidson, 113 La. 1047, 37 So. 965.

92. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. A release of a mortgage appearing of record, executed by an attorney in fact, subsequent purchasers are bound to take notice of the extent of the terms of the power of attorney. Id.

93. Mathews v. Damainville, 91 N. Y. S. 524.

94. Kelly v. Bramblett [Ky.] 81 S. W. 249. Recorded assignment of mortgage held constructive notice that mortgagor had no right to cancel the mortgage. Higgins v. Jamesburg Mut. Bldg. & Loan Ass'n [N. J. Eq.] 58 A. 1078. A deed from a lessor not being placed on record and the lessee having no knowledge thereof, he is not in default for paying rent to the original owner. Indiana Nat. Gas & Oil Co. v. Lee [Ind. App.] 72 N. E. 492. Laws 1895, c. 101, p. 224, requires the recording of a mortgage executed prior to the commencement of work to render it superior to lien claims for labor and materials. City of Ortonville v. Geer [Minn.] 101 N. W. 963.

95. Title passes. Kelly v. Bramblett [Ky.] 81 S. W. 249; Gibson v. Brown [Ill.] 73 N. E. 578. Shannon's Code, § 3749. Wilkins v. McCorkle [Tenn.] 80 S. W. 834. Agreement not to record does not impair validity of delivery. Tabor v. Tabor [Mich.] 99 N. W. 4. Mortgage; New York rule. Ward v. Ward, 131 F. 946.

96. See ante, § 1, as to effect of notice of unrecorded deed.

97. Ilfeld v. De Baca [N. M.] 79 P. 723. Unrecorded deed may be asserted against creditors, it not being shown that credits were induced on the basis that the grantor was the owner of the land. Hagerty v. Goodlad [Kan.] 79 P. 664.

98. In Roberson v. Downing Co., 120 Ga. 833, 48 S. E. 429, record was held unnecessary, the case being controlled by the decisions of Morrison v. Hays, 19 Ga. 296; Griffin v. Sketoe, 30 Ga. 300; and Wiley v. Warmock, 30 Ga. 701. As to whether Civ. Code 1895, § 3587 has changed the rule, quaere. The question was not involved in the principal case, as the deed there considered was made prior to the adoption of such provision.

99. Scott v. Mineral Development Co. [C. C. A.] 130 F. 497.

1. McDonald v. Bayard Sav. Bank, 123 Iowa, 413, 98 N. W. 1025.

2. Steel v. Katzenmeyer, 5 Ohio C. C. (N. S.) 25.

Sufficiency, operation and effect of record.[3]—The instrument must be recorded in the proper book.[4] A decree being equivalent to a conveyance, the entry thereof on the entry books of the court answers all the purposes of registration.[5] Where, as in the case of pleadings, the original paper is filed, it becomes the record.[6] A deed appearing of record, it is presumed to have been recorded by the proper party and at the proper time.[7] Slight inaccuracies in transcribing the instrument do not affect the record as constructive notice;[8] failure to copy the acknowledgment to a deed is not such a slight inaccuracy.[9] A reference to a registered grant similar in form has been held sufficient.[10] Use of the letters "L. S." on the record is a sufficient representation of a corporate seal.[11] In order to operate as constructive notice, the instrument need not be a technically perfect legal conveyance,[12] but it is generally sufficient if it states facts sufficient to put one on inquiry.[13] The record being destroyed, the instruments need not be re-recorded[14] unless such recordation is required by statute.[15]

The record is constructive notice to all subsequent purchasers[16] of those matters which are stated in the record or may be implied therefrom;[17] but the record of instruments wholly collateral to the land is ineffective.[18] In the absence of actual notice,[19] parties are entitled to rely on the record as to title and incumbrances.[20] Recorded mortgage executed by grantee in unrecorded deed is not no-

3. See preceding subdivision, Necessity, operation and effect of recording.

4. Under Civ. Code, §§ 1158, 1213, 1215, and Gen. Laws 1903, p. 157, recording a contract for a conveyance in the volume of "covenants," is constructive notice to subsequent incumbrancers. Kent v. Williams [Cal.] 79 P. 527.

5. Wilkins v. McCorkle [Tenn.] 80 S. W. 834.

6. One cannot rely on docket or index kept by clerk. Declaration in ejectment. Armstrong v. Ashley, 22 App. D. C. 368.

7. That a deed delivered in escrow is recorded is not proof that the grantee procured it prematurely and had it recorded. Swain v. McMillan [Mont.] 76 P. 943.

8. Substitution of "T" for "F" in initials of notary public held immaterial. Roberson v. Downing Co., 120 Ga. 833, 48 S. E. 429.

9. Dean v. Gibson [Tex. Civ. App.] 79 S. W. 363.

10. Grant was from state and described land by metes and bounds. Weeks v. Wilkins, 134 N. C. 516, 47 S. E. 24.

11. Altschul v. Casey [Or.] 76 P. 1083.

12. That description is defective in that there is no western boundary, or that "south" is termed "north," is immaterial on the question of notice. Scott v. Gordon [Mo. App.] 83 S. W. 550.

13. If the **description** is complete enough to enable one examining it to ascertain therefrom that the land actually claimed was included therein, it is sufficient. Notice of mining claim. Mitchell v. Hutchinson, 142 Cal. 404, 76 P. 55. The record of a deed absolute, or of a mortgage which did not state the amount or other particulars of the debt, which, on its face, it purported to secure, held sufficient. Equitable Bldg. & Loan Ass'n v. King [Fla.] 37 So. 181.

14. The record of a deed to wild and vacant land being destroyed by fire, the grantee's rights are not affected by a judgment or sale of the land in a suit against his grantor. Weir v. Cordz-Fisher Lumber Co. [Mo.] 85 S. W. 341.

15. Deed must be re-recorded within four years (Rev. St. 1895, art. 4640), or it is not constructive notice. Greer v. Willis [Tex. Civ. App.] 81 S. W. 1185.

16. Recorded deed granting easement in fee held notice to subsequent grantees of servient estate. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337. Recorded party wall agreement held constructive notice to purchasers of real estate affected thereby. Loyal Mystic Legion v. Jones [Neb.] 102 N. W. 621. See 2 Curr. L. 1058, n. 48.

17. Mortgage in form of absolute deed will, as to subsequent bona fide mortgagees, be treated as a deed. Payne v. Morey, 144 Cal. 130, 77 P. 831. A deed conveying the unsold portion of a tract of land and attempting to specify the part sold, but by mistake omitting a tract which had been conveyed by an unrecorded deed, held, a purchaser was not charged with notice of the latter conveyance. Pierson v. McClintock [Tex. Civ. App.] 78 S. W. 706. That a husband releases his curtesy in the land described in a mortgage by his wife is not notice that he has agreed to convey his own interest in the fee if it should turn out that his wife is not the owner. Livingstone v. Murphy [Mass.] 72 N. E. 1012. Record showing that notes which trust deed were given to secure had not matured is insufficient to charge a subsequent lienholder in good faith with notice that the trust deed had been improperly discharged. Havighorst v. Bowen [Ill.] 73 N. E. 402. See 2 Curr. L. 1058, n. 49, 50.

18. Record of personal, executory contract held not notice to subsequent purchaser of realty. Houston v. Zahm, 44 Or. 610, 76 P. 641.

19. Masterson v. Harris [Tex. Civ. App.] 83 S. W. 428. And see, also, ante, § 1.

20. Rev. St. c. 127, § 4. McCusker v.

tice to subsequent purchaser of holder of record title.[21] In the absence of notice, a recorded instrument has preference over an unrecorded one,[22] and both being recorded, priority generally dates from date of record;[23] hence, in this regard, registration has no retroactive effect.[24] While the record of a void instrument is ineffective,[25] the record of an instrument ineligible to record is admissible, with other circumstances, to show the existence of such an instrument.[26] The record is conclusive upon collateral attack,[27] and one alleging facts contrary to those shown by the record must prove the same by clear and convincing proof.[28]

Recording officers and administration of the acts.[29]—A register of deeds is liable on his bond for failure to correctly register a conveyance, although his negligence is not willful, nor so gross as to imply willfulness,[30] and the cause of action accrues not when the mistake is made, but when the vendee is deprived of the property.[31]

(§ 2) *C. Wills and their probate and administration proceedings.*[32]—Since courts of probate are generally courts of record,[33] or, if not, the probate of the will being an official record,[34] such record constitutes constructive notice. In some states statutes provide for the registration of foreign wills or probate proceedings.[35]

(§ 2) *D. Chattel mortgages, conditional sales, and other liens.*[36]—In most states chattel mortgages,[37] conditional sales,[38] and other liens,[39] are void as against creditors and subsequent creditors or mortgagees in good faith, unless filed or recorded or accompanied by a visible and continuing change of possession.

§ 3. *Registration and certification of land titles under the Torrens System.*[40] —The object of the system is to determine the status of the title and thereby facili-

Goode, 185 Mass. 607, 71 N. E. 76. Title of assignor. Syracuse Sav. Bank v. Merrick, 96 App. Div. 581, 89 N. Y. S. 238. The record owner being a party defendant, the purchaser at a tax sale acquires title as against the holder of an unrecorded deed. Lucas v. Current River Land & Cattle Co. [Mo.] 85 S. W. 359. On foreclosure by senior mortgage, the latter is not obliged to ascertain whether or not there is an outstanding, unrecorded assignment of junior mortgage. Pinney v. Merchants' Nat. Bank [Ohio] 72 N. E. 884. Plaintiff having bought a note secured by a trust deed, after maturity and for an inadequate price, he is not entitled to foreclose the deed against a bona fide lienholder who assumed his position on a discharge of the deed on the record. Havighorst v. Bowen [Ill.] 73 N. E. 402.

Under Hurd's Rev. St. 1903, c. 95, §§ 8, 9, as against a subsequent bona fide lienholder, it is immaterial that the grantor of a trust deed did not know that it was discharged of record. Havighorst v. Bowen [Ill.] 73 N. E. 402.

21. Booker v. Booker, 208 Ill. 529, 70 N. E. 709.

22. Shannon's Code, § 3760. Wilkins v. McCorkle [Tenn.] 80 S. W. 834.

23. Atlantic City v. New Auditorium Pier Co. [N. J. Err. & App.] 59 A. 168. Second mortgage given priority over first. O'Brien v. Fleckenstein [N. Y.] 73 N. E. 30. Under Shannon's Code, § 3749, as to third parties without notice, deed is effective only from the date of registration. Wilkins v. McCorkle [Tenn.] 80 S. W. 834.

24. Wilkins v. McCorkle [Tenn.] 80 S. W. 834; Armstrong v. Ashley, 22 App. D. C. 368.

25. Record of fruit contract. Thompson v. Stark, 25 Ky. L. R. 1882, 79 S. W. 202. Where acknowledgment to deed of trust was void. Lance v. Tainter [N. C.] 49 S. E. 211.

26. Deed was not properly acknowledged and proved. Schultz v. Tonty Lumber Co. [Tex. Civ. App.] 82 S. W. 353. Such record and the fact that the grantee paid taxes for two years held insufficient to show title in such grantee. Id.

27. As to execution of deed of married woman. Godsey v. Virginia Iron, Coal & Coke Co. [Ky.] 82 S. W. 386.

28. Swain v. McMillan [Mont.] 76 P. 943.

29. See 2 Curr. L. 1059.

30. Shannon's Code, §§ 559, 562, 566, 567, 570, 3748, 3752, 4494. State v. McClellan [Tenn.] 85 S. W. 267.

31. State v. McClellan [Tenn.] 85 S. W. 267.

32. See 2 Curr. L. 1059.

33. See Estates of Decedents, 3 Curr. L. 1238.

34, 35. See Estates of Decedents, 3 Curr. L. 1238; Wills, 2 Curr. L. 2076.

36. See 2 Curr. L. 1059.

37. See Chattel Mortgages, 3 Curr. L. 682.

38. See Sales, 2 Curr. L. 1527.

39. See Attorneys and Counselors, 3 Curr. L. 376; Mechanics' Liens, 4 Curr. L. 615; Vendors and Purchasers, 2 Curr. L. 1976; Agister Liens (see Animals, 3 Curr. L. 159); Logging Liens (see Forestry and Timber, 3 Curr. L. 1468); Crop Liens (see Agriculture, 3 Curr. L. 137, and Landlord and Tenant, 4 Curr. L. 389); Maritime Liens (see Shipping and Water Traffic, 2 Curr. L. 1648).

40. See 2 Curr. L. 1061.

tate its transfer.[41] While the court may determine and decree the existence of mechanics' liens, it cannot order the foreclosure thereof.[42] Possession has been held sufficient to prove a title that might be registered.[43] The applicant is not required to establish the invalidity of opposing claims to the title.[44] All persons claiming an interest are proper parties,[45] and may appeal from an adverse decision.[46] The same rules apply with reference to the mode of preserving for review the rulings as to objections and exceptions presented to the report of the examiner of titles as are applicable to the review of objections and exceptions to the reports of masters in chancery.[47] Such an objection is in the nature of a special demurrer, and must point out the grounds of objection with such clearness and certainty as to call the attention of the court to the particular alleged error which it is desired to have reviewed.[48] The general rules as to what constitutes a proper foundation for the admission of documents apply.[49]

41. "The object and purpose of the Torrens System is to provide a speedy and summary method of determining rights and interests in real property, and to authorize the court, in proceedings thereunder, to hear and determine all controversies respecting the title, and by proper decree to definitely fix, establish and declare the title, rights and interests of all interested parties." Reed v. Siddall [Minn.] 102 N. W. 453.

NOTE. Method of registration under Torrens System: "In order that land may be registered under the statute, and the initial certificate of title obtained, the following mode of procedure is usually prescribed: The person or persons claiming the ownership of the land in fee simply file an application, addressed to the court having jurisdiction under the statute, describing the land, setting forth any estates, interests, or liens outstanding in other persons, so far as known to the petitioner, the name of the occupant, and the names of owners of adjoining land. Upon the filing of the application it is referred to one or more official examiners of title, who, after making a proper examination, report to the court. Any persons who appear to be interested in the land are made parties, and the statute provides for the sending of notices to such persons, and also for the publication of a notice in a newspaper for a prescribed period. If the examiner approves the title, and no adverse claims are presented, or if those presented do not appear meritorious, the court confirms the applicant's title, and directs the person having charge of the registration office, known usually as the registrar, to issue to the applicant a certificate of title. This certificate states that the applicant has a fee-simple title (or otherwise, as the case may be), and also there are noted on the certificate any outstanding interests, trusts, or incumbrances in other persons which are recognized by the decree of the court. This certificate is made out in duplicate; one copy being issued to the applicant and one copy being retained in the registration office, where it is inserted in a book called the 'register' or 'registration book.' No person other than the owner in fee simple can, under the acts adopted in this country, obtain the registration of the title, but the existence of lesser estates in other persons does not affect such owner's right to registration, the rights of the owners of lesser estates being protected by statements upon the certificate issued to the owner in fee simple. The proceeding by which the title is registered is, by the terms of the statute, absolutely conclusive upon all persons, either immediately upon the rendition of the decree, or within a short period thereafter. The proceeding is thus in effect one to quiet title. The constitutionality of such legislation, in so far as it makes the decree binding upon persons interested in the land, who receive notice of the proceeding merely by publication, has been vigorously questioned, on the ground that it deprives such persons of property without due process of law; but it has been upheld in at least three states. Tyler v. Judges of Court of Registration, 175 Mass. 71; People v. Simon, 176 Ill. 165, 68 Am. St. Rep. 175; State v. Westfall [Minn.] 89 N. W. 175. See note to latter case in 54 Cent. Law J. 293."—From 2 Tiffany on Real Property, § 489, pp. 1102, 1103.

42. Reed v. Siddall [Minn.] 102 N. W. 453. Filing of an answer by the lien claimant is not equivalent to the commencement of an action to foreclose. Id.

43. Actual possession and payment of taxes for ten years. Glos v. Mickow, 211 Ill. 117, 71 N. E. 830.

44. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1; Glos v. Talcott, 213 Ill. 81, 72 N. E. 707. The burden of proof is upon the party asserting a mechanic's lien to prove that at the time of the trial, in the proceedings under the Torrens System, the lien was a valid and existing one. Reed v. Siddall [Minn.] 102 N. W. 453.

45. Commonwealth is a proper party to proceedings to register title to land over which there is claimed to be a public landing place. McQuesten v. Attorney General [Mass.] 72 N. E. 965.

46. Commonwealth may appeal. McQuesten v. Attorney General [Mass.] 72 N. E. 965. And the existence of a public landing place being claimed by both the commonwealth and a town, the appeal is not invalid because the attorneys who represented the attorney general in taking the appeal were also acting for the town. Id.

47. Objections to the admission of evidence must be incorporated in the exceptions to the report and renewed in the trial court. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1.

48. An exception that the examiner erred in finding that plaintiff was seized in fee of

NOTICES, see latest topical index.

NOVATION.

Definition and elements.[50]—A novation is the substitution of a new obligation for an old one, which is thereby extinguished.[51] The requisites of a novation are a valid prior obligation to be displaced, consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one.[52] The substitution may be in the debt[53] or contract;[54] in the debtor[55] or in the creditor.[56] In any case it must be consented to by all the parties,[57] and there must be a sufficient consideration. The discharge of the original obligation[58] or the substitution of a new party[59] is a sufficient consideration. The

the land is insufficient to raise an objection that the examiner erred in admitting certain secondary evidence without a sufficient foundation having been first laid therefor. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1. Objections to the erroneous admission of certain abstracts in evidence held properly preserved by objections and exceptions to the examiner's report. Glos v. Talcott, 213 Ill. 81, 72 N. E. 707.

49. Abstracts of title held inadmissible in the absence of preliminary proof that the original conveyances abstracted were lost or destroyed, or that it was not in the power of petitioner to produce them, or that the abstracts had been made in the ordinary course of business, as required by Hurd's Rev. St. 1903, c. 30, § 36, and c. 116, §§ 23, 24. Glos v. Talcott, 213 Ill. 81, 72 N. E. 707.

50. See 2 Curr. L. 1061.

51. See 2 Curr. L. 1061. Cyc. Law Dict. 637.

NOTE. Accord and satisfaction and novation distinguished: In an exhaustive note on Accord and Satisfaction, appended to the case of Harrison v. Henderson [67 Kan. 194. 72 P. 875] in 100 Am. St. Rep. 393—after citing McDonnell v. Alabama Gold Life Ins. Co., 85 Ala. 414, 5 So. 120; Parsons. Contracts, 217; Butterfield v. Hartshorn, 7 N. H. 345, 26 Am. Dec. 741; Bonnemer v. Negrete, 16 La. 474, 35 Am. Dec. 217; Netterstrom v. Gallistrel, 110 Ill. App. 352—to a definition of novation substantially as given in the text, it is said: "It will be seen that an accord and satisfaction, when it consists in the substitution of a new contract for the old one and the substituted contract is accepted, without performance as a satisfaction of the old contract, is a novation. Allison v. Ahenroth, 108 N. Y. 472, 15 N. E. 606. Some of the courts treat such a novation as an accord and satisfaction, while others draw a distinction by holding that an execution of the terms of the accord is necessary in order to constitute the transaction an accord and satisfaction." See article Accord and Satisfaction, 3 Curr. L. 17.

52. Piehl v. Piehl [Mich.] 101 N. W. 628. The essentials of novation are the displacement and extinction of the prior contract, the substitution of a new contract, a sufficient consideration therefor, and the consent of the parties thereto. Wright v. Hanna [Pa.] 59 A. 1097.

53. Gerlaugh v. Riley, 2 Ohio N. P. (N. S.) 107.

54. The novation may be by rescission of an executory contract and substitution of a new contract therefor; evidence held to show a rescission and novation and not an accord and satisfaction. Bandman v. Finn, 43 Misc. 516, 89 N. Y. S. 504.

55. The payor of a note gave the payee an order on a third person, payor's debtor, for payment of the amount of the note, and the payee presented the order and received from the third person notes for the amount. Held, novation resulted, and obligation on first note extinguished. Held v. Caldwell-Easton Co., 97 App. Div. 301, 89 N. Y. S. 954. A person owing a company $750 gave a check for $900 to the company's agent, taking the agent's personal check for $150. The agent stated he had settled and the company credited him with $150. The agent's check was not honored. Held, no implied release of the company and acceptance of its agent for the $150 obligation. Rines v. New York & B. Brew. Co., 90 N. Y. S. 362. A creditor who collects a portion of his claim from a third person who, after the debt is contracted, agrees with the debtor to pay it, does not thereby discharge the debtor, or become estopped from collecting the balance from a surety or guarantor. Anglo-American Land, Mortg. & Agency Co. v. Lombard [C. C. A.] 132 F. 721.

56. Defendant drew checks on a bank, indebted to him, by agreement with the bank, and delivered the checks to plaintiffs for a loan which he had agreed to make them. Plaintiffs deposited the checks but the bank became insolvent before demand for payment was made. Held, defendant was not liable for the amount of the loan, but plaintiffs must look to the bank; and plaintiffs were not entitled to a cancellation of the securities. Hubbard v. Pettey [Tex. Civ. App.] 85 S. W. 509.

57. Gerlaugh v. Riley, 2 Ohio N. P. [N. S.] 107. To constitute a novation by substitution of a new debtor, the creditor must have accepted the discharge of the old debtor and consented to the substitution of the new one. Piehl v. Piehl [Mich.] 101 N. W. 628.

58. This must be agreed to by the original creditor, original debtor, and the new debtor. Gerlaugh v. Riley, 2 Ohio N. P. (N. S.) 107.

59. The substitution of a new party for an old one to an existing contract is in itself a sufficient consideration for the contract of substitution. Ceballos v. Munson S. S. Line, 93 App. Div. 593, 87 N. Y. S. 811.

agreement being conditional, no novation results until the conditions have been performed.[60] Whether there was a novation may be a question of fact.[61]

Legal effect of novation.[62]—By a substitution of debtors, the old debtor is released and the new debtor becomes liable.[63]

NUISANCE.

§ 1. Distinction Between Private and Public Nuisance (839).
§ 2. What Constitutes a Nuisance (839).
§ 3. Right to Maintain; Defenses (843).
§ 4. Remedies Against Nuisances (844).
A. Abatement and Injunction (844). Injunction (845). Parties (847). Pleading, Evidence, and Defenses (847). Judgment or Decree (848).
B. Criminal Prosecution (849).
C. Action for Damages (849). Evidence (851). Damages (852).
D. Rights of Private Persons in Regard to Public Nuisances (852).

§ 1. *Distinction between private and public nuisance.*[64]—Public nuisances are those resulting from the violation of public rights and producing no special injury to one more than another of the people.[65] Private nuisances are those resulting from the violation of private rights, producing damages to but one or a few persons.[66] Mixed nuisances are those which are public in their nature, but produce a special and particular injury to private individuals.[67]

§ 2. *What constitutes a nuisance.*[68]—A nuisance is an unreasonable, unwarrantable or unlawful use of one's own property to the annoyance, inconvenience, discomfort or damage of another.[69] The acts complained of must in some manner

60. Where a legatee took renewal notes for notes due a decedent, the original notes being conditional, and had his name substituted for that of decedent, there was no novation. Wright v. Hanna [Pa.] 59 A. 1097. Plaintiff was indebted to a company and he and a third person were jointly indebted to the same company for money borrowed on a building. It was agreed that plaintiff should convey his interest in the building to the third person, who was to assume the debt on the building and also plaintiff's individual debt, after the building was sold, the company thereupon to release its securities. Held, plaintiff was not released from liability, the third party having defaulted. Ellis v. Conrad Seipp Brew. Co., 207 Ill. 291, 69 N. E. 808.

61. Evidence held to justify submission to jury of question whether a contract was made substituting a third party for one of the parties to an existing contract. Ceballos v. Munson S. S. Line, 93 App. Div. 593, 87 N. Y. S. 811.

62. See 2 Curr. L. 1062.

63. Owner of land employed plaintiff to obtain a purchaser, which plaintiff did. Owner then agreed to accept plaintiff's note for the amount of his commission as a payment on the land, and the purchaser, defendant, agreed to repay plaintiff the amount at a certain date. Held, purchaser liable for the amount of the commission. Curry v. Whitmore [Mo. App.] 84 S. W. 1131. This liability was not affected by the fact that the first contract of sale was not carried out, but a deed was finally given under another contract at a less price. Id.

64. See 2 Curr. L. 1062.

65. Indictment for operating rendering establishment held to show public nuisance. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037. One which affects equally the rights of an entire community or neighborhood, although the extent of the damage may be unequal. Ball. Ann. Codes & St. Wash. § 3804. All others are private. Id. § 3087. Wilcox v. Henry, 35 Wash. 591, 77 P. 1055. A nuisance is public if it annoys such part of the public as necessarily comes in contact with it. State v. Tabler [Ind. App.] 72 N. E. 1039.

66. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037. The act of a city in emptying sewerage into a stream, thereby damaging the property of one outside the city limits creates a private, and not a public, nuisance. Matheny v. Aiken, 68 S. C. 163, 47 S. E. 56.

67. Rendering establishment. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037.

68. See 2 Curr. L. 1062.

69. Pritchard v. Edison Elec. Illuminating Co., 92 App. Div. 178, 87 N. Y. S. 225, aff'd. 72 N. E. 243; American Ice Co. v. Catskill Cement Co., 43 Misc. 221, 88 N. Y. S. 455. Anything which is injurious to health or offensive to the senses or an obstruction to the free use of property so as to interfere with the enjoyment of life or property [Cal. Code Civ. Proc. § 731]. McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 542, 78 P. 7. Anything that worketh hurt, injury, or damage to another [Ga. Civ. Code 1895, § 3861]. Ponder v. Quitman Ginnery [Ga.] 49 S. E. 746. Anything which is so injurious to health, or indecent or offensive to the senses, or so obstructs the free use of property as to essentially interfere with the comfortable enjoyment of life or property [Burns' Ann. St. Ind. 1901, § 290]. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037. Anything that worketh hurt, inconvenience or damage to another or his property. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781. Anything obstructing the free use of property, so as to interfere with its comfortable enjoyment,

have injured or annoyed others in the enjoyment of their legal rights,[70] and the inconvenience must not be fanciful, or such as would affect only one of fastidious taste, but must be such as would affect an ordinarily reasonable man.[71] The legislature has power to declare what is and shall be a public nuisance,[72] and the fact that the things declared to be such were not nuisances per se at common law is immaterial.[73] It has, however, no power to declare that to be a nuisance which is clearly not so.[74] Thus dead animals are not nuisances per se, and cannot be made so by legislative enactment.[75]

The obstruction of navigable waters,[76] the pollution of streams,[77] causing overflow of waters,[78] collecting stagnant water,[79] keeping a gaming,[80] or bawdy house,[81]

is a nuisance, entitling anyone whose property is injuriously affected thereby to an injunction and damages [Utah Rev. St. 1898, § 3506]. Stockdale v. Rio Grande Western R. Co. [Utah] 77 P. 849.

70. Veraguth v. Denver [Colo. App.] 76 P. 539. So long as a building owned and maintained by a town for a lock-up is not injurious, offensive or dangerous to any property or person, except such as enter within, willingly or unwillingly, not being compelled or invited by the town, it is not a nuisance, nor is the town liable therefor in an action of nuisance. Town not liable to prisoner, placed therein by constable, for injury to his health on account of its foul condition. Mains v. Ft. Fairfield [Me.] 59 A. 87.

71. Ga. Civ. Code 1895, § 3861. Ponder v. Quitman Ginnery [Ga.] 49 S. E. 746. As melancholy thoughts arising from proximity of cemetery. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

72, 73. State v. Tower [Mo.] 84 S. W. 10.

74. Has large discretion in the matter. McConnell v. McKillip [Neb.] 99 N. W. 505. Property not immediately dangerous or offensive cannot be treated as a nuisance per se. City of Richmond v. Caruthers [Va.] 50 S. E. 265.

75. City of Richmond v. Caruthers [Va.] 50 S. E. 265. A municipality may require their owners to make such use or disposition of the carcasses as will prevent a nuisance, stench, or other inconvenience to the neighborhood, but cannot deprive them of their property rights therein immediately upon the death of the animals, irrespective of whether they are then a nuisance or not. Id. Ordinance vesting property in carcass of dead domestic animal in public contractor immediately upon its death, and before it becomes offensive, is void as depriving owner of property without due process of law. Id.

76. Small v. Harrington [Idaho] 79 P. 461; State v. Charleston Light & Water Co., 68 S. C. 540, 47 S. E. 979. Obstruction in ocean below ordinary high water mark and in front of plaintiff's property, interfering with his right of access to ocean. San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823.

Held nuisances: Obstructions of water courses not made according to law [Missouri Rev. St. 1899, § 8752]. Scheurich v. Southwest Mo. Light Co. [Mo. App.] 84 S. W. 1003. Dam across river without canal and locks. State v. Dundee Water Power & Land Co. [N. J. Law] 58 A. 1094. Placing of pound nets in navigable stream so as to interfere with navigation at certain times. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761.

Held not nuisances: Temporary obstruction of navigable stream while remodeling lock in dam. State v. Charleston Light & Water Co., 68 S. C. 540, 47 S. E. 979. Water pipe authorized by state and Secretary of War. Maine Water Co. v. Knickerbocker Steam Towage Co. [Me.] 59 A. 953.

77. The unreasonable use of a stream in such a manner as to produce a condition actually destructive of physical comfort or health, or a tangible, visible injury to property. Bowman v. Humphrey [Iowa] 100 N. W. 854. Reasonableness depends upon the circumstances of each particular case. Id.

Held nuisances: Pollution of stream by refuse mineral matter [Cal. Code Civ. Proc. § 731]. McCarthy v. Gaston Ridge Mill. & Min. Co., 144 Cal. 542, 78 P. 7. By refuse from creamery. Perry v. Howe Co-op. Creamery Co. [Iowa] 101 N. W. 150; Bowman v. Humphrey [Iowa] 100 N. W. 854. By discharge of chemicals, etc., from paper factories. Forbidden by Burns' Ann. St. Ind. 1901, § 2154. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. Use of water so as to deposit sand and mining debris on land of lower riparian owner so as to render it valueless, both at common law and under Montana Civ. Code, § 4550. Chessman v. Hale [Mont.] 79 P. 254. By sewerage. Matheny v. Aiken, 68 S. C. 163, 47 S. E. 56.

Held not nuisance: Discharge of creamery refuse into cesspool and from there into stream through filtered drain, though creamery odor could be noticed when standing in path of wind. Perry v. Howe Co-op. Creamery Co. [Iowa] 101 N. W. 150.

78. To wrongfully cause waters to flow upon plaintiff's lands by diverting them from their natural course creates a nuisance per se. Allen v. Stowell, 145 Cal. 666, 79 P. 371. Defendants cannot justify acts on ground that they were trying to obviate mistakes of railroad company in locating culverts, where dams did not restore natural conditions. Id. Negligently allowing water to escape from ditch. Astill v. South Yuba Water Co. [Cal.] 79 P. 594. Causing overflow by constructing railway across drainage ditch without providing sufficient passageway for water. Complaint sufficient. Pittsburg, etc., R. Co. v. Greb [Ind. App.] 73 N. E. 620. By means of dams, and by depositing refuse sand in creek. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625. By discharging water from sewers into creek. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555. By erection of

the illegal sale of intoxicating liquors,[82] the discharge of soot, cinders, smoke, and dust,[83] or noxious odors,[84] noise and vibration,[85] obstructing or rendering unsafe

dam. Van Veghten v. Hudson River Power Transmission Co., 92 N. Y. S. 956.

79. Missouri, etc., R. Co. v. Dennis [Tex. Civ. App.] 84 S. W. 860. Where it is necessary, in the natural use of a mill pond, to draw off the water, persons moving into its vicinity after its establishment cannot have injunction against its use, or recover damages because of resulting bad odors. De Witt v. Bissell [Conn.] 60 A. 113. Evidence as to health of neighborhood excluded as too remote. Astill v. South Yuba Water Co. [Cal.] 79 P. 594. Allowing water to collect around ties placed on railroad right of way, causing noxious odors, resulting in sickness. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329. Abandoned well giving off noxious vapors. Ft. Worth, etc., R. Co. v. Glenn [Tex.] 80 S. W. 992.

For liability of municipal corporations for nuisances arising from stagnant water, see note to Johnson v. White [R. I.] 65 L. R. A. 280.

80. Public nuisance at common law. Woods v. Cottrell [W. Va.] 47 S. E. 275. Cigar store in which slot machine is used, under Me. Rev. St. 1903, c. 22, § 1. Lang v. Merwin [Me.] 59 A. 1021.

See, also, Betting and Gaming, § 1, 3 Curr. L. 500.

81. Public nuisance. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513. Change in construction of cribs no defense unless it does away entirely with injury. Id.

See, also, Disorderly Houses, 3 Curr. L. 1111.

82. Walker v. McNeily, 121 Ga. 114, 48 S. E. 718. A place where intoxicating liquors are sold is not, in the absence of statute, a nuisance per se. State v. Tabler [Ind. App.] 72 N. E. 1039. Mere erection of screens and other devices in "blind tiger" held not nuisance as matter of law, no matter what motive for erection and maintenance may be. Id.

For a full discussion of cases arising under statutes making such places nuisances, see Intoxicating Liquors, § 8, 4 Curr. L. 277. See, also, State v. McMaster [N. D.] 99 N. W. 58; Jasper County v. Sparham [Iowa] 101 N. W. 134; State v. Durein [Kan.] 78 P. 152; State v. Bush [Kan.] 79 P. 657; City of Topeka v. Kersch [Kan.] 79 P. 681.

83. Persons living in a manufacturing city or within its sphere of usefulness do so of choice, and therefore voluntarily submit themselves to its peculiarities and discomforts. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065. One living near factories, etc. Bowman v. Humphrey [Iowa] 100 N. W. 854. A manufacturer has the right to the use and enjoyment of his own property, but must so use it as not to injure the property of others. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065. But a manufacturing company has no right to so rebuild and operate its furnaces as to actually destroy homes and other property in a residence portion of the city. Id.

Held nuisances: Employment by owner of ginning plant of machinery separating dust and sand from cotton and expelling it into air so that it is blown into dwelling of adjoining owner, to his discomfort and injury. Ponder v. Quitman Ginnery [Ga.] 49 S. E. 746. Blowing sawdust from mill on plaintiff's lot. Mahan v. Doggett [Ky.] 84 S. W. 525. Operation of electric light plant so as to discharge soot and cinders on plaintiff's hotel. Pritchard v. Edison Elec. Illuminating Co. [N. Y.] 72 N. E. 243, afg., 92 App. Div. 178, 87 N. Y. S. 225. Operation of cement factory so as to throw cinders, ashes, coal dust and other substances on ice in river appropriated by plaintiff under statute. American Ice Co. v. Catskill Cement Co., 43 Misc. 221, 88 N. Y. S. 455. Operation of iron works so as to jar plaintiff's house and to cause same to be invaded by smoke, fumes and soot. Friedman v. Columbia Mach. Works & Malleable Iron Co., 99 App. Div. 504, 91 N. Y. S. 129. Poisonous smoke and gas from roast piles and furnaces of copper reduction plants. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

By statute in Missouri (Laws 1901, pp. 73, 74), the emission or discharge into the open air of dense smoke in cities of 100,000 is a public nuisance. State v. Tower [Mo.] 84 S. W. 10. Law applies to cities having more than the specified number of inhabitants (Id.), and is not unconstitutional as invading the judicial power (Id.), or as class legislation (Const. 1875, art. 4, § 53), or as making an unreasonable classification (Id.), or because it omits steamboats and locomotives (Id.), or because it allows defendant to show that there is no practical device by which emission of smoke can be prevented (Id.), or because it contains no provision that the smoke must injure the property, or affect the health, or interfere with the comfort of citizens in neighborhood (Id.).

Operation of railroads held nuisances: Operation of switch track over private property in city, resulting in shaking of ground, and smoke and noise in close proximity to neighboring premises. Stockdale v. Rio Grande W. R. Co. [Utah] 77 P. 849. The use of realty by a railroad company for private purposes in such a manner as to injuriously affect adjoining property, as for yard purposes. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781. Conveyances held not to grant right to maintain yards. Id.

Not nuisances: Erection and maintenance of railroad yards, roundhouses, shops, etc., not actionable nuisance unless right is exercised in unreasonable manner, to hurt and inconvenience of another. Rainey v. Red River, etc., R. Co. [Tex. Civ. App.] 80 S. W. 95. One cannot enjoin their maintenance, though injured by smoke and noise, even though he might maintain action for damages. Id. Switch track in public street, which is part of general railway system and is not designed for use of any particular person, though from its location only a limited number will have occasion to use it, is not a public nuisance. Stockdale v. Rio Grande W. R. Co. [Utah] 77 P. 849. Noises and smoke of steam railroads. Protected by authority creating company and legal-

a public highway,[86] public disorder,[87] blasting,[88] and noxious weeds,[89] have been held to be nuisances.

izing its operations. Bennett v. Long Island R. Co., 89 App. Div. 379, 85 N. Y. S. 938. Construction of incline on defendant's own property held within general powers conferred on it, and to be damnum absque injuria. Id. Damages to residence property from the operation of railway terminals is damnum absque injuria when due care is taken in the management thereof. Ross v. Cincinnati, etc., R. Co., 5 Ohio C. C. (N. S.) 565.

A railroad company has the right to run its engines with either hard or soft coal, so long as reasonable care is used, and no unnecessary damage is caused. Jersey City v. Abercrombie [N. J. Law] 58 A. 73. And an ordinance providing a penalty for allowing smoke to escape or be discharged therefrom as the result of using soft coal is unreasonable and void. Id.

84. Placing of soap stock on lot adjoining plaintiff's. Fairbank Co. v. Bahre [Ill.] 73 N. E. 322.

Slaughter house. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037. Complaint held to sufficiently allege that noxious odors came into plaintiff's premises. Fairbank Co. v. Bahre [Ill.] 73 N. E. 322. Evidence held to show operation in such a manner as to become offensive. Wilcox v. Henry, 35 Wash. 591, 77 P. 1055. A melting and rendering establishment, carried on without a license, in which horses were not killed, nor horses or other animals rendered, in a city having a health board, which had not made any order applicable to the case, is not a nuisance and the supreme judicial court cannot take jurisdiction of a bill to have it restrained. Construing Rev. Laws, c. 75, §§ 108, 111. City of Cambridge v. Dow Co., 185 Mass. 448, 70 N. E. 447.

Under Burns' Ann. St. Ind. § 2154, providing for punishment of anyone maintaining building for exercise of any business, or for keeping any animal, which becomes injurious to health, comfort, or property by reason of offensive smell. Lipschitz v. State, 33 Ind. App. 648, 72 N. E. 145. Under Ball. Ann. Codes & St. Wash. § 3085, it is a public nuisance to erect, continue, or use any building or other place for the exercise of any trade, employment, or manufacture, which by occasioning noxious exhalations, offensive smells, or otherwise, is offensive or dangerous to the health of individuals, or of the public. Wilcox v. Henry, 35 Wash. 591, 77 P. 1055. A railroad company has no right to erect upon its right of way stock pens or other improvements which in themselves would constitute a nuisance to persons residing in proximity thereto. Missouri, etc., R. v. Mott [Tex.] 81 S. W. 285. Conveyances held not to give such right. Id.

Not nuisance: Erection of wooden structure not in itself noxious or unusually dangerous, though in violation of city ordinance, not a nuisance because cuts off light and air from plaintiff's premises, and renders space so narrow that atmosphere is noxious and unhealthy. Hagerty v. McGovern [Mass.] 73 N. E. 536.

85. City ordinance forbidding owner of stable to keep therein "any dog or other animal which shall by noise disturb the quiet or repose of any person therein, or in the vicinity, to the detriment of the life or health of any human being," does not apply to horses. N. Y. City Sanitary Code, § 195. Cannot be convicted thereunder because of stamping of horses. People v. Edelstein, 91 App. Div. 447, 86 N. Y. S. 861.

86. Hall v. Breyfogle, 162 Ind. 494, 70 N. E. 883. Allowing trains to stand at street intersections. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831. City ordinance allowing them to stand thirty minutes unreasonable. Id. Any act done to a highway by an individual which detracts from the safety of travelers. Young v. Trapp [Ky.] 82 S. W. 429. Rendering public highway unsafe by permitting brick, mortar, and other debris to fall upon it from a wall immediately contiguous, without safeguarding by barricades or otherwise. Id. Maintenance of weak, warped, and rotten eaves trough 20 feet above sidewalk and projecting over it. Keeler v. Lederer Realty Corp. [R. I.] 59 A. 855. Condition of trough proximate cause of injury where snow and ice slid into it and it fell upon plaintiff. Id. Blocking approaches to siding with teams, so as to obstruct traffic, taking possession of cars intended for other shippers, and dumping of coal at siding and station so as to suspend freight business. Robinson v. Baltimore & O. R. Co. [C. C. A.] 129 F. 753.

Not nuisances: Slight obstruction to alley, over which city had right of way only, by structure above it connecting houses. Town of Frostburg v. Hitchins [Md.] 59 A. 49. One giving exhibition of fireworks in public park under contract with city not guilty of nuisance per se, so as to render him liable for injuries to spectator in street irrespective of negligence. Crowley v. Rochester Fireworks Co., 95 App. Div. 13, 88 N. Y. S. 483.

87. Collecting a crowd on grounds by means of Sunday ball games to annoyance of neighbors (Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532), and collecting crowd outside grounds (Id.). Adjoining owners not estopped to complain by reason of fact that they have not attempted to prevent free ball games played on grounds before their enclosure. Id. Collection of obscene and profane crowd by means of "blind tiger." State v. Tabler [Ind. App.] 72 N. E. 1039.

88. Continuous blasting on city lots at least prima facie evidence of nuisance. Longtin v. Persell [Mont.] 76 P. 699. Operation of quarry so that house is shaken and dirt and rocks thrown into yard by blasting. Schaub v. Perkinson Bros. Const. Co. [Mo. App.] 82 S. W. 1094.

89. Minn. Laws 1895, p. 653, c. 273, providing for destruction of wild mustard, etc., is reasonable exercise of police power. State v. Boehm, 92 Minn. 374, 100 N. W. 95. Act does not violate constitutional provision that no act shall embrace more than one

The fact that a business or trade impairs the value of adjoining property does not make it a nuisance unless it results in actual physical discomfort, or a tangible, visible injury to the property itself.[90] The character of the locality in which the property is situated in reference to its location and the use to which neighboring property is put may be considered.[91] An ashpit on private enclosed ground, dangerous only to the occupants of the premises,[92] and an unsafe ceiling in an apartment house leased to plaintiff by defendant and in his exclusive possession, are not nuisances.[93] Neither is the construction and maintenance of an automobile station on a boulevard.[94]

A municipal corporation is liable for injuries resulting from permitting dangerous obstructions or nuisances in the public streets.[95]

Acts not nuisances per se may become so by reason of the manner or place of their commission.[96] So too a structure not a nuisance in itself may become such on account of its location and use,[97] the question usually being one of fact.[98] The question whether a given state of facts, if found to exist by a jury, constitute a nuisance, is ordinarily one of law for the court, or at least one of mixed law and fact.[99]

§ 3. *Right to maintain; defenses.*[1]—The fact that a business is a lawful one,[2]

subject, which shall be embraced in its title. Id. Complaint held to state public offense. Id.

90. Perry v. Howe Co-operative Creamery Co. [Iowa] 101 N. W. 150. Mere proximity of cemetery and consequent depreciation of property. Instructions erroneous. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

91. Pritchard v. Edison Elec. Illuminating Co., 92 App. Div. 178, 87 N. Y. S. 225, afd. 72 N. E. 243.

92. Not nuisance within meaning of city charter, so as to permit child of one of occupants to recover from city for injuries sustained by falling into it. Veraguth v. Denver [Colo. App.] 76 P. 539.

93. Kushes v. Ginsburg, 99 App. Div. 417, 91 N. Y. S. 216.

94. At Rockaway Beach. Stein v. Lyon, 91 App. Div. 593, 87 N. Y. S. 125.

95. Exhibition of fireworks. Landau v. New York [N. Y.] 72 N. E. 631. The board of aldermen have no more right to authorize or permit a nuisance than to create one, and in case they do either, city is liable for injuries directly resulting therefrom. Where resolution suspending operation of ordinance prohibiting fireworks was in substance a license or permit for exhibition, city liable for resulting injuries. Id.

96. Fireworks in certain public streets. Exhibition in street in New York in presence of large number of people held properly found to be nuisance as matter of fact, and city held liable for resulting injuries. Landau v. New York [N. Y.] 72 N. E. 631. Smoke. State v. Tower [Mo.] 84 S. W. 10. Blowing of factory whistles. Redd v. Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761.

97. Cemetery. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56. Stable. Gallagher v. Flury [Md.] 57 A. 672. It will not be presumed that a stable will be neglected and filth allowed to accumulate. Id. The proximity of dwellings to disagreeable or objectionable structures is an inevitable incident of life in cities and towns. Id. Neither increased danger of fire, nor increased insurance rates, nor depreciation of property by the erection of a neighboring lawful building, is ground for relief by injunction. Id. The erection and maintenance of a building authorized by law is not a nuisance per se. If right to locate pest house in particular place is absolute, it is not a nuisance per se. Anable v. Montgomery County Com'rs [Ind. App.] 71 N. E. 272. A board of health pleading statutory sanction in justification of an act which, under the general rules of law, constitutes a nuisance to private property, must show either that the act is expressly authorized by statute, or that it is plainly and necessarily implied from the powers expressly conferred. Pest house. Id. Where the statute is permissive, and leaves it to the persons empowered to determine whether the general powers committed to them shall be put into execution or not, such discretion must be exercised in strict conformity to private rights, and the statute does not give them a license to commit nuisance in any place they may select for the purpose. Complaint in action for damages for maintenance of pest house near plaintiff's premises held not subject to demurrer. Id. One having an easement for an irrigation ditch across the land of another has no right to so use or operate it as to render it a nuisance. Board of Regents of State Agricultural College v. Hutchinson [Or.] 78 P. 1028.

98. Landau v. New York [N. Y.] 72 N. E. 631. Whether bridge piers are a nuisance is a question of fact. Evidence held not to show nuisance. Small v. Harrington [Idaho] 79 P. 461.

99. Town of Frostburg v. Hitchins [Md.] 59 A. 49.

1. See 2 Curr. L. 1064.

2. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781; Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658. Ga. Civ. Code 1895, § 3861. Ponder v. Quitman Ginnery [Ga.]

or that it is properly and carefully conducted,[3] or is a source of benefit and profit to the community,[4] or to defendant,[5] or that it is located in a convenient place,[6] or that it was established before plaintiff purchased his property, is no defense if it is in fact a nuisance.[7] Neither is the fact that plaintiff's property is of insignificant value to him as compared with the benefits accruing to defendant from the acts complained of,[8] nor the existence of other similar nuisances at the same place, where it appears that defendant has sensibly contributed to the injury complained of,[9] nor the fact that the nuisance is not continual and the injury is only occasional, where it is the result of negligence and carelessness;[10] nor is the fact that the maintenance of a public nuisance is tolerated by the municipal authorities a defense to an action therefor by one specially injured thereby.[11]

§ 4. *Remedies against nuisances. A. Abatement and injunction.*[12] *Abatement.*[13]—A public nuisance may always be abated,[14] and if such abatement is beneficial to the owner of the lands on which it is situated, the benefits may be assessed against him without making the abatement an exercise of the power of eminent domain.[15] Statutes in some states authorize the taking of land under the power of eminent domain for the abatement of a public nuisance.[16]

Cities are generally given power to abate nuisances within their boundaries.[17]

49 S. E. 746. Defense that works were lawful and of great benefit to public held demurrable. Friedman v. Columbia Mach. Works & Malleable Iron Co., 99 App. Div. 504, 91 N. Y. S. 129. Fact that city is given authority to discharge sewer into creek does not authorize it to create nuisance. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555.

3. See 2 Curr. L. 1064, n. 22. Especially where different locality could have been selected, in which case no injury would have resulted. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781; Longtin v. Persell [Mont.] 76 P. 699; American Ice Co. v. Catskill Cement Co., 43 Misc. 221, 88 N. Y. S. 455. The operation of an electric light plant in a residence district is no less a nuisance because no amount of care could render it less obnoxious. Pritchard v. Edison Electric Illuminating Co., 92 App. Div. 178, 87 N. Y. S. 225, afd. 72 N. E. 243. Defense that iron works were carried on in proper place and in careful and most improved manner held demurrable. Friedman v. Columbia Mach. Works & Malleable Iron Co., 99 App. Div. 504, 91 N. Y. S. 129. Not question of care and skill, but of results. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

4. Bowman v. Humphrey [Iowa] 100 N. W. 854.

5. Where shown to cause irreparable injury to one's health and home. Redd v. Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761.

6. If place is one where actionable injury is done to another. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

7. See 2 Curr. L. 1067, n. 61. Partial defense that plaintiff purchased property with full knowledge of defendant's works long after they were constructed for purpose of compelling defendant to purchase his property at greatly enhanced value, held demurrable. Friedman v. Columbia Mach. Works & Malleable Iron Co., 99 App. Div. 504, 91 N. Y. S. 129. The right to restrain an adjoining landowner from maintaining a nuisance thereon is a property right running with the land. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513. Hence the fact that the property was so used before plaintiff purchased that adjoining it is immaterial where the injury is a continuing one. Id. Where it is necessary to draw off water from mill pond in summer, persons moving into vicinity after its establishment cannot object to its use because of resulting odors. De Witt v. Bissell [Conn.] 60 A. 113.

8. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065.

9. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

10. Slaughterhouse permitted to become offensive by failure to clean, etc. Wilcox v. Henry, 35 Wash. 591, 77 P. 1055.

11. Bawdyhouse. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513.

12. See 2 Curr. L. 1065, 1066.

13. See 2 Curr. L. 1066, n. 50.

For right of municipal corporations to drain surface water, see note to Johnson v. White [R. I.] 65 L. R. A. 280.

14. State may drain swamp lands, which may otherwise cause disease. Rude v. St. Marie [Wis.] 99 N. W. 460. Obstruction to watercourse. Scheurich v. Southwest Missouri Light Co. [Mo. App.] 84 S. W. 1003.

15. Rude v. St. Marie [Wis.] 99 N. W. 460.

16. Mass. St. 1867, p. 700, c. 308. Sweet v. Boston [Mass.] 71 N. E. 113. Landowners who do not appear and become parties within the prescribed time after notice are barred from recovering damages, though minors and nonresidents. Id. A portion of a person's property cannot be taken for the purpose of abating a nuisance on lands belonging to others without compensation. Wis. Rev. St. 1898, c. 54, § 1359, et seq., providing for drainage of swamp lands, not objectionable since it provides for compensation for land taken. Rude v. St. Marie [Wis.] 99 N. W. 460.

17. Stagnant water on vacant lots. Shannon v. Omaha [Neb.] 100 N. W. 298.

Where the statute requires that the owner be given notice and an opportunity to himself do the work, the city has no authority or jurisdiction to proceed with the work until the notice has been given.[18] A municipal corporation cannot, by the mere declaration that a structure is a nuisance, subject it to removal by one supposed to be aggrieved thereby, or by the city itself.[19] Even when authorized by their charters to remove or abate nuisances or obstructions on public streets, they should not forcibly remove or abate structures connecting private houses above a mere right of way over private property,[20] but should institute proper legal proceedings to establish the fact that they are nuisances or obstructions and to require their removal.[21] The fact that plaintiff's property was benefited by the removal cannot be shown in mitigation of damages.[22]

Under the police power of the state the legislature has power to declare property which may be used only for an unlawful purpose to be a public nuisance, and to authorize its summary abatement by public officers;[23] but this cannot be done where the property is innocent in its ordinary and proper use, and only becomes illegal when used for an unlawful purpose.[24]

Injunction.[25]—The remedy for a nuisance is by civil action or abatement,[26] or the aggrieved party may generally bring one action for the abatement of the nuisance and the recovery of damages.[27] Equity has jurisdiction to restrain the continuance of either public[28] or private nuisances.[29] The jurisdiction of particular courts depends upon the statutes creating them.[30]

As in other cases the granting of an injunction is not a matter of absolute right, but rests in the sound discretion of the court.[31] It will issue only when it

18. Statute held to require giving of notice during six days immediately prior to meeting of board of equalization. Shannon v. Omaha [Neb.] 100 N. W. 298. Requirements as to papers in which notice was published held complied with. Id. Fact that owner of lot was city attorney did not dispense with necessity of notice. Id. Direction of agent of owner to proceed with work does not dispense with necessity of giving notice. Id.

19. Town of Frostburg v. Hitchins [Md.] 59 A. 49.

Right to declare what is nuisance, see § 2, ante.

20. Town of Frostburg v. Hitchins [Md.] 59 A. 49.

21. Facts held not to justify city in forcibly destroying structure. Town of Frostburg v. Hitchins [Md.] 59 A. 49.

22. Town of Frostburg v. Hitchins [Md.] 59 A. 49. In action for trespass in forcibly removing alleged nuisance, agreement between counsel that it should not be removed pending certain litigation held admissible on question of damages. Id. Not such an agreement between counsel in regard to pending litigation as is required to be in writing. Id.

23. McConnell v. McKillip [Neb.] 99 N. W. 505.

24. Neb. Comp. St. 1901, § 3, art. 3, c. 31, in so far as it provides for forfeiture of guns, etc., of those hunting without a license, without a hearing, is unconstitutional as depriving them of their property without due process of law. McConnell v. McKillip [Neb.] 99 N. W. 505.

See, also, § 4 B, post. Also Fish and Game Laws, § 2, 3 Curr. L. 1430; Betting and Gaming, § 2, 3 Curr. L. 505; Penalties and Forfeitures, § 2, 4 Curr. L. 966.

25. See 2 Curr. L. 1065, 1066.

26. Mont. Civ. Code, § 4950. Chessman v. Hale [Mont.] 79 P. 254.

27. Mont. Code Civ. Proc. § 1300. Chessman v. Hale [Mont.] 79 P. 254.

28. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831. Upon information filed in behalf of public by proper officers. Illegal sale of intoxicants enjoined on information filed by solicitor general of circuit in which sale was carried on. Walker v. McNelly, 121 Ga. 114, 48 S. E. 718. The prevention or abatement of a nuisance is to be accomplished by a prohibitive or mandatory injunction, and an action therefor is equitable in its nature. McCarthy v. Gaston Ridge Mill. & Min. Co., 144 Cal. 542, 78 P. 7.

29. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831.

30. The Missouri supreme court has no jurisdiction of an appeal from the denial of an injunction in an action by a private individual for the abatement of a public nuisance, as no right susceptible of valuation is in dispute. Scheurich v. Southwest Mo. Light Co., 183 Mo. 496, 81 S. W. 1226. Supreme judicial court of Massachusetts has no jurisdiction of bill by city, having board of health, to enjoin melting and rendering establishment in which horses were not killed, and dead animals were not rendered, it not appearing that board of health had passed order applicable to case. City of Cambridge v. Dow Co., 185 Mass. 448, 70 N. E. 447.

31. To be determined after consideration of all facts and circumstances. In view of

is made to appear that the act threatened, if done, would be destructive, or that the injury would be irreparable,[32] or that continuous or repeated acts of wrong are being done or threatened.[33] The right[34] and the injury must be clearly established,[35] and there must be no adequate remedy at law.[36] It will not ordinarily be granted against an anticipated nuisance unless the facts alleged and proven are sufficient to show that it will be a nuisance per se.[37]

The rule that no injunction will issue when greater injury will result than would from its refusal does not apply where the act complained of is in itself tortious.[38]

The act sought to be restrained must be a nuisance in fact and not one created solely by statute or ordinance.[39] Where the facts show the existence of a nuisance, it is immaterial whether it results from the nature of the business or the negligent manner in which it is carried on; at least where it appears that it can be so conducted that no harm will result therefrom.[40]

The remedy must be applied for with reasonable promptness.[41] The statute of limitations is no bar to a suit to restrain a continuing nuisance.[42]

Acts 1901, p. 246, c. 139. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658. Will not issue where it would result in destroying mining and smelting business, and injuriously affect a large number of persons. Id.

32. Perry v. Howe Co-operative Creamery Co. [Iowa] 101 N. W. 150.

33. Perry v. Howe Co-op. Creamery Co. [Iowa] 101 N. W. 150. Where nuisance is continuing one, fact that defendant is able to respond in damages is no defense. Friedman v. Columbia Mach. Works & Malleable Iron Co., 99 App. Div. 504, 91 N. Y. S. 129. Pa. Act June 16, 1836 (P. L. 789). Legal remedy usually inadequate because damages are difficult of computation, and expense of recovery may exceed amount recoverable for single trespass. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065. Injuries continuous in character. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761.

34. In doubtful cases party will be turned over to legal remedy. Madison v. Ducktown Sulphur, Cooper & Iron Co. [Tenn.] 83 S. W. 658.

35. Will not issue where there is reasonable doubt as to cause of injury, where defendant's trade is lawful, and injury is not necessary and natural consequence of act. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

36. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658. As where plaintiff cannot be reasonably compensated in damages (Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761), or where defendant is insolvent (Id.). Fact that certiorari will lie to determine validity of ordinance allowing trains to stand on tracks at street intersections no bar. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831.

37. Evidence held not to show with reasonable probability that stable, when completed, would result in nuisance, or irreparable injury to plaintiff's property or comfort. Gallagher v. Flury [Md.] 57 A. 672. Will not issue where the acts complained of are not per se a nuisance, but may or may not become so, and the threatened injuries are remote, uncertain and speculative, or productive of only possible injury. West v. Ponca City Mill. Co. [Okl.] 79 P. 100. Petition demurrable for failure to allege that arch and train sheds would obstruct street, or facts showing that structures would be nuisances per se. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831.

38. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065.

Note: The defendant had erected enormous blast furnaces at great expense. These furnaces were continually throwing out ore dust which fell upon the plaintiff's property in large quantities, creating a nuisance. Held, that a permanent injunction will issue to restrain the defendant from so using its furnaces. Sullivan v. Jones & L. Steel Co., 208 Pa. 540, 57 A. 1065. This decision seems, in effect, to overrule an earlier Pennsylvania case and to place that state among the jurisdictions which, in issuing a permanent injunction, disregard the fact that it will damage the defendant far more than it will benefit the plaintiff. Richards's Appeal, 57 Pa. 105, 98 Am. Dec. 202. The plaintiff's remedy at law in these cases is plainly inadequate. In most jurisdictions he is put to repeated actions for damages which fail to compensate him, and in all he is left unable to prevent the virtual taking of his property for the private purposes of the defendant. Notwithstanding this, the cases in accord with the earlier decision hold that the injunction is a matter of grace, and as such should not be granted where it is against the balance of convenience. Huckenstine's Appeal, 70 Pa. 102, 10 Am. Rep. 669. This result amounts to a grant of immunity to a person who has made a sufficiently expensive outlay on the instruments of his tort. The recent decision seems to take the better view, that a plaintiff having shown a continuing nuisance, can demand the injunction as of right. Hennessy v. Carmony, 50 N. J. Eq. 515. 18 Harv. L. R. 149.

39. Gallagher v. Flury [Md.] 57 A. 672.

40. Sufficient to state facts showing creation and maintenance of nuisance. Schaub v. Perkinson Bros. Const. Co. [Mo. App.] 82 S. W. 1094.

41. Delay of ten years held bar to in-

The rule that a legal action must precede the equitable one is only insisted on where complainant's right is doubtful.[43] A mandatory injunction may issue to direct the removal of a nuisance without any finding as to damages, where the acts complained of are an invasion of another's rights.[44] Complainant need not demand that defendant desist from his wrongful acts before bringing suit.[45]

No one is entitled to damages for being lawfully restrained and prohibited from maintaining either a public or private nuisance.[46]

Parties.[47]—Several owners of distinct tenements may join in a suit to restrain a nuisance common to all of them and affecting all in a similar way,[48] but may not so join when the object of the suit is to restrain that which does a distinct and special injury to each of their properties.[49] So too, when several persons acting independently combine to produce a nuisance, they may be joined as defendants in an action for injunctive relief.[50]

Pleading, evidence, and defenses.[51]—Two or more causes of action for distinct nuisances may be joined in the same complaint.[52]

As in other suits for injunction, the petition must allege such facts as show with cogency, clearness, and reasonable certainty that the acts threatened, if done, will bring into existence a nuisance, and that complainant will suffer irreparable injury thereby,[53] and the proof of such facts must be clear and satisfactory.[54]

junction against operating copper reduction plant, where defendants had made large expenditures in meantime. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658. Delays of two years and of 16 months held not a bar, in absence of showing of improvements or special expenditures. Id. Delay of five years held bar to injunction where defendant made heavy outlay in improving dam, though it was a public nuisance. Scheurich v. Southwest Mo. Light Co. [Mo. App.] 84 S. W. 1003. Delay of less than three years not laches where plaintiff protested on day when work of raising dam was commenced. Id. Plaintiff held guilty of laches. Washington Lodge No. 54, I. O. O. F. v. Frelinghuysen [Mich.] 101 N. W. 569.

42. Blocking street intersections by trains. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831.

43. Scheurich v. Southwest Missouri Light Co. [Mo. App.] 84 S. W. 1003. Where the evidence does not satisfy a court of equity that the acts complained of constitute a nuisance, an injunction will be denied until that fact has been established by the verdict of a jury. Redd v. Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761.

44. To remove dams diverting water onto plaintiff's lands. Allen v. Stowell, 145 Cal. 666, 79 P. 371.

45. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625.

46. Scheurich v. Southwest Mo. Light Co., 183 Mo. 496, 81 S. W. 1226. Plea by one defendant of former suit pending should not be sustained where former suit was by part only of complainants and was for injunction only. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

47. See 2 Curr. L. 1067, n. 60.

48. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532; Madison v. Ducktown Sulphur, Cooper & Iron Co. [Tenn.] 83 S. W. 658. Owner of realty and one operating quarry thereon may join in suit to restrain maintenance of dams and deposit of sand in creek, causing it to overflow. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625. Rule is same where parties are husband and wife. Id.

49. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532. Any misjoinder in suit to restrain Sunday ball games because some of complainants allege injuries from noises on grounds and others from those in street may not be urged against preliminary injunction, as election may be required later. Id.

50. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658. Several mill owners properly joined as defendants in action to restrain pollution of stream, the plaintiff having no adequate remedy at law, since damage inflicted by each defendant merely nominal. Warren v. Parkhurst, 45 Misc. 466, 92 N. Y. S. 725.

51. See 2 Curr. L. 1066, § 5A.

52. Cal. Code Civ. Proc. § 427. Astill v. South Yuba Water Co. [Cal.] 79 P. 594.

53. Need not appear with absolute certainty. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56. Attaching map to petition does not relieve pleader from necessity of alleging facts to which it relates. Id. Allegation that proposed cemetery is higher than plaintiff's lands too indefinite without further allegation that their lands are so close to it that it is reasonably certain that injury will result. Id. Allegation that air will be polluted insufficient in absence of averment as to contemplated mode of sepulture. Evidence insufficient to authorize submission of question to jury. Id. The complainant must aver and prove that the annoyance and loss are continuous or recurrent, and irreparable. Petition sufficient. Scheurich v. Southwest Mo. Light Co. [Mo. App.] 84 S. W. 1003. The bill must state a proper case for equitable relief. Madison v. Ducktown Sulphur, Copper & Iron Co.

An injunction will be denied where the nuisance has been abated pending the action,[55] or where plaintiffs themselves contribute to the acts complained of.[56]

The fact that the acts complained of are punishable criminally will not prevent the issuance of an injunction.[57] The acquittal of one on a criminal charge of maintaining a nuisance is no bar to a civil action against him for its abatement,[58] nor is the recovery of damages a bar to a suit for an injunction.[59]

Judgment or decree.[60]—In a suit for an injunction, the court may, as incidental to the main relief sought, ascertain and allow for the injury already done.[61] A prayer for damages is incidental to the principal equitable relief sought, and a court of equity will determine all the issues.[62] The party injured by a nuisance may, in the same action, obtain a judgment abating it and recover the damages caused thereby.[63] The right to equitable relief may be waived.[64]

It is proper to limit the relief to an injunction against the operation of a business in such a manner as will injure plaintiff, where it is conceded that it can be carried on so that no harm will result.[65]

[Tenn.] 83 S. W. 658. Complaint held to sufficiently show that injury resulted from acts complained of. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625. Complaint failing to show character of land, or to what extent it had been overflowed, or that owner would receive less rents or profits, held insufficient against demurrer for want of facts. Id.

54. Need not be proved beyond reasonable doubt. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56. Question to expert in regard to conveyance of disease germs in water held improper. Id. Testimony of plaintiffs that their homes would become valueless because they could not drink water off of dead people held conclusion. Id. Error to allow witness to state that city officers would not allow city water supply to be taken from near cemetery. Id.

55. McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 542, 78 P. 7; Perry v. Howe Co-operative Creamery Co. [Iowa] 101 N. W. 150.

56. Where they polluted stream before defendants. Reese v. Johnstown, 45 Misc. 432, 92 N. Y. S. 728.

57. Obstructing highway by allowing trains to stand on crossings. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831.

58. Especially where complainant was not complainant in criminal action. Dam in stream. Small v. Harrington [Idaho] 79 P. 461.

59. Van Veghten v. Hudson River Power Transmission Co., 92 N. Y. S. 956. One recovering double damages for the wrongful obstruction of a watercourse is not thereby precluded from obtaining an injunction against its maintenance as a nuisance. Damages do not take place of statutory procedure to acquire right to build dam. Also award was only compensation for injuries already sustained. Scheurich v. Southwest Mo. Light Co. [Mo. App.] 84 S. W. 1003.

60. See 2 Curr. L. 1067, n. 63.

61. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

62. McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 542, 78 P. 7. California superior court has jurisdiction of suit to abate nuisance and for damages. Id. In California not entitled as of right to jury trial on question of damages, and court may refuse to accept their verdict, and itself fix them [Code Civ. Proc. § 592]. Id.

63. Both under Cal. Code Civ. Proc. § 731, and at common law. Astill v. South Yuba Water Co. [Cal.] 79 P. 594. In New York a final judgment for plaintiff in an action for a nuisance may award him damages, or direct the removal of the nuisance, or both. Code Civ. Proc. § 1662. Not bound to grant both classes of relief. Hadcock v. Gloversville, 96 App. Div. 130, 89 N. Y. S. 74. Held proper to deny removal of nuisance, consisting in pollution of stream by sewer, where it was participated in by others, and defendant city had already been enjoined from maintaining sewer, the latter injunction having been temporarily suspended to enable defendant to comply therewith. Id.

64. The consolidation of an action seeking to restrain the maintenance of a nuisance and to recover damages therefor with a subsequent action for damages accruing after the commencement of the first, as an action at law, and the transfer of the consolidated action to the law side of the court, operates as a waiver of the equitable relief asked for, and makes it one to recover damages, to be tried on the relevant allegations of the two complaints. Pritchard v. Edison Elec. Illuminating Co., 92 App. Div. 178, 87 N. Y. S. 225, afd. 72 N. E. 243. Prayer for equitable relief waived by counsel. Van Veghten v. Hudson River Power Transmission Co., 92 N. Y. S. 956.

65. Quarry. Schaub v. Perkinson Bros. Const. Co. [Mo. App.] 82 S. W. 1094. Plaintiff held not entitled to have passageway over alley removed or building of new one restrained on ground that odors, forced from hotel by means of fans, are thereby retained in passageway, where irreparable injury would result to defendant. If odors are nuisance, plaintiff can have them abated. Washington Lodge, No. 54, I. O. O. F. v. Frelinghuysen [Mich.] 101 N. W. 569. Decree held not objectionable as suppressing slaughterhouse business, since it did not prevent operation of plant so as not to in-

Costs[66] in a suit for the abatement of a nuisance and for damages may be allowed in the discretion of the court.[67]

(§ 4) *B. Criminal prosecution.*[68]—Public nuisances are generally punishable by indictment and criminal prosecution.[69] In Indiana, corporations may be prosecuted by indictment or information for erecting or maintaining public nuisances.[70] The burden is on the state to prove that defendant is a corporation.[71]

Upon an indictment for keeping a public nuisance, the offender may be punished, and the nuisance may be abated as part of the judgment and the thing with which it is committed may be destroyed.[72] Such destruction is not a taking for public use, and does not deprive the owner of it without due process of law.[73]

The ordinary rules for the determination of the sufficiency of the indictment apply.[74]

(§ 4) *C. Action for damages.*[75]—One creating a nuisance is liable for the damages resulting therefrom.[76]

One continuing a nuisance is not liable for damages caused by its operation by his predecessors in interest,[77] nor can one recover damages for injuries to crops prior to the time when he acquired title to the land, unless he had or was entitled to possession thereof.[78] It is not necessary to notify one erecting and maintaining

jure plaintiff. Wilcox v. Henry, 35 Wash. 591, 77 P. 1055. Injunction issued to reduce dam to previous height where it appeared that operation of defendant's plant would not be greatly interfered with, and he would not be put to large expense. Scheurich v. Southwest Mo. Light Co. [Mo. App.] 84 S. W. 1003.

66. See 2 Curr. L. 1068, n. 80.

67. Not entitled to them as of right. Allowance not prevented because nuisance voluntarily abated [Cal. Code Civ. Proc. § 1025]. McCarthy v. Gaston Ridge Mill. & Min. Co., 144 Cal. 542, 78 P. 7.

68. See 2 Curr. L. 1065.

69. State v. Charleston Light & Water Co., 68 S. C. 540, 47 S. E. 979. Burns' Ann. St. Ind. § 2154 provides for punishment of any one maintaining any building for exercise of any business or for keeping any animal which becomes injurious to health, comfort, or property by reason of offensive smells. Lipschitz v. State, 33 Ind. App. 648, 72 N. E. 145. Burns' Ann. St. Ind. § 2153, makes any one erecting or maintaining a public nuisance, to the injury of any part of the citizens of the state, subject to fine. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037. Indictment alleging running of "blind tiger," resulting in collection of boisterous crowds using obscene and profane language, held to charge offense under this section. State v. Tabler [Ind. App.] 72 N. E. 1039.

70. Allegation that defendant is corporation is part of description of offense [Burns' Ann. St. 1901, § 1970]. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037.

71. Evidence sufficient. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037.

72. Slot machine. Woods v. Cottrell [W. Va.] 47 S. E. 275.

73. W. Va. Code 1899, c. 151, § 1, authorizing destruction of gaming tables, not unconstitutional. Woods v. Cottrell [W. Va.] 47 S. E. 275.

For a full discussion of this subject, see Betting and Gaming, § 2, 3 Curr. L. 505.

74. See Indictment and Prosecution, § 4, 4 Curr. L. 5. An information charging the keeping and maintenance of a common nuisance up to and including the day when it was verified and filed held not bad as charging its keeping in the past, present and future. State v. Youngberg [Kan.] 78 P. 421. Information charging defendant with maintaining slaughter house held to sufficiently charge offense under Burns' Ann. St. Ind. § 2154, providing for punishment of any one maintaining building for exercise of any business, or for keeping any animal which becomes injurious to health, comfort, or property by reason of offensive smells, and not to charge two distinct offenses. Lipschitz v. State, 33 Ind. App. 648, 72 N. E. 145. Information sufficient to charge maintenance of nuisance under this section and at common law. Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037. Indictment against railroad for committing and maintaining a nuisance by the erection of a bridge and approaches held demurrable for uncertainty under Ky. Cr. Code, §§ 122, 124. Commonwealth v. Louisville & N. R. Co. [Ky.] 82 S. W. 231. Indictment for maintaining dam held to show indictable offense. State v. Dundee Water Power & Land Co. [N. J. Law] 58 A. 1094. Complaint held to contain sufficient description of place where nuisance was maintained. State v. Wisnewski [N. D.] 102 N. W. 883.

75. See 2 Curr. L. 1067.

76. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329; Missouri, etc., R. Co. v. Dennis [Tex. Civ. App.] 84 S. W. 860; Ponder v. Quitman Ginnery [Ga.] 49 S. E. 746. May be recovered as a matter of right. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658. Evidence held to entitle plaintiff to nominal damages only. Perry v. Howe Co-operative Creamery Co. [Iowa] 101 N. W. 150.

77, 78. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14.

a nuisance of the harmful effects resulting therefrom, or to request him to abate it, before bringing suit;[79] but an action cannot be maintained against one coming into possession of property on which there is an existing nuisance for continuing the same until he has been notified of its existence and has been requested to abate it.[80] This rule has been changed by statute in some states.[81]

An owner of real estate suffering a nuisance to be created or continued by another thereon or adjacent thereto, in the prosecution of a business for his benefit and when he has power to prevent or abate it, is liable for resulting injuries to third persons.[82] The fact that the work was done by an independent contractor is no defense.[83]

A landlord is not liable for injuries resulting from the existence of a nuisance on the demised premises, which becomes such only by act of the tenant while they are in his possession.[84] One leasing premises which are a nuisance, or must in the nature of things become so by their use, and receiving rent therefor, is liable for injuries resulting from such nuisance, whether in or out of possession,[85] and even though the tenant is bound by the lease to keep the premises in repair.[86] The fact that the lease is for ninety-five years and that the landlord has no right of re-entry for condition broken does not change the rule, where the lessor is fully protected against breaches of covenants by the lessee.[87] A lessee may recover damages sustained by him during his tenancy from the maintenance of a nuisance on adjoining property.[88]

One maintaining an attractive nuisance is liable for injuries sustained by trespassing animals.[89]

In a suit for injuries to real estate by reason of a nuisance, plaintiff must show some right therein which has been injuriously affected;[90] but one lawfully residing on property injuriously affected by a nuisance may maintain an action for damages on account of sickness and discomfort resulting to him therefrom, though he has no property right in the premises.[91]

One who by his conduct induces another to construct and maintain a nuisance cannot claim damages therefor.[92]

79. Blackstock v. Southern R. Co., 120 Ga. 414, 47 S. E. 902. In an action for erecting and maintaining a nuisance, plaintiff must prove that it was in fact erected by defendant. Mere fact that water was backed up on land by reason of defective culvert under defendant's roadbed not sufficient, particularly where defendant denies that it built the road. Id. Proper to refuse to allow amendment which would change action from one for erection and maintenance of nuisance to one for continuing nuisance erected by another after notice to abate it. Id. Culvert held not nuisance as originally constructed, but flooding of farm caused by construction of new ditches, etc. Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968.

80. Blackstock v. Southern R. Co., 120 Ga. 414, 47 S. E. 902. Common law rule. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14. Ga. Civ. Code 1895, §§ 3862, 4763. Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968.

81. Montana Civ. Code, § 4554, making successive owners liable in same manner as person creating nuisance, does away with the necessity of notice. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14.

82. Doing of acts which must necessarily result in nuisance unless prevented by precautionary measures. Young v. Trapp, 26 Ky. L. R. 752, 82 S. W. 429.

83. Young v. Trapp, 26 Ky. L. R. 752, 82 S. W. 429.

84. Keeler v. Lederer Realty Corp. [R. I.] 59 A. 855.

85. Keeler v. Lederer Realty Corp. [R. I.] 59 A. 855. Where there has been a public nuisance of continued character on demised premises, both the lessor and the lessee are liable for damages resulting therefrom. Id.

86, 87. Keeler v. Lederer Realty Corp. [R. I.] 59 A. 855.

88. See 2 Curr. L. 1068, n. 74. Pritchard v. Edison Elec. Illuminating Co., 92 App. Div. 178, 87 N. Y. S. 225, afd. 72 N. E. 243.

89. Shed in which nitrate of soda sacks were stored not such a nuisance. Tennessee Chemical Co. v. Henry [Tenn.] 85 S. W. 401. See Animals, § 4, 3 Curr. L. 161.

90. Ft. Worth & R. G. R. Co. v. Glenn [Tex.] 80 S. W. 992.

91. One residing with his father on latter's land. Ft. Worth & R. G. R. Co. v. Glenn [Tex.] 80 S. W. 992.

92. Instructions approved. Missouri, etc., R. Co. v. Dennis [Tex. Civ. App.] 84 S. W.

Where the nuisance is the result of the concerted action of two or more persons, each may be held liable for the entire damages occasioned;[93] but in such case, concert of action must be made to appear.[94] The fact that it may be difficult to determine what part of the damage was caused by each contributor does not change the rule.[95] One acting separately and for himself alone, and not in concert with the others, cannot be held liable for any damages not the direct and proximate result of his own acts.[96]

Several owners of distinct tenements may not join in an action for damages caused by a nuisance, though it is common to them all, and affects them all in a similar way,[97] nor can several persons acting independently be joined as defendants, though their joint acts produce the nuisance complained of.[98]

The abatement of a nuisance does not prejudice the right to recover damages for its past existence,[99] nor does an abatement pending the action deprive the court of jurisdiction to render judgment for damages.[1] By statute in Tennessee in all suits brought for the recovery of damages resulting from a nuisance, the court is given discretionary power to abate the nuisance on petition of plaintiff.[2]

That an alleged nuisance may be abated, and that there is no threat to continue the conditions giving rise to it goes to the measure of damages for injuries already sustained, and not to the sufficiency of the complaint.[3]

Any delay short of the statutory period of limitations in instituting suit is no defense.[4]

In an action for damages resulting from a nuisance and for an injunction against its maintenance, plaintiff is entitled to a jury trial on the question of damages, and the existence of the nuisance.[5]

Evidence.[6]—The fact that there is another and proper way of doing the acts complained of so that no injury will result therefrom may be shown.[7]

860. Evidence as to reasons for plaintiff consenting to location of certain road held admissible on question of estoppel. Id.

93. Bowman v. Humphrey [Iowa] 100 N. W. 854. One who intentionally and aggressively assists in creating or maintaining a public nuisance in violation of a positive enactment is individually liable in damages for all injuries proximately resulting therefrom to private individuals bringing themselves within the requirements of the law. Jointly and severally liable for pollution of stream. Instructions approved. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. His liability will not be limited to the actual loss which he alone has occasioned, even though his act alone and of itself would create a public nuisance. Id. Complaint sufficient. Id. The act of changing the grade of a railroad in such a manner as to cause water to collect on plaintiff's land, thereby injuring it and creating a nuisance, is actionable against the railroad and the contractors doing the work, though a right of way has been previously acquired. Baltimore, etc., R. Co. v. Quillen [Ind. App.] 72 N. E. 661.

94. Not always necessary to show agreement, but in many cases the mere fact that they acted together knowingly is sufficient. Bowman v. Humphrey [Iowa] 100 N. W. 854.

95. Bowman v. Humphrey [Iowa] 100 N. W. 854; Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14.

96. Defendant, who polluted stream with refuse from creamery, not liable for injuries resulting from pollution of slough by another person dumping dead animals therein. Instruction erroneous. Bowman v. Humphrey [Iowa] 100 N. W. 854. Where nuisance arises from individual acts of different mining companies in polluting stream, and injury is in no sense a joint one, each is only liable for damage caused by his own wrongful acts. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14.

97. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

98. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658. General demurrer going to whole bill against several defendants for injunction and damages does not raise question of misjoinder of defendants as to recovery of damages. Id. Several mill owners polluting stream. Warren v. Parkhurst, 45 Misc. 466, 92 N. Y. S. 725.

99. Montana Civ. Code, § 4555. Chessman v. Hale [Mont.] 79 P. 254.

1. McCarthy v. Gaston Ridge Mill. & Min. Co., 144 Cal. 542, 78 P. 7.

2. Acts 1901, p. 246, c. 139. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

3. Baltimore & O. S. W. R. Co. v. Quillen [Ind. App.] 72 N. E. 661.

4. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879.

5. Mont. Const. art. 3, § 23. Can only be waived in manner provided by Code Civ.

Cases discussing the admissibility of particular evidence will be found in the notes.[8]

Damages.[9]—Plaintiff can recover only the amount of damages, if any, which he has actually sustained.[10] He may recover for loss of time,[11] depreciation in the value of his property,[12] and for all discomforts in his home resulting therefrom, whether causing mental or bodily pain, or both;[13] but not for the unsightly appearance of the nuisance,[14] or for the marring of his view.[15]

If the nuisance is permanent in character, all damages, whether past, present, or future may be proved and recovered.[16] If temporary, only such damages may be recovered as have accrued up to the bringing of the action.[17]

Ordinarily damages occurring after the commencement of the action cannot be recovered;[18] but an amended petition may be filed alleging damages to the date of its filing.[19]

The measure of damages in such cases is treated elsewhere.[20]

(§ 4) *D. Rights of private persons in regard to public nuisances.*[21]—In order that an individual may maintain a private action for a public nuisance, it must appear that he has suffered a special injury therefrom, different in kind from and in addition to that suffered by the general public.[22]

Proc. § 1110. Chessman v. Hale [Mont.] 79 P. 254. At common law an action for damages was triable by jury. Id.

6. See 2 Curr. L. 1067, n. 58, 59.

7. Mahan v. Doggett [Ky.] 84 S. W. 525. In action for blowing sawdust on plaintiff's lot, evidence that other mills burned sawdust is admissible. Id.

8. In action for damages for pollution of stream, testimony as to effect of water on land and crops not objectionable as opinion evidence. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14. Question as to knowledge of witness that sewerage was dumped into stream above place where he procured sample of water held proper. Id. In action for damages to hotel by maintenance of electric plant, evidence showing depreciation in rent of rooms from year to year competent on question of diminution of rental value of whole premises. Requested instruction properly refused. Pritchard v. Edison Elec. Illuminating Co. [N. Y.] 72 N. E. 243, afg. 92 App. Div. 178, 87 N. Y. S. 225. Requested instruction limiting recovery to diminution in rental value properly refused where evidence showed other independent items of damage. Id. In action for damages to hotel by electric light plant, petition for its removal held admissible merely for purpose of showing what it was, and not as proof of its contents. Id. Evidence of obstruction of street by defendant by ashes and dirt in front of hotel held admissible. Id. In action for damages to orchard by sulphur smoke from smelter, evidence as to what proportion of trees generally in immediate vicinity of smelter were destroyed (Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529), as to effect of smoke on trees of one living between plaintiff's premises and smelter (Id.), and that a precipitate formed on sidewalks in city in which smelter was situated, held admissible (Id.). Error to permit counsel to experiment before jury with liquid which he stated to be sulphuric acid, in absence of proof as to its nature (Id.), and in absence of proof of identity of conditions (Id.).

9. See 2 Curr. L. 1068, n. 75-80.

10. Instructions approved. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879.

11. No evidence on which to base finding of loss of time. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329.

12. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781.

13. Mental suffering will not be presumed from attack of chills and fever due to stagnant water. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329. Personal inconvenience to himself and his family resulting from smoke, noise, noxious gases, and the like. Railroad yards. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781. Sawdust from mill. Mahan v. Doggett [Ky.] 84 S. W. 525.

14, 15. Houston, etc., R. Co. v. Reasonover [Tex. Civ. App.] 81 S. W. 329.

16. Fairbank Co. v. Bahre [Ill.] 73 N. E. 322. Damages for prospective injuries will only be allowed where the nuisance is permanent. Baltimore, etc., R. Co. v. Quillen [Ind. App.] 72 N. E. 661.

17. Offensive odors from soap stock on adjoining lot. Fairbank Co. v. Bahre [Ill.] 73 N. E. 322. Maintenance of dam causing overflow. Van Veghten v. Hudson River Power Transmission Co., 92 N. Y. S. 956.

18. In action for damages to plaintiff's orchard by sulphur released from smelter, no recovery can be had for injuries occurring after service of summons, there being no evidence of damage after that time. Action commenced by such service [Ball. Ann. Codes & St. Wash. § 4869]. Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529. Fact that court assessed damages for period including time prior and subsequent to dates between which injuries for which plaintiff was entitled to recover occurred, held not to require reversal where amount was less than might have been allowed had award been confined to proper

One so injured may either sue for damages[23] or may, in proper cases, maintain an equitable action for an injunction,[24] particularly when plaintiff has first successfully prosecuted an action for damages.[25]

OATHS.[26]

Where affidavits are required to be made "before" an officer, the oath cannot be administered by telephone.[27] Interrogation of a witness as to the form of oath most binding on him should be made before he is sworn.[28]

OBSCENITY, see latest topical index.

OBSTRUCTING JUSTICE.[29]

Interference with an officer attempting to execute a warrant is indictable in Georgia,[30] as is refusal of an officer to execute process,[31] refusal upon each issue of the warrant being a separate offense.[32] An Indian agent searching for intoxicants on a reservation is not within Rev. St. § 5447, prohibiting resistance to certain officer.[33]

An indictment for obstructing the execution of a search warrant issued by a justice of the peace for a certain township and directing the search of described premises sufficiently identifies the warrant.[34]

Four months' imprisonment for violently obstructing the execution of a search warrant is not excessive.[35]

period. Miller v. Edison Elec. Illuminating Co., 89 N. Y. S. 1059.

19. Bowman v. Humphrey [Iowa] 100 N. W. 854.

20. See Damages, § 5C, 3 Curr. L. 1016.

21. See 2 Curr. L. 1065, § 4C.

22. Thomas v. Wade [Fla.] 37 So. 743; Acme Fertilizer Co. v. State [Ind. App.] 72 N. E. 1037; Guilford v. Minneapolis, etc., R. Co. [Minn.] 102 N. W. 365; State v. Charleston Light & Water Co., 68 S. C. 540, 47 S. E. 979. Complaint held to show special damage by obstruction of stream [Idaho Rev. St. 1887, § 3633]. Small v. Harrington [Idaho] 79 P. 461. The complaint must show the nature of his wrongs and that they are different in kind and degree from those sustained by the general public. Complaint in action for removal of railroad tracks from street insufficient. Guilford v. Minneapolis, etc., R. Co. [Minn.] 102 N. W. 365. Owner of island held to suffer peculiar injury by obstruction to navigation by pound nets, thus cutting off his means of access thereto. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761. Evidence held not to show special injury by construction of frame building in fire limits, next to plaintiff's vacant lot. West v. Ponca City Mill Co. [Okl.] 79 P. 100. Ball. Ann. Codes & St. Wash. § 3093. Wilcox v. Henry, 35 Wash. 591, 77 P. 1055. Injuries to proprietor of property adjoining bawdy house held special and different from those sustained by general public. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513. One living near slaughter-house specially injured. Wilcox v. Henry, 35 Wash. 591, 77 P. 1055.

23. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. Mandamus to compel removal of dam from navigable stream refused in absence of allegation of special injury. State v. Charleston Light & Water Co., 63 S. C. 540, 47 S. E. 979.

24. Especially where injuries are to free use of land. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761; Small v. Harrington [Idaho] 79 P. 461. Sunday ball games. Seastream v. New Jersey Exhibition Co. [N. J. Eq.] 58 A. 532. Remedy by criminal prosecution inadequate. Ingersoll v. Rousseau, 35 Wash. 92, 76 P. 513. Obstruction of water course. Scheurich v. Southwest Mo. Light Co. [Mo. App.] 84 S. W. 1003. When circumstances render such relief appropriate (Id.), as where there is immediate danger of irreparable injury (Robinson v. Baltimore & O. R. Co. [C. C. A.] 129 F. 753).

25. Scheurich v. Southwest Mo. Light Co. [Mo. App.] 84 S. W. 1003.

26. See, also, Affidavits, 3 Curr. L. 65; Depositions, 3 Curr. L. 1074; Notaries and Commissioners of Deeds, 4 Curr. L. 828; Perjury, 2 Curr. L. 1171.

27. Sullivan v. First Nat. Bank [Tex. Civ. App.] 83 S. W. 421.

28. State v. Davis [Mo.] 85 S. W. 354.

29. See 2 Curr. L. 1068. As contempt of court, see Contempt, 3 Curr. L. 795.

30. Pen. Code, § 306. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

31. It is covered by Pen. Code, § 334, providing for "other offenses against public justice" not specifically prohibited. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

32. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

33. The title and context of the original act show that it relates to customs officers only. Mackey v. Miller [C. C. A.] 126 F. 161.

34, 35. State v. Moore [Iowa] 101 N. W. 732.

Occupation Taxes; Offer and Acceptance; Offer of Judgment, see latest topical index.

OFFICERS AND PUBLIC EMPLOYES.[36]

§ 1. Definitions and Distinctions (854).
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§ 1. *Definitions and distinctions.*[37]—A public office is a position held of right by election or appointment, and while not property, courts are quick to protect one in the exercise of the right.[38] The relation is never created by contract, but owes its origin and authority to some act or expression of the governmental power; where authority is conferred by contract, it is regarded as an employment and not as a public office.[39] While the clerk of the school council in Ohio is a public officer,[40] a person appointed to perform certain engineering duties with regard to sewers in a city for no definite term and to receive a per diem wage,[41] a superintendent of sidewalks,[42] a comparison clerk in the county clerk's office of the county of New York,[43] a teacher of gymnastics in the public schools of New York,[44] the superintendency of a county children's home,[45] and the janitorship of a police station,[46] are held to be mere employments. The judge of a city court in Illinois is a municipal and not state officer,[47] and under the New York charter the coroners are borough instead of county officers.[48] A constable committing a prisoner to the town lock-up, as a place of detention, acts for the state, and under its authority, if any. He does not act for the town, nor under its authority, though he may have received his appointment from the town.[49] A constitutional office cannot be abolished by the legislature either directly or indirectly by depriving it of its emoluments.[50] The right to be employed is not one of the exceptions enumerated in the Louisiana constitution of 1898, conferring upon the supreme court jurisdiction of an appeal in cases where the matter in dispute does not exceed the sum or value

36. This topic deals with the general law of officers excluding the law of elections (3 Curr. L. 1165) of Quo Warranto (2 Curr. L. 1377) and of or pertaining to particular officers (see Sheriffs and Constables, 2 Curr. L. 1640; Judges, 4 Curr. L. 280 and like topics) or particularly applicable to local subdivisions of government (see Counties, 3 Curr. L. 959; Municipal Corporations, 4 Curr. L. 720).

37. See 2 Curr L. 1069.

38. Christy v. Kingfisher [Okl.] 76 P. 135.

39. Notwithstanding provision for the employment is made by statute. State v. McGonagle, 26 Ohio C. C. 685, 5 Ohio C. C. (N. S.) 292. The contract between a municipality and its appointee to an office is subject to the statutory regulations respecting such municipality. Dolan v. Orange, 70 N. J. Law, 106, 56 A. 130.

40. State v. Coon, 26 Ohio C. C. 241, 4 Ohio C. C. (N. S.) 560. While one who has been duly selected and authorized to do the official printing of a county may not be considered a public officer, his position is so analogous to that of an officer that the rules which have been approved with reference to the conflicting claims of officers de facto and officers de jure and their respective claims against the state, county or municipality, may be properly held applicable. Smith v. Van Buren County [Iowa] 101 N. W. 186.

41. Weesner v. Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

42. Grieb v. Syracuse, 94 App. Div. 133, 87 N. Y. S. 1083.

43. Not within the civil service rules. People v. Hamilton, 90 N. Y. S. 547, overruling 44 Misc. 577, 90 N. Y. S. 97.

44. See, also, 2 Curr. L. 1069, n. 16. Munnally v. Board of Education, 92 N. Y. S. 286.

45. State v. McGonagle, 26 Ohio C. C. 685, 5 Ohio C. C. (N. S.) 292.

46. Dolan v. Orange, 70 N. J. Law, 106, 56 A. 130. In case of discharge, the employes' right of action is at most for breach of contract and he cannot compel the city to keep him in its service. Wiggin v. Manchester, 72 N. H. 576, 58 A. 522.

47. Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082.

48. People v. Scholer, 94 App. Div. 282, 87 N. Y. S. 1122.

49. Mains v. Ft. Fairfield [Me.] 59 A. 87.

50. Morris v. Glover, 121 Ga. 751, 49 S. E. 786.

of $2,000.[51] In Nebraska the office of police judge or magistrate in an incorporated city is constitutional.[52]

§ 2. *The appointing power.*[53]—The appointing power is now generally held to be an attribute of the executive.[54] Courts have no inherent power to appoint to office, and statutes conferring the power must be strictly pursued.[55] Sub-officers and departmental officers and employes are frequently appointed by their superiors.[56]

The right of local self-government as understood in most of our states prohibits the appointment of local officers by state authority.[57] Thus the general assembly of Louisiana is without authority to choose officers to administer the affairs of the city of New Orleans,[58] but there is a diversity of opinion between the courts of last resort in Texas as to the constitutionality of a law authorizing the governor to appoint local officers of municipalities.[59] Elections cannot be postponed in Indiana so as to authorize officers to hold over beyond the terms for which they were elected.[60] A resolution of the board of supervisors in New York extending the term of town officers is invalid,[61] but the constitution does not invalidate a law providing that the first justice of the peace elected in a city after its enactment shall hold office four years and nine months.[62]

The provision of the constitution of Kentucky requiring the general assembly to prescribe the qualifications of all officers of cities and towns, the manner in and causes for which they may be removed from office, etc., does not prohibit the legislature from creating inferior municipal officers to be appointed by the council and to hold their offices during the pleasure of the council.[63] A constitutional provision limiting the membership of a certain board to five is not violated by a statute reorganizing it with three members,[64] and a statute limiting the number of constables to be elected in townships of a certain population is authorized in California.[65]

51. State v. Sewerage & Water Board, 113 La. 924, 37 So. 878.

52. Const. art. 6, § 18. State v. Moores [Neb.] 99 N. W. 504.

53. See 2 Curr. L. 1069.

54. See 2 Curr. L. 1069. Under section 1393, Revised Statutes of 1892 of Florida, the governor of that state is empowered to appoint a clerk ad interim to discharge the duties of circuit court clerk. State v. Givens [Fla.] 37 So. 308. In California power to appoint to such offices as the legislature creates may be delegated to such persons or boards as the legislature directs. Board of medical examiners. Ex parte Gerino, 143 Cal. 412, 77 P. 166.

55. Chadduck v. Burke [Va.] 49 S. E. 976.

56. Letter carriers can be appointed and removed only by the postmaster general. Corcoran's Case, 38 Ct. Cl. 341. The power of appointment and removal of coroners' clerks in the city of New York rests with the coroners rather than the mayor. People v. Scholer, 94 App. Div. 282, 87 N. Y. S. 1122. A city library board in Kentucky has authority to appoint a treasurer, the city treasurer not being ex officio the treasurer of the board. Board of Trustees of Public Library v. Beitzer, 26 Ky. L. R. 611, 82 S. W. 421.

57. A legislative sub-classification of a general class of officers does not create new offices. Dividing police force into roundsmen, patrolmen, detectives, etc. Fay v. Partridge, 174 N. Y. 526, 66 N. E. 1107. Act of March 12, 1903, appointing two commissioners for a given county of New Mexico, held to contravene provisions of Federal Act of July 30, 1886, c. 818, 24 Stat. 170, prohibiting territorial legislatures from passing local or special laws regulating county and township affairs. Territory v. Gutierrez [N. M.] 78 P. 139.

58. Act No. 37 of 1902, by which such authority purports to be exercised, is unconstitutional. Jackson Square Com'rs v. New Orleans, 112 La. 957, 36 So. 817. In the same state it is held that if the legislature has power under the constitution to provide for the temporary, but not for the permanent filling of a vacancy in a municipal office by appointment by the mayor, and the only provision it makes is for the permanent filling of the vacancy, and it appears, however, that the clear intention was that the mayor's appointee should have charge of the office, this intention will be given effect to the extent of its constitutionality; that is to say to the extent of authorizing the mayor's appointee to have charge of the office ad interim. Watson v. McGrath [La.] 36 So. 204.

59. Ex parte Levine [Tex. Cr. App.] 81 S. W. 1206. See 2 Curr. L. 1070, n. 28.

60. Gemmer v. State [Ind.] 71 N. E. 478.

61. Const. art. 3, § 26. People v. Weeks, 176 N. Y. 194, 68 N. E. 251.

62. People v. Kent, 83 App. Div. 554, 82 N. Y. S. 172.

63. City marshal (Const. § 160]. London v. Franklin, 25 Ky. L. R. 2306, 80 S. W. 514.

64. Thomas v. State [S. D.] 97 N. W. 1011.

§ 3. *Eligibility and qualifications. A. In general.*[66]—As a rule every person entitled to vote is eligible to office,[67] if he be a resident of the jurisdiction,[68] and not the incumbent of an incompatible office.[69] Though the legislature may not increase or diminish the constitutional qualifications prescribed for eligibility to any offices created by such instrument, it may prescribe additional qualifications for all offices which it is authorized to establish.[70] One must be eligible at the time of election to an office,[71] but a mere disqualification may be removed at any time before the term begins.[72] A person who owns property actually assessed on the roll is eligible to office, though it may be assessed to another.[73] The world's Columbian commission was authorized to elect an auditor from among its own members.[74] Failure to file bond in time does not deprive one of his right to office,[75] but a truant officer under the Indiana statutes[76] is a public officer and bound to qualify by taking the prescribed oath before entering on the duties of the office.[77]

(§ 3) *B. Civil service.*[78]—The civil service law of New York does not apply to the officers and attendants of the board of aldermen, which as a legislative body has power to appoint its own servants in its own way.[79] The position of comparison clerk in the office of the county clerk of New York is a confidential one authorizing the civil service commission to make it noncompetitive.[80] The determination of the civil service commissioners in rating candidates in competitive examinations cannot be reviewed either on certiorari or by mandamus in the absence of bad faith or illegal action.[81] By the words "classified list" in section 149 of the Ohio Municipal Code of 1902 is meant the register prescribed by section 164.[82] A statute preferring veterans for appointment to public employment is valid.[83] The veteran law does not entitle a veteran highway laborer to work if there is any similar work to be done in the city, but only to work if there is any to be done in the district to which he has been assigned.[84]

65. Const. art. 11, § 5. Sanchez v. Fordyce, 141 Cal. 427, 75 P. 56.

66. See 2 Curr. L. 1070.

67. See 2 Curr. L. 1070, n. 31.

68. See 2 Curr. L. 1070, n. 32. By removing from the district for which he is appointed or elected an officer forfeits his office. Municipal court justice. In re Bolte, 97 App. Div. 551, 90 N. Y. S. 499. A court crier becomes ineligible when the portion of the county in which he lives is set off and becomes a part of another county. In re Buhler, 43 Misc. 140, 88 N. Y. S. 195.

69. See 2 Curr. L. 1070. The office of sheriff and chief of police (Peterson v. Culpepper [Ark.] 79 S. W. 783), and the office of chief clerk of a department and that of an officer on the retired list, are not incompatible (Geddes's Case, 38 Ct. Cl. 428). So the office of town recorder is not incompatible with that of county and probate judge, the former not being a state office (State v. Townsend [Ark.] 79 S. W. 782), and a teacher of gymnastics in the public schools of New York city may also be a truant officer (Munnally v. Board of Education, 92 N. Y. S. 286).

70. Sheehan v. Scott, 145 Cal. 684, 79 P. 350. The office of county superintendent of schools in Montana being an office created by the constitution, it was incompetent for the legislature to prescribe as an additional qualification that an aspirant to such office should be the holder of a teacher's certificate of the highest county grade. State v. Action [Mont.] 77 P. 299.

71. Charter requirements of five years residence. Sheehan v. Scott, 145 Cal. 684, 79 P. 350.

72. Holding certificate as licensed land surveyor. Ward v. Crowell, 142 Cal. 587, 76 P. 491.

73. People v. Davis, 43 Misc. 397, 89 N. Y. S. 334.

74. Butt v. U. S., 122 F. 511.

75. Murdoch v. Strange [Md.] 57 A. 628.

76. Burns' Ann. St. 1901, § 6633b.

77. Featherngill v. State, 33 Ind. App. 683, 72 N. E. 181.

78. See 2 Curr. L. 1071.

79. Shaughnessy v. Fornes, 172 N. Y. 323, 65 N. E. 168.

80. People v. Hamilton, 90 N. Y. S. 547.

81. People v. McCooey, 91 N. Y. S. 436. The battalion chief of a fire department is in the noncompetitive class. People v. Whittet, 91 N. Y. S. 675; Dill v. Wheeler, 91 N. Y. S. 686.

82. State v. Wyman [Ohio] 72 N. E. 457.

83. Goodrich v. Mitchell, 68 Kan. 765, 75 P. 1034; Dever v. Humphrey, 68 Kan. 759, 75 P. 1037. A veteran seeking a transfer to another position has the burden of proving his fitness. Jones v. Willcox, 80 App. Div. 167, 80 N. Y. S. 420. Under the constitution a veteran soldier or sailor is entitled to an absolute preference in appointment to public office. People v. Burch, 79 App. Div. 156, 80 N. Y. S. 274; People v. Stratton, 79 App. Div. 149, 80 N. Y. S. 269.

84. Schuyler v. New York, 95 App. Div. 305, 88 N. Y. S. 646.

§ 4. *Appointment or employment.*[85]—Where an officer is to be elected by a city council, a quorum may act,[86] and such an election may be by adoption of a resolution.[87] The attempted employment of an attorney by a city council in violation of its own ordinance is void and confers no rights on him.[88] While a policeman was serving a definite term, the adoption of a new charter providing that policemen should hold office during good behavior did not operate to reappoint him under the new charter.[89] The provision of the Indiana statute[90] providing for the appointment of a truant officer by the board of education of each county on the first Monday of May in each year is directory merely.[91]

Wherever the law provides for an incumbent holding over until his successor has been appointed and qualified, there is no vacancy in the office at the expiration of the fixed term, authorizing an ad interim appointment,[92] and a statute authorizing appointments to fill vacancies has no reference to a vacancy arising by expiration of a regular term;[93] but incumbency of an office by holding over after expiration of one's term does not preclude the existence of a vacancy as a basis for the exercise in the regular way of the power to appoint a successor.[94] Where the official bond of a county judge is considered and disapproved by the commissioner's court, and the judge tenders no other bond, there is a vacancy in the office which the commissioners are authorized to fill.[95] The unexpired terms of city officers in Kentucky may be filled at the same election at which congressmen are elected, the constitutional prohibition being directed only at full terms.[96]

Under the civil service law of New York, an employe suspended or released because of the abolition of his office is entitled to reappointment to the same or a similar position whenever his services are required,[97] and an attempt to transfer clerks from another branch to the office abolished is a determination that such service is required and entitles the released clerk to reappointment.[98] A petition for a mandamus to compel relator's appointment to an office must show that the office to which he claims a right legally exists.[99] Certiorari to review a removal[1]

85. See 2 Curr. L. 1071.

86. Attorney General v. Remick [N. H.] 58 A. 871. Where a council consists of 17, 9 is a quorum, a majority of whom is sufficient to elect a clerk. In re Brearton, 44 Misc. 247, 89 N. Y. S. 893. A blank ballot cannot be considered in summing up a total vote, a majority of which a candidate must receive to be elected. Murdoch v. Strange [Md.] 57 A. 628.

87. Huey v. Jones, 140 Ala. 479, 37 So. 193.

88. Hope v. Alton [Ill.] 73 N. E. 406.

89. City of Houston v. Mahoney [Tex. Civ. App.] 80 S. W. 1142; City of Houston v. Smith [Tex. Civ. App.] 80 S. W. 1144.

90. Burns' Ann. St. 1901, § 6633b.

91. Featherngill v. State, 33 Ind. App. 683, 72 N. E. 181.

92. Chadduck v. Burke [Va.] 49 S. E. 976, citing many cases.

93. Chadduck v. Burke [Va.] 49 S. E. 976.

94. Kline v. McKelvey [W. Va.] 49 S. E. 896. By the constitution of New York the terms of city officers expire at the end of even numbered years. A statute provided that the term of office of the mayor of New York should end at noon, Jan. 1. The outgoing mayor appointed on Dec. 29, and again in the forenoon of Jan. 1, a successor to an officer whose term expired at midnight Dec. 31. Held, that he could not hold, as when first appointed there was no vacancy, and when subsequently appointed it was by one not authorized to appoint, the mayor's term having expired at midnight. People v. Fitzgerald [N. Y.] 73 N. E. 55.

95. Gouhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104.

96. Const. §§ 148, 152. Smith v. Doyle, 25 Ky. L. R. 958, 76 S. W. 519.

97. People v. Grout, 45 Misc. 47, 90 N. Y. S. 861. See 2 Curr. L. 1072, n. 57. Clerk in office in good faith abolished is not entitled to reinstatement merely because his notice stated that he was removed from office rather than suspended. People v. Monroe, 90 N. Y. S. 907. Under Greater N. Y. Rev. Charter (Laws 1901, p. 122, c. 466), taking effect Jan. 1, 1902, members of the "Brooklyn Borough Headquarters Squad" who were acting as such on April 1, 1901, were entitled to the position as detective sergeants. People v. Greene, 87 App. Div. 346, 84 N. Y. S. 565. Where at the same meeting at which an office is abolished another is created having the same duties, the removed officer is entitled to reinstatement. People v. Coleman, 99 App. Div. 88, 91 N. Y. S. 432.

98. People v. Grout, 45 Misc. 47, 90 N. Y. S. 861.

99. Policeman. No showing that a police department was ever organized. Moon v. Champaign [Ill.] 73 N. E. 408. A petition for mandamus to compel reinstatement of police sergeant which fails to allege a duly au-

or mandamus to compel recognition as a police officer in New York city must be seasonably applied for.[2]

§ 5. *Nature of tenure and duration of term.*[3]—In the absence of constitutional limitations,[4] the legislature may extend or abridge the term,[5] or even wholly abolish the office.[6]

Statutes creating public offices usually prescribe the commencement and expiration of the term;[7] and where an officer's term is "until" a certain day, he holds office until midnight of that day.[8] It is also usually provided that an officer shall hold not only for the term prescribed but until his successor is duly chosen and qualified.[9] Where no such provision exists, the term ipso facto determines, and the incumbent holds as a de facto officer.[10] Where vacancies for a long and short term of office are filled at the same election, and the form of ballot used by the electors leaves the matter of which candidate is to serve for the longer term in

thorized office and relator's right thereto is demurrable. People v. Chicago, 210 Ill. 479, 71 N. E. 400.

1. Delay of 15 months held unreasonable, though position not yet filled. Glori v. Newark Police Com'rs [N. J. Law] 60 A. 47.

2. Acquiescence from April to November held laches. People v. Greene, 87 App. Div. 346, 84 N. Y. S. 565. Held no laches in case. Id., 95 App. Div. 397, 88 N. Y. S. 601.

3. See 2 Curr. L. 1072.

4. See ante, § 2. Judges are not public officers within the meaning of a constitutional provision that no law shall extend the term of a public officer or change his salary after his election or appointment. Commonwealth v. Mathues [Pa.] 59 A. 961, approved in Michell Co. v. Matthues, 134 F. 493. An act extending the term of an incumbent of an office conflicts with a constitutional provision limiting the power of filling offices to the people. State v. Trewhitt [Tenn.] 82 S. W. 480. See 2 Curr. L. 1073, n. 75.

5. A statute extending an official term is not necessarily invalid in toto where there is proper authority to make a valid ad interim appointment to fill the vacancy. State v. Trewhitt [Tenn.] 82 S. W. 480. See 2 Curr. L. 1073, n. 77.

6. The legislature has the right to redistrict a county and abolish the office of justice of the peace in civil districts extinguished thereby. State v. Akin [Tenn.] 79 S. W. 805; Grainger County v. State [Tenn.] 80 S. W. 750. Though the legislature in Kentucky may abolish an office it cannot abolish the tenure of a rightful incumbent of an office even by so redistricting the territory as to leave him a resident of a district other than that for which he was elected. Adams v. Roberts [Ky.] 83 S. W. 1035. The office of water registrar for the city of Brooklyn was abolished by the charter of Greater New York. People v. Oakley, 93 App. Div. 535, 87 N. Y. S. 856. Where the municipal authorities of a town create an office for which the charter does not provide and elect one to the office thus created, they may at their pleasure abolish the office and thus discharge the municipality from liability to the officer notwithstanding his term as prescribed by the ordinance creating the office has not expired. Raley v. Warrenton, 120 Ga. 365, 47 S. E. 972.

7. The term of office of the mayor of Greater New York expires at midnight of December 31 of the even numbered year notwithstanding the statute prescribing Jan. 1, at noon. People v. Fitzgerald [N. Y.] 73 N. E. 55, afg. 96 App. Div. 242, 89 N. Y. S. 268. The term of a policeman in Houston, Tex., appointed for no definite term is two years, subject to removal for cause. City of Houston v. Estes [Tex. Civ. App.] 79 S. W. 848. An auditor of the World's Columbian Commission was entitled to his office and its salary until the completion of the work of the commission and the filing of its report with the president. Butt v. U. S., 122 F. 511. The Kansas amendment of 1902 relates only to the election of township and county officers and the term of a judge of the municipal court of Kansas City was not extended thereby. Griffith v. Manning, 67 Kan. 559, 73 P. 75. An act creating a board and not limiting their term of office is not for that reason invalid, the limitation on the legislature against creating terms of more than four years applying to limit the term to that period. White v. Mears, 44 Or. 215, 74 P. 931. A city charter provision that policemen shall hold office during good behavior is invalid in Texas, but a prohibition of removal except for cause is valid. City of Houston v. Mahoney [Tex. Civ. App.] 80 S. W. 1142.

8. People v. Fitzgerald [N. Y.] 73 N. E. 55, afg. 96 App. Div. 242, 89 N. Y. S. 268.

9. See 2 Curr. L. 1072, n. 67. The clerk of the school council is a public officer and continues in office until his successor is elected or appointed and qualified. State v. Coon, 26 Ohio C. C. 241, 4 Ohio C. C. (N. S.) 560. Where there was a tie vote on an election for school superintendent of a county, such vote did not render the office vacant, since the previous incumbent is entitled to hold the office until a successor is regularly elected. State v. Action [Mont.] 77 P. 299.

10. A mere appointment to an incompatible office, not followed by acceptance does not ipso facto determine the term of the prior office. De Zur v. Provost, 90 N. Y. S. 1016. Where an ad interim appointment of a school trustee is effective only until the next district meeting, but the voters assuming that he held office for the unexpired term failed to elect his successor, he holds over and is an officer de jure. Click v. Sample [Ark.] 83 S. W. 932.

ambiguity, the certificates of nomination and written acceptance thereof, being a matter of public record, may be referred to to determine the fact.[11] The appointee to an office in which a vacancy exists by operation of law holds only as an appointee to an unexpired term.[12]

Where the execution of an official bond and its deposit in the mail addressed to the proper custodian is shown, there is a sufficient compliance with the law to render one an officer de jure though the bond is not found on file in the proper office.[13] It will be presumed that offices are in possession as lawful incumbents.[14] The secretary of the treasury had authority to pass upon the quantum of compensation fixed for officers by the World's Columbian Commission, but none to determine questions relating to the tenure or duties of officers so appointed.[15]

§ 6. *Resignation and removal.*[16]—An acceptance of an unqualified resignation ends the term and the subsequent withdrawal of it on consent does not revive the term.[17]

Proceedings to try charges against police officers are quasi criminal in their nature, and valuable rights of the accused are at stake, hence the same safeguards used to protect the good name, fame, property, or person in courts of justice, should be observed.[18] Legislatures, however, may authorize the removal of public officers in a summary manner, provided such legislation does not contravene the provisions of Federal or state constitutions,[19] and is not in conflict with certain restrictive provisions of law designed to prevent unnecessary and ill considered changes in the public service[20] as exemplified in the various civil service laws,[21] or to provide steady public employment for those who by past military or other distinguished public service have recommended themselves to particular consideration.[22] This course is usually pursued in the case of mere agents or employes;[23] but where removal is authorized for specified cause,[24] the removal can only be exercised upon preferment of

11. Winters v. Warmolts, 70 N. J. Law, 615, 56 A. 245.

12. In re Lowman, 95 App. Div. 32, 88 N. Y. S. 533. See 2 Curr. L. 1073, n. 72.

13. Click v. Sample [Ark.] 83 S. W. 932.

14. There being a general law in force by which the governor is authorized to fill by appointment all vacancies in such offices. Territory v. Gutierrez [N. M.] 78 P. 139.

15. Butt v. U. S., 122 F. 511.

16. See 2 Curr. L. 1074.

17. Provision that incumbent holds until successor is elected and qualified does not control. State v. Grace [Tenn.] 82 S. W. 485.

18. People v. Greene, 96 App. Div. 249, 89 N. Y. S. 343.

19. Christy v. Kingfisher [Okl.] 76 P. 135.

20. See 2 Curr. L. 1074.

21. See 2 Curr. L. 1074, n. 85. What are "regular clerks" within the civil service law. People v. McAdoo, 91 N. Y. S. 553. That part of the charter of the city of Jamestown which fixed the terms of policemen at one year was not repealed by the civil service law of New York passed in 1899. In re Tiffany [N. Y.] 72 N. E. 512. The provisions of the Massachusetts statute that every person holding office under such civil service rules "shall hold such office * * * and shall not be removed therefrom" does not apply to nor enlarge the term of police officers, who by the provision of another statute hold for a term of four years. Smith v. Wood [Mass.] 72 N. E. 988.

22. See 2 Curr. L. 1074, n. 86. The veterans' law of New York is operative only in favor of veterans of the Civil and Spanish American War. People v. Hynes, 91 N. Y. S. 1032.

23. See 2 Curr. L. 1074, n. 83. Carling v. Jersey City [N. J. Law] 68 A. 395. The councils of cities of the third class in Kentucky may remove the city assessor at pleasure. Rogers v. Congleton [Ky.] 84 S. W. 521.

24. It is a willful and flagrant neglect of duty and not a mere technical violation of the rules for a police captain to withdraw an officer from a duty to which the commissioner has assigned him and employ him at other than police work and make no record thereof. People v. Green, 94 App. Div. 287, 87 N. Y. S. 1017. A police officer failing to execute a warrant for the arrest of a person for a crime therein charged cannot justify absolutely by showing that the magistrate issuing the warrant orally requested him not to serve it, though such a defense may be considered in mitigation. People v. McAdoo, 90 N. Y. S. 669. Removals of marshals and other city officers appointed by the council in Kentucky are not limited to removals for cause only. London v. Franklin, 25 Ky. L. R. 2306, 80 S. W. 514. The code of discipline of the police department of the city of Newark does not authorize the dismissal of an officer or patrolman from the police force for offenses or conduct committed prior to entry upon the service. Campbell v. Newark Police Com'rs [N. J. Law] 58 A. 84.

charges[25] and a hearing[26] upon notice.[27] Since such hearing is a judicial function,[28] a statute which makes no provision for an appeal to the courts from such a proceeding will not be upheld,[29] but courts have no inherent power to review a removal by the proper authority.[30] A police board may hear evidence at one meeting and pass upon the case at another, provided the second meeting is composed of the members who were present at the trial of the case;[31] but a deputy commissioner may not conduct the trial and thereafter report the evidence without making any finding of guilt or innocence and leave to the commissioners the duty to pass on the sufficiency of the evidence.[32] An order removing an officer on charges need not state whether he was found guilty under all the specifications.[33] Where charges of misconduct on the part of an officer have been fairly established by the proofs, courts will not interfere for every technical error that may be committed by the police commissioner in the progress of the investigation;[34] but where errors are of such a character as to show that the trial was not fair, it is the duty of the court to review the case and reverse the determination.[35] A finding against the weight of the evidence is not conclusive on the court.[36] The courts cannot review the excessiveness of punishment for neglect of duty, the same being within the law.[37] The right to present affidavits and other proof to the court is limited to facts which

25. Under the civil service law of New York, removals, reductions in salary, and change in position of persons in the classified service, cannot be made except on charges and opportunity to explain. Waters v. New York, 43 Misc. 154, 88 N. Y. S. 238. A municipal court justice cannot remove an attendant who is a Spanish War veteran without a hearing on charges. People v. Hoffman, 98 App. Div. 4, 90 N. Y. S. 184. A police officer, though otherwise qualified, is not entitled to retirement on pension while charges are pending against him though they are not verified until after his application for retirement. People v. Greene, 97 App. Div. 502, 90 N. Y. S. 162. It is not necessary that every specification be proved. It is enough if any be supported. People v. Sturgis, 96 App. Div. 620, 88 N. Y. S. 631.

26. The water registrar in charge of the water office in Brooklyn is not the head of a bureau and as such entitled to a hearing before removal. People v. Oakley, 93 App. Div. 535, 87 N. Y. S. 856. The police commission may reduce a roundsman to patrolman after a trial. People v. Greene, 90 N. Y. S. 833.

27. A discharge without notice and opportunity to be heard is unwarranted. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816.

28. In the trial of charges against a policeman, it is improper for two deputy commissioners to act alternately as accuser, witness, prosecutor, and judge. People v. Greene, 96 App. Div. 249, 89 N. Y. S. 343.

29. Christy v. Kingfisher [Okl.] 76 P. 135.

30. In the absence of statutory authority, the action of the proper authority in lawfully removing a public officer or employe is not reviewable by the courts. Patrolman. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. See 2 Curr. L. 1076, n. 14.

31. State v. Board of Police Com'rs, 113 La. 424, 37 So. 16.

32. People v. Partridge, 93 App. Div. 473, 87 N. Y. S. 680; People v. Greene, 97 App. Div. 404, 89 N. Y. S. 1067. See 2 Curr. L. 1076, n. 10, 11. A deputy police commissioner in New York is not required to make written findings to authorize commissioner to dismiss officers from the force. People v. Partridge [N. Y.] 73 N. E. 4.

33. People v. Sturgis, 96 App. Div. 620, 88 N. Y. S. 631.

34. Campbell v. Newark Police Com'rs [N. J. Law] 58 A. 84. Where the proof is clear, the determination of the commissioner will not be set aside though facts subsequent to the trial were laid before him in a letter which he certified he did not take into consideration in reaching his determination. People v. Greene, 97 App. Div. 502, 90 N. Y. S. 162. A finding on sufficient evidence will not be set aside where there is not such a preponderance against it as would justify setting aside a verdict. People v. Greene, 96 App. Div. 1, 88 N. Y. S. 1060; People v. Webster, 90 N. Y. S. 723. It is no objection to the jurisdiction of the commissioner that he has previous knowledge of the officer's guilt and believes him guilty. People v. Partridge, 99 App. Div. 410, 91 N. Y. S. 258.

35. Admission of testimony beyond range of charge preferred. People v. Greene [N. Y.] 72 N. E. 99. Whether in making a determination of removal by a police commissioner, any rule of law prejudicially affecting the relator has been violated is open to review on appeal. Removal of police captain. People v. Greene [N. Y.] 71 N. E. 777. Where the determination of the deputy commissioner is not his free and honest judgment but was induced by threats by the person making the charges, it will be annulled. People v. Monroe, 97 App. Div. 929, 89 N. Y. S. 929. Refusal of the commissioner to postpone trial on sufficient cause shown is reviewable. People v. Webster, 90 N. Y. S. 723. Proceedings to impeach policeman set aside for failure of evidence. Lamb v. Brunswick, 121 Ga. 345, 49 S. E. 275.

36. People v. Partridge, 95 App. Div. 323, 88 N. Y. S. 657; People v. Hogan, 91 N. Y. S. 715.

37. People v. Greene, 94 App. Div. 287, 87 N. Y. S. 1017; Id., 96 App. Div. 1, 88 N. Y. S. 1060.

affect the jurisdiction of the commissioner.[38] Proceedings to remove a member of a city fire department for failure to pay a debt will be enjoined by the Federal court where bankruptcy proceedings are pending against him, the debt is provable therein, and the efficiency of the department is in no wise impaired by failure to pay the debt.[39] A de facto officer drawing pay and exercising the functions of his office at the mere will of the city may be dismissed at any time and is not entitled to mandamus to compel his restoration.[40] Where proceedings for the removal of county, municipal, or township officers may be commenced by an accusation or information in writing, such an accusation is not an "indictment" objectionable on the ground that it contains more than one offense.[41] The denial of a motion to suspend an officer pending the prosecution and disposition of a statutory procedure for his removal from office will not be reviewed by mandamus.[42] Where the board of aldermen of a city are authorized by law to try and depose the mayor on charges, members preferring them are not disqualified to sit in his trial, they not being a court, but an administrative body and the constitutional inhibition against interested judges not being applicable.[43]

To be entitled to retirement under the police pension law, the applicant must be a member of the force at the time of applying.[44] A policeman of Brooklyn is entitled to retirement on pension only after service of twenty-five years.[45]

§ 7. *Proceedings to try title to office.*[46]—The jurisdiction of courts of chancery is confined to questions arising relative to property or civil rights, and the mere right to office or of the nomination to an office or the acts of public officers in the discharge of their duties cannot be regulated or controlled by the writ of injunction.[47] The title of a de facto incumbent to a public office cannot in general be examined in any collateral proceeding attacking his official acts,[48] nor can the question be raised in any other way except by some common-law or statutory remedy directly raising the issue;[49] but mandamus lies to compel the admission to office of the party having a clear prima facie right thereto shown by a commission, certificate or other legal evidence thereof,[50] and will be awarded in favor of such a

38. People v. Partridge, 99 App. Div. 410, 91 N. Y. S. 258.

39. In re Hicks, 133 F. 739.

40. McNeill v. Chicago, 212 Ill. 481, 72 N. E. 450.

41. In re Burleigh, 145 Cal. 35, 78 P. 242.

42. Appeal is the proper remedy. State v. District Court of Fourth Judicial Dist. [N. D.] 100 N. W. 248.

43. Const. art. 5, § 11. Riggins v. Richards [Tex.] 77 S. W. 946.

44. State v. Policemen's Pension Fund Trustees [Wis.] 101 N. W. 373.

45. Friel v. McAdoo, 91 N. Y. S. 454.

46. See 2 Curr. L. 1077.

47. People v. Rose, 211 Ill. 252, 71 N. E. 1124. The title to an office cannot be tried in a suit to enjoin one of the rival claimants from interfering with the possession of the incumbent. Scott v. Sheehan, 145 Cal. 691, 79 P. 353.

48. The question of the validity of the appointment of an incumbent of a judicial office cannot in the District of Columbia be tried on certiorari to review a judgment rendered by him. Anderson v. Morton, 21 App. D. C. 444. In case of a legal office, which can be filled by a de facto officer, the validity of an appointment thereto, and the right of the appointee to hold it, cannot be questioned in habeas corpus proceedings. Ex parte Gerino, 143 Cal. 412, 77 P. 166. Where school trustees are declared elected and they assume to act as such, the regularity of their election cannot be questioned in a collateral proceeding to restrain the levy of a tax voted by the district at an election, the call for which was participated in by such trustees. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

49. The right to an office occupied by one claiming title thereto under a certificate of election cannot be determined in a suit instituted by an adverse claimant for the salary of the position (State v. Moores [Neb.] 99 N. W. 504), nor does certiorari lie to correct the record of an appointment or election to office merely to pave the way for a contest with another to the office (Daniels v. Newbold [Iowa] 100 N. W. 1119).

50. Kline v. McKelvey [W. Va.] 49 S. E. 896. Mandamus and not election contest is the remedy of one who was the only candidate for a public office and whom the election board refuses to recognize. Morris v. Glover, 121 Ga. 751, 49 S. E. 786. A public officer in the civil service of the state cannot in mandamus litigate his claim to the office from which he has been removed while another holds it under color of title and is in receipt of the salary attached. People v. Hamilton, 44 Misc. 577, 90 N. Y. S. 97.

person against one holding over after expiration of his term.[51] Though the court will not try title to an office on a proceeding to compel delivery of books and papers, it will look into the matter far enough to determine whether petitioner has a prima facie right.[52]

The proper proceeding at common law[53] to try the title to public office is an information in the nature of quo warranto,[54] the purpose of such proceedings at common law being to oust the respondent from office, and not to install the relator or any person into the office.[55] The attorney general ex officio has the right to file such an information, and is not compelled to ask leave of the court; but in the absence of a statute, and without the intervention of the attorney general, a private individual cannot either as of right or by leave of the court.[56]

In an action by the commonwealth for usurpation of an office, the burden to show title is on defendant;[57] but in an action of quo warranto to remove an officer for violation of his duty, the issue of primary importance is that concerning the good faith of the defendant in his official conduct,[58] and upon the trial of such an action, the law presumes that the defendant acted in good faith in all the matters charged against him, and the burden rests upon the state to show otherwise by a preponderance of the evidence.[59] The statute in South Carolina requiring defendant to give bond for costs and emoluments is upheld.[60] The record of a vote of a city council appointing an incumbent to office does not import absolute verity so as to preclude attack in a proceeding by quo warranto to try such incumbent's title.[61] Where, pending a writ of error from a contest the term of office in dispute expires, the writ will be dismissed.[62]

51. Kline v. McKelvey [W. Va.] 49 S. E. 896.

52. In re Brearton, 44 Misc. 247, 89 N. Y. S. 893.

53. See 2 Curr. L. 1077, n. 25.

54. Meehan v. Bachelder [N. H.] 59 A. 620. Charter provision construed with reference to term of city attorney. Attorney General v. Shekell [Mich.] 101 N. W. 525. A position being a mere employment quo warranto cannot be maintained by one claiming to be rightfully appointed to such position. Under Rev. St. § 930, the position of superintendent of a county children's home is an employment. State v. McGonagle, 26 Ohio C. C. 685, 5 Ohio C. C. (N. S.) 292. See Quo Warranto, 2 Curr. L. 1377.

Note: The writ of quo warranto became obsolete in England before our Revolution. Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455. It was a civil proceeding, and issued out of chancery as of right in favor of the crown. The information in the nature of a writ of quo warranto was a criminal proceeding, in which, if the issue was found against the defendant, in addition to a judgment of ouster a fine could be imposed. It is now regarded as a civil remedy, though criminal in form, and is the process that is uniformly used in most of the states of the Union. Osgood v. Jones, 60 N. H. 543; Meehan v. Bachelder [N. H.] 59 A. 620.

55. A judgment ordering the delivery of books, etc., to relator, held erroneous as beyond scope of quo warranto proceedings. Albright v. Territory [N. M.] 79 P. 719. The statute of 9 Anne which provides for judgment of ouster, fine, and costs against the respondent upon an information in the nature of a quo warranto, is a part of the common law in New Mexico. Id.

56. Meehan v. Bachelder [N. H.] 59 A. 620. Private individual to maintain mandamus must make claim to office, and must show that attorney general has refused to allow use of his name on behalf of state. Ney v. Whiteley [R. I.] 59 A. 400.

Note: In some jurisdictions it is held that the Attorney General, in the performance of his official duties, is not an officer of the court, but of the state, and, as such officer, is clothed with a large discretion, in the exercise of which he is not subject to the orders and direction of the court. Attorney General v. Sullivan, 163 Mass. 446, 40 N. E. 843, 28 L. R. A. 455; Attorney General v. Shomo, 167 Mass. 424, 45 N. E. 762; Haupt v. Rogers, 170 Mass. 71, 48 N. E. 1080; State v. Gleason, 12 Fla. 190. While in other states the courts, on a petition for a writ of mandamus to compel the Attorney General to institute proceedings to try the title to a public office, he having declined to do so, have exercised the power of reviewing his discretion, and, in case of its abuse, have required him to proceed. Fuller v. Attorney General, 98 Mich. 96, 57 N. W. 33; Cain v. Brown, 111 Mich. 657, 70 N. W. 337; Everding v. McGinn, 23 Or. 15, 35 P. 178.

57. Stack v. Commonwealth [Ky.] 81 S. W. 917.

58. County attorney failing to enforce prohibitory liquor law. State v. Trinkle [Kan.] 78 P. 854.

59. State v. Trinkle [Kan.] 78 P. 854.

60. McCall v. Webb, 135 N. C. 356, 47 S. E. 802.

61. Daniels v. Newbold [Iowa] 100 N. W. 1119.

§ 8. *Powers and duties.*[63]—An officer may be an officer de facto notwithstanding the unconstitutionality of the statute under which he has been appointed.[64] But there cannot be an officer de facto where there is no legal office, though a person has been employed to perform duties that properly belong to such an office where one exists.[65] Where one claims rights as an officer by virtue of his office, he must show that he is an officer de jure, and a showing that he is an officer de facto is not sufficient.[66]

A person regularly appointed to an appointive office and holding over after his term has expired, and one in possession of the office under an irregular appointment, are de facto officers whose official acts are valid;[67] but a person elected to an appointive office, there being no legal authority for holding the election, is not even a de facto officer, and his acts are void.[68] Where a municipality and another, parties to a contract, have agreed to submit matters in dispute to an arbitrator, who at the same time is a city officer, the fact that such person is removed from office does not operate to relieve or deprive him of jurisdiction of the arbitration proceedings.[69]

Public officers have of course all powers expressly conferred upon them, and as well such as by necessary implication are requisite to enable them to discharge the official duties devolved upon them.[70] Hence boards of supervisors may employ counsel to aid the district attorney in protecting the interests of the county;[71] and a city of the third class in Missouri is entitled to appoint a city engineer;[72] but an officer other than an engineer can perform the duties of such office provided he has the proper qualifications.[73]

Police officers, however, have no power on making an arrest to accept a deposit of money for the appearance of the person arrested in court.[74] Where a majority of the judges of a supreme court decline to sit because of personal interest in the result, the powers of the court devolve on the remaining judges,[75] and where powers are conferred upon and to be exercised by a board, it suffices always that a quorum

62. Elbon v. Hamrick [W. Va.] 46 S. E. 1029, reaffirmed without opinion Hamilton v. Ammons [W. Va.] 49 S. E. 128.

63. See 2 Curr. L. 1079.

64. Watson v. McGrath [La.] 36 So. 204.

65. City engineer. Weesner v. Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

66. Moon v. Champaign [Ill.] 73 N. E. 408.

67. Fire commissioners verbally appointed. Village of Canaseraga v. Green, 88 N. Y. S. 539.

68. Village of Canaseraga v. Green, 88 N. Y. S. 539.

69. Werneberg, Sheehan & Co. v. Pittsburg [Pa.] 59 A. 1000.

70. Deputy clerk of probate court is without authority to receive the election of a widow. Mellinger v. Mellinger, 26 Ohio C. C. 683, 5 Ohio C. C. (N. S.) 435. The commissioner of docks has no authority to lease a portion of a marginal street for a stand for the sale of flowers and tobacco. Villas v. Featherson, 94 App. Div. 259, 87 N. Y. S. 1094. The veto power of the mayor under the Bessemer, Alabama, charter is not applicable in the election of officers. Huey v. Jones, 140 Ala. 479, 37 So. 193. Tax collectors in Louisiana may not lawfully pay or purchase claims against the parish. But where they have been authorized by the police jury to pay or take up certificates and orders issued for legal and valid parish indebtedness, and have done so, they are entitled in equity to restitution. Young v. Parish of East Baton Rouge, 112 La. 511, 36 So. 547. A revenue agent in Tennessee is authorized to bring suit against a county judge to recover public moneys alleged to have been illegally paid over to such judge. State v. Kelley [Tenn.] 82 S. W. 311. The commissioner of sea and shore fisheries of Maine has authority to settle offenses in violation of Rev. St. c. 41, § 17, without suit or prosecution. He may likewise direct one of his wardens to make demand for payment of the penalty incurred. State v. Hanna [Me.] 58 A. 1061. An act (Act 1901, p. 373, c. 174), authorizing the appointment of revenue agents to examine and audit the accounts of all officials charged with the collection of taxes, held constitutional. State v. Kelley [Tenn.] 82 S. W. 311.

71. Santa Cruz County v. Barnes [Ariz.] 76 P. 621.

72, 73. Weesner v. Central Nat. Bank, 106 Mo. App. 668, 80 S. W. 319.

74. Richardson v. Junction City [Kan.] 77 P. 691.

75. Commonwealth v. Mathues [Pa.] 59 A. 961, afd. in Michell Co. v. Matthues, 134 F. 493.

of the board should be present and that a majority of the quorum concur.[76] A board may be represented by its sub-officers and employes.[77]

Assessors of taxes are not agents of the town,[78] and public officers cannot bind the government by acts beyond the scope of their actual authority, though within the apparent scope of their authority;[79] but officers appointed by a town may be agents for whom the town is liable at common law, or may be simply officers for whose acts the town is not liable unless made so by statute.[80] Where public officers act within the apparent scope of their authority, the burden to prove excess of power is upon the party asserting such defense.[81] One who has received a certificate of election or appointment from the proper officers has a prima facie title, entitling him to maintain proceedings for possession of books and papers, though his title turns on difficult questions of law.[82]

Mandamus is a proper remedy to compel such delivery,[83] but where respondent denies their possession, a question of fact arises which must be determined on proof before an order can issue.[84]

In the absence of a supported charge of illegality or fraud, the courts have no authority to interfere with public officers in the discharge of their duties;[85] but the statutes of Nebraska require the mayor and chief of police of cities to actively interfere to prevent or stop open violations of law.[86] A substantial compliance with statutory directions in the performance of duties, disregarding unessential particulars, is sufficient.[87]

Mandamus will lie to control only plain ministerial duties,[88] and does not extend to quasi judicial[89] and discretionary action.[90] Mandamus will not be granted

76. State v. Board of Police Com'rs, 113 La. 424, 37 So. 16.

77. President, secretary and architect. Fransen v. Regents of Education of South Dakota [C. C. A.] 133 F. 24.

78. There is no such relationship between the town and the assessors as makes the opinion of the latter admissible against the former. Penobscot Chemical Fibre Co. v. Bradley [Me.] 59 A. 83. The statement of a tax ferret to a taxpayer who had wrongfully withheld property from taxation that if others did not have to pay like taxes the taxes paid would be refunded is not binding on county so as to authorize a recovery of the amount paid. Kehe v. Blackhawk County [Iowa] 101 N. W. 281.

79. Orange County v. Texas, etc., R. Co. [Tex. Civ. App.] 80 S. W. 670.

80. Mains v. Ft. Fairfield [Me.] 59 A. 87.

81. Martin v. Common School Dist. No. 61 [Minn.] 101 N. W. 952.

82. In re Brearton, 44 Misc. 247, 89 N. Y. S. 893; Christy v. Kingfisher [Okl.] 76 P. 135. Books of a city engineer, containing field notes made by him in surveying lots of individual owners upon their application, under their employment, and at their expense, are his private property and need not be delivered to his successor. Leffingwell v. Miller [Colo. App.] 79 P. 327.

83. State v. Givens [Fla.] 37 So. 308.

84. In re Gill, 95 App. Div. 174, 88 N. Y. S. 466.

85. People v. Trustees of Village of White Plains, 93 App. Div. 599, 88 N. Y. S. 506. The discretion of officers empowered to approve official bonds cannot be controlled by mandamus, though action was influenced by corrupt motives; but an arbitrary refusal to exercise discretion may be controlled. Gouhenour v. Anderson [Tex. Civ. App.] 81 S. W. 104. A county attorney is not obliged to institute proceedings for the punishment of offenders against the prohibitory liquor law upon his own knowledge, but whenever notified by an officer or other person of any violation of that law, it is his duty forthwith diligently to exercise all the authority conferred upon him by law for the purpose of disclosing, prosecuting and punishing the offender. State v. Trinkle [Kan.] 78 P. 854. Mandamus will not lie to compel the arrest without warrant of certain designated persons for alleged commission of a misdemeanor. State v. Williams [Or.] 77 P. 965, 67 L. R. A. 166.

86. Closing of public gaming house. Moores v. State [Neb.] 99 N. W. 249.

87. Letting contract for public printing. People v. McDonough, 173 N. Y. 181, 65 N. E. 963.

88. Indian agent cannot be ordered to countersign Indian's check against fund arising from sale of public land. Hitchcock v. United States, 22 App. D. C. 275. On mandamus to compel comptroller to sign pay roll checks, he cannot raise the question that the position had not been classified. People v. Johnston, 38 Misc. 645, 78 N. Y. S. 212, afd. 75 App. Div. 630, 78 N. Y. S. 1131.

89. Classification of position by civil service commission. Dill v. Wheeler, 91 N. Y. S. 686. In changing the civil service rules by virtue of which it becomes possible to remove an officer and give the office to another, the civil service commission acts in a quasi-judicial capacity, and its action cannot be reviewed or set aside by mandamus. People v. Hamilton, 44 Misc. 577, 90 N. Y. S. 97; Id., 90 N. Y. S. 547.

90. Retirement of policeman on pension.

to compel the secretary of the interior and commissioner of Indian affairs to order an Indian agent to perform a plain ministerial duty, since if the duty is plain no order is necessary,[91] nor will this writ be granted to compel one to do a particular act which his superior in office has lawfully ordered him not to do.[92] A private citizen has no standing to enjoin the enforcement of a writ of mandamus granted against a state treasurer to compel the payment of a salary.[93]

Where the right to an office is not in issue, the only issue being the amount of compensation, the payment of the proper amount may be enforced by mandamus.[94] The duties of public examining and licensing boards are to some extent at least judicial in character, and an appeal from their decision, in the absence of statutory provision therefor, does not lie.[95]

Bonds payable to an officer for another's benefit may be sued in his name after his retirement.[96]

§ 9. *Compensation.*[97]—Since an officer's right to compensation is not based upon contract,[98] compensation cannot be exacted for services performed unless specifically provided by law,[99] and the rule that contract rights acquired under one interpretation of the law are not divested by a subsequent different interpretation does not apply.[1]

Public officers must perform the duties of their offices, however onerous they may be, for the compensation fixed by law, and will not be allowed compensation for extra services, unless expressly authorized by statute.[2] In the note are collated cases where allowances in one form or another were granted.[3]

Friel v. McAdoo, 91 N. Y. S. 454. The exercise of discretion by public officers is not amenable to judicial review except in a capital case. State v. Birch [Mo.] 85 S. W. 361. Mandamus to compel arrest of persons accused of violating liquor laws denied. State v. Moores [Neb.] 99 N. W. 842.

91. Hitchcock v. U. S., 22 App. D. C. 275.

92. State v. Williams [Or.] 77 P. 965, 67 L. R. A. 166.

93. Newlin v. Harris, 209 Pa. 558, 58 A. 925.

94. People v. Greene, 95 App. Div. 397, 88 N. Y. S. 601.

95. Registration in dentistry. Kenney v. State Board of Dentistry [R. I.] 59 A. 932. The California act of February 27, 1901, for the regulation of the practice of medicine and surgery is constitutional. Ex parte Gerino, 143 Cal. 412, 77 P. 166.

96. O'Neill Mfg. Co. v. Harris, 120 Ga. 467, 47 S. E. 934. Query, may his successor sue in his own name? Id.

97, 98. See 2 Curr. L. 1081.

99. Usage is without weight in the matter of allowance of fees to public officers. Millard v. Conrade, 26 Ohio C. C. 445, 5 Ohio C. C. (N. S.) 145. Mere possession of office and performance of duties give no right to enforce recovery for compensation. Smith v. Van Buren County [Iowa] 101 N. W. 186. State law construed not to create direct liability of railway company for commissioners' compensation. Linton v. Long Island R. Co., 91 App. Div. 515, 86 N. Y. S. 903. Laws 1897, p. 763, c. 499, relative to improvements to be made under the direction of a board, the expenses to be borne half by the municipality and half by the railway, held a commissioner cannot enforce payment of his salary against the railway in the absence of any showing that his claim has been passed on by the board. Id. Mandamus to compel payment of salary must show definite salary and an absolute right to it by lapse of time. Moores v. State [Neb.] 93 N. W. 986.

1. Tucker v. State [Ind.] 71 N. E. 140.

2. Pawnee County v. Belding, 1 Neb. Unoff. 533, 95 N. W. 776. See 2 Curr. L. 1081, n. 69. County treasurer in Illinois not entitled to further compensation for acting as supervisor of assessments. Parker v. Richland County [Ill.] 73 N. E. 451. The district attorney in California is not entitled to extra compensation in the form of an allowance for stenographer's services. Humiston v. Shaffer, 145 Cal. 195, 78 P. 651. The keeper of a house of refuge is not entitled to the one year's extra pay granted to the "keeper or member of a crew of a life saving or life boat station." Fulford's Case, 38 Ct. Cl. 548. A county clerk who receives a salary is not entitled to special compensation for official services, unless the statute so provides. Comer v. Morgan County Com'rs, 32 Ind. App. 477, 70 N. E. 179. The fiscal court of Kentucky has no authority to allow its members any other compensation than that provided by statute [Ky. St. 1903, § 1845]. Boyd County v. Arthur, 26 Ky. L. R. 906, 82 S. W. 613. Fees of probate judges in several matters. Millard v. Conrade, 26 Ohio C. C. 445, 5 Ohio C. C. (N. S.) 145. Under the provisions of section 3024, Gen. St. 1901, a county is not liable for clerk hire in the office of its treasurer, unless the board of county commissioners make an allowance therefor in such a sum within the statutory limit as it may deem necessary. Roth v. Ness County Com'rs [Kan.] 77 P. 694. When an inhabitant of a municipal corporation accepts a position of honor and trust for the benefit of all the inhabitants, whether the position be created by statute or by municipal ac-

The declaration of an auditor and assessor prior to his election that he intended to claim commissions on the sums collected as assessor did not confer on him a right to the commissions,[4] nor did the fact that he previously retained commissions on sums collected as assessor,[5] nor that some of the city officials had approved of his act, or consented thereto, nor that it was a matter of common notoriety.[6]

Within the limits of constitutional restrictions, the legislature has power to change not alone the mode of compensation,[7] but the amount of compensation as well,[8] and statutes providing salary for officers in lieu of fees,[9] and providing for the deposit in the county or state treasury of all fees over a certain maximum, are upheld.[10] A constitutional provision that the compensation of a public officer shall not be increased or diminished during his term is not violated by a statute providing for a new board to take the place of an old one and providing a different salary,[11] but a statute allowing additional commissions as applied to an officer whose term began before its enactment, or legalizing commissions theretofore allowed, is invalid.[12] There is no invalidity in a statute that limits the number of days a county officer may draw pay for in a single year.[13] While townships and counties may be

tion, and no provision by law or contract is made for compensation, no duty is imposed upon the municipality to pay such inhabitant for services rendered in performing the uncompensated public duty he has thus voluntarily assumed. Beckwith v. Farmington [Conn.] 59 A. 43.

3. A county auditor is entitled, under the statute, to an additional allowance for clerk hire during the year in which the decennial reappraisement of real property is made and up to the time when the board of equalization must have completed its work, the fourth Monday in January of the second year following the reappraisement. State v. Godfrey, 24 Ohio C. C. 455, 4 Ohio C. C. (N. S.) 465. County recorder is entitled to reasonable allowance for services of an assistant irrespective of what he paid such assistant. Allen v. Adams County, 120 Iowa, 63, 94 N. W. 261. A county auditor is entitled to receive for indexing the records of county commissioners the same fees as other officers receive for like services. State v. Godfrey, 24 Ohio C. C. 455, 4 Ohio C. C. (N. S.) 465. The fact that property formerly improperly omitted from tax duplicates is placed thereon through evidence furnished by an inquisitor employed and paid for that purpose does not deprive the county auditor of his compensation for amounts collected from property so listed. Id. Under the Oregon statutes a justice of the peace acting as a magistrate in the examination of a charge of libel is entitled to fees for the services performed. Wallowa County v. Oakes [Or.] 78 P. 892. The clerk of the supreme court is entitled to fees for services rendered in a suit for taxes brought under §§ 649, 650, Comp. Laws 1897, of New Mexico. Sena v. Bernalillo County [N. M.] 78 P. 46. An account for unpaid salary as district attorney of Bernalillo county, void under the Bateman act (Comp. Laws 1897, §§ 299-302), was revived by §§ 6-11, c. 39, pp. 78, 79, Laws 1901, and said county was thereby made liable to pay the same. Johnston v. Bernalillo County Com'rs [N. M.] 78 P. 43. Regardless of any technical defect in the authority appointing or employing city employes, the city is bound to pay for services received and accepted. Wiggin v. Manchester, 72 N. H. 576, 58 A. 522. For services more onerous than was anticipated, additional compensation may be granted. City physician. Congdon v. Nashua, 72 N. H. 468, 57 A. 686. Under Iowa Code, § 1026, health officers may be engaged to perform additional services in emergency cases at extra compensation. Dewitt v. Mills County [Iowa] 101 N. W. 766.

4, 5, 6. City of Oakland v. Snow, 145 Cal. 419, 78 P. 1060.

7. Fixing compensation of justices of the peace of townships at a monthly salary, varying according to a classification of townships by population, instead of fees. McCauley v. Culbert, 144 Cal. 276, 77 P. 923. Fees allowed officers as compensation in lieu of salary are subject to the constitutional provision forbidding compensation to be changed during their term [Const. Ky. § 161]. Taylor v. Adair County [Ky.] 84 S. W. 299.

8. Carling v. Jersey City [N. J. Law] 58 A. 395. Reasonable reductions in salary are not prohibited by the veterans' law. Black v. Board of Education, 92 N. Y. S. 118. Where a reduction in salary was in fact made by the officer whose duty it was, it is immaterial that he did it by order of his superior. Hartmann v. New York, 44 Misc. 272, 89 N. Y. S. 912. Right to increase during term denied. Wolf v. Hope, 210 Ill. 50, 70 N. E. 1082. Where the compensation of an officer or employe is fixed by the statute, it belongs to him and no other officer can increase, diminish, or withhold it. An agreement to forego it in consideration of appointment to another office, not incompatible, is void. Geddes' Case, 38 Ct. Cl. 428; Grieb v. Syracuse, 94 App. Div. 133, 87 N. Y. S. 1083.

9. See 2 Curr. L. 1083, n. 96. Mitchell v. Clay County [Neb.] 98 N. W. 662; Smith v. Clay County [Neb.] 99 N. W. 501.

10. See 2 Curr. L. 1083, n. 97. Tarrant County v. Butler [Tex. Civ. App.] 80 S. W. 656; State v. Speed, 183 Mo. 186, 81 S. W. 1260.

11. Thomas v. State [S. D.] 97 N. W. 1011.

12. Butte County v. Merrill, 141 Cal. 396, 74 P. 1036.

13. Board of Com'rs of Whitley County v. Garty, 161 Ind. 464, 68 N. E. 1012.

classified on the basis of population for the purpose of regulating compensation, yet such a statute must not offend a constitutional provision fixing salaries "in proportion to duties."[14] To be entitled to the salary of an office the claimant must be an officer de jure;[15] but a city has a right to regard the incumbent of an office holding a certificate as the officer and pay him its salary,[16] and a statute providing that one actually holding a contested office and discharging its duties shall be entitled to its salary is unobjectionable.[17] A successful contestant for an office cannot recover of the state the salary paid the contestee during his incumbency of the office,[18] nor can an unsuccessful contestee maintain an action for services rendered while he was in possession.[19]

After petition for rehearing of an election contest is filed, the city is not bound to withhold payment of the salary to the incumbent until it is decided.[20] Neither officers nor employes are entitled to pay while out of office under suspension or removal;[21] but where an officer is discharged by one having no power to do so and is prevented from performing the duties of his office, he is entitled to its salary, though he performed no duties and engaged in other pursuits.[22]

A stenographer of a municipal commission, though appointed at a yearly salary, is not entitled to pay for a period while there were no commissioners in office.[23] An officer is not, by accepting a less sum, estopped to demand his full compensation,[24] but a mere employe by receiving without protest a less sum than was paid him at the beginning of his service accepts it as compensation in full.[25] Per diem pay is usually allowable for days of actual service.[26] A public officer can assign his salary after it has been earned.[27]

Cases involving the proper compensation of Federal officials and employes[28] and the fees of police officers and magistrates,[29] are collected in the notes.

14. Tucker v. Barnum, 144 Cal. 266, 77 P. 919. In Pennsylvania treasurers in counties containing over 150,000 inhabitants are not entitled to commissions on personal property tax and on municipal loans collected by them (City of Philadelphia v. McMichael, 208 Pa. 297, 57 A. 705), nor may they retain for their own use fees for issuing mercantile licenses (Luzerne County v. Kirkendall, 209 Pa. 116, 58 A. 156).

15. See 2 Curr. L. 1082, n. 76. Sheridan v. St. Louis, 183 Mo. 25, 81 S. W. 1082. Where an officer takes an official oath, gives a bond, and enters on the discharge of his duties without objection, he becomes an officer de jure, though his qualification is not strictly formal. City of Houston v. Estes [Tex. Civ. App.] 79 S. W. 848.

16. Bradley v. Georgetown, 26 Ky. L. R. 614, 82 S. W. 303; Smith v. Van Buren County [Iowa] 101 N. W. 186.

17. Wilson v. Fisher, 140 Cal. 188, 73 P. 850.

18. The remedy is a suit against the contestee who has received the salary. Nall v. Coulter, 25 Ky. L. R. 1891, 78 S. W. 1110; State v. Babcock, 106 Mo. App. 72, 80 S. W. 45. The remedy of a person wrongfully deprived of an office is to recover his damages for the wrong against the usurper. Stemmler v. New York [N. Y.] 72 N. E. 581.

19. Smith v. Van Buren County [Iowa] 101 N. W. 186.

20. Bradley v. Georgetown, 26 Ky. L. R. 614, 82 S. W. 303.

21. See 2 Curr. L. 1082, n. 83. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. The New York statute providing for compensation to veterans unlawfully removed from office during the period of their removal is constitutional. People v. Grout, 44 Misc. 526, 90 N. Y. S. 122.

22. City of Houston v. Estes [Tex. Civ. App.] 79 S. W. 848. The laying off or suspending of police officers for a portion of each month and their acceptance of the reduced pay based on such suspension does not estop them from claiming full pay where the suspension was unauthorized, though made to meet a deficiency of funds. City of Louisville v. Corley, 25 Ky. L. R. 2174, 80 S. W. 203.

23. In re Young, 44 Misc. 521, 90 N. Y. S. 74.

24. People v. Greene, 95 App. Div. 397, 88 N. Y. S. 601. Taking regular pay estops to claim more on ground of service for more than eight hours each day. Burns v. Fox, 90 N. Y. S. 254.

25. Grieb v. Syracuse, 94 App. Div. 133, 87 N. Y. S. 1083.

26. Carpenter employed by board of education cannot recover for time lost by reason of injuries. Conlin v. Board of Education of New York, 43 Misc. 125, 88 N. Y. S. 210. Examiners of Indian lands are entitled to per diem only for days of actual service. Stevens' Case, 38 Ct. Cl. 452.

27. Oberdorfer v. Louisville School Board [Ky.] 85 S. W. 696.

28. The appropriation by congress in 1891 of $5,000 for the salary of each of the judges of the District of Columbia supreme court raised their salary from $4,000 to $5,000 only

When the fees of an officer are regulated by law and he has performed the service which entitles him to the compensation prescribed, the county has no discretion but to allow the claim, and for refusal an action may be maintained.[30] Though the marshal of the supreme court acts as governor's messenger to bring a fugitive from justice from another state, the court has no authority to approve his expense account, that being the governor's duty.[31] An action cannot be maintained to recover back the salary and expenses of an officer, paid to him under an unconstitutional law, but before it is so declared by a court of competent jurisdiction.[32]

Where a legislature nearly 25 years after the commencement of the term of office mentioned, and nearly 20 years after it has ended, seeks to impose a liability upon a city for an officer's salary during the period he was contesting the right of another to the office, the plaintiff cannot recover without showing strict compliance with the requirements of such statute.[33] The personal representative of an attorney who performed services under a contract for fees but died before full performance can recover only such reasonable proportion of the contract price as the services

temporarily. Judge retiring was not entitled to $5,000 per year. James' Case, 38 Ct. Cl. 615. The clerks of courts of the United States are not entitled to fees for the duplicate of their accounts to be retained in their offices as provided by statute. Hart's Case, 38 Ct. Cl. 571. Where a vice-consul performs the duties of the office during the absence of the consul and presents no claim therefor until after the consul's death, he having in the meantime received full salary, it will be presumed the vice-consul was paid by the consul under agreement between them. Wilbor's Case, 38 Ct. Cl. 1. A retired naval officer serving in time of war on the active list and appointed meteorologist by the secretary of the navy under a statute providing an emergency fund for the war is entitled to pay as a meteorologist, though he also draws pay as a retired officer. Hayden's Case, 38 Ct. Cl. 39. A naval officer who acquiesces in the distribution of bounty money on a certain basis cannot afterwards claim the right to a larger share and thus make the government pay twice. Gates' Case, 38 Ct. Cl. 52. A naval officer cannot recover commutation for quarters during the time he occupied as a guest a room belonging to the marine barracks. Odell's Case, 38 Ct. Cl. 194. Officers assigned to staff duty by command of the major general of the army by direction of the secretary of war, though they do staff duty, are not entitled to staff pay under a statute authorizing the president to assign officers to staff duty in his discretion. Truitt's Case, 38 Ct. Cl. 398. An officer on the retired list who is also chief clerk of the department of agriculture is entitled to the pay of both offices. Geddes' Case, 38 Ct. Cl. 428. A letter carrier, on charges against him being dismissed, is entitled to pay during the period of his suspension. Corcoran's Case, 38 Ct. Cl. 341. The pay of a retired officer is an honorary form of pension, its recipient owing no service to the government. Geddes' Case, 38 Ct. Cl. 428.

29. The marshal of Higginsville, Mo., cannot recover fees of the city on conviction of offenders without showing that the amount of fine and costs was in fact worked out by the offender. Fortner v. Higginsville, 106 Mo. App. 560, 80 S. W. 983. An ordinance provided for a salary for the constable; another ordinance was passed giving him a per cent of fines imposed and repealing all former ordinances in conflict with the one as to fees. The constable made no demand for his salary during his term. Held he was only entitled to the fees. Maxey v. Tompkinsville, 25 Ky. L. R. 1948, 79 S. W. 214. Mayors of cities in Ohio are entitled to retain fees and costs collected in criminal cases tried before them, and a city ordinance requiring such fees and costs to be paid into the city treasury is invalid as in conflict with the statute [Rev. St. § 1309]. City of Piqua v. Cron, 2 Ohio N. P. (N. S.) 165. The police justice of Newport News cannot recover of the city fees for issuing and trying warrants for violating city ordinances. City of Newport News v. Brown, 102 Va. 107, 45 S. E. 806.

30. Wallowa County v. Oakes [Or.] 78 P. 892. The claim of a county treasurer in Colorado is a claim ex contractu and therefore within the statutes of that state requiring presentment to the proper board for audit as a condition precedent to suit. Gregg v. Lake County Com'rs [Colo.] 76 P. 376.

31. State v. Allen, 180 Mo. 27, 79 S. W. 164.

32. State v. Carlisle, 2 Ohio N. P. (N. S.) 637. Section 897b, and that part of § 897 which is intended to be applicable to Franklin county conceded to be unconstitutional. Id. In Rev. St. § 2813, providing for the per diem of county commissioners, the word "such" before the word "county" should read "each" so as to make the law general and hence constitutional. The word "such" held to have crept in by error. Id. Section 897 makes no provision for mileage for county commissioners when traveling either within or without their own county. The provision for "necessary traveling expenses when traveling outside of the county on official business" is a provision for official as distinguished from personal expenses, for the cost of going and coming, but not for board and personal expenses. Id.

33. Stemmler v. New York [N. Y.] 72 N. E. 581.

performed bears to the whole services contracted for, or as otherwise stated, the reasonable value of the services performed.[34]

§ 10. *Liabilities.*[35]—A county treasurer in New York is liable to a town for tax money belonging to the town which he has wrongfully paid over to a town supervisor who has absconded.[36] A township is liable to a school district for school moneys lost through the defalcation of the township treasurer;[37] but a county is not liable for the mistake of a city officer in certifying city assessments to the county treasurer.[38] Taxpayers may sue an officer and the county commissioners to recover illegal fees paid by them to such officer.[39]

Public officers having ministerial duties to perform are liable to individuals for injury occasioned in consequence of failure to perform official duty,[40] but a public officer charged with discretionary duties is not liable for an erroneous performance, unless guilty of willful wrong, malice or corruption.[41] The legislature may constitutionally relieve a public officer from a penalty he has incurred to a private citizen by neglect of duty.[42] An officer acting under a valid writ but exceeding his authority is liable for the tort.[43] A sheriff, however, is not liable in punitive damages for the unlawful or oppressive conduct of his deputy not authorized or ratified,[44] and a revenue officer is not personally responsible for injury inflicted by a seizure if he acted under an order from the proper superior officer, as to which the former had no discretion;[45] but under U. S. Rev. St. § 989, for injury so inflicted, compensation is to be made by the government.[46]

A decree against a public officer operates upon the office and binds his successor.[47] In New York, on return of an unsatisfied execution on a judgment for necessaries against a public officer, it may be presented to the municipality and by it paid.[48]

One dealing with public officers is bound at his peril to take notice of the limitations upon their power and authority.[49]

§ 11. *Official bonds and liability thereon.*[50]—A bond, though it may not technically conform to statutory requirements, may nevertheless be valid as a common-law obligation,[51] and a bond, given as required by statute and acted upon by the officer, is valid as against the official and his surety, though it may be objectionable

34. Johnston v. Bernalillo County Com'rs [N. M.] 78 P. 43.

35. See 2 Curr. L. 1085.

36. Town of Walton v. Adair, 96 App. Div. 75, 89 N. Y. S. 230.

37. Whether the treasurer's bond was good and valid was immaterial to the township's liability. Smith v. Jones [Mich.] 99 N. W. 742.

38. Concordia Loan & Trust Co. v. Douglas County, 2 Neb. Unoff. 124, 96 N. W. 55.

39. Zuelly v. Casper, 160 Ind. 455, 67 N. E. 103.

40. Loss of registered letter by postmaster. United States v. Griswold [Ariz.] 76 P. 596. A register of deeds is liable on his bond for damages arising from his failure to record a deed, though his failure was not willful nor so negligent as to imply willfulness. State v. McClellan [Tenn.] 85 S. W. 267. A county court clerk is liable for the loss occasioned by a false certificate by his deputy that a deed was acknowledged before him. Samuels v. Brand, 26 Ky. L. R. 943, 82 S. W. 977.

41. Use of defective materials in bridge. Schooler v. Arrington [Mo. App.] 81 S. W. 468. A special commissioner to build a bridge is not liable to one who is injured by a defect in the bridge. Hardwick v. Franklin [Ky.] 85 S. W. 709.

42. Bray v. Williams [N. C.] 49 S. E. 887.

43. Felonicher v. Stingley, 142 Cal. 630, 76 P. 504.

44. Where sheriff had no knowledge of facts till service of summons, retention of deputy does not amount to ratification. Foley v. Martin, 142 Cal. 256, 75 P. 842.

45, 46. Haynes v. Brown, 132 F. 525.

47. State v. Clinton County Com'rs, 162 Ind. 580, 68 N. E. 295, 70 N. E. 373, 984.

48. Statute does not authorize supplementary proceedings [Code Civ. Proc. § 1391]. Rosenstock v. New York, 91 N. Y. S. 737.

49. Bennett v. Incorporated Town of Mt. Vernon, 124 Iowa, 537, 100 N. W. 349.

50. See 2 Curr. L. 1086.

51. A bond given by the bank in which the funds of a given county were deposited under a statute requiring such bond to be made to the county was sufficient, though it ran to the county treasurer for the county. Buhrer v. Baldwin [Mich.] 100 N. W. 468. Bond naming an obligee other than as required by statute. Connelly v. American Bonding & Trust Co., 24 Ky. L. R. 714, 69 S. W. 959. Bonds of city treasurers in Montana must be conditioned as provided for by

as to penalty,[52] and though not approved by the designated persons.[53] A bond may be validated by a general law curative of defects in official bonds irrespective of whether it strictly complies with the law requiring it to be given.[54] The constitutionality of a law requiring the bond of an officer to be a lien on the real estate of the officer and his sureties cannot be attacked by persons voluntarily executing it.[55]

While the record of the county court is the best evidence of delivery and acceptance, yet where the proper foundation is laid, such delivery and acceptance may be shown by secondary parol testimony.[56]

An official bond that a certain policeman should "well and truly perform each and all the duties of said office required of him by law" is broad enough to cover unlawful arrest and unnecessary and illegal punishment by the officer,[57] and the mere fact that money collected by a county treasurer was collected without authority can make no difference in the liability of the sureties on his bond.[58]

A bond of indemnity, not stipulating how long it shall remain in force, but covenanting that so long as it shall remain in force the obligor shall be paid an annual premium in advance, does not require the payment of the premium so as to continue the obligation, but leaves the obligee at liberty to decline to make payment, and thus put a period to the contract so far as the rights of third persons are not affected.[59]

Sureties are not liable for malfeasance and extra official acts,[60] or for breach of duties not appropriate to the office;[61] they are liable only for misfeasance,[62] and for acts committed by the officer under color of his office and in the line of official duty.[63] They are also liable for failure of the officer to perform duties subsequently imposed by statute during the term of the bond,[64] and for a statutory penalty incurred by their principal by taking illegal fees.[65] Where the statute declares that for certain defaults the officer shall be liable on his bond, the sureties thereon are also liable.[66] Sureties on the bond of a postmaster conditioned for the faithful discharge of all duties imposed either by law or the rules of the department are liable for the loss of a registered letter occasioned by the negligence of the postmaster.[67] Sureties upon an official bond, regular upon its face, by the act of in-

Pol. Code, § 1057. City of Philipsburg v. Degenhart [Mont.] 76 P. 694.

52. Bromberg v. Fidelity & Deposit Co., 139 Ala. 338, 36 So. 622.

53. City of Oakland v. Snow, 145 Cal. 419, 78 P. 1060.

54, 55. City of Mt. Vernon v. Kenlon, 97 App. Div. 191, 89 N. Y. S. 817.

56. Baker County v. Huntington [Or.] 79 P. 187.

57. Connelly v. American Bonding & Trust Co., 24 Ky. L. R. 714, 69 S. W. 959.

58. City of Philipsburg v. Degenhart [Mont.] 76 P. 694.

59. Fidelity & Deposit Co. v. Libby [Neb.] 101 N. W. 994.

60. Felonicher v. Stingley, 142 Cal. 630, 76 P. 504. The fact that a municipal council designates its clerk to collect street assessments does not make such a duty a clerical duty, and in legal contemplation is not within the undertaking of his surety for the faithful performance of his duties as clerk. City of St. Marys v. Rowe, 2 Ohio N. P. (N. S.) 645. Recovery of money unlawfully paid to county auditor denied. Tucker v. State [Ind.] 71 N. E. 140.

61. City of St. Mary's v. Rowe, 2 Ohio N. P. (N. S.) 645. Bond of a municipal clerk who was required to collect street assessments; duties thus imposed not appropriate to the office and sureties not liable. Id.

62. An ordinary is liable on his official bond for any neglect or omission which pertains to his duties as clerk, but not for any judicial act. State v. Henderson, 120 Ga. 780, 48 S. E. 334.

63. A complaint which fails to allege that the trespass was under color of office is defective. Felonicher v. Stingley, 142 Cal. 630, 76 P. 504.

64. Duty to collect taxes for educational purposes. Anderson v. Blair, 118 Ga. 211, 45 S. E. 28. The provision found in § 1738, Rev. St., to the effect that the imposition of new duties upon a municipal officer shall not operate to discharge the surety on his bond, is confined to the imposition of duties appropriate and pertinent to the office in question, and not to any or all duties which a municipal officer may be called upon to perform. City of St. Marys v. Rowe, 2 Ohio N. P. (N. S.) 645.

65. Eccles v. United States Fidelity & Guaranty Co. [Neb.] 101 N. W. 1023.

66. State v. Henderson, 120 Ga. 780, 48 S. E. 334.

67. United States v. Griswold [Ariz.] 76 P. 596.

trusting its possession and control with the principal after having affixed their signatures thereto, clothe him with apparent authority to make the final delivery to the obligee or the proper authorities whose function it is to accept it on the part of the public.[68] Mere negligence on part of the obligee will not release the surety, good faith being all that is required;[69] but where an officer has actual knowledge of defalcations of his deputy of which he does not notify the surety, he cannot recover therefor from the surety.[70] Where the defalcation is less than the penalty of the bond, the surety is liable for principal and interest from the time of demand to the date of judgment, though the total amount exceeds the penalty of the bond.[71] An action may be maintained against the sureties on a county treasurer's bond, though the county auditors may not as yet have adjusted his accounts,[72] and one who has chosen not to object to a re-audit is not thereby estopped to object to a new audit by a new controller.[73] An audit in the absence of gross fraud practiced upon the auditor is binding upon the city.[74] Where the form of an official bond must be joint and several, a person injured by the misconduct of a public officer may bring a several action upon the officer's bond to recover his damages;[75] but a taxpayer has no such separate interest in public funds as to entitle him to sue on the bond of the custodian for misappropriation of the funds.[76]

All bonds given by government officials are to be construed as though executed and to be performed at Washington, and hence are to be construed according to the rules of the common law, except where these rules have been changed by statute.[77] The United States and not the owner of a registered package may sue on the bond.[78] Under the provisions of the Nebraska Code of Civil Procedure (secs. 29 and 643), when an officer of that state by misconduct or neglect of duties renders his sureties liable on his official bond, any person who is by law entitled to the benefit of the security may sue upon the bond in his own name.[79] Where the bond is joint and several, suit may be brought against the sureties without joining the principal.[80] The petition on a bond must state the specific breach of duty.[81] Parol evidence is admissible in behalf of a county treasurer and his sureties to show that his receipt for money was obtained by fraud by the tax collector,[82] and also to establish that

68. If under such conditions the principal deliver it contrary to an agreement or understanding that other persons should also become obligated, the sureties are nevertheless bound. Baker County v. Huntington [Or.] 79 P. 187. The purpose of the Alabama statute (Code 1896, § 3090) is to take away from sureties when sued the defense that they had conditionally executed and delivered the bond. Bromberg v. Fidelity & Deposit Co., 139 Ala. 338, 36 So. 622.

69. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853; Anderson v. Blair, 121 Ga. 120, 48 S. E. 951.

Sureties upon the bond of an overseer of the poor are not released by the fact that members of the town board knew he was short in his accounts, and the accounts being public records are evidence against the sureties. Town of Goshen v. Smith, 173 N. Y. 597, 65 N. E. 1123, afg. without opinion 61 App. Div. 461, 70 N. Y. S. 623.

70. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

71. Goff v. United States, 22 App. D. C. 512.

72. See 2 Curr. L. 1087, n. 57. Lancaster County v. Landis, 209 Pa. 514, 58 A. 1068.

73, 74. Commonwealth v. Patterson, 206 Pa. 522, 56 A. 27.

75. Sections of statutes which require the giving of official bonds, which prescribe the form of the same, as to being joint or several, which state the conditions thereof and designate the persons for whose use they are given, and statutes which provide the manner of procedure in actions upon such bonds and in whose name they shall be brought, are in pari materia and must be construed together. Barker v. Glendore [Neb.] 99 N. W. 548.

76. Since he has no such interest he cannot be reimbursed for costs and expenses incurred in bringing an action on such bond. State v. Holt [Ind.] 71 N. E. 653.

77. Liability of postmaster for loss of registered package. United States v. Griswold [Ariz.] 76 P. 596.

78. The United States may recover the full amount, though the value exceeds $10. United States v. Griswold [Ariz.] 76 P. 596.

79. Barker v. Glendore [Neb.] 99 N. W. 548.

80. State v. Henderson, 120 Ga. 780, 48 S. E. 334.

81. Petition on policeman's bond for unlawful arrest held insufficient to state cause of action. Connelly v. American Bonding & Trust Co., 24 Ky. L. R. 714, 69 S. W. 959.

82. Butler v. State, 81 Miss. 734, 33 So. 847.

the bond in question is in fact the "additional" bond required of sheriffs by statute.[83]

Reports of an officer which are required by law may be given in evidence against the sureties on his official bond, and are prima facie true.[84]

The officer's receipt for money unaccounted for is only prima facie evidence against the sureties.[85]

§ 12. *Crimes and offenses.*—Besides extortion,[86] bribery,[87] and perhaps other specific crimes involving the official character of a party, various crimes are defined by statute. It is a crime for a United States senator to take money for services before the post office department in a fraud order inquiry, that being a proceeding in which the United States is interested.[88] Such money is taken at the place where a check is accepted for deposit and not at the place where it is deposited in the mails addressed to accused or at the drawee bank.[89] A clerk of the third class in the post office department is an officer of the government and subject to an indictment under Rev. St. § 1781.[90]

A public officer is not criminally liable for misconduct in office in the absence of an intent to violate the law,[91] but police officers in St. Louis are liable for indictment for failure to suppress bawdy houses.[92]

Matters touching procedure are given in the note.[93]

Officers of Corporations; Official Bonds; Opening and Closing; Opening Judgments; Opinions of Court; Options; Order of Proof; Orders for Payment; Orders of Court; Ordinances; Oysters and Clams, see latest topical index.

PARDONS AND PAROLES.

Though the pardoning power is an executive function, the legislature has power to pass acts of pardon.[1] A power to reprieve, commute or pardon includes power to pardon on condition,[2] but the condition must be a lawful one, and a condition that on violation the convict should not only be imprisoned but should forfeit any good time earned before the pardon is invalid.[3] An indefinite suspension of sentence on condition amounts to a conditional pardon.[4] Where a conditional pardon provides for revocation at the pleasure of the executive, no determination of any fact is prerequisite to a revocation.[5] A lost pardon may be proved by parol.[6]

83. Sheriff who is ex officio tax collector. Baker County v. Huntington [Or.] 79 P. 187.

84. City of Philipsburg v. Degenhart [Mont.] 76 P. 694.

85. Butler v. State, 81 Miss. 734, 33 So. 847.

86. See 3 Curr. L. 1414.

87. See 3 Curr. L. 527.

88, 89. Burton v. United States, 25 S. Ct. 243.

90. McGregor v. United States [C. C. A.] 134 F. 187.

91. State v. Bair [Ohio] 73 N. E. 514. Statute denouncing misdemeanor in office held not void for vagueness [Sand. & H. Dig. § 1753]. Howard v. State [Ark.] 82 S. W. 196.

92. State v. Boyd [Mo. App.] 84 S. W. 191.

93. Indictment against police captain for failure to suppress bawdy houses held not bad for duplicity. State v. Boyd [Mo. App.] 84 S. W. 191. Indictment substantially in language of statute (Sand. & H. Dig. § 1753) held sufficient. Howard v. State [Ark.] 82 S. W. 196. Issuance of other illegal warrants of same nature held admissible to show intent. Id.

1. Statute giving immunity to one testifying to crimes in which he participated. In re Briggs, 135 N. C. 118, 47 S. E. 403.

2. State v. Hunter [Iowa] 100 N. W. 510.

3. Pardon construed in conection with order of revocation held to be so conditioned. State v. Hunter [Iowa] 100 N. W. 510. Compare Ex parte Russell, 92 N. Y. S. 68, in which a statute providing that a convict discharged before the expiration of his term by reason of good time forfeits such commutation on conviction of a second offense was upheld.

4, 5. State v. Hunter [Iowa] 100 N. W. 510.

6. To restore competency of witness. Court suggests question whether convict was competent to testify to fact of pardon, Yzaguirre v. State [Tex. Cr. App.] 85 S. W. 14.

PARENT AND CHILD.

§ 1. The Custody and Control of Child (873).
§ 2. Support and Necessaries (873).
§ 3. Services and Earnings, and Injuries to Child (874).
§ 4. Property Rights and Dealings Between Parent and Child (875).
§ 5. Liability for Child's Torts (875).

Scope.—Adoption of children,[7] matters relating to illegitimate children,[8] award of custody and allowance for support in divorce proceedings,[9] rights of inheritance,[10] recovery for negligent killing of child,[11] and the rights and liabilities of infants,[12] are elsewhere treated.

§ 1. *The custody and control of child.*[13]—The father is generally entitled to the custody of his child,[14] notwithstanding a verbal agreement to the contrary,[15] if within the jurisdiction,[16] unless the best interests of the child, which is the paramount consideration,[17] demand that another should have it.[18] The father is the natural guardian of his children, and has the legal right to regulate their conduct, restrain their liberty, and direct their training, as they are not entitled to general freedom of action. A father may transfer the custody of his child to a reform school,[19] or to other people by written contract,[20] or he may bind a child as an apprentice for the period of minority.[21] Though an injury done to his child amounts to and is punishable as a crime, the parent is not liable civilly.[22]

§ 2. *Support and necessaries.*[23]—Since a father is entitled to the custody, society and services of his children, he is chargeable with their care and maintenance.[24] This liability continues, though he no longer has the custody of the children,[25] except where by statute the liability is expressly dependent on his having their custody,[26] or another by a valid agreement has assumed their support.[27]

7. See Adoption of Children, 3 Curr. L. 45.
8. See Bastards, 3 Curr. L. 496.
9. See Alimony, 3 Curr. L. 146; Divorce, 3 Curr. L. 1127.
10. Descent and Distribution, 3 Curr. L. 1081.
11. See Death by Wrongful Act, 3 Curr. L. 1034.
12. See Infants, 4 Curr. L. 92; see, also, Master and Servant, 4 Curr. L. 533, and Negligence, 4 Curr. L. 764, as to negligent injuries to infants.
13. See 2 Curr. L. 1089; Divorce, 3 Curr. L. 1127. For an extensive monographic note on considerations controlling the award of custody of children, see 98 Am. St. Rep. 416.
14. Crabtree v. Crabtree [Ky.] 85 S. W. 211.
15. The father on the death of his wife placed his infant daughter in the care of his wife's parents, under a verbal agreement to leave her with them until she was six years of age and to pay them for their services; but he was allowed to recover possession of her when she was only three years of age. Carey v. Hertel [Wash.] 79 P. 482.
16. Alien children become citizens when their father is duly naturalized only if they are dwelling in the U. S. (Rev. St. § 2172), and not when detained as dangerous immigrants at Ellis Island. United States v. Williams, 132 F. 894.
17. Plahn v. Dribred [Tex. Civ. App.] 83 S. W. 867.
18. Divorce decree awarded children to mother where the father was living with a paramour in his own house. Crabtree v. Crabtree [Ky.] 85 S. W. 211. Father not allowed to recover possession of his sickly two-year old daughter who had been properly cared for by her grandmother, where he had no home, and a physician testified that it would not be safe to remove the child, but he was allowed the right to visit. State v. Jones [La.] 36 So. 973.
19. The commitment of a child to a reform school is not in the nature of a punishment, and consequently no judicial hearing can be demanded by the child. The father not being a party to the habeas corpus proceeding, it was not decided whether his transfer of guardianship was irrevocable. Rule v. Geddes, 23 App. D. C. 31.
20. Father not allowed to recover his minor daughter from the deceased wife's parents, it also appearing he was an unfit person. Plahn v. Dribred [Tex. Civ. App.] 83 S. W. 867.
21. Code, § 3229 is the same as the common-law rule. Walton v. Atchison, etc., R. Co. [Iowa] 101 N. W. 506.
22. Even where the offense is that of rape, for which the parent has been convicted. Roller v. Roller [Wash.] 79 P. 788.
23. See 2 Curr. L. 1090.
24. A separation agreement by which wife was to have child but nothing said as to their support. People v. Rubens, 92 N. Y. S. 121.
25. Divorce decree awarded children and $2,000 alimony to wife, but contained no provision as to the maintenance of the children. Lukowski v. Lukowski [Mo. App.] 83 S. W. 274.
26. Civ. Code, §§ 196, 207, provides that a parent entitled to the custody of a child

Consequently a father is liable for necessaries furnished a child whom he has abandoned,[28] but he is not liable for the board of his child unless he has agreed to pay for the same.[29] Where circumstances have changed after a divorce decree, the court may order the husband to contribute an additional amount for the support of the children.[30] An order to pay for the support of children is not alimony, but it cannot be discharged by bankruptcy proceedings.[31] A parent who is capable of supporting his child has no right to trench upon her property or income to maintain and educate her.[32] By statute now in many states a father is liable criminally for abandoning his children,[33] and to warrant a conviction there must be evidence that the father left the child in a destitute as well as in a dependent condition.[34] Where the wife keeps the children away from him and prevents him from seeing them, there is no criminal abandonment.[35] It is presumed that a parent residing with an adult child is not to pay for services or support.[36]

§ 3. *Services and earnings, and injuries to child.*[37]—The father's right to a child's earnings may be lost by voluntary agreement or consent to adoption by another, or by his failure to provide necessaries;[38] the mere fact that the infant is receiving his earnings does not show permission of the parent to receive them as his own.[39] Unless barred by his own negligence or the contributory negligence of the child, a father may recover for injuries to,[40] or crimes against, his child.[41] A stepfather, and not the mother, is entitled to sue for injuries, where he had taken

must furnish support, or a third person may recover for necessaries furnished the child; but one cannot recover from the father for medical services furnished a child awarded by a divorce decree to the mother. Selfridge v. Paxton, 145 Cal. 713, 79 P. 425.

27. The separation agreement of husband and wife held to relieve the husband of liability to support the children, as their custody was given to the wife. Dixon v. Dixon [Mo. App.] 82 S. W. 547.

28. Father had been sentenced to prison for life, and children's guardian was allowed to recover for necessaries, board, clothing and medical attendance which he had furnished them. Finn v. Adams [Mich.] 101 N. W. 533.

29. Defendant's son boarded with plaintiff, but defendant remitted money to his son and not to plaintiff, and evidence only showed an agreement with the son to pay his board until he was 21. McCrady v. Pratt [Mich.] 101 N. W. 227.

30. It is no defense that the husband has married again and is willing to provide a home for the children. Ostheimer v. Ostheimer [Iowa] 101 N. W. 275.

31. But an order to recompense his former wife is like an order to reimburse a stranger for the child's past support and may be discharged. Rush v. Flood, 105 Ill. App. 182.

32. Where child was supported out of her own income and called the people with whom she lived "uncle" and "aunty" the relation of parent and child was not proved so as to exempt property from the transfer tax. In re Davis' Estate, 90 N. Y. S. 244.

33. Evidence that the wife with four minor children left the husband because the house furnished by him was an unsuitable place of residence, and that now he had ceased paying $5 a week which he had done, though he was still able to do so, will support a conviction under Gen. St. 1902, § 1343. State v. Beers [Conn.] 58 A. 745. Under Rev. St. §§ 3140-2, 6795, abandonment of child by parent is a felony. Smith v. State, 4 Ohio C. C. (N. S.) 101. Information that he abandoned, neglected and refused to provide for his 3 children under 12 years of age, born in lawful wedlock, stated an offense under Rev. St. 1899, § 1861. State v. Block [Mo. App.] 82 S. W. 1103.

For a note on criminal liability for neglect of child causing death, see 61 L. R. A. 290.

34. At time of desertion the child's mother was able and did in fact maintain the child [Pen. Code 1895, § 114]. Williams v. State, 121 Ga. 195, 48 S. E. 938.

35. Not shown but what he was a worthy father, and he had demanded their return and was willing to support them. People v. Rubens, 92 N. Y. S. 121.

36. But the presumption may be rebutted. Falls v. Jones [Mo. App.] 81 S. W. 455.

37. See 2 Curr. L. 1090.

38. Evidence showed father had failed to maintain and that maternal grandmother had entire care. Southern R. Co. v. Flemister, 120 Ga. 524, 48 S. E. 160.

Emancipation will not be found merely from the fact that a son supported himself and was absent from home. Town of South Burlington v. Cambridge [Vt.] 59 A. 1013.

39. Evidence that the parent knew that he was receiving his earnings might authorize such an inference. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

40. Parents not negligent in intrusting their 4½ year old son to the care of their 11 year old sister to go to a store, necessitating the crossing of a street railway, to make a purchase. Cameron v. Duluth-Superior Traction Co. [Minn.] 102 N. W. 208.

41. Plaintiff recovered $500 for an assault upon and the criminal abuse of his minor daughter. Nyman v. Lynde [Minn.] 101 N. W. 163.

the child into his family.[42] The measure of damages is the value of the child's services until he attains his majority, taken in connection with his prospects in life, less his support.[43] Sometimes, if properly pleaded, a father may recover whatever pecuniary aid there was a reasonable expectation he would receive after the child was of age;[44] but he is not entitled to recover for mental anguish or suffering, nor can he recover exemplary damages.[45] A settlement made with a defendant will be presumed to cover only that for which the parent had a right to recover, and that it did not cover the right of the child to recover in his own behalf.[46]

§ 4. *Property rights and dealings between parent and child.*[47]—Conveyances between a parent and child may be set aside for undue influence where the consideration is far below the actual value.[48] In Louisiana a father, though not the tutor of his children, may take steps necessary for the preservation of their property.[49] Contracts of a parent to pay an adult child for services rendered are enforceable, where the evidence is sufficient to sustain them.[50] The homestead right of an infant daughter is divested by her marriage during her minority.[51] An adopted or substituted child cannot take under a will.[52]

§ 5. *Liability for child's torts.*[53]—A father is not liable for the tort of his child, with which he was not connected, which he did not ratify, and from which he derived no benefit.[54]

42. Although the mother furnished the clothes, and the son collected his own wages, but which the stepfather was entitled to. Eickhoff v. Sedalia, etc., R. Co., 106 Mo. App. 541, 80 S. W. 966.

43. Error to exclude evidence of the value of board and clothing in the neighborhood, or to require the jury to itemize the various elements of damages. Southern Ind. R. Co. v. Moore [Ind. App.] 72 N. E. 479. May recover for medical attendance, loss to father through consequent neglect of business, and from crippled state of child. Bube v. Birmingham R. Light & Power Co., 140 Ala. 276, 37 So. 285.

44. Father in petition only asked for value of services during minority. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133. Parents cannot recover where deceased, 25 years old, married six months before the accident and had ceased to contribute to their support, and there was no reasonable expectation that he would ever do so again. Texas Portland Cement & Lime Co. v. Lee [Tex. Civ. App.] 82 S. W. 306.

45. Code 1896, § 26, applies only in an action for death of child, and not in one for injuries to child. Bube v. Birmingham R. Light & Power Co., 140 Ala. 276, 37 So. 285.

46. Nursing, attention and medical bills. Myer's Adm'r v. Zoll [Ky.] 84 S. W. 543.

47. See 2 Curr. L. 1091; see also, Fraud and Undue Influence, 3 Curr. L. 1520.

48. A step-daughter conveyed to her step-father property for one-third only of its value, and without independent advice. Eighmy v. Brock [Iowa] 102 N. W. 444.

49. Though not authorized to receive their moneys, he may pay the same into court, and cause them to be invested by order of court rendered on the advice of a family meeting. Varnado v. Lewis [La.] 36 So. 893.

50. Under an agreement by a father to pay his daughter for services after certain debts were paid, she may recover compensation from his estate for services actually rendered, though his death before such debts were paid made it impossible for her to complete the agreement. Evidence sufficient to support verdict for claimant. Harrison v. Harrison [Iowa] 100 N. W. 344. Evidence insufficient to support claim of son against deceased father's estate for extra services alleged to have been rendered by him on farm. Duckworth v. Duckworth, 98 Md. 92, 56 A. 490. Declarations of decedent that his son should be paid for work performed by him will not be regarded as referring to the account presented by the son against the estate or to the services claimed for therein unless the correctness of the claim is otherwise proved according to law. Id. In action on claim for services rendered decedent, testimony by claimant that he only worked a part of the farm on shares and that he did work not required by his contract for tilling such farm, held admissible in rebuttal of testimony to the effect that he worked the farm on shares. Id.

51. Ky. St. 1903, § 1707 provides that unmarried infant children of decedent shall be entitled to the joint occupancy of the homestead. Jones v. Crawford [Ky.] 84 S. W. 568.

52. Held that the plaintiff in the action was an adopted and substituted child, the one entitled to decedent's property being dead. Mayer v. Flammer, 81 N. Y. S. 1062.

53. See 2 Curr. L. 1091.

54. Child shot cattle of another, and held Civ. Code 1895, § 3817 did not change the common-law rule which is that there is no liability unless there is the relation of principal and agent. Chastain v. Johns, 120 Ga. 977, 48 S. E. 343. A parent is not legally chargeable with a check forged by his son. Muller v. Barker, 90 N. Y. S. 388.

PARKS, see latest topical index.

PARKS AND PUBLIC GROUNDS.

[SPECIAL ARTICLE* BY GEO. F. LONGSDORF.]

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A. Public Parks and Parkways (885).
B. Privately Owned Parks to Which the Public is Invited (887).

The scope of this topic is largely self defined. It has nothing to do with public grounds not ejusdem generis with parks,[1] nor with the general laws of public works and improvements or public fiscal affairs.[2]

§ 1. *Definitions.*—A "park" in a city or village means an open space intended for recreation and enjoyment of the public.[3] A "square" indicates a public use either for free passage or for ornament, pleasure, amusement, recreation, or health.[4] "Commons" or "reserves"[5] which are mere public land holdings are not impressed with a public use of a kind to make them germane to this article.

§ 2. *Acquisition of public parks and places.*—The modes of acquiring parks and like public places are the same as those for public ways and localities, viz.: eminent domain, prescription or dedication including reservation from public domain (which is a public dedication), and grant or conveyance.

Parks are a public use justifying the right of eminent domain.[6] While land already devoted to public purposes may not ordinarily be taken,[7] a cemetery not public may be taken.[8] A fee may be taken if necessary,[9] and from the incompatibility of private ownership with park purposes will be freely implied.[10]

It is practically undisputed doctrine that a park or square may be dedicated

1. See Highways and Streets, 3 Curr. L. 1593; Wharves, 2 Curr. L. 2074 and like titles.
2. See Public Works and Improvements, 2 Curr. L. 1328; Public Contracts, 2 Curr. L. 1280; Municipal Corporations, 2 Curr. L. 940; Taxes, 2 Curr. L. 1786.
3. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145, citing other cases. See, also, Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376; Sheffield & T. St. R. Co. v. Rand, 83 Ala. 394.
4. M. E. Church v. Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696.
5. See Compton v. Waco Bridge Co., 62 Tex. 715; Woodson v. Skinner, 22 Mo. 13; Smith v. Floyd, 18 Barb. [N. Y.] 522; President, etc., of Commons of Kaskaskia v. McClure, 167 Ill. 23; Hops v. Hewitt, 97 Ill. 498; Lavalle v. Strobel, 89 Ill. 370; Hebert v. Lavalle, 27 Ill. 428. And see Pettitt v. Macon, 95 Ga. 645.
6. Owners of Land v. Albany, 15 Wend. [N. Y.] 374; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; In re City of Rochester, 137 N. Y. 243; In re Central Park Com'rs, 63 Barb. [N. Y.] 282; St. Louis County Court v. Griswold, 58 Mo. 175; Rowan v. Portland, 8 B. Mon. [Ky.] 232; Foster v. Boston Park Com'rs, 133 Mass. 321 (but see Boston, etc., Mill Dam Corp. v. Newman, 12 Pick. [Mass.] 467, 23 Am. Dec. 622); Shoemaker v. United States, 147 U. S. 282, 37 Law. Ed. 170; United States v. Gettysburg El. R. Co., 160 U. S. 668, 40 Law. Ed. 576; United States v. A Tract of Land, 67 F. 869. In paying for same, public charges should be deducted. Carpenter v. New York, 44 App. Div. [N. Y.] 230, 60 N. Y. S. 633.
7, 8. Power was given to take "any and all lands." In re Application, etc., Public Park, 133 N. Y. 329, 16 L. R. A. 180. Compare Eminent Domain, 3 Curr. L. 1189. Also see dictum in Campbell v. Kansas, 102 Mo. 326, 10 L. R. A. 593.
9. Driscoll v. New Haven, 75 Conn. 92, 52 A. 618; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Dec. 70.
10. Driscoll v. New Haven, 75 Conn. 92, 52 A. 618; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70. See, also, Washington Cemetery v. Prospect Park & C. J. R. Co., 68 N. Y. 591; Holt v. City Council, 127 Mass. 408.

*Late cases are included and marked with a dagger (†).

in the same manner and to the same extent as a street.[11] The word "park" on a plat is as significant of dedication as the word street.[12] The dedication for a park need not be by formal grant but may be like other dedications.[13] As in other dedications an acceptance by acts appropriate to its character will be required to fix a public claim on a park.[14] It need not be by the town nor be very specific.[15] User by the public for a long time suffices for an acceptance without any formal act,[16] and coupled with other facts proves a dedication.[17] Thus if a contiguous owner has rights in reclaimed lands, he may lose the same by acquiescing in their use for park purposes.[18] Actual use for park purposes need not be immediate if the dedication be otherwise complete,[19] and it is almost immaterial how much was done to adorn or improve the grounds.[20] The public may fix the precise location where the dedicator has not done so.[21]

Lands for a park may be acquired by deed[22] or lease,[23] and an executed grant by the public on consideration of the maintenance of a park is binding on both parties[24] and creates a vested public interest in the park.[25] A covenant to keep a square on consideration of a grant is likewise binding.[26]

To the extent of legislative authority, cities may acquire lands for parks,[27] or

11. Abbott v. Cottage City, 143 Mass. 521, 58 Am. Rep. 143 (rejecting Pearsall v. Post, 20 Wend. [N. Y.] 111; Id., 22 Wend. [N. Y.] 425); Commonwealth v. Fisk, 8 Metc. [Mass.] 238, 243; Cincinnati v. White, 8 Pet. [U. S.] 431; New Orleans v. United States, 10 Pet. [U. S.] 662, 713; Watertown v. Cowen, 4 Palge [N. Y.] 510; Cody v. Conger, 19 N. Y. 256, 261; Abbott v. Mills, 3 Vt. 521, 526, 23 Am. Dec. 222; Commonwealth v. Rush, 14 Pa. 186; Rowan v. Portland, 8 B. Mon. [Ky.] 232, 248; M. E. Church v. Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696; Id., 19 N. J. Eq. 355; Bayonne v. Ford, 43 N. J. Law, 292; Princeville v. Auten, 77 Ill. 325; Grogan v. Hayward, 4 F. 161; City of Macon v. Franklin, 12 Ga. 239; Perrin v. New York Central R. Co., 40 Barb. [N. Y.] 65; Jersey City v. Dummer, 20 N. J. Law, 86, 40 Am. Dec. 213; Indianapolis v. Croas, 7 Ind. 9; Logansport v. Dunn, 8 Ind. 378; Alves v. Henderson, 16 B. Mon. [Ky.] 168; Vick v. Vicksburg, 1 How. [Miss.] 379; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255. And see cases collected in American note to Doraston v. Payne, 2 Smith's Lead. Cas. [6th Ed.] 240, and see notes, 10 L. R. A. 215, 13 L. R. A. 251. Plat showing "court square." San Leandro v. Le Breton, 72 Cal. 170. Unsubdivided ground in a government plat designated "public ground * * * not to be occupied with buildings of any description." City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849. Platting "parks," exhibiting plats, and selling with reference to them. Attorney General v. Abbott, 154 Mass. 323, 13 L. R. A. 251.

A majority of directors of a corporation proprietor may dedicate. Attorney General v. Abbott, 154 Mass. 323, 13 L. R. A. 251.

12. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145.

Platting and selling with reference to a park indicated as **"Central Park."** Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145. In a note 27 Am. Dec. 84, it is said that "commons dedicated to public use" can never be appropriated by the original proprietor to an exclusive private use (citing cases).

13. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. And see Dedication, 3 Curr. L. 1050. Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222. An informal and therefore invalid vote of town proprietors to dedicate, may be cured by adoption and acquiescence. Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222.

14. Land, embracing mineral springs and much resorted to, was taxed by the town, though it also contributed to the cost of maintenance because the public was permitted to use the springs. This was held to show no acceptance. Town of Manitou v. International Trust Co., 30 Colo. 467, 70 P. 757. Mere nonassessment for taxes is not enough. Reuter v. Lawe, 94 Wis. 300, 59 Am. St. Rep. 891, 34 L. R. A. 733.

15. Attorney General v. Abbott, 154 Mass. 323, 13 L. R. A. 251.

16. Abbott v. Inhabitants of Cottage City, 143 Mass. 521, 58 Am. Rep. 143; Quindaro Tp. v. Squier, 51 F. 152; Attorney General v. Abbott, 154 Mass. 323, 13 L. R. A. 251; Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207 (a common for county buildings).

17. Sturmer v. Randolph County Court, 42 W. Va. 724, 36 L. R. A. 300.

18. Clarke v. Providence, 16 R. I. 337, 1 L. R. A. 725.

19. Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145.

20. Attorney General v. Abbott, 154 Mass. 323, 13 L. R. A. 251.

21. Rung v. Shoneberger, 2 Watts [Pa.] 23, 26 Am. Dec. 95. It must be done seasonably; thirty years delay was held too long. Id.

22. A conveyance for a park is binding. Village of Corning v. Rector, etc., of Christ Church, 33 N. Y. State Rep. 766, 11 N. Y. S. 762.

23. Holder v. Yonkers, 39 App. Div. 1, 56 N. Y. S. 912.

24, 25. Barney v. Lincoln Park Com'rs, 203 Ill. 397, 67 N. E. 801.

26. Sturmer v. County Court of Randolph Co., 42 W. Va. 724, 36 L. R. A. 300.

27. City of Lexington v. Kentucky Chautauqua Assembly, 24 Ky. L. R. 1568, 71 S.

the various boards or public park corporations which govern parks and parkways may exercise like authority within terms of delegated power.[28] Even beyond their limits, cities may do so,[29] subject to constitutional restrictions.[30] They may also discontinue such proceedings.[31] Under a power to "purchase or lease" lands for public purposes, a park may be acquired by lease.[32] The power to lay out parks does not authorize the closing of a street in other than the regular mode.[33]

§ 3. *Nature of the public property in park lands.*—Parks are public property,[34] but the public access to them is subject to reasonable regulation.[35]

Wherever a grant or dedication for a park is on condition or limitation to particular purposes, the legislature is powerless to divert it to different purposes,[36] or to exceed them,[37] or to avoid the condition;[38] but a particular use compatible with a general and unspecific dedication may be made.[39] The rule applies though the character of the use of adjacent property is entirely changed.[40] If the public holds the fee,[41] the rule does not apply.[42] In that case having specially dedicated

W. 943, construing Ky. St. §§ 3038, 3058. San Francisco may acquire land for parks and playgrounds. †Law v. San Francisco, 144 Cal. 384, 77 P. 1014. In Missouri "villages" have no power to purchase. Vaughn v. Greencastle, 104 Mo. App. 206, 78 S. W. 50.

28. West Chicago Park Com'rs v. Western Union Tel. Co., 103 Ill. 33; Barney v. New York, 78 Hun [N. Y.] 336, 337. Under St. 1893, p. 934, c. 300, § 1, the park board is not restricted to the taking of a street alone to connect two parks. Commonwealth v. Crowninshield [Mass.] 72 N. E. 963. Power to take lands for a "driveway with a park" or to extend or improve "such park" warrants the taking of lands for part of an existing park and for a driveway [Laws 1881, p. 116]. Barney v. Lincoln Park Com'rs, 203 Ill. 397, 67 N. E. 801.

29. Quo warranto lies for transgression of power. City of Detroit v. Moran, 44 Mich. 602; In re City of New York, 99 N. Y. 569.

30. State v. Leffingwell, 54 Mo. 458.

31. In re Military Parade Ground, 60 N. Y. 319.

32. Holder v. Yonkers, 39 App. Div. 1, 56 N. Y. S. 912.

33. Holtz v. Diehl, 26 Misc. 24, 56 N. Y. S. 841.

34. Not taxable. City of Owensboro v. Commonwealth, 20 Ky. L. R. 1281, 44 L. R. A. 202.

35. Scranton v. Minneapolis, 57 Minn. 437, 60 N. W. 26. See, also, post, § 9, p. 884.

36. Le Clerq v. Trustees of Gallipolis, 7 Ohio (pt. 2) 217, 28 Am. Dec. 641; Rowzee v. Pierce, 75 Miss. 846, 65 Am. St. Rep. 625, 40 L. R. A. 402; Guttery v. Glenn, 201 Ill. 275; Cummings v. St. Louis, 70 Mo. 259; Warren v. Lyons, 22 Iowa, 351; City of Jacksonville v. Jacksonville R. Co., 67 Ill. 540; Village of Princeville v. Anton, 77 Ill. 325; City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849; Board of Education v. Kansas City, 62 Kan. 374; City of St. Paul v. Chicago, etc., R. Co., 63 Minn. 330; City of Llano v. Llano Co., 5 Tex. Civ. App. 132; Prince v. Thompson, 48 Mo. 361; United States v. Chicago, 7 How. [U. S.] 185, 12 Law. Ed. 660; Wellington, Petitioner, 16 Pick. [Mass.] 87, 26 Am. Dec. 631.

See Davenport v. Buffington [C. C. A.] 97 F. 234, 46 L. R. A. 377; Fessler v. Union [N. J. Eq.] 56 A. 272, where a square for pleasure was protected from appropriation for public buildings. Platting a park with paths or roadways indicated does not subject it to highway uses. †Riverside v. Maclean, 210 Ill. 308, 71 N. E. 408, 102 Am. St. Rep. 164, 66 L. R. A. 288. In †Huff v. Macon, 117 Ga. 428, 43 S. E. 708, it was held that the use of the space within a mile track for agricultural purposes was not a diversion.

A "square" imports general public use of the place as an open space. M. E. Church v. Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696. "Market square" is not of itself evidence of a dedication. Scott v. Des Moines, 64 Iowa, 444. "Garden square" on a plat has been held equivocal and not a clear dedication. City of Pella v. Scholte, 24 Iowa, 283, 95 Am. Dec. 729. Buildings cannot be erected on "public grounds not to be occupied with buildings." City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849.

If a dedicated graveyard be abandoned, it cannot be made a park. Campbell v. Kansas, 102 Mo. 326, 10 L. R. A. 593.

37. Deed in fee to a church society of land occupied transcends a trust for a park and to permit use of part of it forever for church. Still v. Trustees of Lansingburgh, 16 Barb. [N. Y.] 107.

38. In Harter v. San Jose, 141 Cal. 659, 75 P. 344, a dedication by the public for a park with power in the mayor and council to lease the park for purposes compatible with the public use was held to fasten the power to lease upon the dedication as a condition which a later act transferring the park to a board could not affect.

39. "Plaza" may be made either a common or park. Sachs v. Towanda, 79 Ill. App. 439; Chicago, etc., R. Co. v. Joliet, 79 Ill. 25. A specific use cannot be impressed by parol on an unqualified grant. †Pickett v. Mercer, 106 Mo. App. 689, 80 S. W. 285. The deed not having restricted the use, parol representations of town trustees have no force. Id.

40. Change from residence to business uses. City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849.

41. Declaration in a deed following the description that the premises shall be "forever held and used as a public park" held to

it in whole or part for a specific public use, the city holds the fee subject thereto,[43] and may, especially if legislatively authorized, dedicate for further purposes not inconsistent with the former dedication[44] or the state may do so directly.[45] In giving such authority the legislature need not require a submission to popular vote.[46] A dedication specially for a boulevard implies a restricted use for highway traffic.[47]

On incorporation a municipality succeeds to an existing park within its limits.[48]

The dedicator's grantee is bound[49] and if he investigates he cannot claim as a bona fide purchaser when it transpires he was mistaken.[50]

When a fee is taken the city holds upon a trust for park purposes,[51] and it may not use the land in opposition thereto,[52] but the state may authorize it to disengage itself and for proper purposes to alienate land so taken,[53] though not so as to defeat contract or vested rights.[54] Such authority must be certain but not in particular like the conveyance or grant which pursues it.[55] Consent of voters if prescribed is indispensable.[56] This restricted power to alienate park lands does not follow them until they have been specially dedicated or devoted to that purpose.[57] While held in unqualified fee, they may be conveyed, though ultimately intended for a park.[58]

In the case where a nation, state or municipality dedicates land which it owns to park purposes and sells lots with reference thereto, a covenant implied binds it not to discontinue the park or divert the land.[59]

If a city extends by reclamation park lands which it holds as trustee, the trust extends to cover the reclaimed land.[60] The city cannot claim it free from the trust.[61] The submergence of such lands does not divest the park title.[62]

negative a fee in the public. Flaten v. Moorhead, 51 Minn. 518, 19 L. R. A. 195.

42. Where the city held the fee it was held proper to authorize a city to devote part of a park to state capitol grounds. †City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740.

43. City park dedicated for capitol grounds. †City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740. And see Driscoll v. New Haven, 75 Conn. 92, 52 A. 618.

44, 45. †City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740.

46. †City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740; Whitney v. New Haven, 58 Conn. 450.

47. Quick v. Park Com'rs of Louisville, 20 Ky. L. R. 1457, 49 S. W. 483.

48. †Village of Riverside v. Maclean, 210 Ill. 308, 71 N. E. 408.

49, 50. Attorney General v. Abbott, 154 Mass. 323, 13 L. R. A. 251.

51. Driscoll v. New Haven, 75 Conn. 92, 52 A. 618; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Dec. 70; Case of Philadelphia, etc., R. Co., 6 Whart. [Pa.] 25, 36 Am. Dec. 202; †Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38. They are not liable for sale on execution for general indebtedness. Ransom v. Boal, 29 Iowa, 68, 4 Am. Rep. 195.

52. Grant of park for railway. Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376. The imposition of a condition in a grant of a fee to the city, while it may work a reversion, also leaves this rule operative. Id.

53. Driscoll v. New Haven, 75 Conn. 92, 52 A. 618; Commissioners v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; In re City of Rochester, 137 N. Y. 243; City of Brooklyn v. Copeland, 22 Wkly. Dig. [N. Y.] 347; Waterworks Co. v. Burkhardt, 41 Ind. 364; Clarke v. Providence, 16 R. I. 337, 1 L. R. A. 725. Village trustees cannot. †Pickett v. Mercer, 106 Mo. App. 689, 80 S. W. 285. City of Parkersburg may lease under grant of power to * * * "let," etc. †Bryant v. Logan [W. Va.] 49 S. E. 21.

54. The land was pledged to secure bonds. Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Dec. 70; Davenport v. Buffington [C. C. A.] 97 F. 234, 46 L. R. A. 377.

55. It need not describe precise locality or boundaries as a deed must. Driscoll v. New Haven, 75 Conn. 92, 52 A. 618.

56. Still v. Trustees of Lansingburgh, 16 Barb. [N. Y.] 107.

57. City of Fort Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558, 32 Am. St. Rep. 277, 18 L. R. A. 367; State v. Woodward, 23 Vt. 92.

58. City of Ft. Wayne v. Lake Shore, etc., R. Co., 132 Ind. 558, 32 Am. St. Rep. 277, 18 L. R. A. 367; Beach v. Haynes, 12 Vt. 15, in which case the purpose was recited in the deed to the city.

59. Davenport v. Buffington [C. C. A.] 97 F. 234, 46 L. R. A. 377.

60, 61. City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849, distinguishing Ruge v. Appalachicola, etc., Canning Co., 25 Fla. 656.

62. City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849.

Lands owned in fee for a park by a city and taken for streets must be paid for.[63]

A lease of a park valid in all respects except the excessiveness of the term may be upheld as a lease for the authorized term.[64]

§ 4. *Uses and servitudes compatible with park rights.*—In particulars which are obvious, the contemplated incidental uses of streets and the restrictions thereon are quite different from those of parks.[65]

In the case of a square, the nature of the dedicator's purpose governs[66] and this is a fact to be proven.[67] An exception may be made of the square in the county town where by custom the erection of a court house and county buildings is contemplated and sanctioned,[68] but even this use is strictly regarded,[69] and may be relinquished.[70]

Uses which subserve public comfort and enjoyment of the park are proper.[71] Those which interfere are a nuisance.[72] Generally it is a diversion to use park grounds for public buildings,[73] especially those of a purely economic or administrative character,[74] or for railways[75] or highways if the park purposes are thereby defeated.[76] The state may grant railway or street railway easements over or beneath the surface of public lands devoted to parks,[77] and the grant may be direct, though a general statute requires the municipality's consent.[78] In such a case the direct grant is a legislative substitute for the existing statute.[79] Consent of the municipality to the violation of a restrictive covenant or condition between it and the state may be given by approbative vote on a scheme for improvement which involves such violation,[80] and it need not be in the manner provided generally by the legislature for expressing such consent.[81] Such a right may not be given if title came from a private person who imposed restrictive conditions with reversion for breach thereof,[82] even though he conveyed a fee and received a valuable consideration.[83] Existing street railways are not affected by subsequently creating a park where they are.[84] By acquiescence the park board may approve a plat of

63. Matter of Ninth Ave. & Fifteenth St., 45 N. Y. 729.

64. Lease for 25 years, but authority to lease for 10 years only, held valid for 10 years. Harter v. San Jose, 141 Cal. 659, 75 P. 344.

65. Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376; Sheffield & T. St. R. Co. v. Rand, 83 Ala. 294. Compare Eminent Domain, § 4, 3 Curr. L. 1195.

66, 67. Corporation of Sequin v. Ireland, 58 Tex. 183.

68, 69. Commonwealth v. Bowman, 3 Pa. 203.

70. Sturmer v. County Court of Randolph Co., 42 W. Va. 724, 36 L. R. A. 300.

71. The privilege of selling refreshments (liquors) is a proper use. State v. Schweickhardt, 109 Mo. 496. Lease of limited use of park for racing and horse training, reserving limited right of access to public, held not a diversion, it already containing grand stand and track. †Bryant v. Logan [W. Va.] 49 S. E. 21. Religious buildings cannot be erected even with permission. Village of Corning v. Rector of Christ Church, 33 N. Y. State Rep. 766, 11 N. Y. S. 762.

72. Horse racks in a square so held. Samuels v. Nashville, 35 Tenn. 298. Contra, Harrison County Ct. v. Wall, 11 Ky. L. R. 223, 12 S. W. 130.

73. Rutherford v. Taylor, 38 Mo. 315.

74. Not a proper use: A school house. Rowzee v. Pierce, 75 Miss. 846, 65 Am. St. Rep. 625. City hall and jail. Church v. Portland, 18 Or. 73, 6 L. R. A. 259. City prison. Flaten v. Moorhead, 51 Minn. 518, 19 L. R. A. 195. Court house. McIntyre v. El Paso County Com'rs, 15 Colo. App. 78, 61 P. 237. Barracks and hospital. Appeal of Meigs, 62 Pa. 28, 1 Am. Rep. 372.

75. Railroad uses are incompatible. Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376; City of Jacksonville v. Jacksonville R. Co., 67 Ill. 540. Legislature may do so. Chicago, etc., R. Co. v. Joliet, 79 Ill. 25. Street railway held not a "private" nuisance. Anderson v. Rochester, etc., R. Co., 9 How. Pr. [N. Y.] 553.

76. Price v. Thompson, 48 Mo. 361; †Pickett v. Mercer, 106 Mo. App. 689, 80 S. W. 285. Highway not proper. Seward v. Orange, 59 N. J. Law, 331, 35 A. 799. Highway improper which would cut park into small parcels. †Riverside v. Maclean, 210 Ill. 308, 102 Am. St. Rep. 164, 66 L. R. A. 288.

77, 78, 79. Stat. 1894, c. 548, relating to the Boston subway, controls General Statutes (Pub. St. c. 54). Prince v. Crocker, 166 Mass. 347, 32 L. R. A. 610.

80, 81. Prince v. Crocker, 166 Mass. 347, 32 L. R. A. 610.

82, 83. Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376.

84. Coney Island, etc., R. Co. v. Kennedy, 15 App. Div. 588, 44, N. Y. S. 825.

streets which intersect a parkway, lots having been sold by the dedicator with reference thereto.[85] The erection of a historical or military memorial is compatible with park purposes,[86] or with a special use of a park for capitol grounds,[87] even though its emplacement is but temporary,[88] and the taking of land for a park to be used in part for a free library and art building site has been sustained.[89] Memorials so erected become public property,[90] and the erection of them by public sanction does not constitute a private use of the park.[91] Sometimes economic and administrative purposes are combined with park purposes;[92] even so a part used for a church under the dedication cannot be granted to the church in fee.[93] Diversion is a question of fact,[94] and the court does not control official discretion in determining whether use of a park for base ball is a diversion.

§ 5. *Rights of individuals in or to parks.*—The benefit of proximity to a park is not a property right in private adjacent owners which entitles them to resist the alienation and discontinuance of a park,[95] and when the fee is owned by the city, it is said they can have no vested interest in the continuation of the park.[96] Adjoining owners may however sue to establish the character of a park or public square on lands privately dedicated which the authorities seek to divert or misuse.[97] The persons entitled to the protection afforded by the limited or restricted nature of the public use may of course waive or relinquish their individual rights.[98] Doing so in a single instance does not waive all rights.[99]

§ 6. *Improvement and beautification of parks and approaches.*—Great latitude characterizes the power of beautifying and improving parks, public open places, and parkways.[1] Thus in order to promote the beauty and attractiveness of parks and squares, easements of light and air may be imposed on adjacent land,[2] under the power of eminent domain.[3] Encircling drives may be laid out.[4] In several instances the projecting of portions of buildings into such places has been forbidden.[5]

Streets may be set apart as parkways and boulevards in such portions and in so far as they are not needed for the primary uses of a street,[6] and portions not

85. West Chicago Park Com'rs v. Chicago, 170 Ill. 618.

86. In capitol grounds. †City of Hartford v. Maslen, 76 Conn. 599. 57 A. 740. Soldiers' and sailors' monument. Parsons v. Van Wyck, 56 App. Div. 329, 67 N. Y. S. 1054. A statute is not a "building" forbidden in a park. In re Washington Monument Fund, 154 Pa. 621, 20 L. R. A. 323.

87, 88. City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740.

89. Laird v. Pittsburg, 205 Pa. 1, 61 L. R. A. 332.

90, 91. †City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740.

92. The Battery in New York City has a dual purpose. Castle Garden has not. Phoenix v. Com'rs of Emigration, 12 How. Pr. [N. Y.] 1.

93. Still v. Trustees of Lansingburgh, 16 Barb. [N. Y.] 107.

94. †Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38.

95. Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70.

96. Clarke v. Providence, 16 R. I. 337, 1 L. R. A. 725.

97. Le Clerq v. Trustees of Gallipolis, 7 Ohio (pt. 2) 217, 28 Am. Dec. 641; City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849.

98. Fessler v. Union [N. J. Eq.] 56 A. 272. Combining with other circumstances a prescription would in time result. See Dedication, 3 Curr. L. 1050; Easements, 3 Curr. L. 1148.

99. Consent to one building is not consent to others. Fessler v. Union [N. J. Eq.] 56 A. 272; City of Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849.

1, 2. A provision that park commissioners may permit by their approval the erection of "sculptured ornaments" above the maximum building height prescribed was held to contain no authority for them to so permit the erection of walls even of an ornamentally sculptured character beyond the height prescribed. Knowlton v. Williams, 174 Mass. 476, 47 L. R. A. 314.

3. Knowlton v. Williams, 174 Mass. 476, 47 L. R. A. 314.

4. Commonwealth v. Boro' of Beaver, 171 Pa. 542.

5. McCormick v. South Park Com'rs, 150 Ill. 516; Wormser v. Brown, 149 N. Y. 163.

6. McDonald v. St. Paul, 82 Minn. 308, 83 Am. St. Rep. 428; †Martin v. Williamsport, 208 Pa. 590, 57 A. 1063. One who is not harmed cannot raise the question of undue limitation of street traffic. West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215.

needed for travel may be regarded as part of the park system and enclosed.[7] A space in the middle as well as on the sides may be parked.[8]

§ 7. *Encroachments or obstructions, adverse possession, and the like; and the right to sue for redress.*—It is an indictable nuisance to place on an open square or on such parts of it as have been accepted by the public a building or other structure.[9] A park or square being for the whole public, like a street, is not susceptible of adverse possession[10] or destructible by the act or omission of local authorities,[11] though the contrary was held in Iowa,[12] but as to a part never accepted, the rule fails.[13]

Either the attorney general for the public[14] or that particular subdivision of government or municipality to which care of such places is committed should sue to protect or recover possession of a park.[15] Ordinarily it is the city or the park board.[16] Even if the title be not vested in the municipal corporation, it properly sues to protect the park.[17] A municipal corporation is the proper party to sue to abate or enjoin a nuisance in a park.[18] The obstruction of an easement of light or air appurtenant to a park is a purpresture not strictly a nuisance,[19] and since it injures the public the attorney general will prosecute to redress it[20] by an information in equity.[21] The fact that the purpresture consists in a violation of local building regulations for which a statutory remedy exists does not exclude the remedy by information.[22]

Since parks belong to all inhabitants,[23] any inhabitant may probably maintain a bill if the city fails to protect park rights,[24] every one being a cestui que

The power to do so may be delegated. See post, § 9, p. 883.

7. Abrey v. Com'rs of Parks, 95 Mich. 181, 54 N. W. 714.

8. †Downing v. Des Moines [Iowa] 99 N. W. 1066.

9. State v. Trask, 6 Vt. 355, 27 Am. Dec. 554; Rung v. Shoneberger, 2 Watts [Pa.] 23, 26 Am. Dec. 95, where a case is alluded to. State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

10, 11. Rung v. Shoneberger, 2 Watts [Pa.] 23, 26 Am. Dec. 95; Commonwealth v. Alburger, 1 Whart. [Pa.] 469; Commonwealth v. Bowman, 3 Pa. 206; Commonwealth v. Rush, 14 Pa. 190; Case of Philadelphia, etc., R. Co., 6 Whart. [Pa.] 45; Price v. Plainfield, 40 N. J. Law, 608; City of Alton v. Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Archer v. Salinas City, 93 Cal. 43, 16 L. R. A. 145; Grogan v. Hayward, 4 F. 161; Hoadley v. San Francisco, 50 Cal. 265, 70 Cal. 320; San Leandro v. LeBreton, 72 Cal. 170; People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186. See cases collated on doctrine in note 48 Am. Rep. 24, 48. "Public squares, unlike commons, are not intended for the exclusive use of the citizens of the city or borough where they are situated; but are also designed for the comfort and convenience of strangers in the pursuit either of business or pleasure." Dictum per Rogers, J., in Rung v. Shoneberger, 2 Watts [Pa.] 23, 26 Am. Dec. 95. Misuse of a park for highway short of the time for adverse title held not to show a dedication for street. †Pickett v. Mercer, 106 Mo. App. 689, 80 S. W. 285. Where the public title as proved is possessory merely, an adverse possession is admissible. State v. Trask, 6 Vt. 355, 27 Am. Dec. 554. Cannot sell for taxes or assessments. M. E. Church v. Hoboken, 33 N. J. Law, 13, 97 Am. Dec. 696.

12. City of Pella v. Scholte, 24 Iowa, 283, 95 Am. Dec. 729. In that case the court while admitting that limitations could not run against the public, distinguished this case as one wherein not the public but a municipality was concerned. This holding is therefore inconsistent with the conception of a park as public generally, and not only locally. See supra, § 3.

13. State v. Trask, 6 Vt. 355, 27 Am. Dec. 554.

14. Knowlton v. Williams, 174 Mass. 476, 47 L. R. A. 314.

15. Hurd v. Harvey County Com'rs, 40 Kan. 92; Municipality No. 1 v. Municipality No. 2, 12 La. 49; City of Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

16. Hurd v. Harvey County Com'rs, 40 Kan. 92. Park commissioners may. Gordon v. Winston, 181 Ill. 338.

17. City of Dubuque v. Maloney, 9 Iowa, 451, 74 Am. Dec. 358.

18. Watertown v. Cowen, 4 Paige [N. Y.] 510, 27 Am. Dec. 80.

19, 20, 21, 22. Knowlton v. Williams, 174 Mass. 476, 47 L. R. A. 314.

23. Macon v. Franklin, 12 Ga. 239; Alves v. Henderson, 16 B. Mon. [Ky.] 131; Campbell County Ct. v. Newport, 12 B. Mon. [Ky.] 541; Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207; Commonwealth v. Rush, 14 Pa. 186; Carter v. Portland, 4 Or. 346; Alton v. Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Quincy v. Jones, 76 Ill. 231, 20 Am. Rep. 243; Sheffield & T. St. R. Co. v. Rand, 83 Ala. 294; Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376.

24. See Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376; Maywood Co. v. May-

trust in respect thereto.[25] At any rate abutters[26] and outlookers, though not abutting,[27] or any lot owner,[28] may do so; and a bill is not multifarious because they join with the municipality.[29] If it come into exclusive possession any one of the dedicators or his privy in estate may bring ejectment.[30]

§ 8. *Expense of acquiring or improving.*—This is a phase of the law of public fiscal affairs or of public improvements and not entirely pertinent here.[31]

The legislature may expend public moneys or incur debt for park purposes or may authorize cities or districts to do so[32] within constitutional limits.[33] Public moneys may be devoted to the purpose of acquiring easements of light and air appurtenant to parks[34] which expense the legislature may charge upon the municipality.[35] The public nature of the benefits to be derived from parks and open places is manifested in various holdings and statutes which deny the right to improve and maintain them by local assessment or special tax.[36] At least it is not lawful to apportion such according to abutting frontage,[37] but the cost of parking a street either on the sides or in the center may be assessed to abutting property.[38] Money granted to repair roads may be used to construct a speedway without being a diversion of moneys granted to improve park approaches.[39]

§ 9. *Administration, government and control of public parks.*—The control of public parks is primarily for the state,[40] and cities and subordinate bodies act in respect to them only by virtue of delegated power.[41] Such a delegation for the purpose of administering park affairs is not one of legislative power.[42] Having been so committed it is said the control of a park belonging to a city is a local concern.[43] The legislature has, in so far as mere purposes of government are concerned, power to commit parks and the administration and control thereof to a board independent of the city or village;[44] but must keep within general or special limitations imposed by the constitution,[45] must not violate the terms of the dedi-

wood, 118 Ill. 61. A resident and taxpayer may sue. Davenport v. Buffington [C. C. A.] 97 F. 234, 46 L. R. A. 377.

Contra: Citizens and taxpayers not specially harmed cannot sue. †Bryant v. Logan [W. Va.] 49 S. E. 21.

25. Davenport v. Buffington [C. C. A.] 97 F. 234, 46 L. R. A. 377. Taxpayer may sue in equity for redress of a diversion as breach of trust. †Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38.

26. Cummings v. St. Louis, 90 Mo. 259; Price v. Thompson, 48 Mo. 361; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255; Franklin County v. Lathrop, 9 Kan. 453; Cook v. Burlington, 30 Iowa, 94, 6 Am. Rep. 649; Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849; Earll v. Chicago, 136 Ill. 277.

27. Douglass v. Montgomery, 118 Ala. 599, 43 L. R. A. 376.

28. Church v. Portland, 18 Or. 73, 6 L. R. A. 259, with note. Carter v. Portland, 4 Or. 339; †Riverside v. Maclean, 210 Ill. 308, 102 Am. St. Rep. 164, 66 L. R. A. 288.

29. Maywood Co. v. Maywood, 118 Ill. 61.

30. Pomeroy v. Mills, 3 Vt. 279, 23 Am. Dec. 207, where the proprietors of a town dedicated a square or common.

31. Consult Municipal Corporations, 4 Curr. L. 720; Public Works and Improvements, 2 Curr. L. 1328; Taxes, 2 Curr. L. 1786.

32. People v. Brislin, 80 Ill. 423; Bank of Sonoma Co. v. Fairbanks, 52 Cal. 196.

33. State v. Leffingwell, 54 Mo. 458.

34, 35. Knowlton v. Williams, 174 Mass. 476, 47 L. R. A. 314. Stat. 1898, ch. 452, restricting height of buildings adjacent to Copley Square in Boston.

36. State v. Leffingwell, 54 Mo. 458.

37. State v. Leffingwell, 54 Mo. 458; City of Ft. Wayne v. Shoaff, 106 Ind. 66; Bennett v. Seibert, 10 Ind. App. 369.

38. †Downing v. Des Moines [Iowa] 99 N. W. 1066.

39. Holtz v. Diehl, 26 Misc. 224, 56 N. Y. S. 841.

40. †City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740.

41. †City of Hartford v. Maslen, 76 Conn. 599, 57 A. 740; Commonwealth v. Davis, 162 Mass. 510, 44 Am. St. Rep. 389, 26 L. R. A. 712; West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215; People v. Holladay, 93 Cal. 241, 29 P. 54, 27 Am. St. Rep. 186.

42. Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; Turner v. Detroit, 104 Mich. 326.

43. State v. Schweickardt, 109 Mo. 496.

44. See Harter v. San Jose, 141 Cal. 659, 75 P. 344. Sole control and discretion to approve monuments to be placed in parks was given park board by Greater N. Y. Charter, § 616. Parsons v. Van Wyck, 56 App. Div. 329, 67 N. Y. S. 1054.

45. See Constitutional Law, 3 Curr. L. 730. Such an act general in its frame and language is valid though presently applicable to only one city. West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215.

cation,[46] nor attempt a diversion or change of purpose;[47] and where local self government is guaranteed,[48] must especially avoid any impairment of that privilege. When, however, an act creating a park district and commissioners for it has been approved by vote, a resubmission of an act enlarging their powers is not necessary.[49] Such boards may possess the attributes of a municipal corporation[50] when not designed to be a mere instrumentality auxiliary to the city.[51] A city apart from legislative sanction or authority cannot transfer its functions as trustee and custodian of parks to such a board.[52] That which the Federal government has committed to a city cannot be transferred by the state to a park board.[53] Territory within a park district is not transferred merely by changing it from one town to another.[54]

The extent to which power is given is a question of legislative intent construed as other statutes.[55] A board though recognized as city officers cannot bind the city, by the exercise of powers granted subsequent to such recognition.[56] Where the voice of the board is to be expressed by ordinance, a commissioner in charge of his district cannot act in excess of subsisting ordinances and regulations.[57]

The local authorities may restrict public use of a park in a reasonable way.[58] If a limited public use be declared, they may regulate the manner of such use, though the place be a "public" one,[59] and need not admit improper or untrustworthy persons.[60] A public place within one locality may be opened to inhabitants of other localities.[61] Public assemblages or speech in parks and squares may be regulated or forbidden.[62] Improper vehicles or drivers may be excluded from parks and parkways.[63] When a plat shows a place reserved from the general dedication and specially dedicated to the park board for boulevard purposes,

46. See Harter v. San Jose, 141 Cal. 659, 75 P. 344.

47. See ante, p. 878.

48. See Constitutional Law, 3 Curr. L. 785. The County Park Act of New Jersey is not offensive to this clause. Ross v. Board of Chosen Freeholders of Essex, 69 N. J. Law, 291, 55 A. 310. Acts creating a park board and authorizing it to purchase parks and to require the city council to provide payment up to a stated amount violate that guaranty in so far as they tend to compel the municipality to contract a debt for local purposes against its will. People v. Common Council, 28 Mich. 228, 15 Am. Rep. 202.

49. Andrews v. People, 83 Ill. 529; West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215.

50. West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215; People v. Saloman, 51 Ill. 37; Wilcox v. People, 90 Ill. 192; West Chicago Park Com'rs v. Western Union Tel. Co., 103 Ill. 33; People v. Williams, 51 Ill. 63; South Park Com'rs v. Dunlevy, 91 Ill. 49; People v. Walsh, 96 Ill. 232; People v. Brislin, 80 Ill. 423.

51. Orvis v. Park Com'rs of Des Moines, 88 Iowa, 674, 66 N. W. 294, 45 Am. St. Rep. 252; Ehrgott v. Mayor, 96 N. Y. 264, 48 Am. Rep. 622.

52. Kreigh v. Chicago, 86 Ill. 411.

53. See note 10 L. R. A. 215, citing Com'rs of Parks, etc., v. Detroit, 80 Mich. 663.

54. In re De Las Casas, 178 Mass. 213, 59 N. E. 664.

55. In re Knaust, 101 N. Y. 188. See, also, Statutes, 2 Curr. L. 1707.

56. People v. Common Council, 28 Mich. 228, 15 Am. Rep. 202.

57. Ackerman v. True, 31 Misc. 597, 66 N. Y. S. 140.

58. May fence it allowing openings at convenient intervals. Scranton v. Minneapolis, 58 Minn. 437, 60 N. W. 26; Platt v. Chicago, etc., R. Co. [Iowa] 31 N. W. 883; State v. Com'rs, Riley [S. C.] 146. In order to protect the property and conserve the purpose of amusement, a "common" may be enclosed by fence. †Sherburne v. Portsmouth, 72 N. H. 539, 58 A. 38. Ordinance against carrying shrubs, plants and flowers in parks is reasonable. Baldwin v. Park Com'rs, N. Y. Daily Reg. April 8, 1881.

59. Parade ground. People v. Prospect Park Com'rs, 58 Barb. [N. Y.] 638.

60. People v. Prospect Park Com'rs, 58 Barb. [N. Y.] 638. A citizen or licensee who uses a dock in a lake bordered by a park so that the public is excluded may be removed. Ewing v. Minneapolis, 86 Minn. 51, 90 N. W. 10.

61. Military organizations from other counties were allowed to use the "parade ground" of Kings County. People v. Com'rs of Prospect Park, 58 Barb. [N. Y.] 638.

62. Commonwealth v. Davis, 162 Mass. 610, 44 Am. St. Rep. 389, 26 L. R. A. 712; Commonwealth v. Abrahams, 156 Mass. 57; Commonwealth v. Davis, 140 Mass. 486.

63. Bicycles may be, but not landaus or horseback riders. Doll v. Devery, 27 Misc. 149. The exclusion of bicycles is not as matter of law unreasonable. Matter of Wright, 29 Hun [N. Y.] 357, 65 How. Pr. 119.

with "necessary" and "convenient" rights of way, ingress may be restricted to alternate streets,[64] even as against an abutter.[65] When empowered to regulate the use and government of parks, such a board may prescribe reasonable speed limits within the parks or streets forming part of them,[66] which are not abrogated by general laws applicable to highways.[67]

Privileges conducive to public comfort and use of a park may be granted.[68] A stage privilege in parks and connecting streets does not constitute an encroachment on the authority of the council to grant stage routes[69] or street franchises.[70] A privilege contract which must be either a license or a grant ultra vires may be revoked.[71] The reservation of control does not entitle park authorities to capriciously or unnecessarily interfere with a licensee or concessionaire.[72] When the power is so given, license for compatible uses may be granted by park authorities on whatever terms the act allows,[73] even for a term of years[74] if it does not impede proper performance of its functions.[75] A mere contract privilege may be awarded without formalities prescribed for a grant or lease.[76]

The power to govern parks in respect to any erection or incumbrance thereon does not authorize a permit to encroach on them.[77]

The power to take streets for parkways may be delegated to a park board[78] and its official successor.[79] Consent to this is included in a vote of approbation of an act vesting governmental power respecting parks in the board.[80] Such power is one of governmental discretion not controllable by equity.[81] General power to take streets for connecting parkways is not exhausted by one exercise[82] nor is the taking of parallel and not distant ones unauthorized.[83] They may regulate the erection of buildings fronting on streets thus committed to them.[84] A street is not tributary to a "park" until the park is acquired and defined.[85]

§ 10. *Duties in respect to parks and liability for injuries therein. A. Public parks and parkways.*—Negligence in the use of particular agencies, though occurring in a park, pertains rather to a topic relevant to the agency in question.[86] A park is public and the city in administering it serves a public function; hence

64, 65. Quick v. Park Com'rs of Louisville, 20 Ky. L. R. 1457, 49 S. W. 483.

66. †Commonwealth v. Crowninshield [Mass.] 72 N. E. 963. Eight miles an hour on such a street held reasonable. Id. "Ride or drive" held to apply to the person who is the driver of a self-propelled car or automobile. Id.

67. †Commonwealth v. Crowninshield [Mass.] 72 N. E. 963. Law relative to posting special speed regulations held not applicable. Id.

68. Exclusive privilege of renting chairs illegal where all benches were removed to compel visitors to rent chairs or sit in the sun. Kurtz v. Clausen, 38 Misc. [N. Y.] 105, 77 N. Y. S. 97.

69, 70. American Steel House Co. v. Wilcox, 38 Misc. [N. Y.] 571, 77 N. Y. S. 1010.

71. Right to erect signs. McNamara v. Wilcox, 73 App. Div. [N. Y.] 451, 77 N. Y. S. 294.

72. Gushee v. New York, 42 App. Div. 37, 58 N. Y. S. 967.

73. Act construed to permit license for street railway on consideration of improving park. Philadelphia v. McManes, 175 Pa. 28.

74, 75. Restaurant. Gushee v. New York, 42 App. Div. 37, 58 N. Y. S. 967. Express subjection to control held to protect proper government. Id.

76. State v. Schweickardt, 109 Mo. 496.

77. Ackerman v. True, 31 Misc. 597, 66 N. Y. S. 140. Riverside Drive is part of Riverside Park and park board may grant building permit on abutting lot. Ackerman v. True, 31 Misc. 597, 66 N. Y. S. 140.

78. People v. Walsh, 96 Ill. 232, 36 Am. Rep. 135; West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215. Prior to Act of 1879 the park boards of Chicago could not do so (Kreigh v. Chicago, 86 Ill. 411), but thereafter they might (People v. Walsh, 96 Ill. 232, 36 Am. Rep. 135). Central park commissioners could not take streets not opened and laid out under L. 1865, c. 565, § 8; L. 1866, c. 357, § 7. In re Deering, 85 N. Y. 1.

79. In re Kingsbridge Road, 5 Hun [N. Y.] 146.

80, 81. West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215.

82, 83. West Chicago Park Com'rs v. McMullen, 134 Ill. 170, 10 L. R. A. 215.

84. McCormick v. South Park Com'rs, 150 Ill. 516; Wormser v. Brown, 149 N. Y. 163.

85. Broadbelt v. Loew, 162 N. Y. 542, 57 N. E. 1105, afg. 15 App. Div. 343, 44 N. Y. S. 159.

86. Consult generally such topics as Negligence, 4 Curr. L. 764; Buildings and Building Restrictions, 3 Curr. L. 572; Explosives and Inflammables (fireworks), 3 Curr. L. 1412.

in whatsoever respect the public has imposed a duty of care in respect of a park upon a city, it will be liable for the consequences of nonperformance,[87] proximately caused by such neglect or want of provision for safety.[88] If no duty is thus charged it is not liable.[89] Negligence in respect of such a duty is a question of fact.[90] With respect to nongovernmental or nonpublic instrumentalities maintained by a city within a park, it is not immune, thus, a city is bound to use ordinary care in surrounding with barriers a city reservoir placed in a public park.[91] The mere fact that a city derives profit from a park does not change the governmental character of its duty and immunity respecting injuries in parks,[92] but one unlawfully driving in a park for business is not thereby barred from recovery for negligence.[93]

Movable seats in a park are not an invitation to walk where it is forbidden,[94] and one who willfully does so cannot recover for resulting injury. A city is not liable for injuries resulting to a lessee's servant from defects in a park building leased in good order and put in exclusive control of the lessee. The lessee is.[95] It is not of itself unlawful to discharge fireworks from a square or park,[96] but negligence may intervene imposing liability,[97] and the facts evincing it are as in other cases for the jury;[98] but it may be inferred from the nature of an accident betokening their highly dangerous character.[99] A fireworks exhibitor is not liable for injury caused by a falling rocket discharged from a park if care was exercised to fire it in a safe direction.[1] No negligence is inferred merely from its fall in a street[2] and the firing thus from a park is not a nuisance irrespective of negligence,[3] nor is one standing in a street as a spectator entitled to the protection due to passersby.[4]

For direct injuries to property inflicted in course of the management of parks the remedy is tortwise and not under an eminent domain proceeding.[5]

A boulevard or parkway which affords ordinary street conveniences is a highway within the rule of liability for injuries due to defects therein in the means for travel,[6] and the law of highways applies;[7] but on the boulevarded portions, they being obviously withdrawn from travel, the city is not bound to see to the safety of travelers,[8] though it may be liable if it suffers or places thereon a dangerous thing which might probably injure a traveler.[9]

Where the park department is not independent of the municipality but merely

87. Falling of a limb from trees which it should have trimmed. Jones v. New Haven, 34 Conn. 1.

88. The slipping of his companion on the walk above him while trying to free herself from an entangling twig or branch not the construction of a walk or absence of a guard rail, was proximate cause. †Rhine v. Philadelphia, 24 Pa. Super. Ct. 564.

89. Clark v. Waltham, 128 Mass. 583; Steele v. Boston, 128 Mass. 583 (person struck by sled while on path set apart for coasting). Boy of 7 years waded out and was drowned in pond on common. Schauf's Adm'r v. Paducah, 106 Ky. 228, 50 S. W. 42.

90. Barthold v. Philadelphia, 154 Pa. 109 (defective wall around recently acquired pool).

91. City held to have exercised due care. Carey v. Kansas City [Mo.] 86 S. W. 438.

92, 93. Blair v. Granger, 24 R. I. 17, 51 A. 1042.

94. Falling into unguarded trench. Sheehan v. Boston, 171 Mass. 296, 50 N. E. 543.

95. Leaux v. New York, 87 App. Div. 405, 84 N. Y. S. 511.

96, 97, 98, 99. Dowell v. Guthrie, 99 Mo. 653, 17 Am. St. Rep. 598.

1, 2, 3, 4. Crowley v. Rochester Fireworks Co., 95 App. Div. 13, 88 N. Y. S. 483.

5. A statutory remedy provided in the case of a taking or injuring of property for parks does not apply to a tort wrought by floating timbers against plaintiff's dock. Fiske Wharf, etc., Co. v. Boston, 178 Mass. 526, 60 N. E. 7.

6. Burridge v. Detroit, 117 Mich. 557, 76 N. W. 84, 72 Am. St. Rep. 582, 42 L. R. A. 684, and other cases cited note 83 Am. St. Rep. 432.

7. See Highways and Streets, 3 Curr. L. 1593.

8, 9. Near the cross walk was a guy wire close to the ground which tripped plaintiff while "cutting" the corner. McDonald v. St. Paul, 82 Minn. 308, 84 N. W. 1022, 83 Am. St. Rep. 428. Similar facts were involved in †Martin v. Williamsport, 208 Pa. 590, 57 A. 1063.

of other departments, the city may be liable for its negligence.[10] If a park commissioner, however unlawfully, refuses to allow a licensee to remove personalty from the park, the commissioner individually, not the city, is guilty of conversion,[11] unless he retains it for the city.[12]

(§ 10) *B. Privately owned parks to which the public is invited.*—The proprietor must use reasonable care to the end that persons resorting there shall be safe[13] and that skillful persons be selected to conduct exhibitions therein,[14] and that visitors be apprised or guarded against dangerous devices[15] or such as in their nature are likely to be dangerous.[16] Reasonable and ordinary structural precautions and safeguards must be provided to protect visitors from forces which other visitors would be likely to set in motion.[17] Such are not delegable duties which may be committed to independent contractors.[18] For the negligence of such a contractor in manipulating appliances not naturally or inherently dangerous, the proprietor is not liable.[19] Reasonable care is all that is required of the keepers of amusement parks or like places of public resort.[20] The duty is not so high as that of carriers toward passengers.[21] The proprietor is liable for the negligence of his employes within the scope of their employment.[22] A visitor does not as matter of law assume the risk of carelessness of performers hired by the proprietor.[23] In a recent case a right of recovery was recognized in favor of one who, erroneously supposed to be an objectionable person, had been requested to depart from such a park.[24] The case is criticised as extending relief to an injury where no legal wrong was.[25] In an earlier but still recent case an indication of the contrary principle is discernible.[26] The proprietor is under no duty to find

10. Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622; Richards v. New York, 48 N. Y. Super. Ct. [16 J. & S.] 315.

11, 12. Napier v. Brooklyn, 41 App. Div. 274, 58 N. Y. S. 506.

13, 14. Sebeck v. Plattdentsche Volkfest Verein, 64 N. J. Law, 624, 81 Am. St. Rep. 512, 50 L. R. A. 199. In this case a barrier to nearer approach than thirty yards to an exhibition of fireworks or one which, at that distance would have intercepted a prematurely exploded bomb was held not necessary. Conradt v. Clauve, 93 Ind. 476, 47 Am. Rep. 388 (target shooting allowed on part of grounds and no warning given of course of bullets).

15. Richmond & M. R. Co. v. Moore, 94 Va. 493, 37 L. R. A. 258 (a pole released by a balloon ascension fell on plaintiff's intestate); Thompson v. Lowell, etc., R. Co., 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345 (flying missile at shooting exhibit). A roller coaster is not so inherently dangerous that the proprietor is bound to see that it is kept guarded against derailment. Knottnerus v. North Park St. R. Co., 93 Mich. 348, 17 L. R. A. 726.

16. Thompson v. Lowell, etc., St. R. Co., 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345.

17. †Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783. Failure to put netting between floor and railing of elevated stand to intercept bottles held not negligent in law. Id.

18. Thompson v. Lowell, etc., St. R. Co., 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345 (exhibition of shooting); Railway Co. v. Moore's Adm'r, 94 Va. 493, 37 L. R. A. 258 (balloon ascension); Sebeck v. Plattdentsche Volkfest Verein, 64 N. J. Law, 624, 81 Am. St. Rep. 512, 50 L. R. A. 199 (fireworks exhibition). Stage, target, and butts for a shooting exhibition held not details beyond duty of care resting on proprietor. Thompson v. Lowell, etc., St. R. Co., 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345.

19. Smith v. Benick, 87 Md. 610, 42 L. R. A. 277 (fall of a pole while being raised to support a balloon).

20. Hart v. Washington Park, 157 Ill. 9, 48 Am. St. Rep. 298, 29 L. R. A. 492; Lane v. Minnesota State Agricultural Soc., 62 Minn. 175, 29 L. R. A. 708; Dunn v. Brown County Agricultural Soc., 46 Ohio St. 93, 15 Am. St. Rep. 556, 1 L. R. A. 754; Mastad v. Brethren, 83 Minn. 40, 85 Am. St. Rep. 446, 53 L. R. A. 803; Richmond & M. R. Co. v. Moore's Adm'r, 94 Va. 493, 37 L. R. A. 258; Thompson v. Railroad Co., 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345; Sebeck v. Plattdeutsche Volkfest Verein, 64 N. J. Law, 624, 81 Am. St. Rep. 512, 50 L. R. A. 199; Fox v. Buffalo Park, 47 N. Y. S. 788; Schofield v. Wood, 170 Mass. 415.

21. †Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783.

22. Accident by the dropping of a beer bottle held to have been without the scope of employment of musician in an elevated band stand. †Williams v. Mineral City Park Ass'n [Iowa] 102 N. W. 783.

23. Thompson v. Lowell, etc., R. Co., 170 Mass. 577, 64 Am. St. Rep. 323, 40 L. R. A. 345.

24. Woman in a "street railway" park. †Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209.

25. See note 18 Harv. L. R. 153, and compare Torts, 4 Curr. L. ——

26. Hoagland v. Forest Park, etc., Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740. There the finder in rightful possession of

or care for lost as distinguished from forgotten property of his visitors[27] and cannot require the finder to surrender possession[28] or be ejected.[29]

It must be alleged wherein there was negligence respecting such grounds, unless the fact of injury is such as of itself to bespeak negligence.[30] One who pleads an invitation to such a place need not set out that he went there by the means which the invitation contemplated.[31]

PARLIAMENTARY LAW.[32-34]

A parliamentary body acts or adjourns by vote on questions proposed, hence the mere announcement by its presiding officer that it stands adjourned, no motion having been made or put, is a nullity[35] unless the disorder is so great that it has ceased to be a deliberative body.[36] The power to "preside" embraces such authority as is recognized by good parliamentary usage.[37] If a quorum be present a majority of it may act[38] and all members present may be counted to make a quorum.[39]

PAROL EVIDENCE, see latest topical index.

PARTIES.

§ 1. Definition and Classes (888).
§ 2. Who May or Must Sue (889). Joinder of Parties Plaintiff (889).
§ 3. Who May or Must be Sued (892).
§ 4. Designating and Describing Parties (893).
§ 5. Additional and Substituted Parties; Intervention (893). Substitution (895).
§ 6. Objection to Capacity and to Defects of Parties (896).

Scope.—Only general principles are here treated. For treatment in particular actions, or as controlled by relationship, see appropriate title.[40]

§ 1. *Definition and classes.*—Parties are the adversaries in an action seeking or resisting relief.[41] They stand as plaintiffs and defendants,[42] and in equity and under the reformed procedure co-defendants may so stand as to each other. In proceedings in rem or quasi in rem a party defendant is not essential.[43] Those who sue or are impleaded by name are "record" parties, while persons in interest

property lost in an amusement park was allowed to recover for having been arrested and ejected on his refusal to surrender the property. And the fact that the park proprietor assumed to care for lost and mislaid property and restore the same to the owner was ignored because the park proprietor was under no duty to so protect his other guests. A charge that the ejection was warranted was held erroneous. Id.

27, 28, 29. Hoagland v. Forest Park, etc., Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

30. The mere running away of a race horse which trampled plaintiff while in a part of a racing park where he was invited does not do so. Hart v. Washington Park Club, 157 Ill. 9, 48 Am. St. Rep. 298, 29 L. R. A. 492.

31. Richmond & M. R. Co. v. Moore, 94 Va. 493, 37 L. R. A. 258. This was a park provided by a street railway company to create traffic.

32, 33, 34. See 2 Curr. L. 1091. Proceedings in particular bodies differ. See Municipal Corporations, 4 Curr. L. 720; States, 2 Curr. L. 1703; Statutes, 2 Curr. L. 1707.

35. Election of clerk thereafter sustained. Attorney General v. Remick [N. H.] 58 A. 871.

36. Facts held not to show such a condition. Attorney General v. Remick [N. H.] 58 A. 871.

37. Attorney General v. Remick [N. H.] 58 A. 871.

38, 39. Commonwealth v. Fleming, 23 Pa. Super. Ct. 404.

40. Appeal and Review, 3 Curr. L. 167; Assignments, 3 Curr. L. 326; Bankruptcy, 3 Curr. L. 434; Corporations, 3 Curr. L. 880; Estates of Decedents, 3 Curr. L. 1238; Guardians ad Litem and Next Friends, 3 Curr. L. 1567; Guardianship, 3 Curr. L. 1569; Husband and Wife, 3 Curr. L. 1669; Wills, etc., 2 Curr. L. 2076; also such titles as Equity, 3 Curr. L. 1210; Ejectment, 3 Curr. L. 1157; Mandamus, 4 Curr. L. 506; Quo Warranto. 2 Curr. L. 1377; Replevin, etc., 2 Curr. L. 1514.

41. See Cyc. Law Dict. "Parties." One does not make himself a party to an action by becoming a party to a contract filed as a stipulation in the case, and included in the orders of the court made therein. Elliott v. Superior Ct. of San Diego County, 144 Cal. 501, 77 P. 1109.

42. See post, § 2.

43. See McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.

but not impleaded are parties "not of record."[44] They are also classified according to the character of their interest with respect to the action.[45]

§ 2. *Who may or must sue.*[46]—In the code states[47] every action must be prosecuted in the name of the real party in interest.[48] One having no interest in

44. See Cyc. Law Dict. "Parties," citing Taber v. Gardner, 6 Abb. Pr. [N. S.; N. Y.] 147.

45. **NOTE. Classes of parties:** "The parties to an action are sometimes divided into three classes. (1) Normal parties. (2) Necessary but not indispensable parties. These are persons having an interest in the controversy, who should be made parties, to the end that it may be entirely adjudicated and complete justice done. Their interests, however, are separable from those of the parties before the court, so that the court may proceed to final decree, and do justice therein, without affecting prejudicially the interests of others. They are usually referred to as proper parties. (3) Necessary and indispensable parties are those having an interest of such a nature that a final decree cannot be entered without either affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Shields v. Barrow, 17 How. 130, 15 Law. Ed. 158; Mechanics' Bank v. Seton, 1 Pet. 299, 7 Law. Ed. 152."—Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686.

46. See 2 Curr. L. 1092.

47. **Note.** As to who is real party in interest within the meaning of statutes defining parties by whom action must be brought, see note to Stewart v. Price [64 Kan. 191] in 64 L. R. A. 581.

NOTE. Recovery under code on contracts for benefit of third persons: A recent article makes the assertion that the code provision allowing the real party in interest to sue settles conclusively the question of recovery by the beneficiary under a contract made between other parties for his benefit. 'Suits on Contracts for the Benefit of Third Persons.' M. E. E. Kerr, 66 Alb. Law J. 312. The statement, moreover, is one that is frequently met. 7 Am. & Eng. Enc. Law 109; 15 Enc. Pl. & Pr. 717. That it in fact has not had this effect is shown by the state of the law on this subject in code states. When recovery has been allowed, it has frequently in code states, as in others, been based wholly on the general law and not at all on the code provision. Emmitt v. Brophy, 42 Ohio St. 82; Larson v. Cook, 85 Wis. 564. In some code states, however, the decisions have been put on the latter ground. Rice v. Savary, 22 Iowa, 470; Ellis v. Harrison, 104 Mo. 270. The reason this view is not the prevailing one is apparent when we consider the difficulty met with in construing the word 'interest.' If it is used in its popular sense, the provision leads logically to conclusions which even the courts so using it feel themselves bound to disapprove. For since an accidental beneficiary may in this sense be quite as deeply interested in the performance of a contract as an intended beneficiary, this construction, if followed, must inevitably result in giving a right of action to persons whose benefit under the contract, though material, was neither contemplated nor desired by the contractors. This is of course not the law. Wainwright v. Queens County Water Co., 78 Hun [N. Y.] 146; Chung Kee v. Davidson, 73 Cal. 522; Davis v. Clinton, etc., Co., 54 Iowa, 59, 37 Am. Rep. 185. That the courts do not consistently follow the popular construction is further shown by the fact that even in code states there are instances where a sole beneficiary has not been allowed to suo (Townsend v. Rackham, 143 N. Y. 516; Jefferson v. Asch, 53 Minn. 446; Vrooman v. Turner, 69 N. Y. 516), and that in New York the creditor cannot sue a firm on its obligation to pay the liabilities of an outgoing partner (Wheat v. Rice, 97 N. Y. 296). In all these cases the plaintiff has an interest in the popular sense, yet recovery is denied. The other and perhaps the preferable view is that the word 'interest' in the code is used in a legal sense. But if this is so, it cannot be said that any person has an interest, whose rights are recognized neither in law nor in equity. 15 Harv. L. Rev. 778. In this view the result of the enactment is merely to abolish so far as can be done the distinction between rights at law and in equity (Bliss, Code Pleading [2d Ed.] § 47), leaving it still to be decided whether a plaintiff aside from the code has any right, equitable or legal. 'No new right of action is created.' Harris, J., in Hodgman v. Western R. Co., 7 How. Pr. [N. Y.] 492. In the case of a sole beneficiary, it may be that an equitable right exists, founded on the fact that the promisee has no adequate remedy, and that both parties intended the beneficiary to have an enforceable right under the contract. This seems a possible explanation for Moore v. Darton, 4 De Gex & S. 517. If such a right should be granted by the courts of equity, the code would have the effect of changing it to a legal one. Aside from this consideration, which is at least doubtful, it is probable that the code provision has properly no effect on the enforcement of contracts for the benefit of a third person."—18 Harv. L. R. 141.

48. Burns' Ann. St. 1901, § 251. State v. Holt [Ind.] 71 N. E. 653. One to whom a sum was to be paid as part of consideration for conveyance between other persons may maintain action in her own name to enforce purchase-money lien, without assignment by grantor. Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229. The validity of an assignment of a foreign judgment not being questioned, the assignee thereof is the real party in interest entitled to sue thereon in his own name under Code Civ. Proc. § 1909. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693. A corporation for whose benefit funds have been subscribed may maintain an action to recover them from a person to whom they have been paid. Commercial Travelers' Home Ass'n v. McNamara, 42 Misc. 258, 86 N. Y. S. 608. A water company, incorporated to furnish water to its stockholders, and which made a contract with a land owner for a supply of water, may in its own name maintain an action against subsequent owners of the land to restrain a diversion of the water (construing Code Civ. Proc. §§ 367,

the subject-matter cannot maintain an action.[49] Parties not promisees in an express contract cannot sue thereon in their own names,[50] nor maintain an action of tort in respect of the breach of a duty arising solely out of the contract.[51] Public rights in action must be sued by the proper public functionary, or if he fails or refuses, a taxpayer may sue for the public;[52] but cannot, in his capacity as such, maintain a suit for the furtherance of corporate or private interests.[53]

Some statutes permit the trustee of an express trust to sue without joining the beneficiary.[54] Under such statutes it is optional with the trustee to sue in his own name, or join the beneficiary,[55] and the beneficiary, though not a necessary, may be a proper, party.[56]

An action brought in the name of one who is dead is wholly void.[57] In Illinois, the assignee of a chose in action must sue in the name of his assignor.[58]

Joinder of parties plaintiff.[59]—To warrant joinder of parties under the code, the complaint must state a cause of action in favor of all the plaintiffs, and it must appear that each of the plaintiffs has an interest in the subject of the action.[60] Thus in an action for damages to property, it must appear that the grievance is common to each, that the injury complained of was committed at the same time, by the same act, and that each party is interested in the same relief asked by the other, or some part of it.[61] These facts appearing, the parties may join, though their interest in the judgment may be unequal.[62] Parties whose rights grow out of the same contract may join.[63] Parties having separate

369, 809). Los Robles Water Co. v. Stoneman [Cal.] 79 P. 880. Under Code Civ. Proc. § 540, an owner of live stock shipped by agents in their own names may recover from the railroad company for delay in transportation. Summers v. Wabash R. Co. [Mo. App.] 79 S. W. 481. A solicitor cannot sue to recover money paid to a clerk of court for the benefit of distributees of a deceased person. Brooks v. Holton, 136 N. C. 306, 48 S. E. 737.

49. One not the holder of a claim cannot sue thereon without purchase or assignment. Ramseur v. Whelchel [S. C.] 49 S. E. 228. One member of partnership for operating a threshing machine cannot maintain an action against the county for loss of profits, the engine having been lost through an unsafe bridge, such partner having no property interest in the engine. Foster v. Lyon County Com'rs, 68 Kan. 164, 74 P. 595.

50. Miller v. Butler, 121 Ga. 758, 49 S. E. 754.

51. Conklin v. Staats [N. J. Err. & App.] 59 A. 144.

52. A taxpayer may sue as relator for the use of the county on the official bond of a county treasurer, on failure of county commissioners to bring the action. State v. Holt [Ind.] 71 N. E. 653. But an individual, with no separate and divisible interest in the subject-matter, cannot maintain a personal action on such bond. Id.

53. Ampt v. Cincinnati, 2 Ohio N. P. (N. S.) 489.

54. Husband alone could maintain action to recover funds left by him with a depositary for himself and wife as partners, where he took a receipt in his own name [Code Civ. Proc. § 449]. Meinhardt v. Excelsior Brewing Co., 90 N. Y. S. 642. Trustees of unincorporated association, afterwards incorporated, could maintain action on bond without joining corporation which authorized the trustees to sue for its benefit [Mills' Ann. Code, § 5]. Hecker v. Cook [Colo. App.] 78 P. 311. Beneficiaries under a trust deed are not necessary parties to a suit by the trustee to preserve the estate against claims. Miller v. Butler, 121 Ga. 758, 49 S. E. 754. Under Ky. Code Civ. Proc. § 21, authorizing a person with whom or in whose name a contract is made for the benefit of another to sue alone without joining the beneficiary, a court commissioner who sold land of a decedent's estate and took a sale bond payable to himself in his official capacity, may sue on the bond without making any creditor of the estate a party. French v. Bowling [Ky.] 85 S. W. 1182.

55. Construing Mills' Ann. Code, § 5. Hecker v. Cook [Colo. App.] 78 P. 311.

56. A township is a proper party in a suit in equity to enforce rights relative to a public cemetery held by the board of health in trust for the township. Oneida Tp. v. Allen [Mich.] 100 N. W. 441.

57. An action to revive a judgment, brought in the name of the judgment creditor after his death. Goreth v. Shipherd, 92 App. Div. 611, 86 N. Y. S. 849. In such case the declaration cannot be amended by substituting the name of the administrator. Karrick v. Wetmore, 22 App. D. C. 487.

58. Factor who sells in own name and advances price to owner. Ermeling v. Gibson Canning Co., 105 Ill. App. 196.

59. See 2 Curr. L. 1093, n. 46-48.

60. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625.

61. Owner of realty, and one operating a stone quarry thereon, properly joined in action for damages caused by damming up of water course. (Wife owned the land; husband operated quarry). American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625.

62. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625.

63. An insurer, who has paid a loss less

and distinct causes of action are improperly joined.[64] Separate creditors cannot join in an action against the debtor unless there be a joint interest in the thing demanded or a privity of contract.[65] Where such creditors have no interest in each other's claims, but have a common interest in annulling sales as fraudulent simulations, they should sue separately on their claims and then join in the suit to annul.[66] One of several promisees in a contract joint in form cannot maintain an action thereon without joining the other promisees.[67] A corporation is an indispensable party to a suit in equity by a stockholder in his own name to enforce rights of the corporation.[68] In equity one having a substantial beneficial interest in the subject-matter should be a party to the suit;[69] and all such parties should be joined in order that the court may make a final order and thereby prevent a multiplicity of suits.[70]

than the actual loss by fire and has taken a subrogation assignment for the sum paid, and the insured, may maintain a joint action at law against a wrongdoer who negligently caused the loss. Firemen's Fund Ins. Co. v. Oregon R. & Nav. Co. [Or.] 76 P. 1075. Where by contract under seal defendant agreed to repurchase certain stock transferred to two persons in severalty as part of purchase price of certain property, and repurchased from one but refused to repurchase from the other, an action at law was properly brought by both such persons on the contract, though for the sole benefit of one. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869.

64. Failure to deliver a message whereby father and daughter were not met at a train and had to walk in the rain and pay hotel bills gave them separate causes of action. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580. If a part of plaintiffs have one cause of action and the rest another, they must assert the same in separate suits. Miller v. Butler, 121 Ga. 758, 49 S. E. 754. Persons who have separately subscribed to induce defendant to locate a factory at a certain place cannot join in an action to recover subscriptions on defendant's failure to perform. Akins v. Hicks [Mo. App.] 83 S. W. 75. And an action brought by a proper and an improper relator must fail as to both for want of a common interest. State v. Holt [Ind.] 71 N. E. 653.

65, 66. Blum & Co. v. Wyly [La.] 36 So. 202.

67. In the absence of allegations and proof of a several interest, the language of the contract will control, and the promisees must all be joined. Fisher Textile Co. v. Perkins, 90 N. Y. S. 993.

Note. "Unlike promisors, the relationship of promisees is determined by both language and interest. Slingsby's Case, 5 Rep. 18; Sorsbie v. Park, 12 Mees. & W. 146. Seemingly when the language is clear and no contrary interest appears, the language will control (Wootton v. Steffenoni, 12 Mees. & W. 129, 134); but 'if the legal interest in the covenant and in the cause of action' is several, the contract is several though joint in terms (Wootton v. Cooke, Dyer, 337b; Shaw v. Sherwood, Cro. Eliz. 729; Wilkinson v. Lloyd, 2 Mod. 82; Withers v. Bircham, 3 Barn. & Cr. 255; Hees v. Nellis, 1 Thomp. & C. 118); and, if these interests be joint, the covenant is joint, though several in terms (Eccleston v. Clipshan, 1 Saund. 153, n. 1; Copen v. Barrows, 1 Gray [Mass.] 376). So where only the cause of action is joint, and the interest is several, suit must be brought jointly. Rolls v. Yates, Yelv. 177; Coryton v. Lithebye, 2 Saund. 115 (116a) and n. 12; Anderson v. Martindale, 1 East, 497; Foley v. Addenbrooke, 4 Q. B. 197. Contra, Tippett v. Hawley, 3 Mod. 203. Generally, where the interest is several, and the covenant in terms is joint and several, the action should be several (Owston v. Ogel, 13 East, 538) 'unless such construction be expressly excluded by the terms' (Sharp v. Conkling, 16 Vt. 355). But wherever promisees may be joined they must be. Petrie v. Bury, 3 Barn. & Cr. 353. On principle, it seems clear that as to joint or to several contracts, the intention should control with promisees as with promisors, and that the interest test should be applied only in cases of covenants, joint and several."—5 Columbia L. R. 245, commenting on Fisher Textile Co. v. Perkins, 90 N. Y. S. 993.

68. The alignment of the corporation as plaintiff or defendant is to be determined by the position of the corporation officers, whether they oppose or favor the object sought by the stockholder. Groel v. United Elec. Co., 132 F. 252. As to right of stockholders to sue, see Helliwell, Stock & Stockholders, §§ 403-417.

69. One who in fact makes a contract (though in the name of another) for the purchase of realty, and is the only party in interest, is a necessary party to a suit for specific performance. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097.

70. All persons claiming injury by the same acts or conditions and interested in the event of the suit. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625.

Note: The general rule in chancery is that all persons interested in the subject-matter of the litigation, whether legally or equitably interested, should be made parties so that the courts may settle all their rights at once and so avoid a multiplicity of suits. Willis v. Henderson, 5 Ill. 13, 38 Am. Dec. 120. But this, being a general rule, established for the convenient administration of justice, must not be adhered to in all cases, to which consistently with practical convenience, it is incapable of application. Cockburn v. Thompson, 16 Ves. Jr. 321. A party may therefore be bound by a decree in a suit to which he was not a party by the doctrine of representation. As to the applica-

§ 3. *Who may or must be sued.*[71]—Only persons whose rights in the subject-matter will be affected by the decree are necessary parties.[72] In a suit to annul a series of sales as fraudulent simulations, all vendors and vendees are, in Louisiana, necessary parties.[73] An action for damages for fraudulent misrepresentations of

tion of this doctrine to persons not in esse, see note to Rutledge v. Fishburne [66 S. C. 155, 44 S. E. 564] in 97 Am. St. Rep. 762. As to parties in equity, see, also, Equity, 3 Curr. L. 1210; Fletcher, Eq. Pl. & Pr. §§ 8-60.

71. See 2 Curr. L. 1093.

72. In actions concerning realty, purchasers pendente lite are not necessary parties. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664. A distributee who has been paid in full is not a necessary party to a suit involving the estate. Keith v. McCord, 140 Ala. 402, 37 So. 267; Union Sav. Bank & Trust Co. v. Smith, 4 Ohio C. C. (N. S.) 237. Original contractor is a necessary party in a proceeding under the mechanic's lien law to adjust rights of parties, and the equitable claim of a subcontractor, growing out of an unaccepted order on the owner of the building for the amount of a claim. Wheelock v. Huli [Iowa] 100 N. W. 863. All parties who acquire any right, title, interest or lien in or to real estate prior to the commencement of a suit to foreclose a mechanic's lien thereon and of which the party so foreclosing has actual or constructive notice at the time of beginning such suit, must be made parties thereto, or a sale of the land under a decree rendered therein will be as to such parties a nullity. Krotz v. Beck Lumber Co. [Ind. App.] 73 N. E. 273. Where, in an action for breach of a contract, defendant had a right to counterclaim an unpaid balance of the price and to enforce a lien therefor on a house and lot, he had also the right to bring in plaintiff's wife, legal title to the property being in her. Crosby v. Scott-Graff Lumber Co. [Minn.] 101 N. W. 610. A county condemned property and let a contract for the construction of a public work thereon. Held, it was the real party in interest entitled to defend a suit to enjoin use of the property for the intended purpose. Johnston v. O'Rourke & Co. [Tex. Civ. App.] 85 S. W. 501. Both members of a firm died pending negotiations for a contract to convey land, and subsequent to their death, one of the heirs obtained legal title through deeds of the others. Some of the heirs then brought suit to set aside their deeds for fraud. Held, the validity of their claims could not be determined in a suit against the vendee from the firm, to which such heirs were not parties. Wollenberg v. Rose [Or.] 78 P. 751. An officer of a corporation, charged with embezzlement of funds, is not a necessary party to a suit by his corporation to establish a trust as against one to whom be has turned over such funds; if joined he is only a formal party. White Swan Mines Co. v. Balliet, 134 F. 1004.

Rights in bonds, notes and other contracts: Validity of note cannot be adjudicated in an action where the holder of the note is not a party. Daugherty v. Curtis [Iowa] 97 N. W. 67. The holder of school district bonds is a necessary party to a suit to restrain the trustees from levying and collecting a tax to pay interest on said bonds, the validity of the bonds being in issue. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18. A contractor for the construction of a ditch, to whom bonds for the work had been executed, was a necessary party to a suit to enjoin the board of supervisors from levying or collecting taxes or issuing bonds. Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686. All obligors in a joint forthcoming bond in attachment must be joined in a suit thereon. But upon return of not found, plaintiff may be permitted to proceed as to those served. Young v. Joseph Bros. & Davidson [Neb.] 99 N. W. 522. A complaint by taxpayers alleging collusion of a county board with contractors in letting a road construction contract, and stating wherein the contractors failed to perform the contract according to its terms and that the rights of complainants were defrauded, justifies making the contractors defendants. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860. Where cancellation of contract to pay commission for sale of goods is sought, the purchaser is not an indispensable party, since rescission of the contract of sale is not sought. Warren v. Miller & Sons [Iowa] 99 N. W. 127. Plaintiff made a contract with several attorneys to brief a case in the supreme court, on a contingent fee. One of the attorneys collected and withheld the fee for which they prosecuted the case. Held, all the attorneys were proper parties in the action by plaintiff to recover balance due him. Harrison v. Murphy, 106 Mo. App. 465, 80 S. W. 724. Where a complaint stated a cause of action based on an express promise to pay, and not on a claim assigned to plaintiff, secured by bond which was not assigned, there was no necessity to join as defendant the obligee in the bond, plaintiff's assignor. Holmes v. Ely, 93 App. Div. 390, 87 N. Y. S. 712. In a suit to rescind a stock subscription, induced by fraudulent misrepresentation of directors of a corporation, and to recover the amount paid thereon, the directors were neither necessary nor proper parties. Mack v. Latta, 83 App. Div. 242, 82 N. Y. S. 130. In an action by a town for cancellation and delivery of notes alleged to have been given by selectmen for money borrowed without authority, and for the recovery of money paid thereon, the bank to which the notes were given, and other banks which claimed to be bona fide holders of some of the notes were mutually and jointly interested in the controversy, within the meaning of Conn. Gen. St. 1902, § 918, the same questions of law and fact being involved as to each, and hence were properly joined as defendants in a single action. Town of Fairfield v. Southport Nat. Bank [Conn.] 59 A. 513.

Wills: One who may become a legatee by a possible construction of a will should be made a party to a bill for the construction of the will. Waker v. Booraem [N. J. Eq.] 59 A. 451.

73. Blum & Co. v. Wyly [La.] 36 So. 202.

a member of a partnership may be brought against such partner alone; the other partners are not necessary parties, the action being based on fraud, not on a firm contract.[74]

Joinder of parties defendant.[75]—Joint tort feasors are properly joined.[76] Under some statutes, persons severally liable upon the same contract may be included in the same action at plaintiff's option.[77] The common-law rule requiring all persons jointly liable on a contract to be made parties in an action thereon and permitting recovery of a joint judgment only has been changed by statute in Minnesota except as to contracts made before passage of the act.[78] Persons against whom plaintiff's petition or complaint states separate and distinct causes of action are improperly joined.[79] If a complaint states a cause of action against one defendant, it will not be dismissed for misjoinder.[80]

§ 4. *Designating and describing parties.*[81]—The words "as trustees for the use of * * *" following the names of trustees suing alone are merely descriptio personarum.[82] Where an action cannot be brought against a trustee as such, but must be against him as an individual, the descriptive terms following his name are surplusage.[83] The words "a corporation" following plaintiff's name in the title of a case are merely descriptive and cannot be construed as an allegation of incorporation.[84] In an action for wrongful death by an administrator, a material variance in the name of the intestate as stated in the title and in the complaint is fatal.[85] Where an administratrix is, by order of court, made a party to a suit commenced by her decedent, no allegation of her official capacity is necessary.[86]

§ 5. *Additional and substituted parties; intervention.*[87]—Additional parties, whose presence is necessary if justice is to be done and the controversy determined, may be required to be brought into the suit,[88] and the court may stay

74. Hyde & Sons v. Lesser, 93 App. Div. 320, 87 N. Y. S. 878.

75. See 2 Curr. L. 1093.

76. A servant, injured by negligence of an elevator operator, while at work in the shaft, may join his master and the operator as defendants, the two being joint tort feasors. Lynch v. Elektron Mfg. Co., 94 App. Div. 408, 88 N. Y. S. 70. Joint wrongdoers held properly joined in action for libel. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68.

77. Civ. Code Proc. § 26. Kentucky Live Stock Breeders' Ass'n v. Miller [Ky.] 84 S. W. 301.

78. Gen. Laws 1897, c. 303, p. 563. Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638.

79. Petition setting out separate and distinct causes of action against different defendants demurrable for misjoinder. Van Dyke v. Van Dyke, 120 Ga. 984, 48 S. E. 380. Such pleading is demurrable in favor of either or both defendants. Livermore v. Norfolk County [Mass.] 71 N. E. 305. In an action for damages for obstruction of a right of way by a fence, built by a deceased and continued by his vendee, such vendee and the administrator of the deceased were improperly joined as parties, since the former would not be liable for damages before he purchased, and the estate would not be liable for damage caused by the present owner. Randall v. Brayton [R. I.] 58 A. 734.

80. So held under Conn. Gen. St. 1902, § 622, providing that no action shall be defeated by misjoinder of parties, but that parties misjoined may be dropped at any stage by order of the court. Town of Fairfield v. Southport Nat. Bank [Conn.] 59 A. 513.

81. See 2 Curr. L. 1094.

82. Hecker v. Cook [Colo. App.] 78 P. 311.

83. Massachusetts rule. Hampton v. Foster, 127 F. 468.

84. Boyce v. Augusta Camp No. 7,429, M. W. A. [Okl.] 78 P. 322.

85. The name "Ferdinand" and "Fernando" are not idem sonans, and one suing, if designated as administratrix of the estate of "Ferdinand" N. Armstrong, cannot maintain an action for the death of "Fernando" W. Armstrong. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604.

86. Noyes v. Young [Mont.] 79 P. 1063.

87. See 2 Curr. L. 1094.

88. It is the duty of the court to require others, whose presence is necessary to protect the rights of persons already in court, to be brought in [Kirby's Dig. § 6011]. Choctaw, etc., R. Co. v. McConnell & Co. [Ark.] 84 S. W. 1043. Absent parties may be joined by amendment if objection is timely. Oneida Tp. v. Allen [Mich.] 100 N. W. 441. A married woman suing a municipality for personal injuries may add her husband as a party during the trial, under Ball. Ann. Codes & St. § 4953. Davis v. Seattle [Wash.] 79 P. 784. In an equity proceeding, parties discovered to have an interest therein may be brought in even after final judgment, such judgment having been reversed and the

proceedings until this is done.[89] The court may refuse to direct that an additional party be brought in, if the resulting delay would be prejudicial.[90] Application to bring in additional parties must be made with reasonable diligence after notice of the necessity of bringing them in; an unreasonable, unexcused delay, prejudicial to other defendants, will bar the right.[91] An ex parte order, made without notice to plaintiff, granting defendant leave to file a cross complaint and make other parties named therein defendants, may be set aside by the judge without notice.[92] While new parties may be made to a suit by amendment to the writ, it is the duty of the court to scrupulously guard the rights of parties absent from the record, and to exercise discretion over amendments for their full protection.[93] Additional parties cannot be brought in by defendants for the purpose of litigating issues not raised in the original suit.[94]

Intervention[95] in modern practice is the proceeding taken by a person not a party by which he obtains induction into a pending action between other parties against their will.[96] The right and the power of the court to grant it may be controlled by statute.[97] The decision of the question whether the pleadings and the facts established sustain the application for intervention rests largely in the discretion of the court.[98] If it appears that the applicant has been guilty of laches, the right to intervene may be denied, or granted upon terms.[99] Leave to intervene in a case will not be granted after entry of a final decree unless such intervention is necessary to preserve some right which cannot otherwise be protected, or to avoid some complication, that is liable to arise.[1] So long as property

cause remanded. Bolsen v. Barber Asphalt Pav. Co. [Ky.] 82 S. W. 972. When it appears that other parties are necessary to a final determination of the action after the granting of a new trial, they may be brought in. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562. The code provision requiring a court to bring in parties whose presence is necessary to a complete determination of the controversy applies to equitable actions only. In conversion, court is not authorized to compel a third person, claimed by defendant to have legal title to the property, to be brought in. Ten Eyck v. Denison, 99 App. Div. 106, 91 N. Y. S. 169.

89. In all cases, the court has the right to arrest proceedings until necessary parties are brought into the suit, where justice requires that such a course be taken. Waker v. Booraem [N. J. Eq.] 59 A. 451. Where, in partition suit, a third party was shown to have an interest in the property, it was the court's duty to stay proceedings and require such person to be made a defendant. Latham v. Tombs [Tex. Civ. App.] 73 S. W. 1060.

See Stay of Proceedings, 2 Curr. L. 1736.

90. Where after a reargument, a child was born, whose interests were such that its joinder as a defendant was proper or even necessary, ordinarily, the court refused to delay proceedings longer, and entered judgment nunc pro tunc as of the date of a motion for judgment. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737.

91. Construing Gen. St. 1894, § 5178, relative to bringing in additional parties. Sundberg v. Goar, 92 Minn. 143, 99 N. W. 638.

92. Code Civ. Proc. §§ 389, 937. Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

93. Application for leave to amend by inserting name of assignor of insurance policy as plaintiff for use of assignees denied, such assignor being without the jurisdiction. Frank v. Union Cent. Life Ins. Co., 130 F. 224.

94. Defendants attempted to bring in third parties by a plea in reconvention. Lyons v. Fry, 112 La. 759, 36 So. 674. Where in an action by the state against a sheriff and his sureties, to recover taxes collected and not paid over, the petition did not charge theft or embezzlement, the sureties were not entitled to bring in as defendants a guaranty company which had furnished them a bond indemnifying them against embezzlement by the sheriff. United States Fidelity & Guaranty Co. v. Fossati [Tex.] 80 S. W. 74.

95. See 2 Curr. L. 1095, n. 73-76.

96. Draper v. Pratt, 43 Misc. 406, 89 N. Y. S. 356.

97. Code Civ. Proc. §§ 723, 452. Draper v. Pratt, 43 Misc. 406, 89 N. Y. S. 356. Where the applicant for intervention presents satisfactory proof to the court that the action involves the title to real or personal property, or is to recover a claim for injuries to real property and that the applicant has an interest in such property which is likely to be affected by the judgment, the court has no power to deny his application. Where in an action by the assignee of a bond and mortgage to foreclose, defendants deny the assignment, and allege payment, the action does not involve title to property, and a third person cannot intervene. Id. Where a motion to permit parties to intervene as defendants was granted, it was improper for the court to require the interveners to employ the same attorney retained by the original defendant. O'Connor v. Hendrick, 90 App. Div. 432, 86 N. Y. S. 1.

98, 99. Draper v. Pratt, 43 Misc. 406, 89 N. Y. S. 356.

1. After final decree prohibiting the

remains actually in judicial custody any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree.[2] Intervention will be denied where it would result in the ingrafting of a new suit upon the pending suit and would retard the trial of the main suit.[3]

Interveners must have some interest in the subject of the action, or a complete determination of the controversy must be impossible without their presence.[4] As a general rule the surety on a bond given in a judicial proceeding will not be permitted to intervene in the proceeding;[5] but where the principal is insolvent and does not defend in good faith, or where the surety has a defense peculiar to himself which the principal is under no legal obligation to plead, equity will permit him to intervene.[6] A voluntary intervener may voluntarily dismiss his petition of intervention, and withdrawing it is equivalent to dismissal.[7] By such dismissal, the intervener is no longer within the jurisdiction of the court and costs cannot be taxed against him.[8] One who intervenes in a special or collateral proceeding does not thereby become a party to the main action.[9]

Substitution.[10]—The real party in interest may be substituted for one suing to the use of such party.[11] The rule in actions ex contractu by which the name of the original plaintiff may be stricken and the cause allowed to proceed in the name of the usee, if the latter has a legal right to maintain the suit, does not apply in actions ex delicto.[12] A plaintiff suing as an individual cannot amend and sue as an executor, since that would amount to the substitution of a new plaintiff.[13] A suit begun in the name of a deceased plaintiff is a nullity, and the

Northern Securities Co. from voting the stock held by it in the two railroads, or paying dividends on such stock, application of a stockholder for leave to intervene to obtain further orders as to the distribution of the stock of the roads was denied. United States v. Northern Securities Co., 128 F. 808. Whether a merely proper party to an action should be permitted to intervene and defend after judgment, having had an opportunity to do so before judgment, is discretionary with the court. So held where wife with inchoate right of dower and homestead right in land sought to intervene after judgment in suit to foreclose mechanic's lien. Hunt v. McDonald [Wis.] 102 N. W. 318. In a suit in equity, petitioners claim title to land in fee; after decree interveners claim an undivided interest. Held proper to hear and determine their claims. Brown v. Brown [Neb.] 98 N. W. 718.

2. But no property was placed in judicial custody by the decree against the Northern Securities Co., which rendered valueless, for the purpose of carrying out the unlawful combination, the stock of the railroads concerned. United States v. Northern Securities Co., 128 F. 808.

3. Succession of Dauphin, 112 La. 106, 36 So. 287.

4. Code Civ. Proc. § 452. City of Ironwood v. Coffin, 39 Misc. 278, 79 N. Y. S. 502. Any person may be made a party who claims an interest in the controversy adverse to plaintiff, or who is necessary to a complete determination of the questions involved [Kirby's Dig. § 6006]. Choctaw, etc., R. Co. v. McConnell & Co. [Ark.] 84 S. W. 1043. In an action against a railway company for damages caused by construction of a road, parties who had agreed to indemnify the company against such claims, and who admitted their liability, were properly permitted to appear in the suit. Boyer v. St. Louis, etc., R. Co. [Tex. Civ. App.] 72 S. W. 1038. Under Bail. Ann. Codes & St. § 4846, a taxpayer in a school district has no interest in a contract between the state board of education and a publisher for use of the latter's books, such as to entitle him to intervene in a suit by the publisher for an alleged violation of the contract. Westland Pub. Co. v. Royal [Wash.] 78 P. 1096. The decree against the Northern Securities Co. being merely prohibitory, and not a mandatory injunction, and the government professing satisfaction with the decree, an individual stockholder could not intervene and obtain relief denied in the suit brought in behalf of the public. United States v. Northern Securities Co., 128 F. 808.

5, 6. Price v. Carlton, 121 Ga. 12, 48 S. E. 721.

7, 8. Guinn v. Iowa & St. L. R. Co. [Iowa] 101 N. W. 94.

9. Elliott v. Superior Ct. of San Diego County, 144 Cal. 501, 77 P. 1109.

10. See 2 Curr. L. 1095, n. 68-72. Compare Abatement and Revival, 3 Curr. L. 1.

11. An order substituting distributees of a decedent as parties plaintiff for their solicitor in an action to recover money paid a clerk of court for their benefit, and that the pleadings be reformed, held proper. Brooks v. Holton, 136 N. C. 306, 48 S. E. 737.

12. McEarchern & Co. v. Edmondson [Ga.] 49 S. E. 798.

13. There can be no such substitution under Maine statutes. Fleming v. Courtenay, 98 Me. 401, 57 A. 592.

declaration cannot be amended by substituting the administrator as plaintiff.[14] Where a new or different corporation succeeds to the liability of the original defendant, its substitution as defendant is proper,[15] and there can be no relief against the succeeding corporation unless it is made a party.[16] On the death of a party, the proper legal representative should be substituted.[17] If the subject-matter is real estate, the heir at law must be joined;[18] if only personalty is involved, the administrator should be made a party.[19] Substitution of another party as defendant will not be prevented by limitations, where the action was instituted against the original defendant in time.[20] Where the complaint states a sufficient cause of action, the fact that the parties who originally invoked the jurisdiction of the court subsequently appear on the record as defendants is immaterial.[21]

§ 6. *Objections to capacity and to defects of parties.*[22]—*Capacity to sue* pertains to the civil status of persons or corporations.[23] A plaintiff is presumed to have legal capacity to sue, and the burden is upon defendant in the first instance to show that such capacity does not exist.[24] If it does not appear on the face of the complaint, the objection can only be raised by answer.[25] It is waived by failure to raise it either by answer or demurrer.[26] An objection of want of capacity to sue does not include an objection that the action is not brought in the name of the real party in interest.[27]

Objections to defects of parties[28] must be raised in the manner provided by the practice acts,[29] as by special demurrer[30] or plea in abatement.[31] A defect

14. D. C. Code, § 399, allowing amendments in pending cases, cannot be so construed. Karrick v. Wetmore, 22 App. D. C. 487. This is the rule, even though the plaintiff was suing as assignor to the use of the assignee. Id.

15. Where a defendant corporation conveyed all its property pending suit, the purchasing corporation should be substituted for the original defendant. Commonwealth v. Newton [Mass.] 71 N. E. 699. Where pending a suit for personal injuries defendant corporation leased its property, the lessee assuming all obligations and liabilities, plaintiff was properly allowed to substitute the lessee corporation by amendment, under Rev. Laws, c. 173, § 48. McLaughlin v. West End St. R. Co. [Mass.] 71 N. E. 317.

16. Defendants, pending suit for infringement of patent, formed a corporation and conveyed rights to it. Held, no relief against the corporation, it not having been made a party. Corbin v. Taussig & Co., 132 F. 662.

17, 18, 19. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

20. McLaughlin v. West End St. R. Co. [Mass.] 71 N. E. 317.

21. Applied in creditors' suit. Harrigan v. Gilchrist [Wis.] 99 N. W. 909.

22. See 2 Curr. L. 1096, § 5. Consult Abatement and Revival, 3 Curr. L. 1.

23. See Corporations, 3 Curr. L. 880; Foreign Corporations, 3 Curr. L. 1455; Infants, 4 Curr. L. 92; Insane Persons, 4 Curr. L. 126; Husband and Wife, 3 Curr. L. 1669.

24. Boyce v. Augusta Camp, No. 7,429, M. W. A. [Okl.] 78 P. 322.

25. Want of capacity to sue as a corporation [Code Civ. Proc. § 433]. Los Angeles R. Co. v. Davies [Cal.] 79 P. 855. The objection is not raised by a general demurrer. Id.

26. Code Civ. Proc. §§ 430, 433, 434. Town of Susanville v. Long, 144 Cal. 362, 77 P. 987. Code Civ. Proc. §§ 498, 499. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693. Objection that interpleaders had no capacity to sue held waived by failure to demur, and by answering. Alexander v. Wade, 106 Mo. App. 141, 80 S. W. 19.

27. Boyce v. Augusta Camp No. 7,429, M. W. A. [Okl.] 78 P. 322; Logan v. Oklahoma Mills Co. [Okl.] 79 P. 103.

28. See 2 Curr. L. 1096, 1097.

29. An objection to parties should be raised as a part of the procedure in the case, and is not a proper subject for instructions. Worcester City Missionary Soc. v. Memorial Church, 186 Mass. 531, 72 N. E. 71. Defect in parties plaintiff, disclosed by plaintiff's evidence, cannot be taken advantage of by motion for new trial, after verdict. Young v. Stickney [Or.] 79 P. 345. A motion to compel an attorney to give security for costs, on the ground that he was the owner of part of plaintiff's cause of action, not sworn to, cannot be treated as an objection to the nonjoinder of the attorney as a party. International & G. N. R. Co. v. Reeves [Tex. Civ. App.] 79 S. W. 1099. Where a party makes a contract partly for his own benefit and partly for the benefit of another, the omission to join the latter in an action by the former to recover thereon is not available in aid of a motion for a nonsuit or for a directed verdict, the statutory notice of nonjoinder not having been given [Gen. St. p. 2539, § 37; P. L. 1903, p. 544, § 36]. Murray v. Pfeiffer [N. J. Err. & App.] 59 A. 147. The question of the right of an administratrix of the estate of a person to sue for the death of a person of a different name may be raised by demurrer to the complaint for want of facts to state a cause of action. Cleveland, etc., R. Co. v.

of parties, appearing on the face of the complaint, must be raised by demurrer.[32] Objections to defects of parties are waived by failure to raise the proper objection[33] at the proper time,[34] or by answering over after a demurrer has been overruled.[35] Nonjoinder of a party defendant is waived by defendant at whose request the action has been discontinued as to defendant not joined.[36] An objection that there was a misjoinder[37] or want of proper parties[38] cannot be raised for the first time on appeal; but an objection to the want of necessary parties may be so raised.[39]

Demurrer lies for misjoinder of parties plaintiff.[40] Misjoinder of another party is not a good ground of demurrer for a defendant against whom the record shows a good cause of action on a several liability.[41]

In Louisiana, the court will of its own motion notice a nonjoinder of proper parties.[42]

Pierce [Ind. App.] 72 N. E. 604. A demurrer to the nonjoinder of a party as a legatee under his grandfather's will does not raise the question as to his nonjoinder as a possible legatee under his great-grandfather's will in a suit to construe the latter. Waker v. Booraem [N. J. Eq.] 59 A. 451. A demurrer to a complaint on the ground that there is a defect of parties is insufficient unless it states specifically wherein such defects consist, and names the parties omitted. Anderson v. Dyer & Bro. [Minn.] 101 N. W. 1061.

30. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562. General demurrer does not raise nonjoinder of proper parties. Ray v. Pitman, 119 Ga. 678, 46 S. E. 849.

31. Nonjoinder of a party jointly liable on a contract can be used as a defense by the party sued thereon only when pleaded in abatement. Townsend v. Wheatland [Mass.] 71 N. E. 782. The question of nonjoinder of plaintiff's husband as a party in an action to recover rent held not to have been raised by the plea of the general issue. Morningstar v. Querens [Ala.] 37 So. 825.

32. Not by answer [Code Civ. Proc. § 498, subd. 6, § 499]. Hyde & Sons v. Lesser, 93 App. Div. 320, 87 N. Y. S. 873; Ward v. Smith, 95 App. Div. 432, 88 N. Y. S. 700.

33. Waiver by failure to raise objection by demurrer or answer [Code Civ. Proc. § 169]. Battle v. Columbia, N. & L. R. Co. [S. C.] 49 S. E. 849; Anderson v. Baughman [S. C.] 48 S. E. 38. Waiver by failure to demur specially. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562. Failure to demur and answering. Ward v. Smith, 95 App. Div. 432, 88 N. Y. S. 700. A general denial waives objection to a defect of parties defendant which does not appear on the face of the petition, under Rev. St. 1899, § 602. Dunnaway v. O'Reilly, 102 Mo. App. 718, 79 S. W. 1004. A defect or misjoinder of parties plaintiff, apparent on the face of the pleading, and not taken advantage of by demurrer, is waived by answering [Rev. St. 1899, § 598]. Van Stewart v. Miles, 105 Mo. App. 242, 79 S. W. 988. An objection to a defect of parties plaintiff cannot be raised by demurrer to plaintiff's evidence. Farmers' Bank of Dearborn v. Fudge [Mo. App.] 82 S. W. 1112. An objection that plaintiff's husband was not a party is waived by failure to raise the point by demurrer or answer [Code Civ. Proc. § 434]. Reclamation Dist. No. 551 v. Van Lobens Sels, 145 Cal. 181, 78 P. 638. Nonjoinder or defect in parties plaintiff, not raised by demurrer or answer, is waived [Mansf. Dig. Ark. §§ 5028, 5031; Ind. T. Ann. St. 1899, §§ 3233, 3236]. Gentry v. Singleton [C. C. A.] 128 F. 679. Where no exception was made to a petition, in an action for injuries to a wife, on the ground of joinder of the wife, the objection was waived. San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445. Under 2 Bali. Ann. Codes & St. §§ 4909, 4911, providing that where there is a defect of parties not appearing in the complaint objection shall be taken in the answer or deemed to be waived, where the complaint alleged that certain warrants sued on were issued to A, and he by his answer admitted this fact, but did not state that they were then owned by other parties, held, he waived the point. Criswell v. Directors of Everett School Dist. No. 24, 34 Wash. 420, 75 P. 984. A corporation purchased realty pending an action to set aside a fraudulent conveyance thereof, and was made a party to the action on its own application. Held, it could not complain that it had not been made a party on petition of plaintiff. Sinclair v. Auxiliary Realty Co. [Md.] 57 A. 664.

34. Judgment in justice court was against three persons, only two of whom appealed to county court. An objection that the third person was not joined, made for the first time in a motion for new trial, held unavailing. Miller v. Kinsel [Colo. App.] 78 P. 1075.

35. Guthiel Park Inv. Co. v. Town of Montclair [Colo.] 76 P. 1050.

36. Murphy v. Dobben [Mich.] 100 N. W. 891.

37. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869. Under Rev. St. 1899, § 672, a judgment in favor of plaintiff cannot be reversed for a misjoinder of parties plaintiff. Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036.

38. Oneida Tp. v. Allen [Mich.] 100 N. W. 441; Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686. Valid plea of nonjoinder not fatal to a judgment if not timely urged. Sicard v. Schwab, 112 La. 475, 36 So. 500.

39. Tod v. Crisman, 123 Iowa, 693, 99 N. W. 686.

40. Akins v. Hicks [Mo. App.] 83 S. W. 75.

41. Livermore v. Norfolk County [Mass.] 71 N. E. 305.

42. Blum & Co. v. Wyly [La.] 36 So. 202.

PARTITION.

§ 1. **Nature, Right and Propriety (898).** The Right and Parties Entitled (898). Possession (900). What May be Partitioned (900).

§ 2. **Procedure for Partition (900).** Jurisdiction and Venue (900). Notice (901). Necessary Parties (901). The Pleadings, Evidence, Proof, and Trial (901).

§ 3. **Decision, Judgment and Relief (902).** Determination of Adverse Interests (902). Adjustment of Claims Between the Parties (902). Costs (903). Attorney's Fees (903). Terms and Provisions of Decree (903). Operation and Effect of Decree (903). Setting Aside, New Trial, Appeal and Review (905).

§ 4. **Commissioners or Referees and Their Proceedings (905).**

§ 5. **Mode of Partition (905).** By Sale (906). Allotment (906). Owelty (906).

§ 6. **Sale and Proceedings Thereafter (907).**

§ 7. **Voluntary Partition (907).**

§ 1. *Nature, right and propriety.*[43]—The proceeding for partition is now largely a statutory remedy, and though ordinarily equitable, is in Texas a legal remedy.[44]

The right and parties entitled.[45]—One owning land in common with another has an absolute right to demand partition.[46] This right extends to all owning lands in common,[47] though their interest be for life only,[48] to the grantee of a beneficiary of a trust deed,[49] and to an heir of one whose estate is still unsettled,[50] the debts against the estate having been ascertained;[51] but, in the absence of statutory authority, remaindermen are not entitled to compulsory partition prior to the expiration of the particular estate,[52] and in states where the statutory

43. See 2 Curr. L. 1097.

44. Lee v. Wysong [C. C. A.] 128 F. 833.

45. See 2 Curr. L. 1098.

46. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806; Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115. Adult tenant in common. See Dee v. Dee, 212 Ill. 338, 72 N. E. 429. See 2 Curr. L. 1098, n. 10.

47. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76. A wife obtaining a divorce for husband's adultery and thereby obtaining a one-third interest in land conveyed by him is entitled to partition. Keith v. Mellenthin, 92 Minn. 527, 100 N. W. 366. In Illinois the complainant is required to show that he is the owner of an undivided interest in the property as tenant in common with the party or parties against whom he seeks partition. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622. See 2 Curr. L. 1098, n. 14-19. A bona fide purchaser of the legal title without notice has a right to partition. Martin v. Thomas [W. Va.] 49 S. E. 118.

Note: This last case holds that the possession by one heir who held a contract for the others' share was not notice of his equity. The contrary is held in Collum v. Sanger Bros. [Tex.] 82 S. W. 459. See discussion of "Notice from possession."—3 Mich. L. R. 246, 335.

48. Complainants alleged ownership in fee. One defendant claimed title. There were three life tenants; held error to direct verdict for defendants, but partition should have been adjudged between life tenants. Windham v. Howell, 68 S. C. 478, 47 S. E. 715.

49. A bill alleging that plaintiff had acquired the interest of one and a charge against the interest of another of the beneficiaries of a trust deed, which bill was accompanied by a deed conveying such interests, held, the estate having vested, to show a proper title to institute a suit for partition. Shipley v. Jacob Tome Institute [Md.] 58 A. 200.

50. Hall v. Gabbert, 213 Ill. 208, 72 N. E. 806. But if a sale is ordered, the chancellor should guard the funds so as to protect creditors. Id.

51. Wachter v. Doerr, 210 Ill. 242, 71 N. E. 401.

52. Cannot be partitioned until expiration of estate in curtesy. Croston v. Male [W. Va.] 49 S. E. 136.

Contra. Illinois: In this state they are entitled to partition (Dee v. Dee, 212 Ill. 338, 72 N. E. 429), though they are not entitled to possession (Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115). But see 2 Curr. L. 1098, n. 13.

NOTE. Partition of contingent interests: It was the invariable rule of the common law that estates in remainder or reversion could not be divided by proceedings in compulsory partition. This rule still prevails in England. Evans v. Bagshaw, L. R. 8 Eq. 469, afd. L. R. 5 App. Cas. 340, and generally throughout the United States, although there is some conflict of decision in this country because of the various state statutes. It is also well settled that in the absence of statutory provisions to the contrary, partition will not be awarded, either at law or in equity, of an estate held in remainder or reversion. Wilkinson v. Stuart, 74 Ala. 198; Evans v. Bagshaw, L. R. 8 Eq. 469. The reason for this rule is generally stated to be that tenants in reversion or remainder are not entitled to the possession, are in no respect inconvenienced or damnified by the undivided possession held by others, and consequently will not be permitted to interfere with tenants in possession, as they have no reason to interest themselves concerning the manner in which the estate of the tenant in possession is enjoyed. On the other hand the tenants in possession can compel partition only as to their particular estates and can do nothing toward effecting a severance of the estate in remainder or reversion. Freeman, Cotenancy and Partition, § 440.

authority exists, a life tenant in esse is regarded as the representative of remaindermen unborn at the date of the judgment.[53] Such imperative right is, however, limited where part of the estate is owned by infants, in which case partition will not be decreed unless beneficial to the minor,[54] nor will partition be awarded in violation of a condition or restriction imposed upon the estate by one through whom the petitioner claims,[55] nor is such a condition or restriction in the instrument conveying the estate invalid, as repugnant to the estate granted, or as against public policy.[56] That the interest of plaintiff is subject to a lien which can at any time be discharged and for whose payment the court is authorized to provide in its judgment does not deprive him of the right to maintain partition.[57] That a receiver is erroneously appointed to collect rents and profits does not affect petitioner's right.[58] One owning all the land,[59] or having no title,[60] estate[61] or interest[62] in the property, cannot maintain partition. Conditions precedent to the vesting of the estate must be complied with before partition can be had.[63]

Among the American cases which hold that a tenant for life, or a term of years, or under a lease in possession is not entitled to maintain compulsory partition against the reversioners, remaindermen or others having a future conditional interest in the estate may be cited: Seiders v. Giles, 141 Pa. 93; Petition of Hodgkinson, 12 Pick. [Mass.] 374; Matter of Miller, 90 N. C. 625; Parks v. Siler, 76 N. C. 191; Watson v. Watson, 3 Jones Eq. [N. C.] 400; Williams v. Hassell, 73 N. C. 174, 74 N. C. 434; Culver v. Culver, 2 Root [Conn.] 278; Baldwin v. Aldrich, 34 Vt. 526, 80 Am. Dec. 695; Zeigler v. Grim, 6 Watts [Pa.] 106; Brown v. Brown, 8 N. H. 94; Norment v. Wilson, 5 Humph. [Tenn.] 310; Robertson v. Robertson, 2 Swan [Tenn.] 196; Simmons v. MacAdaras. 6 Mo. App. 297. In some states by reason of special statutes the opposite rule prevails. Striker v. Mott, 2 Paige [N. Y.] 387, 22 Am. Dec. 646; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Brevoort v. Brevoort, 70 N. Y. 136; Sullivan v. Sullivan, 66 N. Y. 37.—From note to Aydlett v. Pendleton [N. C.] 32 Am. St. Rep. 776, 778.

53. Under Rev. St. 1845, p. 764, where remainderman was born after judgment finding extent of interests, held proceedings were not thereby rendered void. After death of life tenant the property, in this case, went to her heirs in fee. Sparks v. Clay [Mo.] 84 S. W. 40.

54. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

55. Cannot be made in contravention of a will. Rev. St. 1899, § 4383. Foreign will recorded in state of forum. Stevens v. Larwill [Mo. App.] 84 S. W. 113. Will giving testator's wife use of all his property during her life and at her decease to be divided among the children, held the language created an express condition against partition prior to the extinguishment of the particular estate. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

56. See Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

57. Attachment lien. McCarty v. Patterson [Mass.] 71 N. E. 112. Where owners in common conveyed property to a trustee to place a mortgage thereon to secure debts due from each of such owners, held partition could be had on termination of trust by payment of mortgage, though all the debts had not been paid and another mortgage had been placed on the property. Gardiner v. Cord, 145 Cal. 157, 78 P. 544.

58. McCarty v. Patterson [Mass.] 71 N. E. 112.

59. Suit to partition between owner and tenant who has violated lease. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

60. Dowress reserving timber in deed of life estate, held could not maintain an action for sale of all saw timber on the land and partition of proceeds. Garnett Smelting & Development Co. v. Watts, 140 Ala. 449, 37 So. 201. Question of title in partition being submitted to the jury and found for defendant, the case is properly dismissed. Kimbrell v. Page [S. C.] 49 S. E. 477. Under Rev. St. 1899, § 4383, providing that partition cannot be made in contravention of a will a court has no jurisdiction of a suit for the partition of devised lands, instituted by persons having no interest under the will, or who have assigned their interest. Stevens v. Larwill [Mo. App.] 84 S. W. 113. Bringing of such suit does not exclude jurisdiction of probate court over land involved. Id.

61. A widow being in the exclusive possession of the homestead and having an unassigned dower interest in other realty of her deceased husband cannot maintain partition against heirs of decedent. [Construing Rev. St. 1898, § 3101; Laws 1899, p. 613, c. 336; Laws 1903, p. 442, c. 280.] Ullrich v. Ullrich [Wis.] 101 N. W. 376.

62. Creditors or assignee of insolvent who has appropriated more than his share of the estate are not entitled to statutory partition. Koerner v. Pfaff, 2 Ohio N. P. (N. S.) 597. A trustee of "all the life estate" of the beneficiary has no interest entitling him to contest proceedings to partition the property among the remaindermen freed from the life estate, the beneficiary having consented thereto. Brillhart v. Mish [Md.] 58 A. 28.

63. Trust deed providing that estate should vest on death of grantor, "provided" that beneficiaries should be charged with advancements, held an account was not a condition precedent to partition, after death of grantor. Shipley v. Jacob Tome Institute [Md.] 58 A. 200.

In Louisiana a guardian suing for partition without the authorization of a family meeting, the sale may be ratified by a family meeting,[64] and the interest of a minor being involved, the adjudicatee of the property may demand such a meeting.[65] In the cases where the interests of minors are involved, failure to comply with the legal formalities renders the decree provisional, and a new partition may be demanded for the least lesion without suing to rescind the former decree.[66]

The statute of limitations never bars relief between tenants in common in an action of partition,[67] unless there be an ouster,[68] but it may be resorted to in such an action to establish interests in the property.[69] Ouster will be implied from the finding of the ultimate fact of the running of the statute.[70]

Possession.[71]—In order to maintain the suit, the complainant must have the possession or right to possession.[72]

What may be partitioned.[73]—A mineral claim, being an estate in freehold, is subject to partition.[74] The whole of a Mexican grant need not be included in a partition suit.[75]

Partition of the homestead[76] is a matter of statutory regulation, the rights varying in different states;[77] but the inhibition only has reference to the heirs of the decedent, and not to those claiming interest in the land through other titles.[78]

§ 2. *Procedure for partition.*[79]—The action is for the benefit of all persons interested in the property included in the complaint; hence the running of limitations as to them is stopped by the filing of the complaint.[80]

Jurisdiction and venue.[81]—The jurisdiction is ordinarily in courts of general chancery powers, but is sometimes concurrent in probate courts if a decedent's estate is to be partitioned.[82] A court dismissing a petition at the request of the petitioners and no appeal being taken, a second petition may be brought in another

64, 65. MacRae v. Smith, 112 La. 715, 36 So. 659.

66. Civ. Code, arts. 1399, 1400. Rhodes v. Cooper, 113 La. 600, 37 So. 527.

67. Rhodes v. Cooper, 113 La. 600, 37 So. 527; Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Code Civ. Proc. § 343, providing a four years' period of limitation, does not apply. Id.

68. Such action may be barred by the continued and uninterrupted separate possession of one of the heirs or joint owners for 30 years [Civ. Code, arts. 1304, 1305]. Rhodes v. Cooper, 113 La. 600, 37 So. 527.

69. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

70. Need not be specifically found. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

71. See 2 Curr. L. 1098.

72. Where testator devised land to wife for life, and, after her death, it was to be sold and the proceeds divided among the heirs, held the latter, on the death of the widow, could not maintain partition. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020. Where testator gave his wife the use of all his property during life or widowhood, and at her death the property to be divided among their children, held that in case of her marriage, the estate of the children would take effect in possession, and entitle them to partition. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

73. See 2 Curr. L. 1099.

74. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

75. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

76. See 2 Curr. L. 1099.

77. Homestead cannot be partitioned as between widow and heirs and purchaser at execution sale. Simpson v. Scroggins, 182 Mo. 560, 81 S. W. 1129.

78. A husband and wife owning land in severalty and putting improvements thereon with money borrowed by the community, and the widow, after the husband's debt, deeding the land in satisfaction of the debt, the property is subject to partition, though the heirs of the deceased husband are entitled to a homestead in his share of the property. King v. Summerville [Tex. Civ. App.] 80 S. W. 1050.

79. See 2 Curr. L. 1099.

80. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

81. See 2 Curr. L. 1099.

82. Massachusetts: Under Pub. St. 1882, c. 178, §§ 45, 48, the probate and superior courts have concurrent jurisdiction to partition realty of a deceased person, whether the latter's estate has been settled or is in course of settlement. McCarty v. Patterson [Mass.] 71 N. E. 112.

Texas: Where decedent was a joint owner of land, the probate court may partition the property between decedent's heirs and the other joint owners. Penn v. Case [Tex. Civ. App.] 81 S. W. 349. [It would have no jurisdiction to adjudicate the question of title. Id.]

court having concurrent jurisdiction.[83] A suit in partition is in New York regarded as a proceeding in rem, and the jurisdiction of the court is confined to the property described in the complaint.[84] A party cannot be heard, upon exceptions to the sale, to deny the jurisdiction of the court.[85] Jurisdiction of the person is as essential as jurisdiction of the subject-matter.[86]

Notice.[87]—All interested parties are entitled to notice and have a right to be heard.[88]

Necessary parties.[89]—All persons having an interest in the premises, of whatever nature or quality, and whether in possession or out of possession, are necessary parties.[90] A defendant in partition after the property has been sold is not a necessary party to a subsequent partition suit instituted by a purchaser against his wife by virtue of her inchoate dower interest.[91]

The pleadings, evidence, proof, and trial.[92]—The bill must allege possession,[93] and ownership,[94] must describe the land,[95] set forth the interests of the parties,[96] and in Florida must state, according to the best of the knowledge and belief of the complainant, the names and residences of the several owners.[97] A defective allegation of divisibility in the petition may be cured by the answer.[98] An amendment adding land to that described in the original complaint does not introduce a new cause of action, and its allowance is within the discretion of the court.[99] The answer must not seek affirmative relief unless the same be germane to the suit,[1] and setting forth the facts whereon it is claimed partition should be denied is sufficient for a determination of the equities of the case.[2] The petition reciting the rights of defendant, the answer, except as to cross prayers, need be no fuller

83. Probate and superior courts. McCarty v. Patterson [Mass.] 71 N. E. 112.

84. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76. See 2 Curr. L. 1097, n. 9.

85. Where life tenant filed answer consenting to partition and sale of property free from his estate. Brillhart v. Mish [Md.] 58 A. 28.

86. Unauthorized use of infant's name does not bind him. Underwood v. Deckard [Ind. App.] 70 N. E. 383.

87. See 2 Curr. L. 1099.

88. Where bill contained undenied allegation that certain parties were the owners of certain undivided interests in the land, held error to confirm an amicable partition, ignoring the interests of such parties, without giving them a right to be heard. Cotton v. Cash [Miss.] 37 So. 459. As to notice, see 2 Curr. L. 1099, n. 33.

89. See 2 Curr. L. 1099.

90. **Tenants in possession** held necessary parties. Wachter v. Doerr, 210 Ill. 242, 71 N. E. 401. Under Code Civ. Proc. § 1342, one having an **inchoate right of dower** in an undivided share in the property must be made a party. Hurley v. O'Neill [Mont.] 79 P. 242.

91. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520.

92. See 2 Curr. L. 1100, n. 41-46.

93. Where plaintiff alleged that he was the owner in fee and in possession of an undivided half of the property, and that defendant was the owner of an undivided half, a demurrer on the ground that the complaint did not allege that plaintiffs had an estate in possession is frivolous. Sprague v. Maxcy [Wis.] 100 N. W. 832. See 2 Curr. L. 1100, n. 44.

94. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800.

95. Description giving township, county and state, and describing the land as the "westerly one-half" of a designated lot and block, according to a specified recorded plat, is sufficient. Home Security Bldg. & Loan Ass'n v. Western Land & Title Co., 145 Cal. 217, 78 P. 626.

96. Hurd's Rev. St. 1899, p. 1255, c. 106. Wachter v. Doerr, 210 Ill. 242, 71 N. E. 401. Description of extent of dower interest held uncertain. Garnett Smelting & Development Co. v. Watts, 140 Ala. 449, 37 So. 201. Complaint describing chain of title and setting forth quantity or proportionate share of each held not demurrable. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722. See 2 Curr. L. 1100, n. 43.

97. Following statement as to name and residence of a corporation held sufficient. "Camp Phosphate Company, which is a Florida corporation." Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

98. Petition failing to allege that division could not be had without impairing the value of the property, the defect, if any, is cured by the answer denying that the land was susceptible of division without impairment. Taylor v. Webber [Ky.] 83 S. W. 567.

99. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

1. Petitioner seeking to charge his severed interest with his debts due defendants, their answer praying a judgment for their debts is germane to the petition. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

2. Answer and cross petition. Koerner v. Pfaff, 2 Ohio N. P. (N. S.) 597.

than the case which plaintiff makes.[3] The necessity for alleging and proving ownership is a concession of the defendant's right of denial and counterclaim.[4] An allegation of prior oral partition must be proven.[5] It is a variance from allegations of legal titles in fee to prove that one is equitable.[6]

In Florida one is not entitled to a jury trial.[7]

§ 3. *Decision, judgment and relief.*[8]—The answer and evidence disclosing the absence of a necessary party, the decree should not be entered,[9] and such person being known, the decree cannot reserve the interest of such party for future adjudication.[10]

Determination of adverse interests.[11]—The rights of adverse parties being put in issue in the partition suit, equity will determine the claims when to so do will avoid a multiplicity of suits,[12] though complainant has never had possession of any part of the land,[13] and regardless of the pendency of a prior action of ejectment brought by him;[14] but the partition suit cannot be used as a substitute for the action of ejectment, nor for the sole purpose of testing a legal title.[15] A proceeding for partition being in Texas one at law in which title may be determined, the legal title must prevail in the Federal courts for that state.[16] Both parties claiming from a common source, defendant cannot set up an outstanding title with which he is disconnected, and the owner of which is not in possession of the premises.[17] Cross bill is the proper method for seeking to have the deed under which plaintiff claims set aside.[18]

Adjustment of claims between the parties.[19]—Allowance must be made for the use and occupancy by one tenant beyond his individual interest,[20] though in New York this only applies where such tenant holds adversely to the others,[21] for rents and profits collected by him while in exclusive possession,[22] and for the payment of liens and taxes;[23] and to secure this allowance the one tenant is entitled to a lien on the other's share.[24] The claims of or against persons not notified[25] nor made parties[26] cannot be determined.

3. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

4. Hence defendant may inquire into the validity of the proceeding whereby the plaintiff acquired the title upon which he sues. Thibodeaux v. Thibodeaux, 112 La. 906, 36 So. 800. See topic Judgments, 4 Curr. L. 287.

5. Hurley v. O'Neill [Mont.] 79 P. 242.

6. There being an express allegation that the interests are all legal and titles in fee, a showing that one of the parties has an equitable interest is insufficient to sustain the suit. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

7. Construing constitutions and statutes. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

8. See 2 Curr. L. 1100.

9. Wachter v. Doerr, 210 Ill. 242, 71 N. E. 401; Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

10. Though it state that it appears from the evidence that defendant is in equity entitled to a conveyance from such third person. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

11. See 2 Curr. L. 1100.

12. Rights of adverse occupants. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. May settle all controversies as to the legal title and right of possession. Construing Rev. St. 1892, §§ 1490-1497. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722. In action by heirs for partition court will determine claims of unsecured creditors which have been allowed by probate court, though no sale has been had under Code Civ. Proc. § 2750, nor action brought against the heirs under § 1843. Hughes v. Golden, 44 Misc. 128, 89 N. Y. S. 765.

13. Girtman v. Starbuck [Fla.] 37 So. 731.

14. Place v. Rogers, 91 N. Y. S. 912.

15. Construing Rev. St. 1892, §§ 1490-1497. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

16. Lee v. Wysong [C. C. A.] 128 F. 833.

17. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722.

18. Cox v. Spurgin, 210 Ill. 398, 71 N. E. 456.

19. See 2 Curr. L. 1100.

20. That husband of such co-tenant occupied land with her does not limit her liability. Walker v. Williams [Miss.] 36 So. 450.

21. Willes v. Loomis, 94 App. Div. 67, 87 N. Y. S. 1086.

22. Cole v. Cole [N. J. Eq.] 59 A. 895.

23. Code 1892, § 3101. Walker v. Williams [Miss.] 36 So. 450. Taxes paid by one co-tenant are chargeable against the estate. Id.

24. Rents, taxes and improvements. Bennett v. Bennett [Miss.] 36 So. 452. If the inquiry as to rents goes behind the death of such co-tenant, the administrator of his es-

Costs.[27]—In partition cases the costs should be apportioned so that each party pays his equitable portion thereof, except such party as may interpose a substantial defense.[28]

Attorney's fees.[29]—Defendant being obliged to employ counsel to defend his interest, he should not be compelled to pay part of complainant's attorney's fees.[30] In the absence of express statutory authority, judgment for fees should not be rendered in name of the attorney,[31] but the right of the latter to receive fees to be taxed as costs is not dependent on final partition being effected in court.[32] Complainant being an attorney and acting as such in the suit, he is not entitled to attorney's fees.[33] In determining the value of the attorney's services, the court cannot on its own motion refer the matter to a committee of lawyers.[34] In Missouri, plaintiff stipulating with his attorney that the court may name the amount of the fee is sufficient to give it authority to do so.[35]

Terms and provisions of decree.[36]—The decree should provide for the protection of homestead and dower rights,[37] and being based on a valid agreement, its scope with relation to the pleadings is immaterial.[38] The land being described in the pleadings and findings, the judgment need not contain such description.[39] Decree failing to authorize a sale of the land to satisfy a charge against it, being a matter of omission not objected to on trial, the appellate court will order the trial court to supply the omission.[40]

Operation and effect of decree.[41]—In involuntary partition the law implies a

tate may be made a party unless administration is shown to be unnecessary. Id.

See, also, post, § 5, "Owelty."

25. It being alleged in the answer by one defendant, that one of the co-tenants had occupied and leased portions of the property, and collected and appropriated the rents, the issue so raised cannot be determined except by service of the answer on the co-defendants. Willes v. Loomis, 94 App. Div. 67, 87 N. Y. S. 1086.

26. Complainant is not entitled to an accounting of the estate of a common source of title, no representative of the estate being a party to the partition suit. Cole v. Cole [N. J. Eq.] 59 A. 895.

27. See 2 Curr. L. 1101.

28. The defense interposed should be substantial, not frivolous, though not necessarily successful. McMullen v. Reynolds, 105 Ill. App. 386. [This case is overruled as to the method of taxing costs by McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041.]

29. See 2 Curr. L. 1101.

30. Where bill omits necessary parties, held should not be compelled to bear such expense. Wachter v. Doerr, 210 Ill. 242, 71 N. E. 401. In such case decree ordering payment to be made from proceeds of sale is erroneous. Id. Where defendant contested form and extent of division. Fristoe v. Gillen [Ky.] 80 S. W. 823. Hurd's Rev. St. 1899, § 40, p. 1259. McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041. Under Hurd's Rev. St. 1901, c. 106, § 40, held error to allow such fee where defendant set up a good defense to a petition in the nature of a bill of review and for partition. Joest v. Adel, 209 Ill. 432, 70 N. E. 638.

31. Under Hurd's Rev. St. 1899, p. 1259, providing that the court may apportion the costs, including reasonable fees, the fees should be taxed like other costs. McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041, overruling 105 Ill. App. 386.

32. Case settled by amicable partition deeds. Edwards v. Whims, 2 Ohio N. P. (N. S.) 464.

33. Girtman v. Starbuck [Fla.] 37 So. 731.

34. McMullen v. Reynolds, 209 Ill. 504, 70 N. E. 1041. The members of such committee not being sworn, the practice is not only erroneous but their report is incompetent. Id.

35. This under Rev. St. 1899, § 4422, providing for the allowance of reasonable fees in partition cases. Forsee v. McGuire [Mo. App.] 83 S. W. 548. [The court intimates that such agreement is unnecessary to the exercise of such power.]

36. See 2 Curr. L. 1102.

37. Partition decree finding a party entitled to homestead and dower but failing to require commissioners to set-off and allot same if it could be consistently done with the interests of the parties, and if not then to appraise the value of each piece and report same to court, held erroneous under Hurd's Rev. St. 1901, c. 106, § 22. Joest v. Adel, 209 Ill. 432, 70 N. E. 638. Decree ordering sale of property free from defendant's homestead and dower interest, without defendant's written consent as required by Hurd's Rev. St. 1901, c. 106, § 22, held erroneous. Id. Homestead and dower having been allowed in the premises, a partition decree should not be entered in disregard thereof until leave had been granted to reopen and review the former decree. Id.

38. If it does not bind as an adjudication it is binding as an agreement. Perdue v. Perdue [Mo. App.] 81 S. W. 633.

39. Hanrick v. Hanrick [Tex.] 83 S. W. 181.

40. Pierson v. Glass [Tex. Civ. App.] 84 S. W. 272.

41. See 2 Curr. L. 1102.

warranty by each party of the title to the parts in severalty taken by the others;[42] this implied warranty covers the inchoate right of dower which the wife of one party has in the property, she failing to join or be joined in a manner sufficient to convey the same.[43] Lots on each side of a road being allotted to one of the tenants, he becomes seized in fee of the land so allotted, including the fee of the road, subject to the public easement.[44] Land being partitioned, the owners in fee take proportionate interests in the fee of the property out of which a life estate is assigned.[45]

Recitals are presumed to be true.[46] A decree adjudicating rights and interests of respective parties, ordering partition and appointing commissioners is interlocutory,[47] but a decree ordering a sale of the property by the commissioners, based upon their report that partition cannot be made without great prejudice to the owners, is generally, though not always, held to be final.[48] The decree determining the title is res judicata thereon,[49] and, though evidence in a subsequent partition suit involving the same land, it has no binding force as to facts incorrectly stated and incompatible with each other;[50] nor is it binding as to matters not in issue and not passed on.[51] Involuntary partition is conclusive against a coparcener who afterwards gets an adverse title to that which was partitioned off to others.[52] At least it is so as to adverse titles which were in any way represented

42. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520.

NOTE. Implied warranties: In the principal case, which was one for involuntary partition, the court states that the rule applies in both voluntary and involuntary cases, citing Freeman, Co-Tenancy and Partition, § 533. Mr. Tiffany in his work on Real Property shows that this is not always true, and states the rule as follows: "Upon a compulsory partition at common law between co-parceners, a warranty was implied in favor of each on the part of the others that the title to the part of the land received by him was good, it not being considered just that one compelled to be a party to a partition should suffer thereby, and the statute of 31 Hen. VIII, c. 1, provided that the same right should accrue to joint tenants and tenants in common in case of compulsory partition. Rawle, Covenants, § 277; Litt, § 241. See Jones v. Bigstaff, 95 Ky. 395, 44 Am. St. Rep. 245; Grigsby v. Peak, 68 Tex. 235, 2 Am. St. Rep. 487. In the case of voluntary partition, however, a warranty was not implied, either as between co-parceners, joint tenants, or tenants in common, the reason on which such a warranty was based in the case of a compulsory partition being entirely absent. Rawle, Covenants, § 277; Morrice's Case, 6 Coke, 12b, 6 Gray's Cas. 668; Rector v. Waugh, 17 Mo. 13; Beardsley v. Knight, 10 Vt. 185, 33 Am. Dec. 193; Weiser v. Weiser, 5 Watts [Pa.] 279; Roundtree v. Denson, 59 Wis. 522. Occasionally, however, the courts have implied a warranty upon a voluntary partition. Huntley v. Cline, 93 N. C. 458; Venable v. Beauchamp, 3 Dana [Ky.] 321, 28 Am. Dec. 74; Morris v. Harris, 9 Gill [Md.] 26." 1 Tiffany on Real Property, § 174, p. 404.

43. Defendant in original partition suit held not entitled to claim proceeds free from wife's inchoate right of dower, she not being a party to the first suit, though a party to the second. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520.

44. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608.

45. Contention that widow's interest in fee under certain conveyances from other heirs was set out of lands other than that in which dower was assigned held unsustainable. Cronkhite v. Strain, 210 Ill. 331, 71 N. E. 392.

46. The judgment reciting that a minor was represented by a guardian ad litem and that the guardian qualified, it is not void, though the record fail to show service on the infant. Penn v. Case [Tex. Civ. App.] 81 S. W. 349.

47. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722. [See case for authorities pro and con.]

48. Camp Phosphate Co. v. Anderson [Fla.] 37 So. 722. [See case for authorities pro and con.]

Contra: Decree of sale and orders regarding fund held not final so as to be res judicata of defendant's interest, and not to entitle him to his portion of the proceeds without deduction for his wife's dower interest, she not being a party to the partition suit. Reed v. Reed, 25 Ky. L. R. 2324, 80 S. W. 520.

49. Place v. Rogers, 91 N. Y. S. 912. See 2 Curr. L. 1102, n. 68.

50. Cronkhite v. Strain, 210 Ill. 331, 71 N. E. 392. See topic Former Adjudication, 3 Curr. L. 1476.

51. Judgment entered by agreement setting off part of community property to widow, and reciting that she should retain her homestead interest therein and improvements thereon, held not to divest her of her title in fee. Drew v. Morris [Tex. Civ. App.] 82 S. W. 321.

52, 53, 54. Carter v. White, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853, with monographic note "The Effect of Compulsory Partition," page 864. In this case and especially in the note [101 Am. St. Rep. 864], it is pointed out that the ordinary rules of res adjudicata meet the question. Its difficul-

in the suit;[53] and in the various statutory forms of the remedy it settles every title which the remedy admits to inquiry.[54] On appeal, the record being silent, the court will presume that the rights of the parties have changed so that a former suit will not operate as a bar.[55]

Setting aside, new trial, appeal and review.[56]—Infants, who are only represented by guardians ad litem, may have a fraudulent decree set aside upon their becoming of age and doing equity in regard to the property received by them.[57] In some states the mode of obtaining a new trial in partition suits is, by statute, made the same as in civil causes.[58] An appeal lies from a final decree,[59] and the action is triable de novo in the appellate court.[60]

§ 4. *Commissioners or referees and their proceedings.*[61]—Commissioners ought not to be appointed without a prior or contemporaneous adjudication as to the interests of the parties, fixing the shares or other interests to which they are entitled.[62] Notice must be given by them to the parties.[63] They need not report the money value of the lands partitioned, or of any share or lot thereof assigned by them.[64] The report being proper on its face, every reasonable presumption is indulged in in favor of its fairness,[65] the ordinary rules of construction applying.[66] Partition, being an equitable proceeding, the court may modify the report;[67] but objection to it cannot be made for the first time on appeal.[68] The burden of proving grounds for setting aside and vacating report of commissioners is on the party making the motion.[69]

§ 5. *Mode of partition.*[70]—Heirs may insist upon the partition in entirety of the property inherited by them.[71]

ties lie in the fact that the old partition in chancery served only to sever and locate the ownership of the coparceners, while the modern extensions of the remedial scope of partition embrace many questions of title as well as possession, and permit the division of plurally owned estates of a character not partible in equity. See, also, 3 Curr. L. 1478, n. 5; Id. 1480, n. 13; Id. 1485, n. 50, 51; Id. 1487, n. 56, 64, 66; and see Former Determination of Title in Distribution Decree, 3 Curr. L. 1489.

55. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

56. See 2 Curr. L. 1102.

57. Where adults fraudulently represented that land was indivisible and had it sold to them for one-fifth of its value. Taylor v. Webber, 26 Ky. L. R. 1199, 83 S. W. 567.

58. Burns' Ann. St. 1901, § 1202; Horner's Ann. St. 1901, § 1188. Hence motion for new trial is proper where it is claimed that the court erred in refusing a trial of the issues joined on the pleadings, and in rendering a judgment over objection without hearing evidence. If the motion is overruled, the ruling may be assigned as error. Van Buskirk v. Stover, 162 Ind. 448, 70 N. E. 520. See 2 Curr. L. 1102, n. 71.

59. An appeal lies from a judgment decreeing partition of which one of the parties, not a co-owner, is usufructuary. Maguire v. Fluker, 112 La. 76, 36 So. 231.

60. James v. James, 35 Wash. 650, 77 P. 1080.

61. Sec 2 Curr. L. 1102.

62. Croston v. Male [W. Va.] 49 S. E. 136.

63. Although the statute does not require it. Wamsley v. Mill Creek Coal & Lumber Co. [W. Va.] 49 S. E. 141.

64. Wamsley v. Mill Creek Coal & Lumber Co. [W. Va.] 49 S. E. 141. In partitioning timber and coal lands, commissioners are not required to report the extent of the coal deposits, and the acreage, quantity and quality of timber, considered by them in arriving at their report. Id.

65. That one commissioner admitted that he was not present all the time and did not know much about the report held insufficient to impeach the latter. Cross v. Cross [W. Va.] 49 S. E. 129.

66. Where complaint described the interest in the fee of the street, and commissioners were directed to partition the property, so as to carry out as far as possible a former invalid partition proceeding, and the commissioners reported that they had complied with this direction, held one-half fee of street was included in award of abutting lots. Mott v. Eno, 97 App. Div. 580, 90 N. Y. S. 608. Report allowing A. "lot 4," and V. "lot 6," and describing passways on both lots, held all of lot 4 was allotted to A. with a restriction only of a passway for the benefit of lot 6. Wayland v. Browning, 26 Ky. L. R. 485, 82 S. W. 234.

67. Shearer v. Shearer [Iowa] 101 N. W. 175.

68. Report that land was not susceptible of division. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

69. Van Buskirk v. Stover, 162 Ind. 448, 70 N. E. 520.

70. See 2 Curr. L. 1103.

71. They cannot be forced to a partition of specific properties in successive actions, and all properties, wherever situated, must be brought in. Maguire v. Fluker, 112 La. 76, 36 So. 231.

By sale.—In the absence of a statute authorizing it, a sale cannot be had in partition proceedings.[72] To warrant a compulsory sale, it must appear that division cannot be conveniently made in specie,[73] or would be inequitable or impossible without injury to the owners.[74] Whether the aggregate value of the several tracts when the property is divided and distributed will be materially less than the value of such property if held by one person is a fair test by which to determine whether or not the interests of the parties will be promoted by the sale.[75] In Kentucky the estate must be in possession;[76] but the possession of one joint owner is, in the absence of any adverse claim by him, the possession of all,[77] and the right to a sale and division of the proceeds depends upon the value of the several interests[78] at the time the sale is sought to be made.[79] In the absence of clear proof of error, the appellate court will not overthrow an adjudication of the trial court as to the propriety of a sale.[80]

Allotment.[81]—Where one co-tenant has improved an amount of land equal to his share, such land should be awarded to him, the remainder being unimproved.[82] When a subdivision of one parcenary share is to be made among infants, their shares may be laid off together at the election of their guardians, or for want of such election, by direction of the court, and without such election or direction, the commissioners may so do.[83] Upon a bill alleging facts sufficient to show a right to have partition and praying for general relief, a court may decree a division in kind, though there be no specific prayer for it in the bill.[84]

Owelty.—A co-tenant being awarded land upon which he has placed improvements, and such land exceeding the remainder in value in a state of nature, con-

72. Croston v. Male [W. Va.] 49 S. E. 136. Such a statute is contrary to the common law and American jurisprudence, and a court cannot by reason thereof take a citizen's freehold away for light or trivial causes, though full and adequate compensation be paid. Id.

73. Croston v. Male [W. Va.] 49 S. E. 136. Meagreness of area in some or all of the shares, as where a small tract of land is to be divided among a number of people, and the existence of dower and curtesy estates in the land do not per se make partition inconvenient. To warrant compulsory sale in such case it must appear that the interests of all the owners will be promoted thereby. Id.

74. Summer resort, the chief value of which was a mineral spring, held indivisible. Gill v. Lane, 26 Ky. L. R. 267, 80 S. W. 1176. Partition by licitation cannot be had where it will defeat Act No. 152, p. 99, of 1844, enacted for the protection of the survivor of the community. Succession of Glancey, 112 La. 430, 36 So. 483. The mere fact that there is no spot on the land allotted one of the parties which suits him for a location of a house should not compel a sale of the entire tract. Shearer v. Shearer [Iowa] 101 N. W. 175. Under Code Civ. Proc. § 1355, where partition cannot be made without great prejudice to owners, the court may order a sale thereof. Hurley v. O'Neill [Mont.] 79 P. 242. The petition asking for a division in kind or if that be impracticable for a sale and division of the proceeds, held sale is proper, there being evidence that the land was not of a uniform value or character. Carpenter v. Coats, 183 Mo. 52, 81 S. W. 1089. See 2 Curr. L. 1103, n. 85.

75. Croston v. Male [W. Va.] 49 S. E. 136.

76. Cestuis que trust being given a vested interest in possession, they are in possession of the property within the meaning of Civ. Code Prac. § 490, subsec. 2, providing for a sale of an estate "in possession," which cannot be divided without materially impairing its value. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931. A remainder interest is not property in possession within Civ. Code Proc. § 490, subsec. 2. Berry v. Lewis, 26 Ky. L. R. 530, 82 S. W. 252.

77. Heirs of an intestate and purchasers from them, holding present vested interests in the property. Stone v. Burge, 26 Ky. L. R. 1060, 83 S. W. 139.

78. Under Civ. Code Prac. § 490, subsec. 1, sale cannot be had where share of life tenant exceeds $100. Berry v. Lewis, 26 Ky. L. R. 530, 82 S. W. 252. Nor can such sale be had under Code, § 496, subsec. 2, where the complainant has a share exceeding $100 in value. The purpose of such subsection is to protect the owner of a share worth less than $100. Id. [Ky.] 84 S. W. 526.

79. Construing Civ. Code Prac. § 490, subsec. 1. The language does not apply to the value of the interest at the time it was acquired. Berry v. Lewis, 26 Ky. L. R. 530, 82 S. W. 252.

80. Croston v. Male [W. Va.] 49 S. E. 136.

81. See 2 Curr. L. 1103.

82. Where one co-tenant cleared farm land. Bennett v. Bennett [Miss.] 36 So. 452. [See post, subdivision Owelty.]

83. Croston v. Male [W. Va.] 49 S. E. 136. If shares are subject to a dower interest, it may be made contiguous to such shares, when the part assigned for dower is not divided subject thereto. Id.

84. Croston v. Male [W. Va.] 49 S. E. 136.

tribution should be ordered,[85] and the owelty will be lien on the share charged.[86] Presumptions and limitations run against a judgment for owelty.[87]

§ 6. *Sale and proceedings thereafter. Mode and conduct, confirmation, setting aside and opening.*[88]—A sale ought not to be decreed without a prior or contemporaneous adjudication as to the interests of the parties, fixing the shares or other interests to which they are entitled.[89]

Notice of sale is generally required,[90] and the sale must conform to the decree.[91] City property being held and used as one lot, it should be sold as such.[92] In Missouri, under the revision of 1845, failure to render an order of substitution on sale of property was only a matter of error, and did not deprive the court of jurisdiction.[93]

The court ordering the sale is the only one that can revoke it on the ground of an irregularity;[94] but in the absence of intervening rights of third parties, equity will set aside the sale and final judgment and order a resale, one of the parties being fraudulently deprived of his rights.[95]

Protection of purchaser.—A bona fide purchaser at the sale will be protected.[96] Mere knowledge of pending litigation in equity does not invalidate the purchase so long as the decree for sale remains unrevoked.[97]

Charges and liens.[98]—A sale in partition being made, a creditor may come in by petition to have his debt paid out of the proceeds.[99] A bill for partition by the grantee of an infant beneficiary of a trust deed, being accompanied by a certified copy of the trust deed, charges against the plaintiff's grantor's interest can be shown by answer and proof.[100]

§ 7. *Voluntary partition.*[101]—Mutual partition deeds carry no title but op-

85. Bennett v. Bennett [Miss.] 36 So. 452.

86. 2 Tiffany, Real Prop. 1287.

87. Ex parte Smith, 134 N. C. 495, 47 S. E. 16. Proceeding to issue execution thereon is an action. Id.

88. See 2 Curr. L. 1103. See, also, Judicial Sales, 4 Curr. L. 321.

89. Croston v. Male [W. Va.] 49 S. E. 136. It is reversible error to decree a sale without such an adjudication if there is any uncertainty as to the interests of the parties. Id. Infant defendants excepting to the report of a referee who was appointed to determine the interests of the parties are entitled to have their interests determined before sale. Though the construction of a will is involved, which construction presents difficulties. Dwight v. Lawrence, 90 N. Y. S. 970.

90. Decree requiring three weeks publication of notice of sale, publication on Nov. 10th, sale to take place on the succeeding Dec. 1st, is a trivial defect and insufficient to avoid the sale. Brillhart v. Mish [Md.] 58 A. 28.

91. Decree partitioning land, foreclosing mortgage and ordering land to be sold in tracts, a sale in solido is unauthorized and will be set aside. Smith v. Sparks, 162 Ind. 270, 70 N. E. 253.

92. Though it was originally two lots, there being no evidence that to sell it as two lots would be manifestly to the interests of the parties. Kiernan v. Lynch, 112 La. 555, 36 So. 588.

93. Sparks v. Clay [Mo.] 84 S. W. 40.

94. Cannot attack the sale in a collateral proceeding. Where decree was obtained without notice to party objecting. Tobin v. Larkin [Mass.] 72 N. E. 985.

95. Where property was bid in for an inadequate price, held sale would be set aside, petitioner being fraudulently and wrongfully deprived of funds by the other parties, whereby she was unable to bid a higher price. Schwaman v. Truax [N. Y.] 71 N. E. 464.

96. Code Civ. Proc. § 1323. Place v. Rogers, 91 N. Y. S. 912. The trustees appointed to make the sale, representing that the purchaser will take title free from certain mortgages, the purchaser is entitled to have the mortgages satisfied from the purchase money, or be relieved from his purchase. Brillhart v. Mish [Md.] 58 A. 28. Where no notice was given a person interested, the sale will not be treated as void unless it is alleged that the purchaser was a party to the wrong or had knowledge of it. Tobin v. Larkin [Mass.] 72 N. E. 985. Ex parte partition proceeding by father and his grantee and sale of property to latter for a consideration which did not pass to children, held not to equitably estop them from asserting their rights against the grantee. Underwood v. Deckard [Ind. App.] 70 N. E. 383.

97. Tobin v. Larkin [Mass.] 72 N. E. 985.

98. See 2 Curr. L. 1104. See ante, § 5, "Owelty."

99. McKinley v. Coe [N. J. Eq.] 57 A. 1030. Under Gen. St. p. 2984, par. 20, a sale being made free from liens, a creditor having an equitable lien on the land may enforce it against the proceeds. Id.

100. Shipley v. Jacob Tome Institute [Md.] 58 A. 200.

101. See 2 Curr. L. 1105.

erate merely as a severance of the unity of possession.[102] The owners of a fee subject to a life estate, by partitioning the same, end the co-tenancy of the fee, and each may take title to the life interest in his own portion and hold the entire estate adversely to the others.[103] One acquiescing in and allowing another to act upon a parol partition is estopped from questioning it as void under the statute of frauds.[104] A minor agreeing to partition land, the agreement is voidable only.[105]

PARTNERSHIP.

§ 1. **What Constitutes (908).** Essential Elements (909). Intent as Test (910). Who May Become Partners (910). Formalities of Contract of Partnership (910). Stockholders in Illegal or Defective Corporations (910). Evidence (910). Questions of Fact (911). Partnerships as to Third Persons (911).
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§ 8. **Limited Partnerships (927).**

This article does not deal with joint stock companies,[1] with joint adventures,[2] nor with the effect of bankruptcy on the rights or liabilities of the partners.[3]

§ 1. *What constitutes. Definition and kinds.*[4]—Where two or more parties are engaged in a joint business enterprise, to which they contribute either capital, skill or labor, upon an understanding, tacit or otherwise, that they will share in common the profits accruing therefrom, they are partners in fact and in law, both between themselves and as to creditors.[5] An unincorporated stock syndicate for the future sale of real estate is a partnership.[6] As to the partnership indebtedness, the firm is a personality distinct from the members who compose it.[7]

102. Where a wife was one of the tenants in common, the husband is only entitled to curtesy in land so conveyed. Harrington v. Rawls, 136 N. C. 65, 48 S. E. 571.

103. McCullough v. Finley [Kan.] 77 P. 696.

104. Where the agreement was followed by exclusive possession, payment of taxes and permanent improvement of the land. McCullough v. Finley [Kan.] 77 P. 696.

NOTE. Validity of parol partitions: See 2 Curr. L. 1105, n. 16, where the subject is fully discussed.

105. Becomes binding on a failure to disaffirm within a reasonable time after majority. McCullough v. Finley [Kan.] 77 P. 696.

1. See topic Joint Stock Companies, 4 Curr. L. 280.

2. See topic Joint Adventures, 4 Curr. L. 280.

3. See topic Bankruptcy, 3 Curr. L. 434.

4. See 2 Curr. L. 1106.

5. In re Beckwith & Co., 130 F. 475.

6. Milligan v. Mackinlay, 209 Ill. 358, 70 N. E. 685.

7. While a wife cannot be a surety for her husband, yet she can be surety of a partner to secure advances made to a partnership of which her husband is a member. Stothart v. Hardie & Co., 110 La. 696, 34 So. 740. That a firm borrows money from the wife of one of the partners does not merge the lender's right to it into that of her husband. Loan took place before passage of married woman's act. Held also that lender could sue firm for recovery of such money after the passage of the act. Parker v. Parker, 25 Ky. L. R. 2193, 80 S. W. 209.

A trading partnership is one which buys and sells. But buying and selling need not be its sole purpose, nor even its most characteristic feature.[8]

Essential elements.[9]—The essential elements of every true partnership are a contract between the partners,[10] and a joint ownership of the profits.[11] Merely sharing in the profits while prima facie evidence of the existence of the relation[12] is not conclusive thereof, and when the profits are taken as compensation for services rendered does not create a partnership.[13] Joint capital is not necessary,[14] though a community of interest in the partnership property is essential.[15] Sharing gross returns does not create a partnership.[16] A contract under which the principle of delectus personam can be disregarded is not one of partnership.[17]

8. Firm taking and executing plumbing contracts is a trading partnership. Marsh v. Wheeler [Conn.] 59 A. 410. A partnership engaged in the insurance, real estate and collecting business is of the noncommercial or nontrading class. Schele v. Wagner [Ind.] 71 N. E. 127.

9. See 2 Curr. L. 1106.

10. A partnership is formed by act of the parties, not by operation of law. Egan v. Wirth [R. I.] 58 A. 987.

11. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582. Contract between a firm and a corporation engaged in the same line of business, providing that each could buy from the other at cost price, and also that each should pay to the other at the end of each year, a sum of money equal to a designated percentage of its gross profits, held not a partnership. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462. Where seven persons hired a cheesemaker and rented a factory owned by three of the parties, the expenses and profits to be divided in proportion to the amount of milk furnished by each, held a partnership. Sullivan v. Sullivan [Wis.] 99 N. W. 1022. A written agreement whereby one party furnished the capital and another the time and labor to conduct the business, the profits to be equally divided, held to conclusively show a partnership. Lapp v. Clark's Adm'r [Ky.] 85 S. W. 717. Owner of business selling it and allowing the buyer to continue the business and buy goods in the seller's name, held a partnership relation did not exist between the two. Hartford Fire Ins. Co. v. McClain [Ky.] 85 S. W. 699.

12. Glore v. Dawson, 106 Mo. App. 107, 80 S. W. 55; Gentry v. Singleton [C. C. A.] 128 F. 679; Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462 [see case for discussion of cases on subject].

13. Smythe's Estate v. Evans, 209 Ill. 376, 70 N. E. 906; Agnew v. Montgomery [Neb.] 99 N. W. 820; Lance v. Butler, 135 N. C. 419, 47 S. E. 488; Dawson Nat. Bank v. Ward, 120 Ga. 861, 48 S. E. 313; Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582; Gentry v. Singleton [C. C. A.] 128 F. 679. The one receiving the profits not incurring any liability for losses. Smith v. Dunn, 44 Misc. 288, 89 N. Y. S. 881. Where one agrees to share profits with another who is to assist him in buying cattle, under a contract with a third party, there is no partnership relation. Bauer v. Wilson [Tex. Civ. App.] 79 S. W. 364. A written instrument, "It is agreed that G. draws $50 per month and half of net profits and profits to remain in business unless we sell out or disagree and then money is due G. at once," signed by both G. and D., held not to constitute a partnership as a matter of law. Glore v. Dawson, 106 Mo. App. 107, 80 S. W. 55.

14. One may furnish capital, another experience. Buckingham v. First Nat. Bank [C. C. A.] 131 F. 192. That one partner fails to furnish a share of the cash necessary to launch the enterprise is insufficient to destroy his interest. McCabe v. Sinclair [N. J. Eq.] 58 A. 412.

15. [The term "community of interest" is often used by writers on the subject as meaning "joint capital." See Shumaker on Part. § 22, p. 72. The above use must be distinguished therefrom. Ed.]

An agreement between a landlord and tenant by which the landlord was to receive as rent a proportion of the proceeds of grain and hogs raised by the latter does not constitute a partnership. Randall v. Ditch, 123 Iowa, 582, 99 N. W. 190. A partnership does not exist regarding animals and crops as to which the interests of the parties are in shares. Beatty v. Clarkson [Mo. App.] 83 S. W. 1033. Patentee owning 90 per cent of stock of a corporation organized to manufacture patented article by entering into an agreement with another whereby the latter furnished capital to the company and leased property therefor in his own name, held not to constitute a partnership. Volney v. Nixon [N. J. Eq.] 58 A. 75. Permitting lender to share in profits which might be made upon the sale of collateral held not to make him a partner with the borrower. Slater v. Van der Hoogt, 23 App. D. C. 417. An agreement to share in the profits of the sales of land is not enough to constitute a partnership. McKinley v. Lloyd, 128 F. 519. Where plaintiff agreed to secure defendant's release as surety on a note for a certain sum to be paid him for his services, held an agreement between plaintiff and a third party whereby the latter, in consideration of one-half of the amount to be paid plaintiff, agreed to join in executing a new note, held not to create a partnership. Ryan v. Riddle [Mo. App.] 82 S. W. 1117.

16. That a cropper furnishes the labor necessary to the making of the crops and is to receive a portion thereof as compensation does not render him a partner having an undivided interest in the crop. De Loach v. Delk, 119 Ga. 884, 47 S. E. 204. Contract allowing one on payment of royalties to manufacture and sell a patented article is not one of partnership. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665.

17. Where one joint owner of land farmed it, the other paying for half his time, ex-

In order to create a *mining partnership,* it is necessary that there be an agreement to work the mine for the joint profit of the parties,[18] and the mere use of property so obtained for partnership purposes does not convert it into partnership assets, in the absence of an agreement to make it partnership property.[19]

Intent as test.[20]—The true test as to the existence of the partnership relation is the intent of the parties as evidenced by their agreement and acts done thereunder.[21]

Who may become partners.[22]—Firms may become partners as well as individuals,[23] but in the absence of statutory authorization, corporations have no power to enter into partnership either with each other or with individuals;[24] but one dealing with a partnership so formed can not take advantage of such fact.[25]

Formalities of contract of partnership.[26]—In the absence of statutory provisions to the contrary, the partnership agreement may be oral.[27] It is not essential that there be a particular partnership name.[28]

Stockholders in illegal or defective corporations.[29]—The subscribers for stock in a proposed,[30] or the stockholders in an illegal,[31] corporation are liable as partners, though the latter, as between themselves and the defective corporation, are not so liable unless they have knowledge of the defect and take part in the management of the business.[32] The unauthorized change of the name of a corporation will not render the stockholders liable as partners for liabilities subsequently accruing.[33]

Evidence.[34]—Declarations[35] or admissions of a partner are admissible to prove a partnership against him,[36] but, as a general rule, mere declarations of an

pense and marketing the produce, held not partners. Logan v. Oklahoma Mill Co. [Okl.] 79 P. 103. Mother and son owning separate property by leasing same to one party do not become partners. Price v. Grice [Idaho] 79 P. 387

18. Contract for locating and developing mining claims for the parties' equal benefit, each to furnish labor and supplies, but not extending to working the mines on joint account, does not create a partnership. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195. See, also, Barringer and Adams, Mines and Mining, p. 750.

19. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195.

20. See 2 Curr. L. 1107.

21. Shea v. Nilima [C. C. A.] 133 F. 209; Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462. Partnership cannot be formed without an intention on the part of the parties to enter into that relation. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890. Signing loose sheets of paper held not subscribing to articles of co-partnership with the intent of becoming a partner, otherwise where sheet was attached to articles. Moore v. Dickson, 121 Wis. 591, 99 N. W. 322. Evidence is admissible to show that a clause in a note limiting liability of three makers to one-third each was intended to avoid a liability as partners. Wheaton v. Bartlett, 105 Ill. App. 326. See 2 Curr. L. 1107, n. 15, 16.

22. See 2 Curr. L. 1107.

23. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890.

24. Ohio corporation held not to have the power. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462. Unauthorized formation of partnership by corporations, see Clark & M. Corp. §§ 213, 214.

25. Huguenot Mills v. Jempson & Co., 68 S. C. 363, 47 S. E. 687.

26. See 2 Curr. L. 1108.

27. McCabe v. Sinclair [N. J. Eq.] 58 A. 412. Oral prospecting and mining partnership held valid. Shea v. Nilima [C. C. A.] 133 F. 209. See 2 Curr. L. 1108, n. 24 and topic Frauds. Statute of, 3 Curr. L. 1527.

28. Sullivan v. Sullivan [Wis.] 99 N. W. 1022. See 2 Curr. L. 1108, n. 23.

29. See 2 Curr. L. 1108.

30. Mt. Carmel Tel. Co. v. Mt. Carmel & F. Tel. Co. [Ky.] 84 S. W. 515.

31. Name of corporation changed without complying with legal requirements. Robinson v. First Nat. Bank [Tex. Civ. App.] 79 S. W. 103.

32. Bolton v. Prather [Tex. Civ. App.] 80 S. W. 666. On demanding recission of sale of stock to them, they are not to be held responsible as partners for the mismanagement of the affairs of the corporation. Id.

Effect of failure to incorporate, see Clark & M. Corp. § 78.

33. Robinson v. First Nat. Bank [Tex.] 82 S. W. 505.

34. See 2 Curr. L. 1108.

35. Where one backed up another in the latter's business and several times stated that he was a special partner in business held sufficient to show the existence of the partnership relation. In re Beckwith & Co., 130 F. 475.

36. See 2 Curr. L. 1108, n. 35. Alleged partner who was not served, held not to admit membership in firm by appearing without answering. State v. McMaster [N. D.] 99 N. W. 58. Litigating such question without claiming the appearance as an admission is a waiver thereof. Id.

Where a complaint alleges that defendants are partners, and the answer admits that they are partners in "a limited sense," held an admission of the existence of the part-

alleged partner are inadmissible for the purpose of showing a partnership with another,[37] even to corroborate a prima facie case of partnership.[38] In proving the existence of a partnership, evidence that an alleged partner shortly before the creation of the partnership transferred his property to his wife is without probative force.[39] That real property is held in the joint names of several owners,[40] or that a business is carried on under a name distinct from the persons engaged therein,[41] is not proof of a partnership between the parties.

Questions of fact.[42]—Partnership is a fact which may be made out from circumstantial as well as direct evidence,[43] and its existence being disputed, it is to be determined as a question of fact.[44]

Partnerships as to third persons.[45]—One who advisedly permits the representation that he is a member of a partnership, or so represents himself to a person doing business with the firm, he will be treated as a partner as to that person, the latter being deceived by the representation.[46]

§ 2. *Firm name, trade-mark, and good will.*[47]—A continuing partner acquires the exclusive right to use the firm name,[48] and if a partner, upon entering a firm, agrees that the name of the latter should be the same as that under which he formerly conducted business, the property right to the name passes to the

nership. Spool Cotton Co. v. King, 68 S. C. 196, 46 S. E. 1005. Where a complaint alleges that defendants are partners in a certain line, evidence that that kind of goods were bought by the firm and a part returned to the seller, establishes the allegation. Id.

37. Providence Mach. Co. v. Browning [S. C.] 49 S. E. 325; Robinson v. First Nat. Bank [Tex.] 82 S. W. 505, rvg. 79 S. W. 103.

38. Robinson v. First Nat. Bank [Tex.] 82 S. W. 505.

Note: While there is a paucity of authority on this point, it is suggested that the better reason tends to the admissibility of such testimony. After establishment of a prima facie case, conduct and it would seem declarations, of the partners, tending to show the existence of a partnership, would seem to be within the res gestae rule [Ed.].

39. Robinson v. First Nat. Bank [Tex.] 82 S. W. 505, rvg. 79 S. W. 103.

40. In absence of proof, they are deemed joint tenants or tenants in common. Jones v. De Camp, 2 Ohio N. P. (N. S.) 133.

41. "Elmendorf & Co." does not necessarily import a partnership. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582.

42. See 2 Curr. L. 1110.

43. Fechteler v. Palm Bros. & Co. [C. C. A.] 133 F. 462.

44. Cassidy v. Saline County Bank [Okl.] 78 P. 324. The court determining such issue, and the evidence reasonably sustaining its findings, the latter will not be disturbed on appeal. Id.

Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333; Cassidy v. Saline County Bank [Okl.] 78 P. 324. Though all the defendants allege that one was not a partner. Providence Mach. Co. v. Browning, 68 S. C. 1, 46 S. E. 550. In the absence of an entire lack of evidence tending to show the creation of a partnership. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890. See 2 Curr. L. 1110, n. 47.

Evidence held sufficient to show relation (2 Curr. L. 1109, n. 34): Where father told son he would take him as a partner, and changed the firm name, bank account, etc., held to create a partnership, though son's name continued on the pay roll with other employes and father at one time stated that he regarded the transaction as a joke. In re Muller, 96 App. Div. 619, 88 N. Y. S. 673. Contract construed and clause inconsistent with the idea of a partnership held to relate merely to the management of the business, and did not deprive the agreement of its effect as a partnership. Marcus v. Segeal, 94 App. Div. 326, 88 N. Y. S. 64.

Evidence held insufficient to show that contract of employment was one of partnership, or that plaintiff placed goods in store as a partner. Ehrlich v. Brucker, 121 Wis. 495, 99 N. W. 213. Evidence held to warrant dismissal of action to recover half of the property left by decedent on ground of alleged partnership between plaintiff and decedent. Gillett v. Sweeney [Neb.] 97 N. W. 795. That ancillary administrator of deceased partner never assumed active relations towards the business conducted by the surviving partner is sufficient to show that the ancillary administrator and the surviving partners are not partners. Egan v. Wirth [R. I.] 58 A. 987. See 2 Curr. L. 1109, n. 34.

45. See 2 Curr. L. 1110.

46. Gamble v. Grether [Mo. App.] 83 S. W. 306; Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333; Lighthiser v. Allison [Md.] 59 A. 182. Corporation contracting under a name which would ordinarily indicate a partnership, held the members were estopped to deny that they were not liable as partners. Hamilton v. Davis, 90 N. Y. S. 370. See 2 Curr. L. 1110, n. 49-51.

47. See 2 Curr. L. 1110. See, also, topics Good Will, 3 Curr. L. 1562, and Trade-Marks and Trade-Names, 2 Curr. L. 1881.

48. Although no express mention is made of such name in the agreement of dissolution. Steinfeld v. National Shirt Waist Co., 90 N. Y. S. 964. If the retiring partner uses the name, the continuing partner is entitled to a preliminary injunction until his rights can be determined. Id.

firm.[49] A firm may enjoin another engaged in a like business at the same place from using the partnership's trade-name,[50] and the motive of the party appropriating the name is immaterial, the test of illegality being the probable and ordinary consequences of the act.[51] Statutory provisions regulating the use of firm names exist in some of the states.[52] That one carries on his business under a fictitious co-partnership name in violation of a statute does not prevent his recovering upon an executory contract.[53]

A partnership having regular customers, a locality, and a distinctive name, a good will exists which is an asset of commercial value,[54] and upon the dissolution of a partnership the continuing partners may become estopped to deny that it possesses such a value.[55] The retiring partner does not waive his right thereto by making a demand for his share of the assets, without specifying the items of the partnership property,[56] nor is the fact that the good will is difficult of appraisement a legal reason for denying him an appraisal.[57] A sale of the good will of a firm does not impair the right of a surviving partner to thereafter use his own name in the same business.[58] A surviving partner by continuing the business may acquire a good will of his own, which he may sell without accounting to the estate of his deceased partner.[59]

§ 3. *Firm capital and property. In general.*[60]—Real estate purchased with partnership funds[61] and used in the firm business[62] is partnership property. The

49. Though not distinctly enumerated. Moore v. Rawson, 185 Mass. 264, 70 N. E. 64.

50. Where corporation used name. Nesne v. Sundet [Minn.] 101 N. W. 490.

51. Nesne v. Sundet [Minn.] 101 N. W. 490.

52. Civ. Code, §§ 3280, 3281, requiring a partnership doing business under a name not revealing the names of the owners to register the same, do not apply to the sole owner of a business which has for its name the owner's surname followed by the words "Furniture & Carpet Co." Lander v. Sheehan [Mont.] 79 P. 406.

53. Construing Pen. Code, § 363. McArdle v. Thames Iron Works, 96 App. Div. 139, 89 N. Y. S. 485.

54. Moore v. Rawson, 185 Mass. 264, 70 N. E. 64. Good will of firm manufacturing farm implements held to be worth $35,000. Rowell v. Rowell [Wis.] 99 N. W. 473.

55. Continuing members who have forcibly and wrongfully appropriated the partnership property, of which the good will was a part, are estopped to so deny. Moore v. Rawson, 185 Mass. 264, 70 N. E. 64.

56, 57. Moore v. Rawson, 185 Mass. 264, 70 N. E. 64.

58. Rowell v. Rowell [Wis.] 99 N. W. 473.

NOTE. Right of a partner to use his name in business after sale of partnership: The general rule may be stated that so far as a firm name serves to designate the establishment, and not merely existing individuals, it belongs to the partnership, and can be transferred to a stranger purchasing the business. So far as that name merely consists of the names of existing individuals, there is not such property in it as to prevent the surviving or outgoing partners from using their own names to describe themselves in a new business, so long as they do not, either by the structure of a new firm name or otherwise, convey the idea of their identity with or succession to the old concern. Meanwhile the successors to the old business must not, without express agreement, so use the old firm name as to convey the idea that the retiring individuals are still connected with it. This rule was originally put on the ground that thereby pecuniary liability might fall upon the retiring partner, but other grounds of equal importance support it, such, for example, that his reputation may suffer by reason of inferiority of goods or dishonorable business conduct, to which he is thereby made ostensibly a party. Fish Bros. W. Co. v. La Belle W. Co., 82 Wis. 546, 561, 52 N. W. 595, 33 Am. St. Rep. 72, 16 L. R. A. 453; Williams v. Farrand, 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161; Cottrell v. Mfg. Co., 54 Conn. 122, 138, 6 A. 791. There are, of course, multitudinous varieties of firm names to which the foregoing rule is not applicable, as where some arbitrary or fancy name is used, which does not naturally describe any individual (Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811); where the name or names of individuals have continued to be used after their death, so that the name does not designate any existing individual, and has practically become an artificial one, designating nothing but the establishment (Rogers v. Taintor, 97 Mass. 291; Slater v. Slater, 175 N. Y. 143, 67 N. E. 224, 96 Am. St. Rep. 605, 61 L. R. A. 796). In such cases the right of succession to the business and good will usually carries the exclusive right to use the old firm name. —From Rowell v. Rowell [Wis.] 99 N. W. 473.

59. Where surviving partner continued business for two years after death of partner, held, the good will was not that of the old firm but of the surviving partner. Hutchinson v. Nay [Mass.] 72 N. E. 974. [See this case for discussion on development of the law on this subject and the reason for the above rule.]

60. See 2 Curr. L. 1111.

61. Bank of Southwestern Ga. v. McGar-

firm using the property, it will be assumed that it has an interest therein,[63] but such use is of itself insufficient to establish title.[64] Right of a firm to a free and perpetual license to manufacture under a patent obtained by an employe is not a partnership asset.[65]

In the United States, in the absence of an agreement, express or implied,[66] partnership realty is to be deemed in equity as changed into personalty only to the extent necessary for the purposes of partnership equities.[67]

How title is held.[68]—The legal title to partnership realty is in the partners as tenants in common,[69] the equitable title being in the partnership.[70] The title to the property being in the partnership name, the money paid by a purchaser of a deceased partner's interest belongs to the estate of such partner;[71] but the title to the land being taken in the partners' individual names, an innocent purchaser at such sale will be protected,[72] and the proceeds of the sale can be recovered from the administrator by the surviving partner, if necessary to pay partnership debts.[73] A deed to a co-partnership by the firm name vests the legal title to the land in those members of the partnership who are designated in the partnership name,[74] and equity will reform such deed by supplying their Christian names.[75]

Partner's interest.[76]—The individual interest of one partner in the firm assets can only be ascertained by a settlement of the partnership,[77] and a partner, before such a settlement is had, selling partnership property for his own benefit, perpetrates a fraud upon the partnership, and the person receiving such property having knowledge of the fraud, the transaction is void.[78] In a dormant partnership the funds of the visible partner, and those purporting to be his, although actually belonging to the partnership, are, with respect to the rights of innocent

rah, 120 Ga. 944, 48 S. E. 393. Land purchased severally by men doing business together, held not partnership property. Jones v. DeCamp, 2 Ohio N. P. (N. S.) 133. See 2 Curr. L. 1111, n. 66.

62. Where partnership was formed to carry on warehouse and commission business, without, however, any limitation upon its power to extend its operations, that the realty was devoted to a farming venture does not deprive it of its character as partnership property. Bank of Southwestern Ga. v. McGarrah, 120 Ga. 944, 48 S. E. 393. That such use is not necessary, see 2 Curr. L. 1111, n. 66.

63. In bankruptcy proceedings, it appearing on the face of one of the notes secured by an insurance policy on the life of a member of the firm, that the firm pledged the policies, it will not be assumed that the firm had no interest therein. In re Mertens, 134 F. 101.

64. Jones v. De Camp, 2 Ohio N. P. (N. S.) 133. See 2 Curr. L. 1111, n. 69, 70.

65. Rowell v. Rowell [Wis.] 99 N. W. 473.

66. Where articles of partnership provided for the purchase, reclaiming and selling marsh lands, the proceeds to be divided pro rata, held, the realty should be treated as personalty. Barney v. Pike, 94 App. Div. 199, 87 N. Y. S. 1038.

67. Huber v. Case, 93 App. Div. 479, 87 N. Y. S. 663. Where a will devised partnership realty as realty, held recorded declarations that such real estate had been purchased with partnership funds, and was treated by both partners as personalty, were insufficient proof of such fact as against subsequent claimants thereof under the will. Id. See 2 Curr. L. 1111, n. 71.

For full discussion of the English and American rules on the subject, see Shumaker, Partnership, p. 215, et seq.

68. See 2 Curr. L. 1112.

Partnership real estate, title to and interest in, see Tiffany, Real Property, p. 386, § 167.

69. Bank of Southwestern Ga. v. McGarrah, 120 Ga. 944, 48 S. E. 393; Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

70. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276. A partnership deed signed for the firm by one of the partners as agent conveys an equitable title to the vendee. Harris v. Bryson [Tex. Civ. App.] 80 S. W. 105. A deed signed by the grantor as "O., M. & Co." by "H., agent" does not disclose on its face that it was executed by a partnership. It might as well indicate a private corporation. Id.

71. Are not partnership assets, since the purchaser acquires only the interest the deceased partner would have in the land on a settlement of the partnership affairs. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

72. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276. The surviving partner is not such an innocent purchaser. Id.

73. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

74, 75. Dwyer Pine Land Co. v. Whiteman, 92 Minn. 55, 99 N. W. 362.

76. See 2 Curr. L. 1112.

77. Riddell v. Ramsey [Mont.] 78 P. 597.

78. Morrison v. Austin State Bank, 213 Ill. 472, 72 N. E. 1109.

third parties, to be regarded as his sole property.[79] An attachment against one partner alone, levied on partnership property, binds only the interest of that partner.[80] A partner selling his interest in the firm does not sell his own indebtedness to the firm.[81]

§ 4. *Rights and liabilities as to third persons. A. Power of partner to bind firm. In general; contracts.*[82]—One partner may bind the partnership, and all members thereof, dormant or otherwise,[83] to any transaction within the apparent scope of the partnership business,[84] unless the person dealing with the partner had notice of his want of authority.[85] As to whether or not an act is within the apparent scope of the partnership business is a question of fact to be determined by the court or jury;[86] thus a trading[87] partnership has been held to be bound by loans obtained by one partner on the firm's credit,[88] or by payments made by a firm debtor to such partner,[89] even though the money be misapplied,[90] and also by representations of a partner,[91] and acceptance of service of process by him;[92] but the acts of a member of a law firm individually acting as a trustee do not bind the firm,[93] nor does the act of a partner in misappropriating another's money and applying it to firm debts bind the other partners, they having no knowledge of the transaction.[94] A partner by satisfying a firm debt for less than its value, while binding himself, does not bind his co-partners.[95] One partner can, without consulting his co-partner, execute in the firm name a mortgage of the firm's property to secure a firm debt,[96] but he cannot do so to secure his individual debt.[97] The

79. White v. Farnham [Me.] 58 A. 425. Silent partner cannot, by the execution of a mortgage on such property, deprive a subsequent purchaser at a sale by the ostensible partner's trustee in bankruptcy of the title thus obtained. Id.

80. Hargadine-McKittrick Dry Goods Co. v. Sapplington, 105 Mo. App. 655, 78 S. W. 1049.

81. A complaint, where one partner had misappropriated the firm's money and then assigned his interest to the other partner, the plaintiff, held not to state a cause of action. Riddell v. Ramsey [Mont.] 78 P. 597.

82. See 2 Curr. L. 1112.

83. Complaint against individual member in an action for a firm debt need not allege that plaintiff knew that defendant was a member of the firm at the time the debt was contracted. Allen & Co. v. Davids [S. C.] 49 S. E. 846.

84. Cassidy v. Saline County Bank [Okl.] 78 P. 324; Sutton v. Weber [Iowa] 101 N. W. 775. See, also, Cohen v. Miller, 91 N. Y. S. 345. See 2 Curr. L. 1112, n. 82. Member of firm engaged in sale of threshing machines on commission, having charge of the canvassing part of the business, has authority to bind his firm by agreeing with the owner of a threshing outfit sold on commission that it should not be shipped to buyer until he had given security for the purchase price. Brown v. Foster [Mich.] 100 N. W. 167. Claim for damages for failure of title to a horse purchased from one of the partners several years before the formation of the partnership, held partnership not liable as it was not in existence at the time, though this is immaterial. Leppel v. Lumley [Colo. App.] 75 P. 605.

85. It not being shown that the person with whom a partner dealt knew that he had acted as agent for third persons in certain cases, evidence that he so acted is incompetent. Huguenot Mills v. Jempson & Co., 68 S. C. 363, 47 S. E. 687.

86. Cassidy v. Saline County Bank [Okl.] 78 P. 324. See 2 Curr. L. 1113, n. 90.

87. The articles of a nontrading partnership containing an express provision that no partnership debts are to be incurred, a partner has no authority to borrow money for the firm. Powell Hardware Co. v. Mayer [Mo. App.] 83 S. W. 1008.

88. Cohen v. Miller, 91 N. Y. S. 345. A member of a firm conducting a "Star Route" business has authority to borrow money for the benefit of the firm. Parker v. Parker, 25 Ky. L. R. 2193, 80 S. W. 209.

89. Collins v. Collins, 26 Ky. L. R. 1037, 83 S. W. 99. See 2 Curr. L. 1112, n. 84.

90. Cohen v. Miller, 91 N. Y. S. 345; Collins v. Collins, 26 Ky. L. R. 1037, 83 S. W. 99.

91. One member of a partnership led another partnership to believe that the two firms were to be partners in a certain undertaking. Held, the first firm is bound thereby. North Pac. Lumber Co. v. Spore, 44 Or. 462, 75 P. 890.

92. Dispossession proceedings. Maneely v. Mayers, 43 Misc. 380, 87 N. Y. S. 471. Hence under Laws 1902, p. 1519, c. 580, § 90, vacation of an attachment does not affect the jurisdiction of the court in an action against a partnership, one partner being personally served. Feldman v. Siegel, 43 Misc. 392, 87 N. Y. S. 538.

93. Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036.

94. Such third party cannot recover the money of them. Powell Hardware Co. v. Mayer [Mo. App.] 83 S. W. 1008.

95. The other partners may recover their share of the unpaid portion. Busby v. Rooks [Ark.] 81 S. W. 1056.

96. Chattel mortgage. Cohen v. Miller, 91 N. Y. S. 345. Evidence held insufficient to

contract being made with all the partners, the question of authority is immaterial.[98] A partner having the right to do an act for the firm may direct an agent to do it.[99] Services performed by a partner in carrying out a partnership contract are legally to be regarded as having been rendered by the partnership, and not by him as an individual.[1] A partner signing letters in his own name, it may be shown by parol that he was acting for the firm.[2]

In some states a partner is liable for all taxes against the partnership.[3]

A subsequent ratification of an act by one partner, even in excess of the scope of the partnership, is equivalent to antecedent authority.[4] As to whether such ratification exists or not is a question of fact for the determination of the court or jury,[5] and it need not be established by direct proof, but may be inferred from the general course of dealing between the members of the firm.[6] After such ratification and the receiving of benefits, such partner cannot repudiate the transaction and thus escape liability.[7]

Partnership bills and notes.[8]—In trading partnerships, the partners may bind the firm by the execution[9] or indorsement[10] of commercial paper; but, in the absence of express authority, necessity or usage, one member of a nontrading partnership cannot bind his co-partner by drawing, making, accepting or indorsing commercial paper,[11] and the burden is upon the holder of the paper who sues on it to prove such authority, necessity or usage.[12] In the absence of assent or ratification by the other members, one partner cannot bind the firm by giving a note to pay his individual debts,[13] and the burden is on the creditor to show that the other partner or partners knew of the transaction and assented thereto,[14] or that the money was obtained and used for carrying on the partnership business,[15] the ques-

support a finding that one partner had not authorized a mortgage nor received any portion of the loan. Id. Evidence held insufficient to show that chattel mortgagee of firm property had reason to suspect that he was not loaning money to the firm. Id. Evidence held sufficient to show that mortgagor was entitled to execute mortgage, so as to render it valid against estate of deceased partner. Chapman v. Greene [S. D.] 101 N. W. 351.

97. Sedalia Nat. Bank v. Cassidy Bros. Live Stock Commission Co. [Mo. App.] 84 S. W. 142. It is immaterial whether or not the mortgagee knew that the property belonged to the partnership. Lance v. Butler, 135 N. C. 419, 47 S. E. 488.

98. McCormick v. Johnson [Mont.] 78 P. 500.

99. Borrowing money. Parker v. Parker, 25 Ky. L. R. 2193, 80 S. W. 209.

1. Where partnership agreed to perform services without compensation. Powell v. Georgia, etc., R. Co., 121 Ga. 803, 49 S. E. 759.

2. Huguenot Mills v. Jempson & Co., 68 S. C. 363, 47 S. E. 687.

3. As between himself and the state he is liable for back taxes which the partnership omitted to list and return for taxation in previous years [Burns' Ann. St. 1901, § 8423]. Parkison v. Thompson [Ind.] 73 N. E. 109.

4. Cassidy v. Saline County Bank [Okl.] 78 P. 324; Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628.

5. Cassidy v. Saline County Bank [Okl.] 78 P. 324.

6. Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628. Joining in lease of mining property and receiving the rents thereof and other benefits of the transaction, held to show that partner had ratified co-partner's agreement to purchase such property. Id.

7. Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628.

8. See 2 Curr. L. 1114.

9. Marsh v. Wheeler [Conn.] 59 A. 410. See 2 Curr. L. 1114, n. 9-12.

10. Partners authorized to sell goods and collect proceeds have authority to indorse and negotiate a check received for property sold. Sullivan v. Sullivan [Wis.] 99 N. W. 1022.

11. Schele v. Wagner [Ind.] 71 N. E. 127. See 2 Curr. L. 1115, n. 15.

12. So held under Burns' Ann. St. 1901, § 2479, providing that an administrator may, without answer, set up any defense. Schele v. Wagner [Ind.] 71 N. E. 127. Indorsing three notes in eight years held not to establish a custom authorizing member to indorse commercial paper in firm name. Id. See 2 Curr. L. 1115, n. 16.

13. Firm notes given in renewal of individual notes. In re McIntire, 132 F. 295. Where one partner borrowed money from bank and immediately applied the same to his individual debt due the bank, held bank could not prove such note against the firm's assets. First Nat. Bank v. State Nat. Bank [C. C. A.] 131 F. 422. There is no ratification of such act where the other partner had no knowledge of such transaction and the books would not have shown it. Id. See 2 Curr. L. 1114, n. 13; Id. 1115, n. 15.

14. Where creditor sought to prove same against partnership estate in bankruptcy. In re McIntire, 132 F. 295.

15. Lowry v. Tivy, 70 N. J. Law, 457, 57

tion being one for the jury.[16] Notes executed by a firm and indorsed by the partners are firm as well as individual debts.[17] Parol evidence is admissible to show that joint notes signed by the members of a partnership are in fact firm debts.[18]

A member refusing to pay his portion of the firm's liability on a check, the firm is entitled to retain a part of the profits due such member, and apply this sum in payment of the member's share of the liability.[19]

Notice to one as notice to all.[20]—The rule that notice to one member is notice to all applies only to partnership matters.[21]

Nature of partnership liability.[22]—Partners are jointly[23] and severally[24] liable for all firm debts. Hence mere indulgence by the creditor to one of the partners will not discharge the others.[25]

Liability for torts and crimes.[26]—The partnership[27] and hence all its members[28] are liable for the torts of a partner committed in the ordinary course of business of the firm;[29] but a partner is not chargeable with criminal acts of his co-partners or others acting in behalf of the firm, unless he has knowledge thereof.[30]

(§ 4) *B. Commencement and termination of liability. Incoming partner or firm.*[31]—A person becoming a member of a partnership does not thereby assume the previous indebtedness of the firm,[32] though he may by agreement assume such indebtedness,[33] and such an agreement does not come within the statute of frauds.[34]

Notice of dissolution and rights of third parties dealing with a partnership after apparent dissolution.[35]—Except where dissolution is caused by operation of law,[36] notice of dissolution or retirement is necessary in order to terminate liability for future acts of the other partners.[37] A former dealer is entitled to actual

A. 267. A plea of non est factum by a partnership held not sustained where the notes were signed with the consent of all the partners to enable them to carry on the partnership business. Miller v. Knight Mfg. Co., 26 Ky. L. R. 1201, 83 S. W. 631.

16. As to whether money was borrowed for the firm. Lowry v. Tivy, 70 N. J. Law, 457, 57 A. 267. Whether or not money was paid to the firm or a partner. Ball v. Beaumont [Neb.] 102 N. W. 264.

17. Bankruptcy proceedings. Buckingham v. First Nat. Bank [C. C. A.] 131 F. 192.

18. In re Weisenberg & Co., 131 F. 517.

19. Sullivan v. Sullivan [Wis.] 99 N. W. 1022.

20. See 2 Curr. L. 1115.

21. Where a member of a law firm is individually acting as a trustee, knowledge acquired by his co-partner in relation to the trust cannot be imputed to the trustee. Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036.

22. See 2 Curr. L. 1115.

23. North Pacific Lumber Co. v. Spore, 44 Or. 462, 75 P. 890. See 2 Curr. L. 1115, n. 24-26.

24. Are equally bound as principal debtors on firm note. McAreavy v. Magirl, 123 Iowa, 605, 99 N. W. 193. See 2 Curr. L. 1115, n. 24-26.

25. McAreavy v. Magirl, 123 Iowa, 605, 99 N. W. 193.

26. See 2 Curr. L. 1115.

27. Conversion. Brown v. Foster [Mich.] 100 N. W. 167. Where a partner, having knowledge of a lien on the crop of a tenant, induced the latter to sell the crop and with the purchase money pay a debt due the firm, the latter was a participant in the wrong, and liable for the crop. Youmans v. Moore [S. C.] 48 S. E. 283. See 2 Curr. L. 1115, 1116, n. 28-33.

28. Fraudulent representations in sale of property. McKibbin v. Day [Neb.] 98 N. W. 845.

29. Shumaker on Partnership, p. 310, § 113.

30. United States v. Cohn, 128 F. 615. Where employe became member of a firm, doing an international business, shortly before being indicted for conspiracy to defraud the customs revenue, held a conviction was contrary to the evidence. Id. In such a case, there being proof that the firm was connected with such conspiracy, it must be shown, in order to convict, that the partnership relation was used or entered into for the purposes of subserving the conspiracy. Id.

31. See 2 Curr. L. 1116.

32. Strickler v. Gitchel [Okl.] 78 P. 94. See 2 Curr. L. 1116, n. 38.

33. Strickler v. Gitchel [Okl.] 78 P. 94; Bartlett v. Smith [Neb.] 98 N. W. 687. Partnership agreement construed with reference to amount paid, etc., and held to show that incoming partner did not assume debts of the old firm. First Nat. Bank v. State Nat. Bank [C. C. A.] 131 F. 422.

34. Bartlett v. Smith [Neb.] 98 N. W. 687.

35. See 2 Curr. L. 1116.

36. Dissolution brought about by death. National Bank v. Hollingsworth, 135 N. C. 556, 47 S. E. 618. See 2 Curr. L. 1116, n. 40.

37. Retiring partner liable for goods purchased by successors. Werner Co. v. Calhoun [W. Va.] 46 S. E. 1024. Note given after

notice,[38] but notice by publication is sufficient as to others.[39] What is actual notice is a question of fact.[40]

Third parties dealing with a partnership after the death of one of the partners are bound to inquire how far the authority to continue extends.[41]

Novation.[42]—In the absence of consent an agreement by one partner to assume the firm debts has no effect on the rights of the creditor,[43] though as between the partners, the retiring partner is merely a surety;[44] but the creditor accepting such promise takes subject to all the equities arising out of the contract between the principal parties,[45] and may sue such purchaser by a direct action.[46] Creditor re-

dissolution, held, in the absence of notice, to bind the partners. Pyron v. Ruohs, 120 Ga. 1060, 48 S. E. 434. Partner bound by indorsement of co-partner after dissolution, note being in the hands of a bona fide holder. Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946.

38. Werner Co. v. Calhoun [W. Va.] 46 S. E. 1024. See 2 Curr. L. 1116, n. 41.

39. Werner Co. v. Calhoun [W. Va.] 46 S. E. 1024. See 2 Curr. L. 1117, n. 42.

40. Publication in a newspaper, and change of name on sign on building is not such actual notice. Werner Co. v. Calhoun [W. Va.] 46 S. E. 1024. Evidence of notoriety of change is not admissible, nor is it permissible to show that a change in the signature of checks from the personal name of the proprietor to the firm name occurred at the time of the change of members. Id.

41. Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333.

42. See 2 Curr. L. 1117.

43. Does not, as to him, render the absolved partner a mere surety. McAreavy v. Magirl, 123 Iowa, 605, 99 N. W. 193. A contract of dissolution by which continuing partner agreed to assume firm debts held inadmissible in a suit on a firm note, the creditor having no knowledge of such an agreement. Preston & Co. v. Putnam County Banking Co., 120 Ga. 546, 48 S. E. 316.

Evidence held to show that grantee of deed from a partnership agreed to assume the latter's debts. Senn v. Louisville Malting Co., 25 Ky. L. R. 305, 75 S. W. 235.

44. McAreavy v. Magirl, 123 Iowa, 605, 99 N. W. 193.

45. Malanaphy v. Fuller & Johnson Mfg. Co. [Iowa] 101 N. W. 640. Must observe the relationship of principal and surety existing between the parties. Malanaphy v. Fuller & Johnson Mfg. Co. [Iowa] 101 N. W. 640; Preston v. Garrard, 120 Ga. 689, 48 S. E. 118. Such retiring partner is released if the time of payment be extended without his knowledge or consent. Id.

NOTE. Effect of dissolution and assumption of firm debts by continuing partner as to a firm creditor: "Some disagreement among the courts has arisen in fixing the rights of creditors after dissolution by the retirement of one member and the assumption of the debts by the other. Of course, if a creditor is a party to the agreement made between the partners, he will be bound by it, and must deal with the retiring partner as a surety. All are agreed as to this. The difficulty has arisen in determining whether mere knowledge by the creditor of the dissolution and the agreement of the partners would require him to deal thereafter with the retiring partner as a surety with reference to past transactions of the firm. The case of Oakeley v. Pasheller, 4 Cl. & F. 207, a decision made by the House of Lords in 1836, was supposed to have held that mere knowledge of these things by the creditor would require him to treat the retiring partner as a surety, and that, if he extended the time of payment of his debt without the retiring partner's knowledge or consent, he would be released. But in the case of Swire v. Redman, L. R. 1 Q. B. 536, Cockburn, C. J., shows very clearly that the House of Lords did not, in Oakeley v. Pasheller, intend to rule as was supposed, but merely to hold that the retiring partner would be released only in the event the creditor consented to the arrangement between the partners. Some American courts have followed what was supposed to be the ruling in Oakeley v. Pasheller, and others have adopted the decision in Swire v. Redman, which was to the effect that something more than mere knowledge on the part of the creditor is required—that he must expressly consent to the arrangement between the partners before he will be bound by it; and that in the absence of such consent, he can deal with the retiring partner as a principal debtor, and as an active partner so far as past transactions are concerned. Cases like Swire v. Redman proceed on the theory that when a creditor's rights once become fixed by contract no agreement on the part of the other parties to the contract can affect those rights or change their relation to the creditor so far as he is concerned; that it is wholly immaterial that the creditor was informed of such an agreement; that the partnership still continues relatively to his debt; and that any arrangement which he makes with the continuing partner in behalf of the partnership will be binding on the other. The other line of decisions holds that whenever the relationship of principal and surety arises between partners after dissolution and the assumption by one partner of the debts of the firm, every one having notice of the dissolution and the agreement between them is bound to take notice of the relationship which the law creates, and act accordingly; that while a creditor holding an obligation of the firm may regard the retiring partner as an active partner, so far as his debt is concerned, as long as he does nothing to affect the status of his claim, the moment he, with knowledge of the dissolution and the agreement, does anything which would release an ordinary surety, the retiring partner will be entirely released from his obligation; that this is no hardship on the creditor, because he can protect himself by granting no indulgence to the continuing partner, who has become alone the principal

leasing, for a small payment, one of the members of a firm assuming the debts of the old firm, thereby releases the members of the original firm.[47] A partner agreeing to assume the debts of the firm, firm creditors refusing to accept the novation cannot claim that one consented to it and thereby became the individual creditor of the purchasing partner.[48]

(§ 4) *C. Application of assets to liabilities.*[49]—A surviving partner of an insolvent firm may honestly prefer a bona fide creditor of the firm even to the exclusion of other creditors.[50]

Partnership assets must be applied to the payment of partnership debts in preference to the individual debts of the partners[51] and vice versa,[52] and the priority of firm creditors attaching partnership property is not affected by a prior attachment of such property by an individual creditor.[53] The lien which each partner has on the partnership assets to secure their proper application continues after dissolution,[54] unless waived.[55] Creditors of an insolvent corporation which has assumed the debts of a firm as part consideration for a conveyance of firm property to it are not entitled to a preference in payment over those of the firm.[56] A partner cannot set-off a partnership demand against a demand against himself individually.[57]

Firm debts and assets.[58]—Money loaned to a partner individually is an individual debt, though the money be used in the firm business,[59] and the one to whom the loan was made must be determined from the facts of the transaction.[60] A partnership agreement providing that certain insurance policies on the lives of the partners should be taken out, the premiums on such policies as between the partners are partnership debts.[61]

debtor, or doing anything without the retiring partner's consent which would affect the status of the claim to the prejudice of the surety partner. The following are some of the decisions dealing with the subject: Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Gates v. Hughes, 44 Wis. 332; Millerd v. Thorn, 56 N. Y. 402; Ridgley v. Robertson, 67 Mo. App. 45; Barber v. Gillson, 18 Nev. 89, 1 P. 452; Maier v. Canavan, 8 Daly [N. Y.] 272; Johnson v. Young, 20 W. Va. 614; Williams v. Boyd, 75 Ind. 286; Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Whittier v. Gould, 8 Watts [Pa.] 485; Wilde v. Jenkins, 4 Paige [N. Y.] 481; Thurber v. Corbin, 51 Barb. [N. Y.] 215; National Cash Reg. Co. v. Brown, 19 Mont. 200, 47 P. 994, 61 Am. St. Rep. 498, 37 L. R. A. 515; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529."—From Preston v. Garrard, 120 Ga. 689, 48 S. E. 118.

46, 47. Malanaphy v. Fuller & Johnson Mfg. Co. [Iowa] 101 N. W. 640.

48. In re Worth, 130 F. 927.

49. See 2 Curr. L. 1117.

50. Bartlett v. Smith [Neb.] 98 N. W. 687.

51. Hargadine-McKittrick Dry Goods Co. v. Sapplington, 105 Mo. App. 655, 78 S. W. 1049. Conveyance to wife in fraud of creditors by a partner makes her a trustee for the creditors, and her claims cannot be paid until all creditors' claims are met. Lawson v. Dunn [N. J. Eq.] 57 A. 415. See 2 Curr. L. 1118, n. 54-56.

52. Hargadine-McKittrick Dry Goods Co. v. Sapplington, 105 Mo. App. 655, 78 S. W. 1049. Partners holding land as tenants in common, firm creditors cannot enforce their claims against it as against individual creditors. Cundey v. Hall, 208 Pa. 335, 57 A. 761. Judgment creditor selling interest of debtor in firm for an amount insufficient to pay the judgment is entitled to a preference over a firm creditor as regards proceeds from real estate owned by the individual partner. Id. See 2 Curr. L. 1118, n. 57.

53. Hargadine-McKittrick Dry Goods Co. v. Sapplington, 105 Mo. App. 655, 78 S. W. 1049.

54. Blackwell v. Farmers' & Merchants' Nat. Bank [Tex.] 79 S. W. 518.

55. Held waived where continuing partner agreed to assume debts. Blackwell v. Farmers' & Merchants' Nat. Bank [Tex.] 79 S. W. 518.

56. London v. Bynum, 136 N. C. 411, 48 S. E. 764.

57. Western Coal & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145. An objection to an attempt to so do can only properly be raised on an objection to the admissibility of testimony. Id.

58. See 2 Curr. L. 1118.

59. Hargadine-McKittrick Dry Goods Co. v. Sapplington, 105 Mo. App. 655, 78 S. W. 1049. Individual members borrowing money on notes signed by all partners, and immediately checking the funds to the partnership account and using it in the firm business held individual and not firm debts. In re Weisenberg & Co., 131 F. 517. See 2 Curr. L. 1118, n. 58, 59, 61.

60. Testimony of cashier of bank loaning money as to witness' intention held inadmissible. In re Weisenberg & Co., 131 F. 517.

61. White v. McPeck, 185 Mass. 451, 70 N. E. 463.

§ 5. *Rights of partners inter se.*[62] *Duty to observe good faith.*[63]—The members must observe the utmost good faith towards each other.[64] Secret arrangements by which one member is to receive more for the firm property than the others is a breach of this faith,[65] but, in the absence of fraud, a partner is not liable for errors of judgment,[66] or for delay caused or consented to by the other members.[67] Where one partner was to receive compensation for his services, the agreed compensation is the proper measure of a counterclaim for nonattention to the business.[68]

Power of majority.—In a partnership composed of numerous individuals bound loosely together by subscription to the stock of a proposed corporation, for all the purposes of the organization a majority must have the right of control so long as they act within the purview of the contract of subscription.[69]

Firm accounts.[70]—A partner is entitled to have proper accounts kept, and may assume that this duty will be fulfilled.[71] In the absence of a wrong motive or injury, a partner is not liable for an unscientific method of keeping books.[72] A partner is entitled to inspect the books at all reasonable times, and this extends to a member who has been induced to retire from the firm by fraud.[73] The inspection of current books should be made at the place of business,[74] and without unnecessary expense to the other partners.[75]

§ 6. *Actions. A. By the firm or partner.*[76]—A suit cannot be maintained in the name of a firm independent of the members constituting the partnership,[77] but

62. See 2 Curr. L. 1119.

Evidence as to indebtedness of partner: A finding by a referee and affirmed by the district court that a partner was not indebted to the partnership held sustained by the evidence. Buckingham v. First Nat. Bank [C. C. A.] 131 F. 192.

63. See 2 Curr. L. 1119.

64. First Nat. Bank v. State Nat. Bank [C. C. A.] 131 F. 422. See 2 Curr. L. 1119, n. 71.

65. Bonus received by widow of deceased partner for consent to sale of property at a certain price to the one paying the bonus should be regarded as part of the purchase price and should be accounted for by the widow to the surviving partners. Comstock v. McDonald [Mich.] 101 N. W. 55.

Note: The court placed the decision on the ground that the relation of partnership is one requiring the utmost good faith, and that secret arrangements by which one member was to receive more for firm property than others was a breach of that faith. Latta v. Kilbourn, 150 U. S. 541, 37 Law. Ed. 1169; Todd v. Rafferty's Adm., 30 N. J. Eq. 254; McMahon v. McClernan, 10 W. Va. 419; Lowry v. Cobb, 9 La. Ann. 492. The strong dissenting opinion pointed out that plaintiffs were not defrauded nor damaged in any way by the widow's act. They received what they asked for the property and were satisfied. The additional sum was merely an inducement to encourage the widow to consent to a contract to which they had already assented. It is difficult to see how the application of this latter rule could work injury to anyone. The courts, however, go to great lengths in favoring the partnership relation. As illustrations of this tendency see Hodge v. Twitchell, 33 Minn. 389, and Fenning v. Chadwick, 3 Pick. [Mass.] 420, 15 Am. Dec. 233. The rule by the overwhelming weight of authority is that the partnership relation forbids a member to "assume a position which would ordinarily excite a conflict between his individual interest and a faithful discharge of his fiduciary duties." 3 Mich. L. R. 332.

66. Where assets were overvalued. Knipe v. Livingston, 209 Pa. 49, 57 A. 1130.

67. Where both partners consented to the charging off of certain accounts to profit and loss, held estate of deceased partner is not liable for failure of decedent to use diligence in collecting the same. Knipe v. Livingston, 209 Pa. 49, 57 A. 1130.

68. Brandt v. Edwards, 91 Minn. 505, 98 N. W. 647. See 2 Curr. L. 1119, n. 71.

69. The majority and minority each forming a separate corporation, the title to the partnership property becomes vested in the corporation formed by the majority. Mt. Carmel Tel. Co. v. Mt. Carmel & F. Tel. Co. [Ky.] 84 S. W. 515.

70. See 2 Curr. L. 1119.

71. Partner having charge of sales department and having nothing to do with financial department may assume that his partner will keep correct accounts. In re McIntire, 132 F. 295. See 2 Curr. L. 1120, n. 77.

72. Knipe v. Livingston, 209 Pa. 49, 57 A. 1130.

73. He should be allowed to inspect books of the partnership both before and after the agreement to retire. Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. S. 1057.

74. Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. S. 1057.

75. Defendants objecting to the paying of an accountant selected by the court with a view of protecting their interests, that portion of the order should be stricken out. Cohn v. Hessel, 95 App. Div. 548, 88 N. Y. S. 1057.

76. See 2 Curr. L. 1120.

77. Complaint: "The L. Bank, plaintiff * * * would respectfully represent that it is a firm * * * composed of T. J. M. & W. J. M." held sufficient to show that the action was brought by the individuals com-

the names of the partners not being set out, the defect may be cured by amendment.[78]

All persons who are partners in a firm when a contract is made with it should join in an action for the breach of such contract,[79] though a partner may sometimes sue on contracts made in his own name;[80] thus a partner depositing firm money with a third party and taking a receipt in his individual name may sue alone to recover such fund.[81] In the absence of prejudice to the rights of defendant, a continuing partner may sue on a firm contract alone.[82] Where a firm is dissolved by the death of a nonresident partner, after a decree in a suit against the firm, the personal representatives of the deceased partner are not necessary parties to a bill of review.[83]

(§ 6) *B. Against the firm or a partner. Pleading and proof of partnership.*[84]—The petition must allege the names of the partners,[85] and the use of the phrase "partners," etc., after defendants' names is treated as descriptio personae,[86] while the use of the word "company" is frequently held to import a corporation.[87]

posing the firm. Scott v. Llano County Bank [Tex. Civ. App.] 85 S. W. 301. Complaint describing plaintiff as "B. P. & Co., a co-partnership composed of B., P., & P.," is not demurrable on the ground that it was filed in the name of the partnership. Hatcher v. Branch, Powell & Co. [Ala.] 37 So. 690.

78. Loewenberg v. Gilliam [Ark.] 79 S. W. 1064.

79. Bumpus v. Turgeon, 98 Me. 550, 57 A. 883. Where one partner fraudulently settled partnership debt by taking debtor's note for part, and applying an individual debt in payment of the balance, held the innocent partner could not alone maintain a suit to recover the amount so applied. Id. See 2 Curr. L. 1120, n. 80.

80. A partner contracting with a third party in his own name, the fact that the other member of the partnership participated in the work and profits does not prevent the contractor from suing on the contract. Council v. Teal [Ga.] 49 S. E. 806. See 2 Curr. L. 1120, n. 83.

81. Is a trustee of an express trust within the meaning of Code Civ. Proc. § 449. Meinhardt v. Excelsior Brew. Co., 90 N. Y. S. 642.

82. Plaintiff's partner having sold his interest in the contract sued on to plaintiff, failure to make him a party plaintiff does not prejudice defendant. Degnan v. Nowlin [Ind. T.] 82 S. W. 758.

83. Perkins v. Hendryx, 127 F. 448. See 2 Curr. L. 1120, n. 81, as to an appeal by the firm.

84. See 2 Curr. L. 1120.

85. Perry-Rice Grocery Co. v. Craddock Grocery Co. [Tex. Civ. App.] 78 S. W. 966.

86. A complaint against "G., S., and S. co-partners doing business under the firm name and style of G., S. & Co." states an action against the persons named individually, and not against the partnership. Guthiel v. Gilmer, 27 Utah, 496, 76 P. 628. An action against G., H. & K., partners under the firm name of G. S. G. & Co., is an action against the individual partners and does not authorize a judgment against the firm, or individual members not served [Comp. Laws 1897, § 2943]. Good v. Red River Valley Co. [N. M.] 78 P. 46.

Contra: Suit being brought against H. & R. composing the firm of H. & R. and the writ of attachment being directed against the property of H. & R. it authorizes a levy on either the firm or individual property. Kleinsmith v. Kempner [Tex. Civ. App.] 83 S. W. 409.

NOTE. Suit against partnership in firm name: The statutes of New Mexico provide that a partnership may sue and be sued in the firm name and that service on one member is service on the firm. Good v. Red River Valley Co. [N. M.] 78 P. 46. At common law a partnership had no standing as a legal entity aside from its individual members. Many of the states, however, have passed statutes permitting the partnership to sue and be sued in its firm name. The New Mexico law is patterned after a similar section in the Iowa Code and is typical of the legislation on this point. It would seem that inasmuch as the statutes are a relaxation of the old law, a liberal interpretation should overlook so technical a point, especially when the intent is so clearly expressed as in the above cases. While the courts show a tendency to modify the common-law rule, yet the weight of authority is that a suit against a partnership must be so designated, and that words such as those mentioned are mere descriptio personae. Ladiga Saw Mill Co. v. Smith, 78 Ala. 108; Davidson v. Knox, 67 Cal. 143. There are some cases to the contrary. In Morrissey v. Schindler, 18 Neb. 672, the facts were precisely the same as in the cases under discussion, but the court held that it was an action against the firm and that the form of expression there used was preferable to the use of the firm name alone. This holding has since been modified. Winters v. Means, 50 Neb. 209; Wigton v. Smith, 57 Neb. 299, 77 N. W. 772; Bastian v. Adams [Neb.] 97 N. W. 231. As to the manner of designating plaintiffs in a partnership action see McCord v. Seale, 56 Cal. 262; Sweet v. Ervin, 54 Iowa, 101; Putnam v. Wheeler, 65 Tex. 522; Moses v. Hatfield, 27 S. C. 324, 3 S. E. 538; Wise v. Williams, 72 Cal. 544.—3 Mich. L. R. 164.

87. Suit against "C. H. Perkins Company," imports a suit against a corporation. Perkins Co. v. Shewmake, 119 Ga. 617, 46 S. E. 832.

In the latter case the petition is amendable,[88] but notice of the amendment must be served on the defendant.[89]

The complaint failing to show a joint cause of action, the fact that the proceeding is in the nature of one against a partnership does not prevent judgment being taken against the party liable.[90] One partner being improperly joined, the action may be dismissed as to him.[91] One injured by the tort of a partner may elect to sue the latter alone.[92] An action on a partnership contract cannot be brought against a partner individually,[93] nor can a partnership demand be joined with an individual demand unless one partner is dead.[94] Two persons being sued as partners, plaintiff cannot recover on the theory that one of them was the sole owner of the business conducted in the name of the other.[95] Action against an individual is not sustained by proof of his liability as a partner,[96] and in such a case, a general denial does not operate as a waiver of a nonjoinder of his partner.[97]

One denying that he is a member of a partnership, the burden is upon the party alleging the partnership, and the question is one of fact for the jury.[98] A note being executed in a firm name, and the defendants in an action thereon admitting its execution and delivery, there is necessarily an admission of the copartnership.[99]

Abatement.—A penal action against a partnership abates upon the death of either partner.[1]

Judgment and subsequent proceedings.[2]—Judgment being entered against the partnership as a corporation, it cannot be enforced against the partners.[3] A firm creditor recovering a judgment against any partner is entitled to recover the statutory items of cost from the commencement of the suit to the entry of judgment.[4]

A partner dying after judgment, his personal representative is a necessary party appellant.[5]

Generally, in levying on a partner's interest, notice should be left with one or more of the partners other than the defendant in execution.[6]

(§ 6) *C. Between partners.*[7]—An action at law will not lie between part-

88. Is amendable by striking out the words "a corporation," and making an allegation that the company is a partnership composed of named individuals. Perkins Co. v. Shewmake, 119 Ga. 617, 46 S. E. 832.

89. Perry-Rice Grocery Co. v. Craddock Grocery Co. [Tex. Civ. App.] 78 S. W. 966.

90. Tennent Shoe Co. v. Birdseye, 105 Mo. App. 696, 78 S. W. 1036. Where summons described defendants as partners but one of whom was served. Mason v. Connors, 129 F. 831.

91. It being shown that one party defendant was not a member of the firm at the time the contract sued on was made, dismissal of the action as to him does not cause a material variance between the pleading and proof. Helios-Upton Co. v. Thomas, 96 App. Div. 401, 89 N. Y. S. 222. See 2 Curr. L. 1120, n. 90, 91.

92. Fraudulent representations in reliance on which goods were sold the partnership. Hyde v. Lesser, 93 App. Div. 320, 87 N. Y. S. 878.

93. Answer setting up such a defense is not insufficient because it fails to allege that the other partner was within the jurisdiction of the court. Wildrick v. Heyshem, 96 App. Div. 515, 89 N. Y. S. 78.

94. Failure to observe this rule makes the declaration demurrable for a misjoinder of counts. Maisby v. Lanark Fuel Co. [W. Va.] 47 S. E. 358.

95. Lighthiser v. Allison [Md.] 59 A. 182.

96, 97. Sparks v. Fogarty, 93 App. Div. 472, 87 N. Y. S. 648.

98. Strickler v. Gitchel [Okl.] 78 P. 94.

99. Hence rejection of evidence tending to show no partnership, held correct. Naftzker v. Lantz [Mich.] 100 N. W. 601.

1. Action under Rev. Codes 1899, § 7605, for maintaining a place where intoxicating liquors were sold. State v. McMaster [N. D.] 99 N. W. 58.

2. See 2 Curr. L. 1121.

3. Whether they were in fact indebted to plaintiff or not. Sinsabaugh v. Dun [Ill.] 73 N. E. 390.

4. This because each partner is liable for the whole of the debt. Moore v. Dickson, 121 Wis. 591, 99 N. W. 322.

5. Under Burns' Ann. St. 1901, §§ 648, 272, 283-285, 2463, 2465. Judgment being rendered against the firm. Newman v. Gates [Ind.] 72 N. E. 638.

6. Under Rev. St. 1895, art. 2352, should be left with them or with a clerk of the firm. Adoue v. Wettermark [Tex. Civ. App.] 82 S. W. 797.

7. See post, Accounting, § 7, subd. E. See, also, 2 Curr. L. 1121.

ners[8] or their assignees[9] upon a demand growing out of a partnership transaction until there has been a final settlement.[10] This rule does not extend to transactions between the partners before the formation of the firm,[11] nor to matters unconnected with the partnership, or which have, by the partners themselves, been isolated from the general partnership account.[12] After such settlement the partner may recover in a law action his share of an item of partnership profits,[13] but he cannot maintain an action of tort therefor unless the other partner be guilty of fraud in withholding the payment.[14] The petition failing to allege the partnership settlement, the answer may effectually supply the defect.[15]

§ 7. *Dissolution, settlement, and accounting. A. Dissolution by operation of law.*[16]—The death of a partner per se dissolves the partnership at once and for all purposes.[17] The exceptions to this rule are where the articles of partnership provide for its continuance,[18] and where there is a direction in the will of the deceased partner that the partnership shall be continued.[19] Such direction must be in express and unambiguous terms.[20] A statute authorizing an executor to continue a "plantation, manufactory, or business belonging to an estate," does not include partnerships.[21]

(§ 7) *B. Dissolution by act of partners.*[22]—A partner may dissolve a partnership according to the terms of the articles,[23] and the prescribed method being inequitable, any convenient method may be employed.[24] One partner refusing to

8. Milligan v. Mackinlay, 209 Ill. 358, 70 N. E. 685; Coulson v. Ferree [Ky.] 85 S. W. 686. Cannot have contribution from the other partners. Foss v. Dawes [Neb.] 101 N. W. 237. Where a corporation acted as a partner, held could not sue other members for money had and received. Powell Hardware Co. v. Mayer [Mo. App.] 83 S. W. 1008; King v. Moore [Ark.] 82 S. W. 494. See 2 Curr. L. 1122, n. 7. A partner who has a minor son in the employ of the firm of which he is a member cannot bring an action at law against his co-partners and recover the value of the services performed by his son. The statutes of **New Mexico** do not authorize a proceeding in the probate court by one of the surviving partners of a firm against the administrator of a deceased partner to recover an alleged indebtedness prior to a settlement of the firm's affairs by suit in the district court or by auditors appointed under such statutes. Gillett v. Chavez [N. M.] 78 P. 68.

9. Trespass or conversion will not lie on behalf of one partner to recover property from the assignee of another partner. Andrews v. Clark [Neb.] 98 N. W. 655.

10. Where there was outstanding accounts, evidence held insufficient to show a final settlement. Foss v. Dawes [Neb.] 101 N. W. 237.

11. One partner may sue another to recover damages for the latter's failure to comply with an agreement made before the formation of the partnership, relating to the terms on which the partnership was to be formed. Owen v. Meroney, 136 N. C. 475, 48 S. E. 821.

12. Partner selling out to his co-partner all his interest excluding specified articles may maintain replevin to recover the same though the partnership business was unsettled and a suit for an accounting was pending. Newberry v. Gibson [Iowa] 101 N. W. 428.

13. Dorwart v. Ball [Neb.] 98 N. W. 652.

14. Milligan v. Mackinlay, 209 Ill. 358, 70 N. E. 685.

15. Jackson v. Powell [Mo. App.] 84 S. W. 1132.

16. See 2 Curr. L. 1122.

17. Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333; National Bank of Maryland v. Hollingsworth, 135 N. C. 556, 47 S. E. 618. See 2 Curr. L. 1122, n. 19.

18. Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333. See 2 Curr. L. 1122, n. 20. The articles of partnership providing for the continuance of the partnership, the executors of a deceased partner are bound thereby, and such articles continue in force so long as the testator's contribution to the capital remains in the business. Whether the court regards the partnership as a continuing one or as successive ones is immaterial. Egan v. Wirth [R. I.] 58 A. 987.

19. Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333. See 2 Curr. L. 1122, n. 21.

20. Authority given in a will to an executor to "pay debts and wind up the estate" is not a direction to continue a partnership. Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333.

21. Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333.

22. See 2 Curr. L. 1123.

23. Will creating trust in real estate and directing executor to continue partnership so long as profitable, held surviving partner could terminate same according to agreement. Egan v. Wirth [R. I.] 58 A. 987.

24. Where articles provided that on termination of relation either partner could purchase business, the book values being the basis of purchase, held the book values being placed at a low figure, and it being inequitable that they should be taken as the basis, that part of the agreement would not be enforced. Egan v. Wirth [R. I.] 58 A. 987.

perform his part of a dissolution agreement, and refusing to pay taxes on the property to be taken by him, the other partner, in an action for specific performance, may pay the taxes for the account of defendant.[25]

(§ 7) *C. Dissolution by order of court.*[26]—A court of equity may dissolve a partnership for fraud in its formation, hopelessness of success, insanity, or misconduct of a partner,[27] but none of these work a dissolution ipso facto.[28]

(§ 7) *D. Effect of dissolution.* 1. *In general.*[29]—On dissolution of a partnership according to its terms, the interest of the partners in the assets becomes several, subject to the payment of partnership debts and the settlement of accounts between the partners.[30] The partnership articles control as to the method of distribution among the partners.[31]

(§ 7 D) 2. *As to surviving partner.*[32]—The administration of the partnership affairs by the surviving partner is entirely distinct and separate from the administration of the estate of the decedent.[33] The surviving partner or partners have the exclusive[34] right of possession and control of the partnership property for the purpose of winding up the partnership business, and may do any act necessary or proper for that purpose,[35] and to this end he may mortgage the property;[36] but he must act honestly and with reasonable discretion and diligence.[37] He takes the legal title to firm personalty,[38] and the equitable title to firm realty, and his grantee takes such an equitable interest as will enable him to compel a conveyance by the heirs of the deceased partner.[39] Real estate which is not an asset of the firm at the time of the death of a member thereof will not pass to the survivor.[40] If he wrongfully appropriates the funds of the concern to his own use, he is chargeable with interest.[41] A surviving partner has no power after dissolution to execute, renew, or indorse a note in the name of the firm;[42]

25. Hutchinson v. Hutchinson [N. J. Eq.] 58 A. 528.

26. See 2 Curr. L. 1123.

27. Shumaker, Partnership, p. 418, § 146.

28. Insanity will not prevent adjudication of bankruptcy against the partnership. In re Stein & Co. [C. C. A.] 127 F. 547.

29. See 2 Curr. L. 1123.

30. Moore v. Ramson, 185 Mass. 264, 70 N. E. 64.

31. Partnership articles providing that on dissolution certain property should be returned to one party, the latter is entitled to the same regardless of any damages caused by his breaking the articles. Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. S. 188. Articles construed and held, that excess of capital contributed by one partner was, after payment of firm debts, a debt due such partner, and on which he was entitled to interest. Brandt v. Edwards, 91 Minn. 505, 98 N. W. 647.

32. See 2 Curr. L. 1124.

In Ohio the rights and duties of a surviving partner are defined by statute. Jones v. De Camp, 2 Ohio N. P. (N. S.) 133.

33. Code 1892, § 1931, forbidding an administrator from paying any claim unless probated and allowed, has no application to a surviving partner. Lance v. Calhoun [Miss.] 37 So. 1014.

34. The executor of a deceased partner has no authority to continue the business. Altgelt v. Alamo Nat. Bank [Tex.] 83 S. W. 6. Rev. St. 1895, art. 1984, does not change the rule nor repeal art. 1867. Id.

35. Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181.

36. And the mortgagee is entitled to priority over such partner's individual creditors whose executions are levied after the making of the mortgage. People's Nat. Bank v. Wilcox [Mich.] 100 N. W. 24.

37. People's Nat. Bank v. Wilcox [Mich.] 100 N. W. 24.

38. Secor v. Tradesmen's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181.

39. Bank of Southwestern Ga. v. McGarrah, 120 Ga. 944, 48 S. E. 393.

40. Jones v. De Camp, 2 Ohio N. P. (N. S.) 133.

41. Porter v. Long [Mich.] 98 N. W. 990.

42. National Bank of Md. v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

NOTE. The indorsement of negotiable paper may be considered first as a contract involving liability on the part of the indorsers in case the paper is not paid when due, and, second, as a mere means of transferring the title of the paper indorsed. So far as an indorsement involves a new contract it is undoubtedly beyond the power of any member of a dissolved partnership to create any liability against his late partners, whether he assumes to make the indorsement in the name of the firm or not, and irrespective of the purpose for which the indorsement was made. Hence, the firm cannot be held answerable on such indorsement, though the partner who made it thereby transferred the paper in payment of a firm debt: Bryant v. Lord, 19 Minn. 396; Sanford v. Mickles, 4 Johns. [N. Y.] 224; Fellows v. Wyman, 33 N. H. 351; Dana v. Conant, 30 Vt. 246; Nott v. Downing, 6 La. 280, 26 Am. Dec. 491; Humphries v. Chas-

but, although he cannot by such an act bind the estate of the deceased partner, he is nevertheless personally liable.[43] He can, however, assign a chose in action belonging to the firm.[44]

While a surviving partner in closing up the affairs of the firm is not entitled to compensation for his services,[45] yet those interested in the estate demanding a share of the profits accruing after the death of the one partner, equity will grant the surviving partner that part of the profits which with reasonable certainty is attributable to his personal services.[46] This is of course subject to the consideration that he who has wrongfully mingled and confused property must prove with reasonable certainty what part of the ultimate general result is due to other sources than the misappropriated property.[47]

Liability to estate of decedent.[48]—The personal representative of a deceased partner has no right to enforce claims and maintain actions to reduce the assets of the partnership to possession,[49] though he may call the surviving partner to account;[50] and where such personal representative has been discharged,[51] or is the surviving partner,[52] the beneficiaries may sue;[53] and all persons interested in, and likely to be affected by, the adjudication sought are proper parties defendant.[54] That a surviving partner is domiciliary administrator of the estate of his deceased partner prevents him, as such administrator, from dealing with himself individually as a partner,[55] though it does not prevent him from dealing individually with an ancillary administrator appointed by the court of another state with respect to partnership property.[56] The articles of co-partnership providing for the carrying on of the business after the death of one of the members and giving one member the right to purchase the business, this latter right extends to an admin-

tain, 5 Ga. 166, 48 Am. Dec. 247; Whitwroth v. Ballard, 56 Ind. 279; Lumberman's Bank v. Pratt, 51 Me. 563; White v. Tudor, 24 Tex. 639, 76 Am. Dec. 126. There does not, however, seem to be any objection to giving the indorsement effect as a mere transfer of title to the property. Chappell v. Allen, 38 Mo. 213; Waite v. Foster, 33 Me. 424.—From note to Gilmore v. Ham [N. Y.] 40 Am. St. Rep. 554, 564.

43. National Bank of Md. v. Hollingsworth, 135 N. C. 556, 47 S. E. 618; Altgelt v. Sullivan & Co. [Tex. Civ. App.] 79 S. W. 333.

44. American Hardwood Lumber Co. v. Nickey, 101 Mo. App. 20, 73 S. W. 331.

45, 46, 47. Rowell v. Rowell [Wis.] 99 N. W. 473.

48. See 2 Curr. L. 1125.

49. Secor v. Tradesman's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181. If he was entitled to maintain such an action, the surviving partner and all persons acquiring any portion of the fund should be made parties. Id.

50. Secor v. Tradesman's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181. The articles providing for the rendering of accounts, an ancillary administrator, where surviving partner is domiciliary administrator, is entitled to an accounting from the date of the last account which has been approved by testator's heirs or their guardian. Egan v. Wirth [R. I.] 58 A. 987.

51. Byers v. Weeks, 105 Mo. App. 72, 79 S. W. 485. In Missouri, it was held where the surviving partner failed to administer the partnership estate and the deceased partner's administrator had been discharged, the office of administrator was functus officio and an administrator de bonis non could not be appointed to administer the partnership estate. Id.

52. Though title to the specific personal property involved was in the administrator. Rowell v. Rowell [Wis.] 99 N. W. 473.

53. NOTE: Accounting of surviving partners: The widow, legatees, distributees, or creditors of the general estate of a deceased partner, not charged with the duties of administering, cannot maintain a bill for an accounting against the surviving partners. Their remedy is to compel the representative of decedent to account or have him removed Vienne v. McCarty, 1 U. S. (1 Dall.) 154, 1 Law. Ed. 79; Tate v. Tate, 35 Ark. 289; Hutton v. Laws, 55 Iowa, 710; Rosenzweig v. Thompson, 66 Md. 593; Harrison v. Righter, 11 N. J. Eq. 389; Ludlow v. Cooper, 4 Ohio, 1; Stainton v. Carron Co., 18 Beav. 146; Davies v. Davies, 2 Keen, 539. An exception to this rule is where there is fraud or collusion between the executor of decedent and the surviving partner, in which case one entitled to an accounting of the separate estate may follow the assets and compel the surviving partners to account. Seeley v. Boehm, 2 Madd. 176; Newland v. Champion, 1 Ves. Sr. 105. See Travis v. Milne, 9 Hare, 141.—From note to Walling v. Burgess [Ind.] 7 L. R. A. 481.

54. Where surviving partner, while acting as administrator of a deceased partner, fraudulently conveyed latter's share, along with rest of the business, to a corporation, held stockholders in latter were proper parties in a suit by the deceased partner's beneficiaries to compel the corporation to permit them to become stockholders. Rowell v. Rowell [Wis.] 99 N. W. 473.

55, 56. Egan v. Wirth [R. I.] 58 A. 987.

istrator of a deceased partner,[57] and the surviving partner determining to discontinue the business should serve notice on such administrator.[58]

(§ 7 D) 3. *As to continuing or liquidating partner. Retiring partner.*[59]—On dissolution, a continuing partner refusing to pay to the retiring partner his share of the assets holds such funds in a fiduciary capacity until final settlement,[60] and whether he is entitled to compensation for taking care of such assets rests in the discretion of the court;[61] but the retiring partner is entitled to a proportionate share of the profits, or interest on his assets up to the time of final settlement.[62] The continuing partner becoming the owner of the indebtedness due the firm may sue thereon in his own name.[63]

(§ 7 D) 4. *As to estate of deceased partner.*[64]—The personal representatives of a deceased partner have an equitable right to have firm assets applied to firm debts,[65] and are entitled to receive the decedent's share of the firm assets after all the partnership affairs have been settled.[66] Generally firm creditors may proceed in the first instance against the estate of a deceased partner,[67] but the personal representatives not being made parties to an action by the creditor, their liability is not in issue.[68] An executor of a deceased partner by allowing testator's capital to remain in business and receiving profits is not personally liable as a partner.[69]

(§ 7) *E. Accounting. Right to.*[70]—A partner, being excluded from the management of the business, is entitled to sue for an accounting.[71] The solvency or insolvency of the parties is immaterial.[72] In an accounting between partners, where neither is guilty of acts, omissions, or concealments involving a breach of legal or equitable duty toward the other, they are only liable to account to each other severally and not jointly.[73]

Jurisdiction.[74]—Equity has jurisdiction of a suit between partners for an accounting and dissolution,[75] but equity will not take jurisdiction unless a dissolution is asked.[76]

57. Where the surviving partner is the domiciliary administrator, the right extends to an ancillary administrator. Egan v. Wirth [R. I.] 58 A. 987.

58. Egan v. Wirth [R. I.] 58 A. 987.

Notice by surviving partner to the ancillary administrator to the effect that he desired to discontinue the business, and that he thereby gave notice to that effect in accordance with the partnership agreement between himself and testator, held sufficient. Egan v. Wirth [R. I.] 58 A. 987.

59. See 2 Curr. L. 1125.

See ante, Novation, § 4, subd. B, for effect of continuing partner assuming firm debts.

60, 61, 62. Moore v. Rawson, 185 Mass. 264, 70 N. E. 64.

63. Holt v. Howard [Vt.] 58 A. 797. The rule that suit must be in the name of the assignor has no application. Id.

64. See 2 Curr. L. 1126.

65, 66. See Secor v. Tradesman's Nat. Bank, 92 App. Div. 294, 87 N. Y. S. 181.

Evidence that decedent on dissolution of partnership had stated to claimant, his partner, that they "were square," held to render plaintiff's claim for undrawn profits untenable. Justis v. Justis [Md.] 57 A. 23.

67. Need not wait until partnership affairs are wound up. Altgelt v. Alamo Nat. Bank [Tex. Civ. App.] 79 S. W. 582. Need not first exhaust his remedy against the surviving partners or show that they are insolvent. Newman v. Gates [Ind.] 72 N. E. 638. **Contra,** 2 Curr. L. n. 84-86.

68. Suit on firm note. National Bank of Md. v. Hollingsworth, 135 N. C. 556, 47 S. E. 618.

69. Tisch v. Rockafellow, 209 Pa. 419, 58 A. 805.

70. See 2 Curr. L. 1127.

71. McCabe v. Sinclair [N. J. Eq.] 58 A. 412.

72. Andrews v. Clark [Neb.] 98 N. W. 655.

73. In such case each can only be held to account to every other for himself, and not for his co-partners. Lynch v. Foley [Colo.] 76 P. 370.

74. See 2 Curr. L. 1128.

75. Kisling v. Barrett [Ind. App.] 71 N. E. 507; Riddell v. Ramsey [Mont.] 78 P. 597. Petition praying for a dissolution of a partnership, an accounting, and an injunction makes an equity case. Fowler v. Davis, 120 Ga. 442, 47 S. E. 951. See 2 Curr. L. 1128, n. 98.

Kentucky: Court of Appeals has jurisdiction of an appeal from a suit to settle partnership affairs although plaintiff's claim is less than $200. Lapp v. Clark's Adm'r [Ky.] 85 S. W. 717.

76. Two partners cannot maintain an action for an accounting against a third merely because of a dispute as to the effect of a contract, no dissolution being asked. Lord

Parties.[77]—All the partners or their representatives must be before the court unless it appears that their presence is unnecessary.[78]

Pleading and proof.[79]—The bill must state the fact of partnership, a dissolution or grounds therefor, and unsettled firm accounts.[80] An order allowing a party to bond the sequestration of partnership property seized at the instance of his co-partner in a suit for settlement and accounting is subject to appeal,[81] and on appeal will generally be reversed as likely to work irreparable injury.[82] A variance between the pleading and proof is fatal.[83]

Receivers.[84]—Equity will only appoint a receiver where the partnership funds are in danger of being wasted or misappropriated.[85] Impossibility of performance will alone excuse failure to turn property over to a receiver.[86]

Credits and charges.[87]—In general, the partners are entitled to share equally in the proceeds of the sale of the business,[88] and to bear the losses equally.[89] Each is entitled to his salary,[90] and should be allowed for all claims he holds against the other partners.[91] One partner contributing all the capital, the other to repay, out of his surplus earnings, one-half of such amount, on dissolution before the stipulated time, the increase in value of the plant is to be considered as part of the profits.[92] During the pendency of the suit, neither partner is entitled to the amount stipulated in the partnership agreement for personal use.[93] Some items of account being omitted from the settlement, equity has no jurisdiction of such items, but the remedy thereon is at law.[94]

Interest being voluntarily paid, it cannot be recovered back in the absence of fraud, mistake, or concealment.[95]

Reference.[96]—When necessary, the court on hearing the referee's report may make additional findings.[97]

Decree.[98]—The court will grant relief co-extensive with the necessities of the case.[99] The ordinary rules of construction apply in construing the decree.[1]

v. Hull, 178 N. Y. 9, 70 N. E. 69. See 2 Curr. L. 1128, n. 99, 1.

77. See 2 Curr. L. 1128.

78. Lynch v. Foley [Colo.] 76 P. 370.

79. See 2 Curr. L. 1128.

80. Petition for dissolution and an accounting held to state a cause of action. Carroll v. Cunningham [Neb.] 102 N. W. 608. See 2 Curr. L. 1128, n. 3.

81, 82. Boimare v. St. Geme, 113 La. 830, 37 So. 770.

83. Party alleging a partnership, proof of a joint adventure is insufficient. Smith v. Dunn, 44 Misc. 288, 89 N. Y. S. 881.

84. See 2 Curr. L. 1129.

85. Rowland v. Auto Car Co., 133 F. 835. Where one partner wrongfully excludes the other from all participation in the business, equity will appoint a receiver pendente lite. Redding v. Anderson [Wash.] 79 P. 628. See 2 Curr. L. 1129, n. 11-13.

86. That property has been destroyed by fire is sufficient to excuse noncompliance with an order directing it to be turned over to a receiver, except where, as in the case of chemical formulas, the property is such as can be reproduced from memory. Lawson v. Tyler, 98 App. Div. 10, 90 N. Y. S. 188.

87. See 2 Curr. L. 1130.

88. Shumaker, Partnership, p. 208, § 76. Evidence held to show that cash payment to partner negotiating sale of business was part consideration of sale, and not paid to him individually for his promise not to engage in the business. Hartung v. Oldfield, 124 Iowa, 184, 99 N. W. 699.

89. Although the contribution of capital may have been unequal. Mallett v. Keller, 91 App. Div. 502, 86 N. Y. S. 917.

90. A partner receiving a salary as clerk and also a percentage of the profits, held his salary was a part of the partnership affairs to be settled in an accounting. Gillett v. Chavez [N. M.] 78 P. 68.

91. Evidence held insufficient to establish a claim by one member of a firm against the executor of a deceased partner for services rendered as clerk to decedent judicially appointed master in chancery. Gillett v. Chavez [N. M.] 78 P. 68.

92, 93. Woldenberg v. Berg [Or.] 77 P. 873.

94. Jackson v. Powell [Mo. App.] 84 S. W. 1132.

95. Price v. Olcovich, 142 Cal. 47, 75 P. 568.

96. See 2 Curr. L. 1131.

97. Where, in suit for an accounting, referee made no finding as to whether purchase by surviving partner was fraudulent, held the court on hearing the referee's report may make an additional finding of actual fraudulent intent. Rowell v. Rowell [Wis.] 99 N. W. 473.

98. See 2 Curr. L. 1132.

99. Where a partnership had a public contract, and two of the partners ignored a third, held in a suit for an accounting that

Apportionment of costs.[2]—The allowance of counsel fees to plaintiff is a matter within the discretion of the court.[3]

Opening or correcting settlement.[4]—A creditor may, by laches, lose the right to object to a partnership settlement.[5]

§ 8. *Limited partnerships.*[6]—The liability of a limited partner is such that suing him in a foreign state does not give the court jurisdiction of the partnership debt.[7] In New York a special partner having contributed his share and correctly stated the amount in his certificate is not responsible for any act of the general partners in relation to the money he has paid in,[8] and the fact that the general partners use the special partner's contribution to pay the debts of the old firm does not amount to a misappropriation of such fund.[9]

PARTY WALLS.

A party wall agreement will not be read from a mere grant of land.[10] An agreement to build a party wall, binding the heirs and assigns of the parties, creates a convenant running with the land.[11] As to whether an agreement, whereby one adjoining owner is to build the wall, the other to contribute his share of the cost of construction when he uses it, creates a covenant so running, there is a conflict of authority.[12] Rights under an agreement which constitute a covenant running with the land pass to a grantee without notice of such agreement;[13] but where the agreement to contribute does not create such a covenant

the two partners would not be enjoined from receiving payments made in the course of the execution of the contract but that they would be restrained from anticipating or assigning the final payment, and would be required to furnish a list of all payments made, and give him the details of the business. McCabe v. Sinclair [N. J. Eq.] 58 A. 412. [The complainant asked for the appointment of a manager, but owing to the expense of such an appointment the above relief was granted.]

1. Decree referring the cause to a commissioner to state the account, and requiring him to charge the defendant with what he had received from the sale of certain timber, held defendant was chargeable with what he received at retail, and was not entitled to have the same charged to him at his wholesale market price. Hughes v. Love [Mich.] 101 N. W. 536.

2. See 2 Curr. L. 1132.

3. Granville v. Arnott [Conn.] 59 A. 405. See 2 Curr. L. 1132, n. 66.

4. See 2 Curr. L. 1132.

5. Creditor having an agreement whereby one partner's share was to be paid on his part of the firm debt, held, in the absence of fraud, to have lost the right to question a partnership settlement by a delay of one year. Langhorne v. McGhee [Va.] 49 S. E. 44.

6. See 2 Curr. L. 1132.

7. Attachment proceedings. National Broadway Bank v. Sampson [N. Y.] 71 N. E. 766.

8. Construing Rev. St. (1st Ed.) p. 764, pt. 2, c. 4, tit. 1, § 4. La Montague v. Bank of New York Nat. Banking Ass'n, 94 App. Div. 219, 88 N. Y. S. 21.

9. La Montague v. Bank of New York Nat. Banking Ass'n, 94 App. Div. 219, 88 N. Y. S. 21. The money contributed having been deposited in the bank, the latter when sued by the special partnership to recover a deposit may, under a plea of payment, show that it was used in balancing the indebtedness of the old firm. Id. The rule that property of a co-partnership cannot be employed to discharge individual indebtedness had no application to the case. Id.

10. See 2 Curr. L. 1134. A release by metes and bounds of a portion of land upon which a wall rests. Fleming v. Cohen [Mass.] 71 N. E. 563.

11. One who had no wall but only the right to support its beams in the walls of an adjoining house agreed that on the destruction of this wall he would join in building a party wall. Finck v. Bauer, 40 Misc. 218, 81 N. Y. S. 625.

12. See 2 Curr. L. 1134, n. 86. In Nebraska it is a covenant running with the land. In this case, however, the contract expressly provided that it should be binding on whoever should take from the parties to the agreement. Loyal Mystic Legion v. Jones [Neb.] 102 N. W. 621.

Note: Whether agreements to contribute to cost of party walls are personal or running covenants depends on the nature of such a contract and on the intent which it evinces. See notes 66 L. R. A. 673; 89 Am. St. Rep. 941. In construing such agreements great diversity of results comes from the variation of intent and some real conflict besides. An exhaustive collection of the authorities is made in the monographic notes cited and the cases analyzed and reconciled so far as they admit of it [Editor].

13. Kappenberger v. Fairchild [Pa.] 59 A. 986. The invalidity of such an agreement cannot be asserted as against an innocent purchaser. Id.

the right to compensation for use of a wall erected by one is personal and does not pass[14] unless the agreement expressly so provides.[15] A right of action for injury to the wall belongs to the owner at the time the injury occurred.[16] A wall built by one, the cost to be shared by the other when he uses it, is, until he uses it, the exclusive property of the builder,[17] and the fact that it becomes unfit for its intended use does not deprive him of his title to that portion standing on the land of the other.[18] If the wall becomes out of repair and dangerous, his adjoiner has no right to go on and repair it.[19] Where his building burns and he negligently permits the wall to remain standing, he is liable to the adjoining owner for any damage occasioned by its subsequent fall,[20] but if the entire wall is used by both, either proprietor may repair or rebuild.[21] If the agreement designates the dimensions and height, the height designated is a limitation beyond which neither party can go without the consent of the other;[22] but where rights are governed by building regulations[23] or in the absence of an agreement, one may carry up the wall to a greater height than required for the support of the building of the other if it causes no injury to him or to the wall.[24] One may deepen its foundations and make additions to it on his own land, if its essential character is not changed or impaired, to fit it to bear the weight of a higher building,[25] but he must exercise due care to avoid unnecessary injury to the other.[26] Any of the incidental changes which result from long use such as inclination one way or the other do not alter their rights.[27] In many states the right of one owner to build a party wall and the rights of the adjoining owner relative to it are fixed by statute.[28]

Where each adjoiner is seised of a moiety with no right of support or shelter, either may raze his building without regard to injury thereby caused the other.[29] A grant of one-half of a wall carries an easement in the portion retained and

14. A wall was erected by one under an agreement that when used by the other he should pay his proportion of the cost; the agreement to be binding on the heirs and assigns of the parties and be construed as a covenant running with the land is a personal covenant. A grantee cannot recover the compensation. Schwenker v. Picken, 91 App. Div. 367, 86 N. Y. S. 681.

15. Agreement was to pay to the builder or his grantee. Loyal Mystic Legion v. Jones [Neb.] 102 N. W. 621.

16. Under Act April 10, 1849, § 4 (P. L. 600), where such right has vested it does not pass by a subsequent conveyance. Lea v. Jones, 209 Pa. 22, 57 A. 1113.

17. Beidler v. King, 209 Ill. 302, 70 N. E. 763.

18. Where building burns. Beidler v. King, 209 Ill. 302, 70 N. E. 763.

19. Beidler v. King, 209 Ill. 302, 70 N. E. 763.

20. Negligence held a question for the jury. Beidler v. King, 209 Ill. 302, 70 N. E. 763. The adjoining owner having called his attention to the dangerous condition of the wall was not guilty of contributory negligence. Id. If it injures that portion in which the adjoining owner has an interest he is liable. Id.

21. If from use and lapse of time the wall becomes weakened. Fleming v. Cohen [Mass.] 71 N. E. 563. "The cost of repairing or rebuilding shall be borne equally by the parties hereto, to the extent that they are each using said wall" means that each shall pay one-half the cost of repairs to that portion used by both. The cost of repairing or rebuilding that portion used exclusively by one to be borne by him. Beidler v. King, 209 Ill. 302, 70 N. E. 763.

22. Henne v. Lankershim [Cal.] 79 P. 591.

23. See Hutchins v. Munn, 22 App. D. C. 88.

24. Fleming v. Cohen [Mass.] 71 N. E. 563.

25. Fleming v. Cohen [Mass.] 71 N. E. 563. Where one owner repairs and makes more stable the foundation of a wall it will be inferred, unless otherwise shown, that the wall has been made sufficient to support a new building and that such use has not caused injury to the wall or to the property of the other owner. Id.

26. Changes which are not repairs. Fleming v. Cohen [Mass.] 71 N. E. 563.

27. Full easement of use is not impaired. Fleming v. Cohen [Mass.] 71 N. E. 563.

28. Under District of Columbia building regulations one may use any part of a wall already built by the other, paying for the portion he uses, or he may use it all, extend it, or build it higher. Hutchins v. Munn, 22 App. D. C. 88. A co-proprietor who does not, as required by statute, request the party building to make necessary flues, cannot use those which the builder provides for his own use. Koolbeck v. Baughn [Iowa] 101 N. W. 860.

29, 30, 31, 32. Fleming v. Cohen [Mass.] 71 N. E. 563.

implies a reservation of an easement in the portion granted.[30] And though no change take place in the ownership of the land, the title of each owner becomes subject to the easement of the other to support his building though only a portion of the wall is used.[31] The easement of support afforded is not confined to the original building but extends to and covers a new structure that may be erected and supported by it.[32]

The provisions of the contract to build a wall may be waived by participation in acts done in disregard of it,[33] or by acquiesence in acts done under it.[34] A literal compliance with the terms of the contract is not essential to enable the party building the wall to recover from the other his proportion of the cost.[35] Where the contract contains no express promise to pay but the wall is built by one and used by the other, a promise will be implied,[36] and if the agreement does not provide that each shall pay his proportion of the cost to the contractor who builds the wall, one paying the entire cost may recover from the other.[37] Where the agreement to build has been performed, a recovery may be had under the common counts,[38] or under a special count on the agreement.[39] It is not necessary to allege a waiver of some of the provisions of the contract in order to let in evidence of it.[40]

The restoration of a wall injured by one will not be compelled at the instance of the other if he does not promptly assert his rights.[41]

A division wall takes on the character of a party wall after the prescriptive period has ripened though the right thus acquired is limited to the exact use of it by the party who claims the easement.[42]

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PATENTS.

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§ 1. *Necessity and kinds.*—In the absence of the protection of a patent, no person can monopolize or appropriate to the exclusion of others patentable objects or processes.[43] A process patent covers a mode of treatment of materials to

33. Use of different material. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

34. A provision that the adjacent owners shall have joint supervision of the construction is deemed waived where one does not insist on his rights. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

35. Performance in all material respects is sufficient. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

36. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

37. Payment cannot be defeated by claiming that if liable he was bound to pay the contractor. Evans v. Howell, 211 Ill. 85, 71 N. E. 854. A contract for the construction of the wall let in accordance with the terms of the agreement is binding on the party who did not participate in the letting of such contract. Id.

38. Contract may be read in evidence for the purpose of showing its terms and the measure of damages. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

39, 40. Evans v. Howell, 211 Ill. 85, 71 N. E. 854.

41. And especially where he has a complete remedy at law. Wakeling v. Cocker, 208 Pa. 651, 57 A. 1104.

42. Fleming v. Cohen [Mass.] 71 N. E. 563. The existence of a division wall for a long period and its use in common raises a presumption of an intention to use in common rather than in severalty. Id.

43. Marvel Co. v. Pearl [C. C. A.] 133 F. 160.

produce a given result;[44] a mechanical patent covers a combination of mechanical elements which may or may not be useful in performing the acts which constitute the process;[45] design patents cover appearances only.[46]

§ 2. *Patentability. Subjects of and invention.*[47]—A monopoly of every means for doing a certain thing,[48] or of inherent and well known natural properties of a re-agent,[49] are not patentable; nor can devices common in other arts be patented and monopolized for the purposes of a particular art.[50] A function of a patented apparatus is not patentable.[51] The patentability of a process is to be judged by its effect.[52] A design pattern is addressed to the eye, and is to be judged by its ability to please,[53] and there is no objection to its being useful as well as ornamental.[54] In all patents, including those covering designs,[55] invention, as distinguished from mechanical skill, is essential.[56] The mere adaptation

44. Burdon Wire & Supply Co. v. Williams, 128 F. 927; United States v. Allen, 22 App. D. C. 56.

45. United States v. Allen, 22 App. D. C. 56.

46. Cannot be made to cover mechanical construction of article. Royal Metal Mfg. Co. v. Art Metal Works [C. C. A.] 130 F. 778; Weisgerber v. Clowney, 131 F. 477. See 2 Curr. L. 1141, n. 92.

47. See 2 Curr. L. 1134-1136.

48. An inventor claimed generally "mechanism" (without describing it) suitable for giving a certain simple mechanical movement. Diamond Match Co. v. Ruby Match Co., 127 F. 341.

49. Where patent provides for the use of such properties at a certain time, in certain quantities, and in a certain way, it does not monopolize them. United States Mitis Co. v. Midvale Steel Co., 135 F. 103.

50. To prevent the excessive rotation of a wheel by a stop, either positive or frictional, and to remove the stop to permit the further operation of the wheel, are features common to all machine construction. Felt & T. Mfg. Co. v. Mechanical Accountant Co., 129 F. 386.

51. In re Cunningham, 21 App. D. C. 29.

52. Not by its simplicity. United States Mitis Co. v. Midvale Steel Co., 135 F. 103.

53. Weisgerber v. Clowney, 131 F. 477; General Gaslight Co. v. Matchless Mfg. Co., 129 F. 137.

54. Weisgerber v. Clowney, 131 F. 477.

55. General Gaslight Co. v. Matchless Mfg. Co., 129 F. 137.

56. In re Klemm, 21 App. D. C. 186. Inventive discovery involves the intelligent apprehension of relations not before recognized by others, although actually existing, followed by the conception of how they can be practically utilized. Eck v. Kutz, 132 F. 758. Patent for product of process is void where the same product has been previously produced by other processes. Patent No. 451,847, artificial musk. Societe Fabriques de Produits Chimiques de Thann et de Mulhouse v. Lueders & Co., 135 F. 102. See 2 Curr. L. 1135, n. 6-8.

ILLUSTRATIONS. Patents held to disclose invention: Design patent No. 35,481, a cluster gas lamp. General Gaslight Co. v. Matchless Mfg. Co., 129 F. 137. No. 333,373, process for making wrought iron and steel castings. United States Mitis Co. v. Midvale Steel Co., 135 F. 103. Nos. 356,690 and 357,933, motor for mechanical musical instruments. Aeolian Co. v. Hallett & D. Piano Co., 134 F. 872. No. 392,387, electrical measuring apparatus. Weston Electrical Instrument Co. v. Jewell, 128 F. 939. Same held as to claims 8, 12 and 13 of above patent. Weston Electrical Instrument Co. v. Stevens, 130 F. 152. No. 403,247, reel for metal box straps. Cary Mfg. Co. v. Patterson Bros., 127 F. 357. No. 413,464, improvement in lanterns. Spear v. Keystone Lantern Co., 131 F. 879. No. 415,720, miner's lamp holder, claim 1. Lattimore Mfg. Co. v. Jones, 133 F. 550. Patent No. 418,678, electric switch for motors. Hammer v. Cutler-Hammer Mfg. Co. [C. C. A.] 128 F. 730. No. 424,905, weather strip. Bredin v. Sohnson, 132 F. 161. No. 434,153, incandescent lamp socket. Buchanan v. Bryant Elec. Co. [C. C. A.] 128 F. 922. No. 474,811, baking powder. Rumford Chemical Works v. New York Baking Powder Co. [C. C. A.] 134 F. 385. No. 481,134, valve mechanism for air-brakes. Westinghouse Air Brake Co. v. Christensen Engineering Co. [C. C. A.] 128 F. 437. No. 488,033, telephone switch. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. No. 491,012, bicycle bell. Mitter v. Mossberg, 128 F. 55, afd. 135 F. 95. No. 497,482, electric shunt. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 F. 82. No. 537,939, apparatus for racking liquids. Golden Gate Mfg. Co. v. Newark Faucet Co. [C. C. A.] 130 F. 112. No. 552,729, telephone switches. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. No. 562,616, waistbands. National Waistband Co. v. Monheit, 133 F. 310. No. 565,605, shell extractors. Stevens Arms & Tool Co. v. Davenport [C. C. A.] 134 F. 869. No. 591,869, electric transformer. General Elec. Co. v. Wagner Elec. Mfg. Co. [C. C. A.] 130 F. 772. No. 597,686, counter seats. Milner Seating Co. v. Yesbera [C. C. A.] 133 F. 916. No. 604,191, improved vessels for containing and administering volatile liquids. Fries v. Leeming, 131 F. 765. No. 616,425, hydrocarbon burner. United Blue Flame Oil Stove Co. v. Silver & Co., 133 F. 47. No. 638,540, combined abdominal pad and stocking supporter. Young v. Wolfe [C. C. A.] 130 F. 891. No. 652,407, garment fastener. Lowrie v. Meldrum Co. [C. C. A.] 130 F. 886. No. 682,448, comb for retaining the hair. Bechtold v. Nowacke, 131 F. 275.

Patents held void for lack of invention: No. 346,899, baseboard and wainscoting construction. Decker v. Sanford, 135 F. 112. No. 347,778, safety-break for elevators, claim 6. Eaton & Prince Co. v. Wadsworth [C. C.

of well known methods of one art to another,[57] or the application of an old process to a similar subject,[58] or the uniting of two parts into one,[59] or the carrying forward of the original thought,[60] or making a temporary device permanent,[61] do not, as a general rule, involve invention, though the contrary is true where one contrives to dispense with useless parts,[62] or makes a practical, beneficial application of a known principle.[63] Double patenting is not allowable even to the same patentee,[64] though he may obtain a second patent broader than the first and embracing the latter.[65] A combination of old elements is not patentable unless the result is a new and useful article,[66] and one which would not suggest

A.] 130 F. 702. No. 367,252, elevated gravity and cable railway. Thompson Scenic R. Co. v. Chestnut Hill Casino Co. [C. C. A.] 127 F. 698. No. 415,720, miner's lamp holder, claim 2. Lattimore Mfg. Co. v. Jones, 133 F. 550. No. 429,516, smokeless powder, claim 2. Wolff v. Du Pont De Nemours & Co. [C. C. A.] 134 F. 862. No. 449,106, telephone apparatus. Western Elec. Co. v. Anthracite Tel. Co. [C. C. A.] 133 F. 547. No. 461,357, knitting machines, claim 11. Mayo Knitting Mach. & Needle Co. v. Jenckes Mfg. Co. [C. C. A.] 133 F. 527. No. 470,340, electrical measuring instrument. Weston Electrical Instrument Co. v. Stevens [C. C. A.] 134 F. 574. No. 480,093, shell for wheel hubs. Higgin Mfg. Co. v. Murdock [C. C. A.] 132 F. 810. No. 498,962, draft tube for soda fountains, claims 1 and 5. American Soda Fountain Co. v. Sample [C. C. A.] 130 F. 145, rvg. 126 F. 760. No. 531,711, flooring. Wilce v. Bush Temple of Music Co. [C. C. A.] 134 F. 389. No. 559,411, telephone signal apparatus. Western Elec. Co. v. Rochester Tel. Co., 132 F. 814. No. 599,447, claim 1, improvement in bowling alleys. Brunswick-Balke-Collender Co. v. Klumpp [C. C. A.] 131 F. 255. No. 600,186, fireproof window. Voightmann v. Weis & Ridge Cornice Co., 133 F. 298. No. 617,592, electrical hand lamp, claims 1, 2 and 4. American Electrical Novelty & Mfg. Co. v. Howard Electrical Novelty Co., 131 F. 495. No. 520,429, for an electric battery. Id. Nos. 623,857 and 624,597, card records. Liberty Bureau v. Fred Macey Co., 134 F. 886. Nos. 627,898 and 627,900, car trucks. North Jersey St. R. Co. v. Brill [C. C. A.] 134 F. 580. No. 629,391, stocking supporter. Kleinart Rubber Co. v. Stein [C. C. A.] 133 F. 228. No. 648,309, elevator guard, consisting of board extending downward from the doorsill of an elevator. Spencer Elevator Safety Guard Co. v. Beifeld [C. C. A.] 130 F. 888. No. 669,011, for flat knit caps. Kahn v. Starrells, 131 F. 464. Patent for improvement in chairs having adjustable back, and one for a similar device as an improvement in articles of furniture having a swinging member, are in the same art; only mechanical skill being required to adapt the device to the different articles. Cook & Co. v. Heywood Bros. & Wakefield Co., 131 F. 755. Improvement in process of pillmaking. In re Colton, 21 App. D. C. 17. Seam for sewed articles. In re Klemm, 21 App. D. C. 186. Vulcanizing a rubber sole directly to inner sole of shoe. In re Butterfield, 23 App. D. C. 84. Perforating end of neck of powder can instead of elsewhere. In re Seabury, 23 App. D. C. 377.

57. Patent No. 565,263, for an apparatus for separating gases from liquids, held void. Drewson v. Hartje Paper Mfg. Co. [C. C. A.] 131 F. 734. See 2 Curr. L. 1135, n. 12, 13.

58. Patent No. 433,088, for a water meter, held void. Neptune Meter Co. v. National Meter Co. [C. C. A.] 127 F. 563.

59. Patent No. 718,378, for an insulating lining for lamp sockets, is void. General Elec. Co. v. Yost Elec. Mfg. Co., 131 F. 874.

60. Voightmann v. Weis & Ridge Cornice Co., 133 F. 298.

61. In re Seabury, 23 App. D. C. 377.

62. Where they performed specific functions. Eck v. Kutz, 132 F. 758.

Brown v. Huntington Piano Co. [C. C. A.] 134 F. 735, afg. 131 F. 273, where patent No. 468,077, for improvements in music desks for pianos, discloses patentable invention. Lane v. Levi, 21 App. D. C. 168. A patentee of combination who has made claims for distinct parts cannot afterwards prove that one of such described parts is not essential. Id. See 2 Curr. L. 1136, n. 24.

63. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167.

64. Patents Nos. 694,534 and 694,535 are void in view of patent No. 555,640. Davis Calyx Drill Co. v. Plunger Elevator Co., 135 F. 119. Patent, No. 453,955, elevator controlling mechanism, held void. Otis Elevator Co. v. Portland Co. [C. C. A.] 127 F. 557. Substantial difference is required to render two several devices patentable as designs. Change, omission or addition of a few minor details of ornamentation is insufficient. In re Freeman, 23 App. D. C. 226.

65. Otis Elevator Co. v. Portland Co. [C. C. A.] 127 F. 557; Sawyer Spindle Co. v. Carpenter, 133 F. 238. A patent for a generic invention is not invalidated by reason of the issue of a previous patent for improvements thereon. Cleveland Foundry Co. v. Detroit Vapor Stove Co. [C. C. A.] 131 F. 853. A prior patent for a device does not defeat a patent for a combination of which such device forms one element. Spear v. Keystone Lantern Co., 131 F. 879.

66. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79; Eldred v. Kirkland [C. C. A.] 130 F. 342; Eck v. Kutz, 132 F. 758; In re Klemm, 21 App. D. C. 186. A patentable compound or composition of matter is one produced by the intermixture of two or more specific ingredients, possessing properties pertaining to none of those ingredients separately, thereby accomplishing a new and useful result. Lane v. Levi, 21 App. D. C. 168. The identity of a composition depends, in general, upon the identity of its ingredients and of their co-operative law, as well as upon the identity of the properties and effect of the composition as a whole. Id.

Valid patented combinations: No. 357,538, spring-jack telephone switches. Western

itself to an ordinarily intelligent mind experienced in the art.[67] The parts of the combination must co-operate mechanically,[68] though it is not necessary that they co-operate all the time.[69] The mere substitution of equivalent, known devices[70] or ingredients[71] does not create a patentable combination. The unsuccessful efforts of other inventors in the same direction,[72] and the utility and commercial success of the article,[73] are evidence of invention, though not of themselves sufficient to establish such fact,[74] and no extent of use can supply the want of actual invention or cure the vice of mere aggregation.[75]

Novelty[76] is essential to all patents,[77] and this requisite is not created by lack of knowledge, on the part of the patentee, of former patents.[78] That the existing art has been somewhat drawn upon is insufficient to negative novelty, where the treatment is new and independent and the result novel.[79] One may become estopped to claim novelty.[80] The fact that the file wrapper discloses the patent to have been granted as first applied for, without any references, diminishes the presumption of novelty arising from the grant.[81]

Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. Nos. 393,278 and 396,313, relating to trolley crossings and switches. Thomson-Houston Elec. Co. v. Ohio Brass Co., 130 F. 542. No. 394,039, insulating turn-buckle. Id. No. 492,913, electric cigar lighter, claims 5 and 10. Eldred v. Kirkland [C. C. A.] 130 F. 342. No. 600,151, automatic rib-knitting machine. McMichael & Wildman Mfg. Co. v. Ruth [C. C. A.] 128 F. 706. No. 548,394, for a saw-stretching machine. Rich v. Baldwin [C. C. A.] 133 F. 920. No. 556,972, claim 2, improvements in rotary disc plows. Sanders v. Hancock [C. C. A.] 128 F. 424. No. 626,927, incandescent lamp socket. Perkins Elec. Switch Mfg. Co. v. Buchanan & Co., 129 F. 134, afd. 135 F. 90.

Void patented combinations: No. 492,913, for an electric cigar lighter, claim 1. Eldred v. Kirkland [C. C. A.] 130 F. 342. No. 600,180, fireproof window. Voightman v. Perkinson, 133 F. 934. Combination of an advertising-catalogue and desk-pad or blotter. In re Davenport, 23 App. D. C. 370. Adding screw cap to perforated cover of powder can. In re Seabury, 23 App. D. C. 377.

67. No. 307,942, gravity tramway, held void. Thompson Scenic R. Co. v. Chestnut Hill Casino Co. [C. C. A.] 127 F. 698.

68. A mechanism operated by hand lever to lift another part out of position where the machine is stopped constitutes a mere aggregation. Diamond Match Co. v. Ruby Match Co., 127 F. 341.

69. It is enough that, in the normal and progressive use of the machine, they do so some of the time. Sanders v. Hancock [C. C. A.] 128 F. 424.

70. Rich v. Baldwin [C. C. A.] 133 F. 920. See 2 Curr. L. 1136, n. 16.

71. Lane v. Levi, 21 App. D. C. 168. See 2 Curr. L. 1136, n. 16.

72. Eck v. Kutz, 132 F. 758. See 2 Curr. L. 1135, n. 9.

73. Raymond v. Keystone Lantern Co., 132 F. 30; Thomson-Houston Elec. Co. v. Ohio Brass Co., 130 F. 542. No. 366,362, claim 4, improvements in electrical converters, sustained. Westinghouse Elec. & Mfg. Co. v. American Transformer Co., 130 F. 550. No. 429,021, ventilating barrel. Farmers' Mfg. Co. v. Spruks Mfg. Co., 127 F. 691. No. 559,827, for featherbone, held valid. Warren Featherbone Co. v. American Featherbone Co., 133 F. 304. No. 574,894, hat ring, held valid. Ferry v. Waring Hat Mfg. Co., 129 F. 389. Improvements rendering an article commercially practicable will generally be upheld as disclosing invention. No. 439,086, coin purse, held valid. Albright v. Langfeld, 131 F. 473.

74. Burdon Wire & Supply Co. v. Williams, 128 F. 927. Where use was due to cheapness of device. General Elec. Co. v. Yost Elec. Mfg. Co., 131 F. 874; Kahn v. Starrells, 131 F. 464. See 2 Curr. L. 1135, n. 10; Id. 1136, n. 23, 27.

75. Voightmann v. Weis & R. Cornice Co., 133 F. 298.

76. See 2 Curr. L. 1136.

77. Design patent. Weisgerber v. Clowney, 131 F. 477. See 2 Curr. L. 1136, n. 28, 29.

Patents possessing novelty: Nos. 343,829 and 401,848, folding trestles. Chicago Wooden Ware Co. v. Miller Ladder Co. [C. C. A.] 133 F. 541. No. 503,103, machine for delinting cotton. American Delinter Co. v. American Machinery & Construction Co. [C. C. A.] 128 F. 709.

Patents void for lack of novelty: No. 477,616, improvement in electric annunciator drops, claim 1. Western Elec. Co. v. North Elec. Co. [C. C. A.] 130 F. 457. Nos. 527,634 and 527,537, improvements in disc water meters. National Meter Co. v. Neptune Meter Co. [C. C. A.] 129 F. 124. No. 669,011, flat knit caps. Kahn v. Starrells, 131 F. 464. No. 696,670, combination of axial and radial insulators for sparking plugs. Folger v. Dow Portable Elec. Co., 128 F. 45, afd. 133 F. 295.

78. Sanders v. Hancock [C. C. A.] 128 F. 424.

79. Patent No. 523,111, knitting machine, held valid. Eck v. Kutz, 132 F. 758.

80. That claim finally allowed was included in rejected part does not estop the inventor from asserting the novelty thereof, where defendant is sought to be held for infringement of the whole combination of which it forms a part. Eck v. Kutz, 132 F. 758.

81. American Soda Fountain Co. v. Sample [C. C. A.] 130 F. 145, rvg. 126 F. 760, cited 2 Curr. L. 1137, n. 33.

Anticipation[82] in a prior invention is fatal to the validity of the patent.[83] The former device must be capable of practical operation,[84] or so described

82. See 2 Curr. L. 1137.

83. **Patents anticipated** [2 Curr. L. 1137, n. 38]: No. 24,915, a copper tube. American Tube Works v. Bridgewater Iron Co. [C. C. A.] 132 F. 16. No. 346,899, baseboard and wainscoting construction. Decker v. Sanford, 135 F. 112. No. 364,217, mold for boot and shoe heels. Greene v. United Shoe Mach. Co. [C. C. A.] 132 F. 973. No. 583,585, device for controlling operation of gas engines. Westinghouse Mach. Co. v. Press Pub. Co., 127 F. 822. No. 507,300, cloth-measuring machine. Windle v. Parks & W. Mach. Co. [C. C. A.] 134 F. 381. No. 513,998, core making machine. Brown v. Crane Co. [C. C. A.] 133 F. 235. No. 524,178, for a packing. Daniel v. Restein & Co., 131 F. 469. No. 575,154, stone planing machine. Lincoln Ironworks v. McWhirter Co., 131 F. 860. No. 667,916, couch-bed. Merrimac Mattress Co. v. Feldman, 133 F. 64.

Patents not anticipated [2 Curr. L. 1137, n. 38]: Reissue patent No. 11,685 (original No. 540,072), bottle stopper. Ideal Stopper Co. v. Brown Cork & Seal Co. [C. C. A.] 131 F. 244. No. 333,373, process for making wrought iron and steel castings. United States Mitis Co. v. Midvale Steel Co., 135 F. 103. No. 354,281, dyeing apparatus. Kauder-Weldon Dyeing Mach. Co. v. Steadwell Dyeing Mach. Co. [C. C. A.] 128 F. 724. Nos. 356,690 and 357,933, motor for mechanical musical instruments. Aeolian Co. v. Hallett & D. Piano Co., 134 F. 872. No. 359,354, car seat. Hale & K. Mfg. Co. v. Oneonta, etc., R. Co., 129 F. 598. No. 369,120, portable drilling machine. Timolat v. Philadelphia Pneumatic Tool Co., 131 F. 257. No. 371,431, water-closet valve. Kenney Mfg. Co. v. Wells & N. Co., 135 F. 101. No. 381,527, manufacturing jewelers' plated wire. Burdon Wire & Supply Co. v. Williams, 128 F. 927. No. 392,387, electrical measuring apparatus. Weston Electrical Instrument Co. v. Jewell, 128 F. 939. Same held as to claims 8, 12, and 13 of above patent. Weston Electrical Instrument Co. v. Stevens, 130 F. 152. Nos. 393,278 and 396,313, trolley crossings and switches. Thomson-Houston Elec. Co. v. Ohio Brass Co., 130 F. 542. No. 413,464, improvement in lanterns. Spear v. Keystone Lantern Co., 131 F. 879. No. 418,678, electric switch for motors. Hammer v. Cutler Hammer Mfg. Co. [C. C. A.] 128 F. 730. No. 421,244, improvement in method of hulling peas. Chisholm v. Fleming, 133 F. 924. Nos. 424,291 and 583,320, instruments for measuring elapsed time. Calculagraph Co. v. Wilson, 132 F. 20. No. 424,905, weather strip. Bredin v. Solmson, 132 F. 161. No. 429,874, stone sawing machine wherein the saw is moved against stone, instead of latter being fed to saw as in machines of the prior art. Diamond Stone Sawing Mach. Co. v. Brown, 130 F. 896. No. 434,153, incandescent lamp socket. Buchanan v. Bryant Elec. Co. [C. C. A.] 128 F. 922. No. 468,006, boottree. Fitz v. Leadan, 132 F. 659. No. 475,401, oil burner, claim 1. Cleveland Foundry Co. v. Detroit Vapor Stove Co. [C. C. A.] 131 F. 853. No. 481,134, valve mechanism for air-brakes. Westinghouse Air Brake Co. v. Christensen Engineering Co. [C. C. A.] 128 F. 437. No. 488,033, telephone switch. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. No. 491,012, bicycle bell. Mutter v. Moseberg, 128 F. 55, afd. 135 F. 95. No. 491,972, logwood extract. Hemolin Co. v. Harway Dyewood & Extract Mfg. Co., 131 F. 483. Nos. 492,205 and 526,968, machines for coating confectionery. American Chocolate Machinery Co. v. Helmstetter, 129 F. 919. Nos. 459,883 and 508,542, ore roasting furnace. Davis-Colby Ore Roaster Co. v. Lackawanna Iron & Steel Co., 128 F. 453. No. 497,482, electric shunt. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 F. 82. No. 498,196, railroad switch-stand. Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 133 F. 730. No. 503,103, machine for delinting cotton seed. American Delinter Co. v. American Machinery & Construction Co. [C. C. A.] 128 F. 709. No. 507,300, device for varying length of circumference of cylinder in cloth measuring machine. Windle v. Parks & W. Mach. Co., 128 F. 58. Nos. 511,559 and 511,560, former for a method and latter for a means of operating electric motors. Westinghouse Elec. & Mfg. Co. v. Electric Appliance Co., 133 F. 396; Westinghouse Elec. & Mfg. Co. v. Mutual Life Ins. Co., 129 F. 213; Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167, rvg. 129 F. 140. No. 521,461, telephone switch board in which fallen annunciator is automatically restored to position. Western Tel. Mfg. Co. v. American Elec. Tel. Co. [C. C. A.] 131 F. 75. No. 552,729, telephone switches. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. No. 559,827, featherbone. Warren Featherbone Co. v. American Featherbone Co., 133 F. 304. No. 562,616, waistbands. National Waistband Co. v. Monheit, 133 F. 310. No. 574,894, hat ring. Ferry v. Waring Hat Mfg. Co., 129 F. 389. No. 575,154, stone planing machine, claim 8. Lincoln Ironworks v. McWhirter Co., 131 F. 860. No. 580,434, improvement in telephone transmitters. Stromberg-Carlson Tel. Mfg. Co. v. American Elec. Tel. Co. [C. C. A.] 127 F. 704. No. 583,560, log turning and loading device. Wilkin v. Hill, 131 F. 762. No. 589,342, tip for acetylene gas burner. Kirchberger v. American Acetylene Burner Co. [C. C. A.] 128 F. 599. No. 591,869, electric transformer. General Elec. Co. v. Wagner Elec. Mfg. Co. [C. C. A.] 130 F. 772. No. 592,134, knitting machine. Eck v. Kutz, 132 F. 758. No. 595,688, for a warp stop-motion for looms. American Chocolate Machinery Co. v. Helmstetter, 129 F. 919; Kip-Armstrong Co. v. King Philip Mills, 130 F. 28. No. 604,191, improved vessels for containing and administering volatile liquids. Fries v. Leeming, 131 F. 765. No. 613,545, hydrant. Cayuta Wheel & Foundry Co. v. Kennedy Valve Mfg. Co., 127 F. 355. No. 616,425, hydrocarbon burner. United Blue Flame Oil Stove Co. v. Silver & Co., 133 F. 47. No. 626,927, incandescent lamp socket. Perkins Elec. Switch Mfg. Co. v. Buchanan & Co., 129 F. 134, afd. 135 F. 90. No. 633,941, dredger for pulverulent material. Arrott v. Standard Sanitary Mfg. Co., 131 F. 457. No. 638,540, combined abdominal pad and stocking supporter. Young v. Wolfe [C. C. A.] 130 F. 891. No. 642,059, guides in machine for ornamenting picture frames. Franklin & Co. v.

that an ordinarily skilled mechanic could convert it into a practical success;[85] but it is not necessary that it should have gone into general use,[86] and being once reduced to practice and exhibited, it cannot be abandoned so as to change its effect as an anticipating article.[87] The effect of a patent as anticipation is to be determined by the date it was issued,[88] and its validity must be sustained solely on features claimed.[89] Increase in efficiency due to the use of different materials, which, however, are not claimed as a feature, does not avoid anticipation.[90] An unpatented device of the same inventor cannot be regarded as part of the prior art.[91] As to whether a prescribed arrangement anticipates the opposite thereof, there seems to be a conflict.[92] A patentee is only required to meet alleged anticipation by publication with full, unequivocal and convincing proof.[93] That defendant has been very successful in sale of infringing article is persuasive evidence against him on the defense of anticipation.[94]

Prior public[95] *use* for two years before filing the application renders the patent void, unless the use was fraudulent, surreptitious and piratical.[96] An inventor has a reasonable time in which to experiment for the purpose of perfecting the invention and demonstrating its utility,[97] the time thus spent, if in good faith, is no part of the statute of limitations;[98] but the experiments must be made in perfecting the invention as described and shown,[99] and as soon as the inven-

Illinois Moulding Co., 128 F. 48. No. 652,407, garment fastener. Lowrie v. Meldrum Co. [C. C. A.] 130 F. 886. No. 692,655, means for converting a single disc plow into a plurality disc plow, and the converse. Sanders v. Hancock [C. C. A.] 128 F. 424. Device for flatly fastening an initial on a finger ring. In re Weiss, 21 App. D. C. 214.

84. Hale & Kilburn Mfg. Co. v. Oneonta, etc. R. Co., 129 F. 598; Farmers' Mfg. Co. v. Spruks Mfg. Co. [C. C. A.] 127 F. 691. See 2 Curr. L. 1138, n. 41.

85. Timolat v. Philadelphia Pneumatic Tool Co., 131 F. 257; Ideal Stopper Co. v. Crown Cork & Seal Co. [C. C. A.] 131 F. 244. It is not a sufficient answer to say of any alleged anticipation that it was a mere paper patent, and had not been operative or commercially successful; for prior existing conditions might not have stimulated full development. Id. Description in a prior publication must be of a complete and operative invention, capable of being put into practical operation. Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 133 F. 730.

86. Merrimac Mattress Mfg. Co. v. Feldman, 133 F. 64. It is sufficient if it was in actual and practical use by a number of persons. Daniel v. Restein & Co., 131 F. 469.

87. Subsequent changes held ineffective. Merrimac Mattress Co. v. Feldman, 133 F. 64.

88. Not by the date of application. Eck v. Kutz, 132 F. 758.

89. Cannot be supported by features not referred to, claimed, or even suggested in the patent, and not a function of the thing patented except when used in a special combination not claimed. Greene v. United Shoe Mach. Co. [C. C. A.] 132 F. 973.

90. Daniel v. Restein & Co., 131 F. 469.

91. So as to create anticipation, or prevent him from drawing upon it in the development of his ideas, where it has not been relinquished by two years prior use or sale. Eck v. Kutz, 132 F. 758. But see 2 Curr. L. 1138, n. 49.

92. Moving bottles through heated water is not anticipated by process of circulating heated water around bottles. In re Wagner, 22 App. D. C. 267. Moving saw against stone instead of stone against saw discloses patentable novelty. Diamond Stone Sawing Mach. Co. v. Brown, 130 F. 896. An alternative construction is an equivalent. Eldred v. Kirkland [C. C. A.] 130 F. 342. Expanding an inner tube, instead of compressing an outer one, constitutes infringement. Burdon Wire & Supply Co. v. Williams, 128 F. 927.

93. Need not establish it beyond a reasonable doubt. Westinghouse Elec. Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167.

94. Milner Seating Co. v. Yesbera [C. C. A.] 133 F. 916.

95. See 2 Curr. L. 1139. Prior application can have weight only if there has been some actual use of the invention, so that there may be elements of publicity. Thomson-Houston Elec. Co. v. Ohio Brass Co., 130 F. 542. No. 559,827, featherbone, held valid. Warren Featherbone Co. v. American Featherbone Co., 133 F. 304.

Patents construed with reference to prior use: No. 42,920, pump for fire engine, void. Eastman v. New York [C. C. A.] 134 F. 844. No. 474,811, baking powder, held valid. Rumford Chemical Works v. New York Baking Powder Co. [C. C. A.] 134 F. 385. Evidence held insufficient to show prior use of electric shunt protected by patent No. 497,482. Western Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 F. 82.

96. Eastman v. New York [C. C. A.] 134 F. 844. Where inventor knew of use and acquiesced therein held not fraudulent or surreptitious. Id.

97, 98. Eastman v. New York [C. C. A.] 134 F. 844.

99. Eastman v. New York [C. C. A.] 134 F. 844. Experiments made in testing parts of a machine not covered by the invention will not have the effect of extending the two-year period. Id.

tion is completed, viz.: "in such a condition that the inventor can apply for a patent for it," the two-year period begins to run.[1] The fact that the invention has been improved since its original embodiment does not demonstrate that it was then embryonic or incomplete.[2] That delay is caused by advice of solicitor does not prevent the running of the statute.[3] In the absence of a sufficient publication, a prior use in a foreign country will not defeat the patent here.[4] The defense of prior use must be proven beyond a reasonable doubt,[5] but when it is established, the burden is on the inventor to prove by convincing proof that the use was experimental.[6]

Abandonment.[7]—The inventor must exercise due diligence in the assertion of his claim,[8] and doing so he cannot be deprived of the right to his invention except by express contract or by a course of conduct that fairly gives rise to an implication of an intention to part with it.[9] Though it has been held that abandonment is not to be predicated from mere delay,[10] failure to exercise reasonable diligence going merely to the question whether one should be given a patent as against intervening rights.[11] To delay one invention for the sake of another projected invention to be used in connection with it, and which may never be realized, cannot be construed as an exercise of due diligence.[12]

§ 3. *Who may acquire patents.*[13]

§ 4. *Mode of obtaining and claiming patents.*[14]—Separate inventions in the same structure need not be claimed in the same patent.[15] A claim for a machine and one for the process for using it cannot be joined in the same application,[16] though the claim for the machine may be joined with one for the means of using it.[17] The invention being a compound, the component parts thereof, the process of their intermixture and the result must be described with clearness and precision;[18] if a design, a picture is the best mode of description;[19] and if a mechanical device, it is not necessary that the description or drawings should be clear to one unskilled in the art,[20] and each is to be construed with reference to

1, 2, 3. Eastman v. New York [C. C. A.] 134 F. 844.

4. Rev. St. § 4923. Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 133 F. 730.

5. Recollection of a single witness, whose knowledge largely depended upon information obtained from importers, held insufficient. Albright v. Langfeld, 131 F. 473. Uncorroborated testimony of a single witness held insufficient. Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 133 F. 730. Mere unsupported say-so of inventor and son as to date of invention is insufficient to show priority. Eck v. Kutz, 132 F. 758. See 2 Curr. L. 1139, n. 59.

6. Eastman v. New York [C. C. A.] 134 F. 844.

7. See 2 Curr. L. 1141.

8. Where year after conceiving invention applicant made a crude machine which he afterward destroyed, held only an abandoned experiment. Hallwood v. Lalor, 21 App. D. C. 61. Delay of over a year by inventor with means held to show lack of diligence. Id. Lack of means and efforts to enlist capital held not to excuse two years' delay. Wyman v. Donnelly, 21 App. D. C. 81. 26 months' delay held not due diligence, another party meanwhile filing an application for a similar patent. Watson v. Thomas, 23 App. D. C. 65. Retaining device for four years after practical experiment, held to show abandonment. Quist v. Ostrom, 23 App. D. C. 69. Query,—as to whether it did not constitute such concealment as to subordinate claims to those of rival. Id.

9. Sendelbach v. Gillette, 22 App. D. C. 168.

10. Eck v. Kutz, 132 F. 758. Three years delay held not to show failure to exercise due diligence. Id.

11. It has no bearing on the issue whether or not he was the first inventor. Eck v. Kutz, 132 F. 758.

12. Lotterhand v. Hanson, 23 App. D. C. 372.

13, 14. See 2 Curr. L. 1139.

15. Thomson-Houston Elec. Co. v. Ohio Brass Co., 130 F. 542.

16. Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 F. 740. See 2 Curr. L. 1141, n. 90.

17. United States v. Allen, 192 U. S. 543, 48 Law. Ed. 555. Rule 41 of the patent office is invalid. Id.

18. Lane v. Levl, 21 App. D. C. 168. See 2 Curr. L. 1139, n. 68.

19. In re Freeman, 23 App. D. C. 226. Comment by commissioner of patents on inutility of descriptive language contained in applicant's specifications cannot properly be made the ground of assignment of error. Id.

20. Description. Wolff v. Du Pont De Nemours & Co. [C. C. A.] 134 F. 862. Drawings and description need not show or state every detail. American Dellnter Co. v. Amer-

the other,[21] though the drawings cannot supply an entire absence of description in the specifications,[22] and any inferences arising from omissions or inconsistencies in the drawings must yield to a legally sufficient specification.[23] The claims must be read in the light of the specifications and drawings, and if from the whole a person skillful in the art can construct the thing invented, the patent is sufficient.[24] A party desiring to have a model or drawing guarded against accident that may thereafter result from frequent handling, should have it particularly described in respect to appearance, construction, and operation at the time he offers it in evidence.[25] An inventor may amend his application so as to include therein all matters within the scope of his invention,[26] but he cannot thereby enlarge the same.[27]

The right to a patent is to be determined in the first instance by the patent office,[28] and all proceedings therein are presumptively correct,[29] and the grant of a patent is presumptive evidence of an application in due form, commensurate with the grant,[30] and that the patent is valid.[31] In regard to the validity of patents, decisions of other circuit courts of appeals carry great weight.[32] The date of the letters patent is prima facie the date of the application, and the latter date of the date of invention.[33] Rev. St. § 4885, providing that every patent shall be issued not later than six months after notice of allowance, is merely directory.[34] The renewal of an application where one fails to pay his fees must be made within two years after the allowance of the first.[35] A petition for the revival of an application being denied, a new application filed thereafter stands on the same footing

ican Machinery & Construction Co. [C. C. A.] 128 F. 709. Failure to show a feed screw or an equivalent device in drawings for a cotton delinting machine held not to invalidate the patent. Id.

21. Western Telephone Mfg. Co. v. American Elec. Tel. Co. [C. C. A.] 131 F. 75; Windle v. Parks & Woolson Mach. Co. [C. C. A.] 134 F. 381. See, also, 2 Curr. L. 1142, n. 99-3.

22. Windle v. Parks & Woolson Mach. Co. [C. C. A.] 134 F. 381.

23. Western Telephone Mfg. Co. v. American Elec. Telephone Co. [C. C. A.] 131 F. 75.

24. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 F. 82. See, also, 2 Curr. L. 1142, n. 99-3. An element of a combination, although not definitely described in the claims, except by reference to the specification by the words "substantially as described" at the end of each claim, may be read into the claims where it is fully described in the specification, and is essential to the operation of the machine. Sanders v. Hancock [C. C. A.] 128 F. 424.

25. Greenwood v. Dover, 23 App. D. C. 251.

26. An inventor coming to better understand the principles of his invention, he may amend his application to conform thereto. Cleveland Foundry Co. v. Detroit Vapor Stove Co. [C. C. A.] 131 F. 853. Where matter was previously disclosed, amendment was held to dominate claims of another claimant, otherwise as to new matter. Luger v. Browning, 21 App. D. C. 201. Amendment was filed within three months, rights of other inventors considered. Kirchberger v. American Acetylene Burner Co. [C. C. A.] 128 F. 599.

27. Cleveland Foundry Co. v. Detroit Vapor Stove Co., 131 F. 740.

28. Standard Scale & Foundry Co. v. McDonald, 127 F. 709.

29. Charge by rival inventor that patentee fraudulently and surreptitiously obtained patent can be sustained only by the clearest proof. Sendelbach v. Gillette, 22 App. D. C. 168.

30. Bowers v. Bucyrus Co., 132 F. 39.

31. That an expert, having the patent before him might build up the structure covered thereby, by selecting and applying appliances theretofore known does not rebut such presumption. McMichael & Wildman Mfg. Co. v. Ruth [C. C. A.] 128 F. 706. That prior patents were called to the attention of the examiners strengthens the presumption that the patent was not anticipated. Hale & Kilburn Mfg. Co. v. Oneonta, etc., R. Co., 129 F. 598. Patents regular on their face cannot be collaterally attacked. Calculagraph Co. v. Wilson, 132 F. 20. Evidence held insufficient to overcome presumption that patentee was inventor. Patent No. 718,130, feed mechanism for carding machines, involved. Kemp v. McBride, 129 F. 382.

32. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167. Where after interference proceedings the patent was acquiesced in for years and sustained by judicial decision, such facts have weight in favor of its validity. Id.

33. Drewson v. Hartje Paper Mfg. Co. [C. C. A.] 131 F. 734.

34. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79.

35. Rev. St. § 4897. Reissue patent No. 10,945 (original 381,305), for an electrical conductor held void. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 F. 90. The court states that in its opinion Rev. St. § 4897 allows only one renewal application. Id.

as though no previous application had been made.[36] One may become estopped to insist on his application for a patent.[37]

Interference.[38]—That the primary examiner failed to make formal allowance of claims before declaring the interference is immaterial.[39] The first to conceive an invention being diligent in reducing it to practice is entitled to priority,[40] and such reduction to practice being subsequent to that of a rival, the controversy between the parties is reduced to the question of diligence.[41] Neither party making an actual reduction to practice, the first to conceive and make disclosure is entitled to priority.[42] To constitute reduction to practice,[43] the machine must be capable of performing the work for which it was designed,[44] and nothing must be left to inference.[45] Lack of diligence cannot be imputed to the party who first reduces to practice,[46] though he may lose the priority thus obtained by being negligent in applying for his patent.[47] The date of filing the application is prima facie the date of conception, disclosure and constructive reduction to practice.[48] For the purpose of constructive reduction to practice, a second application relates back to a former one allowed and abandoned.[49] Foreign inventors are entitled to claim the date they communicated their invention here as the date of conception, and the date of filing their application here as the date of constructive reduction to practice.[50] That one at the time of filing his application has a better invention for the same thing is improbable.[51] Failure to prove allegations as alleged tends to discredit.[52] A party cannot claim disclosure of patent where to do so would ren-

36. To authorize the granting of a patent thereon, it must appear that the invention had not been in public use or on sale in this country for more than two years prior to such application. Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 130 F. 900.

37. Inventor applied for patent, uniting process and apparatus claims, and required process claims to be placed in interference with those of an existing patent, after receipt of a letter from primary examiner permitting retention of both claims pending determination of the interference, but stating that the acceptance of an interference on one of the process claims would be considered an election to prosecute such claims, and prosecution of apparatus claims would not thereafter be permitted. Held, the inventor was not estopped to insist on his application for a patent. United States v. Allen, 192 U. S. 543, 48 Law. Ed. 555.

38. See 2 Curr. L. 1140.

39. Luger v. Browning, 21 App. D. C. 201.

40. Hillard v. Brooks, 23 App. D. C. 526. Junior applicant, as against patentee, must show reasonable diligence in reducing to practice. Dashiell v. Tasker, 21 App. D. C. 64. Delay in filing application caused by loss of drawings held not to show want of reasonable diligence in reducing to practice. Garrels v. Freeman, 21 App. D. C. 207. Eight months delay held to constitute a lack of diligence. Liberman v. Williams, 23 App. D. C. 223. Party conceiving invention and constructively reducing it to practice before another is entitled to priority. Lotterhand v. Hanson, 23 App. D. C. 372. See 2 Curr. L. 1140, n. 72, 73.

41. Liberman v. Williams, 23 App. D. C. 223.

42. Greenwood v. Dover, 23 App. D. C. 251.

43. Facts constituting reduction to practice: Inventor's test of ejecting mechanism on match machine, though real matches were not used. Wyman v. Donnelly, 21 App. D. C. 81. Making full-sized horse collar, exhibiting it and putting it on sale. Couch v. Barnett, 23 App. D. C. 446.

Facts not constituting reduction to practice: Temporary use and abandonment for two years. Hillard v. Brooks, 23 App. D. C. 526. Abandonment for four years. Tripler v. Linde, 21 App. D. C. 32.

44. MacDonald v. Edison, 21 App. D. C. 527. No reduction to practice of breech mechanism for rapid firing guns until tested by actual service. Dashiell v. Tasker, 21 App. D. C. 64. Where after actual test for three years, party came to conclusion that another device was necessary in order to perfect machine, held not an admission that invention without such device was inoperative. Trissel v. Thomas, 23 App. D. C. 219. See 2 Curr. L. 1140, n. 77.

45. Must embrace all elements of combination. Blackford v. Wilder, 21 App. D. C. 1.

46. Paul v. Johnson, 23 App. D. C. 187.

47. Two years delay is a circumstance of significance (Sendelbach v. Gillette, 22 App. D. C. 168), though insufficient to deprive him of his priority (Brown v. Blood, 22 App. D. C. 216). Nonuse for 10 years and ridicule of invention when announced by another, held to discredit claim of priority. Talbot v. Monell, 23 App. D. C. 108. Junior applicant must show reasonable diligence in reducing to practice. Dashiell v. Tasker, 21 App. D. C. 64.

48. Dashiell v. Tasker, 21 App. D. C. 64.

49. Lotterhand v. Hanson, 23 App. D. C. 372.

50. Harris v. Stern, 22 App. D. C. 164.

51. Sachs v. Hundhausen, 21 App. D. C. 511.

52. Both parties failing to prove reduction to practice as alleged, held to indicate such a reprehensible looseness of assertion in the preliminary statements as to tend to dis-

der him guilty of perjury.[53] The junior applicant has the burden of showing priority of invention and the exercise of due diligence,[54] and this burden is substantially increased where there are successive adverse decisions against him in the patent office,[55] or his opponent has a regularly[56] issued patent,[57] and this burden is increased if the two last elements coexist.[58] However, if the junior party shows a disclosure and reduction to practice prior to the filing of the senior party's application,[59] or that the latter received a disclosure of the junior party's conception,[60] the senior party must prove with reasonable certainty that such fact did not affect his priority. The rights of third persons not parties to the proceeding are immaterial.[61] Pure mistakes of fact will not generally be construed against a party.[62] One party adopting the claims and specifications of his adversary, it is proper to construe the issues of the interference thereupon declared in the light of the specifications from which they were thus taken.[63] So far as the interference proceedings are concerned the question whether or not an applicant has the right to make the claim put in issue is determined and becomes res judicata, by the declaration of interference.[64] Where the application of one of the parties to an interference is only a division of an application theretofore filed, he is entitled to the filing date of his first application for the purposes of the interference.[65] In the absence of harm or prejudice, a variance between the dates in the preliminary statement and those shown in the proof is immaterial.[66]

An application for a patent filed in a foreign patent office affords no evidence

credit both parties. Shaffer v. Dolan, 23 App. D. C. 79.

53. Cannot be claimed in violation of oath that the article had never been patented by him. Tripler v. Linde, 21 App. D. C. 32.

54. Paul v. Johnson, 23 App. D. C. 187; Flora v. Powrie, 23 App. D. C. 195; Herman v. Fullman, 23 App. D. C. 259; Whitney v. Howard, 21 App. D. C. 218; McKnight v. Pohle, 22 App. D. C. 219. By a preponderance of evidence. Flather v. Weber, 21 App. D. C. 179. Junior applicant can only prevail by showing conception of the invention prior to the conception of his adversary. Cobb v. Goebel, 23 App. D. C. 75. See 2 Curr. L. 1140, n. 74.

Evidence held insufficient to establish priority of junior party. Whitney v. Howard, 21 App. D. C. 218; Flora v. Powrie, 23 App. D. C. 195; McKnight v. Pohle, 22 App. D. C. 219. Oral, unsupported and contradicted evidence. Arrott v. Standard Sanitary Mfg. Co., 131 F. 457. Conception and disclosure are not established where evidence shows that at the date in question the party had in mind the result to be accomplished but not the means. Cobb v. Goebel, 23 App. D. C. 75. Evidence as to sickness considered and the fact that applicant had filed nine applications during period of alleged sickness considered and held to show lack of diligence. Paul v. Johnson, 23 App. D. C. 187. Held, on the evidence, that an employe did not have an invention during his first period of employment by a certain company. Slaughter v. Halle, 21 App. D. C. 19. The first who reduces an idea to practice, not the first who says he has conceived an invention, is the inventor. Merrimac Mattress Co. v. Feldman, 133 F. 64.

Held sufficient to award priority to junior party. Flather v. Weber, 21 App. D. C. 179. Burden is met when the evidence shows with certainty that junior party conceived invention before the filing of his opponent's application. Garrels v. Freeman, 21 App. D. C. 207.

55. Hallwood v. Lalor, 21 App. D. C. 61; Harris v. Stern, 22 App. D. C. 164; McKnight v. Pohle, 22 App. D. C. 219. See 2 Curr. L. 1140, n. 75.

56. Quist v. Ostrom, 23 App. D. C. 69. Patent inadvertently granted to wrong party will not avail him in interference proceedings. Watson v. Thomas, 23 App. D. C. 65; Shaffer v. Dolan, 23 App. D. C. 79.

57. Must prove facts beyond a reasonable doubt. Dashiell v. Tasker, 21 App. D. C. 64; Meyer v. Sarfert, 21 App. D. C. 26; Sendelbach v. Gillette, 22 App. D. C. 168; Gallagher v. Hastings, 21 App. D. C. 88. See 2 Curr. L. 1140, n. 76.

58. Talbot v. Monell, 23 App. D. C. 108; MacDonald v. Edison, 21 App. D. C. 527.

59. Herman v. Fullman, 23 App. D. C. 259.

60. Greenwood v. Dover, 23 App. D. C. 251.

61. Whether conception of one party was an appropriation of invention of associate cannot be inquired into in a proceeding to which such associate is not a party. Garrels v. Freeman, 21 App. D. C. 207. Testimony by senior party to show that a third person, not a party to the proceeding, was the original inventor and not the junior party, will not be considered. Brown v. Blood, 22 App. D. C. 216.

62. Where a junior party signed application of the senior party, but supposed it was for their joint benefit, that act should not be construed against him. Flather v. Weber, 21 App. D. C. 179.

63. Talbot v. Monell, 23 App. D. C. 108.

64. Herman v. Fullman, 23 App. D. C. 259.

65. Hillard v. Brooks, 23 App. D. C. 526.

66. Date of reduction to practice. Herman v. Fullman, 23 App. D. C. 259.

of priority of invention,[67] but a foreign patent is competent evidence on an issue of priority, though only as of the date when it actually became a patent.[68] Microscopic examination made by the examiners in the patent office is admissible in evidence and presumed to be correct.[69] The testimony of a witness naturally interested in the invention and to whom it was explained is entitled to greater weight than that of an uninterested party to whom it was casually shown.[70] The device in controversy being introduced in evidence, testimony that it was used on a certain kind of a machine warrants the inference that the latter machine was complete.[71] The needless or useless disclosure of a secret process will not be compelled.[72]

Appeal and review.[73]—Mandamus may lie to compel the commissioner of patents to forward to the board of examiners in chief the appeal to which the inventor is entitled under U. S. Rev. St. § 4909.[74] The Court of Appeals of the District of Columbia will not pass upon the question of priority until the patent office has determined the patentability of the alleged invention.[75] A decision considering and sustaining a patent will not be disturbed in the absence of palpable error,[76] nor will the commissioner of patents be reversed on a doubtful question of fact.[77] Such court will not consider an assignment of error based upon the overruling by the commissioner of a motion for a rehearing on the ground that an exhibit had been changed by frequent handling in the patent office.[78] On appeal to the Court of Appeals of the District of Columbia the question of interference must be confined to counts considered by the commissioner,[79] and the court will not consider whether the primary examiner erred in allowing a broad construction,[80] the question of patentability,[81] of operativeness,[82] nor of identity.[83] While affidavits may be permitted to show material changes in an exhibit after its transmission to the court of appeals, they cannot be received to contradict or correct the record of proceedings in the patent office.[84] An applicant against whom adverse decisions have been rendered in interference proceedings by the examiners and commissioner of patents, and on appeal by the Court of Appeals of the District of Columbia may maintain a bill in equity in a circuit court,[85] without waiting for the formal action of the patent office refusing his application.[86] The circuit court of appeals has power to finally determine the validity of

67. Construing Rev. St. U. S. §§ 4886, 4887, as amended by Act March 3, 1887, and § 4923. Rousseau v. Brown, 21 App. D. C. 73.

68. Rousseau v. Brown, 21 App. D. C. 73. Patent held not in evidence where an alleged official copy of a specification and drawings annexed to a French patent were introduced but no copy of the patent was produced. Id.

69. Flora v. Powrie, 23 App. D. C. 195. If either party is dissatisfied with the result of such examination, he should have had the matter subjected to further tests either before the examiners-in-chief or the commissioner on appeal. Id.

70. Interested witness was employe of firm that inventor was thinking of having manufacture his device. Greenwood v. Dover, 23 App. D. C. 251.

71. Wyman v. Donnelly, 21 App. D. C. 81.

72. Herreshoff v. Knietsch, 127 F. 492.

73. See 2 Curr. L. 1141.

74. Writ lies where the primary examiner has twice denied the right of an inventor to unite in one application process and apparatus claims which are essentially the same invention. United States v. Allen, 192 U. S. 543, 48 Law. Ed. 555, rvg. 22 App. D. C. 56. In such case no appeal lies to the court of appeals of the District of Columbia. Ex parte Frasch, 192 U. S. 566, 48 Law. Ed. 664.

75. Slaughter v. Halle, 21 App. D. C. 19.

76. Suit was between different parties. Walker Patent Pivoted Bin Co. v. Miller, 132 F. 823. In order that a junior applicant who appeals may prevail, he must make out a very clear case. Cobb v. Goebel, 23 App. D. C. 75.

77. Flora v. Powrie, 23 App. D. C. 196. Decision of commissioner as to priority of invention affirmed. Shaffer v. Dolan, 23 App. D. C. 79.

78. Greenwood v. Dover, 23 App. D. C. 251.

79. Herman v. Fullman, 23 App. D. C. 259.

80. Hillard v. Brooks, 23 App. D. C. 526.

81. Hillard v. Brooks, 23 App. D. C. 526; Luger v. Browning, 21 App. D. C. 201.

82. Lotterhand v. Hanson, 23 App. D. C. 372.

83. Luger v. Browning, 21 App. D. C. 201.

84. Blackford v. Wilder, 21 App. D. C. 1.

85. 27 Stat. 434 does not repeal Rev. St. § 4915. McKnight v. Metal Volatilization Co., 128 F. 51.

86. McKnight v. Metal Volatilization Co., 128 F. 51.

a patent upon an appeal from an order allowing a preliminary injunction restraining infringement.[87] The patent, however, will only be held invalid in very plain cases.[88] No appeal or writ of error lies to the Federal Supreme Court from the Court of Appeals of the District of Columbia.[89] One failing to take advantage of the right to purchase inventions abandons the same to the inventor.[90]

Abandonment.[91]

§ 5. *Letters patent. Construction and limitation of claims.*[92]—A patent must be taken with all its limitations, and resort may be had to its course through the patent office to determine them.[93] The claims of a patent are to be fairly construed, so as to cover, if possible, the invention,[94] and the construction placed upon them by the inventor is conclusive[95] unless it fails to affect the result.[96] Such construction may be determined by reference to the specifications and drawings.[97] Various constructions placed upon patents[98] and words and phrases therein[99] are stated in the notes. That the patent recites that it is an improvement upon a former invention does not preclude the inventor from showing that inventive idea of which it is the embodiment was antecedent to the first invention.[1]

A pioneer invention is entitled to a liberal construction,[2] and if the invention is one for which there is a prior art it will receive a construction dependent upon the state of such art.[3] A combination or adaptation of known devices, con-

87. Co-operating Merchants' Co. v. Hallock [C. C. A.] 128 F. 596.

88. Evidence of anticipation held insufficient to justify appellate court in holding patent No. 600,782, for a weeding machine, invalid. Co-operating Merchants' Co. v. Hallock [C. C. A.] 128 F. 596.

89. Since the latter court does not enter final judgment but only makes a return of a certificate of its proceedings and decision to the patent office to govern further proceedings there. Rousseau v. Brown, 21 App. D. C. 73.

90. One having the right to purchase inventions before the filing of the application for a patent, by failing to pay the final fee, held to abandon his election to purchase and left the inventor free to take the patents for his own benefit. Paul Steam System Co. v. Paul, 129 F. 757.

91, 92. See 2 Curr. L. 1141.

93. Eck v. Kutz, 132 F. 758.

94. Mossberg v. Nutter [C. C. A.] 135 F. 95.

95. Claim actually made is measure of right to protection. Lanyon Zinc Co. v. Brown [C. C. A.] 129 F. 912. One is estopped to change construction placed on claims in order to avoid infringement. Westinghouse Elec. & Mfg. Co. v. Wagner Elec. Mfg. Co., 129 F. 604. Rejected features cannot be reasserted, nor can a broad construction be insisted on, where a narrow one has been accepted by amendment to meet the objections of the examiner. Eck v. Kutz, 132 F. 758.

96. Not effecting result patentee is entitled to benefit of invention though he may not have correctly understood the principles of its operation. Cleveland Foundry Co. v. Detroit Vapor Stove Co. [C. C. A.] 131 F. 853.

97. See ante, § 4.

98. Claim of "a trestle consisting of two pair of legs" pivoted as shown, held to include the top piece. Chicago Wooden Ware Co. v. Miller Ladder Co. [C. C. A.] 133 F. 541. No. 508,542, ore roasting furnace, claims 3 and 8 require the three chambers to be substantially co-extensive, as shown in the drawings. Lackawanna Iron & Steel Co. v. Davis-Colby Ore Roaster Co. [C. C. A.] 131 F. 68, afg. 128 F. 453. Claims 2 and 3 of No. 429,874, stone sawing machine, construed and held to require as an element a proportionate feed. Diamond Stone Sawing Mach. Co. v. Brown, 130 F. 896.

99. The term "rotary" does not necessarily imply continuous rotation. Kip-Armstrong Co. v. King Philip Mills, 130 F. 28. Patent for an insulator made of "nonporous vitreous material, preferably glass," cannot be construed to include mica, where at the date of the application the patentees had unsuccessfully attempted to use mica for the construction of such insulator. Folger v. Dow Portable Elec. Co., 128 F. 45.

1. Eck v. Kutz, 132 F. 758.

2. Patent No. 492,205, machine for coating confectionery, is such an invention. American Chocolate Machinery Co. v. Helmstetter, 129 F. 919. No. 595,688, warp stop-motion for looms, held a primary invention. Kip-Armstrong Co. v. King Philip Mills, 130 F. 28.

Note: In the last mentioned case the court uses the following language which is interesting as showing the modern trend of the courts on the subject of interpretation: "We recognize, however, that the distinction between primary and secondary patents is now given less force than formerly by the courts, for every patent may be regarded as primary within its field; and it follows, then, that every patent should have as broad an interpretation as the courts may fairly give it, and as full and fair a use of the doctrine of equivalents as the courts may fairly allow it."

3. **Patents entitled to a reasonably liberal construction:** Nos. 424,291 and 583,320, instruments for measuring elasped time. Calculagraph Co. v. Wilson, 132 F. 20. No. 415,720, miner's lamp holder, claim 1. Lattimore Mfg. Co. v. Jones, 133 F. 550. See 2 Curr. L. 1143, n. 7.

Patents to be narrowly construed: Design

stituting a distinct step in the progress of the art, is entitled to a fairly liberal construction.[4] A combination of old parts performing an old function is only entitled to a narrow construction.[5] That former patents are mere paper patents, not capable of successful practical operation, do not affect their relevancy as limitations upon the scope of a subsequent patent.[6]

In the absence of disclaimer, a patent covers all equivalents[7] whether the inventor thought of them or not,[8] nor is this rule altered by the fact that the inventor advanced an erroneous theory to explain his process.[9] An alternative construction has been held to be an equivalent.[10] The inventor of an improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not colorable invasions of his own.[11]

§ 6. *Duration of patent right, surrender, and reissues.*[12]—In order that an American patent shall expire with a previous foreign patent, the party alleging such expiration has the burden of proving that the foreign patent was obtained by the American patentee or with his consent,[13] and the foreign patent being for a specific invention and the American patent being for a genus which includes the former, the latter, to the extent of the specific invention, expires with the foreign patent.[14] The Congressional Act on this subject is not retroactive.[15] A patentee cannot claim rights under a surrendered patent or surrendered reissue thereof.[16] After the lapse of two years after the issue of a patent, a reissue which seeks to enlarge the claims of the original patent will not be granted, or if granted will be held invalid, unless special circumstances are shown to excuse the delay.[17]

patent No. 27,514, paper fastener. Young v. Clipper Mfg. Co. [C. C. A.] 130 F. 150. Patent No. 432,582, machines for braiding whiplashes, claim 3. Mesick v. Hassler, 134 F. 395. No. 441,022, method of baling cotton, also lacks utility. Rembert Roller Compress Co. v. American Cotton Co. [C. C. A.] 129 F. 355. No. 471,772, fireproof floor and ceiling construction. New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co., 131 F. 265. No. 477,616, improvement in electric annunciator drops, claim 4. Western Elec. Co. v. North Elec. Co. [C. C. A.] 130 F. 457. No. 548,394, saw-stretching machines. Rich v. Baldwin [C. C. A.] 133 F. 920. No. 555,693, fireproof wall. Sanitary Fireproofing & Contracting Co. v. Sprickerhoff, 131 F. 868. No. 559,446, shade-holding device. Curtain Supply Co. v. Keeler, 131 F. 871. No. 600,788, rotary winder in knitting machine. Mayo Knitting Mach. & Needle Co. v. Jenckes Mfg. Co. [C. C. A.] 133 F. 527. No. 639,222, spring bed and seat bottom. Simmons Mfg. Co. v. Southern Spring Bed Co., 131 F. 278. Process of roasting or fusing a mixture of ore. McKnight v. Pohle, 22 App. D. C. 219. See 2 Curr. L. 1143, n. 7.

4. Letson v. Alaska Packers' Ass'n [C. C. A.] 130 F. 129; Eldred v. Kirkland [C. C. A.] 130 F. 342.

5. Raymond v. Keystone Lantern Co. [C. C. A.] 134 F. 866.

6. No. 481,134, valve mechanism for air-brakes, should be restricted to combination described. Westinghouse Air Brake Co. v. Christensen Engineering Co. [C. C. A.] 128 F. 437.

7. Oehrle v. Horstmann Co., 131 F. 487; Westinghouse Elec. Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167; Albright v. Langfeld, 131 F. 473. Adjustable plate to attach to share of breaking plows held equivalent to device covered by patent No. 415,542. Lourie Implement Co. v. Lenhart [C. C. A.] 130 F. 122. A machine for making matches; a cutter head and cutter adapted to cut rows of match sticks and insert them in rows of perforations having a continuous motion is infringed by the same kind of a device having an intermittent motion. Diamond Match Co. v. Ruby Match Co., 127 F. 341. See 2 Curr. L. 1143, n. 9-10; Id. 1147-1148.

8. Oehrle v. Horstmann Co., 131 F. 487; American Chocolate Machinery Co. v. Helmstetter, 129 F. 919.

9. United States Mitis Co. v. Midvale Steel Co., 135 F. 103. Charge of infringement cannot be successfully met by assigning attainment of different object. Id.

10. Eldred v. Kirkland [C. C. A.] 130 F. 342. See, also, Burdon Wire & Supply Co. v. Williams, 128 F. 927, and also the following cases which, it would seem, are in conflict with the above rule. Diamond Stone Sawing Mach. Co. v. Brown, 130 F. 896; In re Wagner, 22 App. D. C. 267.

11. Cook & Co. v. Heywood Bros. & Wakefield Co., 131 F. 755.

12. See 2 Curr. L. 1143.

13. Sawyer Spindle Co. v. Carpenter, 133 F. 238. Quaere, whether evidence that it was obtained by another, to whom the American patentee communicated the invention, is sufficient to show prima facie that such person was authorized to procure a patent. Id.

14. Sawyer Spindle Co. v. Carpenter, 133 F. 238. See 2 Curr. L. 1144, n. 15.

15. The amendment of 1903 (32 Stat. 1225) to Rev. St. § 4887 providing for the expiration of a patent on an article previously patented in a foreign country is not retroactive. Sawyer Spindle Co. v. Carpenter, 133 F. 238.

16. Franklin & Co. v. Illinois Moulding Co., 128 F. 48.

17. Reissue refused after unexcused de-

A reissue patent must be for the same invention as that of the original patent, failure to observe this rule rendering the reissue void.[18] The defense that a reissue is void on its face when compared with the original patent may be raised and determined on demurrer where both patents are properly before the court.[19]

§ 7. *Disclaimer and abandonment.*[20]—A disclaimer may be filed at any time during the pendency of a suit for infringement, though the case has been heard on appeal,[21] and where such disclaimer is filed for the purpose of avoiding the effect of the decision of the appellate court, the lower court may, in its discretion, grant a rehearing.[22] A disclaimer by an applicant is not conclusive upon a third party.[23] A patentee cannot patent a structure and by disclaimer withdraw the invention which makes the structure patentable.[24] The question of whether a patentee has abandoned any part of what he has described in his patent is very largely one of intention.[25] That only one of three equivalent processes described in the specification is named in the claim does not constitute an abandonment of the other two.[26]

§ 8. *Titles in patent rights and license, conveyance, or transfer thereof.—In general.*[27]—A patent secures the exclusive right to make, use and sell the invention it protects[28] within the territorial limits of the United States.[29] Since the monopoly granted by a patent is a property right, assignable under the constitution and laws of the United States, a state law forbidding the giving or taking of a negotiable instrument for an assignment of a patent is unconstitutional.[30] Letters patent are not visible, tangible property which has of itself a local character, and of which the court can take jurisdiction apart from its apparent ownership,[31] and, so far as such property has any situs, it follows the person of its owner, and ordinarily belongs at his place of residence.[32]

Under a statute requiring notes given for patent rights to disclose such consideration,[33] the transferee of a note, who knows that it was given for a patent right, cannot recover thereon if the words "given for a patent right" are omitted from the note, in violation of the statute.[34]

lay of six years. In re Starkey, 21 App. D. C. 519. See 2 Curr. L. 1144, n. 17.

18. United States Whip Co. v. Hassler, 134 F. 398. Cannot cover matters not intended to be secured by the original patent. Reissue No. 11,250 (original No. 433,637), electrical measuring instrument, held void. Weston Electrical Instrument Co. v. Stevens [C. C. A.] 134 F. 574. Cannot include devices or parts which, though described or shown in the original specifications or drawings, are not a part of the invention as therein disclosed. Reissue No. 12,058 (original No. 679,650), tension for braiding machines, held void. United States Whip Co. v. Hassler, 134 F. 398. Cannot include a feature withdrawn to meet requirements of the Patent Office, or the rejection of which was acquiesced in Franklin & Co. v. Illinois Moulding Co., 128 F. 48. Second reissue No. 11,980 (original No. 642,059), machine for ornamenting picture frames, claims 11 to 18 inclusive, held void. Id. But see 2 Curr. L. 1144, n. 16.

19. Edison v. American Mutoscope & Biograph Co., 127 F. 361. Reissue No. 12038, kinetoscopic film, held not so clearly for a different invention as to warrant the court in declaring it void on demurrer. Id.

20. This section deals only with the abandonment of patented rights, for abandonment of ideas, see § 1, subd. Abandonment; for abandonment of patent proceedings see § 3.

21, 22. Sample v. American Soda Fountain Co., 134 F. 402.

23. Eck v. Kutz, 132 F. 758.

24. Otis Elevator Co. v. Portland Co., 127 F. 557.

25, 26. Burdon Wire & Supply Co. v. Williams, 128 F. 927.

27. See 2 Curr. L. 1144.

28. Paulus v. Buck Mfg. Co. [C. C. A.] 129 F. 594.

29. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105.

30. Pennsylvania act held void. Pegram v. American Alkali Co., 122 F. 1000. See 2 Curr. L. 1144, n. 18.

31. Hildreth v. Thibodeau [Mass.] 71 N. E. 111. Court having no jurisdiction of owner has no jurisdiction of patent. Id.

32. Hildreth v. Thibodeau [Mass.] 71 N. E. 111.

33. Under Rev. St. 1881, §§ 6054-6056, requiring notes taken for the price of patent rights to state that fact, an answer in an action on a note, setting up such defense, must aver facts showing that the consideration, in whole or in part, was a patent right, or a right claimed to be a patent right. Jones v. People's State Bank, 32 Ind. App. 119, 69 N. E. 466.

34. Pinney v. First Nat. Bank [Kan.] 78 P. 151.

The state may require a license of a patentee or his vendee before he can sell the right to make or sell the patented article.[35]

Patent rights as between employer and employe.[36]—The obligation of an employe to assign to an employer an invention made in the course of his employment does not arise from the existence of the relation of employe and employer alone;[37] there must be a contract to assign,[38] or an agreement that the invention or patent should accrue to the benefit of the employer,[39] though the latter is entitled to improvements made by one employed to construct his invention.[40] An employer having the right to the perpetual use of his employe's inventions does not thereby acquire title to the same.[41] Acts of the employe may be construed as granting a license to the employer.[42] The burden is upon an employe to show that his employment was for the accomplishment of a general purpose only and that he had an original conception of the method and means adopted.[43]

Royalties.[44]—In the absence of some reservation in the contract, the article being manufactured, delivered, accepted and paid for, the patentee's cause of action for his royalty is complete.[45] A contract requiring the payment of royalty on each machine "sold or delivered" covers machines delivered, but returned unpaid for.[46] Where other devices are used to avoid the payment of royalties, equity may order an accounting on the ground of fraud.[47] In an action for the use of a patented invention, founded on implied contract, substantially all the defenses may be interposed which would be admissible, if the action were for an infringement;[48] but if the action is upon an express contract, the case must be determined by the law of contracts.[49] The defense that the patent was invalid,[50] or that the process used was not that patented,[51] is not available.

Transfer.[52]—A grant of all the exclusive rights of a patentee throughout the United States, a grant of an undivided part of all these exclusive rights, or a grant

35. The contrary, held in Com. v. Petty, 96 Ky. 452, 29 S. W. 291, 29 L. R. A. 786, has been overruled by several later cases. Burns v. Sparks [Ky.] 82 S. W. 425. One who sells the exclusive right to sell an article of tinware in a given territory, is not a vendor of tinware within the meaning of the exemption clause in the peddlers' statute, excluding vendors of tinware from operation of the statute. Construing Ky. St. 1903, § 4218. Id.

36. See 2 Curr. L. 1146, n. 46, 47. See, also, Master and Servant, 4 Curr. L. 533.

37. Pressed Steel Car Co. v. Hansen, 128 F. 444.

38. Pressed Steel Car Co. v. Hansen, 128 F. 444. That the employe has assigned the rights to some of the patents applied for by him for inventions made in the course of his employment does not alone warrant an inference that he was bound by a contract to assign all such inventions. Id.

39. Work of an employe involving invention as distinguished from mechanical skill cannot be claimed by the employer without such an agreement. Sendelbach v. Gillette, 22 App. D. C. 168.

40. Gallagher v. Hastings, 21 App. D. C. 88.

41. Has a mere license. Plea construed as one of license only. Barber v. National Carbon Co. [C. C. A.] 129 F. 370.

42. Where employe helped erect machines invented and patented by him, held to constitute an implied license to the employer to use the same and any replacement thereof so long as it continued in the business. Barber v. National Carbon Co. [C. C. A.] 129 F. 370.

43. Gallagher v. Hastings, 21 App. D. C. 88.

44. See 2 Curr. L. 1146.

45. Harvey Steel Company's Case, 38 Ct. Cl. 662.

46. Confectioners' Machinery & Mfg. Co. v. Panoualias [C. C. A.] 134 F. 393.

47. Eclipse Bicycle Co. v. Farrow, 23 App. D. C. 411. Patentable differences between such devices is immaterial. Id.

48. Harvey Steel Co.'s Case, 38 Ct. Cl. 662.

49. Court will not consider patent, its construction, state of art, etc. Harvey Steel Co.'s Case, 38 Ct. Cl. 662.

50. In a suit against the United States for royalties for use of the Harvey process of treating armor plate, the defense of invalidity of the patent could not be set up, since the contract provided that royalties should cease "in case it should at any time be judicially decided" that the patent was invalid, and no such decision had been made. United States v. Harvey Steel Co., 25 S. Ct. 240, afg. 38 Ct. Cl. 662.

51. Where it was not denied that the United States had used the process commonly known as the "Harvey Process" of treating armor plate, the defense that if the patent be properly construed, the patented process had not been used, was held not available in an action for royalties for use of the process. United States v. Harvey Steel Co., 25 S. Ct. 240, afg. 38 Ct. Cl. 662.

52. See 2 Curr. L. 1144.

of all these exclusive rights throughout a specified part of the United States, is an assignment of an interest in the patent.[53] A grant of any interest in or right under a patent less than this is a license.[54] The patentee may put any lawful restriction or condition upon the sale or use of his article that he sees fit.[55] A contract to assign the right to obtain a patent may be by parol, and if proved, will be specifically enforced in equity.[56] An executory agreement to transfer an interest in patents to be obtained does not operate as an assignment.[57]

The doctrines of bona fide purchaser and equitable notice apply to the purchaser of a patent.[58] As against subsequent bona fide purchasers, an assignment of an interest in a patent must be recorded.[59] An instrument conveying an interest in inventions to be conceived and perfected in the future is not entitled to registration.[60] The recording acts are not intended for the protection of an infringer.[61] An assignor is estopped as against his transferee to challenge the validity of the patent for want of novelty and patentability.[62]

The rights of parties to a contract relating to patent rights may depend upon the construction placed on such contract.[63]

Licenses.[64]—The owner of an undivided part of all the rights secured by a patent may, without the consent of his co-owners, grant a valid license to use the monopoly it protects.[65] The exclusive licensee of a patented article may attach

53, 54. Paulus v. Buck Mfg. Co. [C. C. A.] 129 F. 594.

55. Rupp & Wittgenfeld Co. v. Elliott [C. C. A.] 131 F. 730. Condition that it should only be used with other patented materials made by the patentee held valid. Broderick Copygraph Co. v. Mayhew, 131 F. 92.

56. Pressed Steel Car Co. v. Hansen, 128 F. 444.

57. Cannot be set up to impeach the title of an assignee of the patent, in a suit for its infringement. McMichael & W. Mfg. Co. v. Ruth [C. C. A.] 128 F. 706.

58. National Cash Register Co. v. New Columbus Watch Co. [C. C. A.] 129 F. 114. As to what constitutes one a bona fide purchaser, and what constitutes notice see topic, Notice and Record of Title, 4 Curr. L. 829.

59. Rev. St. § 4898. Paulus v. Buck Mfg. Co. [C. C. A.] 129 F. 594.

60. National Cash Register Co. v. New Columbus Watch Co. [C. C. A.] 129 F. 114.

61. Patent assigned absolutely and assignment recorded, unrecorded instrument by assignee giving assignor full right to operate under the patent and sue for infringements. Ormsby v. Connors, 133 F. 548.

62. Where assignor employed the identical construction described in the patent transferred, and where the rights of the assignee were clearly based upon the purchase. Frank v. Bernard, 131 F. 269.

63. Sale of all of corporation's property including its "patent properties" held to transfer legal and equitable title to patents though the latter were not specifically described. Aeolian Co. v. Hallett & D. Piano Co., 134 F. 872. Contract construed as an absolute transfer of patent rights and not a mere license to use the patents for a certain period. Church v. Anti-Kalsomine Co. [Mich.] 101 N. W. 230. Evidence held insufficient to sustain claim of an equitable interest in patent by assignment or transfer. Arrott v. Standard Sanitary Mfg. Co., 131 F. 457. A contract for sale of an interest in an invention was conditional on the issuance of a patent. Held, in action for breach, that an allegation that the commissioner of patents made an order allowing the patent was a sufficient averment of issuance of the patent, within the meaning of the contract. Landers v. Foster, 34 Wash. 674, 76 P. 274.

64. See 2 Curr. L. 1145.

NOTE. Rights of licensee: The property rights which a patentee or grantee has in the patent and articles made under it, the violation of which rights constitute an infringement, are not possessed by a mere licensee. His rights are purely contractual. 9 Ency. of Laws of Eng. 533; Heap v. Hartley, 42 Ch. Div. 461; Walker, Patents, 400; Paper Bag Cases, 105 U. S. 766, 26 Law. Ed. 959. As against a licensee, his vendees secure rights limited only by contract. Thomas v. Hunt, 17 C. B. (N. S.) 183. In the United States the property rights of a grantee or assignee of limited territory are not affected by the unauthorized selling or use of his territory by a third party, of articles made by a special grantee of the same patent in another territory. Adams v. Burke, 17 Wall. [U. S.] 453, 21 Law. Ed. 700; Hobbie v. Jennison, 149 U. S. 355, 37 Law. Ed. 766; Keeler v. Standard Folding Bed Co., 157 U. S. 659, 39 Law. Ed. 848. But the courts of both countries have refused to apply this doctrine to imported goods on which there is a domestic patent. Emslie v. Boursier, 32 Law J. Ch. 328; Boesch v. Graff, 133 U. S. 697, 33 Law. Ed. 787. The court in McGrouther v. Pitcher, 2 Ch. 306, also properly holds, on the authority of Tweedle v. Atkinson, 1 B. & S. 393, that no recovery can be had on contract, there being no privity between the parties. Stipulations as to price do not follow the goods nor effect title to them, since covenants do not run with goods as with land, Splidt v. Bowles, 10 East, 279; and conditions cannot be attached to goods so as to follow their sale. 3rd resolution in Spencer's Case, 1 Sm. L. C. 115; Pollock on Contracts [4th Ed.] p. 224; Taddy & Co. v. Sterlous & Co., 1 Ch. 354.—5 Columbia L. R. 62.

65. Paulus v. Buck Mfg. Co. [C. C. A.] 129 F. 594.

such conditions as he sees fit to sales made under his license.[66] A patentee, or his general agent, entering into competition with an exclusive licensee, is liable to the latter for all profits realized.[67] The holder of a nonexclusive, nontransferable license cannot recover for damages or profits for infringement,[68] nor proceed against defendant for a violation of the injunction by reason of such infringement.[69] In order to secure an accounting it is necessary to resort to an original or supplemental bill brought by the licensee and assignees as co-complainants,[70] and proceedings being had for violation of the injunction, recourse should be had to a bill of the latter character.[71] The rights of parties are governed by the terms of the contract granting the license.[72]

§ 9. *Infringement. A. What is.*[73]—Generally one may not escape infringe-

66. National Phonograph Co. v. Schlegel [C. C. A.] 128 F. 733. Contract binding purchaser not to resell for less than a certain price, nor to any other dealer who did not sign a similar agreement, is valid and enforceable. Id.

67. Corbin v. Taussig & Co., 132 F. 662.

68. Where patentee after obtaining a decree awarding an accounting assigned patent taking such a license from the assignees, held he could not recover such damages or profits. Goss Printing Press Co. v. Scott, 134 F. 880.

69, 70, 71. Goss Printing Press Co. v. Scott, 134 F. 880.

72. Contract between owner of patent and manufacturer construed as one whereby the owner agreed to indemnify the manufacturer for losses resulting from manufacture of the patented article. Mankato Mills Co. v. Willard [Minn.] 102 N. W. 202. License of limited duration with privilege of renewal on certain conditions, held under the evidence not to have been renewed. Seal v. Bookkeeper Pub. Co. [C. C. A.] 130 F. 449. A contract by which one party gives the other the full and exclusive right to manufacture and sell certain machines under any letters patent that may be granted to the former is not a contract that the said parties would be successful in obtaining said patents. Bancroft v. Union Embossing Co., 72 N. H. 402, 57 A. 97. In an action on a contract containing a warranty of a right to manufacture and use the patented article undisturbed, it is incumbent upon the defendants to show that they have been ousted from the purchased right by some superior patentee or disturbed in the exercise of it. Harvey Steel Company's Case, 38 Ct. Cl. 662. Under a contract between the inventor of a bicycle lamp and a manufacturer whereby it was agreed that in case the royalties amounted to less than $500 in any year, the patent should be reassigned, it was held that the manufacturer could not abandon manufacture and sale of lamps sufficient to produce the agreed royalty, tender the inventor the specified minimum royalty and thereby prevent the inventor from placing his invention on the market. Corbet v. Manhattan Brass Co., 93 App. Div. 217, 87 N. Y. S. 577. Held, also, that the contract did not require the payment of the minimum royalty until the patents were reassigned. Id. Defendant accepted proposals for lease of a patented machine for a certain sum for installment and certain semi-annual royalties, and agreed to sign a license agreement when the machine was installed. Defendant was to have the privilege of terminating the agreement by paying royalties due and returning machine. Held, measure of damages for breach by refusal to allow machine to be put in was the amount agreed to be paid for installing it, and the royalties for the first six-month period. Warth v. Liebovitz [N. Y.] 71 N. E. 734.

73. See 2 Curr. L. 1147.

ILLUSTRATIONS: Patents held infringed: Design patent No. 35,027, bottle. Jammes v. Carr-Lowry Glass Co., 132 F. 827. Design patent No. 35,481, cluster gas lamp. General Gaslight Co. v. Matchless Mfg. Co., 129 F. 137. No. 262,816, machine for making matches, infringed by No. 592,605. Diamond Match Co. v. Ruby Match Co., 127 F. 341. No. 333,373, process for making wrought iron and steel castings. United States Mitis Co. v. Midvale Steel Co., 135 F. 103. Nos. 343,829 and 401,848, folding trestles. Chicago Wooden Ware Co. v. Miller Ladder Co. [C. C. A.] 133 F. 541. No. 354,281, dyeing apparatus. Klauder-Weldon Dyeing Machine Co. v. Steadwell Dyeing Mach. Co. [C. C. A.] 128 F. 724. No. 354,577, sewing machine rufflers, claims 2, 7 and 8. Parsons v. New Home Sew. Mach. Co. [C. C. A.] 134 F. 394. Nos. 356,690 and 357,933, motor for mechanical musical instruments, claims 1 and 3 of first patent and claim 1 of second patent. Aeolian Co. v. Hallett & D. Piano Co., 134 F. 872. No. 357,538, spring-jack telephone switches, claims 3 and 5. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. No. 359,354, car seat. Hale & K. Mfg. Co. v. Oneonta, etc., R. Co., 129 F. 598. No. 369,120, portable drilling machine, claims 1 and 2. Timolat v. Philadelphia Pneumatic Tool Co., 131 F. 257. No. 371,431, water-closet valve, claims 1 and 2. Kenney Mfg. Co. v. Wells & Newton Co., 135 F. 101. No. 376,804, can-capping machine, claims 3, 5, 9, 10 and 11 infringed by No. 629,574. Letson v. Alaska Packers' Ass'n [C. C. A.] 130 F. 129. No. 381,527, manufacturing jewelers' plated wire. Burdon Wire & Supply Co. v. Williams, 128 F. 927. No. 392,387, an electrical measuring apparatus. Weston Electrical Instrument Co. v. Jewell, 128 F. 939; Weston Electrical Instrument Co. v. Whitney Electrical Instrument Co., 131 F. 280. Claims 8, 12 and 13 of above patent. Weston Electrical Instrument Co. v. Stevens, 130 F. 152. No. 394,039, insulating turn-buckle. Thomson-Houston Elec. Co. v. Ohio Brass Co., 129 F. 378. No. 400,086, phenacetin. Farbenfabriken of Elberfeld Co. v. Harriman, 133 F. 313. No. 403,247, reel for metal box straps. Cary Mfg. Co. v. Patterson Bros.,

ment by adding to or subtracting from a patented device,[74] or by changing its

127 F. 357. No. 413 464, an improvement in lanterns, claims 1 and 2. Spear v. Keystone Lantern Co., 131 F. 879. No. 415,720, miner's lamp holder. Lattimore Mfg. Co. v. Supply Co., 133 F. 556. No. 418,678, electric switch for motors. Hammer v. Cutler-Hammer Mfg. Co. [C. C. A.] 128 F. 730. No. 421,244, improvement in method of hulling peas. Chisholm v. Fleming, 133 F. 924. Nos. 424,291 and 583,-320, instruments for measuring elapsed time. Calculagraph Co. v. Wilson, 132 F. 20. No. 424,905, weather strip. Bredin v. Solmson, 132 F. 161. No. 429,874, stone sawing machine, claims 1, 2 and 3. Diamond Stone Sawing Mach. Co. v. Brown, 130 F. 896. No. 433,791, coil clasp for fastening belts. Kelley v. Diamond Drill & Mach. Co. [C. C. A.] 129 F. 756. No. 434,153, incandescent lamp socket. Buchanan v. Bryant Elec. Co. [C. C. A.] 128 F. 922. No. 439,086, coin purse, claims 1 and 6. Albright v. Langfeld, 131 F. 473. No. 445,814, improvement in the process of patent No. 381,527, for manufacturing ingots for seamless plated wire. Burden Wire & Supply Co. v. Williams, 128 F. 927. No. 452,-168, for bosh plates for furnaces. Smeeth v. Fox Copper & Bronze Co. [C. C. A.] 130 F. 455. No. 461,793, method of forming chain stitch. Caunt v. United Shoe Mach. Co. [C. C. A.] 132 F. 976. No. 468,077, improvements in music desks for pianos, claims 1 and 2. Brown v. Huntington Piano Co., 131 F. 273, afd. 134 F. 735. No. 469,809, system of electrical distribution. Westinghouse Elec. & Mfg. Co. v. Montgomery Elec. Light & Power Co., 131 F. 86. No. 474,811, baking powder. Rumford Chemical Works v. New York Baking Powder Co. [C. C. A.] 134 F. 385. No. 475,401, oil burner. Cleveland Foundry Co. v. Detroit Vapor Stove Co. [C. C. A.] 131 F. 853. No. 481,134, valve mechanism for air brakes, claim 2. Westinghouse Air Brake Co. v. Christensen Engineering Co. [C. C. A.] 130 F. 144. No. 488,033, telephone switch, claims 1 and 3. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. No. 491,012, bicycle bell, claims 1, 2, 3 and 4 infringed by No. 622,159. Mutter v. Mossberg, 128 F. 55, afd. 135 F. 95. No. 491,113, bottle stopper. Hutter v. De Q. Bottle Stopper Co. [C. C. A.] 128 F. 283. No. 491,972, logwood extract. Hemolin Co. v. Harway Dyewood & Extract Mfg. Co., 131 F. 483. No. 492,205, machine for coating confectionery, infringed by No. 634,-633. American Chocolate Machinery Co. v. Helmstetter, 129 F. 919. No. 492,913, electric cigar lighter, claims 5 and 10 are infringed by Nos. 562,395, 598,489 and 628,982. Eldred v. Kirkland [C. C. A.] 130 F. 342. No. 497,-482, electric shunt. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 F. 82. No. 498,196, railroad switch-stand. Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 133 F. 730. No. 500,151, automatic rib-knitting machine. McMichael & Wildman Mfg. Co. v. Ruth [C. C. A.] 128 F. 706. No. 503,103, machine for delinting cotton. American Delinter Co. v. American Machinery & Construction Co. [C. C. A.] 128 F. 709. No. 507,300, improvement in cloth-measuring apparatus. Windle v. Parks & Woolson Mach. Co., 128 F. 58. Claims 3 and 8 of patent No. 508,542, and claims 3 and 4 of No. 495,883, and 4 and 5 of No. 508,542, ore roasting furnaces. Lackawanna Iron & Steel Co. v. Davis-Colby Ore Roaster Co. [C. C. A.] 131 F. 68, afg. 128 F. 453. Nos. 511,559 and 511,560, the former for a method and the latter for a means of operating electric motors. Westinghouse Elec. & Mfg. Co. v. Electric Appliance Co., 133 F. 396; Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167. No. 521,218, knitting machine. Brinton v. Paxton [C. C. A.] 134 F. 78. No. 521,461, telephone switch board in which the fallen annunciator is automatically restored to its position, held infringed by Nos. 617,691 and 617,692. Western Tel. Mfg. Co. v. American Elec. Tel. Co. [C. C. A.] 131 F. 75. No. 523,111, knitting machine. Eck v. Kutz, 132 F. 758. Nos. 526,968 and 533,974, chocolate dipping machines. American Chocolate Machinery Co. v. Helmstetter, 129 F. 919. No. 535,465, washing machine. Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 F. 614. No. 552,729, telephone switches, claims 2 and 4. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79. No. 559,827, featherbone. Warren Featherbone Co. v. American Featherbone Co., 133 F. 304. No. 562,616, waistbands. National Waistband Co. v. Monheit, 133 F. 310. No. 565,605, shell extractors. Stevens Arms & Tool Co. v. Davenport [C. C. A.] 134 F. 869. No. 574,894, hat ring. Ferry v. Waring Hat Mfg. Co., 129 F. 389. No. 580,434, improvement in telephone transmitters. Stromberg-Carlson Telephone Mfg. Co. v. American Elec. Tel. Co. [C. C. A.] 127 F. 704. No. 583,560, log turning and loading device. Wilkin v. Hill, 131 F. 762. No. 589,342, acetylene gas burners. Kirchberger v. Nattrass, 135 F. 121; Kirchberger v. American Acetylene Burner Co. [C. C. A.] 128 F. 599. No. 591,869, electric transformer, claims 4, 5, 6 and 11. General Elec. Co. v. Wagner Elec. Mfg. Co. [C. C. A.] 130 F. 772. No. 595,688, warp stop-motion for looms. American Chocolate Machinery Co. v. Helmstetter, 129 F. 919; Kip-Armstrong Co. v. King Philip Mills, 130 F. 28, afd. 132 F. 975. No. 597,686, counter seats. Milner Seating Co. v. Yesbera [C. C. A.] 133 F. 916. No. 604,191, improved vessels for containing and administering volatile liquids, claim 6. Fries v. Leeming, 131 F. 765. No. 613,545, hydrant. Cayuta Wheel & Foundry Co. v. Kennedy Valve Mfg. Co., 127 F. 355. No. 614,279, tilting bins. Walker Patent Pivoted Bin Co. v. Miller, 132 F. 823. No. 616,425, claims 6, 7 and 8, and No. 617,291, burners. United Blue Flame Oil Stove Co. v. Silver & Co., 133 F. 47. No. 626,927, incandescent lamp socket. Perkins Elec. Switch Mfg. Co. v. Buchanan & Co., 129 F. 134, afd. 135 F. 90. No. 638,540, combined abdominal pad and stocking supporter. Young v. Wolfe [C. C. A.] 130 F. 891. No. 644,347, composition for lining pulp digesters. Panzl v. Battle Island Paper & Pulp Co., 132 F. 607. No. 682,448, comb for retaining the hair. Bechtold v. Nowacke, 131 F. 275.

Patents held not infringed: Reissue patent, No. 11,664 (original No. 560,816), machines for ironing the edges of collars and cuffs and No. 678,949, are not infringed by No. 660,277. Fay v. Mason [C. C. A.] 127 F. 325. No. 25,435, design for bottle stopper. Hutter v. De Q. Bottle Stopper Co. [C. C. A.] 128 F. 283. Nos. 263,075, 263,076, 280,-095, 297,471, 302,055 and 393,866, improvements in machines for felting hat goods. Taylor v. Marshall, 128 F. 741. No. 293,545,

form unless the latter is essential,[75] or by making it more or less efficient,[76] while he retains its principle and mode of operation, and attains its result by the use of the same or equivalent mechanical means. Neither the making, selling, nor

fountain pen. Waterman Co. v. McCutcheon, 128 F. 926. No. 366,362, electric converter. Westinghouse Elec. & Mfg. Co. v. Wagner Elec. Mfg. Co., 129 F. 604. Same, claim 4. Westinghouse Elec. & Mfg. Co. v. American Transformer Co., 130 F. 550. No. 376,804. can-capping machine, claim 1. Letson v. Alaska Packers' Ass'n [C. C. A.] 130 F. 129. No. 378,223, penholder having a sleeve of cork at its lower end. Tower v. Hobbs [C. C. A.] 129 F. 918. Nos. 378,465 and 472,555, undergarments. Scriven v. North [C. C. A.] 134 F. 366. No. 388,830, shoe lasts, is not infringed by No. 632,994. Wright v. Fitz Bros. Co. [C. C. A.] 133 F. 394. No. 393,278, claims 4, 5 and 6, and No. 396,313, claims 1, 2, and 3, trolley crossings and switches. Thomson-Houston Elec. Co. v. Ohio Brass Co., 130 F. 542. No. 401,775, car coupler. Coup v. McConway & Torley Co., 127 F. 351. No. 412,155, improvement in electric railway trolleys, claim 8 held not infringed by No. 690,639. Star Brass Works v. General Elec. Co. [C. C. A.] 131 F. 78. No. 429,516, smokeless powder, claim 1. Wolff v. Du Pont De Nemours & Co. [C. C. A.] 134 F. 862. No. 432,582, machines for braiding whiplashes, claim 3. Mesick v. Hassler, 134 F. 395. Same, held not infringed by No. 683,276. Id. Nos. 438,548, 461,219 and 467,466, vapor burners. Cleveland Foundry Co. v. Detroit Vapor Stone Co., 131 F. 740. No. 441,022, method for baling cotton, is not infringed by No. 473,144. Rembert Roller Compress Co. v. American Cotton Co. [C. C. A.] 129 F. 356. Nos. 441,962, 532,175, and 703,440, each for a set-saw. Morrill v. Hardware Jobbers' Purchasing Co., 131 F. 882. Nos. 461,357 and 363,528, knitting machines, held not infringed by Nos. 570,059 and 581,887. Mayo Knitting Mach. & Needle Co. v. Jenckes Mfg. Co. [C. C. A.] 133 F. 527. No. 468,006, boottree. Fitz v. Leadam, 132 F. 659. No. 471,264, ore roasting furnace, is not infringed by No. 691,112. Lanyon Zinc Co. v. Brown [C. C. A.] 129 F. 912. No. 471,772, fireproof floor and ceiling construction, is not infringed by No. 529,724. New Jersey Wire Cloth Co. v. Buffalo Expanding Metal Co., 131 F. 265. No. 476,506, improvement in lanterns. Raymond v. Keystone Lantern Co., 132 F. 30, afd. 134 F. 866. No. 477,616, improvement in electric annunciator drops, claim 4. Western Elec. Co. v. North Elec. Co. [C. C. A.] 130 F. 457. No. 478,168, improvements in casket handles, is not infringed by No. 559,898. McCarthy v. Westfield Plate Co. [C. C. A.] 129 F. 128. No. 503,301, improvement in chain clips for cloth stretching machines. Whitley v. Winsor & J. Mfg. Co. [C. C. A.] 127 F. 338. No. 520,481 buttressing walls in ore roasting furnace. Davis-Colby Ore Roaster Co. v. Lackawanna Iron & Steel Co., 128 F. 453. No. 532,216, improvement in coal trucks or heavy wagons. Shadbolt v. McKee [C. C. A.] 128 F. 736. No. 548,394, saw-stretching machines. Rich v. Baldwin [C. C. A.] 133 F. 920. No. 555,693, fireproof wall. Sanitary Fireproofing & Contracting Co. v. Spricker-hoff, 131 F. 868. No. 559,446, shade-holding device, claims 3 and 4. Curtain Supply Co. v. Keeler, 131 F. 871. No. 559,522, sewage apparatus. American Sewage Disposal Co. v. Pawtucket, 132 F. 35. No. 575,164, stone planing machine, held void except as to claim 3, and such claim held not infringed. Lincoln Ironworks v. McWhirter Co., 131 F. 860. No. 599,191, improvement in ornamental ropes or cords. Oehrle v. Horstmann Co., 131 F. 487. No. 600,671, winder in knitting machines, claims 8, 10 and 11, held not infringed by No. 581,887. Mayo Knitting Machine & Needle Co. v. Jenckes Mfg. Co. [C. C. A.] 133 F. 527. No. 600,788, rotary winder in knitting machines, claims 1 to 6, held not infringed by No. 581,887. Id. Nos. 617,942 and 634,838, acetylene gas burners. American Acetylene Burner Co. v. Kirchberger, 131 F. 94. Nos. 627,898, and 627,900, car trucks, claim as to links. North Jersey St. R. Co. v. Brill [C. C. A.] 134 F. 580. No. 634,556 water still. Hale v. World Mfg. Co. [C. C. A.] 127 F. 964. No. 639,222, spring bed and seat bottom. Simmons Mfg. Co. v. Southern Spring Bed Co., 131 F. 278. No. 650,129 drip coffee pot. Heekin v. Baker, 127 F. 828. No. 652,407, garment fastener. Lowrie v. Meldrum Co. [C. C. A.] 130 F. 886. Nos. 668,888 and 674,491, wood distilling apparatus. Georgia Pine Turpentine Co. v. Bilfinger, 129 F. 131. No. 664,564, quill-grinding machine, claim 1. Levy v. Harris [C. C. A.] 130 F. 711. Nos. 667,162 and 678,219, improvements in furniture, are not infringed by reissue patent No. 11,919. Cook & Co. v. Heywood Bros. & Wakefield Co., 131 F. 755. No. 669,152, frame or foundation for the collars of dresses. Warren Featherbone Co. v. Roberts & Co., 128 F. 745. No. 675,693, rolling chair. Weisgerber v. Clowney, 131 F. 477. No. 679,896, sound box for talking machines, claims 7, 11 and 16. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 131 F. 67.

74. Mere addition of feature which contributes to the general handiness of device does not avoid infringement. Walker Patent Pivoted Bin Co. v. Miller, 132 F. 823.

75. Eck v. Kutz, 132 F. 758; Hutter v. De Q. Bottle Stopper Co. [C. C. A.] 128 F. 283; Milner Seating Co. v. Yesbera [C. C. A.] 133 F. 916. A specific description in claim of an element does not alter rule unless it is of the essence of the invention. Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 F. 614. Even though an additional beneficial result is attained. Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 133 F. 730.

76. Improvement to the extent of novelty involving invention does not necessarily protect from infringement. Diamond Match Co. v. Ruby Match Co., 127 F. 341. Infringement of a device for regulating the quantities of air and gas admitted into mixing chamber of a gas engine is not avoided by changing the mechanism so that the quantity of air admitted remains the same while the quantity of gas is variable. Westinghouse Mach. Co. v. Press Pub. Co., 127 F. 822. See, also, Lourie Implement Co. v. Lenhart [C. C. A.] 130 F. 122; Walker Patent Pivoted Bin Co. v. Miller, 132 F. 823; Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 133 F. 730.

using of one element of a combination is infringement.[77] A claim for a combination is not infringed if any one of the described or specified elements is omitted without the substitution of any equivalent thereof.[78] A patent being strictly construed, a patent lacking an essential element thereof does not infringe.[79] That a device lacks one of the functions of a patented device does not avoid infringement.[80] As to whether the reversal of a prescribed process avoids infringement, there is a conflict.[81] The inventor is entitled to the benefit of the doctrine of equivalents.[82] The making of a machine adapted to practice a patented method is not per se an infringement of such patent.[83] A single sale made under circumstances which indicate a readiness to make other sales upon application is sufficient to make out a prima facie case of infringement.[84]

One making and selling one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination is guilty of *contributory infringement.*[85] The intent and the infringement by the completed article are essential.[86] One aiding or assisting another in violating the conditions imposed by the patentee upon the use of his invention is liable as a contributory infringer.[87] One furnishing money for the manufacture of an infringing article and acting as agent for its sale may be joined with the manufacturer.[88]

(§ 9) *B. Defenses.*[89]—It is not a defense in a suit against the user that a decree had previously been obtained against the maker,[90] or that the maker had prevailed in a suit against him.[91] The manufacturer defending the suit against the user, the decision renders the question res judicata as to him.[92] A party can-

77. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105.

78. Levy v. Harris [C. C. A.] 130 F. 711.

79. Mesick v. Hassler, 134 F. 395.

80. Letson v. Alaska Packers' Ass'n [C. C. A.] 130 F. 129.

81. Expanding inner tube instead of compressing outer one does not avoid infringement. Burdon Wire & Supply Co. v. Williams, 128 F. 927. An alternative construction is an equivalent. Eldred v. Kirkland, 130 F. 342. Moving saw against stone instead of stone against saw held to disclose patentable novelty. Diamond Stone Sawing Mach. Co. v. Brown, 130 F. 896. Moving bottles through heated water is not anticipated by patent under which heated water was circulated around stationary bottles. In re Wagner, 22 App. D. C. 267.

82. See ante, § 5.

83. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105.

84. Hutter v. De Q. Bottle Stopper Co. [C. C. A.] 128 F. 283.

85. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105.

NOTE. Injunction against acts contributing to infringement. The American and English decisions on this question: According to the English view, the owner of a patent has no right against one knowingly selling component parts to a person who uses them in infringing the patent. Townsend v. Haworth, cited in Sykes v. Howarth, 12 Ch. Div. 826, 831. Under the American rule a manufacturer of a component part of an article which he knows is to be used in infringing the patent is liable as a contributory infringer. Wallace v. Holmes, 9 Blatchf. [U. S.] 65. Under the English view, it would seem that some irresponsible person might get manufacturers to furnish different parts to be used by him in infringing the patent. Against such a person damages would be inadequate and an injunction would be the only remedy. After he was enjoined, some other such person could continue the performance with the manufacturers. There seems to be no valid objection against holding one, who is thus furnishing the means of infringement and is reaping part of the benefit, accountable to the patentee. The American rule justly grants the needed protection to the holder of the patent.—18 Harv. L. R. 151.

86. Manufacturing an element of a patented combination with the intent that it should be sent to a foreign country and there used in the practice of a method covered by the patent is not contributory infringement. Bullock Elec. & Mfg. Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 129 F. 105.

87. Rupp & Wittgenfeld Co. v. Elliott [C. C. A.] 131 F. 730; Brodrick Copygraph Co. v. Mayhew, 131 F. 92.

88. Lattimore Mfg. Co. v. Jones, 133 F. 550.

89. See 2 Curr. L. 1150.

90. Westinghouse Elec. & Mfg. Co. v. Mutual Life Ins. Co., 129 F. 213.

91. In this case there was a decision of the circuit court of appeals in the circuit where suit was brought holding that such article infringed. Eldred v. Breitwieser, 132 F. 251.

92. Suit against dealer was defended by manufacturer and on appeal it was adjudged that the complainant was not the inventor and that his patent was void. Held, such adjudication is a bar to a subsequent suit directly against the manufacturer on the same point. Sacks v. Kupferle, 127 F. 569.

not escape liability by attempting to shield himself behind a corporation.[93] Laches will bar one from suing for infringement.[94] The patent being assigned pending suit, and the assignee filing an original bill in the nature of a supplemental bill, he is entitled to the benefit of all the proceedings in the original suit except that the defendants may avail themselves of any equity or defense which has arisen since the original bill was filed.[95] One may become estopped to deny the validity of the patent.[96] Act March 3, 1897, amendatory of Rev. St. § 4921, providing that there shall be no recovery for infringements committed more than six years before the filing of the bill, is not a statute of limitation, but a qualification of the right of recovery,[97] and such amendment not being an exception to the original statute, the plaintiff need not allege the time of infringement, or if stated under a videlicet it need not be proved;[98] but defendant seeking the provisions of such statute as a defense must prove his case, which he may do under the general issue.[99] Rev. St. § 4900, requiring the marking of patented articles, does not apply to a process patent.[1] That similar patents are simultaneously issued to the same inventor does not warrant the infringement of either.[2] The defenses of lack of invention and noninfringement must be made by answer,[3] but the defense that the patent bears date more than six months later than the date of the giving of the notice of allowance is properly taken by plea.[4] One admitting similarity of process, a mere denial of infringement is insufficient.[5]

(§ 9) *C. Damages, profits, and penalties.*[6]—Complainant is entitled to recover the amount of the profits he would have realized, if he had made the sales which were made by defendant, where he was prepared to supply the demand, although it may exceed the profits made by defendants.[7] Patented improvements constituting the chief value of infringing articles and making the sale thereof possible, the patentee is entitled to recover the entire profits realized from the sale,[8] nor can the infringer avoid an accounting on the ground that the cost of the infringing articles cannot be definitely ascertained, nor because it lost money on its entire business, it not appearing that it lost on the infringement,[9] but the burden is upon the complainant to show that the improvements are of such a nature,[10] or, in the absence of such a showing, he must separate and apportion the damages in order to recover more than nominal damages.[11] The profit upon

93. Calculagraph Co. v. Wilson, 132 F. 20.

94. Assignee having knowledge of, and acquiescing in, an agreement between the patentee and another held barred by laches from suing for infringement. American Tube Works v. Bridgewater Iron Co. [C. C. A.] 132 F. 16. That suit was not commenced until a short time before expiration of patent held insufficient to constitute laches. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 F. 558.

95. Haarmann-DeLaire-Schaffer Co. v. Leuders, 135 F. 120.

96. Lessees covenanting not to contest validity of patent, held barred, in a suit for infringement, to claim that patent expired with foreign patent. United Shoe Machinery Co. v. Caunt, 134 F. 239. A corporation having a nontransferable, nonassignable license, mortgage trustees taking possession of the business and continuing the same, and selling the patented article and placing the patented stamp thereon, are estopped to deny the validity of the patent when sued for the infringement. Regina Music Box Co. v. Newell, 131 F. 606.

97. Peters v. Hanger [C. C. A.] 134 F. 586. Need not be specially pleaded. Id.

98, 99. Peters v. Hanger [C. C. A.] 134 F. 586.

1. United States Mitis Co. v. Midvale Steel Co., 135 F. 103.

2. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 131 F. 494.

3. Cannot be made by plea. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79.

4. Western Elec. Co. v. North Elec. Co. [C. C. A.] 135 F. 79.

5. Hemolin Co. v. Hanvay Dyewood & Extract Mfg. Co., 131 F. 483.

6. See 2 Curr. L. 1150.

7. Westinghouse v. New York Air Brake Co., 131 F. 607. Profits and damages for infringement of patent No. 376,837, for an improvement in air-brakes must be based on sales of the entire triple valve structure. Id.

8, 9. Force v. Sawyer-Boss Mfg. Co., 131 F. 884.

10, 11. Kansas City Hay Press Co. v. Devol, 127 F. 363.

the patented part alone being shown, and it appearing that no other substituted mechanism on the market was open to defendant's use, complainant is entitled to recover such profits.[12] Defendants are not entitled to be credited with their own services in manufacturing the infringing articles.[13] Contributory infringers cannot be required to account for machines sold by them, to be used by others in making the infringing articles.[14] An accounting will be ordered though the infringement be trivial, where it may be detrimental to public health.[15] Where a complainant recovers only damages and profits on an accounting for infringement, the costs of the reference are taxed against him.[16] That defendant's device also infringes another patented article, the validity and scope of which is not in issue, is not cause for apportioning the profits.[17] The damages being practically liquidated at the date of the master's report, interest may be awarded from such date.[18]

(§ 9) *D. Remedies and procedure.*[19]—Equity has jurisdiction of a suit for infringement at any time up to the expiration of the patent,[20] and having jurisdiction it may grant all appropriate and necessary relief in connection with the particular act complained of, even though it amounts to an infringement of an expired patent, in addition to the infringement of an existing and unexpired one.[21] The defendant denying the validity of the patent, equity has jurisdiction though the answer alleges that defendant has ceased infringement.[22] The jurisdiction of the court must affirmatively appear in the pleadings.[23] The fact that the patentee may have a remedy by action for breach of contract does not defeat the jurisdiction of the court.[24] The court of claims has no jurisdiction where the infringement of the patent is the only question involved;[25] an implied contract is essential.[26]

The assignee of a claim of infringement cannot sue.[27] A suit against an alien may be brought in any district where defendant may be found.[28] A patentee who has transferred all his interest in the patent is not a necessary party to a subsequent suit for infringement.[29] Joint tort feasors may be joined.[30] In

12. Brinton v. Paxton [C. C. A.] 134 F. 78.
13. Kansas City Hay Press Co. v. Devol, 127 F. 363.
14. Diamond Drill & Mach. Co. v. Kelley, 131 F. 89.
15. Farbenfabriken of Elberfeld Co. v. Harriman, 133 F. 313.
16. This rule is subject to modification in the discretion of the court. Kansas City Hay Press Co. v. Devol, 127 F. 363.
17. Brinton v. Paxton [C. C. A.] 134 F. 78.
18. Westinghouse v. New York Air Brake Co., 133 F. 936.
19. See 2 Curr. L. 1151.
20. Although no preliminary injunction was applied for and the patent expires before a hearing. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 F. 558. A court of equity is without jurisdiction of a suit for infringement of a patent where process was not issued until six days before the expiration of the patent, and was returnable thereafter, and no application was made for a preliminary injunction, nor special ground therefor alleged in the bill. Miller v. Schwarner, 130 F. 561.
21. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 F. 558. A bill for the infringement of an expired and unexpired patent states ground for equitable relief where it alleges that the infringing article so embodies the two patented ideas as to render it practically impossible to apportion the damages and profits resulting from the use of each patented idea. Id. See 2 Curr. L. 1152, n. 26.
22. Cayuta Wheel & Foundry Co. v. Kennedy Valve Mfg. Co., 127 F. 355. For general rule see 2 Curr. L. 1151, n. 18.
23. Presumption is that cause is without jurisdiction. International Wireless Tel. Co. v. Fessenden, 131 F. 491. The bill showing that defendant is a nonresident it must allege that some act of infringement was committed within the district, or that defendant has an office or place of business within the district, with an agent in charge on whom service could properly be made. Id.
24. Rupp & Wittgenfeld Co. v. Elliott [C. C. A.] 131 F. 730.
25. Henry's Case, 38 Ct. Cl. 635.
26. United States using article under license from one patentee, a contract with another patentee cannot be implied. Henry's Case, 38 Ct. Cl. 635.
27. Rev. St. § 4919, refers to assignee of patent. Webb v. Goldsmith, 127 F. 572.
28. 29 Stat. 695, held not to apply. United Shoe Mach. Co. v. Duplessis Independent Shoe Mach. Co., 133 F. 930.
29. Contract and decree construed and

the absence of special circumstances, an agent should not be joined with his principal in a suit for infringement, the acts complained of being done in his capacity as agent.[31] An officer of a corporation should not be joined as a party in a suit for infringement against the corporation there being no proof that such officer had any part personally in the infringement.[32]

The precise point raised having been previously determined in favor of the validity of the patent the latter will not be adjudged void on demurrer.[33]

A motion by complainant to dismiss, after all the proofs have been taken and the case set for final hearing, is addressed to the sound discretion of the court and will not be granted where the proceedings entitle defendant to a decree.[34]

The bill being dismissed for want of jurisdiction, costs cannot be awarded to defendant,[35] and where, before the taking of testimony, he offers to allow judgment to be entered as prayed for and makes no further appearance, he should not be taxed with costs for the subsequent taking of testimony and printing of the record.[36]

Injunctions.[37]—The United States cannot be enjoined from using an infringing machine.[38] Where in a suit by an exclusive patentee to restrain interference, the defendants organize a corporation and transfer their business to it, recovery cannot be had against the latter unless made a party.[39] An applicant for a patent, while his application is pending, cannot maintain a suit in equity to enjoin another for using the same and for an accounting.[40] Actual user is not necessary to warrant an injunction; threatened use is sufficient.[41] That defendant disclaims any future intention of infringing does not affect complainant's right to an injunction.[42] A preliminary injunction must be asked for in the prayer of the bill,[43] and in the absence of special circumstances and leave of court thereupon, a motion for a preliminary injunction must rest, on the part of the complainant, on the bill and accompanying affidavits originally filed.[44] A preliminary injunction will not be granted where complainant's right is doubtful,[45] and the defendant is able to respond in damages.[46] Generally the court requires

patentee held to have divested himself of all title and interest. Lincoln Ironworks v. McWhirter Co., 131 F. 860.

30. Complaint alleging that defendants conjointly endeavored to injure complainant, one by selling and making infringing articles in one city, and the other by using and vending infringing articles in another city, etc., held not demurrable on the ground that defendants are improperly joined. Bradley v. Eccles, 133 F. 308.

31. Westinghouse Elec. & Mfg. Co. v. Mutual Life Ins. Co., 129 F. 213.

32. Hutter v. De Q. Bottle Stopper Co. [C. C. A.] 128 F. 283.

33. Regensberg & Sons v. American Exch. Cigar Co., 130 F. 549.

34. Georgia Pine Turpentine Co. v. Bilfinger, 129 F. 131.

35. International Wireless Tel. Co. v. Fessenden, 131 F. 493.

36. Brunswick-Balke-Collender Co. v. Klump, 131 F. 93.

37. See 2 Curr. L. 1152. See, also, Injunction, 4 Curr. L. 96.

38. International Postal Supply Co. v. Bruce, 194 U. S. 601, 48 Law. Ed. 1134.

39. Corbin v. Taussig & Co., 132 F. 662.

40. Another by fraud secured a patent to himself for the invention. Standard Scale & Foundry Co. v. McDonald, 127 F. 709.

41. An injunction was granted where there had been no actual infringement but where the device was used with such alterations that it did not infringe but could in short time be put in infringing shape. Westinghouse Mach. Co. v. Press Pub. Co., 127 F. 822.

42. Brookfield v. Elmer Glassworks, 132 F. 312; General Elec. Co. v. New England Elec. Mfg. Co. [C. C. A.] 128 F. 738.

43. American Graphophone Co. v. National Phonograph Co., 127 F. 349.

44. In the absence of such leave, rebutting affidavits cannot be filed. Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co., 132 F. 614.

45. Diamond Match Co. v. Union Match Co., 129 F. 602; Jefferson Elec. Light, Heat & Power Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 134 F. 392, rvg. 128 F. 751; Felt & T. Mfg. Co. v. Mechanical Accountant Co., 129 F. 386. Infringement being doubtful. Cleveland Foundry Co. v. Silver & Co. [C. C. A.] 134 F. 591; Brookfield v. Elmer Glassworks, 132 F. 312; Thomson-Houston Elec. Co. v. Wagner Elec. Mfg. Co., 130 F. 902. Preliminary injunction denied where proof left in doubt both the validity of the claims and the question of infringement. Comptograph Co. v. Mechanical Accountant Co., 129 F. 394.

46. Diamond Match Co. v. Union Match Co., 129 F. 602; Jefferson Elec. Light, Heat

that the patent be supported by public acquiescence or prior adjudication,[47] and while, in the absence of new evidence, a preliminary injunction will generally issue upon a prior judgment of another court holding the patent valid and infringed,[48] still one Federal court is not obliged to grant a preliminary injunction because the validity of the patent has been sustained in another circuit.[49] An order granting a preliminary injunction, or requiring defendant in the alternative to give a bond, will not be reviewed on the merits on appeal in advance of the hearing on full proofs, the bond being given.[50]

One who with knowledge of the injunction takes over the business of the parties enjoined in collusion with them to evade the injunction is guilty of violating the latter.[51] Where defendants are enjoined as individuals from infringing a patent, they cannot avoid individual liability for a violation of the injunction by organizing a corporation which commits the acts of infringement.[52] The use of another machine, the infringement by which is doubtful, does not render one guilty of contempt for violating an injunction against infringement.[53] There is a conflict as to whether the fact that the sale was made under the advice of counsel that the article sold did not infringe is or is not a defense to the violation of an injunction.[54]

Pleading.[55]—The forms and requisites of bills in suits for infringement of patents have been settled by decisions, and the practice can only be changed by an amendment of the equity rules or of the rules of the circuit courts.[56] A bill alleging the issuance of letters patent, ownership by complainant, infringement by defendant, and the damage sustained, has been held sufficient;[57] other courts, however, hold that failure to allege the extent of the damage does not render the bill demurrable,[58] while others hold that it must allege that the invention had not been previously patented or described in a printed publication[59] or used for more than two years prior to the application,[60] and that complainant caused the patented article, or the package in which it is inclosed to be marked "Patented."[61] It must allege complainant's title and it is not sufficient to attach a copy of the patent as an exhibit.[62] A bill charging infringement generally, it will be construed as

& Power Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 134 F. 392, rvg. 128 F. 751; Silver & Co. v. Eustis Mfg. Co., 130 F. 348. Injunction denied where the complainant failed to so show, and the answer stated that the defendant had abandoned the manufacture and sale of the alleged infringing article. Id. Where defendant had openly claimed right to use patent for 6 years, had built up an established business, and was amply able to respond in damages, held no preliminary injunction would be awarded. Thomson-Houston Elec. Co. v. Wagner Elec. Mfg. Co., 130 F. 902.

47. Silver & Co. v. Eustis Mfg. Co., 130 F. 348; Felt & T. Mfg. Co. v. Mechanical Accountant Co., 129 F. 386.

48. Brill v. Peckham Mfg. Co., 129 F. 139.

49. Such court may exercise its independent judgment on the proofs. Diamond Match Co. v. Union Match Co., 129 F. 602.

50. United Blue-Flame Oil Stove Co. v. Silver & Co. [C. C. A.] 128 F. 925.

51. Whether actually employed and paid by them or not. Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 132 F. 978. Injunction against the manufacture and sale of coil clasps, held violated where defendants set a third person up in business and furnished him with a list of customers, machines, etc. Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 130 F. 893.

52. Diamond Drill & Mach. Co. v. Kelley Bros. & Spielman, 130 F. 893.

53. Brookfield v. Novelty Glass Mfg. Co., 132 F. 316.

54. That it is not. Westinghouse Elec. & Mfg. Co. v. Sangamo Elec. Co., 128 F. 747. Patentee acting in good faith and under advice of attorney should not be punished for contempt. Goss Printing Press Co. v. Scott, 134 F. 880.

55. See 2 Curr. L. 1153. See, also, Equity, 3 Curr. L. 1210.

56. American Graphophone Co. v. National Phonograph Co., 127 F. 349.

57. Bowers v. Bucyrus Co., 132 F. 39.

58, 59. American Graphophone Co. v. National Phonograph Co., 127 F. 349.

60. American Graphophone Co. v. National Phonograph Co.; 127 F. 349; Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 130 F. 900.

61. Sprague v. Bramhall-Deane Co., 133 F. 738.

62. American Graphophone Co. v. National Phonograph Co., 127 F. 349.

charging infringement of all the claims of the patent in suit.[63] When necessary to further justice, amendments may be allowed at any stage of the proceedings.[64]

A bill for the infringement of two patents is not multifarious, although one is for a process and the other for a product, where both relate to the same article and are capable of being conjointly infringed,[65] nor is it multifarious though it be for the infringement of an expired and an unexpired patent, it alleging that the recovery sought is not separable with respect to the two patents,[66] but in the absence of an allegation of diverse citizenship, a cause of action for infringement cannot be joined with one for unfair competition.[67]

A plea unsupported by proof will be stricken,[68] but failure to prove an allegation in the bill may be waived.[69] Mere mention in the bill of prior patents does not amount to a proffer thereof, so as to bring them before the court on demurrer.[70]

Evidence.[71]—The burden is upon defendant to prove, beyond a reasonable doubt, the invalidity of complainant's patent.[72] The court cannot take judicial notice of prior patents.[73] Uncertified printed copies of patents being issued and sold by the patent office are generally held to be admissible in evidence.[74] Agreement whereby defendant was entitled to use the article is admissible.[75] A strong presumption that there is a substantial difference between the patent in suit and the alleged infringing patent arises from the fact that the file wrapper of the latter discloses that the application was considered in connection with the patent in suit.[76] The mechanical questions involved being difficult, the complainant should give the court the benefit of expert testimony thereon.[77] Facts constituting sufficient evidence to show sale by defendant are stated in the notes.[78]

Interlocutory and final decrees.[79]—Complainants succeeding on all the proofs in establishing the merits of their bill, they are entitled to an interlocutory decree,[80] and it appearing that no hearing can be had on appeal until after the expiration of the patent, a supersedeas will not be granted.[81] So far as appellate procedure is concerned, a decree upon the merits, finding infringement, awarding a permanent injunction, and directing a reference to ascertain damages and profits, is an interlocutory decree granting an injunction.[82] A decree adjudging title, validity, and invalidity of claims, infringement and liability therefor, and awarding a perpetual injunction, is final in so far that an appellate tribunal has authority to consider and decide the case upon its merits.[83]

63. In the absence of exceptional circumstances, complainant cannot be required to amend so as to specify the particular claims infringed and the parts of defendant's structure which are claimed to infringe. Morton Trust Co. v. American Car & Foundry Co. [C. C. A.] 129 F. 916.

64. Name of witness and place of residence added to answer after filing of replication. Standard Elevator Interlock Co. v. Ramsey, 130 F. 151.

65. American Graphophone Co. v. Leeds & Catlin Co., 131 F. 281.

66. Huntington Dry Pulverizer Co. v. Virginia-Carolina Chemical Co., 130 F. 558.

67. King & Co. v. Inlander, 133 F. 416.

68. That defendant had abandoned the manufacture and sale of the alleged infringing article. Silver & Co. v. Eustis Mfg. Co., 130 F. 348.

69. Bill alleging that article was properly marked, and answer not denying it and no objection being made on the hearing to the failure of complainant to prove it, the objection is waived. Pettibone, Mulliken & Co. v. Pennsylvania Steel Co., 134 F. 889.

70. Bowers v. Bucyrus Co., 132 F. 39.

71. See 2 Curr. L. 1154.

72. Timolat v. Philadelphia Pneumatic Tool Co., 131 F. 257; Kirchberger v. American Acetylene Burner Co. [C. C. A.] 128 F. 599.

73. Bowers v. Bucyrus Co., 132 F. 39.

74. Drewson v. Hartje Paper Mfg. Co. [C. C. A.] 131 F. 734.

75. Holmes v. Kirkpatrick [C. C. A.] 133 F. 232.

76. New Jersey Wire Cloth Co. v. Buffalo Expanded Metal Co., 131 F. 265.

77. Fay v. Mason [C. C. A.] 127 F. 325.

78. Defendant not denying allegation that it was doing business in a certain place, proof of a purchase at a store bearing defendant's name and located in such place, prima facie establishes that sale was made by defendant. Hutter v. De Q. Bottle Stopper Co. [C. C. A.] 128 F. 283.

79. See 2 Curr. L. 1155.

80, 81. Timolat v. Philadelphia Pneumatic Tool Co., 130 F. 903.

82. Is appealable under 26 Stat. 828, as amended by 31 Stat. 660. Star Brass Works v. General Elec. Co. [C. C. A.] 129 F. 102.

83. Chicago Wooden Ware Co. v. Miller Ladder Co. [C. C. A.] 133 F. 541.

PAUPERS.

Definition and status of paupers.[84]—A person whom the public has supported is presumed to be a public charge.[85]

Proceedings to establish pauperism.—The justices of the peace who try a petition for relief must themselves by their judgment find that it is necessary and not delegate that office to overseers of the poor.[86] If they do the order is void[87] and objection may be taken at any time.[88]

Settlements and removals of paupers.[89]—A settlement is derived from such residence and intention as characterizes domicile.[90] Declarations of the alleged pauper accompanying acts which they explain are admissible on this question.[91] Residence and payment of taxes for the prescribed period make out a settlement, even if the tax assessment was irregular.[92] A minor's settlement is derived from his parent's, even though the minor lives away,[93] if he be not emancipated. In order to settle a minor away from his parent, he must have been emancipated and so lived for the requisite period.[94]

The full statutory notice of removal must be given.[95] A defective notice to remove a pauper is waived if the town sought to be charged answers "no settlement."[96] In Pennsylvania an appeal is the proper review for a removal without proper notice[97] and all defenses may be made therein.[98]

Liability for support.[99]—It is generally held that the place of settlement is not liable if a person relieved is solvent.[1] Ability to pay is sometimes made a test whether quarantine and medical expense shall be charged to the person or the public.[2] To be recovered as "expense," the amount should be proved as specifically applied to the pauper in question.[3] Under the laws of New York whereby a child is committed until a certain age to an institution at the charge of the county of its settlement, the liability does not change when the parents gain a new settlement.[4] In Maine the nearest incorporated town is given the care of paupers settled in an unincorporated town, but it is not bound to reimburse another town which relieves such person.[5] Such a liability must be found if at all in statute.[6] An overseer cannot charge his town by a promise to pay for past relief.[7]

Assumpsit lies on the common counts for medical services rendered at request of the county.[8]

The liability of a son to reimburse the town for support of his parent is stat-

84. See 2 Curr. L. 1156, n. 92.

85. Public payment of charges for maintenance of a child. McTier v. Crosby, 120 Ga. 878, 48 S. E. 355.

86, 87, 88. Brushvalley Tp. Poor Directors v. Allegheny County Poor Directors, 25 Pa. Super. Ct. 595.

89. See 2 Curr. L. 1156.

90, 91. Inhabitants of Knox v. Montville, 98 Me. 493, 57 A. 792.

92, 93. Highland Tp. Poor Dist. v. Jefferson County Poor Dist., 25 Pa. Super. Ct. 601.

94. Town of South Burlington v. Cambridge [Vt.] 59 A. 1013. Evidence held not sufficient to prove emancipation. Id.

95. Franklin Tp. Poor Dist. v. Danville & M. Poor Dist., 25 Pa. Super. Ct. 40.

96. Notice signed by only one overseer. Inhabitants of Brookfield v. West Brookfield, 186 Mass. 524, 72 N. E. 86.

97, 98. Certiorari not the remedy. Franklin Tp. Poor Dist. v. Danville & M. Poor Dist., 25 Pa. Super. Ct. 40.

99. See 2 Curr. L. 1157.

1. Board of Com'rs of Marshall County v. Roseau County Com'rs [Minn.] 101 N. W. 164.

2. In Maine under Rev. St. c. 18, § 51, one must be "able" to pay the full amount; and must be able at the time of discharge; and subsequent ability is not regarded. Inhabitants of Greenville v. Beauto [Me.] 58 A. 1026.

3. Expense on behalf of a pauper does not appear where he was merely boarded at the almshouse, but no account was kept of his expense and he rendered valuable services. Striking an average cost is insufficient. City of Taunton v. Talbot [Mass.] 71 N. E. 785.

4. Western New York Institution for Deaf Mutes v. Yates County, 94 App. Div. 1, 87 N. Y. S. 534.

5, 6. Inhabitants of Machias v. Wesley [Me.] 58 A. 240.

7. Physicians who attended on advice of one that he would see the overseer cannot recover. Farmer v. Salisbury [Vt.] 59 A. 201.

8. County of De Witt v. Spaulding, 111 Ill. App. 364.

utory.[9] It must be enforced within the time prescribed; a promise to do so finds no consideration in such statute,[10] nor is the moral obligation sufficient.[11]

Care and custody of paupers.[12]

Administration of poor laws; officers and districts.[13]—A state which has committed the poor to the several counties and cities may nevertheless provide state funds for the same purpose,[14] and may pay them to a private charitable corporation organized to provide homes and sustenance for children.[15] Such being a public purpose[16] and not a loan of credit[17] or a public debt, though appropriated annually.[18] In view of a provision for securing a proper administration of such fund before it is paid over, it cannot be regarded as a gift without reservation of control.[19] Neither can it be called a foreign charity merely because there is a national and a state society affiliated;[20] nor special legislation because payable to the one society fitted to carry out the purpose.[21]

Where poor districts constitute a separate municipal corporation,[22] laws relating to buildings for paupers in a poor "district" do not conflict with those relating to buildings erected by the "county" as a poorhouse.[23]

The Virginia law for appointment of poor officers by the courts should be strictly construed.[24]

PAWNBROKERS.

The business of pawnbrokers is subject to police regulation.[25] The article pledged is security only for the amount advanced in that transaction.[26] The period allowed for redemption prior to sale may be regulated by custom.[27] On default of redemption, the articles pawned may be sold.[28] In the absence of special agreement the sale must be public,[29] after notice to the pawnor of the pawnee's intention to sell and of the time and place of sale.[30] A special agreement controlling the manner of sale is not contrary to public policy,[31] and may be qualified by pawnor's knowledge of the customs of the business.[32] A sale in violation of such an agreement is a conversion.[33]

PAYMENT AND TENDER.

§ 1. Mode and Sufficiency of Payment or Tender (956).
§ 2. Application of Payment (957).
§ 3. Effect of Tender or Payment (959).
§ 4. Payment or Tender as an Issue (959).
A. Pleading (959).
B. Presumptions and Burden of Proof (959).
C. Evidence (960).

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9. Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 A. 884.

10, 11. Inhabitants of Freeman v. Dodge, 98 Me. 531, 57 A. 884. A letter held to show no promise to pay for support but only to pay cost of defending a suit to recover same. Id.

12, 13. See 2 Curr. L. 1157.

14, 15, 16, 17, 18, 19, 20, 21. Hager v. Kentucky Children's Home Soc., 26 Ky. L. R. 1133, 83 S. W. 605.

22. So in Pennsylvania. Melvin v. Summerville [Pa.] 59 A. 483.

23. Act June 4, 1879, construed with Act April 4, 1870, and Act April 19, 1895. Melvin v. Summerville [Pa.] 59 A. 483.

24. Chadduck v. Burke [Va.] 49 S. E. 976. See, also, Officers and Public Employes, 4 Curr. L. 854.

25. See 2 Curr. L. 1157.

They may be required to record and report their transactions. Ullman v. District of Columbia, 21 App. D. C. 241.

26. Under Laws 1883, § 10, p. 509, providing that surplus arising from the sale shall be paid to the pawnor where several loans were made to the same person at different times and on different articles, a surplus arising on the sale of one cannot be set off against the deficiency resulting from the sale of another. Stephens v. Simpson, 94 App. Div. 298, 87 N. Y. S. 1068.

27. Stern v. Leopold Simons Co. [Conn.] 58 A. 696.

28. See 2 Curr. L. 1157. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696.

29, 30, 31. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696.

32. That pawned articles would be sold after six months without notice. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696.

33. Prior to the stipulated time. Loftus v. Agrant [S. D.] 99 N. W. 90; Ullman v. District of Columbia, 21 App. D. C. 241.

This article does not include discharge by novation,[34] release,[35] or accord and satisfaction;[36] nor does it include payment into court,[37] nor matters peculiar to negotiable paper.[38]

§ 1. *Mode and sufficiency of payment or tender.*[39] *To or by whom.*[40]—Payment to an agent having no authority to receive the same is not a payment[41] unless the creditor actually receives the money.[42]

Medium.[43]—A note,[44] order,[45] or check,[46] does not constitute payment unless given and accepted with such intention, though in some states a check is effective unless objected to;[47] but an objection upon some ground, other than that it is not lawful money, is ineffectual unless well taken.[48] Failure to present a check as required by the common law converts the same into an absolute payment.[49] A delivery of a certified check amounts to a payment.[50] By agreement, merchandise may be taken in payment.[51]

Manner of payment.—In order that the payment may be effectual, the property must pass out of the control of the debtor.[52] A payment being voluntary,[53]

34. See Novation, 4 Curr. L. 838.

35. See Releases, 2 Curr. L. 1498.

36. See Accord and Satisfaction, 3 Curr. L. 17.

37. See Payment into Court, 2 Curr. L. 1163; 4 Curr. L. 961.

38. See Negotiable Instruments, 4 Curr. L. 787.

39. See 2 Curr. L. 1158. See, generally, Hammon, Contracts, § 429 et seq.

40. Effect of payment by a third person. See note 100 Am. St. Rep. 397.

41. Attorney. Willis v. Gorrell, 102 Va. 746, 47 S. E. 826. See 2 Curr. L. 1158, n. 18.

42. Wagoner v. Silva, 139 Cal. 559, 73 P. 433.

43. See 2 Curr. L. 1158.

44. Berksbire v. Hoover, 92 Mo. App. 349. A contract of purchase providing for certain payments and the "notes of * * * for the balance," held the notes were taken in absolute payment. Burlee Dry Dock Co. v. Besse [C. C. A.] 130 F. 444. See 2 Curr. L. 1158, n. 29.

45. A creditor accepting an order on a third person from his debtor, and taking a note from the drawee and extending the time of payment, held to constitute a payment by the debtor though the note was never paid. Elm City Lumber Co. v. Mackenzie [Conn.] 58 A. 10. Judgment on an answer alleging such facts held not erroneous, in the absence of a demurrer or objection to the evidence, on the ground that there was no allegation that the note was taken without the knowledge of the debtor. Id.

46. Not being paid, the vendor is remitted to his original rights under the contract of sale. Pflueger v. Lewis Foundry & Mach. Co. [C. C. A.] 134 F. 28. A plea of payment by a post-dated check which has been returned is unavailable. Lockwood Trade Journal v. New York Silicate Book Slate Co., 88 N. Y. S. 152. Where debtor gave agent of creditor a check for more than the amount due and received the agent's personal check for the difference, held principal was liable for such excess on nonpayment of agent's check. Rines v. New York & Brooklyn Brewing Co., 90 N. Y. S. 362. In an action to recover realty leased, held deposit of check in bank was not a compliance with the requirements of the lease requiring the deposit of a certain sum. Chapple v. Kansas Vitrified Brick Co. [Kan.] 79 P. 666. See 2 Curr. L. 1158, n. 26, 28.

47. Under Code § 3063 requiring objections to be made at the time the check is received, one who retains a draft for six months cannot insist that he should have been paid in money. Shay v. Callanan, 124 Iowa, 370, 100 N. W. 55.

48. Kollitz v. Equitable Mut. Fire Ins. Co., 92 Minn. 234, 99 N. W. 892.

49. Manitoba Mortg. & Inv. Co. v. Weiss [S. D.] 101 N. W. 37. Where check on third person was not presented until 5 days after receipt by debtor. Civ. Code 1903, § 2256, held inapplicable. Id. See 2 Curr. L. 1158, n. 27.

50. Herrmann Furniture & Plumbers' Cabinet Works v. German Exch. Bank, 87 N. Y. S. 462.

NOTE. Certified check: The acceptance by a creditor of a certified check from his debtor does not ipso facto constitute a payment of the debt. Born v. Indianapolis First Nat. Bank, 123 Ind. 78, 18 Am. St. Rep. 312, 7 L. R. A. 442.—From note to National Bank of Commerce v. Chicago, etc., R. Co. [Minn.] 9 L. R. A. 263.

51. Advertising contract providing that publisher should produce business to the amount of the cost of the advertisement, held publisher was obliged to take its pay in goods, if it were to be paid at all, and orders for goods should be treated as payment pro tanto. Snyder v. International Economist Co., 91 N. Y. S. 748.

52. One person being the manager of a bank and a corporation a deposit in the bank by him of the corporation's money as consideration for a conveyance of land from a third party to the corporation is not equivalent to payment to the grantor, the deposit being under the control of such manager. Halloran v. Holmes [N. D.] 101 N. W. 310.

53. Where a note provided that upon payment of a bonus it could be paid before maturity, held payment of bonus and principal after commencement of suit to foreclose was not a payment under duress so that the bonus could be recovered. Kilpatrick v. Germania Life Ins. Co., 95 App. Div. 287, 88 N. Y. S. 628.

NOTE. Payment when involuntary: A

it cannot be recovered back though illegally demanded.[54] A payment made for the purpose of recovering possession of personal property wrongfully detained is not voluntary,[55] but a mere protest accompanying a payment does not change its character as a voluntary one.[56]

Manner of proffer.[57]—There must be an unconditional[58] tender of the cash[59] or property[60] due the other. A tender is excused where, before the expiration of the time therefor, the party to whom it is to be made makes declarations equivalent to a refusal to accept the tender if made.[61] The tender must be for the full amount due,[62] including attorney's fees.[63]

Keeping tender good.[64]—A tender to be effective must be kept good,[65] and to this end the fund must be preserved.[66]

§ 2. *Application of payment.*[67]—A debtor who owes several debts to the same creditor may designate the application of a voluntary remittance at the time it is made,[68] or at any time before the creditor, in the absence of such direction, has applied it,[69] and a surety cannot object to the exercise of this right except in cases where a diversion of funds, which the surety is entitled to have applied in a particular manner, is attempted in fraud of his rights.[70] In the absence of such designation the creditor may apply the payment to any of the debts,[71] and, at

payment made under compulsion, coercion, or duress is involuntary. The coercion or duress which will render a payment involuntary must consist of some actual or threatened exercise of power possessed or believed to be possessed by the person exacting the payment. Brumagin v. Tillinghast, 18 Cal. 272, 79 Am. Dec. 176; Radich v. Hutchins, 95 U. S. 210, 24 Law. Ed. 409. Service or filing a written protest cannot make a payment involuntary. Wabaunsee County v. Walker, 8 Kan. 436; Union Pac. R. Co. v. Dodge County, 98 U. S. 544, 25 Law. Ed. 196.—From note to De La Cuesta v. Ins. Co. [Pa.] 9 L. R. A. 631, 632.

54. Du Vall v. Norris, 119 Ga. 947, 47 S. E. 212.

55. Especially where owner cannot find out who has property but deals with a third person. Du Vall v. Norris, 119 Ga. 947, 47 S. E. 212.

56. Gerry v. Slebrecht, 88 N. Y. S. 1034.

57. See 2 Curr. L. 1159.

58. An offer to pay the purchase price of land on the delivery of a properly executed deed is not an unconditional tender. Will not support specific performance. Terry v. Kelm [Ga.] 49 S. E. 736. See 2 Curr. L. 1158, n. 35-37.

59. Contract requiring securing and tendering of $100,000, held tender by defendant who had simply made arrangements whereby he could secure the money was insufficient, the cash not being actually tendered. Venable v. Riley-Grant Co., 117 Ga. 127, 43 S. E. 428.

60. In an action on a policy, plaintiff being entitled to recover awnings destroyed by fire, a tender not including the same is insufficient. Wicks v. London & L. Fire Ins. Co., 91 N. Y. S. 1036 [Advance sheets]. Plaintiffs tendering stock in writing, renewing the tender in their petitions, and on trial producing the shares in court and filing them with the clerk held sufficient to justify judgment though the first written tender was not kept good. Wisconsin Lumber Co. v. Greene & W. Telephone Co. [Iowa] 101 N. W. 742.

61. Ansley v. Hightower, 120 Ga. 719, 48 S. E. 197.

62. Surety on a mortgage buying in property mortgaged to secure deficiency judgment on first mortgage, held tender of amount paid by surety less the amount of deficiency judgment was insufficient to sustain a redemption. Dunning v. Gaige [Mich.] 100 N. W. 267. Mortgagor agreeing to satisfy mortgage for a sum less than the debt secured if paid within a certain time and the mortgagor failing to carry out the agreement, a tender of the balance called for by such contract by a purchaser of the land at a receiver's sale is ineffectual. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

63. When a tender is made after suit has been commenced to foreclose a trust deed or mortgage which provides for the payment of a reasonable solicitor's fee, to be effective, the tender should include the amount of the solicitor's fee earned up to the time of making the tender. Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678. See 2 Curr. L. 1159, n. 44, 45.

64. See 2 Curr. L. 1159.

65. Unless kept good will not stop interest. Woodland Cemetery Co. v. Ellison, 25 Ky. L. R. 2069, 80 S. W. 169. Where a tender is made after suit has been commenced to foreclose a trust deed or mortgage, it must be kept good. Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678.

66. If placed in a bank and checked against until the deposit is reduced below the amount of the tender, it is not kept good, Healy v. Protection Mut. Fire Ins. Co., 213 Ill. 99, 72 N. E. 678.

67. See 2 Curr. L. 1160.

68. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986.

69. Lynn v. Bean [Ala.] 37 So. 515.

70. Boyd v. Agricultural Ins. Co. [Colo. App.] 76 P. 986.

71. Hamilton v. Rhodes [Ark.] 83 S. W. 351. See 2 Curr. L. 1160, n. 50.

common law, this application may be made at any time before suit.[72] A debtor may, by silence, ratify a creditor's application.[73] Debtor and creditor determining the method of application, the creditor cannot subsequently change the same.[74] As an exception to the rule that a surety may not direct application to the secured debt in opposition to the creditor,[75] it has been held that he may do so when the very money for payment of which he is bound is the payment received and to be applied.[76] When the parties make no application of payments, the law applies them to the oldest of several debts,[77] though this rule is subject to qualification where the rights and equities of third persons are involved. Thus, as between a debtor and a surety whose obligation covers a distinct portion of the time during which the account was running, all deposits should be applied to debit items made during the same time,[78] or, where there are different sureties covering different periods of time, each surety is entitled to the benefit of the moneys received during the period of his suretyship.[79] The remittance and a debt being identical in amount, it is presumed that the debtor intended to have the payment applied to such debt.[80] Payments being applied to a general account they are held to apply to the oldest of the several items.[81] Interest should be paid before the principal.[82] There being no proof of usury, interest in excess of the legal rate being voluntarily paid by the borrower cannot be credited on the principal.[83] Payments upon a void substituting instrument should be applied to the original instrument.[84] Generally,

72. People v. Grant [Mich.] 102 N. W. 226. See 2 Curr. L. 1160, n. 58. [Under the civil law this application must be made at the time of payment.]

73. So held where a debtor failed to answer a letter which law presumed had been received. Sloan v. Sloan [Or.] 78 P. 893.

74. One selling a subcontractor materials for different buildings, and keeping but one account, by accepting notes from the subcontractor and crediting the same on the general account thereby loses his right to separate the items of the account and apply the money received on the notes as he saw fit. City Coal & Wood Co. v. New Britain Institute [Conn.] 59 A. 33. See 2 Curr. L. 1160, n. 48.

75. 2 Am. & Eng. Enc. Law [2d Ed.] 437. Crane Co. v. Pacific Heat & Power Co. [Wash.] 78 P. 460.

Note: In this case A entered into a contract to install a heating plant in a school building, B became surety for payment of laborers and materialmen. C, the plaintiff, furnished a large amount of material. On two occasions A, having received installments of payment on the job, made remittances therefrom to C, with no particular directions as to application of such payments. C. applied them on a former running account, and afterwards brought this action against A and B to recover for the material furnished for this contract. Held, that B was equitably entitled to have the payments made to C applied on the indebtedness for which he was surety. Crane Co. v. Pacific Heat & Power Co. [Wash.] 78 P. 460.

The annotator in 3 Mich. L. R. 246 says: "The holding in this case seems to be quite against the weight of authority. The rule is that where the debtor does not direct the application of a payment, the creditor may apply it as he sees fit. In the case of Merchants Ins. Co. v. Herber, 68 Minn. 420, cited by defendants as sustaining their contention, the payments, the application of which was in dispute, were of money belonging to the creditors, and in Young v. Swan, 100 Iowa, 323, the money belonged to the party against whom it was sought to enfore a lien. But in the present case it would seem that the money in question was the property of A, and that according to the rules generally followed C had a perfect right to apply it to the former account. See: 2 Parsons, Cont., 634; Pardee v. Markle, 111 Pa. 548, 56 Am. Rep. 299; Stamford Bank v. Benedict, 15 Conn. 437; Hanson v. Rounsavell, 74 Ill. 238; Harding v. Tefft, 75 N. Y. 461. See, also, 12 L. R. A. 131, note."

The opinion discloses that the surety was sued as a co-defendant with the debtor, but does not comment on that as important. **Query** whether the creditor suing on a contract between others for his benefit is not bound by the rights of the parties thereto? If so the material man must have made such applications as the parties between themselves would have been bound to make or he could not enforce the contract liability. On this reasoning the decision can be defended from criticism.

76. Crane Co. v. Pacific Heat & Power Co. [Wash.] 78 P. 460.

77. Rowan v. Chenoweth [W. Va.] 47 S. E. 80; Johnson v. Foster [Iowa] 101 N. W. 741.

78, 79. First Nat. Bank v. National Surety Co. [C. C. A.] 130 F. 401.

80. Monthly balances. Boyd v. Agriculture Ins. Co. [Colo. App.] 76 P. 986.

81. People v. Grant [Mich.] 102 N. W. 226.

82. Civ. Code 1895, § 2883. Becker v. Shaw, 120 Ga. 1003, 48 S. E. 408. See 2 Curr. L. 1160, n. 53.

83. Bosworth v. Kinghorn, 94 App. Div. 187, 87 N. Y. S. 983.

84. A consolidated lease of school lands being void payments made thereon should be applied to constituent leases in good standing. Scott v. Slaughter [Tex. Civ. App.] 80 S. W. 643.

security cannot be applied to other than the debt secured.[85] A court of common law cannot compel a party to apply money conditionally received from one joint debtor, but not actually appropriated, in favor of another who was equally liable.[86] The application of payment being a question for the jury, it is the business of the court to direct the jury how the payments should be applied, upon a state of facts which it may find to exist.[87]

§ 3. *Effect of tender or payment.*[88]—A tender is an admission of liability[89] to the one to whom tender is made,[90] and, though the offer be withdrawn, it may be proven as an admission of indebtedness.[91] But it has been held that where a tender if unaccepted is deemed withdrawn, an unaccepted tender in an action for breach of contract is not an admission of the terms of the contract and of the breach alleged.[92] Defendant amending his answer so as to withdraw an admission of indebtedness and setting up a counterclaim and demanding affirmative relief the court may relieve him from a tender which has been paid into court.[93] Payment of debt amounts to a satisfaction of evidences of indebtedness held as collateral.[94]

§ 4. *Payment or tender as an issue. A. Pleading.*[95]—Payment is an affirmative defense which must be pleaded,[96] though in some states payment may be proved under a plea of nil debet.[97] Plaintiff alleging nonpayment a denial of the allegation is proper as a part of a defense of payment.[98] Under an answer of payment of the entire debt, part payment may be proved as a defense pro tanto.[99] The court may, in its discretion, allow a plea of payment to be withdrawn before impaneling the jury.[1] It is not necessary that the complaint show a strict legal tender, an equitable tender being sufficient.[2] The money paid into court being legal tender, the complaint need not allege that it is the "lawful money" alleged to have been tendered.[3]

(§ 4) *B. Presumptions and burden of proof.*[4]—Person alleging payment[5] by

85. Land conveyed as security for debt held under agreement could not be applied to indebtedness arising thereafter. Berner v. German State Bank [Iowa] 101 N. W. 156.

86. Hudson v. Baker, 185 Mass. 122, 70 N. E. 419.

87. Hoskins' Adm'r v. Brown [Ky.] 84 S. W. 767.

88. See 2 Curr. L. 1161.

89. A tender in a tort action is a conclusive admission of plaintiff's cause of action, and of the existence of every fact essential to maintain such action. Wells v. Missouri-Edison Elec. Co. [Mo. App.] 84 S. W. 204. See 2 Curr. L. 1161, n. 65, 66.

90. A tender by a purchaser at a receiver's sale to an assignee of a mortgage on the land amounts to a recognition of the assignee's ownership of the mortgage. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

91. O'Connell v. King [R. I.] 59 A. 926. Defendant would, of course, have the right to answer and explain the same. Id.

92. Young v. Stickney [Or.] 79 P. 345.

93. Mann v. Sprout, 102 App. Div. 60, 92 N. Y. S. 372.

94. Note and mortgage. Brosseau v. Lowy, 209 Ill. 405, 70 N. E. 901.

95. See 2 Curr. L. 1161.

96. Selleck v. Garland, 184 Mass. 596, 69 N. E. 345. A denial cannot raise the issue. First Nat. Bank v. Jennings, 44 Misc. 374, 89 N. Y. S. 995. Code Civ. Proc. § 500. In the absence of such a plea evidence of payment is inadmissible. Rogers v. Simonson & Son Co., 90 N. Y. S. 298. Where an obligation requires a specific sum of money to be paid at a certain time, allegation and proof of payment are strictly a matter of defense Montgomery v. Leuwer [Minn.] 102 N. W. 367. See 2 Curr. L. 1161, n. 68.

97. Under Code 1887, § 3298; 2 Code 1904, p. 1737, it is immaterial that the payments are described as offsets. Langhorne v. McGhee [Va.] 49 S. E. 44.

98. Flournoy v. Osgood, 90 N. Y. S. 972.

99. Elm City Lumber Co. v. Mackenzie [Conn.] 58 A. 10.

1. O'Connell v. King [R. I.] 59 A. 926. This discretion will not be reviewed unless abused. Id. The general rule that pleadings cannot be changed after a case has been opened to the jury is not applicable to the above case. Id.

2. Where it was prayed that if tender was insufficient the plaintiff offered to pay the amount the court found due. Bowen v. Gerhold, 32 Ind. App. 614, 70 N. E. 546.

3. Where the money was paid in in the presence and under the supervision of the court. Bowen v. Gerhold, 32 Ind. App. 614, 70 N. E. 546.

4. See 2 Curr. L. 1161.

5. Ewing's Adm'rs v. Ewing, 26 Ky. L. R. 580, 82 S. W. 292; Galbraith v. Starks, 25 Ky. L. R. 2090, 79 S. W. 1191. Estate of a decedent. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Suit to foreclose a mortgage. Tisdale v. Mallett [Ark.] 84 S. W. 481.

a certain instrument[6] must prove the allegation, though failure to sustain the burden may be waived.[7] A receipt is only prima facie evidence of payment,[8] and the person giving it has the burden of showing that it is incorrect.[9]

The presumption of payment after the lapse of twenty years does not arise where there is affirmative proof that the debt has not been paid, or where there are circumstances accounting for the creditor's delay,[10] the question being one for the jury.[11] Payment of a debt recently created by a written instrument still outstanding will not be presumed.[12] Possession of a note by the payee raises a presumption of nonpayment,[13] and such presumption is not overcome by the fact that after the maturity of such note the payee thereof, in a separate transaction, executed a note to the maker.[14] The word "received" generally stamps a paper as evidence of a payment, not an obligation to pay.[15] In Massachusetts there exists a prima facie presumption that a negotiable promissory note is payment of the debt for which it is taken,[16] and the fact that giving effect to the presumption will deprive a party of his security will go a long way toward rebutting the same.[17] The giving of notes is presumptive evidence of a settlement of an account claimed to exist, or of a payment of previous accounts.[18] As to whether or not a transfer of negotiable paper amounts to a payment or a purchase depends upon the circumstances of the case and the intent of the parties.[19] A presumption of partial payment may arise from the pleadings.[20]

(§ 4) *C. Evidence. Admissibility.*[21]—Entries made by a merchant in the usual course of his business are admissible,[22] unless self-serving.[23] In an action on a note, it may be shown that there were other demands owing at the time from the maker to the payee.[24] The note being held by the maker, it may be introduced though not marked "paid."[25]

6. One alleging payment by a check containing the words "in full of all demands" must prove that the check contained such words when accepted by the creditor. Decker v. Laws [Ark.] 85 S. W. 425.

7. In an action for rent though plaintiff fail to establish nonpayment, if defendant proceeds plaintiff has a right to rely on defendant's statement that it has not been paid. Butler v. Carillo, 88 N. Y. S. 941.

8. Anderson v. Davis [W. Va.] 47 S. E. 157. May be explained or contradicted by parol. Lynn v. Bean [Ala.] 37 So. 515. See 2 Curr. L. 1162, n. 84-86. See, also, Evidence, 3 Curr. L. 1334.

9. That it was not intended as full payment. Decker v. Laws [Ark.] 85 S. W. 425.

10. O'Hara v. Corr [Pa.] 59 A. 1099. See 2 Curr. L. 1162, n. 89.

11. So held where several witnesses declared that deceased debtor had declared that he had not paid the debt. O'Hara v. Corr [Pa.] 59 A. 1099.

12. Fein v. Meier [N. J. Law] 58 A. 114.

13, 14. Sarraille v. Calmon, 142 Cal. 651, 76 P. 497.

15. Rowan v. Chenoweth [W. Va.] 47 S. E. 80.

16. Paddock & Fowler Co. v. Simmons [Mass.] 71 N. E. 298.

17. In an action on a written guaranty, a note given to the guarantee for the loss thereunder is not conclusively presumed to operate as payment pro tanto. Paddock & Fowler Co. v. Simmons [Mass.] 71 N. E. 298.

18. Downs v. Downs [Iowa] 102 N. W. 431.

19. Note paid after maturity by cashier of collecting bank, the cashier not being liable on the note, held a purchase. Sturgis v. Baker, 43 Or. 236, 72 P. 744. Payment of note by a third party held a purchase though note was stamped "paid" by the unauthorized act of a bank official. Ashburn v. Evans [Tex. Civ. App.] 72 S. W. 242. Although marked "paid" note not deemed satisfied where substitute note, forming payment, is forgery. Central Nat. Bank v. Copp, 184 Mass. 328, 68 N. E. 334. In absence of statement otherwise, holder of note of corporation may assume that check of a stockholder and director, delivered by secretary and treasurer, is in payment, not as purchase, of the note. Henderson v. Shaffer, 110 La. 481, 34 So. 644.

20. Defendants denying payment and in their petition for a new trial alleging that only a certain sum had been paid, held to raise a presumption that the debt was not entirely paid. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562.

21. See 2 Curr. L. 1163.

22. Storekeeper's books are not evidence as to an account therein relative to the purchase of land and payment therefor; this not being connected with the business. Galbraith v. Starks, 25 Ky. L. R. 2090, 79 S. W. 1191. Account books in which payments would have been entered. Handy & Co. v. Smith [Conn.] 58 A. 694.

23. Entries in books of account held self-serving declarations and inadmissible to negative effect of receipts given. Hudson v. Baker, 185 Mass. 122, 70 N. E. 419.

24. So as to justify an inference that the money claimed to have been paid by the maker had in part at least been applied on the demands. Sarraille v. Calmon, 142 Cal.

Sufficiency.[26]—Mere showing that money passed from debtor to creditor[27] and casual admissions, though in writing,[28] are insufficient to show payment. In some states it is provided by statute that no indorsement or memorandum of payment written on a promissory note shall be sufficient proof of payment to avoid the bar of limitations.[29] The evidence as to payment being conflicting, the question is for the jury.[30]

PAYMENT INTO COURT.[31]

This topic should be read with reference to the ones on payment and tender,[32] and interpleader.[33]

Occasion and propriety.[34]—The time allowed by a decree for payment into court is suspended by appeal.[35]

The payment and its effect.[36]—Defendant on paying the money into court pursuant to an order of interpleader is not entitled to recover costs.[37] A tender being paid into court without condition, the opposite party may take it as his own without waiving any of his claims.[38]

Custody and liabilities.[39]—A depositary of court money is entitled to a strict compliance with the terms of a judicial order before making payment out of the fund.[40]

Payment, surrender or distribution.[41]—Where the fund in the hands of the clerk has been obtained by void garnishment proceedings, it should be returned to the garnishee.[42]

PEDDLING.[43]

§ 1. Definition (962).
§ 2. Statutory or Municipal Regulation (962).
§ 3. Who May Become Licensees (963).
§ 4. Offenses and Prosecution (963).

651, 76 P. 497. In such case held not error to admit notes signed by a third person and made payable to the maker of the note in suit and by him transferred, for value received, to the payee in the latter note. Id.

25. Chouteau Land & Lumber Co. v. Chrisman, 172 Mo. 610, 72 S. W. 1062.

26. See 2 Curr. L. 1163.

27. Debtor must show that money was to be applied on debt, or that there was no other indebtedness. Galbraith v. Starks, 25 Ky. L. R. 2090, 79 S. W. 1191.

28. Anderson v. Davis [W. Va.] 47 S. E. 157.

29. Evidence that one of two defendants did not make indorsements is not proof that the payments were made by either defendant [Mills' Ann. St. § 2921]. Coulter v. Bank of Clear Creek County [Colo. App.] 72 P. 602.

30. Held error for the court to compel the jury to credit defendant's testimony. Linsell v. Linsell [Mich.] 100 N. W. 1009.

ILLUSTRATIONS. Sufficiency of evidence: One admitting an indebtedness of $750 for goods bought and a note for $75 against him, held evidence of payment of $758.60 was insufficient to show payment of note. Carpenter v. Rosenbaum [Ark.] 83 S. W. 1047. Plea of payment of $1,000 held not sustained by the introduction of a check and receipt, each for $500, and bearing the same date, the check not indicating the purpose for which it was given. Ewing's Adm'rs v. Ewing, 26 Ky. L. R. 580, 82 S. W. 292. Defendant admitting that he received goods, but not remembering having paid for them, there is no proof of payment. Carter & Co. v. Weber [Mich.] 101 N. W. 818. In a suit to establish a lien on land evidence held insufficient to show payment of title bond. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562. Evidence held sufficient to show note was accepted in full settlement of debt. Clarkson Sawmill Co. v. Patrick, 2 Neb. Unoff. 191, 96 N. W. 211. Evidence held sufficient to warrant the jury to sustain the defense of payment. Hawver v. Ingalls [Minn.] 101 N. W. 604.

31. See 2 Curr. L. 1163. For full discussion of subject and forms, see Fletcher, Eq. Pl. & Pr. §§ 368, 369.

32. See Payment and Tender, 4 Curr. L. 955.

33. See Interpleader, 4 Curr. L. 249.

34. See 2 Curr. L. 1163.

35. Ruzicka v. Hotovy [Neb.] 101 N. W. 328.

36. See 2 Curr. L. 1164.

37. Scharff v. Supreme Lodge K. H., 96 App. Div. 632, 89 N. Y. S. 168.

38. Taking it after judgment but before reversal on appeal does not estop him from further prosecution of his action. Tilden v. Gordon & Co., 34 Wash. 92, 74 P. 1016.

39. See 2 Curr. L. 1164.

40. Order requiring payment to be made to the administrators of a certain decedent, the check drawn pursuant thereto must contain the name of the decedent. Holt v. Colonial Trust Co., 97 App. Div. 305, 89 N. Y. S. 955.

41. See 2 Curr. L. 1164.

42. Yeiser v. Cathers [Neb.] 102 N. W. 612. [The court intimates that if a claimant should, by proper averments in a proceed-

§ 1. *Definition.*[44]—A peddler is a small retail dealer who carries his merchandise with him, traveling from place to place, and from house to house, exposing his goods for sale, and selling and delivering them to consumers rather than to dealers.[45] It has been held that there can be no distinction in principle between the party who peddles his own product and the one who buys his stock from the producer and peddles it;[46] but under the statutes of most states a farmer selling his farm products is not a hawker or peddler within the understood meaning of such terms.[47]

§ 2. *Statutory or municipal regulation.*[48]—In most states the occupation of peddling is regulated by statute,[49] the method generally being by the imposition of a license tax. The amount of the license fee is not limited to an amount which will cover the expense of issuing it, but it may include the reasonable cost of policing the business, and such further reasonable sum as may be deemed necessary in order to secure the orderly pursuit of the business, by excluding therefrom irresponsible and disorderly persons,[50] and these are considerations for the municipal authorities rather than for the courts.[51] Statutes upon the subject will be strictly construed,[52] and do not embrace vendors of merchandise not ejusdem generis with articles expressly enumerated.[53]

Constitutionality.[54]—Such statutes must observe the requirements of the Federal and state constitutions, hence they must not constitute class legislation,[55] interfere with interstate commerce,[56] deny anyone the equal protection of the law,[57]

ing to which the garnishee and others interested are made parties, show that he is entitled to some legal or equitable claim to the fund, the above order would not be made.]

43. See 2 Curr. L. 1165.

For the licensing and regulation of analogous occupations, as transient merchants, etc., see Licenses, 4 Curr. L. 428.

44. See 2 Curr. L. 1165.

45. State v. Jensen [Minn.] 100 N. W. 644. Commercial traveler selling goods by sample is not a peddler. Wrought Iron Range Co. v. Campen, 135 N. C. 506, 47 S. E. 658. That employer shipped goods to salesman, in such quantities as would in his judgment supply the trade at that point, the shipment being timed so as to arrive at the same time as the salesman, held not to constitute the latter a peddler. Kloss v. Com. [Va.] 49 S. E. 655. Sess. Laws 1901, p. 155 applies to an agent of a wholesale merchant if he carries the goods, which he is selling, with him. In re Abel [Idaho] 77 P. 621. The phrase "taking orders" in a statute does not contemplate that agent shall have goods with him at time of sale. Id. Sale must be to consumers. Standard Oil Co. v. Com., 26 Ky. L. R. 1187, 83 S. W. 557. Oil company selling oil from wagons directly to consumers held a peddler. Id., 26 Ky. L. R. 142, 80 S. W. 1150. That purchasers allowed employes to buy the article at retail price does not make them retailers. Id. See 2 Curr. L. 1165, n. 25.

46. State v. Jensen [Minn.] 100 N. W. 644.

47. City of St. Louis v. Meyer [Mo. App.] 84 S. W. 914. Under Rev. St. 1899, §§ 6146, 6258, 8861, a city has no authority to declare such a farmer a peddler and require him to obtain a license. Id. Ordinance prohibiting farmer from selling the products of his farm without taking out a license is in violation of Sess. Laws 1901, p. 156, § 8. Ex parte Snyder [Idaho] 79 P. 819. Beef from slaughtered animals raised and slaughtered on the farm is the product of the farm. Id.

48. See 2 Curr. L. 1165.

49. Gen. St. 1902, §§ 4662-4668, making it an offense for an itinerant vendor to expose goods for sale without having a license, does not forbid a transient sale unless made by one of a class of wandering, intermittent traders. State v. Feingold [Conn.] 59 A. 211.

50. State v. Jensen [Minn.] 100 N. W. 644; Kansas City v. Overton, 68 Kan. 560, 75 P. 549. Ordinance requiring hawker to pay $35 for six months and a helper to pay $15 for the same time is not unreasonable. Id. City license of $125 a year held not unreasonable. State v. Jensen [Minn.] 100 N. W. 644. Fees are not excessive where highest fee provided is not more than 16 cents per day. Murphy v. Columbus, 2 Ohio N. P. (N. S.) 484.

51. Kansas City v. Overton, 68 Kan. 560, 75 P. 549.

52. Standard Oil Co. v. Swanson, 121 Ga. 412, 49 S. E. 262; Kloss v. Com. [Va.] 49 S. E. 655.

53. Standard Oil Co. v. Swanson, 121 Ga. 412, 49 S. E. 262. Oil handled in bulk and sold in quantity is not ejusdem generis with patent medicines, jewelry, paper, soap, etc. Id.

54. See 2 Curr. L. 1165.

55. Sess. Laws 1901, p. 156, § 8, by which it is sought to confine the taking of orders for goods sold to merchants only, is class legislation. Rest of such section is valid. In re Abel [Idaho] 77 P. 621. Comp. Laws 1897, c. 136, requiring hawkers and peddlers to have licenses and by its terms not applying to manufacturers, merchants, etc., is not objectionable as class legislation. People v. De Blaay [Mich.] 100 N. W. 598.

56. Sess. Laws 1901, p. 156, § 8 applies to farm products of other states as well as of Idaho, and in no manner interferes with interstate commerce. In re Abel [Idaho] 77

or be mere arbitrary restrictions on trade,[58] and must conform to constitutional requirements as to the titles of legislative acts.[59] The license taxation of commercial travelers is not germane to the license taxation of peddlers or hawkers.[60] A municipal ordinance must not discriminate.[61]

§ 3. *Who may become licensees.*—While a peddler's license cannot issue to a corporation as such, it is competent for a corporation desiring to peddle its goods to take out a license in the name of a designated agent.[62]

§ 4. *Offenses and prosecution.*[63]—A conditional sale accompanied by the delivery of the article constitutes a "sale."[64] The offense of peddling without a license is indictable in some states,[65] and a corporation may be punished criminally for peddling through the medium of an unlicensed agent.[66] The person in charge of a corporation's business at the time of its peddling through the medium of an unlicensed agent may be convicted of the offense.[67]

PEDIGREE, see latest topical index.

PENALTIES AND FORFEITURES.

§ 1. Definitions and Elements (963).
§ 2. Rights and Liabilities to Penalties and Forfeitures, and the Policy of the Law (964).
§ 3. Remedies and Procedure (967).

§ 1. *Definitions and elements.*[68]—Penal laws, strictly speaking, are those imposing punishment for an offense committed against the state.[69] The test is

P. 621. License tax imposed by Revenue Act 1903, § 36 is void in so far as it affects sales by sample of goods manufactured in another state, shipped into the state and delivered in their original packages. Wrought Iron Range Co. v. Campen, 135 N. C. 506, 47 S. E. 658. [See this case for a full, clear and splendid review of the cases relating to the interstate commerce law.] See 2 Curr. L. 1165, n. 29.

NOTE. Peddling as related to interstate commerce: A state tax on peddlers who carry goods and deliver them when they sell them is not unconstitutional as a regulation of interstate commerce if no discrimination is made against persons or property of other states. Howe Mach. Co. v. Gage, 100 U. S. 676, 25 Law. Ed. 754; Commonwealth v. Gardner, 133 Pa. 284, 19 Am. St. Rep. 645, 7 L. R. A. 666. But a sale by sample of goods not yet brought into the state and owned by a nonresident cannot be subjected to a state tax or license fee, such a tax constituting a regulation of interstate commerce. Robbins v. Shelby County Taxing Dist., 120 U. S. 490, 30 Law. Ed. 695; Stoutenburgh v. Hennick, 129 U. S. 141, 32 Law. Ed. 637.—From note to In re Spain [U. S.] 14 L. R. A. 97.

57. Rev. St. 1898, § 1570 et seq., as amended by Laws 1901, p. 477, c. 341, requiring peddlers to have a license, but excepting therefrom certain specified persons, held void. State v. Whitcom [Wis.] 99 N. W. 468.

58. Gen. St. 1902, §§ 4662-4668, requiring itinerant venders to deposit $500, which deposit should be surrendered when license expired, held not a mere arbitrary restriction on trade. State v. Feingold [Conn.] 59 A. 211. This provision may be sustained even though one in behalf of creditors be held unconstitutional. Id.

59. Act No. 49 of 1904 is void as being broader than its title and discriminating against home merchants. Beary v. Narrau, 113 La. 1034, 37 So. 961. Acts 1895, p. 207, No. 137, being unconstitutional in so far as it attempted to extend Acts 1889, p. 284, No. 204, to the Lower Peninsula without any recital of such intent expressed in its title, is ineffectual to repeal the provisions of the General Statutes. People v. De Blaay [Mich.] 100 N. W. 598. Comp. Laws 1897, c. 136, held not objectionable on the ground that an unconstitutional statute cannot be made valid by amendment. Id.

60. Beary v. Narrau, 113 La. 1034, 37 So. 961.

61. City ordinance exempting one personally selling the products of his own or leased lands held valid. Kansas City v. Overton, 68 Kan. 560, 75 P. 549. An ordinance requiring the payment of license fees by peddlers is not discriminating because it seems to exempt other vehicles than those mentioned. Murphy v. Columbus, 2 Ohio N. P. (N. S.) 484.

62. Crall v. Com. [Va.] 49 S. E. 638.

63. See 2 Curr. L. 1166.

64. Crall v. Com. [Va.] 49 S. E. 638.

65. Indictment that defendant did sell * * and offer to sell goods, wares and merchandise, to wit, oil, to * * six different, distinct and separate times, it being then an itinerant peddler, without having first secured a license so to do, held sufficient. Standard Oil Co. v. Com., 26 Ky. L. R. 142, 80 S. W. 1150. See 2 Curr. L. 1166, n. 33.

66. Crall v. Com. [Va.] 49 S. E. 638.

67. Vice-president. Crall v. Com. [Va.] 49 S. E. 638. One who became manager after illegal peddling cannot be convicted therefor. Id.

68. See 2 Curr. L. 1166.

69. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618. Vermont statute (V. S. 2359), providing for forfeiture of certain sum by anyone having custody of will who

whether the wrong sought to be redressed is a wrong to the public or to the individual.[70]

As a general rule the intention of the parties controls in determining whether a sum contracted to be paid on nonperformance of a covenant is to be construed as liquidated damages or a penalty.[71] Where the contract provides for the payment of a certain sum as liquidated damages for the nonperformance of a specific act, which may result in damages of an uncertain character, and there is nothing inconsistent therewith in other parts of the contract, such sum is liquidated damages.[72] But it will not be so regarded unless it bears such proportion to the actual damages that it may reasonably be presumed to have been arrived at upon a fair estimation of the parties of the compensation to be paid for the prospective loss.[73] The fact that it is or is not called liquidated damages is not necessarily controlling.[74] The question is one for the court.[75] Where the damages are liquidated, actual damages need not be alleged or proved.[76]

§ 2. *Rights and liabilities to penalties and forfeitures, and the policy of the law.*[77]—Penalties are not favored in the law,[78] and those seeking to recover them must show the existence of the conditions precedent to their right thereto.[79] Statutes creating them are to be strictly construed,[80] but not so strictly as to defeat the

fails to deliver it to executor or probate court, is penal. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064.

70. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

71. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39. Agreement will control where case is one in which parties are at liberty to so agree, unless unreasonable, unconscionable or inconsistent with other parts of contract. Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643.

72. Provision that, in consideration of a certain sum paid it by a property owner, a street railway would operate entire line for a certain period, and that if it did not it would pay him an equal sum with interest, held to provide for liquidated damages, though such sum was not so named. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39. Agreement to pay five cents a gallon for milk not delivered held for liquidated damages. Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643.

73. Will be considered penalty if greatly exceeds actual loss. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39.

74. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39; Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643.

75. Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643.

76. Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643.

See, also, Damages, § 1, 3 Curr. L. 997.

77. See 2 Curr. L. 1166.

78. Barber Asphalt Pav. Co. v. Peck [Mo.] 85 S. W. 387.

79. Demand held necessary to recover 15 per cent. penalty on tax bills under St. Louis charter, art. 6, § 24. Barber Asphalt Pav. Co. v. Peck [Mo.] 85 S. W. 387.

80. Virginia Act April 16, 1903, § 50, as amended by Act May 13, 1903 (Va. Code 1904, pp. 2223-2224), requiring peddlers to obtain licenses, though a revenue law, is penal in so far as it imposes a penalty for its violation. Kloss v. Com. [Va.] 49 S. E. 666; United States v. York, 131 F. 323; Schmidt v. Justus, 92 N. Y. S. 362.

Particular statutes construed. Refusal to satisfy mortgage: The Alabama statute prescribes a penalty for failure of a mortgagee receiving a partial payment to enter the date and amount thereof on the margin of the record of the mortgage within 30 days after being requested by the mortgagee to do so [Code 1896, § 1065]. Lynn v. Bean [Ala.] 37 So. 515. No particular form of words is necessary to constitute a sufficient request. All that is necessary is that the words used be such as shall reasonably inform the mortgagee that such entry is desired. Notice held sufficient. Id. The notice is admissible in evidence in an action for the penalty. Id. Evidence that mortgage was satisfied of record after suit was brought held inadmissible. Id. The burden is on defendant to show that the mortgage was wholly paid before the request was made. Id.

Right of action to recover forfeitures for **cutting and carrying away trees on forest preserve** given by N. Y. Laws 1895, c. 395, § 280 is not taken away by Laws 1896, c. 114. People v. Francisco, 76 App. Div. 262, 78 N. Y. S. 423. Defendant cannot question the validity of tax deeds recorded more than two years before the trespass. Id.

Refusal of railroad to receive merchandise: State may impose penalty, though goods are to be shipped outside state. Where jury found that car was properly loaded, company liable for penalty imposed by N. C. Code 1883, § 1964, as amended by Laws 1903, p. 788, c. 444. Not interference with interstate commerce. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654.

N. C. Laws 1903, p. 999, c. 590, providing penalty for **failure of carrier to transport goods** within specified time, does not affect common law duty to transport them within reasonable time, or apply to action for breach thereof. Meredith v. Seaboard Air Line R. Co. [N. C.] 50 S. E. 1.

Under Kirby's Dig. Ark. §§ 5438, 5456, 5460, 5461, town may adopt ordinance prescribing

obvious intention of the legislature.[81] They will never be extended by implication.[82]

The concurrence of a criminal statute does not exclude penal liability.[83] It has been held in New York that a penalty "for every refusal" does not import a cumulation of penalties, but only one penalty to the aggrieved person,[84] which holding departs from the earlier ones.[85]

manner of **constructing railroad crossings** and provide penalties for failure to comply therewith. Hughes v. Arkansas & O. R. Co. [Ark.] 85 S. W. 773.

The Federal statute providing that all penalties and forfeitures imposed for **violation of the postal laws** shall be recoverable, one-half to the use of the person informing or prosecuting for the same, and the other half to be paid into the treasury, does not apply to criminal prosecutions so as to entitle one furnishing information on which they were instituted to a share of the money accepted by the government in compromise of the cases [Rev. St. § 4059; Comp. St. 1901, p. 2757]. Leathers v. U. S., 127 F. 776.

Inspection of vessels: U. S. Rev. St. § 4499, providing a penalty for navigating steam vessels without inspection and without a licensed engineer, does not apply to vessels propelled by gasoline. The Ben R. Co. [C. C. A.] 134 F. 784.

Failure to assess taxable property: Wisconsin Laws 1901, p. 550, c. 379, § 5, providing that any member of a board of review who unlawfully omits or agrees to omit from assessment property liable to taxation shall forfeit a certain sum, is not unconstitutional as contrary to public justice. State v. Zillmann, 121 Wis. 472, 98 N. W. 543.

Town treasurers and sureties liable for penalty provided for by Wis. Rev. St. 1898, § 1117, for **failure to settle for taxes** included in tax rolls, where improperly accepted certificates in lieu of cash. Oneida County v. Tibbetts [Wis.] 102 N. W. 897.

Cancellation of fidelity bond: Texas Acts 1897, p. 247, c. 165, § 9, denouncing penalty against company cancelling bond guaranteeing fidelity of employe, which fails to give latter its reasons for so doing on request, does not apply to palace car company acting as agent of surety company. Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635. Section 8 of said act, prescribing what acts shall constitute one an agent of a surety company, does not render palace car company liable to employe compelled to resign because of cancellation of his bond by surety company, where car company has done no act which, had it been done by the surety company, would have rendered it liable for the penalty. Id. Evidence insufficient to show violation of act by car company, in that it failed to show that it ever sollcited business for car company or otherwise acted as its agent. Id.

Laws of Connecticut provide penalty for **failure of administrator to file inventory** within two months after acceptance of his bond, unless before suit is brought he shall make excuse therefor, acceptable to the court [Gen. St. 1888, §§ 578, 579]. Atwood v. Lockwood, 76 Vt. 555, 57 A. 279. Excuse must be made to and accepted by court and entered on records, and oral excuse made to and accepted by judge is insufficient. Id. Can only be proved by records. Id.

Unlawful traffic in milk cans: N. Y. Laws 1902, p. 1135, c. 482 does not apply to cans in such condition as not to be susceptible of further use for milk. Schmidt v. Justus, 92 N. Y. S. 362. Dismissal of complaint before plaintiff rested, on introduction of evidence that plaintiff found can full of ashes and with top cut off, held error. Should have been allowed to show its condition. Id.

Diamond contracts: Leases to be redeemed in diamonds held violation of Mass. Rev. Laws, c. 73, § 7, providing for forfeiture of franchise of corporation selling bonds, etc., to be redeemed in numerical or any arbitrary order without regard to amount previously paid. Attorney General v. Preferred Mercantile Co. [Mass.] 73 N. E. 669. Statute constitutional. Id.

Violation of game laws: Wis. Laws 1901, p. 518, c. 358, § 22, as amended by Laws 1903, p. 720, c. 437, § 20, providing penalty for shipping certain fish, held constitutional. State v. Nergaard [Wis.] 102 N. W. 899. Whether fish were taken from inland waters of state is for jury, on conflicting evidence. Id.

N. C. Code, § 754, providing penalty for **allowance of unverified account** by county commissioners, held mandatory. Turner v. McKee [N. C.] 49 S. E. 330.

Failing to record town plats: Mississippi statute (Rev. Code 1892, § 4403), imposing penalty on anyone selling lots in any town, or subdivision thereof or addition thereto "hereafter laid out," without recording a plat, does not apply to plats of towns previously incorporated, nor to private surveys made prior to its passage. Wellborn v. Muller [Miss.] 36 So. 544.

81. Words of statute should not be so narrowed as to exclude cases which they, in their ordinary acceptation, or in sense in which legislature obviously used them, would comprehend. United States v. York, 131 F. 323.

82. Kloss v. Com. [Va.] 49 S. E. 655. Case must come within the very terms of the statute. Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635. Where the statute is grammatically accurate and its meaning is not obscure, its scope cannot be extended by repunctuation. U. S. Rev. St. § 5424 (Comp. St. 1901, p. 3668), relating to forged naturalization certificates, construed. United States v. York, 131 F. 323. Not to be extended beyond plain meaning by implication or construction. The Ben R. Co. [C. C. A.] 134 F. 784. To extend them to cases not specifically described, the intention of the legislature must be ascertained from the words of the act and not made out by conjecture or based on probabilities. Id.

83. Taking illegal fees [Shannon's Code Tenn. § 6353]. Plyley v. Allison [Tenn.] 82 S. W. 475. The fact that defendant acted in good faith is no defense. Id.

84. Griffin v. Interurban St. R. Co. [N. Y.] 72 N. E. 513.

Private property cannot be forfeited for the alleged violation of law by its owner, nor destroyed by way of penalty inflicted upon him without giving him an opportunity to be heard,[86] unless it is such as can only be used for an illegal purpose, in which case it may be declared a nuisance and summarily abated.[87]

A judgment cannot be rendered against defendant in ejectment as a penalty for failure to comply with a rule of court,[88] and a statute authorizing the court to strike out a party's answer on his refusal to attend when required and give his deposition is unconstitutional, as tending unduly to restrict the right to defend an action.[89]

Instruments creating forfeitures will be strictly construed,[90] and their terms will never be extended by construction.[91] The right to declare a forfeiture must be distinctly reserved,[92] the proof of the happening of the event on which the right is to be exercised must be clear,[93] the party entitled to do so must exercise his right promptly,[94] and the result of enforcing the forfeiture must not be unconscionable.[95]

The right may be waived.[96] Subsequent acceptance of rent accruing before forfeiture of a lease will not waive such forfeiture,[97] but acceptance of that accruing after forfeiture will do so.[98]

85. "For each refusal" is cumulative. Suydam v. Smith, 52 N. Y. 383, cited in note "Cumulative Penalties and Stare Decisis," 5 Columbia L. R. 156. Penalty provided for failure to post time of arrival of trains held cumulative. Southern R. Co. v. State [Ind. App.] 72 N. E. 174.

86. Neb. Comp. St. 1901, c. 31, art. 3, § 3, in so far as it provides for seizure and forfeiture of guns, dogs, etc., of persons hunting without a license without a hearing, is unconstitutional as depriving them of their property without due process of law. McConnell v. McKillip [Neb.] 99 N. W. 505.

87. McConnell v. McKillip [Neb.] 99 N. W. 505.

See, also, Betting and Gaming, § 2, 3 Curr. L. 505; Fish and Game Laws, § 2, 3 Curr. L. 1430; Nuisance, § 4A; 4 Curr. L. 845.

88. For failure to deposit half of reporter's fee in advance, such action is a deprivation of property without due process of law. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281. Also not authorized by Cal. Code Civ. Proc. § 274 as amended (Amendment of Codes 1880, Code Civ. Proc. p. 54), providing for taxing of such fees as costs. Id.

89. Cal. Code Civ. Proc. § 1991. Summerville v. Kelliher, 144 Cal. 155, 77 P. 889.

90. Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 P. 625. Conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate, and strictly against the enforcement of the forfeiture [Cal. Civ. Code, § 1442]. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638. Every presumption is against the forfeiture and the grantee must clearly show the existence of conditions authorizing it. One claiming that land granted for reclamation purposes has reverted to grantor must show that it has ceased to be used for such purposes. Id. Evidence held to sustain finding that land had never ceased to be so used. Id. Conveyance by grantee for same purposes held not to show that premises had ceased to be so used or to work forfeiture. Id.

91. Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 P. 625.

92. Contract granting right to drill for oil and gas cannot be forfeited for breach of a condition in absence of stipulation to that effect. Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 P. 625. Forfeitures are not favored in law, and the burden is on the one who claims the benefit thereof to clearly establish his right. Aetna Ins. Co. v. Jacobson, 105 Ill. App. 283.

93. Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 P. 625. Courts of law as well as courts of equity do not favor forfeitures, and requirements for them must be strictly pursued. Where railroad lease required lessee to pay dividends directly to lessor's stockholders, forfeiture will not be declared for failure to do so, where lessor has failed to declare dividends or furnish list of stockholders as required by lease. Johnson v. Lehigh Valley Traction Co., 130 F. 932.

94. Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 P. 625.

95. Rose v. Lanyon Zinc Co., 68 Kan. 126, 74 P. 625.

For forfeiture of leases, see Landlord and Tenant, 4 Curr. L. 402; Mining and oil and gas leases, Mines and Minerals, 4 Curr. L. 669. For forfeiture of estate for breach of conditions subsequent, see Deeds of Conveyance, § 3, 3 Curr. L. 1068.

96. For waiver of forfeitures of mining leases, see Mines and Minerals, § 7, 4 Curr. L. 670. Where the lessor has, by his conduct, led the lessee to suppose that the rights of forfeiture given by the lease would not be strictly pursued, forfeiture will not be enforced without a notice that in future it will be insisted upon. Johnson v. Lehigh Valley Traction Co., 130 F. 932.

97. Johnson v. Lehigh Valley Traction Co., 130 F. 932.

98. Lease of railroad. Johnson v. Lehigh Valley Traction Co., 130 F. 932.

A provision in a will that legatees contesting its validity shall forfeit their legacies is valid;[99] but it will not be enforced where the contest was justified under the circumstances.[1]

A refusal to allow a husband who feloniously murders his wife to take the proceeds of a life insurance policy belonging to her is not a violation of the constitutional provision that no conviction shall work a forfeiture of estate.[2]

§ 3. *Remedies and procedure.*[3]—Equity will not enforce a penalty or forfeiture.[4] Equity will ordinarily relieve a tenant against forfeiture for breach of a covenant to pay rent[5] or taxes,[6] and may relieve one from a forfeiture of a contract brought about by the acts of the other party.[7]

99. In re Friend's Estate, 209 Pa. 442, 58 A. 853.

1. In determining whether there was probable cause, court will consider information which contestant had before litigation began. In re Friend's Estate, 209 Pa. 442, 58 A. 853. In cases of doubt, provision will be enforced. Id. Testimony of attorney that he advised contest is of no weight in itself in determining question, but may be taken into consideration. Id.

Note. In re Friend's Estate [Pa.] 58 A. 853. While the law upon the subject of such forfeiture clauses is in a very unsettled condition, the principal case does not seem to accord with the weight of authority. The rule is quite well established in England that in the case of bequests of personal property, a forfeiture clause, if there is no gift over, is merely in terrorem, and void, but if there is a gift over to specified persons, the forfeiture clause will be upheld. In the case of devises of realty, the forfeiture clause will be upheld without a gift over. Cooke v. Turner, 14 Simons, 218, 493; 2 Jarman on Wills [6th Ed.] *p. 902; Redfield on Wills, *298. The American cases present a great diversity of judicial opinion, some enforcing the forfeiture regardless of a gift over and with no distinction between real and personal property. Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419; Thompson v. Gaut, 82 Tenn. 310. Such cases maintain the position, also upheld by the English courts, that no question of public policy is involved. Other cases express the opinion, without directly so deciding, however, that all such clauses of forfeiture are void as against the policy or liberty of the law. Mallet v. Smith, 6 Rich. Eq. [S. C.] 12, 60 Am. Dec. 107. Probably the weight of American authority tends in the direction of the English rule. Smithsonian Institution v. Meech, 169 U. S. 398, 42 Law. Ed. 793; Chew's Appeal, 45 Pa. 228; Hoit v. Holt, 42 N. J. Eq. 388, 7 A. 856, 59 Am. Rep. 43; Underhill on Wills, § 511; Rood on Wills, §§ 615-622.—3 Mich. L. R. 167.

2. Never acquired estate therein [Const. art. 1, § 12]. Box v. Lanier [Tenn.] 79 S. W. 1042.

3. See 2 Curr. L. 1168.

4. Merk v. Bowery Min. Co. [Mont.] 78 P. 519. Suit to recover land praying for cancellation of deed as cloud on title on ground of forfeiture for breach of condition subsequent held suit to enforce forfeiture, though called one to remove cloud on title. Moberly v. Trenton, 181 Mo. 637, 81 S. W. 169. Mortgage to building and loan association to secure loan, increased by adding thereto premiums on shares of stock and monthly dues thereon, all to be paid in monthly instalments, and providing that on failure to pay any instalment all shall become due, will not be foreclosed for full amount, on nonpayment of instalment, without rebate, as for unearned premiums, interest, and dues. Greenville Bldg. & Loan Ass'n v. Wholey [N. J. Eq.] 59 A. 341. Courts of chancery are not the appropriate tribunals to enforce a forfeiture and recover possession of real estate on the strength of an alleged legal title thereto. Notes and deeds held mortgage, and plaintiff entitled to foreclosure. Land v. May [Ark.] 84 S. W. 489. An action to remove as a cloud on plaintiff's title defendants' claim under a contract giving them an option to purchase mining property, which plaintiffs had declared forfeited before the commencement of the action, is not an action to declare a forfeiture. Merk v. Bowery Min. Co. [Mont.] 78 P. 519. One giving an option to purchase mining property by the payment of the price in instalments at certain dates, time being of the essence of the contract, is not bound to return an instalment previously paid on forfeiture for nonpayment. Id. Mining lease held forfeited by its terms for nonpayment of royalties. Id.

5. Landlord may be compensated with interest. Johnson v. Lehigh Valley Traction Co., 130 F. 932. While the tenant is in possession, equity has no jurisdiction to enforce a forfeiture, the landlord having an adequate remedy in ejectment. Id.

6. Part of rental. Webb v. King, 21 App. D. C. 141. Lessee not guilty of laches. Id. Fact that lessee has allowed land to be sold and a tax deed to be issued held not to prevent relief. Id. If shown that deed was obtained by arrangement to coerce lessee into giving up property and to put purchaser into possession as lessee, such deed cannot prevent equitable relief, and if bona fide title is claimed, court can send issues to court of law to determine validity of deed and retain cause until validity is determined. Id. Bill against lessor and holder of tax deed held not multifarious. Id.

7. Answer in action for damages for breach of contract to supply electrical energy, held to present proper defense and counterclaim, if not for damages, at least as appeal to equitable power of court to relieve from forfeiture brought about by plaintiff. Hudson River Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448.

Federal courts have no jurisdiction of a suit in behalf of a state, or the people thereof, to recover a penalty imposed by way of punishment for a violation of the statute of the state, except in cases where it is given by an express act of congress in order to protect rights under the Federal constitution.[8] Where the action is prosecuted in the name of the state, the fact that the penalty is divided between the prosecuting officer and the county does not change the rule.[9]

The courts of one state will not enforce the penal laws of another state.[10] In determining the character of the statute, the courts of the state where the action is brought are not bound by the construction placed upon it by the courts of the state enacting it.[11]

Actions to recover statutory penalties or forfeitures must generally be brought in the name of the state, in the absence of a provision to the contrary.[12] Ordinarily, unless otherwise provided, a penalty or forfeiture may be recovered in a civil action, the proceedings being the same as in other civil actions.[13] The pleadings, as in other civil actions, are to be construed liberally to meet the ends of justice,[14] and it is sufficient if the case is established by a preponderance of the evidence.[15] A complaint substantially in the language of the statute is sufficient.[16]

Where the statute is a public one, it need not be pleaded.[17] The declaration must contain a substantial averment that the offense was committed against the

8. Action under Burns' Ann. St. Ind. 1901, § 5187 against foreign railroad company for penalty for failure to post time of arrival of trains not removable to Federal court on ground of diverse citizenship. Southern R. Co. v. State [Ind. App.] 72 N. E. 174.

9. Southern R. Co. v. State [Ind. App.] 72 N. E. 174.

10. Whitlow v. Nashville, etc., R. Co. [Tenn.] 84 S. W. 618.

11. Whitlow v. Nashville, C. & St. L. R. Co. [Tenn.] 84 S. W. 618. Alabama Code 1896, § 27, providing for actions by personal representatives in cases of death by wrongful act where deceased would have been entitled to have recovered had he lived is not penal in the international sense. Id.

12. Penalty provided by Tex. Acts 1897, p. 247, c. 165, § 9. against anyone accepting as security a surety company which has not complied with statutory provisions. Davis v. Pullman Co. [Tex. Civ. App.] 79 S. W. 635. Wis. Rev. St. 1898, § 3295. State v. Nergaard [Wis.] 102 N. W. 899. A complaint made by one styling himself a deputy of the fish and game warden is sufficient, though not stating that it is made on behalf of the state. Id.

13. Wis. Rev. St. 1898, § 3294. State v. Nergaard [Wis.] 102 N. W. 899; State v. Zillmann, 121 Wis. 472, 98 N. W. 543. An action for debt is appropriate. Count to recover delinquent license taxes and count to recover fees due tax commissioners (Ala. Act Feb. 21, 1899, Acts 1898-99, p. 195), held properly joined regardless of whether fees are in nature of costs or a penalty. Southern Car & Foundry Co. v. Calhoun County [Ala.] 37 So. 425. Right to sue for such fees is primarily in county. Id. Vermont Statutes, § 2359, authorizing action on case for penalty for failure to deliver will to executor or probate court, authorizes such action for penalty accruing before it took effect. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064.

14. State v. Zillmann, 121 Wis. 472, 98 N. W. 543. Complaint in action against member of board of review for forfeiture for failure to assess property liable to taxation (Wis. Rev. St. 1898, § 3295), held sufficient. Id. Not defective for failure to describe property omitted, or to allege that defendant acted in his official capacity (Id.), or for failure to specifically allege that property was liable to taxation on certain date. Id. Complaint in action to enforce penalty for failure to post time of arrival of trains in accordance with Burns' Ann. St. Ind. 1901, § 5187, held sufficient. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. Not defective as failing to negative statutory exceptions. Id. Evidence sufficient to support judgment for plaintiff. Id. Complaint in action before justice held sufficient. Turner v. McKee [N. C.] 49 S. E. 330. By statute in Wisconsin, in actions to recover forfeitures, it is sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, according to the provisions of the statute which imposes it, specifying the section and chapter containing such statute [Rev. St. 1898, § 3295]. State v. Zillmann, 121 Wis. 472, 98 N. W. 543. When such section imposes a forfeiture for several offenses or delinquencies, the particular one must be specified, with a demand for judgment for the amount of such forfeiture. Id.

15. State v. Nergaard [Wis.] 102 N. W. 899.

16. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. Complaint sufficient. State v. Zillmann, 121 Wis. 472, 98 N. W. 543. If every act necessary to constitute the offense is thereby charged, or necessarily implied. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064.

17. Imposing a penalty on railroad companies for failure to receive merchandise for transportation [N. C. Code 1883, § 1964, as amended by Laws 1903, p. 788, c. 444]. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654. Need not allege that

form of the statute,[18] unless a cause of action existed at common law.[19] Allegations as to statutory provisions wholly unnecessary to the offense charged may be disregarded.[20] In an action for a statutory penalty for refusal of a railroad company to receive merchandise for transportation, a tender thereof to the company must be alleged.[21] A declaration seeking to recover for neglect of two or more separate and distinct statutory duties is bad for duplicity.[22] When an exception is so incorporated with, and becomes a part of, the enactment, as to constitute a part of the definition or description of the offense, it must be negatived.[23]

The New York statute requiring the summons to be served by the marshal applies only to actions brought by a common informer, and not to one brought by a stockholder for a refusal to allow an inspection of corporate books.[24] In that state if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute under which the action is brought must be indorsed upon the copy of the summons so delivered.[25]

The law of Vermont requires that, when an action is commenced on a penal statute, the clerk or magistrate signing the writ shall make a minute thereon in writing under his official signature of the date when the same was signed.[26] A recital of the date in the instrument itself is insufficient.[27]

Under a statute providing a penalty for each month's neglect to do a certain act, each month's neglect is a separate offense within the meaning of the statute of limitations.[28] All for which a recovery may be had may be joined in one count in a complaint.[29]

The validity of the statute imposing the penalty may be determined in an action for its recovery.[30]

Where a penalty is claimed as damages, and recovery of it is sought as measuring the damages, both cannot be recovered.[31]

section in revised statutes is same as section in former statute. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064.

18. Penalty for failure to deliver will to probate court. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064.

19, 20. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064.

21. Allegation of tender sufficient. Currie v. Raleigh & A. Air Line R. Co., 135 N. C. 535, 47 S. E. 654.

22. Declaration in action to recover penalty for failure to deliver will to executor or probate court held sufficient. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064.

23. Declaration charging neglect to deliver will to probate court sufficient though there was no averment that defendant did not give probate court satisfactory excuse therefor [V. S. 2359]. Richardson v. Fletcher, 74 Vt. 417, 52 A. 1064. Complaint in action to recover penalty for failure of corporation to allow inspection of stock book (N. Y. Laws 1892, p. 1840, c. 688, § 53, as amended by Laws 1897, p. 314, c. 384, § 3), held fatally defective for failure to negative that it was moneyed or railroad corporation. Seydel v. Corporation Liquidating Co., 92 N. Y. S. 225. Defendant not confined to objection by demurrer. Id. Defect not cured by judgment. Id.

24. Code Civ. Proc. § 1895. Action for penalty prescribed by Laws 1892, p. 1840, c. 688. Seydel v. Corporation Liquidating Co., 88 N. Y. S. 1004. Demurrer held equivalent to general appearance, and a waiver of defects in service. Id.

25. Code Civ. Proc. § 1897. Attaching copy of complaint as subsequently filed with justice on return of summons, which referred to statute, held substantial compliance. Burdick v. Erie R. Co., 92 N. Y. S. 122. Same provision in Municipal Court Act (Laws 1902, p. 1502, c. 580, § 381). Sufficient compliance where summons and copy summons referred to statute, though copy alias summons did not. State Board of Pharmacy v. Jacob, 92 N. Y. S. 836.

26. For purpose of fixing time when running of limitations begins. Will be construed in connection with V. S. 1992, relating to criminal proceedings [V. S. 1993]. Town of Brighton v. Kelsey [Vt.] 59 A. 833.

27. Must be made after the signature. Town of Brighton v. Kelsey [Vt.] 59 A. 833.

28. Statute authorizing recovery of penalty of $20 per month for failure of executor to file inventory (Conn. Gen. St. 1888, §§ 578, 579). Penalties more than year old when suit brought barred by Gen. St. 1902, § 1120. Atwood v. Lockwood, 76 Conn. 555, 57 A. 279.

29. Atwood v. Lockwood, 76 Conn. 555, 57 A. 279.

30. In an action for a penalty for violating an ordinance requiring the closing of saloons, an answer controverting the validity of the ordinance because it had not been published may be filed and the question of fact investigated. McNulty v. Toopf, 25 Ky. L. R. 430, 75 S. W. 258.

31. Suit by town for damages for failure of railroad to construct crossings in manner prescribed by ordinance held inconsistent

The passage by the legislature of an act relieving defendant from liability for a statutory penalty puts an end to a pending action therefor.[32] Plaintiff in such case is not entitled to costs incurred before its passage.[33]

A proceeding in rem to enforce the penalty provided by the Federal statutes for navigating a vessel without inspection and without a licensed engineer is in admiralty, and a decree dismissing the libel is appealable.[34]

PENSIONS.

Exemptions.[35]—In Iowa land purchased with pension money is exempt, and the proceeds of a sale of mineral rights therein is also exempt,[36] but lands so bought and conveyed to the pensioner's wife are not exempt in her hands.[37] The exemption of pension money cannot be waived.[38]

Policemen's and firemen's pensions.[39]—May be provided by statute which at the time applies to but one city.[40] The right does not become vested merely because of holding office as a policeman while an act for pensioning is in force.[41] Nor is there a contractual right where the fund was created by scaling salaries and applying the amount so saved.[42] In New York City one may now be given to an officer who has served for twenty years and must be given if he has served twenty-five years,[43] and the discretion to grant one at the end of twenty years is not controllable by mandamus.[44]

PEONAGE; PERFORMANCE, see latest topical index.

PERJURY.

§ 1. **Elements of the Offense (970).**
§ 2. **Prosecution and Punishment (972).** Indictment (972). Admissibility of Evidence (974). Sufficiency of Evidence (974). Instructions (974).

§ 1. *Elements of the offense.*[45]—Perjury at common law is the willful and corrupt taking of a false oath in a judicial proceeding in regard to a matter material to the issue.[46] The definition, however, in most jurisdictions has been extended to include false swearing not in judicial proceedings,[47] and materiality is not a requisite in Rhode Island.[48] To constitute perjury at common law or under the statutes, there must be an oath[49] administered by some one of competent au-

with action to enforce penalties provided for failure to comply therewith. Hughes v. Arkansas & O. R. Co. [Ark.] 85 S. W. 773. Action held one for damages, and error to transfer it to equity. Id.

32. N. C. Pub. Laws 1903, pp. 132, 133, c. 108, relieving register of deeds from liability for failure to record marriage licenses (Code §§ 1818, 1819), is constitutional. Bray v. Williams [N. C.] 49 S. E. 887. Bill properly passed. Not necessary to notify defendant of its introduction. Id.

33. Bray v. Williams [N. C.] 49 S. E. 887.

34. U. S. Rev. St. § 4499 (Comp. St. 1901, p. 3060). The Ben R. Co. [C. C. A.] 134 F. 784.

35. See 2 Curr. L. 1170.

36. Code, § 4009. Smyth v. Hall [Iowa] 102 N. W. 520.

37. Whinery v. McLeod [Iowa] 102 N. W. 132.

38. Justification of bail recited no exemptions. King v. Warren, 42 Misc. 317, 86 N. Y. S. 609.

39. See 2 Curr. L. 1171.

40. State v. Board of Trustees, 121 Wis. 44, 98 N. W. 954. Various statutes construed. Id.

41. State v. Board of Trustees, 121 Wis. 44, 98 N. W. 954; Friel v. McAdoo, 91 N. Y. S. 454.

42. State v. Board of Trustees, 121 Wis. 44, 98 N. W. 954.

43, 44. Friel v. McAdoo, 91 N. Y. S. 454.

45. See 2 Curr. L. 1171.

46. Clark & M. Crimes, § 431.

47. Clark & M. Crimes, § 431. Pension matters. Noah v. U. S. [C. C. A.] 128 F. 270.

48. Under a statute which provides that every person of whom an oath or affirmation is required who shall willfully swear or affirm falsely in regard to any matter respecting which such oath or affirmation is required shall be guilty. Materiality is not an element of perjury. State v. Miller [R. I.] 58 A. 882.

49. United States v. Howard, 132 F. 825. Defendant having been sworn on her deposition, it was not necessary to the completion of the oath that she should sign it. State v. Woolridge [Or.] 78 P. 333. It is immaterial whether a witness was sworn, if he signs the

thority,[50] in a judicial or other proceeding of which the court or officer has jurisdiction;[51] the matter sworn to must be false,[52] or believed to be false, or the witness must not know whether it is true or false; the taking of the false oath must be both willful and corrupt,[53] and the matter sworn to,[54] and the oath,[55] must be material to the issue or question in controversy. While perjury cannot be committed in proceedings in which there is an entire lack of jurisdiction, mere irregularities or informalities not ousting the jurisdiction constitute no defense.[56]

Subornation of perjury[57] consists in procuring another to commit perjury by inciting, investigating or persuading him to do so.[58]

It is not a bar to a prosecution for perjury that defendant's alleged false tes-

testimony and makes the statement that he does swear to it. Markey v. State [Fla.] 37 So. 53.

50. United States v. Eddy, 134 F. 114; State v. Woolridge [Or.] 78 P. 333. A deposition may be taken as well by stipulation as by commission, and perjury before a commissioner designated by stipulation is as culpable as any other. Manning v. State [Tex. Cr. App.] 81 S. W. 957. Irregular appointment of commissioner to take testimony in divorce suit held sufficient to confer authority on him. Markey v. State [Fla.] 37 So. 53.

51. Where the court has general jurisdiction of the subject-matter, lack of jurisdiction of the case because of nonresidence of the parties, as in divorce, does not oust the jurisdiction so that perjury cannot be committed. Markey v. State [Fla.] 37 So. 53. Testimony is not necessarily taken before the court trying the case. It may by stipulation or commission be taken anywhere. Manning v. State [Tex. Cr. App.] 81 S. W. 957. Where the defendant was alleged to have committed perjury, in testifying at the perjury trial of another, it is immaterial that this other's false swearing had been done in a case in which the proceedings were void. Quigg v. People, 211 Ill. 17, 71 N. E. 886. There is no perjury in false testimony given under oath, unless the officer who administered the oath had legal authority, or the matter is one of which the tribunal or magistrate has jurisdiction. If the clerk of court had jurisdiction to administer the oath, it will be presumed that the court had jurisdiction to try the cause. Kizer v. People, 211 Ill. 407, 71 N. E. 1035. A defendant having voluntarily appeared before a clerk of court and given her deposition cannot deny perjury on the ground that the clerk did not have authority to take the deposition. State v. Woolridge [Or.] 78 P. 333. See, also, Markey v. State [Fla.] 37 So. 53.

52. Kizer v. People, 211 Ill. 407, 71 N. E. 1035; United States v. Howard, 132 F. 325; People v. Albers [Mich.] 100 N. W. 908. The falsity must be in point of fact; not mere legal falsity. People v. Wong Fook Sam [Cal.] 79 P. 848.

53. United States v. Lake, 129 F. 499; United States v. Howard, 132 F. 325; United States v. Eddy, 134 F. 114. The answer of a witness under oath being false, it is a sufficient basis for a prosecution, although the attention of the witness was not specifically called to the facts about which he testified falsely. McDonough v. State [Tex. Cr. App.] 84 S. W. 594.

54. Noah v. U. S. [C. C. A.] 128 F. 270; United States v. Howard, 132 F. 325; Kizer v. People, 211 Ill. 407, 71 N. E. 1035; People v. Albers [Mich.] 100 N. W. 908; People v. Root, 94 App. Div. 84, 87 N. Y. S. 962; State v. Booker [Miss.] 36 So. 241; Pyles v. State [Tex. Cr. App.] 83 S. W. 811; Liggett v. State [Tex. Cr. App.] 83 S. W. 807. Any evidence that is relevant is material. State v. Miller [R. I.] 58 A. 882. Where the rule of court requires that an affidavit of bias and prejudice shall state the facts upon which it is based, if the facts stated are false, a prosecution for perjury may be based thereon. State v. Fronizer, 2 Ohio N. P. (N. S.) 476. If the matter sworn to is circumstantially material or tends to support the witness in respect to the main fact, it is perjury. People v. Root, 94 App. Div. 84, 87 N. Y. S. 962; Pyles v. State [Tex. Cr. App.] 83 S. W. 811; McDonough v. State [Tex. Cr. App.] 84 S. W. 594. A witness who testified falsely as to whether he did or did not make certain contradictory statements is guilty of perjury. Brown v. State [Fla.] 36 So. 705. The testimony need not be material to the main issue. It is enough if it is circumstantially material. State v. Brown [Iowa] 102 N. W. 799. Whether the alleged perjured testimony was material is a question of law for the court. Id. On a prosecution for conversion of a draft, testimony by defendant that he paid the amount of the draft in money to the person to whom he should have delivered, the draft is material. Id. That a question before a grand jury whether defendant had seen certain persons engaged in gambling did not exclude gambling at a private residence, does not prevent defendant's denial of having seen such persons so engaged from being material. Foreman v. State [Tex. Cr. App.] 85 S. W. 809.

55. It is immaterial whether the deposition was used or not, as the offense was complete when the oath was taken. Manning v. State [Tex. Cr. App.] 81 S. W. 957; State v. Woolridge [Or.] 78 P. 333. It is no defense to urge that the officer at the time he administered the oath knew that it was false. Thompson v. State, 120 Ga. 132, 47 S. E. 566.

56. Manning v. State [Tex. Cr. App.] 81 S. W. 957; Schmidt v. U. S. [C. C. A.] 133 F. 257; Markey v. State [Fla.] 37 So. 53.

57. See 2 Curr. L. 1172.

58. Clark & M. Crimes, § 431 (h); United States v. Howard, 132 F. 325; State v. Booker [Miss.] 36 So. 241.

timony helped acquit the defendant in the former case,[59] nor is it a defense that defendant was privileged to refuse to testify.[60]

§ 2. *Prosecution and punishment.*[61] *Jurisdiction.*[62]—The Federal courts have jurisdiction to punish perjury in naturalization proceedings, whether committed in state or Federal courts.[63]

Indictment.[64]—An indictment for perjury must clearly and distinctly, without resort to inference or intendment, charge the several elements of the offense, including the taking of the oath[65] before a court or officer authorized to administer it[66] in a judicial[67] or other proceeding in which an oath is authorized, of which the officer or court has jurisdiction,[68] that the matter sworn to was false,[69] or believed to be false, or that the defendant did not know whether it was true

59. State v. Vandemark [Conn.] 58 A. 715; State v. Albers [Mich.] 100 N. W. 908.

60. If a witness waives his privilege and answers incriminating questions, perjury may be predicated on his answers. State v. Faulkner [Mo.] 84 S. W. 967.

61, 62. See 2 Curr. L. 1172.

63. Schmidt v. U. S. [C. C. A.] 133 F. 257.

64. See 2 Curr. L. 1172.

65. The indictment must show by direct averment or equivalent words that the witness was sworn to speak the truth, the whole truth, and nothing but the truth. United States v. Howard, 132 F. 325. An averment that the defendant appeared before the clerk of court to have her deposition taken in a certain cause, and was then and there duly sworn in said cause, sufficiently alleged that an oath was administered. State v. Woolridge [Or.] 78 P. 333. An indictment for subornation sufficiently shows the time and place of the perjury by setting out the alleged false affidavit which shows the time and place of its making. United States v. Cobban, 134 F. 290. Averment of false testimony that defendant did not during a certain year see certain named persons bet money on a game of chance at a certain place is sufficiently specific. Foreman v. State [Tex. Cr. App.] 85 S. W. 809.

66. Averment of clerk's authority to administer oath held sufficient. State v. Woolridge [Or.] 78 P. 333. The indictment must designate the court in which the perjury occurred. United States v. Howard, 132 F. 325. The name of the judge before whom the oath was taken or of the clerk who administered it need not be shown. Id. The authority of the person administering the oath need not be set out where his authority is such that the court can take judicial notice of it. Register and receiver of land office. United States v. Eddy, 134 F. 114. A description of the court as "a justice of the peace sitting as a court of inquiry" is not sufficient where no such court is known to the law. Morris v. State [Tex. Cr. App.] 83 S. W. 1126. An indictment for perjury in an application to purchase public lands, alleging that the application was sworn to before a person named who was then and there receiver of the United States land office in the district where the land was situated, sufficiently alleges his office. United States v. Cobban, 134 F. 290.

67. The proceeding must be described. Morris v. State [Tex. Cr. App.] 83 S. W. 1126. It is not necessary to allege in an indictment that the false swearing was in a judicial proceeding, when the facts set out in the indictment show this unequivocally. Thompson v. State, 120 Ga. 132, 47 S. E. 566. An indictment setting out the name of the court, its location, term, the parties to the cause, the nature of the action, the judge before whom the case was tried, and that it was tried in due form of law, by a jury taken before the parties and duly sworn, and that the defendant then appeared as a witness and testified falsely, sufficiently charges that the alleged perjury was committed in the course of a judicial proceeding without a specific allegation of that fact. Kizer v. People, 211 Ill. 407, 71 N. E. 1035.

68. Curtis v. State [Tex. Civ. App.] 81 S. W. 29; Kizer v. People, 211 Ill. 407, 71 N. E. 1035; Morris v. State [Tex. Cr. App.] 83 S. W. 1126. It must appear with certainty from the indictment that there was jurisdiction. But this may be done either by direct averment or by the statement of facts from which the court can see that there was jurisdiction. Kizer v. People, 211 Ill. 407, 71 N. E. 1035. An indictment for perjury in testifying in a trial in a city court must aver that the crime being tried was committed within the city. Id. See, also, Liggett v. State [Tex. Cr. App.] 83 S. W. 807; Pyles v. State [Tex. Cr. App.] 83 S. W. 811. Where it is averred that the clerk of the court had authority to and did administer the oath, it sufficiently appears that the court had jurisdiction of the subject-matter of the proceeding. Kizer v. People, 211 Ill. 407, 71 N. E. 1035.

69. Where an indictment negatived time and place of an alleged conversation, but did not negative the fact that the conversation did occur, it was held to be a good indictment in the absence of a claim that the conversation occurred at another place. Jordan v. State [Tex. Cr. App.] 83 S. W. 821. Where the affidavit is partly true and partly false, the part which is false should be specified. Morris v. State [Tex. Cr. App.] 83 S. W. 1126. In case of prosecution for perjury for fraudulently failing to list property on the schedule, the property fraudulently omitted need not be specifically described in more than one count of the same indictment. United States v. Lake, 129 F. 499. An averment that "whereas in truth and in fact as defendant well knew" the fact was otherwise than as stated in the alleged false statement is the proper form to negative the truth of such statement. State v. Brown [Iowa] 102 N. W. 799.

or false, that the false oath was taken willfully,[70] that the matter sworn to[71] and the oath,[72] were material to the issue or question in controversy. Direct averments of each of the several elements, while advisable, are not necessary if the facts set out are such that each element necessarily appears,[73] and as in other prosecutions the rule applies as to averments showing the jurisdiction of the court in which the prosecution is had.[74] As in other offenses, merely formal defects are disregarded by virtue of the various statutes of jeofails.[75] While it must appear either by express averment or necessary inference that the court in which the oath was taken had jurisdiction,[76] all proceedings necessary to confer it need not be set out.[77] In some states the particularity of the allegations in indictments for perjury is regulated by statute.[78]

An indictment for subornation of perjury must contain all the averments necessary in one charging the crime of perjury against the witnesses suborned.[79]

Evidence need not be limited to proof of the exact words alleged; proof of the substance is sufficient,[80] but perjury in testifying to a certain conversation cannot be proved by showing what the witness said at another conversation immediately thereafter.[81] The materiality of the alleged false testimony must be proved.[82]

70. United States v. Lake, 129 F. 499; United States v. Howard, 132 F. 325; United States v. Eddy, 134 F. 114. A charge that defendant falsely, "knowingly and corruptly did declare, testify, and give," certain evidence is sufficient under Code Cr. Proc. § 291. People v. Root, 94 App. Div. 84, 87 N. Y. S. 962.

71. Kizer v. People, 211 Ill. 407, 71 N. E. 1035; Morris v. State [Tex. Cr. App.] 83 S. W. 1126. Materiality may be shown in two ways; either by direct allegation that the testimony in question was material, or by allegation of facts from the relation of which materiality may be made to appear. State v. Horine [Kan.] 78 P. 411; Markey v. State [Fla.] 37 So. 53; Pyles v. State [Tex. Cr. App.] 83 S. W. 811. Materiality must appear either by direct averment or by facts shown. State v. Booker [Miss.] 36 So. 241; Morris v. State [Tex. Cr. App.] 83 S. W. 1126; Brown v. State [Fla.] 36 So. 705. Materiality held sufficiently to appear without express statement. Bankruptcy schedules. United States v. Lake, 129 F. 499. Materiality of deposition held sufficiently to appear, though taken before cause was at issue. State v. Woolridge [Or.] 78 P. 333.

72. Failure to aver that deposition was in fact used is not fatal. State v. Woolridge [Or.] 78 P. 333; Manning v. State [Tex. Cr. App.] 81 S. W. 957. An indictment for perjury contained in a pension affidavit was not objectionable for failure to set out that the affidavit was used by or in behalf of the applicant for whom it was made. Averments set out held material. Noah v. U. S. [C. C. A.] 128 F. 270.

73. See cases above cited.

74. Indictment need not allege the venue in which the false swearing occurred, if it is sufficiently alleged in stating the facts which occurred. Manning v. State [Tex. Cr. App.] 81 S. W. 957. Under the Iowa code, the date of the offense need not appear in the indictment, if it can be understood therefrom that the offense was committed prior to the bringing of the indictment. State v. John, 124 Iowa, 230, 100 N. W. 193.

75. No date alleged [U. S. Rev. St. § 1025]. United States v. Howard, 132 F. 325. Willfulness held sufficiently shown. United States v. Eddy, 134 F. 114.

76. Kizer v. People, 211 Ill. 407, 71 N. E. 1035; Markey v. State [Fla.] 37 So. 53.

77. As for instance, where it is alleged that the trial was on an information, it need not be further alleged that the information was based on a complaint. Curtis v. State [Tex. Cr. App.] 81 S. W. 29. And where it is alleged that the prosecution was for playing a game with cards not at a private house, the name of the game need not be alleged, all playing at places other than private houses being unlawful. Id. The grounds on which a divorce was sought need not be set out. Markey v. State [Fla.] 37 So. 53.

78. Issue held described with sufficient particularity [R. I. Gen. Laws 1896, c. 285, § 5]. State v. Miller [R. I.] 58 A. 882. B. & C. Comp. § 1321. State v. Woolridge [Or.] 78 P. 333.

79. Must show that witness claimed to have been suborned was sworn to speak the truth, the whole truth and nothing but the truth. United States v. Howard, 132 F. 325. Must designate the court in which the perjury occurred. Id. Must show that the false swearing was willful. Id. Must negative the truthfulness of the testimony, though it need not affirmatively aver what the truth was. Id. Must aver the materiality of the testimony and of the oath. United States v. Howard, 132 F. 325; State v. Booker [Miss.] 36 So. 241. Indictment for subornation held to sufficiently allege scienter of defendant and person suborned. United States v. Cobban, 134 F. 290.

80. Meierholtz v. Territory [Okl.] 78 P. 90.

81. Kizer v. People, 211 Ill. 407, 71 N. E. 1035.

82. Liggett v. State [Tex. Cr. App.] 83 S. W. 807; Pyles v. State [Tex. Cr. App.] 83 S. W. 811; Brown v. State [Fla.] 36 So. 705.

Admissibility of evidence.[83]—Any competent matter tending to show or dispute the taking of the oath,[84] the authority or jurisdiction of the court or officer before whom it was taken,[85] the giving, or the failure to give, the testimony,[86] the falsity or truth of the testimony,[87] or the materiality of the false testimony, are admissible.[88] Where it appears that the accused had sworn to a report of several pages, one of such pages is not inadmissible because he had previously sworn to that page before another attesting officer,[89] nor is it error to admit parol evidence to prove that the oath of the accused subscribed to the report was to the entire report, including the page referred to.[90] The ordinary rules as to secondary evidence apply,[91] and the taking of the oath and the fact of giving the testimony may be proved as well by oral testimony as by the record or other writing.[92] That the final order in naturalization proceedings is void for lack of certain recitals does not render it inadmissible in a prosecution for perjury in such proceedings, and the record may still be used to show the pendency of the proceeding, the jurisdiction of the court, or the giving of the testimony and its materiality.[93]

Sufficiency of evidence.[94]—To establish the taking of the oath or the giving of the testimony as alleged, and its falsity,[95] the evidence must be something more

83. See 2 Curr. L. 1173.

84. Schmidt v. U. S. [C. C. A.] 133 F. 257. Signature to affidavits filed in a proceeding is admissible to show that the defendant was a witness therein, although the affidavits were signed in blank. Id.

85. State v. Horine [Kan.] 78 P. 411. The complaint filed and warrant served in the action in which the false testimony was given are competent and relevant to prove the institution and pendency of the proceeding to which they related. Id.

86. State v. Woolridge [Or.] 78 P. 333. Evidence of the identity of the person charged in a criminal complaint is admissible to prove that she is the person that the defendant intended to charge and in fact did charge. People v. Jan John, 144 Cal. 284, 77 P. 950. In a prosecution based upon the defendant's false testimony in a civil action, evidence as to what defendant testified to on cross-examination in such action is admissible. McDonough v. State [Tex. Cr. App.] 84 S. W. 594.

87. Where the statute provides that perjury shall be established by the testimony of two credible witnesses, it is proper as touching on a witness' credibility to show upon cross examination that he had been among the county convicts working out a fine for beating his wife. Curtis v. State [Tex. Cr. App.] 81 S. W. 29. A person charged with perjury should be permitted to introduce evidence as to his reputation for truth and veracity; but witness' opinion on this point based on personal knowledge cannot be admitted. People v. Albers [Mich.] 100 N. W. 908. In a prosecution for perjury based on defendant's false testimony in stating that he had never had any other claim for injuries against a railroad company, it was proper to admit evidence that about the time the civil action was commenced defendant stated to witness that he never had been injured on any other railroad. McDonough v. State [Tex. Cr. App.] 84 S. W. 594. Where the alleged false testimony was that defendant did not during a certain year see certain persons engaged in gambling, evidence that he saw them so engaged on several occasions during such year is admissible. Foreman v. State [Tex. Cr. App.] 85 S. W. 809.

88. Schmidt v. U. S. [C. C. A.] 133 F. 257. Where defendant is accused of perjury in denying an assault on his wife, the circumstances surrounding the alleged assault are material. Townley v. State [Tex. Cr. App.] 81 S. W. 309. Evidence of the testimony actually given in a prosecution for conspiracy may be admitted to show materiality of the alleged false testimony. State v. Vandemark [Conn.] 58 A. 715.

89. The first oath did not affect the falsity of the second, nor render the page inadmissible. Thompson v. State, 120 Ga. 132, 47 S. E. 566.

90. Thompson v. State, 120 Ga. 132, 47 S. E. 566.

91. The justice before whom the false oath was taken may give oral testimony as to the contents of lost documents relating to his title to his office, and as to his public discharge of the duties of the office under a claim of official right. State v. Horine [Kan.] 78 P. 411. Under indictment for swearing to a false report which has been lost, a former indictment for the same offense is admissible in evidence to show the contents of the lost report, where there is evidence that certain names in the indictment and in the lost report are identical. Thompson v. State, 130 Ga. 132, 47 S. E. 566.

92. The record in naturalization proceedings is not the only evidence admissible on a trial for perjury therein, and oral evidence may be admitted to show the commission of the offense. Schmidt v. U. S. [C. C. A.] 133 F. 257. Parol evidence is admissible to show the testimony given at proceedings to take a deposition, although it was taken by a stenographer, it not having been extended. State v. Woolridge [Or.] 78 P. 333.

93. Schmidt v. U. S. [C. C. A.] 133 F. 257.

94. See 2 Curr. L. 1173.

95. Falsity held shown. State v. Hunter, 181 Mo. 316, 80 S. W. 955. Falsity held not sufficiently shown to support conviction. People v. Root, 94 App. Div. 84, 87 N. Y. S. 962. Evidence **held** insufficient to show that

than sufficient to counterbalance the oath of the prisoner and the legal presumption of his innocence, and the oath of the opposing witness will not avail unless it be corroborated by other independent circumstances. But the additional evidence need not be such as standing by itself would justify a conviction in a case where the testimony of a single witness would suffice.[96] Perjury like any other crime, however, may be proven either by circumstantial evidence, or by more than one credible witness, or by one such witness and independent corroborating evidence or circumstances.[97] The identification and production of the testimony of the accused, with proof of his signature as well as that of the officer taking the testimony, is at least prima facie proof that accused was sworn, and in the absence of contradiction, sufficient.[98]

Instructions.[99]—An instruction as to the necessity that the accusing witness be corroborated must define "corroborated."[100]

PERPETUATION OF TESTIMONY, see latest topical index.

PERPETUITIES AND ACCUMULATIONS.

§ 1. The Rule Against Perpetuities and Accumulations; Its Nature and Application (975).

§ 2. Computation of the Period and Remoteness of Particular Limitations (976).

§ 3. Operation and Effect, Complete and Partial Invalidity (978).

§ 1. *The rule against perpetuities and accumulations; its nature and applications.*[1]—The rule against perpetuities is a rule of law and not one of interpretation,[2] and is the same at law as in equity.[3] It is concerned only with the time of vesting of an estate and not with the duration of an estate already vested.[4]

accused testified as alleged, or that it was false. Medlock v. State [Tex. Cr. App.] 82 S. W. 508.

96. State v. Hunter, 181 Mo. 316, 80 S. W. 955.

97. Corroborative evidence against the accused, on a prosecution for perjury, means evidence aliunde which tends to show the perjury, independent of any declaration or admission of the prisoner. State v. Hunter, 181 Mo. 316, 80 S. W. 955. Evidence held to sustain conviction for perjury in denying before a grand jury any knowledge of a matter of bribery under investigation. State v. Faulkner [Mo.] 84 S. W. 967.

98. Markey v. State [Fla.] 37 So. 53.

99. See 2 Curr. L. 1173. Instruction in case where everything except falsity was admitted held correct. People v. Wong Fook Sam [Cal.] 79 P. 848.

100. State v. Hunter, 181 Mo. 316, 80 S. W. 955.

1. See 2 Curr. L. 1173. For construction of Deeds and Wills in so far as they create perpetuities see Deeds, § 3, 3 Curr. L. 1062; Wills, § 5D5, 2 Curr. L. 2134. Right to limit alienation of fee or life estate, see Wills, § 5D3, 2 Curr. L. 2125.

2. Instrument first to be interpreted without considering rule, and rule then applied to objects of testator's bounty so ascertained. Graham v. Whitridge [Md.] 57 A. 609.

3. Graham v. Whitridge [Md.] 57 A. 609.

4. Graham v. Whitridge [Md.] 57 A. 609.

See, also, Tiffany on Real Property, p. 344, § 152. Will directed holding and investment of estate for 25 years, payment of certain legacies from income, and that balance should be added to principal, and that at expiration of such period executors should procure formation of corporation to which estate should be conveyed for specified charitable purpose. Held that entire estate was impressed with trust in favor of the charity, and gift vested at once, on testator's death. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

NOTE. Rule against perpetuities. Time of vesting and not the duration of the estate the test: A testator left his residuary estate in trust to A. for life, remainder to several grandchildren for life, with remainders to their children. The grandchildren were born after the death of the testator and before the death of A. Held, that the life estates to the grandchildren are valid, but that the remainders over are void. Graham v. Whitridge [Md.] 57 A. 609. In many former cases Maryland considered that the rule against perpetuities condemned any trust that might last longer than lives in being and twenty-one years thereafter, on the ground that the disposal of the whole estate should not be so long suspended. Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88. This confounded two distinct rules of law; that estates cannot be made inalienable, and that future estates may not be created after fixed limit. The court failed to see that an equitable fee is a present and not a future estate and is not less alienable than a legal fee. See Gray, Perpetuities, § 236. The principal case brings Maryland into line with all the authorities in regarding the time of vesting and not the time of ending of estates as the test. The remainders to the children of unborn grandchildren are clearly void under either test. The life estates would be void under the old test of duration, as part of a trust extending beyond lives in being and twenty-

The event upon the happening of which the future estate is to vest must be one that is certain to occur within the prescribed period or the limitation will be bad.[5]

The prohibited suspension is such as arises from the terms of the instrument creating the estate, and not such as exists outside of it.[6] A power of sale to be exercised after a definite period does not necessarily suspend the power of alienation,[7] nor is a direction to executors to maintain the estate and collect the rents for a definite number of years, and then to sell it, a restraint upon its alienation during that period.[8] A trust to pay income creates a suspension,[9] but a trust to pay annuities does not, since they are releasable and assignable.[10]

The period of suspension cannot be extended by the creation of a trust,[11] and a trust violating the rule cannot be sustained as a power in trust.[12]

§ 2. *Computation of the period and remoteness of particular limitations.*[13] —The period fixed and prescribed by law for the future vesting of an estate is generally a life or lives in being at the time of its commencement, and twenty-one years, and a fraction of a year beyond, to cover the period of gestation,[14] though the rule has been more or less modified by statute in many of the states.[15] In New York the limit is two lives in being at the creation of the estate.[16] In that state a testator may, in the creation of a trust, suspend the absolute power of alienation of the trust estate for a period of two selected lives then in being,[17] and during that period may provide for the distribution of the annual income among as many different persons and for as many successive lives as he sees fit.[18]

one years. Lee v. O'Donnell, 95 Md. 538. But because they must vest, if at all, within the legal period, the court correctly holds them good. Otis v. McLellan, 13 Allen [Mass.] 339. —13 Harv. L. R. 232.

5. Graham v. Whitridge [Md.] 57 A. 609. The absolute ownership of the property must vest in some one within the period of a life or lives in being and twenty-one years and nine months thereafter. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37. The devise is void if there is a possibility that the fee will not vest within the time limited. Provision in will giving property to testator's son until youngest grandchild should reach age of 25, when it was to be divided equally among all grandchildren held void, since it was not clearly limited to grandchildren then living. Id.

6. As a disability of the person in whom an interest is vested, or delay incident to procuring order of court for sale, or its confirmation. In re Pforr's Estate, 144 Cal. 121, 77 P. 825.

7. In re Pforr's Estate, 144 Cal. 121, 77 P. 825.

8. Court may direct sale if necessary, and no point of time at which beneficiaries may not unite in conveyance made at sale under order of court. In re Pforr's Estate, 144 Cal. 121, 77 P. 825.

9. Smith v. Haven's Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. A direction to apply interest and income only necessarily involves a never ending trust and hence is void. Devise to treasurer of unincorporated association in trust, to apply the same to the uses and for the benefit of such association. Murray v. Miller, 178 N. Y. 316, 70 N. E. 870.

10. Smith v. Haven's Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

11. The time for which the alienation of realty and the absolute ownership of personalty may be suspended can no more be extended by a trust than by the limitation of a strictly legal estate. Murray v. Miller, 178 N. Y. 316, 70 N. E. 870. A devise to treasurer of unincorporated association in trust, to apply the same to the uses and for the benefit of such association, is void if construed as a direction to apply the corpus or principal, since its total consumption may not be required within the statutory period. Id.

12. Act sought to be performed under power is very act forbidden by statute. Murray v. Miller, 178 N. Y. 316, 70 N. E. 870.

13. See 2 Curr. L. 1175.

14. Graham v. Whitridge [Md.] 57 A. 609. Burns' Ann. St. Ind. § 3382. Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520.

15. For discussion of statutory modifications of rule in various states, see Tiffany on Real Property, p. 365, § 160.

16. Where testator devised certain property absolutely to certain grandchildren, whose mother had previously died, and the use of certain other property to his children for life, and will provided that when his children "are all dead" residue was to be equally divided between other grandchildren, held that title to property vested in latter immediately on testator's death, with right of possession on death of any life tenant, such being testator's evident intention, and hence devise was not contrary to the rule. Kent v. Kent, 90 N. Y. S. 828.

17. Smith v. Haven's Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

18. Smith v. Haven's Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. Trust for payment of annuities to six persons, none of them charged on land or specific funds, held valid. Id. Devise of lands in trust to pay income to fixed amount to beneficiary until he reached the age of twenty-five, thereafter a portion of such income to go to him for life and balance to another beneficiary for his life, and unexpended portion to residuary legatee, held valid. Id.

(To be concluded.)

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PERPETUITIES AND ACCUMULATIONS—Cont'd.

The Mississippi statute provides that any person may make a conveyance or devise of lands to a succession of donees then living not exceeding two, and to the heirs of the body of the remainderman, and in default thereof, to the right heirs of the donor in fee simple.[19] The effect of the act is to prescribe a limit of time beyond which the vesting of the estate in fee cannot be suspended, but within which the grantor may exercise unbounded discretion.[20]

The suspension must be measured by lives and not by years.[21]

A grantor reserving out of the operation of his deed a legal life estate for himself cannot be counted as one of the donees within whose life the ultimate fee must vest in order to avoid the rule against perpetuities.[22]

The application of the rule to particular estates will be found in the cases cited in the note.[23]

Charitable gifts.[24]—The rule does not apply to charitable gifts,[25] provided

19. Rev. Code 1880, § 1190. Middlesex Banking Co. v. Field [Miss.] 37 So. 139. Applies to deeds. Id. A limitation over to a specific person, who is one of the right heirs of the donor, is valid. Id. The right heirs of the donor take by purchase and not by descent; as limitees under the will or deed, and not as heirs. Id. Conveyance to B and C, with cross remainders to survivor in case of death of either without issue and a conditional limitation over to A, a right heir of the donor, in case of death of both without issue, is valid. Id.

20. Middlesex Banking Co. v. Field [Miss.] 37 So. 139.

21. Provision that trust property was to be partially distributed when certain child reached age of 21, or, if died before that time, then on date when she would have reached that age, held invalid. Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 N. Y. S. 228. Provision in will directing distribution of trust fund to children when they reached age of twenty-eight held invalid. Id. Fact that trustees are given power of sale for trust purposes does not cure invalidity, since proceeds subject to trust. Id. Devise in trust for thirty years void. Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520.

22. Middlesex Banking Co. v. Field [Miss.] 37 So. 139.

23. **Provisions held valid:** Trust deed directing that on death of grantor's daughter the property shall go to her "children and descendants, if any such survive her," means those surviving at time of daughter's death. Cribbs v. Walker [Ark.] 85 S. W. 244. Devise to unmarried woman in trust for life, with remainder to her children if any, and if none, or if those born died before reaching maturity, then to her husband [Ga. Civ. Code, 1895, § 3102]. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350. Devise to testator's children, three of whom were living when will was made and one born afterwards, the estate not to be divided until youngest reached majority, and in case one died without heirs, then his share to go to survivors. Coleman v. Coleman [Kan.] 76 P. 439. A bequest of bonds in trust to continue during the lives of two legatees in being. Hoffman v. New England Trust Co. [Mass.] 72 N. E. 952. Devise in trust, so much of income as might be necessary to be paid to wife for life, balance to children, and after wife's death, income then to be divided among children then living, or issue of any deceased children, for life, and after their death income to be paid to their children until they reached age of twenty-one, when principal was to be divided. Grandchildren took vested interest. In re Smith's Estate [Pa.] 60 A. 255.

Provisions held void: In devise to several for life, with remainder over, provision that property should never be sold invalid in so far as it attempted to prohibit sale after vesting in remainderman, but valid in so far as it applied to life tenancy [Ky. St. 1903, § 2360]. Morton's Guardian v. Morton [Ky.] 85 S. W. 1188. Remainders created by will of life tenant, under power of appointment, to descendants of persons who were themselves not in esse at death of donor of the power. Graham v. Whitridge [Md.] 57 A. 609. Provision in will directing payment of income of trust fund to testator's son during his life, and oh his death division of fund into as many parts as he left children, each part to be used to set up a separate trust for the benefit of each child, is void as to children not in esse at time of testator's death. In re Faile's Estate, 44 Misc. 619, 90 N. Y. S. 157. A provision in a will for the deposit of a sum of money in bank, the interest to be used to keep testator's burial lot in good condition yearly [Tex. Const. art. 1, § 26]. McIlvain v. Hockaday [Tex. Civ. App.] 81 S. W. 54. Provision for expenditure of certain sum annually in care of family graves effective only during administration of estate. Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520.

24. See 2 Curr. L. 1174, n. 10-13.

25. Codman v. Brigham [Mass.] 72 N. E. 1008; Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513; Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520. Bequest in trust for benefit of red cross society. Objects of society admittedly charitable and intention to create charitable trust plainly manifest. In re Merchant's Estate, 143 Cal. 537, 77 P. 475.

Does not apply to trust for educational purposes under Ky. St. 1903, § 317. Pullins

they are not limited on preceding gifts to private persons or corporations.[26] An outright gift to a charitable corporation for its corporate purposes does not contravene the rule, though the principal of the fund is directed to be invested in perpetuity and only the income used.[27] A limitation of a trust estate over from one charity which speaks from the death of the testator, or from the execution of the deed providing for it, to another charity, is valid regardless of the rule.[28]

Accumulations of income.[29]—In New York the accumulation of income or profits of either real or personal property, in order to be valid, must be for the benefit of one or more minors then in being, and be limited to a period within their minority.[30] An accumulation for the benefit of an unborn child commencing after its birth and terminating during its minority is valid,[31] but such an accumulation commencing before its birth is invalid.[32]

§ 3. *Operation and effect, complete and partial invalidity.*[33]—A devise, bequest, or grant rendering property inalienable or deferring its vesting for a longer period than that allowed by the rule, is void.[34] The fact that a provision in a will contravenes the rule does not render the whole will void, unless the general scheme of distribution is thereby so far disturbed as to make it necessary.[35]

A void limitation over does not affect the validity of the preceding particular estate.[36] Where the first gift is of an absolute estate, subsequent repugnant limitations, which are void because contrary to the rule, may be disregarded.[37] But where it is obvious that the intention was to create a life estate only, it cannot be

v. Board of Education of Methodist Church, 25 Ky. L. R. 1715, 78 S. W. 457.

See, also, Tiffany on Real Property, p. 361, § 158.

26. Codman v. Brigham [Mass.] 72 N. E. 1008; Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513. Where will devised and bequeathed residuary estate to executors to be invested and allowed to accumulate for twenty-five years, and then transferred to corporation to be formed for charitable purposes, executors took as trustees. Codman v. Brigham [Mass.] 72 N. E. 1008. Will created valid charitable trust, and executors took legal title while equitable title vested immediately in that part of public for whose benefit trust was created. Corporation did not take directly. Id. Income and accumulations go with corpus of fund. Codman v. Brigham [Mass.] 72 N. E. 1008; Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

27. Smith v. Haven's Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. A devise in trust for educational purposes providing that the principal shall be kept invested and interest alone used does not show an intention that the identical property shall be preserved by the trustee, and does not suspend the power of alienation, within Ky. St. 1903, § 2360. The will directed realty and personalty to be invested and the interest only used. Pullins v. Board of Education of Methodist Church, 25 Ky. L. R. 1715, 78 S. W. 457.

28. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

29. See 2 Curr. L. 1175. Tiffany on Real Property, p. 363, § 159.

30. Laws 1896, p. 568, c. 547, § 51. Laws 1897, p. 508, c. 417, § 4. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970. 1 Rev. St. (1st Ed.) p. 726, pt. 2, c. 1, tit. 2, §§ 37, 38, and Id. p. 773, pt. 2, c. 4, tit. 4, §§ 3, 4. Provision directing carrying on of testator's business and accumulation of profits after paying annuity to wife and for support of children, each child to receive his proportion of profits upon arriving at age of twenty-five, estate to be divided after death of wife and one daughter, held invalid. Thorn v. De Breteuil [N. Y.] 71 N. E. 470; Thorn v. De Breteuil, 86 App. Div. 405, 83 N. Y. S. 849. Decree in suit for construction of will held to estop children over twenty-five from claiming that trust provisions were invalid. Id. Provision in will directing accumulation of net income of estate by executors, to be used in paying off mortgages on realty, is invalid. Lowenhaupt v. Stanisics, 95 App. Div. 171, 88 N. Y. S. 537. Not authorized by Laws 1896, p. 571, c. 547, § 76, subd. 2, authorizing trust to lease, sell, or mortgage real property for benefit of annuitants or other legatees. Id.

31. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970.

32. Direction for accumulation of surplus profits during lifetime of testator's sons for benefit of their children invalid where neither of them were married at the time of trial. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970.

33. See 2 Curr. L. 1177.

See Tiffany on Real Property, p. 358, § 157.

34. Graham v. Whitridge [Md.] 57 A. 609.

35. Whole will not declared void in order to reach equality of distribution where equality was not intended by testatrix. In re Faile's Estate, 44 Misc. 619, 90 N. Y. S. 157. Validity of independent bequest not affected by void trust. Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520. Bequest to educational institution void because part of invalid trust scheme. Id.

36. Limitation will be considered as stricken out, leaving particular estate to vest as though it had never been made. Graham v. Whitridge [Md.] 57 A. 609.

enlarged into an absolute estate by disregarding such subsequent limitations.[38] Remainders limited on void trusts fall with such trusts.[39]

Where a will creating a power of appointment provides for the devolution of the property in case it is not exercised, and certain remainders attempted to be created in exercising such power violate the rule, the property will pass as in default of appointment.[40] The fact that one exercising a power of appointment creates certain void remainders does not invalidate the exercise of the power in toto.[41]

The amount of a void trust will not pass under a residuary clause from which the trust fund is expressly excluded,[42] but will pass as intestate property.[43]

The fact that remainders created under a power of appointment violate the rule does not prevent the application of the doctrine of election to the case of a devisee in whom the badly appointed portion of the estate will vest, where there is a blending of the individual property of the testator with that over which he has the power of appointment.[44] But the doctrine does not apply under such circumstances where only the settled property of the estate is disposed of.[45] The fact that one takes a beneficial interest under a will does not preclude him from asserting that a clause thereof is void for remoteness.[46]

In the absence of statute, income unlawfully accumulated goes to the heirs or next of kin as in cases of intestacy.[47] In New York where the accumulation is invalid, the surplus is to be paid over to the persons presumptively entitled to the next eventual estate.[48] Where it cannot be determined who is so entitled, the statute does not apply, and the surplus goes to the heirs at law or next of kin as in case of intestacy.[49]

PERSONAL INJURIES; PERSONAL PROPERTY; PETITIONS; PEWS; PHOTOGRAPHS; PHYSICIANS AND SURGEONS; PILOTS, see latest topical index.

PETITORY ACTIONS.[50]

Definition and characteristics.—A petitory action is one in which the mere title to property is litigated and sought to be enforced, as distinguished from a possessory action.[51] That plaintiff prays to be decreed the owner of immovable property is sufficient to determine the character of the action as petitory.[52]

Procedure.—One having an imperfect ownership and real right may maintain a petitory action,[53] and it is optional with the plaintiff to assert the right of possession, or any other right, accessory and of inferior dignity to that of ownership,

37, 38. Graham v. Whitridge [Md.] 57 A. 609.

39. In re Faile's Estate, 44 Misc. 619, 90 N. Y. S. 157.

40, 41. Graham v. Whitridge [Md.] 57 A. 609.

42, 43. In re Faile's Estate, 44 Misc. 619, 90 N. Y. S. 157.

44, 45. Graham v. Whitridge [Md.] 57 A. 609.

46. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37.

47. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970.

48. Statute applies to income derived from personalty as well as from realty [Laws 1896, p. 568, c. 547, § 53]. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970

49. Where grandchildren were entitled to next eventual estate, or in case there were none, the surviving son, and there were no grandchildren, court could not determine which son would survive, and hence surplus would go to both sons equally as heirs or next of kin. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970.

50. See 2 Curr. L. 74, n. 62.

This topic treats only of the Louisiana petitory action affecting the title to realty. Petitory suits in admiralty are treated in Admiralty, see 3 Curr. L. 40.

51. Cyc. Law Dict. 691.

52. Ruddock Cypress Co. v. Peyret [La.] 36 So. 105.

53. Vendee who by his contract of sale has bound himself to reconvey the land after the timber has been removed or after the expiration of 50 years is entitled to maintain the action. Ruddock Cypress Co. v. Peyret [La.] 36 So. 105.

in the same or a subsequent proceeding.[54] Plaintiff must show some title in himself,[55] and must recover on the strength of his own title.[56] Defendant cannot urge rights between plaintiff and a third person.[57]

Where defendant disclaims, the owner being brought in, he is the real defendant,[58] and damages for timber removed by the disclaiming defendant being the subject of a personal action cannot be tried.[59] Defenses must not be conflicting.[60] Defendant setting up a government survey as a muniment of title he cannot deny facts appearing on the plat thereof.[61] Parol evidence is admissible on the question whether or not an adjudication was made at a judicial sale under which one party claims title.[62]

PIPE LINES AND SUBWAYS.[63]

It is held that the common council of Brooklyn cannot grant a perpetual conduit franchise,[64] and complete performance on the part of the grantees does not aid them to uphold its validity.[65] When such a grant is not exclusive the grantee has no grievance at the location of another conduit in close proximity but not unreasonably disturbing its rights,[66] though inconvenience and enhanced expense may ensue.[67] The right to lay a permanent pipe line across another's lands is an estate in the lands and not a license, and the instrument creating it is a deed[68] and is in fee if to the grantee, his heirs and assigns,[69] and mere nonuser, no time for use being fixed, will not defeat it.[70] It is certain if it describes the tracts to be crossed and the pipes be actually laid.[71] An injunction may issue to protect such a right,[72] and where it is grounded on lack of title which may be gained by eminent domain, the injunction should run until proceedings may be begun. Conduits beneath a street and the manholes at the surface when placed by public authority is in the one who furnished and placed them,[73] so that he may recover for injuries wrongfully done them[74] and not due to improper construction.

PIRACY; PLACE OF TRIAL; PLANK ROADS, see latest topical index.

PLEADING.

§ 1. **Principles Common to all Pleadings.** General Rules (981). Interpretation and Construction in General (988). Exhibits (991). Bills of Particulars (991).

§ 2. **The Declaration, Count, Complaint or Petition.** In General (996). Joinder of Causes of Action (998). Election (1003). Splitting Causes of Action (1003). Prayer (1004).

§ 3. **The Plea or Answer.** General Principles (1005). Denials and Traverses (1007). Confession and Avoidance (1008).

§ 4. **Replication or Reply and Subsequent Pleadings (1009).**

§ 5. **Demurrer.** General Rules (1010). Form, Requisites and Sufficiency (1013). Issues Raised (1013). Hearing and Decision on Demurrer (1015).

54. Ruddock Cypress Co. v. Peyret [La.] 36 So. 105.

55. Granger v. Sallier, 110 La. 250, 34 So. 431.

56. Wilson v. Ober, 109 La. 718, 33 So. 744. Will be nonsuited if it appears that title is in a third person, even though the action be against a possessor without legal title. Slattery v. Heilperin, 110 La. 86, 34 So. 139.

57. Leathem & S. Lumber Co. v. Nalty, 109 La. 325, 33 So. 354.

58. Where lessee disclaimed and lessor was brought in. Jewell v. De Blanc, 110 La. 810, 34 So. 787.

59. Adams v. Drews, 110 La. 456, 34 So. 602.

60. Defenses that one has acquired land by accession as alluvion or relicted land, and that it was acquired as dry land within the boundaries of the original purchase, are conflicting. Hall v. Com'rs of Bossier Levee Dist., 111 La. 913, 35 So. 976.

61. That lake was not meandered. Hall v. Com'rs of Bossier Levee Dist., 111 La. 913, 35 So. 976.

62. Landry v. Laplos, 113 La. 697, 37 So. 606.

63. See 2 Curr. L. 1178.

64, 65. Rhinehart v. Redfield, 93 App. Div. 410, 87 N. Y. S. 789.

66, 67. Western Union Tel. Co. v. Electric Light & Power Co., 178 N. Y. 325, 70 N. E. 866.

68, 69, 70, 71, 72. Everett Water Co. v. Powers [Wash.] 79 P. 617.

73, 74. One was held liable for driving load of 64,000 pounds over manhole covers, the ordinary load being 20,000 or less. Missouri Edison Elec. Co. v. Weber, 102 Mo. App. 95, 76 S. W. 736.

§ 6. **Cross Complaints and Answers (1015).**
§ 7. **Amendments.** Right, Time and Manner of Amendment (1016). Matter of Amendment (1018). Changing Cause of Action (1022). To Correct Variance (1025). On Appeal (1027). After Appeal (1027). Terms of Amendment (1028). Effect of Amendment (1028).
§ 8. **Supplemental Pleadings (1029).**
§ 9. **Motions upon the Pleadings (1031).**
§ 10. **Right to Object, and Mode of Asserting Defenses and Objections; Whether by Demurrer, Motion, etc.** Right to Object (1031). Mode of Objection. Matters of Substance (1032). Matters of Form (1035).
§ 11. **Waiver of Objections and Cure of Defects by Failure to Object, Responsive Pleading, or Going to Trial (1038).** Cure by Other Pleadings or Proof, or Instructions (1045). Aider by Verdict) 1045.
§ 12. **Time and Order of Pleadings (1046).**
§ 13. **Filing, Service, and Withdrawal (1048).**
§ 14. **Issues Made, Proof, and Variance (1049).** The General Issue and General Denials (1049). Special Issues and Special Denials (1049). Variance (1050). Admissions in Pleadings or by Failure to Plead (1052). Judgment on the Pleadings (1053).

Scope of title. This topic treats only of the general rules applicable to common-law and code pleading. For the sufficiency of pleadings in particular actions, reference should be had to the appropriate topics.[75] Matters particularly applicable to equity pleading,[76] the necessity of verifying pleadings and the sufficiency of the verification,[77] and all questions in regard to set-off and counterclaim, are treated elsewhere.[78]

§ 1. *Principles common to all pleadings. General rules.*[79]—Under the code, the distinction between actions at law and suits in equity and all forms of actions are abolished, and there is but one form of action for the enforcement and protection of private rights and the redress or prevention of private wrongs, which is called a civil action.[80] The object of the reformed system of pleading is to compel the adverse parties to disclose to each other the facts upon which they rely to uphold the claim on one side and the defense on the other, in order that each may know what he is required to establish or repel by proof upon the trial.[81] The policy of the law is to permit litigants to dispose of the whole controversy between them in a single action, and hence liberal provisions are made to enable pleaders to place their cases before the court in such manner that a single trial may adjust all differences.[82]

75. See, also, 2 Curr. L. 1187, n. 71, 72.

76. See Equity, § 6, 3 Curr. L. 1222.

77. See Verification, 2 Curr. L. 2023; see, also, 2 Curr. L. 1182, 1222, n. 44-46.

78. See Set-Off and Counterclaim, 2 Curr. L. 1624.

79. See 2 Curr. L. 1179.

80. N. C. Const. art. 4, § 1. Code, § 133. Staton v. Webb [N. C.] 49 S. E. 55. Idaho Rev. St. 1887, § 4020. Rauh v. Oliver [Idaho] 77 P. 20. Causes of action, whether legal or equitable, and whatever their nature, are stated in one form of complaint, and judgment may be rendered for the relief demanded upon any right of action which facts alleged in the complaint are sufficient in law to support. Cole v. Jerman [Conn.] 59 A. 425. Plaintiff can be sent out of court only when upon the facts alleged he is entitled to no relief either at law or in equity. Rauh v. Oliver [Idaho] 77 P. 20. Where the complaint states a cause of action, it is not demurrable, though based on a wrong theory (Coppola v. Kraushaar, 92 N. Y. S. 436), and though it specifies only items of damage to which plaintiff is not entitled (Id.). Damages demanded for breach of contract too remote. Id. Relief granted according to facts alleged and proved without regard to form or denomination of the plea. Randolph v. Nichol [Ark.] 84 S. W. 1037. An exception to a complaint that it is by its form for money had and received, and, as such, cannot be maintained unless the money has been actually received by defendant, is untenable. Staton v. Webb [N. C.] 49 S. E. 55. Though the code is said to furnish a new and complete system of procedure as to forms of actions, and new names and characteristics as to pleadings, with a system of procedure as regards the same, it does not include forms for pleadings, or judgments, or for all mere details of practice. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. The forms of actions merely, not the substance thereof, as regards the essentials of the remedy, were abolished. Id.

And see Equity, 3 Curr. L. 1210.

81. To force trial on merits. Harvey v. Douglass [Ark.] 83 S. W. 946. Every purpose of pleadings is accomplished when it is apparent to the parties and the court at the time the trial begins what the affirmative and negative averments are upon which the plaintiff relies for a recovery. Cleveland, etc., R. Co. v. Tehan, 4 Ohio C. C. (N. S.) 145. Where the issue is one of the danger of the work to plaintiff, the fact that plaintiff was doing new work with the dangers of which he was not acquainted, being alleged in the petition, establishes the necessary causal connection and the pleading is good against a general demurrer as a pleading of negligence. Id.

82. Mulligan v. Erie R. Co., 99 App. Div. 499, 91 N. Y. S. 60.

Only pleadings authorized by the code are allowed.[83] The substantive facts pleaded and not the name given to the pleading by the pleader control in determining its character.[84]

Except in justice courts and the like,[85] all pleadings are generally required to be in writing,[86] and must be made out in words at length, and not abbreviated.[87]

A party is entitled to a definite statement in the pleading of the nature of the charge intended to be made against him, but not of the particulars or circumstances of time and place,[88] unless the latter are material parts of the cause of action or defense, in which case they must be definitely stated, the same as any other necessary element.[89] The omission of the name and address of the attorney or of a party appearing in person is a mere irregularity which does not necessarily vitiate a pleading or its service.[90]

Facts should be stated in plain and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;[91] but the use of technical words is not required.[92]

Pleadings should be definite and certain,[93] and direct rather than argumen-

83. Schlesinger v. Thalmessinger, 92 N. Y. S. 575.

84. Paragraphs held to show intention to aver counterclaim, though called answers by way of counterclaim and answers. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. Misnaming a pleading is immaterial. There is no such pleading as a "reply amended petition." Pleading so called held amended petition. Harris v. Langford, 26 Ky. L. R. 1096, 83 S. W. 566. Fact that pleading is misnamed a "cross complaint" immaterial. Randolph v. Nichol [Ark.] 84 S. W. 1037. A pleading containing the essentials of an answer, alleging facts deemed sufficient to abate the action, may be properly regarded as such, though called a plea in abatement. Tutty v. Ryan [Wyo.] 78 P. 657. A paper designated in the answer as a second amended petition will be considered as a complete new amended petition, though called by plaintiff an amendment to amended petition, where it appears to be a full statement of his cause of action, without reference to any prior pleading. John Deere Plow Co. v. Jones, 68 Kan. 650, 76 P. 750. An affidavit for attachment which, except for the heading, contains every essential part of a complaint, including the prayer for judgment, may serve also for the complaint required to be filed before the writ can issue. Handley v. Anderson [Ind. T.] 82 S. W. 716. Fact that pleadings is called an "answer," while the relief sought is more appropriate to a counterclaim or cross-petition, does not prevent the granting of such relief. Crawford v. Ft. Dodge Plaster Co. [Iowa] 101 N. W. 479.

85. In New Jersey no formal pleadings are required in the district court. O'Donnell v. Weiler [N. J. Law] 59 A. 1055.

86. In Louisiana a judgment rendered on an oral plea in the district court will be reversed, and the cause remanded. Sevey v. Chappuis Co. [La.] 36 So. 889. Under the New York municipal court act a verbal demurrer cannot be interposed to a written complaint whether verified or unverified [Laws 1902, p. 1536, c. 650, § 145, subd. 2]. Drake v. Interurban St. R. Co., 88 N. Y. S. 1041. A demurrer ore tenus to counterclaims is properly sustained where they have been held on appeal not to state a cause of action. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050.

87. N. Y. Code Civ. Proc. § 22. Bigelow v. Drummond, 42 Misc. 617, 87 N. Y. S. 581. Referring to parts of the complaint as at or between certain folios is improper pleading and does not operate as an incorporation of the parts referred to. Id.

88. Latter properly obtained by bill of particulars. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170.

89. May be directed to be made more definite and certain on motion. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170. Affirmative pleadings should contain a venue where each traversable fact is said to have taken place. Chicago City R. Co. v. McMeen, 102 Ill. App. 318.

90. Required by supreme court rule 2, which is made applicable to municipal court by Laws 1902, p. 1496, c. 580, § 20. Heidenheimer v. Daniel, 90 N. Y. S. 387.

91. Burns' Ann. St. Ind. 1901, § 341, subd. 2. Ellison v. Towne [Ind. App.] 72 N. E. 270. The test of the validity of a pleading on demurrer is, do the facts alleged tend to constitute a cause of action or defense? Guthrie v. Howland [Ind.] 73 N. E. 259. Facts must be directly and positively alleged. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218. The allegations of the answer should be specific in their statements so as to inform the court what were the facts and enable it to determine whether it might properly deny the relief demanded. In action for specific performance, allegations as to sale held not sufficient to constitute defense. Christiansen v. Aldrich [Mont.] 76 P. 1007. All matters of substance essential to a good cause of action or defense must be set out with clearness and precision [Pa. Procedure Act 1887]. Young v. Geiske, 209 Pa. 515, 58 A. 887.

92. Young v. Geiske, 209 Pa. 515, 58 A. 887.

93. Legal certainty required. Malsby v. Lanark Fuel Co., 55 W. Va. 484, 47 S. E. 358. A pleading may be stricken out for indefiniteness [N. J. P. L. 1903, p. 569]. Rice v.

tative.[94] Matters going merely in aggravation or extenuation and whose effect is but to enhance or diminish the damages need not be pleaded.[95]

Inconsistency,[96] duplicity,[97] negatives pregnant,[98] departures in pleading,[99]

Standard Oil Co., 134 F. 464. A plea averring facts which, if true, may or may not constitute a legal defense, depending entirely upon an ulterior fact not averred, is bad. In action at law, plea in abatement of former suit pending is bad for uncertainty where it is not averred whether it is at law or in equity. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016. The amount of damages sustained should be stated exactly. Rooney v. Gray, 145 Cal. 753, 79 P. 523.

Names of persons necessarily referred to and their interest should appear with certainty. In absence of averment that their names are not known, parties referred to as "others" must be made definite and certain. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170. The only proper way to set out the parties to a contract is by their names. Allegation that defendant let certain premises to "plaintiff and his family" insufficient. Davis v. Smith [R. I.] 58 A. 630. Misnomer of a defendant is cured by his appearance and pleading in his true name. Municipal corporation. Rhodes v. Louisville, 121 Ga. 550, 49 S. E. 681. Where the answer does not disclose defendant's name, extraneous matters may be considered in determining who is the real party filing the pleadings, and the question is for the jury. Evidence sufficient to support finding that amended answer was filed by real defendant, and that it appeared before the running of limitations. McCord Collins Co. v. Prichard [Tex. Civ. App.] 84 S. W. 388.

Pleadings held sufficient: Allegations in caveat as to mental capacity of testator. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306. A petition alleging a specific act of negligence by one of three agents of defendant, but stating that plaintiff did not know which one of the three it was, is not subject to a motion to make more definite and certain, nor to strike out allegation of want of knowledge, there being nothing to show bad faith. Atchison, etc., R. Co. v. Davis [Kan.] 79 P. 130. Allegations of petition, though indefinite, sufficient to warrant admission of evidence as to loss of time and value thereof. Wilbur v. Southwest Mo. Elec. R. Co. [Mo. App.] 85 S. W. 671.

Pleadings insufficient: Answer in action on contract for sale of real estate, since it could not be determined therefrom whether contract as pleaded was admitted or denied. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. S. 851. Complaint in action against directors of corporation for false representations as to its affairs. Warner v. James, 94 App. Div. 257, 87 N. Y. S. 976. In action for attorney's services, defense held meaningless. Pierce v. Newlin, 91 N. Y. S. 377. A plea of nonjoinder of parties defendant not pointing out the precise defect of parties or showing that a complete determination of the controversy could not be had without the omitted party. Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, 70 N. E. 783. Plea to jurisdiction alleging that cause of action arose upon navigable waters and is exclusively within jurisdiction of Federal courts held bad on demurrer for failing to show that they were navigable waters of the United States rather than of the state. Birch v. King [N. J. Law] 59 A. 11. Should set forth facts so that court can determine whether they are waters of state or United States. Id. Declaration in action for damages under Sherman anti-trust act held bad for indefiniteness and uncertainty in describing alleged combination and conspiracy entered into by defendant, and acts done which resulted in damage. Rice v. Standard Oil Co., 134 F. 464. Answer in action on notes attempting to plead breach of contract pursuant to which they were given held insufficient for want of certainty to state any defense. Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903. Defense that defendant was foreign corporation which had not complied with statute held defective in failing to state in what particulars it had not complied. Worrell v. Kinnear Mfg. Co. [Va.] 49 S. E. 988.

94. Birch v. King [N. J. Law] 59 A. 11.

95. Insulting language by conductor. Houston, etc., R. Co. v. Batchler [Tex. Civ. App.] 83 S. W. 902.

96. Renders it subject to demurrer. Harrison v. Maury, 140 Ala. 523, 37 So. 361.

Allegations held consistent: Answer. Ryan v. Riddle [Mo. App.] 82 S. W. 1117. In action on contract for furnishing electrical energy, averment of certain small deficiencies in amount furnished, adjusted in accordance with terms of contract, and allegation of full performance. Hudson River P. T. Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179. Averments that one of the defendants is a resident of a certain county and that under sentence of court he is confined in a prison located in another county. Thompson v. Montrass, 2 Ohio N. P. (N. S.) 368.

Allegations inconsistent: Amended bill setting up that contract created relation both of vendor and vendee, and of mortgagor and mortgagee between plaintiff and defendant, held bad for inconsistency, and a departure in pleading and bill subject to demurrer. Harrison v. Maury, 140 Ala. 523, 37 So. 361. Allegations that injury was negligently and carelessly inflicted and that it was willful. Boyd v. St. Louis Transit Co. [Mo. App.] 83 S. W. 287.

97. No matters, however multifarious, make a pleading double, if, when taken together, they constitute but one proposition or entire point. Declaration in action for malicious suit, charging that suit was instituted without probable cause, and that a judgment therein was procured by fraud, not bad for duplicity where latter was not declared on as cause of action. King v. Estabrooks [Vt.] 60 A. 84.

Pleadings held bad: Declaration in action for royalties under mining lease. Consolidated Coal Co. v. Peers, 205 Ill. 531, 68 N. E. 1065. Petition in mandamus praying reinstatement and for order compelling payment of salary held obnoxious to demurrer because seeking two kinds of relief. City of

hypothetical pleading,[1] and ambiguity, should be avoided.[2] Matters of evidence should not be pleaded.[3]

One who in his pleading seeks to avail himself of the benefits of a statute must aver facts sufficient to bring himself fully within the provision or provisions thereof on which he relies.[4] It is sufficient to follow the language of the statute provided the pleading embraces all its essential parts.[5]

A public domestic statute, not penal, need not be pleaded.[6] Exceptions in

Chicago v. People, 210 Ill. 84, 71 N. E. 816. In action for services, where defendant pleads former adjudication that they were not rendered, replication alleging that sole issue in former case was whether plaintiff bad contract for specific sum, and also that services were not same. Randall v. Carpenter [R. I.] 57 A. 865. Declaration in action for damages for violation of Sherman anti-trust act, alleging in single count that defendant entered into a "contract, combination, and conspiracy" in restraint of trade. Rice v. Standard Oil Co., 134 F. 464.

98. Complaint in action for statutory penalty held sufficient. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. Action to enjoin interference with water rights. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053. Allegation that execution was issued before judgment was properly entered held pregnant with admission that it was in fact entered. Burton v. Kipp [Mont.] 76 P. 563. In action on contract, a denial that plaintiff has performed all conditions precedent is not a negative pregnant. Electrical Equipment Co. v. Feuerlicht, 90 N. Y. S. 467. Denial that plaintiff did work on specified day held admission that he did so at some other time. Levin & M. Contracting Co. v. Jackson, 92 N. Y. S. 307. Conjunctive denials of conjunctive allegations are improper. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053.

99. See, also, § 4, post. The addition to a complaint by amendment of a new cause of action does not constitute a departure in pleadings. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777.

1. Hypothetical clauses in an answer are mere surplusage to be stricken out on motion. Allegation that if note described in complaint was ever indorsed by plaintiff's testator, it was done under circumstances showing a diversion. Corn v. Levy, 97 App. Div. 48, 89 N. Y. S. 658. Does not render the pleading bad on demurrer. Id.

2. Statute of limitations sufficiently pleaded. Nickell v. Tracy, 91 N. Y. S. 287. Complaint in ejectment held demurrable. Meacham v. Bear Valley Irr. Co., 145 Cal. 606, 79 P. 281.

3. Only ultimate facts, and not the evidence relied on to support them, need be pleaded. Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 P. 34. The objection that an attempted set-off by a partner in a suit against him individually is a partnership demand need not be raised by the pleadings, but is properly raised by objection to the admissibility of the evidence. Question depends altogether upon evidence. Western Coal & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145. Not necessary for one filing caveat to will to indicate how he expects to prove allegations as to misrepresentation. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306. Wherein will is unreasonable and unnatural need not be set forth in caveat, but it is proper to allege in detail the reasons why it should be so regarded. Id. Answer in disbarment proceedings stricken out because of pleading evidence, and matters not admissible in evidence. People v. Payson, 210 Ill. 82, 71 N. E. 692. In pleading the character of an injury, it is not necessary to give a specific catalogue of every incident or subordinate result flowing therefrom in order to introduce proof of such results, but the pleading of such injury will permit proof of all results which naturally and proximately ensue therefrom. Cudahy Packing Co. v. Broadbent [Kan.] 79 P. 126. In action against druggist for negligently selling poison, allegations charging specific breach of statutory duty held material and appropriate and improperly stricken out. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201. In action for false imprisonment, facts tending to show malice should not be pleaded unless they are ground for special damage. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

4. Action under Indiana employers' liability act (Burns' Ann. St. 1901, § 7083). Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218. Action for penalty for failure of foreign corporation to keep stock book as required by N. Y. Laws 1892, p. 1840, c. 688, § 53, as amended by Laws 1897, p. 314, c. 384, § 3. Seydel v. Corporation Liquidating Co., 92 N. Y. S. 225. Under a statute allowing attorney's fees if defendant has acted in bad faith, has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense, they cannot be recovered unless one of such reasons for their recovery is alleged. Central of Ga. R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E. 727. One who fails to show by his pleadings that he is entitled to the benefits of a statute or to be relieved from its burdens is not entitled to have it declared invalid. Statute authorizing change of county seat. Pleadings held not to state cause of action. Robertson v. Board of Com'rs [Okl.] 79 P. 97.

5. Pleading founded on U. S. Rev. St. § 3030 (U. S. Comp. St. 1901, p. 1995), relating to transfer of imported merchandise into other packages, not sufficient where it merely alleges that merchandise is "entitled to debenture," but should allege facts making it so entitled. Such allegation a mere conclusion. Thomas & Son Co. v. Barnett, 135 F. 172.

6. See, also, Evidence, § 1, 3 Curr. L. 1335. It is sufficient if the allegations are broad enough to show that the action is brought upon it, and not otherwise. Complaint in action for damages done by dog (Conn. Gen. St. 1902, § 4487) sufficient. Leone v. Kelly

penal statutes must be negatived.[7] Foreign statutes[8] and local laws and customs must be specially pleaded and proved when relied on.[9]

Where it is necessary to obtain leave to sue, that fact must be stated.[10]

Statutes in some states authorize a party to plead in the alternative in certain cases.[11]

Whatever is necessarily implied from an express allegation need not be otherwise averred.[12] One should plead to some material conclusion.[13] Matters of which the court takes judicial notice need not be pleaded.[14] A conclusion of law need not be pleaded,[15] though it is not always improper to do so.[16] The pleading should state facts rather than conclusions.[17] A mere general allegation of fraud or

[Conn.] 60 A. 136. At common law, allegation of scienter, or of other facts dispensing with its presence, was necessary. Not under statute. Id.

7. Seydel v. Corporation Liquidating Co., 92 N. Y. S. 225. Complaint in action for statutory penalty held to sufficiently negative exceptions in statute. Southern R. Co. v. State [Ind. App.] 72 N. E. 174.

8. Cummings v. Montague, 116 Ga. 457, 42 S. E. 732; Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642. Where breach of duty relied on to show negligence is imposed by foreign statute or ordinance. Savannah, etc., R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308. Will assume statute of frauds is same in absence of allegation and proof to contrary. Wilhite v. Skelton [Ind. T.] 82 S. W. 932. Law itself, as relied upon, should be set out in complaint, or attached thereto as exhibit in the pleading, and not its general effect. Engleman v. Cable [Ind. T.] 69 S. W. 894. Reference to law of Chickasaw Nation as an "act of the Chickasaw legislature, approved," etc., held insufficient. Id. As to whether stock subject to further assessment. Gause v. Commonwealth Trust Co., 44 Misc. 46, 89 N. Y. S. 723.

See, also, Conflict of Laws, § 7, 3 Curr. L. 725; Evidence, § 1, 3 Curr. L. 1335.

9. Local laws of Indian tribes in Indian Territory. Where title to crops depends on ownership of land, local Indian laws may be proved to establish such ownership without being specially pleaded. Brown v. McNair [Ind. T.] 82 S. W. 677.

10. Where undertaking running to county clerk is given to procure discharge of mechanic's lien, obtaining leave to sue is essential, and must be pleaded [N. Y. Code Civ. Proc. § 814]. Goldstein v. Michelson, 91 N. Y. S. 33.

11. Mo. Rev. St. 1899, § 626. Does not authorize pleading that inconsistent causes of action are both true. Drolshagen v. Union Depot R. Co. [Mo.] 85 S. W. 344; Behen v. St. Louis Transit Co. [Mo.] 85 S. W. 346. Averment that defendant's servant placed torpedo on sidewalk or placed it on track so that it could easily be removed, and suffered it to be removed to place where it was found, and that one of such averments is true, but that plaintiff does not know which one, is not bad for duplicity. Merschel v. Louisville & N. R. Co. [Ky.] 85 S. W. 710.

12. If facts are pleaded from which an ultimate fact necessarily results, it is the same as though such ultimate fact were specifically pleaded. Harmon v. Fox [Mont.] 78 P. 517. In action for price of privilege of selling certain articles at race track, count in complaint sufficient. Id.

13. In suit to subject realty to judgment which complaint alleges is unsatisfied except as to certain sum, allegations in answer setting forth decree in supplementary proceedings ordering certain stock to be sold under execution held properly stricken, there being no allegations as to the disposition of such stock. Stephens v. Parvin [Colo.] 78 P. 688.

14. General custom in action on contract. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050; Gilkeson v. Thompson [Pa.] 59 A. 1114.

15. Chicago, I. & L. R. Co. v. Barnes [Ind.] 73 N. E. 91. A pleader need not formerly aver a conclusion if he distinctly alleges facts from which it must follow. Matters of law need not be alleged. Wiggin v. Federal Stock & Grain Co. [Conn.] 59 A. 607. If unwarranted, a demurrer for that cause will be sustained. Id. A legal duty may, as a general rule, be implied from the acts averred in the pleading. Not essential to allege that certain act or line of conduct was duty imposed upon appellant by law. Chicago, I. & L. R. Co. v. Barnes [Ind.] 73 N. E. 91. Allegations of duty are merely conclusions of law, and the declaration should be sustained where the facts alleged show the duty, and are stated with sufficient clearness to prevent surprise and enable the court to proceed upon the merits of the cause. Wiggin v. Federal Stock & Grain Co. [Conn.] 59 A. 607. Va. Code 1904, pp. 1708, 1722, §§ 3246, 3272. Virginia & N. C. Wheel Co. v. Harris [Va.] 49 S. E. 991. Amendment consisting simply of an averment of the legal effect of a written request to satisfy a mortgage of record, neither adds to nor detracts from sufficiency of pleading. Partridge v. Wilson [Ala.] 37 So. 141.

16. Thus, where the existence of a duty on defendant's part depends on the proper construction of certain contracts, plaintiff may state the construction in this respect on which he relies. A mode of applying the law to the facts which is helpful rather than harmful to defendant. Wiggin v. Federal Stock & Grain Co. [Conn.] 59 A. 607.

17. The sufficiency of the complaint must be determined from the facts stated and not from the conclusions. Burdick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13. Must state the facts necessary to enable the court to judge whether the conclusion of law has any foundation in fact. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296. Not sufficient to allege existence of

conspiracy is insufficient, but facts showing the nature and essence of the offense must be pleaded.[18] A general allegation of negligence is ordinarily sufficient.[19]

duty which it is alleged defendant failed to perform, but must allege facts showing its existence. Marples v. Standard Oil Co. [N. J. Law] 59 A. 32. Particularly true in regard to complaint for injunction. Complaint insufficient. Shafer v. Fry [Ind.] 73 N. E. 698.

Allegations held to be conclusions: That plaintiff had not given the "bond mentioned" in the contract sued on. Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 So. 106. That deed is void, that claim is barred by limitations, etc. Gates v. Solomon [Ark.] 83 S. W. 348. That plaintiff was discriminated against. Phillips v. Southwestern Tel. & T. Co. [Ark.] 81 S. W. 605. In suit to compel bank to distribute part of its reserve fund, averments in complaint that directors refused for purpose of dividing it among themselves (Mulcahy v. Hibernia Sav. & Loan Soc., 144 Cal. 219, 77 P. 910), and that it is their duty to make distribution and a fraud on plaintiff to refuse (Id.), and that it was not necessary to keep amount specified in fund, no facts being stated to support them (Id.). Statement that assessment for taxation was made as of personalty. Bakersfield & Fresno Oil Co. v. Kern County [Cal.] 77 P. 892. That indebtedness is "now due and payable." Provident Mut. Building-Loan Ass'n v. Davis, 143 Cal. 253, 76 P. 1034. Allegation of ownership based on chain of title set out. Setting out will and alleging ownership thereunder. Kidwell v. Ketler [Cal.] 79 P. 514. Count in petition against railroad company alleging in general terms that defendant was guilty of negligence should be stricken out on special demurrer on ground that it fails to set forth particulars in which defendant was negligent, unless defect is cured by amendment. Atlanta, K. & N. R. Co. v. Gardner [Ga.] 49 S. E. 818. Averment in petition for mandamus for reinstatement of police officer that action complained of "was wholly unauthorized, and without justification, cause, or excuse, fraudulent, and contrary to and in disregard of the legal rights of petitioner." City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. Direct statement that it was duty of defendant to do or not to do a particular thing. Facts should be alleged from which law will imply existence of underlying duty. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218; Mackey v. Northern Mill. Co., 210 Ill. 115, 71 N. E. 448. Allegation as to law of another state. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132. An averment that a conveyance was made without valuable consideration. Bad on general demurrer. Ky. Civ. Code Prac. § 119. Should state what consideration was. Roush v. Vanceburg, S. L., T. & M. Turnpike Co. [Ky.] 85 S. W. 735. Allegation that it was made in fraud of creditors does not aid such averment, since title of one holding for valuable consideration and without knowledge of fraud not affected by that fact. Id. That train was run without proper signals. Illinois Cent. R. Co. v. McIntosh, 26 Ky. L. R. 14, 80 S. W. 496. That conveyance was without valuable consideration. Roush v. Vanceburg, S. L., T. & M. Turnpike Co. [Ky.] 85 S. W. 735. Allegation that bond unlimited in duration had expired prior to defalcation. North St. Louis Bldg. & Loan Ass'n v. Obert, 169 Mo. 507, 69 S. W. 1044. Allegation in petition for divorce that defendant continually abused plaintiff, quarreling with him over various small matters. Slaughter v. Slaughter, 106 Mo. App. 104, 80 S. W. 3. That judgment was not properly entered. Burton v. Kipp [Mont.] 76 P. 563. That principal of certain bonds is due and payable by reason of nonpayment of interest. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296. Allegations in answer in ejectment held conclusions and hence to state no defense and to be vulnerable on demurrer. State v. Tanner [Neb.] 102 N. W. 235. In replevin, allegations relating to ownership and right to possession, and as to unlawful taking. Burdick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13. That defendant has arbitrarily and wrongfully manipulated affairs of a company, and has denied and disputed plaintiff's right to certain stock. Petty v. Emery, 96 App. Div. 35, 88 N. Y. S. 823. That rent became due and payable. George A. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049. In action for breach of contract to sell stock for plaintiff, counterclaim sounding in tort alleging that defendant was induced to make certain advances to plaintiff by false representations, in consequence of which the money advanced was "wholly lost." Gause v. Commonwealth Trust Co., 44 Misc. 46, 89 N. Y. S. 723. That by reason of the premises, the plaintiff's title to certain securities was fraudulent, unmarketable, and not good. Id. That certain stock was not fully paid. Id. In action for attorney's services, a defense that, under the circumstances of the case, defendant denies that plaintiff is entitled to any compensation whatever, expresses an opinion only. Pierce v. Newlin, 91 N. Y. S. 377. That cause of action is exclusively within jurisdiction of Federal courts. Birch v. King [N. J. Law] 59 A. 11. That car came nearly to standstill at instance and request of plaintiff, who then and there, at defendant's instance and request, was invited to become a passenger. "Invitation" used in legal sense. Kennedy v. North Jersey St. R. Co. [N. J. Law] 60 A. 40. In petition in election contest that "illegal votes were cast." Robertson v. Board of Com'rs of Grant County [Okl.] 79 P. 97. In action for conversion of hops, that, by reason of certain facts, plaintiff waived and surrendered their alleged claim of the mortgage lien on said hops. Zorn v. Livesley, 44 Or. 501, 75 P. 1057. Not injured by striking it out, where other allegations constituted complete defense. Id. That defendant never legally executed mortgage. Stewart v. Linton, 204 Pa. 207, 53 A. 744. That assault was made on plaintiff by defendant's employe while acting within scope of his authority. Waaler v. Great Northern R. Co. [S. D.] 100 N. W. 1097. That cemetery would create noisome odors, etc., in absence of averment as to contemplated mode of sepulture. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56. As to fraud and collusion between directors of corporation and lessee under oil lease. Stark v. J. M. Guffey Petroleum Co. [Tex.

An allegation is irrelevant when the issue formed by its denial can have no connection with or effect upon the cause of action.[20]

A pleading will not be regarded as frivolous unless its insufficiency is apparent upon a bare statement, without argument.[21]

Civ. App.] 80 S. W. 1080. That suit was instituted without "reasonable or probable cause of action," without allegation of facts showing it. King v. Estabrooks [Vt.] 60 A. 84. Allegations held to sufficiently impeach judgment to overcome its effect as proof of probable cause. Id. That adoption was void under laws of another state, without setting them out. James v. James, 35 Wash. 655, 77 P. 1082.

Allegations held not to be conclusions: That fair proportion of expense of draining mine, which defendant was required to pay under contract, was certain sum per month. Fisk Min. & Mill Co. v. Reed [Colo.] 77 P. 240. Paragraph of complaint in action on contract not demurrable on ground that it was made up of statements of law and fact so involved in and dependent upon each other as to be wholly inseparable. Wiggin v. Federal Stock & Grain Co. [Conn.] 59 A. 607. Allegation in answer of waiver, acquiescence and ratification. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058. Averments as to breaches of bond. Coffinberry v. McClellan [Ind.] 73 N. E. 97. That way existed as appurtenant to land. Cincinnati, R. & M. R. Co. v. Miller [Ind. App.] 72 N. E. 827. That deceased mortgagor "left no heirs or kindred of any kind or degree" surviving her, and that property descended under the statute to her husband. Not necessary to state specifically that she left neither maternal nor paternal kindred. Montz v. Schwabacher, 26 Ky. L. R. 1214, 83 S. W. 569. In petition in action on benefit certificate that all dues and assessments had been paid, where plaintiff further alleged that he could not specify dates and amounts because books and receipts were in defendant's possession, and gave notice to produce them at trial. Endowment Rank Supreme Lodge K. P. v. Townsend [Tex. Civ. App.] 83 S. W. 220.

18. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170; Bell v. Southern Home B. & L. Ass'n, 140 Ala. 371, 37 So. 237; Miller v. Butler, 121 Ga. 758, 49 S. E. 754; Hoon v. Hoon [Iowa] 102 N. W. 105. Fraud and want of consideration for deed. Noble v. Gilliam, 136 Ala. 618, 33 So. 861. In action on promissory note given for purchase price of business, where defendants pleaded partial failure of consideration by reason of false representation as to business, allegations as to such representations held demurrable as failing to set forth amount of profits represented to have been made, and amount of damage suffered by defendant. McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341. Will be judged, not by the epithets used, nor the general characterization of acts, but by the facts specially set forth as constituting the wrong. Answer failing to allege in what fraud consisted held demurrable. Board of Com'rs of Howard County v. Garrigus [Ind.] 73 N. E. 82. Allegation that chattel mortgage was procured by fraudulent and false representations made at time of its execution does not sufficiently set up defense of fraud in procuring its execution. Beadleston & Woerz v. Furrer, 92 N. Y. S. 879. Bill for cancellation of deed. McPeck's Heirs v. Graham's Heirs [W. Va.] 49 S. E. 125.

19. Chicago, etc., R. Co. v. O'Donnell [Neb.] 101 N. W. 1009. Answer in action for personal injuries sufficiently specific. Durham v. Bolivar, 106 Mo. App. 601, 81 S. W. 463. General averments of negligence "as hereinafter more specifically mentioned or described" will be limited in their application to the specific allegations referred to. Allegations of negligence in action for personal injuries. Chicago, etc., R. Co. v. Wheeler [Kan.] 79 P. 673. If legal duty and violation thereof are disclosed in action for negligence, the general averment of the negligence complained of will be sufficient on demurrer. Chicago, etc., R. Co. v. Barnes [Ind.] 73 N. E. 91. A general allegation of negligence is sufficient as against a demurrer for want of facts. Remedy, if any, to obtain more specific statement of acts constituting it is by motion to make more specific. Nickey v. Steuder [Ind.] 73 N. E. 117. In an action for personal injuries, plaintiff must state the nature and character of the injuries complained of, and if for any reason this cannot be done, the petition must so allege. Dallas Consol. Elec. St. R. Co. v. Ison [Tex. Civ. App.] 83 S. W. 408.

20. Cheatham v. Edgerfield Mfg. Co., 131 F. 118. One having no substantial relation to the controversy between the parties to the suit, and which cannot affect the decision of the court because it has no bearing on the subject-matter of the controversy. In action to restrain plaintiff from holding herself out as defendant's wife, allegations as to original meretricious relations between them, and that plaintiff was married when they began, held relevant. Bell v. Clarke, 45 Misc. 275, 92 N. Y. S. 411. Certain allegations in answer, in action on contract, where defense was payment, held improperly stricken out as irrelevant and improper defenses. Flournoy v. Osgood, 90 N. Y. S. 972.

Allegations held irrelevant: In answer as to reasons for setting up limitations. Lenhardt v. French, 68 S. C. 297, 47 S. E. 382. In complaint for breach of contract as to prior independent contracts. Murray v. National Biscuit Co., 96 App. Div. 609, 88 N. Y. S. 1001. In suit to set aside assignment of bond and mortgage, as to publication of assignment under false names to prevent discovery of fraud. Day v. Day, 95 App. Div. 122, 88 N. Y. S. 504.

21. Demurrer. Where court disregards this rule, holding will be reversed. Shaw v. Feltman, 99 App. Div. 514, 91 N. Y. S. 114. See, also, Doll v. Smith, 43 Misc. 417, 89 N. Y. S. 331. When the frivolousness appears from a mere inspection, and therefore justifies the inference that it was interposed in bad faith. Demurrer not frivolous if argument required to show that it is bad. Rankin v. Bush, 93 App. Div. 181, 87 N. Y. S. 539. A motion for judgment upon the answer as frivolous presents no more than the proposition that the pleading is insufficient upon a bare inspec-

Scandal in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners, or anything unbecoming the dignity of the court to hear.[22] The fact that the petition contains irrelevant, and scandalous matter does not deprive the plaintiff of the relief to which it shows him to be entitled.[23]

Whether matter alleged in a pleading is inducement or surplusage must be determined by a sound construction of the entire pleading.[24] It cannot be treated as surplusage where its substantiation at the trial is material to the right of recovery.[25]

A sham pleading is one good in form and false in fact and which is not pleaded in good faith.[26]

Where the pleadings in a case are lost, the court should require the parties to file substantial copies thereof.[27] If those filed are not conceded to be substantial copies, the court should hear testimony on the question and require the filing of copies in accordance therewith.[28]

Interpretation and construction in general.[29]—At common law everything in a pleading was taken most strongly against the pleader,[30] and this rule still prevails in some states.[31] Under the code, however, pleadings are generally to be liberally

tion without the need of argument (Goldstein v. Michelson, 91 N. Y. S. 32), and an order denying it in no way determines the legal sufficiency of such pleading (Id.).

Pleadings held frivolous: Where the complaint shows on its face that it is not on an open or unliquidated account, a plea of the three years' statute of limitations. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777. Answer in action by creditors to reach beneficial interest of defendant in voluntary trust. Kene v. Hill, 92 N. Y. S. 805. Defense of contract of third person to do certain work for defendant, contract of plaintiff with third person to do part of such work and failure of plaintiff so to do. Dixon v. Johnson, 44 Or. 43, 74 P. 394. Demurrer to complaint in suit for partition. Sprague v. Maxey [Wis.] 100 N. W. 832. Plea of assumption of risk in action against carrier for injuries to employe. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. In Wisconsin, a party appearing from an order overruling a frivolous demurrer will be charged with double attorney's fees, to be taxed as penalty [Rev. St. 1898, § 2951]. Sprague v. Maxey [Wis.] 100 N. W. 832.

22. Answer in action by trustee in bankruptcy to set aside fraudulent transfer. McNulty v. Wiesen, 130 F. 1012.

23. Petition for alimony. Hawley v. Hawley, 95 App. Div. 274, 88 N. Y. S. 606.

24. Allegations in declaration, in action for royalties under mining lease, showing that defendant was in privity of estate with regard to lease and therefore bound, held not matter of inducement or surplusage. Consolidated Coal Co. v. Peers, 205 Ill. 531, 68 N. E. 1065.

Allegations held surplusage: In action for damages for ejection from train, where plaintiff is only entitled to recover for breach of contract of carriage, allegations as to tortious acts of conductor. Chase v. Atchison, etc., R. Co. [Kan.] 79 P. 153. In action for penalty for failure to transmit telegram, where essential allegation of careless and negligent failure is made, unnecessary words as to actual delivery. Hill v. Western Union Tel. Co., 105 Mo. App. 572, 80 S. W. 3. In a declaration of covenant, a concluding phrase, "whereby an action hath accrued," etc., which is appropriate to an action of debt. Bowen v. White [R. I.] 58 A. 252. In action for injuries, allegation that defendant corporations were co-partners. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. The statement in a replication properly pleading fraud that it is in the nature of an equitable defense may be disregarded as surplusage. Probate Court of Westerly v. Potter [R. I.] 58 A. 661.

25. N. Y. Code Civ. Proc. § 549, subd. 2. Allegations, in action for conversion of rents, alleging that money was received in fiduciary capacity and embezzled, not surplusage. Frick v. Freudenthal, 90 N. Y. S. 344.

26. Continental B. & L. Ass'n v. Boggess, 145 Cal. 30, 78 P. 245.

27. John Hamilton & Co. v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 58.

28. John Hamilton & Co. v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 58. It is error to permit plaintiff to substitute as a copy of his original petition one omitting items on which defendant has based a plea in reconvention. Id.

29. See 2 Curr. L. 1183. Equity pleading, see Equity, § 6a, 3 Curr. L. 1222.

30. Witham v. Blood, 124 Iowa, 695, 100 N. W. 558; Manning v. School Dist. [Wis.] 102 N. W. 356; David v. Whitehead [Wyo.] 79 P. 19.

31. Where a count in a petition is equivocal and capable of two constructions, one of which will let in a defense and the other will not, the construction which is most favorable to defendant and which will let in the defense will be adopted. Count construed as one for continuing injury to property and not for continuing nuisance, so that it was barred by limitations. Holbrook v. Norcross, 121 Ga. 319, 48 S. E. 922. Allegations as to negligence, on question as to propriety of instructions. Chicago, etc., R. Co. v. Wheeler [Kan.] 79 P. 673. Every in-

construed, with a view to substantial justice between the parties,[32] particularly after the trial,[33] and every reasonable intendment and presumption is to be made in their favor.[34] All facts necessary to a cause of action not expressly alleged

tendment legitimately deducible therefrom in favor of other party should be taken as true. Allegation in reply held not an admission that certain deed conveyed land in controversy. Skidmore v. Smith [Ky.] 84 S. W. 1163. Under allegation that defendant agreed to convey portion of land to plaintiff in consideration of his making certain improvements, it will be presumed that she was to convey only so much as was occupied by such improvements. Robards v. Robards [Ky.] 85 S. W. 718.

On demurrer: Karter v. Fields, 140 Ala. 352, 37 So. 204; Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 So. 106; Indiana Nat. Gas & Oil Co. v. Lee [Ind. App.] 72 N. E. 492. Petition held to seek recovery on quantum meruit for services. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. Petition to enforce mechanic's lien held to sufficiently allege plaintiff's ownership of land. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546. Allegations in petition to enjoin diversion of water, being consistent with lawful use by defendants, will be so construed. Cline v. Stock [Neb.] 102 N. W. 265. In action for injuries resulting from explosion of gasoline, absence of allegation that defendant placed it in tank in store without storekeeper's consent raises presumption to contrary. Marples v. Standard Oil Co. [N. J. Law] 59 A. 32.

32. Griffin v. Atlantic Coast Line R. Co., 134 N. C. 101, 46 S. E. 7. In the construction of a pleading for the purpose of determining its effect [Wis. Rev. St. 1898, § 2668]. Manning v. School Dist. [Wis.] 102 N. W. 356. Statute should be given broad and liberal interpretation [Wis. Rev. St. 1898, § 2668]. Emerson v. Nash [Wis.] 102 N. W. 921. Mo. Rev. St. 1899, § 629. Ruebsam v. St. Louis Transit Co. [Mo. App.] 83 S. W. 984. N. C. Code, § 260. Staton v. Webb [N. C.] 49 S. E. 55. On demurrer will be liberally construed. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. S. 525. Averments which sufficiently point out the nature of the pleader's claim are sufficient, if under them he would be entitled to give the necessary evidence to support his cause of action. Complaint sufficient to admit evidence of breach of contract. Coppola v. Kraushaar, 92 N. Y. S. 436. On demurrer for failure to state facts sufficient to constitute a cause of action, the only question is whether a cause of action is alleged or can be fairly gathered from all the averments of the complaint. Id. It will be sustained only when it appears that after admitting all the facts alleged, or that can by reasonable and fair intendment be implied from them, the complaint fails to state a cause of action. Id. Should be fairly and reasonably construed. Complaint held to show that work was performed under independent contract. Schilling Co. v. Reid & Co., 94 App. Div. 500, 87 N. Y. S. 1115. The code looks to the substance and not to the form. Manning v. School Dist. [Wis.] 102 N. W. 356. Reply held not to amount to admission that deed was delivered on certain date. David v. Whitehead [Wyo.] 79 P. 19.

33. After issue joined, trial, and verdict [Mo. Rev. St. 1889, § 2074]. Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299. Answer, on appeal. Allen v. Dunn [Neb.] 99 N. W. 680. On appeal from the judgment where the evidence does not appear to have been objected to, and the findings are conclusive. Neumann v. Moretti [Cal.] 79 P. 510. Where the question is presented for the first time after judgment, the complaint will be upheld if a cause of action is fairly inferable from its allegations. Complaint in action on contract for services held to sufficiently allege that plaintiff was duly qualified teacher. Norton v. Wilkes [Minn.] 101 N. W. 619. In order to warrant a reversal on the ground of error in overruling a demurrer to a complaint because of uncertainty, after the case has been tried and a judgment rendered on the facts, it must appear that some substantial right of defendant has been prejudiced. Uncertainty as to damages not prejudicial where defendant interposed specific denial of all the allegations of the complaint. Rooney v. Gray, 145 Cal. 753, 79 P. 523.

34. To be construed in favor of pleader on demurrer, and to be viewed with greater liberality if objection taken otherwise. Manning v. School Dist. [Wis.] 102 N. W. 356. In determining whether complaint states a cause of action, question is not whether pleader used most appropriate language to that end, but whether that used will permit reasonably of a coustruction sustaining the intent of the pleader. Manning v. School Dist. [Wis.] 102 N. W. 356; Emerson v. Nash [Wis.] 102 N. W. 921. Will be held sufficient whenever the requisite allegations can be fairly gathered from all the averments, though the statement of them may be argumentative, and the pleading deficient in logical order and technical language. Complaint in action by stockholder to compel directors to return stock illegally appropriated to the company. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. S. 525. Complaint in action on railroad construction contract sufficient. Lewis v. Utah Const. Co. [Idaho] 77 P. 336. On demurrer, the pleading will be held to state all facts that can be implied from the allegations by reasonable and fair intendment, and facts so impliedly averred are traversable in the same manner as though directly stated. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. S. 525. All reasonable inferences that can be drawn from the language of a pleading to support it are to be indulged in, rather than such as will defeat it. In action against city for death caused by electric light wire, complaint held sufficient. Wilbert v. Sheboygan, 121 Wis. 518, 99 N. W. 330. On general demurrer, every reasonable intendment from the allegations thereof taken as a whole will be indulged in in its favor. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077. Petition in action for damages for flooding land held sufficient. Colorado Canal Co. v. Sims [Tex. Civ. App.] 82 S. W. 531. Action for injuries due to negligence. El Paso & S. W. R. Co. v. Kelly [Tex.

which can be reasonably inferred from what is stated will be regarded as properly pleaded.[35] But a party will still be presumed to have stated his case as strongly as the facts will justify,[36] and nothing will be inferred in his favor which has not been averred, or may not, upon a liberal and fair interpretation, be implied from his averments.[37] The rule requiring a liberal construction does not affect the fundamental requirements of good pleading, but merely matters of form.[38]

The sufficiency of a pleading is to be determined by the facts therein stated only.[39] Inferences cannot be indulged in in support of it,[40] and the conclusions of the pleader will not be considered.[41]

A pleading should be taken as a whole and all its parts construed together.[42] Specific allegations will control general ones.[43] Allegations in a paragraph in conflict with its general theory will be rejected,[44] and isolated statements will not be permitted to control the scope and meaning of long and involved pleadings.[45]

The language used must be taken in its plain and ordinary meaning, and such interpretation given it as fairly appears to have been intended by the pleader.[46] When an expression is capable of different meanings, that one will be

Civ. App.] 83 S. W. 855. Allegations of petition, when taken together, held to constitute allegation of performance of services sued for. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850.

35. Witham v. Blood, 124 Iowa, 695, 100 N. W. 558; Manning v. School Dist. [Wis.] 102 N. W. 356.

36. Witham v. Blood, 124 Iowa, 695, 100 N. W. 558.

37. Petition in suit to quiet title insufficient. Witham v. Blood, 124 Iowa, 695, 100 N. W. 558. No facts will be presumed to exist in favor of the pleader which have not been averred or alleged. Complaint for injunction insufficient. Shafer v. Fry [Ind.] 73 N. E. 698.

38. Ruehsam v. St. Louis Transit Co. [Mo. App.] 83 S. W. 984.

39. Southern R. Co. v. State [Ind. App.] 72 N. E. 174. On demurrer. Johnson v. Brice [Tenn.] 83 S. W. 791. Contract annexed to answer cannot be deemed a part of complaint, though latter contains statement that contract would be produced when and where court ordered. Hudson River Power Transmission Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179. Each pleading must stand on its own ground. Admissions exclusive to pleading in which they are made and cannot be used as evidence in issues joined in other pleadings. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. The summons cannot be used to aid in interpreting the complaint on demurrer. Complaint alone to be considered. Buckham v. Hoover [S. D.] 101 N. W. 28.

40. Though they could have been legitimately drawn had question arisen as to effect of evidence. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218.

41. In considering the sufficiency of a pleading, the court does not accept the conclusions drawn by the pleader, but determines for itself the legal force of the facts alleged. Marples v. Standard Oil Co. [N. J. Law] 59 A. 32.

42. David v. Whitehead [Wyo.] 79 P. 19. According to its general scope and tenor as appears from the averments. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. The prayer will not control and determine its validity. Action held one for damages for nuisance and not for injunction. Id.

43. Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297. Where a petition contains a general allegation of negligence followed by an enumeration of certain careless acts, the latter will be regarded as explanatory of the general allegation. Where there is a general charge of common-law negligence, followed by a statement of particular omissions of duty constituting the same kind of negligence, plaintiff cannot recover on proof of an act not specified. Mueller v. La Prelle Shoe Co. [Mo. App.] 84 S. W. 1010. General allegations of payment will be disregarded and reference had to the specific allegations of payments as stated in the answers to each count to determine what credits defendant is entitled to under each count. Answer held not to authorize jury to allow defendant amount of due bill as credit on second count of complaint. Sayers v. Crane [Mo. App.] 81 S. W. 473.

44. Cannot draft answer for purpose of presenting proposition that plaintiff never had any present right in contract under law of place where it was made, and then, when allegation as to foreign law is held insufficient, fall back on proposition that there was contemporaneous oral agreement limiting plaintiff's rights under law of forum. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

45. Answer in action on insurance policy held to commingle matters of fact having no relation to each other. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

46. Answer alleging fraud and conspiracy sufficient. Ryan v. Riddle [Mo. App.] 82 S. W. 1117. On demurrer words will be given their legal rather than their colloquial meaning. Word "invitation" in action against carrier for injury to passenger. Kennedy v. North Jersey St. R. Co. [N. J. Law] 60 A. 40.

adopted which will support the pleading, rather than one which will defeat it.[47] When the trial court has placed a reasonable construction on a complaint capable of two constructions, the appellate court will be disposed to adhere thereto.[48]

The form of an instrument attached to a pleading controls over the pleader's conclusion as to its legal effect.[49] Where the words of a writing are pleaded, they are regarded merely as descriptive of the identity of the instrument.[50]

Exhibits.[51]—An exhibit cannot be resorted to on behalf of a pleader to supply a material allegation or cure a fatal defect,[52] but may be used to give the pleading the requisite definiteness and certainty.[53] It may be looked to to contradict a pleading and make it bad, but not to help it.[54] A party cannot, on the hearing of a demurrer, object to the consideration of an exhibit which he has himself attached to his pleading in order to make it more definite and certain.[55]

A paper which is merely attached to a pleading and marked as an exhibit but not incorporated therein is not a part thereof.[56]

In Indiana when any pleading is founded on a written instrument or an account, the original or a copy thereof must be filed with the pleading.[57] If the action is not founded on the instrument as such, all the facts constituting the cause of action must be stated in the complaint itself.[58]

Bills of particulars.[59]—Statutes in some states authorize an order directing

47. Averment that master promised to repair machinery, but failed and "refused" to do so, not inconsistent with theory that promise induced servant to incur a known danger. Virginia & N. C. Wheel Co. v. Harris [Va.] 49 S. E. 991.

48. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879.

49. Averment that undertaking ran to plaintiff rendered nugatory. Goldstein v. Michelson, 91 N. Y. S. 33. Where the contract sued on is annexed to the complaint and made a part thereof, the rights of the parties are to be determined by it rather than by the general allegations of the complaint concerning its effect. Samuel Cuppies Envelope Co. v. Lackner, 90 N. Y. S. 954.

50. Higgins v. Graham, 143 Cal. 131, 76 P. 898. Where a complaint alleges a written acknowledgment of a debt in words set out, a denial of an acknowledgment in such words is not pregnant with an admission that it was acknowledged in other words. Id. If denial could be construed as admission of execution in other words would be simply an admission of other writings and hence variant from those alleged, and immaterial. Id.

51. See 2 Curr. L. 1192, n. 94 et seq.

52. Dixon v. Roessler [S. C.] 50 S. E. 184. Cannot be substituted for, or take the place of, necessary allegations, but can only be looked to in aid and explanation of them. Do not relieve pleader from necessity of alleging facts to which they relate. Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56. Cannot be considered in determining whether the complaint states a cause of action. Nichols v. Montgomery, 68 S. C. 332, 47 S. E. 373.

53. Where complaint states cause of action. Dixon v. Roessler [S. C.] 50 S. E. 184; Elliott v. Ferguson [Tex. Civ. App.] 83 S. W. 56.

54. Fact that mortgage is filed with petition to foreclose does not aid defects or supply omission to plead its conditions or their breach. Miller v. McConnell, 26 Ky. L. R. 181, 80 S. W. 1103. Articles of incorporation filed with answer may be considered against defendant in suit for organization tax. Commonwealth v. Licking Valley Bldg. Ass'n, 26 Ky. L. R. 730, 82 S. W. 435.

55. Dixon v. Roessler [S. C.] 50 S. E. 184.

56. Notice of expiration of time to redeem from tax sale. David v. Whitehead [Wyo.] 79 P. 19. The total omission of a fact necessary to constitute a cause of action cannot be supplied by reference to an exhibit not copied into the petition, but simply filed and referred to therein. Goff v. Janeway, 26 Ky. L. R. 525, 82 S. W. 267, afd. on rehearing 26 Ky. L. R. 1266, 83 S. W. 1038.

57. Incomplete contract not properly made an exhibit [Burns' Ann. St. 1901, § 365]. Ellison v. Towne [Ind. App.] 72 N. E. 270. Railroad need not file instrument of appropriation when suing to enjoin removal of buildings from land condemned by it. Stauffer v. Cincinnati, etc., R. Co., 33 Ind. App. 356, 70 N. E. 543. Allegation in action on insurance policy that adjuster's agreement is "made a part hereof and attached hereto" sufficient to make it part of complaint. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814. In an action by surety to be reimbursed for money which he has been compelled to pay for principal, action is not on bond, and it need not be made an exhibit. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

58. If incomplete instrument a part of such facts it may be inserted in pleading itself with proper averments. Ellison v. Towne [Ind. App.] 72 N. E. 270. Where the instrument is not the basis of the pleading, it cannot be looked to to aid its averments, though it is made an exhibit. Lease attached to complaint not basis of suit. Indiana Natural Gas & Oil Co. v. Lee [Ind. App.] 72 N. E. 492.

59. See 2 Curr. L. 1190, 1198.

either party to furnish a bill of particulars of his claim to the adverse party.[60] When used in connection with defendant's case, the word claim means that ground of fact which he alleges in his answer as the reason why judgment should not go against him.[61] The remedies provided for by motions to make the pleadings more definite and certain and to require a bill of particulars are separate and distinct, and the moving party should be required to choose the one appropriate to the relief he seeks.[62] The granting or withholding of the bill is generally held to be within the discretion of the trial court, and his action will not ordinarily be interfered with on appeal in the absence of an abuse of such discretion.[63]

The office of a bill of particulars is to amplify a pleading and to inform the party with reasonable certainty of the nature of the claim made by his adversary, in order to prevent surprise and to enable him to intelligently meet the issue upon the trial.[64] It is not its purpose to furnish evidence to the opposite party.[65] It

60. In Connecticut the common counts may be used for the commencement of an action in all cases when any of the counts is a general statement of the cause of action, but plaintiff is required to furnish a bill of particulars of the items of his claim before a default can be entered or judgment rendered thereon [Gen. St. 1902, § 627]. Hoggson & P. Mfg. Co. v. Sears [Conn.] 60 A. 133.

In Florida a plea of set-off must be accompanied by a bill of particulars [Rev. St. 1892, § 1069]. Muller v. Ocala Fonndry & Machine Works [Fla.] 38 So. 64.

In Georgia the failure to attach a bill of particulars to the complaint does not authorize a dismissal unless, after motion therefor, plaintiff fails to supply the omission by the second term. Simpson v. Wicker, 120 Ga. 418, 47 S. E. 965.

New York court may order bill of particulars of the claim of either party to be delivered to the adverse party [N. Y. Code Civ. Proc. § 531]. Swan v. Swan, 44 Misc. 163, 89 N. Y. S. 794; Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. S. 967; Knipe v. Brooklyn Daily Eagle, 91 N. Y. S. 872. In municipal court an order for a bill need not be made at the time of joining issue. Code Civ. Proc. § 2942 does not apply. Laws 1882, p. 349, c. 410, § 1347, repealed by Laws 1902, p. 1595, c. 580, § 364. Time not limited by Laws 1902, c. 580, § 145. Pough & Co. v. Cerimedo, 44 Misc. 246, 88 N. Y. S. 1054.

In North Carolina the court may in all cases order a bill of particulars [Code, § 259]. Turner v. McKee [N. C.] 49 S. E. 330. In an action by a common informer for a statutory penalty against a county commissioner for auditing unverified accounts, if defendant desires fuller information in regard to the accounts referred to he should demand a bill of particulars, and not demur. Id.

In South Carolina a party need not set forth in a pleading the items of an account therein alleged, but must deliver a copy of the account to the other party on demand [Code, § 179]. Creighton v. Creighton & Co., 68 S. C. 326, 47 S. E. 439. The court may also, in all cases, order a bill of particulars of the claim of either party to be furnished [Code, § 179]. Id.

In Virginia the court may order a statement to be filed of the particulars of the claim or the ground of defense [Va. Code 1887, § 3249 (Code 1904, p. 1709)]. Driver's Adm'r v. Southern R. Co. [Va.] 49 S. E. 1000.

In Washington, a bill may be ordered where the demand is for particulars of the general items set out in the complaint, but it is not the remedy where discovery is sought of facts in possession of plaintiff material to the defense of the action. May be demanded in certain actions as matter of right under Ball. Ann. Codes & St. Wash. § 4930. Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 P. 34. The remedy in such case is by interrogatories before trial, or by an examination of the party as a witness at the trial. Id. Motion in action for injuries caused by operation of sluice dams properly denied. Id.

61. Plaintiff sued her husband for moneys advanced. Defendant set up antenuptial agreement under which wife was to contribute her income and he his earnings for support of family, and alleged his performance. Held, that defense did not constitute such a claim, the amount of defendant's contribution not being presented by answer. Swan v. Swan, 44 Misc. 163, 89 N. Y. S. 794.

62. Motion should not be in alternative. Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. S. 967.

63. Knipe v. Brooklyn Daily Eagle, 91 N. Y. S. 872. Unless plainly erroneous. Driver's Adm'r v. Southern R. Co. [Va.] 49 S. E. 1000. In action against railroad company for death of employe, where grounds of defense actually relied on were defendant's want of negligence and contributory negligence of deceased and his fellow-servants, refusal to require statement was not prejudicial to plaintiff. Id. N. Y. Code Civ. Proc. § 531. Where counterclaim alleged conversion of securities which plaintiff agreed to carry in consideration of certain services theretofore rendered to him, bill of particulars of services and value properly granted, to prevent needless preparation. Llewellyn v. Froehlich, 88 N. Y. S. 966. Appellate court will not interfere to control discretion where real object of bill is to limit the party furnishing it in his proof, and facts are equally within knowledge of both. Messer v. Aaron, 91 N. Y. S. 921.

64. Messer v. Aaron, 91 N. Y. S. 921; Creighton v. Creighton & Co., 68 S. C. 326, 47 S. E. 439. To reasonably apprise defendant of the nature of plaintiff's claim. City of Battle Creek v. Haak [Mich.] 102 N. W. 1005.

should, however, properly describe the claim proved,[66] and give the particulars of the cause of action and the nature and amount of damage in detail, where it is claimed as being suffered by many and diverse articles.[67] Matters of time, place and circumstance, unless they constitute material parts of the cause of action or defense, are strictly within its province and must be obtained by that method rather than by a motion to make more definite and certain.[68]

A party should not be required to furnish particulars which it is impossible to know with any degree of certainty,[69] nor to give details which are more likely to

The office of the bill of particulars required by Conn. Gen. St. 1902, § 627, when the action is commenced by the common counts, and they remain in the case as a sufficient form of complaint, is to furnish a sufficiently particular statement or bill of the items of the claims which are generally described by the allegations of the general common counts. Hoggson & P. Mfg. Co. v. Sears [Conn.] 60 A. 133. To limit the generality of a pleading and to prevent surprise upon the trial, and not to furnish evidence to the opposite party. Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. S. 1003; Knipe v. Brooklyn Daily Eagle, 91 N. Y. S. 872.

65. Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. S. 1003; Messer v. Aaron, 91 N. Y. S. 921; Knipe v. Brooklyn Daily Eagle, 91 N. Y. S. 872; Stern v. Wabash R. Co., 90 N. Y. S. 299. Not to inform party in advance upon what his opponent relies. American Transfer Co. v. Borgfeldt & Co., 99 App. Div. 470, 91 N. Y. S. 209. One should not be required to annex his documentary evidence. Pruyn v. Ecuadorian Ass'n, 94 App. Div. 195, 87 N. Y. S. 970.

66. Inaccurate description held harmless where case was held open until defendant had opportunity to investigate facts, and it was not objected to. Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58.

67. Stern v. Wabash R. Co., 90 N. Y. S. 299. In order to prevent surprise at the trial, plaintiff should be required to make as full a disclosure of the facts on which his claim is based as he is able. In an action against executors to recover for wearing apparel furnished testator's wife, defendants entitled to be informed whether marriage was ceremonial one, and as to dates and places where credit of testator was specifically pledged for goods. Oatman v. Watrous, 90 N. Y. S. 940.

68. Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. S. 967; Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170.

Defendant held entitled to bill: In action for damages for fraudulent representations in selling team of horses, showing which horse was referred to in each paragraph of complaint, and amounts paid for treating them and to whom paid. Newman v. West, 91 N. Y. S. 740. In action for breach of contract to produce play where plaintiff claimed damages because defendant's breach had led public and managers to believe it was not a dramatic success, showing who had been so led to believe, and damages resulting therefrom, and places where play had been successfully produced. Royle y. Goodwin, 90 N. Y. S. 142. In action for injuries, stating expense incurred for medical attendance and amount of time and wages lost. Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. S. 606. Where, in action to recover percentage of profits under contract, plaintiff's bill of particulars indicates that much business was done over and above amount indicated by defendant's books, defendant held entitled to further bill as to such amounts. Elting v. Gillette Clipping Mach. Co., 96 App. Div. 632, 89 N. Y. S. 252. In action for false representations which induced plaintiff to invest money in bonds, etc., held proper to require him to specify what representations were, and when, where, and by whom they were made, and whether they were written or oral, also what bonds he purchased, what moneys he advanced, what corporations he financed, and details of his claim. Pruyn v. Ecuadorian Ass'n, 94 App. Div. 195, 87 N. Y. S. 970.

Plaintiff held entitled to bill: Where, in action to recover for furnishing plans for building, defendant alleges damages resulting from error in specifying location of property in all papers connected with plans, stating in what papers error occurred, names of persons making other surveys and plans, for how long construction was delayed, amount lost in rents, names of persons to whom money was paid, and nature of their services. Price v. Ryan, 96 App. Div. 607, 88 N. Y. S. 984. In action by executrix upon judgment recovered by testator, where defense is payment, showing when and to whom money was paid, though facts could be procured from testator's attorney and from papers on file in supplementary proceedings instituted on judgment. Lynch v. Dorsey, 90 N. Y. S. 741. Required in action on building contract under allegation by way of counterclaim that by reason of plaintiff's breach defendant was compelled to buy materials and employ others to do the work. Engineer Co. v. Senn, 92 App. Div. 616, 86 N. Y. S. 1115.

Sufficiency: In action for goods sold and delivered, held sufficient with the count for goods sold and account stated, to show plaintiff's cause of action, and meet requirements of rules (Conn. Rules under practice act, Rule 2, § 1, 26 Atl. v.), though it did not specify the kind or quantity of meat sold. Hatch v. Busby [Conn.] 59 A. 422. Item in account, filed with petition in action on account, entered as "damage on orchard by cattle, $10," is insufficiently stated. Bick v. Halberstadt [Mo. App.] 85 S. W. 127. Items for half of taxes and of certain accounts held not insufficient as matter of law, sufficiency depending on evidence adduced to prove them. Id. Exhibit filed with petition in action for services held to sufficiently itemize services. Taussig v. St. Louis & K. R. Co. [Mo.] 85 S. W. 378.

69. Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. S. 1003. In action for

be known by the other party,[70] nor information peculiarly within the knowledge of the party seeking it,[71] or equally within the knowledge[72] or the reach of both parties,[73] nor to disclose the names of his witnesses.[74] Where a party is unable to furnish any of the information demanded or to furnish it completely, he should be directed to so state as a substitute therefor.[75]

A bill of particulars may not be resorted to to enlarge the grounds of recovery, nor to change the cause of action, or enlarge the defense set up in the answer.[76] The fact that an answer contains only admissions and denials may be a reason for refusing to compel defendant to furnish a bill of particulars,[77] but it does not affect his right to one from plaintiff.[78]

In an action on a contract, where the substance of the answer is a denial of performance, which plaintiff must prove in order to recover, he is not entitled to a bill of particulars specifying the items in which he has failed to perform.[79] It is proper, however, to require defendant to file a bill setting forth in detail the money damage alleged to have been sustained in excess of the amount claimed by plaintiff, by reason of plaintiff's negligent and improper conduct.[80] Plaintiff is entitled to a bill of particulars in regard to moneys alleged to have been expended by him in completing the contract, alleged by way of off-set.[81]

rent where defendant alleged eviction and counterclaimed for damages, order for bill from him held too broad. Hall v. Gerken, 96 App. Div. 632, 89 N. Y. S. 171. In action for breach of contract to accept certain pails, where plaintiff claimed damages for compliance with provision that he should not sell similar goods to others, held that he should not be required to specify names of persons whose trade was lost by such compliance. Armstrong v. Heide, 90 N. Y. S. 372.

70. Such as particular acts of negligence claimed to have caused explosion of gas. Neuwelt v. Consolidated Gas Co., 94 App. Div. 312, 87 N. Y. S. 1003.

71. American Transfer Co. v. George Borgfeldt & Co., 99 App. Div. 470, 91 N. Y. S. 209. Error to order bill where complaint alleged that plaintiff hired defendant to secure bookings for his play, and sought recovery of sums received by him from those with whom it was booked. Belasco v. Klaw, 96 App. Div. 268, 89 N. Y. S. 208. Defendants not entitled to bill in regard to matters which they can ascertain from their own books. Elting v. Gillette Clipping Mach. Co., 96 App. Div. 632, 89 N. Y. S. 252. The mere fact that defendant is in a better position to know the facts than plaintiff will not excuse plaintiff from giving a bill of particulars, where proof of such facts is necessary to the establishment of his case. Plaintiff, in action for injuries from falling of hotel window, required to give bill showing in what respect window and appliances were defective. Burke v. Frenkel, 95 App. Div. 89, 88 N. Y. S. 517.

72. Where plaintiff sued to reform contract on ground that it was entered into by his mistake and by mistake or fraud on defendant's part, defendant, answering by general denial, was not entitled to bill of facts constituting alleged fraud. American Transfer Co. v. Borgfeldt & Co., 99 App. Div. 470, 91 N. Y. S. 209.

73. Matter of public record. Messer v. Aaron, 91 N. Y. S. 921. In action for specific performance of contract for sale of realty or for damages for its breach, where complaint alleged that defendant was unable to convey, and explained in bill that he was unable because of adverse claims, held that he should not be required to furnish further bill showing names of claimants and grounds on which claims were based. Id.

74. Messer v. Aaron, 91 N. Y. S. 921. In action for libel, where defendant pleads in mitigation that article was based on information furnished to reporter by residents of police precinct of which plaintiff was captain, defendant held not entitled to names and addresses of reporter and residents. Knipe v. Brooklyn Daily Eagle, 91 N. Y. S. 872. It will not be presumed for the purposes of a motion to compel defendant to furnish a bill that he intends to establish his case by evidence of questionable witnesses. Id.

75. Ziadi v. Interurban St. R. Co., 97 App. Div. 137, 89 N. Y. S. 606.

76. Bill respecting false representations made by plaintiff to defendant cannot aid defective averments of fraud in answer. Beadleston v. Furrer, 92 N. Y. S. 879.

77, 78. Newman v. West, 91 N. Y. S. 740.

79. Since defendant is entitled, under denial, to prove any particular failure, and should not be restricted in such proof. O'Rourke v. United States Mortg. & Trust Co., 95 App. Div. 518, 88 N. Y. S. 926. Rule applies though he has, in his answer, also specified certain particulars in which the contract was not complied with. Barreto v. Rothschild, 93 App. Div. 211, 87 N. Y. S. 553. Knowledge as much within possession of plaintiff as of defendant. Brandt v. Burke, 90 N. Y. S. 929. In an action to recover for labor and materials where defendant, by way of counterclaim, sets up a contract and its breach, he cannot be required to file a bill of particulars setting forth the particular breaches claimed. Plaintiff must prove performance. Reitmayer v. Crombie, 94 App. Div. 303, 87 N. Y. S. 973.

80. O'Rourke v. United States Mortg. & Trust Co., 95 App. Div. 518, 88 N. Y. S. 926.

In an action for fraud, a bill of particulars will not be ordered unless defendant denies the fraud charged in the complaint.[82] The substance, merit, and good faith of such denials control, rather than the name of the paper in which they are contained.[83]

A defendant is not required to furnish a bill of particulars of payments made under the defense of payment.[84]

In New York a bill may be required when it is necessary to enable defendant to answer,[85] or when necessary to his defense. An application on the latter ground is premature when made before issue joined.[86] Such an application will also be denied where defendant has sworn to the merits in his moving papers.[87] Where a sufficient affidavit for a bill of particulars is not disputed by answering affidavits, the bill should be ordered.[88]

In case a bill is not furnished pursuant to the order requiring it, the party will be precluded from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered.[89] The order should so state.[90]

A demand for a bill of particulars is not equivalent to a request for an adjournment where none is had or asked for by defendants, and they especially have it noted on the minutes that they do not ask for one.[91]

Where a bill is insufficient, the other party may return it and demand that the order requiring it be complied with,[92] or may move for an order requiring it to be made more specific.[93] On its return the party who served it may take the risk of its sufficiency and wait until the question is raised at the trial,[94] or may, by motion to compel its acceptance, have the question settled in advance of the trial.[95]

The bill of particulars is no part of the original pleading.[96]

81. Brandt v. Burke, 90 N. Y. S. 929.

82. Newman v. West, 91 N. Y. S. 740.

83. Immaterial that they are in verified answer rather than separate affidavit, under N. Y. Code Civ. Proc. § 3343, subd. 11. Newman v. West, 91 N. Y. S. 740.

84. Action for money loaned. Swan v. Swan, 44 Misc. 163, 89 N. Y. S. 794.

85. Not necessary in taxpayer's action to restrain payment of sheriff's bill for boarding prisoners, on ground that number charged for had not been boarded. Hicks v. Eggleston, 95 App. Div. 162, 88 N. Y. S. 528.

86. Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. S. 967. Since, until issue is raised, it cannot be known what defense, if any, will be made. Hicks v. Eggleston, 95 App. Div. 162, 88 N. Y. S. 528. Should be given leave to renew application thereafter. McDonald v. Winchester Repeating Arms Co., 92 N. Y. S. 618.

87. Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. S. 967.

88. Frankel v. Keller Printing Co., 92 N. Y. S. 282.

89. N. Y. Code Civ. Proc. § 531 (Laws 1904, p. 1267, c. 500). Oatman v. Watrous, 90 N. Y. S. 940. Defendants in action for rent. D'Anglemont v. Fischer, 87 N. Y. S. 505.

90. Should not absolutely require it [N. Y. Code Civ. Proc. § 531]. Oatman v. Watrous, 90 N. Y. S. 940.

91. New York Lumber & Storage Co. v. Noone, 92 N. Y. S. 349. Refusal to grant continuance on ground that amended bill of particulars had just been filed held not error, where information therein was not material and could have been obtained from original bill. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

92. Need not move for new bill. Faller v. Ranger, 44 Misc. 424, 90 N. Y. S. 55.

93. The remedy is by motion for a more specific bill, and not by demurrer. Demurrer will not lie because account furnished shows that nothing is due plaintiff. Creighton v. Creighton & Co., 68 S. C. 326, 47 S. E. 439. In Connecticut common counts for money paid and work performed and the bill of particulars applicable thereto are not demurrable for failing to allege that the money was paid and the work performed at defendant's request, but the remedy is by motion to make the bill more specific. Hoggson & P. Mfg. Co. v. Sears [Conn.] 60 A. 133. Original complaint contained common counts for money paid and work performed, and bill of particulars contained account of plaintiff with defendant, the sum of the items of which amounted to the sum named in a count for account stated which was afterward added to the complaint by amendment. Held, that court properly ruled that count for account stated was part of complaint, so as to enable plaintiff to allege in his reply a special contract and settlement of amount due thereunder, the question whether the bill was applicable to the count, or they together stated a cause of action for account stated, not having been raised by motion or demurrer. Id.

94, 95. Faller v. Ranger, 99 App. Div. 374, 91 N. Y. S. 205.

96. Creighton v. Creighton & Co., 68 S. C.

§ 2. *The declaration, count, complaint, or petition. In general.*[97]—The complaint is generally required to contain the title of the cause, specifying the names of the court and the parties, and the county in which the action is brought,[98] a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition,[99] and a demand for the relief to which the plaintiff supposes himself entitled.[1]

326, 47 S. E. 439. A specification is no part of the declaration in respect to subsequent pleadings (Aseltine v. Perry, 75 Vt. 208, 54 A. 190), but it nevertheless circumscribes the scope of the evidence and plaintiff's right of recovery. Assumpsit for insurance premium, in which plaintiff declared on common counts only. Id.

97. See 2 Curr. L. 1183, 1184. See, also, Equity, § 6B, 3 Curr. L. 1222.

98. N. C. Code, § 233 (1). Staton v. Webb [N. C.] 49 S. E. 55. Omission of name of court and venue not fatal, but may be cured by amendment [Kan. Code Civ. Proc. § 87]. Hastie v. Burrage [Kan.] 77 P. 268.

Names of parties: A failure to name the true plaintiff is fatal upon the trial and need not be raised by plea in abatement. Naming nonexistent partnership as plaintiff instead of individual trading under such partnership name held not a misnomer. Voight Brew. Co. v. Pacifico [Mich.] 102 N. W. 739. The defendant must be styled by his correct name. Otherwise judgment would not be against him. Municipal corporation. Rhodes v. Louisville, 121 Ga. 550, 49 S. E. 681. The words "a corporation," appearing in the title of a case after the name of the plaintiff, are merely descriptive of the plaintiff and not an allegation of incorporation. Boyce v. Augusta Camp, No. 7,429, M. W. A. [Okl.] 78 P. 322. As against a general denial, an averment that plaintiff is a private corporation is sufficient. Need not allege that it is "duly" incorporated to come within Rev. St. 1895, art. 1186, dispensing with proof of corporate existence. Bury v. Mitchell Co. [Tex. Civ. App.] 74 S. W. 341. Where an administratrix is, by order of court, made a party to a suit commenced by her decedent, no allegation of her official capacity is necessary. Noyes v. Young [Mont.] 79 P. 1063. Where summons and caption read "S. B. Executor" and body reads "S. B., who sues as executor," pleadings sufficiently indicate plaintiff's representative capacity. Englehart v. Richter, 136 Ala. 562, 33 So. 939. Where the complaint states a sufficient cause of action, the fact that the parties who originally invoked the jurisdiction of the court subsequently appear on the record as defendants is immaterial. Applied in creditor's suit. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

99. Mo. Rev. St. 1899, § 592. Ruebsam v. St. Louis Transit Co. [Mo. App.] 83 S. W. 984. N. C. Code, § 233 (2). Staton v. Webb [N. C.] 49 S. E. 55. Idaho Rev. St. 1887, § 4168, subd. 2. Rauh v. Oliver [Idaho] 77 P. 20. Kan. Gen. St. 1901, § 4251. Chase v. Atchison, etc., R. Co. [Kan.] 79 P. 153. N. C. Code, § 233 (2). Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642. The character of an action is determined by the facts recited in the petition and the nature of the relief prayed, and not by the particular phraseology employed by the pleader. Use of word "guaranty" in describing agreement sued on does not make petition a suit upon such a contract. City of Albany v. Cameron & Barkley Co., 121 Ga. 794, 49 S. E. 798. In condemnation proceedings the allegations of the complaint must substantially comply with the statutory requirements [Idaho Rev. St. 1887, § 5216]. Hollister v. State [Idaho] 77 P. 339. In ascertaining whether such requirements have been substantially met, the rules, method and manner of inquiry applicable in ascertaining the sufficiency of any other pleading will be followed. Id. All the facts constitutive of the cause of action must be pleaded in the petition. Wilbur v. Southwest Mo. Elec. R. Co. [Mo. App.] 85 S. W. 671. Evidence of particular bodily injuries admissible under general averment of injuries to body. Id. The state of demand in New Jersey district court need only state a cause of action in such form as will make it appear what the plaintiff's cause of action is. Trespass for dispossession of tenant. O'Donnell v. Weiler [N. J. Law] 59 A. 1055. Of each cause of action. N. Y. Code Civ. Proc. § 481. Referring to parts of it as at or between certain folios improper. Bigelow v. Drummond, 42 Misc. 617, 87 N. Y. S. 581. Plaintiff or complainant must, in his bill, petition declaration, or other pleading in which his cause of action is stated, show a state of facts which, under the law applicable thereto, will entitle him to recover the thing sued for. Nelson v. Sneed [Tenn.] 83 S. W. 786. Bill to contest election should show clear right in contestant. Id. Ordinary rules of pleading apply to election contest, except where otherwise provided. Id. Plaintiff must by his pleadings inform the adverse party of the facts on which he intends to rely for a recovery, thereby avoiding surprise. Southern Pac. Co. v. Martin [Tex.] 83 S. W. 675. Complaint insufficient to inform defendant that damages would be claimed for fracture of femur and shortening of limb, and hence evidence of such injuries not admissible. Id. In action for personal injuries, though it may be sufficient to specify main fact, if it is attempted to particularize the injuries arising from the particular one all that it is designed to prove must be alleged. Id. A declaration is sufficient if it informs defendant of the nature of the demand made upon him, and states such facts as will enable the court to say that, if proved as alleged, they establish a good cause of action. Complaint in action for damages for personal injuries sufficient. Virginia & N. C. Wheel Co. v. Harris [Va.] 49 S. E. 991. Complaint in action for death caused by negligence sufficient. Virginia Portland Cement Co. v. Luck's Adm'r [Va.] 49 S. E. 577. Though general, states a good cause of action if it states sufficient facts to enable the court on demurrer to say that, if such facts are proved, plaintiff is entitled to recover. Declaration in action for wrongful death caused by gas escaping from de-

It is not necessary that the action be classified or characterized by any name, if the petition sets forth facts which in law entitle plaintiff to recover.[2]

Plaintiff need not ordinarily plead matters of defense.[3] The common count in debt at common law may be used to state a cause of action under the code.[4] Though the date of an injury is immaterial when pleaded in the complaint, it becomes material on the filing of an answer alleging limitations, and will be taken as true on appeal from a judgment for defendant.[5]

In an action on a contract, the complaint must allege a performance of all its conditions on plaintiff's part, or an excuse for nonperformance.[6] A general allegation of performance is sufficient in most states.[7] Where plaintiff may elect to sue either upon a contract or for a tort arising out a breach of duty under the contract, the petition, if equivocal in its terms, will be construed as claiming damages for the tort.[8]

fective mains held good, though failing to state what particular main was defective. City of Richmond v. Gay's Adm'x [Va.] 49 S. E. 482. Complaint insufficient. Hortenstein v. Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996.

1. N. C. Code, § 233 (3). Staton v. Webb [N. C.] 49 S. E. 55. Ky. Civ. Code, § 90. Bowman v. Ray, 25 Ky. L. R. 2131, 80 S. W. 516.

2. McNorrill v. Daniel, 121 Ga. 78, 48 S. E. 680; City of Albany v. Cameron & Barkley Co., 121 Ga. 794, 49 S. E. 798. Where a court has jurisdiction of the subject-matter, the form of application to invoke same is not material. Application to county court in form of bill in equity to enforce contract made by deceased. Wheeler v. Wheeler, 105 Ill. App. 48.

3. Freedom from contributory negligence. In action for personal injuries. Pryor v. Walkerville [Mont.] 79 P. 240. In action on fire policy need not, in case of total loss, refer to three-fourths value clause or provision as to concurrent insurance. Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299. In action on option contract to purchase stock, complaint need not allege that actual delivery was intended. Wiggin v. Federal Stock & Grain Co. [Conn.] 59 A. 607. It is not necessary for the petition to negative the statute of limitations unless prima facie on the facts alleged the action would appear to be barred unless brought within some exception. In such case the exception should be alleged. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708.

4. Provident Mut. Bldg. Loan Ass'n v. Davis, 143 Cal. 253, 76 P. 1034. A complaint substantially in the form of the common count in assumpsit for goods sold and delivered, and work and labor performed, on defendant's implied promise to pay therefor is good. Worthington v. Worthington, 91 N. Y. S. 443. A count in a declaration on an account annexed contains by intendment all the allegations contained in the common counts. Massachusetts Mut. Life Ins. Co. v. Green, 185 Mass. 306, 70 N. E. 202.

5. Where complaint showed that action against corporation for personal injuries was not brought within a year after they occurred. Fitzgerald v. Scovil Mfg. Co. [Conn.] 60 A. 132.

6. Averment that plaintiff delivered "an average of 1,000 pounds" of milk daily not allegation of performance of agreement to furnish 1,000 pounds daily for certain period. Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643; Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612; Hudson River Power Transmission Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179; Guarino v. Firemen's Ins. Co., 44 Misc. 218, 88 N. Y. S. 1044. Where the obligation of a party to a contract is to pay only on the happening of a contingency, its occurrence must be alleged in the complaint. Briggs v. Rutherford [Minn.] 101 N. W. 954. The petition in an action on a guaranty must either allege notice of its acceptance or a waiver thereof. Goff v. Janeway, 26 Ky. L. R. 1266, 83 S. W. 1038; Id., 26 Ky. L. R. 525, 82 S. W. 267.

7. Allegations of performance of conditions precedent in action on fire policy sufficient. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62. Burns' Ann. St. Ind. 1901, § 373. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132; Mondamin Meadows Dairy Co. v. Brudi [Ind.] 72 N. E. 643. Burns' Ann. St. Ind. 1901, § 373 (Rev. St. 1881, § 370; Horner's Ann. St. 1901, § 362). In action on insurance policy such an averment sufficient pleading of furnishing proofs of loss, etc. Fireman's Fund Ins. Co. v. Finklestein [Ind.] 73 N. E. 814. Burns' Ann. St. Ind. 1904, § 373; Horner's Ann. St. 1897, § 370. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612. Where complaint alleges both performance of conditions of insurance policy sued on and facts showing waiver of proofs of loss, former may be treated as surplusage. Id. Such allegations, in action on fire policy, is sufficient pleading of furnishing proofs of loss [Mo. Rev. St. 1899, § 634]. Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299. Complaint alleging that plaintiff assigned building contract to defendant, who agreed to pay certain sums when paid by owner, held demurrable for failure to allege that he had been so paid. Schilling Co. v. Reid & Co., 94 App. Div. 500, 87 N. Y. S. 1115. Word "duly" one of substance, and its omission is fatal [N. Y. Code Civ. Proc. § 533]. Guarino v. Firemen's Ins. Co., 44 Misc. 218, 88 N. Y. S. 1044. See, also, Contracts, § 9E, 3 Curr. L. 850; Insurance, § 24B, 4 Curr. L. 224, n. 88, 89.

8. Central of Georgia R. Co. v. Chicago Portrait Co. [Ga.] 49 S. E. 727. A motion to make a complaint more definite and certain, for the purpose of compelling plaintiff

The numbering of the paragraphs of a petition, though unnecessary, does not render the pleading bad on demurrer.[9]

A defendant is only bound to answer the complaint served upon him, and the cause is to be tried upon the issues raised by his answer to such complaint.[10]

Parties will not be allowed to waste the time of the courts by the repetition in new pleadings of claims which have been set up on the record and overruled at an earlier stage of the proceedings.[11]

Joinder of causes of action.[12]—Where a plaintiff has two or more distinct and separate reasons for the relief he asks,[13] or when there is some uncertainty as to the grounds of recovery, he may set forth his claim in several distinct counts or statements in his complaint,[14] provided that the statements in one count are not so inconsistent with those in another that proof of one will disprove the other.[15]

Generally speaking, where a complaint contains two or more causes of action, each is regarded as a separate complaint.[16] As a rule, each must be separately stated,[17] and in some states, numbered,[18] and must be complete in itself,[19] except

to state whether his cause of action is in contract or tort, is properly denied where either case or assumpsit will lie, and the allegations are appropriate to an action on the case in tort. McDonald v. Winchester Repeating Arms Co., 92 N. Y. S. 618.

9. Numbering held for purpose of distinguishing paragraphs of same cause of action and not to separate different causes, only one being stated. Minter v. Gose [Wyo.] 78 P. 948.

10. Insertion of words in original amended complaint of no effect unless they are also inserted in defendant's copy. Guarino v. Firemen's Ins. Co., 44 Misc. 218, 88 N. Y. S. 1044.

11. Hillyer v. Winsted [Conn.] 59 A. 40.

12. See 2 Curr. L. 1193.

13. Spotswood v. Morris [Idaho] 77 P. 216. A plaintiff may state his cause of action in different forms in separate counts to meet any phase of the case which it is anticipated that the evidence may show. Drolshagen v. Union Depot R. Co. [Mo.] 85 S. W. 344.

14. In action to recover commissions for sale of realty, where exact nature of plaintiff's rights and defendant's liability depends upon facts within peculiar knowledge of defendant. Spotswood v. Morris [Idaho] 77 P. 216. A count is a part of the declaration wherein plaintiff sets forth a distinct cause of action. Misnomer to call paragraphs of answer "counts." Ryan v. Riddle [Mo. App.] 82 S. W. 1117. In action for injuries, plaintiff may allege different acts of negligence, or that the negligence was committed in different ways, though they are inconsistent. Griffin v. Atlantic Coast Line R. Co., 134 N. C. 101, 46 S. E. 7. Where plaintiff alleged that he was injured by starting of train while he was attempting to alight, and in amendment that injury was caused by negligence of porter in commanding him to alight before train stopped, held that the two causes of action were inconsistent and that jury should have been required to find which version was true. Id.

15. Allegations in action for injuries that they were caused by striking plaintiff, thereby causing him to lose his hold and fall off car, inconsistent with allegation that they were caused by running over him while he was on the street. Drolshagen v. Union Depot R. Co. [Mo.] 85 S. W. 344. Allegations that injuries were caused by starting car without giving passenger time to alight, and by allowing her to alight while it was in motion, held inconsistent. Behen v. St. Louis Transit Co. [Mo.] 85 S. W. 346. Causes for failure to furnish safe place to work and for negligence of fellow-servant. Illinois Cent. R. Co. v. Abrams [Miss.] 36 So. 542.

16. Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268.

17. Equitable Securities Co. v. Montrose & D. Canal Co. [Colo. App.] 79 P. 747. Mo. Rev. St. 1899, § 593. Shinn v. Guyton & H. Mule Co. [Mo. App.] 83 S. W. 1015. Plaintiff may plead as many causes of action of the same general character as he possesses, provided each is stated in a separate count. In action against city for personal injuries, proper not to require plaintiff to elect between causes of action. Watters v. Waterloo [Iowa] 101 N. W. 871. Complaint in action for damages for wrongfully obtaining injunction held to state three causes of action, and action properly dismissed for failure to comply with order requiring them to be separately stated. Burdick v. Carbondale Inv. Co. [Kan.] 80 P. 40. If defendant waives such objection, plaintiff has the right to the relief to which all the allegations show him to be entitled. That two causes of action are not separately stated. Welborn v. Dixon [S. C.] 49 S. E. 232. The fact that several causes of action properly joined are not separately stated is no ground for demurrer in California. Several nuisances. Astill v. South Yuba Water Co. [Cal.] 79 P. 594.

18. Complaint in action to compel directors in accident association to account for misappropriated funds held to state single cause of action. Powell v. Hinkley, 93 App. Div. 138, 87 N. Y. S. 2. On a motion to compel plaintiff to file an amended complaint specifically setting forth and numbering his several causes of action defendant cannot raise the question of the sufficiency of the complaint as stating a cause of action. Id. Complaint for conversion held to set forth four causes of action [N. Y. Code Civ. Proc. § 483]. Whitney v. Wenman, 96 App. Div. 290, 89 N. Y. S. 296. Complaint in action by stockholder against corporation and directors, alleging that they had acquired stocks

that any fact common to several causes of action or defenses, when once pleaded, may be made a part of subscquent causes of action or defenses in the same pleading by reference thereto, without repetition.[20]

Damages for all the causes of action in the several counts may be claimed at the end of the declaration.[21]

Several causes of action, whether legal or equitable or both, may be united in the same complaint, where they arise out of the same transaction, or transactions connected with the same subject of action,[22] provided they affect all the parties to the action,[23] and do not require different places of trial.[24] The test is whether

belonging to corporation by collusion and fraud and seeking to recover them for corporation, held not to state more than one cause of action. O'Connor v. Virginia Passenger & Power Co., 45 Misc. 228, 92 N. Y. S. 161. Causes of action for false imprisonment and malicious prosecution. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749. An order requiring plaintiff to separately state and number causes of action will not be made unless the complaint appears to state more than one good cause of action. Action held one for malicious prosecution only. Id. In court of equity, where plaintiff intends to state but one, and it is fairly doubtful whether he bas stated more, will not be required. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170.

19. Equitable Securities Co. v. Montrose & D. Canal Co. [Colo. App.] 79 P. 747. Each paragraph must proceed upon a definite theory, but if, from all the facts averred therein, a precise theory is deducible under which the paragraph is sufficient, it will not be rendered bad by reason of redundant or detached allegations tending toward, yet insufficient to state, another cause of action. Borror v. Carrier [Ind. App.] 73 N. E. 123. Cannot be aided by facts alleged in any other paragraph. Fact that plaintiff may state single cause in several counts or paragraphs does not change rule. Daly v. Gubbins [Ind. App.] 73 N. E. 833. Where two paragraphs are bad, judgment cannot be sustained unless record affirmatively shows that it was based on third paragraph. Id. Where there is an insufficient paragraph of the complaint in the record to which a demurrer has been overruled, it will be presumed, in the absence of a showing to the contrary, that the error perpetuated itself in the finding and judgment, and this vitiates the result, though the evidence may also have warranted a finding and judgment on a good paragraph of the complaint. Chicago, etc., R. Co. v. Reyman [Ind.] 73 N. E. 587. Two allegations of negligence held to state but one cause of action, though stated in separate paragraphs. General verdict good. Leu v. St. Louis Transit Co. [Mo. App.] 85 S. W. 137. The question whether allegations are irrelevant and redundant must be determined by reference alone to the cause of action in which they are set out. Berry v. Moore Co. [S. C.] 48 S. E. 249. Where causes of action are separately stated, a party moving to strike out parts of them as irrelevant and redundant cannot refer to them jointly for the purpose of establishing that fact. Id. When attacked by separate demurrers, each cause of action must be considered by itself. Equltable Securities Co. v. Montrose & D. Canal Co. [Colo. App.] 79 P. 747.

20. Burdick v. Carbondale Inv. Co. [Kan.] 80 P. 40. Description of tenement in action of trespass and ejectment against lessee. Fellows v. Chipman [R. I.] 58 A. 663. Matters of inducement. Equitable Securities Co. v. Montrose & D. Canal Co. [Colo. App.] 79 P. 747.

21. Need not insert claim at end of each count, where language broad enough to cover all. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

22. Minn. Gen. St. 1894, § 5260, sets out six classes and provides that causes united must belong to only one of them, and must not require different places of trial. Hanna v. Duxburry [Minn.] 101 N. W. 971. Causes of action against agent for sale of realty and purchasers alleging fraud improperly joined. Id. Cause of action for rent and one for damages to land by tenant properly joined [Mo. Rev. St. 1899, § 593]. Shinn v. Guyton & H. Mule Co. [Mo. App.] 83 S. W. 1015. N. M. Comp. Laws 1897, § 2685, subsec. 33. Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806. Practically same provisions found in N. Y. Code Civ. Proc. § 484, subd. 9. Mack v. Latta, 83 App. Div. 242, 82 N. Y. S. 130; Campbell v. Hallihan, 90 N. Y. S. 432. Where plaintiff seeks to rescind a subscription and secure the return of money paid from a corporation defendant or in case that is impossible to recover from the officers making the misrepresentations on which the action is based, the same sum as damages, there is but one cause of action alleged if the complaint is not sufficient as against the individual defendants. Demurrer for improper joinder of causes overruled. Mack v. Latta, 83 App. Div. 242, 82 N. Y. S. 130. Causes of action for breach of warranty of gun, which exploded and for the wrong in putting defective and dangerous weapon on the market. Reed v. Livermore, 91 N. Y. S. 986. Whether legal or equitable or both [N. C. Code, § 267]. Reynolds v. Mt. Airy & E. R. Co., 136 N. C. 345, 48 S. E. 765; Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234. Statute to be liberally construed according to rule as to remedial laws [Wis. Rev. St. 1898, § 2647]. Emerson v. Nash [Wis.] 102 N. W. 921. Causes of action arising out of contract to convey land and to obtain options for defendant on other lands held properly united. Id.

23. All the defendants must be affected by each of them. Cause of action for wrongful attachment cannot be joined with one against surety for breach of attachment bond. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234. Minn. Gen. St. 1894, § 5260, subd. 7. Hanna v. Duxburry [Minn.] 101 N. W. 971. Employe

the two are founded on, or closely connected with, the same transaction.[25] The cause of action is the statement of facts upon the happening or nonhappening of which the plaintiff bases his action.[26] Any event in which two or more persons are actors, involving a right which may presently or by what may proximately occur in respect thereto be violated, creating an actionable wrong, is a transaction within the meaning of the statute.[27]

injured while working in elevator shaft by negligent operation of elevator by third person may join cause of action against him with one against employer for failure to furnish safe place to work, the two defendants being joint tort feasors. Lynch v. Elektron Mfg. Co., 94 App. Div. 408, 88 N. Y. S. 70. Two distinct causes of action, which require the application of different legal principles, affect different parties, and require different relief, cannot be joined. Complaint seeking to set aside sale of stock and bonds, and to compel defendant to account for property of corporation received by virtue of his control of corporation, acquired by transfer of stock in violation of alleged agreement with plaintiff, held demurrable. Groh v. Flammer, 91 N. Y. S. 423. Cause of action by corporate stockholder against president for breach of contract, by which plaintiff was to be president, cannot be joined with one for wrongful appropriation of corporate funds. Stoddard v. Bell & Co., 91 N. Y. S. 477. Distinct and separate claims against different persons cannot be joined [Ga. Civ. Code 1895, § 4938]. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595. Cause of action against one defendant for recovery of ice machine and reasonable rent of same, improperly joined with cause against others for conversion of certain personalty. Sims v. Cordele Ice Co., 119 Ga. 597, 46 S. E. 841. If a part of the plaintiffs have one cause of action and the rest another, they must assert the same in separate suits. Miller v. Butler, 121 Ga. 758, 49 S. E. 754. Where beneficiaries under trust deed have cause of action against defendant alone or against defendant and trustee, or right to recover from defendant an amount equal to consideration for consent verdict in defendant's favor, same must be asserted in separate suit. Id. Except in actions to enforce mortgages and other liens, different causes of action can be united only when all of them affect all the parties to the action. Kan. Civ. Code, § 83. Cause of action for equitable accounting against two defendants cannot be joined with action at law to recover damages for tort against another defendant not affected by first cause. Benson v. Battey [Kan.] 78 P. 844. Cause of action for equitable accounting against two defendants and action at law to recover damages for tort against another not affected by first. Id. There is no misjoinder in an action of ejectment brought by joint owners of a tract of land against several defendants claiming and holding separate parcels thereof. Bryant v. Stephens, 26 Ky. L. R. 718, 82 S. W. 423. Holder of bonds guaranteed by railroad company cannot join action to recover them from one to whom they were delivered for specific purposes and who wrongfully refuses to return them, with suit against company which had acquired assets of guarantor, under void foreclosure proceedings, to apply such assets in payment of the bonds. Latter company in no way responsible for withholding of bonds, and has no equitable remedy against it until he has recovered judgment at law for their recovery, and judgment at law against guarantor. Sawyer v. Atchison, etc., R. Co. [C. C. A.] 129 F. 100. A count upon an individual demand cannot be joined with one upon a partnership demand, where neither partner is dead. Fatal on demurrer. Malsby v. Lanark Fuel Co., 55 W. Va. 484, 47 S. E. 358. Causes growing out of contract to procure real estate options held to affect all parties [Wis. Rev. St. 1898, § 2647]. Emerson v. Nash [Wis.] 102 N. W. 921.

24. Wis. Rev. St. 1898, § 2647. Emerson v. Nash [Wis.] 102 N. W. 921. Where the court would not have jurisdiction of one of such causes, it should be dismissed, because of amount involved. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234. Cause of action for infringement of patent and one for unfair competition in trade cannot be joined in Federal court, though relating to same subject-matter, where there is no allegation of diverse citizenship to give court jurisdiction of second cause. Demurrer for multifariousness sustained. King & Co. v. Inlander, 133 F. 416.

25. Cause of action for converting horse and buggy cannot be joined with one for subsequent assault on plaintiff while attempting to recover them. Campbell v. Hallihan, 90 N. Y. S. 432. All of a series of acts having in view the consummation of a single fraudulent purpose, regardless of the number of persons concerned therein, are parts of one subject-matter; and where that is a primary subject of action or is an incidental part of a subject of controversy including it and other matters however numerous, the entire subject-matter may be brought into a single action for adjudication. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

26. Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642. To constitute a cause of action there must be a right possessed by one or more persons and a violation thereof by others. Emerson v. Nash [Wis.] 102 N. W. 921. Is some particular right of the plaintiff against the defendant, together with some violation of that right. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318; Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972.

27. For full discussion of meaning of terms "causes of action," "transaction," and "primary right," see Emerson v. Nash [Wis.] 102 N. W. 921. When a contract creates situation involving presently or proximately separate rights, each of which, when violated, would constitute a complete ground of complaint for judicial redress, the making of the contract, which is the initial circumstance, is a "transaction," and such grounds of complaint are separate "causes of action arising out of the same transaction." Id.

A single transaction causing a single item of damage constitutes a single cause of action.[28] The rule forbidding misjoinder is one of convenience and expediency, and should be construed with reference to the broader policy enjoining a multiplicity of suits.[29] Mere matters of description or inducement not relied on as a separate cause of action,[30] or the fact that a complaint under one section of a statute incidentally states facts also constituting a cause of action under another section, does not cause a misjoinder,[31] nor do different elements of damage arising from the same nuisance constitute different causes of action.[32] Neither will it be held that a complaint unites two or more causes of action when an elaborate argument is necessary to show that more than one such cause can be proved thereunder.[33] The fact that causes of action are blended and commingled in one statement does not cure a misjoinder nor prevent the operation of a demurrer on that ground.[34]

Inconsistent causes of action cannot ordinarily be joined.[35] They will be

Term transactions connected with same subject of action applies more generally, if not exclusively, to equitable suits. Is not surplusage, but there is a distinction between the two. Id.

28. Otoe County v. Dorman [Neb.] 98 N. W. 1064.

29. St. Louis S. W. R. Co. v. Hengst [Tex. Civ. App.] 81 S. W. 832. After death of plaintiff in suit for personal injuries, his children held entitled to file amended petition claiming damages for his death, or, in the alternative, in case his death was not the result of the injuries, for a recovery on the action as originally brought, though the causes of action were in a sense distinct. Id.

30. Averments of negligence which are merely descriptive of the mode in which the contract was broken do not make action ex delicto. Breach of implied contract to deliver telegram promptly. Western Union Tel. Co. v. Crumpton [Ala.] 36 So. 517. In action against directors of insolvent corporation for payment of dividends with knowledge that capital was impaired, neither a count for payment of dividends authorized by vote of directors, or one for payment without such vote held to state two causes of action. Davenport v. Lines [Conn.] 59 A. 603.

Complaint held to state single cause of action: In action for damages for injuries to houses by operation of stone quarry and for injunction, certain allegations of complaint held to go to propriety of injunction and not to constitute basis of demand for damages so that demurrer on ground that causes of action for injuries to person and property had been improperly united or should have been separately stated was properly overruled. Rooney v. Gray, 145 Cal. 753, 79 P. 523. In action to have plaintiff adjudged owner of certain lands and to have judgment quieting title in defendants declared void as to him. Parsons v. Weis, 144 Cal. 410, 77 P. 1007. Petition alleging that defendant maliciously caused plaintiff's indictment and prosecution, and without warrant arrested and imprisoned him, held to state only one cause of action, for malicious prosecution. Jones v. Louisville & N. R. Co., 26 Ky. L. R. 690, 82 S. W. 416. Complaint held to state but one cause of action for dissolution of partnership, and for an accounting. Whittingham v. Darrin, 45 Misc. 478, 92 N. Y. S. 752. Complaint alleging that plaintiff was shot and wounded through negligence and improper and unlawful conduct of defendant held only for negligence, and motion to require election properly denied. Magar v. Hammond, 95 App. Div. 249, 88 N. Y. S. 796. In action for trespass against several defendants for driving sheep on plaintiff's land. Minter v. Gose [Wyo.] 78 P. 948.

31. Action for injuries to employe under Burns' Ann. St. Ind. 1901, § 7083. Chicago & E. R. Co. v. Lain [Ind. App.] 72 N. E. 539.

32. Both by common law and California statute (Code Civ. Proc. § 731), party may obtain judgment abating it and recover damages. Astill v. South Yuba Water Co. [Cal.] 79 P. 594. In action for injuries to realty by maintenance of railroad yards, allegation of impairment of health of plaintiff's family merely specification of damages to residence as home, and not statement of cause of action for injury to health of family. No misjoinder. Louisville & N. Terminal Co. v. Lellyett [Tenn.] 85 S. W. 881.

33. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66. Complaint held to state one cause of action founded on fraud, and in the nature of a creditor's bill. Id. It will not be assumed that the pleader intends to conceal a cause of action in a complaint based on another (Id.), nor that he intends to join inconsistent causes (Id.).

34. Benson v. Battey [Kan.] 78 P. 844; Chase v. Atchison, etc., R. Co. [Kan.] 79 P. 153. A demurrer for improper joinder of causes of action will lie, though they are not separated and distinguished. Reed v. Livermore, 91 N. Y. S. 986.

35. N. Y. Code Civ. Proc. § 484. Lomb v. Richard, 45 Misc. 129, 91 N. Y. S. 881. Repugnancy is as objectionable in a petition as in an answer. Drolshagen v. Union Depot R. Co. [Mo.] 85 S. W. 344. Counts charging carrier with not having delivered all of certain goods received for carriage, and with having issued bills for more than it received held not inconsistent. Frieze v. Alabama G. S. R. Co., 99 App. Div. 545, 91 N. Y. S. 81. In action for infringement of trade-mark, plaintiff held properly required to elect between claim for injunction and accounting and claim for damages based on fraud. Taylor, Jr., & Sons Co. v. Taylor [Ky.] 85 S. W. 1085. Cause of action for breach of contract cannot be joined with one for its re-

held inconsistent when proof of one would disprove the other,[36] or when they require different forms of judgment and final process.[37]

Two or more causes of action belonging to the same statutory class,[38] or affecting real property,[39] or on contract, express or implied, may ordinarily be joined.[40] So may separate causes of action for the recovery of penalties under the same statute,[41] or counts for common-law negligence with counts under the employer's liability acts;[42] but actions on penal statutes may not be joined with actions at common law.[43]

As a general rule causes of action on contract cannot be joined with causes in tort,[44] nor can a claim upon contract and one in tort be joined in the same count.[45] There seems to be a conflict of authority as to the effect on this rule of the statutory provision allowing causes of action arising out of the same transaction to be joined.[46]

scission on ground of fraud. Lomb v. Richard, 45 Misc. 129, 91 N. Y. S. 881.

36. Boyd v. St. Louis Transit Co. [Mo. App.] 83 S. W. 287. Counts on written and verbal contracts to divide damages resulting from accident at crossing not inconsistent. Southwest Mo. E. R. Co. v. Missouri Pac. R. Co. [Mo. App.] 85 S. W. 966.

37. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66. A court alleging a waiver of exemptions may not be joined with counts not alleging such waiver. Johnson Bros. v. Selden [Ala.] 37 So. 249, reafg. McCrummen v. Campbell, 82 Ala. 566, 2 So. 482.

38. Causes of action for distinct nuisances [Cal. Code Civ. Proc. § 427]. Astill v. South Yuba Water Co. [Cal.] 79 P. 594.

39. Causes of action for partition and for the recovery of real property may be united in one action, or may be tried as a single cause of action when so pleaded and no objection is made. Howard v. Carter [Kan.] 80 P. 61.

40. When not inconsistent. Causes of action on written and verbal contracts to divide damages resulting from accident at railroad crossing [Mo. Rev. St. 1899, § 593]. Southwest Mo. Elec. R. Co. v. Missouri Pac. R. Co. [Mo. App.] 85 S. W. 966. Counts in assumpsit with counts in assumpsit on a contract under seal. Under Va. Act Jan. 25, 1898 (Acts 1897-98, p. 103), providing that an action of assumpsit may be maintained in any case where an action of covenant will lie. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853. On special contract and quantum meruit. Burton v. Rosemary Mfg. Co., 132 N. C. 17, 43 S. E. 480. May recover on the common counts in general assumpsit, provided he sets forth facts sufficient to constitute a cause of action, though he does not specifically declare upon a second cause of action. Id. A special count in assumpsit for breach of contract with the common count for work and labor done. Bingham v. Davidson [Ala.] 37 So. 738. For the payment of money. Ala. Code, § 3292. For breach of implied contract by failure to promptly deliver two telegrams. Western Union Tel. Co. v. Crumpton [Ala.] 36 So. 517.

41. Counts for separate causes of action to recover statutory penalties for failure to discharge mortgages of record may be joined in the same complaint. Partridge v. Wilson [Ala.] 37 So. 441.

42. Counts at common law for negligent injury to one on defendant's premises by invitation may be joined with counts under the employers' liability act, though inconsistent. Sloss Iron & Steel Co. v. Tilson [Ala.] 37 So. 427; Mulligan v. Erie R. Co., 99 App. Div. 499, 91 N. Y. S. 60.

43. At least when principles of justice violated thereby. A cause of action based on a statute imposing a liability on directors of a corporation in three times the amount paid in on their stock for the violation of certain statutory provisions cannot be joined with the common counts in assumpsit and counts based on fraud. Penalty imposed by Mich. Comp. Laws 1897, § 7059. Liability of director would not be precisely ascertained by verdict. Wachusett Nat. Bank v. Steel [Mich.] 98 N. W. 748.

44. Count for failure to deliver telegram promptly held one in tort for breach of common-law duty as carrier, and hence improperly joined with counts for breach of contract to deliver it. Western Union Tel. Co. v. Waters, 139 Ala. 652, 36 So. 773. Ga. Civ. Code 1895, §§ 4938, 4944. Grantee in security deed may not join suit against widow of deceased grantor to recover land described in deed, and suit against administrator of grantor's estate to recover judgment on debt secured by deed. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595. Petition construed as whole held to show intention to sue for tort only, and no misjoinder of causes. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68. Cause of action in forcible entry and detainer, sounding in tort, with one in unlawful detainer, sounding in contract. Crawford v. Alexander [Ind. T.] 82 S. W. 707. Count alleging right to use of water of canal on payment of rent, which defendant refused to receive, and averring that defendant wrongfully diverted water, held framed in tort. Colonial Woolen Co. v. Trenton Water Power Co. [N. J. Law] 58 A. 172. Action for personal injuries to employe with one on contract of insurance against accidents. Duerler Mfg. Co. v. Dullnig [Tex. Civ. App.] 83 S. W. 889. Action in tort for injuries to seamen with one on contract to furnish medical care, etc., at expense of ship. Sanders v. Stimson Mill Co., 34 Wash. 357, 75 P. 974.

45. Declaration bad on general demurrer. Wilkins v. Standard Oil Co. [N. J. Law] 59 A. 14.

Claims not accruing to plaintiff in the same capacity cannot be joined.[47] Counts in trover and in case[48] or in trespass quare clausum et de bonis are properly joined,[49] but counts in trespass,[50] or assumpsit cannot be joined with counts in case.[51] A cause of action for malicious prosecution may be joined with one for false imprisonment,[52] but not with one for slander or libel.[53] In a complaint invoking equitable jurisdiction, incidental and subsidiary claims are not improperly joined, though they state separate and distinct causes of action.[54]

Where no right of recovery exists in favor of plaintiff against any of the defendants, the question as to whether there was a misjoinder of causes of action or of parties is of no importance to him.[55]

Election.[56]—In case two causes of action are improperly joined, plaintiff should, on motion, be required to elect between them.[57] He is entitled to make the election himself,[58] and, where both are properly pleaded, it is error to strike out one of them on motion without giving him an opportunity to do so.[59]

In some states the court may order the action to be divided into as many actions as may be necessary to the proper determination of the causes of action therein mentioned.[60]

Splitting causes of action.[61]—An indivisible cause of action cannot be split

46. **In North Carolina** a cause of action in tort may be joined with one in contract, provided they both come within the same statutory class. Reynolds v. Mt. Airy & E. R. Co., 136 N. C. 345, 48 S. E. 765.

In New York a different rule prevails. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66.

47. Count founded on statutory liability for wrongful death which he seeks to enforce as representative of next of kin, and count at common law for injuries to deceased for which he could have recovered during life and which plaintiff seeks to recover as his representative cannot be joined. Brennan v. Standard Oil Co. [Mass.] 73 N. E. 472.

48. Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 72 N. E. 200.

49. Meloon v. Read [N. H.] 59 A. 946.

50. In action in case for negligence, demurrer to count alleging assault properly sustained. Smith v. Rhode Island Co. [R. I.] 57 A. 1056.

51. Davis v. Smith [R. I.] 58 A. 630.

52. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

53. Not under Ky. Civ. Code, § 83, subd. 5, permitting joinder of actions for injury to character. Tandy v. Riley, 26 Ky. L. R. 98, 80 S. W. 776. Malicious prosecution and abuse of process. Green v. Davies, 91 N. Y. S. 470. Acts done pursuant to a conspiracy may be averred and proved, not as separate causes of action, but as means used to work injury and inflict damage. Complaint charging conspiracy and unlawful combination, pursuant to which slanders were uttered and libels published, and plaintiff was illegally arrested and maliciously prosecuted, states single cause of action. Id.

54. Anderson v. Dyer & Bro. [Minn.] 101 N. W. 1061.

55. Action by creditor against directors of insolvent corporation. Emanuel v. Barnard [Neb.] 99 N. W. 666.

56. See 2 Curr. L. 1195. See. also, Election and Waiver, § 2A, 3 Curr. L. 1178.

57. Inconsistent. Drolshagen v. Union Depot R. Co. [Mo.] 85 S. W. 344; Behen v. St. Louis Transit Co. [Mo.] 85 S. W. 346. When inconsistency plainly appears on face of pleading. Frieze v. Alabama G. S. R. Co., 99 App. Div. 545, 91 N. Y. S. 81. The doctrine of an election of remedies applies only to cases where there is by law or by contract a choice between two remedies which proceed on opposite and irreconcilable claims of right. Mulligan v. Erie R. Co., 99 App. Div. 499, 91 N. Y. S. 60. In such case a party resorting to one remedy is bound by his election, and hence barred from the prosecution of the other. Id. Where the allegations are appropriate to either of two causes. Welborn v. Dixon [S. C.] 49 S. E. 232. Proper to refuse to require plaintiff to make an election until the case has developed far enough to enable the court, in view of the whole case, to pass intelligently on the subject. Counts on contract and quantum meruit in action for services. Rosenberg v. Heidelberg, 98 App. Div. 17, 90 N. Y. S. 684. Court may reserve his decision and thereafter try the case upon certain of the causes of action only. Lewis v. Utah Const. Co. [Idaho] 77 P. 336. Election may be required at any time before defense [Ky. Civ. Code Prac. § 85]. Bryant v. Stephens, 26 Ky. L. R. 718, 82 S. W. 423.

58. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201.

59. Proper practice is by motion to require election. Causes of action for physical suffering and for death. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201.

60. N. C. Code, § 272. Pittsburg, etc., R. Co. v. Wakefield Hardware Co., 135 N. C. 73, 47 S. E. 234. In Kansas when a demurrer is sustained on the ground of a misjoinder of causes of action, the court, upon application, is required to allow the plaintiff to file several petitions and proceed without further service [Civ. Code, § 92]. Benson v. Battey [Kan.] 78 P. 844.

61. See 2 Curr. L. 1195, n. 26, 27.

up.[62] The rule will not be applied where no injury can accrue to the debtor or a second claim be made for the same demand, if its application will defeat the statutory lien in favor of mechanics and materialmen.[63]

Prayer.[64]—The prayer for judgment forms no part of the statement of the cause of action.[65] It may be resorted to when the complaint is ambiguous, for the purpose of ascertaining the pleader's intention, but cannot control the nature of the action as against a clearly expressed intention to the contrary.[66] It is of no avail unless the petition states facts upon which the relief may be properly granted.[67]

The fact that a party asks relief to which he is not entitled does not ordinarily vitiate his complaint,[68] nor is he generally restricted to the relief demanded.[69]

The equitable prayer for general relief has been substantially adopted by the codes.[70]

There is a conflict of authority as to the effect of a failure to include a prayer for relief. Some courts hold that none is necessary where the appropriate relief sufficiently appears from the allegations of the complaint,[71] and others that the court has no jurisdiction to decree any relief where the petition demands none.[72]

62. Where defendant interposes indivisible cause of action for $150 as set-off, and then withdraws $50 of it, and has judgment for $100, he is barred from suing for balance (Andreas v. School Dist. No. 4, Fractional, Tp. of Leavitt [Mich.] 100 N. W. 1021) though action was before justice who could not render judgment for more than $100 (Id.), though he was not only defendant and claim was due him alone, where action was on contract against him as principal and others as sureties (Id.), and though plaintiff's claim was for unliquidated damages, so that he had no right to interpose set-off (Id.). One cannot ordinarily split a demand and recover in one action the principal and in another the interest. McDonald v. Holdom, 208 Ill. 128, 70 N. E. 21. A cause of action on an entire contract cannot be split. Plaintiff must elect his remedy. Wilkerson v. Bacon [Tex. Civ. App.] 79 S. W. 348.

63. Christopher & S. Architectural Iron & Foundry Co. v. Kelly, 91 Mo. App. 93.

64. See 2 Curr. L. 1186, n. 59-64.

65. Frick v. Freudenthal, 90 N. Y. S. 344; Fairy v. Kennedy, 68 S. C. 250, 47 S. E. 138.

66. Complaint held to sound in tort, though prayer was for damages in liquidated amount with interest from day certain. Frick v. Freudenthal, 90 N. Y. S. 344. Not conclusive as to the character of the action (Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66), unless complaint sets forth facts that may support equally an action at law or in equity (Id.). Fact that money judgment only is asked does not necessarily control if complaint sets out facts which entitle plaintiff to equitable relief if proven. Kuntz v. Schnugg, 90 N. Y. S. 933. May be considered in determining the theory of the pleading. Borror v. Carrier [Ind. App.] 73 N. E. 123. Not a part of the cause of action and is not controlling. Fairy v. Kennedy, 68 S. C. 250, 47 S. E. 138. The sufficiency of a complaint when attacked at the trial by an objection to the introduction of evidence does not depend upon the prayer for relief. Under S. D. Rev. Code Civ. Proc. § 311, authorizing court, where answer has been served, to grant plaintiff any relief consistent with case made by complaint and embraced within issues. Woodford v. Kelley [S. D.] 101 N. W. 1069.

67. A prayer for equitable relief in an action at law. Emanuel v. Barnard [Neb.] 99 N. W. 666.

68. Will not be denied the relief to which he is entitled merely because he claims too much. Where bill of particulars showed that plaintiff had lost title to part of land claimed, held error to sustain demurrer to complaint, and that he was entitled to recover balance of lot on proper showing. Morrison v. Berlin [Wash.] 79 P. 1114. Plaintiff's failure to call court's attention to fact that tax foreclosure proceedings affected part of lot only did not preclude him from obtaining reversal, in absence of actual deceit. Id. More than entitled to. Mathot v. Triebel, 90 N. Y. S. 903. A complaint stating a cause of action will not be dismissed, though it does not state facts warranting the equitable relief prayed. Complaint sufficient to sustain decree for specific performance. McKay v. Calderwood [Wash.] 79 P. 629. A complaint stating a cause of action for breach of contract but seeking to recover damages as for a tort is bad on demurrer. Action against landlord for failure to repair ceiling, resulting in personal injuries. Spero v. Levy, 43 Misc. 24, 86 N. Y. S. 869.

69. May have any additional relief not inconsistent with the pleadings and the facts proved. On appeal, case is heard on facts alleged in pleadings. Voorhees v. Porter, 134 N. C. 591, 47 S. E. 31. By statute in Louisiana, if one demand less than is due him and does not amend his petition in order to augment his demand, he shall lose the overplus. La. Code Prac. art. 156. Plaintiff not entitled to greater rate of valuation for logs than that alleged. Carre & Co. v. Massie, 113 La. 608, 37 So. 530.

70. See Equity, § 10C, 3 Curr. L. 1234. A prayer for such other and further relief as shall be meet and agreeable to equity and good conscience is sufficient to warrant the court in granting any relief to which plaintiffs are entitled upon the allegations of the complaint and the proof introduced at the trial. Mont. Code Civ. Proc. § 1003. Com-

§ 3. *The plea or answer.*[73] *General principles.*[74]—In code states a defendant is generally allowed and required to set up in his answer as many grounds of defense, counterclaim and set-off, whether legal or equitable, as he may have.[75] There seems to be a conflict of authority as to whether such a provision authorizes absolutely inconsistent defenses.[76] Some courts hold that it does,[77] provided that each is stated in a separate paragraph and is complete in itself,[78] while others hold that defenses cannot be so inconsistent that if one is true the other must be false, because of the requirements in regard to verification.[79] One of two inconsistent pleas cannot be used to disprove the other, or to establish the fact therein alleged.[80]

Each defense must be complete in itself and cannot be asserted by general denial in the answer.[81] Denials in another part of the pleading cannot be treated as a part of such defense unless repeated or incorporated therein and made a part thereof by reference.[82]

plaint in action to quiet title, cancel contracts, and remove cloud sufficient. Merk v. Bowery Min. Co. [Mont.] 78 P. 519.

71. Staton v. Webb [N. C.] 49 S. E. 55. Where amount sued for can be gathered from petition, that fact is sufficient to support judgment, though it fails to allege amount due, or to pray judgment in any sum. Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470. A creditor's bill alleging facts entitling plaintiff to be subrogated in equity, under the prayer for general relief, to the rights of a judgment creditor, is not demurrable for failure to specifically ask for such relief. Hawpe v. Bumgardner [Va.] 48 S. E. 554.

72. Action to prevent removal of school teacher. Bowman v. Ray, 25 Ky. L. R. 2131, 80 S. W. 516.

73. In equity, see Equity, §§ 6F, 6G, 3 Curr. L. 1228, 1229.

74. See 2 Curr. L. 1196, 1200.

75. In action to cancel note and mortgage for breach of warranty may seek reformation of deed and mortgage and their cancellation. Motion to strike out or elect unavailing [Burns' Ann. St. Ind. 1901, § 350]. Johnson v. Sherwood [Ind. App.] 73 N. E. 180; Sparks v. Green [S. C.] 48 S. E. 61. N. Y. Code Civ. Proc. § 507. Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857. Neb. Code Civ. Proc. § 100. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 101 N. W. 341. May plead subrogation as defense to legal cause of action. Potter v. Lohse [Mont.] 77 P. 419. Whether dilatory, in abatement, or in bar. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479; Tutty v. Ryan [Wyo.] 78 P. 657.

76. See 2 Curr. L. 1197, n. 48-50.

77. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. May plead and rely on inconsistent defenses subject to instructions as to their proper effect. Thus in conversion may assert rights as absolute owner and as mortgagee. Potter v. Lohse [Mont.] 77 P. 419. In Texas may plead as many several matters, whether of law or fact, as he shall think necessary for his defense, and which may be pertinent to the cause. Wildey Lodge v. Paris [Tex. Civ. App.] 81 S. W. 99.

78. Johnson v. Sherwood [Ind. App.] 73 N. E. 180; Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857. If pertinent to the cause, filed all at the same time, and in due course of pleading. Right to possession as tenants and as owners in fee simple. Wildey Lodge v. Paris [Tex. Civ. App.] 81 S. W. 99.

79. Such condition is implied from requirements in regard to verification. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 101 N. W. 341. In action on accident insurance policy, defenses that no accident happened and that no notice was given not inconsistent. Id. Defense that no policy was in force at time of loss is inconsistent with defense based upon conditions of policy, such as that proofs of loss were not furnished in accordance with its terms. Id. In action to enjoin collection of taxes, defenses held not inconsistent, and court erred in requiring election. Horton v. Driskell [Wyo.] 77 P. 354. Cannot be presumed that defendant had no evidence to support one of them. Id.

80. Allegation of right to possession as owners in fee cannot be used to disprove allegation of right as lessee. Wildey Lodge v. Paris [Tex. Civ. App.] 81 S. W. 99.

81. Flournoy v. Osgood, 90 N. Y. S. 972.

82. Barnard v. Lawyers' Title Ins. Co., 91 N. Y. S. 41. An affirmative defense or counterclaim is a separate plea. Goldberg v. Wood, 90 N. Y. S. 427; Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857. Denials in paragraphs 1 and 2 of answer held no part of last three paragraphs meant as a single separate defense. Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 81. Where defense, without incorporating previous denials, alleged that particular cause of action set forth in complaint did not accrue within six years, and it clearly appears from the pleadings that it did accrue within six years, held that it was demurrable. Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857. Must not only confess but also avoid or bar, and hence defense merely setting forth contract different from one alleged in complaint, but not avoiding or barring latter, has no effect. Barnard v. Lawyers' Title Ins. Co., 91 N. Y. S. 41. A statement in an answer by way of counterclaim need not necessarily include a repetition of facts alleged as defensive matter or alleged in the complaint, provided they are so referred to as to make reasonably clear the purpose of the pleader to rely upon them. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356. When plaintiff, by replying, indicates that he considers them so incorporated,

Ordinarily a pleading cannot perform the office of both an answer and a counterclaim,[83] or of both a demurrer and an answer,[84] and grounds of demurrer cannot be set up in an answer.[85] In some states, however, a demurrer is treated as a defense, and is required to be pleaded in the answer.[86]

An answer must be responsive[87] and not evasive.[88] A plea in confession and avoidance must give color.[89] The statute of limitations is an affirmative defense,[90] and waiver is a proper special defense.[91] A defense that a contract sued on is against public policy need not be pleaded.[92] A plea that the maturity of the account sued on has been extended by plaintiff to a time subsequent to the institution of the suit and that the suit was prematurely brought is a plea in abatement.[93] Pleas in abatement must be certain to every intent.[94]

Defendants may, if they so elect, plead specially defenses in confession and avoidance which would be admissible in evidence under the general issue, and the fact that they are so admissible does not make the plea bad;[95] but special pleas which only aver matters that may be given in evidence under the general issue will generally be rejected.[96]

that view should prevail, unless the language of the counterclaim as a whole very clearly will not admit thereof. Id.

83. Johnson v. Sherwood [Ind. App.] 73 N. E. 180.

84. Both cannot be served in same pleading. Schlesinger v. Thalmessinger, 92 N. Y. S. 575. An answer raises an issue of fact and a demurrer one of law. Id.

85. That counterclaim does not set up facts sufficient to constitute a cause of action. Schlesinger v. Thalmessinger, 92 N. Y. S. 575.

86. Arizona Rev. St. 1901, par. 1350. Perrin v. Mallory Commission Co. [Ariz.] 76 P. 476. Same rule in Texas. Id.

87. Answer in suit to restrain unlawful combination held irresponsive and evasive. Straus v. American Publishers' Ass'n, 96 App. Div. 315, 89 N. Y. S. 172. Answer, in action for price of coal, admitting liability for more than amount claimed, exclusive of interest, held demurrable. Harder v. Indiana Bituminous Coal Co. [Ind.] 71 N. E. 138. In action for price of goods, wares and merchandise, an answer alleging contract for purchase of lumber from plaintiff and breach by him held demurrable for failure to connect such contract with that sued on. Must be something to show that complaint and answer relate to same contract. Seelav v. McKenzie, 92 N. Y. S. 350.

88. A defendant should not be permitted to evade the admission of a material allegation of the complaint by shifting the time in which he addresses himself from the period contemplated in the complaint to a subsequent and much later period, the rights of the parties being determined as of the commencement of the action, and subsequent occurences being no defense. Straus v. American Publishers' Ass'n, 96 App. Div. 315, 89 N. Y. S. 172. Thus, the averments should not be made to date from the verification of the answer instead of from the verification of the complaint. Id. A petition charging facts peculiarly within defendant's knowledge will be taken as true where the answer is evasive. Ga. Civ. Code 1895, § 5054. As to amount of guano shipped to defendant by manufacturers. Horn v. Peacock [Ga.] 49 S. E. 722. An answer to restrain an alleged unlawful combination held not objectionable on the ground that defendants denied or averred facts on information or belief of which they had knowledge. Straus v. American Publishers' Ass'n, 96 App. Div. 315, 89 N. Y. S. 172.

89. In action to recover possession of leased premises for breach of covenant prohibiting their use for sale of liquor, plea that plaintiff permitted sale as alleged in complaint held properly stricken out, as it did not give color. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

90. Plaintiff need not plead and prove, in first instance, an exception taking case out of the statute, where complaint does not necessarily show case within statute. Metz v. Metz, 90 N. Y. S. 340.

91. That plaintiff waived breach of covenant in lease by accepting rent. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

92. Relief will be denied when invalidity appears from plaintiff's own showing. Fisher v. Hampton Transp. Co. [Mich.] 98 N. W. 1012.

93. Adams v. Branan, 120 Ga. 530, 48 S. E. 128.

94. All the particularity of the common law is required. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016.

95. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654.

96. In action for death due to defendant's negligence, pleas that death was due to deceased's physical condition. Richards v. Riverside Ironworks [W. Va.] 49 S. E. 437. Will be stricken on demurrer. Defenses in action for libel that article did not refer to plaintiff, and that it was a news item received in usual course of business, and published in good faith. Butler v. Evening Leader Co., 134 F. 994. It is not error to refuse to allow the filing of special pleas, where the matters sought to be set up thereby can be shown under the general issue previously filed, and the right to so show them is reserved in the order. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853. It is not error to strike them out. Granite Bldg. Corp. v. Greene [R. I.] 57

If two or more pleas are interposed as a defense to a declaration or to any count thereof, as for example, the plea of limitations and that of the general issue, and a demurrer is filed to the former and a replication or joinder of issue to the latter, a judgment on demurrer in favor of defendant entitles him to final judgment, though upon the plea of the general issue the facts may be found in favor of plaintiff.[97] An answer such as would be proper in equity, and a technical plea of the general issue, such as is known at the common law, should not be combined in a defense.[98] Two pleas of the general issue are improper.[99] Affirmative allegations of that which has been negatively pleaded should be stricken out.[1]

In some states if plaintiff files with his bill in an action on an account, a copy of the bill, note or account on which the suit is based, defendant is required to file an affidavit of defense within a specified time, or judgment may be entered against him as in case of a default.[2] A failure to file such affidavit is a conclusive admission, for the purposes of the suit, of the validity of the claim.[3] In Pennsylvania, in actions of assumpsit, the plaintiff's statement must be replied to by affidavit of defense.[4] Plaintiff is not entitled to judgment for an insufficient affidavit of defense where no such affidavit is required.[5]

In many states pleas of non est factum, nul tiel corporation and nul tiel record must be made under oath.[6]

The North Carolina statute requiring the defendant in actions to recover real property to give bond for costs and damages as a condition precedent to the right to answer applies only to a defendant in possession.[7] Hence where defendant in possession files a bond by leave after the expiration of the time for doing so, plaintiff is not entitled to judgment against him as for failure to answer.[8]

A substituted answer, which is in conflict with the original and sets up no defense to the merits, is properly stricken from the files.[9]

Denials and traverses.[10]—In code states the answer is usually required to

A. 649. In action to recover possession of leased property from assignee of lease for breach of assignment, pleas that assignment had not been made to defendant at time of breach (Id.), that plaintiff had not recognized assignment to defendant, and had refused to consent thereto (Id.), and that defendant held premises from plaintiff as tenant from year to year, held properly stricken out, because provable under general issue (Id.). Special pleas unnecessary, and rulings on demurrers thereto are inconsequential. Ivy Coal & Coke Co. v. Long, 139 Ala. 535, 36 So. 722. Error in sustaining a demurrer is harmless. Shafer v. Fry [Ind.] 73 N. E. 698. As to false representations. Worrell v. Kinnear Mfg. Co. [Va.] 49 S. E. 988; Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730.

97. Applies only where there are two distinct pleas and not same plea under different forms. Clark v. Mutual Reserve Life Ins. Co., 23 App. D. C. 546. Judgment will be reversed where record shows demurrer to first two pleas, first being in effect, and second in form, the general issue, and a judgment on the demurrer, the plaintiff electing not to amend, and no disposition being made of the third plea. Id. Stipulation withdrawing third plea will not be received on appeal where it reserves right to again file it in lower court. Id.

98. Answer is plea of general issue in another form. Clark v. Mutual Reserve Life Ins. Co., 23 App. D. C. 546.

99. First plea held, in effect, the general issue. One cannot be tried on demurrer and other on evidence to jury. Clark v. Mutual Reserve Life Ins. Co., 23 App. D. C. 546.

1. Where defendant denies contract as alleged in complaint, further allegations as to what she understands contract to be are properly stricken out. Robards v. Robards [Ky.] 85 S. W. 718.

2. R. I. Gen. Laws 1896, c. 239, § 14. O'Connell v. King [R. I.] 59 A. 926.

3. O'Connell v. King [R. I.] 59 A. 926.

4. Act May 25, 1887 (P. L. 271). Brady v. Osborn Engineering Co., 132 F. 412. Required only in actions on demands which are liquidated and certain, or which can be made so by proper averments. Not required in action for damages for breach of contract for failure to perform it in proper manner. Id.

5. Brady v. Osborn Engineering Co., 132 F. 412. Affidavit of defense to a scl. fa. on a mortgage which denies the indebtedness but fails to deny execution of mortgage. Stewart v. Linton, 204 Pa. 207, 53 A. 744.

6. See Verification, 2 Curr. L. 2023.

7. Clark's Code, § 390. Carraway v. Stancill [N. C.] 49 S. E. 957.

8. Carraway v. Stancill [N. C.] 49 S. E. 957.

9. Cleveland v. Cazort [Ark.] 83 S. W. 316.

10. See 2 Curr. L. 1198. See, also, § 14, post.

contain a general or specific denial of each material allegation of the complaint intended to be controverted by defendant, or of any knowledge or information thereof sufficient to form a belief.[11] It is not sufficient to allege a want of information without a want of knowledge or vice versa.[12]

Generally any allegation which, if found true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial.[13] Denials raise no issue unless they deny material allegations of the complaint, or put in issue some fact alleged therein which plaintiff must prove in order to recover, and which defendant may disprove.[14] Thus the denial of a conclusion of law is immaterial and raises no issue.[15]

A general denial of all allegations not otherwise admitted is good.[16] A defective special denial does not control a good general denial.[17] The statute of Michigan provides for a notice of special defense, to be attached to the general issue.[18] It need not conform to the rules of special pleading, but is sufficient if it informs plaintiff of the substance of the matter proposed to be shown under it.[19] An answer denying allegations as alleged in certain paragraphs of the complaint, referring to them by number, is sufficient, at least on appeal.[20]

Confession and avoidance.[21]—The answer should also contain a statement of any new matter constituting a defense or counterclaim.[22] New matter means

11. Mills' Ann. Code Colo. § 56. Rucker v. Bolles [C. C. A.] 133 F. 858. N. Y. Code Civ. Proc. § 500. Hicks v. Eggleston, 95 App. Div. 162, 88 N. Y. S. 528. Municipal Court Act (Laws 1902, p. 1538, c. 580, § 150). Levin & M. Contracting Co. v. Jackson, 92 N. Y. S. 307. Sand. & H. Dig. Ark. § 5722. Haggart v. Ranney [Ark.] 84 S. W. 703. In Kansas the statute requires a guardian ad litem to file a general denial, and it is error to try a case against a minor without such a pleading [Code Civ. Proc. § 101]. Swartwood v. Sage, 68 Kan. 817, 75 P. 508. Its omission, however, is not a jurisdictional defect. Id.

12. Allegation that defendants "have no information sufficient to form a belief" insufficient. Haggart v. Ranney [Ark.] 84 S. W. 703.

13. In action for reasonable value of services, answer denying that defendant is indebted to plaintiff in certain sum, or in any sum, is sufficient to present issue. Heaton-Hobson Associated Law Offices v. Arper, 145 Cal. 282, 78 P. 721.

14. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049. In action for rent, denial of landlord's title (Id.), and of allegations charging nonpayment of rent, where lease is admitted, raise no issues (Id.). Denial of demand for rent does not raise material issue since demand unnecessary. Id.

15. Failure to deny it not an admission of its truth. Kidwell v. Ketler [Cal.] 79 P. 514; Illinois Cent. R. Co. v. McIntosh, 26 Ky. L. R. 14, 80 S. W. 496; Roush v. Vanceburg, etc., Turnpike Co. [Ky.] 85 S. W. 735. That rent became due and payable. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049. A denial on information and belief of plaintiff's incorporation raises no issue. Id. In Nebraska the plea nil debet puts no fact in issue, and cannot be regarded as a defense. General denial held not to put in issue amount due on benefit certificate. Denial that there is due the amount claimed raises no issue. Bankers' Union of the World v. Favalora [Neb.] 102 N. W. 1013. When, in ejectment, alleged title is set forth specifically, general denial of ownership raises no issue. Harvey v. Douglass [Ark.] 83 S. W. 946.

16. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053. A denial of each and every other allegation of the complaint "not hereinbefore specifically admitted, controverted or denied," following specific admissions. Landesman v. Hauser, 91 N. Y. S. 6.

17. Implied admission does not control general denial traversing all allegations not otherwise admitted. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053.

18. McRae v. Lonsby [C. C. A.] 130 F. 17.

19. Notice, in action on note, setting up fraud and false representations and seeking its cancellation, held sufficient. McRae v. Lonsby [C. C. A.] 130 F. 17.

20. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. S. 103.

21. See 2 Curr. L. 1203, n. 30 et seq.

22. See, also, Set-Off and Counterclaim, 2 Curr. L. 1624. Mills' Ann. Code Colo. § 56. Rucker v. Bolles [C. C. A.] 133 F. 858. Answer may contain new matter constituting counterclaim [Minn. Gen. St. 1904, § 5236]. Monitor Drill Co. v. Moody [Minn.] 100 N. W. 1104. A defendant cannot avail himself of any matter of defense not appearing in the answer, though it appears in the evidence. Allegations as to consideration of note insufficient. Noble v. Gilliam, 136 Ala. 618, 33 So. 861. To warrant sustaining of objection to introduction of note on ground of nonexecution and material alteration, answer not being verified, such defenses should have been alleged. Id. In Georgia a defendant may, in every case, set up in his answer any matter which, under the English rule, should be the subject of a cross bill [Civ. Code 1895, § 4969]. Latimer v Irish-American Bank, 119 Ga. 887, 47 S. E. 322. Where petitioner in equitable proceeding for partition seeks to charge her severed interest with her debts to defendants, their answer, praying judgment for their debts, is germane to the peti-

anything operating by way of confession and avoidance, as distinguished from denial.[23]

Matters relating to set-off and counterclaim are treated elsewhere.[24]

§ 4. *Replication or reply and subsequent pleadings.*[25]—Generally, where the answer contains a counterclaim or any new matter, plaintiff is required to reply to the same denying generally or specially each allegation controverted by him.[26] The new matter referred to is in the nature of a plea in confession and avoidance,[27] and no reply is necessary where it merely tends to deny the allegations of the complaint.[28] An allegation of new matter in the answer to which a reply is not required will be deemed controverted.[29] The reply may generally plead any new matter tending to avoid new matter set up in the answer.[30]

In some states new matter set up in the answer is deemed controverted and no reply is necessary.[31] In others it is only necessary when the answer sets up a counterclaim.[32] A reply filed when none is necessary will be treated as a nullity.[33]

tion. Id. Failure by one to perform his contract with another, entitling the latter to a modification or extinguishment of the contract price, may be pleaded as a defense or counterclaim. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356.

23. Rucker v. Bolles [C. C. A.] 133 F. 858.

24. See Set-Off and Counterclaim, 2 Curr. L. 1624.

25. See 2 Curr. L. 1204. In equity, see Equity, § 6H, 3 Curr. L. 1230.

26. Floyd-Jones v. Anderson [Mont.] 76 P. 751. Mont. Code Civ. Proc. § 720, as amended by Sess. Laws 1899, p. 142 (Act Feb. 22). State v. District Court of Eighth Judicial Dist. [Mont.] 79 P. 546. In action for personal injuries, allegations of contributory negligence in answer are new matter. Id. A denial on information and belief is insufficient. Mont. Act Feb. 22, 1899 (Laws 1899, p. 142), amending Code Civ. Proc. § 720. Floyd-Jones v. Anderson [Mont.] 76 P. 751.

27. King v. Burnham [Minn.] 101 N. W. 302.

28. In action for goods sold and delivered, which complaint alleges were of agreed and reasonable value of $124, answer alleging that they were of agreed value of $50, and no more, does not require reply. King v. Burnham [Minn.] 101 N. W. 302. In suit for specific performance, answer held not to set up new matter sufficiently to require replication. Christiansen v. Aldrich [Mont.] 76 P. 1007. Denial of delivery of a promissory note (Bode v. Werner, 4 Ohio C. C. [N. S.] 158), or that there is anything due thereon (Id.). Where the complaint does not necessarily disclose a case within the statute of limitations, plaintiff may, in avoidance of the defense of the statute, prove an exception taking the case out of its operation, without pleading in reply. Metz v. Metz, 90 N. Y. S. 340.

29. N. Y. Code Civ. Proc. § 522. Metz v. Metz, 90 N. Y. S. 340.

30. In action to recover proceeds of benefit certificate, where defendant claimed under subsequent certificate, allegations of antenuptial agreement in which insured agreed to transfer insurance to plaintiff held proper matter in reply [Burns' Ann. St. Ind. 1901, § 360]. Carter v. Carter [Ind. App.] 72 N. E. 187. A reply to a counterclaim should contain denials of material allegations thereof, or new matter not inconsistent with the complaint constituting a defense thereto [N. Y. Code Civ. Proc. § 514]. Fett v. Greenstein, 92 N. Y. S. 736. A counterclaim to a counterclaim is not allowable, plaintiff's remedy in such case being by motion for leave to amend the complaint. Id.

31. Statute operates as replication. In suit to foreclose mortgage discharged of record not necessary to allege in complaint facts showing that discharge was inoperative [Cal. Code Civ. Proc. § 462]. White v. Stevenson, 144 Cal. 104, 77 P. 828. Statute of limitations [Idaho Rev. St. 1887, § 4217]. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226. In Montana in the police and justice courts [Code Civ. Proc. § 1528]. Duane v. Molinak [Mont.] 78 P. 588. On appeal to the district court, the pleadings are governed by same rules as apply in the lower courts. Where amendment to answer pleading affirmative defense is filed after appeal, no replication is necessary. Id. In action in police court to recover balance due on contract for purchase of land, where defendant denied allegations of complaint and counterclaimed for damages for false representations, issues so raised were not superseded by amendment to answer, adding defense of statute of frauds, made in district court on appeal. Id. While such issues remained, court could not grant judgment on pleadings or direct verdict for defendant. Id. In Georgia, special pleadings and replications are not ordinarily allowed. Beard v. White, 120 Ga. 1018, 48 S. E. 400. But where the defendant, by set-off or cross bill, seeks affirmative relief against the plaintiff, the court may require the latter to meet such claims by appropriate written pleadings. Id.

32. Indian Territory: Mansf. Dig. § 5043; Ind. T. Ann. St. 1899, § 3248. Madden v. Anderson [Ind. T.] 82 S. W. 904.

In North Carolina allegations of new matter not relating to counterclaims are deemed controverted as upon a direct denial or avoidance as the case may require. Code, § 268. Immaterial whether denial of abandonment in reply was sufficient. Smith v. Bruton [N. C.] 49 S. E. 64.

33. Madden v. Anderson [Ind. T.] 82 S. W. 904. In such case sustaining a demurrer thereto and entering judgment against plain-

Allegations in a reply must be construed together and with reference to the answer.[34] Where a plea requires something more than a mere similiter to put it in issue, it is error to allow the case to go to trial in the absence of any reply or joinder of issue thereon.[35] A replication failing to aver anything responsive to a plea setting up a distinct and independent defense is subject to demurrer.[36] Replications purporting to answer several pleas cannot be sustained if bad as to one of them, though good as to the others.[37]

If a plaintiff demurs or replies over to a proper plea answering a part only of his cause of action, without "signing judgment," an hiatus and consequent discontinuance takes place.[38]

Plaintiff can recover only on the cause of action stated in his complaint,[39] and cannot in his reply take a position inconsistent therewith.[40]

Additional pleadings.[41]—New matter in the reply is generally deemed denied without further pleading.[42] A rejoinder should be by demurrer, confession and avoidance, or traverse,[43] and should not set up facts in the nature of evidence from which an inference may be drawn.[44]

§ 5. *Demurrer.*[45] *General rules.*[46]—A demurrer reaches only those defects apparent on the face of the pleadings.[47]

tiff on the pleadings, on his refusal to plead further, is error where his complaint states a cause of action. Id.

34. David v. Whitehead [Wyo.] 79 P. 19.

35. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64.

36. Keystone Mfg. Co. v. Hampton [Ala.] 37 So. 552.

37. Matthews v. Farrell, 140 Ala. 298, 37 So. 325.

38. Since plaintiff thus fails to prosecute or follow up his action. Risher v. Wheeling Roofing & Cornice Co. [W. Va.] 49 S. E. 1016. Not a discontinuance where defendant filed plea of payment answering part of plaintiff's claim, and clerk entered plea of general issue, and of the common order confirmed, which was stricken out at next term as unauthorized, where plaintiff did not appear at rules, and did nothing until the next term. Id.

39. Jackson v. Powell [Mo. App.] 84 S. W. 1132; Kearney County Bank v. Zimmerman [Neb.] 99 N. W. 524. It is not the province of a reply to introduce new causes of action, or to supply material allegations to the original petition. Error to allow filing of reply after going to trial for purpose of supplying omitted allegations. Creditor's bill to cancel deed. Id. The only exception is where the trial proceeds on the new matter alleged in the reply without objection. Id.

40. In action for diversion of water, plea of estoppel or res adjudicata, barring defendant from denying that plaintiff was deprived of all water, held inconsistent with allegations of complaint that she did use a portion of the water, and therefore she could not rely on same. Flannery v. Campbell [Mont.] 75 P. 1109. In debt on bond to which defendant's testator was a party, where defendant pleaded that claim was not presented within statutory period after publication of notice of executor's qualification, but plea did not allege such publication, plaintiff could not deny that notice was given without a departure in pleading. Municipal Court v. Whaley [R. I.] 57 A. 1061. Where same facts pleaded in reply were provable under answer to defendant's cross complaint, fact that allegations of reply were not germane to claim in complaint held immaterial. Carter v. Carter [Ind. App.] 72 N. E. 187.

No departure: In action for price of threshing machine, where complaint alleged indebtedness in sum certain and replication set out agreement for extension of time and for security and defendant's failure to give it. Messenger v. Woge [Colo. App.] 78 P. 314. Replications, in mandamus to compel reinstatement of police officer, showing that removal was wrongful, held in confession and avoidance. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. In action for conversion of hops, reply designed to affirm averments of complaint and make them more certain, and which is merely new assignment of cause therein alleged. Zorn v. Livesley, 44 Or. 501, 75 P. 1057. Where petition is for money had and received, and answer pleads payment by check, reply negativing payment and alleging fraud. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765. Reply in action against surety on bond held to respond to answer, and not to plead new cause of action. State v. Bergfeld [Mo. App.] 84 S. W. 177. In action for proceeds of benefit certificate, defendant held estopped to object that reply was departure, since, if order in which facts were presented was erroneous, it was invited error. Carter v. Carter [Ind. App.] 72 N. E. 187.

41. See 2 Curr. L. 1206, n. 56.

42. Mont. Code Civ. Proc. § 754. Swain v. McMillan [Mont.] 76 P. 943.

43, 44. Probate Court of Westerly v. Potter [R. I.] 58 A. 661.

45. See 2 Curr. L. 1206. In equity, see Equity, § 6E, 3 Curr. L. 1227.

46. See 2 Curr. L. 1206.

Defects reached by demurrer, see post, § 10.

47. Wyo. Rev. St. 1899, § 3535. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708. Held that question whether persons suing to recover lands as heirs at law are estopped to

Upon general demurrer the only question is the sufficiency of the pleading to state a cause of action or a defense upon any theory,[48] which must be determined from the matter pleaded alone.[49] An admission as to the facts made by counsel during the argument may, however, be considered.[50]

A petition good on general demurrer stops the running of limitations, though open to attack by special demurrer.[51] The court will not construe an instrument set up in the pleading demurred to, and determine the rights of the parties thereunder, when it is ambiguous and so uncertain in meaning that it cannot be fairly interpreted without a knowledge of the surrounding facts and circumstances.[52]

A demurrer goes to the whole of a plea,[53] and hence it is error to sustain it when directed to a portion of a plea.[54] A demurrer may, however, be interposed to a single plea.[55]

impeach decree making partial distribution of estate, by which they were given other lands, could not so arise under the circumstances. Alcorn v. Brandeman, 145 Cal. 62, 78 P. 343. Fact that plaintiffs might be estopped by conduct from claiming a third of the lands under a deed held not to affect sufficiency of complaint to support claim for other two-thirds as heirs. Id. Amended answer held not to show on its face that no damage could have resulted to defendants on account of false representations, and hence not demurrable on that ground. McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341. The question whether a plea seeks to contradict or vary a written contract cannot be raised by demurrer where there is nothing in the pleadings to show that such contract was in writing. Id. The objection that the contract sued on is void under the statute of frauds cannot be raised by demurrer, where it does not appear from the face of the complaint whether it is oral or written. Wilhite v. Skelton [Ind. T.] 82 S. W. 932. A former adjudication of the same cause of action, not appearing from the petition, is not a ground for demurrer, but for plea. Reid v. Caldwell, 120 Ga. 718, 48 S. E. 191. To sustain a demurrer to a bill on the defense of the statute of limitations, the facts warranting that defense must distinctly appear on its face. Action for partition. Bragg v. Wiseman, 55 W. Va. 330, 47 S. E. 90. For want of jurisdiction. Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 169.

48. Complaint in action for damages for causing plaintiff's arrest held sufficient. McKenzie v. Royal Dairy, 35 Wash. 390, 77 P. 680. A demurrer on the ground that the complaint states no cause of action will be sustained where it states no facts warranting the judgment asked or any part thereof. To complaint for breach of covenant to furnish pass in consideration of grant of railroad right of way, praying that defendant be ejected and enjoined, but not demanding damages for breach. Hasbrouck v. New Paltz, H. & P. Traction Co., 90 N. Y. S. 977. The sufficiency of a petition depends upon whether the defendant can admit all its allegations and escape liability. Petition in suit for wrongful death sufficient. Rowland v. Towns, 120 Ga. 74, 47 S. E. 581. Under the Alaska code, plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim. Alaska Code Civ. Proc. § 68 (Carter's Codes, p. 158; 31 Stat. 343, c. 786). Demurrer must be directed to new matter. Held v. Ebner [C. C. A.] 133 F. 156. General demurrer to answer on ground that it did not state facts sufficient to constitute defense should be overruled where answer denies material allegations of complaint, though it also sets up new matter. Id.

49. Straus v. American Publishers' Ass'n, 45 Misc. 251, 92 N. Y. S. 153. Thus the court cannot look to facts appearing in the process, return of service, or other parts of the record not forming a part of the pleading to sustain the demurrer to the petition. Not to ascertain when action was commenced. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708. Nor can point that issuance of new summons with amended petition amounted to abandonment of original suit be considered. Id. A demurrer runs to the allegations of the complaint and not to its caption or to the summons. Complaint not demurrable for failure to add to statement of representative character words "as trustees" in addition to words "as executors" in caption, where complaint shows that they are so acting. Rowe v. Rowe, 92 N. Y. S. 491. The appellate court cannot resort to the evidence in aid of pleading. Case v. Hursh [Ind. App.] 70 N. E. 818. In action on bond to which defendant's testator was a party, where defendant pleaded that claim was not filed or presented to executors within statutory period, plaintiff, on demurrer to pleas, cannot argue that he did not know of breach until after such period had expired. Municipal Court v. Whaley [R. I.] 57 A. 1061.

50. That contract sued on was oral. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

51. Schmidt v. Brittain [Tex. Civ. App.] 84 S. W. 677.

52. O'Shaugnessy v. Humes, 129 F. 953.

53. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64.

54. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64. Harmless where portion overruled is afterwards made part and basis of amended plea. Id. Under a statute authorizing a demurrer to the answer or any defense therein, a demurrer cannot be interposed to a part only of a defense. Cannot be addressed to fragmentary part of pleading [Wis. Rev. St. 1898, § 2658]. McCall Co. v. Stone [Wis.] 102 N. W. 1053.

A general demurrer to a misjoinder will not be sustained if either count is good,[56] hence a special demurrer is necessary in order to reach such defect.[57] A joint demurrer to a pleading good as to one of the demurring parties will be overruled as to both,[58] and a complaint which does not state a good cause of action as to all who join in it, though it does as to some, is bad on demurrer as to all for insufficiency of facts.[59]

A demurrer to the entire declaration raises the question whether it sets out sufficient matter to sustain the action.[60] In such case the demurrer will be overruled if one of the counts is good,[61] or if the facts alleged entitle plaintiff to a portion of the relief sought.[62] So too a demurrer to a whole answer is properly overruled if an issue is raised by any of its denials or allegations;[63] but a demurrer to a plea of limitations filed to all of certain additional counts is properly sustained where it does not present a defense as to all of them.[64] Assigning special causes for demurrer does not make a demurrer special which is general in its nature.[65]

Sustaining a demurrer to one of several paragraphs or pleas is harmless where no competent evidence is thereby excluded, as where others are left under which it may be admitted.[66] So too error in overruling a demurrer is harmless, where

55. Where the answer in an action for slander sets up, first, a general denial; second, justification, as a complete defense; and third, mitigation as a partial defense, plaintiff may test on demurrer the sufficiency of the second plea apart from the third. Jansen v. Fischer, 90 N. Y. S. 346.

56. See 2 Curr. L. 1207, n. 81-83. Hudson v. McNear [Me.] 59 A. 546. A general demurrer to the whole of a bill for an injunction and damages for the maintenance of a nuisance, on the ground of misjoinder of defendants, will be overruled where they are properly made joint defendants as far as the injunctive relief is concerned. Madison v. Ducktown Sulphur, Copper & Iron Co. [Tenn.] 83 S. W. 658.

57. Hudson v. McNear [Me.] 59 A. 546.

58. Brown v. Tallman [N. J. Eq.] 54 A. 457. A demurrer to complaint in several paragraphs on ground that "neither of said paragraphs states facts sufficient to constitute a cause of action" is not joint. Case v. Hursh [Ind. App.] 70 N. E. 818. A general demurrer to an answer and counterclaim, put in by two plaintiffs jointly. Answer in suit for wrongful eviction sufficient. Neumann v. Moretti [Cal.] 79 P. 510.

59. State v. Holt [Ind.] 71 N. E. 653.

60. Virginia & N. C. Wheel Co. v. Harris [Va.] 49 S. E. 991.

61. Virginia & N. C. Wheel Co. v. Harris [Va.] 49 S. E. 991. A demurrer to a plea of set-off on the ground that particular items of damage therein alleged cannot properly be recovered should be overruled if any of the items are proper subjects of set-off, though others are not. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64. A demurrer to a plea in abatement that the action was not brought in the proper county, such plea going to the maintenance of the action as a whole, is properly sustained where the cause of action stated by one of the counts is properly brought, irrespective of whether those stated by the other counts are or not. Hoge v. Herzberg [Ala.] 37 So. 591. The petition in an action on an account cannot be attacked by general demurrer because one item of an account filed therewith is insufficiently stated. Bick v. Halberstadt [Mo. App.] 85 S. W. 127.

62. Anderson v. Dyer & Bro. [Minn.] 101 N. W. 1061.

63. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049. Where defendants pleaded general issue and two special pleas, and plaintiff filed a single demurrer to all pleas, defendant was entitled to judgment, the plea of the general issue being unexceptionable. Carpenter v. Spring Garden Ins. Co. [N. J. Law] 58 A. 114. A demurrer to a paragraph sufficient as a partial defense in mitigation of damages is properly overruled. Privid v. O'Brien, 91 N. Y. S. 324.

64. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737.

65. Character not altered by statement of special causes that one of the counts or breaches or parts of plaintiff's demand of a distinct and divisible nature is bad. Virginia & N. C. Wheel Co. v. Harris [Va.] 49 S. E. 991.

66. See 2 Curr. L. 1207, n. 75. Matthews v. Farrell, 140 Ala. 298, 37 So. 325; Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132. Sustaining a demurrer to a special plea in reduction of damages in an action on the case, where the general issue is pleaded, under which such reduction may be shown. Karter v. Fields, 140 Ala. 352, 37 So. 204. Where defense may be shown under a general denial. Under Burns' Ann. St. Ind. 1901, §§ 1067, 1082, 1083, every defense in action to quiet title is admissible under general denial. Beasey v. High, 33 Ind. App. 689, 72 N. E. 181. Where the issue under which the evidence is admissible is formed by a general denial, it is immaterial whether it is on file at the time of the ruling, or is filed afterwards. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132. Defendant cannot make the error available by subsequently withdrawing such general denial. Beasey v. High, 33 Ind. App. 689, 72 N. E. 181.

ample evidence to support the allegations of the pleading is received without objection.[67]

Form, requisites and sufficiency.[68]—Demurrers should specifically assign the grounds on which it is claimed that the pleadings objected to are insufficient,[69] and only the grounds so specified will be considered.[70] It is sufficient to use language equivalent to that of the statute.[71] Where a right result is reached in ruling on the sufficiency of the pleadings, the form of the demurrer,[72] or the fact that it is misnamed, is immaterial.[73] Clerical errors will be disregarded in the absence of a showing of prejudice to the substantial rights of the opposite party.[74] A demurrer filed after the filing of an amended complaint is sufficient as a demurrer to the latter, though purporting to be addressed to the original complaint.[75]

A speaking demurrer is one based on matter outside the pleading against which it is directed, and is generally held to be bad.[76]

Issues raised.[77]—As a general rule a demurrer, whenever and by whomsoever interposed, reaches back through the whole record, and condemns the first pleading defective in substance.[78] Upon demurrer to a plea in abatement,[79] or to a plea to the jurisdiction the declaration is not brought in question.[80] A demurrer

67. Waiver of proofs of loss in action on insurance policy. Ohio Farmers' Ins. Co. v. Vogel [Ind. App.] 73 N. E. 612.

68. See 2 Curr. L. 1209.

69. Demurrers alleging that complaint states no cause of action and that statutes under which suit is brought are unconstitutional held bad for failure to assign any grounds for the contentions advanced. Travis v. Rhodes [Ala.] 37 So. 804. It is not sufficient to merely say that the facts stated do not constitute a defense or a particular defense. Iowa Code, § 3562. Exact point must be set out. Timken Carriage Co. v. Smith & Co., 123 Iowa, 554, 99 N. W. 183. Demurrer to answer in action for price of wagon held insufficient to support contention that defendant never offered to return wagon, or that plaintiff had made good his warranty, or that an implied warranty was excluded by the express one. Id. A demurrer to a complaint, other than on the ground of want of jurisdiction or failure to state a cause of action. Stephens v. Parvin [Colo.] 78 P. 688. On the ground of ambiguity and uncertainty. Baden Baden Gold Min. Co. v. Jose [Colo. App.] 78 P. 313. A demurrer for defect of parties must state specifically wherein such defect consists, and name the parties omitted. Anderson v. Dyer & Bro. [Minn.] 101 N. W. 1061. In Virginia the court may, on motion of either party or on its own motion, require the grounds of demurrer relied on to be stated specifically, in which case only those so stated may be relied on. Code, § 3271, as amended by Acts 1899-1900, p. 111, c. 100 (2 Code 1904, p. 1721). Where grounds are not copied in record, appellate court will treat case as though there had been no demurrer. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857. By statute in Connecticut, whenever a demurrer is filed on more than one ground the judge, in rendering his decision, is required to specify in writing the ground on which it is based. Gen. St. 1902, § 765. Where specified four grounds as sufficient to sustain demurrer, but based decision on all the grounds, held error was not ground for reversal on plaintiff's appeal, since he had same opportunity to amend as if statute had been complied with. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 A. 853.

70. Snyer v. New York & N. J. Tel. Co. [N. J. Law] 58 A. 90.

71. Demurrer on ground that complaint does not state facts sufficient to constitute "good" cause of action is sufficient. Word "good" will be treated as surplusage. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531. That answer does not state facts sufficient to constitute "ground of defense." Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297.

72. Penn Mut. Life Ins. Co. v. Norcross [Ind.] 72 N. E. 132.

73. Calling them motions to strike. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

74. Mistake in reciting date on which complaint to which it was taken was filed held not ground for reversal. Hollenback v. Poston [Ind. App.] 73 N. E. 162.

75. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531.

76. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708. Merits of defense can only be raised by plea or answer. O'Shaugnessy v. Humes, 129 F. 953. Seek to raise matters which should be pleaded and proved as defenses to the action. Reid v. Caldwell, 120 Ga. 718, 48 S. E. 191.

77. See 2 Curr. L. 1209.

78. Demurrer to an answer for insufficiency may be carried back to the complaint as not stating a cause of action. Mitchell v. Peru [Ind.] 71 N. E. 132; Goff v. Lowe, 25 Ky. L. R. 2176, 80 S. W. 219; Bigelow v. Drummond, 42 Misc. 617, 87 N. Y. S. 581. It is error to sustain a demurrer to a bad answer addressed to a bad complaint since a bad answer is good enough in law for bad complaint. Whitesell v. Strickler [Ind. App.] 73 N. E. 153.

79, 80. Birch v. King [N. J. Law] 59 A. 11.

to a replication cannot be carried beyond the answer where the latter pleading is interposed after the overruling of a demurrer to the complaint.[81]

A demurrer is equivalent to a general appearance.[82] It admits facts well pleaded,[83] but does not admit conclusions of law,[84] nor that the construction of a written instrument attached to the pleading is the true one, or that its legal effect is contrary to that which its language imports.[85] If for misjoinder of causes of action, it admits that there are two or more good causes of action stated.[86] Such admission is only for the purpose of testing the sufficiency of the pleading,[87] and

81. Where respondents file an answer presenting a complete defense to a petition for mandamus after their demurrer thereto has been overruled, and relator replies thereto, a demurrer to such replication cannot be carried beyond the answer. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816.

82. N. Y. Code Civ. Proc. § 421. Where demurrer to complaint is overruled, defendant, though he fails to answer over, is entitled to notice of assessment of damages by the clerk, as well as of the application to the court for judgment, and to challenge amount of recovery [N. Y. Code Civ. Proc. § 1219]. Mathot v. Triebel, 92 N. Y. S. 512.

83. Miller v. Butler, 121 Ga. 758, 49 S. E. 754; Southern R. Co. v. State [Ind. App.] 72 N. E. 174; Simons v. Gregory [Ky.] 85 S. W. 751; Commissioners of Anne Arundel County v. Baltimore Sugar Refining Co. [Md.] 58 A. 211; Randolph v. Wheeler, 182 Mo. 145, 81 S. W. 419; Kennedy v. North Jersey St. R. Co. [N. J. Law] 60 A. 40; Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857; Hudson River Power Transmission Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179; Coppola v. Kraushaar, 92 N. Y. S. 436; Gilkeson v. Thompson [Pa.] 59 A. 1114; Waaler v. Great Northern R. Co. [S. D.] 100 N. W. 1097; Johnson v. Brice [Tenn.] 83 S. W. 791; Ferguson v. Morrison [Tex. Civ. App.] 81 S. W. 1240; Colorado Canal Co. v. Sims [Tex. Civ. App.] 82 S. W. 531; Trumbo v. Fulk [Va.] 48 S. E. 525; Hester v. Thomson, 35 Wash. 119, 76 P. 734; Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Demurrer held to admit allegation that defendants were in possession of property under license from plaintiff, and hence they could not contend that he was not owner as to them. Clark v. Wall [Mont.] 79 P. 1052. Every fact pleaded or fairly inferable from the facts alleged, whether expressly, impliedly or argumentatively averred. Complaint in action for wrongful death of servant held sufficient. Ellsworth v. Franklin County Agricultural Soc., 99 App. Div. 119, 91 N. Y. S. 1040. All facts argumentatively or inferentially alleged. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. S. 525. A demurrer to a separate defense admits the truth of all material matters therein stated, and for the purpose of determining their sufficiency as a defense the material allegations of the complaint must be taken as admitted. Barnard v. Lawyers' Title Ins. Co., 91 N. Y. S. 41. Admits facts construed in light most favorable to plaintiff. Action for damages for failure to deliver telegram. Green v. Western Union Tel. Co. [N. C.] 49 S. E. 165. On demurrer to a petition for order to show cause why one should not be punished for contempt for violating a decree, the question whether such decree was sustained by the pleadings and the evidence cannot be considered, the court having had jurisdiction of the parties and the subject-matter. State v. District Court of Third Judicial Dist. [Mont.] 79 P. 319. Same rule applies to default. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296.

As to what is admitted by a demurrer to a complaint, see note, 97 Am. St. Rep. 833.

84. As to what are conclusions, see ante, § 1. In proceedings to correct tax assessment, allegation as to certain machinery being realty not admitted. Commissioners of Anne Arundel County v. Baltimore Sugar Refining Co. [Md.] 58 A. 211. Allegations that defendant has no vested interest in property, and is incapable, under its charter, of receiving certain property. Carroll v. Smith [Md.] 59 A. 131; Burdiok v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13; Petty v. Emery, 96 App. Div. 35, 88 N. Y. S. 823; Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857; Trumbo v. Fulk [Va.] 48 S. E. 525. Law must be determined by court on facts admitted. Simons v. Gregory [Ky.] 85 S. W. 751. Argumentative conclusions as to knowledge of fraud in assignments. Gilkeson v. Thompson [Pa.] 59 A. 1114; Clerks' Benev. Union v. Knights of Columbus [S. C.] 50 S. E. 206; Edison v. Edison, Jr., Chemical Co., 128 F. 957. Allegation that roadway is not public highway, where bill shows that it is, in sense that it is subject to public easement of travel. Sullivan v. Browning [N. J. Eq.] 58 A. 302. Allegation that cause of action same as that in former cases. First Nat. Bank v. Lewinson [N. M.] 76 P. 288. Demurrer does not admit truth of general allegations of fraud, but only of facts set forth as constituting it, and all reasonable deductions from them. Edison v. Edison, Jr., Chemical Co., 128 F. 957; Miller v. Butler, 121 Ga. 758, 49 S. E. 754. Demurrer to allegation that injury was unavoidable result of operating cars in lawful manner does not admit that acts were lawful. Baltimore Belt R. Co. v. Sattler [Md.] 59 A. 654. Conclusions drawn from facts not admitted by motion to quash writ of mandamus, which performs office of general demurrer. Hester v. Thomson, 35 Wash. 119, 76 P. 734. Same rule applies to default. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296.

85. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296.

86. A demurrer for misjoinder of causes of action admits that there are two or more good causes of action stated. Emerson v. Nash [Wis.] 102 N. W. 921.

87, 88. Hudson River Power Transmission

does not bar the one who demurs from disproving the facts alleged upon the trial, nor from disputing them when his own pleading is being analyzed to determine its sufficiency.[88]

Hearing and decision on demurrer.[89]—A decision on demurrer goes only to the sufficiency of the matter pleaded.[90] The decision of the court or report of a referee must direct a final or interlocutory judgment to be entered thereupon, but findings of fact are not necessary.[91] On overruling a demurrer to the complaint, there should be a decision directing the entry of an interlocutory judgment.[92] On overruling a demurrer to an answer, the judgment should be for the costs of the demurrers only, where there is no dismissal.[93] Where the court files an opinion stating that demurrers should be sustained, but no order is entered, he may subsequently withdraw such opinion and overrule the demurrers.[94] The judgment upon demurrer to a plea to the jurisdiction is, if in favor of plaintiff, respondeat ouster.[95] Where a demurrer to a declaration in two counts is overruled subject to exception and either count is bad, a general verdict thereon will be set aside.[96] An order sustaining a demurrer to a bill is not a final order and no appeal lies therefrom.[97] Where complainant is willing to rest his case on the demurrer, he must move for a dismissal of the bill.[98] No appeal lies from a judgment overruling a demurrer and awarding costs.[99] A judgment overruling a demurrer to a petition is proper matter for direct exception.[1] Where demurrers to each of several complete defenses are overruled and plaintiff declines to plead further, judgment is properly entered against him, though the demurrer as to one of such defenses was erroneously overruled.[2] Defendant is generally given the right to file an answer after demurrer overruled.[3]

§ 6. *Cross complaints and answers.*[4]—A cross complaint must relate to or depend upon the contract or transaction on which the main case is founded, or affect the property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants.[5] As to subject-matter, a counterclaim is more comprehensive and liberal, but for relief against individual plaintiffs or defendants, or bringing in new parties against whom a defendant claims relief growing out of the subject-matter of the action, the cross complaint is the available procedure.[6]

Reconventions or cross bills are to be regarded as pleadings in separate suits brought by defendant against plaintiff.[7] Not being defensive pleadings, allegations therein may be used by plaintiff as evidence to support his claim, if in-

Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179.

89. See 2 Curr. L. 1210.

90. Decision that plea presents sufficient defense not an adjudication of the fact in favor of defendant. Probate Court of Westerly v. Potter [R. I.] 58 A. 661.

91. Mere order not appealable. Rowe v. Rowe, 92 N. Y. S. 491.

92. Mere order not appealable. Brown v. Leary, 91 N. Y. S. 463.

93. Gates v. Solomon [Ark.] 83 S. W. 348.

94. Shipley v. Jacob Tome Inst. [Md.] 58 A. 200.

95. Birch v. King [N. J. Law] 59 A. 11.

96. Gendron v. St. Pierre, 72 N. H. 400, 56 A. 915.

97. Decision merely interlocutory. Livingston County Bldg. & Loan Ass'n v. Keach, 213 Ill. 59, 72 N. E. 769; State v. Fleming [Wash.] 79 P. 1115.

98. Order of dismissal is final, and appealable. Livingston County Bldg. & Loan Ass'n v. Keach, 213 Ill. 59, 72 N. E. 769.

99. Not final. Gates v. Solomon [Ark.] 83 S. W. 348.

1. Is a ruling which would have been final if it had been rendered as claimed by defendant [Ga. Civ. Code 1895, § 5526]. Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595.

2. Board of Education of Canton v. Walker [Ohio] 72 N. E. 898.

3. Conn. St. 1872. Hourigan v. Norwich [Conn.] 59 A. 487. Ordering a default to be entered against him for failure to do so in an action for negligent death is improper. Id.

4. See 2 Curr. L. 1212. In equity, see Equity, § 6D, 3 Curr. L. 1226.

5. Idaho Rev. St. 1887, § 4188. Hunter v. Porter [Idaho] 77 P. 434.

6. Hunter v. Porter [Idaho] 77 P. 434.

7, 8. Lewis v. Crouch [Tex. Civ. App.] 85 S. W. 1009.

troduced for that purpose,[8] but they cannot be regarded as conclusive admissions of record in the case because they are not contained in pleadings directed to plaintiff's demands.[9] An averment of a cross-complaint for affirmative relief not addressed to the plaintiff's complaint or purporting to be an answer thereto cannot be construed as a denial of allegations therein.[10] An intervenor can recover judgment only on the cause of action alleged by him and involved in the issues between him and the plaintiff.[11]

In California a defendant who seeks affirmative relief against any party to the action may file a cross complaint at the same time he files his answer.[12] When a complete determination of the controversy may not be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross complaint to be filed and summons thereon to be issued and served,[13] and even with an order, defendant cannot inject into the action a controversy between himself and an outsider, though it affects the property to which the action relates, unless some party already before the court is interested in, or will be affected by, its determination.[14]

A judgment may be attacked for fraud by answer and cross complaint.[15] An action for unlawful detainer is not subject to cross complaint or counterclaim.[16]

Even though a separate answer to a cross bill is necessary in addition to a reply to new matter in the answer, a reply denying the new matter is sufficient to deprive defendant of the right to a judgment pro confesso on the cross bill, where the new matter claimed to be a cross bill is so blended with that alleged as an affirmative defense that plaintiff cannot distinguish between them.[17]

§ 7. *Amendments.*[18] *Right, time and manner of amendment.*[19]—As a rule, pleadings may be amended before trial without leave of court on service of a copy of the amended pleading on the opposite party.[20] In some states pleadings may be once amended as of right, without costs and without prejudice to any proceedings already had.[21]

9. In action against lessor for breach of contract to furnish water for irrigation purposes, where defendant pleaded general denial and also, in reconvention, that loss of crop was caused by plaintiff's breach, whereby he was injured by loss of part to which he was entitled, held error to limit issues to question as to who breached contract, and to treat measure of plaintiff's damages as conclusively admitted. Lewis v. Crouch [Tex. Civ. App.] 85 S. W. 1009.

10. As to ownership of land in controversy. White v. Besse, 145 Cal. 223, 78 P. 649.

11. White v. Besse, 145 Cal. 223, 78 P. 649. An intervenor who in no way connects himself with the pleadings between the plaintiff and the defendant cannot obtain any advantage therefrom, but must rest his case on appeal solely on the cause of action stated in his complaint in intervention. Id.

12. Code Civ. Proc. § 442. Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

13. Code Civ. Proc. § 389. Alpers v. Bliss, 145 Cal. 565, 79 P. 171. New parties cannot be brought in without an order of court. Id. Ex parte order by judge, made without notice to plaintiff, may be vacated by judge making it without notice [Code Civ. Proc. § 937]. Id. In an action to determine water rights, where each defendant answered, setting up his rights and praying to have them adjudicated, a determination of their relative rights was within the issues, though such question was not raised by cross complaints. Miller v. Thompson, 139 Cal. 643, 73 P. 583.

14. Cannot bring in irrelevant controversies, except for purpose of making determination of the one before the court complete and without prejudice to the rights of others. Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

15. Suit to quiet title. Relender v. Riggs [Colo. App.] 79 P. 328.

16. A claim for unliquidated damages arising out of breach of covenant by lessor not proper matter for either. Hunter v. Porter [Idaho] 77 P. 434.

17. Castleman v. Castleman [Mo.] 83 S. W. 757.

18. See 2 Curr. L. 1213. In equity, see Equity, § 6C, 3 Curr. L. 1225.

19. See 2 Curr. L. 1213, 1216, 1221.

20. In Arizona all pleadings or proceedings may be amended at any stage of the action upon leave of court, and may be amended before trial without leave on service of a copy of such amended pleading or proceeding on the adverse party. Rev. St. 1901, par. 1288. Any amendment which court could allow during trial may be made as matter of right before trial. Perrin v. Mallory Commission Co. [Ariz.] 76 P. 476. A specification in an action of assumpsit may

In Missouri when three successive pleadings have been adjudged bad on demurrer, or the whole or some part thereof stricken out on motion, no further pleading may be filed, but judgment will be entered against the party in default and he will be required to pay treble costs.[22] The act does not deprive a party of a right to plead further because his petition has twice been adjudged insufficient on motion to strike out and once on motion to make more definite and certain.[23]

Amendments after answer must generally be by leave of court,[24] but formal leave is not necessary where they are filed in open court during the progress of the trial and are recognized by the court and embodied in its instructions.[25]

The right to amend may be lost by laches.[26] A party will not be allowed to amend for the purpose of setting forth facts of which he had full knowledge at the time of interposing the original, in the absence of a satisfactory excuse for his failure to plead them originally.[27]

If one count of a complaint is sufficient to support an amendment, it is immaterial in so far as a motion to strike it out is concerned, whether a second one is also sufficient.[28]

Amendments made at the trial need not be served on the opposite party.[29]

The refusal to compel a refiling of the complaint after amendment is not reversible error where defendant is permitted to demur to the amended pleading.[30] Refiling, after an amendment to make a pleading conform to the proof, is not necessary.[31]

The fact that a demurrer to a pleading is sustained does not prevent the al-

be amended. Aseltine v. Perry, 75 Vt. 208, 54 A. 190.

21. The defendant may at any time before trial and as of right amend his answer by inserting a new defense. General demurrer amended so as to allege matters in bar. Demurrer an answer. Perrin v. Mallory Commission Co. [Ariz.] 76 P. 476. In New Mexico any pleading may be once amended as of course, without costs and without prejudice to proceedings already had, at any time within twenty days after it is served, or at any time before the time for answering expires [Comp. Laws 1897, § 2685, subsec. 81]. Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806. In New York within twenty days after an answer is served or at any time before the period for answering has expired, a pleading may be once amended as of course, without costs and without prejudice to the proceedings already had, unless it appears that such amendment is made for the purpose of delay, and that the opposite party will thereby lose the benefit of the term for which the case is or may be noticed. Code Civ. Proc. § 542. Amended answer held not interposed in bad faith. Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. S. 216. Plaintiff may amend as a matter of right, and defendant may ask a continuance if aggrieved [Rev. St. 1899, § 688]. Grymes v. Liebke Hardwood Mill. & Lumber Co. [Mo. App.] 85 S. W. 946.

22. Mo. Rev. St. 1899, §§ 621-623. Roth Tool Co. v. Champ Spring Co. [Mo. App.] 84 S. W. 183. See 2 Curr. L. 1187, n. 65.

23. Act is penal and will be strictly construed. Roth Tool Co. v. Champ Spring Co. [Mo. App.] 84 S. W. 183.

24. Burns' Ann. St. Ind. 1901, § 397. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985; May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001.

25. Action for breach of contract. Berkey v. Lefebure & Sons [Iowa] 99 N. W. 710.

26. See 2 Curr. L. 1217, n. 10-12. Delay of two years after plaintiff's attention was directed to defect by demurrer and answer, in absence of excuse. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226. Motion to amend answer in action for personal injuries denied. Kane v. Metropolitan St. R. Co., 91 N. Y. S. 351. The court has a right to allow amendments at the trial, though two years have elapsed since the commencement of the action, where both parties are equally responsible for the delay. Sparks v. Green [S. C.] 48 S. E. 61. Except under extraordinary circumstances, an amendment permitting defendants to deny what has been previously admitted will be denied on the ground of laches, when offered after trial and reversal and when the case has been placed on the day calendar for a second trial. Delay must be excused. Treadwell v. Clark, 45 Misc. 268, 92 N. Y. S. 166.

27. Pratt, Hurst & Co. v. Tailer, 90 N. Y. S. 1023.

28. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777.

29. Miller v. Georgia R. Bank, 120 Ga. 17, 47 S. E. 525. Where a demurrer is filed to a suit on an account on the ground that no sufficient bill of particulars is attached, and plaintiff is given leave to amend, the action will not be dismissed for failure to serve a copy of the amendment on defendant. Norman v. Great Western Tailoring Co., 121 Ga. 813, 49 S. E. 782.

30. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985.

31. Stewart v. Knight & Jillson Co. [Ind. App.] 71 N. E. 182.

lowance of an amendment.[32] Where an amendment is permitted pending the hearing of a demurrer, the opposite party should be allowed to plead or demur to the amended declaration.[33] It is error to apply a demurrer on file to the amended declaration without the consent of the party filing it.[34] Demurrer to answers may be amended after the filing of amended answers.[35]

In New York an amendment introducing a new cause of action or defense can only be allowed at special term.[36] In Florida leave to amend may be granted during a term of court without special notice to the opposite party of the application therefor, even though the case has been submitted upon demurrer by brief at such term.[37]

On motion to amend pleadings, the moving affidavit must be made by the party and not by his attorney.[38] Where plaintiff knows or ought to know the purpose of his original complaint when he serves notice of motion to amend, but gives no reason in his papers why he wishes to amend, and in a subsequent affidavit gives no excuse for failing to do so, the affidavit cannot properly be read on the motion.[39]

Amendments should be actually incorporated into the pleading.[40] The practice of amending by interlineation or erasure should not be favored.[41]

Matter of amendment. Discretion of court.[42]—As a general rule, the court may, at any time before final judgment, in furtherance of justice and on such terms as may be proper, allow the amendment of any pleading by correcting mistakes,[43] adding or striking out the name of any party,[44] or inserting other allega-

32. Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987. On sustaining a demurrer to a petition for failure to state facts sufficient to constitute a cause of action, plaintiff should be given leave to amend. Goff v. Lowe, 25 Ky. L. R. 2176, 80 S. W. 219. After a special demurrer is sustained, the declaration may be amended upon terms, if amendable. Under Me. Rev. St. 1903, c. 84, § 10. Amendments to declaration containing three counts, one in assumpsit, one in debt on judgment, and one in assumpsit on note, held properly allowed. Hudson v. McNear [Me.] 59 A. 546. In Indiana if a demurrer is sustained or overruled, the party affected thereby may plead over or amend upon such terms as the court may direct, on payment of the costs occasioned by the demurrer. Burns' Ann. St. 1901, § 345. Does not apply to pleadings stricken out on motion. Guthrie v. Howland [Ind.] 73 N. E. 259.

33. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

34. Where defendant knew at time of filing pleas that court had given it benefit of demurrer to same extent as though it had been filed to amended declaration, and did not offer to file amendment, error in requiring it "to plead over" held harmless. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

35. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

36. In action on note held error to permit defendant, after jury had been impaneled, to amend answer so as to allege new defense of usury. Robinson v. Lampel, 97 App. Div. 198, 89 N. Y. S. 853. Where plaintiff refuses to withdraw a juror and apply at special term for leave to amend, he cannot complain, after dismissal of the complaint, of the court's refusal to allow the amendment. Kuntz v. Schnugg, 90 N. Y. S. 933.

37. Hartford Fire Ins. Co. v. Redding [Fla.] 37 So. 62.

38. Party's knowledge and not attorney's is material. Treadwell v. Clark, 45 Misc. 268, 92 N. Y. S. 166.

39. Northrop v. Village of Sidney, 97 App. Div. 271, 90 N. Y. S. 23.

40. Failure to do so not ground for reversal where trial proceeded on merits as though this had been done and defendants had opportunity to introduce all their evidence. Christiansen v. Aldrich [Mont.] 76 P. 1007. Granting leave to attach exhibits does not amount to an amendment when not taken advantage of. Bill of lading, in action against carrier for damage to goods. Chicago, etc., R. Co. v. Reyman [Ind.] 73 N. E. 587.

41. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 101 N. W. 341.

42. See 2 Curr. L. 1214, 1217.

43. In Washington the court may in furtherance of justice and on such terms as he may deem proper allow amendments correcting mistakes and may likewise, on affidavit showing good cause therefor and after notice to the adverse party, allow an amendment to any pleading on such terms as may be just [2 Ball. Ann. Codes & St. § 4953]. Cooke v. Cain, 35 Wash. 353, 77 P. 682. Amendment to answer after plaintiff had rested held proper where it did not change issues, and plaintiff did not ask continuance on ground of surprise or claim to be able to produce other proof than that which he introduced. Id. In Missouri, court may at any time before final judgment, in furtherance of justice and on proper terms, amend any pleading by adding or striking

tions material to the case.[45] Mistakes in dates [46] or the names of the parties may ordinarily be cured by amendment;[47] but one party plaintiff or defendant cannot be

out the name of any party, or by correcting a mistake in the name of a party, or in any other respect, or by inserting material allegations, or when the nature of the claim or defense is not substantially changed thereby, by conforming the pleadings to the facts proved [Rev. St. 1899, § 657]. United States Water & Steam Supply Co. v. Dreyfus, 104 Mo. App. 434, 79 S. W. 184; Grymes v. Liebke Hardwood Mill. & Lumber Co. [Mo. App.] 85 S. W. 946. Amendment entitling plaintiff "a corporation," properly allowed on appeal from justice court. United States Water & Steam Supply Co. v. Dreyfus, 104 Mo. App. 434, 79 S. W. 184. In Michigan the court may amend any pleading in form or substance for the furtherance of justice at any time before judgment. Comp. Laws, § 10,268. Amendment to complaint in action for price of stock held not to state new cause of action. Cleveland v. Rothschild [Mich.] 101 N. W. 62. In New York the court may upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading or other proceeding by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case [Code Civ. Proc. § 723]. Schun v. Brooklyn Heights R. Co., 82 App. Div. 560, 81 N. Y. S. 859. This statute may be invoked to enable plaintiff to bring in additional joint tort feasors. In action against city and one railroad company for injuries caused by defect in street at crossing of two railroads, where negligence on part of city and both railroad companies is claimed, court may order other railroad to be made party defendant. Id. The power extends to the granting of an amendment after a judgment absolute on stipulation. Plaintiff allowed to amend before assessment of damages pursuant to a judgment absolute entered by court of appeals. On affirming judgment granting plaintiff new trial in action for personal injuries, on stipulating that all proceedings subsequent to service of original complaint be set aside, and on payment of costs. Wood v. New York, etc., R. Co., 91 N. Y. S. 788. Under the New York municipal court act, the court must allow a pleading to be amended at any time, if substantial justice will be promoted thereby [Laws 1902, p. 1542, c. 580, § 166]. Bunke v. New York Tel. Co., 91 N. Y. S. 390. Held that oral pleadings in municipal court were amended so as to set up statute of limitations. Meehan v. Figiuolo, 88 N. Y. S. 920.

44. In Washington the court may, in furtherance of justice and on such terms as may be proper, amend any pleadings or proceedings by adding or striking out the name of any party [Ball. Ann. Codes & St. § 4953]. Davis v. Seattle [Wash.] 79 P. 784. Allowing amendment, in action by married woman for personal injuries, joining husband, who was a necessary party, held proper, no surprise being claimed or prejudice shown. Id. By statute in Indiana the court is given discretionary power to direct the name of any party to be added or struck out of a pleading, to direct a mistake in name, description, or legal effect to be corrected, and may direct any material allegation to be inserted or struck out or modified to conform the pleadings to the facts proven, when the amendment does not substantially change the claim or defense. Burns' Ann. St. 1901, § 399. The act does not authorize the substitution of a new plaintiff for the original one after verdict. Substitution of administrator of decedent's estate in place of next friend of his infant son, in action for wrongful death. Baltimore, etc., R. Co. v. Gillard [Ind. App.] 71 N. E. 58.

45. Amendment to complaint in action for personal injuries, alleging that acts were done willfully and maliciously, properly allowed [S. C. Code Civ. Proc. § 194]. Morrow v. Gaffney Mfg. Co. [S. C.] 49 S. E. 573. The proposed amendment should be material to the case which has been defectively stated. Sutton v. Catawba Power Co. [S. C.] 49 S. E. 863. Amendment to complaint in action for damages resulting from construction of dam properly allowed after verdict and new trial ordered. Id. Insertion of words "negligently and carelessly," in characterizing act of foreman, in petition in action for injuries to servant, held proper. Carter v. Baldwin [Mo. App.] 81 S. W. 204. In Oregon the court may, at any time before trial, in furtherance of justice and upon such terms as he may deem proper, allow any pleading to be amended by adding an allegation material to the cause [B. & C. Comp. § 102]. Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 83 P. 94. In North Carolina the court may amend by inserting other allegations material to the case. Code, § 273. May insert allegation as to foreign law, giving right of action for wrongful death. Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642. Changing cause of action on contract to one in tort, arising out of same transaction. Reynolds v. Mt. Airy & E. R. Co., 136 N. C. 345, 48 S. E. 765. The district court of New Jersey has power to amend the state of demand by inserting therein that plaintiff sues as assignee, under P. L. 1898, p. 616, § 161. Cosgrove v. Metropolitan Const. Co. [N. J. Law] 58 A. 82. Court may, in furtherance of justice, insert allegations. Code Civ. Proc. § 194. In action for wrongful death, amendment stating that plaintiff was sole heir at law of deceased properly allowed at opening of trial. Kitchen v. Southern R. Co., 68 S. C. 554, 48 S. E. 4.

46. A mistake in alleging the date of the execution of an instrument may ordinarily be cured by amendment. Policy of insurance, which was subject-matter of controversy. Quillan v. Johnson [Ga.] 49 S. E. 801. Allowing amendment correcting averment as to year in which cotton was raised held proper. Karter v. Fields, 140 Ala. 352, 37 So. 204.

47. Allowing an amendment changing one letter in plaintiff's surname is proper. Mitterwallner v. Supreme Lodge of Knights & Ladies of Golden Star, 90 N. Y. S. 1076.

thereby substituted for another.[48] There is a conflict of authority as to whether an amendment may be allowed so as to charge one in his individual instead of his representative capacity, or vice versa.[49] Allegations may be made more full and precise,[50] and inconsistent allegations may be eliminated by amendment,[51] and the venue may be inserted when the opposite party is not prejudiced thereby.[52] Failure to verify a plea to a verified petition may be cured by amendment.[53]

Defendant ordinarily has a right to rely on the allegations of the complaint as to the amount of plaintiff's actual damage,[54] and if plaintiff wishes to amend in this particular by increasing his demand, he should do so before the case is submitted for decision, or at least before decision.[55] A complaint in an action to recover damages for breach of a contract may be amended so as to include those accruing between the commencement of the action and the trial,[56] and also at the close of the trial so as to increase the amount of damages claimed.[57]

The court is justified in refusing to allow an amendment which can be of no substantial benefit to the party seeking it and will operate to delay trial.[58] One is not aggrieved by an amendment to a count which does not change its form,[59] and the denial of a motion to allow an amendment to the answer to traverse allegations of an amended complaint is not prejudicial where defendant is afterwards permitted to file an amended answer denying all material allegations of the amended complaint.[60]

The allowance of amendments at any stage of the proceedings is largely in the sound judicial discretion of the trial court, and his ruling thereon will only be reversed in case such discretion is abused;[61] but they should be liberally allowed

48. An amendment from "railroad" to "railway" in the name of the corporation declared against and amendment of the return on the summons to correspond is not permissible in the absence of proof that the "railway" company was actually served. Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155. Where action was commenced against the "Voigt Brewing Company, Limited," and there was no such copartnership, an amendment substituting E. W. V. doing business as such company properly disallowed. Voigt Brewing Co. v. Pacifico [Mich.] 102 N. W. 739. A new party plaintiff cannot be substituted by amendment. Where action is brought in name of "F. H., statutory guardian of R. H., suing for the use and benefit of said R. H.," the petition may be amended so as to make R. H. party plaintiff, suing by F. H. as his statutory guardian. Illinois Cent. R. Co. v. Head [Ky.] 84 S. W. 751.

49. Will not be allowed in Georgia. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. In Maine cannot amend so as to make one suing in individual capacity a party plaintiff in representative capacity. Fleming v. Courtenay, 98 Me. 401, 57 A. 592. An amendment may be allowed to correct a mistake in the designation of a defendant so as to enforce a liability against him personally instead of in his representative capacity. Error to refuse to allow amendment to title of complaint so as to designate corporation itself as defendant instead of corporation as trustee (Boyd v. United States Mortg. & Trust Co., 84 App. Div. 466, 82 N. Y. S. 1001), even though it cuts off the defense of the statute of limitations (Id.).

50. Where the answer is not sufficiently full and precise, the defect may be remedied by amendment. Deaver v. Deaver [N. C.] 49 S. E. 113.

51. Complaint charging simple negligence properly amended by striking out subsequent allegation that injury was caused by defendant's willful, wanton and reckless act, since allegations were contradictory and inconsistent. Williams v. North Wisconsin Lumber Co. [Wis.] 102 N. W. 589.

52. Hastie v. Burrage [Kan.] 77 P. 268. An amendment is not necessary to correct a mistake in naming the venue in the complaint, where both parties recognize it to be such, and that it was not intended to change the place of trial. All subsequent proceedings in county named in summons. Bell v. Polymero, 90 N. Y. S. 923.

53. Rodgers v. Caldwell [Ga.] 50 S. E. 95.

54. Clark v. San Francisco & S. J. V. R. Co., 142 Cal. 614, 76 P. 507.

55. So as to give defendant notice. Clark v. San Francisco & S. J. V. R. Co., 142 Cal. 614, 76 P. 507.

56. Proper where defendant did not ask for continuance, and it appears that he was not prejudiced. Dunham v. Hastings Pavement Co., 95 App. Div. 360, 88 N. Y. S. 835.

57. Dunham v. Hastings Pavement Co., 95 App. Div. 360, 88 N. Y. S. 835.

58. Amendment offered to avoid submission to jurisdiction of court properly disallowed since question of lack of jurisdiction could be raised at any time. Le Brantz v. Campbell, 89 App. Div. 583, 85 N. Y. S. 654.

59. Hudson v. McNear [Me.] 59 A. 546.

60. Frey v. Vignier, 145 Cal. 251, 78 P. 733.

61. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614. Idaho Rev. St. 1887, §§ 4229,

in furtherance of justice.[62] Amendments to answers are especially favored, and greater liberality will be exercised in allowing them than in allowing amendments

4231. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226. U. S. Rev. St. § 954 (Comp. St. 1901, p. 696). Rucker v. Bolles [C. C. A.] 133 F. 858; Kleimenhagen v. Dixon [Wis.] 100 N. W. 826; Kinney v. Craig [Va.] 48 S. E. 864. Of complaint in action to enjoin obstruction of stream. Small v. Harrington [Idaho] 79 P. 461. Will not be disturbed unless it appears that adverse party has been prejudiced or surprised, and makes timely objection on such grounds. Cooke v. Cain, 35 Wash. 353, 77 P. 682; Kennett v. Van Tassell [Kan.] 79 P. 665; Clerks' Benev. Union v. Knights of Columbus [S. C.] 50 S. E. 206; Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987. Of a bill of particulars. City of Battle Creek v. Haak [Mich.] 102 N. W. 1005. At trial. Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505; St. Louis S. W. R. Co. v. Hengst [Tex. Civ. App.] 81 S. W. 832. Not reviewable unless gross abuse. Dunn v. Mayo Mills [C. C. A.] 134 F. 804. One is not entitled, as a matter of right, to amend his pleadings during the trial of a case. Goodale v. Rohan [Conn.] 58 A. 4. B. & C. Comp. Or. § 102. In action for breach of agreement to pay commission for sale of property, by inserting name of one appearing to have some interest therein, where title was not in dispute or made an issue. Good v. Smith, 44 Or. 578, 76 P. 354.

No abuse of discretion to refuse to permit amendment setting up new defense and radically changing issues, not offered until after plaintiff had rested and defendant had occupied two days in introducing evidence. Alaska Commercial Co. v. Williams [C. C. A.] 128 F. 362. Where several depositors of insolvent national bank filed bill against directors for breach of implied contract to see that assets were used according to law, held that they were entitled to amend by adding allegation as to when their deposits were made. Boyd v. Schneider [C. C. A.] 131 F. 223. In partition proceedings, amendment to complaint so as to include lands omitted held not to change cause of action, and to be discretionary. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. Where plaintiff, after demurrers to merits have been sustained, files without motion for leave, agreement of parties, or offer to pay costs, amendment containing more specific prayer for relief but not avoiding substantial grounds on which demurrer was sustained, its disallowance is not ground for reversal. Patterson v. Farmington St. R. Co., 76 Conn. 628, 57 A. 853. By refusal to allow amendment of answer to show payment of note, in absence of statement that defendant desired to show other payments than those indorsed on note, and credited in bill of particulars. Goodale v. Rohan [Conn.] 58 A. 4. In refusing to allow amendments, or in refusing to allow defendant to file cross complaint, where motion was not made until after case had been tried, and new trial would have been necessary, taking into consideration all the circumstances. Kindall v. Lincoln Hardware & Implement Co. [Idaho] 76 P. 992. In action to restrain removal of fixtures by tenant, in striking out that portion of amended answer demanding affirmative relief, and allowing defensive matter therein to stand. Daly v. Simonson [Iowa] 102 N. W. 780. In suit by subcontractor to enforce mechanic's lien in which he alleged performance of contract and waiver of delay by contractor, and in which principal contractor answered denying waiver and alleging damages resulting from delay which were recoverable against him by the owner, and praying that owner be required to pay him the balance of the contract price after paying the subcontractor's claim, held that such principal contractor was properly refused permission to amend by omitting prayer for personal judgment against owner because of other matters of difference between them not ready for trial. Kilby Mfg. Co. v. Menominee Circuit Judge [Mich.] 101 N. W. 522. Amendment entitling plaintiff, a "corporation," in conformity to undisputed facts, properly allowed on appeal from justice court. United States Water & Steam Supply Co. v. Dreyfus, 104 Mo. App. 434, 79 S. W. 184. Amendment to complaint in action on contract so as to allege part performance and waiver instead of complete performance, offered when plaintiffs offered their proofs before referee, held properly allowed, there being no claim of surprise. Graves Elevator Co. v. Parker Co., 92 App. Div. 456, 87 N. Y. S. 156. In allowing filing of third amended answer alleging want of authority of general manager of corporation to execute certain notes. Baines v. Coos Bay, etc., Nav. Co. [Or.] 77 P. 400. Refusal to allow amendment of answer on trial so as to set up limitations. De Hihns v. Free [S. C.] 49 S. E. 841. In allowing amendment changing cause of action from quantum meruit to express contract, where court stated that it would be allowed unless defendants showed that they would be prejudiced and record discloses no attempt to make such showing. Cummings v. Weir [Wash.] 79 P. 487. Where answer had been three times amended and counterclaims had been held on appeal to state no cause of action, to refuse to allow amendment, offered 9 months after order of supreme court, injecting new fact which defendant must have known after entry of order affirmed. O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050.

62. Kindall v. Lincoln Hardware & Implement Co. [Idaho] 76 P. 992. Should be allowed at any time during the progress of the trial and before final judgment, if no injustice is done thereby. Error to refuse to allow amendment striking out second count, which showed on its face that court had no jurisdiction of subject-matter, since this was all that could in legal effect have been accomplished by proper plea in abatement and judgment thereon. Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268; Chemung Min. Co. v. Hanley [Idaho] 77 P. 226; United States Water & Steam Supply Co. v. Dreyfus, 104 Mo. App. 434, 79 S. W. 184; Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806; Murphy v. Plankinton Bank [S. D.] 100 N. W. 614; Babcock v. Ormsby [S. D.] 100 N. W. 759. To enable parties to litigate all questions arising out of subject of controversy.

to complaints.[63] Every application for leave to amend must be determined upon the particular facts and circumstances upon which it is made.[64]

Changing cause of action.[65]—At common law the court had no power to allow amendments introducing new and different causes of action, or setting up new defenses founded upon transactions entirely different from those stated in the plea,[66] and this rule is still generally in force in so far as it applies to amendments at the trial,[67] or, in some states, after the filing of the pleading.[68] In some states, how-

Kleimenhagen v. Dixon [Wis.] 100 N. W. 826. Statutes allowing amendments are remedial in character, and are to be liberally construed and applied in favor of the privilege. Perrin v. Mallory Commission Co. [Ariz.] 76 P. 476; Cooke v. Cain, 35 Wash. 353, 77 P. 682.

63. Since plaintiff may dismiss his action and bring new one, while defendant must present all his defenses for his own protection. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614; Perrin v. Mallory Commission Co. [Ariz.] 76 P. 476.

64. Kleimenhagen v. Dixon [Wis.] 100 N. W. 826.

65. See 2 Curr. L. 1218, n. 16 et seq.

66. Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806.

67. Babb v. Oxford Paper Co. [Me.] 59 A. 290; Grymes v. Liebke Hardwood Mill. & Lumber Co. [Mo. App.] 85 S. W. 946; Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806; Kuntz v. Schnugg, 90 N. Y. S. 933; Sutton v. Catawba Power Co. [S. C.] 49 S. E. 863. In Georgia all parties may, at any stage of the cause and as a matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough to amend by [Civ. Code 1895, § 5097] (Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162; City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318). But no amendment adding a new and distinct cause of action or new and distinct parties may be allowed unless distinctly provided for by law [Civ. Code 1895, § 5099] (City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318). Held that there was enough in the declaration to amend by. City of Rome v. Sudduth, 121 Ga. 420, 49 S. E. 300. A defendant who has filed his plea may, after the expiration of the time within which he is allowed to plead, set up by amendment any new defense without making an affidavit that its omission from his original answer was not intended for the purpose of delay, if in the discretion of the trial judge, the circumstances of the case or the ends of justice require the amendment [Ga. Acts 1897, p. 35]. McCall v. Wilkes, 121 Ga. 722, 49 S. E. 722. An amendment setting up new and distinct issues is not allowable after the filing of an auditor's report. Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162. In Louisiana can be allowed only when they do not alter the substance of the demand by making it different from the one originally brought. Code Prac. art. 419. Supplemental petition cannot be allowed at close of evidence, in suit to set aside judgment for fraud, where parties for whose benefit suit is instituted are different. Relief demanded thereby is inconsistent with that originally asked for, and evidence needed to protect defendant is different. Succession of Dauphin, 112 La. 103, 36 So. 287.

Amendment held not to change cause of action: Where complaint alleged that defendant wrongfully and unlawfully changed grade of street and occupied it with tracks, amendment made during trial, striking out words "wrongfully and unlawfully," and demand for injunction. Error to strike it out. St. Clair v. San Francisco, etc., R. Co., 142 Cal. 647, 76 P. 485. Such words are mere epithets, and presence does not improve, or absence impair, complaint. Id. In action on contract. Kitchens v. Usry, 121 Ga. 294, 48 S. E. 945. Changing the form of an action for the recovery of money obtained by fraud from trespass to assumpsit. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001. In action of ejectment, description of property held sufficiently definite to amend by, and amendment more particularly describing it properly allowed. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834. Correcting description of property in complaint in action of ejectment. Kennett v. Van Tassell [Kan.] 79 P. 665. Amended petition, in proceeding for assignment of dower and establishment of right of ingress and egress, setting up right to passway. Harris v. Langford, 26 Ky. L. R. 1096, 83 S. W. 566. Where petition to set aside deed alleged that it was procured by fraud of grantee, amendment alleging that it was executed under mutual mistake. Castleman v. Castleman [Mo.] 83 S. W. 757. Petition in action for attorney's fees. Harrison v. Murphy, 106 Mo. App. 465, 80 S. W. 724. In action for injuries resulting from fall from unprotected bridge, held that it could not be held as matter of law that plaintiff was not entitled to amend so as to allege fall from embankment over culvert. Northrop v. Sidney, 97 App. Div. 271, 90 N. Y. S. 23. Where, in action for rent, allegations of petition were sufficiently general to admit proof that defendant had gone into possession either with or without the owner's consent, and had or had not agreed to pay the reasonable rental value, amended petition declaring on either express or implied promise to pay rent would not set up different cause of action. Schmidt v. Brittain [Tex. Civ. App.] 84 S. W. 677. Fact that amended petition omitted count on note and prayed for larger sum did not create new cause of action. Id. In action for breach of contract, where answer set up release or rescission, amendment setting out copy of release held germane and properly allowed. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

Amendment held to change cause of action: Amendment declaring an account stated immediately between parties is departure from original cause based on account claimed by plaintiff as assignee, and is properly stricken. Ivy Coal & Coke Co. v. Long, 139 Ala. 535, 36 So. 722. Where, on foreclosure of a chattel mortgage, an execution is issued against the property, one interposing a claim

ever, the allowance of such amendments is discretionary,[60] and in others a cause of action may be substituted for another when the two could have been joined originally.[70] The rule does not ordinarily apply to amendments made before trial.[71]

cannot, on a trial thereof, amend the same by alleging that the mortgagor is not indebted to the mortgagee. Ford v. Fargason, 120 Ga. 708, 48 S. E. 180. In suit for breach of lease, consisting in dispossessing plaintiff before its expiration, amendment alleging that weather was cold and plaintiff's wife was made sick by exposure. Id. Petition on quantum meruit against father's estate for services to child cannot be amended by seeking to recover on express contract made with widow after father's death. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. In action for injuries to servant, amendment alleging defect in derrick. Moyer v. Ramsay-Brisbane Stone Co., 119 Ga. 734, 46 S. E. 844. An amendment changing the action from one of tort to one of contract should not be allowed. Amendment to declaration sounding in tort, seeking to recover for breach of defendant's duty as common carrier to furnish suitable car for transportation of live stock, so as to set up special contract for equipment of car, properly disallowed. Gilleland v. Louisville & N. R. Co., 119 Ga. 789, 47 S. E. 336. Petition in action by going partnership for damages for conversion of its property cannot be so amended as to wholly abandon such cause of action and to state a cause in favor of a member of the dissolved partnership for an accounting of the partnership business between such member and such defendant. Plaintiff's right also barred by limitations. Thompson v. Beeler [Kan.] 77 P. 100. No abuse of discretion in refusing to allow amendment during trial of action to restrain mining of coal and for accounting. Barrett v. Kansas & T. Coal Co. [Kan.] 79 P. 150. In action to enforce lien for purchase price of mill, held no abuse of discretion, after issues had been made up, to refuse to allow filing of amended answer setting up fraudulent representations as to lease of certain water power, and as to ownership of land, which facts would have introduced new issue and must have been known to defendant when original answer was filed. Newton v. Levy, 26 Ky. L. R. 476, 82 S. W. 259. Amendment in action to recover debt, commenced by capias, properly disallowed. Musselman Grocer Co. v. Casler [Mich.] 100 N. W. 997.

Note: The rule generally laid down to the effect that no amendments which change or alter the cause of action contained in the original pleading are allowed has in legal actions been maintained by an overwhelming weight of judicial authority and must be considered as the settled doctrine on the subject. Doyle v. Pelton [Mich.] 96 N. W. 483; Proctor v. Southern R. Co., 64 S. C. 491; Westover & Co. v. Van Dorn Iron Works Co. [Neb.] 97 N. W. 589; Ex parte Mansfield, 11 App. D. C. 558; Gilleland v. L. & N. R. Co., 119 Ga. 789. Various questions present themselves, among the most important of which are: What is the cause of action sued upon? Does the amendment merely amplify the statement of facts already made (Woodward v. Miller, 119 Ga. 618, 622, 100 Am. St. Rep. 188), state it in different form, still relying on the original cause of action (Robertson v. Springfield & S. R. Co., 21 Mo. App. 633), or does it seek to introduce some material allegations which create a cause of action where none existed before (Ex parte Mansfield, 11 App. D. C. 558), or does it seek to change the facts so as to permit the plaintiff to recover on a matter not anticipated by the defendant and therefore to his prejudice (Bermel v. Harnischfeger, 89 N. Y. S. 1029)?

Various tests have been resorted to to determine the question: (1) Would a recovery under the original complaint have barred any further recovery under the proposed amended complaint? Coyle v. Davidson, 86 N. Y. S. 1089; Davis v. N. Y. T. T. Co., 110 N. Y. 646. (2) Would the same evidence have been required to support and would the same judgment have been rendered in the one case as in the other? Grigsby v. Barton Co., 169 Mo. 221, 225; Boeker v. Crescent Belting & Packing Co., 101 Mo. App. 429. (3) Does the amended declaration set out a new act or thing as the cause of action, or does it only state in a different form the original act or thing as the cause? Metropolitan Life Ins. Co. v. People, 106 Ill. App. 516, afd. 70 N. E. 643.—3 Mich. L. R. 228.

68. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318.

69. Allowing amendment setting up new and distinct issue after introduction of evidence matter of discretion, and refusal not ground for reversal. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808. In New York municipal court new cause of action or defense may be set up. Proper to allow oral pleadings, in action for use and occupation of roof of plaintiff's house for purpose of stringing wires, to be amended so as to base claim on trespass. Bunke v. New York Tel. Co., 91 N. Y. S. 390.

70. May not substitute for a cause of action another which could not have been originally joined with it. By substituting cause in contract for one in tort. Crawford v. Alexander [Ind. T.] 82 S. W. 707. A complaint stating a cause of action on contract may be amended so as to declare on tort where the two causes could have been joined. Where both grow out of the same transaction. Action for breach of contract in regard to construction of railway on plaintiff's land. Reynolds v. Mt. Airy & E. R. Co., 136 N. C. 345, 48 S. E. 765. Plaintiff cannot amend by setting up a new and distinct cause of action not germane to the first. Id. Changing cause of action on contract to one in tort arising out of same transaction is merely different mode of stating same cause. Id.

71. Permitting a petition in a suit to quiet title to be amended before answer so as to change the action to one in ejectment is within the discretion of the court. Not error where no prejudice to defendant is shown. Curtis v. Schmehr [Kan.] 76 P. 434. Must not set up an entirely new and different cause of action, founded on facts wholly foreign to that attempted to be set up originally. Proper where transaction and par-

New causes of action or defenses which are barred by limitations cannot be set up.[72] Tests often applied are whether the same evidence will support, and the same measure of damages apply to, both pleadings.[73] The amendment is not objectionable where the pleading remains the same in substance, notwithstanding differences of specification,[74] nor where it merely corrects a defective statement of a good cause of action,[75] strikes out words inaccurately describing the transaction

ties are same and relief only is different. Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806. Where after foreclosure of deed of trust grantor filed bill praying for redemption, amendment showing limitations and praying for cancellation of trustee's deed and quieting plaintiff's title should be allowed before answer. Id. Amendments substantially changing a cause of action may be allowed before, but not during or after, the trial. S. C. Code Proc. § 194, limiting right to amend, does not apply to amendments before trial, and tort action may be substituted for contract action at that time. Standard Sew. Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711. In South Dakota the court may, either before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleadings or proceedings to the proof [Rev. Code Civ. Proc. § 150]. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614. The limitation as to not changing substantially the claim or defense applies only to amendments made after trial for the purpose of conforming the pleadings to the proof (Id.), and does not apply to amendments made before trial (Id.).

72. In action by administratrix for wrongful death of child, amendment striking out allegation that it was brought under certain section of the code, under which it could not be maintained, and thus leaving right of action under another section, held not to constitute a departure or add a new cause of action, and properly allowed. Louisville & N. R. Co. v. Robinson [Ala.] 37 So. 431. In action to enforce lien securing note, amendment by adding prayer seeking to foreclose lien on another tract of land held not to introduce new cause of action, but merely the addition of a prayer for additional relief which could have been granted without the amendment. Kent v. Williams [Cal.] 79 P. 527. In action for personal injuries count held not to set up new cause, but to constitute restatement of one previously alleged. Town of Cicero v. Bartelme, 212 Ill. 256, 72 N. E. 437. In action against railroad company for personal injuries resulting from negligence, amendment changing place at which injuries took place does not state new cause of action, and is not amenable to plea of limitations. Chicago City R. Co. v. McMeen, 102 Ill. App. 318. Where petition in action for appointment of receiver to take charge of road transferred by turnpike company to county, for purpose of enforcing payment of company's bonds, alleged that plaintiff had lien on property, amendment alleging that transfer was without consideration and in fraud of creditors held to state new cause of action. Roush v. Vanceburg, etc., Turnpike Co. [Ky.] 85 S. W. 735. Amendment held not improper on ground that it introduced new cause of action which would otherwise have been barred by limitations. Cogswell v. Hall, 185 Mass. 455, 70 N. E. 461. Amendment of complaint in action for price of stock. Cleveland v. Rothschild [Mich.] 101 N. W. 62. In action for breach of contract to repair buildings, amendments to complaint by inserting words "for a valuable consideration" (Frey v. Vignier, 145 Cal. 251, 78 P. 733), and by striking out allegation that defendant "repaired said premises and property" except the kiln, held not to set up new causes of action (Id.). An amended petition which is merely a restatement of the gravamen of the charge in the original is not a departure, nor does it introduce a new subject of litigation, though original sounded in tort, and amendment avers contract liability only. Shoemaker v. Commercial Assur. Co. [Neb.] 101 N. W. 335. Petition in nature of bill of review, by widow and heirs of decedent and one to whom it was alleged they had conveyed certain property of decedent by warranty deed, to set aside judgment against him under which land was sold, held properly amended so as to allege that conveyance was in trust for grantors. Ferguson v. Morrison [Tex. Civ. App.] 81 S. W. 1240. Petition in action under Indian depredation act of March 3, 1891 (26 Stat. at L. 851, c. 538; U. S. Comp. St. 1901, p. 758), in which wrong is alleged to have been committed by particular tribe, cannot be amended after expiration of three years' limitation therein prescribed, so as to state different tribe as wrongdoer. United States v. Martinez, 25 S. Ct. 80.

73. If both of these fail, the new pleading is not an amendment. Haines v. Pearson [Mo. App.] 81 S. W. 645. Where original petition alleges negligence in placing and maintaining sign without properly securing it, a second one alleging negligence in failing to remedy defect resulting from rusting of wires held amendment, and not statement of new cause of action. Id.

74. The test of whether an amendment sets up a new cause of action is whether the cause of action remains the same in substance, notwithstanding differences of specification. Where foundation of action in both pleadings is negligence in failure to keep sidewalks clean, differences of specifications of negligence immaterial. District of Columbia v. Frazer, 21 App. D. C. 154.

75. Thompson v. Hibbs [Or.] 76 P. 778. In action for personal injuries, amended petition held not to state new or different cause of action from that stated in original, but to be merely an amplification and more specific statement of general allegations of original. Chicago, etc., R. Co. v. O'Donnell [Neb.] 101 N. W. 1009. The

declared on,[78] corrects mistakes,[77] changes the mode of proving damages,[78] or contains additional matter descriptive of the same wrong originally pleaded, without pleading any other or different wrong.[79] By statute in Illinois an adjudication of the court allowing an amendment is conclusive on the question as to whether it is the same action,[80] unless it is claimed that the amendment sets up a new cause of action barred by limitations.[81]

On amendment introducing a new cause of action, the opposite party is ordinarily entitled to a continuance.[82] But he is not entitled to a continuance in such case on the ground of surprise where he gave evidence on the issue and was notified long before the trial that he would be called upon to meet it,[83] nor can he claim error in the allowance of an amendment on the ground of surprise where he does not ask for an adjournment on that ground,[84] or refuses the court's offer of a continuance.[85]

To correct variance.[86]—Allowing amendments during the trial for the purpose of making the pleadings conform to the proof is generally held to be discre-

rounding out of a complaint to cure defects is not changing a cause of action, or adding a new cause. Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642. May amend by alleging foreign law giving right of action for negligently causing death. Id. The difference between a defective statement of a good cause of action and a statement of a defective cause of action is that the latter cannot be made good by adding other allegations. Id. Allowing amendment, not changing cause of action, for purpose of correcting inadvertence in copying unsigned paper into statement of claim instead of signed memorandum of contract. Dunn v. Mayo Mills [C. C. A.] 134 F. 804. Amendment supplying omitted allegation that conveyance was made for purpose of hindering, delaying and defrauding complainants. Kinney v. Craig [Va.] 48 S. E. 864.

76. Word "guaranty." City of Albany v. Cameron & Barkley Co., 121 Ga. 794, 49 S. E. 798.

77. Where petition in action for damages for ejection from street car alleged that plaintiff had paid his fare, amendment alleging that he tendered transfer slip. Lexington R. Co. v. O'Brien [Ky.] 84 S. W. 1170. So as to include lands omitted in complaint in partition proceedings. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

78. Amendment alleging market price of yarn undelivered under contract instead of sale at that price. Dunn v. Mayo Mills [C. C. A.] 134 F. 804.

79. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318. In an action ex delicto, a petition setting out certain acts of negligence to show a violation by defendant of plaintiff's right may be amended by setting out additional acts of negligence to show substantially the same violation of the same right. Injury from defective sidewalk. Id. In action on fire insurance policy, amendment alleging that goods were damaged by being prepared for removal from building properly allowed. Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972. Amendment in action by servant for personal injuries held properly allowed, it merely adding additional description of conditions making defendant's acts negligent. Babb v. Oxford Paper Co. [Me.] 59 A. 290. Setting up new ground of negligence. Galveston, etc., R. Co. v. Perry [Tex. Civ. App.] 85 S. W. 62; Pratt, Hurst & Co. v. Tailer, 90 N. Y. S. 1023. In action against architects for negligence in supervising construction of building, amendment to permit proof of negligent placing of trimmer against side wall properly allowed. Straus v. Buchman, 96 App. Div. 270, 89 N. Y. S. 226.

80. Hurd's Rev. St. 1903, c. 110, § 23. Mackey v. Northern Mill. Co., 210 Ill. 115, 71 N. E. 448.

81. As where original declaration fails to state cause of action, and amended one is filed after running of limitations. Mackey v. Northern Mill. Co., 210 Ill. 115, 71 N. E. 448.

82. Immediate enforced continuance of the trial is reversible error. Application for postponement not essential where counsel is informed by court that he should have been prepared to meet issue. Action for personal injuries on dock. Oats v. New York Dock Co., 90 N. Y. S. 878.

83. Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505.

84. Straus v. Buchman, 96 App. Div. 270, 89 N. Y. S. 226. No error in permitting amendment of petition on eve of trial, where defendant did not ask for delay on account of it, and court did not deem it necessary to strike it for his own protection. Snyder v. Ward [Iowa] 100 N. W. 348.

85. In action by junior incumbrancer to redeem from senior mortgage, held proper to allow amendment of complaint to allege payment and demand its satisfaction of record, to conform to proof, where court's offer to grant continuance to defendant was refused. Conlon v. Minor, 94 App. Div. 458, 88 N. Y. S. 224. In suit for specific performance, amendment alleging tender of unpaid purchase price and demand for deed properly allowed pending defendant's motion for judgment on pleadings, where defendants declined offer of continuance if they would show prejudice. Christiansen v. Aldrich [Mont.] 76 P. 1007.

86. See 2 Curr. L. 1220, n. 23-25.

tionary when the claim or defense is not substantially changed thereby.[87] They are generally held proper where such proof was received without objection,[88] but not when it was seasonably objected to.[89] There is a conflict of authority as to whether such amendments should be allowed after verdict and judgment.[90]

87. A new cause of action cannot be introduced after submission of case. Where case was tried and submitted and correct judgment rendered on original theory, fact that such amendment was filed after submission was immaterial. Boardman v. Louis Drach Const. Co., 123 Iowa, 603, 99 N. W. 176. Amendment seeking to recover for use and occupation instead of under lease held to change cause of action. Id. A complaint setting up a cause of action for fraud cannot be amended so as to set up a cause based on mutual mistake. Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677. There is no abuse of discretion in refusing to strike amendments to a petition, filed after the taking of testimony and while the case is under consideration for the purpose of making it conform to the proofs. Johnson v. Farmers' Ins. Co. [Iowa] 102 N. W. 502. Refusal to allow amendment of the declaration after plaintiff has rested and when court is about to direct verdict held not error. Prochaska v. Fox [Mich.] 100 N. W. 746. Allowed where there is a mere variance as distinguished from a failure of proof [Mo. Code, § 798]. Studenroth v. Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487. Where defendant does not show prejudice from variance. Carlisle v. Barnes, 92 N. Y. S. 924. Amendment after trial so as to state new and distinct cause of action different from that first stated and upon which case was tried held properly disallowed where complaint was amended three times during trial. Conrad v. Adler [N. D.] 100 N. W. 722. Not error to refuse leave when plaintiff's claim would thereby be substantially changed. Hazzard v. Wallace, 5 Ohio C. C. (N. S.) 653. Should be allowed where it does not work a surprise to opposing counsel. Striking out word "flying" in allegation that deceased was killed while making flying switch. Adams v. South Carolina & G. Extension R. Co., 68 S. C. 403, 47 S. E. 693. A party not asking for a continuance cannot claim surprise, on appeal. Helbig v. Gray Harbor Elec. Co. [Wash.] 79 P. 612.

Amendments properly allowed: In action on contract to purchase property at judicial sale, to raise question of validity of sale. Fairy v. Kennedy, 68 S. C. 250, 47 S. E. 138. In action against village for personal injuries, so as to make complaint conform to proof in regard to date of injury, where no surprise was claimed. Ladrick v. Village of Green Island, 92 N. Y. S. 622. Changing allegation that defendant entered into contract through its agent to allegation that it made contract itself, where no substantial prejudice is shown. Babcock v. Ormsby [S. D.] 100 N. W. 759. In action to set aside proceedings of village board for laying of drain, amendment alleging that meetings were irregularly called. Kleimenhagen v. Dixon [Wis.] 100 N. W. 826.

88. Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505. N. Dak. Rev. Code Civ. Proc. § 150. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614. No abuse of discretion in allowing amendment to complaint, in action for wrongful death, after argument begun, where evidence fully authorized averment [Burns' Ann. St. Ind. 1901, § 399]. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985. May be allowed after auditor's report where it does not set up a new and distinct issue. Where other party wishes to introduce further evidence, he should move to recommit case to auditor. Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162. Leave to amend a complaint upon trial as to material matters in accordance with the evidence admitted without objection should be granted as a matter of course, especially where such matters appear to be undisputed and undisputable. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

89. Reilly v. Vought, 87 N. Y. S. 492. When such evidence has been received over objection and the amendment is also objected to. Changing cause from one to set aside fraudulent conveyances to one upon contract, or to enforce vendor's lien. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66. Error in admitting evidence inadmissible under the pleadings and seasonably objected to on that ground cannot be cured by subsequent amendment of the pleadings. Does not apply when no such objection. Motion to strike out does not take its place. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

90. See 2 Curr. L. 1216, 1217, n. 5-9.

California: Even if the court has power to order an amendment after verdict so as to make the demand for damages conform thereto, he is not warranted in doing so where the evidence does not warrant a verdict for a larger amount than that originally claimed. Not where treble damages are demanded, and evidence shows defendant is only liable for actual damages, and verdict is greater than such damage. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507.

In Georgia will not be allowed after verdict and judgment. Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162. An amendment to a petition is not too late when offered before the case is submitted to the jury. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318. An auditor may allow amendments while the case is before him [Civ. Code 1895, § 4583]. Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162.

Kansas: Amendment alleging mental unsoundness of grantor at time of executing certain deeds properly allowed on hearing of motion for new trial, under Kan. Code Civ. Proc. § 139 (Gen. St. 1901, § 4573). Howard v. Carter [Kan.] 80 P. 61.

In Minnesota will be allowed even after judgment, where it clearly appears that defendant was not misled or in any way prejudiced in maintaining his defense upon the merits [Minn. Gen. St. 1894, § 5262]. Briggs v. Rutherford [Minn.] 101 N. W. 954.

New Hampshire: Where one rescinds a contract of sale for false representations

On appeal.[91]—On appeal a party is confined to the issues raised by his pleadings in the court below, and cannot change them or introduce new issues by amendment.[92] An amendment will not be allowed in the supreme court making a radically different case from that presented in the lower court.[93]

After appeal.[94]—Pleadings may ordinarily be amended after reversal of a cause on appeal and remand to the court below.[95] Where a judgment overruling a demurrer to a declaration is reversed on appeal, the plaintiff may amend on return

and sues in deceit to recover the purchase price, conceding that such is not the proper remedy, he may, after verdict for the damages claimed, amend by adding count for money had and received, and thereupon have judgment on the verdict. Course of trial and rule of damages the same. Fellows v. Judge, 72 N. H. 466, 57 A. 653.

Rhode Island: After verdict the declaration should be so amended as to conform to the evidence and the issues between the parties. Where, in action to recover land, declaration did not describe portion to which plaintiff was entitled. New York, etc., R. Co. v. Horgan [R. I.] 59 A. 310.

In South Carolina complaint stating cause of action may be amended after judgment. Kitchen v. Southern R. Co., 68 S. C. 554, 48 S. E. 4.

Illinois: Amendment of declaration charging defendant with negligently erecting, permitting to remain and maintaining a column in an unsafe condition, by inserting word "placing," properly allowed after verdict. Hansell-Elcock Foundry Co. v. Clark [Ill.] 73 N. E. 787.

NOTE. Amendment to cure defects for which motion in arrest of judgment has been made: "At common law the court had power to allow an amendment of the pleadings in any case until final judgment and after motion in arrest of judgment. Chaffee v. Rutland R. Co., 71 Vt. 384, 45 A. 750. In Georgia a motion in arrest of judgment can be sustained only for such defects appearing on the face of the pleadings as are not amendable. Merritt v. Bagwell, 70 Ga. 579. In Daley v. Atwood, 7 Cow. [N. Y.] 483, an amendment of plaintiff's oyer was granted after trial and verdict for him, though the defendant's attorney supposed the oyer to be correct until the trial, and relied on moving in arrest of judgment, of which privilege he was deprived by the amendment." Amendment may also be allowed to supply omitted averments, or to cure insufficient or erroneous allegations, or to strike out improper matter. See note 67 L. R. A. 179.

91. See 2 Curr. L. 1217, n. 9.

92. From county to district court. Bankers' Union of the World v. Favalora [Neb.] 102 N. W. 1013. Where, in county court, defendant pleaded account stated, could not amend on appeal to district court by including defense of accord and satisfaction. New ground of defense, and properly stricken. Id. In New York, when an action commenced before a justice of the peace is discontinued and recommenced in the county court, plaintiff must complain for the same cause of action only, and defendant must set up the same defense only [Code Civ. Proc. § 2957]. Moisen v. Burr, 92 N. Y. S. 435. No amendment may be made in the county court which changes the cause of action or adds a new one, or which materially changes the nature and scope of the defense, or sets up an independent and separate defense not made before the justice. Defendant setting up only facts showing that title to real estate is involved cannot amend so as to show counterclaim. Id. Upon removal of an action from the municipal court to the city court of New York, the pleadings remain the same unless amendment thereof be allowed. Cannot be amended except by permission, and then only to extent allowed in lower court. Vail v. Blumenthal, 89 N. Y. S. 287. The issue must be joined before removal, and may not be changed. Id. Where a case is removed after issue joined by answer, plaintiff cannot thereafter demur to new matter in such answer. Id.

93. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

94. See 2 Curr. L. 1215, n. 83.

95. As far as facts are concerned, case stands as though it had never been tried. Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 80 P. 94. When a decree or judgment is reversed and remanded by the appellate court without specific directions, the lower court may permit amendments to the pleadings not inconsistent with the principles announced by the reviewing court, and not introducing grounds that did not exist at the hearing in the court below. Case stands as though no trial had been had. Dinsmoor v. Rowse, 211 Ill. 317, 71 N. E. 1003. Where the cause is remanded with directions to proceed in accordance with the views expressed, and it appears from the opinion that the grounds of reversal are such as may be obviated by subsequent amendments, it is the duty of the court to permit the case to be redocketed and permit amendments as though it were being heard for the first time. Id. Denial of application to amend plea, made after case had been heard in supreme court and remanded for new trial, not abuse of discretion. Central Sav. Bank v. O'Connor [Mich.] 102 N. W. 280. Denial not prejudicial where defendants were permitted on trial to make a full statement of all defenses claimed, and verdict was directed for plaintiff because defenses were not available on the merits. Id. On reversal of judgment for plaintiff in action on verbal contract to convey land to him in consideration of his making certain improvements, held that he should be allowed to amend petition to show how much land was to be conveyed. Robards v. Robards [Ky.] 85 S. W. 718. And that defendant should be allowed to set up counterclaim for money loaned. Id. When remanded generally, pleadings may be amended and new issues raised, but only such new issues may be raised as are presented by such amendments. Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878.

of the remittitur to the lower court.[96] Where a judgment of the lower court sustaining a demurrer is affirmed, the rule is otherwise.[97]

Terms of amendment.[98]—The court may in his discretion impose such terms for allowing amendments as may be just, including the payment of costs,[99] but onerous conditions should not be imposed.[1]

Effect of amendment.[2]—Amendments ordinarily relate back to the beginning of the suit,[3] unless the original complaint fails to state a cause of action.[4]

96. City of Rome v. Sudduth, 121 Ga. 420, 49 S. E. 300; Ramey v. O'Byrne, 121 Ga. 516, 49 S. E. 595.

97. Nothing in lower court to amend. City of Rome v. Sudduth, 121 Ga. 420, 49 S. E. 300.

98. See 2 Curr. L. 1215.

99. That the conditions stated at the beginning of the trial under which the amendment should be allowed had not arisen (Cogswell v. Hall, 185 Mass. 455, 70 N. E. 461), and the question whether plaintiff when he brought the action intended to include the subject of the amended count in his demand is within the discretion of the trial court. Amendment properly allowed. Id. On amendment of complaint so as to bring in new party, after reversal of judgment denying motion to dismiss because of defect of parties, where the court of appeals grants a new trial with costs to abide the event, held that requiring payment of $50 costs as condition of allowing amendment was proper. Steinbach v. Prudential Ins. Co., 92 App. Div. 440, 87 N. Y. S. 107. Held that plaintiff should be required to pay all costs of action as condition for service of amended complaint, except trial fee, payment of which was imposed on him as condition of allowing withdrawal of juror. Ross v. Bayer-Gardner-Himes Co., 92 App. Div. 616, 87 N. Y. S. 36. After a mistrial, amendments presenting new issues should be allowed only upon payment of costs already incurred. In action for libel allowing amendment to answer setting up justification, held not abuse of discretion. Bruns v. The Brooklyn Citizen, 90 N. Y. S. 701. Under New York Municipal Court Act, court may impose payment of costs as condition [Laws 1902, p. 1542, c. 580, § 166]. Klinker v. Guggenheimer, 92 N. Y. S. 797. Defendant should be required to pay costs on amending answer, where, after reversal of judgment on appeal, she was bound to be defeated and mulcted in costs as the record then stood. Id. Justice cannot impose greater sum than $10 costs as condition for allowing amendment [Id. § 335]. Toher v. Schaefer, 92 N. Y. S. 795. Order imposing greater sum not appealable, but remedy is by application to justice for reargument of motion as to terms of amendment. Id. On amendment of pleadings after an appeal and decision by appellate courts, the amending party should be required to pay all costs incurred by his adversary after the service of the original pleading. Wood v. New York, etc., R. Co., 91 N. Y. S. 788. It is not error to allow an amendment to the complaint after a reversal of a judgment in plaintiff's favor, without requiring as a condition the payment of costs incurred by defendant on the former trial and appeal. Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 80 P. 94. A successful plaintiff should not be charged with the costs up to the filing of an amended petition which does not change the cause of action. Where original petition was in form of trespass to try title, amended one specifically pleading facts upon which he relied for recovery held not to set up new cause of action. Keas v. Gordy [Tex. Civ. App.] 78 S. W. 385. The court may require the amending party to pay costs. Where it did not appear that, if amendment had been made before trial, case would not have been contested in same manner, it was not error to allow plaintiff to amend on payment of costs and to impose costs of trial on defendant on judgment being rendered against him. Kleimenhagen v. Dixon [Wis.] 100 N. W. 826.

1. In action on account stated, refusal to allow amendment to answer so as to plead payment and accord and satisfaction, save on condition that defendant withdraw all previous objections, held error. Shaw v. O'Meara, 88 N. Y. S. 152.

2. See 2 Curr. L. 1222.

3. Changing form of action for money obtained by fraud from tort to assumpsit. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001. For the purpose of determining plaintiff's right of action, the complaint as amended is to receive the same consideration as if the matters alleged in the amendment had been included in the original complaint. White v. Stevenson, 144 Cal. 104, 77 P. 828. Amended pleading only speaks as of the time of the commencement of the action, and the rights of the parties are determined as of that time [N. Y. Code Civ. Proc. § 544]. Le Boeuf v. Gray, 87 N. Y. S. 597; Industrial & General Trust v. Tod, 93 App. Div. 263, 87 N. Y. S. 687. Where the court has acquired jurisdiction of the parties, an amendment to the petition will be construed as relating back to the original institution of the suit, and not as the institution of a new suit. Ferguson v. Morrison [Tex. Civ. App.] 81 S. W. 1240. Where petition in nature of bill of review, brought by widow and heirs of decedent and one to whom it was alleged they had conveyed a part of decedent's lands by warranty deed, to set aside judgment under which land was sold, was amended so as to allege that conveyance was in trust for grantors, held, as regards limitations, action should not be regarded as having been commenced as to widow and heirs at time of filing amendment. Id. Unless a new cause of action be introduced or a new party brought in. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708. Amended petition in suit on claim against estate of decedent held not to state new cause of action. Id.

4. An amended one filed after the running of the statute of limitations cannot relate back to the original summons. Mackey v. Northern Mill. Co., 210 Ill. 115, 71 N. E. 448.

An amended pleading supersedes all previous ones of the same class,[5] and must contain all averments necessary to the cause of action or defense relied on.[6] In determining what pleadings are superseded, their contents and not the name given them by the pleader controls.[7] The opposite party will not be held to have waived the right to object to a disregard of this rule where the amended pleading contains nothing to indicate an intention to rely on the former one.[8] An application to replead to an amended complaint is an election to abandon the original answer, though it is then on file.[9]

An order refusing leave to amend because of want of power is appealable.[10] The refusal of the court to permit the filing of an additional paragraph of the answer is not ground for a new trial, but can only be presented by an independent assignment of error on appeal.[11]

A material amendment to the petition opens the case, if in default, for answer by the defendant.[12]

Failure to amend upon order of court is ground for dismissal.[13]

§ 8. *Supplemental pleadings.*[14]—The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the cause occurring after his former pleading,[15] and

5. Texas district and county court rules 14, 15 (20 S. W. xii, 84 Tex. 709, 710). Chicago, etc., R. Co. v. Halsell [Tex.] 83 S. W. 15; Guthrie v. Howland [Ind. App.] 71 N. E. 234. For all purposes of the record. Goldstein v. Michelson, 91 N. Y. S. 32. Defendant cannot change its status by referring to it in the amended pleading, at least without plaintiff's consent. Original properly stricken, though amended one alleged that defendant realleged every allegation contained in certain paragraphs of the original. Id. Original need not be preserved in record made for appellate court. John Deere Plow Co. v. Jones, 68 Kan. 650, 76 P. 750. On appeal original cannot be tested by the ruling upon the demurrer thereto. Stewart v. Knight & Jillson Co. [Ind. App.] 71 N. E. 182. The sufficiency of instructions is to be determined by the amended and not the original declaration. Amended after verdict. Hansell-Elcock Foundry Co. v. Clark [Ill.] 73 N. E. 787.

6. Answer containing denial of partnership superseded by amended one containing no such denial. Chicago, etc., R. Co. v. Halsell [Tex.] 83 S. W. 15.

7. Pleading called "supplemental answer," which was direct and full reply to petition, held an amended answer, and superseded by subsequent amended answer. Dist. & Co. Court Rules Tex. Rules 6-8, 10, 15 (84 Tex. 709, 710, 20 S. W. 12). Chicago, etc., R. Co. v. Halsell [Tex.] 83 S. W. 15.

8. Plaintiff entitled to go to trial on assumption that no defense was relied on except those alleged in last amended answer. Chicago, etc., R. Co. v. Halsell [Tex.] 83 S. W. 15.

9. Nye v. Bill Nye Gold Min. & Mill. Co. [Or.] 80 P. 94.

10. Lassiter v. Norfolk & C. R. Co., 136 N. C. 89, 48 S. E. 642.

11. Fireman's Fund Ins. Co. v. Finkelstein [Ind.] 73 N. E. 814. Order granting defendant leave to amend is not appealable under New York municipal court act. Klinker v. Guggenheimer, 92 N. Y. S. 797.

12. Amendment of petition in action on fire insurance policy held material. Lippman v. Aetna Ins. Co., 120 Ga. 247, 47 S. E. 593. Allowing a material amendment to the petition at the trial term opens it to demurrer or to pleas setting up new and distinct defenses at that term [Ga. Civ. Code 1895, § 5068]. Quillan v. Johnson [Ga.] 49 S. E. 801. Only such amendments as make a particular defense available for the first time are material, within the meaning of this rule. Id. Amendment in action on fire insurance policy alleging that damage was caused by preparing goods for removal held not so material as to open default. Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972. Amendment of petition in action for injuries from negligent maintenance of telephone, made after default, held not to materially change cause of action, but merely to set forth jurisdictional facts, and hence not to open petition to demurrer or plea. Southern Bell Tel. & T. Co. v. Parker, 119 Ga. 726, 47 S. E. 194.

13. Egan v. New York, etc., R. Co., 5 Ohio C. C. (N. S.) 482.

14. In equity, see Equity, § 6C, 3 Curr. L. 1225.

15. Sparks v. Green [S. C.] 48 S. E. 61.

In Georgia a defendant in any case may by special plea set up matter of defense which has arisen since the institution of the suit, or since his last plea. Cook v. Georgia Land Co., 120 Ga. 1068, 48 S. E. 378. In actions involving the title or right to possession of land, defendant may, by a special plea of puis darrein continuance, set up the fact that such title and right have become vested in him pending the action. Amendment to answer, alleging that defendant had acquired tax title, properly allowed. Id.

Iowa Code, § 3641. Little v. Pottawattamie Co. [Iowa] 101 N. W. 752. Where an action is prematurely brought and plaintiff thereafter performs the conditions precedent to his right to sue, he should be allowed to file an amendment or supplement to his petition reciting the facts, and to proceed

either party may, by leave of court, set up by supplemental pleading the judgment or decree of any court of competent jurisdiction, rendered since the commencement of the action, determining the matters in controversy or any part thereof.[16] In some states the supplemental pleading may also include matters existing when the original plea was filed, but of which the party was then ignorant.[17] In others such matters may only be availed of by amendment.[18]

After an order of interpleader in an action at law plaintiff should apply for leave to file a supplemental complaint.[19]

Ordinarily a supplemental pleading cannot be served without leave of court.[20] Allowing such pleas is not wholly discretionary, and they should be permitted when substantial justice will thereby be promoted,[21] but they will not be allowed where the matters therein set out are not essential to a proper determination of the suit.[22]

The right to file a supplemental pleading may be barred by laches;[23] but mere delay in moving for leave to bring in a supplemental complaint has been held, not to preclude the court from granting the motion.[24]

with his case upon payment of costs. For failure to present claim against county to board of supervisors. Id.

New York: The proper way to take advantage of facts constituting a new cause of action or defense, arising after action brought, is by application to the court for leave to serve a supplemental complaint or answer. Code Civ. Proc. § 544. Amended pleading only speaks as of date of commencement of action and rights of parties are determined as of that time. Le Boeuf v. Gray, 87 N. Y. S. 597; Industrial & General Trust v. Tod, 93 App. Div. 263, 87 N. Y. S. 687. But where an amended complaint setting up such facts is served and answered and the issues thus raised are tried, they will be considered in determining the rights of the parties. Id.

South Dakota Rev. Code Civ. Proc. § 154. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614.

Washington: In action for rescission of contract whereby plaintiff was to raise alfalfa on plaintiff's land, where complaint alleged breach by defendant, held proper to allow filing of supplemental complaint setting up acts of defendant since filing of original, done for purpose of driving plaintiff off the land. Hodges v. Price [Wash.] 80 P. 202. Where the contract sued on provides for payments in monthly instalments, a supplemental complaint may be filed to cover those accruing after the commencement of the action. Benefit certificate. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209.

Wisconsin: New matters which, if known or in existence at the commencement of the action, might properly have been included in the original complaint, may be brought in by supplemental or amended complaint. True under old practice and under Code [Wis. Code, § 2687]. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

16. If set up by plaintiff, shall be without prejudice to any provisional remedies theretofore issued, or other proceedings had in said action on his behalf [S. C. Code Civ. Proc. § 198]. Sparks v. Green [S. C.] 48 S. E. 61. In action to recover crops seized under lien warrant, supplemental answer alleging that first warrant had been set aside and another issued since first seizure, and crops had been again seized by defendant, who had made advances on lien which had not been paid, and that plaintiff was insolvent, held properly filed. Id.

17. Sparks v. Green [S. C.] 48 S. E. 61. Iowa Code, § 3641. Little v. Pottawattamie County [Iowa] 101 N. W. 752. Wis. Code, § 2687. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. See, also, Murphy v. Plankinton Bank [S. D.] 100 N. W. 614.

18. Rev. Code Civ. Proc. § 154 should be construed in connection with Id. § 150, relating to amendments, and matters occurring before filing of original answer, but omitted by mistake, should be pleaded by way of amendment rather than by a supplemental answer. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614.

19. Under N. Y. Code Civ. Proc. § 544. Greenblatt v. Mendelsohn, 92 N. Y. S. 963. Should contain substantially the allegations of the former complaint, and such further ones as may be necessary to show the facts preceding the order, including substitution of defendants and the discharge of the original defendant upon payment into court of the amount of the debt or the delivery of the property, and compliance with the terms of the order, and praying judgment for the amount deposited or the property specified in the complaint, and costs. Id. The substituted defendant should answer the supplemental complaint within the time prescribed by law for answering a complaint. Id.

20. Complaint. Greenblatt v. Mendelsohn, 92 N. Y. S. 963.

21. Little v. Pottawattamie County [Iowa] 101 N. W. 752.

22. Answer in controversy over real estate. Jones v. Jones, 90 N. Y. S. 1002.

23. Defendants held barred from serving supplemental answer by failure to appeal from order holding supplemental pleadings unnecessary to join administratrix, and by long delay in making application. Jones v. Jones, 90 N. Y. S. 1002.

24. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. A delay of two years after the commencement of the action does not bar the right to apply, on proper notice, for leave to file supplemental answers. Prop-

A party should not be forced to trial on the day a supplemental answer is filed.[25]

Where a new trial is granted on appeal, such pleadings as may be necessary to bring in other necessary parties and complete the issues may be filed.[26]

§ 9. *Motions upon the pleadings.*[27]—In some states motions to strike irrelevant or redundant matter, to make more definite and certain, and the like must be made before trial.[28] A motion to dismiss is equivalent to a general demurrer, and may be made at the trial term if the petition is fatally defective.[29]

A motion to make a complaint more definite and certain[30] or to expunge irrelevant matter should point out the objectionable matter with reasonable accuracy.[31] Where the record shows that a motion to make the complaint more specific was acted upon and an amended complaint was filed, but fails to show the filing of a motion to make the amended complaint more specific, the motion addressed to the original complaint presents no question for review.[32]

Notice of motion for judgment on the pleadings is required only when some special application therefor is to be made in advance of the trial.[33]

Until a motion to require verification is disposed of or verification made, the moving party cannot be in default of pleading to issue.[34]

An amended answer cannot be stricken out unless the case is properly on the calendar.[35]

§ 10. *Right to object, and mode of asserting defenses and objections; whether by demurrer, motion, etc.*[36] *Right to object.*—The general rules that objections can only be taken by the party aggrieved,[37] and that, in order to do so, he must, by proper procedure, have saved the right to rely thereon, are fully treated elsewhere.[38] An irregularity in the form of the action, which plaintiff, upon leave

erly allowed in suit to recover crops seized under lien warrant. Sparks v. Green [S. C.] 48 S. E. 61.

25. Sparks v. Green [S. C.] 48 S. E. 61.

26. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562.

27. See 2 Curr. L. 1223. See, also, § 10, post.

28. In Georgia amendable defects can be taken advantage of only at the appearance term. Failure to verify plea to verified petition. Rodgers v. Caldwell [Ga.] 50 S. E. 95. In Missouri objections that the petition is not sufficiently definite cannot be made for first time at the trial. That injuries were not sufficiently described. Wilbur v. Southwest Mo. Elec. R. Co. [Mo. App.] 85 S. W. 671. In New York a motion to make more definite and certain must be made within twenty days from the service of the pleading [N. Y. gen. rules of practice, rule 22]. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. S. 851. Under the rules of the circuit court of South Carolina, motions to strike irrelevant or redundant matter, and to correct pleadings as being indefinite and uncertain, must be noticed before answering or demurring, and within twenty days after service thereof. Lenhardt v. French, 68 S. C. 297, 47 S. E. 382. This rule does not apply where the irrelevant or redundant matter contains no statement of facts, but merely gives a reason for pleading certain defenses. In such case the motion may be made at the trial. Reasons for pleading limitations. Not too late when made after six terms and two mistrials. Id. A motion to make a complaint more definite and certain need not be heard before the expiration of the time to answer. Under S. C. Code Civ. Proc. § 181. Bryce v. Southern R. Co., 129 F. 966. Whether pendency of motion extends time to answer, quaere. Id.

29. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783. A petition capable of withstanding a general demurrer should not be dismissed on motion made at the trial term. Id.

30. Complaint sufficient as against motion. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

31. Court not required to pick it out. Johnson v. Brice [Tenn.] 83 S. W. 791. Motion to expunge certain parts of petition will be overruled where it does not separate competent from incompetent parts. Id.

32. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531.

33. Notice required by N. Y. Code Civ. Proc. § 537, not necessary when it is made when case is regularly reached for trial. Dodge v. United States [C. C. A.] 131 F. 849.

34. In an action against purchaser from her husband. Eweil v. Tye, 25 Ky. L. R. 976, 76 S. W. 875.

35. Stipulation extending time to answer held not to authorize placing case on calendar before it was at issue. Muglia v. Erie R. Co., 97 App. Div. 532, 90 N. Y. S. 216.

36. See 2 Curr. L. 1225.

37. See Appeal and Review, § 3, 3 Curr. L. 172; Harmless and Prejudicial Error, § 1, 3 Curr. L. 1579.

38. See Saving Questions for Review, § 4, 2 Curr. L. 1598.

granted, has the right to correct as against defendant, cannot be taken advantage of by an intervening creditor or an interpleader whose rights have been acquired pendente lite.[39]

Mode of objection. Matters of substance.[40]—A general demurrer reaches only matters of substance.[41] It will not lie to a general denial.[42]

The grounds of demurrer vary in the different states.[43] Generally speaking, it will lie for failure to state facts sufficient to constitute a cause of action,[44] insufficiency of new matter in the answer to constitute a defense,[45] misjoinder of parties plaintiff,[46] defect of parties,[47] or improper joinder of causes of action, when appearing on the face of the complaint.[48]

39. Changing declaration in tort to one in assumpsit. May v. Disconto Gesellschaft, 211 Ill. 310, 71 N. E. 1001.

40. See 2 Curr. L. 1225; also § 5, 2 Curr. L. 1206.

41. Gaskin v. Courson, 120 Ga. 1056, 48 S. E. 379. Defects in substance should be taken advantage of by demurrer where complaint does not state facts sufficient to constitute cause of action in any form. Phillips v. Southwestern Tel. & T. Co. [Ark.] 81 S. W. 605. A mere defective statement of a cause of action cannot be reached by general demurrer. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077; Ball v. Neosho [Mo. App.] 83 S. W. 777. A complaint is not subject to demurrer if it shows that plaintiff is entitled to any relief whatever, even though it may be different from that to which he supposes himself entitled. Not because allegations are appropriate to more than one cause of action. Welborn v. Dixon [S. C.] 49 S. E. 232. A demurrer is the proper remedy where a counterclaim for a breach of contract does not set out such contract. Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987.

Defects not reached: A demurrer on the ground that it does not appear that defendant owes plaintiff the sum claimed for installing plumbing work, and that it does not appear by the terms of the contract that defendant owes plaintiff for the plumbing done under the contract, does not raise the question whether it appears from the complaint that it is subject to the objection that demand was for work under the contract other than for installing the plumbing in the building mentioned. Matthews v. Farrell, 140 Ala. 298, 37 So. 325. Complaint not open to such objection. Id. The absence of a prayer for judgment. Vanatta v. Waterhouse, 33 Ind. App. 516, 71 N. E. 159. A declaration, reciting that defendant was attached to answer, where such attachment would not issue on a claim for unliquidated damages. Winant v. Nautical Preparatory School, 70 N. J. Law, 366, 57 A. 133. Failure of petition to foreclose a mechanic's lien to allege that the material was actually used in the construction of the building. Foreclosure of lien only ancillary to main cause of action, and petition sufficient to enable plaintiff to recover debt. Ryndak v. Seawell, 13 Okl. 737, 76 P. 170. Defect in plea setting up failure to present claim against decedent's estate within statutory period after publication of notice of qualification of executor, in failing to allege publication of notice. Municipal Court v. Whaley [R. I.] 57 A. 1061. That a pleading is not properly indorsed. That petition was not indorsed "an action to try title as well as for damages." Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082.

42. In answer in injunction suit under Texas Rev. St. 1895, art. 3006, authorizing answer as in other civil actions. Murphy v. Smith, Walker & Co. [Tex. Civ. App.] 84 S. W. 678.

43. See 2 Curr. L. 1208.

44. By demurrer or, in case of judgment for plaintiff, by motion in arrest. Messenger v. Woge [Colo. App.] 78 P. 314. The right of one suing as administratrix of the estate of one person to maintain the action for the wrongful death of a person having a different name is properly raised by a demurrer to the complaint for want of sufficient facts to constitute a cause of action. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604. N. Y. Code Civ. Proc. § 488. Mack v. Latta, 83 App. Div. 242, 82 N. Y. S. 130. The question whether a pleading states a cause of action or defense should not be raised by motion at special term, especially where question is as to measure of damages. Error to strike allegation of special damages, since it had effect of granting judgment in favor of defendant on motion. Pavenstedt v. New York Life Ins. Co., 92 N. Y. S. 853. Should be raised by a demurrer, or upon the trial, either at the opening thereof, or when evidence is offered, or at the close of the case, by motion to the court. Id. If facts stated in a cause of action are not sufficient to constitute a cause of action in themselves, distinct and different from the other causes of action, the remedy is by demurrer to such cause separately, and not by motion to strike out. Berry v. Moore Co. [S. C.] 48 S. E. 249.

45. Whether they are admissible in evidence under a general denial or not. Blumenfeld v. Stine, 42 Misc. 411, 87 N. Y. S. 81.

46. Akins v. Hicks [Mo. App.] 83 S. W. 75.

47. N. Y. Code Civ. Proc. § 488, subd. 6. Ward v. Smith, 95 App. Div. 432, 88 N. Y. S. 700. A defect of parties defendant must be taken advantage of by special demurrer. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562. Under a statute providing for a demurrer when there is a defect of parties plaintiff (Burns' Rev. St. 1901, § 342), an objection that there are too many parties plaintiff cannot be so taken. Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687.

48. N. Y. Code Civ. Proc. § 488, subd. 7. Ward v. Smith, 95 App. Div. 432, 88 N. Y. S.

The defense of res judicata may be raised by demurrer when the facts showing it appear on the face of the petition,[49] otherwise it must be raised by special plea.[50]

So too the defense of limitations may generally be raised by demurrer when it clearly appears on the face of the pleading that the action is barred.[51] Where the objection does not appear on the face of the pleading, it must be taken by answer,[52] and in some states it must be so taken in any event.[53]

Matters involving only the construction of the instrument sued on,[54] or the declaration, should be raised by demurrer.[55] The omission to file with the complaint the original or a copy of the instrument on which the suit is based as required by statute is a ground for demurrer.[56] Suing on contract when the action is in tort is ground for general demurrer.[57] Equitable defenses in actions at law may be reached by demurrer.[58]

A general demurrer to a petition on the ground that it sets out no cause of action does not raise the question of the constitutionality of the statute upon which the action is based.[59]

The objection that separate causes of action are inconsistent should be taken by motion to require plaintiff to elect, and not by demurrer.[60] Where a statute declares that suit on an official bond shall be brought in the name of the state, the action is not demurrable because so brought, though the bond runs to the governor.[61] The fact that plaintiff has not filed an amended bill,[62] or that he asks

700; Mack v. Latta, 83 App. Div. 242, 82 N. Y. S. 130. Mo. Rev. St. 1899, § 598. Boyd v. St. Louis Transit Co. [Mo. App.] 83 S. W. 287; Chase v Atchison, etc., R. Co. [Kan.] 79 P. 153; Malsby v. Lanark Fuel Co., 55 W. Va. 484, 47 S. E. 358. In order to sustain demurrer, a fair and reasonable construction of the language used must show two causes of action plainly stated, each complete and perfect in itself. Mack v. Latta, 83 App. Div. 242, 82 N. Y. S. 130. Will not lie where the allegations are set forth, in form, as a single cause of action. Marion v. City Council of Charleston, 68 S. C. 257, 47 S. E. 140. The remedy in such case is by motion to make more definite and certain, or, in case allegations were made which were unnecessary to sustain the cause of action stated, by motion to strike them out as irrelevant and surplusage. If objections waived by failure to make such motions, plaintiff has right to relief to which allegations show him to be entitled. Id.

49. Ordinarily must be raised by plea. Holtheide v. Smith's Guardian [Ky.] 84 S. W. 321.

50. That plaintiff cannot maintain the action because of a recovery in a former suit. Cannot be urged by way of motion to dismiss predicated on evidence admitted without objection, or on admission by plaintiff in regard thereto. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783.

51. Stapper v. Wolter [Tex. Civ. App.] 85 S. W. 850. In Idaho must be raised by special demurrer. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226. In Wyoming by general demurrer. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708. Where the amended petition shows that the time between the accrual of the cause of action and the filing of such petition exceeds the period of limitations, a general demurrer does not raise the question whether the summons issued on filing the original petition was a sufficient commencement of a new action within one year after plaintiff's failure, otherwise than on the merits. Id.

52. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226; Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708.

53. S. D. Rev. Code Civ. Proc. § 39. State v. Patterson [S. D.] 100 N. W. 162. Suit to set aside allowance of guardian's account. Scoville v. Brock, 76 Vt. 385, 57 A. 967.

54. In action to recover possession of leased premises from assignee of lease for breach of covenant, pleas that covenant was personal to lessee and did not run with land (Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649), and that breach was not a continuing one, properly stricken out (Id.).

55. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649.

56. Omission to file bill of lading in action against carrier for damage to goods. Chicago, etc., R. Co. v. Reyman [Ind.] 73 N. E. 587.

57. Where the complaint seems to set out a cause of action on contract, and the action is in tort. Wilkins v. Standard Oil Co. [N. J. Law] 59 A. 14.

58. In an action in ejectment where certain paragraphs of the answer allege facts constituting a legal defense as mere inducement to other facts pleaded as an equitable estoppel, a demurrer will lie to the whole defense of estoppel. Proper remedy not by motion to strike facts pleaded as such estoppel. Cheatham v. Edgerfield Mfg. Co., 131 F. 118.

59. State v. Henderson, 120 Ga. 780, 48 S. E. 334.

60. Equitable Securities Co. v. Montrose & D. Canal Co. [Colo. App.] 79 P. 747.

61. State v. Henderson, 120 Ga. 780, 48 S. E. 334.

for more than he is entitled to,[63] or that he claims damages by an incorrect measure, is no ground for demurrer.[64] The question as to whether the county attorney was authorized to bring an action in the name of the county cannot be raised by demurrer.[65]

The objection that plaintiff has not legal capacity to sue,[66] or that the court has no jurisdiction, is properly raised by demurrer or answer.[67]

The objection that defendant is misnamed,[68] and all matter in abatement dehors the record, is properly presented by plea in abatement.[69] The objection that the petition, in a suit by a next friend for a lunatic, does not allege that the lunatic has no guardian or any sufficient reason why he does not appear by guardian if he has one, must be raised by special demurrer or plea in abatement.[70] An officer's return to a writ cannot be falsified by a plea in abatement.[71] The validity of the process or return can be raised by motion to quash or by plea in abatement.[72] The question whether the action is barred by limitations cannot be raised by motion to quash the process.[73] A motion to quash is the proper method of objecting to a variance between the declaration and an affidavit for attachment.[74] The declaration may be resorted to for the purpose of establishing the variance, and a plea in abatement is not necessary.[75]

A defense that a bond was extorted in proceedings which were void for want of jurisdiction is the subject of a plea in bar, and not of a plea to the jurisdiction.[76]

Defects in the pleadings cannot properly be used as a ground for a motion for a new trial.[77] The sufficiency of a complaint is reviewable only on appeal from the judgment, and not on appeal from an order denying a motion for a new trial.[76]

Where there is no evidence to support one of two counts, which is good in

62. Where a demurrer to original has been sustained. Shipley v. Jacob Tome Institute [Md.] 58 A. 200.

63. In action for enforcement of attorney's lien, objections that plaintiff's lien is a "retaining lien" and therefore passive, that he has no right to enforce it, or have the amount thereof determined, and that the action is not justified, are not grounds for demurrer. Mathot v. Triebel, 90 N. Y. S. 903.

64. Where declaration states a good cause of action. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118.

65. Otoe County v. Dorman [Neb.] 98 N. W. 1064.

66. N. Y. Code Civ. Proc. § 498. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693. An objection goes to his right to sue at all and does not raise the point that he is not the real party in interest. That he is a minor, incompetent, insane, etc. Boyce v. Augusta Camp [Okl.] 78 P. 322. In Washington must be raised by a special and not a general demurrer. James v. James, 35 Wash. 655, 77 P. 1082.

67. Whether court has jurisdiction of action for breach of contract between nonresident and foreign corporation. Rosenblatt v. Jersey Novelty Co., 45 Misc. 59, 90 N. Y. S. 816. Where a complaint contains two counts, as to the subject-matter of one of which the court has jurisdiction and of the other not, a plea in abatement for want of jurisdiction should be limited to the quashing of the summons as to the second. Summons issuing contrary to statute, requiring suits in regard to realty to be brought in county where it is situated, must be abated under Ala. Code 1896, § 4205. Hence plea goes to quashing of summons. Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268. A plea to the jurisdiction of defendant's person must show that there is another court in the state having such jurisdiction. Akers v. High Co. [Ga.] 50 S. E. 105.

68. Plaintiff may then cure the mistake by amendment. McCord-Collins Co. v. Prichard [Tex. Civ. App.] 84 S. W. 388.

69. Schofield v. Palmer, 134 F. 753. Notice of motion for judgment on note, under Code Va. 1887, § 3211 (Ann. Code 1904, p. 1686), is subject to plea in abatement if served before defendant's liability matures. Id.

70. La Grange Mills v. Kener, 121 Ga. 429, 49 S. E. 300.

71. McDaniels v. De Groot [Vt.] 59 A. 166.

72, 73. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857.

74. Simmons v. Simmons [W. Va.] 48 S. E. 833. A plea in abatement setting up only matter of variance appearing from the declaration and affidavit without the aid of the plea may be treated as a motion to quash. Id.

75. Simmons v. Simmons [W. Va.] 48 S. E. 833.

76. Birch v. King [N. J. Law] 59 A. 11.

77. Failure to attach bill of particulars to complaint [Ga. Civ. Code 1895, §§ 4963, 5642]. Simpson v. Wicker, 120 Ga. 418, 47 S. E. 965. Motion in arrest of judgment proper remedy. Rodgers v. Western Home Town Mut. Ins. Co. [Mo.] 85 S. W. 369.

78. Frey v. Vignier, 145 Cal. 251, 78 P. 733.

form, but there is evidence to support the other, defendant can neither demur to the complaint nor to the evidence, but his remedy is by motion to instruct the jury to disregard the unsustained count.[79]

Insufficiency of the complaint to state a cause of action cannot be raised by a motion for nonsuit.[80]

A motion to dismiss is equivalent to a summary demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.[81] It cannot reach defects in a pleading which are curable by amendment.[82] The question of jurisdiction may be raised by such a motion.[83] If a case stands in default of an initial pleading, it may be dismissed as against the plaintiff.[84] If the facts stated in the petition are such as to constitute a defense, advantage should be taken thereof in the first instance by demurrer, or afterwards by motion to dismiss, and not by motion to nonsuit.[85]

Judgment will not be arrested for lack of an essential averment in the declaration which is contained by implication in the averments used,[86] nor for an omission of the formal concluding words of a pleading.[87]

Matters of form.[88]—Defects in form, readily cured by amendment, should be taken advantage of by special demurrer.[89] In many states a demurrer lies only for defects of substance, and defects of form must be raised by motion.[90] Thus, as a general rule, indefiniteness and uncertainty must be taken advantage of by a

79. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 663, 47 S. E. 850.

80. Such motion is in nature of demurrer to the evidence [Mills' Ann. Code Colo. § 166]. Messenger v. Woge [Colo. App.] 78 P. 314.

81. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693. A bill insufficient in that it fails to state facts which, whether taken as well or illy pleaded, could form a basis of relief, is properly dismissed on motion, though the result be to cut off further right to amend the same. Equitable action to rescind contract. Bell v. Southern Home Bldg. & Loan Ass'n, 140 Ala. 371, 37 So. 237. Where plaintiff is dismissed at trial before testimony is taken because he has not stated a cause of action, the only question is on the pleading. Coppola v. Kraushaar, 92 N. Y. S. 436.

82. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783.

83. City of Windsor v. Cleveland, etc., R. Co., 105 Ill. App. 46.

84. Where, after a motion to quash an alternative writ of mandate is sustained, plaintiff elects to stand on his petition, and declines to plead further, it is proper for the court to enter a judgment of dismissal. Hester v. Thomson, 35 Wash. 119, 76 P. 734.

85. Motion for nonsuit should not be granted where petitioner proves his case exactly as laid. Ogburn v. Dublin Wagon & Mach. Co., 121 Ga. 437, 49 S. E. 263.

See, also, Discontinuance, Dismissal and Nonsuit, § 2, 3 Curr. L. 1100.

86. Bowen v. White [R. I.] 58 A. 252.

87. Bowen v. White [R. I.] 58 A. 252.

See, also, New Trial and Arrest of Judgment, § 5, 2 Curr. L. 1051.

88. See 2 Curr. L. 1228.

89. Gaskin v. Courson, 120 Ga. 1056, 48 S. E. 379. A meritorious plea ill pleaded may be assailed by demurrer but not as frivolous. Troy Grocery Co. v. Potter, 139 Ala. 359, 36 So. 12. A count alleging negligence in general terms is bad on special demurrer for failure to set up the particulars in which defendant was negligent. Rowland v. Towns, 120 Ga. 74, 47 S. E. 581. In an action for damages for failure of a bank to cash a check, a defect in the petition for failure to allege that the check was properly indorsed when presented should be taken advantage of by special demurrer, and not by motion for nonsuit. Wachstein v. Germania Bank, 120 Ga. 229, 47 S. E. 586. In an action to charge a widow, who has taken possession of her husband's estate, with his debt, a failure to allege that she took possession without notice of any existing debt. Moore v. Smith, 121 Ga. 479, 49 S. E. 601. Objections on the ground of vagueness or duplicity. Minnesota Lumber Co. v. Hobbs [Ga.] 49 S. E. 783. Uncertainty as to a material and essential date. That transaction occurred "on or about" certain date. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226. Duplicity. Declaration in action for royalties under mining lease. Consolidated Coal Co. v. Peers, 205 Ill. 531, 68 N. E. 1065. An objection that a declaration for fraud contains no precise averment that plaintiff was induced to part with his property by the false representations must be raised by special demurrer, where the petition states a cause of action and such an averment may be inferred. Cannot be considered after plea of general issue. McDonald v. Smith [Mich.] 102 N. W. 668. So must an objection that the property parted with is not particularly described. Id. Objection that declaration is not sufficiently specific. Thick v. Detroit U. & R. R. Co. [Mich.] 101 N. W. 64. Objection for indefiniteness should be made by motion or special demurrer. Ball v. Neosho [Mo. App.] 83 S. W. 777.

90. Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987.

motion to make more definite and certain and not by demurrer,[91] or motion for a bill of particulars.[92]

A party may be required to make his pleading more definite and certain when it is too general in its terms to be readily understood.[93] The granting or refusing of a motion for that purpose is so far discretionary that a reversal will not follow unless it appears that the rights of the complaining party have suffered.[94] A party is not prejudiced by the denial of the motion when the judgment against him is not based on any of the allegations claimed to be insufficient.[95]

Where two causes of action are set forth without being separately stated, the remedy is by motion to make the complaint more definite and certain,[96] or, if the allegations are unnecessary to sustain the cause of action stated, by motion to strike them out as irrelevant and as surplusage.[97]

If a pleading states a cause of action or defense, defects therein cannot be taken advantage of at the trial by objection to the introduction of evidence;[98] but

91. Woodford v. Kelley [S. D.] 101 N. W. 1069; Emerson v. Nash [Wis.] 102 N. W. 921. Action for death because of unsafe condition of street. Wilbert v. Sheboygan, 121 Wis. 518, 99 N. W. 330. Conclusions stated instead of facts. Gates v. Solomon [Ark.] 83 S. W. 348; Newburn v. Lucas [Iowa] 101 N. W. 730; Ellsworth v. Franklin County Agricultural Soc., 99 App. Div. 119, 91 N. Y. S. 1040; Kitchen v. Southern R. Co., 68 S. C. 554, 48 S. E. 4. New matter in answer ambiguous. Pierson v. Green [S. C.] 48 S. E. 624. Defects of form. Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987. Where statement of facts is defective and uncertain, by motion to make more definite and certain. Phillips v. Southwestern Tel. & T. Co. [Ark.] 81 S. W. 605. The insufficiency or indefiniteness of a statement filed by an auditor's agent against the estate of a decedent. Riedel v. Com., 26 Ky. L. R. 898, 82 S. W. 635. An exception that the petition shows on its face that the court has no jurisdiction of the cause of action alleged, because of the amount involved, does not raise the question of the vagueness and uncertainty of the allegations as to the amount of damage. Question as to sufficiency of allegations not determinative of question of jurisdiction. Foster v. Roseberry [Tex.] 81 S. W. 521. General averment of damages sufficient to confer jurisdiction, though petition did not specifically aver amount claimed for each of items of damage alleged. Id.

92. Where the injuries sued for are indefinitely stated, defendant's remedy is by motion to make the complaint more definite and certain, or by application for a physical examination and not by motion for a bill of particulars. Lachebruch v. Cushman, 87 N. Y. S. 476.

93. Colo. Code Civ. Proc. § 60. Mulligan v. Smith [Colo.] 76 P. 1063. In action for injuries to passenger held error to deny motion. Ruebsam v. St. Louis Transit Co. [Mo. App.] 83 S. W. 984. In New York motion lies only when the precise meaning or application of the charges is not apparent. Application under N. Y. Code Civ. Proc. § 546. Day v. Day, 90 N. Y. S. 680. Application on ground that pleader may intend to charge fraud, forgery or undue influence denied, as forgery and undue influence are both species of fraud. Id. Should not be directed if meaning can be seen with reasonable certainty. Complaint in action by stockholder to recover for loss caused by negligence of directors held sufficient. Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201, 91 N. Y. S. 967. Court may require it to be made definite and certain by amendment. N. Y. Code Civ. Proc. § 546. Each case to be determined with reference to particular facts alleged. Allegations of fraud sufficient. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170.

94. In suit for damages for its obstruction, defendant held not injured by failure to have more particular description of way. Cincinnati, etc., R. Co. v. Miller [Ind. App.] 72 N. E. 827. Defendant not prejudiced by denial of motion to make complaint more certain in regard to services rendered. Mulligan v. Smith [Colo.] 76 P. 1063.

95. Helbig v. Gray Harbor Elec. Co. [Wash.] 79 P. 612.

96, 97. Welborn v. Dixon [S. C.] 49 S. E. 232.

98. Patterson v. Frazer [Tex. Civ. App.] 79 S. W. 1077. The fact that the petition does not set up the true rule for the measure of damages, and would have been demurrable on that ground, does not warrant the exclusion of evidence admissible under the true rule. Ford v. Fargason, 120 Ga. 606, 48 S. E. 180. If the declaration is sufficient to sustain a judgment, the objection that it is not sufficiently specific must be raised by demurrer. Cannot do so by objection to introduction of any evidence. Objection that complaint in action for breach of contract to deliver ties does not allege delivery, or offer or ability to deliver, or that defendant prevented delivery. Thick v. Detroit, etc., R. Co. [Mich.] 101 N. W. 64. Bill of divorce. Pierce v. Pierce [Miss.] 38 So. 46. Petition in action on insurance policy held formally and not radically defective. Robinson v. Metropolitan Life Ins. Co., 105 Mo. App. 567, 80 S. W. 9. Where answer contains good defense, even though some of its allegations are superfluous or repugnant. Ryan v. Riddle [Mo. App.] 82 S. W. 1117. Technical defects which are capable of being cured by amendment. Bonne v. Security Sav. Soc., 35 Wash. 696, 78 P. 38.

if it wholly fails to state any cause of action or defense because of the omission of an essential averment, which cannot be implied by fair and reasonable intendment, the rule is otherwise.[99] Objections made at the trial are not favored,[1] and every intendment will be allowed in favor of the pleading.[2] Defendant cannot object to the introduction of evidence on the ground that the petition fails to state a cause of action, where he supplies the defects therein by his answer.[3]

Where it is uncertain on which of two theories plaintiff seeks to recover, defendant may protect himself against surprise by motion to make the complaint more definite and certain,[4] or by motion made at the opening of the trial to compel defendant to elect on which theory he will proceed.[5]

The propriety of allowing an amendment should be raised by objection and exception to its allowance, or by motion to strike, and not by demurrer to the amended pleading.[6] So, too, the objection that an amended petition states a new cause of action should be raised by motion to strike out, and not by objection to the reception of evidence,[7] or by demurrer to the added counts.[8]

The objection that pleas are not properly verified,[9] that an amended pleading does not differ from one previously held bad,[10] or that it was filed without leave,[11] and that a plea should have been offered by a supplemental rather than by the original or amended plea, should be raised by motion to strike.[12] Matter which

99. Objection to introduction of evidence in nature of oral demurrer. Robinson v. Metropolitan Life Ins. Co., 105 Mo. App. 567, 80 S. W. 9; Farmers' Bank v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 76. May in such case object to evidence tending to prove facts pleaded, though better practice is to demur or move to strike out. Ryan v. Riddle [Mo. App.] 82 S. W. 1117. An objection that a petition does not state a cause of action may be made at any time, even after judgment. Objection to introduction of evidence after overruling of demurrer. Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470. See, also, Pavenstedt v. New York Life Ins. Co., 92 N. Y. S. 853. Only defects in substance, which cannot be cured by amendment may be taken advantage of at that time. Bonne v. Security Sav. Soc., 35 Wash. 696, 78 P. 38.

1. Howard v. Carter [Kan.] 80 P. 61; Farmers' Bank v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 76; Boyd v. St. Louis Transit Co. [Mo. App.] 83 S. W. 287; Woodford v. Kelley [S. D.] 101 N. W. 1069.

2. Petition in action against railroad company for killing cattle held sufficient after answer, though it would have been bad on demurrer. Farmers' Bank v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 76. Will be sustained if susceptible of a construction that will make it good. Complaint in action for personal injuries. Drolshagen v. Union Depot R. Co. [Mo.] 85 S. W. 344. Should be overruled, if, upon any fair construction, any cause of action is stated. Howard v. Carter [Kan.] 80 P. 61. Allegations of fraud and undue influence sufficient, though in general terms, and would have been made more definite and certain on motion. Id. Objection will not be sustained unless there is total lack of sufficient allegations. Waldner v. Bowdon State Bank [N. D.] 102 N. W. 169. If a necessary fact is alleged by fair inference or intendment, the objection will be overruled. Complaint for recovery of money paid as usury, pursuant to contract, held sufficient. Id. Where the case has been heard on the merits without apparent prejudice to defendant's rights so far as the pleadings are concerned, error cannot be predicated on overruling his objection to the complaint, made after the trial begins, though it is inartistic, indefinite and uncertain. Woodford v. Kelley [S. D.] 101 N. W. 1069.

3. If parties go to trial with full knowledge of charge, and record contains enough to show court that all material facts were in issue, defendant cannot take advantage of defects which he would seem purposely to have omitted to notice at outset of controversy. Failure of petition in action on partnership account between former partners to allege partnership settlement. Jackson v. Powell [Mo. App.] 84 S. W. 1132.

4. Whether suing for damages for breach of contract or for money paid. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. S. 142.

5. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. S. 142.

6. Western Union Tel. Co. v. Crumpton [Ala.] 36 So. 517.

7. Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43.

8. Moore v. First Nat. Bank, 139 Ala. 595, 36 So. 777.

9. Pleas in bar in assumpsit not accompanied by required affidavit. Price v. Marks [Va.] 48 S. E. 499. Verified answer and counterclaim cannot be taken as true because of unverified reply. Newburn v. Lucas [Iowa] 101 N. W. 730.

10. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708.

11. Is not raised by a general demurrer. Columbia Sav. & Loan Ass'n v. Clause [Wyo.] 78 P. 708.

12. Cannot be raised by demurrer where it is sufficient on its face. Straus v. American Publishers' Ass'n, 45 Misc. 251, 92 N. Y. S. 153.

is irrelevant or redundant,[13] and superfluous or repugnant allegations may be eliminated by motion for that purpose.[14] Impertinent and scandalous allegations will be stricken out[15] when irrelevant.[16] No allegation should be stricken as irrelevant or redundant when the portions left are unintelligible when standing alone.[17] Sham, irrelevant, or frivolous answers, defenses or replies, and frivolous demurrers, may be stricken out, or judgment rendered notwithstanding the same, on motion as for want of an answer.[18] Statutes authorizing the striking out of pleadings for contumacy are unconstitutional.[19]

A motion to strike out reaches formal defects only,[20] and cannot take the place of a demurrer so as to reach defects in matters of substance.[21] A motion to strike the whole of an answer should be overruled where plaintiff could not recover if he admitted the truth of all its averments.[22] A pleading stricken out on motion is eliminated from the record and cannot be amended.[23]

Error in refusing to strike out a part of a petition is harmless where the question presented thereby is not submitted to the jury.[24] So also is the refusal to strike out pleas of set-off and counterclaim where the jury finds nothing in favor of defendant on the pleas,[25] the refusal to strike out a part of a reply where the answer is thereafter abandoned,[26] and the striking out of a reply where evidence of the facts therein alleged is admitted.[27] Overruling a motion to strike out parts of a pleading does not constitute available error on appeal.[28]

§ 11. *Waiver of objections and cure of defects. By failure to object, responsive pleading, or going to trial.*[29]—Objections which may be taken advantage of by demurrer or answer are waived by not doing so,[30] and defects which should

13. Cheatham v. Edgefield Mfg. Co., 131 F. 118. N. Y. Code Civ. Proc. § 545. Day v. Day, 95 App. Div. 122, 88 N. Y. S. 504. No part of a pleading will be stricken out as irrelevant unless the court can see that the moving party is aggrieved by it, and that striking it out will not harm the pleader. Complaint in equitable action to set aside will. Palmer v. Day, 44 Misc. 579, 90 N. Y. S. 133. Paragraph merely stating plaintiff's residence and business will not be stricken, where plaintiff cannot be aggrieved thereby. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749. A verified answer, or a portion thereof, alleging matters constituting a defense, should not be stricken out as sham, though containing irrelevant or evidential matter. Continental Bldg. & Loan Ass'n v. Boggess, 145 Cal. 30, 78 P. 245. Motion to strike out the objectionable matter as evidentiary or surplusage is the proper remedy. Id.

14. Ryan v. Riddle [Mo. App.] 82 S. W. 1117.

15. Statements, in answer to bill by which complainant claims land as devisee, that she was not testator's wife, held impertinent and scandalous. Livesey v. Livesey [N. J. Eq.] 58 A. 1020.

16. Bell v. Clarke, 45 Misc. 275, 92 N. Y. S. 411.

17. If complaint states even semblance of cause of action, it should not be destroyed. Day v. Day, 95 App. Div. 122, 88 N. Y. S. 504.

18. Minn. Gen. St. 1894, § 5240. Answer presenting counterclaim may be stricken out as sham and frivolous. Counterclaim in answer authorized by Id. § 5236. Monitor Drill Co. v. Moody [Minn.] 100 N. W. 1104.

19. Cal. Code Civ. Proc. § 1991, authorizing striking of answer for failure of party to attend when required and give his deposition, as tending unduly to restrict right to defend. Summerville v. Kelliher, 144 Cal. 155, 77 P. 889.

20. Guthrie v. Howland [Ind.] 73 N. E. 259.

21. Guthrie v. Howland [Ind.] 73 N. E. 259. Hence it is error to strike out a complaint or cross complaint on the ground that it does not state facts sufficient to constitute a cause of action. Pleader thereby deprived of right to amend. Id.

22. In nature of general demurrer. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124.

23. Burns' Ann. St. Ind. 1901, § 345, allowing amendments, does not apply. Guthrie v. Howland [Ind.] 73 N. E. 259.

24. Bolton v. Prather [Tex. Civ. App.] 80 S. W. 666.

25. Owen v. American Nat. Bank [Tex. Civ. App.] 81 S. W. 988.

26. Strother v. McMullen Lumber Co. [Mo. App.] 85 S. W. 650.

27. Patterson v. First Nat. Bank [Neb.] 102 N. W. 765.

28. Conner v. Andrews Land, Home & Improvement Co., 162 Ind. 338, 70 N. E. 376.

29. See 2 Curr. L. 1229. See Equity, § 6J, 3 Curr. L. 1230.

30. That defendant is a married woman, and husband was not made a party [Cal. Code Civ. Proc. § 434]. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638. N. Y. Code Civ. Proc. §§ 498, 499. Ward v. Smith, 95 App. Div. 432, 88 N. Y. S. 700. Trying case as one of negligence and failing to demur, or object, waives objection that declaration fails to allege negligence or intentional harm. Savage v. Marlborough St. R. Co. [Mass.] 71 N. E. 531. Objection that plaintiff has no legal capacity to sue [Code

be taken advantage of by demurrer are waived by answering.[31] Defendant does not, by failing to object and except to the filing of an amended declaration on the ground that it is barred by limitations, waive its right to raise such question, but may set it up by plea.[32]

Answering over after demurrer is a waiver of the demurrer,[33] and going to trial on the merits without objection waives a plea to the jurisdiction.[34]

Error in overruling a demurrer,[35] or a motion for a more specific statement,[36] or in denying a motion to strike a pleading from the files,[37] or in sustaining a motion or demurrer, is generally held to be waived by subsequently pleading over,[38] though it has been held that by replying plaintiff does not waive an exception to the overruling of his demurrer to a paragraph of the answer,[39] and that error in overruling a motion to make more definite and certain is not waived by pleading over.[40] Demurrers will be deemed waived on appeal where the record shows no action taken thereon by the lower court.[41] The right to move to strike amended answers is not waived because demurrers have been filed to the original answers.[42] Exceptions not called to the attention of the trial court and not acted upon will be deemed abandoned.[43]

Failure to reply,[44] or answer,[45] or to file an affidavit of defense,[46] or a bill of

Civ. Proc. § 499]. Waters v. Spencer, 44 Misc. 15, 89 N. Y. S. 693. One not pleading a former judgment in bar of the action cannot raise the question on appeal. Newburn v. Lucas [Iowa] 101 N. W. 730. Where the petition states a cause of action, its sufficiency cannot be raised for the first time on appeal. Id. Injury to passenger on street car. Stern v. Westchester Elec. R. Co., 90 N. Y. S. 870.

31. As defect of parties, or misjoinder of causes of action, to which demurrer lies under N. Y. Code Civ. Proc. § 488, subds. 6, 7. Ward v. Smith, 95 App. Div. 432, 88 N. Y. S. 700. In action for trade libel, where defendant fails to demur for failure to expressly aver falsity and malice, he cannot raise the objection after trial where those facts are proved. Young v. Geiske, 209 Pa. 515, 58 A. 887. A defect of parties defendant. Combs' Adm'x v. Krish [Ky.] 84 S. W. 562; Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470.

32. Where original declaration fails to state cause of action and amended one is filed after running of limitations. Mackey v. Northern Mill. Co., 210 Ill. 115, 71 N. E. 448.

33. Rodgers v. Western Home Town Mut. Fire Ins. Co. [Mo.] 85 S. W. 369; Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115. Answer filed without disposing of previous demurrer. Camfield v. Plummer, 212 Ill. 541, 72 N. E. 787. For nonjoinder of a necessary party unless no valid judgment can be rendered without the presence of the omitted party in court. Guthiel Park Inv. Co. v. Montclair [Colo.] 76 P. 1050.

34. Cannot, on appeal, assail the judgment on the ground that the plea to the jurisdiction was not passed upon. Harrison v. Murphy, 106 Mo. App. 465, 80 S. W. 724.

35. Chicago & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754; City of Battle Creek v. Haak [Mich.] 102 N. W. 1005; City of Chicago v. People, 210 Ill. 84, 71 N. E. 816; Glos v. Hanford, 212 Ill. 261, 72 N. E. 439; Baden Baden Gold Min. Co. v. Jose [Colo. App.] 78 P. 313. Error will not be considered on appeal where defendant answered over, and also failed to call attention to ruling on motion for new trial. MacDonald v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1001.

36. Carlson v. Hall, 124 Iowa, 121, 99 N. W. 571.

37. Amended petition. Castleman v. Castleman [Mo.] 83 S. W. 757.

38. Motion to strike paragraph. Curtis v. Tenino Stone Quarries [Wash.] 79 P. 955. A motion to strike or to make more definite or certain. City of Port Townsend v. Lewis, 34 Wash. 413, 75 P. 982.

39. Bowen v. Woodfield, 33 Ind. App. 687, 72 N. E. 162.

40. Ruebsam v. St. Louis Transit Co. [Mo. App.] 83 S. W. 984. See, also, Sommers v. St. Louis Transit Co. [Mo. App.] 83 S. W. 268.

41. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054.

42. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742.

43. Where exceptions to a plea in replication are not called to the attention of the trial court and not acted upon, the case stands as though no such exception had been interposed, and plaintiff may avail himself of it on trial. Replication setting up failure of consideration for lease, excepted to because not sworn to. Woodall v. Pacific Mut. Life Ins. Co. [Tex. Civ. App.] 79 S. W. 1090.

44. Minnich v. Swing [Ind. App.] 73 N. E. 271. Failure to object to absence of reply to counterclaim until near close of trial, thereby treating allegations as at issue. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Where defendant makes no motion on the subject, he cannot, after the case has been submitted to the jury, take advantage of plaintiff's failure to reply (Beard v. White, 120 Ga. 1018, 48 S. E. 400); nor will the latter's silence be taken as an admission of the truth of the allegations in defendant's cross-bill, plea of set-off, or like answer (Id.). Objection after verdict is too late. Wells v. Missouri-Edison Elec. Co. [Mo.] 84 S. W. 204. A judgment will not

particulars, is waived by proceeding to trial without it and without objection.[47] Absence of the original answer is waived by going to trial without objecting to a substituted one.[48]

Filing an amended pleading is a waiver of any error in ruling on the sufficiency of the original.[49] Answering an amended pleading and going to trial is a waiver of any error in the allowance of the amendment,[50] and of the objection that the amended pleading departs from the original.[51] An objection on the ground of a departure between the petition and the replication is waived by going to trial on the issues raised by the latter pleading without objection.[52] Objection to the allowance of supplemental pleadings cannot be taken for the first time on appeal.[53] Errors in ruling on the sufficiency of the original pleadings are immaterial, when the case is tried and judgment rendered on amended ones.[54]

Merely technical defects in the manner of stating a cause of action or defense are waived by pleading thereto and going to trial,[55] but this rule does not apply to defects in matters of substance.[56]

be reversed for insufficiency of the reply, where the case was tried as though it constituted a denial of the defenses set forth in the answer. Taussig v. St. Louis & K. R. Co. [Mo.] 85 S. W. 378. The rule is not changed by the fact that defendant moved for a peremptory instruction that, under the pleadings and evidence, plaintiff was not entitled to recover, without specifically directing the court's attention to the supposed defects. Id.

45. Where parties go to trial without answer or other pleading to an amended petition and try the case as though such answer had been filed, plaintiff cannot afterwards claim a default, or that allegations in amended petition should be treated as confessed. Gregory v. Bowlsby [Iowa] 102 N. W. 517.

46. O'Connell v. King [R. I.] 59 A. 926.

47. Should move for order requiring it, or to strike plea. Muller v. Ocala Foundry & Machine Works [Fla.] 38 So. 64. The fact that a bill of particulars was demanded but not served is not of itself ground for reversal, where it does not appear that the fact was called to the attention of the trial court, or that defendant insisted upon it before going to trial, or excepted to going to trial without it. Block v. Sherry, 43 Misc. 342, 87 N. Y. S. 160.

48. Commonwealth v. Higgins' Trustee, 26 Ky. L. R. 910, 82 S. W. 601.

49. Guthrie v. Howland [Ind. App.] 71 N. E. 234. Election to amend after demurrer has been sustained. Bremen Min. & Mill. Co. v. Bremen [N. M.] 79 P. 806; Wolf v. New Orleans Tailor-Made Pants Co., 113 La. 388, 37 So. 2.

50. Carter v. Baldwin [Mo. App.] 81 S. W. 204. Answering over and going to trial on the merits. Even though it is clear departure and changes cause of action. Grymes v. Liebke Hardwood Mill & Lumber Co. [Mo. App.] 85 S. W. 946. Must move to strike out, and stand on motion and appeal if it is overruled. Id. Where the objection has been waived cannot exclude evidence tending to prove contract set out in amended petition, though different from that alleged in original. Id. An objection to the allowance of an amendment to the answer, on the ground that it was unfair and disadvantageous to plaintiff to have such an amendment made late in the trial, cannot be urged for the first time on appeal. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

51. Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43.

52. Where plaintiff sued on oral contract, answer set up written contract and pleaded payment, and replication admitted latter contract, but denied payment. Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43. Must be taken advantage of by proper objection before trial, and cannot be raised for the first time on appeal. Messenger v. Woge [Colo. App.] 78 P. 314.

53. Hodges v. Price [Wash.] 80 P. 202.

54. Where the second amended complaint is answered, and the case is tried and judgment rendered on the case made thereby. Rooney v. Gray, 145 Cal. 753, 79 P. 523.

55. McNerney v. Barnes [Conn.] 58 A. 714; Cole v. Jerman [Conn.] 59 A. 425; Galvano Type Engraving Co. v. Jackson [Conn.] 60 A. 127. In an action for negligence, claiming unliquidated damages, when a defendant, either after default or a demurrer overruled, moves for a hearing in damages, giving notice of his intention to disprove the material averments of the complaint, and to prove matters of defense, and, upon the hearing, substantially tries the case upon the merits, he will be deemed to have waived the right to question the sufficiency of the complaint for defects not matters of substance. Hourigan v. Norwich [Conn.] 59 A. 487. That pleading is not sufficiently specific. Durham v. Bolivar, 106 Mo. App. 601, 81 S. W. 463. Defective statement of good cause of action. Leu v. St. Louis Transit Co. [Mo. App.] 85 S. W. 137. Indefiniteness and uncertainty. Woodford v. Kelley [S. D.] 101 N. W. 1069. The right to have irrelevant and redundant matter stricken out is waived unless a motion for that purpose is made before answer or demurrer. Id. Technical defects in the language of a defense are not available on appeal, where the answer fully advises plaintiff that it will be insisted upon, and no objection is made to the introduction of evidence supporting it. Nickell v. Tracy, 91 N. Y. S. 287. A reply waives informalities and uncertainties in a counterclaim. Manning v. School Dist. [Wis.] 102 N. W. 356.

A party cannot complain of the admission of testimony as to irrelevant or defective allegations which he has allowed to remain in a pleading,[57] but the fact that he has allowed them to remain does not prevent the court from excluding such evidence.[58] Going to trial on the merits waives an objection that the pleading was filed too late.[59]

In some states defects in form are waived unless the pleading is returned within a specified time after service.[60]

One pleading to the merits waives his right to object that the action is not in proper form,[61] that defendant is misnamed,[62] or that a pleading is misnamed.[63]

Failure to seasonably and properly object to a pleading on the ground of ambiguity and uncertainty,[64] or that it is not properly indorsed,[65] or for want of a sufficient verification, is a waiver of such defects.[66]

56. But if the complaint is bad in substance and does not state a cause of action, a judgment for plaintiff is erroneous, and may be reversed on appeal. Hourigan v. Norwich [Conn.] 59 A. 487.

57. Where no motion to strike such allegations has been made. Martin v. Seaboard Air Line R. Co. [S. C.] 48 S. E. 616. Uncertainties not taken advantage of by demurrer are waived, and proof will be admitted to establish the real facts thus defectively pleaded. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226.

58. Martin v. Seaboard Air Line R. Co. [S. C.] 48 S. E. 616. In an action for damages caused by defendant's negligence in failing to have proper spark arresters on its locomotives, defendant is entitled to know the exact dates of the occurrences charged, and may call for them by motion or demurrer. Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968. In case this is not done, evidence is admissible under the general allegation that they occurred on or about certain dates, and on various other dates. Id.

59. On the merits of a plea of privilege without raising the question. On error. Leahy v. Ortiz [Tex. Civ. App.] 85 S. W. 824. Invoking a ruling on the merits of a demurrer and amending in accordance with the judgment sustaining it. Lippman v. Aetna Ins. Co., 120 Ga. 247, 47 S. E. 593. An objection to a judgment rendered on a plea in abatement on the ground that the plea was not filed in due order cannot be made for the first time on appeal where no exception is filed to the plea. Hayden v. Kirby, 31 Tex. Civ. App. 441, 72 S. W. 198.

60. In New York defective pleadings must be returned within twenty-four hours. Sweeney v. O'Dwyer, 45 Misc. 43, 90 N. Y. S. 806. Refusal of an unverified answer found to be not within twenty-four hours, it having been served at noon on August 30th and mailed back, the postmark being 8:00 p. m. on August 31st. Id.

61. Welker v. Metcalf, 209 Pa. 373, 58 A. 687. By defendant, in action to quiet title, denying plaintiff's title and filing a cross complaint to establish his own. Also waives failure of proof of plaintiff's possession. Relender v. Riggs [Colo. App.] 79 P. 328. Where defendant's demurrer to bill on ground that action to quiet title to easement did not lie was overruled, and he afterward answered claiming title thereto and asking that it be quieted in him, he thereby waived his objection to the form of the action. Guthiel Park Inv. Co. v. Montclair [Colo.] 76 P. 1050. In action of trespass for breach of marriage promise, where defendant appeared and ruled plaintiff to file her declaration, which she did, and defendant then pleaded not guilty and ruled plaintiff for bill of particulars, and subsequently had case continued, held that it was then too late for him to move for leave to withdraw his plea on ground that form of action was erroneous. Welker v. Metcalf, 209 Pa. 373, 58 A. 687.

62. McCord-Collins Co. v. Prichard [Tex. Civ. App.] 84 S. W. 388.

63. Any substantial defect arising from failure to designate the allegations of the answer as a cross complaint. Action to foreclose deeds as mortgages. Answer held to contain essential averments of cross complaint. Schneider v. Reed [Wis.] 101 N. W. 682.

64. Mont. Code Civ. Proc. § 685. Pryor v. Walkerville [Mont.] 79 P. 240. A failure to demur specially deprives defendant of the right to raise that objection after trial of the issues made by the answer. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964. It is too late after verdict to allege that the complaint did not authorize proof of all circumstances attending assault for which damages are asked. If particulars desired as to general allegations, defendant should have moved for more specific statement. Levidow v. Starin [Conn.] 60 A. 123. Failure to move to have the answer made more definite and certain or to object at the trial because of defective denials. Bessemer Irr. Ditch Co. v. Woolley [Colo.] 76 P. 1053. Failure to demur. Hollister v. State [Idaho] 77 P. 339. Uncertainty and ambiguity in a pleading can only be taken advantage of by demurrer (Id.), and it is only where there is a total lack of a necessary or material allegation that the opposite party is justified in suffering a default and raising its insufficiency on appeal (Id.). Where no proper objection is taken to reach the defect, either before or after pleading, or on the trial of the case, it will be deemed to have been waived, and, on appeal, the pleading will be regarded as having been properly amended. Failure of petition to foreclose mechanic's lien to allege that material was used in the construction of the building. Ryndak v. Seawell, 13 Okl. 737, 76 P. 170. Where the complaint states the substantial facts con-

Misjoinder of causes of action is waived by joining issue and proceeding to trial without properly and seasonably objecting thereto.[67] Where the question of misjoinder of causes of action is fairly before the court at special term on a motion to compel plaintiff to separate and number them, and defendants do not appeal from an adverse decision, they cannot thereafter raise the question by demurrer.[68]

A variance is waived by failure to properly object when the evidence is offered,[69] or, in some states, by failure to show its materiality in the trial court in the manner prescribed by statute.[70] An issue not made by the pleadings may be regarded as an issue in the case where evidence is introduced and received thereon without objection.[71] Where parties treat certain facts as in issue, they cannot thereafter take exception to the interpretation thereby put upon the petition.[72]

stituting a cause of action, or they can be inferred by reasonable intendment from the matter set forth, it will be held sufficient, in the absence of a motion to make more definite and certain, notwithstanding imperfections of form, or the omission of specific allegations. Action to enforce constructive trust in mining claim. Shea v. Nilima [C. C. A.] 133 F. 209.

65. Objection that petition was not indorsed "An action to try title as well as for damages" cannot be first raised on appeal. Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082.

66. Mere irregularity. Bennett v. Roys, 212 Ill. 232, 72 N. E. 380.

67. Cannot be raised by objecting to introduction of evidence [Mo. Rev. St. 1899, § 602]. Boyd v. St. Louis Transit Co. [Mo. App.] 83 S. W. 287; Duerler Mfg. Co. v. Dullnig [Tex. Civ. App.] 83 S. W. 889; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Unless objected to in the manner prescribed by statute. Ky. Civ. Code Prac. § 86. Must be made by motion to require an election. Id., § 85. Waived by answer. Bryant v. Stephens, 26 Ky. L. R. 718, 82 S. W. 423. May not be made after answer, even though the answer is subsequently withdrawn. Id. Joining an action of trespass against one with an action of trover against two. Meloon v. Read [N. H.] 59 A. 946.

68. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. S. 525.

69. Kitchen Bros. Hotel Co. v. Dixon [Neb.] 98 N. W. 816. Must point out in what the variance consists. In case he does so it is error to submit question not raised by pleadings. Id. Timely and appropriate objection must be made on the distinct ground of variance. Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299. Or motion is made to exclude it. Attention thus called to it, and court given opportunity to meet it. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 663, 47 S. E. 850. Where the bill of particulars sufficiently apprised defendant of the character of plaintiff's claim and the case was tried on theory that action was for money paid out for defendant's account, an objection of variance between the oral complaint, and the proof, made for the first time at the end of the case came too late, especially where there was no surprise, or claim of surprise. Prince & K. Iron Works v. Kenny, 92 N. Y. S. 268. When first raised by requests to charge made after the close of the evidence. Alderton v. Williams [Mich.] 102 N. W. 753. Where plaintiff, for the first time on appeal, claims that a judgment in his favor can be supported on the ground of mistake, the defendant cannot be held to have waived the objection that the complaint seeking a recovery for fraud only was not supported by proof of mistake. Court found fraud. Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677. Cannot be raised for the first time on appeal. City of Denver v. Strobridge [Colo. App.] 75 P. 1076; Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240; Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50. An objection that evidence admitted on behalf of defendants denies allegations in the declarations which their pleadings admit to be true. Alderton v. Williams [Mich.] 102 N. W. 753. Must be taken in the trial court so as to enable the opposite party to meet it by amendment. Variance curable by amendment. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2.

70. City of Covington v. Miles, 26 Ky. L. R. 609, 82 S. W. 281. In Missouri a variance will not be considered on appeal unless the objecting party has shown by affidavit, in the trial court, that he was misled thereby. Must proceed in accordance with Rev. St. 1899, § 2096. Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

71. Kitchen Bros. Hotel Co. v. Dixon [Neb.] 98 N. W. 816. Variance between allegations that injury was caused by defective machine and proof that it was caused by improper adjustment, held cured by answer denying that it was defective or that defendant failed to have it in proper condition, and evidence, admitted without objection, showing improper adjustment. James v. Ames & Co., 26 Ky. L. R. 498, 82 S. W. 229. Though there is no allegation of damages for failure to complete building in answer, where there is a finding of such damages in the record the appellate court is bound to assume that it was based on competent evidence received without objection, nothing appearing to the contrary. Uldrickson v. Samdahl, 92 Minn. 297, 100 N. W. 5. Petition, in equitable action to set aside judgment at law, failing to state that motion for new trial was filed and overruled, will be treated as sufficient where evidence received without objection, and case tried as though such fact was stated. Parker v. Parker [Neb.] 102 N. W. 85. Where the case is tried on the real issue, the state of demand will be considered as amended on appeal. O'Donnell v. Weiler

An objection that the court has no jurisdiction of the subject-matter,[73] or that plaintiff has not negatived the exceptions in a penal statute on which he sues,[74] or that the complaint does not state facts sufficient to constitute a cause of action,[75] may be raised at any time. Parties appearing and demurring to the complaint cannot thereafter plead want of jurisdiction over their persons.[76] A plea to the jurisdiction of the person, made before a justice, is not waived by taking an appeal from his ruling against it,[77] or by filing a motion for security for costs.[78]

Failure to object to the granting of a motion for a continuance is a waiver of the necessity for a supplemental pleading setting out the facts on which the order is based.[79]

In Georgia, objections to the pleadings on both sides must be made at the first term, or they will be deemed waived.[80]

A plea in abatement is ordinarily waived unless filed before a plea in bar.[81] A plea of privilege is not waived by a continuance in order to allow a question of fraud raised thereby to be tried by a jury on trial on the merits, where the matter is called to the attention of the court and the order of continuance provides that it shall be without prejudice to the plea.[82] After a plea in abatement has been heard on the merits and plaintiff's action dismissed, he cannot raise ob-

[N. J. Law] 59 A. 1055. Where a defective averment is supplied by the evidence, an amendment will be implied. Cleveland, etc., R. Co. v. Tehan, 4 Ohio C. C. (N. S.) 145. The admission of evidence without objection as to variance justifies the submission of the question raised thereby to the jury without regard to the pleading on the point. Testimony as to agreement as to how long contract was to continue justifies submission of question as to whether agreement was as stated. Ceballos v. Munson S. S. Line, 93 App. Div. 593, 87 N. Y. S. 811.

72. Carlson v. Hall, 124 Iowa, 121, 99 N. W. 571.

73. This is the rule whether counsel raise the question, or presently waive it, or expressly assent to the jurisdiction. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Cannot be waived. Not by filing plea in bar before plea in abatement on this ground. Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268. Not by failure to take it by objection or answer [N. Y. Code Civ. Proc. § 499]. Le Brantz v. Campbell, 89 App. Div. 583, 85 N. Y. S. 654.

74. Not confined to demurrer, and hence withdrawal of demurrer does not preclude raising objection at trial. Seydel v. Corporation Liquidating Co., 92 N. Y. S. 225.

75. Not waived by failure to take it by objection or answer [N. Y. Code Civ. Proc. § 499]. La Brantz v. Campbell, 89 App. Div. 583, 85 N. Y. S. 654; Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470. The fundamental sufficiency of a petition is always an open question, and may be raised for the first time on appeal [Mo. Rev. St. 1899, § 602]. Ball v. Neosho [Mo. App.] 83 S. W. 777. In such case it should be liberally construed. Petition sufficient though indefinite in describing defect causing injury. Id. May be raised at any time [Wash. Code Proc. § 193]. Watson v. Kent, 35 Wash. 21, 76 P. 297. This does not apply where the question has been once raised by a demurrer which has been subsequently waived. Id. A trial judge may determine the sufficiency of the complaint on the trial, objected to on the ground that it does not state facts sufficient to constitute a cause of action, notwithstanding the fact that a demurrer thereto has previously been overruled by another judge of the same court. McConaghy v. Clark, 35 Wash. 689, 77 P. 1084.

76. Shafer v. Fry [Ind.] 73 N. E. 698.

77, 78. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479.

79. McPhillips v. Fitzgerald, 76 App. Div. 15, 78 N. Y. S. 631.

80. Ga. Civ. Code 1895, §§ 5045, 5050. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

81. Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268. A plea in abatement setting up nonresidence and service outside the state is properly stricken out when filed after a demurrer for want of facts, and a second demurrer for lack of jurisdiction and misjoinder of causes of action. Johnson v. Staley, 32 Ind. App. 628, 70 N. E. 541. The objection that a claim against a decedent's estate was not presented to the county court by the proper person is a matter in abatement only, and is waived by joining issue on the merits without raising it in that court. In re Morgan's Estate [Or.] 78 P. 1029. Is waived by filing pleas in bar which do not refer to, or save the benefit of it. Plea, in action by corporation to recover leased property for breach of covenant, denying that action was authorized by plaintiff. Granite Bldg. Corp. v. Greene [R. I.] 57 A. 649. In Missouri a defendant may unite in the same pleading pleas to the jurisdiction of the person as well as of the subject-matter, with a plea to the merits without thereby waiving the question of jurisdiction. Meyer v. Phenix Ins. Co. [Mo.] 83 S. W. 479; Harrison v. Murphy, 106 Mo. App. 465, 80 S. W. 724.

82. To be sued in another county. Leahy v. Ortiz [Tex. Civ. App.] 85 S. W. 824.

jections thereto which he had full opportunity to raise at such hearing, particularly where he offers no excuse for his failure to do so.[83]

The right to judgment on the pleadings may be waived.[84] Where a new party is joined after a demurrer on the ground of a defect of parties has been sustained, defendant cannot object that the amended complaint is insufficient to warrant a recovery against either because not showing that he has any interest in the litigation.[85]

Admitting due and timely service of a supplemental complaint is a waiver of the objection that it was served without leave of court.[86]

Objections once waived cannot be again relied on.[87]

Errors or defects not affecting the substantial rights of the parties may be disregarded.[88] After judgment on the merits technical rules of pleading, invoked merely to injure the other party, should not be enforced.[89] Amendments which might have been made in the lower court on motion will, on appeal, be deemed to have been made.[90]

83. Cannot raise question that plea was filed too late by motion to vacate judgment of dismissal and reinstate case. Wright v. Jett, 120 Ga. 995, 48 S. E. 345.

84. Plaintiff waives right to judgment on account of admission in answer, where answers cross petition and thereby raises issue done away with by admission, and case is tried on issue so raised, he having made no request for judgment nor any objection to the introduction of evidence in regard to such issue. Caldwell v. Drummond [Iowa] 102 N. W. 842.

85. Where demurrer to complaint on ground that plaintiff's husband is necessary party is sustained, defendant cannot thereafter object that amended complaint naming him as party is insufficient to warrant recovery by either party, because not showing that he has any interest in the litigation. Harrington v. Gordon [Wash.] 80 P. 187.

86. Defendant then bound to answer within statutory time, and, where he does not do so, plaintiff may enter judgment by default. Greenblatt v. Mendelsohn, 92 N. Y. S. 963.

87. Where the original answer is lost before trial in the circuit court on appeal from the county court, and the case is tried in the circuit court on the pleadings filed in that court, absence of the original answer being waived, on appeal from the judgment there rendered the case must be tried on the eame pleadings. Objection having been once waived, cannot be relied on in appellate court. Commonwealth v. Higgins' Trustee, 26 Ky. L. R. 910, 82 S. W. 601. Where a demurrer to a pleading has been waived, its eufficiency cannot be again called in question. Demurrer on ground that it does not state facts sufficient to constitute cause of action. Cannot thereafter object to evidence on same ground. Healy v. King County [Wash.] 79 P. 624. Either in the lower court or on appeal. Watson v. Kent, 35 Wash. 21, 76 P. 297; Kern v. Arbeiter Unterstuetzungs Verein [Mich.] 102 N. W. 746.

88. Alaska Code Civ. Proc. § 97 (31 Stat. 347). Shea v. Nilima [C. C. A.] 133 F. 209. Kentucky Code Prac. § 134. Miller v. McConnell, 26 Ky. L. R. 181, 80 S. W. 1103. Gen. Laws R. I. 1896, p. 812, c. 235, § 3. Barlow v. Tierney [R. I.] 59 A. 930. Wis. Rev. St. 1898, § 2829. Emerson v. Nash [Wis.] 102 N. W. 921. Mont. Code Civ. Proc. § 778. Christiansen v. Aldrich [Mont.] 76 P. 1007. Failure to incorporate amendment in complaint not ground for reversal, where trial upon merits proceeded to judgment, with full opportunity for defendants to present all their evidence. Id. On motion in arrest of judgment in such cases the supreme court may direct the district court to permit the proper amendment to be made, and then to enter judgment on the decision. Barlow v. Tierney [R. I.] 59 A. 930. Where only defect was failure to allege that trespass was committed with force and arms and against the peace. Id.

89. Miller v. McConnell, 26 Ky. L. R. 181, 80 S. W. 1103.

90. Hodges v. Price [Wash.] 80 P. 202. Providing the judgment is supported by the findings of fact, allegations of possession and payment of taxes under warranty deed from owner instead of under color of title. Jones v. Herrick, 35 Wash. 434, 77 P. 798. Though the complaint does not state a cause of action, it will, on appeal, be deemed amended to conform to the proof where the latter is sufficient to sustain a cause of action, and the point is not raised in either the trial or appellate court. Failure of proof. Weber v. Snohomish Shingle Co. [Wash.] 79 P. 1126. Court will sustain the petition if it contains sufficient facts to constitute any cause of action, where no defects were pointed out below while plaintiff was in a position to amend. Misjoinder of causes of action. Chase v. Atchison, etc., R. Co. [Kan.] 79 P. 153. In view of liberality allowed in municipal court, and consent of defendant's attorney that plaintiff might plead anything he wished, held that pleadings in action for money had and received and conversion might be deemed amended to conform to proof, though cause of action established was not conversion. Poess v. Twelfth Ward Bank, 43 Misc. 45, 86 N. Y. S. 857. Specification in assumpsit may be treated as having been amended if the course of trial has been such as to permit it to be so treated. Aseltine v. Perry, 75 Vt. 208, 54 A. 190.

Cure by other pleadings or proof, or instructions.[91]—Defects in a pleading may be cured by averments in the pleadings of the opposite party.[92] Thus, if an allegation is defective because its terms are too narrow to include the legal principle sought to be stated, its denial, in terms as broad as the allegation should have been, cures the defect.[93]

Where evidence is given by both parties as to a matter defectively alleged without objection, the defective averment will be deemed cured by proof.[94] But where defendant understands from the court's ruling on a demurrer to a petition that its liability is rested solely on a certain ground, its introduction of evidence will not be deemed a waiver of defects in alleging another ground of liability.[95]

Misjoinder of causes of action may be cured by instructions.[96]

Aider by verdict.[97]—Cured by verdict means that the court will presume that the thing imperfectly or defectively stated or omitted was duly proven at the trial.[98] Defects, imperfections, or omissions either in the substance or form of a pleading, which would have been fatal on demurrer, are cured by verdict when the issue joined on the trial is such as to necessarily require the proof of the facts so defectively stated or omitted, and without which it will not be presumed that the verdict would have been given.[99] It is only where there is a total omission to

91. See 2 Curr. L. 1234.

92. In cross complaint in suit for balance due for work, material, and money furnished. Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 P. 1050. Failure to allege nonpayment in complaint cured by admissions in answer. Harmon v. Fox [Mont.] 78 P. 517. Complaint defective in failing to state contract sued on with sufficient clearness, not demurred to, held cured by answer in justification of breach charged. Carhart v. Oddenkirk [Colo. App.] 79 P. 303. In action for balance due for goods sold and for labor, failure of cross complaint to allege that the amount demanded had not been paid held cured by answer denying indebtedness, and by failure to object to evidence on such ground, and by the findings. Abner Doble Co. v. McDonald, 145 Cal. 641, 79 P. 369. Failure to allege that defendant did not know of defective condition of mine, and could not have known of it by exercise of ordinary care, cured by allegations of answer that he was notified of danger, and directed not to work there. Wilson v. Alpine Coal Co., 26 Ky. L. R. 337, 81 S. W. 278. In assumpsit for rent, failure of declaration to allege that defendant occupied premises is cured by an allegation of the plea that defendant entered into possession and was evicted by plaintiff. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127. In action between former partners on partnership account, allegations of partnership settlement in answer held express aider to those of petition. Jackson v. Powell [Mo. App.] 84 S. W. 1132. An answer supplying an omitted and necessary allegation of the petition, error on the part of the trial court in overruling a demurrer thereto ceases to be reversible error. Northwestern Nat. Life Ins. Co. v. Hare, 5 Ohio C. C. (N. S.) 348. A transfer pleaded by answer and traversed by reply is in issue though the answer itself was not so verified as to deny the title pleaded in the complaint. Suit by assignee of note. Defense of assignment by payee to third person and nonassignment by such third person. Reply claiming reassignment. Leis v. Potter, 68 Kan. 117, 74 P. 622. Alleged assignee's testimony that he had no interest did not cure rejection of evidence under answer offered by defendant. Id.

93. Defect in petition alleging that land was susceptible of division among its owners in not adding words "without impairing its value" is cured by answer denying that it could be divided "without impairing its value." Taylor v. Webber, 26 Ky. L. R. 1199, 83 S. W. 567.

94. Illinois Cent. R. Co. v. McIntosh, 26 Ky. L. R. 14, 80 S. W. 496. Where an issue not raised by the pleadings is so tendered, the court is justified in considering the pleadings amended so as to embrace it. May submit it by instructions. Iverson v. McDonnell, 36 Wash. 73, 78 P. 202.

95. Illinois Cent. R. Co. v. McIntosh, 26 Ky. L. R. 14, 80 S. W. 496.

96. Causes of action held eliminated by instructions. Louisville & N. Terminal Co. v. Lellyett [Tenn.] 85 S. W. 881.

97. See 2 Curr. L. 1234.

98. Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 P. 1050.

99. Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 P. 1050. Formal defects. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127. Formal defects cured by verdict and judgment, or by the judgment alone where the law and facts are tried by the court. Answer sufficient after judgment. Commonwealth v. Higgins' Trustee, 26 Ky. L. R. 910, 82 S. W. 601. In action for injuries to passenger while attempting to board street car, failure of petition to allege that defendant's servants had knowledge or were negligent in failing to ascertain that he was about to board car. Ashland, etc. R. Co. v. Lee, 26 Ky. L. R. 699, 82 S. W. 368. Where evidence not in the record, it will be presumed on appeal that such fact was proved, since it was necessary to sustain judgment. Id. Where, after verdict and judgment in an action for breach of a contract to purchase realty, it affirmatively appears that plaintiff

state a cause of action, or an omission to state some fact essential to a cause of action, that the verdict will not cure the defect.[1]

§ 12. *Time and order of pleadings.*[2]—The time within which pleadings must be filed is regulated by the statutes of the various states.[3] The time within which a pleading must be served is to be computed from the date of the actual service of the preceding one and not from an erroneous date inadvertently given in the admission of service.[4] In New York where notice must be given or a paper served within a specified time before an act is done, or where the adverse party has a specified time after notice or service within which to do an act, if service of the paper requiring action of the adverse party is made by mail the time required or allowed is double that specified.[5] In Georgia it is error on the call of the case for hearing, to dismiss a plea and demurrer not filed in time, where the case has never been marked in default.[6]

Parties may, by agreement and with the consent of the court, extend the time for entry of a writ beyond the term at which it is returnable.[7]

The time to answer may be extended by stipulation,[8] but such time is not extended by a motion to quash the service of summons,[9] or by the removal of a case

was able, ready and willing to comply with the contract on his part within the time limited, failure of complaint to so allege is cured. Defect one of form. Harmon v. Thompson [Ky.] 84 S. W. 569. A cause of action defectively stated. Plaintiff will be presumed to have proved at trial the facts inadequately stated. Robinson v. Metropolitan Life Ins. Co., 105 Mo. App. 567, 80 S. W. 9. In action for personal injuries to employe, omission of averment of knowledge on part of employer that machine was in bad order not cured by verdict, where there was nothing in petition suggesting such knowledge. Mueller v. La Prelle Shoe Co. [Mo. App.] 84 S. W. 1010. Failure to allege that if conductor had signaled motorman to stop he could have stopped in time to avert injury. Leu v. St. Louis Transit Co. [Mo. App.] 85 S. W. 137. Defective allegations as to mutual mistake. Lewis v. Batten [Tex. Civ. App.] 80 S. W. 389. Where no objection is made to the adequacy of the pleading by motion or otherwise, general averments of negligence are sufficient after verdict. Barnes v. Columbia Lead Co. [Mo.] 82 S. W. 203. Mere imperfections or indefiniteness in the statement of a cause of action [Mo. Rev. St. 1899, § 672]. Ball v. Neosho [Mo. App.] 83 S. W. 777. An issue raised on the statement of a legal conclusion which presents the real point in controversy. Allegation in petition for divorce that defendant continually abused plaintiff, quarreling with him over various small matters. Slaughter v. Slaughter, 106 Mo. App. 104, 80 S. W. 3. Failure to allege a promise to repay a loan or a breach of such promise. Kitchen v. Holmes, 42 Or. 252, 70 P. 830. Suit on note and contract, and to foreclose mortgage. Ellis v. Howard Smith Co. [Tex. Civ. App.] 80 S. W. 633.

1. Ellis v. Howard Smith Co. [Tex. Civ. App.] 80 S. W. 633. The objection that plaintiff has not negatived the exceptions in a penal statute is not cured by judgment. Seydel v. Corporation Liquidating Co., 92 N. Y. S. 225.

2. See 2 Curr. L. 1236.

See, also, Defaults, 3 Curr. L. 1069.

3. Answers to suits in the city court of Savannah must be filed on or before the first day of the return term. Lippman v. Aetna Ins. Co., 120 Ga. 247, 47 S. E. 593.

In Georgia where the next term of court is illegally adjourned during vacation, and is not held at the regular time, the defendant, in a case in which such term was the appearance term, may file his plea or answer at the following term, or at any time prior thereto. Where May term was adjourned until June, answer then filed is in time, where next term is in August. Frank & Co. v. Horkan [Ga.] 49 S. E. 800. Error to strike such answer as filed too late, and error properly corrected by allowing it to be refiled on same day. Id.

4. Answer within 20 days after service of summons under N. Y. Code Civ. Proc. § 520. Tolhurst v. Howard, 94 App. Div. 439, 88 N. Y. S. 235.

5. Code Civ. Proc. § 798, applies to motion to make answer so served more definite and certain. Borsuk v. Blauner, 93 App. Div. 306, 87 N. Y. S. 851.

6. Defendant has thirty days after entry of default in which to appear and have it reopened on payment of costs. Gordon v. Hudson, 120 Ga. 698, 48 S. E. 131. Where defendant's offer to file answer after first term is refused on ground that case is in default, and record is silent as to whether it has been so marked, will be presumed, on appeal, that such entry had been made. Norman v. Great Western Tailoring Co., 121 Ga. 813, 49 S. E. 782. In city court established by Civ. Code 1895, § 4270 et seq. Clifton v. Fiveash [Ga.] 50 S. E. 134.

7. Indorsement "The within writ may be entered late" construed to allow entry after term. United States v. O'Brien, 120 F. 446.

8. Stipulation that defendant might, within five days, file such pleas or answers as it could have filed before default occurred, held to require plea of accord and satisfaction to be filed within that time. Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972.

9. Mantle v. Casey [Mont.] 78 P. 591.

to the Federal court.[10] Where, after the removal, a motion to remand is made, the time to answer is thereby extended to the rule day next succeeding the determination of such motion.[11]

A pleading filed prematurely[12] or too late will be stricken from the files.[13] Pleas in abatement must be filed within the time allowed by statute or they will not be considered.[14]

The court may generally in its discretion allow an answer to be made after the time limited by statute.[15]

In some states dilatory pleas must be filed at the first term, unless a failure to do so is shown to be unavoidable.[16] Special demurrers to petitions or answers cannot be considered unless filed before the trial term.[17] A motion to dismiss, in the nature of a general demurrer, may be made at the trial.[18] The previous dismissal of a special demurrer because not filed in time is no bar to such motion.[19]

Demurrers to the petition should be filed and acted upon before the case is tried.[20]

The subsequent approval of the filing of a pleading is as effective as though permission to file it had been granted in advance.[21] The appellate court will not

10. Bryce v. Southern R. Co., 129 F. 966. In such case the time for answering is determined by ascertaining the number of days which had elapsed between the service of the complaint in the state court and the date of the removal, and suspending the time until the record reaches the Federal court, when it again begins to run from the date of the entry there. Id. Under the circuit court rules for the fourth circuit, the answer will be in time if served on a rule day within twenty days thereafter. Id.

11. Bryce v. Southern R. Co., 129 F. 966.

12. If prematurely filed before leave given, it may be stricken to purge the records of a mistake. Petition for leave to intervene. Born v. Schneider, 128 F. 179.

13. On motion. Lippman v. Aetna Ins. Co., 120 Ga. 247, 47 S. E. 593. An answer served and filed after the entry of a default. Proper practice is to make motion to set aside default and obtain leave to answer, tendering answer with motion. Mantle v. Casey [Mont.] 78 P. 591. Plea filed out of time and without leave of court is not part of record, and if review of ruling rejecting it is desired it must be taken up by bill of exceptions. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64.

14. Rule 17 requires pleas in abatement to be filed five days before the cause stands for trial. Collier v. Grey, 105 Ill. App. 485.

15. Denial of motion to allow defendant two days in which to file pleas other than the general issue and not guilty will not be reversed, where motion was not supported by showing that he in fact desired to file other pleas than general issue, or that he had defense which could not be presented thereunder, and no excuse was shown for delay. Maultsby v. Boulware [Fla.] 36 So. 713. The court must exercise a sound legal discretion in allowing the opening of defaults. Ga. Civ. Code 1895, § 5072. No abuse of discretion in refusing to do so. Southern Bell Tel. & T. Co. v. Parker, 119 Ga. 721, 47 S. E. 194; El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. B. & C. Comp. Or. § 103. Where, after entry of decree of divorce, plaintiff applied for alimony, etc., and defendant appeared specially and challenged jurisdiction of court, and, after his objections were overruled, refused to plead further, suffered default, and appealed, and secured reversal in part, held that he should have been allowed to answer to the merits, though mistaken in part in his view of the law. McFarlane v. McFarlane [Or.] 77 P. 837. Discretion a legal one, to be exercised in conformity with spirit of law, and to subserve ends of justice. Id. S. C. Code Civ. Proc. § 195. As where defendant has failed to answer because of pendency of motion to make complaint more definite and certain and judgment taken by default. Bryce v. Southern R. Co., 129 F. 966.

16. Ga. Civ. Code 1895, § 5058. Adams v. Branan, 120 Ga. 530, 48 S. E. 128; Quillan v. Johnson [Ga.] 49 S. E. 801. Where no such cause is shown, it is too late to file such a plea in the superior court on appeal from the county court. Held error to refuse to strike plea because filed too late. Adams v. Branan, 120 Ga. 530, 48 S. E. 128. Entirely new and distinct grounds for abating an action cannot be set up at the trial term under the guise of an amendment to a plea in abatement filed in due time. Quillan v. Johnson [Ga.] 49 S. E. 801. A plea in abatement should be filed at the earliest opportunity for pleading (Karthaus v. Nashville, etc., R. Co., 140 Ala. 433, 37 So. 268), but may, in the discretion of the court, be allowed after the time for filing it has passed, where defendant has not pleaded to the merits, and plaintiff has not acted upon this waiver of the matter in abatement (Id.).

17. Ford v. Fargason, 120 Ga. 606, 48 S. E. 180.

18. On ground that no cause of action is set forth. Rountree v. Finch, 120 Ga. 743, 48 S. E. 132

19. Rountree v. Finch, 120 Ga. 743, 48 S. E. 132.

20. Sheridan v. Forsee, 106 Mo. App. 495, 81 S. W. 494.

21. Substituted answer. Rice v. Bolton [Iowa] 100 N. W. 634.

interfere because of dilatory tactics in making up issues unless the trial court has abused its discretion.[22]

§ 13. *Filing, service, and withdrawal. Filing.*[23]—The fact that answers were not marked "filed" does not affect the validity of the decree if they were actually before the court and in its custody when it was rendered.[24]

Service.[25]—In Montana a copy of the complaint must be served with the summons unless two or more defendants are residents of the same county, in which case a copy need only be served on one of them.[26] The fact that the party on whom the complaint is served files a disclaimer does not affect the service on the others, there being nothing to show that he was not made a defendant in good faith.[27] Where the summons is served on all the defendants in the same county and a copy of the complaint is served on one of them, the return of the sheriff need not show that they were all residents of such county.[28]

Service of papers in an action may be made by mail by depositing them in the postoffice, properly inclosed in a postpaid wrapper, and directed to the person to be served at his address.[29] The test for determining the sufficiency of such service is whether the papers actually come into the hands of the party sought to be served.[30] If they are actually received, insufficiency of postage is immaterial.[31]

A defendant served by publication may, before the service is completed, appear and demand a copy of the complaint, if one has not been delivered to him personally, notwithstanding the fact that one was served on him by mail.[32] His time to answer runs from the time of compliance with such demand.[33]

The fact that a pleading is entitled in the wrong county does not justify a refusal to receive it, where it is returned on other grounds.[34]

Withdrawal and abandonment.[35]—Allowing the withdrawal of pleadings is a matter largely in the discretion of the trial court.[36] Pleadings cannot, as a general rule, be changed after the case has been opened to the jury.[37]

An abandoned plea is not before the court, and need not be passed upon or disposed of.[38] Admissions or declarations made in abandoned pleadings are open to explanation or contradiction.[39]

22. Rice v. Bolton [Iowa] 100 N. W. 634.

23. See 2 Curr. L. 1237.

24. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

25. See 2 Curr. L. 1238.

26. May be served on any one of those named in complaint [Mont. Code Civ. Proc. § 635]. Mantle v. Casey [Mont.] 78 P. 591.

27. Mantle v. Casey [Mont.] 78 P. 591.

28. Presumed that they were, in absence of showing to contrary. Mantle v. Casey [Mont.] 78 P. 591.

29. N. Y. Code Civ. Proc. § 797. Appeal Print. Co. v. Sherman, 99 App. Div. 533, 91 N. Y. S. 178; Fitzgerald v. Dakin, 91 N. Y. S. 1003. Service by dropping papers in an office letter box, loosely, and without any wrapper, is unauthorized. Answer and bill of particulars so deposited at 8 o'clock p. m., may be returned within twenty-four hours. Id.

30. Appeal Print. Co. v. Sherman, 99 App. Div. 533, 91 N. Y. S. 178.

31. Where counterclaim was sent not fully prepaid, and attorney's paid postage due without objection, the service was valid, and they could not return pleading on opening package and discovering what it contained. Appeal Printing Co. v. Sherman, 99 App. Div. 533, 91 N. Y. S. 178.

32, 33. Sanders v. People's Co-op. Ice Co., 44 Misc. 171, 89 N. Y. S. 785.

34. Tolhurst v. Howard, 94 App. Div. 439, 88 N. Y. S. 235.

35. See 2 Curr. L. 1238.

36. Allowing defendant's plea of tender, in action of assumpsit, to be withdrawn just before impaneling jury not abuse of discretion. O'Connell v. King [R. I.] 59 A. 926. Withdrawal does not prevent plaintiff from proving same as admission. Id.

37. Does not prevent withdrawal before jury is impaneled. O'Connell v. King [R. I.] 59 A. 926.

38. Hill v. Lyles [Tex. Civ. App.] 81 S. W. 559. A defendant who, after announcing ready for trial and waiving a jury, refuses to submit or read his pleadings to the court, thereby abandons a plea in reconvention. Id. An announcement in open court that a party will not rely on certain allegations in his pleading is equivalent to striking them out, and they need not thereafter be considered. Where plaintiff's counsel announced that he would not rely on allegations of negligence in original petition, but would rely entirely on those in amendment, held not error for court not to submit to jury issues raised by original petition. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E.

§ 14. *Issues made, proof, and variance.*[40]—By demurrer[41] or motion tendering no issues of fact, all questions of fact are admitted.[42]

On appeal from a judgment by default, the complaint is to be tested as upon demurrer.[43]

The general issue and general denials.[44]—All facts which directly tend to disprove any one or more of the averments of the complaint, or to show that plaintiff never had a cause of action, are admissible under a general denial.[45]

Special issues and special denials.[46]—New matter constituting a defense or counterclaim must be specially pleaded.[47] Thus, payment,[48] fraud,[49] the statute of frauds,[50] unless the making of the contract alleged in the complaint is put in issue by the answer,[51] the statute of limitations,[52] the defense of non est factum,[53]

788. Defendant abandoning all the issues raised by the pleadings except one, is voluntarily restricted to that one defense. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011.

39. Evidence held to show that pleas of limitations in answer were made simply as defensive pleas to meet allegations of forfeiture of lease, and not intended to assert title inconsistent with lease. Wildey Lodge v. Paris [Tex. Civ. App.] 81 S. W. 99.

40. See 2 Curr. L. 1239.

41. See § 5, ante.

42. A motion to dissolve an injunction on the ground of the insufficiency of the bill admits no more than would a demurrer thereto. Board of Trade of Chicago v. Weare, 105 Ill. App. 289.

43. Bad on appeal if it would be bad on demurrer. Dame v. Cochiti Reduction & Improvement Co. [N. M.] 79 P. 296.

44. See 2 Curr. L. 1239.

45. Distinction depends primarily on construction of complaint and material averments of fact therein. Hogen v. Klabo [N. D.] 100 N. W. 847. The new matter of the codes admits that all the material allegations of the complaint are true, and consists of facts not alleged therein which destroy the right of action and defeat a recovery. Id.

Facts which may be proved: That the contract sued on was otherwise than alleged in complaint. May introduce evidence to show what contract really was. Alaska Commercial Co. v. Williams [C. C. A.] 128 F. 362. May show entire transaction. Hogen v. Klabo [N. D.] 100 N. W. 847. Where petition avers establishment and continued use of streets up to time of suit and that attempt to close them was without authority in law or right and without sanction from proper authorities, may show that streets had been vacated and enclosed by abutting owners. Chrisman v. Omaha & C. B. R. & Bridge Co. [Iowa] 100 N. W. 63. Estoppel in pais. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058. In Michigan, in an action on a promissory note before a justice of the peace, the plea of total failure of consideration is admissible [Comp. Laws §§ 767, 769]. Hubbard v. Freiberger, 133 Mich. 139, 94 N. W. 727, 10 Det. Leg. N. 123. In an action of conversion may show title in a stranger. Ten Eyck v. Denison, 99 App. Div. 106, 91 N. Y. S. 169. In Indiana contributory negligence [Burns' Ann. St. 1901, § 359a]. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218. Also in an action to quiet title every defense, whether legal or equitable, is admissible under a general denial [Burns' Ann. St. 1901, §§ 1067, 1082, 1083]. Beasey v. High, 33 Ind. App. 689, 72 N. E. 181.

46. See 2 Curr. L. 1202, 1239.

47. Hogen v. Klabo [N. D.] 100 N. W. 847. Mich. Circuit Court Rule 7. In action for injuries to land by water from mill race, right under deed or by prescription to do acts complained of held affirmative defenses. Scott v. Longwell [Mich.] 102 N. W. 230. In action for price of lumber defendant cannot show shortage in amounts for which it had formerly paid without pleading such facts by way of recoupment or counterclaim. Strother v. McMullen Lumber Co. [Mo. App.] 85 S. W. 650. New matter by way of confession and avoidance. That contract sued on is champertous, or void as against public policy. Rucker v. Bolles [C. C. A.] 133 F. 858.

48. Fuller Co. v. Manhattan Const. Co., 88 N. Y. S. 1049. In action to recover money which plaintiff was required to pay state on land purchased from defendant, in excess of what he represented was due, evidence as to settlement inadmissible unless fact pleaded as bar. Word v. Marrs [Tex. Civ. App.] 83 S. W. 17. In an action on notes compensation in whole or in part [Rev. Code Prac. La. art. 367]. Julius Kessler & Co. v. Perilloux & Co. [C. C. A.] 132 F. 903. The issue raised by a general denial of a counterclaim is the original existence of the cause of action alleged therein, and not any settlement thereof. Shaffer Bros. v. Warren [Iowa] 102 N. W. 497.

49. An assignment cannot be set aside for fraud under an answer containing a general denial only. Midler v. Lese, 91 N. Y. S. 148.

50. De Montague v. Bacharach [Mass.] 72 N. E. 938; Livingstone v. Murphy [Mass.] 72 N. E. 1012; Christiansen v. Aldrich [Mont.] 76 P. 1007. Unless apparent on the face of the complaint, allegation that contract was made is sufficient without alleging that it was in writing. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

51. Christiansen v. Aldrich [Mont.] 76 P. 1007.

52. Gray Lithograph Co. v. American Watchman's Time Detector Co., 44 Misc. 206, 88 N. Y. S. 857. The pendency of another action relied on to toll limitations. Citizens' Bank v. Spencer [Iowa] 101 N. W. 643.

53. Anderson v. Blair, 121 Ga. 120, 48 S. E. 951. The execution of an instrument sued on need not be proved when no plea of non est factum is filed, though the para-

or ultra vires, unless want of capacity appears on the face of the petition,[54] and the failure to perform conditions precedent to the right to sue,[55] cannot be shown under a general denial. Damages not necessarily and naturally resulting from the injuries complained of must be specially pleaded.[56] Matters which must be specially pleaded cannot be taken advantage of by a denial in an answer, even though no objection is made thereto.[57]

Variance.[58]—A party must recover, if at all, on the cause of action set up in his pleadings.[59] Hence, allegations and proofs must substantially correspond.[60]

graph of the petition alleging due execution is denied in an answer, not sworn to. Id.

54. Royal Fraternal Union v. Crosier [Kan.] 78 P. 162.

55. Failure of plaintiff to resort to arbitration before suing on an insurance policy. Royal Fraternal Union v. Crosier [Kan.] 78 P. 162.

56. Loss of time and earnings. Wilbur v. Southwest Mo. Elec. R. Co. [Mo. App.] 85 S. W. 671.

57. Anderson v. Blair, 121 Ga. 120, 48 S. E. 951.

58. See 2 Curr. L. 1241.

59. Plaintiff cannot rely on the evidence of defendant to make out a case, where, in order to do so, he must repudiate his own testimony and the allegations of the petition. Behen v. St. Louis Transit Co. [Mo.] 85 S. W. 346. Purchaser suing for fraudulent representations made by vendor as inducement for sale cannot recover by showing mutual mistake. Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677; Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730. Cannot allege specific negligence of one kind and recover upon proof of negligence of another character. Chicago & A. R. Co. v. Bell, 209 Ill. 25, 70 N. E. 754. If fails to establish truth of case as laid, defendant is entitled to verdict. Murphy v. North Jersey St. R. Co. [N. J. Law] 53 A. 1018. Where plaintiff seeks to recover amount of purchase money paid defendant, less rental value, on ground that he has been wrongfully evicted from premises sold to him, and it affirmatively appears from his testimony that he defaulted in payment, and that defendant re-entered as purchaser at sheriff's sale pursuant to judgment recovered therefor, plaintiff fails to prove his case as alleged, and evidence touching rental value of land is irrelevant. Rodgers v. Caldwell [Ga.] 50 S. E. 95. Is concluded by the theory of his pleadings and cannot depart therefrom by evidence repugnant thereto or contradictory thereof, or introduce a new issue. In action on curator's bond, where answer alleges that curator had property and committed defalcation after defendant was discharged as surety, defendant cannot show that property was lost by improper investment prior to his suretyship. State v. Bergfeld [Mo App.] 84 S. W. 177. The rule as to variance is the same under the code as at common law, except in so far as its consequences may be obviated at the trial. Higgins v. Graham, 143 Cal. 131, 76 P. 898; Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66.

60. Griffin v. Atlantic Coast Line R. Co., 134 N. C. 101, 46 S. E. 7; Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299. Plaintiff cannot recover for injuries caused by any other acts of defendant than those alleged in his pleadings. Wilhelm v. Donegan, 143 Cal. 50, 76 P. 713. Both for purpose of advising other party what he will be called upon to answer, and to preserve record so as to prevent another suit based on same cause. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Action for injuries received while operating elevator. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50. Every allegation descriptive of the cause of action must be proved as alleged. Even unnecessary allegations descriptive of what is material. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2.

No variance: Between original declaration and additional count in regard to locus in quo of accident. Town of Cicero v. Bartelme, 212 Ill. 256, 72 N. E. 437. Between declaration and terms of lease. Agreement by lessor to put premises in habitable condition held independent covenant. Rubens v. Hill, 213 Ill. 523, 72 N. E. 1127. Between evidence of an accounting with an agent and allegations of an accounting with the principal. Hayes v. Walker [S. C.] 48 S. E. 989.

Variance immaterial: Proof of mode of payment different from that described in complaint. McNerney v. Barnes [Conn.] 58 A. 714. Where benefit certificate offered in evidence was dated April 21, the one described in petition dated April 8, and the application made a part of the certificate was dated April 8, the variance did not warrant its exclusion. Hyatt v. Legal Protective Ass'n, 106 Mo. App. 610, 81 S. W. 470. Between allegation that defendant's testator received certain shares of stock as bailee to sell for plaintiff under guaranty to obtain certain price therefor and evidence showing that deceased purchased the stock at the same price. Linden v. Thieriot, 96 App. Div. 256, 89 N. Y. S. 273. Where plaintiff may sue in trespass or case at his election, the fact that the writ states an action of trespass and the declaration sounds in case, since the defect may be cured by amendment. Action by one bitten by dog [Gen. Laws R. I. 1896, p. 373, c. 111, § 3]. Barlow v. Tierney [R. I.] 59 A. 930.

Fatal variance: A judgment creditor, intervening in action to restrain sheriff from selling wife's land as that of husband, and claiming merely that husband's deed to wife was void as to creditors, cannot after filing of findings of fact, claim that deed was really mortgage, and that equitable title was in husband. White v. Besse, 145 Cal. 223, 78 P. 649. Between allegations of damage to crops by failure to furnish water for irrigation purposes, and evidence that acts complained of resulted in depreciation of market

In order to be fatal, the variance must be as to a material fact.[61] Where it is apparent from the reading of a written instrument that its meaning and purpose as pleaded are identical with the original, there is no variance, even though the wording as pleaded is different from the instrument itself.[62] A failure of proof results only when the allegations to which the proof is directed are unproved, not in some particulars only, but in their entire scope and meaning.[63]

Immaterial variances will be wholly disregarded.[64] As a rule no variance will be deemed material unless it actually misleads the adverse party to his prejudice in maintaining his action or defense upon the merits.[65] A party claiming to have been misled must show that fact to the satisfaction of the court, and also show the particulars in which he has been misled.[66]

value of land. Equitable Securities Co. v. Montrose & D. Canal Co. [Colo. App.] 79 P. 747. In suit for balance due on open account, held that plaintiff could not recover on proof of breach of covenant with respect to certain timber sold to him for cash, he having failed to prove his case as laid. Loyd v. Anderson, 119 Ga. 875, 47 S. E. 208. An objection of variance will be overruled on appeal if there is evidence in the record which, if taken as true, together with all inferences which may be legitimately drawn therefrom, fairly tends to sustain the averments of the declaration. Evidence in action for personal injuries held to tend to support averments in declaration, and hence no fatal variance. Town of Cicero v. Bartelme, 212 Ill. 256, 72 N. E. 437. Where a declaration states a good cause of action against two defendants jointly, and plaintiff dismisses as to one at the close of the evidence, and is granted leave to amend so as to show a cause of action against the remaining one only, the failure to make such amendment produces a fatal variance. Cannot be treated as having been made. Action against employer for personal injuries. Condon v. Schoenfeld [Ill.] 73 N. E. 333. As to manner in which injury occurred. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Mistake in one's middle name or initial. One suing as administratrix of the estate of "Ferdinand N." A. for his wrongful death cannot recover under a complaint alleging death of "Fernando W." A. Cleveland, etc., R. Co. v. Pierce [Ind. App.] 72 N. E. 604. In suit to establish lien, where complaint alleged that plaintiff's mortgagor had title bond at time of mortgage, and subsequently paid for land without receiving deed, and proof showed that bond was given to a third person who sold land to mortgagor. Comb's Adm'x v. Krish [Ky.] 84 S. W. 562. Between petition alleging negligence in allowing valve to remain out of order after having been notified, without plaintiff's knowledge, and proof that plaintiff discovered defect, reported it to defendant, and continued to work, relying on promise to repair it. Studenroth v. Hammond Packing Co., 106 Mo. App. 480, 81 S. W. 487. Between allegation that plaintiff was struck by brick while in front of building owing to negligence in failure to guard those lawfully there and proof that he worked in rear of building and was in cellar when injured. Reilly v. Vought, 87 N. Y. S. 492. Inconsistency between the claim stated in an affidavit for attachment and the demand in the declaration. Simmons v. Simmons [W. Va.] 48 S. E. 833.

61. Special finding of jury that plaintiff did not state condition of his title to person who readjusted his insurance held not to show fatal variance. Farmers' Mut. Fire Ins. Co. v. Jackman [Ind. App.] 73 N. E. 730.

62. Use of word "heretofore" instead of "hereafter" mere clerical error. Mulligan v. Smith [Colo.] 76 P. 1063.

63. No failure in action to establish ownership of land [N. D. Rev. Codes 1899, § 5295]. Halloran v. Holmes [N. D.] 101 N. W. 310. The fact that the petition, in an action on a fire policy, alleges an absolute promise and the proof shows a conditional one is a variance as distinguished from a failure of proof. Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

64. Conn. Rules under Practice Act III, § 6 (58 Conn. 565). McNerney v. Barnes [Conn.] 58 A. 714.

65. Cal. Code Civ. Proc. § 469. On appeal in absence of showing of objection on ground of variance, will be presumed that evidence justified findings and judgment. Will not be reversed unless prejudice shown. Id. § 475. Abner Doble Co. v. Keystone Consol. Min. Co., 145 Cal. 490, 78 P. 1050. If averments of complaint uncertain, answer held sufficient to put question in issue, and to show that defendant was not misled [Idaho Rev. St. 1887, § 4225]. Lewis v. Utah Const. Co. [Idaho] 77 P. 336. Variance between pleading alleging that accident occurred on one side of street and proof that it occurred on other is immaterial [Ky. Civ. Code Prac. § 129]. City of Covington v. Miles, 26 Ky. L. R. 609, 82 S. W. 281. Variance in date of contract immaterial [N. Y. Code Civ. Proc. § 539]. Carlisle v. Barnes, 92 N. Y. S. 924, afg. 45 Misc. 6, 90 N. Y. S. 810. When not amounting to failure of proof [N. D. Rev. Codes 1899, § 5293]. Halloran v. Holmes [N. D.] 101 N. W. 310. S. D. Rev. Code Civ. Proc. § 146. Woodford v. Kelley [S. D.] 101 N. W. 1069.

66. Amendment to conform pleadings to proof properly allowed, where defendant failed to show prejudice [N. Y. Code Civ. Proc. § 539]. Carlisle v. Barnes, 92 N. Y. S. 924, afd. 45 Misc. 6, 90 N. Y. S. 810. Counsel's refusal to make statement that he had been misled, required by court as condition to denying amendment, held not to entitle defendant to vacation of judgment on ground of surprise, etc. Id. Court may thereupon order the pleadings to be amended upon such terms as may be just [Ky. Civ. Code Prac. § 129]. City of Covington v. Miles, 26 Ky. L. R. 609, 82 S. W. 281. Mo. Rev. St. 1899, §

The petition may be dismissed for a fatal variance.[67]

Admissions in pleadings or by failure to plead.[68]—Allegations of the complaint, petition, or declaration which are admitted,[69] or not specifically denied, by the answer,[70] and new matter in the answer not denied by the reply,[71] will be

2096. Farmers' Bank v. Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299. The affidavit setting forth in what manner he has been misled is the sole test of the materiality of the discrepancy. Id. Unless he does so, the variance will be deemed immaterial and disregarded. N. D. Rev. Codes 1899, § 5293. Action to redeem from deed given as security and prevent sale by defendant. Halloran v. Holmes [N. D.] 101 N. W. 310.

67. Particularly where the plaintiff declines the court's offer of leave to withdraw a juror. Reilly v. Vought, 87 N. Y. S. 492.

68. See 2 Curr. L. 1199, 1204, n. 36-38.

69. Are tantamount to findings duly made. As to method of reinstatement of suspended member of benefit society. Miller v. Head Camp [Or.] 77 P. 83. Parties may not contradict or disprove what they have admitted in their pleadings, but, to render such evidence admissible, should correct the pleadings by amendment. Sievers v. Martin, 26 Ky. L. R. 904, 82 S. W. 631. The admission of the execution of a note does not preclude defendant from setting up a conditional delivery. New Haven Mfg. Co. v. New Haven Pulp & Board Co., 76 Conn. 126, 55 A. 604. Admission that paragraph in complaint, alleging that "a copy of said protested check is hereto attached, marked 'Exhibit A,' to which reference is prayed," is true, admits that exhibit is a true copy of the original check, with all entries thereon. Wachstein v. Germania Bank, 120 Ga. 229, 47 S. E. 586. Plaintiff in partition claimed land, alleged to have been occupied by his grandparents as homestead, as heir. Defendants claimed same under contract with deceased owners, but admitted that land was occupied by decedents as homestead until their death. Held, that admission left no issue as to plaintiff's right to partition as against purely defensive part of answer, and he was entitled to judgment on the pleadings. Caldwell v. Drummond [Iowa] 102 N. W. 842. In suit to enforce mechanic's lien, answer setting up estoppel to enforce it, held to in effect admit existence and validity of lien. Badger Lumber Co. v. Muehlebach [Mo. App.] 83 S. W. 546. Need not be proved. Noyes v. Young [Mont.] 79 P. 1063. An answer in a suit for specific performance alleging that, since contract was made, defendant has conveyed land to another, constitutes an admission that they owned it when it was made, and cures defect in complaint failing to aver such fact. Christiansen v. Aldrich [Mont.] 76 P. 1007. In action for personal injuries, admission of allegation that defendant was in possession of, and used certain cars at time and place of accident held to make it unnecessary for plaintiff to prove that particular engine causing injury was owned by defendant. Allen v. Palmer, 91 N. Y. S. 731. Answer in action on contract with city for street cleaning construed, and held not to admit that final payment actually made was due. Uvalde Asphalt Pav. Co. v. New York, 99 App. Div. 327, 91 N. Y. S. 131.

70. Bates v. Frazier [Ky.] 85 S. W. 757. An allegation as to the death of a person, and to his dying without issue is not uncontroverted where the answer denies that he died without issue on a specified date, "or other time, or that he is dead at all." Ironton Fire Brick Co. v. Tucker, 26 Ky. L. R. 1021, 82 S. W. 1009. Will be taken as prima facie true. Miller v. Georgia R. Bank, 120 Ga. 17, 47 S. E. 525. Such admission concludes defendant and he cannot contradict it on trial. Fiebiger v. Forbes, 43 Misc. 612, 88 N. Y. S. 284. N. Y. Code Civ. Proc. § 522. Driscoll v. Brooklyn Union El. R. Co., 95 App. Div. 146, 88 N. Y. S. 745; Corn v. Levy, 97 App. Div. 48, 89 N. Y. S. 658; Fiebiger v. Forbes, 43 Misc. 612, 88 N. Y. S. 284. Where plaintiff, in action for dissolution of partnership, filed a supplemental complaint, by leave of court, after entry of interlocutory judgment dissolving the partnership and appointing a referee, on which no final judgment was entered, he was not entitled to a final judgment as for default on defendant's failure to answer, particularly where the supplemental complaint set up no cause of action. Cox v. Clarke, 45 Misc. 102, 91 N. Y. S. 587. Separate defenses of estoppel and easement in action to enjoin maintenance of elevated road held unavailing, in absence of denial of allegation that none of owners had consented to construction and operation of road. Driscoll v. Brooklyn Union El. R. Co., 95 App. Div. 146, 88 N. Y. S. 745. Plea denying making of contract and representations inducing it, but failing to deny allegation that representations were false, admits their falsity. Phillips v. Crosby [N. J. Err. & App.] 59 A. 142. Allegation in statement of claim that contract of married woman was valid by laws of state where made, not denied by affidavit of defense. Peter Adams Paper Co. v. Cassard, 208 Pa. 267, 57 A. 564. Failure to deny execution of contracts by president and secretary of corporation in its name and under its seal admits execution (Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742), and that officers had power to make it (Id.). Allegations as to value of property damaged by blowing sawdust over it. Mahan v. Doggett [Ky.] 84 S. W. 525. Matters improperly denied [Sand. & H. Dig. Ark. § 5761]. Haggart v. Ranney [Ark.] 84 S. W. 703. Failure to deny prima facie title set up by plaintiff, and pleading, in avoidance, tax deed and adverse possession to show prima facie title in themselves, held admission of plaintiff's title. Harvey v. Douglass [Ark.] 83 S. W. 946. Where the petition alleges that the contract sued on was made by defendants' agents, and defendants fail to deny such fact under oath, it will be taken as proven. Watkins Land Mortg. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 560. Where the answer in a suit on an accident insurance policy pleads a failure to give notice, and the reply pleads waiver and estoppel, or matter to avoid the effect of a failure, the allegation that no notice was given will be taken as admitted. Western Travelers' Acc. Ass'n v.

taken as established. The rule, however, does not apply to amendments to the petition.[72] Nor is an admission in a pleading binding on the party making it where the opposite party fails to rely upon it, and introduces evidence to controvert the allegations admitted.[73]

A portion of a paragraph of an answer containing an admission complete in itself is admissible without the remaining portion.[74]

By default; defendant admits the truth of all the allegations of the complaint, including facts shown by an exhibit attached to, and made a part of it.[75]

A tender and payment into court of a specific sum as adequate compensation for injuries suffered, in an action for unliquidated damages sounding in tort, is a solemn and conclusive admission of plaintiff's cause of action, and of the existence of every fact essential to the maintenance of his action.[76]

A defendant admitting the allegations of the complaint and its prayer is only entitled to such relief as it suggests.[77]

Judgment on the pleadings will be given when they present such a state of conceded facts as to entitle either party to relief.[78] Judgment cannot be entered

Tomson [Neb.] 101 N. W. 341. Question of excuse or whether notice was given within reasonable time entirely eliminated. Id. A party adopting the answer of another is bound by admissions therein. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121.

71. See 2 Curr. L. 1204, n. 36-38. In action for possession of realty and cancellation of tax deed, failure of plaintiff to deny allegations of answer setting up tax deed acquired after commencement of action does not defeat action, where deed is not before court on appeal, so that its regularity can be determined. Paine v. Palmborg [Colo. App.] 79 P. 330. Where material parts of petition, which were basis of prayer for writ of mandamus to compel payment of salary, were denied by part of answer to which no replication was filed, payment should not have been ordered on overruling demurrer to replication. City of Chicago v. People, 210 Ill. 84, 71 N. E. 816. Defendant is not entitled to judgment on the pleadings for plaintiff's failure to reply to an amended answer, filed just before the second trial of an action, which merely sets out with greater particularity matters of defense relied on in the original answer, all of which were substantially denied by the original reply. Ruby Carriage Co. v. Kremer, 26 Ky. L. R. 274, 81 S. W. 251. Where an answer stating a complete defense is not replied to, defendant is entitled to judgment on the pleadings. Advice of counsel in action for malicious prosecution. Tandy v. Riley, 26 Ky. L. R. 98, 80 S. W. 776. Where the replication admits certain items set up in a counterclaim, it is error to charge that the burden is on defendant to prove each and every item of the counterclaim. Oliver v. Love, 104 Mo. App. 73, 78 S. W. 335. Replication admitting "each and every fact set up in the answer, except that the timber has been paid for, which he expressly denies," held not to admit payment. Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43. Mere anticipatory denials in the complaint are insufficient. Allegations of contributory negligence must be replied to, though complaint alleges due care. State v. District Court [Mont.] 79 P. 546; Floyd-Jones v. Anderson [Mont.] 76 P. 751. In case plaintiff fails to reply or demur, defendant may move for such judgment as he is entitled to on the pleadings [Mont. Code Civ. Proc. § 722, as amended by Sess. Laws 1899, p. 142]. State v. District Court [Mont.] 79 P. 546. It is then too late for plaintiff to dismiss. Submission of motion for judgment on pleadings a trial within Code Civ. Proc. § 1004. Id. Denial cannot be assumed. Adams Exp. Co. v. Gordon, 5 Ohio C. C. (N. S.) 563.

72. Miller v. Georgia R. Bank, 120 Ga. 17, 47 S. E. 525.

73. Dressner v. Manhattan Delivery Co., 92 N. Y. S. 800.

74. Where it admits killing, plaintiff need not put in matter of explanation or exculpation. Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793. Where it is complete as an admission, it is admissible though only part of a sentence. Hedrick v. Southern R. Co., 136 N. C. 510, 48 S. E. 830.

75. Map. Hollister v. State [Idaho] 77 P. 339.

76. Only remaining question is amount of damages. Wells v. Missouri-Edison Elec. Co. [Mo.] 84 S. W. 204.

77. Cauthen v. Cauthen [S. C.] 49 S. E. 321.

78. See 2 Curr. L. 1224, n. 78, 1225, n. 93, 94. Dodge v. U. S. [C. C. A.] 131 F. 849. Where the pleadings themselves show him to be entitled thereto. Denied in suit on contract to manufacture articles. Midvale Steel Co. v. Camden Ironworks, 129 F. 246. In action against accommodation indorser on notes, where affidavit of defense sets up written contract to which plaintiff was a party, pursuant to which contract was made, and under which its enforcement was optional with plaintiff, together with facts dehors the record tending to show an election not to enforce it, the court will not attempt to construe the contract or determine its effect on defendant's liability on motion for judgment for want of a sufficient affidavit of defense, but will permit case to proceed to trial, in order that entire transaction may be shown. Gallice v. Crilly, 134 F. 983. In view of admissions of answer in action on benefit certificate, judgment held properly rendered on pleadings. Bankers' Union of the World v. Favalora [Neb.] 102

on pleadings presenting issues of fact,[79] nor on the complaint alone, where its deficiencies are curable by amendment.[80] The defendant may assail such a judgment if no cause of action is stated in the complaint, though affirmative matter pleaded in the answer is not a sufficient defense.[81]

A motion for final judgment on the pleading should be made at the trial, and not previously.[82] On a rule for judgment for want of a sufficient affidavit of defense, the affidavit must be accepted as a verity.[83] Statements contained in affidavits cannot be considered upon a motion for judgment upon a pleading as frivolous.[84] One moving for judgment on the pleadings admits, for the purposes of the motion, the truth of all the allegations of his adversary, and the untruth of his own allegations which have been denied.[85]

It is improper to dismiss the petition for failure to properly set out the special damages sued for, where plaintiff is entitled to nominal damages in any event.[86]

PLEAS, see latest topical index.

PLEDGES.

§ 1. Definition and Nature (1054).
§ 2. Right to Make (1055).
§ 3. Property Subject to be Pledged (1055).
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§ 5. Rights, Duties, and Liabilities Under the Pledge (1056). Title to the Property (1056). Possession and Custody (1057). Duty to Realize on Collaterals and Prevent Loss (1057). Conversion by the Pledgee (1057). Redemption and Surrender (1058). Default, Foreclosure, and Sale (1058). Right of Action on the Debt (1059). Effect of Insolvency and Bankruptcy (1059). Equities and Defenses Between One of the Parties and Third Persons (1059).

§ 1. *Definition and nature.*[87]—A pledge is a delivery of personal property as security for a debt or engagement, and unlike a lien gives the right not only to retain the property, but also to sue it on default in accordance with any special agreement not contrary to public policy.[88] If the general ownership passes, the transfer is a sale[89] or an assignment.[90] No writing is necessary to create the contract,[91] it being based on the idea of actual possession by the pledgee[92] or

N. W. 1013. In trespass for taking and carrying away seaweed where defendant pleads a right to use a way for the taking of seaweed, appurtenant to the land of which he is a tenant, to which plaintiff replies a trespass by the use of the way for other land than that to which the way applies, and defendant confesses the latter trespass in his rejoinder, plaintiff is entitled to judgment. Norman v. Sylvia [R. I.] 59 A. 112.

79. Issue as to existence of contract. Stratton's Independence v. Stark [Colo. App.] 79 P. 745.

80. However deficient will not sustain a final judgment on the merits in favor of defendant, entered after the opening statement of plaintiff's counsel. Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 P. 308.

81. Goldstein v. Michelson, 91 N. Y. S. 33.

82. Durham v. Durham, 99 App. Div. 450, 91 N. Y. S. 295.

83. Where it sets up that under laws of another state no personal liability is imposed on defendant, it is sufficient to put plaintiff on proof to contrary. American Alkali Co. v. Huhn, 209 Pa. 238, 58 A. 283.

84. Kene v. Hill, 92 N. Y. S. 805.

85. Rule extends to denials given plaintiff by statute to matters of defense set up by defendant. Chemung Min. Co. v. Hanley [Idaho] 77 P. 226. Where complaint states cause of action and answer pleads limitations, it is error to enter judgment for defendant on pleadings, though cause of action should appear to be barred on face of the complaint. Id.

86. Breach of contract for interchange of freight. Graham & Ward v. Macon, etc., R. Co. [Ga.] 49 S. E. 75.

87. See 2 Curr. L. 1243.

88. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696; Hagan v. Continental Nat. Bank. 182 Mo. 319, 81 S. W. 171. The law of pledges is materially different from that of mortgages. The lien resulting from a pledge is subject to strict foreclosure. That resulting from a mortgage is not. Blood v. Shepard [Kan.] 77 P. 565.

89. A purported bill of sale for cash will not, as against third persons, be regarded as a pledge. Millot v. Conrad [La.] 38 So. 139.

90. Instrument held to be an assignment and not a pledge of rents and profits of a building to one who loaned money to assignor. Seymour v. Ryan [Minn.] 101 N. W. 958.

91. If writing is passed, rights other and different from those expressed may be set up as against third parties dealing with the pledgor. Shenkle v. Vickery [C. C. A.] 130 F. 424.

some one for him,[93] of the thing pledged, though the pledgee may make pledgor his agent to take and use the pledge for any special or limited purpose.[94] The pledgee of a real estate mortgage may foreclose it and take possession of the land, but he holds the land as a pledgee.[95]

§ 2. *Right to make.*[96]—A pledge is not necessarily dependent on ownership for its validity,[97] and anyone in possession and apparently the owner of goods can confer rights on a pledgee regardless of the equities between the pledgor and others.[98] Consent of the pledgor is unnecessary to enable the pledgee to subpledge.[99] The pledgee of a corporation may rely on the apparent authority of its officers to pledge its bonds.[1]

§ 3. *Property subject to be pledged.*[2]—Every kind of personal property in existence and capable of delivery may be pledged. A pledge may, therefore, be made not only of ordinary goods and chattels, but of life insurance policies,[3] shares of stock,[4] liquor licenses having a surrender value,[5] warehouse receipts[6] and bills of lading,[7] but trade marks and trade names, having no tangible existence apart from the business in which they are used, cannot.[8] A corporation may pledge its unissued bonds[9] and the pledge is efficient as an issue.[10] Likewise, an underwriter's agreement to subscribe and float corporate securities may be pledged by the underwritten corporation with the securities.[11]

§ 4. *The contract and its requisites.*[12]—A pledge is created by delivery,[13]

92. Robertson v. Robertson [Mass.] 71 N. E. 571. By a contract of pledge only a special title passes to the pledgee, which depends on actual possession, while the general right of property remains in the pledgor. Harding v. Eldridge [Mass.] 71 N. E. 115. Pledgee abandons lien when he permits purchaser to receive goods from pledgor though under an agreement that such purchaser should be given notice of pledgee's lien. Thalmann v. Capron Knitting Co., 91 N. Y. S. 520.

93. A pledge of money or negotiable paper in the hands of a third party to receive the payment of the purchase price of chattels upon an executory contract of sale vests in the vendor a lien upon or interest in the fund, which, upon performance of the contract by him, he may enforce by a suit in equity. But contract must be performed. Western Fly Guard Co. v. Hodges [Neb.] 100 N. W. 407.

94. Harding v. Eldridge [Mass.] 71 N. E. 115.

95. Where choses in action, the payment of which is secured by a real estate mortgage, are pledged as collateral security for the payment of a debt, and such real estate mortgage is foreclosed by the pledgee, and the title to the property taken by him under a sheriff's deed, and he takes possession of the property thereunder, such title is vested in him, and is substituted for the pledged choses in action, and is governed by the law of pledges. Blood v. Shepard [Kan.] 77 P. 565.

96. See 2 Curr. L. 1244.

97. Intention controls where pledgee makes pledgor his agent after original delivery to retain property pawned. Harding v. Eldridge [Mass.] 71 N. E. 115. One who has stolen coupon bonds may, there being nothing putting the pledgee on inquiry, confer a lien on a pledgee taking them in good faith. Cochran v. Fox Chase Bank, 209 Pa. 34, 58 A. 117.

98. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Eq.] 59 A. 360.

99. Consent of pledgor unnecessary to enable the pledgee to subpledge. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057.

1. Kirkpatrick v. Eastern Milling & Export Co., 135 F. 146.

2. See 2 Curr. L. 1245.

3. Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 P. 67; Clark v. Equitable Life Assur. Soc., 133 F. 816. A policy of life insurance, or a benefit certificate which is in effect a policy of insurance, may, even before death of the insured, be pledged as collateral security, by one having an interest therein. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057.

4. Robertson v. Robertson [Mass.] 71 N. E. 571; Richardson v. Longmont Supply Ditch Co. [Colo. App.] 76 P. 546.

5. In re Elm Brew. Co., 132 F. 299.

6. Lewis v. First Nat. Bank [Or.] 78 P. 990.

7. Commercial Bank v. Armsby Co., 120 Ga. 74, 47 S. E. 589.

8. Crossman v. Griggs [Mass.] 71 N. E. 560.

9, 10. In re Waterloo Organ Co. [C. C. A.] 134 F. 345.

11. Kirkpatrick v. Eastern Mill. & Export Co., 135 F. 146.

12. See 2 Curr. L. 1245.

13. A pledge of stock is not valid if the certificate is not delivered. Robertson v. Robertson [Mass.] 71 N. E. 571. To hold and preserve his lien, a pledgee must have the goods actually delivered to him and continued possession. Harding v. Eldridge [Mass.] 71 N. E. 115. Title in pledgee is not affected by pledgee making pledgor agent to take and use the pledge for special or limited purpose. Id. A valid pledge is created when certain stock certificates were transferred to a trustee as security for a debt and the transfer was made on the books of the company as required by statute.

no writing being necessary.[14] A transfer absolute on its face may be shown by parol to have been intended only as a pledge.[15]

§ 5. *Rights, duties, and liabilities under the pledge.*[16]—*The property pledged* includes all that is within the terms of the pledge or incident to that included but not delivered with it.[17]

Title to the property[18] remains in the pledgor until divested by some sale, by judicial proceedings, or by the pledgee's converting the property to his own use,[19] and on payment or tender of payment of the debt within the redemption period is entitled to a return of the pledge.[20] The pledgee's title is not divested by reason of his failure to pay the debt at maturity.[21] There must be a sale which, whatever the terms of the contract, must be fair.[22]

A pledgee acquires a special property commensurate with his rights as pledgee.[23] The pledgee of negotiable paper has the rights of a bona fide holder.[24] The pledgee stands in the relation of trustee to the pledgor and will not be permitted to manage the trust so as to gain an advantage to himself beyond his legitimate claims for debt and expenses.[25]

Though the legal title is transferred by a pledge of corporate stock, the

Richardson v. Longmont Supply Ditch Co. [Colo. App.] 76 P. 546.

14. A purchaser from the pledgor takes subject to all the pledgee's claims though not expressed in the writing between pledgor and pledgee. Thinkle v. Vickery [C. C. A.] 130 F. 424.

15. Clark v. Equitable Life Assur. Soc., 133 F. 816; Loftus v. Agrant [S. D.] 99 N. W. 90.

16. See 2 Curr. L. 1247, 1248.

17. If **bonds** be pledged and with them **an agreement to underwrite the flotation of them,** stocks which by the agreement shall be a bonus to bond subscribers are included in the pledge by implication though not delivered. Kirkpatrick v. Eastern Mill & Export Co., 135 F. 146. In that case receivers must surrender the stock to the pledgee in order that he may make proper tender to the underwriters. Id. In a proceeding by petition for that purpose, subscribers to the underwriting agreement cannot try their rights under the agreement. Id.

18. See 2 Curr. L. 1247, n. 16 et seq.; Id., 1248, n. 21 et seq.

19. Brown v. Bronson, 93 App. Div. 312, 87 N. Y. S. 872. An absolute assignment of a life policy to secure a debt does not divest the assignor of his general property therein. Clark v. Equitable Life Assur. Soc., 133 F. 816. Pledgor of stock of a corporation has power to enter into an agreement with a corporation issuing the stock to change its nature from preferred to common stock subject to the pledgee's lien. Pendleton v. Harris-Emery Co., 124 Iowa, 361, 100 N. W. 117. A check deposited to secure performance of a contract remains the pledgor's property until breach; then it goes to the pledgee. Pledgee is not a trustee. Furth v. West Seattle [Wash.] 79 P. 936.

20. Pledgor assigned absolutely, life insurance policy to pledgee, but as security for loan. Clark v. Equitable Life Assur. Soc., 133 F. 816. Pledgor has right to redeem from assignee of pledgee where pledgee sold pledgor's note and did not sell but merely assigned collateral security of pledgor. Hart v. Tyrrell [Tex. Civ. App.] 82 S. W. 1074. Where no time of redemption is limited by the contract, the right extends through the debtor's lifetime and descends to the representatives of the pledgor unless demand has been made upon the pledgor to redeem. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197.

21. Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171. The pledgee's possession is not regarded as adverse to the pledgor, and does not bar his right to redeem, unless it is continued so long a time as to raise the presumption that the pledgor has relinquished his title in satisfaction of his debt. White Mountain R. Co. v. Bay State Iron Co., 50 N. H. 60; Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

22. Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171; Hart v. Tyrrell [Tex.] 82 S. W. 1074; Perkins v. Applegate [Ky.] 85 S. W. 723.

23. Coleman v. Anderson [Tex. Civ. App.] 82 S. W. 1057. Pledgee acquires an assignable interest in the pledge, or a right to subpledge. Id. The pledgee of negotiable bills of exchange or notes acquires, where the same are transferred so as to make him a party thereto, the legal title to such negotiable securities, and is entitled to receive the sum due upon the same from the parties liable thereon. Larkin Co. v. Dawson [Tex. Civ. App.] 83 S. W. 882.

24. Pledgee has good title to bonds payable to bearer, when taken in the ordinary course of business in good faith, without knowledge that they were stolen. Cochran v. Fox Chase Bank, 209 Pa. 34, 58 A. 117. Where possession of a bill of lading is by custom regarded as evidence of a right to the goods, the owner cannot recover them from one who has taken them in good faith as a pledge. Broker had pledged the bill to a bank to secure a loan on his own account. Commercial Bank v. Armsby Co., 120 Ga. 74, 47 S. E. 589.

25. Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

pledgee's interest therein is special, the pledgor remaining the general owner and his property therein subject to the corporation's rights against him,[26] but where a pledgee of stock notifies the corporation issuing it of his rights, the corporation is bound to respect them though the transfer is not registered on its books.[27] The pledgee of stock has an interest entitling him to have corporate assets conserved and protected,[28] but it is not such as to enable him to sue in the Federal court where the pledgor could not.[29]

Possession and custody.[30]—The pledgee is entitled, until the debt secured has been paid, to have possession of the property pledged,[31] but is bound to use ordinary care and diligence in the care and custody thereof.[32]

Duty to realize on collaterals and prevent loss.[33]—Ordinarily the pledgee must collect a pledged note when it falls due,[34] and must exercise all reasonable diligence to preserve its value by enforcing securities which pertain to it.[35] If by delay he allows it to become uncollectible by reason of the maker's insolvency, he is liable to the pledgor.[36] The pledgee of stock indorsed in blank with power to transfer should collect dividends and account,[37] but if he assign and thereafter collect dividends the assignee is not liable to the pledgor.[38] A pledgee who holds commodities in a losing market is not liable to the pledgor's guarantor, no request to sell having been made.[39]

Conversion by the pledgee occurs[40] when he sells the pledge before time of

20. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. Where a corporation issues stock which is unpaid for and the same is pledged for a loan with full power of attorney to pledgee, the pledgee's lien has priority. Id.

27. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197. Stock as a pledge, see Helliwell, Stock and Stockholders, §§ 356-372.

28. Gorman-Wright Co. v. Wright [C. C. A.] 134 F. 363. **Status of a pledgee of stock** with reference to membership in the corporation. See Helliwell, Stock & Stockholders, § 35.

29. He is within Acts Cong. March 3, 1887, c. 373, and Aug. 13, 1888, c. 866, disabling assignees to create diversity of citizenship by mere assignment. Gorman-Wright Co. v. Wright [C. C. A.] 134 F. 363.

30. See 2 Curr. L. 1248, n. 21 et seq. See, also, ante, § 1.

31. Brown v. Leary, 91 N. Y. S. 463.

32. Pledgee is liable for loss resulting from his failure to use ordinary care and diligence in protecting pledgor's collateral security when assigned to him. Failure to collect promissory note. Roberts v. Farmers' Bank, 25 Ky. L. R. 2296, 80 S. W. 441; Scott v. First Nat. Bank [Ind. T.] 82 S. W. 751. "When negotiable instruments made by a third party are used as collateral security for the promissory note or bill of exchange of the pledgor, so that the pledgee becomes a party thereto, and such collateral paper matures before the principal debt, it is the duty of the pledgee to use reasonable and ordinary care and diligence in the collection of the collateral." Larkin Co. v. Dawson [Tex. Civ. App.] 83 S. W. 882.

33. See 2 Curr. L. 1248, n. 22.

34. Hamilton's Ex'r v. Hamilton [Ky.] 84 S. W. 1156.

35. Secured note was pledged as security. Scott v. First Nat. Bank [Ind. T.] 82 S. W. 751.

Note: "The courts quite generally hold that when a creditor takes, as collateral security, a note due to his debtor from a third person, the pledgee, being entitled to the possession of the note having a certain ownership therein, must take all reasonable care to make secure the rights of the pledgor. Farm Inv. Co. v. Wyoming College, etc., 10 Wyo. 240, 68 P. 561; Reeves v. Plough, 41 Ind. 204; Mt. Vernon Bridge Co. v. Knox County Sav. Bank, 46 Ohio St. 224, 20 N. E. 339; Mauck v. Atlanta Trust & Bank Co., 113 Ga. 242, 38 S. E. 845. The pledgee, in his exercise of reasonable diligence, must, if necessary to preserve the collateral note, sue the maker thereof; and if by failure to take proper steps, the value of the collateral is lost, the pledgee is liable therefor to the pledgor. Whitteker v. Charleston Gas Co., 16 W. Va. 515; Wakeman v. Gowdy, 10 Bosw. [N. Y.] 209; Roberts v. Thompson, 14 Ohio St. 1, 82 Am. Dec. 465; Hanna v. Holton, 78 Pa. 384, 21 Am. Rep. 20; Northwestern Nat. Bank v. Thompson & Sons Mfg. Co., 71 F. 113; Hazard v. Wells, 2 Abb. N. C. [N. Y.] 444; Lamberton v. Windom, 12 Minn. 232, 90 Am. Dec. 301. In a late case, the court held that where a promissory note had been given as collateral security for the payment of a smaller one, made by the pledgor, and the pledgee had failed to demand payment of the collateral note or to give notice of its dishonor whereby the indorser was discharged, the pledgor could, when sued on his own note, show by way of recoupment the damages which he had sustained by the pledgee's negligence. Coleman v. Lewis, 183 Mass. 485, 97 Am. St. Rep. 450."—3 Mich. L. R. 245.

36. Hamilton's Ex'r v. Hamilton [Ky.] 84 S. W. 1156.

37, 38. Maxwell v. National Bank [S. C.] 50 S. E. 195.

39. First Nat. Bank v. Waddell [Ark.] 85 S. W. 417.

40. See 2 Curr. L. 1247, n. 16; Id., 1252, n. 47.

redemption expires.[41] In such case the pledgor has his remedy by an action for wrongful conversion,[42] or he may set up his claim in defense of the pledgee's action on the debt.[43] Limitations begin to run against the pledgor from the time of actual conversion by the pledgee.[44]

The pledgor's remedy when the proceeds of the pledge have been thrown into the common funds of the city which was pledgee is money had and received[45] and not injunction against disbursement of the fund.[46]

Redemption and surrender.[47]—The pledgor has a right to an action against the pledgee for refusal to return the property on demand and tender of the amount due within the time limited, but has no right to the aid of a court of equity to redeem unless there is some special ground of equitable jurisdiction,[48] and equity will not intervene unless the pledgee offers to pay the debt,[49] even though limitations have run against it,[50] except in a case where the pledgee has expressly denied pledgor's right.[51] A pledge for performance of contract cannot be recovered until full performance.[52]

Default, foreclosure, and sale.[53]—By agreement the parties may make notice of exhaustion of margins unnecessary[54] and may permit the closing out of a future transaction when margins are depleted without waiting until loss ensues.[55] What is a reasonable time to call for margins depends upon the situation.[56] The pledgee may sell fairly by any method provided for in the contract,[57] but where the contract authorizes either a public or a private sale and the pledgee assumes to sell at public sale he must pursue those methods ordinarily adopted in making public sales.[58] After foreclosure of a mortgage pledged as collateral the pledgee is entitled, after a reasonable time, to have the title he acquired by the foreclosure quieted as against the claims of the pledgor.[59] One cannot purchase at his own sale unless by special agreement with the pledgor.[60] When buying in under the

41. Pledgor conveyed by bill of sale to pledgee. Evidence that transaction was a pledge admissible. Loftus v. Agrant [S. D.] 99 N. W. 90.

42. Loftus v. Agrant [S. D.] 99 N. W. 90; Brown v. First Nat. Bank [C. C. A.] 132 F. 450. Being entitled to possession until redeemed mere assertion of title by the pledgee is not sufficient to constitute conversion. Brown v. Leary, 91 N. Y. S. 463.

43. Brown v. First Nat. Bank [C. C. A.] 132 F. 450; Larkin Co. v. Dawson [Tex. Civ. App.] 83 S. W. 882.

44. Brown v. Bronson, 93 App. Div. 312, 87 N. Y. S. 872.

45, 46. Certified check to secure performance of contract. Furth v. West Seattle [Wash.] 79 P. 936.

47. See 2 Curr. L. 1247, n. 18, 20; Id., 1248, n. 23; Id., 1252, n. 48.

48. De Bevoise v. H. & W. Co. [N. J. Eq.] 58 A. 91; Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

49. De Bevoise v. H. & W. Co. [N. J. Eq.] 58 A. 91; Shinkle v. Vickery [C. C. A.] 130 F. 424.

50. Where paid-up life insurance policies are pledged to secure a loan which is not proceeded against within the statute of limitation, pledgor must repay loan for which pledge is security, before equity will grant affirmative relief to pledgor. Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 P. 67.

51. Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

52. Deposit to secure performance of covenants in lease. Mirsky v. Horowitz, 92 N. Y. S. 48.

53. See 2 Curr. L. 1250, n. 37 et seq.

54, 55. Foster v. Murphy & Co. [C. C. A.] 135 F. 47. Evidence held to show such an agreement by a modified contract. Id.

56. Fifty-eight minutes call for $8,000 made peremptory on the last five minutes held sufficient call by wire from New York to South Carolina in a very panicky market. Foster v. Murphy & Co. [C. C. A.] 135 F. 47.

57. Stern v. Leopold, Simons & Co. [Conn.] 58 A. 696; Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171; Blood v. Shepard [Kan.] 77 P. 565. He may proceed against the pledgor personally for his debt or file a bill in chancery in the nature of a foreclosure and proceed to judicial sale or sell without judicial process upon giving reasonable notice to the pledgor. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197.

58. Sale must be held in a public place, duly advertised, etc. Hagan v. Continental Nat. Bank, 182 Mo. 319, 81 S. W. 171.

59. Blood v. Shepard [Kan.] 77 P. 565.

60. Wetherell v. Johnson, 208 Ill. 247, 70 N. E. 229. But where he is the payee of a note holding shares as collateral with power to sell at public or private sale with or without notice, he may lawfully agree with debtor to take the stock. Id.

terms of the pledge the pledgee must show fairness and good faith.[61] When sale is set aside, a day should be set for redemption and surrender within a reasonable time.[62] In a proper case the pledgee of corporate stock after sale is entitled to a transfer on the books of the corporation,[63] and may maintain a bill in equity for that purpose;[64] but he cannot compel it without showing a strict right under the terms of his contract of pledge,[65] and where he does not bring suit until long after the debt for which the stock was pledged has outlawed and the pledgor has died, he must make the heirs parties.[66] A bank having power to take a pledge may in selling the same after default warrant it.[67] The pledgee has no right to use the proceeds arising from the sale for other purposes than to reduce the amount of the loan.[68] He can recover the reasonable[69] but not unreasonable expenses incurred in maintaining the pledge and keeping it available.[70]

Right of action on the debt.[71]—An agreement to pay any deficiency remaining after realizing on collaterals will not support action on the debt until realization is made.[72]

Effect of insolvency and bankruptcy.[73]—The powers of a trustee holding collateral may be suspended by insolvency and receivership of the pledgor.[74] Where a brewing company advanced the money to pay liquor licenses, taking an assignment thereof for security and afterward pledged them for a loan and became bankrupt, the pledgee is entitled to the sums collected by the trustee from the licensees on the advancements.[75] If the trustee of collaterals petitions against a receiver for power to sell them, the pledgees may intervene to resist his application for costs and expenses.[76] The right to treat the pledge as preference is vested exclusively in the trustee in bankruptcy.[77]

Equities and defenses between one of the parties and third persons.[78]—The equities which follow non-negotiable paper do not avail against the bona fide trans-

61. Perkins v. Applegate [Ky.] 85 S. W. 723. Sale held fraudulent there having been no person but the auctioneer present who bought in for the creditor and the pledge precluding a buying in save at "public" sale. Id.

62. Perkins v. Applegate [Ky.] 85 S. W. 723.

63. Where corporate stock pledged is also subject to a second lien in favor of the corporation issuing it, the pledgee is not entitled to a transfer but only to a sale. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197.

64. The pledgee is entitled to maintain a bill in equity for the enforcement of the pledge of corporate stock where the contract specifies no time of redemption or time and manner of sale and the corporation claims a prior lien on the stock. White River Sav. Bank v. Capital Sav. Bank & Trust Co. [Vt.] 59 A. 197.

65. State v. North American Land & Timber Co., 112 La. 441, 36 So. 488.

66. Wadlinger v. First Nat. Bank, 209 Pa. 197, 58 A. 359.

67. Cattle warranted sound and healthy. State Bank of Commerce v. Dody [Kan.] 79 P. 1092.

68. Iowa Nat. Bank v. Cooper [Iowa] 101 N. W. 459.

69. Pledgee's lands had been damaged by trespass of pledgor's hogs. It was agreed to arbitrate damages pending which decision, the hogs were pledged. Later pledgor refused to arbitrate. Collins v. Cochran, 121 Ga. 785, 49 S. E. 771.

70. Pledgee paid $30 assessment on pledged stock worth $5. Iowa Nat. Bank v. Cooper [Iowa] 101 N. W. 459. Under Iowa Code no holder of corporate stock as collateral security is liable for assessments thereon. Id.

71. See 2 Curr. L. 1251, n. 43.

72. Klee v. Trauerman [Pa.] 60 A. 157. This situation is unlike that where there is a separate unconditional promise to pay the debt. Id.

73. See Bankruptcy, 3 Curr. L. 434, and kindred topics.

74. A trustee of maturing securities pledged under an agreement that he shall sell or collect them and be allowed his expenses cannot, unless the agreement so provides, exercise such powers after the pledgor's receivership. Girard Trust Co. v. McKinley-Lanning Loan & Trust Co., 135 F. 180. Agreement held not to so provide. Id.

75. In re Elm Brewing Co., 132 F. 299.

76. Girard Trust Co. v. McKinley-Lanning Loan & Trust Co., 135 F. 180.

77. But does not exclude trustee to maintain action on assumption that after payment of note secured by pledge, the surplus is an asset of the bankrupt. Lewis v. First Nat. Bank [Or.] 78 P. 990.

78. See topics Negotiable Instruments, 4 Curr. L. 787; Sales, 2 Curr. L. 1527; Chattel Mortgages, 3 Curr. L. 682; Fraudulent Conveyances, 3 Curr. L. 1535, and like topics.

feree of it as security for a negotiable note.[79] A broker who carries a transaction on margin is not affected by the undisclosed purpose of his principal that the transaction should be an unlawful one.[80] Neither is the broker affected by the fact that the customer's agent procured the transaction in his own name and in substituting the customer falsified the price.[81] Since the pledgee may assign his rights, it is immaterial to the pledgor whether it was done by one whom the pledgee authorized.[82]

POINTING FIREARMS, see latest topical index.

POISONS.

Criminal poisoning.[83]—Vending drugs and poisons without a license is by statute generally made a crime.[84]

Negligent sale and use.[85]—The mere selling of poison by a druggist is not negligence,[86] but he must exercise the highest degree of care for the safety of the public,[87] and a failure to comply with a statute requiring receptacles in which poisons are sold to be labeled "poison," is negligence per se.[88] Though selling without labeling constitutes a crime, recovery may be had in damages for injuries resulting,[89] but it must appear that the negligence (violation of the statute) was the proximate cause.[90] The fact that the person to whom it is sold is negligent as to its care subsequently does not relieve the act of its character.[91] The customer is bound only to exercise ordinary care for his own safety.[92] One who negligently allows poison to be in such position that another will be injured by it is liable in damages for injuries resulting,[93] but directing one to drink poison out of a receptacle not labeled is not negligence where the person giving the directions does not know it contains poison.[94] Whether one drinking poison from a receptacle not labeled is guilty of contributory negligence may be a question for the jury.[95]

POLICEMEN; POLICE POWER; POLLUTION OF WATERS; POOR LAWS; POOR LITIGANTS; POSSE COMITATUS, see latest topical index.

POSSESSION, WRIT OF.

This writ, originally issuable on a judgment for plaintiff in ejectment, is

79. Though fraud infects a pledge of a non-negotiable note, a bona fide indorsee of a negotiable note which they secure may take a superior title by assignment. White v. Dodge [Mass.] 73 N. E. 549.

80, 81. Hocomb v. Kempner [Ill.] 73 N. E. 740.

82. Carson v. Old Nat. Bank [Wash.] 79 P. 927.

83. See 2 Curr. L. 1252.

84. Indictment held sufficient under Criminal Code 1895, § 480. Carter v. State [Ga.] 50 S. E. 64. See Medicine and Surgery, 4 Curr. L. 636, for regulation of drug business.

85. See 2 Curr. L. 1253.

86. Selling arsenic to an unknown person, twenty years old, intelligent appearing, and who gives a good account of the person for whom and the purpose for which it is bought, is not negligence. Galvin v. Overbeck, 2 Ohio N. P. (N. S.) 63.

87. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201.

88. Code, §§ 4976, 2593, making such failure a misdemeanor. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793. Violation of St. 1903, § 263, establishes a prima facie case of negligence. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201.

89. Crime under St. 1903, § 2630, but recovery may be had for unlawful death. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201. Though the druggist is liable regardless of the statute, the jury should be instructed that failure to comply with it would render him liable. Id.

90. Action for death caused by drinking from a receptacle not labeled. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793. As to whether it was the proximate cause held a question for the jury. Id.

91. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793. Negligence of a nurse in administering the poison. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201.

92. Sutton's Adm'r v. Wood [Ky.] 85 S. W. 201.

93. Master putting poison in water cooler for purpose of cleansing it and failing to

now applied in other suits at law and in equity where the relief is wholly or partly the recovery of possession.[96] A purchaser at execution sale entitled to the writ on notice after obtaining a conveyance is not entitled to it if the record does not show a conveyance.[97] A court has jurisdiction to issue the writ so long as it has control of the subject-matter and parties.[98] Where the trial court has lost jurisdiction to issue it, the appellate court may do so or remand the cause for that purpose.[99]

POSSESSORY WARRANT.[1]

The action is wholly statutory,[2] and it lies against an agent with whom property has been left to be kept until called for.[3]

POSTAL LAW.

§ 1. The Federal Postal System and Its Administration (1061).
§ 2. Use of Mails, and Mail Matter (1062).
§ 3. Postal Crimes and Offenses (1063). Use of Mails to Defraud (1063). Embezzlement and Larceny from the Mails (1065). Conspiracy (1065).

§ 1. *The Federal postal system and its administration. Postal officers and employes.*[4]—The postmaster general may terminate a contract for carrying mails, though some service remains to be performed in the district covered.[5] The measure of damages recoverable for such discontinuance is one month's extra pay, as provided in the statute, and not the profits the contractor would have made had the contract remained in force.[6] A contractor cannot recover extra pay for services outside the terms of his contract when such services were rendered pursuant to an unauthorized requirement of a local postmaster, and the contractor was relieved of such services on protest to the department.[7] A subcontractor for the transportation of mails cannot substitute another person for himself without the consent of the contractor and the postal department.[8] In a suit on a mail contractor's bond, for abandonment of the contract, the official report of the local postmaster and the finding of the postmaster general, based thereon, that the prin-

warn his servants not to drink from such cooler. Geller v. Briscoe Mfg. Co. [Mich.] 99 N. W. 281.

94. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793.

95. Burk v. Creamery Package Mfg. Co. [Iowa] 102 N. W. 793. One need not anticipate that water in a cooler from which persons habitually drink will be poisoned. Geller v. Briscoe Mfg. Co. [Mich.] 99 N. W. 281.

96. See 16 Enc. Pl. & Pr. 745, and Cyc. Law Dict. "Possession, Writ of"; "Writ of Assistance." See, also, Assistance, Writ of, 3 Curr. L. 345.

97. Under Ky. St. 1903, 1689. Scott v. Powers, Little & Co., 25 Ky. L. R. 1640, 78 S. W. 408.

98. In condemnation proceeding the writ was not awarded at the term at which the decree was entered, held it could issue at a subsequent term. Collier v. Union R. Co. [Tenn.] 83 S. W. 155.

99. Collier v. Union R. Co. [Tenn.] 83 S. W. 155. Execution as evidence to establish title in action of ejectment. Nelson v. Brisbin [Neb.] 98 N. W. 1057.

1. See 2 Curr. L. 1253.

2. A possessory warrant does not lie unless the defendant acquired possession of the property in dispute in one of the modes set forth in Civ. Code 1895, § 4799. Susong v. McKenna, 121 Ga. 97, 48 S. E. 695.

3. Where the evidence showed that it was not deposited as collateral security for a debt. Allen v. Wheeler, 121 Ga. 277, 48 S. E. 923. See 2 Curr. L. 1253, n. 63.

4. See 2 Curr. L. 1253.

5. Where street car service was substituted, leaving only the carrying of mails from the station to the cars in a given district, the contract was properly terminated. Slavens v. U. S., 25 S. Ct. 229, afg. 38 Ct. Cl. 574.

6. Postal Laws, § 817. Slavens v. U. S., 25 S. Ct. 229; Travis v. United States, 25 S. Ct. 233, afg. 38 Ct. Cl. 574.

7. Slavens v. U. S., 25 S. Ct. 229; Travis v. United States, 25 S. Ct. 233, afg. 38 Ct. Cl. 574.

8. No recovery by subcontractor for breach of contract by a substitute, the consent to the substitution by the subcontractor's superiors not being alleged or proved. McConaghy v. Clark, 35 Wash. 689, 77 P. 1084.

cipal was a failing contractor, is prima facie proof of abandonment of the contract.[9]

The sureties on a postmaster's bond are liable for a loss of registered mail matter caused by negligence of the postmaster.[10] A suit on such bond cannot be maintained by the owner of the package in his own name and for his own benefit,[11] but may be maintained by the United States, for the benefit of the owner, and it is the duty of the government to bring such action.[12] No formal allegation that the suit is for the benefit of the bailor is necessary.[13] In such suit, the government may recover the entire loss, though it is only obligated to return to the sender an amount not exceeding ten dollars.[14]

A carrier, suspended by a postmaster and acquitted of charges and restored by the postmaster general, with nothing said as to loss of pay, is entitled to pay during the period of suspension.[15] The duty of collecting letters and packages to be registered is within the scope of a letter carrier's duties, so that his surety is liable for the theft of such a package, though the rule requiring such duty was made after the bond was given.[16] The United States may maintain an action against a surety on a letter carrier's bond for the value of registered matter stolen by the carrier, though no claim has been made against the government for the loss.[17]

§ 2. *Use of mails, and mail matter.*[18]—The right to use the mails is a statutory privilege which must be exercised under and subject to such conditions and restrictions as Congress sees fit to impose.[19] By virtue of the plenary power conferred on Congress to establish a postal system and make regulations for its government and control, it may lawfully declare what shall and what shall not be carried in the mails,[20] and may lawfully confer on the postmaster general the requisite authority to prevent the mails from being used as a medium to disseminate printed matter which, on grounds of public policy, it has declared to be non-mailable.[21] The statute empowering the postmaster general to direct the seizure and return of mail matter sent to any person or company engaged in certain prohibited enterprises, involving the obtaining of money by fraud, is constitutional.[22] It is not objectionable as violating due process of law, since the action of the postmaster general, in excess of his authority, is reviewable by the courts;[23] nor as involving an unlawful interference with private mail matter;[24] nor as authorizing confiscation of property of the addressee of the prohibited mail matter.[25]

9. United States v. McCoy, 193 U. S. 593, 48 Law. Ed. 805.

10. As where registered package of money was stolen. United States v. Griswold [Ariz.] 76 P. 596.

11, 12, 13. United States v. Griswold [Ariz.] 76 P. 596.

14. Government being the bailee, may recover not only its own special loss but the entire loss of bailor and bailee, under the common law. United States v. Griswold [Ariz.] 76 P. 596.

15. A local postmaster has no power to dismiss or to suspend and deprive of pay. Corcoran's Case, 38 Ct. Cl. 341.

16, 17. National Surety Co. v. U. S. [C. C. A.] 129 F. 70.

18. For corresponding matter, and also carriage of mails, see 2 Curr. L. 1254.

19, 20. Missouri Drug Co. v. Wyman, 129 F. 623.

21. Rev. St. §§ 3929, 4041, and 28 Stat. 964, are constitutional. Missouri Drug Co. v. Wyman, 129 F. 623. The postmaster general has jurisdiction, under Rev. St. § 3929, to issue "fraud orders" to postmasters, directing them to mark as "fraudulent" certain mail matter, on evidence, satisfactory to him, that the sender was then engaged in a fraudulent scheme. United States v. Burton, 131 F. 552.

22. Rev. St. U. S. § 3929, as amended in 1890 and 1895 upheld. Public Clearing House v. Coyne, 194 U. S. 497, 48 Law. Ed. 1092.

23. Public Clearing House v. Coyne, 194 U. S. 497, 48 Law. Ed. 1092.

24. This objection held not valid where a "fraud order" directed the return only of mail directed to a fraudulent concern or its officers or agents. Public Clearing House v. Coyne, 194 U. S. 497, 48 Law. Ed. 1092.

25. Public Clearing House v. Coyne, 194 U. S. 497, 48 Law. Ed. 1092.

Congress having excluded matter of a certain class from the mails, the duty of determining whether certain matter belongs to the prohibited class, or whether a certain person is in fact using the mails for a fraudulent purpose,[26] rests with the executive officer charged with administration of the postal laws;[27] and such determination is not reviewable judicially, if supported by credible evidence.[28] Even though such decision is upon a mixed question of law and fact, or on a question of law alone, it carries with it a strong presumption of its correctness.[29]

Within the meaning of the statute classifying mail matter, "periodicals" and "periodical publications" are synonymous terms.[30] The mere fact that books, complete in themselves, are published at regular intervals and in consecutive numbers, and are made to conform to the conditions prescribed by law for mail matter of the second class, does not entitle them to second-class postage rates as periodicals.[31] The fact that a publisher has made contracts for future delivery of publications at prices based on the belief that a certificate of admission at second-class rates would be continued by a succeeding postmaster general, is no ground for an injunction to prevent revocation of such certificate.[32] A certificate of admission to the mails as matter of a certain class, which by its express terms continues until revoked, is a mere license.[33]

§ 3. *Postal crimes and offenses.*[34]—The offense of placing obscene matter in the mails is committed by placing therein a letter obscene in character by necessary inference, though the words used were not themselves obscene.[35] An indictment for mailing of a prohibited article must describe the article with sufficient particularity so that an acquittal or conviction of the accused will bar further prosecution for the same offense.[36]

Use of mails to defraud.[37]—The effect of the 1889 amendment to the statute denouncing as an offense use of the mails in furtherance of a scheme or artifice to defraud another was simply to add other acts to those described by the original act.[38] There are three elements to the offense: a plan or contemplated series of actions for the purpose of defrauding some one;[39] contemplated use of the mails to carry out the plan;[40] actual placing of some letter or mail matter in the mails.[41]

26. A scheme whereby a fund was to be created out of dues and fees, "realizations" being returnable after a stated time, the amount to depend on membership at that time, held a lottery, within Rev. St. § 3929, authorizing "fraud orders," since the scheme contained no provision for a reserve fund, and must result in loss. Public Clearing House v. Coyne, 194 U. S. 497, 48 Law. Ed. 1092.

27. Missouri Drug Co. v. Wyman, 129 F. 623.

28. Exclusion of matter advertising a certain drug, on the ground that such matter contained fraudulent misrepresentations, held proper. Missouri Drug Co. v. Wyman, 129 F. 623. Court refused to review refusal of postmaster general to admit numbers of "music magazine," complete in themselves, as second-class matter. Bates & G. Co. v. Payne, 194 U. S. 106, 48 Law. Ed. 1092, afg. Payne v. Bates & G. Co., 22 App. D. C. 250. Decision of postmaster general was a discretionary not a merely ministerial duty. Payne v. Bates & G. Co., 22 App. D. C. 250. Postmaster general having excluded a newspaper which was being carried on by a receiver in bankruptcy to preserve the good will of the paper, mandamus to compel its admission to the mails was refused. In re Coleman, 131 F. 151.

29. Bates & G. Co. v. Payne, 194 U. S. 106, 48 Law. Ed. 894; Public Clearing House v. Coyne, 194 U. S. 497, 48 Law. Ed. 1092.

30. Payne v. Houghton, 22 App. D. C. 234.

31. Numbers of a "literature series" held not periodicals within the meaning of the postal laws. Houghton v. Payne, 194 U. S. 88, 48 Law. Ed. 888, afg. Payne v. Houghton, 22 App. D. C. 234; Id., 31 Wash. L. Rep. 390.

32, 33. Payne v. Houghton, 22 App. D. C. 234.

34. See 2 Curr. L. 1254.

35. Construing Rev. St. U. S., § 3893. United States v. Moore, 129 F. 159. See 2 Curr. L. 1254.

36. Applied to an indictment charging the mailing of a letter giving information where and from whom an article or thing designed or intended for the prevention of conception might be obtained, in violation of Rev. St. § 3893, as amended by 25 Stat. 496. United States v. Pupke, 133 F. 243.

37. Rev. St. U. S. § 5480. See 2 Curr. L. 1255.

38. Act March 2, 1889, 25 Stat. 873, c. 393, § 1, amending Rev. St. U. S., § 5480. Miller v. U. S. [C. C. A.] 133 F. 337.

39, 40. United States v. Post, 128 F. 950.

A valid indictment under this statute must allege facts which fairly show use of the mails to execute a scheme or artifice to defraud,[42] intention to so use the mails as a part of such scheme or artifice,[43] the scheme or artifice to defraud itself,[44] and the intention of defendants to defraud.[45] Only three offenses may be joined in the same indictment.[46] Omission of the names of persons whom it was defendant's intention to defraud is not fatal, when it is alleged that such persons were unknown to the grand jury.[47] An indictment charging accused with conspiring to defraud persons unknown to the grand jury is not objectionable though it shows also the offense, not charged therein, of conspiring to defraud known persons.[48] Intentional use of a legal contract or transaction to defraud another may constitute a scheme or artifice to defraud, although use of the same contract or transaction with an honest intent would be lawful or innocent.[49] The fact that the alleged fraudulent scheme is impossible of execution on its face is no defense.[50] The defense that the fraudulent scheme involved a gambling transaction forbidden by state laws, and that therefore defendants ought not to be prosecuted for not carrying it out, is also without merit.[51] The burden of proving each element of the offense beyond a reasonable doubt[52] rests throughout on the prosecution.[53] Hence, in a prosecution of a mental healer for using the mails to advertise her power and secure money from patients, the United States must prove that defendant did not possess the power alleged,[54] or that she did not believe in or intend to administer the treatment she advertised and was paid for.[55] The fraudulent intent, in such a prosecution, not being provable as an ordinary fact, but being a mental condition, may be found from surrounding circumstances.[56] Letters and telegrams of the accused and newspaper articles written as news and paid for as advertising, containing alleged misrepresentations, are admissible to show the fraudulent intent, where the charge is use of the mails to defraud by inducing the public to buy mining stock.[57]

41. United States v. Post, 128 F. 950. The offense is not completed until some letter in furtherance of the fraudulent scheme has been deposited in the mails. United States v. Burton, 131 F. 552.

42. Miller v. U. S. [C. C. A.] 133 F. 337. An indictment which charges that defendants, having devised or intending to devise a scheme to defraud, to be effected by use of the mails, did, in the execution of this fraudulent scheme, deposit for transmission a letter in some post office, is sufficient. O'Hara v. U. S. [C. C. A.] 129 F. 551.

43. An allegation that a scheme "was to be effected" by correspondence, etc., held a sufficient allegation of intent to use the mails to execute the alleged fraudulent scheme. Miller v. U. S. [C. C. A.] 133 F. 337.

44. Miller v. U. S. [C. C. A.] 133 F. 337. An indictment charging use of mails and a contract between directors of a mutual insurance corporation and defendant to render the corporation insolvent, held to set out a scheme to defraud. Id. A mere allegation that defendant was engaged in the business of mental healing is not an allegation of a "scheme or artifice to defraud." Post v. U. S. [C. C. A.] 135 F. 1, rvg. 128 F. 950. An averment that defendants intended to obtain a large sum of money between January 1 and May 23, 1902, for a fraudulent purpose, is not repugnant to a particular averment that the scheme was devised on May 21, 1902, at which date a letter was deposited in the mails. O'Hara v. U. S. [C. C. A.] 129 F. 551.

45. Miller v. U. S. [C. C. A.] 133 F. 337.

46. Where there were nine indictments for fraudulent use of the mails, each containing three counts, and all relating to the same scheme to defraud, but charging different mailings, an order to try the nine indictments together, which was done, separate verdicts being rendered and separate sentences being imposed, did not effect a consolidation of more than three offenses, within the meaning of Rev. St. § 5480, as amended by 25 Stat. 873. Betts v. U. S. [C. C. A.] 132 F. 228.

47, 48, 49. Miller v. U. S. [C. C. A.] 133 F. 337.

50, 51. O'Hara v. U. S. [C. C. A.] 129 F. 551.

52. United States v. Post, 128 F. 950.

53. United States v. Post [C. C. A.] 135 F. 1.

54. Defendant does not have burden of proving possession of such power, even though its existence is contrary to generally accepted scientific views. United States v. Post [C. C. A.] 135 F. 1, rvg. 128 F. 950.

55. Evidence held not to sustain charge that defendant did not intend to administer advertised mental treatment. Post v. United States [C. C. A.] 135 F. 1.

56. United States v. Post, 128 F. 950.

57. Balliet v. U. S. [C. C. A.] 129 F. 689.

Embezzlement and larceny from the mails.[58]—The offense is committed by a carrier who takes and destroys a letter, and takes a silver certificate therefrom,[59] and it is immaterial that the letter, addressed to a real person, was a mere decoy, prepared by an inspector to test the carrier's honesty.[60] Two counts of the indictment, one charging the carrier with embezzling and destroying a letter, and the other with stealing the contents, are not repugnant to one another.[61] Describing the article of value taken from a letter as a silver certificate of the United States, and giving its denomination, is sufficient without setting out the marks and numbers thereon.[62] An indictment for larceny of a package from the mails need not allege that the package was stamped.[63] An allegation that a package was lately put into the mails and came into defendant's possession as mail clerk admits evidence of its having been stamped and the manner in which it was stamped.[64] Where the name of the addressee as charged was idem sonans with that proved, the variance was immaterial.[65]

Conspiracy.[66]—Willful or corrupt misconduct by an official of the postal department, impairing its administration, works a wrong to the United States, and is punishable under the statute denouncing the offense of conspiracy to defraud the United States.[67]

POSTPONEMENT, see latest topical index.

POWERS.

§ 1. Nature and Kinds (1065).
§ 2. Creation, Construction, Validity, and Effect (1065).
§ 3. Execution of Powers (1066).

§ 1. *Nature and kinds.*[68]

§ 2. *Creation, construction, validity, and effect.*[69]—No precise form or technical words are necessary to the creation of a power.[70] If the execution of the power is not obligatory but is left entirely to the discretion of the donee only a

58. Rev. St. U. S. § 5467. See Abstracting Letters, 2 Curr. L. 1256.

59. Such certificate is a "pecuniary obligation or security of the government" and "an article of value" within the meaning of the statute. Bromberger v. U. S. [C. C. A.] 128 F. 346.

60. Bromberger v. U. S. [C. C. A.] 128 F. 346.

NOTE. **Decoy letters:** The use of decoy letters to detect offenses against the postal laws is not forbidden by the statutes or good morals, but is proper and justifiable. United States v. Moore, 19 F. 39; United States v. Wight, 38 F. 106. But see United States v. Jones, 80 F. 513. The purpose for which a letter is mailed is not a question under the statute against embezzlement of letters. United States v. Cottingham, 2 Blatchf. 470. It is not necessary that the letter should be a bona fide letter intended to be delivered to the addressee. Hall v. U. S., 168 U. S. 632, 42 Law. Ed. 607. See construction of term "letter" in Goode v. U. S., 159 U. S. 663, 40 Law. Ed. 297, per Brown, J. But such letter is not "intended to be conveyed by mail" if discarded as unmailable. United States v. Rapp, 30 F. 818. It has been held that a letter not reaching the employe through regular channels is yet "intended to be conveyed by mail" within the meaning of the statute. Walster v. U. S., 42 F. 891. In this case the letter was prepared in the local office and postmarked as coming from another town. See, also, Goode v. U. S., 159 U. S. 663, 40 Law. Ed. 297; Hall v. U. S., 168 U. S. 632, 40 Law. Ed. 297.—See article "Decoy Letters" in 9 Am. & Eng. Enc. Law (2nd Ed.) 15. Also note in 1 L. R. A. 104.

61, 62. Bromberger v. U. S. [C. C. A.] 128 F. 346.

63, 64. Alexis v. U. S. [C. C. A.] 129 F. 60.

65. "L. Krowder" and "L. Krower." Alexis v. U. S. [C. C. A.] 129 F. 60.

66. See 2 Curr. L. 1256.

67. Thus an indictment charging the assistant attorney general and attorney with failure to report on schemes for misuse of the mails, in the manner required by law, for certain corrupt purposes, was held to state an offense under Rev. St. § 5440. Tyner v. U. S., 23 App. D. C. 324.

68, 69. See 2 Curr. L. 1257.

70. Provisions of a will construed and held to confer a power of appointment. McCook v. Mumby, 64 N. J. Eq. 594, 54 A. 406. A right to use the income and so much of the principal as is necessary for support creates a life estate with power of disposition. It also creates a right to incur indebtedness for living expenses payable out of the principal after death of the donee. Hinn v. Gersten [Wis.] 99 N. W. 338.

mere naked power is conferred.[71] A power in trustees to distribute when they deem prudent is not a mere naked authority, purely discretionary, but is blended with the trust.[72] Where it appears that the donor placed special confidence in the donee, the power is personal to him,[73] but if it is not, by the terms of the instrument creating it, limited to the donee designated, it devolves upon his successor.[74] A devise over upon the same trusts and with like powers in case the first donee fails to execute a power conferred, creates in the devisees a power equal to the one given to the first donee.[75] A power of sale,[76] being merely a trust,[77] may lawfully reside in one who has no legal or equitable title to the property.[78] A power of sale given to the devisee of a life estate becomes inoperative where the life estate becomes merged with the remainder.[79] Title made by the donee passes from the donor to the appointee.[80]

§ 3. *Execution of powers.*[81]—If the instrument creating the power indicate that the donor placed special confidence in the donee, so that the element of personal choice is found, the power must be executed by the person selected.[82] If an act of the donee shows an intention to execute the power, it will be given effect.[83] It is not necessary that the deed of execution refer to the power.[84] A deed inoperative except as an exercise of a power will be construed as an execution though it contain no reference to the power.[85] Expressions of doubt by the donee as to whether his appointment would be effectual will not render invalid a power lawfully executed.[86] Well appointed portions in a defectively executed power will stand,[87] and where the instrument creating the power directs the further devolution of the property in case the power is not executed, badly appointed portions will follow the course prescribed.[88] If the instrument creating a power prescribes

71. A power in an heir to confirm a devise in case it was held void does not create a trust in violation of Rev. St. § 5915. Thomas v. Ohio State University Trustees, 70 Ohio St. 92, 70 N. E. 896.

72, 73. Sells v. Delgado [Mass.] 70 N. E. 1036.

74. To "my trustees or the survivor of them" confers the power on any trustee appointed to administer the trust. Sells v. Delgado [Mass.] 70 N. E. 1036. Under Rev. Laws, c. 147, §§ 5, 6, providing that where a trustee declines to serve or resigns, or is removed, a successor appointed in his stead shall have all his powers. Id.

75. Inglis v. McCook [N. J. Eq.] 59 A. 630.

76. Full power to mortgage, lease, or sell, is power to convey a perfect title to a stranger though the evident purpose of the donor was to vest his estate in his whole family subject to such distribution as the donee should determine to be proper. Dana v. Jones, 91 App. Div. 496, 86 N. Y. S. 1000.

77. Where an estate goes to a successor of the original trustee subject to the same trusts, the power passes to him. Coleman v. Cabaniss [Ga.] 48 S. E. 927.

78. Coleman v. Cabaniss [Ga.] 48 S. E. 927.

79. A power of sale was coupled with a life estate. In case of sale, one-third of the proceeds was to go to another beneficiary. A mortgage given by the devisee in her own right was valid. Spencer v. Kimball, 98 Me. 499, 57 A. 793.

80. McCook v. Mumby, 64 N. J. Eq. 594, 54 A. 406.

81. See 2 Curr. L. 1258.

Note: What constitutes a sufficient execution of a power depends largely on the facts and circumstances of each particular case, and while certain rules and principles are considered in the decision of all cases yet individual instances are constantly arising in which some circumstance causes an exception to or a novel application of those rules. As to what is a sufficient execution by will see note to Lane v. Lane [Del.] 64 L. R. A. 849, where English and American cases are considered and discussed.

82. Sells v. Delgado [Mass.] 70 N. E. 1036.

83. A testator anticipating that a certain devise would be held void prescribed a further devolution of the property but empowered his only lineal heir to confirm the devise and if she complied, the estate over was declared revoked. Held, a deed of confirmation purporting to execute the power was operative. Thomas v. Ohio State University Trustees, 70 Ohio St. 92, 70 N. E. 896. Execution of a power held valid. Koch v. Robinson, 26 Ky. L. R. 969, 83 S. W. 111. Rights of appointees determined. In re Lafferty's Estate, 209 Pa. 44, 57 A. 1112.

84. Where a trustee with power of sale joins with beneficiary in a deed, it is a good execution of the power though the conveyance does not refer to it. Kirkman v. Wadsworth [N. C.] 49 S. E. 962.

85. Kirkman v. Wadsworth [N. C.] 49 S. E. 962.

86. McCook v. Mumby, 64 N. J. Eq. 594, 54 A. 406.

87. Life estates created were valid but future estates violated the rule against perpetuities. Graham v. Whitridge [Md.] 57 A. 609.

88. Graham v. Whitridge [Md.] 57 A. 609.

the manner of execution, it must be followed.[89] No member of designated appointees named as a class can be ignored.[90]

PRAECIPE; PRAYERS; PRECATORY TRUSTS; PRELIMINARY EXAMINATION; PRELIMINARY SUITS; PRESCRIPTION; PRESUMPTIONS; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; PRIOR APPROPRIATION; PRIORITIES BETWEEN CREDITORS, see latest topical index.

PRISONS, JAILS AND REFORMATORIES.

§ 1. **Nature and Classes (1067).**
§ 2. **Custody, Discipline, Government, and Employment of Inmates (1067).** Employment of Prisoners (1067). A Scheme of Credits (1068). Injury to Prison by Convict (1069).
§ 3. **Administration and Fiscal Affairs (1069).**

This topic treats of penal and reformatory institutions, and the custody and control of the inmates. The law of criminal procedure,[91] the legal status of a convict,[92] pardon, commutation, or remission of sentence,[93] and escape or prison breach,[94] are elsewhere treated.

§ 1. *Nature and classes.*[95]—A prison is a public building for confining persons[96] in judicial custody,[97] either to insure their production in court as accused persons and witnesses, or to punish as criminals.

§ 2. *Custody, discipline, government, and employment of inmates.*[98]—A commitment need not set forth the judgment or finding of the court upon which it is based.[99] A county jailor must receive prisoners committed to his custody by a court of competent jurisdiction.[1] A sheriff has no inherent right to the custody of the county jail,[2] nor of the prisoners therein confined nor to the emoluments to be derived therefrom,[3] and cannot successfully assert a right thereto where prior to his election he has notice that he would be deprived of their custody.[4] A prisoner sentenced to hard labor cannot be unreasonably detained in jail by the sheriff.[5] Prisoners afflicted with a contagious disease must be provided with a suitable place of detention.[6]

Employment of prisoners.[7]—The state acquires a property interest in the labor of convicts, and the authorized board may,[8] by contract lawfully executed,[9] let out

89. Otherwise it is void. Ketchin v. Rion, 68 S. C. 260, 47 S. E. 376.

90. Power to divide an estate among testator's lawful issue. Inglis v. McCook [N. J. Eq.] 59 A. 630.

91. See Criminal Law, 3 Curr. L. 979; Indictment and Prosecution, 4 Curr. L. 1.

92. See Convicts, 3 Curr. L. 878.

93. See Pardons and Paroles, 4 Curr. L. 872.

94. See Escape and Rescue, 3 Curr. L. 1236.

95. See generally Charitable and Correctional Institutions, 1 Curr. L. 507.

96. See Cyc. Law Dict. 723, defining "prison."

97. A reform school wherein children of tender years may be kept under reasonable restraint, not as punishment for a crime, but for their moral and physical well-being, is not a prison and is not converted into one by the fact that certain persons may be committed there instead of to a penal institution. Rule v. Geddes, 23 App. D. C. 31. A parent may commit his child to such an institution without a judicial hearing. Id.

98. See 1 Curr. L. 508, n. 44 et seq.

99. In re Phillipp [Del.] 59 A. 47.

1. By judgment of a police court, where the commitment should have been in the workhouse. City of Lexington v. Gentry, 25 Ky. L. R. 738, 76 S. W. 404.

2. In Delaware this right is especially conferred by statute and may be taken away in the same manner. McDaniel v. Armstrong [Del.] 59 A. 865.

3. Constitution, § 6, art. 8, makes the powers, duties, and compensation of sheriffs dependent on legislative action. Lang v. Walker [Fla.] 35 So. 78.

4. The enactment of a law providing for the transfer of prisoners from the county jail to the workhouse is notice to a sheriff subsequently elected. McDaniel v. Armstrong [Del.] 59 A. 865.

5. Ex parte Bettis [Ala.] 37 So. 640. What constitutes a detention for an unreasonable length of time depends on the circumstances of each particular case. Id.

6. Laws 1892, pp. 1766, 1782. In re Boyce, 43 Misc. 297, 88 N. Y. S. 841.

7. See 1 Curr. L. 508, n. 49 et seq.

8. In Nebraska the board of public lands and buildings is vested with the general management of the penitentiary and may, by contract, let out the labor of any or all of the convicts. State v. Mortensen [Neb.] 95 N. W. 831.

9. A contract for the hiring of convict labor drawn under the provisions of section 16,

such labor and employ guards clothed with authority to have custody of the prisoners while at work.[10] In making such contract, the board acts for the state,[11] and the contract entered into is a contract of the state.[12] The employer of convict labor is liable for the face of his bond though the convict cannot be compelled to work out the term therein prescribed.[13] Provisions in such bond not authorized by statute are mere surplusage and do not destroy its validity.[14]

A scheme of credits[15] is for the benefit of all prisoners coming within the terms of the statute by which it is prescribed,[16] and the diminution of sentence provided for is a privilege of which a prisoner can be deprived only in accordance with the provisions of the statute,[17] and if no forfeiture has been declared until he has served for such length of time that with the diminution provided for he is entitled to his discharge, he can secure it in a legal proceeding.[18] On cumulative sentences, each term is to be considered by itself as regards the allowance of credits.[19] A state law prescribing a specified commutation to be allowed in the discretion of the governor and prison board is not a "rule of credits" applicable to a Federal prisoner.[20] The Federal statute providing a scheme of credits applies to prisoners convicted prior to its passage,[21] unless such prisoner is entitled to the benefit of the scheme prescribed by the state wherein he is confined.[22] A Federal prisoner entitled to the benefit of a state system of credits is bound by the conditions of forfeiture annexed to it.[23] Allowance of good time is a matter of grace which may be regulated at will,[24] and the imposition of a forfeiture of "good time" by the warden of a penitentiary,[25] or the discretion of a

c. 86, Comp. St., is not valid unless executed by the warden of the penitentiary and approved by the governor and the board of public lands and buildings. State v. Mortensen [Neb.] 95 N. W. 831.

10. Under Rev. St. § 3032, the county commissioners have authority to employ county convicts at labor upon the public roads of their respective counties and under c. 4391, Laws 1895, they may employ guards who are clothed with authority to have the care and custody of such prisoners while at work. Lang v. Walker [Fla.] 35 So. 78.

11. The action of the board of public lands and buildings in keeping or refusing to keep its engagement for the leasing of convict labor is the action of the state. State v. Mortensen [Neb.] 95 N. W. 831.

12. An action to compel specific performance is an action against the state. State v. Mortensen [Neb.] 95 N. W. 831.

13. The hirer gave a bond for the payment of $40.40 fine and costs which stipulated that the term of service should be six months at $7.50 per month. Under the statute the convict could be compelled to work only one day for each fifty cents of fine and costs. Gonzales County v. Houston [Tex. Civ. App.] 81 S. W. 117. The right of the county to obtain a contract for the hire of a convict for the full amount of his fine and costs is not affected by a provision for the benefit of the convict. Id.

14. Gonzales County v. Houston [Tex. Civ. App.] 81 S. W. 117.

15. Comp. Laws, § 2112, pertaining to allowance of good time for good behavior did not repeal §§ 11785, 11786, pertaining to additional punishment for habitual criminals. In re Butler [Mich.] 101 N. W. 630.

16. One has not served a term in prison within the meaning of a statute, allowing a prisoner reduction of term for good behavior if he has not already served a second term, though he was confined, the convictions having been of offenses not punishable by such confinement. In re Harney [Mich.] 96 N. W. 795.

17. State v. Hunter, 124 Iowa, 569, 100 N. W. 510. Where no provision is made for the forfeiture of this privilege on account of the violation of the terms of a conditional pardon or suspension of sentence by the executive no such forfeiture can be imposed by the executive under any condition or stipulation inserted therein. Under Code, § 5703. Id.

18. State v. Hunter, 124 Iowa, 569, 100 N. W. 510.

19. Where greater credits are allowed for successive years of confinement, the terms are not considered as a continuous period. Ex parte Clifton, 145 Cal. 186, 78 P. 655.

20. Act Pa. 1901 (P. L. 166). United States v. Byers, 127 F. 993.

21. Apparent contradictory sections of the statute reconciled. In re Farrar, 133 F. 254.

22. In re Walters, 128 F. 791.

23. A Federal prisoner given time for his credits and again convicted in a Federal court in the same state forfeits the credits earned during his prior term. In re Walters, 128 F. 791.

24. Laws 1886, c. 21, § 14, providing that convicts released before expiration of sentence shall lose good time by conviction of another offense, is valid. Ex parte Russell, 92 N. Y. S. 68.

25. In Iowa the warden of the penitentiary may impose a forfeiture of a prisoner's "good time" without a judicial determination of the facts constituting a violation of the prison rules. State v. Hunter, 124 Iowa, 569, 100 N. W. 510.

board of managers of a reformatory in refusing to terminate an imprisonment[26] is not open to judicial inquiry.

A law requiring the workhouse warden to serve on prisoners a copy of the mittimus showing date of discharge is without application where the mittimus is not made out.[27]

Injury to prison by convict.—That a prisoner is illegally confined is no justification for breaking or injuring the jail.[28] It is not necessary to the commission of the crime of injuring a public jail to show that the accused was confined there under commitment.[29]

§ 3. *Administration and fiscal affairs.*[30]—The personnel of the board of prison managers and inspectors,[31] and the extent of their authority,[32] is generally regulated by statute. A member holding his office by virtue of another official capacity is not deprived of his membership because of a change in name of the latter office.[33] In Idaho the board of state prison commissioners may determine the time of their meetings.[34] A majority of the officers constituting such board are a quorum for the transaction of authorized business.[35] A meeting may be held by a majority without giving notice to a member who at the time of the calling and holding of such meeting is beyond the jurisdiction of the state.[36]

Maintenance of prison and prisoners.[37]—In maintaining a police lockup, a town is pursuing a public purpose,[38] and a constable placing a prisoner in a town lockup, as a place of detention, acts for the state even though he may have received his appointment from the town.[39] So long as a town lockup is not injurious nor dangerous to any property or person, except to such as enter into it either willingly or are committed, it is not a nuisance.[40]

The county is liable for the board of all prisoners the sheriff is compelled by law to receive,[41] and for the necessary expense of caring for prisoners afflicted

26. A statute gave them power to remit part of sentence for good conduct. They refused to discharge a prisoner. Terry v. Byers, 161 Ind. 360, 68 N. E. 596.

27. Greater New York Charter, § 710. People v. Warden of City Prison, 37 Misc. 635, 76 N. Y. S. 286.

28. People v. Boren, 139 Cal. 210, 72 P. 899. When one accused of injuring a jail set up that at the time he was illegally confined there, evidence that he had been surrendered by his bondsmen on a charge of felony is admissible. Id.

29. People v. Boren, 139 Cal. 210, 72 P. 899. Evidence showing that one accused of injuring a public jail was confined there is admissible as showing motive. Id. On a prosecution for injuring a public jail, broken bars shown to have come from the jail are admissible. Id.

30. See 1 Curr. L. 509.

31. In Nebraska the board of public lands and buildings is vested with the general management of the penitentiary. State v. Mortensen [Neb.] 95 N. W. 831.

32. Under Statute 1899, p. 111, c. 108, authorizing the trustees of Whittier State School to take and hold property, real and personal, in the name of the corporation, they have power to make a lease of land binding on their successors. Harvey v. Whittier State School Trustees, 142 Cal. 391, 75 P. 1086.

33. P. L. 607, includes the mayor of Pittsburg in the board of inspectors of Allegheny county prison. P. L. 20, abolishes the office of mayor and vests his power in the city recorder. Hays v. Allegheny County Prison Inspectors, 209 Pa. 347, 58 A. 684.

34. The board of state prison commissioners created by the constitution and granted "control, direction, and management of the penitentiaries" may meet at such times as they deem necessary. Akley v. Perrin [Idaho] 79 P. 192.

35, 36. Akley v. Perrin [Idaho] 79 P. 192.

37. See 1 Curr. L. 509.

38. In the absence of any statute imposing liability, it is not liable for the neglect of its selectmen in the care of it. Mains v. Ft. Fairfield [Me.] 59 A. 87.

39. Mains v. Ft. Fairfield [Me.] 59 A. 87. The fact that a prisoner placed by a constable in the town lock-up suffers damage from its neglected condition does not make the town liable to an action therefor. Id.

40. Mains v. Ft. Fairfield [Me.] 59 A. 87.

41. Prisoners arrested for petty offenses and held until their case is determined. People v. Livingston County Sup'rs, 89 App. Div. 152, 85 N. Y. S. 284. Prisoners committed for violating city ordinances, where statutes provide that such prisoners may be sentenced to jail. Burton v. Erie County, 206 Pa. 570, 56 A. 40. Under Ky. St. 1899, § 1730, making a city liable for the keep of prisoners where it gets the benefit of a fine, it is not liable to the sheriff for the keep of prisoners committed to his custody either for appearance or under sentence when a fine constitutes no part of the punishment. City of Lexington v. Gentry, 25 Ky. L. R. 738, 76 S. W. 404.

with a contagious disease,[42] but is not liable for the board of prisoners confined for the violation of city ordinances where the fine constituting part of the punishment goes to the city.[43] A sheriff entitled to remuneration for the maintenance of prisoners must, as a condition precedent to the allowance of his claim, file such vouchers as are required by law.[44] One who furnishes board for prisoners at the instance of a sheriff who is allowed a reasonable compensation for their maintenance must look to the sheriff for his pay.[45]

The discretion of the official with authority to appoint jail matrons cannot be controlled by mandamus.[46] If the necessity of a jailor rests in the determination of the sheriff, the county is liable for the services of an appointee.[47] The amount of compensation may be determined from the allowance of prior claims.[48]

PRIVATE INTERNATIONAL LAW; PRIVATE SCHOOLS; PRIVATE WAYS; PRIVILEGE; PRIVILEGED COMMUNICATIONS; PRIZE, see latest topical index.

PRIZE FIGHTING.[49]

That a prize fight was conducted before a "club" is no defense where the alleged club was a mere device to avoid the law.[50]

PROBATE, see latest topical index.

PROCESS.

§ 1. **Nature and Kinds, Form and Requisites (1071).**
§ 2. **Issuances (1072).**
§ 3. **Extraterritorial Effect or Validity (1072).**
§ 4. **Actual Service (1072).**
A. Personal (1072). Upon Nonresidents or Their Agents (1073). Upon Municipal Corporations (1074). Upon Domestic Corporations (1074). Upon Foreign Corporations (1074). Upon Foreign Unincorporated Organizations (1076). Presumption of Proper Service (1076).
B. Substituted (1076).
C. The Server, His Qualifications and Protection (1076).
§ 5. **Constructive Service (1077).** Procedure to Authorize (1077). How Made (1078). Sufficiency of Order and Publication (1079). Personal Service in Lieu of Publication (1079).
§ 6. **Return and Proof (1079).** Return of Service on Corporations (1080). Amendment of Return (1080). Impeachment or Contradiction of Return (1081). Waiver of Irregularities (1081). Return on Constructive Service, and Proof of Service by Publication (1082).
§ 7. **Defects, Objections, and Amendments (1082).** Alterations (1082). When Objections Made (1082). How Objections Made (1083). Waiver of Irregularities or Lack of Process (1083).
§ 8. **Privilege and Exemptions from Service (1084).**
§ 9. **Abuse of Process (1084).**

This article treats of original civil process including the code summons or notice;[51] but not of final,[52] or matters peculiar to ancillary,[53] process.

42. Rent of a place selected by the sheriff as a pest house. Under Laws 1900, p. 685, c. 324, § 8, where the selection was ratified by the purchasing committee of the county. In re Boyce, 43 Misc. 297, 88 N. Y. S. 841.

43. Prisoners unlawfully committed to the county jail when they should have been sent to the workhouse. City of Lexington v. Gentry, 25 Ky. L. R. 738, 76 S. W. 404.

44. Mombert v. Bannock County [Idaho] 75 P. 239.

45. A statute provided that the sheriff must provide prisoners with food and clothing for which he should be allowed a reasonable compensation. The sheriff defaulted. Mombert v. Bannock County [Idaho] 75 P. 239. See, also, Hendricks v. Chautauqua County Com'rs, 35 Kan. 483, 11 P. 450, a case under a similar statute.

46. The discretion of probate judges as to the appointment of jail matrons cannot, in the absence of gross abuse, be directed or controlled by mandamus. State v. Robeson, 3 Ohio N. P. (N. S.) 5.

47. Plunkett v. Lawrence County [S. D.] 101 N. W. 35.

48. Where the county commissioners have for a considerable period allowed a jailer a certain compensation, they could not refuse to allow him for a past quarter's services, they having given no notice that the claim would be disallowed. Plunkett v. Lawrence County [S. D.] 101 N. W. 35.

49. See 2 Curr. L. 1258.

50. Evidence held for jury where public was admitted without question on signing application for membership in club. Commonwealth v. Mack [Mass.] 73 N. E. 534.

51. Summons under the code is not technically process. See Leas v. Merriman, 132 F. 510.

52. See Executions, 3 Curr. L. 1397.

§ 1. *Nature and kinds, form and requisites. Definition.*[54]—Process is the means of compelling a defendant to appear in court, or to comply with the latter's demands.[55] Under the Federal conformity act, an action may be instituted in a Federal court by a notice issued in accordance with state practice.[56] The petition cannot take the place of process,[57] though it is sufficient if the summons is contained in the writ of attachment.[58]

Designation of court and parties.[59]—The process must generally describe the parties to the suit or action by their own or customary names;[60] but it need not state facts showing that defendant is a corporation,[61] and in a suit against such a defendant it need not name the agent upon whom service is to be made.[62] A statement that defendant is unincorporated may be rejected as surplusage if the service would be effectual as against a corporation.[63] It need not show plaintiff's capacity to sue.[64] Generally the process being addressed to two parties it is sufficient to sustain proceedings against either.[65]

Signing and sealing.[66]—In some states the process must be sealed[67] and signed by the court or clerk thereof, a facsimile stamp being sufficient,[68] though these requirements do not generally apply to the code summons or notice.[69] An original notice in a justice court being signed in blank by the justice and filled out by plaintiff under authority of the justice is sufficient.[70]

Indorsement.[71]—In some states the copy served must bear an indorsement of filing by the clerk.[72] Statutes requiring the attorney's name to be indorsed on the summons do not render the name a part of the summons.[73]

53. See Attachment, 3 Curr. L. 353; Garnishment, 3 Curr. L. 1550.

54. See 2 Curr. L. 1259.

55. See Cyc. Dict. p. 729, and 2 Curr. L. 1259.

56. Leas v. Merriman, 132 F. 510.

57. Service of petition held ineffectual where neither the order of the judge extending time of service nor a new process was attached thereto. Rowland v. Towns, 120 Ga. 74, 47 S. E. 581.

58. Within Mansfield's Digest § 4967 (Ind. T. Ann. St. 1899, § 3172) providing for commencement of action. Handley v. Anderson [Ind. T.] 82 S. W. 716.

59. See 2 Curr. L. 1259.

60. Durst v. Ernst, 91 N. Y. S. 13. See 2 Curr. L. 1259, n. 58.

61. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

62. El Paso & S. W. R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

63. Corp. Act § 88 (P. L. 1896, p. 305). Saunders v. Adams Exp. Co. [N. J. Law] 57 A. 899.

64. Failure to so do is not cause for dismissal before the complaint is filed. The objection should be taken by demurrer to the complaint. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667. Summons need not recite that plaintiff is a partnership formed for the purpose of carrying on trade or business in the state. Biddle v. Spatz, 1 Neb. Unoff. 175, 95 N. W. 354.

65. A notice addressed to two parties and stating a demand for goods sold and delivered is sufficient to sustain an action against one. Padden v. Clark, 124 Iowa, 94, 99 N. W. 152. Though the summons describes the defendants as partners, if the complaint does not show any joint liability, the action may proceed against the defendant who alone was served. Mason v. Connors, 129 F. 831. But see 2 Curr. L. 1263, n. 1.

66. See 2 Curr. L. 1260.

67. Under Sayles' Ann. Civ. St. 1897, arts. 1214, 1447, citation must bear seal of court. Carson Bros. v. McCord-Collins Co. [Tex. Civ. App.] 84 S. W. 391. Under Rev. St. 1895, art. 1447, seal of clerk is essential to validity of citation. Robinson v. Horton [Tex. Civ. App.] 81 S. W. 1044.

68. Original notice in a justice court. Loughren v. Bonniwell & Co. [Iowa] 101 N. W. 287. Even if defective it would only be an irregularity. Id.

69. Where action in Federal court was instituted under notice provided by Code Va. 1887, § 3211. U. S. Rev. St. § 911, as to processes issuing from U. S. courts construed. Leas v. Merriman, 132 F. 510.

NOTE. Sealing summons: The summons provided by the code in some of the states, not being issued by an officer of the court but furnished by the attorney, is not a writ or "process" and does not require a seal. Porter v. Vandercook, 11 Wis. 70; Johnston v. Hamburger, 13 Wis. 175; Hanna v. Russell, 12 Minn. 80; Bailey v. Williams, 6 Or. 71; Gilmer v. Bird, 15 Fla. 411; Rand v. Pantagraph, 1 Colo. App. 270.—From note to Choate v. Spencer [Mont.] 20 L. R. A. 424.

70. Loughren v. Bonniwell & Co. [Iowa] 101 N. W. 287. [The court expressly limits its decision to the notice involved and states that if it were a summons, a writ or a precept issued by the justice, they would be inclined to hold it insufficient.]

71. See 2 Curr. L. 1260.

72. Under Comp. Laws, § 9985, providing for the commencement of suit by filing declaration, entering a rule to plead, and serving a copy of the declaration and rule, the copy so served need not bear such an

Stating nature or cause of action.[74]—In some states the summons must set forth the nature and cause of action,[75] but referring[76] or being attached[77] to the complaint, a defect may be cured by reference to the latter.[78]

Return day.[79]—In the absence of prejudice, error in the return day is merely an irregularity.[80] The summons being improperly made returnable before the judge at chambers he should transfer it to the civil issue docket for trial, making such amendments to process and pleading as may be necessary.[81]

Alias, counterpart, and supplemental process.—An alias summons substantially complying with the original is not defective as to form,[82] and a copy alias summons being served with a copy summons is referable to the latter.[83] In some states the original summons need not be served with the alias.[84] In Tennessee counterpart summons do not apply to local actions.[85] A second original process to perfect service on a joint defendant may issue by way of amendment after the appearance term.[86]

§ 2. *Issuance.*[87]—There being but one suit, one petition, one defendant, the clerk has no power, without some direct and express order of the court, to issue more than one process.[88] Plaintiff being guilty of laches after filing the petition, the court loses jurisdiction to issue process or to have service perfected;[89] but if he shows due diligence in endeavoring to have process issue, and service made, the court may, at a subsequent term, authorize new process[90] or cure defective process. A precipe for summons is not a part of the record.[91]

§ 3. *Extraterritorial effect or validity.*[92]—The law requiring suits affecting land to be brought in the county in which the land lies, summons may be sent to any county in the state where the defendant resides or may be found.[93]

§ 4. *Actual service. A. Personal. In general.*[94]—The Federal conformity act only requires that the Federal practice shall conform "as near as may be" to the state practice.[95] Process in an action in personam in admiralty must be served personally, unless the defendant cannot be found, in which case an attach-

indorsement. Michigan Buggy Co. v. Smallegan [Mich.] 101 N. W. 62.

73. Is not necessary to publish such indorsement. People v. Wrin, 143 Cal. 11, 76 P. 646.

74. See 2 Curr. L. 1260.

75. Under Civ. Code 1895, § 4116, the summons in a justice's court must set forth the cause of action with some degree of certainty. Summons held insufficient. Macon & B. R. Co. v. Walton, 121 Ga. 275, 48 S. E. 940.

76. Summons stating that the plaintiff will apply to the court for the relief demanded in the complaint is not defective under Rev. St. 1887, § 4140, even though it does not state the amount demanded. Hill v. Morgan [Idaho] 76 P. 323.

77. Indefinite statement. Old Alcalde Oil Co. v. Ludgate [Tex. Civ. App.] 85 S. W. 453.

78. But see 2 Curr. L. 1260, n. 67-69.

79. See 2 Curr. L. 1261.

80. So held where service was actually made on defendant and full time to answer given. It might have been taken advantage of before judgment but it does not render the latter void. Jones v. Danforth [Neb.] 99 N. W. 495.

81. Should not dismiss the action. Martin v. Clark, 135 N. C. 178, 47 S. E. 397.

82. Under Rev. St. 1887, § 4141. Hill v. Morgan [Idaho] 76 P. 323.

83. Under Municipal Court Act, § 38, in an action to recover a statutory penalty, a copy summons being served with the copy alias summons and properly referring to the statute, the fact that the copy alias summons did not so refer to the statute does not deprive the court of jurisdiction. State Board of Pharmacy v. Jacob, 92 N. Y. S. 836.

84. Under Municipal Court Act, §§ 26, 30. Lawrence v. Bernstein, 92 N. Y. S. 817.

85. Shannon's Code, §§ 4517, 4526. City of Nashville v. Webb [Tenn.] 85 S. W. 404.

86. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912. Service made under such order relates to the date of the filing of the petition. Id.

87. See 2 Curr. L. 1261.

88. Rowland v. Towns, 120 Ga. 74, 47 S. E. 581.

89. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

90. Rowland v. Towns, 120 Ga. 74, 47 S. E. 581; Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

91. Within meaning of Rev. St. § 5334. Palmer v. Palmer, 5 Ohio C. C. (N. S.) 242.

92. See 2 Curr. L. 1261.

93. Castleman v. Castleman [Mo.] 83 S. W. 757. A suit in equity to cancel a deed is one affecting title to land within meaning of Rev. St. 1899, § 564. Id.

94. See 2 Curr. L. 1262.

95. Does not require Federal court in district of Connecticut to follow Gen. St. Conn. 1902, as to service on towns. Elson v. Waterford, 135 F. 247.

ment of his property suffices.[96] The residence of one who is serving a sentence of imprisonment is, for the purpose of service of summons, in the county where the prison is located.[97] Service upon one partner is sufficient.[98]

Generally a copy of the complaint must accompany the summons,[99] though, by statute in some states, there being several defendants, service of one complaint is sufficient, and that the defendant so served files a disclaimer of interest does not affect the service as to the others.[1]

One seeking to avoid service, the paper may be placed upon his person or dropped near him, but his attention must be called to the proceeding and the fact that service is intended.[2] The test in determining whether service by mail in particular cases suffices is whether or not the papers actually came to the hands of the attorney for the adverse party.[3] Shortage of postage not preventing such actual receipt does not invalidate the service.[4] Statutes as to the acceptance of service are not generally retroactive.[5]

Upon nonresidents or their agents.[6]—Personal service of a nonresident without the state does not confer jurisdiction of the person,[7] though giving the court jurisdiction to render a judgment in rem, as a judgment in divorce proceeding,[8] or one affecting property within the jurisdiction of the court;[9] but personal service[10] on a nonresident temporarily within the state gives the court jurisdiction to render a personal judgment against him,[11] unless his presence in the state be for a purpose which renders him privileged.[12] Attachment cannot take the place of personal service.[13] In some states service upon a co-defendant within the state is

96. Service by exhibiting the original citation to a servant in the defendant's family, at his residence, and leaving a copy with her held insufficient. Walker v. Hughes, 132 F. 885.

97. Thompson v. Montrass, 2 Ohio N. P. (N. S.) 368. Service upon him in a suit brought in that county renders service valid upon co-defendants in the county where they reside. Id. An averment that he is a resident of a certain county is not inconsistent with an averment that, in accordance with the sentence of court, he is confined in a prison located in another county. Id.

98. Maneely v. Mayers, 43 Misc. 380, 87 N. Y. S. 471.

99. Under Code Civ. Proc. §§ 635, 636, service of a summons without a copy of the complaint confers no jurisdiction. Rule applied to a justice's summons under § 1510. State v. Harrington [Mont.] 78 P. 484.

1. Code Civ. Proc. § 635. Bad faith would affect the above rule. Mantle v. Casey [Mont.] 78 P. 591.

2. Where paper was dropped near defendant who at the time was in a large crowd and handcuffed to a detective, his attention not being called to the proceeding, held no personal service. Anderson v. Abeel, 96 App. Div. 370, 89 N. Y. S. 254.

3. Appeal Print. Co. v. Sherman, 99 App. Div. 533, 91 N. Y. S. 178.

4. Where attorneys paid postage due without objection, but, after learning the nature of the package, returned it, held a valid service. Appeal Print. Co. v. Sherman, 99 App. Div. 533, 91 N. Y. S. 178.

5. Rev. St. 1895, art. 1349, providing for the acceptance of service does not apply to a case in which service was accepted before the passage of the act. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

6. See post, § 5, Constructive service. See 2 Curr. L. 1263.

7. Hildreth v. Thibodeau [Mass.] 71 N. E. 111; First Nat. Bank v. Eastman, 144 Cal. 487, 77 P. 1043. Substituted service. Eastern Tex. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 883. Service on a nonresident defendant outside of the district of suit is only authorized in a Federal court in cases affecting property within the district [U. S. Rev. St. § 738 as amended]. Winter v. Koon, Schwarz & Co., 132 F. 273. See 2 Curr. L. 1263, n. 2.

8. Under Gen. St. 1894, §§ 4796, 4797, the complaint and summons in divorce proceedings may be personally served outside of the state. Sodini v. Sodini [Minn.] 102 N. W. 861.

9. First Nat. Bank v. Eastman, 144 Cal. 487, 77 P. 1043. A judgment rendered without substituted, but after personal, service on the defendant, a nonresident whose property within the state of the forum has been seized, is merely erroneous, and not void. Jones v. Danforth [Neb.] 99 N. W. 495.

10. Leaving summons with another than defendant at a house where the latter was temporarily staying is insufficient. Hennings v. Cunningham [N. J. Law] 59 A. 12.

11. Mason v. Connors, 129 F. 831. Is subject to suit, by a nonresident, on a transitory action. Lee v. Baird, 139 Ala. 526, 36 So. 720.

12. That he is superintending erection of public work does not render him privileged. Mason v. Connors, 129 F. 831.

13. Under Shannon's Code, §§ 4516, 4542, 4546, jurisdiction is not acquired by an attachment of property in lieu of personal service on the nonresident's agent. Green v. Snyder [Tenn.] 84 S. W. 808.

sufficient to bind a nonresident.[14] Petition not stating a cause of action against defendants residing in the county, jurisdiction is not acquired, by service of the summons, of defendants residing and served outside the county.[15]

Upon municipal corporations.[16]—In suing a municipal corporation, service is generally required to be made on the mayor.[17]

Upon domestic corporations.[18]—Service upon corporations is largely regulated by statutes, these generally provide for service upon an agent[19] or chief officer of the corporation; a receiver is not such an officer,[20] and the affairs of the corporation being in the hands of the receiver, and the president being a nonresident, service may be made on the "last vice-president."[21] Service is sufficient when served on one theretofore served with process, and which service the corporation accepted by appearance.[22] In some states substituted service is allowed,[23] in others it is not.[24]

Upon foreign corporations.[25]—As regards service of process, a Federal corporation is foreign to the states.[26] In most states a foreign corporation doing business therein is required to appoint an agent for the acceptance of service, and, in the absence of such an appointed agent, the law generally authorizes service upon a designated person.[27] A foreign corporation doing business within the state

14. In Vermont, there being no attachment of property or credits, service on a nonresident by leaving a copy of the summons with a co-defendant who is within the state is insufficient. Mason v. Connors, 129 F. 831.

15. Haseltine v. Messmore [Mo.] 82 S. W. 115. The misjoinder of defendants, in such a case appearing on the face of the petition, the question of jurisdiction by service of the summons outside of the county may be raised after judgment. Id.

16. As to effect of Federal conformity act see ante, this section.

17. The requirement of the Brannock Law that service shall be made on the mayor does not supersede the provision of the municipal code which determines who is the mayor at the time of service. In re Gorey, 2 Ohio N. P. (N. S.) 389. Under the Brannock Law a summons directed to B, as mayor of the city of S, and left at the office of the mayor, is not good, in the absence of B, against the acting mayor. Id.

18. See 2 Curr. L. 1263. Many of the statutory rules applicable to domestic corporations apply to foreign corporations and vice versa, hence both subdivisions should, to a limited extent, be read together. See, also, post, § 6, Return and proof. Service on agent of corporation is personal. Brassfield v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 1032.

19. One taking orders for cargoes held such an agent. Gilchrist Transp. Co. v. Northern Grain Co., 204 Ill. 510, 68 N. E. 558. Local operator of a wireless telegraph company at an office not yet open for general business but who had received messages for pay is a local agent for service of summons under Code § 217. Copland v. American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501. Secretary of local assembly of a fraternal benefit association is the agent of the latter. Hildebrand v. United Artisans [Or.] 79 P. 347.

20. Is an officer of the court. Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

21. Rev. St. 1899, § 995. Youree v. Home Town Mut. Ins. Co., 180 Mo. 153, 79 S. W. 175.

22. This is especially true where the corporation fails to inform the party in interest how better service could be made. Hill v. Morgan [Idaho] 76 P. 323.

23. May be made by leaving a copy at the dwelling house or usual place of abode of the president. Gen. Corp. Law 1901, § 48, 22 Del. Laws, p. 305, c. 167. A rule and alternative writ in mandamus may be so served. Bay State Gas Co. v. State, 4 Pen. [Del.] 238, 56 A. 1114. Such act applies to service on domestic corporation organized prior to the taking effect of the Constitution of the state in force at the time of the passage of the act. Id.

24. Under Civ. Code, § 1899, service cannot be made by leaving a copy at the most notorious place of abode of the general manager. Stuart Lumber Co. v. Perry, 117 Ga. 888, 45 S. E. 251. Such provision of the Code supersedes Water Lot Co. v. Bank of Brunswick, 30 Ga. 685. Id.

25. See 2 Curr. L. 1264. See, ante, Domestic corporations as many of the statutory rules are applicable to both domestic and foreign corporations. See, also, post, § 6, Return and proof.

26. Territory v. Baker [N. M.] 78 P. 624.

27. North Carolina: Pub. Laws 1901, p. 66, § 1, includes all foreign corporations doing business, or who have done business, in the state. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667. This statute is cumulative to Acts 1899, p. 175, c. 54, § 62, providing for service on foreign insurance companies. Id. See 2 Curr. L. 1264, n. 25.

Vermont: Vermont St. § 3949, providing for service on station agents of foreign railroad furnishes an additional mode of service to that provided by § 1109 authorizing service of attachment on nonresident by leaving copy with agent or attorney. Gokey v. Boston & M. R. Co., 130 F. 994.

is presumed to have complied with such laws.[28] They are constitutional[29] and apply to a corporation though the latter be not licensed.[30] Such laws do not cease to apply upon the corporation ceasing to do business within the state, but continue to operate until all of such corporation's liabilities to citizens of the state are paid.[31] The appointment of an agent for service of process impliedly revokes a former appointment and service upon such former appointee is insufficient.[32] The corporation may become estopped to deny the agent's authority to accept service.[33] Service to be binding[34] must be made upon the identical officer or agent,[35] or one of the officers or agents[36] prescribed by the statute. A corporation may be such an agent.[37] If plaintiff cannot, with the exercise of diligence, serve the designated persons, he may generally serve the managing agents[38] or other officers of the cor-

28. Johnston v. Mutual Reserve Life Ins. Co.. 90 N. Y. S. 539.

29. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667. Acts of Arkansas 1901, p. 52, § 1, providing for service on state auditor in the absence of a designated agent of the corporation is not unconstitutional as denying due process of law. Davis v. Kansas & T. Coal Co., 129 F. 149.

NOTE. Power of the states to prescribe how and on whom process may be served: It is difficult, if not impossible, to describe any well-defined limits to the power of the state to prescribe either the mode in which process may be served on a foreign corporation or the officer, agent, or other representative upon whom it can be made. It is quite safe to affirm that any mode of service may be authorized which would be valid as against a domestic corporation. Pope v. Terre Haute C. M. Co., 87 N. Y. 137. Of course, the object of all process and of its service is to inform the person, natural or artificial, of the proceeding against him, of the court in which it is pending, and that he must, within some time designated, either by law or in the process, appear and make some defense, or that otherwise some judgment or order may be entered against him. Any method of service not calculated to give the defendant notice of any of these essential facts may well be regarded as beyond the power of the state to authorize, whether the defendant be a natural or artificial person, a resident or a nonresident. In a comparatively recent case the constitutionality of a statute was questioned which purported to authorize service upon a defendant corporation "by delivering to, and leaving with, the registrar of deeds" true copies of the summons and complaint. The statute was assailed, the defendant being a domestic corporation, as authorizing a proceeding without "due process of law." The court quoted with approval the language of Mr. Justice Curtis, in Murray v. Hoboken Land & I. Co., 18 How. [U. S.] 276, 15 Law. Ed. 372, that "it is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will." See, also, Hagar v. Reclamation Dist., 111 U. S. 708, 28 Law. Ed. 569; Pinney v. Providence, etc., Co., 106 Wis. 396, 82 N. W. 308, 80 Am. St. Rep. 41. These principles are doubtless applicable to foreign corporations. The Minnesota supreme court has stated the law as follows: "The statute does not define the word 'agent,' but as the service of process goes to the jurisdiction of the court over the person, it must be construed so as to conform to the principles of natural justice, and so that the service will constitute 'due process of law.' To do this, the agent must be one having in fact a representative capacity and derivative authority. Such agent must be one actually appointed and representing the corporation as a matter of fact, and not one created by construction or implication contrary to the intention of the parties." Mikolas v. Walker, 73 Minn. 305, 76 N. W. 36. See, also, Connecticut Mut. Life Ins. Co. v. Spratley, 172 U. S. 602, 43 Law. Ed. 569; Carroll v. New York, etc., R. Co. [N. J.] 46 A. 708.—From note to Abbeville, etc., Co. v. Western, etc., Co. [S. C.] 85 Am. St. Rep. 890, 905, 927.

30. Pub. Laws 1901, p. 66, c. 5, construed. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

31. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667; Johnston v. Mutual Reserve Life Ins. Co., 90 N. Y. S. 539. Arkansas rule. Davis v. Kansas & T. Coal Co., 129 F. 149.

32. Mullins v. Central Coal & Coke Co. [Ark.] 84 S. W. 477.

33. Corporation's general counsel stating that a certain agent was authorized to accept service, the corporation cannot question the sufficiency of service upon him. Taylor Provision Co. v. Adams Exp. Co. [N. J. Law] 59 A. 10.

34. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. See Clark & M. Corp. § 267.

35. Local operator of a wireless telegraph company at an office not yet open for general business but who had received messages for pay, is a local agent for service of summons under Code § 217. Copland v. American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501. Local agent held to be local agent representing company within meaning of Rev. St. 1895, art. 1222. El Paso, etc., R Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

36. Rev. St. 1895, art. 1223, providing that either the general manager or local agent may be served, the former being served it is immaterial whether he is the local agent or not. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

37. Rev. St. 1899, § 570. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069.

38. Code Civ. Proc. § 432. Doherty v.

poration. But in order to have a valid service, the corporation must be doing business within the state,[39] which fact must appear of record,[40] have property therein,[41] or the cause of action must have arose there,[42] and the officer must not be inviegled into the state for the purpose of service.[43] Several methods being prescribed, a substantial compliance with all or either is sufficient.[44]

Upon foreign unincorporated organizations.—Process against a foreign unincorporated organization may be served on an agent thereof.[45]

Presumption of proper service.[46]—The service is presumed to have been regular even though the return be defective.[47]

(§ 4) *B. Substituted.*[48]—The statutes of most states provide that service may be made by leaving a copy of the process at defendant's usual place of abode with some one of a certain age or over.[49] The New York statute providing for substituted service is mandatory as to the time within which the papers, upon which the substituted service is granted, may be filed,[50] and it devolves upon the plaintiff[51] to show by satisfactory proof[52] that he has complied with all the requirements of the statute. In the municipal court, failure of the affidavit to state that no previous application for an order for such service had been made is a mere irregularity.[53]

(§ 4) *C. The server, his qualifications and protection.*[54]—By statute in most

Evening Journal Ass'n, 90 N. Y. S. 671. Return of service as on "vice-president and managing agent" is good though the person was no longer vice-president. Evidence held to show that person was managing agent under B. & C. Comp. § 55. Coast Land Co. v. Oregon Pac. Colonization Co., 44 Or. 483, 75 P. 884. See 2 Curr. L. 1265, n. 26.

39. Service upon the president of a foreign corporation while he was casually going through a state in which the corporation did no business is insufficient. Territory v. Baker [N. M.] 78 P. 624, afd. 25 S. Ct. 375. Service upon the officers or directors of a foreign corporation not doing business and having no office in the state is insufficient. Martin v. New Trinidad Lake Asphalt Co., 130 F. 394. See 2 Curr. L. 1266, n. 38, 39.

40. Where neither the statement, summons, praecipe therefor, nor the return of the marshal recites such fact, service may be set aside. Jackson v. Delaware River Amusement Co., 131 F. 134.

41. Complaint for libel alleging that the same was circulated "throughout Jersey City, and the state of New Jersey and other states in the U. S.," and failing to show that the corporation had property in New York, held insufficient to warrant service upon managing agent. Doherty v. Evening Journal Ass'n, 90 N. Y. S. 671.

42. Washington: Pierce's Code § 7216, does not justify service on an agent in a transitory action by a servant for personal injuries occurring in another state. Olson v. Buffalo Hump Min. Co., 130 F. 1017.

43. Where secretary of foreign corporation was induced to come into state on business and was there served, the process being dated the day he stated he would be in town, held service would be set aside. Cavanagh v. Manhattan Transit Co., 133 F. 818.

44. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

45. Under Practice Act (P. L. 1903, p. 545) § 40. Although such agent is not the general agent in charge of its whole business. Saunders v. Adams Exp. Co. [N. J. Law] 57 A. 899. Service upon city and route agents of an express company held good, nothing appearing to show any limitation of the control of such agents over the company's business in the state of the forum. Id., 58 A. 1101.

46. See 2 Curr. L. 1267.

47. In a direct proceeding to set aside a judgment based on a defective return, the movant must affirmatively show that the required service was not actually made. He cannot rely on the incompleteness of the return. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

48. See 2 Curr. L. 1267.

49. Under Code § 3518, authorizing leaving of notice with some member of defendant's family over 14 years old, the fact that it was left with defendant's wife who could not understand English is insufficient to warrant a new trial. Hass v. Leverton [Iowa] 102 N. W. 811. [Had the officer been obliged to read the notice the decision might have been different. See Diltz v. Chambers, 2 G. Greene (Iowa) 479.]

50. Municipal Court Act (Laws 1902, p. 1501, c. 580) § 34. Dalton v. Mills, 91 N. Y. S. 733.

For history and practice under this statute see 1 Nichols, New York Practice, ch. 3, p. 751.

51. Dalton v. Mills, 91 N. Y. S. 733; Skinner v. Jordan, 91 N. Y. S. 322.

52. An indorsement on an alias summons, "Cal. fee paid 4-12-04," without signature or any evidence of filing is insufficient to prove service of substituted process under Municipal Court Act, § 34. Skinner v. Jordan, 91 N. Y. S. 322.

53. Lawrence v. Bernstein, 92 N. Y. S. 817.

54. See 2 Curr. L. 1268. See, also, topic Sheriffs and Constables, 2 Curr. L. 1640.

states a summons may be served by an unofficial person.[55] A statute requiring service by the acting sheriff service by a deputy is sufficient.[56]

A ministerial officer is protected in the execution of process where it appears on the face of the process that the court has jurisdiction of the subject-matter, and the process in other respects shows no want of authority.[57]

§ 5. *Constructive service. Service by publication. When proper.*[58]—Service by publication is one of the forms of constructive service; such service does not deny a nonresident due process of law,[59] and is proper where defendant is a nonresident,[60] or being a resident cannot after due diligence be found within the state.[61] The principal defendant being a nonresident, service by publication is sufficient to support garnishment proceedings against a resident.[62]

Procedure to authorize.[63]—Where service is by publication, the statutes must be strictly complied with.[64] Generally the jurisdiction of the court to make the order of publication rests exclusively upon the affidavit for publication,[65] though in some states an attachment of a nonresident's property is essential.[66] An order for publication made in vacation before the filing of any pleading is void.[67] The affidavit for publication should describe the nature of the action,[68] it must show whether defendant is a resident or nonresident,[69] his last known place of residence, or, if unknown, such fact should appear,[70] it should also state the facts which constitute due and diligent search.[71] To this end there must be a valid return that

55. Code Civ. Proc. § 1688, as amended, providing for the appointment of a special constable, does not affect § 1510, authorizing an unofficial person to serve a justice's summons. State v. Harrington [Mont.] 78 P. 484. Code Civ. Proc. § 1895, requiring service to be made by the marshal, applies only to an action brought by a common informer. Does not apply to an action for penalties for refusing to allow a stockholder to inspect corporate books. Seydel v. Corporation Liquidating Co., 88 N. Y. S. 1004.

56. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911.

57. To assess the cost of habeas corpus proceedings against a sheriff who has lawfully performed his duty, when an order of discharge is entered thereon, is erroneous. Magerstadt v. People, 105 Ill. App. 316.

58. See 2 Curr. L. 1268.

59. Action to enforce levee taxes. Ballard v. Hunter [Ark.] 85 S. W. 252.

60. Under Code Civ. Proc. § 412, service may be made by publication where the person upon whom service is to be made resides out of the state. Parsons v. Weis, 144 Cal. 410, 77 P. 1007. In such case the affidavit need not state that such person cannot, after due diligence, be found within the state. Id. See 2 Curr. L. 1269, n. 83.

61. Under the Wisconsin statutes the essential fact warranting service by publication is that defendant cannot be found in the state, that he is a resident therein is not fatal. McHenry v. Brackin [Minn.] 101 N. W. 960.

62. Holford v. Trewella, 36 Wash. 654, 79 P. 308.

63. See 2 Curr. L. 1269.

64. McHenry v. Brackin [Minn.] 101 N. W. 960. Must receive at least a substantial compliance. Mills v. Smiley [Idaho] 76 P. 783. Where the publication addressed to residents who cannot be found and that addressed to nonresidents are different one cannot be substituted for the other. Erased order of deputy clerk held ineffectual, the wrong order being substituted [Rev. St. 1899, §§ 575, 577 construed]. Kelly v. Murdagh [Mo.] 83 S. W. 437. See 2 Curr. L. 1269, n. 92. Civil Code § 4788 relating to service by publication in partition is not repealed by the general law relating to service by publication. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372.

65. Not on attachment of defendant's real estate within the state. Johnson v. Miner, 144 Cal. 785, 78 P. 240.

66. Under Code Civ. Proc. §§ 148, 156, 248. Little v. Christie [S. C.] 48 S. E. 89.

67. Only a petition setting forth intent to sue was presented. Lochrane v. Equitable Loan & Security Co. [Ga.] 50 S. E. 372.

68. Affidavit held to describe the nature of the action with reasonable certainty. Reister v. Land [Okl.] 76 P. 156. See 2 Curr. L. 1269, n. 95.

69. Mills v. Smiley [Idaho] 76 P. 783; Empire City Sav. Bank v. Silleck, 90 N. Y. S. 561. Certificate of sheriff that he cannot find defendant and believes him to be a nonresident is not proof of nonresidence unless made a part of, or referred to in, the affidavits. Id. In the absence of affidavit that defendant was a nonresident or nonaccessible, and such facts not being alleged in the petition, the order for publication cannot be sustained [Rev. St. 1899, § 575, construed]. Cummings v. Brown, 181 Mo. 711, 81 S. W. 158. Under Code Civ. Proc. § 412, affidavit alleging nonresidence jurisdiction of court is brought into exercise. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

70. Mills v. Smiley [Idaho] 76 P. 783.

71. Mills v. Smiley [Idaho] 76 P. 783; Empire City Sav. Bank v. Silleck, 90 N. Y. S. 561. The affidavit failing in this regard, the court has no jurisdiction. Simensen v. Simensen [N. D.] 100 N. W. 708. Placing summons in hands of sheriff, the sheriff's return,

defendant cannot be found[72] at the date of the application.[73] An unsigned, undated jurat being appended to the affidavit, the latter is insufficient.[74] The affidavit is not subject to collateral attack on the ground that the statements contained therein are based on information and belief,[75] and, if it state defectively but inferentially the statutory requirements, it is merely voidable and may be corrected by amendment.[76] In a collateral attack it will be presumed that it was sufficiently shown that personal service could not be made.[77] Sufficiency of the affidavit as to some of the defendants is immaterial on the question of its sufficiency as to others.[78] Where a faulty publication for nonresident defendants has been set aside, it is not necessary to file a second affidavit unless new facts have developed.[79] In Washington, personal service on one or more of the defendants will, in some cases, prolong the time for service by publication.[80]

The order may in some states be issued by the clerk,[81] though its issuance is generally a matter for the court, and, like other orders, can in such case be proved only by the court's record.[82] Substantial compliance with the statutory form is sufficient.[83]

How made.[84]—The service is made by publication in a newspaper within the territorial jurisdiction of the court if possible[85] for a time fixed by statute.[86] Publication for a longer time does not vitiate the service.[87] Publication on Sunday renders the service void,[88] and, after judgment, the burden is upon defendants to show that the newspaper containing the notice was actually published on Sunday.[89] If defendant's residence is known, the order must direct a copy of the summons and complaint to be mailed to him.[90] In construing the order, the ordinary rules of construction apply.[91]

and inquiry made of persons held to show the exercise of diligence. People v. Wrin, 143 Cal. 11, 76 P. 646. See 2 Curr. L. 1269, n. 95.

72. Rev. St. 1898, § 577. Cummings v. Brown, 181 Mo. 711, 81 S. W. 158. See 2 Curr. L. 1269, n. 95.

73. Return showing absence of defendant seven months prior to application does not show absence at the latter date. Mills v. Smiley [Idaho] 76 P. 783.

74. Rumeli v. Tampa [Fla.] 37 So. 563.

75. Johnson v. Miner, 144 Cal. 785, 78 P. 240.

76. Reister v. Land [Okl.] 76 P. 156.

77. McHenry v. Brackin [Minn.] 101 N. W. 960.

78. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

79. Hunt v. Hunt, 2 Ohio N. P. (N. S.) 577.

80. So held in this case [Ballinger's Ann. Codes & St. § 4869]. Johnston v. Gerry, 34 Wash. 524, 76 P. 258.

81. Where record showed issuance of order by clerk in vacation, judgment held not subject to collateral attack [Rev. St. 1889, § 2022, construed]. Vincent v. Means [Mo.] 82 S. W. 96.

82. The following memorandum on clerk's docket: "2-8-1900. Ord. Pub. to Leader Democrat," held insufficient. Cummings v. Brown, 181 Mo. 711, 81 S. W. 158.

83. Omission of words "be made" in speaking of serving summons on defendant held immaterial. McHenry v. Brackin [Minn.] 101 N. W. 960.

84. See 2 Curr. L. 1270.

85. Laws 1877, p. 215, Laws 1879, p. 84 and Rev. St. 1899, § 581, construed and applied. Jewett v. Boardman, 181 Mo. 647, 81 S. W. 186.

86. Order for publication requiring two months' publication must yield to Pol. Code, § 3549, making four weeks' publication sufficient. People v. McFadden [Cal.] 77 P. 999. Proof that a summons was published for "six successive weeks" in a weekly newspaper, shows a publication "once a week" for six successive weeks. McHenry v. Brackin [Minn.] 101 N. W. 960. Quaere, would the same be true if the newspaper was a daily? Comp. Laws N. M. 1897, §§ 2956, 2964, requiring the last publication to be made at least two weeks before the return day, does not demand that the period of publication should be completed by such time, but only that the last insertion of the notice should have been published. Harrison v. Wallis, 44 Misc. 492, 90 N. Y. S. 44.

87. Harrison v. Wallis, 44 Misc. 492, 90 N. Y. S. 44.

88. Harrison v. Wallis, 44 Misc. 492, 90 N. Y. S. 44. But see 2 Curr. L. 1270, n. 8, where contra is held under California rule.

89. Under Comp. Laws N. M. 1897, § 1372 that it was published after sunrise. Harrison v. Wallis, 44 Misc. 492, 90 N. Y. S. 44.

90. Mills v. Smiley [Idaho] 76 P. 783. Code Civ. Proc. § 412. Such direction must appear of record. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

91. It cannot be said, on appeal, that the court erred in construing its order for publication in the "S. D. Union" as referring to the "S. D. Union and Daily Bee." People v. McFadden [Cal.] 77 P. 999.

Sufficiency of order and publication.[92]—Slight discrepancies between the original summons and the one published which are not capable of misleading the defendant as to the nature of the proceeding, the property affected and the relief demanded, are immaterial.[93] The order of publication is presumptive proof of the existence of all prerequisites,[94] and, unless the affidavit and order are part of the judgment roll, their sufficiency is conclusively presumed.[95] The order is not open to collateral attack if the affidavits vest the judge with jurisdiction to pass on the question and he is satisfied.[96] Sufficiency of the service is presumed from judicial recitals.[97]

Personal service in lieu of publication.[98]—Personal service out of the state is equivalent to publication and deposit of the notice in the post office.[99]

§ 6. *Return and proof. Official return.*[1]—While the return is only evidence of service, still there should be in the record a return by the officer showing that the process has been served, and that thereby the court has acquired jurisdiction.[2] The officer has no right to return the writ unexecuted, until the return day,[3] and if the writ shows such a return prior thereto such showing is not overcome by proof that there is no memorandum in the clerk's office.[4] The law will indulge in presumptions in favor of a return,[5] even though made by a de facto officer,[6] but this rule does not extend to the return on a justice's summons.[7] If possible the return should be construed so as to render it legal and sufficient.[8] The return should have a venue,[9] state the date of service,[10] place of return,[11] and in some states, in the case of substituted service, the name of the person with whom the summons was left.[12] A return signed by a sheriff, when the service is actually made

92. See 2 Curr. L. 1271.

93. People v. Davis, 143 Cal. 673, 77 P. 651.

94. Under Rev. St. Wis. 1878, § 2641 of filing of complaint, though minutes of court deny such fact. McHenry v. Brackin [Minn.] 101 N. W. 960.

95. People v. Davis, 143 Cal. 673, 77 P. 651. Being part of the judgment roll they are to be considered in determining the jurisdiction of the court. Parson v. Weis, 144 Cal. 410, 77 P. 1007.

96. Held not open to collateral attack where the affidavits showed that defendants were nonresidents and plaintiff would be unable to make personal service within the state. Kennedy v. Lamb, 92 N. Y. S. 385.

97. Such recital is entitled to the same presumption of verity as any other recital. Parsons v. Weis, 144 Cal. 410, 77 P. 1007. A recital in the judgment that defendant was regularly served is not rebutted where the judgment roll contains simply the original summons, the return of the sheriff, and the affidavit of publication which does not show that an alias summons was not issued prior to publication. People v. Davis, 143 Cal. 673, 77 P. 651.

98. See 2 Curr. L. 1271.

99. First Nat. Bank v. Eastman, 144 Cal. 487, 77 P. 1043. Hence the affidavit of publication is not a prerequisite. Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 P. 40. See 2 Curr. L. 1271, n. 16.

1. See 2 Curr. L. 1271.

For the law relating to the appointment of sheriffs and constables see topic, Sheriffs and Constables, 2 Curr. L. 1640.

2. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. There being a valid service but no return or a void return a default judgment should not be entered. Id.

3. Cummings v. Brown, 181 Mo. 711, 81 S. W. 158.

4. Such proof does not warrant the presumption that officer retained the writ until the return day seeking to execute it. Cummings v. Brown, 181 Mo. 711, 81 S. W. 158.

5. Under Code Civ. Proc. § 635, providing that where two or more defendants reside in the same county the complaint need only be served on one, held that the service having been made in the same county the return need not show that they were all residents of such county. Mantle v. Casey [Mont.] 78 P. 591. But see 2 Curr. L. 1271, n. 22. Parol evidence held insufficient to overcome presumption of regularity of official conduct. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837.

6. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837.

7. Such return is presumed to show all that was done by the person making the service. State v. Harrington [Mont.] 78 P. 484.

8. Sodini v. Sodini [Minn.] 102 N. W. 861.

9. Being without venue it is a nullity. Frees v. Blyth, 99 App. Div. 541, 91 N. Y. S. 103.

10. Rev. St. 1895, art. 1225. Failure to so do held fatal to default judgment. Robinson v. Horton [Tex. Civ. App.] 81 S. W. 1044.

11. Record stating writ to have been returned "before B., one of the justices of the peace for the county aforesaid, at his office at home" is insufficient. Rust v. Frame [Del.] 58 A. 825.

12. Code § 3519. Such statute is satisfied by the return stating that it was left with defendant's wife. Hass v. Leverton [Iowa] 102 N. W. 811.

by a deputy is sufficient.[13] That the return contains unnecessary matter does not necessarily affect its validity.[14]

Return of service on corporations.[15]—The return should affirmatively set out facts which will bring the service within one of the methods prescribed by statute.[16] Where service on a certain person is allowed only on condition, the return must show the existence of the condition,[17] though a motion to dismiss such service having been denied, the existence of such condition will be presumed.[18] With regard to a showing of the existence of material facts, the return is to be construed with reference to the record.[19] Use of words "business hours" in return is synonymous with "office hours," the words of the statute.[20] Return showing service on officer at "usual business office" does not show service at "principal office of corporation."[21] The terms "president or other chief officer" and "president or chief officer" are synonymous.[22]

Amendment of return.[23]—An irregular or incomplete return may be amended to conform to the facts.[24] The amendment may be voluntarily made by the officer while he remains in commission,[25] or after his retirement from office, the trial court consenting,[26] or by a nunc pro tunc order[27] of the trial court,[28] though in some cases the appellate court may, in the exercise of its sound discretion, exercise the power.[29] In Texas the return may be amended without notice to defendant.[30] Motion to set aside judgment, as based on a defective return, affirmatively showing on its face proper service, it is unnecessary to amend the return.[31] The officer seeking to amend the return, defendant may raise an issue as to the validity of the

13. Orchard v. Peake [Kan.] 77 P. 281.

14. Return held valid where officer certified the name by which defendant was described was only an alias. Sodini v. Sodini [Minn.] 102 N. W. 861.

15. See 2 Curr. L. 1272.

16. Where action is commenced in the county where the cause of action accrued, instead of in the county where defendant has its principal office, the return must show the reason for making the service on the local agent. Hildebrand v. United Artisans [Or.] 79 P. 347. Return must state that president or other chief officer could not be found in county to render alternative service good [Rev. St. 1899, § 995]. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911.

17. Under St. 1899, p. 111, c. 94, § 1, a return showing service on the secretary of state must show that foreign corporation failed to designate agent. Willey v. The Benedict Co., 145 Cal. 601, 79 P. 270. Certificate of secretary of state to the effect that no such agent had been appointed, being no part of the judgment roll cannot be looked to on a motion to quash the service on the record. Id. Return, under Rev. St. 1899, § 570, showing service on an agent not in defendant's place of business, must state that defendant had no place of business at which the writ could be served. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069.

18. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667.

19. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855. Petition describing defendant as a foreign corporation the return need not so state. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069.

20. El Paso, etc., R. Co. v. Kelly [Tex Civ. App.] 83 S. W. 855.

21. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911.

22. Rev. St. 1899, § 995, as amended by Laws 1903, p. 115, construed. Brassfield v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 1032.

23. See 2 Curr. L. 1273.

24. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. Return on a writ of attachment. Cord v. Newlin [N. J. Law] 59 A. 22.

25. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. See 2 Curr. L. 1273, n. 40-42.

26. Smoot v. Judd [Mo.] 83 S. W. 481.

27. Civ. Code 1895, §§ 5116, 5117. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

28. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911.

29. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911. Held amendment would not be allowed on appeal where to do so would shut defendant out from a defense on the merits. Id. Request to amend denied where sheriff was not produced for cross-examination as to where and on whom he served the writ. Id. Slight misnomer is an imperfection which, under Rev. St. 1899, §§ 672, 673, may be cured in the appellate court. Word "company" omitted from corporate name. Brassfield v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 1032. A return may be amended on appeal by adding "the president and other chief officers being absent from the county and could not be found" [Rev. St. 1899, §§ 670, 672, 673]. Holtschneider v. Chicago, etc., R. Co. [Mo. App.] 81 S. W. 489.

30. Construing Rev. St. 1895, art. 1239. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

31. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

service, and on satisfactory evidence may prevent the amendment.[32] An amended return relates back to the time of service.[33] Objection to the filing of an amended affidavit of service cannot be made for the first time on appeal.[34]

Impeachment or contradiction of return.[35]—The return is conclusive upon the parties to the suit or action[36] and cannot be contradicted except for fraud or mistake[37] or in a direct action against the officer for making a false return.[38] In some states the rule seems to be limited to matters, the truth and falsity of which are within the personal knowledge of the officer,[39] and while the general rule is as stated above yet modern practice is liberal in allowing inquiry into the actual facts where the return itself is not full or explicit,[40] and an application to set aside such service may be made by a rule to show cause.[41] The rule is not altered by the fact that plaintiff became the purchaser at the execution sale,[42] nor does the fact that the defendant only obtained nominal damages in an action against the sheriff entitle him to attack the return in equity.[43] The return cannot be falsified by a plea in abatement.[44] In states where the return is held inconclusive, the oath and return of the officer prevails against the oath of a single person.[45]

The rule that the return is conclusive does not deny one due process of law if on the face of the record he appears to have been legally served.[46]

The officer's return being regular on its face the burden is upon the defendant to show that the writ was not served in the manner stated.[47] Specific findings may be taken in connection with the return in determining the sufficiency of the service.[48] Findings of chancellors as to the truth of return will not generally be disturbed on appeal.[49]

Waiver of irregularities.[50]—Motion to quash the process on the ground that

32. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25. On similar proof may, in a direct attack on the judgment, have the latter set aside. Id.

33. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855; Smoot v. Judd [Mo.] 83 S. W. 481.

34. State Board of Pharmacy v. Jacob, 92 N. Y. S. 836.

35. See 2 Curr. L. 1273.

36. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069. Remedy is an action against the officer. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Smoot v. Judd [Mo.] 83 S. W. 481. But see 2 Curr. L. 1273, n. 45, 47-50.

37. Ky. St. 1903, § 3760. That party alleged to have been served had no recollection thereof held insufficient to show mistake. Utter v. Smith, 25 Ky. L. R. 2272, 80 S. W. 447. Evidence that deceased officer, who in his lifetime had made the return in question, had drank to excess, and evidence of conversations with such officer while alive concerning his return held incompetent to show mistake. Id.

38. Equity. Smoot v. Judd [Mo.] 83 S. W. 481.

[**Note:** In the above case the authorities are collected, discussed at length and the question decided as indicated, thus overruling Smoot v. Judd, 161 Mo. 673, 61 S. W. 851, 84 Am. St. Rep. 738. Along this line see the note on the power of equity to set aside a default judgment at law because based on a false return, 4 Curr. L. 304, where the authorities are exhaustively set out and the rules as to the conclusiveness of the return discussed. See, also, the dissenting opinion in Smoot v. Judd [Mo.] 83 S. W. 481, 509.]

39. That personal service had been made. Judgment had been rendered. Orchard v. Peake [Kan.] 77 P. 281. Service on the agent of a corporation is not conclusive of the fact of agency. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

40. See Jackson v. Delaware River Amusement Co., 131 F. 134.

41. Jackson v. Delaware River Amusement Co., 131 F. 134. A plea in abatement, while the more ancient and formal way, will not be required. Id.

NOTE. Necessity of plea in abatement. Federal practice: The practice of setting aside service on rule has been adopted in many of the Federal districts even where the local practice requires a plea in abatement. Wall v. Chesapeake, etc., R. Co. [C. C. A.] 95 F. 398.

42. Smoot v. Judd [Mo.] 83 S. W. 481.

43. Cannot maintain a suit in equity to set aside a default judgment based thereon. Smoot v. Judd [Mo.] 83 S. W. 481.

44. McDaniels v. De Groot [Vt.] 59 A. 166.

45. Smoot v. Judd [Mo.] 83 S. W. 481. [The above point was raised in this case and decided on the strength of Gatlin v. Dibrell, 74 Tex. 36, 11 S. W. 908 and Randall v. Collins, 58 Tex. 282. The principal case holds, however, that a bill in equity will not lie to set aside a default judgment based on a false return. See note on subject in Judgments, 4 Curr. L. 304.]

46. Smoot v. Judd [Mo.] 83 S. W. 481.

47. Return to a writ of attachment. Lewis v. Rasp [Okl.] 76 P. 142.

48. El Paso, etc., R. Co. v. Kelly [Tex. Civ. App.] 83 S. W. 855.

49. Smoot v. Judd [Mo.] 83 S. W. 481.

50. See 2 Curr. L. 1275.

the action is barred by limitations waives all defects in the return.[51] Irregularities in the return are cured by judgment.[52]

Return on constructive service, and proof of service by publication.[53]—The return showing constructive service is to be strictly construed, and everything may be inferred against it which its departure from the description of the statute will warrant.[54] In Nebraska proof of publication by the affidavit of a person having knowledge of the fact must be made within six months after the last day of publication.[55]

§ 7. *Defects, objections, and amendments. In general.*[56]—Defects in the process must be distinguished from defects in the officer's return.[57] Irregularities in form will be disregarded.[58] Service of a void summons is equivalent to no service.[59] One defendant cannot avail himself of defects in the service of summons on other parties.[60] Defects in ancillary process do not affect the writ as against the principal defendant.[61] The clerk failing to annex process to petition in time for service at the succeeding term, the court may remedy the mistake by an ex parte order.[62]

Alterations. Amendments.[63]—Process may be amended[64] nunc pro tunc[65] upon motion made,[66] or, if the court has jurisdiction of the parties, upon its own motion[67] at any time before final judgment.[68] That the amendment is granted after the cause of action sued on would be barred by limitations is immaterial.[69] Where a defendant answers to the merits and files a plea of misnomer, the misnomer may be amended.[70] The court cannot assume the truth of averments in a

51. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857.

52. Omission of word "The" from company name, held so cured. Jones v. Bibb Brick Co., 120 Ga. 321, 48 S. E. 25.

53. See 2 Curr. L. 1274.

54. Holtschneider v. Chicago, etc., R. Co. [Mo. App.] 81 S. W. 489. Return held insufficient under Rev. St. 1899, §§ 995, 996, as not showing directly or by inevitable inference that the sheriff left a copy of the writ and petition at any business office of the corporation with a person in charge thereof. Id.

55. Lonergan v. South Omaha [Neb.] 100 N. W. 407.

56. See 2 Curr. L. 1274.

57. For the latter see ante, § 6, Return and proof.

58. Failure of summons to contain words "under the penalty of the complaint being taken as confessed" as required by statute, held an irregularity of form. Ammons v. Brunswick-Balke-Collender Co. [Ind. T.] 82 S. W. 937.

59. Henman v. Westheimer [Mo. App.] 85 S. W. 101. See 2 Curr. L. 1274, n. 59.

60. Adams v. Hopkins, 144 Cal. 19, 77 P. 712.

61. The fact that an executor was made garnishee and cited in to disclose, contrary to Gen. St. 1902, § 881, does not render the writ defective as against the principal defendant. Hatch v. Bushy [Conn.] 59 A. 422. Inserting a fictitious name in the trustee blank in a trustee process, no one being served as trustee, does not prevent the writ from being effectual as one of summons and attachment. Keenan v. Perrault, 72 N. H. 426, 57 A. 335.

62. Bentley v. Reid [C. C. A.] 133 F. 698. The order should recite such failure and order that defendant be served with a copy of the petition and process in time for the succeeding term. Id.

63. See 2 Curr. L. 1274.

64. Illustrations: Signature of clerk added where original process was not signed, though copy was. Myers v. Griner, 120 Ga. 723, 48 S. E. 113. Defect in corporate name held amendable, summons being actually served in the statutory manner. Saunders v. Adams Exp. Co. [N. J. Law] 57 A. 899. There being a general appearance, a justice may amend the summons so as to change the action from one in replevin to one to foreclose a lien. Amendment in such case wipes out the first action. Horowitz v. Decker, 88 N. Y. S. 217. Request to insert name of partner held properly denied. Holmes v. Daniels, 86 N. Y. S. 19. See generally 2 Curr. L. 1274, n. 63.

Contra, a summons cannot be amended in any substantial particular unless the statute expressly authorizes amendment. Fisher, Sons & Co. v. Crowley [W. Va.] 50 S. E. 422.

65. Where a general appearance had been made, held proper to allow an amendment nunc pro tunc inserting return day in an order to show cause. In re Quo Vadis Amusement Co., 82 App. Div. 240, 81 N. Y. S. 394.

66. A notice of an application for an order allowing amendment of misnomer held a notice to apply for an order permitting amendment wherever misnomer appeared. Sentell v. Southern R. Co., 67 S. C. 229, 45 S. E. 155.

67. Sentell v. Southern R. Co., 67 S. C. 229, 45 S. E. 155.

68. Writ amended by adding words "who brings this action for and as the next friend of J., a minor" [Rev. Laws, c. 173, § 48]. Drew v. Farnsworth [Mass.] 71 N. E. 783.

69, 70. Sentell v. Southern R. Co., 67 S. C. 229, 45 S. E. 155.

motion to amend.[71] An order allowing process to be amended is a judgment which is binding until reversed or set aside.[72]

When objections made.[73]—Objection may be made after removal of cause from a state to a Federal court,[74] and the summons failing to state a cause of action, the objection can be made for the first time on appeal.[75]

How objections made.[76]—A motion to quash is the proper method if the defect appears on the face of the return,[77] otherwise it should be taken advantage of by plea.[78] Demurrer is improper.[79]

Waiver of irregularities or lack of process.[80]—A general appearance without protestation waives lack of process[81] or any irregularities in the process,[82] and the right to object on appeal extends only to those making proper objections below.[83] Irregularities may also be waived by stipulation.[84] The appearance may be by guardian.[85] There being no process, jurisdiction over the person of the defendant is complete from the date of such general appearance.[86] One's motion to set aside insufficient service being overruled, he does not waive his rights by proceeding to trial.[87] Jurisdictional defects in the return being asserted in the first paragraph of the answer, additional paragraphs do not operate as a waiver.[88]

71. Proof must be introduced. Jordan v. Chicago & A. R. Co., 105 Mo. App. 446, 79 S. W. 1155.

72. Amendment authorized thereby should be made nunc pro tunc at a subsequent term. Myers v. Griner, 120 Ga. 723, 48 S. E. 113.

73. See 2 Curr. L. 1275.

74. Special appearance being made. Cavanagh v. Manhattan Transit Co., 133 F. 818.

75. Appeal from justice's court. Macon & B. R. Co. v. Walton, 121 Ga. 275, 48 S. E. 940.

76. See 2 Curr. L. 1275.

77. Allegation in answer is insufficient. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069. But see 2 Curr. L. 1275, n. 71.

78. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069. See 2 Curr. L. 1275, n. 69, 70.

79. Cannot be used to attack failure to attach process or an irregularity in the process. Meyers v. Griner, 120 Ga. 723, 48 S. E. 113.

80. See 2 Curr. L. 1275.

81. Illustrations: Facts held equivalent to due service. Demurring and answering. Adams v. Hopkins, 144 Cal. 19, 77 P. 712; Mulholland v. Washington Match Co., 35 Wash. 315, 77 P. 497. Filing a general demurrer, answering and appearing generally in the taking of depositions, and on application to produce papers and at the trial. Haseltine v. Messmore [Mo.] 82 S. W. 115.

General appearance: Contempt proceedings. Anderson v. Indianapolis Drop Forging Co. [Ind. App.] 72 N. E. 277. Where defendant moved to vacate default judgment and be allowed to file an answer. Simensen v. Simensen [N. D.] 100 N. W. 708. Recital in judgment that party appeared by counsel held sufficient. Smithers v. Smith [Tex. Civ. App.] 80 S. W. 646. See generally 2 Curr. L. 1276, n. 79.

82. Illustrations: Facts held to constitute general appearance. Demurring. Myers v. Griner, 120 Ga. 723, 48 S. E. 113; Seydel v. Corporation Liquidating Co., 88 N. Y. S. 1004.

Appearance and pleading: Neglect of clerk to annex process to petition, held waived. Bentley v. Reid [C. C. A.] 133 F. 698. That full time did not elapse between issuance of the precept and its return. Martin v. Crossley, 91 N. Y. S. 712. Plea to the merits though answer also contains an objection. Newcomb v. New York, etc., R. Co., 182 Mo. 687, 81 S. W. 1069. Motion to quash the process on the ground that the action is barred by limitations. Lane Bros. & Co. v. Bauserman [Va.] 48 S. E. 857. Entering into an arrangement to postpone execution. Coast Land Co. v. Oregon Pac. Colonization Co., 44 Or. 483, 75 P. 884. An objection that the summons was made returnable at chambers, instead of at term, held waived by failure to move to transfer the case to the proper docket. Jones v. Madison County Com'rs, 135 N. C. 218, 47 S. E. 753. Mere error of court in a finding and order based on an affidavit of publication cannot be taken advantage of five years after rendition of judgment. People v. Wrin, 143 Cal. 11, 76 P. 646. See generally 2 Curr. L. 1276, n. 79.

83. Those raising the objection not appealing, the appellants cannot take advantage thereof. Martin v. Crossley, 91 N. Y. S. 712.

84. Ammons v. Brunswick-Balke-Collender Co. [Ind. T.] 82 S. W. 937.

85. A judgment against a minor not served, but represented by a guardian ad litem, is not void. Penn v. Case [Tex. Civ. App.] 81 S. W. 349.

86. It does not relate back and cure void proceedings theretofore had. Simensen v. Simensen [N. D.] 100 N. W. 708.

87. Order denying motion was not appealable. Dalton v. Mills, 91 N. Y. S. 733. Defect in the summons is not waived by pleading to the merits after the overruling of a motion to quash and the entry of an exception. Fisher Sons & Co. v. Crowley [W. Va.] 50 S. E. 422.

88. Thomasson v. Mercantile Town Mut. Ins. Co. [Mo. App.] 81 S. W. 911.

§ 8. *Privilege and exemptions from service.*[89]—One is not exempt because within the jurisdiction as a witness in a suit in which he is plaintiff, such suit being in furtherance of the alleged actionable wrong for which plaintiff sues.[90]

§ 9. *Abuse of process.*[91]—While malice is not essential still there must be an intent to do something wrong, or to make a willful misuse of the court or its process for the purpose of improperly accomplishing some collateral purpose which could not be obtained by direct method.[92] An action for damages for the malicious abuse of process may be maintained before the action in which such process was issued is terminated.[93]

PRODUCTION OF DOCUMENTS; PROFERT, see latest topical index.

PROFANITY AND BLASPHEMY.

Use of obscene language[94] or language calculated to produce a breach of the peace[95] is elsewhere treated. Where defendant testified that he never used profane language, evidence of profanity at times other than that charged is admissible.[96]

PROHIBITION, WRIT OF.

§ 1. Nature, Function, and Occasion of Remedy (1084).
§ 2. The Right to the Writ (1087).
§ 3. Practice and Procedure (1087).

§ 1. *Nature, function, and occasion of remedy.*[97]—The office of the writ of prohibition is to restrain excess or improper assumption of jurisdiction.[98] It is an appropriate remedy only where the inferior court or tribunal is proceeding in some matter over which it possesses no rightful jurisdiction,[99] or is

89. See 2 Curr. L. 1276.

90. Iron Dyke Copper Min. Co. v. Iron Dyke R. Co., 132 F. 208. See 2 Curr. L. 1276, n. 88; Id., 1277, n. 90-92.

NOTE. Exemption of witnesses: The common law has, from its earliest period, extended privilege and immunity to parties and witnesses in a law suit while attending court including the going and coming. Green v. Young, 120 Ill. 189; Massey v. Colville, 45 N. J. Law, 119, 46 Am. St. Rep. 754. This privilege is not a natural right; it is contrary to common right. Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598. The privilege exists to subserve public interest [Moletor v. Sinnen, 76 Wis. 308, 20 Am. St. Rep. 71, 7 L. R. A. 817] and the proceedings must be in court. Parker v. Manco, 61 Hun [N. Y.] 519. The privilege extends to nonresidents. Small v. Montgomery, 23 F. 707; First Nat. Bank of St. Paul v. Ames, 39 Minn. 179. He may procure his writ of protection in advance of starting for or from the court, if circumstances make it reasonable to ask the court's mediation for such protection. Smith v. Jones, 76 Me. 138, 40 Am. Rep. 598. Such writ always receives a liberal construction in favor of the witness covered by it. Ex parte Hall, 1 Tyler [Vt.] 274. Every privileged person, however, must at a proper time, and in a proper manner, claim the benefit of his privilege. Gyer v. Irwin, 4 U. S. (4 Dall.) 187, 1 Law. Ed. 762.—From note to Mullen v. Sanborn [Md.] 25 L. R. A. 721.

91. See 2 Curr. L. 1277.

See Special Article, Malicious Prosecution and Abuse of Process, 4 Curr. L. 470.

92. Petry v. Childs & Co., 43 Misc. 108, 88 N. Y. S. 286.

93. Mullins v. Matthews [Ga.] 50 S. E. 101.

A different rule applies in an action for the malicious use of legal process, where no object is contemplated to be gained by such use other than the proper effect and execution of the process. In such case it is necessary to allege malice, want of probable cause, and that the action on which the process issued has been finally determined in favor of the defendant therein." See Mullins v. Matthews [Ga.] 50 S. E. 101, and cases cited.

94. See Indecency, Lewdness, and Obscenity, 3 Curr. L. 1697.

95. See Disorderly Conduct, 3 Curr. L. 1111.

96. Lampkin v. State [Tex. Cr. App.] 85 S. W. 803.

97. See 2 Curr. L. 1278.

98. Taylor v. Bliss [R. I.] 57 A. 939; State v. Fort [Mo. App.] 81 S. W. 476.

99. State v. Crosby, 92 Minn. 176, 99 N. W. 636. Writ issued to restrain justice from issuing citations to creditors in a proceeding to take a poor debtor's oath, he having no jurisdiction, and there being no appeal from a decision thereon by him if rendered. Taylor v. Bliss [R. I.] 57 A. 939. Prohibition properly issues against an officer appointed by the probate court as superintendent of an estate to prevent him from acting as such, the appointment being void for want of jurisdiction. Koury v. Castillo [N. M.] 79 P. 293. The writ lies to prohibit a circuit court from proceeding in a prohibition suit to prevent certain persons who claim to have been elected to office from taking the same and assuming and exercising its duties. Moore v.

exceeding its powers in a matter over which it has jurisdiction.[1] The writ will not issue to restrain an inferior court from improperly exercising jurisdiction in a particular case of a class of cases of which such court has jurisdiction,[2] the existence or nonexistence of jurisdiction in the particular case depending on contested facts which the inferior tribunal is competent to inquire into and determine.[3] It will not issue to prevent a court from committing a threatened error,[4] as from making orders which, if made, would be at variance with a decision of the higher court.[5] It does not lie to prevent execution of a warrant for a criminal act, issued by a court having jurisdiction, even though the act does not constitute an offense.[6] Proceedings having been instituted in one court, another court may be restrained from taking jurisdiction.[7]

The writ is usually held not to be one of right, but issuable in extraordinary cases in the exercise of a sound discretion of the court to which application therefor is addressed;[8] but under some statutes the writ is one of right, in cases where it is applicable.[9] It is a preventive, not a corrective, remedy,[10] and does not lie after the action sought to be controlled has been taken.[11] The writ will issue only where there is not a plain, speedy, and adequate remedy in the ordinary course of law,[12] and cannot take the place of an appeal[13] or writ of

Halt, 55 W. Va. 507, 47 S. E. 251. County court acts judicially and within its jurisdiction in acting on applications for dram-shop licenses and its action is not subject to prohibition by the circuit court. State v. Fort [Mo. App.] 81 S. W. 476. Superior court held to have jurisdiction of a proceeding to restrain a city from canvassing returns of a special election relative to annexation of territory; hence prohibition denied. State v. Superior Court for King County, 36 Wash. 566, 79 P. 29.

1. State v. Crosby, 92 Minn. 176, 99 N. W. 636. Justice of the peace has no authority to issue a rule for contempt for refusal to surrender upon a warrant issued by such justice, and contempt proceeding may be stayed by prohibition. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383. The writ will issue from Kentucky court of appeals to prevent unauthorized exercise of jurisdiction by an inferior court [Const. § 110]; Commonwealth v. Jones, 26 Ky. L. R. 867, 82 S. W. 643. Thus the writ may issue to restrain a circuit court from unlawfully appointing a special commissioner, this being an exercise of the general power of control of the court of appeals over inferior jurisdictions. Louisville Public Warehouse Co. v. Miller, 26 Ky. L. R. 351, 81 S. W. 275.

2. Cincinnati, etc., Packet Co. v. Bellville, 55 W. Va. 560, 47 S. E. 301.

3. Even though the superior court is of opinion that the questions of fact have been wrongfully determined and if rightly determined would oust the court of jurisdiction. Finley v. Moose [Ark.] 85 S. W. 238.

4. State v. Superior Court of King County, 34 Wash. 643, 76 P. 282. Court of equity having jurisdiction of subject matter, prohibition refused to prevent an erroneous exercise of such jurisdiction. State v. Kennan, 35 Wash. 52, 76 P. 516.

5. It is presumed that the decision of the supreme court will be observed by the lower court. In re Sullivan's Estate, 36 Wash. 217, 78 P. 945.

6. A justice has jurisdiction to issue a warrant to begin a prosecution for keeping gaming tables, under Code 1899, c. 151, § 1, and a decision by him as to what constitutes an instrument of gaming, is, even if erroneous, not a usurpation of jurisdiction. Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275.

7. Where a proceeding under an indictment for homicide may be maintained in either of two counties, and the court of one has taken jurisdiction, prohibition lies to restrain proceedings in the other county. Hargis v. Parker [Ky.] 85 S. W. 704.

8. People v. Stevens [Colo.] 79 P. 1018.

9. Town of Hawk's Nest v. Fayette County Court, 55 W. Va. 689, 48 S. E. 205; Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275.

10. State v. Crosby, 92 Minn. 176, 99 N. W. 636.

11. Town of Hawk's Nest v. Fayette County Court, 55 W. Va. 689, 48 S. E. 205. Does not lie to interfere with county court's action in establishing election districts. Williamson v. Mingo County Court [W. Va.] 48 S. E. 835. Does not lie to restrain an inferior court after judgment has been given and fully executed. Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275. The supreme court will not review the dismissal of a petition for a writ of prohibition to prevent the canvass of votes in a congressional election after the representatives-elect have been admitted to their seats in the house. Jones v. Montague, 194 U. S. 147, 48 Law. Ed. 913.

12. 2 Ball. Ann. Codes & St. § 5770. State v. Superior Court of King County, 34 Wash. 643, 76 P. 282; People v. Stevens [Colo.] 79 P. 1018. Except in extreme cases, where the right to the extraordinary relief clearly appears and the usual remedy is not full, speedy and adequate, parties will be remitted to their ordinary remedies. (It is said by the writer of the opinion that applications for the writ are becoming too frequent in Colorado.) People v. District Court of Second Judicial Dist. [Colo.] 77 P. 239. The writ cannot be used to perform the function of an action of detinue; hence will not lie to command a clerk of court to no longer hold a slot machine, seized under the gaming law, from a petitioner. Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275.

13. State v. Leche [La.] 36 So. 868. Ir-

error,[14] if such remedy is adequate.[15] In considering the adequacy of the remedy of appeal, time alone, or the expenses incident to prolonged litigation, will not be decisive, if the fruits of the appeal are not lost by the delay.[16]

In some states, prohibition is only to judicial tribunals,[17] and does not lie to control administrative or ministerial acts.[18] Prohibition is not a proper remedy to try title to an office, and a court acquires no jurisdiction of such a controversy by issuing its writ.[19]

regularities and defects in a proceeding over which the inferior court or tribunal may lawfully exercise jurisdiction cannot be reviewed by prohibition. State v. Crosby, 92 Minn. 176, 99 N. W. 636. Prohibition will not lie to prevent enforcement of an erroneous order of revivor, since such order is reviewable and can be adequately corrected by ordinary remedies. Chicago, etc., R. Co. v. Woodson [Mo. App.] 85 S. W. 105. Writ refused to restrain lower court's erroneous vacation of deficiency judgment in mortgage foreclosure. State v. Superior Court of King County, 34 Wash. 643, 76 P. 282. Order overruling motion for change of venue reviewable only by appeal from final judgment. State v. District Court of Second Judicial Dist. [Mont.] 77 P. 318. Refusal to grant change of venue is appealable and writ of prohibition will not lie to restrain proceeding with case thereafter. State v. Evans [Mo.] 83 S. W. 447. The court having jurisdiction of the subject-matter, whether it had jurisdiction of the person should be raised by appeal. Finley v. Moose [Ark.] 85 S. W. 238. Prohibition will not lie to correct an erroneous ruling on a motion in the nature of a demurrer to an election notice. State v. Evans [Mo.] 83 S. W. 447. Prohibition cannot be made to take the place of certiorari or appeal by compelling a county court to revise its action in revoking a liquor license. Town of Hawk's Nest v. Fayette County Court, 55 W. Va. 689, 48 S. E. 205. Refusal to dismiss an indictment on the ground that defendant had testified before the grand jury and hence could not be prosecuted, being reviewable by appeal from any judgment that might be rendered, cannot be reviewed on application for prohibition. Rebstock v. Superior Court of San Francisco [Cal.] 80 P. 65.

14. People v. District Court of Second Judicial Dist. [Colo.] 77 P. 239; People v. Stevens [Colo.] 79 P. 1018; People v. District Court of Third Judicial Dist. [Colo.] 79 P. 1024.

15. If an appeal is a wholly inadequate remedy, the right to it is no ground for denying the writ of prohibition. State v. Fort [Mo. App.] 81 S. W. 476. Under Const. § 110, the supreme court of Kentucky may issue the writ of prohibition not only to prevent courts of inferior jurisdiction from acting in matters outside their jurisdiction, but also in cases where the right of appeal does not afford a plain, speedy, and adequate remedy. Jenkins v. Berry, 26 Ky. L. R. 1141, 83 S. W. 594. Refusal to grant a dramshop license cannot work irreparable injury; hence appeal an adequate remedy, and appellate court will not prohibit circuit court from prohibiting county court's action. State v. Fort [Mo. App.] 81 S. W. 476.

16. State v. Superior Court for King County, 36 Wash. 566, 79 P. 29.

17. Not issuable against a constable and clerk of court. Woods v. Cottrell, 55 W. Va. 476, 47 S. E. 275. Prohibition cannot go against an assessor. Town of Hawk's Nest v. Fayette County Court, 55 W. Va. 689, 48 S. E. 205. The establishment of election precincts and voting places by the county court is not a judicial action. Williamson v. Mingo County Court [W. Va.] 48 S. E. 835. The writ lies only to inferior courts, boards, officers, or tribunals having judicial or quasi judicial powers, to confine them within their respective jurisdictions. Moore v. Holt, 55 W. Va. 507, 47 S. E. 251. It cannot be invoked against individuals in respect to rights claimed by or asserted against them. Id.

18. Power of county court to grant or refuse a liquor license is not so controllable. Town of Hawk's Nest v. Fayette County Court, 55 W. Va. 689, 48 S. E. 205.

19. Moore v. Holt, 55 W. Va. 507, 47 S. E. 251.

NOTE. Prohibition, mandamus and quo warranto compared: "Mandamus lies to restore to office one who has been illegally ousted. Dew v. Judges, 3 Hen. & M. 1, 3 Am. Dec. 639; Lewis v. Whittle, 77 Va. 415. Quo warranto lies to try and determine the right to an office; but it goes against one who is in office, not to prevent a person from taking an office. State v. Shank, 36 W. Va. 223, 14 S. E. 1001; State v. Matthews, 44 W. Va. 372, 29 S. E. 994; Kilpatrick v. Smith, 77 Va. 347. But in these cases the process by which the subject-matter is brought within the jurisdiction of the court is authorized and given by law for that purpose.

"In its very nature prohibition is an improper proceeding by which to determine the title to an office. If it could go against a person in office, the writ would ipso facto stop the exercise of the functions of the office before an adjudication of the right of the defendant to hold it. If awarded against a person out of office to prevent him from assuming its duties, its effect would be, in some instances, to leave the office vacant pending the controversy. Thus the efficiency of the public service would be impaired, and the state left without officers to execute the laws. Everything would be within the power of the courts. Board of Education v. Holt [W. Va.] 46 S. E. 134. A mandamus to restore a person to an office from which he has been illegally ousted works no interruption of the exercise of the functions of the office. It puts the ousted officer in and thereby incidentally ousts the intruder, who has not been prevented from performing the duties of the office until the very moment of the reinstatement of the rightful incumbent. Upon a quo warranto calling upon the occupant of the office to show by what right he exercises its powers, he continues to discharge its duties until the

§ 2. *The right to the writ.*[20]

§ 3. *Practice and procedure.*[21]—The only question to be considered on a petition for prohibition is whether the court had jurisdiction.[22] It will be assumed that the court below will do its duty in the premises, as to matters brought to its attention,[23] and the application will be denied if it appears that the jurisdictional question was not raised below,[24] unless want of jurisdiction appears on the face of the record.[25] A petition for the writ will be dismissed where, in proceedings in error involving the same matters complained of, final action has been taken.[26] Prohibition lies only to a court, not to a judge or chancellor at chambers;[27] but a judge of the supreme court of Missouri may issue a preliminary rule in vacation, returnable to the court in term time.[28] In Louisiana, if a case is appealable to the court of appeals, application for a writ of prohibition as to an order or proceeding therein should be made to such court and not to the supreme court.[29] The writ runs in the name of the state, but the rule for the writ is only the necessary preliminary notice, and need not so run.[30]

PROPERTY.[31]

Definition and nature.[32]—Aside from constitutional and statutory meanings,[33] "property" in its general sense has recently been held to include a dog[34] and the carcass of a dead domestic animal[35] though the owner may not allow such carcass to become a nuisance.[36] Commodities may be property though traffic in them is unlawful.[37]

Realty or personalty.[38]—Shares in an incorporated company are personalty[39]

question of his right to the office has been determined. High, Ex. Leg. Rem. § 594. The law has wisely withheld from the courts any writ by which to vacate offices in advance of judicial determination of cause of removal coupled with the power of removal, and the use of the writ of prohibition in such cases as this clearly contravenes this great principle of public policy and natural right."—From Moore v. Holt [W. Va.] 47 S. E. 251.

20. See 2 Curr. L. 1278.

21. See 2 Curr. L. 1279.

22. People v. District Court of Third Judicial Dist. [Colo.] 78 P. 679; State v. Evans [Mo.] 83 S. W. 447. An attempt in an answer in mandamus proceedings to set up matters which would oust the court of jurisdiction cannot be considered on an application for prohibition. People v. District Court of Third Judicial Dist. [Colo.] 79 P. 1024.

23. State v. Evans [Mo.] 83 S. W. 447.

24. State v. District Court of Second Judicial Dist. [Wyo.] 76 P. 680; Reese v. Steele [Ark.] 83 S. W. 335. Where a personal decree for money is made on publication against nonresidents, without service of process or appearance, they must first apply to the circuit court by special appearance to vacate the decree and quash the execution before asking a writ of prohibition against an execution on the decree. Jennings v. Bennett [W. Va.] 49 S. E. 23.

25. Thus, where it so appears that an order of a judge in vacation was in excess of his authority, application to the judge to vacate the order is not essential to entitle the person injured to prohibition to forbid enforcement of the order. State v. Dearing [Mo.] 84 S. W. 21.

26. State v. District Court of Second Judicial Dist. [Wyo.] 78 P. 1093.

27. Reese v. Steele [Ark.] 83 S. W. 335.

28. State v. Dearing [Mo.] 84 S. W. 21.

29. State v. Machen, 113 La. 541, 37 So. 175.

30. Williamson v. Mingo County Court [W. Va.] 48 S. E. 835.

31. This topic is necessarily limited in scope to very general matters of definition; and the doctrines of "Lost or abandoned property" and of "Formulae, plans," etc., are included instead of being made separate topics chiefly because they so intimately involve the general principles.

32. See 2 Curr. L. 1279, and Cyc. Law Dict. "Property."

33. See 2 Curr. L. 1279, n. 23, 24; also Constitutional Law, 3 Curr. L. 752, and topics relating to the subject-matter of statutes wherein the term is used.

34. Moore v. Charlotte Elec. R. Light & Power Co., 136 N. C. 554, 48 S. E. 822.

35, 36. Prosecution for removing carcass in alleged violation of ordinance. Mann v. District of Columbia, 22 App. D. C. 138. Such a carcass is not per se a nuisance in the suppression whereof it may be instantly taken from the owner. City of Richmond v. Caruthers [Va.] 50 S. E. 265.

37. Liquors are property in North Dakota. State v. McMaster [N. D.] 99 N. W. 58.

38. See 2 Curr. L. 1279.

Consult Fixtures, 3 Curr. L. 1432; Real Property, 2 Curr. L. 1462; and such titles as Execution, 3 Curr. L. 1397; Descent and Distribution, 3 Curr. L. 1081; Taxes, 2 Curr. L. 1786.

of an incorporeal nature,[40] and the certificate is merely the evidence of it. Buildings are realty if fixtures, and personalty if not.[41]

The law of the place governs chattel interests in land and real estate.[42]

Formulae, processes, plans, information, literary, musical, and dramatic productions.[43]—Blue prints of plans are property[44] which remains in the maker when merely to facilitate inspection of chattels sold and delivered he entrusts them to another.[45] A trade secret is assignable,[46] and the assignment may operate by enurement of the title subsequently acquired by the assignor.[47] An assignee need not show how his assignor had title.[48] The assignor and those employed by him may be restrained from using the secret.[49] The violator cannot set up the assignor's fraud in obtaining title.[50] If there be a dispute as to the plaintiff's right, the injunction will be limited to preserving the status quo.[51] All who have united to use it may be joined in one bill.[52] There can be no exclusive right or property in mechanical elements or principles apart from the combination of them into an undisclosed or patented invention.[53] Information consisting in stock and market quotations is property even if many of the quoted transactions were gambling ones,[54] and even if such information be used in part for other unlawful transactions.[55]

Creation and transfer of property rights.[56]—Property in a thing is not created by a contract which is merely in relation to it.[57] An affidavit by a claimant cannot constitute any muniment of title to land.[58]

Loss and abandonment.[59]—Abandonment is the total relinquishment of property without intent to reclaim it or to confer it on any particular person or purpose.[60] There is no abandonment of property which one leaves behind when compelled by duress to depart intending to return and take.[61] Abandonment may be found from knowing failure for many years to pay taxes or exercise rights of ownership to land occupied by claimants under deeds.[62] A constructive abandonment of land under the Michigan statute by nonpayment of taxes and failure to redeem cannot be based on void tax sales.[63] Property in a decedent's strong box does not come to the executor as a "finder" of lost goods.[64]

"Treasure trove" is properly restricted to gold and silver coins or bullion and the like,[65] and perhaps also articles which constitute riches.[66] It does not include gold bearing quartz.[67] Chattels not treasure trove being not lost or aban-

39. Ditch and canal company. Watson v. Molden [Idaho] 79 P. 503.

40. Lipscomb's Adm'r v. Condon [W. Va.] 49 S. E. 392.

41. Ice house erected by soil owner is realty. Roberts v. Lynn Ice Co. [Mass.] 73 N. E. 523. See other cases cited. Fixtures, 3 Curr. L. 1432.

42. Broadwell v. Banks, 134 F. 470. See, also, Conflict of Laws, 3 Curr. L. 720.

43. See 2 Curr. L. 1280, and compare Copyrights, 3 Curr. L. 878; Patents, 4 Curr. L. 929.

44, 45. Pressed Steel Car Co. v. Standard Steel Co. [Pa.] 60 A. 4.

46, 47, 48, 49, 50, 51, 52. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 58 A. 290.

53. Marvel Co. v. Pearl [C. C. A.] 133 F. 160.

54. Board of Trade v. Kinsey Co. [C. C. A.] 130 F. 507. The fact that an exchange tolerates such gambling does not disqualify it to invoke equity to protect this property right. Id.

55. Board of Trade v. Kinsey Co. [C. C. A.] 130 F. 507.

56. Consult such topics as Adverse Possession, 3 Curr. L. 51; Assignments, 3 Curr. L. 326; Deeds of Conveyance, 3 Curr. L. 1056; Descent and Distribution, 3 Curr. L. 1081; Gifts, 3 Curr. L. 1560; Sales, 2 Curr. L. 1527; Wills, 2 Curr. L. 2076.

57. Forrest v. O'Bryan [Iowa] 102 N. W. 492.

58. Patterson v. Landru, 112 La. 1069, 36 So. 857.

59. See 2 Curr. L. 1280.

60. Norman v. Corbley [Mont.] 79 P. 1059. See, also, Cyc. Law Dict. "Abandonment."

61. Eisele v. Oddie, 128 F. 941.

62. Timber v. Desparois [S. D.] 101 N. W. 879.

63. Platz v. Englehardt [Mich.] 101 N. W. 849.

64. Case v. Spencer, 86 App. Div. 454, 83 N. Y. S. 697.

65, 66, 67. Ferguson v. Ray, 44 Or. 557, 77 P. 600.

doned[68] but embedded by human agency and design in the soil belong to the soil owner and not the finder.[69] In declaring on this right, the soil owner must plead that one who has removed and taken possession of the property is not the owner[70] and that the owner is not known.[71] The soil ownership necessary to recover is that of an heir or devisee of a decedent and not that of his executor[72] and all undivided ownerships must be in plaintiffs.[73]

PROSECUTING ATTORNEYS; PROSTITUTION; PROXIMATE CAUSE IN ACCIDENT INSURANCE; PUBLICATION, see latest topical index.

PUBLIC CONTRACTS.

§ 1. Power of Government and Authority of its Officers to Contract (1089).
§ 2. How Initiated (1092).
§ 3. How Closed (1094).
§ 4. Essential Provisions in, and Conditions Pertaining to, Public Contracts (1095).
§ 5. Interpretation and Effect of Public Contracts; Performance and Discharge (1096).
A. Construction and Interpretation (1096).
B. Performance and Discharge (1097).
§ 6. Remedies and Procedure (1102).
A. By Taxpayer (1102).
B. By Bidder (1102).
C. On the Contract Proper (1103).
D. On the Contractor's Bond (1104).
E. Under Lien Laws (1105).

§ 1. *Power of government and authority of its officers to contract.*[74]—The legislature of a state in the absence of a constitutional prohibition[75] has power, as the supreme legislative body, to enter into a contract binding on the state, or it may authorize a committee so to do.[76] The power of a municipal corporation or public board to contract must be based on an express or implied authorization thereof by the legislature,[77] but a city having received the benefits of a contract

68. See 2 Curr. L. 1280, n. 44.

69. Ferguson v. Ray, 44 Or. 557, 77 P. 600; Burick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13. Evidence held not to show loss or abandonment where portions of a sack were found in the soil, where nearby trees had blaze marks and where the locality was not mineral bearing soil. Ferguson v. Ray, 44 Or. 557, 77 P. 600.

NOTE. Rights of finder of chattel: It is not always easy to determine the rights of a finder. Thus, it has been held that one who finds bank notes among rags which she is sorting is entitled to their possession against the owner of the rags (Bowen v. Sullivan, 62 Ind. 281, 30 Am. Rep. 172); while an aerolite, it is determined, belongs to the person on whose land it falls, and not to the one who first discovers it (Goddard v. Winchell, 86 Iowa, 71, 41 Am. St. Rep. 481, 17 L. R. A. 788). Although the present case decided merely the right of possession as between the finder and the owner of the land whereon the property was found, the court discussed at length the law relating to treasure trove, and reached the conclusion that the state could not claim the property under consideration. See further in this connection 2 Mich. L. R. 299, 495.—3 Mich. L. R. 153.

70, 71. Simple allegation that it had been buried for many years is deficient. Burick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13.

72, 73. Burick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13.

74. See 2 Curr. L. 1281.

75. A contract to furnish the legislature of Pennsylvania with sustenance on the occasion of their attendance in a body at the dedication of Grant's tomb is not invalid as being in contravention of art. 2, § 8, of the Const. prohibiting the members from receiving any compensation other than their salaries. Russ v. Com. [Pa.] 60 A. 169.

76. Russ v. Com. [Pa.] 60 A. 169.

77. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208. Contracts entered into by municipal corporations in excess of their power or in violation of statutes expressly limiting their authority are void and absolute nullities. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. The matter of contractor's bonds, and conditions and limitations as to their enforcement, is germane to public improvement and hence within the purview of a statute authorizing a city to frame its own charter. Grant v. Berrisford [Minn.] 101 N. W. 940. See fuller discussion, Municipal Corporations, 4 Curr. L. 720. Incorporated towns have authority to contract for water for public use and for the lighting of the streets, alleys, and other public places in the town. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208. The power of the county court to build and rebuild court houses is governed by the provisions of Kirby's Dig. Ark. § 1025. Bowman v. Freth [Ark.] 84 S. W. 709. Code of Public Instruction Wash. § 105, authorizes the state board of education to enter into contracts with publishers for the supply of text books for the public schools. Wagner v. Royal, 36 Wash. 428, 78 P. 1094. The county commissioners have no authority to enter into a contract with a person to collect a judgment in its favor and to pay such other compensation therefor, it being the duty of the state's attorney to do so. Fox v. Jones [N. D.] 102 N. W. 161.

may be estopped to set up the unconstitutionality of the authorizing statute.[78] The power must be exercised through the agency of the proper officers or agents of the municipality[79] acting within their powers.[80] The courts will not interfere with contracts, entered into by municipal corporations, which are within the scope of their powers unless it appears there has been a gross abuse of the power entrusted to them.[81] Persons contracting with public officers are bound to take notice that their powers are limited by law,[82] and the extent of their authority.[83] An unauthorized contract made on behalf of a municipality may be ratified.[84] In the absence of legislative or constitutional restriction,[85] a city council or other municipal legislative body has power to enter into a contract, otherwise within its power, the time for the performance of which extends beyond the term of office of the persons constituting such body,[86] though it has no power to enter into a contract for an indefinite period and in perpetuity.[87] Power to make a contract does not necessarily imply power to release one who has entered into a valid con-

78. City of Mt. Vernon v. State [Ohio] 73 N. E. 515.

79. Presidio County v. Clarke [Tex. Civ. App.] 85 S. W. 475.

80. Municipal corporations acting within the limit of the powers conferred upon them by the legislature are responsible for the acts and contracts of their duly authorized agents within the scope of the authority of such agents in like manner with other corporations or natural persons. Jersey City v. Harrison [N. J. Law] 58 A. 100. Town trustees have no power to charge their townships with anything but needful and appropriate articles, hence one seeking to recover on a contract for sale of article to the town must show that it was a needful and appropriate article for them to purchase. Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100. Where the board of trustees of a city have power and authority to enter into a contract, they have power and authority to change and modify it. Doland v. Clark, 143 Cal. 176, 76 P. 958. Where a public board charged with the care and custody of a county building authorizes the custodian or other person to employ another to do certain work, the expense of so doing is properly chargeable to the county and the fact that the expense exceeded the estimate of such agent does not affect his authority. Webber v. Ramsey County Com'rs [Minn.] 101 N. W. 296. A contract by the bridge commissioner of the Williamsburgh bridge authorizing street railway companies for a specified consideration to operate cars on the bridge held not the granting of a franchise and within the authority of the commissioner. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754.

81. Nelson v. Harrison County [Iowa] 102 N. W. 197; Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 Law. Ed. 1142; McMaster v. Waynesboro [Ga.] 50 S. E. 122. The fact that a contract by a city providing for the lighting of its streets by electricity would render valueless an oil equipment already owned by it would not authorize interference by the courts with the creation and carrying out of such a contract. Id.

82. Taylor v. School Town of Peterburgh [Ind. App.] 72 N. E. 159; Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100.

83. Silver, Burdett & Co. v. Indiana State Board of Education [Ind. App.] 72 N. E. 829; Bennett v. Incorporated Town of Mt. Vernon, 124 Iowa, 537, 100 N. W. 349. One dealing with a city through its counsel is bound to take notice of existing ordinances and a contract with the officers of the city, purporting to act in its behalf, in violation of such ordinance is void, and the city having no authority to make it is not estopped to assert such invalidity. Hope v. Alton [Ill.] 73 N. E. 406.

84. Swenson v. Bird Island [Minn.] 101 N. W. 495; Lines v. Otego, 91 N. Y. S. 785. Where a commissioner without authority appointed plaintiffs to prepare plans and supervise the construction of a building, and later the Laws of 1896, p. 751, c. 626, gave such authority, and thereafter the commissioner accepted the plaintiff's plans, it constituted a ratification of plaintiff's employment. Withers v. New York, 92 App. Div. 147, 86 N. Y. S. 1105.

85. Under Rev. St. Ohio, § 4017, the board of education are without power to employ a teacher whose term of employment under the contract would extend beyond the term of office of every member of the board. Board of Education of Canton v. Walker [Ohio] 72 N. E. 898.

86. Tanner v. Auburn [Wash.] 79 P. 494. A contract by which a municipality fixes the term for which one appointed to a position in the city's service shall serve is not ultra vires. Dolan v. Orange, 70 N. J. Law, 106, 56 A. 130.

87. Under a statute authorizing a city to levy a tax of 5 cents on the $100 of valuation and out of the proceeds pay a water company such sum as the mayor and council may deem proper for supplying the city with water, the city has no power to enter into a contract which binds it to levy and pay such sum for an indefinite period without reference as to whether such levy produced too much or too little revenue in the judgment of succeeding city councils, since such contract is an attempted invasion of the legislative functions of subsequent councils. A contract to pay a definite sum for specified period would have been binding. Nor will such contract be deemed limited to the period for which the corporation is organized, so as to be for a definite time. Westminster Water Co. v. Westminster, 98 Md. 551, 56 A. 990.

tract, from his obligation to perform.[88] Statutes or charter provisions prohibiting a municipality from entering into contracts creating an indebtedness, for the payment of which no funds are on hand or appropriated,[89] have no application to contracts for public improvements, the cost of which are to be paid for by local assessments on the property benefited,[90] nor to contracts for a number of years involving the payment of a certain sum each year, where the yearly payments do not exceed the revenue provided for each year.[91] A contract for a pur-

88. Under statutes providing that the county commissioners may enter into a contract for not less than two nor more than three years for the care and repair of the public roads and providing for the enforcement of such contracts, the commissioners have no power or authority to release one with whom they have contracted from the obligation of his contract, it being against the interest of the county to do so. Corker v. Elmore County Com'rs [Idaho] 77 P. 633.

89. Under St. Mass. 1893, c. 444, § 29, providing, in regard to cities, that no sum appropriated for a specific purpose shall be expended for any other purpose and no expenditure shall be made and no liability incurred by or on behalf of the city until the city council has appropriated sufficient funds to meet such expenditure or liability, a contract consuming a part of an appropriation is valid, though the completion of the improvement will require a greater sum than that appropriated. Webb Granite & Construction Co. v. Worcester [Mass.] 73 N. E. 639. Where a school district is by statute prohibited from contracting debts in excess of the funds available to pay the same, the fact that, after making a contract for the payment of which there are available funds, the district enters into another contract which consumes the available funds, does not render the earlier contract invalid. School Dist. No. 3, Carbon County v. Western Tube Co. [Wyo.] 80 P. 155. A city should not be allowed to escape payment for light furnished under a contract duly entered into on the ground that there was another existing contract under which all the taxes had been appropriated, where such appropriation was not necessary under the terms of such other contract, but appears to be an arbitrary act to defeat payment under the former contract. Kennedy v. New York, 99 App. Div. 588, 91 N. Y. S. 252. Under a constitutional provision prohibiting a county from incurring an indebtedness in excess of the income for the current year, a contract for the erection of a court house made after the levy of the taxes for a given year, but before the expenditure of such funds for the ordinary purposes for which they were raised, is invalid, since such provision contemplates the payment of the ordinary current expenses out of the revenue of the county, before any of it can be applied to extraordinary purposes. Anderson v. Ripley County, 181 Mo. 46, 80 S. W. 263. Municipal improvements being let by contract, the clerk's certificate provided for by Rev. St. § 1536-205 that the money required is in the treasury and credited to the proper fund, and unappropriated, is not required until just before the contract is signed. Braman v. Elyria, 5 Ohio C. C. (N. S.) 387. Under a statute prohibiting a municipality from entering into a contract unless the money therefor is on hand or appropriated, one who enters into a contract with a municipality calling for an expenditure in excess of the funds on hand, is entitled to payment, after performance on his part, to the extent of funds on hand at the time the contract was made. Lines v. Otego, 91 N. Y. S. 785.

90. Winona Charter, § 10, providing that an annual estimate of all sums required to defray expenses of the city for the ensuing year shall be made and taxes levied on the basis thereof and further providing that no greater sum shall be expended does not apply to improvements (sewers) authorized by Chap. 7 of the charter, the costs and expenses of which are to be paid by the property owners. The City of Winona is not prohibited from entering into a contract for the construction of sewers by reason of the fact that no provision has been made in advance for the payment of the pecuniary liability incurred thereby. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. Under P. L. N. J. 1902, p. 284, providing for the making of municipal improvements and local assessments according to benefits to defray the expenses thereof, it is not necessary that the municipality should have funds on hand with which to pay for such improvements before entering into the contract therefor. Dixey v. Atlantic City [N. J. Law] 58 A. 370.

91. Const. Cal. art. 11, § 18, providing that no city "shall incur any indebtedness or liability in any manner or for any purpose, exceeding in any year the income and revenue provided for in such year, does not prohibit a city from entering into a contract for a term of years by which it obligates itself to pay an annual rental for the thing contracted for, where the amount of the annual rental does not exceed the amount provided for such year, though the aggregate of the rental which will accrue under the contract does. Doland v. Clark, 143 Cal. 176, 76 P. 958. If a town contracts for water or light, or other things which pertain to its ordinary and necessary expenses and agrees to pay for the same annually or monthly as furnished, such contract does not create an indebtedness for the aggregate sum of all such payments, within the meaning of Const. art. 13, because the debt for each year or month does not come into existence until it is earned, but if the indebtedness of the town already equals or exceeds the constitutional limit and the current revenues are not sufficient to pay such indebtedness as it comes into existence, including the other expenses for which the town is liable, the contract is in violation of the constitutional provision. Voss v. Waterloo Water Co. [Ind.] 71 N. E. 208. The power of a city to provide for itself is derived from its charter and the fact that two-thirds of the electors did not vote in favor of making a ten-year contract does not de-

pose substantially the same as one authorized by the electors will be upheld.[92] Contracts entered into by municipal corporations with members of the legislative body to whom its business affairs are entrusted, or other municipal officers in violation of statutory or constitutional provisions may be void,[93] or merely voidable.[94]

§ 2. *How initiated.*[95]—Where a municipal corporation is prohibited from contracting in any manner other than provided by law, a contract not entered into in substantially the manner so provided is of no legal effect.[96] If the legislature has not directed that the municipality shall contract by ordinance, it may do so by resolution.[97] The action of the council must be taken at a legal meeting thereof.[98] Statutory or charter provisions, requiring as conditions precedent to the power of the municipality to contract, that a finding of the necessity of the

prive the city of its inherent power to make a contract which did not involve the creation of a debt. But if, without the popular vote authorizing the same, it entered into a ten-year contract, the agreement would only be operative so long as neither party renounced or repudiated it. McMaster v. Waynesboro [Ga.] 50 S. E. 122.

92. While a municipality that has submitted to its electors the question of whether or not the indebtedness of the municipality shall be increased for a designated purpose cannot divert the funds raised pursuant to a vote authorizing an increase, to a different purpose, a contract made by it calling for substantial performance of such purpose is valid and will not be enjoined. Major v. Aldan Borough, 209 Pa. 247, 58 A. 490.

93. Under Acts 27th Gen. Assem. Iowa, c. 13, § 1, prohibiting members of the board of supervisors from being party to any contract with the county, a contract made by a third person for the benefit of a member of the board, to the extent it is performed by such member will be held illegal and compensation pro tanto refused. Contracts express or implied entered into with a member are void and warrants issued in payment should be canceled. Nelson v. Harrison County [Iowa] 102 N. W. 197. Under Pol. Code Ga. 1895, §§ 709, and 751, a contract entered into by a municipality through its council with a private corporation is void where one of the councilmen is a stockholder in the corporation at the time contract was entered into and the fact that the councilman thereafter sells and transfers his stock does not validate the contract. Hardy v. Gainesville, 121 Ga. 327, 48 S. E. 921. Charter City of New York, § 1533, prohibiting any officer of the city from being interested in any contract, the consideration of which is payable from the city treasury, has no application to a mere employe. A teacher of gymnastics in the public schools is an employe and not an officer of the city. Munnally v. Board of Education of New York, 92 N. Y. S. 286.

94. Munnally v. Board of Education of New York, 92 N. Y. S. 286. A statute prohibiting any member of the city council from being interested in any contract with the city does not render a contract by a firm of which a member of the council is a member void, when it also appears that enough votes without his own were cast to carry the resolution awarding the contract. Such contract might have been voidable, but one who has not objected before performance cannot resist collection of an assessment to pay for the improvement on such ground. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542. A contract awarded to a private corporation by commissioners, acting for a municipal corporation, one of whom is a stockholder in the private corporation, will be set aside on application of a taxpayer of the municipality. Brown v. Street Lighting Dist. No. 1 [N. J. Law] 58 A. 115.

95. See 2 Curr. L. 1284.

96. A municipality is without authority to make a contract having any vitality whatever, otherwise than for objects and in the manner prescribed by law, and one in form entered into in any other manner than substantially that provided by law, where the provisions in that regard are coupled with a prohibition to otherwise contract, imposes no liability on the municipality even though it is performed by the opposite party. Nor can such a contract be ratified unless the acts relied on as a ratification would be sufficient to support a contract as an original matter. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

97. Where the legislature has authorized a municipality to act or contract and does not require this to be done by ordinance, the legislative body of the municipality may contract by vote upon a motion or by passage of a resolution, but a resolution, to take the case out of the statute of frauds, must be communicated to the other contracting party by the direction of the legislative body adopting it and accepted by such other, in order to constitute a contract. The mere passage of a resolution directing certain municipal officers to enter into a contract, is not a contract until they have executed the contract and such resolution may be rescinded. Jersey City v. Harrison [N. J. Law] 58 A. 100. An ordinance confirming a contract entered into pursuant to a prior ordinance cannot be held to repeal the ordinance authorizing the contract to the extent that the terms of the contract are inconsistent with the first ordinance. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

98. A city council has no power to enter into a contract at an adjourned meeting, the meeting adjourned not having been attended by a quorum and less than a quorum having no power to adjourn. Pennsylvania v. Cole, 132 F. 668.

making of the improvement shall be made,[99] or that the question of making it shall first be submitted to a vote of the electors,[1] or that it shall be made only on petition of a stated proportion of the abutting property owners,[2] must be complied with. Bids for public improvement contracts must be advertised for as required by statute.[3] Substantial compliance with the statute is sufficient.[4] If the lowest bidder fails to enter into a contract, the contract may be awarded to the next lowest bidder without readvertising for bids.[5] The time recited in the advertisement for the opening of bids must be fixed by competent authority.[6] Where a statute provides that contracts for public works shall be let to the lowest responsible bidder, it implies that plans and specifications shall be furnished by the city and be equally accessible to all persons and a failure of a city so to do renders a contract entered into by it of no legal effect.[7] Specifications au-

99. Under Burns' Ann. St. Ind. § 7853, a finding by the board of commissioners that a necessity for entering into a contract exists and the entry thereof of record is a condition precedent to the power of the board to enter into certain class of contracts. But it is not necessary that a contract made in pursuance thereof should be agreed to and spread on the minutes before it is entered into; it is sufficient if it is made a matter of record during the term and before performance is commenced. Board of Com'rs of Howard County v. Garrigus [Ind.] 73 N. E. 82.

1. Where a municipality enters into a contract for the performance of a public improvement but is at the time of so doing, by reason of an informality in calling the election at which the question of making the improvement was voted on, unauthorized to enter into it, and is enjoined from paying for it after the completion of the improvement by the contractor, the municipality by accepting the improvement after a valid election has been held, ratifies and renews the former agreement and makes it a binding contract. Failure to give the bond required by Laws 1895, c. 354, p. 757, did not defeat contractor's right to compensation. Swenson v. Bird Island [Minn.] 101 N. W. 495.

2. Under Ky. St. § 3096, providing for the laying of sidewalks of certain materials only on petition of a certain proportion of the abutting owners, a city of the class to which such statute is applicable has no power to award a contract for a sidewalk of the designated material until a petition has been presented therefor and the abutting owner is not liable for an assessment though he made no objection to the improvement. City of Covington v. Brinkman, 25 Ky. L. R. 1949, 79 S. W. 234.

3. Rev. St. § 796. State v. Snyder, 2 Ohio N. P. (N. S.) 261. An indispensable prerequisite to the making of a valid contract is the inviting of offers by advertisement in accordance with Pol. Code Ga. 1895, § 345. Scott v. Crow, 121 Ga. 68, 48 S. E. 691. A notice inviting bids reciting that payment will be made as the building reaches certain stages of completion but not requiring commencement or completion of the building at any specified time is not a compliance with Pol. Code Ga. 1895, § 345, requiring such notice to inform the public of the terms and times of payment, and the officer charged with the letting of the contract will be enjoined from so doing at the suit of taxpayers. Id.

4. Substantial compliance with statutes as to advertising for bids, the manner of submitting them and the furnishing of a bond to enter into a contract are conditions precedent to power of a municipality to make a valid contract. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603. An ordinance requiring the city engineer to advertise for bids on public improvements for five days does not require that the advertisement should be published for five consecutive days. Roth v. Forsee [Mo. App.] 81 S. W. 913. A statutory requirement that proposals for bids shall be published in a weekly paper for not less than four weeks prior to the opening of bids does not require that the first publication should be a full 28 days prior to the day set for opening bids, but a publication once a week for four successive weeks, the last publication being before the date set for opening bids, is sufficient. Commonwealth v. Brown [Pa.] 59 A. 479. Where the plan for a public improvement remains practically as it was at the time bids were received, the fact that details were changed and the amount of deductions therefor agreed on after the bids had been opened, and contract awarded to the lowest bidder, is not ultra vires, as constituting a letting of a contract without advertising for bids. Criswell v. Board of Directors of Everett School Dist. No. 24, 34 Wash. 420, 75 P. 984. Under Rev. St. Wyo. 1887, § 3938, requiring the board of directors of a school district to advertise for bids where the amount of the improvement exceeds a certain sum, an advertisement by a committee authorized to act for the board for bids on a building and heating plant held a sufficient compliance with the statute, though the accepted bid for the building consumed the funds at the disposal of the committee, where the board subsequently accepted the bid advertised for by the committee. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

5. Huston v. Franklin County Com'rs, 2 Ohio N. P. (N. S.) 582.

6. Where the charter of a city requires that notice of opening of bids shall be given, a resolution directing the engineer to advertise for bids whereupon the latter fixes the date without any authority therefor from the city, the advertisement is invalid and no legal contract can be predicated thereon. Pennsylvania Co. v. Cole, 132 F. 668.

7. Chippewa Bridge Co. v. Durand [Wis.]

thorizing bidders to submit samples of more than one kind of material proposed to be used under a bid at a given price, choice therefrom to be made by the municipality, does not preclude the submission of bids at different prices with different kinds of material, by any one bidder.[8]

§ 3. *How closed.*[9]—In the absence of a mandatory statute or charter provision requiring it,[10] it is not necessary to the validity of a contract for a public improvement that it be let to the lowest bidder.[11] Cases construing such statutes with reference to whether the improvement is within the purview thereof are referred to in the notes.[12] Public officers must act in the manner prescribed by statute or the municipality is not bound.[13] Statutes requiring contracts to be in

99 N. W. 603. Variations in the plans and specifications, not communicated to all persons who may have bid, and the acceptance of a new offer based on such changes without submission to all the bidders, is not a letting to the lowest responsible bidder and is of no legal effect. Id.

8. Dixey v. Atlantic City [N. J. Law] 58 A. 370.

9. See 2 Curr. L. 1287.

10. A contract not let to the lowest bidder after notice is void. Swenson v. Bird Island [Minn.] 101 N. W. 495. Where public work must be let as a whole, the county commissioners having such work in hand must award the contract to the lowest bidder [Rev. St. § 799]. Huston v. Franklin County Com'rs, 2 Ohio N. P. (N. S.) 582. Under Act of March 11, 1901, § 5, providing that in case one who bids for a franchise shall fail to pay therefor within 24 hours, the same shall be awarded to the next highest bidder, the franchise must be awarded to one whose bid was submitted at the time the franchise was offered for sale and not to one who subsequently bids. Pacific Elec. R. Co. v. Los Angeles, 194 U. S. 112, 48 Law. Ed. 896. Where a municipal corporation has paid a contractor for the erection of a structure (bridge) under a contract which was entered into without a substantial compliance with a statute requiring the contract to be let to the lowest bidder, the contractor as well as the officers who paid him the money may be held personally liable at the suit of a taxpayer in behalf of the city to refund the money so received. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

11. The powers of municipal officers in awarding contracts are not merely ministerial, but discretionary and they may take into consideration other matters than the mere pecuniary responsibility of the bidder, and they are not bound to make awards to the lowest bidder. City of Philadelphia v. Pemberton, 208 Pa. 214, 57 A. 516. It lies in the discretion of the directors of public service, after street improvements not exceeding $500 in cost have been ordered by the council, to let the contract therefor to the lowest bidder. Under Rev. St. § 1536-679, the council cannot require the contract to be so let. Ohio v. Roebuck, 2 Ohio N. P. (N. S.) 688. Where a statute directs the awarding of public contracts to the lowest responsible bidder, it is discretionary with the proper officials to reject any or all bids or to award the contract to one whose bid is not the lowest. City of Akron v. France, 4 Ohio C. C. (N. S.) 496.

12. A contract for lighting the streets and public places of a city is not a contract for the erection, improvement or repair of a public building or work, or for street or sewer work, and hence need not be let to the lowest bidder after notice as required by Laws Wash. 1903, p. 33, c. 29. Tanner v. Auburn [Wash.] 79 P. 494. A statute providing that all "work" ordered by the council of a city * * * shall be let to the lowest responsible bidder, requires that contracts for buildings, bridges, and other structures should be so let. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603. Under Laws Ill. 1872, p. 218, § 50, all public improvements to be paid for by a special assessment and all public improvements which will exceed in cost the sum of $500 must be let to the lowest responsible bidder after advertising for bids and the city cannot itself make the improvement. Such provision applies to the completion of a contract which has been abandoned by the contractor where the cost of completion will exceed $500. Such statute is constitutional and is not repealed by Laws 1897, p. 102. City of Chicago v. Hanreddy, 211 Ill. 24, 71 N. E. 834.

13. A township trustee is a special agent possessing statutory powers only and is without general authority to bind the town. He can bind it when he does what the statute authorizes and does it in the manner prescribed. Oppenheimer v. Greencastle School Tp. of Putnam County [Ind.] 72 N. E. 1100; Taylor v. School Town of Petersburgh [Ind. App.] 72 N. E. 159. Where the statutes fix the manner in which statutory board and officers may enter into a contract, compliance with such statute is a prerequisite to a valid contract, nor can the state be estopped to deny that the contract is invalid for the reason that such provisions were not complied with. Acts of state board of schoolbook commissioners with reference to revision of text books held not to constitute a contract under Burns' Ann. St. Ind. §§ 5890-5895. Silver, Burdett & Co. v. Indiana State Board of Education [Ind. App.] 72 N. E. 829. A contract made with an ordinary in behalf of the county of which he is an official is not binding upon the county, unless it is in writing and entered on his minutes, under Ga. Pol. Code 1895, § 343. Holliday v. Jackson County, 121 Ga. 310, 48 S. E. 947. Act of April 4, 1870, Laws Pa. being an act prescribing the manner for entering into contracts by county commissioners is not repealed by Gen. Laws 1895, p. 38. Commonwealth v. Brown [Pa.] 59 A. 479. Application by a contractor to compel the execution of a contract held properly denied on the ground the resolution of the city council authorizing the con-

writing and signed by the parties must be complied with.[14] If the bidder has made a mistake in his bid, he will not be bound if he promptly withdraws it.[15] Where a contractor has given a bond for the faithful performance of his contract with a public board, the latter cannot resist performance on the ground that the bond has not been approved as required by law.[16] Title to money deposited by the contractor as security for the performance of the contract, remains in him until the expiration of the time of performance and vests in the city, if at that time he has failed to perform.[17] In Kentucky, contracts by boards of public works of cities of the first class, for the original construction of public ways need not be approved by the general council, as a prerequisite to their validity.[18]

§ 4. *Essential provisions in, and conditions pertaining to, public contracts.*[19] —A statute providing that contractors with a municipality should not employ laborers for more than eight hours a day in performing work on a public improvement is unconstitutional and the incorporation of the provisions of such statute in a contract does not deprive a contractor who has violated such provision of his right to compensation for work done under the contract.[20] A public contract unlawfully stipulating against alien labor is not against public policy where that was disregarded and it was otherwise valid.[21] A clause in a contract for the construction of a pavement requiring the contractor to keep it in repair for a specified time is regarded as a guaranty of good work and not as imposing on abutting owners the cost of maintenance,[22] provided the time for which he is bound to keep it in repair is not longer than a well constructed improvement ought to last without repairs.[23] The period of time fixed by the municipal au-

tract was not passed in the manner required by the charter of the city of Geneva. People v. Geneva, 90 N. Y. S. 275.

14. Burns' Ann. St. Ind. 1901, § 5989a, providing that contracts between teachers and school corporations shall be in writing and signed by the parties to be charged is mandatory. It is not conclusive against the validity of such a contract, however, that the agreement is contained in more than one paper. Taylor v. School Town of Petersburgh, 33 Ind. App. 675, 72 N. E. 159. Under Rev. St. Mo. 1899, § 6759, counties in the erection of public buildings cannot be made liable upon an implied promise to pay the value thereof; the contract must be in writing, including the consideration and a contract changing one in writing which states the consideration, and which increases the cost about one-third must also be in writing expressing the consideration to be paid for the extra work. Anderson v. Ripley County, 181 Mo. 46, 80 S. W. 263. A contract entered into in behalf of the state board of education by the president and secretary of the board is valid, at least as against third persons where it appears that the board acquiesced in the execution of contracts in its behalf by the president and secretary. Rand, McNally & Co. v. Royal, 36 Wash. 420, 78 P. 1103. A contract for a water supply is a contract for the sale of goods, wares, and merchandise, and where the price exceeds $30 or it cannot by its terms be performed within one year, it is within the statute of frauds and must be in writing. Jersey City v. Harrison [N. J. Law] 58 A. 100.

15. Where a contractor by reason of an excusable mistake on his part puts in a bid for a sum much less than he intended to do, pursuant to proposals therefor, there is no contract since no meeting of the minds, where he notifies the opposite party at once and the bid of the next lowest bidder is accepted, and in such case he is entitled to a return of money deposited with his bid as a guarantee that he would enter into the contract if it was awarded to him. Board of School Com'rs of Indianapolis v. Bender [Ind. App.] 72 N. E. 154.

16. Wagner v. Royal, 34 Wash. 428, 78 P. 1094; Rand, McNally & Co. v. Royal, 36 Wash. 420, 78 P. 1103.

17. Furth v. West Seattle [Wash.] 79 P. 936.

18. Board of Public Works of Louisville v. Selvage Const. Co., 25 Ky. L. R. 2098, 79 S. W. 1182.

19. See 2 Curr. L. 1289.

20. People v. Grout [N. Y.] 72 N. E. 464.

21. Doyle v. People, 207 Ill. 75, 69 N. E. 639.

22. A clause in a contract requiring the contractor to keep the improvement in repair for a specified period of time after the completion of the work is not void, since considered as a guarantee of good construction and not imposing on the abutting owner the burden of repairs for which they are not subject to assessment though they are for original construction. Bacas v. Adler, 112 La. 806, 36 So. 739. A provision in a contract for paving that the contractor will keep the premises in repair for a specified period is not void on the ground that the city charter does not permit the cost of repairs to be assessed against the abutting owners who must pay the cost of construction. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

23. Local assessments for local improvements can be imposed only where special

thorities is presumed to be reasonable until the contrary is shown.[24] If a portion of the contract price is withheld by the government as security for the maintenance of the improvement, it must show damage as well as nonperformance in order to withhold payment of such sum.[25]

§ 5. *Interpretation and effect of public contracts; performance and discharge. A. Construction and interpretation.*[26]—Contracts for the construction of public improvements are to be construed the same as contracts between individuals and the intention of the parties as gathered from the entire instrument will control.[27] They must be certain as to terms.[28] A contract may be implied.[29] They are, however, subject to the statutory or charter limitations of the municipality.[30] A local custom inconsistent with the terms of the contract is not incorporated therein.[31] The Federal courts are not bound, under all circumstances, to follow the construction placed on a municipal contract by the state courts.[32]

benefits have been conferred on the property assessed and only to the extent of the benefits. In the case of street paving only the first cost can be charged against the abutting property. A charge for maintenance indirectly imposed by including it in the first cost is no less objectionable than a direct charge. But the municipality, to secure the proper performance of the contract, may require a guaranty of the permanency of the work, if in so doing they do not impose on the abutting owner more than the cost of the original improvement in accordance with the specifications. If the obligation to repair does not exceed the time which the pavement, if laid in accordance with the contract, would endure, such guaranty does not add to the cost of the improvement, unless the time for which the guaranty is made is unreasonable so as to evade the provision that only the first cost shall be chargeable to the abutting owner. The latter cannot resist the enforcement of a lien on his premises by the municipality for the benefit of the contractor. City of Philadelphia v. Pemberton, 208 Pa. 214, 57 A. 516.

24. City of Philadelphia v. Pemberton, 208 Pa. 214, 57 A. 516.

25. Where by terms of a contract the government retains a part of the consideration of the contract as security for the maintenance by the contractor of the improvement during a prescribed period and also provides that the contractor shall be paid a certain rate of interest on the sum so held, the government in order to withhold the payment must prove damages from the failure to maintain and not merely a failure to maintain the improvement. Switzer & McHenry's Case, 38 Ct. Cl. 275.

26. See 2 Curr. L. 1290.

27. Morrill & W. Const. Co. v. Boston [Mass.] 71 N. E. 550. A contract by a municipal corporation with a water company to furnish the former with an emergency water supply does not authorize the municipality to require the water company to furnish water to an adjoining municipality. Rehill v. Jersey City [N. J. Law] 58 A. 175. Contracts of a corporation, whether municipal or private, stand on the same footing with contracts of natural persons and depend on the same circumstances for their validity and effect. Jersey City v. Harrison [N. J. Law] 58 A. 100. Proposals for construction, invited bids on a structure complete and as modified in two different particulars. A bid offering to do it for a certain price and a deduction for each particular feature omitted, was accepted omitting one feature only, held not to constitute a contract as to the value of the other feature that it was of the value the bidder proposed to deduct in case it was omitted, so as to preclude a reduction of a greater amount than that stated in his bid on a subsequent change of the contract so as to omit such feature. Conners v. U. S., 130 F. 609. A contract to pay a designated sum per cubic yard for the "removal of 2,000 cubic yards of gravel more or less, as may be designated by the city engineer, read in connection with the balance of the contract, held to mean that the amount of gravel to be removed and not the location from which it was to be removed was to be designated by the engineer. Normile v. Ballard, 33 Wash. 369, 74 P. 566.

28. A resolution of a school board made pursuant to a request for a position by a teacher, reciting that the person should be employed for the following year but not reciting the time when the employment should begin or the pay which should be given does not constitute a contract for employment as a teacher and hence no recovery can be had for refusal to employ the teacher. Taylor v. School Town of Petersburgh, 33 Ind. App. 675, 72 N. E. 159.

29. An implied contract to pay for the use and occupation of land may arise from the use and occupation thereof by the government officers in the prosecution of a public improvement. Willink's Case, 38 Ct. Cl. 693. A contract to pay for materials received and used in the construction of a public improvement may be implied. Lines v. Otego, 91 N. Y. S. 785.

30. Under Rev. Charter City of Orange, § 8, employment by city of a janitor for police station is revocable at pleasure. Dolan v. Orange, 70 N. J. Law, 106, 56 A. 130.

31. One who has contracted to deliver a certain quantity of coal at a government wharf is not entitled to demurrage paid for delay in getting to the wharf, when the delay was not due to the fault of the government, and the terms of the contract are inconsistent with a custom imposing on the consignee the payment of demurrage charges. Moore & Co.'s Case, 38 Ct. Cl. 590.

32. The Federal courts are not bound to

(§ 5) *B. Performance and discharge.*[33]—If a person contracts to do a thing which is possible at the time the contract is entered into, he is not excused from performance by an act of God; if he wishes to escape liability on such ground, it must be so provided in the contract.[34] Nor is he excused by reason of contingencies making the work more expensive than was anticipated by reason of unexpected exactions of the government.[35] Substantial performance by the contractor is essential to his right to recover on the contract.[36] Gross negligence or a willful departure from the terms of the contract preclude a recovery for any part of the contract price.[37] If he does not perform in accordance with the contract, but the municipality accepts the improvement and uses it, it must pay the reasonable value thereof not exceeding the contract price.[38] An engineer charged with overseeing the construction of a public improvement has no implied authority to consent to the construction of the improvement in any manner other than that called for by the contract.[39] If the contractor fails to perform in accordance with the terms of the contract, the measure of damages is the reasonable cost of completing the improvement in accordance with the contract,[40] unless the

follow the decisions of the state courts as to the validity of a municipal contract unless at the time the alleged contract was entered into the state courts had adopted a settled course of decisions with reference to such contracts so as to constitute a rule of property, where the jurisdiction of the Federal courts is invoked by a resident of another state. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 F. 162.

33. See 2 Curr. L. 1290.

34. Phoenix Bridge Company's Case, 38 Ct. Cl. 492.

35. One who has accepted a franchise and agreed to construct a street railway over a certain route and has deposited a check to be forfeited in case of his failure to perform within a specified time is not relieved of performance by reason of the fact that the United States government requires the construction of more expensive bridges, which are essential to the completion of the route, than was contemplated by the parties, where the requirements of the government could have been ascertained before the contract was entered into. Furth v. West Seattle [Wash.] 79 P. 936.

36. The term "substantial performance" is by no means without limitation of a legal nature. The rule allowing a recovery on a contract for such performance is equitable in its nature. It is really a judicial invasion of strict contract right out of regard for the contractor. It means strict performance in all essentials necessary to the full accomplishment of the purposes for which the thing contracted for was designed. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

37. City of Philadelphia v. Pemberton, 208 Pa. 214, 57 A. 516.

38. Criswell v. Board of Directors of Everett School Dist. No. 24, 34 Wash. 420, 75 P. 984. Slight imperfections in the work or variations from the contract not seriously affecting the usefulness of the pavement, but making it of less value, would entitle the defendant to a deduction of the difference between the value of the work contracted for and the value of the work done. City of Philadelphia v. Pemberton, 208 Pa. 214, 57 A. 616. Where a contract has not been fully, but has been substantially, performed, in that it has been, in good faith, complied with in all essentials to the full accomplishment of that which was contracted for and the contract labor and material wrought into the property of the proprietor has been appropriated to the use intended, such contractor is entitled to recover the contract price less such deduction therefrom as will make good to the proprietor the imperfections in the work. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

39. The city is not estopped from asserting its damages as an offset in an action for the contract price by the contractor or a subcontractor seeking to charge the fund due the contractor with a lien for materials or work furnished by him. Modern Steel Structural Co. v. Van Buren County [Iowa] 102 N. W. 536.

40. Under a contractor's bond conditioned that the contractor "shall complete said contract according to the terms thereof and the contract price * * * and shall faithfully perform the work specified in said contract," the measure of damages which a city can recover against the sureties on the bond, where the contractor abandoned performance, is the reasonable cost and expense of completing the work, nor was it necessary that the city in completing the work, should follow the plans and specifications made a part of the contract, but they had a right to resort to such methods and means as were reasonably necessary so to do. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. The reasonable damages sustained for the necessary work and labor performed and for materials furnished in the completion of defective work are a proper counterclaim by the government against a contractor suing for the contract price. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295. Where in an action for the contract price for the construction of a bridge, the county sets up a counterclaim for damages on the ground the bridge was not constructed of metal as heavy as called for by the contract, the measure of damages is the difference in the cost of the metal used and that called for by the contract plus the contractor's profit

measure of damages is fixed by the terms of the contract.[41] Money paid to a contractor during the progress of the work cannot be recovered back merely because he fails to complete the entire work. In order to recover money so paid there must be either an agreement to that effect or an entire failure of consideration.[42] Where time is not of the essence of the contract, completion of the improvement by the contractor within a reasonable time after the time fixed is sufficient,[43] nor can the municipality resist payment where the noncompletion was prevented by an injunction obligatory on the city as well as the contractor,[44] or a valid extension of the time has been made.[45] Where time is of the essence of the contract, a contractor cannot recover on tax bills issued to him by the city where he failed to complete the improvement within the time limited by the contract.[46] Where the ordinance authorizing the improvement fixes the time for completion, time is deemed to be of the essence of the contract.[47] Where the

for construction. Modern Steel Structural Co. v. Van Buren County [Iowa] 102 N. W. 536.

41. Under a contract providing that the contractor shall furnish a certain kind of material in quantities as needed during a specified time at a specified price and also provided that in case of his failure to supply the same it should be purchased by the government in the market and that the difference between the contract price and the amount paid should be charged to the contractor, the government cannot recover of the contractor the excess of cost of supplies purchased in open market after the contractor's bankruptcy, where no order was given to him to supply the materials, but as to materials ordered and not furnished prior to that time the government can recover. Sparhawk v. U. S. [C. C. A.] 134 F. 720.

42. Where a city contracts for a sewerage filtration plant guaranteed to accomplish certain results which are expressly declared to be the inducement on the part of the city for entering into the contract and the completed plant wholly fails to accomplish the results contracted for, the city is entitled to recover the full sum paid the contractor without allowance for parts of the plant which are in accordance with the contract, they being valueless to the city for any other purpose, the rule applicable to sales of personal property that the vendee is liable for the value of property retained though not in accordance with the contract of sale not being applicable to permanent erections on real estate. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

43. Where an ordinance providing for a public improvement does not fix the time within which the contract shall be completed and the contract though fixing the time does not make time of the essence of the contract, its completion within a reasonable time is a compliance with the contract. Hilgert v. Barber Asphalt Pav. Co. [Mo. App.] 81 S. W. 496. A paving contract held to have been performed within a reasonable time, where delay not due to fault of contractor. Id. A contract for the performance of work in the way of street improvement, first specifying a definite time for the completion of the work, then followed by a penalty clause for failure to complete within the time designated, in the absence of a requirement by an ordinance that the work shall be completed within a definite time, may be complied with by the completion of the work within a reasonable time. In other words, that time is not the essence of a contract in that form, in the absence of an ordinance fixing a definite time for the completion of the work. Schibel v. Merrill [Mo.] 83 S. W. 1069.

44. Webb Granite & Construction Co. v. Worcester [Mass.] 73 N. E. 639.

45. Where a contract provides that the time for completion "may be extended only by the previous written consent of the mayor for good cause shown," the mayor is not precluded from making more than one extension nor does the making of more than one extension constitute an alteration of the contract so as to release a surety on the contractor's bond. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

46. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062. Where a definite time for the completion of an improvement is specified in the ordinance ordering it, or if no definite time be specified therein, but is made of the essence of the contract by the stipulation of the parties, then in either case, if the work be not completed in the specified time, tax bills issued in payment for the improvement will be void. Hilgert v. Barber Asphalt Pav. Co. [Mo. App.] 81 S. W. 496. Where a contract fixes the time within which an improvement shall be completed and provides that no additional time will be allowed unless the contractor shall be restrained from prosecuting the work in pursuance of a written order of the city engineer and then only for the number of days stated in the order, the engineer has no authority to dispense with compliance with the contract except for some reasonable cause, and unfavorable weather conditions, nothing with reference to the same being stipulated in the contract does not excuse performance within the time limited by the contract or authorize the engineer to suspend the completion of the work. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

47. Where an ordinance provides for the completion of the improvement within a specified time and the contract also provides for its completion within the time stated in the ordinance and provides a liquidate sum as damages for each day of noncompletion after the time limited, time is of the essence of the contract, and the time fixed by ordinance

performance of a contract is indefinitely suspended by the government, the contractor may elect to treat the contract as terminated and recover his expenditures made in performance to the time of its suspension, together with loss of anticipated profits.[48] Where a contract provides that the work contemplated thereby shall be done to the satisfaction of a designated officer, the work must be satisfactory to him; whether his decision is right or wrong is immaterial, provided he acts in good faith.[49] The person holding the office at the time the contract is completed is the person to pass on the sufficiency of the performance and not the person in office at the time the contract was entered into.[50] So too an arbitration clause providing that the determination of a named person or officer as to any matter in dispute,[51] or as to the quantity of work performed, shall be conclusive, is binding on the parties.[52] The person occupying office at the time the decision is to be made is the person upon whom devolves the determination of the controversy,[53] though one to whom a controversy has been submitted may render a decision after his term of office has terminated.[54] What constitutes an acceptance of the improvement must in a measure be determined from the circumstances of each case.[55] Mere use by a municipality of a public improvement

governs. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

48. Houston Co.'s Case, 38 Ct. Cl. 724.

49. Board of Education v. National Surety Co., 183 Mo. 166, 82 S. W. 70. A clause in a contract that the improvement "shall be accepted and payment made when the plant is completed, tested, and made to work satisfactorily," requires that the completed plant should be satisfactory to the purchaser, acting reasonably, and hence the question whether it works satisfactorily should not be submitted to the jury. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

50. Where a contract provides that the work thereunder shall be performed to the satisfaction of the architect of the board and the board is afterwards reorganized and the duties of the architect devolved on an officer differently designated, the latter is the judge of the sufficiency of the performance. "It is the officer who discharges the duties of the office who is meant and not the person who fills the office." Board of Education v. National Surety Co., 183 Mo. 166, 82 S. W. 70.

51. Conners v. U. S., 130 F. 609; City of Mobile v. Shea [C. C. A.] 127 F. 521. A clause in a contract providing that claims arising thereunder shall be submitted to arbitration is valid and requires the submission of a claim to arbitration before an action at law arises. Werneberg, Sheehan & Co. v. Pittsburg [Pa.] 59 A. 1000.

52. A clause in a contract that "the estimate and certificate of the director of the department of public works shall be final and conclusive evidence of the amount of work performed and shall be taken as a full measure of the compensation to be received by the contractor, without the right of exception or appeal, renders the decision of the director final only as to the 'amount of work performed' and the compensation to be received" and does not preclude an arbitration clause in the contract from being operative as to other questions in dispute. Werneberg, Sheehan & Co. v. Pittsburg [Pa.] 59 A. 1000.

53. Under a provision in a contract that in case the city became dissatisfied with the manner in which the contractor was executing the contract, the city should take over the work and proceed to complete it and that the entire expense incurred in executing the improvement should be allowed by the contractor in favor of the city in accordance with the decision of the city engineer from whose decision there shall be no appeal, the engineer in office at the completion of the contract is the one to make the decision, and where no decision on the entire work is made by him, the contractor is not precluded from a judicial investigation of such expense. City of San Antonio v. Marshall & Co. [Tex. Civ. App.] 85 S. W. 315.

54. Where a contract provides that "in case any question or dispute shall arise between the parties, it shall be submitted to the director of the department of public works whose decision thereon shall be final, the fact that the official named as arbitrator was removed from office after a disputed question had been submitted to him and he had heard the evidence does not deprive him of jurisdiction to determine the question submitted. He acts as an individual and not as an official. If he refuses to render a decision, the arbitration clause of the contract is exhausted and the jurisdiction of the courts attaches. Werneberg, Sheehan & Co. v. Pittsburg [Pa.] 59 A. 1000.

55. A contractor on a public improvement cannot object to a deduction for defective work on the ground that it has been accepted by the government engineer and that he has paid the subcontractor in full therefor when he could have discovered the defect had he used reasonable diligence, there having been no final inspection of the work. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295. Making a part payment of the amount due the contractors, after the time stipulated for the completion of the building, is not a waiver of the county's claim for liquidated damages by reason of its noncompletion within the specified time, the county retaining enough to discharge such liquidated damages. Lawrence County v. Stewart Bros. [Ark.] 81 S. W. 1059.

is not an acceptance of the same, so as to preclude it from objecting that the performance has not been in conformity to the contract.[56] A contractor who has agreed to complete a given improvement is not entitled to extra compensation for work done by him in the performance of his contract, in excess of what it was contemplated would be necessary.[57] He may, however, recover for extra work, required by a representative of the municipality, authorized to give directions in the premises, performed under protest and not called for by a proper interpretation of his contract.[58] In such case he is entitled to the reasonable value of such

56. Mere use by a city of a public improvement, when it is necessary that it should use it in order to protect the public health and convenience, is not an acceptance of the improvement so as to preclude it from objecting that it is not in accordance with the contract. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. Where a public improvement is of such a nature that a partial performance thereof by the contractor incorporates labor and material into the purchaser's property (such as installation of a heating plant) in such a way as to render him powerless to do otherwise than accept what is delivered, there can be no recovery by the contractor without proof of acceptance other than such as is inferable from the mere fact that the improvement is retained and used. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356. An unorganized and informal meeting of the supervisors of a county at the place of the erection of a bridge pursuant to a contract with the county and the execution and delivery to the contractor of a statement signed by the supervisors to the effect that they "hereby accept the bridge," cannot bind the board nor is it an acceptance of the bridge by the county so as to estop it to allege damages for the contractor's failure to perform the contract according to the specifications. Use of the bridge, though not in accordance with the contract is not an acceptance so as to estop the county from claiming damages. Modern Steel Structural Co. v. Van Buren Co. [Iowa] 102 N. W. 536. The fact that a county with the consent of the contractor authorized certain county officers to occupy the court house before it had been accepted by the county is not a waiver of liquidated damages which had accrued at the time of such occupation, arising by reason of failure to complete within the specified time. Lawrence County v. Stewart Bros. [Ark.] 81 S. W. 1059.

57. A contractor who makes a gross bid for the entire performance of a given work, even though approximate estimates of the quantities of work to be done, which are materially wrong, have been prepared by the public authorities, is not entitled to extra compensation for the performance of work in excess of that called for by the estimate, and necessary to complete the improvement, but where there is an express representation in a plan or specification inserted for the purpose of showing bidders that something exists which will facilitate and render less expensive the performance of the work, a recovery may be had for the damages caused if it shall turn out that the representation is erroneous. Lentilhon v. New York, 92 N. Y. S. 897. Where a contract for laying a sewer provides that the contractor shall, as a part of the work for which compensation is stipulated, keep the same free from water and also provides that if the bottom of the trench is not a suitable foundation for the sewer that a suitable foundation should be made under the direction of the city engineer and extra compensation paid the contractor therefor, the contractor is not entitled to extra compensation for removing an unexpected quantity of water, where it appears that it is practicable though expensive to do so and the bed of the trench when water is removed is a suitable foundation. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368. Where specifications which are submitted to prospective bidders state the approximate amount of excavation which must be done to secure a foundation for a structure, but which also recites that the bidder must satisfy himself as to their accuracy, a contractor who has been compelled to do more excavation than is recited in the specifications in order to get a proper foundation is not entitled to extra compensation therefor. Conners v. U. S., 130 F. 609. Where a proposal for bids on cement to be furnished in a given year recites the approximate amount which will be required and the specifications which are made a part of the contract recite that the approximate quantities are only given as a guide to the bidder, but in no way to bind or limit the city as to the amount which is to be ordered, a contract to furnish all the cement which may be required during the year, obligates the contractor to furnish all cement required for municipal purposes in excess of the amount named as the approximate amount, at the contract price. National Bldg. Supply Co. v. Baltimore [Md.] 59 A. 726.

58. Damages as for a breach of contract may be recovered for an erroneous direction of a representative of a municipality authorized to give directions in the premises in superintending the execution of contract work, which are insisted on and necessitate the performance of more work than the contract, properly interpreted, requires; and the contractor has an election whether to refuse to proceed and recover upon a quantum meruit for the work already done, or to continue under protest and recover the value of the extra work upon a quantum meruit as the measure of damages for the breach of contract. Lentilhon v. New York, 92 N. Y. S. 897. Under Act of Congress of June 16, 1880, the court of claime has power to award compensation to a contractor for extra work performed by him under the direction of the commissioners of the District

extra work.[59] He cannot of course recover for extra services rendered at the instance of an officer having no authority to order the same.[60] A contract with a municipal corporation, in the absence of some ordinance or statute prohibiting it, is assignable.[61] An order by a contractor directing the municipality to pay a third person a designated sum out of a certain fund accruing to the contractor under a contract is payable only from such fund.[62] Where a contract with a city provided that the contractor should receive assessment certificates in full payment for the work done under the contract and such certificates were duly delivered to him, he can nevertheless recover the amount of the certificate where it develops the assessment is illegal.[63] Acceptance of a sum and receipt in full by the contractor may constitute an accord and satisfaction, precluding further recovery by him.[64] A public officer charged with the superintendence of a public improvement is liable for negligently and corruptly accepting inferior work.[65] A city is not liable for the torts of an independent contractor, though it may be liable for damages caused by the prosecution of an improvement intrinsically dangerous.[66] It is liable for the torts of its officers and agents in connection with

of Columbia. District of Columbia v. Barnes, 25 S. Ct. 401.

59. Mott v. Utica, 96 App. Div. 495, 89 N. Y. S. 168. Where a contractor is required to do extra work in carrying out his contract, the amount which he is entitled to recover for such extra work is the amount fixed by the contract for similar work. Beckwith & Quackenbush's Case, 38 Ct. Cl. 295.

60. Slaven's Case, 38 Ct. Cl. 574; Phoenix Bridge Co.'s Case, 38 Ct. Cl. 492. Where a contract provides that no claim for extra work or material will be allowed unless authorized in writing by the secretary of the treasury, a contractor cannot recover for work done under orders from the superintendent in charge, though beneficial to the improvement. Hyde's Case, 38 Ct. Cl. 649.

61. Where a contractor assigns a part of the money earned under his contract and the city pays the assignee, it cannot object to the assignment of the residue to another, on the ground of the division of the claim. Gordon v. Jefferson [Mo. App.] 85 S. W. 617. Section 277 Duluth City Charter does not forbid or render void an assignment of the money due or to become due on a contract for public work, made after the work has been completed. Appeal of City of Duluth [Minn.] 101 N. W. 1059.

62. An order by a contractor directing a city to pay a third person a designated sum "out of any money belonging to me or that may hereafter be due me * * * on the waterworks contract, either in the 20 per cent reserve or the amount found due on the final estimate," held payable only from the reserve created by the terms of the contract on the amount payable to the contractor on final estimate. There being no money in such fund, there can be no recovery on the order. Dickerson v. Spokane, 35 Wash. 414, 77 P. 730. In an action against a city on an order by a contractor directing the city to pay the payee named in the order a certain sum out of certain money earned under the contract, the plaintiffs cannot recover unless there is money in the fund on which the order is drawn, and the fact that the consideration for the order was work and labor furnished to the contractor in the prosecution of the public work does not entitle plaintiff to payment as preferred creditor, since the action is founded on the order and plaintiff's rights are measured thereby. It is not an assignment of the laborer's claim. Id.

63. Younker v. Des Moines [Iowa] 101 N. W. 1129; Iowa Pipe & Tile Co. v. Callanan [Iowa] 101 N. W. 141.

64. Acceptance of payment and receipt of voucher "in full for all charges, claims, adjustments, differences, or other alleged indebtedness" incident to the performance of a contract held to be a compromise and settlement of a contractor's claim for extra compensation under a contract. Phoenix Bridge Co.'s Case, 38 Ct. Cl. 492. Release signed by contractor held to be an accord and satisfaction as to disputed claim for payment under the contract. Uvalde Asphalt Pav. Co. v. New York, 99 App. Div. 327, 91 N. Y. S. 131.

65. Where a local improvement (paving) is to be paid for by assessing the cost against the abutting owner, the latter has a cause of action against the municipal officers who negligently or corruptly allow the contractor to do the work in such a manner that the completed improvement is inferior to that for which the abutting owner has been assessed. The acts of the officers in accepting the inferior work is ministerial and not judicial, and they are personally liable. The cause of action exists though the abutting owner may have had other remedies as by injunction to restrain a departure from the contract; or a writ of mandamus to compel the city to complete the contract in accordance with the terms, or by interposing objections to a judgment on the special assessment. Gage v. Springer, 211 Ill. 200, 71 N. E. 860.

66. One who undertakes to furnish the material and perform the labor for laying a water main in a city street, the city retaining no control over the method of doing the work, is an independent contractor and the city is not liable for his negligence in the performance of the work unless the negligence was with reference to some positive

the performance of a contract for a public improvement.[67] The contractor is not liable for the doing of acts which he has a right to do unless he does them in such a negligent and unreasonable manner as to unnecessarily injure another.[68] The contractor may recover damages for unreasonable delay on the part of a municipality in permitting him to proceed, or in performing conditions precedent to his duty to proceed, or unreasonable interference with the contract work, or with other contractors over whom control has been reserved.[69]

§ 6. *Remedies and procedure. A. By taxpayer.*[70]—A resident freeholder and taxpayer may maintain a suit to enjoin a municipality, and one with whom it has contracted, from performing an ultra vires or otherwise illegal contract,[71] or to restrain the municipality from accepting and paying for work not in accordance with the contract.[72] But he cannot, after completion of the improvement, resist assessment proceedings to pay the cost thereof, where he has failed to avail himself of a remedy provided by statute, while the contract is executory,[73] though it seems he may maintain a suit in behalf of the municipality to recover money paid out under an unlawful contract.[74]

duty of the city or the work itself was intrinsically dangerous, or if properly done was likely to create a nuisance. Bennett v. Mt. Vernon, 124 Iowa, 537, 100 N. W. 349.

67. Normile v. Ballard, 33 Wash. 369, 74 P. 566.

68. The town had authority to lay water mains in its streets and also had power to contract with a third person to do the work, and if in the course of the installation of the water mains, the contractor disconnected a private drain which a property owner had constructed across the street, and such disconnecting was necessary to the laying of the water main, the injury is damnum absque injuria. Bennett v. Mt. Vernon, 124 Iowa, 537, 100 N. W. 349.

69. Lentilhon v. New York, 92 N. Y. S. 897. Where a contractor is delayed in the performance of a contract by noncompletion of his contract by another contractor, he is entitled to receive the value of the services of his employees and machinery during the time they were idle, diminished by compensation received by them for other services performed during the period not engaged on the contract work. Cotton's Case, 38 Ct. Cl. 536. For any improper interference with the work of a contractor, the United States, like a private individual, is liable. Houston Co.'s Case, 38 Ct. Cl. 724. A contractor, doing work for a city is entitled to damages and extra expenses caused by default of the city engineer in locating the place for the erection of the improvement. (Sinking crib in lake.) O'Neill v. Milwaukee, 121 Wis. 32, 98 N. W. 963. Where by reason of the fault of a city engineer, a contractor has failed to complete a public improvement and the city demands that he do so, he does not waive his demand for damages sustained by reason of the engineer's fault, by proceeding to repair the faulty construction so caused, when he, at the time of so doing, notifies the city that he will claim such damages. Id.

70. See 2 Curr. L. 1293, n. 67.

71. Fox v. Jones [N. D.] 102 N. W. 161; Bowman v. Frith [Ark.] 84 S. W. 709. Price excessive. Ohio v. Fronizer, 2 Ohio N. P. (N. S.) 373. Where a taxpayer brings an action to enjoin a contractor from proceeding under an alleged illegal contract with a city and joins the city and its officers as parties defendant and praying that the contract be adjudged void, the fact that the contractor has abandoned performance under the contract does not deprive plaintiff of his right to have the action proceed where the contractor has done some work under the contract for which he will be entitled to pay if the contract is not adjudged invalid. Patterson v. Barber Asphalt Pav. Co. [Minn.] 101 N. W. 1064. A taxpayer cannot maintain a suit to restrain the performance of a contract between a city and another, on the ground that the other is an officer of the city and not authorized to contract with it, without joining the city as a party defendant. Eames v. Kellar, 92 N. Y. S. 665.

72. Taxpayers may maintain a bill in equity to enjoin a county board from accepting and paying for work done by a contractor which is not in accordance with his contract and which it is alleged the county board in collusion with the contractor intend to accept and pay for. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860.

73. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542. On an application for judgment against a property owner for an assessment made to pay for an improvement, he cannot object that the contract was not let within the time and in the manner required by statute where he has not taken advantage of the means provided for objecting to the validity of the contract before its performance by the contractor. In such a proceeding in the absence of evidence to the contrary it will be presumed that the contract was let within the time fixed by statute. Gage v. People, 213 Ill. 468, 72 N. E. 1108. One who has been assessed for a local improvement cannot resist the proceedings to enforce it on the ground that the terms of the contract under which the improvement was made has not been complied with. City of Chicago v. Sherman, 212 Ill. 498, 72 N. E. 396.

74. A taxpayer is entitled to equitable relief to recover money paid out by the officers of a municipal corporation on a contract not lawfully entered into, though his

(§ 6) *B. By bidder.*[75]—Where public officials directed by statute to award contracts to the lowest responsible bidder do not award a contract to the lowest bidder, mandamus will not lie to compel such award,[76] nor can the bidder maintain an action to recover the profits which he would have made had the contract been awarded to him.[77] His remedy is by a suit to enjoin the prosecution of the work and have the contract set aside and the matter referred back for further action.[78] Mandamus will not lie to compel a municipality to levy an assessment to pay for a public improvement at the suit of the contractor, where the city denies performance by the complainant, nor will the question be litigated in such proceedings.[79] An injunction will lie at the suit of the contractor to restrain a breach of a contract already entered into.[80]

(§ 6) *C. On the contract proper.*[81]—Where a contract with a municipality is illegal, there can be no recovery for work performed thereunder.[82] Statutory requirements constituting conditions precedent to the contractor's right to payment must be complied with.[83] Only such persons as are parties to the contract,[84] or for whose benefit it is made,[85] can maintain an action thereon. Officers of a municipality who enter into a contract solely for the municipality and as officers thereof cannot be held personally liable on the contract.[86] Where a contractor rejects material furnished by a subcontractor as not being in accordance with the subcontractor's contract and subsequently uses them, he is liable to the

injury in case the relief is not granted would be very slight and it appears that his private pecuniary interests other than in his capacity as a taxpayer would be seriously injured and that the latter motive is probably the controlling one in the institution of the suit. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

75. See 2 Curr. L. 1293.

70, 77, 78. City of Akron v. France, 4 Ohio C. C. (N. S.) 496.

79. City of Mt. Vernon v. State [Ohio] 73 N. E. 515. Mandamus will not lie to compel a municipality to levy a tax to carry out a contract between a city and a water company unless the right of the water company to the performance of the contract is clear and there is no other adequate remedy. Westminster Water Co. v. Westminster, 98 Md. 551, 56 A. 990.

80. Under statutes authorizing the state board of education to adopt a uniform system of text books for use in the public schools and also authorizing them to contract for the furnishing of the books so adopted, the publishers with whom the board have contracted can maintain a suit to enjoin a school board from substituting other books for those which they have contracted to furnish; provided the complainant suffers substantial injury or loss by reason thereof. Westland Pub. Co. v. Royal, 36 Wash. 399, 78 P. 1096; Eaton & Co. v. Royal, 36 Wash. 435, 78 P. 1093. In such a proceeding, the board cannot object to the legality of the contract. Rand, McNally & Co. v. Royal, 36 Wash. 420, 78 P. 1103.

81. See 2 Curr. L. 1293.

82. Ohio v. Fronizer, 2 Ohio N. P. (N. S.) 373.

83. Under Duluth Charter § 276, providing that payment to a contractor for public work shall not be made until an affidavit that all claims for work and labor have been paid shall be made by the contractor or his personal representative, the affidavit may be made by the contractor or his assignee if the latter has personal knowledge of the facts; and the term personal representatives does not mean executor or administrator, but those persons who stand in the place of or represent the contractor. Lowry v. Duluth [Minn.] 101 N. W. 1059.

84. Where a city enters into a contract with a water company to furnish water for purposes of extinguishing fires and to maintain hydrants, a resident of the city has no cause of action on the contract, against the water company for damages caused by a defective hydrant resulting in loss to his property from fire which could not be extinguished because of the defective hydrant. Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980. Where a contract for the construction of an improvement provides that the contractor shall hold the city harmless on account of all injuries sustained by any person by reason of the performance of the contract, a property owner abutting on the improvement who has been injured by the negligence of a subcontractor cannot maintain a suit against such contractor, since not a party to the contract and it is not made for his benefit. Haefelin v. McDonald, 96 App. Div. 213, 89 N. Y. S. 395.

85. A mortgagee of a water company which has a contract with a city to furnish water for fire protection at an annual price, where the contract provides that the said annual rentals shall be paid to a trustee of the company's bonds in case it shall appoint one, has such an interest in the contract as will support a suit to enjoin the city from maintaining a waterworks system in competition with the company's franchise. Columbia Ave. Sav. Fund Co. v. Dawson, 130 F. 152.

86. Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100.

owner for the value thereof, but not for the contract price.[87] In a suit against a municipality on a contract entered into in its behalf by its officers, it must affirmatively appear from the complaint that the contract is one the officers had authority to make,[88] and that it was entered into in the manner prescribed by statute.[89]

(§ 6) *D. On the contractor's bond.*[90]—In a suit on a contractor's bond, a surety cannot set up as a defense the want of power of the city to enter into the contract or that it was not made in the manner required by statute.[91] The obligation of the bond will be construed as a penalty and not an agreement for liquidated damages.[92] Nor are the sureties liable for liquidated damages stipulated for in the contract, where not made so by the terms of the bond.[93] The amount recoverable on a bond cannot exceed the penal sum named therein, nor can interest on the amount of the damages sustained be allowed where the aggregate exceeds the penalty of the bond.[94] Minor changes in the contract for the faithful performance of which the bond is given do not constitute such an alteration as will relieve the surety from liability.[95] Nor is he relieved from liability by payment to the contractor of the contract price before it is due.[96] The successors in office of the obligees in the bond can maintain a suit thereon.[97] In some cases

87. Wilson v. Dietrich [N. J. Eq.] 59 A. 251.

88. Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100.

89. A contract by a township not entered into in accordance with Burns' Ann. St. 1901, § 8085, designating the manner of entering into such contract is void. In an action on a contract, the plaintiff must affirmatively show that the contract was entered into in accordance therewith. In the absence of a showing it will be presumed the contract was not so entered into. Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100.

90. See 2 Curr. L. 1294.

91. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

92. A bond given by a contractor in the "penal sum" of a certain designated amount, conditioned for the performance by the contractor of numerous covenants, warranties, and guaranties in the contract for the faithful performance of which it was given, will be held to be for a penal sum and not liquidated damages, and the plaintiff in an action thereon must show the amount of his damages caused by a breach thereof. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097.

93. A surety on a contractor's bond conditioned "that the contractor" will complete the contract according to its terms and save the city from any cost, charge, or expense that may accrue or arise from the doing of the work specified in the contract" is not liable for liquidated damages specified in the contract for failure to complete the contract within the specified time, no such provision being incorporated in the bond. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368.

94. Board of Education v. National Surety Co., 183 Mo. 166, 82 S. W. 70.

95. Work done in an attempt by the contractor to bring the improvement up to his guaranty and pursuant to an understanding that it was so done held not an alteration of the original contract so as to relieve a surety on the contractor's bond from liability. Board of Education v. National Surety Co., 183 Mo. 166, 82 S. W. 70. Delay in deciding that heating plant installed in school would not heat the building, due to absence of suitable weather for making test and also due to time afforded to contractor to enable him to try to remedy defect held not so unreasonable as to release surety on contractor's bond. Id. Where a city pays a contractor a part of the consideration of a contract on the certificate of one engineer, instead of two as required by the terms of the contract, a surety on the contractor's bond cannot escape liability thereon on the ground that there was an alteration of the principal contract, where it appears that the provision that the payment should be made on the certificate of two engineers was inserted for the benefit of the owner alone and that the payments made were not greater than they should have been if a proper certificate had been exacted. City of Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. A surety on a contractor's bond is not released from liability thereon to a materialman by reason of an extension of time by the latter within which the contractor may pay his claim, where the materialman and contractor could have fixed the time when the materialman's claim should become due, without the consent of the surety. Chaffee v. United States Fidelity & Guaranty Co. [C. C. A.] 128 F. 918.

96. Chaffee v. United States Fidelity & Guaranty Co. [C. C. A.] 128 F. 918. Sureties on a contractor's bond are not relieved of liability thereon by reason of the fact that the secretary of the treasury, after the breach of the contract for the faithful performance of which the bond was given, paid to the contractor on account of money accruing on the contract an amount in excess of the damages claimed, though under 18 Stat. U. S. 481, he was authorized to retain an amount equal to the damages suffered. United States v. Ennis, 132 F. 133.

97. Where a public board is by legislative enactment reorganized, but the new or re-

the statutes provide that no action on the bond shall be maintained unless a notice of claim is served on the surety within a designated time.[98] A bond given by a contractor pursuant to Act of Congress of August 13, 1894[99] is liable for material delivered though not actually used in the improvement.[1] A subcontractor can maintain an action in his own name on such a bond,[2] but the mere fact that it is brought in the name of the United States for his benefit does not give the circuit court jurisdiction.[3]

(§ 6) *E. Under lien laws.*[4]—In some states the statutes provide that a subcontractor on filing a claim therefor may have a lien on money due the contractor under the contract,[5] and likewise one who furnishes labor or material to

organized board composed of different individuals from those on the old board, performs the same public duties as were imposed on the old board, the new board can maintain an action on a contractor's bond given to the old board. Board of Education v. National Surety Co., 183 Mo. 166, 82 S. W. 70.

98. Laws Minn. 1897, c. 307, § 3, providing that no action on a contractor's bond for work or labor furnished shall be commenced unless a notice of claim is served on the principal and surety within 90 days, has no application to a bond required and given pursuant to the provisions of the St. Paul home rule charter, since it, purporting to deal with such subject, supersedes the statute. Grant v. Berrisford [Minn.] 101 N. W. 940.

99. A contract to furnish all the necessary labor and material required in the construction of a building is a contract for the construction of a building within the purview of Act of Congress Aug. 13, 1894, c. 280, providing that any person who enters into a contract with the United States for the construction of any building shall give a bond with certain conditions. United States v. Murdock [Me.] 59 A. 60. Lubricating oil furnished to a contractor to be used for lubricating machinery used in the prosecution of a public improvement is not "material used in the prosecution of the improvement" for which the contractor's bond given pursuant to Act of Congress August 13, 1894, is liable. United States v. City Trust, Safe Deposit & Security Co., 21 App. D. C. 369.

1. Under Act of Congress Aug. 13, 1894, c. 280, providing that one who has supplied labor or materials to one who has contracted for the construction of a public building may maintain a suit on the contractor's bond, one who has contracted with the contractor to manufacture and supply certain materials, who manufactures but does not deliver them to the contractor has no cause for action on the bond. If delivered it is not necessary that they should actually be incorporated in the building. United States v. Murdock [Me.] 59 A. 60.

2. Where a contractor has given a bond under the Act of Congress of August 13, 1894, conditioned for the payment of all persons furnishing material or labor, to the contractor in the prosecution of the work, all persons who have furnished material and labor can maintain a suit on the bond in the name of the United States to recover compensation for the labor or material furnished, nor does the fact that the contractor associated a partner with him in the performance of the contract constitute an assignment of the contract or the firm a subcontractor so as to preclude a recovery on the bond. United States v. City Trust, Safe Deposit & Security Co., 21 App. D. C. 369.

3. A contractor's bond to the United States conditioned "to pay all persons supplying labor or materials" in carrying on a contract with the United States, given pursuant to 28 Stat. U. S., c. 280, which also authorizes an action thereon in favor of subcontractors in the name of the United States, gives rise to a cause of action in favor of the subcontractor and not the United States and hence the circuit court has no jurisdiction unless there is the requisite diversity of citizenship and amount in controversy. United States v. Barrett, 135 F. 189.

4. See 2 Curr. L. 1295.

5. Under Code Iowa § 3102, providing that a subcontractor who furnishes material or labor for the construction of a public building may have a claim therefor against the municipal corporation "not in excess of the contract price and providing the corporation shall not be required to pay any such claim before or in any different manner from that provided in the principal contract" provided a sworn statement is filed by the subcontractor within thirty days after furnishing the last item, a subcontractor who files a claim after the completion of the contract and after the municipal corporation, in garnishment proceedings, has disclosed that it is indebted to the principal contractor is not entitled to priority over such garnishee creditor, where at the time of the disclosure the corporation had no notice of the subcontractor's claim. Swearingen Lumber Co. v. Washington School Tp. [Iowa] 99 N. W. 730. A subcontractor who intends to assert a claim against funds due the contractor, under Code Iowa § 3102 must take notice of the terms of the contract between the municipality and the principal contractor and cannot recover against the city where by reason of the contractor's failure to perform the contract in accordance with the specifications there is nothing owing to the contractor, at the time of filing his claim, especially where the defect is in the quality of the materials furnished by the subcontractor. Modern Steel Structural Co. v. Van Buren Co. [Iowa] 102 N. W. 536. The right of subcontractors and materialmen to assert a lien against funds due to the contractor from a municipality is not affected by the fact that the contractor unjustifiably abandoned performance of his contract. Rockland Lake Trap Rock Co. v. Port Ches-

a subcontractor may have a lien on the funds due to the subcontractor from the contractor.[6] Generally the lien does not attach until a claim is filed.[7] A surety who completes the performance of a contract which has been abandoned by the contractor is not entitled to subrogation to the rights of the city under a contract authorizing it to complete and deduct the amount from the contract price so as to gain priority over a subcontractor claiming a lien on funds due the contractor.[8] The lien of a subcontractor may be discharged by the contractor by giving a bond to pay such sum as may be found due the subcontractor.[9]

PUBLIC LANDS.

§ 1. The Public Domain and Property Therein (1107).
§ 2. Lands Open for Settlement and Lands Granted or Reserved (1107). State Lands (1107). Swamp Land Grants (1108). Who May Locate and Acquire (1108).
§ 3. Mode of Locating and Acquiring Title (1109).
A. Federal Lands (1109). Railroad Grants (1109). A Grant of Indemnity Lands (1110). Sale of Town Lots (1111). Defective Titles and Confirmation Thereof (1111). Cancellations and Forfeitures (1111). Repayment of Purchase Price on Cancellation (1111). Jurisdiction of Land Officers and Courts (1112).
B. State Lands (1113). Grants and Patents (1114). Purchase of Additional Lands in Texas (1115). Rescissions, Cancellations, Forfeitures, and Reversions (1116). Adjudication of Title by Courts (1116).
§ 4. Interest and Title of Occupants, Claimants, and Patentees (1117).
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§ 5. Leases of Public Lands and Rights Thereunder (1121).
§ 6. Spanish and Other Grants Antedating Federal Authority (1122).
§ 7. Regulations and Policing, and Offenses Pertaining to Public Lands (1123). Cutting Timber on Public Lands (1123). Crimes and Offenses Against Public Lands (1124).

This topic includes both state and Federal lands. For obvious reasons the treatment of each is separate from the other within each section; but many prin-

ter, 92 N. Y. S. 631. Under N. Y. Code Civ. Proc. § 3418, a municipality is not liable for costs in a suit by a subcontractor to foreclose a lien on funds due a contractor for a public improvement where the amount of the subcontractor's lien together with costs aggregate more than the amount due the contractor from the municipality. Id.

6. Under Laws N. J. March 30, 1892 (Gen. St. p. 2078) one who furnishes material to a subcontractor for use on a public improvement is entitled to a lien, on giving the notice required by the statute, for his pay therefor to the extent that the contractor is at such time indebted to the subcontractor. Wilson v. Dietrich [N. J. Eq.] 59 A. 251. Where two lien claimants file their notice of claim of lien at the same time, they are entitled to a pro rata distribution of the funds in the hands of the contractor due and owing to the subcontractor. Id.

7. Under P. L. N. J. 1892, p. 369, the lien does not attach until the filing of the claim, and where prior to the filing of the claim the contractor had been adjudged a bankrupt, the trustee takes the money due the contractor free of any lien sought to be created by a subsequently filed claim. Garretson v. Clark [N. J. Eq.] 57 A. 414. Under this statute the lien attaches on the filing of the notice to all sums due or to become due to the contractor. The claimant has a lien irrespective of whether the contractor is proceeding with his contract or has abandoned it, though payment cannot be enforced until the completion of the contract since, until then, it cannot be ascertained what, if anything, is due the contractor. Pierson v. Haddonfield [N. J. Eq.] 57 A. 471. A notice of a claim of lien for work and material furnished in grading and macadamizing a village street served on the chairman of the committee on roads and bridges of the village board of trustees is a service on the head of the department having charge of the improvement. Rockland Lake Trap Rock Co. v. Port Chester, 92 N. Y. S. 631. Liens filed against a village on account of a public improvement need not be verified. Id.

8. Pierson v. Haddonfield [N. J. Eq.] 57 A. 471.

9. Where a contractor gives a bond to discharge a lien claimed by a subcontractor on funds due the contractor from a municipality, the subcontractor can maintain a suit in equity against the contractor and the sureties on his bond to establish his claim as against the contractor and also personal judgment against the surety for the claim so established. Mertz v. Press, 99 App. Div. 443, 91 N. Y. S. 264. The time limited by Laws 1882, c. 410, § 1824, for the bringing of actions to foreclose liens for work done under municipal contracts has no application to action on bonds given by contractor to discharge a lien claim filed by a subcontractor in accordance with Laws 1895, c. 605. Id.

ciples common to both may be found. Hence the reader is likely to profit by an examination of both.

§ 1. *The public domain and property therein.*[10]—"Public Lands" has no statutory definition and should be given such meaning in each case as comports with the intention of congress in the use of the term.[11] The state rather than its local municipalities owns public lands.[12] The mere right to acquire public lands even if it be preferential is not property in the lands.[13]

Proceeds of lands granted for a specified purpose may be used as directed by statute.[14]

§ 2. *Lands open for settlement and lands granted or reserved.*[15]—Portions of the public domain opened to settlement may be taken subject to prior valid settlement, reservation, or withdrawal.[16] Lands appropriated by the United States for special public purpose are not open to preemption while so used.[17] Lands made subject to sale and to the homestead laws are "public" lands subject to reservation.[18] A withdrawal of lands from preemption or homestead entry withdraws them for all purposes.[19]

State lands.[20]—Portions of the public domain such as navigable waters[21] necessary for public use or convenience are not open to settlement. In setting apart, specifically, to schools or other public use, certain of the public lands, irregulari-

10. See 2 Curr. L. 1295.

11. United States v. Blendaur [C. C. A.] 128 F. 910.

12. Note: The general rule is that title to tide lands is in the state and not in the municipal subdivision in which they lie unless expressly granted to such subdivision by the state (Commonwealth v. Roxbury, 9 Gray [Mass.] 451), and the mere establishment of municipal boundaries so as to include a portion of the land under the water is not sufficient to carry title to the land there situated (Bliss v. Ward, 198 Ill. 104, 64 N. E. 705; Kean v. Stetson, 5 Pick. [Mass.] 492; Russ v. Boston, 157 Mass. 60; Palmer v. Hicks, 6 Johns. [N. Y.] 133). There is nothing to prevent the state from granting title to the municipality. Coolidge v. Williams, 4 Mass. 140; Payne v. English, 79 Cal. 540, 21 P. 952. A grant of land within certain boundaries will include land under the water within such boundaries (Robins v. Ackerly, 24 Hun [N. Y.] 499), but water not expressly within the bounds of the grant will not pass (East Hampton v. Vail, 151 N. Y. 463, 45 N. E. 1030). See note to Mobile Transportation Co. v. Mobile [Ala.] 64 L. R. A. 333).

13. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845; Graham v. Great Falls Water Power & Town-Site Co. [Mont.] 76 P. 808. Laws 1893, p. 241, c. 99, providing for a lien on tide lands for the excavation of public waterways does not deprive owners abutting on such tide lands of property without due process; they having no interest but only a preferential right to purchase, and on purchasing take with notice of the lien. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845. Nor does it violate a constitutional provision that the credit of the state shall not be given to a private individual, it being provided that the state is not liable to discharge the lien. Id.

14. See 2 Curr. L. 1296, n. 2, 3. Laws 1852-53, p. 29, c. 13, conveying swamp lands to the counties in which they were situated and directing the appliance of the proceeds of a sale was not repealed by Laws 1858, p. 256, c. 132, requiring question of the use of proceeds for the erection of public buildings to be submitted to the people and its use for a purpose specified under the former act need not be submitted. Nelson v. Harrison County [Iowa] 102 N. W. 197.

15. See 2 Curr. L. 1296.

16. A homestead entry so long as it remains a subsisting entry, precludes a subsequent entry. Holt v. Murphy [Okl.] 79 P. 265. At the time of attaching of railroad grants to lands in California, certain lands within the place limits of the grants were within the boundaries of a Mexican grant, the plat and field notes of which were of record in the land department. Held, such lands were excluded from the grant though a subsequent survey excluded a part of them. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 662.

17. Lands appropriated for a military post cannot be preempted under the act of April 22, 1826, until such post is abandoned. Scott v. Carew, 25 S. Ct. 193.

18. The Flathead Indian lands from which the Indians were removed by Act June 5, 1872, and which were made subject to sale and to which the homestead laws were extended by Act Feb. 11, 1874, became part of the general public domain and as such were subject to be set apart as forest reservations in "public lands." United States v. Blendaur [C. C. A.] 128 F. 910.

19. Withdrawal of railroad lands which came within the place limits of a subsequent grant to another railroad excepted them from such subsequent grant though the line of the first railroad was so changed that the lands did not come within its grant. Northern Lumber Co. v. O'Brien, 134 F. 303.

20. See 2 Curr. L. 1298.

21. State v. Twiford, 136 N. C. 603, 48 S. E. 586.

ties may be disregarded except in particulars made essential.[22] In the absence of judicial interpretation of statutes reserving lands from location, the departmental construction will be adopted.[23] The privilege of taking state like Federal lands is subject to prior application or settlement. Thus, in Texas, school lands under lease[24] or which the records of the department show to have been sold[25] are not open to settlement. And a part owner of a lease of state school lands cannot waive the lease so as to authorize purchase of the lands.[26]

In that state a patent though containing an erroneous description and not filed in the county where the land is located withdraws it from the public domain.[27] An award to one who through uncertainty as to the boundaries had made settlement on the wrong section is sufficient to keep the land from being subject to a subsequent application.[28]

Swamp land grants[29] whereto the state has completed the title may be sold,[30] but if set aside for or granted to a particular incompatible public purpose they are withdrawn from settlement.[31]

Who may locate and acquire.[32]—In Texas only actual settlers[33] or owners[34] engaged in agricultural or stock raising pursuits[35] are entitled to purchase "additional" school lands. A sale to a minor is validated where after attaining majority he affirms the purchase by residing on the land.[36]

In California lands belonging to the state and suitable for cultivation can be sold only to actual settlers.[37] This provision is applicable to swamp lands.[38] The Chilocco reservation was not "within" the Cherokee Strip opened to settlement in 1893 and one who ran from there is qualified to enter lands though he

22. Under the laws of Texas, irregularities in the survey or noncompliance with statutory requirements relative thereto, or mistakes of the commissioner of the land office in failing to charge lands to the school fund in the adjustment on a partition between the state and such fund, does not affect the character of lands as school lands. Failure to comply with the statutory requirements with reference to application for survey or in returning certificate and field notes to the land office. Under Rev. St. 1895, art. 4265, providing that all public lands heretofore surveyed for the benefit of the public schools by virtue of any certificate, valid or void, are hereby declared to be lands belonging to the public schools. Eyl v. State [Tex. Civ. App.] 84 S. W. 607. The numbering and designation of sections reserved for the school fund need not be the personal act of the commissioner. He may adopt the designation and numbering of the surveyor's field notes. Id.

23. Courts will follow the construction placed upon such statutes by the attorney general. State v. Gunter [Tex. Civ. App.] 81 S. W. 1028.

24. Bradford v. Brown [Tex. Civ. App.] 84 S. W. 392. In trespass to try title where plaintiff made a prima facie case, the burden is on the defendant to show that a lease was still in force when plaintiff's application to purchase was made. Jones v. Wright [Tex. Civ. App.] 81 S. W. 569.

25. Application to purchase is properly rejected. Bradford v. Brown [Tex. Civ. App.] 84 S. W. 392.

26. Evidence of the transfer by one part owner is inadmissible in the absence of proof of his authority to act for the others. Jones v. Wright [Tex. Civ. App.] 81 S. W. 569.

27. Gilbert v. Mansfield [Tex. Civ. App.] 85 S. W. 830.

28. May v. Hollingsworth [Tex. Civ. App.] 80 S. W. 841.

29. See 2 Curr. L. 1297.

30. California swamp land cannot be sold by the state until it is segregated and surveyed by authority of the United States [Pol. Code, § 3441]. Polk v. Sleeper, 143 Cal. 70, 76 P. 819.

31. Lands granted to levee boards held not subject to pre-emption. West v. Roberts [C. C. A.] 135 F. 350, following earlier cases. See 2 Curr. L. 1298, n. 30.

32. See 2 Curr. L. 1299.

33. One who actually occupies and settles on land with an intention of making it his home is an actual settler. May v. Hollingsworth [Tex. Civ. App.] 80 S. W. 841.

34. One is an "owner" entitled to purchase additional land under Sayles' Ann. Civ. St. 1897, art. 4218fff, who has a contract to purchase and has taken possession and made valuable permanent improvements. Bone v. Cowan [Tex. Civ. App.] 84 S. W. 385.

35. Not the owner of town lots. Under Rev. Civ. St. 1897, art. 4218fff. Conn v. Terrell [Tex.] 80 S. W. 608.

36. Taylor v. Lewis [Tex. Civ. App.] 85 S. W. 1011.

37. Const. art. 3, § 7. Polk v. Sleeper, 143 Cal. 70, 76 P. 819.

38. Constitutional provision, art. 3, § 7, that lands belonging to the state suitable for cultivation shall be sold only to actual settlers, applies to swamp lands. Polk v. Sleeper, 143 Cal. 70, 76 P. 819.

was not on the 100-foot strip and was on the reservation before noon of the day set.[39]

§ 3. *Mode of locating and acquiring title. A. Federal lands.*[40]—An application has no validity if made when the land was not subject to entry.[41] Entry must be made in good faith[42] on a part of the public domain,[43] and for the entryman's own benefit.[44] If it be homestead entry, he must reside on his claim.[45] A prior sale by an entryman may raise a suspicion that his entry was not made for his own benefit but is insufficient to establish fraud.[46] The holder of a state certificate of homestead acquires no title as against the United States.[47]

The preferential right given to a successful contestant of preemptions is a mere privilege of becoming the first entryman,[48] and may be cut off by laws of congress.[49]

Railroad grants[50] take effect in praesenti and title passes on filing the map of definite location[51] and survey where that is necessary to identify the sections

39. McCalla v. Acker [Okl.] 78 P. 223.

40. See 2 Curr. L. 1300.

41. Hence, an appeal from the rejection of an application to enter land covered by a homestead entry is not a pending application that will attach on the cancellation of the previous entry, since the appeal does not create any rights not secured by the application. Holt v. Murphy [Okl.] 79 P. 265.

42. Entries made by fraud and for the purpose of obtaining title in violation of the laws of congress are void. United States v. Clark, 129 F. 241. Grantees of an entryman with notice of all the facts may be sued without joining the entryman. Id.

43. In order to make a valid mining location under Rev. St. U. S. § 2319, surface ground, including the vein or lode appropriated must be the property of the United States. In this case it had been patented to a railroad company. Traphaagen v. Kirk [Mont.] 77 P. 58. Application to enter land covered by a subsisting entry confers no rights upon the applicant. Holt v. Murphy [Okl.] 79 P. 265.

44. A contract by an entryman to convey a part of the land to be acquired in consideration of advancements to enable him to enter and make final proof is void. Collins v. Bounds [Miss.] 36 So. 689. A husband contracted to give his wife one-half of all property which he should acquire. He thereafter entered a timber culture claim which they resided on until long after he acquired a patent. Held, the agreement did not contravene the Federal law providing that such claims shall not be entered for the benefit of another than the entryman. McElhaney v. McElhaney [Iowa] 101 N. W. 90. A stipulation that one shall obtain a patent if he can, when the land is in the market for the benefit of the other to the extent of his interest, does not reveal a contemplated fraud on the government. Waring v. Loomis, 35 Wash. 85, 76 P. 510.

45. A homestead entryman who votes in a county different from that in which his claim lies is precluded from claiming at the same time a residence on the land for homestead purposes. Small v. Rakestraw, 25 S. Ct. 285.

46. Anthracite Mesa Coal-Min. Co.'s Case, 38 Ct. Cl. 56.

47. Code 1896, § 1813, providing that certificates issued pursuant to any act of congress should vest title in the holders could not operate to pass the title of the United States. Lowery v. Baker [Ala.] 37 So. 637.

48. Is not a property or vested right which may be enforced against the government [21 Stat. 140]. Graham v. Great Falls Water Power & Town-Site Co. [Mont.] 76 P. 808. Facts and review of proceedings before the land department held to show that a preemption entry was never canceled so as to entitle the contestant to a preferential right of entry. Id.

49. Act Cong. March 3, 1891 (26 Stat. 1098), providing for the confirmation of contested preemptions in the hands of bona fide purchasers cut off the preferential right given to a successful contestant by 21 Stat. 140. Graham v. Great Falls Water Power & Town-Site Co. [Mont.] 76 P. 808.

50. See 2 Curr. L. 1302.

51. Adverse possession as against the company commences from this date. Sage v. Rudnick, 91 Minn. 325, 100 N. W. 106.

Note: This decision reverses the court's former holding on the same case. Sage v. Rudnick, 91 Minn. 325, 98 N. W. 89. See 2 Mich. L. R. 630. The first decision followed Railroad Co. v. Olson, 87 Minn. 117, 94 Am. St. Rep. 693. In reversing the case on rehearing the court holds that Railroad Co. v. Olson is to be distinguished in principle, the parties before the land office not occupying the same relation to the property. The principal case seems to have the weight of authority in its support. It recognizes the well established principle that when a person is prevented from exercising his legal remedy by some paramount authority, the time during which he is so prevented is not to be counted against him in determining whether the statute of limitations has barred his right. Railroad Co. v. Olson, 87 Minn. 117, 94 Am. St. Rep. 693, 19 Am. & Eng. Enc. Law [2d Ed.] 216. In view of the facts, however, the court held the case did not come within the rule, as the title passed to the H. & D. R. Co. upon filing the map of definite location. Schulenberg v. Harriman, 21 Wall. [U. S.] 44, 22 Law. Ed. 551; St. Paul, etc., R. Co. v. Phelps, 137 U. S. 528, 34 Law. Ed. 767; Deseret Salt Co. v. Tarpey, 142 U. S. 241, 35 Law. Ed. 999; Railroad Co. v. Baldwin, 103 U. S. 426, 26

granted within place limits.[52] An exception from a railroad grant of such lands as shall be found to have been "granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of," includes lands upon which preemption filings had been made and accepted by the land office, though not paid for at the time of the attaching of the grant,[53] also lands upon which homestead applications were made between the filing and approval of the map of definite location;[54] lands occupied with an intention to acquire title under the homestead law though no application for entry thereof had been made;[55] and lands for which such application has been made and accepted whether occupied by the claimant or not.[56] The grant to Minnesota for the benefit of a railroad company is not void because of a prior application to enter the land as a homestead.[57]

A grant of indemnity lands[58] to the state becomes absolute upon acceptance and selection. Selection may be made by a legislatively authorized board,[59] and the right of selection is not impaired by settlers' entries until the time for selection has elapsed,[60] except as provided by the terms of the grant.[61]

Law. Ed. 578; Toltec Ranch Co. v. Cook, 191 U. S. 532, 48 Law. Ed. 291. While in most cases the government retains title to the public lands until issuance of a patent yet railroad grants are usually an exception to this rule as they are almost invariably grants in praesenti, a patent being issued merely as evidence of the title. Tiffany, Real Prop. §§ 371, 374; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 Law. Ed. 687; St. P. & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 35 Law. Ed. 77; Carter v. Ruddy, 166 U. S. 493, 41 Law. Ed. 1090; Langdeau v. Hanes, 21 Wall. [U. S.] 521, 22 Law. Ed. 606. The government therefore having no interest in the land, the title having passed to plaintiff's assignor, the courts and not the department of the interior had jurisdiction over the controversy between the two railroad companies. Peyton v. Desmond, 129 F. 1; Bockfinger v. Foster, 190 U. S. 116, 47 Law. Ed. 975; Parcher v. Gillen, 26 Land Dec. 34; Noble v. Union River Logging R. Co., 147 U. S. 165, 37 Law. Ed. 123. The plaintiff's right to bring ejectment not having been suspended, defendant's adverse possession had ripened into title.—3 Mich. L. R. 152.

Under act of congress granting lands to the Northern Pacific Railroad Company, such company acquired title to the odd numbered sections within the place limits of its grant on the filing of its map showing definite location of the line, without paying for the cost of survey, therefore the United States cannot recover for timber cut on land which when surveyed would show to be from such odd numbered sections. United States v. Losekamp [C. C. A.] 127 F. 959.

52. The Northern Pacific Railway Company did not acquire title under the grant of July 2, 1864, until identification of the odd numbered sections by survey. United States v. Montana Lumber & Mfg. Co., 25 S. Ct. 367. A private survey is inadmissible to show that when the land is surveyed it will be an odd numbered section and included in the grant to the company by the act of July 2, 1864. Id.

53. United States v. Oregon & C. R. Co., 133 F. 953.

54. Grant to the Oregon & California Railroad Company (Act June 25, 1866) 14 Stat. 239. United States v. Oregon & C. R. Co., 133 F. 953. Where the United States relies upon the private entry of a tract of land which was of record and uncanceled at the time of the attaching of a railroad grant under which the land was patented, to except such tract from the grant and as ground for the cancellation of the patent, it must be shown either that the entryman was then residing on the land or that he had made final proof and payment where without one or the other his right had been lost by abandonment. Id.

55. United States v. Oregon & C. R. Co., 133 F. 953.

56. Such lands being within the term "otherwise disposed of." United States v. Oregon & C. R. Co., 133 F. 953.

57. The certification to Minnesota for the benefit of a railroad company of land within the indemnity limits of the railway land grant act of July 4, 1886 (14 Stat. 87). United States v. Chicago, etc., R. Co., 25 S. Ct. 113.

58. Grant to the state of portions of the land within the abandoned military reservations by Act Cong. March 3, 1893 (27 Stat. 555), held to become absolute on its acceptance and selection of the lands according to the terms of the grant. State v. Tanner [Neb.] 102 N. W. 235.

59. The state may by legislative act accept the terms of the act of congress, granting to it lands as indemnity school lands and authorize the commissioner of public lands and buildings to select them. State v. Tanner [Neb.] 102 N. W. 235.

60. The Act of Congress, August 23, 1894, 28 Stat. 491, giving the preference right of entry to a bona fide settler on lands embraced within an abandoned military reservation in no way impairs the right of the state to select indemnity school lands within the time and manner contemplated by the grant. State v. Tanner [Neb.] 102 N. W. 235.

61. The rights acquired by settlement and recognized by the Act of July 5, 1884, or those of like character are the "lawful rights" which it is declared shall not be prejudiced by Act March 3, 1893, granting lands to the state as indemnity school lands. State v. Tanner [Neb.] 102 N. W. 235. The

Sale of town lots.[62]—"Claimant" in the Arizona statute providing the method of executing the trust of land entered by the county court pursuant to the United States statute relative to the entry of town sites applies to "occupants" and he is entitled to his deed only on compliance with such statute.[63]

Defective titles and confirmation thereof.[64]—The act confirming title in bona fide purchasers of land from a railroad company to which it was erroneously patented, and requiring the company to pay to the United States the government price of the land is valid,[65] and an action under such statute may be maintained in equity.[66] This act is not applicable to lands patented to the state in aid of railroad construction.[67] It is no defense that the company sold the particular land in controversy for less than the government price,[68] nor that the company has not yet received the full amount of land to which it is entitled; there being other lands within the indemnity limits from which it may select to make up the deficiency.[69] A bona fide purchaser from a railroad company of land excepted from its grant who makes application to purchase within ten months after the land is stricken from the company's list acts with reasonable promptness.[70]

The right to confirmation of a commutation entry which was invalid only because prematurely made in ignorance of the Act of March 3, 1891, is not defeated by the entryman's subsequent efforts to protect his grantee's title by taking a reconveyance and residing again upon the land.[71]

Cancellations and forfeitures.[72]—A breach of a condition annexed to a state grant that no more than a certain number of acres should be granted to any one person can be taken advantage of only by the United States,[73] and not by a private individual, especially after a long lapse of time and an apparent waiver of the conditions by the United States.[74]

Repayment of purchase price on cancellation.[75]—Error of the land department at the time of entry in receiving an unauthorized affidavit and taking the entryman's money entitles an assignee to recover on subsequent cancellation of the patent,[76] and the fact that the entry can be corrected will not defeat his right where

proviso in this act that no existing lawful rights arising under the public land laws shall be prejudiced does not inure to the benefit of one who settled on the land about the time of the passage of the act and prior to a survey and the time within which the state might make its selection. Id.

62. See 2 Curr. L. 1302.

63. Robertson v. Martin [Ariz.] 76 P. 614.

64. See 2 Curr. L. 1303.

65. Not void as creating an indebtedness by a retrospective statute. The debt having been created when the company sold the land to which it had no right. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 651. Mortgages executed by the Southern Pacific Railroad Company held not to constitute the mortgagee's bona fide purchasers. Id., 133 F. 662. Purchaser of land certified by the secretary of the interior to the State of Minnesota in aid of railway construction and conveyed to a railroad company is a purchaser in good faith protected by Act March 3, 1887, though the certification was erroneous and the land might have been recovered by the government while it was in the hands of the railway company. United States v. Chicago, etc., R. Co., 25 S. Ct. 113. A state corporation is a citizen of the United States within the meaning of the Act of March 3, 1887. Ramsey v. Tacoma Land Co., 25 S. Ct. 286.

66. Act March 3, 1887 [24 Stat. 556]; Act March 2, 1896 [29 Stat. 42]. United States v. Oregon & C. R. Co., 133 F. 953. Action to recover from a railroad company the purchase price of land and for the cancellation of the patents to such lands as have not been conveyed. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 651.

67. Protection afforded by Adjustment Act March 3, 1887, to bona fide purchasers from any grantee railroad company to whom lands had been erroneously patented does not extend to one who purchased after the date of that act unearned lands included in the grant of May 12, 1864, to the state of Iowa. Knepper v. Sands, 194 U. S. 476, 48 Law. Ed. 1083.

68, 69. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 662.

70. Ramsey v. Tacoma Land Co., 25 S. Ct. 286.

71. Right to confirmation under act of June 3, 1896. Hill v. McCord, 25 S. Ct. 96.

72. See 2 Curr. L. 1304.

73, 74. Nichols v. Southern Or. Co., 135 F. 232.

75. See 2 Curr. L. 1304, n. 12 et seq.

76, 77. Anthracite Mesa Coal-Min. Co.'s Case, 38 Ct. Cl. 56.

the entryman cannot be found to make the necessary affidavit.[77] An assignee before entry cannot recover.[78]

Jurisdiction of land officers and courts.[79]—The land department retains jurisdiction over public lands[80] until the issuance of patent or such other act as passes the title of the United States.[81] Except as to possessory rights, this jurisdiction is exclusive[82] and cannot be affected by state laws.[83] But where rights are asserted in good faith and on colorable grounds, a court may enjoin removal of timber prior to patent issued.[84] Until legal title has passed out of the United States, the interlocutory rulings and decisions of the land department are open to review or reversal[85] after notice to the parties in interest and due opportunity for a full hearing;[86] but the final judgment of the land department in matters of fact properly determinable by it is conclusive when brought to notice in a collateral proceeding.[87] After legal title has passed from the government, the interior department has no jurisdiction to determine controversies between individual claimants concerning title or right to possession,[88] and the pendency of a controversy before that department will not suspend the running of the statute of limitations in favor of an adverse claimant.[89] A court of equity will not review proceedings had before the land department,[90] nor entertain disputes which by act of congress the land department is given jurisdiction to determine.[91] Mandamus will not issue to review the judicial discretion of officers of the interior department.[92] A finding of fact in a state court is conclusive on the Federal supreme court, on a writ of error to the

78. Where one prior to entry conveys a portion of the public lands his grantee takes nothing and where the grantor subsequently makes entry which is canceled for an error of the land officers, the grantee cannot recover the money paid. Anthracite Mesa Coal-Min. Co.'s Case, 38 Ct. Cl. 57.

79. See 2 Curr. L. 1305.

80, 81. Peyton v. Desmond [C. C. A.] 129 F. 1.

82. The courts have no jurisdiction in controversies involving equitable rights in public lands, except in possessory actions, so long as title remains in the United States. Sims v. Morrison, 92 Minn. 341, 100 N. W. 88. Courts have no jurisdiction to determine controversies between claimants of public lands the legal title of which has never passed out of the United States by patent. Northern Lumber Co. v. O'Brien, 124 F. 819.

83. A state law purporting to regulate the final receipts issued by the land department cannot restrict the authority of the officers of that department in the disposition of public lands or withhold from the grantees of the United States any of the incidents of the transfer of the government title. Peyton v. Desmond [C. C. A.] 129 F. 1.

84. Northern Lumber Co. v. O'Brien, 124 F. 819.

85. Peyton v. Desmond [C. C. A.] 129 F. 1. One who purchases from an entryman on faith of a final receipt or patent certificate, before the issuance of a patent, takes only the equity of his vendor subject to the authority of the land department while title remains in the United States, to cancel the entry if it is found to be based on error which if not corrected, will lead to the transfer of the government's title to one not entitled to it. Id.

86. The power to review its prior rulings and to cancel existing entries while the legal title remains in the United States is not unlimited or arbitrary. Peyton v. Desmond [C. C. A.] 129 F. 1.

87. Peyton v. Desmond [C. C. A.] 129 F. 1. In issuing a patent. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552. A finding by the land department on an issue as to whether certain persons are bona fide purchasers of contested pre-emptions is conclusive on the state courts. Graham v. Great Falls Water Power & Town-Site Co. [Mont.] 76 P. 808. The conclusiveness of a finding by the land department of the sufficiency of settlement, residence, and improvements, is not affected by a later decision in a second contest between the same parties that the alienation of the land was a bar to supplemental proofs offered in aid of a premature commutation entry. Hill v. McCord, 25 S. Ct. 96.

88. Sage v. Rudnick, 91 Minn. 325, 100 N. W. 106.

89. Sage v. Rudnick, 91 Minn. 325, 100 N. W. 106. St. Paul, M. & M. R. Co. v. Olson, 87 Minn. 117, 91 N. W. 294, distinguished.

90. Where parties submit their cause to the Federal land department and are given a full and fair hearing, equity will not set aside the decision upon an allegation in a petition that perjury was committed during the hearing. Cagle v. Dunham [Okl.] 78 P. 561.

91. Rights of grantees of the Northern Pacific Railway Co. of land claimed to be within the indemnity limits of the land grant of July 2, 1864 (13 Stat. at L. 365). Humbird v. Avery, 25 S. Ct. 123.

92. Evidence held to show that the secretary of the interior had not abused his discretion in deciding that an applicant had failed to show by his application that the land was open for settlement. Riverside Oil Co. v. Hitchcock, 21 App. D. C. 252.

state court.[93] In ejectment in the Federal courts, an equitable title cannot be set up to defeat the legal title by impeaching a patent. This rule is not affected by a state statute under which such defense would be permissible.[94]

(§ 3) *B. State lands.*[95]—Subject to constitutional modes of disposal,[96] it can be accomplished only pursuant to statutory mode or by direct legislative act and where the disposal of title is governed by special laws, a grant except under such laws is void.[97] The legislature cannot provide for the disposition of school lands to which the state has acquired a perfect title otherwise than as directed by the constitution.[98]

In Texas the legislature must provide for the sale of school lands in such manner as to be most beneficial to the school fund.[99] In that state the county in which school lands are located has a restricted power of sale[1] which cannot be committed, without restriction, to a third person.[2] A sale by one to whom such power was committed is void whether made to one with notice of such procedure[3] or to a purchaser in good faith.[4] The county is not liable on the warranties in the deed executed by such commissioner.[5]

In Washington, if the land be heavily timbered, land and timber must be sold separately.[6] The Kentucky statute providing that one desiring to appropriate vacant lands may obtain from the county court an order authorizing him to enter and survey not to exceed 200 acres does not limit the number of orders the same person may obtain.[7] The three years' residence required under the grant to persons who arrived in the state of Texas, prior to 1837 need not have been subsequent to the issue of the conditional certificate.[8] In perhaps all the states where there are public lands, a survey or other identification of the land is the first act,[9] and while it subsists[10] one location and survey withdraws the land

93. That when a commutation entry under the homestead laws was allowed neither the entryman nor the land officers had knowledge of the amendment of Rev. St. § 2301, by the act of March 3, 1891, making such commutation premature. Hill v. McCord, 25 S. Ct. 96.

94. Law and equity are separate in the Federal courts. Tegarden v. Le Marchel, 129 F. 487.

95. See 2 Curr. L. 1306.

96. State v. Tanner [Neb.] 102 N. W. 235.

97. The "Cherokee Lands" in North Carolina have always been kept separate from other public lands of the state and are not subject to acquisition under the general entry and grant laws. Bealmear v. Hutchins, 134 F. 257. Provision of Rev. St. N. C. 1837, c. 42, that it shall not be lawful for an entry taker to receive an entry for lands lying (description) except the vacant and unsurveyed lands, etc., if construed to authorize an entry of these lands under the general entry and grant laws, casts the burden upon one claiming under such entry to show that the land was "vacant and unsurveyed." Id.

98. Sess. Laws 1901, p. 529, c. 115, providing for the disposition of school lands to which the state has acquired perfect title otherwise than is provided by Const. art. 8, §§ 1, 8, is void. State v. Tanner [Neb.] 102 N. W. 235.

99. Under Const. art. 7, § 4, provlding that such lands shall be sold under such regulations and at such times as may be provided by law. Conn v. Terrell [Tex.] 80 S. W. 608.

1. Under Const. art. 7, § 6. Logan v. Stephens County [Tex. Civ. App.] 81 S. W. 109; Id. [Tex.] 83 S. W. 365.

2. Rev. St. 1895, § 794, gives the court power to appoint a commissioner to sell but declares the court is not authorized to dispose of such lands in any other manner than as provided by law. Logan v. Stephens County [Tex. Civ. App.] 81 S. W. 109.

3. Const. art. 7, § 6 and Rev. St. 1895, art. 794. Logan v. Stephens County [Tex. Civ. App.] 81 S. W. 109.

4. Logan v. Stephens County [Tex.] 83 S. W. 365. Want of power exercised by the commissioner being one of the links in the chain of title, a purchaser is charged with notice of it. Id. [Tex. Civ. App.] 81 S. W. 109.

5. Logan v. Stephens County [Tex. Civ. App.] 81 S. W. 109.

6. Act 1897, c. 89, p. 235, § 11; Laws 1903, p. 103, c. 74; Laws 1901, p. 308, c. 148, construed. State v. Callvert [Wash.] 79 P. 791.

7. Lockard v. Asher Lumber Co. [C. C. A.] 131 F. 689.

8. Buster v. Warren [Tex. Clv. App.] 80 S. W. 1063.

9. **In Kentucky** the first person to enter and survey public land acquires title, under St. 1903, § 4704, providing that every survey, entry, or patent shall be void so far as it embraces land previously entered, surveyed, or patented. Gray v. Peay, 26 Ky. L. R. 989, 82 S. W. 1006.

10. A location and survey under an original certificate is not rendered void by the fact that a survey was made under a dupli-

from others. When entry is made on lands already publicly surveyed, the affidavits of occupancy and improvements of a homestead claimant must identify the land[11] and be filed in the proper land office. Entries must be before an officer authorized to take them;[12] mere irregularities of the owner of an original certificate to enter land,[13] or of the surveyor in making the survey, will not invalidate a location.[14] Applicants must comply with proper regulations adopted by the land commissioner.[15] School lands in Texas regularly classified and valued need not be sold for less than the valuation fixed though the "corrected and revised list of all unsold school lands" show school lands in a certain county to be valued at less.[16] Mandamus will lie to compel the issuance of a patent or certificate to one clearly entitled,[17] no exercise of discretion being involved.[18] Mandamus will not issue to compel the acceptance of an application where the right to purchase depends on a question of fact,[19] or where the records in the commissioner's office show the land to be claimed by another than the person seeking to compel the sale.[20]

Grants and patents.[21]—A patent is only prima facie evidence that steps leading up to its issue have been taken.[22] An original land patent is not void because not sealed with the lesser seal of the commonwealth.[23] A grant of land under water

cate certificate under a mistaken belief that the original was lost, the latter survey having been abandoned when the original was found. Eyl v. State [Tex. Civ. App.] 84 S. W. 607.

11. McClallahan v. Marshall [Tex. Civ. App.] 80 S. W. 862. Must be filed in general land office. Id.

12. Laws of North Carolina in force in 1852 (Rev. St. 1837, c. 42), authorizing justices of the peace of a county to elect one person to receive entries of lands within such county, does not authorize him to receive entries for lands in another county. A grant based on such an entry is void. Bealmear v. Hutchins, 134 F. 257. Pub. Laws N. C. 1850-51, p. 99, does not confer jurisdiction on an entry taker living in one county to take entries of lands in another. Id.

13. The failure of the owner of a certificate for the entry of public land to make a written application or entry describing the land applied for. Eyl v. State [Tex. Civ. App.] 84 S. W. 607.

14. Failing to conform to the description embraced in an entry and application which substantially cover the body of land segregated. Eyl v. State [Tex. Civ. App.] 84 S. W. 607. That surveys made under a certificate of entry are not contiguous is an irregularity which the state alone can take advantage of. Id.

15. The regulations requiring applications to be in writing and on blanks furnished. Held that one having knowledge of such rule cannot claim to be a purchaser through letters and telegrams. Hornbeck v. Terrell [Tex. Civ. App.] 85 S. W. 485.

16. Wilson v. Smith [Tex. Civ. App.] 82 S. W. 818.

17. Note: When one has complied with the law in applying to purchase state lands, he is entitled to a deed or patent and mandamus will lie to compel its issue. Hubbard v. Auditor General, 120 Mich. 505, 79 N. W. 979. So it will lie to compel a commissioner of the general land office to reinstate relator as a purchaser of certain public lands, the award to him having been canceled (Hazelwood v. Rogan, 95 Tex. 295, 67 S. W. 80), and to force an entry taker to receive entry where he wrongfully refuses (Rainey v. Aydelette, 51 Tenn. 122). It will not lie, however, to compel the execution of a patent where a prior patent has been issued to another. Smithee v. Mosely, 31 Ark. 425. The ministerial duty of delivering a patent to a person entitled may be compelled by mandamus. United States v. Schurz, 102 U. S. 378, 26 Law. Ed. 167. See note to State v. Gardner [Wash.] 98 Am. St. Rep. 873.

18. In Michigan the discretion of the commissioner of the state land office in issuing a certificate of homestead entry is not reviewable on mandamus. Under Act No. 107, p. 154 of 1899, he may issue the certificate when "in his judgment the application is made in good faith." Beebe v. State Land Office Com'r [Mich.] 100 N. W. 128. **In Kansas** the county treasurer in receiving and receipting for purchase money of school lands acts ministerially and must accept a receipt for payment from one who presents a proper transcript from the probate judge though another has purchased the same lands. Scott v. Schwab [Kan.] 78 P. 443.

19. Commissioner asserted that the land had been previously sold to another. Clark v. Terrell [Tex.] 81 S. W. 4.

20. Under Act April 15, 1901, p. 253, c. 88, amending Act Feb. 23, 1900, p. 29, c. 11, § 6. Juencke v. Terrell [Tex.] 82 S. W. 1025.

21. See 2 Curr. L. 1310.

22. Proof that the affidavit of occupancy had not been so filed rebuts the presumption that precedent steps to authorize the issuance of a patent had been taken. McClallahan v. Marshall [Tex. Civ. App.] 80 S. W. 862.

23. Howdashell v. Krenning [Va.] 48 S. E. 491. A land office copy of a patent is admissible though it fails to show that the lesser seal of the commonwealth had ever been attached to the original. Virginia Coal & Iron Co. v. Keystone Coal & Iron Co., 101 Va. 723, 45 S. E. 291.

with the privilege to improve and fill in the same takes effect at the date of the grant.[24] Patents issued for land already located for and appropriated to the general school fund at the time of the locations and surveys upon which said patents were based are void,[25] and the unauthorized act of the commissioner of the general land office in issuing such patents does not operate as an estoppel against the state.[26]

Purchase of additional lands in Texas.[27]—An applicant for the purchase of additional land need not be an actual settler on the land applied for,[28] especially if it be a detached tract of less than 640 acres.[29] The Decker healing act validated an award of a home section as well as of additional lands to one who within six months after filing his application made actual settlement on the land.[30] The first applicant is entitled to the land.[31] An application for the purchase of additional lands must show the location of the home section of the applicant and that he is a resident thereon,[32] and must not be for more land than is authorized to be sold to one person,[33] or for land subject to a lease.[34] Mere clerical errors[35] or error in the name of the applicant not causing uncertainty will not invalidate it.[36] An award is prima facie evidence that all requirements of the law have been complied with, including classification and appraisal,[37] but not that the land is within the required distance of land owned and resided on or purchased and settled on by the applicant.[38] After an award of school lands, only the state can raise the issue of collusion.[39] An abandonment of actual residence and bona fide settlement on state school lands is only excused if caused by fear of death or serious bodily harm,[40] but it need not be such as would be given way to only by a man of ordinary prudence and courage.[41] Jurisdiction to determine whether an applicant is an actual settler is vested in the land department.[42]

24. A deed by the riparian commissioners of land below highwater mark "with the right and privilege * * * to exclude the tide water from so much of the land * * * as lies under the water by filling in or otherwise improving the same and to appropriate the lands under the water to the 'grantees' exclusive use" passes title to the land prior to the filling in. Burkhard v. Heinz Co. [N. J. Err. & App.] 60 A. 191.

25, 26. Eyl v. State [Tex. Civ. App.] 84 S. W. 607.

27. See 2 Curr. L. 1299, n. 45 et seq.

28. The right of an applicant to purchase additional lands is not impaired by the fact that in his application he, by mistake, described himself in the affidavit as an actual settler on such additional lands. Under Sayles' Ann. Civ. St. 1897, art. 4218fff. Ratliff v. Terrell [Tex.] 80 S. W. 600.

29. Gen. Laws 27th Leg. p. 253, c. 88, was not repealed by Laws 27th Leg. p. 292, c. 88, §§ 7, 9. McGrady v. Terrell [Tex.] 84 S. W. 641. Whether detached at the time the statute so providing was enacted or subsequently became detached [Gen. Laws 27th Leg. p. 253, c. 88]. Id.

30. Evidence held sufficient to show actual settlement on the home section within six months after the application to purchase. Taylor v. Lewis [Tex. Civ. App.] 85 S. W. 1011.

31. In a school land case, evidence held to show that plaintiff's application to purchase reached the general land office first. Coody v. Harris [Tex. Civ. App.] 81 S. W. 1233.

32. "Settlement is on No. 4," is insufficient. Goethal v. Read [Tex. Civ. App.] 81 S. W. 592.

33. Goethal v. Read [Tex. Civ. App.] 81 S. W. 592.

34. An application to purchase filed prior to the expiration of a lease is void and action on it by the land commissioner after the expiration of the lease confers no title on the applicant, a valid application having been filed in the meantime. Jones v. Lohman [Tex. Civ. App.] 81 S. W. 1002.

35. In one place omitting the word "land" but showing that the applicant desired to purchase the "survey" in question for a home is admissible. Goethal v. Read [Tex. Civ. App.] 81 S. W. 592.

36. Application by "Wm. Reed" is admissible in an action to establish title brought by W. M. Read where the record identified the plaintiff as the applicant. Goethal v. Read [Tex. Civ. App.] 81 S. W. 592. "Read" and "Reed" are idem sonans. Id.

37. Stolley v. Lilwall [Tex. Civ. App.] 84 S. W. 689. Proof of an award by the land commissioner establishes a prima facie case of ownership. Holt v. Cave [Tex. Civ. App.] 85 S. W. 309.

38. Knippa v. Brown [Tex. Civ. App.] 82 S. W. 658. In trespass to try title, he must show these facts in order to establish a prima facie case. Id.

39. May v. Hollingsworth [Tex. Civ. App.] 80 S. W. 841.

40, 41. Jones v. Wright [Tex. Civ. App.] 81 S. W. 569.

42. As to abandonment. Angle v. Terrell [Tex.] 80 S. W. 231.

Rescissions, cancellations, forfeitures, and reversions.[43]—Generally speaking a grant or patent may be rescinded and canceled by the state for lack of any essential fact or act necessary to gain title.[44] One may contest the right of another to purchase swamp and over-flowed land though he shows no right in himself to purchase, nor in any way connects himself with it.[45] The date on which the constitution took effect is to be excluded in determining whether certificates required to be surveyed and returned to the land office within five years are barred.[46] In Arkansas the county court may, in its discretion, reject a sale of school land, but cannot exercise its authority in such manner as to prohibit a sale.[47] The grant of Texas school lands to Greer county reverted to the state when it was determined that the territory embraced within the county was not within the state but was in Oklahoma.[48]

Adjudication of title by courts.[49]—The superior court of California does not get jurisdiction of a state land contest by reason of a reference of the contest by the surveyor general unless action is also begun.[50] A power in a court to entertain an appeal from the board of land commissioners involving the prior right of purchase of tide lands and to try the case de novo does not give it power to determine what papers were on file in the commissioner's office.[51] The power of the Oregon land commissioners to settle disputes between occupants gives them power to waive a forfeiture by a purchaser of school land for nonpayment of the purchase-money notes.[52] In New York the court of claims has jurisdiction to determine the rights of one claiming under a patent without warranties and to disregard the defense of lack of warranty.[53] In New Jersey the validity of a grant of tide lands by riparian commissioners is to be determined at law rather than in equity.[54]

The defendant in a state land contest is not required to come into court and affirmatively set up his rights where the complainant does not state a prima facie case.[55] But if the complaint states facts which if proved would defeat his right, he must affirmatively aver and prove facts which entitle him to purchase.[56] It is

43. See 2 Curr. L. 1312.

44. See ante this section. Excessive subgrant by state as breach of condition in grant to it. See Nichols v. Southern Or. Co., 135 F. 232.

45. Polk v. Sleeper, 143 Cal. 70, 76 P. 819.

46. Const. 1876, art. 14, § 2, and Rev. St. 1879, arts. 3880, 3881, 3882, fixing April 18, 1876, as the date on which the constitution took effect. Eyl v. State [Tex. Civ. App.] 84 S. W. 607.

47. Under Kirby's Dig. §§ 7700, 7708. Ex parte Young [Ark.] 85 S. W. 1133.

48. The legal title to Texas lands patented to Greer county by Gen. Laws Texas 1883, c. 55, under the mistaken supposition that this county was Texas territory did not pass to the corporation subsequently organized out of such territory by Act Cong. May 4, 1896. On disappearance of the de facto county the title vested in the state of Texas. Greer County v. State, 25 S. Ct. 437.

49. See 2 Curr. L. 1313.

50. This must be followed by the commencement of an action and filing of a complaint showing that for some reason the defendant's certificate of purchase is invalid. Sharp v. Salisbury, 144 Cal. 721, 78 P. 282. Affidavit for the publication of summons in an action to foreclose the rights of the holder of a certificate for state lands held not to show that the foreclosure and judgment thereon were fraudulent. Id.

51. Whether the original application to purchase had been taken away and a forged one substituted. Squire v. Sidney [Wash.] 79 P. 469.

52. Hills' Ann. Laws 1892, §§ 3607, 3608. Robertson v. Low, 44 Or. 587, 77 P. 744. Waived by subsequently accepting payment though another application to purchase had been filed in the meantime. Id. Facts held to show waiver of forfeiture by a state. Miller v. Wattier, 44 Or. 347, 75 P. 209.

53. Wheeler v. State, 97 App. Div. 276, 90 N. Y. S. 18. Evidence held to show that the town of Hempstead had parted with its title to the land in question. Sandiford v. Hempstead, 97 App. Div. 163, 90 N. Y. S. 76. Evidence held to show that its title to "Post Lead" was extinguished by the fencing order of the town in 1659. Id.

54. Whether a grant of tide lands was ultra vires. Attorney General v. Central R. Co. [N. J. Eq.] 59 A. 348.

55. The fact that defendant has a certificate of purchase, that the plaintiff protested against the issuance to him of any further evidence of title and that an order for reference has been made is insufficient. Sharp v. Salisbury, 144 Cal. 721, 78 P. 282; Polk v. Sleeper, 143 Cal. 70, 76 P. 819. The defect in the affidavit or application to purchase relied on must be alleged. Id.

56. Polk v. Sleeper, 143 Cal. 70, 76 P. 819.

presumed that the commissioner of the general land office performed his duty with reference to the classification and appraisement of school lands actually sold.[57] The finding of fact of the death of the grantee of a conditional headright certificate by the county board of land commissioners and the issuance of an unconditional certificate to his administrator is not conclusive on the heirs of such grantee.[58]

§ 4. *Interest and title of occupants, claimants, and patentees.*[59] *A. Federal lands. Possessory rights.*[60]—The power of the United States to dispose of its public lands is absolute and the right of its grantee to possession on receiving the legal title cannot be obstructed or affected by any claim made under the law of any state.[61] The possession and improvements of a homestead entry man[62] or occupant of public lands[63] are valuable rights which he may legally convey. A homestead entryman acquires the privilege of pre-emption and the right and power to protect his entry from intrusion or trespass.[64] While as against the government he, perhaps, acquires no vested interest in the land allotted to him.[65] As against all others he acquires the right to an absolute and undisturbed possession.[66] An occupant has a right relative to which he may contract.[67] An entry on land already patented to another is a trespass.[68] It confers no rights on the occupant,[69] and a contract based on such entry is without consideration.[70] Statutes relative to possessory rights of one in possession of public lands with a view to acquiring title thereto do not apply to unoccupied land owned by an individual.[71]

The provisions in the law in restraint of alienation by the homestead entryman are strictly construed.[72] The alienation prohibited is an absolute alienation of the land or a part thereof.[73] A sale of standing timber is not an alienation of part of the land within the meaning of this law,[74] nor is a lease of short duration and for a specific purpose, e. g., lease of timber for turpentine purposes.[75] Such a lease is not against the policy of the government which is designed to secure for the homesteader the exclusive benefit of his homestead right.[76]

The pre-emptor has a right to assign after entry.[77]

Adverse possession[78] does not run against a patentee until patent issued,[79] but as against an action to recover land granted by congress to a railroad company, it runs from the time the company's title is perfect and nothing remains except to receive the final certificate.[80] Adverse possession will not give title to the right of

57. He being required by law to do so, a plaintiff in trespass to try title is not required to prove that the lands were classified and appraised. Corrigan v. Fitzsimmons [Tex.] 80 S. W. 989.

58. Buster v. Warren [Tex. Civ. App.] 80 S. W. 1063.

59. Compare ante, § 1.

60. See 2 Curr. L. 1314.

61. Claim to improvements made by one in possession as against a patentee. Tegarden v. Le Marchel, 129 F. 487.

62. Holloway v. Miller [Miss.] 36 So. 531.

63. One in possession of public lands with an intention of acquiring title. Waring v. Loomis, 35 Wash. 85, 76 P. 510.

64. Orrell v. Bay Mfg. Co., 83 Miss. 800, 36 So. 561.

65, 66. Orrell v. Bay Mfg. Co., 83 Miss. 800, 36 So. 561.

67. Is based upon a consideration. Waring v. Loomis, 35 Wash. 85, 76 P. 510. Description of the land held sufficient as between the parties to a contract relative to their rights. Id.

68. Entry on land patented to a railroad company is ineffectual for the purpose of initiating a valid mining claim. Traphaagen v. Kirk [Mont.] 77 P. 58.

69. One in actual occupancy of land patented to a railroad company has no preferential right to purchase it by virtue of his occupancy. Cavanaugh v. Wholey, 143 Cal. 164, 76 P. 979.

70. Cannot be specifically enforced under Civ. Code, § 4417, providing that specific performance of a contract cannot be had unless it is based on an adequate consideration. Traphaagen v. Kirk [Mont.] 77 P. 58.

71. Howard v. Perrin [Ariz.] 76 P. 460.

72, 73, 74, 75, 76. Orrell v. Bay Mfg. Co., 83 Miss. 800, 36 So. 561.

77. Anthracite Mesa Coal-Min. Co.'s Case, 38 Ct. Cl. 56

78. See 2 Curr. L. 1315.

79. Tegarden v. Le Marchel, 129 F. 487.

80. Iowa Railroad Land Co. v. Fehring [Iowa] 101 N. W. 120.

way of the Northern Pacific Railroad Company.[81] As between two adverse claimants one of whom has initiated his claim in violation of the law and the other in obedience to it, the latter is favored.[82]

The legal title to a timber culture claim[83] or homestead[84] remains in the United States until patent issued, and if a claimant die before such date his heirs take as donees of the government,[85] but a patent issued relates back to the initiation of the claim[86] not only for the benefit of the entryman but for the benefit of those with whom he has dealt,[87] and validates and renders enforceable by the doctrine of estoppel contracts previously entered into with reference to the land.[88] The patentee may recover for a trespass between the initiation of his claim and patent issued,[89] and the United States cannot retain, as against its grantees, a sum recovered from trespassers between the selection of his claim and approval of such selection by the land department.[90]

A patent to a trustee conveys to him the legal title.[91] A patent is prima facie evidence that entry was made in good faith;[92] of the regularity of proceedings leading up to its issue;[93] and that the patentee named therein is the entryman.[94]

81. The act of April 28, 1904, was intended only to confirm title to lands held adversely outside the right of way. Northern Pac. R. Co. v. Ely, 25 S. Ct. 302; Northern Pac. R. Co. v. Hasse, 25 S. Ct. 305.

82. One had made his settlement in advance of the time permitted. Watt v. Amos [Okl.] 79 P. 109.

83. Where the entryman died prior to its issue, his estate as such never became entitled to the property. Gould v. Tucker [S. D.] 100 N. W. 427.

84. The inchoate rights of a deceased homestead claimant, who dies before the issuance of, or before he has acquired a right to a patent, vest in his heirs, and cannot be sold by the administrator for the payment of his debts. Under U. S. Rev. St. §§ 2290, 2291 (U. S. Comp. St. 1901, pp. 1389, 1390). Towner v. Rodegeb, 33 Wash. 153, 74 P. 50. Where equitable interest of deceased vendee under contract of sale to him of school land has been treated as realty, and dower has been assigned to the widow therein, a deed issued to her for the portion so assigned in her own name, on payment by her pro tanto of the balance due on the purchase price, gives her no new rights as against the heirs, she taking the legal title as trustee for their benefit. Cutler v. Meeker [Neb.] 99 N. W. 514. A contract for the sale of a homestead by an entryman before he has made final proof or acquired a patent is not enforceable. Under U. S. Comp. St. 1901, p. 1389, § 2290. Horsman v. Horsman, 43 Or. 83, 72 P. 698.

85. Under Act Cong. June 14, 1878 (20 Stat. 113), until receiving final certificate the entryman has no divisible interest. Kelsay v. Eaton [Or.] 76 P. 770.

86. Peyton v. Desmond [C. C. A.] 129 F. 1. Where an entryman is permitted to amend his entry, the amendment to take effect as of the date of entry, the patent relates back to the date of the original entry. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552. An approval of an Indian's deed by the secretary of the interior has a retrospective effect and validates subsequent conveyances. Campbell v. Kansas Town Co. [Kan.] 76 P. 839.

87. Orrell v. Bay Mfg. Co., 83 Miss. 800, 36 So. 561. The assignee of a soldier's additional homestead certificate, upon filing an application for a specific tract, acquires an equitable, which ripens into a legal, title relating back to the date of application, upon issuance of the government patent. Gilbert v. McDonald [Minn.] 102 N. W. 712.

88. A turpentine lease. Orrell v. Bay Mfg. Co., 83 Miss. 800, 36 So. 561.

89. May recover the value of timber wrongfully cut. Peyton v. Desmond [C. C. A.] 129 F. 1. After patent issues such grantee may maintain damages for trespass committed after date of application but prior to confirmation. Gilbert v. McDonald [Minn.] 102 N. W. 712.

90. Grant of indemnity lands by 11 Stat. at L. c. 41, in aid of railway construction. United States v. Anderson, 194 U. S. 394, 48 Law. Ed. 1035.

91. The president of the board of trustees of a town may convey land patented to him in trust for the town though not authorized to do so by the corporate officials. Thomas v. Wilcox [S. D.] 101 N. W. 1072.

92. Evidence held insufficient to show fraud in a patentee where action was commenced 40 years after the alleged fraud and two lower courts had found that there was no fraud. United States v. Stinson, 25 S. Ct. 426. Purchasers of land are not required to go behind the patent to discover antecedent defects in the title. Bogart v. Moody [Tex. Civ. App.] 79 S. W. 633. One who would attack a patent for fraud or mistake of fact must plead and prove the evidence before the department from which it resulted, the particular mistake that was made, the way in which it occurred, and the fraud which induced it, before any court can enter upon the consideration of the original issue of fact determined by the department. Le Marchel v. Teegarden, 133 F. 826.

93. Act Cong. Feb. 26, 1895 (28 Stat. 683), providing that no patent shall be delivered to the Northern Pacific Railroad Company for any land in Montana or Idaho under the congressional grant until the land has been classified by mineral land commissioners as non-mineral. A patent to land classified as

Clear and convincing proof of its invalidity is required to disturb the title passed by it.[95] The title of a bona fide purchaser subsequent to the issue of patent is superior to the equitable claim of the United States to avoid the patent for fraud or error in their issue.[96] Bona fide purchasers of the equitable title evidenced by receiver's final receipts upon which patent subsequently issued have a complete defense unassailable by the United States to avoid the patent for fraud or error in its procurement.[97]

In a proceeding to declare a resulting trust, findings of the secretary of the interior made in a contest and attached to the petition are conclusive on demurrer.[98] The demurrer will be sustained if the secretary's judgment is consistent with all his findings.[99]

A contract by a preemptor of Federal lands to pay another one-fourth the amount of a sale of the lands at a proper value after title secured in consideration of one-fourth of the expenses of final proof is valid.[1]

One who procures the relinquishment of a homestead entry and himself enters the same land is bound by the terms of a contract entered into by the prior entryman to convey a specified tract for church and cemetery purposes.[2]

The exemption from debts until issuance of final certificate is applicable to tree claims and will be enforced in state as well as in Federal courts.[3]

That an unsuccessful contestant institutes proceedings asking the secretary of the interior to exercise his supervisory powers and reopen the case is not a bar to forcible entry and detainer by the successful contestant.[4] Bona fide purchasers will be protected against a successful contestant who has made no declaration of homestead nor paid fees for the land and the good faith of his action in bringing a suit to have them declared trustees is questionable.[5]

A selection of indemnity lands in an unsectionized township where the selection is liable to be defeated because of adverse claims or because the land was mineral in its character confers no rights.[6] A selection of a town lot in a projected townsite does not vest in the person making the selection a right superior to the rights of the public.[7]

Area acquired and boundaries.[8]—A patent is not rendered void because including a greater number of acres than called for by metes and bounds.[9] A patent

non-mineral is conclusive as to its character in the absence of fraud, imposition or mistake. Traphaagen v. Kirk [Mont.] 77 P. 58.

94. Where it is claimed that an entry was made by a particular person but that in issuing the certificate and patent a wrong name was used, before a court can vest title in the claimant it must be shown that he is the person who made the entry. Martin v. Brand, 182 Mo. 116, 81 S. W. 443.

95. Graham v. Great Falls Water Power & Town-Site Co. [Mont.] 76 P. 808.

96. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668.

97. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668. Receivers' final receipts are notice to purchasers of the equitable title they evidence that they are voidable by the Land Department for fraud at any time prior to patent issued but they are not notice that the equitable titles they disclose were procured by fraud or other irregularity but on the other hand are prima facie evidence that the land they describe was honestly and regularly entered and that the entryman is entitled to a patent. Id.

98, 99. McCalla v. Acker [Okl.] 78 P. 223.

1. Gross v. Hafemann, 92 Minn. 367, 100 N. W. 1, following 91 Minn. 1, 97 N. W. 430.

2. Eimer v. Wellsand [Minn.] 101 N. W. 612.

3. Act Cong. March 3, 1891, c. 561 (26 Stat. 1095), providing for this exemption is a substantial re-enactment of Rev. St. U. S. 1878, § 2468. Gould v. Tucker [S. D.] 100 N. W. 427.

4. Smith v. Finger [Okl.] 79 P. 759.

5. Graham v. Great Falls Water Power & Town-Site Co. [Mont.] 76 P. 808.

6. Land selected under Act Cong. June 4, 1897 (30 Stat. 36), providing that owners of land included within forest reservations might relinquish it and select another tract in lieu. Peters v. Van Horn [Wash.] 79 P. 1110.

7. Will not prevail against the rights of the town to use the lot as a public street under a subsequent survey approved by the Act of May 14, 1890. Oklahoma City v. McMaster, 25 S. Ct. 324.

8. See 2 Curr. L. 1318.

9, 10. Goff v. Lowe, 25 Ky. L. R. 2176, 80 S. W. 219.

excluding from the lands granted prior patents amounting to a designated number of acres need not describe the patents.[10] Where the description in two patents conflicts, the senior will prevail.[11] In locating the lines of subdivisions of a government survey, the courses, distances, and monuments given in the field notes of the government surveyor should be followed without regard to whether more land is given to one subdivision than to another.[12] A diagram from the office of the secretary of the interior certified to by the acting commissioner of the general land office is to be taken as prima facie to correctly indicate the limits of the grant,[13] and is not overcome by unofficial maps and plats filed in the office of the governor or secretary of state.[14] Where the remainder of a subdivision is shown to be the waters of a navigable stream, a patentee in a patent purporting to convey up to the meander line takes title to the stream,[15] and where he takes possession of the land between a meander line and the stream, his title and possession will be protected as against persons not claiming from the government though the government has not been paid for such land.[16] In such case no one but the government or its grantee can question his title or right to possession.[17] Grants of public lands are construed most favorably to the grantor.[18]

Mode of proving title.[19]—It is permissible to show that the certificate was seen in the hands of a particular person as tending to show that he made the entry though the certificate and patent were issued in another name.[20]

Indian allotments are fully covered in a prior article.[21]

(§ 4) *B. State lands.*[22] *Possessory rights.*[23]—One lawfully in possession of school lands and having improvements thereon has a right as against a subsequent purchaser to retain possession until paid therefor.[24] A patentee in a grant conferring constructive seisin may maintain ejectment without proof of seisin in fact.[25] In Texas a purchaser from one holding a certificate of occupancy has a good defense to an action by the state to cancel the sale for nonoccupancy.[26] In that state a homestead claimant under the act of February 23, 1900, has a title superior to one who purchases the same tract as school land,[27] and if he is able to show that he comes within the class protected by that act the fact that field notes filed in the land office have disappeared does not affect his rights.[28] In Washington the preference right of an abutting owner on tide lands to purchase must be availed of within the time limited by law,[29] as must the right of appeal by an owner whose property is affected by a sale or lease of state shore lands.[30] In California the

11. Senior patent was issued before entry or survey of the land included in the latter. Moore v. Mauney, 25 Ky. L. R. 2274, 80 S. W. 458.

12. Yolo County v. Nolan, 144 Cal. 445, 77 P. 1006.

13, 14. Eastern Oregon Land Co. v. Andrews [Or.] 77 P. 117.

15, 16, 17. Johnson v. Hurst [Idaho] 77 P. 784.

18. Act Cong. Feb. 13, 1891 (26 Stat. 748), granting to the state of Montana a portion of a former military reservation to be selected "so as to embrace the buildings and improvements thereon" did not carry the right to use the water of a stream from which the government had taken water by means of a ditch across other lands. Story v. Woolverton [Mont.] 78 P. 589. A grant, "to embrace buildings thereon," "embrace" means to encircle. Id.

19. See 2 Curr. L. 1318.

20. Martin v. Brand, 182 Mo. 116, 81 S. W. 443.

21. See Indians, 3 Curr. L. 1707.

22, 23. See 2 Curr. L. 1319.

24. Brummett v. Campbell, 32 Wash. 358, 73 P. 403.

25. Howdashell v. Krenning [Va.] 48 S. E. 491.

26. State v. Hughes [Tex.] 80 S. W. 524.

27, 28. Lane v. Huffman [Tex. Civ. App.] 82 S. W. 1070.

29. Under Sess. Laws 1901, p. 294, c. 138, he had until July 1, 1902. McNaught-Collins Imp. Co. v. Atlantic & P. Pile & Timber Preserving Co., 36 Wash. 669, 79 P. 484.

30. Under Laws 1901, p. 98, c. 62, he must appeal from the order of the board of land commissioners within thirty days. McNaughton-Collins Imp. Co. v. Atlantic & P. Pile & Timber Preserving Co., 36 Wash. 669, 79 P. 484. Denial of resale of a right to lease tide land, by the board of land commissioners, held, under the circumstances of this case, an executive act and not appealable to the circuit court under Laws 1901, p. 98, c. 62. Id.

right of purchasers of swamp and overflowed lands to recover from the state the amount expended in reclamation is an absolute right.[31] Statutes providing for this recovery create a contract between the state and the purchasers,[32] and statutes providing for the payment are a fulfillment of the contract.[33]

Area acquired and boundaries.[34]—The grant by Texas to the Federal government of specific lands devoted to the purposes of public defense did not deprive the state of her right to the waters for three leagues from the shore nor entitle the Federal government to lands attached by accretion.[35] A patentee takes subject to easements granted by the state.[36]

Mode of proving title.[37]—One assailing the validity of a sale by the state as against the vendee in possession has the burden of proof[38] which is not met by evidence that at the date of the sale the land was subject to a lease.[39] One claiming under the United States must, as against the state, show that the state has parted with its title.[40] After transfers of school land have become archives in the general land office, the original copies cannot be used as evidence.[41]

§ 5. *Leases of public lands and rights thereunder.*[42]—In Texas prior to 1895, the commissioner of the general land office could lease the same land to former lessees who had forfeited their leases.[43] The statute forbidding this practice until arrears in rent were fully paid has no retrospective operation.[44] The commissioner has no power to issue a new lease while a prior one is still in force,[45] nor to cancel constituent leases on the execution of a consolidated lease covering the lands embraced within them,[46] nor has he power to execute such consolidated lease,[47] and payments of rent thereon should be applied to the constituent leases;[48] but such consolidated lease is valid as to lands not embraced within the constituent leases.[49] He cannot reinstate a canceled lease.[50] The date of execution of a lease is excluded in computing the time of its operation.[51]

The cancellation of a lease cannot be shown by the deposition of the land commissioner but only by a copy furnished as required by law.[52]

31. McCord v. Slavin, 143 Cal. 325, 76 P. 1104. St. 1893, p. 342, c. 229, § 6, providing that lands susceptible of reclamation "by reason of periodical overflow" establisbes the test whereby to determine what lands are "swamp and overflowed" and enables the purchasers to avail themselves of the provisions of Pol. Code, §§ 3446-3491. Id.

32. Statutes 1893, p. 342, c. 229, § 6, providing for the repayment to purchasers of swamp lands of their payments made in purchase of the land, after reclamation had been completed. McCord v. Slavin, 143 Cal. 325, 76 P. 1104.

33. St. 1899, p. 182, c. 149, not objectionable as a gift of public money. McCord v. Slavin, 143 Cal. 325, 76 P. 1104.

34. See 2 Curr. L. 1321.

35. State v. Jadwin [Tex. Civ. App.] 85 S. W. 490.

36. Under Act 1882, No. 84, p. 106, "any person, company or corporation" is authorized to build a railroad through state lands. A purchaser of land subsequent to the building of a railroad through it cannot recover compensation. Friedrichs v. New Orleans Belt & Terminal Co. [La.] 38 So. 32.

37. See 2 Curr. L. 1321.

38. Jones v. Wright [Tex.] 84 S. W. 1053.

39. Under Act 1895, p. 63, c. 47, a sale could be made with the consent of the lessee. Jones v. Wright [Tex.] 84 S. W. 1053.

40. Evidence held to show that land in question did not pass to the United States under the cession. State v. Jadwin [Tex. Civ. App.] 85 S. W. 490.

41. Proof of such fact warrants the introduction of certified copies. Tolleson v. Wagner [Tex. Civ. App.] 80 S. W. 846.

42. See 2 Curr. L. 1322.

43. Act April 1, 1887, does not forbid it. Angle v. Terrell [Tex.] 80 S. W. 231.

44. Section 20 of this act providing for the cancellation of the original leases and the execution of new ones on security being given for the back rent does not affect the construction placed upon this act [Rev. St. 1895, art. 4218v]. Angle v. Terrell [Tex.] 80 S. W. 231.

45. Where a lessee intended to forfeit his old lease and have a payment of rent made while it was still in force apply on a new lease applied for, the year's rental deposited should be applied on the old lease. Thomson Bros. v. Lynn [Tex. Civ. App.] 81 S. W. 330.

46, 47, 48, 49. Scott v. Slaughter [Tex. Civ. App.] 80 S. W. 643.

50. Wilson v. Smith [Tex. Civ. App.] 82 S. W. 818.

51. Jones v. Lohman [Tex. Civ. App.] 81 S. W. 1002.

52. Under Sayles' Rev. St. 1897, art. 4218v, and art. 308. Bradford v. Brown [Tex. Civ. App.] 84 S. W. 392.

It will not be presumed that the commissioner did not consent to the transfer of a lease.[53] Where the commissioner did not claim a forfeiture on the grounds of want of consent to assign, the assignee cannot set up such want of consent to defeat his contract.[54]

In Colorado leases procured by fraud may be canceled by the state board of land commissioners.[55] The authority to cancel such leases is not a judicial power.[56]

§ 6. *Spanish and other grants antedating Federal authority.*[57]—Title under a Spanish grant passes on the date of confirmation of the survey.[58] The confirmation of a Mexican grant need not be approved by the land department.[59] The finality of a decree of the district court confirming a Mexican grant is not affected by a mere application for an appeal.[60] A purchaser from the Mexican government may alienate his concession before the lands have been selected.[61] The title to an imperfect Spanish or Mexican grant was, at the date of the treaty, vested in the United States,[62] and does not pass out of it except by legal survey and patent issued,[63] and until such time the land is not subject to territorial taxation.[64]

The protocol of the treaty of Guadalupe Hidalgo, stating that the suppression of the 10th article was not intended to annul Mexican grants in ceded territories but that these should preserve the legal value which they possess, refers to titles existing in Texas at the time of the treaty and not to titles to lands embraced in the treaty.[65] In the construction of those provisions of a treaty that provide for the protection of property of owners within the ceded territory, the term "property" embraces all rights, legal, equitable, or imperfect,[66] but rights claimed by virtue thereof cannot be adjudicated until a remedy is provided by the political department.[67] The laws providing for the testing of titles emanating from the Spanish or Mexican governments includes equitable titles having their origin in a grant by the Mexican government.[68] This statute does not of itself confirm any grant,[69] nor can a presumption of grant be indulged in, in order to authorize a confirmation.[70] Rights will be adjudicated according to the laws of Mexico in force when the right was acquired,[71] and where the record evidence as to whether

53. On which to base a forfeiture. Scott v. Slaughter [Tex. Civ. App.] 80 S. W. 643.

54. Scott v. Slaughter [Tex. Civ. App.] 80 S. W. 643.

55. Evidence held to show fraud [Mills' Ann. St. § 3637]. American Sulphur & Min. Co. v. Brennan [Colo. App.] 79 P. 750.

56. A statute conferring it does not confer a judicial power. American Sulphur & Min. Co. v. Brennan [Colo. App.] 79 P. 750.

57. See 2 Curr. L. 1324.

58. A Spanish grant, based on settlement and cultivation was confirmed by Act Cong. May 4, 1826 (4 Stat. 159). The tract was subsequently surveyed in accordance with the statutes and the survey approved by the surveyor general of Louisiana in 1856, but patent did not issue until 1873. Held, title passed on confirmation of the survey and was not held in abeyance until patent issued. Levy v. Gause, 112 La. 789, 36 So. 684.

59. This did not change its effect as a withdrawal of the land from the operation of a railroad grant nor did the fact that it was subsequently disapproved and a new survey ordered. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 662.

60. Southern Pac. R. Co. v. U. S. [C. C. A.] 133 F. 662.

61. Surghenor v. Ranger [C. C. A.] 133 F. 453.

62. Territory v. Delinquent Tax List [N. M.] 76 P. 316.

63. Under land court act (26 Stat. 858) not by decree of the court of private land claims. Territory v. Delinquent Tax List [N. M.] 76 P. 316.

64. Territory v. Delinquent Tax List [N. M.] 76 P. 316.

65. Does not affect article 8, that property of every kind belonging to Mexicans shall be inviolably respected. Haynes v. State [Tex. Civ. App.] 85 S. W. 1029; State v. Russell [Tex. Civ. App.] 85 S. W. 288.

66. The provision in the Guadalupe Hidalgo treaty that Mexican grants in ceded territory shall preserve their legal value, etc., is applicable to equitable titles. Titles which could have been perfected had there been no change of sovereignty. State v. Russell [Tex. Civ. App.] 85 S. W. 288; Haynes v. State [Tex. Civ. App.] 85 S. W. 1029.

67. State v. Russell [Tex. Civ. App.] 85 S. W. 288; Haynes v. State [Tex. Civ. App.] 85 S. W. 1029.

68. Sp. Laws 1901, p. 4, c. 4. State v. Russell [Tex. Civ. App.] 85 S. W. 288; Haynes v. State [Tex. Civ. App.] 85 S. W. 1029.

69. Sess. Laws 1901, p. 4, c. 4.

70. Haynes v. State [Tex. Civ. App.] 85 S. W. 1029.

71. The courts will take judicial notice of

necessary steps to acquire title had been taken cannot be produced, parol evidence is admissible.[72] Under the treaty of Guadalupe Hidalgo the governor of Tamaulipas had no power on Jan. 2, 1848, to grant land east of the Rio Grande.[73] The fact that an applicant for the purchase of Mexican lands was in possession when the lands were denounced is sufficient to dispense with juridical possession.[74] One who had denounced land but had not paid the amount required by Decree No. 24 of the state of Tamaulipas did not have a title protected by the treaty of Guadalupe Hidalgo, and the documents evidencing the grant are not evidence of the facts recited therein in behalf of those claiming under them.[75]

§ 7. *Regulations and policing, and offenses pertaining to public lands.*[76]—State police regulations relative to the keeping of live stock extends over the public lands of the United States within a state.[77]

Cutting timber on public lands.[78]—A homestead entryman may cut such timber as is necessary to clear the land for cultivation, or to erect buildings or fences and perhaps exchange such timber for lumber to be devoted to such purposes,[79] but may not sell for money except so much as has been cut for the purposes of cultivation,[80] though the fact that a profit incidently results does not render the sale void.[81] The fact that timber removed from mineral lands is manufactured and sold as an article of commerce does not make the taking unlawful,[82] nor can it be made so by a rule of the secretary of the interior,[83] since he has no power to deprive one entitled of the right to take.[84]

The right of the United States to recover is confined to damages for the trespass, or in trover for the value of the manufactured product and a suit in equity for an accounting cannot be maintained.[85] A bill against several persons does not state a cause of action in equity for an accounting because it alleges that by reason of the complicated relations between the defendants it is impossible to state the quantity taken by each,[86] or because of an allegation that under cover of licenses to cut timber on certain land, the defendants willfully cut from other lands.[87] Nor is such a suit maintainable on the theory of establishing a trust in property purchased with the proceeds of the timber taken, it not being alleged that defendants are insolvent.[88] If the trespass was not willful, only the stumpage value can be recovered.[89]

those laws. Haynes v. State [Tex. Civ. App.] 85 S. W. 1029. Where at the time of the location the settler had neither a legal nor equitable title within the protection of the treaty or of the laws of Texas existing at the time or within the protection of the act of 1901, the state can recover the lands. Id.

72. Haynes v. State [Tex. Civ. App.] 85 S. W. 1029. Evidence held to show that an applicant for the purchase of Mexican lands had complied with the requirements of the laws of that nation. Id.

73. Texas claim to the territory having been perfected by possession in 1846. Haynes v. State [Tex. Civ. App.] 85 S. W. 1029.

74, 75. Haynes v. State [Tex. Civ. App.] 85 S. W. 1029.

76. See 2 Curr. L. 1326.

77. Spencer v. Morgan [Idaho] 79 P. 459.

78. See 2 Curr. L. 1326.

79. See 2 Curr. L. 1326, n. 17 et seq. Orrell v. Bay Mfg. Co., 83 Miss. 800, 36 So. 561.

80. Orrell v. Bay Mfg. Co., 83 Miss. 800, 36 So. 561.

81. Under Rev. Stat. U. S. § 2291, requiring an affidavit that no part of the land has been allenated and section 2461, making it a crime to remove timber from the public lands. King-Ryder Lumber Co. v. Scott [Ark.] 84 S. W. 487.

82. Under Act June 3, 1878. United States v. Rossi [C. C. A.] 133 F. 380. Where the taking was justified under this act it was proper to show the mineral character of the land from which the timber was taken and also of adjoining lands. Id.

83. He has power to promulgate rules prescribing the manner of taking so as to preserve the undergrowth. United States v. Rossi [C. C. A.] 133 F. 380.

84. Under the act of June 3, 1878, timber can be taken for smelting purposes. United States v. United Verde Copper Co., 25 S. Ct. 222. See, also, 2 Curr. L. 1326, n. 16.

85, 86, 87, 88. United States v. Bitter Root Development Co. [C. C. A.] 133 F. 274.

89. Bark taken from trees on the public domain under a misapprehension as to the true boundary held not willful trespass. Trespasser liable only for stumpage value of bark. United States v. McKee, 128 F. 1002. See, also, 2 Curr. L. 1327, n. 29 et seq.

A purchaser of timber cut from state lands by a trespasser acquires no title.[90] He cannot defend an action of replevin by the vendee of the state trespass agent on the ground that the vendee's title from the state is defective.[91]

Crimes and offenses against public lands.[92]—The Act of Congress providing that the secretary of the interior may make rules and regulations concerning the occupancy and for the preservation of forest reservations, the violation of which shall be punished, is not a delegation of legislative power.[93] A conspiracy to defraud the United States of a portion of the public lands is complete when the conspiracy is established and an overt act committed.[94] The making of a false verified statement under the timber and stone act that the land acquired is not for the benefit of any other person is a criminal offense though the agreement whereby the land entered was to inure to the benefit of another be within the statute of frauds.[95] The intent and motive of the entrymen in making the entries is the material question in issue.[96] Indictments against the same person for conspiracy by means of illegal entries by different persons may be consolidated for trial.[97] An allegation charging that defendants did unlawfully conspire together to defraud the United States out of a portion of its public lands on homestead entry, etc., included all proceedings as a whole necessary to complete the transfer of title.[98] It would be implied from such allegation that the affidavits and proofs were such as are required by law to entitle an entryman to a patent and that such affidavits and proofs were false.[99] An allegation that defendants did unlawfully conspire to defraud the United States out of a portion of its public lands by "procuring persons" to make fraudulent entries is not inconsistent with a further allegation as to overt acts charged showing that false proofs and entries were made by defendants themselves.[100] Where the overt act charged was the causing of an illegal entry of a certain described tract by a named person evidence that the defendants induced the entry of other tracts by different persons at the same time is competent in proof of conspiracy and fraudulent motive.[101] A special agent of the general land office whether appointed by the secretary of the interior or by the commissioner of the general land office is not an officer of the United States.[102]

PUBLIC WORKS AND IMPROVEMENTS.

§ 1. Definitions and Scope of Title (1125).
§ 2. Power, Duty, and Occasion to Order or Make Improvements (1125).
§ 3. Funds for Improvement and Provision for Cost (1126).
§ 4. Proceedings to Authorize Making (1129).
A. In General (1129).
B. By Whom, and How Initiated (1130).
C. Notice and Hearing (1131).
D. Protests and Remonstrances (1131).
E. Estimates of Cost (1132).
F. Necessity and Contents of Ordinance or Resolution (1132).
G. Curative Legislation and Ratification (1134).
§ 5. Proposals, Contracts, and Bonds (1135).
§ 6. Security to Laborers and Materialmen (1138).
§ 7. Injury to Property and Compensation to Owners (1139).

90, 91. Raber v. Hyde [Mich.] 101 N. W. 61.

92. See 2 Curr. L. 1327.

93. 30 Stat. 35. Criminal prosecution and punishment provided by 25 Stat. 166. Dent v. U. S. [Ariz.] 76 P. 455.

94. It is not a fatal variance where several were charged with conspiracy to defraud the United States out of lands to show that only a part of them shared in the benefit. Olson v. U. S. [C. C. A.] 133 F. 849.

95. Olson v. U. S. [C. C. A.] 133 F. 849.

96. Where they are placed on the stand by the prosecution, the defendants may cross-examine as to whether they had made contracts to sell the lands. Olson v. U. S. [C. C. A.] 133 F. 849. Evidence as to the value of the timber on the land is admissible as bearing on the bona fides of the entry and conveyance by the entryman. Id.

97. They are for the same class of offenses [Rev. St. § 1024]. Olson v. U. S. [C. C. A.] 133 F. 849.

98, 99, 100. United States v. Cunningham, 129 F. 833.

101. Olson v. U. S. [C. C. A.] 133 F. 849.

102. Not subject to indictment and prosecution for extortion under color of his office as provided in Rev. St. U. S. § 5481. United States v. Schlierholz, 133 F. 333.

A. In General (1139).
B. Establishment or Change of Grade of Street (1140).
§ 8. **Local Assessments (1141).**
A. General Principles (1141). Due Process of Law (1144).
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F. Equalization (1151).
G. Reassessment and Additional Assessments (1151).
H. Maturity, Obligation, and Lien of Assessments (1154).
I. Payment and Discharge (1155).
J. Enforcement and Collection (1156). Notice (1158). Limitations (1158). Pleading and Proof (1158). Defenses (1159). Waiver and Estoppel to Urge Defenses (1160). The Judgment (1161). The Sale and Redemption (1162).
K. Remedies by Injunction or Other Collateral Attack, and Grounds Therefor (1163).
L. Appeal and Other Direct Review (1164).

§ 1. *Definitions and scope of title.*[1]—This article treats generally of public works and improvements, the powers and duties of municipalities in respect thereto, the procedure to be followed in the making thereof, and the manner of providing for the cost, including local assessments.[2] The taking of property for public works,[3] the construction and operation of particular public works,[4] and matters peculiar to the powers and fiscal affairs of particular public bodies,[5] are specifically treated elsewhere. While the manner of letting a contract for a public work, and the validity of provisions peculiar to contracts of this kind, are here treated, matters pertaining to the making and validity of public contracts in general are not included.[6] The liability of municipalities for negligence in construction of a work is also excluded.[7]

§ 2. *Power, duty, and occasion to order or make improvements.*[8]—Municipalities have only such power to order or make public improvements as is expressly or impliedly conferred by statute.[9] The exercise of powers, clearly granted, by the proper municipal authorities, in determining the necessity, time, and place, and plan, of a particular improvement, is discretionary, and will not be interfered with by the courts[10] in the absence of a manifest abuse.[11] The power so conferred can-

1. See 2 Curr. L. 1328.

2. As distinguished from topics like Highways and Streets (see 3 Curr. L. 1593) they treat of the structure and use of specific public places and improvements while the present title is devoted chiefly to fiscal and economic questions.

3. See Eminent Domain, 3 Curr. L. 1189.

4. See Highways and Streets, 3 Curr. L. 1593; Sewers and Drains, 2 Curr. L. 1628; Waters and Water Supply, 2 Curr. L. 2034.

5. See Counties, 3 Curr. L. 959; Municipal Corporations, 4 Curr. L. 720; Towns, 2 Curr. L. 1877; States, 2 Curr. L. 1703.

6. See Public Contracts, 4 Curr. L. 1089; Building and Construction Contracts, 3 Curr. L. 550.

7. See Negligence, 4 Curr. L. 764; Municipal Corporations, 4 Curr. L. 720; Independent Contractors, 3 Curr. L. 1702.

8. See 2 Curr. L. 1328.

9. Under Rev. St. 1899, § 5989, cities of the fourth class have power to condemn and order removal of **sidewalks.** Scott v. Marshall [Mo. App.] 85 S. W. 98. Code, § 782, authorizes cities and towns to establish **street grades** without reference to sidewalks, thus giving them power to grade the portion of streets reserved for walks and parking purposes. Gallaher v. Jefferson [Iowa] 101 N. W. 124. The general power to improve streets, under Code § 792, includes the power to construct a strip of **parking** along the center of the driveway, to curb the same, and assess the cost to abutting owners. Downing v. Des Moines, 124 Iowa, 289, 99 N. W. 1066. The statutory proceeding to improve streets applies not only to the improvement of the street as a highway but also to the laying of **water pipes.** Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884. Authority to build a street gives council power to lay a **drain** necessary to the completion of the work, though that might have been done under a different law or in a different way. Burke v. Wapakoneta, 4 Ohio C. C. (N. S.) 482. A city or village in Ohio may build a **pest house** outside its corporate limits without consent of the township within which it is located [Rev. St. §§ 2142, 2169]. City of Lorain v. Rolling, 24 Ohio Circ. R. 82. Under Ky. St. 1903, § 1840, the fiscal court has power to install an **elevator in a county court house.** Simons v. Gregory [Ky.] 85 S. W. 751. Charter gave city power to acquire land for **fire house** without previously or at the time providing for erection of building thereon. City of Santa Barbara v. Davis, 142 Cal. 669, 76 P. 495. Purchase of land by city presumed to have been in good faith for a **site for an engine house,** and its action cannot be attacked on the ground that there was no intention to erect such building. Id.

10. Scott v. Marshall [Mo. App.] 85 S. W.

not be delegated, but the functions of the municipal legislative body are not delegated by the appointment of agents to carry on the actual work.[12] Such agents are also confined to the authority given, which may be implied[13] but not proven by parol,[14] nor derived from a city which itself lacks power to make the particular improvement.[15] A statute which creates a board of public works and directs the preliminary steps in the making of an improvement to be taken by it, such steps to be approved by an ordinance passed by the council after a hearing, does not deprive a city of control over its local affairs.[16]

The drainage and reclamation of large tracts of swamp and overflowed or submerged lands is a matter of general public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations.[17] If two cities have unreasonably neglected their duty relative to the maintaining of a bridge between them, it is within the power of the legislature to compel compliance with the regulations of law, Federal and state, by appointing a commission with power to remove an existing bridge and replace it with a new one.[18]

§ 3. *Funds for improvement and provision for cost.*[19]—Municipalities have

98. Ordinance condemning a sidewalk and ordering construction of a new one held proper under Rev. St. 1899, § 5991. Id. When power is given a city to provide works of public improvement it is ordinarily within the discretion of the council to determine when and where the work shall be done and to provide the plan thereof. Downing v. Des Moines, 124 Iowa, 289, 99 N. W. 1066. The question of the necessity of a local improvement is for the council, and the courts will not prevent the construction of an improvement unless the ordinance providing therefor is so unreasonable as to be void. Clark v. Chicago [Ill.] 73 N. E. 358. County board itself is the judge of the necessity of repairs on court house and whether finances justify such repairs, under Rev. St. c. 34, § 26, prescribing its duties in this regard. Cole County v. Goehring, 209 Ill. 142, 70 N. E. 610. The fact that a street which had been macadamized was repaired with asphalt is not such evidence of fraud or abuse of power as to warrant a court in interfering with the action of the city council, especially where it appeared that the macadam was out of repair. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 Law. Ed. 1142. The municipal authorities are the best judges of the necessity for the improvement of streets and alleys, and the opinion of a witness that an improvement is unnecessary will not warrant the court in reviewing their decision. Jones v. Chicago, 213 Ill. 92, 72 N. E. 798. The legislature, with the consent of the city, having provided for the erection of a monument in a certain square, the courts will not interfere on the ground that the proposed location is improper. Locke v. Buffalo, 97 App. Div. 483, 90 N. Y. S. 550.

11. It is the duty of a council in constructing a street improvement to avoid any abuse of discretion as to character or cost, and to exercise good judgment in making the improvement permanent, and to require work to be done in a workmanlike manner, without extravagance. Burke v. Wapakoneta, 4 Ohio C. C. (N. S.) 482. Taking up brick walk in good repair and ordering cement walk relaid, the only object being to correct the grade and slope of the walk, held an abuse of discretion, warranting an injunction. Detmers v. Columbus, 2 Ohio N. P. (N. S.) 657.

12. A council does not delegate its functions to the city engineer by directing him by ordinance to fix the grade of a sewer. Rich v. Woods, 26 Ky. L. R. 799, 82 S. W. 578. Council has power to appoint engineer to take charge of improvement. Burke v. Wapakoneta, 4 Ohio C. C. (N. S.) 482. Buffalo park commissioners may delegate to the department of public works the actual work of diverting and re-enforcing sewers passing through a public square. Locke v. Buffalo, 97 App. Div. 483, 90 N. Y. S. 550. An ordinance for street improvement is not void because an infinitesimal portion of the work is left to the discretion of the proper city officials. Swift v. St. Louis, 180 Mo. 80, 79 S. W. 172.

13. Authority to make street improvement is conferred upon the directors of public service by the passage of the semi-annual appropriation ordinance, authorized by statute, containing among other things an appropriation for work and labor necessary in making such improvement. State v. Roebuck, 2 Ohio N. P. (N. S.) 688.

14. Authority to construct a sewer cannot be shown by parol, no such authority appearing on the records of the officers concerned. Kidson v. Bangor [Me.] 58 A. 900.

15. A city of the fifth class in Kentucky having no power to construct a sidewalk on private property without compensating the owner, an ordinance declaring the necessity of such work and directing that it be done, could not confer authority on the city's agents. City of Clinton v. Franklin, 26 Ky. L. R. 1056, 83 S. W. 140.

16. Statute creating Denver board is valid. City of Denver v. Londoner [Colo.] 80 P. 117.

17. Neal v. Vansickel [Neb.] 100 N. W. 200.

18. In re Opinion of the Justices [Me.] 60 A. 85.

19. See 2 Curr. L. 1330.

no power to provide for the cost of local improvements by special assessments unless such power has been expressly conferred by the legislature.[20] Statutes delegating the power are strictly construed,[21] and the provisions of law prescribing the purposes for which the power may be used, and the manner and mode of its exercise, are mandatory, and must be complied with.[22] An attempt to employ a method other than that provided by statute is without jurisdiction and void.[23] None of the prescribed steps can be taken by officers other than those designated.[24] Where, as in Iowa, an assessment can be made only through the medium of an ordinance, the ordinance providing for a work must also provide for an assessment for the cost.[25] The assessment must be made within the time prescribed by law,[26] and must be, by some laws, preceded by a valid contract for the work.[27] Statutes compelling lot owners to make sidewalk improvements and authorizing liens upon property when the improvement is made by the municipality are to be strictly construed.[28]

The cost of an improvement may be met by an issue of bonds if power to issue bonds exists.[29] An issue of bonds cannot be authorized by special legislation con-

20. Allen v. Davenport [C. C. A.] 132 F. 209. The repeal of a statute authorizing assessments by the front-foot rule, and not according to benefits, renders invalid an ordinance pursuant to such statute. Martin v. Oskaloosa [Iowa] 99 N. W. 557. West Chicago Park Commissioners constitute a corporation authorized to levy special assessments for park purposes under Park Act §§ 1, 2, and may follow the provisions of the local improvement act in the return and collection of assessments. Cummings v. People, 213 Ill. 443, 72 N. E. 1094. Township of East Orange commenced construction of a drain for drainage of swamp lands, in January, 1899, was incorporated as a city in December, 1899, and finished the drain in 1901. The revised township act of 1900 repealed the drainage and sewage act under which construction was commenced. Held, city could not levy an assessment to pay for construction of drain. City of East Orange v. Hussey [N. J. Law] 59 A. 1060. Statutes authorizing cities and villages to make local improvements by special assessments are amendatory of the incorporation act and hence of the charters of cities and villages, within the meaning of Const. 1870, art. 4, § 22, prohibiting amendment of such charters by local or special laws. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399.

21. Miserney v. People, 208 Ill. 646, 70 N. E. 678.

22. Allen v. Davenport [C. C. A.] 132 F. 209.

23. City of Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989.

24. Power to select the kind of paving materials to be used cannot be delegated by council to engineer. City of Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989. Proceedings to open a street cannot, in New York, be joined with those to improve the same, and commissioners appointed to assess benefits for the opening of the street have no power to assess for the grading of it. In re Locust Ave., 93 App. Div. 416, 87 N. Y. S. 798. The assessment for improvement being wholly void, the commissioners' report must be thrown out entirely, and could not be recommitted to them for correction, this being an error going to the jurisdiction of the board. Id.

25. Where an improvement was ordered, the contract let, and work completed, under an ordinance which did not provide for an assessment to pay the cost, no assessment therefor could be made by a retroactive ordinance. Martin v. Oskaloosa [Iowa] 99 N. W. 557.

26. An ordinance appropriating damages and costs of a public improvement is valid if passed at the first session of the council after the report of the judgment by the clerk, though not at the first meeting. City of St. Joseph v. Truckenmiller, 183 Mo. 9, 81 S. W. 1116. In Massachusetts an assessment of betterments must be made within two years from the passage of the original order. This means two years from the time of the approval of the mayor, or from the time of passage over his objections, if he objects, or at the expiration of 10 days after the original passage if the mayor takes no action. Quinn v. Cambridge [Mass.] 73 N. E. 661.

27. Under Burns' Ann. St. 1901, §§ 4362, 4393a, town trustees have no authority to levy taxes for water and lighting until contracts therefor have been actually made. Brewer v. Bridges [Ind.] 73 N. E. 811. Special assessment invalid where contract for paving had been declared void by Iowa supreme court before work was done, valid contract being required by Acts 25th Gen. Assem. Iowa, c. 7, p. 18. Allen v. Davenport [C. C. A.] 132 F. 209.

28. Town of Greendale v. Suit [Ind.] 71 N. E. 658. A statute authorizing assessments upon lots for sidewalk improvements made by the municipality does not authorize an assessment upon lands which have not been divided into lots. Burns' Ann. St. 1901, § 4394 et seq., construed. Town of Greendale v. Suit [Ind.] 71 N. E. 658. Under 1 Starr & C. Ann. St. 1896, p. 857, the bill for cost of a sidewalk built by the city on failure of the property owner to do so must set out the cost of grading, materials, laying and supervision in separate items, or the special tax levied therefor will be invalid. Miservey v. People, 208 Ill. 646, 70 N. E. 678.

29. A county may issue bonds to pay for its share of the cost of a highway. County Law, § 12, subd. 6. Ontario County v. Shepard, 91 N. Y. S. 611.

trary to the constitution.[30] The validity of such a statute may be contested by a bidder to whom the bonds have been awarded and who has made the required deposit with his bid, the trustees having refused to return his deposit on the ground of invalidity of the statute.[31] Certificates[32] or bonds, payable out of special assessments,[33] or pledging special assessments,[34] do not render the municipality issuing them primarily liable thereon. Nor do bonds pledging special assessments make a city a guarantor of collection: the city becomes a mere statutory trustee, bound to use due diligence in the collection of assessments and payment of the same to the bondholders.[35] The city does not become liable on such bonds by a return of the taxes as delinquent,[36] but must account to the bondholders only for the amounts returned to the city by the county after collection.[37] A bondholder is entitled only to his pro rata share, according to the class of bonds held by him, of the fund collected by the city, less the amount he has already received.[38]

Constitutional limitations upon the general tax rate in cities do not apply to assessments for local improvements or taxes to pay bonds issued for such improvements.[39] Limitations on the tax rate,[40] or on the indebtedness which municipalities may incur,[41] apply when the cost of an improvement is to be met by general taxation. A limitation of the cost of an improvement to fifty per cent of the assessed value of property to be charged does not prohibit the assessment of particular tracts in the district for more than one-half their assessed value.[42] "Assessed value," within the meaning of such a limitation, is the value of property as last assessed for general taxation.[43] Limitation of assessments to twenty-five per cent of the general taxable value of the property assessed refers to the fair market value after the improvement is made.[44] The constitutional limitation as to the amount of an assessment may be waived by contract or by conduct of the parties in pais.[45]

30. Acts 1903, p. 347, c. 198, autborizing issuance of school bonds in any city or town having a population not less than 4540 nor more than 4545 is repugnant to Const. art. 4, § 22. School City of Rushville v. Hayes, 162 Ind. 193, 70 N. E. 134.

31. School bonds. School City of Rushville v. Hayes, 162 Ind. 193, 70 N. E. 134.

32. Statute authorizing opening and improvement of an avenue in Long Island City held not to make the city liable on certificates provided thereby, so as to render Greater New York liable after the consolidation. East River Nat. Bank v. New York, 93 App. Div. 242, 87 N. Y. S. 803.

33. Such bonds do not create a liability against the city within the meaning of a constitutional limitation or municipal indebtedness. Adams v. Ashland, 26 Ky. L. R. 184, 80 S. W. 1105.

34, 35, 36, 37, 38. Jewell v. Superior [C. C. A.] 135 F. 19.

39. Const. Ky. § 157, limiting tax rate in cities of 15,000 or more to $1.50 per $100 does not apply to bonds for sewerage system payable by tax on district. Dyer v. Newport, 26 Ky. L. R. 204, 80 S. W. 1127. Art. 281 of Louisiana constitution limiting taxes to five mills, does not apply to art. 232, and city of Monroe did not exceed its power to tax itself. Endom v. Monroe, 112 La. 779, 36 So. 681.

40. Under Road and Bridge Act § 13, the highway commissioners cannot levy a tax exceeding 60 cents on each $100 without filing a certificate that there is a contingency justifying such levy. People v. Cincinnati, etc., R. Co., 213 Ill. 503, 72 N. E. 1119.

41. While the legislature may impose the burden of assuming and paying the cost of a bridge upon two cities, it cannot authorize a city to increase its indebtedness beyond the constitutional limit. In re Opinion of the Justices [Me.] 60 A. 85. An ordinance accepting a gift of a library building on condition of an annual expenditure of $1,000 for maintenance violates Const. § 157, prohibiting the incurring of indebtedness exceeding in any year the income and revenue of such year, without the consent of the voters. Ramsey v. Shelbyville, 26 Ky. L. R. 1102, 83 S. W. 116. A contract for repairs to a court house, providing for monthly payments of 85 per cent of the work done, in interest bearing orders, and the payment of the balance in orders bearing interest from date on completion of the work, does not create an indebtedness of the kind contemplated by Const. art. 9, § 12, requiring a direct annual tax to provide for the same, not being fixed in amount, or payable at a stated time. Cole County v. Goehring, 209 Ill. 142, 70 N. E. 610.

42, 43. Ferry v. Tacoma, 34 Wash. 652, 76 P. 277.

44. Ayers v. Toledo, 6 Ohio C. C. (N. S.) 57.

45. Signing a petition for an improvement, the signers agreeing to pay the assessment irrespective of the number of owners signing, constitutes such a waiver. Thornton v. Cincinnati, 4 Ohio C. C. (N. S.) 31.

Whether the cost of street improvements is to be borne by abutting property owners or the city at large may depend upon the character or permanency of the work.[46] The nature of the work may also determine which of several funds is to be used.[47] It is not necessary that a municipality have in hand a fund to pay for paving streets before authorizing such improvement.[48] The manner of paying the cost may be decided when a particular work is to be done.[49]

The commissioners and inspectors of a levee and drainage district of Arkansas may maintain a suit in equity to recover funds, resulting from a valid import for levee purposes, in the hands of the county treasurer.[50]

Where two cities neglect to rebuild a bridge, the legislature may appoint a commission to do the work and apportion the cost between such cities, or direct such apportionment to be made by appraisers.[51]

A private corporation organized to drain swamp lands performs a public service for which it may constitutionally be given a lien for special taxes on adjacent land benefited by the work.[52]

§ 4. *Proceedings to authorize making. A. In general.*[53]—Procedure is statutory.[54] There may be more than one method provided by law, either of which is proper.[55] So long as the constitutional guaranty of due process of law is not

46. Work done on curbing held repairs and not reconstruction and hence not chargeable to property owner. Perkinson v. Schnake [Mo. App.] 83 S. W. 301. Paving a street with vitrified brick, in place of an improvement made years before consisting of grading and macadamizing with cinders and mill ashes, is an original construction, the cost of which is chargeable to abutting owners, and not a reconstruction, chargeable to the city at large. Adams v. Ashland, 26 Ky. L. R. 184, 80 S. W. 1105. Temporary repairs on a plankroad acquired by a city, made to render travel thereon safe until a permanent improvement could be made, do not constitute a paving so as to relieve abutting property owners of the cost of subsequent improvements when the road was changed into a city street. In re East St. [Pa.] 60 A. 154.

47. Under Code, §§ 751, 782, 832, a city may improve, grade, or repair streets and pay therefor out of the general fund, or the grading fund if the improvement consist of grading, or the improvement fund if repairs are made. Shelby v. Burlington [Iowa] 101 N. W. 101. Under Laws 1897, p. 735, c. 455, authorizing Buffalo park commissioners to take possession of and improve a certain square, etc., the commissioners had power to use money appropriated for that purpose to divert and re-enforce sewers within the square. Locke v. Buffalo, 97 App. Div. 483, 90 N. Y. S. 550.

48. Scheme for street improvement provided by Act April 3, 1902, §§ 66, 87, 94, 105, does not render this necessary. Dixey v. Atlantic City [N. J. Law] 58 A. 370.

49. "Ordinance No. 50" of Burlington, Iowa, did not commit that city to the policy of paying for street improvements by special assessments, but left the manner of paying open to be decided when a particular work was to be done. Shelby v. Burlington [Iowa] 101 N. W. 101. Action of village board in authorizing construction of gutters and sidewalks held to have been taken under Rev. St. 1898, c. 40, § 893, subd. 11, and §§ 912, 914a, authorizing general street improvements payable by the city, and not under § 905 authorizing paving of particular streets and assessment of abutting property for the cost. McCullough v. Campbellsport [Wis.] 101 N. W. 709.

50. The commissioners appointed under the act of 1901 are the successors of those acting under the act of 1893; the latter act was not repealed by the former. Pratt v. Dudley [Ark.] 84 S. W. 781.

51. In re Opinion of the Justices [Me.] 60 A. 85.

52. 2 Acts 1857-58, c. 518, as amended, creating the Jefferson Southern Pond Draining Company does not grant special privileges. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141. The act having been recognized by subsequent legislation, an objection that the charter thereby granted was invalid could not be sustained. Id.

53. See 2 Curr. L. 1332.

54. Proceedings to improve a street also properly taken under general street improvement act, as constitutional amendment did not affect or change that law as applied to such proceedings. Duncan v. Ramish, 142 Cal. 686, 76 P. 661. Proceedings to change grade properly taken under Laws of 1891 and 1893, instead of under charter of Los Angeles which was not made supreme in such matters until the constitutional amendment of 1896. Id. Improvement of certain streets in Boston and construction of terminal station held to have been done under a special law providing therefor (St. 1896, p. 520, c. 516) and not under the general law requiring the superintendent of streets to construct improvements through contracts. Wells v. Street Com'rs of Boston [Mass.] 73 N. E. 554.

55. Procedure in construction of walk and assessment therefor under Laws 1881, c. 37, § 12, held proper, though Laws 1881, c. 38, might have been followed. City of Leavenworth v. Jones [Kan.] 77 P. 273.

violated,[56] the legislature, or its proper delegate, may prescribe any scheme or procedure for the making of public improvements which it considers proper.[57]

(§ 4) *B. By whom and how initiated.*[58]—In the absence of statutory provisions, city authorities may initiate and complete improvements without preliminary action on the part of owners whose property may be assessed for the cost.[59] But many statutes require a petition of property owners as a necessary prerequisite,[60] without which subsequent proceedings and assessments are invalid.[61] The necessity of such petition depends, under some statutes, upon the class to which the city concerned belongs.[62] In Missouri, a petition is unnecessary to authorize proceedings to condemn land for the extension of a street.[63] When required, the petition must conform to the statutory provisions.[64] The sufficiency of a petition for a change of grade, signed by a majority of the owners of the land to be charged is not affected by a subsequent enlargement of the assessment district by the council.[65] A petition in behalf of a city need not allege that a petition of property owners has been made and presented.[66] The resolution of intention to construct improvements involving a change of grade is itself conclusive that at its passage the persons whose names appeared on the petition were the owners of a majority of the frontage.[67]

56. The procedure required by the Vrooman Act (St. 1885, c. 153, and amendments thereto) for the making of a street improvement constitutes "due process of law." Chase v. Trout [Cal.] 80 P. 81. Rev. St. 1899, §§ 5648-5658, providing that all steps in proceedings relative to public improvements prior to hearing of exceptions and entry of judgment may be taken in vacation do not violate Const. art. 6, § 1, providing for the vesting of judicial power in certain courts (City of St. Joseph v. Truckenmiller, 183 Mo. 9, 81 S. W. 1116), nor do those sections operate to deprive persons of property without due process of law (Id.).

57. Chase v. Trout [Cal.] 80 P. 81. Within constitutional limits city authorities have power to prescribe the preliminary steps to be taken in the making of improvements. Thus, a contract for paving may be let without notice to property owners, so far as the constitution is concerned. City of Denver v. Campbell [Colo.] 80 P. 142.

58. See 2 Curr. L. 1332.

59. Denver Charter, art. 7, § 23, providing that construction of storm sewers shall not be the subject of petition or remonstrance is valid. Spalding v. Denver [Colo.] 80 P. 126.

60. Rev. St. 1899, § 5683, relative to petitions for local improvements and publication of the same was not repealed by § 5661, whereby a petition is not required in some cases. Roth v. Forsee [Mo. App.] 81 S. W. 913. Where the surface of a street is so worn and rotten that all the surface material will have to be removed and replaced with new material, though the same concrete base may be used, such work constitutes a "repaving" and not simply a "repairing" and hence can be done only on petition of the property owners affected, when the cost is to be borne by the abutting property. McCaffrey v. Omaha [Neb.] 101 N. W. 251.

61. Under Ky. St. 1903, § 3096, an ordinance providing for the original construction of a brick sidewalk is void unless preceded by a petition of the owners of two-thirds of the frontage. City of Covington v. Brinkman, 25 Ky. L. R. 1949, 79 S. W. 234. Failure to commence proceedings for a street improvement by petition of the property owners renders an assessment levied therefor invalid. Brookfield v. Sterling [Ill.] 73 N. E. 302.

62. The mayor and council of a city of the first class, with a population of less than 25,000 have power to contract for grading of streets and alleys and to assess abutting property for the expense, without having been requested to do so by a petition signed by the resident owners of abutting property. Tarman v. Atchison [Kan.] 77 P. 111. An ordinance providing for a street improvement in a village of less than 10,000 cannot be adopted until there has been a petition signed by the owners of one-half the abutting property, and by a majority of the resident owners of the property affected [4 Starr & C. Ann. St. 1902, p. 149, c. 24]. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399. Laws 1897, p. 103, § 4, as amended by Laws 1899, p. 95, giving cities having a population of over 50,000 power to adopt ordinances for local improvements by special assessments without a petition by property owners, and denying that power to cities having a population of 50,000 or less, is a valid classification of cities. Id. Laws 1903, p. 101 (Acts of May 11, 1903, and May 15, 1903), amending the Act of 1897, are in conflict with Const. 1870, art. 4, § 22, because the classification adopted by those statutes is arbitrary. Id.

63. Rev. St. 1899, §§ 5979, 5990, 5993. City of Tarkio v. Clark [Mo.] 85 S. W. 329.

64. No evidence to justify finding that petition for construction of sewer had been presented, signed as required by statute. Kidson v. Bangor [Me.] 58 A. 900.

65. O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020.

66. Local Improvement Act, § 37. Richards v. Jerseyville [Ill.] 73 N. E. 370.

67. Objection that there was no proper petition held untenable. Chase v. Trout [Cal.] 80 P. 81.

Sanction by voters is quite commonly required to authorize the issue of bonds, increase of public debt, or levy of taxes.[68] The validity of public work may depend on any of these as prerequisite. At a special election to vote on public improvements, taxes may be voted for or against, without specifying with close particularity the amount to be expended upon each improvement contemplated.[69] In such elections, registration laws must be complied with.[70] The ballots must be so worded as to submit the question directed by the council to be submitted to the voters.[71]

(§ 4) *C. Notice and hearing.*[72]—Failure to give notice of the various steps in the proceedings[73] in the manner provided by statute[74] is fatal and leaves the authorities without jurisdiction to proceed. Notice will not be implied from the fact that the property owner is the city attorney.[75] Published notices of proceedings must correspond to ordinances and resolutions.[76] A mortgagee, as well as the owner, has the right of appeal to the city council, secured by the California act.[77]

(§ 4) *D. Protests and remonstrances.*[78]—To be effective a protest must be unqualified.[79] The Missouri statute giving a majority of resident owners the privilege of protest against an improvement does not violate the constitutional guaranty of due process or equal protection of law because it does not give nonresident owners the same privilege.[80] In Indiana, a remonstrance is not peremptory, so as to cause proceedings to be abandoned, unless signed by two-thirds of the property owners who reside on lots abutting on the improvement, and who also represent two-thirds of the lineal feet of such abutting property.[81] A remonstrance is of no effect unless filed within the time prescribed by statute.[82] Remon-

68. See Municipal Bonds, 4 Curr. L. 706; Municipal Corporations, § 13, 4 Curr. L. 746; Taxes, 2 Curr. L. 1786.

69, 70. Endom v. Monroe, 112 La. 779, 36 So. 681.

71. Where a borough council resolved to submit the question of construction of waterworks at a special election, and the ballots read "for" or "against" "the proposition of construction or purchase of waterworks," such ballots, being in the alternative did not submit the question directed to be submitted, and the election was invalid and nugatory. Marcellus v. Garfield [N. J. Law] 58 A. 1099.

72. See 2 Curr. L. 1333, n. 47.

73. City charter provisions requiring the mayor and council to give property owners thirty days after approval of an ordinance in which to designate paving materials are mandatory and jurisdictional. Eddy v. Omaha [Neb.] 101 N. W. 25. City authorities have no power or jurisdiction to abate a nuisance consisting of stagnant water on lots without giving notice to the owner and affording him an opportunity to do the work himself. Shannon v. Omaha [Neb.] 100 N. W. 298. The record of condemnation proceedings to condemn land for street extension must show five days' notice of hearing on award of damages [Rev. St. 1899, § 5993]. City of Tarkio v. Clark [Mo.] 85 S. W. 329. Evidence held to show notice of order for construction of sewer and service of such notice. Walker v. Detroit [Mich.] 101 N. W. 847.

74. In giving notice after filing the plat and schedule, special charter cities of Iowa are to follow § 971 of the Code and not § 823, the former section not having been repealed by Acts 28th Gen. Assem. c. 29, p. 15, § 3. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542. Publication of notice of time when proposed improvements will be considered once each week for two weeks is insufficient unless first publication is two weeks before the time of meeting [Comp. Laws, § 3195]. Auditor General v. Calkins [Mich.] 98 N. W. 742. Publication of notice of hearing of objections, made by the city clerk under the instruction of the council, is a sufficient compliance with Comp. Laws, § 3195, requiring the council to give notice of such hearing. Id. Under Denver City Charter, art. 7, § 3, subsec. 2, requiring board of public works to publish a notice 20 days before ordering a public improvement, Sunday is to be included though it is the last day of publication. City of Denver v. Londoner [Colo.] 80 P. 117.

75. Proceedings to abate a nuisance by filling in private lots. Shannon v. Omaha [Neb.] 100 N. W. 298.

76. Thus, where resolution was for grading and graveling and notices only mentioned graveling, the variance was fatal to a special assessment for all the work. Gallaher v. Garland [Iowa] 101 N. W. 867.

77. Chase v. Trout [Cal.] 80 P. 81.

78. See 2 Curr. L. 1334.

79. A protest to paving in 1898 but expressing willingness to have it done in 1900, insufficient under Sess. Laws 1897, p. 219, § 31. McMillan v. Butte [Mont.] 76 P. 203.

80. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 Law. Ed. 1142.

81. Remonstrance insufficient when signed by more than two-thirds of the resident owners, but such signers did not own or represent two-thirds of the lineal feet of abutting property. Maley v. Clark, 33 Ind. App. 149, 70 N. E. 1005.

82. Remonstrance filed after notice for bids had been published three weeks was too late [Burns' Rev. St. 1901, § 4289a]. McKee v. Pendleton, 162 Ind. 667, 69 N. E. 997.

strances do not render invalid subsequent ordinances containing substantially different specifications for the improvement.[83]

(§ 4) *E. Estimates of cost.*[84]—In New Jersey the ascertainment of the probable cost of an improvement is a condition precedent to the passage of an ordinance ordering the improvement.[85] Under the Illinois statute, the engineer's estimate is insufficient if given in a gross sum.[86] An estimate showing the estimated cost of the substantial component elements of the improvement is sufficient.[87] In Indiana, the engineer's estimate of the cost of a street improvement must give the frontage on both sides of the street.[88] In California the only certificate required of the engineer is one which gives the street superintendent the facts necessary to enable him to make an assessment according to law.[89] When such certificate is required by the superintendent, it must be recorded.[90] An increase in the cost over the original estimate is sometimes prohibited.[91]

(§ 4) *F. Necessity and contents of ordinance or resolution.*[92]—The authorities are not in accord as to whether powers in regard to public improvements are to be exercised by resolution or ordinance, and the matter probably depends on the language of the various statutes.[93] If the statute provides that a city shall exercise powers conferred upon it by general ordinance, such ordinance is essential before the city can act, and proceedings without it will be invalid.[94] Even though the statute does not provide for the exercise of powers conferred by general ordinance, such an ordinance may be necessary if the statute is not specific as to the methods to be adopted in carrying out the powers granted.[95] But where it is simply required that the council shall act, by vote or otherwise, in the specific case, in accordance with a method pointed out by statute or general ordinance, a resolution is sufficient.[96] In Missouri, the first step in proceedings to condemn land for a street extension should be by ordinance, not by resolution.[97] If an ordinance is necessary, it must be properly adopted.[98] In providing for a street improvement not involving a change of grade, no action need be taken relative to the grade when it has already been fixed, even though the previous action fixing it was taken by resolution and not by ordinance.[99]

83. Town of Greendale v. Suit [Ind.] 71 N. E. 658.

84. See 2 Curr. L. 1334, n. 50.

85. Under P. L. 1895, p. 242, amount to be paid for land taken and damages caused must be determined before laying out and opening of a street can be ordered. Paterson, etc., R. Co. v. Town Council of Nutley [N. J. Law] 59 A. 1032.

86. City of Peoria v. Ohl, 209 Ill. 52, 70 N. E. 632.

87. Clark v. Chicago [Ill.] 73 N. E. 358.

88. Giving frontage on one side only is not a compliance with Burns' Ann. St. 1901, § 4293. Klein v. Nugent Gravel Co., 162 Ind. 509, 70 N. E. 801.

89. Duncan v. Ramish, 142 Cal. 686, 76 P. 661. Engineer's estimate of cost held sufficient, though not detailed. O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020.

90. Chase v. Trout [Cal.] 80 P. 81.

91. Where a second increased estimate was made and notice thereof given and opportunity to be heard thereon afforded, such estimate was practically original and did not violate a charter provision prohibiting an increase in cost above the original estimate. City of Denver v. Kennedy [Colo.] 80 P. 122.

92. See 2 Curr. L. 1335.

93. In Iowa, ordinance rather than resolution. Martin v. Oskaloosa [Iowa] 102 N. W. 529.

94, 95. Martin v. Oskaloosa [Iowa] 102 N. W. 529.

96. Martin v. Oskaloosa [Iowa] 102 N. W. 529. An ordinance is not essential to providing for an improvement payable out of the general fund, under Code, § 751; such action may be taken by resolution. Shelby v. Burlington [Iowa] 101 N. W. 101.

97. City of Tarkio v. Clark [Mo.] 85 S. W. 329. The mayor has no power to appoint a jury to assess damages in a proceeding to condemn land for a street improvement until an ordinance has been passed defining the benefit district. Id.

98. Ordinance for laying stone sidewalk set aside because not passed by "unanimous vote of all the members of the council." That all present voted for it is not sufficient. Crickenberger v. Westfield [N. J. Law] 58 A. 1097. The certificate of the clerk of the city council that an ordinance has been adopted is prima facie proof of its regular adoption. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836.

99. Langan v. Bitzer, 26 Ky. L. R. 579, 82 S. W. 280.

Contents.[1]—In Illinois, the first resolution is sufficient if it specifies in general terms the extent, kind, character,[2] and estimated cost[3] of the improvement. It need not include a statement of the manner in which an improvement is to be paid for.[4] The statute requiring the estimate of the cost to be made a part of the record of the first resolution is not complied with where the resolution makes the estimate a part thereof by reference only.[5] Where after objection to a proposed improvement, the board, at the public hearing, decided to adhere to the original scheme, a new resolution adhering to the first resolution was sufficient.[6] The final ordinance must contain a definite description of the improvement provided for[7] and the material to be used.[8] A variance between the resolution and ordinance is not fatal unless willful and material.[9]

Under the Indiana statute, the necessity for an improvement and an order therefor may be declared in the same resolution,[10] and the adoption of a resolution declaring the necessity of an improvement is not necessary to confer jurisdiction on the municipal authorities, when the property owner is notified and a hearing is had before making final assessments.[11] An ordinance providing for a street improvement is not void for the purpose of showing an intention to pay the whole cost by special assessments, though void as to the limitation of the assessment to abutting property on only one side of the street.[12]

Under the Kansas City charter, the council must, by ordinance, prescribe the dimensions, materials, and character of the contemplated improvement.[13] Pro-

1. See 2 Curr. L. 1335.

2. No variance between resolution and ordinance where resolution did not contain details of street improvement. Lanphere v. Chicago, 212 Ill. 440, 72 N. E. 426. Resolution for paving of alley, giving locality of improvement and stating how it was to be made, sufficient, though width of alley was not stated. Jones v. Chicago, 213 Ill. 92, 72 N. E. 798.

3. Estimate of cost in a paving resolution held sufficiently itemized. Hulbert v. Chicago, 213 Ill. 452, 72 N. E. 1097. Reciting the engineer's estimate in full in the first resolution is a sufficient compliance with Hurd's Rev. St. 1903, c. 24, par. 513, though the preamble and signature of his report are omitted. Lanphere v. Chicago, 212 Ill. 440, 72 N. E. 426. Statute sufficiently complied with where estimate of street improvement except title and signature, was copied into the first resolution; and estimate held sufficiently itemized. Jones v. Chicago, 213 Ill. 92, 72 N. E. 798.

4. Hurd's Rev. St. 1903, p. 390, c. 24, contains no such requirement. Ziegler v. Chicago, 213 Ill. 61, 72 N. E. 719; Jones v. Chicago, 213 Ill. 92, 72 N. E. 798.

5. Chicago Union Traction Co. v. Chicago, 209 Ill. 444, 70 N. E. 659. Nor was the section complied with by keeping the estimate on file and accessible, with other estimates, in the office of the board of local improvements. Id. The fact that this practice has been followed in Chicago does not warrant placing such construction on the act as applied throughout the state. Id.

6. Hulbert v. Chicago, 213 Ill. 452, 72 N. E. 1097.

7. Description of street improvement in ordinance held sufficient. Lanphere v. Chicago, 212 Ill. 440, 72 N. E. 426.

8. Language of ordinance describing paving material held sufficiently definite and certain. Jones v. Chicago, 213 Ill. 92, 72 N. E. 798. Ordinance held not to contain sufficient description of supply pipe. McChesney v. Chicago [Ill.] 73 N. E. 368. Fire hydrants not mentioned in original ordinance and held not included in the description of cast-iron water supply pipes. Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884.

9. Omission of signature from engineer's estimate in resolution held not to invalidate special tax, such variance not being willful or substantial. Ziegler v. Chicago, 213 Ill. 61, 72 N. E. 719. Where a resolution provided that the entire roadway of an avenue and all intersections should be paved and the ordinance provided that some of the intersections should not be paved, the variance between the resolution and the ordinance was willful and material within the meaning of § 9 of the local improvement act and the ordinance is invalid. Smith v. Chicago [Ill.] 73 N. E. 346.

10. Pennsylvania Co. v. Cole, 132 F. 668.

11. Hence, notice and hearing upon the necessity are not essential before the order for construction. Pennsylvania Co. v. Cole, 132 F. 668.

12. Helm v. Witz [Ind. App.] 73 N. E. 846.

13. An ordinance did not prescribe the dimensions, material and character of a sewer (Kansas City Charter, art. 9, § 10) by merely referring to specifications on file with the board of public works, when such specifications were not in fact on file at the time. Dickey v. Holmes [Mo. App.] 83 S. W. 982. The detailed plans and specifications for a public work required by Kansas City Ordinance 1888, § 924, are not those required to be prescribed by ordinance under art. 9, § 10, of the charter. Id. The council cannot delegate to the city engineer the power to prescribe specifications for the roofing of areas or vaults in sidewalks; such specifications

ceedings taken under an ordinance, invalid in this respect, cannot be validated by a subsequent ordinance.[14] A charter provision that property owners may select paving materials is satisfied by an ordinance providing for selection from asphalt, vitrified brick, or macadam, without specifying at least two kinds of each material.[15] A certificate by a board of public works that an ordinance proposing a sewer system conformed to the system established by the board is a sufficient compliance with the charter provision requiring the approval of the board to be endorsed on such ordinance.[16]

The resolution of intention, provided for by statute in California, must describe the extent of the improvement.[17] A resolution which describes the work in general terms, and makes the description potentially certain by reference to plans and specifications on file, is sufficient as to description.[18] Such plans and specifications need not be incorporated in and published with the resolution.[19] A resolution which declares the contemplated work to be "of more than local and ordinary public benefit" is not invalid because it charged the expense on a district including only abutting lots.[20] Under the "Bond Act," authorizing the issue of bonds if the estimated cost exceeds fifty cents per front foot, the resolution of intention need only state the determination that bonds shall be issued, which implies a finding that the cost exceeds the amount required.[21] A general description of the bonds in the resolution is sufficient, without incorporating them in full.[22] The resolution must be properly recorded,[23] and posted.[24]

(§ 4) *G. Curative legislation and ratification.*—From the power to authorize it follows that the legislature also has power to cure the omission or irregular performance of steps which it has prescribed, except as to those necessary to constitute due process of law, or to comply with any other constitutional provision.[25] That a

must be made by ordinance, under Kansas City Charter, art. 9, § 2. Haag v. Ward [Mo.] 85 S. W. 391.

14. Where sewer ordinance did not prescribe dimensions, material and character of sewer, a subsequent ordinance passed after the contract was let did not render tax bills valid. Dickey v. Holmes [Mo. App.] 83 S. W. 982. A sewer for drainage only is not authorized by an ordinance directing construction of a sewer for "sanitary and drainage purposes." Barton v. Kansas City [Mo. App.] 83 S. W. 1093. The assessment therefor was not made valid by the subsequent construction of catchbasins and connections with the sewer to carry off surface water. Id.

15. Ross v. Gates, 183 Mo. 338, 81 S. W. 1107.

16. Dollar Sav. Bank v. Ridge, 183 Mo. 506, 82 S. W. 56.

17. A resolution stating an intention to curb and pave a certain street between two other intersecting streets "where not already laid" sufficiently expresses the portions of the streets not to be improved. Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 P. 141.

18, 19. Chase v. Trout [Cal.] 80 P. 81.

20. The size of the benefit district is not jurisdictional. O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020.

21, 22. Chase v. Trout [Cal.] 80 P. 81.

23. Entry of resolution in resolution book after first publication, and then by pasting in the published notice, instead of writing it in, is immaterial. Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 P. 141.

24. Posting of resolution of intention to improve a street held sufficient to comply with St. 1891, p. 196, c. 147. Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 P. 141.

25. The Street Bond Act (St. 1893, c. 21) providing that bonds issued pursuant to the act shall be conclusive evidence of the regularity of previous steps cures all defects, not jurisdictional, to which no objection was properly made before the bonds were issued. Chase v. Trout [Cal.] 80 P. 81. Thus, the act was held to have cured an objection that the time for completion of the work was extended; that the notice of the time of recovering bids was not posted or published for the precise length of time required by the statute; that the contract did not provide that materials used should conform to specifications; that the street superintendent did not properly certify to the record of the assessment; that the engineer's certificate did not show actual measurement of the work by him; that the time for beginning the work was not fixed by the contract; and that the contractor's return to the assessment was insufficient. Id. Denver City Charter, art. 7, § 3, subd. 3, providing that the finding by the city council that the petition for paving was signed by the required number of property owners shall be conclusive is valid. City of Denver v. Londoner [Colo.] 80 P. 117. Denver City Charter, art. 7, § 3, subsec. 8, makes the finding of the council, by ordinance, that an improvement was ordered after due notice, conclusive. Held, the provision is valid, since other cp-

curative act arbitrarily fixes a period of thirty days after which defects which before may have been fatal are placed beyond inquiry does not make the law unreasonable.[26] Statutes designed to cure minor irregularities cannot cure failure to give proper notice.[27] No subsequent ratification or acquiescence by a city can cure a substantial defect or omission of a board acting judicially under statutory authority.[28]

§ 5. *Proposals, contracts, and bonds.*[29]—In the letting of contracts for public works, statutory requirements must be strictly complied with.[30] Statutes, or city charters or ordinances, determine what contracts may be made,[31] and who may make them.[32] Some statutes prohibit the making of a contract until an appropriation has been made for the cost,[33] or until the cost has been estimated by the council.[34] Where a city, without authority to charge cost of grading to abutting property, receives bids and lets contracts in lump sums for work including both grading and graveling, so that the expense of each work cannot be separately ascertained, a special assessment for the work is wholly void.[35]

The notice for bids must ordinarily make competitive bidding possible, and to that end the specifications must be definite[36] and such that bidders may make their offers intelligently and on the same basis.[37] Under the power of selecting materials

portunities to be heard are afforded. City of Denver v. Dumars [Colo.] 80 P. 114.

26. Chase v. Trout [Cal.] 80 P. 81.

27. Comp. Laws, § 3922, unavailing when notice did not comply with § 3195. Auditor General v. Calkins [Mich.] 98 N. W. 742.

28. Held no authority to construct a sewer. Kidson v. Bangor [Me.] 58 A. 900.

29. See 2 Curr. L. 1336; also title Public Contracts, 2 Curr. L. 1280; and Building and Construction Contracts, 3 Curr. L. 550.

30. State v. Snyder, 2 Ohio N. P. (N. S.) 261. Where county commissioners could let a bridge contract without advertising if the cost did not exceed $1,000 they could not leave out the cost of the substructure in ascertaining the cost. Id. A public letting of the contract is essential to the validity of tax bills therefor. Dickey v. Holmes [Mo. App.] 83 S. W. 982. Charter requirements as to manner of letting contracts for work being disregarded, the contract and work done thereunder does not render the city liable, nor can the city give the contract any validity by recognizing it as valid. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

31. An ordinance providing for the paving of a street authorizes a contract for macadamizing. Ross v. Gates, 183 Mo. 338, 81 S. W. 1107. The Illinois statute providing for construction of sidewalks by the municipality on failure of the property owner to do so, and providing for the cost by special assessment, does not prevent construction by contract. People v. Peyton [Ill.] 73 N. E. 768. Contract for construction of sewers held not to have been in excess of power of council as given by Winona city charter relative to public improvements, the limitations on incurring liabilities therein found not being applicable to such works. City of Winona v. Jackson, 92 Minn. 453, 100 N. W. 368.

32. Contracts awarded by boards of public works in cities of the first class in Kentucky, for the original construction of public ways, need not be approved by the general council. Board of Public Works of Louisville v. Selvage Const. Co., 25 Ky. L. R. 2098, 79 S. W. 1182. The street commissioner of Worcester, who has been "directed and authorized" by the council to construct a bridge, may make a contract therefor, in conjunction with the mayor under St. 1893, c. 444, §§ 18, 23, 32, 39, 40. Webb Granite & Const. Co. v. Worcester [Mass.] 73 N. E. 639.

33. Where a county board appropriated 75 per cent. of the tax levy for repairs on the courthouse, before making the contract for such repairs, the misappropriation of such funds or their application to other purposes could not affect the question of the power of the board to make the contract. Cole County v. Goehring, 209 Ill. 142, 70 N. E. 610. The statute prohibiting a city from incurring liabilities until a sufficient appropriation has been voted therefor precludes the making of a contract only when prior unpaid obligations in excess of the appropriation have been actually incurred, not where the mere estimated expenses exceed such appropriation. Webb Granite & Const. Co. v. Worcester [Mass.] 73 N. E. 639. Thus where damages for the taking of land did not accrue until September 13th, a contract made on July 30 preceding, for construction of streets and bridges for which an appropriation had been voted July 1, was not in violation of the statute. Id.

34. Though the order of a city council contains an estimate of the cost of a bridge, without determining such cost does not prevent the mayor and street commissioner from contracting in good faith for such bridge at a cost in slight excess of the council's estimate. Webb Granite & Const. Co. v. Worcester [Mass.] 73 N. E. 639.

35. Gallaher v. Garland [Iowa] 101 N. W. 867.

36. Specifying three alternative kinds of paving material does not comply with statute. City of Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989.

37. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603. Specifications which called for a particular brand of coal tar cement, only made by one manufacturer, did not render the ordinance void by preventing competi-

for paving, vested in city councils, those bodies have power to choose a material as to which competitive bidding is impossible.[38] If the notice is invalid, no legal contract can be based thereon.[39] The call for bids must be published as the law directs,[40] or must be made in some way reasonably calculated to attract the attention of persons likely to become bidders if given an opportunity.[41]

Statutes requiring contracts to be let to the lowest responsible bidder[42] do not require acceptance of the lowest bid.[43] It is discretionary with the proper authorities to award the contract to one whose bid is not the lowest,[44] or to reject any or all bids.[45] It is improper for the council to negotiate with one bidder privately and close a contract by changing the scope of the work or the terms of payment in consideration of his reducing his bid.[46] The council should, after judiciously considering the relative merits of bids submitted, accept the one deemed most reasonable, or reject all bids, if power to do so is reserved.[47] Bids must be within the advertised specifications[48] and must comply substantially with charter requirements.[49] A contractor who interposes a gross bid for entire performance of a given work assumes the risk as to the nature and quantity of work to be performed, even though approximate estimates, which are materially wrong, have been prepared for the guidance of bidders.[50] Where public officials fail to award a contract to the lowest bidder as provided by statute, such bidder cannot maintain an action to recover profits which he claims he would have made had the contract been awarded to him.[51] His remedy is an injunction to restrain prosecution of the work, have the contract set aside and the matter referred back for further action.[52]

The best thought of recent years is opposed to the "maintenance clause" in public contracts as imposing an improper burden on property owners, and giving the contractor an undue advantage,[53] but such provisions are commonly held valid,[54]

tion, where there was only one manufacturer who had been successful in making the material desired. Swift v. St. Louis, 180 Mo. 80, 79 S. W. 172. Specifying cement by calling it a certain brand was sufficient when all the contractors knew that the brand referred to was a brand of cement. Id.

38. Choice of Trinidad Lake asphalt valid. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 Law. Ed. 1142. The choice by a city council of a product of a foreign country for paving material is not an interference with interstate commerce so as to violate the commerce clause of the constitution or the federal anti-trust act (Trinidad Lake asphalt selected.) Id.

39. A resolution directing the city engineer to advertise for bids left the date for receiving bids blank, and did not expressly authorize him to fill in the date. Held, such notice by the engineer was invalid. Pennsylvania Co. v. Cole, 132 F. 668.

40. Publication of the engineer's notice to contractors for five different days is sufficient in Missouri though the days are not consecutive. Roth v. Forsee [Mo. App.] 81 S. W. 913.

41. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

42. The word "work" in a city charter providing that all work exceeding in cost a specified sum shall be let to the lowest reasonable and responsible bidder, includes structures such as buildings and bridges. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

43. So held under Denver City Charter art. 7, § 46, requiring contracts to be let to the lowest reliable and responsible bidder. City of Denver v. Dumars [Colo.] 80 P. 114.

44. City of Denver v. Dumars [Colo.] 80 P. 114. Mandamus will not lie to compel an award to the lowest bidder. City of Akron v. France, 4 Ohio C. C. (N. S.) 496. It lies in the discretion of the directors of public service, after street improvements not exceeding $500 in cost have been ordered by the council, to let the contract therefor to the lowest bidder. Under Rev. St. § 1536-679, the council cannot require the contract to be so let. State v. Roebuck, 2 Ohio N. P. (N. S.) 688.

45. City of Akron v. France, 4 Ohio C. C. (N. S.) 496.

46, 47. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

48. Specifications for paving materials held to permit bids for different kinds of blocks at different prices by same bidder; successful bid within specifications. Dixey v. Atlantic City [N. J. Law] 58 A. 370.

49. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

50. Lentilhon v. New York, 92 N. Y. S. 897.

51, 52. City of Akron v. France, 4 Ohio C. C. (N. S.) 496.

53. Bacas v. Adler, 112 La. 806, 36 So. 739.

54. Provision in paving contract requiring contractor to maintain street in proper state of repair for 10 years held not invalid at time contract was made. Bacas v. Adler, 112 La. 806, 36 So. 739. A contract provision requiring the contractor to guaranty a pavement

as are provisions indemnifying the city against claims for damages growing out of the work.[55] Provisions requiring the exclusive use of union labor,[56] and provisions requiring residents or citizens to be employed as laborers, and supplies to be purchased of local concerns,[57] are invalid. In Illinois where a municipality, on failure of the owner, constructs a sidewalk by contract, the contract must specify separately the cost of grading, materials, and laying the walk so that the bill of cost may be made to conform to the statute.[58] Hence, a contract for construction by the square foot cannot be made the basis of a special assessment for the cost[59] and the fact that the bid contained the proper terms as an alternative does not cure it.[60]

Failure to complete work within the time prescribed by an ordinance and contract, both of which make time of the essence of the contract, renders tax bills void, notwithstanding a stipulation in the contract for deduction of a certain sum per day as liquidated damages for delay.[61] In such case the time cannot be extended after the contract has been let so as to validate the tax bills.[62] But in the absence of an ordinance requiring completion of the work within a specified time, a contract containing such a provision and also a provision for liquidated damages for delay, is complied with by completion within a reasonable time after confirmation of the contract.[63] Taxpayers are entitled to have deducted from the contract price of a road improvement amounts which the contractors have saved themselves by failing to make the work conform to the contract.[64] In the absence of any claim of fraud or collusion, the acceptance of a work by the proper city authorities is conclusive proof that work has been done according to contract.[65]

A suit to enjoin performance[66] of a contract will not lie when the work is practically finished.[67] But a taxpayer's action to prevent unlawful disbursement of money for a public improvement, the contract for which is alleged to have been illegal, will not be dismissed merely because execution of the work has proceeded so far that the preventive relief asked cannot be granted; the action should be retained and such relief granted as the court has power to afford.[68] The fact that

to remain in a perfect state of repair for five years does not conflict with a Kansas City charter provision prohibiting the charging of repairs on abutting property. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

55. A contract for paving and curbing is not rendered invalid by provisions requiring the contractor to meet claims for damage arising out of the nature of the work, to repair or replace all permanent sidewalks, streets, alleys, etc., to indemnify the city from suits or claims for damages to person or property growing out of the work, and to pay for injuries to water, gas or sewer pipes. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542.

56. The Detroit board of education has no power to require contractors to use union labor exclusively in the construction of public buildings. Lewis v. Board of Education of Detroit [Mich.] 102 N. W. 756.

57. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542. The invalidity of the alien clause does not make the contract against public policy both parties having disregarded it. Doyle v. People, 207 Ill. 75, 69 N. E. 639.

58. People v. Peyton [Ill.] 73 N. E. 768.

59, 60. An alternative proposition in the contract, providing for such construction, cannot be availed of to justify an assessment. People v. Peyton [Ill.] 73 N. E. 768.

61. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

62. Spalding v. Forsee [Mo. App.] 83 S. W. 540.

63. Evidence held to show work was not completed in a reasonable time. Schibel v. Merrill [Mo.] 83 S. W. 1069.

64. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860.

65. Baldrick v. Gast, 25 Ky. L. R. 1977, 79 S. W. 212.

66. Where in an action to restrain excavation of a street which would result in destruction of shade trees, plaintiff did not suggest that the excavation was being done with a view to the construction of a sidewalk, the question whether the city had a valid sidewalk ordinance under which to act was immaterial. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

67. Injunction to prevent performance of a paving contract refused when the work was practically finished, and the circumstances which would call for enforcement of the bond to keep the paving in repair for 10 years were only remotely contingent. Fisher v. Georgia Vitrified Brick & Clay Co., 121 Ga. 621, 49 S. E. 679.

68. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603 Where in a suit to determine the validity of a paving contract and to enjoin the contractor from proceeding with the work and the city from incurring any liability thereon, it appeared that part of the work had been finished, and the contract

such taxpayer has private interests which will be affected by the outcome of the suit does not affect his right to maintain the action.[69] Where a council has exceeded its power in making a contract, a property owner affected thereby may have an injunction to prevent execution of the contract.[70] Equity has jurisdiction to enjoin a county board from accepting a road and allowing the contract price therefor, where the work was not done in accordance with the contract and the county board acted in collusion with the contractors to defraud the taxpayers.[71]

§ 6. *Security to laborers and materialmen.*[72]—Ordinary mechanics' lien laws do not apply to public property.[73] Some statutes provide for security to mechanics and materialmen by requiring a bond of the contractor.[74] It is held that under the act of Congress requiring such bond,[75] the persons secured are practically given a special lien, substituting the bond for the building.[76] Other statutes provide for a lien on funds due the contractor from the municipality.[77] Under such statutes, notice of claims must be served upon the proper municipal officer[78] and within the time provided by law.[79] Two lien claimants who deliver their lien claims at the

abandoned by mutual consent as to the latter, the plaintiffs had a right to continue the suit to determine the validity of the contract. Patterson v. Barber Asphalt Pav. Co. [Minn.] 101 N. W. 1064. These facts do not bring the case within the rule that an injunction will not be granted where a change of circumstances after commencement of the suit renders it unnecessary. Id.

69. As where owner of toll bridge, whose receipts would be affected by construction of new bridge, sought to prevent payment of money on contract. Chippewa Bridge Co. v. Durand [Wis.] 99 N. W. 603.

70. City of Bluffton v. Miller, 33 Ind. App. 521, 70 N. E. 989.

71. Board of Com'rs of Laporte County v. Wolff [Ind.] 72 N. E. 860. In accepting work and directing payment, the board acts in an administrative not a judicial capacity. Id. No demand on the county board to bring suit was necessary, since it would have been unavailing. Id. A complaint alleging failure of contractors to comply with contract for road, and collusion between contractors and commissioners, and seeking to enjoin acceptance of work and allowance of payments on the work, justifies making the contractors parties to the proceedings. Id.

72. See 2 Curr. L. 1339.

73. Carnegie Library held a public building, on which no mechanic's lien is imposed by the mechanic's lien law, Rev. St. 1883, c. 91, § 30 et seq. Goss Co. v. Greenleaf, 98 Me. 436, 57 A. 581.

74. A contractor's bond can derive no obligatory force, in so far as it refers to materials furnished, from a statute requiring such bond to secure payment of "laborers and mechanics" only. American Radiator Co. v. American Bonding & Trust Co. [Neb.] 100 N. W. 138.

75. **Construction** Act Aug. 13, 1894. Lubricating oils used in operating a dredge are not "materials" supplied in prosecution of the work within the meaning of the act. United States v. City Trust, Safe Deposit & Security Co., 21 App. D. C. 369. Same holding as to coal used in operating the dredging machine. United States v. City Trust, Safe Deposit & Surety Co., 23 App. D. C. 153. Hence the parties furnishing the coal cannot recover therefor from sureties on the contractor's bond. Id. Nor can persons who made repairs on the dredging machine recover the cost thereof from such sureties. United States v. City Trust, Safe Deposit & Surety Co., 23 App. D. C. 155. Contract to "furnish all necessary labor and materials" for construction of a government building, providing for work to be done and time and manner of doing it, and wherein the government agrees to pay for "construction" of the building, is a contract for construction of a building within the meaning of 28 Stat. 278, requiring contractors to give bonds for prompt payment of persons supplying labor and materials. United States v. Murdock [Me.] 59 A. 60. A mere agreement to supply materials, without actual delivery to the contractor, or his sureties who complete a contract after his death, is not a "supplying" of materials under the act. Id.

76. United States v. City Trust, Safe Deposit & Security Co., 21 App. D. C. 369.

77. Under Gen. St. p. 2078, securing payment of persons furnishing materials for a public improvement, one supplying materials to a subcontractor has a lien only on so much of the contract price as had not been paid to the subcontractor at the time the lien claim was notified, etc., under the statute. Wilson v. Dietrich [N. J. Eq.] 59 A. 251.

78. Lien for materials used in macadamizing village street properly served on chairman of committee on roads and bridges of the village trustees, under the lien law. Rockland Lake Trap Rock Co. v. Port Chester, 92 N. Y. S. 631. Service of notice of a mechanics' lien against an addition to Gouverneur Hospital, authorized by commissioners of the sinking fund, by filing with the comptroller—chief financial officer of the city and a commissioner—held sufficient, under Laws 1897, p. 520, c. 418, § 12, in the absence of any showing that the commission had a regular official head on whom such notice could be served. Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, 70 N. E. 783.

79. Payments made to a contractor for construction of a schoolhouse were valid as against the claims of materialmen who did not file claims against the school district until after the last payment had been made to the contractor according to the terms of the contract [Code, § 3102]. Green Bay

same time are each entitled to a pro rata share of the fund remaining applicable to their claims.[80] The right of materialmen to enforce their liens is not affected by the fact that the contract was unjustifiably abandoned.[81]

In New York, liens filed against a village on account of public improvements do not require verification.[82] Orders on a fund due from a village for a public improvement, are invalid unless copies thereof are filed in the county clerk's office.[83] A village which has paid such invalid orders is not entitled to the benefit of such payment as against the liens of materialmen.[84] A judgment directing the payment of funds due a contractor to lienors properly limits costs to the amount due the contractor.[85]

Under the Iowa statute subcontractors on buildings not belonging to the state may file claims against the municipality to the extent of the contract price.[86] This statute does not authorize a lien on the building or on funds due the contractor.[87]

The affidavit that all claims for labor have been paid, required by the Duluth charter, before a final estimate and payment on a public contract, may be made by an assignee of the balance due thereon, who has personal knowledge of the facts.[88]

§ 7. *Injury to property and compensation to owners. A. In general.*[89]—A municipality is not liable for damages to private property necessarily caused by the construction of a public work.[90] But if the work is done in a negligent manner, and unnecessary damage, such as a physical invasion of property beyond the limits of the street results,[91] or the procedure has been irregular[92] or unauthorized, an

Lumber Co. v. Independent School Dist. [Iowa] 101 N. W. 84.

80. Wilson v. Dietrich [N. J. Eq.] 59 A. 251.

81, 82, 83, 84. Rockland Lake Trap Rock Co. v. Port Chester, 92 N. Y. S. 631.

85. Code Civ. Proc. § 3418. Rockland Lake Trap Rock Co. v. Port Chester, 92 N. Y. S. 631.

86. A contract for construction of a school building provided that the district might complete the work and deduct the cost from the contract price, and that the architect's certificate of such cost should be conclusive thereon. The contract was abandoned and completed by the district. Held, the architect's certificate of the cost of the work by the district was conclusive as against materialmen seeking to enforce claims against the district. Green Bay Lumber Co. v. Independent School Dist. [Iowa] 101 N. W. 84. That the district, in completing the contract, took possession of materials left by the contractor, as the contract permitted it to do, did not render it liable to the materialmen. Id. In action by materialmen and subcontractors for materials furnished for a schoolhouse, the contractor answered, and the proof showed liability as to him; held, error to refuse judgment against him, though the school district was found not liable. Id.

87. Code § 3102, construed. Green Bay Lumber Co. v. Independent School Dist. [Iowa] 101 N. W. 84.

88. Appeal of City of Duluth [Minn.] 101 N. W. 1059.

89. See 2 Curr. L. 1341. Taking property for public use, see Eminent Domain, 3 Curr. L. 1189.

90. Necessary destruction of private drains in the course of laying water mains is damnum absque injuria. Bennett v. Incorporated Town of Mt. Vernon, 124 Iowa, 537, 100 N. W. 349. A property owner cannot recover damages for removal of a condemned sidewalk. Scott v. Marshall [Mo. App.] 85 S. W. 98. No damages are recoverable by a property owner for the necessary removal of shade trees by a city in the course of improvement of a street. Fourth class cities have power under Rev. St. 1899, § 5960, to remove shade trees which prevent construction of a walk of uniform width. Id. No recovery where trees were outside lot line, but roots penetrated into plaintiff's lot. Colston v. St. Joseph, 106 Mo. App. 714, 80 S. W. 590. The act of paving a street nearer to the lot line on one side of the street than on the other involves the exercise of discretionary power, and does not give a cause of action for damages to an abutting property owner. McGrew v. Kansas City [Kan.] 77 P. 698. A railroad company having a right to elevate its track without liability to adjoining owners, the city cannot be made liable for requiring such elevation for the public safety. Osburn v. Chicago, 105 Ill. App. 217. Requiring a railway company to build a new bridge to accommodate an increased flowage in a natural stream caused by construction of a drainage system is not taking property without due process of law. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

91. McCullough v. Campbellsport [Wis.] 101 N. W. 709. As where filling on street was thrown on plaintiff's lot. Bunker v. Hudson [Wis.] 99 N. W. 448. Or where excavation removed lateral support and caused a landslide removing and injuring part of plaintiff's land, separated from street by a narrow strip. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706; Haubner v. Milwaukee [Wis.] 102 N. W. 578.

92. Where there is a valid ordinance for

abutting property owner, charged with part of the cost, has a right of action for damages.[93] But an irregularity in procedure cannot be made the basis of an action by one not an abutting owner.[94] The right to damages cannot be taken away by a subsequent statute, though such a statute may provide for a reassessment of benefits.[95] Where the property owners affected, and the city, have agreed upon the compensation for damages caused by an improvement, a general taxpayer cannot interfere, though the improvement is to be paid for out of a general fund, the agreement not being inequitable.[96] The question of "just compensation" to owners of property for injuries caused by grading a street is for the jury, in an action for damages.[97]

For failure to enforce compliance with a contract for paving and corruptly allowing the contractor to use inferior materials, members of the board of public works are personally liable to the owner of property assessed for the cost for the special damage thereby suffered.[98] The duty to strictly enforce the contract is ministerial, and recovery of such damage cannot be defeated on the ground that the board was performing a judicial function,[99] nor is the right to maintain such personal action barred by the fact the property owner injured might have invoked the powers of a court of equity to restrain departure from the terms of the contract, or might have compelled proper performance by mandamus, or could have objected to the application for judgment against the property to satisfy the assessment.[1] Where a statute authorizes the making of contracts for river and harbor improvements, the occupation of land on the river frontage by the engineer in charge of the work is not ultra vires, and a contract of tenancy should be implied.[2] But if it appears that the damages suffered from such occupancy were caused by illegal acts and intimidations of the government officers, no contract can be implied.[3]

(§ 7) *B. Establishment or change of grade of street.*[4]—There is no common-law liability resting upon municipalities to pay damages or make compensation to abutting owners for changes lawfully made in the grades of streets. Such liability is entirely statutory.[5] Damage resulting from a change of grade does not constitute a taking of private property for public use, within the meaning of

grading and the work is done without taking measures to ascertain and pay damages to an abutting property owner, the city is liable for the damages caused. Schrodt v. St. Joseph [Mo. App.] 83 S. W. 543. In an action to recover therefor, a warranty deed and proof of possession by plaintiff is sufficient evidence of title. Id. An occupant of property cannot recover for damage and inconvenience caused while a railway right of way was being lowered in the street, without showing some special damage, not suffered by the public at large, and that the work was done unlawfully or in a negligent manner. Thompson v. Macon, 106 Mo. App. 84, 80 S. W. 1.

93, 94. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706.

95. Haubner v. Milwaukee [Wis.] 102 N. W. 578.

96. Shelby v. Burlington [Iowa] 101 N. W. 101.

97. Swope v. Seattle, 36 Wash. 113, 78 P. 607. A jury trial being granted in a suit to restrain a city from grading a street, it was not error to allow the jury to determine the damages to which plaintiffs were entitled in the same action, instead of by a suit by the city under the statute. Id.

98, 99, 1. Gage v. Springer, 211 Ill. 200, 71 N. E. 860.

2, 3. Willink's Case, 38 Ct. Cl. 694.

4. See 2 Curr. L. 1342. See, also, Highways and Streets, 3 Curr. L. 1603.

5. City of Newark v. Weeks [N. J. Law] 59 A. 901; Damkoehler v. Milwaukee [Wis.] 101 N. W. 706. Railroad Law 1897, p. 797, § 63, authorizing condemnation of lands to abolish grade crossings, does not impose such liability. Smith v. Boston & A. R. Co. [N. Y.] 73 N. E. 679, afg. 99 App. Div. 94, 91 N. Y. S. 412. Laws 1903, p. 1396, c. 610, relative to change of grade of highways on which state roads are built does not change the rule as to ordinary highways. Id. New York railroad commissioners have no power to determine that a municipality shall be liable for damages to abutters caused by change of grade. Id. The revised eminent domain act of New Jersey (P. L. 1900, p. 79) does not apply to injuries arising from change of street grade. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 59 A. 1. Nonpayment of damages for change of grade of street does not affect the right of a city to make the improvement or to assess the cost thereof on adjoining property. Duncan v. Ramish, 142 Cal. 686, 76 P. 661.

the constitution, if the municipality act under authority of law, and use due care.[6] But if the city acts without authority, or if the work is done in a negligent manner so that injury is unnecessarily caused, an abutting owner has a cause of action therefor.[7] Conditions prescribed by statutes allowing recovery of damages must be complied with.[8] The correct measure of damages, when recoverable, for a change of grade, is the difference in the value of the property with, and the value without, the improvement.[9] That the city consented, when convenient, to fill a lot with surplus earth, is irrelevant on the question of damages.[10] Under the New Jersey statute,[11] the damages should include not only structural damage to buildings but also loss of rental value during the time the buildings are rendered untenantable by the work of changing the grade and of adjusting the building to the new grade.[12] A city having the right to grade streets, an excavation for that purpose will not be restrained unless it is made to appear that the change is unnecessary and unreasonable or that the work is to be so performed as to result in an unnecessary injury to private property.[13]

§ 8. *Local assessments. A. General principles. Equality and uniformity.*[14]—Many of the general principles of taxation apply to local assessments and as to such the topic Taxes should be consulted.[15] It is within the power of the legislature to create special taxing districts and to charge the cost of local improvements, in whole or in part, upon the property in such district, either according to valuation, superficial area, or frontage.[16] Statutes conferring this power on municipalities are the measure of their rights.[17] Whether the cost, or a portion

6. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706. Where village board acted lawfully and with due care in changing grade, property owners had no cause of action for damages for rendering access to property difficult and inconvenient. McCullough v. Campbellsport [Wis.] 101 N. W. 709.

7. Damkoehler v. Milwaukee [Wis.] 101 N. W. 706.

8. Failure of an abutting owner to file petition for damages with council is a waiver of the claim for damages. Duncan v. Ramish, 142 Cal. 686, 76 P. 661. To entitle a property owner to damages for change of grade, under Greater New York charter allowing damages only where the owner has improved his property after the grade has been established, such owner must show that his improvements were made in conformity to the grade established. People v. Muh, 101 App. Div. 423, 92 N. Y. S. 22. The board of assessors of New York city having rejected a claim for damages for change of grade, and the board of revision having confirmed such action, it is not reviewable by certiorari. Id.

9, 10. Wheeler v. Bloomington, 105 Ill. App. 97.

11. Legislation on subject in New Jersey reviewed. City of Newark v. Weeks [N. J. Law] 59 A. 901. By virtue of 3 Gen. St. p. 2820, the common council of Camden has power to appoint commissioners to assess damages to property owners caused by change of street grade. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 59 A. 1. The power conferred to appoint "nine commissioners, at least one from each ward," does not authorize the appointment of twelve, though the number of wards has increased from nine to twelve. Id. The power to assess damages for altering a street conferred by the Camden charter does not confer a power to assess for change of grade. Id.

12. City of Newark v. Weeks [N. J. Law] 59 A. 901.

13. Gallaher v. Jefferson [Iowa] 101 N. W. 124.

14. See 2 Curr. L. 1344.

15. See 2 Curr. L. 1786.

16. Vories v. Pittsburg Plate Glass Co. [Ind.] 70 N. E. 249; Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955. Amendment to charter of city of Dallas by Acts 27th Leg. held valid. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874. Laws passed in the exercise of this power are not open to the objection that they deprive the owner of property without due process of law, in the absence of proof that the assessment upon particular property is altogether out of proportion to the actual benefits conferred. McMillan v. Butte [Mont.] 76 P. 203.

17. The legislature may confer the power of special assessment upon municipalities, empowering them to determine what property, as regards its location with respect to local improvements, shall be assessed. Wolff v. Denver [Colo. App.] 77 P. 364. Acts 1893, p. 332, c. 149, Burns' Ann. St. 1901, § 4274, prescribes modes of assessment for sewers constructed or ordered before passage of the act. Pennsylvania Co. v. Cole, 132 F. 668. A levy of assessments for drainage authorized by acts passed under the constitution of 1850 is not affected by the constitution of 1891. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141. Under Ky. St. 1903, § 3706, the board of trustees of a city of the sixth class has power to order the improvement of one-half of a street and assess the cost thereof to property owners on that side, the other half of the street being outside the

thereof, is to be paid by special assessments,[18] the proportion of the cost to be so paid,[19] what property is benefited by an improvement, so that it may be included in the assessment district,[20] and the apportionment of the cost within the benefit district,[21] are legislative questions, with the decision of which by the proper legislative authorities, the courts will not interfere[22] in the absence of fraud or manifest injustice.[23]

Constitutional provisions requiring taxes to be uniform are not applicable to

city limits. Town of Central Covington v. Busse, 25 Ky. L. R. 2179, 80 S. W. 210. Virginia Const. of 1902, § 170, prohibits special assessments except for sidewalks, improving and paving existing alleys, and sewers. Held, a special assessment for paving a street made after the constitution went into effect, was invalid. Hicks v. Bristol, 102 Va. 861, 47 S. E. 1001. The St. Louis charter, adopted by vote of the people in obedience to an express grant by the constitution, has, with respect to municipal improvements and assessments therefor, all the force and effect of an act of the legislature. Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955. Where a sidewalk was constructed and drain pipes put in by order of the council and not on petition of property owners, the rule for apportioning the cost is that each piece of property pays its proportionate share according to frontage. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836.

18. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874. Charter provision that district "benefited" should be assessed is valid and does not authorize assessments on property not "specially" benefited. City of Denver v. Kennedy [Colo.] 80 P. 122. A pumping station and system of sewers constitute a local improvement for which a special assessment may properly be made. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680. A tax for a public improvement in one portion of the municipality at the general expense of the taxing district is for a governmental purpose and is valid. Davern v. Board of Com'rs [Ind. App.] 72 N. E. 268.

19. The decision of a city council, by ordinance, of the proportion of the cost of an improvement to be paid for by special taxation, is conclusive. The court has no power to change the proportion or submit the question to a jury. City of Peru v. Bartels [Ill.] 73 N. E. 755. Where a council established an assessment district for a new road 300 feet wide on either side, the reviewing court could not hold such action an abuse of discretion on the ground that the district should have been larger or that the whole city should have borne the expense. Power v. Detroit [Mich.] 102 N. W. 288.

20. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062. City council's finding that benefits exceeded damages not reviewable. Duncan v. Ramish, 142 Cal. 686, 76 P. 661. The question of benefit vel non to particular property included within a local assessment district because of its being similarly situated with all the other property in the district with reference to the work of public improvement for the cost of which the assessment is levied, is a legislative not a judicial question. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836. In establishing a sewer district, a city council is exercising, for police purposes, a legislative power, having its origin in the taxing power, such power being conferred by the constitution and statutes of the state. Wolff v. Denver [Colo. App.] 77 P. 364. Action of city authorities in laying out street-grading district is conclusive on the courts unless manifestly unjust or unreasonable. City of Denver v. Campbell [Colo.] 80 P. 142. A resolution providing for payment of a certain sum by property owners who connect their premises with a city sewer applies not only to abutting owners but all who connect with and make use of the sewer. City of Fergus Falls v. Edison [Minn.] 102 N. W. 218. St. Louis charter, art. 6, § 14, providing method of creating assessment districts for street improvements, construed. Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955.

21. Vories v. Pittsburg Plate Glass Co. [Ind.] 70 N. E. 249. Action of municipal authorities in making alleged excessive assessment final. Price v. Toledo, 4 Ohio C. C. (N. S.) 57. A taxing district having been fixed, and taxes therein apportioned, by valid legislation, a property owner cannot be heard to contend that his property, included in the district, is not in fact benefited, or that the apportionment is incorrect. Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955. Apportionment of benefits for viaduct upheld where subdistricts were made, the rate on each tract in a subdistrict being the same, but the subdistricts varying. City of Denver v. Kennedy [Colo.] 80 P. 122. No presumption that an assessment is inequitable arises from the mere failure of council to make a record of the valuation of the property charged therewith. Ayers v. Toledo, 6 Ohio C. C. (N. S.) 57.

22. Court refused to restrain tax sale on ground of erroneous judgment in creating sewer district. Wolff v. Denver [Colo. App.] 77 P. 364. Creation of assessment district for viaduct under Denver charter art. 7, § 24. City of Denver v. Kennedy [Colo.] 80 P. 122. Where an assessment on a tract comprising several lots, for a street improvement, is certified over without authority by the city clerk, a court cannot, upon complaint of a lot owner, without having all lot owners affected before it, apportion an assessment over all the lots of the tract liable therefor. Bloch v. Godfrey, 5 Ohio C. C. (N. S.) 318. In such case the court will simply decree that plaintiff pay that proportion of the entire amount of the assessment which the area of his lot or lots bears to the area of the entire tract assessed. Id.

23. City of Denver v. Kennedy [Colo.] 80 P. 122. Assessing the whole cost of a street extension, including planking on abutting property, is not so manifestly unjust to one whose property lies some distance from the point where the planking ceased, as to invalidate the assessment. City of Seattle v. Kelleher, 25 S. Ct. 44.

special assessments.[24] Absolute equality is not to be expected and any rule of apportionment which makes assessments on property as nearly as possible proportionate to benefits is upheld.[25] It is therefore held that assessments for street improvements levied on property in the benefit district in proportion to frontage are valid,[26] even if made without reference to benefits.[27] But an application of the frontage rule which results in great inequality is void,[28] and may be relieved against in equity.[29] So also the rule of apportionment according to area is prima

24. Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955. Tax within an improvement district being equal and uniform, a law authorizing creation of districts does not contravene constitutional requirement of equality and uniformity of taxation. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874.

25. City of Denver v. Dumars [Colo.] 80 P. 114.

NOTE. Local assessments as "taxes": The distinction between the words "tax" and "assessment" as applied to local improvements is said to have been first pointed out in Re New York, 11 Johns. [N. Y.] 77, upon which many later decisions have been based. The word "assessment" is technically applied, not to a burden, but to an equivalent, which is laid for local purposes upon local objects, and compensated for to some extent in local benefits and improvements enhancing the value of the property assessed. McGehee v. Mathis, 21 Ark. 40; Creighton v. Manson, 27 Cal. 613; People v. Austin, 47 Cal. 353; Hayden v. Atlanta, 70 Ga. 817; Palmer v. Stumph, 29 Ind. 329.

It has been held that assessments are taxes within the meaning of the constitutional provision requiring uniformity. But such cases usually hold that the rule of uniformity is sufficiently complied with when the assessment is uniformly laid upon property within a prescribed district, or upon property uniformly benefited; or justify the assessment by holding it analogous to license fees, tolls, duties, and the like, excepted by implication from the rule of uniformity. People v. Whyler, 41 Cal. 351, 354; Smith v. Farrelly, 52 Cal. 77; Lexington v. McQuillan, 9 Dana [Ky.] 513, 35 Am. Dec. 159; Daily v. Swope, 47 Miss. 367.

Other cases hold that assessments are not taxes within the meaning of the uniformity clause, since the property owner is compensated by benefits accruing to the property by reason of the improvement. Holley v. Orange County, 106 Cal. 420; Bridgeport v. New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63; Sterling v. Galt, 117 Ill. 11; Illinois C. R. Co. v. Decatur, 126 Ill. 92, 1 L. R. A. 613; Rooney v. Brown, 21 La. Ann. 51; Brooks v. Baltimore, 48 Md. 265; Atlanta v. First Pres. Church, 86 Ga. 730, 12 L. R. A. 852.

Another class of cases holds that while assessments are made by the taxing power so long as the assessment is an equivalent for the benefits, yet when the benefit ceases to be an equivalent for the assessment, it becomes pro tanto a taking of private property for public use without just compensation, and hence unconstitutional. But these cases also hold that the rule of uniformity is not violated by an assessment spread over a whole district, or spread upon property according to benefits. People v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Excelsior, P. & M. Co. v. Green, 39 La. Ann. 455; Matz v. Detroit, 18 Mich. 495; Macon v. Patty, 57 Miss. 378, 386, 34 Am. Rep. 451; Clinton v. Henry County, 115 Mo. 557, 37 Am. St. Rep. 415; Litchfield v. Vernon, 41 N. Y. 123, 133; Lima v. Cemetery Ass'n, 42 Ohio St. 128, 51 Am. Rep. 809.—From note to San Diego v. Linda Vista Irr. Dist. [108 Cal. 189] 35 L. R. A. 33.

26. City of Seattle v. Kelleher, 25 S. Ct. 44. Kansas City Charter imposing frontage tax is valid. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062. St. Louis charter valid in this respect. Barber Asphalt Pav. Co. v. Peck [Mo.] 85 S. W. 387. The front-foot rule for grading is prima facie valid and just. City of Denver v. Campbell [Colo.] 80 P. 142. Acts 1894-95, p. 907, authorizing imposition of entire cost of paving a street on abutting property according to frontage is constitutional and valid. City Council of Montgomery v. Moore, 140 Ala. 638, 37 So. 291.

27. Assessments according to frontage without reference to benefits are not a denial of due process of law. Ross v. Gates, 183 Mo. 338, 81 S. W. 1107. Assessments for sidewalks according to frontage, without reference to actual benefits conferred, do not constitute taking of property without compensation. Wilzinski v. Greenville [Miss.] 37 So. 807. A special assessment is to be levied on all property benefited by the improvement in proportion to benefits, and hence the proportion of benefits is a proper subject of inquiry. City of Peru v. Bartels, 214 Ill. 515, 73 N. E. 755. But a special frontage tax is valid, though not based on proportionate benefits, if the tax is within the limit of benefits conferred. Id.

Note: The case of Norwood v. Baker, 172 U. S. 269, 43 Law. Ed. 443, which held in effect that an assessment in substantial excess of benefits was a taking of private property without just compensation, and that the question of benefits was always decisive of the validity of an assessment, has been thoroughly discredited, although not expressly overruled, by French v. Barber Asphalt Paving Co., 181 U. S. 324, 45 Law. Ed. 879, and subsequent decisions. Wight v. Davidson, 181 U. S. 371, 45 Law. Ed. 900; Tonawanda v. Lyon, 181 U. S. 389, 45 Law. Ed. 908; Webster v. Fargo, 181 U. S. 394, 45 Law. Ed. 912; Brown v. Drain, 187 U. S. 635, 47 L. Ed. 343; City of Seattle v. Kelleher, 25 S. Ct. 44. See, also, City Council v. Moore, 140 Ala. 638, 37 So. 291, 294; Duncan v. Ramish, 142 Cal. 686, 76 P. 661, 665; Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874, 878.

28. Under the Milwaukee charter, a uniform front-foot assessment of several lots, so differently situated that the cost of grading varied from $4.20 to $86.70, without regard to benefits to the particular lots and without any allowance of damages, is void. Haubner v. Milwaukee [Wis.] 101 N. W. 930.

29. City of Denver v. Campbell [Colo.] 80 P. 142.

facie valid,[30] but may be relieved against in particular instances when it appears that injustice has been done.[31]

It is held in some states that property can be assessed only to the extent to which it is actually benefited by the improvement,[32] and that assessments in excess of, or without regard to, benefits are void,[33] and constitute a taking of property for public use without compensation[34] or without due process of law.[35] But this rule is rigidly applied only in the case of improvements primarily for the public welfare and only incidentally for the benefit of the landowner.[36] With respect to improvements primarily for the benefit of the adjoining land, which are deemed appendages thereto, such as sidewalks and curbs, gutters and house connections with sewers, the actual cost may be charged on the private property to which the chief advantage accrues.[37] Water pipes in streets constitute an improvement of the latter class.[38]

Due process of law.[39]—Assessments levied without notice to persons on whose

30. Under Denver Charter, art. 7, § 4, assessments for paving are according to frontage, unless the abutting lots are not of substantially the same depth, in which case the lots may be assessed substantially the same deptb, not less than 20 nor more than 150 feet from the street line, as the board of public works may determine. Held, the scheme of assessment is prima facie valid. City of Denver v. Londoner [Colo.] 80 P. 117. Under it strips of land less than 20 feet deep are not exempt. Id. Denver Charter, art. 7, § 21, whereby assessments in storm sewer district are apportioned according to area, is valid. City of Denver v. Dumars [Colo.] 80 P. 114; Spalding v. Denver [Colo.] 80 P. 126. Sess. Laws 1897, p. 219, § 30, providing for payment of improvement by an entire district, each tract being assessed according to area, is constitutional. McMillan v. Butte [Mont.] 76 P. 203. The Kentucky statute imposing the cost of improvements on owners of lots in quarter squares, according to the square feet owned by each, and defining a square as the territory bounded by principal streets, and providing that where contiguous land is not so divided into squares, the council shall determine the depth to which an assessment district shall extend, is not rendered invalid by the fact that squares are not all of the same size [Ky. St. 1903, § 2833]. German Protestant Orphan Asylum v. Barber Asphalt Pav. Co., 26 Ky. L. R. 805, 82 S. W. 632.

31. Spalding v. Denver [Colo.] 80 P. 126.

32. Doughten v. Camden [N. J. Law] 59 A. 16; Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874; Harper v. New Hanover County Com'rs, 133 N. C. 106, 45 S. E. 526. A sidewalk having been built on private property without compensation to the owner, a court of equity could not enforce a lien against the property for the cost of the improvement, at the same time charging the city with the value of the land, even though the city could have originally condemned the land. City of Clinton v. Franklin, 26 Ky. L. R. 1056, 83 S. W. 140. The right to assess property for local improvements is measured by the amount of benefits. Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884. A lot having a frontage of 218 feet on one street, and already supplied with water, could not be assessed for the laying of a supply pipe in another street, on which it had a very small frontage, no benefit resulting therefrom. McChesney v. Chicago [Ill.] 73 N. E. 368. An ordinance for sidewalks on several disconnected streets, provided that the cost should be levied "on the lots or parcels of land touching upon the line of said sidewalk, in proportion to their frontage upon such sidewalk." Held, the ordinance provided that each owner should pay a pro rata share of the cost of all the walks, and was invalid. People v. Stearns, 213 Ill. 184, 72 N. E. 728. Where an assessment for a street improvement is apportioned without regard to benefits, it cannot be protected by any order the board of public service may make upon its journal. Nulsen v. Cincinnati, 5 Ohio C. C. (N. S.) 679. In apportioning an assessment for a street improvement according to benefits, regard should be had for the depth of lots and the relative value of each after the improvement is made. Id. Engineer's certificate showing assessment for sewer construction in accordance with resolution directing assessment, and made in proportion to benefits, is conclusive that lots were so assessed as well as by area. Walker v. Detroit [Mich.] 101 N. W. 847.

33. Neal v. Vansickel [Neb.] 100 N. W. 200.

34. A front-foot assessment of three tracts each fronting 100 feet on a street, and 8 feet deep, equal to the assessment per front foot of lots 120 to 175 feet deep held unequal and invalid. Iowa Pipe & Tile Co. v. Callanan [Iowa] 101 N. W. 141.

35. Village Laws, § 230, as amended by Laws 1902, p. 1628, c. 591, providing for assessment for fire protection of a building and lot within 500 feet of a hydrant, though water is not taken or used by such premises, is unconstitutional because it provides for the taking of property without due process of law. Village of Canaseraga v. Green, 88 N. Y. S. 539.

36, 37. Doughten v. Camden [N. J. Law] 59 A. 16.

38. Act of March 9, 1871 (P. L. p. 415), making the charge of 75 cents per foot of frontage a lien on adjoining land to meet expense of laying pipes in streets of Camden is valid. Doughten v. Camden [N. J. Law] 59 A. 16. Laying new pipes in place of old ones put in by the city's predecessor comes within the meaning of the act. Id.

39. See 2 Curr. L. 1346, n. 68, 69.

property they are imposed, or without affording them an opportunity to be heard, are void.[40] Notice of an assessment by advertisement and posters, instead of by actual service, is not a denial of due process of law.[41] Publication of notice to property owners, and opportunity to be heard before the tribunal intrusted with steps in the assessment procedure is due process of law as to matters to be passed on by such tribunals.[42] A statute which provides for a hearing is not invalid because not providing for notice of the time and place.[43] Publication of an ordinance creating a benefit district on Sunday does not render the assessment invalid.[44] Under the Missouri constitution, no notice is required to be given property owners respecting those matters which the legislature itself determines or delegates to the municipal authorities.[45] A special sewer assessment has been held not void for want of notice to the owner of the property assessed when notice was given to the person who paid the taxes on the property the preceding year.[46]

(§ 8) *B. Assessing and levying officers.*[47]—The appointment of a commissioner to spread assessments must be legal.[48] Such appointment may, in Illinois, be made by the president of the board of public works.[49] One who is pecuniarily interested in a contract for an improvement is disqualified from acting.[50]

40. Neal v. Vanslckel [Neb.] 100 N. W. 200; In re City of New York, 95 App. Div. 552, 89 N. Y. S. 6. Since Laws 1896, p. 887, c. 727, § 2, providing for the addition of Riverside Park to New York City, makes the provisions of law relative to the taking of private property for public use applicable to the procedure, notice is provided for, and the act is constitutional. Id. Failure to give property owners notice of the proposal to make an improvement, of the engineer's estimate of cost, and of the time and place for hearing objections renders an assessment void, and subjects it to collateral attack. Daly v. Gubbins [Ind. App.] 73 N. E. 833. An assessment for street improvements held not conclusive as against a street railroad company to which notice had not been given in accordance with Mobile charter, § 87. City of Mobile v. Mobile Light & R. Co. [Ala.] 38 So. 127. On objections by property owners to an assessment, it was referred back. Later the resolution referring back the assessment was rescinded, and more than a year later the assessment was confirmed as originally made without further notice to property owners. Held, proceedings set aside as illegal, and new assessment according to law directed. Beach v. Jersey City [N. J. Law] 58 A. 81. Burns' Rev. St. 1894, § 4290, making abutting property to the extent of 150 feet from the front line liable for improvements according to frontage, and providing that where such land is subdivided or platted the first 50 feet shall be primarily, and the backlying property secondarily, liable, is not unconstitutional for not entitling the owners of the backlying property to a hearing on the benefits assessed, since the statutory notice of assessment of abutting property is binding on such owners, and they are interested parties, entitled to a hearing. Voris v. Pittsburg Plate Glass Co. [Ind.] 70 N. E. 249. Creditors secured by a deed of trust are not entitled to notice before the levy of a special assessment, not being owners within the meaning of Acts 1891-92, c. 312. City of Richmond v. Williams, 102 Va. 733, 47 S. E. 844. Under Laws 1893, c. 57, a separate ordinance is required for each improvement, and a general ordinance prior to that statute is of no force. Hence, notice of a hearing on confirmation of the report of assessment officers, if sufficient to constitute due process of law, is valid though not given in accordance with such prior general ordinance. City of Aberdeen v. Lucas [Wash.] 79 P. 632.

41. 2 Acts 1857-58, c. 518, providing for assessments for drainage is constitutional on this ground. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141. Notice by the city engineer of the completion of an assessment for street improvements, and that such assessment will be open to inspection in his office for ten days, need not be addressed to individual property owners, but is sufficient if addressed "to all owners and other persons interested in" the land described. Palmer v. Port Huron [Mich.] 102 N. W. 996. Notice by publication of the boundaries of a benefit district is due process of law as to persons whose land is not taken but only benefited. City of St. Joseph v. Truckenmiller, 183 Mo. 9, 81 S. W. 1116.

42. Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955. Giving property owners an opportunity to be heard before a council is sufficient though the judgment of the council is subject to revision by the board of public works. City of Denver v. Londoner [Colo.] 80 P. 117.

43. Denver Charter, art. 7, § 30, is valid. City of Denver v. Londoner [Colo.] 80 P. 117; City of Denver v. Dumars [Colo.] 80 P. 114. Sections 30, 31 of such article provide due process of law. City of Denver v. Kennedy [Colo.] 80 P. 122.

44. City of Denver v. Londoner [Colo.] 80 P. 117. Storm sewer district. City of Denver v. Dumars [Colo.] 80 P. 114.

45. Meier v. St. Louis, 180 Mo. 391, 79 S. W. 955.

46. People v. Illinois Cent. R. Co., 213 Ill. 367, 72 N. E. 1069.

47. See 2 Curr. L. 1346.

48. Laws 1901, p. 101, amending and repealing certain previous legislation, held to control appointment of commissioner. Vil-

(§ 8) *C. Persons, property, and districts liable.*[51]—In general, all property benefited,[52] including homesteads,[53] may be assessed.[54] Property owned by the municipality or the state is liable for assessments in some jurisdictions.[55] In California, it is held that a railroad right of way cannot be assessed for a street improvement.[56] The contrary is held in Kentucky[57] and New Jersey.[58] In de-

lage of Melrose Park v. Dennebecke, 210 Ill. 422, 71 N. E. 431.

49. Sumner v. Milford [Ill.] 73 N. E. 742.

50. Civil and sanitary engineer, employed to design and construct waterworks system, whose compensation is based on total cost of the work, is disqualified. Murr v. Naperville, 210 Ill. 371, 71 N. E. 380. Proof that such engineer was employed to design and construct the system and later appointed a commissioner to spread the assessment is admissible to show disqualifying interest, in proceeding to confirm an assessment. Id.

51. See 2 Curr. L. 1347.

52. NOTE. Applicability of exemption clauses to local assessments: Applying the generally recognized distinction between taxation and local assessments [see note supra under § 8a], it is generally held that constitutional provisions exempting certain classes of property from general taxation do not apply to local assessments. Thus, in the absence of specific statutory or constitutional exemption, the property of religious, charitable, and educational institutions or societies, is held not exempt from local assessment when benefited by an improvement. In re New York, 11 Johns. [N. Y.] 77; Lockwood v. St. Louis, 24 Mo. 20; Atlanta v. First Pres. Church, 86 Ga. 730, 12 L. R. A. 852; M. E. Church v. Hinton, 92 Tenn. 188, 19 L. R. A. 289; Chicago v. Baptist Theological Union, 115 Ill. 245; Harlem Pres. Church v. New York, 5 Hun [N. Y.] 442. Whether such property is exempt under statutes which state exemptions in more specific terms, depends on the construction placed on the particular statute involved. Held exempt: Lefevre v. Detroit, 2 Mich. 586; Erie v. First Universalist Church, 105 Pa. 278. Held not exempt: Beatrice v. Brethren Church, 41 Neb. 358; Mullen v. Erie Com'rs, 85 Pa. 288, 27 Am. Rep. 650.

Private educational institutions are usually held liable for local assessments. Harvard College v. Boston, 104 Mass. 470; Thiel College v. Mercer County, 101 Pa. 530; In re College Street, 8 R. I. 474; Marks v. Purdue University, 37 Ind. 155; Sioux City v. Ind. School Dist., 55 Iowa, 150.

Property set aside for cemeteries is also liable for improvements which benefit it, in the absence of specific exemption. Bloomington Cemetery Ass'n v. People, 139 Ill. 16; Buffalo City Cemetery v. Buffalo, 46 N. Y. 506; Beltzhoover v. Beltzhoover, 173 Pa. 213; State v. St. Paul, 36 Minn. 529.

So also the property of public charitable organizations and other institutions beneficial to the public are not exempt under the general taxation exemption clause. State Protestant Foster Home Soc. v. Newark, 36 N. J. Law, 478, 13 Am. Rep. 464; Boston Society, etc., v. Boston, 129 Mass. 178; Roosevelt Hospital v. New York, 84 N. Y. 108; Erie City v. Y. M. C. A., 151 Pa. 168; Philadelphia v. Ladies' United Aid Soc., 154 Pa. 12.

Public property cannot be assessed, unless the power to assess it is conferred by statute. Polk County Sav. Bank v. State, 69 Iowa, 24. The intent of the legislature to confer the power must be clear. Worcester County v. Worcester, 116 Mass. 193, 17 Am. Rep. 159. But when the power is clearly granted, such property as court houses, public squares, etc., is assessable on the theory of benefits. McLean County v. Bloomington, 106 Ill. 209. [The Kentucky statute has recently been held valid. Hager v. Gast (Ky.) 84 S. W. 556.]

Quasi public property, such as that belonging to railroad companies and used for railroad purposes is usually held liable for assessments in proportion to benefits. New Haven v. Fair Haven & W. R. Co., 38 Conn. 422, 9 Am. Rep. 399. But an assessment cannot be made unless the property is benefited. Mount Pleasant v. Baltimore & O. R. Co., 138 Pa. 365, 11 L. R. A. 520.

There is, however, a conflict as to the power to assess railway property. See cases cited to text in this section. Also, C., etc., R. Co. v. Milwaukee, 89 Wis. 509, 62 N. W. 419, 28 L. R. A. 249. [For discussion of exemption from assessment in general see note to San Diego v. Linda Vista Irr. Dist. (108 Cal. 189) in 35 L. R. A. 33, from which the above matter is largely taken.]

53. Under Texas Const. art. 16, § 50, making homesteads liable to sale for taxes, a homestead is liable for a street assessment. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874.

54. Changes in certain streets of Boston and construction of a terminal station held to be parts of a single improvement, so that benefits might properly be assessed therefor on adjoining property. Wells v. Street Com'rs of Boston [Mass.] 73 N. E. 554. Where property owners knew of, and most of them requested or consented to, the building of a necessary retaining wall along a street constructed on the side of a hill, they were liable to assessments for the cost, though the wall was not actually built on their property. In re Perrysville Ave. [Pa.] 60 A. 160.

55. In Missouri, property owned by a city is liable for special assessments for street improvements. The statute providing for enforcement of the tax by a general judgment against the city is constitutional [Rev. St. 1899, § 5682]. Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64. The Kentucky statute providing that in cities of the first class, where an improvement is such that the abutting property is assessable for the cost, property owned by the state may be assessed the same as other property, is not invalid as special legislation, even though Louisville is the only city of the first class in the state. Hager v. Gast [Ky.] 84 S. W. 556. The statute does not violate the constitutional provision exempting public property from taxation; nor that forbidding the general assembly from authorizing any debt on behalf of the commonwealth except for specified purposes [Const. §§ 49, 50]. Id.

56. A statute authorizing assessments for

termining the liability of a street railway company for street improvements, the local charter,[59] general statutes,[60] and contracts between the company and the municipality,[61] must be looked to. A company cannot be charged with the cost of improving a street which it has not occupied with its tracks.[62]

Whether particular property has been properly included in an assessment district may depend upon the construction placed upon the statute or ordinance creating the district.[63] In Indiana it is held that an assessment omitting benefited

street improvements on abutting property does not authorize the assessment of a railroad right of way. A portion of such right of way could not be sold to satisfy such assessment if made, since the use of the land is necessary to the exercise of the franchise. Southern California R. Co. v. Workman [Cal.] 79 P. 586.

57. Orth v. Park & Co., 25 Ky. L. R. 1910, 79 S. W. 206.

58. Railroad lands benefited for railroad purposes by a municipal improvement may be assessed to the extent of such benefit, in the absence of a legislative exemption. Land occupied by depot and tracks held benefited by curbing and paving of street. Erie R. Co. v. Paterson [N. J. Law] 59 A. 1031.

59. City charter provision requiring street railway companies to pay cost of paving streets between rails and tracks and two feet on either side is valid. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874. A street railway company required by ordinance to pave and keep in good condition portions of streets in which tracks were laid is not liable to an assessment for a water supply pipe on one side of the street. McChesney v. Chicago [Ill.] 73 N. E. 368.

60. Under Pub. Acts 1893, p. 310, c. 169, § 6, placing on street railroads the duty of keeping in repair that part of the highway occupied by them, and the act of 1897, providing that the cost of an agreement for future repairs by the contractor may be made an element of the cost of paving, it is held that a street railroad cannot be compelled to bear that proportion of the cost added by an agreement to keep the paving in repair for ten years, the contractor's bond inuring only to the benefit of the city. Fair Haven & W. R. Co. v. New Haven [Conn.] 58 A. 703. Award of court assessing street railroad held to include such a sum, and hence improper. Id.

61. Where a street railway company agreed to repave a portion of the streets used by it with trap block pavement, and the city council passed a resolution requiring a street to be paved with granite blocks, the railway company was liable for what trap block paving would have cost. City of New York v. Harlem Bridge, etc., R. Co., 91 N. Y. S. 557.

Note: See note on liability of street railways for paving assessments appended to Shreveport v. Prescott [51 La. Ann. 1895] in 46 L. R. A. 193.

62. Harris v. Macomb, 213 Ill. 47, 72 N. E. 762. Under Mobile Charter, §§ 91, 85, a street railroad cannot be charged with a portion of the cost of underground drainage incurred in paving a street on which it had no tracks, though it had tracks on streets in the district improved. City of Mobile v. Mobile Light & R. Co. [Ala.] 38 So. 127.

63. Certain tracts of land held to have been erroneously included in assessment district, under St. Louis city charter. Collier's Estate v. Western Paving & Supply Co., 180 Mo. 362, 79 S. W. 947. Where only one of four lots owned by the same person abuts on an improved street, the whole tract cannot be assessed unless the owner has disregarded the lot lines and used the lots as a single tract. Barber Asphalt Pav. Co. v. Peck [Mo.] 85 S. W. 387. The St. Louis charter provides that if property fronting on an improved street is divided into lots, the line of a special assessment district shall be drawn so as to include the entire depth of lots fronting on the improved street. Held, platted lots should be included, though they extend beyond the middle line between the improved street and the next street. State v. St. Louis, 183 Mo. 230, 81 S. W. 1104. A tract including ten lots, only five of which front on the improved street, should be included only to the middle line, though the owner uses the tract as one, disregarding the lot lines. Id. An unplatted tract between the two streets should be included to the middle line. Id. Under Laws 1895, p. 1380, c. 635, tit. 7, § 19, an assessment for grading and curbing cannot be made on a lot no part of which fronts on the street improved. Harriman v. Yonkers [N. Y.] 73 N. E. 493. Lands which do not abut on proposed sewers, are not within the district, and are not permitted to drain into the proposed sewers cannot be assessed for their construction. Clark v. Chicago [Ill.] 73 N. E. 358. A finding by the Kentucky court of appeals that certain territory is not a square, not being surrounded by principal streets, is not binding on the court in a subsequent case between different parties, when the contrary appears to be the fact. German Protestant Orphan Asylum v. Barber Asphalt Pav. Co., 26 Ky. L. R. 805, 82 S. W. 632. Where improved cross streets were not extended because a railroad right of way intervened, they were treated as extended for purposes of assessment. Specht v. Barber Asphalt Pav. Co., 26 Ky. L. R. 193, 80 S. W. 1106. Where a free turnpike road, improved under the one-mile assessment law, makes an obtuse angle, the proper method for ascertaining the amount of property assessable at the angle, is to project the limit lines parallel with their respective sides at an exact length and then connect the two points to a line, instead of projecting them still further till they meet. Monypeny v. Board of County Com'rs, 2 Ohio N. P. (N. S.) 330. Portions of a street vacated by a municipality go to the owners of the abutting lots and do not revert to the original owners and such lots are liable as abutting property to assessment for improving the street. Price v. Toledo, 4 Ohio C. C. (N. S.) 57.

abutting property is invalid.[64] In Colorado, the omission of lots from an assessment does not make the entire assessment void.[65] An objection that lots which should have been assessed were omitted is unavailing unless accompanied by proof of other tracts that should have been included.[66] Territory brought within the limits of a municipality during the construction of a public work, and benefited thereby, is subject to assessment.[67] The detachment from a town of territory in which an improvement has been made does not prevent the carrying out of proceedings to pay therefor by special assessment.[68] A city in accepting a deed of land for a street has no power to agree to a condition that other land of the grantor in the addition shall not be assessed for the improvement.[69] The action of one council in creating an assessment district is not conclusive on a subsequent council by which an improvement is completed.[70]

(§ 8) *D. Amount of individual assessment, and offsetting of benefits and damages.*[71]—Damages caused by an improvement are commonly deducted from the amount of the assessment.[72] Where a council proceeds under the Barrett law and subsequent legislation, in Indiana, in providing the cost of a general sewer system, actual benefits and damages are to be considered, and the assessment is not limited to ten per cent of the assessed valuation of the property.[73] In Washington a city may, after determining the amount of damages for land taken for street purposes, assess benefits resulting from the improvement against the remaining land.[74] In New York a property owner is entitled to interest on the award of damages[75] if a proper demand for damages has been made.[76] Both damages and benefits being assessed on realty in street opening proceedings,

64. Helm v. Witz [Ind. App.] 73 N. E. 846. Though only a part of a street in width is improved, abutting property on both sides of the street is liable to assessment of benefits, and an assessment of property on one side only is void under Burns' Ann. St. 1901, § 4290. Klein v. Nugent Gravel Co., 162 Ind. 509, 70 N. E. 801.

65. City of Denver v. Dumars [Colo.] 80 P. 114; Spalding v. Denver [Colo.] 80 P. 126.

66. O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020.

67. Since under Rochester charter, §§ 198, 199, an assessment cannot be made until the improvement is completed. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518. Under § 172, the first assessment having omitted such property, the council properly enlarged the assessment district so as to include the property newly incorporated into the city. Id.

68. 1 Starr & C. Ann. St. 1896, p. 802, § 10. Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884.

69. Leggett v. Detroit [Mich.] 100 N. W. 566.

70. Where a council opened a new street and fixed the limits of the district to be assessed for the cost, and a subsequent council provided, by independent proceedings, for the grading and curbing of the street, and fixed a district to be assessed for the cost thereof, the omission from the second district of two tracts included in the first did not render invalid the second assessment, since the first council could not by its action conclude the second. Harriman v. Yonkers [N. Y.] 73 N. E. 493.

71. See 2 Curr. L. 1348.

72. Ordinance invalid where award of commissioners failed to allow damages to railroad company for structural changes in roadbed and tracks made necessary by opening new street. Paterson, etc., R. Co. v. Town Council of Nutley [N. J. Law] 59 A. 1032. Where the council failed to deduct from an assessment the amount realized from the sale of a building on property taken, it was held proper for the reviewing court to amend the assessment by deducting such amount and then allow the assessment to stand. Power v. Detroit [Mich.] 102 N. W. 288.

73. Burns' Ann. St. 1901, § 3 (Barrett Law) and Acts 1895, p. 192, c. 91, § 3, held to have been followed, and not Burns' Ann. St. 1901, § 3541, subd. 43. Norton v. Fisher, 33 Ind. App. 132, 71 N. E. 51.

74. Pierce's Code, § 5064. Quirk v. Seattle [Wash.] 80 P. 207. This is not a violation of § 5071, prohibiting assessing of benefits against lands taken or found to be damaged, since that section applies only to entire tracts. Id.

75. Laws 1896, p. 888, c. 727, § 4, providing for addition of Riverside Park, is not objectionable because it includes interest in the amount to be awarded owners as damages, since owners are entitled to interest from the time title to property taken vests in the city. In re City of New York, 95 App. Div. 552, 89 N. Y. S. 6.

76. To entitle a property owner to interest on an award of damages, after six months from the date of the confirmation of the commissioner's report, under the New York charter, a proper demand must have been made within the six-months period. A demand for damages which took no account of the benefits assessed, was not sufficient. In re City of New York, 91 App. Div. 553, 87 N. Y. S. 123.

and the city being liable for interest on the damages, interest should also be charged on the unpaid benefits.[77] When the amount by which an assessment is excessive can be mathematically determined, the excess only, and not the entire assessment, is invalid.[78] Where lots are adjacent and appropriated in use and occupation as one property, they are to be so treated alike, for purposes of assessment, whether improved or vacant.[79] Though a corner lot has been assessed to the limit per front foot for a sewer in the street on one side, it may nevertheless be assessed according to frontage for a sewer in the other street.[80] An assessment roll of benefits and damages to lands in a drainage district by a jury who went on the land is prima facie proof that the benefits assessed will be received by the lands concerned.[81] In fixing benefits arising from improvement of a street, greater weight will be given to the testimony of experts than to that of resident property owners who have established permanent homes and give little attention to changes in market value.[82] Where a municipality is made liable to a lot owner for damages which it has been decided he has sustained in excess of benefits conferred by an improvement, the taxable property of the municipality constitutes a pledge or fund to which the owner may resort for payment in the manner prescribed by statute.[83]

(§ 8) *E. The assessment roll or report, and objections thereto; approval or confirmation.*[84]—The record of assessment should be properly certified or authenticated.[85] An accurate description and location of the land assessed is essential to the validity of an assessment.[86] Extraneous evidence cannot be resorted to, to render a description certain, as in the case of a private conveyance.[87] The fact that only one-half a lot was included in a resolution creating a district is immaterial where the whole lot is assessed and the tax paid, and the result would have been the same had the description been correct.[88] Property must be assessed to the proper person,[89] and under the Indiana statute, the engineer's report on assessments must give the owner's name in full.[90] A general objection that an assessment and all proceedings are illegal and void does not raise an objection that the assessment is irregular because made to the estate of a testator instead of to the devisees who held title.[91] Such irregularity is waived where the owners did not raise it at the time they raised other objections thereto.[92] Where the engineer is instructed to make a plat of a district to be assessed, showing the location, number and frontage of each lot, and such plat is made and adopted, the district assessed is sufficiently designated.[93] The assessing or-

77. In re City of New York, 91 App. Div. 553, 87 N. Y. S. 123.

78. City of Denver v. Kennedy [Colo.] 80 P. 122.

79. Hill-O'Meara Const. Co. v. Sessinghaus, 106 Mo. App. 163, 80 S. W. 747.

80. Under Ky. St. 1903, § 3105, limiting sewer assessments to $1 per front foot. Rich v. Woods, 26 Ky. L. R. 799, 82 S. W. 578.

81. But finding that a tract would not be damaged by a ditch held contrary to evidence. Pinkstaff v. Allison Ditch Dist. No. 2, 213 Ill. 186, 72 N. E. 715.

82. Waldschmidt v. Bowland, 6 Ohio C. C. (N. S.) 99.

83. Haubner v. Milwaukee [Wis.] 101 N. W. 930.

84. See 2 Curr. L. 1349.

85. Certificate held sufficient. Chase v. Trout [Cal.] 80 P. 81.

86. Description held to apply to tract not owned by person charged. City of Rochester v. Farrar, 44 Misc. 394, 89 N. Y. S. 1035. Laws 1903, p. 1187, c. 522, § 1, curing errors and irregularities in assessment proceedings and validating assessments cannot validate an assessment void because the land was erroneously described. Id.

87. Description of land in engineer's report of assessments held uncertain. Pennsylvania Co. v. Cole, 132 F. 668.

88. McMillan v. Butte [Mont.] 76 P. 203.

89. Land belonging to devisees under a will is improperly assessed to the estate of the testator. Brown v. Otis, 90 N. Y. S. 250.

90. "P. Ft. W. & C. Railway Co." for Pittsburg, Ft. Wayne & Chicago Railway Company is insufficient. Pennsylvania Co. v. Cole, 132 F. 668.

91, 92. Brown v. Otis, 90 N. Y. S. 250.

93. Under Comp. Laws, § 3198. Auditor General v. Calkins [Mich.] 98 N. W. 742. Assessment roll and designation of district

dinance need only give the rate of assessment in the district, without showing in detail the amount charged against each tract in the district.[94] The original order of county commissioners fixing a road levy can, on petition, be amended by the commissioners, if the amendment is made in time to permit the first installment thereof to be collected in due course, and before any inconsistent action has been taken upon the first levy.[95]

Judicial confirmation.[96]—In Illinois the filing of a petition for confirmation of an assessment gives the county court jurisdiction.[97] A property owner who voluntarily appears and files objections waives all questions of jurisdiction over his person.[98] Objections must be made in such a manner as to show the point on which a decision is asked, and to enable the opposite party to obviate it, if it can be done.[99] Allowance of amendments to objections filed, or permission to file further objections, is discretionary with the court.[1] Under a statute providing that a recommendation by a board of local improvements shall be prima facie proof that all preliminary steps required by law have been complied with, the introduction in evidence of such recommendation, of the estimate of the engineer, and of the ordinance makes a prima facie case.[2] The prima facie case made by an assessment roll returned by a jury cannot prevail if rebutted by competent proof.[3] A plat stated by the witness to be incorrect is inadmissible.[4] The city has the right to open and close the argument.[5] The judgment of confirmation should not include the expense of making and levying an assessment.[6] Where an ambiguity in the description of property in a judgment of confirmation is shown by extrinsic evidence, the ambiguity may be explained by similar evidence.[7] The reversal of a judgment confirming an assessment as to a particular piece of property does not affect the assessment on other property[8] as to which no appeal was taken.[9] Where, after reversal of a confirmation of an assessment, notice of a motion to redocket the cause was given, and the objector failed to appear, it was proper to take a default before proceeding further.[10] A paving ordinance being held insufficient on appeal, on the ground that it did not properly describe the improvement, it was improper for the court, on remand of the case, to hold the ordinance invalid as tending to create a monopoly; hence the latter judgment is not conclusive in a subsequent proceeding based on a different ordinance providing for a second assessment to pay for the same improvement.[11] Where a

therein held sufficient. Walker v. Detroit [Mich.] 98 N. W. 744.

94. Denver Charter, §§ 218, 190. Spalding v. Denver [Colo.] 80 P. 126.

95. Monypeny v. Board of County Com'rs, 2 Ohio N. P. (N. S.) 330.

96. See 2 Curr. L. 1350, n. 23.

97. Where the objection that a petition had been previously used in connection with other ordinances, which had been held invalid, was not raised, objectors could not obtain relief in equity against a confirmation, on the ground of want of jurisdiction. Sumner v. Milford [Ill.] 73 N. E. 742.

98. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680.

99. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680. Objections that the resolution by the board of local improvements should specify in terms, whether the improvement is to be made by special assessment or special taxation, or partly by one and partly by the other; and that the estimate required to be itemized and made a part of the resolution should be incorporated in the record thereof, over the signature of the engineer of the board of local improvement, held sufficient in form. Ziegler v. Chicago, 213 Ill. 61, 72 N. E. 719.

1. City of Peru v. Bartels [Ill.] 73 N. E. 755.

2. Local Improvement Act, §§ 9, 10. Richards v. Jerseyville [Ill.] 73 N. E. 370.

3. Evidence held sufficient to show assessment of benefits on land in drainage district excessive, and to overcome prima facie case made by assessment roll. Wathen v. Allison Ditch Dist. No. 2, 213 Ill. 138, 72 N. E. 781.

4, 5. City of Peru v. Bartels [Ill.] 73 N. E. 755.

6. Since the 1901 amendment to the local improvement act. Lanphere v. Chicago, 212 Ill. 440, 72 N. E. 426.

7. Harman v. People [Ill.] 73 N. E. 760.

8. Sumner v. Milford [Ill.] 73 N. E. 742.

9. Goldstein v. Milford [Ill.] 73 N. E. 758; Harman v. People [Ill.] 73 N. E. 760.

10. Gage v. Chicago, 211 Ill. 109, 71 N. E. 877.

proceeding to confirm a special assessment was dismissed because not brought under the proper act, the judgment of dismissal was not conclusive in a proceeding under another ordinance, brought under the proper statute.[12] Objections to an assessment must be raised in the county court, and cannot be first raised on appeal.[13] Failure of the board of local improvements to give an itemized cost estimate does not subject to collateral attack the county court's judgment declaring and fixing an assessment.[14] The question of benefits, and whether property has been assessed more than its proportionate share of the cost, are questions of fact, and a judgment of confirmation rendered on a hearing before the court will not be interfered with unless manifestly contrary to the weight of the evidence.[15] On a hearing of objections to a petition for a special assessment the court may, in its discretion, grant separate hearings to different classes of objectors.[16] In such case each hearing is distinct, and objectors in one class are not entitled to a bill of exceptions containing the evidence given in support of objections heard in another case.[17] The order of the court granting separate hearings can be made a part of the record only by a bill of exceptions.[18]

Under a statute requiring any attack upon an assessment to be made in thirty days, the day of passage of the ordinance and ascertainment of cost of the improvement is included.[19]

(§ 8) *F. Equalization.*[20]—Notice of a meeting of the council as a board of equalization "at least six days prior" to such meeting means that the notice is to be given during the six days immediately preceding the meeting.[21] Property owners may, at such meeting, offer objections and submit evidence in support thereof.[22] An equalization board, when properly in session, with due notice given, acts judicially, and its action within its jurisdiction is not subject to collateral attack, except for fraud, gross injustice, or mistake.[23] "Gross injustice" within the meaning of the exception must be so flagrant and excessive as to substantially deprive a citizen of his property, or a part of it, without due process of law.[24]

(§ 8) *G. Reassessment and additional assessments.*[25]—The statutory assessment of benefits is simply a mode of special taxation to meet the expenses of government in making public improvements which specially benefit particular property.[26] If the other necessary conditions exist, such taxation may be authorized after as well as before the expenditure is incurred,[27] and this proposition includes the authorization of a reassessment to take the place of one which is void for ir-

11, 12. Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878.

13. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680. Objections, except to the jurisdiction of the court, over the subject-matter, are waived unless properly raised on the hearing below. Id. An objection to a judgment confirming a special sewer assessment, which does not appear on the face of the record, will be overruled, the judgment appearing regular on its face, showing that the court had jurisdiction and the statutory requirements were complied with. People v. Illinois Cent. R. Co., 213 Ill. 367, 72 N. E. 1069.

14. Treat v. Chicago [C. C. A.] 130 F. 443.

15. Clark v. Chicago [Ill.] 73 N. E. 358.

16. Hurd's Rev. St. 1899, p. 374, c. 24, § 48. People v. Carter, 210 Ill. 122, 71 N. E. 369.

17, 18. People v. Carter, 210 Ill. 122, 71 N. E. 369.

19. City of Leavenworth v. Jones [Kan.] 77 P. 273.

20. See 2 Curr. L. 1352.

21. Shannon v. Omaha [Neb.] 100 N. W. 298.

22. Denver City Charter, art. 7, § 31, making it the duty of the council sitting as a board of equalization to hear and determine all complaints before the assessment ordinance is passed, contemplates an opportunity to property owners to offer objections and evidence in support thereof. City of Denver v. Dumars [Colo.] 80 P. 114.

23. Comp. St. 1901, § 161, c. 12a, and § 164, c. 12a, construed. Wead v. Omaha [Neb.] 102 N. W. 675.

24. Wead v. Omaha [Neb.] 102 N. W. 675.

25. See 2 Curr. L. 1352.

26. Warren v. Boston [Mass.] 72 N. E. 1022.

27. Warren v. Boston [Mass.] 72 N. E. 1022. An assessment may be levied for public work already done. City of Seattle v. Kelleher, 25 S. Ct. 44. But see 2 Curr. L. 1346, n. 76.

regularity or error.[28] Reassessments for this purpose are commonly authorized.[29] Since an assessment may be levied for public work already done,[30] a reassessment is not invalid because it covers work unauthorized at the time the improvement was constructed.[31] Such a reassessment is not a denial of due process of law.[32]

Where an ordinance is necessary to authorize a city to order an improvement, a wholly void ordinance renders all proceedings pursuant thereto invalid, and incapable of being cured by reassessment.[33] But if no ordinance was necessary, as under a statute specifically pointing out the method to be followed, an invalid ordinance is immaterial and a reassessment may be upheld notwithstanding.[34] Under the Iowa reassessment statute, a reassessment may be made where the original assessment was adjudged invalid by the district court because made by the front-foot rule, regardless of the correctness of such decision.[35]

In Illinois, unless an assessment has been annulled by the city council, or set aside by some court, or the ordinance has been held insufficient for the purpose of a prior assessment, so that collection is impossible, a new assessment cannot be made.[36] An ordinance authorizing a supplemental assessment for work completed and accepted under an invalid ordinance need not remedy defects of description in the original ordinance.[37]

In Kentucky, the court which, on an appeal to it, has declared an apportionment illegal, is authorized to order an apportionment on the proper basis as prescribed by the statute.[38]

28. If the error or defect is one which the legislature might have authorized in the first place, it has power to cure it by a subsequent act. Warren v. Boston [Mass.] 72 N. E. 1022.

29. St. 1902, p. 439, c. 527, authorizing reassessment of betterments for improvements completed during the six preceding years, assessments for which were void owing to irregularities, is constitutional. Warren v. Boston [Mass.] 72 N. E. 1022. The act applies to previous improvements made under both general and special acts, and whether such prior assessments were void for mere irregularity or because of unconstitutionality. Id. The act does not apply to improvements assessments for which were valid. Id. The act is not unconstitutional because authorizing unequal taxation, by reason of the fact that the lands on which prior invalid assessments were paid without protest are exempt, since the reassessment is only for one-half the cost, and presumably is proportionately less than the prior assessment. Id. A reassessment may be made where the original assessment was unenforceable because the ordinance did not properly define the assessment district. State v. St. Louis, 183 Mo. 230, 81 S. W. 1104. Under Rochester Charter, § 215, authorizing reassessment in case of nonpayment for irregularity or error, where an assessment is held invalid because not including territory incorporated in the city after commencement of the work, the council is authorized to make a reassessment including such property. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518.

30. City of Seattle v. Kelleher, 25 S. Ct. 44. Contra, see 2 Curr. L. 1346, n. 76.

31, 32. City of Seattle v. Kelleher, 25 S. Ct. 44.

33. Martin v. Oskaloosa [Iowa] 102 N. W. 529. McClain's Code, §§ 834, 835, providing that the council may take necessary steps to correct any omission or irregularity in proceedings, rendering a tax invalid, does not authorize an ordinance validating a void assessment. McManus v. Hornaday, 124 Iowa, 267, 100 N. W. 33.

34. Code, § 792 et seq., relative to street improvements and assessments therefor, renders a general ordinance unnecessary. Martin v. Oskaloosa [Iowa] 102 N. W. 529.

35. Under Code, § 836. Martin v. Oskaloosa [Iowa] 102 N. W. 529.

36. Where judgment on a special assessment was reversed and remanded to allow proof that "flat stones" had a well known commercial meaning among contractors, so that an ordinance using the term would be valid, such judgment was not a final disposition or setting aside of the assessment so as to authorize the making of a new one. Holden v. Chicago, 212 Ill. 289, 72 N. E. 435. Under Hurd's Rev. St. 1901, p. 389, c. 24, §§ 57, 58, providing that a special assessment shall not be void because levied for work already done, in good faith, under a prior ordinance, and authorizing a supplemental petition in such case, a judgment that the ordinance is invalid is not res judicata on the liability of property assessed; a supplemental ordinance being passed, the court has jurisdiction to entertain a petition for an assessment thereunder. City of Chicago v. Sherman, 212 Ill. 498, 72 N. E. 396.

37. City of Chicago v. Sherman, 212 Ill. 498, 72 N. E. 396.

38. Ky. St. 1899, § 2834; also § 2833 prescribing mode of apportionment. Orth v. Park & Co., 25 Ky. L. R. 1910, 79 S. W. 206. Where the chancellor ordered the commissioner to charge quarter squares contiguous to an improvement, as required by statute, the presumption is that the commissioner did so, and that the circuit court's judgment was right. Orth v. Park & Co., 26 Ky. L. R. 184, 80 S. W. 1108.

In Wisconsin, where, in an equitable action to set aside an assessment, or an action at law to recover damages for an improper assessment of benefits and damages, the court decides an assessment invalid, it must stay proceedings until a new assessment is had.[39] The statute so providing is applicable to a proceeding instituted after the statute went into effect, where the assessment complained of was made before its enactment;[40] and, as thus construed, is constitutional.[41]

Under the Illinois statute, authorizing a second assessment to pay a deficit, such assessment should have its origin in a proper petition to the county court for an order directing the same to be made.[42] The engineer's estimate, and its approval by the board of trustees of a town, affords prima facie proof of a deficiency.[43] In determining the question, the expense of collecting and disbursing an assessment, and the interest on vouchers given the contractor, may be considered a part of the cost of the improvement.[44] The holder of a voucher for an instalment of a special assessment is not entitled to a supplemental assessment to cover a deficiency caused by property owners paying instalments to a village before maturity, thus causing a loss of interest.[45] A supplemental assessment for a deficiency cannot be made until the amount of the deficiency is definitely determined;[46] that is, until the work has been actually completed and accepted and the cost thereof ascertained.[47] Hence, the preliminary steps necessary in the case of the first assessment are not essential to the validity of the second.[48] An improvement as made must conform substantially to the original description thereof in the ordinance, in order to sustain a supplemental assessment.[49] When the benefits to property from an improvement have been finally and conclusively determined, and the amount of an assessment equal thereto paid, the power to assess is exhausted.[50] A judgment confirming an assessment is, in the absence of an express finding, a prima facie adjudication that the property of an objector has been assessed to the full amount of its benefits,[51] and such judgment should be given that effect in a proceeding for a supplemental assessment.[52]

The effect of vouchers, accepted by contractors under the city and village act of Illinois, is simply to release claims against the municipality, except the right to have assessments collected, and does not prevent supplemental assessments.[53]

39. Held error to refuse such stay in action at law for damages, construing Laws 1903, p. 572, c. 354, amending Rev. St. 1898, § 1210e. Haubner v. Milwaukee [Wis.] 101 N. W. 930.

40. Haubner v. Milwaukee [Wis.] 101 N. W. 930.

41. It does not deprive lot owners of damages in excess of benefits, nor of any right of action or remedy to which they are by law entitled. Haubner v. Milwaukee [Wis.] 101 N. W. 930.

42. Hurd's Rev. St. 1899, p. 374, c. 24, § 59. City of Chicago v. Noonan, 210 Ill. 18, 71 N. E. 32.

43, 44. Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884.

45. The relinquishment of claims by holders of vouchers bars the right. Village of Wilmette v. People [Ill.] 73 N. E. 327.

46. Sheriffs v. Chicago [Ill.] 73 N. E. 367.

47. Sheriffs v. Chicago [Ill.] 73 N. E. 367. Where contract is let at a price in excess of the first assessment, a second cannot be levied until the work is completed. City of Chicago v. Richardson, 213 Ill. 96, 72 N. E. 791.

48. Recommendation by board of improvements, engineer's estimate, public hearing, and second ordinance, unnecessary. City of Chicago v. Noonan, 210 Ill. 18, 71 N. E. 32. Where work was done and accepted and bonds and interest-bearing vouchers were issued therefor, an ordinance for a second assessment to pay a deficit need not provide for an estimate of cost by commissioners. Lusk v. Chicago, 211 Ill. 183, 71 N. E. 878.

49. Construction of roadway 64 feet wide is a substantial departure from an ordinance authorizing one fifty feet wide. City of Chicago v. Ayers, 212 Ill. 59, 72 N. E. 32. The use of a five-inch instead of a six-inch curb and gutter and use of four-inch instead of three-inch crushed stone is not such a departure as to invalidate an assessment. City of Chicago v. Sherman, 212 Ill. 498, 72 N. E. 396.

50. Thus a verdict of a jury in a proceeding to confirm an assessment that the benefits exactly equal the amount of the assessment precludes litigation of the question of benefits in a supplemental proceeding for a second assessment. Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884.

51, 52. Sheriffs v. Chicago [Ill.] 73 N. E. 367.

53. Town of Cicero v. Green, 211 Ill. 241, 71 N. E. 884.

The order of a city council confirming reassessment proceedings has the conclusiveness of a judgment of a court.[54] To include in a reassessment items not proper to be included therein does not render the assessment void or subject it to collateral attack.[55] An objection that a reassessment is excessive is waived by failure to raise it at the proper time.[56] The mere fact that lots are all charged with the same amount by a reassessment and for the same amount as by a prior assessment which was under the front-foot rule does not conclusively show that the reassessment is not according to benefits.[57] The validity of a reassessment is not affected by the fact that city officials promised to give an interested person notice of the reassessment proceedings, and failed to do so, where the statutory notice is given and proceedings de novo taken.[58] Such a promise could not in any case affect the proceedings, since it was void as against public policy.[59]

Notice of the reassessment may be presumed from the record of the proceedings.[60] A supplemental assessment must be made within the time provided by law.[61]

(§ 8) *H. Maturity, obligation, and lien of assessments.*[62]—Special assessments are not a lien on property unless levied according to the statutory rule[63] and entered on the proper books.[64] The lien of a tax bill is not rendered invalid by the omission of the owner's name.[65] The duration of a special assessment lien is fixed by statute.[66] A constitutional provision that tax liens shall lapse in three years, as against third persons, cannot be taken advantage of by one not a third person.[67] Special assessment liens cover the entire estate and are paramount to all existing liens of a private nature.[68] A lien for general taxes is paramount to a lien for a special assessment, even though such assessment is payable in instalments, some of which have not matured.[69] The fact that the city holding the lien of a special assessment was not made a party to the proceeding to foreclose a delinquency certificate does not change the rule, proper notice having been given the owner of the property.[70] A street assessment lien, unlike the lien of a general tax, is subject to the statute of limitations, and when merged in a judgment is

54. The statute so providing is valid. Alexander v. Tacoma, 35 Wash. 366, 77 P. 686.

55. Cost of keeping street in repair for five years improperly included. Alexander v. Tacoma, 35 Wash. 366, 77 P. 686.

56. Question of excessiveness of reassessment waived by failure to appear and object, statutory notice being given. Alexander v. Tacoma, 35 Wash. 366, 77 P. 686.

57, 58, 59. Alexander v. Tacoma, 35 Wash. 366, 77 P. 686.

60. As where resolution for reassessment was on Jan. 6, 1902, objection thereto was made on Jan. 31, 1902, whereupon a resolution was passed making the reassessment. Martin v. Oskaloosa [Iowa] 102 N. W. 529.

61. An order denying a sale, made several terms after a judgment of confirmation, was not a setting aside of the confirmation, and hence a subsequent assessment more than five years after the original assessment was confirmed, was barred by limitations, under § 60 of Law of 1897. Doremus v. Chicago, 212 Ill. 513, 72 N. E. 403.

62. See 2 Curr. L. 1353.

63. Front-foot rule in Iowa. Fitzgerald v. Sioux City [Iowa] 101 N. W. 268.

64. In Iowa, if the county treasurer on receiving the tax list fails to enter thereon unpaid special assessments, such assessments cease to be a lien on the property. Fitzgerald v. Sioux City [Iowa] 101 N. W. 268.

65. City of St. Joseph v. Forsee [Mo. App.] 84 S. W. 98.

66. Special assessments levied by a city are barred by limitations when delinquent for five years. Fitzgerald v. Sioux City [Iowa] 101 N. W. 268. Revenue Act, § 279, barring by limitations a special assessment not returned as provided by that act, does not apply to an assessment confirmed under a prior act and returned under Act 1897. Cummings v. People, 213 Ill. 443, 72 N. E. 1094. Since a city has no authority to adopt the plan of charging the whole cost of a street improvement to abutting owners, and making the same payable in ten yearly instalments except upon request of the owners, when such action is taken, the statute limiting the lien of the assessment to five years applies. City of Lexington v. Crosthwaite, 25 Ky. L. R. 1898, 78 S. W. 1130.

67. La. Const. 1898, art. 186. Bacas v. Adler, 112 La. 806, 36 So. 739.

68. Chase v. Trout [Cal.] 80 P. 81. A special assessment lien is superior to all liens acquired by personal contract. O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020.

69, 70. Pennsylvania Co. v. Tacoma, 36 Wash. 656, 79 P. 306.

governed by the same rules as other judgment liens.[71] Under the Indiana statute making abutting lands on an improved street primarily liable, and backlying lands secondarily liable, an assessment based on a report covering only the bordering lands creates a valid lien on the backlying lands.[72] Such lien is not released by the signing of a waiver of illegalities by abutting owners for the privilege of paying assessments in instalments.[73]

(§ 8) *I. Payment and discharge.*[74]—Assessments may usually be made payable in instalments.[75] In such case interest is properly charged on deferred payments.[76] Where an ordinance directing the issue of street improvement bonds named the rate of interest of the bonds, the statute requiring the council to fix the rate of interest on unpaid instalments was sufficiently complied with.[77] An assessment payable in a single payment cannot be regarded as an instalment within the statute authorizing the charging of interest on deferred instalments.[78] In Indiana, owners may have the privilege of paying in instalments by agreeing to pay the assessment and to waive irregularities.[79] Interest accrues upon an indebtedness to a municipality for an assessment the same as upon any other debt.[80] A property owner who refuses to pay any part of an assessment is liable to the penalties and interest prescribed by law on such amount as is held valid upon litigation of a tax bill though the amount of the assessment is reduced.[81] A formal demand of payment is waived by the owner's declaring that he will not pay except at the end of a lawsuit,[82] and the penalty for nonpayment is chargeable against such owner without a formal demand.[83] The exact date of a demand not being shown, it will be considered as having been made on the last day of the month wherein it was made,[84] and the penalty for nonpayment will be computed from that date.[85] Unless there has been a prior demand, a penalty begins to run on a tax bill when suit is brought thereon.[86] A property owner is not liable to a contractor for interest on an assessment until a legal apportionment has been made, since, until then, he is not in default for not paying.[87] Nor is such interest recoverable from the city where under the statute it is not liable when it is without power to enforce liability against the property benefited.[88]

71. Duration is six years in Washington. Hinckley v. Seattle [Wash.] 79 P. 779.

72. Construing Burns' Rev. St. 1894, §§ 4290, 4293, 4294. Voris v. Pittsburg Plate Glass Co. [Ind.] 70 N. E. 249.

73. Voris v. Pittsburg Plate Glass Co. [Ind.] 70 N. E. 249.

74. See 2 Curr. L. 1354.

75. This mode of payment is proper. Sumner v. Milford, 214 Ill. 388, 73 N. E. 742. An assessment payable in one payment is an "instalment" returnable as delinquent and collectible under Laws 1901, p. 118, amending Act 1897, p. 135, § 99. Cummings v. People, 213 Ill. 443, 72 N. E. 1094. Detroit City Charter, § 44, providing for payment of a street grading assessment in four instalments does not apply to an assessment for a street opening; the latter may properly be made payable at one time, under Pub. Acts 1883, p. 120, § 15. Power v. Detroit [Mich.] 102 N. W. 288.

76. Local Improvement Act, §§ 42, 86, providing for payment of assessments in instalments and the issuance of bonds in anticipation of deferred payments, are constitutional and do not deprive owners of property without due process of law by fixing the interest on the bonds at not less than 5%. Legislature has power to fix the interest. Hulbert v. Chicago, 213 Ill. 452, 72 N. E. 1097.

77. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

78. Part of ordinance providing for interest on an assessment payable in one payment held void. McChesney v. Chicago, 213 Ill. 592, 73 N. E. 368.

79. The agreement to pay an assessment, contained in stipulations signed by a property owner who waived illegalities for the privilege of paying an assessment in instalments, was not changed by the 1893 amendment to Burns' Ann. St. 1894, § 4294. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

80. Gilfeather v. Grout, 91 N. Y. S. 533. Interest held properly included in a reassessment. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518.

81. Power v. Detroit [Mich.] 102 N. W. 288.

82, 83, 84, 85. Perkinson v. Schnake [Mo. App.] 83 S. W. 301.

86. Barber Asphalt Pav. Co. v. Peck [Mo.] 85 S. W. 387.

87. Second apportionment being necessary because of invalidity of first, no interest between the two was recoverable. Orth v. Park & Co., 25 Ky. L. R. 1910, 79 S. W. 206.

A special assessment, paid under protest, before the whole amount was delinquent, may be recovered if the assessment is held void.[89] Voluntary payment of a special assessment, with notice of the proceedings on which the assessment is based, precludes recovery of the amount paid.[90] The legislature has power to prohibit an action to recover money paid on a void assessment except on compliance with certain conditions,[91] and where it has provided a remedy for persons aggrieved by such an assessment, such remedy is exclusive.[92] Money paid on an assessment, valid on the face of the record, but invalid by reason of facts outside the record, cannot be recovered until the assessment is set aside.[93, 94] One who has voluntarily paid the whole amount of an assessment cannot maintain an action for a reassessment, to reduce or extinguish the assessment of benefits.[95] One who pays or redeems from a drainage assessment cannot require reimbursement from other owners unless they claim some adverse or junior right in the land.[96]

A statute relieving property owners from assessments should be construed in favor of, not against, such owners.[97]

(§ 8) *J. Enforcement and collection.*[99]—Since there is no personal liability for a special assessment,[99] the proceeding to enforce such assessment is one in rem,[1] and the validity of the decree is not affected by the fact that the owner of the property was not a party.[2] But it has been held that an action to foreclose the lien of a street assessment is not a proceeding in rem except in the sense that the amount of the lien can be collected only out of the property involved in the action,[3] and that the owner of the land is not bound by a judgment in such action if he was not made a party.[4] The statutory rule that a pendente lite purchaser is bound by a judgment, if notice of lis pendens is properly filed, is applicable to the suit.[5] A court of general superior jurisdiction is a court of "competent jurisdiction" to enforce a drainage assessment lien in Indiana.[6] It was expressly provided in Indiana that certain drainage assessments should be collected under the law in force when the work was begun.[7] The commencement of a suit to foreclose

88. Orth v. Park & Co., 25 Ky. L. R. 1910, 79 S. W. 206.

89. South Omaha Charter of 1889. City of South Omaha v. McGavock [Neb.] 100 N. W. 805.

90. Shirley v. Waukesha [Wis.] 102 N. W. 576. Payment of assessment, apparently valid, but in fact void, by one who has knowledge of the facts rendering it void, is a voluntary payment and the amount cannot be recovered. McCall v. Rochester, 44 Misc. 129, 89 N. Y. S. 766.

91. Laws 1898, p. 440, c. 182, §§ 466, 467, providing an exclusive remedy for a party aggrieved by a void assessment, is constitutional. McCall v. Rochester, 44 Misc. 129, 89 N. Y. S. 766.

92. No resort can be had to equity. McCall v. Rochester, 44 Misc. 129, 89 N. Y. S. 766.

93, 94. McCall v. Rochester, 44 Misc. 129, 89 N. Y. S. 766.

95. Shirley v. Waukesha [Wis.] 102 N. W. 576.

96. Ellison v. Branstrator [Ind. App.] 73 N. E. 146.

97. Gilfeather v. Grout, 91 N. Y. S. 533. Laws 1899, c. 522, authorizing cancellation of certain assessments on payment of one-third thereof, construed as giving property owners the right to three months in which to pay said one-third on payment of 6% interest from the date of the passage of the act, and on failure to do so, requiring 1% per month for the balance of the time fixed. Id.

98. See 2 Curr. L. 1354.

99. A provision in a deed that it is subject to any existing liens for street work does not render the vendee personally liable. Page v. Chase Co., 145 Cal. 578, 79 P. 278.

1. Orth v. Park & Co., 26 Ky. L. R. 342, 81 S. W. 251. A proceeding to enforce an apportionment warrant being in rem, a mistake in the christian name of the person owning the property assessed is immaterial. Langan v. Bitzer, 26 Ky. L. R. 579, 82 S. W. 280.

2. Suit to procure sale under Acts 1895, p. 89, c. 71. Ballard v. Hunter [Ark.] 85 S. W. 252.

3. Page v. Chase Co., 145 Cal. 578, 79 P. 278.

4. Construing St. 1885, c. 153, § 16, and St. 1896, c. 151, § 8. Page v. Chase Co., 145 Cal. 578, 79 P. 278.

5. Page v. Chase Co., 145 Cal. 578, 79 P. 278.

6. Rev. St. 1881, § 4277. Ellison v. Branstrator [Ind. App.] 73 N. E. 146.

7. Burns' Ann. St. 1894, § 5646, repealing

an assessment lien within two years does not extend the life of the lien after the expiration of the two years as against a purchaser not made a party.[8] A lien for an assessment cannot be foreclosed pending an appeal by property owners from the action of a common council approving the assessment.[9]

The Kansas City charter provision requiring plaintiff in a suit to enforce a special tax bill to file a statement with the city treasurer showing the tax bills sued on, when and in what court, and against whom the suit has been brought, is constitutional, except so far as it attempts to penalize failure to file the statement.[10] Such statement being filed before the two-year lien of the tax bill had expired, and stating that suit had been brought, was sufficient to continue the lien during proceedings though it did not state when suit was brought.[11]

When the legal and illegal portions of the cost of a work, represented by a tax bill, are separable, the bill may be enforced as to the legal portion only.[12] Where on trial of a suit on a special tax bill, the theory adopted by plaintiff was that the work was done as required, he could not recover on a quantum meruit for actual work done, but he must recover full value or nothing.[13] The circuit court of Missouri may, in condemnation proceedings, order the damages allowed to be paid into court, and retained to satisfy special tax bills previously issued against the property condemned.[14] The money so paid into court represents the land and an assignee of a special tax bill has the same right thereto as he would have had against the land.[15]

In Missouri, a general judgment may be recovered against a city on special tax bills for the city's share of the cost of a street improvement.[16] Such judgment may properly bear interest.[17] The city's liability for improvements does not arise out of contract but out of the benefit to its property; hence it cannot urge the invalidity of the contract for the improvement in an action on tax bills against it.[18] The statute authorizing such judgment does not conflict with the constitutional provisions exempting the property of municipal corporations from taxation,[19] nor with that prohibiting the general assembly from imposing taxes on cities for county, city, town, or other municipal purposes.[20] A city cannot urge that the statute providing for such judgment conflicts with the constitutional provision limiting indebtedness to the amount of the yearly income and revenue when there is no evidence as to the amount of such income and revenue.[21]

Owners of street improvement bonds, issued in Indiana for the purpose of anticipating the collection of assessments, may sue thereon to enforce collection by foreclosure or otherwise.[22] There need be no resolution of the city council author-

former laws. Ellison v. Branstrator [Ind. App.] 73 N. E. 146.

8. Street Improvement Act, § 9, provides the lien shall continue two years. Page v. Chase Co., 145 Cal. 578, 79 P. 278.

9. Under Acts 1901, c. 231, §§ 4, 5. City Bond Co. v. Bruner [Ind. App.] 73 N. E. 711. The same is true though the appeal is taken by property owners affected, other than those against whom the assessment lien is sought to be foreclosed. City Bond Co. v. Wells [Ind. App.] 73 N. E. 713.

10, 11, 12. Haag v. Ward [Mo.] 85 S. W. 391.

13. St. Louis Charter, art. 6, § 25, authorizing unworkmanlike work to be pleaded in reduction held not applicable. Heman v. Larkin [Mo. App.] 83 S. W. 1019.

14. This procedure does not violate the constitutional provision as to compensation for property condemned. Ross v. Gates, 183 Mo. 338, 81 S. W. 1107.

15. Ross v. Gates, 183 Mo. 338, 81 S. W. 1107.

16. Rev. St. 1899, § 5682. Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64.

17. Ten per cent under direct provisions of Rev. St. 1899, § 5664. Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64.

18. Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64.

19. Const. art. 10, § 6. Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64.

20. Const. art. 10, § 10. Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64.

21. Barber Asphalt Pav. Co. v. St. Joseph, 183 Mo. 451, 82 S. W. 64.

22. Burns' Ann. St. 1894, §§ 4296, 4290,

izing the suit, nor is a demand upon the city to pay or collect the bonds a prerequisite to the bringing of the action to enforce the lien of the assessment.[23] In such action an averment that the city failed and refused to pay the amount of the assessments is merely formal and no proof thereof is required.[24]

Notice[25] of the proceeding by publication is due process of law.[26] Parties who appear and offer objections to an application for sale, waive a defect in the notice consisting of a mistake in their names, and the court has jurisdiction.[27] The warning order required in Arkansas need not be entered of record nor on the complaint.[28]

Limitations[29] against a valid assessment[30] is tolled by a suit against proceeds of the land as well as against the land itself.[31] The Kentucky statute limiting liability for assessments to five years applies to the collection of the assessment by distraint as well as to suits to enforce the lien.[32]

Pleading and proof.[33]—A complaint in an action to foreclose an assessment lien need not include, by reference or otherwise, the preliminary proceedings, when the assessment itself is included therein, and a general allegation states that the proper steps have been taken.[34] Where a city, in proceedings to enforce liens for sidewalk improvements, relies on the acquiescence of the owners in the making of the improvement, the issue of acquiescence should be tendered in the complaint.[35] Plaintiff makes a prima facie case in an action to foreclose the lien of an assessment by introducing in evidence the assessment, diagram, warrant, return, and engineer's certificate.[36] While suit to enforce a tax bill may be against any person having an interest in the property, the bill is not prima facie evidence of liability against anyone except the person named therein as owner.[37] A city seeking to enforce a sidewalk assessment against a lot, must prove the making and filing of a special tax list against the lot[38] and due service of the tax warrant.[39]

4294. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

23, 24. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

25. See 2 Curr. L. 1356.

26. Acts 1895, p. 88, c. 71, relative to the action to enforce levee taxes, providing for notice by publication, affords due process of law. Ballard v. Hunter [Ark.] 85 S. W. 252. A sworn complaint in proceedings for sale of property for levee taxes, stating which defendants were nonresidents, is sufficient to authorize notice to such defendants by publication, without an affidavit [Acts 1895, p. 89, c. 71]. Id. Certificate of publication of notice of application for judgment of sale held not defective. Gage v. People, 213 Ill. 410, 72 N. E. 1084.

27. Dickey v. People, 213 Ill. 51, 72 N. E. 791.

28. Acts 1895, p. 89, c. 71, providing for suits to enforce levee taxes, does not so require; if it had so required, proceedings could not be collaterally attacked for want of it, unless it was made jurisdictional. Ballard v. Hunter [Ark.] 85 S. W. 252.

29. See 2 Curr. L. 1356.

30. Failure to fix a grade before assessment, in violation of a charter, did not exempt the land from taxation within the meaning of § 1189, Rev. St. 1898, providing that the limitation statute does not apply where the land assessed is not liable to taxation. Hamar v. Leihy [Wis.] 102 N. W. 568. Nor did the fact that land was assessed with land belonging to another have the effect of rendering the tax certificate void within the meaning of that statute. Id.

31. Where by charter the lien of a special tax bill continues for one year after the last instalment of the tax falls due, an action within such time to recover payment on a tax bill from a fund reserved from the proceeds of a condemnation proceeding against the land is in time though no suit has been brought against the land. Ross v. Gates, 183 Mo. 338, 81 S. W. 1107.

32. City of Lexington v. Crosthwaite, 25 Ky. L. R. 1898, 78 S. W. 1130.

33. See 2 Curr. L. 1357.

34. Helm v. Witz [Ind. App.] 73 N. E. 846. Complaint in action to foreclose lien of assessment, containing copy of assessment, and referring to estimate of engineer, held to sufficiently describe the property. Id.

35. Town of Greendale v. Suit [Ind.] 71 N. E. 658.

36. Dowling v. Hibernia Sav. & Loan Soc., 143 Cal. 425, 77 P. 141. Resolution of intention to improve a street held to have been sufficiently identified in the records to sustain a prima facie case in an action to foreclose an assessment lien. Id.

37. City of St. Joseph v. Forsee [Mo. App.] 84 S. W 98. The owner of property, within the meaning of a statute requiring tax bills to state the owner's name, is the person having the record title, in the absence of knowledge to the contrary. Rev. St. 1899, § 5686, construed. Id.

38. 1 Starr & C. Ann. St. 1896, p. 857, c. 24. People v. Record, 212 Ill. 62, 72 N. E. 7.

One objecting to an assessment on the ground of irregularity in the proceedings must prove facts to sustain his objection.[40] The burden is on defendants to show portions of a tax bill invalid, because involving costs not properly charged to the owner.[41]

Defenses.[42]—Delay in issuing tax bills, caused by litigation, is no defense in an action thereon.[43] The doctrine concerning bona fide purchasers for value cannot be relied on in a suit to enforce the lien of an assessment.[44] Where land is erroneously described in the assessment roll, the owner may defend an action to foreclose a tax lien thereon on the ground that his land has not been taxed.[45] That part of the work done was repair work, chargeable to the city, was no defense to an action on a tax bill for reconstruction when the evidence showed that the city had paid for the repairs.[46] That the work as completed is substantially different from that authorized by the ordinance is a good defense, if the cost has been thereby materially increased;[47] but changes in the plan with permission of the proper authorities is not a defense, if the cost is not increased.[48] A general taxpayer cannot object to payment for a street improvement, completed under a valid resolution, out of the general fund.[49] Irregularities do not constitute a defense in the absence of proof that the objectors were prejudiced thereby.[50] Errors

39. Handing a bill of costs to the marshal, and service of it by him, is not the issuance and service of a warrant for a tax as required by 1 Starr & C. Ann. St. 1896, and ordinance pursuant thereto. People v. Record, 212 Ill. 62, 72 N. E. 7. Nor is the handing of such bill to the clerk with the oral statement that, after demand, the marshal had been unable to collect, a sufficient return. Id.

40. Objection that proceedings to let contract were not taken in time held not sustained. Gage v. People, 213 Ill. 347, 72 N. E. 1062. In an action to enforce the lien of a tax bill, the burden is on defendant to prove the ordinance providing for the improvement was invalid. Dollar Sav. Bank v. Ridge, 183 Mo. 506, 82 S. W. 56.

41. Haag v. Ward [Mo.] 85 S. W. 391.

42. See 2 Curr. L. 1355.

43. Where tax bills were required to be issued within twenty days after completion of the work, but the law provided that delay should not render the same invalid, a delay of five years, caused by long litigation, was held not fatal to the tax bills. Dollar Sav. Bank v. Ridge, 183 Mo. 506, 82 S. W. 56.

44. One who purchased land after an assessment had been declared void, and before a reassessment was made, could not raise that defense. City of Seattle v. Kelleher, 25 S. Ct. 44.

45. City of Rochester v. Farrar, 44 Misc. 394, 89 N. Y. S. 1035.

46. Perkinson v. Schnake [Mo. App.] 83 S. W. 301.

47. As where grade was changed in street improvement. Eustace v. People, 213 Ill. 424, 72 N. E. 1089.

48. A street which was being improved crossed a railroad at an acute angle, and by agreement, the road put in the crossing at a right angle, necessitating a deflection in the roadway. Held, this was not a deviation from the contract such as to invalidate the assessment, no greater burden being thereby placed upon the property owners. Orth v. Park & Co., 25 Ky. L. R. 1910, 79 S. W. 206. Nor did the fact that the clerk of the board of public works failed to enter the order providing for the change defeat the lien of the assessment. Id. Changes may be made in the plan of work, upon the written agreement of the board of public works, with the consent of the contractor, after the contract has been let. Such changes are no defense to an action on apportionment warrants, so long as they do not increase the cost, as where street grade, as fixed by ordinance, was changed, so as to reduce the cost under Ky. St. 1903, § 2830. Lindenberger Land Co. v. Park & Co. [Ky.] 85 S. W. 213.

49. Especially after permitting the work to be completed without objection. Shelby v. Burlington [Iowa] 101 N. W. 101.

50. The objection that an assessment is void because certain land owners by agreement with the contractors waived their statutory right to take the contract in consideration of a 25% reduction in their assessment is unavailing if the objectors do not show that they were prejudiced by such agreement. Duncan v. Ramish, 142 Cal. 686, 76 P. 661. That an ordinance and contract provided for pavement on both sides of a street cannot be objected to by a property owner unless he can show he was prejudiced thereby. Langan v. Bitzer, 26 Ky. L. R. 579, 82 S. W. 280. The defense that an apportionment was not legally or correctly made cannot be relied on in the absence of proof that under a correct apportionment the charge against the objector's property would be lessened. Baldrick v. Gast, 25 Ky. L. R. 1977, 79 S. W. 212. The invalidity of an apportionment on one side of a street which is to bear one-half the cost of an improvement cannot affect the validity of the apportionment on the other side, which bears the other half. Lindenberger Land Co. v. Park & Co. [Ky.] 85 S. W. 213. Failure to publish an ordinance providing for an improvement for the required time after it became effective will not invalidate the assessment for the improvement in the absence of a showing that some property owner was thereby prejudiced. Burke v. Wapakoneta, 4 Ohio C. C. (N. S.) 482.

cured by statute cannot be relied on,[51] but statutes designed to prevent property owners from taking advantage of technical defenses do not authorize recovery of an assessment for work done pursuant to a wholly void contract.[51a]

Waiver and estoppel to urge defenses.[52]—The trend of recent decisions involving questions affecting the validity of assessments for local improvements is to be less technical than formerly, and to require owners whose property may be assessed to be at least reasonably diligent in protecting their rights before the improvements are completed,[53] and objections, not jurisdictional, but going merely to irregularities in proceedings, cannot be first raised in an action to enforce an assessment.[54] Thus, it is held that owners who stand by until a public work is completed and accepted, without availing themselves of opportunities to object before the tribunals provided by law, cannot, when suit is brought to enforce assessments, object to the regularity of the assessment.[55] Such conduct has been held to estop the owner from objecting that the ordinance providing for the work was irregularly adopted,[56] that the work was not done in accordance with the ordinance,[57] that the letting of the contract was irregular,[58] that a member of the council was interested in the contract, in violation of the statute, no actual fraud being shown,[59] that provisions of a contract, which did not increase the cost of the work, were invalid,[60] or that property has been unjustly omitted from the assessment district.[61] But where an improvement is unauthorized and the tax therefor void, a property owner is not barred from contesting a tax lien by not having objected to proceedings before the council.[62] Property owners who have petitioned for a street improvement are estopped to urge the invalidity of proceedings or the assessment, unless the city council never had jurisdiction, or so far departed from

51. A mistake in the christian name of the owner of property in an apportionment warrant is cured after completion of the work by Ky. St. 1903, § 2834. Langan v. Bitzer, 26 Ky. L. R. 579, 82 S. W. 280.

51a. Code Iowa 1873, §§ 478, 479, not available as against defense that contract was void. Allen v. Davenport [C. C. A.] 132 F. 209.

52. See 2 Curr. L. 1355.

53. City of Denver v. Campbell [Colo.] 80 P. 142.

54. City of Aberdeen v. Lucas [Wash.] 79 P. 632.

55. Ferry v. Tacoma, 34 Wash. 652, 76 P. 277. After the completion of an improvement and a long lapse of time, most assessments having been paid, an assessment will not be held invalid unless the language of the statute clearly requires it. Wells v. Street Com'rs of Boston [Mass.] 73 N. E. 554. On application for a judgment of sale for an assessment, no objection which could have been raised in the proceedings for making or confirming the assessment will be heard [Hurd's Rev. St. 1903, c. 24, § 572]. Goldstein v. Milford, 214 Ill. 528, 73 N. E. 758; Harman v. People, 214 Ill. 454, 73 N. E. 760. On such application want of jurisdiction to enter the judgment of confirmation must appear on the face of the record; it cannot be shown by extraneous evidence. Goldstein v. Milford, 214 Ill. 528, 73 N. E. 758. Owners of property in front of which water pipes were laid in the street without objection from them, and who used the water so supplied, will not be heard to complain of mere informalities in regard to the ordering of the work. Doughten v. Camden [N. J. Law] 59 A. 16.

56. Objection was that an ordinance authorizing an improvement, and another ordinance for a street improvement were both passed on the same day without objection. City of Louisville v. Gast, 26 Ky. L. R. 412, 81 S. W. 693.

57. Baldrick v. Gast, 25 Ky. L. R. 1977, 79 S. W. 212.

58. City of Denver v. Kennedy [Colo.] 80 P. 122. An objection that a contract was not let within the time provided by law cannot be first raised on application for judgment of sale for the assessment, in the absence of any showing of injury. Gage v. People, 213 Ill. 468, 72 N. E. 1108. On appeal from a judgment of sale it will be presumed, in the absence of contrary evidence, that the first step to let a contract for a street improvement was taken within 90 days after expiration of the term at which the assessment was confirmed. Id. Tax bills will not be held void for acts of the contractor's agent in securing the contract, in the absence of proof of fraud or collusion, especially after full performance of the contract. Field v. Barber Asphalt Pav. Co., 194 U. S. 618, 48 Law. Ed. 1142.

59, 60. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542.

61. Spalding v. Denver [Colo.] 80 P. 126; City of Denver v. Dumars [Colo.] 80 P. 114; O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020. Failure of a property owner to object to the limits of an assessment district made by the council is a waiver of the objection and makes the action of the council conclusive. Duncan v. Ramish, 142 Cal. 686, 76 P. 661.

62. Carter v. Cemansky [Iowa] 102 N. W. 438.

established methods as to oust it of jurisdiction.[63] A property owner cannot acquiesce in the mode of payment adopted by a city council until the lapse of the limitation period and then rely upon limitations in bar of the city's claim against him.[64]

The defense that an improvement was made under an unconstitutional law is not precluded by conduct of the owners.[65]

Property owners are not barred by laches from showing invalidity of assessments because of want of notice of a hearing on the improvement, though such objection is first raised when suit is brought for sale of the land.[66]

A charter provision that no objection can be urged in an action on a tax bill unless such objection has been filed with the board of public works within sixty days after issuance of the bill is a denial of due process of law.[67]

Payment of part of an original assessment estops a subsequent grantee from denying the validity of the obligation,[68] unless the assessment was void.[69] But one claiming under a tax deed may object to prior special assessments notwithstanding the fact that owners prior to the sale paid part of the taxes without objection.[70] Estoppel arises against a grantee seeking to escape a street assessment when it appears that the assumption of that particular assessment constituted a part of the purchase price,[71] and that he purchased after the resolution declaring the necessity for the improvement and the ordinance ordering the improvement were passed, but before the passage of the ordinance assessing the property.[72] Estoppel does not arise against a grantee where the provision in the deed as to payment of the assessment does not specify any particular assessment on any particular street.[73] A conveyance "subject to all incumbrances of record" does not estop the grantee from attacking the validity of an assessment on the land.[74]

The judgment.[75]—As there is no personal liability for a street assessment, there can be no deficiency judgment in an action for its foreclosure.[76] Interest and a reasonable attorney's fee are properly included in a judgment in an action under the Indiana law by the holders of street improvement bonds to enforce the lien of assessments.[77] Interest is recoverable on an apportionment warrant, when no new apportionment has been necessary.[78]

If a court has jurisdiction of the subject-matter and owners of property affected, a judgment for an assessment is valid, and any defense against the assessment by reason of errors or irregularities in the proceedings prior to the judgment is res judicata.[79] Where, in a suit against a property owner for the recovery of a tax, it has been finally adjudged that the tax is invalid and no recovery thereon

63. City of Aberdeen v. Lucas [Wash.] 79 P. 632.

64. City of Lexington v. Bowman [Ky.] 84 S. W. 1161.

65. The fact that property owners petitioned for consideration of a street improvement by the board of public improvements, and later permitted the work to be completed without objection, did not estop them from contesting the validity of the tax. Perkinson v. Hoolan, 182 Mo. 189, 81 S. W. 407.

66. Auditor General v. Calkins [Mich.] 98 N. W. 742.

67. Kansas City Charter, art. 9, § 23, is unconstitutional. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062; Schibel v. Merrill [Mo.] 83 S. W. 1069.

68. Gilfeather v. Grout, 91 N. Y. S. 533.

69. Payment of an instalment of a void assessment by one through whom plaintiff claimed title, did not estop plaintiff from contesting the lien of the assessment. Carter v. Cemansky [Iowa] 102 N. W. 438.

70. Fitzgerald v. Sioux City [Iowa] 101 N. W. 268.

71, 72, 73. Waldschmidt v. Bowland, 6 Ohio C. C. (N. S.) 99.

74. Carter v. Cemansky [Iowa] 102 N. W. 438.

75. See 2 Curr. L. 1357.

76. Page v. Chase Co., 145 Cal. 578, 79 P. 278.

77. Scott v. Hayes, 162 Ind. 548, 70 N. E. 879.

78. Langan v. Bitzer, 26 Ky. L. R. 579, 82 S. W. 280.

79. As objection that there was no proper petition. Hanse v. St. Paul [Minn.] 102 N. W. 221.

can be had, no subsequent legalizing statute will operate to nullify such judgment, and subject the property owner to another suit for recovery on the same demand.[80] A decree of a court of competent jurisdiction is not subject to collateral attack because lands were sold thereunder for illegal penalties and costs.[81] The validity of a judgment of sale for prior delinquent instalments may not be questioned on application for sale for the fourth instalment.[82]

The order of sale follows the language of the statute and need not contain anything which it does not require.[83] The obtaining of jurisdiction by notice need not be recited in the statutory form, when jurisdiction was obtained by appearance of the parties and the entering of objections.[84] A judgment of sale is fatally defective if it is not certain in amount or does not find a sum of money due for taxes and costs,[85] but a slight error in the name of the board making the assessment is not cause for reversal.[86] Two judgments cannot be entered against the same lot for the same assessment,[87] but a regular, signed judgment of sale is not rendered void by another judgment of sale on the same assessment which is not signed.[88]

The sale and redemption.[89]—In some states it is the law that special assessments are certified to the officer charged with collection of general taxes and if they become delinquent the lands are sold to pay the two kinds of taxes according to the mode of sale for delinquent general taxes. A full treatment of the law of tax sales will be found elsewhere.[90] The assessment and levy of special taxes having been made with opportunity to owners to be heard, no other notice than that which the law itself gives of the enforcement and collection of the tax by sale is necessary.[91] The fact that no further notice is required does not render the statute governing such sale unconstitutional because providing for the taking of property without due process of law.[92] A sale under a judgment foreclosing a tax lien cannot pass title to a tract of land other than that described in the assessment roll.[93] A purchaser at a sale for taxes and special assessments takes the property free from special assessments as well as taxes.[94] Where an assessment is wholly void, a purchaser at the sale cannot recover from the owner the value of the improvements on the theory of benefits conferred.[95] The right to refundment of money paid by a purchaser at a tax sale, after the sale has been held invalid, is statutory.[96] The existence of a bond constituting a lien on land for

80. McManus v. Hornaday, 124 Iowa, 267, 100 N. W. 33.

81. Ballard v. Hunter [Ark.] 85 S. W. 252.

82. Gage v. People, 213 Ill. 410, 72 N. E. 1084.

83. Method of sale of lots for assessments having been changed by Hurd's Rev. St. 1899, p. 1428, the order of sale need not now contain the statutory words "or so much of each of them as shall be sufficient." Gage v. People, 213 Ill. 347, 72 N. E. 1062.

84. Gage v. People, 213 Ill. 347, 72 N. E. 1062.

85. Judgment defective when there was nothing to show figures meant dollars and cents. Gage v. People, 213 Ill. 347, 72 N. E. 1062.

86. Board of West Chicago Park Commissioners described as Board of West Park Commissioners. Cummings v. People, 213 Ill. 443, 72 N. E. 1094.

87. A judgment of sale was entered but was not signed by the judge. A second judgment was properly entered which did not purport to be an amendment or correction of the first. Held, power of court was exhausted by first judgment. Dickey v. People, 213 Ill. 51, 72 N. E. 791.

88. Cummings v. People, 213 Ill. 443, 72 N. E. 1094.

89. See 2 Curr. L. 1357.

90. See the topic Taxes, 2 Curr. L. 1786.

91. Where land is sold for taxes under Sess. Laws 1903, c. 76, p. 519. City of Beatrice v. Wright [Neb.] 101 N. W. 1039. The notice given as required by the general revenue law (Comp. St. 1903, art. 1, c. 77, § 193 et seq.), for the sale of realty for taxes is not a notice of sale under the special provisions of Sess. Laws 1903, c. 76, p. 519. Id.

92. City of Beatrice v. Wright [Neb.] 101 N. W. 1039.

93. City of Rochester v. Farrar, 44 Misc. 394, 89 N. Y. S. 1035.

94. Fitzgerald v. Sioux City [Iowa] 101 N. W. 268.

95. Carter v. Cemansky [Iowa] 102 N. W. 438.

96. The right is not contingent, under the St. Paul charter, upon the bringing of an

a street improvement, after a sale of the land for unpaid instalments, does not affect the right to redeem from the sale; hence mandamus will not lie to compel cancellation of the bond by the treasurer until the owners redeem.[97]

The purchaser at a sale alone may question the redemptioner's right; other owners liable to contribute cannot.[98]

(§ 8) *K. Remedies by injunction or other collateral attack, and grounds therefor.*[99]—In general, collection of an assessment will be enjoined only when proceedings are wholly void,[1] as for want of notice of the intention to assess.[2] Mere irregularities, to which property owners have failed to object when opportunity to do so was afforded, cannot be made the ground for relief in equity,[3] as by injunction,[4] or by a decree annulling the assessment.[5] Relief against an excessive assess-

action to test the validity of the proceeding within three years from the date of sale. The right to refundment exists when the proceedings have been held invalid in any form of action, before or after the running of the limitation statute. Otis v. St. Paul [Minn.] 101 N. W. 1066.

97. Ellis v. Workman, 144 Cal. 113, 77 P. 822.

98. Drainage assessments. Ellison v. Branstrator [Ind. App.] 73 N. E. 146.

99. See 2 Curr. L. 1358.

1. Proceeding being wholly void and not merely irregular, suit to enjoin collection of assessment certificates will lie. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542. Suit to enjoin sale for assessment not barred by failure to appear and object when assessment was void. Gallaher v. Garland [Iowa] 101 N. W. 867. Collection of a special assessment will not be enjoined unless the assessment is void, or levied without authority of law, or the property assessed is exempt. Lyman v. Chicago, 211 Ill. 209, 71 N. E. 832. That the improvement is not being made in conformity with the provisions of the ordinance is not ground for an injunction; the remedy is by mandamus. Id. A court of equity will not enjoin an assessment when the benefits conferred equal the amount of the assessment. A court after hearing the evidence may say it will enjoin if assessments exceed a certain amount, otherwise not, and so practically fix the assessment. Thornton v. Cincinnati, 4 Ohio C. C. (N. S.) 31.

2. A property owner who has no notice of an intention to assess his property for grading does not waive objections by seeing the work done. Gallaher v. Garland [Iowa] 101 N. W. 867. The owner of property, 700 feet from a sewer, who had no notice of an intention to assess such property for the sewer, until it was completed was not estopped to set up the invalidity of the proceedings by suit to enjoin collection. Pennsylvania Co. v. Cole, 132 F. 668.

3. Before parties aggrieved by an assessment levied under a fixed rule which appears to be reasonable and likely to proximate an equality of assessments can appeal to a court of equity to relieve them from an alleged excess, or because their property was not in fact benefited, they must at least first apply for such relief to the special tribunal which the law has provided to settle these questions. Spalding v. Denver [Colo.] 80 P. 126. Thus, the objection that a sewer is an improvement of such nature that the cost should be borne by the city and not by a district cannot be first raised in a court of equity. Id.

4. Objection that itemized estimate of cost was not included in resolution cannot be made the basis of suit to enjoin collection of assessment. Lyman v. Chicago, 211 Ill. 209, 71 N. E. 832. Collection of an assessment in full will not be enjoined on the ground that it includes more than the council was authorized to incur, when there is no question that the expense charged was actually and properly incurred and property owners had full knowledge of what was being done. City of Akron v. France, 4 Ohio C. C. (N. S.) 496. The making of an improvement will not be enjoined on the ground that the assessment therefor was to be by the front foot, where the property owner has opportunity to object to the assessment in the course of the proceedings. McKee v. Pendleton, 162 Ind. 667, 69 N. E. 997.

5. The objection that there was no valid judgment confirming a special assessment cannot be raised in a proceeding to set the assessment aside, when such objection could have been raised on the hearing of an application for judgment of sale for delinquency. Lyman v. Chicago, 211 Ill. 209, 71 N. E. 832. After completion of paving without objection, property owners could not have lien annulled on ground of invalidity of contract. Bacas v. Adler, 112 La. 806, 36 So. 739. An improvement being patent to all who saw the lots, and the fact that assessments thereon were unpaid being easily ascertainable, a claim by petitioners to vacate assessments that they purchased without notice of such unpaid assessments is without merit. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518. Where a remonstrator to a public work alleged generally that proceedings were void, but did not raise the point that the petition was improperly signed by executors of deceased owners instead of the heirs, that objection could not be raised as ground to set aside the assessment. Stewart v. Detroit [Mich.] 100 N. W. 613. Complainant not entitled to have assessment set aside when he resided on the street but made no objection to the improvement. Farr v. Detroit [Mich.] 99 N. W. 19. Property owners who have failed to object cannot be heard to say that their property was in fact injured and not benefited, in an action to annul the assessment. City of Denver v. Dumars [Colo.] 80 P. 114. A property owner is not estopped to attack, through suit to set aside a tax bill, the formation of an assessment district for a street improvement by allowing work to be completed, where the only objection open to

ment will not be granted unless the amount justly due is tendered,[6] except where the entire assessment is illegal as substantially in excess of benefits.[7] The grantee of land subject to special assessments, who has agreed to assume and pay such assessments as a part of the consideration, cannot maintain a suit in equity to enjoin collection.[8] Where in a proceeding to enjoin collection of special taxes, the city relies on a waiver of the thirty days' notice to property owners to designate paving materials, such waiver must be pleaded.[9] Proceedings of a council altering and amending an estimate and a report by a city engineer on an assessment, after the commencement and during pendency of a suit to enjoin collection of the assessment, cannot validate the assessment, or affect the rights of a party to such suit.[10]

A suit to quiet title as against the lien of a void assessment will not be barred by laches since, the original assessment being void, there could be no reassessment.[11] Where in a proceeding to set aside an assessment on a lot as a cloud on title, the complaint did not set up the irregularity in the proceedings, but evidence of the facts constituting the same was admitted without objection, the omission in the complaint was immaterial.[12] Suits questioning the validity of assessments,[13] such as an action to cancel a tax certificate or set aside a sale,[14] must be brought within the time prescribed by statute for such proceedings.

(§ 8) *L. Appeal and other direct review. Appeal.*[15]—Where in a proceeding to confirm a special assessment, the order allowing an appeal provides for a joint appeal only, a single property owner is not entitled to maintain a separate appeal.[16] Appeals from final order to the county court under the levee act lie to

him was as to "the proposed improvement" and "the kind of material and manner of construction." Collier's Estate v. Western Pav. & Supply Co., 180 Mo. 362, 79 S. W. 947.

6. The court should determine the amount justly due, by computation or from proof offered, and require the payment of such amount as a condition of granting relief against the excess. Wead v. Omaha [Neb.] 102 N. W. 675. Though an assessment is excessive, the property owner is not thereby relieved from the payment of any tax; he must pay what is equitable, and a tender of such amount is a condition precedent to the maintenance of an action to annul an assessment. City of Denver v. Londoner [Colo.] 80 P. 117; City of Denver v. Kennedy [Colo.] 80 P. 122. Property owners cannot, in a suit to annul an assessment, complain that the city auditor has added interest, and that the assessment had been prematurely declared due without tendering the amount they consider due. Spalding v. Denver [Colo.] 80 P. 126. A property owner cannot, after his property has received the benefits of an improvement, the contract for which contained illegal provisions, refuse to pay his proportionate share of the just cost, and at the same time have the city perpetually enjoined from collecting anything on account of the improvement, where it appears that the cost was within the assessment of benefits. Treat v. Chicago [C. C. A.] 130 F. 443.

7. Iowa Pipe & Tile Co. v. Callanan [Iowa] 101 N. W. 141. Erroneous action by a board of equalization causing an excessive and unjust assessment upon a particular piece of property will not defeat the whole tax, in equity, where the prior proceedings have been regular. Wead v. Omaha [Neb.] 102 N. W. 675.

8. Eddy v. Omaha [Neb.] 101 N. W. 25. When in foreclosure sales, tax liens are deducted from the appraisal, a purchaser who buys under such appraisal is presumed to have assumed and agreed to pay the liens, unless something to the contrary appears in the record. Id. Such a purchaser is estopped to contest the validity of special assessments on the land in a proceeding to enjoin collection. Id.

9. Eddy v. Omaha [Neb.] 101 N. W. 25.

10. Pennsylvania Co. v. Cole, 132 F. 668.

11. Carter v. Cemansky [Iowa] 102 N. W. 438.

12. Harriman v. Yonkers [N. Y.] 73 N. E. 493.

13. Section 34 of Denver Charter, art. 7, precluding maintenance of a suit questioning the validity of an assessment on any but constitutional grounds, after 30 days from publication of the assessing ordinance, and § 62 limiting the period in which an action may be brought to impeach an assessment on any ground, are not in conflict. City of Denver v. Campbell [Colo.] 80 P. 142. Section 34 is not invalid as special legislation, nor does it conflict with § 6 of the Bill of Rights guarantying remedies in court for injuries to person or property. Id.

14. Rev. St. 1898, § 1210h, that no action to cancel tax certificates or set aside a tax sale shall be brought after one year from the date of the sale applies to sales for municipal street improvements. Hamar v. Leihy [Wis.] 102 N. W. 568.

15. See 2 Curr. L. 1360.

16. Construing 4 Starr & C. Ann. St. p. 201, c. 24, par. 132, relating to the allowance of appeals. Lingle v. Chicago, 210 Ill. 600, 71 N. E. 590.

the circuit court and not to the appellate court.[17] A writ of error from a judgment confirming an assessment will be dismissed unless accompanied by an affidavit as to the time when notice of the delinquency and confirmation of the assessment came to the applicant for the writ.[18] The final order of confirmation of the report of the commissioners of estimate and assessment for the opening of a street can be attacked only by an appeal or a direct action to set it aside.[19] An estimate by a city engineer on a paving contract is a claim against the city such that a taxpayer may appeal from the order of the council approving and allowing it to the district court.[20] Pending such appeal the comptroller is not required to deliver the warrant for the payment of the estimate to the claimant.[21] The review of an assessment made by drainage commissioners is properly imposed upon a court of chancery.[22]

PUIS DARREIN CONTINUANCE; PURCHASE-MONEY MORTGAGES, see latest topical index.

QUESTIONS OF LAW AND FACT.

Province of Court and Jury in General (1165). | **Particular Facts or Issues (1166).**

Scope of topic.—Only the general principles are here treated, with a few illustrative applications. Whether particular facts or issues are questions of law or fact is considered as germane to the particular subject involved, and is treated in the topic referring thereto.[23] The propriety of taking a case from the jury is also elsewhere treated.[24]

Province of court and jury in general.[25]—In general, all issues of fact are to be tried and determined by the jury,[26] while questions of law are to be determined solely by the court.[27] When there is no jury, the findings of fact by the court, or master or referee,[28] are distinct from the findings of law, and have somewhat the same force as a verdict.[29] The court cannot invade the province of the jury by instructions[30] on the weight or credibility of the evidence,[31] or by instructions assuming as proved facts in issue.[32] But though the weight[33] and credibility[34]

17. Where confirmation of special assessments is involved, the appeal is to the supreme court. In re Petition of McCaleb, 105 Ill. App. 28.

18. Lingle v. Chicago, 212 Ill. 512, 72 N. E. 677.

19. Greater New York charter. In re Opening of Whitlock Ave., 101 App. Div. 539, 92 N. Y. S. 18.

20. Within the meaning of § 33 of the Omaha charter. Lobeck v. State [Neb.] 101 N. W. 247.

21. Lobeck v. State [Neb.] 101 N. W. 247.

22. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

23. See such titles as Contracts, 3 Curr. L. 805; Negligence, 4 Curr. L. 764; Master and Servant, 4 Curr. L. 533; Railroads, 2 Curr. L. 1382; Street Railways, 2 Curr. L. 1742; Highways and Streets, 3 Curr. L. 1593; Wills, 2 Curr. L. 2076.

24. See Directing Verdict and Demurrer to Evidence, 3 Curr. L. 1093; Discontinuance, Dismissal, and Nonsuit, 3 Curr. L. 1097.

25. See 2 Curr. L. 1361.

26. Hehir v. Rhode Island Co. [R. I.] 58 A. 246. Binding instructions cannot be given when there is nothing in a case but a question of fact. Blue v. Hunt, 208 Pa. 248, 57 A. 576.

27. An instruction that "defendant is liable, if without good cause and validity under the law, he repudiated his contract," is erroneous because submitting an issue of law to the jury. Harmison v. Fleming, 105 Ill. App. 43. Whether an official was entitled, under the law, to compensation for collecting taxes is a question of law. City of Oakland v. Snow, 145 Cal. 419, 78 P. 1060.

28. See Masters in Chancery, 2 Curr. L. 867; Reference, 2 Curr. L. 1484.

29. See Verdicts and Findings, 2 Curr. L. 2019; Masters in Chancery, 2 Curr. L. 867; Reference, 2 Curr. L. 1484; Appeal and Review, 3 Curr. L. 271.

30. See Instructions, 4 Curr. L. 133.

31. Weight of the evidence is exclusively for the jury, and instructions thereon are erroneous. Harman v. Maddy Bros. [W. Va.] 49 S. E. 1009. Erroneous instruction on weight to be given contradictory statements of witness. Bradley v. Gorham [Conn.] 58 A. 698. Error to instruct jury to ignore testimony regarding mental healing as contrary to well established laws of nature. Post v. United States [C. C. A.] 135 F. 1.

32. Gallick v. Bordeaux [Mont.] 78 P. 583.

33. Louisville & N. R. Co. v. Dick, 25 Ky. L. R. 1831, 78 S. W. 914; Bissell v. York

of evidence are solely for the jury, the probative tendency of evidence is for the court.[35] Thus where a foundation is needful to render testimony admissible, sufficiency of the evidence to that end is for the court.[36] The jury must pass upon material issues of fact upon which the evidence is conflicting,[37] or such that more than one reasonable inference may be drawn therefrom.[38] But if the facts are undisputed,[39] and such that reasonable men in the exercise of an unprejudiced judgment could draw but one conclusion therefrom,[40] a question of law only is presented. Generally speaking, if there is evidence tending to show the plaintiff's right to recover, the case should go to the jury.[41]

Particular facts or issues.[42]—The existence of a contract,[43] the adequacy of consideration,[44] and whether an undertaking is original or collateral, so as to be without or within the statute of frauds,[45] are held questions of fact. Ordinarily, the legal effect[46] and construction[47] of written instruments is for the court. But if the language used is ambiguous and uncertain, letting in extraneous evidence,

[Mo. App.] 83 S. W. 282; Woodard v. Cooney [Mo.] 85 S. W. 598; Meyers v. Highland Boy Gold Min. Co. [Utah] 77 P. 347.

34. Bradley v. Gorham [Conn.] 58 A. 698; Strickler v. Gitchel [Okl.] 78 P. 94; Glasscock v. Swofford Bros. Dry Goods Co., 106 Mo. App. 657, 80 S. W. 364; Sternaman v. Metropolitan Life Ins. Co., 94 App. Div. 610, 87 N. Y. S. 904. Whether a witness was corroborated. Haggerty v. New York City R. Co., 90 N. Y. S. 336. Where the credibility of a sole witness is questioned, the jury should pass on the issues. Payne v. Union Life Guards [Mich.] 99 N. W. 376. Reasonableness of witness' explanation of contradictory statements on stand for jury. Piehl v. Piehl [Mich.] 101 N. W. 628. Jury properly permitted to pass on the credibility and value of testimony as to the law of another state, consisting of a deposition of an attorney as to what he believed it to be. Hancock v. Western Union Tel. Co. [N. C.] 49 S. E. 952.

35. The probative tendency of evidence is for the court; its probative force for the jury. Southern Loan Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435. Whether there is evidence legally tending to prove a fact alleged is for the court; its weight, and the ascertaining where the preponderance is, is for the jury. Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099. Whether there is evidence in the case legally sufficient to entitle the plaintiff to recover is a question of fact for the court, sitting as a jury, to pass on. Leviness v. Kaplan [Md.] 59 A. 127.

36. See Evidence, 3 Curr. L. 1334.

37. Booth v. Fordham, 91 N. Y. S. 406; Coolidge v. New York, 90 N. Y. S. 1078; Kehl v. Abrahm, 210 Ill. 218, 71 N. E. 347. Evidence conflicting as to location of division line between lots. Daley v. Wingert [Pa.] 59 A. 982. It is the peculiar province of the jury to reconcile conflicting evidence, and in so doing they may call into exercise their own experience and general knowledge. Young v. Irwin [Kan.] 79 P. 678.

38. Though evidence is undisputed, if it is such as to afford ground for opposing inferences of fact in the minds of reasonable men, it is for the jury. Tracy v. Grand Trunk R. Co., 76 Vt. 313, 57 A. 104.

39. Hendley v. Globe Refinery Co., 106 Mo. App. 20, 79 S. W. 1163. Facts being undisputed, whether a contract of sale was performed was for the court. Kalamazoo Corset Co. v. Simon, 129 F. 144.

40. Chicago & N. W. R. Co. v. De Clow [C. C. A.] 124 F. 142.

41. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50. There being evidence tending to support plaintiff's claim, the character of property seized on execution, and whether exempt, should have been submitted to jury. O'Reilly v. Erlanger, 92 N. Y. S. 56. Evidence being admitted without objection, it should go to the jury, though incompetent as not the best evidence. Wilson v. Wilson, 106 Mo. App. 501, 80 S. W. 711. There is a case for the jury where there is a conflict of evidence with testimony admitted without objection which supplies material averments of the petition. Cleveland, etc., R. Co. v. Tehan, 4 Ohio C. C. (N. S.) 145. See Directing Verdict and Demurrer to Evidence, 3 Curr. L. 1093; Discontinuance, Dismissal, and Nonsuit, 3 Curr. L. 1097.

42. See 2 Curr. L. 1363.

43. Existence of special contract between shipper and carrier. Chicago, etc., R. Co. v. Woodward [Ind.] 73 N. E. 810. Time of signing contract. Klosterman v. United States Elec. Light & Power Co. [Md.] 60 A. 251.

44. Whether consideration for note transferred by husband to wife was adequate. Southern Loan Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435.

45. East Baltimore Lumber Co. v. K'nessett Israel Anshe S'phard Congregation [Md.] 59 A. 180.

46. In the absence of fraud the effect of documents as muniments of title is a question of law. Brewer v. White [Mo. App.] 85 S. W. 641.

47. Norton v. Shields, 132 F. 873; Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386. Duty of court to construe all written papers, acts of the assembly, and minutes of city council. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53. Construction of unambiguous letters and telegrams containing instructions to real estate broker, and authority thereby conferred, for court. Sullivant v. Jahren [Kan.] 79 P. 1071.

the interpretation of the language, and intention of the parties, is for the jury.[48] Comparisons of genuine signatures with alleged spurious signatures are for the jury.[49]

It is the province of the jury to determine between what parties the relation of agency existed;[50] the proper amount of an assessment against property;[51] the dedication of land for a highway;[52] whether an alleged telephone conversation took place;[53] whether a bankrupt was insolvent at the time of giving an alleged preference, and whether the creditor had reasonable cause to believe that it was intended thereby to give a preference.[54] The application of ordinances[55] and what constitutes an estoppel[56] are for the court.

The existence of negligence[57] or fraud,[58] the question of proximate cause in personal injury actions[59] or other actions for damages,[60] of probable cause for attachment,[61] and what damages, if any, are recoverable by a passenger in a suit against a carrier,[62] are ordinarily questions for the jury. But when only one inference can reasonably be drawn from undisputed facts, negligence is a question of law.[63] Whether a given state of facts, if found to exist by a jury, constitute a nuisance, is ordinarily a question of law, or at least a mixed question of law and fact.[64]

QUIETING TITLE.

§ 1. Chancery and Statutory Remedies and Rights. Nature and Office. Form or Nature of Proceedings (1168). Title and Possession (1168). Possession (1169). Defenses (1170).
§ 2. What Is a Cloud or Conflicting Claim (1170).
§ 3. Procedure (1171).
A. Quieting Title and Statutory Equivalents. Petition for an Issue (1171). Jurisdiction, Venue, and Place of Trial (1171). Service of Process (1172). Parties (1172). Sufficiency of Bill, Complaint, or Petition (1172). An Answer (1173). Dismissal and Judgment on the Pleadings (1173). Jury Trial (1174). Evidence (1174). Burden of Proof (1175). Variance (1175). Harmless Error (1175). Findings, Decree, or Judgment (1175). Costs (1176). An Occupying Claimant (1176).
B. Determination of Conflicting Claims to Real Property (1176).

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48. Norton v. Shields, 132 F. 873. Whether a deed, absolute on its face, was intended as a mortgage. Reich v. Dyer [N. Y.] 72 N. E. 922. Language in deed being ambiguous, intention of parties is for jury. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781. A timber contract being sufficient to pass title, but ambiguous and uncertain as to what was conveyed, that question was for jury, parol evidence being admissible to explain the ambiguity. Ward v. Gay [N. C.] 49 S. E. 884. When there is a disputed question of fact as to the intention of a grantor in a deed, the description being ambiguous, the question is for the jury. Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591.

49. Groff v. Groff, 209 Pa. 603, 59 A. 65.

50. Whether a person was the agent of plaintiff or defendant held a mixed question of law and fact. Gough v. Loomis, 123 Iowa, 642, 99 N. W. 295.

51. Whether property has been assessed more than it will be benefited, and more than its proportionate share of the cost of an improvement. Clark v. Chicago, 214 Ill. 318, 73 N. E. 358.

52. Gerhards v. Johnson, 105 Ill. App. 65.

53. Whether or not a telephone conversation took place as alleged. McCarthy v. Peach [Mass.] 70 N. E. 1029.

54. Verdict of jury thereon conclusive on supreme court. Kaufman v. Tredway, 25 S. Ct. 33.

55. The fact that such ordinances were in force being admitted. Barton v. Odessa [Mo. App.] 82 S. W. 1119.

56. Daley v. Wingert [Pa.] 59 A. 982.

57. Price v. Standard Life & Acc. Ins. Co., 92 Minn. 238, 99 N. W. 887. Unless standard of ordinary care is fixed, contributory negligence is for the jury. Lebeau v. Dyerville Mfg. Co. [R. I.] 57 A. 1092. Whether a servant, kicked by a horse, was handling the animal in a horseman-like manner. Hagen v. Ice Delivery Co., 2 Ohio N. P. (N. S.) 592.

58. McMillan v. Reaume [Mich.] 100 N. W. 166. Whether transfer was made with actual intent to defraud creditors. Mowry v. Reed [Mass.] 72 N. E. 936.

59. Brewster v. Elizabeth City [N. C.] 49 S. E. 885.

60. Cause of damage to shipment of stock. Southern R. Co. v. Railey Bros., 26 Ky. L. R. 53, 80 S. W. 786.

61. Where the attorney is falsely informed as to the facts, or is not informed as to all the facts, the question of probable cause for attachment is for the jury. Voss v. Bender, 32 Wash. 566, 73 P. 697.

62. Whether passenger was put to expense, inconvenience, and discomfort by being compelled to walk between street car stops. Northern Tex. Traction Co. v. Hooper [Tex. Civ. App.] 80 S. W. 113.

63. Maine Water Co. v. Knickerbocker Steam Towage Co. [Me.] 59 A. 953; Stein-

§ 1. *Chancery and statutory remedies and rights. Nature and office. Form or nature of proceedings.*[65]—The proceeding to quiet title is equitable, and to entitle the complainant to relief he must do equity.[66] It is analogous to ejectment in that the complainant must recover, if at all, on the strength of his own title,[67] but differs from it in that it is equitable and unless otherwise provided by statute complainant must be in possession,[68] and from forcible entry and unlawful detainer[69] in that title is involved. The proceeding may be maintained without the plaintiff having first established his title at law,[70] and is properly brought though the issues to be determined are legal.[71] A cloud constituting a defense at law may be removed.[72] A suit to set aside a decree may be maintainable as one to remove a cloud,[73] and is not in its nature a bill of review.[74] An action to remove an option to purchase which plaintiffs had prior to the commencement of the suit declared forfeited is not an action to declare a forfeiture.[75] The legal capacity of a grantee in a chain of title will not be determined.[76] Where one who has agreed to indemnify another against a certain claim, acquires by assignment a judgment based on such claim, the other may, as against him, maintain an action to have the judgment canceled as a cloud.[77]

Title[78] *and possession* in the complainant are essential, both in the suit in

dorff v. St. Paul Gaslight Co., 92 Minn. 496, 100 N. W. 221.

64. Town of Frostburg v. Hitchins [Md.] 59 A. 49.

65. See 2 Curr. L. 1366.

66. Where one seeks to quiet his title against a vendor's lien, he is not entitled to relief if the consideration on account of which the lien exists is not paid, though an action to recover it is barred by limitations. Cassell v. Lowry [Ind.] 72 N. E. 640. A grantee who assumes an apparent lien as part of the purchase price cannot quiet title against it on the ground that it is not enforceable against his grantor. McGregor v. Eastern Bldg. & Loan Ass'n [Neb.] 99 N. W. 509. In an action to remove an option to purchase as against an assignee, a payment made by the assignee to his assignor and by him turned over to plaintiff need not be returned to the assignee. Merk v. Bowery Min. Co. [Mont.] 78 P. 519.

67. See post, this section. See, also, Ejectment, 3 Curr. L. 1157.

68. See post, this section "Possession."

69. See Forcible Entry and Unlawful Detainer, 3 Curr. L. 1435.

70. Where plaintiff is the owner and in possession and there is an outstanding claim which appears to impair his title which may be shown by extrinsic proof to be void. Greenfield v. U. S. Mortg. Co., 133 F. 784.

71. Under Ky. St. 1903, § 11. Chenault v. Eastern Ky. Timber & Lumber Co., 26 Ky. L. R. 1078, 83 S. W. 552.

72. A fraudulent conveyance. Wood v. Fisk [Or.] 77 P. 128.

73. Where the decree constitutes a cloud. Jewett v. Boardman, 181 Mo. 647, 81 S. W. 186.

74. Suit to cancel a judgment as a cloud. Smith v. Nelson [Or.] 78 P. 740.

75. Merk v. Bowery Min. Co. [Mont.] 78 P. 519.

76. Whether a corporation was properly organized to authorize it to engage in the business it was pursuing cannot be raised by objection to the admissibility of its deed. Thomas v. Wilcox [S. D.] 101 N. W. 1072.

77. Evidence held to show such an agreement. Smith v. Nelson [Or.] 78 P. 740.

78. See 2 Curr. L. 1368. The action cannot be maintained by one having no present legal or equitable interest in the land. Stockton v. Craig [W. Va.] 49 S. E. 386. Weakness of the title of the adversary will not sustain the bill. Mills v. Henry Oil Co. [W. Va.] 50 S. E. 157.

Title sufficient: Absolute title claimed in good faith accompanied by **adverse possession** for the period prescribed by limitations is sufficient. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862. A **purchaser from a mortgagor** who redeemed from foreclosure sale has title. Evidence held to show that the mortgagor redeemed from the sale. Alexander v. Goetz [Ala.] 37 So. 630. Evidence held to show that one claiming title **under a sheriff's deed** was not guilty of fraud in the transaction out of which the claim on which the judgment was based arose. Relender v. Riggs [Colo. App.] 79 P. 328.

Evidence sufficient to show title in plaintiff as heirs of one who acquired by adverse possession. O'Neal v. Bellevue Imp. Co. [Neb.] 101 N. W. 1028. That land **deeded for reclamation purposes** only had never ceased to be used for such purposes. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638. That plaintiff was **owner of a leasehold** and rightfully in possession and that defendant had no title or right thereto or thereon. Fitchette v. Victoria Land Co. [Minn.] 101 N. W. 655. That plaintiff (grantor) never authorized the **delivery of a deed deposited in escrow,** except on condition that the grantee should survive him. Skinner v. Kelley [Mich.] 101 N. W. 205. Title in one claiming under a **contract to support** his grantor as against one claiming under a will. Best v. Gralapp [Neb.] 99 N. W. 837. That one holding under a **sheriff's deed** claimed title in good faith. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862. To show plaintiffs to be bona fide purchasers without notice of defendant's equity under a

equity and the statutory equivalents,[79] unless otherwise expressly provided[80] or the land is vacant and unoccupied,[81] and complainant must recover on the strength of his own title and not on the weakness of the title of his opponent.[82] A mere claim of title is insufficient.[83] The plaintiff must establish a title superior to that of his opponent.[84] He may show a claim connecting himself with the state,[85] build up title by adverse possession,[86] or show a title superior to that of his opponent under a common grantor.[87] If both claim from a common source, plaintiff need do no more than establish his own title as derived from such source,[88] but if they do not he must connect himself with the paramount title.[89] Where title is derived from the foreclosure of a lien, compliance with statutory requirements must be shown.[90]

In some states the action will lie relative to any interest or estate of which the law takes cognizance.[91] Whence, one having a lien by virtue of a mortgage has an "estate or interest,"[92] but even here it will not lie relative to a portion of the public domain by one who has not filed a possessory claim and has never had possession.[93]

Possession.[94]—The proceeding being in the nature of a suit in slander of title,[95] as a general rule, both in equity and under the statutes of most of the states, a bill either to quiet title or remove a cloud can be maintained only where the plaintiff is in actual possession,[96] and if the defendant is in possession, equity

contract of sale. Alexander v. Goetz [Ala.] 37 So. 630.

Evidence insufficient to show title in the defendant. Townsend v. Trustees of Freeholders & Commonalty of Brookhaven, 97 App. Div. 316, 89 N. Y. S. 982. To establish a parol boundary agreement. Moore v. Mauney, 25 Ky. L. R. 2274, 80 S. W. 458. Agency and tenancy of one claiming under a sheriff's deed held a disability on the part of the grantee. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862. Evidence held to show no title or interest in one claiming by virtue of homestead rights in his ancestor. Saddlemire v. Stockton Sav. & Loan Soc., 144 Cal. 650, 79 P. 381. Uncorroborated though not directly contradicted testimony as to a lost lease held discredited by circumstances. Plaintiff held to have title by adverse possession. Howatt v. Green [Mich.] 102 N. W. 734.

79. See 2 Curr. L. 1367. Where plaintiff's title is void and he is not in actual possession, he is not entitled to judgment though defendant has no title. Nolen v. Hall, 26 Ky. L. R. 773, 82 S. W. 418. Complaint alleging possession of mining claim held to show possession of extralateral rights. United States Min. Co. v. Lawson [C. C. A.] 134 F. 769.

80. See post, § 3, "Jurisdiction." Rev. St. 1899, § 650. Spore v. Ozark Land Co. [Mo.] 85 S. W. 556.

81. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

82. Nix v. Pfeifer [Ark.] 83 S. W. 951; Krotz v. Beck Lumber Co. [Ind. App.] 73 N. E. 273; Townsend v. Trustees of Freeholders & Commonalty of Brookhaven, 97 App. Div. 316, 89 N. Y. S. 982. Where the issues are the same as in an ordinary action of ejectment. Williams v. Northwest Quarter, Section Four, etc. [Neb.] 100 N. W. 316.

83. Johnson v. Thomas, 23 App. D. C. 141. A claim by adverse possession not based on color of title is insufficient upon which to maintain the action or require an exhibition of the nature of the adversary's claim. Muckle v. Good [Or.] 77 P. 743.

84. Code, § 4184, relative to recovery of real property has no application. English v. Otis [Iowa] 101 N. W. 293; Di Nola v. Allison, 143 Cal. 106, 76 P. 976.

85, 86, 87. Marshall v. Corbett [N. C.] 50 S. E. 210.

88. English v. Otis [Iowa] 101 N. W. 293.

89. Where parties do not claim from a common source and defendant is in possession. Harmon v. Goggins [S. D.] 101 N. W. 1088.

90. Where title depends upon the validity of statutory liens and the proceedings which followed thereon. Krotz v. Beck Lumber Co. [Ind. App.] 73 N. E. 273.

91. Rev. St. 1887, § 4538. Johnson v. Hurst [Idaho] 77 P. 784. One having a colorable title. Johnson v. Hurst [Idaho] 77 P. 784; Shields v. Johnson [Idaho] 79 P. 391.

92. An owner of a note secured by a trust deed may maintain the action against parties claiming adverse to the deed, under Code Civ. Proc. § 675, providing that the action may be maintained by any person against another claiming adversely to his interest. Battelle v. Wolven [S. D.] 102 N. W. 297.

93. Where it appears that the plaintiff or his predecessor has never occupied nor filed a possessory claim as required by Rev. St. 1887, § 4552. Branca v. Ferrin [Idaho] 77 P. 636.

94. See 2 Curr. L. 1367.

95. Patterson v. Landru, 112 La. 1069, 36 So. 857.

96. Tarwater v. Going, 140 Ala. 273, 37 So. 330; Mills v. Henry Oil Co. [W. Va.] 50 S. E. 157. Legal title and actual possession are essential under Ky. St. 1903, § 11. Floyd v. Louisville & N. R. Co., 25 Ky. L. R. 2147, 80 S. W. 204; Annis v. Butterfield

has no jurisdiction unless some other ground of equitable cognizance appears.[97] The fact that the answer fails to state that the complainant has an adequate remedy at law does not confer jurisdiction.[98] The possession must be so open, notorious, and exclusive as to inform persons seeing the property that it is appropriated by some person who is occupying it as his own.[99] Possession by a tenant under a written lease is sufficient,[1] and where peaceable possession is required, it means peaceable as against the defendant and not as against third persons.[2] The question of actual possession may be waived by stipulation,[3] and though the plaintiff be not in possession if defendant by cross complaint seeks to quiet his own title to a portion of the premises, the court has jurisdiction of the entire controversy.[4] An undelivered deed fraudulently obtained from the grantor may be canceled though plaintiff is not in possession.[5]

Defenses.[6]—A conveyance by one estops him to assert title but does not estop his wife who did not join, from setting up her contingent dower interest.[7] In a proceeding against a married woman, a defense based on the invalidity of her deed in that her husband did not join must be specially pleaded.[8] Laches in bringing suit is no defense to a suit to quiet title against a void municipal assessment where no reassessment could be made.[9]

§ 2. *What is a cloud or conflicting claim.*[10]—A cloud is an apparent but

[Me.] 58 A. 898. One out of possession who has merely an equitable title cannot maintain the action against one in possession under a tax title between whom and himself no privity exists. Glenn v. West [Va.] 49 S. E. 671. One out of possession cannot maintain the action whether his title is legal or equitable. Id. The holder of the equitable title suing to procure the outstanding title of his trustee may not implead an adverse claimant in possession in in order to quiet title against his claim. Id.

Evidence sufficient to show possession: Allegation of possession is established by proof that when complainant received his deed, part of the land was fenced; that he occasionally visited the property, had a new fence built around it, went on the land with another to whom he executed a paper whereby such other was to keep possession for him. Glos v. Dyche, 214 Ill. 417, 73 N. E. 757. An allegation that plaintiff is entitled to the immediate possession does not necessarily show that he has not possession. McKinley v. Morgan, 36 Wash. 561, 79 P. 45. Undisputed evidence that plaintiff is in possession claiming title in fee by virtue of a certain deed and judicial proceedings, is sufficient to justify recovery against one who failed to establish any title in himself. Weeks v. Cranmer [S. D.] 101 N. W. 32.

Note: As to necessity of possession, see note to Helden v. Hellen [Md.] 45 Am. St. Rep. 375.

97. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715. Equity has no jurisdiction unless the complainant is in possession. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

98. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715.

99. Glos v. Archer, 214 Ill. 74, 73 N. E. 382.

1. Possession of the tenant is possession of his lessor. Moran & Co. v. Palmer, 36 Wash. 684, 79 P. 476. A lease of vacant premises is insufficient proof of possession by the lessor. Glos v. Archer, 214 Ill. 74, 73 N. E. 382.

2. Bradley v. McPherson [N. J. Eq.] 58 A. 105.

3. Where premises were occupied by a tenant, an agreement to allow payment of rent to be suspended pending result of the suit and then paid to the prevailing party amounts to such a stipulation. Moran & Co. v. Palmer, 36 Wash. 684, 79 P. 476.

4. Relender v. Riggs [Colo. App.] 79 P. 328.

5. Cribbs v. Walker [Ark.] 85 S. W. 244.

6. See 2 Curr. L. 1369.

7. Cunningham v. Cunningham [Iowa] 101 N. W. 470.

8. Jasper County v. Sparham [Iowa] 101 N. W. 134.

9. Carter v. Cemansky [Iowa] 102 N. W. 438.

10. See 2 Curr. L. 1369, for definition.

NOTE. What constitutes a cloud has provoked a well defined conflict of authority. By the rule in New York which has the sanction of the weight of authority, the plaintiff must fail if the claim of the defendant is void on its face or if, although valid on its face, it would inevitably fall through evidence which the defendant would be compelled to introduce. Washburn v. Burnham, 63 N. Y. 132. Moreover, prima facie validity will not suffice if the claimant's case could be destroyed by a mere reference to the record. Thus, where both claim under the same grantor and the defendant's deed is subsequent. Bockes v. Lansing, 74 N. Y. 437. In California, the existence of a cloud is made to depend on whether the plaintiff in an action by the defendant would have to offer any evidence to overthrow his claim. Pixley v. Huggins, 15 Cal. 127. Since the basis of this jurisdiction is to clear title from a claim which renders it less marketable, the question should be not whether the claim fulfills certain technical

unfounded semblance of title or claim of interest, e. g., an extinguished tax lien;[11] the recorded transfer of a mortgage;[12] a plat improperly recorded which introduces confusion as to titles based on an original plat with which it conflicts and which it appears to supersede;[13] an adverse claim[14] or a claim to an easement.[15] A deed re-delivered for a valuable consideration to the grantor becomes a cloud when apparent rights are asserted under it,[16] but mere words denying the right of plaintiff to possession which afford him no right to test the substance of those claims at law do not destroy the peaceableness of his possession.[17]

A failure to pay royalties is not a cloud on an inventor's title to a patent.[18]

§ 3. *Procedure. A. Quieting title and statutory equivalents.*[19] *Petition for an issue.*—In Pennsylvania the court cannot on an application to frame an issue determine summarily the title to the property.[20] If the petition contains sufficient averments as to title and right of possession and exclusive possession is sustained by proof, the issue prayed for should be granted.[21]

Jurisdiction, venue, and place of trial.[22]—Unless authorized by the constitution, the legislature cannot confer on a court of equity jurisdiction to determine the nature of the title of one in possession.[23] The fact that an adverse claimant sets up a remainder in fee expectant on a life estate does not confer it.[24] Though a court of equity will restrain trespass which would result in irreparable injury where defendant is in possession it will not entertain a bill where the sole purpose is to determine title.[25] Where a state law authorizes the suit regardless of possession, a federal court of equity sitting in the state is a court of competent jurisdiction.[26] The proceeding cannot be maintained in a probate court.[27] A suit

requirements, but whether it is of a character to frighten the average purchaser. Bishop v. Moorman, 98 Ind. 1. Upon this analysis it would seem that Moran v. Palmer [Wash.] 79 P. 476, which allowed the bill to be maintained as against an oral claim, is correct, but it must be admitted that the authorities have not gone so far. Parker v. Shannon, 121 Ill. 452. But see City of Lafayette v. Wabash R. Co., 28 Ind. App. 497, holding under a statute that the defendant's claim need not be described.—From 18 Har. L. R. No. 7, p. 527.

NOTE. As against sewer assessment: The owner or occupant cannot compel the city to prosecute at law its claim under an invalid sale to satisfy a special sewer assessment whereby his title is clouded, but he may maintain a bill under the statute to quiet his title. Chaffee v. Detroit, 53 Mich. 573, 19 N. W. 199.—From note to Waterbury v. Platt Brothers & Co. [Conn.] 60 L. R. A. 243.

11. Clark v. San Diego, 144 Cal. 361, 77 P. 973.

12. Recorded after purchase of the land by plaintiff. Winnerman v. Angell [R. I.] 58 A. 882.

13. Cranston v. McQuiston [Iowa] 102 N. W. 785.

14. An adverse claim is the expressed assertion of a right by a claimant of suitable age and sufficient intelligence. Harding v. Harding [Or.] 80 P. 97.

15. An unfounded claim by the owner of stone cutting rights to the right to use a side track built by the owner of the land. Bedford-Bowling Green Co. v. Oman, 134 F. 441; Oman v. Bedford-Bowling Green Stone Co. [C. C. A.] 134 F. 64.

16. Where grantee fraudulently obtains possession of it and has it recorded. Arnold's Heirs v. Arnold, 26 Ky. L. R. 884, 82 S. W. 606.

17. Bradley v. McPherson [N. J. Eq.] 58 A. 105.

18. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. S. 665.

19. See 2 Curr. L. 1370.

20. Proceeding under Act June 10, 1893 (P. L. 415). Titus v. Bindley [Pa.] 59 A. 694. Where an adverse claimant relies on possession to oust the court of jurisdiction, he must establish it without requiring the court on an application for the issue to determine the validity of his title. Under Act June 10, 1893 (P. L. 415). Id.

21. Titus v. Bindley [Pa.] 59 A. 694.

22. See 2 Curr. L. 1370.

Note: The right to remove a cloud is, in the absence of statute, purely equitable in its nature. Hence, relief must be sought in equity. Loring v. Downer, 1 McAll. 360; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Huntington v. Allen, 44 Misc. 654; Standish v. Dow, 21 Iowa, 363; Eldridge v. Smith, 34 Vt. 484; Walker v. Peay, 22 Ark. 103. The jurisdiction is an independent source or head of jurisdiction not requiring any accompaniment of fraud, mistake, accident, trust, account or any other basis of equitable intervention. Dull's Appeal, 113 Pa. 510.—From note to Helden v. Hellen [Md.] 45 Am. St. Rep. 374.

23. Pub. St. c. 205, § 2 (Laws 1883, p. 29, c. 33) does not. Harvey v. Harvey [N. H.] 59 A. 621.

24. Harvey v. Harvey [N. H.] 59 A. 621.

25. Toledo, etc., R. Co. v. St. Louis, etc., R. Co., 208 Ill. 623, 70 N. E. 715.

26. Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430), where neither party is in

against a nonresident claimant may in a proper case be removed to the United States circuit court,[28] as where suit is against a resident and nonresident and the resident disclaims.[29]

Service of process.[30]—Where summons is by publication as to several defendants, the fact that the affidavit is sufficient as to some is immaterial as to the question of its sufficiency as to others.[31]

Parties.[32]—If the action is to quiet title as to all the world, all holders of the record title should be made parties,[33] and the bill should allege that they are holders of the record title.[34] One who has no interest need not be joined.[35] The vendor is not a necessary party in a suit by his vendee against a third person.[36] In California a married woman may sue alone.[37] In Oregon the action may be maintained against any person of suitable age and intelligence asserting an adverse claim.[38] Statutes providing the remedy are generally made applicable to unknown as well as to known claimants.[39]

Sufficiency of bill, complaint, or petition.[40]—A complaint to quiet title and to have a judgment quieting title in defendant declared void as to plaintiff states but one cause of action.[41] The complaint must allege plaintiff's title[42] and pos-

possession. Willitt v. Baker, 133 F. 937. Right of action to quiet title given by Rev. St. Utah, §§ 2915, 3511, without previous adjudication of title, and without reference to possession, may be enforced in a Federal court of equity if there is no adequate remedy at law. United States Min. Co. v. Lawson [C. C. A.] 134 F. 769.

27. Best v. Gralapp [Neb.] 99 N. W. 837.

28, 29. Day v. Oatis [Miss.] 37 So. 559.

30. See 2 Curr. L. 1371; see, also, Process, 4 Curr. L. 1070.

31. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

32. See 2 Curr. L. 1371.

Note: That a purchaser at execution sale may maintain the proceeding to remove as a cloud a prior fraudulent conveyance by the judgment debtor is the established doctrine in most states, see Gerrish v. Mace, 9 Gray [Mass.] 235; Frakes v. Brown, 2 Blackf. [Ind.] 295; Wagner v. Law [Wash.] 15 L. R. A. 784, and cases cited in the brief and opinion. The court remarks in this last case that the authorities in favor of it are overwhelming. **Contra,** see Cranson v. Smith, 47 Mich. 189, 647; Thigpen v. Pitt, 54 N. C. 49; Wagner v. Law [Wash.] 15 L. R. A. 784 and note.

33. One seeking to establish title by adverse possession under D. C. Code, § 111. Johnson v. Thomas, 23 App. D. C. 141.

34. Proceeding under D. C. Code, § 111, to establish title by adverse possession. Johnson v. Thomas, 23 App. D. C. 141.

35. One who has conveyed. Cunningham v. Cunningham [Iowa] 101 N. W. 470.

36. Where terminal tracks were sold to the owner of the land and the owner of stone cutting rights on the land asserted a right to use them. Oman v. Bedford-Bowling Green Stone Co., 134 F. 64.

37. Female complainant need not allege whether she is married or single. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

38. B. & C. Comp. § 516. Harding v. Harding [Or.] 80 P. 97.

39. Act Cong. March 3, 1899, applies to heirs, devisees, and alienees. Gwin v. Brown, 21 App. D. C. 295.

NOTE. Actions against unknown persons to quiet title may be maintained. Hardy v. Beaty, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80. An equitable suit to remove a cloud may be brought against unknown claimants under a statute allowing publication of summons against such persons, if there are any unknown claimants. One who claims as an only heir cannot maintain the proceeding by publication against the heirs of the intestate. Cashman v. Cashman, 123 Mo. 647, 27 S. W. 549. The proceeding is not an action in personam, but an action for land, and the judgment effects title, hence a statute may authorize such an action against unknown owners. Sloan v. Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613.—From note to McClymond v. Noble [Minn.] 87 Am. St. Rep. 366.

40. See 2 Curr. L. 1371.

Complaint held sufficient: O'Neal v. Bellevue Imp. Co. [Neb.] 101 N. W. 1028. Complaint held to sufficiently allege as against general demurrer a holding of possession under color of title. Jones v. Herrick, 35 Wash. 434, 77 P. 798. Complaint alleging plaintiff's ownership, the description of the land, defendant's claim of an adverse interest, a prayer for the determination of defendant's claim, the establishment of plaintiff's title and for an injunction to prevent waste is good under Comp. Laws 1897, § 4010, as against demurrer challenging jurisdiction. Marquez v. Maxwell Land Grant Co. [N. M.] 78 P. 40. Complaint by grantor in a deed deposited in escrow and delivered prior to performance of conditions held sufficient. Skinner v. Kelley [Mich.] 101 N. W. 205.

41. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

42. Complaint insufficient under Burns' Ann. St. 1901, § 1082. Seymour Water Co. v Seymour [Ind.] 70 N. E. 514; Glos v. Miller, 213 Ill. 22, 72 N. E. 714; Rennert v. Shirk [Ind.] 72 N. E. 546; Holderby v. Hagan [W. Va.] 50 S. E. 437. Under Ky. St. 1903, § 11. Goff v. Lowe, 25 Ky. L. R. 2176, 80 S. W. 219.

session[43] unless possession is not necessary;[44] or that the premises are vacant and unoccupied;[45] that the claim asserted by the defendant is adverse to his title.[46] or is unfounded and a cloud thereon,[47] but need not allege such fact as a conclusion.[48] It need not contain a formal statement as to the nature of defendant's claim or of its relation to or effect upon complainant's title where the general facts alleged supply such allegations.[49] It must contain a definite description of the land.[50] The source of complainant's title need not be alleged[51] unless required by statute.[52] In some states it is sufficient to allege ownership[53] and possession,[54] and that defendant claims an adverse right, and a complaint is not rendered bad because stating the period of ownership and possession.[55] One seeking to remove a void tax deed as a cloud must allege and prove in what respect the deed is invalid.[56] A complaint to remove a lease must negative rights claimed under it.[57] Where it is sought to quiet title in complainant and set aside an alleged fraudulent judgment quieting title in defendant, plaintiff must allege a meritorious defense to the prior action and that the judgment was fraudulently procured.[58] A bill for partition and to remove a cloud which fails as to partition because the complainant is the owner of all the land cannot be regarded as seeking the removal of the cloud as incidental relief.[59]

An answer[59a] pleading title through execution sale need not detail proceedings relative to the sale.[60]

Dismissal and judgment on the pleadings.[61]—Where it appears that defendant has not violated any rights of the plaintiff, the bill is properly dismissed.[62]

43. Glos v. Miller, 213 Ill. 22, 72 N. E. 714; Glos v. Archer, 214 Ill. 74, 73 N. E. 382; Tarwater v. Going, 140 Ala. 273, 37 So. 330; Goff v. Lowe, 25 Ky. L. R. 2176, 80 S. W. 219; Annis v. Butterfield [Me.] 58 A. 898.

44. Complaint under Rev. St. 1899, § 650, held sufficient. Spore v. Ozark Land Co. [Mo.] 85 S. W. 556.

45. Glos v. Miller, 213 Ill. 22, 72 N. E. 714; Glos v. Archer, 214 Ill. 74, 73 N. E. 382.

46. Complaint insufficient because not showing that defendant claimed an interest. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514; Rennert v. Shirk [Ind.] 72 N. E. 546.

47. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514; Rennert v. Shirk [Ind.] 72 N. E. 546.

48. Complaint to set aside a decree is not insufficient because lacking such an averment. Jewett v. Boardman, 181 Mo. 647, 81 S. W. 186.

49. Seymour Water Co. v. Seymour [Ind.] 70 N. E. 514.

50. Complaint praying to have title quieted to a certain tract "except a half acre tract surrounding each of said three wells" is insufficient. Carr v. Huntington Light & Fuel Co., 33 Ind. App. 1, 70 N. E. 552.

51. Code 1896, § 810, does not expressly require it. Love v. Coker, 140 Ala. 249, 37 So. 92. Where complainant alleges that he is the owner, it is immaterial whether further allegation concerning possession allege title by prescription. Rennert v. Shirk [Ind.] 72 N. E. 546.

52. Complaint held insufficient under Rev. Code 1892, § 501. Jackson v. Port Gibson Bank [Miss.] 38 So. 35.

53. Complaint not objectionable because alleging defendant's claim to be different from that set up in the answer [Code Civ. Proc. § 1310]. Merk v. Bowery Min. Co. [Mont.] 78 P. 519. Complaint alleging that plaintiff "claims to be the owner" and "claims title in fee" and that defendant "claims" an interest adverse, is not objectionable for the first time on appeal, as not alleging a better title in plaintiff than in defendant. Under Code Civ. Proc. § 1310. Pollock Min. & Mill. Co. v. Davenport [Mont.] 78 P. 768.

54. An allegation that the "orator is the owner and in the peaceable possession" is sufficient. Love v. Coker, 140 Ala. 249, 37 So. 92.

55. That he has been the owner and in possession for 15 years. Love v. Coker, 140 Ala. 249, 37 So. 92.

56. Not sufficient to allege that the deed is void. Langlois v. People, 212 Ill. 75, 72 N. E. 28.

57. No allegation that lease or rights under it were not in force. Indiana Natural Gas & Oil Co. v. Lee [Ind. App.] 72 N. E. 492. A lease sought to be removed which is made an exhibit but which is not the basis of the suit cannot be considered to aid the averments of the complaint. Id.

58. Parsons v. Weis, 144 Cal. 410, 77 P. 1007. Allegations that plaintiff was prior to the commencement of the former action, the owner in fee of the premises, and that defendant's allegations in that action that he was the owner were false, and known by him to be so, show a meritorious defense to the prior action. Id.

59. McConnell v. Pierce, 210 Ill. 627, 71 N. E. 622.

59a. See 2 Curr. L. 1376, n. 42.

60. Averments of the judgment execution thereon, confirmation and recording of the marshal's deed, is sufficient. Held v. Ebner [C. C. A.] 133 F. 156.

61. See 2 Curr. L. 1373.

Jury trial.[63]—The proceeding being in equity, neither party is entitled to a jury trial as a matter of right,[64] and a statutory right to have the action removed to the law docket for a jury trial of legal issues may be lost by laches.[65]

Evidence.[66]—In suits relative to mining claims, no presumptions of fact as to title arise.[67] In Louisiana the plaintiff does not admit that the muniment of title casting the cloud of which he complains is sufficient on its face to show title.[68] Where ownership[69] or possession[70] is alleged, it must be proved, even though it is neither admitted nor denied.[71] A showing that premises were vacant and unoccupied two years before the bill is filed is insufficient to show that they were vacant at the time of filing the bill.[72]

On an issue of ownership assignments of mortgages to one claimant are irrelevant,[73] but where plaintiff claims under foreclosure sale, the record of the foreclosure action, writ of assistance, and sheriff's return showing delivery to him are competent proof of the transfer of title.[74] In an action relative to a part of the public domain where it appears that defendant is in possession and the plaintiff or his predecessors in interest never filed a possessory writ, foreclosure records through which plaintiff claims are inadmissible.[75] A deed conveying the premises to plaintiff's predecessor in interest who is shown to have owned the land is admissible without proof that the grantor was possessed of title at the time of the conveyance,[76] but the inventory and appraisement filed in the matter of his estate is not admissible to show that during his lifetime he exercised acts of ownership over the property.[77] If "possession" is not used as "seisin" a question as to who was in possession does not call for a conclusion.[78] A party may testify that he derived property from his son who died without other heirs.[79] Documentary evidence insufficient to show title deraigned from the United States or a common grantor is admissible to show the location of the premises occupied by plaintiff under claim of ownership.[80] The statements by a former owner in disparagement of his title made subsequent to its sale on foreclosure are inadmissible in an action by subsequent purchasers except to impeach such former owner as a wit-

62. Browning v. Wayland [Ky.] 85 S. W. 211.

63. See 2 Curr. L. 1373.

64. Action to quiet title to a leasehold under Rev. St. 1887, § 4538, by a lessee in possession. Shields v. Johnson [Idaho] 79 P. 391.

65. Right under Civ. Code Prac. § 12, lost by two years' delay. Chenault v. Eastern Kentucky Timber & Lumber Co., 26 Ky. L. R. 1078, 83 S. W. 552.

66. See 2 Curr. L. 1373.

67. Under Rev. St. § 2326 (U. S. Comp. St. 1901, p. 1430). Title and right of possession must be established. Willitt v. Baker, 133 F. 937.

68. Patterson v. Landru, 112 La. 1069, 36 So. 857. The affidavit of recordation is no evidence as a muniment of title. Id.

69. Glos v. Miller, 213 Ill. 22, 72 N. E. 714. Evidence that complainant paid taxes on vacant and unoccupied property for seven years is insufficient to show title where it is not shown that the premises were vacant during the entire period, or that possession was thereafter taken. Id. **A tax deed not witnessed** as required by statute is not prima facie evidence of title. Green v. McGrew [Ind. App.] 72 N. E. 1049. **A deed alone,** without possession, is insufficient. Glos v. Miller, 213 Ill. 22, 72 N. E. 714. **Certificate of title** made by a title company purporting to show that title in fee was given to a person at a specified time is not, if objected to, equivalent to proof of such title. Johnson v. Thomas, 23 App. D. C. 141. Where plaintiff sought to quiet title and set aside an alleged fraudulent judgment quieting title in defendant, proof that defendant's allegations of title in the former action were false warranted a finding that they were willfully false; defendant, having the ability to show whether they were or not, remaining mute. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

70. Glos v. Archer, 214 Ill. 74, 73 N. E. 382. That possession is under a claim of right may be shown by exercise of acts of ownership without declaration. Rennert v. Shirk [Ind.] 72 N. E. 546.

71, 72. Glos v. Miller, 213 Ill. 22, 72 N. E. 714.

73. Harmon v. Goggins [S. D.] 101 N. W. 1088.

74. Nathan v. Dierssen [Cal.] 79 P. 739.

75. Branca v. Ferrin [Idaho] 77 P. 636.

76, 77, 78. Nathan v. Dierssen [Cal.] 79 P. 739.

79. English v. Otis [Iowa] 101 N. W. 293.

80. Weeks v. Cranmer [S. D.] 101 N. W. 32.

ness.[81] Such statements are insufficient to destroy his evidence as to the character of his occupancy.[82]

Burden of proof.[83]—Where title is denied or the adverse claimants are infants, plaintiff must prove his title.[84] If plaintiff holds the paper title, defendant has the burden of proving adverse possession.[85] If the premises are wild and unoccupied, the plaintiff must establish a superior paper title.[86] Where one seeks to quiet title in himself and set aside a judgment quieting title in defendant, proof that prior to the rendition of the prior judgment he became vested with the title and had never disposed of it imposed on defendant the burden of showing transfer of title to him.[87] The prior judgment is inadmissible for this purpose it having been shown that plaintiff had no notice of such action.[88]

Variance.[89]—Under a complaint alleging that defendant holds his apparently absolute title as security only, proof that he holds it as a mere passive trust is not a variance.[90]

Harmless error.[91]—If evidence of every defense, legal or equitable, can be given under a general denial pleaded, it is not error to sustain a demurrer to a special paragraph of the answer though it alleges a valid defense,[92] and such ruling cannot be converted into an available error by withdrawing the general denial at a subsequent stage of the case and refusing to plead further.[93] An incorrect ruling on an immaterial defense is harmless.[94]

Findings, decree, or judgment.[95]—A finding that the land had been found exempt in bankruptcy is warranted by a finding to such effect by the referee.[96] Special findings depending on a tax deed should state that it was signed, witnessed, and acknowledged as required by statute.[97]

The decree has no more force than a conveyance of the same date,[98] and is not binding on persons not parties.[99] Rights which claimant has should be exempted from the operation of the decree.[1] A judgment that bars a defendant from claiming an interest in the premises so long as impressed with a homestead character does not prejudice him where he asserts no claim while the premises are so impressed.[2] That the decree is irregular does not entitle the party against whom it is rendered to have it set aside, without notice to the prevailing party,[3] and where set aside without such notice mandamus will lie to compel its reinstatement.[4]

In North Carolina an order allowing a party who claims in good faith to cut timber pending trial as against one whose claim is not made in good faith must be based on a finding of fact by the court and incorporated in the order that the

81, 82. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862.

83. See 2 Curr. L. 1373.

84. Holderby v. Hagan [W. Va.] 50 S. E. 437.

85. Nathan v. Dierssen [Cal.] 79 P. 739.

86. Skidmore v. Smith [Ky.] 84 S. W. 1163.

87, 88. Parsons v. Weis, 144 Cal. 410, 77 P. 1007.

89. See 2 Curr. L. 1373.

90. Halloran v. Holmes [N. D.] 101 N. W. 310.

91. See Harmless and Prejudicial Error, 3 Curr. L. 1579.

92. Such evidence is authorized by Burns' Ann. St. 1901, §§ 1067, 1082, 1083. Beasey v. High, 33 Ind. App. 689, 72 N. E. 181.

93. Beasey v. High, 33 Ind. App. 689, 72 N. E. 181.

94. Other defenses clearly sufficient to support the judgment. Jones v. Herrick, 35 Wash. 434, 77 P. 798.

95. See 2 Curr. L. 1373.

96. McKinley v. Morgan, 36 Wash. 561, 79 P. 45.

97. Green v. McGrew [Ind. App.] 72 N. E. 1049.

98. Jasper County v. Sparham [Iowa] 101 N. W. 134.

99. A judgment lien holder. Jasper County v. Sparham [Iowa] 101 N. W. 134.

1. One had stone cutting rights but no right to use a side track built by the owner of the land. Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441.

2. Miller v. Stuck [Kan.] 77 P. 552.

3, 4. Vincent v. Benzie Circuit Judge [Mich.] 102 N. W. 369.

claim of one is not made in good faith, and that the claim of the other is and is based on prima facie title.[5]

Costs.[6]—Costs may be awarded against defendant in an action to remove a tax deed where prior to filing the bill the complainant tendered him the amount paid at the tax sale,[7] but where it is not shown that defendant violated any rights of plaintiff he is not liable for costs.[8] Costs cannot be recovered against a defendant who files a disclaimer,[9] but he must disclaim as to the entire premises.[10] A defendant filing a disclaimer cannot recover costs in excess of the amount necessary to enable him to file it.[11] Where he files a disclaimer but is obliged to continue the case because another defendant filed a cross-complaint against him, he is entitled to recover costs against the cross complainant.[12] In Iowa if prior to commencement of suit the complainant requests a defendant disclaiming any interest to execute a quitclaim deed, and tenders the expenses of such execution, he is entitled to recover costs.[13]

An occupying claimant must have entered in good faith, under color of title in fee for which he gave a valuable consideration and have made improvements of permanent value to the land.[14] All improvements of permanent value to the land are within the scope of the law,[15] but ordinary repairs are not.[16] When plaintiff in his pleadings, makes no claim for improvements, he is not entitled to recover for them when his title is declared void.[17] The measure of recovery is the increase in the value of the premises, not the cost of the improvements.[18]

(§ 3) *B. Determination of conflicting claims to real property.*[19]—In the code action the defendant may claim affirmative relief by way of reformation of the description in a quitclaim deed and have the same foreclosed as a mortgage.[20] Such claim may be set up by way of amended answer though at the time the original was filed the defendant had notice of all the facts.[21]

A complaint[21a] conforming to the statute is sufficient.[22]

Findings, judgment, or decree.[23]—A finding on the ultimate issues renders unnecessary a finding on matters of evidence.[24]

In some states, the judgment does not conclude unknown minor parties,

5. Under Laws 1901, p. 900, c. 666. Johnson v. Duvall, 135 N. C. 642, 47 S. E. 611.

6. See 2 Curr. L. 1375.

7. Writing accompanying the tender stating that it was in full payment and for redemption held not to render the tender conditional. Glos v. Dyche, 214 Ill. 417, 73 N. E. 757.

8. Browning v. Wayland [Ky.] 85 S. W. 211.

9. Summerville v. March, 142 Cal. 554, 76 P. 388.

10. Where defendant claims to be the owner and entitled to possession of a portion of the premises and disclaims as to the residue, he is not entitled to the benefit of a statute providing that if he disclaims any interest plaintiff shall not recover costs [Mills' Ann. Code, § 256]. Relender v. Riggs [Colo. App.] 79 P. 328.

11, 12. Summerville v. March, 142 Cal. 554, 76 P. 388.

13. Tender held sufficient. Shay v. Callanan, 124 Iowa, 370, 100 N. W. 55. Tender by draft cannot be objected to after it has been retained for six months. Id.

14. See 2 Curr. L. 1374, n. 24. Evidence held to show one entitled to rights under Occupying Claimant's Act. Northern Inv. Co. v. Bargquist [Minn.] 100 N. W. 636.

15. Northern Inv. Co. v. Bargquist [Minn.] 100 N. W. 636.

16. Gen. St. 1894, § 5853. Northern Inv. Co. v. Bargquist [Minn.] 100 N. W. 636.

17. Blackburn v. Lewis [Or.] 77 P. 746.

18. Gombert v. Lyon [Neb.] 100 N. W. 414, following Lothrop v. Michaelson, 44 Neb. 633, 63 N. W. 28.

19. See 2 Curr. L. 1375.

20. Rev. Code Civ. Proc. § 675. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614.

21. Murphy v. Plankinton Bank [S. D.] 100 N. W. 614.

21a. See 2 Curr. L. 1375.

22. See 2 Curr. L. 1375, n. 38 et seq. The provision in the South Dakota statute of 1903, requiring an allegation that defendants are proper parties, need not be complied with in an action brought under the prior statute, since the act of 1903 purports to afford a cumulative remedy against unknown persons, none of whom are made parties. Buckham v. Hoover [S. D.] 101 N. W. 28.

23. See 2 Curr. L. 1376.

24. Fitcbette v. Victoria Land Co. [Minn.] 101 N. W. 655.

jurisdiction of whom was obtained by publication,[25] and who came in with a meritorious defense within the prescribed period after attaining majority.[26]

New trial as of right.[27]—The substance of the action as disclosed by the pleadings and not its form controls in determining whether a party is entitled to a new trial.[28] Where title and right to possession are involved either party is entitled to a new trial as a matter of right though other issues are presented by the pleadings upon which both parties are concluded by the first trial.[29]

The object and purpose of the "Torrens Act" was to provide a speedy and summary method of determining rights in real property, and to authorize a court to hear and determine all controversies respecting title and by proper decree definitely fix those rights.[30] The existence and validity of mechanics' liens may be determined and decreed but not their foreclosure.[31] A party asserting a mechanic's lien in proceedings under this act must prove that at the time of the trial the lien was a valid and existing one.[32]

QUO WARRANTO.

§ 1. Nature, Function, and Occasion of the Remedy (1177).
§ 2. Parties and Right to Prosecute (1177).
§ 3. The Information or Complaint (1178).
§ 4. Answers and Other Pleadings and Motions to Quash or Dismiss (1179).
§ 5. Trial and Judgment (1180).
§ 6. New Trial and Review (1180).

§ 1. *Nature, function, and occasion of the remedy.*[33]—Quo warranto is the appropriate remedy to try title to a public office,[34] but not to install any person into such office.[35] It will lie to test the right of a foreign-born citizen to occupy a public office,[36] and is the proper remedy when the question of eligibility of a person to an office held by another under a claim of right turns on the construction of statutes,[37] or to determine whether certain officers are performing governmental functions.[38] It will not lie against a public official for conduct of his predecessor in which he did not participate,[39] nor for his own misconduct until he has been formally charged therewith and given an opportunity to be heard.[40] It is the appropriate remedy for an inquiry into the validity of proceedings to organize

25. Relief authorized by Gen. St. 1894, §§ 5842, 5267, providing for opening of default judgments by persons who were minors when it was entered, applies to actions to determine adverse claims in which jurisdiction was obtained by publication over parties described as unknown. Hoyt v. Lightbody [Minn.] 101 N. W. 304.

26. In Minnesota a minor heir may upon good cause shown be allowed to defend his interest involved in such an action within two years after becoming of age where jurisdiction was obtained by publication and he was without actual notice of the pendency of the action prior to judgment entered [Gen. St. 1894, § 5842]. Hoyt v. Lightbody [Minn.] 101 N. W. 304.

27. See 2 Curr. L. 1376.

28, 29. Gray Cloud Land Co. v. Security Trust Co. [Minn.] 101 N. W. 605.

30, 31, 32. Reed v. Siddall [Minn.] 102 N. W. 453.

33. See 2 Curr. L. 1377.

Note: As to proceedings to question corporate existence, see Clark & M. Corp., § 93; to try title to corporate office, § 668; to attack ultra vires acts, § 207.

34. At common law (Meehan v. Bachelder [N. H.] 59 A. 620), the purpose of the proceeding is to oust from a public office one unlawfully holding it (Albright v. Territory [N. M.] 79 P. 719).

35. A judgment directing the defendant to deliver to the relator the books and articles pertaining to the office is beyond the scope of the proceeding. Albright v. Territory [N. M.] 79 P. 719.

36. Seat in a municipal council. State v. Collister, 6 Ohio C. C. (N. S.) 33.

37. People v. Hinsdale, 43 Misc. 182, 88 N. Y. S. 206.

38. The question of the legality of the transfer of the Original State Agricultural Society and its acceptance by the state can only be inquired into by the original society or the state on quo warranto. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.

39. Where a county judge dies pending proceeding against him, his successor cannot be substituted as respondent in his stead. State v. Gower [Neb.] 102 N. W. 674. Whether it lies against a county judge, who under color of office, has usurped functions and powers in excess of the jurisdiction conferred upon him by law is not decided. Id.

40. State v. Gower [Neb.] 102 N. W. 674.

a municipal corporation,[41] or to set aside a franchise irregularly or fraudulently granted where the party to whom it has been granted is in the exercise of the privileges conferred,[42] and a statute making it the proper remedy when an association acts as a corporation without being duly incorporated includes persons who act as officers of such association.[43] It cannot be maintained where the ultimate object is to assail the judgment of a court.[44] Since the proceeding affects a public right, the doctrine of estoppel does not apply.[45]

§ 2. *Parties and right to prosecute.*[46]—The attorney general ex officio has the right to bring an information to try title to a public office and is not required to ask leave of the court,[47] but a private individual, in the absence of statute and without the intervention of the attorney general, may not, either as of right or by leave of court.[48] A proceeding to determine title to a public office brought on behalf of the state and not on behalf of one who claims title to it should be brought by the attorney general,[49] and cannot be maintained by a private individual not claiming title and not showing that the attorney general has refused to allow the use of

41. As to the validity of the petition and qualifications of the petitioners. West End v. State [Ala.] 36 So. 423. The corporate existence of a **municipal or public corporation** in the defacto exercise of corporate life must be challenged by the state itself by an information in the nature of quo warranto and is not subject to collateral attack. State v. Birch [Mo.] 85 S. W. 361. Commissioners for the organization of **drainage districts** have not final jurisdiction to determine what lands will be benefited by a certain ditch and their findings on this question does not preclude quo warranto proceedings to test the validity of the organization. McDonald v. People, 214 Ill. 83, 73 N. E. 444.

42. Clark v. Interstate Independent Tel. Co. [Neb.] 101 N. W. 977.

43. Under Code 1896, c. 94, § 3420, intendant and aldermen of an unincorporated town. West End v. State [Ala.] 36 So. 423.

44. Judgment organizing a drainage district. People v. Waite, 213 Ill. 421, 72 N. E. 1087.

45. In a proceeding against drainage commissioners on the ground that the drainage district was not lawfully organized, the fact that the relator was present at some of the meetings of the commissioners and acquiesced in the proceedings does not prevent maintenance of it. People v. Burns, 212 Ill. 227, 72 N. E. 374.

46. See 2 Curr. L. 1378.

NOTE. Statute of limitations in quo warranto proceedings; Whatever the proceeding by information in the nature of a quo warranto may have been originally, it is now regarded as in the nature of a civil remedy. People v. Boyd, 132 Ill. 60, and a statute which limits the prosecution of an information under any penal law does not apply to it. Commonwealth v. Birchett, 2 Va. Cas. 51.

The principle that acts of limitation do not bind the state applies to proceedings by quo warranto, the rule being that, in the absence of any statutory period of limitation the attorney general may file an information on behalf of the state at any time; and that the lapse of time constitutes no bar to the proceeding. Catlett v. People, 151 Ill. 16; King v. Stacey, 1 Term R. 2, 3; Commonwealth v. Allen, 128 Mass. 308; State v. Pawtuxet Turnpike Co., 8 R. I. 521, 94 Am. Dec. 123. "The lapse of time," says Gray, C. J., in Commonwealth v. Allen, 128 Mass. 308, between the defendant's assumption of office and the institution of this proceeding, whatever effect it might have as against a private person cannot bar the right of the commonwealth suing by its Attorney General. But there are cases holding that laches may be imputed to the state as well as to an individual. Commonwealth v. Bala, etc., Turnpike Co., 153 Pa. 47; State v. Bailey, 19 Ind. 452; State v. Gordon, 87 Ind. 171.

In Illinois the statute requiring all civil actions to be commenced within five years next after the cause of action accrued has been applied to a quo warranto proceeding to compel school directors to show by what right they claimed to hold their office. People v. Boyd, 132 Ill. 60. Under the Ohio statute, regulating proceedings in quo warranto, an action against a corporation for forfeiture of its charter must be brought within five years after the act complained of was committed (State v. Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541, 15 L. R. A. 145; State v. Railroad Co., 50 Ohio St. 239), but the right of the state to bring an action for the purpose of ousting a corporation from the exercise of a power or franchise under its charter is not barred until such power or franchise has been exercised for twenty years (State v. Standard Oil Co., 49 Ohio St. 137, 34 Am. St. Rep. 541, 15 L. R. A. 145). A court may refuse a writ even before the statute has run when the object sought is to enforce private rights and in some other proper cases where public policy requires that the writ should not issue. People v. Boyd 132 Ill. 60.—From note to McPhail v. People [Ill.] 52 Am. St. Rep. 312. Later cases applying limitations to quo warranto will be found collected in note to Bannock County v. Bell [Idaho] 101 Am. St. Rep. 141, at page 187.

47. Meehan v. Bachelder [N. H.] 59 A. 620.

48. An individual is not authorized to do so by Acts 1893, p. 55, c. 66, § 1, and Pub. St. 1901, c. 240. Meehan v. Bachelder [N. H.] 59 A. 620. Statutes 4 & 5 W. & M., c. 18, and 9 Anne, c. 20, modifying the practice in England is not a part of the common law of New Hampshire. Id.

49, 50. Ney v. Whiteley [R. I.] 59 A. 400.

his name on behalf of the state.[50] In Alabama any person who will give the required security for costs may institute proceedings to annul the charter of a corporation.[51] Where a county increases the number of commissioners to the number to which it is entitled, the regularity of the proceedings will not be inquired into at the instance of a private individual.[52]

Joinder of parties.[53]—In a proceeding to try title to an office held by another under a claim of right, the people of the state and the incumbent of the office are necessary parties.[54] A joint action cannot be maintained to try title to office where it appears that one of the defendants is not the successor of one of the alleged illegally appointed members.[55] In a proceeding against the officers of a purported municipal corporation all the inhabitants need not be joined.[56] In Alabama by statute an informant must join as plaintiff with the state.[57]

§ 3. *The information or complaint.*[58]—An information[59] challenging one's right to an office on the ground that the statute under which he was appointed is unconstitutional must set out in direct and traversable form the facts relied on to render it so.[60] In proceedings to vacate the organization of an independent school district, grounds for invalidating the incorporation must be alleged.[61] The complaint must contain the averments required by statute.[62] No complaint other than the information is necessary.[63] Though an information is defective for want of a joinder of the informant with the state, it is sufficient to begin the suit when filed.[64] The general rules as to amendment of pleadings apply to an information.[65] The mere allowance of an amendment does not call for new security for costs.[66]

§ 4. *Answers and other pleadings, and motions to quash or dismiss.*[67]—The defendant must either disclaim the office, which he is charged with usurping, or justify.[68] If he justifies he must show on the face of his plea that he has title to the office.[69] In a proceeding against a purported municipal corporation, a plea that does not show incorporation is demurrable.[70] In proceedings to vacate the organization of an independent school district on the ground that the presiding officer at the election was disqualified, such contention does not raise the question of the validity of his election as trustee of the district.[71] In a proceeding against a corporation to require it to show by what authority it is conducting the business in which it is engaged, the defendant's answer is not necessarily to be taken as true.[72]

51. Code 1896, §§ 3417, 3418. State v. U. S. Endowment & Trust Co., 140 Ala. 610, 37 So. 442.

52. People v. Long [Colo.] 77 P. 251.

53. See 2 Curr. L. 1380.

54. People v. Hinsdale, 43 Misc. 182, 88 N. Y. S. 206.

55. County commissioners. People v. Long [Colo.] 77 P. 251.

56. West End v. State [Ala.] 36 So. 423.

57. Code 1896, § 3426. West End v. State [Ala.] 36 So. 423.

58. See 2 Curr. L. 1380.

59. Information to review the establishment of a drainage district organized under 4 Starr & C. Ann. St. 1902, c. 42, pp. 470, 471, held sufficient against demurrer. People v. McDonald, 208 Ill. 638, 70 N. E. 646.

60. Attorney-General v. Fox [N. J. Law] 60 A. 60.

61. How or to what extent it encroached on other districts, whether the encroachment was assented to by such other districts, and whether relator was inconvenienced. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

62. In a proceeding to inquire into the legality of an election, the complaint must state the number of legal votes cast for relator and defendant [Rev. St. 1898, § 3468]. State v. Rosenthal [Wis.] 102 N. W. 49.

63, 64. West End v. State [Ala.] 36 So. 423.

65. Insertion of name of informant as plaintiff. West End v. State [Ala.] 36 So. 423. Refusal of an offered amendment which did not obviate the objection to the question in controversy, held not error. McDonald v. People, 214 Ill. 83, 73 N. E. 444.

66. Information amended by inserting name of informant as plaintiff. West End v. State [Ala.] 36 So. 423.

67. See 2 Curr. L. 1380.

68. People v. Burns, 212 Ill. 227, 72 N. E. 374.

69. Allegations in plea by drainage commissioners held sufficient where it was charged that the drainage district was not lawfully organized under Hurd's Rev. St. 1903, p. 740, c. 42, § 11. People v. Burns, 212 Ill. 227, 72 N. E. 374.

70. West End v. State [Ala.] 36 So. 423.

71. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

72. It is not like the answer of a judicial

§ 5. *Trial and judgment.*[73]—An application for leave to file quo warranto which sets forth facts which entitle the petitioner to recover is sufficient.[74] In Virginia the writ is not returnable at a special term.[75] Where the information contains two separate and distinct counts, they must on demurrer be considered independently of each other.[76] In an action to remove a county attorney, the issue of primary importance is his good faith in official conduct.[77] In a proceeding to inquire into the legality of an election, the question to be submitted for special verdict is the number of legal votes cast for relator and defendant respectively.[78] In New Hampshire it is a civil remedy though criminal in form, and the procedure is governed by the rules of the common law.[79]

It is presumed that a public official acts in good faith,[80] and the burden is on the state to show otherwise by a preponderance of evidence.[81] In an action to remove a county attorney for failure to prosecute violations of the prohibitory liquor law, evidence that saloons were run openly in his county is relevant.[82] Where it is shown that the defendant did not receive the number of votes stated in his certificate of election, he has the burden to establish the fact that he received a plurality by other evidence.[83] Declarations of persons claiming to have voted that they were not legal voters at the time are admissible.[84]

The court has a discretion as to declaring forfeiture of a corporation charter for an act not expressly made ground of forfeiture.[85] Such discretion will be exercised in favor of the corporation when it appears that the violation of its charter is doubtful and no public interest requires forfeiture.[86] At common law a judgment for fine, ouster, and costs could be awarded against the defendant.[87]

An injunction may issue to protect those having a prima facie right during pendency of the proceedings.[88]

§ 6. *New trial and review.*[89]—At common law, the expiration of the term of the office involved pending the determination of the cause does not work a dismissal of the writ of error from the judgment of ouster.[90]

tribunal to a writ of certiorari. Attorney General v. Preferred Mercantile Co. [Mass.] 73 N. E. 669.

73. See 2 Curr. L. 1381.

74. Application for leave to file quo warranto, reciting that applicant received a majority of votes cast at an election which fact was duly certified by the proper authorities, that notwithstanding his opponent was given a commission by the governor and was unlawfully exercising the functions of the office, held sufficient. Hathcock v. McGoulrk, 119 Ga. 973, 47 S. E. 563.

75. Under Code 1904, § 3024, p. 1612, providing that where the petition is sufficient the writ shall be returnable at the next term of the court, "next term" means the next regular term. Stultz v. Pratt [Va.] 49 S. E. 654.

76. One count denied the jurisdiction of drainage commissioners to organize a district and the second a general charge of usurpation. People v. McDonald, 208 Ill. 638, 70 N. E. 646.

77. State v. Trinkle [Kan.] 78 P. 854.

78. State v. Rosenthal [Wis.] 102 N. W. 49.

79. Rev. St. 1842, c. 171, § 3, and Pub. St. 1901, c. 204, §§ 2, 4, and Laws 1901, p. 563, c. 78, § 2, authorizing the issuance of writs but not prescribing the procedure. Meehan v. Bachelder [N. H.] 59 A. 620.

80. County attorney. State v. Trinkle [Kan.] 78 P. 854.

81. Evidence insufficient to warrant the removal from office of a county attorney. State v. Trinkle [Kan.] 78 P. 854.

82. State v. Trinkle [Kan.] 78 P. 854.

83, 84. State v. Rosenthal [Wis.] 102 N. W. 49.

85. State v. United States Endowment & Trust Co., 140 Ala. 610, 37 So. 442.

86. State v. U. S. Endowment & Trust Co., 140 Ala. 610, 37 So. 442. The charter will not be declared forfeited for a failure for a limited time after organization to keep its books at the place it is required to maintain its principal office, nor for failure of the president through mistake to make the first annual report to the state as required by the charter. Id.

87. Statute of 9 Anne is a part of the common law of New Mexico. Albright v. Territory [N. M.] 79 P. 719.

88. A court, though without original jurisdiction of a suit for an injunction may, in an original action in quo warranto to determine the right of rival boards to exercise official functions, grant an ancillary injunction. State v. Deputy State Sup'rs of Cuyahoga County, 70 Ohio St. 341, 71 N. E. 717.

89. See 2 Curr. L. 1381.

90. Statute of 9 Anne. Albright v. Territory [N. M.] 79 P. 719.

RACING.[91]

RAILROADS.

§ 1. **Railroad Companies (1181).**
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G. Fires (1225).
§ 11. **Offenses Relating to Railroads (1230).**

The duties and liabilities of railroad companies as common carriers,[92] their liabilities to employes[93] and matters common to all corporations,[94] are elsewhere treated.

§ 1. *Railroad companies.*[95]—The general law of corporations applies except in so far as rules specially applicable to railroads are prescribed.

Incorporation and existence.[96]—Statutes authorizing the formation of railroad companies are construed liberally.[97] Failure by a railroad to perform its

91. No cases have been found during the period covered by this volume. But see Betting and Gaming, 3 Curr. L. 499.

92. See Carriers, 1 Curr. L. 421, 3 Curr. L. 591.

93. See Master and Servant, 2 Curr. L. 801, 4 Curr. L. 533.

94. See Corporations, 1 Curr. L. 710, 3 Curr. L. 880.

95. See 2 Curr. L. 1383.

96. See 2 Curr. L. 1383.

97. Deepwater R. Co. v. Lambert, 54 W. Va. 387, 46 S. E. 144.

public duties may be ground for forfeiture of its franchise,[98] and failure to construct a road within the time limited by the charter may forfeit it, but in the absence of evidence to the contrary, compliance with the charter will be presumed.[99]

Powers of corporation and authority of officers.[1]—The franchises granted to a railroad corporation must be exercised by that corporation alone.[2] The discretion of the officers, if exercised in good faith within the limits of the corporate powers, will not be reviewed by the courts.[3] The power of directors to extend a railroad includes the power to acquire a use of terminal facilities of other companies in another state by action of the directors.[4] Power to do all acts incidental to the maintenance of the road includes the right to lay conduits in the right of way.[5] Continued acquiescence by a board of directors may confer power on an executive committee to purchase needful supplies.[6]

Actions by and against companies.[7]—A statute providing that in certain cases companies leasing their property may be liable for claims against the lessee does not make service of process upon the agent of the lessee equivalent to service upon the lessor.[8] In general, suits against railroad corporations should be brought in the county where the cause of action arose,[9] and actions for killing stock in some states must be brought in the county or township in which the stock is killed.[10] A statute of Illinois giving single damages by way of compensation for the killing of stock by a railroad may be sued in Missouri,[11] and a Georgia corporation transacting business in another state may be sued in Georgia for injuries inflicted in such other state.[12] That a railroad of another state in the transfer of its business to and from roads within the state runs its cars and engines across the state line does not give the state courts jurisdiction of it.[13] The words "railroad" and "railway" are synonymous in the name of a railroad company,[14] and process omitting the word "company" from defendant's corporate name has been held good, and a return of service on its agent, the president, or other chief officer not being found in the county is sufficient.[15] Some states allow an attorney fee if there be a recovery for more than tendered by the company, and it failed to pay after the statutory notice before service of process.[16] A

98. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001.

99. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 23 App. D. C. 587. Suspension of work for several years will not work a forfeiture of charter where the project was not abandoned but was pushed to completion as soon as funds could be procured. Collier v. Union R. Co. [Tenn.] 83 S. W. 155.

1. See 2 Curr. L. 1385.

2. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001.

3. Price v. Pennsylvania R. Co., 209 Pa. 81, 58 A. 137.

4. Union Pac. R. Co. v. Mason City, etc., R. Co. [C. C. A.] 128 F. 230.

5. City of Canton v. Canton Cotton Warehouse Co. [Miss.] 36 So. 266.

6. Roebling's Sons Co. v. Barre & M. Traction & Power Co., 76 Vt. 131, 56 A. 530.

7. See 2 Curr. L. 1387, n. 16-24.

8. Acts 1899, pp. 54, 55, § 1. Perry v. Brunswick & W. R. Co., 119 Ga. 819, 47 S. E. 172.

9. Acts 1889, p. 362 does not give the plaintiff the right to elect in what county suit may be brought. Le Croix v. Western & A. R. Co., 118 Ga. 98, 44 S. E. 840. An action for personal injuries should be brought in the county where the cause of action originated. Civ. Code 1895, § 2334. Coakley v. Southern R. Co., 120 Ga. 960, 48 S. E. 372.

10. Question of lack of proof of venue may be first raised on appeal. St. Louis, etc., R. Co. v. Gray [Ark.] 80 S. W. 748. Venue must affirmatively appear from record where action is before justice of the peace. Shaw v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 611; Atlantic Coast R. Co. v. Du Pont [Ga.] 50 S. E. 103.

11. Stonebraker v. Chicago & A. R. Co. [Mo. App.] 85 S. W. 631.

12. Savannah, F. & W. R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308.

13. St. Louis, etc., R. Co. v. J. H. White & Co., 97 Tex. 493, 80 S. W. 77.

14. Black v. St. Louis & S. F. R. Co. [Mo. App.] 85 S. W. 96.

15. Brassfield v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 1032.

16. Gen. Laws, c. 187, § 34. Smallwood v. New York, etc., R. Co. [R. I.] 59 A. 314

statute authorizing the recovery of attorneys' fees where a railroad violates a statute does not include a case where a passenger recovers for injuries from a railway servant, no statute being violated.[17] Consolidation of actions for killing animals is within the discretion of the court.[18]

Foreign corporations.[19]—Statutes may require the appointment of some resident on whom process may be served.[20]

§ 2. *Public regulation.*[21]—Railroads by reason of their quasi-public nature are subject to regulation which usually takes the form of rate revision[22] and safety provisions,[23] but must not transcend constitutional limitations.[24] When a charter provision reserves a permissive power of regulation, it will be relinquished by the public if a new charter silent in this respect be granted before exercise of the power.[25]

Control by railroad commissions.[26]—That a railroad commission is given jurisdiction of certain cases does not necessarily bar common-law remedies therefor.[27] An order requiring a railroad company to build a side track for a private individual is invalid.[28]

§ 3. *Fees, licenses and taxes.*[29]—The construction of a railroad under municipal consent required by statute and upon conditions for the payment of an annual license fee per car is a contractual obligation.[30] The Indiana law providing for recovery from railroads of earnings in excess of certain amounts under charters long since surrendered is unconstitutional.[31] Local assessments for the cost of public improvements may in some cases be laid on railroads, depending statutes, the existence of a corresponding benefit, and circumstances. The cases are at variance.[32] General taxes are levied according to statutory modes more or less peculiar to each of the several states.[33]

§ 4. *Aids and bonuses.*[34]—Public land grants to railroads[35] and municipal aid bonds[36] are treated elsewhere.

Subscriptions.[37]—One who subscribes on condition that the road be built to a point outside the state is estopped to deny his obligation after the road is built on the ground that such building was ultra vires.[38] Where the subscription is conditioned on running a train into a certain town on a certain date, the mere fact that a train was run, is enough. Its equipment is immaterial.[39]

17. Kansas City Southern R. Co. v. Marx [Ark.] 80 S. W. 579.

18. Atlantic Coast Line R. Co. v. Du Pont [Ga.] 50 S. E. 103.

19. See 2 Curr. L. 1386. See, generally, Foreign Corporations, 3 Curr. L. 1455.

20. V. S. 3948. Gokey v. Boston & M. R. Co., 130 F. 994.

21. See 2 Curr. L. 1387.

22. See Carriers, 3 Curr. L. 592; Commerce, 3 Curr. L. 711.

23. See post, §§ 4, 7, 8.

24. See Constitutional Law, 3 Curr. L. 730.

25. A provision in a railroad charter that the legislature may so regulate tolls that not more than a certain income be paid over to stockholders and that the surplus be paid over to the state treasurer for the use of schools is permissive only, not mandatory, and until the legislature acts the company may do as it will as to tolls, and by surrendering its charter and accepting another containing no such provision, before the legislature has acted, it escapes such regulation. Terre Haute & I. R. Co. v. State of Indiana, 194 U. S. 579, 48 Law. Ed. 1124.

26. See 2 Curr. L. 1387.

27. Gen. St. 1901, § 5998. Missouri Pac. R. Co. v. State [Kan.] 77 P. 286.

28. Railroad Comm. of Texas v. St. Louis S. W. R. Co. of Texas [Tex. Civ. App.] 80 S. W. 102; Railroad Commission of Texas v. St. Louis S. W. R. Co. of Texas [Tex.] 80 S. W. 1141.

29. See 2 Curr. L. 1386.

30. Defendant may plead statute of limitations in an action on such an obligation. Jersey City v. Jersey City & B. R. Co. [N. J. Law] 59 A. 15.

31. Terre Haute & I. R. Co. v. Indiana, 194 U. S. 579, 48 Law. Ed. 1124; afg. 159 Ind. 438, 65 N. E. 401, cited 2 Curr. L. 1386.

32. See Public Works and Improvements, § 8C, ante, p. 1146.

33. See Taxes, 2 Curr. L. 1786.

34. See 2 Curr. L. 1383.

35. See Public Lands, 4 Curr. L. 1106.

36. See Municipal Bonds, 4 Curr. L. 766.

37. See 2 Curr. L. 1385.

38, 39. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899.

§ 5. *Franchises, public grants, and right of way.*[40] *Certificate of public convenience.*[41]—In determining the question of public convenience, the future growth in population and the fact that the local authorities consent to the construction should be considered.[42] The certificate should be refused where a line parallel to the one proposed affords all needed transportation facilities,[43] but the fact that a franchise has been granted for a line through the territory in question, under such conditions as to render construction prohibitive, should not control.[44] A certificate according to the matter set forth in the articles of incorporation is proper.[45] That the road has been staked out to a point beyond that specified in its articles and the certificate, will not invalidate the certificate nor is it ground for refusing the same.[46]

A charter authority to acquire "land for the track of said road not to exceed 150 feet wide" is not a grant of right of way.[47]

Grants in highways and streets.[48]—Power to cross any public road or way refers to municipal streets as well as country highways.[49] Where a road is to pass over the streets of a city, the consent of the council must be obtained and the route of the road defined.[50] The right given by a statute to railroad companies to construct tracks across or along streets is not interfered with by the power given to municipalities to regulate the use of locomotives within the city and to control the location of tracks.[51] Municipalities may grant railroad companies a reasonable use of the streets for the construction and operation of roads for public transportation,[52] but grants in highways and streets are subject to the prior easement of the public and will not be permitted to injure or destroy the rights of abutters.[53] The placing of a steam railway track on a public street imposes an ad-

40. See 2 Curr. L. 1389. Sale, lease or transfer of franchise, see post, § 8.

41. See 2 Curr. L. 1383.

42. In re Wood, 99 App. Div. 334, 91 N. Y. S. 225. A certificate should not be granted where an overwhelming majority of the public, as represented by the owners and occupants of property along the line of the proposed road, are opposed to the building thereof. People v. State Board of R. Com'rs, 95 App. Div. 38, 88 N. Y. S. 522.

43, 44. In re Wood, 99 App. Div. 334, 91 N. Y. S. 225.

45. Not according to a map filed. People v. State Board of R. Com'rs, 99 App. Div. 85, 91 N. Y. S. 375.

46. Publication held sufficient. People v. Board of R. Com'rs of New York, 91 N. Y. S. 977.

47. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490.

48. See 2 Curr. L. 1390.

49. Temporary obstruction of a street not a nuisance. City of Canton v. Canton Cotton Warehouse Co. [Miss.] 36 So. 266.

50. Collier v. Union R. Co. [Tenn.] 83 S. W. 155.

51. In re Milwaukee Southern R. Co. [Wis.] 102 N. W. 401.

52. Switch track held not to be for private purposes. Stockdale v. Rio Grande W. R. Co. [Utah] 77 P. 849.

53. Tennessee Brewing Co. v. Union R. Co. [Tenn.] 85 S. W. 864. A company allowed the use of a street cannot unreasonably obstruct the street or interfere with travel. Atlantic & B. R. Co. v. City of Montezuma [Ga.] 49 S. E. 738. A municipal council can grant no authority to a railroad company to interfere with the private property rights of others without compensation. Cincinnati, R. & M. R. Co. v. Miller [Ind. App.] 72 N. E. 827. A company cannot, even under municipal ordinance authorizing it so to do, lay its tracks in a street so narrow that if so occupied there would not be room for vehicles to pass. Mobile, etc., R. Co. v. Middleton, 139 Ala. 610, 36 So. 782. The maintenance of an elevated railroad will be enjoined where the pleadings admit that the necessary easement or right of property was not acquired. Answer failing to controvert such allegations of the complaint, they must be taken as true [Code Civ. Proc. § 522]. Driscoll v. Brooklyn Union El. R. Co., 95 App. Div. 146, 88 N. Y. S. 745. Erection of a depot and warehouse is not a taking of or proximate injury to a lot located at some distance therefrom entitling the owner to compensation or injunctive proceedings under eminent domain provisions, where access to complainant's lot is afforded not only by way of private street which defendant has agreed to keep open, but also by a public street and its connections. Dennis v. Mobile & M. R. Co., 137 Ala. 649, 35 So. 30. An injunction would not lie to enjoin building of a railway trestle longitudinally along an unimproved and impassable street, when the city had consented to the construction and the abutting owner, suing for the injury, could show no material injury. Cleveland, etc., R. Co. v. Cincinnati & I. W. R. Co., 2 Ohio N. P. (N. S.) 237. An ordinance permitting a railroad to obstruct a street for not to exceed 30 minutes at a time is un-

ditional burden upon it, for which the abutting owners are entitled to compensation.[54] The right of action for damages accruing to a landowner because of the construction of a railway in the street before his premises belongs to him personally and his grantees take the land subject to the burden, notwithstanding the traffic becomes heavier.[55] Where between platting and acceptance of dedication a track is laid along a platted street, the company acquires more than a revocable license, but can retain its track only on paying damages to adjoining owners.[56] For grading down a street for a railway so as to cut off access to abutting property the owner may have damages.[57]

Consent of abutting owners.[58]—Authority to occupy a portion of the street and sidewalk does not permit the construction of a track onto other property to the irreparable injury of the adjoining owner.[59]

Rights in public lands.[60]—In Louisiana a purchaser of land from the state is not entitled to damages from a railroad company for a road constructed before his purchase, though the company has paid nothing for its right of way.[61]

Right of eminent domain.[62]—To authorize eminent domain proceedings, the taking must be for a necessary,[63] public,[64] purpose; and certain lands, such as cemeteries, homesteads,[65] and the right of way of other roads,[66] are usually exempt. A company may increase its existing right of way to the statutory limit.[67] The Arkansas constitution prohibits the exercise of eminent domain except by domestic corporations,[68] but a corporation of another state by complying with the statute relative to filing its articles with the proper authorities so far becomes a domestic company as to give it the right of eminent domain.[69] Proceedings for the taking of private property must be in strict compliance with the statute.[70] Payment of compensation before possession can be taken is generally required,[71] though this is not necessary unless there is an express constitutional provision to that effect,[72] and such payment gives no priority over the holder of an unrecorded conveyance.[73] The mere commencement of proceedings confers no right to control or possession.[74] A merely temporary taking may entitle the owner to

reasonable and will be restrained as a nuisance. J. K. & W. H. Gilcrest Co. v. Des Moines [Iowa] 102 N. W. 831.

54. Though the track is on one side of the street, owners on both sides are "abutting owners" within this rule. Herzog v. Cincinnati, 2 Ohio N. P. (N. S.) 17.

55. Kakeldy v. Columbia & P. S. R. Co. [Wash.] 80 P. 205.

56. Koch v. Kentucky & I. R. & Brldge Co., 26 Ky. L. R. 216, 80 S. W. 1133.

57. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665.

58. See 2 Curr. L. 1391.

59. Shaking of ground, noise and smoke entitle such owner to compensation. Stockdale v. Rio Grande W. R. Co. [Utah] 77 P. 849.

60. See 2 Curr. L. 1391.

61. Friedrichs v. New Orleans Belt & Terminal Co. [La.] 38 So. 32.

62. See 2 Curr. L. 1391.

63. Condemnation to widen right of way is not authorized where there has been no increase of business. O'Leary v. Wabash Pittsburgh Terminal R. Co. [Pa.] 60 A. 164. Under Ohio statutes a railroad proposing to appropriate the land of another railroad company longitudinally must establish an urgent necessity for the land. Steubenville & T. R. Co. v. Cleveland & P. R. Co., 2 Ohio N. P. (N. S.) 45. Where it appears that a company can conveniently build between its termini without crossing a public park, no necessity is shown for taking part of the park. In re Milwaukee S. R. Co. [Wis.] 102 N. W. 401.

64. A branch railroad track is for a public purpose if it is to be open to all without discrimination. Ulmer v. Lime Rock R. Co., 98 Me. 579, 57 A. 1001. A belt line may be a public necessity. Collier v. Union R. Co. [Tenn.] 93 S. W. 155.

65. In Pennsylvania a company may, for the purpose of widening an established way, condemn a homestead [Act March 7, 1869]. Dryden v. Pittsburg, V. & C. R. Co., 208 Pa. 316, 57 A. 710; O'Leary v. Wabash Pittsburgh Terminal R. Co. [Pa.] 60 A. 164.

66. Chicago & M. El. R. Co. v. Chicago & N. W. R. Co., 211 Ill. 352, 71 N. E. 1017; Steubenville & T. R. Co. v. Cleveland & P. R. Co., 2 Ohio N. P. (N. S.) 45.

67. Chicago & M. El. R. Co. v. Chicago & N. W. R. Co., 211 Ill. 352, 71 N. E. 1017.

68. Russell v. St. Louis S. W. R. Co., 71 Ark. 451, 75 S. W. 725.

69. Acts 1899, p. 43, c. 34. Russell v. St. Louis S. W. R. Co., 71 Ark. 451, 75 S. W. 725.

70, 71, 72, 73, 74. Atlanta K. & N. R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657.

compensation,[75] though such taking be in obedience to a command of the state.[76] Abandonment of condemnation proceedings and construction thereunder revokes a statutory license and makes the railroad company a trespasser ab initio.[77] A company dismissing condemnation proceedings and abandoning construction thereunder will not be permitted to question the validity of such dismissal in an action for trespass by the land owner.[78] A railroad company appropriating a city alley and making a deep excavation therein is liable to the adjoining owner for injury by reason of access to and egress from his property being cut off.[79] The fact that a railroad seeking to condemn right of way through a city has no license to cross or traverse the streets is no defense to property owners.[80] The right acquired by condemnation proceedings dominates all right of possession except as to the owner of the fee;[81] and he may use only that portion not in immediate use by the company and not necessary in the safe and convenient use of that which is in actual service.[82] Cases discussing the elements of damage are cited in the note.[83]

Private grants.[84]—A lessee of property is a necessary party to negotiations and contracts for a right of way thereon.[85] Where a deed of right of way fails to locate the route, occupancy by mutual consent will locate and indentify the route.[86] A right of way belonging to a railroad company is private property as to an adjoining owner, and the latter has no easement thereon of light, air and view.[87] A voluntary conveyance of land for right of way gives a company no greater rights as to the use of the land than it could acquire by proceedings under the statutes.[88] A grant of a right of way carries with it the right to use without further compensation all the suitable materials within the lines of the way.[89] For the necessary support an embankment slope may extend beyond the right of way, but for this additional compensation may be demanded,[90] as also for ma-

75. The fact that occupancy of a street is merely temporary is to be regarded only as going to the amount of compensation. McKeon v. New York, etc., R. Co., 75 Conn. 343, 53 A. 656.

76. McKeon v. New York, etc., R. Co., 75 Conn. 343, 53 A. 656.

77. Measure of damages for such a trespass considered. Enid & A. R. Co. v. Wiley, 14 Okl. 310, 78 P. 96.

78. Enid & A. R. Co. v. Wiley, 14 Okl. 310, 78 P. 96.

79. A landowner suffers no damages reroverable at law for injury to the lateral support of his property until the earth is so much disturbed that it slides or falls. Kansas City N. W. R. Co. v. Schwake [Kan.] 78 P. 431.

80. Dowie v. Chicago, etc., R. Co. [Ill.] 73 N. E. 354.

81, 82. Kansas & C. P. R. Co. v. Burns [Kan.] 79 P. 238.

83. The measure of damages is the difference in the fair cash value of the property before and after the construction of a subway and the closing of a street. Village of Winnetka v. Clifford, 201 Ill. 475, 66 N. E. 384. The fact that the injury continues only while the work of construction is in progress is immaterial in case of special damage. Bailey v. Boston & P. R. Corp., 182 Mass. 537, 66 N. E. 203. Remote and speculative damages cannot be awarded. East & W. I. R. Co. v. Miller, 201 Ill. 413, 66 N. E. 275. In the absence of statute, loss of business cannot be considered. Taking for right of way. Bailey v. Boston & P. R. Corp., 182 Mass. 537, 66 N. E. 203. Diminished rental value may be recovered where distinguishable from the damage suffered by the public generally. Id. On condemnation of a right of way, damages are to be awarded as of the time of entry. Van Husen v. Omaha Bridge & T. R. Co., 118 Iowa, 366, 92 N. W. 47. Only the damages arising from lawful and proper construction are recoverable in eminent domain proceedings, the damages from negligent and improper construction being recoverable only in another suit. Gulnn v. Iowa & St. L. R. Co. [Iowa] 101 N. W. 94.

84. See 2 Curr. L. 1392.

85. Thompson v. Erie R. Co., 96 App. Div. 539, 89 N. Y. S. 92.

86. Gaston v. Gainesville & D. Elec. R. Co., 120 Ga. 516, 48 S. E. 188. Evidence held to show a conveyance of a right of way when the line might be finally located. Bell v. Southern Pac. R. Co., 144 Cal. 560, 77 P. 1124.

87. Osburn v. Chicago, 105 Ill. App. 217.

88. Right to erect buildings amounting to nuisance as to adjoining lands. Missouri, etc., R. Co. v. Mott [Tex.] 81 S. W. 285. Land granted for a "right of way" cannot be used for a switch yard. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781.

89. Stautory exception of timber in Pa. Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 A. 486.

90. Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 A. 486.

terials taken from a point outside of the right of way.[91] A mere license for the construction of a railroad over land of the licensor may be revoked at the latter's option.[92] In determining the reasonableness of a grant of right of way, prospective advantages may be considered.[93]

Conditions and reservations in private grants.[94]—Where a clause requiring the road to be finished within a certain period is a covenant and not a condition, failure to so finish does not forfeit the grant.[95]

Enforcement of conditions.[96]—A grant of right of way may be lost by failure to comply with a condition requiring construction within a specified time.[97] Covenants to maintain crossings and gates other than as required by law may be enforced by the covenantee[98] or his grantee.[99] Where a grant of right of way contains a covenant for a crossing and a grade crossing is subsequently made impossible through no act of the company, a tunnel costing more than the lands to be benefited are worth will not be ordered, but the land owner will be relegated to his action at law for damages.[1]

Rights as against subsequent grantees.[2]—Covenants to maintain fences and farm crossings as partial consideration for a deed of right of way run with the land.[3]

Disposal of or use of right of way by company.[4]—The right of way may be devoted to any use indispensable to or which will facilitate the objects of the railroad's operation.[5] An ordinance authorizing a company to construct and maintain a railroad in a street does not include a use thereof for drilling, switching or transferring cars.[6] The laying of another line of road upon the same right of way by a company already having one line thereon is not a violation of a constitutional prohibition of the construction of parallel or competing lines.[7] A trespasser frequently riding a tricycle upon a company's track may be perpetually enjoined.[8]

Abandonment of right of way.[9]—The track on an abandoned right of way reverts with the soil to the owner of the fee.[10]

91. Hendler v. Lehigh Valley R. Co., 209 Pa. 256, 58 A. 486. Not liable for double damages for the taking of sand [Act May 8, 1876]. Hendler v. Lehigh Valley R. Co., 209 Pa. 263, 58 A. 488.

92. Evidence held not to show a contract. Stratton's Independence v. Midland Terminal R. Co. [Colo.] 77 P. 247.

93. Bell v. Southern Pac. R. Co., 144 Cal. 560, 77 P. 1124.

94. See 2 Curr. L. 1392. Contract for special switching rates in consideration of grant of right of way construed and held not to be uncertain and ambiguous. Thompson v. Erie R. Co., 96 App. Div. 539, 89 N. Y. S. 92. Evidence held not to show an agreement to begin construction at a given point within 90 days as a material inducement of the contract. Bell v. Southern Pac. R. Co., 144 Cal. 560, 77 P. 1124.

95. Krueger v. St. Louis, etc., R. Co. [Mo.] 84 S. W. 898.

96. See 2 Curr. L. 1393.

97. Peterson v. Atlantic & B. R. Co., 120 Ga. 967, 48 S. E. 372. Whether the construction of a railroad has been with "reasonable dispatch" depends upon the character and magnitude of the work, and the surrounding circumstances. The lapse of 2½ years in the construction of 5 miles of road costing $7,000,000 during the financial depression of 1893 not unreasonable. Bell v. Southern Pac. R. Co., 144 Cal. 560, 77 P. 1124.

98. Chicago & S. E. R. Co. v. McEwen [Ind. App.] 71 N. E. 926.

99. Measure of damages is cost of completion of crossing and compensation for loss of use. Pittsburg, etc., R. Co. v. Wilson [Ind. App.] 72 N. E. 666.

1. Speer v. Erie R. Co. [N. J. Err. & App.] 60 A. 197.

2. See 2 Curr. L. 1393.

3. Chicago & S. E. R. Co. v. McEwen [Ind. App.] 71 N. E. 926; Pittsburg, etc., R. Co. v. Wilson [Ind. App.] 72 N. E. 666.

4. See 2 Curr. L. 1393.

5. May lay water conduits upon the right of way and cross streets therewith. City of Canton v. Canton Cotton Warehouse Co. [Miss.] 36 So. 266.

6. Atlantic & B. R. Co. v. Montezuma [Ga.] 49 S. E. 738.

7. A company may lay as many tracks upon its right of way as it deems fit. Chicago & M. Elec. R. Co. v. Chicago, etc., R. Co., 211 Ill. 352, 71 N. E. 1017.

8. Atchison, etc., R. Co. v. Spaulding [Kan.] 77 P. 106.

9. See 2 Curr. L. 1394.

10. Missouri Pac. R. Co. v. Bradbury, 106 Mo. App. 450, 79 S. W. 966.

Adverse possession by or against railroad.[11]—By statute undisturbed possession may for a specified period give a railroad company title to land occupied by it,[12] but the building of a road over land by mere permission gives the company no rights in the land outside the roadbed embankment.[13] Permissive use of a company's right of way confers no rights upon the public,[14] or an abutting fee owner,[15] and the use by an individual of parts of a railroad right of way for grain elevators, granaries, coal sheds and other structures incident to a business connected with shipping, will not be regarded as adverse to the company except on clear proof of notice of claim of right.[16] An adjoining owner may acquire a prescriptive right to a farm crossing.[17] Adverse user by the public for the statutory period may imply a dedication of railroad lands for highway purposes.[18]

Appropriation of right of way for other public use.[19]—Unless forbidden by their charters, railroad corporations may dedicate as a public highway lands conveyed to them for railroad purposes,[20] and under the general authority to establish streets, a city or village may establish streets across lands which are subject to the franchises of a railroad, provided the second use is reasonably consistent with the former.[21] One railroad company cannot for right of way purposes condemn longitudinally the right of way of another.[22] Telegraph companies are not entitled to enter upon or occupy any part of the right of way of railroads under the power of eminent domain.[23]

§ 6. *Location of road, termini and stations. Filing, location, profile, etc.*[24]—In order to constitute a location, a selection and adoption of a line by the officers of the company is necessary.[25] Statutes requiring the designation of the termini of a road for the construction of which a company is formed are liberally,[26] and those regulating the construction of parallel lines are strictly, con-

11. See 2 Curr. L. 1394.

12. Laws 1854-55, p. 274, c. 229, § 11. Barker v. Southern R. Co. [N. C.] 49 S. E. 115; City of Hickory v. Southern R. Co. [N. C.] 49 S. E. 202.

13. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490. Title by prescription extends only to so much as is actually occupied. Floyd v. Louisville & N. R. Co., 25 Ky. L. R. 2147, 80 S. W. 204. Company not entitled to recover land occupied by it for 40 or 50 years, to the extent of 100 feet on each side of the center of track, such land having been in the exclusive occupancy of its owners during such period. Jones v. Nashville, etc., R. Co. [Ala.] 37 So. 677.

14. The passageway may at any time be fenced by the railroad company. Illinois Cent. R. Co. v. Waldrop, 24 Ky. L. R. 2127, 72 S. W. 1116; Wilmuth's Adm'r v. Illinois Cent. R. Co., 25 Ky. L. R. 671, 76 S. W. 193. On closing up a passageway permitted to be used by the public on a right of way, the obstruction should be safe and sufficient for a reasonable time to notify the public of the revocation of consent to such use. Illinois Cent. R. Co. v. Waldrop, 24 Ky. L. R. 2127, 72 S. W. 1116.

15. The temporary and occasional placing of gates in trestle work by a stock raiser for his own convenience does not amount to an assertion of rights therein. Chicago, etc., R. Co. v. Hammond, 210 Ill. 187, 71 N. E. 576. Use by the fee owner of a passage under a trestle for the passage of his stock does not raise a presumption of adverse user. Continuous use by railroad of its right of way. Id.

16. Roberts v. Sioux City & P. R. Co. [Neb.] 102 N. W. 60. Scales. Michigan Mill. Co. v. Ann Arbor R. Co. [Mich.] 101 N. W. 574.

17. Zook v. Illionis Cent. R. Co., 25 Ky. L. R. 2194, 80 S. W. 211.

18. Southern Pac. Co. v. Pomona, 144 Cal. 339, 77 P. 929.

19. See 2 Curr. L. 1395.

20. Company bound by dedication of its agent. Southern Pac. Co. v. Pomona, 144 Cal. 339, 77 P. 929.

21. Cleveland, etc., R. Co. v. Urbana, etc., R. Co., 5 Ohio C. C. (N. S.) 583.

22. This rule does not extend to property beyond the right of way. Chicago, etc., R. Co. v. Chicago & N. W. R. Co., 211 Ill. 352, 71 N. E. 1017. Under the Ohio statutes where it is absolutely necessary for a railroad to have the land it seeks to appropriate in order to build its road, and the railroad owning it will not need it for a long time to come, the right to appropriate it exists. Steubenville & T. R. Co. v. Cleveland & P. R. Co., 2 Ohio N. P. (N. S.) 45.

23. Western Union Tel. Co. v. Pennsylvania R. Co., 25 S. Ct. 133.

24. See 2 Curr. L. 1388.

25. Kaufman v. Pittsburg, etc., R. Co. [Pa.] 60 A. 2.

26. Substantial compliance is sufficient. Deepwater R. Co. v. Lambert, 54 W. Va. 387, 46 S. E. 144.

strued.[27] "Location" has been interpreted as the physical location of the track.[28] A priority in location may be lost by laches in a further prosecution of construction;[29] but where a railroad has located, surveyed and staked out its route over land before the incorporation of the city, including such land within its limits, the subsequent incorporation of the city cannot deprive the railroad of its priority of location.[30] The staking out of a location different from that adopted by regular corporate action cannot form the basis of condemnation proceedings.[31] It is essential to name the termini in the charter in Tennessee, but the route need not be definitely described.[32]

Alteration and changes.[33]—A statute authorizing the widening of railroads is not unconstitutional in failing to provide a specific limit of width.[34] A railroad may obtain the power to extend its road over new and additional routes by procuring an amendment to its charter, describing the proposed additional routes.[35]

Compulsory maintenance of stations, sidings, etc.[36]—The public has an interest in the location of depots and the time and place at which trains must stop for freight and passengers,[37] and in Kansas the judgment of the court below ordering a station will not be reversed on disputed questions of fact.[38]

§ 7. *Construction and maintenance. Private and farm crossings.*[39]—The fee owner of land subject to a right of way is entitled to a private crossing of such way if necessary for convenient use of his two parcels of land, and such crossing will not unreasonably interfere with the railroad's operation,[40] and the right to a farm crossing may be acquired by prescription[41] or given by the statutes.[42] A railroad company should provide fastenings for a gate from a public highway over a farm crossing.[43] A right to a private crossing is not barred by the statute of limitations in that possession of a right of way is adverse to the rights of the owner of the fee.[44] Where the statute requires suitable and convenient farm crossings, their suitability and convenience is to be considered with due reference to the inconvenience and expense to the company, and under such a statute an under grade crossing may sometimes be required;[45] but there is no rule requiring a grade crossing if the crossing be adequate.[46] The legal duty of a railroad company to maintain such farm crossings as the court may determine to be suitable may be enforced by mandamus.[47]

27. That a proposed line will parallel an existing line for a short distance is not material. Wheelwright v. Com. [Va.] 49 S. E. 647.

28. City of Hickory v. Southern R. Co. [N. C.] 49 S. E. 202.

29. West Virginia, etc., R. Co. v. Belington & N. R. Co. [W. Va.] 49 S. E. 460.

30. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

31. West Virginia, etc., R. Co. v. Belington & N. R. Co. [W. Va.] 49 S. E. 460.

32. Collier v. Union R. Co. [Tenn.] 83 S. W. 155.

33. See 2 Curr. L. 1388. Evidence held not to show a case for preliminary injunction restraining a relocation of road rendering it more dangerous. Baldwin Tp. v. Baltimore & O. R. Co. [Pa.] 59 A. 478.

34. Dryden v. Pittsburg, etc., R. Co., 208 Pa. 316, 57 A. 710.

35. Collier v. Union R. Co. [Tenn.] 83 S. W. 155.

36. See 2 Curr. L. 1388.

37. But the public is not concerned in a company's covenant to build a spur track. Butler v. Tifton, etc., R. Co., 121 Ga. 817, 49 S. E. 763.

38. Procedure on appeal. Board of Railroad Com'rs v. Missouri Pac. R. Co. [Kan.] 80 P. 53.

39. See 2 Curr. L. 1396.

40. Cincinnati, etc., R. Co. v. Wachter, 70 Ohio St. 113, 70 N. E. 974.

41. Zook v. Illinois Cent. R. Co., 25 Ky. L. R. 2194, 80 S. W. 211.

42. Mandamus will lie to compel such crossing without first petitioning the railway commissioners [Code, § 2022]. Swinney v. Chicago, etc., R. Co., 123 Iowa, 219, 98 N. W. 635.

43. That the adjoining owner does not require such fastenings does not relieve the company of its statutory duty. Bumpas v. Wabash R. Co., 103 Mo. App. 202, 77 S. W. 115.

44. Cincinnati, etc., R. Co. v. Wachter, 70 Ohio St. 113, 70 N. E. 974.

45. Undergrade crossing held required in instant case [Rev. St. 1898, § 1810]. State v. Wisconsin Cent. R. Co. [Wis.] 102 N. W. 16.

46. Gulnn v. Iowa & St. L. R. Co. [Iowa] 101 N. W. 94.

47. State v. Wisconsin Cent. R. Co. [Wis.] 102 N. W. 16.

Public crossings.[48]—By statute railroad companies may be compelled to construct and keep in good and safe condition all highway crossings,[49] and this duty is the same whether the highway was established before or after the railroad was built;[50] such laws are constitutional though enacted after construction of the road.[51] The duty to erect a crossing necessarily implies the duty to maintain it,[52] with its approaches,[53] and the duty extends to foot passengers as well as vehicles.[54] In the manner of crossing the companies must keep pace with the times, with the increase in travel, change of methods and improvements of highways.[55] Railroad companies are liable for all damages arising from failure to comply with statutes requiring them to restore streets to their original condition.[56] A railroad company may be liable to one injured in crossing a track on an insufficient public crossing,[57] but failure to exercise ordinary care in driving over a known defective crossing may constitute such contributory negligence as to bar a recovery.[58] No liability arises from the injury by being jolted from his wagon of one who attempts to cross a railway at a place where there is neither a public or private crossing.[59] In an action for injuries from a descending crossing gate, the question of contributory negligence should be confined to the care exercised at and after the gate arm began to descend.[60]

Damages from negligent construction.[61]—A company is liable where it cuts and leaves timber on its right of way in such a manner as to constitute a menace to adjoining land in case of inundation reasonably to be expected.[62] A railway company cannot under its general powers to erect necessary buildings erect stock pens on its right of way in a town that would be a nuisance,[63] nor can it establish switchyards in a residence neighborhood without liability to adjoining owners for the discomfort and depreciation of property occasioned thereby.[64] For illegally

48. See 2 Curr. L. 1397.

49. Company not entitled to damages. Lake Erie & W. R. Co. v. Shelley [Ind.] 71 N. E. 151. Relates to bridge approaches (Southern Ind. R. Co. v. McCarrell [Ind.] 71 N. E. 156), but does not require company to construct or maintain public highways of the county other than where interfered with by the construction of the roadbeds and to perform the grading required for a convenient approach to such crossing (Id.). Statutes may require railway companies establishing crossings to restore the highway to its former or as good condition [Burns' Rev. St. 1901, § 5153]. Chicago, etc., R. Co. v. Leachman, 161 Ind. 512, 69 N. E. 253. Must restore highway to its full width—narrow strip insufficient. Evansville & I. R. Co. v. Allen [Ind. App.] 73 N. E. 630. Provision as to notice of defective crossing by municipal officials does not affect the company's liability. See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106. Where a defect in a crossing was the result of ordinary use and wear, and was plainly visible, an instruction that the company had notice thereof is not erroneous. Hughes v. Chicago, etc., R. Co. [Wis.] 99 N. W. 897. May be required to keep crossings in such condition that the highway may be safely and conveniently used by the traveling public generally [Code 1892, § 3555]. Gulf & C. R. Co. v. Sneed [Miss.] 36 So. 261.

50, 51. Lake Erie & W. R. Co. v. Shelley [Ind.] 71 N. E. 151.

52, 53. See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106.

54. Hughes v. Chicago, etc., R. Co. [Wis.] 99 N. W. 897.

55. Southern Ind. R. Co. v. McCarrell [Ind.] 71 N. E. 156.

56. International, etc., R. Co. v. Haddox [Tex. Civ. App.] 81 S. W. 1036; Chicago, etc., R. Co. v. Leachman, 161 Ind. 512, 69 N. E. 253; International, etc., R. Co. v. Butcher [Tex. Civ. App.] 81 S. W. 819. One knowing of a defective crossing but having reasonable grounds for believing that it may be safely crossed by the exercise of ordinary care and not believing as a reasonably prudent person that it was imprudent to undertake its passage, was under no obligation to take another road. See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106.

57. St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 85 S. W. 476. Other defects than those alleged cannot be shown. Lowenstein v. Missouri Pac. R. Co. [Mo. App.] 85 S. W. 625. That other cause of injury concurred is immaterial. Evansville & I. R. Co. v. Allen [Ind. App.] 73 N. E. 630.

58. Teamster standing up on loose dump boards of his wagon. Reynolds v. Missouri, etc., R. Co. [Kan.] 78 P. 801.

59. Sanders v. Texas Mexican R. Co. [Tex. Civ. App.] 83 S. W. 871.

60. Sager v. Atchison, etc., R. Co. [Kan.] 79 P. 132.

61. See 2 Curr. L. 1398.

62. Illinois Cent. R. Co. v. Moore, 26 Ky. L. R. 859, 82 S. W. 624.

63. Missouri, etc., R. Co. v. Mott [Tex.] 81 S. W. 285.

64. Missouri, etc., R. Co. v. Anderson [Tex. Civ. App.] 81 S. W. 781; Louisville & N. Terminal Co. v. Lellyett [Tenn.] 85 S. W. 881.

maintaining a ditch along its track in a public street, in which water stagnates and which cuts off access to abutting property, the landowner may have damages against a railroad company.[65]

Establishment of crossings.[66]—Statutes and ordinances may prescribe the manner in which crossings shall be made and provide for penalties and damages for failure to comply.[67] Where a right of way for a highway is condemned across a railroad company's right of way, it is entitled to damages for direct expenses but not to compensation for the observance of public regulations requiring the opening of crossings when obstructed by trains.[68] Before the passage of the New York grade crossing law, the manner of crossing rested primarily with the railroad companies;[69] but thereafter the question was exclusively within the power of the railroad commission as to cases therein mentioned.[70] In New Jersey the regulation of conflicting easements at crossings is exclusively a chancery power;[71] but a crossing agreement between a railroad company and a traction company is not void because made without the sanction of the chancellor.[72] The courts may at the instance of a railroad company compel municipal authorities to comply with the statutes relative to the establishment of grade crossings.[73]

Abolition and prevention of grade crossings.[74]—Statutes requiring railroad companies to bridge streets, being referable to the police power, apply to roads and crossings built before their enactment.[75] Many states require that all crossings constructed after the enactment of the statute shall be above or below grade unless permission for a crossing at grade be secured,[76] but in the absence of a statute providing otherwise, a company chartered to construct a line between ascertained termini may, by implication, cross at grade all streets on highways intervening,[77] and if a crossing at grade is authorized by law, its construction cannot be enjoined as a nuisance.[78]

A municipality has the right in the exercise of its police power to require a railroad company to elevate its tracks so as to avoid grade crossings over public streets.[79] Under general powers over railroad crossings, a city may compel railways to reduce their crossings to the level of the streets at their own expense.[80] Authority to prescribe the manner in which crossings shall be abolished implies the right to take additional land.[81] Upon the taking of land for the abolition of grade crossings, a full compliance with the statute is requisite to the changing of title.[82] An ordinance on the bridging of streets by railroads need not contain

65. Cane Belt R. Co. v. Ridgeway [Tex. Civ. App.] 85 S. W. 496.

66. See 2 Curr. L. 1398.

67. Hughes v. Arkansas & O. R. Co. [Ark.] 85 S. W. 773.

68. Village of Plymouth v. Pere Marquette R. Co. [Mich.] 102 N. W. 947.

69, 70. People v. Delaware & H. Co., 81 App. Div. 335, 81 N. Y. S. 478.

71. Board of Chosen Freeholders of Hudson County v. Central R. Co. [N. J. Eq.] 59 A. 303.

72. P. L. 1895, p. 462. Raritan River R. Co. v. Middlesex & S. Traction Co., 70 N. J. Law, 732, 58 A. 332.

73. Act June 7, 1901. Pennsylvania R. Co. v. Bogert, 209 Pa. 589, 59 A. 100.

74. See 2 Curr. L. 1398.

75. City of Harriman v. Southern R. Co. [Tenn.] 82 S. W. 213.

76. P. L. 1903, p. 659. Board of Chosen Freeholders of Hudson County v. Central R. Co. [N. J. Eq.] 59 A. 303.

77, 78. Board of Chosen Freeholders of Hudson County v. Central R. Co. [N. J. Eq.] 59 A. 303.

79. Osburn v. Chicago, 105 Ill. App. 217.

80. The exercise of such power is under the police power and is not the exercise of a taxing power, nor of the power of eminent domain. Houston & T. C. R. Co. v. Dallas [Tex.] 84 S. W. 648. It is no objection to such an ordinance that it would also require the reduction of the railroad grade between crossings. Id. On application for mandamus to compel such action, an answer showing the impracticability of complying is not demurrable. Id.

81. St. 1896, p. 268, held constitutional. Lancy v. Boston [Mass.] 71 N. E. 302.

82. St. 1900, p. 471, c. 472, construed. Providence, F. R. & N. Steamboat Co. v. Fall River [Mass.] 72 N. E. 338.

the details for construction.[83] Municipal plans and specifications for a required separation of grade crossings must be reasonable and practicable.[84]

Under the New York grade crossing law, the railroad commissioners have exclusive authority in enumerated cases of determining the manner of crossing,[85] and the time when the work shall be prosecuted;[86] but they have no authority to determine whether a town shall be liable to an abutter for damages from a change of street grade.[87] For violation by a railroad commission of its contract relative to a grade crossing, a railroad company has an adequate remedy at law by contesting the tax levied thereunder.[88] In Massachusetts commissioners may apportion the expense in changes of crossings,[89] and in Connecticut the assessment of benefits to a railroad company upon a change of grade crossing is within their jurisdiction.[90] A contract between the Buffalo grade crossing commissioners and the railroad company for the abolition of certain grade crossings and the postponement of action on others must be complied with by the commissioners before proceeding with the postponed construction.[91]

A contract for the permanent maintenance of specified grade crossings is subject to the railroad company's duty to the public.[92]

Damages for change of grade.—In order that an abutting owner may recover damages for a change in grade it is not necessary that his property abut on a portion of the street which is changed.[93] He cannot recover on the sole ground that his use of the street is made less convenient and easy.[94] Recovery may be had where access to property is shut off for several months while making a change in grade.[95] Recovery may be had for a direct and physical injury of private property by the lowering of a street grade for a subway,[96] but depreciation of rental and market values from the diversion of customers cannot be recovered.[97] A railroad company changing its grade and that of a public street without proper authority by municipal ordinance is liable as a trespasser for the damages resulting to adjacent property.[98]

Crossings with other railroads, street railroads and canals.[99]—The crossing of the right of way of one company by the track of another amounts to an easement.[1] It may be done according to such plans as the statutes permit.[2] A stat-

83. Ordinance not void for uncertainty. Burlington, etc., R. Co. v. People [Colo. App.] 77 P. 1026.

84. Burlington, etc., R. Co. v. People [Colo. App.] 77 P. 1026.

85. Laws 1897, c. 754. People v. Delaware & H. Co., 81 App. Div. 335, 81 N. Y. S. 478.

86. Their determination not subject to review unless fraud charged or they act beyond the purview of their authority. Erie R. Co. v. Buffalo, 96 App. Div. 458, 89 N. Y. S. 122.

87. Smith v. Boston & A. R. Co., 99 App. Div. 94, 91 N. Y. S. 412.

88. Equity will not enjoin the letting of the contract for the improvement. Erie R. Co. v. Buffalo, 96 App. Div. 458, 89 N. Y. S. 122.

89. In re City of Taunton, 185 Mass. 199, 70 N. E. 48.

90. A city has no authority to assess such benefits. Fair Haven & W. R. Co. v. New Haven [Conn.] 59 A. 737.

91. Erie R. Co. v. Buffalo [N. Y.] 73 N. E. 26. A stipulation regarding a temporary undercrossing held not to be a contract requiring its construction. People v. Delaware & H. Co., 81 App. Div. 335, 81 N. Y. S. 478.

92. Injunction forbidding removal of the crossings denied where the public and railroad authorities determined them to be dangerous. Swift v. Delaware, etc., R. Co. [N. J. Err. & App.] 58 A. 939.

93. Pub. St. c. 112, § 95. Putnam v. Boston & P. R. Corp., 182 Mass. 351, 65 N. E. 790.

94, 95. Putnam v. Boston & P. R. Corp., 182 Mass. 351, 65 N. E. 790.

96, 97. City of Chicago v. McShane, 102 Ill. App. 239.

98. United New Jersey R. & Canal Co. v. Lewis [N. J. Eq.] 59 A. 227.

99. See 2 Curr. L. 1400.

1. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

2. In West Virginia grade crossings are neither prohibited nor discriminated against. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746. Under Ohio statutes steam railways and electric railways are not in the same class, and statutes regulating and relating to one are not applicable to the other. Dayton & Union R. Co. v. Dayton & M. T. Co., 4 Ohio C. C. (N. S.) 329.

ute relative to crossings of railroads is not a police regulation in that it requires an interlock if the companies elect not to stop all trains at the crossing.[3] One railroad company asking for a crossing over the tracks of another may be required to pay the cost of installation of an interlocker.[4] Whether a crossing is necessary and practicable is a matter of almost pure fact dependent upon the evidence.[5] By various statutes the courts are empowered to determine the place and manner of the crossing of two railroads if the parties thereto cannot agree.[6] Where the court decrees a crossing substantially different from the one demanded before the institution of suit, a decree for costs against the plaintiff is proper.[7] An injunction restraining one railroad company from crossing the tracks of another in a street incidental to laying its tracks along the street under a void ordinance is not a deprivation of the constitutional right to condemn a crossing.[8] Appeal does not lie to a judgment of the common pleas dismissing the application by a railroad company to define the manner in which another company may cross its tracks.[9]

A railroad company may on proper showing be authorized to construct bridges over a canal in the custody of an officer of the court.[10]

Duty to make transfer connections.[11]

Cattle guards.[12]—The statutes requiring cattle guards are sustained under the police power of the state and for that reason cannot be objected to as depriving the companies of their property without due process of law.[13] The owner may recover for injuries to stock caused by attempting to cross defective cattle guards.[14] That the company acquired its right of way through plaintiff's land by warranty deed does not relieve it of its duty to maintain cattle guards.[15]

Fences.[16]—Statutes may require a railroad company to construct and maintain stock proof fences,[17] and authorize the abutting landowner to construct such a fence at the company's expense if it is negligent therein.[18] Double damages are given in some states for damages resulting from failure to fence.[19] Where de-

3. Company electing an interlock cannot attack constitutionality of interlock section. Minneapolis, etc., R. Co. v. Gowrie & N. W. R. Co., 123 Iowa, 543, 99 N. W. 181.

4. Code, § 2063. Cost of maintenance may be pro-rated by the court [Code, § 2065]. Minneapolis, etc., R. Co. v. Gowrie & N. W. R. Co., 123 Iowa, 543, 99 N. W. 181.

5. Wellsburg, etc., R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

6. Crossing may be decreed other than that petitioned for [Code 1899, c. 52, § 11]. Wellsburg, etc., R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

7. Wellsburg, etc., R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

8. Mobile, etc., R. Co. v. Louisville & N. R. Co. [Ala.] 37 So. 849.

9. This is not a civil action. It is provided by statute that the order from which an appeal is sought must be made in a civil action in which the court has original jurisdiction. Dayton & U. R. Co. v. Dayton & M. T. Co., 4 Ohio C. C. (N. S.) 329.

10. Chesapeake & O. Canal Co. v. Western Md. R. Co. [Md.] 58 A. 34.

11, 12. See 2 Curr. L. 1401.

13. Yazoo, etc., R. Co. v. Harrington [Miss.] 37 So. 1016.

14. Saine v. Missouri, etc., R. Co. [Tex. Civ. App.] 85 S. W. 487.

15. Missouri, etc., R. Co. v. Wetz [Tex.] 80 S. W. 988.

16. See 2 Curr. L. 1402.

17. Burns' Ann. St. 1901, § 5323. Chicago, etc., R. Co. v. Croy, 33 Ind. App. 461, 71 N. E. 671. To be maintained in a manner sufficient to answer the purpose for which it was constructed. Terre Haute & L. R. Co. v. Erdell [Ind.] 71 N. E. 960.

18. Statutory notice before constructing fence [Burns' Ann. St. 1901, § 5323]. Chicago, I. & L. R. Co. v. Croy, 33 Ind. App. 461, 71 N. E. 671. Failure of landowner to repair for two years after giving notice works no injury to defendant and does not affect right to compensation. Terre Haute & L. R. Co. v. Earhart [Ind.] 73 N. E. 711. Where all of the materials in the fence were unfit for further use, a new fence may be built and the cost thereof recovered. Terre Haute & L. R. Co. v. Erdell [Ind.] 71 N. E. 960; Terre Haute & L. R. Co. v. Salmon [Ind. App.] 73 N. E. 268.

19. Tenant of a portion of the field not adjoining the track may recover. Brannock v. St. Louis, etc., R. Co., 106 Mo. App. 379, 80 S. W. 699; Phillips v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 926. In an action for double damages to crops for failure to erect and maintain fences and cattle guards, the defense of insufficient time after construction of the road to fence must be pleaded and proved by defendant. Wilkerson v. St. Louis, etc., R. Co., 106 Mo. App. 336, 80 S. W. 308.

fendant has provided fences and gates, one seeking to recover damages to crops from stock entering through a gate provided by himself and used by the public generally must prove that entry was through the negligence of the company.[20]

Drainage and disposal of surface water.[21]—A railroad company is liable for damages to persons and property resulting from its failure to erect and maintain sufficient culverts and sluices through its embankments to carry off natural surface water.[22] One is not barred from an action for damages from surface water by reason of the fact that his acquirement of the property was after the construction of the railroad.[23]

Obstruction of watercourses.[24]—At common law a railroad crossing a watercourse must be so constructed as not to interfere with the public use of the watercourse,[25] though the flow be increased by artificial means.[26] In an action for damages from the maintenance of an embankment on a river, the fact that plaintiff acquired title after its construction is no defense.[27]

Miscellaneous matters.[28]—Depreciation of property from operation of a railroad without negligence is damnum absque injuria, and gives rise to no cause of action.[29] Damages are not recoverable for the elevation of its tracks by a railway company on its own right of way,[30] and a railroad company having a right to elevate its track without liability to adjoining owners, the city cannot be made liable for requiring such elevation for the public safety.[31] Adjoining landowners can recover for injuries resulting from growths of noxious weeds negligently permitted, and where the statutes so provide may recover without showing negligence.[32] An agreement to build a siding to a warehouse if the owner will remove it to a more convenient site and remodel it is founded on sufficient consideration, though the owner did not promise to remove the building.[33]

Construction contracts.[34]

§ 8. *Sales, leases, contracts and consolidation. Lease or joint use of privileges.*[35]—Where a railroad company has built a switch over private lands, it owes no duty in respect thereto to the public and may sell it to the landowner on such terms as it sees fit.[36] A lease of all of a company's property to hold and enjoy all the rights,

20. Gulf, etc., R. Co. v. Tucker [Tex. Civ. App.] 85 S. W. 461.

21. See 2 Curr. L. 1402.

22. Denison, etc., R. Co. v. Barry [Tex. Civ. App.] 80 S. W. 634. The statutory duty of a railroad to put necessary culverts and sluices through its embankments extends also to the maintenance of them in proper condition. Id. Failure to construct culverts with the engineering knowledge and skill ordinarily applied in the erection of such works renders the company liable for resulting damage. Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378. A company is liable for damage resulting from the negligent construction of a culvert. Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968.

23. Richards v. Ohio River R. Co. [W. Va.] 49 S. E. 385.

24. See 2 Curr. L. 1403.

25. This is a continuing duty. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

26. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

27. Gulf, etc., R. Co. v. Moore [Tex. Civ. App.] 81 S. W. 569.

28. See 2 Curr. L. 1403.

29. Consequential damages, smoke, etc. Cincinnati Connecting Belt R. Co. v. Burski, 4 Ohio C. C. (N. S.) 98; Ross v. Cincinnati, etc., R. Co., 5 Ohio C. C. (N. S.) 565.

30. City of Chicago v. McShane, 102 Ill. App. 239.

31. Osburn v. Chicago, 105 Ill. App. 217.

32. Johnson grass. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 81 S. W. 74. Statute is constitutional. International, etc., R. Co. v. Shelton [Tex. Civ. App.] 81 S. W. 794; Missouri, etc., R. Co. v. May, 194 U. S. 267, 48 Law. Ed. 971.

33. Thomas v. South Haven & E. R. Co. [Mich.] 100 N. W. 1009.

34. See 2 Curr. L. 1404. Railroad company laying spur on another's land held under contract to be entitled to a conveyance of right of way only for the duration of the contract and not unlimited as to time and general railway purposes. Chicago, etc., R. Co. v. Wright Lumber Co. [Wis.] 100 N. W. 1034.

35. See 2 Curr. L. 1404.

36. Persons who have no property rights in a private switch over another's land cannot compel the latter to permit the railroad to receive and ship their freight over the switch to the railroad's own track. Bedford-Bowling Green Stone Co. v. Oman, 134 F. 441.

powers and franchises includes all the powers and franchises the lessor held.[37] A railroad company cannot divest itself of its franchises and exempt itself from liability by lease to a foreign corporation.[38] Recovery of rent cannot be had upon a lease void as against public policy.[39]

Consolidation.[40]—Consolidation cannot take place unless the power to so consolidate is expressly conferred upon both consolidating corporations.[41] Unanimous consent of the stockholders is in general necessary,[42] and statutes authorizing consolidation upon the consent of a majority is in effect an exercise of the power of eminent domain.[43] Consolidations defeating competition are frequently prohibited,[44] but the consolidation of companies doing a terminal business only is not within the constitutional prohibition against the consolidation of competing and parallel lines.[45] The purchase of a railroad may be shown by oral testimony, and the court will take notice of a statute authorizing a consolidation.[46] Where extensive interests are involved, laches may bar an action for dissolution of a consolidation.[47] The state, stockholders and parties alone can attack the contract of a railroad corporation as ultra vires or in restraint of trade; bondholders cannot.[48]

Duties and liabilities after sale or lease.[49]—A statute providing that the purchaser of a railroad shall take the same subject to all the vendor's debts does not apply to foreclosure sales and in such case the purchaser takes the property discharged of all liabilities except prior liens.[50] Neither a mortgagee nor a purchaser at foreclosure sale acquires title free from the use imposed under reservation in the charter.[51] A purchase on foreclosure, subject to all outstanding contracts incurred by the receiver, binds the purchaser to accept valid outstanding tickets.[52] A covenant by a lessee to "pay all taxes now or hereafter imposed by law upon the property demised and the earnings from or business thereof" does not cover the shares of capital stock of the lessor, or the property or franchises upon which the valuation of such shares was made after the lease for purposes of taxation.[53] In general the lessor and lessee of a railway track are jointly and severally liable to the public for a negligent operation on that track,[54] and a company may be liable for injuries resulting from defects in its track sustained by the servant of another company using the road.[55] A railroad company is not relieved from liability for an accident from negligent operation of an engine on its

37. City of Canton v. Canton Cotton Warehouse Co. [Miss.] 36 So. 266.

38. Brooker v. Maysville, etc., R. Co., 26 Ky. L. R. 1022, 83 S. W. 117.

39. Cox v. Terre Haute, etc., R. Co. [C. C. A.] 133 F. 371.

40. See 2 Curr. L. 1405.

41. Seaboard Air Line R. Co. and Raleigh & Gaston R. Co. held to have authority to consolidate. Spencer v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 96.

42, 43. Spencer v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 96.

44. The completion by one company of a railroad formerly owned by another does not lessen or defeat competition but creates it where none before existed. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

45. Mo. Const. art. 12, § 17. State v. Terminal Ass'n of St. Louis, 182 Mo. 284, 81 S. W. 395.

46. International & G. N. R. Co. v. Hall [Tex. Civ. App.] 81 S. W. 82.

47. Spencer v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 96.

48. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

49. See 2 Curr. L. 1405.

50. Kansas City Southern R. Co. v. King [Ark.] 85 S. W. 1131.

51. Union Pac. R. Co. v. Mason City, etc., R. Co. [C. C. A.] 128 F. 230.

52. Erie R. Co. v. Littell [C. C. A.] 128 F. 546.

53. Erie & P. R. Co. v. Pennsylvania R. Co., 208 Pa. 506, 57 A. 980.

54. Held to apply to an employe of the lessee for negligence of the lessee. Chicago, etc., R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654. A statute making the lessor company liable for the acts of the lessee as though it operated the road itself extends to injuries to servants. Markey v. Louisiana, etc., R. Co. [Mo.] 84 S. W. 61. In Missouri a domestic corporation which has leased its road to a foreign corporation is liable for injuries inflicted by the lessee in the operation of the road. Keller v. Kansas City, etc., R. Co., 135 F. 202.

55. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 80 S. W. 1038.

road, though the engine is owned and operated by another company that it has allowed to use the road.[56] The lessee may assert rights as a bondholder of the leased road.[57]

Contracts for use of bridges.[58]

§ 9. *Indebtedness, insolvency, liens and securities. Mechanics' and materialmen's liens.*[59]—The Washington statute allowing a lien to materialmen and those furnishing "provisions" has been held unconstitutional as embracing more than one subject.[60] Explosives used in blasting are materials entitling the furnisher to a lien,[61] but coal furnished for use of a steam shovel used by a contractor is not.[62] The keeper of the contractor's commissary is not entitled to a lien,[63] and a subcontractor is not entitled to a lien in Texas for that portion of the work he contracts to others.[64] The lien cannot be obtained on a portion of the road, but must cover all;[65] and a person furnishing ties in another state which were used outside Missouri cannot have a lien on the property in Missouri.[66] Matters of procedure are discussed in the note.[67]

Bonds and mortgages.[68]—A clear case must be made out by stockholders to restrain the issue of bonds or securities.[69] Mortgages by railroad companies of after-acquired property have been universally sustained.[70] In general a trustee is not entitled to the rents and profits of mortgaged property until he takes possession or possession is refused.[71] The legality of a change of trustee, in apparent conformity with a mortgage, cannot be attacked collaterally.[72]

56. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 80 S. W. 112.

57. A trustee, in a suit for the benefit of all bondholders, sued a railway company for breach of contract for failure to keep in repair the roadbed of a leased road. The company was a bondholder but did not allege its ownership in the suit, but instead denied breach of the contract, and paid the judgment in full. Held, it was not precluded from claiming its pro rata share of the judgment as a bondholder. First Nat. Bank v. Louisville & N. R. Co., 25 Ky. L. R. 2051, 79 S. W. 280.

58. See 2 Curr. L. 1406.

59. See 2 Curr. L. 1407.

60. Laws 1893, p. 32, c. 24, § 1. Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 P. 1106.

61. Hercules Powder Co. v. Knoxville, etc., R. Co. [Tenn.] 83 S. W. 354.

62. Cincinnati, etc., R. Co. v. Shera [Ind. App.] 73 N. E. 293.

63. St. Louis, etc., R. Co. v. Rogers [Ark.] 79 S. W. 794.

64. He may recover for that portion of the work he does with his own laborers and teams. Eastern Tex. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 883.

65, 66. Bagnell Timber Co. v. Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130.

67. In Tennessee a principal contractor may enforce a lien against a railroad either in the circuit or chancery court [Acts 1883, p. 296, c. 220, as amended by Acts 1891, p. 215, c. 98]. Noll v. Cumberland Plateau R. Co. [Tenn.] 79 S. W. 380. Where a railroad subcontractor, in a suit to enforce a lien, was permitted on trial without objection to amend his bill and introduce evidence thereunder to prove an amount due greater than that claimed in the notice filed, defendant could not object to such proceeding on appeal. Id. Notice given within the statutory limit after the last entry on a running account is good as to the whole account (Hercules Powder Co. v. Knoxville, etc., R. Co. [Tenn.] 83 S. W. 354), and refusal to deliver the last shipment because of insolvency of the purchaser does not affect the seller's right to a lien for what he has furnished (Id.). In an action by a laborer to enforce a lien for labor furnished a contractor, the contractor is a necessary party. Substituted service on nonresident held insufficient. Eastern Tex. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 883. In a proper case a plaintiff failing to establish his lien may have a general judgment against the company. Personal judgment reversed for faulty instruction including liability on lien. Bagnell Timber Co. v. Missouri, etc., R. Co., 180 Mo. 420, 79 S. W. 1130. In South Dakota it is proper that the decree include the "right of way" and "all franchises and privileges incident to defendants' ownership and the ownership of the right of way." Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722.

68. See 2 Curr. L. 1407.

69. The issue of securities will not be restrained at the instance of stockholders in a profitable road, though thereby they claim that the deficit of another road will take up profits, if necessarily the purchasers of such securities must take with notice of and subject to all equities. Kissel v. Chicago, etc., R. Co., 44 Misc. 156, 89 N. Y. S. 796.

70. Such a mortgage held to include an after-acquired city lot adjacent to the company's main line and adapted to use in its business. Pere Marquette R. Co. v. Graham [Mich.] 99 N. W. 408.

71. Cox v. Terre Haute & I. R. Co. [C. C. A.] 133 F. 371.

72. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 132 F. 921.

Property covered by mortgages.[73]—Leased lines operated in connection with the main road are within a mortgage clause on after-acquired property "connected with" the railroad.[74]

Priorities.[75]—A promise by a railroad company to pay a claim in a certain way out of a fund which never came into existence does not create a lien upon the property entitled to priority over a subsequent mortgage.[76]

Priorities between mortgages and operating expenses.[77]—Statutes requiring receivers to pay employes out of the first receipts and earnings do not give such claimants priority over mortgagees.[78] As against a mortgagee of net earnings, such expenses as rents, taxes and betterments are chargeable to capital rather than to operating expenses.[79] Tort liabilities antedating a receiver's custody are not prior to a mortgage.[80]

Foreclosure of mortgages.[81]—A suit by trustees being not in the name of the bondholders, the suit does not abate by a bondholder's death,[82] nor need the title to particular bonds be proved before decree.[83] Intervening bondholders take the case as they find it and their right to raise objections is limited accordingly.[84] A court will be slow to interfere with a trustee in foreclosing a mortgage in the apparently lawful discharge of its duty.[85] A Federal court will refuse jurisdiction of suit by a car trustee when a pending state court receivership can afford full relief.[86] A suit in a different jurisdiction to restrain brokers from transferring the stock of a principal road until event of a foreclosure suit against a subsidiary road or until deposit of a guaranty fund to protect the mortgagee bondholders is not ancillary or supplemental to the foreclosure suit.[87] Laches, changes in value, and the accruing of rights of innocent third parties, will bar an impeachment of foreclosure proceedings.[88] Where bondholders also bore a stock liability, a set-off may be allowed and the equities adjusted.[89]

73. See 2 Curr. L. 1407.

74. Lien also embraced capital stock of another corporation, and a branch line but not a hotel. Guaranty Trust Co. v. Atlantic Coast Elec. R. Co., 132 F. 68.

75. See 2 Curr. L. 1407.

76. Roberts v. Central Trust Co. [C. C. A.] 128 F. 882.

77. See 2 Curr. L. 1408.

78. B. & C. Comp. § 1083. Security Sav. & Trust Co. v. Goble, etc., R. Co., 44 Or. 370, 75 P. 697.

79. Losses of some years cannot be set off as against profits of prior years. Schmidt v. Louisville, etc., R. Co. [Ky.] 84 S. W. 314.

80. A judgment obtained against a railroad company, after its property was placed in the hands of a receiver in a suit to foreclose a mortgage, for a tort committed prior to receivership, is not entitled to priority of payment over the mortgage debt. Hampton v. Norfolk & W. R. Co. [C. C. A.] 127 F. 662. Nor is this priority given by North Carolina statute. Id.

81. See 2 Curr. L. 1408.

82. Where bondholders are represented by trustees under a mortgage, a suit in which such bondholders intervene does not abate by the death of one of them, nor is it necessary to have the deceased bondholder's representative made a party. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

83. Where trustees under a mortgage represent the bondholders, it is unnecessary for the bonds to be proved before final decree of foreclosure. Any question of ownership may be determined by reference to a master under order of the court. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

84. In a suit to foreclose a mortgage securing bonds, an intervening bondholder could not object to a stockholder dismissing its exceptions to an auditor's findings, nor use the exception as a basis for an original assignment of error on appeal. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885.

85. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 132 F. 921.

86. Security Trust Co. v. Union Trust Co., 134 F. 301.

87. Raphael v. Trask, 194 U. S. 272, 48 Law. Ed. 973.

88. Raphael v. Rio Grande W. R. Co. [C. C. A.] 132 F. 12.

89. Where, in a suit to foreclose a mortgage securing bonds, a contract is construed as a sale of bonds at 90 with stock as a bonus, the purchaser thereby becomes liable as for unpaid subscriptions, but liability therefor would be barred in six years, under Civ. Code 1895, § 2891, as would also any claim for forfeiture for excessive interest. Weed v. Gainesville, etc., R. Co., 119 Ga. 576, 46 S. E. 885. Intervening bondholders in such a suit have no cause to complain of the allowance of a set-off to such purchasers for cash advanced, since they must be paid, having a first lien, before such set-off can be satisfied. Id. In a suit to foreclose a mortgage securing bonds, the fact that some bonds were endorsed and others not did not

Sale and proceeds.[90]—The sale of terminal tracks by a railroad company does not violate the public obligations of such company.[91] A purchaser on mortgage foreclosure takes the rights previously acquired by adverse possession.[92] A holder of bonds guaranteed by a mortgagor company must exhaust his legal remedies against the guarantor before he may in equity pursue the mortgagor's property in the hands of one who bought it on foreclosure.[93] He cannot join with such a suit one to compel a depositary to surrender the bonds to him.[94] Moneys realized from a sale of personalty covered by a mortgage is applicable to the payment of the mortgage indebtedness the same as proceeds of the sale of real estate.[95]

Receivership.[96]—Receivers are allowed a reasonable time to determine and elect whether they will assume executory contracts, such as leases.[97] A general agent of receivers of a railroad company ordered to continue its business has the same authority to make contracts of carriage that he would have if he were acting for the company.[98] Earnings during receivership are not subject to an equitable lien for the misappropriation of moneys prior thereto.[99] A judgment obtained against a corporation, after its property has been placed in the hands of receivers in a suit to foreclose a mortgage thereon, for a tort committed prior to the appointment of the receivers, is not entitled to priority of payment over the mortgage from the earnings of the receivership.[1] A claim for ties furnished within six months before the receiver was appointed is not entitled to priority over a previous mortgage, though the receiver used them,[2] and a claim for equipping cars with air brakes required by act of congress is not entitled to preference over any other claim for necessary equipment or supplies.[3] A railroad in the hands of a receiver is not liable for penalties prescribed against companies for failure of their servants to give signals at crossings,[4] but receivership is no defense where injury arises from

make the doctrine of two funds applicable, the endorsement not being a lien, nor equally accessible, nor even a liability of the common debtor, and the collateral not being the property of the common debtor. Id.

90. See 2 Curr. L. 1409.

91. Hence the motives for sale will not be examined into. Oman v. Bedford-Bowling Green Stone Co. [C. C. A.] 134 F. 64.

92. Barker v. Southern R. Co. [N. C.] 49 S. E. 115. Rights transferred by foreclosure sale, see, also, ante, § 8.

93, 94. Sawyer v. Atchison, etc., R. Co. [C. C. A.] 129 F. 100.

95. Security Sav. & Trust Co. v. Goble, etc., R. Co., 44 Or. 370, 75 P. 697.

96. See 2 Curr. L. 1409.

97. Johnson v. Lehigh Valley Traction Co., 130 F. 932.

98. Northern Pac. R. Co. v. American Trading Co., 25 S. Ct. 84.

99. Cox v. Terre Haute & I. R. Co. [C. C. A.] 133 F. 371.

1. Hampton v. Norfolk & W. R. Co. [C. C. A.] 127 F. 662. This rule is not altered by Code N. C. § 1255, giving judgments for torts priority where the mortgage was given by the lessor and the judgment was against the lessee, the latter's rights being extinguished by the appointment of the receivers and sale of the property for less than the mortgage debt. Id. Code N. C. § 1255, which gives judgments for torts priority over mortgages, does not apply to a judgment against a lessee of a railroad so as to render it a lien superior to a mortgage given by the lessor prior to the lease. Id. Property purchased at a sale under a decree foreclosing a mortgage on all a railway company's property and franchises is not rendered liable to sale for satisfaction of a judgment recovered for a tort committed by the mortgagor, by reason of North Carolina Code, making liens for torts superior to mortgages of incorporated companies. Julian v. Central Trust Co., 193 U. S. 93, 48 Law. Ed. 629. Corporate property of a North Carolina railway company, covered by an authorized mortgage, does not continue liable for the debts of such company accruing after the sale in foreclosure proceedings because of failure of the purchasing company to exercise the privilege conferred by statute of organizing a domestic corporation to operate the purchased property. Id. A determination by a state court that property of a railroad company covered by a mortgage remains liable, after sale under foreclosure at the decree of a Federal court, for debts thereafter accruing against the mortgagor, is not conclusive on the Federal supreme court in determining the rights of the purchaser under such sale. Id. Judgments for injuries to third persons not employes are not to be classed as operating expenses, and hence not entitled to priority of payment over mortgages. Property of corporation was placed in the hands of receivers subsequent to the date of the injuries. Atlantic Trust Co. v. Dana [C. C. A.] 128 F. 209.

2. Gregg v. Metropolitan Trust Co., 25 S. Ct. 415.

3. State Trust Co. v. Kansas City, etc., R. Co., 129 F. 455.

4. Arkansas Cent. R. Co. v. State [Ark.] 79 S. W. 773.

neglect of duties, the performance of which would in no way have interfered with the receivership.[5]

§ 10. *Operation of railroad. A. Duty to operate, statutory and municipal regulations, and care required in moving trains in general.*[6]—A railroad company is entitled to the uninterrupted and exclusive possession and occupancy of its tracks and all its right of way necessary for conducting its business, except where built on public highways or over public crossings.[7] The right of a railroad company to operate its trains is subject to the restrictions imposed by law and reasonable prudence,[8] and violations of ordinances regulating the movement of locomotives and cars, proximately resulting in injury may constitute negligence per se.[9] At places where it is expected that persons will be rightfully found on a railroad track, ordinary care under the circumstances must be exercised to keep a lookout for them.[10] A company backing an engine toward a passenger depot may be required to send a servant in advance to give warning;[11] but the taking of that precaution will not relieve it of liability for the negligence of its servants managing the train.[12] A railway company is not liable for damage resulting from the operation of a car or locomotive on its tracks by a mere trespasser.[13] An ordinance forbidding the escape of any cinders, smoke, etc., from the burning of soft coal or any other substance, is unreasonable and void.[14]

Keeping stations open.[15]

Operation on Sunday[16] is sometimes made penal.[17]

Equipment of cars[18] engaged in interstate commerce has been the subject of congressional legislation. Only roads engaged in interstate commerce are within the act,[19] but a car laden in one state and destined for another is within the act as to the initial carrier who does not take it out of the state.[20] The act applies to the function of coupling as well as that of uncoupling,[21] and where a car cannot be successfully coupled by impact or uncoupled without men going between the ends of the cars, the car is unsafe and should not be used.[22] That proper appliances were originally provided and reasonable care exercised in inspecting is no defense.[23] Where the inspectors found nine defective cars in one train, it cannot be said the company used reasonable care and diligence to discover and remedy the defects.[24]

Speed regulations.[25]—A railroad company may be a "person" within a statute

5. Arkansas Cent. R. Co. v. State [Ark.] 79 S. W. 772.

6. See 2 Curr. L. 1410.

7. Atchison, etc., R. Co. v. Spaulding [Kan.] 77 P. 106. It is not only the right but the duty of a railroad company to keep its tracks clear. May enjoin use of railway tricycle. Id.

8. Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183.

9. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218; Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250. A belt line railroad may be within the Indiana statute requiring switch lights, etc. [Burns' Ann. St. 1901, § 5173a]. Toledo, etc., R. Co. v. Bond [Ind. App.] 72 N. E. 647. Failure to ring bell within city limits as required by ordinance. Galveston, etc., R. Co. v. Levy [Tex. Civ. App.] 79 S. W. 879.

10. San Antonio & A. P. R. Co. v. Brock [Tex. Civ. App.] 80 S. W. 422.

11. Code 1892, § 3549, construed. Yazoo, etc., R. Co. v. Metcalf [Miss.] 36 So. 259.

12. Galveston, etc., R. Co. v. Levy [Tex. Civ. App.] 79 S. W. 879.

13. Burns' Ann. St. 1901, § 5313. Cleveland, etc., R. Co. v. Wasson, 33 Ind. App. 316, 70 N. E. 821.

14. Jersey City v. Abercrombie [N. J. Law] 58 A. 73.

15, 16. See 2 Curr. L. 1411.

17. Seale v. State, 121 Ga. 741, 49 S. E. 740.

18. See 2 Curr. L. 1411.

19. United States v. Geddes [C. C. A.] 131 F. 452.

20. United States v. Southern R. Co., 135 F. 122.

21. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

22. United States v. Southern R. Co., 135 F. 122.

23. "M. C. B. defect card" on car is immaterial. United States v. Southern R. Co., 135 F. 122.

24. United States v. Southern R. Co., 135 F. 122.

25. See 2 Curr. L. 1411.

regulating the speed of locomotives or cars.[26] In the absence of regulations the excessiveness of speed is a question of fact.[27]

Precautions at highway crossings.[28]—Municipal ordinances may require railroad companies to maintain at crossing lights equivalent to and operated under rules similar to those governing the municipal street lights,[29] and an agreement whereby a city contracts to keep in repair a certain street crossing does not relieve a railroad company from its statutory duty in regard thereto.[30] A higher degree of care is required of a railroad company in running its trains over crossings where the view is obstructed or where the surroundings make it unusually difficult to see the train or observe the signals.[31] Ordinances and statutes requiring signals at crossings may be relied on by others than those at legally established crossings.[32] Failure to signal may be indictable.[33]

Obstruction of crossings.[34]—Statutes prohibiting railroad company from obstructing a highway crossing for more than five minutes does not forbid an engine from standing that length of time within the highway if it does not obstruct the crossing.[35] An unreasonable obstruction of city streets by a train renders the owning company liable to one exercising due care, injured in attempting to go around the train.[36] The actual occupancy of a track by a railroad is, so long as it lasts, a revocation of any right the public may have to cross the track.[37]

Stops at railroad crossings.[38]—Statutes may require engineers and conductors to stop and "know the way is clear" before crossing the tracks of another railroad.[39]

Maintaining telegraph offices may be enforced by statute, but failure to comply with the statute cannot be the basis of recovery for a personal injury where a strict compliance would not have avoided the accident.[40]

(§ 10) *B. Injuries to licensees and trespassers. General rules.*[41]—A railroad company owes to all persons along its tracks, whether licensees or mere trespassers, the duty of refraining as to them from active misconduct, and wanton and willful injury.[42] It is not generally responsible for mere negligence toward trespassers,[43] but is not absolutely relieved from precautions against their injury.[44]

26. Southern R. Co. v. Jones, 33 Ind. App. 333, 71 N. E. 275.

27. It is not negligence for a company to run its trains at a speed of 50 or 60 miles an hour where there is no public crossing and where the company is not bound to anticipate persons or property on the track. Central of Georgia R. Co. v. Williams Buggy Co., 121 Ga. 293, 48 S. E. 939.

28. See 2 Curr. L. 1412.

29. It is no defense that the ordinance prevents the use of a certain automatic light. Chicago, etc., R. Co. v. Crawfordsville [Ind.] 72 N. E. 1025.

30. Butin v. New York, etc., R. Co., 90 N. Y. S. 909.

31. Missouri Pac. R. Co. v. Griffith [Kan.] 76 P. 436.

32. Galveston, etc., R. Co. v. Levy [Tex. Civ. App.] 79 S. W. 879.

33. Choctaw, etc., R. Co. v. State [Ark.] 85 S. W. 85.

34. See 2 Curr. L. 1412.

35. C. L. 1897, § 6234. Hirchman v. Pere Marquette R. Co. [Mich.] 99 N. W. 277. Municipal ordinance. Crowley v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1016.

36. Obstruction for 40 minutes. Central of Georgia R. Co. v. Owen, 121 Ga. 220, 48 S. E. 916.

37. Wagner v. Chicago, etc., R. Co., 122 Iowa, 360, 98 N. W. 141.

38. See 2 Curr. L. 1413.

39. Code 1896, § 3441. Southern R. Co. v. Bonner [Ala.] 37 So. 702.

40. Driver's Adm'r v. Southern R. Co. [Va.] 49 S. E. 1000.

41. See 2 Curr. L. 1413.

42. Dotta v. Northern Pac. R. Co., 36 Wash. 506, 79 P. 32. Explosion of sulphuric acid tank in freight depot. Means v. Southern California R. Co., 144 Cal. 473, 77 P. 1001. Licensee falling through a trestle on which he was walking. McConkey v. Oregon R. & Nav. Co., 35 Wash. 55, 76 P. 526; Greene v. New York, etc., R. Co., 92 N. Y. S. 424. Trespasser must not be treated without some regard to the dictates of humanity. Sentell v. Southern R. Co. [S. C.] 49 S. E. 215; Nashville, etc., R. Co. v. Harris [Ala.] 37 So. 794. Running a train at night without a headlight may constitute wanton negligence. For the jury. McKeown v. South Carolina & G. Extension R. Co., 68 S. C. 483, 47 S. E. 713. A special finding that a trespasser on the track was discovered by an engineer in time to have stopped the train held warranted under the evidence. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578. Willfulness of injury for the jury. Chicago G. W. R. Co. v. Troup [Kan.] 76 P. 859.

43. A railroad company owes a trespasser of mature age no duty beyond refraining from acts willfully injurious to him. Ken-

Failure to sound the statutory signals[45] or otherwise observe statutory regulations may be negligence,[46] but does not import a wantonness or willfulness by the company's servants,[47] and generally the duty to give such signals is for the benefit of the travelers upon the highway and does not extend to licensees on the right of way.[48] Failure of the operatives to warn by whistle or bell is not actionable where the person sustaining the injury was fully cognizant of the approach of the train and stayed in the endeavor to remove his team from the track.[49] A licensee is entitled to ordinary care.[50] In some states it is the duty of engineers and firemen to watch out for every danger,[51] while in others they are under no obligation to be on the lookout for trespassers on the track.[52] But in all after discovery of a tres-

dall v. Louisville & N. R. Co., 25 Ky. L. R. 793, 76 S. W. 376; Kendrick v. Seaboard Air Line R. Co., 121 Ga. 775, 49 S. E. 762; Powell v. Erie R. Co., 70 N. J. Law, 290, 58 A. 930; Fitzgibbons v. Manhattan R. Co., 88 N. Y. S. 341. Injury from falling of a pile of ties upon defendant's right of way. Smith v. Hopkins [C. C. A.] 120 F. 921. Whether one is a trespasser is for the jury. McKeown v. South Carolina & G. Extension R. Co., 68 S. C. 483, 47 S. E. 713. No duty to trespasser to provide reasonably safe and proper appliances, nor as to rate of speed or schedule of time for running, nor as to whistle signals at crossings. Hortenstein v. Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996. Trespasser stealing a ride. Klenk v. Oregon Short Line R. Co., 27 Utah, 428, 76 P. 214. The rule given by a railroad company to its employes to "use great care" cannot change the degree of care the law requires toward a stranger. Heck v. New York, etc., R. Co., 94 App. Div. 562, 88 N. Y. S. 154. A boy eight years of age who climbed on a box car to watch a sale of stock in an adjacent yard is a trespasser. Jordan v. Grand Rapids & I. R. Co., 162 Ind. 464, 70 N. E. 524. A trespasser is not required to allege or prove that the injury was willful except when he seeks to recover exemplary damages. Klenk v. Oregon Short Line R. Co., 27 Utah, 428, 76 P. 214. One riding on a work train, after notice prohibiting such actions, is carried at his own risk. Failure by employes to enforce the rule does not alter the question of liability. Pennsylvania Co. v. Coyer [Ind.] 72 N. E. 875. The law does not require the company to search the cars for trespassers before moving the cars. Jordan v. Grand Rapids & I. R. Co., 162 Ind. 464, 70 N. E. 524. Those using a roadway on a right of way after sufficient notice of withdrawal of consent to such use are trespassers. Illinois Cent. R. Co. v. Waldrop, 24 Ky. L. R. 2127, 72 S. W. 1116.

44. See 2 Curr. L. 1413, n. 56. St. Louis S. W. R. Co. v. Bolton [Tex. Civ. App.] 81 S. W. 123. A company is charged with the duty of being in a state of expectancy as to the probable presence of persons upon the track at places where travel thereon is known to be customary and frequent. McConkey v. Oregon R. & Nav. Co., 35 Wash. 55, 76 P. 526.

45. Davis v. Southern R. Co., 68 S. C. 446, 47 S. E. 723.

46. A licensee may recover for injuries under the Mississippi statute imposing a liability on railroad companies for every injury inflicted by the backing of trains into depot grounds, not preceded by a servant to give warning [Code 1892, § 3549]. Yazoo & M. V. R. Co. v. Metcalf [Miss.] 36 So. 259.

47. Nashville, etc., R. Co. v. Harris [Ala.] 37 So. 794.

48. Batchelder v. Boston & M. R. Co., 72 N. H. 528, 57 A. 926; Texas & P. R. Co. v. Shoemaker [Tex.] 84 S. W. 1049.

49. Carpenter v. Chicago, etc., R. Co. [Iowa] 101 N. W. 758.

50. Whether one is a licensee is for jury. McKeown v. South Carolina & G. Extension R. Co., 68 S. C. 483, 47 S. E. 713; Curtis v. Oregon R. & Nav. Co., 36 Wash. 55, 78 P. 133. One who has alighted from a train and then walked about a depot and the right of way for purposes of his own is a licensee. Quantz v. Southern R. Co. [N. C.] 49 S. E. 79; Sentell v. Southern R. Co. [S. C.] 49 S. E. 215. Continuous use of track by pedestrians without objection from company may amount to license. St. Louis S. W. R. Co. v. Bolton [Tex. Civ. App.] 81 S. W. 123; Booth v. Union Terminal R. Co. [Iowa] 101 N. W. 147. Contra, St. Louis S. W. R. Co. v. Shiflet [Tex.] 83 S. W. 677.

51. St. Louis S. W. R. Co. v. Breton [Tex. Civ. App.] 81 S. W. 123; Davis v. Southern R. Co., 68 S. C. 446, 47 S. E. 723. It is the duty of both engineer and fireman to look forward along the track. Jordan v. Grand Rapids & I. R. Co., 162 Ind. 464, 70 N. E. 524. By statute a railroad company may be required to always keep a lookout on a locomotive and to sound an alarm whistle for any one on the track, and to do all things possible to avoid an accident [Code, §§ 1574-1576]. Cincinnati, etc., R. Co. v. Davis [C. C. A.] 127 F. 933. Shannon's Code, §§ 1574-1576. Southern R. Co. v. Simpson [C. C. A.] 131 F. 705. Employes must be on a reasonable lookout for trespassers or licensees. McConkey v. Oregon R. & Nav. Co., 35 Wash. 55, 76 P. 526. Trainmen should exercise that degree of care in keeping a lookout, which men of ordinary intelligence and prudence engaged in the same line would have exercised under similar circumstances. Hughes v. Chicago, etc., R. Co. [Wis.] 99 N. W. 897.

52. Wilmuth's Adm'r v. Illinois Cent. R. Co., 25 Ky. L. R. 671, 76 S. W. 193; Curtis v. Oregon R. & Nav. Co., 36 Wash. 55, 78 P. 133. Rule applies to children. Louisville & N. R. Co. v. Logsdon's Adm'r [Ky.] 81 S. W. 657. Failure to keep a constant lookout is not necessarily negligence. Hughes v. Chicago, etc., R. Co. [Wis.] 99 N. W. 897.

passer on the track, ordinary care should be used to avoid injury,[53] and failure to use the whistle on discovering a child on the track may be negligence.[54] Failure of the engineman to keep a proper lookout can only be considered the proximate cause of injury when it appears that a proper lookout would have prevented it.[55] Mere proof of an unexplained killing and impairment of the engineer's vision does not rebut the presumption that a proper lookout was kept.[56] A railroad company is liable for injuries negligently inflicted by the servants of another company using the track by consent.[57] A railroad company owning a track passing through an elevator is not liable for injuries to an employe of the elevator company caused by other employes of that company moving a car by hand.[58] Defendant's liability for injury to trespassers on its right of way is not affected by the fact that it has no title to the right of way.[59] A railroad is not chargeable with negligence in failing to reduce the speed of its trains at the point where deceased, a contractor, was working, where the work was not of such a character as to interrupt the ordinary operation of trains.[60]

Employes of other roads and of independent contractors.[61]—A railroad company owes an employe of an independent contractor engaged in raising the track the duty of using reasonable care to avoid injuring him.[62] A company must exercise ordinary care for the safety of a person carried gratuitously.[63] An express messenger is not a mere licensee,[64] but his relation to the railway company is analagous to that of one of its own employes.[65] Reasonable care is the measure of duty of one railroad company to an employe of another road.[66] Where two companies are by agreement using a common track, each owes the operatives of the other the duty to avoid injury to them.[67] A railway company is not liable to an

53. Gulf, etc., R. Co. v. Miller [Tex. Civ. App.] 79 S. W. 1109; St. Louis S. W. R. Co. v. Bolton [Tex. Civ. App.] 81 S. W. 123; Wilmuth's Adm'r v. Illinois Cent. R. Co., 25 Ky. L. R. 671, 76 S. W. 193; Louisville & N. R. Co. v. Logsdon's Adm'r [Ky.] 81 S. W. 657; Houston, etc., R. Co. v. Ramsey [Tex. Civ. App.] 81 S. W. 825; Kendrick v. Seaboard Air Line R. Co., 121 Ga. 775, 49 S. E. 762; Kendall v. Louisville & N. R. Co., 25 Ky. L. R. 793, 76 S. W. 376; Gregory v. Wabash R. Co. [Iowa] 101 N. W. 761; Dotta v. Northern Pac. R. Co., 36 Wash. 506, 79 P. 32; Curtis v. Oregon R. & Nav. Co., 36 Wash. 55, 78 P. 133; McConkey v. Oregon R. & Nav. Co., 35 Wash. 55, 76 P. 526. From the time an engineer sees another's perilous position, he must use diligence and care to avoid injury (Fitzgibbons v. Manhattan R. Co., 88 N. Y. S. 341), but greater care must be exercised where the situation of the trespasser is known in time to prevent injury (Jordan v. Grand Rapids & I. R. Co., 162 Ind. 464, 70 N. E. 524). In an action by a trespasser, the declaration must show that after discovery of his peril, the company by ordinary care could have avoided injury. Hortenstein v. Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996. Testimony of trainmen is not conclusive as to the time of discovering deceased's peril. Circumstances may show they discovered it sooner than they admit. Gregory v. Wabash R. Co. [Iowa] 101 N. W. 761.

54. Gregory v. Wabash R. Co. [Iowa] 101 N. W. 761.

55, 56. Texas & P. R. Co. v. Shoemaker [Tex.] 84 S. W. 1049.

57. Gulf, etc., R. Co. v. Miller [Tex. Civ. App.] 79 S. W. 1109. Presumption of defendant's ownership of engine held not overcome by evidence. Id. [Tex.] 83 S. W. 182.

58. Sauls v. Chicago, etc., R. Co. [Tex. Civ. App.] 81 S. W. 89.

59. Dorsey's Adm'x v. Louisville & N. R. Co., 26 Ky. L. R. 232, 80 S. W. 1131.

60. Carpenter v. Chicago, etc., R. Co. [Iowa] 101 N. W. 758.

61. See 2 Curr. L. 1414.

62. Company not liable to such employe injured by a stone left on the track by the contractor and forcibly thrown against plaintiff by a passing train. Reilly v. Chicago, etc., R. Co., 122 Iowa, 525, 98 N. W. 464.

63. Pennsylvania Co. v. Coyer [Ind.] 72 N. E. 875. To recover for injuries received while traveling upon a work train, it must be shown that the person was rightfully on board and that the company owed the duty of carrying him safely. Id.

64, 65. Chicago & N. W. R. Co. v. O'Brien [C. C. A.] 132 F. 593.

66. Heck v. New York, etc., R. Co., 94 App. Div. 562, 88 N. Y. S. 154. In an action for the death of a fireman of another company, the negligence of the engineer on whose engine deceased was employed, in relying on signal lights and not watching for a train, does not affect the right of recovery. Chicago & A. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22.

67. Central of Georgia R. Co. v. Martin [Ala.] 36 So. 426. An engineer, in the absence of knowledge or notice to the contrary, may assume that the track is clear. Failure to give crossing signals cannot form

employe of another company switching cars under contract, for injuries received while operating upon former company's tracks.[68]

Persons at stations.[69]—In the absence of an invitation express or implied, one going upon depot premises after the office is closed for the night and all lights put out assumes the risk consequent thereto.[70] Defects in the track which cause a licensee or trespasser thereon to fall create no liability on the part of the company, especially if a safe way was open.[71]

Persons having relation to passenger.[72]

Persons loading and unloading cars[73] are entitled to the exercise of reasonable care and skill on the part of the railroad,[74] but intermediate carriers are under no duty to the consignee or his servants as regards inspection of cars.[75] The customary rules of contributory negligence apply.[76] The servant of a consignee assumes the risk of known defects in equipment,[77] but a shipper unloading a car does not assume the risk of injuries caused by a train backing against the car without warning.[78] It is not necessarily negligent for one of a gang of men unloading cars to sit in the shade of one of them during the noon hour.[79]

Children on tracks.[80]—A railroad company may assume that no children are playing about or under its cars unless it knows or has reasonable grounds to anticipate their presence;[81] but where children are allowed to play on and around empty cars standing on siding, it may be negligence to violently bump such cars without warning or keeping lookout so as to throw a child to the ground and injure him.[82] Children picking flowers upon a company's right of way are trespassers.[83] Though a child is too young to be chargeable with contributory negligence, he may be a trespasser within the law,[84] but circumstances which would render an adult a trespasser will not necessarily have that effect as to children.[85] Negligence of the

a basis for defense of contributory negligence. Id.

68. Ederle v. Vicksburg, etc., R. Co., 112 La. 728, 36 So. 664.

69. See 2 Curr. L. 1414.

70. Sullivan v. Minneapolis, etc., R. Co., 90 Minn. 390, 97 N. W. 114.

71. Archer v. Union Pac. R. Co. [Mo. App.] 85 S. W. 934.

72, 73. See 2 Curr. L. 1415.

74. St. Louis S. W. R. Co. v. Kennemore [Tex. Civ. App.] 81 S. W. 802; Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. The question of negligence in moving a train without signaling to one unloading a car was for the jury. Hartford v. New York, etc., R. Co., 184 Mass. 365, 68 N. E. 835. To leave a car with brakes not set, at the top of a grade on a spur track where shippers were accustomed to move cars by hand, is negligence. Car set in motion by wind. Pratt v. New York, etc., R. Co. [Mass.] 72 N. E. 328. Where defendant's pleadings admit possession of the engines, tracks, etc., the plaintiff need not prove that the particular engine causing injury was operated by defendant's employes. Allen v. Palmer, 91 N. Y. S. 731. One who is unloading a car at a point where it has been placed for that purpose by defendant is not obliged to be in a state of continual apprehension, but has a right to assume that he will not be subjected to injury in person or property by defendant's negligence. Train on side track unloading car of grain. Bachant v. Boston & M. R. Co. [Mass.] 73 N. E. 642.

75. Sykes v. St. Louis, etc., R. Co., 178 Mo. 693, 77 S. W. 723.

76. Plaintiff held not negligent in standing on elevator chute. St. Louis S. W. R. Co. v. Kennemore [Tex. Civ. App.] 81 S. W. 802. An employe of a shipper engaged in moving a freight car by a lever and on an unfrequented siding is not guilty of negligence in going between the rails to accomplish such undertaking. Pratt v. New York, etc., R. Co. [Mass.] 72 N. E. 328. Warning to plaintiff of intention to move cars may charge him with negligence. Houston & T. C. R. Co. v. Jones [Tex. Civ. App.] 83 S. W. 29. Knowledge of custom of company may be. Louisville & N. R. Co. v. Smith [Ky.] 84 S. W. 755. For the jury to decide whether one unloading live stock was guilty of contributory negligence in failing to observe an approaching train. Brown v. Pontiac, etc., R. Co., 133 Mich. 371, 94 N. W. 1050, 10 Det. Leg. N. 173.

77. Sykes v. St. Louis & S. F. R. Co., 178 Mo. Sup. 693, 77 S. W. 723.

78. St. Louis S. W. R. Co. v. Kennemore [Tex. Civ. App.] 81 S. W. 802.

79. Employe of contractor held not a trespasser. Texas & N. O. R. Co. v. McDonald [Tex. Civ. App.] 85 S. W. 493.

80. See 2 Curr. L. 1416.

81. Wagner v. Chicago & N. W. R. Co., 122 Iowa, 360, 98 N. W. 141.

82. Houston, etc., R. Co. v. Ollis [Tex. Civ. App.] 83 S. W. 850.

83. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578.

84. Nashville, etc., R. Co. v. Harris [Ala.] 37 So. 794; Louisville & N. R. Co. v. Logsdon's Adm'r [Ky.] 81 S. W. 657.

85. St. Louis S. W. R. Co. v. Bolton [Tex.

child's parent may be a defense,[86] but in the absence of such negligence defendant's liability is governed by the acts of its servants in keeping a proper lookout rather than by what they did after discovery of the child's danger.[87] The duty of a railroad company with reference to young children on its track is not to keep a reasonable lookout but to exercise ordinary care under all the circumstances existing, with reference to keeping a lookout.[88] Whether sounding the whistle on discovering a child of two years on the track would have been proper or improper as tending to frighten him into inaction is properly left to the jury.[89] It is for the jury to say whether a child during its minority is capable of understanding and avoiding the danger to be encountered upon railroad tracks.[90]

Adults walking on tracks.[91]—To walk upon a railroad track is in some states such negligence as to bar a recovery for an injury resulting therefrom,[92] unless from custom or otherwise the injured person can claim rights as a licensee,[93] or the operatives of the train saw the trespasser in time to have avoided the injury by the exercise of ordinary care.[94] Contributory negligence does not excuse a railroad company from compliance with statutory requirements,[95] and is no defense to an action for willful or wanton injury.[96] In Texas one walking along the track after making proper observation as to approaching train is not necessarily negligent,[97] and in such case the principle of discovered peril applies.[98] A person walking

Civ. App.] 81 S. W. 123. Child held not trespasser. Texas & P. R. Co. v. Ball [Tex. Civ. App.] 85 S. W. 456.

86. Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591.

87. Instruction stating otherwise held error. Olivaras v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 981. Where a child three years old could have been seen by the exercise of ordinary care at a distance of 450 yards and the train could have been stopped in 300, the company was held responsible. Louisville & N. R. Co. v. Logsdon's Adm'r, 25 Ky. L. R. 1656, 78 S. W. 409. Evidence as to the distance within which a train could have been stopped is admissible. As a matter of common knowledge and observation, the jury could take notice thereof without evidence. Davis v. Seaboard Air Line R. Co., 136 N. C. 115, 48 S. E. 591. Evidence of experiments as to engineer's ability to see on similar curve held admissible. Olivaras v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 77 S. W. 981.

88. Olivaras v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 84 S. W. 248.

89. Gregory v. Wabash R. Co. [Iowa] 101 N. W. 761.

90. Chicago, etc., R. Co. v. Russell [Neb.] 100 N. W. 156.

91. See 2 Curr. L. 1418.

92. Carter v. Southern R. Co., 135 N. C. 498, 47 S. E. 614; Koegel v. Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905. Evidence insufficient to attach liability on company. Southern R. Co. v. Hall's Adm'r, 102 Va. 135, 45 S. E. 867; St. Louis, etc., R. Co. v. Shiflet [Tex.] 83 S. W. 677; Gulf, etc., R. Co. v. Townsend [Tex. Civ. App.] 82 S. W. 804. Railroad tracks are known places of danger. Wagner v. Chicago & N. W. R. Co., 122 Iowa, 360, 98 N. W. 141. One whose hearing is defective is charged with greater vigilance in such a situation. Hamlin v. Columbia & P. S. R. Co. [Wash.] 79 P. 991.

93. That one pedestrian may frequently and others occasionally use a railroad track as a footpath is insufficient to establish an implied license to pedestrians to use the track. Kendrick v. Seaboard Air Line R. Co., 121 Ga. 775, 49 S. E. 762. One on his own errand walking on a path between two railroad tracks in general use by the public, is a mere licensee. Yazoo & M. V. R. Co. v. Metcalf [Miss.] 36 So. 259. A license to the public to travel on a path between tracks will not be inferred unless such use be coupled with express or implied consent by the company. That regular walks are provided for the public rebuts an inference of the company's consent to the public use of a path between tracks. Wagner v. Chicago & N. W. R. Co., 122 Iowa, 360, 98 N. W. 141. Though the public make general use of a path between tracks, a person is not authorized to be at any other place than those so used or to be under the cars or between the rails. Id. Trespasser can claim no rights to walk on switch yard where notices forbidding it are posted. Koegel v. Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905. Frequent use held not to amount to license. Hamlin v. Columbia & P. S. R. Co. [Wash.] 79 P. 991. Unless a clear right to be on a track is shown, a footman thereon is a trespasser. Dotta v. Northern Pac. R. Co., 36 Wash. 506, 79 P. 32.

94. Koegel v. Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905. There can be no recovery for injuries to one run over by a train while walking on the track in the absence of evidence that the trainmen saw the trespasser and failed to use ordinary care thereafter. Manning v. Illinois Cent. R. Co. [Ky.] 84 S. W. 565.

95. Cincinnati, etc., R. Co. [C. C. A.] 127 F. 933; Southern R. Co. v. Simpson [C. C. A.] 131 F. 705.

96. Southern R. Co. v. Yancy [Ala.] 37 So. 341; Koegel v. Missouri Pac. R. Co., 181 Mo. 379, 80 S. W. 905.

97. Gulf, etc., R. Co. v. Miller [Tex. Civ. App.] 79 S. W. 1109.

98. Gulf, etc., R. Co. v. Miller [Tex. Civ.

along the right of way of a double track railroad, though under such circumstances that he is not a trespasser, has no right to presume that only the right hand track will be used for cars going in the same direction with him.[99] The mere fact that a man is found in an injured condition near the track is not sufficient evidence to establish actionable negligence on the part of the railroad company.[1] The ejection of a trespasser in a drunken condition from a signal tower will not render the company liable for a subsequent injury to him by a train.[2]

Persons along or between tracks.[3]—Where a track is laid along a public highway, the rights of the public and the railroad company are equal and the company is charged with greater care to avoid injury to travelers.[4] A person walking along railroad tracks maintained in a public street by permission of the city council is not a trespasser,[5] and has a right to presume that trains thereon will not exceed the city speed ordinance, and that due warning will be given.[6] The law imposes no duty on a locomotive engineer during daytime to give signals to a pedestrian on the track who is apparently in possession of his faculties,[7] and an engineer may presume that a pedestrian at the side of the track will remain there or step back when he sees the train;[8] but the rule that an engineer or motorman may act upon the theory that a person on or near the track who sees the train or car approaching will get out of the way of danger has no application after it becomes reasonably apparent that this will not be done.[9] A pedestrian who without looking steps from a safe position outside a railroad track on to another track in front of an approaching train is negligent.[10] Evidence held to justify an inference of negligence and not to warrant a directed verdict for defendant.[11]

Persons standing, sitting, or lying on track.[12]—Sitting or lying upon a railroad track is contributory negligence;[13] but failure to stop a train, after discovery of a person in that position where it was within the power of the engineer to stop and avoid injury, renders a company liable,[14] and under such circumstances the doctrine of last clear chance applies.[15] Previous knowledge of deceased's condition may charge the company with constructive knowledge.[16]

App.] 79 S. W. 1109. Evidence held sufficient to raise the issue of proper lookout. International & G. N. R. Co. v. Davis [Tex. Civ. App.] 84 S. W. 669. Evidence held insufficient to raise the issue of last clear chance. Norfolk & W. R. Co. v. Johnson's Adm'r [Va.] 50 S. E. 268.

99. Stewart v. Washington, etc., R. Co., 22 App. D. C. 496.

1. Southern R. Co. v. Back's Adm'x [Va.] 50 S. E. 257.

2. Southern R. Co. v. Back's Adm'x [Va.] 50 S. E. 257; Cincinnati, etc., R. Co. v. Marr's Adm'x [Ky.] 85 S. W. 188.

3. See 2 Curr. L. 1420.

4. Scullin v. Wabash R. Co. [Mo.] 83 S. W. 760.

5. Especially where over 100 people a day have used the way for many years. Illinois Terminal R. Co. v. Mitchell, 214 Ill. 151, 73 N. E. 449.

6. Illinois Terminal R. Co. v. Mitchell, 214 Ill. 151, 73 N. E. 449.

7, 8. Pharr v. Southern R. Co., 133 N. C. 610, 45 S. E. 1021.

9. Denison & S. R. Co. v. Craig [Tex. Civ. App.] 80 S. W. 865.

10. Pharr v. Southern R. Co., 133 N. C. 610, 45 S. E. 1021. There can be no recovery where one in the possession of his faculties walking in a place of safety suddenly steps upon the track, there being no opportunity to stop the train. Randolph v. Brunswick & B. R. Co., 120 Ga. 969, 48 S. E. 396.

11. Boy on track. Wilmuth's Adm'r v. Illinois Cent. R. Co., 25 Ky. L. R. 671, 76 S. W. 193. Man on highway used by railroad company. Scullin v. Wabash R. Co. [Mo.] 83 S. W. 760.

12. See 2 Curr. L. 1421.

13. Carter v. Southern R. Co., 135 N. C. 498, 47 S. E. 614. Person asleep. Maysville, etc., R. Co. v. McCabe, 26 Ky. L. R. 532, 82 S. W. 233. Company held not negligent in failing to have headlight at rear of backing train. Gilliam v. Texas & P. R. Co. [La.] 38 So. 166.

14. Green's Adm'r v. Southern R. Co., 102 Va. 791, 47 S. E. 819. Issue of discovered peril held not raised by the evidence. Dorsey's Adm'x v. Louisville & N. R. Co., 26 Ky. L. R. 232, 80 S. W. 1131.

15. Carter v. Southern R. Co., 135 N. C. 498, 47 S. E. 614.

16. Where the servants of the company knew deceased was in its yards in a drunken condition, it is liable, though he fell asleep between the rails. Cincinnati, etc., R. Co. v. Marr's Adm'x [Ky.] 85 S. W. 188.

Whether the place where deceased was sitting had been so long used by the public as to make deceased a licensee was for the jury.[17] A licensee who has been accustomed to board a switch engine in the usual way to ride to and from work cannot recover where on flagging the engine he received no response, and though he knew the engine was not slowing down, remained on the track until too late to escape.[18]

Persons on bridges or trestles.[19]—A right to use of a trestle by pedestrians can only be acquired by use so definite and long existing as to clearly impute acquiescence on the part of the railroad company.[20]

Persons near crossings.[21]

Persons crossing tracks away from established crossings.[22]—The duty of a railroad to give signals at a crossing is owed to those using the crossing and not to persons at other places along the track.[23] Where the long continued and frequent use of a pathway crossing is acquiesced in by a railroad, warning signals should be given by trains approaching such crossing.[24] There is no presumption that deceased was negligent.[25]

Persons in switch yards.[26]

Persons under cars.[27]—One going under a car to avoid rain and there falling asleep is a trespasser, to whom the company owes no duty save that of refraining from willful injury,[28] and one recklessly going beneath cars without proper notice to the trainmen is guilty of contributory negligence.[29] Car repairers having a right where they are, are under a different rule, and where the employes of another master negligently fail to observe danger signals set by the repairers and injure them, their master is liable.[30]

Persons stealing rides.[31]—A person injured while jumping on or off a train in motion,[32] or riding between freight cars in violation of the company's rules, cannot recover.[33] That the conductor of a freight train sees a boy riding on the top of a freight car, and knows that the caboose is a place of greater safety, does not render the doctrine of discovered peril applicable.[34] One attempting to steal a ride may be ordered off or his attempt may be resisted with reasonable force.[35]

17. Sentell v. Southern R. Co. [S. C.] 49 S. E. 215.

18. Gallagher v. Northern Pac. R. Co. [Minn.] 101 N. W. 942.

19. See 2 Curr. L. 1422.

20. Dotta v. Northern Pac. R. Co., 36 Wash. 506, 79 P. 32.

21. See 2 Curr. L. 1422.

22. See 2 Curr. L. 1423.

23. Texas & P. R. Co. v. Shoemaker [Tex.] 84 S. W. 1049.

24. Keller v. Erie R. Co., 90 N. Y. S. 236.

25. Texas & P. R. Co. v. Shoemaker [Tex.] 84 S. W. 1049. Person looking and listening shortly before crossing track held not negligent. Booth v. Union Terminal R. Co. [Iowa] 101 N. W. 147.

26. See 2 Curr. L. 1423.

27. See 2 Curr. L. 1424.

28. Kendall v. Louisville & N. R. Co., 25 Ky. L. R. 793, 76 S. W. 376.

29. Chicago & A. R. Co. v. Pettit, 209 Ill. 452, 70 N. E. 591. Boy running after hat. Wagner v. Chicago, etc., R. Co., 124 Iowa, 462, 100 N. E. 332. Defendant is entitled to an affirmative presentation of its theory that defendant was hurt while crawling under a car. Gulf, etc., R. Co. v. Johnson [Tex.] 81 S. W. 4.

30. Kentucky, etc., R. Co. v. Sydnor, 26 Ky. L. R. 951, 82 S. W. 989.

31. See 2 Curr. L. 1424.

32. Powell v. Erie R. Co., 70 N. J. Law, 290, 58 A. 930. One who goes on the road bed of a railroad and seizes and attempts to board a moving car and is injured is barred by his negligence from recovery, and the fact that an employe of the company saw him is immaterial, the issue of discovered peril not being raised. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133.

33. Chicago, etc., R. Co. v. Martin [Tex. Civ. App.] 79 S. W. 1101.

34. Boy held to have sufficiently comprehended danger to make him responsible for negligence. Cockrell v. Texas, etc., R. Co. [Tex. Civ. App.] 82 S. W. 529.

35. Powell v. Erie R. Co., 70 N. J. Law, 290, 58 A. 930. A railroad company may lawfully prevent access by a trespasser to its cars, and if access be gained may lawfully expel the trespasser, using for that purpose only necessary force in view of all the circumstances, and resorting to no means which unnecessarily menace the life or limb of the trespasser. Klenk v. Oregon, etc., R. Co., 27 Utah, 428, 76 P. 214.

A brakeman on a freight train has implied authority to eject a trespasser thereon, so that the company is liable for injuries sustained by such trespasser resulting from the brakeman's improper manner of ejection, though the acts were wanton and reckless if unaccompanied by an independent malicious purpose of his own.[36] Where a petition states that at the time it injured plaintiff, defendant's engine was in charge of defendant's servants, who were respectively engineer and fireman, it by implication alleges that the fireman had authority to eject trespassers therefrom.[37] The number of the engine injuring plaintiff is not essential, though the number is testified to, and it is not error to refuse to limit the inquiry to that particular engine.[38]

Persons using hand cars or railroad tricycles[39] without consent of the company are trespassers and entitled only to a trespasser's rights.[40] As to them the rule of discovered peril applies.[41] A licensee injuring himself by lifting a heavy car from the track alone, made necessary by defendant's failure to signal, is not necessarily barred from recovery.[42]

(§ 10) *C. Accidents to trains.*[43]—A licensee running trains on another's road cannot recover for a collision with the owner's train where he was running without orders or flag as required by his license.[44] The negligence of one company causing its train to collide with that of another at a crossing will not give a right of action to a person injured while stealing a ride on the train of the non-negligent company.[45] An action by one company for contribution according to agreement for losses sustained through a collision is based on contract.[46] The servant of one company injured through the negligence of the servants of another at a crossing is not barred of recovery by reason of negligence as of fellow-servants.[47] In an action for the death of an engineer by the negligence of another railroad at a crossing, it was for the jury to determine the questions of contributory negligence and willfulness of the injury.[48]

(§ 10) *D. Accidents at crossings.* 1. *Care required on part of company. General rules.*[49]—The care requisite at crossings is that which is commensurate with the dangers,[50] and the management of a train must be conducted with due regard to the statutory provision for safety.[51] Greater vigilance and care is required at street crossings in a populous city neighborhood than in sparsely settled and unfrequented places,[52] and parallel tracks on which trains run in opposite directions require greater care.[53] It is not negligence for a company to maintain upon its right of way buildings reasonably necessary for the prosecution of its business.[54] A railroad company owes a person standing on a street crossing the

36. Dixon v. Northern Pac. R. Co. [Wash.] 79 P. 943.

37. Chicago G. W. R. Co. v. Troup [Kan.] 80 P. 30. Whether he was a fireman or some one temporarily engaged to do the work is immaterial. Id.

38. Chicago G. W. R. Co. v. Troup [Kan.] 80 P. 30.

39. See 2 Curr. L. 1425.

40, 41. Houston & T. C. R. Co. v. Ramsey [Tex. Civ. App.] 81 S. W. 825.

42. Duty to signal on curves is for the jury. Houston & T. C. R. Co. v. Goodman [Tex. Civ. App.] 85 S. W. 492.

43. See 2 Curr. L. 1425.

44. Provisions in contract requiring plaintiff's operatives to be satisfactory to defendant and to work under his orders does not render them defendant's servants. Roganville Lumber Co. v. Gulf, etc., R. Co. [Tex. Civ. App.] 82 S. W. 816.

45. Wickenburg v. Minneapolis, etc., R. Co. [Minn.] 102 N. W. 713.

46. Southwest Mo. Elec. R. Co. v. Missouri Pac. R. Co. [Mo. App.] 85 S. W. 966.

47. Chicago & A. R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22.

48. Southern R. Co. v. Bonner [Ala.] 37 So. 702.

49. See 2 Curr. L. 1426.

50. Ringing of bell, sounding of whistle, or maintenance of flagman may not be sufficient. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985.

51. Day v. Boston & M. R. R., 97 Conn. 528, 55 A. 420.

52, 53. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985.

54. Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554.

same duty it owes the public in general, reasonable care and diligence to avoid injury.[55] A train has the preference and right of way at crossings,[56] and an engineer may assume that a man walking upon the tracks will use reasonable care for his own safety;[57] but where the dangerous situation is apparent, the train should be stopped as soon as possible.[58] Street railway passengers injured through the negligence of railway operatives are entitled to damages from the railway.[59] Negligence must be alleged and proved,[60] and the mere fact that a person was killed at a railroad crossing by being struck by a train is not sufficient to warrant a verdict;[61] but if by the exercise of ordinary care plaintiff's peril could have been discovered and the injury prevented, the defendant is liable.[62] Liability for negligent operation rests upon the company owning the railway and franchise.[63] Where plaintiff's horse fell on a railway crossing and could not be removed, and his wagon was injured by an engine, the railway company was not liable in the absence of evidence of negligence.[64] An engineer seeing a traveler on the highway at a distance from the crossing slowly approaching has a right to assume he will stop and is not required to check the train.[65]

Towards whom care must be exercised.[66]—The duty to give signals or maintain flagmen at crossings is not alone to protect persons from actual collisions,[67] but also to enable travelers in vehicles drawn by animals to secure them against taking fright.[68] Statutes on warning signals are not only for the benefit of travelers at the crossing, but also those who are approaching for the purpose of crossing;[69] but not for trespassers[70] nor for persons at work in adjoining fields or neighboring highways.[71] An engineer is not bound to stop a train simply because boys are in the highway and close to the train though not in places of danger, until he sees some act on their part indicative of an intent to board the cars.[72] A car repairer's invitation to a boy to assist in moving a car held not to be the proximate cause of the boy's death at a nearby crossing over an hour later.[73] A railroad employe may assume that a person apparently of full age walking upon a track some distance before an engine will leave it in time

55. Chicago & E. I. R. Co. v. Reilly, 212 Ill. 506, 72 N. E. 454.

56. New York, etc., R. Co. v. Martin [Ind. App.] 72 N. E. 654. A train is not required to stop and give precedence to a team approaching upon a highway, except in cases of manifest danger, when it is apparent that a collision cannot be otherwise avoided. Day v. Boston & M. R. Co., 97 Me. 528, 55 A. 420.

57. Savage v. Southern R. Co. [Va.] 49 S. E. 484. Trainmen may assume that an adult driving across a track is possessed of the ordinary faculties of sight and will leave the track before encountering danger. Louisville & N. R. Co. v. Lewis [Ala.] 37 So. 587.

58. Savage v. Southern R. Co. [Va.] 49 S. E. 484. Issue of discovered peril held raised by evidence. Central Tex. & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862. Negligence in failing to discover one's peril is not the equivalent of discovered peril. Hawkins v. Missouri, etc., R. Co. [Tex. Civ. App.] 83 S. W. 52. Where one is injured by a train in crossing a track where he had a right to cross, an instruction that if those in charge of the train saw or by the exercise of ordinary care could have seen his danger in time to stop the train, the railroad company is liable, is proper. Louisville & N. R. Co. v. Dick, 25 Ky. L. R. 1831, 78 S. W. 914. A railroad is liable for killing cattle at a public crossing where its servants saw or by the exercise of due care might have seen the cattle upon or approaching the crossing in time to have safely stopped the train. Atterbury v. Wabash R. Co. [Mo. App.] 85 S. W. 114.

59. Snider v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 530.

60. Queen Anne's R. Co. v. Reed [Del.] 59 A. 860; Reed v. Queen Anne's R. Co., 4 Pen. [Del.] 413, 57 A. 529.

61. Reed v. Queen Anne's R. Co., 4 Pen. [Del.] 413, 57 A. 529.

62. Missouri, etc., R. Co. v. Matherly [Tex. Civ. App.] 81 S. W. 589.

63. Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

64. Voehl v. Delaware, etc., R. Co. [N. J. Law] 59 A. 1034.

65. Lambert v. Southern Pac. R. Co. [Cal.] 79 P. 873.

66. See 2 Curr. L. 1427.

67, 68. Pennsylvania Co. v. Fertig [Ind. App.] 70 N. E. 834.

69, 70, 71. New York, etc., R. Co. v. Martin [Ind. App.] 72 N. E. 654.

72, 73. Horn v. Chicago, etc., R. Co., 124 Iowa, 281, 99 N. W. 1068.

to avoid injury,[74] and assume that one in a place of safety will remain there.[75] One having an opportunity by the exercise of proper care to avoid injuring another must do so, notwithstanding the latter has placed himself in a position of danger by his own negligence.[76]

Duty to signal.[77]—Statutes may require every locomotive to be equipped with a bell and whistle and that they be sounded under specified conditions,[78] and though not required by statute, a failure to give reasonable warning of the approach of a locomotive may render the company liable.[79] Failure to give the statutory signals at crossings is negligence per se,[80] even as to dumb animals killed by reason of such failure;[81] but the duty does not extend to private crossings,[82] and the duty to signal 80 rods from a crossing does not extend to a train which starts from a point less than 80 rods from the crossing.[83] In a city or town in Iowa where the crossings are less than 60 rods apart, the bell must be rung continuously till all crossings are passed.[84] Failure to signal after discovering peril is negligence, though the train could not be stopped.[85] Statutes requiring signals at crossings are not only to prevent collisions of trains but to protect pedestrians at such places.[86] It has been held negligence to so give signals when the engineer knows that plaintiff's team has become frightened.[87] Where plaintiff actually saw the train while he was 450 feet from the crossing, defendant's failure to signal had no causal connection with the injury.[88] Whistle and bell signals are not sufficient warning for backing over a public crossing or closing an opening left near a crossing through which the public has been invited by the act of the company to pass.[89]

Speed.[90]—Excessive speed even with statutory signals[91] may be some evidence of negligence,[92] but does not prevent the application of rules of contribu-

74, 75, 76. Green v. Los Angeles T. R. Co., 143 Cal. 31, 76 P. 719.

77. See 2 Curr. L. 1427.

78. Burns' Ann. St. 1901, § 5307. New York, etc., R. Co. v. Martin [Ind. App.] 72 N. E. 654. Evidence held to show that statutory signal was given. Frank v. Pennsylvania R. Co. [N. J. Law] 55 A. 691.

79. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985; New York, etc., R. Co. v. Martin [Ind. App.] 70 N. E. 654.

80. Reed v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 919; Tucker v. Boston & M. R. Co. [N. H.] 59 A. 943; Pennsylvania Co. v. Fertig [Ind. App.] 70 N. E. 834; Missouri, etc., R. Co. v. Matherly [Tex. Civ. App.] 81 S. W. 589; Esler v. Wabash R. Co. [Mo. App.] 83 S. W. 73; Hawkins v. Missouri, etc., R. Co. [Tex. Civ. App.] 83 S. W. 52; McKerley v. Red River, etc., R. Co. [Tex. Civ. App.] 85 S. W. 499; Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554. When approaching a crossing the company must give due and timely warning. Reed v. Queen Anne's R. Co., 4 Pen. [Del.] 413, 57 A. 529. In an action for an injury at a crossing, negligence in failure to give signals cannot be shown by showing habitual failure to do so at that point. Stewart v. Galveston, etc., R. Co. [Tex. Civ. App.] 78 S. W. 979. Failure to give statutory signals is some evidence of negligence, but is not negligence per se. Chicago, etc., R. Co. v. Clinebell [Neb.] 99 N. W. 839.

81. Texas & P. R. Co. v. Crutcher [Tex. Civ. App.] 82 S. W. 341. Whether failure to signal was proximate cause of injury to stock being driven across, held question for jury. Kuehl v. Chicago, etc., R. Co. [Iowa] 102 N. W. 512.

82. Nicholas v. Chicago, etc., R. Co. [Iowa] 100 N. W. 1115.

83. In such case the failure to signal as negligence is a question for the jury. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133.

84. Golinvaux v. Burlington, etc., R. Co. [Iowa] 101 N. W. 465.

85. St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 80 S. W. 240.

86. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71.

87. Where a complaint for injuries received by a collision charged failure to give signal, it was no error to charge that if the engineer saw the unmanageable team and realized that the signal would tend to increase the fright, it was his duty to refrain from giving it; but if the train could not be stopped and he had reached the point where the signal should be given, he must give it. Nichols v. Baltimore & O. S. W. R. Co., 33 Ind. App. 229, 70 N. E. 183.

88. Lambert v. Southern Pac. R. Co. [Cal.] 79 P. 873.

89. Chicago, etc., R. Co. v. Russell [Neb.] 100 N. W. 156.

90. See 2 Curr. L. 1428.

91. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985; Golinvaux v. Burlington, etc., R. Co. [Iowa] 101 N. W. 465. Without signals is gross negligence. Gruebel v. Wabash R. Co. [Mo. App.] 84 S. W. 170.

92. Garlich v. Northern Pac. R. Co. [C. C.

tory negligence.[93] High speed over crossings at points remote from towns or stations is not negligent,[94] but speed in cities or towns in excess of the statutory or municipal regulations is negligence per se.[95] Without evidence on the subject a court will not presume any particular method of operating motor cars on railroad tracks to be the usual and ordinary method.[96]

Gates.[97]—The raising of crossing gates when unsafe and the subsequent closing of them while travelers are crossing the tracks is negligence per se.[98] A pedestrian injured by the negligence of a gateman in closing crossing gates may recover.[99]

Flagmen.[1]—There is no duty on a railroad to maintain a watchman at a crossing in a small village,[2] but the absence of a flagman from his accustomed place may be negligence.[3]

Headlights.[4]—An experienced locomotive engineer may testify how far a headlight could be seen.[5]

Switching and backing trains.[6]—Statutes may require a watchman or other person on the rear of trains running backward.[7] The propelling of cars across a city street, with no one upon or in control of them,[8] and backing cars towards and upon a crossing,[9] especially while another train is passing, without giving due notice of their approach, are negligent.[10] It is not necessarily negligent for an engine to closely follow a train across a crossing.[11]

(§ 10D) 2. *Contributory negligence. General rules.*[12]—Whether or not a traveler upon a public highway who is killed at a grade crossing is guilty of contributory negligence depends upon the circumstances of each case.[13] A traveler has the same right over the public highway that a railway has over its tracks,

A.] 131 F. 837; International & G. N. R. Co. v. Quinones [Tex. Civ. App.] 81 S. W. 757; McKerley v. Red River, etc., R. Co. [Tex. Civ. App.] 85 S. W. 499. Speed at a crossing must be regulated according to the danger. Reed v. Queen Anne's R. Co., 4 Pen. [Del.] 413, 57 A. 529. Where the law does not limit the speed, it is in the discretion of the company, reasonable precaution being taken for the security of life and property. Id.

93. Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837.

94. Parkerson v. Louisville & N. R. Co., 25 Ky. L. R. 2260, 80 S. W. 468.

95. Missouri, etc., R. Co. v. Matherly [Tex. Civ. App.] 81 S. W. 589; Texas & P. R. Co. v. Ball [Tex. Civ. App.] 85 S. W. 456.

96. Illinois Cent. R. Co. v. Scheffner, 209 Ill. 9, 70 N. E. 619.

97. See 2 Curr. L. 1429.

98. Galveston, etc., R. Co. v. Fry [Tex. Civ. App.] 84 S. W. 664.

99. O'Keefe v. St. Louis, etc., R. Co. [Mo. App.] 83 S. W. 308; Sager v. Atchison, etc., R. Co. [Kan.] 79 P. 132.

1. See 2 Curr. L. 1429.

2. Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554.

3. Montgomery v. Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930.

4. See 2 Curr. L. 1429.

5. Southern R. Co. v. Bonner [Ala.] 37 So. 702.

6. See 2 Curr. L. 1429.

7. Burns' Ann. St. 1894, § 3541. Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250. Railroad company held not to have been guilty of willfulness and wantonness in backing train without watchman or signals. Id.

8. Unless resulting from causes beyond the company's control. Corbally v. Erie R. Co., 97 App. Div. 21, 89 N. Y. S. 577; Montgomery v. Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930; Id., 181 Mo. 508, 79 S. W. 938.

9. Reed v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 919.

10. Wabash R. Co. v. Billings, 105 Ill. App. 111. The backing of an engine at night across a highway without light or signal while a train is passing on another track is such negligence as will authorize recovery for resulting injuries. Illinois Cent. R. Co. v. Hays' Adm'r [Ky.] 84 S. W. 338. Plaintiff's contributory negligence held to bar recovery in such a case. Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157.

11. Barnum v. Grand Trunk Western R. Co. [Mich.] 100 N. W. 1022.

12. See 2 Curr. L. 1430.

13. Held question for the jury where there was an obstruction of the view, failure of the approaching train to blow whistle or ring bell, and distraction from headlight and escaping steam of locomotive standing on sidetrack. Hine v. Erie R. Co., 6 Ohio C. C. (N. S.) 7. Where one goes upon a crossing in such close proximity to an approaching train that it cannot be stopped in time to avoid an injury, he cannot recover. St. Louis, S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71. Crossing a railway with knowledge that a train is approaching is not alone contributory negligence, regardless of the rate of speed and manner in which the train is running. Id.

both being bound to exercise care and caution to avoid collision.[14] When a traveler has reached a point where he cannot extricate himself and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition and not the proximate cause.[15] Mere intention to board a train when not a passenger does not render one a trespasser who is rightfully at a public crossing.[16]

Who may be charged.[17]—The care required of an infant is such as may be reasonably expected of one of his age, intelligence and experience.[18]

Acts required of traveler.[19]—The law regards a railroad crossing as a place of danger,[20] and a track on a level with the highway as a warning of danger.[21] All persons competent to exercise care for their own protection about to cross a railroad track must use their faculties of sight and hearing,[22] strictly observe the law as to crossing,[23] act upon the assumption that engines or trains may be expected to pass in either direction at any moment,[24] and exercise care proportionate to the dangerous nature of the place.[25] Many courts hold that a traveler upon a highway approaching a crossing must stop, look and listen,[26] but the better

14. Esler v. Wabash R. Co. [Mo. App.] 83 S. W. 73. Where the place where a person was struck and killed by a train was a public street, or path used by the public, deceased was not a trespasser or guilty of contributory negligence by reason of being there. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71.

15. French v. Grand Trunk R. Co., 76 Vt. 441, 58 A. 722.

16. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133.

17. See 2 Curr. L. 1431. The negligence of the driver is not imputable to one riding in the buggy as the driver's guest. Duval v. Atlantic Coast Line R. Co., 135 N. C. 331, 46 S. E. 750; Central Texas & N. W. R. Co. v. Gibson [Tex. Civ. App.] 83 S. W. 862.

18. Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985. See, also, Negligence, 4 Curr. L. 774.

19. See 2 Curr. L. 1432.

20. Rogers v. Boston & M. R. Co. [Mass.] 72 N. E. 945; New York, etc., R. Co. v. Martin [Ind. App.] 72 N. E. 654; Queen Anne's R. Co. v. Reed [Del.] 59 A. 860; Southern R. Co. v. Davis [Ind. App.] 72 N. E. 1053; Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837; Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Savage v. Southern Ry. Co. [Va.] 49 S. E. 484.

21. Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554. Presence of another train on parallel track and backing of train without warning do not relieve pedestrian of ordinary care for his own safety. Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157.

22. Green v. Los Angeles T. R. Co., 143 Cal. 31, 76 P. 719; Quinn v. Chicago & E. R. Co., 162 Ind. 442, 70 N. E. 526; Rogers v. Boston & M. R. R. [Mass.] 72 N. E. 945; Atlanta, etc., R. Co. v. Lovelace, 121 Ga. 487, 49 S. E. 607. One who goes on a railroad crossing where the view of the track is unobstructed for several hundred feet in the direction from which a train is coming, so that he must have seen the train had he looked, is guilty of contributory negligence. Dolfini v. Erie R. Co., 178 N. Y. 1, 70 N. E. 68. On approaching a crossing, a traveler is bound to look, and if he cannot see, to stop and listen. One hurrying on a bicycle to catch a passenger train and injured by a switch engine held to be an ordinary traveler under the above rule. Smith v. Detroit & M. R. Co. [Mich.] 99 N. W. 15.

23. Wolfe v. Pennsylvania R. Co., 22 Pa. Super. Ct. 335.

24. Quinn v. Chicago & E. R. Co., 162 Ind. 442, 70 N. E. 526; Chicago & E. I. R. Co. v. Coggins, 212 Ill. 369, 72 N. E. 376. A person going upon the tracks of a railroad must listen and keep a lookout in each direction. Savage v. Southern R. Co. [Va.] 49 S. E. 484. A traveler's duty to look when approaching a crossing is not performed by looking in one direction when he could see in both. Harvey v. Erie R. Co. [Pa.] 59 A. 691.

25. Crossing in the timber. Reed v. Queen Anne's R. Co., 4 Pen. [Del.] 413, 57 A. 529. One about to cross railroad tracks must exercise a reasonable degree of caution. Plaintiff negligent. Stack v. New York, etc., R. Co., 96 App. Div. 575, 89 N. Y. S. 112; Van Riper v. New York, etc., R. Co. [N. J. Law] 59 A. 26; Dolfini v. Erie R. Co., 178 N. Y. 1, 70 N. E. 68. One about to cross a railroad track must use ordinary care under the surrounding circumstances. Contributory negligence of plaintiff. Chicago & N. W. R. Co. v. Andrews [C. C. A.] 130 F. 65; Coleman v. New York, etc., R. Co., 90 N. Y. S. 264; Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837. Crossing at grade. Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554. A driver who stopped, looked, and listened and waited for the train to pass 240 feet is not guilty of contributory negligence in then crossing, though struck by a train rapidly approaching from the opposite direction without signals. Wolfe v. Pennsylvania R. Co., 22 Pa. Super. Ct. 335. One approaching a crossing upon a bicycle should have his wheel under control. Waddell v. New York, etc., R. Co., 90 N. Y. S. 239.

26. Failure to do so negatives a right of recovery. Canfield v. Baltimore & O. R. Co., 208 Pa. 372, 57 A. 763; Cromley v. Pennsylvania R. Co., 208 Pa. 445, 57 A. 882; Queen

rule seems to be that whether he must stop in addition to looking and listening depends on the facts of each case.[27] In Texas mere failure to look and listen, though it would have resulted in avoidance of the injury, does not bar recovery.[28] Where no law regulates the speed of trains, a reasonably careful person should guard himself from the danger of excessive speed before moving into a place of danger.[29]

Duty where view of track is obstructed.[30]—A person whose hearing[31] or vision is temporarily obstructed by some supervening condition should take the greater care,[32] and if possible await its passing away.[33]

Parallel tracks.[34]—One approaching a crossing of many tracks must continue to exercise due care for each track.[35] One waiting at a crossing is negligent in proceeding upon the further track after one train has passed without waiting to see if other trains were approaching.[36] One run down by a backing engine on a sidetrack while waiting for a train to pass on the main track is not necessarily negligent.[37]

Right to rely on crossing signals, stops, gates, flagmen, etc.[38]—The failure of a gateman or other person to perform his duty in the giving of signals does

Anne's R. Co. v. Reed [Del.] 59 A. 860. Failure to do so is negligence per se. Ihrig v. Erie R. Co. [Pa.] 59 A. 686; Burns v. Pennsylvania R. Co. [Pa.] 59 A. 687; Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Wands v. Chicago, etc., R. Co., 106 Mo. App. 96, 80 S. W. 18. One who in going on a railway track does not look and listen is guilty of contributory negligence. Evidence held not to support a finding that there was no contributory negligence. Ft. Worth & D. C. R. Co. v. Wyatt [Tex. Civ. App.] 79 S. W. 349. One who stops, looks and listens when about 50 feet from a track and thereafter only looked out of the glass in the back of his carriage top, from which but a small portion of the track was visible, is guilty of contributory negligence. Proper v. Lake Shore & M. S. R. Co. [Mich.] 99 N. W. 283.

27. Unmanageable team. Nichols v. Baltimore & O. S. W. R. Co., 33 Ind. App. 229, 70 N. E. 183; Southern R. Co. v. Davis [Ind. App.] 72 N. E. 1053. Dark night, reliance on custom to keep crossing watchman, and backing train without signals. Montgomery v. Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930. A person slowly approaching a track in a noiseless vehicle is not required to stop, look and listen. Esler v. Wabash R. Co. [Mo. App.] 83 S. W. 73. Whether under the evidence one should have stopped as well as looked and listened was properly submitted to the jury. St. Louis & S. F. R. Co. v. Brock [Kan.] 77 P. 86; Gulf, etc., R. Co. v. Dolson [Tex. Civ. App.] 85 S. W. 444.

28. Frugia v. Texarkana & Ft. S. R. Co. [Tex. Civ. App.] 82 S. W. 814.

29. Green v. Los Angeles T. R. Co., 143 Cal. 31, 76 P. 719.

30. See 2 Curr. L. 1433.

31. Chicago & A. R. Co. v. Pulliam, 208 Ill. 456, 70 N. E. 460.

32. Golinvaux v. Burlington, etc., R. Co. [Iowa] 101 N. W. 465; Stack v. New York, etc., R. Co., 96 App. Div. 575, 89 N. Y. S. 112; Missouri Pac. R. Co. v. Griffith [Kan.] 76 P. 436; Louisville & N. R. Co. v. Satterwhite [Tenn.] 79 S. W. 106; Norfolk & W. R. Co. v. Great China Tea Co., 4 Ohio C. C. (N. S.) 500. Plaintiff's negligence held to bar recovery. West v. Northern Pac. R. Co. [N. D.] 100 N. W. 254. It is a question for the jury whether one who has stopped, looked and listened should again do so before crossing a track, the view of which is obstructed. Confer v. Pennsylvania R. Co., 209 Pa. 425, 58 A. 811. Plaintiff whose view was obstructed was not negligent where he stopped 30 feet from the track, and though he heard a train, went on being assured by another that it was on another road. Neither was he negligent in not stopping again and in not asking bystanders in a position to see if a train was coming. Coffee v. Pere Marquette R. Co. [Mich.] 102 N. W. 953. Whether plaintiff should have alighted from his wagon and gone forward to where he could see held a question for the jury. Elliott v. Chicago & A. R. Co., 105 Mo. App. 523, 80 S. W. 270.

33. Stack v. New York, etc., R. Co., 96 App. Div. 575, 89 N. Y. S. 112. One whose view is obstructed by smoke and steam should stop until he is able to see whether trains are approaching. Keller v. Erie R. Co., 90 N. Y. S. 236. Where the view is obstructed, one about to cross a track should stop until he can ascertain whether he can pass in safety. Waddell v. New York, etc., R. Co., 90 N. Y. S. 239; Rogers v. Boston & M. R. Co. [Mass.] 72 N. E. 945.

34. See 2 Curr. L. 1433.

35. Coleman v. New York, etc., R. Co., 90 N. Y. S. 264; Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157. Whether plaintiff exercised proper care in the crossing of parallel tracks some of which held cars obstructing the view, was for the jury. Louisville & N. R. Co. v. Bryant [Ala.] 37 So. 370. Four roads converged at place where deceased was killed, and a number of trains were running thereon, which might distract his attention. Such evidence held to support finding of no contributory negligence. St. Louis S. W. R. Co. v. Matthews [Tex. Civ. App.] 79 S. W. 71.

36. Stack v. New York, etc., R. Co., 96 App. Div. 575, 89 N. Y. S. 112.

37. Illinois Cent. R. Co. v. Hays' Adm'r [Ky.] 84 S. W. 338.

38. See 2 Curr. L. 1433.

not absolve a traveler on the highway from the use of independent observation for his own protection,[39] but a traveler on the highway is not required to await a signal of safety from a flagman, since he may to some extent rely on his duty to give signals of danger.[40] Open gates tended by a keeper are an affirmative assurance of safety in crossing,[41] and the raising of crossing gates after the passing of a train is an invitation for a pedestrian to proceed across the tracks.[42] But where the traveler knows that the gates are not being operated, he cannot rely on their being up.[43] Where the gate is customarily left down during the night, it is not necessarily negligent for a pedestrian having knowledge of the custom to pass under it.[44]

Duties as to standing, switching, and backing trains.[45]—An attempt to pass between cars blocking a city street will not preclude recovery, though plaintiff, a minor, knew there was some danger.[46] To place one's self on a railroad track or in a position to be struck by a moving car when no necessity exists therefor, and to resign into unwatching listlessness, is such contributory negligence as to bar a recovery.[47] A reviewing court will not say as a matter of law that because others saw a locomotive backing toward a crossing on a dark night without any headlight, that one who was standing on the crossing and did not see it was guilty of contributory negligence.[48]

Intoxication.[49]—Intoxication may be such contributory negligence as to bar recovery, though decedent's team went upon the track at a point where the statutory fence was lacking.[50] Evidence that deceased who had been drinking was seen approaching a railroad crossing and thereafter sitting or lying on or near the track, held to show contributory negligence.[51]

39. West v. Northern Pac. R. Co. [N. D.] 100 N. W. 254; Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250; Van Riper v. New York, etc., R. Co. [N. J. Law] 59 A. 26. Under the evidence, plaintiff's intestate had some reason to believe it was safe to cross. Brusseau v. New York, etc., R. Co. [Mass.] 72 N. E. 348. Upon conflicting testimony in an action for the wrongful death of one invited to cross a track by defendant's employes, the verdict will not be disturbed. Central of Georgia R. Co. v. Henson, 121 Ga. 462, 49 S. E. 278. Failure to sound the statutory signals does not relieve a traveler from the duty to use his senses to learn of approaching trains. McSweeney v. Erie R. Co., 93 App. Div. 496, 87 N. Y. S. 836; Evansville & T. H. R. Co. v. Clements, 32 Ind. App. 659, 70 N. E. 554; Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837; Day v. Boston & M. R. Co., 97 Me. 528, 55 A. 420. One who drives onto a railroad crossing in front of a train, when at any time within 40 feet of the track he could have seen or heard an approaching train, is guilty of contributory negligence, though no signals were given. Pittsburgh, etc., R. Co. v. West [Ind. App.] 69 N. E. 1017. Statute making contributory negligence a matter of defense does not relieve a traveler of his duty. Id. The failure of railway servants to signal on approaching a street crossing does not relieve pedestrians of the necessity of exercising ordinary care for their own safety. Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157. Negligence in driving stock on crossing held question for jury. Kuehl v. Chicago, etc., R. Co. [Iowa] 102 N. W. 512.

40. Montgomery v. Missouri Pac. R. Co., 181 Mo. 477, 79 S. W. 930; Id., 181 Mo. 508, 79 S. W. 938.

41. Sager v. Atchison, etc., R. Co. [Kan.] 79 P. 132.

42. For the jury whether pedestrian then justified in crossing without looking and listening. Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050. Gates standing open. Not required by statute. San Antonio, etc., R. Co. v. Votaw [Tex. Civ. App.] 81 S. W. 130. Raising of gates when unsafe is negligence per se. Galveston, etc., R. Co. v. Fry [Tex. Civ. App.] 84 S. W. 664; Northern Cent. R. Co. v. State [Md.] 60 A. 19. Open gates are an invitation to cross. Stegner v. Chicago, etc., R. Co. [Minn.] 102 N. W. 205.

43. Stack v. New York, etc., R. Co., 96 App. Div. 575, 89 N. Y. S. 112.

44. Baltimore & P. R. Co. v. Landrigan, 20 App. D. C. 135.

45. See 2 Curr. L. 1434.

46. Gulf, etc., R. Co. v. Grisom [Tex. Civ. App.] 82 S. W. 671. A person climbing over the bumpers of a train at a crossing and injured by a sudden movement of the train cannot recover without showing knowledge of his dangerous position by some employe in control of the train's movements. Russell v. Central of Georgia R. Co., 119 Ga. 705, 46 S. E. 858.

47. Atchison, etc., R. Co. v. Withers [Kan.] 77 P. 542; Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157.

48. Pittsburgh, etc., R. Co. v. Fagin, 3 Ohio N. P. (N. S.) 30.

49. See 2 Curr. L. 1435.

50. Union Pac. R. Co. v. Smith [Neb.] 99 N. W. 813.

Racing with train.[52]—One deliberately going upon a track in front of an approaching engine and injured by reason of a miscalculation of speed cannot recover.[53]

Acts after realization of danger[54] are not regarded strictly, and movements in cases where the peril is great may not be negligent, though clearly dangerous.[55] Where two ways are open to a person, one of which is obviously safe and the other plainly dangerous, and he voluntarily chooses the latter, he ordinarily does so at his peril.[56] But if one be placed in peril by the negligence of another, and through consequent bewilderment makes an injudicious choice of escape, contributory negligence cannot be ascribed to him as a matter of law.[57] One in a perilous situation but able to help himself must make a vigilant use of his eyes, ears, and physical strength to avoid injury.[58] The duty of exercising care to avoid the consequences of another's negligence does not arise until such negligence exists and is either apparent or the circumstances are such that an ordinarily prudent person would apprehend its existence.[59] A company negligent in failing to sound the statutory signals is liable to one who exercises ordinary care and diligence to escape the consequences of the company's negligence.[60] In order to relieve a person injured from the exercise of ordinary care on the ground of real or apparent danger, inducing an imprudent act, there must be either a real danger or the circumstances as they appear to the party at the time must be such as to create in his mind a reasonable apprehension of danger.[61]

(§ 10D) 3. *Procedure.*[62]—By statute the officials of a railroad company may be examined before trial to ascertain what train inflicted the injuries complained of,[63] but not as to the authority for operating upon a certain street, that being a matter of statutory regulation.[64]

Pleading.[65]—The allegations of negligence should be specific,[66] and a demurrer to allegations of negligence in general terms will be sustained unless such allegations be made more specific by amendment.[67] But a general allegation of negligence is sufficient to withstand a demurrer for want of facts, unless absence of negligence appears from the facts pleaded.[68] One relying on a foreign statute, in an

51. Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793.

52. See 2 Curr. L. 1435.

53. Thomas v. Central of Georgia R. Co., 121 Ga. 38, 48 S. E. 683. Where one attempted to cross a track ahead of an oncoming train which he must have seen, evidence held to show contributory negligence as a matter of law. Day v. Boston & M. R. Co., 97 Me. 528, 55 A. 420.

54. See 2 Curr. L. 1435.

55. Gruehel v. Wabash R. Co. [Mo. App.] 84 S. W. 170.

56, 57. St. Louis, etc., R. Co. v. Brock [Kan.] 77 P. 86.

58. French v. Grand Trunk R. Co., 76 Vt. 441, 58 A. 722. By statute recovery may be barred to one who by ordinary care could have avoided the consequence to himself of another's negligence [Civ. Code 1895, § 3830]. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818.

59. Atlanta, etc., R. Co. v. Lovelace, 121 Ga. 487, 49 S. E. 607; Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818.

60. Macon, etc., R. Co. v. McLendon, 119 Ga. 297, 46 S. E. 106.

61. Texas Midland R. Co. v. Booth [Tex. Civ. App.] 80 S. W. 121.

62. See 2 Curr. L. 1435.

63. Code Civ. Proc. § 872. Muldoon v. New York, etc., R. Co., 98 App. Div. 169, 91 N. Y. S. 65.

64. Muldoon v. New York, etc., R. Co., 98 App. Div. 169, 91 N. Y. S. 65.

65. See 2 Curr. L. 1435.

66. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818. Complaint for injury by backing train held sufficient. Birmingham Belt R. Co. v. Gerganous [Ala.] 37 So. 929. A petition which does not allege negligence in terms or equivalent terms nor facts constituting negligence as a matter of law nor that the injury resulted from any act of defendant, does not state a cause of action. Chicago, etc., R. Co. v. Clinebell [Neb.] 99 N. W. 839. An allegation in a complaint for damages for being hit by a train at a crossing, that it was due to the negligent, careless, and reckless management of the train, was sufficient notice that the manner of operating the train would be brought in issue at the trial. Louisville & N. R. Co. v. Dick, 25 Ky. L. R. 1831, 78 S. W. 914.

67. Russel v. Central of Georgia R. Co., 119 Ga. 705, 46 S. E. 858.

68. Baltimore, etc., R. Co. v. Reynolds, 33 Ind. App. 219, 71 N. E. 250.

action for negligence, must plead such statute specially,[69] and a complaint for injuries resulting from a violation of city ordinance must allege the ordinance to have been in effect at the time of the accident.[70] A count relying on the willful acts of defendant's servants is in case,[71] and one averring that defendant willfully and wantonly ran its train against plaintiff is in trespass.[72] In those states in which by statute or otherwise contributory negligence is matter of defense, freedom therefrom need not be averred by the plaintiff;[73] but if the complaint discloses contributory negligence, it will be demurrable.[74] A count charging a willful and wanton injury, not alleging it to be the act of a servant, is in trespass, not in case, and requires proof of actual participation by defendant.[75] Where the cause of action is alleged as failure to give warning of the approach of a train and in running at a high rate of speed, the question of negligence in permitting buildings and cars to be so placed as to obstruct the view should not be submitted to the jury.[76] A variance between an allegation that an engine struck plaintiff's vehicle whereby plaintiff was thrown out and injured, and proof that a car struck the vehicle and the horse ran away throwing plaintiff out is fatal.[77] A complaint averring that the train could have been stopped within a foot and that defendant's servants could have seen plaintiff had they looked does not charge a willful and wanton injury.[78]

Burden of proof.[79]—As a general rule the burden is on plaintiff not only to show negligence on the part of the defendant,[80] but also to show his own freedom from contributory negligence;[81] the rule is otherwise, however, by common law or statute in some states, and in such states[82] it is for the defendant to show contributory negligence, if any, as a defense,[83] though where plaintiff's evidence itself discloses it,

69. Savannah, etc., R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308.

70. Southern R. Co. v. Jones, 33 Ind. App. 333, 71 N. E. 275.

71. Southern R. Co. v. Yancy [Ala.] 37 So. 341.

72. Southern R. Co. v. Yancy [Ala.] 37 So. 341; Central of Georgia R. Co. v. Freeman, 140 Ala. 581, 37 So. 387.

73. Southern R. Co. v. Davis [Ind. App.] 72 N. E. 1053; Chicago, etc., R. Co. v. La Porte, 33 Ind. App. 691, 71 N. E. 166; Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 289, 71 N. E. 170.

74. Complaint showing plaintiff to have been run down by backing train on one track while waiting for train to pass on another held demurrable as disclosing contributory negligence. Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157.

75. Birmingham Belt R. Co. v. Gerganous [Ala.] 37 So. 929; Central of Georgia R. Co. v. Freeman, 140 Ala. 581, 37 So. 387.

76. Missouri Pac. R. Co. v. Griffith [Kan.] 76 P. 436.

77. Unless cured by amendment. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2.

78. Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157.

79. See 2 Curr. L. 1436.

80. Coolbroth v. Pennsylvania R. Co., 209 Pa. 433, 58 A. 808; Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793. Circumstances may raise a presumption of want of proper care by a railroad company. Corbally v. Erie R. Co., 97 App. Div. 21, 89 N. Y. S. 577. Proof of injury to one driving across a track is not evidence of actionable negligence. Louisville, etc., R. Co. v. Lewis [Ala.] 37 So. 587. Facts held not to raise a presumption of negligence in loading or managing a car of lumber. Chicago, etc., R. Co. v. Reilly, 212 Ill. 506, 72 N. E. 454.

81. Wilson v. Illinois Cent. R. Co., 210 Ill. 603, 71 N. E. 398; Rogers v. Boston & M. R. Co. [Mass.] 72 N. E. 945; Waddell v. New York, etc., R. Co., 90 N. Y. S. 239; Coleman v. New York, etc., R. Co., 90 N. Y. S. 264. Evidence held insufficient to show that a man killed at a crossing where the view of the track was unobstructed was free from contributory negligence. Meinrenken v. New York, etc., R. Co., 92 App. Div. 618, 86 N. Y. S. 1075. Though the railroad company was running its train at an unusually high rate of speed and violating an ordinance, the burden is still on plaintiff to show ordinary care on his part. The doctrine of comparative negligence does not obtain in Illinois. Imes v. Chicago, etc., R. Co., 105 Ill. App. 37.

82. New Orleans, etc., R. Co. v. Brooks [Miss.] 38 So. 40.

83. Brusseau v. New York, etc., R. Co. [Mass.] 72 N. E. 348; Pittsburg, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218; Chicago, etc., R. Co. v. La Porte, 33 Ind. App. 691, 71 N. E. 166; Coolbroth v. Pennsylvania R. Co., 209 Pa. 433, 58 A. 808; Pennsylvania Co. v. Fertig [Ind. App.] 70 N. E. 834; McDonald v. New York, etc., R. Co., 186 Mass. 474, 72 N. E. 55; Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 229, 71 N. E. 170; Cleveland, etc., R. Co. v. Miles, 162 Ind. 646, 70 N. E. 985; Queen Anne's R. Co. v. Reed [Del.] 59 A. 860. Burns' Ann. St. 1901, § 359. Southern R. Co. v. Davis [Ind. App.] 72 N. E. 1053. Under Indiana statute providing that burden of proof to show contributory negligence shall be on

he cannot recover.[84] The presumption that deceased used due care may be negatived by the physical facts, such as unobstructed view, familiarity with the crossing, etc.;[85] and where deceased's acts are fully covered by direct evidence during the whole time he was within the zone of danger, the presumption of due care arising from the instinct of self-preservation does not apply.[88] Where the injury arises from the sudden backing of a train without warning, the burden is on the company to show contributory negligence.[87] The burden is on plaintiff to prove the lack of statutory signals and not upon defendant to prove that they were given.[88] Where the injury at a crossing and failure to signal is shown, the burden is on defendant to show that the want of signals was not the cause of the injury.[89] The law will assume that a traveler saw what he could have seen had he looked, and heard what he could have heard had he listened.[90] One suing for personal injuries from a train need not make formal proof of ownership; common reputation is sufficient.[91] That a locomotive was lettered with a railroad company's initials and managed by its servants raises a prima facie case of its ownership.[92]

Admissibility of evidence[93] is controlled by the customary rules as to competency, materiality, etc. In the footnotes some peculiar decisions are noted,[94] and a few cases are cited involving the sufficiency of the evidence.[95]

the railroad company an allegation that a decedent killed at a crossing was without fault is not necessary (Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183), and an instruction calculated to impress upon the jury that the burden of the issue of contributory negligence was on plaintiff is erroneous (Id.). There is no presumption of negligence against a traveler from the mere fact that the injuries occurred at a railway crossing. Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 289, 71 N. E. 170. In the absence of all evidence, the court will presume that the traveler stopped, looked, and listened. Cromley v. Pennsylvania R. Co., 208 Pa. 445, 57 A. 832; Burns v. Pennsylvania R. Co. [Pa.] 59 A. 687; Queen Anne's R. Co. v. Reed [Del.] 59 A. 860. Evidence held not to overcome the presumption. Patterson v. Pittsburg, etc., R. Co. [Pa.] 59 A. 318. **Contra,** McSweeney v. Erie R. Co., 93 App. Div. 496, 87 N. Y. S. 836. In action for injuries from a failure to provide a statutory crossing, the burden of showing contributory negligence is on the defendant. See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106.

84. Van Winkle v. New York, etc., R. Co. [Ind. App.] 73 N. E. 157.

85. Tomlinson v. Chicago, etc., R. Co. [C. C. A.] 134 F. 233.

86. Golinvaux v. Burlington, etc., R. Co. [Iowa] 101 N. W. 465.

87, 88. Gulf, etc., R. Co. v. Hall [Tex. Civ. App.] 80 S. W. 133.

89. Atterberry v. Wabash R. Co. [Mo. App.] 85 S. W. 114.

90. Southern R. Co. v. Davis [Ind. App.] 72 N. E. 1053.

91. Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

92. East St. Louis Connecting R. Co. v. Altgen, 210 Ill. 213, 71 N. E. 377.

93. See 2 Curr. L. 1436.

94. As to whether signals were given at crossings other than where injury occurred is irrelevant. But on cross-examination could test a conductor's memory by this question. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818; Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793. On the issue whether defendant's train ran over a "blocked" crossing, it is proper to show that at the time a parallel track was blocked, it being protected against the intersecting road by a semaphore controlled by the same lever which operated the semaphore on defendant's tracks. Chicago, etc., R. Co. v. Vipond, 212 Ill. 199, 72 N. E. 22. Failure of persons near the place of accident to notice or hear signals is competent for the jury's consideration. McDonald v. New York, etc., R. Co., 186 Mass. 474, 72 N. E. 55. Evidence as to boys, other than deceased, playing on a railroad crossing is incompetent on the question of contributory negligence. Williams v. Southern R. Co., 68 S. C. 369, 47 S. E. 706. Declarations by a person injured as to the manner of accident, made immediately thereafter, are admissible as part of the res gestae. Id. That plaintiff was in the habit of drinking is inadmissible on the question whether he was sober when injured. Bedenbaugh v. Southern R. Co. [S. C.] 48 S. E. 53. Testimony that a path generally used in crossing a railroad is less dangerous than a neighboring street crossing is inadmissible. Likewise of testimony on general knowledge of the dangers incident to crossing where deceased was killed. Savannah, etc., R. Co. v. Evans, 121 Ga. 391, 49 S. E. 308. An invalid city ordinance requiring a railroad company to construct a safety gate upon the township side of a line crossing is not admissible to prove the dangerous character of the crossing. Burns v. Pennsylvania R. Co. [Pa.] 59 A. 687. A provision in a contract between a city and a railway company limiting the rate of speed on the streets is admissible in evidence, equally with a violation of an ordinance, to show negligence. Duval v. Atlantic Coast Line R. Co., 134 N. C. 331, 46 S. E. 750. Evidence as to what occurred at the time of an accident, in-

Instructions[96] must conform to the usual rules as to applicability to the issues, invading province of jury, etc. The form and subject-matter of a few are discussed below.[97]

Directing verdict.[98]—While defendant's negligence[99] and plaintiff's contributory negligence is ordinarily a question for the jury,[1] and always is on a conflict

cluding the acts of decedent's companion, is admissible as res gestae. Proper v. Lake Shore, etc., R. Co. [Mich.] 99 N. W. 283. In an action by one injured in passing between a stationary car and a freight train which obstructed a crossing, evidence is admissible to show that it was a custom of the company to leave such a space for pedestrians, and also evidence to show that others had preceded him in such passage. Chicago, etc., R. Co. v. Russell [Neb.] 100 N. W. 156. A city ordinance requiring signals is admissible. Reed v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 919. Evidence only on the exact negligence charged is admissible under allegations of negligence peculiar in their nature. Wirstlin v. Chicago, etc., R. Co., 124 Iowa, 170, 99 N. W. 697.

95. A jury need not consider as conclusive the testimony of the engineer operating a train causing injury. Farrell v. Chicago, etc., R. Co., 123 Iowa, 690, 99 N. W. 578. Upon conflicting testimony as to whether a signal was sounded, the law gives a preference to positive over negative evidence. St. Louis, etc., R. Co. v. Brock [Kan.] 77 P. 86. While evidence of persons that they did not hear a bell rung is of less probative value than that of others that the bell was rung, the jury are not authorized to entirely disregard the negative evidence. Northern Cent. R. Co. v. State [Md.] 60 A. 19. That plaintiff did not see the train, if it could have been seen, may be a circumstance tending strongly to establish contributory negligence, but the extent to which, if any, it is established is for the jury. Morse v. New York, etc., R. Co., 92 N. Y. S. 657. In the absence of direct evidence, deceased's custom to stop, look, and listen, and his familiarity with the crossing may be shown and may be sufficient to support a finding of due care. Tucker v. Boston & M. R. Co. [N. H.] 59 A. 943. Evidence that defendant ran an extra freight train by which deceased was killed, at an unusual time of night through a thickly eettled part of town, at a rapid rate of speed over frequent street crossings without giving any signals, is sufficient to sustain a finding of negligence. New Orleans, etc., R. Co. v. Brooks [Miss.] 38 So. 40. Case involving conflict of evidence on bad condition of crossing, speed of train, obstruction of view, defective vision of plaintiff, held properly for jury. Emmons v. Minneapolis & St. L. R. Co., 92 Minn. 521, 100 N. W. 364. Evidence in action by street car passenger held to establish negligence on part of railroad, but not on part of street car company. Snider v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 530. Deaf and dumb child killed at crossing. Evidence held sufficient to support recovery, the issue being negligence and contributory negligence of child and parents. St. Louis S. W. R. Co. v. Allen [Tex. Civ. App.] 80 S. W. 240.

96. See 2 Curr. L. 1437.

97. A railway company requesting an instruction that reasonable care "at the time of the accident" was requisite to a recovery cannot complain of the court's use of the words "immediately before and at the time of the accident." Chicago, etc., R. Co. v. Coggins, 212 Ill. 369, 72 N. E. 376. An instruction that plaintiff must have used reasonable care "to ascertain whether any train was approaching" was properly refused. Id. A jury should be clearly instructed to reduce the verdict if they find plaintiff failed to exercise proper care. Atlanta, etc., R. Co. v. Gardner [Ga.] 49 S. E. 818. In an action for the death of a child at a crossing, it is proper to refuse an instruction predicating defendant's freedom from liability on the inability of the engineer to stop in time to prevent an accident, if decedent suddenly ran on the track in front of the engine. Louisville & N. R. Co. v. Robinson [Ala.] 37 So. 431. A court may properly refuse an instruction that "if decedent was drunk and in a helpless condition on or near the track and was unable to realize the dangerous position he was in, then decedent would not be guilty of contributory negligence." Stewart v. North Carolina R. Co., 136 N. C. 385, 48 S. E. 793. Under Indiana statutes providing that the burden of proof of contributory negligence for an accident at a crossing shall be on the railroad company, an instruction that it is presumed of law that an injury received from a collision at a crossing was due to the negligence of the injured party is erroneous. Nichols v. Baltimore, etc., R. Co., 33 Ind. App. 229, 70 N. E. 183. An instruction that plaintiff must have used ordinary care to avoid an accident is proper. Chicago, etc., R. Co. v. Zapp, 209 Ill. 339, 70 N. E. 623. An instruction implying that nothing less than foolhardiness would constitute contributory negligence is erroneous. Hinchman v. Pere Marquette R. Co. [Mich.] 99 N. W. 277. Instruction on plaintiff's failure to stop, look, and listen, held prejudicial to defendant. Wands v. Chicago, etc., R. Co., 106 Mo. App. 96, 80 S. W. 18. A charge on discovered peril is harmless, though not justified by the evidence where the issue is contributory negligence which the jury found in plaintiff's favor. Reed v. St. Louis, etc., R. Co. [Mo. App.] 80 S. W. 919.

98. See 2 Curr. L. 1438.

99. Whether an accident occurred at a highway crossing is generally for the jury. Tereszko v. New York, etc., R. Co., 96 App. Div. 615, 88 N. Y. S. 561. Upon conflicting testimony it is for the jury to say whether the statutory signals were given. McDonald v. New York, etc., R. Co., 186 Mass. 474, 72 N. E. 55; Brusseau v. New York, etc., R. Co. [Mass.] 72 N. E. 348.

1. Chicago & A. R. Co. v. Pettit, 209 Ill. 452, 70 N. E. 591; McDonald v. New York, etc., R. Co., 186 Mass. 474, 72 N. E. 55; Chicago & A. R. Co. v. Pulliam, 208 Ill. 456, 70 N. E. 460; Cromley v. Pennsylvania R. Co., 208 Pa. 445, 57 A. 832; Wolfe v. Pennsylvania

of evidence,[2] if the undisputed evidence shows the accident to have resulted from plaintiff's negligence, verdict for the defendant should be directed.[3] Culpable negligence is a matter of law.[4]

Special findings.[5]

(§ 10) *E. Injuries to persons on highway or private premises near tracks.*[6]—A railway company may be liable to one in a highway for injuries caused by objects protruding[7] or falling from a train lawfully operating in a part of such highway.[8] To impose a liability upon the company, the injury complained of must have resulted from its negligence.[9] A carrier is responsible only for those acts of strangers which might have been reasonably anticipated.[10] A boy standing in a public street and injured by a piece of ice kicked from a passing train is not negligent.[11]

Accidents from derailed trains.[12]

Injuries from frightened horses.[13]—A railway company is not liable for the consequences of such noises on or in the vicinity of public streets made by its locomotives or engines as are incident to the ordinary management thereof,[14] but failure to sound the statutory signals until so near the crossing that a team is in dangerous proximity to it before knowledge of its presence may render the company liable for injuries resulting from the fright of the team.[15] That a team is frightened by the blowing of a signal whistle or other noise of train imposes no liability upon the company unless an unusual and unnecessary noise was made;[16]

R. Co., 22 Pa. Super. Ct. 335. Whether a pedestrian may cross without looking and listening, immediately after the raising of railroad gates is for the jury. Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

2. Where the evidence tended to show the exercise of due care by the plaintiff, the question of his contributory negligence was for the jury. Illinois Cent. R. Co. v. Scheffner, 209 Ill. 9, 70 N. E. 619. Where there is conflicting testimony as to whether a person stopped to look and listen, the question is for the jury. Coolbroth v. Pennsylvania R. Co., 209 Pa. 433, 58 A. 808.

3. Garlich v. Northern Pac. R. Co. [C. C. A.] 131 F. 837; Chicago & N. W. R. Co. v. Andrews [C. C. A.] 130 F. 65; Wilson v. Illinois Cent. R. Co., 210 Ill. 603, 71 N. E. 398; Chicago & A. R. Co. v. Pettit, 209 Ill. 452, 70 N. E. 591; McDonald v. New York, etc., R. Co., 186 Mass. 474, 72 N. E. 55. A nonsuit is proper where the plaintiff approached a crossing without stopping, looking, and listening. Canfield v. Baltimore & O. R. Co., 208 Pa. 372, 57 A. 763.

4. Green v. Los Angeles T. R. Co., 143 Cal. 31, 76 P. 719.

5. See 2 Curr. L. 1438. Tennessee statute providing that a railroad company shall keep some one on the locomotive always on the lookout and sound the alarm whistle in case any one appears on the track, and for failure to do so contributory negligence shall be considered only in mitigation of damages, the jury need not mitigate to nominal damages in case the person on the track was grossly negligent. Cincinnati, etc., R. Co. v. Davis [C. C. A.] 127 F. 933.

6. See 2 Curr. L. 1438.

7. Chicago, etc., R. Co. v. Thrasher [Ind. App.] 73 N. E. 829.

8. Evidence of user of that part of the highway by the public and that improvements thereon had been made by the county is admissible. Turney v. Southern Pac. Co., 44 Or. 280, 76 P. 1080.

9. Nonsuit in an action for death of a person last seen upon the highway near a defective bridge. Morgan v. Pennsylvania R. Co., 209 Pa. 25, 58 A. 116.

10. Injury to passenger by employe of another company using the same depot. Miller v. West Jersey & S. R. Co. [N. J. Law] 59 A. 13.

11. Willis v. Maysville, etc., R. Co. [Ky.] 85 S. W. 716.

12. See 2 Curr. L. 1438.

13. See 2 Curr. L. 1438. Instructions in a case where it was alleged plaintiff drove upon the track with the reins so loose as not to be in control of his team held bad both as to negligence and contributory negligence. St. Louis S. W. R. Co. v. Hall [Tex.] 85 S. W. 786.

14. Escape of steam by engine partially in highway. Crowley v. Chicago, etc., R. Co. [Wis.] 99 N. W. 1016. But see Hinchman v. Pere Marquette R. Co. [Mich.] 99 N. W. 277.

15. Woman attempting to alight from wagon. Texas Midland R. Co. v. Booth [Tex. Civ. App.] 80 S. W. 121. Negligence will not be imputed from a failure to give the statutory signals where the doing so would probably have increased the fright of a horse beyond control. Fares v. Rio Grande Western R. Co. [Utah] 77 P. 230.

16. Chalkley v. Central of Georgia R. Co., 120 Ga. 683, 48 S. E. 194. A railroad company is liable to travelers upon a highway parallel with the right of way, or in the neighborhood thereof, for injuries arising only from unusual and unnecessary causes, attributable to negligence or willfulness. New York, etc., R. Co. v. Martin [Ind. App.] 72 N. E. 654. Evidence that plaintiff's team was frightened

but it is culpable negligence for an engineer to sound a locomotive whistle while passing under a bridge upon which he sees a vehicle crossing.[17] Authority to erect and maintain the necessary buildings and machinery for the conducting of the railroad business does not protect a company in so using a shop whistle as to frighten horses.[18] After discovery of the perilous position of one on an adjacent highway the company must refrain from any heedless or wanton act tending to increase the danger.[19] A railroad company may use its right of way in any lawful manner, but it must use all precautions necessary to prevent obstructions to a view of the track from the crossings from becoming dangerous.[20] A company is not liable for injuries from a horse becoming frightened at an object in the road after safely making a crossing,[21] and there can be no recovery for a horse killed in running away from fright at escaping steam which was neither unusual nor unnecessary.[22] Allowing steam to escape from an engine partially upon a crossing when a nervous horse is passing may constitute negligence.[23] A railroad company may be liable for injuries from frightened horses where it leaves a locomotive on a crossing for an unreasonable time.[24] The presence of a freight car at the margin of a street crossing is not a nuisance rendering the railroad company liable for injuries from a horse becoming frightened thereat,[25] or at a hand car which unexpectedly crosses the street in front of a team.[26] A railroad may be constructed through a canyon, though it runs very close to a highway.[27] A railroad company is not required to keep a special lookout for travelers upon a highway in close proximity to the tracks, but ordinary care should be used.[28] In an action for injuries from a team becoming frightened by a railroad shop whistle, evidence that another team had been frightened thereby was admissible.[29]

(§ 10) *F. Injuries to animals on or near tracks.*[30]—At places where stock are frequently encountered, employes must exercise more care than elsewhere,[31] and the law requires that those in charge of a locomotive keep a lookout for stock,[32] even in counties where stock is not allowed to run at large,[33] though the per-

by noise made necessarily in starting a train up a grade, the engineer not seeing plaintiff or the team, does not show negligence on part of railway employes. St. John v. St. Louis S. W. R. Co. [Tex. Civ. App.] 79 S. W. 603. The moving of an engine without unnecessary or extraordinary noise is not negligence per se, though it frighten a horse. Fares v. Rio Grande Western R. Co. [Utah] 77 P. 230.

17. Cleveland, etc., R. Co. v. David, 105 Ill. App. 69.

18. Powell v. Nevada, etc., R. Co. [Nev.] 78 P. 978.

19. Fares v. Rio Grande Western R. Co. [Utah] 77 P. 230.

20. A person was injured by her horse becoming frightened at the blowing off of steam from engines standing near a crossing. At this point the view of the track was obstructed and the horseman did not notice the engines until they began to blow off. Nashville, etc., R. Co. v. Witherspoon [Tenn.] 78 S. W. 1052.

21. Gulf, etc., R. Co. v. Sneed [Miss.] 36 So. 261.

22. Southern R. Co. v. Duckett, 121 Ga. 511. 49 S. E. 589.

23. Hinchman v. Pere Marquette R. Co. [Mich.] 99 N. W. 277.

24. Contributory negligence of driver going on crossing and negligence of company for jury. Welborne v. Gulf, etc., R. Co. [Tex. Civ. App.] 80 S. W. 653. Declaration and verdict held inconclusive. Butler v. Easton & A. R. Co. [N. J. Law] 60 A. 218.

25. Hohman v. New York, etc., R. Co., 90 N. Y. S. 882. Where two companies use tracks, only the one leaving the car is liable if either. Jolly v. Missouri, etc., R. Co. [Tex. Civ. App.] 85 S. W. 837.

26. Chicago, etc., R. Co. v. Roberts [Neb.] 101 N. W. 2.

27. Fares v. Rio Grande Western R. Co. [Utah] 77 P. 230.

28. Need not exercise same care as at crossing. Fares v. Rio Grande Western R. Co. [Utah] 77 P. 230.

29. Powell v. Nevada, etc., R. Co. [Nev.] 78 P. 978.

30. See 2 Curr. L. 1440.

31. For the jury whether the train was running at an improper speed. Rafferty v. Portland, etc., R. Co., 32 Wash. 259, 73 P. 382.

32. Louisville & N. R. Co. v. Swann, 120 Ga. 695, 48 S. E. 117; Cincinnati, etc., R. Co. v. Burgess [Ky.] 84 S. W. 760; St. Louis S. W. R. Co. v. Bowen [Ark.] 84 S. W. 788.

33. Davis v. Southern R. Co., 68 S. E. 446, 47 S. E. 723. Contra in Texas. Red River, etc., R. Co. v. Dooley [Tex. Civ. App.] 80 S. W. 566.

formance of important and necessary duties about an engine may constitute a sufficient excuse for nonperformance of the duty.[34] In Texas, if a railroad company fences its road, it is liable only for injuries resulting from a want of ordinary care.[35] No liability arises from the killing of stock suddenly running upon the track, the engineer keeping a lookout ahead and promptly using all the appliances of a well equipped engine to stop after discovery of the stock.[36] Failure to signal at crossings as required by statute is as to animals killed at crossings negligence per se;[37] but failure to signal for a crossing is immaterial as to stock not killed at a crossing.[38] An averment that a passenger train was running at a speed exceeding 60 miles an hour does not per se charge negligence.[39] The owner of land adjoining a railroad right of way is not liable for injuries to a neighbor's stock which comes upon his land without his negligence and through an open right of way fence strays upon the track.[40]

How far liability extends.[41]—The general rules applying to injuries to licensees and trespassers extends to the live stock of such persons, upon the right of way under similar conditions.[42] If stock break a lawful fence to get upon the track, the railroad company is not liable, whether the fence be its own or that of an adjoining proprietor,[43] but if there is no lawful fence to stop them, the company is liable, though they were trespassing at the point where they entered.[44] In Virginia the liability extends to a stock owner who owns no land on the road either at the place where the stock went on or at the place where they were killed.[45] Geese are not within the ordinary rules regarding the killing of stock.[46] By statute in some states injuries arising from fright of stock getting on the right of way through the company's negligence may be recovered for.[47]

Place of entry on right of way.[48]—Where stock get upon the track at a point where there is no duty to fence, there can be no recovery without proof of negligence, though they are killed at a point where fences are required;[49] but a railroad company is liable for damage to stock securing access to the right of way over an insecure and insufficient cattle guard.[50] Defendant is not liable for injuries to stock going upon track through a defective gate which the owner has

34. Louisville & N. R. Co. v. Swann, 120 Ga. 695, 48 S. E. 117.

35. Missouri, etc., R. Co. v. Bradshaw [Tex. Civ. App.] 83 S. W. 897.

36. Southern R. Co. v. Hoge [Ala.] 37 So. 439; Alabama & V. R. Co. v. Boyles [Miss.] 37 So. 498.

37. Texas & P. R. Co. v. Crutcher [Tex. Civ. App.] 82 S. W. 341.

38. Houston, etc., R. Co. v. Wilson [Tex. Civ. App.] 84 S. W. 274; Nicholas v. Chicago, etc., R. Co. [Iowa] 100 N. W. 1115.

39. Chicago, etc., R. Co. v. Wheeler [Kan.] 79 P. 673.

40. Strobeck v. Bren [Minn.] 101 N. W. 795.

41. See 2 Curr. L. 1441.

42. See ante, § 10B1. Curtis v. Oregon R. & Nav. Co., 36 Wash. 55, 78 P. 133.

43. Farmers' Bank v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 76.

44. Rinehart v. Kansas City So. R. Co. [Mo. App.] 80 S. W. 910; Farmers' Bank v. Chicago & A. R. Co. [Mo. App.] 83 S. W. 76; Litton v. Chicago, etc., R. Co. [Mo. App.] 85 S. W. 978. Plaintiff must show that adjoining owner's fence was defective. Seidel v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 77.

45. Acts 1897-8, c. 283. Sanger v. Chesapeake, etc., R. Co., 102 Va. 86, 45 S. E. 750.

46. A goose is not an "animal or obstruction" within the meaning of Tennessee Code, requiring every possible means to be used to stop a train to prevent an accident. Nashville, etc., R. Co. v. Davis [Tenn.] 78 S. W. 1050. In the absence of recklessness or common-law negligence, a railroad company is not liable for the killing of geese permitted to run at large. Id.

47. Evidence must show fright from train. Circumstances held insufficient. Shaw v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 611. Where the statute gives a right of action for injuries to stock on the track arising from being frightened by any locomotive or train, a gasoline motor hand car is not within the statute. Henson v. Williamsville, etc., R. Co. [Mo. App.] 85 S. W. 597.

48. See 2 Curr. L. 1441.

49. Redmond v. Missouri, etc., R. Co., 104 Mo. App. 651, 77 S. W. 768. It is the place where animals get upon the tracks and not where they are killed that fixes a company's liability. Bumpas v. Wabash R. Co., 103 Mo. App. 202, 77 S. W. 115; Chicago, etc., R. Co. Sevcek [Neb.] 101 N. W. 981.

50. Chicago, etc., R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908.

covenanted to maintain.[51] A railroad company is not liable for killing an animal entering on its track in a county where the stock law is in force, where it used the utmost care to stop the train as soon as the danger was discovered.[52] The presumption that stock was killed where it is found dead is not conclusive.[53]

Duty to maintain fences.[54]—Statutes may require railroad companies to erect and maintain fences of sufficient height and strength to turn stock,[55] when necessary to prevent stock from reaching the right of way,[56] and abutting landowners have a right to assume that they will do so.[57] Failure to repair upon notice or within a reasonable time is a failure to fence within the meaning of such statutes.[58] In the absence of an agreement whereby the abutting landowner is to maintain a fence, the duty to provide a statutory fence rests upon the railroad company.[59] That a railroad company has compensated the abutting owner for making and keeping in repair the necessary fencing does not relieve the company from its statutory duty therein.[60] The voluntary construction of a fence by an abutting owner does not relieve the company from its statutory duty relative to fences,[61] unless at its construction the fence was sufficient and at the time complained of was in a fair state of repair.[62] Though adjoining landowners may by agreement relieve the company from its statutory duty to maintain fences, they cannot waive that duty in behalf of third persons whose stock is killed through failure to fence.[63] Failure to comply with the statute renders the company liable for resulting damages.[64] There is no duty to fence at stations where to do so would hinder the proper operation of the road,[65] but failure to fence is excusable

51. Texas & P. R. Co. v. Owens [Tex. Civ. App.] 81 S. W. 62.

52. Houston, etc., R. Co. v. Atlas Press Brick Works [Tex. Civ. App.] 81 S. W. 792.

53. Chicago, etc., R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908.

54. See 2 Curr. L. 1442.

55. Code 1887, § 1258. Sanger v. Chesapeake & O. R. Co., 102 Va. 86, 45 S. E. 750; Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. The Virginia fencing statute is valid as an exercise of the police power [Code 1887, §§ 1258-9; Acts 1897-8, c. 250, 283]. Sanger v. Chesapeake & O. R. Co., 102 Va. 86, 45 S. E. 750. A "good and sufficient" fence to restrain domestic animals must be such as will restrain the kind of animals kept on the adjacent property. Fence sufficient to restrain cattle not sufficient for sheep [Rev. St. 1883, §§ 36, 37, c. 51]. Cotton v. Wiscasset, etc., R. Co., 98 Me. 511, 57 A. 785. Burns' Ann. St. 1901, § 5323, requiring fences, does not change a company's liability for killing of stock. Chicago, etc., R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908. Duty to fence extends to switch track used only by private person. Duncan v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 661. Montana statute on fences held to be an attempted adoption of § 485 of Cal. Code and to be construed accordingly. Beaudin v. Oregon Short Line R. Co. [Mont.] 78 P. 303. Instruction on duty to maintain fence held sufficiently favorable to defendant. Klay v. Chicago, etc., R. Co. [Iowa] 102 N. W. 526. Statutes may require railroad companies to fence their right of way if the adjoining owner fence all other sides of his land. Lessee is not an "owner" under this statute [Civ. Code, § 542]. Crary v. Chicago, etc., R. Co. [S. D.] 100 N. W. 18.

56. Need not fence in City of New York where a highway intervened between adjoining lands and right of way [Laws 1892, § 32, c. 676, p. 1390]. Lee v. Brooklyn Heights R. Co., 97 App. Div. 111, 89 N. Y. S. 652. Code, § 2055. Dailey v. Chicago, etc., R. Co., 121 Iowa, 254, 96 N. W. 778.

57. It is not contributory negligence for an owner to permit animals to remain in a pasture after discovery that the fence was inadequate to restrain them. Chicago, etc., R. Co. v. Bourne, 105 Ill. App. 27.

58. Dailey v. Chicago, etc., R. Co., 121 Iowa, 254, 96 N. W. 778.

59. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

60. Such compensation is a matter of defense in an action by the compensated owner. Sanger v. Chesapeake & O. R. Co., 102 Va. 86, 45 S. E. 750.

61, 62. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

63. Rinehart v. Kansas City Southern R. Co. [Mo. App.] 80 S. W. 910.

64. Lee v. Brooklyn Heights R. Co., 97 App. Div. 111, 89 N. Y. S. 652. Under Texas statutes a railroad company that has not fenced its track is absolutely liable for the killing or injuring of livestock on its tracks. Ft. Worth & R. G. R. Co. v. Swan [Tex.] 78 S. W. 920. Under this statute a track is not fenced unless it is entirely enclosed and the company is liable for a mule killed where the track was fenced if the track was open a short distance away. Id.

65. Redmond v. Missouri, etc., R. Co., 104 Mo. App. 651, 77 S. W. 768. No duty rests upon a railroad company to fence at stations. Chicago, etc., R. Co. v. Sevcek [Neb.] 101 N. W. 981; Beaudin v. Oregon S. L. R. Co. [Mont.] 78 P. 303. A place where there is no agent is not a station, though passengers are taken up and set down there and

only to an extent sufficient to afford the public and the railroad company necessary facility for transacting the business reasonably to be expected at the locality.[66] Where a right of way is parallel to a highway, the erection of a fence is required unless its erection would destroy the use of the highway as such.[67] A company putting in a fence gate for the convenience of an adjoining landowner is not responsible for injury to stock occasioned by the careless use of such gate by persons not in its employ.[68] The stock law in Missouri does not relieve railroad companies of their duty to fence where their roads run through cultivated or uninclosed fields.[69] The platting of lands through which the road runs will not relieve it of its duty to fence.[70] In New Mexico, failure to fence is not negligence per se but only places on defendant the burden of proving that the stock was not killed as a result of its negligence.[71] That a railroad company constructs a fence does not estop it from showing that it was not required to do so and that plaintiff had no right to assume the fence would be maintained in good repair.[72]

Gates.[73]—Ordinary care and prudence must be exercised in the construction of gates;[74] to provide such gates as are reasonably sufficient to prevent live stock of ordinary disposition from going upon the tracks.[75] Trivial defects in gates at farm crossings impose no liability on the railroad,[76] and no liability arises for defective gates of original proper construction until actual notice of the defects, or the company ought in the exercise of reasonable care to have had notice, and a sufficient time has elapsed in which to make the repairs.[77] A railroad company must exercise reasonable care in keeping gates closed to farm crossings.[78] Where parallel adjoining rights of way cross a farm, failure to maintain gates between the rights of way of a private crossing is not negligent.[79]

Cattle guards.[80]—Statutes may require railroad companies to maintain proper and sufficient cattle guards.[81] A cattle guard should be reasonably adapted for the intended purpose, and need not be such a one as may not under any circumstances be crossed by an animal.[82] Statutes may provide that a cattle guard approved by the state railroad commissioner shall be sufficient;[83] but the approval of a device will not relieve defendant of liability for loss of stock getting upon the right of way, through a space between the guard and a glance fence,[84] though the fence could not be built closer and allow the passing of trains. Evidence that a cattle guard was of the style in general use by first class railroads does not necessarily show a compliance with the statute thereon.[85] In Michigan cattle guards

freight is sometimes thrown off for accommodation of consignees. Duncan v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 661. Sawmill near track. Smith v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 972.

66. Chicago, etc., R. Co. v. Sevcek [Neb.] 101 N. W. 981.

67. Sanger v. Chesapeake & O. R. Co., 102 Va. 86, 45 S. E. 750.

68. Dailey v. Chicago, etc., R. Co., 121 Iowa, 254, 96 N. W. 778.

69. Rinehart v. Kansas City Southern R. Co. [Mo. App.] 80 S. W. 910.

70. Iola Elec. R. Co. v. Jackson [Kan.] 79 P. 662.

71. Pecos Valley & N. E. R. Co. v. Cazier [N. M.] 79 P. 714.

72. Crary v. Chicago, etc., R. Co. [S. D.] 100 N. W. 18.

73. See 2 Curr. L. 1443.

74, 75. Wirstlin v. Chicago, etc., R. Co., 124 Iowa, 170, 99 N. W. 697.

76. Missouri, etc., R. Co. v. Bradshaw [Tex. Civ. App.] 83 S. W. 897.

77. Wirstlin v. Chicago, etc., R. Co., 124 Iowa, 170, 99 N. W. 697.

78. Bumpas v. Wabash R. Co., 103 Mo. App. 202, 77 S. W. 115. **Contra,** Missouri, etc., R. Co. v. Bradshaw [Tex. Civ. App.] 83 S. W. 897.

79. Fowbel v. Wabash R. Co. [Iowa] 100 N. W. 1121.

80. See 2 Curr. L. 1443.

81. Code, § 2055. Boyer v. Chicago, etc., R. Co., 123 Iowa, 248, 98 N. W. 764.

82. Campbell v. Iowa Cent. R. Co., 124 Iowa, 248, 99 N. W. 1061.

83. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760; Clement v. Pere Marquette R. Co. [Mich.] 100 N. W. 999.

84. Johnson v. Detroit & M. R. Co. [Mich.] 102 N. W. 744; Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760.

85. Pennsylvania Co. v. Newby [Ind.] 72 N. E. 1043.

must be sufficient to turn sheep and hogs as well as cattle.[86] The sufficiency of a cattle guard is ordinarily for the jury.[87] Railroad companies must use due care to maintain the efficacy of their cattle guards.[88] Fences and cattle guards should be placed at the highway line of a crossing.[89] A company is not required to place cattle guards at crossings where they would endanger the railway's employes in performing their necessary duties, as switching, etc.[90] A specified pattern of surface guard cannot be judicially declared to be a compliance with the statute because less dangerous to the traveling public than the pit guard, though less effective in turning cattle.[91]

Contributory negligence of owner[92] is a defense,[93] but the fact that one's stock was trespassing upon a right of way is not a bar to his action for damages to stock.[94] In Texas the mere fact that stock is at large in a county where the stock law is in force makes their owner negligent, and it is immaterial whether he knew it or whether the railway fence was sufficient, the company having in fact fenced.[95]

Pleading.[96]—The acts of negligence complained of should be specifically alleged,[97] a general allegation being insufficient as against a special demurrer.[98] It is generally not necessary to allege that plaintiff owned the field from which the cattle went on the track or that the cattle were lawfully in the field;[99] but a petition under the Montana statute must allege plaintiff's ownership or possession of the land through which the railroad runs, and that the stock was killed at such place. But there need be no allegation of negligence.[1] Under an allegation of negligence in the operation of a train, a failure to provide cattle guards may be shown,[2] and an allegation that a horse entered upon a right of way "where the same was not securely fenced in" is sustained by proof of entry over a cattle guard that was not sufficient to turn stock.[3] A petition alleging that the track not enclosed by a fence is not supported by proof that the stock went on the track through an open gate, though defendant's servants left the gate open.[4] Contributory negligence of the owner is only in issue when pleaded.[5]

86. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760.

87. Pennsylvania Co. v. Newby [Ind.] 72 N. E. 1043.

88. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. A cattle guard so out of repair for two months that stock could pass over it constitutes negligence as a matter of law on the part of the railroad company. Id. Sheet iron cattle guards held insufficient. Yazoo & M. V. R. Co. v. Hubbard [Miss.] 37 So. 1011.

89. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

90. Whether cattle guards can be placed at a railroad crossing without danger to the company's employes is not for determination of the company alone, but is triable as a question of fact. Gilpin v. Missouri, etc., R. Co. [Mo. App.] 77 S. W. 118.

91. Yazoo & M. V. R. Co. v. Harrington [Miss.] 37 So. 1016.

92. See 2 Curr. L. 1443.

93. Plaintiff camped for night with drove of cattle on public highway alongside unfenced track. Ft. Worth & D. C. R. Co. v. Roberts [Tex. Civ. App.] 83 S. W. 250.

94. Sanger v. Chesapeake & O. R. Co., 102 Va. 86, 45 S. E. 750.

95. Red River, etc., R. Co. v. Dooley [Tex. Civ. App.] 80 S. W. 566.

96. See 2 Curr. L. 1444.

97. Macon, etc., R. Co. v. Stewart, 120 Ga. 890, 48 S. E. 354. Averments of negligence held sufficient. Southern R. Co. v. Hoge [Ala.] 37 So. 439; Central of Georgia R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780. The complaint must allege whether the negligence complained of was failure to provide or maintain proper fences and gates, or whether it was in permitting a gate to remain open. Litton v. Chicago, etc., R. Co. [Mo. App.] 85 S. W. 978. A complaint alleging that on or about a certain date defendant, in operating a train of cars, negligently, carelessly, and wrongfully struck and killed certain stock, states a cause of action. Jones v. Great Northern R. Co., 12 N. D. 343, 97 N. W. 535.

98. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785.

99. Wages v. Quincy, etc., R. Co. [Mo. App.] 85 S. W. 104.

1. Civ. Code, § 950. Beaudin v. Oregon S. L. R. Co. [Mont.] 78 P. 303.

2. Rafferty v. Portland, etc., R. Co., 32 Wash. 259, 73 P. 382.

3. Chicago, etc., R. Co. v. Brown, 33 Ind. App. 603, 71 N. E. 908.

4. Stonebraker v. Chicago & A. R. Co. [Mo. App.] 85 S. W. 631; Litton v. Chicago, etc., R. Co. [Mo. App.] 85 S. W. 978.

Burden of proof.[6]—To support a recovery it must appear that the animal was killed upon the right of way.[7] Proof of failure to fence and injury to stock raises a prima facie case of negligence.[8] By the statute in some states proof of the killing of stock by a train raises a presumption of negligence on the part of the railroad company,[9] which must be overcome by evidence of the exercise of due care.[10] Where animals are killed at a point where the company is not required to fence, the burden is on plaintiff to show negligence.[11]

Admissibility and sufficiency of evidence.[12]—The admissibility of evidence in these cases is governed by the customary rules. A few illustrative cases are cited below.[13] Cases involving the sufficiency of the evidence to support recovery are discussed in the note.[14]

5. St. Louis, etc., R. Co. v. Philpot [Ark.] 77 S. W. 901. Plea of contributory negligence in that the stock injured were running at large contrary to the stock law held demurrable. Southern R. Co. v. Hoge [Ala.] 37 So. 439.

6. See 2 Curr. L. 1444.

7. Lee v. Brooklyn Heights R. Co., 97 App. Div. 111, 89 N. Y. S. 652.

8. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965.

9. Code 1883, § 2326. Baker v. Roanoke & T. R. Co., 133 N. C. 31, 45 S. E. 347. Where the statute (Code, § 2326) provides that a prima facie case of negligence against a company for killing stock shall be made by showing the killing and ownership of the animal, where suit is brought within six months, defendant is not entitled to a nonsuit by rebutting by one witness the prima facie case so made. Davis v. Seaboard Air Line R. Co., 134 N. C. 300, 46 S. E. 515; Central of Georgia R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780; Central of Georgia R. Co. v. Weathers, 120 Ga. 475, 47 S. E. 956; Louisville & N. R. Co. v. Swann, 120 Ga. 695, 48 S. E. 117. Where stock is killed on a railroad track, the law raises a presumption of negligence on the part of the railroad company. Cincinnati, etc., R. Co. v. Burgess [Ky.] 84 S. W. 760; Louisville & N. R. Co. v. Moore [Ky.] 84 S. W. 1144.

10. Cincinnati, etc., R. Co. v. Burgess [Ky.] 84 S. W. 760. A railroad company is liable for any damage to stock by the running of its trains unless the company make it appear that its agents exercised all ordinary and reasonable care and diligence. Georgia Southern & F. R. Co. v. Jones, 121 Ga. 822, 49 S. E. 729. Where no precautions were taken to prevent striking a horse, it was incumbent on the company to show that its failure in this respect did not bring about the injury. Atlantic Coast Line R. Co. v. Williams, 120 Ga. 1042, 48 S. E. 404. Where the killing of stock is admitted, the company must show by a preponderance of evidence its exercise of "ordinary and reasonable care and diligence," to escape liability. Verdict for plaintiff sustained. Georgia Southern & F. R. Co. v. Young, Inv. Co., 119 Ga. 513, 46 S. E. 644. Presumption held overcome by evidence that the killing could not have been averted by the exercise of ordinary care. Central of Georgia R. Co. v. Dich, 121 Ga. 65, 48 S. E. 683. See, also, Central of Georgia R. Co. v. Williams Buggy Co., 121 Ga. 293, 48 S. E. 939; Western & A. R. Co. v. Clark, 121 Ga. 419, 49 S. E. 290; Southern R. Co. v. Cook, 121 Ga. 416, 49 S. E. 287. The presumption is overcome if uncontradicted evidence shows that the negligence did not occur as alleged. Central of Georgia R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780. On conflicting testimony, it is for the jury to decide whether the presumption is overcome. Central of Georgia R. Co. v. McWhorter, 121 Ga. 465, 49 S. E. 264.

11. Houston, etc., R. Co. v. McMillan [Tex. Civ. App.] 84 S. W. 296.

12. See 2 Curr. L. 1445.

13. Evidence as to value of dog killed held competent. St. Louis, etc., R. Co. v. Philpot [Ark.] 77 S. W. 901. Defendant has a right to introduce evidence to show the value of the cattle. Missouri, etc., R. Co. v. Lane [Tex. Civ. App.] 80 S. W. 534. Speed of train two miles distant held inadmissible. Evidence showing custom as to speed held admissible. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 82 S. W. 785. Testimony based on an observation of the animal's tracks, that it was running, is admissible, as also testimony relative to depressions showing where the animal was struck. Craig v. Wabash R. Co., 121 Iowa, 471, 96 N. W. 965. That defendant's servants have worked the track since the accident may be considered with reference to their testimony as to where the killing occurred and their claim that no tracks were seen at the point where plaintiff claims it occurred. Klay v. Chicago, etc., R. Co. [Iowa] 102 N. W. 526. An expert witness, as a roadmaster, may testify as to the sufficiency of a cattle guard to turn stock. Johnson v. Detroit & M. R. Co. [Mich.] 97 N. W. 760. Testimony as to the condition of a cattle guard the day after an accident is admissible where it is subsequently shown that its condition had not been altered meanwhile. Id. Farmers and stockmen may testify as to whether the mare killed was with foal. Boyer v. Chicago, etc., R. Co., 123 Iowa, 248, 98 N. W. 764. Evidence as to the value of the animal as a brood mare and the character of her foals is admissible upon the question of damages. Campbell v. Iowa Cent. R. Co., 124 Iowa, 248, 99 N. W. 1061. Where the negligence alleged is failure to maintain sufficient fences, if the cattle entered over a cattle guard, plaintiff cannot recover and defendant should be allowed to show that fact. Clement v. Pere Marquette R. Co. [Mich.] 100 N. W. 999.

14. Circumstantial evidence of negligence of company's servants in killing horse held sufficient. San Antonio & A. P. R. Co. v. Harris [Tex. Civ. App.] 79 S. W. 841. Where

Instructions[15] are governed by the usual rules.[16] A verdict can be directed only in case there is no conflict of evidence.[17]

Special findings.[18]

Double damages and attorney's fees.[19]—Double damages may be allowed in Iowa for failure to pay within thirty days for stock killed.[20] The notice required as a prerequisite to the recovery of double damages must advise the company with reasonable certainty of the claim.[21] A jury returning a verdict of damages for the killing of stock may retire and thereafter render a verdict of double damages according to statute.[22]

(§ 10) *G. Fires.*[23]—At common law independently of statute, the owner of property could recover damages arising from fire communicated by a locomotive through negligence.[24] Whether a high rate of speed constitutes negligence depends on the surrounding circumstances,[25] and statutes imposing liability for non-negligent fires communicated from their right of way are upheld.[26] A railroad com-

positive testimony showed that employes could not have prevented, by the exercise of ordinary care and diligence, the killing of an animal on the track, a verdict against the company for the killing should have been set aside. Southern R. Co. v. Harrell, 119 Ga. 521, 46 S. E. 637. The question of negligence was for the jury where an engineer saw a buggy on the track when he was 100 yards distant and sounded no alarm and made no effort to stop the train because he did not know there was a horse attached to the buggy and knew it would be impossible to stop the train in time. The horse was killed. Mitchell v. New Orleans & N. E. R. Co. [Miss.] 36 So. 1. The tracks of the animal and other evidence held sufficient to justify a verdict for the plaintiff. Central of Georgia R. Co. v. Dozier, 117 Ga. 793, 45 S. E. 67; Klay v. Chicago, etc., R. Co. [Iowa] 102 N. W. 526. Evidence sufficient to justify a verdict of negligence by the company. Louisville & N. R. Co. v. Swann, 120 Ga. 695, 48 S. E. 117; Georgia, etc., R. Co. v. Wisenbacker, 120 Ga. 656, 48 S. E. 146. That no means are shown by which stock passed a right of way fence is not sufficient to rebut a prima facie case of negligent killing. Dailey v. Chicago, etc., R. Co., 121 Iowa, 254, 96 N. W. 778. Death of steer held sufficiently shown. Houston, etc., R. Co. v. Wilson [Tex. Civ. App.] 84 S. W. 274. For the jury whether a defective cattle guard was the occasion of stock being on the right of way. Black v. Minneapolis, etc., R. Co., 122 Iowa, 32, 96 N. W. 984. Evidence held sufficient to go to jury on question whether train frightened horse into culvert, breaking his leg. Carlos v. Missouri Pac. R. Co., 106 Mo. App. 574, 80 S. W. 965. Evidence held insufficient to show a killing by engine or cars. Beaudin v. Oregon S. L. R. Co. [Mont.] 78 P. 303. Engineer's testimony as to when he saw the cattle and how soon he stopped, and that it was a quick stop under the circumstances, being uncontradicted, held sufficient on which to direct verdict for defendant. Carman v. Montana Cent. R. Co. [Mont.] 79 P. 690. Evidence held insufficient to warrant submission of negligence in killing stock to the jury. Crary v. Chicago, etc., R. Co. [S. D.] 100 N. W. 18.

15. See 2 Curr. L. 1445.

16. Charge erroneous as on weight of evidence. Plaintiff camped for night with drove of cattle near unfenced track. Ft. Worth & D. C. R. Co. v. Roberts [Tex. Civ. App.] 83 S. W. 250. Instructions on prima facie case considered and held not misleading. Central of Georgia R. Co. v. Weathers, 120 Ga. 475, 47 S. E. 956.

17. Central of Georgia R. Co. v. Larkins [Ala.] 37 So. 660. Upon conflicting testimony, it is for the jury to decide whether the engineer did all within his power to stop the train after discovering stock upon the track. Central of Georgia R. Co. v. Sport [Ala.] 37 So. 344. Upon conflicting evidence an instruction that the engineer was keeping a lookout was properly refused. Id.

18, 19. See 2 Curr. L. 1445.

20. Tender in court of the value of stock does not relieve the company from liability for double damages [Code § 2055]. Black v. Minneapolis, etc., R. Co., 122 Iowa, 32, 96 N. W. 984.

21. Where the notice alleged failure to fence, and the petition a defective cattle guard, as the cause of an injury to a mare, held, the variance did not prevent recovery of double damages [Iowa Code, § 2055]. Boyer v. Chicago, etc., R. Co., 123 Iowa, 248, 98 N. W. 764. A demand of pay for stock killed, properly served, but in one of several places using the term "Railway Company" instead of "Railroad Company," defendant's legal name, is sufficient. Black v. Minneapolis, etc., R. Co., 122 Iowa, 32, 96 N. W. 984.

22. Campbell v. Iowa Cent. R. Co., 124 Iowa, 248, 99 N. W. 1061.

23. See 2 Curr. L. 1446. For the general rules relating to liability for negligent fires, see Fires, 3 Curr. L. 1425.

24. Dyer v. Maine Cent. R. Co. [Me.] 58 A. 994.

25. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025.

26. Dyer v. Maine Cent. R. Co. [Me.] 58 A. 994. Code Laws 1902, § 2135, making a railroad company liable for damages occasioned by fire communicated from its premises, is not unconstitutional as being in violation of article 14, § 1, amendments of the United States constitution. Brown v. Carolina Midland R. Co., 67 S. C. 481, 46 S. E. 283. The words "right of way" as used in Code Laws 1902, § 2135, do not refer to the title of the railroad company, but are used to designate

pany furnishing a defective engine to an independent contractor is liable for fires set by it.[27] A railroad company is liable to third persons for the negligence of a shipper,[28] and where a fire is caused by the joint negligence of a railroad company and a shipper, the negligence of one is no defense to the other;[29] but as between themselves, a company may rely on the undertaking of a shipper assuming control of a car, to use reasonable care in the heating thereof.[30] A railroad company cannot absolve itself from keeping its right of way and its adjacent property free from combustible material by leasing such property.[31] An insurance company paying for a fire loss resulting from a railroad company's negligence may maintain an action against the company therefor,[32] notwithstanding the statute entitling the railroad company, held responsible for destruction by fire, to the benefit of the insurance upon the property destroyed.[33] Where the value of the property destroyed exceeds the insurance paid, an action against the railroad company must be brought in the name of the owner.[34] Where a railroad company sets fires on its right of way, it is incumbent on it to guard the fires as long as they exist.[35] Where plaintiff discovered the fire and with others partially subdued it, and believing it to be so under control as to be without capacity for further injury, retired, when it broke out afresh and destroyed property, it cannot be said as a matter of law that the negligence in starting the original fire was not the proximate cause of the loss.[36] The maintenance of a dilapidated shingle roof building close to its tracks by a railroad company may be evidence of negligence for the jury.[37]

Duty as to equipment and operation of engines.[38]—The law requires a high degree of care to prevent the escape of fire,[39] and spark arresters are generally required by statute;[40] but the adoption and maintenance in good condition of the device generally recognized as the best for suppression of fire is sufficient.[41] The general rule seems to be that a railroad company must adopt the most approved mechanical inventions and appliances to prevent the escape of fire.[42] This duty is

the locality from which the fire may originate to render the company liable. Id. It is immaterial whether the fire originate from locomotive sparks or from an overheated journal box. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507.

27. Brady v. Jay [La.] 36 So. 132.

28. Fire originating from stove in shipper's car. Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 A. 688.

29, 30. Boston & M. R. Co. v. Sargent, 72 N. H. 455, 57 A. 688.

31. Sprague v. Atchison, etc., R. Co. [Kan.] 78 P. 828.

32. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036; Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60; Dyer v. Maine Cent. R. Co. [Me.] 58 A. 994; Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025. Owner may also maintain suit, though insurance company has paid loss and is subrogated. Missouri, etc., R. Co. v. Keahey [Tex. Civ. App.] 83 S. W. 1102.

33. P. L. 1895, c. 75, p. 77, applies only to non-negligent fires for which liability is created by statute. Dyer v. Maine Cent. R. Co. [Me.] 58 A. 994.

34. Kansas City, etc., R. Co. v. Blaker & Co., 68 Kan. 244, 75 P. 71.

35. Fires on right of way adjacent to buildings. An inspection at 6 o'clock in the evening at which it was determined by the employes that there was no danger, is insufficient. Brister & Co. v. Illinois Cent. R. Co. [Miss.] 36 So. 142.

36. St. Louis & S. F. R. Co. v. League [Kan.] 80 P. 46.

37. Knickel v. Chicago & N. W. R. Co. [Wis.] 101 N. W. 690.

38. See 2 Curr. L. 1446.

39. Toledo, etc., R. Co. v. Parks [Ind.] 72 N. E. 636; Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561. Care commensurate with the danger in case of drought or wind is necessary. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429.

40. Rev. St. § 3365. Lake Shore & M. S. R. Co. v. Wahlers, 24 Ohio Circ. R. 310. "Safe" and "sufficient" are relative terms when applied to spark arresters. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552.

41. St. Louis S. W. R. Co. v. Crabb [Tex. Civ. App.] 80 S. W. 408; Toledo, etc., R. Co. v. Parks [Ind.] 72 N. E. 636; Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561. Compliance with a statute on spark arresters is a good defense. Lake Shore & M. S. R. Co. v. Wahlers, 24 Ohio Circ. R. 310. It is not the duty of railroad companies to equip their engines with the "best approved" spark arresters, but merely such approved appliances as are in general use. Bottoms v. Seaboard Air Line R. Co. [N. C.] 49 S. E. 348; Missouri, etc., R. Co. v. Jordan [Tex. Civ. App.] 82 S. W. 791; Houston, etc., R. Co. v. Laforge [Tex. Civ. App.] 84 S. W. 1072; Missouri, etc., R. Co. v. Hopkins [Tex. Civ. App.] 80 S. W. 414.

42, 43, 44. Anderson v. Oregon R. Co. [Or.] 77 P. 119.

fulfilled when the company has exercised reasonable diligence and precaution in obtaining and putting such appliances into actual use.[43] A railroad company is not accountable for unusual or unavoidable consequences of the operation of its locomotives.[44] In a time of drought, special care should be exercised in running an engine emitting large sparks past a barn very near the tracks,[45] and at times when the danger of fire is great, a high rate of speed may amount to negligence.[46]

Contractual exemptions from liability.[47]—A release from damages for burning property on the right of way will not relieve from negligently burning connected property.[48] Where the terms of a release from liability for fire are general, it will not be limited to fires caused by engines on a private spur.[49] One who has released the company from liability for injuries to property on the right of way cannot recover, though the fire was the consequence of the company's negligence.[50] That owners of property in a warehouse destroyed by fire were stockholders in the warehouse company under contract exempting a railroad company from liability for fire does not relieve the company from liability to such owners.[51]

Contributory negligence.[52]—An owner of lands adjoining a railroad is required to take such care of his property to protect it from fire as a man of ordinary prudence would employ under the circumstances, and if through neglect to take such care or such negligence proximately contributing with the negligence of the railroad a fire occurs, he cannot recover.[53] Plaintiff is not negligent in storing baled cotton on an open platform 50 feet distant from track.[54] In an action for personal injuries from fire, it is no defense that plaintiff, a child of five years, was removed from the burning house but was injured after returning to the inside.[55] Negligence in the setting of a fire communicated to plaintiff's property is the proximate cause of the injury, though plaintiff had allowed combustible material to accumulate.[56] Plaintiff's efforts at subduing a fire, his retirement believing it subdued, and its subsequent breaking out and destroying property, are, as contributory negligence, matters for the jury.[57]

Pleading.[58]—A railroad company is entitled to a specific statement as to the time when the fires complained of occurred,[59] but the complaint need not negative contributory negligence.[60] Where the negligence counted on is failure to provide spark arresters, negligence in overloading and handling the engine is not in issue.[61] The sufficiency of several complaints is discussed below.[62] A complaint alleging

45. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552. Instructions held bad as imposing too high a degree of care. Ft. Worth. etc., R. Co. v. Dial [Tex. Civ. App.] 85 S. W. 22.

46. Norfolk & W. R. Co. v. Fritts [Va.] 49 S. E. 971.

47. See 2 Curr. L. 1447.

48. Kansas City, etc., R. Co. v. Blaker & Co., 68 Kan. 244, 75 P. 71.

49. Railroad released from liability for damages if it would run a spur to a certain icehouse. Richmond v. New York, etc., R. Co. [R. I.] 58 A. 767.

50. Provision to this effect in a lease of a part of the right of way. Woodward v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 79 S. W. 893. Verbal reservation cannot limit effect of lease. Id.

51. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036.

52. See 2 Curr. L. 1447.

53. Whether leaving barn window open is negligent is for the jury. Owner need not discontinue ordinary beneficial use of his property, though hazardous. St. Louis S. W. R. Co. v. Crabb [Tex. Civ. App.] 80 S. W. 408. Stacks too close to right of way. Ft. Worth, etc., R. Co. v. Dial [Tex. Civ. App.] 85 S. W. 22.

54. Louisville & N. R. Co. v. Short, 110 Tenn. 713, 77 S. W. 936.

55. Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635.

56. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 80 S. W. 844.

57. St. Louis & S. F. R. Co. v. League [Kan.] 80 P. 46.

58. See 2 Curr. L. 1448.

59. Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968.

60. Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635.

61. St. Louis S. W. R. Co. v. Moss [Tex. Civ. App.] 84 S. W. 281.

62. Complaint held to sufficiently allege negligence in the operation of a locomotive. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552. Allegations that a railroad company allowed fire to remain so near its buildings

that a railroad company willfully, carelessly, and negligently allowed fire on its right of way to escape therefrom to adjoining property, from which damage resulted, states a cause of action at common law.[63] An allegation of improper and negligent management of an engine renders admissible testimony as to the care and caution exercised.[64] That an engine setting a fire was going in the opposite direction from that alleged in the complaint is not a fatal variance.[65] Contributory negligence and acts of God must be pleaded to be available as defenses.[66]

Burden of proof and presumptions.[67]—A railroad company is presumed to obey the law in running its trains,[68] and the burden is on the plaintiff to prove negligence in equipment and operation.[69] Fire caused by sparks from a locomotive is prima facie proof of negligence, however, and throws upon the railroad company the burden of proof of approved appliances and careful handling.[70] The burden of proving contributory negligence is upon the party alleging it, as in other cases.[71] Proof of the use of proper and necessary spark arresters and that the engine was carefully operated will overcome a prima facie case.[72]

Admissibility of evidence[73] is controlled by the usual rules as to relevancy, materiality, etc.; a few cases involving questions peculiar to these actions are grouped below.[74] A witness may testify how the quantity of sparks thrown by a particular engine compared with those emitted by other engines along the same road.[75] Loco-

that they caught and such fire was communicated to plaintiff's property are sufficient under Code Laws 1902, § 2135, making a railroad company liable for damages occasioned by fires originating on their right of way. Brown v. Carolina Midland R. Co., 67 S. C. 481, 46 S. E. 283. In an action for negligent fire, an amendment to the petition alleging that litter was "carelessly" allowed to accumulate along the right of way is not improper. Southern R. Co. v. Horine [Ga.] 49 S. E. 285. Allegations that defendant negligently selected and maintained an engine in an improper and defective condition and negligently and improperly managed such engine whereby plaintiff was damaged by fire, held sufficient. Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635.

63. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507.

64. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025.

65. Reishus v. Willmar & S. F. R. Co., 92 Minn. 371, 100 N. W. 1.

66. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036.

67. See 2 Curr. L. 1448.

68. Toledo, etc., R. Co. v. Parks [Ind.] 72 N. E. 636.

69. Toledo, etc., R. Co. v. Parks [Ind.] 72 N. E. 636; Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561.

70. Norfolk & W. R. Co. v. Fritts [Va.] 49 S. E. 971; Toledo, etc., R. Co. v. Needham, 105 Ill. App. 25; Lake Shore & M. S. R. Co. v. Wahlers, 24 Ohio Circ. R. 310; Southern R. Co. v. Johnson [Ala.] 37 So. 919. The starting of a fire by sparks from a locomotive is presumptively negligent. Olmstead v. Oregon, etc., R. Co., 27 Utah, 515, 76 P. 557. That fire is communicated from an engine raises a presumption of negligent construction, equipment, or management. Dyer v. Maine Cent. R. Co. [Me.] 58 A. 994. Though plaintiff makes out a prima facie case by proving that defendant's engine set the fire, the burden of proof on the whole case does not shift. St. Louis S. W. R. Co. v. Moss [Tex. Civ. App.] 84 S. W. 281. Proof of damage resulting from fire communicated by a locomotive raises a prima facie case. Anderson v. Oregon R. Co. [Or.] 77 P. 119.

71. Clark v. Kansas City, etc., R. Co. [C. C. A.] 129 F. 341.

72. Olmstead v. Oregon, etc., R. Co., 27 Utah, 515, 76 P. 557.

73. See 2 Curr. L. 1449.

74. The time of admission of evidence of the effect of a fire is in the discretion of the court. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499. Evidence on the speed of the train two miles distant from the fire is irrelevant. Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. Evidence that the sparks were of unusual size and that witness "had never seen it throw out fire that way before" is admissible. Birmingham R., Light & Power Co. v. Hinton [Ala.] 37 So. 635. Evidence tending to show that owner intentionally set the fire is admissible. Missouri, etc., R. Co. v. Jordan [Tex. Civ. App.] 82 S. W. 791.

Expert evidence: An experienced locomotive engineer familiar with spark arresters may testify as to whether sparks sufficient to ignite property near the right of way could escape from an engine properly equipped. Kansas City, etc., R. Co. v. Blaker & Co., 68 Kan. 244, 75 P. 71. Expert evidence of the distance a locomotive will throw sparks of a sufficient size to fire a building is admissible. That an engine going up grade will throw sparks 50 feet. Gibbs v. St. Louis & S. F. R. Co., 104 Mo. App. 276, 78 S. W. 835.

75. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036. Testimony that sparks escaped in large showers or in large and unusual size or were carried to a great height or in unusual volume or quantities is admissible. Anderson v. Oregon R. Co. [Or.] 77 P. 119.

motive inspectors may refresh their memories by the original memoranda made at the time of inspection, or by copies thereof if the originals be lost.[76] To show that a spark arrester in use by defendant was of the kind recommended by the Master Mechanics' Association, the records of such association should be introduced.[77]

Sufficiency of evidence.[78]—Courts seldom require direct and positive evidence that the fire complained of escaped from a locomotive,[79] and circumstances may justify the conclusion that the fire originated from locomotive sparks.[80] That a railroad company's employes aided in putting out a fire raises no presumption that the company set the fire.[81] Where a statute makes the causing of a fire by a railway company prima facie negligence, it becomes a question of fact whether such case is overcome by evidence for the defendant.[82] Proof that cinders escaped which could not have done so had the spark arrester been in repair and that the same locomotive had started other fires is sufficient to take the case to the jury.[83] If a jury find that those in charge of a locomotive were "usually" negligent in such management, they may conclude negligence in the case at bar.[84]

Instructions[85] are governed by the customary rules. A few illustrative ones are cited below.[86]

76. Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60.

77. Parol evidence of member not admissible. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025.

Other fires: Other fires by defendant's locomotives may be shown. Louisville & N. R. Co. v. Fort [Tenn.] 80 S. W. 429. Evidence as to fires in the same vicinity set by locomotives of other companies is irrelevant. Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. Evidence of fires set by other of the defendant's locomotives of the same description is competent. Louisville & N. R. Co. v. Short, 110 Tenn. 713, 77 S. W. 936. Evidence of other fires set by the same company is inadmissible without showing they originated from the particular engine complained of. Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. Where a particular engine is alleged to have set a fire and the question is whether a locomotive would throw igniting sparks and to that distance, evidence that other of defendant's engines similarly constructed and under similar circumstances had thrown igniting sparks that distance is admissible. Sprague v. Atchison, etc., R. Co. [Kan.] 78 P. 828.

Condition of equipment: Evidence as to the condition of machinery that causes an accident must refer to a time approximately near the time of the accident. Fire from locomotive sparks. Evidence that during the preceding winter the spark arresters were defective is entirely too remote. Toledo, etc., R. Co. v. Needham, 105 Ill. App. 25. Upon evidence that all of defendant's engines were substantially in the same condition, testimony that other engines than that complained of had thrown sparks 100 feet was admissible. Black v. Minneapolis, etc., R. Co., 122 Iowa, 32, 96 N. W. 984.

Ownership of engine: Testimony that engines which went by immediately before the fire were attached to regular trains of the defendant is prima facie proof that they were defendant's engines. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499.

Value of property: Evidence as to the value of a stock of goods one day prior to their destruction by fire is proper. Norfolk & W. R. Co. v. Briggs [Va.] 48 S. E. 521. In an action for burning trees, evidence of the value of the wood "if put to its best use" is admissible. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499. In an action for the destruction of trees, it is proper to ask a witness the value of the farm before the fire and immediately after. Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561. Where the claim is for permanent injury to a meadow, it may be shown that other lands burned over at the same time were not injured. Castner v. Chicago, etc., R. Co. [Iowa] 102 N. W. 499. Prior admissions of less damage may be shown unless made to effect compromise. Id.

78. See 2 Curr. L. 1450.

79. Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561.

80. No fire before and no probable cause for fire except locomotive; wind blowing and appearance of fire directly after passage of train. Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561; Wright v. Chicago & A. R. Co. [Mo. App.] 80 S. W. 927. Evidence examined and held sufficient to sustain a verdict based on negligence in setting a fire. Reishus v. Willmar, etc., R. Co., 92 Minn. 371, 100 N. W. 1.

81. Clarke v. New York, etc., R. Co. [R. I.] 58 A. 245.

82. Gen. St. 1901, § 5923, makes it evidence and not merely presumption of negligence. Atchison, T. etc., R. Co. v. Geiser, 68 Kan. 281, 75 P. 68. Statutory presumption held not rebutted by the evidence that the latest and best appliances had been adopted, it not appearing that they were then in use. Southern R. Co. v. Puckett, 121 Ga. 322, 48 S. E. 968.

83. Olmstead v. Oregon, etc., R. Co., 27 Utah, 515, 76 P. 557.

84. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025.

85. See 2 Curr. L. 1451.

86. An instruction limiting the damages to "the outcome of the fire" is proper. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499. Instruction held bad as on weight of evidence

Special findings.[87]

Damages.[88]—The measure of damages for burning a meadow is the cost of reseeding and the rental value of the land while rendered unproductive, together with interest.[89] Damages for the destruction of fruit trees may be based on their value as a distinct part of the land, if capable of measurement, or the difference in the land value before and after their destruction.[90] Statutes may allow treble damages for negligently allowing fire to escape from one's own property.[91]

§ 11. *Offenses relating to railroads.*[92]—Statutes may provide a penalty for leaving a freight train across a street,[93] for failure to maintain street lights at crossings,[94] and may require the posting in a conspicuous place of notices as to the lateness of passenger trains, and provide a penalty for a failure so to do.[95] An ordinance forbidding the digging up of any street without a license does not apply to a railroad crossing.[96] Railroads are subject to indictment in some states for failure to sound statutory signals at crossings,[97] for running trains on Sunday,[98] and where obstruction of the highway is a public offense, railroads may be liable.[99] The offense of maliciously shooting into a car on which there are or may be passengers is committed by shooting at a car containing passengers, whether they are of the kind ordinarily known as passenger cars or not.[100] Malicious obstruction of railway tracks is generally punished by statute.[101] For a boy stealing a ride to inno-

and for error in defining negligence. Missouri, etc., R. Co. v. Wood [Tex. Civ. App.] 81 S. W. 1187. Where a railroad company permitted fires on its right of way to be communicated to adjacent property and the insurers thereof brought action, an instruction that if "the owners in any way contributed to the fire by their negligence," a recovery could not be had, was erroneous. Buster & Co. v. Illinois Cent. R. Co. [Miss.] 36 So. 142. Also an instruction that if the employes of the mill might by the exercise of reasonable care have prevented the burning, there could be no recovery, because the contributory negligence must have been predicated on knowledge of the fire. Id. Where the court charged that defendant's negligence must appear by a preponderance of the evidence, it was not error to refuse to charge that it must appear by affirmative evidence. Nashville, etc., R. Co. v. Heikens [Tenn.] 79 S. W. 1038. Instruction held not erroneous as predicating a high rate of speed. Norwich Ins. Co. v. Oregon R. Co. [Or.] 78 P. 1025. Where the particular engine setting a fire is not identified by the evidence, the instruction as to equipment should not be limited to one engine. Manchester Assur. Co. v. Oregon R. & Nav. Co. [Or.] 79 P. 60.

87. See 2 Curr. L. 1452. The district judge found that the fire was caused by sparks from a passing locomotive not equipped with a spark arrester, and that the railway company knew the danger of using engines not so equipped. The trial court's findings were sustained. Brady v. Jay [La.] 36 So. 132.

88. See 2 Curr. L. 1452. See also Fires, 3 Curr. L. 1426.

89. Black v. Minneapolis, etc., R. Co., 122 Iowa, 32, 96 N. W. 984.

90. Atchison, R. Co. v. Geiser, 68 Kan. 281, 75 P. 68.

91. Under the evidence, actual damages only allowed [Pol. Code, § 3344]. Clark v. San Francisco, etc., R. Co., 142 Cal. 614, 76 P. 507.

92. See 2 Curr. L. 1452.

93. A cut of cars held to be within the statute [Burns' Ann. St. 1901, § 2291]. Becker v. State, 33 Ind. App. 261, 71 N. E. 188.

94. Chicago, etc., R. Co. v. Crawfordsville [Ind.] 72 N. E. 1025.

95. A trial under this statute does not involve a Federal question of citizenship [Burns' Ann. St. 1901, § 5186]. Southern R. Co. v. State [Ind. App.] 72 N. E. 174.

96. New York, etc., R. Co. v. Cambridge [Mass.] 71 N. E. 557.

97. Indictment held open to motion to make more specific. Choctaw, etc., R. Co. v. State [Ark.] 85 S. W. 85.

98. An indictment for running a train on Sunday need not allege that the particular train was not within any of the statutory exceptions [Pen. Code 1894, § 420]. Seale v. State [Ga.] 49 S. E. 740. On the trial of one indicted for running a freight train on Sunday, proof of any Sunday before the finding of the bill and within the statute of limitations is sufficient. Id. Where the accused was responsible for a schedule, the compliance with which necessitated a violation of the law, it is not error to charge that he might justify himself by proof that the employes of the company acted in direct violation of his orders. Id.

99. Indictment held sufficient. Every obstruction is a separate offense. Commonwealth v. Illinois Cent. R. Co., 26 Ky. L. R. 672, 82 S. W. 381. Indictment for maintaining bridge and approach held so uncertain as to be demurrable. Commonwealth v. Louisville & N. R. Co., 26 Ky. L. R. 493, 82 S. W. 231.

100. Burkhart v. Com., 26 Ky. L. R. 1245, 83 S. W. 633.

101. An indictment for placing obstructions on track, referring in subsequent clauses to "said railway track," is sufficient. Furlow v. State [Ark.] 81 S. W. 232. Under the statute of Wisconsin, the willful, wanton, and malicious placing of an obstruction on a track is a complete offense, irrespective of whether defendant was prompted by an in-

cently turn an air cock on the car, setting the brakes, is not a willful and malicious act that might upset the car or throw it from the rails, though setting the brake might have that effect.[102]

RAPE.

§ 1. **Nature and Elements (1231).**
A. In General (1231).
B. Female Under Age of Consent (1231).
C. Attempts and Assault with Intent to Commit Rape (1231).
§ 2. **Indictment and Prosecution (1232).**
A. Indictment or Information (1232).
B. Evidence (1232).
1. Admissibility (1232).
2. Weight and Sufficiency (1233).
C. Instructions (1234).
D. Trial and Punishment (1234).

Matters of criminal law and procedure common to other crimes,[1] and civil liability for ravishment,[2] are elsewhere treated.

§ 1. *Nature and elements. A. In general.*[3]—Rape at common law is the carnal knowledge of a woman forcibly and against her will despite her utmost resistance,[4] but compliance from fear induced by threats of violence is sufficient, there need not be physical force,[5] and carnal knowledge of a woman unconscious from chloroform is rape though the drug was administered for a lawful purpose.[6] Statutes in some states cover rape by fraud. There must be some trick or strategem to constitute an offense against such statutes.[6a]

(§ 1) *B. Female under age of consent.*[7]—It is universally provided by statute that carnal knowledge of a female under a specified age shall be rape irrespective of her consent.[8] In some states it is required that defendant be above a certain age, and when so required it is part of the corpus delicti[9] and must be distinctly proved.[10] A statute forbidding the "unlawful" carnal knowledge of a female under the age of 16 sufficiently defines the offense, the word "unlawfully" being used in view of the right of females below that age to contract a lawful marriage.[11] Another phase of the same crime is presented by statutes such as that in Missouri punishing carnal intercourse with minor females by any person to whose care such a female has been confided. Such a statute has been held to apply to the relation of teacher and pupil, and to prohibit such intercourse at any time during the period of such relation.[11a]

(§ 1) *C. Attempts and assault with intent to commit rape.*[12]—There must be a specific intent to have intercourse with the woman without her consent, overcoming all resistance,[13] but this intent may be inferred from the nature of the assault,[14] and is a question for the jury.[15] That the offense was not consummated does not show absence of intent.[16]

tent to endanger life or prevent the safe running of trains. State v. Bisping [Wis.] 101 N. W. 359.

102. Thacker v. Com. [Ky.] 85 S. W. 1096.

1. See Criminal Law, 3 Curr. L. 979, and Indictment and Prosecution, 4 Curr. L. 1.

2. See Assault and Battery, 3 Curr. L. 319.

3. See 2 Curr. L. 1453.

4. Devoy v. State [Wis.] 99 N. W. 455.

5. Smith v. Com., 26 Ky. L. R. 1229, 83 S. W. 647.

6. Harlan v. People [Colo.] 76 P. 792.

6a. Huffman v. State [Tex. Cr. App.] 80 S. W. 625.

7. See 2 Curr. L. 1454.

8. Consent is immaterial. State v. Barrett [Del.] 59 A. 45; State v. Clark [Vt.] 58 A. 796.

9. That defendant is over sixteen years old, being part of the corpus delicti, cannot be proved by a confession. Wistrand v. People, 213 Ill. 72, 72 N. E. 748.

10. The jury cannot fix his age by his appearance in court. Opinions of witnesses from appearance is admissible. Wistrand v. People, 213 Ill. 72, 72 N. E. 748.

11. Plunkett v. State [Ark.] 82 S. W. 845.

11a. Rev. St. 1899, § 1845. State v. Hesterly, 182 Mo. 16, 81 S. W. 624.

12. See 2 Curr. L. 1455.

13. Mason v. State [Tex. Cr. App.] 83 S. W. 689; Franey v. People, 210 Ill. 206, 71 N. E. 443. Mere persuasion is not sufficient to constitute the crime of assault with intent to rape a female under the age of consent. State v. Riseling [Mo.] 85 S. W. 372.

14. State v. Riseling [Mo.] 85 S. W. 372.

15. State v. Clark [Vt.] 58 A. 796.

16. State v. Sheets [Iowa] 102 N. W. 415.

§ 2. *Indictment and prosecution. A. Indictment or information.*[17]—In Vermont, statutory rape may be prosecuted by information.[18] Statutory rape is sufficiently alleged in the language of the statute,[19] and averments in addition thereto may be treated as surplusage.[20] Two counts on the same act, one for statutory rape and one for rape by force, may be joined.[21] Rape by force may be shown under an indictment for statutory rape,[22] but an indictment for rape by force will not sustain a conviction of statutory rape.[23] It must be averred that the female was not defendant's wife,[24] but it has been held sufficient if it appears by implication.[25]

(§ 2) *B. Evidence.* 1. *Admissibility.*[26]—The prosecuting witness may testify to her own age.[27] Family record is not admissible where the person making the entry is in court,[28] or where it is not fully identified,[29] or when the source of information from which it was made is doubtful.[30] Express[31] or implied admissions by defendant are competent.[32] Complaint by the prosecutrix is admissible,[33] and delay in making it goes only to its weight,[34] though prosecutrix is too young to testify.[35] Statements in answer to questions are not admissible[36] unless part of the res gestae.[37] It is only the fact of complaint which may be proved, not the details thereof unless it is so connected with the offense as to be part of the res gestae.[38] Declarations of prosecutrix inconsistent with her testimony are not admissible as original evidence.[39] On a prosecution for statutory rape, the rules of evidence are akin to those obtaining in prosecutions for seduction and accordingly improper familiarities,[40] promise of marriage,[41] and prior and subsequent acts of intercourse,[42]

17. See 2 Curr. L. 1456. **Indictment for assault** with intent to carnally know child under age of consent held sufficient. State v. Riseling [Mo.] 85 S. W. 372. **Averment of resistance** held sufficient. People v. Jailles [Cal.] 79 P. 965. Conviction of included offenses see Indictment and Prosecution, 4 Curr. L. 18.

18. State v. Leach [Vt.] 59 A. 168.

19. State v. Tourjee [R. I.] 58 A. 767.

20. The indictment charging in the language of the statute that defendant did carnally know and abuse a certain woman, the additional words "and did unlawfully have carnal knowledge of her" may be rejected as surplusage. State v. Cannon [N. J. Law] 60 A. 177. Where carnal knowledge of a female under the age of consent is alleged, an averment of force is to be treated as surplusage. State v. Anderson [Iowa] 101 N. W. 201.

21. People v. Jailles [Cal.] 79 P. 965.

22. State v. Carl [Ohio] 73 N. E. 463.

23. Munoz v. State [Tex. Cr. App.] 85 S. W. 11. But if all the essentials of statutory rape are alleged averments of force may be rejected as surplusage. State v. Anderson [Iowa] 101 N. W. 201.

24. An averment that the crime was committed on a certain day with a woman named "a female person under the age of sixteen years, and not the wife of" defendant sufficiently alleges that she was not his wife at the time of the offense. People v. Miller [Cal.] 78 P. 227.

25. The averment that defendant "feloniously did carnally know and abuse" a certain woman sufficiently negatives that she was his wife, as the intercourse would not otherwise have been unlawful. Garner v. State [Ark.] 84 S. W. 623.

26. See 2 Curr. L. 1457.

27, 28. State v. Miller [Kan.] 80 P. 51.

29. Admission of unidentified family record held harmless where evidence as to age was clear. Robbins v. State [Tex. Cr. App.] 83 S. W. 690.

30. School register held inadmissible on issue of age where teacher did not remember how information therein relative to prosecutrix was obtained. Simpson v. State [Tex. Cr. App.] 81 S. W. 320.

31. Letters of defendant to prosecutrix corroborating her testimony are admissible. State v. De Witt [Mo.] 84 S. W. 956.

32. Evidence that shortly after the offense, defendant's wife was crying and that defendant sat silent is not admissible. Humphrey v. State [Tex. Cr. App.] 83 S. W. 187. That defendant, not being under arrest, was silent when accused of the crime is admissible. Id.

33, 34. State v. Bebb [Iowa] 101 N. W. 189.

35. Thomas v. State [Tex. Cr. App.] 84 S. W. 823. See note 65 L. R. A. 316.

36. Cannot be received either as a complaint or as corroboration. Cunningham v. People, 210 Ill. 410, 71 N. E. 389. A complaint made only in answer to a demand for an explanation of pregnancy is not admissible. State v. Bebb [Iowa] 101 N. W. 189.

37. Declarations of child to her mother in answer to questions twenty minutes after the offense held part of the res gestae. Thomas v. State [Tex. Cr. App.] 84 S. W. 823.

38. State v. Harness [Idaho] 76 P. 788. Question asked of prosecutrix, "Did you tell what he had done to you to anybody?" is improper. Oakley v. State, 135 Ala. 29, 33 So. 693. Identification of defendant by prosecutrix is not admissible. State v. Egbert [Iowa] 101 N. W. 191.

39. State v. Brady [N. J. Law] 59 A. 6.

40. Blair v. State [Neb.] 101 N. W. 17;

are admissible; but unchastity of the woman with other men is not,[43] even to contradict her denials thereof,[44] except where her pregnancy is shown[45] or where the statute makes her previous chaste character essential.[46] Subsequent pregnancy and childbirth may be shown,[47] as may an attempt by accused to procure abortion,[48] but such evidence is not admissible where defendant admits the intercourse and the only issue is as to consent.[49] On a trial for rape by force, defendant is entitled to show his general reputation for peace,[50] but where the woman is below the age of consent, only repute for chastity and morality is admissible.[51] Where the statute provides that previous unchastity is a bar to a prosecution for statutory rape, general repute is not admissible.[52] But where rape by force is charged general repute is admissible and not specific acts of unchastity.[53] Where the issue was as to consent, evidence as to what an eye witness did in consequence of what he saw is admissible.[54]

(§ 2B) 2. *Weight and sufficiency.*[55]—In some states, corroboration of prosecutrix is required by statute,[56] while the decisions are in conflict as to the necessity of corroboration in the absence of statute.[57] Corroboration when necessary must, it is ordinarily said, go to the fact of crime and to defendant's connection therewith.[58] In the footnote will be found decisions discussing the sufficiency of evidence in particular cases.[59]

Henard v. State [Tex. Cr. App.] 82 S. W. 655.

41. Woodruff v. State [Neb.] 101 N. W. 1114. Evidence that prosecutrix did not know that defendant was married is admissible. Id.

42. Sykes v. State [Tenn.] 82 S. W. 185; State v. Lancaster [Idaho] 78 P. 1081; Woodruff v. State [Neb.] 101 N. W. 1114; State v. Cannon [N. J. Law] 60 A. 177.

Contra: Other acts of intercourse cannot be shown (Wiggins v. State [Tex. Cr. App.] 84 S. W. 821), and it does not authorize such evidence that defendant claims that the prosecution was inspired by malice (Id.).

43. State v. Smith [S. D.] 100 N. W. 740; Plunkett v. State [Ark.] 82 S. W. 845.

44. Plunkett v. State [Ark.] 82 S. W. 845.

45. Though the prosecution is for statutory rape, if the prosecutrix appears to be pregnant, evidence of intercourse with others is admissible, for the purpose, it is said in Iowa, of counteracting sympathy by reason of her condition. State v. Bebb [Iowa] 101 N. W. 189. It would seem that a better reason is that given in Illinois (Shirwin v. People, 69 Ill. 55, that the condition of the prosecutrix establishes that she has had intercourse with some man, to that extent corroborating her testimony and that defendant is therefore entitled to show an explanation of the condition consistent with his innocence. [Editor.]

46. Woodruff v. State [Neb.] 101 N. W. 1114.

47. State v. Miller [Kan.] 80 P. 51; State v. Walke [Kan.] 76 P. 408; Woodruff v. State [Neb.] 101 N. W. 1114.

48. Woodruff v. State [Neb.] 101 N. W. 1114.

49. Darrell v. Com., 26 Ky. L. R. 541, 82 S. W. 289.

50. Horton v. State [Miss.] 36 So. 1033.

51. State v. Brady [N. J. Law] 59 A. 6.

52. Woodruff v. State [Neb.] 101 N. W. 1114. Evidence of the reputation of the house where prosecutrix lived is inadmissible to rebut proof that she had contracted a venereal disease from defendant (James v. State [Wis.] 102 N. W. 320), nor is evidence of the repute of one with whom prosecutrix associated (Woodruff v. State [Neb.] 101 N. W. 1114).

53. Black v. State, 119 Ga. 746, 47 S. E. 370. Nor is evidence that she has had a venereal disease admissible. State v. Smith [S. D.] 100 N. W. 740.

54. State v. Huff [N. C.] 49 S. E. 339.

55. See 2 Curr. L. 1460.

56. State v. Icenbice [Iowa] 101 N. W. 273; State v. Egbert [Iowa] 101 N. W. 191; People v. Green, 92 N. Y. S. 508; Smith v. Com., 26 Ky. L. R. 1229, 83 S. W. 647.

57. Corroboration necessary. Davis v. State, 120 Ga. 433, 48 S. E. 180. No corroboration is required. Brenton v. Territory [Okl.] 78 P. 83; State v. Patchen [Wash.] 79 P. 479.

58. Confession by defendant is sufficient corroboration on the question of his identity. State v. Icenbice [Iowa] 101 N. W. 273. Complaint by prosecutrix and flight of defendant held sufficient corroboration. Smith v. Com., 26 Ky. L. R. 1229, 83 S. W. 647. Not sufficient corroboration. No complaint or marks of violence. People v. Green, 92 N. Y. S. 508. That prosecutrix and defendant were seen near the same place on the afternoon of the alleged assault is not sufficient corroboration. State v. Egbert [Iowa] 101 N. W. 191. The condition of prosecutrix and complaints by her are insufficient for they go only to the fact of crime and not to defendant's connection therewith. Id. Prompt complaint, marks of violence or similar circumstances, suggested as adequate corroboration. Davis v. State, 120 Ga. 433, 48 S. E. 180.

59. Evidence held sufficient: State v. De Witt [Mo.] 84 S. W. 956; Henard v. State [Tex. Cr. App.] 82 S. W. 655. Evidence of statutory rape held sufficient. Prosecutrix corroborated. Rodgers v. State [Tex. Cr. App.] 82 S. W. 1041. Evidence of prosecu-

(§ 2) *C. Instructions.*[66]—No definition of carnal knowledge need be given,[61] and if one were needful use of it as interchangeable with sexual intercourse is sufficient.[62] Evidence of subsequent acts of intercourse and of attempts by defendant to procure an abortion should be confined by instruction to their effect as corroboration.[63] It is not error to refuse an instruction that the charge of rape "is easily made hard to prove and harder still to disprove."[64] Instructions not applicable to the evidence need not be given.[65] While on points of conflict the instructions should be specific.[66]

(§ 2) *D. Trial and punishment.*[67]—It is not error to allow the prosecutrix to have her child with her in the court room.[68]

RATIFICATION, see latest topical index.

REAL ACTIONS.

Real actions include all those brought for the specific recovery of lands, tenements or hereditaments.[69] The actions now commonly used are elsewhere spe-

trix, weakened by proof of bad character but corroborated by person witnessing struggle from a distance, held sufficient. Black v. State, 119 Ga. 746, 47 S. E. 370. Evidence held to sustain conviction of assault with intent to rape woman under influence of chloroform. Harlan v. People [Colo.] 76 P. 792. Evidence held to sustain conviction of statutory rape. Woodruff v. State [Neb.] 101 N. W. 1114; Crocker v. People, 213 Ill. 287, 72 N. E. 743. Evidence held to sustain conviction in a case where prosecutrix was too young to testify. Thomas v. State [Tex. Cr. App.] 84 S. W. 823. Evidence of prosecutrix, a female under age of consent, held to show assault. State v. Riseling [Mo.] 85 S. W. 372.

Evidence insufficient: Uncorroborated evidence of prosecutrix held insufficient to convict of statutory rape against defendant's denial and proof of his good character. Cunningham v. People, 210 Ill. 410, 71 N. E. 389. An affirmative answer by prosecutrix to a question whether defendant "had intercourse" with her is not of itself sufficient. People v. Howard, 143 Cal. 316, 76 P. 1116. Testimony of woman weakened by inconsistent declarations held insufficient. Rushing v. State [Tex. Cr. App.] 80 S. W. 527. Evidence held insufficient. No complaint or indicia of violence. Harvey v. Com. [Va.] 49 S. E. 481. Evidence of rape by fraud insufficient; impersonation of husband. Huffman v. State [Tex. Cr. App.] 80 S. W. 625.

Intent: Intent may be inferred from nature of the assault. State v. Riseling [Mo.] 85 S. W. 372. Evidence of solicitation held not to show intent to rape. Quinn v. State [Ark.] 84 S. W. 505; Franey v. People, 210 Ill. 206, 71 N. E. 443. Evidence of assault held to show intent to rape. Perkins v. State [Tex. Cr. App.] 80 S. W. 619; State v. Miller, 124 Iowa, 429, 100 N. W. 334. Evidence of assault held not to show intent to ravish. State v. Smith [N. C.] 49 S. E. 336. That the offense was not consummated does not show absence of intent. State v. Sheets [Iowa] 102 N. W. 415. Evidence of entry of woman's bedroom at night held insufficient to show intent to rape. Taylor v. State [Miss.] 37 So. 498; Mason v. State [Tex. Cr. App.] 83 S. W. 689; Price v. State [Tex. Cr. App.] 83 S. W. 185.

Age of prosecutrix: Finding on conflicting evidence that prosecutrix was under age of consent sustained. State v. Callahan [S. D.] 99 N. W. 1100.

Penetration: Proof of penetration is essential. People v. Howard, 143 Cal. 316, 76 P. 1116. Penetration may be shown by direct or circumstantial evidence. State v. Newman [Minn.] 101 N. W. 499. Evidence of penetration held sufficient. Id. Ambiguous answer held to warrant finding of penetration. Bradburn v. State, 162 Ind. 689, 71 N. E. 133. A medical examination of prosecutrix is not indispensable. Harmon v. Territory [Okl.] 79 P. 765.

Resistance: Evidence held insufficient to show that utmost possible resistance was made. Devoy v. State [Wis.] 99 N. W. 455. Testimony of prosecutrix that she fought all the while is a mere conclusion of no probative force. Id. That prosecutrix made no outcry and no subsequent complaint and continued on friendly terms with defendant is not conclusive as to consent. Darrell v. Com., 26 Ky. L. R. 541, 82 S. W. 289.

60. See 2 Curr. L. 1461. Instruction as to effect of evidence of **bad character of female sustained.** Black v. State, 119 Ga. 746, 47 S. E. 370.

61, 62. State v. De Witt [Mo.] 84 S. W. 956.

63. Woodruff v. State [Neb.] 101 N. W. 1114.

64. Harmon v. Territory [Okl.] 79 P. 765; Black v. State, 119 Ga. 746, 47 S. E. 370.

65. An instruction as to the duty to make outcry hypothesizing the nearness of a house to the scene of the crime is properly refused where the nearest house was a quarter of a mile away. Misenheimer v. State [Ark.] 84 S. W. 494.

66. Where there is conflict as to age of prosecutrix there should be full instructions as to the necessity of proving it. Simpson v. State [Tex. Cr. App.] 81 S. W. 320.

67. See 2 Curr. L. 1462. Sentence of 8 years for assault with intent to commit rape reduced to 5 years. State v. Miller, 124 Iowa, 429, 100 N. W. 334.

68. Plunkett v. State [Ark.] 82 S. W. 845.

cifically discussed.[70] In real actions the demandant is sometimes allowed to recover mesne profits and the terre tenant to recover for betterments.[71] In no event, however, may he recover without actually proving damages.[72]

A statutory action to recover real property is prescribed in North Carolina and a bond to pay costs, rents, and profits is required of defendant else plaintiff will be entitled to judgment as prayed; but it is required only of the defendant in possession,[73] and not of co-defendants out of possession[74] against whom, therefore, no judgment will be entered on default of bond.[75] Neither will incidental relief be allowed against defaulting parties when the result would be to cloud the answering defendant's possible title.[76] The court has discretion to allow a filing of the bond after answer[77] and to increase it if defendant seeks delay.[78]

A new trial of right is allowable in some states in all actions for recovery of land.[79]

REAL COVENANTS, see latest topical index.

REAL PROPERTY.

Definitions (1235).
The Rule in Shelley's Case (1236).
Entails are Generally Abolished (1237).
Covenants Run with the Land (1237).
Possession (1237).
Merger of Estates (1237).
Forfeiture and Abandonment (1238).

The scope of this title is narrow. It is confined to definitions and to such parts of the law of real property as by the infrequency of their appearance and recurrence would not warrant a separate treatment. Ordinarily the law of a particular branch or division of the real property will be found treated by name in a separate topic.[80]

Definitions.[81]—"Real estate" includes the soil and everything so attached to it that by intention it is given the immovable character of the land. It becomes in law a part of the land by the doctrine of fixtures.[82] Emblements and crops are also of the soil till severed.[83] Minerals in place such as oil and gas are real property, but by reservation or exception they may be made a separate hereditament.[84] A right to be exercised at a particular locality or incident to soil ownership is real property. Thus the right to a ferry landing is a hereditament,[85] and a water right appurtenant to land is real estate.[86] The right to kill game on one's own land has

69. Stephen Pl; 3 Cyc. Law Dict. "Real Actions."

70. They go to the right like Petitory Actions (4 Curr. L. 979), or to the possession like Forcible Entry and Unlawful Detainer (3 Curr. L. 1435). Ejectment (3 Curr. L. 1157) was originally wholly possessory but now is in some jurisdictions both possessory and droitural. See 3 Curr. L. 1157, and 7 Enc. Pl. & Pr. 262 et seq. Trespass is now adopted to the trial of title in Texas (see Trespass, 2 Curr. L. 1891). The codes have provided various remedies to determine conflicting claims to real property. These partake largely of the nature of suits to quiet title and remove clouds. See Quieting Title, 4 Curr. L. 1167.

71. See Ejectment, 3 Curr. L. 1157; Trespass (to try title), 2 Curr. L. 1903.

72. Rollins v. Blackden [Me.] 58 A. 69.

73, 74, 75, 76, 77, 78. Carraway v. Stancill [N. C.] 49 S. E. 957.

79. See New Trial, etc., § 2I, p. 821.

80. Consult the latest topical index where all the well known real property headings will be found with a reference to the place of treatment.

81. See 2 Curr. L. 1462.

82. See Fixtures, 3 Curr. L. 1432. This can not be where a reservation of a chattel ownership negatives such an intention. Lorain Steel Co. v. Norfolk, etc., R. Co. [Mass.] 73 N. E. 646. And one who plants oysters on another's lands does not make them part of the land though it may be he commits trespass or nuisance. Vroom v. Tilly, 99 App. Div. 516, 91 N. Y. S. 51.

Permanent improvements are realty. In re Long Beach Land Co., 91 N. Y. S. 503. Boilers, machinery, and the like held part of realty. In re City of New York, 92 N. Y. S. 8. Derrick built for oil lessee subjects "lease" to mechanic's lien. It is not personalty. Showalter v. Lowndes [W. Va.] 49 S. E. 448.

83. See Emblements and Natural Products, 3 Curr. L. 1187.

84. Preston v. White [W. Va.] 50 S. E. 236.

85. Parsons v. Hunt [Tex.] 84 S. W. 644.

86. Talcott v. Mastin [Colo. App.] 79 P. 973.

recently been held to be an incident of soil ownership.[87] Burial lots have been held to be an inalienable hereditament.[88] The repeated use of an open common may give or indicate a right of common and not evince a dedication.[89]

The common-law doctrine that estates for years howsoever many are chattel interests[90] is so changed in Ohio that leases perpetually renewable are real estate,[91] and in New York all leases for more than three years are real estate.[92]

The law of the place governs lands and all interests therein.[93]

The rule in Shelley's case is in force in North Carolina,[94] among other states, and applies whenever the word "heirs" is technically used or other words equivalent to its technical meaning.[95] In Michigan the rule is abrogated by a statute making

87. State v. Mallory [Ark.] 83 S. W. 955, and see Fish and Game Law, 3 Curr. L. 1431.

Note: The annotator of the Columbia Law Review states that this is the first case to regard game killing as a property right. He points out that it was in its origin a public or common right which became restricted as the right of enclosure and possession of lands grew up and as reservations for forests and the like began to be made by the early kings of England. Franchises to hunt and chase were royal grants which by an implied negation restricted the public rights in like manner. Continuing he states, "In general these principles were transplanted here by our ancestors and underlie the American law. Geer v. Connecticut, 161 U. S. 519, 40 Law. Ed. 793. Such property as there is in wild game is in the state or public. Geer v. Connecticut, 161 U. S. 519, 40 Law. Ed. 793; State v. Theriault, 70 Vt. 617, 67 Am. St. Rep. 695, 43 L. R. A. 290. No individual has such a right to take game that it cannot be controlled by the State (1 Columbia L. R. 548) or completely taken away. Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129. It is said the only right of an individual to take game is by permission of the State (Magner v. People, 97 Ill. 320), though no special privileges as English franchises may be granted here (1 Schouler, Pers. Prop. § 49)."—From note 5 Columbia L. R. 241.

That no property in animals ferae naturae can be created save by bringing them into individual power and control was recently reiterated in State v. Shaw, 67 Ohio St. 157, 60 L. R. A. 481, with exhaustive note on "Right to Fish." Distinct from property in wild game or fish is the proprietary right to hunt or fish on land. It belongs to one's exclusive dominion over his own soil. See 3 Curr. L. 1431; L. Realty Co. v. Johnson, 92 Minn. 363, 100 N. W. 94. It is so far distinct from mere possession that the fee owner of a highway may exclude others from shooting thereon at game which passes over. Id. The same kind of a right is recognized in Rockefeller v. Lamora, 85 App. Div. 254, 83 N. Y. S. 289; Id., 96 App. Div. 91, 89 N. Y. S. 1, where it is decided that by consenting to the stocking of a stream with fish by the State, it becomes public to a certain degree. Like recognition is found in Albright v. Sussex County Lake & Park Com. [N. J. Err. & App.] 59 A. 146. In that case the power to condemn private waters for public sport or pastime in fishing was held invalid. Finally the principal case (State v. Mallory [Ark.] 83 S. W. 955) does not deny but adheres to the doctrine of public ownership in wild game. It declares the public ownership to be for the sole end of protecting and preserving game for common use, which public ownership is compatible with an individual's proprietary right to hunt on his own land. The individual right is subject to regulation but the right of a nonresident proprietor cannot be taken away solely because he is a nonresident, whilst it is allowed to remain to resident landowners. The distinction between the rights in wild game and the right to hunt is well drawn and the history of the doctrines stated in State v. Mallory [Ark.] 83 S. W. 955.

88. One Waldron died leaving a will in which his widow was made residuary legatee. No mention was made of a burial lot in which two previous wives and a child of the testator were buried. The question arose as to whether it passed to the widow under a residuary clause or to the daughter as heir at law. Held, that it descended to the daughter. In re Waldron [R. I.] 58 A. 453.

Note: Because of long recognized sentiment and religious teaching, property in burial lots is subject to many limitations. An executor empowered to sell all the real estate cannot, in the absence of express direction, sell a burial lot where the testator's wife is buried. Derby v. Derby, 4 R. I. 414. Nor can the owner of such lot mortgage it, in case members of his family have been interred therein. Thompson v. Hickey, 59 How. Pr. [N. Y.] 434. It has been held otherwise where no bodies have been buried at the time the mortgage was given. Loutz v. Buckingham, 4 Lans. [N. Y.] 484, 4 Colum. L. R. 604.

Consult Corpses and Burial, 3 Curr. L. 939; Cemeteries, 3 Curr. L. 665.

89. McKay v. Reading, 184 Mass. 140, 68 N. E. 43.

90, 91. Broadwell v. Banks, 134 F. 470.

92. Westchester Trust Co. v. Kelly, 92 N. Y. S. 482.

93. Perpetually renewable lease for years held real estate and not personalty in Ohio. Broadwell v. Banks, 134 F. 470. See, also, Conflict of Laws, 3 Curr. L. 720.

94. Tyson v. Sinclair [N. C.] 50 S. E. 450.

95. Tyson v. Sinclair [N. C.] 50 S. E. 450; Thompson v. Crump [N. C.] 50 S. E. 457. The rule in Shelley's case does not apply where a remainder is devised to an unborn child of the devisee of a life estate, though the child is spoken of in the will as the heir of such devisee. Kesterson v. Bailey [Tex. Civ. App.] 80 S. W. 97. **It should be noted** that usually the contention is that the

"heirs" take as purchasers when the estate is given to their ancestor for life remainder to heirs.[96]

Entails are generally abolished though still recognized in Rhode Island,[97] and may be barred by a deed in common form,[98] and statutes now provide in most states that fees tail shall be regarded as fees simple[99] taking effect as such when all conditions precedent to vesting are fulfilled[1] either as a fee in the first taker[2] or as life estates in the first taker and fees in the first issue entitled.[3]

Covenants run with the land as it is said when they are part of the estate in the lands to which they relate and are inseparable from it. It is not essential that heirs be expressly bound or charged.[4] Such are covenants to pay rent[5] and covenants for title.[6] Covenants for the benefit of land may become discharged by impossibility of performance,[7] the value of the right to performance being justly compensated.[8]

Possession presumably follows ownership.[9] No constructive possession of vacant lands is drawn to a grantee from those who are strangers to the title,[10] nor has a void judicial sale any effect.[11] Possessory rights of an entry-man on public lands are valuable rights.[12] In California the possessory right to a mining claim is real estate.[13]

Merger of estates results when a lesser estate comes to one in the same right as that wherein he holds a greater estate or when they are united in one person.[14] In law, a union of a legal and an equitable estate merges the latter.[15] In equity it

words do or do not have that meaning thus raising a question not of estates but of construction. For these cases consult Deeds of Conveyance, 3 Curr. L. 1056; Wills, 2 Curr. L. 2076.

96. Fullagar v. Stockdale [Mich.] 101 N. W. 576.

97. In re Tillinghast's Account [R. I.] 55 A. 879.

98. Gilkie v. Marsh [Mass.] 71 N. E. 703.

99. Applied to conveyance to a wife and her heirs by her then husband. Schrecongost v. West [Pa.] 59 A. 269. To devise to son of rents and profits of land, the fee over if he should die without issue, otherwise to "him and his heirs." McCullough v. Johnetta Coal Co. [Pa.] 59 A. 984.

1. See McCullough v. Johnetta Coal Co. [Pa.] 59 A. 984.

The rules determinative of vesting in the first taker are discussed in topics Deeds of Conveyance, 3 Curr. L. 1056; Wills, 2 Curr. L. 2076.

2. Fee simple in devisee (devise not only to him but also to heirs of his body). Rhodes v. Bouldrey [Mich.] 101 N. W. 206.

3. Thompson v. Crump [N. C.] 50 S. E. 457. Entails being recognized in Rhode Island, the statutory rule that when a gift is to one for life and to his "heirs" in fee, the heirs of the first taker have a fee is inapplicable. Permissible in R. I. Gen. St. 1896, c. 202, § 21; c. 201, §§ 5, 9; c. 129, § 6; c. 203, §§ 2, 8, 10. In re Tillinghast's Account [R. I.] 55 A. 879.

4. Broadwell v. Banks, 134 F. 470.

5. See Landlord and Tenant, 4 Curr. L. 389.

Rent reserved in a perpetual lease. Broadwell v. Banks, 134 F. 470.

6. See Covenants for Title, 3 Curr. L. 973.

7, 8. Covenant to maintain grade crossing made physically impossible because of elevation of tracks in obedience to law. Speer v. Erie R. Co. [N. J. Err. & App.] 60 A. 197. Performance by under grade held not according to covenant, hence not enforceable in specie. Id.

9. Ewers v. Smith, 90 N. Y. S. 575; Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249; Weir v. Cordz-Fisher Lumber Co. [Mo.] 85 S. W. 341.

10. Terhune v. Porter, 212 Ill. 595, 72 N. E. 820.

11. Tax sale. Weir v. Cordz-Fisher Lumber Co. [Mo.] 85 S. W. 341.

12. Waring v. Loomis, 35 Wash. 85, 76 P. 510; Holloway v. Miller [Miss.] 36 So. 531. See, also, fuller discussion in Public Lands, 4 Curr. L. 1106.

13. Pol. Code, § 3617. Bakersfield & Fresno Oil Co. v. Kern County [Cal.] 77 P. 892.

14. Forfeiture of senior title for nonpayment of taxes and redemption by junior owner. State v. Jackson [W. Va.] 49 S. E. 465. The union of life estate vested remainder and reversion merges all estates and **destroys all contingent remainders.** Archer v. Jacobs [Iowa] 101 N. W. 195. The devise of a life estate coupled with a devise of the residue to the same beneficiary, there being no intervening life estates, merges the two and vests a fee in the devisee. A mother willed her daughter a life estate and a subsequent clause gave her all the residue of her estate if she [daughter] survived her [mother]. Spencer v. Kimball, 98 Me. 499, 57 A. 793.

15. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145, with note "Merger of Estates" pp. 152-171, from which this and the following note are quoted.

NOTE. "Merger is the annihilation of one estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the

depends on circumstances and the intention of parties.[16] It will not take place contrary to the intention of parties.[17] If a purpose be expressed it will be prevented so far only as that purpose goes.[18] A way of necessity extinguished by a union of seisin is not revived by severance, but a new way is granted by implication if the necessity continues.[19]

Forfeiture and abandonment.[20]—Where common-law titles prevail, a fee simple cannot be lost by mere abandonment.[21] A forfeiture of title is not favored.[22]

REASONABLE DOUBT; RECEIPTORS, see latest topical index.

RECEIVERS.[23]

§ 1. **Nature, Grounds, and Subjects of Receivership (1239).**
§ 2. **Appointment, Qualification, and Tenure of Receivers (1242).**
A. Proceedings for Appointment and Qualification (1242).
B. Who May be Appointed (1243).
C. Tenure of Receiver (1243).

less is immediately merged, that is, sunk or drowned in the greater."

"The general rule at law is that equal estates will not merge in each other, but to this rule are well-established exceptions, and even when estates are theoretically equal the first in order of succession may merge in the next vested remainder. Thus, an estate at will may merge in an estate for years, and estates for years may merge into each other or in estates for life, and estates for life may merge into each other. Boykin v. Ancrum, 28 S. C. 486, 6 S. E. 305, 13 Am. St. Rep. 698. The rule at law is inflexible that when a greater and less estate meet in the same person, without any intermediate estate, the less estate at once merges into the greater. Fox v. Long, 8 Bush [Ky.] 551; Bassett v. O'Brien, 149 Mo. 381, 51 S. W. 107; Welsh v. Phillips, 54 Ala. 309, 25 Am. Rep. 683; James v. Morey, 2 Cow. [N. Y.] 246, 14 Am. Dec. 475; Jackson v. Roberts, 1 Wend. 478; Little v. Bowen, 76 Va. 724. To constitute a merger, it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right. Reed v. Latson 15 Barb. 9; Garland v. Pamplin, 32 Grat. [Va.] 305. When two or more titles unite in one person, they are merged at law, and a conveyance of one title by such person passes them all. Logan v. Steele, 7 T. B. Mon. [Ky.] 101."

"A merger as to a portion of the premises, the legal titles to which have become united in the same person, may take place pro tanto, although no union takes place as to the residue. Fox v. Long, 8 Bush [Ky.] 551. Merger never takes place by the greater estate sinking into a smaller estate. If either perishes by merger, it must be the smaller estate. Collamer v. Kelly, 12 Iowa, 325."—From note 99 Am. St. Rep. 153.

16. Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145.

NOTE: "The doctrine of merger is never regarded with favor in a court of equity, nor allowed therein, except for special reasons, and to carry out the intention of the parties. Estates in equity are always kept distinct when the interest of either party or a creditor requires it. Clark v. Clark, 56 N. H. 105; Mechanics' Bank v. Edwards, 1 Barb. [N. Y.] 272. Merger is not favored in equity, and if a term for years and the fee meet in the same person, the former will not be merged in the latter, if the continuance of the term is necessary to the protection of the owner of the inheritance though the term would be merged at law. Dougherty v. Jack, 5 Watts [Pa.] 456, 30 Am. Dec. 335. In equity, a merger never takes place, contrary to the intention of the parties or the requirements of justice. Sheldon v. Edwards, 35 N. Y. 279. The doctrine of merger will not be applied by a court of equity to the union of two estates in the same person, when it will conflict with the intention, or be against the interest of such person. Sater v. Hunt, 66 Mo. App. 527. Equity will keep the lesser estate alive, or consider it merged and extinguished as will best serve the purposes of justice and the actual intention of the parties. Goulding v. Bunster, 9 Wis. 466, 513. Equity will, when justice requires, prevent a merger of the legal and equitable estates. Gleason v. Carpenter, 74 Vt. 399, 52 A. 966. Although the well-settled rule at law is that where the equitable and legal estate unite in the same person, the equitable estate is merged in the legal, this does not necessarily follow in equity. Worcester Nat. Bank v. Cheeney, 87 Ill. 602; Cole v. Beale, 89 Ill. App. 427; Hinchman v. Emans, 1 N. J. Eq. 100; Whythe v. Arthur, 17 N. J. Eq. 521. Although the equitable and legal estates unite in the same person, merger thereof will not take place, if he has a beneficial interest in keeping the estates distinct. Lockwood v. Sturdevant, 6 Conn. 373. And a merger of such estates does not take place if justice requires that they shall be kept separate. Earle v. Washburn, 7 Allen [Mass.] 95. A court of chancery will generally relieve from the legal consequences of a merger, where equity requires it. Slocum v. Catlin, 22 Vt. 137."—From note 99 Am. St. Rep. 158.

17. Deed between widow and heirs recognizing her dower and making mutual conveyances subject thereto. Howells v. McGraw, 97 App. Div. 460, 90 N. Y. S. 1.

18. Coon v. Smith, 43 Misc. 112, 88 N. Y. S. 261.

19. Bates v. Sherwood, 5 Ohio C. C. (N. S.) 63.

20. Compare Adverse Possession, 3 Curr. L. 51; Easements, 3 Curr. L. 1148.

21. Barrett v. Kansas & Tex. Coal Co. [Kan.] 79 P. 150.

§ 3. **Title and Rights in and Possession of the Property (1244).**
A. Title in General (1244).
B. Rights as Between Receivers, Claimants or Lienors (1244).
C. Possession and Restitution (1245).
§ 4. **Administration and Management of the Property (1245).**
A. Authority and Powers in General (1245).
B. Payment of Claims Against Receiver or Property (1247). Debts Created by Receiver and Expenses of Administration (1247). Counsel Fees (1247). Procedure to Obtain Payment (1248).
C. Sales by Receiver (1248).
D. Actions by and Against Receivers (1249).
§ 5. **Accounting by Receivers (1251).**
§ 6. **Compensation of Receivers (1251).**
§ 7. **Liabilities and Actions on Receivership Bonds (1252).**
§ 8. **Foreign and Ancillary Receivers (1253).**

Rules peculiar to receivers of foreign[24] or domestic[25] corporations, and to those appointed in mortgage foreclosure[26] or supplementary[27] proceedings, are treated elsewhere.

§ 1. *Nature, grounds, and subjects of receivership.*[28]—Proceedings for the appointment of a receiver are ancillary in nature and, as a general rule, the appointment will not be granted in a suit brought solely for that purpose.[29] The appoint-

22. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638.

23. For definition and law on subject see Fletcher, Eq. Pl. & Pr. ch. 27, p. 479.

24. See Foreign Corporations, 3 Curr. L. 1455.

25. See Corporations, 3 Curr. L. 880.

26. See Foreclosure of Mortgages on Land, 3 Curr. L. 1438.

27. See Supplementary Proceedings, 2 Curr. L. 1774.

28. See 2 Curr. L. 1465.

See Fletcher Eq. Pl. & Pr. § 460; Clark & M. Corp. § 785 et seq.

29. Smiley v. Sioux Beet Syrup Co. [Neb.] 101 N. W. 253. Equity will not, on the petition of persons suing in tort, appoint a receiver for a corporation in order to preserve its property and have it ready to turn over to satisfy such judgments as may be obtained in the actions at law. Slover v. Coal Creek Coal Co. [Tenn.] 82 S. W. 1131. See 2 Curr. L. 1465, n. 45, 46.

NOTE. Can a suit be maintained solely for the purpose of obtaining the appointment of a receiver: The general and well-nigh universal rule is that receiverships are only provisional, or auxiliary to the main purpose of an action; and that, if the jurisdiction exist to make the appointment of a receiver the chief purpose of the action it is rarely exercised. Villa v. Grand Island, etc. Co. [Neb.] 97 N. W. 613, 63 L. R. A. 791; State v. Ross [Mo.] 25 S. W. 947, 23 L. R. A. 534; Whitney v. Hanover Nat. Bank [Miss.] 15 So. 33, 23 L. R. A. 531; Wallace v. Pierce Wallace Pub. Co. [Iowa] 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122; French Bank Case, 53 Cal. 495; Jones v. Bank of Leadville, 10 Colo. 465, 17 P. 276; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508. The most notable exception to the above rule is the Wabash Case, 29 F. 618. The nature and origin of which is stated in the opinion of Treat, J. to be as follows:

"In order that this matter may not be misunderstood, for it is important in its vast reaching consequences, it should be stated that it was not an application by a mortgagee to foreclose. It was an application by the corporation itself. * * * The application was originally made to myself in this circuit, which is limited in extent. I hesitated. I found that Judge Shipman, a very learned and able judge, had gone over in extenso that class of thought. After further consideration with respect thereto, I reached the conclusion that his views were correct, to wit: 'Here is a vast system extending through many states and through many judicial districts. A default it was certain would have been made in a few days. What should be done? The interests of all concerned required that some judicial action should be had for conservation of these interests—stockholders, bondholders, creditors at large,' etc."

The cases of Miner v. Belle Isle Ice Co. [Mich.] 53 N. W. 218, 17 L. R. A. 412; State v. Second Judicial Dist. Ct. [Mont.] 39 P. 316, 48 Am. St. Rep. 682, 27 L. R. A. 392; Columbia Athletic Club v. State [Ind.] 40 N. E. 914, 52 Am. St. Rep. 407, 28 L. R. A. 727, and Supreme Sitting of the Order of Iron Hall v. Baker [Ind.] 33 N. E. 1128, 20 L. R. A. 210, have sometimes been referred to as falling within the exception, but we hardly think that all of these cases can be so classed. The first was a case where a court of equity assumed jurisdiction to wind up a corporation at the suit of a minority stockholder, and, as incidental thereto, to appoint a receiver with an order for an accounting, where the corporation had utterly failed of its purpose.

The second case cited is nearer the point. The proposition announced in that case was that a receiver of a corporation might be appointed on the application of minority stockholders, pending the investigation of charges of outrageous frauds on the part of the minority stockholders and managers in a suit for an injunction against the negotiation of enforced or fraudulent obligations created by them, and for other relief, although the latter did not extend to the winding up of the corporation.

In Columbian Athletic Club v. State [Ind.] 40 N. E. 914, 52 Am. St. Rep. 407, 28 L. R. A. 727, it appears that a bill was filed for the dissolution of a corporation on the ground that it had forfeited its franchise, and for an injunction to restrain in the meantime the exercise of the franchises claimed and for a receiver to

ment of a receiver is a matter resting in the sound discretion of the court.[30] The appointment will not be made unless necessary as a protective measure.[31] Insolvency is generally a sufficient[32] and essential[33] element. The assignee of an assigned estate being discharged, a receiver may be appointed to enforce uncollected accounts.[34] In South Dakota, a judgment debtor refusing to apply unexempt prop-

take charge of the property until the further order of the court.

The case of Supreme Sitting of the Order of Iron Hall v. Baker [Ind.] 33 N. E. 1128, 20 L. R. A. 210, went off on a construction of an Indiana statute, and need not be further referred to. There is, however, a valuable note (20 L. R. A. 210-214) appended to this case, containing a large collection of authorities. In this note the annotator recognizes the prevailing doctrine as above stated, but cites certain exceptions thereto, as follows, viz.: That the appointment of a receiver may be made the main purpose of an action when a corporation ceases to exist, or abandons its business, and neglects to elect its officers, and there is no one to administer or care for its effects (citing Smith v. Danzig, 64 How. Pr. [N. Y.] 320; Lawrence v. Greenwich F. Ins. Co., 1 Paige [N. Y.] 587; Crumlish's Adm'r v. Shenandoah Valley R. Co., 28 W. Va. 623; Finney v. Bennett, 27 Grat. [Va.] 365; Buck v. Piedmont & A. L. Ins. Co., 4 Hughes, 415, 4 Fed. 849; Stark v. Burke, 5 La. Ann. 740; St. Louis & S. Coal & Min. Co. v. Edwards, 103 Ill. 472; Consolidated Tank Line Co. v. Kansas City Varnish Co., 43 F. 204); or where there is such a dispute among the members of a governing body as prevents the affairs being carried on properly (citing Featherstone v. Cooke, L. R. 16 Eq. 298; Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. 303; Shepherd v. Oxenford, 1 Kay & J. 491); or for the protection of creditors where there is danger of irreparable loss, and a receiver is necessary to protect their rights (citing Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; Conro v. Gray, 4 How. Pr. [N. Y.] 166; Sage v. Memphis, etc., R. Co., 125 U. S. 361, 31 Law. Ed. 694; Kennedy v. St. Paul & P. R. Co., 2 Dill. 448, Fed. Cas. No. 7,706). It has been held that a court of chancery has power to appoint a receiver until administration can be granted, where the right of administration is in litigation, or other impediment exists. Smiley v. Bell, Mart. & Y. [Tenn.] 378, 380, 17 Am. Dec. 813. It has also been held that pending litigation over the probate of a will and during the interval before an executor or administrator is appointed, a court of equity may appoint a receiver of personal property and of the rents and profits of the realty, where there is danger of loss, misuse or misapplication. 23 Am. & Eng. Enc. Law [2d Ed.] p. 1015, and cases cited; or for the estate of an infant when there is no guardian or trustee (Id. p. 1016); or for the estate of an idiot or lunatic, pending the return or decision upon the inquisition of lunacy (Id.). Thus it appears that, while there are some exceptions, both as respects corporations and the estates of private individuals, to the rule that the appointment of a receiver in equity is merely auxiliary to a pending litigation, and that such action may occasionally be the object of the suit itself, and that as to corporations the power may, under some peculiar states of fact, be invoked in behalf of creditors, yet such creditors must generally be judgment or lien creditors (Wallace v. Pierce-Wallace Pub. Co. [Iowa] 70 N. W. 216, 63 Am. St. Rep. 389, 38 L. R. A. 122; Union Mut. L. Ins. Co. v. Union Mills Plaster Co., 37 F. 286, 3 L. R. A. 90, 94; Thomps. Corp. § 6839), or at least creditors by contract (5 Thompson, Corp. § 6840; 2 Morawetz, Corp. §§ 797, 860).—See Slover v. Coal Creek Coal Co. [Tenn.] 82 S. W. 1131. See, also, comment in 18 Harv. L. R. 398.

30. Rowland v. Auto Car Co., 133 F. 835. See 2 Curr. L. 1467, n. 76, 77.

31. Where, in a suit by a bankrupt's trustees, it appearing that there is no money in defendant association's possession, and that the latter's claim of set-off might wipe out the indebtedness sued for, held a receiver would not be appointed. Rowland v. Auto Car Co., 133 F. 835. Where plaintiff asked for a sufficient amount of funds in the hands of a sheriff to satisfy his demand, the appointment of a receiver is unnecessary. Hardy v. Pecot [La.] 36 So. 992. Where loan by brewing company to saloonkeeper had been repaid and the latter had been released from an agreement to purchase beer of the former, the company being merely a surety for the saloonkeeper, held company's application for a receiver should be denied. Seattle Brewing & Malting Co. v. Jensen, 36 Wash. 462, 78 P. 1007.

32. Under Gen. St. 1901, § 1302, before its repeal, a judgment creditor of an insolvent corporation, after the return of an execution unsatisfied, was entitled to the appointment of a receiver by application in the original action. Consolidated Barb Wire Co. v. Stevenson [Kan.] 79 P. 1085. A building and loan association is insolvent when its financial condition is such that it is unable to carry to completion the purpose of its creation. Gunley v. Armstrong [C. C. A.] 133 F. 417. See 2 Curr. L. 1465, n. 55.

33. A court of equity has no power to appoint a receiver for a solvent concern for the purpose of preventing its creditors from maintaining actions against it. Smiley v. Sioux Beet Syrup Co. [Neb.] 101 N. W. 253. Where the applicant was neither a creditor nor stockholder. State v. Dearing [Mo.] 84 S. W. 21. Where plaintiff's right to recover was doubtful and defendant was financially responsible held order appointing receiver was too drastic. Stern v. Shapiro, Remick & Co., 99 App. Div. 405, 91 N. Y. S. 249. Dissolution of partnership, appointment denied where existence of partnership was denied and there was no proof that the fund was in danger or the firm or its members insolvent. Rowland v. Auto Car Co., 133 F. 835. See 2 Curr. L. 1465, n. 49.

34. Andrews v. Wilson's Assignees, 26 Ky. L. R. 658, 82 S. W. 391. If the court cannot find a competent person to accept such position, it may assign the duty to the master commissioner. Id.

erty to the satisfaction of the judgment, a receiver may be appointed.[35] A receiver will not be appointed if the party has an adequate remedy at law,[36] or where a temporary injunction,[37] or the giving of a bond[38] will afford complete protection; and, so long as the case is pending, it lies within the discretion of the court to order the strengthening of the bond, or in default thereof, the appointment of a receiver.[39]

The appointment of a *receiver pendente lite* will only be made, as against one in possession, in a case showing an immediate necessity for preserving some particular property.[40] This rule has been applied to actions to enforce a lien,[41] to recover money obtained by extortion,[42] and to partnership dissolution proceedings.[43] The receiver may be appointed though answer has been served and the defendant is solvent.[44] To warrant the reversal of an order appointing a temporary receiver, the complaint must show that the complainant has no cause of action.[45]

Acquiescence in the appointment of a receiver[46] and the giving of a bond to dissolve the same[47] constitute an admission of the power of the court to make the appointment.

Liability for wrongful appointment.[48]—Persons wrongfully procuring the appointment of a receiver become, after the appointment is judicially declared void, trespassers ab initio, and liable for the damages caused by their wrongful acts,[49] and, in some states, an action to recover such damages may be brought against an executor.[50] It is not necessary that the wrongful appointment be procured maliciously and without probable cause.[51] In such an action the opinion of the supreme court reversing the order of appointment is admissible.[52] The measure of recovery

35. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

36. In an attack on a fraudulent conveyance held attachment afforded a complete and adequate relief. Booth & Co. v. Mohr & Sons [Ga.] 50 S. E. 173. See 2 Curr. L. 1465, n. 49-51.

37. So held in an action under Code Civ. Proc. § 1781, against the director of a foreign corporation for an accounting and the appointment of a receiver to prevent the threatened disposal of corporate property. Acken v. Coughlin, 92 N. Y. S. 700. See 2 Curr. L. 1465, n. 53.

38. Cordele Ice Co. v. Sims, 120 Ga. 428, 48 S. E. 12. Where, in an action to recover realty, it is alleged that the interests of a guardian are adverse to those of the ward, held error for the court before the trial of the issue to appoint a receiver to take charge of the property and apply the rents to the benefit of the minor. Phillips v. Williams, 26 Ky. L. R. 654, 82 S. W. 379. See 2 Curr. L. 1468, n. 86.

39. Held no abuse of discretion. Cordele Ice Co. v. Sims, 120 Ga. 428, 48 S. E. 12.

40. Belding v. Washington Cornice Co., 36 Wash. 549, 79 P. 37; Lemker v. Kalberlah, 105 Ill. App. 445. Insolvency of the person in possession is not of itself a sufficient ground, at least in case of real estate. Lemker v. Kalberlah, 105 Ill. App. 445.

41. Complaint alleging that one has a lien on certain hay for cutting, stacking and baling the same, and that the owner was wrongfully disposing of such hay and refused to pay the lien, held to warrant the appointment of a receiver pendente lite. Woodford v. Kelley [S. D.] 101 N. W. 1069. Receiver appointed to preserve property pending suit to foreclose certain railroad liens. Rev. Code Civ. Proc. § 227, construed. Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722.

42. Evidence of payments by old man to prostitute held insufficient to warrant appointment of receiver. Platt v. Elias, 91 N. Y. S. 1079, overruling 44 Misc. 401, 89 N. Y. S. 1015.

43. Receiver appointed where one partner was denied participation in partnership business. Redding v. Anderson [Wash.] 79 P. 628. See Partnership, 4 Curr. L. 908.

44. Receiver to preserve lien. Woodford v. Kelley [S. D.] 101 N. W. 1069.

45. That it is defective and subject to demurrer is insufficient. Belding v. Washington Cornice Co., 36 Wash. 549, 79 P. 37.

46. Failure of one to object to the appointment of a receiver, or if his objection is overruled, to prosecute an appeal, prevents his questioning its propriety upon the final hearing of the cause. Pagett v. Brooks, 140 Ala. 257, 37 So. 263. Attorney for insurance company agreeing to the appointment of a receiver, held the company was bound by order appointing receivers. Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125.

47. Booth & Co. v. Mohr & Sons [Ga.] 50 S. E. 173.

48. See Malicious Prosecution, etc., § 1B, 4 Curr. L. 470.

49. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10.

50. Under Code Civ. Proc. § 2733, providing that any person may sue an executor or administrator of a decedent who in his lifetime wasted, destroyed, or converted the goods of plaintiff. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10.

51, 52. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10.

is largely affected by statutes,[53] and the amount of a good and collectible account which was lost by reason of the receivership may be shown as an item of damage.[54] Plaintiff not claiming interest, prospective profits, nor exemplary damages, allegations in the complaint concerning the extent of the business and malice and fraud of defendant will be treated as surplusage.[55]

§ 2. *Appointment, qualification, and tenure of receivers. A. Proceedings for appointment and qualification.*[56]—Statutory provisions respecting corporation[57] and bankruptcy[58] receivers must be followed. The court must have jurisdiction over the property affected.[59] The courts of a state have jurisdiction to appoint a receiver to preserve the assets of a foreign corporation whose principal place of business is within the state,[60] but the order of appointment should be limited to property within the state.[61] Courts generally have not the power in vacation to render the appointment of a receiver permanent.[62] The court first appointing a receiver has exclusive jurisdiction.[63] Generally, notice of the application is essential,[64] though this requirement may be waived by appearance.[65] That a discharged receiver who never took charge or control of any property was appointed without notice is immaterial.[66] Creditors of the insolvent, while proper, are not necessary parties.[67] One alleging irreparable injury must allege facts showing same.[68] In some states a receiver is required to give a bond.[69] Creditors stipulating for the conditional waiver of their

53. The measure of damages is defined by Civ. Code, §§ 4270, 4330, 4333, and 4334. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10. Under Civ. Code, §§ 4333, 4334, the fact that accounts and bills belonging to a corporation were taken under attachment to satisfy the corporation's indebtedness does not affect the measure of the corporation's damages for the wrongful receivership. Id.

54. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10. Evidence of loss of account by limitations held admissible though no action had been brought to collect it. Id.

55. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10.

56. See 2 Curr. L. 1468.

Form of order of appointment, see Fletcher Eq. Pl. & Pr. §§ 471, 472. For requisites and form of bill, see §§ 462, 463.

57. Under P. L. p. 58, the ordering of a statutory injunction is a condition precedent. Gallagher v. Asphalt Co. [N. J. Eq.] 58 A. 403. Under Corporation Act, § 66, providing for the summary appointment of a receiver, a mere restraining order or preliminary writ of injunction, limited in its operation, is insufficient to authorize the appointment of a receiver. Pierce v. Old Dominion Copper Min. & Smelt. Co. [N. J. Eq.] 58 A. 319. See Corporations, 3 Curr. L. 880.

58. See Bankruptcy, 3 Curr. L. 434.

59. Court having sole power to determine validity of will has no jurisdiction to appoint a receiver. Burgess v. Sullivant, 2 Ohio N. P. (N. S.) 327.

60. Reusens v. Manufacturing & Selling Co., 90 N. Y. S. 1010. Bill by stockholder alleging that entire control had been given over to one director, that the corporation's principal place of business was within the state, as were its books and assets, and alleging waste and unlawful payments held not demurrable. Id.

61. Action for an accounting and the appointment of a receiver under Code Civ. Proc. §§ 1781, 1788. Acken v. Coughlin, 92 N. Y. S. 700. See 2 Curr. L. 1468, n. 92. See topic Foreign Corporations, 3 Curr. L. 1455.

62. Order to show cause held void. State v. Dearing [Mo.] 84 S. W. 21.

63. A state court will not appoint a corporate receiver to bring suit against stockholders where a Federal receiver has been previously appointed, no application having been made to the Federal court to permit the filing of a bill and use of the Federal receiver's name to enforce the stockholder's liability. Gallagher v. Asphalt Co. [N. J. Eq.] 58 A. 403. The same rights to property in the hands of a receiver in one court cannot be taken jurisdiction of in a new suit in another court. Harper v. Printing-Telegraph News Co., 128 F. 979. See 2 Curr. L. 1468, n. 96.

64. See State v. Dearing [Mo.] 84 S. W. 21. Necessity and form of notice, see Fletcher Eq. Pl. & Pr. §§ 467, 468.

65. Consolidated Barb Wire Co. v. Stevenson [Kan.] 79 P. 1085. [In this case the court states that it is doubtful if any notice was necessary under Gen. St. 1901, § 1302; this section has since been repealed.]

66. Wilkie v. Reynolds [Ind. App.] 72 N. E. 179.

67. That defendant's answer was sufficient to overcome the evidence, that the court was not justified in finding the fraud and mismanagement charged in the bill, and that other persons alleged to have been indebted to the corporation ought to have been made parties does not affect the jurisdiction of the court to appoint a receiver for the corporation. Town of Vandalia v. St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662.

In the New Jersey summary proceedings under Corporation Act, § 66, others besides the corporation and its stockholders are not proper parties. Pierce v. Old Dominion Copper Min. & Smelt. Co. [N. J. Eq.] 58 A. 319.

68. Union Boom Co. v. Samish Boom Co., 33 Wash. 144, 74 P. 53.

69. The purpose of Code 1896, §§ 801, 802,

claims if a receiver would be appointed are bound thereby, the court granting their request.[70] A receiver dying before the completion of his trust, a successor will be appointed.[71] The court having jurisdiction of the parties and the subject-matter, the regularity[72] or necessity[73] of the appointment cannot be collaterally attacked, and it has been held that an appointment by a court of general jurisdiction is not subject to collateral attack on the ground that the court did not have jurisdiction of the insolvent.[74] In the absence of statutory provisions an order appointing a receiver is not appealable.[75] Where an adequate supersedeas bond was given pending an appeal from an order of appointment, the receiver will not be reinstated on affirmance, but the bond will be allowed to stand as security.[76]

(§ 2) *B. Who may be appointed.*[77]—The discretion of an inferior court in the selection of a receiver should not be interfered with unless objections of the most serious character are shown, or some fatal objection on principle in the person named.[78] The mere fact that one was formerly an officer and director[79] or a creditor of and stockholder in[80] the insolvent corporation, and that he is related to some of the parties in interest,[81] or that he is attorney for a party,[82] is not of itself sufficient to disqualify him.

(§ 2) *C. Tenure of receiver.*[83]—The distinctions between the vacating of the appointment and the removal and the discharge of the receiver should be kept in mind.[84] The receivership must be terminated by a formal order of the court.[85]

requiring a bond on the appointment of a receiver, with condition to pay all damages sustained by the appointment if it is vacated, is to afford indemnity to those who suffer damage by reason of the appointment of the receiver and avail themselves of the opportunity afforded by the statutes to have the appointment vacated. Pagett v. Brooks, 140 Ala. 257, 37 So. 263. Receiver's bond and form thereof, see Fletcher's Eq. Pl. & Pr. §§ 475, 476.

70. Gibson v. Standard Automatic Gas Engine Co. [C. C. A.] 134 F. 799.

71. In re Townsend, 44 Misc. 415, 89 N. Y. S. 1012.

72. Gunby v. Armstrong [C. C. A.] 133 F. 417. Statutory requirements being substantially complied with. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

73. Bowman v. Hazen [Kan.] 77 P. 589.

74. Blue Mountain Iron & Steel Co. v. Portner [C. C. A.] 131 F. 57.

75. Pagett v. Brooks, 140 Ala. 257, 37 So. 263; Town of Vandalia v. St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662. Under Hurd's Rev. St. 1899, p. 226, c. 22, § 52, an order appointing a receiver cannot be reviewed by the supreme court on a subsequent appeal from a different interlocutory order prior to the rendition of final judgment. Id. Considered by itself the order appointing a corporation receiver in a summary proceeding as authorized by Corporation Act, § 66, is an interlocutory order. Pierce v. Old Dominion Copper Mining & Smelting Co. [N. J. Eq.] 58 A. 319.

Statutory changes: Code 1896, §§ 429, 800. Pagett v. Brooks, 140 Ala. 257, 37 So. 263. Code, art. 5, § 25. Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125.

76. Oudin & B. Fire Clay Min. & Mfg. Co. v. Conlan [Wash.] 80 P. 283.

77. See 2 Curr. L. 1469.

See Fletcher Eq. Pl. & Pr. § 461.

78. In re Eckhardt Mfg. Co. [La.] 38 So. 78.

79. Appointment was opposed by a small minority, and even they did not deny his fitness for the position. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 133 F. 186. See 2 Curr. L. 1470, n. 24.

80. In re Eckhardt Mfg. Co. [La.] 38 So. 78.

81. Bowling Green Trust Co. v. Virginia Passenger & Power Co., 133 F. 186.

82. While the attorney of a party will not usually be appointed, such an appointment will not be disturbed unless there is a showing of personal unfitness. Fisher v. Southern Loan & Trust Co. [N. C.] 50 S. E. 592.

83. See 2 Curr. L. 1470.

84. To "vacate" the appointment is to set aside the order of appointment because improvidently made, the motion for which is based on the circumstances and conditions attending the appointment. The term "remove" as applied to a receiver means simply a change in the personnel of the receivership, which remains unaffected. The effect of the removal is only to substitute one person for another in the office. The cause of the removal of a receiver is some personal objection to him. The "discharge" of a receiver relates to the termination of the receivership, and is asked and ordered for the reason that, because of the state of the suit, there is no longer any necessity for continuing the receiver. Pagett v. Brooks, 140 Ala. 257, 37 So. 263.

A final decree on the merits, dismissing complainant's bill, does not operate to vacate the appointment of a receiver appointed in the action, within the meaning of Code 1896, § 801, providing for an action on the applicant's bond upon the "vacation" of the receivership. Pagett v. Brooks, 140 Ala. 257, 37 So. 263.

85. Pagett v. Brooks, 140 Ala. 257, 37 So. 263. Decree of dismissal held insufficient to ipso facto discharge receiver. Id. Removal and discharge of receivers, law and forms, see Fletcher's Eq. Pl. & Pr. §§ 479-482.

Any creditor may of his own motion, and without bringing in other creditors or the original parties to the suit, petition the court to set aside its order of discharge.[86] The overruling of a motion to set aside a discharge will not bar a proper application by petition.[87] A creditor moving to set aside a receivership, the issues formed are much broader than if he had appealed from the order of appointment.[88] A receiver cannot individually complain of an order of removal,[89] though he can of an order sustaining an application to set aside his discharge.[90] A receiver being appointed pending a suit, whether or not a discharge follows the termination of the suit depends upon the exigencies of the case.[91] The setting aside of an order of discharge lies in the discretion of the court.[92] No appeal lies from an order removing or discharging[93] or refusing to remove or discharge[94] the receiver, though an appeal from an order discharging him has been recognized.[95]

§ 3. *Title and rights in and possession of the property. A. Title in general.*[96]—A receiver is merely a custodian for those who may be found entitled to the property; he is entitled to possession, but his appointment extinguishes no titles.[97] The order of appointment cannot affect vested rights.[98] Orders purporting to vest the receiver with the authority and control of property and funds not involved in the litigation in which the receiver was appointed are absolutely void,[99] and the receiver taking such property without the consent and contrary to the wishes of the owner, he and all co-operating with him are trespassers, and are liable for the property and funds so wrongfully taken with interest,[1] and that the use was beneficial to the wronged party is no defense.[2]

(§ 3) *B. Rights as between receivers, claimants or lienors. Receivers.*[3]—A state court having first acquired the right of control of the property, the receiver of a Federal court taking possession of the same must surrender it to the receiver of the state court who is subsequently appointed.[4]

Claimants or lienors.[5]—In the absence of statutory provisions[6] a receiver takes the property subject to all valid and existing liens thereon at the time of his appointment.[7] The registry of a judgment after the appointment of a receiver produces no legal effect.[8]

86, 87. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277.

88. In re Eckhardt Mfg. Co. [La.] 38 So. 78.

89. State v. Interstate Fisheries Co., 36 Wash. 80, 78 P. 202.

90. See Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277, where, although the question was not discussed, an appeal by a receiver from such an order was recognized.

91. Receiver being appointed pending an appeal from an order removing an executrix, held reversal of order and entry of judgment on appeal did not ipso facto discharge the receiver. In re Kayser's Estate [Minn.] 100 N. W. 214.

92. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277.

93. Pagett v. Brooks, 140 Ala. 257, 37 So. 263.

94. Pagett v. Brooks, 140 Ala. 257, 37 So. 263; Monumental Mut. Life Ins. Co. v. Wilkinson [Md.] 59 A. 125.

95. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277. In this case the appeal was from an application to set aside the order of discharge and, while the court did not discuss the validity of the appeal, it held that the discretion of the trial court in the matter would not be disturbed. Id.

96. See 2 Curr. L. 1470.

Receiver's title and possession, see Fletcher's Eq. Pl. & Pr. § 477.

97. Commonwealth v. Overholt, 23 Pa. Super. Ct. 199.

98. Where in foreclosure proceedings receiver was appointed to collect rents held not to affect rights of tenant who had paid rent in advance. Thorpe v. Mindeman [Wis.] 101 N. W. 417.

99. May be collaterally attacked. Bowman v. Hazen [Kan.] 77 P. 589.

1, 2. Bowman v. Hazen [Kan.] 77 P. 589.

3. See 2 Curr. L. 1471.

4. Louisville Trust Co. v. Knott [C. C. A.] 130 F. 820.

5. See 2 Curr. L. 1471.

Mode of asserting claims against a receiver. Fletcher's Eq. Pl. & Pr. § 478.

6. Mortgagees, bondholders and lienors of a New Jersey corporation take subject to the effect of insolvency proceedings which may be subsequently commenced, and in which a receiver may be appointed of all corporate assets. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Eq.] 59 A. 565.

7. Attachment lien. Bories v. Union Bldg. & Loan Ass'n, 141 Cal. 74, 74 P. 552. Receiver's certificates for expenses cannot be so issued as to disturb existing liens.

(§ 3) *C. Possession and restitution.*[9]—The possession of a receiver not being essential to the protection of creditors, it will not be protected so as to wrongfully deprive a third party of the possession of his property.[10] A petition for an order on a receiver to turn over certain property to petitioners is simply an application for incidental administrative relief, and is not adapted to the determination of substantive issues.[11] All persons affected by the proceedings should be made parties.[12] Receivers are not entitled to appeal from an order ordering them to deliver over property if such order does not affect the estate or the receivers personally,[13] though it is otherwise as to parties affected by the decisions.[14] Where, as between the receiver and an attaching creditor, the right to the possession of the debtor's property depends on the latter's solvency, the question may be raised by an order to show cause issued to the sheriff and attaching creditor.[15] A tenant not a party to foreclosure proceedings is not guilty of contemptuous interference with the receiver's possession in refusing to attorn to him.[16]

§ 4. *Administration and management of the property. A. Authority and powers in general.*[17]—A receiver is an officer of the court appointing him,[18] and through him the court has possession of the property, though its custody is temporary only and for the purpose of conserving the property, if not sold, until the creditors are paid.[19] The power of a receiver is limited by the terms of his appointment,[20] and his duties are generally wholly of an administrative character.[21] In administering a receivership trust, the ordinary advisory orders may properly be granted ex parte, and the fact that they are so granted is not evidence tending to show infidelity on the part of the receiver.[22] A misstatement of facts by fraud, negligence or mistake, included in a petition for judicial advice, reasonably calculated to influence action to the prejudice of creditors and which has that effect,

Fisher v. Southern Loan & Trust Co. [N. C.] 50 S. E. 592.

8. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

9. See 2 Curr. L. 1472.

10. Where in dispute between husband and wife as to which was lessee of premises, husband was appointed receiver, held, no creditors being involved, the landlord was entitled to possession, there having been a failure to pay rent. Foster v. Foster, 98 App. Div. 24, 90 N. Y. S. 451.

11. The only question to be determined is whether the petitioners have shown such title to the property, that the court ought, in justice, to direct the receiver to turn it over to them. Kirkpatrick v. Eastern Mill. & Export Co., 135 F. 146. In such a case subscribers to an underwriting agreement which has been assigned as collateral to the petitioner cannot set up defenses on the merits, to the enforcement of the agreement against them. Id.

12. Prayer by one holding an underwriting agreement as collateral security to have receivers turn over stock of insolvent corporation so that it could enforce such agreement against the subscribers will not be granted until the latter are made parties. Kirkpatrick v. Eastern Mill. & Export Co., 135 F. 144.

13. Where one holding an underwriting agreement as collateral sued the receiver for stock admittedly worthless, in order that he might enforce the agreement against the subscribers, held the receiver could not appeal. Kirkpatrick v. Eastern Mill. & Export Co., 135 F. 151.

14. Where one holding an underwriting agreement as collateral sued the receiver for stock in order that he might enforce the agreement against the subscribers, held, latter could appeal. Kirkpatrick v. Eastern Mill. & Export Co., 135 F. 151.

15. State v. Superior Court of King County, 36 Wash. 91, 78 P. 461.

16. American Mortg. Co. v. Sire, 92 N. Y. S. 1082.

17. See 2 Curr. L. 1472.

18. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698. Common pleas court is without jurisdiction over receivers appointed by the probate court to take care of property involved in common pleas suit. American Engineering Specialty Co. v. O'Brien, 2 Ohio N. P. (N. S.) 550.

19. Receivers being appointed in creditors' suits against lessor and lessee, court has no power to compel lessor to execute a new lease materially differing from the old. Guaranty Trust Co. v. North Chicago St. R. Co. [C. C. A.] 130 F. 801.

20. Judgment creditor suing to have a fraudulent transfer by his debtor set aside and having a receiver appointed to sell the lands and apply the proceeds to the indebtedness, such receiver takes no title to the real estate, nor acquires any rights in the land for the benefit of creditors generally. Hillyer v. Le Roy [N. Y.] 72 N. E. 237.

21. Corporate receiver. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

22. Such advisory orders are usually ex parte. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

is a sufficient ground in the same jurisdiction to support an application by such creditors, seasonably made while the court has control of the matter, for relief.[23] Oral evidence as to judicial advice in the administration of a receivership matter is not necessarily to be rejected or condemned as false.[24]

Receivers represent their principals and have no greater rights than they have.[25] A corporate receiver is the representative of creditors, the corporation and stockholders.[26]

A receiver may never speculate with trust property,[27] but, subject to the approval of the court, he may properly burden his trust fund with expenses of converting into money choses in action or other property in which he has only an equitable title, creditors of the insolvent having the property as collateral, though no surplus is obtainable therefrom, if, under the circumstances, that seemed for the best interests of general creditors.[28] A receiver acting in good faith may properly conserve an equity belonging to the trust at his own expense, where the court with knowledge of the facts will not permit the trust fund to be burdened to save it,[29] and when he so acts he has an equitable lien upon the property conserved for the amount of his reasonable expenditures, any profits obtained to inure to the trust fund.[30] Receivers are allowed a reasonable time to determine and elect whether they will assume any of the corporation's executory contracts.[31] They may properly be allowed to finish uncompleted contracts of the insolvent, when that, at the time of action in regard thereto, seems for the best interests of general creditors,[32] but the court will not as of course order them to complete unfinished contracts of the insolvent unless necessary to save investments already made, or save encumbered property, and such completion is clearly required in the interests of general creditors.[33] Where the business requires the attention of an expert, the receiver may in certain cases employ one of the parties to the suit.[34]

23, 24. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

25. Fitzner v. Noullet [La.] 38 So. 94. Receiver of a firm seeking to rescind a contract of purchase entered into by the firm occupies the same position as the firm, or rather its members, would have done. City of Ironwood v. Wickes, 93 App. Div. 164, 87 N. Y. S. 554. A contract being nonassignable, a receiver of one of the parties thereto cannot transfer it so as to confer rights on the transferee. Sargent Glass Co. v. Matthews Land Co. [Ind. App.] 72 N. E. 474.

26. Directors diverting the assets of the company to themselves while the corporation was solvent, the receiver may sue them for an accounting Hayes v. Pierson, 65 N. J. Eq. 353, 58 A. 728. May inquire into actions of the directors to the same extent that stockholders might do. Id. As representative of the corporation is entitled to recover funds to defray expenses of receivership from directors who have diverted assets of corporation to themselves. Id. One agreeing to pay a certain sum when and as required by the directors, a receiver levying the assessment may recover the same. French v. Millville Mfg. Co. [N. J. Err. & App.] 59 A. 214. But see Clark & M. Corp. § 820, for receiver's right to enforce stockholder's liability. The receiver of a corporation is the proper party to sue stockholders of an insolvent corporation to recover corporate money fraudulently divided among them. Mitchell v. Jordan, 36 Wash. 645, 79 P. 311. A receiver of an insolvent corporation in a creditors' action to administer its affairs for their benefit is a trustee of corporate assets in the right of the corporation for such creditors, and for the latter in their right as to all liabilities to which they may properly resort as a class, not enforceable by the corporation. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. The interests of creditors of an insolvent corporation holding valid securities is not adverse to the interests of the receiver or general creditors, the property which is the basis of the security being in the receiver's hands. Id. See 2 Curr. L. 1473, n. 83, 84.

27, 28, 29, 30. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

31. Johnson v. Lehigh Valley Traction Co., 130 F. 932. Where within 41 days receivers of railroad paid rent which had matured before their appointment, which rent the lessor accepted, held lease would not be forfeited, even though notice to that effect had been given. Id.

32. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

33. In other cases the court and its receivers act according to their judgment of the probabilities as to general interests. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Where a manufacturing business with stock, partly built machinery and partly performed contracts, was placed in the hands of a receiver, and investments had been made on such contracts, and contract liabilities assigned as security, and the court ordered a temporary continuance of the busi-

(§ 4) *B. Payment of claims against receiver or property.*[35]—A receiver being required[36] to pay "all sums due employes," he must pay wages earned both prior and subsequent to his appointment.[37]

Debts created by receiver and expenses of administration.[38]—As a general rule the expenses of the receivership are to be satisfied out of the property or funds coming into the hands of the receiver,[39] and property which should not have been brought within the jurisdiction or taken possession of by a receiver should not be appropriated to the payment of the expenses of the receivership.[40] In such cases the receiver must look for his compensation to the portion of the fund which was properly brought within his jurisdiction, or, if there is no such fund, then to the plaintiff on whose application the receivership was secured.[41] The receivership of a corporation being necessary for the conservation of several funds, the expense should be borne by the whole in proportion, as regards the different interests, to the benefits received.[42] The object being to preserve the property pending a determination of the rights of the parties to the litigation with reference to such property or the proceeds thereof, the successful party, availing himself of the fruits of the litigation, must take subject to the costs of the receivership.[43] But this rule is properly applied only where the contest is as to the disposition of the proceeds of the property or funds, and not where it is as to the regularity or legality for the proceedings for the appointment of the receiver.[44] In the latter case the appointment being resisted and the result showing that it was erroneous, the expenses of the receivership should be charged to the party at whose instance the receiver was appointed;[45] but in no case can such expenses be satisfied out of the property or funds as against an intervener asserting and establishing his right to the property in hostility to the entire receivership proceeding.[46] A receiver collecting from a stockholder in the insolvent corporation more than is necessary to pay the debts and costs of administration, and to equalize the rights and liabilities of stockholders, he is bound to return the excess.[47]

The power to issue *receiver's certificates* rests largely in the discretion of the court, and in the absence of an abuse of this discretion, the exercise of the power will not be reversed on appeal.[48] They will issue in order that the receiver may bring an authorized suit to obtain property belonging to the insolvent.[49]

Counsel fees.[50]—A receiver is entitled as a matter of right to the benefit of

ness, giving the receiver power to borrow for the purpose, on the credit of the trust fund, held, the court's order impliedly authorized the receiver, when in his judgment the general interests so demanded, to complete the contracts. Id.

34. Where it required a skilled man to run the business and such men were unavailable, held, the employment by the receiver of one of the parties to the suit, and the salary paid him, were justified, and the amounts so paid were properly allowed in the receiver's account. Oudin & B. Fire Clay Min. & Mfg. Co. v. Cole, 35 Wash. 647, 77 P. 1066.

35. See 2 Curr. L. 1474.

36. Parties consenting to jurisdiction and making no objection to appointment of receiver or decree, held receiver could not refuse to pay wages, none exceeding $300 in amount. Dickinson v. Saunders [C. C. A.] 129 F. 16.

37. Dickinson v. Saunders [C. C. A.] 129 F. 16.

38. See 2 Curr. L. 1475.

39, 40, 41. Frick v. Fritz, 124 Iowa, 529, 100 N. W. 513.

42. In re Immanuel Presbyterian Church, 113 La. 911, 37 So. 873.

43. It is immaterial whether the plaintiff has succeeded in asserting his rights in aid of which the receivership has been asked, or whether defendant has established the invalidity of defendant's claims. Frick v. Fritz, 124 Iowa, 529, 100 N. W. 513.

44, 45. Frick v. Fritz, 124 Iowa, 529, 100 N. W. 513.

46. Chattel mortgagees. Frick v. Fritz, 124 Iowa, 529, 100 N. W. 513.

47. In re New Iberia Cotton Mills Co., 113 La. 404, 37 So. 8.

48. Town of Vandalia v. St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662. See 2 Curr. L. 1474, n. 97.

49. Town of Vandalia v. St. Louis, etc., R. Co., 209 Ill. 73, 70 N. E. 662.

50. See 2 Curr. L. 1476.

counsel when the nature of the trust requires it,[51] and it is for the court to determine both the necessity for counsel and the compensation to be allowed therefor.[52] Expenses allowed a receiver for legal assistance are such as are reasonably necessary, assuming proper discharge by the receiver of his personal duties, the amount paid the attorney being at the rate ordinarily paid for similar services in official life.[53] Order awarding counsel fees should run to the receiver rather than to the attorney.[54] Where a receiver pays an attorney the sum allowed by the court for his services, there is an implied promise to repay any excess should the allowance be reduced by a subsequent adjudication, and hence interest on such excess runs from the time of payment.[55] A general attorney for a receiver rendering services of a general and continuous character need not keep an itemized account thereof, as the court customarily allows such sum as is reasonable for the services performed.[56] The court having personal knowledge as to the extent of the attorney's services, it is not necessary that it should hear evidence respecting the amount it should allow.[57] The order of appointment being void, an order awarding counsel fees is void.[58] Receivers' counsel fees are not "costs" within the meaning of statutory provisions on the latter subject.[59] Legal services rendered a secured creditor are not inconsistent with such services rendered at the same time for the receiver.[60]

Procedure to obtain payment.[61]

(§ 4) *C. Sales by receiver.*[62]—The judgment of sale is not subject to collateral attack because made in a suit other than that in which the receiver was appointed and to which the receivership had not been extended,[63] and the parties treating the receivership as extended, the sale is valid.[64] In the absence of a showing of great injustice, mere inadequacy of price[65] is of itself insufficient to warrant a refusal to confirm the sale.[66] Confirmation being refused for mere inadequacy of price the applicants for a resale will be required to give some security or assurance that at such resale a higher purchase price will be bid for the property.[67] A sale will not be confirmed where the terms show an intent to stifle competition,[68] or where the court has not been fairly dealt with.[69] A provision in the

51. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698.

52. Receiver cannot make any contract in this regard that will be binding on the court. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698.

53. The court will consider the time consumed, the grade of service required, efficiency of that rendered, results accomplished, fidelity to trust, and all other enlightening circumstances. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Attorney's services being constantly sought for a considerable period of time, an allowance of $150 held reasonable. Ondin & B. Fire Clay Min. & Mfg. Co. v. Cole, 35 Wash. 647, 77 P. 1066.

54. Sullivan v. Gage, 145 Cal. 759, 79 P. 537. See 2 Curr. L. 1476, n. 32.

55. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

56. The amount allowed should depend on results accomplished, though a reasonable expense account may also be allowed. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

57. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698.

58. Sullivan v. Gage, 145 Cal. 759, 79 P. 537.

59. Within meaning of Code Civ. Proc. § 1038, providing that costs against the state must be paid out of the state treasury. Sullivan v. Gage, 145 Cal. 759, 79 P. 537.

60. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

61, 62. See 2 Curr. L. 1476.

63, 64. Gila Bend Reservoir & Irrigation Co. v. Gila Water Co. [Ariz.] 76 P. 990.

65. A bid being less than one-half of the value of the property at forced sale, as estimated by a competent expert, it is inadequate. Strickland v. National Salt Co., 43 Misc. 172, 88 N. Y. S. 323.

66, 67. Porch v. Agnew Co. [N. J. Eq.] 57 A. 726.

68. In view of the fact that a new corporation was a majority stockholder in the insolvent one, held terms of sale, providing that property should be offered in parcels and then as a whole, and if the price bid at the latter offer exceeded the aggregate price bid for the parcels, the property should be struck off to the bidder for the whole, must be regarded as stifling competition. Strickland v. National Salt Co., 43 Misc. 172, 88 N. Y. S. 323.

69. Confirmation refused where order of sale was obtained without disclosing to the court a prior order for the same relief. Strickland v. National Salt Co., 43 Misc. 172, 88 N. Y. S. 323.

terms of sale being applicable to only one person, it shows a design to favor such person.[70] Superior liens being discharged by a sale, the court, when confirmation is asked, will consider the equities of such lienholders.[71] The property being sold in bulk and title to a portion failing, the purchaser is entitled to a reduction in the purchase price equal to the amount that the price was enhanced by the inclusion of such property; such sum to be ascertained by finding what proportion its actual value is to the value of the whole property sold.[72] The appointment of the receiver and the order authorizing the sale being reversed on appeal, the purchaser becomes an involuntary trustee for the alleged insolvent and the receiver occupies the same relation towards the purchaser,[73] and the alleged insolvent by taking such appeal is deemed to elect to have the property restored to him or applied to his benefit,[74] and the fact that it is applied to the payment of his debts does not prevent the purchaser from recovering the purchase price.[75] An order of court directing a party to convey to the purchaser the property to which he holds title does not require him to warrant such title.[76] The general rules of construction apply to recitals in the judgment of sale.[77] Objection that sale should be conducted by the sheriff and not by the receiver should be made by an attack on the decree, and not on the order confirming the sale.[78]

(§ 4) *D. Actions by and against receivers.*[79]—In the absence of statutory authority, a receiver cannot bring a suit without first obtaining leave to so do from the court appointing him;[80] failure to obtain such leave is not, however, a jurisdictional defect,[81] and the order granting such leave may be entered nunc pro tunc.[82] A receiver in one state cannot maintain suit in the courts of other states as a matter of absolute right, but the courts of other states may in the exercise of their sound discretion, as a matter of fact or comity, permit such receiver to bring and maintain such suits.[83] This doctrine of comity is almost universally applied, except in the single exception where some well established right of a citizen of the state intervenes.[84] A receiver being a nonresident, the appointment of a resident as his successor destroys diversity of citizenship.[85] A corporation being continued, after dissolution, for the purposes of suits by and against it, a receiver thereof, being authorized, may sue in the name of the corporation.[86]

70. Strickland v. National Salt Co., 43 Misc. 172, 88 N. Y. S. 323.

71. Porch v. Agnew [N. J. Eq.] 57 A. 726.

72. Cypress Lumber & Shingle Co. v. Tillar [Ark.] 84 S. W. 490.

73. Civ. Code, §§ 2958, 2959 construed. Lutey v. Clark [Mont.] 77 P. 305.

74. Lutey v. Clark [Mont.] 77 P. 305. Otherwise might sue for damages for conversion. Id. Applying the property to judgments recovered against the alleged insolvent constitutes an application of the property to his benefit. Id.

75. Lutey v. Clark [Mont.] 77 P. 305.

76. Cypress Lumber & Shingle Co. v. Tillar [Ark.] 84 S. W. 490.

77. Judgment of sale reciting that it was made by the agreement of all stockholders, both in their individual and corporate capacities, it should be construed that the corporation entered its appearance and was bound by the order of sale. McNeill v. Thompson [Ky.] 84 S. W. 1145.

78. Crouch v. Dakota, etc., R. Co. [S. D.] 101 N. W. 722.

79. See 2 Curr. L. 1477.

80. Hubert v. New Orleans [C. C. A.] 130 F. 21. Receiver having authority to demand and receive sums due, held not authority to sue therefor. Id. Averment in complaint in an action by a foreign receiver "that he brings this action by order of said court," held sufficient, after verdict, to show his authority. Minnich v. Swing [Ind. App.] 73 N. E. 271. See 2 Curr. L. 1477, n. 59.

81. Is not a bar to the jurisdiction of a court of law and no defense to an otherwise legal action. Manker v. Phoenix Loan Ass'n, 124 Iowa, 341, 100 N. W. 38.

82. De La Fleur v. Barney, 45 Misc. 515, 92 N. Y. S. 926.

83. Special receiver to whom securities had been assigned allowed to maintain suit thereon in Federal court in another state. Lewis v. Clark [C. C. A.] 129 F. 570.

84. Lewis v. Clark [C. C. A.] 129 F. 570.

85. A receiver being a nonresident and his authority to sue in the Federal court being annulled, the Federal court has no authority to permit the continuance of the suit by a resident who was appointed such receiver's successor. Hubert v. New Orleans [C. C. A.] 130 F. 21.

86. Writ of error. Laws of Michigan construed. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

A receiver can be sued only in the court of appointment,[87] though this rule has been modified by statute so far as the Federal courts are concerned, by permitting a receiver appointed by those courts to be sued in another jurisdiction in cases where his act is drawn in question in transactions connected with the property in his hands.[88] It rests in the discretion of the court whether it will permit an independent action to be brought against the receiver or compel the applicant to intervene in the suit in which the receiver was appointed, and such discretion will not be interfered with unless manifestly abused.[89] The general rule that one must obtain leave to sue a receiver does not seem to apply to suits respecting property of which the receiver is in neither actual nor constructive possession.[90] The statute allowing Federal receivers to be sued without leave in respect to their "acts or transactions" does not authorize suit without leave to condemn a grade crossing over property in the receiver's hands.[91] In granting leave to sue a receiver, the court may specify the forum in which such suit shall be brought.[92] Leave to sue a receiver improvidently granted may be modified or revoked.[93] Failure to obtain leave is a mere irregularity not going to the jurisdiction,[94] and in a collateral proceeding it will be presumed that leave was granted where the suit was in the court which appointed the receiver.[95] A Federal court appointing an ancillary receiver, a bill by the latter to foreclose a mortgage on property within the district is within its jurisdiction without regard to the citizenship of the parties or the amount in controversy.[96] No person can bring an action against a corporation after a receiver has been appointed, without the consent of court, but, in the absence of an injunction or legislative provision to the contrary, actions pending at the time of the appointment of the receiver can go on to judgment even without making the latter a party.[97] It is the privilege of the receiver to be substituted for the corporation, if he so desires, and makes application for that purpose.[98] The receiver is a necessary party to a suit by a creditor to have the former turn over property in the possession of the corporation, which suit is contested by a judgment creditor.[99] A receiver voluntarily appearing and submitting to the jurisdiction of the court, it will be presumed that he is authorized to defend,[1] and he cannot thereafter question the jurisdiction of the court.[2] A receiver will not be required to file security for costs merely on the ground of insolvency; it is necessary to show that the action was brought in bad faith, or that plaintiff will probably not succeed.[3] No action can be maintained against a receiver, as such, after his discharge.[4] A complaint against a receiver to recover a trust fund must allege that such fund came into the hands of the receiver.[5]

87. See Coster v. Parkersburg Branch R. Co., 131 F. 115.

88. Above act held not to apply to a suit against the receiver of a railroad by another railroad to condemn a grade crossing. Coster v. Parkersburg Branch R. Co., 131 F. 115.

89. Stephens v. Augusta Tel. & Elec. Co., 120 Ga. 1082, 48 S. E. 433.

90. A receiver loaning money on property in a state other than the one of his appointment, the borrower on paying the loan is entitled to bring an action against the receiver to cancel an unsatisfied mortgage given as security, without obtaining leave of the court appointing the receiver. Egan v. North American Sav., Loan & Bldg. Co. [Or.] 76 P. 774. See 2 Curr. L. 1477, n. 61-63. An action to recover deposits will not lie against a bank receiver appointed at the instance of creditors, the remedy is by petition in the original action. Crutchfield v. Hunter [N. C.] 50 S. E. 557.

91. U. S. Comp. St. 1901, p. 582. Buckhannon & N. R. Co. v. Davis, 135 F. 707.

92, 93. Buckhannon & N. R. Co. v. Davis [C. C. A.] 135 F. 707.

94, 95. Payson v. Jacobs [Wash.] 80 P. 429.

96. Gunley v. Armstrong [C. C. A.] 133 F. 417.

97, 98, 99. Cooper v. Philadelphia Worsted Co. [N. J. Eq.] 57 A. 733.

1, 2. Manker v. Phoenix Loan Ass'n, 124 Iowa, 341, 100 N. W. 38.

3. De La Fleur v. Barney, 45 Misc. 515, 92 N. Y. S. 926.

4. Ansley v. McLoud [Ind. T.] 82 S. W. 908.

5. Allegation that it went to increase the assets of the insolvent bank held sufficient.

§ 5. *Accounting by receivers.*[6]—It is the duty of a receiver to transact his business in such a manner, and to keep his books and vouchers in such shape, that he may be ready for examination at any time,[7] and a court, within the boundaries of judicial discretion, may make its own rules as regards the time and manner in which its receiver's account shall be examined and passed upon.[8] A receiver pendente lite, continuing in office after the termination of the action, cannot deny the jurisdiction of the court to call him to account for his acts in connection with the trust.[9] Whenever the order of appointment is reversed, it becomes the receiver's duty to immediately render his final report and demand his formal discharge.[10] Although not required by statute, a court has the inherent power to require the giving of a notice of the filing of a final report or of the time fixed for the hearing thereof.[11] Such notice is insufficient if not directed to anyone or signed by anyone.[12] Order fixing the time for hearing on a receiver's final report and for publication of notice thereof has no force or validity until entered of record.[13] In some states the filing of the report and the rendition of such orders must be noted on the motion docket.[14] In the absence of opposition, the account of the receiver is presumed to be correct, and it may be confirmed upon the testimony of the receiver.[15] Expenses of a receiver in the settlement of his account, caused by creditors contesting matters in respect thereto, which he reasonably incurs, may properly be allowed to him as legitimate charges against the trust fund.[16] Items of expense not accompanied by sworn vouchers cannot be allowed.[17] Matters which could have been urged against the decree of insolvency are concluded thereby and cannot be made the subject of objections to the receiver's report.[18] The receiver should not be discharged until it appears whether all the debts have been paid and whether all collectible assets have been realized.[19]

§ 6. *Compensation of receivers.*[20]—The compensation allowed a receiver must be reasonable, and the amount thereof is not increased because he is employed by the court,[21] and, in the absence of statutory provisions,[22] the amount allowed is governed by the subject-matter of the administration, the care exercised, the degree of success attained, the manner of the accounting, and all other considera-

Oswego Milling Co. v. Skillern [Ark.] 84 S W. 475.

6. See 2 Curr. L. 1478.

7. Hickey v. Parrot Silver & Copper Co. [Mont.] 79 P. 698.

8. A reference of an account is not governed by statutes or rules regarding references of actions for trial. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. So the court may discharge his referee, and may himself consider the account, in the light of proceedings before the referee, and of other aids which he may use to assist him. Id. The mere pro forma, ex parte settlement of an important receiver's account, where creditors are dissatisfied therewith, held to be an indiscretion. Id.

9. In re Kayser's Estate [Minn.] 100 N. W. 214. Where receiver was appointed pending an appeal from an order removing an executrix, evidence held sufficient to show that he continued as receiver after reversal of order and not as the representative of the executrix. Id.

10. See Hickey v. Parrot Silver & Copper Co. [Mont.] 79 P. 698.

11. Discharge secured without compliance with such order will be set aside. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277.

12. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277.

13. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277. Order discharging receiver is void if based on such unrecorded order. Id.

14. In Polk county, Iowa, the receiver should note on the motion docket the filing of his final report and petition for discharge, and the order of the court fixing the time of hearing thereon and directing publication of notice thereof. Williams v. Des Moines Loan & Trust Co. [Iowa] 101 N. W. 277.

15. In re New Iberia Cotton Mills Co., 113 La. 404, 37 So. 8.

16. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

17, 18, 19. Strauss v. Casey Mach. & Supply Co. [N. J. Eq.] 60 A. 402.

20. See 2 Curr. L. 1479.

21. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698. See 2 Curr. L. 1479, n. 91.

22. Under Ky. St. 1903, § 1740, a receiver whose sole duties consist in receiving and disbursing moneys is entitled to $3 for each day he is actually engaged, and such statute is conclusive on the subject. Fidelity Nat. Bank's Receiver v. Youtsey, 26 Ky. L. R. 340, 81 S. W. 263.

tions bearing on the actual value of such services, the rate to be that characterizing somewhat similar services in official life.[23] The compensation allowed by the court is conclusively presumed to be adequate, and the receiver is not entitled to any additional remuneration for his work,[24] any contract having such an end in view being void as against public policy.[25] The order allowing compensation being made through inadvertence and mistake, it will be set aside.[26] Where a receiver is legally appointed, he is entitled to compensation for services actually rendered, though the order of appointment be vacated or reversed.[27] If he be improperly appointed, the party procuring his appointment is liable for his compensation.[28] For acts done beyond the scope of the receivership, the receiver has no claim or lien upon the funds or property in his possession,[29] but if entitled to any compensation, he must look to the party benefited thereby.[30] He is not entitled to compensation or allowances for any new business transacted after the termination of the receivership,[31] unless he acted under the orders of the court.[32]

§ 7. *Liabilities and actions on receivership bonds.*[33]—A receiver is expected to apply to the execution of his trust the discretion of an ordinarily careful business man in business of a similar nature, and will not be liable for losses caused by mere mistakes of judgment,[34] though he is liable for losses created through his mismanagement[35] or negligence.[36] Damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employes, are classed as operating expenses.[37] A beneficiary of the receivership settling a claim, with which a receiver is charged on his accounting, for less than its full value, thereby releases the receiver from liability thereon, it not being shown that the full amount could not have been collected.[38] A receiver may be compelled to perform his duty by beneficiaries of a trust fund under his control, the court to whom he is accountable granting them permission to bring the action.[39] The court may permit a receiver charged with wasting or misappropriating a trust fund for creditors to be made a defendant in a creditor's suit, and his liability as a wrongful holder of trust funds determined and enforced.[40] A receiver collusively appointed to carry out the fraudulent designs of adversaries of the creditors may

23. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; National Exch. Bank v. Woodside [Mo. App.] 80 S. W. 715; Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698; Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 79 P. 1061. Where receiver continued to operate factory, held 4% of amount administered was not an excessive allowance for costs and fees of receiver and his counsel. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Eq.] 59 A. 565. Receiver of insolvent corporation bringing suit on behalf of stockholders and general creditors, such suit being practically a suit to foreclose a mortgage, held receiver was entitled to the same compensation as if the suit had been one to foreclose. Id. See 2 Curr. L. 1479, n. 88-90.

24. National Exch. Bank v. Woodside [Mo. App.] 80 S. W. 715.

25. Contract whereby receiver was to be paid for allowing purchaser of assets to use his name to collect the same held void. National Exch. Bank v. Woodside [Mo. App.] 80 S. W. 715.

26. Order being made in the last few hours of the judge's term of office and before the time set in the notice of the application, the amount being excessive in that the court failed to remember that the receiver had been superseded before discharged, held order would be set aside. Joralmon v. McPhee [Colo.] 76 P. 922.

27, 28. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698.

29, 30. In re Kayser's Estate [Minn.] 100 N. W. 214.

31. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698. See 2 Curr. L. 1479, n. 93.

32. Forrester v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 79 P. 1061.

33. See 2 Curr. L. 1480.

34. In ordinary matters and in details he is expected to act upon his own judgment. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

35. Morehead v. Striker, 132 F. 943.

36. Costs. Hickey v. Parrott Silver & Copper Co. [Mont.] 79 P. 698.

37. Judgment for personal injury to employe is entitled to priority over receiver's certificates for current expenses, or mortgage or other debts existing when the receiver was appointed. Robinson v. New York & S. I. Elec. Co., 99 App. Div. 509, 91 N. Y. S. 153.

38. Morehead v. Striker, 132 F. 943.

39. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

40. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909, overruling Board v. Mutual

be regarded as the agent of such adversaries and made defendant in the main action or other action by the creditors.[41]

§ 8. *Foreign and ancillary receivers.*[42]

RECEIVING STOLEN GOODS.

§ 1. Nature and Elements; Other Crimes Distinguished (1253). | § 2. Indictment and Prosecution (1253).

§ 1. *Nature and elements; other crimes distinguished.*[43]—Receiving of stolen goods is an offense distinct from larceny,[44] and receipt of goods which have been embezzled is in Missouri an offense distinct from receiving stolen goods.[45] The goods need not have been received from the thief,[46] nor is it necessary that the goods should have been stolen in the same state.[47]

§ 2. *Indictment and prosecution. Indictment.*[48]—The information need not allege that defendant received the goods with intent to aid the thief or to defraud the owner.[49] In Wyoming the information need not state the name of the person who stole the goods or of the person from whom defendant received them.[50] Indictment for receiving a "hog" is fatally variant from proof of the receipt of the carcass of a hog.[51] One charged in the alternative with receiving or concealing stolen goods may be convicted if he concealed them with guilty knowledge, though he received them without it.[52]

Evidence.[53]—It is error to receive in evidence other property stolen at the same time, but not received by defendant.[54] Guilty knowledge may be inferred from the circumstances under which the goods were received,[55] but possession of stolen goods by defendant does not alone warrant an inference that he received them with guilty knowledge.[56] The thief is not an accomplice, and conviction may be had on his uncorroborated testimony.[57]

Instructions.[58]—Defendant is entitled to a specific instruction as to the necessity of showing identity of the property received by him with that stolen.[59]

RECITALS, see latest topical index.

RECOGNIZANCES.[60]

A recognizance is a debt of record[61] and it is conclusive that it was regularly

Fire Ass'n, 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918.

41. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

42. Suits by and against foreign and ancillary receivers, see ante, § 4D. See 2 Curr. L. 1480.

43. See 2 Curr. L. 1480.

44. Waiver of examination as to one will not sustain information for the other. State v. Fields [Kan.] 78 P. 833.

45, 46. State v. Fink [Mo.] 84 S. W. 921.

47. Curran v. State [Wyo.] 76 P. 577.

48. See 2 Curr. L. 1481. Indictment held sufficient under Federal statute. Bise v. U. S. [Ind. T.] 82 S. W. 921.

49. State v. Richmond [Mo.] 84 S. W. 880.

50. Curran v. State [Wyo.] 76 P. 577.

51. Hutchinson v. State [Ark.] 83 S. W. 331.

52. Rowland v. State, 140 Ala. 142, 37 So. 245.

53. See 2 Curr. L. 1481.

Evidence held sufficient: Birdsong v. State, 120 Ga. 850, 48 S. E. 329; Delahoyde v. People, 212 Ill. 554, 72 N. E. 732; State v. Richmond [Mo.] 84 S. W. 880; Curran v. State [Wyo.] 76 P. 577.

54. Schultz v. People, 210 Ill. 196, 71 N. E. 405.

55. Birdsong v. State, 120 Ga. 850, 48 S. E. 329; Blumenthal v. State, 121 Ga. 477, 49 S. E. 597; Delahoyde v. People, 212 Ill. 554, 72 N. E. 732.

56. State v. Richmond [Mo.] 84 S. W. 880.

57. Birdsong v. State, 120 Ga. 850, 48 S. E. 329.

58. Instruction as to **inference of guilty knowledge** from circumstances sustained. Birdsong v. State, 120 Ga. 850, 48 S. E. 329; Blumenthal v. State, 121 Ga. 477, 49 S. E. 597.

59. Schultz v. People, 210 Ill. 196, 71 N. E. 405.

60. **This title includes** only the law of recognizances as obligations and their general enforcement. The general law of bail is elsewhere shown. See Bail, Civil, 3 Curr. L. 394; Bail, Criminal, 3 Curr. L. 395.

acknowledged.[62] It is not essential that the accused sign a recognizance unless the statute so provides.[63] A forfeiture need not be entered on appearance day if the recognizance is to appear from day to day and term to term.[64]

Ordinarily only the court where the breach took place should enforce the recognizance,[65] and especially so when a statutory procedure and special powers are prescribed for the enforcement of recognizances and the court is named.[66] Scire facias lies on a forfeited bail bond[67] in the Federal district courts,[68] the common law procedure being followed.[69] In an action on a recognizance taken by a special justice, the records of the court taking it may be amended to show his authority to do so.[70] In such action the return on the execution that the debtor was duly arrested and admitted to bail is conclusive, so that it cannot be shown that there had been an escape, which continued when the recognizance was taken.[71] A poor debtor's recognizance, reciting that he has been arrested by virtue of a certain statute, is not void because making no reference to amendments thereof, even if such amendments materially affect his rights.[72] It is not necessary that such recognizance taken by a special justice or the declaration in an action thereon, state the facts which gave such justice jurisdiction.[73] A breach[74] of the recognizance occurs when the person recognized fails to appear or be produced by bail.[75] The United States cannot be sued even jointly with its marshal to prevent improper enforcement of judgment on a recognizance.[76]

RECORDARI; RECORDING DEEDS AND MORTGAGES, see latest topical index.

RECORDS AND FILES.

§ 1. What are Records (1254).
§ 2. Keeping and Custody (1255).
§ 3. Publicity and Access (1255).
§ 4. Proof of Records (1256).
§ 5. Crimes Relating to Records (1257).

This topic is confined to the nature and public characteristics of records. The element of constructive notice is elsewhere treated.[77]

§ 1. *What are records.*[78]—A public record is a written memorial by a public officer.[79] Records kept by a public official of his own volition, though at public expense, are not public records,[80] nor is a memorandum kept by him while engaged in a private enterprise.[81] In Michigan unverified tax statements erroneously accepted by the supervisor are records,[82] notwithstanding an intention to amend

61, 62. Commonwealth v. Gray, 26 Pa. Super. Ct. 110.

63. State v. Quattlebaum, 67 S. C. 203, 45 S. E. 162.

64. Kirk v. U. S., 131 F. 331.

65, 66. State v. Quattlebaum, 67 S. C. 203, 45 S. E. 162.

67, 68, 69. Kirk v. U. S., 131 F. 331. See also Scire Facias, 2 Curr. L. 1618; Id., 4 Curr. L. ——.

70. Bent v. Stone, 184 Mass. 92, 68 N. E. 46.

71. Bent v. Stone, 184 Mass. 92, 68 N. E. 46. Evidence sufficient to warrant the court in assuming that there was an oath or affidavit justifying the issuance of the certificate of arrest. Id.

72. Mass. Pub. St. 1882, c. 162. Bent v. Stone, 184 Mass. 92, 68 N. E. 46.

73. Under Mass. Rev. Laws, c. 160, § 41. Bent v. Stone, 184 Mass. 92, 68 N. E. 46.

74. Evidence sufficient to show breach of poor debtor's recognizance. Bent v. Stone, 184 Mass. 92, 68 N. E. 46; Kirk v. U. S., 131 F. 331.

75. See Bail, Civil, 3 Curr. L. 394; Bail, Criminal, 3 Curr. L. 395.

76. Kirk v. U. S., 131 F. 331.

77. See Notice and Record of Title, 4 Curr. L. 829.

78. See 2 Curr. L. 1482.

79. Poll books of a special election, under special act of the legislature, deposited in the office of the clerk of the county court, are public papers under Code 1899, c. 117, §§ 3, 5, though the special act calling the election be unconstitutional. Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927.

80. Not open to inspection as a matter of right. State v. Reed, 36 Wash. 638, 79 P. 306.

81. Books of a city engineer containing field notes of surveys made by him while in the employ of private individuals are not public records. Leffingwell v. Miller [Colo. App.] 79 P. 327.

82. Comp. Laws, § 3843. People v. Jewell [Mich.] 101 N. W. 835.

by substituting another therefor, especially where the amendment is never prepared.[83]

Papers are deemed filed when delivered to the official for that purpose,[84] and the fact that the filing fee is not advanced does not deprive them of their character as public records from such date.[85]

A court has inherent power to correct clerical misprision on the face of its records.[86] This right extends to criminal as well as civil cases.[87] It is not lost by mere lapse of time,[88] nor by an appeal if the correction does not affect substantial rights.[89] A court may by nunc pro tunc order correct the record of a pending case to conform to the facts, and may proceed on satisfactory evidence,[90] but the evidence must be furnished by the records of the court,[91] and to justify such an amendment there must be something to amend by.[92]

§ 2. *Keeping and custody.*[93]—An official lawfully elected is entitled to possession of the records of his office.[94] He has such an interest as entitles him to refuse an inspection when it is not called for by law.[95] He may not maintain at public expense a set of records different from the system prescribed by law,[96] and may be restrained from doing so, notwithstanding the records are a public utility and their abolition will cause a greater expense than their maintenance.[97]

§ 3. *Publicity and access.*[98]—As a general rule public records are open to inspection of the public as a matter of right. The right to inspect, however, is

83. People v. Jewell [Mich.] 101 N. W. 835.

84. Papers in a pending trial delivered to the clerk of court. Manning v. State [Tex. Cr. App.] 81 S. W. 957. An entry is entitled to be marked as filed the day on which it was offered, though the clerk of court was absent at that time, and it was not in fact filed until his return the following day. Jenkins v. Columbus, 2 Ohio N. P. (N. S.) 535.

85. Papers in condemnation proceedings. Dowie v. Chicago, etc., R. Co., 214 Ill. 49, 73 N. E. 354.

86. Superfluous initial to a name in a decree. Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174. A misdescription in a decree directing a sale of land properly described in the bill for partition is a clerical misprision correctible by the record itself and is no excuse for a long delay in appealing. Farmer v. Allen [Miss.] 38 So. 38.

In its specific application to judgment records this power is discussed in Judgments, 4 Curr. L. 287.

87, 88. People v. Ward, 141 Cal. 628, 75 P. 306.

89. Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174.

90. Clark v. Bank of Hennessey [Okl.] 79 P. 217. Where it does not appear that substantial rights are prejudiced, the court may properly refuse to strike a referee's report from the files because the defeated party is not notified of the finding of the referee. Id.

91. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.

92. Where there is no record to show that a former order existed, a court cannot enter a judgment or order nunc pro tunc as of a prior date. Gagnon's Case, 38 Ct. Cl. 10. A nunc pro tunc order is to supply on the record something which has actually occurred, but it cannot supply omitted action by the court. Jett v. Farmers' Bank, 25 Ky. L. R. 817, 76 S. W. 385.

93. See 2 Curr. L. 1482.

94. May maintain an action to recover them from his predecessor. In re Brearton, 44 Misc. 247, 89 N. Y. S. 893.

95. Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927.

96. County auditor keeping tract indices. Dirks v. Collin [Wash.] 79 P. 1112.

97. Dirks v. Collin [Wash.] 79 P. 1112.

98. See 2 Curr. L. 1483.

Note: Under statutory provisions or charter authorizing any person or abstractor to have inspection of the records, they are entitled to a reasonable use of the same. Under such provisions it is also held that other persons, though not abstractors, are entitled to the same privileges. Stockman v. Brooks, 17 Colo. 248; State v. Rachac, 37 Minn. 372; People v. Rielly, 38 Hun [N. Y.] 429; Hanson v. Eichstad, 69 Wis. 538; Johnson v. Wakulla County, 28 Fla. 720; State v. Long, 37 W. Va. 266; In re Chambers, 44 F. 786; Burton v. Tuite, 78 Mich. 363, 7 L. R. A. 73; Day v. Button, 96 Mich. 600.

What is a reasonable use: A restriction in the use of the office to three employes of the abstract company is held reasonable. People v. Richards, 99 N. Y. 620. A surveyor has no right to desk room in the recorder's office to copy all the field notes of all the surveys in the county. Phelan v. State, 76 Ala. 49. Use of records allowed six hours a day when not used by the commissioners and two hours per day when they are, is reasonable. Upton v. Catlin, 17 Colo. 546, 17 L. R. A. 282. But where statutes have not been particularly for the benefit of abstractors, they have been refused the privilege to use the office where they had no special interest in the record at the time (Bean v. People, 7 Colo. 200; Buck v. Collins, 51 Ga. 391, 21 Am. Rep. 236; Ran-

not a vested one. The person seeking to inspect must have an interest in the record of which inspection is sought, and the inspection must be for a legitimate purpose.[99] One seeking to compel inspection by mandamus must have a pecuniary interest,[1] and in order that a demand may be made the basis of a mandate, it must specify the records and be made at such time and in such manner as not to interfere with the reasonable dispatch of public business.[2] Several persons who unite in a common application and are refused may unite in mandamus to compel such inspection.[3] In Washington, county auditors are not public abstractors and are not, on demand, required to make a complete list of all liens and transfers affecting particular tracts, but are required only to search for such instruments as their attention is directed to.[4]

§ 4. *Proof of records.*[5]—The records themselves are the best evidence of what they contain,[6] but are evidence of nothing more,[7] and a statute providing for the admission in evidence of certified copies does not affect the admissibility of the original.[8] In the absence of the original the proper evidence is a duly authenticated copy,[9] and not written statements of the contents.[10] Copies properly certified by the custodian are admissible,[11] and are prima facie evidence of facts therein recited,[12] and are not rendered inadmissible by the fact that the official

dolph v. State, 82 Ala. 527, 60 Am. Rep. 761; Cormack v. Wolcott, 37 Kan. 391); but they are entitled to use them if they have a present interest (Boylan v. Warren, 39 Kan. 301, 7 Am. St. Rep. 551).—From note to In re Caswell [R. I.] 27 L. R. A. 82.

99. Papers in county clerk's office. Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927.

1. Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927. Mandamus will not lie to compel inspection by a private individual for the sole purpose of getting evidence for the institution of a criminal prosecution. Id.

2. State v. Reed, 36 Wash. 638, 79 P. 306.

3. Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927.

NOTE. Mandamus to enforce right of inspection: It may be stated as a general rule that mandamus is the proper remedy to compel permission to examine and inspect public records and documents. State v. King, 154 Ind. 621, 57 N. E. 535; Hawes v. White, 66 Me. 305; Brown v. County Treasurer, 54 Mich. 132, 19 N. W. 778, 52 Am. Rep. 800; State v. Hobart, 12 Nev. 408. It will not issue, however, to compel the clerk of court to permit an abstractor of titles to examine and copy a file in an action relating to land between private parties, where the petition negatives constructive notice of the pendency of the action, and does not assert actual notice, nor state that the examination and copying are necessary to the interests of his employer. Burton v. Reynolds, 110 Mich. 354, 68 N. W. 217.—From note to State v. Gardner [Wash.] 98 Am. St. Rep. 875.

4. Under Ball. Ann. Codes & St. § 417. Dirks v. Collin [Wash.] 79 P. 1112.

5. See 2 Curr. L. 1483. See, also, Evidence, 3 Curr. L. 1334.

6. Court records are the best evidence as to who dropped proceedings to revoke the probate of a will. Spencer v. Spencer [Mont.] 79 P. 320. Parol evidence of the judgment of a court is inadmissible against objection. Carhart v. Oddenkirk [Colo. App.] 79 P. 303.

7. A custom in the office of the clerk of court to copy into a writ of replevin the value of the property as stated in the replevin affidavit is not competent proof of the contents of the affidavit. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011. Loss of patent certificates had been plausibly accounted for but no witnesses had ever seen it. Arbuckle v. Matthews [Ark.] 83 S. W. 326. It will be presumed that claims against an estate of a decedent presented to the probate court and lost from its files were properly verified. Gutierrez v. Scholle [N. M.] 78 P. 50.

8. Rev. St. 1895, art. 2252 is cumulative, not restrictive. Manning v. State [Tex. Cr. App.] 81 S. W. 957.

9. Transcript of final judgment "Now April 16, 1901, on motion (of counsel) the court directs judgment for want of appearance * * *. Whereupon judgment is entered," etc., is sufficient. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703. A book introduced in evidence held to show a compliance within an insurance policy that the insured should keep books. Other books had been destroyed by fire. Fire Ass'n of Philadelphia v. Masterson [Tex. Civ. App.] 83 S. W. 49.

10. Written statements of the register of a United States land office and of the state land commissioner as to the contents of the records of their offices are inadmissible. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249. A certificate of a county clerk as to what appears from the records of his office, being a mere statement of his conclusions, is inadmissible. Bickerdike v. State, 144 Cal. 698, 78 P. 277.

11. An objection that the copy would not prove the capacity of the person who executed it goes to its effect not to its admissibility. State v. Allen, 113 La. 705, 37 So. 614.

12. Copy of tax judgment sale. Tifft v. Greene, 211 Ill. 389, 71 N. E. 1030. A record in a proceeding to sell land as forfeited to the state for nonpayment of taxes is prima facie evidence as against strangers to the

states as a conclusion that there is nothing more in the record pertaining to the issues involved in the proceeding in which they are to be used.[13] Copies should be certified by the official from whose office they come.[14] A signature to a transcript containing only the initials of the Christian name of the official certifying is sufficient.[15] A recital in a certificate to a transcript that a record contained "inter alia" the records there set out does not show that the record was incomplete, but that other matters were recorded there.[16]

The published records of congress are unimpeachable.[17] A recorded deed is evidence of a conveyance as beween the parties, though it was not entitled to record because not acknowledged.[18]

§ 5. *Crimes relating to records.*[19]—That abstraction or destruction may constitute a crime, it must be done with criminal intent.[20] In New York the stealing of records is larceny,[21] and that bribery be also employed does not alleviate the offense.[22] Such also constitutes unlawfully removing files.[23]

REDEMPTION; RE-EXCHANGE, see latest topical index.

REFERENCE.

§ 1. Definitions and Distinctions, Master and Referee, Referee and Umpire or Arbitrator (1257).
§ 2. Occasion for Reference (1257).
§ 3. Time and Stage of Proceedings (1259).
§ 4. Motion and Order for Reference, and Stipulations or Consents on Voluntary Reference (1259).
§ 5. Selection and Qualifications of the Referee; His Oath and Induction Into Office (1259).
§ 6. General Scope of Reference and Powers of Referees or Masters (1259).
§ 7. Appearance Before Referee, Hearing and Adjournments, Trial and Practice Thereon (1259).
§ 8. The Report, Its Form, Requisites, and Contents, and Return and Filing (1260).
§ 9. Revision of Report Before the Court. Objections and Exceptions (1261).
§ 10. Decree or Judgment on the Report; Confirmation or Overruling, Recommittal or Additional Findings; Modification, Conformity of Judgment with Report (1262).
§ 11. Appellate Review (1263).
§ 12. Compensation, Fees and Costs (1264).

§ 1. *Definitions and distinctions, master and referee, referee and umpire or arbitrator.*[24]—The reference here meant is the Code analogue of the reference to a master in chancery,[25] and the reference to state an account allowed in actions at law. Referees and references so called are provided by statute in certain proceedings[26] and in bankruptcy.[27]

record of the fact of forfeiture and that the person against whom forfeiture was declared was the owner. State v. Jackson [W. Va.] 49 S. E. 465.

13. Glos v. Dyche, 214 Ill. 417, 73 N. E. 757.

14. The offices of clerk of the county court and county clerk, though held by the same person, are distinct. Copies of the records of each office should be certified by the incumbent of that office. Tifft v. Greene, 211 Ill. 389, 71 N. E. 1030.

15. Transcript of judgment under Burns' Ann. St. 1901, § 458. Old Wayne Mut. Life Ass'n v. McDonough [Ind.] 73 N. E. 703.

16. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

17. Not by showing that they were approved by the president on a date different from that recited in the record. Gibson v. Anderson [C. C. A.] 131 F. 39.

18. Whitaker v. Thayer [Tex. Civ. App.] 86 S. W. 364; Schultz v. Tonty Lumber Co. [Tex. Civ. App.] 82 S. W. 353.

19. See 2 Curr. L. 1483.

20. Under Comp Laws, § 11361, making willful abstraction or destruction a misdemeanor. People v. Jewell [Mich.] 101 N. W. 835.

21. An attempt to steal them is an attempt to commit the crime. People v. Mills, 178 N. Y. 274, 70 N. E. 786, afg. 91 App. Div. 331, 86 N. Y. S. 529, cited 2 Curr. L. 1483, n. 59.

22. People v. Mills, 178 N. Y. 274, 70 N. E. 786.

23. Bribing a representative of the district attorney's office to secure possession of indictments violates the statute prohibiting unlawful removal of a paper filed in a public office. People v. Mills, 178 N. Y. 274, 70 N. E. 786.

24. See 2 Curr. L. 1484.

25. See Masters and Commissioners, 4 Curr. L. 614. Arbitrators are sometimes called "referees." See Arbitration and Award, 3 Curr. L. 303.

26. For reference in particular proceedings see such topics as Garnishment, 3 Curr. L. 1550; Supplementary Proceedings, 2 Curr. L. 1774, etc.; Estates of Decedents, 3 Curr. L. 1238; Divorce, 3 Curr. L. 1127.

27. See Bankruptcy, 3 Curr. L. 434.

§ 2. *Occasion for reference.*[28]—References under special statutes are governed by the terms thereof, and the code reference analogous to that in chancery is governed by principles similar to chancery.[29] Accordingly the reference of a case rests largely in the discretion of the court, and unless abused, the exercise of this discretion will not be disturbed;[30] but this fact does not render an erroneous refusal to grant an application for a reference harmless.[31] Error in referring a case is waived where the party asserting the error, on the court's offering to set aside the reference, objects thereto, and insists on a decision on the report.[32] Reference is not of right where the statute merely enables the court to grant it.[33] A real question of a referable kind is necessary to support a reference.[34] It being argued in opposition to a motion for a reference that difficult questions of law will have to be decided, the party opposing the motion must specifically point out the questions to be raised unless they appear on the face of the pleadings.[35] In some states and cases the consent of the court[36] or parties[37] is essential.

Statutory reference as under codes;[38] *accounts.*—Statutes generally authorize a reference when the examination of a long account is necessary.[39] To justify a compulsory reference, the long account must be the immediate object of the suit or ground of defense, and directly involved;[40] but the mere fact that issues outside the account are raised is not of itself sufficient to defeat the right to a reference.[41] When a long account is brought into the case by a counterclaim setting up a distinct and independent cause of action, and which is not an element in the proof of the plaintiff's cause of action, a reference cannot be ordered;[42] but where a defense necessarily involving a long account is interposed, then a reference may be ordered, although the cause of action set up in the complaint appears on its face to be nonreferable.[43]

Other statutory grounds include convenience of parties and witnesses where

28. See 2 Curr. L. 1484.

29. Compare Masters and Commissioners, 4 Curr. L. 614.

30. Teasley v. Bradley, 120 Ga. 373, 47 S. E. 925. Action by widow against son-in-law for conversion of certain notes held erroneously referred for findings of fact and conclusions of law. Stroup v. Bridger, 124 Iowa, 401, 100 N. W. 113.

31. Hart v. Godkin [Wis.] 100 N. W. 1057.

32. Stroup v. Bridger, 124 Iowa, 401, 100 N. W. 113.

33. Under Rev. St. 1898, § 2864, providing that "all or any of the issues in question * * * may be referred," a party is not entitled to a reference as a matter of right. Hart v. Godkin [Wis.] 100 N. W. 1057.

34. A reference to an auditor is erroneous if no adjudication is necessary to determine the matter referred. Apportionment of inheritance tax where there was no "contingent legacy." Burkhart's Estate, 25 Pa. Super. Ct. 514.

35. Lee Coal Co. v. Meeker, 43 Misc. 162, 88 N. Y. S. 190. See, also, Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98.

36. Under Code 1883, §§ 398, 416, 420, and Const. art. 4, § 13, the amount of damages in an action for trespass cannot be referred without the consent of the court. J. L. Roper Lumber Co. v. Elizabeth City Lumber Co. [N. C.] 49 S. E. 946.

37. Under Rev. St. § 5215, an order of reference by the probate court of a complicated guardian's account is void where the estate objects thereto, and the estate cannot be amerced for costs therefor. In re Gorman, 2 Ohio N. P. (N. S.) 667.

38. See 2 Curr. L. 1484.

39. Rev. St. 1899, § 698. Citizens' Coal Min. Co. v. McDermott [Mo. App.] 84 S. W. 459. Held, reference should be allowed where account involved determination of amount of profits of a business for over 13 years. Boisnot v. Wilson, 95 App. Div. 489, 88 N. Y. S. 867. The services of an attorney rendered in an action or actions under a single or different retainers, which merely involve charges in connection with the various steps in the litigation, do not constitute a long account. Prentice v. Huff, 90 N. Y. S. 780. Where the accounting consisted in adding sums due on certain notes, with interest, and subtracting certain credits, held no necessity for a reference. Bond v. Wilson [N. C.] 49 S. E. 89. See 2 Curr. L. 1484, n. 65.

40. Lee Coal Co. v. Meeker, 43 Misc. 162, 88 N. Y. S. 190. Examination denied where it was merely collateral and would only serve as evidence upon which plaintiff might rely to fix the amount of his recovery. Id.

41. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98; Boisnot v. Wilson, 95 App. Div. 489, 88 N. Y. S. 867.

42, 43. See Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98, citing Irving v. Irving, 90 Hun, 422, 35 N. Y. S. 744, afd., without opinion, 149 N. Y. 573, 43 N. E. 987.

they are numerous,[44] the equitable character of the action,[45] the taking of necessary proofs where no issue is joined.[46]

§ 3. *Time and stage of proceedings.*[47]

§ 4. *Motion and order for reference, and stipulations or consents on voluntary reference.*[48]—Notice should be given all parties of record affected by the motion, but while all who file claims in a proceeding previous to the entry of an order of reference are entitled to notice of the application, such notice may be given nunc pro tunc when the claim is filed intervening the application and order.[49] The parties by consenting to a reference consent to all the incidents of such a proceeding.[50] An order of reference founded on the expressed opinion of the judge, not followed by the sentence of the law thereon, is not complete.[51] The denial of an application for a compulsory reference is not res judicata on a subsequent application for the same relief before a different judge called in to try the cause on a change of venue.[52]

§ 5. *Selection and qualifications of the referee; his oath and induction into office. Removals and substitutions.*[53]—The referee must not only be impartial but the relations between him and the parties or their representatives must be such that there will be no chance for his judgment to become even unconsciously biased.[54]

§ 6. *General scope of reference and powers of referees or masters.*[55]—The powers of the referee are limited by the order of appointment.[56] The court may order additional evidence taken if the scope of the reference is not thereby enlarged.[57]

§ 7. *Appearance before referee, hearing and adjournments, trial and practice thereon.*[58]—A party to the action is entitled to notice of all proceedings therein before the referee, and may appear and protect any interest he may have without obtaining leave from the court to intervene.[59]

Evidence being received conditionally, the question of its competency must be raised at some later stage of the case, and passed on before its reception will be held to be erroneous.[60] Written evidence noticed to be produced should be presented when called for by the party noticing, and a refusal so to produce is a ground of objection to its production after secondary evidence has been put in.[61] A party being allowed to refer to his books to refresh his recollection, and in connection with such testimony, to designate what appears upon his books in relation

44. Under Ann. Code Civ. Proc. 1901, § 4493, a referee may be appointed to take testimony in an action where the parties are numerous and the convenience of the witnesses and the ends of justice would be promoted thereby. Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25.

45. Under Clark's Code, § 421, subsec. 5, providing for a reference where questions of fact arise in an action of which the courts of equity had exclusive jurisdiction prior to the adoption of the constitution of 1868, a reference is properly ordered where the question is whether or not certain land was by mistake omitted from a certain deed. Pinchback v. Bessemer Min. & Mfg. Co. [N. C.] 49 S. E. 106.

46. Code Civ. Proc. § 1544 refers only to defaults, or where an infant defendant has served a formal answer which makes no issue. Fairweather v. Burling [N. Y.] 73 N. E. 565; afg. 90 N. Y. S. 516.

47, 48. See 2 Curr. L. 1485.

49. Construing supreme court rule 64. Schieck v. Donohue, 44 Misc. 425, 90 N. Y. S. 36.

50. Waive jury trial. Williams v. Weeks [S. C.] 48 S. E. 619.

51. Hill v. Cronin [W. Va.] 49 S. E. 132.

52. Hart v. Godkin [Wis.] 100 N. W. 1057.

53. See 2 Curr. L. 1485.

54. Disagreement between attorney and referee as to latter's compensation held sufficient to warrant appointment of a new referee. Smith v. Dunn, 94 App. Div. 429, 88 N. Y. S. 58. See 2 Curr. L. 1485, n. 81.

55. See 2 Curr. L. 1485.

56. Bond v. Wilson [N. C.] 49 S. E. 89. See 2 Curr. L. 1485, n. 83.

57. Davidson v. Copeland [S. C.] 48 S. E. 33.

58. See 2 Curr. L. 1486.

59. Ingersoll v. Weld, 91 N. Y. S. 1037.

60. Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686.

61. Merritt v. Jordan [N. J. Err. & App.] 60 A. 183.

to the matter, it is proper for the referee to have shown him whatever the witness used under the claim that it aided his recollection.[62] Failure to object to the admission of evidence waives it.[63] As a general rule objections to the admissibility of evidence cannot be taken by way of exception to the referee's report.[64] Admissions of counsel may become binding on the referee.[65]

That the legal questions involved are difficult forms no reason for the referee to refuse to decide the same.[66] An auditor may for good cause open the case for further proof after argument.[67]

§ 8. *The report, its form, requisites, and contents, and return and filing.*[68]—Tested by custom, it is not improper for a referee to delegate to an interested attorney the preparation of findings of fact or conclusions of law for the approval of the referee or judge.[69] Essential facts must be specifically found,[70] and are generally required to be stated separately from the conclusions of law,[71] failure to so do being ground for a motion to recommit.[72] Unless requested by the parties or directed by the court, it is not usual for a master, to whom a question of damages in an action at law has been referred after default, to append the evidence to his report;[73] whether or not it will be required on a subsequent motion therefor rests in the discretion of the court,[74] and the court will not ordinarily grant the motion after the filing of the report.[75] In New York the report of a referee upon the trial of a demurrer must direct the final or interlocutory judgment to be entered thereon, but it is not necessary to make any findings of fact.[76]

In the absence of prejudice, the fact that the defeated party was not notified of the finding and conclusions of the referee is not ground for striking the report from the files.[77]

The referee's report must be filed[78] within the time set by the order of appointment,[79] though this time may, upon good cause being shown within the time limited, be extended by the court,[80] but not by the parties or their counsel.[81] Testimony, if it can be clearly identified, may be filed after the death of the referee.[82] The referee having made and delivered his report, his functions and powers with reference to the case are ended,[83] and in some states the point that the referee at

62. Holt v. Howard [Vt.] 58 A. 797.

63. Where on the hearing before the referee defendant did not object to evidence on the ground that it was inadmissible under the statute of frauds, such objection is waived. Holt v. Howard [Vt.] 58 A. 797.

64. So held, where, except as to one item, no evidence was received against defendant's objection. Holt v. Howard [Vt.] 58 A. 797.

65. Admission held not binding on auditor where on motion to recommit and in a supplemental report the basis of the admission was done away with. Hudson v. Baker, 185 Mass. 122, 70 N. E. 419.

66. Construction of will in partition case. Dwight v. Lawrence, 90 N. Y. S. 970.

67. Rhinesmith's Case, 25 Pa. Super. Ct. 300.

68. See 2 Curr. L. 1486.

69. Mr. Justice Marshall expresses personal disapproval of the custom. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

70. Consideration of mortgage. Alcock v. Davitt, 179 N. Y. 9, 71 N. E. 264.

71. Held not erroneous for referee to refuse to answer list of interrogatories answerable only by "Yes" or "No." Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686.

72. Jones v. Nolan, 120 Ga. 588, 48 S. E. 166. It is not ground for an exception of law to his report. Id.

73, 74. Trustees of Dartmouth College v. International Paper Co., 132 F. 89.

75. Motion granted where evidence was at hand, report was not submitted to counsel, and case was important. Trustees of Dartmouth College v. International Paper Co., 132 F. 89.

76. Code Civ. Proc. § 1021. Rowe v. Rowe, 92 N. Y. S. 491.

77. Clark v. Bank of Hennessey, 14 Okl. 572, 79 P. 217.

78. Under Code Civ. Proc. §§ 1010, 1019, upon the trial of an issue of law, the report of a referee must be filed. Rowe v. Rowe, 92 N. Y. S. 491.

79. Peavy v. McDonald, 119 Ga. 865, 47 S. E. 203. But see 2 Curr. L. 1487, n. 98.

80. Clark v. Bank of Hennessey, 14 Okl. 572, 79 P. 217.

81. Peavy v. McDonald, 119 Ga. 865, 47 S. E. 203.

82. Davidson v. Copeland [S. C.] 48 S. E. 33.

83. Neither he nor the court at special term has any power to alter or change the decision in any matter of substance. Union Bag & Paper Co. v. Allen Bros. Co., 94 App.

the time he filed his report had lost all control over the case may be raised by way of exception to the report,[84] though the better practice would seem to be to present an independent objection to its consideration by the court by way of a motion to disregard it, based on the ground that it amounted to a mere nullity, and should be treated as such.[85]

§ 9. *Revision of report before the court. Objections and exceptions.*[86]—The office of exceptions to a referee's report is to assign reasons why it should not be adopted and made the judgment of the court.[87] If an auditor's report fails to find all the facts or to cover all the issues, advantage should be taken by motion to recommit.[88] The exception must be clear and intelligible. Generally the exceptions must clearly and distinctly specify the errors complained of.[89] The exceptions must be complete in themselves; they should state the ruling complained of, the evidence on that point, and of what and wherein there was error.[90] The grounds upon which the exceptions are based must be verified by reference to the auditor's report; and if the report affords no means of verification, the exceptions cannot be considered, unless otherwise certified by the auditor.[91] In a law action in Georgia, however, an exception which distinctly points out the finding of the auditor on a given issue, and then avers that such finding is "contrary to the evidence," or "without evidence to support it," is sufficiently definite.[92] An exception of fact being clearly erroneous, it is properly overruled.[93] Exceptions of fact and of law should be separately classified, and while a failure to observe this rule is amendable, yet in the absence of such amendment it is ground for a motion to dismiss or strike such exception.[94]

It is too late, after the report has been passed upon by the trial court and the judgment affirmed on appeal to raise the question of jurisdiction by a petition for an injunction seeking to restrain the enforcement of the judgment.[95] An objector may withdraw his exceptions without hindrance from a co-party who has no joint interest in them or has not joined in them.[96] It is within the discretion of the court to allow or reject new exceptions after the time for filing them has expired; but the right to so file them should be denied unless good cause for the

Div. 595, 88 N. Y. S. 368. See 2 Curr. L. 1487, n. 99.

84. Peavy v. McDonald, 119 Ga. 865, 47 S. E. 203; Hart v. Manson, 120 Ga. 481, 47 S. E. 929.

85. Peavy v. McDonald, 119 Ga. 865, 47 S. E. 203.

86. See 2 Curr. L. 1488.

87. Peavy v. McDonald, 119 Ga. 865, 47 S. E. 203. Objections to the admissibility of evidence cannot be taken by way of exception to the referee's report. Holt v. Howard [Vt.] 58 A. 797.

88. Rather than by an exception, which, if sustained, would leave the matter where it began. Weldon v. Hudson, 120 Ga. 699, 48 S. E. 130.

89. Civ. Code 1895, § 4589. Exceptions failing to set out the ruling complained of, or the question, answer or evidence objected to is insufficient. Green v. Valdosta Guano Co., 121 Ga. 131, 48 S. E. 984; Perkins v. Castleberry [Ga.] 50 S. E. 107. A general objection to the rejection of a set of conclusions of fact is unavailable if any of the conclusions were rightfully rejected. Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686.

90. Weldon v. Hudson, 120 Ga. 699, 48 S. E. 130.

91. Waycross Air Line R. Co. v. Offerman & W. R. Co., 119 Ga. 983, 47 S. E. 582. Failure to do so is sufficient reason for refusing to approve the exceptions of fact and for overruling the exceptions of law. Butler, Stevens & Co. v. Georgia & A. R. Co., 119 Ga. 959, 47 S. E. 320; Perkins v. Castleberry [Ga.] 50 S. E. 107.

92. Anderson v. Blair, 121 Ga. 120, 48 S. E. 951. Exception that the auditor's general finding in favor of the plaintiff was contrary to the evidence is sufficient in form. Green v. Valdosta Guano Co., 121 Ga. 131, 48 S. E. 984.

93. Tippin v. Perry [Ga.] 50 S. E. 35. It is proper to overrule an exception complaining of the admission of evidence when it appears that the auditor found for the excepting party on every issue to which such evidence related. Jones v. Nolan, 120 Ga. 588, 48 S. E. 166.

94. Tippin v. Perry [Ga.] 50 S. E. 35.

95. Hart v. Manson, 120 Ga. 481, 47 S. E. 929.

96. Gilbert v. Washington Ben. Endowment Ass'n, 21 App. D. C. 344.

delay is shown.[97] The time to move to strike out exceptions is at the time of the settlement of the case.[98] A recommittal makes immaterial exceptions to matters ruled differently on the second hearing.[99]

In Georgia exceptions to an auditor's report need not be submitted to a jury if the case be equitable[1] or if by the pleadings and prayers it has become so.[2]

§ 10. *Decree or judgment on the report; confirmation or overruling, recommittal or additional findings, modification, conformity of judgment with report.*[3]—The report of the referee is merely advisory to the court and may be adopted, modified or rejected by the latter as it sees fit;[4] but the testimony being conflicting, it has the weight of a verdict and is not to be set aside unless clearly erroneous,[5] and the reference being by consent and the referee being given the power to finally decide all questions, his findings, so far as they are within his jurisdiction, are conclusive;[6] but the case being one wherein a compulsory reference would have been proper, the court has power to enter a contrary judgment without retrying the cause.[7] By consenting that the referee's findings be submitted to the court for determination on the merits, parties are precluded from assigning error to the court's ruling substituting its own findings for those of the referee.[8]

The court may by its judgment correct any error of law[9] or of fact[10] apparent on the face of the report.

Presumptions are in favor of rather than against the referee's[11] or auditor's[12] report.

An auditor being appointed under the usual rule and his report being merely evidence, the question of recommittal is one of discretion,[13] and the decision of the

97. Tippin v. Perry [Ga.] 50 S. E. 35.

98. Motion being made at special term and before any judgment had been entered, and before any case had been offered for settlement held premature. Underwood v. Greenwich Ins. Co., 45 Misc. 62, 90 N. Y. S. 832.

99. Bakshian v. Hassanoff [Mass.] 71 N. E. 555.

1. Partnership accounting without dissolution but where one partner excludes the other from his rights. Hogan v. Walsh [Ga.] 50 S. E. 84.

2. Claim case in which claimant filed petition for equitable relief in aid of his claim. Austin v. Southern Home Bldg. & L. Ass'n [Ga.] 50 S. E. 382.

3. See 2 Curr. L. 1489.

4. Report of referee on the account of an executor. In re Courtney's Estate [Mont.] 79 P. 317; Sullivan v. Sullivan [Wis.] 99 N. W. 1022. Where evidence reported was uncertain and insufficient and findings did not seem to cover all the issues and seemed to be contrary to undisputed evidence, held not an abuse of discretion to vacate report and order a new trial before itself. Id.

5. Trustees of Dartmouth College v. International Paper Co., 132 F. 89.

6. Electric Supply & Maintenance Co. v. Conway Elec. Light & Power Co. [Mass.] 71 N. E. 983.

7. West v. Bank of Caruthersville [Mo. App.] 85 S. W. 601.

8. Hodges v. Graham [Neb.] 98 N. W. 418. In such a case the appellate court will only consider the correctness of the findings, and judgment of the trial court. Id.

9. It makes no difference that no exceptions of law have been filed, or if filed, have been withdrawn. Wade v. Peacock, 121 Ga. 816, 49 S. E. 826.

10. Thus the sufficiency of evidence to support the master's findings may be considered if he returns it, though the reference did not require him to do so and though a special order to do so was refused. Fleming v. Cohen [Mass.] 71 N. E. 563.

11. Where it appeared that referee could hardly have reached the conclusion he did unless he took notice of a certain fact, held error to assume that he did not so do. In re Muller, 96 App. Div. 619, 88 N. Y. S. 673.

12. Equity case. Burden is on party assigning error to show that it was unsupported by evidence. Fowler v. Davis, 120 Ga. 442, 47 S. E. 951.

13. Tripp v. Macomber [Mass.] 72 N. E. 361. Where defendant was out of the country and letters telling him of litigation failed to reach him, held denial of a motion to recommit was erroneous. Harmon v. Stuart [Ky.] 84 S. W. 524. Plaintiff entering up judgment on the referee's report in violation of a stipulation between the parties, whereby defendant was to be allowed time for filing a brief, is ground for referring the case back, though the stipulation be not brought to the attention of the referee. Mercantile Nat. Bank v. Sire, 91 N. Y. S. 419. Held error to recommit, the report not being objectionable as being "of matters not at issue, and not within the submission." Electric Supply & Maintenance Co. v. Conway Electric Light & Power Co. [Mass.] 71 N. E. 983.

court upon it is not open to exception;[14] but when an auditor's finding is to be final on questions of fact, it has a different function, and is to receive other treatment than a report made under the usual rule.[15] A report being recommitted for further evidence and the referee dying before reporting, an order providing that the case shall be heard on the report made by the first referee and additional evidence taken is erroneous,[16] and an order appointing another referee to take further evidence and report is appealable.[17] An auditor's report will not be recommitted as indefinite if complete though brief.[18]

The settling of a decree based on a referee's report devolves upon the court at special term,[19] and the latter's power is confined to making the decree conform to the referee's decision.[20] When the report is set aside an opinion should be filed stating reasons.[21] There being omissions in the decree upon the referee's report, a party's remedy is by motion to amend,[22] and on such motion the desired amendments should be clearly specified.[23]

The ruling of the judge leaves all the findings of the referee in force except as overruled or modified thereby.[24] The report being set aside, the case stands as though it had never been referred,[25] and a recital in the judgment that the report was set aside is presumptively correct.[26] The decision of confirmation cannot determine rights not before the referee or court.[27] Failure of the judge to formally approve the exceptions of fact before submitting the case to the jury is a mere irregularity.[28]

§ 11. *Appellate review.*[29]—A refusal to recommit is not appealable.[30] Findings will not be reviewed unless the evidence is brought up,[31] and unless the evidence is reported the findings are presumed to have been supported thereby.[32] Exceptions must be taken below.[33] The findings of fact of a consent referee are not reviewable on a writ of error further than to ascertain if they are sufficient to warrant the judgment of the court.[34] The decision of the referee as to a question of fact will not be disturbed on appeal unless greatly against the weight of the evidence.[35] Where the referee's report is to be final on the facts, the appellate

14, 15. Tripp v. Macomber [Mass.] 72 N. E. 361.

16, 17. Davidson v. Copeland [S. C.] 48 S. E. 33.

18. Fowler v. Davis, 120 Ga. 442, 47 S. E. 951.

19. Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595, 88 N. Y. S. 368. Not upon the referee. Id.

20. Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595, 88 N. Y. S. 368.

21. Horn & Brannen Mfg. Co. v. Steelman, 24 Pa. Super. Ct. 126; Furth v. Stahl, 205 Pa. 439, 55 A. 29.

22. Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595, 88 N. Y. S. 368. Not by motion to vacate. Id.

23. Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595, 88 N. Y. S. 368.

24. The rulings of the judge affecting only the referee's conclusions of law, his findings of fact remain in force. Ramsey v. Browder, 136 N. C. 251, 48 S. E. 651.

25. Court has no right to try the issues of fact, and should either refer it again, if the parties so agree, or submit the issues to a jury. Stroup v. Bridger, 124 Iowa, 401, 100 N. W. 113.

26. Stroup v. Bridger, 124 Iowa, 401, 100 N. W. 113.

27. Farmers' Loan & Trust Co. v. Hoffman House, 96 App. Div. 301, 89 N. Y. S. 281.

28. Civ. Code 1895, § 4596. Malette v. Wright, 120 Ga. 735, 48 S. E. 229.

29. See 2 Curr. L. 1490.

30, 31. Bakshian v. Hassanoff [Mass.] 71 N. E. 555.

32. In such a case held an objection that various items were allowed without evidence will not be reviewed. Holt v. Howard [Vt.] 58 A. 797.

33. Bakshian v. Hassanoff [Mass.] 71 N. E. 555. In the absence of objection, the legality of an allowance made by an auditor is not open on appeal. May's Estate, 25 Pa. Super. Ct. 267.

34. United States Fidelity & Guaranty Co. v. Hampton [C. C. A.] 134 F. 734.

35. Curnen v. Reilly, 90 N. Y. S. 974; Taylor v. Folz, 24 Pa. Super. Ct. 1; Union Trac. Co. v. Grubb, 24 Pa. Super. Ct. 345; W. & T. Allen & Co. v. Maxwell [W. Va.] 49 S. E. 242. Where there were no objections. Citizens' Coal Min. Co. v. McDermott [Mo. App.] 84 S. W. 459. Findings of a referee on oral testimony, as well as depositions, confirmed by the court, will be given the same weight and effect on appeal as a verdict. Chancellor v. Teel [Ala.] 37 So. 665. The findings of fact by a consent referee have the same conclusiveness as the verdict of a jury, or the findings of fact by a court sitting as a jury. Greenhaw v. Combs [Ark.] 85 S. W. 768.

court may regard an unexplained refusal to recommit as equivalent to a ruling that there was no error with the referee's dealings with the questions of evidence.[36] If the decree on a report and the exceptions thereto are too complicated to admit of decision and correction of errors, without restating an account, the decree may be reversed with directions to recommit.[37]

§ 12. *Compensation, fees and costs.*[38]—In the absence of statute the amount of the referee's compensation rests in the discretion of the court,[39] and if abused such discretion cannot be reviewed.[40] In New York one waiving the statutory fees must fix the compensation to be paid.[41] Referee's fees being part of the costs, they are not preferred debts.[42] A motion by a referee for the payment of his fees is a motion in the cause.[43] Stenographer's compensation forming part of the referee's fees, that the latter were taken in bulk and at less than their face value does not prevent the stenographer from recovering the reasonable value of his services,[44] and in such a case evidence of the referee as to how much he received, and of the party who made the payment to the referee as to how much he paid, was admissible.[45] The referee having discretion as to the award of costs,[46] the only method by which its exercise can be challenged is by an appeal from the judgment.[47] The fee of an auditor fixed by himself may become conclusive if not seasonably objected to,[48] especially if leave to except nunc pro tunc be refused.[49]

REFORMATION OF INSTRUMENTS.

§ 1. **The Remedy (1264).**
A. Nature and Office (1264).
B. Right to Remedy (1265).
C. Instruments Reformable (1267).
§ 2. **Procedure (1267).**
A. Jurisdiction and Form of Proceeding (1267).
B. Parties (1268).
C. Pleading and Evidence (1268).
D. Trial and Judgment (1270).

§ 1. *The remedy. A. Nature and office.*[50]—Reformation is the equitable remedy whereby written instruments, which, through mutual mistake of fact, or mistake on one side accompanied by fraud on the other, fail to express the real agreement of the parties, are made to conform to such agreement.[51]

36. Especially where the questions of evidence were of such a nature as to have had an effect upon his findings. Tripp v. Macomber [Mass.] 72 N. E. 361.

37. Clark v. Hendricks Co. [W. Va.] 49 S. E. 455.

38. See 2 Curr. L. 1491.

39. Allowance of $2,150 to referee for 30 days' services held excessive and reduced to $1,000. Jordon v. Western Union Tel. Co. [Kan.] 76 P. 396.

40. Under Clarke's Code [3d Ed.] § 533, providing that the fees of the referee shall be fixed by the court and taxed against either party, or apportioned as seems right to the court, the apportionment is a final judgment both as to the amount and the apportionment (Cobb v. Rhea [N. C.] 49 S. E. 161), and rests in the discretion of the judge making the allowance, subject to exception and review by appeal in case of abuse. Such order cannot be changed by a subsequent coordinate judge (Id.).

41. Code Civ. Proc. § 3296. Stipulation "that referee shall not be confined to the statutory compensation, but may charge and be paid a reasonable compensation for the services performed" is invalid. New York Mut. Sav. & L. Ass'n v. Westchester Fire Ins. Co., 90 N. Y. S. 710.

42. Under Clarke's Code [3d Ed.] § 533, such fees not being paid in advance by an administrator judgments therefor, including the part of the referee's fees adjudged against the estate, take no greater pro rata than the judgment of which they are a part. Cobb v. Rhea [N. C.] 49 S. E. 161. The fact that funds derived from a sale of realty to make assets in another proceeding are in the hands of the clerk does not authorize the court to order payment of such fees out of those funds as a preferred debt. Id.

43. Where motions were made in separate actions between the same parties but which were consolidated, held appeal from decision rendered should be entitled by the name of the first action in which the motion was made. Cobb v. Rhea [N. C.] 49 S. E. 161.

44. Poucher v. Faber, 92 N. Y. S. 870. But see Poucher v. Faber, 90 N. Y. S. 385, where the opposite is held.

45. Poucher v. Faber, 90 N. Y. S. 385.

46. Under Code Civ. Proc. § 1836, providing that if a claim has been unreasonably resisted or neglected costs may be awarded against an executor or administrator, the award of costs is discretionary with the referee. Domeyer v. Hoes, 90 N. Y. S. 1074.

47. Code Civ. Proc. § 1836, providing for costs against an administrator, construed. Domeyer v. Hoes, 90 N. Y. S. 1074.

48, 49. McHenry v. Finletter, 23 Pa. Super. Ct. 636.

50. See 2 Curr. L. 1492.

(§ 1) *B. Right to remedy.*[52]—While a pure mistake of law is not a ground for equitable relief,[53] reformation may be had where the parties through mutual mistake as to the legal effect and operation of the language used have failed to make the writing express their intended agreement.[54] A unilateral mistake of fact is ground for rescission and cancellation of a contract but not for reformation.[55] But reformation will be decreed where the mistake is mutual[56] or where there is a mistake on one side and the other party has been guilty of fraud or inequitable conduct.[57] Mutual mistake frequently arises where the scrivener makes an error in reducing the agreement of the parties to writing,[58] as where a deed is not made to convey the intended estate.[59] A mutual mistake as to the land conveyed is ground for reformation, even though the parties intentionally used the descriptive terms employed, when such terms do not in fact apply to the land sought to be conveyed.[60]

Where a deed of gift expresses the donor's intention at the time of its execu-

51. See 2 Curr. L. 1492, and cases cited under § 1B.

52, 53. See 2 Curr. L. 1492.

54. Conner v. Baxter, 124 Iowa, 219, 99 N. W. 726; Norris v. Belcher Land Mortg. Co. [Tex.] 82 S. W. 500; Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436. Error as to the sufficiency of language to put in legal form a transaction upon which the minds of the parties have met is ground for equitable relief. Rowell v. Smith [Wis.] 102 N. W. 1. Where the evidence clearly showed a mutual mistake as to the effect of language used in a clause in a deed calling for construction of a pass, the deed should be reformed so as to call for a pass under the tracks of the size agreed upon. Owens v. Carthage & W. R. Co. [Mo. App.] 85 S. W. 987. Where parties to a note intended to bind only the corporation, but the language used made the directors personally liable, they were entitled to have it reformed to express the intention of both parties. Western Wheeled Scraper Co. v. McMillen [Neb.] 99 N. W. 512.

55. Coleman v. Illinois Life Ins. Co. [Ky.] 82 S. W. 616. Reformation on ground that description included more than grantor intended to convey, refused where it appeared that grantee believed she was buying all the land included in the description, and was not guilty of fraud. Greenhaw v. Combs [Ark.] 85 S. W. 768.

56. If land is excepted from the description in a deed by mutual mistake of the parties, equity will correct the deed. Pinchback v. Bessemer Min. & Mfg. Co. [N. C.] 49 S. E. 106. Evidence and conduct of parties held to warrant reformation of lease by striking therefrom certain words inserted by mutual mistake. Fox v. Coggeshall, 95 App. Div. 410, 88 N. Y. S. 676. Evidence held to show that warranty that premises were used exclusively for dwelling purposes was inserted in policy by mistake, and to warrant reformation by striking such warranty out. Schuessler v. Fire Ins. Co., 92 N. Y. S. 649. Where both parties thought a lot reconveyed was the same one formerly conveyed by the grantee to the grantor, but the description was of lot 4 instead of lot 3, there was a mutual mistake. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362. Insurance policy, covering a stock of goods reformed, where the evidence was sufficient to show that the goods were, by mutual mistake, described as being in a building other than where they were located. Warner, Moore & Co. v. Western Assur. Co. [Va.] 49 S. E. 499. Equity will reform a written contract so as to express the real intention of the partiee, as disclosed by their negotiations, though the evidence does not show fraud, accident or mistake. Stelpflug v. Wolfe [Iowa] 102 N. W. 1130.

57. Johnson v. Sherwood [Ind. App.] 73 N. E. 180; Duke v. Stuart, 45 Misc. 120, 91 N. Y. S. 885. Where defendant procured the execution of a written compromise which omitted a provision for payment of plaintiff, such conduct was a fraud on plaintiff, for which equity would reform the instrument by inserting the provision for payment and a lien as intended by the parties. Davy v. Davy, 90 N. Y. S. 242. Lease reformed so as to include provision permitting removal of improvements, when it appeared that plaintiff took advantage of defendant's belief that the lease contained such provision, and of his situation and illiteracy. Daly v. Simonson [Iowa] 102 N. W. 780. A deed procured by fraud expressed a consideration of $500, while that agreed on was $3,000. Held, reformation proper remedy. Gillis v. Arringdale, 135 N. C. 295, 47 S. E. 429.

58. As where a conveyance located an easement on the wrong property. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. Evidence sufficient to show that real contract was not embodied in writing, by mistake of scrivener and oversight of parties. Kitchens v. Uery, 121 Ga. 294, 48 S. E. 945.

59. Nutall v. Nutall, 26 Ky. L. R. 671, 82 S. W. 377. Description in deed incorrect, the vendor, vendee and scrivener all participating in the mistake. Slack v. Craft [N. J. Eq.] 57 A. 1014. Evidence sufficient to prove intention of grantor to be to convey only a life estate, and not a fee, subject to a life estate, and that the scrivener made a mistake. Newland v. First Baptist Church Soc. [Mich.] 100 N. W. 612.

60. Miles v. Miles [Miss.] 37 So. 112.

tion, the fact that he subsequently changed his mind will not warrant reformation of the deed so as to include a revocation clause.[61]

Where a lease, made under a decree in a suit to settle boundary and title to land, contains a line or boundary different from that authorized by the decree, omitting a part of the tract, either through fraud or mistake, the lessee being ignorant of the physical effect of the line, as a fact, equity will reform the lease.[62]

A contract within the statute of frauds, defectively reduced to writing, cannot, in the absence of fraud, be reformed by equity so as to conform to the statute,[63] and to the agreement of the parties, unless part performance of the agreement is established whereby it is taken out of the statute.[64]

A mortgage having become extinct by foreclosure, the omission of property by mistake in the execution of the instrument is no ground for reformation either of the mortgage or the decree of foreclosure.[65] But the fact that a mistake in the description in an instrument creating a mechanic's lien was not discovered until after suit had been brought on the contract, and judgment obtained foreclosing the lien, cannot defeat the right of the lienors to have the mistake corrected and to have foreclosure of their lien upon the property intended to be described in the contract.[66]

As a general rule, equity will not decree reformation of an instrument at the instance of a mere volunteer who is not a party to the instrument.[67] While equity

61. Deed was executed, giving children fee subject to donor's life estate, the donor knowing the provisions of the deed. Thirteen years thereafter he brought suit to reform the deed by inserting a revocation clause, which he alleged had been omitted by mistake of the scrivener, but it appeared that he had changed his mind owing to family dissensions. Held, relief denied. Van Houten v. Van Houten [N. J. Eq.] 59 A. 555.

62. Le Comte v. Carson [W. Va.] 49 S. E. 238.

63. Collateral contract of guaranty. Rowell v. Smith [Wis.] 102 N. W. 1.

64. An instrument not purporting to be a lease because not containing a sufficient description of the premises, and not being signed by lessees, cannot be reformed as a lease without proof of part performance. Browder v. Phinney [Wash.] 79 P. 598.

Note: As to the reformation of contracts within the statute of frauds, it is said in a note to Williams v. Hamilton [104 Iowa, 423], 65 Am. St. Rep. 501, that "notwithstanding some little diversity of opinion on the subject, especially with respect to executory contracts, it is clear that, in most of the cases, courts of equity reform contracts, both executed and executory, irrespective of the statute of frauds. In other words, the statute does not prevent a court from reforming the written evidence of a contract within the statute, by enlarging or restricting the terms or the subject-matter of the contract, so as to make it express the real agreement whenever it is clearly shown that, by reason of fraud or mistake, either the terms or the subject-matter of the contract, as it was intended and understood by the parties to it, is not embraced in the writing." Citing Noel v. Gill, 84 Ky. 241, 249; Ruhling v. Hackett, 1 Nev. 360, 365; Judson v. Miller, 106 Mich. 140; Conaway v. Gore, 24 Kan. 389; Blackburn v. Randolph, 33 Ark. 119; Morrison v. Collier, 79 Ind. 417; Thompson v. Marshall, 36 Ala. 504, 76 Am. Dec. 328. In granting such relief the statute of frauds is said not to be violated, but "uplifted," that it may not perpetrate the fraud that the legislature designed it to prevent. Noel v. Gill, 84 Ky. 241, 249. A contract required by the statute to be in writing cannot, of course, be enforced until it is in writing. Kidd v. Carson, 33 Md. 37, 42; Carskaddon v. South Bend, 141 Ind. 596. But the statute does not interfere with the power of a court of equity to reform deeds or other instruments in which the parties intended to comply with the statute, but were prevented by fraud, accident or mistake. Blackburn v. Randolph, 33 Ark. 119; Petesch v. Hambach, 48 Wis. 443.

In the case of executory contracts, there are a few authorities which hold that oral testimony cannot be received in equity to reform the written contract on account of fraud or mutual mistake, and to specifically enforce it as reformed. Macomber v. Peckham, 16 R. I. 485; Davis v. Ely, 104 N. C. 16, 17 Am. St. Rep. 667; Elder v. Elder, 10 Me. 80, 25 Am. Dec. 205; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Osborn v. Phelps, 19 Conn. 63, 48 Am. Dec. 133.

See discussion of cases in McDonald v. Yungbluth, 46 F. 836; note to Gillespie v. Moon [N. Y.] 7 Am. Dec. 567-569; also discussion by Judge Marshall in the recent case of Rowell v. Smith [Wis.] 102 N. W. 1.

65. Stewart v. Wilson [Ala.] 37 So. 550.

66. Where plaintiffs offered to do equity by reconveying the property obtained under the other foreclosure, equity would set aside that foreclosure and foreclose the lien on the intended property. Silliman v. Taylor [Tex. Civ. App.] 80 S. W. 651.

67. Gould v. Glass, 120 Ga. 50, 47 S. E. 505.

will not reform a deed at the instance of a voluntary grantee,[68] yet where parties derive title from a common source and the real intent of the common grantor is in dispute, such intent being ascertained, equity will enforce it by the remedy of reformation.[69]

As in the case of other equitable remedies, the existence of an adequate remedy at law bars relief by reformation.[70]

Laches; limitations; bar of other action.[71]—Equity will not grant relief by reformation to persons who have been guilty of laches, negligence or inequitable conduct,[72] especially when a change in the situation would injuriously affect the rights or status of innocent third parties.[73] Slight circumstances excusing failure to examine a deed before accepting it are sufficient to prevent a finding of negligence on the part of the grantee as a matter of law.[74]

The statute of limitations does not begin to run against a suit for reformation on the ground of mistake until the mistake has been discovered.[75] The statute of limitations relative to actions on written contracts, and not that governing actions for relief on the ground of fraud, applies to a suit in equity to reform an instrument and to recover on it as reformed.[76]

An unsuccessful action at law on a contract, unreformed, is not a bar to a suit in equity to reform the instrument and recover on it as reformed.[77]

(§ 1) *C. Instruments reformable.*[78]—The remedy is applicable to any written instrument which purports to express an agreement.[79]

§ 2. *Procedure. A. Jurisdiction and form of proceeding.*[80]—The court of claims has jurisdiction to reform a contract for public work in the District of Columbia in order to determine the amount due the contractor thereunder.[81] The Texas county court, sitting as a court of probate, and the district court on appeal, having jurisdiction to hear evidence as to a mistake in reducing a contract to writ-

68. Miles v. Miles [Miss.] 37 So. 112. Part of the consideration for a conveyance of certain lands to plaintiffs being the purchase of an interest in the grantor's estate, such grantees were not mere volunteers so as to preclude relief by reformation. Id.

69. As where a deed from a grantor to his son was part of a family settlement, and part of the consideration passing to the grantor for dividing the property was the purchase by such son of his brother's interest, the parties occupying the same position as though they had undertaken to divide inherited property and a mutual mistake had occurred. Miles v. Miles [Miss.] 37 So. 112.

70. Action for breach of contract, held not adequate remedy so as to bar equitable relief including reformation. Loyd v. Phillips [Wis.] 101 N. W. 1092.

71. See 2 Curr. L. 1493, 1494, as to laches.

72. Fritz v. Fritz [Minn.] 102 N. W. 705. Where no claim to land was made for 10 years, equity would not grant relief for mistake in description in deed. Moore v. Crump [Miss.] 37 So. 109.

73. Reformation of contract and deeds running to complainant and another, so as to make former sole grantee, refused, complainant having been negligent after discovery of mistake. Fritz v. Fritz [Minn.] 102 N. W. 705. A purchaser who knew of mistakes in his deed and a deed to adjoining lots, but took no steps to remedy the defects, but, instead, took down his line fence and put up a building partly on land not intended to be conveyed, took the risk of a subsequent reformation of his deed. Slack v. Craft [N. J. Eq.] 57 A. 1014. Where grantee accepts deed and goes into possession and grantor changes position on strength of acceptance, mutual mistake cannot be urged by grantee. Kruse v. Koelzer [Wis.] 102 N. W. 1072.

74. Plaintiff held to have been justified in relying on execution of a deed by grantor's wife in accordance with her promise. Loyd v. Phillips [Wis.] 101 N. W. 1092.

75. Same rule as to cancellation, under direct provisions of Code, § 3448. Bottorff v. Lewis, 121 Iowa, 27, 95 N. W. 262.

76. As to reform insurance policy by inserting provision consenting to concurrent insurance. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246.

77. Reformation of insurance policy to make it express consent to concurrent insurance. Grand View Bldg. Ass'n v. Northern Assur. Co. [Neb.] 102 N. W. 246.

78. See 2 Curr. L. 1494.

79. See cases cited under § 1B. Also 2 Curr. L. 1494. The rule that equity will correct a misdescription due to a mutual mistake applies to an instrument whereby a man and wife seek to create a mechanic's lien on their homestead. Silliman v. Taylor [Tex. Civ. App.] 80 S. W. 651.

80. See 2 Curr. L. 1495.

81. By District of Columbia claims act of June 16, 1880. District of Columbia v. Barnes, 25 S. Ct. 401.

ing, in classifying claims against an estate, have also power to grant the appropriate relief.[82] Where married women are authorized by law to devise and convey their lands as if unmarried, equity has jurisdiction to reform the deed of a married woman conveying her own land.[83]

In a Federal court a written contract cannot be reformed in an action at law.[84] Under the mixed system of jurisprudence prevailing in some states, which permits the interposition of equitable defenses in common-law actions, reformation of an instrument may be had in an action at common law.[85] But proof of the ground on which reformation is so sought must be sufficient to satisfy the conscience of a chancellor.[86] A suit to reform a deed of gift on the ground that a revocation clause was omitted by mistake of the scrivener is within the original jurisdiction of the chancery court.[87] The bill for reformation being in such case tried as an equity cause, it is immaterial that it contains allegations required by statute in actions to quiet title.[88] A contract may be reformed in a suit for specific performance,[89] but equity will not compel a party to sign a contract and then enforce specific performance of the contract as reformed.[90]

(§ 2) *B. Parties.*[91]—The general rule is that in a suit to reform a deed the grantor in the deed, or, if dead, his heirs, and those claiming under him, are necessary parties.[92] Hence persons under whom defendants claim by deeds of warranty made since the mistake or accident is alleged to have occurred must be made parties.[93] But where the title of a grantee in the deed sought to be reformed has been acquired by complainants without warranty, such grantee is not a necessary party to the bill.[94] In a suit to correct the description in a trust deed and foreclose the same, the holder of a second trust deed on the same property, containing the same errors, is entitled to be made a party and to have the same relief as to his deed.[95] A description in a mortgage will not be corrected to the prejudice of creditors without notice.[96] A corporation for which a contract of lease was procured may sue for reformation of the contract after the rights of the person procuring it have been assigned to the corporation.[97] If reformation of a contract is necessary to sustain a petition in bankruptcy against a corporation, the corporation should be made a party to the proceeding to reform, notwithstanding a previous default as to the petition, and though the petition did not ask for reformation.[98]

(§ 2) *C. Pleading and evidence.*[99]—A bill for reformation of a written instrument must show a mutual mistake, the agreement actually made, and that which the parties intended to make.[1] In an action to cancel a note and mort-

82. Ziechang v. Helmke [Tex. Civ. App.] 84 S. W. 436.

83. Const. 1874. Mills v. Driver [Ark.] 81 S. W. 1058.

84. York City School Dist. v. Aetna Indemnity Co., 131 F. 131.

85. Where plaintiff sued for loss by fire, and defendant interposed a release, plaintiff was entitled in the same action to show fraud, and reform the release so that it should cover only uninsured property. Highlands v. Philadelphia & R. Co., 209 Pa. 286, 58 A. 560.

86. Highlands v. Philadelphia & R. Co., 209 Pa. 286, 58 A. 560.

87. Such suit is not within 3 Gen. St. p. 3486, providing for an action to determine claims to realty and quiet title. Van Houten v. Van Houten [N. J. Eq.] 59 A. 555.

88. Van Houten v. Van Houten [N. J. Eq.] 59 A. 555.

89. Pleading held to warrant reformation, and decree held to have included reformation, by necessary implication. Conner v. Baxter, 124 Iowa, 219, 99 N. W. 726.

90. Thus, where a writing did not purport to be a contract between two persons, but recited dealings of the signer with himself, the owner of the land concerned could not be required to sign. Kaster v. Mason [N. D.] 99 N. W. 1083.

91. See 2 Curr. L. 1495.

92, 93, 94. Indian River Mfg. Co. v. Wooten [Fla.] 37 So. 731.

95. Scott v. Gordon [Mo. App.] 83 S. W. 550.

96. German National Bank v. Bode, 5 Ohio C. C. (N. S.) 30.

97. Pittsburgh Amusement Co. v. Ferguson, 91 N. Y. S. 666.

98. In re Imperial Corporation, 133 F. 73.

99. See 2 Curr. L. 1496.

1. Johnson v. Sherwood [Ind. App.] 73 N. E. 180.

gage for an alleged breach of warranty in a deed, the defendant may seek reformation of the deed and mortgage in one paragraph of his answer and cancellation in another.[2] A petition containing only general allegations of mistake is insufficient; it should state how the mistake was made, and whose mistake it was or what brought it about.[3]

The proof must show substantially as alleged in the pleadings that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties;[4] that there was in fact a written contract which failed to express such real intention;[5] and that this failure was due to mutual mistake, or to mistake of one side and fraud or inequitable conduct of the other.[6] Proof of fraud or mistake must be by competent evidence which is consistent, clear and convincing;[7] a mere preponderance of evidence is not enough.[8] Direct and positive proof that an instrument does not express the intention of the parties may not be necessary if the acts and conduct of the parties, as clearly shown by the evidence, justifies an inference necessary to enable the court to grant relief.[9] There is a strong presumption that an instrument examined and deliberately signed by the parties is what they intended it to be.[10] Parol evidence is competent to show and explain the mistake, and to show what was the real contract.[11] A mutual mistake of parties whereby certain land is excepted in the description in a deed may be shown by extrinsic evidence.[12] But if such mistake is shown by discrepancies between essential recitals in the deed and the description, equity will make the correction upon inspection of the deed.[13]

2. Under Burns' Ann. St. 1901, § 350, permitting a defendant to set up all his defenses of whatever nature. Johnson v. Sherwood [Ind. App.] 73 N. E. 180.

3. Gould v. Glass, 120 Ga. 50, 47 S. E. 505.

4. Fritz v. Fritz [Minn.] 102 N. W. 705. There must be an actual agreement. Conner v. Baxter, 124 Iowa, 219, 99 N. W. 726.

5. Fritz v. Fritz [Minn.] 102 N. W. 705. There must be a writing purporting to express a contract. Kaster v. Mason [N. D.] 99 N. W. 1083.

6. Fritz v. Fritz [Minn.] 102 N. W. 705 (citing 2 Curr. L. 1492, 1493).

7. Fritz v. Fritz [Minn.] 102 N. W. 705 (citing 2 Curr. L. 1497). Proof must be clear, convincing, and satisfactory. If there be a substantial doubt, plaintiff must fail. Johnson v. Farmers' Ins. Co. [Iowa] 102 N. W. 502. Must be clear evidence of mutual mistake. Kruse v. Koelzer [Wis.] 102 N. W. 1072. Trial court held not to have overruled defendant's claim that plaintiff must prove his case beyond reasonable doubt. Jenner v. Brooks [Conn.] 59 A. 508. Proof need not be indubitable in the sense that there must be no opposing testimony, but in the sense that it must carry a clear conviction of its truth. Highlands v. Philadelphia R. Co., 209 Pa. 286, 58 A. 560.

Evidence insufficient to show mistake whereby note and mortgage read $200 instead of $250. Denny v. Barber [Ark.] 81 S. W. 1055. Direct conflict in testimony as to mutuality of mistake held conclusive as against reformation. Coleman v. Illinois Life Ins. Co. [Ky.] 82 S. W. 616. Evidence insufficient to prove erroneous description in contract of sale through mutual mistake whereby there was an alleged shortage in land conveyed. Albro v. Gowland, 90 N. Y. S. 796. Evidence insufficient to support finding that conveyance should have included certain mining property, where property had been sold by a receiver according to descriptions in the inventory. Joswich v. Faber [Minn.] 101 N. W. 614.

Evidence sufficient to reform a release for fraud. Highlands v. Philadelphia & R. Co., 209 Pa. 286, 58 A. 560. Evidence of mutual mistake held to be clear and convincing beyond a reasonable doubt so as to warrant reformation. Schaefer v. Mills [Kan.] 76 P. 436.

8. Fritz v. Fritz [Minn.] 102 N. W. 705 (citing 2 Curr. L. 1497); Merchants' Nat. Bank v. Murphy [Iowa] 101 N. W. 441; Duke v. Stuart, 45 Misc. 120, 91 N. Y. S. 885.

9. Evidence held sufficient to warrant reformation of deed. Jenner v. Brooks [Conn.] 59 A. 508.

10. Duke v. Stuart, 45 Misc. 120, 91 N. Y. S. 885.

11. Parol evidence admissible to show that by mistake of scrivener deed did not convey intended estate. Nutall v. Nutall, 26 Ky. L. R. 671, 82 S. W. 377. In a suit in equity to correct a deed for mutual mistake, parol evidence of a preliminary agreement between the parties is admissible. Lehew v. Hewett [N. C.] 50 S. E. 459. Parol evidence is competent to show that a note which is so drawn as to render directors personally liable was intended to bind only the corporation. Western Wheeled Scraper Co. v. McMillen [Neb.] 99 N. W. 512. Parol evidence is admissible to show the real contract, and that by mistake of the scrivener and oversight of the parties the writing did not express the entire agreement. Kitchens v. Usry, 121 Ga. 294, 48 S. E. 945.

12, 13. Pinchback v. Bessemer Min. & Mfg. Co. [N. C.] 49 S. E. 106.

(§ 2) *D. Trial and judgment.*[14]—The usual rules as to instructions apply.[15] In a suit for a conveyance or reformation of a deed, a prayer for a conveyance warrants a decree that the deed should have a seal,[16] even though no one had yet questioned plaintiff's title, and though plaintiff had also a good title by adverse possession.[17] Though a complaint did not seek a money judgment, where the verdict found fraud in inserting a consideration less than that agreed on in a deed, it was error in a suit for reformation to refuse leave to amend so as to admit a money judgment.[18]

REFORMATORIES; REGISTERS OF DEEDS; REHEARING; REJOINDERS, see latest topical index.

RELEASES.

§ 1. Nature, Form and Requisites (1270).
§ 2. Parties to Release (1271).
§ 3. Interpretation, Construction and Effect (1271).
§ 4. Defenses to or Avoidance of Release (1273).
§ 5. Pleading, Proof and Practice (1274).

This topic treats only of formal releases, relegating settlements and the effect of the release as an accord and satisfaction to appropriate topics.[19]

§ 1. *Nature, form and requisites.*[20]—A release is the giving up or abandoning a claim or right to the person against whom the claim exists, or the right is to be exercised or enforced.[21] It is based on the principles applicable to contracts,[22] and must be definite in its terms,[23] mutually assented to, without fraud,[24] or duress,[25] executed[26] by parties competent to contract,[27] and supported by a consideration.[28] A written release imports a consideration.[29] The consideration, however, need not

14. See 2 Curr. L. 1498.

15. The word "impression" held equivalent to "mistake" in an instruction in substance that plaintiff was entitled to reformation if both parties were under the impression that other property was described by the deed. Metcalfe v. Lowenstein [Tex. Civ. App.] 81 S. W. 362.

16. Since under Conn. Gen. St. 1902, § 4029, a conveyance is a writing "sealed by the grantor." Jenner v. Brooks [Conn.] 59 A. 508.

17. Since under his agreement with defendant he was entitled to a valid deed. Jenner v. Brooks [Conn.] 59 A. 508.

18. Gillis v. Arringdale, 135 N. C. 295, 47 S. E. 429.

19. See Accord and Satisfaction, 3 Curr. L. 17. Seaman's release, see Shipping and Water Traffic, 2 Curr. L. 1648.

20. See 2 Curr. L. 1498.

21. Cyc. Law. Dict. 786.

22. See Contracts, 3 Curr. L. 805.

23. Conversation between a member of a partnership and a creditor of the firm relative to a release of such partner from liability to which the creditor said "All right" held not to constitute a release. Isaac Goldman Co. v. Wilkes, 88 N. Y. S. 390.

24. Whether false representations inducing the execution of a release were made is a question for the jury. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248; State v. Stuart [Mo. App.] 86 S. W. 471. Evidence as to whether a claim agent in procuring a release for damages for personal injuries and property lost, concealed the real nature of the transaction held a question for the jury. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Release of damages for injuries procured from a passenger held void for fraud. International, etc., R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189. Fraudulent promise of employment to procure release. Rapid Tr. R. Co. v. Smith [Tex.] 86 S. W. 322.

25. Evidence held insufficient to show that a release was executed through fear of imprisonment. Naretti v. Scully, 133 F. 828.

26. Evidence held for the jury as to whether there had been a release of the contract sued on. Conant v. Jones, 120 Ga. 568, 48 S. E. 234. Evidence held to establish the execution of a release. Sterling v. Chapin, 92 N. Y. S. 904.

27. Release of damages for personal injuries obtained while one was suffering great pain, was locked up in a car with a number of injured persons, and after he had been given whisky, held obtained by fraud. St. Louis, etc., R. Co. v. Brown [Ark.] 83 S. W. 332. Testimony of four witnesses that one signing release for personal injuries was conscious at the time of signing and that he comprehended its contents held to show full mental capacity at the time. Laird v. Union Traction Co., 208 Pa. 574, 57 A. 987. Mental or physical infirmity. State v. Stuart [Mo. App.] 86 S. W. 471.

28. Evidence insufficient to show want of consideration. Naretti v. Scully, 133 F. 828. Evidence as to whether a release was executed on an employer's agreement to pay for lost time held for the jury. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477.

29. In the absence of evidence to the contrary, a consideration is presumed. Adams v. Hopkins, 114 Cal. 19, 77 P. 712.

be adequate in value,[30] but if it fails entirely, the legal effect of the release is destroyed.[31]

A writing in form a receipt may be a release,[32] but will not be given such effect unless so intended.[33]

An agreement that all the rights of parties under a contract shall cease amounts to a release of a right of action growing out of such contract,[34] and is not deprived of its effect because of a clause stating that the contract is abrogated "in consequence of the notice heretofore given," although such notice was ineffectual to terminate the contract.[35] A release is technically a specialty, though parol accords and satisfactions are sometimes called releases.[36]

A release of a mere personal obligation need not be recorded, though it rests on consideration of a conveyance.[37]

§ 2. *Parties to release.*[38]—A general agent with power coextensive with the business has power to make a contract of release with an employe.[39] A principal who acquiesces in such release and complies for a considerable time with its terms thereby ratifies it.[40] A cause of action for unlawful death given to relatives in lieu of the right in the deceased had he lived may be released by the person injured during his lifetime.[41]

§ 3. *Interpretation, construction and effect.*[42]—A valid release is binding according to its terms,[43] which will be given a fair construction,[44] and is a bar to any action on the cause to which it refers.[45] It inures to the benefit of the party released, though delivered to another,[46] and the fact that the claim is still carried on

30. Sufficiency of particular considerations. See 2 Curr. L. 1498, n. 47. Forbs v. St. Louis, etc., R. Co., 107 Mo. App. 661, 82 S. W. 562. "For and in consideration of re-employment for such time only as may be satisfactory" to the employer is sufficient. Id. **Contra,** Re-employment for such time as might be satisfactory to the employer is not. Missourl, etc., R. Co. v. Smith [Tex.] 81 S. W. 22. "Employment for such time and in such capacity as may be satisfactory to the employer and not longer or otherwise" is void. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477.

Compromise of a colorable claim is a sufficient consideration. Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240. One dollar and future employment is sufficient. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 85 S. W. 477. Release for wrongful ejectment from a train for two dollars. Illinois Cent. R. Co. v. Heath, 26 Ky. L. R. 19, 80 S. W. 502. A mortgage cannot be released by a simple agreement that it shall be no longer of force. Lynn v. Bean [Ala.] 37 So. 515.

31. See 2 Curr. L. 1498, n. 48. An action may be maintained on the cause released where the consideration was re-employment and the day after the servant executing the release resumed work he was discharged without cause under a design conceived prior to the execution of the release. Illinois Cent. R. Co. v. Keebler [Ky.] 84 S. W. 1167.

32. See 2 Curr. L. 1498, n. 45.

33. A receipt "in full of all demands" executed and given for wages and a doctor's bill which the company had agreed to pay held not a release of damages for injuries sustained. Davis v. Diamond Carriage & Livery Co. [Cal.] 79 P. 596.

34, 35. Swarts v. Narragansett Elec. Lighting Co. [R. I.] 59 A. 77.

36. See Accord and Satisfaction, 3 Curr. L. 17; 1 Curr. L. 8. If rights under a release may terminate within one year, it is not within the statute of frauds. See Frauds, Staute of, 3 Curr. L. 1527. A release in consideration of wages, nurse hire, doctor's bills and employment after recovery. Party releasing might have died within a year. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608. A release accepted by the party procuring it becomes binding on him, though he does not sign it and it contains no promise to pay the consideration mentioned. Id.

37. Obligation to support. Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240.

38. See 2 Curr. L. 1499.

39. See Agency, 3 Curr. L. 68. Superintendent of quarry with authority to employ and discharge men. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608.

40. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608.

41. See Death by Wrongful Act, 3 Curr. L. 1034. Thompson v. Ft. Worth, etc., R. Co., 97 Tex. 590, 80 S. W. 990.

42. See 2 Curr. L. 1499.

43. Instruction approved. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682.

44. An agreement to pay wages "during disability" is not limited to the period during which a nurse and doctor are required. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608.

45. Release of claims for support of a bastard child held not procured by fraud. Conlon v. Hearn, 96 App. Div. 608, 88 N. Y. S. 570.

46. A release of a claim for money advanced to purchase a membership in a stock

on the books of the releasor cannot alter its effect.[47] If it relates to a cause of action it will be construed as applying to all claims arising therefrom,[48] but a release of one cause will not be construed as applicable to another,[49] nor a release of rights arising by virtue of a relationship as applying to a cause issuing from a foreign source.[50] Prospective releases will not be extended to injuries not contemplated by their terms.[51] A promise of employment cannot be added by parol proof to a release in consideration of a sum certain and the payment of medical expenses,[52] but the procuring of a release by promise to employ releasor without intention of doing so is fraudulent.[53]

A release of one of two joint contractors releases both.[54] There is a conflict as to whether a release of one joint tort feasor, independent of the question of full satisfaction, releases all.[55] If the release contain no reservation of rights against the others, it discharges them;[56] but if it does it is construed, not as a technical release, but as a covenant not to sue the party in whose favor it runs,[57] and the fact that an indemnity bond is given to the party released does not alter the character of the transaction,[58] but in an action against the others they are entitled to have the amount received for the release deducted from the full amount necessary to satisfy the claim.[59] A satisfaction by one discharges all.[60]

exchange, delivered and filed with the stock exchange in conformity to its rules inures to the benefit of the party for whose benefit the membership was purchased. Sterling v. Chapin, 92 N. Y. S. 904.

47. Sterling v. Chapin, 92 N. Y. S. 904.

48. Release reciting that "his throat and breast were injured by falling on a peg and that he released the master from all claims arising from contract or tort" held sufficiently broad to cover an injury to sight when he subeequently became blind. Quebe v. Gulf, etc., R. Co. [Tex.] 81 S. W. 20.

49. A release of a statutory right of action against saloon keepers who sold the liquor to an intoxicated person who was injured is no bar to an action against the party whose negligence caused the injury. Fox v. Michigan Cent. R. Co. [Mich.] 101 N. W. 624. A release by the parent of an injured infant of his claim to one jointly liable is no bar to an action by the infant against the other. Nagle v. Hake [Wis.] 101 N. W. 409. A deed of property to a city for street purposes is not a release of damages for possible injury to property retained where it does not appear that the grantor has any reason to apprehend that the street will be so improved as to render it impossible to construct approaches to remaining property. City of Houston v. Bartels [Tex. Civ. App.] 82 S. W. 323.

50. On termination of the relation of principal and agent, a stipulation that neither should have any claim against the other with respect to any matter arising out of the agency did not bar an action for a cause not arising out of the agency. Brown v. American Freehold Land Mortg. Co. [Tex. Civ. App.] 82 S. W. 1056.

51. General words of exemption in case of shipments of glass and the words "owner's risk." Uvalde Asphalt Pav. Co. v. New York, 99 App. Div. 327, 91 N. Y. S. 131. Release of prospective damages by killing of animals on a side track held not to apply to injuries on adjoining main track. St. Louis S. W. R. Co. v. Stringer [Ark.] 86 S. W. 280.

52, 53. Rapid Tr. R. Co. v. Smith [Tex.] 86 S. W. 322.

54. Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240.

55. See 2 Curr. L. 1500, n. 65.

NOTE: Release of one joint tort feasor as release of all when there is a reservation of rights as against others than the one released. On this question there is a conflict of authority. Some courts are disposed to hold, and have held, that such a reservation is repugnant to the release in that it defeats or attempts to defeat the natural effect of the instrument, and should therefore be ignored. McBride v. Scott [Mich.] 93 N. W. 243, 61 L. R. A. 445; Abb v. Northern Pac. R. Co. [Wash.] 68 P. 954, 58 L. R. A. 293 and cases there cited. Other courts hold, however, that such an instrument should be given effect according to the obvious intent of the person executing it, and should not be treated as a technical release operating to destroy the cause of action against all the others, but rather as a covenant not to sue the party in whose favor the instrument runs. Gilbert v. Finch [N. Y.] 66 N. E. 133, 61 L. R. A. 807; Matthews v. Chicopee Mfg. Co., 3 Rob. [La.] 712; Ellis v. Esson, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830; Hood v. Hayward, 124 N. Y. 1, 16, 26 N. E. 331; Sloan v. Herrick, 49 Vt. 327; McCrittis v. Howes, 38 Me. 566; Miller v. Beck [Iowa] 79 N. W. 344; Price v. Barker, 4 El. & Bl. 760, 776. See Carey v. Bilby, 129 F. 203. See, also, note to Abb v. Northern Pac. R. Co. [Wash.] 58 L. R. A. 293.

56. Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. S. 930.

57. Carey v. Bilby [C. C. A.] 129 F. 203; Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. S. 930; Robertson v. Trammell [Tex.] 83 S. W. 1098. Dismissal of cause as to one and a release to him only which does not show a release of the cause of action or full satisfaction of the claim does not release the others. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258.

58. Robertson v. Trammell [Tex.] 83 S. W. 1098.

A release which constitutes a fraudulent conveyance cannot be impeached by the administrator of the party who executed it.[61]

§ 4. *Defenses to or avoidance of release.*[62]—A release procured from one mentally incompetent to transact business is not binding[63] unless subsequently ratified.[64] The releasor's state of health may be considered in determining mental capacity.[65] If procured by fraud either as to nature and extent of injuries,[66] or as to the nature of the instrument,[67] as by misreading it to the party from whom it is procured,[68] or in inducing one to sign without reading,[69] or upon collateral promises made without intention to perform them,[70] it is void, notwithstanding the fraud was not the sole inducement to its execution,[71] unless the party signing was negligent.[72] On conflicting evidence, whether a release was procured by fraud,[73] or whether

59, 60. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258.

61. See Fraudulent Conveyances, 3 Curr. L. 1535. Hayes v. Fry [Mo. App.] 83 S. W. 772.

62. See 2 Curr. L. 1500.

63. See ante, § 1. Bertrand v. St. Louis Transit Co., 108 Mo. App. 70, 82 S. W. 1089; Johnson v. Gulf, etc., R. Co. [Tex. Civ. App.] 81 S. W. 1197.

From one **under the influence of liquor** to such a degree that he does not know what he is doing. Merril v. Pike [Minn.] 102 N. W. 393. Release executed while injured person was **suffering pain** and did not know what she was doing. Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103.

Note: Where a release is procured while one is suffering from his injuries, etc., the question as to his capacity to execute is for the jury (Alabama, etc., R. Co. v. Jones, 73 Miss. 110, 55 Am. St. Rep. 488; 1 Union Pac. R. Co. v. Harris, 158 U. S. 326, 39 Law. Ed. 1003; Gibson v. Western, etc., R. Co., 164 Pa. 142, 42 Am. St. Rep. 586; Och v. Missouri, etc., R. Co., 130 Mo. 27; Bliss v. New York, etc., R. Co., 160 Mass. 447, 39 Am. St. Rep. 504), as is also the question of ratification (Jones v. Alabama, etc., R. Co., 72 Miss. 22; Gibson v. Western, etc., R. Co., 164 Pa. 142, 44 Am. St. Rep. 586). A finding that the release was procured by fraud will not be disturbed where the evidence shows that it was signed by the releasor when he was incapable of transacting any important business or exercising an intelligent judgment on any subject. St. Louis, etc., R. Co. v. Phillips, 66 F. 35; Union Pac. R. Co. v. Harris, 63 F. 800; Northwestern Ins. Co. v. Woods, 54 Kan. 663; Jones v. Alabama, etc., R. Co., 72 Miss. 22; Sanford v. Royal Ins. Co., 11 Wash. 653.—From Alabama, etc., R. Co. v. Jones and note thereto 73 Miss. 110, 55 Am. St. Rep. 510.

64. One who uses money received for a release for personal injuries, with full knowledge of where the money came from, ratifies. Laird v. Union Traction Co., 208 Pa. 574, 57 A. 987.

65. Johnson v. Gulf, etc., R. Co. [Tex. Civ. App.] 81 S. W. 1197.

66. A release of damages for injuries executed by a passenger who relies on the false representations of the carrier's physician as to the extent of the injuries is void for fraud. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189. False representations of a railroad company's physician are binding on the company. Id. Release procured by representations to an injured party that her injuries were slight; that the injured person's medical attendant had told the party procuring the release that she would be out in a day or two; that party procuring release was in a great hurry and could not wait until the physician could be sent for, held procured by fraud. Fleming v. Brooklyn Heights R. Co., 95 App. Div. 110, 88 N. Y. S. 732. Counsel by the company's physician that his injuries were slight, it appearing that the counsel was not given for the purpose of procuring the release, held insufficient to show fraud. Quebe v. Gulf, etc., R. Co. [Tex.] 81 S. W. 20.

67. Fraudulent representations that it was a receipt. Central of Georgia R. Co. v. Goodwin, 120 Ga. 83, 47 S. E. 641.

68. New Omaha Thomson-Houston Electric Light Co. v. Rombold [Neb.] 102 N. W. 475, afg. 93 N. W. 966, cited 2 Curr. L. 1500, n. 73.

69. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248. Where one is induced to execute a release by fraudulent representations as to her injuries, etc., the fact that she signs without reading is immaterial. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189.

70. Promise of employment. Rapid Transit R. Co. v. Smith [Tex.] 86 S. W. 322.

71. Party executing was sorely in need of funds. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189.

72. "Release" written in capital letters at the top of the instrument. Hartley v. Chicago & A. R. Co. [Ill.] 73 N. E. 398. One who can read and executes a release without reading it cannot be relieved from its effect because of want of knowledge of its contents. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248; Rutherford v. Rutherford, 55 W. Va. 56, 47 S. E. 240. But a passenger who relies on the false representations of the carrier's physician as to the extent of her injuries is not negligent in failing to advise with others and further investigate the truth of the statements. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189.

73. One signing release testified that she was induced to sign by fraud and in ignorance of its contents; the released party testified to the contrary. Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103. As to whether one was induced to sign a release by representations that it was a receipt. Chicago City R. Co. v. Uhter, 212 Ill.

one executing without reading it is negligent,[74] are questions for the jury. Inadequacy of consideration is of itself insufficient,[75] but if grossly inadequate, it imports fraud.[76] It is not void because executed solely out of motives of kindness,[77] and the fact that injuries not apparent at the time are not foreseen is insufficient to avoid it for mistake.[78] The defense of fraud is not precluded by the fact that an employe executing a release to his employer remains in his employ.[79]

A release procured by fraud is no defense to[80] and may be impeached at the trial of an action founded on the claim to which it applies,[81] and the consideration received need not be returned as a condition precedent to the maintenance of such action,[82] and if tendered in the petition it need not be tendered in court.[83]

§ 5. *Pleading, proof and practice.*[84]—A fraudulent release may be set aside in an accounting in equity.[85] A release procured by fraudulent representations as to the nature of the instrument may be assailed at law,[86] but where the representations go to collateral matters or as to the nature and value of the consideration, resort must be had to equity.[87] A statutory right to tender issue of fraud by reply being remedial may be availed of in an action pending when the act was passed.[88] When so pleaded it is defensive by confession and avoidance and not an affirmative application for relief,[89] hence limitations stop when the action is begun, not when the reply is filed.[90] Under such a statute the complaint need not allege the release and impeach it for fraud.[91]

The defense of release pleaded by copy need not be under oath,[92] and is not bad because not containing the names of the witnesses, the answer stating that they are unknown.[93]

An instruction which eliminates a material defense[94] or issue[95] is bad.

174, 72 N. E. 195; Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 72 N. E. 1060. Fraudulent representations of a physician and a representative of the company. Bjorklund v. Seattle Elec. Co., 35 Wash. 439, 77 P. 727.

74. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248.

75. See ante, § 1. Quebe v. Gulf, etc., R. Co. [Tex.] 81 S. W. 20.

76. Release of a one-half interest in an estate worth $2,700 for $200 held procured by fraud. Toomey v. Whitney, 94 App. Div. 154, 88 N. Y. S. 216. Evidence held to show that a claim agent and physician made fraudulent representations and procured a release for an inadequate consideration. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189.

77. Conductor wrongfully put a passenger off a train and she released him and the company for a nominal sum from all claim for damages so he would not lose his job. Illinois Cent. R. Co. v. Heath, 26 Ky. L. R. 19, 80 S. W. 502.

78. Quebe v. Gulf, etc., R. Co. [Tex.] 81 S. W. 20.

79. Bjorklund v. Seattle Elec. Co., 35 Wash. 439, 77 P. 727.

80. Release of damages for personal injuries. Bjorklund v. Seattle Elec. Co., 35 Wash. 439, 77 P. 727.

81. Fleming v. Brooklyn Heights R. Co., 95 App. Div. 110, 88 N. Y. S. 732.

82. St. Louis, etc., R. Co. v. Brown [Ark.] 83 S. W. 332; Jaques v. Sioux City Traction Co., 124 Iowa, 257, 99 N. W. 1069; Bjorklund v. Seattle Elec. Co., 35 Wash. 439, 77 P. 727.

83. International & G. N. R. Co. v. Shuford [Tex. Civ. App.] 81 S. W. 1189.

84. See 2 Curr. L. 1501.

85. Partnership accounting. Smith v. Irvin, 45 Misc. 262, 92 N. Y. S. 170.

86. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195. That a release was procured by fraudulent representations that the instrument was a receipt may be shown at law. It is not necessary to return the consideration or resort to equity for cancellation of the instrument. Spring Valley Coal Co. v. Buzis, 213 Ill. 341, 72 N. E. 1060.

87. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195. At law a release cannot be impeached for fraud not affecting the execution of the instrument but going only to the consideration. Hartley v. Chicago & A. R. Co. [Ill.] 73 N. E. 398.

88. Rev. St. 1899, § 654. State v. Stuart [Mo. App.] 86 S. W. 471.

89, 90. The 10-year period had elapsed when reply was filed. State v. Stuart [Mo. App.] 86 S. W. 471.

91. State v. Stuart [Mo. App.] 86 S. W. 471.

92, 93. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

94. Question of fraud not presented. Johnson v. Gulf, etc., R. Co. [Tex. Civ. App.] 81 S. W. 1197.

95. Where one claimed that an amount received from a claim agent was a mere charity and not a consideration for a release, an instruction on the effect of the release excluding the issue of gift was properly refused. Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. Fraud. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248.

In admiralty if the evidence fails to sustain the answer but tends to support another defense, an amendment will be allowed to set up such defense.[96] If executed after libel has been filed, it cannot be filed in satisfaction of a default judgment except on payment of costs.[97]

RELIEF FUNDS AND ASSOCIATIONS, see latest topical index.

RELIGIOUS SOCIETIES.[1]

§ 1. Organization as a Corporation, and Status of Society (1275).
§ 2. Membership and Meetings (1275).
§ 3. Ministers (1276).
§ 4. Powers and Liabilities of Society in General (1276).
§ 5. Property and Funds (1276).
§ 6. Jurisdiction of Courts (1276).
§ 7. Actions By or Against Society or Members (1277).

§ 1. *Organization as a corporation, and status of society.*[2]—Statutes authorizing the incorporation of the trustees of religious societies do not confer upon such corporation any power or authority to interfere with matters relating strictly to spiritual concerns,[3] and under such statutes members of the congregation are not members of the corporation.[4] The members of an insolvent or dormant religious corporation may organize a new corporation for the promotion of the same purposes to which the old one was dedicated without becoming chargeable with its debts or obligations, but they must act in good faith, and not convert the assets of the old corporation to the prejudice of its creditors.[5] The legal identity of the new corporation with the old ordinarily depends upon the intention of the incorporators.[6] A "congregation" is a "worshipping assembly."[7] The right of a congregation to elect its officers, being derived from the Scriptures, ecclesiastically the right must remain with the congregation so long as the authority of the Scriptures is recognized, whether the congregation stands within or without the pale of denominational unity.[8]

§ 2. *Membership and meetings.*[9]—The right of a member of a faction to participate in the control of the church property is not property.[10] Independent

96. Answer set up want of consideration for a release. The release showed on its face that there was a consideration, but the evidence tended to show duress. Naretti v. Scully, 131 F. 399.

97. Rev. St. U. S. § 983. Naretti v. Scully, 133 F. 828.

1. Consult: Associations and Societies, 3 Curr. L. 346; Charitable Gifts, 3 Curr. L. 678; Contracts, 3 Curr. L. 805; Corporations, 3 Curr. L. 880, etc.

2. See 2 Curr. Law. 1502.

3. Code Pub. Gen. Laws 1889, art. 23, § 205. Shaeffer v. Klee [Md.] 59 A. 850.

4. Code Pub. Gen. Laws 1889, art. 23, § 205, construed. Shaeffer v. Klee [Md.] 59 A. 850. Under Rev. Laws, c. 36, §§ 44-46, no persons but the trustees have any part or voice in the corporate doings. Enos v. Harkins [Mass.] 72 N. E. 253.

5. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808. [The above rule is not peculiar to religious corporations. Ed.]

6. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808. The mere change in the name of the corporation has no effect upon its legal status or upon the rights of creditors. Id. The fact that the new organization embraces the old membership is immaterial, and in itself affords no reason why it should be held liable for the debts of the old corporation. Id. [The above rules are not peculiar to religious corporations. Ed.]

7. In common acceptation, as well as by the express declaration of the Synod of Dort. Pulis v. Iserman [N. J. Law] 58 A. 554.

8. Pulis v. Iserman [N. J. Law] 58 A. 554 (Day v. Bolton, 12 N. J. Law, 206, distinguished). Rules of True Reformed Dutch Church construed and held to sanction the right of each congregation to withdraw from the classis and synod with which it had been connected, and become independent, without loss of ecclesiastical or civil function. Id. Classis to which a congregation, which by the unaminous vote of its members has thus withdrawn, was previously subordinate, has no power to remove officers of congregation and civil corporation elected by the congregation. Id.

9. See 2 Curr. L. 1502.

10. Will not descend to his children. Suit against representatives of a minority faction to obtain control of church property held properly dismissed as to a defendant dying pendente lite. Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226.

of proof it is presumed that meetings of religious societies are conducted in an orderly manner and according to the rules, customs and usages of all deliberative bodies.[11]

§ 3. *Ministers.*[12] *Their powers.*—The pastor of a church may bind the latter as to acts performed within the apparent scope of his authority,[13] but he is not, because of his position, capable of binding the church corporation.[14]

§ 4. *Powers and liabilities of society in general.*[15]—A congregation is not liable for acts of its officers beyond the apparent scope of their authority.[16] In Virginia the trustees of a church have no power of their own volition and in their capacity as trustees to either alien or incumber church realty.[17] A creditor of a church corporation is not the creditor of the members of the church, and has no right of action against them as such.[18]

§ 5. *Property and funds.*[19]—It is within the power of any religious society to devote its general funds to the aid of other churches or religious societies or to home or foreign missions.[20] Where the articles of a church corporation composed of members of two nationalities provide for the alternate use of the church property by either nationality, members of one nationality are entitled to such use of the church property without application to the corporate board of trustees by any organized portion of the corporate stockholders or members.[21] A deed to a religious society's trustees and their successors in fee, without restriction or limitation, does not create a trust.[22] A fund for the use of the poor of the church cannot be applied to the payment of its debts.[23] A testator bequeathing the residuum of his estate to several incorporated religious societies, and one of such societies being subsequently dissolved and a receiver appointed, the remnant of the fund in the hands of the receiver should be delivered to the remaining associations.[24]

§ 6. *Jurisdiction of courts.*[25]—The right of civil courts to interfere in ecclesiastical matters exists only where there are conflicting claims to church property or funds, or the use of them, or where civil rights are involved.[26]

11. Congregations of Baptist churches. Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226. Evidence held sufficient to show that a certain work on parliamentary law was customarily used by the church. Id.

12. See 2 Curr. L. 1502.

13. In the absence of proof to the contrary the rector of an Episcopal church has no implied authority to bind the church by agreements with architects in relation to drawing plans for a church edifice. Cann v. Rector, Wardens & Vestrymen of Church of The Redeemer [Mo. App.] 85 S. W. 994. Evidence held insufficient to show that rector had been given authority by the vestry to bind the church by contracting with the architects. Id. Architects being required to draw plans to the satisfaction of the vestrymen, such terms restrict any authority the rector of the church might have as such. Id.

14. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808.

15. See 2 Curr. L. 1503.

16. Where a committee had been appointed to rebuild a church edifice, held congregation was not liable on contract of its president for lumber furnished. East Baltimore Lumber Co. v. K'nessett Israel Anshe S'phard Congregation [Md.] 59 A. 180. See, also, ante, § 3, Ministers.

17. Under Va. Code 1904, p. 773, § 1398, p. 774, § 1399, p. 776, § 1405, and p. 775, § 1402. a judgment against such trustees for the price of pews is binding on them individually, but not on the church real estate, or the proceeds of a sale thereof. Globe Furniture Co. v. Trustees of Jerusalem Baptist Church [Va.] 49 S. E. 657.

18. Allen v. North Des Moines M. E. Church [Iowa] 102 N. W. 808.

19. See 2 Curr. L. 1503.

20. Incorporated Roman Catholic Church may give part of its general funds to a Catholic parish. Enos v. Harkins [Mass.] 72 N. E. 253.

21. Peterson v. Christianson [S. D.] 101 N. W. 40.

22. Shaeffer v. Klee [Md.] 59 A. 850.

23, 24. In re Immanuel Presbyterian Church, 112 La. 348, 36 So. 408.

25. See 2 Curr. L. 1504.

26. Westminster Presbyterian Church v. Findley, 44 Misc. 173, 89 N. Y. S. 801. In the absence of fraud a civil court will not review a parliamentary decision by the presiding officer of a church meeting. Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226. Court refused to restrain change of language in which service was conducted in the absence of an allegation as to what the particular denomination required in respect

§ 7. *Actions by or against society or members.*[27]—The general rules of parties,[28] evidence,[29] and instructions,[30] apply to actions by or against the society or its members.

REMAINDERS; REMEDY AT LAW; REMITTITUR, see latest topical index.

REMOVAL OF CAUSES.

§ 1. Right to Remove from State to Federal Court (1278).
§ 2. What is a "Suit" or "Action" so Removable (1278).
§ 3. Nature of Controversy or Subject-Matter and Existence of Federal Question (1278).
§ 4. Diversity of Citizenship and Alienage of Party (1278).
§ 5. Prejudice and Local Influence and Denial of Civil Rights (1280).
§ 6. Amount in Controversy (1280).
§ 7. Procedure to Obtain and Effect the Removal (1281).
§ 8. Transfer of Jurisdiction and Other Consequences of Removal (1282).
§ 9. Practice and Procedure after Removal; Remand or Dismissal (1282).
§ 10. Transfers Between Courts of the Same Jurisdiction (1283).

The nature and extent of Federal jurisdiction is specifically treated elsewhere.[31]

to the language to be used in the services. Shaeffer v. Klee [Md.] 59 A. 850. See 2 Curr. L. 1504, n. 22; Id. 1505, n. 28.

NOTE: Jurisdiction of civil courts when property or civil rights are involved: In considering whether or not civil courts will entertain jurisdiction over church matters or church disputes and as between warring factions, it must be borne in mind that if no property rights are involved a civil court has no jurisdiction to interfere to quell religious disturbances. Ferraria v. Vasconcellos, 31 Ill. 25; Grimes v. Hannon, 35 Ind. 201, 9 Am. Rep. 690; Bird v. St. Mark's Church, 62 Iowa, 568, 17 N. W. 747; Watson v. Garvin, 54 Mo. 354. The power of the civil courts to adjudicate property disputes between warring church factions is limited to an examination of the rules of the church organization for the purpose of ascertaining the church law, and if that is not in conflict with the law of the land, all they can do is to protect the rights of the parties under the law which they have made for themselves. Long v. Harvey, 177 Pa. 473, 35 A. 869, 55 Am. St. Rep. 733, 34 L. R. A. 169. See, also, Trustees of Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663. And it is a general rule that if the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, or church government, and that question has been decided by the highest church tribunal within the organization to which it belongs, the civil court will adopt such decision as conclusive, and be governed by it in its application to the case before it. Watson v. Jones, 13 Wall. [U. S.] 680, 20 Law. Ed. 666; Goff v. Greer, 88 Ind. 122, 45 Am. Rep. 449; Trustees of Lutheran Church v. Halvorson, 42 Minn. 503, 44 N. W. 663. In the ascertainment of the rights of property devoted to church purposes as between contending factions, the civil courts will give effect to the usages and regulations of the church itself, if not inconsistent with the constitution and laws of the land (Prickett v. Wells, 117 Mo. 502, 24 S. W. 52); and if the membership of a church is divided into factions, each claiming to be the true church, civil courts have jurisdiction to determine that the title to the church property is in that faction, even though it be the minority, which is acting in harmony with the doctrine and practices which were accepted and adopted by the church before the division took place (Ferraria v. Vasconcellos, 31 Ill. 25; Smith v. Pedigo, 145 Ind. 362, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433; Gibson v. Armstrong, 7 B. Mon. [Ky.] 491; Canadian Ass'n v. Parmenter, 180 Mass. 415, 62 N. E. 740; Mont Helm Baptist Church v. Jones, 79 Miss. 488, 30 So. 714; Schlicter v. Keiter, 156 Pa. 119, 27 A. 45, 22 L. R. A. 161; Gipson v. Morris, 28 Tex. Civ. App. 555, 67 S. W. 433).—From note to Morris St. Baptist Church v. Dart [S. C.] 100 Am. St. Rep. 734, 743. See, also, 2 Curr. L. 1504, § 6.

27. See 2 Curr. L. 1505.

28. In an action by members of a church corporation composed of two nationalities to restrain other members from preventing plaintiffs from occupying the church edifice one-half of the time for separate religious services, as provided by by-laws, the corporation is not a necessary party. Peterson v. Christianson [S. D.] 101 N. W. 40. Under Laws 1902, pp. 334, 335, c. 97, § 40, subds. 6, 7, the temporalties of a Presbyterian church are managed by trustees elected by those qualified to vote; held, ruling elders and members of the session could not maintain in their own name an action to enjoin certain trustees from acting as such on the ground that they had been suspended as communicants. Westminster Presbyterian Church v. Findley, 44 Misc. 173, 89 N. Y. S. 801.

29. In a suit against the minority of a church to obtain control of the church property, held not erroneous, on an issue as to how the members voted, to permit a witness to state how many persons were present at the meeting. Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226. On such an issue a list of members compromising the minority faction was immaterial. Id.

30. In a suit against representatives of a minority faction to obtain control of church property, a charge held not prejudicially erroneous, in failing to name all the plaintiffs and all the defendants. Gipson v. Morris [Tex. Civ. App.] 83 S. W. 226.

31. See Jurisdiction, 4 Curr. L. 324.

§ 1. *Right to remove from state to Federal court.*[32]—The cause must be within some Act of Congress as to the jurisdiction of the Federal courts.[33] A cause may be removed though it could not originally have been begun in that particular Federal court.[34] A state statute revoking an insurance company's license for removing a case is not in violation of the Federal constitution.[35]

§ 2. *What is a "suit" or "action" so removable.*[36]—A prosecution by a state against a Federal official,[37] or a condemnation proceeding instituted by a railroad, is a "suit of a civil nature, at law or in equity," and is removable;[38] but a proceeding for mandamus, though damages may be awarded, is a special proceeding and not a suit and is not removable.[39]

§ 3. *Nature of controversy or subject-matter and existence of Federal question.*[40]—A suit against a corporation created under Federal laws is one arising under the laws of the United States and is removable where all of the defendants join in the petition;[41] but the fact that plaintiff is a receiver appointed by a Federal court will not authorize the removal of a case.[42] A proposition definitely determined by the supreme court of the United States ceases to be a Federal question.[43] The complaint must show that a Federal question is really involved.[44]

§ 4. *Diversity of citizenship and alienage of party.*[45]—Where all of the defendants are citizens of different states from the state of which plaintiff is a citizen, the cause is removable by any one defendant because of the diversity of citizenship.[46] Some courts will remove a cause though neither party is an inhabitant of the district;[47] but others will not assume jurisdiction without the consent of both parties,[48] or will refuse it because a suit could not have been begun in the Federal court.[49] A state is not a citizen within the meaning of the statute authorizing the removal of causes from the state to the Federal court on the ground of

32. See 2 Curr. L. 1506.

33. Where congress had created the Southern District of Texas out of part of the Eastern and provided that the pending cases should be transferred, except those in which evidence had been taken before the present judge, a case in which testimony had been taken by deposition before special examiners would be transferred. Baldwin v. Rice, 44 Misc. 64, 89 N. Y. S. 738.

34. Suit by a citizen of Pennsylvania appointed receiver by a Federal court in Massachusetts in a state court of Massachusetts against a citizen of New York. Pepper v. Rogers, 128 F. 987.

35. Prewitt v. Security Mut. Life Ins. Co. [Ky.] 83 S. W. 611.

36. See 2 Curr. L. 1506.

37. Prosecution of a U. S. deputy marshal for murder committed in the exercise of his duties. Virginia v. Felts, 133 F. 85.

38. See 2 Curr. L. 1056, n. 34, 35. The suit is civil in its nature, though using the state's power of eminent domain. Madisonville Traction Co. v. St. Bernard Min. Co., 130 F. 789. It is a suit involving a controversy between citizens of different states; four justices dissent, as the power of eminent domain can only be exercised under the authority of the state. Madisonville Traction Co. v. St. Bernard Min. Co., 25 S. Ct. 251.

39. 2 Ball. Ann. Codes & St. § 5765. Kelly v. Grand Circle, Women of Woodcraft, 129 F. 830. The jurisdiction was not necessary for the exercise by it of a jurisdiction which was otherwise previously acquired. Mystic Milling Co. v. Chicago, etc., R. Co., 132 F. 289.

40. See 2 Curr. L. 1506.

41. Suit in Texas against a Texas corporation and one created by laws of United States to hold them for joint negligence may be removed where both join in petition. Martin v. St. Louis S. W. R. Co., 134 F. 134.

42. Pepper v. Rogers, 128 F. 987.

43. Judiciary act of 1887 was intended to limit the jurisdiction of the Federal courts. Arkansas v. Choctaw & M. R. Co., 134 F. 106.

44. Must be set up in good faith. Arkansas v. Choctaw & M. R. Co., 134 F. 106.

45. See 2 Curr. L. 1507.

46. Although it involves but a single controversy. Munford Rubber Tire Co. v. Consolidated Rubber Tire Co., 130 F. 496. In 25 U. S. Stat. 433, "nonresidents of that state" construed as equivalent to "not being citizens of that state." Madisonville Traction Co. v. St. Bernard Min. Co., 130 F. 789. Where jurisdiction is acquired over a foreign corporation by attachment, either the defendant or the garnishee may remove the cause. Greevy v. Jacob Tome Institute, 132 F. 408.

47. 25 U. S. Stat. 433. Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co., 130 F. 585.

48. Both foreign corporations. Gebbie & Co. v. Review of Reviews Co., 134 F. 150.

49. Suit by a citizen of Colorado in New York against a citizen of New York and a citizen of New Jersey, both served in New York, cannot be removed by either. Appel Suit & Cloak Co. v. Baggott, 132 F. 1005.

diversity of citizenship,[50] and an action brought by a state for a penalty cannot be removed on the ground that some one else is to receive the penalty.[51] As regards the question of Federal jurisdiction, a corporation incorporated in several states[52] is a citizen of each state, unless the obligation on which the plaintiffs seek to recover was incurred in its capacity as a corporation of one particular state.[53] A partnership has no citizenship apart from that of its members.[54] A cause cannot be removed to the Federal courts where any one defendant is a citizen of the same state as the plaintiff,[55] and there is no separable controversy,[56] though no recovery is had against him,[57] unless he entirely disclaims any interest.[58] But if there is a separable controversy as to the nonresident defendant, as where there is a distinct charge of negligence against the nonresident defendant alone sufficient to constitute a cause of action,[59] or there is an allegation of acts of negligence which are essential to cause of action with which the co-defendant has no concern,[60] or one of the defendants is liable merely as the employer of the other defendants, the cause is removable by such nonresident.[61] There is no separable controversy in a suit by stockholders to enforce the stockholders' liability,[62] or in suits where concurrent acts of negligence are charged in the petition,[63] or where

50. Commonwealth v. Ayer & L. Tie Co., 25 Ky. L. R. 1068, 77 S. W. 686.

51. The state is the real party in interest in an action to recover the penalty from a railroad for failure to post delayed trains, though the prosecuting attorney and the county were entitled to the penalties recovered. Southern R. Co. v. State [Ind. App.] 72 N. E. 174.

52. See 2 Curr. L. 1507, n. 53, 54.

53. Defendant was formed by the consolidation of an Indiana and an Illinois railroad corporation, and alleged that the contract sued on was made in its capacity as an Indiana corporation; but in the absence of such an averment in the complaint, the fact that one of the plaintiffs was a citizen of Illinois prevented a removal. Dodd v. Louisville Bridge Co., 130 F. 186.

54. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

55. No jurisdiction of a suit against a foreign and a domestic corporation, where no separable controversy is claimed to exist. Keller v. Kansas City, etc., R. Co., 135 F. 202.

56. In a suit by a mortgagee against the mortgagor and his creditor, the latter has no separable controversy. Weldon v. Fritzlen, 128 F. 608. An equitable petition by a judgment creditor against his debtor and a lien creditor of the latter to subject encumbered property to the payment of the judgment does not present a separable controversy as to the lien creditor. Palmer v. Inman [Ga.] 50 S. E. 86. No separable controversy in a suit brought in Louisiana by a Missouri corporation for materials furnished against the contractors, citizens of Texas, the owners of the building, a Louisiana corporation, and a surety company, a Maryland corporation. Union Iron & Foundry Co. v. Sonnefield, 113 La. 436, 37 So. 20. Distinct causes of action on each of which a separate suit could have been maintained are separable. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650.

57. Though if defendant had been sued alone the diversity of citizenship would have authorized a removal. Southern R. Co. v. Carson, 194 U. S. 136, 48 Law. Ed. 907. It is immaterial that at the trial a peremptory instruction for the resident defendant was given. Illinois Cent. R. Co. v. Harris [Miss.] 38 So. 225.

58. Suit to remove a cloud from title against a resident and a nonresident, and the former disclaimed, thereby retiring from the suit. Day v. Oatis [Miss.] 37 So. 559. In ejectment one was joined as being in possession of the land, but disclaimed after removal, but court held there might be liability for mesne profits. Davies v. Wells, 134 F. 139.

59. Complaint against railway and employes alleged that latter ran cars at dangerous speed, and also that defendants were negligent in maintaining a steep grade close to a switch, and was held to be separable. McIntyre v. Southern R. Co., 131 F. 985.

60. Also alleged that engineer was joined as defendant with railway to fraudulently prevent removal. Henry v. Illinois Cent. R. Co., 132 F. 715.

61. Action against foreign railway corporation and several of its employes who were citizens of same state as plaintiff for wrongful death of plaintiff's intestate, where the only negligence alleged was that of the employes, presents a separable controversy as to the railway. Sessions v. Southern Pac. Co., 134 F. 313. An action for services against the employer and his agent who made the contract is not severable. Lathrop-Shea & Henwood Co. v. Pittsburg, etc., R. Co. 135 F. 619.

62. Where no separable controversy, all the defendants must join in the petition. Miller v. Clifford [C. C. A.] 133 F. 880.

63. Foreign railroad corporation and a resident of the state were made defendants. Weaver v. Northern Pac. R. Co., 125 F. 155. Where an action for tort lies against several jointly, the controversy is not separable. Joint action for personal injuries against employer and another railroad using same switching facilities. Illinois Cent. R. Co. v. Harris [Miss.] 38 So. 225. Master and servant both made defendants. Roberts v. Shelby Steel Tube Co. [C. C. A.] 131 F. 729.

the injury was caused by the joint tortious acts of both,[64] or because defendants might present separate and different defenses.[65] A fraudulent joinder of a resident defendant will not defeat the right to removal where the court finds the averments as to joint liability are palpably untrue,[66] but a petition merely alleging that co-defendants were fraudulently joined to defeat the jurisdiction is insufficient to procure a removal.[67] Whether there is a separable controversy must be determined by the state of the pleadings at the time of making the motion for removal,[68] but only indispensable parties will be considered.[69] In determining removability the position assigned to parties by the pleader may be disregarded and the parties considered according to their real interests.[70] The determination by the state court that the plaintiffs had a right to sue in their individual capacity determines the defendants' right of removal.[71] In suits by stockholders, the corporation is to be aligned with one or the other of the parties according to the facts.[72]

§ 5. *Prejudice and local influence and denial of civil rights.*[73]—A cause cannot be removed for prejudice or local influence where one of defendants is a citizen of the same state as plaintiff.[74] The interposition of a counterclaim does not make the original plaintiff a defendant so as to entitle him to remove for local prejudice.[75]

§ 6. *Amount in controversy.*[76]—A cause is not removable unless the amount claimed against each defendant is more than $2,000,[77] excluding the interest prayed for.[78] The allegation of value, if controverted, must be established by proof.[79] In actions for unliquidated damages, the amount in controversy is what the plaintiff in good faith demands,[80] and where no amount is stated in the complaint,

64. Plaintiff seeks to enjoin defendant corporation from practicing a secret process owned by plaintiff and communicated to defendant by the breach of trust of another defendant, a citizen of another state and who had been an employe of plaintiff. Vulcan Detinning Co. v. American Can Co., 130 F. 635.

65. A complaint for wrongful death of intestate against his employer, a foreign corporation and fellow employes, citizens of same state as himself, alleging a defective electric crane, and that the employes were negligent in operating it, did not state a separable controversy, as there were concurring acts of negligence. American Bridge Co. v. Hunt [C. C. A.] 130 F. 302.

66. The engineer of the train that killed plaintiff's intestate was joined with the railroad as defendants, though it was clear there was no expectation of recovery against the engineer and that the sole purpose of joining him was to defeat the right to removal. Crawford v. Illinois Cent. R. Co., 130 F. 395. Joinder of engineer of train and foreign railway company. Dishon v. Cincinnati, etc., R. Co. [C. C. A.] 133 F. 471.

67. Mere conclusions and not facts showing a separable controversy in a suit against a railroad and its employes. Rutherford v. Illinois Cent. R. Co. [Ky.] 85 S. W. 199.

68. It must appear that each party is the citizen of some state. Laden v. Meck [C. C. A.] 130 F. 877. The separable character of the controversy is to be determined from the complaint in the absence of an averment of a pretense to defeat Federal jurisdiction. Illinois Cent. R. Co. v. Harris [Miss.] 38 So. 225.

69. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650. Parties improperly joined and sham causes of action may be disregarded without evidence aliunde if the facts are apparent of record. Id.

70. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650.

71. Notwithstanding an averment that they sued as stockholders, and the recovery they sought was for the sole benefit of a Kentucky corporation. Dodd v. Louisville Bridge Co., 130 F. 186.

72. The corporation is an indispensable party. Groel v. United Elec. Co., 132 F. 252.

73. See 2 Curr. L. 1509.

74. Weldon v. Fritzlen, 128 F. 608. A nonresident defendant may remove for local prejudice, though plaintiff and some of the defendants are residents. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650.

75. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 135 F. 837.

76. See 2 Curr. L. 1509.

77. Suit against two railroad companies where no joint liability was alleged, for $1,999, against one, and $971 against the other, could not be removed. Texas & P. R. Co. v. Dishman [Tex. Civ. App.] 85 S. W. 319.

78. Where plaintiff sued insurance company to recover $1,527.25 assessments with interest, and prayed for judgment for $2,346.50 and interest on this last from Sept. 1, 1900, he did not convert the interest into principal, though he had asked for compound interest. Gilson v. Mutual Reserve Fund Life Ass'n, 129 F. 1003.

79. Davies v. Wells, 134 F. 139.

80. Chicago, etc., R. Co. v. Stone [Kan.] 79 P. 655.

an allegation in the petition for removal will be insufficient to oust the state court of jurisdiction.[81] An action by a nonresident for a sum less than $2,000, where a counterclaim is filed for a greater sum, may be removed by the plaintiff;[82] but whether the amount of the counterclaim shall be added to plaintiff's claim in determining the jurisdiction is doubtful under the authorities.[83] It is sufficient if the requisite amount in controversy exists at the time of removal.[84]

§ 7. *Procedure to obtain and effect the removal.*[85]—The filing of the requisite petition and bond for removal instantly operates to transfer the case,[86] and it is the duty of the state court to proceed no further.[87] These must be filed at or before the time the defendant is required to answer or to plead to the declaration,[88] or the plaintiff is required to plead to the counterclaim that may have been filed,[89] but it may be after a party has filed notice of intention to suffer a default,[90] or after he has filed a motion to dissolve a preliminary injunction and had a hearing thereon.[91] After a judgment has been rendered in the state court and affirmed as to plaintiff's cause of action but reversed as to a counterclaim, the cause is not subject to removal.[92] In the case of a criminal prosecution they need not be filed until after the indictment of defendant.[93] The time is not extended where the case may be appealed to another court to try de novo.[94] The jurisdictional facts stated in the petition for removal may be denied, in which case the court will receive evidence on the issue,[95] where not denied, they are taken to be true,[96] and where one demurs to the petition for removal, he cannot aid himself by reference to what the evidence will show.[97] An amendment to the petition for removal may with the consent of the parties be permitted in the circuit court of appeals for an inadvertent though fatal omission.[98] Where jurisdiction depends on citizenship, such citizenship must be distinctly alleged,[99] and not merely their resi-

81. Complaint to compel a railroad to deliver coal on a private siding, and the latter alleged that the matter in controversy, involving the right of the railroad to manage its large interstate commerce without interference, largely exceeded the sum of $2,000. State v. Southern R. Co., 135 N. C. 81, 47 S. E. 221.

82. Price v. Ellis & Co., 129 F. 482.

83. Claim of $1,022.61, counterclaim of $3,500, and jurisdiction refused as the case was doubtful. Crane Co. v. Guanica Centrale, 132 F. 713.

84. Suit to recover $2,025 and cross bill for $1,700, after removal complainant dismissed his bill, but court retained jurisdiction. Kirby v. American Soda Fountain Co., 194 U. S. 141, 48 Law. Ed. 911.

85. See 2 Curr. L. 1511.

86. Plaintiff cannot defeat the right afterwards by amending his petition so as to reduce the amount of his demand below $2,000. Chicago, etc., R. Co. v. Stone [Kan.] 79 P. 655.

87. But if removal ordered on an insufficient petition, the aggrieved party may appeal to the appellate court of the state. Illinois Cent. R. Co. v. Jones' Adm'r, 26 Ky. L. R. 31, 80 S. W. 484.

88. Where one of the heirs of a decedent appeared in the probate court and filed objections to the allowance of a claim, he had no right to subsequently petition for a removal. Mayer v. Schneider, 212 Ill. 286, 72 N. E. 436.

89. Nonresident sued for a sum less than $2,000 and on the filing of a counterclaim for over that amount he was allowed to remove the cause. Price & Hart v. Ellis & Co., 129 F. 482.

90. Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 125 F. 631.

91. Where his petition was presented before the time when by the laws of the state he was required to plead. Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 131 F. 657.

92. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 135 F. 837.

93. Rev. St. § 643, authorizes removal into "the circuit court next holden in the district," and where there are several places of trial in the district, the petition may be filed at the place where the next term is to be held, though filing at a different place is not a ground for remanding the case. State v. Felts, 133 F. 85.

94. Madisonville Traction Co. v. St. Bernard Min. Co., 25 S. Ct. 251.

95. But it will not remand the case on plaintiff's affidavit denying the allegations of the petition. Weaver v. Northern Pac. R. Co., 125 F. 155.

96. Allegation of fraudulent joinder of co-defendant to prevent removal. Dishon v. Cincinnati, etc., R. Co. [C. C. A.] 133 F. 471.

97. Day v. Oatis [Miss.] 37 So. 559.

98. Failure to aver the citizenship of the plaintiff. Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13.

99. Insufficient where it was alleged that defendant was a "resident" of a state other than that of which plaintiff was a citizen, and was not a "citizen or resident" of the

dence.[1] The petition should allege specifically the states of which each of the parties are respectively citizens,[2] even though there is a very large number of them;[3] but amendment may be permitted when this is omitted.[4] An allegation that defendant is a citizen of another state is not equivalent to an allegation of nonresidence.[5] Where a separable controversy is claimed, the petition must be founded on that.[6] It has been held that a plaintiff, when he has been made in effect a defendant by the filing of a counterclaim, may remove the cause.[7] Petitions for removal are to be decided not on doubts but on a fair preponderance of the facts,[8] and the fact that an erroneous removal may be reviewed on certificate in the Federal supreme court while a remand cannot be is to be considered.[9]

§ 8. *Transfer of jurisdiction and other consequences of removal.*[10]—The filing of a petition ousts the jurisdiction of the state court if a removable cause is disclosed by the record.[11] The Federal court acquires complete jurisdiction and is not concluded by any proceedings of the state court before removal.[12] It takes the case on removal in the condition in which it stood in the state court at the time of removal,[13] thus proceedings do not have to be repeated,[14] and motions pending[15] or the attachment by which the suit was begun are transferred to the Federal court for determination.[16] To protect its jurisdiction the Federal court may enjoin further proceedings in the state court by the plaintiff.[17]

§ 9. *Practice and procedure after removal; remand or dismissal.*[18]—The removal itself does not extend the time for answering,[19] but a motion to remand does extend the time until the first rule day after the determination thereof.[20] On removal of an equity case, the complaint must be redrafted to conform to the

state of which plaintiff was a citizen. Laden v. Meck [C. C. A.] 130 F. 877. An averment that plaintiff is a citizen of another state is insufficient where it appears that it is a partnership and there is no showing of the citizenship of its members. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

1. Allegation that plaintiff was a resident of Louisiana is insufficient. Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13.

2. Thompson v. Stalmann, 131 F. 809.

3. Not sufficient to allege a diversity of citizenship in general terms, where there were over 3,000 defendants who were doing business together without incorporation. Jones v. Adams Exp. Co., 129 F. 618.

4. Petition alleged diverse citizenship and that the amount in controversy exceeded $2,000. Thompson v. Stalmann, 131 F. 809.

5. In a suit in Oregon, petition alleged that defendant was a citizen of Washington and a nonresident of Oregon. Irving v. Smith, 132 F. 207.

6. Petition against a domestic and foreign corporation failed to make any such claim. Keller v. Kansas City, etc., R. Co., 135 F. 202.

7. Price v. Ellis & Co., 129 F. 482.

Contra: A nonresident sued in trespass to try title, and defendant filed a cross plea to quiet his title and demanding affirmative relief, but plaintiff was not allowed to remove the case. Smithers v. Smith [Tex. Civ. App.] 80 S. W. 646.

8, 9. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650.

10. See 2 Curr. L. 1513.

11. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650.

12. Defendant did not have notice of a condemnation proceeding until his land was condemned, when he removed the case, and the Federal court held it had the right to consider the plaintiff's right to the land, as well as the amount of compensation. Madisonville Traction Co. v. St. Bernard Min. Co., 130 F. 789.

13. A lien obtained by attachment in the state court is not lost or terminated, but will be enforced by the Federal court. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

14. Where defendant in state court had filed notice of his intention to suffer a default, he is not required to file a second notice in the Federal court. Johnson v. Bridgeport Deoxidized Bronze & Metal Co., 125 F. 631.

15. Motion to make complaint more definite and certain. Bryce v. Southern R. Co., 129 F. 966.

16. Rule to show cause why attachment should not be dissolved. Commonwealth Trust Co. v. Frick, 120 F. 688.

17. Notwithstanding Rev. St. § 720, which limits the right to enjoin state courts to bankruptcy proceedings. St. Bernard Min. Co. v. Madisonville Traction Co., 130 F. 794.

18. See 2 Curr. L. 1513.

19. Except that the period from the date of removal until the record reaches the Federal court is not counted. Bryce v. Southern R. Co., 129 F. 966.

20. Where default was made because of pendency of motion to make complaint more definite, the judgment will be set aside on terms. Bryce v. Southern R. Co., 129 F. 966.

practice of the Federal courts,[21] but a judgment rendered where the pleadings were not recast, though erroneous, is not void and cannot be collaterally attacked.[22] In the trial of a criminal prosecution, state practice will be followed in substantive matters,[23] and the sentence will be in accordance with state law, and the prisoner will be delivered to the state officials for punishment;[24] but where the state fails to prosecute, the court will direct the jury to bring in a verdict of not guilty.[25] On a motion to remand, the jurisdiction must be clear in order to justify the court in retaining the case,[26] for it is its duty to remand where jurisdiction is doubtful,[27] and this it must do at any stage of the proceedings and of its own motion, when any defect in the jurisdiction appears.[28] The rule is the same in the appellate courts.[29] There can be no waiver of the right to remand where plaintiff immediately moves to remand on the removal of the case.[30] After a case has been removed, defendant may appear specially and move to dismiss on the ground that the court had not obtained jurisdiction of defendant's person.[31] No dismissal will be granted because a suit was begun by attachment and not by personal service,[32] and such attachment granted in the state court before removal will not be vacated by the Federal court.[33] Plaintiff may dismiss his case after removal and begin again in the state court[34] and sue there for a smaller sum.[35] The court of appeals will review a removal on appeal of a removed cause, though no objection is made.[36]

§ 10. *Transfers between courts of the same jurisdiction.*[37]—Acts authorizing the transfer of cases from city to county courts are constitutional.[38] In Indiana

21. Complaint alleged a cause of action at law, and one in equity. Motley Co. v. Detroit Steel & Spring Co., 130 F. 396. Equity rule 94 that a bill by a stockholder against a corporation shall be verified cannot be applied to a bill filed in a state court and subsequently removed. Maeder v. Buffalo Bill's Wild West Co., 132 F. 280.

22. Money judgment in an equity suit. Hatcher v. Hendrie & B. Mfg. & Supply Co. [C. C. A.] 133 F. 267.

23. Such as impaneling and charging the jury, the number of challenges allowed, the competency of witnesses, and in confining the jurors during trial. State v. Felts, 133 F. 85.

24. To be executed or imprisoned, or kept in custody until his fine is paid, as the case may be. State v. Felts, 133 F. 85.

25. State v. Felts, 133 F. 85.

26. It will be assumed that under state laws plaintiffs had the right to sue in their own names, and that the pleadings were appropriate, until the contrary is shown. Dodd v. Louisville Bridge Co., 130 F. 186. It cannot determine whether the cause is sufficiently stated. Mystic Milling Co. v. Chicago, etc., R. Co., 132 F. 289.

27. In stockholders' suits the corporation is aligned with plaintiffs or defendants as the persons controlling are in favor of one or the other. Groel v. United Elec. Co., 132 F. 252. Doubtful if counterclaim can be added to claim to determine the amount in controversy. Crane Co. v. Guanica Centrale, 132 F. 713. Federal question decided by United States Supreme Court. State v. Choctaw & M. R. Co., 134 F. 106.

28. Case remanded by court of appeals as not presenting a separable controversy. American Bridge Co. v. Hunt [C. C. A.] 130 F. 302.

29. When the court is without jurisdiction, the judgment of the circuit court will be reversed and costs awarded against the removing party. Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13.

30. Subsequent appearance. Pepper v. Rogers, 128 F. 987.

31. A New Hampshire insurance corporation was sued in Maine, the insurance commissioner being served with process, though the corporation was not licensed to do business there. Greenleaf v. National Ass'n of R. Postal Clerks, 130 F. 209. Defendant's secretary was induced fraudulently to go to another state, where he was served with process. Cavanagh v. Manhattan Transit Co., 133 F. 818. No jurisdiction over defendant's person. Gebbie & Co. v. Review of Reviews Co., 134 F. 150.

32. Hubbard v. Central of Georgia R. Co., 135 F. 256.

33. Though it may never be effective if no personal service is had, as service by publication is not provided for in Federal practice in actions such as this. Blumberg v. Shaw Co., 131 F. 608.

34. If within 12 months of the accrual of his cause of action, the first action was for $20,000, the second for $2,000. Nipp's Adm'x v. Chesapeake & O. R. Co., 25 Ky. L. R. 2335, 80 S. W. 796.

35. Action against a domestic and foreign corporation which was removed to the Federal court because the former was fraudulently joined and was then dismissed, and plaintiff sued again in the state courts for less than $2,000. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 83 S. W. 22. See 2 Curr. L. 1514, n. 42, 43.

36. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

37. See 2 Curr. L. 1510.

38. Loc. Acts 1903, p. 369, authorizing transfer from city court of Bessemer to

a case may be transferred from the appellate to the supreme court, where the opinion of the former contravenes a ruling of the latter, or a new question of law is involved and is erroneously decided.[39] In New York a defendant may, after issue is joined and before an adjournment, remove the case from the municipal to the city court[40] on the filing of a proper bond with the application.[41] The pleadings remain the same after removal unless amendment is allowed,[42] or the pleadings are ordered to be reduced to writing.[43] A motion made to reduce the amount claimed will defeat defendant's right to a removal.[44] If the judgment demanded exceeds $100, defendant may remove from a justice in any town in the county of Kings to the county court thereof.[45] Where a justice of a municipal court is disqualified, the cause may be transferred to an adjoining district.[46]

RENDITION OF JUDGMENT; REPLEADER; REPLEGIANDO, see latest topical index.

REPLEVIN.

§ 1. Nature and Form of Action—Distinctions (1284).
§ 2. Right of Action and Defenses (1285).
§ 3. Jurisdiction and Venue (1288).
§ 4. The Affidavit (1288).
§ 5. Plaintiff's Bond (1288).
§ 6. The Writ and Its Execution (1288).
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§ 8. Trial (1290).
§ 9. Judgment (1291).
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§ 11. Review (1293).
§ 12. Liability on Bonds and of Receiptors, etc. (1293).

§ 1. *Nature and form of action—distinctions.*[47]—Replevin, or claim and delivery as it is sometimes called,[48] is an ancient common-law proceeding,[49] and is one of several remedies[50] allowed the owner of personal property[51] wrongfully taken or withheld from his possession, its object being to recover such possession,[52]

circuit court of Jefferson county, was not bad as a special law, or as interfering with the court's power as to the venue of cases, or as vesting authority in one court to control the clerk of another. Dudley v. Birmingham R., Light & Power Co., 139 Ala. 453, 36 So. 700.

39. The supreme court cannot examine the record to see if the reasons for the transfer are sustained, but can only look at the opinion of the appellate court, and a denial of the transfer merely approves the opinion in respect to the reasons assigned for a transfer. City of Huntington v. Lusch [Ind.] 71 N. E. 647.

40. An oral answer is insufficient. Hinrichs v. Interurban St. R. Co., 43 Misc. 654, 88 N. Y. S. 193. Too late where case had been adjourned on the joint consent of the parties. Syms v. American Automobile Storage Co., 43 Misc. 395, 87 N. Y. S. 484.

41. Where the bond in one place omitted the letter "s" after defendant, though in all other places it referred to them in the plural number, it was not objectionable. New York Lumber & Storage Co. v. Noone, 92 N. Y. S. 349.

42. A demurrer to new matter in answer is an additional pleading and not entitled to consideration. Vail v. Blumenthal, 89 N. Y. S. 287.

43. But such order will not authorize the filing of new pleadings. Halloran v. Coney Island Jockey Club, 81 N. Y. S. 143.

44. Though defendant simultaneously moved to remove the cause, the denial may be reviewed on appeal, even if there was no supplemental answer and plea to the jurisdiction of the court. Sherwood v. New York Tel. Co., 91 N. Y. S. 387.

45. May remove from the municipal court in the borough of Brooklyn to the county court. Raynes v. Bloom, 44 Misc. 81, 89 N. Y. S. 732.

46. Where the only motion was to transfer to the district in which defendant lived, and which was denied, defendant cannot complain that the case was not transferred. Lesser v. Adolph, 91 N. Y. S. 705.

47. See 2 Curr. L. 1514.

48. Cyc. Law Dict. "Replevin."

49. Three States Lumber Co. v. Blanks [C. C. A.] 133 F. 479.

50. The owner of goods wrongfully taken from his possession may proceed in tort to recover damages, or waive the tort and sue for the value of the goods upon the fiction that the property was sold, or replevin the property in case it can be reached. Harter v. Pearson, 5 Ohio C. C. [N. S.] 304.

51. A **building** being regarded as personal property, replevin will lie to recover it. Adams v. Tully [Ind.] 73 N. E. 595. Fact that it is personalty must be alleged in the complaint. Id. See 2 Curr. L. 1514, n. 46. An owner may maintain replevin for **timber** cut on his land. Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356. As to fixtures, see Bronson, Fixt. § 110.

52. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243; Three States Lumber Co. v. Blanks [C. C. A.] 133 F. 479.

and consequently the issue is which of the parties was entitled to possession at the commencement of the action.[53] As a general rule replevin will not lie for the recovery of an undivided part of personal property,[54] though an exception is sometimes made where the property sought to be replevied consists of a part of a larger mass of the same nature and quality, which can be easily divided into aliquot parts.[55]

§ 2. *Right of action and defenses.*[56]—In order to maintain his action plaintiff must plead and prove the following facts: (1) that he is the owner of, or has a special interest in the property in controversy;[57] (2) that he is entitled to the immediate possession thereof;[58] (3) that defendant wrongfully detains the same,[59] though it has been held that a party is liable in replevin if concerned in the wrongful sale of the property, even though he had no possession thereof.[60] As corollaries to the first and second elements it is held that plaintiff must recover on the strength of his own title,[61] and this title must be such as to give him the legal right to possession.[62] The special property conferred by possession,[63] espe-

53. Cunningham v. Stoner [Idaho] 79 P. 228; Bartlett v. Ridgley Nat. Bank [Kan.] 78 P. 414. Plaintiff's wrongdoing in relation to the property after the commencement of the action cannot be litigated therein. Id. In replevin to recover stock seized by mortgagee, held proper to permit an amendment to the petition setting up that the mortgage was procured by fraud and was without consideration. Sylvester v. Ammons [Iowa] 101 N. W. 782. See 2 Curr. L. 1514, n. 45.

54. Schwarz v. Lee Gon [Or.] 80 P. 110.

55. Replevin will lie for lumber though it cannot be identified, because of its being intermixed with other lumber of the same kind and value. Mine La Motte Lead & Smelting Co. v. White [Mo. App.] 80 S. W. 356. Exception held not to apply to an action to recover an undivided interest in a certain number of bales of hops, which vary in weight and quality. Schwarz v. Lee Gon [Or.] 80 P. 110.

56. See 2 Curr. L. 1514.

57. Robb v. Dobrinski, 14 Okl. 563, 78 P. 101. Where a third person transferred his right in timber to plaintiff prior to replevin, it is immaterial to defendant that part of the timber was cut from the land of such third person, and it was impossible to distinguish it. Lieberman v. Clark [Tenn.] 85 S. W. 258.

Evidence held sufficient to sustain a verdict in favor of plaintiff where she testified that she was the owner of the property, and had notified defendant not to receive or advance money on any article of personalty brought to his place of business by her husband. Mariotte v. Bremer, 33 Ind. App. 701, 71 N. E. 250. Evidence held insufficient to show that transfer of certificates of deposit was without consideration and void. Sather v. Sexton [Minn.] 101 N. W. 654. Evidence held sufficient to sustain verdict for plaintiff. Day v. Ferguson & Wheeler [Ark.] 85 S. W. 771. Evidence held sufficient to show plaintiff's ownership as a matter of law. Roberts v. Francis [Wis.] 100 N. W. 1076.

58. Robb v. Dobrinski, 14 Okl. 563, 78 P. 101; Harding v. Eldridge [Mass.] 71 N. E. 115.

59. Robb v. Dobrinski, 14 Okl. 563, 78 P. 101. Defendant must have actual or constructive possession. Id. Where complaint affirmatively showed that when the action was commenced defendant had sold and disposed of the property, held not to state a cause of action for replevin. Glass v. Basin & Bay State Min. Co. [Mont.] 77 P. 302. One cannot maintain replevin for property in his own possession. Clute v. Everhart [Mich.] 100 N. W. 124. In an action against a constable for the wrongful seizure of property, the sureties on his official bond are improperly made defendants where they are in no manner concerned in the seizure and detention of the property. Gallick v. Bordeaux [Mont.] 78 P. 583. An instruction authorizing a verdict for defendant unless the sale under which plaintiff claimed was followed by "an actual and continued change of possession," held improperly modified by striking out the words "and continued." Id.

60. Tyler v. Young, 92 N. Y. S. 818.

61. Harding v. Eldridge [Mass.] 71 N. E. 115; Bierman v. Reinhorn [N. J. Law] 58 A. 1083; Robb v. Dobrinski, 14 Okl. 563, 78 P. 101. Trover to recover certain personalty. Central Bank of Oakland v. Georgia Grocery Co., 120 Ga. 883, 48 S. E. 325. An instruction authorizing a verdict for plaintiff if there were some particular defects in the justification relied upon by defendant is erroneous. Gallick v. Bordeaux [Mont.] 78 P. 583. See 2 Curr. L. 1514, n. 50.

62. An equitable right is insufficient. Fisher v. Alsten, 186 Mass. 549, 72 N. E. 78. Where plaintiff claimed to be the winner of a voting contest, the judges having decided otherwise, held, his title was insufficient to maintain replevin. Fisher v. Alsten, 186 Mass. 549, 72 N. E. 78; Clerks' Benev. Union v. Knights of Columbus [S. C.] 50 S. E. 206. A chattel mortgagee taking possession after default, the mortgagor has no longer any legal title to the property and cannot maintain replevin. Though the sale was not made in strict conformity with Rev. St. 1898, § 2316a, relative to foreclosure sales. John O'Brien Lumber Co. v. Wilkinson [Wis.] 101 N. W. 1050. See 2 Curr. L. 1514, n. 51.

63. Lieberman v. Clark [Tenn.] 85 S. W. 258.

cially where the possessor asserts a claim of ownership,[64] is sufficient to support replevin against a trespasser. As to things severed from the realty, the possession of the land at the time determines the right of possession to such things,[65] with this single exception, that where neither party has actual possession of the land at the time of the severance, the right to the possession must be determined by the title to the land,[66] and in this connection it should be remembered that possession of a part is possession of the whole.[67] A vendor rescinding a sale for fraud may retain replevin to regain the goods,[68] and if the sale is conditional and the conditions are not complied with, the seller may maintain replevin even as against a bona fide purchaser.[69] As to whether or not defendant was in possession at the commencement of the action is largely a question of fact for the jury,[70] and may be inferred from other facts.[71] By pleading title in himself defendant waives the technical defense that he was not in possession at the commencement of the action,[72] and by giving a forthcoming bond estops himself to deny such possession;[73] but he is not thereby estopped to deny plaintiff's title to the property.[74] The fact that defendant admits the execution of the instrument under which plaintiff claims does not preclude him from attacking its validity.[75] The courts do not view with favor a defense that one was not technically in possession at the commencement of the action.[76]

Plaintiff never having been in actual possession, defendant may defeat the action by showing title in a third party,[77] but defendant's possession being referable to a wrongful taking from plaintiff, he must connect himself with such superior title of the third party.[78]

64. The owner of a tax deed fair on its face having acquired possession through an agent has a sufficient title to maintain replevin against a mere trespasser. Dresser v. Lemma [Wis.] 100 N. W. 844.

65, 66. Lieberman v. Clark [Tenn.] 85 S. W. 258.

67. See Lieberman v. Clark [Tenn.] 85 S. W. 258; also Adverse Possession, 3 Curr. L. 51.

68. Kuh, N. & F. Co. v. Glucklick, 120 Iowa, 504, 94 N. W. 1105. Proof of the fraud is part of the seller's case in chief. Id. Written statements, furnished seller at his request, showing purchaser's assets and liabilities, held admissible. Id. Purchaser's cash book held admissible. Id. See Sales, 2 Curr. L. 1568 et seq.

69. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646.

70. Where plaintiff let 4 turkeys loose and his evidence tended to show that they went toward defendant's place and never returned home, the question as to whether they were in defendant's possession and subject to replevin is for the jury. Clute v. Everhart [Mich.] 100 N. W. 124.

71. Defendant admitting that the property was stored in his name, it may be inferred that he controlled the possession. Tyler v. Young, 92 N. Y. S. 818.

72. In this case he had also made a general denial. McGinley v. Wirthele [Neb.] 101 N. W. 244.

73. Strahorn-Hutton-Evans Commission Co. v. Heffner [Ark.] 85 S. W. 784; Hochberger v. Baum, 85 N. Y. S. 385; Boyce v. Augusta Camp, No. 7,429, 14 Okl. 642, 78 P. 322. Where defendant gave a forthcoming bond and his possession was not disputed, held instruction requiring plaintiff to prove such fact was harmless. Id.

74. That it was not covered by plaintiff's mortgage. Strahorn-Hutton-Evans Commission Co. v. Heffner [Ark.] 85 S. W. 784. That title to the property is in a third person and that he held it as agent for such third party at the commencement of the suit. Boyce v. Augusta Camp, No. 7,429, 14 Okl. 642, 78 P. 822. Admission in a redelivery undertaking of the identity of the goods will not justify exclusion of evidence as to circumstances of the defendants' possession. Hochberger v. Baum, 85 N. Y. S. 385.

75. That bill of sale was fraudulent, intended as a mortgage and improperly executed to operate as such. Culver v. Randle [Or.] 78 P. 394.

76. The fact that the property was taken under a void writ and that a second writ was issued, which under Rev. St. 1899, § 3850, constituted the commencement of the suit, held not to affect the probative force of the return to the first writ, as showing that defendants were in possession of the property when suit was instituted. American Nat. Bank v. Strong [Mo. App.] 85 S. W. 639.

77. Robb v. Dobrinski, 14 Okl. 563, 78 P. 101. See, also, Dresser v. Lemma [Wis.] 100 N. W. 844.

78. Raber v. Hyde [Mich.] 101 N. W. 61; Dresser v. Lemma [Wis.] 100 N. W. 844. Lumber being taken from the possession of plaintiff, it is immaterial that the land from which it was cut was in the possession of a stranger to an action. Id. See, also, Levy v. Hohweisner, 91 N. Y. S. 552, where defendants alleging title in a third party were held entitled to offer evidence thereof and

No demand and refusal need be shown where the defendant places his defense upon his right of possession at the time of the commencement of the action.[79] As a general rule chattel mortgagees cannot maintain replevin against the mortgagor after default or conditions broken without demand for the possession,[80] but a prior demand is not necessary to support replevin of property held under a conditional sale, whereby the title remained in plaintiff.[81] Where the goods of an execution debtor and a stranger to the action are so intermingled that they cannot be readily distinguished, and the stranger fails to designate his portion, the officer may levy on the whole, and demand is a condition precedent to the bringing of replevin by the stranger,[82] but the designation being made, such a demand is not requisite to the maintenance of such action.[83] A demand is unnecessary where it would be futile or unavailing.[84] A party breaking a contract under which he holds property, the other party is entitled to maintain replevin without performing his part of the contract.[85]

An equitable defense may be interposed to a replevin suit.[86] A champertous deed is no defense to an action to recover timber cut from land.[87]

That one brings a suit on a replevin bond does not constitute an election of

to call the person, so alleged to have title, as a witness, irrespective of the fact that he has not availed himself of his right, under Municipal Court Act, § 115a, to appear and defend.

79. Sellers v. Catron [Ind. T.] 82 S. W. 742; Bartlett v. Ridgley Nat. Bank [Kan.] 78 P. 414.

NOTE: Demand and refusal are necessary to sustain replevin where the defendant came lawfully into the possession of the property, or where his possession is not wrongful. Oleson v. Merrill, 20 Wis. 462, 91 Am. Dec. 428; Galvin v. Bacon, 11 Me. 28, 25 Am. Dec. 258; Fleischman v. Glaser, 28 Misc. 555, 59 N. Y. S. 686; Combs v. Bays, 19 Ind. App. 263, 49 N. E. 358; Adams v. Wood, 51 Mich. 411; Keller v. Robinson, 153 Ill. 458, 38 N. E. 1072. Thus, if goods have been sold, the title being reserved in the vendor as security for the payment of the purchase money and payments have been made in instalments and received, the vendor cannot, after the final day for completing payment, where the vendee is in default, retake the goods without notice or demand. People's, etc., Carpet Co. v. Crosby, 57 Neb. 282, 77 N. W. 658, 73 Am. St. Rep. 504; Grand Rapids Chair Co. v. Lyon, 73 Mich. 438, 41 N. W. 497. Contra, Forbes v. Martin, 7 Houst. [Del.] 375, 32 A. 327. In such a case, a tender on demand of the amount remaining due is sufficient, however, to retain the right of possession in the vendee. People's, etc., Carpet Co. v. Crosby, 57 Neb. 282, 77 N. W. 658, 73 Am. St. Rep. 504. No demand is necessary to sustain replevin where the possession of the property was originally acquired by tort. Sargent v. Sturm, 23 Cal. 359, 83 Am. Dec. 118; Guthrie v. Olson, 44 Minn. 404, 46 N. W. 853; Oleson v. Merrill, 20 Wis. 462, 91 Am. Dec. 428; Breitenwischer v. Clough, 111 Mich. 6, 69 N. W. 88, 66 Am. St. Rep. 372; Galvin v. Bacon, 11 Me. 28, 25 Am. Dec. 258; Richey v. Ford, 84 Ill. App. 121; Cottrell v. Carter, 173 Mass. 155, 53 N. E. 375. A demand is not necessary in replevin where it would be futile or unavailing (Barton v. Mulvane, 59 Kan. 313, 52 P. 883; Bunce v. McMahon, 6 Wyo. 24, 42 P. 23), as where defendant admits he has disposed of the property (Torres v. Rogers, 28 Misc. 176, 58 N. Y. S. 1104), or where he sets up title in himself (Triplett v. Rugby Distilling Co., 66 Ark. 219, 49 S. W. 975; Barton v. Mulvane, 59 Kan. 313, 52 P. 883). No demand is necessary where the only issue is the taking. Woodward v. Edmunds, 20 Utah, 118, 57 P. 848. If property sought to be replevied is in the possession of an agent, a demand upon him binds the principal. Udell v. Slocum, 56 Ill. App. 216; Congdon v. Bailey, 121 Mich. 570, 80 N. W. 369. The only effect of a failure to make a demand is to prevent a maintenance of the present suit. Webster v. Brunswick-Balke, etc., Co., 37 Fla. 433, 20 So. 536.—From note to Sinnott v. Feicock [N. Y.] 80 Am. St. Rep. 736, 753 et seq.

80. Black v. Pidgeon, 70 N. J. Law, 802, 58 A. 372.

81. Norman Printers' Supply Co. v. Ford [Conn.] 59 A. 499.

82. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722. Where the goods consisted of women's and men's wearing apparel, held not so intermingled as to necessitate their being distinguished by the stranger to the process. Id.

83. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

84. A principal repudiating an exchange made by his agent and demanding a return of the property from the transferee, which demand is refused, need not tender a return of the property received by the agent before commencing replevin. Roberts v. Francis [Wis.] 100 N. W. 1076. See supra, Note: Demand and refusal.

85. Where property was held as security, held pledgor need not tender amount due as a prerequisite to maintaining replevin, the pledgee having broken the contract. Sellers v. Catron [Ind. T.] 82 S. W. 742.

86. American Soda Fountain Co. v. Futrall [Ark.] 84 S. W. 505.

87. Lieberman v. Clark [Tenn.] 85 S. W. 258.

remedies, precluding plaintiff from maintaining an action of re-replevin,[88] but the defeated party in a replevin suit cannot bring re-replevin except where some illegality prevents the matter from being res judicata.[89]

§ 3. *Jurisdiction and venue.*[90]—In cases of concurrent jurisdiction, the court first obtaining it will have precedence.[91]

§ 4. *The affidavit.*[92]—The affidavit should clearly advise the defendant of the nature and extent of plaintiff's claim, but in this connection it may be read with reference to the petition.[93] It should describe and give the value of each article, but failure to observe this rule may be remedied by subsequent pleadings.[94] Statutes requiring plaintiff to make an affidavit of value apply only to actions wherein immediate possession is sought.[95] Nonprejudicial, clerical errors will be disregarded.[96] A practice or custom in the clerk's office is incompetent to prove the contents of a lost affidavit.[97]

§ 5. *Plaintiff's bond.*[98]—The necessity for plaintiff's bond is statutory.[99] The omission of the date in the bond is immaterial,[1] but a bond purporting to be given by a corporation, but being signed only by an individual, is defective.[2] A motion to dismiss for a defective bond must be filed at the first term and is waived by pleading to the merits before the motion is filed.[3] The plaintiff and his surety are estopped to take advantage of defects in their bond, the writ having been issued on it, and the property having been taken under the writ.[4]

§ 6. *The writ and its execution.*[5]—A release of the goods levied on or seized under the writ is an abandonment thereof, and invalidates the levy.[6] The defendant being adjudged a bankrupt in a proceeding, the petition in which was filed within four months of the seizure of the property under the writ in replevin, the lien obtained thereby is rendered void.[7] Plaintiff having obtained actual pos-

88. Douglass v. Galwey [Conn.] 58 A. 2.

89. Ginsburg v. Morrall, 105 Ill. App. 213.

90. See 2 Curr. L. 1516.

91. The circuit court may not take by writ of replevin goods in the hands of an assignee appointed by the county court. Hillis v. Asay, 105 Ill. App. 667.

92. See 2 Curr. L. 1516.

93. Affidavit by chattel mortgagee, alleging ownership of property by plaintiff, is sufficient where the mortgage contains no stipulation retaining title in the mortgagor, especially where verified petition sets out the exact nature of the claim. Bartlett v. Ridgley Nat. Bank [Kan.] 78 P. 414.

94. The affidavit describing each article and giving the total value, and an amended bill of particulars giving the value of each article, held case would not be reversed. Boyce v. Augusta Camp, No. 7,429, 14 Okl. 642, 78 P. 322.

95. Code Civ. Proc. 1903, § 185, subd. 5. Johnson v. Hillenbrand [S. D.] 101 N. W. 33.

96. That the replevin affidavit described plaintiff as "Charles Oleson," but was signed "Charley Olson," held immaterial where the justice who issued the warrant thereon certified that the affidavit was subscribed and sworn to before him. Olson v. Peabody, 121 Wis. 675, 99 N. W. 458. Where affidavit gave first name of defendant as "Wimmian" instead of "William" as it appeared in the warrant, held immaterial where defendant appeared and made an affidavit of removal. Id.

97. Custom was of copying into the writ of replevin the value of the property as stated in the affidavit. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011. Where the finding of the jury was justified by other evidence, the admission of such evidence was held harmless. Id.

98. See 2 Curr. L. 1516.

99. The scope of the undertaking given under Code Civ. Proc. § 1699 is more comprehensive than an undertaking given for security for costs under § 3268, and the former includes all the objects covered by the latter, hence a foreign corporation having given a bond under § 1699 cannot be required to give one under § 3268. Vulcanite Portland Cement Co. v. Williams, 92 N. Y. S. 574.

1, 2. Kimball Co. v. Tasca [R. I.] 59 A. 919.

3. Bond purporting to be given by a corporation was signed by an individual. Kimball Co. v. Tasca [R. I.] 59 A. 919.

4. Where the defects were that the surety was the magistrate who afterwards signed the writ, and that the recognizance was entered into before a magistrate who did not sign the writ. Douglass v. Unmack [Conn.] 58 A. 710.

5. See 2 Curr. L. 1516.

6. Where sheriff surrendered property to receiver in bankruptcy. In re Hymes Buggy & Implement Co., 130 F. 977.

7. Bankr. Act § 67f applies to a seizure of property on a writ of replevin. In re Hymes Buggy & Implement Co., 130 F. 977.

session of the property under his replevin writ, he is estopped to say that the writ was wrongly issued or executed, or to contradict the return of the marshal.[8]

§ 7. *The pleadings*[9] *and parties to the action.*—The petition being in the statutory form, it is sufficient.[10] It should definitely describe the property,[11] and allege that plaintiff was the owner or entitled to the possession thereof at the commencement of the action,[12] and such allegations must not be mere conclusions of law.[13] Plaintiff need only allege the value of his interest in the property, or the damages sustained by the wrongful detention thereof.[14] The complaint in an action to recover possession of a dwelling house must allege that it is personalty.[15] It need not allege facts whose existence is presumed.[16] General allegations by defendant of ownership or right of possession are sufficient.[17] Under a general denial, defendant may show title in himself[18] and, in those cases wherein plaintiff had not prior actual possession, may disprove plaintiff's title even by showing title in a stranger.[19] In some cases a supplemental answer may be filed.[20] In Iowa a counterclaim cannot be filed in a replevin suit.[21] A denial that a cross complainant at the time of filing a cross complaint had the right of possession puts the question of the right in issue, and defendant may show that the right of possession was in himself or a third party.[22] A slight variance between the description in the petition and that in the mortgage under which defendant claims is immaterial where it is clearly shown that the property described in both is the same.[23]

Where the whole possessory right is in one of the plaintiffs, it is immaterial to defendants if he joins others with him in the suit,[24] and the fact that he has transferred part of his interest is immaterial if his transferee is made a party.[25]

8. Three States Lumber Co. v. Blanks [C. C. A.] 133 F. 479.

9. See 2 Curr. L. 1516.

10. The declaration being in the statutory form, it cannot be treated as a complaint under the practice act (Gen. St. 1902, §§ 607, 1058) and required to be made more specific as to the nature of plaintiff's title and its right to possession. Norman Printers' Supply Co. v. Ford [Conn.] 59 A. 499.

11. Description of horses, farming utensils and crops held sufficient. McNorrill v. Daniel, 121 Ga. 78, 48 S. E. 680.

12. Allegation that "plaintiffs were the owners thereof as hereinbefore stated" is not an allegation of ownership at the time the allegation was commenced within Code Civ. Proc. § 1720. Burdick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13. In Oregon a chattel mortgagee after breach of condition can maintain replevin under an allegation of absolute ownership. B. & C. Comp. § 5636 construed. Culver v. Randle [Or.] 78 P. 394.

13. Allegations that when defendant wrongfully and unlawfully took the property plaintiffs were the owners thereof, as before stated in the complaint and were entitled to immediate possession, held mere conclusions of law. Burdick v. Chesebrough, 94 App. Div. 532, 88 N. Y. S. 13.

14. Johnson v. Hillenbrand [S. D.] 101 N. W. 33. Need not allege the value of the property. Id.

15. Adams v. Tully [Ind.] 73 N. E. 595. Under Burns' Ann. St. 1901, § 379, requiring that allegations be liberally construed, such an allegation is sufficient to overcome the presumption that the building is realty. Id.

16. Where defendant mortgaged to plaintiff a stock of goods, he to render a true account of all sales made, etc., held, complaint in an action of replevin, defendant having failed to render the account for two months, need not allege that any sales were made during such months. Johnson v. Hillenbrand [S. D.] 101 N. W. 33.

17. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243.

18. Harvey v. Ivory, 35 Wash. 397, 77 P. 725.

19. May show that a sale under which plaintiff claimed was void. Gallick v. Bordeaux [Mont.] 78 P. 583. See Dresser v. Lemma [Wis.] 100 N. W. 844. Also ante, § 2, Right of action and defenses.

20. Where plaintiff sued to recover crops seized under a lien warrant, and defendant filed a supplemental answer alleging the setting aside of the first warrant, the issuance of another, the insolvency of plaintiff and that defendant had made advances on the lien which had not been paid, held supplemental answer was properly filed. Sparks v. Green [S. C.] 48 S. E. 61.

21. Sylvester v. Ammons [Iowa] 101 N. W. 782.

22. Summerville v. Stockton Milling Co., 142 Cal. 529, 76 P. 243. [See case for authorities pro and con.]

23. Saenz v. Mumme & Co. [Tex. Civ. App.] 85 S. W. 59.

24. Lieberman v. Clark [Tenn.] 85 S. W. 258.

25. Where, in replevin of timber, plaintiff joins his grantee in the suit, it is immaterial to defendant that plaintiff conveyed a portion of the land, and the timber

§ 8. *Trial.*[26]—The cause may be removed for prejudice on the part of the court.[27] In North Carolina the action is properly triable in the county in which the property is situated,[28] and being begun in another county, defendant is entitled to a removal as a matter of right, he having made the motion in writing and in apt time;[29] the court refusing to grant the motion, an appeal lies.[30] The general rules of evidence apply,[31] and the action being for articles severed from land, the deeds to the latter may be referred to for the purpose of defining the possession,[32] and such deeds constitute prima facie evidence of title to the property sought to be recovered.[33] The burden is on plaintiff to establish his right to recover by a preponderance of the evidence,[34] but the party alleging fraud must prove it.[35] Plaintiff obtaining possession of the property and defendant claiming no title therein, a third party interposing a claim to the property will be allowed to interplead.[36] In Georgia a claim cannot be filed and successfully entertained by a third person to property seized by a sheriff under bail-trover proceedings.[37] Defendant bonding the property and a claimant interpleading, plaintiff may take a nonsuit, and in such case the interpleader cannot recover a judgment, other than for costs, against him.[38] The general rules as to instructions[39] and harmless and prejudicial error[40] apply, special applications being collected in the notes. Questions of fact are for the jury.[41]

may have been cut from such portion. Lieberman v. Clark [Tenn.] 85 S. W. 258.

26. See 2 Curr. L. 1516.

27. An affidavit by defendant of prejudice on the part of a justice of the peace is sufficient for the removal of the cause to the county court. Olson v. Peabody, 121 Wis. 675, 99 N. W. 458.

28. Code, § 190 (4), as amended by Laws 1889, p. 232, c. 219. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515. This is true whether the ancillary remedy of claim and delivery is resorted to or not, since the latter is simply to obtain possession of the property before judgment, or security for its being forthcoming if the plaintiff obtains judgment. Id.

29. Must be made before the time for answering expires. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515.

30. Brown v. Cogdell, 136 N. C. 306, 48 S. E. 515.

31. In replevin for a ring, plaintiff claiming that he gave it to his son to show to a customer and that the customer ran off with it and pawned it, evidence that plaintiff's **business methods** were discreditable held incompetent and improper. Gumberg v. Goodstein, 95 App. Div. 101, 88 N. Y. S. 423. See Evidence, 3 Curr. L. 1334.

32. Replevin to recover logs cut from land. Lieberman v. Clark [Tenn.] 85 S. W. 258.

33. Hence an instruction that the burden was on defendant to either establish fraud or qualify the legal effect of the deed so as to impose a trust on the grantee was proper. Dresser v. Lemma [Wis.] 100 N. W. 844.

34. Kerfoot v. State Bank of Waterloo, 14 Okl. 104, 77 P. 46. The plaintiff alleging ownership and the answer denying the allegation, the burden is upon the plaintiff to prove such allegation. Gallick v. Bordeaux [Mont.] 78 P. 583. The action being one for property wrongfully seized by a constable under an execution, where plaintiff claimed title from the execution defendant, the burden of proof was not shifted by mere proof of notice of claim to the constable at the time of the levy. Id.

35. Where in replevin against a sheriff the latter alleged that sale to plaintiff was fraudulent. Williams v. Finlayson [Fla.] 38 So. 50. In such a case held proper to instruct that if sale was fraudulent verdict should be for defendant, and vice versa. Id.

36. Where third party made his claim while the property was in the possession of the sheriff. Wright Steam Engine Works v. New York Kerosene Oil Engine Co., 44 Misc. 580, 90 N. Y. S. 130.

37. Central Bank of Oakland v. Georgia Grocery Co., 120 Ga. 883, 48 S. E. 325.

38. Dawson v. Thigpen [N. C.] 49 S. E. 959.

39. In replevin of cattle claimed by plaintiff under a mortgage, an instruction that the cattle "levied on" under the writ were included in the mortgage is not defective where the court afterward referred to the description in the mortgage. National Bank of Boyertown v. Schufelt [Ind. T.] 82 S. W. 927. See Instructions, 4 Curr. L. 133.

40. Where plaintiff submitted the issue of his ownership, he cannot object on appeal that such issue should not have been submitted because his ownership was admitted of record. Walker v. Robertson [Mo. App.] 81 S. W. 1183. In replevin against a sheriff a charge that the execution plaintiff was the real party in interest, though not formally substituted as a party in interest, held harmless, the defense being in every respect as though a substitution had been made. Hackler v. Evans [Kan.] 79 P. 669. In replevin to recover stock seized by mortgagee, plaintiff claiming that the mortgage was without consideration and that issue being stated to the jury, a statement that plaintiff claimed further credit on the note because of fraud is not prejudicial error. Sylvester v. Ammons [Iowa] 101 N. W. 782.

Verdicts.[42]—Where the return of a part of the property is authorized, the jury should be required to find the separate value of each article.[43] The defendant failing to claim the property or damages, failure of the jury to assess the value of the property or to fix any damages is not prejudicial.[44] Where plaintiff has obtained possession of the property and there is no evidence as to its value, and defendant recovers a verdict, the jury may adopt as such value the amount alleged in the complaint.[45] Plaintiff recovering a verdict for the return of the property, and assessing its value, it is error to set aside the verdict as to the value on the ground that the evidence does not show that the property could not be delivered, and refuse to enter judgment for the value until after the return of an execution unsatisfied.[46] The verdict being irregular in form through the fault of the court, and being rendered against the objection of plaintiff, a claim that plaintiff consented thereto is without merit.[47]

§ 9. *Judgment.*[48]—The judgment must conform to the verdict[49] and the evidence,[50] though mere clerical mistakes will be disregarded.[51] A general verdict warrants a judgment in the alternative.[52] The refusal to enter the judgment upon the verdict is generally held to be the denial of a substantial right and appealable.[53] The right to an alternative judgment may be determined from the pleadings and agreements of the parties.[54] As a general rule where the successful party claims less than the full interest in the property replevied, the value of his interest should be fixed.[55] Plaintiff obtaining possession of the property, there is a conflict as to whether defendant by establishing his ownership becomes entitled to a judgment for the return of the property or its value if he does not pray for such affirmative relief,[56] and in those states that hold that he must pray for

See Harmless and Prejudicial Error, 3 Curr. L. 1579.

41. Under the evidence held plaintiff's right to sole possession was for the jury. Beatty v. Clarkson [Mo. App.] 83 S. W. 1033.

42. See 2 Curr. L. 1517.

43. The articles having been sequestered by plaintiff and replevied by defendant who gave a replevy bond held proper under Rev. St. 1895, art. 4877, authorizing the return of all or a part of the property, to give an instruction directing the jury to find the separate value of each article. Lewter v. Lindley [Tex. Civ. App.] 81 S. W. 776. On rehearing opinion, 81 S. W. 777, this case is distinguished from that of Byrne v. Lynn, 18 Tex. Civ. App. 253, 44 S. W. 311, 544.

44. Rev. St. 1899, § 4473 construed. Walker v. Robertson [Mo. App.] 81 S. W. 1183.

45. North Star House Furnishing Co. v. Rinkey, 92 Minn. 80, 99 N. W. 429.

46. Globe Oil Co. v. Messick Grocery Co., 136 N. C. 354, 48 S. E. 781.

47. Hitchcock v. Wimpleberg, 45 Misc. 293, 92 N. Y. S. 298.

48. See 2 Curr. L. 1518. See Judgments, 4 Curr. L. 287.

49. There being no evidence and no finding by the jury of the value of the articles, it is error to give the value in the judgment. Lewter v. Lindley [Tex. Civ. App.] 81 S. W. 776.

50. Where several actions to recover logs levied on were consolidated and one of the writs and the bond covered pilings as well as the logs, but there was no evidence that plaintiff was the owner of the piling, held a judgment awarding him the piling was erroneous. Day v. Ferguson [Ark.] 85 S. W. 771.

51. The findings showing that seven head of cattle were taken under the writ, a statement in the judgment as to the "six head" held a mere clerical error and immaterial. Olson v. Peabody, 121 Wis. 675, 99 N. W. 458.

52. Hitchcock v. Wimpleberg, 45 Misc. 293, 92 N. Y. S. 298. Motion to amend judgment by striking out the provision for the return and for costs on the ground that plaintiff consented to a change in the action from replevin to conversion, by accepting the verdict, denied. Id.

53. So held where court set aside that part of the verdict which related to the value of the property. Globe Oil Co. v. Messick Grocery Co., 136 N. C. 354, 48 S. E. 781.

54. Held entitled to an alternative judgment where it was asked for and there was an agreement as to interest if the value should be recovered. Globe Oil Co. v. Messick Grocery Co., 136 N. C. 354, 48 S. E. 781.

55. Verdict and special finding construed and held sufficient to sustain judgment. Muller v. Parcel [Neb.] 99 N. W. 684.

56. That he is entitled to its return or its value [Ball. Ann. Codes & St. § 5020, does not prescribe a different rule]. Harvey v. Ivory, 35 Wash. 397, 77 P. 725.

In the absence of the plea authorized by § 117 of the Municipal Court act, and of any proof that the defendants had required a return of the chattel, the final judgment cannot award possession to the defendants. Levy v. Hohweisner, 91 N. Y. S. 552. The

such judgment, it is held that failure to do so does not preclude him from maintaining a subsequent action to regain possession.[57] If the defendant has only a special interest in the property and such interest is terminated pending suit, he is entitled, if he prevails, only to a judgment for costs and expenses.[58] It appearing that there is not sufficient property to satisfy certain claims, the failure of the court to determine the respective rights of such claimants is harmless error.[59] No property having been found and none taken by the writ, an error in the judgment in awarding both damages and a return of the property is harmless.[60] The judgment must be satisfied in the way indicated by its terms.[61] Plaintiff taking a nonsuit and the cause continuing between defendant and an interpleader, plaintiff is bound by the result as privy to the suit.[62]

Damages.[63]—Where plaintiff in replevin desires to proceed for the value of the goods instead of by writ of de retorno habendo to recover the specific chattels, he must first resort to the statutory writ of inquiry for the assessment of damages.[64] Generally a mere prayer for damages is of itself insufficient to warrant a recovery.[65] The value of the property is to be determined from the evidence offered.[66] As a general rule, in the absence of fraud or malice, one is only entitled to actual damages.[67] Where plaintiff sues for the recovery of his property and in the alternative for its value, if the property cannot be recovered the measure of damages is the value of the property at the time of trial,[68] or, where there is a writ of restitution, at the time of refusal to comply with the writ.[69] Plaintiff having the option to recover the property or its value and electing to take the latter and treating the conversion as completed at the time of the trial, he is entitled to recover damages for the detention of the property;[70] but if he elects to treat the property as converted at the time it was taken from him, he should not be permitted to recover damages for its detention thereafter.[71] Damages for depreciation in value

judgment erroneously awarding such possession, it may be awarded on appeal. Id. Such § 117 is not limited by § 115a, providing that where title is in a third person the latter may appear and become a party to the action. Id.

57. Levy v. Hohweisner, 91 N. Y. S. 552. If in the replevin action he pleads the title of a third person, his subsequent recovery must be subordinate to such title. Id.

58. Sheriff. Culver v. Randle [Or.] 78 P. 394.

59. Summerville v. Kelliher, 144 Cal. 155, 77 P. 889.

60. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

61. The judgment reciting that plaintiff recover the value of specified articles if they or any part thereof cannot be found, it cannot be satisfied without a delivery or tender of the entire property recovered or the payment of its value, as stated in the judgment. Pauls v. Mundine [Tex. Civ. App.] 85 S. W. 43.

62. Dawson v. Thigpen [N. C.] 49 S. E. 959.

63. See 2 Curr. L. 1518.

64. Painter v. Snyder, 22 Ra. Super. Ct. 603.

65. Under Rev. St. 1898, §§ 3165, 2960, defendant desiring damages for the taking and detention of the property, he must set up his claim by a statement of the facts, a mere clause in the prayer for relief asking for damages is insufficient. Shafer v. Russell [Utah] 79 P. 559.

66. No witness estimating the value of the article at more than $35, a judgment on a verdict for $60 cannot be sustained. Nolen v. Sevine [Tex. Civ. App.] 81 S. W. 990.

67. Where property was allowed to remain in defendant's possession until sale, when part of it was purchased by defendant, the replevin suit terminating in favor of defendant, he is entitled to the price paid for the goods bought together with the actual value of the remainder at the time of sale. Pure Oil Co. v. Terry, 209 Pa. 403, 58 A. 814. It is erroneous to assess the full value of the property involved in favor of a defendant whose rights therein are confined to a special interest. Gaston v. Johnson [Mo. App.] 80 S. W. 276. A defendant testifying that he had never taken possession of the replevied property and the jury returning a verdict "for plaintiff to retain said goods and to recover * * * no damages," held erroneous for the judge to direct them to return a verdict for "some damages." Norman Printers' Supply Co. v. Ford [Conn.] 59 A. 499.

68. Nolen v. Sevine [Tex. Civ. App.] 81 S. W. 990.

69. Nolen v. Sevine [Tex. Civ. App.] 81 S. W. 990 [dicta].

70. Newberry v. Gibson [Iowa] 101 N. W. 428.

71. Colean Implement Co. v. Strong

are not recoverable unless pleaded.[72] To comply with an alternative judgment for the return of the property, it must be returned in substantially the same condition and without deterioration in value.[73] There being a judgment for return and only a part of the goods being returned and those being injured, the measure of damages is the value of the goods not returned with legal interest from the time of the replevin, and deterioration in value of those returned resulting from such injury, with legal interest thereon from the date of their return.[74] Where the property in controversy has a usable value, the value of the use of such property during the time of its wrongful detention may be recovered as proper damages.[75] The action being brought by a mortgagee, the measure of his damages in case return of the goods cannot be had is the value of the goods up to the amount of the indebtedness, with accrued interest.[76] The defendant coming rightfully into possession, plaintiff must demand the chattel before he can recover damages for the detention thereof.[77] Judgment being rendered for a return of the goods, and a demand therefor being refused, an action for nominal damages for such refusal to deliver will lie, though the goods be subsequently delivered, and the damages and costs recovered paid.[78] The defendant is not entitled to a verdict for the value of the property in controversy merely on the ground that he did not have possession of it when the suit was begun.[79]

§ 10. *Costs.*[80]—In New Jersey a bailee of the property may become liable for costs if he fail to obtain a written statement from the bailor to the effect that the latter is the sole owner of the property.[81]

§ 11. *Review.*[82]—The general rule of appellate procedure, that questions cannot be raised for the first time on appeal, applies.[83]

§ 12. *Liability on bonds and of receiptors, etc.*[84]—Unless authorized by its terms, the remedy upon a nonstatutory bond is by separate action.[85] On breach of a condition to duly prosecute the action, defendant is entitled to recover the value of the property taken with interest[86] and nominal damages.[87] Plaintiff's bond being conditioned to pay defendant such sums as may be adjudged against the

[Iowa] 102 N. W. 506. Also 2 Curr. L. 1518, n. 9.

72. Jermyn v. Hinter, 93 App. Div. 175, 87 N. Y. S. 546.

73. Having depreciated in value, an action may be brought to recover the depreciation. Fair v. Citizens' State Bank [Kan.] 76 P. 847; MacRae v. Kansas City Piano Co. [Kan.] 77 P. 94.

74. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011. In such a case an instruction allowing damages for depreciation held not erroneous. Id.

75. Where the property consisted of a flock of sheep, the measure of damages was held to be the sheep and their increase, or their value, and the value of the wool shorn, defendant being entitled, as an offset thereto, to the reasonable cost of shearing the sheep and marketing the wool, but he is not entitled to the cost of keeping the sheep except from the date of the judgment below until the termination of the retrial after the appellate decision. Cunningham v. Stoner [Idaho] 79 P. 228.

76. Gallick v. Bordeaux [Mont.] 78 P. 583.

77. Hall v. Bassler, 96 App. Div. 96, 88 N. Y. S. 1039.

78. Douglass v. Galwey [Conn.] 58 A. 2.

79. Clute v. Everhart [Mich.] 100 N. W. 124.

80. See 2 Curr. L. 1519.

81. In an action of replevin, a warehouseman who, by demanding for storage more than is due him, has lost his lien, if he has failed to obtain from his bailor a statement in writing under the supplement to the replevin act (P. L. 1893, p. 451), is liable for costs in case he appears and defends the replevin suit. Stephenson v. Lichtenstein [N. J. Law] 59 A. 1033.

82. See 2 Curr. L. 1519.

83. Plaintiff recovering only a part of the articles sued for, defendant cannot for the first time raise the question on appeal of his right to judgment against plaintiff and his sureties on the bond for the remaining articles replevied. Beatty v. Clarkson [Mo. App.] 83 S. W. 1033.

84. See 2 Curr. L. 1519.

85. Bond conditioned that if defendant should be condemned in the action he or some other person would return property, etc., not being a statutory bond, the court was not authorized to render a summary judgment against the sureties. Mariany v. Lemaire [Tex. Civ. App.] 83 S. W. 215.

86. Kentucky Land & Immigration Co. v. Crabtree, 26 Ky. L. R. 283, 80 S. W. 1161.

87. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011.

plaintiff and the costs of the action, defendant is not entitled, in an action thereon, to recover anything not adjudged against defendant,[88] nor do such terms permit defendant to recover for loss of time and expenses incurred in defending the action, together with an attorney's fee.[89] A forthcoming bond being conditioned that the defendant shall perform the judgment of the court in the action, the sureties are not liable thereon until after final judgment.[90]

Breaches.[91]—The conditions that plaintiff shall prosecute his writ with effect and will return the goods if return is ordered are separate and distinct, the penalty of the breach of either being the forfeiture of the bond.[92] Defendant giving a redelivery undertaking, the burden rests upon him to restore possession to the plaintiff upon the latter recovering judgment, and not upon the plaintiff to demand or enforce possession.[93]

Defenses.[94]—The obligation of the plaintiff being an alternative one, it does not become impossible of performance by the loss or destruction of the goods replevied.[95] That the plaintiff in the replevin action had title and right to the immediate possession of the property is only a partial defense to an action on the bond for breach of the condition to return if the action should be dismissed.[96] The suit having been dismissed, there is no liability on the part of the surety for the nonreturn of the chattels replevied, unless such return was demanded by the defendant in the action.[97]

REPLICATION; REPORTED QUESTIONS; REPORTS; REPRESENTATIONS; RES ADJUDICATA; RESCISSION; RESCUE; RES GESTAE; RESIDENCE; RESPONDENTIA; RESTITUTION, see latest topical index.

RESTORING INSTRUMENTS AND RECORDS.

§ 1. Evidence and Proof of Loss and of Contents (1294).
§ 2. Proceedings In Equity or Otherwise to Restore Lost Papers or Instruments (1295).
§ 3. Procedure In Equity or Under the Burnt Records Act to Restore Records (1295).

§ 1. *Evidence and proof of loss and of contents.*[1]—In order to prove the former existence of an instrument, it is necessary to prove its execution and contents[2] by such a degree of proof as amounts to a practical reproduction of[3] the substance and contents of the instrument.[4] Vague and uncertain recollections con-

88. Plaintiff dismissing the action and the court not adjudging either a return of the property or the payment of any sum, the fact that plaintiff has not returned the property or paid the value thereof does not authorize an action on the bond. Kentucky Land & Immigration Co. v. Crabtree, 26 Ky. L. R. 283, 80 S. W. 1161.

89. Kentucky Land & Immigration Co. v. Crabtree, 26 Ky L. R. 283, 80 S. W. 1161.

90. Hence they are not liable for the costs of an appeal; plaintiff having dismissed his case on remand to the trial court, on reversal of judgment for defendant. Spencer v. Davidson [Ind. T.] 82 S. W. 731.

91. See 2 Curr. L. 1519.

92. Pure Oil Co. v. Terry, 209 Pa. 403, 58 A. 814.

93. MacRae v. Kansas City Piano Co. [Kan.] 77 P. 94.

94. See 2 Curr. L. 1519.

95. Shannon's Code Tenn. § 5144. Three States Lumber Co. v. Blanks [C. C. A.] 133 F. 479. Where lumber was replevied on barge, latter sank, plaintiff saved same and sold it for salvage, held sale at its own instance could not be set up as a defense to defeat a judgment for its value. Id. But see Bobo v. Patton, 6 Heisk. [Tenn.] 172, 19 Am. Rep. 593, where it is held that the death of an animal replevied, without fault, relieved the plaintiff from his obligation to either return or pay value.

96. Freeman v. United States Fidelity & Guaranty Co., 87 N. Y. S. 493. Hence, under Code, § 508, must be pleaded as such a defense. Id.

97. Freeman v. United States Fidelity & Guaranty Co., 87 N. Y. S. 493.

1. See 2 Curr. L. 1520.

2. Under the Montana statute. Capell v. Fagan [Mont.] 77 P. 55.

3. Capell v. Fagan [Mont.] 77 P. 55.

4. Evidence held insufficient to establish a deed. Capell v. Fagan [Mont.] 77 P. 55.
Evidence held sufficient to establish the execution of certain powers of attorney. Bickerdike v. State, 144 Cal. 698, 78 P. 277. To establish the execution of a lost note. Day v. Long [Ky.] 80 S. W. 774. The contents of an answer in an action may be established by parol where it is shown to have

cerning the stipulations are insufficient.[5] "Contents" includes all the substantial parts of the instrument,[6] and cannot be established by proof of the negotiations, conversations and acts of the parties at the time of and after the execution.[7]

The establishment of a lost note is no bar to any defense that might be set up as against the original.[8]

§ 2. *Proceedings in equity or otherwise to restore lost papers or instruments.*[9]

§ 3. *Procedure in equity or under the burnt records act to restore records.*[10] —The proceeding under the Illinois burnt records act is a suit in equity,[11] and may be maintained, though questions as to title involving tax deeds subsequent to the destruction of the records are involved.[12] In such proceedings the holder of a tax title has the burden of showing its validity,[13] which is not sustained by merely introducing the tax deed in evidence,[14] and if he does not attempt to show its validity, but merely offers it in evidence, if he desires to be reimbursed money paid in procuring it, he must prove the amount.[15] Proof of possession in good faith under color of title and payment of taxes for the statutory period and the destruction of the records is sufficient proof of title under the burnt records act.[16] On collateral attack all presumptions will be indulged in favor of the decree.[17] Objections to the report of an examiner of titles cannot be reviewed on appeal unless incorporated into the exceptions to the report and renewed in the trial court.[18]

Retraxit; Returnable Package Laws; Returns; Revenue Laws; Reversions; Review; Revival of Judgments; Revivor of Suits; Revocation, see latest topical index.

REVOCATION OF AGENCY BY OPERATION OF LAW.

[Special Article.*]

§ 1. **In General (1295).**
§ 2. **By a Change in the Law (1296).**
§ 3. **By a Change in the Subject-Matter or Circumstances (1296).**
§ 4. **By a Change in the Condition of the Parties (1297).**
§ 5. **By Death (1297).**
A. Of the Principal (1297).
B. By Death of the Agent (1302).
§ 6. **By Insanity (1303).**
A. Of the Principal (1303).
B. Insanity of the Agent (1305).
§ 7. **By Bankruptcy (1306).**
A. Of the Principal (1306).
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§ 8. **By Marriage (1307).**
§ 9. **By War (1308).**

§ 1. *In general.* —Besides a termination by the intentional acts, express or

been taken from the records to be used as evidence in another case and cannot be found. Meyer v. Purcell [Ill.] 73 N. E. 392.

5. Capell v. Fagan [Mont.] 77 P. 55.

6. Consideration of a deed, if it is mentioned therein. Capell v. Fagan [Mont.] 77 P. 55.

7. Capell v. Fagan [Mont.] 77 P. 55.

8. Payment prior to the judgment establishing it may be pleaded. Jenkins v. Forbes, 121 Ga. 383, 49 S. E. 284.

9. See 2 Curr. L. 1520.

10. See 2 Curr. L. 1521.

11. Can be reviewed only by appeal or writ of error. Bennett v. Roys, 212 Ill. 232, 72 N. E. 380. Petition held to show on its face that it was under the Burnt Records Act (Hurd's Rev. St. 1903, p. 1484, c. 115), and not to remove a cloud. Glos v. Kelly, 212 Ill. 314, 72 N. E. 378.

12, 13, 14. Glos v. Kelly, 212 Ill. 314, 72 N. E. 378.

15. Evidence insufficient to show amount, under Hurd's Rev. St. 1903, c. 120, § 224. Glos v. Kelly, 212 Ill. 314, 72 N. E. 378.

16. Glos v. Mulcahy, 210 Ill. 639, 71 N. E. 629.

17. Where after a decree for possession defendant was removed under a writ of assistance, his subsequent motion for a writ of restitution and to quash the writ of assistance is a collateral attack on the decree. Bennett v. Roys, 212 Ill. 232, 72 N. E. 380.

18. Objections that certain abstracts were received in evidence without proof that the original deeds had been lost held not sufficiently specific. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1.

*From Clark and Skyles on Agency, Copyright 1905, Keefe-Davidson Co.

implied, of the parties to the relation,[19] there may be cases in which the contracts of agency are discharged by law, and perhaps contrary to the real intention of the parties. This is what is known as termination by operation of law, and occurs in those cases where by reason of changes in the condition of affairs, either of the parties or affecting the subject-matter, it is inconsistent, impossible, or contrary to public policy for the relation to continue. Whereupon the law steps in and terminates or dissolves the contract that cannot be performed whether such is the intention of the parties or not. These changes and conditions that cause a termination of the relation by operation of law may be divided into three general heads, so far as concerns contracts in which personal service is to be performed: (1) A change in the law itself, (2) a change in the subject-matter of the contract, (3) a change in the conditions of the parties to the contract.

§ 2. *By a change in the law.*—If one enters into a contract of agency to perform certain acts, and the law is afterwards changed so as to make the performance of such acts illegal, this operates as a termination of the agency, as to the future performance of such acts. This is but an application of the principle of contracts, that one is discharged from the performance of a contract when by a change in the law, performance becomes impossible or illegal.[20] It has been seen heretofore that an agency cannot be created for an illegal purpose, or for the performance of illegal acts;[21] for the same reason, as there given, an agency cannot exist for the performance of such, though such acts were legal, and capable of being performed by an agent when the agency was first created.

§ 3. *By a change in the subject-matter or circumstances.*—Where a contract of agency is entered into in contemplation of the continued existence of the subject-matter or circumstances as they were when the contract was made, a change permanently affecting the condition of such subject-matter or circumstances may operate to terminate the agency, although contrary to the real intention of the parties.[22] Although a party to an absolute executory contract is not excused by inability to execute it, caused by unforeseen accident or misfortune, but must perform or pay damages unless he has protected himself by a stipulation in the contract, there may be in the nature of the contract an implied condition by which he will be relieved from such unqualified obligation, and, when in such case, without his fault, performance is rendered impossible, it may be excused. Such an implication arises when it inherently appears to have been known to the parties to the contract, and contemplated by them when it was made, that its fulfillment would depend upon the continuance or existence, at the time for performance, of certain things or conditions essential to its existence.[23] Any change in conditions must take place without any voluntary act on the part of the principal or his agent, as where the property is destroyed by fire,[24] for if such change or disposition of the subject-matter is caused by the voluntary act of either one of the parties, it effects a termination by implication from the acts of the parties, as has been seen in a previous section.[25] Whether or not the prevalence of a contagious disease at the place where an agent is to perform his services will operate as a termination of the agency and excuse the agent from performing his contract is not definitely settled. It has been held that where such disease renders it unsafe

19. See Clark and Skyles, Agency, 381 et seq.

20. See Hammon, Cont. 829.

21. See Clark and Skyles, Agency, § 38, p. 78.

22. Turner v. Goldsmith [1891] 1 Q. B. 544, Huffc. Cas. 137; Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415; Stewart v. Stone, 127 N. Y. 500; People v. Bartlett, 3 Hill [N. Y.] 570.

23, 24. Stewart v. Stone, 127 N. Y. 500.

25. See Clark and Skyles, Agency, § 170, p. 409.

and unreasonable for men of ordinary care and prudence to remain there, it is a sufficient cause for not performing the agency.[26]

§ 4. *By a change in the condition of the parties—In general.*—So a termination of agency by operation of law may be effected by a change in the condition of one of the parties to the relation. If the condition of one of the parties becomes such that it is impossible for the contract of agency to be further performed, the law steps in and terminates the relation. This condition of affairs may be brought about (1) by the death of one of the parties; (2) by the insanity of one of the parties; (3) by the illness of one of the parties; (4) by bankruptcy of one of the parties; (5) by war; or (6) by marriage of one of the parties. These different conditions and their effects will be fully treated in the following sections.

§ 5. *By death. A. Of the principal—In general.*—As we shall see presently, an agency which is coupled with an interest in the subject-matter is not terminated or revoked by the death of the principal; and even when an agency is not coupled with an interest, the act of the agent after the principal's death may be binding on the latter's heirs and personal representatives, if the act is done in ignorance of such death. Except in these cases the general rule is that an agency is terminated or revoked, ipso facto, by the death of the principal, and that acts or contracts done or made by the agent on behalf of the principal after his death are not binding on the principal's heirs or representatives;[27] and this is true although the power is such that it could not have been revoked by the principal during his lifetime,[28] as where it was given for a valuable consideration, or as security. It is also true, although the agent may have been employed for a definite

26. Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77. Compare Dewey v. Alpena School Dist., 43 Mich. 480, 38 Am. Rep. 206.

27. England: Palmer v. Reiffenstein, 1 Man. & G. 94; Smout v. Ilbery, 10 Mees. & W. 1; Campanari v. Woodburn, 15 C. B. 400.

United States: Hunt v. Rousmanier's Adm'rs, 8 Wheat. 174, 5 Law. Ed. 589; Boone's Ex'r v. Clarke, 3 Cranch, C. C. 389, Fed. Cas. No. 1,641; Long v. Thayer, 150 U. S. 520, 37 Law. Ed. 1167; Pacific Bank v. Hannah, 90 F. 72; McDonald v. Hannah, 51 F. 73, 75; McClaskey v. Barr, 50 F. 712.

Alabama: Scruggs v. Driver's Ex'rs, 31 Ala. 274; Saltmarsh v. Smith, 32 Ala. 404.

Arizona: Tuttle v. Green, 48 P. 1009.

California: Ferris v. Irving, 28 Cal. 645; Travers v. Crane, 15 Cal. 12; Judson v. Love, 35 Cal. 463; Krumdick v. White, 92 Cal. 143; Id., 107 Cal. 37.

Florida: McGriff v. Porter, 5 Fla. 373.

Georgia: Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; Jones v. Beall, 19 Ga. 171.

Illinois: Garber v. Myers, 32 Ill. App. 175; Risley v. Fellows, 10 Ill. 531; Turnan v. Temke, 84 Ill. 286.

Indiana: Harness v. State, 57 Ind. 1.

Iowa: Dorr v. Dorr, 59 Iowa, 81; Furenes v. Eide, 109 Iowa, 511, 77 Am. St. Rep. 545.

Kentucky: Clark's Ex'rs v. Parrish's Ex'rs, 1 Bibb, 547; Campbell's Representatives v. Kincaid, 3 T. B. Mon. 68.

Maine: Harper v. Little, 2 Greenl. 14, 11 Am. Dec. 25; Staples v. Bradbury, 8 Greenl. 181, 23 Am. Dec. 494.

Massachusetts: Lincoln v. Emerson, 108 Mass. 87; Marlett v. Jackman, 3 Allen, 287; Gleason v. Dodd, 4 Metc. 333; Farnum v. Boutelle, 13 Metc. 159; Brown v. Cushman, 173 Mass. 368.

Mississippi: Clayton v. Merrett, 52 Miss. 353.

New Hampshire: Gale v. Tappan, 12 N. H. 145, 37 Am. Dec. 194; Wilson v. Edmonds, 24 N. H. 517.

New Jersey: Durbrow v. Eppens, 65 N. J. Law, 10.

New York: Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284, 36 Am. St. Rep. 696; Smith's Ex'rs v. Wyckoff, 3 Sandf. Ch. 77; Putnam v. Van Buren, 7 How. Pr. 31.

North Carolina: Doe d. Smith v. Smith, 46 N. C. [1 Jones Law] 135, 59 Am. Dec. 581; Duckworth v. Orr, 126 N. C. 674; Wainwright v. Massenburg, 129 N. C. 46.

Ohio: McDonald v. Black, 20 Ohio, 185, 55 Am. Dec. 448, 453; Easton's Adm'x v. Ellis, 1 Handy, 70; Johnson v. Johnson's Adm'rs, Wright, 594; Lessee of Wallace v. Saunders, 7 Ohio, 173.

Pennsylvania: Appeal of Given, 16 A. 75; In re Kern's Estate, 176 Pa. 373.

Tennessee: Jenkins v. Atkins, 1 Humph. 294, 34 Am. Dec. 648.

Texas: Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Primm v. Stewart, 7 Tex. 178.

Vermont: Gifford v. Thomas' Estate, 62 Vt. 34; Michigan State Bank v. Leavenworth's Estate, 28 Vt. 209; Davis' Adm'r v. Windsor Sav. Bank, 46 Vt. 728; Michigan Ins. Co. v. Leavenworth's Estate, 30 Vt. 11.

Virginia: Huston's Adm'r v. Cantril, 11 Leigh, 136; Triplett v. Woodworth's Adm'r, 98 Va. 187.

Compare Kelly v. Bowerman, 113 Mich. 446.

28. Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 174, 201, 5 Law. Ed. 589, Huffc. Cas. 146; McGriff v. Porter, 5 Fla. 373.

time, and no recovery can be had against the principal's estate upon the contract of agency.[29] If, however, the agency has been wholly executed before the death of the principal, such death cannot terminate the authority so as to affect rights that have been acquired under such agency. Or if it has been partly executed before the death of the principal, such death will not terminate the unexecuted part as to the other contracting party,[30] unless the agency was a severable one and the part already executed could be separated from the unexecuted part without affecting the other party's rights. Thus, except where the power is coupled with an interest, the principal's death terminates an agent's power to collect a debt;[31] or to make a sale of personal property;[32] or to make a sale and conveyance of real property;[33] and deeds made thereafter by the agent are null and void. So one claiming under a power of attorney to recover land whereby he is to have one-half of what he recovers has not an interest coupled with the power which prevents death from terminating the agency.[34] Where a party litigant dies after verdict, or at any time pending action, the authority of his attorney to act for him is thereby determined, and he can neither give nor receive a motion for a new trial, or appeal, or conduct any other proceeding by virtue of his original authority.[35] The attorney of the ancestor does not become the attorney of the heirs, without a new appointment;[36] and when an attorney revives a suit, after the death of his principal, and acts for the representatives, his claim is on his engagement with them, and not as attorney for the deceased.[37] But where such suit is revived in the name of the heirs, the counsel employed by the deceased principal will be presumed, in the absence of evidence to the contrary, to be continued as counsel in the cause.[38] The general rule that a power of attorney, though irrevocable by the principal during his life, is extinguished by his death, is not affected by the circumstance that testamentary powers are executed after the death of the testator. The power in such case is necessarily to be executed after the death of the person who makes it and cannot exist during his life. It is the intention of the parties that it shall be executed after his death.[39]

Reason for the rule.—The general rule is based upon the theory that a person acting through an agent acts by himself—qui facit per alium, facit per se—and since it is impossible for him to act for himself after his death, it is likewise im-

29. Yerrington v. Greene, 7 R. I. 589, 84 Am. Dec. 578; Friend v. Young [1897] 2 Ch. Div. 421, 66 Law J. Ch. 737; Tasker v. Shepherd, 6 Hurl. & N. 575; Burnet v. Hope, 9 Ont. Rep. 10. But see Fereira v. Sayres, 5 Watts & S. [Pa.] 210, 40 Am. Dec. 496, where a contrary doctrine is held upon the death of one of the partners, who were principals.

30. Garrett v. Trabue, 82 Ala. 227.

31. Gale v. Tappan, 12 N. H. 145, 37 Am. Dec. 194; Long v. Thayer, 150 U. S. 520, 37 Law. Ed. 1167. And see cases cited supra.

32. McDonald v. Black's Adm'r, 20 Ohio, 185, 55 Am. Dec. 448; Scruggs v. Driver's Ex'rs, 31 Ala. 274; Campanari v. Woodburn, 15 C. B. 400; Brown v. Cushman, 173 Mass. 368. See cases cited supra.

33. Ex parte Welch, 2 N. B. Eq. 129; Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 201, 5 Law. Ed. 589, Huffc. Cas. 146; Pacific Bank v. Hannah, 90 F. 72; McClaskey v. Barr, 50 F. 712; Saltmarsh v. Smith, 32 Ala. 404; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; Coney v. Sanders, 28 Ga. 511; Lewis v. Kerr, 17 Iowa, 73; Harper v. Little, 2 Greenl. [Me.] 14, 11 Am. Dec. 25; Clayton v. Merrett, 52 Miss. 353; Gaston's Adm'x v. Ellis, 1 Handy [Ohio] 70; Primm v. Stewart, 7 Tex. 178; Huston's Adm'r v. Cantrill, 11 Leigh [Va.] 136.

34. Wainwright v. Massenburg, 129 N. C. 46.

35. Judson v. Love, 35 Cal. 463; Adams v. Nellis, 59 How. Pr. [N. Y.] 385; Pool v. Pool, 58 Law J. Prob. 67.

36. Putnam v. Van Buren, 7 How. Pr. [N. Y.] 31; Turnan v. Temke, 84 Ill. 286; Risley v. Fellows, 10 Ill. 531; Gleason v. Dodd, 4 Metc. [Mass.] 333. And see Clark & Skyles, Agency, § 743, p. 1615.

37. Campbell's Representatives v. Kincaid, 3 T. B. Mon. [Ky.] 68; Clark's Ex'rs v. Parrish's Ex'rs, 1 Bibb [Ky.] 547; Adams v. Nellis, 59 How. Pr. [N. Y.] 385. And see Clark & Skyles, Agency, § 743, p. 1615.

38. Wilson v. Smith, 22 Grat. [Va.] 494. See Clark & Skyles, Agency, § 743, p. 1615.

39. Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 206, 5 Law. Ed. 589, Huffc. Cas. 150; McGriff v. Porter, 5 Fla. 373, 381.

possible for an agent to act for him.[40] As has been said: "It seems founded on the presumption that the substitute acts by virtue of the authority of his principal, existing at the time the act is performed; and on the manner in which he must execute his authority, as stated in Combes' Case, 9 Co. 766. In that case it was resolved, that 'when anyone has authority as attorney to do any act, he ought to do it in his name who gave the authority.' "[41] Now as an agent can only do that which the principal might do, it is evident that he cannot do that which the principal, by reason of his death, cannot do.

Where power is coupled with an interest.—There is an exception to the above general rule, however, where the agent has a power coupled with an interest in the subject-matter of the agency, as has been seen heretofore in the case of a revocation by the principal. When the authority of a person to act as agent for another is coupled with an interest in the subject-matter of the agency, it is not revoked or terminated by the principal's death, and an execution of the authority after the principal's death is good, and binds the principal's heirs and personal representatives.[42] Where, however, such a power is expressly conditioned to be performed in the principal's lifetime, it will be terminated by the principal's death.[43] Thus, where a bond executed by a son to his father for the maintenance of the latter, in consideration of a conveyance of the father's farm to his son, conditioned to account for and deliver to the father on demand, the cattle on the farm, or other cattle as good, imports no power to sell the cattle and substitute others, or if it does, the power must be executed in the father's lifetime, and ceases at his death.[44]

What is a sufficient interest.—The same question arises here as in case of an attempted voluntary revocation[45] by the principal, as to what is a sufficient interest to make the power with which it is coupled irrevocable by the death of the principal. It need only be said here that it must be an interest in the subject-matter of the agency itself and which may be executed in the name of the agent;

40. Ish v. Crane, 8 Ohio St. 520; Weber v. Bridgman, 113 N. Y. 600.

41. By Marshall, C. J., in Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 174, 5 Law. Ed. 589, Huffc. Cas. 146.

42. Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 174, 5 Law. Ed. 589, Huffc. Cas. 146; Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172; Travers v. Crane, 15 Cal. 12; Gilbert v. Holmes, 64 Ill. 548; Merry v. Lynch, 68 Me. 94; Kelly v. Bowerman, 113 Mich. 446; Durbrow v. Eppens, 65 N. J. Law, 10; Bergen v. Bennett, 1 Caines Cas. [N. Y.] 1, 2 Am. Dec. 281; Knapp v. Alvord, 10 Paige [N. Y.] 205, 40 Am. Dec. 241; Hess v. Rau, 95 N. Y. 359; Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284, 36 Am. St. Rep. 696; Grapel v. Hodges, 112 N. Y. 419; Houghtaling v. Marvin, 7 Barb. [N. Y.] 412; Stevens v. Sessa, 50 App. Div. [N. Y.] 547; Wilson v. Stewart, 5 Pa. Law J. 450; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Carleton v. Hausler, 20 Tex. Civ. App. 275. But the doctrine in England seems to be contra. As was said by Ld. Ellenborough: "A power coupled with an interest cannot be revoked by the person granting it; but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?" Watson v. King, 4 Camp. 272; Wallace v. Cook, 5 Esp. 117. So it was held in a late Canadian case, that a power of attorney from a mortgagor authorizing the attorney to receive any surplus realized from a foreclosure sale of the mortgaged premises, to be applied on any debt due him from the mortgagor, is revoked by the mortgagor's death before the sale. Ex parte Welch, 2 N. B. Eq. 129.

The reason for this exception is this: "The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. * * * But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such a person acts in his own name. The estate being in him passes from him by a conveyance in his own name. He is no longer a substitute, acting in the place and name of another, but is a principal acting in his own name, in pursuance of powers which limit his estate. The legal reason which limits a power to the life of the person giving it exists no longer, and the rule ceases with the reason on which it is founded."—By Marshall, C. J., in Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 174, 5 Law. Ed. 589, 204, Huffc. Cas. 148.

43, 44. Staples v. Bradbury, 8 Greenl. [Me.] 181, 23 Am. Dec. 494.

45. See full discussion Clark and Skyles, Agency, § 165, p. 400.

and not merely an interest in the proceeds of the power.[46] Thus, a power of sale contained in a mortgage deed, on default of payment, is a power coupled with an interest, and is not terminated by the death of the mortgagor,[47] unless there is a statute in the particular state, giving a mortgage the effect of mere security for a debt, passing no estate or title to the mortgagee, in which case the power of sale would be revoked by the mortgagor's death.[48] Nor does the death of the principal terminate the agent's power to sell for the purpose of paying certain notes indorsed by the agent and others for the principal,[49] or to collect to pay advances made by the agent.[50] So where negotiable paper is indorsed to an agent for collection, he may sue thereon in his own name; and as the indorsement for such purposes passes the legal title in trust, the authority to collect is not revoked by the death of the principal.[51]

Where principal's death is unknown.—Whether an act of an agent after his principal's death is binding when both of the parties were ignorant of the death is a question upon which there has been some conflict of opinion. On some points, however, the law is clear. All of the authorities agree that an act done by an agent after the death of his principal is not binding, but a mere nullity, although both parties may have been ignorant of the principal's death, if the act was one which could only be done in the name of the principal, such as the execution of a conveyance of land or other instrument under seal.[52] The distinction as to notice between revocation and termination by death of the principal has been stated thus: "In the case of a revocation, the power continues good against the principal, till notice is given to the agent (and to third persons); but the instant the principal dies the estate belongs to his heirs, or devisees, or creditors; and their rights cannot be divested or impaired by any act performed by the attorney after the death has happened; the attorney then being a stranger to them, and having no control over their property."[53] Some courts hold that if the act is of such a character that it need not be done in the principal's name, it will be binding if done after his death, though the parties were ignorant thereof.[54] But the preponderance of authority holds that as to mere acts in pais of an agent of a deceased principal, the agent's authority, if not coupled with an interest, is instantly terminated by the death of the principal, whether the parties have notice of the death or not.[55]

46. "The power and the estate must be united and coexistent." Clark and Skyles, Agency, § 165, p. 400, citing Chambers v. Seay, 73 Ala. 378; Ralelgh v. Atkinson, 6 Mees. & W. 670; Mansfield v. Mansfield, 6 Conn. 559; Nevitt v. Woodburn, 82 Ill. App. 649; Bonney v. Smith, 17 Ill. 531; Black v. Harsha, 7 Kan. App. 794.

Must be a power "engrafted on an estate in the thing itself." Marshall, C. J., in Hunt v. Rousmanier's Adm'rs, 8 Wheat. [U. S.] 175, 5 Law. Ed. 589.

47. Bergen v. Bennett, 1 Caines Cas. [N. Y.] 1, 2 Am. Dec. 281; Wilson v. Troup, 2 Cow. [N. Y.] 195, 14 Am. Dec. 458; Conners v. Holland, 113 Mass. 50; Varnum v. Meserve, 8 Allen [Mass.] 158; Harvey v. Smith, 179 Mass. 592; Hudgins v. Morrow, 47 Ark. 515; Berry v. Skinner, 30 Md. 567; Beatie v. Butler, 21 Mo. 313. But see Ex parte Welch, 2 N. B. Eq. 129.

48. Wilkins v. McGehee, 86 Ga. 764; Johnson v. Johnson, 27 S. C. 309, 13 Am. St. Rep. 636. Compare Reilly v. Phillips, 4 S. D. 604.

49. Knapp v. Alvord, 10 Paige [N. Y.] 205, 40 Am. Dec. 241; Merry v. Lynch, 68 Me. 94.

50. Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172.

51. Boyd v. Corbitt, 37 Mich. 52; Moore v. Hall, 48 Mich. 143; Deweese v. Muff, 57 Neb. 17.

52. Galt v. Galloway, 4 Pet. [U. S.] 331, 7 Law. Ed. 876; Travers v. Crane, 15 Cal. 12; Ferris v. Irving, 28 Cal. 645; Coney v. Sanders, 28 Ga. 511; Home Nat. Bank v. Waterman, 134 Ill. 461; Lewis v. Kerr, 17 Iowa, 73; Harper v. Little, 2 Me. 14, 11 Am. Dec. 25; Weber v. Bridgman, 113 N. Y. 600; Doe d. Smith v. Smith, 46 N. C. [1 Jones] 135, 59 Am. Dec. 581; Watson v. King, 4 Camp. 272; Wallace v. Cook, 5 Esp. 117.

53. Harper v. Little, 2 Me. 14, 11 Am. Dec. 27.

54. Cassiday v. McKenzie, 4 Watts & S. [Pa.] 282, 39 Am. Dec. 76; Garrett v. Trabue, 82 Ala. 227; Dick v. Page, 17 Mo. 234, 57 Am. Dec. 267; Ish v. Crane, 8 Ohio St. 520; Id., 13 Ohio St. 574; Deweese v. Muff, 57 Neb. 17, 42 L. R. A. 789.

55. Campanari v. Woodburn, 15 C. B. 400; Smout v. Ilbery, 10 Mees. & W. 1; Blades v. Free, 9 Barn. & C. 167; Houstoun v. Robertson, 6 Taunt. 448; Farrow v. Wilson, L. R.

Under the civil law, acts done after the principal's death in good faith and before notice are upheld.[56] But this equitable principle does not prevail in the English law, and the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest.[57]

Statutory provisions.—In view of the fact that this common-law rule was seen to work great hardships in many cases, the legislatures in some states have passed statutes making valid acts of the agent after his principal's death and in ignorance thereof, even though they are such acts as must be executed in the principal's name.[58]

By death of partner or joint principal.—Where authority is given to an agent by a partnership, the death of one of the partners will thereby terminate the agent's authority, unless it is a power coupled with an interest;[59] and it is held to be immaterial whether the dissolution was known or not.[60] But it has been held that authority of an agent to draw out and apply the money of such firm to the uses thereof continues in a qualified form after the death of one of the members of such firm; as where an agent of a firm, authorized to draw its moneys from the bank and apply the same to the uses of the firm, continues to do so after the death of one of the members without knowledge on his part or on the part of the bank, of such death, he acts within the scope of his authority, and his acts

4 C. P. 744; Bank of Washington v. Peirson, 2 Cranch, C. C. 685, Fed. Cas. No. 953; Galt v. Galloway, 4 Pet. [U. S.] 331, 7 Law. Ed. 876; Long v. Thayer, 150 U. S. 522; Rapp's Estate v. Phoenix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427; Royal Ins. Co. v. Davies, 40 Iowa, 469, 20 Am. Rep. 581; Lewis v. Kerr, 17 Iowa, 73; Green v. Young, 8 Me. 14, 22 Am. Dec. 218; Clayton v. Merrett, 52 Miss. 353; Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284; Jenkins v. Atkins, 1 Humph. [Tenn.] 294, 34 Am. Dec. 648; Rigs v. Cage, 2 Humph. [Tenn.] 350, 37 Am. Dec. 559; Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 274; Michigan Ins. Co. v. Leavenworth's Estate, 30 Vt. 11; Davis v. Windsor Sav. Bank, 46 Vt. 728; Michigan State Bank v. Leavenworth's Estate, 28 Vt. 209. Thus, the power of an agent to collect and receive rents falling due to his principal ceases upon the death of the latter, unless the agency is coupled with an interest, and payment made thereafter does not bind the estate of the principal, although made in ignorance of such death. Farmers' Loan & Trust Co. v. Wilson, 139 N. Y. 284.

56. Pothier says: "Although the commission terminates by the death of the person giving it, and there appears a repugnancy in supposing me to contract by the ministry of another, who after my death contracts in my name; yet if he contracts in my name after my death, but before it could be known at the place where the contract is made, such contract shall oblige my successor as if I had actually contracted by the ministry of this agent." Pothier, Obl. [81].

57. Cleveland v. Williams, 29 Tex. 204, 94 Am. Dec. 279.

58. See Cal. Civ. Code, § 2356; Dak. Civ. Code, §§ 1150, 1151; Md. Rev. Code 1878, p. 388, art. 44, § 31; Voorhees' Rev. Civ. Code La. 1875, arts. 3032, 3033; S. C. Gen. St. 1882, § 1302; 2 Kent, Comm. 646.

Under the Maryland statute: "All payments of money, transfers of property, or other dealings made or had, to or with, any person acting under a power of attorney, or other agency, duly executed or created, by any person within this state, which would be binding on the party giving such power of attorney, or agency, if the same was in full force and unrevoked at the time of such payment, transfer or other dealings, shall be equally binding and obligatory upon the representatives or other assignees of such party, although at the time aforesaid said party may be dead, or may have assigned his interest in such money, property, or dealing; provided, that the person paying, transferring, or having such dealings with the person acting under such power of attorney, or agency, had not at the time notice of the death of the party giving such power or creating such agency." Md. Rev. Code 1878, p. 388, § 31.

So in **Georgia** the fifth section of the act of 1875 declares that sales of lands, made under powers, shall be good, if made before the agent "has notice of a countermand, revocation, or death of the constituent." Coney v. Sanders, 28 Ga. 511. The court, however, in that state gave it as its opinion that that section applied only to powers created in other states than Georgia, and as the power in question had been created in Georgia it was held to be revoked by the death of the principal. Id.

In Louisiana, the statute provides that, "If the attorney, being ignorant of the death or of the cessation of the rights of his principal, should continue under his power of attorney, the transactions done by him, during this state of ignorance, are considered as valid." Voorhees' Rev. Civ. Code La. 1875, art. 3032.

59. McNaughton v. Moore, 2 N. C. [1 Hayw.] 189; Easton's Adm'x v. Ellis, 1 Handy [Ohio] 70; Friend v. Young [1897] 2 Ch. 421, 66 Law J. Ch. 737; Tasker v. Shepherd, 6 Hurl. & N. 575.

60. Easton's Adm'x v. Ellis, 1 Handy [Ohio] 70.

bind the firm.[61] And again it has been held that, if the agent has been expressly employed for a definite time, the death of one of the partners does not terminate the agency, so as to defeat the agent's claim for compensation for the full time.[62] The same applies when two principals jointly appoint an agent to take charge of some matter in which they are jointly interested, and a severance of such interests afterwards occurs by the death of one of the joint principals.[63] Where, however, the principals are joint and several and the power given to the agent is both joint and several, the death of one of the principals does not terminate his authority.[64]

Effect of principal's death on subagent.—For the same reason that the principal's death terminates the agent's authority, it also terminates the subagent's authority, whether such subagent has been appointed by the principal's authority or not. If he has been appointed by the authority of the principal, the latter's death terminates his authority, for what the principal cannot do neither can the agent. And if he derives his authority directly from the primary agent, as the principal's death terminates the latter's authority, it also terminates the subagent's.

(§ 5) *B. By death of the agent. In general.*—As has been seen heretofore, the relation of principal and agent presupposes the existence of two parties—a principal and an agent. If for any reason the agent ceases to exist, or, as we shall see presently, becomes incapable of performing his duties, the relation forthwith ceases, subject to an exception which we shall see hereafter. It is a general rule of law, then, subject to one exception, that the death of an agent terminates the agency; and especially is this so where his duties were such as to require the exercise of personal skill, judgment and discretion. The principal having selected him by reason of his peculiar ability to transact the particular business, would perhaps not consent that such duties should devolve upon the agent's personal representatives, of whom he knew nothing and who perhaps did not possess the required skill, judgment, and discretion.[65] And this is true, although the contract of agency was for a definite time, which had not expired at the time of the agent's death.[66] Thus, upon the death of an agent, money due for goods sold by the agent for his principal shall be paid to the principal and not to the administrators of such agent.[67] If, however, the agent has the money in his possession at the time of his death, it shall be looked upon as the agent's estate, and must first answer the debts of a superior creditor, etc., for in that regard money has no earmarks, and equity cannot follow that in behalf of the principal.[68] But if the agent, before his death, had invested the money in other goods, or had the original goods in his possession at the time of his death, these goods shall be taken as part of the principal's estate, and not the agent's,[69] and the agent's executor cannot lawfully dispose of the goods, although he may retain them for the agent's lien.[70]

61. Bank of New York v. Vanderhorst, 32 N. Y. 553.

62. Fereira v. Sayres, 5 Watts & S. [Pa.] 210, 40 Am. Dec. 496. But see Friend v. Young [1897] 2 Ch. 421, 66 Law J. Ch. 737; Tasker v. Shepherd, 6 Hurl. & N. 575; Burnet v. Hope, 9 Ont. 10.

63. Rowe v. Rand, 111 Ind. 206, Huffc. Cas. 126.

64. Milson v. Stewart, 5 Clark [Pa.] 450.

65. Merrick's Estate, 8 Watts & S. [Pa.] 402; Adriance v. Rutherford, 57 Mich. 170; Shiff v. Lessep's Succession, 22 La. Ann. 185; Gage v. Allison, 1 Brev. [S. C.] 495, 2 Am. Dec. 682; Jackson Ins. Co. v. Partee, 9 Heisk. [Tenn.] 296; Mills v. Union Cent. L. Ins. Co., 77 Miss. 327, 78 Am. St. Rep. 522.

66. Mills v. Union Cent. L. Ins. Co., 77 Miss. 327, 78 Am. St. Rep. 622.

67. Merrick's Estate, 8 Watts & S. [Pa.] 402; Whitecomb v. Jacob, 1 Salk. 160; Burdett v. Willett, 2 Vern. 638.

68. Whitecomb v. Jacob, 1 Salk. 160.

69. Whitecomb v. Jacob, 1 Salk. 160; Adriance v. Rutherford, 57 Mich. 170.

70. Gage v. Allison, 1 Brev. [S. C.] 495, 2 Am. Dec. 682.

Where agent's power is coupled with an interest.—The same exception obtains here as in the case of a principal's death, and if an agent has acquired not only a power but also connected with it an interest in the subject-matter of the agency, his death will not terminate the power, but it may be exercised after his death by his personal representatives and assigns.[71] Thus, where a trust deed, or a mortgage, executed to secure the payment of a sum of money, confers upon the grantee, his administrator and assigns, the power to sell the premises, upon nonpayment of the debt, the power is irrevocable, and does not cease with the death of the grantee;[72] and if this is not by virtue of the instrument itself, it may be by statute.[73]

Death of a joint agent.—When authority is conferred upon two or more agents, in the absence of evidence to the contrary, it is usually understood to be a joint agency and the power must be exercised by all of them acting together. Where such is the case the death of one of the joint agents necessarily terminates the authority of the others, for as they could only execute their powers by acting jointly, the death of one makes this impossible and operates to terminate the agency,[74] unless there is a subsequent recognition by the principal of the survivor as agent.[75] But this is in effect a new appointment. Thus, where A. delivered a note to B. & C. for collection, taking their receipt therefor, B. having died, the agency was thereby terminated, and B.'s estate could not be charged for C.'s subsequent misconduct.[76] So where a firm is employed as agents, their authority is determined by the death of one partner,[77] for whilst the firm may act by one of its members alone, yet it is the act of the firm, and upon his death the firm is dissolved and they cannot then act jointly. Where, however, the agency is joint and several, the same rule would apply as in the case of joint principals and the death of one agent would not terminate the agency.[78]

Effect of agent's death on subagents.—Where the authority of the subagent comes directly from the principal, or in other words where there is a privity of contract between the principal and subagent, although the appointment is made by the primary agent, the subagent's authority is held not to be terminated by the death of the primary agent.[79] Where, however, the subagent derives his authority directly from the agent, there is no privity of contract between the principal and subagent, and the agent's death terminates the subagent's authority,[80] although the primary agent may have been expressly authorized to appoint such subagent.[81]

§ 6. *By insanity. A. Of the principal. General rule.*—As we have seen elsewhere, a principal cannot authorize another to do that which he cannot do himself, on in other words what the principal cannot do himself, an agent cannot do for him. There is, as it were, a constant stream of authority flowing from the principal to the agent throughout the performance of anything for the principal. If, then, for any reason, the principal becomes incapable of himself doing the particular thing authorized, this stream of authority must likewise cease. The

71. Lewis v. Wells, 50 Ala. 198; Merrin v. Lewis, 90 Ill. 505; Collins v. Hopkins, 7 Iowa, 463; Harnickell v. Orndorff, 35 Md. 341.

72. Collins v. Hopkins, 7 Iowa, 463, and see cases cited above.

73. Lewis v. Wells, 50 Ala. 198.

74. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180; Rowe v. Rand, 111 Ind. 206, Huffc. Cas. 126; Johnson v. Wilcox, 25 Ind. 182; Martine v. International L. Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529.

75. Hartford F. Ins. Co. v. Wilcox, 57 Ill. 180.

76. Johnson v. Wilcox, 25 Ind. 182.

77. Martine v. International L. Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529.

78. See ante, § 5a.

79. Smith v. White, 5 Dana [Ky.] 376.

80. Jackson Ins. Co. v. Partee, 9 Heisk. [Tenn.] 296.

81. Watt v. Watt, 2 Barb. Ch. [N. Y.] 371; Peries v. Aycinena, 3 Watts & S. [Pa.] 64; Lehigh Coal & Nav. Co. v. Mohr, 83 Pa. 288, 24 Am. Rep. 161.

fountainhead being destroyed, the stream must necessarily cease to flow. It is a general rule of law, therefore, subject to certain exceptions, as we shall see presently, that if a principal becomes insane, to such an extent that he is incapable of exercising his own will, after he has appointed an agent to act for him, such insanity thereby terminates or suspends the agency by operation of law.[82] But although the agent's power ceases during the principal's insanity, yet, if on his recovery he manifests no will to terminate the agent's power, it may be considered as merely suspended, and acts done by the agent during the suspension will be inferred to be assented to, if he does not dissent from them, when they come to his knowledge.[83] Thus, where a wife who had been the general agent of her husband for years past, on the day of his death, when he was entirely senseless and no hopes of his recovery were entertained, turned over to another in settlement of a debt owing by the husband a note which the husband held against such other, it was held that the agency of the wife was revoked by the situation and the transaction invalid.[84]

Where power is coupled with an interest.—Where, however, an agent has a power coupled with an interest in the subject-matter of the agency, the after-occurring insanity of the principal will not terminate it.[85] Thus, the lunacy of a mortgagor does not in any manner affect or interfere with the mortgagee's right to execute the power of sale, and foreclose the right of redemption, in the mode and manner stipulated by the parties.[86] It has been said that it is a quaere as to whether or not this rule applies to the case of a power which is given as part of a security or for a valuable consideration;[87] but as these are in effect powers coupled with an interest, no reason appears why it should not apply to them as well as to other powers coupled with an interest.

82. Drew v. Nunn, 4 Q. B. Div. 661, Huffc. Cas. 24, Wamb. Cas. 967; Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2,133; Davis v. Lane, 10 N. H. 156; Matthiessen & W. Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Hill's Ex'rs v. Day, 34 N. J. Eq. 150; Berry v. Skinner, 30 Md. 567; Motley v. Head, 43 Vt. 633; Blake v. Garwood, 42 N. J. Eq. 276.

83. Davis v. Lane, 10 N. H. 156; Hill's Ex'rs v. Day, 34 N. J. Eq. 150; Drew v. Nunn, 4 Q. B. Div. 661, Huffc. Cas. 24, Wamb. Cas. 967.

84. Davis v. Lane, 10 N. H. 156. As was said in this case: "It would be preposterous, where the power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract or acknowledging a deed, when he was in fact lying insensible on his deathbed, and this fact well known to those who undertook to act with him and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract; he does the act. It is done through the more active instrumentality of another, but the latter represents his principal and uses his name. Further, upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest and not irrevocable, there exists at all times a right of supervision in the principal, and the power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues. When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being; otherwise the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased; for after the principal was deprived of the power to exercise any will upon the subject, there could be no assent, or acquiescence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority, which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke." "An authority to do an act for and in the name of another pre-supposes a power in the individual to do the act himself, if present. The act to be done is not the act of the agent, but the act of the principal; and the agent can do no act in the name of the principal which the principal might not himself do, if he were personally present. The principal is present by his representative, and the making or execution of the contract or acknowledgment of a deed, is his act or acknowledgment."

85. Berry v. Skinner, 30 Md. 567; Davis v. Lane, 10 N. H. 156; Hill's Ex'rs v. Day, 34 N. J. Eq. 150; Matthiessen & W. Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536.

Where insanity is unknown.—There seems to be another exception to the general rule, where, in the absence of a formal adjudication of insanity, the third person is ignorant of the principal's insanity. Where the principal has not been judicially declared insane, persons who deal with the agent in ignorance of the principal's insanity will be protected, on the ground that between two equally innocent parties he who has made the loss possible must bear it. Whilst the principal and third party may both be innocent, the principal by conferring the authority on the agent has made the loss possible and must bear it.[88] Thus, where a purchase of real estate from an insane person is made, and a conveyance is obtained in perfect good faith, before an inquisition and finding of lunacy, for a fair and reasonable consideration, without knowledge of the insanity, and no advantage is taken by the purchaser, the conveyance cannot be avoided by the insane person, or by one representing him, if the consideration has not been returned to the purchaser, and no offer has been made to return the same.[89] If, however, the principal has been judicially declared insane, the decree or order of the court or commission will be notice to all of such insanity, and a third party cannot plead his ignorance as a protection to himself for acting with the agent.

What insanity is sufficient.—As has been stated before, the insanity should be such as renders the principal incapable of exercising his own will. Whether or not it is necessary that the insanity be established by an inquisition is not fully settled. It has been held that a power of attorney executed by one, whose sanity was in question, is not terminated until the lunacy has been established by an inquisition.[90] But the weight of authority seems to hold that if the insanity is such as to affect the principal's exercise of his will, it will effect a termination or suspension of the agent's authority, although there has been no inquisition.[91] An inquisition de lunatico inquirendo simply makes a prima facie case. Where there is no reason to suspect fraud, the test in cases where mental incapacity is charged is: Did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing or the business he was transacting?[92] And even where one was sent to an insane asylum under a special guardian for treatment for an uncontrollable appetite for liquor, it was held that the agency of the wife appointed before his going there does not thereby terminate, it not appearing that the insanity was of that character which disqualified a person from entering into a valid contract.[93]

(§ 6) *B. Insanity of the agent. General rule.*—The insanity of the agent also constitutes a natural termination of the agency, for it cannot be presumed that the principal intends one to act for him and to bind him when that one is incompetent to understand or to transact the business for which he was employed. Especially is this true where the agent is one selected for his mental abilities, as where performance of his duties requires the exercise of skill, judgment, and discretion. Where, therefore, during continuance of the agency, the agent becomes insane to such an extent as to incapacitate him from the further execution of his

86. Berry v. Skinner, 30 Md. 567.
87. Davis v. Lane, 10 N. H. 156.
88. Gribben v. Maxwell, 34 Kan. 8; Young v. Stevens, 48 N. H. 133; Davis v. Lane, 10 N. H. 156; Mutual L. Ins. Co. v. Hunt, 79 N. Y. 541; Hill's Ex'rs v. Day, 34 N. J. Eq. 150; Matthiessen & W. Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Drew v. Nunn, 4 Q. B. Div. 661, Huffc. Cas. 24, Wamb. Cas. 967.
89. Gribben v. Maxwell, 34 Kan. 8; Young v. Stevens, 48 N. H. 133; Mutual L. Ins. Co. v. Hunt, 79 N. Y. 541.
90. Wallis v. Manhattan Co., 2 Hall [N. Y.] 495; 2 Kent, Comm. 645.
91. Matthiessen & W. Refining Co. v. McMahon's Adm'r, 38 N. J. Law, 536; Bunce v. Gallagher, 5 Blatchf. 481, Fed. Cas. No. 2,133; Drew v. Nunn, 4 Q. B. Div. 661, Huffc. Cas. 24, Wamb. Cas. 967.
92. Hill's Ex'rs v. Day, 34 N. J. Eq. 150.
93. Motley v. Head, 43 Vt. 633.

authority, it will be terminated or suspended during such insanity, unless he has an interest in the subject-matter of the agency. Mere partial derangement, however, or monomania will not terminate or suspend his authority, unless it happens to be on the particular subject of the agency, or otherwise unfits him for transacting the business of his agency.[94]

Where insanity is unknown.—Where the agent's insanity is of such a nature as not to be readily apparent, and a third person was ignorant thereof, and has dealt with him in good faith, taking no advantage of his mental incapacity, and the contract has been so far executed that the parties cannot be placed in statu quo, the agent's insanity will have no effect on such executed transactions. Where, however, the agent has been judicially declared insane, it is sufficient notice to third persons and any dealings had with him thereafter will be at their own risk.

Insanity of a joint agent.—In case of the insanity of one of two or more joint agents, the same rule applies as in case of the death of one of the joint agents. If the agency is a joint one, all the agents must act jointly in executing it, and where one of them becomes insane to the extent of incapacitating him from joining in the execution of the agency, it would necessarily be thereby terminated.[95] Where, however, the agency was joint and several, the insanity of one does not prevent the others from executing it.

As to subagents.—Whether or not the insanity of an agent terminating his authority also terminates the authority of a subagent depends upon whether the latter is the agent of the primary agent or of the principal. If he is appointed by the agent with or without the authority of the principal, and derives his authority wholly from the primary agent, then the latter's insanity also terminates such subagent's authority. But if the subagent derives his authority directly from the principal although appointed by the agent, he is the agent of the principal and the primary agent's insanity would not affect his authority. Of course if the subagent, in the latter case, himself becomes insane, the same rules would apply to him as to the original agent.

§ 7. *By bankruptcy. A. Of the principal. General rule.*—Where the principal enters into bankruptcy, either voluntarily or involuntarily, the agent's authority is thereby terminated, by operation of law, as to all rights of property of which the principal was divested by reason of his bankruptcy.[96] The reason for this rule is that by the bankruptcy the principal is divested of any control over his property, and cannot in any manner dispose of it, or transfer a good title thereto. And since the agent has no higher power or authority over the property than the principal himself has, and cannot do what the principal cannot do, and as the principal cannot dispose of or give a title to the property, neither can the agent do so. Thus, if a bankrupt previous to his bankruptcy has given a power of attorney to another, to receive sums of money due to him in consideration of engagements entered into by such person on account of the bankrupt, money received under such power after the bankruptcy may be recovered by the assignees.[97] But a factor may, after his principal has become bankrupt, enforce his lien, for sums for which he has become surety, against his principal's property, and thus collect for goods of the principal sold by him.[98] Or where the agent has funds

94. See Story, Agency, § 487; Mechem. Agency, § 259.

95. Rowe v. Rand, 111 Ind. 206, 210, Huffc. Cas. 127; Salisbury v. Brisbane, 61 N. Y. 617.

96. Parker v. Smith, 16 East, 382; Ex parte Snowball, 7 Ch. App. 534; Minett v. Forrester, 4 Taunt. 541; In re Daniels, 6 Biss. 405, Fed. Cas. No. 3,566; Ogden v. Gillingham, Baldw. 38, Fed. Cas. No. 10,456.

97. Hovill v. Lethwaite, 5 Esp. 158.

98. Drinkwater v. Goodwin, Cowp. 251.

of the principal paid into his hands, he may, after bankruptcy of the principal, apply the proceeds in satisfaction of the debt due to him from the principal.[99] But the bankruptcy of the principal does not prevent the agent from performing a mere formal act, which the bankrupt himself might have been compelled to execute notwithstanding his bankruptcy.[1]

Mere insolvency does not terminate agent's authority.—The agent's authority, however, will not be terminated by operation of law upon the mere insolvency of the principal, or from the mere fact that he is unable to meet his obligations when due. To have that effect the principal must have been legally declared a bankrupt, whether voluntarily or involuntarily. Until such is the case, the principal does not lose control of his property, and may delegate to another to do with it anything that he himself may do.

Where power is coupled with an interest.—But where the agent's power is coupled with an interest in the subject-matter of the agency, the same exception exists here as we have seen before, and the bankruptcy of the principal will not operate to terminate the agent's authority.[2] Thus, a power of sale in the mortgagee contained in a mortgage is not terminated by the bankruptcy of the mortgagor.[3]

Where bankruptcy is unknown.—Although the adjudication of the court is held to relate back to the time of the act of bankruptcy, yet if third persons, subsequent to such act, but in ignorance thereof, and prior to the adjudication of the court, deal in good faith with the agent, they will be protected.[4] And so if the agent receives money after an act of bankruptcy by the principal, but before the date of the receiving order, without notice of the act of bankruptcy, the money may be set off by the agent as against the trustee in bankruptcy.[5]

(§ 7) *B. Of the agent.*—When one appoints another to act as his agent, it is generally presumed, especially in cases where the handling of funds or property is necessary, that he appoints a certain one because he believes the latter responsible for any loss or damage sustained by his misconduct or neglect of duty. For this reason it is a general rule of law that an agent's authority is usually terminated by the bankruptcy of such agent.[6] Of course, there may be circumstances in particular cases, that would permit the agent to exercise his authority notwithstanding his bankruptcy and notwithstanding his duties involved responsibility, as where it was expressly agreed that the agent should be relieved from all responsibility, or where the principal, knowing of his bankruptcy, permits him to continue in his capacity of agent. If, however, the act to be performed by the agent is merely a formal one, and not such a one as involves much responsibility, his bankruptcy would not terminate his authority to do such acts.[7]

§ 8. *By marriage.*—Although, as a general rule, marriage of the principal does not terminate the relation of principal and agent, yet if the continuance of such relation would impair rights growing out of the marriage relation, the mar-

99. Alley v. Hotson, 4 Camp. 325.

1. Dixon v. Ewart, 3 Mer. 322.

2. Hall v. Bliss, 118 Mass. 554; Alley v. Hotson, 4 Camp. 325.

3. Hall v. Bliss, 118 Mass. 554.

4. Ex parte Snowball, 7 Ch. App. 548. "We are of the opinion," said Lord Justice Mellish, "that though, no doubt, as a general rule, a power of attorney must be treated as revoked by an act of bankruptcy committed by the giver of the power as against the trustee under a subsequent bankruptcy, still if after the act of bankruptcy, but before adjudication, property is conveyed under the power of a bona fide purchaser who has no notice of the act of bankruptcy, the purchaser may hold the property as against the trustee." Id.

5. Elliott v. Turguand, 7 App. Cas. 79. And see Ogden v. Gillingham, Baldw. 38, Fed. Cas. No. 10,456.

6. Hudson v. Granger, 5 Barn. & Ald. 27; Scott v. Surman, Willes, 400; Audendried v. Betteley, 8 Allen [Mass.] 302.

7. Hudson v. Granger, 5 Barn. & Ald. 27; Robson v. Kemp, 4 Esp. 233.

riage of the principal would have this effect. Thus, where a single man gave a power of attorney to sell his land, and before such sale could be effected he married, as the wife thereby acquired certain interests in the land which could not be impaired without her consent, the marriage operated to terminate the agent's power of attorney.[8] At common law the marriage of a feme sole gave to her husband the control over all of her property, and thus the authority of any agent she may have appointed was thereby terminated,[9] and the same is true now where the execution of the agency would affect any property interests or rights acquired by the husband by reason of such marriage.[10] A submission of any matter to arbitration by a woman is terminated by her marriage before award is made.[11] Where, however, the agent has a power coupled with an interest, it would not be terminated by the subsequent marriage of the feme sole.[12] Thus, if a feme sole gives a warrant of attorney to confess judgment on her bond, and afterwards marries, judgment may be entered against husband and wife.[13] The modern statutes in some states have given to a married woman the right to hold and control property as if she were unmarried, and of course in such cases, her agent's authority would not be terminated by her subsequent marriage.[14]

§ 9. *By war. General rule.*—There has been some controversy since the Civil War as to what effect war has upon agencies; and the authorities conflict somewhat on this subject. It seems, however, to be the general rule in America, although there are cases to the contrary, that war between the state or country of the principal and that of the agent, terminates ipso facto any agency that contemplates commercial intercourse or communication between them through the hostile lines, and makes unlawful any further commercial intercourse between them in the prosecution of the agency.[15] Contracts between alien enemies have frequently been held to be void; consequently as they cannot contract themselves, it would be impossible for them to appoint an agent to contract for them or to even continue in employment one previously appointed to transact business between them.[16]

Reason for the rule.—This rule is based upon the principle that during a state of war between different states or countries, trading or commercial intercourse between those states or countries, directly or indirectly, which may in any

8. Henderson v. Ford, 46 Tex. 627. But see Joseph v. Fisher, 122 Ind. 399.

9. McCan v. O'Ferrall, 8 Clark & F. 30; Charnley v. Winstanley, 5 East, 266; Anonymous, 1 Salk. 399.

10. Judson v. Sierra, 22 Tex. 365; Wambole v. Foote, 2 Dak. 1; Linton v. Minneapolis & N. Elevator Co., 2 N. D. 232.

11. McCan v. O'Ferrall, 8 Clark & F. 30; Sutton v. Tyrrell, 10 Vt. 91.

12. Wambole v. Foote, 2 Dak. 1.

13. Eneu v. Clark, 2 Pa. 234, 44 Am. Dec. 191. Contra, Anonymous, 1 Salk. 399.

14. Reynolds v. Rowley, 2 La. Ann. 890; Edgecomb v. Buckhout, 146 N. Y. 332; Joseph v. Fisher, 122 Ind. 399.

15. New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 Law. Ed. 453, Wamb. Cas. 962; United States v. Lapene, 17 Wall. [U. S.] 601, 21 Law. Ed. 693; Ward v. Smith, 7 Wall. [U. S.] 447, 19 Law. Ed. 207; Hanger v. Abbott, 6 Wall. [U. S.] 532, 18 Law. Ed. 939; The William Bagaley, 5 Wall. [U. S.] 377, 18 Law. Ed. 583; Howell v. Gordon, 40 Ga. 302; Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142; Conley v. Burson, 1 Heisk. [Tenn.] 145; Maloney v. Stephens, 11 Heisk. [Tenn.] 738; Small's Adm'r v. Lumpkin's Ex'r, 28 Grat. [Va.] 832; Hale v. Wall, 22 Grat. [Va.] 430; Billgerry v. Branch & Sons, 19 Grat. [Va.] 393, 100 Am. Dec. 679.

Thus, in a case growing out of the late Civil War, it was said: "If the power of attorney was given prior to the war, it was revoked by the war, as the principal was a citizen of Massachusetts, and the agent a resident or citizen of Georgia, and no act of revocation or renunciation by the parties was necessary. Whenever the parties became alien enemies, by the laws of war, the agency was at an end. It ceased by operation of law."—By Brown, C. J., in Howell v. Gordon, 40 Ga. 308.

16. Fretz v. Stover, 22 Wall. [U. S.] 198, 22 Law. Ed. 769; United States v. Grossmayer, 9 Wall. [U. S.] 72, 19 Law. Ed. 627; Hanger v. Abbott, 6 Wall. [U. S.] 532, 18 Law. Ed. 939; The William Bagaley, 5 Wall. [U. S.] 377, 18 Law. Ed. 583; Conley v. Burson, 1 Heisk. [Tenn.] 145; Blackwell v. Willard, 65 N. C. 555, 6 Am. Rep. 749.

way tend to aid the enemy, whether by transmission of goods or money, or orders for the delivery of either, is prohibited except so far as may allowed by the sovereign authority.[17]

Exceptions to general rule.—But the mere fact of the breaking out of a war does not necessarily and as a matter of law revoke every agency. Whether it is revoked or not depends upon the circumstances surrounding the case and the nature and character of the agency.[18] As may be seen from the reason for the general rule in the preceding section, such rule was specially made to terminate such agencies as required for their existence an intercourse or communication between the principal and agent, and a transmission of goods or funds through the hostile lines. If then these circumstances are not present in any given case, the rule would seem to no longer apply. Thus, recognized exceptions to the general rule are: That if the agent has property of the principal in his possession or control, good faith and fidelity to his trust will require him to keep it safely during the war and to restore it at its close; and that debts may be paid by the debtor to the agent of an alien enemy, where the agent resides in the same state or country with the debtor, provided there is no intention of transmitting such property or funds to the principal during the continuance of the war.[19]

REWARDS.

§ 1. Nature and Definition (1309).
§ 2. The Offer (1309).
§ 3. Earning Reward (1310).

§ 1. *Nature and definition.*[20]

§ 2. *The offer.*[21]—An offer must be made by one with authority.[22] As between two claimants where the money is paid into court, the offer alleged in the complaint will be considered as the one made.[23] County or municipal officials have no authority aside from statute to offer rewards for the apprehension of offenders against the criminal laws of the state.[24]

17. Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142; United States v. Grossmayer, 9 Wall. [U. S.] 72, 19 Law. Ed. 627; Montgomery v. United States, 15 Wall. [U. S.] 395, 21 Law. Ed. 97; Jecker v. Montgomery, 13 How. [U. S.] 498, 14 Law. Ed. 240; Id., 18 How. [U. S.] 110, 15 Law. Ed. 311; Small's Adm'r v. Lumpkin's Ex'x, 28 Grat. [Va.] 832; Potts v. Bell, 8 Term R. 561.

"The law of nations, as judicially declared, prohibits all intercourse between citizens of the two belligerents, which is inconsistent with the state of war between their countries; and this includes every kind of trading or commercial dealing or intercourse, whether by transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy." By Gray, J., in Kershaw v. Kelsey, 100 Mass. 561, 1 Am. Rep. 142, 152.

18. Williams v. Paine, 169 U. S. 55, 42 Law. Ed. 658.

19. New York Life Ins. Co. v. Davis, 95 U. S. 425, 24 Law. Ed. 453, Wamb. Cas. 964; Conn v. Penn, 1 Pet. C. C. 496, Fed. Cas. No. 3,104; Denniston v. Imbrie, 3 Wash. C. C. 396, Fed. Cas. No. 3,802; United States v. Grossmayer, 9 Wall. [U. S.] 72, 19 Law. Ed. 627; Ward v. Smith, 7 Wall. [U. S.] 447, 19 Law. Ed. 207; Bartow County Com'rs v. Newell, 64 Ga. 699; Buford v. Speed, 11 Bush [Ky.] 338; Monsseaux v. Urquhart, 19 La. Ann. 482; Shelby v. Offutt, 51 Miss. 128; Murrell v. Jones, 40 Miss. 565; Buchanan v. Curry, 19 Johns. [N. Y.] 141, 10 Am. Dec. 200; Sands v. New York Life Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535; Clarke v. Morey, 10 Johns. [N. Y.] 73; Jones v. Harris, 10 Heisk. [Tenn.] 98; Darling v. Lewis, 11 Heisk. [Tenn.] 125; Maloney v. Stephens, 11 Heisk. [Tenn.] 738; Hale v. Wall, 22 Grat. [Va.] 424; Manhattan Life Ins. Co. v. Warwick, 20 Grat. [Va.] 614, 3 Am. Rep. 218; Mutual Ben. Life Ins. Co. v. Atwood, 24 Grat. [Va.] 497, 18 Am. Rep. 652; New York Life Ins. Co. v. Hendren, 24 Grat. [Va.] 536; King v. Hanson, 4 Call [Va.] 259.

20, 21. See 2 Cnrr. L. 1521.

22. Evidence as to an agent's authority held for the jury. Cornwell v. St. Louis Transit Co., 106 Mo. App. 135, 80 S. W. 744.

23. Atwood v. Armstrong, 92 N. Y. S. 596.

24. County commissioners. Felker v. Elk County Com'rs [Kan.] 78 P. 167.

NOTE: The right of a town or city to offer a reward for the arrest and conviction of a criminal is affirmed in Codding v. Mansfildt, 7 Gray [Mass.] 272; Crenshaw v. Roxbury, 7 Gray [Mass.] 374; Janvrin v.

§ 3. *Earning reward.*[25]—A reward "for information leading to the arrest" of a fugitive is earned by giving such information,[26] but not by giving information that does not lead to the arrest[27] and a reward "for the arrest" of a fugitive is not earned by merely giving information which leads to the arrest.[28] A statutory offer for "delivering a murderer up for trial" is not earned by conveying information to a sheriff who makes the arrest.[29] A police officer[30] or sheriff[31] who makes an arrest in the performance of his official duty does not earn a reward, but otherwise if he is not acting in his official capacity and the services performed are not a part of his official duty.[32]

RIGHT OF PROPERTY, see latest topical index.

RIOT.

To constitute riot, there must be not only a conspiracy of two or more persons to act in a violent and tumultuous manner, but concert of action in pursuance thereof.[33] Violent conduct by an individual not acting in concert with others is not a riot.[34]

RIPARIAN OWNERS.

§ 1. Persons who are Riparian Owners, and Title to Lands Under Water (1311).
§ 2. Rights Attendant on Change in Bed of Stream or in Shore Line (1312).
§ 3. Rights Incidental to Riparian Ownership (1314).
§ 4. Subjection to Public Easements (1316).
§ 5. Actions for Protection of Riparian Rights (1316).

Scope of title.—What are navigable waters, and the right to use them for purposes of navigation,[35] matters relating to navigation,[36] and consuming uses of water, are treated elsewhere.[37]

Exeter, 48 N. H. 83; York v. Forscht, 23 Pa. 391; but is denied in Murphy v. Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Lee v. Flemingsburg Trustees, 7 Dana [Ky.] 28. In Indiana it is held that county commissioners cannot offer such rewards. Grant County Com'rs v. Bradford, 72 Ind. 455, 37 Am. Rep. 174.—From note to Daggett v. Colgan [Cal.] 14 L. R. A. 480.

Note: In the absence of express statutory provisions this power is generally denied. Hanger v. City of Des Moines, 52 Iowa, 193, 2 N. W. 1105, 35 Am. Rep. 266; Gale v. Inhabitants of South Berwick, 51 Me. 174; Board of Commissioners v. Bradford, 72 Ind. 455, 37 Am. Rep. 174; Mountain v. Multnomah County, 16 Or. 279, 18 P. 464; Abel v. Pembroke, 61 N. H. 359; Crofut v. Danbury, 65 Conn. 294, 32 A. 365; Patton v. Stephens, 77 Ky. 324; Murphy v. Jacksonville, 18 Fla. 318, 43 Am. Rep. 323; Baker v. Washington, 7 D. C. 134. See Felker v. Board of County Com'rs of Elk County [Kan.] 78 P. 167.

25. See 2 Curr. L. 1521.

NOTE: Statutes offering rewards must be strictly complied with. Hence a reward offered for the arrest of a person who shall have stolen any mare, horse or gelding is not earned by arresting one who stole a mule. Commonwealth v. Edwards, 10 Phila. 215. An offer for the arrest of a fugitive is not earned by his arrest several years later when he is not a fugitive. State v. Clark, 61 Mo. 263. A reward offered by the governor for an arrest and conviction means a conviction in the state court and is not earned by a conviction in a Federal court. Sias v. Hallock, 14 Neb. 332.—From note to Houston v. State [Wis.] 42 L. R. A. 63, 64.

26, 27. Atwood v. Armstrong, 92 N. Y. S. 596.

28. McClaughrey v. King, 135 F. 195.

29. For the reason that "he did not deliver him up for trial." Gould v. Chickasaw County [Miss.] 37 So. 710.

30. Atwood v. Armstrong, 92 N. Y. S. 596.

31. Sheriff is not entitled to the reward offered by Rev. Code 1892, § 1387, for arresting a fleeing murderer. Gould v. Chickasaw County [Miss.] 37 So. 710.

Note: The policy of the law forbids a public officer or those called to aid him in the discharge of a public duty, receiving for his or their services any reward or compensation beyond that allowed by law. Hence persons acting as a posse comitatus, and as special deputies and under the immediate direction and control of a sheriff, and who, while acting in the discharge of their duty, arrest persons for whose arrest and conviction a reward has been offered, are not entitled to such reward. St. Louis, etc., R. Co. v. Grafton, 51 Ark. 504, 14 Am. St. Rep. 66.—From note to Robinson v. State [Ga.] 44 Am. St. Rep. 140.

32. Deputy sheriff looking up evidence to secure a conviction after his term of service has ended. Cornwell v. St. Louis Transit Co., 106 Mo. App. 135, 80 S. W. 744.

33. Jemley v. State, 121 Ga. 346, 49 S. E. 292.

34. Turner v. State, 120 Ga. 312, 48 S. E. 312.

35. See Navigable Waters, 4 Curr. L. 757.

§ 1. *Persons who are riparian owners, and title to lands under water.*[38]—A municipality buying a piece of land on a non-navigable stream several miles distant from its corporate limits does not thereby become entitled as riparian owner to take from the stream a supply of water for its inhabitants.[39]

At common law the fee of all land covered by navigable waters was in the king, subject only to the public right of fishing and navigation.[40]

Absolute property in, and dominion and sovereignty over, the soils under the tide waters in the several states belongs to the states in which such lands are situate.[41] In New Jersey land between high and low water mark becomes vested in a shore owner reclaiming it,[42] subject, however, to the easement of an existing highway reaching to the high-water mark before the reclamation.[43]

There is a conflict of authority as to the ownership of the soil under non-tidal navigable waters lying wholly within a state.[44] In some states it is held to belong to the state, to be controlled by it for the benefit of the public.[45] The riparian proprietor ordinarily owns to high-water mark only,[46] but by statute in

36. See Shipping and Water Traffic, 2 Curr. L. 1648.

37. See Waters and Water Supply, 2 Curr. L. 2034.

38. See 2 Curr. L. 1522. See, also, Waters and Water Supply, § 2, 2 Curr. L. 2035; Navigable Waters, § 2, 4 Curr. L. 758.

39. City of Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779.

40. No one had right to erect or maintain wharf or other structure below high-water mark. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646; San Francisco Sav. Union v. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823. Had right to grant land to riparian owners subject to public easement of navigation. Smith v. Bartlett [N. Y.] 73 N. E. 63.

41. Pacific Ocean. San Francisco Sav. Union v. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823. Va. Code 1887, § 1338 not self-servient declaration, but declaratory of common law. Taylor v. Commonwealth, 102 Va. 759, 47 S. E. 875. The title between low-water mark and the line of navigability is in the state for the benefit of its citizens, and the riparian owner merely has certain rights therein, as the right of access, to build wharves, and the like. Id. Lands under the Atlantic Ocean below high-water mark. Evans v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 191. Hudson River. Woodcliff Land & Imp. Co. v. New Jersey S. L. R. Co. [N. J. Law] 60 A. 44. An owner of lands bordering on high-water mark cannot charge lands in front of his property and below high-water mark, the title to which he has not acquired from the state, with restrictions as to their use. Restriction against erecting building nearer than 27 feet to certain street not binding on subsequent grantee from state. Evans v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 191. Restrictions charged on the lands conveyed do not apply to land subsequently added thereto by natural accretion. Evans v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 191. Columbia River. Muckle v. Good [Or.] 77 P. 743. A littoral proprietor has no absolute right to build a wharf on the submerged soil. Trustees of Town of Brookhaven v. Smith, 90 N. Y. S. 646.

See, also, Tiffany, Real Prop. p. 590.

42. Under the N. J. Wharf Act of 1851 (Gen. St. p. 3753), §§ 1, 11, land between high and low-water mark becomes vested in a shore owner reclaiming it. Attorney General v. Central R. Co. [N. J. Eq.] 59 A. 348.

43. Attorney General v. Central R. Co. [N. J. Eq.] 59 A. 348. The question of the existence of a highway on the shore of a navigable water prior to the grant of the locus in quo by the riparian commissioners (Id.), whether such grant was ultra vires because neither of the grantees were riparian owners of the lands included within the lines of the alleged highway (Id.), and whether such grant operated to terminate the existence of the highway, are questions to be determined in a pending action at law, rather than in a suit in equity to determine the validity of such grant (Id.). Delay of state in instituting suit to determine validity of grant of tide land in front of highway until death of all officers executing it not of itself sufficient to deprive it of equitable relief, but will prevent it from insisting on rule of evidence as basis for deciding that it must be conclusively presumed that such grant was induced by fraudulent representations as to termination of highway. Id.

44. See Tiffany, Real Prop., p. 593.

45. Waters under Lake Michigan. Cobb v. Lincoln Park Com'rs, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 264, and note; Woodcliff Land Imp. Co. v. New Jersey S. L. R. Co. [N. J. Law] 60 A. 44. Meandered waters. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52. Land covered by navigable waters is not subject to entry. Grant of such land void. State v. Twiford, 136 N. C. 603, 48 S. E. 586. Under stream legally and technically navigable. Webster v. Harris [Tenn.] 69 S. W. 782. Va. Code 1887, § 1338. Taylor v. Commonwealth, 102 Va. 759, 47 S. E. 875. The state of Alabama, when admitted to the Union, acquired title to the soil below high-water mark, under the navigable waters within the limits of the state, not previously granted. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

46. Meandered waters. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52. Navigable streams. Woodcliff Land Imp. Co. v. New

some states such ownership is extended to low-water mark.[47] The rights of abutting owners on the drying up of such waters cannot be extended beyond the boundaries fixed by the original patents, except by accretion or reliction.[48]

In other states the riparian proprietors own the soil to the center of the stream, subject to the right of navigation.[49] Hence a grant of riparian lands vests in the purchaser the title to any unsurveyed islands lying between the bank and the thread of the stream, in the absence of a provision therein to the contrary.[50] His rights are not affected by the fact that his own land is surrounded by two channels of the river.[51]

The question of the title of a riparian owner is one of local law,[52] and grants of the government for lands bounded by streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.[53]

A riparian proprietor may convey the bank of a stream so as to sever the title thereto from the bed, putting the ownership of the latter in one and of the former in another.[54] A devise of land bordering on a navigable stream conveys all that the testator owns.[55]

The beds of unmeandered streams[56] and streams navigable only in the ordinary sense belong to the riparian owners.[57] If a non-navigable stream is the boundary of lands, the title extends to its center or thread,[58] in the absence of a clearly expressed intention to the contrary in the grant or deed.[59]

§ 2. *Rights attendant on change in bed of stream or in shore line.*[60]—Land formed by gradual and imperceptible accretion, or by gradual recession of the water, belongs to the owner of the contiguous land to which the addition is

Jersey S. L. R. Co. [N. J. Law] 60 A. 44. On tidal river, whether tide land or not. Muckle v. Good [Or.] 77 P. 743. Where board of school land commissioners found land to be tide land, and conveyed it as such, held that grantees took good title as against plaintiffs. Id.

47. Va. Code 1887, § 1338. Taylor v. Commonwealth, 102 Va. 759, 47 S. E. 875.

48. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

49. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118; Sliter v. Carpenter [Wis.] 102 N. W. 27; West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393. Owner of the bank presumably owns the bed to the thread of such stream, subject to public rights. Walls v. Cunningham [Wis.] 101 N. W. 696. Clear evidence to the contrary is necessary to rebut such presumption. Id. Mere evidence of the conveyance of all of a certain tract of land on a specified side of such stream, or of land giving its meander line as a boundary, is insufficient for that purpose. Evidence insufficient to show severance, and parties held adjoining owners within Wis. Rev. St. 1898, §§ 1391, 1395, relating to division fences. Id. In Nebraska owns to center of stream. Whitaker v. McBride, 25 S. Ct. 530.

50. Sliter v. Carpenter [Wis.] 102 N. W. 27. Takes title to unsurveyed island as against one claiming to enter it as homestead, where omission to survey it not due to fraud or mistake, and subsequent application for survey has been refused by land department. Whitaker v. McBride, 25 S. Ct. 530. He takes title to unsurveyed islands existing when patent is issued, in the absence of an expressed intention on the part of the government to treat them as a part of the public domain. Accretions had established sand bar between island and shore of lake when action was commenced. Webber v. Axtell [Minn.] 102 N. W. 915. His rights become established at the time of his patent. Id. Such title cannot be subsequently divested by any acts of the government. Subsequent patent to island passes no title. Id. Plaintiff not estopped to assert title against defendant. Id.

See, also, Tiffany, Real Prop., p. 1038.

51. Has rights of riparian owner in channel opposite his banks. Whitaker v. McBride, 25 S. Ct. 530.

52, 53. Whitaker v. McBride, 25 S. Ct. 530.

54. Walls v. Cunningham [Wis.] 101 N. W. 696.

55. Where owned land under water of river, separate devises of land on each bank carry title to thread of stream, though river is navigable one in which tide ebbs and flows. Smith v. Bartlett [N. Y.] 73 N. E. 63.

56. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813.

57. Webster v. Harris [Tenn.] 69 S. W. 782.

See, also, Tiffany, Real Prop., p. 595.

58. Navigable in ordinary but not technical sense. Webster v. Harris [Tenn.] 69 S. W. 782.

59. Deeds held to convey title merely to low-water mark of lake. Webster v. Harris [Tenn.] 69 S. W. 782. For fuller discussion see Boundaries, 3 Curr. L. 518.

60. See 2 Curr. L. 1523.

[To be concluded.]

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made,[61] and this is true though it occupies a space formerly occupied by the land of another which has been washed away.[62] But in case of an avulsion, or sudden and perceptible change in the course of a stream, title to the land remains in the original owner.[63]

In order to render applicable the rules of law in regard to accretion and reliction, there must be a lake or stream,[64] and a gradual deposit on, or addition to,[65] visible lands owned by the claimant or his grantors.[66] The true test as to what is gradual and imperceptible is whether witnesses could see the process while it was going on.[67] Land formed by the gradual filling in of a space between a detached bar or island and the mainland, or by a gradual recession of the waters, is not an accretion to the mainland.[68]

The running of a meander line does not conclusively establish the character of the area beyond it.[69] Thus the mere fact that a body of water is meandered does not make it a lake so as to render applicable the doctrine of accretion and reliction.[70]

The question whether the grantee of a surveyed tract of land bordering on a river takes accretions depends upon whether the line run by the surveyor was the meander line of the river or an independent boundary.[71] If the former, a conveyance bounded by it is a conveyance bounded by the river, and land made by accretion belongs to the grantees.[72] If the latter, title to such land remains in the grantors.[73] The meander line of a body of water is not, strictly speaking, a boundary line.[74] If a meander line is run around a lake, which is properly mean-

See, also, Tiffany, Real Prop., p. 1034.

61. Topping v. Cohn [Neb.] 99 N. W. 372; Widdecombe v. Chiles, 173 Mo. 195, 73 S. W. 444. Gradual advance or retreat of river carries owner's line with it. Nix v. Pfeifer [Ark.] 83 S. W. 951. Thread of stream continues to be dividing line. Witt v. Willis [Ky.] 85 S. W. 223. The right to accretions is an incident to all riparian ownership. Based on right of access, which is fundamental riparian right, on which all others depend. Webber v. Axtell [Minn.] 102 N. W. 915. Evidence held to authorize submission to jury of question whether tract of land was formed as island in river, or as an accretion to one of its banks. Instructions approved. Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109.

62. Widdecombe v. Chiles, 173 Mo. 195, 73 S. W. 444. All lines submerged by the encroachments of a river cease to exist. Id. Hence, if an intervening tract separating a remote tract from a river is gradually washed away until the remote tract is washed by the river, such latter tract becomes riparian (Id.), and subsequent accretions become a part of it. Fractional section, not patented, between defendant's land and river, gradually washed away, and river flowed through defendant's land. River then rebuilt to defendant's land more than had been washed away, and plaintiff thereafter received patent to fractional section. Held, that plaintiff took no title. Id.

63. Old water line remains the boundary line. Nix v. Pfeifer [Ark.] 83 S. W. 951. Where a stream changes its course so as to perceptibly cut off a point of land and leave it beyond the thread of the stream. Witt v. Willis [Ky.] 85 S. W. 223. The shifting of the channel of a river, which is the boundary between two counties, from one side of an island to the other, does not change the boundary. Id.

64. Body of water held not a lake. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

65. Widdecombe v. Chiles, 173 Mo. 195, 73 S. W. 444. Evidence insufficient to show imperceptible additions. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

66. Widdecombe v. Chiles, 173 Mo. 195, 73 S. W. 444.

67. Not necessary that it be indiscernible by comparison at two distinct points of time. Nix v. Pfeifer [Ark.] 83 S. W. 951.

68. Nix v. Pfeifer [Ark.] 83 S. W. 951.

69. As to whether it is river, lake, marsh, or unsurveyed land. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

70. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

71. Leonard v. Wood, 33 Ind. App. 83, 70 N. E. 827.

72. Evidence held to show that line was meander line, and hence purchaser at foreclosure sale entitled to land formed by change in course of river. Leonard v. Wood, 33 Ind. App. 83, 70 N. E. 827. A deed conveying a described tract and "all accretions and riparian rights belonging to said lands" covers accretions to the lands described, though not within the metes and bounds. Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109.

73. Leonard v. Wood, 33 Ind. App. 83, 70 N. E. 827.

74. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52. Is line designed to point out sinuosity of bank or shore, and a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. Whitaker v. McBride, 25 S. Ct. 530.

dered, the title of the abutting owners extends to the actual water line.[75] But if there is no body of water corresponding to the meander line to which such ownership can extend, then such line limits the extent of the land conveyed.[76] Where the bank of a river forms a boundary of a grant from the United States, subsequent accretions attach to and become a part of it,[77] and pass under a subsequent conveyance by lot numbers.[78]

Where a river flowing over government land changes its course, the abandoned bed becomes a part of the surrounding land and passes by a subsequent patent.[79] No claim of adverse possession can, of course, be made to the bed of a dried-up body of water, which is owned by the state or the Federal government,[80] or to accretions to land so owned.[81]

§ 3. *Rights incidental to riparian ownership.*[82]—A riparian proprietor upon either a navigable or a non-navigable stream or lake is entitled to have the water flow or remain in its natural condition, undiminished[83] and unpolluted.[84]

He is also entitled to a reasonable use of the water flowing over his premises,[85] what is a reasonable use depending upon the size and velocity of the stream, and the attending circumstances.[86] He may use it for domestic purposes,[87] to furnish power to run machinery,[88] and to irrigate his land, when the amount so used is not out of proportion to the size of the stream,[89] and may create ponds for fish and fowl, so long as they are not large enough to materially diminish the flow of the stream by evaporation.[90] His rights are, however, subject to the like rights

75. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52; Webber v. Axtell [Minn.] 102 N. W. 915.

76. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

77. Formed by gradual recession of bank. Topping v. Cohn [Neb.] 99 N. W. 372.

78. Topping v. Cohn [Neb.] 99 N. W. 372.

79. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

80. Carr v. Moore, 119 Iowa, 152, 93 N. W. 52.

81. Topping v. Cohn [Neb.] 99 N. W. 372.

82. See 2 Curr. L. 1523. See, also, Waters and Water Supply, § 3, 2 Curr. L. 2035, § 4, 2 Curr. L. 2040.

83. No one has right to drain lake. Webster v. Harris [Tenn.] 69 S. W. 782. The fact that a stream for some distance flows through a swamp, without well defined banks, does not change the rights of the riparian owners above and below such swamp, or authorize an owner above it to unreasonably interfere with its flow to the injury of an owner below it. Harrington v. Demaris [Or.] 77 P. 603. A riparian proprietor has no right to erect dams and float logs by means of artificial freshets during a season of the year when the stream is not navigable. Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 P. 1046. Lower proprietor not estopped from objecting to obstruction of stream by dam because assisted upper proprietor in clearing stream of obstructions, and used water stored by such dam for two years. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813. May enjoin maintenance of dam and release of water so stored in large quantities at intervals for purpose of floating shingle bolts, etc. Id.

Riparian rights in canals. See note, 61 L. R. A. 877.

84. Webster v. Harris [Tenn.] 69 S. W. 782. It is immaterial whether the refuse matter is discharged directly into the stream, or reaches it through a ditch, flume, reservoir, or race, so long as the water is actually polluted thereby. United States Board & Paper Co. v. Moore [Ind. App.] 72 N. E. 487. Under Mass. St. 1867, c. 106, p. 541, authorizing city of Worcester to discharge sewerage into creek, and St. 1886, c. 331, p. 309, requiring it to establish purification plant within four years, held city not negligent in failing to purify sewerage prior to establishment of plant, in absence of showing that it could have done so by any reasonable and incidental construction and careful management, without establishing such plant. Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326.

See, also, Nuisance, § 2, 4 Curr. L. 839.

85. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799; Samuels v. Armstrong, 93 N. Y. S. 24; Harrington v. Demaris [Or.] 77 P. 603.

86. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799. An injunction will not issue to restrain the use of the water in the absence of a finding that the use is unreasonable under the circumstances. Not authorized by finding merely that dams increased evaporation and absorption. Id. Each action to be governed by facts of particular case. Samuels v. Armstrong, 93 N. Y. S. 24.

87. In house and barn, and to water stock, etc. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799. Including farming purposes. Samuels v. Armstrong, 93 N. Y. S. 24.

88. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799.

89. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799. After the natural wants of all the riparian proprietors have been satisfied, each is entitled to a reasonable use of the waters for irrigation purposes. Harrington v. Demaris [Or.] 77 P. 603. For a full discussion of this subject, see Waters and Water Supply, § 13, 2 Curr. L. 2046.

of the other riparian owners on the stream below, which he may not prejudice.[91] Thus he has no right to divert the stream and lessen the volume of water, to their detriment, annoyance, or future disadvantage or injury,[92] or to use the water for commercial purposes.[93] Several owners of distinct tracts of land who, by a concert of action, cause waters from a swamp to run into a stream where they have never run before, thereby make such waters tributary to such stream, and, after the running of limitations, subject to the rules of law applicable to riparian ownership.[94]

A riparian owner may construct levees and embankments on his own land, outside the channel of a watercourse, in order to protect it from overflow, though the embankment constructed by an opposite owner is thereby endangered.[95] The proprietor of lands upon navigable waters may also construct landings, wharves, or piers for his own use, or that of the public, subject to such rules and regulations as the legislature may see proper to impose.[96] The rights of the riparian owner and the state should be so exercised as not to interfere with each other.[97]

Riparian rights are property and are inseparably annexed to the soil and parcel of the land itself.[98] The proprietor of lands upon navigable waters is entitled to the right of access to their navigable parts,[99] and anything which obstructs or interferes with it is a private nuisance as to him.[1] Each owner, as against the others, is entitled to his proportion of the line bounding navigable water, and to a direct course over intervening shallows for the construction of piers or other structures to connect the shore with such navigable line.[2]

The control of navigable water is not appurtenant to the ownership of the shore.[3]

90. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799.

91. Webster v. Harris [Tenn.] 69 S. W. 782. Not absolute ownership. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799. Lower owner takes subject to lawful uses and conveniences of upper. Samuels v. Armstrong, 93 N. Y. S. 24.

92. Samuels v. Armstrong, 93 N. Y. S. 24.

93. May not divert water into reservoir for purpose of selling ice there formed. Samuels v. Armstrong, 93 N. Y. S. 24.

94. Harrington v. Demaris [Or.] 77 P. 603.

95. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625.

96. See Navigable Waters, 4 Curr. L. 757; Wharves, 2 Curr. L. 2074.

97. Taylor v. Com., 102 Va. 759, 47 S. E. 875. Va. Acts 1899-1900, p. 797, c. 757, leasing tract under York River below low-water mark, including artesian well thereon, not objectionable as interfering with rights of adjacent riparian proprietor. Id.

98. Taylor v. Com., 102 Va. 759, 47 S. E. 875. Cannot be arbitrarily or capriciously destroyed or impaired. Littoral proprietor's right of access to navigable part of tide water. San Francisco Sav. Union v. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823. The secretary of war cannot interfere with such rights by granting them to a stranger. Letter from secretary of war held, at most, a statement that that department would not object to such works, provided navigation was not interfered with. Id. The right to have the waters of a non-navigable stream come to his land in the natural and usual flow. City of Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779. Comes within the constitutional provision prohibiting the taking of private property without just and adequate compensation first being paid. Id. The rights are incidents of property in the land and not an appurtenance to it. Webster v. Harris [Tenn.] 69 S. W. 782.

99. Thousand Island Steamboat Co. v. Visger, 179 N. Y. 206, 71 N. E. 764. A littoral proprietor whose lands abut on tide water. San Francisco Sav. Union v. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823. Right to accretions based on right of access. Webber v. Axtell [Minn.] 102 N. W. 915.

1. Cal. Civ. Code, § 3479. Defendants enjoined from maintaining works for purpose of boring for oil in front of plaintiff's property between high and low water mark. San Francisco Sav. Union v. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823.

2. This is the dominant rule, and all rules for apportionment and division are subject to such modification as may be necessary to accomplish substantially this result. Thomas v. Ashland, etc., R. Co. [Wis.] 100 N. W. 993. Where irregularities of shore are such that lines cannot be drawn at right angles to shore to accomplish this, then whole cove is to be treated as a unit of the shore line by drawing such vertical lines from its two boundary points or headlands to the line of navigability, and apportioning the whole intervening boundary line of navigable water to the whole shore line of the cove between such headlands, and by drawing straight lines from the two termini of navigable water line to the respective termini of shore line pertaining to each owner. Id.

3. State v. Twiford, 136 N. C. 603, 48 S. E. 586.

A lower riparian proprietor cannot show an adverse use of the water against an upper proprietor, in the absence of proof of recognition of his right by such upper proprietor.[4] Nor is the use of water from a spring, which has never been tributary to the stream in which the lower proprietor claims rights, adverse to the latter.[5]

§ 4. *Subjection to public easements.*[6]—Though the riparian proprietor owns the bed of the stream, he holds it subject to a public easement therein for purposes of navigation and commerce.[7] He is entitled to no compensation for injuries resulting from either the navigation itself, or from work done for the purpose of improving it.[8]

A party using a navigable stream is confined to its limits and may not go upon the lands of an adjoining owner without his permission.[9] The use of the water when it is above the line of mean high tide is not a use of the adjoining land if the land itself is not trespassed upon.[10]

§ 5. *Actions for protection of riparian rights.*[11]—Equity will enjoin the pollution,[12] or obstruction of a stream,[13] or the diversion of its waters for commercial purposes, though the damages caused thereby are merely nominal.[14] Injunction will also issue to restrain the draining of the waters of a lake at the instance of a riparian proprietor injured thereby.[15] Such proprietor may also recover damages for the injuries which he has sustained.[16] Injunction will also issue at the instance of a littoral proprietor to prevent interference with his right of access to the ocean.[17]

4. Use for less than statutory period gives no rights. Harrington v. Demaris [Or.] 77 P. 603.

5. Harrington v. Demaris [Or.] 77 P. 603.

6. See 2 Curr. L. 1524. See, also, Navigable Waters, § 3, 4 Curr. L. 760.

7. Public right paramount. Tunnel held obstruction. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393. Even if a grant of land under a navigable stream passes title, such title is subject to the right of navigation. State v. Twiford, 136 N. C. 603, 48 S. E. 586. Stream navigable in ordinary sense. Webster v. Harris [Tenn.] 69 S. W. 782. Own the bed of an unmeandered stream subject to the right of driving timber products over it. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813.

8. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118. Applies only where work done for purpose of improving stream itself, or body of water emptying into it or into which it naturally empties. Id. Entitled to compensation where waters are taken and their general level reduced for purpose of making navigable an artificial canal, as where water in canals connecting with Chicago River was lowered by construction of drainage canal. Id.

9. Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 P. 904. Driving logs. Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 P. 813.

10. Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 P. 904.

See, also, Navigable Waters, 4 Curr. L. 757.

11. See 2 Curr. L. 1524.

12. Mass. St. 1886, p. 309, c. 331, provides for construction of sewerage purification plant by city of Worcester, so that sewage discharged in creek should not create nuisance. Held that provision for its enforcement by injunction was for benefit of public health, and could only be enforced by boards of selectmen of towns, and not by riparian proprietors, and city not liable to them for failure to erect adequate plant. Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326.

13. Depositing debris in stream. Where obstruction has taken place, must show continuing injury attended with substantial and serious damage. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625. The detention of water by means of a dam and its subsequent release for the purpose of facilitating navigation. Monroe Mill. Co. v. Menzel, 35 Wash. 487, 77 P. 813. To float logs. Decree not too sweeping. Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 P. 1046.

14. Samuels v. Armstrong, 93 N. Y. S. 24. Will enjoin a municipal corporation from wrongfully taking a water supply from a stream. Interlocutory injunction properly granted. City of Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779.

15. Webster v. Harris [Tenn.] 69 S. W. 782.

16. May recover damages for the depreciation of the value of his land caused by a city depositing its sewage in the stream, for the destruction of its comfortable use and occupation, and for his actual loss of rents. Smith v. Sedalia, 182 Mo. 1, 81 S. W. 165. In action for damages resulting from discharge of sewage into stream, not required to show special damages in order to recover at least nominal damages. Id.

17. Private nuisance. San Francisco Sav. Union v. R. G. R. Petroleum & Min. Co., 144 Cal. 134, 77 P. 823. One of several owners of lots fronting on beach, who have conveyed easement to city to construct board walk over their property, with covenant that no buildings should be erected on ocean side, may restrain another of such grantors from

ROBBERY.

§ 1. Nature and Elements (1317).
§ 2. Indictment and Prosecution (1317).
A. Indictment (1317).
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§ 1. *Nature and elements.*[18]—Robbery is larceny by force or intimidation,[19] and to constitute it there must be actual violence, or such a demonstration of threats as will create reasonable apprehension of bodily injury, if the victim resists,[20] and an intent to deprive the owner of his property.[21] To snatch a watch from the person of the owner with sufficient force to break the chain is robbery.[22] A statute defining robbery is not repealed by one providing the death penalty for assault with intent to rob a train.[23]

The intent to rob in a charge of assault with intent to rob sufficiently appears where defendant drew a gun on prosecuting witness and ordered him to halt and throw up his hands, but prosecuting witness immediately broke and ran.[24]

§ 2. *Indictment and prosecution. A. Indictment.*[25]—Intent being a substantive element of the crime, it must be directly alleged,[26] but a charge that defendant "unlawfully, wrongfully, and feloniously did take and carry away," includes a taking with intent to steal the property taken.[27] Robbery being larceny by force or intimidation, it is sufficient to charge it in either form.[28] Ownership of the property must be alleged.[29]

The same particularity not being required in charging attempted acts as in charging a completed crime, it is not necessary in an indictment for assault with intent to rob to specify what accused intended to take, to aver that he intended to deprive the owner of its value,[30] or allege ownership, possession being sufficient.[31] An information charging an assault and an attempt will sustain a conviction of assault with intent to rob.[32] Under an information charging robbery, there may be a conviction of an attempt to rob,[33] an assault with intent to rob, or simple assault,[34] and in the absence of evidence of violence or putting in fear, there may be a conviction of larceny from the person.[35] Amendment of the information by the insertion of unnecessary and immaterial averments is not prejudicial.[36] An information charging that the property was taken by force and putting in

building a structure on ocean side of walk on land subsequently acquired from state. Evans v. New Auditorium Pier Co. [N. J. Eq.] 58 A. 191.

18. See 2 Curr. L. 1524.

19. Traver v. State [Ark.] 81 S. W. 615. "An aggravated form of larceny." State v. Wasson [Iowa] 101 N. W. 1125.

20. Ramirez v. Territory [Ariz.] 80 P. 391; State v. Donohue [N. J. Law] 59 A. 12; State v. Alexander [Mo.] 83 S. W. 753. It is not robbery to obtain personal property from another without force or putting in fear. Cutting rope attaching jug to saddle horn. Bowlin v. State [Ark.] 81 S. W. 838. Where defendant armed with a dangerous weapon struck prosecutor and took property from his person by force and violence, a conviction was proper. State v. Duffy, 124 Iowa, 705, 100 N. W. 796.

21. State v. Graves [Mo.] 84 S. W. 904; State v. Fordham [N. D.] 101 N. W. 888. In North Dakota statute defining robbery, the word "wrongful" should be construed as synonymous with "felonious." Id. There can be no robbery where one takes property under a bona fide belief that it is his own. State v. Wasson [Iowa] 101 N. W. 1125.

22. Perry v. Commonwealth [Ky. L. R.] 85 S. W. 732.

23. Pen. Code Ariz. § 319, not repealed by Laws 1889, p. 19, No. 2. Smith v. Territory, 4 Ariz. 95, 78 P. 1035.

24. Long v. State [Tex. Cr. App.] 83 S. W. 384.

25. See 2 Curr. L. 1525.

26, 27. State v. Fordham [N. D.] 101 N. W. 888.

28. Traver v. State [Ark.] 81 S. W. 615.

29. State v. Wasson [Iowa] 101 N. W. 1125; Traver v. State [Ark.] 81 S. W. 615.

30, 31. Traver v. State [Ark.] 81 S. W. 615.

32. Smith v. State [Neb.] 100 N. W. 806.

33. State v. Franklin [Kan.] 77 P. 588.

34. State v. Duffy, 124 Iowa, 705, 100 N. W. 796.

35. And it is not error to so instruct. State v. Donohue [N. J. Law] 59 A. 12; State v. Wasson [Iowa] 101 N. W. 1125.

36. Where statute does not make the value of property stolen an essential element in the offense, it is not necessary to allege its value "in current United States silver coin." State v. La Chall [Utah] 77 P. 3. And the statutory words "and against his will" are unnecessary. Id.

fear and that it was taken from the person and possession and from the immediate presence of a certain specified person does not charge more than one offense.[37]

(§ 2) *B. Evidence.*[38]—The presumption of guilt arising from the recent possession of stolen property applies in robbery as well as in larceny.[39] Admissibility of evidence is governed by the usual rules,[40] and such circumstances as defendant's prior impecuniosity and subsequent affluence may always be shown.[41] Cases involving the sufficiency of the evidence are cited in the note.[42]

(§ 2) *C. Instructions.*[43]—As in other crimes, the instructions should define the issues raised by the pleadings and evidence.[44] An instruction for conviction if the jury believed that defendant did assault prosecuting witness with intent to rob and did rob him with intent to convert property to his own use, is good.[45] Where the evidence demands, it is proper to instruct as to included offenses,[46] but where there is no evidence tending to support a conviction of any but the offense charged, instructions as to lower degrees are uncalled for.[47]

RULES OF COURT; SAFE DEPOSITS, see latest topical index.

SALES.

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§ 2. Contract Requisites of a Sale (1320).
§ 3. Modification, Rescission and Revival (1323).
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37. State v. Howard [Mont.] 77 P. 50.

38. See 2 Curr. L. 1526.

39. State v. Wasson [Iowa] 101 N. W. 1125.

40. Evidence of attempt to rob a train and in prosecution of which mail clerk was robbed for which prosecution was made, admissible as part of res gestae. State v. Howard [Mont.] 77 P. 50. The attempt of defendant to induce prosecuting witness not to appear is admissible. State v. Alexander [Mo.] 83 S. W. 753. That woman very intimate with accused was in possession of an article stolen the morning after the robbery may be shown. Clay v. State [Ga.] 50 S. E. 56.

41. People v. Sullivan, 144 Cal. 471, 77 P. 1000. Accused while gambling the night before the robbery had stated that he was "broke" and the day following the crime had money. State v. Franklin [Kan.] 77 P. 588.

42. Accomplice held sufficiently corroborated. People v. Sullivan, 144 Cal. 471, 77 P. 1000. Evidence held sufficient to support conviction. People v. Kelly [Cal.] 79 P. 846; State v. Alexander [Mo.] 83 S. W. 753; State v. Swisher [Mo.] 84 S. W. 911; State v. Davis [Mo.] 85 S. W. 354. Possession of property is sufficient evidence of ownership to sustain conviction. State v. Howard [Mont.] 77 P. 50. Evidence of larceny from person without force or intimidation held insufficient. Ramirez v. Territory [Ariz.] 80 P. 391. Conflicting statements of witnesses intoxicated at time of alleged offense held to leave guilt in doubt. State v. Wain [Idaho] 80 P. 221.

43. See 2 Curr. L. 1526.

44. Robbery accomplished by force and no evidence as to putting in fear, trial judge need not instruct as to fear. People v. Modina [Cal.] 79 P. 842. Failure to read an amendment to the statute defining the offense (snatching) is immaterial in a case not within the amendment. Clay v. State [Ga.] 50 S. E. 56. Judge should instruct jury to acquit defendant if they believed his testimony, where he testified as to the facts showing that he did not commit the crime as charged. Smith v. State [Tex. Cr. App.] 81 S. W. 712.

45. State v. Alexander [Mo.] 83 S. W. 753. Instruction omitting felonious intent is bad (State v. Fordham [N. D.] 101 N. W. 888) and is not cured by one properly defining robbery (State v. Graves [Mo.] 84 S. W. 904). An instruction that if defendant forcibly took money from prosecutor and that a struggle then took place for its possession and defendant took it with intent to steal it, there was robbery, is unhappily expressed, the struggle being immaterial. State v. Graves [Mo.] 84 S. W. 904. Where all the evidence tended to show robbery by force and violence which was properly charged, an error respecting robbery by putting in fear is immaterial. State v. Davis [Mo.] 85 S. W. 354.

46. State v. Franklin [Kan.] 77 P. 588; State v. Donohue [N. J. Law] 59 A. 12. Where request is not made, not error for trial judge to omit instructions. People v. Modina [Cal.] 79 P. 842. Where defendant struck prosecutor, an omission to charge on assault and assault with intent to rob was error. State v. Duffy, 124 Iowa, 705, 100 N. W. 796.

47. State v. Clough [Kan.] 79 P. 117. Charge on aggravated assault held not required in prosecution for assault with intent to rob. Long v. State [Tex. Cr. App.] 83 S. W. 384.

ignation of the Goods (1327). Payment (1328). Delivery and Acceptance (1328). Revesting Title (1330).

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§ 14. Conditional Sales. Definition, Validity and Formation (1364).

§ 1. *Definition; distinction from other transactions.*[48]—A sale is a transfer of the absolute or general property in a thing for a price in money.[49] Sales may be either executed or executory, the passing of title being the distinguishing feature of an executed sale.[50] An option, while closely related to a sale, is distinct therefrom.[51] If the alleged seller has the right to compel return of the thing sent, it is a bailment and not a sale.[52] Shipments on trial, the consignee having

48. See 2 Curr. L. 1527.

49. Cyc. Law Dict., "Sale," p. 821; "Money," compare topic, Exchange of Property, 3 Curr. L. 1396. See, also, 2 Curr. L. 1528, n. 35. One agreeing to purchase stock and good will of business and lease store, held a sale and not merely a contract containing covenants. Schott Co. v. Stone, 35 Wash. 252, 77 P. 192.

50. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432; Cooper v. Payne, 93 N. Y. S. 69. See post, § 6, Transition of title. A written agreement, commonly called a **"permit,"** whereby a licensee is authorized **to enter** on **land, cut and remove logs** and timber, paying stumpage therefor, is an executory contract to sell the timber after cutting, as personal property, coupled with a license to enter and cut. Pierce v. Banton, 98 Me. 553, 57 A. 889. The **employment of** the **word "sell"** in the memoranda of the initiatory part of a contract is not conclusive, as a matter of law, as to the nature of the contract as executed or executory. Pacific Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105. Contract in the following form: "Contract. * * * We this day enter you on contract for the following: Article * * * Cod Oil. Quantity * * *. Price * * *. Terms * * *. Deliveries: To be delivered in lots as wanted prior to April 1, 1903. * * * Accepted * * *," held not an absolute sale, especially in view of plaintiff's burden of proof. Carter v. Dodd [Mass.] 71 N. E. 803.

51. A contract providing that upon the execution of a certain license to defendant by a patentee plaintiff **would sell** defendant all its personal property "then on hand" for a specified sum, held a mere option. New York Pelton Floor Co. v. Tucker, 43 Misc. 429, 89 N. Y. S. 410. Contract whereby the party of the first part agreed to sell to no one but the party of the second part and agreed to deliver two machines a month and **failing to so deliver** the said **party** of the second part **should** be at liberty to **have** the **machines built** by a responsible concern, held not to constitute an option allowing the party of the first part to build the machines or not as it chose, but that the other party could hold him to his agreement to sell to no one else and under the circumstances indicated could purchase the machines elsewhere. Myers v. Steel Mach. Co. [N. J. Eq.] 57 A. 1080. See topics Contracts, 3 Curr. L. 805; Gambling Contracts, 3 Curr. L. 1546; Vendors and Purchasers, 2 Curr. L. 1976.

52. One making advances and selling the goods on commission held to hold the goods as bailee. In re Flanders [C. C. A.] 134 F. 560. Defendant agreeing to pipe plaintiff's oil into defendant's storage tanks and issuing tickets therefor held to constitute a bailment. Guffey Petroleum Co. v. Glass Oil Co. [Tex. Cr. App.] 84 S. W. 281. Proof of sale at a certain price held not fatally variant from allegation of bailment with agreement to sell at that price. Linden v.

the right to return the goods if they prove unsuitable or unsatisfactory, are generally held to be bailments,[53] though they may be converted into sales by retention after the trial period,[54] or by the bailee treating the property as his own, as by selling it to a third person.[55] Such shipments on trial must be distinguished from what is known in the law as a contract of "sale or return," in which the title passes to the party to whom the goods are delivered, he having a right to return them independent of any consideration other than his mere will or desire.[56] It is not incompatible with the notion of an agency that the compensation of an agent to sell goods shall be the difference between the amount of purchase money received by him and the price fixed by the principal.[57]

§ 2. *Contract requisites of a sale.*[58]—The sale being a contract, it must contain all the requisites thereof relative to parties,[59] consideration,[60] mutuality,[61] and

Thieriot, 96 App. Div. 256, 89 N. Y. S. 273. A shipment of goods to be paid for when sold, there being nothing in the contract in regard to commissions, held a sale and not a bailment. In re Martin-Vernon Music Co., 132 F. 983. See 2 Curr. L. 1528, n. 30-33.

53, 54. O'Donnell v. Wing, 121 Ga. 717, 49 S. E. 720.

55. O'Donnell v. Wing, 121 Ga. 717, 49 S. E. 720. Hence such subsequent purchaser acquires a good title as against the original owner. Id.

56. In re Miller, 135 F. 868.

57. Contract by which corporation appointed one its agent to receive, keep and sell farm implements, the corporation to retain title to all goods and the contract providing for the rendering of accounts, the agent's compensation to be made by selling implements at an advanced price, held one of agency. Commonwealth v. Parlin & Orendorff Co., 26 Ky. L. R. 58, 80 S. W. 791. See Clark and Skyles, Agency, §§ 8-11, pp. 16-28, for a full discussion of the distinction between contracts of agency and sale. See, also, 2 Curr. L. 1527, n. 29.

58. See 2 Curr. L. 1529. See, also, Contracts, 3 Curr. L. 805.

59. Manufacturer selling through broker and shipping direct to buyer held to constitute a contract of sale between manufacturer and buyer. Tuthill Spring Co. v. Holliday [Ind.] 72 N. E. 872. Where the question was whether goods were sold to defendant firm or to its successor, a corporation of the same name, held, where goods were ordered by and charged to the corporation, that a verdict against the firm was erroneous. Esher v. Meeker [N. J. Law] 60 A. 35. Defendant failing to disclose existence of corporation and making payments on goods, held personally liable therefor. Cook v. Williams, 85 N. Y. S. 1123. A mere stockholding corporation accepting, through its vice president and general manager, an offer to sell a boiler to another company, in which the accepting officer held the same positions as in the stockholding company, all payments being made by the company actually using the boiler, held boiler belonged to it though stockholding company's name was painted thereon. Tilford v. Atlantic Match Co., 134 F. 924. Held a question for the jury as to whether contract was made with a party individually or with a corporation of which he was president. Alden Speare's Sons Co. v. Hubinger [C. C. A.] 129 F. 538. See 2 Curr. L. 1529, n. 38.

60. A party is not precluded from asserting his right to property as between himself and another by the mere fact that he knew the other was appropriating such property and made no objection. Watson v. Gross [Mo. App.] 87 S. W. 104. Satisfaction of judgment held consideration for sale whether any attempt had been made to enforce the judgment or not. Lewter v. Lindley [Tex. Civ. App.] 81 S. W. 776. Contract to purchase a piano, payment to be made partly in cash, partly in advertising, held the seller having furnished matter for the advertising, he incurred an obligation to pay therefor according to the contract, which amounted to a valuable consideration. Mail & Times Pub. Co. v. Marks [Iowa] 101 N. W. 458. Failure of expressions of opinion to come true held not to constitute failure of consideration for purchase-money notes. Shiretzki v. Kessler & Co. [Ala.] 37 So. 422.

61. Agreement to sell and buy as much as one party shall want, there being no agreement that he shall want any quantity whatever, is void for lack of mutuality. Higbie v. Rust, 211 Ill. 333, 71 N. E. 1010. There being no consideration other than the mutual promises of the parties, and the seller reserving the right to cancel the agreement, the contract is void for lack of mutuality of engagement, though the seller has acted under it. American Agricultural Chemical Co. v. Kennedy [Va.] 48 S. E. 868.

Contract specifying that the buyer might change the sizes from those specified, and, in the event of an emergency, might cancel such portions of the order as had not been taken in work by the seller, held not lacking in mutuality. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. A provision whereby upon the happening of a certain contingency the manufacturer and seller was to have the option to perform or practically close his factory, held not to render the contract unilateral. Allen v. Field [C. C. A.] 130 F. 641. Contract to purchase a piano, payment to be made partly in cash, partly in advertising, the advertising contract was assigned, held the contract was not void for want of mutuality between the buyer and the assignee. Mail & Times Pub. Co. v. Marks [Iowa] 101 N. W. 458. Contract whereby one agreed to purchase wire for every 70 rods of fence, at 58 cents per rod, to be paid for before a certain date, the seller agreeing to stretch the wire, held not void for want of mutual-

fraud.[62] The minds of the parties must meet[63] and hence all the terms of the contract must be agreed upon,[64] or be capable of ascertainment.[65] An offer to sell or to buy is revocable at any time before acceptance,[66] and the acceptance, to create a valid contract of sale, must be an unconditional[67] acceptance of all the terms of the offer,[68] and must be made within the time specified therein,[69] or, if no time is

ity. Mohr Hardware Co. v. Dubey [Mich.] 100 N. W. 127. A contract by which a producer sells hops of a certain quantity and quality, the purchaser to have the privilege of taking the hops, or enough to cover advances made, and to exercise his judgment as to whether they are of the quality contracted for, held not wanting in mutuality. Livesley v. Johnston [Or.] 76 P. 946.

Note: In this last case the defendants urged that if the hops were not of the quality agreed upon, "according to the judgment" of plaintiffs, they were given the privilege of taking the hops or not subject to their mere will or caprice—thus nullifying the promise to purchase, and rendering it of no binding effect upon them. The purchaser of a commodity has the right of inspection before acceptance, but he exercises it at his peril, and must act in good faith and with honesty of purpose, and cannot be heard to express dissatisfaction which is wholly feigned or simulated. Baltimore & O. R. Co. v. Brydon, 65 Md. 198, 9 A. 126, 57 Am. Rep. 318; 1 Mechem, Sales, §§ 663-668; Campbell Printing Press Co. v. Thorp, 36 F. 414, 1 L. R. A. 645. Nor is it contrary to public policy for parties that the decision of one or the other shall be conclusive. Campbell Printing Press Co. v. Thorp, supra. These cases support the contract in the principal case, and Livesley & Co. cannot arbitrarily or capriciously exercise their judgment. If they violate their duty in this regard, a recovery may be had, in the absence of their approval, for the nonacceptance of the hops furnished.—From 3 Mich. L. R. 154.

62. A buyer's illiteracy does not relieve him from the obligation to inform himself of the contents of the contract by having it read to him by some one whose interests are not antagonistic to his own. Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360. Even though the seller be not bound, as a matter of contract, by fraudulent statements of their salesman, still they cannot be permitted to profit by his fraud. Id. Instruction that jury should find for the seller unless the buyer was induced to sign the contract by the former's fraud, held correct. Id. Party's signature being not that of an inexperienced penman and there being no pretense that he could not read, held bound by contract. Hallwood Cash Register Co. v. Greenberger, 90 N. Y. S. 361. See 2 Curr. L. 1529, n. 39. See, also, Fraud and Undue Influence, 3 Curr. L. 1520.

63. Letters with reference to sale of railroad rails construed and held not to constitute a contract of sale. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205. Where mistake in order and acceptance was corrected by the agent of the seller, and through mistake the buyer took the order and the seller's agent kept the acceptance, held insufficient as a matter of law to show that no contract had been made. Delafield v. Armsby Co., 90 N. Y. S. 998.

64. Terms of payment. Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. See post, § 9.

65. A sale of a specified number of tin cans, deliveries to be made as buyer ordered during season, and the **buyer to specify** the **style** wanted monthly, held a completed contract, and the failure of the buyer to make the selection is a violation thereof. Kirwan v. Roberts [Md.] 58 A. 32. An accepted order for paper, specifying the amount, general kind and quality of the paper to be furnished, the price and terms of payment, with other details relating to shipment and delivery, is not incomplete or indefinite in its substantial provisions and requirements because the **size and weight** was left **undetermined.** Single Paper Co. v. Hammermill Paper Co., 96 App. Div. 535, 89 N. Y. S. 116. Order and memorandum held to constitute a contract for a breach of which damages might be recovered, irrespective as to the subsequent correspondence, as to **credit.** Talcott v. Freedman [Mich.] 12 Det. Leg. N. 128, 103 N. W. 535. See 2 Curr. L. 1530, n. 55; Id., 1531, n. 58-60.

66. Huggins v. Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933; Reeves & Co. v. Bruening [N. D.] 100 N. W. 241; Mueller Furnace Co. v. Meiklejohn, 121 Wis. 605, 99 N. W. 332.

Order given traveling salesman is not binding on seller or purchaser until after acceptance by the former and hence may be revoked at any time before such acceptance. Becker Co. v. Alvey [Ky.] 86 S. W. 974; Merchants' Exch. Co. v. Sanders [Ark.] 84 S. W. 786. A request to **hold until further notice** does not constitute a **countermand** of the order. National Cash Register Co. v. Hill, 136 N. C. 272, 48 S. E. 637. Agreement to sell at a specified price within a specified time held a mere offer, revocable at any time before acceptance. Worthington v. Herrmann, 89 App. Div. 627, 88 N. Y. S. 76. See 2 Curr. L. 1529, n. 42, 43.

67. Written order. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241. See 2 Curr. L. 1530, n. 46.

68. Johnston v. Fairmont Mills [C. C. A.] 129 F. 74. Buyer wrote seller: "You may ship us * * * one car straights and one car culls," and the seller replied: "We will fill your order for * * *, and will wire you price before shipping." Held a contract of purchase and sale. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084. An order for choice potatoes is not an acceptance of an offer to sell "nice white potatoes (Peerless stock)." Brophy v. Idaho Produce & Provision Co. [Mont.] 78 P. 493. Nor is such offer accepted where the order required the seller to select the stock and send no small ones. Id. An offer to sell 10 car loads of potatoes is not accepted by an order requiring the cars to average 30,000

specified, within a reasonable time.[70] What is a reasonable time depends upon the situation of the parties and the subject-matter of the negotiations,[71] the question being one of law for the court where it arises in such commercial transactions as happen in the same way, day after day, and present the question upon the same data in continually recurring instances, and where the time taken is such that there can be no reasonable doubt as to the answer;[72] otherwise the question is one for the jury.[73]

The fact that one has regularly sold goods to another does not bind him to continue to do so.[74] Unless revoked, an offer will remain open for a reasonable time.[75] Acceptance of an offer to sell may be shown by an order,[76] and of an offer to buy by shipment and acceptance of the goods.[77] The whole transaction being by mail, the contract is complete when the acceptance is mailed.[78] Where an offer to sell is made on Sunday with the understanding that it will expire on the following day, Sunday is included in calculating the time limit.[79] Upon acceptance, the contract of sale comes into existence as a binding agreement,[80] unless the acceptance be subject to existing conditions precedent.[81] One is liable for goods furnished, received, and appropriated, even though not ordered.[82]

pounds. Id. Nor is a proposal to sell 10 cars of potatoes for winter use accepted by an order of 8 cars for winter storage. Id. Where offeror refused to accept warranty added by buyer, held no contract. Wood v. Ellsworth, 91 N. Y. S. 24. There is no contract where offer to sell oil of a gravity of 15 degrees is "accepted" with the qualification that the 15 degrees gravity is to be at a temperature of 60 degrees. Four Oil Co. v. United Oil Producers, 145 Cal. 623, 79 P. 366. Acceptance fixing time of delivery, which term was rejected by seller and then entire offer withdrawn, held no contract. Bringham v. American Bridge Co. [Wash.] 80 P. 788. See 2 Curr. L. 1530, n. 49.

69. A letter containing an offer requiring an answer by return mail, the acceptance must be sent by the next post. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199. See 2 Curr. L. 1530, n. 47, 48.

70. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

71. Where price of commodity changes from day to day, held offer made at a subsequent business day was too late. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

72. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199. Where offer by mail was accepted within three days thereafter held court could not say as a matter of law that the offer had lapsed by reason of the delay. Id.

73. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

74. Penn Shovel Co. v. Phelps, 24 Pa. Super. Ct. 595.

75. An offer being made during a personal interview, it is supposed to continue, unless revoked, to the close of the interview and negotiations upon the subject. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

76. Huggins v. Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933. Even though a contract be unenforceable because not binding on the buyer, the seller is nevertheless bound to furnish goods to the extent that they are ordered before the offer to sell is withdrawn. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41.

77. Written order. National Cash Register Co. v. Dehn [Mich.] 102 N. W. 965. A merchant soliciting generally the shipment to him of goods at a stated price is under an implied contract to pay that price to one who, acting upon solicitation, ships goods to him which are accepted. Robinson v. Leatherbee Tie & Lumber Co., 120 Ga. 901, 48 S. E. 380. Shipper may recover, at least upon a quantum valebat, for the goods proven to have been shipped and received in accordance with the circulars sent out. Id.

78. Mueller Furnace Co. v. Meiklejohn, 121 Wis. 605, 99 N. W. 332. Notice of withdrawal must be received before acceptance is mailed. Id. Evidence held sufficient to support finding that notice of withdrawal reached seller before acceptance was mailed. Id.

79. Ropes v. Rosenfeld's Sons, 145 Cal. 671, 79 P. 354.

80. Offer and acceptance of a contract for the sale of yarn held to constitute a valid executory contract. Cherokee Mills v. Gate City Cotton Mills [Ga.] 50 S. E. 82. Where defendant agreed to buy a quantity of tea at a designated price per pound and the tea was delivered and accepted, held a binding sale. Hathaway v. O'Gorman Co. [R. I.] 59 A. 397. An option being exercised, a binding obligation is imposed on both parties—on the part of the vendor to sell and deliver, and on the part of the vendee to accept and pay the stipulated price. Kirwan v. Roberts [Md.] 58 A. 32.

Evidence held sufficient to sustain a finding that the buyer's order had been accepted. Single Paper Co. v. Hammermill Paper Co., 96 App. Div. 535, 89 N. Y. S. 116. Evidence held sufficient to establish a prima facie case of the making of the contract. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275.

81. If a bargain be made by an agent subject to his principal's approval, there is no contract of sale until such approval is obtained. Wolf Co. v. Galbraith [Tex. Civ.

Whenever required by the statute of frauds, the contract must be in writing.[83]

A bill of sale is a written agreement, either under seal or not under seal, by which one person transfers his right to or interest in personal chattels to another.[84]

A sale being made through a broker who represented both parties and who failed to make a memorandum of the sale, the bought and sold notes together, if they agree, establish the contract between the parties,[85] but the contrary is true where they differ materially,[86] unless such material variance can be explained by a custom or usage.[87]

§ 3. *Modification, rescission and revival.*[88]—It is competent for the parties by mutual[89] consent to change the character[90] or terms[91] of the contract, and this modification may be by parol, though the contract contains a stipulation to the contrary;[92] but the modification must be executed and not lie wholly in a promise to modify.[93] In the absence of authority, an agent's consent is of no effect.[94] There being a conflict in the evidence, the questions of modification[95] and of an agent's authority to consent thereto,[96] are for the jury.

The consent of both parties is essential to a rescission.[97] The contract may provide for its cancellation upon the happening of a contingency,[98] but after

App.] 80 S. W. 648. Where an offer by a broker to sell cotton for future delivery was accepted subject to confirmation by his principal, as customary in the trade, and before confirmation the seller became insolvent, a demand for security by the intending purchaser was not a waiver of the requirement of confirmation. Johnston v. Fairmont Mills [C. C. A.] 129 F. 74.

82. Masterson v. Heitmann & Co. [Tex. Civ. App.] 87 S. W. 227. Where goods were not as ordered. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506; Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. Buyer is bound to return excess in amount delivered or pay for the same. So held where articles sold were labels that had the buyer's name on them. Levino v. Moore Co., 97 App. Div. 109, 89 N. Y. S. 573.

83. See Frauds, Statute of, 3 Curr. L. 1527.

84. Berry v. Robinson [Ga.] 60 S. E. 378. A conditional sale evidenced by a promissory note is not a bill of sale to secure a debt within the meaning of Acts 1899, p. 82 [Van Epps' Code Supp. §§ 6631, 6632]. Id.

85. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

86. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430. Sale of tomatoes. Sale ticket contained no guaranty of swells or quality, while the bought ticket contained the "usual guaranty against swells and qualities." The latter also contained the words "terms regular" which the former did not. Held variance immaterial. Id.

87. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

88. See 2 Curr. L. 1534. For general rules, see Contracts, 3 Curr. L. 805.

89. Where buyer was to give shipping orders but failed to do so, the seller, in the absence of acquiescence, cannot rely on notice sent the buyer that unless he gave such orders shipment would be made without notice, and this is true, though one shipment was made and accepted without notice. Kellogg v. Frohlich [Mich.] 102 N. W. 1057. See 2 Curr. L. 1534, n. 91.

90. Default in payment, sale changed to a conditional one. Cooper v. Payne, 93 N. Y. S. 69. Executory contract of sale changed to a bailment by parol, it being subsequently reduced to writing. In re Naylor Mfg. Co., 135 F. 206.

91. The contract being modified so as to enable the machine to do certain work, it is immaterial whether the original contract called merely for a plant of a certain kind or for a plant of a certain working capacity. Boothe v. Squaw Springs Water Co., 142 Cal. 573, 76 P. 385. Facts held to sustain finding that time of payment had been changed. Allum v. Nolle, 25 Pa. Super. Ct. 220. Buyer's compliance with seller's request for an inspection held not to change the contract, where the latter did not provide for an inspection. Thick v. Detroit, etc., R. Co. [Mich.] 101 N. W. 64.

92. General Elec. Co. v. National Contracting Co., 178 N. Y. 369, 70 N. E. 928. Party held estopped to deny such modification by allowing other party to rely thereon. Id.

93. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241.

94. The contract providing that no modifications should be made without the consent of the home office, a sales agent at the place of delivery has no authority to make a material change. Larson v. Minneapolis Threshing Mach. Co., 92 Minn. 62, 99 N. W. 623.

95. Modification of contract price. McAfee v. Dix, 91 N. Y. S. 464. Where, as against the denial of plaintiff, defendant testified that he modified the contract by attaching a printed slip thereto. McArdle v. Thames Iron Works, 96 App. Div. 139, 89 N. Y. S. 486.

96. Delafield v. Armsby Co., 90 N. Y. S. 998.

97. Hathaway v. O'Gorman Co. [R. I.] 59 A. 397.

98. Contract providing, "Prices guaranteed against decline, and in event of receiving lower quotations" the seller to have the privilege of meeting the same or cancelling further orders, held privilege of can-

breach an agreement to cancel and waive performance must be supported by a consideration moving from the party in default.[99]

The contract being terminated, it cannot be revived without the consent of both parties.[1] Unless a second agreement in terms purports to rescind the former one, or unless the entire subject-matter of the earlier agreement is covered by the later one, or the later one is so inconsistent with the former one that both cannot stand together, there is no rescission of the former.[2]

§ 4. *General rules of interpretation and construction.*[3]—A contract with reference to the title of tangible chattels is construed according to the law of the state of the situs of the chattels.[4]

The general rule that the court will give effect to the intention of the parties applies,[5] and this intention may be ascertained from the conduct of the parties,[6] and from the customs and usages of the trade,[7] for, in the absence of terms to the contrary,[8] the parties are presumed to have contracted with reference to known and established customs,[9] hence proof of such customs is admissible to explain the contract,[10] but not to vary or contradict its terms[11] or established rules of law,[12]

cellation was dependent on decline in prices, receipt of lower quotations, and election not to meet decline. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41.

99. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275.

1. Failure to deliver after notice and demand held to terminate the contract so that buyer was not liable for goods subsequently shipped. Camden Ironworks v. Masterson, 93 N. Y. S. 754.

2. Where a contract required a stallion to be sound and in good condition and warranted him to be a good foal-getter, held the giving of a note for the purchase price conditioned that it should be void unless the stallion was sound did not abrogate the warranty. Berkey v. Lefebure & Sons [Iowa] 99 N. W. 710. Furnishing additional measurements and requesting another quotation on prices held to abrogate former contract for the sale of parts of a machine. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052.

3. See 2 Curr. L. 1535.

4. Lees v. Harding, Whitman & Co. [N. J. Err. & App.] 60 A. 352. A contract of sale made in one state, the goods to be shipped to the buyer in another state, is a contract of the former state. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275. See Conflict of Laws, 3 Curr. L. 720.

Note: See note, Conflict of Laws, as to sales of personal property, 64 L. R. A. 823.

5. American Soda Fountain Co. v. Gerer's Bakery, 14 Okl. 258, 78 P. 115.

6. Union Trust Co. v. Webber-Seeley Hardware Co. [Ark.] 84 S. W. 784.

Evidence of buyer's unexpressed intentions in making the contract and writing a letter held inadmissible. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506.

7. See Customs and Usages, 3 Curr. L. 988.

8. Instruction as to custom held properly modified by adding unless there was a special contract between the parties different from the custom. Delaware & H. Canal Co. v. Mitchell, 211 Ill. 379, 71 N. E. 1026. Where corsets were offered in job lots and defendant refused the offer but offered to take three of the lots as specified, held acceptance of defendant's offer made a contract on express stipulations. Kalamazoo Corset Co. v. Simon, 129 F. 144.

9. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430. In a sale of **tomatoes** words "usual **guarantee against swells** and quality" held implied. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430; Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Allegation in an answer that contracts were made in recognition of an alleged custom held sufficient and not to aver a separate parol contract. Id. Sale of **distillery slops** held to contemplate that distillery should supply feeding lot with troughs, tanks, etc. Id. That buyer misunderstood meaning of term held not to alter seller's rights. Soper v. Tyler [Conn.] 58 A. 699. Term "via H. R." interpreted according to its meaning in the Boston **grain trade.** Id. It being an established custom in the **cotton trade** that a sale made by a broker shall be confirmed in writing by both the buyer and seller, held acceptance by one party was subject to withdrawal at any time before such **confirmation.** Johnston v. Fairmont Mills [C. C. A.] 129 F. 74. On the Chicago **tomato market** the words **"regular terms"** mean that the buyer has a credit of 60 days, with the privilege of 1½ per cent. discount in case cash is paid within 10 days from date of invoice, and also that there is a six months' guaranty on swells. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

10. Kalamazoo Corset Co. v. Simon, 129 F. 144; Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. In a sale of **distillery slops** a provision giving the buyers of the slop the privilege of using troughs and tubs which the seller was to place in the feeding lot held not to exclude evidence of custom requiring seller to so do. Id. Terms **"cash basis,** note at 60 days from shipment of each 100 bales, interest added," held ambiguous and evidence of a trade custom is admissible to show that purchaser

and either party may rely upon such custom.[13] The custom must be certain and definite.[14] Evidence of prior[15] or contemporaneous[16] parol agreements is inadmissible to vary or alter the terms of a written instrument[17] of sale, though it may be admitted to explain ambiguous terms in the contract,[18] or to show that the contract was obtained through fraud.[19] Where there is an express contract of sale, nothing is implied.[20] A written enumeration of conditions precedent is presumed to be exclusive.[21] The constructions placed upon words and phrases in particular contracts are stated in the notes.[22]

could pay either in cash or by a note drawn to his order and indorsed by him. Morris v. Supplee, 208 Pa. 253, 57 A. 566.

11. Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430; Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Custom requiring consignee to designate a berth for the discharge of a ship's cargo cannot prevail over terms of contract requiring delivery "at the wharf" and "on the wharf as customary." Moore v. U. S., 25 S. Ct. 202.

12. See Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, 73 N. E. 430.

13. Where custom was to open a few boxes of fruit and make the purchase of the entire lot upon the showing made by such samples, held no lack of diligence in not examining all the boxes. Abel v. Murphy, 43 Misc. 648, 88 N. Y. S. 256.

14. A usage that, in sales of job lots of goods the buyer is not obligated if the variation in the quantity delivered is considerable, and that it rests with the buyer to determine whether the discrepancy is reasonable or unreasonable, no definite test being recognized, is invalid for uncertainty. Kalamazoo Corset Co. v. Simon, 129 F. 144. For general rules, see article Customs and Usages, 3 Curr. L. 988.

15. All previous verbal negotiations respecting the terms of sale are merged in a subsequent written contract, and are inadmissible to vary or contradict the writing. Arnold v. Malsby, 120 Ga. 586, 48 S. E. 132. Facts stated in conversation and not included in written contract held incompetent. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64. Evidence held inadmissible to show parol negotiations prior to the date of the sale, whereby a larger quantity of the same article was sold at a less price than that named in the contract. Hatfield v. Thomas Iron Co., 208 Pa. 478, 57 A. 950. In the absence of fraud or mistake such evidence is inadmissible to show representations. American Home Sav. Bank Co. v. Guardian Trust Co. [Pa.] 59 A. 1108.

16. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804; Cluster Gaslight Co. v. Baker, 90 N. Y. S. 1034; Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Objection that jury should have found that statements of agent were as of facts or an opinion, held without merit. Id. Contract for the sale of potatoes being in writing, evidence of oral statements as to how long the potatoes would keep is immaterial. Id. Evidence of a separate agreement with salesman in violation of terms of contract held inadmissible. Walter Pratt & Co. v. Meyer [Ark.] 87 S. W. 123. Where the contract provided that: "We [the purchasers] will pay the freight charges, as agreed upon between you and I, the above prices being f. o. b." held parol evidence that the seller agreed to pay any freight in excess of a certain rate is inadmissible. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803.

17. Memorandum of sale on which seller's name did not appear held not an instrument. Messenger v. Woge [Colo. App.] 78 P. 314.

18. Evidence held admissible to show that word "currently" meant that goods were not to be shipped before a certain date. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. Evidence admitted to explain phrase "all scrap material" seller "might receive" for a stated period. Helper v. MacKinnon Mfg. Co. [Mich.] 101 N. W. 804. Contract for sale of ties "needed during the year 1899" held might be explained by parol to require the tie company to furnish only so many ties as might be needed by the railroad company that year in building contemplated extensions. Laclede Const. Co. v. Moss Tie Co. [Mo.] 84 S. W. 76. Evidence that defendant was engaged in the business of rerolling rails held admissible as tending to show that the contract actually made was for the sale only of rails fit for rerolling. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205. In such a case letters relating to a former and distinct transaction, stating that rails were to be free from switch, guard, and frog rails, held admissible as showing that plaintiff knew the character of defendant's business. Id. Phrase "in accordance with plans acceptable to engineer, held not ambiguous and explainable by parol. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

19. Hallwood Cash Register Co. v. Berry [Tex. Civ. App.] 80 S. W. 857; Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360. This can be done notwithstanding the fact that the evidence contradicts declarations of the defendant embodied in the written contract. Id.

20. Beck & C. Iron Co. v. Holbeck [Mo. App.] 82 S. W. 1128.

21. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

22. Where contract provided that granite should be furnished from the quarries of "G. & S. **and** J. L. G.," held "and" should be construed as meaning "or." United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351. Contract for pottery machinery construed, and **kiln doors** held part of the **"machinery."** Thomas China Co. v. Raymond Co. [C. C. A.] 135 F. 25. One selling **hay** in stacks **to be baled** before taken away, the buyer to furnish the baler and the seller to assist in the balling, held, buyer

The entirety of the contract depends upon the intention of the parties,[23] and not upon the divisibility of the subject,[24] and the question of intent is one for the jury.[25] A separable illegal provision, free from the imputation of malum in se, may be rejected.[26]

§ 5. *Property sold. Amount, kind, nonexistence and failure of consideration.*[27]—One may contract to sell property to be acquired in the future.[28] He may make the obligation conditional upon his being able to acquire title from some one else,[29] but if he contracts absolutely, he will be bound by the terms of the agreement.[30]

The kind and quality,[31] *the identity,*[32] *and the quantity,*[33] of property pur-

had the right to direct the order of baling. Fowles v. Rupert [Mich.] 101 N. W. 202. A "bought and sold note" for the sale, at a stated price, of tobacco in bond, provided for the delivery of all the tobacco and payment therefor within five months, and contained a stipulation that the buyer should pay the duty, expressed in the following language: "Terms **Duty Cash** 70c. if appraised at less, **Diffce to be allowed.**" Held the buyer could not recover excessive duties paid by him and recovered by the seller on the ground that the appraisement was illegal. Solomon Tobacco Co. v. Cohen, 95 App. Div. 297, 88 N. Y. S. 641.

23. Barnett v. Becker, 25 Pa. Super. Ct. 22; Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. The fact that **separate prices** were named for different machines sold held not to render the contract severable where it expressly provided that "all of said machines are to be to the full satisfaction" of the buyer before payment will be required. Id. Contract to deliver coal, shipments to be made when ordered, payments to be made the next succeeding month, is divisible. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 134 N. C. 574, 47 S. E. 116. Contract to deliver all castings required during period of three years, **deliveries to be paid for** 60 days **after date** of delivery, held an entirety which the seller might terminate on the buyer's failure to make payment according to the contract. Ross Meehan Foundry Co. v. Royer Wheel Co. [Tenn.] 83 S. W. 167.

24, 25. Barnett v. Becker, 25 Pa. Super. Ct. 22.

26. So held with regard to a provision for the payment over of rebates. Minnesota Sandstone Co. v. Clark, 35 Wash. 466, 77 P. 803.

27. See 2 Curr. L. 1535.

Sales of **corporate stock,** see articles Corporations, 3 Curr. L. 880; Frauds, Statute of, 3 Curr. L. 1527; also Helliwell, Stock and Stockholders, §§ 179-190. Sale of **returnable packages** see Commerce, 3 Curr. L. 711, "Can and Bottle" acts.

28. Northington-Munger Pratt Co. v. Farmers' Gin & Warehouse Co., 119 Ga. 851, 47 S. E. 200. Whether a sale of a crop to be grown is of any validity in Nebraska as a sale of things not in esse, query. Robinson v. Stricklin [Neb.] 102 N. W. 479. See 2 Curr. L. 1535, n. 6, 7.

29. Northington-Munger Pratt Co. v. Farmers' Gin & Warehouse Co., 119 Ga. 851, 47 S. E. 200.

30. Northington-Munger Pratt Co. v. Farmers' Gin & Warehouse Co., 119 Ga. 851, 47 S. E. 200. A written offer for a described gin outfit "and to pay for same upon the other party giving possession and a good title," when duly accepted, is an absolute contract of bargain and sale. Id. The purchaser is bound to pay if within a reasonable time the seller delivers the property and tenders good title. Id.

31. See 2 Curr. L. 1536, n. 21.

Contract providing that **rails** should be **fit for rerolling,** the seller cannot recover for refusal of the buyer to accept rails not fit for rerolling. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205. Since **shaddocks** are **not grape fruit** for commercial purposes, a delivery of shaddocks is not compliance with an order for grape fruit. Abel v. Murphy, 91 N. Y. S. 26. An order for **boards,** clear stock without knots does not prohibit the **gluing together** of boards to meet the required dimensions. Herrmann Lumber Co. v. Heidelberg, Wolf & Co., 92 N. Y. S. 256. Where the sale was of **clay** "suitable **for** the manufacture of **cement,**" held the buyer was not obliged to accept clay which could only be so used by being mixed with other clay. Coburn v. California Portland Cement Co., 144 Cal. 81, 77 P. 771. The terms **"footing"** or **"dimension" stone** are synonymous, but neither term is the synonym of **"rubble."** Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506. Seller of **sausages** to be **"dry enough for export"** held liable for damages sustained by reason of refusal of foreign authorities to permit the sausages to be landed owing to their containing excessive fat. James v. Libby, 92 N. Y. S. 1047.

32. See 2 Curr. L. 1536, n. 22.

Where the agreement was to take the **entire output of iron mine** held shipment of iron of the same kind and quality but from other mines was not a compliance with the contract. Shackelford v. Sloss Iron & Steel Co. [Ala.] 36 So. 1005. Where contract of sale required the seller of a ship to deliver **"unexpired insurance** fully paid" **without specifying** any **policies,** held the seller was not required to vest the purchaser with the title to the particular policies then covering the ship, but only title to equivalent policies. Livermore v. Brauer [C. C. A.] 128 F. 265.

33. See 2 Curr. L. 1536, n. 20.

Contract to **purchase business** held not to cover **return premiums** on unexpired insurance. Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58. In such case the seller was held not entitled to recover return premiums on unexpired policies assigned to the buyer. Id. The seller

chased depend upon the terms of the contract. The circumstances surrounding the transaction and the value of the property may be looked to in determining the property sold.[34]

§ 6. *Transition of title. Meaning and effect of contract.*[35]—The question whether title has passed is in part the question whether the sale is executed or executory. If the former, title has passed, if the latter, it has not;[36] but an entire executory contract of sale may be divisible in the execution thereof, so as to vest title to parts of the property in the vendee as they are delivered; and whether in any case such partial transfer of title takes place is a question of intent.[37] The time when title passes depends upon the intention of the parties,[38] and this intention is a question of fact for the jury,[39] to be gathered from the terms and purposes of the contract, the nature, condition and situation of the property, and the circumstances surrounding the parties when made.[40] Unless a contrary intent is shown, the seller is deemed to have parted with the title when he permits the purchaser to change the character of the property by spending money and labor on it.[41] Where the bill of lading is taken to the seller's order or his assigns, the mere fact that the buyer is named as consignee will not pass title to him.[42] Where goods are shipped by a vendor to a vendee, the former taking a bill of lading in which he himself is named both as consignor and consignee, which bill is endorsed in blank and attached to a draft for the purchase price drawn on the vendee, title remains in the vendor and does not pass to the vendee until the drafts are paid.[43]

Separation and designation of the goods.[44]—As between buyer and seller the

of a **herd of cattle** guarantying the number of cattle to be 500, held entitled to judgment on purchase-money note on executing bill of sale for 514. Barnett v. Pyle [Tex. Civ. App.] 79 S. W. 1093. Contract to furnish all **granite** required **for bridge approaches** held entitled to furnish so much as is necessary to construct such approaches but no more. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351. Contract providing that none of the **goods** were **to be shipped** except as might be specified and ordered by the buyer from time to time **as** his **requirements might demand,** held to require the buyer to take the goods, except in case its requirements should not demand them. Semon, Bache & Co. v. Coppes, Zook & Mutschler Co. [Ind. App.] 74 N. E. 41. Under a contract to sell such ties **as might be needed** for the construction of proposed new lines, neither party is bound unless the lines are built, and then only to the extent of the number needed for that purpose. Laclede Const. Co. v. Moss Tie Co. [Mo.] 84 S. W. 76. Contract held the same, though buyer's rights were transferred. Id. Evidence held sufficient to show that defendant purchased the quantity alleged. Horner v. Hughbanks [Neb.] 100 N. W. 947.

34. There being a contract for the sale of machinery and the sunken hull of a vessel, the seller claiming that the hull was not included in fixing the price, **expert evidence** is admissible to show that the machinery without the hull was of much less **value** than the purchase price named in the contract. McRae v. Lonsby [C. C. A.] 130 F. 17.

35. See 2 Curr. L. 1536.

36. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432; Cooper v. Payne, 93 N. Y. S. 69. See 2 Curr. L. 1536, n. 25. As to what contracts are executory, see ante, § 1, Definition and distinctions.

37. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. Sale of timber to be cut and removed, and measured and paid for each month and before removal, held title vests in purchaser as timber is cut down. Id.

38. Roberts v. McWatty [Wis.] 102 N. W. 18. Civ. Code, § 1540. Adlam v. McKnight [Mont.] 80 P. 613. Evidence held insufficient to show passage of title where there was a dispute as to quantity, and when, prior to delivery, the buyer promised to retain part of the purchase money and pay it to a creditor of the seller. Id.

39. Adlam v. McKnight [Mont.] 80 P. 613; Wesoloski v. Wysoski [Mass.] 71 N. E. 982.

40. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432; Roberts v. McWatty [Wis.] 102 N. W. 18. Contract for the sale of goods to apply on land at a price to be "fixed by an invoice to be made * * * the balance of the purchase price to be paid as soon as the invoice is completed," held indefinite as to time when title passed, and that the intent must be ascertained from the circumstances of the case. Id. Where the correspondence and accountings between a foreign shipper and his consignee show that the parties did not intend title to pass, the fact that in the invoices, custom house entries and shipping declarations, the transaction is referred to as a sale, is immaterial. Deburghraeve v. Autenrieth, 24 Pa. Super. Ct. 267.

41. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432.

42. Grayson County Nat. Bank v. Nashville, etc., R. Co. [Tex. Civ. App.] 79 S. W. 1094.

43. Liable for freight where vessel is lost. Portland Flouring Mills Co. v. British & F. Marine Ins. Co. [C. C. A.] 130 F. 860.

44. See 2 Curr. L. 1537.

general rule is that title passes when the terms of the sale are agreed upon and everything the buyer has to do with the matter has been done.[45] In the absence of evidence showing an intent to the contrary, title does not pass where there is no identification or selection out of a common mass.[46] Measurement[47] and weighing,[48] if required by the terms of the contract, must be performed before title passes, though this rule does not apply to the sale of an entire mass where the object of such conditions precedent is to determine the amount to be paid.[49] It is perfectly competent for the parties to change any of these rules.[50]

Payment.[51]—In the absence of an agreement to the contrary,[52] payment is not essential to the passage of title in any sale other than one for cash,[53] and nothing being said as to the time of payment, the sale is treated as one for cash;[54] but, in such case, the buyer failing to pay at the time of the sale, the seller may treat the title as having passed.[55] The mere fact that payment is deferred until the time of shipment, and is to be made against the shipping receipts, does not show that title is not to pass until shipment.[56] In some states the subject is regulated by statutes.[57] As to whether payment is a condition precedent is a question of intention, and this question is one for the jury.[58]

Delivery and acceptance.[59]—Complete delivery is not essential to the passage

45. Fromme v. O'Donnell [Wis.] 103 N. W. 3.

46. Kellogg v. Frohlich [Mich.] 102 N. W. 1057; Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. Where goods were to be subsequently selected from samples, held contract was executory. Huguenot Mills v. Jempson & Co., 68 S. C. 363, 47 S. E. 687. Purchaser of oranges on trees held, under Civ. Code § 1141, to take title. Bill v. Fuller [Cal.] 79 P. 592. Rule applied to a sale of a crop to be grown, the crop to come up to a certain standard. Robinson v. Stricklin [Neb.] 102 N. W. 479. See 2 Curr. L. 1537, n. 28, 29.

47. Where logs had to be scaled and measured before delivery could be made. State v. Meehan, 92 Minn. 283, 100 N. W. 6. Where a trustee in a deed was empowered to convey title to timber after the purchase price was paid, upon a proper measurement, title and possession could not pass to vendee until these things were done.. Porter v. Bridgers, 132 N. C. 92, 43 S. E. 551. See 2 Curr. L. 1537, n. 30.

48. Where onions were to be screened and weighed, held title did not pass. Wesoloski v. Wysoski [Mass.] 71 N. E. 982. Hay being sold at $8 per ton, "baler's weights," and being received by the buyer in his yard, held title passed. Colorado Trading & Transfer Co. v. Oliver [Colo. App.] 78 P. 308.

49. Where a written contract of sale is made of an entire crop of standing hay at an agreed price per ton, part payment is made, and the purchaser takes possession of the crop, cuts and stacks it, and bales and carries away part of it, the title to the crop passes to him. Allen v. Rushfort [Neb.] 101 N. W. 1028.

50. Title held to pass where delivery was tendered as per contract, postponement requested, and partial payment made. Mayberry v. Lilly Mill Co. [Tenn.] 85 S. W. 401. On sale of paving blocks, title held to pass, though quantity to be paid for was to be subsequently determined. Fromme v. O'Donnell [Wis.] 103 N. W. 3.

51. See 2 Curr. L. 1537.

Payment and tender as terms of the contract, see post, § 9.

52. Payment at place of delivery being a condition precedent, title does not pass until then. Town of Canton v. McDaniel [Mo.] 86 S. W. 1092.

53. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. See 2 Curr. L. 1537, 36, 37.

54. The price must be paid either before or concurrently with the passing of the title. Hughes v. Knott [N. C.] 50 S. E. 586.

55. Richardson v. Insurance Co. of North America, 136 N. C. 314, 48 S. E. 733.

56. Browning v. McNear, 145 Cal. 272, 78 P. 722.

57. California: Under Civ. Code § 1140, title passes to the buyer whenever the parties agree upon a present transaction and the thing is identified, whether it is separated from other things or not; hence it is not essential to a valid sale of corporate stock that the stock certificates be delivered simultaneously with payment. Mason v. Lievre, 145 Cal. 514, 78 P. 1040.

Georgia: The provisions of Civ. Code 1895, § 3546, providing among other things that title to certain commodities shall not pass until paid for, are applicable only to planters and commission merchants. Butler, Stevens & Co. v. Georgia & A. R. Co., 119 Ga. 959, 47 S. E. 320. A planter as used in that section, is one who is engaged in the business of producing crops from the soil; and it is immaterial whether he sows and reaps with his own hand, the hand of a tenant, a cropper or of a hired laborer. Id. A planter may avail himself of the protection of the above section in any cash sale of cotton which may be made by him, without reference to whether it was produced by him or acquired from another. Id.

58. Where entire price was agreed on, part paid and the final settlement was to depend on an inventory being taken, held question for the jury whether title passed. Richardson v. Insurance Co. of North America, 136 N. C. 314, 48 S. E. 733.

59. See 2 Curr. L. 1538.

of title,[60] for, as between the parties, the sale may be complete whether possession be delivered or not.[61] In the absence of evidence of an intention to the contrary, the sale being executory, title does not pass until the property is delivered and accepted,[62] generally at the place designated in the contract,[63] though the buyer is not obliged to wait until the property has been delivered at such place before receiving and accepting it.[64] The sufficiency of delivery is to be determined by the law of the place where the article is to be manufactured and delivered,[65] particular instances being shown in the notes.[66]

In the absence of an express or implied agreement to the contrary, it is a general rule, subject to exceptions, that a delivery to a common carrier is a delivery to the consignee,[67] and this is especially true where the carrier has been designated by the buyer,[68] though the seller, in accordance with the contract, prepays the charges,[69] or where such delivery is accompanied by a delivery of the bills of lading, properly indorsed, to the buyer.[70] The buyer being designated in the bills of lading as consignor and consignee, and such bills of lading being indorsed in blank and attached to drafts drawn on the buyer, title does not pass until such drafts are paid.[71] Where the contract requires delivery at a designated place, title does not pass until delivery is there made,[72] and, in some cases, until the

60. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. See 2 Curr. L. 1538, n. 41.

61. Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471.

62. La Vie v. Tooze [Or.] 79 P. 413. The buyer accepting the goods but refusing to remove them from the cars of a common carrier, the seller is not required to accept the proceeds of a sale of the goods made by the carrier, but is entitled to sue for and recover the contract price. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

63. Hunter Bros. Milling Co. v. Kramer Bros. [Kan.] 80 P. 963.

64. La Vie v. Tooze [Or.] 79 P. 413. Where hops were inspected, weighed, branded and paid for by the purchaser, held title passed though hops were not at place specified in the contract as the place of delivery. Id.

65. Where controversy was between purchaser of a bankrupt and the latter's trustee. In re Pease Car & Locomotive Works, 134 F. 919.

66. Sale of locomotives: Purchaser's name was painted on engines, the latter were inspected, accepted and paid for, but purchaser retained possession owing to shipment being delayed by high water; held, under the law of Illinois, there was a sufficient delivery to pass title. In re Pease Car & Locomotive Works, 134 F. 919. Where **range stock** is the subject of sale, title passes when the stock is taken charge of by the purchaser, or his agents or employes, and driven from the pasture of the seller and placed in the pasture of the purchaser; and if some of the stock afterwards escapes and strays back to its former range without the knowledge or connivance of the purchaser, it will not defeat his title. Woods v. Faurot, 14 Okl. 171, 77 P. 346.

67. Butts v. Hensey [Neb.] 102 N. W. 1011; Greif & Bro. v. Seligman [Tex. Civ. App.] 82 S. W. 533. Though the contract be silent as to the person or mode by which the goods are to be sent. Id. Where fruit is delivered to carrier in good merchantable condition, packed or otherwise protected in the manner customary in the trade, the seller's responsibility ends. United Fruit Co. v. Bisese, 25 Pa. Super. Ct. 170. Sale held complete at time of delivery to carrier, it being followed by an acceptance by the purchaser. Schwab & Sons Co. v. Frieze [Mo. App.] 81 S. W. 1174. Where principal filled order of agent and sent article to him for delivery to the purchaser. James v. State [Tex. Cr. App.] 78 S. W. 951. Evidence that vendor had sold goods to vendee, loaded them on a car and shipped them to him, and had taken a check for the price, held to warrant a finding of a sale on credit and a delivery to the common carrier, and therefore title had passed to vendee. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134. See 2 Curr. L. 1538, n. 50; Id. 1539, n. 55. See, also, Intoxicating Liquors, 4 Curr. L. 252, 270, where the late cases dealing with the sale of intoxicants will be found.

Note: Where is contract made? See 4 Curr. L. 270.

68. Third Nat. Bank v. Smith [Mo. App.] 81 S. W. 215; State v. Intoxicating Liquors, 98 Me. 464, 57 A. 798.

69. State v. Intoxicating Liquors, 98 Me. 464, 57 A. 798.

70. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134; Mitchell v. Baker, 208 Pa. 377, 57 A. 760. The carrier becomes the agent of the buyer and bound to deliver the goods to him. Id. Where order was countermanded after expiration of time for delivery and after car had been loaded, but before sent, the bill of lading being retained by the seller, held no delivery. McKelvey v. Perham [Mont.] 79 P. 253.

71. Portland Flouring Mills Co. v. British & F. Marine Ins. Co. [C. C. A.] 130 F. 860.

72. Greif & Bro. v. Seligman [Tex. Civ. App.] 82 S. W. 533. That seller is to pay freight and furnish property at destination for a specified price is evidence tending to show an agreement to deliver at such place, and that title is not to pass until delivery

buyer has been afforded a reasonable time within which to inspect and accept the goods.[73]

Revesting of title.—Failure to pay the purchase price does not divest the buyer of title.[74]

§ 7. *Delivery and acceptance under terms of contract. A. Construction and operation of contract. Necessity, time, place, amount, etc.*[75]—The intention of the parties at the time delivery is claimed determines whether delivery was made or not.[76] Unless delivery according to terms be waived[77] or prevented by the acts of the other party,[78] it is ineffectual unless it corresponds to the terms of the contract[79] respecting place,[80] amount,[81] mode and manner of shipment,[82] and time,[83] but no time being specified, a reasonable time is implied.[84] In no case need delivery be made before the expiration of the time specified or implied,[85] though a statement by the seller that he will not deliver within such time may

is so made. Hunter Bros. Milling Co. v. Kramer Bros. [Kan.] 80 P. 963.

73. Lummis v. Millville Mfg. Co. [N. J. Law] 60 A. 219. Where vendee accepted goods and gave a check therefor, held liable for subsequent loss. Id.

74. Where buyer procured bill of lading in his own name as shipper and owner. Also held not to affect title of assignee of bill of lading. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

75. See 2 Curr. L. 1539.

76. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241.

77. Where buyer did not insist on **time limit,** held waived. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. Acceptance and payment without protest waives **premature delivery.** Bill v. Fuller [Cal.] 79 P. 592. The contract specifying the **terms of delivery,** delivery held not shown by pointing out the property in a deliverable condition, nothing being said or done to show a waiver of the conditions. Reeves & Co. v. Bruening [N. D.] 100 N. W. 241. Where delivery was to be made **f. o. b. on cars at A,** held under circumstances of case, that the seller complied with the contract, though he shipped such cars to B, the buyer's place of business, consigned to himself. Naas v. Welter, 92 Minn. 404, 100 N. W. 211. Where buyer **modified contract** so as **to include additional** machinery, giving 60 days additional time within which to manufacture the same, and all the machinery was delivered within the time as extended, the buyer is not entitled to demurrage for delay in delivering the machinery first contracted for. Washington Iron Works v. McNaughton, 35 Wash. 10, 76 P. 301. On a sale of job lots, the buyer was held not to waive a material variance in the quantities delivered by his **requesting a correction** in his order, which correction the seller refused to permit him to make. Kalamazoo Corset Co. v. Simon, 129 F. 144.

Evidence that **extension of time** of delivery was **not communicated** to seller until after his default held insufficient to support a finding that before the expiration of the time limited for the performance of the contract, the time for delivery was extended, and the original contract modified. Birkett v. Nichols, 90 N. Y. S. 257.

78. Morel v. Stearns, 43 Misc. 639, 88 N. Y. S. 416.

79. A refusal to deliver except on different terms imposing an additional burden on the buyer is, at the buyer's election, equivalent to an absolute refusal. Morris v. Supplee, 208 Pa. 253, 57 A. 566.

80. The buyer having designated a place, the mere **arrival** of goods **at a wharf** within the limits of the city where delivery was to be made does not constitute a delivery to the buyer. Morel v. Stearns, 43 Misc. 639, 88 N. Y. S. 416.

81. "4,644 tons of coal" is not "about 5,000 tons." Moore v. United States, 25 S. Ct. 202. Where defendant purchased three job lots of corsets represented on plaintiff's stock list as containing 251 10/12 doz., 204 11/12 doz. and 80 9/12 doz., and the deliveries offered contained 266⅔ doz., 267 1/12 doz. and 78 doz., the variance was substantial, and entitled the buyer to refuse acceptance. Kalamazoo Corset Co. v. Simon, 129 F. 144.

82. Where goods were to be delivered f. o. b. New York, proof of delivery to express company consigned to defendant at Baltimore, charges of carriage to be collected, was insufficient. International Money Box Co. v. Southern Trust & Deposit Co., 93 App. Div. 309, 87 N. Y. S. 881.

83. Tender of goods on June 1st is not a delivery within the terms of a contract providing for delivery in May. Morel v. Stearns, 43 Misc. 639, 88 N. Y. S. 416. Contract requiring cars to be shipped **"as early as possible** in September," the seller has until the expiration of the last day in the month in which to make shipment. Chattanooga Car & Foundry Co. v. Lefebvre, 113 La. 487, 37 So. 38.

84. In the **manufacture of articles** seller must use reasonable diligence, no time being specified. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052. One contracting absolutely to sell **property to be acquired in the future** must tender title and make delivery within a reasonable time. Northington-Munger Pratt Co. v. Farmers' Gin & Warehouse Co., 119 Ga. 851, 47 S. E. 200. Even though impossibility of obtaining title would prevent specific performance. Id. Is liable where he conveys to third party. Id. See 2 Curr. L. 1539, n. 62.

85. The contract providing for delivery upon the payment of the balance of the purchase price, failure to deliver until such balance is tendered does not constitute a breach of the contract, even though the seller agreed

amount to a repudiation of the contract.[86] A contract providing that "deliveries are to be made as wanted until further agreement" binds the purchaser to accept them within a reasonable time.[87] In the absence of any designation in the contract as to the place of delivery, portable goods must be delivered at the buyer's place of business,[88] or at such other place, not less accessible, as the buyer may designate.[89] Provisions for weighing, etc., generally indicate the place of delivery.[90] In the absence of an agreement to the contrary, the seller is not bound to send or carry the goods to the vendee, but fulfills his obligations by leaving or placing them at the latter's disposal, so that he may remove them without lawful obstruction,[91] and the buyer has a reasonable time within which to remove the goods.[92] Failure to deliver being due to a difference of opinion as to how shipments should be made, the case does not come within an "unavoidable contingency" clause,[93] nor, except in the case of a quasi-public corporation can such a clause compel the buyer to prorate with other patrons of the seller.[94] In all the cases mentioned, what is a reasonable time is a question for the jury,[95] as is the question whether or not the delivery conformed to the terms of the contract.[96] In some cases delivery may be inferred from part payment,[97] and from a return without explanation.[98]

The term "f. o. b." means "free on board" at the designated place,[99] and the courts will take judicial notice of such interpretation,[1] and will not allow this meaning to be changed by reference to extrinsic evidence or circumstances.[2] In the absence of evidence to the contrary, the phrase implies that the weights are to be determined at the point of delivery,[3] and that the buyer will designate the carrier by whom and the point to which the goods shall be shipped,[4] as to whether or not it imposes a duty on the seller to furnish the cars there is a conflict.[5]

to assist the buyer in selling the article. Whitaker v. Sterling [Mich.] 99 N. W. 880.

86. Where seller of coal was given one hour within which to decide whether he would deliver coal, and at the expiration of such time stated that he would not deliver it, held a repudiation of the contract, even though time set in contract for delivery had not expired. United States v. New York Cent. Coal Co. [C. C. A.] 130 F. 312.

87. Dunn v. Mayo Mills [C. C. A.] 134 F. 804.

88, 89. Morel v. Stearns, 43 Misc. 639, 88 N. Y. S. 416.

90. Where bills of lading with draft attached were sent to consignee through a bank at the consignee's place of residence, the contract provided for reweighing and reclassifying at the latter place, held contract provided for delivery at such place. Callender, Holder & Co. v. Short [Tex. Civ. App.] 78 S. W. 366.

91. Davis v. Alpha Portland Cement Co., 134 F. 274. Benjamin on Sales (7th Am. Ed.) § 679.

92. Blalock & Co. v. Clark & Bros. [N. C.] 49 S. E. 88.

93. Union Trust Co. v. Webber-Seeley Hardware Co. [Ark.] 84 S. W. 784.

94. Contract binding plaintiff to sell to defendant all the coal it may require during a specified period and promptly ship the same when ordered, unless prevented by strikes or other causes beyond its control. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 134 N. C. 574, 47 S. E. 116.

95. Dunn v. Mayo Mills [C. C. A.] 134 F. 804; Blalock & Co. v. Clark & Bros. [N. C.] 49 S. E. 88.

96. As to whether delivery was within contract time. Sloss Iron & Steel Co. v. Jackson Architectural Ironworks, 92 N. Y. S. 1056.

97. Where, in an action for a balance due, it appeared that the buyer had exercised its option and made part payment, held to warrant a finding that the seller had made all deliveries called for under the contract. American Electrical Works v. New England Elec. R. Const. Co., 186 Mass. 546, 72 N. E. 64.

98. Where goods were delivered and returned without explanation, held sufficient to support a finding of a delivery. O'Connor v. Hitzler [Colo. App.] 80 P. 474.

99. Vogt v. Shienebeck [Wis.] 100 N. W. 820. An agreement to sell "f. o. b." at a distant place implies that the seller will ship and place the property on the cars at the designated point free of any expense to the buyer. Hunter Bros. Milling Co. v. Kramer Bros. [Kan.] 80 P. 963.

1, 2. Vogt v. Shienebeck [Wis.] 100 N. W. 820.

3. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

4. Hughes v. Knott [N. C.] 50 S. E. 586.

5. That it does not. Evanston Elevator & Coal Co. v. Castner, 133 F. 409. This view is not altered by a further provision guarantying a maximum freight rate. Evanston Elevator & Coal Co. v. Castner, 133 F. 409; Davis v. Alpha Portland Cement Co., 134 F. 274. Where seller always obtained cars, held a construction of the contract

These ordinary meanings cannot be changed except by clear and satisfactory evidence of a custom to the contrary, known to both parties to the transaction at the time of the making of the contract.[6]

(§ 7) *B. Sufficiency of delivery; actual, constructive, symbolical.*[7]—Where manual delivery cannot be made, delivery of an order on a warehouseman may be sufficient.[8] Where delivery is to be by transfer of the bill of lading and stoppage in transit, the buyer, after a transfer of the bill of lading to him, must take the necessary steps to procure a delivery.[9]

(§ 7) *C. Acceptance; necessity; time; what is.*[10]—A positive and unequivocal refusal to accept constitutes a breach of the contract.[11]

A reasonable time is allowed for inspection after delivery of goods sold by sample,[12] or for a particular purpose,[13] or of a specified quality, they not being in existence or ascertained at the time of sale.[14] The goods not being as ordered, the buyer should promptly[15] reject the entire shipment,[16] or store them, on notice, at the seller's expense.[17] What constitutes a rejection depends upon the subject-matter of the sale and the circumstances of the case.[18] After acceptance, the

placing the duty so to do upon the seller. Id.

That it does: Vogt v. Shienebeck [Wis.] 100 N. W. 820.

6. Vogt v. Shienebeck [Wis.] 100 N. W. 820.

NOTE. Effect of contract to ship f. o. b. Duty to furnish cars: The term "f. o. b." implies that the vendor must bear the expense of conveying the goods to or upon the vehicle or conveyance specified, or to the point named (Ex parte Rosevear China Clay Co., L. R. 11 Ch. Div. 565, 48 L. J. Bankr. N. S. 100, 40 L. T. [N. S.] 730, 27 Weekly Rep. 591, 4 Asp. Mar. L. Cas. 144; Burgess Sulphite Fibre Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367), including all port and harbor charges, canal dues, wharfage, etc., at the place of shipment (George v. Glass, 14 U. C. Q. B. 514), as well as the expenses of an inspection, where that was stipulated to be had at the works of the maker who had agreed to deliver the goods f. o. b. at the point of shipment (Silberman v. Clark, 96 N. Y. 522).

Unless express provision is otherwise made in the contract, under an agreement to deliver f. o. b. at the initial point of shipment, the vendor is under no duty to provide the transportation facilities (Sutherland v. Alhusen, 14 L. T. [N. S.] 666; Baltimore & L. R. Co. v. Steel Rail Supply Co., 123 F. 655; Howland v. Brown, 13 U. C. Q. B. 199; Marshall v. Jamieson, 42 U. C. Q. B. 115), nor even to make any attempt to deliver until cars or ships are provided or named, by the vendee, unless the time or place of delivery is within the option of the vendor, in which event he must give notice of his readiness to deliver, or specify the place where, as the case may be, then the vendee must on his part provide or specify the vehicles of conveyance for the goods (Dwight. v. Eckert, 117 Pa. 490, 12 A. 32).—From note in 62 L. R. A. 795. The Wisconsin case (Vogt v. Schienebeck, 100 N. W. 820) is contrary to the general weight of authority. The court argues that supplying cars is but a means to the end which the seller must accomplish. The annotator in 18 Harv. L. R. 233, points out that the rule that the buyer must furnish the cars "proceeds upon the theory that as the buyer is to pay the freight, he is the one to make all arrangements for the carriage of the goods. Ordinarily to-day, however, where transportation is to be by rail, this circumstance has little force; for rates are generally uniform and shipment is possible over only one railroad. The Wisconsin rule seems, therefore, thoroughly consistent with modern business conditions. See Cincinnati, etc., R. Co. v. Consolidated, etc., Co., 7 W. L. Bul. 200."

7. See 2 Curr. L. 1540.

8. Salmon v. Brandmeier, 93 N. Y. S. 271.

9. Jones-Pope Produce Co. v. Breedlove [Ark.] 83 S. W. 924.

10. See 2 Curr. L. 1541.

11. Notification by brokers that customer would not receive any more goods on account of quality of goods previously delivered, held such notice constituted an unconditional breach of the contract. Lincoln v. Levi Cotton Mills Co. [C. C. A.] 128 F. 865.

12. Kanrich v. Wise, 92 N. Y. S. 790. See 2 Curr. L. 1541, n. 91.

13. Sale of a machine. Reasonable time held to include time enough to put machinery in motion and see if it operated properly. Cooper v. Payne, 93 N. Y. S. 69. Allowing machine to remain, in its original wrappings, in the factory for some months, held not to constitute an acceptance as a matter of law. Id.

14. Thick v. Detroit, etc., R. Co. [Mich.] 101 N. W. 64.

15. Herrmann Lumber Co. v. Heidelberg, Wolf & Co., 92 N. Y. S. 256. 22 days' delay in returning goods sold by sample held unreasonable and to amount to an acceptance. MacEvoy v. Aronson, 92 N. Y. S. 724.

16. A buyer cannot retain a part of the goods and reject the rest. Herrmann Lumber Co. v. Heidelberg, Wolf & Co., 92 N. Y. S. 256.

17. Herrmann Lumber Co. v. Heidelberg, Wolf & Co., 92 N. Y. S. 256.

18. It is not presumed that **fixtures** purchased for a store have been accepted where they differed in quality, value and kind from those contracted for, and there was a contemporaneous refusal to accept followed by

goods cannot be rejected,[19] and being delivered and accepted in part performance of the contract, they must be paid for even though the seller subsequently fails to perform,[20] the damages sustained by such breach being available as a set-off, but not as a bar to such suit.[21] Selling part of the goods constitutes an acceptance,[22] but retention of possession on assurances of the seller to remedy the defect does not,[23] nor does holding the property as security for a loan to the seller.[24] In many cases the question of acceptance is one for the jury.[25] An acceptance after a refusal to so do waives the latter.[26]

(§ 7) *D. Excuses for and waiver of breach.*[27]—The seller must use all reasonable efforts to procure and ship the articles sold.[28] An act of God rendering delivery impossible,[29] refusal by the purchaser to accept,[30] or his failure to designate mode and manner of shipment as required by the contract,[31] or to make payment,[32] except for an instalment of a severable contract,[33] justify refusal to deliver. Acquiescence in breach does not warrant subsequent breaches of the same nature.[34] The party claiming the breach must not be in default.[35]

Delivery being subject to strikes, accidents, or other causes delaying or preventing shipments, the existence of such conditions does not avoid the contract but only suspends the operation of the same during their pendency.[36] A shortage

a notice to reconstruct them to conform to the contract. Loeper v. Haas, 24 Pa. Super. Ct. 184. Supplemental affidavit of defense held sufficient to prevent judgment. Id.

19. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. Hats accepted after inspection cannot be returned a week later because crushed, bent and "off color." Kanrich v. Wise, 92 N. Y. S. 790.

20, 21. Gibboney v. Wayne & Co. [Ala.] 37 So. 436.

22. Where sale was before discovery of breach of warranty. Lenz v. Blake-McFall Co., 44 Or. 569, 76 P. 356.

23. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753.

24. Holding machines as security for money loaned the seller by the buyer does not constitute an acceptance after rejection. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860.

25. Where, following a custom in the trade, the buyer gave the messenger in charge of the goods a receipt, stating that they were in good condition, held to warrant submission to the jury of the question of acceptance. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

26. Where the purchaser refused to accept on the ground that the price was incorrect, held a subsequent acceptance in fulfillment of the contract entitled the seller to recover on the theory of a delivery and acceptance pursuant to the contract. Manda v. Etienne, 93 App. Div. 609, 87 N. Y. S. 588.

27. See 2 Curr. L. 1542.

28. That the seller had contracts for a supply does not excuse him from an effort to secure cars to ship the coal in, or to procure the article sold; if, as a matter of fact, they could have with reasonable expenditure of money, purchased it in the open market, or secured the cars. Haff v. Pilling, 134 F. 294.

29. Where delivery could have been made by land, failure to deliver in time owing to an act of God rendering waterway impassible held no excuse. Fleishman v. Meyer [Or.] 80 P. 209.

30. Levy v. Glassberg, 92 N. Y. S. 50. Where meat was bought on "buyer's option," and the buyer evidenced an intention not to receive it, held delivery was not necessary. Bonds v. Lipton Co. [Miss.] 37 So. 805. See 2 Curr. L. 1543, n. 19.

31. Where sale was made f. o. b. cars at a certain point and buyer failed to designate the mode and place of delivery. Hughes v. Knott [N. C.] 50 S. E. 586.

32. Default in payments. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507. Instalment payment. Contractors & Builders' Supply Co. v. Alta Portland Cement Co., 4 Ohio C. C. (N. S.) 225.

33. Campbell & Cameron Co. v. Weisse, 121 Wis. 491, 99 N. W. 340. A contract to furnish brick to be paid for monthly as delivered and used is severable, and the failure of the purchaser to pay an instalment does not release the seller from the contract. Iowa Brick Mfg. Co. v. Herrick [Iowa] 102 N. W. 787.

34. The buyer of the output of a certain mine by accepting ore from other mines held not to bind him to continue to receive such ore in performance of the contract. Shackelford v. Sloss Iron & Steel Co. [Ala.] 36 So. 1005. The acceptance of shipments of less than the contract amount does not justify the seller in continuing such shipments, nor bar the buyer from taking advantage of such subsequent shipments to terminate the contract. United States Iron Co. v. Sloss-Sheffield Steel & Iron Co. [N. J. Law] 58 A. 173.

35. Buyer of ice held in no position to claim waiver of condition of time of delivery. Fish v. Spicer [Conn.] 60 A. 696.

36. Contract for deliveries of coal, held where strike occurred, damages could only be recovered for refusal to deliver coal after restoration of normal conditions at the mines. Cottrell v. Smokeless Fuel Co., 129 F. 174.

of cars comes within the meaning of the phrase "other causes."[37] One contracting to manufacture and sell certain machinery is not entitled to refuse performance on the ground that the machinery contracted for would infringe outstanding patents.[38]

The contract stating that the goods shall be to the full satisfaction of the buyer, dissatisfaction of the latter in good faith, though unreasonable, authorizes its refusal to accept.[39] A buyer is not justified in refusing to take goods when they are in the same condition as when he bought them.[40]

Whether the purchaser has waived delivery at the specified time,[41] or the seller has waived refusal to accept,[42] is to be determined from their respective acts and declarations.

§ 8. *Warranties and conditions. A. In general. Nature and distinctions. Descriptions and representations.*[43]—Warranties are collateral to the contract of sale,[44] resting upon an express or implied agreement between the parties,[45] and must be either as to the title, quality or quantity of the thing sold.[46] A contract of indemnity is to reimburse one for a loss; a contract of warranty asserts the existence of certain conditions.[47] Representations[48] of material subsisting facts,[49] as distinguished from mere expressions of opinion,[50] may constitute warranties as to

37. Hatfield v. Thomas Iron Co., 208 Pa. 478, 57 A. 950. If of such proportion as to render the fulfillment of all the seller's contracts impossible, and in such case the seller must make delivery to all customers ratably, and is bound to put forth all reasonable and proper exertion and to pay any additional reasonable expense to obtain cars. Jessup & M. Paper Co. v. Piper, 133 F. 108.

38. Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51.

39. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860.

40. Heller v. Altman, 91 N. Y. S. 769.

41. Austin Mfg. Co. v. Snouffer [Iowa] 102 N. W. 128. Telegram from purchaser **directing shipment** after time specified for delivery is strong evidence of waiver of the time stipulated. Id.

Subsequent dealings "in no way to be connected" with former ones held not to waive breach of latter. Nebraska Bridge Supply & Lumber Co. v. Owen [Iowa] 103 N. W. 122.

42. Where on refusal to take, the seller continued to treat the goods as his own, and acted in accordance with a letter in which defendant repudiated the terms of its original agreement, held, he waived his rights under the contract. American Cotton Co. v. Herring [Miss.] 37 So. 117.

43. See 2 Curr. L. 1543.

44. Dean & Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230. Buyer may sue on warranty as collateral to contract of sale. Parker v. Fenwick [N. C.] 50 S. E. 627.

45. Warranty held not a part of the agreement between the parties, but instead a warranty which the buyer, as agent, was authorized to make on behalf of the original seller upon reselling the article. Osborne & Co. v. Josselyn, 92 Minn. 266, 99 N. W. 890.

Consideration: A warranty by a pledgee selling forfeited pledge is supported by consideration of his interest in the chattel. State Bank of Commerce v. Dody [Kan.] 79 P. 1092.

46. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048.

47. A contract whereby the vendor of sausages agreed to make good any claim for too much fat, held a contract of indemnity and not one of warranty. James v. Libby, 44 Misc. 210, 88 N. Y. S. 812.

48. Where an option for the purchase of corporate stock recited that the corporation's assets and liabilities were as shown in annexed schedule, held to amount to a representation. Worthington v. Herrmann, 89 App. Div. 627, 88 N. Y. S. 76. Where such schedule was accompanied by explanatory notes explaining date of figures in schedule, that the indebtedness had been increased, etc., held recital, schedule and explanatory notes did not amount to a warranty. Id.

49. Sauerman v. Simmons [Ark.] 86 S. W. 429; Harrigan v. Advance Thresher Co., 26 Ky. L. R. 317, 81 S. W. 261. Sale of machinery. Northwestern Lumber Co. v. Callendar, 36 Wash. 492, 79 P. 30; National Cash Register Co. v. Townsend Grocery Store [N. C.] 50 S. E. 306. Representations that a cash register will save the expense of a bookkeeper, that the books could be kept in half the time, and that the machine could be operated by one of ordinary intelligence, held not representations as to material facts. Id. Where on a sale of a horse the buyer asked if he was perfectly sound and the seller replied "in every particular," and the buyer said, "If that is the case I will take your word for it and I don't care for any receipt," held to show a warranty of soundness. Faust v. Koers [Mo. App.] 86 S. W. 278. See 2 Curr. L. 1543, n. 21.

50. Sauerman v. Simmons [Ark.] 86 S. W. 429; Holt v. Sims [Minn.] 102 N. W. 386; Lander v. Sheehan [Mont.] 79 P. 406. Statements by wholesale liquor dealer that whisky would meet the wants of the retailer's trade held mere expressions of opinion. Shiretzki v. Julius Kessler & Co. [Ala.] 37 So. 422. Representations that seller's bid for the work was as low as it could be done, and that there was no profit in it at the price bid, held mere expressions of opinion. Wor

all facts covered thereby,[51] and it is for the jury to determine whether or not a warranty is to be inferred from the representations made.[52] The buyer must rely upon the representations[53] and must not have been negligent in so doing.[54] The naked averment of a fact is neither a warranty of itself nor evidence of it.[55] The buyer relying to his injury upon false and fraudulent misrepresentations made by the seller with intent to deceive, the latter is liable for such damage.[56]

(§ 8) *B. Express and implied warranties and fulfillment or breach thereof.*[57]—The rule of caveat emptor does not apply where there is no opportunity for examination.[58] As to whether there is an express warranty is largely one of fact[59] for the jury,[60] who may consider prior negotiations and agreements,[61] but an express warranty, although in the form of advertisements or letters, cannot be read into a subsequently executed written contract of sale.[62] A warranty not expressed in or implied from the terms used in a written contract of sale cannot be added to by implication of law or parol proof.[63] An article being sold with an express warranty of title by the seller, who at the time has no title, his subsequent acquirement of title inures to the benefit of the buyer by estoppel.[64] As a general rule, an express warranty excludes implied warranties,[65] though some cases refuse to extend the doctrine to matters concerning which the writing is silent.[66]

rell v. Kinnear Mfg. Co. [Va.] 49 S. E. 988. See 2 Curr. L. 1543, n. 22.

51. An auctioneer announcing that **"everything** should be as represented, or no sale," and no specific article being excepted therefrom, the representation covers all articles sold. Bailey v. Manley [Vt.] 59 A. 200. The contract providing that the **price** shall be **based upon** the **cost marks** on the goods, it amounts to a **representation by** the **seller that** such marks truly state the price he paid for the goods. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048.

52. Phillips v. Crosby [N. J. Err. & App.] 59 A. 142; Sauerman v. Simmons [Ark.] 86 S. W. 429; Lander v. Sheehan [Mont.] 79 P. 406.

53. See Sauerman v. Simmons [Ark.] 86 S. W. 429.

54. Evidence held sufficient to sustain finding that buyer was not negligent in relying on representations. Harwood v. Breese [Neb.] 103 N. W. 55. Where the representations were concerning an alleged newly patented complicated machine, the buyer is not bound to make inquiry as to their truth or falsity, and is entitled to rescission if fraudulent. Mulholland v. Washington Match Co., 35 Wash. 315, 77 P. 497.

NOTE. Doctrine of reasonable inquiry.—The doctrine announced in the principal case is undoubtedly sound (Speed v. Hollingsworth, 54 Kan. 436; Faribault v. Sater, 13 Minn. 223; Cottrill v. Krum, 100 Mo. 397, 18 Am. St. Rep. 549), though the facts would almost seem to warrant an application of the rule, that where the exercise of ordinary prudence would have prevented deception, no relief will be given). Moore v. Turbeville, 2 Bibb. 202, 5 Am. Dec. 642; Morrill v. Madden, 35 Minn. 493). The doctrine of caveat emptor does not apply to the purchase of the right to sell an invention (Heater Co. v. Heater Co., 32 F. 723), nor need the vendee inspect the public records to ascertain what is covered by a patent (David v. Park, 103 Mass. 501; Rose v. Hurley, 39 Ind. 77; McKee v. Eaton, 26 Kan. 226). Where, however, an opportunity is given the vendee to test a machine, and he relies on statements made by the vendor concerning such test, he is bound thereby. Machine Works v. Meyer, 15 Ind. App. 385, 44 N. E. 193.—3 Mich. L. R. 161.

55. Krauskopf v. Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506.

56. Mason v. Thornton & Co. [Ark.] 84 S. W. 1048. Defense to action on purchase notes. Custer v. Harmon, 105 Ill. App. 76. See topic Deceit, 3 Curr. L. 1045.

57. See 2 Curr. L. 1544.

58. Armour & Co. v. Gundersheimer, 23 App. D. C. 210. See 2 Curr. L. 1544, 28-32.

59. Where contract called for "400 bush. s'k'd' potatoes," held there was no express warranty, but that the contract was merely for "good" potatoes. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066.

60. Whether warranty made during prior negotiations entered into contract as finally made held a question for the jury. Powers v. Briggs [Mich.] 103 N. W. 194.

61. Negotiations. Powers v. Briggs [Mich.] 103 N. W. 194. Agreement to furnish good title being followed by a bill of sale to the property, held in effect a warranty of title. Barnum v. Cochrane, 143 Cal. 642, 77 P. 656.

62. Cooper v. Payne, 93 N. Y. S. 69. See 2 Curr. L. 1545, n. 39, 40.

63. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382. See Curr. L. 1545, n. 39, 40.

64. Coolidge v. Ayers, 76 Vt. 405, 57 A. 970.

65. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143. A written warranty that "it is understood that the goods are warranted only against breakage caused by manifest defects in material" excludes all other warranties of quality, express or implied. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903. Under a written contract of sale of machinery, specifying the terms and conditions of the contract, a sale by sample cannot be shown. Id. See 2 Curr. L. 1545, n. 43, 44.

66. Ideal Heating Co. v. Kramer [Iowa] 102 N. W. 840. Phrase that the writing "shall

Except in those states where implied warranties are prohibited by statute,[67] a manufacturer[68] impliedly warrants that the article sold is merchantable,[69] free from latent defects not discoverable upon ordinary examination,[70] and if ordered for a special purpose, that it is reasonably fit for such purpose,[71] unless the article be known, described and defined,[72] or there is an opportunity for inspection,[73] and these implied warranties override provisions in the contract providing for an exchange of the goods if unsatisfactory, waiver of failure of consideration or noncompliance with order, unless the buyer exhausts the terms of warranty and exchange.[74] Such warranties do not extend to a sale of second-hand articles not manufactured by the seller.[75] The implied warranty that articles sold for food are wholesome does not extend to food stuffs for cattle.[76] Property sold by sample[77] or by description[78] is impliedly warranted to conform thereto, but such warranty does not survive acceptance with full knowledge of all the conditions affecting the character and quality of the articles.[79] Intent to deceive is not a necessary element of an implied warranty.[80]

fully express the agreement between the parties" merely excludes parol evidence to vary its terms, and does not exclude an implied warranty. Id.

67. Under Civ. Code § 1764, a sale does not imply a warranty. Browning v. McNear, 145 Cal. 272, 78 P. 722.

68. One engaged in putting up apples in cans for sale is a manufacturer within the meaning of the above rule. Nixa Canning Co. v. Lehmann-Higginson Grocer Co. [Kan.] 79 P. 141.

69. Main & Co. v. Deering [Ark.] 84 S. W. 640. Sale of ice. Campion v. Marston [Me.] 59 A. 548. See 2 Curr. L. 1546, n. 58.

70. Nixa Canning Co. v. Lehmann-Higginson Grocer Co. [Kan.] 79 P. 141. Held liable where defect in canned apples was due to the method employed in the preparation. Id. Where forge company agreed to purchase steel and forge rod, held not liable on an implied warranty for defects in the rod either in respect to the steel or as to its make or manufacture, if such defects were not discoverable by the use of ordinary care. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382.

NOTE. Reason for and application of above rule: The great weight of authority rests the rule that the manufacturer impliedly warrants or agrees to deliver an article, made for a special purpose, free from latent defects, upon the presumed superior knowledge of the manufacturer and the purchaser's reliance upon the knowledge and skill of the maker. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382. Whether the presumption is justifiable in a particular case is a question of fact. Id. Whether any other reasonable inference can be drawn from the facts in evidence is a question of law. Id.

71. Main & Co. v. Deering [Ark.] 84 S. W. 640; Beck & C. Iron Co. v. Holbeck [Mo. App.] 82 S. W. 1128; Cooper v. Payne, 93 N. Y. S. 69. Eggs furnished baker. Armour & Co. v. Gundersheimer, 23 App. D. C. 210. That goods sold for resale are merchantable and reasonably fit for the purposes of the trade for which they are purchased. Bunch v. Weil Bros. [Ark.] 80 S. W. 582. Sale of cattle for breeding purposes, seller must deliver cattle suitable for such purpose. Redhead Bros. v. Wyoming Cattle Inv. Co. [Iowa] 102 N. W. 144. The money value of the animal is not the standard by which compliance with the contract is to be determined. Id. See 2 Curr. L. 1545, n. 50; Id. 1545, n. 58, 60.

Heating apparatus cases. Conflict: One agreeing to install a heating plant "in a good and workmanlike manner" undertakes not only to do a good job of pipe fitting, but to have the apparatus operate with reasonable success in heating the house. Ideal Heating Co. v. Kramer [Iowa] 102 N. W. 840. Upon the sale of a heating apparatus to be placed in a building, there is no implied warranty that it will heat such structure to any certain degree of temperature, or so as to render it sufficient in that respect. Holt v. Sims [Minn.] 102 N. W. 386. Where a heating plant of better capacity than that agreed to be furnished was furnished, held a legal and substantial compliance with the contract therefor. Id.

72. American Home Sav. Bank v. Guardian Trust Co. [Pa.] 59 A. 1108.

73. National Cotton Oil Co. v. Young [Ark.] 85 S. W. 92. See 2 Curr. L. 1544, n. 32.

74. Main & Co. v. Deering [Ark.] 84 S. W. 640.

75. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. See 2 Curr. L. 1546, n. 59.

76. National Cotton Oil Co. v. Young [Ark.] 85 S. W. 92.

77. Alabama Steel & Wire Co. v. Symons [Mo. App.] 83 S. W. 78. Act of April 13, 1887, P. L. 21. Barnett v. Becker, 25 Pa. Super. Ct. 22. Shade of bricks. Washington Hydraulic Press Brick Co. v. Sinnott, 92 N. Y. S. 504. One purchasing grape fruit by sample, held there was an implied warranty that all the fruit was grape fruit. Abel v. Murphy, 43 Misc. 648, 88 N. Y. S. 256. Evidence held to show that sale of by-products of oil mill was made by sample. Shreveport Cotton Oil Co. v. Friedlander, 112 La. 1059, 36 So. 853. See 2 Curr. L. 1546, n. 51, 55.

Buyer's agent taking and submitting samples held not a sale by sample so as to raise an implied warranty. Browning v. McNear, 145 Cal. 272, 78 P. 722.

78. Bowman Lumber Co. v. Anderson, 70 Ohio St. 16, 70 N. E. 503; Timken Carriage Co. v. Smith & Co., 123 Iowa, 554, 99 N. W. 183; Lenz v. Blake-McFall Co., 44 Or. 569, 76 P.

An assertion of ownership[81] or a sale by one in possession[82] constitutes a warranty of title which estops the seller from setting up title in himself unless subsequently acquired.[83] The seller warranting title, being notified by his purchaser of an action brought against him and refusing to have anything to do with it, the refusal excuses a formal demand to defend,[84] renders the seller liable for the reasonable costs of the action[85] and bound by the result thereof, so far as concerns the value of the chattel.[86]

The contract providing that the seller's inspection should be conclusive, his inspection can only be set aside for fraud.[87] While the method prescribed in the contract should generally be followed in determining the breach or fulfillment of the warranty,[88] still such method is not always held exclusive,[89] and the evidence being conflicting as to whether or not such test was made, the question is for the jury.[90]

A warranty will be limited to the matters[91] imported by its terms,[92] which terms will be construed with reference to each other and the circumstances of the case.[93] In the absence of fraud a general warranty does not cover obvious defects,[94] nor does an implied warranty of quality cover latent defects developing

356; Beck & C. Iron Co. v. Holbeck [Mo. App.] 82 S. W. 1128. See 2 Curr. L. 1546, n. 52, 56.

79. Bowman Lumber Co. v. Anderson, 70 Ohio St. 16, 70 N. E. 503.

80. Abel v. Murphy, 43 Misc. 648, 88 N. Y. S. 256.

81. To logs which one gave another the license to cut. Pierce v. Banton, 98 Me. 553, 57 A. 889.

82. Deatz & Sterling's Case, 38 Ct. Cl. 355.

83. Deatz & Sterling's Case, 38 Ct. Cl. 355. The forcible seizure by the seller of property which he has sold to the party in possession is a breach of the contract of sale. Id.

84, 85, 86. Schnurmacher v. Kennedy, 88 N. Y. S. 943.

87. Beck & C. Iron Co. v. Holbeck [Mo. App.] 82 S. W. 1128; Camden Ironworks v. Masterson, 93 N. Y. S. 754.

88. Underfeed Stoker Co. v. Hudson County Consumers' Brew. Co., 70 N. J. Law, 649, 58 A. 296.

89. Where an **engine** is sold upon a warranty that it is capable of developing 25 **horse power** when tested according to a designated system, a finding that there was a breach of such warranty may be sustained by evidence that, in **actual use under ordinary conditions,** it could not develop more than 15 horse power, where no test was ever made according to the prescribed method. Kinnard Press Co. v. Stanley [Kan.] 79 P. 661.

90. Underfeed Stoker Co. v. Hudson County Consumers' Brew. Co., 70 N. J. Law, 649, 58 A. 296.

91. See 2 Curr. L. 1546.

92. The warranty implied in a written contract for the sale of **"good" potatoes** is that those delivered will be of the kind agreed on as regards imperfections not discoverable at the time of delivery, by ordinary inspection. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Breach of implied warranty held made out by finding that those delivered were not such as the agreement called for. Id. Where an article is sold for a specific use, **"quality guaranteed,"** the legal effect is a warranty that the article shall be salable or marketable for the designated use. Union Selling Co. v. Jones [C. C. A.] 128 F. 672.

Word "machinery" in warranty of derrick held sufficiently broad to include the whole of the derrick and appliances furnished by the seller. Miller v. Patch Mfg. Co., 91 N. Y. S. 870. A representation that a jack is as sure a foal getter as ordinary jacks in this climate and country warrants the ability of the **animal** to render reasonable service as a foal getter. Wingate v. Johnson [Iowa] 101 N. W. 751. Evidence held insufficient to show breach of warranty of secondhand threshing **machine,** the warranty being that it **would do** the **work** "if properly operated." Crenshaw v. Looker [Mo.] 84 S. W. 885. Where there is a **warranty of** the **quality of oil at** the **place of delivery,** and it is possible for the oil to deteriorate during transit, held shipper was not entitled to have samples of the oil taken before shipment considered in settling the controversy. Kentucky Refining Co. v. Shreveport Cotton Oil Co., 112 La. 838, 36 So. 750. See 2 Curr. L. 1546, n. 61, 62.

93. One purchasing **oranges to be delivered when wanted** implied warranty of merchantableness, if any, only warranted merchantableness of fruit on trees and that when gathered it should be handled and delivered with care. Bill v. Fuller [Cal.] 79 P. 592. One knowing that the **engine** bought was **to be used in a sawmill** and warranting the one delivered to have the same capacity as the engine contracted for, held the warranty would be construed as applying to its capacity as used in the sawmill. Critcher v. Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604.

94. Scott v. Gelser Mfg. Co. [Kan.] 80 P. 955. Representations as to condition of secondhand threshing machine held not to cover obvious defects, the purchaser being experienced in handling such machines. Id. Where the purchaser of mules inspected them before purchase, held he is presumed to have knowledge of water seeds and wire scratches. Doyle v. Parish [Mo. App.] 85 S. W. 646. See 2 Curr. L. 1547, n. 68.

after delivery to and acceptance by the buyer, both parties having equal means of knowledge.[95] A warranty of machinery does not cover unreasonable or careless use by the buyer.[96]

(§ 8) *C. Conditions and fulfillment or breach.*[97]—Conditions must be substantially complied with,[98] but a technical compliance will not be required where to do so would work a hardship.[99] Breach of a condition is a breach of the contract.[1] The time for performance not being specified, a reasonable time is implied.[2] Interpretations given particular conditions are stated in the notes.[3] In proving a condition, the probability of its existence may be considered,[4] and the general rules as to parol evidence apply.[5]

(§ 8) *D. Conditions on a warranty.*[6]—Unless waived,[7] all conditions upon the warranty must be complied with,[8] or it cannot be enforced; but failure to comply with conditions does not waive frauds practiced by the seller.[9] Notice of the kind[10] required by the contract must be given within the time stipulated therein;[11] but the seller waives his right to a notice in the manner prescribed, by acting on the notice received.[12]

(§ 8) *E. Waiver of warranties and conditions; excuse for breach.*[13]—An express warranty survives acceptance,[14] even though the defects could have been

95. Implied warranty that oysters were merchantable held not to extend to latent defects developing after buyer had accepted them. Farren & Co. v. Dameron [Md.] 58 A. 367.

96. Miller v. Patch Mfg. Co., 91 N. Y. S. 870. See 2 Curr. L. 1547, n. 69.

97. See 2 Curr. L. 1548.

98. A contract for delivery equal to sample at buyer's place of business is broken or not according to conformity with samples on delivery at buyer's place of business. Union Carpet Lining Co. v. Miller & Co. [Tex. Civ. App.] 86 S. W. 651. Under contract requiring seller to give bond satisfactory to a third party, held latter's notification of satisfaction must be given buyer. Equitable Mfg. Co. v. Cooley [S. C.] 48 S. E. 267. See 2 Curr. L. 1548, n. 81.

99. Though contract required that notice be given a third person, held notice to the seller was sufficient where notice to such third party would simply have allowed him to send a repair man to the seller who in turn would send him to the buyer. Kenney Co. v. Anderson, 26 Ky. L. R. 367, 81 S. W. 663. See 2 Curr. L. 1548, n. 82.

1. Failure of butter to come up to sample and failure to put same in 60 pound tubs as required by the contract held to constitute a breach thereof. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275. See 2 Curr. L. 1549, n. 87.

2. Time within which seller was to give a bond. Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 So. 106.

3. One agreeing to furnish a certain amount of granite and to be permitted to use certain specified **places for piling** it, held he was entitled only to such portion of the named space as he needed. Degnon-McLean Const. Co. v. City Trust, Safe Deposit & Surety Co., 90 N. Y. S. 1029. The contract calling for a **complete,** fully equipped **printing press,** the fact that the plates are worn out in trials of its efficiency warrants its rejection by the buyer. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860.

4. Evidence that the purchase of a store for $2,100 was on condition that the gross receipts were $100 a day is not so improbable that it may not be credited. Machson v. Syrop, 91 N. Y. S. 12.

5. Where contract provided that seller should furnish bond to be approved by bank after knowledge that seller and sureties were satisfactory, held, parol evidence was admissible to show that notification by bank was written without knowledge of the responsibility of the principal and sureties. Equitable Mfg. Co. v. Cooley [S. C.] 48 S. E. 267.

6. See 2 Curr. L. 1549.

7, 8. Osborne & Co. v. West [Iowa] 103 N. W. 118. Where contract of sale of thresher provided for its return to place of delivery, failure to so do and request for a renewal of purchase-money note held to prevent recovery on breach of warranty. Nichols-Shepard Co. v. Rhoadman [Mo. App.] 87 S. W. 62. Warranty providing that five days continuous use without complaint shall be conclusive evidence of fulfillment of warranty, a retention without complaint for five days after its first use, without continuous use, does not have such effect. Kinnard Press Co. v. Stanley [Kan.] 79 P. 661.

9. Failure to give notice of breach of warranty within five days after delivery as required by the contract. Folkes v. Walter Pratt Co. [Miss.] 38 So. 224.

10. Written notice being required, an oral one is insufficient. Nichols & Shepard Co. v. Caldwell, 26 Ky. L. R. 136, 80 S. W. 1099; Davis v. Case Threshing Mach. Co., 26 Ky. L. R. 235, 80 S. W. 1145.

11. Walter Pratt & Co. v. Meyer [Ark.] 87 S. W. 123; Walter Pratt & Co. v. Langston Mercantile Co. [Mo. App.] 85 S. W. 134.

12. Advance Thresher Co. v. Curd [Ky.] 85 S. W. 690; Kenney Co. v. Anderson, 26 Ky. L. R. 367, 81 S. W. 663.

13. See 2 Curr. L. 1550.

14. Where a machine is sold upon an express warranty that it will perform certain work. Tansley v. Higgins, 88 N. Y. S. 1005. Warranty that a derrick would have a lifting capacity of fifty tons, with a factor of

discovered upon an examination before delivery,[15] though it has been held that the rule does not apply where an inspection is actually made and the acceptance is not accompanied by a renewal of the warranty manifesting an intention to have it survive.[16] As a general rule an implied warranty is waived by acceptance where the defects are patent,[17] otherwise if latent,[18] though, it being possible to return the goods, retention after discovery will waive the latter.[19] The implied warranties of suitableness for a particular purpose,[20] merchantable quality,[21] and conformity to description,[22] or sample,[23] survive acceptance until inspection,[24] or until a reasonable time has elapsed therefor.[25] What is a reasonable time is a question of fact.[26] When the defect is ascertained, the buyer is bound either to elect to rescind the contract, so far as possible, or to treat it as a subsisting one, and sue on the warranty.[27] In such case the right of rescission must be exercised not only promptly but unequivocally,[28] and such a rescission includes a return of the thing sold within a reasonable time after inspection,[29] or, what amounts to the

safety of five. Miller v. Patch Mfg. Co., 91 N. Y. S. 870.

15. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143; Harrigan v. Advance Thresher Co., 26 Ky. L. R. 317, 81 S. W. 261, citing Cook v. Gray, 2 Bush [Ky.] 121; Lichtenstein v. Rabolinsky, 90 N. Y. S. 247. That **bill of lading allows inspection** does not supersede a warranty of quality in the contract. Marlboro Wholesale Grocery Co. v. Brooke [S. C.] 50 S. E. 186.

16. James v. Libby, 44 Misc. 210, 88 N. Y. S. 812. But see 2 Curr. L. 1550, n. 5.

17. Where by the exercise of ordinary care defects could have been discovered before delivery. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143; Casselli v. Mosso, 90 N. Y. S. 371. See 2 Curr. L. 1551, n. 14.

18. Crane Co. v. Collins, 93 N. Y. S. 174. See 2 Curr. L. 1551, n. 13.

19. Crane Co. v. Collins, 93 N. Y. S. 174. Cannot in such case charge buyer with the expense of putting property in proper condition. Id.

20. Notwithstanding a written contract containing no warranty. Cooper v. Payne, 93 N. Y. S. 69.

21. An acceptance of ice may be evidence of the release or waiver of an implied warranty of merchantable quality, but does not of itself necessarily constitute such release or waiver. Campion v. Marston [Me.] 59 A. 548.

22. Parker v. Fenwick [N. C.] 50 S. E. 627.

Note: In executory contracts of sale, where it is alleged that a warranty of quality has been made, it is sometimes difficult to decide whether the words which constitute the alleged warranty are words of description or of warranty. Where the words are descriptive of the goods, even though indicating quality, they do not make up a warranty of quality of such a nature that the buyer can recover for a breach thereof if he has had an opportunity to inspect the goods and has afterwards converted them to his own use, provided an examination would have disclosed the existing defect. Neff v. McNeeley [Neb.] 96 N. W. 150; Maxwell v. Lee, 34 Minn. 511, 27 N. W. 196; McClure v. Jefferson, 85 Wis. 208, 54 N. W. 777; Reed v. Randall, 29 N. Y. 358, 86 Am. Dec. 305. When goods are sold by description, although there is no warranty of fitness for a particular purpose, there is an implied warranty that the goods shall be of the kind described. Gregg v. Page Belting Co., 69 N. H. 247, 46 A. 26; Jarechi Mfg. Co. v. Kerr, 165 Pa. 529, 30 Atl. 1019, 44 Am. St. Rep. 674; Diebold Safe & Lock Co. v. Huston & Breeding, 55 Kan. 104, 39 P. 1035, 28 L. R. A. 53; Peoria Grape Sugar Co. v. Turney, 175 Ill. 631, 51 N. E. 587; Kleeb v. Bard, 7 Wash. 41, 34 P. 138; Wisconsin Red Pressed Brick Co. v. Hood, 67 Minn. 329, 69 N. W. 1091, 64 Am. St. Rep. 418. But where, in an executory contract for the sale of personal property, the seller warrants the quality of the goods and the vendee, after receiving them, discovers that there has been a breach of the warranty, the vendee is not required to return the goods, but may retain them and recover upon the warranty. First Nat. Bank of Kansas City v. Grindstaff, 45 Ind. 158; Day v. Pool, 52 N. Y. 416, 11 Am. Rep. 719; Zabriskie v. The Central Vermont R. R. Co., 131 N. Y. 72; Underwood v. Wolf, 131 Ill. 425, 19 Am. St. Rep. 40; Halley v. Folsom, 1 N. D. 325.—3 Mich. L. R. 335.

23. Spiegelberg v. Karr, 24 Pa. Super. Ct. 339.

24. Where both parties had long experience in the trade, and the sale was by description, delivery being made, the goods inspected and accepted, the buyer is liable for the price. Casselli v. Mosso, 90 N. Y. S. 371.

25. Failure to inspect within such time waives breach. Boessneck v. William Taylor & Son Co., 91 N. Y. S. 360; Spiegelberg v. Karr, 24 Pa. Super. Ct. 339. See 2 Curr. L. 1551, n. 16.

26. Boessneck v. William Taylor & Son Co., 91 N. Y. S. 360. Six months' delay held to waive implied warranty. Id.

27. Spiegelberg v. Karr, 24 Pa. Super. Ct. 339. Buyer may keep the chattel even after knowledge of defects and rely on the breach of warranty in diminution of the contract price. Alabama Steel & Wire Co. v. Symons [Mo. App.] 83 S. W. 78.

28. Mere complaints as to quality of goods while exercising dominion over them inconsistent with ownership in the seller are not sufficient. Spiegelberg v. Karr, 24 Pa. Super. Ct. 339.

29. Cooper v. Payne, 93 N. Y. S. 69. Two years use after discovery of defects held to

same thing, a reasonable time after receipt,[30] and what is a reasonable time is a mixed question of law and fact,[31] though if the facts are undisputed it is purely one of law.[32] The buyer is responsible for delay in inspection by his agent.[33] If the seller states that he will not accept the goods, the buyer need not return them.[34] Where there is an express warranty, the right to damages for the breach survives acceptance, and an offer to return on account of the breach is neither necessary nor permissible,[35] unless the sale be on "trial,"[36] in which case, if no time is stipulated, the chattel must be returned within a reasonable time;[37] but the seller trying to remedy the breach waives a provision that acceptance after a specified time constitutes an acceptance.[38] Buyer wishing to be relieved from the duty of inspection and fully protected should demand a warranty.[39] The fact that the buyer pays the purchase price[40] or resells at a profit,[41] does not waive the buyer's right to damages for the breach of an express warranty. He cannot recover on a warranty of title while remaining in the undisputed possession of the property.[42] Breach of warranty may be waived by a new agreement.[43] The breach being caused by the negligence of the buyer, he cannot recover therefor,[44] and the seller alleging such fact must prove it.[45] The buyer notifying the seller of the breach of the warranty and specifying certain defects is deemed to waive all others.[46]

Conditions.[47]—In the absence of fraud,[48] acceptance,[49] after an opportunity to

waive same. Parker v. Fenwick [N. C.] 50 S. E. 627.

30. Offer to return seven months after receiving the goods and after most of them had been resold held too late. Vogel v. Moore [Ky.] 84 S. W. 557. Retention of shingles for over a month held to waive a defect of quality. Sisson Lumber & Shingle Co. v. Haak [Mich.] 102 N. W. 946.

31. Hess v. Corwin [Mo. App.] 84 S. W. 141.

32. Spiegelberg v. Karr, 24 Pa. Super. Ct. 339. Five months' delay where goods were Madras shirtings held unreasonable. Id.

33. So held where goods were sent to an examiner. MacEvoy v. Aronson, 92 N. Y. S. 724.

34. Abel v. Murphy, 43 Misc. 648, 88 N. Y. S. 256.

35. Billson v. Hall & G. Const. Co., 43 Misc. 620, 88 N. Y. S. 245.

36. Nichols & Shepard Co. v. Caldwell, 26 Ky. L. R. 136, 80 S. W. 1099.

37. Nearly two months' delay in returning threshing machine held not unreasonable. Powers v. Briggs [Mich.] 103 N. W. 194.

38. Westinghouse Co. v. Meixel [Neb.] 101 N. W. 238.

39. Parker v. Fenwick [N. C.] 50 S. E. 627.

40. Dean Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230. Giving of note for price on date set in contract and after trial held not to waive breach of warranty. Kinnard Press Co. v. Stanley [Kan.] 79 P. 661.

41. Dean & Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230.

42. Barnum v. Cochrane, 143 Cal. 642, 77 P. 656.

NOTE. Remedy for breach of warranty of title: The question when a warranty of title is so broken as to give a cause of action is in square conflict, but the view taken by the court, that the vendee can sue only after he has been dispossessed or otherwise injured, is supported by the weight of authority. McGiffin v. Baird, 62 N. Y. 329. Some courts, however, uphold the other position that the vendee is entitled to sue at once. Grose v. Hennessey, 3 Allen [Mass.] 389. The former view seems the better in principle, as under the latter a vendee might recover full damages at once for failure of title when, if never dispossessed, his damage would be only nominal. Furthermore under this latter theory the vendee might be barred by the statute of limitations, although he were unaware of any defect in his title until his remedy was lost. The present decision requiring actual dispossession follows the analogy in the law of real property that a covenant of warranty is not broken until there has been an actual ouster. Gilman v. Haven, 11 Cush. [Mass.] 330.—18 Harv. L. R. 152.

43. Breach of warranty of quality held waived where buyer, at the time he received the goods, knew that they were not of the quality agreed upon, and then accepted them under a new agreement to pay a less price. Hogue v. Simonson, 94 App. Div. 139, 87 N. Y. S. 1065.

44. Plaintiff alleging and proving breach of warranty, in that jack was not a sure foal getter, defendant could show as a defense that such incapacity was due to lack of proper care or treatment on the part of plaintiff. Wingate v. Johnson [Iowa] 101 N. W. 751. But proof that such treatment rendered the jack less efficient does not overcome proof of actual inefficiency. Id.

45. Wingate v. Johnson [Iowa] 101 N. W. 751.

46. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. S. 142.

47. See 2 Curr. L. 1552.

48. Browning v. McNear, 145 Cal. 272, 78 P. 722.

49. Browning v. McNear, 145 Cal. 272, 78 P. 722; Yeiser v. Russell & Co., 26 Ky. L. R. 1151, 83 S. W. 574; Crane Co. v. Collins,

inspect,[50] and without an offer to return,[51] is generally held to waive nonconformity with the contract, though in some states it is held to be at most mere evidence of compliance,[52] the seller retaining the right to damages,[53] and its weight as evidence is a question for the jury.[54] In this connection acceptance of a part is not an acceptance of the whole.[55] In the states where it is held that such acceptance waives the breach, it is nevertheless competent for the parties to change the rule by agreement, as where the buyer demands and receives a contract of indemnity.[56] Where goods are bought on condition of approval by a third person, the condition is waived by acceptance and payment without such approval.[57] The benefit of a forfeiture clause may be waived by acquiescence,[58] and equity will not permit the perversion of such a clause to a use or purpose for which it was never intended.[59] Waiver by an unauthorized agent is ineffectual.[60] Tender becomes unnecessary when it is reasonably certain that the offer will be refused.[61] Unless waived,[62] only those breaches which are relied on at the time acceptance[63] or retention is refused can be taken advantage of. Given circumstances may have more weight upon a question of waiver of nonessentials than upon a question of waiver of essentials.[64]

(§ 8) *F. Remedies*[65] on the warranty and breach of condition have been reserved for other parts of this title,[66] together with damages for breach[67] and rights of assignees and subsequent purchasers.[68]

93 N. Y. S. 174. Where price was fixed by contract. Krauskopf v. Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506. In an action for the price of machinery which has been accepted, retained and used by the buyer, it is not necessary to allege and prove compliance with a provision requiring the seller to submit plans for approval. Thomas China Co. v. Raymond Co. [C. C. A.] 135 F. 25. It appearing that the machine broke down on trial but was repaired, accepted and used, evidence as to the cause of the original breakage is immaterial. Boothe v. Squaw Springs Water Co., 142 Cal. 573, 76 P. 385.

50. Field v. Schuster, 26 Pa. Super. Ct. 82. That staves were not of the contract width. Dinwiddie & Co. v. Nash [Ky.] 86 S. W. 517.

51. So held where one ordered 5 barrels of catsup and received warehouse order for 50 barrels, though he notified broker of mistake. Salmon v. Brandmeier, 93 N. Y. S. 271.

52, 53, 54. Watson v. Bigelow Co. [Conn.] 58 A. 741.

55. Coburn v. California Portland Cement Co., 144 Cal. 81, 77 P. 771.

56. James v. Libby, 92 N. Y. S. 1047.

57. Hano v. Simons, 92 N. Y. S. 337.

58. Forfeiture clause in contract for the sale of timber to be cut held waived by silence while large expenditures, etc., were being made. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432.

59. Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432.

60. Statement by unidentified agent that buyer need not insure the property as provided by a provision in the contract of conditional sale, held insufficient to establish waiver of such provision. Gordeen v. Pearlman, 91 N. Y. S. 420. See 2 Curr. L. 1552, n. 28.

61. Where there was an agreement to repurchase and the seller on being asked to comply therewith stated that he did not believe there was any such agreement, but if there was he would live up to it, and he failed to notify the buyer that he would not repurchase until after the time for tender, held tender was excused. Pierce v. Lukens, 144 Cal. 397, 77 P. 996.

62. Buyer refusing to receive goods, but subsequently ordering and receiving same, held to constitute only a waiver of its right to stand on its first refusal, and did not constitute a new contract. Helper v. MacKennon Mfg. Co. [Mich.] 101 N. W. 804.

63. The seller, in violation of the terms of the agreement, refusing to perform unless the purchaser gave security, held the breach was waived where the purchaser subsequently refused to accept the goods on the ground that the price stated in the invoice was incorrect. Manda v. Etienne, 93 App. Div. 609, 87 N. Y. S. 588. Such refusal held to also waive any breach of contract because of consignment not having been made through broker named in the contract. Id. Purchaser of fruit refusing fruit solely on ground that it was frozen on its arrival, he cannot subsequently allege as a ground for refusal to pay that the quantity sent was excessive. United Fruit Co. v. Bisese, 25 Pa. Super. Ct. 170. Noncompliance, with a condition not being made a ground for refusal to accept nor taken advantage of on trial, held there was a waiver of the question whether the condition was complied with or not. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

64. Campion v. Marston [Me.] 59 A. 548.

65. See 2 Curr. L. 1552.

66. See post, § 10, Remedies of the seller; § 11, Remedies of the purchaser.

67. See post, § 12.

68. See post, § 13.

§ 9. *Payment, tender, and price as terms of the contract.*[69]—The contract being silent as to the time of payment, delivery and payment are presumed to be concurrent acts,[70] and the seller is entitled to demand cash on delivery,[71] and to refuse to make delivery until bills previously incurred have been paid.[72] Neither party to such a contract can maintain an action for a breach by the other without showing performance of the conditions upon his own part, or an offer to perform, even though it is not certain from the terms which is to do the first act.[73] The time of payment being deferred on condition, failure to perform such conditions renders the price payable at once.[74] Payment is not due until conditions precedent have been complied with.[75] Interest does not start until the payment is due.[76] The contract being severable, the seller may recover for the goods delivered, though they constitute only a part of those sold.[77] The contract being silent as to the mode of payment, it is competent to prove a general custom as to the method of payment among dealers in the commodity sold.[78] The seller contending that the buyer was unable to pay in cash, evidence of a custom allowing payment in checks is admissible,[79] the fact that the buyer could have within a reasonable time converted his checks into currency is sufficient to sustain a finding that he was ready and able to perform.[80] A cash sale is not converted into a credit sale by the merchant receiving and depositing a check for the purchase money, drawing against the account thus increased and marking the bill "Paid."[81] A sight draft accompanying the bill of lading is not equivalent to the payment of cash on delivery.[82] The buyer accepting the goods is bound to pay the contract price and cannot limit the seller's recovery to the actual value of the goods delivered.[83]

69. See 2 Curr. L. 1552.

Payment as necessary to pass title, see ante, § 6. Conditional sales, see post, § 14.

Criminal liability for fraudulent purchase of goods on credit, see False Pretenses and Cheats, 3 Curr. L. 1419. See, also, Payment and Tender, 4 Curr. L. 955.

70. Livermore v. Brauer [C. C. A.] 128 F. 265; Messenger v. Woge [Colo. App.] 78 P. 314. See 2 Curr. L. 1553, n. 41-43.

71. Bauer v. Blaha, 88 N. Y. S. 933. See 2 Curr. L. 1553, n. 41-43.

72. Bauer v. Blaha, 88 N. Y. S. 933.

73. Livermore v. Brauer [C. C. A.] 128 F. 265.

74. Messenger v. Woge [Colo. App.] 78 P. 314.

75. Where an option to purchase hides required the performance of certain conditions, held, the buyer was not required to pay the price in advance of the performance of such acts by the seller. Kibler v. Caplis [Mich.] 103 N. W. 531. Contract calling for a certain quantity of axes at a certain price, payment to be made a certain time **after shipment,** held, payment was not due until all the goods were shipped. Union Trust Co. v. Webber-Seeley Hardware Co. [Ark.] 84 S. W. 784. The contract providing that the goods should be shipped to a distant point and there resold, the buyer agreeing to pay therefor **on** the **receipt of** the **money from** the **resale,** the seller cannot recover the price without proof that the goods had arrived at their destination and that the buyer had received the money therefor. Machale v. Leber, 88 N. Y. S. 958.

76. The contract of sale providing that the property should become the buyer's on a certain date, but that the purchase price should not be paid until a subsequent date, the seller is not entitled to interest on the amount between these two dates. Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58.

77. Contractors' & Builders' Supply Co. v. Alta Portland C. Co., 4 Ohio C. C. (N. S.) 225; Racine Shoe Mfg. Co. v. Badger Mfg. Co. [Wis.] 100 N. W. 1044. The buyer buying for resale and the contract providing that he should pay for the goods as soon as he received pay for the same or any part thereof, held the contract was severable. Racine Shoe Mfg. Co. v. Badger Mfg. Co. [Wis.] 100 N. W. 1044; Campbell & Cameron Co. v. Weisse, 121 Wis. 491, 99 N. W. 340. Letter "We propose to accept your offer of $5.00 per cord for 200 cords, more or less, of hemlock bark * * * bark to be measured * * * and measurements of each car reported to us at once. * * * Terms spot cash within 10 days from receipt of cars." This offer was accepted. Held contract was apportionable. Campbell & Cameron Co. v. Weisse, 121 Wis. 491, 99 N. W. 340.

78. Blalock & Co. v. Clark & Bros. [N. C.] 49 S. E. 88.

79, 80. Hughes v. Knott [N. C.] 50 S. E. 586.

81. Charleston & W. C. R. Co. v. Pope [Ga.] 50 S. E. 374. In such case, the check being dishonored, the title of the commission merchant, by the terms of Civ. Code 1895, § 3546, is good as against the purchaser, the railroad to whom the cotton sold is delivered, and the bona fide holder of the bill of lading. Id.

82. Thick v. Detroit, etc., R. Co. [Mich.] 102 N. W. 64.

83. Brown v. Harris [Mich.] 102 N. W. 960.

The effect of particular terms for payment is matter for construction[84] generally by the court.[85] "Cost price" is a relative term, necessarily depending for its meaning on the situation of the parties and the circumstances under which it is used.[86] As applied to a retail stock of goods, it usually has reference to the cost at wholesale.[87] The contract providing that the seller should give the purchaser credit for freight, the seller is only entitled to claim such credit as a set-off to an action for the price,[88] and this only after the freight has been paid.[89] The seller may waive the terms of payment[90] or part payment,[91] or the parties may modify them without otherwise disturbing the contract.[92]

A tender of goods to be effectual under a contract must comply in all material respects with the contract, both as to time of delivery and description of the goods.[93] The seller refusing to deliver tender of the price is waived.[94]

§ 10. *Remedies of the seller. A. Rescission and retaking of goods or action for conversion. Rescission.*[95]—Fraud,[96] and especially fraudulent statements by the buyer as to his solvency,[97] warrant rescission by the seller, and if he elects to so do, he must act promptly on discovering the fraud,[98] neither the breach of another separate contract,[99] nor an attempt by the buyer to change the terms of the

84. Illustrations: Where one agreed to sell flower bulbs at a **specified sum less than the price of competitors,** held, where price offered by seller was based on the market price of bulbs in his region, that there was no breach of contract. Manda v. Etienne, 93 App. Div. 609, 87 N. Y. S. 588. Contract price being a certain sum less than **market value,** the latter **to be** ordinarily **determined** by the **last official quotation** of the day, held, latter quotation was not conclusive, and that seller could not be made to take a sum based on less than the actual value of the commodity. American Cotton Co. v. Herring [Miss.] 37 So. 117. Contract providing for sale of gunstocks of specified dimensions, 30 cents each of the price to be paid **"on consignment,"** and the **balance on receipt of the "inspector's report,"** held if stock consigned conformed to description, seller was entitled to the 30 cents each, though some were rejected on inspection. Cady v. Turnbull [Ark.] 84 S. W. 1025. One agreeing to pay **market price at certain place,** evidence of market price at place 10 miles distant therefrom held inadmissible. Bacon Fruit Co. v. Blessing [Ga.] 50 S. E. 139. Where a **running account** was kept, **goods** being **sold on 30 days' time,** the 30 days begins to run, as to each article sold, at the date of invoice. People v. Grant [Mich.] 100 N. W. 1006. The seller writing the buyer that he would sell at the price offered and take stock "in **either** the G. **or** D. roads," held, that this did not necessarily mean that the option was to be exercised by the buyer. Aldrich v. Bay State Const. Co., 186 Mass. 489, 72 N. E. 53. See 2 Curr. L. 1553, n. 46.

85. Where one agreed to sell flower bulbs at a specified sum less than the prices of competitors, held, where price offered by seller was based on the market price of bulbs in his region, the question of breach of contract was one of law. Manda v. Etienne, 93 App. Div. 609, 87 N. Y. S. 588.

86, 87. Sylvester v. Ammons [Iowa] 101 N. W. 782.

88, 89. Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 So. 106.

90. The seller by directing the sale of cotton at 9 cents held to waive his rights under a contract entitling him to the market value of the cotton on the day of sale, and which on such day was 9⅛ cents. American Cotton Co. v. Herring [Miss.] 37 So. 117.

91. Contract to purchase a piano, payment to be partly in cash, partly in advertising, held, buyer could not repudiate obligation to receive piano and recover cash for advertising done, by reason of the fact that all the advertising contemplated was not done; defendant waiving his right to the balance. Mail & Times Pub. Co. v. Marks [Iowa] 101 N. W. 458.

92. Verbal agreement changing time of payment held simply to modify contract, and that seller might, after latest date for payment mentioned in original agreement, bring suit upon original invoices based upon his book account. Weiss v. Marks, 23 Pa. Super. Ct. 602.

93. Books marked with a purchaser's monogram do not comply with a contract not calling for a monogram. Barrie v. King, 105 Ill. App. 426.

94. Hughes v. Knott [N. C.] 50 S. E. 586.

95. See 2 Curr. L. 1554.

96. Seller being old and feeble, held bill of sale not conforming to his intention and executed under a misapprehension of its effect would be set aside. Stites v. Stites [N. J. Eq.] 60 A. 751.

97. Fraudulent representation as to amount of debts. Zeeman v. Saleburg, 25 Pa. Super. Ct. 423. Fraudulent intent is essential. Mere erroneous statement is not ground for rescission. Brown v. Mentzer, 209 Pa. 477, 58 A. 863. An **intention** even of an insolvent buyer at the time of the purchase **not to pay** will not amount to fraud, unless some false representation, trick or artifice or conduct which involves a false representation, be added. Reed v. Felmlee, 25 Pa. Super. Ct. 37. See 2 Curr. L. 1554, n. 64.

98. Zeeman v. Saleburg, 25 Pa. Super. Ct. 423.

99. That purchaser had not paid for goods previously sold. Southern Car Mfg. & Supply Co. v. Scullin-Gallagher Iron & Steel Co. [Tex. Civ. App.] 85 S. W. 845.

sale,[1] authorize rescission. The seller acquiescing in a continuing breach cannot make the same grounds for a sudden, unconditional, and absolute rescission,[2] but must first give notice of his intention to insist upon compliance with the terms of the contract.[3] The buyer being a bankrupt at the time of rescission, the seller must appear and try the title in the bankruptcy court,[4] and the bankrupt's receiver, taking possession of the property prior to the rescission, is not liable to the seller for conversion if he sells the same under order of the court of bankruptcy.[5] What constitutes a rescission is largely a question of fact.[6] When the seller refuses to take back the property, a tender is not necessary.[7]

Recovery of chattel; replevin.[8]—If the buyer lawfully obtains possession, the property must be demanded before possession can be recovered.[9]

(§ 10) *B. Stoppage in transit.*[10]—Goods being delivered to a carrier for shipment to the buyer, the seller has the right to stop them in transit in the event of the buyer's insolvency before payment of the purchase price,[11] and if the rights of third persons have not intervened.[12] The exercise of the right of stoppage in transitu does not rescind the sale but simply restores the seller to his right of possession and lien.[13]

(§ 10) *C. Lien.*[14]—An unpaid vendor has a lien upon the goods so long as they remain in his possession,[15] but in the absence of an express or implied contract

1. John Single Paper Co. v. Hammermill Paper Co., 96 App. Div. 535, 89 N. Y. S. 116.

2. Where purchaser failed to make payments weekly and was solvent. Portland Ice Co. v. Connor, 24 Pa. Super. Ct. 493.

3. Portland Ice Co. v. Connor, 24 Pa. Super. Ct. 493.

4, 5. In re Mertens, 131 F. 507.

6. Where smoked meat was bought on "buyer's option," held sale by seller of unsmoked meat for the buyer's account was not a rescission of the sale, it being shown that meat was smoked only when it had to be shipped. Bonds v. Lipton Co. [Miss.] 37 So. 805.

7. Bailey v. Manley [Vt.] 59 A. 200.

8. See 2 Curr. L. 1556.

9. Boyd v. McArthur, 120 Ga. 974, 48 S. E. 358.

10. See 2 Curr. L. 1556.

11. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

NOTE. Right of stoppage in transitu where goods are shipped f. o. b.: No strict rule exists in regard to the right of stoppage in transitu under f. o. b. contracts, as this right depends upon whether the title to the goods has entirely passed from the vendor to the vendee prior to the desired exercise of the right. If the vendor consigns the goods to the vendee upon delivery f. o. b., this in the absence of stronger evidence to the contrary, will be deemed sufficient to pass the title to the vendee at that time, and prohibit any further interference with the goods by the vendor. Cowas-jee v. Thompson, 5 Moore P. C. C. 165, 3 Moore Ind. App. 422. But, on the other hand, if the vendor retains the bill of lading within his own control, or does some other act indicative of an intent to retain the title, it has been held that he has the right of stoppage under proper circumstances. Craven v. Ryder, 6 Taunt. 433, 2 Marsh. 127, Holt, 100, 16 Revised Rep. 644; Ruck v. Hatfield, 5 Barn. & Ald. 632, 24 Revised Rep. 507. A somewhat different theory is presented in Ex parte Rosevear China Clay Co., L. R. 11 Ch. Div. 565, 48 L. J. Bankr. (N. S.) 100, 40 Law T. (N. S.) 730, 27 Week. Rep. 591, 4 Asp. Mar. L. Cas. 144, to the effect that the right of stoppage in transitu remains so long as the goods are in the hands of a common carrier, as such carrier is an intermediate between vendor and vendee until the latter actually receives the goods. See, also, Berndston v. Strang, L. R. 4 Eq. 481, 36 L. J. Ch. (N. S.) 879, 16 Law T. (N. S.) 583, 15 Week. Rep. 1168. However, in all cases, it seems to be a question of the intention of the parties as to the passing of the title to be deduced from the facts in the case, including the language of the contract, manner of delivery, form of bill of lading, etc.

In the only American decision found on this point (Neimeyer Lumber Co. v. Burlington & M. River R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534) it was held, after weighing all the facts in the case, that, under the contract, the title passed upon delivery to the common carrier at the point of shipment, and that, therefore, the vendor thereafter had no control over the goods sufficient to give him any right to a stoppage in transitu. —From note to Lawder & Sons Co. v. Mackie Grocery Co. [Md.] 62 L. R. A. 795, 805 et seq.

12. Where seller has parted with title to the goods sold and has delivered them to a common carrier for the buyer, he has no right of stoppage in transitu after the vendee has transferred the title to another by an assignment of the bill of lading. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

13. McGill v. Chilhowee Lumber Co. [Tenn.] 82 S. W. 210.

14. See 2 Curr. L. 1556.

15. McGill v. Chilhowee Lumber Co. [Tenn.] 82 S. W. 210; In re Portuondo Co., 135 F. 592; Buskirk Bros. v. Peck [W. Va.] 50 S. E. 432. Where contract for the sale of timber provided for the payment of the

to the contrary,[16] this lien is divested by a voluntary[17] delivery.[18] The indorsement and delivery of a bill of lading is sufficient to divest it.[19] A lien being waived by the extension of credit, it is immediately revived if the seller retains possession after the expiration of the time granted by the extension.[20] Until the seller has relinquished his right of possession to the purchaser, the latter cannot communicate any title to the property so as to defeat the lien.[21] The lien is superior to the title passing to the buyer's trustee in bankruptcy.[22]

A vendor's privilege[23] (recognized in Louisiana) exists only in favor of the owner.[24]

(§ 10) *D. Resale.*[25]

(§ 10) *E. Action for price or on quantum valebat.*[26] *Right of action and conditions precedent.*[27]—The cause of action accrues when the price becomes due,[28] or when conditions precedent have been complied with,[29] but, except where the purchase price is payable irrespective of delivery, repudiation and refusal to accept by the buyer while the contract is still executory does not authorize the action,[30] though the contrary is held in some states.[31]

The contract being executed by delivery and acceptance, the seller may recover the price in indebitatus assumpsit.[32] The count for goods sold and delivered is not applicable to a case where the defendant is a subsequent buyer and there has not been a novation.[33] An agent bringing the action as an individual cannot

purchase price before removal, held seller had a lien on property. Id.

Evidence in an action to foreclose a vendor's lien held insufficient to show that defendant ever had any interest in or possession of the chattel. Rosenthal v. Cristal, 91 N. Y. S. 15.

16. Offer of evidence to prove seller's lien held properly excluded, there having been a delivery and there being no offer to prove an agreement to continue the lien. Meyers v. McAllister [Minn.] 103 N. W. 564.

17. Where seller had exercised his right of stoppage in transitu, and the buyer by fraud obtained possession of the property, held, the buyer's transferee did not take legal title to the property. McGill v. Chilhowee Lumber Co. [Tenn.] 82 S. W. 210.

18. Meyers v. McAllister [Minn.] 103 N. W. 564.

19. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

20. In re Portuondo Co., 135 F. 592.

21. McGill v. Chilhowee Lumber Co. [Tenn.] 82 S. W. 210.

22. In re Portuondo Co., 135 F. 592.

23. See 2 Curr. L. 1556.

24. No vendor's privilege arises from the execution by a pledgee under a bill of sale of a counter bill of sale retransferring the pledged property to the owner. Elstner-Martin Grocery Co. v. Lament, 113 La. 894, 37 So. 868.

25. See 2 Curr. L. 1557.

26. See 2 Curr. L. 1557. Recoupment and counterclaim by purchaser, see post, § 11D.

27. See 2 Curr. L. 1557.

28. The contract providing for payment after delivery, the seller is not entitled to recover the price without showing a delivery or refusal to accept. Southern Car Mfg. & Supply Co. v. Scullin-Gallagher Iron & Steel Co. [Tex. Civ. App.] 85 S. W. 845. Letter by purchaser that if the goods to be manufactured were ready he would take them, though he would prefer not to do so, held not a refusal to accept. Id. See 2 Curr. L. 1557, n. 6.

29. One contracting to purchase when an inventory shall have been taken and matters adjusted, he is not liable for the purchase price until the taking of the inventory and the adjustment. Bressler v. Kelly [Ind. App.] 72 N. E. 613. Where nursery stock was accepted upon the condition that the buyer would not be liable unless it proved as hardy as certain other stock, action brought within 10 days after delivery is premature. Backes v. Erickson [S. D.] 103 N. W. 21. Buyer of smoke consumer held not liable for the price, notwithstanding good faith of seller. Reed Smokeless Furnace Co. v. State [Ind. App.] 72 N. E. 615.

30. Only remedy is an action for damages for breach of contract. Sherman Nursery Co. v. Aughenbaugh [Minn.] 100 N. W. 1101.

31. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860.

32. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084. See 2 Curr. L. 1558, n. 12.

33. So held in a case where the subsequent buyer assumed a mortgage given by the original buyer for the purchase price, which mortgage had been foreclosed and the subsequent buyer had promised to pay the balance due in consideration of which the seller forebore for a time to take possession of the goods. Miller v. Wilbur, 76 Vt. 73, 56 A. 280. The fact that the seller had fully performed would not affect the case, since general assumpsit, on the theory that plaintiff had fully executed a contract and defendant has nothing to do but pay, applies only where the service performed by plaintiff raises an implied promise to pay therefor, which a mere forbearance to take possession of the goods will not do. Id.

recover.[34] Where the seller bases his right to recover for a balance due upon an express contract, he can only recover by showing performance of the contract on his part, or that the buyer accepted a partial performance as full performance of the contract.[35]

Defenses and election between them.[36]—The seller's default if caused by the buyer is no defense,[37] unless the effect of the buyer's acts has been waived; and extension of the time of performance constitutes such a waiver,[38] and is an acknowledgment that the seller has not completed his contract.[39] The contract being apportionable, the seller is entitled to enforce payment for the quantity delivered regardless of his intention to fully perform his obligation to deliver the remainder.[40] The seller who fails to perform his contract in full may recover compensation for the part performed, less the damage occasioned by his failure,[41] and this is particularly true where the contract is divisible.[42]

A plea of breach of warranty should be one of set-off or recoupment,[43] unless the buyer disaffirms the contract and offers to return the chattel,[44] though a return is unnecessary if the article be valueless.[45] "Valueless" in this connection does not mean that the property is valueless for the particular purpose for which it was bought; it must be intrinsically of no value.[46] Of course, the rule of restoration or offer to so do has no application where the use of the property, in testing its qualities, destroys it or renders it impossible to return it to the seller.[47] In some cases use shows benefit.[48] In the absence of stipulations excluding them,[49] one may rely on damages caused by false representations either by way of defense or recoupment.[50] The rule that the purchaser of a defective article which has

34. Messenger v. Woge [Colo. App.] 78 P. 314.

35. Mead v. Rat Portage Lumber Co. [Minn.] 101 N. W. 299. Petition in an action to recover for logs sold and delivered held to proceed as upon an express contract. Id. An offer by the purchaser to retain part of the goods not being accepted cannot be made the basis of a recovery for such portion in an action on the entire contract. American Art Metal Novelty Co. v. Bosselman & Co., 91 N. Y. S. 722.

36. See 2 Curr. L. 1558.

37. Letters of seller complaining of difficulties interposed by the buyer's agent held incompetent in an action on the contract, because if the things complained of were prejudicial to the seller and were the acts of the buyer proving them, it is sufficient. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860. See 2 Curr. L. 1558, n. 21.

38, 39. Inman Mfg. Co. v. American Cereal Co., 124 Iowa, 737, 100 N. W. 860.

40. Campbell & Cameron Co. v. Weisse, 121 Wis. 491, 99 N. W. 340. See 2 Curr. L. 1558, n. 23. See ante, § 9, Payment and tender of price as terms of the contract.

41. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 134 N. C. 574, 47 S. E. 116; Mead v. Rat Portage Lumber Co. [Minn.] 101 N. W. 299.

42. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 134 N. C. 574, 47 S. E. 116; Campbell & Cameron Co. v. Weisse, 121 Wis. 491, 99 N. W. 340.

43. Eastern Granite Roofing Co. v. Chapman & Co., 140 Ala. 440, 37 So. 199. The buyer accepting the goods before discovering the breach of warranty is only entitled to a counterclaim for such damages as naturally result from the breach. Lenz v. Blake-McFall Co., 44 Or. 569, 76 P. 356. See 2 Curr. L. 1558, n. 25.

44. Cluster Gaslight Co. v. Baker, 90 N. Y. S. 1034. Leaving threshing machine at roadside and telling neighbor to tell seller if he saw him, held not a tender or return of the property. Crenshaw v. Looker [Mo.] 84 S. W. 885.

45. Eastern Granite Roofing Co. v. Chapman & Co., 140 Ala. 440, 37 So. 199; Hallwood Cash Register Co. v. Berry [Tex. Civ. App.] 80 S. W. 857.

46. Eastern Granite Roofing Co. v. Chapman & Co., 140 Ala. 440, 37 So. 199; Crenshaw v. Looker [Mo.] 84 S. W. 885; Heimann v. Hatcher Mercantile Co., 106 Mo. App. 438, 80 S. W. 729.

47. Eastern Granite Roofing Co. v. Chapman & Co., 140 Ala. 440, 37 So. 199 [dicta].

48. In an action for the price of an electric light plant, there being evidence that the buyer had used the same for several months, held proper to refuse defendant's prayer that there was no legally sufficient evidence that he had derived benefit therefrom. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753.

49. The contract stipulating that the sale was made under representations therein expressed and no others, the buyer cannot defend on the ground that he was induced to enter into the contract by the false representations of the seller's agent, there being nothing to show that the buyer was deceived as to the contents of the contract. Equitable Mfg. Co. v. Biggers, 121 Ga. 381, 49 S. E. 271.

50. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753.

been accepted after inspection will not be allowed to set up failure of consideration will not be extended to a case where the purchaser could have but did not inspect the article.[51] Unless the seller aids or participates in the illegal purpose, mere knowledge on his part that the property sold will or may be used for an illegal purpose is no defense.[52] Failure of title is no defense where the chattel is taken from the buyer under a default judgment, it not appearing that the seller was notified of the action or that there was any defect in the title acquired at the sale.[53] That the buyer was persuaded to make an improvident purchase,[54] or negligence of seller in sending the bill of lading,[55] is not a defense.

The complaint.[56]—An allegation, in general terms, of an indebtedness in a sum certain[57] for goods sold and delivered[58] at the place specified,[59] and according to the terms of sale, is a sufficient statement of a cause of action.[60] Defects in pleading an acceptance or tender may be cured by the answer.[61] An allegation

51. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 148.

52. Intoxicating liquor sold keeper of a house of ill fame. Washington Liquor Co. v. Shaw [Wash.] 80 P. 636.

NOTE. Illegal use of the property as a defense: In order to invalidate the sale, there must be a union of intent between the vendor and vendee. It is not sufficient that the vendor was indifferent and did not care what was the intent of his vendee, or was put upon inquiry concerning it, or that he had actual knowledge of it. Dater v. Earl, 3 Gray [Mass.] 482; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Tracy v. Talmange, 14 N. Y. 162, 67 Am. Dec. 132; Labbe v. Corbett, 69 Tex. 503; Tuttle v. Holland, 43 Vt. 542; Braunn v. Keally, 146 Pa. 519, 28 Am. St. Rep. 811. At least in all cases in which the property might be lawfully resold in the state into which it is shipped, no presumption will be indulged, in the absence of evidence on the subject, that the vendor united with the vendee in any illegal purpose or intent. Wagner v. Breed, 29 Neb. 720-733; King v. Fries, 33 Mich. 275. But the fact that the vendor had knowledge of the vendee's unlawful intent may properly be taken into consideration by the jury in connection with other evidence as tending to prove that the vendor participated in the illegal purpose of his vendee. Tegler v. Shipman, 33 Iowa, 194, 11 Am. Rep. 118. The vendor cannot be held to have participated in the unlawful intent, and the acts required to carry it out, from the fact that he did acts necessary to complete the sale and deliver the property, and that, as a result therefrom, it necessarily followed that the property reached the vendee, and he was thereby enabled to effectuate the known illegal intent with which the purchase was made. Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205; Tuttle v. Holland, 43 Vt. 542; Feineman v. Sachs, 33 Kan. 621, 52 Am. Rep. 547; Jameson v. Gregory, 4 Metc. [Ky.] 363; Webber v. Donnelly, 33 Mich. 469; Kerwin v. Doran, 29 Mo. App. 397; Braunn v. Keally, 146 Pa. 519, 28 Am. St. Rep. 811. In harmony with these decisions are those determining that if property is sold with knowledge that the purchaser intended to use it in a house kept by him for purposes of prostitution (Mahood v. Tealza, 26 La. Ann. 108, 21 Am. Rep. 546); or to engage with it in the military service of the Confederate States during the Rebellion (Wallace v. Lark, 12 S. C. 576, 32 Am. Rep. 516; Tedder v. Odom, 2 Heisk. [Tenn.] 68, 5 Am. Rep. 25; Id., 4 Heisk. [Tenn.] 668; McGavock v. Puryear, 6 Cold. [Tenn.] 34; Hedges v. Wallace, 2 Bush [Ky.] 442, 92 Am. Dec. 497; Brunswick v. Valleau, 50 Iowa, 120, 32 Am. Rep. 119); or to employ it in a gambling house when the conducting of such house is forbidden by law (Michael v. Bacon, 49 Mo. 474, 8 Am. Rep. 138; Beckel v. Sheets, 24 Ind. 1; Rose v. Mitchell, 6 Cold. [Tenn.] 102, 45 Am. Rep. 520). Possibly the decisions respecting the sale of property known to be intended for use by the enemy during the Rebellion were not well considered, for it is doubtless the judgment of the Federal courts that this was a practical aiding and abetting of a crime of so heinous a nature that no action can be sustained in any of our courts founded upon a contract connected with it. Hanauer v. Doane, 12 Wall. [U. S.] 342, 20 Law. Ed. 439; Lightfoot v. Tenant, 1 Bos. & P. 551, 556; Wood v. Stone, 2 Cold. [Tenn.] 368, 88 Am. Dec. 601.—From note to Graves v. Johnson [Mass.] 32 Am. St. Rep. 446.

53. Maul v. Pfeiffer, 23 Pa. Super. Ct. 280.

54. Powell v. Price [Mo. App.] 85 S. W. 924.

55. Greif & Bro. v. Seligman [Tex. Civ. App.] 82 S. W. 533.

56. See 2 Curr. L. 1559.

57. Messenger v. Woge [Colo. App.] 78 P. 314. Complaint must allege value or agreed price. Macksond v. Dildarian, 93 N. Y. S. 382. Reference to a bill of particulars in which it is alleged are "detailed certain payments" held not to amount to an allegation of value. Id.

58. Messenger v. Woge [Colo. App.] 78 P. 314. See 2 Curr. L. 1559, n. 30.

59. Fairbanks, Morse & Co. v. Midvale Min. & Mfg. Co., 105 Mo. App. 644, 80 S. W. 13.

60. Messenger v. Woge [Colo. App.] 78 P. 314.

61. So held where the answer showed that refusal to receive was not based on violation of agreement to deliver at a certain place. Fairbanks, Morse & Co. v. Midvale Min. & Mfg. Co., 105 Mo. App. 644, 80 S. W. 13. Tacit admission in answer that terms of agreement were fully agreed upon held to cure any defect in the petition in that it failed to allege acquiescence by plaintiff in the terms of defendant's acceptance. Id. See 2 Curr. L. 1559, n. 31.

that defendant received and accepted the goods carries with it the implication that the goods were of the kind and quality warranted.[62] In the absence of objection or injury, the fact that an allegation in the complaint does not properly describe the transaction does not preclude recovery.[63]

Answer, counterclaim and reply.[64]—The answer setting up breach of contract must show that such contract is the one sued on.[65] Breach of warranty being set up, the answer must allege in what respect the goods were defective.[66] If plaintiff alleges a failure to pay, a denial of such allegation is proper as part of a defense of payment.[67] In order to recover damages, defendant must claim and prove them.[68]

Unliquidated damages growing out of the alleged breach of a contract other than that sued upon and in no wise connected therewith cannot be set up as a counterclaim.[69] In Iowa the demurrer to a defensively pleaded breach of warranty must specify the grounds of objection.[70]

Affirmative matter in an answer which tends merely to deny the allegations of the complaint is not new matter requiring a reply.[71] Failure to reply may be waived by proceeding to trial.[72]

The general rules as to departure,[73] irrelevancy,[74] pleading conclusions of law,[75] and sufficiency of affidavits of defense,[76] apply. Sufficiency of pleadings in particular cases are stated in the notes.[77]

Proof.[78]—To warrant a judgment in his favor, the seller must prove either an agreement to pay a specific price, or the fair market value of the goods.[79] An

62. Fairbanks, Morse & Co. v. Midvale Min. & Mfg. Co., 105 Mo. App. 644, 80 S. W. 13.

63. Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58.

64. See 2 Curr. L. 1559.

65. Mere coincidence of date is insufficient. Seelav v. McKenzie, 92 N. Y. S. 350.

66. Vogel v. Moore [Ky.] 84 S. W. 557.

67. Flournoy v. Osgood, 90 N. Y. S. 972.

68. Where no counterclaim was interposed, and the amount of damages sustained by defendant was not shown, he was properly refused an instruction that he was entitled to have furnished him materials of good, substantial character. Kertscher v. Picken, 88 N. Y. S. 384.

69. Higbie v. Rust, 211 Ill. 333, 71 N. E. 1010.

70. Under Code, § 3562, a demurrer to an answer in an action for the price, the answer setting up breach of warranty and rescission, "that said alleged defense contains no allegations which entitle the defendants to rescind said contract," held insufficient. Timkem Carriage Co. v. Smith & Co., 123 Iowa, 554, 99 N. W. 183.

71. The complaint alleged the sale and delivery to defendant of goods of the "agreed and reasonable value of $124." The answer admitted the sale and delivery but denied that the agreed value was $124, alleging that such value was $50, held not new matter requiring a reply. King v. Burnham [Minn.] 101 N. W. 302.

72. By proceeding to trial without replying to counterclaim for damages for delivery of defective goods, held defendant waived failure to reply. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066.

73. The complaint alleging an indebtedness in a sum certain for goods sold, and the replication setting out an agreement for an extension of time and for security, and defendant's failure to give security, such allegations do not amount to a departure. Messenger v. Woge [Colo. App.] 78 P. 314.

74. A paragraph in the answer denying that certain property was excluded from the property paid for, held not subject to a motion to strike on the ground of irrelevancy. Flournoy v. Osgood, 90 N. Y. S. 972. Such property being described in the complaint as "merchandise," held proper to deny that they were merchandise. Id.

75. The contract requiring the giving of a bond, a plea that plaintiff had not given the "bond mentioned" held demurrable as a conclusion of law. Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 So. 106.

76. Plaintiff's statement not alleging delivery, the affidavit of defense need not deny that defendant received the goods. Friel v. Custer, 23 Pa. Super. Ct. 466. Affidavit of defense alleging that liquors sold were impure and that defendant suffered damage because thereof is sufficient. Rheinstrom v. Wolf, 26 Pa. Super. Ct. 559. Affidavit of defense setting up breach of warranty held sufficient. Rakestraw v. Woodward, 25 Pa. Super. Ct. 165.

77. Counterclaim setting up breach of contract held insufficient in that it did not show that the seller was obliged to continue to sell to defendant. Hughes Paint & Glass Co. v. Wright [Mo. App.] 85 S. W. 919. Plea that contract was obtained through misrepresentation held not objectionable in that it failed to allege that misrepresentation was of a material fact, and was relied on to defendant's injury. Brenard Mfg. Co. v. Citronelle Mercantile Co., 140 Ala. 602, 37 So. 509. Replication to answer alleging false representations held demurrable. Id.

78. See 2 Curr. L. 1560.

79. Meyer v. Jewell, 88 N. Y. S. 972.

offer by the purchaser to compromise the claim involves an admission of the delivery of the goods and of their value, up to the amount of the offer;[80] hence, in the absence of other evidence of value, the recovery cannot exceed the amount of the offer.[81]

Variance.[82]—In an action for the price, the seller cannot recover on a quantum valebat.[83] The plaintiff is not generally held to strict proof as to the date of sale as set forth in the bill of particulars.[84] Where defendant pleads that the article was not to be delivered until called for, he cannot contend that the order had been countermanded.[85]

Presumptions and burden of proof.[86]—Only those presumptions of fact are recognized which are immediate inferences of facts proved.[87] Where the sale or the performance thereof is evidenced by letters, the usual presumption that they were received without alteration applies,[88] and the burden rests on the party alleging the mailing to show by a preponderance of evidence that the letter was in fact sent.[89] Defendant not being the purchaser, the seller must prove his liability.[90] The purchaser[91] must prove his allegations of fraud,[92] breach of warranty,[93] and failure of consideration.[94] If he relies on a false representation, he must prove its falsity and materiality.[95]

Evidence; admissibility and sufficiency.[96]—As the familiar rules of evidence[97] determine the questions of relevancy and competency, illustrations only are given.[98] A witness may refresh his memory as to the price of a commodity at a giv-

80, 81. Hopkins v. Rodgers, 91 N. Y. S. 749.

82. See 2 Curr. L. 1561.

83. The buyer reselling a few goods before discovering that they were inferior to sample, and the seller suing for breach of contract to recover the entire price is not entitled to recover the value of the few articles sold by defendant, on failure to recover the whole sum. Hess v. Corwin [Mo. App.] 84 S. W. 141.

84. Buckeye Buggy Co. v. Dickey [Ga.] 50 S. E. 66. But see 2 Curr. L. 1562, n. 90.

85. National Cash Register Co. v. Hill, 136 N. C. 272, 48 S. E. 637.

86. See 2 Curr. L. 1562.

87. In an action for the breach of a contract for the purchase of oranges, evidence that some dwarfed and immature fruit had dropped from the trees and decayed on the ground, and had been picked up by plaintiff, does not warrant an inference that such fruit had been delivered to defendant under the contract. Bill v. Fuller [Cal.] 79 P. 592.

88. That printed modification was still attached to contract. McArdle v. Thames Iron Works, 96 App. Div. 139, 89 N. Y. S. 485; Merchants' Exch. Co. v. Sanders [Ark.] 84 S. W. 786. Evidence held insufficient to overcome such presumption. Id.

89. Brown v. Harris [Mich.] 102 N. W. 960.

90. Must show a connection between him and purchaser. Hardeman v. Bell, 120 Ga. 342, 47 S. E. 919.

91. See 2 Curr. L. 1562.

92. National Cash Register Co. v. Townsend Grocery Store [N. C.] 50 S. E. 306.

93. Purity Ice Co. v. Hawley Furnace Co., 22 App. D. C. 573. B. & C. Comp. § 799. Lenz v. Blake-McFall Co., 44 Or. 569, 76 P. 356. Must prove the making and breach thereof. Dean Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230.

94. Masterson v. Heitmann & Co. [Tex. Civ. App.] 87 S. W. 227.

95. Brenard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 37 So. 509.

96. See 2 Curr. L. 1562.

97. See Evidence, 3 Curr. L. 1334.

Parol evidence, see ante, § 4.

98. The contract simply calling for "good" potatoes, evidence as to whether potatoes were of good, sound, white stock held inadmissible. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Also evidence of what kind of soil they were grown in held inadmissible. Id. Where beets were sold by plaintiff to defendant by the ton and there was a dispute as to correctness of weighing, and it was agreed that next year's cars should be weighed and be determinative, but at such time the defendant refused to take the cars as improperly loaded, held evidence of the condition of the scales the first year was admissible. Oliver v. Oregon Sugar Co. [Or.] 76 P. 1086. Conceding that the compromise agreement admitted the inaccuracy of the scales, the admission of the testimony is harmless. Id. Where hay was sold according to **"baler's weights,"** held proper to exclude evidence showing weight of hay on buyer's scales. Colorado Trading & Transfer Co. v. Oliver [Colo. App.] 78 P. 308.

The material question being **conformity of goods to order,** held evidence that it was impossible for defendants to use certain small pieces of the goods delivered was irrelevant. Brown v. Harris [Mich.] 102 N. W. 960.

Books of account held admissible to show real purchaser. Love v. Ramsey [Mich.] 102 N. W. 279. Corporation's cash book and ledger held inadmissible for same purpose. Cook v. Williams, 85 N. Y. S. 1123. Order book held admissible to show existence of order. Oltarsh v. Lewis, 88 N. Y. S. 127. Unsigned carbon **copy of contract** held admissible against person dictating same. Pacific

en time by reference to a newspaper proven to be recognized by tradesmen as the standard authority on the price of such commodity.[99]

The evidence must preponderate[1] to establish the sale between the parties,[2] its terms,[3] warranties and representations,[4] the performance or breach thereof,[5] or any defense set up,[6] the cases cited being illustrative of this rule.

Export Lumber Co. v. North Pacific Lumber Co. [Or.] 80 P. 105.

Petition in another suit held admissible as an admission, though prepared by counsel and not signed by defendant. Greif & Bro. v. Seligman [Tex. Civ. App.] 82 S. W. 533.

The question in controversy being delivery and acceptance, evidence as to **overtures of compromise** and an attempt to settle after delivery is inadmissible. Field v. Schuster, 26 Pa. Super. Ct. 82.

Custom: In an action for the purchase price of tobacco, defendant introducing evidence that tobacco was improperly dampened by water, held proper for plaintiff to show in rebuttal that it was a common practice to so treat tobacco and that it was not prejudicial to its quality or condition. Field v. Schuster, 26 Pa. Super. Ct. 82.

Where **seller was required to give a bond,** held erroneous to permit defendant to testify that cashier of bank told him no bond had been filed with the bank, the declaration not being in the usual course of business. Equitable Mfg. Co. v. Howard, 140 Ala. 252, 37 So. 106. Where defense was failure to file a bond and credit freight as required by the contract, evidence that defendant notified plaintiff of the rescission of the contract held immaterial. Id. Where defense was breach of warranty, held error to permit witness to testify that he **had set up other machines** of the same make and character as that sold and never had any complaints. Haynie v. Plano Mfg. Co. [Tex. Civ. App.] 82 S. W. 532. Defense in an action for the price of decalcomanias being that the goods were defective, it is competent to show that the **same goods when skilfully handled** at another factory were satisfactory. Blair v. Ford China Co., 26 Pa. Super. Ct. 374. Evidence of what the buyer **paid others** under contracts for similar stone held inadmissible as not tending to prove market price at place of delivery. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506.

On an issue as to the value and contract price, evidence that **bills** were **rendered** the buyer **and retained** by him without objection, and of the **price** at which such merchandise sold **on the exchange,** is admissible. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93.

Evidence **that third party simply claimed interest** in the proceeds and that his claim had been satisfied was admissible. Randall v. Ditch, 123 Iowa, 582, 99 N. W. 190. In an action for the price of an electric plant, held proper to permit **expert witness** to state of his own knowledge the character of the dynamo and the amount of lights it was capable of lighting. Kernan v. Crook, Horner & Co. [Md.] 59 A. 753. Also held proper to permit the seller to ask his experts in rebuttal as to their opinion on what defendant's experts had declared to be defects. Id. In such a case where defendant's experts testified that the coupling was too short, held proper on cross-examination to ask if the room was large enough for a larger coupling, though it appeared that the room had been selected by plaintiff. Id.

Testimony of agents: Evidence that agent of plaintiffs, who was connected with the business of defendant to protect plaintiffs' interests, that an abbreviation in the name of the consignor stood for a firm other than plaintiffs, held admissible. Campbell v. Emslie, 91 N. Y. S. 1069. Defense being false representations, held proper to allow witness to testify to representations of traveling salesman. Brenard Mfg. Co. v. Citronelle Mercantile Co., 140 Ala. 602, 37 So. 509. Testimony of seller's salesman that goods complained of were not those sold by him held competent. Vogel v. Moore [Ky.] 84 S. W. 557.

See 2 Curr. L. 1562, n. 7.

99. Blanding v. Cohen, 101 App. Div. 442, 92 N. Y. S. 93.

1. See 2 Curr. L. 1563.

2. Evidence held sufficient to sustain a finding that the goods were not sold by plaintiffs, but that they were consigned to defendant by another firm. Campbell v. Emslie, 91 N. Y. S. 1069. See 2 Curr. L. 1564, n. 9.

3. Evidence held sufficient to show a sale on approval. Leiffer v. Post, 88 N. Y. S. 1007. Evidence held insufficient to show a sale on approval. Chester Gaslight Co. v. Baker, 88 N. Y. S. 389. Evidence held sufficient to show that defendant contracted to buy a certain quantity of articles, plaintiff to have up to a certain time to make delivery. Jaques & Son v. Parker Bros. [Mass.] 74 N. E. 301. Evidence held sufficient to support a finding that an extra pump head was furnished under an agreement that there should be no extra charge for it. Boothe v. Squaw Springs Water Co., 142 Cal. 573, 76 P. 385. See 2 Curr. L. 1564, n. 10.

4. Evidence held sufficient to sustain a finding that purchase-money notes were executed in reliance on seller's agent's statement that he would make everything right. Nichols & Shepard Co. v. Caldwell, 26 Ky. L. R. 136, 80 S. W. 1099. See 2 Curr. L. 1564, n. 11.

5. The fact that the buyer resold at a profit may be considered by the jury on the question of whether or not there was a breach of warranty. Dean Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230. Evidence held insufficient to entitle defendant to go to the jury on the defense of breach of warranty that threshing machine outfit was new, free from defects, etc. Davis v. Case Threshing Mach. Co., 26 Ky. L. R. 235, 80 S. W. 1145. That persons to whom staves had been resold rendered bills for scaling the same on account of their narrowness is not evidence that the staves were not of contract width. Dinwiddie & Co. v. Nash [Ky.] 86 S. W. 517. Contract for the construction of a tank, evidence held insufficient to support a judgment for plaintiff. Isseks v. Nelson, 91 N. Y. S. 756. Evidence held sufficient to sustain a

Trial and instructions.[7]—The general principles of trials[8] and instructions[9] are treated elsewhere. Particular cases hereunder discuss the applicability of the instructions to the case as defined by its issues,[10] and their sufficiency to fairly present such issues[11] without misleading the jury.[12] Questions to the jury must not be multifarious.[13]

Questions of fraud,[14] existence of agreement to pay,[15] and terms of the contract,[16] are generally for the jury,[17] unless there is no conflict in the evidence.[18] The general rule applies that findings must be consistent,[19] and not based on conjecture.[20]

The evidence tending strongly to show fraud on the part of the seller, it is error to direct a verdict for him.[21] There being sufficient evidence to make a prima facie case, at least as to some of the articles alleged to have been sold, it is error to grant a nonsuit.[22]

finding that the buyer broke the contract. Fish v. Spicer [Conn.] 60 A. 696. Evidence held sufficient to show that the purchaser gave shipping directions. Goldstein v. Nathan, 88 N. Y. S. 980. See 2 Curr. L. 1564, n. 12.

6. In an action to recover for goods sold and delivered, evidence held sufficient to sustain the defense of payment. Hawver v. Ingalls [Minn.] 101 N. W. 604.

7. See 2 Curr. L. 1564.

8. See Trial, 2 Curr. L. 1907.

9. See Instructions, 4 Curr. L. 133.

10. The answer specifically setting forth the requirements of the horses sold, it is not error to fail to charge that, in accordance with the terms of the contract, they must compare favorably with those previously sold. Stafford v. Christian [Tex. Civ. App.] 79 S. W. 595. Where the defense is framed to the measure of damages for breach of warranty of the fitness of the article sold, it is misleading to instruct the jury on the measure of damages for the breach of a warranty of quality. Lander v. Sheehan [Mont.] 79 P. 406. Held error to submit an issue as to whether goods should be examined on arrival and accepted or rejected before taken from car, where written contract contained no such agreement. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Instructions as to the proper course to be pursued by a buyer who has accepted goods and afterwards discovered that they were not of the quality contracted for were not inapplicable. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084. See 2 Curr. L. 1564, n. 17.

Counterclaim setting up damages for breach of contract, held defendant's indebtedness to plaintiff was properly submitted to the jury. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 134 N. C. 574, 47 S. E. 116.

11. In an action for the price due under an alleged sale of a business to a partnership, held instructions fairly presented the issues. Borum v. Allen [Ky.] 84 S. W. 760.

12. Plaintiff contracted to sell a quantity of rubblestone to defendant, and at defendant's request furnished a different kind of stone. In an action to recover for this stone, plaintiff testified that he had been paid for the rubble furnished, and the court charged that, if plaintiff recovered, he was entitled to the reasonable market value of the stone so furnished; held not misleading. Nugent v. Armour Packing Co. [Mo. App.] 81 S. W. 506.

13. In an action for the purchase price of potatoes, the question submitted to the jury: "Were all the potatoes furnished by plaintiff to defendant of the kind and quality agreed to be furnished?" was not multifarious. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066.

14. Question as to whether by fraud or mistake the contract sued on did not contain the whole agreement between the parties held one for the jury. Becker Co. v. Alvey [Ky.] 86 S. W. 974.

15. As to whether there was any agreement to pay for gravel held a question for the jury. Douglas v. New York, etc., R. Co., 93 N. Y. S. 723.

16. Upon a sale of beets by the ton, the amount delivered being disputed and a compromise agreement being affected, whereby the cars were to be reloaded and weighed, held a question for the jury whether a certain car was intended as a substitute for one of the cars specified in the agreement. Oliver v. Oregon Sugar Co. [Or.] 76 P. 1086.

17. **Evidence held to warrant submission of case** to the jury. Catlett v. Brookhaven Lumber Co. [Miss.] 38 So. 329.

18. Where hay was sold according to "baler's weights," and according thereto was of the quantity alleged in the complaint, the payments made were as therein stated, and the balance due was as therein claimed; held there was no question for the jury. Colorado Trading & Transfer Co. v. Oliver [Colo. App.] 78 P. 308.

19. The contract being modified, a finding that the work was completed according to the original contract held harmless. Boothe v. Squaw Springs Water Co., 142 Cal. 573, 76 P. 385.

20. Where counterclaim sets up loss occasioned by the delivery of potatoes which soon rotted and ruined good potatoes with which they were placed, held, seller could not complain that a verdict that 50 bushels so lost was based on conjecture, because the undisputed evidence showed that 75 bushels were so destroyed. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066.

21. Cox v. Indiana Drug & Specialty Co. [Miss.] 37 So. 835.

22. Buckeye Buggy Co. v. Dickey [Ga.] 50 S. E. 66.

(§ 10) *F. Action for breach.*[23]—To recover damages the vendor must show that he has complied with the terms of the contract,[24] unless the buyer refuses to perform his part before the time of performance by the seller has arrived, in which case the latter need not tender performance,[25] though he must show that he was able to have performed the contract if the buyer had not repudiated it.[26]

That plaintiff bases his right to recovery upon an erroneous theory does not necessarily bar his right of recovery.[27] Plaintiff claiming as part of his damages the loss sustained by compliance with a provision restricting the sale to defendant is not required to serve a bill of particulars specifying the names and addresses of the different dealers whose trade was thus lost.[28] Instructions requiring seller to prove nonexistence of any defect in addition to proof of a rejection regardless of defects are erroneous.[29] The general rules as to instructions,[30] the admissibility[31] and sufficiency[32] of evidence, apply; illustrations alone are given.

(§ 10) *G. Choice and election of remedies.*[33]—On breach of a contract of sale by the buyer, the seller is entitled, after everything necessary to vest title in the buyer has been done, to store or retain the goods for the buyer's benefit, and recover the contract price;[34] or he may resell them, his recovery in such case being the difference between the contract price and the net proceeds of the resale;[35] or if he does not care to adopt either of these courses, he is entitled to recover the difference between the contract price and the market price or

23. See 2 Curr. L. 1566.

24. Shreveport Cotton Oil Co. v. Friedlander, 112 La. 1059, 36 So. 853. Contract for the sale of by-products of oil mill held not indivisible, so that the seller could withhold part of the output and obtain damages from the buyer for not accepting the remainder. Id. Contract construed and refusal of the seller to recognize an assignment by the buyer, held not to constitute a breach thereof so as to preclude him from recovering for the buyer's subsequent breach. Allen v. Field [C. C. A.] 130 F. 641. Evidence held sufficient to show performance by the plaintiff of his part of the contract within the specified time. Wright v. Thomas & P. Commission Co. [Mo. App.] 86 S. W. 462.

25. Habeler v. Rogers [C. C. A.] 131 F. 43; Kinkead v. Lynch, 132 F. 692; Thick v. Detroit, etc., R. Co. [Mich.] 101 N. W. 64.

26. Habeler v. Rogers [C. C. A.] 131 F. 43. Where it appeared that the buyer had contracts for the goods which his sellers were able to perform held sufficient. Id. Plaintiff may show that though he did not have the goods he was able to procure them. Thick v. Detroit, etc., R. Co. [Mich.] 101 N. W. 64.

27. Where a complaint was erroneously framed on the theory that the contract was not one of sale but was one containing covenants, but contained an allegation of damages based on the rule applied to breach of a contract of sale, held, plaintiff was entitled to recover such damages. Schott Co. v. Stone, 35 Wash. 252, 77 P. 192.

28. Armstrong v. Heide, 90 N. Y. S. 372.

29. Parkins v. Missouri Pac. R. Co. [Neb.] 101 N. W. 1013.

30. Where the buyer refused to accept the property and two tenders were made, the evidence, in an action for damages, being directed entirely to the sufficiency of the second tender, an instruction authorizing a recovery on the first is erroneous. Redhead Bros. v. Wyoming Cattle Inv. Co. [Iowa] 102 N. W. 144. See Instructions, 4 Curr. L. 133.

31. Where buyer refused to carry out sale of ties, held evidence that some of the ties that defendant afterwards purchased were a part of the lot plaintiff had bought to fill defendant's order was inadmissible, it not being contended that there were not some good ties in the lot. Thick v. Detroit, etc., R. Co. [Mich.] 101 N. W. 64. In an action for damages for buyer's failure to accept the goods, evidence as to the manner in which the seller removed the goods held irrelevant. Joseph Joseph Bros. Co. v. Schonthal Steel & Iron Co. [Md.] 58 A. 205.

32. In an action for damages for buyer's refusal to accept part of the goods, evidence held sufficient to justify submission to the jury of defendant's right to a set-off for failure of goods received to conform to contract requirements. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205.

33. See 2 Curr. L. 1567. See, also, Election and Waiver, 3 Curr. L. 1177.

34. Habeler v. Rogers [C. C. A.] 131 F. 43; American Cotton Co. v. Herring [Miss.] 37 So. 117; Levy v. Glassberg, 92 N. Y. S. 50; Mayberry v. Lilly Mill Co. [Tenn.] 85 S. W. 401; Schott Co. v. Stone, 35 Wash. 252, 77 P. 192. See 2 Curr. L. 1567, n. 69.

Evidence held to show that the seller had elected to retain the goods as the property of the purchaser. Levy v. Glassberg, 92 N. Y. S. 50.

35. Habeler v. Rogers [C. C. A.] 131 F. 43; American Cotton Co. v. Herring [Miss.] 37 So. 117; Levy v. Glassberg, 92 N. Y. S. 50; Mayberry v. Lilly Mill Co. [Tenn.] 85 S. W. 401; Schott Co. v. Stone, 35 Wash. 252, 77 P. 192.

value at the time and place of delivery fixed by the contract.[36] If the seller elect to resell, the weight of authority is to the effect that notice to the buyer is necessary.[37] The seller having a lien on the property may waive the same and sue for the price.[38] When the buyer refuses to receive the property, a claim to recover the contract price and one to recover damages for breach of the contract are consistent and concurrent remedies.[39] The title being retained by the seller and the property delivered, he may waive the provision as to title and elect to sue for the purchase price,[40] and the bringing of an action for the purchase price is such a waiver.[41] Title not having passed, the giving of a notice to store and resell does not preclude an action for the breach.[42] Suit for the purchase money on a contract of sale is an affirmance of the sale and a waiver of any claim that the seller was induced to part with the property by fraud,[43] but such action being one wherein owing to peculiar conditions recovery could not be had, it will not bar the action in tort,[44] nor is such action in tort barred by the retention of past-due notes,[45] or by proving such notes in bankruptcy proceedings against the buyer.[46] One who brings an action of attachment against a party accused of fraud in obtaining goods affirms the sale to him and waives the tort.[47]

§ 11. *Remedies of purchaser. A. Rescission.*[48]—Fraud[49] or false material representations[50] in the procurement of the contract is ground for rescission by the buyer, but the fraud must be clearly alleged and, if denied, fully sustained by proof.[51] Breach of warranty is also a ground for rescission,[52] even though part of the goods sold have been disposed of,[53] and the contract provides that upon such breach the article may be returned and exchanged;[54] but all conditions

36. Habeler v. Rogers [C. C. A.] 131 F. 43; American Cotton Co. v. Herring [Miss.] 37 So. 117; Levy v. Glassberg, 92 N. Y. S. 50; Mayberry v. Lilly Mill Co. [Tenn.] 85 S. W. 401; Schott Co. v. Stone, 35 Wash. 252, 77 P. 192. See 2 Curr. L. 1567, n. 70.

37. Kellogg v. Frohlich [Mich.] 102 N. W. 1057; Mayberry v. Lilly Mill Co. [Tenn.] 85 S. W. 401.

Contra, Habeler v. Rogers [C. C. A.] 131 F. 43.

38. Provision that hay was to be paid for before removed held to create a lien in favor of the seller, which lien was waived by assent to a violation of its conditions. Allen v. Rushfort [Neb.] 101 N. W. 1028.

39. Seller suing to recover the price may amend his petition so as to state an action for damages. Redhead Bros. v. Wyoming Cattle Inv. Co. [Iowa] 102 N. W. 144.

40. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903. Rev. Codes 1899, § 4988, is not applicable to such a case. Id.

41. Dowagiac Mfg. Co. v. Mahon [N. D.] 101 N. W. 903.

42. Habeler v. Rogers [C. C. A.] 131 F. 43.

43. See Standard Sew. Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711.

44. Where judgment could not be obtained therein because of bankruptcy proceedings. Standard Sew. Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711.

45, 46. Standard Sew. Mach. Co. v. Alexander, 68 S. C. 506, 47 S. E. 711.

47. Ermeling v. Gibson Canning Co., 105 Ill. App. 196.

48. See 2 Curr. L. 1568.

49. Conde Implement Co. v. Grigsby & Co., 26 Ky. L. R. 768, 82 S. W. 458. Mere silence on the part of a seller as to defects of which he knows the bidder is ignorant is not such fraud as would avoid the contract of sale; but silent acquiescence in the false statement of an auctioneer makes it a false averment of the seller, and the rule of caveat emptor does not apply. Disease of cattle. Dayton v. Kidder, 105 Ill. App. 107. Where answer in an action for the price failed to allege fraud or that the property was worthless, held error to submit question of rescission to the jury. Jesse French Piano & Organ Co. v. Thomas [Tex. Civ. App.] 80 S. W. 1063. See 2 Curr. L. 1568, n. 86.

50. Though made in ignorance of falsity. Jesse French Piano & Organ Co. v. Nolan [Tex. Civ. App.] 85 S. W. 821. That seller had not sold similar goods to anyone else in town. Id. Notwithstanding provision in contract that separate agreements with salesman were not binding on seller. Pratt v. Darling [Wis.] 103 N. W. 229. See 2 Curr. L. 1568, n. 85.

51. Wilson v. Maxon [W. Va.] 49 S. E. 123.

52. Timken Carriage Co. v. Smith & Co., 123 Iowa, 554, 99 N. W. 183; Harrigan v. Advance Thresher Co., 26 Ky. L. R. 317, 81 S. W. 261. The purchaser of goods on receiving the last instalment, finding that they are not according to sample, has a right to rescind the agreement. American Art Metal Novelty Co. v. Bosselman & Co., 91 N. Y. S. 722.

53. Where there was an implied warranty and the buyer was under no obligation to inspect the goods. Burch v. Weil Bros. & Bauer [Ark.] 80 S. W. 582.

54. Berkey v. Lefebure & Sons [Iowa] 99 N. W. 710.

precedent, such as notice,[55] must be complied with. The buyer being in default, he has no right to rescind for the refusal of the seller to perform.[56] It being agreed that the chattel, if unsatisfactory, might be returned within a specified time, the purchaser is entitled to the whole of the last day.[57]

Unless the article be entirely worthless,[58] rescission involves the obligation to return the property to the seller,[59] with reasonable promptness after discovery of the fraud or breach,[60] unless the buyer before the time for return declares that he will not receive the goods,[61] or the buyer retains possession on the promise of the seller to remedy the defect.[62] The buyer's long delay puts the burden upon him to show why the defect in the goods had not been sooner discovered, and the goods promptly returned.[63] The contract providing for the return of the chattel but failing to specify any place, the implication is that it must be offered to the seller at the place where the purchase was effected.[64]

The buyer surrendering all his right, title and interest in the property to the seller, there is a complete rescission,[65] but if the seller refuse to accept, the buyer need not abandon the property, but may do such acts as are necessary to preserve and keep it.[66] When the contract is rescinded, it must be upon equitable terms, and as far as practicable, the court must place the parties in statu quo,[67] and the parties cannot by previous contract alter this rule,[68] but, though the buyer cannot place the seller in statu quo, he is, nevertheless, entitled to com-

55. Where contract provided for notice. Larson v. Minneapolis Threshing Machine Co., 92 Minn. 62, 99 N. W. 623.

56. Mason v. Edward Thompson Co. [Minn.] 103 N. W. 507.

57. A return between 9 and 10 o'clock P. M. of the last day held sufficient. Cornell v. Fox, 95 App. Div. 71, 88 N. Y. S. 482.

58. Harris v. Daly, 121 Ga. 511, 49 S. E. 609; Rumsey v. Shaw, 25 Pa. Super. Ct. 386.

59. Harris v. Daly, 121 Ga. 511, 49 S. E. 609; Rumsey v. Shaw, 25 Pa. Super. Ct. 386. Disregard of this rule held to warrant a new trial. Id. See 2 Curr. L. 1569, n. 94.

60. Pound v. Williams, 119 Ga. 904, 47 S. E. 218; Blair v. Ford China Co., 26 Pa. Super. Ct. 374. Retention and use of an article after discovery of fraud by which the sale was induced precludes a rescission. Hallwood Cash Register Co. v. Berry [Tex. Civ. App.] 80 S. W. 857. In such case his only remedy is to sue for breach of warranty, or to interpose the latter claim by way of counterclaim in an action for the price. Thomas China Co. v. Raymond Co. [C. C. A.] 135 F. 25. Two month's use of **heating apparatus** warranted to heat the house to a certain temperature in the coldest weather held not to preclude rescission for breach of warranty. Economy Furnace Co. v. Blachley [Iowa] 101 N. W. 1123.

61. Cornell v. Fox, 95 App. Div. 71, 88 N. Y. S. 482. See 2 Curr. L. 1569, n. 97-99.

62. Nichols & Shepard Co. v. Caldwell, 26 Ky. L. R. 136, 80 S. W. 1099.

63. Blair v. Ford China Co., 26 Pa. Super. Ct. 374.

64. Cornell v. Fox, 95 App. Div. 71, 88 N. Y. S. 482.

65. Milner & Kettig Co. v. De Loach Mill Mfg. Co., 139 Ala. 645, 36 So. 765. A complaint alleging the sale, warranty and that if warranty was broken, the article could be returned and another demanded, and also alleging the breach of the warranty, return of the article and demand for the other, and that there was a failure of consideration, held to allege, in effect, a rescission. Berkey v. Lefebure & Sons [Iowa] 99 N. W. 710. Complaint alleging that plaintiff returned a horse which he had purchased from defendant and demanded a return of his money on the ground of misrepresentations, and that the defendant accepted and retained the horse and promised to repay the money, which he has failed to do, held to show a complete rescission and to state a cause of action for the price paid. Kendall v. Hardebeck [Ind.] 71 N. E. 957. A return of the goods to an authorized agent of the seller and the latter's receipt held insufficient to show an agreement to rescind or right or election of the purchaser to rescind. Keystone Mfg. Co. v. Hampton [Ala.] 37 So. 552. See 2 Curr. L. 1572, n. 46.

66. Where horse sold was placed in livery stable on seller's refusal to accept his return, held occasional use by the buyer did not waive effect of rescission. Faust v. Koers [Mo. App.] 86 S. W. 278. Where, upon breach of a warranty in a sale of a horse, the buyer returned the same but the seller refused to take it, threatening to turn it loose, and thereupon the buyer retained possession, held to show a rescission. Berkey v. Lefebure & Sons [Iowa] 99 N. W. 710.

67. Nichols & Shepard Co. v. Caldwell, 26 Ky. L. R. 136, 80 S. W. 1099. Upon rescission by the purchaser, held, profits made with machine bought and damages to such machine should be credited against the value of the old machine taken by the seller in part payment. Id.

68. Where contract provided that in case of breach of warranty the seller should not be liable for an old machine taken in part payment, held, such a provision was not binding in determining the right of the parties on rescission. Nichols & Shepard Co. v. Caldwell, 26 Ky. L. R. 136, 80 S. W. 1099.

pensation for injuries received.[60] The contract being rescinded for fraud, the purchaser is entitled to recover actual damages.[70] The buyer misunderstanding a judgment ordering the return of the chattel and repayment of the purchase price, and selling the property, should account to the seller for its value at the time of the disposal of it.[71]

(§ 11) *B. Action to recover purchase money paid.*[72]—A buyer rescinding a contract on discovering breach of warranty[73] or fraud on the part of the seller[74] is entitled to sue and recover the purchase money paid, and the fact that he sues in deceit instead of for money had and received does not constitute an election between inconsistent remedies.[75] The contract providing that on such breach of warranty the seller will refund the consideration, the buyer is entitled to such repayment before delivering possession;[76] but it is otherwise if the contract provides that the buyer may return the chattel and receive back the consideration.[77] The seller desiring to claim noncompliance with conditions precedent must plead the same.[78]

(§ 11) *C. Actions for breach of contract.*[79]—The seller must have performed all conditions precedent.[80] The violation being positive and not passive,[81] or the seller admitting his inability to conform to the contract,[82] it is unnecessary to put him in default, and no tender of the price is necessary if he refuses to deliver,[83] though the buyer must show that he was able to comply with his part of the contract.[84] He is not required to go into the market and buy other goods in order to recover for the breach.[85] Retention and use of an article after discovery of fraud does not prevent a recovery of the damages resulting therefrom.[86] Acceptance of part of the goods after the time for delivery does not bar recovery for damages for failure to deliver the rest.[87]

Parties entitled to a joint interest in the contract are entitled to maintain a

69. Rumsey v. Shaw, 25 Pa. Super. Ct. 386.

70. Where the fraudulent representations had reference to a sunken vessel, buyer was held entitled to recover the reasonable expense incurred by them in endeavoring to raise the hull before its true condition was discovered. McRae v. Lonsby [C. C. A.] 130 F. 17. See topics Deceit, 3 Curr. L. 1045, and Fraud and Undue Influence, 3 Curr. L. 1520.

71. Kenney Co. v. Anderson, 26 Ky. L. R. 1217, 83 S. W. 581.

72. See 2 Curr. L. 1570.

73. Is not confined to his right to recover damages. Ruby Carriage Co. v. Kremer, 26 Ky. L. R. 274, 81 S. W. 251.

74. Hallwood Cash Register Co. v. Berry [Tex. Civ. App.] 80 S. W. 857; Fellows v. Judge, 72 N. H. 466, 57 A. 653.

75. Conceding that deceit is not the proper remedy, the buyer may after verdict amend by adding a count for money he had received, and thereupon have judgment on the verdict. Fellows v. Judge, 72 N. H. 466, 57 A. 653.

76. Kenney Co. v. Anderson, 26 Ky. L. R. 367, 81 S. W. 663.

77. Haynie v. Plano Mfg. Co. [Tex. Civ. App.] 82 S. W. 532.

78. Westinghouse Co. v. Meixel [Neb.] 101 N. W. 238. Where the petition alleged breach of warranty, and the answer denied that the terms of the warranty and the conditions of the trial were as stated, held, defendant could not prove and rely as a defense upon certain conditions in the written contract. Id.

79. See 2 Curr. L. 1570.

80. Where the seller agreed to repair or replace defective parts and the buyer gave him an opportunity so to do, there is a sufficient performance by the purchaser so that he can maintain an action. Timken Carriage Co. v. Smith & Co., 123 Iowa, 554, 99 N. W. 183. See 2 Curr. L. 1571, n. 27, 28.

81. Chattanooga Car & Foundry Co. v. Lefebevre, 113 La. 487, 37 So. 38.

82. Inability of the seller to make shipment within the time specified, it being shown that such time is of the essence of the contract. Chattanooga Car & Foundry Co. v. Lefebevre, 113 La. 487, 37 So. 38. See 2 Curr. L. 1571, n. 29.

83. Blalock & Co. v. Clark & Bros. [N. C.] 49 S. E. 88. See 2 Curr. L. 1571, n. 30.

84. Before plaintiff in an action for nondelivery of cotton can recover, he must show that when he demanded it he was able to pay for it in the method fixed by the custom among cotton dealers. Blalock & Co. v. Clark & Bros. [N. C.] 49 S. E. 88.

85. Where contract provided that deliveries were to be made when needed. Delaware & H. Canal Co. v. Mitchell, 211 Ill. 379, 71 N. E. 1026.

86. Hallwood Cash Register Co. v. Berry [Tex. Civ. App.] 80 S. W. 857.

87. Sun Mfg. Co. v. Egbert [Tex. Civ. App.] 84 S. W. 667.

joint action for its breach.[88] In Alabama an assignee for the benefit of creditors cannot maintain an action, in his own name, for the breach of a contract of sale of goods to his assignor.[89]

Pleading.[90]—The complaint must allege the consideration for the contract.[91]

Proof.[92]—Defendant alleging rescission must prove the same by a preponderance of the evidence.[93] Plaintiff must prove his damages measured by the rules of law applicable to the case.[94] The ordinary rules as to the admissibility,[95] relevancy,[96] and sufficiency[97] of evidence, apply.

Questions for the jury and instructions.[98]—Whether the goods delivered complied with the contract,[99] and whether the terms of the contract have been modified,[1] are for the jury.

(§ 11) *D. Action for breach of warranty.*[2]—Where, on an executed sale, there is a breach of warranty, the purchaser may retain the article and sue for the breach,[3] though there be an agreement to repurchase.[4] All conditions precedent must be performed,[5] and the contract providing for the replacement of defective warranted parts, such new parts must be demanded before the action can

88. Where mother, brother and sister of deceased bought coffin for him. Dunn & Co. v. Smith [Tex. Civ. App.] 74 S. W. 576. In such case held no defense that portion of money paid came from decedent's estate, there being no administration thereof. Id.

89. Code 1896, §§ 28, 876, relating to contracts for the payment of money, held inapplicable. Snead v. Bell [Ala.] 38 So. 259.

90. See 2 Curr. L. 1571.

91. Alderman v. New Departure Bell Co. [Conn.] 59 A. 408.

92. See 2 Curr. L. 1572.

93. Brockman Commission Co. v. Kilbourne [Mo. App.] 86 S. W. 275.

94. Seaboard Lumber Co. v. Cornelia Planing Mill Co. [Ga.] 50 S. E. 121. See post, § 12.

95. Evidence that buyer was unable to pay for articles held inadmissible, there being no issue of that kind in the case. Iowa Brick Mfg. Co. v. Herrick [Iowa] 102 N. W. 787. Exclusion of question asking defendant's president as to whether or not a certain phrase was inserted in the contract by reason of any suggestion made by him, held proper. United Engineering & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

In an action for nondelivery, held competent for plaintiff to state that when he went to get the goods he **was prepared to pay** for them. Blalock & Co. v. Clark & Bros. [N. C.] 49 S. E. 88. In an action for nondelivery, evidence that plaintiff **bought the goods at an advance** held competent. Id. If there was an error in admitting such evidence, held harmless where the evidence was ruled out on the issue of damages. Id. See 2 Curr. L. 1572, n. 48.

96. That market price exceeded contract price and that the **buyer continued to sell at the contract price,** while irrelevant on the issue of the seller's liability for the breach of the contract, goes to show that the buyer is not standing upon a legal right, without merit. Haff v. Pilling, 134 F. 294. In an action for breach of contract in the construction of a 60 horse power boiler according to a plan furnished by the buyer, held evidence tending to show **that plan was suitable for a smaller boiler** was irrelevant. Watson v. Bigelow Co. [Conn.] 58 A. 741. Deduction in price held not an admission that the buyer's plan was a suitable one. Id. That **seller had contracted for supply of article** held to have no bearing on his liability for breach of contract, except as evidence that he had used every precaution to be prepared to deliver in compliance with the terms of the agreement, and was prevented from doing so solely by a shortage of cars. Hoff v. Pilling, 134 F. 294. See 2 Curr. L. 1572, n. 47.

97. Evidence held sufficient to show **that seller accepted rejection** of oil sold and thus waived buyer's duty to inspect on delivery and to authorize inspection by his foreign customers. Peck v. Will & Baumer Co., 90 N. Y. S. 272. Where a cheaper, smaller coffin than the one bought was furnished, evidence held sufficient to warrant a finding **that seller knew of substitution.** Dunn & Co. v. Smith [Tex. Civ. App.] 74 S. W. 576.

98. See 2 Curr. L. 1573.

99. Evidence as to whether sausages were "dry enough for export" within the contract held to present a question for the jury. James v. Libby, 92 N. Y. S. 1047. Also the question as to whether they were properly manufactured. Id.

1. As to whether or not there was an extension of time for performance held a question for the jury. Bass v. Rublee, 76 Vt. 395, 57 A. 965.

2. See 2 Curr. L. 1573.

3. Browning v. McNear, 145 Cal. 272, 78 P. 722; Pound v. Williams, 119 Ga. 904, 47 S. E. 218; Harrigan v. Advance Thresher Co., 26 Ky. L. R. 317, 81 S. W. 261; Miller v. Patch Mfg. Co., 91 N. Y. S. 870.

4. Where one warranted the value of stocks and agreed to repurchase them in case of breach of warranty, held, the remedy for the repurchase was not exclusive, but the purchaser might sue for breach of warranty. Crothers v. Dolph, 2 Ohio N. P. (N. S.) 652.

5. In an action for breach of an implied warranty, held no error in informing the jury that the plaintiff refused to permit a test to be made. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382.

be maintained.[6] That purchaser warned bank not to take purchase-money note is no defense to his right of action for breach of warranty.[7]

Pleading, proof and issues.[8]—A petition alleging warranty and the falsity thereof sufficiently counts on a breach of warranty.[9] To be recovered, damages should be claimed in the petition.[10] A plea must be taken as confessing truth of represented facts when it does not allege their falsity, the same being traversable.[11] In this action the buyer is only required to prove the contract of warranty, breach thereof, and his damages.[12] Evidence that another article of the same kind was worthless is inadmissible.[13] The general rules as to the competency of evidence[14] and the examination of witnesses[15] apply.

(§ 11) *E. Recovery of chattel; replevin or conversion.*[16]—If the seller seizes the property without offering to put the buyer in statu quo, the latter may recover possession.[17]

(§ 11) *F. Lien for price paid.*[18]

(§ 11) *G. Recoupment and counterclaim.*[19]—The buyer retaining the article may interpose damages occurring from breach of contract[20] or breach of warranty[21] as a counterclaim to an action for the price.

(§ 11) *H. Choice and election of remedies.*[22]—The article not being in conformity with the contract, the buyer has three remedies: The first is to reject the article and give notice of such action to the seller;[23] the second is to accept the article and bring an action on the contract for damages;[24] the third is to set up such damages as a counterclaim in an action for the purchase money.[25] If he seeks to reject the article he must, after discovering its true condition, do nothing inconsistent with the seller's ownership thereof; hence, in order to rely on the rejection, he must not use the property for his own use.[26] On refusal to deliver, the buyer may purchase the article in open market, and failing in this may sue for breach of contract.[27] Upon breach of a warranty of quality, the buyer may require the seller to remove the article or, if he fails to do so, may remove it himself and recover the purchase price, or he may recover damages for the breach.[28]

6. Allen v. Tompkins, 136 N. C. 208, 48 S. E. 655.

7. Doyle v. Parish [Mo. App.] 85 S. W. 646.

8. See 2 Curr. L. 1574.

9. Although it is further specifically averred that defendant knew his statements to be false. Wingate v. Johnson [Iowa] 101 N. W. 751.

10. Purchaser of stallion rescinding for breach of warranty, he cannot recover for the keep of the stallion and expense of returning him any greater sum than is claimed in the petition. Berkey v. Lefebure & Sons [Iowa] 99 N. W. 710.

11. Phillips v. Crosby [N. J. Err. & App.] 59 A. 142.

12. Parker v. Fenwick [N. C.] 50 S. E. 627.

13. Lander v. Sheehan [Mont.] 79 P. 406.

14. In an action for breach of warranty in that a jack is a sure foal getter, it is competent to show the actual, proved capacity of the jack in that respect after the purchase. Wingate v. Johnson [Iowa] 101 N. W. 751.

15. Question as to market value of animal if he was as buyer "thought he was," held, while improper in form, not prejudicial, the witness understanding it to be predicated upon the seller's representations. Wingate v. Johnson [Iowa] 101 N. W. 751.

16. See 2 Curr. L. 1575. Also Conversion as Tort, 3 Curr. L. 866; Replevin, 4 Curr. L. 1284.

17. Where there was a mistake on the part of the seller as to the identity of the property sold. Kenova Transfer Co. v. Monongahela River Consol. Coal & Coke Co. [W. Va.] 49 S. E. 452.

18, 19. See 2 Curr. L. 1576.

20. May interpose as a counterclaim that the machinery did not conform to blue prints and that additional expense was thereby incurred in rebuilding foundations. Thomas China Co. v. Raymond Co. [C. C. A.] 135 F. 25.

21. Browning v. McNear, 145 Cal. 272, 78 P. 722; Pound v. Williams, 119 Ga. 904, 47 S. E. 218; Harrigan v. Advance Thresher Co., 26 Ky. L. R. 317, 81 S. W. 261.

22. See 2 Curr. L. 1577.

23, 24, 25. Graham v. Hatch Storage Battery Co. [Mass.] 71 N. E. 532.

26. Graham v. Hatch Storage Battery Co. [Mass.] 71 N. E. 532. Findings that one rejected article and then used it held not inconsistent. Id.

27. Where buyer gave notice that he would purchase the article held not to bar suit for damages. Iowa Brick Mfg. Co. v. Herrick [Iowa] 102 N. W. 787.

28. Long v. Chapman, 97 App. Div. 241, 89 N. Y. S. 841. Where seller agreed to remove chattel and refund money if there was a breach. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. S. 142. See post, § 12C.

Goods not being equal to sample, the buyer may return the articles or keep them and pay their value.[29] The contract often provides cumulative remedies.[30] There being a warranty, a provision to repair and replace broken parts is cumulative.[31] An unsuccessful action to recover the price paid on the theory of a rescission of the sale does not prevent action for a breach of warranty.[32] It being uncertain from the complaint which of several remedies plaintiff is pursuing, the defendant can protect himself against surprise by a motion before the trial to make the complaint more definite and certain,[33] or by a motion at the opening of the trial to compel the plaintiff to elect upon which theory he will proceed.[34]

§ 12. *Damages for breach of sale and warranty.*[35] *A. General rules* as to the measure of damages cannot be formulated so as to be applicable to all cases; and where the damages in a given case may be estimated in a variety of ways, that method will be adopted which is most definite and certain.[36] It being apparent that the damages which would result from a breach of the contract by either party would be uncertain, it is competent for them to stipulate for the payment of liquidated damages.[37]

(§ 12) *B. Breach by seller.*[38]—*On the seller's failure to deliver*[39] the measure of damages is the difference between the contract price and the market value at the time and place of delivery,[40] less any expense which the buyer, if the contract had been performed, would have been put to in delivering the goods at such place,[41] with interest on the residue from the date of the breach,[42] or if there be no market at the place of delivery, then the value in the nearest and most available market to which the buyer must resort in order to supply himself, with the cost of transportation and compensation for the time, trouble and expense of making the repurchase added,[43] and it is not necessary that the purchaser actually go into the market and obtain the goods.[44] The contract providing for monthly de-

29. Washington Hydraulic Press Brick Co. v. Sinnott, 92 N. Y. S. 504.

30. Where contract provided for shipment of specified number of tons of ore per day, and that upon **failure to so deliver** the buyer should have the **right to buy elsewhere** and charge the seller any excess over the contract price, held failure of seller to deliver justified buyer in terminating the contract. United States Iron Co. v. Sloss-Sheffield Steel & Iron Co. [N. J. Law] 58 A. 173.

31. Timken Carriage Co. v. Smith & Co., 123 Iowa, 554, 99 N. W. 183.

32. Zimmerman v. Robinson & Co. [Iowa] 102 N. W. 814.

33, 34. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. S. 142.

35. See 2 Curr. L. 1578. See, also, Damages, 3 Curr. L. 997.

36. Kinkead v. Lynch, 132 F. 692.

37. Davis v. Alpha Portland Cement Co., 134 F. 274. Contract providing liquidated damages for failure to deliver, and further providing that the seller should make all shipments within 10 days after the receipt of orders, held stipulation covered both failure to deliver within 10 days from order and total failure to deliver. Id.

38, 39. See 2 Curr. L. 1578.

40. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168; Huggins v. Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933; Iowa Brick Mfg. Co. v. Herrick [Iowa] 102 N. W. 787; Falkenberg v. O'Neill, 88 N. Y. S. 378; Morris v. Supplee, 208 Pa. 253, 57 A. 566; Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199; Woldert Grocery Co. v. Veltman [Tex. Civ. App.] 83 S. W. 224; Nottingham Coal & Ice Co. v. Preas, 102 Va. 820, 47 S. E. 823; Vogt v. Shienebeck [Wis.] 100 N. W. 820. Contract for the sale and manufacture of machinery. Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51.

Where **dealings** are **between wholesaler and retailer,** wholesale market price should be taken. Righter v. Clark [Conn.] 60 A. 741. See 2 Curr. L. 1578, n. 25.

Contra: Where the seller failed to deliver the entire amount of lumber sold, held, the buyer was entitled to recover the fair market value of the amount not delivered. New York House Wrecking Co. v. Jarvis, 87 N. Y. S. 464.

41, 42. Vogt v. Shienebeck [Wis.] 100 N. W. 820.

43. Righter v. Clark [Conn.] 60 A. 741; Woldert Grocery Co. v. Veltman [Tex. Civ. App.] 83 S. W. 224; Nottingham Coal & Ice Co. v. Preas, 102 Va. 820, 47 S. E. 823.

Where machinery was to be manufactured, damages are difference between contract price and the sum it would cost the buyer to have the machinery manufactured. Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51.

44. Need not buy them. Nottingham Coal & Ice Co. v. Preas, 102 Va. 820, 47 S. E. 823. Need not have them manufactured. Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51.

liveries, the measure of damages is the difference between the contract price and the market value on the last day of each month for each month's proportionate delivery.[45] The burden is on the buyer to show at what price he purchased.[46] Evidence as to market value being oral and conflicting, the question is one for the jury.[47]

Special damages[48] may be recovered where they are the usual and proximate result of the breach, and such as may be reasonably supposed to have been within the contemplation of the parties at the time they made the contract,[49] or the seller had notice of the special circumstances at or before the making of the contract.[50] Mere notice is not always sufficient, some cases holding that the circumstances must be such as to render it reasonable to believe that the seller tacitly consented to be bound for more than ordinary damages,[51] and in this connection the amount of compensation to be received is often material.[52]

45. Haff v. Pilling, 134 F. 294; Benton Fuel Co. v. Shipman Co. [Mich.] 99 N. W. 746. Instruction that the buyer was not entitled to purchase the commodity until the expiration of the entire contract held properly refused. Benton Fuel Co. v. Shipman Co. [Mich.] 99 N. W. 746. In an action for damages for failure to deliver, held court instructed that amount delivered should be deducted. Id. See 2 Curr. L. 1578, n. 26.

46. Morris v. Supplee, 208 Pa. 253, 57 A. 566.

47. Boyd v. Merchants' & Farmers' Peanut Co., 25 Pa. Super. Ct. 199.

48. See 2 Curr. L. 1580, § 12D.

49. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168; Vogt v. Shienebeck [Wis.] 100 N. W. 820. See 2 Curr. L. 1580, n. 58.

ILLUSTRATIONS: Loss of profits may be recovered. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168; Wolf Co. v. Galbraith [Tex. Civ. App.] 80 S. W. 648; Sun Mfg. Co. v. Egbert [Tex. Civ. App.] 84 S. W. 667. May recover for profits lost on cash sales for immediate delivery as well as on binding contracts for future delivery. Sun Mfg. Co. v. Egbert [Tex. Civ. App.] 84 S. W. 667.

Contra, Bliss Co. v. Buffalo Tin Can Co. [C. C. A.] 131 F. 51. In an action for damages for failure to deliver bricks to one having contract to build walks, held plaintiff was not entitled to profits on walks he might have built but for defendant's breach, where the orders to build them had not in fact been issued by the board of public works. Iowa Brick Mfg. Co. v. Herrick [Iowa] 102 N. W. 787. See 2 Curr. L. 1580, n. 59-61.

Loss of crop: Seller failing to ship apparatus for removing sugar cane within time specified in contract, held liable for damage caused by freeze. Chattanooga Car & Foundry Co. v. Lefebvre, 113 La. 487, 37 So. 38.

Loss of customers by retail dealer held not an element of damages. Righter v. Clark [Conn.] 60 A. 741.

Mental anguish: Where coffin was purchased and a cheaper one and one too small for the remains was furnished and used, held recovery could be had, by relatives purchasing same, for mental anguish. Dunn & Co. v. Smith [Tex. Civ. App.] 74 S. W. 576.

Shrinkage in value of goods bought in place of those not delivered held not recoverable. Righter v. Clark [Conn.] 60 A. 741. Plaintiff ordering a specified kind of **coal for "school house use"** held, in an action for damages for failure to deliver, that the sale was not merely for "schoolhouse use," and that plaintiff's damages were not limited to coal used for such purposes. Benton Fuel Co. v. Shipman Co. [Mich.] 99 N. W. 746. Failure to deliver **food for cattle** held to entitle buyer to recover damages resulting from additional outlays for food or labor or any other expense or injury to the cattle. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. The seller of building material to a building contractor is not liable for the **penalty provided** against the contractor **for delay,** in the absence of knowledge on the seller's part of the liability the buyer is under. Wendell v. Walker, 87 N. Y. S. 142. Where a manufacturer is entitled to recover special damages for the **idleness of its plant, caused by delay in furnishing proper repairs** for machinery, the measure thereof is the reasonable rental value of so much of the plant as is rendered idle for a period long enough for the manufacturer to secure proper repairs, and time lost in attempting to use the defective repairs cannot be considered. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052.

50. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052. Where buyer had contracted to **resell goods.** Woldert Grocery Co. v. Veltman [Tex. Civ. App.] 83 S. W. 224; Huggins v. Southeastern Lime & Cement Co., 121 Ga. 311, 48 S. E. 933. **Payments of wages** to unemployed hands held not recoverable from seller in the absence of proof that he had notice that a stoppage of the plant would cause the manufacturer to make such payments. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052. Vendor of repairs held not chargeable with rental value of plant during time required to obtain substitute repairs from a distant place, there being nothing to show that he had notice that they **could not be obtained in a near-by town.** Id. The fact that one does not patronize a home industry does not prove that there are no home industries. Id.

51. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052.

52. Where profit on sale of parts for re-

For breach of other conditions, the buyer is entitled to recover actual damages.[53] Damages stipulated against are not recoverable.[54]

All of the above rules are subject to the qualification that the buyer must use all reasonable means to mitigate the damages.[55] In this connection the buyer may rely on the seller's promise to perform,[56] and the acceptance of goods after the time for delivery does not preclude recovery of damages.[57]

(§ 12) *C. Breach by purchaser.*[58]*—There being a complete performance,* the seller is only entitled to recover the contract price[59] with interest from the time that payment was due,[60] which in case of omission the court may add to the verdict on entering judgment.[61]

For non-acceptance.[62]—Except where the article has no market value,[63] the measure of damages for the refusal to receive goods is the difference between the contract price and the market value at the time and place of breach,[64] and cost of completing performance of the contract;[65] or the profits lost may be recovered less those made on resale.[66] The seller may determine the market value by selling

pairing machinery amounted to $100 or $200, held seller not liable for special damages amounting to $5,450, resulting from shutting down of plant owing to delay in delivery Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052.

53. The measure of damages for breach of **condition to keep parts for repair at a near-by place** is the loss of profits on work for which the buyer had orders, and which he could have done during the time of the delay in furnishing such parts and which he could not do thereafter. Janney Mfg. Co. v. Banta, 26 Ky. L. R. 1089, 83 S. W. 130. One selling a perforating attachment for a printing press in violation of an **agreement to sell only to another,** the measure of damages is the difference between the profits made from the use of the machine with such attachment and those made by the use of presses without such attachment. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. [N. Y.] 73 N. E. 48. For breach of contract to **furnish a certain quality of feed for cattle,** the difference before and immediately after they became sick by reason thereof, plus a sum sufficient to compensate for loss of time, care and attention and other expenses caused by the sickness. Hartgrove v. Southern Cotton Oil Co. [Ark.] 77 S. W. 908.

54. Contract stipulating that seller should not be "liable for damages for delay by railroads," etc., held seller was not liable for damages caused by such delay. Arnold v. Malsby, 120 Ga. 586, 48 S. E. 132. See 2 Curr. L. 1580, n. 57.

55. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co., 134 N. C. 574, 47 S. E. 116; Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. Though seller knows that goods are bought for resale, he is not liable for lost profits where the buyer could easily have purchased goods in market but failed to do so. Righter v. Clark [Conn.] 60 A. 741. Where damages were caused by the buyer offering to sell at an advanced price, held not to come within the doctrine of avoidable consequences. Sun Mfg. Co. v. Egbert [Tex. Civ. App.] 84 S. W. 667.

56. Lillard v. Kentucky Distilleries & Warehouse Co. [C. C. A.] 134 F. 168. That he suffered greater loss than he reasonably should have by reliance on such promises does not preclude him from recovering such damages as were sustained before he himself should have taken the requisite step to save himself. Id.

57. Chattanooga Car & Foundry Co. v. Lefebvre, 113 La. 487, 37 So. 38.

58. See 2 Curr. L. 1578.

59. Fairbanks, Morse & Co. v. Midvale Min. & Mfg. Co., 105 Mo. App. 644, 80 S. W. 13; Field v. Schuster, 26 Pa. Super. Ct. 82. See 2 Curr. L. 1578, n. 34.

60. Fairbanks, Morse & Co. v. Midvale Min. & Mfg. Co., 105 Mo. App. 644, 80 S. W. 13; McAfee v. Dix, 91 N. Y. S. 464. See Interest, 4 Curr. L. 241.

61. McAfee v. Dix, 91 N. Y. S. 464.

62. See 2 Curr. L. 1579.

63. As where it is to be specially manufactured, see post, this subdivision.

64. Kellogg v. Frohlich [Mich.] 102 N. W. 1057; Huguenot Mills v. Jempson & Co., 68 S. C. 363, 47 S. E. 687; Falkenberg v. O'Neill, 88 N. Y. S. 378. Where such difference was $550, judgment and verdict for $200 reversed. Id. Time and place of delivery. Blair v. Ford China Co., 26 Pa. Super. Ct. 374; Mohr Hardware Co. v. Dubey [Mich.] 100 N. W. 127. Taking time of delivery instead of time of notice of cancellation, if erroneous, is not prejudicial where difference in value on the respective days is slight, if any. Nebraska Bridge Supply & Lumber Co. v. Conway & Sons [Iowa] 103 N. W. 122. See 2 Curr. L. 1579, n. 38.

65. Contract to sell and install machinery; the seller may recover the difference between the contract price, less the cost of installing the machinery, and the price obtained at the sale, with interest on such sum. General Elec. Co. v. National Contracting Co., 178 N. Y. 369, 70 N. E. 928. For breach of a contract to purchase a crop, causing its loss, the damages are the value of the crop estimated at the contract price, less the cost of harvesting that portion which was left unharvested by reason of the breach. Avery v. Segura Sugar Co., 111 La. 891, 35 So. 967.

66. The seller is not, however, bound to take the difference between the sum realized at a resale and the contract price, but

the goods[67] within a reasonable time after the breach,[68] reasonableness of time being for the jury,[69] and the fact that the buyer has some one representing him at the sale cannot be held to be an acquiescence in it.[70] The only difference between a public sale and a private one is that in the latter the burden is upon the seller to prove that he obtained the market value,[71] while a fair public sale is competent and ordinarily satisfactory evidence of the value of the thing sold.[72] The seller, refusing an offer by the buyer of less than the contract price and selling the goods for less than the price offered, can only recover the difference between the price offered and the contract price.[73] The burden is upon plaintiff to show that the goods have no market value,[74] and the evidence being conflicting, the question is one for the jury.[75] The article having no general market value, the seller may retain the property for the purchaser and recover the contract price,[76] or he may recover as damages the difference between the contract price and the cost of performing the contract,[77] together with incidental profits arising from the terms of the contract,[78] and this is true, though the contract extends over a number of years, is broken before its expiration and the seller does not thereafter perform his part,[79] though in the latter case the buyer is entitled to a reasonable deduction for the less time engaged and for the release from care, trouble, risk and responsibility attending a full execution of said agreement by the plaintiff,[80] and in this connection expert testimony is admissible.[81] If the seller continues to operate the factory after the breach, the buyer is entitled to have the profits actually made by him up to the time of trial set off against the damages.[82] The vendor of material to be used in the manufacture of an article is not a subcontractor within the meaning of the rule excluding supposed advantages of a subcontractor in computing profits in the sale of a manufactured article.[83] The buyer can only be charged with the goods he is required to take.[84] While the seller is obliged to make a reasonable effort to reduce damages, he is not bound to accept the buyer's offer to revive the contract.[85] The seller waiving his rights under the contract and

may take the profits he would have received if the buyer had not refused to perform, less the profit actually received from the sale to others. Lincoln v. Levi Cotton Mills Co. [C. C. A.] 128 F. 865. See 2 Curr. L. 1579, n. 39.

67. May hold the buyer for any loss. Redhead Bros. v. Wyoming Cattle Inv. Co. [Iowa] 102 N. W. 144; Heller v. Altman, 91 N. Y. S. 769; Mitchell v. Baker, 208 Pa. 377, 57 A. 760.

68. Alden Speare's Sons Co. v. Hubinger [C. C. A.] 129 F. 538; Redhead Bros. v. Wyoming Cattle Inv. Co. [Iowa] 102 N. W. 144.

69, 70. Alden Speare's Sons Co. v. Hubinger [C. C. A.] 129 F. 538.

71, 72. Mayberry v. Lilly Mill Co. [Tenn.] 85 S. W. 401.

73. American Cotton Co. v. Herring [Miss.] 37 So. 117.

74, 75. Blair v. Ford China Co., 26 Pa. Super. Ct. 374.

76. Kinkead v. Lynch, 132 F. 692.

77. Worrell v. Kinnear Mfg. Co. [Va.] 49 S. E. 988; Coburn v. California Portland Cement Co., 144 Cal. 81, 77 P. 771. So held with regard to a contract for granite blocks. Broadnax v. United Engineering & Contracting Co., 128 F. 649, afd. 136 F. 351. In an action for breach of a contract to purchase dimension granite, evidence held insufficient to authorize an allowance for rubble backing as dimension granite to be furnished under the contract. Id. Where, in an action for breach of a contract to purchase granite, it appeared that no allowance was made for dressing the blocks, but that the mortar joints probably made up the difference, held, a verdict in favor of the seller would not be set aside on the ground that such joints were included in the measurement. Id.

78. Under a contract to sell articles to be manufactured during a series of years, the seller being entitled to compensation for storage, and there being a profit in such storage, he is entitled to recover damages for the loss thereof upon breach of the contract by the buyer. Allen v. Field [C. C. A.] 130 F. 641.

79. Allen v. Field [C. C. A.] 130 F. 641. Evidence as to average cost of manufacture of whisky and average price of grain used during a series of years held competent as furnishing a basis on which to estimate the probable cost during the remainder of the term. Id.

80, 81, 82. Allen v. Field [C. C. A.] 130 F. 641.

83. Worrell v. Kinnear Mfg. Co. [Va.] 49 S. E. 988.

84. Ready v. Fulton Co., 179 N. Y. 399, 72 N. E. 317.

85. An offer to take the goods on the

leaving the property with the buyer, the latter is entitled to recover his expenses in caring for it.[86]

(§ 12) *D. Breach of warranty.*[87]—The warranty and its breach being proven, the plaintiff is entitled to nominal damages.[88] On retention of the property the measure of damages is the difference between the actual value of the chattel and its value as warranted[89] at the time and place of delivery;[90] but if he reject the property, he is entitled to recover the amount paid, less a fair rent for the use of the article.[91]

In either case he is entitled to recover all special damages which were within the contemplation of the parties at the time the contract was made,[92] and which the buyer by the use of ordinary care could not have prevented.[93] Whether he

terms of the contract, being made after the expiration of the contract, is not one which the seller is obliged to accept. Kellogg v. Frohlich [Mich.] 102 N. W. 1057.

86. Is entitled to charge the seller storage, insurance and interest. American Cotton Co. v. Herring [Miss.] 37 So. 117.

87. See 2 Curr. L. 1580.

88. Nonsuit is improper. Phillips v. Crosby [N. J. Err. & App.] 59 A. 142.

89. Union Selling Co. v. Jones [C. C. A.] 128 F. 672; Harrigan v. Advance Thresher Co., 26 Ky. L. R. 317, 81 S. W. 261; Doyle v. Parish [Mo. App.] 85 S. W. 646; McQuade v. Newman, 88 N. Y. S. 363; Long v. Chapman, 97 App. Div. 241, 89 N. Y. S. 841; Hano v. Simons, 92 N. Y. S. 337; Critcher v. Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604; Parker v. Fenwick [N. C.] 50 S. E. 627; Aultman & T. Mach. Co. v. Cappleman [Tex. Civ. App.] 81 S. W. 1243; Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Special finding held fatally defective. Id. In an action for breach of an implied warranty, held an instruction that the measure of damages was the difference between the value of the rod before it was broken and afterwards was properly refused. Rollins Engine Co. v. Eastern Forge Co. [N. H.] 59 A. 382. In an action for breach of warranty that jack was a sure foal getter, where purchase price was $400, a verdict for $300 was held not excessive. Wingate v. Johnson [Iowa] 101 N. W. 751. See 2 Curr. L. 1580, n. 50.

90. Seaboard Lumber Co. v. Cornelia Planing Mill Co. [Ga.] 50 S. E. 121, applying the rule as laid down in American Grocery Co. v. Brackett & Co., 119 Ga. 489, 46 S. E. 657; Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. See 2 Curr. L. 1580, n. 53.

91. Where defect was as to capacity of engine. Critcher v. Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604.

92. Critcher v. Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604. Breach of warranty on sale of refrigerator, held could recover for meat spoiled. Dean Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230. Loss of profits. Aultman & Taylor Mach. Co. v. Cappleman [Tex. Civ. App.] 81 S. W. 1243. Breach of warranty on the sale of an engine to run a sawmill, held plaintiff could not recover loss of profits resulting from his inability to perform contracts. Critcher v. Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604. Where plaintiff did not offer to show that he had sufficient logs to run the mill, or for what time the contracts for the sale of the output extended, held proper to exclude evidence that at the time of the purchase of the engine he had contracted for the sale of the output of the mill. Id. Also held entitled to interest on the amount invested in the mill for the time it was idle. Id. Loss occasioned by the delivery of potatoes which soon rotted and ruined good potatoes with which they were placed, held an element of damages. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Pledgee warranting that cattle are free from disease is liable for all losses sustained by the purchaser resulting from an infectious disease with which the cattle were affected when sold. State Bank of Commerce v. Dody [Kan.] 79 P. 1092. Where buyer continued to use machinery for making oil from cotton seed, on promise of seller to repair according to warranties, held seller was not liable for damages resulting from waste in kernel of the cotton seed in consequence of defects. Allen v. Tompkins, 136 N. C. 208, 48 S. E. 655.

For special damages, see 2 Curr. L. 1580, § 12 D.

93. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066. Where the goods delivered were decayed and were placed with undecayed goods and the purchaser did nothing except to sort a few from time to time for his trade, held, the cost of such sorting was not a basis of damages, but the reasonable cost of removing the goods on discovering their condition was the extent of the purchaser's damage on this score. Id. Where evidence was undisputed that purchaser soon discovered condition of perishable goods delivered but took no steps to avoid the loss, held, verdict freeing him from responsibility therefor was inconsistent and contrary to the evidence. Id. Testimony as to the best method of handling the goods in the condition of those in question held material. Id. Baker cannot recover for loss of cakes and custom due to bad eggs sold him, his foreman using the eggs with knowledge that they were bad. Armour & Co. v. Gundersheimer, 23 App. D. C. 210. Where bricks, instead of being a uniform color like sample, were of a mottled appearance, held seller was not liable for consequent decrease in value in the house, the buyer before using them failing to make some test to see whether the discoloration would wash off. Washington Hydraulic Press Brick Co. v. Sinnott, 92 N. Y. S. 504. Where the defective condition can be cor-

used proper care is a question for the jury.[94] The purchaser is entitled to take any reasonably prudent and sufficient means to remedy the defect; and if he acts in good faith, he is entitled to charge the warrantor with the cost thereof,[95] and this remedy may be pursued, though the contract contain an agreement by the seller to replace any defective part.[96] Neither the buyer's right of recovery nor the measure of his damages is dependent upon a resale by him or upon the price obtained at such resale.[97] A test being made at the seller's request, the purchaser may recover the expenses thereof.[98] Where goods are sold on approval, damages may be recovered for breach of warranty occurring during the trial period.[99] On the return of a chattel sold on approval, the buyer being entitled to recover certain expenses incurred, he may recover storage expenses until such expenses are paid.[1]

Upon breach of implied warranty of quality, the buyer is entitled to go into market and purchase goods at most reasonable price and charge difference between such price and contract price to seller,[2] but he is not required to go beyond the local market for such purpose.[3]

Upon breach of warranty of title and consequent loss of the property, the measure of damages is the value of the property at the time and place they were taken from the buyer, plus all costs incident thereto, less the unpaid purchase price, on which balance interest should be paid from the date of the taking.[4]

(§ 12) *E. Evidence as to damages.*[5]—The evidence as to value must be definite.[6] In arriving at the value of the article when accepted, it is proper to show the value of certain portions which the buyer had used, and that the other portions were entirely worthless.[7] It is not material to a breach of warranty that the goods were such that the seller could not make and vend.[8]

§ 13. *Rights of bona fide purchasers or other third persons.*[9]—On a sale of property obtained through theft, the original owner may recover the same from any taker,[10] though not as against a bona fide taker where the seller obtained the goods

rected by the expenditure of a small sum of money, the damages should not exceed this amount. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. S. 142. For special damages see 2 Curr. L. 1580, § 12D.

94. Northern Supply Co. v. Wangard [Wis.] 100 N. W. 1066.

95. Thomas China Co. v. Raymond Co. [C. C. A.] 135 F. 25; Miller v. Patch Mfg. Co., 91 N. Y. S. 870. May recover reasonable value of such expenditures. Masterson v. Heitmann & Co. [Tex. Civ. App.] 87 S. W. 227. Where parts furnished for machinery are defective, the purchaser is entitled to damages to the amount required to replace them, less any value received from the defective parts. Hooks Smelting Co. v. Planters' Compress Co. [Ark.] 79 S. W. 1052.

96. Thomas China Co. v. Raymond Co. [C. C. A.] 135 F. 25.

97. Union Selling Co. v. Jones [C. C. A.] 128 F. 672. At most, the price thus obtained may be some, but not conclusive, evidence of the actual value. Id.

98. In an action for breach of warranty that engine for use in a sawmill would develop a certain horse power, held plaintiff was entitled to recover expenses incurred in running the mill, at defendant's request, to enable him to make the engine develop the designated horse power. Critcher v. Porter-McNeal Co., 135 N. C. 542, 47 S. E. 604.

99. Where refrigerator was sold on 60 days' trial and warranted to keep meat for 3 weeks, held seller liable for loss of meat during the 60 days caused by breach of the warranty. Cincinnati Butchers' Supply Co. v. Steinmetz [Ind. App.] 73 N. E. 950.

1. Cincinnati Butchers' Supply Co. v. Steinmetz [Ind. App.] 73 N. E. 950.

2. Armour & Co. v. Gundersheimer, 23 App. D. C. 210.

3. Where seller was a nonresident. Armour & Co. v. Gundersheimer, 23 App. D. C. 210.

4. Pierce v. Baton, 98 Me. 553, 57 A. 889.

5. See 2 Curr. L. 1582.

6. Testimony by buyer that he thought the damages resulting from breach of warranty were about $100, held insufficient. Dean Co. v. Standifer [Tex. Civ. App.] 83 S. W. 230.

7. Rochevot v. Wolf, 96 App. Div. 506, 89 N. Y. S. 142.

8. That article infringes a patent held material only on the question of damages for breach of contract. Graham v. Hatch Storage Battery Co. [Mass.] 71 N. E. 532.

9. See 2 Curr. L. 1583. Necessity of record of conditional sale, see post, § 14.

10. Where a former lessee was allowed to keep certain personal property in the cellar of the building and to retain the keys to such cellar, held, he could recover from a bona fide purchaser of property, who purchased from a servant of the owner of the building, such servant having wrongfully

through fraud.[11] But in order to be protected, the buyer must be a bona fide purchaser;[12] that is, he must have parted with value[13] before obtaining knowledge of the fraud,[14] or of facts sufficient to put him on inquiry,[15] and in the end the question is one for the jury.[16] In the absence of recordation, the burden is on the true owner to show notice brought home to the subsequent purchaser.[17] From this it will be seen that mere possession by the seller is of itself insufficient to protect the third party,[18] and this rule extends to an agent[19] who must have authority to sell in order to pass title.[20] In some states it is a crime to fraudulently dispose of goods bought on credit,[21] in others a sale in bulk is deemed fraudulent unless attended with certain formalities.[22] The transferee refusing to return the property he need not be put in statu quo or offer made to do so.[23] A third party having an interest in the proceeds, authorizing the sale, the buyer is not bound to see that the seller makes a proper division of the proceeds, and such third person cannot disaffirm the sale on the seller's failing to make such a division.[24] While a sale to one in his own name gives him title, he may agree with one who advanced the price that title shall stand in the lender's name.[25]

Brokers and pledges.[26]—One purchasing from a pledgee has no greater title or rights in the property than the pledgee.[27] As against third persons an absolute bill of sale will not be construed as a pledge.[28]

§ 14. *Conditional sales. Definition, validity and formation.*[29]—In a conditional sale the transfer of title to the purchaser, or the retention of it by him, depends upon the performance of some condition.[30] Such contracts are valid.[31]

converted the same. McQuale v. North American Smelting Co., 208 Pa. 504, 57 A. 984.

11. National Bank of Bristol v. Baltimore & O. R. Co. [Md.] 59 A. 134.

12. Kops Bros. Co. v. Smith & Co. [Mich.] 100 N. W. 169. See general discussion of doctrine of bona fides in Notice and Record of Title, 4 Curr. L. 829.

13. One taking property in payment of past-due indebtedness is not a bona fide purchaser. Kops Bros. Co. v. Smith & Co. [Mich.] 100 N. W. 169; Logan v. Oklahoma Mill Co., 14 Okl. 402, 79 P. 103.

14. Maddox v. Reynolds [Ark.] 81 S. W. 603. Evidence held to sustain a verdict for the plaintiff. Pitz v. Kentucky & N. Distilling & Cattle Feeding Co. [Minn.] 101 N. W. 797.

15. That seller is known by buyer to be deeply indebted, or even insolvent, is not enough per se to charge the purchaser with a want of good faith. Sellers v. Hayes [Ind.] 72 N. E. 119. Attachment of goods held sufficient to put purchaser on inquiry. Maddox v. Reynolds [Ark.] 81 S. W. 603. The purchaser must prove a fair consideration not necessarily up to the full price, but a price that would not cause surprise. Babcock Printing Press Mfg. Co. v. Herbert [N. C.] 49 S. E. 349. Evidence that buyer required guaranty of title held admissible on question of good faith. Hogan v. Detroit United R. Co. [Mich.] 103 N. W. 543.

16, 17. Hogan v. Detroit United R. Co. [Mich.] 103 N. W. 543.

18. Gentry v. Singleton [C. C. A.] 128 F. 679.

19. The fact that an agent has possession of property raises no presumption that he has authority to dispose of it. Roberts v. Francis [Wis.] 100 N. W. 1076.

20. Where traveling man sold samples. Hibbard, Spencer, Bartlett & Co. v. Stein [Or.] 78 P. 665.

21. See False Pretenses and Cheats, 3 Curr. L. 1419.

22. See Fraudulent Conveyances, 3 Curr. L. 1535.

23. Roberts v. Francis [Wis.] 100 N. W. 1076.

24. Randall v. Ditch, 123 Iowa, 582, 99 N. W. 190.

25. Wright v. Ellwood Ivins Tube Co., 128 F. 462.

26. See 2 Curr. L. 1584. See, generally, Brokers, 3 Curr. L. 535; Pledges, 4 Curr. L. 1243.

27. Harding v. Eldridge [Mass.] 71 N. E. 115.

28. Millot v. Conrad [La.] 38 So. 139.

29. See 2 Curr. L. 1584.

30. Lance v. Butler, 135 N. C. 419, 47 S. E. 488; Freed Furniture & Carpet Co. v. Sorensen [Utah] 79 P. 564. See 2 Curr. L. 1584, n. 9.

Illustrations: Personal property sold and delivered under the condition that title is to remain in the vendor until it is paid for is a conditional sale, not a mortgage. Alden v. Dyer & Bro., 92 Minn. 134, 99 N. W. 784. Title being reserved in the seller, the sale is a conditional one, though the **buyer be permitted to resell.** Bradley, Clark & Co. v. Benson [Minn.] 100 N. W. 670. A contract wherein title remained in the seller, and in case of default **payments to be regarded as rent,** held a conditional sale. Bronson v. Russell [Ala.] 37 So. 672. A contract whereby the owner of goods delivered them to another, the owner retaining title, and the one receiving the goods **agreeing to sell them and pay the owner a specified portion of the selling price,** held a mere

While technically distinct from chattel mortgages[32] and leases,[33] with an agreement to transfer title,[34] the classification of a given transaction is often difficult. In Kentucky the ordinary conditional sale is an absolute sale with a mortgage back to secure the price.[35] The words "all conditional contracts" as used in some recording acts do not name the particular form of instrument by which conditional sales must be made, but embrace the different kinds of instruments by which such sales may be made.[36] The sale being made in the state where the property is situated and between residents of such state, it should be construed according to the laws of such state.[37] A law requiring that the bill of sale shall specify the property on which it is to take effect does not require such a description as will identify the property without the aid of parol evidence.[38] Reservation of title by an agent inures to the seller.[39] The parties to a conditional sale by adjusting their accounts and giving a new contract note, worded and conditioned like the original, for the balance, do not convert the transaction into an absolute sale.[40]

Rights of parties to the contract.[41]—The parties to the contract[42] and the terms thereof[43] are largely matters of construction, the intent of the parties being the guiding rule. Upon refusal to accept or on default, the seller, having in good faith substantially performed all the requirements on his part,[44] may either treat

agency, not a conditional sale. Lance v. Butler, 135 N. C. 419, 47 S. E. 488. A **lease of property,** under an agreement that **on payment** of a specified sum in instalments **title shall pass** to the lessee, amounts to a conditional sale. Kidder v. Wittler-Corbin Machinery Co. [Wash.] 80 P. 301. Orders whereby the purchaser agreed that the **goods** and the proceeds thereof should be **held in trust** subject to the seller's order **until paid for,** title remaining in the seller, held in effect conditional sales. In re Tweed, 131 F. 355. A purchase-money note reciting that the contract of sale reserved title in the seller until the note was paid, and that the **seller could take possession of the property at any time,** before or after maturity, and resell it, or retain it regarding the amount paid as compensation for the use, held not a conditional sale, but that seller might retake and sell and collect difference between amount obtained and the sum due from the maker. Van Den Bosch v. Bouwman [Mich.] 101 N. W. 832. Under the law of **Utah** a contract whereby no title passes until full payment, the purchaser being given possession, the **seller** having the right to **retake possession on default** and the **obligation to pay is absolute,** is a conditional sale. Studebaker Bros. Co. v. Mau [Wyo.] 80 P. 151; Freed Furniture & Carpet Co. v. Sorensen [Utah.] 79 P. 564.

31. In view of Pub. St. c. 140, § 23, providing for the recordation of conditional sales, such sales are not void as against public policy or the laws of the state. Michelson v. Collins, 72 N. H. 554, 58 A. 50. See 2 Curr. L. 1584, n. 11.

32. See Chattel Mortgages, 3 Curr. L. 682.

33. See Bailment, 3 Curr. L. 400.

34. See ante, § 1, "Options."

35. In re Ducker, 133 F. 771, afd. 134 F. 43.

36. Gen. St. 1902, § 4864, held to embrace a conditional sale in the form of an order given by the buyer. National Cash Register Co. v. Lesko [Conn.] 58 A. 967.

37. Studebaker Bros. Co. v. Mau [Wyo.] 80 P. 151.

38. Thomas Furniture Co. v. T. & C. Furniture Co., 120 Ga. 879, 48 S. E. 333. Where bill of sale specified articles sold as named articles of furniture, held sufficient. Id.

39. Where the title to property sold through an agent is shown to be in the seller, and the agency is established. Bronson v. Russell [Ala.] 37 So. 672.

40. Freed Furniture & Carpet Co. v. Sorensen [Utah] 79 P. 564.

41. See 2 Curr. L. 1584, 1587. See, also, 2 Curr. L. 1588, note, "Rights of parties to a conditional sale on default of payment."

42. The fact that plaintiff's husband purchased the property and signed the conditional sale does not irrevocably fix title in him as against his wife, she testifying that she owned it and made the payments as they became due. Canton v. Grinnell [Mich.] 101 N. W. 811.

43. Two written agreements, made at different times for the sale of distinct items of personal property, claimed by defendant to constitute one contract, construed and held that the property agreed to be transferred by one was not pledged as security for the payment of the debt created by the other agreement. North Star House Furnishing Co. v. Rinkey, 92 Minn. 80, 99 N. W. 429. Where same blank was used for contract of agency and for contract of sale, condition that title remained in seller held not to apply to sale to purchaser, though contract recognized "all conditions on the sheet." Oliver Chilled Plow Works v. Dolan [Mich.] 103 N. W. 186.

44. American Soda Fountain Co. v. Gerer's Bakery [Okl.] 78 P. 115. Where on a conditional sale of piano the seller temporarily exchanged the piano bought for another, and this over the objection of the buyer and upon promise to re-exchange, held seller could not recover possession in the absence of performance of the agreement to re-exchange. Heine Piano Co. v. Crepin, 142 Cal. 609, 76 P. 493.

the sale as absolute and sue for the contract price,[45] or retain or retake the property,[46] though the portion of the price remaining unpaid is less than the market value of the property,[47] and the purchaser cannot recover the amount paid,[48] though there is a conflict as to the correctness of this last proposition.[49] But the assertion of either right is an abandonment of the other.[50] Under contracts providing that the seller may take possession without legal process on default, seizure and removal of the property does not amount to a trespass.[51] In South Dakota the vendor's rights in case of breach of conditional sale by the buyer are fixed by stat-

45. Davis v. Millings [Ala.] 37 So. 737. Is not limited to damages for the breach. National Cash Register Co. v. Dehn [Mich.] 102 N. W. 965; National Cash Register Co. v. Hill, 136 N. C. 272, 48 S. E. 637.

NOTE. Remedy of vendor when title has not passed and vendee wrongfully refuses to pay: In the last case above cited, defendants contended that, as the contract was executory, they could not be sued for the price, but that the plaintiff could recover only damages for breach of the contract, which damages were the difference between the market price of the machine and the contract price. The court, however, said that when a manufacturer had fulfilled his part of a contract, it was unreasonable to compel him to send an agent to the point of shipment and there sell the property, or reship it to the place of manufacture, before bringing suit; that it was more just to compel the party in default to fulfill his contract and himself sell the property in case he thus desired to reduce his loss. There is a conflict of authority, as to the rights of the vendor, in cases where the contract is executory and the title to the property has not passed. Some courts hold that the vendor can, in such a case, maintain no action for the contract price, but must adopt, as his exclusive remedy, an action for damages. Collins v. Delaporte, 115 Mass. 159; Allen v. Jarvis, 20 Conn. 37; Tufts v. Weinfeld, 88 Wis. 647; Unexcelled Fire Works Co. v. Polites, 130 Pa. 536; Moody v. Brown, 34 Me. 107, 56 Am. Dec. 640; Indianapolis, P. & C. R. Co. v. Maguire, 62 Ind. 140; Tufts v. Bennett, 163 Mass. 398, 40 N. E. 172. Other courts take the position that the seller has a right to elect either to sue for the entire contract price, treating the vendee as the owner of the goods, or to bring an action for damages. Marvin Safe Co. v. Emanuel, 21 Abbott's N. C. [N. Y.] 181; Brewer v. Ford, 54 Hun, 116, 7 N. Y. S. 244; Carnahan v. Hughes, 108 Ind. 225; Shawan v. Van Nest, 25 Ohio St. 490, 18 Am. Rep. 313; Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279. Some courts hold that if the vendee wrongfully refuses to receive and to pay for the goods, the vendor may resell them and recover, from the vendee, the difference between the proceeds of the resale and the contract price. West v. Cunningham, 9 Port. [Ala.] 104, 33 Am. Dec. 300; McCord v. Laidley & Co., 87 Ga. 221; Morris v. Wibaux, 159 Ill. 627; McLean v. Richardson, 127 Mass. 339; Williams v. Robb, 104 Mich. 242; Sands v. Taylor & Lovett, 5 Johns. [N. Y.] 395; Moore v. Potter, 155 N. Y. 481, 63 Am. St. Rep. 692. The vendor is not obliged to resort to his right of resale, but he may bring, against the vendee, a personal action for the full contract price. Darby v. Hall, 3 Penn. [Del.] 25; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544; Lassing v. James, 107 Cal. 348. In Gardner v. Caylor, 24 Ind. App. 521, the court took the position that the vendor must exercise his right of resale so as to make the vendee's loss as light as possible.—3 Mich. L. R. 248.

46. Davis v. Millings [Ala.] 37 So. 737; Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646. The buyer, a corporation, becoming insolvent and making default, held resale by seller to brother of president of the corporation did not amount to fraud. Kidder v. Wittler-Corbin Machinery Co. [Wash.] 80 P. 301.

47, 48. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646.

49. Instruction that upon default all payments made became forfeited to the seller held properly refused as erroneous. Shafer v. Russell [Utah] 79 P. 559.

50. Davis v. Millings [Ala.] 37 So. 737. Bringing action for the price waives condition. Alden v. Dyer & Bro., 92 Minn. 134, 99 N. W. 784, following Keystone Mfg. Co. v. Cassellius, 74 Minn. 115, 76 N. W. 1028. Where a note, given for the purchase price, containing the condition, was sent to an attorney in another state and he brought action to recover on it, the property was relieved from the condition of the sale. Id. Cannot maintain an action to recover the purchase price unless the reservation is waived. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143; Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co. [S. D.] 99 N. W. 854. The seller bringing an action of trover, it has the effect of rescinding the contract, and the seller having the buyer's note is not entitled to recover until he surrenders or accounts for the same. Id. Proof that at the time of the commencement of the action he had possession of the same, was still the owner of it, but had lost it, held prima facie sufficient. Id. The vendor under a conditional sale electing to retake the property absolutely, the consideration for obligations or security given for the purchase price fails, and he can neither collect upon the one nor enforce payment of the other. White v. Gray's Sons, 96 App. Div. 154, 89 N. Y. S. 481. This is true, though it be claimed that he took the property as trustee for the buyer, and in such case the buyer is entitled to have the value of the property offset against the balance of the purchase price remaining unpaid. Id.

51. Wilmerding v. Rhodes-Haverty Furniture Co. [Ga.] 50 S. E. 100. May seize and remove it while in the hands of an administrator of the buyer. Id.

ute.[52] By voluntarily surrendering the property and attending the sale without making complaint, the buyer does not waive irregularities therein.[53] The seller bringing an action of trover and electing to take a money judgment, the damages cannot exceed the value of the property at the time of the conversion with interest or hire, or the highest proved value between the conversion and the trial as the plaintiff may elect,[54] and in fixing such damages, interest should be calculated at the conventional rate, if the note containing the contract of sale so stipulates;[55] but in no event are attorney's fees part of the damages.[56] As a general rule the buyer cannot waive statutory requirements.[57] The seller may waive[58] or consent to breaches, but the consent in such case must be strictly construed.[59] The seller transferring the purchase-money note without recourse and without transferring title to the property to the purchaser of the note, the buyers of the property thereby become invested with the title thereto.[60] The constructions placed on various statutes are shown in the notes.[61]

Rights of third persons. Notice, record and filing.[62]—Except in those states where recordation is required,[63] the original seller may recover the property even from a bona fide purchaser.[64] Where by a conditional sale a resident purchases

52. Rev. Civ. Code, § 2303, providing the measure of damages to be recovered. Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co. [S. D.] 99 N. W. 854.

53. Acts 1899, p. 117, c. 81, construed. Massillon Engine & Thresher Co. v. Wilkes [Tenn.] 82 S. W. 316.

54. Though balance due on debt may be a large sum. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143.

55. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143.

56. Although there may be a stipulation to that effect in the note, and the evidence may disclose a state of facts which would authorize a recovery of attorney's fees if the suit had been directly upon the note and there had been a claim for such fees. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143.

57. A provision in the contract of sale that the buyer waived his right to a sale of the property at public auction in case of breach of the condition as required by Acts 1899, p. 117, c. 81, held not binding on the buyer. Massillon Engine & Thresher Co. v. Wilkes [Tenn.] 82 S. W. 316. An instrument by the buyer by which he waives the right given by Rev. Laws, c. 198, § 13, requiring the seller before taking possession on default to furnish a statement of the amount due, etc., held against public policy and void. Desseau v. Holmes [Mass.] 73 N. E. 656.

58. Removal of goods by vendee in a conditional sale and in violation of the terms of such sale held waived by the vendor mailing him at his new address a copy of the sale. Brown v. Goldthwait Furniture Co. [Mass.] 71 N. E. 71.

59. The seller consenting to a mortgage to a designated party, the buyer is not authorized to mortgage the property to another. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646.

60. McCullough v. Pritchett, 120 Ga. 585, 48 S. E. 148.

61. California: Under Civ. Code, §§ 3049, 3311, subd. 1, the purchaser under a conditional sale making default, the seller reselling the property is entitled to recover the balance due after crediting the amount received at the sale. Matteson v. Equitable Min. & Mill Co., 143 Cal. 436, 77 P. 144.

Massachusetts: St. 1898, p. 531, c. 545, in substance re-enacted in Rev. Laws, c. 198, § 13, which provides that the vendor in a conditional sale shall give 30 days notice, etc., to vendee before taking possession for default, applies only where the breach relied on is default in the payment of money. Brown v. Goldthwait Furniture Co. [Mass.] 71 N. E. 71.

Tennessee: Acts 1899, p. 117, c. 81, providing that if the seller take possession on default he must sell the goods at auction and account to the buyer for the proceeds less the amount due under the contract, is constitutional. Massillon Engine & Thresher Co. v. Wilkes [Tenn.] 82 S. W. 316.

62. See 2 Curr. L. 1586.

63. Kentucky: The sale is governed by the laws relating to mortgages and must be recorded. In re Ducker, 133 F. 771, afd. 134 F. 43.

Massachusetts: St. 1894, p. 355, c. 326, requiring a conditional sale of **street railway rolling stock** to be recorded in order to be valid as against bona fide purchasers, held to mean the car and not its component parts, as the trucks, motors, trolley poles, etc. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646.

New Jersey: Holder of bonds secured by a trust mortgage executed prior to the conditional sale, held not such a subsequent purchaser or mortgagee. Tilford v. Atlantic Match Co., 134 F. 924.

Ohio: Under Rev. St. Ohio, § 4155-2, a conditional sale being unrecorded at the time of the bankruptcy of the purchaser, it is void as against his creditors, whether their claims arose before or after the contract was made. Dolle v. Cassell [C. C. A.] 135 F. 52.

Oregon: Bill of sale intended as a mortgage must be recorded. Culver v. Randle [Or.] 78 P. 394.

64. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646; Goodgame v. Sanders, 140 Ala. 247, 37 So. 200. Mere in-

property of a nonresident for use in a foreign state, upon the property being subsequently brought into the state where the buyer resides, the contract of sale becomes subject to the recording acts of such state;[65] but the conditional sale being made in the state where the parties reside and where the property is situated and delivered, and without any agreement or intention that the property is to be removed to another state, upon such removal the lex loci contractus still governs the rights of the buyer.[66] While a trustee in bankruptcy is not a subsequent purchaser, pledgee, or mortgagee in good faith,[67] he nevertheless takes title to property sold the bankrupt under an unrecorded conditional sale in those states wherein such a sale is void as to creditors.[68] Where recordation is required but not complied with, the buyer must show that he is a bona fide purchaser.[69] The goods being sold with the intent that they should be resold, an innocent purchaser for value takes title superior to the original seller.[70] Where the sale must be recorded within a reasonable time, the day after delivery is sufficient.[71] A selling agent of the seller may take the buyer's acknowledgment.[72] In some states if the buyer be in possession, the bona fide purchaser is protected.[73]

SALVAGE; SATISFACTION AND DISCHARGE, see latest topical index.

SAVING QUESTIONS FOR REVIEW.

§ 1. **Inviting Error (1368).**
§ 2. **Acquiescing in Error (1371).**
§ 3. **Mode of Objection, Whether by Objection, Motion or Request (1375).**
§ 4. **Necessity of Objection (1376).**
§ 5. **Necessity of Motion or Request. In General (1382).** Motion for a Judgment or Nonsuit, or to Direct a Verdict (1383). Motion to Strike Out (1383). Motion for a New Trial (1384). Request for Instructions (1386). Request for Findings (1387).
§ 6. **Necessity of Ruling (1388).**
§ 7. **Necessity of Exception (1388).** Time of Taking Exceptions (1391).
§ 8. **Form and Sufficiency of Objection (1392).**
§ 9. **Sufficiency of Exception (1396).**
§ 10. **Waiver of Objections and Exceptions Taken (1398).**

Scope of title.—This title comprehends those things which must be done or left undone in the lower court, if an objecting party would keep his right to challenge the error averred, on a review of the resultant judgment. The manner of objecting to pleadings is treated elsewhere.[74]

§ 1. *Inviting error.*[75]—A party cannot complain of an error which he himself invites,[76] or is instrumental in bringing about,[77] or to which he contributes,[78]

ference held insufficient to overcome positive testimony that original seller retained title. Id. In **Utah** conditional sales are valid not only as between the parties to the contract, but also, in the absence of fraud, as to third parties, and do not fall within the chattel mortgage act. Freed Furniture & Carpet Co. v. Sorensen [Utah] 79 P. 564; Kidder v. Wittler-Corbin Machinery Co. [Wash.] 80 P. 301.

Alabama: Under Loc. Acts 1898-99, p. 1120, a conditional sale in Montgomery county need not be recorded. Bronson v. Russell [Ala.] 37 So. 672.

65. Cooper v. Philadelphia Worsted Co. [N. J. Eq.] 57 A. 733.

66. Lees v. Harding, Whitman & Co. [N. J. Err. & App.] 60 A. 352; Studebaker Bros. Co. v. Mau [Wyo.] 80 P. 151.

67. Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 Law. Ed. 986.

68. In re Smith, 132 F. 301; In re Tweed, 131 F. 355. Pennsylvania rule. In re Butterwick, 131 F. 371.

69. Crumrine v. Reynolds [Wyo.] 78 P. 402.

70. South Bend Iron Works v. Reedy [Del.] 60 A. 698.

71. Gen. St. 1902, § 4864, construed. National Cash Register Co. v. Lesko [Conn.] 58 A. 967.

72. National Cash Register Co. v. Lesko [Conn.] 58 A. 967.

73. Illinois: Conditional sale may be asserted at any time where the rights of a judgment creditor or innocent purchaser have not intervened. Walkau v. Manitowoc Seating Co., 105 Ill. App. 130.

Iowa: The bona fide purchaser of the vendee in a conditional sale is entitled to the protection of Code, § 2905, providing that no conditional sale shall be valid as against any purchaser from the vendee in actual possession, unless the purchaser had notice, though the bona fide purchaser was in wrongful possession at the time of his purchase. Rock Island Plow Co. v. Maynard Sav. Bank, 123 Iowa, 640, 99 N. W. 298.

74. See Pleading, § 10, 4 Curr. L. 1031.

75. See 2 Curr. L. 1590.

76. Error in rendering judgment on third count of declaration without disposing of

or for which he is to blame.[79] Thus, he cannot complain of a ruling made,[80] or a declaration of law given, at his request,[81] of the admission or exclusion of evidence obtained at his instance,[82] of the introduction by his adversary of evidence which he has himself previously introduced,[83] or subsequently brings out on cross-examination,[84] of the submission of a question of law to the jury at his own request,[85] or of the submission of an issue raised by him,[86] of a verdict[87] or judgment rendered against him at his own request,[88] of a decree in conformity with the prayer of his pleadings,[89] or of a verdict in the exact sum which he in his answer admitted the damages to be,[90] question the admissibility of his own evidence,[91] nor object that a fact was not proved where proof was prevented by his own objection,[92] or

issue made by first count. Consolidated Coal Co. v. Peers, 205 Ill. 531, 68 N. E. 1065. Errors invited, waived, or immaterial. Gillett v. Chavez [N. M.] 78 P. 68. Where matters of inducement in answer are denied, error in admission of evidence tending to prove them is invited by pleadings. Fleishman v. Meyer [Or.] 80 P. 209.

77. Huddleson v. Polk [Neb.] 100 N. W. 802. Exercise of additional challenges in selection of struck jury. Flowers v. Flowers [Ark.] 85 S. W. 242. Defendant cannot claim error in denying a motion to strike out certain evidence, where leave to withdraw it is subsequently denied upon his objection. Kahn v. Triest-Rosenberg Cap. Co., 139 Cal. 340, 73 P. 164. Of remarks made in reply to his own argument. International & G. N. R. Co. v. Goswick [Tex. Civ. App.] 83 S. W. 423. A litigant may not defeat his opponent because the latter has omitted to do that which the former has made it impossible or futile for him to perform. Plattner Implement Co. v. International Harvester Co. [C. C. A.] 133 F. 376.

78. Of court's use of expressions requiring jury to find that defendant's negligence contributed to his injury, where his own requests contain same requirement. Galveston, etc., R. Co. v. McAdams [Tex. Civ. App.] 84 S. W. 1076.

79. Where, after striking plaintiff's reply, court recalled its decision and defendant withdrew his objections to motion for leave to file same, but plaintiff failed to file it, he cannot object that court erred in striking same. Wilhite v. Coombs [Ind. T.] 82 S. W. 772.

80. Ruling sustaining his objection to evidence. Holmes v. Seaman [Neb.] 100 N. W. 417; Drainage Com'rs of Drainage Dist. No. 2 v. Drainage Com'rs of Union Drainage Dist. No. 3, 211 Ill. 328, 71 N. E. 1007. That amendment sets up new cause of action. Butler v. Tifton, etc., R. Co., 121 Ga. 817, 49 S. E. 763. To determine question of title and right to redeem on motion to confirm judicial sale. Mercer v. McPherson [Kan.] 79 P. 118. Where plaintiff's objection to introduction of evidence as to conditions after certain date could not complain of subsequent similar limitation of his own evidence in rebuttal. Murray v. Butte [Mont.] 77 P. 527. Overruling motion for new trial. Atchison, etc., R. Co. v. Williams [Tex. Civ. App.] 86 S. W. 38.

81. Clough v. Stillwell Meat Co. [Mo. App.] 86 S. W. 580.

82. Of the exclusion of evidence which his own objections have assisted in keeping out of the record (Huddleson v. Polk [Neb.] 100 N. W. 802), or claim error in the admission or exclusion of evidence when he himself obtains the ruling (Id.). Brought out by his own suggestion. Hyland v. Southern Bell Tel. & T. Co. [S. C.] 49 S. E. 879.

83. Letters. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574.

84. Beyer v. Isaacs, 93 N. Y. S. 312; Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029; Eastham v. Hunter [illegible] S. W. 323; Stowe v. La Conner Trading & Transportation Co. [Wash.] 80 P. 856. Cannot complain that witness had not shown himself qualified to give opinion, where he himself establishes his qualifications on cross-examination. Speck v. Kenoyer [Ind.] 73 N. E. 896.

85. Where he asked instructions on theory that it was question of fact and asked that special findings in regard to it be submitted. Walker v. Freeman, 209 Ill. 17, 70 N. E. 595. Or mixed question of law and fact. Town of Frostburg v. Hitchins [Md.] 59 A. 49. Construction of contract. Creelman Lumber Co. v. De Lisle [Mo. App.] 82 S. W. 205.

86. Parties raising issue of legitimacy of appellee, thereby challenging her right to contest will, and having taken initiative in introducing proof thereon. Flowers v. Flowers [Ark.] 85 S. W. 242.

87. Where counsel invites jury to return verdict for defendant if it finds that plaintiff is entitled to nominal damages, cannot complain of their doing so, where evidence would support verdict for such damages. Langdon v. Clarke [Neb.] 103 N. W. 62.

88. Where, on reversal of judgment in their favor, plaintiffs applied to court of appeals to render judgment against them, so that they could have ruling revised by supreme court. Texas Portland Cement & Lime Co. v. Lee [Tex.] 82 S. W. 1025.

89. Crawford v. Ft. Dodge Plaster Co. [Iowa] 101 N. W. 479.

90. Curtis v. Oregon R. & Nav. Co., 36 Wash. 55, 78 P. 133.

91. Competency of his own witness (Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866), or the admissibility of his opinion called out by his own questions (Id.). As to meaning of term "winter season" in insurance policy. Id.

92. Hahl v. Brooks, 213 Ill. 134, 72 N. E. 727; Huddleson v. Polk [Neb.] 100 N. W. 802. Does not apply where the objection was that the testimony was not offered in chief and was not proper rebuttal, and not that it was incompetent or unnecessary.

where he admitted its truth on trial.[93] A party voluntarily suing in equity cannot thereafter claim that the action should have been brought at law, where the court has jurisdiction.[94] Where both parties are equally at fault, neither can complain of the common error.[95]

A party cannot complain of instructions given at his own request,[96] or substantially the same as those requested by him,[97] or adopting a theory urged by him.[98]

A requested instruction submitted after the general charge has left the judge's hands,[99] or one refused as having been given in the main charge,[1] or which is not

Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. One who induces the court to exclude competent evidence of his opponent on the sole ground that no evidence in support of his claim is admissible cannot sustain the ruling on the ground that he did not offer to prove all the facts requisite to sustain his claim. Plattner Implement Co. v. International Harvester Co. [C. C. A.] 133 F. 376.

93. Where counsel admits that company is a mutual one, and claims that it has confessed that fact and urges the court to consider it. Wilson v. Union Mut. Fire Ins. Co. [Vt.] 58 A. 799.

94. Cribbs v. Walker [Ark.] 85 S. W. 244.

95. Where both introduce evidence as to value alone, without restricting it to market value. Schrodt v. St. Joseph [Mo. App.] 83 S. W. 543.

96. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011; South Covington, etc., R. Co. v. Smith [Ky.] 86 S. W. 970; Esler v. Wabash R. Co. [Mo. App.] 83 S. W. 73. Or of inconsistencies and contradictions caused thereby. Deckerd v. Wabash R. Co. [Mo. App.] 85 S. W. 982. Because no evidence to support it. Wilkerson v. St. Louis, etc., R. Co., 106 Mo. App. 336, 80 S. W. 308. Because did not harmonize with court's oral charge, even though previously refused and then given by consent of other party. Birmingham Belt R. Co. v. Gerganous [Ala.] 37 So. 929. Partial compliance with request. Stern v. Leopold Simons & Co. [Conn.] 58 A. 696. Because calculated to confuse. Manchester Assur. Co. v. Dowell & Co., 25 Ky. L. R. 2240, 80 S. W. 207. Cannot complain of modifications without which requests could not have been given. Pearlstine v. Westchester Fire Ins. Co. [S. C.] 49 S. E. 4. Party at whose request instruction allowing three-fourths verdict is given cannot, on appeal, question validity of statute authorizing such verdict. Hugus & Co. v. Hardenburg [Colo. App.] 76 P. 543.

97. Conant v. Jones, 120 Ga. 568, 48 S. E. 234; Griffin v. Seaboard Air Line R. Co. [N. C.] 50 S. E. 516; Houston, etc., R. Co. v. Foster [Tex. Civ. App.] 86 S. W. 44. Cannot object to an instruction submitting a defense in the manner in which he has alleged it and in the manner in which he requested its submission in a special instruction refused by the court. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020.

Same as those given at his request. Houston, etc., R. Co. v. Kothmann [Tex. Civ. App.] 84 S. W. 1089; Jacksonville & St. L. R. Co. v. Wilhite, 209 Ill. 84, 70 N. E. 583; Franks v. Matson, 211 Ill. 338, 71 N. E. 1011; Gerst v. St. Louis [Mo.] 84 S. W. 34. Where defendant requested instruction that failure to keep books in accordance with its provisions avoided insurance policy, could not question court's action in submitting issue of its violation to jury, nor its adverse finding thereon. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025. Requested instruction refused by court held not to have invited error in instruction submitting issue of carrier's liability for goods lost. Bibb v. Missouri, etc., R. Co. [Tex. Civ. App.] 84 S. W. 663.

Given on behalf of his adversary. Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561; Creelman Lumber Co. v. De Lisle [Mo. App.] 82 S. W. 205. Submitting same issues. Walker v. Robertson [Mo. App.] 81 S. W. 1183. Announcing same rule of law. International & G. N. R. Co. v. Clark [Tex. Civ. App.] 81 S. W. 821. Submitting issue of discovered peril. Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 83 S. W. 248. Meaning of instructions as to quantum of proof the same. Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068.

98. Where defendant requested and was granted instruction that plaintiff could not recover on note if defendant showed that it was without consideration, he could not complain of instruction that burden was on him to show want of consideration. Farnsworth v. Fraser [Mich.] 100 N. W. 400. Rule not changed by fact that defendant was administrator, and note was given by his intestate. Id. Where both parties submit instructions on the same theory and with reference to the same subject-matter, one cannot complain that the subject was not a proper matter to be submitted to the jury (Hansell-Elcock Foundry Co. v. Clark [Ill.] 73 N. E. 787), or that they were erroneous (Id.). Where defendants procured giving of instructions which did not require finding that reasonable time had elapsed within which it should have removed obstructions, could not contend that plaintiff's instructions were erroneous because omitting reference to question of time to remove them. City of Ottawa v. Hayne [Ill.] 73 N. E. 385. Defendant cannot complain of instruction that plaintiff could not recover unless he was using reasonable care "immediately before and at the time of the accident," where in drawing the first part of the instruction he himself used words "at the time of the accident." Chicago & E. I. R. Co. v. Coggins, 212 Ill. 369, 72 N. E. 376. That issues submitted vary from those raised by pleadings. McKinstry v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1108.

99. Texas & N. O. R. Co. v. McDonald [Tex. Civ. App.] 85 S. W. 493.

1. Western Union Tel. Co. v. Bowen [Tex.] 81 S. W. 27. Error in charge as to mental anguish held not invited. Id.

called to the court's attention or passed upon, cannot be regarded as the basis of invited error.[2]

§ 2. *Acquiescing in error.*[3]—A party cannot complain of irregularities or errors to which he consented,[4] or in which he acquiesced.[5] Thus, he cannot appeal from or assign error upon a decree rendered by his consent.[6] One acquiescing in a course of procedure assuming the existence of a fact will be deemed to have admitted it, and cannot, on appeal, interpose any objection thereto not made on the trial.[7]

The province of the supreme court is to pass upon questions raised in and passed upon by the court below.[8] Hence all errors relied on must have been in

2. Plaintiff not estopped to complain of refusal of requested instruction that it was negligence not to give crossing signal by presence in record of his request to submit question whether it was negligence to jury, where it did not appear that latter request was called to court's attention or passed upon. Hawkins v. Missouri, etc., R. Co. [Tex. Civ. App.] 83 S. W. 52.

3. See 2 Curr. L. 1591.

4. Of fact that one juror did not view premises, where expressly consented to view by eleven. Desverges v. Goette, 121 Ga. 65, 48 S. E. 693. Manner of certifying shorthand notes of evidence. Hofacre v. Monticello [Iowa] 103 N. W. 488. Submission of issue to jury. Dittel v. Bowsky, 90 N. Y. S. 365. Of juror's misconduct, where he consents to his discharge, and to proceed with eleven. Texarkana & Ft. S. R. Co. v. Tolliver [Tex. Civ. App.] 84 S. W. 375. Cannot claim surprise by reason of the allowance of an amendment, where he fails to ask for a continuance on that ground. Helbig v. Grays Harbor Elec. Co. [Wash.] 79 P. 612.

5. Where performed conditions precedent to setting aside a default judgment, could not complain of the conditions upon an appeal from a second judgment rendered against him. Doyle v. Burns, 123 Iowa, 488, 99 N. W. 195. Cannot urge that issues should have been tried by jury when he did not demand a jury and submitted the case to the court. West v. Bank of Caruthersville [Mo. App.] 85 S. W. 601. Objection to refusal to give instructions cannot be considered where party acquiesces in court's statement that he thought he had already covered them, by failure to object thereto. Roth v. Slobodien [N. J. Law] 60 A. 59. Where misjoinder of causes of action was fairly before the court on a motion to compel plaintiff to separately state and number them, and defendants did not appeal from an adverse ruling thereon, they were not entitled to thereafter raise the objection by demurrer. O'Connor v. Virginia Passenger & Power Co., 92 N. Y. S. 525. Party deeming terms imposed as condition of allowing him to withdraw juror unsatisfactory should decline to accept order and proceed with trial. Rawson v. Silo, 93 N. Y. S. 416. Where he accepts them and takes affirmative steps to carry them into effect, as by asking permission to conform pleading to ruling. Easton v. Woodbury [S. C.] 50 S. E. 790. Objection to ruling on evidence waived by saying "That is all right, your honor," and stating that the witness had answered the question. Davis v. Collins [S. C.] 48 S. E. 469. A party accepting a bill of exceptions as signed by the judge cannot thereafter question its correctness. Collins v. George, 102 Va. 509, 46 S. E. 684. A party accepting the verdict as reduced cannot complain of the action of the court in requiring him to remit a part of it on penalty of having it set aside. Lynchburg Telephone Co. v. Bokker [Va.] 50 S. E. 148.

6. King v. King [Ill.] 74 N. E. 89.

7. That plaintiff was damaged by reason of conditions existing at point of injury, and that conditions resulted from defendant's negligence. Keneally v. New York City R. Co., 91 N. Y. S. 770. That agency was proved. Hopkins v. Rodgers, 91 N. Y. S. 749. Where case was tried on theory of liability under employer's liability act, and no objection to the sufficiency of the complaint to state a cause of action thereunder was made at the trial, the action will be treated as under the statute on appeal. Braunberg v. Solomon, 92 N. Y. S. 506. The correctness of an assumption made by the court and counsel upon the trial cannot be disputed where no question in reference thereto was raised on the trial and no request made to submit the case to the jury on any other theory. That person had authority to make contract for defendant. Fox v. New York, etc., R. Co., 95 App. Div. 132, 88 N. Y. S. 519. Held to construction of stipulated facts adopted below. Gurney v. Brown [Colo.] 77 P. 357. That amendment was not formally made where case was tried on theory that it was in and that matter therein was traversed. Balfe v. Hanley [Colo. App.] 78 P. 78. Instruction asked and given for defendant, leaving it to jury to determine whether defendant maintained certain telegraph pole, or "permitted it to exist," in its yard, estopped defendant from insisting on appeal that it was necessary for plaintiff to prove, in order to escape variance, that defendant had erected pole or permitted it to be erected. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328. That there was no variance between the opposite party's pleading and proof. Where objection was made at opening of trial and bill of particulars was amended, after which objection was not renewed. Linsell v. Linsell [Mich.] 100 N. W. 1009. That cause of action was ex contractu. Logan v. Freerks [N. D.] 103 N. W. 426.

8. O'Connor v. Hitzler [Colo. App.] 80 P. 474; Phillips v. Heraty [Mich.] 100 N. W. 186.

some manner brought to the attention of the trial judge,[9] and as a general rule, questions not raised in the lower court will not be considered on appeal.[10] This acquiescence may apply to a right or claim not asserted below,[11] to the right to file an amended affidavit of service,[12] to a failure to file an amended pleading,[13] to defects of procedure,[14] to the form of the action and the mode and manner of trial,[15]

9. District of Columbia v. Dietrich, 23 App. D. C. 577; Van Alstyne v. Franklin Council, No. 41 [N. J. Err. & App.] 58 A. 818; O'Donnell v. Weiler [N. J. Law] 59 A. 1055. Absence of evidence as to agreed price of goods sold. O'Connor v. Hitzler [Colo. App.] 80 P. 474. That stipulated facts did not establish certain essential facts. Gurney v. Brown [Colo.] 77 P. 357. Statement in argument that claim for services might be filed against estate could not be objected to on ground that time for filing claims had expired, where no such answer suggested below. Bray v. Bray [Iowa] 103 N. W. 477. General demurrer to evidence cannot be used to inject into case questions not specifically called to attention of trial court, and upon which he did not rule. Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109. Where, on motion to dismiss at opening of case, parties rested their claims solely upon question whether plaintiff could recover under statute relied on or at common law, plaintiff could not complain of dismissal without permitting him to offer proof, unless he was entitled to maintain the action under the statute or at common law. Eckes v. Stetler, 90 N. Y. S. 473. Matters of omission. Failure to pass upon issue in conclusions. Chicago, etc., R. Co. v. Mitchell [Tex. Civ. App.] 85 S. W. 286. Where appellant in pleadings rested right to relief solely on ground that property was his rural homestead and did not suggest to court that he desired to select any portion of it if it was decided to be urban, and did not set up in motion for new trial that he would have selected different lots than court set apart for him, cannot complain of court's action in so doing. Harris v. Matthews [Tex. Civ. App.] 81 S. W. 1198. The court of appeals cannot certify to the supreme court a question not raised by the pleadings and not presented to or ruled upon by the court below. Nabours v. McCord [Tex. Civ. App.] 82 S. W. 153. Assignment complaining of overruling of demurrer will not be considered where does not appear that demurrer was called to court's attention or that ruling thereon was invoked. Smith v. Hughes [Tex. Civ. App.] 86 S. W. 936. Where plaintiff sued to recover possession of lot and filed bill of particulars showing that he had lost title to a part of it by tax foreclosure sale, and demurrer to complaint was sustained, he was not precluded from obtaining reversal of judgment, because he did not call court's attention to fact that foreclosure did not include whole lot, in absence of actual deceit on his part. Morrison v. Berlin [Wash.] 79 P. 1114. The court's action in entering a default judgment without notice to defendant will not be reviewed in the absence of a motion to set such judgment aside. Walton v. Hartman [Wash.] 80 P. 196. Ordinarily a new trial will not be granted because of propositions which are afterthoughts, or which were not carefully and properly submitted to the jury during the course of the trial. Kenney v. Knight, 127 F. 403.

10. Cole v. Jerman [Conn.] 59 A. 425; Inhabitants of Verona v. Bridges, 98 Me. 491, 57 A. 797; Michigan Sanitarium & Benevolent Ass'n v. Battle Creek [Mich.] 101 N. W. 855. Conn. Gen. St. 1902, § 802. Marsh v. Keating [Conn.] 60 A. 689. Questions not raised upon trial, urged on motion for new trial, or assigned as error in appellate court deemed waived. Dunn v. Crichfield [Ill.] 73 N. E. 386. Where defendant excepted to a ruling as to the declarations, but asked for no ruling on the declaration as amended, and, in his opening to the jury, stated that his only defense was a question of fact, he cannot contend that amended declaration did not set forth a cause of action. Gerrish v. Hayes [Mass.] 70 N. E. 42. Issue of fact which neither party submitted or sought to submit to the jury for their decision. Will not consider point that evidence is insufficient to show tender, where not raised below, and no instructions asked in regard to it. Bertrand v. St. Louis Transit Co. [Mo. App.] 82 S. W. 1089. Unless fundamental. Evans v. Gray [Tex. Civ. App.] 86 S. W. 375. Trial court held to have properly refused to determine question of plaintiff's liability for part of expense of maintaining defendant's school. School Dist. No. 9 v. School Dist. No. 5 [Wis.] 101 N. W. 681.

11. Adverse possession. Shirey v. Clark [Ark.] 81 S. W. 1057. Contention that defendant had a right to remove school building. Hayward v. School Dist. No. 9 of Hope Tp. [Mich.] 102 N. W. 999. A claim not made in the complaint, but advanced for the first time in the brief on appeal. Stein v. Waddell [Wash.] 80 P. 184. Failure to allow set-offs. Colston v. Miller, 55 W. Va. 490, 47 S. E. 268. On appeal from order granting preliminary injunction for infringement of copyright, court cannot consider argument that similarity of articles was due to their having been derived from common sources where no such suggestion was made in court below and no evidence in that regard was offered. Werner Co. v. Encyclopaedia Britanica Co. [C. C. A.] 134 F. 831.

12. State Board of Pharmacy v. Jacob, 92 N. Y. S. 836.

13. Mayo v. Halley, 124 Iowa, 675, 100 N. W. 529.

14. Appropriateness of cross bill. King v. King [Ill.] 74 N. E. 89.

15. Whether action at law is maintainable for conversion of property pledged, when transaction is evidenced by bill of sale. Loftus v. Agrant [S. D.] 99 N. W. 99. That case tried in equity court was not one of equity jurisdiction. Gerstle v. Vandergriffe [Ark.] 79 S. W. 776; Jennie Clarkson Home for Children v. Chesapeake & O. R. Co., 87 N. Y. S. 348. Where such question the bill. Mortimer v. Potter, 213 Ill. 178, 72 was not raised by demurrer or answer to N. E. 817. Hearing proceedings to forfeit

to the right of certain attorneys to take part in the trial,[16] to matters of defense,[17] to a variance between the pleadings and the proof,[18] to misconduct of the jury,[19] to the question whether a particular issue is for the court or the jury,[20] to the form of submission of issues,[21] to errors in the charge,[22] to the allowance of costs[23] or attorney's fees,[24] to a failure to award the relief to which a party is entitled,[25] to the form of the verdict,[26] and to the objection that the judgment is not in conformity to the decree.[27]

liquor license at special term. State v. Barnett [Mo. App.] 86 S. W. 460.

16. Bray v. Bray [Iowa] 103 N. W. 477.

17. Greenwich Ins. Co. v. State [Ark.] 84 S. W. 1025; Pacific Mut. Life Ins. Co. v. Bailey, 25 Ky. L. R. 1456, 78 S. W. 119. Title cannot be attacked on ground not raised by pleadings or proof. First Nat. Bank v. Waddell [Ark.] 85 S. W. 417. Question whether certain fruit was shipped from first steamer. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084. That bond was without consideration. Town of Hudson v. Miles, 185 Mass. 582, 71 N. E. 63. That plaintiff could not complain of fraud because had not returned stock which he was fraudulently induced to acquire. Smith v. McDonald [Mich.] 102 N. W. 738. Usury. Webb v. Downes [Minn.] 101 N. W. 966. That an ordinance regulating the speed of street cars did not apply to the street where the accident occurred. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140. That contract violated Federal anti-trust act. New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co. [N. Y.] 73 N. E. 48. Res judicata. Ex parte Landrum [S. C.] 48 S. E. 47. That plaintiff is not entitled to equitable relief because did not make tender. Finks v. Hollis [Tex. Civ. App.] 85 S. W. 463. Error in rendering judgment because of insufficiency of a tender. Wisconsin Lumber Co. v. Greene & W. Tel. Co. [Iowa] 101 N. W. 742. The constitutionality of a statute. Norwich Gas & Elec. Co. v. Norwich [Conn.] 57 A. 746; In re Andersen, 178 N. Y. 416, 70 N. E. 921. Constitutional points cannot be considered unless squarely raised below, the ruling thereon properly challenged and exceptions saved and preserved in a bill of exceptions, or unless embedded in the record proper. City of Tarkio v. Clark [Mo.] 85 S. W. 329. Ordinance. City of Excelsior Springs v. Ettenson [Mo.] 86 S. W. 255. Objections to special assessments for local improvements, except that the court has no jurisdiction over the subject-matter. That ordinance authorizing improvement required further legislation to make it operative, and that officer making assessment was not legally qualified to do so. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680. Right of objector to tax to appear and be heard on ground of want of interest in lands. People v. Chicago & E. I. R. Co. [Ill.] 73 N. E. 315. Where, in action for breach of contract to purchase granite, no allusion was made at trial to value of granite left in quarry which would have been removed if contract had been performed, verdict for plaintiff would not be set aside on ground that its value should have been deducted from damages. Broadnax v. United Engineering & Contracting Co., 128 F. 649.

18. Fisk Min. & Mill. Co. v. Reed [Colo.] 77 P. 240; Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50; Dawes v. Great Falls [Mont.] 77 P. 309. Question must be raised in statutory manner, and must be shown that party was prejudiced. Mere objection to evidence insufficient. Huey Co. v. Johnston [Ind.] 73 N. E. 996.

See, also, Pleading, 4 Curr. L. 980.

19. Werner v. Interurban St. R. Co., 99 App. Div. 592, 91 N. Y. S. 111. Irregularity in the answering of a question by a witness accompanying the jury on a view. Wood v. Moulton [Cal.] 80 P. 92. That juror slept. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

20. Existence of probable cause in action for malicious prosecution. Motions for nonsuit and direction of verdict based solely on insufficiency of evidence to show want of probable cause, question was treated as one for jury, and no exceptions to charge or refusal of requests. McFadden v. Lane [N. J. Err. & App.] 60 A. 365. Cannot complain that a counterclaim was erroneously submitted to the jury where he made no motion to take the case from the jury and did not except to the instructions. Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505.

21. Stahl v. Askey [Tex. Civ. App.] 81 S. W. 79.

22. Schenck v. Griffith [Ark.] 86 S. W. 850; Vacca v. Martucci, 90 N. Y. S. 356; Weber v. Snohomish Shingle Co. [Wash.] 79 P. 1126. Cannot object to instruction as stating wrong measure of damages where did not object to evidence in regard thereto, or except to instruction, or request different ones. Story v. Nidiffer [Cal.] 80 P. 692. Language deemed misleading, if charge is otherwise clear and distinct on issues. Cody v. Duluth St. R. Co. [Minn.] 102 N. W. 397; Fox v. Ralston [Iowa] 102 N. W. 424. Narrating evidence. Place v. Place [Mich.] 102 N. W. 996. Errors in stating issues. Turner v. Lyles, 68 S. C. 392, 48 S. E. 301. Omission to state certain elements of damage. Stewart v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 310. Inadvertent expressions not affecting verdict. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1.

23. Provision for costs and allowance of execution in judgment. La Grange v. Merritt, 96 App. Div. 61, 89 N. Y. S. 32. By clerk. Guffey v. Alaska & P. S. S. Co. [C. C. A.] 130 F. 271.

24. Failure to include fees in judgment. Metz v. Winne [Okl.] 79 P. 223.

25. Plaintiffs cannot complain of failure of court to enforce lien in their favor for taxes paid by them on lands awarded to defendant, where did not request such relief. Wilcox v. Smith [Wash.] 80 P. 803.

26. Failure to recite certain facts there-

Change of theory.[28]—On appeal, the parties are confined to the same theory as that on which the case was tried below,[29] and to the grounds of objection there urged.[30] Nor can they assume a different position in the supreme court from that

in. Evans v. Gray [Tex. Civ. App.] 86 S. W. 375.

27. Walker v. Cassels [S. C.] 49 S. E. 862.

28. See 2 Curr. L. 1593.

29. Benton Land Co. v. Zeitler, 182 Mo. 251, 81 S. W. 193; Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc. [Mo. App.] 80 S. W. 694; Standard Furniture Co. v. Anderson [Wash.] 80 P. 813. Where defendant did not question regularity of appointment of one as referee, or authority to act in that capacity, but merely objected to sufficiency of report, cannot claim error in treating report as that of referee because designated as master in chancery in order appointing him. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006. Where a judgment is pleaded only for the purpose of recovering costs in a former suit and to show disseisin, defendant, who did not plead it as a bar to the action, could not raise that question. Newburn v. Lucas [Iowa] 101 N. W. 730. Sufficiency of defense that property covered by contract of sale is homestead and wife of vendor did not join cannot be questioned where issues made and case tried below on theory that such facts constituted good defense. Ormsby v. Graham, 123 Iowa, 202, 98 N. W. 724. Request to charge held not to call attention to fact that objection was made because claim against city was not properly presented to council, and hence question could not be considered on appeal. Spier v. Kalamazoo [Mich.] 101 N. W. 846. Where defendant's requests assumed that truckmen, alleged to have committed assault, were in their employ, could not claim that they were temporarily in employ of another. Canton v. Grinnell [Mich.] 101 N. W. 811. Objections to evidence insufficient to call attention to those urged on appeal. In re Condemnation of Lands in Ramsey County [Minn.] 100 N. W. 650. Where case tried on theory that defendant was guilty of negligence at common law, plaintiff cannot rely on statute not pleaded or relied on at trial. Glaser v. Rothschild, 106 Mo. App. 418, 80 S. W. 332. Where treated ordinance limiting speed of cars as applying to defendant's cars at point named and issue arising by virtue of it was submitted to jury at its request, defendant cannot contend that did not apply to its cars at point named. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140. Where appellant tried case below on theory that plaintiff owned shore land, must try it on same theory. Chinn v. Naylor, 182 Mo. 583, 81 S. W. 1109. Cannot urge different construction of agreement not suggested by motion or request. Ascheim v. Levinsohn, 91 N. Y. S. 157. Where complaint and judgment for plaintiff were based on theory that defendant refused to accept goods sold in accordance with modified contract extending time for delivery, he could not contend in defense of the judgment that defendant had waived his default in failing to deliver goods within time specified. Birkett v. Nichols, 90 N. Y. S. 257. Where, in assumpsit, the affidavit of defense denies the contract sued on, and the case is tried on that issue, cannot contend that the action was prematurely brought. Welch v. Miller [Pa.] 59 A. 1065. Where action tried as one to try title and judgment rendered for plaintiff on that theory, he cannot contend that it is one for forcible entry and detainer. Fifer v. Fifer [N. D.] 99 N. W. 763. Where on trial corporation claimed lien superior to mortgagee on whole proceeds of certain property, and introduced no evidence as to separate value of land and improvements for which it had furnished materials after execution of mortgage, could not claim priority in part of proceeds derived from improvements. Vaughan Lumber Co. v. Martin [Tex.] 81 S. W. 1. Where tried on theory that statute is unconstitutional, cannot contend that contract comes within exceptions thereof. Normile v. Thomson [Wash.] 79 P. 1095.

30. To evidence: Glos v. McKerlie, 212 Ill. 632, 72 N. E. 700; Pichon v. Martin [Ind. App.] 73 N. E. 1009; Williams v. Dittenhoefer [Mo.] 86 S. W. 242; Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10; Smithers v. Lowrance [Tex. Civ. App.] 79 S. W. 1088; City of Austin v. Forbis [Tex. Civ. App.] 86 S. W. 29; Texas & P. R. Co. v. Birdwell [Tex. Civ. App.] 86 S. W. 1067; Beebe v. Redward, 35 Wash. 615, 77 P. 1052. Where admission of protest of note was objected to on ground that it was not competent because suit was against guarantor, could not raise question that protest could only be proved by certified copy of notary's record. Ewen v. Wilbor, 208 Ill. 492, 70 N. E. 575. The urging of a single specific objection waives all others. Id. Objection held not to suggest claim that failure to remove deposits affected measure of damages. Neely v. Detroit Sugar Co. [Mich.] 101 N. W. 664. Where no reasons were suggested at trial for use of books of plaintiff's assignor which were not covered by plaintiff's admissions on record, defendant cannot contend that he was improperly denied right to use them on other grounds. Conroy v. Boeck, 91 N. Y. S. 80.

To amendment of a certificate of levy. People v. Chicago & E. I. R. Co. [Ill.] 73 N. E. 315.

Grounds of demurrer: Cleland v. Hostetter [N. M.] 79 P. 801; Virginia Iron, Coal & Coke Co. v. Roberts [Va.] 49 S. E. 984.

Grounds for nonsuit (Warner v. Warner, 144 Cal. 615, 78 P. 24), or direction of verdict (Rawson v. Leggett, 97 App. Div. 416, 90 N. Y. S. 5). Rule does not apply where the defect is inherent and cannot be cured. Warner v. Warner, 144 Cal. 615, 78 P. 24. Grounds not assigned on motion to direct verdict should not, strictly speaking, be considered in support of judgment rendered pursuant thereto, but may be in view of practice in trial court to allow defendant, after motion to direct verdict has been overruled, to introduce evidence, and ask submission of all issues raised thereby. Brown v. Insurance Co., 21 App. D. C. 325. Motion having been based solely on the ground of contributory negligence, the question of the absence of negligence on the part of defend-

taken in the appellate court.[31] So too when a case is tried on the theory that a certain issue is before the court, the point that it is not properly presented by the pleadings will not be heard on appeal.[32]

A party seeking to introduce evidence for a specific purpose cannot claim on appeal that it was admissible for a different purpose.[33] A party cannot avail himself of the testimony of an opposite party where, in order to do so, he will have to concede that his own evidence and the allegations of his pleadings are untrue, and that only a part of such testimony of the opposite party is true.[34]

§ 3. *Mode of objection, whether by objection, motion or request.*[35]—Defect of parties must be taken advantage of by demurrer or answer.[36] The objection that an amended petition states a new cause of action,[37] or that defenses are inconsistent, should be raised by motion to strike out.[38]

ant cannot be considered. Zeliff v. New Jersey St. R. Co., 69 N. J. Law, 541, 55 A. 96.

Ground for dismissing complaint: Zeisloft v. Blackburne Co., 91 N. Y. S. 8.

Grounds for new trial: Tillman v. International Harvester Co. [Minn.] 101 N. W. 71. Where a written motion is presented. Spring Valley Coal Co. v. Chiaventone [Ill.] 73 N. E. 420. Submitting special interrogatories to jury without first submitting them to counsel. Hansell-Elcock Foundry Co. v. Clark [Ill.] 73 N. E. 787. Grounds not insisted upon not considered. Knights Templar & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Motion for failure to give peremptory instruction will not enable court to review the failure to give other instructions. Muldoon v. Meriwether, 25 Ky. L. R. 2085, 79 S. W. 1183. Where notice of intention bases motion on ground of insufficiency of evidence to support findings, moving party cannot claim that making of findings was error of law. Schilling v. Curran [Mont.] 76 P. 998.

31. As to wording of letter. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

32. Parke & Lacy Co. v. San Francisco Bridge Co., 145 Cal. 534, 78 P. 1065; Schnitzer v. Cole, 4 Ohio C. C. (N. S.) 319. That estoppel is sufficiently pleaded. Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 P. 106. Where tried on theory that right of interveners to equitable relief was sole question in case. Stelpflug v. Wolfe [Iowa] 102 N. W. 1130. That count stated cause of action under employer's liability statute, no demurrer being interposed or ruling on pleadings requested. Greenstein v. Chick [Mass.] 72 N. E. 955. Where issue of condonation in divorce case has been contested without objection, and condonation clearly appears, the court will deny relief, though such defense is not pleaded. Bordeaux v. Bordeaux [Mont.] 80 P. 6. Material facts, though not pleaded, will be considered when proved by evidence received without objection. Alabama Steel & Wire Co. v. Symons [Mo. App.] 83 S. W. 78. Where case is tried as though reply constituted denial of defenses in answer. Taussig v. St. Louis & K. R. Co. [Mo.] 85 S. W. 378. Rule not changed by motion for peremptory instruction that plaintiff cannot recover under pleading and evidence where court's attention not directed to defects. Id. Cannot take exception to such a construction of pleadings in instructions. Carlson v. Hall, 124 Iowa, 121, 99 N. W. 571. Where plea and answer to bill are treated as interposing valid defenses not incompatible with each other by complainant, who files a general replication to both, and by chancellor, appellate court will so treat them, and hold that plea is not overruled by answer. Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56. In action in equity to obtain new trial of action at law, where petition is defective in not sufficiently showing nature of ruling in former action complained of, party offering evidence as to its nature cannot thereafter object to defect. Zweibel v. Caldwell [Neb.] 102 N. W. 84. Where an issue is tendered in the testimony without objection and evidence is offered thereon by both parties, the court may consider the pleadings amended to embrace it and submit it by instructions. Iverson v. McDonnell, 36 Wash. 73, 78 P. 202. Court not bound to instruct on issue not raised by pleadings, though evidence in regard thereto is admitted without objection. Thompson v. Bucholz [Mo. App.] 81 S. W. 490.

33. Where, in action for malicious prosecution, sought to introduce it to show malice, could not claim that court erred in excluding it on ground that it was admissible in mitigation of damages. Adkin v. Pillen [Mich.] 100 N. W. 176. Where evidence is excluded as irrelevant, the court stating his understanding of its purpose, cannot claim that it was admissible to test the memory of the witness, such ground not having been called to court's attention. Bowick v. American Pipe Mfg. Co. [S. C.] 48 S. E. 276.

34. Behen v. St. Louis Transit Co. [Mo.] 85 S. W. 346.

35. See 2 Curr. L. 1594.

36. Defect of parties defendant; when sued he admitted that the warrants were issued to him but did not state that he was not the owner. Criswell v. Board of Directors of Everett School Dist. No. 24, 34 Wash. 420, 75 P. 984. Waived when objection is first made in the motion for a new trial. Mills' Ann. Code Colo. § 55. Applies to case originating in justice court, in which there were no written pleadings. Miller v. Kinsel [Colo. App.] 78 P. 1075.

37. Not by objection to reception of evidence. Phillips v. Barnes, 105 Mo. App. 421, 80 S. W. 43.

38. Not by request for an instruction. Harper v. Fidler, 105 Mo. App. 680, 78 S. W. 1034.

See, also, Pleading, 4 Curr. L. 1032.

Objections to the admission in evidence of a deposition on a ground going only to the time or manner of taking it must be presented by motion to suppress, and cannot be made for the first time on trial.[39]

Where a question depends altogether upon the evidence, it is properly raised by objection to the admissibility of testimony.[40] An objection that there is no evidence must be raised before verdict by a proper prayer for instructions to the jury.[41] Where the answer to an interrogatory is not sufficiently explicit, the remedy is by motion for a more explicit answer rather than by motion to dismiss.[42] Claims which might have been predicated on objections to evidence cannot be raised by exception to instructions on the ground of their materiality, where the question was properly submitted within the evidence received.[43] The proper way of correcting errors in the admission or rejection of evidence in a trial before a committee is by written remonstrance to the acceptance of its report, filed in the trial court.[44] General objections to the admissibility of evidence before a referee cannot be raised by exceptions to his report.[45]

An objection to the manner in which the bidding at a partition sale was conducted will not be considered where not raised by exceptions to the master's report, nor by assignments of error to the order of confirmation.[46]

Objection to the entering of a judgment on a general verdict which is inconsistent with special findings must be made in the lower court by a motion for judgment upon the special findings, notwithstanding the general verdict.[47]

The objection that the verdict is excessive is sufficiently raised by an exception to an instruction authorizing a recovery of the full amount claimed, and a motion for a new trial on the ground of such excessiveness.[48] Failure to object and except to the submission of specific questions to the jury is not cured by an exception to the direction of a general verdict based on their answers thereto.[49] Error in failure of jury to make finding on counterclaim is waived by failure to object when the verdict is returned, and, if not then corrected, by failure to call court's attention thereto by motion in arrest of judgment.[50]

§ 4. *Necessity of objection.*[51]—As a general rule in order that errors occurring at the trial or in the lower court may be saved for consideration upon appeal, objections thereto must be taken at the time, and if not so taken they will be deemed waived and will not be reviewed.[52] This rule applies to an objection to the form of the action,[53] or method of procedure,[54] to the sufficiency of motion papers,[55] to

39. Oliver v. Oregon Sugar Co. [Or.] 76 P. 1086.

40. Set-off by partner of partnership demand against himself individually, objection not mutual. Western Coal & Min. Co. v. Hollenbeck [Ark.] 80 S. W. 145.

41. N. C. Code, § 957, requiring supreme court to render such judgment as, on inspection of whole record, it appears ought to be rendered, does not change rule. Babcock Printing Press Mfg. Co. v. Herbert [N. C.] 49 S. E. 349.

42. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209.

43. Minneapolis Threshing Mach. Co. v. Burton [Minn.] 103 N. W. 335.

44. Geary v. New Haven, 76 Conn. 84, 55 A. 584.

45. Where no evidence was objected to. Holt v. Howard [Vt.] 58 A. 797.

46. Black v. Black, 206 Pa. 116, 55 A. 847.

47. A motion for a new trial does not save the point. Drake v. Justice Gold Min. Co. [Colo.] 75 P. 912.

48. Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P. 287.

49. Cooper v. New York, etc., R. Co. [N. Y.] 72 N. E. 518.

50. Grier v. Strother [Mo. App.] 85 S. W. 976.

51. See 2 Curr. L. 1594.

52. Union Book Co. v. Robinson, 105 Ill. App. 236. That record on appeal from probate to district court failed to show which of two decrees was appealed from. Gillett v. Chavez [N. M.] 78 P. 68.

53. Where cause is tried as equity case without objection, an appeal in accordance with equity practice cannot be objected to on ground that cause was in fact one at law, for which reason there should have been motion for new trial. Error in adopting kind of proceedings waived by failure to object at proper time [Mansf. Dig. § 4927; Ind. T. Ann. St. 1899, § 3132]. Howell v. Brown [Ind. T.] 83 S. W. 170. Where action to quiet title is tried on merits, without demurrer or objection, cannot contend that

an order granting a change of venue,[56] to the admission,[57] exclusion,[58] or sufficiency

facts as to possession showing no adequate remedy by ejectment do not appear from pleadings or evidence. McKinley v. Morgan, 36 Wash. 561, 79 P. 45.

54. That issues raised by pleas to the jurisdiction and to the merits were both submitted to the jury in the same trial. Padrosa v. High [Ga.] 50 S. E. 97. Irregularity of court's action in determining question of res judicata on motion that defendant be enjoined from pleading former judgment as defense. Vincent v. Mutual Reserve Fund Life Ass'n [Conn.] 58 A. 963. May waive objections to remedies pursued in courts having jurisdiction of the subject-matter. Objection to reopening of decree on ground that petitioner was not party to it, having been improperly raised by answer instead of demurrer, and not having been insisted upon in court below, and case having been heard and determined on merits without reference thereto, held that a waiver resulted. Foster v. Phinizy, 121 Ga. 673, 49 S. E. 865. To permitting filing and litigation of counterclaim on trial of action for claim and delivery of personal property. Burt-Brabb Lumber Co. v. Crawford [Ky.] 86 S. W. 702.

55. Objection that do not comply with rules. Austrian Bentwood Furniture Co. v. Wright, 43 Misc. 618, 88 N. Y. S. 142.

56. Wright v. Kansas City [Mo.] 85 S. W. 452.

57. Ballow v. Collins, 139 Ala. 543, 36 So. 172; San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025; Marsh v. Bennett [Fla.] 38 So. 237; Fabian v. Traeger [Ill.] 74 N. E. 131; Redden v. Lambert, 112 La. 740, 36 So. 668; Reno v. St. Joseph, 169 Mo. 642, 70 S. W. 123; Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10; Goken v. Dallugge [Neb.] 101 N. W. 244; Lennox v. Interurban St. R. Co., 93 N. Y. S. 230; Hyland v. Southern Bell Tel. & T. Co. [S. C.] 49 S. E. 879; Shannon v. Marchbanks [Tex. Civ. App.] 80 S. W. 860; Saenz v. Mumme & Co. [Tex. Civ. App.] 85 S. W. 59; Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209; Anderson v. Hilker [Wash.] 80 P. 848; Jefferson Hotel Co. v. Warren [C. C. A.] 128 F. 565. Where answer is responsive. Mobile, etc., R. Co. v. Bromberg [Ala.] 37 So. 395. Must be regarded as correct. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19. That proper foundation was not laid for impeaching evidence. Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132. That questions called for evidence of distinct prior acts of negligence. Gregory v. Wabash R. Co. [Iowa] 101 N. W. 761. That evidence is irrelevant. Jordan v. Cedar Rapids, etc., R. Co., 124 Iowa, 177, 99 N. W. 693. That it is parol and hence inadmissible to establish an express trust. Merritt-Allen Co. v. Torrence [Iowa] 102 N. W. 154. Not ground for reversal where not objected to and no motion to exclude it. South Covington & C. St. R. Co. v. Riegler's Adm'r, 26 Ky. L. R. 666, 82 S. W. 382. That confirmation of title, being by judgment, could not be shown by his testimony. Selleck v. Garland, 184 Mass. 596, 69 N. E. 345. That it was not admissible under the pleadings. Loeser v. Jorgensen [Mich.] 100 N. W. 450; Hellinger v. Marshall, 92 App. Div. 607, 86 N. Y. S. 1051. That defendants by introducing certain evidence denied allegations admitted by their pleadings to be true. Alderton v. Williams [Mich.] 102 N. W. 753. Objection, in ejectment, to master's deed in foreclosure, because files and records in foreclosure proceedings and order confirming sale were not introduced. Pere Marquette R. Co. v. Graham [Mich.] 99 N. W. 408. It is not error to permit a question to be answered where the proper objection is not made and there is no motion to strike out the answer. Cameron v. Duluth-Superior Traction Co. [Minn.] 102 N. W. 208; Young v. O'Brien, 36 Wash. 570, 79 P. 211. Parol proof of written contract. Wagner v. Ellis [Miss.] 37 So. 959. Objection to incompetency of witness waived by permitting her deposition to be read in probate court, and cannot be raised on trial de novo on appeal. In re Imboden's Estate [Mo. App.] 86 S. W. 263. No reversal because court took it into consideration in his instructions, though was variance between it and pleadings. Spengler v. St. Louis Transit Co. [Mo. App.] 83 S. W. 312. That defendant was not entitled to allowance on ground that no claim therefor was pleaded, when objection not made to evidence. Bevier Black Diamond Coal Co. v. Watson [Mo. App.] 80 S. W. 287. Where evidence as to market value of cattle at real destination was not objected to and court, at defendant's request, submitted issue of damage based on value as proved. Chicago, etc., R. Co. v. Carroll [Tex. Civ. App.] 81 S. W. 1020. Except in case of incompetency of the witness, objections to declarations because not made in presence of defendant. Colston v. Miller, 55 W. Va. 490, 47 S. E. 268. Nonproduction of relevant letter, important as evidence, waived by failure to object to contents. Campbell v. Beard [W. Va.] 50 S. E. 747. That transcript of judgment introduced in evidence was not properly certified. Aetna Indemnity Co. v. Ladd [C. C. A.] 135 F. 636.

Incompetent testimony not objected to becomes competent. Hyland v. Southern Bell Tel. & T. Co. [S. C.] 49 S. E. 879. Where fact proved is within issues. Pichon v. Martin [Ind. App.] 73 N. E. 1009. Becomes a part of the case, and may be considered. Webb v. Sweeney, 32 Ind. App. 54, 69 N. E. 200; Brightman v. Buffington, 184 Mass. 401, 68 N. E. 828; Secrist v. Eubank, 104 Mo. App. 113, 78 S. W. 315. Fact that evidence as to misrepresentations was received without objection held not to warrant finding that mortgage was wholly void, there being no such allegation in the pleadings, and the evidence being admissible on the issue of partial invalidity raised by the answer. Kittel v. Schmieder, 89 App. Div. 618, 85 N. Y. S. 977. Failure to object to evidence showing injuries to be permanent rendered the admission of mortality tables proper, though permanent injuries not pleaded. Fallon v. Rapid City [S. D.] 97 N. W. 1009. No error in permitting an answer to a question clearly calling for incompetent testimony. Robinson v. Halley, 124 Iowa, 443, 100 N. W. 328.

Hearsay evidence admitted without objection is before the jury, and cannot be ob-

of the evidence,[59] to the form of a question,[60] or the responsiveness of an answer,[61] to variance between the pleading and proof,[62] to a failure to allow sufficient time for argument,[63] to misconduct of counsel,[64] to instructions,[65] to the submission of specific questions to the jury,[66] to an order limiting the number of instructions,[67] to the objection that an order violates a rule of court,[68] to the verdict,[69] judgment,[70]

jected to on appeal. Holder v. Cannon Mfg. Co., 135 N. C. 392, 47 S. E. 481. Is sufficient to support a finding based thereon. Receipt admitted against stranger. Beebe v. Redward, 35 Wash. 615, 77 P. 1052. Has all the probative force it would have had if not open to objection on that ground. Hatch v. 84 S. W. 246; City of Austin v. Forbis [Tex. Pullman Sleeping Car Co. [Tex. Civ. App.] Civ. App.] 86 S. W. 29.

58. Gooding v. Watkins [Ind. T.] 82 S. W. 913.

59. As to condition of mine on dissolution of injunction. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552. To warrant instructions where no objection to the charge as given and no requests for counter instructions. District of Columbia v. Dietrich, 23 App. D. C. 577. To support judgment. Barker v. Citizens' Mut. Fire Ins. Co. [Mich.] 99 N. W. 866. Opinion evidence as to values sufficient in absence of objection to qualification of witnesses. Kaufman v. Abrams, 90 N. Y. S. 1068. Where defendant made no objection at trial that there was no proof of plaintiff's discharge, and question was submitted to jury, cannot contend that verdict was against weight of evidence for want of such proof. Zeisloft v. Blackburne Co., 91 N. Y. S. 8. Objection that there was no proof of assignment of claim to plaintiff not raised by general motion to dismiss complaint. Conroy v. Boeck, 91 N. Y. S. 80. Where the confession of a judgment is alleged in the bill and admitted in the answer, and proved by oral testimony without objection or exception, the question of the sufficiency of the proof of the existence of such judgment because the record thereof was not produced. Nuzum v. Herron, 52 W. Va. 499, 44 S. E. 257. A prosecutor in certiorari waives a complaint based on the insufficiency of the facts to support the judgment by bringing the cause to final hearing without procuring a return to a rule on the lower court to certify the facts found. Willett v. Morse [N. J. Err. & App.] 60 A. 362.

60. Weinhandler v. Eastern Brewing Co., 92 N. Y. S. 792. Answer cannot be objected to as departing from proper sphere of expert testimony, where court's attention was not called to fact that question was not sufficiently restricted and no motion made to strike out answer. Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311.

61. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591.

62. See, also, Pleading, 4 Curr. L. 1050. Illinois Terminal R. Co. v. Thompson, 210 Ill. 226, 71 N. E. 328; Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869; Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103; Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2; Moore Lime Co. v. Johnston's Adm'r [Va.] 48 S. E. 557. When not presented to lower court in manner provided by statute. Hartwell Bros. v. Peck & Co. [Ind.] 71 N. E. 958; Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491. Where defendant's instructions based on theory that gong was sounded before plaintiff was struck by car, no ground of reversal that instruction sanctioned recovery for delay in signaling, though cause of action relied on was failure to sound gong, where evidence tending to show that it was sounded at time of collision was not objected to, nor a variance charged. Brown v. St. Louis Transit Co. [Mo. App.] 83 S. W. 310. Supreme court will not, on rule to show cause, grant new trial for variance between negligence alleged and that proved, which might have been cured by amendment. Neutze v. Atlantic City R. Co. [N. J. Law] 58 A. 1083.

63. Wall v. Continental Casualty Co. [Mo. App.] 86 S. W. 491.

64. Where it is such as could have been prevented, or the resulting prejudice could have been removed by instructions. Gregory v. Wabash R. Co. [Iowa] 101 N. W. 761. Remarks in argument. Levidow v. Starin [Conn.] 60 A. 123; Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43.

65. Quinn v. Baldwin Star Coal Co. [Colo. App.] 76 P. 552; Collins v. George, 102 Va. 509, 46 S. E. 684; Southern Pac. Co. v. Maloney [C. C. A.] 136 F. 171. Allowing recovery of interest. Mulligan v. Smith [Colo.] 76 P. 1063. Requests for instructions which could only have been based on evidence contrary to that warranting instructions given on plaintiff's behalf without objection are properly refused. Bentley, Shriver & Co. v. Edwards [Md.] 60 A. 283. To submission on theory that defendant was undisclosed principal of her husband. Mollineaux v. Clapp, 90 N. Y. S. 880. Charge on exemplary damages. Morning Journal Ass'n v. Duke [C. C. A.] 128 F. 657. If given without objection become the law of the case. Atchison, etc., R. Co. v. Ringle [Kan.] 80 P. 43.

66. Cooper v. New York, etc., R. Co. [N. Y.] 72 N. E. 518.

67. The Fair v. Hoffman, 209 Ill. 330, 70 N. E. 622.

68. Allowing preference. Cohen v. Interurban St. R. Co., 90 N. Y. S. 479.

69. That it is not unanimous. Wores v. Preston, 4 Ariz. 92, 77 P. 617. For failure to answer interrogatories. Mayo v. Halley, 124 Iowa, 675, 100 N. W. 529. That it is not for specific sum. Steinhart v. Enteen, 43 Misc. 388, 87 N. Y. S. 482. Where defendant objected to the admission of the testimony later made the subject of certain special findings, and also by special charges tried to show his phase of the case as different from the said special findings, and objected again in a motion for a new trial, held sufficient objections. White v. Simonton [Tex. Civ. App.] 79 S. W. 621. Correctness of the findings of the jury as to the quantum of damages in the absence of an objection by motion to set aside the verdict or otherwise. Verdict subject to action of trial court on

or decree,[71] to the sufficiency of a motion for a new trial,[72] and to the findings of a commissioner,[73] or assessor.[74] An objection in the court below will not, however, be held necessary where there is no occasion or opportunity therefor.[75]

A failure to object to the introduction of evidence does not prevent a party from attacking its sufficiency,[76] nor preclude him from objecting to an instruction erroneously allowing the jury to consider it as an element of damage,[77] nor does the mere fact that evidence on a collateral matter is received without objection justify the admission of evidence in rebuttal.[78] An instruction is not open to criticism as misleading where it exactly corresponds to the language of an issue submitted, to which no exception was taken.[79]

A party permitting evidence to be introduced without objection is not ordinarily entitled to have it stricken,[80] unless it appears that he had no opportunity to object before the question was answered,[81] or that the answer is not such as could reasonably have been anticipated.[82]

Matters not objected to[83] or considered in an intermediate court will not be considered on appeal to the supreme court.[84]

demurrer to evidence. Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378.

70. Where finding on value of property was not objected or excepted to, and sufficiency of the evidence is not brought before the supreme court, contention that judgment is excessive will not be considered. Schilling v. Curran [Mont.] 76 P. 998. That the court erred in fixing the date from which certain interest should be computed. Henderson v. Kibble, 211 Ill. 556, 71 N. E. 1091.

71. That it was prematurely entered before time to answer had expired. Patterson v. Johnson [Ill.] 73 N. E. 761. Decree in equitable partition proceeding will not be reopened on ground that debts on which it was based are not quite due, where plaintiff made no reference to that fact in petition, and no objection at hearing on that ground, and notes matured before bill of review was filed, or any effort was made to enforce decree. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322.

72. That moving party did not state the grounds relied on in writing, where no rule to compel him to do so is entered or applied for, and no objection. Chicago Union Traction Co. v. Chicago, 209 Ill. 444, 70 N. E. 659.

73. Objection to the finding of commissioners in partition that the land could not be divided must be made by objecting to their report and offering evidence in support of the objection, or it will not be reviewed on appeal. Miller v. Lanning, 211 Ill. 620, 71 N. E. 1115.

74. Must take specific objections to them and request so much of the evidence to be reported as bears on the points covered by the exceptions. Cannot be reviewed on exceptions to order refusing to recommit. National Mach. & Tool Co. v. Standard Shoe Machinery Co. [Mass.] 70 N. E. 1038.

75. Where recovery was sought on ground of fraud only, and court found fraud, and plaintiff first claimed on appeal that judgment could be supported on ground of mistake, defendant could not be held to have waived variance. Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677.

76. To show appointment of trustee in bankruptcy. Page v. Roberts, Johnson & Rand Shoe Co., 103 Mo. App. 662, 78 S. W. 52.

77. Lennox v. Interurban St. R. Co., 93 N. Y. S. 230.

78. Pichon v. Martin [Ind. App.] 73 N. E. 1009.

79. Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226.

80. Astill v. South Yuba Water Co. [Cal.] 79 P. 594; Mann v. Balfour [Mo.] 86 S. W. 103; Walker v. McCormick, 88 N. Y. S. 406; Hogen v. Klabo [N. D.] 100 N. W. 847.

81. Astill v. South Yuba Water Co. [Cal.] 79 P. 594.

82. Where question is susceptible of a competent answer, the remedy, in case the answer is actually incompetent, is by motion to exclude it, and not by objection to the question. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493.

83. That there was no evidence to sustain allegation that plaintiff was directed to go between cars, where he was injured. Chicago & E. I. R. Co. v. White, 209 Ill. 124, 70 N. E. 588. As to instructions and admission of evidence. Kehl v. Abram, 210 Ill. 218, 71 N. E. 347. Instructions. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. That issues were improperly limited. Chicago & E. I. R. Co. v. Coggins, 212 Ill. 369, 72 N. E. 376. Where absence of original answer is waived in circuit court on appeal from county court, and case was tried on pleadings there filed, such absence cannot be relied on in court of appeals. Commonwealth v. Higgins' Trustee, 26 Ky. L. R. 910, 82 S. W. 601. An issue not raised by the pleadings or in argument in the trial court or court of appeal. Sintes v. Commerford, 112 La. 706, 36 So. 656. Objection that claimant filed two separate claims against estate on which separate decrees were rendered in probate court, and that record on appeal to district court failed to show which was appealed from not available in supreme court in absence of motion to dismiss in district court. Gillett v. Chavez [N. M.] 78 P. 68. Confined to points made in court of civil appeals. Collum v. Sanger Bros. [Tex.] 83 S. W. 184. Point that damages were too

Jurisdiction.[85]—An objection to the jurisdiction of the court over the subject-matter may as a general rule be raised at any time,[86] but objections to jurisdiction of the person are generally held to be waived by appearing and answering without raising them.[87]

Parties.[88]—The objection that there is a defect[89] or misjoinder of parties,[90] or that plaintiff is a married woman and cannot sue in her own name, cannot be raised for the first time on appeal.[91]

To pleadings.[92]—Technical defects or insufficiencies, which could not have been corrected in the court below, cannot be objected to for the first time on appeal.[93] The rule applies to objections that the allegations are indefinite and

small. Peden v. Crenshaw [Tex.] 84 S. W. 362.

84. Errors assigned in appellate court but not argued or brought to its attention. Dunn v. Crichfield, 214 Ill. 292, 73 N. E. 386; United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803; Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50.

85. See 2 Curr. L. 1600.

86. See, also, Appearance, § 3, 3 Curr. L. 302; Jurisdiction, § 14, 4 Curr. L. 356; Process, 4 Curr. L. 1070. Midler v. Lese, 91 N. Y. S. 148. B. & C. Comp. Or. § 72. Kalyton v. Kalyton [Or.] 78 P. 332. Mont. Code Civ. Proc. § 685. Oppenheimer v. Regan [Mont.] 79 P. 695. When answer accompanied by demurrer [Mansf. Dig. Ind. T. § 5054; Ann. St. 1899, § 3259]. Ansley v. McLoud [Ind. T.] 82 S. W. 908. Arising from defect in proof of service of process. Skinner v. Jordan, 91 N. Y. S. 322. Trial of action elsewhere than at court house, without written stipulation provided for by statute. Armstrong v. Loveland, 90 N. Y. S. 711. Will not be considered where only urged in lower court by evidence offered in support of motion to set aside default. Gage v. Chicago, 211 Ill. 109, 71 N. E. 877. To judgment confirming special assessment because of defects in preliminary proceedings. Not waived by general appearance. Chicago Union Traction Co. v. Chicago, 209 Ill. 444, 70 N. E. 659. Duty of circuit court of appeals, on appeal in action removed from state court, to determine whether record exhibits a case properly removable, regardless of whether jurisdiction of Federal court objected to either in court below or on appeal. Fred Macey Co. v. Macey [C. C. A.] 135 F. 725.

87. See, also, Appearance, § 3, 3 Curr. L. 302; Jurisdiction, § 14, 4 Curr. L. 356; Process, § 7, 4 Curr. L. 1083. School District No. 94 v. Gautier, 13 Okl. 194, 73 P. 954. Irregularity in service of process. Lesser v. Adolph, 91 N. Y. S. 705.

88. See 2 Curr. L. 1600.

89. B. & C. Comp. Or. §§ 68, 71. Thompson v. Hibbs [Or.] 76 P. 778. Waived unless raised by answer or demurrer. Anderson v. Baughman [S. C.] 48 S. E. 38. May, however, be brought in by amendment, if necessary. Oneida Tp. v. Allen [Mich.] 100 N. W. 441. Party not indispensable. Buckingham v. Estes [C. C. A.] 128 F. 584.

90. Osgood v. Skinner, 211 Ill. 229, 71 N. E. 869; San Antonio & A. P. R. Co. v. Jackson [Tex. Civ. App.] 85 S. W. 445.

See, also, Pleading, 4 Curr. L. 980.

91. That must sue by trustee or next friend. Buckingham v. Estes [C. C. A.] 128 F. 584.

92. See 2 Curr. L. 1598.

For a full discussion of the mode of asserting objections to pleadings, and of the waiver of objections thereto and the cure of defects therein, see Pleading, §§ 10, 11, 4 Curr. L. 1031, 1038.

93. Complaint will be upheld if facts alleged, with all reasonable deductions that can be drawn therefrom, are sufficient to show cause of action. Boglino v. Giorgetta [Colo. App.] 78 P. 612. Sufficiency of plea of limitations as answer to action on statute prescribing penalty. Demurrer only on ground that action was not under statute. Davenport v. Lines [Conn.] 59 A. 603. That bill for infringement of patent insufficiently describes it, where did not demur or otherwise object thereto, but admitted existence of patent. Lane v. Levi, 21 App. D. C. 168. Nor can he question sufficiency of such allegations to give jurisdiction in equity. Id. Complaint sufficient in absence of special demurrer. Murry v. Nixon [Idaho] 79 P. 643. Where defendant answered after demurrer was overruled and did not, in answer, object that bill did not sufficiently allege plaintiff's ownership or occupancy of land in controversy. Glos v. Hayes, 214 Ill. 372, 73 N. E. 802. Must be total absence of essential averment, or presence of averment absolutely destroying plaintiff's right to recover. Ohio Oil Co. v. Detamore [Ind.] 73 N. E. 906; Thompson v. Jordan [Ind.] 73 N. E. 1087. Good where facts omitted might be supplied by proof, and complaint sufficient to bar another action for same cause. Embree v. Emmerson [Ind. App.] 74 N. E. 44; Crystal Ice & Cold Storage Co. v. Marion Gas Co. [Ind. App.] 74 N. E. 15; Perry-Matthews-Buskirk Stone Co. v. Speer [Ind. App.] 73 N. E. 933. Complaint sufficient after verdict. Minnich v. Swing [Ind. App.] 73 N. E. 271. May not object to answer as cross petition, or question right to have issues raised thereby determined. Page v. Southern Const. Co., 25 Ky. L. R. 1634, 78 S. W. 879. Not by one pleading to declaration without objection. Fowles v. Rupert [Mich.] 101 N. W. 202. Not raised in probate court or in petition for appeal. In re Alexander [Mich.] 99 N. W. 746. Where case was tried on pleadings of rival claimants and not on bill of interpleader, held too late to attack judgment for insufficiencies of such bill which could have been corrected before trial. Supreme Council of Legion of Honor v. Palmer, 107 Mo. App. 157, 80 S.

uncertain,[94] or are not sufficiently broad to admit certain evidence,[95] that causes of action are improperly joined in one count,[96] that different causes of action are jumbled together,[97] that a plea was filed too late,[98] that a pleading is not properly signed[99] or verified,[1] and to objections to allowing the filing of supplemental pleadings.[2]

An objection to the fundamental sufficiency of the complaint may, however, be made at any time.[3]

Time of objection.[4]—Objections to evidence,[5] or to a variance between the pleadings and the proof, must be taken when the evidence is offered,[6] to a question before it is answered,[7] to the jury panel before the jury is sworn,[8] to

W. 699. Must stand unless wholly fails to state cause of action, even defectively. Pence v. Mercantile Town Mut. Ins. Co., 106 Mo. App. 402, 80 S. W. 746. Petition sufficient after verdict. McKinstry v. St. Louis Transit Co., 108 Mo. App. 12, 82 S. W. 1108. Objection to defective statement of good cause of action in election contest. Lemaire v. Walsh [Nev.] 74 P. 801. Complaint held to sufficiently disclose that action was brought by individuals composing firm, in absence of special exception. Scott v. Llano County Bank [Tex. Civ. App.] 85 S. W. 301. Averments held sufficient to admit evidence as to custom, in absence of special demurrer. Gammel-Statesman Pub. Co. v. Monfort [Tex. Civ. App.] 81 S. W. 1029. Where defendant did not object to evidence tending to show interstate character of commerce in which defendant was engaged when plaintiff was injured, or except to instructions applying Federal statute in regard to automatic couplers, could not object on appeal that petition did not allege that it was interstate commerce. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

94. Mere uncertainty or inadequacy. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247. Allegations as to ownership of property sufficient after judgment. Rodgers v. Western Home Town Mut. Fire Ins. Co. [Mo.] 85 S. W. 369. That the declaration is not sufficiently specific. Quigley v. Pennsylvania R. Co., 210 Pa. 162, 59 A. 958. That description of property in complaint to quiet title is insufficient. Thomas v. Wilcox [S. D.] 101 N. W. 1072. An objection that petition in action to enforce stockholder's liability is indefinite, in not disclosing whether corporate obligations were unconditional or were guaranties, and therefore conditional. Anglo-American Land, Mortg. & Ag. Co. v. Lombard [C. C. A.] 132 F. 721.

95. Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084.

96. Should be taken by demurrer or answer. Owens v. Carthage & W. R. Co. [Mo. App.] 85 S. W. 987.

97. McConnell v. Combination Min. & Mill. Co. [Mont.] 79 P. 248.

98. Privilege. Leahy v. Ortiz [Tex. Civ. App.] 85 S. W. 824. That defendant has waived its right to claim that the amended complaint set up a new cause of action. Mackey v. Northern Mill Co., 210 Ill. 116, 71 N. E. 448.

99. That complaint is not signed by plaintiff or his attorneys. Defendants voluntarily appearing and answering are bound by judgment. Mann v. Carson [Ind. T.] 82 S. W. 692.

1. Pryor v. Walkerville [Mont.] 79 P. 240.

2. Hodges v. Price [Wash.] 80 P. 202.

3. Smiley v. Sioux Beet Syrup Co. [Neb.] 101 N. W. 253. Mo. Rev. St. 1899, § 602. Jackson v. Lincoln Min. Co., 106 Mo. App. 441, 80 S. W. 727. The total absence from the complaint of an averment of a fact essential to the existence of the cause of action. Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247; Tomlinson v. Tomlinson, 162 Ind. 530, 70 N. E. 881. Where fails to state cause of action, and shows on its face that it cannot be made to do so by amendment. Harshman v. Northern Pac. R. Co. [N. D.] 103 N. W. 412. A demurrer to a bill for want of equity may first be made on appeal, where the objection could not have been obviated if made in the lower court, is supportive and not subversive of the decree, and is a cause of demurrer on the record going to the whole bill. Weed v. Hunt, 76 Vt. 212, 56 A. 980.

4. See 2 Curr. L. 1601.

5. Kemble v. National Bank of Rondout, 94 App. Div. 544, 88 N. Y. S. 246. That it is of an inferior or secondary nature. Thyll v. New York & L. B. R. Co., 92 App. Div. 513, 87 N. Y. S. 345. Remedy after answer is by motion to strike it out (Buckley v. Westchester Lighting Co., 93 App. Div. 436, 87 N. Y. S. 763; Frank v. Berry [Iowa] 103 N. W. 358), or by a request for an instruction directing the jury to disregard it (Mollineaux v. Clapp, 90 N. Y. S. 880). Cannot be first urged on motion for new trial. Atlantic & B. R. Co. v. Rabinowitz, 120 Ga. 864, 48 S. E. 326. As inadmissible under statute of frauds. Holt v. Howard [Vt.] 58 A. 797. Objection to competency of witness waived by allowing deposition to be read, and cannot be thereafter renewed on trial de novo on appeal. In re Imboden's Estate [Mo. App.] 86 S. W. 263.

6. See, also, Pleading, § 11, 4 Curr. L. 1042. Chicago City R. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103; Hartwell Bros. v. William E. Peck & Co. [Ind.] 71 N. E. 958; Kemble v. National Bank of Rondout, 94 App. Div. 544, 88 N. Y. S. 246. Or by motion to strike. Between judgment pleaded and that shown by transcript. Schuler v. Schuler, 209 Ill. 522, 71 N. E. 16. Waived when first brought to attention of court by request to charge. Steele v. Crabtree [Iowa] 102 N. W. 808. Cannot be made for first time in arrest of judgment. Virginia & S. W. R. Co. v. Bailey [Va.] 49 S. E. 33.

7. Western Union Tel. Co. v. Bowman

misconduct of the jury when it is discovered,[9] to a defect of parties when disclosed by the evidence,[10] to pleadings,[11] or to the manner of instituting the proceedings,[12] or to a party's physical or mental inability to go to trial, before trial,[13] and to a verdict when it is received.[14]

Instructions must be objected to when given,[15] or, in some states, before verdict.[16]

The question of the sufficiency of the evidence to warrant a verdict for plaintiff must be raised before the evidence is closed.[17] Objection to an improper argument may be made at its close.[18] Questions as to alleged errors in taking depositions and in the report of a special master should be raised before judgment.[19]

§ 5. *Necessity of motion or request. In general.*[20]—In some states errors in a judgment are no ground for reversal in the absence of a motion to correct them in the lower court.[21] In West Virginia a motion to reverse, made in the lower court, is a condition precedent to the right to appeal from a decree against a party on a bill taken for confessed as to him.[22] The objection that a suit is improperly brought in equity is waived by failure to move to transfer it to a court of law,[23] and an objection that the summons was made returnable at chambers instead of at term is waived by failure to move to transfer the case to the proper docket.[24] If counsel desire the court to direct a witness to make responsive answers, they should request him to do so.[25] The fact that the court did not rule on a question in a particular manner cannot be assigned as error where he was not requested to do so.[26]

[Ala.] 37 So. 493; Tanzer v. New York City R. Co., 91 N. Y. S. 334. Objection after questions have been asked and evidence is in record, "I object and take an exception to this line of examination," is of no force. Willett v. Morse [N. J. Law] 58 A. 72. Cannot take chances as to answer, and accept or reject it, as may seem advisable, after it is in. Id.

8. A party cannot after verdict take advantage of the fact the names of two jurors did not appear on the jury list, even though he was ignorant of the fact. Faulkner v. Snead [Ga.] 49 S. E. 747.

9. Cannot wait until after verdict and allege it for first time on motion for new trial. Olivares v. San Antonio, etc., R. Co. [Tex. Civ. App.] 84 S. W. 248.

10. Cannot first be raised on motion for new trial. Young v. Stickney [Or.] 79 P. 345.

11. At the first term. Latimer v. Irish-American Bank, 119 Ga. 887, 47 S. E. 322. The objection that the attorney signing the papers on motion for a new trial is not the attorney of record is waived by admitting service without objection and serving papers in reply on him. Objection must be made when papers served. Smith v. Smith, 145 Cal. 615, 79 P. 275.

See, also, Pleading, § 11, 4 Curr. L. 1038.

12. Objection that contempt proceedings were not instituted by attachment or order to show cause is waived by failure to make it at special term. Maigille v. Leonard, 92 N. Y. S. 656.

13. Cannot ordinarily present it as ground for a new trial in case of dissatisfaction with the result. Chapman v. Pendleton [R. I.] 59 A. 928.

14. Wores v. Preston, 4 Ariz. 92, 77 P. 617.

15. Improper statement of nonessential parts of plaintiff's claim must be called to attention of court before case is finally submitted to jury. McDonald v. Smith [Mich.] 102 N. W. 668. As misleading or prejudicial. Olson v. Chicago, etc., R. Co. [Minn.] 102 N. W. 449.

16. Collins v. George, 102 Va. 509, 46 S. E. 684.

17. Elwell v. Roper, 72 N. H. 585, 58 A. 507.

18. It is sufficient if objection is made to the judge and exception taken to his ruling. Not necessary to interrupt argument. Texas Cent. R. Co. v. Pledger [Tex. Civ. App.] 81 S. W. 755.

19. Too late to raise them by motion for rehearing, when are result of counsel's own negligence. Bracey-Welles Const. Co. v. Terry [Ind. T.] 82 S. W. 846.

20. See 2 Curr. L. 1602.

21. Ky. Civ. Code, § 763. Horn v. Carroll, 25 Ky. L. R. 2305, 80 S. W. 518.

22. Code 1899, c. 134. Morrison & Co. v. Leach, 55 W. Va. 126, 47 S. E. 237; Cipher v. Bowen [W. Va.] 49 S. E. 128. Does not apply to a decree reversing a decree on motion. Appeal lies direct in such case. Morrison & Co. v. Leach, 55 W. Va. 126, 47 S. E. 237. Appeal after such motion brings up all the errors of law in the decree. George v. Zinn [W. Va.] 49 S. E. 904.

23. Cribbs v. Walker [Ark.] 85 S. W. 244.

24. Jones v. Madison County Com'rs, 135 N. C. 218, 47 S. E. 753.

25. Otherwise not entitled to reversal because answer is irresponsive. Brown v. Harris [Mich.] 102 N. W. 960.

26. Childs v. Bolton [S. C.] 48 S. E. 618.

Error in rendering judgment for costs must ordinarily be brought to the court's attention by motion for a new trial or for their retaxation;[27] but a motion for retaxation is not a necessary prerequisite to the consideration of the question on appeal, where the objection is to the taxation of any costs and not to the amount taxed.[28]

Motion for a judgment or nonsuit, or to direct a verdict.[29]—By failure to move to dismiss the complaint or for judgment at the close of plaintiff's case,[30] or for a nonsuit, defendant concedes that there is a question of fact for the court or jury to decide as between the parties.[31] Defendant's rights are preserved by moving for a nonsuit at the close of plaintiff's case, and for a dismissal of the complaint at the close of the evidence, if in no view of the evidence could plaintiff recover.[32]

The question whether a particular question is one of law and whether the court erred in submitting it to the jury may be raised on appeal, though appellant did not move for a directed verdict.[33] Where a motion to direct a verdict is sustained, the party making it will ordinarily be deemed to have waived his right to have questions of fact passed upon by the court or jury.[34] This rule is, however, based upon reason, and is governed somewhat by the circumstances of the particular case.[35] Where its strict application would work injustice, it may be waived or disregarded by the appellate court.[36] The supreme court cannot consider a contention that the verdict is not supported by the evidence where no effort was made to have the case withdrawn from the jury.[37]

Motion to strike out.[38]—A party cannot, on appeal, complain that an answer is not responsive to the question,[39] or of a voluntary statement of a witness, in the absence of a motion to strike it out,[40] made at the proper time.[41] The motion should call the court's attention to the particular objection relied on.[42]

To effect the exclusion of evidence material to only one of two counts in the complaint, and to avail himself of an adverse ruling thereon, defendant should

27. Cunningham v. McDonald [Tex. Civ. App.] 80 S. W. 871.

28. Guinn v. Iowa, etc., R. Co. [Iowa] 101 N. W. 94.

29. See 2 Curr. L. 1606.

30. Rapp v. Hutchinson Stair Elevator Co., 87 N. Y. S. 459; Parker v. Homan, 88 N. Y. S. 137.

31. McDowell v. Syracuse Land & Steamboat Co., 44 Misc. 627, 90 N. Y. S. 148. Not strictly enforced in appeals from municipal court, and omission not obstacle to reversal in such case where judgment is clearly against weight of evidence. Engel-Heller Co. v. Dineen, 91 N. Y. S. 336.

32. Raymond v. Tallman, 91 N. Y. S. 670.

33. Question that the court should have held as a matter of law that certain papers did in effect constitute a chattel mortgage void as against plaintiff. Appellate division may review questions of law and fact and reverse when judgment is against weight of evidence. Dickinson v. Oliver, 96 App. Div. 65, 89 N. Y. S. 52.

34. Where he neglects specifically to request submission of issues of fact. Rosenstein v. Traders' Ins. Co., 92 N. Y. S. 326.

35. Defendant's request held not to involve concession that there did not exist question of fact necessary to be settled in favor of plaintiffs before they could recover upon their theory. Rosenstein v. Traders' Ins. Co., 92 N. Y. S. 326.

36. Rosenstein v. Traders' Ins. Co., 92 N. Y. S. 326.

37. Can consider questions of law only [Hurd's Rev. St. Ill. 1903, c. 110, § 90]. Morgan v. McCaslin, 213 Ill. 358, 72 N. E. 1066.

38. See 2 Curr. L. 1606.

39. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818; Hoffman v. Loud & Sons Lumber Co. [Mich.] 100 N. W. 1010. Part of answer. Cashin v. New York, etc., R. Co., 185 Mass. 543, 70 N. E. 930. That witnesses improperly stated their conclusions in answer to proper questions. Hallum v. Omro [Wis.] 99 N. W. 1051. Objectionable portion of answer to question, not calling for objectionable matter, no ground for reversal where question not objected to before answer, and no motion to strike it, or request for instruction to disregard it. Beyer v. Isaacs, 93 N. Y. S. 312.

40. Continental Casualty Co. v. Lloyd [Ind.] 73 N. E. 824.

41. Motion to strike out evidence relating to consequences of injury not pleaded and not shown to necessarily result from those pleaded held timely, though made at close of testimony. Wilkins v. Nassau Newspaper Delivery Exp. Co., 90 N. Y. S. 678.

42. Motion held to have sufficiently called court's attention to fact that retention of evidence was error. Date v. New York Glucose Co., 93 N. Y. S. 249.

move to strike it out after plaintiff's election of the count on which he will rely.[43] A motion to strike out the irrelevant parts of certain correspondence introduced in evidence is necessary, where a part of it is relevant.[44]

Motion for a new trial.[45]—In some states, in an action at law, a motion for a new trial is a condition prerequisite to a review of alleged errors occurring during the progress of the trial.[46] Such a motion is necessary to review a ruling on demurrer to a pleading,[47] or to the evidence,[48] an order allowing the filing of a pleading not filed in a lower court,[49] alleged errors in the admission,[50] or exclusion of evidence,[51] remarks of the trial court in overruling objections to evidence,[52] to save the objection that there is a variance between the pleadings and the proof,[53] that a party is entitled to a verdict under the undisputed evidence,[54] or that a verdict is not unanimous,[55] that the verdict,[56] findings,[57] or judgment, is not sustained by the evidence,[58] that the damages recovered are excessive,[59] or that the damages assessed by the court are too small,[60] that the court rendered judgment without hearing the evidence,[61] or to review an alleged error

43. Pringle v. King [Ariz.] 78 P. 367.

44. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465.

45. See 2 Curr. L. 1603.

46. Pringle v. King [Ariz.] 78 P. 367; Spolek Denni Hlasatel v. Hoffman, 105 Ill. App. 170; Blattner v. Metz [Mo. App.] 80 S. W. 270; Taylor v. Brotherhood of Railroad Trainmen, 106 Mo. App. 212, 80 S. W. 306; State v. Ellsworth [Neb.] 100 N. W. 314. Absence precludes consideration of errors for which a new trial might have been had. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50. Kan. Civ. Code, § 306. Coy v. Missouri Pac. R. Co. [Kan.] 76 P. 844. A party complaining of rulings and charges by direct exception and failing to move for a new trial, stakes his right to a reversal on strictly legal grounds. Little v. Southern R. Co., 120 Ga. 347, 47 S. E. 953. Matters which are causes for new trial cannot be assigned as independent errors. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000. Failure of party to file motion after verdict on plea in abatement in an attachment proceeding is a waiver of errors occurring at trial on plea, though he files motion on merits in main issue [Mo. Rev. St. 1899, § 407]. Alexander v. Wade [Mo. App.] 80 S. W. 917. Where for want of a notice of intention, the court below was without authority to entertain motion, an appeal brings up the judgment alone. Under S. D. Comp. Laws 1887, § 5090, notice of intention to move for new trial necessary prerequisite. MacGregor v. Pierce [S. D.] 95 N. W. 281. Errors dependent upon evidence in jury trial [Utah Rev. St. 1898, § 3304, as amended by Sess. Laws 1901, p. 25, c. 27]. Touse v. Consolidated R. & Power Co. [Utah] 80 P. 506. Rulings of the court upon objections being excepted to, and incorporated in the motion for new trial as the grounds therefor, may be reviewed upon an appeal from the order overruling the motion. Stickney v. Hughes [Wyo.] 75 P. 945.

47. Overruling of demurrer to petition for misjoinder of causes of action. MacDonald v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1001.

48. Coy v. Missouri Pac. R. Co. [Kan.] 76 P. 844.

49. Filing of counterclaim in circuit court not proffered in justice court from which case was appealed. Cedar Hill Orchard & Nursery Co. v. Heiney, 106 Mo. App. 302, 80 S. W. 278.

50. Mt. Nebo Anthracite Coal Co. v. Williamson [Ark.] 84 S. W. 779; Young v. Stevenson [Ark.] 86 S. W. 1000; Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Hartwell Bros. v. Peck & Co. [Ind.] 71 N. E. 958; Storer v. Markley [Ind.] 73 N. E. 1081. Allowing plaintiff in action against estate of decedent to testify in his own behalf. Green's Ex'r v. Green, 26 Ky. L. R. 1007, 82 S. W. 1011; Johnson v. Songster [Neb.] 103 N. W. 274.

51. Gooding v. Watkins [Ind. T.] 82 S. W. 913; Chicago & E. I. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Johnson v. Songster [Neb.] 103 N. W. 274.

52. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957.

53. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50.

54. Nabours v. McCord [Tex. Civ. App.] 82 S. W. 153.

55. Wores v. Preston, 4 Ariz. 92, 77 P. 617.

56. Schulte v. Chicago, etc., R. Co., 124 Iowa, 191, 99 N. W. 714; Dodd v. Presley [Tex. Civ. App.] 86 S. W. 73.

57. Where a finding is within the issues presented. Kisling v. Barrett [Ind. App.] 71 N. E. 507.

58. Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Dawes v. Great Falls [Mont.] 77 P. 309; Cassidy v. Collier [Neb.] 100 N. W. 802; Leavy v. Collier [Neb.] 100 N. W. 802; Johnson v. Songster [Neb.] 103 N. W. 274. Where is jury trial. Hausmann v. Trinity & B. V. R. Co. [Tex. Civ. App.] 82 S. W. 1052.

59. Hugus & Co. v. Hardenburg [Colo. App.] 76 P. 543.

60. Peden v. Crenshaw [Tex.] 84 S. W. 362.

61. That the court, in a partition suit, erred in refusing a trial of the issues joined on the pleadings, and in rendering judgment over objection without hearing evidence. Van Buskirk v. Stover, 162 Ind. 448, 70 N. E. 520.

in the refusal of the trial court to submit the cause to a jury,[62] or a judgment in habeas corpus proceedings.[63]

It is not necessary in order to raise the question whether the pleadings sustain the judgment,[64] to obtain a review of a judgment on the pleadings,[65] a judgment in an error proceeding affirming or reversing the decision of an inferior court or tribunal,[66] a probate order on the merits,[67] or a ruling directing a verdict.[68] Nor is it necessary to review errors apparent on the face of the record,[69] or to bring up the evidence in a suit in equity.[70] There is a conflict of authority as to whether it is necessary to a review of alleged errors in the giving[71] or refusing of instructions.[72]

In some states no such motion is necessary where the rulings complained of have been properly excepted to.[73]

The motion must be timely,[74] the grounds thereof must be stated, and the objections specifically pointed out.[75] Where it is based on matters outside the record, evidence must be offered in support of it.[76]

62. Meloy v. Weathers [Ind. App.] 73 N. E. 924. Dismissal of complaint. Muratore v. Pirkl, 93 N. Y. S. 484.

63. Judgment upon application for writ, where trial was had and petitioner's right to be discharged determined. Kellar v. Davis [Neb.] 95 N. W. 1028.

64. To review judgment of dismissal, notwithstanding verdict for plaintiff because petition did not state facts sufficient to constitute cause of action. Eccles v. United States Fidelity & Guaranty Co. [Neb.] 100 N. W. 942. Motion to dismiss proceedings in error for failure to make motion for new trial will not be in such case Id. In the absence of motion, the only question open for review is the sufficiency of the pleadings to sustain the judgment. Bixby v. Jewell [Neb.] 101 N. W. 1026; Johnson v. Songster [Neb.] 103 N. W. 274.

65. Dunn v. Claunch [Okl.] 78 P. 388.

66. Judgment of the district court entered on the hearing of an appeal taken from an order of a license board granting or refusing a license to sell intoxicating liquors. In re Krug [Neb.] 101 N. W. 242.

67. Useless disposition of attorneys to inject the procedure of a motion for new trial into probate litigation. In re Geary's Estate [Cal.] 79 P. 855.

68. If exception is taken. Wheeler v. Seamans [Wis.] 102 N. W. 28; Gerhards v. Johnson, 105 Ill. App. 65.

69. Will be considered though there is no bill of exceptions and no showing that a motion for a new trial or in arrest of judgment was made. Hill-O'Meara Const. Co. v. Sessinghaus, 106 Mo. App. 163, 80 S. W. 747.

70. Action on note by executrix and to foreclose mortgage securing same. List's Ex'x v. List, 26 Ky. L. R. 691, 82 S. W. 446. Rule not affected by the fact that the parties might have caused some question of fact in the case to be tried as an issue out of chancery. Id.

71. Held necessary. Pringle v. King [Ariz.] 78 P. 367; Kehl v. Abram, 210 Ill. 218, 71 N. E. 347; National Bank v. Schufelt [Ind. T.] 82 S. W. 927; Hoskins' Adm'r v. Brown [Ky.] 84 S. W. 767. To raise question of sufficiency of evidence to support them. Touse v. Consolidated R. & Power Co. [Utah] 80 P. 506.

Not necessary: Fact that instruction was attacked in motion on some grounds not waiver of right to attack it on others. Northern Tex. Traction Co. v. Jamison [Tex. Civ. App.] 85 S. W. 305.

72. Held necessary: Schenck v. Griffith [Ark.] 86 S. W. 850; Jennings v. Kansas City, 105 Mo. App. 677, 78 S. W. 1041. Modifying instructions. Central Union Bldg. Co. v. Kolander, 212 Ill. 27, 72 N. E. 50. Sufficiency of evidence to warrant refusal of instruction to return verdict for defendant. Touse v. Consolidated R. & Power Co. [Utah] 80 P. 506.

Not necessary if ruling excepted to. Schulte v. Chicago, etc., R. Co., 124 Iowa, 191, 99 N. W. 714.

73. Assignment of error sufficient. Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529. Errors which were involved in the disposition of the case, and were fully presented to the court below, and rulings had thereon and exceptions taken. Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632. Rulings on evidence. Under Mills' Ann. Code Colo. § 393, providing that motion is not necessary where alleged errors have been once passed upon. Applies to appeals in eminent domain proceedings [Mills' Ann. St. § 1727]. Loloff v. Sterling, 31 Colo. 102, 71 P. 1113. Not necessary in condemnation proceedings in order to obtain review of alleged errors in exclusion of evidence of damage to lands not taken [2 Bail. Ann. Codes & St. § 5056]. Sultan Water & Power Co. v. Weyerhauser Timber Co., 31 Wash. 558, 72 P. 114.

74. Johnson Bros. v. Wright, 124 Iowa, 61, 99 N. W. 103. Appeal will not be dismissed for failure to serve and file motion, where paper was served and filed which was, without objection, treated by parties and court as such motion. Crooker v. Pacific Lounge & Mattress Co., 34 Wash. 191, 75 P. 632.

75. Court will not look beyond the motion or the assignment of error in the bill of exceptions. Georgia Northern R. Co. v. Hutchins, 119 Ga. 504, 46 S. E. 659. Must be complete in itself, or in connection with exhibits attached to motion. Central of Ga. R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590. Must set out testimony referred to. Robert Port-

Request for instructions.[77]—A party cannot ordinarily complain of the failure to give instructions for which he did not ask,[78] nor can he object to instructions, not affirmatively erroneous, for deficiencies therein unless he calls the court's attention thereto and requests an instruction embodying his views.[79] Thus, in the absence of a request, a party cannot complain that the court failed to comprehend all the issues in the instructions given,[80] or to submit a particular issue[81] or phase of the case,[82] or to restrict the effect of the evidence,[83] or to

ner Brewing Co. v. Cooper, 120 Ga. 20, 47 S. E. 631. Judgment overruling motion based on general grounds only, affirmed where evidence was sufficient to support verdict. Central of Georgia R. Co. v. Bagley, 120 Ga. 614, 48 S. E. 179. Must clearly indicate the identity of the particular subject and ruling complained of. Continental Casualty Co. v. Lloyd [Ind.] 73 N. E. 824. Ground that verdict is contrary to law is too vague and indefinite. Hoskins' Adm'r v. Brown [Ky.] 84 S. W. 767; McClintock v. Frohlich [Ark.] 86 S. W. 1001. Objection to evidence too general. Id. It is unnecessary, under Minn. Laws 1901, p. 121, c. 113, dispensing with the necessity of exceptions, to embody in the notice of motion the general grounds specified in Gen. St. 1894, § 5398, except, perhaps, where mere reference to ruling complained of would not disclose the particular respects in which it is claimed to be erroneous. King v. Burnham [Minn.] 101 N. W. 302. Objection that court erred in allowing any salary to defendant does not raise question that amount allowed was excessive. Bevier Black Diamond Coal Co. v. Watson [Mo. App.] 80 S. W. 287. Must point out particular phase or issue on which judgment is assailed as not supported by evidence. Nabours v. McCord [Tex. Civ. App.] 82 S. W. 153. Motion on ground that verdict is excessive (International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991; Houston & T. C. R. Co. v. Shults [Tex. Civ. App.] 78 S. W. 45), or that verdict and judgment are contrary to the law and the evidence too general (Dodd v. Presley [Tex. Civ. App.] 86 S. W. 73).

76. Shaw v. Goldman, 183 Mo. 461, 81 S. W. 1223.

77. See 2 Curr. L. 1605.

78. Bingham v. Davidson [Ala.] 37 So. 738; Nadeau v. Sawyer [N. H.] 59 A. 369; Kaufman v. Pittsburg, etc., R. Co. [Pa.] 60 A. 2; Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21; Hawkins v. Casey [Wash.] 80 P. 792. Requests must be in writing (Cooper v. Nisbet, 119 Ga. 752, 47 S. E. 173; Buchanan v. Ellison, 121 Ga. 772, 49 S. E. 724), and be signed by party or his attorney (Wren v. Howland [Tex. Civ. App.] 75 S. W. 894).

79. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957; Chicago, etc., R. Co. v. Cain [Tex. Civ. App.] 84 S. W. 682. If conceives that instruction, correct in so far as applies to particular issue, may be misapplied. Flowers v. Flowers [Ark.] 85 S. W. 242. A complaint that the court omitted to instruct the jury as to pertinent matters is not brought under review by an assignment that certain instructions excepted to were incorrect in that other proposition should have been charged in the same connection. Robert Portner Brew. Co. v. Cooper, 120 Ga. 20, 47 S. E. 631. Where whole theory of plaintiff's case was based on theory that contract was entirely in writing, court not bound of its own motion to give instruction on theory that it was partly in parol. Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co. [Md.] 58 A. 205. Where evidence of a promise and its nonperformance is admitted on issue of fraud, defendant, if he wishes a charge that they do not of themselves constitute fraud, should prefer an appropriate request. McDonald v. Smith [Mich.] 102 N. W. 668.

80. Cornwell v. St. Louis Transit Co., 106 Mo. App. 135, 80 S. W. 744; Gooding v. Watkins [Ind. T.] 82 S. W. 913. Failure to fully state issues in preliminary part of charge, where all material issues raised by pleadings and evidence were covered. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735.

81. Kupferberg v. Central Crosstown R. Co., 88 N. Y. S. 366; Raymond v. Tallman, 91 N. Y. S. 670; Boyles v. Texas & P. R. Co. [Tex. Civ. App.] 86 S. W. 936. Other questions. Spearman v. Sanders, 121 Ga. 468, 49 S. E. 296. Submitting question of plaintiff's social standing. City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997. Where no request was made that court submit question whether conductor was acting within scope of employment in assaulting boy, question not raised by motion for dismissal after close of all the evidence on ground that, if plaintiff's claim was true, conductor's act was willful and without scope of his authority. Hewson v. Interurban St. R. Co., 95 App. Div. 112, 88 N. Y. S. 816. Provided those submitted are in themselves sufficient to dispose of the controversy, and enable the court to proceed to judgment. Falkner v. Pilcher & Co. [N. C.] 49 S. E. 945. Failure to instruct upon law of fellow-servant. Turrentine v. Wellington, 136 N. C. 308, 48 S. E. 739. Where charge contains no affirmative error, cannot complain of omission to submit one of elements of damage for which he might have recovered. St. Louis South Western R. Co. v. Bolton [Tex. Civ. App.] 81 S. W. 123. Rule not changed by Tex. Rev. St. 1895, art. 1316, as amended by Laws 1903, p. 55, c. 39, requiring judge to prepare and deliver written charge. San Antonio & A. P. R. Co. v. Votaw [Tex. Civ. App.] 81 S. W. 130; San Antonio & A. P. R. Co. v. Hahl [Tex. Civ. App.] 83 S. W. 27; Stewart v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 310. Matter of latent defect in coupling pin submitted on question of negligence. San Antonio & A. P. R. Co. v. Hahl [Tex. Civ. App.] 83 S. W. 27. Failure to charge on issue in regard to contributory negligence. International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991.

define a particular term,[84] or to instruct the jury to return a verdict in his favor;[85] or that the charge was not applicable to the facts,[86] or was too general,[87] or not sufficiently full,[88] or exact.[89] A defense as to which no instructions were asked cannot be considered on appeal.[90]

A party is not, however, bound to tender issues which the court has announced that it will not submit,[91] nor does a failure to request a special instruction deprive him of the right to complain of an erroneous one on the same subject to which he has saved an exception.[92]

Requests for instructions should ordinarily be made before argument.[93]

Requests for findings.—Ordinarily a party cannot object to the absence of findings,[94] or to the refusal or failure to make certain findings, unless he requests them,[95] nor to insufficiencies[96] or defects in findings, in the absence of a

82. Thompson v. Bucholz [Mo. App.] 81 S. W. 490.

83. San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025. To a particular party. Eastland v. Maney [Tex. Civ. App.] 81 S. W. 574.

84. "Adverse" and "claim of right." Evans v. Scott [Tex. Civ. App.] 83 S. W. 874. Though requested charge erroneous in some particulars, held sufficient to call court's attention to failure to define such terms, and to require charge covering same. Id. "Reasonable care and diligence." Atlantic Coast Line R. Co. v. Williams, 120 Ga. 1042, 48 S. E. 404. "Ordinary care." Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957.

85. Cook Bros. Carriage Co. v. National Bank of Cleburne [Tex. Civ. App.] 85 S. W. 1169. To withdraw question of fact from jury. International, etc., R. Co. v. Vanlandingham [Tex. Civ. App.] 85 S. W. 847.

86. Gooding v. Watkins [Ind. T.] 82 S. W. 913.

87. Gooding v. Watkins [Ind. T.] 82 S. W. 913; Alderton v. Williams [Mich.] 102 N. W. 753. Where a rule of law is stated in a general way, failure to apply it specifically to the facts involved. Central of Georgia R. Co. v. McClifford, 120 Ga. 90, 47 S. E. 590. Party desiring further elaboration of his contentions. Little v. Southern R. Co., 120 Ga. 347, 47 S. E. 953. If desires court to specially charge how plaintiff could carry burden of proof, or to charge on subject of weight or preponderance of evidence (Powell v. Georgia, etc., R. Co., 121 Ga. 803, 49 S. E. 759), or further instructions on line of those given, must make timely request in writing (Id.). That it is not sufficiently specific. Parman v. Kansas City, 105 Mo. App. 691, 78 S. W. 1046; City of Lexington v. Kreitz [Neb.] 103 N. W. 444. That charge as to the duty to exercise the highest degree of care is not applicable. Zvonik v. Interurban St. R. Co., 88 N. Y. S. 399. Greater particularity. Turrentine v. Wellington, 136 N. C. 308, 48 S. E. 739. That it is not sufficiently distinct and explicit (San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401), or is incomplete and not as full as desired (International & G. N. R. Co. v. McVey [Tex. Civ. App.] 81 S. W. 991). That should be more apt reference to particular facts. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. Instructions as to negligence sufficient in absence of request for more specific one. San Antonio & A. P. R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302. Where charge states correct rule of law applicable to evidence, cannot complain of failure to give qualifications which might have been applicable in view of certain evidence. Id. Of failure to explain fully measure of damages for permanent injuries, where court had charged correctly thereon in general terms. Red River, etc., R. Co. v. Reynolds [Tex. Civ. App.] 85 S. W. 1169. That elements of damage to be considered were not sufficiently defined. Southern Pac. Co. v. Maloney [C. C. A.] 136 F. 171.

88. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571; Wingate v. Johnson [Iowa] 101 N. W. 751; Nadeau v. Sawyer [N. H.] 59 A. 369. Not stating defensive matters as fully as allegations of petition. El Paso Elec. R. Co. v. Harry [Tex. Civ. App.] 83 S. W. 735.

89. More exact definition of degree of care incumbent on plaintiff. Brown v. St. Louis Transit Co. [Mo. App.] 83 S. W. 310.

90. Barber Asphalt Pav. Co. v. Munn [Mo.] 83 S. W. 1062.

91. Need not offer evidence in support of them. Falkner v. Pilcher & Co. [N. C.] 49 S. E. 945.

92. Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226. Failure to request proper charge on measure of carrier's liability for goods lost held not to constitute waiver of error in charge limiting liability to exercise of ordinary care. Bibb v. Missouri, etc., R. Co. [Tex. Civ. App.] 84 S. W. 663.

93. Where record does not disclose that they were so made, will be presumed that they were refused because not made in time. White v. Sun Pub. Co. [Ind.] 73 N. E. 890.

94. Judgment will not be reversed unless party requests them at close of evidence and argument. Mont. Code Civ. Proc. § 1114. Too late when made after findings were filed. Schilling v. Curran [Mont.] 76 P. 998.

95. Request must be in writing, and be made at close of evidence and argument, and must be entered on minutes of court. Bordeaux v. Bordeaux [Mont.] 80 P. 6. Submission of written findings instead of requests held sufficient compliance [Mont. Code Civ. Proc. § 1114]. Quinlan v. Calvert [Mont.] 77 P. 428.

96. Failure to show what condition at-

request for further findings.[97] But no request is necessary where the court states that he will make findings.[98] A failure to make special findings in accordance with the request will not be considered on appeal when not subsequently called to the attention of the trial court.[99]

§ 6. *Necessity of ruling.*[1]—In addition to an objection or motion, there must have been a ruling thereon by the trial judge.[2] Thus, issues ignored, and on which no ruling is sought, though raised by the pleadings,[3] motions which do not appear to have been disposed of,[4] the admissibility of evidence received subject to objection and not subsequently passed on,[5] and matters which the lower court expressly refused to pass on, and reserved for decision on fuller proof, cannot be considered on appeal.[6]

§ 7. *Necessity of exception.*[7]—Objections and rulings must ordinarily be accompanied or followed by exceptions, or they will not be considered on appeal,[8]

tached to delivery of note was. Cannon v. McIntyre [Mich.] 12 Det. Leg. N. 63, 103 N. W. 530.

97. Mont. Code Civ. Proc. § 1114. Bordeaux v. Bordeaux [Mont.] 80 P. 6.

98. May presume that he will make them as to all material facts. Quinlan v. Calvert [Mont.] 77 P. 423.

99. Simon v. Simon [Kan.] 77 P. 571.

1. The "record" must show a ruling or decision made. See Appeal and Review, § 9, 3 Curr. L. 204.

2. Fenn v. Georgia R. & Elec. Co. [Ga.] 50 S. E. 103; Canton Co. v. Baltimore & O. R. Co. [Md.] 57 Atl. 637; Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378. Judgment will not be reversed on account of misconduct of counsel, where no motion for mistrial was made at the time, and no ruling is complained of. Southern R. Co. v. Rollins, 121 Ga. 436, 49 S. E. 290. Propositions to submit the case without argument, made in the presence of the jury, are no ground for reversal where no ruling of the court is invoked in reference thereto, and opposing counsel accepts the proposition. Sullivan v. Padrosa [Ga.] 50 S. E. 142. Nothing to review where there is no ruling by the court during the trial, and no proposition of law held, refused, or modified. Illinois Trust & Sav. Bank v. Pontiac, 212 Ill. 326, 72 N. E. 411. The validity of a statute. Village of Morgan Park v. Knopf, 210 Ill. 453, 71 N. E. 340.

Admissibility of evidence. Mollineaux v. Clapp, 90 N. Y. S. 880; Ocala Foundry & Mach. Works v. Lester [Fla.] 38 So. 56; Fabian v. Traeger [Ill.] 74 N. E. 131; Hoffman v. Loud & Sons Lumber Co. [Mich.] 100 N. W. 1010. Must appear that court overruled objection, and that evidence was admitted. Saenz v. Mumme & Co. [Tex. Civ. App.] 85 S. W. 59. As to whether witness was bound to produce certain papers. Exception to abstract statement of court as to letter afterwards produced and received without objection insufficient. Winn v. Itzel [Wis.] 103 N. W. 220. Motion to exclude a paper admitted in evidence. Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443.

3. As to plaintiff's incorporation. Allen-West Commission Co. v. People's Bank [Ark.] 84 S. W. 1041. Sufficiency of notice of purchase at tax sale not passed on, and not offered in evidence or incorporated in bill of exceptions. David v. Whitehead [Wyo.] 79 P. 19.

4. To strike part of answer before reply filed. Vette v. Evans [Mo. App.] 86 S. W. 504.

5. Naas v. Welter, 92 Minn. 404, 100 N. W. 211. Suit in equity. Donaldson v. Smith, 122 Iowa, 388, 98 N. W. 138. Objection that court erroneously refused to consider such evidence cannot be considered. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090.

6. Owens v. Owens' Estate [Miss.] 37 So. 149.

7. See 2 Curr. L. 1607.

8. Stryker v. Pendergast, 105 Ill. App. 413; Froman v. Wilson [Colo. App.] 78 P. 615; Tillman v. International Harvester Co. [Minn.] 101 N. W. 71; Lee v. Dow [N. H.] 59 A. 374; O'Donnell v. Weiler [N. J. Law] 59 A. 1055; Warden v. Tesla, 93 App. Div. 520, 87 N. Y. S. 853; Netherlands-American Steam Nav. Co. v. Diamond [C. C. A.] 128 F. 570. On appeal from order denying new trial, where no evidence was introduced, only errors at law occurring at trial and excepted to may be considered. Action of court in granting nonsuit. Green v. Duvergey [Cal.] 80 P. 234. On objections to special assessments for local improvements. Fisher v. City of Chicago, 213 Ill. 268, 72 N. E. 680. Can only rule on exceptions taken to specific rulings. Mayo v. Halley, 124 Iowa, 675, 100 N. W. 529. Objection that limitations pleaded in amended answer were not applied by trial court unavailing where not made part of record by bill of exceptions or any order of court. Falls Branch Jellico Land & Imp. Co. v. Com., 26 Ky. L. R. 1028, 83 S. W. 108. Question not open to review where no findings of fact or conclusion of law, and no exception to ruling thereon. Employers' Liability Assur. Corp. v. Grand Rapids Bridge Co. [Mich.] 102 N. W. 975. Questions of law. N. Y. Code Civ. Proc. § 992. Appeal from judgment brings up only questions of law raised by exception at trial, and appellate division cannot, in such case, review exclusion of evidence (Alden v. Supreme Tent, Knights of Maccabees, 178 N. Y. 535, 71 N. E. 104; Mollineaux v. Clapp, 90 N. Y. S. 880), or dismissal of complaint on facts where no exception was taken (Muratore v. Pirkl, 93 N. Y. S. 484). May review exclusion of evidence without exception when appeal is from order denying motion for new trial. Alden v. Supreme

or on motion to set aside the verdict,[9] or for a new trial.[10] An exception must be taken to the granting of a severance,[11] to the overruling of a challenge to a juror,[12] to rulings on demurrer,[13] to the overruling of a motion to strike out a pleading,[14] or for a continuance,[15] to a ruling allowing the filing of an additional pleading on appeal,[16] to an order granting a change of venue,[17] to going to trial without a bill of particulars,[18] to remarks of the trial court,[19] or of counsel,[20] or, in some states, to the denial of a proper motion in regard to such remarks,[21] to the admission[22] or exclusion of evidence,[23] to the giving,[24] modification,[25] or re-

Tent, Knights of Maccabees, 178 N. Y. 535, 71 N. E. 104. In the absence of a certificate or stipulation that the appeal book contains all the evidence given at the trial, review is limited to exceptions taken by appellant. Jones v. Oppenheim, 91 N. Y. S. 343. In Pennsylvania the rules of equity practice provide for filing of exceptions to cover all objections to rulings on evidence, findings, and to the decree, and on appeal to the supreme or superior court, only such matters as have been excepted to and finally passed upon by the court are assignable as error [Sup. Ct. Rule 67]. Swope v. Snyder, 209 Pa. 352, 58 A. 669. Rules are mandatory, and rulings on evidence cannot be reviewed where no exceptions were filed to them, or to findings of fact and conclusions of law. Id. To holding that defendant abandoned homestead. Anderson v. Baughman [S. C.] 48 S. E. 38.

9. Nadeau v. Sawyer [N. H.] 59 A. 369.

10. Carpenter v. Rosenbaum [Ark.] 83 S. W. 1047. Kan. Code Civ. Proc. § 306. St. Louis & S. F. R. Co. v. Werner [Kan.] 78 P. 410.

11. Where, in trespass to try title, defendants' vendor was vouched in as warrantor and was granted severance, and no exception was taken thereto, overruling motion to set aside severance cannot be regarded as reversible error. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

12. Under Pierce's Code, § 5940. State v. Clark, 34 Wash. 485, 76 P. 98.

13. Adams v. Board of Com'rs of Whitley County [Ind.] 72 N. E. 1029; Minnich v. Swing [Ind. App.] 73 N. E. 271.

14. McCroskey v. Mills [Colo.] 75 P. 910.

15. Smith v. Hughes [Tex. Civ. App.] 85 S. W. 936.

16. Allowing filing of counterclaim in circuit court not proffered in justice court from which case was appealed. Cedar Hill Orchard & Nursery Co. v. Heiney, 106 Mo. App. 302, 80 S. W. 278.

17. Wright v. Kansas City [Mo.] 85 S. W. 452.

18. Must show that its absence was called to the attention of the court, or that it was insisted upon before going to trial, or that exception was taken to going to trial without it. Block v. Sherry, 43 Misc. 342, 87 N. Y. S. 160.

19. Wilson v. Royal Neighbors of America [Mich.] 102 N. W. 957; Diamond v. Planet Mills Mfg. Co., 97 App. Div. 43, 89 N. Y. S. 635. On exclusion of evidence (Halverson v. Seattle Elec. Co., 35 Wash. 600, 77 P. 1058), or on overruling objections thereto (Lightfoot v. Winnebago Traction Co. [Wis.] 102 N. W. 30).

20. Decker v. Laws [Ark.] 85 S. W. 425; Chicago City R. Co. v. Gemmill, 209 Ill. 538, 71 N. E. 43; Lee v. Dow [N. H.] 59 A. 374. No reversal where no exception taken at the time, and court not given opportunity to correct error, unless prejudice clearly appears. Streeter v. Marshalltown, 123 Iowa, 449, 99 N. W. 114. To court's adverse ruling, or failure to interfere. Spengler v. St. Louis Transit Co., 108 Mo. App. 329, 83 S. W. 312. Must be shown by bill of exceptions and not brought to attention of trial court by affidavits in support of motion for new trial. Adler v. St. Louis & S. F. R. Co. [Mo. App.] 85 S. W. 948.

21. As, where wrong is not incurable, motion to admonish jury not to consider remarks. Southern Ind. R. Co. v. Fine [Ind.] 72 N. E. 589. Failure to immediately admonish jury not to consider remarks not ground for reversal where not requested, and court stated that he would and did instruct jury to disregard them. Id.

22. Kehl v. Abram, 210 Ill. 218, 71 N. E. 347; Fabian v. Traeger [Ill.] 74 N. E. 131; Selleck v. Garland, 184 Mass. 596, 69 N. E. 345; Stryker v. Pendergast, 105 Ill. App. 413; Lafferty v. Hilliker [Mo. App.] 81 S. W. 910; National Bank v. Schufelt [Ind. T.] 82 S. W. 927; Hausmann v. Trinity & B. V. R. Co. [Tex. Civ. App.] 82 S. W. 1052; City of Tarkio v. Clark [Mo.] 85 S. W. 329; Mollineaux v. Clapp, 90 N. Y. S. 880; Anderson v. Hilker [Wash.] 80 P. 848; Goken v. Dallugge [Neb.] 101 N. W. 244; Heenan v. Forest City Paint & Varnish Co. [Mich.] 101 N. W. 806. No exception taken when question asked, no bill of exceptions asked on the subject, and no mention of it in petition for writ of error. Norfolk R. & Light Co. v. Spratley [Va.] 49 S. E. 502.

23. Howard v. Town of Lamoni, 124 Iowa, 348, 100 N. W. 62. Waives right to rely on statute pleaded by failing to object to exclusive evidence and saving exceptions to ruling, and making offer of proof. Gooding v. Watkins [Ind. T.] 82 S. W. 913.

24. Birmingham Belt R. Co. v. Gerganous [Ala.] 37 So. 929; Dodds v. Gregson, 35 Wash. 402, 77 P. 791; Baden Baden G. M. Co. v. Jose [Colo. App.] 78 P. 313; Auckland v. Lawrence [Colo. App.] 78 P. 1035; Story v. Nidiffer [Cal.] 80 P. 692; Hawkins v. Casey [Wash.] 80 P. 792; McCabe v. Whitman [Mass.] 73 N. E. 535; White v. Sun Pub. Co. [Ind.] 73 N. E. 890; Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505; City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997; Olson v. Chicago, M. & St. P. R. Co. [Minn.] 102 N. W. 449; Parkerson v. Louisville & N. R. Co., 25 Ky. L. R. 2260, 80 S. W. 468; Carpenter v. Rosenbaum [Ark.] 83 S. W. 1047; Bently, Shriver & Co. v. Edwards [Md.] 50 A. 283; Austin v. Fisher Tanning Co., 96 App. Div. 550, 89 N. Y. S. 137; Wright v. Fleisch-

fusal to give instructions,[26] to a ruling limiting the number of instructions,[27] to the manner of submitting interrogatories,[28] to the direction of[29] or refusal to direct a verdict,[30] to the dismissal of the complaint,[31] to an order discharging a rule for judgment for want of a sufficient affidavit of defense,[32] to the findings of fact and conclusions of law made by the court,[33] to the verdict,[34] or judgment,[35] to the denial of a motion to set aside a verdict,[36] to an order referring the

mann, 99 App. Div. 547, 91 N. Y. S. 116; Morning Journal Ass'n v. Duke [C. C. A.] 128 F. 657; Southern Pac. Co. v. Maloney [C. C. A.] 136 F. 171. Otherwise not a ground for new trial [Kan. Code Civ. Proc. § 306]. St. Louis & S. F. R. Co. v. Werner [Kan.] 78 P. 410. In the absence of exceptions will be presumed that the jury were fully and properly instructed. Higgins v. Shepard [Mass.] 70 N. E. 1014; Graves v. Norfolk & S. R. Co., 136 N. C. 3, 48 S. E. 502. To submission of specific questions. Cooper v. New York, etc., R. Co. [N. Y.] 72 N. E. 518. Defendant cannot predicate error on the denial of a motion to dismiss the complaint made at the close of the whole case, where no exception was taken to the charge. Hilgert v. Black, 90 N. Y. S. 1067.

25. Cannot be considered where exceptions do not include the modifications and no appeal is taken from the action modifying the prayers. Brish v. Carter, 98 Md. 445, 57 A. 210.

26. Bingham v. Davidson [Ala.] 37 So. 738; Carpenter v. Rosenbaum [Ark.] 83 S. W. 1047; Auckland v. Lawrence [Colo. App.] 78 P. 1035; Baden Baden Gold Min. Co. v. Jose [Colo. App.] 78 P. 313; Finkbinder v. Ernst [Mich.] 97 N. W. 684.

27. The Fair v. Hoffmann, 209 Ill. 330, 70 N. E. 622.

28. Because attached request that jury be required to answer them, and folder of both were also submitted, so that jury might have ascertained at whose request they were submitted. M. S. Huey Co. v. Johnston [Ind.] 73 N. E. 996.

29. Barber v. Dewes, 91 N. Y. S. 1059; Del. Co. Tr. S. D. & Title Ins. Co. v. Lee, 24 Pa. Super. Ct. 74. Exception should be taken to effective act and not to expression of opinion that there was no evidence warranting submission to jury. Exception held to apply to ruling under the circumstances. Wheeler v. Seamans [Wis.] 102 N. W. 28. Questions of fact may not be presented by one who neither requested their submission to the jury nor excepted to the direction of a verdict. Raymond v. Tallman, 91 N. Y. S. 670.

30. Baden Baden G. M. Co. v. Jose [Colo. App.] 78 P. 313.

31. Cannot review facts where appeal is from judgment only. Muratore v. Pirkl, 93 N. Y. S. 484.

32. Pa. Act April 18, 1874, P. L. 64. Commonwealth v. Cavett, 23 Pa. Super. Ct. 57; Chambers v. McLean, 23 Pa. Super. Ct. 551.

33. See 2 Curr. L. 1610. Fleer v. Reagan, 24 Pa. Super. Ct. 170. Defects in findings in case tried by court [Mont. Code Civ. Proc. § 1114]. Bordeaux v. Bordeaux [Mont.] 80 P. 6. Where no exception is taken to finding that land covered by contract of purchase was subject to servitude cannot contend on appeal that it could not be assumed, in absence of proof, that agreement constituting servitude injuriously affected value of property, or that defendant would have bid less had agreement been mentioned in terms of sale. Scudder v. Watt, 90 N. Y. S. 605. Where findings not excepted to, question of sufficiency of evidence to sustain them cannot be raised by cross assignment on appeal. Buster v. Warren [Tex. Civ. App.] 80 S. W. 1063. Though no findings are necessary in an equitable proceeding, yet, when they are made, they must be properly excepted to. Lilly v. Eklund [Wash.] 79 P. 1107. In absence of exception to findings, the only question open to review is the sufficiency of the findings to support the judgment. Poor v. Cudihee [Wash.] 79 P. 1105; Simmons Hardware Co. v. Baker [Mich.] 12 Det. Leg. N. 133, 103 N. W. 529. Exceptions to those proposed by defendants insufficient where they were materially altered by the court. Shaw v. Benesh [Wash.] 79 P. 1007. Findings of fact [Wis. Rev. St. 1898, § 3070]. McGillivray v. Huschka [Wis.] 103 N. W. 250.

34. On review of proceedings to condemn land for street across railroad right of way, fact that no allowance was made for keeping crossing in repair will not be considered, in absence of exception to verdict on that ground. Village of Royal Oak v. Detroit, etc., R. Co. [Mich.] 101 N. W. 535. Where there is no exception to the verdict on one issue, a new trial will be confined to the other. Satterthwaite v. Goodyear [N. C.] 49 S. E. 205.

35. Rule not changed by fact that court attached statement to transcript that plaintiff's motion for voluntary nonsuit would have been granted if court had known that repeal of statute had deprived plaintiff of right to two trials. Smith v. Mock [Colo.] 79 P. 1011. A case cannot be taken to the supreme court by direct exceptions to a ruling made pendente lite, where there is no exception to any final judgment made at the trial. Kibben v. Coastwise Dredging Co., 120 Ga. 899, 48 S. E. 330. An objection to the finding and judgment of a lower court, not relating to the pleadings or appearing on the face of the judgment itself, can be preserved for review only by exception. Not by recital in transcript by clerk that, on judgment being entered, appellant prayed an appeal, which was allowed. Jones v. Village of Milford, 208 Ill. 621, 70 N. E. 598. Otherwise will be affirmed, though plaintiff was entitled to larger damages than she was awarded. Chicago, etc., R. Co. v. Potts [Ind. App.] 72 N. E. 168. To secure a review of the sufficiency of a verdict claimed to be ambiguous, it must appear that there were exceptions not only to the rulings of the court on motions in arrest and for a new trial, but also that his attention was called to the insufficiency by proper objection and exception to the judgment. Gillespie v. Ashford [Iowa] 101 N. W. 649. N. C. Code, § 550. Appeal from judgment on referee's re-

taxation of costs back to the clerk after an appeal therefrom,[37] to an order setting aside a default,[38] or to the denial of a motion for relief from a judgment entered through mistake or inadvertence.[39]

No exception is necessary to a review of errors appearing on the face of the record,[40] nor of error in permitting the jury to find for plaintiff for an amount in excess of that justified by his own evidence.[41] It is unnecessary to except to the conclusions of law, where appellant's contention is that the findings of fact do not justify the judgment or decree.[42] There seems to be some conflict of authority as to whether an exception must be taken to an order denying a motion for a new trial.[43]

By statute in some states no exception is necessary.[44] In others it is not necessary to except to the giving of or refusal to give instructions,[45] to a ruling or decision embodied in a written judgment, order, or journal entry,[46] or to an order necessarily affecting the judgment.[47] In New York no exception is necessary to enable the appellate division to review errors of law occurring at the trial,[48] nor is an exception to the report of a referee or a decision of the court necessary to enable it to review the facts on an appeal from a judgment entered thereon.[49]

Time of taking exceptions.[50]—Exceptions must ordinarily be taken at the time when the ruling, opinion, direction, or judgment is given.[51] A failure to

port, overruling exceptions thereto, treated as exception to the judgment based on referee's conclusion of fact, as a case agreed or special findings by the court. Miller v. Coxe, 133 N. C. 578, 45 S. E. 940. Failure to include attorney's fees. Metz v. Winne [Okl.] 79 P. 223.

36. An exception to the denial of a motion to set aside a verdict as contrary to the evidence raises no question of law where there is some evidence to support it. Elwell v. Roper, 72 N. H. 585, 58 A. 507.

37. Smith v. Wenz [Mass.] 73 N. E. 651.

38. Defendant cannot object to the setting aside of a default entered for failure of plaintiff to file bill of particulars, where record does not show exception to ruling and order was acted on by defendant in amending his plea. Heenan v. Forest City Paint & Varnish Co. [Mich.] 101 N. W. 806.

39. Smith v. Mock [Colo.] 79 P. 1011.

40. Hill v. O'Meara Const. Co. v. Sessinghaus, 106 Mo. App. 163, 80 S. W. 747.

41. Spinner v. Klinger, 87 N. Y. S. 453.

42. Adams v. Washington Brick, Lime & Mfg. Co. [Wash.] 80 P. 446.

43. No exception need be taken to an order denying a motion on the minutes for a new trial. Toohey v. Interurban St. R. Co., 92 N. Y. S. 427. Incompetent testimony properly excepted to may be a ground of reversal, where no exception was taken to an order denying a new trial. Ginsburg v. Morrall, 105 Ill. App. 213.

Question of sufficiency of evidence to support verdict and judgment and errors in the admission or exclusion of evidence are not open to review unless a motion for a new trial is made and overruled, and exceptions to such ruling are taken and preserved by bill of exceptions. Chicago & E. S. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050.

44. Minn. Laws 1901, p. 121, c. 113. King v. Burnham [Minn.] 101 N. W. 302.

45. In Montana the statute gives a party an exception to the refusal to give proper instructions submitted on the law feature of the case. Code Civ. Proc. § 1080, as amended by Sess. Laws 1901, p. 160. Chessman v. Hale [Mont.] 79 P. 254.

Michigan: Judgment must be reversed for error in charge, though first raised on appeal. Howell v. Lansing City Elec. R. Co. [Mich.] 99 N. W. 406. Pub. Acts 1901, Act No. 52, p. 79. Though case submitted on appeal in ignorance of statute and on theory that exception was necessary, supreme court will consider assignments based on refusal to give requested instructions on attention being called to statute on motion for rehearing. Finkbinder v. Ernst [Mich.] 100 N. W. 180.

46. Ball. Ann. Codes & St. § 5051. No exception is necessary to obtain review of a decree, based on findings of fact and conclusions of law, previously filed. Fisher v. Puget Sound Brick, Tile & Terra Cotta Co., 34 Wash. 578, 76 P. 107.

47. An order striking out a pleading is reviewable on appeal from a judgment of dismissal under Cal. Code Civ. Proc. § 956, providing that on such appeal court may review any intermediate order or decision excepted to which necessarily involves merits or affects judgment, except one from which an appeal might have been taken, and Id. § 647, providing that any decision or order necessarily affecting the judgment is deemed excepted to. Alpers v. Bliss, 145 Cal. 565, 79 P. 171.

48. Error in submitting question of law to jury. Dickinson v. Oliver, 96 App. Div. 65, 89 N. Y. S. 52.

49. In re Mosher's Estate, 93 N. Y. S. 123.

50. See 2 Curr. L. 1610.

51. Jones v. Newton St. R. Co. [Mass.] 71 N. E. 114. Without exceptions pendente lite and an assignment of error thereon, a ruling made Aug. 10th cannot be reviewed under bill of exceptions tendered Feb. 27th following. Norman & Harrell v. Great Western Tailoring Co., 121 Ga. 813, 49 S. E. 782.

except at the proper time is not cured by a motion for a new trial.[52] Exceptions to evidence should be taken when it is offered.[53] Exceptions to rulings on evidence by a master or referee must be filed before him, and if overruled, renewed in the trial court.[54]

As a general rule exceptions to the giving and refusing of instructions must be taken when the rulings are made,[55] and before the retirement of the jury,[56] unless counsel is prevented from so doing.[57] They cannot ordinarily be taken before the instructions are given.[58] In some states they may be taken at any time before verdict,[59] and the time may be extended by stipulation, made in open court or with the court's consent, until the entry of judgment, but not beyond such entry.[60] In North Carolina errors upon the face of the charge may be excepted to at any time within ten days after adjournment for the term.[61]

A finding cannot be excepted to as unwarranted by the evidence after it has been made,[62] but, if it expressly includes a ruling of law not previously made, exceptions thereto may be alleged within a reasonable time after notice thereof.[63]

Exceptions to the conclusions of law must be taken when the decision is made.[64]

§ 8. *Form and sufficiency of objection.*[65]—Objections to pleadings must point out the particular grounds thereof.[66]

To evidence.[67]—Objections to the admissibility[68] or sufficiency of the evi-

52. Based on rulings on evidence not excepted to. Bingham v. Davidson [Ala.] 37 So. 738.

53. Exception to testimony taken after it has been given in answer to interrogatories is too late. Kenney v. Town of Hampton [N. H.] 58 A. 1046.

54. Applies to rulings by examiner of titles for registration. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1.

55. Cannot be taken in first instance on motion for new trial. Barnes v. Columbia Lead Co., 107 Mo. App. 608, 82 S. W. 203. Mass. Super. Ct. Rule 48. Court cannot allow exception to refusal of request to instruct on hearing of allowance of bill of exceptions on counsel's statement that intended to save exception and supposed he had done so. Jones v. Newton St. R. Co. [Mass.] 71 N. E. 114. Exceptions to instructions taken on motion for new trial after return of verdict insufficient to raise any question where grounds of objection not set out [Iowa Code, § 3707]. Tyler v. Bowen, 124 Iowa, 452, 100 N. W. 505.

56. N. H. Super. Ct. Rule No. 47. Nadeau v. Sawyer [N. H.] 59 A. 369. Points of exception must be designated when exceptions taken. Improper practice to permit points of exception to be then noted, and specification of objection to be supplied later. Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1.

57. Where court refused to comply with counsel's request to indicate, before jury retired, which of his requests had been given and which refused, he is entitled to be heard on exceptions to refusal of each separate request, identified by number, they being as specific as the situation permitted. Erie R. Co. v. Littell [C. C. A.] 128 F. 546.

58. Failure to object and except to court's statement as to how he would instruct on particular question does not prevent review, where exception taken after retirement of jury. Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529. Exception before instructions read to jury held sufficient where grounds of objection were specifically stated. First Nat. Bank v. Anderson [Ind. T.] 82 S. W. 693.

59. Ball. Ann. Codes & St. Wash. § 5053. Weber v. Snohomish Shingle Co. [Wash.] 79 P. 1126; Rowe v. Northport Smelting & Refining Co., 35 Wash. 101, 76 P. 529.

60. Weber v. Snohomish Shingle Co. [Wash.] 79 P. 1126.

61. Code, § 550 and Sup. Ct. Rule 27. Instruction of proposition of law without any evidence to support it. H. G. Williams & Co. v. Harris [N. C.] 49 S. E. 954.

62. Richards v. Appley [Mass.] 73 N. E. 555.

63. Mass. Sup. Ct. Rule 48. Must be made promptly. Richards v. Appley [Mass.] 73 N. E. 555. Mass. Rev. Laws, c. 170, § 106, requiring exceptions to be reduced to writing and filed within 20 days after notice of decision, where case is tried without jury, does not authorize exceptions to be first alleged on such filing. Id.

64. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000.

65. See 2 Curr. L. 1610.

66. See, also, Pleading, 4 Curr. L. 980. Exception on ground that does not state facts sufficient to constitute cause of action too general. Carson v. Southern R. Co., 68 S. C. 55, 46 S. E. 525. Objection that a party has no legal capacity to sue goes to his authority to maintain the suit at all, and will not include the objection that he is not the real party in interest. Logan v. Oklahoma Mill Co., 14 Okl. 402, 79 P. 103.

67. See 2 Curr. L. 1611.

68. Thuis v. Vincennes [Ind. App.] 73 N. E. 141; Hogen v. Klabo [N. D.] 100 N. W. 847; Gwynn v. Citizens' Tel. Co. [S. C.] 48 S. E. 460; Thomas China Co. v. C. W. Raymond Co. [C. C. A.] 135 F. 25; Anderson

dence must state the grounds thereof with definiteness and certainty,[69] and must be sufficiently specific to direct the attention of the trial court to the particular point complained of.[70] An objection for which no ground[71] or an improper ground is given cannot be considered on appeal.[72]

Objections on the ground that the evidence called for is incompetent, irrelevant and immaterial,[73] or incompetent and immaterial,[74] or incompetent and ir-

v. New York Life Ins. Co., 34 Wash. 616, 76 P. 109. Must appear that reasons were presented to trial judge when evidence was offered. Not sufficient that they were assigned on motion for new trial. Powell v. Georgia F. & A. R. Co., 121 Ga. 803, 49 S. E. 759. Grounds of objection and exclusion must be stated in bill of exceptions. Volusia County Bank v. Bigelow [Fla.] 33 So. 704. Objection that authority to sign has not been shown is not sufficient to render inadmissible evidence as to whether a signature was that of an officer. Coney Island Automobile Race Co. v. Boyton, 87 App. Div. 251, 84 N. Y. S. 347. A general objection to the unfinished sentence: "My brother's wages would be ———," is aimed at the conjectural character of the answer and does not raise an objection to the finished answer as to the union scale of wages on the ground that there was no evidence that deceased was a union man. Nelson v. Young, 91 App. Div. 457, 87 N. Y. S. 69. Where a letter demanding part of the purchase price of land calculates the same on an assumption of the number of acres in the tract, an objection to the admission of the latter on the ground that the sum was not due, also raises the question whether defendant's liability was measured by the actual or the assumed acreage. Warden v. Tesla, 93 App. Div. 520, 87 N. Y. S. 853. Objection to question as to what occurred when administrator came to witness' house on ground that testimony involved personal transaction with deceased person, before any such evidence was given, and no motion being made to strike evidence in answer to such question on that ground, held insufficient to present its admissibility on appeal. In re Andrews, 97 App. Div. 429, 89 N. Y. S. 965. That proof offered is inconsistent with theory of action disclosed by complaint. Carmichael v. John Hancock Mut. Life Ins. Co., 90 N. Y. S. 1033. Objection to a question that "the subject-matter of the examination, as inquired about, was not admissible," presents no question on the qualification of the witness to testify. Hathaway v. Goslant [Vt.] 59 A. 835. Objection to question as to cost price of producing certain granite blocks on ground that it was not proper way to establish measure of damages, insufficient to raise objection that it did not contain words "fair and reasonable." United Engr. & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

69. United Engr. & Contracting Co. v. Broadnax [C. C. A.] 136 F. 351.

70. Weatherford v. Union Pac. R. Co. [Neb.] 98 N. W. 1089; Stuart v. Mitchum, 135 Ala. 546, 33 So. 670; Conroy v. Boeck, 91 N. Y. S. 80; Enid & A. R. Co. v. Wiley, 14 Okl. 310, 78 P. 96; Westinghouse Elec. & Mfg. Co. v. Stanley Instr. Co. [C. C. A.] 133 F. 167. Error in admitting mortgage signed by mark in presence of witnesses without testimony that latter had signed their names, not reached by objection that witnesses were not called, and that it was not shown in what manner the witness identified the mortgage. Ballow v. Collins, 139 Ala. 543, 36 So. 712. Evidence competent as against general objection. Birmingham R., Light & Power Co. v. Mullen, 138 Ala. 614, 35 So. 701. Objection that facts assumed by hypothetical question are not in evidence must point out facts referred to. City of Aledo v. Honeyman, 208 Ill. 415, 70 N. E. 338. Objection to introduction of lien notices insufficient to raise question as to sufficiency of proof of service. L. A. Page & Son v. Grant [Iowa] 103 N. W. 124. Objection that question went to measure of damages not raised. Phillips v. Heraty [Mich.] 100 N. W. 186. Objection that statement not limited as to time not raised by motion to strike. Howe v. Chicago, K. & S. R. Co. [Mich.] 103 N. W. 185. Objection to competency of record insufficient to raise question of failure to require preliminary proof of its genuineness. Sampson v. Mayer, 90 N. Y. S. 379. In what particulars it is incompetent. Gwynn v. Citizens' Tel. Co. [S. C.] 48 S. E. 460.

71. Thuis v. Vincennes [Ind. App.] 73 N. E. 141; Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465. An objection that evidence has no relation to the issue should be taken on the ground of irrelevancy, and is not raised by objection that such matters are not averred in the declaration. McDonald v. Smith [Mich.] 102 N. W. 668. Invalid if the evidence might have been rendered unobjectionable by a change in the course of proceeding. Willett v. Morse [N. J. Err. & App.] 60 A. 362. Objection not put upon any ground, and not ruled on, or excepted to. Mollineaux v. Clapp, 90 N. Y. S. 880.

72. Where question asked expert was not hypothetical and not so intended, an objection that it was not sufficiently broad and did not state a hypothetical question was not placed on proper grounds. Holloway v. Kansas City [Mo.] 82 S. W. 89. Objected to as "incompetent, irrelevant and immaterial," whereas it expressed a conclusion. Hellinger v. Marshall, 92 App. Div. 607, 86 N. Y. S. 1051.

73. Thuis v. Vincennes [Ind. App.] 73 N. E. 141. Does not raise personal disqualification of witness. Hence stipulation permitting taking deposition subject to such objection is waiver of incompetency of witness. In re Imboden's Estate [Mo. App.] 86 S. W. 263. Hypothetical question. Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655. Does not question the sufficiency of the certificate of the clerk attached to record objected to. Huber v. Ehlers, 76 App. Div. 602, 79 N. Y. S. 150. An objection to a question as "incompetent, immaterial and improper," in that plaintiff had stated that there had been improvement in a joint since a certain date, is insufficient to present the objection that the question did not confine the answer with-

relevant,[75] or irrelevant and immaterial,[76] or incompetent,[77] or immaterial, are usually held to be too general and indefinite to present any available question,[78] if it is admissible for any purpose.[79] But an objection that evidence is "incompetent and immaterial" going to the merits has been held sufficient.[80] A request for a peremptory instruction is too general an objection to a declaration as insufficient to state a cause of action.[81] An objection to the admissibility of a document generally will not save the question whether it is binding on the objector as a party.[82]

An insufficient objection to the competency of a witness cannot be availed of as an objection to the competency or relevancy of his testimony.[83] A general objection to a question does not raise the point that a part of the answer is not responsive.[84] To properly determine the sufficiency of objections, they must be considered in connection with the testimony to which they are interposed.[85] Defendant's objection to plaintiff's evidence cannot be made to do service for an objection by plaintiff to defendant's evidence.[86] Where an objection is limited to a particular ground, the court need only pass on that ground.[87] Objections to the same point need not be multiplied.[88]

in reasonable certainty. Nassau Elec. R. Co. v. Corliss [C. C. A.] 126 F. 355.

74. George v. St. Joseph, 97 Mo. App. 56, 71 S. W. 110. Objection to evidence that train causing accident was in vicinity when witness arrived, held not to raise question that, as witness was not present when accident occurred, he could not swear as to where train stopped. International & G. N. R. Co. v. Quinones [Tex. Civ. App.] 81 S. W. 757.

75. Does not raise the question that it is hearsay. Loeser v. Jorgensen [Mich.] 100 N. W. 450.

76. Texas & P. R. Co. v. Coutourie [C. C. A.] 135 F. 465.

77. Does not reach the defect that question asked expert is not sufficiently restricted to prevent the witness, when answering it, from going outside the field of scientific knowledge. Lyon v. Grand Rapids, 121 Wis. 609, 99 N. W. 311. Too indefinite to raise the question that no proper foundation has been laid for secondary evidence. Enid & A. R. Co. v. Wiley, 14 Okl. 310, 78 P. 96.

78. Objection that "it is immaterial as to why he quit, the witness having stated that he quit of his own volition. and that he was not discharged by defendant." Aetna Powder Co. v. Earlandson, 33 Ind. App. 251, 71 N. E. 185.

79. George v. St. Joseph, 97 Mo. App. 56, 71 S. W. 110. If it should be limited in its application, that purpose may be accomplished by appropriate instructions. Boddy v. Henry [Iowa] 101 N. W. 447. A general objection to evidence in whole and in part as incompetent and insufficient on a particular issue cannot be sustained unless it is apparent that the facts intended to be proved could have no weight in whatever form produced. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167.

80. If the objection had gone to a formal defect, it would have been necessary to have it more specific in order that the error might have been remedied. Bowdle v. Jencks [S. D.] 99 N. W. 98.

81. Action for death resulting from collision. On appeal defendant claimed declaration insufficient to state a cause of action in that it failed to state that defendant's servants were incompetent. Yazoo & M. V. R. Co. v. Schraag [Miss.] 36 So. 193. See, also, Pleading, § 10, 4 Curr. L. 1031.

82. Saenz v. O. F. Mumme & Co. [Tex. Civ. App.] 85 S. W. 59.

83. Lincoln Supply Co. v. Graves [Neb.] 102 N. W. 457.

84. Cashin v. New York, etc., R. Co., 185 Mass. 543, 70 N. E. 930.

85. "I object," held sufficient in connection with other objections to same class of evidence. Iverson v. McDonnell, 36 Wash. 73, 78 P. 202.

86. Plaintiff not relieved from objecting to parol evidence offered by defendant by fact that court had previously taken under advisement a similar objection by plaintiff. Redden v. Lambert, 112 La. 740, 36 So. 668.

87. Objection to question properly overruled, where, as limited, it shows no ground for excluding it. Luce v. Hassam [Vt.] 58 A. 725.

88. Objection to any examination touching appellant's admission to the bar because it was an admitted fact, made at beginning, sufficient. Kane v. Kane, 35 Wash. 517, 77 P. 842. Where has once been distinctly raised and overruled, it need not be repeated to the same class of evidence. Omission to repeat it not a waiver. Schutz v. Union R. Co. [N. Y.] 73 N. E. 491; Gabriel v. McMullin [Iowa] 103 N. W. 355. Where exception taken to announcement of court that it will receive certain class of evidence for purpose stated. Date v. New York Glucose Co., 93 N. Y. S. 249. Where testimony of one witness is objected to as incompetent, irrelevant and immaterial, and on ground that no foundation has been laid, statement of counsel that same objection is interposed to testimony of another witness, objectionable only because statements testified to by him have not been stated to witness to be impeached thereby, is not sufficient to call court's attention to distinction. Western

The objection of want of responsiveness in an answer is only available to the party asking the question.[89]

A general objection to specified evidence as a whole,[90] or a motion to strike it out as a whole, is properly overruled where a portion of it is admissible,[91] or where it is admissible as against one of the parties, though inadmissible as against the others.[92] So, too, an offer of evidence as a whole is properly rejected where part of it is inadmissible.[93] An objection to an entire series of interrogatories will be overruled if any of them are competent.[94]

To exclusion of evidence.[95]—To preserve an objection to the exclusion of evidence, an offer of proof must be made, showing the answer expected and the purpose of the testimony sought to be elicited,[96] unless such facts and its materiality are apparent on the face of the question,[97] or the evidence is excluded on the ground that the witness is not qualified to testify at all.[98]

To instructions.—Objections to instructions,[99] or to a failure to give certain instructions, must specifically point out the error complained of.[1] Objections to instructions en masse will not be considered where any of those so complained of are correct.[2]

Union Oil Co. v. Newlove, 145 Cal. 772, 79 P. 542.

89. Christensen v. Thompson, 123 Iowa, 717, 99 N. W. 591.

90. Arnold v. Cofer, 135 Ala. 364, 33 So. 539; Bass Dry Goods Co. v. Granite City Mfg. Co., 116 Ga. 176, 42 S. E. 415; McCrary v. Pritchard, 119 Ga. 876, 47 S. E. 341; Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76; Hixon v. Asbury, 120 Ga. 385, 47 S. E. 901; Vedder v. Delaney, 122 Iowa, 583, 98 N. W. 373; Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360; Sun Mfg. Co. v. Egbert & Guthrie [Tex. Civ. App.] 84 S. W. 667; Texas Cent. R. Co. v. Powell [Tex. Civ. App.] 86 S. W. 21; St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 86 S. W. 938. That all testimony of certain witnesses was in chief and not in rebuttal, not indicating the parts which were objectionable. Duckworth v. Duckworth, 98 Md. 92, 56 A. 490. To a series of documents. Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10. Challenging sufficiency of description of property sought to be recovered. Weatherford v. Union Pac. R. Co. [Neb.] 98 N. W. 1089. That the damages claimed were not the proximate results of the defendant's negligence where some of them might have been the result of such negligence. International & G. N. R. Co. v. Evans, 30 Tex. Civ. App. 252, 70 S. W. 351. To entire statement in deed. Wren v. Howland [Tex. Civ. App.] 75 S. W. 894. Should limit objection to inadmissible portion, or request instruction that it is not to be considered. Consumers' Cotton Oil Co. v. Jonte [Tex. Civ. App.] 80 S. W. 847. Declarations of deceased persons. Jamieson v. Dooley [Tex.] 82 S. W. 780.

91. Powley v. Swensen [Cal.] 80 P. 722; Appeal of Spencer [Conn.] 60 A. 289; Wilson, Close & Co. v. Pritchett [Md.] 58 A. 360.

92. Declarations against interest admissible against party making them. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

93. Farleigh v. Kelley, 28 Mont. 421, 72 P. 756; Mease v. United Traction Co., 208 Pa. 434, 57 A. 820. Documents. Burch v. Swift, 118 Ga. 931, 45 S. E. 698. Exclusion of an affidavit, the larger part of which is hearsay, there being no offer to omit the objectionable part. City of Ft. Scott v. Elliott, 68 Kan. 805, 74 P. 609. Where court offers to allow hypothetical question after exclusion of objectionable elements and offer is declined, whole question properly disallowed. International & G. N. R. Co. v. Goswick [Tex. Civ. App.] 83 S. W. 423.

94. To interrogatories under Rev. St. Fla. § 1116. Volusia County Bank v. Bigelow [Fla.] 33 So. 704.

95. See 2 Curr. L. 1613.

96. Leverett v. Bullard, 121 Ga. 534, 49 S. E. 591; Council v. Teal [Ga.] 49 S. E. 806; Capital Nat. Bank v. Wilkerson [Ind. App.] 72 N. E. 247; Millington v. O'Dell [Ind. App.] 73 N. E. 949; Neff v. Metropolitan Life Ins. Co. [Ind. App.] 73 N. E. 1041; Gooding v. Watkins [Ind. T.] 82 S. W. 913; Harrison v. Incorporated Town of Ayrshire, 123 Iowa, 528, 99 N. W. 132; Marshall v. Marshall [Kan.] 80 P. 629; Burt-Brabb Lumber Co. v. Crawford [Ky.] 86 S. W. 702; Thornton-Thomas Mercantile Co. v. Bretherton [Mont.] 80 P. 10; City of South Omaha v. Sutliffe [Neb.] 101 N. W. 997; Norman v. Hopper [Wash.] 80 P. 551. Bill of exceptions must show what answer would have been, or what party expected to prove by witness. Ashby v. Elsberry & N. H. Gravel Road Co. [Mo. App.] 85 S. W. 957.

97. Marshall v. Marshall [Kan.] 80 P. 629. On face of record. Norman v. Hopper [Wash.] 80 P. 551.

98. Witness excluded because not an expert. Muskeget Island Club v. Inhabitants of Nantucket, 185 Mass. 303, 70 N. E. 61.

99. Jacksonville & St. L. R. Co. v. Wilhite, 209 Ill. 84, 70 N. E. 583. General objection insufficient. Mt. Nebo Anthracite Coal Co. v. Williamson [Ark.] 84 S. W. 779. Where it is a mere formal inaccuracy. General objection insufficient to reach inadvertent use of term "right of way." St. Louis S. W. R. Co. v. Bowen [Ark.] 84 S. W. 788.

1. Failure to point out discrepancy between charges and request. Roth v. Slobodien [N. J. Law] 60 A. 59.

2. Mattern v. McCarty [Neb.] 102 N. W. 468.

To the reports of referees, etc.—A remonstrance to the report of a committee before whom a trial is had,[3] or objections to the report of a master or referee, must point out the grounds thereof with such clearness and certainty as to call the court's attention to the particular alleged error which it is desired to have reviewed.[4] A general objection to the refusal of a referee to adopt a set of conclusions of fact is of no avail if any of them were rightly rejected.[5]

§ 9. *Sufficiency of exception.*[6]—An exception is an objection taken to the decision of the court upon a matter of law.[7] No particular form of expression is necessary to properly save an exception, but it is sufficient if the purpose to do so is plainly manifested, and the court understands that it has been so taken.[8] Appellate courts should not seek to deprive a party of the benefit of an exception, where it appears that the lower court was fully appraised of the nature of the objection.[9] The question to what portion of an argument an exception relates is one of fact, to be determined by the trial court.[10]

Exceptions to evidence must be to its admission over objection and not to the overruling of a motion to strike it out.[11] The question of the sufficiency of the evidence to support the verdict is raised by an exception to an order overruling a demurrer to the whole of the evidence.[12]

It is not necessary to multiply exceptions upon the same point,[13] but no other grounds of exception will be considered than those raised in the court below.[14]

Several parties excepting jointly cannot severally assign errors based thereon.[15] The sufficiency of a single paragraph of the complaint cannot be considered under a joint exception to rulings on separate demurrers to each paragraph.[16]

Exceptions to instructions, or to the refusal to charge as requested,[17] to the

3. Remonstrance complaining, not of the rulings, but merely of the manner in which they were stated in the report, is insufficient. Geary v. City of New Haven, 76 Conn. 84, 55 A. 584.

4. Examiner of titles for registration. Glos v. Hoban, 212 Ill. 261, 72 N. E. 1. Objection that examiner erred in finding that plaintiff owned lots in fee does not raise question whether he erred in admitting secondary evidence without sufficient foundation having been laid therefor. Id. To master's report. Holdroff v. Remlee, 105 Ill. App. 671; Holdroff v. Remlee, 105 Ill. App. 671.

5. Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686.

6. See 2 Curr. L. 1613.

7. Burns' Ann. St. Ind. 1901, § 637. Southern Indiana R. Co. v. Fine [Ind.] 72 N. E. 589.

8. Jones v. Newton St. R. Co. [Mass.] 71 N. E. 114.

9. Date v. New York Glucose Co., 93 N. Y. S. 249.

10. Lee v. Dow [N. H.] 59 A. 374.

11. Continental Casualty Co. v. Lloyd [Ind.] 73 N. E. 824.

12. Though tried on a theory adopted by defendant. Kennefick-Hammond Co. v. Norwich Union Fire Ins. Soc. [Mo. App.] 80 S. W. 694.

13. Where plaintiff challenged juror for cause and, on challenge being overruled, exercised peremptory challenge, did not waive objection to four other jurors disqualified for same reason by failing to challenge them for cause or peremptorily, though had two peremptory challenges left. Martin v. Farmers' Mut. Ins. Co. [Mich.] 102 N. W. 656.

14. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

15. Special finding and joint exception to each conclusion of law. Coy v. Druckamiller [Ind. App.] 73 N. E. 195. The correctness of an order overruling a demurrer to an answer to a paragraph of the complaint as to which one of the plaintiffs was not a party cannot be questioned on appeal where the only exception taken was a joint one by all the plaintiffs. McCarty v. Snowbarger [Ind. App.] 73 N. E. 606.

16. Where defendants jointly and severally demurred to each of two paragraphs of the complaint separately and severally, on ground that neither stated cause of action against defendants or either of them, an exception, on demurrers being overruled, to each of the rulings of the court, is sufficient to present each paragraph of the complaint for review. Acme Bedford Stone Co. v. McPhetridge [Ind. App.] 73 N. E. 838.

17. Luce v. Hassam, 76 Vt. 450, 58 A. 725; United States v. Rossi [C. C. A.] 133 F. 380; Erie R. Co. v. Littell [C. C. A.] 128 F. 546. Exception "to the instructions on the question of exemplary damages, and to the instruction that exemplary damages may be recovered in this case against both defendants," sufficiently raises the question whether the evidence warranted the jury in giving exemplary damages. Giddings v. Freedley [C. C. A.] 128 F. 355. If wish charge to be more full, must state precisely what they wish charged. Exception "to the instructions on the question of exemplary damages" held too indefinite. Id. Under the Colorado Court of Appeals Rule 11 (64 Pac. xiv), an exception that the "court erred in giving in-

judgment,[18] or decree,[19] to an order overruling a special verdict,[20] or the findings and conclusions of a master,[21] to improper remarks of the trial judge,[22] and to rulings on evidence, must specify the particular points deemed objectionable,[23] and should be absolute and not qualified.[24]

Clerical errors in exceptions will be disregarded.[25]

To instructions.[26]—Exceptions to the charge must be publicly taken.[27] A general exception to several instructions, a part of which are correct,[28] or to the refusal of a number of requests to charge,[29] or to submit to the jury a number of special interrogatories, some of which are improper, raises no question for review.[30] An exception to a charge as given, which is conceded to be correct, does not entitle a party to complain of the refusal to charge as requested, or the omis-

struction No. 1" is insufficient, where error is alleged only as to a portion of the instruction. City of Denver v. Strobridge [Colo. App.] 75 P. 1076. Where court refused to rule that writings evidenced contract, but left whole question to jury, authorizing them to find contract independently of oral negotiations, and defendant was refused special ruling on this point on ground that in substance such ruling had been given, though in fact it had not, and he excepted to refusal and charge so far as inconsistent therewith, held that he was entitled to complain of the instructions submitting the construction of the writings. Ellis v. Block [Mass.] 73 N. E. 475. Where instruction not erroneous per se. Van Blarcom v. Central R. Co. of New Jersey [N. J. Law] 60 A. 182. Exception sufficient. Diamond v. Planet Mills Mfg. Co., 97 App. Div. 43, 89 N. Y. S. 635; Date v. New York Glucose Co., 93 N. Y. S. 249; Hanau v. Metropolitan St. R. Co., 92 N. Y. S. 1086. The principal office of exception is to point out an error, if one exists, so that an opportunity may be afforded to rectify it. McKinley v. Metropolitan St. R. Co., 77 App. Div. 256, 79 N. Y. S. 213. An exception to each request which is refused or modified when taken in that form by permission of the court is sufficient to warrant the review of the modification of a certain requested instruction. Id. Hence by permission of the court an exception to a charge may be general. Id. That court erred in its charge to the jury, insufficient. Sigman v. Southern R. Co., 135 N. C. 181, 47 S. E. 420. A request to instruct that, on all the evidence, plaintiff is not entitled to recover, is, in effect, a motion for a verdict, and sufficiently states the grounds thereof so that, by excepting to the refusal to comply therewith, defendant reserves the question whether plaintiff is entitled to recover on the most favorable view of the evidence. French v. Grand Trunk R. Co., 76 Vt. 441, 58 A. 722. Exception "to the failure of the court to charge as requested," too general. Luce v. Hassam, 76 Vt. 450, 58 A. 725.

18. Exception sufficiently specific in view of form of decision and judgment. Brown v. Otis, 90 N. Y. S. 250.

19. Exceptions that decree was manifestly contrary to weight of evidence, too general. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

20. Exception too general. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

21. Kinard v. Proctor, 68 S. C. 279, 47 S. E. 390.

22. To comments in refusing prayers for instructions. Joseph Joseph & Bros. Co. v. Schonthal Iron & Steel Co., 99 Md. 382, 58 A. 205.

23. Hyland v. Southern Bell Tel. & Teleg. Co. [S. C.] 49 S. E. 879. Where defendant claimed that it was liable for premiums at the rate specified in the application for a policy rather than that specified in the policy itself, an exception to the admission in evidence of the original application raises such contention for review. Employers' Liab. Assur. Corp. v. Grand Rapids Bridge Co. [Mich.] 102 N. W. 975. Question raised by exception to allowance of experiment is merely whether evidence is relevant to any issue in case, and not whether it is likely to aid or confuse jury. Latter question one of fact. Healey v. Bartlett [N. H.] 59 A. 617.

24. Exception to failure of court to charge as requested, "so far as there was a failure," held bad. Luce v. Hassam, 76 Vt. 450, 58 A. 725.

25. Use of word "defendants" in exceptions to instructions. Pichon v. Martin [Ind. App.] 73 N. E. 1009.

26. See 2 Curr L. 1614.

27. Rule in Federal courts. So as to call court's attention thereto, and give him opportunity to correct errors. Erie R. Co. v. Littell [C. C. A.] 128 F. 546; Mountain Copper Co. v. Van Buren [C. C. A.] 133 F. 1.

28. Giddings v. Freedley [C. C. A.] 128 F. 355; Erie R. Co. v. Littell [C. C. A.] 128 F. 546; Kansas City Southern R. Co. v. Prunty [C. C. A.] 133 F. 13; United States v. Rossi [C. C. A.] 133 F. 380; Young v. Stevenson [Ark.] 86 S. W. 1000; Adams Exp. Co. v. Aldridge [Colo. App.] 77 P. 6; Gallamore v. City of Olympia, 34 Wash. 379, 75 P. 978; Lowe v. Ring [Wis.] 101 N. W. 698. No exception lies to charge as a whole. Savage v. Marlborough St. R. Co. [Mass.] 71 N. E. 531. Even though exception to denial of motion for new trial be construed as exception to charge, cannot be reviewed, since it is a "broadside exception." Kelly v. Johnson, 135 N. C. 650, 47 S. E. 672. Exception to "charge as given," too general. Luce v. Hassam, 76 Vt. 450, 58 A. 725.

29. Young v. Stevenson [Ark.] 86 S. W. 1000; Erie R. Co. v. Littell [C. C. A.] 128 F. 546; Bean-Chamberlain Mfg. Co. v. Standard Spoke & Nipple Co. [C. C. A.] 131 F. 215; Southern Pac. Co. v. Hetzer [C. C. A.] 135 F. 272.

30. Coffeyville Vitrified Brick & Tile Co. v. Shanks, 69 Kan. 306, 76 P. 856.

sion to give further instructions.[31] It is not necessary to, except to the reason given by the court for refusing instructions.[32]

To the findings and judgment.[33]—The burden is on a party excepting to a decree to show in what respect the court erred,[34] which is not satisfied by merely showing that the court could have erred.[35] General exceptions to the findings of fact, conclusions of law, and decree, are insufficient and will not be considered unless each and all of the findings are erroneous.[36] Exceptions to findings of fact improperly taken present for review only the action of the court in excluding evidence.[37] Where plaintiffs request the court to find specifically certain damages, which are disallowed, exceptions to such refusals and to the findings in effect disallowing such damages are sufficient to entitle plaintiff to a review of the ruling.[38] An exception to an order overruling a motion for a new trial authorizes an attack on the findings of the court, though they were not specially excepted to.[39]

An exception to a conclusion of law admits, for the purpose of the exception, that the facts on which it was stated were correctly found,[40] but does not preclude the party making it from controverting such facts by a motion for a new trial.[41]

The sufficiency of the evidence to sustain the judgment is raised by an exception to the judgment.[42]

§ 10. *Waiver of objections and exceptions taken.*[43]—Counsel may upon the trial waive the rights secured by proper exceptions,[44] and, having done so, they are not thereafter available upon a motion for a new trial or to set aside a verdict.[45]

Waiver may be shown by a subsequent stipulation,[46] by a subsequent pleading over in compliance with the ruling,[47] by a failure to renew the objection,[48] or to press the matter further on an opportunity being given to do so,[49] or a failure to take advantage of an opportunity to cure the errors complained of.[50]

31. Hathaway v. Goslant [Vt.] 59 A. 835. Failure to charge as to a matter pertinent to a case cannot be taken advantage of by assigning error upon a charge correctly instructing the jury as to other matters involved. Atlantic Coast Line R. Co. v. Williams, 120 Ga. 1042, 48 S. E. 404.

32. Exception to instruction itself sufficient. Chessman v. Hale [Mont.] 79 P. 254.

33. See 2 Curr. L. 1616.

34. Staniels v. Whitcher [N. H.] 59 A. 934.

35. Staniels v. Whitcher [N. H.] 59 A. 934. Where plaintiff in foreclosure proceedings was declared to have first lien on two tracts of land and decree charged half of such lien on each tract, an exception on ground that he should be compelled to satisfy whole lien out of tract on which defendant had no claim, cannot be maintained in absence of showing that such tract was not worth enough to satisfy both. Id.

36. Lilly v. Eklund [Wash.] 79 P. 1107. Findings of fact. Robins v. Paulson, 30 Wash. 459, 70 P. 1113.

37. General exceptions. Statement of facts will not be stricken where it appears that some of the errors relied on are based on exclusion of evidence. Lilly v. Eklund [Wash.] 79 P. 1107.

38. Davelaar v. Milwaukee [Wis.] 101 N. W. 361.

39. Temple v. Watkins Land Co. [Tex. Civ. App.] 81 S. W. 1188.

40. Wilkinson v. Wilkinson, 33 Ind. App. 540, 71 N. E. 169. All which were within issues presented. Kisling v. Barrett [Ind. App.] 71 N. E. 507; Reserve Loan Life Ins. Co. v. Hockett [Ind. App.] 73 N. E. 842.

41. Reserve Loan Life Ins. Co. v. Hockett [Ind. App.] 73 N. E. 842.

42. Berry v. Ryan [Colo. App.] 79 P. 977.

43. See 2 Curr. L. 1616.

44, 45. Fox v. Metropolitan St. R. Co., 93 App. Div. 229, 87 N. Y. S. 754.

46. The right to have alleged errors in the report of a referee, properly excepted to, considered on a motion for a new trial, and the granting or refusing of such motion reviewed on appeal is not waived by a stipulation that the report be in all things accepted and adopted. Stipulation merely waives right to question authenticity of report on settlement of bill of exceptions. Babcock v. Ormsby [S. D.] 100 N. W. 759.

47. Waiver of demurrers and other objections to pleading by pleading over and going to trial on the merits, see Pleading, § 11, 4 Curr. L. 1038.

48. Motion to make more definite and certain waived by failure to renew it after amendment. Hunter v. Lang [Neb.] 98 N. W. 690.

49. Where remarks of counsel in argument were immediately withdrawn on exception being taken thereto, and jury was instructed to disregard them and opposing counsel said nothing further in regard to the matter, right to object further will be deemed waived. Lee v. Dow [N. H.] 59 A. 374.

An objection to evidence is waived by permitting other witnesses to testify to the same facts without objection.[51] Allowing improper evidence to be admitted, without objection, does not waive the right to object to subsequent testimony to the same effect,[52] nor is an objection and exception to testimony waived by the introduction of controverting evidence,[53] nor an objection to a question by the fact that the same witness subsequently reiterates the matter elicited thereby without objection.[54]

An objection to the exclusion of secondary evidence is waived by subsequently offering primary evidence on the same point,[55] and an exception to the exclusion of parts of a record as fragmentary, by the subsequent introduction of the whole of it.[56] So, too, any error in a ruling that plaintiff has not shown title by possession is waived by showing it by other means.[57] It is no answer to a challenge of the rejection of competent evidence, on the ground that no evidence is admissible in support of the claim, that all the evidence requisite to establish it was not presented or rejected.[58] A motion to exclude all the testimony of a witness does not forfeit the rights reserved by previous objections and exceptions to its admission.[59] Exceptions to the admissibility of evidence are not available where the pleadings are subsequently amended in such a way as to render it admissible.[60]

Seeking to limit, by requested instructions, the effect of evidence introduced over objection, is not a waiver of the exception reserved upon its introduction, or of an exception to a refusal of an instruction to entirely disregard it.[61] Error in sustaining a motion to require plaintiffs to state whether they adopted a memorandum book referred to therein as a part of a will sought to be probated by them is waived by an amendment to the petition alleging that such book was the one referred to and praying that the directions therein be considered as a part of the last will of the testator.[62] A party is not deprived of his right to have a wrong ruling reviewed because it is a repetition by a judge of co-ordinate jurisdiction of a previous erroneous decision of another judge in the same case.[63]

Failure of a notice to take depositions to name a party whose deposition is taken is waived by the adverse party appearing and cross-examining him,[64] but

50. Exceptions to the admission of evidence are waived by declining the court's offer to declare a mistrial, or to strike it out, where the error in admitting it can be cured in that manner. Fox v. Metropolitan St. R. Co., 93 App. Div. 229, 87 N. Y. S. 754.

51. As to rules of railroad. San Antonio & A. P. R. Co. v. Lester [Tex. Civ. App.] 84 S. W. 401. Where other like evidence is admitted without objection. Galveston City R. Co. v. Chapman [Tex. Civ. App.] 80 S. W. 856. Error in permitting witness not present when accident occurred to state location of train when he arrived held waived by permitting him to answer previous question in regard to same matter without objection. International & G. N. R. Co. v. Quinones [Tex. Civ. App.] 81 S. W. 757.

52. Smith v. Sovereign Camp of Woodmen of the World, 179 Mo. 119, 77 S. W. 862.

53. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195; See v. Wabash R. Co., 123 Iowa, 443, 99 N. W. 106.

54. As leading. Ft. Worth & R. G. R. Co. v. Jones [Tex. Civ. App.] 85 S. W. 37.

55. The right to insist that the overruling of a question, wherein a witness was asked if he did not describe a certain ditch in his application for a patent to a mining claim, was error, is waived by offering a certified copy of such application. Leggat v. Carroll [Mont.] 76 P. 805.

56. Southern Loan & Trust Co. v. Benbow, 135 N. C. 303, 47 S. E. 435.

57. An error in the court's ruling that plaintiff had not shown title by possession is waived by showing title by other means. Field v. Tanner [Colo.] 75 P. 916.

58. Plattner Implement Co. v. International Harvester Co. [C. C. A.] 133 F. 376.

59. Even though some of evidence subject to motion was competent. Elliott v. Campbell, 25 Ky. L. R. 1841, 78 S. W. 1122.

60. General Elec. Co. v. National Contracting Co., 178 N. Y. 369, 70 N. E. 928.

61. Not by request for instruction that it could be considered only for purpose of impeachment, to be given only in case request to entirely disregard it was refused. Myers v. Manlove [Ind.] 71 N. E. 893.

62. Beebe v. McFaul [Iowa] 101 N. W. 267.

63. Plattner Implement Co. v. International Harvester Co. [C. C. A.] 133 F. 376.

64. Babcock v. Ormsby [S. D.] 100 N. W. 759.

such appearance is not a waiver of the right to suppress depositions for incompetency of the notary before whom they were taken.[65]

An exception to the refusal to give an instruction is not waived by proceeding with the trial after such refusal.[66] Defendant waives his demurrer to plaintiff's evidence,[67] or any error in overruling his motion for a nonsuit,[68] or in refusing a peremptory instruction in his favor, by subsequently introducing evidence in his own behalf,[69] and by failing to renew his motion at the close of all the evidence.[70] Error in the rejection of a prayer offered at the conclusion of plaintiff's case is waived by offering the same prayer at the conclusion of the whole case.[71]

A demurrer to the whole of the evidence,[72] or an exception to the denial of a motion for a peremptory instruction, is not waived by subsequently requested instructions submitting questions of fact.[73] Nor does one waive his right to a review of the refusal to give such an instruction because it is offered for the first time at the close of all the evidence.[74] A party is not estopped to object that a question should not have been submitted to the jury, where he has unavailingly done everything possible to prevent its submission under instructions asked by his adversary, by the fact that he asks instructions presenting it in a favorable aspect to himself.[75]

Where evidence is received subject to objection, the question of its competency must be subsequently raised and passed upon.[76] If evidence which has been excluded subsequently becomes admissible, it must be again offered.[77]

The right to object to the action of the court in regarding a case as one in equity and treating the findings of the jury as advisory is not waived by failure to demand a jury trial, or to submit the question of the right to it, or by endeavoring to maintain the claim under the theory which the party is compelled to adopt by reason of the ruling.[78]

The right to have an intermediate ruling reviewed on appeal from final judgment is not waived by failure to appeal from such ruling, an appeal being allowed.[79] Questions presented by a demurrer to the evidence at the close of plain-

65. Knickerbocker Ice Co. v. Gray [Ind.] 72 N. E. 869.

66. Chessman v. Hale [Mont.] 79 P. 254.

67. Brock v. St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219.

68. Gilmer v. Holland Inv. Co. [Wash.] 79 P. 1103.

69. Knights Templars' & Masons' Life Indemnity Co. v. Crayton, 209 Ill. 550, 70 N. E. 1066. Prayers requesting the taking of the case from the jury. Keyser v. Warfield [Md.] 59 A. 189.

70. Exception to denial of motion for nonsuit (McDowell v. Syracuse Land & Steamboat Co., 44 Misc. 627, 90 N. Y. S. 148; Earnhardt v. Clement [N. C.] 49 S. E. 49), or objection to denial of motion to direct a verdict, waived by introduction of evidence and failure to renew motion (Columbia, N. & L. R. Co. v. Means [C. C. A.] 136 F. 83). Rule applies even though defendant's evidence does not change the situation of the case. McDowell v. Syracuse Land & Steamboat Co., 44 Misc. 627, 90 N. Y. S. 148.

71. Wells & McComas Council No. 14 v. Littleton [Md.] 60 A. 22.

72. By requesting instructions on the theory of the case adopted by opposing counsel and the court. Brock v. St. Louis Transit Co., 107 Mo. App. 109, 81 S. W. 219.

73. Though they in effect concede that there was evidence tending to establish plaintiff's case on issues presented. Motion raises question of law only. Illinois Cent. R. Co. v. Swift, 213 Ill. 307, 72 N. E. 737. Nor by requesting instructions as to the law of the case after its refusal. Chicago Union Traction Co. v. O'Donnell, 211 Ill. 349, 71 N. E. 1015. Party compelled to submit case may assist in its proper submission without estopping himself to contend that verdict is not supported by evidence. Sorensen v. Sorensen [Neb.] 103 N. W. 455.

74. Chicago Union Traction Co. v. O'Donnell, 211 Ill. 349, 71 N. E. 1015.

75. Behen v. St. Louis Transit Co. [Mo.] 85 S. W. 346.

76. Question reserved by referee. Breitkreutz v. National Bank of Holton [Kan.] 79 P. 686.

77. Where evidence excluded when offered in chief becomes competent in rebuttal. Appeal of Spencer [Conn.] 60 A. 289. Evidence excluded as not admissible under the pleadings must be again offered after they have been amended. Risdon v. Yates, 145 Cal. 210, 78 P. 641.

78. Right to jury can only be waived in manner specified by statute. Chessman v. Hale [Mont.] 79 P. 254.

tiff's case and by motion to dismiss at the conclusion of the entire testimony need not be again presented by prayers for instructions.[80]

Where plaintiff alleges an oral agreement as the basis of his action, and, in case he is mistaken in that, seeks to recover on a subsequent written one, he does not waive his right to complain of a ruling that the written contract must control by proceeding with the trial on such contract after excepting to such ruling.[81]

SAVINGS BANKS; SCANDAL AND IMPERTINENCE; SCHOOL LANDS, see latest topical index.

SCHOOLS AND EDUCATION.

§ 1. The School System in General (1401).
§ 2. Right, Privilege and Duty of Attendance (1401).
§ 3. School Districts, Sites and Schools (1402).
§ 4. Organization, Meetings and Officers (1404).
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§ 8. Control and Discipline of Scholars, and Regulation of Attendance (1412).
§ 9. Torts and Liability for the Same (1413).
§ 10. Decisions, Rulings and Orders of School Officers, and Review of the Same (1413).
§ 11. Actions and Litigation (1414).
§ 12. Libraries, Reading Rooms and Other Auxiliary Educational Institutions (1414).
§ 13. Private Schools (1415).

§ 1. *The school system in general.*[82]—The legislature has general control of the educational system of the state and may adopt such measures as they deem necessary to secure to the people the advantages of education,[83] provided the legislation is not special.[84] A uniform text-book law securing to the successful bidder the exclusive right to supply books to the public schools is constitutional,[85] and state boards of education may be authorized to contract for the revision of text-books.[86] A legislature may impose a payment on a school district without its consent.[87] A law will apply to an institution, though it is not exactly described,[88] but if the language is not imperative, it will not affect a pending suit in regard to the institution.[89]

§ 2. *Right, privilege and duty of attendance.*[90]—It is illegal to charge a tuition fee at a public school.[91]

79. Des Moines Sav. Bank v. Morgan Jewelry Co., 123 Iowa, 432, 99 N. W. 121.

80. Holder v. Cannon Mfg. Co. [N. C.] 50 S. E. 681.

81. McNeill v. Galveston, H. & N. R. Co. [Tex. Civ. App.] 86 S. W. 32.

82. See the topic Common and Public Schools, 1 Curr. L. 544.

83. R. I. Const. art. 12, § 1; they may abolish school districts entirely. In re School Committee of North Smithfield [R. I.] 58 A. 628. Right to rearrange school districts on account of the creation of the county of Denver. School Dist. No. 1 v. School Dist. No. 98 [Colo.] 78 P. 693; School Dist. No. 1 v. School Dist. No. 35 [Colo.] 78 P. 690.

84. A law making cities of the third class one school district is not special. Commonwealth v. Middleton [Pa.] 60 A. 297.

85. It does not create a monopoly nor is it the grant of a special exclusive privilege, nor is it in violation of the Interstate Commerce Act. Dickinson v. Cunningham, 140 Ala. 527, 37 So. 345.

86. But the contract will not be enforceable though the publisher has performed work under it, unless the statutory requirements are exactly followed. Silver, Burdett & Co. v. Indiana State Board of Education [Ind. App.] 72 N. E. 829.

87. For tuition of pupils in excess of its quota at a country high school. Boggs v. School Tp. of Cass [Iowa] 102 N. W. 796. A law imposing on school districts a liability to a parent of pupils residing more than three miles from a school house for their carriage to and return is constitutional; it does not contain more than one subject, nor does it appropriate public funds to a private use. School Dist. No. 3 v. Atzenweiler, 67 Kan. 609, 73 P. 927.

88. Where laws applicable to a certain city and certain educational institution refer to the latter as a "university," the laws will be construed as applying to the intended school, though it in fact is of lower grade than a "university." Waddick v. Merrill, 5 Ohio C. C. (N. S.) 103.

89. Where a new law relative to an educational institution was enacted after institution of a suit, the court refused to decree a change of management, under the law, near the close of the school year, since the law contained no imperative requirement of a change, and the change, if made, would demoralize the schools for the rest of the year. Section 217, School Code, and section 4105 of Rev. St., construed. Waddick v. Merrill, 5 Ohio C. C. (N. S.) 103.

90. See 1 Curr. L. 544.

NOTE: Admission of children to school may be compelled by mandamus (State v.

Separate schools for races.[92]—A board cannot sell a school used for colored children and use the proceeds to build an addition to a school used for white children.[93]

Vaccination of pupils.[94]—State laws excluding children not vaccinated from the schools are constitutional,[95] or a school board under its general powers may during an epidemic of smallpox make vaccination a prerequisite to a pupil's attendance.[96]

Duty to furnish school facilities.[97]—It is the duty of the trustees to rebuild a school that has been destroyed by fire.[98] The state may compel school districts to reimburse parents of pupils who live more than three miles from a school house.[99]

§ 3. *School districts, sites and schools. Formation, alteration, consolidation, and dissolution of districts.*[1]—School districts need not coincide with local municipalities or be within their boundaries unless the statute bears such a meaning,[2] and acts enabling incorporation for school purposes are separate and distinct from those enabling it for general municipal purposes.[3] A legislature may abolish all school districts and vest all their property in towns without the consent of either.[4] A law declaring that cities of a class shall constitute one school district is not special legislation.[5] In New Jersey the legislature may by special act establish or consolidate school districts, leaving their government to the general laws.[6] In Texas no local notice is necessary before enacting laws for the formation of school districts.[7] Where a city incorporated under a special law with a separate school system becomes incorporated under the general law, the provisions of the special law as to schools not being in conflict with the general law were not superseded.[8] Districts can only be extended,[9] divided,[10] or abandoned,

Duffy, 7 Nev. 342, 8 Am. Rep. 713); but not admission of one [a negro] already provided for, to another school (People v. Easton, 13 Abb. Pr. [N. S.] 159), nor to compel admission to schools already full (In re Nicoll, 44 Hun, 340). A wrongfully expelled pupil may be reinstated by mandamus. Perkins v. Board of Directors, 56 Iowa, 476; In re Rebenack, 62 Mo. App. 8; Jackson v. State, 57 Neb. 183, 77 N. W. 662.

91. High school being a free common school cannot charge a tuition fee. Board of Education of City of Lawrence v. Dick [Kan.] 78 P. 812.

92. See 1 Curr. L. 544.

93. An injunction granted. Board of Education of City of Kingfisher v. Board of Com'rs of Kingfisher County, 14 Okl. 322, 78 P. 455.

94. See 1 Curr. L. 544.

95. Not in violation of requirement of free public schools, nor does it deny a citizen his rights and privileges, it being a reasonable health regulation and exercise of the police power. Viemeister v. White, 179 N. Y. 235, 72 N. E. 97.

96. Resolution not bad because it declared itself a permanent regulation, and it was applicable to a child, though her physical condition made it dangerous. Hutchins v. School Committee of Durham [N. C.] 49 S. E. 46. See note "Compulsory Vaccination," 2 Curr. L. 176.

97. See 1 Curr. L. 545.

98. Acts 1901, c. 97, authorizes the abandonment of school only with written consent of a majority of voters or when the school has a less daily attendance than twelve. Advisory Board of Washington Tp. v. State [Ind.] 73 N. E. 700.

99. School Dist. No. 3 v. Atzenweiler, 67 Kan. 609, 73 P. 927.

1. See 1 Curr. L. 545.

2. Under Batts' Ann. St. art. 3994, it is immaterial that agricultural land beyond the limits of the town was included, or parts of other common districts were included, providing the area did not exceed 25 square miles. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

3. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

4. It is not unconstitutional as being a taking of property, as it is devoted to no new use, nor as an impairment of contract, as the duty to educate did not arise out of contract, nor because no jury trial was provided to ascertain the value of the property involved. In re School Committee of North Smithfield [R. I.] 58 A. 628.

5. The City of Harrisburg having accepted the act, the city treasurer was ex officio school treasurer. Commonwealth v. Middleton [Pa.] 60 A. 297.

6. N. J. Const. art. 4, § 7, par. 11, only provides that no "local or special law providing for the management and support of free public schools" shall be passed, and an act declaring certain de facto districts should continue to exist was valid. Howe v. Board of Education of Landis Tp. [N. J. Law] 60 A. 518.

7. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

8. Where a village was annexed, the jurisdiction of the school board was accord-

according to law.[11] It is the law in most states that only by consent of the local school officers[12] or on the initiative of a petition by voters or residents,[13] or on referendum to them,[14] can districts be changed or new ones be erected pursuant to statutes of an enabling character as distinguished from those which are self-executing upon the existence of given conditions. The board of education is the proper body to canvass the returns at a special election on the question of the creation of a new district, where it has general authority over school elections.[15] The fact that one of the judges of election was disqualified,[16] or that a clerk failed to act,[17] or that some territory beyond the legal limit without voting inhabitants was included,[18] will not invalidate the election. Until rights have changed or jurisdiction is lost, a board of county commissioners may reconsider its order establishing a new school district on proper notice or appearance of adverse parties.[19] Under a law that a district which exercises its prerogatives without dispute for a year shall enjoy the privileges of a district, a school district which allows another to enjoy such privileges over a part of its territory loses such territory.[20] On quo warranto because of encroachment on existing districts, the particulars of such encroachment and lack of consent must be pleaded.[21] In Missouri where the districts affected are not all in favor of change, the petitioners are entitled to appeal to the county commissioner,[22] who is to appoint arbitrators.[23]

ingly extended. Phelps v. Board of School Inspectors [Ill.] 73 N. E. 412.

9. Proceedings taken under an act before it had gone into effect are void. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18. Annexation by city extends authority of school inspectors. Phelps v. Board of School Inspectors of City of Peoria [Ill.] 73 N. E. 412.

Contra: Under Rev. St. 1899, § 9898, the extension of the city limits does not by itself extend the school district. School Dist. No. 7, Tp. 57, R. 32 v. School Dist. of St. Joseph [Mo.] 82 S. W. 1082.

10. Rev. St. 1899, § 9747, allowing "any school district" divided by a county line to attach themselves to districts in the respective counties, does not apply to village but only to country school districts. State v. Fry [Mo.] 85 S. W. 328.

11. But where the town would be liable to the school teachers for breach of contract because of the abandonment, such was an indebtedness as would prevent the abandonment under the statute, and so the school treasurer was justified in not paying over the money. Hornbeck v. State, 33 Ind. App. 609, 71 N. E. 916.

12. A petition to establish a graded school district must be approved by a **majority of the trustees** of the common school districts included therein. A material alteration, as by changing the location of the school house, after the approval, is fatal to the validity of the proceedings. Waring v. Bertram, 25 Ky. L. R. 307, 75 S. W. 222.

13. A county superintendent has no power to change the boundaries of a school district by detaching part thereof except on a **petition of the voters.** Injunction is the appropriate remedy when there was no petition of 1-3 of voters or the statutory notice. School Dist. No. 44 v. Turner, 13 Okl. 71, 73 P. 952. **Majority of resident freeholders.** Jurisdiction at the hearing is not lost because the freeholders have so increased that the petitioners are no longer in the majority. The board has authority to establish the district, even though a majority of the freeholders do not concur therein. Gerber v. Board of Com'rs, 89 Minn. 351, 94 N. W. 886.

14. After a county superintendent has decided that the proposed change is for the best interests of the districts affected, the sole power to determine the matter is in the electors. The recording of the boundaries and a map thereof being purely ministerial acts may be enforced by mandamus. People v. Vanhorn [Colo. App.] 77 P. 978. The power of the county school commissioner to change boundaries is confined to propositions submitted to the voters. State v. Patton [Mo. App.] 82 S. W. 537. Batts' Ann. St. art. 3938, requiring such consent applies to districts formed by the commissioners' court not to town or village districts incorporated under article 3994. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

15. Such elections do not come under the general laws as to the division of precincts; where no election commissioners were appointed by the proper tribunal, the voters present on election day may elect them. Rader v. Board of Education [W. Va.] 50 S. E. 240.

16. By running for the office of trustee he invalidated the election of officers but not the vote to incorporate. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

17. The judge selected another person to act as clerk with the consent of the voters, and the fact that he was trustee and that he alone, without the judge, signed the returns, did not invalidate the election. Collins v. Masden, 25 Ky. L. R. 81, 74 S. W. 720.

18. Collins v. Masden, 25 Ky. L. R. 81, 74 S. W. 720.

19. Provided no appeal has been granted or vested rights accrued. Tiley v. Board of Com'rs [Okl.] 79 P. 756.

20. Mills' Ann. St. § 4007. People v. Vanhorn [Colo. App.] 77 P. 978.

21. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

22. Where the vote was 10 to 8 in favor

Division of property on change of district.—The legislature may provide for compensation for property where the boundaries of a district have been changed, and the levy of a tax therefor may be compelled by mandamus;[24] the provisions of such an act requiring the appraisal of the value of the school property and the remittance thereof to the taxpayers of each district are mandatory.[25] So where a borough is carved out of a school district, the remainder, however small, is entitled to a share of the school property.[26] A tax voted before but collected after the formation of a new school district is a credit which must be apportioned.[27]

Establishment of high schools.[28]—Any school district may constitutionally maintain a high school,[29] as it is a part of the common school system, which means the free common schools of the state.[30] A legislature may require a district to pay tuition on pupils attending a county high school in excess of its quota,[31] or provide that no adjunct school district to a high school can be created unless all of the districts affected vote on the proposition.[32]

Sites.—The school meeting cannot delegate its authority to designate a site for a school.[33]

Schools.—School districts may erect buildings for the separate use of white and colored pupils.[34]

Use of building for other purposes.[35]—School buildings may not be used for outside purposes during term time.[36]

§ 4. *Organization, meetings and officers.*[37]—The election of trustees is not rendered void because persons not entitled to vote voted at the election;[38] and it may be valid though no notice was given, if there is nothing to show but what it was

and it was shown 2 persons were not entitled to vote, but it was not shown how they voted, the facts were insufficient to show an unfavorable vote. State v. McClain [Mo.] 86 S. W. 135.

23. A certification of the appointment of "the following voters" does not show an appointment of "four disinterested men, resident taxpayers." State v. Wilson, 99 Mo. App. 675, 74 S. W. 404.

24. Change in districts resulting from the creation of the City and County of Denver. School Dist. No. 1 v. School Dist. No. 7 [Colo.] 78 P. 690. On reversal of a writ requiring payment out of the levy of 1903, on the ground that petitioner was not entitled to payment out of that levy, the writ would be amended by inserting the proper year, 1904. School Dist. No. 1 v. School Dist. No. 98 [Colo.] 78 P. 693.

25. A tax levied by a town without an appraisal is void. Tefft v. Lewis [R. I.] 60 A. 243.

26. In a proceeding to apportion debt and property, the title of the school directors to their office cannot be attacked. In re Old Forge School District's Indebtedness, 22 Pa. Super. Ct. 239.

27. Action of money had and received is the proper remedy for the new district. School Dist. No. 9 v. School Dist. No. 5, 118 Wis. 233, 95 N. W. 148. Counterclaim based on an alleged agreement between the districts properly rejected where no evidence that it was more than dismissed. School Dist. No. 9 v. School Dist. No. 5 [Wis.] 101 N. W. 681.

28. See 1 Curr. L. 547.

29. Const. art. 8, § 1, requires an efficient system of free schools whereby all may receive a good common school education. Russell v. High School Board of Education, 212 Ill. 327, 72 N. E. 441.

30. A statute authorizing city high schools to charge a tuition fee is unconstitutional. Board of Education of Lawrence v. Dick [Kan.] 78 P. 812.

31. The act does not require the assent of the corporation. Boggs v. School Tp. of Cass [Iowa] 102 N. W. 796.

32. The law was held defective in that no officer had authority to submit the proposition. State v. Board of Com'rs [Neb.] 95 N. W. 6.

33. The appointment of a committee to locate it "as near as practicable to the center of the district," and the subsequent location ½ mile from such center, is illegal and will be enjoined. School Dist. No. 34 v. Stairs, 1 Neb. Unoff. 85, 95 N. W. 492.

34. Regardless of the question whether they have the legal right to prevent colored children from attending a white school. Board of Education of Kingfisher v. Board of Com'rs, 14 Okl. 322, 78 P. 455.

35. See 1 Curr. L. 547.

36. Under Burns' Ann. St. 1901, § 5999, granting the right to use a school when "unoccupied for common school purposes," it was illegal to allow a religious organization to use a school house on Sundays and evenings during a school term. Baggerly v. Lee [Ind. App.] 73 N. E. 921.

37. See Officers and School Meetings in 1 Curr. L. 547.

38. Persons voted who resided in territory supposed to have been, but not legally, annexed. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

a fair expression of the will of the voters.[39] A school district meeting may ratify the action of the board in incurring an indebtedness.[40] Candidates should not be election officers.[41]

A board of education can only legally act when a quorum is assembled after due notice;[42] but when all the members of the board are present, though there has been no notice or call, it has been held that they may hold a valid meeting.[43] The action of a board is legal, though it fails to make or preserve a record of it.[44] They have power to employ a janitor and to determine his salary,[45] or to regulate the compensation of clerks and subordinates, and to reduce the same, provided the reduction is not ex post facto.[46]

Selection of officers.[47]—An appointment cannot be made to fill a vacancy until the same occurs.[48] City officers may be ex officio officers of the school district.[49]

Qualification of officers.[50]—A truant officer appointed by a county board of education,[51] and school trustees, are officers who must take the constitutional oath of office.[52] Where the oath of office is taken, the fact that it is not on file will not deprive an officer of his office.[53]

Tenure of office.[54]—Officers usually hold over where no successor is elected or appointed.[55]

Salaries.—An act allowing mileage to county superintendents which is not uniform in all counties is constitutional.[56] A board of county commissioners acts ministerially and not judicially in auditing the salary of a county superintend-

39. It was held at the regular time and place, the voters selecting their own election officers who were not sworn and had no blanks. Buchanan v. Graham [Tex. Civ. App.] 81 S. W. 1237.

40. Voting a tax amounted to a ratification. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

41. Election may be void if candidate was an election officer. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

42. The action of two of three members, when no notice was given to the third is void. Cunningham v. Board of Education, 53 W. Va. 318, 44 S. E. 129. Notice of meeting at "6 o'clock the next morning" was insufficient where members received it different days. Shepherd v. Gambill, 25 Ky. L. R. 333, 75 S. W. 223. Proceedings not invalidated because an irregularly elected but de facto trustee participated therein. State v. Buchanan [Tex. Civ. App.] 83 S. W. 723.

43. Notwithstanding Rev. St. 1899, § 9761, requires each member to have notice. Decker v. School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390.

44. Settlement made with a contractor then present. Decker v. School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390.

45. A janitor may assign his salary which has been earned. Oberdorfer v. Louisville School Board [Ky.] 85 S. W. 696.

46. An attendance officer's salary was fixed at the first year at $1,000 and second at $1,100; he served 3 months on his second year, but was paid only at the rate of $1,000, and his salary was then reduced, and he was allowed to recover for his back salary. Black v. Board of Education, 92 N. Y. S. 118.

47. See 1 Curr. L. 547.

48. Because of failure to hold an election, the office of school trustee was to become vacant, but no valid appointment could be made until the incumbent's term of office expired, then an appointment would prevent his holding over. Shepherd v. Gambill, 25 Ky. L. R. 333, 75 S. W. 223.

49. By Act May 23, 1874, § 42 (P. L. 256) city treasurer of Harrisburg ex officio school district treasurer. Commonwealth v. Middleton [Pa.] 60 A. 297. In 1861 by special charter the council of the City of Galena was declared ex officio the city school directors; in 1879 in all such cases it was declared that the directors should be appointed by the mayor and confirmed by the council; a law relating to school directors in school districts, organized under special laws but maintaining schools under the general law, was held not to apply to Galena. Schmohl v. Williams [Ill.] 74 N. E. 75.

50. See 1 Curr. L. 547.

51. The statute is directory as to the time of the appointment and does not preclude a subsequent appointment. Featherngill v. State, 33 Ind. App. 683, 72 N. E. 181.

52. Must be done before they enter on discharge of duties; but where they were prevented it may be taken later. Buchanan v. Graham [Tex. Civ. App.] 81 S. W. 1237.

53. It appeared that the oath was duly signed and mailed to the county clerk. Click v. Sample [Ark.] 83 S. W. 932.

54. See 1 Curr. L. 548.

55. The county court appointed two directors to fill two vacancies, not designating which was to hold the longer term; at the next meeting a successor was elected for only one, though it appeared that the appointments were only effective until that meeting, and it was held that the other held over. Click v. Sample [Ark.] 83 S. W. 932.

56. Were allowed 5 cents a mile in counties under the eleventh class and in others 10 cents, but this was not a grant of special privileges, or a denial of the equal protection of the laws. Henry v. Thurston County, 31 Wash. 638, 72 P. 488.

ent.[57] Schools in special districts are not to be counted in computing the salary of a county superintendent, under the North Dakota law,[58] as they are not under his supervision, and the county cannot recover any excess payment unless it is against conscience for the superintendent to retain it.[59] An officer who qualifies and performs the duties of his office is entitled to the salary attached thereto pending an election contest,[60] unless he gives a bond to return it.[61]

§ 5. *Property and contracts.*[62]—A school township may condemn land for school purposes whenever necessary in the judgment of the trustees,[63] but it cannot condemn a street over its land without express legislative authority.[64] School buildings may be subject to materialmen's liens,[65] and those erected on leased land may be removed within a reasonable time after the closing of the school.[66] The legislature may make provision for the holding of trust funds.[67]

School lands.[68]—A legislature cannot dispose of school lands to which it has an absolute title except in the way authorized by the constitution.[69] Public lands with which the school funds are endowed are treated in another topic.[70]

Validity of contracts in general.[71]—The school township is only liable on contracts for needful and proper articles,[72] or for services.[73] A board of education empowered to maintain schools in connection with an academy may contract to lease part of its rooms and employ services of its principal.[74] Having been per-

57. Statute provides the minimum salary, and the number of days he is employed is left to his discretion. Chase County v. Kelley [Neb.] 95 N. W. 865.

58. Rev. Codes 1899, § 652, made the salary dependent on the number of schools, or departments of graded schools under his supervision the preceding year. Dickey County v. Denning [N. D.] 103 N. W. 422.

59. The county auditor in good faith but without authority of law included in the warrant amounts due to the clerks employed by the superintendent and which the latter duly paid to the clerks, but the county was not allowed to recover back the money. Dickey County v. Hicks [N. D.] 103 N. W. 423.

60. Pol. Code, § 936, applied to all offices. Wilson v. Fisher, 140 Cal. 188, 73 P. 850.

61. Where a clerk, whose office was contested, executed a bond to obtain payment of his salary, and he was subsequently defeated, the board was not estopped from suing on the bond to recover back the salary, nor was the bond without consideration. McLaughlin v. Board of Education of Covington, 26 Ky. L. R. 1126, 83 S. W. 568.

62. See 1 Curr. L. 549.

63. Power absolute and the courts have no power to review the exercise of the discretion, nor can the landowner show that a less amount of land would do. Richland School Tp. of Fulton County v. Overmyer [Ind.] 73 N. E. 811.

64. A public street is not such property as a state normal school corporation may take under the general power of eminent domain. In re South Western State Normal School, 26 Pa. Super. Ct. 99.

65. But here it appeared that the contractor was paid according to the contract and that the district furnished the school because of the contractor's failure to do so, and that the subcontractors had no claim. Green Bay Lumber Co. v. Independent School Dist. [Iowa] 101 N. W. 84.

66. Where a school district asserted its right to remove a school within 5 days after the closing of the school and did remove the same within 20 days, there was no inference that it had abandoned the same; nor where the statute provided that no school should be erected on land leased for a shorter period than 50 years, without the privilege of removal, is the owner of premises leased for 50 years without any express reservation entitled to a school house on the termination of the lease. Hayward v. School Dist. No. 9 [Mich.] 102 N. W. 999.

67. A statute providing for the holding of an educational trust fund is not unconstitutional for want of a corporate power to receive and execute the trust. State v. City of Toledo, 23 Ohio Circ. R. 327.

68. See 1 Curr. L. 549.

69. The legislature having accepted the terms of an Act of Congress as to indemnity school lands, and the commissioner of public lands and buildings having made selections which were approved by the interior department within the time limited, the title of the state was absolute, and an act authorizing a deed of relinquishment to certain persons who settled on and improved the land and claimed a preference was void as a breach of trust. State v. Tanner [Neb.] 102 N. W. 235.

70. See Public Lands, 4 Curr. L. 1106.

71. See 1 Curr. L. 549, and compare topic Public Contracts, 4 Curr. L. 1089.

72. The complaint in an action on the contract for the purchase of a heater for a school is insufficient where there is no allegation of the necessity of procuring the heater. Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100.

73. District contracted with plaintiff, an architect, for his services for one year, and the breach being total, plaintiff was allowed to recover what he would have earned less his expenses. School Dist. v. McDonald [Neb.] 94 N. W. 829.

74. Trustees of Washington Academy in

formed on one side, ultra vires cannot be urged,[75] and breach may be avoided by injunction.[76] Such a power specially given is not destroyed by a general law that boards generally or specially chartered may adopt academies on resignation of trustees.[77] The action of the board in making contracts cannot be reviewed on the ground that they have not acted prudently,[78] and if their act was within the apparent scope of their authority, the burden to prove an excess of power is on the one asserting it.[79] One may recover in quasi contract for money loaned to a school district,[80] or on a quantum meruit where one has not fully performed his contract in erecting a school building, or the board may make a settlement in such a case.[81] But where contracts of school districts are required to be in writing,[82] a recovery cannot be had on a quantum meruit.[83] A contract of a board not fully negotiated,[84] or with one of its members, is void.[85] The depriving of the contractor after he has made a contract of the right to sue the board is not an impairing of the obligation of a contract.[86]

Proposals.[87]—The advertising for bids by a building committee is a sufficient compliance with the requirement that the board shall advertise for bids.[88] An advisory board may attend to the letting of contracts, but cannot overrule the judgment of the county superintendent as to the advisability of rebuilding a school.[89]

Contracts for text books.[90]—Where a state board of education has entered into a contract with a publisher which the latter has faithfully performed, it will not be held invalid at the instance of a local board not parties thereto.[91] The requirements of a statute must be literally followed in order to obtain a binding contract to revise text books with a state board of commissioners.[92] A local board has no right to enter into contract with booksellers to sell text books at cost in consideration of certain payments from the contingent fund of the district.[93] A

Salem v. Cruikshank, 43 Misc. 197, 88 N. Y. S. 330.

75, 76, 77. Trustees of Washington Academy v. Cruikshank, 43 Misc. 197, 88 N. Y. S. 330.

78. In action on note for money lent to build a school, no defense that its erection was illegal, where the action had been authorized by the advisory board whose approval was now required by law instead of that of the county commissioners. Lincoln School Tp. v. Union Trust Co. [Ind. App.] 73 N. E. 623.

79. Officers contracted with one to haul a load of lumber to aid in the construction of a school, and it was no defense that no site had ever been lawfully designated. Martin v. Common School Dist. No. 61 [Minn.] 101 N. W. 952.

80. Evidence held not to show that money loaned to a trustee for the erection of a school was ever received by the school township. White River School Tp. v. Caxton Co. [Ind. App.] 72 N. E. 185.

81. Cannot be set aside except for fraud or mistake. Decker v. School Dist. No. 2, 101 Mo. App. 115, 74 S. W. 390.

82. Teachers' contracts. Lee v. York School Tp. [Ind.] 71 N. E. 956.

83. Plaintiff's written offer to do the work of superintendence for $25 a month, and the school records that plaintiff was elected to do the work for $50, did not show a contract. Perkins v. Independent School Dist. of Ridgeway, 99 Mo. App. 483, 74 S. W. 122.

84. School district not bound by an agreement with another district where its terms had been merely proposed and talked over, but the agreement had never actually been signed. School Dist. No. 9 v. School Dist. No. 5 [Wis.] 101 N. W. 681. Contract signed by president and secretary of state board of education are valid. Rand, McNally & Co. v. Royal, 36 Wash. 420, 78 P. 1103.

85. In action by member to recover purchase price of goods sold to board for use of schools, it is not necessary that the plea setting up the illegality of the contract should show that it was prejudicial to the school district. Poling v. Board of Education of Philippi Independent Dist. [W. Va.] 49 S. E. 148.

86. The act constituting the board a corporation and permitting it to be sued was repealed. Wheeler v. Board of Control of State Public School [Mich.] 100 N. W. 394.

87. See 1 Curr. L. 549.

88. Rev. St. 1887, § 3938. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

89. Mandamus allowed. Advisory Board of Washington Tp. v. State [Ind.] 73 N. E. 700.

90. See 1 Curr. L. 550.

91. Because of insufficiency of contractor's bond, or because the publisher's textbook in geography had been altered. Wagner v. Royal, 36 Wash. 428, 78 P. 1094.

92. Though the contractor had employed the persons designated by the board and expended much money, he was entitled to no relief on the board's letting the contract to another publisher. Silver, Burdett & Co. v. Indiana State Board of Education [Ind. App.] 72 N. E. 829.

93. The statutory method allowed the board to contract for books and to keep

publisher cannot sue in equity to restrain the breach of a contract where he has not fully performed,[94] or where his damage is merely nominal,[95] and in some jurisdictions it is held that his remedy at law is adequate.[96]

Ratification of action of officers.[97]—A school district may ratify a contract which was not formally authorized.[98]

Officers are not personally liable[99] on a school contract,[1] unless they join therein,[2] and the school district is not liable on the verbal promise of an officer.[3]

Contractors' bonds.[4]—The contractor's bond must be approved before the contract will be valid.[5] The county superintendent may recover on a publisher's bond conditioned that its prices for books shall not be greater than those made in other states.[6] A contract may be enforced by a school board which has been reorganized under a new name but was otherwise unchanged by action on the contractor's bond.[7]

§ 6. *Funds, revenues and taxes.*[8]—A school treasurer may deposit school funds in a solvent bank.[9]

Tuition and incidental fees.[10]—No tuition fee can be charged in the public schools.[11]

them for sale or select persons to sell them at cost to the pupils. Any taxpayer was entitled to restrain the board irrespective of his motive or that he had been party to a similar contract. Ries v. Hemmer [Iowa] 103 N. W. 346.

94. Where a state board of education contracted with a person to revise certain text books, but reserving the right to reject, they will not be enjoined from contracting with others for books where it did not appear that the revised books were suitable. Silver, Burdett & Co. v. Indiana State Board of Education [Ind. App.] 71 N. E. 667.

95. Here used the books the full number of years, but not the years required in the contract. Westland Pub. Co. v. Royal, 36 Wash. 399, 78 P. 1096.

96. Under the law that text books once adopted shall not be changed for five years, a resolution of a city board of education authorizing the purchase of a certain arithmetic did not constitute a contract with the publisher, but it constituted a sufficient adoption of the book to preclude the board from changing it within 5 years of the date of the resolution. Attorney General v. Board of Education of Detroit, 133 Mich. 681, 10 Det. Leg. N. 314, 95 N. W. 746.

97. See 1 Curr. L. 550.

98. The district through its moderator entered a written contract with plaintiff for supplies and the goods were accepted and payments made thereon, and a warrant issued for the balance which was paid, and the payments approved by the district and plaintiff was here allowed to recover interest on the warrant. Haney School Furniture Co. v. School Dist. No. 1, 133 Mich. 241, 10 Det. Leg. N. 135, 94 N. W. 726.

99. See 1 Curr. L. 550.

1. Oppenheimer v. Greencastle School Tp. [Ind.] 72 N. E. 1100.

2. But here the officers were released from liability on a warrant which they had guaranteed because of its felonious alteration by the cutting off of an annexed memorandum, notwithstanding that the instrument was easily susceptible of such alteration. First Nat. Bank v. Carter [Mich.] 101 N. W. 585.

3. The president of the board promised a subcontractor before he began work, that he would pay him. Moore v. Leonard Independent School Dist. [Tex. Civ. App.] 74 S. W. 324.

4. See 1 Curr. L. 551.

5. The state board of education consisted of the superintendent of public instruction, the secretary of state and the attorney general; the law provided that the assistant secretary of state might do the business of the office in the absence of the secretary of state, and it was held that such assistant and another member of the board might approve of a bond, though the secretary of state had not actually left town, but was on his way to. Commonwealth v. Ginn & Co. [Ky.] 85 S. W. 688. The bond was delivered to and filed with state superintendent of schools, who was president of state board of education, but was not formally approved by said board and the attorney general as required by law. Rand, McNally & Co. v. Royal, 36 Wash. 420, 78 P. 1103.

6. Plaintiff who sold in Kentucky to retailers at 80% of list prices, who were bound to sell the books at list prices, entered into contract in Ohio to furnish books to township boards of education at 75% of list prices, who should arrange for sale to pupils at a price not exceeding a 10% advance. American Book Co. v. Wells, 26 Ky. L. R. 1159, 83 S. W. 622.

7. Contract to install an adequate heating plant. Board of Education of St. Louis v. National Surety Co., 183 Mo. 166, 82 S. W. 70.

8. See 1 Curr. L. 551.

9. Code 1873, § 1747, by the word "hold," did not mean physical possession; nor was it a loan of funds so as to constitute embezzlement, or as to prevent the treasurer's recovering on a guaranty given by the bank. Hunt v. Hopley, 120 Iowa, 695, 95 N. W. 205.

10. See 1 Curr. L. 551.

11. A high school cannot charge a tuition fee. Board of Education of Lawrence v. Dick [Kan.] 78 P. 812.

Debt limit.[12]—Contracts let in excess of the debt limit will not avoid prior contracts.[13] The debt limit cannot be raised by creating another school corporation for the same district.[14] Contracts let for a greater sum than the debt limit will be valid if the board has property which it can sell to meet them.[15]

Levy and collection of taxes.[16]—The power to levy taxes may reside in the city authorities.[17] The validity of a tax is not affected by any informality in the election of the supervisors or failure to publish notice of their meetings,[18] or any irregularity in the certificate,[19] or for failure to fix the time when the tax should be paid.[20] Redemption may be made from school taxes,[21] and a sheriff is entitled to the same commission for collecting a school tax as for other taxes.[22] The county is liable for funds of a school city received by it in compromise of a defaulting treasurer's shortage.[23] In Louisiana, in elections for the purpose of levying taxes for school purposes, the property valuation of each voter must be marked on each ballot,[24] and the petition for election must state the amount proposed to be realized as well as the rate of the tax.[25]

School bonds.[26]—Bonds may be issued by de facto officers,[27] but only in the manner provided by law.[28] In Missouri the holder of school bonds has the burden of proving that they were authorized at an election and that they are within the debt limit;[29] but generally the recitals protect a purchaser in good faith.[30] A

12. See 1 Curr. L. 551.

13. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

14. Law making the high school board a separate corporation. Russell v. High School Board of Education, 212 Ill. 327, 72 N. E. 441.

15. Authorized to issue $25,000 bonds and found that to install a heating plant that sum would be exceeded, but it owned other property not required for school purposes and a balance in the treasury in excess of the extra cost. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

16. See 1 Curr. L. 552. For general rules of taxation, see Taxes, 2 Curr. L. 1786.

17. Priv. Laws 1857, p. 219, c. 11, giving the city council of Joliet the right to levy taxes for school purposes, held not to be impliedly repealed or altered by subsequent legislation giving certain powers to the school inspectors. People v. Mottinger [Ill.] 74 N. E. 150.

18. The notice being for the benefit of the tax payer is waived by him in paying the taxes. United States Fidelity & Guaranty Co. v. Board of Education of Somerset [Ky.] 86 S. W. 1120.

19. The fact that certificate of levy of tax is not under seal might have been remedied on the application for judgment, and will not justify the restraint of the collection of the taxes. Schmohl v. Williams [Ill.] 74 N. E. 75.

20. Suit where no penalty was claimed. Collins v. Masden, 25 Ky. L. R. 81, 74 S. W. 720. Within ten days of the levy of a tax, the treasurer and county superintendent must make a list of persons liable to the tax. Id.

21. Pol. Code, § 3817. Palomares Land Co. v. Los Angeles County [Cal.] 80 P. 931.

22. Board of Education of Iredell County v. Board of Com'rs of Iredell County [N. C.] 49 S. E. 47.

23. Money was turned in to the general fund of the county. Demarest v. Holdeman [Ind. App.] 73 N. E. 714.

24. The tax must be carried by majority of voters and of property, and it is improper to mark in the valuations while canvassing the votes. Bennett v. Staples, 110 La. 847, 34 So. 801.

25. Otherwise a nullity; Const. art. 232. Bennett v. Police Jury [La.] 36 So. 891.

26. See 1 Curr. L. 553, and the title Municipal Bonds, 2 Curr. L. 931, and 4 Curr. L. 706.

27. Bonds not illegal because authorized at an election called by trustees whose election was irregular. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

28. An order that notice be posted calling a meeting of voters for the purpose of making an "appropriation" of 1% of assessed valuation, and a record that the voters assembled after due notice of 20 days and "considered the propriety of the loan as per notice," and that it was carried by vote of 17 to 2, does not show that bonds were authorized by a ⅔ vote at an election called for that purpose. Thornburgh v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81. A school warrant for $800 cannot be funded under a law providing that bonds may be issued in any denomination from $100 to $1,000 and that they must be in series running from 10 to 20 or 20 to 30 years. School Dist. No. 44 v. Baxter, 14 Okl. 374, 78 P. 386.

29. Recitals in bonds issued in violation of statute will not avail a purchaser in good faith before maturity, as they are not even prima facie proof and the bonds would be just as valid without them. Thornburgh v. School Dist. No. 3, 175 Mo. 12, 75 S. W. 81.

30. See 4 Curr. L. 717. Recitals will estop a district to claim bonds were not issued and used to refund a valid indebtedness where the bonds are in the hands of a bona fide holder. Gamble v. Rural Independent School Dist., 132 F. 514.

law authorizing a city to issue bonds to build school houses or to provide for additional play grounds,[31] and an act authorizing a school district to issue bonds which does not refer to it by its legal name, provided it is plainly designated, are valid.[32] The legislature cannot authorize several boards of education in the same territory to issue bonds up to the debt limit and so evade the constitutional limitation of indebtedness.[33] In an action to restrain levy of taxes to pay for bonds, the bondholders are necessary parties.[34]

Orders and warrants for payment of claims.[35]—Warrants can only be drawn pursuant to an order of the board and on a particular fund for a specific use.[36] One regularly drawn is valid, though the minutes of the board contain no record of the claim or of its allowance,[37] and though it is drawn on the wrong fund,[38] unless it exceeds the legal indebtedness of the district.[39] Officers may guarantee the payment of a warrant.[40] The treasurer may be compelled by mandamus to pay an order where he has the funds.[41]

Apportionment of funds.[42]—A county superintendent is sometimes required to apportion the school moneys among the several districts according to the school census.[43] Mandamus will not lie to compel a state treasurer to pay to an agricultural college funds where its right to them is not undisputed.[44]

§ 7. *Teachers and instruction. Contracts of employment.*[45]—Teachers' contracts with a district school board are subject to the power of the district at its next meeting to terminate the contract by inconsistent rulings as to length of term, sex of teacher, or payment of moneys.[46] The board may make a conditional contract with a teacher,[47] but they cannot in Ohio employ one for a term longer

31. The objection that education is a state affair and not a municipal affair is not sustained. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

32. District was created as School District No. 34, and thereafter at request of citizens was known as Gault School District, and was so designated in the tax books, and in the act of legislature authorizing the bonds. State v. Brock, 66 S. C. 357, 44 S. E. 931.

33. Constitutional limit 5% and bonds could not be issued in excess, though necessary to provide a high school by the device of creating a separate board of education for high schools. Russell v. High School Board of Education, 212 Ill. 327, 72 N. E. 441.

34. The regularity of the election of school trustees cannot be questioned in a proceeding to restrain a tax voted at an election called by the trustees. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

35. See 1 Curr. L. 554.

36. Where the order is lost, it is necessary to prove not merely that the order existed, but its contents; and where no use is mentioned, the warrant is void. Tunica County Sup'rs v. Rhodes [Miss.] 37 So. 1005.

37. The warrant valid, though not numbered or though its issue was not noted in the warrant stub-book. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

38. Warrant drawn on "contingent fund," in payment of school house, will be regarded as drawn on "school house" fund, the only other authorized fund being a "teachers'" fund. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

39. The burden to show this is on the district, and it is not shown by its appearing to be greater than 4% of the assessed valuation, where it appears that telegraph and railroad property is not included in the assessed valuation. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

40. Officers not liable on a warrant which they signed and guaranteed and which was easily susceptible of felonious alteration by the cutting off of the attached memorandum and which was so altered. First Nat. Bank v. Carter [Mich.] 101 N. W. 585.

41. The order was given for school supplies in due form and was included in the statement of indebtedness issued to validate bonds, the proceeds of which were in the treasurers' hands, but the treasurer claimed to have no knowledge of any contract or resolution authorizing the purchase of supplies. Commonwealth v. Johnson, 24 Pa. Super. Ct. 490.

42. See 1 Curr. L. 554.

43. In Nebraska the superintendent has no power to correct the census, though he may order a new one. State v. Wedge [Nev.] 72 P. 817.

44. Regents of Agricultural College v. Vaughn [N. M.] 78 P. 51.

45. See 1 Curr. L. 555.

46. But the district cannot by a mere resolution cancel the contract. Hemingway v. Joint School Dist. No. 1, 118 Wis. 294, 95 N. W. 116.

47. Before the annual meeting the teacher was employed for the ensuing year, provided the district was only bound for the five months required by law, or the further time that may be fixed at the meeting; the meeting fixed the school year at nine months and employed another teacher, but was held

than that of any member of the board of education.[48] A school committee may delegate authority to hire teachers to the superintendent, or they may ratify his contracts.[49] A contract to employ a teacher to superintend two schools and to teach in both,[50] or one made with a teacher whose certificate is irregular, is good.[51] A teacher of gymnastics in the schools is a mere employe of the board and not an officer of the city and therefore may be appointed an attendance officer.[52] In Greater New York teachers are appointed by the board of education on the nominations of the board of superintendents from the promotion lists.[53]

Dismissal, suspension and reassignment.[54]—A teacher elected to a permanent position on the favorable report of the committee on classification cannot be removed except for cause.[55] A board having the power to reduce the number of classes may determine what teachers may be retired,[56] but a school board having authority to dismiss a teacher cannot arbitrarily exercise it, and its decision may be reviewed by a court or jury.[57]

Breach of contract.[58]—The discontinuance of a position to which a teacher has been elected and has accepted is a breach of contract.[59] In a teacher's suit for breach of contract the complaint need not state that she held a certificate.[60]

Payment of salary.[61]—To be entitled to a salary one must have taught under a valid contract.[62] Where contracts with school teachers are required to be in writing, there can be no recovery on a quantum meruit,[63] but the writing may be in several instruments if it is so definite as to be capable of specific performance.[64]

liable to the first teacher. Norton v. Wilkes [Minn.] 101 N. W. 619.

48. Rev. St. 4017; purpose to prevent a teacher's appointment continuing after the personnel of the board was entirely changed. Board of Education of Canton v. Walker [Ohio] 72 N. E. 898.

49. Where plaintiff was engaged in the middle of the school year at the rate of the annual salary, it will be presumed that the contract was to end with the school year. Denison v. Inhabitants of Vinalhaven [Me.] 60 A. 798.

50. He may resort to mandamus to secure his salary. State v. McQuade, 36 Wash. 579, 79 P. 207.

51. The teacher was examined by the county superintendent at the request of the school district under Gen. St. 1894, § 3810, which was repealed prior to the issuance of the certificate. Snell v. Glasgow, 90 Minn. 111, 95 N. W. 881.

52. N. Y. charter provided that no person should hold two city or county offices, and that no officer should be interested in any contract with the city. Munnally v. Board of Education of New York, 92 N. Y. S. 286.

53. The making of such lists by the superintendents is a ministerial duty and may be enforced by mandamus, and Brooklyn teachers under the Greater N. Y. charter are entitled to have their names placed thereon. Brooklyn Teachers' Ass'n v. Board of Education of New York, 85 App. Div. 47, 83 N. Y. S. 1.

54. See 1 Curr. L. 556.

55. But the board of education may remove at will any teacher though in a permanent position who has not been favorably reported. Stockton v. Board of Education of San Jose, 145 Cal. 246, 78 P. 730. A rule in a private school forbidding teachers to enter a saloon, for violation of which he was discharged, was held a reasonable one as a matter of law. Koons v. Langum [Minn.] 101 N. W. 490.

56. Where one school had 12 teachers for 176 pupils and another the same number for 343 pupils, a reduction of teachers in the former school was warranted in the interest of economy. Bates v. Board of Education of San Francisco, 139 Cal. 145, 72 P. 907.

57. This though there was a provision in the contract that the teacher might be dismissed within six months if she failed to give satisfaction, and the law authorized dismissal by the board for certain stated reasons. School Dist. No. 94 v. Gautier, 13 Okl. 194, 73 P. 954.

58. See 1 Curr. L. 556.

59. Elected and accepted position of teacher in kindergartening in normal school, and when refused to be transferred to the training department, the kindergarten department was discontinued. MacKenzie v. State, 32 Wash. 657, 73 P. 889. Teachers employed by town are entitled to recover damages of the town for breach of contract resulting from the abandonment of the schools. Hornbeck v. State, 33 Ind. App. 609, 71 N. E. 916.

60. It will be presumed that the trustees employed only such as held a certificate; evidence as to teacher's misconduct at a previous term is irrelevant. Hughes v. School Dist. No. 37, 66 S. C. 259, 44 S. E. 784.

61. See 1 Curr. L. 556.

62. Where one taught not having a valid contract, he cannot recover, neither can one who had a valid contract, but had not taught. Shepherd v. Gambill, 25 Ky. L. R. 333, 75 S. W. 223.

63. Though the services were necessary, accepted and beneficial. Lee v. York School Tp. of Elkhart County [Ind.] 71 N. E. 956.

64. The statute requiring writing is mandatory, but it is sufficient if plaintiff is designated by her surname, but failure to fix the amount of salary will prevent plaintiff's

Instruction.[64a]—A state board of education has power to prepare the course of study and to adopt a uniform system of text-books for the use of schools throughout the state;[65] school directors must enforce such course of study,[66] and the use of the adopted text-books.[67]

§ 8. *Control and discipline of scholars, and regulation of attendance.*[68]—The power of school officers to make rules for government of schools and advancement of education includes power to require that pupils go directly home, and to enforce such rule.[69] The board of directors has power to expel a refractory pupil, after a full examination,[70] where he has a fair opportunity to be heard and written reasons are filed.[71]

Corporal punishment[72] in moderation is allowable,[73] and the teacher in applying it is not liable tortwise for resultant grave injuries unless they were such as might have been reasonably and probably foreseen.[74]

recovering, though she had partly executed the contract by attending a summer training school. Taylor v. School Town of Petersburgh, 33 Ind. App. 675, 72 N. E. 159.

64a. See 1 Curr. L. 557, n. 35-37.

65. Such power is exclusive and books adopted cannot be supplanted during the life of the contract, and it is improper for the local board to use such books for another year than that prescribed, but it may be used for only a part of the year prescribed. Westland Pub. Co. v. Royal, 36 Wash. 399, 78 P. 1096.

66. They cannot adopt a course of study in conflict therewith; but where they required all pupils to buy the plaintiff's geography, the plaintiff cannot complain because it is not used the whole year. Wagner v. Royal, 36 Wash. 428, 78 P. 1094.

67. The publisher of the history is entitled to a mandamus requiring such use. Eaton & Co. v. Royal, 36 Wash. 435, 78 P. 1093. Where directors required each pupil in the first to fifth years to purchase readers and study the same until he was proficient, that was a sufficient compliance, but that had no authority to omit it for the sixth year altogether. Rand, McNally & Co. v. Royal, 36 Wash. 420, 78 P. 1103.

68. See 1 Curr. L. 557.

69. Jones v. Cody, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160.

Note: In an annotation to this case are cited the following American cases: Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387 (swearing, quarreling and fighting ¾ mile from school house); Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (disrespectful language to teacher after pupil had gone home and returned); Hutton v. State, 23 Tex. App. 386, 59 Am. Rep. 776 (fighting after school). These cases are set out more fully and others cited 62 L. R. A. 160 et seq.

70. The investigation of charges against a pupil may be delegated to a committee of the board when the report is afterwards reviewed by the full board. Miller v. Clement, 205 Pa. 484, 55 A. 32.

71. School committee no power to compel witnesses to testify, and mere errors in the admission or exclusion of evidence will not invalidate the decision. Morrison v. Lawrence, 186 Mass. 456, 72 N. E. 91.

72. See 1 Curr. L. 557.

73. Teacher liable criminally for excess. State v. Thornton, 136 N. C. 610, 48 S. E. 602.

74. Throwing pencil which struck and destroyed a pupil's eye. Drum v. Miller, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890 (with note, "Liability of Teacher for Chastisement of Pupil"), 102 Am. St. Rep. 537 (with note "Powers and Liabilities of School Teachers in Relation to Pupils").

Note: The following extract from a recent monograph well states the rule. "'The better doctrine of the adjudged cases is, that the teacher is within reasonable bounds the substitute for the parent, exercising his delegated authority. He is vested with the power to administer moderate correction, with a proper instrument, in cases of misconduct which ought to have some reference to the character of the offense, the sex, age, size, and physical strength of the pupil. When the teacher keeps within this circumscribed sphere of his authority, the degree of correction must be left to his discretion, as it is to that of the parent, under like circumstances. Within this limit he has the authority to determine the gravity or heinousness of the offense, and to mete out to the offender the punishment which he thinks his conduct justly merits, and hence the parent or teacher is often said, pro hac vice, to exercise judicial functions.' Boyd v. State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 33."

Right of teacher generally to inflict reasonable punishment: It is everywhere admitted that a school teacher has a right to inflict reasonable punishment upon a pupil, for misconduct, by whipping or otherwise, for the purpose of maintaining the discipline and efficiency of the school. The law in all instances confides to teachers a discretionary power in the infliction of punishment upon their pupils, and will not hold them responsible, either civilly or criminally, unless the punishment inflicted is clearly excessive, or is inflicted merely to gratify malice or evil passions. Boyd v. State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645; Commonwealth v. Randall, 4 Gray [Mass.] 37; Clasen v. Pruhs [Nev.] 95 N. W. 640; Haycraft v. Grigsby, 88 Mo. App. 354; State v. Pendergrass, 2 Dev. & B. [N. C.] 365, 31 Am. Dec. 416; Bolding v. State, 23 Tex. App. 172, 4 S. W. 579; Hathaway v. Rice, 19 Vt. 102; Stephens v. State, 44 Tex. Cr. 67, 68 S. W. 281. Within the sphere of his authority the school teacher is the judge, and vested with a large discretion, as to when correction of the pupil is required, and

§ 9. *Torts and liability for the same.*[74a]—A pupil may recover for his wrongful exclusion where the committee is found not to have acted in good faith.[75] In the case of corporal punishment where the teacher grossly abuses his powers and uses his authority as a cover for malice or revenge, he is punishable criminally.[76] He may be liable civilly if he chastises or corrects a pupil, thereby producing grave injuries which he might have foreseen.[77] To enforce an order requiring children to go directly home is not a wrong, though a merchant thereby loses trade.[78]

§ 10. *Decisions, rulings and orders of school officers, and review of the same.*[79]—The refusal of school officers to put one on the teachers' promotion list,[80] or of a county superintendent to record and map the boundaries of a district,[81] or of a school board to restore a child expelled, may be reviewed on mandamus.[82] An injunction may be obtained to prevent a county superintendent from illegally changing the boundaries of a school district.[83]

of the degree of correction necessary. State v. Thornton, 136 N. C. 610, 48 S. E. 602. A school teacher may always enforce discipline by the imposition of reasonable corporal punishment upon his pupil. He may determine when and to what extent punishment is necessary, and he is not liable in any manner for an error of judgment when he has acted in good faith and without malice. Commonwealth v. Randall, 4 Gray [Mass.] 36; Heritage v. Dodge, 64 N. H. 297, 9 A. 722; Fox v. People, 84 Ill. App. 270; State v. Pendergrass, 2 Dev. & B. [N. C.] 365, 31 Am. Dec. 416; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645. The fact that a pupil is over twenty-one years of age does not relieve him of the duty of obedience, nor restrict the schoolmaster's authority to punish him. State v. Mizner, 45 Iowa, 248, 24 Am. Rep. 769. And if such pupil in school hours intrudes himself into the desk assigned to the teacher, and refuses to leave it upon his request, he may be removed by the master, who for that purpose may use such force, and call to his assistance such aid, as is necessary to accomplish that subject. Stevens v. Fassett, 27 Me. 266. And if a pupil, seventeen years of age, brings a pistol to school and threatens to kill or shoot his teacher, the latter is entitled to use such force as is necessary to disarm his pupil, and punish him for his actions. Metcalf v. State, 21 Tex. App. 174, 17 S. W. 142. A school teacher may inflict reasonable punishment upon his pupil without liability, but in the exercise of the power of corporal punishment, he must not make such power a pretext for cruelty or oppression and the cause must be sufficient, the instrument suitable, and the manner and extent of the correction, the part of the person to which it is applied, and the temper in which it is inflicted, must be distinguished with the kindness, prudence and propriety which become the station of the teacher. Cooper v. McJunkin, 4 Ind. 290. The punishment inflicted by a teacher upon a pupil should not be cruel or excessive, and ought always to be apportioned to the gravity of the offense, and within the bounds of moderation, and when complaint is made, the calm and honest judgment of the teacher as to what the situation required should have weight, and the reasonableness of the punishment determined by the varying circumstances of the particular case. Vanvactor v. State, 113 Ind. 276, 15 N. E. 341, 3 Am. St. Rep. 645."

"In inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion and be governed, as to the mode and severity of the punishment, by the nature of the offense, the age, size, and apparent powers of endurance of the pupil. Boyd v. State, 88 Ala. 169, 7 So. 268, 16 Am. St. Rep. 31; Commonwealth v. Randall, 4 Gray [Mass.] 36; Dowlen v. State, 14 Tex. App. 66. If a parent has forbidden the child to pursue a certain study in school, and this fact is known to the teacher, he is not authorized to inflict corporal punishment upon the child for the purpose of compelling it to pursue the study so forbidden by the parent. Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471. If a teacher is requested when taking charge of a school, to be more strict than a former teacher in enforcing discipline among his scholars, this does not vest in him any more authority by reason thereof than he otherwise would have possessed. State v. Thornton, 136 N. C. 610, 48 S. E. 602."—From note, "Powers and Liabilities of School Teachers in Relation to Pupils," to Drum v. Miller [N. C.] 102 Am. St. Rep. 537.

74a. See 1 Curr. L. 557, n. 38-44.

75. May submit to jury question if pupil had a fair hearing and whether committee acted in good faith in excluding certain evidence. Morrison v. Lawrence, 186 Mass. 456, 72 N. E. 91.

76. Teacher has no greater authority because the school had been ill managed and he was requested to be stricter, but the presumption is that he exercised correct judgment in whipping, and evidence of his general good character is admissible, but the jury may infer malice from the excessive punishment. State v. Thornton, 136 N. C. 610, 48 S. E. 602.

77. Drum v. Miller, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, with note, 102 Am. St. Rep. 528, with note.

78. Jones v. Cody, 132 Mich. 13, 92 N. W. 495, 62 L. R. A. 160, with note.

79. See 1 Curr. L. 557.

80. Brooklyn Teachers' Ass'n v. Board of Education of New York, 85 App. Div. 47, 83 N. Y. S. 1.

81. People v. Vanhorn [Colo. App.] 77 P. 978.

82. Will be refused where board had prop-

§ 11. *Actions and litigation.*—School boards are not usually exempt from suit,[84] but the state may deprive one of the right to sue them.[85] A general judgment may be entered on a warrant drawn against a special fund.[86] After a division one district may sue another for its share of the property.[87] A proceeding in the nature of quo warranto to determine the validitv of a school district is properly brought against the officers and may be entertained by the court in its discretion.[88] Whilst injunction may lie in some cases to prevent breach of contract,[89] a publisher cannot enjoin the breaking of a school book contract;[90] but a taxpayer may sue to restrain an illegal contract without regard to his motive, or that he has been a party to illegal contracts in the past.[91] The validity of the appointment of officers cannot be questioned in a suit to restrain the levy of taxes levied by them.[92] Upon certiorari to review a tax regularly levied by a de facto district, the court will not inquire into its legal existence.[93] Mandamus is the proper remedy to enforce the performance of ministerial acts,[94] unless there is a controversy[95] on questions of law and fact.[96]

§ 12. *Libraries, reading rooms and other auxiliary educational institutions.*[96a] —A new charter of a city will supersede the special provisions of a library act.[97] In Kentucky a city cannot accept a gift for a library building conditioned on the city's guarantying a fixed sum per year for maintenance without the assent of the voters.[98] A city may acquire lands for public parks to be used as children's playgrounds.[99]

erly heard the question. Miller v. Clement, 205 Pa. 484, 55 A. 32.

83. School Dist. No. 44 v. Turner, 13 Okl. 71, 73 P. 952.

84. Ky. St. 1903, § 2949, authorizes suit and so it is no defense that it is an agent of the state. Suit by assignee of a janitor for salary. Oberdorfer v. Louisville School Board [Ky.] 85 S. W. 696.

85. By repealing act of incorporation. Wheeler v. Board of Control of State Public School [Mich.] 100 N. W. 394.

86. School district warrant drawn against a contingent fund. School Dist. No. 3 v. Western Tube Co. [Wyo.] 80 P. 155.

87. Action of money had and received proper for new district to secure taxes collected by old district. School Dist. No. 9 v. School Dist. No. 5, 118 Wis. 233, 95 N. W. 148. Old district may set up a special agreement between the districts as a counterclaim. School Dist. No. 9 v. School Dist. No. 5 [Wis.] 101 N. W. 681. In proceeding to apportion property, title of directors to office cannot be attacked. In re Old Forge School District's Indebtedness, 22 Pa. Super. Ct. 239.

88. Where it appeared that the relator voted for the officers, the question was not reviewable. State v. McClain [Mo.] 86 S. W. 135.

89. Injunction to prevent breach of contract executed by plaintiff. Trustees of Washington Academy v. Cruikshank, 43 Misc. 197, 88 N. Y. S. 330.

90. The remedy at law is adequate. Attorney General v. Board of Education of Detroit, 133 Mich. 681, 10 Det. Leg. N. 314, 95 N. W. 746.

91. Suit by a taxpayer to restrain the execution of a contract with a rival bookseller. Ries v. Hemmer [Iowa] 103 N. W. 346.

92. Schmohl v. Williams [Ill.] 74 N. E. 75.

93. Howe v. Board of Education of Landis Tp. [N. J. Law] 60 A. 518.

94. A treasurer may be compelled by mandamus to pay an order. Commonwealth v. Johnson, 24 Pa. Super. Ct. 490. Mandamus is proper remedy to compel a county clerk to make an assessment for a school district, though the remedy of certiorari existed. State v. Patton, 108 Mo. App. 26, 82 S. W. 537. Publishers allowed mandamus against local school directors to compel use of their history prescribed by state board of education. Eaton & Co. v. Royal, 36 Wash. 435, 78 P. 1093. A teacher may resort to mandamus where a school board refuses to draw a warrant for his salary, as he has not a speedy remedy at law. State v. McQuade, 36 Wash. 579, 79 P. 207.

Note: Mandamus will lie in cases of mismanagement of schools to enforce official duties as in other cases. See note 98 Am. St. Rep. 878, citing cases and applications of rules.

95. The district is entitled to a jury trial, and a teacher cannot compel a school director to sign a warrant for her salary. Davis v. Jewett, 69 Kan. 651, 77 P. 704.

96. Question whether salary of a janitor determined by N. Y. or Brooklyn rule, after the consolidation. People v. Board of Education of New York, 93 N. Y. S. 300.

96a. See 1 Curr. L. 555, n. 98.

97. In 1901 Atlantic City adopted the provisions of the library act of 1884, by which it could raise 1-3 mill on the dollar for library purposes, and in 1902 adopted the act of 1902 as to the government of cities, by which the council was authorized to raise the amount it deemed expedient for library purposes. Trustees of Free Public Library of Atlantic City v. City Council of Atlantic City [N. J. Law] 58 A. 1101.

98. Ky. St. 1903, § 3490, subd. 22, authorizes cities to establish and maintain local public libraries by taxation. Const. § 157

§ 13. *Private schools.*—The requirement of a private school attended by minors that teachers shall not frequent saloons is reasonable.[100] Schools entirely supported by tuition fees are not exempt from taxation as public charities.[101] A town is not liable to a private school for the tuition of a child residing with his parents in the town.[102]

SCIRE FACIAS.[103]

Scire facias is in the nature of an original action if in an ordinary civil case, but a writ to obtain an execution on a judgment is a judicial, not an original, writ,[1] and should issue from and be returnable to the court which rendered judgment and has possession of the records. In Pennsylvania a scire facias proceeding to foreclose a municipal lien is in rem.[2]

A court has inherent jurisdiction to issue the writ to obtain execution on its own judgments.[3] The Federal district court has jurisdiction to issue the writ to enforce a forfeited recognizance or bail bond.[4] In Missouri the writ to revive a judgment may be heard in a division of the circuit court other than the one in which the judgment was rendered.[5]

The writ is not necessary to revive a suit in equity in the name of a proper representative of a deceased plaintiff.[6]

Parties.—In a proceeding to revive a judgment against land which has been conveyed, the terre tenant must be made a party.[7] In Missouri if an assigned judgment can be revived after the death of the judgment creditor, it cannot be by a proceeding in the name of the dead man to the use of the assignee nor by the assignee in his own name.[8]

The writ in a proper case may issue as of course out of the office of the clerk of court without leave of court being first had.[9] In a proceeding to revive a judgment, it is not necessary that a petition accompany the writ,[10] and failure to sign the petition is a mere irregularity which may be amended by motion.[11]

Service.—Where issued on a forfeited recognizance, unless the surety has voluntarily submitted to the jurisdiction, he must be personally served in the district of the court issuing the writ.[12]

The return to the writ will be given a fair construction.[13] Where issued

provides that no city shall become indebted to an amount exceeding its income without the assent of the voters. Ramsey v. Shelbyville, 26 Ky. L. R. 1102, 83 S. W. 116.

99. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

100. It was error to submit the question to a jury. Koons v. Langum [Minn.] 101 N. W. 490.

101. Though under the management of trustees who serve without compensation and though it had formerly received aid from the state and private persons. Harrisburg v. Harrisburg Academy, 26 Pa. Super. Ct. 252.

102. It was expressly not decided whether the school district would be liable. Sanborn Seminary v. Town of Newton [N. H.] 59 A. 614.

103. See 2 Curr. L. 1618.

1. Kennebec Steam Towage Co. v. Rich [Me.] 60 A. 702.

2. Where at the time judgment is entered on an original scire facias, there is no registered owner, one who registers his title several years later need not be made a party to a proceeding to continue the lien. Philadelphia v. Peyton, 25 Pa. Super. Ct. 350.

3. Rev. St. c. 79, § 75, which provides that the Kennebec superior court "has exclusive jurisdiction of scire facias on judgments and recognizances not exceeding $500.00," does not take away the inherent jurisdiction of that court over scire facias to obtain execution on its own judgments, though the debt and costs exceed such amount. Kennebec Steam Towage Co. v. Rich [Me.] 60 A. 702.

4. Rev. St. U. S. § 716 (U. S. Comp. St. 1901, p. 580). Kirk v. U. S., 131 F. 331.

5. After final judgment the record belongs to the whole court. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

6. Straight v. Ice [W. Va.] 48 S. E. 837.

7. Barrell v. Adams, 26 Pa. Super. Ct. 635.

8. Statutes construed. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

9. Goddard v. Delaney, 181 Mo. 564, 80 S. W. 886.

10, 11. Polnac v. State [Tex. Cr. App.] 80 S. W. 381.

12. Kirk v. U. S., 131 F. 331.

13. A return to a writ directed to three defendants that it was executed on three different dates is construed to mean that

against bail the execution cannot be awarded against the defendant who has not been personally served with process until there have been two returns of nihil,[14] and the return of two nihils is deemed equivalent to personal service only where defendant is domiciled or found within the jurisdiction of the court when the writ issues.[15]

Procedure.—When the method of procedure is not provided by statute, the common-law course will be resorted to.[16] On a scire facias to revive a judgment, no defense can be made except one that has arisen since the judgment.[17]

The record cannot be contradicted by an answer to scire facias to enforce the forfeiture of a recognizance.[18]

In Pennsylvania on a scire facias sur mortgage a certificate in favor of the defendant cannot be properly entered.[19]

Appeal is governed by the rules with reference to procedure in civil cases,[20] and in a criminal case the state has no right of appeal from an adverse judgment.[21]

SEALS; SEAMEN, see latest topical index.

SEARCH AND SEIZURE.

§ 1. What is an Unreasonable Search and Seizure (1416).
§ 2. Procedure for Issuance and Execution of Search Warrants (1417).

§ 1. *What is an unreasonable search and seizure.*[22]—As a general rule a search or seizure cannot be made without a warrant,[23] and where authorized to be so made the officer making it is held to a strict compliance with the statutory requirements,[24] and a warrant, subsequently issued which does not conform to the statute will afford him no protection.[25] The person of one lawfully arrested, the place in which he is arrested and any other place to which lawful access can be had, may be searched for articles to prove the charge on which he is arrest-

service was had on each. Polnac v. State [Tex. Cr. App.] 80 S. W. 381.

14, 15. Kirk v. U. S., 131 F. 331.

16. Federal statutes do not indicate the practice to be followed on scire facias on a forfeited recognizance or bail bond. Kirk v. U. S., 131 F. 331.

17. Philadelphia v. Peyton, 25 Pa. Super. Ct. 350.

18. The entry of forfeiture on a recognizance in a criminal case becomes part of the record. State v. Morgan, 136 N. C. 593, 48 S. E. 604.

19. Land Title & Tr. Co. v. Fulmer, 24 Pa. Super. Ct. 256.

20. Transcript must be filed within the period prescribed by law and contain an appeal bond. Wolf v. State [Tex. Cr. App.] 85 S. W. 17.

21. State v. French [Tex. Cr. App.] 80 S. W. 1007.

22. See 2 Curr. L. 1618.

23. The police department has no right to invade any one's house or place of business without a warrant. Hale v. Burns, 41 Misc. 1, 89 N. Y. S. 711.

Note: In no case, it is believed, has any person, even a peace officer, the right to search the private premises of another for evidence of crime except under authority of a search warrant. Reed v. Adams, 2 Allen [Mass.] 413. Perhaps after a person is alleged to have committed a crime, his premises may be searched for evidence thereof without a warrant by permission and with the assistance of the servant or agent of the owner, where the former is in charge of the premises. State v. Griswold, 67 Conn. 290, 34 A. 1046; Grim v. Robinson, 31 Neb. 540, 48 N. W. 388. A peace officer vested with authority to inspect certain places cannot without a warrant invade or search a house or place on his mere suspicion that misdemeanors are committed there. The power to "inspect" does not confer authority of visitation and search. People v. Glennon, 37 Misc. 1, 74 N. Y. S. 794. The most frequent use of the search warrant is to search for goods alleged to have been stolen (Stone v. Dana, 5 Metc. [Mass.] 98; State v. Mann, 5 Ired. [N. C.] 45), but may be used to seek out goods used as a means of committing a felony or which a person has in his possession with intent to use as a means of committing a crime (People v. Noelke, 29 Hun [N. Y.] 461; Langdon v. People, 133 Ill. 382, 24 N. E. 874; Boyd v. United States, 116 U. S. 616, 29 Law. Ed. 746). See note to McClurg v. Brenton [Iowa] 101 Am. St. Rep. 329.

24. Adams v. Allen [Me.] 59 A. 62. Where an officer seizes liquor without a warrant, a warrant subsequently issued should command the arrest of the person from whom the seizure was made. Id.

25. Adams v. Allen [Me.] 59 A. 62.

ed.[26] A provision requiring one who operates an automobile on the street to display thereon a number furnished by the municipality is not an unreasonable search.[27] Compelling the production of books and papers for the purposes of evidence is no unreasonable search and seizure if the subpoena be precise and definite as to the documents required;[28] e. g. where one as agent makes entries on the books of a corporation and those books are in the actual or legal control of another officer of the corporation or of the corporation itself,[29] or the examination of the books and papers in the hands of a trustee in bankruptcy of a banker alleged to have received deposits when his bank was insolvent.[30] Whether a search is lawful or unlawful cannot affect the admissibility of the evidence.[31] Of course if the documents would tend to incriminate the producer, he may claim his privilege.[32]

§ 2. *Procedure for issuance and execution of search warrants.*[33]—A description in a search warrant which points out or identifies the place with such reasonable certainty as will obviate any mistake in locating it is sufficient.[34] Sur-

26. Letters of an incriminating character taken. Smith v. Jerome, 93 N. Y. S. 202.

27. People v. Schneider [Mich.] 103 N. W. 172.

28. An order of a municipal assembly made in the exercise of its charter powers requiring the production before it of books of a corporation in aid of investigations as to evasion of license taxes by the corporation. Ex parte Conrades [Mo. App.] 85 S. W. 150.

29. In re Moser [Mich.] 101 N. W. 588.

30. State v. Strait [Minn.] 102 N. W. 913.

31. Sheriff who searches a prisoner may testify that he found a pistol which it was unlawful to carry. Springer v. State, 121 Ga. 155, 48 S. E. 907.

32. See Witnesses, 2 Curr. L. 2163.

33. See 2 Curr. L. 1619.

NOTE. Designation of place: If a search-warrant is issued upon probable cause supported by affidavit, and particularly describes the place to be searched and the property to be seized, it is sufficient (Langdon v. People, 133 Ill. 382, 24 N. E. 874); but a search-warrant, to be of any validity and to authorize a search, must describe the place to be searched, the person against whom the warrant issues, and the property sought with such certainty as to identify them (Reed v. Rice, 2 J. J. Marsh. [Ky.] 44, 19 Am. Dec. 122; Byrnside v. Burdett, 15 W. Va. 702; Ashley v. Peterson, 25 Wis. 621). Thus, a search-warrant based on an affidavit that on a specified date a certain amount of cotton seed was taken from the affiant's premises and that there is probable cause for believing such property to be on a certain plantation, occupied by two designated persons, is void for want of a certain description of the place to be searched. Thrash v. Bennett, 57 Ala. 156. It has been held, although we do not think it to be the prevailing rule, that the description in the warrant of the place to be searched should be as certain and specific as would be necessary in a deed of conveyance (Jones v. Fletcher, 41 Me. 254; State v. Bartlett, 47 Me. 388); but the place to be searched must be particularly designated in the search-warrant, and a warrant authorizing a search of any suspected place is too general to be of any validity (Frisbie v. Butler, Kirby [Conn.] 213; People v. Holcomb, 3 Park. Cr. Rep. 656). The warrant must specifically describe the goods, place, and person, and direct the officer to search such place and arrest such person, and if any of these preliminaries is omitted, or if the warrant is too general, the proceedings are coram non judice. Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Sandford v. Nichols, 13 Mass. 286, 7 Am. Dec. 151. A search-warrant commanding the officer to diligently search a certain house for stolen goods will not authorize him to force his way into an adjoining house and search it (Larthet v. Forgay, 2 La. Ann. 524, 46 Am. Dec. 554), and a warrant to search the dwelling-houses of a certain person only authorizes the officer to search the house in which such person lives, and if he searches a house hired and occupied by another, although owned by such person, he is guilty of a trespass (Humes v. Taber, 1 R. I. 464). A house or place where the contraband goods are believed to be concealed is sufficiently designated and described in the warrant by denominating it as the office of the person named in the warrant, and specifically designating the street and number of its location, although the person named and another occupy such office together. Commonwealth v. Dana, 2 Metc. [Mass.] 329. And a warrant to search the house of a particular person and the barn, outhouses, and grain stacks of such person, on the same farm, is sufficiently specific, and not void for uncertainty. Meek v. Pierce, 19 Wis. 318. Authority to search a house will justify the search of a shop on the premises if the goods under search are such as might reasonably be found in such shop. Dwinnels v. Boyington, 3 Allen [Mass.] 310. A warrant directing the officer to search the house of a certain named person authorizes the search of his dwelling-house situated on the premises designated in the warrant. Wright v. Dressel, 140 Mass. 147, 3 N. E. 6.—From note "Search of Premises of Private Persons," 101 Am. St. Rep. 328, 331.

34. Under Const. art. 1, § 8 and Code, § 5550, requiring the place to be searched to be particularly described. State v. Moore [Iowa] 101 N. W. 732. Warrant commanding immediate search of the person or the dwelling,

plusage may be disregarded.[35] A search warrant irregular on its face is no protection to the officer who executes it.[36]

Resisting the warrant.[37]—An indictment for resisting the service of a search warrant which identifies the warrant alleged to have been resisted is sufficient.[38] A sentence of four months in the county jail is not excessive for violent resistance of the execution of a search warrant.[39]

SECRET BALLOT; SECURITY FOR COSTS, see latest topical index.

SEDUCTION.

§ 1. Nature and Elements of the Tort (1418).
§ 2. Civil Remedies and Procedure (1418).
§ 3. The Crime (1418).
§ 4. Indictment and Prosecution (1419).

§ 1. *Nature and elements of the tort.*[40]

§ 2. *Civil remedies and procedure.*[41]—A parent's cause of action for the seduction of his daughter arises when the act of seduction is complete, not when he discovers it.[42]

§ 3. *The crime*[43] consists generally in inducing an unmarried female of previous chaste character or good repute to submit to sexual intercourse by promise of marriage or other seductive means.[44] The exact amount or kind of seductive art necessary to constitute the crime cannot be defined. Every case must stand on its own peculiar circumstances; the condition of life, age, and intelligence of the parties.[45] Under some statutes the crime is committed though the

house and barn or other outbuilding of defendant in a certain township, range and section sufficiently identifies the place. Id.

35. In a warrant directing the search of certain property for the discovery of grain, a provision commanding search of the person of the one against whom it is directed. State v. Moore [Iowa] 101 N. W. 732.

36. Warrant did not show that the justice who issued it had authority to do so. Casselini v. Booth [Vt.] 59 A. 833.

37. See 2 Curr. L. 1619, n. 24.

38, 39. State v. Moore [Iowa] 101 N. W. 732.

40, 41. See 2 Curr. L. 1619.

42. Limitations run from such date. Davis v. Boyett, 120 Ga. 649, 48 S. E. 185.

43. See 2 Curr. L. 1620.

44. See Cyc. Law. Dict. 835. Evidence sufficient to sustain a conviction for seduction under promise of marriage. State v. Meals [Mo.] 83 S. W. 442; State v. Phillips [Mo.] 83 S. W. 1080. False promise of marriage which defendant refused to perform. Caldwell v. State [Ark.] 83 S. W. 929. Evidence sufficient to establish the venue of the crime. Jordan v. State, 120 Ga. 864, 48 S. E. 352.

NOTE. A previous chaste character is an essential element in the crime of seduction. State v. Smith, 107 Ala. 139. There is a conflict of authority as to whether chaste character is presumed in the first instance or whether it must be proved by the state as an ingredient of the crime. In Iowa, chastity is presumed (Andre v. State, 5 Iowa, 389, 68 Am. Dec. 708; State v. Burns, 78 N. W. 681; State v. McClintic, 73 Iowa, 663), and the presumption is not overcome by testimony of the defendant that he had intercourse with her a week before the seduction took place (State v. Bauerkemper, 95 Iowa, 562). In some other states previous chastity is presumed when there is no evidence to the contrary. People v. Squires, 49 Mich. 487; People v. Brewer, 27 Mich. 134; O'Neill v. State, 85 Ga. 383. But when there is introduced evidence tending to show unchastity, reasonable doubt as to her chastity is fatal to a conviction. Ferguson v. State, 71 Miss. 805, 42 Am. St. Rep. 492; West v. State, 1 Wis. 209; State v. Eckler, 106 Mo. 585, 27 Am. St. Rep. 372. But in proving the previous chaste character the general reputation for chastity is admissible in corroboration of her own testimony. State v. Lockerby, 50 Minn. 363, 36 Am. St. Rep. 656; People v. Samoset, 97 Cal. 448. In some states a statute requires that the woman be of good repute. Bowers v. State, 29 Ohio St. 542; State v. Hill, 91 Mo. 423; State v. Bryan, 34 Kan. 63. In such case there is usually no presumption of good repute but it must be shown by the prosecution. Zabriskie v. State, 43 N. J. Law, 640, 39 Am. Rep. 610; Oliver v. Commonwealth, 101 Pa. 215, 47 Am. Rep. 704; State v. Hill, 91 Mo. 423; State v. McCaskey, 104 Mo. 644. A statute of this character has been held to bring in issue only the reputation of the woman and consequently evidence as to previous conduct is inadmissible and the proof must be confined to reputation. Bowers v. State, 29 Ohio St. 542; State v. Bryan, 34 Kan. 63. But see State v. Patterson, 88 Mo. 88, 57 Am. Rep. 374; State v. Wheeler, 94 Mo. 252.—From note to Bradshaw v. Jones [Tenn.] 76 Am. St. Rep. 679.

45. Evidence sufficient to sustain a conviction. Pike v. State, 121 Ga. 604, 49 S. E. 680. Combination of flattery, lovemaking and hypnotism is a sufficient predicate for a prosecution. State v. Donovan [Iowa] 102 N.

prosecutrix submits, relying solely on a conditional promise of marriage,[46] or though consent be obtained without other persuasion than repeating a prior promise.[47] It is not necessary that the promise of marriage be the exciting or producing cause,[48] or have been made or repeated at the time the seduction took place,[49] or be made by one competent to make a contract of marriage enforceable against him,[50] and that the defendant was married at the time is no defense.[51] The female seduced must have been of previous chaste character.[52]

§ 4. *Indictment and prosecution.*[53]—An indictment charging the offense in the language of the statute is sufficient.[54] If chastity of character of the female is not mentioned in the statute, it need not be alleged.[55] It need not be alleged that the defendant is unmarried.[56]

Revival of prosecution suspended by marriage.—A prosecution suspended by marriage cannot be renewed upon a separation by mutual consent unless the wife has offered to resume marital relations and her offer has been refused,[57] but can be revived if the separation was caused by wrongful conduct on the part of the husband with the intention of forcing the wife to agree to the separation.[58] On renewal of a prosecution after abandonment, grounds for divorce are immaterial.[59]

Burden of proof and evidence.[60]—The defendant has the burden of showing want of chastity.[61] Where the indictment is silent as to whether defendant is married or single, the state need not prove that he is unmarried.[62]

In most states the testimony of the injured female must be corroborated.[63] The sufficiency of the corroboration is always a question for the jury.[64]

The environment of the prosecutrix may be shown,[65] and where seduction is by means of hypnotism and other influences, it may be shown that defendant has operated on other subjects and the control exerted over them.[66] The child begotten may be brought into court.[67] Preparations for marriage, made by prose-

W. 791. That prosecutrix's mother was dead and that she lived with her step-mother was held admissible to show the extent of her protection from the persuasions of defendant. Pike v. State, 121 Ga. 604, 49 S. E. 680.

46. Ball. Ann. Codes & St. § 7066, making it a crime for any person to seduce an unmarried woman of previously chaste character. State v. O'Hare, 36 Wash. 516, 79 P. 39.

47. Evidence held to warrant a conviction. Hill v. State [Ga.] 50 S. E. 57.

48. De Yampert v. State, 139 Ala. 53, 36 So. 772.

49. Burnett v. State [Ark.] 81 S. W. 382.

50. The crime may be committed by a minor. State v. Brock [Mo.] 85 S. W. 595.

51. State v. Donovan [Iowa] 102 N. W. 791.

52. Evidence sufficient to support a finding of previous chaste character. State v. Smith, 124 Iowa, 334, 100 N. W. 40.

53. See 2 Curr. L. 1621. See, also, Indictment and Prosecution, 4 Curr. L. 1.

54. Under Sand. & H. Dig. § 1900, previous chastity of the female is not mentioned and need not be alleged. Caldwell v. State [Ark.] 83 S. W. 929.

55. Caldwell v. State [Ark.] 83 S. W. 929. But see Walton v. State, 71 Ark. 398, 75 S. W. 1, cited 2 Curr. L. 1621, n. 57.

56. Jordan v. State, 120 Ga. 864, 48 S. E. 352.

57. Under Acts 1899, p. 23, providing that marriage shall suspend a prosecution which shall be continued in case of subsequent desertion. Burnett v. State [Ark.] 81 S. W. 382.

58. Burnett v. State [Ark.] 81 S. W. 382.

59. Jury need not be instructed as to what constitutes. Keaton v. State [Ark.] 83 S. W. 911.

60. See 2 Curr. L. 1621, n. 58 et seq.

61. Under Sand. & H. Dig. § 1900, making it a felony to obtain carnal knowledge of a female by virtue of a marriage promise. Caldwell v. State [Ark.] 83 S. W. 929.

62. Marriage is no defense and it need not be alleged that he is single. Jordan v. State, 120 Ga. 864, 48 S. E. 352.

63. State v. Smith, 124 Iowa, 334, 100 N. W. 40.

64. State v. Smith, 124 Iowa, 334, 100 N. W. 40. Testimony of one witness that the defendant told him that he had promised prosecutrix to marry her is a sufficient corroboration of the marriage promise. State v. Phillips [Mo.] 83 S. W. 1080.

65. Extent of her protection from the persuasions of the defendant. Pike v. State, 121 Ga. 604, 49 S. E. 620.

66. State v. Donovan [Iowa] 102 N. W. 791.

67. It is not error to permit the prosecutrix's child to be brought before the jury and referred to by the district attorney as "this child" in their presence. People v. Tibbs, 143 Cal. 100, 76 P. 904.

cutrix some time after the seduction and not shown to have been brought to the attention of defendant, are not part of the res gestae and are inadmissible.[68] Whether other men came to see prosecutrix subsequent to the seduction is immaterial.[69]

Evidence of the moral character of the prosecutrix may be admissible for the purpose of impeaching her testimony.[70]

Instructions.[71]—Instructions must correctly describe the elements of the crime,[72] and if defined by statute, must conform to the statute.[73] The usual rules as to the relation of the charge to the evidence,[74] repetition[75] and construction of particular charges,[76] apply.

The punishment imposed must be that prescribed by the statute in effect when the crime was committed.[77]

SENTENCE; SEPARATE PROPERTY; SEPARATE TRIALS; SEPARATION, see latest topical index.

SEQUESTRATION.

Chancery has inherent and original jurisdiction to issue a writ of sequestration to impound property and hold it subject to the final decree of the court.[78] Such chancery power in respect to the property of an insolvent corporation is not affected by statutory regulations of power to dissolve a corporation,[79] but though they have judicial power to do so, courts of equity will not generally render a corporation incapable of performing its corporate functions by sequestering its property and taking charge of its affairs.[80] The statutory remedy by sequestration is merely a provisional remedy for use in an action which, except as to form, exists independently of the statute, and is in effect a substitute for the common-law writ.[81] That the affidavit for the writ does not conform to the statute is not fatal.[82] The bond may be amended so as to fulfill the requirements of the law.[83]

The legitimate expenses of a creditor in instituting and prosecuting proceed-

68, 69. People v. Tibbs, 143 Cal. 11, 76 P. 904.

70. Under Code, § 4614, providing that the general moral character of a witness may be proved for the purpose of testing his credibility. State v. Haupt [Iowa] 101 N. W. 739.

71. See 2 Curr. L. 1622.

72. Language in an opinion of an appellate court held proper. Pike v. State, 121 Ga. 604, 49 S. E. 680.

73. Under Sand. & H. Dig. § 190, there must be an express promise, false or feigned. Burnett v. State [Ark.] 81 S. W. 382. Where a statute requires corroboration of the prosecutrix as to promise of marriage and intercourse, the court should on request instruct the jury to this effect, and the mere reading of the statute is insufficient. Keaton v. State [Ark.] 83 S. W. 911.

74. Proper to assume admitted facts. Burnett v. State [Ark.] 81 S. W. 382. Instruction held not objectionable as undertaking to determine the sufficiency of evidence corroborating the prosecutrix. State v. Smith, 124 Iowa, 334, 100 N. W. 40. Referring to the flight of defendant is justified by evidence that he knew the condition of the prosecuting witness and of her claim that he was the cause of it. State v. Haupt [Iowa] 101 N. W. 739. Where there was evidence that the defendant pretended to exercise a hypnotic influence over prosecutrix, it is proper to instruct the jury to consider testimony relative to the exercise of such power. State v. Donovan [Iowa] 102 N. W. 791.

75. State v. Meals [Mo.] 83 S. W. 442.

76. Instructions when considered entire held to state all the elements of the crime. State v. Meals [Mo.] 83 S. W. 442.

Clerical errors not ground for reversal unless misleading. Use of "defendant" instead of "prosecutrix." State v. Meals [Mo.] 83 S. W. 442.

77. Ex parte Biela [Tex. Cr. App.] 81 S. W. 739.

78. Dean v. Boyd [Miss.] 38 So. 297.

79. Authority of a court to dissolve a corporation does not apply to the question of its power in sequestration and winding up proceedings. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

80, 81. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

82. Error in not requiring it to be amended is not ground for reversal of a decree refusing to dismiss the proceedings. Dean v. Boyd [Miss.] 38 So. 297.

83. Dean v. Boyd [Miss.] 38 So. 297.

ings for sequestration and administration of an insolvent's property for the benefit of all creditors should be allowed as expenses of such administration.[84]

The remedy in Louisiana and Texas.—An affidavit and bond for a writ in aid of an action relative to property leased by one as lessor and agent of an undisclosed principal is properly made by such agent.[85] In an action to recover personal property consisting of several items sequestered by one and replevied by the owner who has given a replevy bond, there should be proof of the separate value of each article.[86]

In Louisiana a writ of sequestration must be based on conditions existing at the time of suing it out.[87] Judicial sequestration may be ordered after an appeal has been perfected.[88] Where the court ex officio orders the sequestration of real property, the defendant has the right to dissolve on bond as in ordinary sequestrations.[89] This right is, by statute, absolute, and embraces both movables and immovables,[90] except in cases of corporate or partnership property.[91] Where there has been an imperfect performance of a contract for the irrigation of a rice crop, only the excess of rent over the loss resulting from imperfect performance can serve as a basis for sequestration.[92]

In Arizona the power given an inspector or civil officer to seize and sequester certain unbranded cattle, the ownership of which is questioned, cannot be exercised unless the ownership is questioned in some reasonable manner,[93] and the fact that the ownership is questioned must appear from the record.[94] The statutory procedure relative to sequestration and sale must be strictly followed.[95]

Wrongful sequestration[96] is a conversion.[97] Actual damages may be recovered if sequestration is wrongfully sued out,[98] and exemplary damages if it is done maliciously.[99]

SERVICE, see latest topical index.

SET-OFF AND COUNTERCLAIM.

§ 1. Nature and Extent of Right in General (1421).
§ 2. To be Available as a Set-Off or Counterclaim, a Demand Must Have Been a Vested and Subsisting Cause of Action at the Time of the Commencement of Plaintiff's Suit, and the Parties Must Stand in the Same Right and Capacity (1422).
§ 3. To Admit of Set-Off or Counterclaim the Main Action Must be Similar in Form and Remedy to That Required for the Other (1425).
§ 4. Pleading and Practice (1427).

§ 1. *Nature and extent of right in general.*[1]—Though often used as equivalents, set-off and counterclaim are distinct.[2] In an action for goods sold and de-

84. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.
85. Hunter v. Adoue [Tex. Civ. App.] 86 S. W. 622.
86. Rev. St. 1895, art. 4877, authorizing the return of all or a part of the replevied property as a full or pro tanto satisfaction. Lewter v. Lindley [Tex. Civ. App.] 81 S. W. 776.
87. See 2 Curr. L. 1623. Boimare v. St. Geme, 113 La. 898, 37 So. 869.
88. Where a lessor brought a possessory suit against his lessee, which was dismissed, whereupon the lessor perfected a suspensive appeal. Thereafter an oil well was bored for and a gusher struck. State v. De Baillon, 113 La. 572, 37 So. 481.
89. Ramos Lumber & Mfg. Co. v. Sanders, 112 La. 614, 36 So. 625.
90. Code Prac. art. 279. Ramos Lumber & Mfg. Co. v. Sanders, 112 La. 614, 36 So. 625.
91. Ramos Lumber & Mfg. Co. v. Sanders, 112 La. 614, 36 So. 625.
92. Hunter Canal Co. v. Robertson's Heirs, 113 La. 833, 37 So. 771.
93. Under Laws 1903, p. 34, No. 26, § 5. Lacey v. Parks [Ariz.] 80 P. 367.
94. Lacey v. Parks [Ariz.] 80 P. 367.
95. Sale under Laws 1903, p. 34, No. 26, §§ 5, 7, held void because of noncompliance with the terms of the statute. Lacey v. Parks [Ariz.] 80 P. 367.
96. See 2 Curr. L. 1623.
97. See 2 Curr. L. 1622. Bledsoe v. Palmer [Tex. Civ. App.] 81 S. W. 97.
98, 99. Bledsoe v. Palmer [Tex. Civ. App.] 81 S. W. 97.
1. See 2 Curr. L. 1624.
2. See notes following and see 2 Curr. L. 1624.

livered by plaintiff's assignor, defendant's claim for damages for breach of the contract between himself and plaintiff's assignor is at most a set-off and does not entitle him to an affirmative judgment as for a counterclaim.[3]

A set-off must be in such condition and of such a character that the court may appropriate it to the demand.[4] Thus judgments against a person, deceased since their rendition, cannot be set off in a suit by the administratrix against the purchaser of the judgments, before the settlement of the estate.[5] Only a liquidated demand,[6] or one ascertainable by calculation,[7] is available.

The defense of set-off was unknown to the common law.[8] It and counterclaim are now statutory remedies.[9] In equity, insolvency or nonresidence of a party against whom a set-off is asserted is ground for relief.[10] Since a firm demand cannot be set off in a suit against one partner, where such suit is brought, and there exists a demand available as a set-off in a suit against the firm, but not available as the basis of an independent action because barred by limitations, equity will grant relief, and make such claim available as a set-off.[11]

In recoupment, defendant's claim must arise from the same transaction as the plaintiff's, and in this it is distinguished from set-off, which must arise in a distinct claim.[12]

Damages sought to be recouped against one of the parties must be limited to the amount of his interest in the bill.[13]

Counterclaim against counterclaim can only be had in New York by obtaining leave to amend the complaint.[14]

§ 2.[15] *To be available as a set-off or counterclaim, a demand must have been a vested and subsisting cause of action*[16] *at the time of the commencement of*

3. Levy v. Ash, 88 N. Y. S. 131.

4, 5. Ashworth v. Trammell, 102 Va. 852, 47 S. E. 1011.

6. To constitute a set-off, under the Missouri statute, a claim must be in the nature of a debt; hence a claim for unliquidated damages cannot be used as a set-off [Rev. St. 1899, § 4487]. Scarritt Estate Co. v. Schmelzer & Sons Arms Co. [Mo. App.] 86 S. W. 489.

7. Liebmann's Sons Brewing Co. v. De Nicolo, 91 N. Y. S. 791.

8. Wilson v. Exchange Bank [Ga.] 50 S. E. 357.

Note: The primitive notion of an action did not admit the possibility of a defendant being an actor and interposing a claim against a plaintiff to be tried in the one suit. Pom. Code Rem. [3d Ed.] § 729; Waterman, Set-Off [2d Ed.] § 10. The defense was provided for in England by the statute of 2 Geo. II., c. 27, § 13, and this statute has been the model for state legislation in this country, the effect of which is the same as that of the English statute, though varying somewhat in phraseology. Wilson v. Exchange Bank [Ga.] 50 S. E. 357.

According to common law mutual debts were distinct, and inextinguishable except by actual payment or release. Cyc. Law Dict. 844, citing 1 Rawle [Pa.] 293; Babington, Set-Off, 1. But chancery recognized the right and the statutes of set-off were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides. See Blake v. Langdon, 19 Vt. 485, 47 Am. Dec. 701, cited in note in 47 Am. St. Rep. 578. Though the remedy exists in chancery independent of statute, courts of law are governed by the statutes defining and regulating the right. Cyc. Law Dict. p. 894.

9. Counterclaim is a term of statutory origin, and includes both set-off and recoupment and something more. It embraces all sorts of claims which a defendant may have against a plaintiff in the nature of a cross action or demand, or for which a cross or separate action would lie. Cyc. Law Dict. 844, citing 13 How. Pr. [N. Y.] 84.

10. Fitzgerald v. Wiley, 22 App. D. C. 329.

11. Fowler & Co. v. Bellinger [Ala.] 37 So. 225.

12. Cyc. Law Dict. 844.

As to recoupment, see Damages, 3 Curr. L. 997.

13. Fitzgerald v. Wiley, 22 App. D. C. 329.

14. Fett v. Greenstein, 92 N. Y. S. 736.

15. See 2 Curr. L. 1624-1626.

16. Where railroads agreed to maintain a bridge, and to pay to the bridge company an amount equivalent to certain dividends on the bridge company's stock, but built and paid for a new span of the bridge ordered by the secretary of war, the cost of constructing such span was a money liability, which the roads could set off in an action to recover a deficit in dividends agreed upon. Louisville Bridge Co. v. Dodd [Ky.] 85 S. W. 683. In an action on a bond given by a tenant to a landlord on an appeal from a judgment of a justice of the peace, awarding possession of leased premises, the tenant may set off counterclaims against the rent demanded, since such set-offs could not have been used in the action before the justice for possession of the premises, and hence the judgment of common pleas affirming that

plaintiff's suit,[17] *and the parties must stand in the same right and capacity.*[18]—Thus in an action on a note by a bona fide holder, the maker cannot offset a note made to him by the payee of the note in suit.[19] A counterclaim must, in general, be owned by the defendant in absolute right.[20] An agent, liable on a contract for the benefit of a third person, by reason of not disclosing his agency, cannot avail himself of a debt due by plaintiff to such person as a set-off.[21]

In respect to assignees, trustees, receivers and the like, the right to set-off and counterclaim by privity to the assignor, insolvent or decedent become fixed at the time of succession and demands then accrued may be offset,[22] but those subsequently accruing cannot be,[23] save on some ground of an equitable nature.[24]

By statute in Ohio, when cross demands have existed such that in a suit by one against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment.[25] This statute applies even though

of the justice was not res adjudicata of such set-offs. McMichael v. McFalls, 23 Pa. Super. Ct. 256. A testator bequeathed to his deceased wife's children all his interest in a life insurance policy assigned by him to her in her lifetime, "without abatement on account of premiums" paid by him on the policy. Held, payment of premiums cannot be set off against a note held by her estate against him. Claypool v. Claypool, 4 Ohio C. C. (N. S.) 577.

A counterclaimed judgment cannot be collaterally attacked, no previous effort having been made to have it vacated. Couchman v. Bush, 26 Ky. L. R. 1277, 83 S. W. 1039. A widow recovered a judgment against her husband's estate for rents, after a codicil had been probated, increasing her rights. Subsequently the probate of the codicil was reversed, and an action brought to recover back the rents recovered by the widow. Held, her judgment not having been vacated, could in such suit be counterclaimed. Id.

17. Hutchinson v. Hutchinson [N. J. Eq.] 58 A. 528. Counterclaim must be one existing at the time of commencement of the action [Code Civ. Proc. § 438]. Provident Mut. Bldg. Loan Ass'n v. Davis, 143 Cal. 253, 76 P. 1034. Note not available as set-off when acquired by defendants six days after service of subpoena in suit. Hutchinson v. Hutchinson [N. J. Eq.] 58 A. 528. Since the equitable owner of money in the hands of another may recover by assumpsit for money had and received, he may offset the amount in an action against him by the holder. Langhorne v. McGhee [Va.] 49 S. E. 44.

18. Where heirs of a tenant in common sued other tenants in common separately for a share of profits of the estate, defendants could not prove that decedent had received his share in his lifetime, since that would be a claim primarily against decedent's executors. Sieger v. Sieger, 209 Pa. 65, 58 A. 140. Under a statute authorizing as set-offs only mutual debts or demands, an administrator, who has acquired the interest of decedent's heirs in the estate, cannot set off a personal claim against the assignor of a claim against the estate, in a suit by the assignee on the claim [Pub. St. 1901, c. 223, § 7]. McCaffrey v. Kennett [N. H.] 60 A. 96. A counterclaim for use and occupation of premises let by defendant to plaintiffs cannot be interposed in an action in tort to recover for conversion of rents of premises collected by defendant as plaintiffs' agent. Frick v. Freudenthal, 90 N. Y. S. 344. Since a counterclaim must be one existing against a plaintiff and in favor of a defendant, defendant, in an action on an assigned claim for rent, cannot counterclaim for damages for delay in the making of alterations and repairs by plaintiff's assignor [Rev. St. 1899, § 605]. Scarritt Estate Co. v. Schmelzer & Sons Arms Co. [Mo. App.] 86 S. W. 489.

19. Levy v. Avery, 91 N. Y. S. 67.

20. Variations of the rule may be allowable for the enforcement of certain equities existing in favor of a defendant and which would otherwise be irremediable. Gibboney v. Wayne & Co. [Ala.] 37 So. 436.

21. Hence, where damages sought to be recouped are alleged as having been sustained, not by defendants, but by their alleged principals, who are not parties to the suit, the plea of recoupment is demurrable. Gibboney v. Wayne & Co. [Ala.] 37 So. 436.

22. Where judgments were obtained against plaintiff in former actions between the same parties for a larger amount than that claimed by plaintiff, there could be no recovery by him or his assignees in insolvency, since such prior judgments constituted valid set-offs. Foster v. Central Nat. Bank, 93 N. Y. S. 603.

23. A debtor of an insolvent bank, in a suit by the receiver, cannot offset a claim against the bank acquired by assignment after it became insolvent. Schlesinger v. Goldberg, 93 N. Y. S. 592.

Note: For extended discussion of set-off after insolvency, see note to St. Paul, etc., Trust Co. v. Leck [Minn.] 47 Am. St. Rep. 578.

24. Where an assignee for creditors completes a contract unfinished by the assignor at the time of the assignment, and sues for the contract price, defendant may set off a claim growing out of dealings with the assignor before the assignment. Meeder v. Goehring, 23 Pa. Super. Ct. 457. Holders of bonds of an investment company, after insolvency of the company, become creditors, and are entitled to set off the value of their bonds, according to what they have paid, against notes given for the bonds, though, at the time of insolvency, the bonds have not matured. New Farmers' & Traders' Bank v. Crowe, 26 Ky. L. R. 500, 82 S. W. 287.

25. Rev. St. § 5073. Oliver v. Canan [Ohio] 73 N. E. 466.

the assignee is ignorant at the time of the assignment of his assignor's indebtedness to plaintiff.[26] By agreement with an assignee a debtor may disentitle himself to his right of set-off.[27]

A materialman claiming a lien on a balance due under a contract is subject to all offsets good as against the entire contract.[28]

Claims barred by limitations cannot be set off.[29] But where a demand subsists at the time plaintiff's cause of action accrues, limitations do not run against it as a mutual demand or set-off, though an independent action thereon may then be barred.[30]

In a suit against two or more persons on a joint obligation, set-off is not available to less than the entire number of defendants.[31] If defendants are severally liable, so that separate judgments may be entered against them, it is held in some states that a cross demand in favor of any one of the defendants is available.[32] Thus in an action against the maker of a note and an indorser, the indorser may set off an individual claim against the plaintiff growing out of the transaction which gave rise to the execution of the note.[33]

26. As where a judgment debtor assigned his judgment, his assignee being ignorant of the assignor's indebtedness to the plaintiff. Oliver v. Canan [Ohio] 73 N. E. 466.

27. Where defendant agreed to pay bills to a bank, which thereupon advanced money to the assignor, no indebtedness of the assignor to defendant could be set off in an action by the assignee. Batavian Bank v. Minneapolis, etc., R. Co. [Wis.] 101 N. W. 887.

28. In an action by a subcontractor to enforce a claim for materials furnished on two bridges, as against an alleged unpaid balance of the contract price for either or both, the subcontractor having furnished materials under one contract and filed but one statement of account, a county is entitled to set off its entire damages for breach of its contracts for the two bridges, in determining whether there was money in its hands applicable to the subcontractor's demands. Modern Steel Structural Co. v. Van Buren County [Iowa] 102 N. W. 536.

29. Sieger v. Sieger, 209 Pa. 65, 58 A. 140.

30. By Code 1896, § 3728. Fowler & Co. v. Bellinger [Ala.] 37 So. 225.

31. Wilson v. Exchange Bank [Ga.] 50 S. E. 357.

32. So held in Georgia. Wilson v. Exchange Bank [Ga.] 50 S. E. 357.

33. Wilson v. Exchange Bank [Ga.] 50 S. E. 357.

NOTE. Set-off where defendants are jointly and severally liable: In some states it is flatly held that the defense of set-off is not available to less than the entire number of defendants. See Lemon v. Stevenson, 36 Ill. 49; Ryan v. Barger, 16 Ill. 28; Woods v. Harris, 5 Blackf. [Ind.] 585; Gordon v. Swift, 46 Ind. 208; Warren v. Wells, 1 Metc. [Mass.] 80; Brooks v. Stackpole, 168 Mass. 537, 47 N. E. 419; Jones v. Gilreath, 28 N. C. 338; Corbett v. Hughes, 75 Iowa, 282, 39 N. W. 500; Banks v. Pike, 15 Me. 268.

In Arkansas, the above doctrine was first held in Trammell v. Harrell, 4 Ark. 602, construing a statute providing for set-offs between persons "mutually indebted." The chief justice dissented, and in Leach v. Lambeth, 14 Ark. 668, the earlier decision was overruled, and it was held that, under the statute, a debt in favor of one of several defendants, sued together, but jointly and severally liable, was available to such defendant. See, also, Burke's Adm'r v. Stillwell's Ex'r, 23 Ark. 294. And for decisions of other states to a like effect, see Pitcher v. Patrick's Adm'rs, Minor [Ala.] 321, 12 Am. Dec. 54; Carson v. Barnes, 1 Ala. 93; Sledge v. Swift, 53 Ala. 110; Huddleston v. Askey, 56 Ala. 218; Riley v. Stallworth, 56 Ala. 481; Locke v. Locke, 57 Ala. 475; Childerston v. Hammon, 9 Serg. & R. [Pa.] 68; Robinson v. Beall, 3 Yeates [Pa.] 267; Miller v. Kreiter, 76 Pa. 78; Dunn v. West, 5 B. Mon. [Ky.] 377.

In Pom. Code Rem. [3d Ed.] § 755, the author says: "The provision found in nearly all the codes that the counterclaim must exist in 'favor of a defendant and against a plaintiff between whom a several judgment might be had in the action,' implies that whenever the single defendant or all the defendants jointly may recover against one or some of the plaintiffs, and not against all, or whenever one or some of the defendants, and not all, may recover against the single plaintiff or all the plaintiffs jointly, or whenever both of these possibilities are combined, a counterclaim may be interposed against the one or some of the plaintiffs, and not against all, and by the one or some of the defendants and not by all. Such a severance in the recovery is possible when the right sought to be maintained on the one side and the liability to be enforced on the other are not originally joint." After a full discussion of numerous cases bearing on the subject, the author, in section 761, lays down the following rules: "First. When the defendants in an action are joint contractors, and are sued as such, no counterclaim can be made available which consists of a demand in favor of one or some of them. Second. When the defendants in an action are jointly and severally liable, although sued jointly, a counterclaim, consisting of a demand in favor of one or some of them, may, if otherwise without objection, be imposed. Third. Since it is possible, pur-

§ 3.[34] *To admit of set-off or counterclaim the main action must be similar in form and remedy to that required for the other.* In general, a cause of action ex contractu cannot be counterclaimed against one ex delicto,[35] or vice versa,[36] unless both demands arise out of the transactions set forth in the complaint.[37] Because of the nature of the judgment demanded, actions of replevin[38] or forcible entry[39] do not, unless it be so provided, admit of this right. If an alternative judgment for the value be sought in replevin, a recoupment may be available on the damages.[40] A defendant cannot oust a magistrate of jurisdiction by bringing a cross suit for an amount beyond the jurisdiction of the magistrate.[41]

In code states, equitable defenses and counterclaims may be interposed in actions at law.[42] In equity, cross demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off, whenever the circumstances are such as to warrant the intervention of equity.[43]

Under the New York statute, which has been followed by the legislatures of several other states, a counterclaim must embody a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.[44] The cause of action arises from the transaction set forth in the complaint when the combination of acts and events, circumstances and defaults, upon which the rights of the parties are based, when viewed in one aspect, result in plaintiff's right of action, and, when viewed in another aspect, result favorably to defendant.[45] "Transaction" is not necessarily limited by the facts stated in the complaint, but defendant may set up new facts, and show the entire transaction, and counterclaim upon

suant to express provisions of all the codes, for persons severally liable to be sued jointly under certain circumstances in a legal action—that is, in an action brought to recover a common money judgment—a counterclaim in favor of one or more of such defendants may be pleaded and proved." In Roberts v. Donovan, 70 Cal. 108, 9 P. 180, 11 P. 599, it was held that one of two joint obligors could not set off an individual claim against the plaintiff's demand on the action; but in the opinion (page 114 of 70 Cal., page 182 of 9 Pac.) the following language was used: "The action was brought upon the joint bond of all the defendants. Were it a joint and several bond, no difficulty would arise; for where the cause of action is several, as well as joint, a several judgment may be entered without reference to the mere form of the action."—For discussion and authorities see Wilson v. Exchange Bank [Ga.] 50 S. E. 357.

34. See 2 Curr. L. 1624-1626.

35. A judgment cannot be counterclaimed against an action of conversion. Under Code Civ. Proc. § 691. Potter v. Lohse [Mont.] 77 P. 419. A claim for goods sold and delivered cannot be counterclaimed in an action for libel. Action for libel for publication of name in St. Paul Produce Exchange as a "delinquent debtor." Thomssen v. Ertz [Minn.] 101 N. W. 304.

36. A counterclaim for tort cannot be interposed in an action on a lease for rent. Gerry v. Siebrecht, 88 N. Y. S. 1034. In an action on notes, damages for fraud in inducing defendant to advance money to plaintiff cannot be counterclaimed. Story v. Richardson, 91 App. Div. 381, 86 N. Y. S. 843.

37. If a counterclaim arises out of transactions set forth in the complaint, it is immaterial that it is based on contract and the plaintiff's cause of action is for a tort. King v. Coe Commission Co. [Minn.] 100 N. W. 667.

38. The filing of a counterclaim in a replevin suit is prohibited by statute in Iowa. Sylvester v. Ammons [Iowa] 101 N. W. 782.

39. The action for unlawful detainer, under the Idaho statute, is not subject to counterclaim or cross action. Claim for unliquidated damages arising out of breach of covenant by the lessor is not proper matter for counterclaim under Rev. St. 1887, §§ 4184, 4188. Hunter v. Porter [Idaho] 77 P. 434.

40. See Cunningham v. Stoner [Idaho] 79 P. 228, and see Damages, 3 Curr. L. 997; Replevin, 4 Curr. L. 1514.

41. Corley v. Evans [S. C.] 48 S. E. 469.

42. Crosby v. Scott-Graff Lumber Co. [Minn.] 101 N. W. 610.

43. Fitzgerald v. Wiley, 22 App. D. C. 329. Where mortgage on inventions and patents therefor is sought to be foreclosed, damages for loss of profits on sale of a foreign patent, the sale having failed of consummation through default of the mortgagees, are not too speculative or remote to be recouped. Id.

44. Code Civ. Proc. § 501, subd. 1. Frick v. Freudenthal, 90 N. Y. S. 344. Same statute in Minnesota. King v. Coe Commission Co. [Minn.] 100 N. W. 667.

45, 46, 47. King v. Coe Commission Co. [Minn.] 100 N. W. 667.

that.[46] It refers not only to an occurrence or act but to commercial or business dealings or transactions with respect to the same business or subject-matter.[47] The words "the subject of the action" mean the facts constituting plaintiff's cause of action.[48] One slander cannot be counterclaimed against another, though both are uttered at the same time and place, and in the same conversation; each slander is a separate transaction.[49]

In Idaho a cross complaint must relate to or depend upon the contract or transaction on which the main case is founded, or affect property to which the action relates, but does not necessarily seek its relief against all or any of the original plaintiffs or defendants.[50] A counterclaim, in that state, while it must exist in favor of defendant and against plaintiff, may in other respects go further than a cross complaint, and, if the cause of action arose on contract, may set forth any other cause of action arising on a contract.[51]

Under statutes defining a set-off as a cause of action arising on contract, or ascertained by the decision of a court,[52] a judgment may be used as a set-off,[53] and it is immaterial that the judgment has become dormant.[54] Where contracts may be counterclaimed, an implied contract for money had and received is subject to counterclaims of an express contract.[55] In Illinois, in assumpsit for goods sold, defendant's claim of unliquidated damages for alleged breach of a contract entirely separate and distinct from the contract of sale can neither be offset nor recouped.[56]

Claims arising out of the same contract or transaction set forth in the complaint, being available, damages for breach of a contract may be counterclaimed in a suit to recover thereon,[57] or a claim for a balance due may be counterclaimed in an action for damages for breach.[58] While money paid to clear taxes may be

48. Potter v. Lohse [Mont.] 77 P. 419.

49. Within meaning of Rev. Codes 1899, § 5274, subd. 1. Wrege v. Jones [N. D.] 100 N. W. 705.

50, 51. Hunter v. Porter [Idaho] 77 P. 434.

52. Rev. St. § 5071. Oliver v. Canan [Ohio] 73 N. E. 466.

53. Kirkby's Dig. § 6101. Milner v. Camden Lumber Co. [Ark.] 85 S. W. 234.

54. Oliver v. Canan [Ohio] 73 N. E. 466.

55. Action against administratrix, in individual capacity to recover attorney's fee allowed by court; counterclaim on note of plaintiff held by defendant. Vaughn v. Walsh [Wis.] 100 N. W. 840.

56. Higbie v. Rust, 211 Ill. 333, 71 N. E. 1010, approving former cases.

57. A buyer of personalty may set off damages for breach of warranty in an action for the price. Browning v. McNear, 145 Cal. 272, 78 P. 722. Failure to perform a contract entitling the contractee to a modification or extinguishment of the contract price may be pleaded as a counterclaim, as well as a defense. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356. In an action on a contract for services as night watchman, defendant alleged that plaintiff carelessly and negligently performed his duties under the contract, permitting water in boilers to become low, thereby injuring the boilers to defendant's damage. Held, the answer did not set out a cause of action for tort, but on the contract, and was properly pleaded as a counterclaim. Hagin v. Cayauga Lake Cement Co., 93 N. Y. S. 428. In an action for failure of a telephone company to furnish connection over its system, the company may counterclaim damages for breach of contract. Such counterclaim is connected with subject of action within Code 1902, § 171. Gwynn v. Citizens' Tel. Co. [S. C.] 48 S. E. 460. If plaintiff claims damages growing out of a contract or transaction, the defendant may deny liability or default, and as a counterclaim allege and establish the liability and default of the plaintiff and recover damages. Hudson River Power Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448. In an action by a power company for electric power furnished during a certain month, an allegation in the answer that plaintiff ceased to perform its contract on a certain date, and has since refused to furnish power, constitutes a valid counterclaim. Hudson River Power Transmission Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179. In an action to recover for repairs on a locomotive engine, defendant may set off the rental value of the engine for the period covered by delay in making repairs according to the contract. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64. In a suit to recover for repairs to machinery, negligence in the making of the repairs may be considered as a ground for recoupment of damages. Electric Supply & Maintenance Co. v. Conway Elec. Light & Power Co. [Mass.] 71 N. E. 983.

58. In an action for damages for breach of a contract to furnish materials of a certain quality for a house, defendant may counterclaim an unpaid balance of the price of the materials. Crosby v. Scott-Graff Lumber Co. [Minn.] 101 N. W. 610.

counterclaimed against an action for the price of land sold with a covenant against incumbrances, since both arise out of the same transaction,[59] damages by breach of warranty in that mineral rights were outstanding cannot, it is held, be offset.[60]

The New York statute authorizing, in a suit for divorce or separation, a defense by way of counterclaim setting up a cause of action against plaintiff for divorce or separation, does not authorize a counterclaim upon facts which would warrant annulment of the marriage.[61]

§ 4. *Pleading and practice.*[62]—The rules of pleading applicable to the statement of a cause of action in a complaint apply also to a counterclaim.[63] Thus a counterclaim must contain every allegation necessary to constitute an original cause of action for the same matter,[64] in favor of defendant and against plaintiff,[65] or it will be subject to demurrer.[66] The pleading must show that the counterclaim existed at the time of the commencement of the action.[67] Each counterclaim must contain within itself all the allegations necessary to its sufficiency without reference to other allegations of the answer.[68] But since facts not expressly alleged which can reasonably be inferred from what is stated are to be regarded as well pleaded,[69] matter once stated in a complaint or answer may be reasonably regarded as incorporated into that part of the answer apparently devoted to the statement of a counterclaim, if referred to for that purpose, directly or circumstantially;[70] and when plaintiff, by replying, indicates that he considers them so incorporated, that view should prevail, unless the language of the counterclaim as a whole very clearly will not admit thereof.[71] A counterclaim for damages for breach of contract must set out the contract,[72] and must allege performance by defendant.[73]

A pleading cannot perform the office of both an answer and counterclaim.[74] Facts sufficient to constitute a counterclaim must be pleaded as such.[75] If they

59. Payments made to satisfy tax liens. Bullitt v. Coryell [Tex. Civ. App.] 85 S. W. 482.

60. Must look to his warranty. Joiner v. Trail [Ky.] 86 S. W. 980.

61. Durham v. Durham, 99 App. Div. 450, 91 N. Y. S. 295.

62. See 2 Curr. L. 1627.

63. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356.

64. Robards v. Robards [Ky.] 85 S. W. 718. Such substantive facts must be averred as will show a liability on the part of the plaintiff to the defendant, disclosing a complete right of action in his favor against the plaintiff growing out of the subject-matter alleged in the complaint. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. Counterclaim, in action to recover balance of price of wheat, for damages for failure to deliver a portion of that sold, held insufficient to state a cause of action against plaintiff because not alleging defendant's willingness to perform. Stoner v. Swift [Ind.] 74 N. E. 248.

65. Burns' Ann. St. 1901, § 350. Stoner v. Swift [Ind.] 74 N. E. 248.

66. Stoner v. Swift [Ind.] 74 N. E. 248. The sufficiency of facts to constitute a counterclaim is to be determined in the same manner as when a demurrer is interposed to a complaint on the ground that it does not state facts sufficient to constitute a cause of action. Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987.

67. An allegation that plaintiff is indebted to defendant on a contract for the payment of money, that the money had not been paid, and that the same is due and payable, does not show that a counterclaim existed at the time of commencement of the action. Provident Mut. Bldg. Loan Ass'n v. Davis, 143 Cal. 253, 76 P. 1034.

68. Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987.

69. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356.

70. Breaches of contract held well pleaded as counterclaim in action thereon. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356.

71. Manning v. School Dist. No. 6 [Wis.] 102 N. W. 356.

72. Kentucky Refining Co. v. Saluda Oil Mill Co. [S. C.] 48 S. E. 987.

73. Answer alleging breach of contract to furnish electric power held insufficient as counterclaim. Hudson River Power Transmission Co. v. United Traction Co., 98 App. Div. 568, 91 N. Y. S. 179, rvg. 43 Misc. 205, 88 N. Y. S. 448.

74. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. Answer and counterclaim or set-off distinguished. Stoner v. Swift [Ind.] 74 N. E. 248.

75. Where the statute allows a claim against an assignor after maturity of a bill or note to be used as a counterclaim against the assignee, it must be pleaded as such, and if properly pleaded, must be replied to. Hunter v. Fiss, 92 App. Div. 164, 86 N. Y. S. 1121.

are pleaded as a defense only,[76] no affirmative relief being asked,[77] the pleading cannot be regarded as setting up a counterclaim. But in Indiana, if the allegations show a cause of action against the plaintiff, the pleading will be treated as a counterclaim, though styled by the pleader an "answer by way of counterclaim."[78] A separate and distinct cause of action for damages remains a counterclaim, though called a set-off.[79] A reply setting up a counterclaim to a counterclaim is unauthorized by the New York Code.[80] The remedy for a plaintiff in such case is to move for leave to amend the complaint.[81]

Allegations of set-off in an affidavit of defense must be as specific as those used in a statement of claim, and averments in general terms are not to be regarded.[82] The Virginia statute treats payment and set-off together, and places them upon the same ground in prescribing the mode of relying on them as matters of defense.[83] Hence where the items of an account filed with a plea of payment, or nil debit, are so described as to give plaintiff notice of their character, defendants may prove the items as payments, though described generally in the account filed as offsets.[84] Failure to file a bill of particulars with a plea of set-off, required by statute in Florida, is waived by a plaintiff who proceeds to trial without objection by motion to strike the plea or have the bill of particulars filed.[85] Where, in an action for the recovery of the value of repairs to personalty, defendant files a plea containing proper subjects of set-off, a demurrer to the plea should be overruled, though other items contained in the plea were not proper subjects of set-off.[86]

After a valid plea of set-off has been filed, the plaintiff is not entitled to dismiss his action so as to interfere with the defendant's rights, except upon sufficient cause shown.[87] Where a counterclaim has been filed, defendant is entitled to proceed with the trial thereof, on plaintiff's failure to appear.[88] Where plaintiff institutes a suit to have a mortgage and lien on property canceled, but thereafter sells his interest and moves to discontinue the suit, a reconventional demand seeking to enforce such mortgage and lien, filed after the motion for discontinuance,

76. As where in action for rent of hotel, defendant pleaded fraudulent representations inducing execution of the lease, not as an equitable counterclaim, but as a separate answer and defense. Gilsey v. Keen, 93 N. Y. S. 783. Purely defensive allegations not warranting affirmative relief do not constitute a counterclaim. Stewart v. Gorham, 122 Iowa, 669, 98 N. W. 512. Answer attempting to plead a prior action by an assignee pending, but which failed to allege that an assignment was in fact made or an action brought, held insufficient as a counterclaim under Civ. Code, § 501. Cassidy v. Arnold, 91 N. Y. S. 570.

77. Hudson River Power Transmission Co. v. United Traction Co., 43 Misc. 205, 88 N. Y. S. 448.

78. Johnson v. Sherwood [Ind. App.] 73 N. E. 180.

79. Liebmann's Sons Brewing Co. v. De Nicolo, 91 N. Y. S. 791.

80. Where complaint alleged breach of contract of employment, and answer set up a counterclaim for money advanced, a reply setting up services of a certain value as a set-off against defendants' counterclaim was not authorized. Fett v. Greenstein, 92 N. Y. S. 736.

81. Fett v. Greenstein, 92 N. Y. S. 736.

82. Penn Shovel Co. v. Phelps, 24 Pa. Super. Ct. 595; McFetridge v. Megargee, 26 Pa. Super. Ct. 501. General allegations of loss from failure to deliver goods, without specifying the number of articles of each kind and the price, insufficient to show set-off in action for price of goods. Carnahan Stamping & Enameling Co. v. Foley, 23 Pa. Super. Ct. 643. Affidavit of defense in action to recover price of paper sold a publisher held insufficient to show set-offs, because uncertain, indefinite, and lacking in facts. Genesee Paper Co. v. Bogert, 23 Pa. Super. Ct. 23.

83. 2 Code 1904, p. 1737. Langhorne v. McGhee [Va.] 49 S. E. 44.

84. Langhorne v. McGhee [Va.] 49 S. E. 44.

85. The statute (Rev. St. 1892, § 1069), requiring such bill, is for the benefit of plaintiff, and he may waive noncompliance therewith. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64.

86. Muller v. Ocala Foundry & Mach. Works [Fla.] 38 So. 64.

87. Wilson v. Exchange Bank [Ga.] 50 S. E. 357.

88. But pleading held not a counterclaim, but purely defensive, though designated "an answer and cross petition," and hence defendant was not permitted to proceed [Code, § 3766]. Stewart v. Gorham, 122 Iowa, 669, 98 N. W. 512.

is not in time.[89] Plaintiff in reconvention is not entitled, in such case, to have other parties interested in the property brought into the suit and have his claim litigated, but must resort to another suit.[90]

Judgment and costs.—A judgment which makes no disposition whatever of a counterclaim filed in the action is not final and will not support an appeal.[91] Where, in an action for recovery of money only, a counterclaim or set-off is set up, there should be only one judgment, which should be for the party in whose favor the greater amount is found due, and should include the costs of such party.[92] The fact that plaintiff commenced his action in a justice court does not change the rule on trial de novo in the court of common pleas, where the claim of defendant was not due and could not be set up in the justice court.[93] Where defendant denies all liability, and puts plaintiff to the expense of a trial, plaintiff is entitled to costs, though a judgment used as a set-off by defendant exceeds in amount the verdict on plaintiff's demand.[94] A statute providing that where a defendant fails to avail himself of a claim against plaintiff by using it as a set-off, he cannot recover costs in a subsequent independent action thereon, does not apply to a claim for unliquidated damages.[95] A set-off consisting of several items should be credited to a defendant as of their respective dates.[96]

SETTLEMENT OF CASE; SETTLEMENTS; SEVERANCE OF ACTIONS, see latest topical index.

SEWERS AND DRAINS.

§ 1. **State and Municipal Control (1429).**
§ 2. **Independent Organizations (1431).**
§ 3. **Cost and Provision for Same (1432).** Local Assessments (1433). Review of Assessment Proceedings (1435).
§ 4. **Public Contracts and Construction (1436).**
§ 5. **Management and Operation (1438).**
§ 6. **Private and Combined Drainage (1441).**
§ 7. **Obstruction of Drains (1441).**

§ 1. *State and municipal control.*[97]—The drainage and reclamation of swamp or overflowed lands, to increase the area of cultivable lands,[98] or to promote the public health and welfare,[99] is a matter of general public utility and concern, for which the legislature may provide by the creation of local administrative organizations or political corporations.[1] In carrying on such work, or in establishing, maintaining and operating a drainage system to relieve natural streams of sewage, the legislature is not, in the absence of any constitutional limitation, required to delegate the work to existing municipalities, nor to establish a new municipality, but may act directly and through its own agencies.[2] Thus the statute creating the Passaic valley sewerage district is not unconstitutional as special and local legis-

89, 90. Lyons v. Fry, 112 La. 759, 36 So. 674.

91. Riddle v. Bearden [Tex. Civ. App.] 80 S. W. 1061.

92. Rev. St. §§ 5348, 5349. Gordon v. Steinmetz [Ohio] 73 N. E. 512.

93. Action for breach of warranty and note set up as set-off, such note not having been due at the time of first trial. Gordon v. Steinmetz [Ohio] 73 N. E. 512.

94. Costs should be credited with the amount of the verdict on the judgment. Milner v. Camden Lumber Co. [Ark.] 85 S. W. 234.

95. Construing Kirkby's Dig. § 6104. Milner v. Camden Lumber Co. [Ark.] 85 S. W. 234.

96. Goodell v. Sanford [Mont.] 77 P. 522.

97. See 2 Curr. L. 1628, 1629, 1630, for corresponding matter.

98. St. 1885, p. 204, c. 158, providing for the formation of drainage districts each consisting of land susceptible of one mode of drainage, is constitutional. Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 77 P. 933. Land taken for this purpose is taken for a public use, even though the district to be reclaimed and made cultivable comprises only 160 acres. Id.

99. Drainage of swamps. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

Creation of assessment districts, see post, § 3.

1. Comp. St. 1903, art. 4, c. 89, has a valid object. Neal v. Vansickel [Neb.] 100 N. W. 200.

2. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571, afd. 60 A. 214.

lation,[3] nor as an unlawful regulation of the internal affairs of local municipalities.[4] A statute incorporating a company for the drainage of swamp land and giving the company a lien for special assessments on property benefited is not unconstitutional as a grant of special privileges for which no public service is rendered.[5] An objection that the charter of such company is defective because it does not specifically locate the lands to be assessed cannot be heard, after the legislature has by subsequent legislation recognized the charter as valid.[6]

Local boards have only such powers relative to drains and sewers as are conferred by statute, and the power conferred must be exercised in the manner prescribed by law.[7] In the absence of statutory authority, a municipal corporation has no power to grant permission to use streets for private drains.[8] One department of a city authorized to perform certain work may delegate the actual work of construction to the department of public works.[9] County commissioners, in Ohio, are without jurisdiction or authority to locate and construct a county ditch within the limits of a municipal corporation, unless such municipality petitions for the same, or a ditch being constructed necessarily passes into or through it.[10] The Indiana statute providing for the tiling of public, open drains, in certain cases, does not authorize construction by commissioners of an entirely new drain by tiling.[11] Though the commissioners were without authority, under this act, only as to a portion of the drain, the entire proceedings were void, since they treated the work as an entirety.[12] The Michigan statute providing for the drainage of swamp or overflowed lands surrounding lakes or rivers, by laying or extending drains through such bodies of water, does not authorize a drain which would lower the water in a navigable lake or stream so as to impair navigation.[13] The acts of New Jersey under which the city of Paterson was authorized to empty its sewage into the Passaic river amount to a mere legislative license, revocable at the will of the legislature whenever the public health and safety require.[14] In Nebraska, a ditch constructed jointly by two counties having proved insufficient to properly drain the lands intended to be benefited, the county board of one of such counties has power to adopt a new system, of which the old ditch, altered and repaired, shall form a part, and assess the cost upon the lands benefited, proper proceedings being taken; and such action is not precluded by the fact that the board has failed to clean out the old ditch for several years.[15] In Minnesota, villages

3. Laws 1902, c. 48. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571, afd. 60 A. 14. Since the situation of the territory included in the district is exceptional and not likely to be paralleled elsewhere in the state, the act providing for its construction and maintenance by special commissioners is not special legislation in the constitutional sense. Id. The provision of the New Jersey constitution, prohibiting special laws conferring corporate powers, applies only to private corporations and does not render invalid the act creating the Passaic Valley sewerage district commission. Laws 1903, p. 777, does not violate Const. art. 4, §§ 4, 11. Id.

4. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 60 A. 214, afg., thus far, 58 A. 571.

5. Kentucky statutes creating the Jefferson Southern Pond Draining Company are valid. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

6. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

7. Village of Pleasant Hill v. Miami County Com'rs [Ohio] 72 N. E. 896.

8. Bennett v. Incorporated Town of Mt. Vernon, 124 Iowa, 537, 100 N. W. 349.

9. Park department of Buffalo may so delegate actual work of re-enforcing and diverting sewers in a public square. Locke v. Buffalo, 97 App. Div. 483, 90 N. Y. S. 550.

10. Only such authority as is conferred by Rev. St. c. 1, tit. 6, §§ 4483, 4485. Village of Pleasant Hill v. Miami County Com'rs [Ohio] 72 N. E. 896.

11. Construing Burns' Ann. St. 1901, § 5653a. Kemp v. Adams [Ind.] 73 N. E. 590.

12. Kemp v. Adams [Ind.] 73 N. E. 590.

13. Thornapple river is navigable, and a drain which would lower it 4 feet is not authorized by Comp. Laws, § 4339. Cole v. Dooley [Mich.] 100 N. W. 561.

14. Hence the act providing for the Passaic Valley sewerage system, which abolished the city's method of disposing of sewage, did not necessitate compensation to the city. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

organized under the general law have no power to construct or contract for the construction of sewers until the property owners have had an opportunity to perform the work themselves.[16] The Illinois statute which, as incidental to the erection of a sanitary district, in effect requires the city of Chicago to supply water to the town of Cicero, on application by the latter, is not unconstitutional as depriving the city of Chicago of property without due process of law, since the operation of a public system of waterworks is the exercise of a quasi-governmental function, subject to legislative control.[17] Furthermore, the city of Chicago should not be heard to urge the unconstitutionality of the act after enjoying the benefit of the system, provided by the act, a portion of the cost of which has been borne by the people of the town of Cicero.[18]

§ 2. *Independent organizations.*[19]—*Illinois.*—The "Levee Act" and the "Farm Drainage Act" are separate and distinct acts, and a district organized under one is subject only to the provisions of that act.[20] The section of the farm drainage act relating to the organization of districts where lands affected lie wholly in one township does not provide for notice and a hearing; hence the other sections of the act relative to such notice and hearing apply to the proceeding.[21] Since county courts have jurisdiction to organize drainage districts, a judgment of a county court organizing a district is presumptively valid,[22] and is not subject to collateral attack.[23] If township commissioners have jurisdiction, their finding as to what lands should be brought into a drainage district is conclusive in a quo warranto proceeding.[24] But they cannot finally determine the question of their jurisdiction; hence a finding that lands affected by a proposed system of drainage were all within their township is not conclusive.[25] The objection, raised by quo warranto, that township commissioners were without jurisdiction, since the lands affected by the proposed drainage ditches lay in two or more townships, is not obviated by a proposed amendment to the plea to the effect that relators were present and their objections heard at the organization, the nature of the objections, and whether the relators were heard on the merits, not being stated by such amendment. Hence, leave to so amend was properly refused.[26] A drainage district may avail itself of the right of eminent domain to obtain a right of way to construct a ditch across the lands of others.[27] The legislature has power, under the state constitution, to change the boundaries of an established sanitary district.[28]

15. Morris v. Washington County [Neb.] 100 N. W. 144.

16. Laws 1901, p. 215, c. 167. State v. Foster [Minn.] 103 N. W. 14.

17. Hurd's Rev. St. 1901, p. 347, § 26, is valid. City of Chicago v. Cicero, 210 Ill. 290, 71 N. E. 356.

18. City of Chicago v. Cicero, 210 Ill. 290, 71 N. E. 356.

19. See 2 Curr. L. 1628.

20. The repealing section of the Illinois farm drainage act does not make the levee act applicable to proceedings under the farm drainage act. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

21. Construing Farm Drainage Act, § 76 (Hurd's Rev. St. 1903, p. 763, c. 42). McDonald v. People, 214 Ill. 83, 73 N. E. 444.

22. Starr & C. Ann. St. 1896, p. 1500, c. 42, gives such authority to county courts. People v. Waite, 213 Ill. 421, 72 N. E. 1087.

23. Such judgment cannot be attacked in a quo warranto proceeding on the ground that the court did not specifically find that the petition for organization of the district was signed by the requisite number of adult property owners, and the district was duly organized as provided by law. People v. Waite, 213 Ill. 421, 72 N. E. 1087. The legality of the organization of a drainage and levee district can be attacked and brought under judicial review only in a direct proceeding by quo warranto; it cannot be attacked in a proceeding to condemn land for a ditch. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684.

24. McDonald v. People, 214 Ill. 83, 73 N. E. 444.

25. The Illinois statute provides for three kinds of ditches: one where land lies in a single township; another where it lies in two; and a third where it lies in three or more. The commissioners of a single township have jurisdiction only as to the first class. McDonald v. People, 214 Ill. 83, 73 N. E. 444.

26. McDonald v. People, 214 Ill. 83, 73 N. E. 444.

27. Cleveland, etc., R. Co. v. Polecat Drainage Dist., 213 Ill. 83, 72 N. E. 684.

28. Sess. Laws 1903, p. 113, § 1, is valid.

California.—Under the California statute providing for the sale of uncovered swamp lands which have accrued to the state by the recession or drainage of the waters of inland lakes, the purchasers of such lands may avail themselves of the provisions of law relating to the reclamation of swamp and overflowed lands.[29] When such purchasers have formed a reclamation district and reclaimed the land, they are absolutely entitled to recover payments made on the land.[30] The statute providing for such payments constituted a contract between the state and the purchasers, and a subsequent statute providing for performance of such contract by the state was not objectionable as a gift of public money.[31] This contract is not subject to the statute of limitations applicable to written contracts.[32] Under a deed of land to a reclamation district for reclamation purposes only, title to revert to the grantor if the land ceases to be used for such purposes, the district has no right to use the land principally for any other purpose, and if it or its assigns should do so, title would revert to the grantor.[33] A conveyance by the district reserving the right to use a part of a building on the premises for tools and appliances used for the purposes of reclamation does not of itself show that the premises had ceased to be used for reclamation purposes.[34] Such conveyance by the district, it void for want of power to make it, would not operate to place title in the grantor, but would leave title in the district, unless it had actually ceased to use the land for reclamation purposes.[35] A purchaser of the land with full knowledge of the district's rights under its prior deed cannot be heard to say that the use being made of the land by the district was not necessary for reclamation purposes.[36] Whether a reclamation district organized under the California law of 1867 be considered a quasi public corporation or a mere public agency of the state, it could not be sued until an action against it was authorized by law.[37] In order to maintain an action against it under the provisions of the act of 1885, subjecting such districts to the provisions of the Political Code, the petition must show that the district had been, and was at the time of passage of the act, prosecuting the objects for which it was formed.[38] Furthermore the act of 1885 did not affect debts incurred prior to 1873 nor change the sole existing remedy of mandamus to enforce payment of such debts, nor revive rights of action against a district barred by limitations prior to the passage of the act.[39] A reclamation district can have no property subject to execution.[40]

§ 3. *Cost and provision for same.*[41]—A sewer is a public improvement, within the meaning of the San Francisco charter, for which a bonded indebtedness may be created.[42] That charter provides two methods for the building of sewers, either of which may be used, in the discretion of the supervisors; one, by the use of funds derived from the general revenues, within the dollar limit; the other, where the sum required exceeds the amount which may be so reserved, by the issuance of bonds for the construction of a general system of sewerage and drainage.[43] The drainage of swampy lands within municipal limits may properly

City of Chicago v. Cicero, 210 Ill. 290, 71 N. E. 356.

29. St. 1893, p. 342, c. 229, § 6, makes Pol. Code, §§ 3446 to 3491, available to such purchasers. McCord v. Slavin, 143 Cal. 325, 76 P. 1104.

30. McCord v. Slavin, 143 Cal. 325, 76 P. 1104.

31. St. 1899, p. 182, c. 149, amending St. 1893, p. 341, c. 229, § 5, is valid. McCord v. Slavin, 143 Cal. 325, 76 P. 1104.

32. McCord v. Slavin, 143 Cal. 325, 76 P. 1104.

33. Evidence held sufficient to show that land had not ceased to be used for reclamation purposes. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638.

34, 35, 36. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638.

37, 38, 39, 40. San Francisco Sav. Union v. Reclamation Dist. No. 124, 144 Cal. 639, 79 P. 374.

41. See 2 Curr. L. 1631.

42, 43. Law v. San Francisco, 144 Cal. 384, 77 P. 1014.

be deemed a public enterprise, the cost of which the legislature may properly place upon the municipalities benefited.[44] A private party having constructed a system of drainage under contract made by commissioners, the legislature has power to discharge the commissioners and provide for the payment of compensation by the municipalities benefited.[45]

The New Jersey statute providing for the Passaic valley sewerage system is unconstitutional as to the method therein provided of paying the cost, because it unlawfully delegates the power of taxation to executive commissioners, who have no governmental functions,[46] and because the taxation area and sewerage district provided for are not political divisions of the state.[47] Under the farm drainage act of Indiana, the owners of lands outside an established district, or another district, may connect with the ditches of the established district by paying such an amount as they would have been assessed had they been originally included in the district.[48]

Local assessments.[49]—The subject of local assessments is given a general and more extended treatment elsewhere.[50] Only the decisions peculiarly applicable to sewers and drains are here retained.

The cost of sewers in a city cannot be met by special assessments unless the power to assess is expressly conferred,[51] and such power does not retroact.[52] But sewer and drainage systems are usually held local improvements as to which such power exists.[53] Statutory authority to construct sewers and pay the cost by special as-

44. Drainage of swampy land in Hoboken and Weehawken. O'Neill v. Hoboken [N. J. Law] 60 A. 50.

45. Commissioners appointed under act of April 4, 1866, were commissioners for Hoboken and Weehawken, within the meaning of the act of April 8, 1903, providing for payment of improvement certificates, and the act of 1903 is valid. O'Neill v. Hoboken [N. J. Law] 60 A. 50.

46. Since the commissioners are given power to levy taxes to the amount of an indebtedness to be incurred by them in its judgment or discretion. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 60 A. 214, rvg. 58 A. 571.

47. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 60 A. 214, rvg. 58 A. 571.

48. Where an assessment was made on lands lying in two districts, and District No. 2 connected its ditches with a main ditch constructed by District No. 3, satisfaction of said assessment did not satisfy a claim of District No. 3 for benefit conferred by such main ditch on the assessed land lying exclusively in District No. 2. Construing Hurd's Rev. St. 1903, p. 750, c. 42. Drainage Com'rs of Drainage Dist. No. 2 v. Drainage Com'rs of Union Drainage Dist. No. 3, 211 Ill. 328, 71 N. E. 1007.

49. See 2 Curr. L. 1631.

50. See Public Works and Improvements, 4 Curr. L. 1124.

51. The city of Elkins has no authority under its charter act to levy assessments on abutting property for sewers in the streets. Cain v. Elkins [W. Va.] 49 S. E. 898.

52. Act Ind. March 4, 1893, relative to special assessments for sewer construction, applies only to sewers ordered and constructed after the act went into effect. Pennsylvania Co. v. Cole, 132 F. 668.

53. Pumping station and sewer system. Fisher v. Chicago, 213 Ill. 268, 72 N. E. 680.

NOTE. Property assessable: Local assessments being based on the theory of compensation for benefits derived from the improvement, property benefited by a sewer is properly assessed for the cost. Com. v. Woods, 44 Pa. 113; Wolf v. Philadelphia, 105 Pa. 25; Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160. But it must clearly appear that the property assessed is actually benefited. Chicago v. Adcock, 168 Ill. 221, 48 N. E. 155. Owners of land not actually benefited are entitled to relief against assessments. Paulson v. Portland, 16 Or. 450, 19 P. 450, 1 L. R. A. 673; Providence Retreat v. Buffalo, 29 App. Div. 160, 51 N. Y. S. 654. Nonabutting farm property cannot be assessed for a sewer where its drainage will not be improved thereby and no provision is made for the extension of the sewer so as to benefit such property. Bickerdike v. Chicago, 185 Ill. 280, 56 N. E. 1096. Assessments must be confined to lands abutting directly on the line of the improvement. Parker's Appeal, 169 Pa. 433, 32 A. 574. Unless the property is so placed as to admit of connection with the sewer. State v. Hoboken, 45 N. J. Law, 482. Title Guarantee & T. Co. v. Chicago, 162 Ill. 505, 44 N. E. 832. That surface water flowing over land finally reaches a drain will not sustain an assessment if the water would have flowed off the land without the drain. Beals v. James, 173 Mass. 591, 54 N. E. 245. Special benefits arising from construction of a ditch for which a landowner may be assessed, as distinguished from general benefits for which he may not be assessed, are whatever increase the value of the land. Lipes v. Hand, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160; Dodge County v. Acorn, 61 Neb. 376, 85 N. W. 292; Illinois C. R. Co. v. East Lake Fork Special Drainage Dist., 129 Ill. 417, 21 N. E. 925. Making land more healthy. Beals v. Brookline, 174 Mass. 1, 54 N. E. 339. For discussion of lia-

sessments does not authorize a grant to an individual of the right to construct and maintain sewers and charge rentals for their use.[54] Neither can a public body reimburse itself by assessment for reclamation work not comprehended by the statutes.[55] The provisions of the Nebraska drainage law authorizing the county board to provide funds for compensation to land owners whose property has been taken or damaged in the construction of drains do not provide for the taking of property without just compensation.[56] In Massachusetts, under the statute authorizing assessments on estates especially benefited by a new sewer, assessments may be levied where land has been taken for a new channel.[57] The fact that an assessment is not in fact levied is no reason for setting off the benefits against a claim for property taken.[58]

The power to assess being a continuing one admits of a second and additional assessment for necessary improvements and additions.[59] So also additional assessments from time to time to cover the expense of maintaining and keeping a ditch in repair may be authorized by statute.[60] A city having in good faith adopted and carried out plans for a sewerage system recommended by a competent sanitary engineer of high standing cannot be charged with the cost of additional or substituted improvements rendered necessary by the city's growth.[61]

In establishing a sewer district and determining its boundaries, a city council is exercising a legislative power, having its origin in the taxing power, for police purposes.[62] The exercise of this power by municipal authorities is discretionary and not subject to judicial review.[63] A city of general powers may create a new sewer district within the limits of a larger district and assess the cost of a new sewer on the property of such district according to special benefits.[64]

Sewer assessments are commonly apportioned according to frontage.[65] If required to be levied in proportion to benefits, they are void unless the property owner affected is notified or afforded an opportunity to be heard;[66] or if the amount assessed is in substantial excess of benefits.[67] An assessment roll prepared by a

bility for expense of drainage, see note to Heffner v. Cass and Morgan Counties (193 Ill. 439) 58 L. R. A. 353. See, also, treatment of local assessments in Public Works and Improvements, and notes thereto, 4 Curr. L. 1124.

54. The invalidity of an ordinance granting such right may be raised in an action to recover rentals, though it has not been specially pleaded. Weaver v. Canon Sewer Co., 18 Colo. App. 242, 70 P. 953.

55. A city of New Jersey may not have an assessment levied, under the drainage and sewage acts, to reimburse it for the expense of constructing a drain, which is neither a sewer nor a street improvement, its object being the drainage of swampy land, such drain having been built by the township before its organization as a city, since the act of March 4, 1884, under which the drain was built, was repealed in 1900, and the improvement was not one included within the incorporation act, permitting completion of and assessments for certain improvements. City of East Orange v. Hussey [N. J. Law] 59 A. 1060.

56. Cobbey's St. 1903, §§ 5500 to 5527, are valid. Morris v. Washington County [Neb.] 100 N. W. 144.

57, 58. Atkins v. Boston [Mass.] 74 N. E. 292.

59. Additional and larger pipes laid, the system first built having proved insufficient. Shannon v. Omaha [Neb.] 103 N. W. 53.

60. Laws 1901, p. 427, § 25, is valid. In re McRae [Minn.] 100 N. W. 384.

61. City held not negligent in adopting original plan. Shannon v. Omaha [Neb.] 103 N. W. 53.

62, 63. Wolff v. Denver [Colo. App.] 77 P. 364.

64. Assessment by frontage rule held not inequitable. Shannon v. Omaha [Neb.] 103 N. W. 53.

65. The cost of drain pipes and of filling in the construction of sidewalks must be apportioned on abutting property according to frontage. Moody & Co. v. Spotorno, 112 La. 1008, 36 So. 836.

66. Comp. St. 1903, art. 4, c. 89, § 12, is not open to this objection, since the board is given implied power to provide for due notice and hearing. Neal v. Vansickel [Neb.] 100 N. W. 200. Under P. L. 224, § 29, a property owner cannot be charged with costs of house connections with a sewer, in the absence of notice to the owner and default in compliance with the notice. Erie City v. Willis, 26 Pa. Super. Ct. 459.

67. Iowa Pipe & Tile Co. v. Callanan [Iowa] 101 N. W. 141. Comp. St. 1903, art. 4, c. 89, § 14, is invalid because it authorizes assessments for drainage without regard to benefits. Neal v. Vansickel [Neb.] 100 N. W. 200.

jury who went on the land is prima facie evidence that the land assessed will be benefited to the extent of the assessments.[68] A statute authorizing assessments for sewers on property according to frontage, or according to the area of such property to a certain depth from the street or way, will be construed as limiting the amount of particular assessments to the special benefits conferred, and, as so construed, is constitutional.[69] Failure of a contractor to complete a drain according to contract specifications through certain lands does not exempt such lands from assessment after completion of the drain through renewed proceedings.[70] Under the Kentucky statute, providing for proceedings in the county court for the construction of drains, and the assessment of the cost on lands benefited, after the landowner has refused or neglected to do the work within a certain time after confirmation of the report of the viewers, a contract for work cannot be let until such neglect or refusal by the owner.[71] Hence no lien for the assessment exists until the contract has been let, and a purchaser after the work has been ordered but before the contract has been let cannot resist payment of the assessment on the ground that no notice of lis pendens had been filed by the contractor.[72]

Equity will enjoin collection of a sewer assessment levied without authority;[73] but the equitable principle that a person taxed will not be relieved of his just share of burdens is not applicable to an action of assumpsit to recover from a treasurer a drain assessment, erroneously spread, and paid under protest.[74] A sewer connection having been properly made in accordance with a permit, equity will enjoin a borough from cutting it off as a means of compelling the owner to pay an assessment for which he is not liable or which is enforceable in the mode prescribed by ordinance.[75]

Review of assessment proceedings.[76]—The establishment of taxing districts is legislative and not reviewable,[77] but the fixing of assessments is judicial.[78] Though, in New Jersey, the circuit court takes part in municipal proceedings to assess benefits for drainage, the action of the municipal authorities is reviewable in the supreme court by certiorari only, and not by writ of error.[79] In Illinois the order confirming an assessment is alone appealable, no other prior order of the court being final.[80]

A court of last resort cannot be deprived of its exclusive prerogative by giving a lower court power to review finally the action of assessment commissioners.[81]

68. Pinkstaff v. Allison Ditch Dist. No. 2, 213 Ill. 186, 72 N. E. 715. May be rebutted. A finding by a jury that a tract of land would not be damaged held contrary to the evidence when it appeared conclusively that the excavated dirt from a ditch would form embankments necessitating construction of a bridge. Id.

69. Cheney v. Beverly [Mass.] 74 N. E. 306.

70. Pollock v. Sowers [Mich.] 100 N. W. 596.

71. Scherm v. Garrett's Adm'r, 26 Ky. L. R. 186, 80 S. W. 1103.

72. Construing Ky. St. 1903, §§ 2380, 2358. Scherm v. Garrett's Adm'r, 26 Ky. L. R. 186, 80 S. W. 1103.

73. Cain v. Elkins [W. Va.] 49 S. E. 898.

74. Murphy v. Dobben [Mich.] 100 N. W. 891.

75. Allen v. Swarthmore Borough, 25 Pa. Super. Ct. 410. Borough authorities having placed blank permits in the hands of a sewer inspector, who issued one to a property owner, the latter paying therefor and making connection with a sewer in accordance therewith in good faith, the borough cannot object that the permit was not properly issued. Id. Permit to make sewer connection held to sufficiently describe premises; and the facts that point of connection designated was not directly opposite lot, and that owner conducted his drain over another's lot, held immaterial. Id.

76. See 2 Curr. L. 1633.

77. Wolff v. Denver [Colo. App.] 77 P. 364.

78. Assessments for drainage ditch by county board [Comp. St. 1899, c. 89, art. 1]. Dodge County v. Acom [Neb.] 100 N. W. 136.

79. City of East Orange v. Hussey, 70 N. J. Law, 244, 57 A. 1086.

80. Commissioners of Lacey Levee & Drainage Dist. v. Langellier [Ill.] 74 N. E. 148.

81. N. J. Gen. St. p. 3639 construed as simply requiring the circuit court to take part in proceedings to assess benefits for drainage; the act does not make the action of the

From a judgment and orders of the county board in Nebraska, fixing drainage assessments, error will lie to the district court, whose judgment may be reviewed by the supreme court.[82] The judgment of the county board will not be reversed or set aside unless its findings are clearly wrong and unsupported by the evidence.[83] The board of review, in Michigan, in acting upon the drain commissioner's apportionment, has power to add lands to an assessment district for construction of a drainage ditch.[84]

§ 4. *Public contracts and construction. Procedure.*[85]—In general, the procedure prescribed by statute must be strictly followed, since the omission of any step necessary to constitute due process of law leaves the authorities without jurisdiction.[86] But failure to observe merely directory provisions as to the time within which certain action is to be taken will not be fatal to the proceedings, if the rights of property owners are not thereby injuriously affected.[87] No subsequent ratification or acquiescence of a city can cure a substantial defect or omission in the acts of a board of municipal officers acting judicially under statutory authority in the establishment of public drains and sewers.[88] Since the record of the proceedings of the board presumptively shows the full proceedings, parol evidence cannot extend, supply, or modify such record.[89]

When a petition of property owners is required, the presentation of such petition, signed as required by law, is a jurisdictional prerequisite.[90] The fact that a county owns land in a proposed drainage district, and that the chairman of the county board signed a petition for the district, does not disqualify the board so as to preclude its hearing the petition.[91] In the absence of fraud or mistake, an agreement between petitioners for a drainage ditch and a landowner that a private ditch maintained by the latter should not be interfered with between certain dates is valid.[92] A defendant in proceedings to condemn land for a drainage ditch, whose lands lie outside the assessment district, cannot assail the constitutionality of the law under which the district was formed and the proceedings instituted, on the ground that it does not provide for notice of the hearing on the petition for the district or of assessments on the land in the district.[93] An estimate of cost[94] and of the proportion of the expense to be borne by the municipality[95] is required by the Massachusetts statute before a plan for sewers may be adopted.

court on the report of the commissioners final. City of East Orange v. Hussey, 70 N. J. Law, 244, 57 A. 1086.

82, 83. Dodge County v. Acom [Neb.] 100 N. W. 136.

84. Murphy v. Dobben [Mich.] 100 N. W. 891.

85. See 2 Curr. L. 1633. Compare Public Contracts, 4 Curr. L. 1089.

Note: See exhaustive treatment of "procedure for the establishment of drains and sewers," including discussion of acquisition of funds and contesting assessments, in note to State v. Board of County Com'rs [Minn.] 60 L. R. A. 161.

86. Kidson v. Bangor [Me.] 58 A. 900.

87. Failure of commissioners, in proceedings to establish a drainage ditch, to appoint viewers within the time prescribed by law, does not invalidate the proceedings, since such provision is merely directory, and its violation does not injuriously affect the rights of property owners; construing Laws 1901, c. 258, p. 413, as amended by Laws 1902, c. 38, p. 90. In re McRae [Minn.] 100 N. W. 384.

88. Deviation from adopted plan without authority could not be cured by subsequent ratification. Kidson v. Bangor [Me.] 58 A. 900.

89. Parol testimony inadmissible to show consent of city to deviation from original plan of sewer system, or to show presentation of a proper petition. Kidson v. Bangor [Me.] 58 A. 900.

90. Such fact must appear to show laying out of sewer to be legal. Kidson v. Bangor [Me.] 58 A. 900.

91. O'Connell v. Baker, 35 Wash. 376, 77 P. 673.

92. Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678.

93. Laguna Drainage Dist. v. Charles Martin Co., 144 Cal. 209, 77 P. 933.

94. Pub. St. 1882, c. 50, § 7, held to have been complied with. Cheney v. Beverly [Mass.] 74 N. E. 306.

95. Where the proportion paid by a town is not less than ¼ nor more than ⅔ of the total cost, an assessment will not be set aside as void because it does not appear that the portion to be paid by the town was

Bids must be received for all materials to be used,[96] as designated by the statute.[97] Where individuals have a precedent option to construct their portions of drains, no contract can be made before a refusal of it.[98]

In Indiana, viewers must make the final report required by law, though they recommend that work for a ditch be let as an entirety instead of by allotment.[99] The board of county commissioners has no authority, after the filing of the viewers' report, to make an order allowing a credit for a part of a private ditch utilized in the work, since provision therefor, after completion of the work, is made by the statute.[1] But the fact that such unauthorized order is made does not affect the validity of their final order as a whole.[2] A report locating a ditch being held invalid and being referred back, the drainage commissioners were at liberty to change the location.[3] A remonstrance against a ditch as located by the viewers, on the ground of excessive assessment or insufficient damages, must be filed within the time specified by statute or the right thereto is lost.[4]

In Illinois, if a proper petition to abandon work is filed before the contract for a drainage system has been let, work must be abandoned; but this statute refers to the contract for the system as originally planned, and does not require the granting of a petition to abandon additional work petitioned for under the statute after the original contract has been let.[5] The Illinois act providing that land affected by additional drainage, which has been petitioned for after the contract for the system has been let, shall be organized into a subdistrict, does not apply where a petition was filed before the enactment of the statute.[6]

In Michigan the drain commissioner is authorized by statute to institute new proceedings to complete a drain after proceedings have been declared void for any cause except that the drain is unnecessary and not conducive to public health or welfare;[7] or after an assessment has been held invalid for any cause which would not deprive the commissioner of jurisdiction.[8]

Where petitioners for mandamus to compel commissioners to improve a drain had sought to secure better drainage and the commissioners had recognized their rights and taken steps to enforce them the suit for mandamus was not barred by limitations.[9] In a mandamus proceeding to compel commissioners to improve a drain so as to carry off water from the petitioner's land the question whether such lands had been increased in value by the drain as it existed was immaterial.[10]

determined by the selectmen as required by Rev. Laws, c. 49, § 27. Cheney v. Beverly [Mass.] 74 N. E. 306. Certiorari to quash an assessment not granted on this ground when applied for several years after adoption of sewer plan. Id.

96. The drain commissioner must receive bids for sewer pipe for a part of a drain, under Pub. Acts 1899, p. 463, providing for the receipt of bids and letting contracts for drains. Kenyon v. Board of Sup'rs of Ionia County [Mich.] 101 N. W. 851.

97. Comp. Laws, § 4338, authorizes use of sewer pipe in construction of drains when necessary. Kenyon v. Board of Sup'rs of Ionia County [Mich.] 101 N. W. 851.

98. Scherm v. Garrett's Adm'r, 26 Ky. L. R. 186, 80 S. W. 1103.

99. Burns' Ann. St. 1901, § 5670. Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678.

1. Burns' Ann. St. 1901, § 5657. Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678.

2. Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678.

3. A report of drainage commissioners being held invalid because not naming a railroad right of way crossed by the proposed ditch, and the railroad company owning the right of way, as required by Burns' Ann. St. 1901, § 5624, the commissioners were not bound (their report being referred back) to locate the ditch as in their first report, but could relocate it so as to terminate at the right of way. Turner v. Lay [Ind.] 71 N. E. 217.

4. Construing Burns' Ann. St. 1901, § 5665. Tolin v. Jones, 33 Ind. App. 423, 71 N. E. 678.

5. Hurd's Rev. St. 1903, c. 42, § 44. Soran v. Commissioners of Union Drainage Dist. [Ill.] 74 N. E. 129.

6. Soran v. Commissioners of Union Drainage Dist. [Ill.] 74 N. E. 129.

7. Comp. Laws 1897, § 4366. Pollock v. Sowers [Mich.] 100 N. W. 596.

8. Comp. Laws 1897, § 4369. Decision of circuit court did not hold an assessment void so as to preclude assessment for work after completion. Pollock v. Sowers [Mich.] 100 N. W. 596.

9, 10. Kreiling v. Northrup [Ill.] 74 N. E. 123.

Appeals.[11]—In Michigan, action of a drain commissioner in establishing a drain may be reviewed by certiorari, notice thereof being served on the commissioner within ten days after his final decision has been filed with the county clerk.[12] But this remedy is confined to defects existing at the time of such final order; hence where fatal defects occur more than ten days after such order, the board of supervisors may refuse to spread a tax for a drain, without first resorting to certiorari.[13] Under the Minnesota statute, a notice of appeal, otherwise specific, directed to the board of county commissioners, is sufficient in form, and after bond filed, operates to perfect an appeal to the district court from an order of the commissioners dismissing a petition for a ditch.[14] Upon appeal the district court is vested with jurisdiction to try all issues both of fact and law de novo.[15]

§ 5. *Management and operation. Duty to properly construct, maintain and repair works and provide drainage.*[16]—In devising a plan for the construction of public sewers, the public authorities discharge a quasi judicial duty, involving the exercise of judgment and discretion with regard to general convenience, which is not reviewable in a private suit for damages because of alleged error.[17] The public authorities do not owe an individual the duty of devising a plan which will afford him sufficient drainage.[18] In the absence of want of good faith, or negligence, there is no liability for damages resulting from a change in the course of a sewer.[19] The necessary destruction of a private drain in the construction of a street improvement is damnum absque injuria.[20] Nor is the contractor employed by the city liable unless he does the work in a negligent manner or in such a way as to create a nuisance.[21]

It is held in some states that in the absence of a general statute or special charter provisions, a city has no power in its corporate capacity to lay out and

11. See 2 Curr. L. 1635.

12. Pub. Acts 1899, p. 465. Kenyon v. Board of Sup'rs of Ionia County [Mich.] 101 N. W. 851.

13. Under Comp. St. §§ 3860, 4356. Kenyon v. Board of Sup'rs of Ionia County [Mich.] 101 N. W. 851.

14, 15. In re McRae [Minn.] 100 N. W. 384.

16. See 2 Curr. L. 1636, 1637.

Note: The authorities are not in accord on the question of liability of municipal authorities for damages arising from the construction of sewers and drains. It is usually held that in devising plans for such works the authorities exercise a quasi judicial discretion and that the municipality is not answerable for an error of judgment, whereby the system proves insufficient to drain certain lands. Bates v. Westborough, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156; Garratt v. Canandaigua, 135 N. Y. 436, 32 N. E. 142; Paine v. Dehhi, 116 N. Y. 224, 22 N. E. 405, 5 L. R. A. 797; Denver v. Capelli, 4 Colo. 25, 34 Am. Rep. 62. But the contrary has been held. Litchfield v. Southworth, 67 Ill. App. 398. An action will lie for the imperfect, negligent, unskillful execution of the plan adopted. Little Rock v. Willis, 27 Ark. 572.

A city is liable where the construction and maintenance of an improper system in accordance with defective plans create a nuisance, resulting in special damage to a private owner. Seymour v. Cummins, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126; King v. Kansas City, 58 Kan. 334, 49 P. 88. Particularly where the municipality has had notice of the defect and has failed to remedy it. Tate v. St. Paul, 56 Minn. 527, 58 N. W. 158; Selfert v. Brooklyn, 101 N. Y. 136, 4 N. E. 321, 54 Am. Rep. 664.

For negligence in carrying out a plan, a city is liable, since it then acts in a ministerial capacity. Montgomery v. Gilmer, 33 Ala. 116, 70 Am. Dec. 562; Chicago v. Seben, 165 Ill. 371, 46 N. E. 244; Thurston v. St. Joseph, 51 Mo. 510, 11 Am. Rep. 463.

For extended discussion of duty and liability of municipalities with respect to drainage, see note to Georgetown v. Com. [Ky.] 61 L. R. A. 673, from which the above citations are taken.

17. Owner who connected his cellar with sewer could not recover for flooding of cellar owing to lack of sufficient fall and capacity in the sewer. Harrington v. Woodbridge Tp., 70 N. J. Law, 28, 56 A. 141. The selection and adoption of the general plan of a system of drainage or sewage is a matter of discretion with municipal authorities; the exercise of such discretion does not render the municipality liable for damages, nor is it subject to judicial review. District of Columbia v. Cropley, 23 App. D. C. 232.

18. Harrington v. Woodbridge Tp., 70 N. J. Law, 28, 56 A. 141.

19. District of Columbia v. Cropley, 23 App. D. C. 232. The course of a sewer having long been established before the conveyance of certain lots on the Potomac river by the District of Columbia, the purchasers have no cause of action against the district for the discharge of sewage in the river, even though the discharge had been increased. Id.

20, 21. Bennett v. Incorporated Town of Mt. Vernon, 124 Iowa, 537, 100 N. W. 349.

construct drains and sewers in such a manner as to create any legal liability upon the city for a nuisance created thereby.[22] But other courts hold that municipalities are liable for construction of drains or sewers which cause an actual invasion of private property.[23] Where street commissioners, acting under statutory authority, built a conduit, not only to render a highway safe and convenient, but also to drain a tract of land privately owned, the city was liable for damages caused by surface water thrown on private land in the course of construction.[24] A property owner so injured is not prevented from maintaining an action in tort by the existence of the statutory remedy of petition to recover damages.[25] Whether conditions which arose in the course of construction of a conduit by sections, which resulted in damage to private owners, were such as could reasonably have been foreseen and provided against, is a question of fact for a jury.[26] The construction of a street in such a manner as to cause water to accumulate on private property does not render the city liable for personal injury and expense, the city being liable only for damage to property;[27] and the city is liable for damage of the latter kind only for negligent construction.[28] A municipality will not be permitted to carry out a scheme for the collection and diversion of surface water in such a manner as to certainly cast it upon lands of a private owner, to his great damage.[29]

A sanitary district is liable to riparian owners for damages caused by an improvement which lowers the water of a navigable stream.[30] The measure of damages recoverable in such case is the difference in the value of the abutting property before and after the making of the improvement.[31]

A city is liable in damages for failure to keep sewers in repair.[32] To entitle a plaintiff to a recovery of damages against a town for failure to maintain a public drain in a state of repair, under the Maine statute,[33] he must show that the drain in question was a public drain or sewer, legally established by act of the municipal officers;[34] that the plaintiff was a person entitled to drainage through it;[35] that the defendant had failed to maintain the sewer or to keep it in repair so as to afford sufficient and suitable flow for all drainage entitled to pass through it;[36] that the plaintiff suffered injury from the city's neglect.[37] Adverse, uninterrupted and exclusive use of a culvert by a city for a period of fifty years, the culvert being made an essential part of the sewer system, gives the city title and

22. No statute giving city such power in Maine, but Rev. St. 1903, c. 21, § 2, gives such power to municipal officers. Hence act of city ultra vires and created no liability. Atwood v. Biddeford [Me.] 58 A. 417.

23. See authorities cited in note, supra.

24. Where procedure is under St. 1897, p. 396, c. 426. Westcott v. Boston, 186 Mass. 540, 72 N. E. 89.

25. Provided by St. 1897, pp. 397, 398, c. 426, §§ 2-5. Westcott v. Boston, 186 Mass. 540, 72 N. E. 89.

26. Westcott v. Boston, 186 Mass. 540, 72 N. E. 89.

27, 28. Taylor v. Houston, etc., R. Co. [Tex. Civ. App.] 80 S. W. 260.

29. Authorities enjoined from carrying out a proposed drainage scheme. Fuller v. Belleville Tp. [N. J. Eq.] 58 A. 176.

30. Defendant liable under Starr & C. Ann. St. 1896, c. 42, for lowering water in South Branch of Chicago River by connecting its drainage channels with said river. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118.

31. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118.

32. Overflow of sewer into cellar, caused by heavy rainfall. Burnside v. Everett [Mass.] 71 N. E. 82.

33. Rev. St. c. 21, § 18. Kidson v. Bangor [Me.] 58 A. 900.

34. Held that drain in question was not legally established. Kidson v. Bangor [Me.] 58 A. 900.

35. Not a mere trespasser, but one who had fulfilled the requirements of law which were conditions precedent to the enjoyment of the right of drainage. Kidson v. Bangor [Me.] 58 A. 900.

36. On this point it must be shown that the damage was caused by an actual failure to maintain, and not by a defect in the original system established by judicial act of the municipal authorities. Kidson v. Bangor [Me.] 58 A. 900.

37. Kidson v. Bangor [Me.] 58 A. 900.

places upon it the duty of maintaining it in a safe condition.[38] The fact that the collapse of the culvert was caused by the improper construction of a wall by another corporation does not excuse the city.[39] Nor is the city relieved from liability by showing that a prior owner of the property damaged would have been estopped to claim damages, or was guilty of contributory negligence, without further proof that by covenant in the chain of title, such estoppel or contributory negligence runs with the land.[40] The owner of land abutting on a public alley who builds a blind ditch in the alley for his own use, without the permission or consent of the public authorities, must keep it in repair; the duty to do so does not rest on the municipality.[41]

Liability for improper operation.[42]—A city which assumes control over a creek, using it as the main trunk of a sewer system, is liable for damages resulting from an overflow caused by want of due care to prevent such injury.[43] The city is not excused from liability on the ground that the overflow was caused by an act of God, though the overflow occurred during a freshet, when negligent use of the creek as a sewer contributed to the result.[44] Legislative permission to use the creek does not affect liability for its negligent use,[45] nor would the fact that the overflow resulted from an error of judgment by the officials in carrying out a plan of sewerage constitute a defense.[46] Damages recoverable for injuries caused by the overflow of a creek used as a trunk sewer by a city are not limited to such as accrued from the deposit of sewage on the land, but include such as were caused by the water independent of the use of the creek as a sewer.[47] A city is liable for damages caused by the overflow of a sewer as a result of adding territory to that intended to be drained by the sewer as originally constructed.[48] The measure of damages to property caused by the overflow of a sewer is the depreciation in rental value.[49] Damages for successive overflows are continuous and may be recovered in one action up to the time of commencement of the other action.[50]

A city which collects sewage and discharges it in a volume into a creek is liable to a lower riparian owner for damages thereby caused to his land.[51] Such owner is entitled to compensation for the depreciation in the market value of the land, and for the destruction of its comfortable use and occupation, and for actual loss of rents, if these several elements of damage are shown.[52] He is not required to prove special damages in order to recover at least nominal damages.[53] Under the statutes by which the city of Worcester is permitted to discharge its sewage into Mill Brook, the city is not liable to a riparian owner for failure to purify the sewage before so discharging it, in the absence of a showing that such purification could have been accomplished by careful construction, without the construction of a plant therefor.[54] Nor does the statute requiring construction of a plant for the purpose within four years create a liability for failure to construct a plant adequate to accomplish the purpose, since that statute imposes a governmental function.[55]

38. City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877. Such acquisition is not forbidden by a charter provision authorizing the making of improvements in "streets, alleys or sidewalks," though the culvert is not within such limits. Id.

39, 40. City of Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877.

41. Owner liable for injury to child caused by defect in covering of ditch. Covington Saw Mill & Mfg. Co. v. Drexilius [Ky.] 87 S. W. 266.

42. See 2 Curr. L. 1637.

43, 44, 45, 46, 47. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555.

48, 49, 50. Ahrens v. Rochester, 97 App. Div. 480, 90 N. Y. S. 744.

51, 52, 53. Smith v. Sedalia, 182 Mo. 1, 81 S. W. 165.

54. St. 1867, c. 106, p. 541. Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326.

55. Under St. 1886, p. 309, c. 331, providing that the city should within four years erect a plant for the purification of sewage before its discharge into Mill Brook, to prevent creation of a nuisance or injury to the

A county has no right to collect surface water either on the public highway or from the lands of another, and discharge it upon the lands of one where it was not wont to go.[56] Persons whose lands are damaged by water so unlawfully cast upon them may abate the nuisance by filling up the ditch.[57] The owner injured is not estopped to take such action by his having previously enlarged the ditch, other owners having done nothing on the strength of such enlargement which they would not otherwise have done.[58] The act of the injured owner in filling the ditch being done during the period of limitations defeats the claim of an easement in the drain by adverse user.[59] A village which discharged sewage into a sink hole on private land under a license from the owners was not liable for resulting damages until after the license was revoked.[60]

The sanitary district of Chicago having been authorized by the state and the secretary of war to connect its drainage canal with the Chicago river, its use of the river is lawful, and the district is not liable for damages resulting from such use, so long as it is reasonable and within the authority conferred.[61]

Whether a claim for damages caused by improper operation of a sewer must be presented to the council before an action may be maintained,[62] and the sufficiency of the notice, when required, depends upon the local charter.[63]

§ 6. *Private and combined drainage.*[64]—It is provided by statute in Illinois that where the owner of lower lands connects a drain with one built by the owner of upper lands, the connected drain is one for the mutual benefit of all the lands interested, and none of the parties have the right, without the consent of the others, to fill up, interfere with, or obstruct, the drain so constructed.[65] The mutual license, consent or agreement under which such drain is constructed need not be in writing, but may be oral and may be inferred from the acquiescence of the parties interested.[66] The statute provides that the right to revoke a parol license shall be forever barred unless exercised within one year from the time that the statute went into effect.[67] One party having become vested with a perpetual right to have such drain maintained through failure of the other to exercise his right to revoke the license, that right cannot be lost or forfeited through a mere oral agreement.[68]

§ 7. *Obstruction of drains.*[69]—The right of drainage through a natural watercourse or natural waterway is a natural easement appurtenant to the land of every individual through whose land such watercourse runs, and every owner of land along such watercourse is bound to take notice of the easement possessed by other owners similarly situated.[70] There is a continuing duty resting upon railroads at common law to keep waterways over which they cross in such condition as not to interfere with public requirements.[71] This includes the duty of making

public health. Harrington v. Worcester, 186 Mass. 594, 72 N. E. 326.

56, 57, 58, 59. Schofield v. Cooper [Iowa] 102 N. W. 110.

60. Sink hole held not to have been dedicated to village by co-tenants, but a license to use the same granted. Sherman Lime Co. v. Glens Falls, 91 N. Y. S. 994.

61. Creation of a current of 1¼ miles an hour in the river does not make district liable for delay in transportation at congested points in the stream. Corrigan Transp. Co. v. Sanitary Dist., 125 F. 611.

62. Not necessary in Rochester. Ahrens v. Rochester, 97 App. Div. 480, 90 N. Y. S. 744.

63. Notice of a claim for damages caused by overflow of a creek used as a trunk sewer was presented to the acting president and clerk of the common council of Syracuse within the time prescribed. Held, a sufficient compliance with § 461 of the charter requiring presentation to the council. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555.

64. See 2 Curr. L. 1638.

65. Hurd's Rev. St. 1903, p. 772, c. 42, pars. 187, 189. Dorman v. Droll [Ill.] 74 N. E. 152.

66, 67, 68. Dorman v. Droll [Ill.] 74 N. E. 152.

69. See 2 Curr. L. 1639.

70, 71, 72, 73. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

changes in bridges or culverts to accommodate the increased flow in such waterways caused by artificial means.[72] Hence a statute requiring changes in railroad bridges to accommodate an increased flowage caused by improvements made under the farm drainage law is merely declaratory of a common law duty, and does not provide for the taking of property without due process of law or without compensation, within the meaning of the constitutional prohibition.[73] The provisions of the Illinois act giving assessors and county clerks power to impose penalties on lands whose owners have failed to remove impediments in waterways are unconstitutional because imposing judicial duties on ministerial officers and providing for the taking of property without due process of law.[74] One who has permitted a city to construct a sewer outlet on his land cannot obstruct the outlet and thereby injure persons who have connected their residences with it, on the faith of representations made by him and the city that they had a right to make such connections, even though the sewer is a nuisance, and was constructed under a promise that it would not be a nuisance.[75]

SHAM PLEADINGS; SHELLEY'S CASE; SHERIFF'S SALES, see latest topical index.

SHERIFFS AND CONSTABLES.

§ 1. **The Office; Election or Appointment;**
§ 2. **Powers, Duties, and Privileges (1442).**
§ 3. **Compensation (1444).**
§ 4. **Deputies, Undersheriffs, and Bailiffs (1445).**
§ 5. **Liabilities (1445).**
A. In General (1445).
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E. Wrongful Levy or Sale (1447).
F. Misappropriation of Proceeds (1448).
§ 6. **Liability on Bonds (1448).**

§ 1. *The office; election or appointment; qualifications.*[76]—A constable who performs official duties after the expiration of his term is a de facto officer until his successor is chosen and has qualified.[77] The presumption of regularity applies to the acts of de facto officer.[78] Failure to comply with a directory statute requiring filing of the appointment of a deputy sheriff does not invalidate his appointment nor official acts.[79] Constables appointed by a town may, according to the nature of the particular duty involved, be agents for whose acts the town is liable, or they may be simply public officers for whose acts the town is not liable.[80] In Florida, by statute, the sheriff of the county in which the supreme court is held is the sheriff of the court,[81] and all county sheriffs are ex officio his deputies,[82] and are required to execute all process to be executed in their respective counties.[83]

§ 2. *Powers, duties, and privileges.*[84]—The duties of a police department as

74. Drainage Act (Hurd's Rev. St. 1899, c. 42), §§ 200, 201, are invalid. Cleveland, etc., R. Co. v. People, 212 Ill. 638, 72 N. E. 725.

75. Such owner is estopped from obstructing the outlet after such acts. City of Chillicothe v. Bryan, 103 Mo. App. 409, 77 S. W. 465.

76. See 2 Curr. L. 1640.

77. After the expiration of his term where he acts officially under a colorable but invalid appointment. Hammondsport Law, L. & Coll. Ass'n v. Kinzell, 43 Misc. 505, 89 N. Y. S. 534.

78. Where a deputy sheriff is shown to have been at least a de facto officer, the presumption of regularity with reference to his acts attaches without proof of his appointment by official record. Mosher v. McDonald & Co. [Iowa] 102 N. W. 837.

79. Orchard v. Peake, 69 Kan. 510, 77 P. 281.

80. Mains v. Inhabitants of Ft. Fairfield [Me.] 59 A. 87. In committing a prisoner to a town lockup as a place of detention, he acts for the state and not for the town from which he receives his appointment. Id. Police officers in the preservation of the peace are not agents of the borough; their powers and duties are derived from the state to which their primary responsibility is due, and the borough is not liable for their omissions or commissions, malfeasance or nonfeasance in the performance of their duties. Miller v. Hastings Borough, 25 Pa. Super. Ct. 569.

81, 82, 83. Johnson v. Price [Fla.] 36 So. 1031.

84. See 2 Curr. L. 1640.

NOTE. Officer paying judgment or exe-

defined by the general assembly cannot be restricted nor enlarged by a municipal corporation.[85] The right of the sheriff to the charge and care of the county jail and to the custody of the prisoners therein confined is a statutory and not a constitutional, common law, or immemorial right attached to the office.[86] A sheriff in possession of personal property by virtue of an order of attachment may retain possession until the lien acquired thereby is lost, the property disposed of by force of it, or the lien is satisfied;[87] but a right to maintain action for the possession of things attached by him cannot be invoked after the attachment is discharged.[88] In Colorado a constable alone can execute writs of execution issued by a justice of the peace in a civil action, unless another person is deputed by the justice to do so;[89] but he has no power to appoint a substitute or deputy to execute it,[90] and an execution by such deputy is void.[91] A de facto marshal of a municipal corporation may make an arrest.[92] A constitutional provision against deprivation of liberty without due process does not preclude a state police officer from making an arrest of a seaman on a foreign vessel for insubordination.[93] A police officer may be restrained

cution: There are a number of cases holding that a judgment or execution cannot ordinarily be kept alive in the hands of the sheriff for his benefit when he has paid the same without any agreement or assignment. Boren v. McGehee, 6 Port. [Ala.] 432, 31 Am. Dec. 695; Roundtree v. Weaver, 8 Ala. 314; Whittier v. Heminway, 22 Me. 238, 38 Am. Dec. 309; Morris v. Lake, 9 Smedes & M. [Miss.] 521, 48 Am. Dec. 724; Reed v. Pruyn, 7 Johns. [N. Y.] 426, 5 Am. Dec. 287; Harwell v. Worsham, 2 Humph. [Tenn.] 524, 37 Am. Dec. 572. According to Lintz v. Thompson, 1 Head [Tenn.] 456, 73 Am. Dec. 182, the voluntary payment of an execution by the officer holding it, without a transfer of the judgment to him, operates not only as a satisfaction of the execution, but as an extinguishment of the judgment, notwithstanding the officer, by reason of his neglect, had rendered himself liable under the statute to a judgment on motion for the amount. But in Finn v. Stratton, 5 J. J. Marsh. [Ky.] 364, it is held that where an execution is paid by a sheriff who has rendered himself liable by his official defalcation in regard to it, he is entitled to the interest of the plaintiff in the demand, and may use the name of the plaintiff to enforce it against all the defendants in the execution. See, also, Allen v. Holden, 9 Mass. 133, 6 Am. Dec. 46; Denson v. Ham [Tex. App.] 16 S. W. 182; Hall v. Taylor, 18 W. Va. 544. In Heilig v. Lemly, 74 N. C. 250, 21 Am. Rep. 489, a sheriff neglected to enforce an execution until after it was spent, and then paid the amount due thereon, and took an assignment for his own benefit to a third person. It was held that the judgment was not extinguished, and that an alias execution might issue. The court, referring to the case of Reed v. Pruyn, 7 Johns. [N. Y.] 426, 5 Am. Dec. 287, which has been widely cited to a contrary doctrine, says: "We think that in the subsequent cases in New York, and others elsewhere that have followed this case, the opinion of the eminent judge (Kent) has been misconceived, and an extension given to it which was not intended, and which cannot be supported by reason. An opinion applicable to a special case has been converted into a general and arbitrary rule." When a sheriff, under a void execution, collects the amount of a valid judgment, and pays it to the judgment plaintiff, and afterward the judgment defendant recovers a judgment against the officer for the money so collected, the officer is subrogated to the rights of the first judgment creditor, and he may, at his option, have execution on the judgment or offset it against the one obtained against him. Gillette v. Hill, 102 Ind. 531, 1 N. E. 551. And when personalty is sold under execution after the judgment has been satisfied, the purchaser being chargeable with such satisfaction, the officer or his sureties may be entitled to the money bid or taken in at the sale, on being compelled by the debtor to repay the value of the property sold. Morgan v. Oberly, 85 Ill. 74. A sheriff, after satisfying a judgment recovered against him because of his deputy failing to pay money collected on execution, may be subrogated to the rights of the deputy in a judgment obtained by him against a bank for the sum collected on the execution and deposited in the bank, where the deputy and his sureties are insolvent. Downer v. South Royalton Bank, 39 Vt. 25. See note to American Bonding Co. v. National, etc., Bank [Md.] 99 Am. St. Rep. 505.

85. City of Cleveland v. Payne [Ohio] 74 N. E. 177.

86. Conferred by Rev. Code 1852, p. 421, c. 54, § 1. McDaniel v. Armstrong [Del.] 59 A. 865.

87. First Nat. Bank of Hennessey v. Hesser, 14 Okl. 115, 77 P. 36.

88. Under Code Civ. Proc. § 655. O'Brien v. Manhattan R. Co., 91 N. Y. S. 69.

89. Mills' Ann. St. § 4668. Stacy v. Bernard [Colo. App.] 78 P. 615.

90, 91. Stacy v. Bernard [Colo. App.] 78 P. 615.

92. McDuffie v. State, 121 Ga. 580, 49 S. E. 708.

93. Arrest made at request of the consul of the foreign nation to which the vessel belonged, pursuant to treaty provision. Dallemagne v. Noisan, 25 S. Ct. 422.

from performing an act in discharge of his duty which comes within the nature of a trespass.[94]

§ 3. *Compensation.*[95]—A sheriff may refuse to levy any attachment or writ until his fees are tendered or secured.[96] A constable appointed to attend the grand jury is entitled to his per diem for each day he performs any bona fide service for such body, whether the jury is in session or not.[97] An officer is not entitled to compensation from public funds for services performed for the benefit of a private enterprise,[98] nor to fees for a service he does not perform.[99] He is not entitled to any compensation for services rendered the public unless expressly so provided by statute.[1] Especially where he receives a salary in lieu of fees;[2] but generally his salary does not preclude him from the right to fees in civil cases.[3] Fees are purely the creature of statute, and an officer claiming them must show a claim within a statutory provision,[4] and where he accepts a provision for compensation which he has asked the court to make, he is precluded from making a claim for fees.[5]

Where a sheriff has notice that his office will be changed from a fee to a salary basis during his term, there is no violation of a provision against diminishing his salary during his term.[6]

A sheriff is entitled to charge his reasonable expenditures in caring for attached property,[7] or to make a reasonable charge for his own services if he performs the duty himself,[8] but he is entitled to no more.[9] One who contests the reasonableness of his charge has the burden to show that it is unreasonable.[10] Where he is under a duty to collect certain fees and turn them over to a city, he is entitled to recover from the city, money necessarily expended by him in an attempt to collect them.[11] In New York a sheriff is entitled to his poundage without an order of the court,[12]

94. Hale v. Burns, 91 N. Y. S. 929.

95. See 2 Curr. L. 1641.

96. Under Mansf. Dig. § 3250 [Ind. T. Ann. St. 1899, § 2234]. Tully v. Cutler [Ind. T.] 82 S. W. 714.

97. Connors v. Shelby County [Tenn.] 81 S. W. 598.

98. Nerlien v. Village of Brooten [Minn.] 102 N. W. 867.

99. Under Act July 11, 1901 (P. L. 663), a mere offer to serve subpoenas does not entitle him to fees. Deitrick v. Northumberland Co., 24 Pa. Super. Ct. 22.

1. In Minnesota he is not entitled to a fee for each execution issued upon a personal property tax judgment delivered to him and returned by him unsatisfied. Appeal of Justus [Minn.] 101 N. W. 943.

2. Act 1902, p. 1078, § 4, giving a sheriff a salary and repealing all acts inconsistent therewith, gives him a salary in lieu of fees. Gilreath v. Greenville County [S. C.] 50 S. E. 18.

3. A sheriff who receives a fixed annual stipend for services rendered the county and is also entitled to fees for services rendered in civil cases is not a salaried officer within the meaning of a statute entitling all but salaried sheriffs to a certain fee for each jury cause on the calendar. People v. Leech, 43 Misc. 435, 89 N. Y. S. 178.

4. Under Rev. St. 1899, § 3246, allowing a sheriff $1.25 per day for keeping a prisoner while undergoing an examination preparatory to commitment, he is not entitled to that allowance for keeping one arrested under a capias and in jail awaiting trial. State v. Allen [Mo.] 86 S. W. 144. Under Act of 1868, a sheriff is not entitled to a fee of fifty cents for the discharge of prisoners other than vagrants, from his custody. Dougherty v. Cumberland, Co., 26 Pa. Super. Ct. 610.

5. The sheriff procured an order of court fixing the wages of a keeper of malefactors which provided "this compensation covers all fees on the commitment of vagrancy." Held, the sheriff was not entitled to a statutory fee. Dougherty v. Cumberland County, 26 Pa. Super. Ct. 610.

6. Statute enacted prior to election to take effect on the completion of a workhouse. McDaniel v. Armstrong [Del.] 59 A. 865.

7. Worley v. Shelton [Tex. Civ. App.] 86 S. W. 794. A sheriff is entitled to his necessary expenses of keeping attached property until after the judgment. Alexander v. Wilson [Cal.] 79 P. 274.

8. Worley v. Shelton [Tex. Civ. App.] 86 S. W. 794.

9. Charge held unreasonable. Worley v. Shelton [Tex. Civ. App.] 86 S. W. 794.

10. Worley v. Shelton [Tex. Civ. App.] 86 S. W. 794.

11. Laws 1890, p. 963, c. 523; Laws 1891, p. 645, c. 315; Laws 1892, p. 868, c. 418; Laws 1894, p. 959, c. 477, providing that poundage fees collected by the sheriff of New York county shall be paid by him monthly to the city treasurer. Dos Passos v. New York, 90 N. Y. S. 398. Money expended by the sheriff of New York County in an attempt to collect poundage fees which were to be paid into the city treasury of New York can be recovered only from the city. Id.

and may recover, after the expiration of his term, fees and poundage in an attachment concluded during his term;[13] but his right to retain property levied on until his fees and poundage are paid gives him no right of action for poundage.[14]

§ 4. *Deputies, undersheriffs, and bailiffs.*[15]—In an action by a sheriff on his deputy's bond, the complaint should distinctly allege wherein the deputy has failed in his duty.[16]

§ 5. *Liabilities. A. In general.*[17]—An officer is protected in the execution of process where it appears on the face of the process that the court has jurisdiction of the subject-matter, and the process in other respects shows no want of authority,[18] but not otherwise.[19] Thus, an officer is not liable for false imprisonment for making an arrest under a warrant,[20] but is if he makes an unjustifiable arrest without a warrant,[21] or on a warrant not fair on its face,[22] or if in making an arrest he commits an assault;[23] and where he seizes property without a warrant, he is held to a strict compliance with the law authorizing such proceeding.[24] His refusal to execute a warrant delivered to him for that purpose is indictable.[25] A sheriff is required to exercise only reasonable care in keeping safely property in his custody,[26] and is required to use at least reasonable diligence in executing writs.[27] By statute in Montana, a sheriff need not deliver property levied on to a third person who claims it if the execution plaintiff gives an indemnity bond.[28] Where title to property levied on is in dispute, he may require an indemnity bond prior to selling it.[29] Under a statute providing for an attachment bond to protect claimants of attached property, a sheriff cannot demand any indemnity beyond such bond as a condition of levying an attachment,[30] and where a counter affidavit is filed to the levy of a distress warrant, the only bond the levying officer may take is one for the eventual condemnation money.[31] If the bond taken is conditioned otherwise and loss is sustained by the plaintiff in the distress warrant, the officer is responsible.[32] Where, because of a sheriff's negligence in failing to file a deed of assignment to him, the

12. Under Laws 1890, p. 936, c. 523, § 17, subd. 2, as amended by Laws 1892, p. 868, c. 418. And the amount in attachment is governed by § 7. O'Brien v. Obel, 92 N. Y. S. 333.

13. O'Brien v. Obel, 92 N. Y. S. 333.

14. Under Laws 1890, p. 940, c. 523, as amended by Laws 1892, p. 868, c. 418. O'Brien v. Manhattan R. Co., 91 N. Y. S. 69.

15. See 2 Curr. L. 1642. Right of officer to act by deputy, see ante, § 2.

16. Berrie v. Taylor, 117 Ga. 56, 43 S. E. 411.

17. See 2 Curr. L. 1643. See, also, False Imprisonment, 3 Curr. L. 1417.

18. To assess the costs of habeas corpus proceedings against a sheriff who has lawfully performed his duty when an order of discharge is entered thereon is erroneous. Magerstadt v. People, 105 Ill. App. 316. Process regular on its face is protection to the officer who executes it. Casselini v. Booth [Vt.] 59 A. 833.

19. Process showed want of jurisdiction. Casselini v Booth [Vt.] 59 A. 833. A warrant void on its face is no protection to him. Adams v. Allen [Me.] 59 A. 62.

20. Williams v. Sewell, 121 Ga. 665, 49 S. E. 732.

21. Evidence held to show that there was no necessity for or legality in the arrest made, and that plaintiff was entitled to some damages. Smith v. Dulion, 113 La. 882, 37 So. 864.

22. A warrant issued on complaint of one "in his own proper person and on oath of office," but not stating his office, is neither a complaint by an "officer" nor one by a "citizen." Casselini v. Booth [Vt.] 59 A. 833.

23. Is liable on his official bond in damages. Carlisle v. Silver Creek [Miss.] 37 So. 1015.

24. Adams v. Allen [Me.] 59 A. 62.

25. Ormond v. Ball, 120 Ga. 916, 48 S. E. 383.

26. Question as to whether he had used reasonable care in failing to execute a writ of venditioni exponas held for the jury. O'Bryan Bros. v. Webb [Ala.] 37 So. 935. A complaint for failure to execute a writ of venditioni exponas must allege that the failure was negligent or wrongful. Id.

27. Johnson v. Price [Fla.] 36 So. 1031. Evidence that a sheriff had a reasonable time to execute a writ of venditioni exponas before the destruction of the property by fire establishes a prima facie case against him. O'Bryan Bros. v. Webb [Ala.] 37 So. 935.

28. Under Code Civ. Proc. §§ 906, 1220. Gallick v. Bordeaux [Mont.] 78 P. 583.

29. Mayberry v. Whittier, 144 Cal. 322, 78 P. 16.

30. Tully v. Cutler [Ind. T.] 82 S. W. 714.

31, 32. Hardy v. Poss, 120 Ga. 385, 47 S. E. 947.

property of the insolvent is lost to the creditors, the filing with and approval of claims by the county court is not a prerequisite to the maintenance of an action for his negligence.[33] The measure of damages in such case is the amount the creditor would have received had the assignment not been invalidated.[34] If properly pleaded it may be shown in mitigation that other creditors are entitled to participate in the assets of the insolvent.[35]

(§ 5) *B. Failure to execute process or insufficient execution.*[36]—An officer cannot justify a failure to execute a warrant by showing that the magistrate from whom it issued orally requested him not to execute it. Such fact, however, may be considered in mitigation.[37] A sheriff is not liable for failure to execute a judgment where the execution debtor was adjudged a bankrupt within four months of the rendition of the judgment,[38] even though declared so by statute.[39] A statute providing a summary remedy for failure to execute process is not void as depriving him of a right of jury trial.[40] The negligence of a sheriff by which an attempted levy of a writ was rendered ineffectual does not render him liable to one who has contributed to the result by his own negligence.[41]

In an action for failure to execute or return final process, there is a presumption that plaintiff has been damaged in an amount equal to the execution;[42] but in an action for damages for failure to execute an attachment or other mesne process, there is no such presumption.[43]

A release of the goods seized under writ is an abandonment thereof.[44]

(§ 5) *C. Failure to return process or false return.*[45]—The return of a sheriff showing or attempting to show constructive service of process is strictly construed.[46] A sheriff may sign a return of process served by his deputy,[47] and he may by leave of court amend a return after the expiration of his term.[48] A sheriff is not liable for a failure to return an execution if his omission to perform his duty is due to conduct or instructions of the attorney of the judgment creditor.[49] That the sheriff at first refused to levy an execution because of the failure of a judgment creditor to furnish an indemnity bond is no defense to an action for a false return of nulla bona to the execution.[50] Under a statute providing that execution may issue to any county, it is no defense to an action for a false return that two executions issued the same day and that the property was taken by the sheriff of the other county,[51]

33, 34, 35. Huddleson v. Polk [Neb.] 102 N. W. 464.

36. See 2 Curr. L. 1644.

37. Police officer. People v. McAdoo, 90 N. Y. S. 669.

38. Mohr v. Mattox, 120 Ga. 962, 48 S. E. 410.

39. Though a statute requires a sheriff to execute all process and orders and renders him liable to a judgment creditor for failure to levy on or sell property of the debtor, he is justified in obeying an order of the bankruptcy court restraining a sale when the attachment was levied within four months of proceedings to declare the debtor bankrupt [St. 1897, c. 277, pp. 480, 481, and Nat. Bankr. Act 1898, c. 541, § 67]. Alexander v. Wilson, 144 Cal. 5, 77 P. 706.

40. Rev. St. 1892, § 1250. Johnson v. Price [Fla.] 36 So. 1031.

41. Or by the negligence of his attorney. Parrott v. McDonald [Neb.] 100 N. W. 132.

42. Defendant has the burden of showing that plaintiff was not injured. Beck & G. Hardware Co. v. Knight, 121 Ga. 287, 48 S. E. 930.

43. Plaintiff must allege and prove actual damages. Beck & G. Hardware Co. v. Knight, 121 Ga. 287, 48 S. E. 930.

44. Surrender to a receiver in bankruptcy of goods seized on a writ of replevin before he has made his return. In re Hymes Buggy & Implement Co., 130 F. 977.

45. See 2 Curr. L. 1645.

46. Holtschneider v. Chicago, etc., R. Co., 107 Mo. App. 381, 81 S. W. 489.

47. Return of service signed by the sheriff when the service was made by a deputy is irregular but not invalid. Orchard v. Peake, 69 Kan. 510, 77 P. 281.

48. Smoot v. Judd [Mo.] 83 S. W. 481.

49. Under Kirby's Dig. § 3286, imposing a liability for a failure to return an execution on or before the return day. Bickham v. Kosminsky [Ark.] 86 S. W. 292.

50. Such a defense involves a contradiction of the return. People v. Finch [Colo. App.] 76 P. 1120.

51. Mill's Ann. St. § 2337. People v. Finch [Colo. App.] 76 P. 1120.

and under a statute declaring execution a lien when the writ is delivered to the officer, an officer who receives the writ and takes possession of the property cannot defend an action for a false return of nulla bona on the ground that a few days later a receiver was appointed for the debtor and ordered to take charge of all his property.[52] Failure of sureties on a bail bond to surrender their principal as provided by statute may be considered in mitigation of a sheriff's liability for a false return to an execution issued against the principal.[53] A recovery against the sheriff for a false return bars a suit to set aside a default judgment based on such return.[54]

(§ 5) *D. Failure to take security.*[55]

(§ 5) *E. Wrongful levy or sale.*[56]—An officer making an unlawful levy of attachment is a trespasser,[57] and is liable where he seizes property not subject to execution and which furnishes notice of such fact,[58] or which belongs to another,[59] or which is subject to a paramount lien,[60] and the fact that one injured by such wrongful levy may sue the creditor in whose favor the sale is made does not relieve him.[61] Where the taking amounts to a conversion and the goods are damaged while in possession of the officer, the owner is not bound to accept a return of them but may recover their value.[62]

Where an officer seizes property after being warned that it does not belong to the judgment debtor,[63] or where he seizes commingled goods after a stranger to the execution has designated the portion which belongs to him,[64] replevin may be maintained without a prior demand; but otherwise if the stranger does not designate his goods.[65] Failure to make a statutory demand is no defense if such demand would have been unavailing.[66]

A complaint in an action for wrongful levy need not particularize the property.[67]

A sheriff who seizes goods in the hands of a vendee on the ground that the sale to him was fraudulent has, in replevin by such vendee, the burden of proving the fraud;[68] but where one claiming to be the owner of goods at the time they were

52. The property levied on did not thereby pass to the receiver. People v. Finch [Colo. App.] 76 P. 1120.

53. Prividl v. O'Brien, 91 N. Y. S. 324.

54. Smoot v. Judd [Mo.] 83 S. W. 481.

55, 56. See 2 Curr. L. 1645.

57. When he levies an attachment after the return day. Jordan v. Henderson [Tex. Civ. App.] 86 S. W. 961. A constable, who at the instance of a landlord breaks into the room of a boarder and seizes and sells a piano belonging to the boarder. Oliver v. Wheeler, 26 Pa. Super. Ct. 5.

Evidence insufficient: In an action for conversion for selling exempt property, the plaintiff's own case held to show that there had been no sale of such property. Lester v. Addison [Mich.] 102 N. W. 643.

58. Cattle issued to an Indian by the United States and bearing the brand, "I. D." It is immaterial that the cattle were in the possession of the Indian woman's husband. McKnight v. U. S. [C. C. A.] 130 F. 659. In an action on a sheriff's bond to recover the amount of an exemption demanded by an execution debtor, evidence held sufficient to show that the defendant was sheriff when the sale was made. Fowler v. State, 99 Md. 594, 58 A. 444.

59. Evidence held to show that one's claim to property taken on execution against another was bona fide. State v. Steele & Co., 108 Mo. App. 363, 83 S. W. 1023. He is liable on a general clause in his bond "for the faithful discharge of his dutles" or equivalent general words for a levy on the goods of one person under an execution against another. Frankenstein v. Cummisky, 92 N. Y. S. 708. Evidence held to sustain a conversion by a sheriff of goods located in a houseboat levied on. Lucas v. Sheridan [Wis.] 102 N. W. 1077.

60. A constable who takes property under execution with notice that it is subject to a landlord's lien is liable for damages caused [Code 1896, § 3070]. Burton v. Dangerfield [Ala.] 37 So. 350.

61. Burton v. Dangerfield [Ala.] 37 So. 350.

62. Lucas v. Sheridan [Wis.] 102 N. W. 1077.

63. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

64. Evidence held to show that goods were sufficiently designated. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

65. Greenberg v. Stevens, 212 Ill. 606, 72 N. E. 722.

66. Richey v. Haley, 138 Cal. 441, 71 P. 499.

67. Rasco v. Jefferson [Ala.] 38 So. 246.

68. Williams v. Finlayson [Fla.] 38 So. 50. Where the sheriff denies a claimant's

levied on brings action against the sheriff, he has the burden of showing a valid sale from the execution debtor.[69] This burden is not shifted by a mere showing that the sheriff had notice of his claim at the time of the levy.[70]

An officer's notice of rights in the property superior to those of the judgment creditor may be shown by the fact that he was indemnified,[71] or by his own declarations at the time of making the levy.[72] All evidence tending to show in whom the ownership of the property rests is admissible,[73] and ownership is a fact to which a witness may testify.[74] Where an officer justifies on the ground that the property was taken on mortgage foreclosure, the mortgage and foreclosure proceedings are admissible.[75] Evidence not material to any issue and which tends to arouse the sympathy of the jury is inadmissible.[76]

Where he sells goods under execution with notice that they are subject to a superior lien, the measure of damages is the amount of the lien,[77] and where he sells goods which belong to another, the measure of damages is the value of the goods,[78] which may be shown by evidence of the market value of the goods levied on and similar goods at the time and place of levy;[78] but the sale under execution of a homestead does not render him liable except for the costs of removing an apparent cloud on title.[80]

(§ 5) *F. Misappropriation of proceeds.*[81]—One seeking to recover a penalty for failure of an officer to pay over funds received from sale of goods unlawfully attached must establish that the retention is willful and corrupt.[82]

§ 6. *Liability on bonds.*[83]—The official bond of a sheriff or constable must be executed and delivered.[84] A bond may be proved by a duly certified transcript of the record,[85] or by the testimony of the officer testifying in his own behalf.[86]

A constable's bond running to the county judge instead of to the governor as required by statute is enforceable, despite the defect,[87] and failure of the county

ownership he may cross-examine claimant's agent as to the particulars of the sale under which he claims. State v. Stone [Mo. App.] 85 S. W. 950.

69, 70. Gallick v. Bordeaux [Mont.] 78 P. 583.

71. Burton v. Dangerfield [Ala.] 37 So. 350.

72. Declarations which go to show his knowledge that the property levied on belonged to a third person. McKnight v. U. S. [C. C. A.] 130 F. 659.

73. On the trial of an action against a marshall for wrongful seizure of money under execution, it is pertinent to interrogate the plaintiff as to the ownership of the money. Ginsberg v. Cohen, 38 Misc. 751, 78 N. Y. S. 823. In an action by one for property claimed to have been wrongfully seized on execution, the sheriff may show under a general denial of plaintiff's ownership that the sale under which he claims is void. Gallick v. Bordeaux [Mont.] 78 P. 583.

74. "Whose property was that" is not objectionable as calling for a conclusion. Rasco v. Jefferson [Ala.] 38 So. 246.

75. Anderson v. Medbery, 16 S. D. 329, 92 N. W. 1087.

76. Testimony of plaintiff that she told the constable making the levy to look at her twelve babies. Rasco v. Jefferson [Ala.] 38 So. 246.

77. Burton v. Dangerfield [Ala.] 37 So. 350.

78. The value of property wrongfully taken on execution is shown by evidence of the cost of the property and its value at the time it was taken. State v. Steele & Co., 108 Mo. App. 363, 83 S. W. 1023. Question as to value of goods annexed to property taken under wrongful levy held admissible as tending to show the amount to be deducted from value of the property in its then condition. Perlberger v. Grell, 77 App. Div. 128, 78 N. Y. S. 1038.

79. This being the measure of damages recoverable. State v. Stone [Mo. App.] 85 S. W. 950.

80. Johnson v. Twichell [N. D.] 101 N. W. 318.

81. See 2 Curr. L. 1646.

82. Evidence held insufficient under Kirby's Dig. § 4487. Craig & Co. v. Smith [Ark.] 85 S. W. 1124.

83. See 2 Curr. L. 1646.

84. Authority of a sheriff to deliver his official bond to the county court held a question for the jury. Baker County v. Huntington [Or.] 79 P. 187.

85. In an action on a constable's official bond, a transcript of the bond duly certified is admissible. Burton v. Dangerfield [Ala.] 37 So. 350. In Mississippi, by statute, if the execution of a bond is not denied, the record of it is admissible. Carlisle v. Silver Creek [Miss.] 37 So. 1015.

86. Carlisle v. Silver Creek [Miss.] 37 So. 1015.

87. Hines v. Norris [Tex. Civ. App.] 81 S. W. 791.

court to keep a record of the filing and approval of the sheriff's bond is not fatal to its enforcement.[88]

A bond indemnifies only acts, the faithful performance of which it is given to secure;[89] but if the language is ambiguous or susceptible of conflicting interpretations, the intentions of the parties may be ascertained by parol evidence of the circumstances which induced its execution.[90]

An action for breach of bond given to indemnify a constable against damages possible to result from a levy of attachment placed in his hands is ex contractu.[91]

The liability of the indemnitors to the officer is on the bond, but their liability to the person whose property is seized is that of a trespasser.[92] If an officer while attempting to execute some duty of his office abuses or exceeds his authority,[93] or if damages be recovered against him for a wrongful official act,[94] his bond is liable; but indemnitors who neither advise nor ratify a levy which amounts to a trespass are not.[95] An indemnity bond given a constable after the illegal levy of an execution to induce him not to return the property is enforceable against the sureties.[96] The sureties on a sheriff's bond may bind themselves without joining the sheriff.[97]

In Massachusetts, by statute, any person injured by breach of a constable's bond may sue the constable in the name of the town.[98] Where an attachment plaintiff is liable for custodian's fees on a bond given a United States marshal, the custodians may maintain an action in their own name.[99] Action may be maintained on a forthcoming bond in the name of the officer to whom it is made payable, though he has retired from office prior to the commencement of the action.[1] Claim and delivery cannot be maintained against a constable and sureties on his bond jointly, where it appears that the sureties were not in any manner concerned in the seizure and detention of the property.[2]

A complaint in an action on a bond to indemnify against damage possible to result from a levy of execution which alleges execution of the bond and recovery of judgment against the obligee is sufficient.[3] A release of sureties on such a bond must be specially pleaded,[4] and it is discretionary with the court whether to allow

88. Baker County v. Huntington [Or.] 79 P. 187. Delivery and acceptance of his bond may be shown by parol evidence where record of it does not appear in the records of the county court. Id.

89. Under Hill's Ann. Laws 1892, §§ 2390. 2392, 2395, 2793, 2794, a sheriff's ordinary bond did not cover his special duties as tax collector. Baker County v. Huntington [Or.] 79 P. 187. A bond indemnifying a marshal against actions and damages resulting from the execution of a writ of attachment does not secure fees of custodians of the attached property. Tully v. Cutler [Ind. T.] 82 S. W. 714.

90. Sheriff's ordinary undertaking may be shown to have been intended as an additional bond covering his duties as tax collector. Baker County v. Huntington [Or.] 79 P. 187.

91. Leader v. Mattingly, 140 Ala. 444, 37 So. 270.

92. Where a petition does not allege that the giving of the bond induced the levy, there can be no recovery. Unsell v. Sisk [Tex. Civ. App.] 83 S. W. 34. On appeal judgment rendered against them will be dismissed and affirmed as to those who are liable. Id.

93. State constable acting under the dispensary law is liable on his bond under Civ. Code 1902, § 595, providing that a party aggrieved may sue. Wieters v. May [S. C.] 50 S. E. 547.

94. Wrongfully killing a person while making an arrest. Black v. Moore [Tex. Civ. App.] 80 S. W. 867.

95. Jordan v. Henderson [Tex. Civ. App.] 86 S. W. 961.

96. Hines v. Norris [Tex. Civ. App.] 81 S. W. 791.

97. Baker County v. Huntington [Or.] 79 P. 187.

98. Under Rev. Laws, c. 25, § 90, c. 149, § 20, and c. 26, § 14, where a person has recovered judgment which remains unsatisfied after demand, he may sue on the constable's bond in the name of the treasurer of the city. Crocker v. Buttrick [Mass.] 73 N. E. 650.

99. Mansf. Dig. §§ 4933, 4936. Tully v. Cutler [Ind. T.] 82 S. W. 714.

1. O'Neill Mfg. Co. v. Harris, 120 Ga. 467, 47 S. E. 934.

2. Action will lie only against one in possession. Gallick v. Bordeaux [Mont.] 78 P. 583.

3. Held sufficient to support a judgment for the plaintiff after verdict. Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392.

4, 5. Leader v. Mattingly, 140 Ala. 444, 37 So. 270.

such plea to be filed during the trial.[5] In an action on a forthcoming bond, it is not necessary that the execution levied on the property for the production of which the bond was given be set out in the petition.[6]

The evidence must show a breach of the bond declared on.[7]

Where the obligors on a sheriff's indemnity bond had notice of an action for conversion against him and participated in the defense, they are bound by the judgment;[8] but where damages are recovered against a constable and his sureties in different amounts, judgment cannot be rendered against the sureties for the amount of the verdict against the constable.[9]

SHIPPING AND WATER TRAFFIC.

§ 1. Public Control and Regulation; Extent of State Jurisdiction (1450).
§ 2. Nationality, Registration and Enrollment (1451).
§ 3. Master and Officers (1451).
§ 4. Seamen (1452). Shipping Articles (1452). Wages and Subsistence (1452). Punishment of Seamen (1453). Injuries to Seamen (1454).
§ 5. Mortgages, Bottomry, Maritime and Other Liens on the Vessel, Craft, or Cargo (1455).
§ 6. Charter Party (1456).
§ 7. Navigation and Collision (1459).
A. Rules for Navigation and Their Operation in General (1459).
B. Lights, Signals and Lookouts (1461).
C. Steering and Sailing Rules (1462).
D. Vessels Anchored, Drifting, Grounded (1465).
E. Tugs and Tows, Pilot Boats, Fishing Vessels, etc. (1467).
F. Sole or Divided Liability, and Division of Damages (1470).
G. Ascertainment and Measure of Damages (1471).
§ 8. Carriage of Passengers (1472).
§ 9. Carriage of Goods (1474).
§ 10. Freight and Demurrage (1478).
§ 11. Pilotage, Towage, Wharfage (1480).
§ 12. Repairs, Supplies, and Like Expenses (1481).
§ 13. Salvage (1484).
§ 14. Loss and Expense (1486).
§ 15. General Average (1487).
§ 16. Wreck (1487).
§ 17. Marine Insurance (1488).
§ 18. Maritime Torts and Crimes (1491).

Matters relating to the obstruction of navigation are treated elsewhere.[10]

§ 1. *Public control and regulation; extent of state jurisdiction.*[11]—Except as adopted by statute, the general maritime law is not the law of the United States.[12]

A vessel is deemed a part of the territory of the state to which it belongs, and its territorial sovereignty extends to such vessel when on the high seas.[13]

Before a clearance will be granted to a vessel, the master is required to submit to the collector of customs a list of his crew, supported by an affidavit on his part as to its correctness.[14]

Tonnage tax and light money.—A tonnage tax is provided for, to be levied on foreign vessels,[15] and vessels coming from a foreign port or place which are entered in the ports of the United States,[16] including all foreign vessels entering from the Philippines.[17] The Philippines are not a foreign port or place within the meaning of these acts.[18]

6. Petition held sufficient. O'Neill Mfg. Co. v. Harris, 120 Ga. 467, 47 S. E. 934.

7. In an action on a bond alleged to have been executed one day prior to which the bond put in evidence bore date, the variance was fatal. Burton v. Dangerfield [Ala.] 37 So. 350.

8. Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392. In an action on a sheriff's indemnity bond in attachment, it is proper to admit the judgment against the sheriff in conversion where the obligors had notice of the pendency of such action. Id.

9. Black v. Moore [Tex. Civ. App.] 80 S. W. 867.

10. See Navigable Waters, 4 Curr. L. 757.

11. See 2 Curr. L. 1648.

12. The Sacramento, 131 F. 373.

13. Vessel subject to its laws: Suit in admiralty may be maintained for damages against vessel in fault for collision for loss of life occasioned thereby, where statutes of state to which both vessels belong give right of recovery for wrongful death. In re Clyde S. S. Co., 134 F. 95.

14. Fact of clearance held to prove that seamen were engaged when it was procured [Rev. St. § 4573]. Bark "Shetland" v. Johnson, 21 App. D. C. 416.

15. The Alta [C. C. A.] 136 F. 513.

16. Rev. St. § 4219, as amended by Act June 26, 1884, c. 121, § 14, 23 St. 57 (Comp. St. 1901, p. 2850), and Act June 19, 1886, c. 421, § 11, 24 St. 81; Comp. St. 1901, p. 2850.

A duty of fifty cents a ton, to be denominated "light money," is levied on all vessels not of the United States, which may enter the ports of the United States,[19] except unregistered vessels owned by citizens of the United States, and carrying a sea letter or other regular document proving them to be American property.[20] In order to come within the exception the owner or master of an unregistered American vessel entering from a foreign port is required to make oath as to her ownership.[21] Such proof need not necessarily be made at the time of entry, but is sufficient if made shortly thereafter, and the law is complied with if the facts are shown to the collector by any competent evidence.[22]

Inspection.—The hull and boilers of every ferryboat, canalboat, yacht, or other small boat of like character propelled by steam, must be inspected, and no such vessel may navigate without a licensed engineer and pilot.[23] A penalty is provided for failure to comply with the inspection laws, to be collected by the government in a proceeding in rem by way of libel.[24] Such proceeding is in admiralty, and is not criminal.[25] The provisions for such penalty do not apply to vessels propelled by gasoline, and they are not subject to seizure and forfeiture therefor.[26]

§ 2. *Nationality, registration and enrollment.*[27]—Vessels of the United States are such as are registered pursuant to law, and those duly qualified to carry on the coasting trade, or fisheries.[28] American vessels are such as are owned by citizens of the United States.[29]

A vessel is domestic at the port where her owners are domiciled or reside, and foreign at other ports, irrespective of where she may be registered or enrolled,[30] though a foreign vessel may be regarded as domestic, or vice versa, where a materialman has been misled by the place of her enrollment.[31]

§ 3. *Master and officers.*[32]—In the absence of anything to the contrary in the contract, the master of a tramp steamer, who is not employed for any particular voyage or for any stated time, may be removed by the owners at any time, with or without cause.[33] Where the contract provides that he shall be returned to the port of shipment at the termination of his employment, and he is discharged in a foreign port, he is entitled to recover the expenses incurred by him in returning and wages for the time spent in doing so.[34] He is not, however, entitled to recover expenses incident to a sickness occurring at such foreign port after his discharge.[35]

Manlla not a "foreign port or place" within meaning of these acts. The Alta [C. C. A.] 136 F. 513.

17. Act March 8, 1902, c. 140, § 3, 32 St. 54, Comp. St. Supp. 1903, p. 349. Vessels owned by Americans not foreign vessels, though not registered. The Alta [C. C. A.] 136 F. 513.

18. The Alta [C. C. A.] 136 F. 513.

19. N. S. Rev. St. § 4225, Comp. St. 1901, p. 2855. The Alta [C. C. A.] 136 F. 513.

20, 21. Rev. St. § 4226, Comp. St. 1901, p. 2855. The Alta [C. C. A.] 136 F. 513.

22. The Alta [C. C. A.] 136 F. 513.

23. U. S. Rev. St. § 4426. The Ben R. Co. [C. C. A.] 134 F. 784.

24. Vessels propelled in whole or in part by steam which do not comply with statutory provisions in regard to inspection and the carrying of licensed engineers and pilots [U. S. Rev. St. § 4499, Comp. St. 1901, p. 3060]. The Ben R. Co. [C. C. A.] 134 F. 784.

25. Decree dismissing libel appealable. The Ben R. Co. [C. C. A.] 134 F. 784.

26. Act Jan. 18, 1897, c. 61, 29 St. 489. Comp. St. 1901, p. 3029, making all vessels above 15 tons burden carrying freight or passengers for hire, and propelled by gas, fluid, naphtha, or electric motors, subject to the provisions of Rev. St. § 4426, relating to inspection, etc., and to certain other sections relating to navigation, does not refer to § 4499, and hence latter section does not apply to such boats. Statute penal and will be strictly construed and not extended beyond plain meaning of words used. The Ben R. Co. [C. C. A.] 134 F. 784.

27. See 2 Curr. L. 1648.

28. Rev. St. § 4131, Comp. St. 1901, p. 2803. The Alta [C. C. A.] 136 F. 513.

29. The Alta [C. C. A.] 136 F. 513.

30, 31. The New Brunswick [C. C. A.] 129 F. 893.

32. See 2 Curr. L. 1648.

33, 34, 35, 36. Lombard S. S. Co. v. Anderson [C. C. A.] 134 F. 568.

37. Evidence insufficient to show drunkenness or incompetency, and owners not entitled to recoup damages caused by grounding of vessel in action by him for wages. Lombard S. S. Co. v. Anderson [C. C. A.] 134 F. 568.

The evidence to sustain a charge of incompetency against the master must be clear and satisfactory,[36] the burden of proof being on the owners.[37]

§ 4. *Seamen.*[38]—As a general rule, a sailor agreeing to serve on a ship, without specifying any particular time, ships for the voyage,[39] but this does not apply in case of a steamboat making daily trips between two ports.[40]

All shipments of seamen contrary to any act of congress are void.[41]

Shipping articles.[42]—The Federal statute requires an agreement in writing to be executed by a master of a vessel and the seamen who ship with him, before he starts on a voyage, to contain certain specified provisions,[43] among others being a statement of the time when each seaman is to be on board to commence work.[44] The master has no right to disregard the provisions of the act by leaving blank spaces and filling in certain of the required information after the execution of the articles before the shipping commissioner,[45] and his action in so doing is not binding on the seamen.[46] In case the evidence is evenly balanced as to the time when the seamen were required to report for duty, it is proper, where the master fails to insert such time in the articles, to find for the seamen.[47] The act does not preclude the insertion of other reasonable provisions not specified,[48] and when so inserted they are binding.[49]

Wages and subsistence.[50]—A seaman's right to wages is, by statute, to be taken to commence either at the time at which he commences work, or at the time specified in the agreement for his commencement of work, or presence on board, whichever first happens.[51] The act does not, however, deprive him of a right to contract that his wages shall commence at a different time.[52]

A seaman injured in the service of the ship is entitled to his wages for the term of his employment.[53] The fact that he is an escaped convict and liable to recapture as such does not deprive him of the rights which ordinarily arise from his employment,[54] but he is not entitled to wages after his recapture.[55] A seaman wrongfully discharged may recover a month's extra pay.[56]

38. See 2 Curr. L. 1649.

39, 40. The Express, 129 F. 655.

41. Rev. St. § 4523, Comp. St. 1901, p. 3075. The Alnwick, 132 F. 117. Seamen to whom advance is made can leave service at any time and recover wages for time served. Right not affected by waiver of any claim to recover sums advanced. Id.

42. See 2 Curr. L. 1649, n. 27.

43. Rev. St. § 4511, Comp. St. 1901, p. 3068. Provisions made applicable to contracts for shipping crews for American vessels engaged in coastwise trade, and in trade with Canada by acts of Aug. 19, 1890, Feb. 18, 1895, and March 3, 1897 [Comp. St. 1901, p. 3076]. The Lillian, 131 F. 375.

44. Rev. St. § 4511. Bark "Shetland" v. Johnson, 21 App. D. C. 416.

45. Cannot be valid custom authorizing him to fill in time when seamen are to report for work after execution of articles, when it is definitely ascertained. Bark "Shetland" v. Johnson, 21 App. D. C. 416.

46. Bark "Shetland" v. Johnson, 21 App. D. C. 416.

47. Evidence held to entitle seamen to wages during time that departure was prevented by ice. Bark "Shetland" v. Johnson, 21 App. D. C. 416. Fact that vessel cleared from custom house held to prove that seamen were engaged when they claimed, since master required to submit list of seamen to collector before clearance will be granted [Rev. St. § 4573]. Id.

48. Agreement not to claim wages or provisions if vessel detained by ice is reasonable and valid. The Lillian, 131 F. 375. Where went on board and were given provisions and light work for a few days and were then told to go on shore and wait until ice would permit voyage to commence, held not entitled to wages for time they were on board. The Joseph B. Thomas, 136 F. 693.

49. Though seamen are wards of the nation, they are not entitled to repudiate any lawful and reasonable contract entered into by them with full knowledge of its meaning and effect. The Lillian, 131 F. 375.

50. See 2 Curr. L. 1649, n. 33-37.

51. Rev. St. § 4524, Comp. St. 1901, p. 3076. The Lillian, 131 F. 375; Bark "Shetland" v. Johnson, 21 App. D. C. 416.

52. Applies only in absence of reasonable stipulation in articles of shipment. The Lillian, 131 F. 375.

53, 54, 55. McCarron v. Dominion A. R. Co., 134 F. 762.

56. Rev. St. § 4527, Comp. St. 1901, p. 3077. Does not apply where seamen not discharged, but directed to wait on shore until voyage should begin. Articles provided that should not claim wages while ship detained by ice. The Joseph B. Thomas, 136 F. 693.

The Federal statute imposes a penalty of one dollar a day for neglect to pay seamen's wages when due without sufficient cause.[57] It does not apply to a case where there is a fair question of controversy as to the amount due, if any.[58] A court of admiralty may, in its discretion, take jurisdiction of a suit by seamen to recover wages from a foreign ship.[59]

The payment of advance wages to seamen or to anyone in their behalf is forbidden,[60] and the act is made applicable to foreign vessels in the absence of conflicting treaty provisions.[61]

A scale of provisions to be served to the crew is fixed by statute,[62] and those furnished are required to be weighed in the presence of a witness.[63] Penalties are provided for violation of the act.[64]

Punishment of seamen.[65]—The master of a vessel at sea has power to imprison a member of the crew in the exercise of his authority to provide for the safety of the vessel and the protection of those on board.[66] He may imprison seamen for insubordination,[67] and may fine them a portion of their wages,[68] unless their conduct is justified.[69] But no deduction for misconduct will ordinarily be allowed unless the master makes an entry of the offense in the ship's log book on the day it is committed,[70] though it is made discretionary with the court to receive other evidence.[71]

Seamen who desert their ship thereby forfeit their right to wages theretofore earned,[72] and a seaman rightfully discharged by an American consul in a foreign port for insubordination is not entitled to wages for the return voyage.[73]

Both the master and the owner are liable for an abuse of the right of imprisonment by exercising it maliciously, or without probable cause.[74] The owner is not, however, liable for punitive damages in such case, in the absence of proof that he

57. Rev. St. U. S. § 4529; Act. Dec. 21, 1898, c. 28, § 4, 30 St. 756; U. S. Comp. St. 1901, p. 3077. Statute penal, intended to punish arbitrary refusal to pay. Libel should allege facts showing want of sufficient cause. The Express. 129 F. 655.

58. Where libelants, who were hired as deckhands on steamer making daily trips for a specified sum per month, quit without master's consent after six days, owner not liable for penalty, there being at least a reasonable ground for claim that contract was one from month to month. The Express, 129 F. 655. Justified in contesting liability where fine had been imposed for disobedience, but same was unavailing as defense because not entered on log book. The St. Paul, 133 F. 1002.

59. Will do so where they are American seamen, and strong case for immediate relief is shown, or where they invoke provisions of United States statutes. The Alnwick, 132 F. 117.

60. Act Dec. 21, 1898, c. 28, § 10a, 30 St. 763, Comp. St. 1901, p. 3079. The Alnwick, 132 F. 117.

61. Applies in case of shipment of seamen on British vessel in American port. The Alnwick, 132 F. 117.

62. U. S. Rev. St. § 4612, as amended by Act Dec. 21, 1898, c. 28, 30 St. 762, Comp. St. 1901, p. 3120. The Mary C. Hale, 132 F. 800.

63. Must have instruments for that purpose [Rev. St. § 4571, Comp. St. 1901, p. 3100]. The Mary C. Hale, 132 F. 800.

64. Evidence held to entitle each seaman to recover one dollar a day for failure to furnish provisions in accordance with scale, and of good quality. The Mary C. Hale, 132 F. 800.

65. See 2 Curr. L. 1649, n. 38, 39.

66. Pacific Packing & Nav. Co. v. Fielding [C. C. A.] 136 F. 577.

67. For refusal to work. The Cora F. Cressy, 131 F. 144.

68. The Cora F. Cressy, 131 F. 144. Rev. St. § 4529, Comp. St. 1901, p. 3077. The St. Paul, 133 F. 1002.

69. Refusal to work. The Cora F. Cressy, 131 F. 144. The fact that the master fails to replace a second mate, who has been paid off at an intermediate port, is no excuse for the crew's disobedience. In violation of Rev. St. § 4516, as amended by Act 1898, c. 28, § 1, 30 Stat. 755, Comp. St. 1901, p. 3071. Id.

70. U. S. Rev. St. § 4597, Comp. St. 1901, p. 3115. Act must be strictly complied with. The St. Paul, 133 F. 1002; The Cora F. Cressy, 131 F. 144.

71. Deduction from wages of mate on small schooner for drunkenness held justified, though required entries not made. Vessel kept no log, as is often case with small coasting vessels. The Marjory Brown, 134 F. 999.

72. Evidence held not to show desertion. The Alnwick, 132 F. 117.

73. Discharge of seamen by United States consul at port where outward voyage terminated because of refusal to discharge cargo and insubordination held justified. The Annie, 133 F. 325.

74, 75. Pacific Packing & Nav. Co. v. Fielding [C. C. A.] 136 F. 577.

authorized or ratified the acts of the master.[75] The burden of proving a special defense that the confinement was rendered necessary and proper by reason of the fact that plaintiff had become mentally deranged is on the defendant.[76]

By the treaty between the United States and France, the local authorities are required, at the requisition of a French consul, to lend forcible aid in the arrest and imprisonment of seamen on French vessels whom such consul may deem it necessary to confine.[77] Under the act of congress passed for the purpose of carrying into effect treaties with respect to consular jurisdiction over the crews of foreign vessels in the ports of the United States, such arrest can only be made by a Federal marshal.[78] The imprisonment need not end with the departure of the vessel to which the seaman belongs,[79] but cannot continue for a longer period than two months.[80]

Injuries to seamen.[81]—The ship owner owes to the seamen a duty to use reasonable diligence to furnish them a safe place in which to work.[82] The vessel is not liable to its seamen for injuries sustained by them in the discharge of their duties,[83] except in cases arising from its unseaworthiness,[84] or a failure to supply and keep in order the proper appliances appurtenant to the ship.[85] It is, however, bound to furnish them with prompt medical and surgical aid in case they are injured while in the service of the ship, and is liable for a failure to do so.[86] Such liability does not terminate with the voyage, but continues until the cure is completed, so far as expenses necessarily incurred therefor are concerned.[87]

An action in tort against the owner for injuries cannot be joined with an action on contract, express or implied, to furnish a seaman with such care, nursing, and attendance at the expense of the ship.[88] The ordinary rules as to the master's liability for injuries caused by the negligence of fellow-servants apply to actions for injuries to seamen.[89]

76. Instruction to that effect approved. Not inconsistent with general charge that burden was on plaintiff to prove that restraint was unlawful, malicious, and without probable cause. Pacific Packing & Nav. Co. v. Fielding [C. C. A.] 136 F. 577.

77. Treaty of Aug. 12, 1853, art. 8, 10 St. at L. 992, 996. Dallemagne v. Moisan, 25 S. Ct. 422.

78. Rev. St. §§ 4079-4081, Comp. St. 1901, p. 2766. Dallemagne v. Moisan, 25 S. Ct. 422. Unauthorized arrest by state official does not entitle seaman to discharge on habeas corpus by Federal district court, since irregularity obviated by that court examining into the matter. Id. State police officer not forbidden to make such arrests by provision of state constitution against deprivation of personal liberty without due process of law. Id.

79. Treaty provides that they shall be held "during the whole time of their stay in the port, at the disposal of the consuls." Dallemagne v. Moisan, 25 S. Ct. 422.

80. Rev. St. § 4081, Comp. St. 1901, p. 2766. Dallemagne v. Moisan, 25 S. Ct. 422.

81. See 2 Curr. L. 1649, n. 28-32.

82. Liable for injuries resulting from blowing up of oil tank through negligence of employe of contractor making repairs and changes. In re Michigan S. S. Co., 133 F. 577.

83. The Svaeland, 132 F. 932, afd. [C. C. A.] 136 F. 109. Ship is not liable for personal injuries sustained through master's failure to maintain proper discipline, and to protect crew from abuse at the hands of subordinate officers. Have right of action against them individually. The Astral, 134 F. 1017.

84. The Svaeland, 132 F. 932, afd. [C. C. A.] 136 F. 109.

85. The Svaeland, 132 F. 932, afd. [C. C. A.] 136 F. 109. Evidence held not to show that fall was due to unsound condition of gasket. The Shenandoah, 134 F. 304. Officers held to have exercised reasonable care in overhauling rigging and replacing defective ropes. Id.

86. For damages and expenses of cure. The Svaeland, 132 F. 932, afd. [C. C. A.] 136 F. 109.

87. McCarron v. Dominion Atl. R. Co., 134 F. 762.

88. Sanders v. Stimson Mill Co., 34 Wash. 357, 75 P. 974. Where complaint states cause of action in tort only, for the negligent and wrongful acts of defendant, cannot recover on implied contract for medical care, etc. Sanders v. Stimson Mill Co., 34 Wash. 357, 75 P. 974; Lambert v. La Conner T. & T. Co. [Wash.] 79 P. 608.

89. An engineer on a steamship is a fellow-servant of an oiler in the engine room. McCarron v. Dominion A. R. Co., 134 F. 762. Injuries held not due to dangerous condition of engine room, but to negligence of engineer. Id. In matters relating to the ordinary navigation of the vessel, the master is the fellow-servant of the seamen, and hence the vessel is not liable for injuries sustained by one of them through his negligence. The Westport [C. C. A.] 136 F. 391, rvg. 131 F. 815.

The question of whether it is the duty of the captain to put into the nearest port to obtain assistance for an injured seaman depends upon the circumstances of each case,[90] he being only required to exercise a reasonable judgment in the matter.[91]

An alien seaman admitted to a hospital through the intervention of his consul is entitled to be discharged when he so desires, no matter how imprudent the step may be, nor how his health may be affected thereby, though the consul may disapprove, and though the captain of his vessel directed that he be detained until he could be returned to the port from which he came.[92]

§ 5. *Mortgages, bottomry, maritime and other liens on the vessel, craft, or cargo.*[93]—Mortgages on vessels are not maritime contracts, and no maritime lien or contract is created by recording them in conformity with the provisions of the Federal statutes.[94] State statutes are inoperative as to vessel mortgages which have been recorded pursuant to the acts of congress.[95] In admiralty an oral pledge is sufficient when duly established.[96]

The owners and mortgagors of a ship, who are allowed to remain in possession by the mortgagee, are at liberty in the meantime to make contracts for her employment.[97] When the mortgagee again takes possession, he is entitled to all freight then accruing, and succeeds to any liens therefor which the mortgagor has on the cargo.[98] He is not, however, entitled to freights which have theretofore become due and payable, and have been received by the mortgagor, though they are for the voyage then current.[99] Nor can he complain in case the owner and charterer agree to modify the charter in respect to the time of paying the freight.[1] The master, however, has no authority, as such, to receive advance payments in excess of the

90. The Erskine M. Phelps [C. C. A.] 131 F. 1. Taking into consideration the seriousness of the injury, the care that can be given him on shipboard, the proximity of the port, the consequences of delay to the interests of the owner, the direction of the wind and the probability of its continuing in the same direction, and whether a competent surgeon is likely to be found in such port. Ship not liable for failure to put into nearest port, 540 miles distant, where weather was bad, entrance to harbor very difficult, and seaman was cared for by mate who had some surgical skill and experience. Id. Ship held not at fault for failure to deviate from voyage, taking into consideration the time to be saved and the extent of the injury as it then appeared. The Svaeland, 132 F. 932, afd. [C. C. A.] 136 F. 109.

91. As to the extent of the injuries, and as to the necessity of putting into port. Not liable in case of error in judgment, where nature and extent of injury not apparent, and could only have been discovered by surgeon. The Shenandoah, 134 F. 304.

92. In re Carlsen's Petition, 130 F. 379.

93. See 2 Curr. L. 1650.

Liens for supplies, repairs, etc., are treated in § 12, post.

94. Court of admiralty ordinarily has no jurisdiction over controversies in relation thereto. The Gordon Campbell, 131 F. 963. Sole object of U. S. Rev. St. §§ 4192, 4193 (Comp. St. 1901, p. 2837) is to give priority in order of record. However, where court of admiralty has fund for distribution arising from sale of vessel, and all maritime liens have been satisfied, holder of recorded mortgage may prove claim and be paid therefrom in order of his priority. Id. Pendency of suit in state court to set aside mortgage, and temporary injunction restraining its foreclosure, held not to affect his right. Id.

95. Illinois statute providing that chattel mortgage given to secure note which does not, on its face, show that it is so secured, shall be void, does not affect mortgage on enrolled and licensed vessel, recorded at home port pursuant to Federal statutes. The Gordon Campbell, 131 F. 963.

96. Time charterer of vessels, who rechartered same for particular voyages, borrowed money from bank to pay charter hire, under agreement that freights should stand pledged for its repayment. Indorsed subcharters to bank, agreeing that it might collect freights, or that he might do so as its agent. He collected rents, deposited them in his own name, and used part of money, and died. Held, that money was trust fund, which could be followed and identified as freight money. Bank of British North America v. Freights, etc., of the Ansgar, 127 F. 859. Proper proceeding by bank to enforce lien was by libel in admiralty against deposit as freight money. Id. Where pledgor drew check on deposit to pay charter hire on a third vessel, and before it was paid deposited in same account money received as freight from such vessel, held that such deposit should be applied to payment of check so far as it would go, leaving trust fund unimpaired except to extent of difference between deposit and check. Id.

97, 98, 99. Merchants' Banking Co. v. Cargo of The Afton [C. C. A.] 134 F. 727.

1. Sanctions such transaction by permitting owner to retain possession. Merchants' Banking Co. v. Cargo of The Afton [C. C. A.] 134 F. 727.

amount fixed by the charter, and though he does so, the mortgagee may recover all the freight due under its terms when he takes possession, in the absence of proof that the additional advances were required by the necessities of the vessel, or that the master's acts were theretofore authorized or ratified by the owners.[2]

Under the general maritime law, the owner of a cargo has no lien on the vessel for breach of a contract of affreightment unless it has been placed on board the vessel or delivered into the custody or control of her master or officers.[3] Mere delivery to the carrier or his agent, evidenced by a bill of lading, in the absence of the vessel and without knowledge thereof on the part of the master or officers, is not such a constructive delivery to the vessel as to bind her.[4] A state statute giving a lien on a vessel for breach of a contract of carriage is to be strictly construed.[5]

An unfinished vessel may be transferred by a verbal agreement made prior to her enrollment, and a full performance thereof.[6] A court of equity has jurisdiction of an action to have the plaintiff declared to be a tenant in common of a vessel, and for an accounting of her earnings.[7]

§ 6. *Charter party.*[8]—In order to be maritime, a contract must relate to the trade or business of the sea.[9]

The question as to the character in which the charterer is to be treated is in all cases one of construction.[10] If the entire vessel is let to him, with a transfer to him of its command and possession, and consequent control over its navigation, he will generally be regarded as owner for the voyage or service stipulated.[11] Where the owner retains control of the navigation, he is liable for injuries to the cargo resulting from the negligence of the master.[12]

As in the case of other contracts, in order to make a valid charter the minds of the parties must meet as to its terms.[13]

One affixing his signature to a charter party providing for the leasing of a vessel to a corporation of which he is the president, and delivering the instrument

2. Merchants' Banking Co. v. Cargo of The Afton [C. C. A.] 134 F. 727.

3. Guffey v. Alaska & P. S. S. Co. [C. C. A.] 130 F. 271. Lien is stricti juris, and cannot be extended by analogy or inference. Id.

4. Guffey v. Alaska & P. S. S. Co. [C. C. A.] 130 F. 271. No lien where, at time goods were delivered on wharf under bill of lading reciting that they were to be shipped on vessel "now" at port of S., complainant knew that chartered vessel by which it was intended to ship them was at sea, and goods were never delivered to her master or officers. Id.

5. Guffey v. Alaska & P. S. S. Co. [C. C. A.] 130 F. 271. A statute giving lien for breach of a contract made by a master, owner, agent, or consignee, does not apply to a contract made by a charterer [2 Ball. Ann. Codes & St. Wash. § 5953]. Id.

6. Verbal contract providing that if promisee would lend his credit and help negotiate a loan, he should have third interest in unfinished vessel, vested title in him on performance by him. Misner v. Strong [N. Y.] 73 N. E. 965. Statute of frauds not available as defense after such performance. Id.

7. Misner v. Strong [N. Y.] 73 N. E. 965.

8. See 2 Curr. L. 1650.

For matters relating to demurrage, see § 10, post.

9. As to what contracts are maritime so as to confer jurisdiction on a court of admiralty, see Admiralty, § 1, 3 Curr. L. 41. The Mary F. Chisholm, 129 F. 814. Must be essentially maritime in character, and provide for maritime services, transactions, or casualties. The James T. Furber, 129 F. 808.

10. Rosenstein v. Vogemann, 102 App. Div. 39, 92 N. Y. S. 86.

11. Where provided that captain, though appointed by owners, should be under orders of charterers as regarded employment, agency, or other arrangements, and charterers agreed to indemnify owners from all liability arising from captain's signing bills of lading, charterers held owners as between themselves and shippers. Rosenstein v. Vogemann, 102 App. Div. 39, 92 N. Y. S. 86.

12. Owner of scow chartered by day with man in charge held liable to charterer for loss of cargo of stone caused by her careening at end of pier. Duty of master to haul her into slip where she would have been protected, which he could have done without difficulty. High wind not proximate cause. Rodgers v. Bouker Contracting Co., 134 F. 702.

13. Steamer held to have been sent for wood under a misunderstanding and that minds of parties did not meet on any contract in regard to her, and hence defendant not liable for failure to furnish wood to load her. Nipigon Transit Co. v. Smythe [Mich.] 100 N. W. 275. Evidence held not to show the bookkeeper of purchaser was authorized to engage such steamer unconditionally. Id.

to the owner of such vessel, thereby makes himself a party and becomes bound as lessee, though his name is not recited in the body of the charter.[14]

The owner of a vessel is bound to see that she is seaworthy and suitable for the service in which she is to be employed,[15] and to provide proper fittings and equipment for the service in which she is engaged,[16] and proper appliances for handling the cargo.[17] Where the owners of the vessel are responsible for the proper stowage and safe carriage of the cargo, the master is justified in refusing to load goods which are liable to injure, or to be injured by, other goods previously loaded,[18] notwithstanding a provision of the charter party requiring the vessel to receive all such lawful cargo as the charterers may think proper to ship.[19] The charterer is bound to disburse the vessel and to protect her from liens, whether the charter expressly so provides or not.[20] He is also ordinarily bound to furnish a clean bill of health and is responsible for delay resulting from a failure to do so.[21] One hiring a boat is, as in the case of other bailments, bound to exercise ordinary care in its custody.[22]

The charterer is entitled to deduct from the hire items properly chargeable to the vessel.[23] In the absence of any speed warranty or provision in the charter for docking and cleaning, he is not entitled to a deduction because the speed of the vessel is retarded by the foul condition of her bottom of which he knew when the contract was made, or should have expected from the circumstances.[24] Under a provision that, in case of accident preventing the vessel from working for more than a specified period, the payment of hire shall cease until she is again in an efficient state to resume her service, the charterer is not liable for hire until the vessel is again in condition to be tendered under the charter.[25] This is true, though the charterer has had some benefit from her services in the carriage of the goods

14. Esselstyn v. McDonald, 90 N. Y. S. 518. Parol evidence that lessor declined to enter into contract until it was so signed is admissible to explain the ambiguity in the lease. Id. Evidence held to support finding to that effect (Id.), and also finding that dredge was in defendants' possession during whole period alleged in complaint (Id.). Case one for allowance of extra costs, where lessee failed to pay rent and allowed filing of libels, which plaintiff was compelled to pay. Id.

15. Smith v. Heinlein, 132 F. 1001. The owner of a barge chartering her to a lighterage company has no recourse against it to recover damages adjudged against her because of her unseaworthiness for the use to which she was put, where he knew of such use when the charter was made, and the charterer is not shown to have been otherwise negligent. The Willie, 134 F. 759.

16. Ship which went to Trinidad without objection to load cargo of asphalt bound to furnish special lining required to prevent its getting behind her permanent battens, and, where not provided, is liable for cost of taking off battens and removing asphalt from behind them. Dene Steam Shipping Co. v. Tweedie Trading Co., 133 F. 589. Asphalt is a lawful cargo. Id.

17. Mahogany logs tendered held to have been of usual size in trade, and master's refusal to accept any but smaller ones not justified. Ship liable for resulting damages whether refusal due to unsuitableness of vessel, or want of proper tackle for loading. Smith v. Heinlein, 132 F. 1001.

18. Birt v. Hardie, 132 F. 61.

19. Master held justified in refusing to receive flour in sacks, where had already loaded a large amount of refined petroleum in tins. Birt v. Hardie, 132 F. 61.

20. The Surprise [C. C. A.] 129 F. 873.

21. Does not apply where it does not appear that the absence of such bill would have made any difference if vessel had not deviated from her course on account of injuries due to stranding. Lake Steam Shipping Co. v. Bacon, 129 F. 819.

22. City liable for injury to scow by ice while being moved to safer place by tug also employed by city. Tug not in fault. The Three Brothers, 134 F. 1001. Lessee of pullboat destroyed by fire held not liable to owner for its value. Destruction due to unavoidable accident. D'Echaux v. Gibson Cypress Lumber Co. [La.] 38 So. 476.

23. Deductions from hire due by charterer for exchange, coal, use of gear, and wages paid firemen for assisting in discharging cargo held improper. The Buckingham, 129 F. 975. Evidence held not to show any reason for opening settlement between charterer and master. Id.

24. Glasgow Shipowners' Co. v. Bacon, 132 F. 881.

25. Under charter requiring the vessel to be staunch, strong, and tight, and in every way fitted for service. Where vessel stranded and injured so that two of her holds containing cargo were partially filled with water, and remained so until end of voyage, charterer not liable after accident occurred. Lake Steam Shipping Co. v. Bacon, 129 F. 819.

after the accident.[26] He is, however, liable for the time spent in discharging the cargo.[27] A charterer who is required to take the vessel to a port where there are facilities for docking her is not relieved from liability for hire by reason of the fact that during a delay at a port, due to a lack of such facilities, the owners utilized the time to make repairs, where the vessel remained in condition to sail on short notice.[28]

The tender of a ship to a charterer on the Monday following the Sunday which would be, by the terms of the charter party, the last day for such tender, is in time, in the absence of some controlling custom of the port to the contrary.[29] It will be presumed that the parties knew that the last day was Sunday, and that the law of the port forbade loading on that day.[30]

A provision excepting detention resulting from dangers of navigation takes effect immediately upon the execution and delivery of the charter.[31]

The ordinary rules of construction apply.[32] Parol evidence is admissible to explain the terms of the charter, when such a course is necessary to its proper understanding.[33] Trade terms will be deemed to have been used in the sense in which they would be understood by persons engaged in the trade referred to,[34] and are

26. Lake Steam Shipping Co. v. Bacon, 129 F. 819.

27. On ground that vessel was in efficient state for that particular employment. Lake Steam Shipping Co. v. Bacon, 129 F. 819.

28. Actiesselskabet Albis v. Munson, 130 F. 32. Held duty of charterer under contract to determine when vessel should be docked and to take her to port where there were facilities, and that he was liable for delay caused by absence of facilities at port where he sent her. Id.

29. No custom of port of Philadelphia requiring tender to be made on Saturday. Manchester S. S. Co. v. Parr, 130 F. 999. Where freight was to be less unless steamer ready for cargo on certain date, arrival at port on morning of such date, ready for cargo, in time, though it was Sunday, and no tender was made until next day. Id.

30. Manchester S. S. Co. v. Parr, 130 F. 999.

31. Under a charter providing that the vessel shall after completing a contemplated prior voyage return to the port where the charter party is to begin, covers delays during the voyage before the ship was turned over to the charterers. Where vessel injured on outward voyage, and owing to strike in port of destination, was taken to another port for repairs, which were made in shortest possible time, charterers not entitled to refuse to accept and load vessel on her return to port, because of such delay, particularly where refused owners offer to furnish another vessel or to cancel charter. The Hercules, 129 F. 945. Deviation to another port for purposes of repairs, owing to strike at port of destination, not such deviation from contemplated prior voyage as released charterers or entitled them to damages for delay. Id.

32. For construction of provisions in regard to demurrage, see § 10, post. Charter period held to have commenced, in any event, on date when alterations in vessel were to be completed. Michigan S. S. Co. v. American Bonding Co., 93 N. Y. S. 805. Compliance with charterer's request for delay in conversion not such a modification as to release charterer's surety from liability for breach of charter. Id. Defense setting up alteration of charter held to state sufficient defense in action against charterer's surety. Id. Allegation that owner did not use proper diligence to recharter vessel insufficient when pleaded as complete defense in action against surety, though it would have been good as partial defense. Id. Contract for charter of vessel made by president of railroad company held binding on company, whether such was his intention or not, it being apparent that he must have known that such was the intention of the agent of the vessel. Quillan v. Brunswick & B. R. Co., 130 F. 216. Where charter party required charterer to load vessel to full capacity or pay dead freight, all matters of dispute in regard thereto to be settled on clearance, vessel cannot recover dead freight on claim that she was not fully loaded, where captain signed bill of lading and delivered them to charterer on chief officer's statement, after examination, that she was loaded to her marks, and charterer thereupon permitted her to sail on his own time, though he had sufficient cargo to supply any deficiency. West Hartlepool Steam Nav. Co. v. Vogemann, 134 F. 1008.

33. Where charter provided that vessel should receive full cargo of pipe, "say about 3,400 gross tons," correspondence between brokers and owners showing that latter were advised that charterer had agreed to deliver 3,400 tons and had represented that vessel would carry that amount, held admissible to explain charter, master having refused to accept more than 3,258 tons. Sewall v. Wood [C. C. A.] 135 F. 12. Charter construed as contemplating margin beyond 3,400. Id. Where charter describes capacity of ship as about certain number of gross tons and fixes freight at certain amount per ton of 2,240 pounds, representation as to capacity should be construed as referring to long tons. Id. Weight of cargo held to be as claimed by shippers. Id.

34. "Cuban invoice" in charter to transport timber held to mean same as "Cuban

binding on the owners, though the agents negotiating the charter had no knowledge of such meaning.[35]

The charterer cannot take advantage of a breach of the contract which he was himself instrumental in causing.[36] It is a breach of the charter for the charterers to load cargo which, on account of its condition, is liable to deteriorate, and to procure from the master, over his protest, a clean bill of lading therefor.[37]

In an action against the charterer for a total breach of his contract, the measure of damages is the net amount that would have been earned thereunder, less the net amount earned, or which might with reasonable diligence have been earned, by the vessel during the time required for the performance of the voyage named in the charter.[38] The burden is on the party breaching the contract to prove in mitigation of damages that the owner could have, by the exercise of such diligence, prevented or reduced the damages complained of.[39] The owner may refuse other employment for the vessel until after the expiration of her lay days under the charter, though notified by the charterer of his intention not to perform the contract, there being no actual breach until that time.[40] Where the master refuses to receive the amount of cargo which the charter party obligates the vessel to carry, the shippers are entitled to recover any extra expense to which they were put in shipping the balance to its destination.[41]

§ 7. *Navigation and collision. A. Rules for navigation and their operation in general.*[42]—Vessels employed in lawful business on a navigable river are each entitled to its reasonable use,[43] but they thereby assume the ordinary risks of navigation.[44] Persons setting a scow adrift in a channel are liable for failure to warn approaching vessels of her presence.[45]

A vessel is bound to use care and precaution commensurate with the situation in which she finds herself,[46] but will not be held in fault for a mere mistake of judgment when in extremis.[47]

The propriety of a course of navigation is to be tested by the conditions under which it was decided upon,[48] and by the conditions in regard to another vessel in the same vicinity which are bound to be expected.[49]

A master seeing that a collision is imminent is bound to take such precautions to avoid it as may be made necessary by the special circumstances of the case.[50] A

invoice measure," the term having a known meaning in the trade. Arenburg v. Grupe, 135 F. 238.

35. Arenburg v. Grupe, 135 F. 238.

36. Held that, under the facts shown, the charterer was not legally justified in refusing to accept vessel when tendered for loading. Bonanno v. Tweedie Trading Co. [C. C. A.] 130 F. 448.

37. Loading wet lumber. Owner has cause of action in admiralty against them, judgment for damages because of condition of lumber when loaded, and failure to note it on bill, having been rendered against him in foreign court in action by him against indorsees of bill of lading for freight. Kennedy v. Weston & Co. [C. C. A.] 136 F. 166.

38. Duty of ship owner to protect himself. Cornwall v. Moore & Co., 132 F. 868.

39, 40. Cornwall v. Moore & Co., 132 F. 868.

41. Sewall v. Wood [C. C. A.] 135 F. 12.

42. See 2 Curr. L. 1654.

43, 44. Kenova Transp. Co. v. Monongahela River Consol. C. & C. Co. [W. Va.] 48 S. E. 844.

45. Collision between scow and steamer due to fault of libelant's employes in setting former adrift so that she was carried into and obstructed channel, in failing to give danger signal to approaching steamer, and in negligent use of searchlight. The Tarpon, 132 F. 277.

46. The Sitka, 132 F. 861. The master is only bound to exercise due care, having in view the extraordinary perils confronting him. Held to have exercised due care in anchoring in fog. The Newburgh [C. C. A.] 130 F. 321.

47. Schooner not chargeable with contributory fault for collision with steamer, brought about by latter's gross fault in changing her course so as to cross schooner's bows, when they were approaching nearly head on, in failing to luff, there being little time for such maneuver and no certainty that it would have avovided collision. Chadwick v. Wiley, 131 F. 1003.

48, 49. The Prudence [C. C. A.] 134 F. 358.

50. Act March 3, 1885, § 24, c. 354, 23 St. 438-439. The Pierre Corneille, 133 F. 604. Tug in fault for failing to stop and back

vessel which, while attempting to escape collision with another which is in fault, collides with a third, will not be considered in fault provided her pilot uses the care demandable of a man of good judgment and prudence under the circumstances.[51] A vessel voluntarily placing herself in a position where she is liable to be in extremity cannot plead the peril she thereby came into as an excuse.[52]

A vessel is responsible for the inexcusable errors of whoever for the time being has control of her movements.[53]

The mere happening of a collision does not give a right of action for the resulting damages except in cases where, under the navigation rules, one vessel is presumed to be in fault until she exonerates herself.[54] The burden is therefore upon the plaintiff, or the libelant, to show affirmatively by a fair preponderance of the evidence, some fault on the part of the vessel, or the existence of circumstances from which it will be legally inferred.[55]

A vessel violating the navigation rules has the burden of proving that the collision was directly attributable to the fault of the other vessel,[56] and that her own fault could not have been one of the causes thereof.[57] Local harbor regulations are necessary aids to commerce and must be obeyed like other statutory requirements.[58] The fact that the harbor master fails to enforce them is immaterial.[59]

A collision will be deemed to have been caused by the wrongful act, neglect, or fault of the vessel failing to stand by and rescue the passengers and crew of the other.[60]

There can be no recovery where the loss is occasioned by a vis major.[61] An in-

when danger of collision became obvious. The Gladiator, 132 F. 876. Tug with car float on each side held in fault for collision with crossing steamer for failure to see or signal her until they were close together, and for continuing on course after second signal, though she could have stopped without danger. The Wallace B. Flint [C. C. A.] 130 F. 338.

51. Ferryboat P. not in fault for collision with N. so as to relive S. from full liability, the latter's fault in changing her course in violation of starboard hand rule without notice to P. being the proximate cause of the collision, P's fault, if any, in failing to avoid N. having been committed when in extremis, through prior fault of S. The Susquehanna, 134 F. 641.

52. Minnesota S. S. Co. v. Lehigh Valley Transp. Co. [C. C. A.] 129 F. 22. Two vessels racing up channel held at fault for sinking barge in tow, for coming up abreast so near the center of the channel, and one of them also held in fault for unnecessarily crowding the other toward the meeting vessels. Id.

53. Vessel in fault for choosing unsuitable place for anchorage, though it was designated by tug which brought her there. The Robert Rickmers, 131 F. 638.

54. Right even in such cases based on presumption of negligence. The Tarpon, 132 F. 277. The mere fact that one vessel strikes and damages another does not of itself make her liable for the injury, but the collision must in some degree be occasioned by her fault. Kenova Transp. Co. v. Monongahela River Consol. C. & C. Co. [W. Va.] 48 S. E. 844.

55. Kenova Transp. Co. v. Monongahela River Consol. C. & C. Co. [W. Va.] 48 S. E. 844. The burden is on the libelant to establish his case. Must show some negligence or infraction of duty on part of other vessel that contributed to collision. The Echo, 131 F. 622.

56. As to signals. The Sitka, 132 F. 861.

57. In anchoring in place forbidden by local harbor regulations. The Amiral Cecille, 134 F. 673; The Edward Smith [C. C. A.] 135 F. 32. All reasonable doubts resolved in favor of other vessel. Foster v. Merchants' & Miners' Transp. Co., 134 F. 964. Vessel having unlicensed mate contrary to Rev. St. § 4438, as amended by Act Dec. 21, 1898, c. 29, 30 St. 764, Comp. St. 1901, p. 3034. Presumed that it contributed to the collision, unless contrary is obviously apparent. The Eagle Wing, 135 F. 826.

58. The Amiral Cecille, 134 F 673.

59. Fact that he saw vessel anchored within prohibited zone and made no objection, or that habitually failed to enforce rule requiring permit to anchor there, is not the equivalent of a permit, and does not exonerate vessel from liability for consequences of its violation. The Amiral Cecille, 134 F. 673.

60. Act Sept. 4, 1890, c. 875, § 1, 26 U. S. Stat. 425, U. S. Comp. St. 1901, p. 2902. The Trader, 129 F. 462. Failure of one to stand by other after she was beached, or to take off passengers, not violation of statute rendering it liable for collision, where extent of own injuries was unknown, and it was calm and was little danger to passengers, and captain returned with tug after reaching nearby port, and rescued passengers and crew. Id.

61. Collision between vessels forming part of passing tows held due to inevitable accident, they having been driven together by sudden windstorm. The Cornell, 134 F. 694.

evitable accident is something that human skill and foresight could not, in the exercise of ordinary prudence, have provided against.[62] The burden is on a vessel seeking to escape from liability on that ground to prove it.[63]

The persons in charge of the navigation of the respective vessels are best enabled to explain what took place, and their evidence is entitled to great weight,[64] and the failure to call those navigating a vessel when the collision occurs may be considered against her, in the absence of equivalent testimony.[65]

The court is not bound to accept the statement of any witness simply because his testimony is uncontradicted, if it is unreasonable and inherently improbable.[66]

(§ 7) *B. Lights, signals and lookouts.*[67] *Lights.*[68]—Vessels must carry the prescribed lights,[69] which must be placed in the prescribed manner,[70] but a vessel will not be held in fault for failure to do so where it appears that the collision would not have been prevented had she complied with the rules.[71]

Signals.[72]—Vessels must give the required passing signals,[73] and answer those given by other vessels;[74] but a vessel will not be held in fault where her failure to give proper signals in no degree contributed to the collision.[75]

A vessel should signal her intention to change her course.[76] Proper fog signals

62. Breaking of ship from moorings during severe storm, and drifting into collision with another moored vessel, held due to her negligence in not putting out more fastening lines when warned of approaching storm. The Drumcraig, 133 F. 804. Occurrence which party charged with the collision could not possibly have prevented by the exercise of ordinary care, caution, and maritime skill. Collision between barge, cut loose from tow in fog in order to save towboat, and moored wharfboat, held the result of inevitable accident. Kenova Transp. Co. v. Monongahela River Consol. C. & C. Co. [W. Va.] 48 S. E. 844. Must establish that collision occurred without any fault on her part and notwithstanding the exercise of due care and caution and a proper display of nautical skill. Collision held result of negligent navigation by yacht by running too close to shore. The Surf, 132 F. 880. Evidence insufficient to show inevitable accident. Foster v. Merchants' & Miners' Transp. Co., 134 F. 964; The San Rafael, 134 F. 749.

63. The Drumcraig, 133 F. 804.

64. The Georgetown, 135 F. 854. The testimony of officers and crew as to what was done on their own vessel is entitled to greater weight than that of witnesses on other boats who form opinions from mere observations. The Sitka, 132 F. 861; The H. S. Beard, 134 F. 648. As to course on which vessel was running. Minnesota S. S. Co. v. Lehigh Valley Transp. Co. [C. C. A.] 129 F. 22.

65. Of navigating officers of tug, in suit for collision by tow with another vessel. The Gladys, 135 F. 601. The failure of the vessel against which the preponderance of evidence exists to call all those likely to know the circumstances, at least among its own officers and crew. The Georgetown, 135 F. 854.

66. Statement of pilot of steamer that launch, which was sunk by collision, suddenly changed its course and ran directly into steamer, where only persons on board it were drowned. The Dauntless [C. C. A.] 129 F. 715.

67. See 2 Curr. L. 1655.

68. See 2 Curr. L. 1655, n. 86.

69. Barge in fault for failure to carry running lights so as to be visible to approaching vessels [Inspectors' rule 11; Act June 7, 1897, c. 4, 30 St. 96; Comp. St. 1901, p. 2875]. Foster v. Merchants' & Miners' Transp. Co., 134 F. 964. Running lights of tug obscured by barges. Id. Evidence held to show that vessel had regulation lights, which were not defective. The Trader, 129 F. 462. Vessel held in fault because lights were defective. Must be defective where ought to have been seen but were not. The Pierre Corneille, 133 F. 604. Tug held to have displayed proper lights. Pilot rules for Western waters, rule 10. The Echo, 131 F. 622, afd. In re Walsh [C. C. A.] 136 F. 557.

70. Tug in fault for failure to have towing lights placed one over the other. Art. 3, Inland Nav. Rules, 30 St. 97, Comp. St. 1901, p. 2877. Insufficient when carried horizontally. Foster v. Merchants' & Miners' Transp. Co., 134 F. 964.

71. The Virginia Jackson, 130 F. 221.

72. See 2 Curr. L. 1655, n. 89-91.

73. Steamer in fault for failure to give signals required by rule 4 of the pilot rules for the Great Lakes on leaving her berth. The Sitka, 132 F. 861. Steamer in fault for failure to give proper signals. The Echo, 131 F. 622, afd. In re Walsh [C. C. A.] 136 F. 557. Collision held due to suction of steamer and that she was solely in fault for attempting to pass yacht without giving signals required by Inland Navigation Rules, art. 18, rule 8. Act June 7, 1897, c. 4, § 1, 30 St. 101, Comp. St. 1901, p. 2882. The North Star, 132 F. 145.

74. Tug in fault. The C. R. Hoyt, 136 F. 671.

75. The Newburgh [C. C. A.] 130 F. 321.

76. Vessel in fault where collision made inevitable by suddenly changing her course without indicating intention to do so by signal. The Trader, 129 F. 462.

must also be given.[77] Unless in extreme cases, to give signals not called for by the international rules may be a fault.[78]

In the case of steamers passing on rivers, the pilot of the ascending steamer is required to first indicate the side on which he desires to pass, and his signal is controlling, unless the descending steamer deems such passing dangerous and so indicates by danger signals and a contrary signal.[79] The passing signal should not be given by one of two vessels approaching each other until the course of the other has been ascertained.[80] Error in signaling prematurely to pass on the starboard side gives a steamer no right to insist on passing on that side when the conditions are such as to require adherence to the rule requiring them to pass on the port side.[81]

A vessel should stop and sound an alarm when an approaching vessel gives a wrong passing signal,[82] or fails to respond to her signals.[83] Steam vessels are required to give danger signals when they reverse and move backwards, even if done with a view of avoiding collision.[84]

A vessel should act on a signal to which she has acceded.[85]

Lookouts.[86]—It is the duty of every steamer navigating the thoroughfares of commerce to have a trustworthy lookout in addition to the helmsman, who should ordinarily be stationed in the bow,[87] and his absence is prima facie evidence that she was to blame for a collision.[88] A vessel will not, however, be condemned for the absence of a lookout where it appears that such fault in no way contributed to the collision.[89]

(§ 7) *C. Steering and sailing rules.*[90]—A steamer must ordinarily keep out of the way of a sailing vessel,[91] an unincumbered vessel out of the way of an in-

77. Evidence held to show proper fog signals to have been given by tugs. The Chicago, 134 F. 1013. Evidence held to show that there was no such fog as to require anchored ship to ring fog bell. The Cypromene, 135 F. 558.

78. Especially in thick fog, with numerous vessels in neighborhood. The Admiral Schley [C. C. A.] 131 F. 433.

79. Rule 1, pilot rules. Steamer going down stream held solely in fault for collision. Hudson v. Monongahela River Consol. Coal & Coke Co. [C. C. A.] 136 F. 173.

80, 81, 82, 83. The Trader, 129 F. 462.

84. Art. 18, rule 3, art. 28, Inland Nav. Rules. Act June 7, 1897, c. 4, 30 St. 100, 102, Comp. St. 1901, pp. 2882, 2884. Failure to give signals held to indicate that vessel stopped with view of being taken into dock rather than to avoid collision. The Georgetown, 135 F. 854. Steamer at fault for collision for backing in channel, while attempting to turn around, without giving signals. The Deutschland, 129 F. 964.

85. The Trader, 129 F. 462.

86. See 2 Curr. L. 1655, n. 87-88.

87. The Dauntless [C. C. A.] 129 F. 715. Tug with car float. The Gladiator, 132 F. 876. Yacht in fault for collision with submerged scow in tow. Failure to maintain lookout contributing cause. The H. S. Beard, 134 F. 648. Steamer in fault for collision in fog, either because of immoderate speed, or failure to hear signals. Should have had lookout in bow instead of in crow's nest. The Vedamore, 131 F. 154. Tug in fault for collision with anchored yacht for failure to see and avoid it. The Idlewild, 129 F. 846. Steamer in fault. The Echo, 131 F. 622, afd. In re Walsh [C. C. A.] 136 F. 557 on other grounds; The Sitka, 132 F. 861; The John I. Brady & The Wildcroft [C. C. A.] 131 F. 235; City of New York v. New York & E. R. Ferry Co., 130 F. 397. Collision with anchored vessel. The Cypromene, 135 F. 558. Two tugs, neither of which had lookout on duty or gave any signals, held in fault for collision between their tows. The Robert Burnett, 134 F. 700. Vessel coming out of harbor in fog. The Admiral Schley [C. C. A.] 131 F. 433. Tug with three barges in tow on long hawser solely in fault for collision between last of them and schooner, which was tacking and on crossing course, because, though schooner was seen when crossing tug's bows on former tack, no proper lookout was kept for her return, and no measures were taken to avoid collision when she was again seen. The Prudence [C. C. A.] 134 F. 358. Tug and tow held in fault, particularly as they were on wrong side of channel. The Winfield S. Cahill, 130 F. 989. Steamer at fault for collision for backing in channel without having lookout in stern. The Deutschland, 129 F. 964.

88. Steamer at fault for failure to have proper lookout. The Dauntless [C. C. A.] 129 F. 715.

89. Absence of lookout held not to have caused collision. The Tarpon, 132 F. 277; The Newburgh [C. C. A.] 130 F. 321. Failure of tug to see lights of tow not fault contributing to collision, where it was her duty to keep her course and speed, which she did until in extremis. The Virginia Jackson, 130 F. 221.

90. See 2 Curr. L. 1656.

91. The Anson M. Bangs [C. C. A.] 129 F.

cumbered one,[92] and a vessel sailing with the wind free out of the way of one sailing close hauled.[93] A sailing vessel, even with abundant sea room ahead, is not bound to run out her tacks when running in the vicinity of another vessel.[94]

It is the duty of a vessel overtaking another to keep out of her way,[95] and, when attempting to pass her, to keep far enough off the course of the latter to avoid the influence of suction.[96]

Steam vessels approaching each other head on are required to pass each other port to port.[97]

When two steam vessels are crossing, so as to involve risk of collision, the vessel having the other on her own starboard side must keep out of her way.[98] A steamer approaching a sailing vessel on a crossing course is bound to keep out of her way, and if necessary, to slacken speed, stop, or reverse, and to act in time to avoid risk of collision.[99]

In narrow channels a steam vessel is required, when it is safe and practical to do so, to keep to that side of the fair-way or mid-channel lying on her starboard side.[1]

In rivers the descending vessel is ordinarily required to keep in the center of

103. When ungovernable. Transfer tug with car floats in fault for collision with becalmed schooner, though she was rightfully on that side of channel and stopped in due time, where she did not get out of the way, though she had time to do so. The Transfer No. 11, 130 F. 1019.

92. See, also, § 7E, post. A steamer having easy and perfect command of her own movements is bound to keep out of the way of a cumbersome tow going slowly, where there is nothing in the way to prevent her doing so. The Echo [C. C. A.] 131 F. 622, afd. on other grounds, In re Walsh [C. C. A.] 136 F. 557. Bound to keep out of her way, and to avoid any risk of collision. Steamer solely in fault, evidence being insufficient to sustain her contention that her stopping was justified by sheering of barge. The Georgetown, 135 F. 854.

93. The Pierre Corneille, 133 F. 604. Art. 17a, Rules of Nav., c. 4, 30 St. 100, Comp. St. 1901, p. 2869. The Eagle Wing, 135 F. 826.

94. The Prudence [C. C. A.] 134 F. 358.

95. International Rules, art. 24. The Edward Smith [C. C. A.] 135 F. 32. Steamer with tow in fault for attempting to pass another steamer, which she overtook, without signals and so as to enter channel leading into St. Clair canal nearly abreast of her, in violation of rules. Id. Vessel in fault for not having seasonably signified her unwillingness that other should pass her, and in checking unreasonably and irrationally under conditions likely to subject her more strongly to influence of suction at stern of passing vessel. Id. Evidence held not to show that schooner was overtaking vessel. The Gladys, 135 F. 601.

96. The Edward Smith [C. C. A.] 135 F. 32.

97. Art. 18, rule 1, of rules of supervising inspectors [Act June 7, 1897, c. 4, § 1, 30 St. 100, Comp. St. 1901, p. 2881]. The John I. Brady & The Wildcroft [C. C. A.] 131 F. 235. Evidence insufficient to show custom allowing tows to keep on westward side of channel. Id. Each is required to give way sufficiently to allow them to do so. Vessel in fault for signaling to pass on starboard side, and persisting in signal. The Trader, 129 F. 462. Tug in fault for failure to observe rule. The New York Central No. 2, 132 F. 167. Ascending tug held solely in fault for collision on ground that she attempted cross bows of meeting tug and pass starboard to starboard, when situation such as to render port to port passing proper, and contrary to proper signal given by descending tug. The Three Brothers, 136 F. 479. Passing of two meeting tugs with long tows starboard to starboard not a violation of the rule, where necessary to enable upbound vessel to safely pass through span of bridge, it being shown that such had been the custom since the bridge was built. The Cornell, 134 F. 694.

98. Art. 19, Inland Nav. Rules, 30 St. 101, Comp. St. 1901, p. 2883. Steamer wholly in fault for collision with ferry boat. The Steinway [C. C. A.] 135 F. 344. Evidence held to show that ferry and tug with barges were on crossing courses, and latter liable for collision. Duty of tug not to attempt to cross ahead of ferry, and if necessary to slow up or stop and reverse. Foster v. Merchants' & Miners' Transp. Co., 134 F. 964. Tug with tows in fault for collision between another tug on a crossing course and her starboard barge. The Virginia Jackson, 130 F. 221.

99. Inland Nav. Rules, arts. 20-23, 30 St. 101, Comp. St. 1901, p. 2883. Presence of passing steamer renders observance all the more necessary. Donald v. Guy, 135 F. 429. Pilot of steamer solely in fault for collision for failure to change course or speed until collision was unavoidable. No right to assume that sailing vessel will keep her tack. Id.

1. Art. 25 of Inland Navigation Rules (Act June 7, 1897, c. 4, 30 St. 101; Comp. St. 1901, p. 2883). Rule not absolute, but to be considered in connection with other rules, and may be changed by circumstances. Steamer in fault for collision because of its violation. The Dauntless [C. C. A.] 129 F. 715. Steamer not in fault for collision with drifting scow [Pilot Rules, art. 25, p. 17]. The Tarpon, 132 F. 277.

the channel.[2] Vessels descending the St. Clair river have the right of way, and are required to signal on which side they will pass ascending ones.[3] Vessels ascending the Mississippi river near New Orleans are required to keep on the right hand side of the channel.[4] A vessel passing down a river on the wrong side of the channel takes the risk in so doing, and should take extra precautions to avoid collisions with vessels coming up.[5]

The mere fact that a tug with a tow, on meeting a steamer, gives the first passing signal, does not make the latter the privileged vessel.[6] Meeting vessels should give attention to each other,[7] and not approach too close for safety.[8] A vessel attempting to cross the bows of another should first ascertain whether there are any vessels on the other side.[9]

The privileged vessel is ordinarily bound to keep her course and speed,[10] at least until it is plain that the other cannot so maneuver as to avert the peril,[11] and must give full and fair notice of an intention to depart therefrom.[12] There is a presumption that she did so,[13] but when such presumption is overthrown, and a fault on her part, sufficient in itself to account for the collision, is established, she has the burden of proving fault on the part of the other vessel beyond a reasonable doubt.[14] A vessel undertaking to change the ordinary course which she is expected to take does so at her own risk.[15] A vessel suddenly sheering from her course will ordinarily be presumed in fault for a resulting collision.[16]

2. Tug coming down river with two car floats in fault for not being in center of channel as required by local statute. The Transit, 130 F. 996; The Echo [C. C. A.] 131 F. 622, afd. on other grounds, In re Walsh [C. C. A.] 136 F. 557.

3. Rule 24 of act relating to St. Clair river (28 St. 645, 649, Comp. St. 1901, pp. 2886, 2891) gives descending boat right of way and requires her to signal on which side she will pass ascending boat. The Yuma [C. C. A.] 132 F. 964. Descending steamer with tow not in fault for failure to keep on American side of channel in accordance with order of war department, where ascending steamer assented to her signal to pass starboard to starboard, and there was ample room to pass in that manner. Id.

4. Tug and tow held in proper place in river according to the customary course of navigation. The Echo [C. C. A.] 131 F. 622, afd. on other grounds, In re Walsh [C. C. A.] 136 F. 557.

5. The Wingfield S. Cahill, 130 F. 989.

6. The Georgetown, 135 F. 854. See, also, The Trader, 129 F. 462.

7. The Trader, 129 F. 462.

8. Steamer and tug with tows held equally in fault. The John I. Brady & The Wildcroft [C. C. A.] 131 F. 235.

9. Tug in fault for attempting to cross bows of tug with car floats, without knowing that there was no vessel on other side. The Transit, 130 F. 996.

10. The Virginia Jackson, 130 F. 221. Sailing vessel. Donald v. Guy, 135 F. 429. Art. 21, Inland Nav. Rules. Steamer wholly in fault for collision with ferry boat. The Steinway [C. C. A.] 135 F. 344. Ferry boat in fault for collision. The Susquehanna, 134 F. 641. Sailing vessel solely in fault for collision because she changed course and ran across course of approaching sailing vessel, when it was too late for latter to avoid her, and after she had led latter to believe that she would keep her course. The Eagle Wing, 135 F. 826. A vessel sailing close-hauled is justified in maintaining her course as against an approaching vessel sailing free, in the absence of some clear indication that the latter will fail in her duty to keep out of the way. The Pierre Corneille, 133 F. 604. The pilot of the privileged vessel must continue his course without assuming that the obligated vessel will not yield to him in accordance with the signals already exchanged [23 St. 438, rule 22. Inland Pilot Rules, rule 1]. The C. R. Hoyt, 136 F. 671. Tug in fault for failure to slacken speed, or stop and reverse when danger of collision. Special circumstance under Rule 23. Id. The rule that a vessel which has come into collision had a right to proceed on the assumption that the other vessel would perform her duty has a limited effect, and is misleading unless carefully applied. Held not to apply under circumstances. The Admiral Schley [C. C. A.] 131 F. 433. Steamer in fault for changing course after schooner was seen on nearly meeting course. The Chelsea, 135 F. 616.

11. Tug held solely in fault for collision with schooner on crossing course, for persisting in her course upon theory that schooner would not run out her tack, as she had a right to do. The Anson M. Bangs [C. C. A.] 129 F. 103.

12. The Susquehanna, 134 F. 641.

13, 14. The Eagle Wing, 135 F. 826.

15. Vessel undertaking to change rule of passing to right bound to exercise correct judgment in executing maneuver. Shortland Bros. Co. v. New York, 129 F. 973.

16. In ordinary weather, in a fairly ample space for navigation, and being under no special stress of circumstances occurring without her fault. Minnesota S. S. Co. v. Lehigh Valley Transp. Co. [C. C. A.] 129 F. 22. Steamer sheering toward course of meet-

A vessel directed to keep out of the way of another must, if the circumstances of the case permit, avoid crossing ahead of her.[17]

Passing vessels should allow sufficient space for the ordinary contingencies of navigation.[18]

Vessels should not proceed at excessive speed in harbors or other places where other vessels are liable to be encountered,[19] particularly in a fog.[20]

In a dense fog and in waters frequented by vessels, every reasonable precaution should be observed.[21] Vessels attempting to cross courses in a dense fog, when neither can see each other in time to avoid a collision, are both in fault.[22] A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, is bound, in so far as the circumstances permit, to stop her engines, and then to navigate with caution until danger of collision is over.[23]

A steamer passing near a dock at such a high rate of speed as to cause dangerous swells is liable for the resulting damage.[24]

A ferryboat is entitled to the space requisite for her proper maneuver in leaving as well as in entering her slip.[25]

(§ 7) *D. Vessels anchored, drifting, grounded.*[26]—A moving vessel is ordinarily bound to keep out of the way of a vessel at rest;[27] or of one anchored or moored,[28] and, in case of a collision, there is a presumption that she was in fault.[29]

ing steamer and tow after passing former. The Yuma [C. C. A.] 132 F. 964.

17. Art. 22 Inland Nav. Rules. Steamer wholly in fault for collision with ferry boat. The Steinway [C. C. A.] 135 F. 344.

18. Tugs towing canal boats and tugs towing ship all held in fault. The Dictator, 132 F. 164. Steamer in fault for collision with launches, there being no necessity for passing so near them as to create hazard, and even if launches were in some respects careless, collision would not have occurred had proper care been taken on board steamer after their lights were seen. The Dauntless [C. C. A.] 129 F. 715. Steamer in fault for failing to sooner observe course of steamer and tow, and avoiding them by giving them more room. The Yuma [C. C. A.], 132 F. 964.

19. Steamer passing between meeting tows solely in fault for collision. American S. S. Co. v. American Steel Barge Co. [C. C. A.] 129 F. 65. Vessel in fault for coming out of slip too fast. Shortland Bros. Co. v. New York, 129 F. 973. Steamer not in fault for excessive speed. The Sitka, 132 F. 861. At night. The Cypromene, 135 F. 558.

20. The Admiral Schley [C. C. A.] 131 F. 433. Steamer at fault for collision with anchored lighter. The Newburgh [C. C. A.] 130 F. 321. Speed of 10 knots in fog excessive. The Chelsea, 135 F. 616. Schooner sailing at 6 knots not chargeable with contributory fault, where fog was not thick where she was, and she was reducing speed on entering thick part. Id. Six knots excessive speed for steamship in thick fog in frequented part of ocean. In re Clyde S. S. Co., 134 F. 95. Speed of tug excessive. The Gladiator, 132 F. 876. Ferry boats must proceed cautiously in a fog, particularly when other boats are known to be near. In fault for excessive speed, and failure to hear fog signals of tugs. The Chicago, 134 F. 1013.

21. The Vedamore, 131 F. 154. Must use extraordinary care in harbor. Steamer in fault for deviating from true course. The Amiral Cecille, 134 F. 673. Vessel in track of vessels leaving port, in a fog and without necessity, may be in fault for collision, though would not have been had she been in line of voyage. The Admiral Schley [C. C. A.] 131 F. 433.

22. Both of two ferryboats in fault, one for attempting maneuver, and other for assenting to it and changing course so as to swing nearer other, though she immediately stopped and reversed her engines. Hall v. North Pacific Coast R. Co., 134 F. 309.

23. Int. Nav. Rules, art. 16. Act Aug. 19, 1890, c. 802, 26 St. 326, Comp. St. 1901, p. 2868. Vessel in fault for failing to observe rule. In re Clyde S. S. Co., 134 F. 95.

24. Liable where swells damaged lighter and caused her to dump part of her cargo. The Kaiser Wilhelm der Grosse, 134 F. 1012. Liable for resulting injuries to canal boat in tow, which was knocked against another boat in tow. The Asbury Park, 136 F. 269.

25. The Steinway [C. C. A.] 135 F. 344. Steamer at fault for keeping too close to shore while proceeding through Hell Gate, so as not to be able to see situation and avoid danger. Id.

26. See 2 Curr. L. 1657.

27. The Col. John F. Gaynor [C. C. A.] 130 F. 856. A steamer which has stopped her engines, while lying at a quarantine station where it is not customary to anchor, and is moving only slightly with the tide and is without steerageway, has, as regards passing vessels, to a large extent the rights of a vessel at rest. Tug towing scows without rudders solely in fault for collision between one of them and steamer, in failing to keep at safe distance in passing, there being plenty of room to do so. Id.

28. When she can do so with reasonable practicability, having regard for her own safety. Rebstock v. Gilchrist Transp. Co.,

The rule applies irrespective of whether or not the anchored vessel is in a proper and safe place.[30] It is, however, unlawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels,[31] and a vessel anchoring outside the anchorage limits of a harbor, without sufficient excuse, will be held in fault for a resulting collision.[32]

A vessel not equipped with proper anchors, or not properly anchored, will be held in fault for a collision caused by her dragging her anchors and coming in contact with another anchored vessel.[33] The duty of an anchored vessel to change her position to avoid collision depends upon circumstances.[34]

By statute in New York all vessels are prohibited from lying at the end of any pier in the North or East river, and any vessel so lying cannot claim damages for any injury caused by another vessel entering or leaving any adjacent pier.[35] The statute is penal in character, and is not to be extended by construction.[36] The exemption extends only to injuries caused by such vessel obstructing the entrance to an adjacent pier.[37]

A barge rightfully lying at the end of a pier which refuses the offer of a steamship to remove her temporarily while such ship was making her berth and to return her afterwards, takes the risk of injury from the docking of such ship, if the latter is properly handled, and cannot recover therefor without proving fault.[38]

A vessel having another between herself and the dock must exercise proper care to prevent injury to her.[39] Where a vessel is fastened to another one lying at a dock, and the additional strain on the latter's moorings is obvious, it is incumbent on both to provide against it by additional moorings.[40]

It is the duty of one inviting vessels to his wharf to provide a safe berth

132 F. 174. Tug in fault for collision of tow with anchored steamer, for failure to make sufficient allowance for swing of tow, for which there was ample room. The Charles E. Matthews, 132 F. 143. Evidence held to sustain finding that injury to barge while lying at wharf was due to negligent navigation by steamboat towing raft of logs. Spencer v. Bertrand [C. C. A.] 133 F. 46.

29. Federal Ins. Co. v. Starin, 134 F. 1010. Burden on her to absolve herself from blame. Rebstock v. Gilchrist Transp. Co., 132 F. 174. Tug with tow on long line solely in fault for collision between tow and steamer, which was about to anchor and had stopped her engines, though she might have been moving a little with tide. Britain S. S. Co. v. King Transp. Co. [C. C. A.] 131 F. 62. Vessel at anchor. The Newburgh [C. C. A.] 130 F. 321.

30. Rebstock v. Gilchrist Transp. Co., 132 F. 174. It will be presumed that she is in fault for collision with vessel moored outside of channel, unless it is affirmatively shown that the accident could not have been avoided by the exercise of human skill and precaution. Id.

31. Act March 3, 1899, c. 425, § 15, 30 St. 1152, U. S. Comp. St. 1901, p. 3543. The Newburgh [C. C. A.] 130 F. 321. Does not condemn lighter compelled to anchor in Hudson river because of fog, which made her way to side on which were anchorage grounds as far as was considered safe, and anchored after taking soundings which indicated that she was within them. Id. Forbidden to anchor in channels except in cases of great emergency, and then must anchor as near the edge of the channel as possible, and remain only until they can procure assistance. Rules & Regulations relating to Anchorage of Vessels in the Port of New York, p. 7. Steamship in fault for remaining anchored in channel after necessity therefor had ceased. The Charles E. Matthews, 132 F. 143.

32. New York Bay. The Idlewild, 129 F. 846.

33. Vessel in fault for collision with anchored schooner. The Robert Rickmers, 131 F. 638.

34. Anchored schooner held not in fault for collision with another vessel which dragged her anchors and drifted against her in gale, either because of absence of captain or for failure to set her sails. The Robert Rickmers, 131 F. 638.

35. Laws 1897, p. 314, c. 378, § 879. The Chauncey M. Depew, 130 F. 59.

36. The Chauncey M. Depew, 130 F. 59.

37. Does not extend to case where canal boat lying at end of pier was struck by barge which tug was intending to leave at end of pier. The Chauncey M. Depew, 130 F. 59.

38. The Minneapolis [C. C. A.] 130 F. 111.

39. Steamship liable for breaking guard rail of barge between herself and dock, caused by pressing barge against dock, on ground that proper care was not exercised in adjusting booms so as to keep her off with changing tide. The Adelaide, 131 F. 1002.

40. Where, through failure to do so, they go adrift, salvage services rendered to inner one will be charged against both. McWilliams v. New York, 134 F. 1015.

thereat.[41] He is bound to know the condition of the bottom and the depth of the water on the premises,[42] and is responsible for injuries resulting from his failure to warn vessels using the wharf of obstructions on the bottom of which he has knowledge, or which he could have discovered by the exercise of proper care.[43] The defense of contributory negligence on the part of the libelants, when relied upon, must be affirmatively proven by a preponderance of evidence.[44]

(§ 7) *E. Tugs and tows, pilot boats, fishing vessels, etc.*[45]—An engagement to tow imposes on the tug neither the obligations of an insurer nor of a common carrier,[46] and she is therefore obligated to the exercise of reasonable diligence only.[47] Her master will not be deemed negligent where his course, though it proved not to have been the best, was justified by the conditions as they then appeared.[48]

The tug is ordinarily bound to exercise ordinary diligence to see that the tow is properly made up, and that the hawsers are of proper length,[49] and securely fastened, particularly when there is only one man on the tow.[50] She should not take a boat in tow in the absence of her master,[51] nor when the weather is too rough for safety.[52]

She is the pilot of the voyage, and responsible for the navigation of both ves-

41. Implied undertaking that he has taken reasonable care to ascertain that bottom is not in condition to cause injury to vessel. The Nellie, 130 F. 213. At fault for maintaining dangerous mooring place, bottom being uneven, and water, at low tide, insufficient for loaded boats to lie there safely. The Thomas Quigley [C. C. A.] 130 F. 336.

42. The Thomas Quigley [C. C. A.] 130 F. 336. Owner, having lighter brought to wharf on Sunday during temporary absence of master, assumes duty of having it so placed as to be safe, mooring place being dangerous at low tide. Id.

43. Liable for injuries to barge caused by submerged pile, whose existence was known to respondent's manager. The Nellie, 130 F. 213. Liable for injury to vessel by sunken pile, which could have been discovered and removed by exercise of fair degree of prudence. Barber v. Lockwood, 134 F. 985.

44. Boatmen using wharf not negligent because they made erroneous guess as to why certain fenders were placed on bottom, in absence of notice that they were for protection against submerged pile. The Nellie, 130 F. 213.

45. See 2 Curr. L. 1659.

46. The W. G. Mason, 131 F. 632; Rebstock v. Gilchrist Transp. Co., 132 F. 174; Winslow v. Thompson [C. C. A.] 134 F. 546.

47. Means very great diligence in view of fact that tug is generally at home, while tow is stranger, and in view of nature of service. Winslow v. Thompson [C. C. A.] 134 F. 546. Ordinary care and maritime skill. Tug held in fault for sinking of tow by striking obstructions in channel. The Inca, 130 F. 36. In releasing tow after she grounded. Id. Such caution and skill as prudent navigators ordinarily exercise in like employment. Tugs held solely in fault for collision between tow and moored vessel. Rebstock v. Gilchrist Transp. Co., 132 F. 174. Ordinary care and skill, such as a reasonably prudent man would exercise under the circumstances. Care and diligence must be proportional to the magnitude of the peril. The W. G. Mason, 131 F. 632. Reasonable care and diligence. The Joseph Peene, 130 F. 489.

48. The Britannia, 134 F. 948. Tug with ship in tow overran course, owing to fog and snow, and finding herself near shore attempted to go to sea, but was unable to do so on account of strong wind, and ship stranded. Held, that she exercised skill and ordinary care required of her and was not liable for loss. Id.

49. Tug solely in fault for sinking of barge by striking cribbing of bridge while passing through draw, because she was towing with too long hawsers. The Maurice [C. C. A.] 135 F. 516. Cannot shift responsibility upon bridge owner on ground that if cribbing had been in perfect condition collision would not have injured barge. Id. Statements made by master of barge as to cause of collision not relevant as admissions because not authorized by libellant, and too remote to be part of res gestae. Id. Responsible for injuries resulting from negligence in so making up tow that canal boat was filled with water, and was struck by a scow. The Ganoga, 130 F. 399.

50. Tug held liable for damages to tow having only one man on board by collision, whether line was not properly fastened or became loose from effect of prior collision. The Lyndhurst, 129 F. 843. Cannot escape liability for failure to perform such duty by turning it over to the master of such boat. Is agent of tug in handling hawser. Id.

51. Temporary absence of master from lighter on Sunday held not such contributory negligence as to preclude him from collecting damages for its injury through fault of tug and cargo owner. The Thomas Quigley [C. C. A.] 130 F. 336.

52. Evidence held to show negligence in taking out tow in rough weather owing to the manner in which it was made up. The Ganoga [C. C. A.] 135 F. 747.

sels,[53] and is bound to know the accustomed waterways and channels, the depth of the water, and the nature and formation of the bottom, whether in its natural state or not.[54] If the peculiarities involve any special hazard, she must, in so far as by the exercise of due diligence she might have ascertained them, make them known to the tow,[55] and must exercise care and skill commensurate with the peril she assumes to encounter.[56] If she performs such duties she is not liable for injuries resulting to the tow, which could not have been prevented by the exercise of reasonable care and skill in the act of towing,[57] but is responsible for damages resulting from her negligence in the immediate act of towing, which could have been prevented by such care and skill, notwithstanding the hazards.[58] If she fails in such duties she is liable for the consequences, whatever amount of care she may have used in the act of towing.[59]

A tug undertaking to continue the voyage against the protest of the master of the tow is required to take every precaution for her safety.[60] It is also her duty to leave the tow in a safe place.[61] In case she takes a lighter in tow in the absence of her master, it is her duty to deliver her to the care of some competent person at her destination.[62] Where a tug fastens three barges together and supplies an anchor to the third, none of them having anchors of their own, the latter becomes the agent of the tug as to the other two, and its fault in the management of the anchor is that of the tug.[63]

The master of a boat offering her for towage represents her as sufficiently strong to withstand the ordinary perils to be encountered on the voyage,[64] and

53. The Joseph Peene, 130 F. 489. Must manage and direct the course of navigation of the tow. The W. G. Mason, 131 F. 632. Tugs in fault for stranding of tow in narrow and crooked channel unknown to captain of tow, for failing to seasonably direct her to start her engines forward. Id. Injury to barge chartered to respondent held due to negligence on part of respondent's tug in bringing her in violent contact with wharf. Blakeslee v. New York, etc., R. Co., 132 F. 153.

54. When all these conditions as they exist admit of safe towage, tug responsible for any negligence in failing to observe and be guided by them. The Inca, 130 F. 36. Obliged to have general knowledge of situation and its difficulties. Rebstock v. Gilchrist Transp. Co., 132 F. 174. "Bound to know" means that she must exercise proper diligence in ascertaining condition. Winslow v. Thompson [C. C. A.] 134 F. 546. Presumed to know channel and obstructions. The W. G. Mason, 131 F. 632. Evidence held to show that barge in tow did not strike on uncharted and unknown rock in center of channel so as to relieve tug from liability. The Triton [C. C. A.] 129 F. 698.

55. Winslow v. Thompson [C. C. A.] 134 F. 546. Will not be excused where the danger could have been avoided by timely measures of precaution. Duty of tug knowing of obstructions unknown to those on tow to warn the latter, particularly when he believes that she is not being properly steered. The Inca, 130 F. 36.

56. The Inca, 130 F. 36. A tug exercising her own option as to the course pursued is bound to the strictest care, and will be charged with liability for loss due to tow striking a rock, in the absence of evidence to show that it was not properly following. Passing through narrow channel between two islands instead of taking safer course. The Triton [C. C. A.] 129 F. 698.

57. Winslow v. Thompson [C. C. A.] 134 F. 546.

58. Winslow v. Thompson [C. C. A.] 134 F. 546. Tugs negligent in persisting in efforts to pull vessel over bar after she grounded instead of drawing her off by stern. Id.

59. Winslow v. Thompson [C. C. A.] 134 F. 546.

60. Tug liable to injuries to tow caused by ice. The Joseph Peene, 130 F. 489. Responsible for the loss of a tow which she failed to land, on request of her master, when the danger to her became apparent. The Ganoga, 130 F. 399.

61. Tug in fault for grounding of lighter, for leaving it in unsafe place, it being her duty to leave it in the best situation to cross the bar and enter the harbor. The S. C. Hart, 132 F. 536. Tug not in fault for sinking of barge, left at dock in accordance with custom, and injured by pile on bottom, the accident being due to the extraordinarily low tide, and the dock being a safe place under ordinary conditions. The Media, 132 F. 148. Tug, leaving three barges at anchor, two being fastened to third which was supplied with anchor by tug, none of them having anchors of their own, held negligent in leaving them without sufficient protection against conditions which might have been anticipated, though anchor was sufficient at time, and liable for half of damages due to dragging of anchor. The Flushing, 134 F. 757.

62. The Thomas Quigley [C. C. A.] 130 F. 336.

63. The Flushing, 134 F. 757.

64. Dady v. Bacon, 133 F. 986. Evidence

the tug is absolved from liability for any loss caused by her unseaworthiness, unless the defects are obvious.[65]

The tow should be provided with an efficient crew,[66] and with sufficient anchors.[67] In case she is injured during the voyage she must notify the tug of that fact.[68] It is the duty of the tow to exercise all reasonable care.[69] She must follow the course of the tug,[70] and conform to and promptly obey her signals.[71]

The duties imposed on both the tug and the tow arise by operation of law and not from the contract of towage.[72]

The burden is generally on the tow to show a failure to perform the contract or unskillfulness in performance resulting in injury,[73] but there may be a presumption of negligence on the part of the tug where the injury occurs while attempting to navigate a well known channel.[74] Where a prima facie case of negligence is made out against the tug, she has the burden of exonerating herself from liability by showing that the accident occurred from some cause for which she was not in fault.[75]

A vessel is liable in damages for the consequences of the acts of the master of a tug, who knowingly violates a reasonable regulation prescribed by lawful authority, while in the service of such vessel as local pilot.[76]

Two tugs belonging to the same owner and co-operating in the towing service under one common direction are both liable for the fault of either.[77]

A tug with several tows on a long line will be regarded as one vessel, and is required to exercise extreme care to avoid collision,[78] particularly when in harbors.[79]

held not to sustain contention that contract required towing vessel to keep along shore and to take unusual care of tow, in view of her age and condition. Id.

65. Barge unseaworthy because not in fit condition to tow safely in ordinary weather without special care. Damages divided because of negligence in taking her in tow and in not observing proper care in accordance with her condition. Dady v. Bacon, 133 F. 986. Collision between tow and anchored scow held solely the fault of former because steering gear had been out of order for some days, to knowledge of owner and master, by reason of which she failed to follow tug. Tug had no knowledge of defect, and was entitled to assume that she could be steered. The Alfred W. Booth [C. C. A.] 135 F. 519.

66. Libellant in fault for failure to provide such a crew for lighter. Might have been able to avoid grounding after it was left in unsafe place by tug. The S. C. Hart, 132 F. 536.

67. Barges in fault. The Flushing, 134 F. 757.

68. Of damage caused by being knocked into another tow by swells of passing steamer. The Asbury Park, 136 F. 269.

69. Rebstock v. Gilchrist Transp. Co., 132 F. 174. Tow in fault for collision because of wrong maneuver. Fault not attributable to towing steamer. The Sitka, 132 F. 861.

70. Tow in fault. The Yuma [C. C. A.] 132 F. 964. On the question as to whether a tow was in fault the judgment of the responsible parties exercised on the spot must ordinarily prevail. Where captain of tug was able to see and comprehend situation perfectly, and made no signal to barge, but testified that he supposed she would clear rock, cannot contend that she was not steered properly. The Triton [C. C. A.] 129 F. 698.

71. Of pilot tug. Rebstock v. Gilchrist Transp. Co., 132 F. 174. Signals and directions. The W. G. Mason, 131 F. 632.

72. Rebstock v. Gilchrist Transp. Co., 132 F. 174.

73. The W. G. Mason, 131 F. 632.

74. Stranding of tow in channel. The W. G. Mason, 131 F. 632.

75. Burden on tug to account for apparently unnecessary grounding, and libellant held entitled to damages. Burr v. Knickerbocker Steam Towage Co. [C. C. A.] 132 F. 248.

76. Anchoring her in harbor without permit in violation of harbor regulations. The Amiral Cecille, 134 F. 673.

77. The W. G. Mason, 131 F. 632. Where employed generally by a single contract with the common owner to tow a steamer, both liable for any injury to another vessel resulting from a collision with the tow, due to the failure of one of them to properly perform the service. Rebstock v. Gilchrist Transp. Co., 132 F. 174.

78. Tug with three tows on single line, the whole 4,000 feet in length, in fault for collision between one of them and schooner. The Gladys, 135 F. 601. When navigating New England coast. The Admiral Schley [C. C. A.] 131 F. 433.

79. Tug solely in fault for collision between tow and schooner for failure to keep out of her way, schooner having properly held her course until danger of collision became imminent. The John Fleming, 136 F. 486.

Tugs with tows are not warranted in obstructing ferry slips for an unreasonable length of time, even in a fog,[80] or in loitering in front of the entrance to a harbor.[81]

Tugs towing a submerged scow must place a signal upon it, or give some notice to approaching vessels of its presence and position.[82]

Where the tug is employed by the master or owners of the tow as the mere motive power to propel her from one point to another, and both vessels are under the exclusive control, direction, and management of the master and crew of the tow, she is not responsible for the faults of the tow.[83]

(§ 7) *F. Sole or divided liability, and division of damages.*[84]—A vessel clearly shown to have been guilty of a fault adequate in itself to account for a collision has the burden of clearly proving contributory negligence on the part of the other vessel.[85] The skill, knowledge, and ability of the crews of the two vessels may be taken into consideration in fixing the fault.[86]

The owner may maintain a suit against the pilot to recover damages paid by him for a collision caused by the pilot's negligence, notwithstanding the fact that they were paid without suit.[87] Ordinarily his right of action will not be deemed barred by laches where suit is commenced within the time allowed by the state statutes to sue at law on similar claims.[88]

A decree against a part owner of a vessel for damages resulting from a collision must be limited to the proportion of the damage that his individual share of the vessel bears to the whole.[89]

A mere volunteer to whom claims for damages by collision have been assigned solely for purposes of suit, and who has no interest therein, has no standing to prosecute them in admiralty.[90]

80. Tugs in fault for not having sufficient power to handle tow with reasonable dispatch. The Chicago, 134 F. 1013.

81. Tug in fault for loitering with tows in front of harbor, and in failing to change her course, rule prohibiting change in fog not being applicable under circumstances. The Admiral Schley [C. C. A.] 131 F. 433.

82. Sounding alarm signals and shouts of crew insufficient warning. Dangerous obstruction to navigation. The H. S. Beard, 134 F. 648.

83. Where tug lashed to vessel and in all things with respect to navigation of fleet is subject to orders of pilot on tow. In re Walsh [C. C. A.] 136 F. 557, afg. The Echo, 131 F. 622.

84. See 2 Curr. L. 1661.

85. Burden of steamer to prove that lighter was anchored outside of anchorage grounds. Evidence insufficient. The Newburgh [C. C. A.] 130 F. 321. The burdened vessel, having been found guilty of faults sufficient in themselves to account for the collision, has the burden of proving that they could not have caused or contributed to it, all reasonable doubts being resolved in favor of the other vessel. The Georgetown, 135 F. 854. Rule that other vessel to be presumed not in fault artificial and misleading, unless very carefully applied. May operate in reverse directions according to which vessel's faults first considered. The Admiral Schley [C. C. A.] 131 F. 433. Where her fault is palpable and adequate to account for a collision, she cannot impugn the management of another vessel for the purpose of apportioning the damages, without clear proof of contributing fault on its part. Evidence insufficient to show fault on part of steamer and barge in tow. American S. S. Co. v. American Steel Barge Co. [C. C. A.] 129 F. 65. Must overcome favorable presumption by preponderance of evidence. The Sitka, 132 F. 861. Steamer not in fault for collision with scow. The Tarpon, 132 F. 277. Steamer passing between meeting tows held solely in fault for collision, both because of her excessive speed, and her course after passing one of the towing steamers. American S. S. Co. v. American Steel Barge Co. [C. C. A.] 129 F. 65. Peculiarly applicable in case of vessel at anchor. The Newburgh [C. C. A.] 130 F. 321. Where vessel an offender in running into vessel at anchor, evidence as to fault of latter must be clear and convincing. The Amiral Cecille, 134 F. 673. Vessel running into another at anchor on anchorage grounds must show necessity for latter to have given fog signals required by Act June 7, 1897, c. 4, 30 St. 99, Comp. St. 1901, p. 2880. Federal Ins. Co. v. Starin, 134 F. 1010. Evidence insufficient to charge anchored vessel with contributory fault. Id. Clear proof of contributory fault is required. Rebstock v. Gilchrist Transp. Co., 132 F. 174.

86. Where testimony as to what was done on one vessel is conflicting and uncertain, and as to other is clear and positive, or where witnesses of one are intelligent, experienced and apparently reliable, and those of other vessel are not. The Eagle Wing, 135 F. 826.

87, 88. Donald v. Guy, 135 F. 429.

89. Act June 26, 1884, c. 121, § 18, 23 St.

Where the collision is due to the fault of two or more vessels, the damages and costs will be divided.[91] In case the two in fault are both damaged, the one receiving the greater damage will be allowed to recover from the other one-half of the difference between the amounts of their respective losses.[92]

The right of a libeled vessel, held liable for all cargo damages in a suit for collision, to recoup one-half the amount so paid from another vessel held to be equally in fault, but which was not a party to the original suit, rests on the doctrine of contribution rather than on that of subrogation,[93] and hence the fact that the right of action against it by cargo owners is barred by limitations is no defense.[94]

(§ 7) *G. Ascertainment and measure of damages.*[95]—The measure of damages for the sinking of a vessel in a collision, when she is a total loss, is her value at the time of the loss, with interest,[96] to which may be added the necessary expenses of raising her, when such a course is necessary to determine whether she can be repaired advantageously,[97] and the expense of removing her from a place where she is liable to be an obstruction to navigation.[98] The fact that the wreck has been sold for a sum more or less considerable does not affect the rule, except that the wrongdoer will be credited with the price received.[99]

In case she is not a total loss, the measure of damages is the reasonable expense of raising and repairing her to an extent sufficient to put her in as good condition as she was before the collision,[1] including expenses incurred in securing a new rating,[2] dockage expenses,[3] the wages of a watchman while she is necessarily detained,[4] necessary and reasonable commissions paid agents by foreign owners for disbursing the amounts necessary to pay repair bills,[5] and a reasonable fee paid by them to the ship's agent for his services in arranging to obtain bids, drawing up contracts, and other like services in connection with the repairs.[6] In either case the burden is upon the owner to prove the amount of his loss.[7]

A respondent who is sought to be charged with the original value of the vessel may show in mitigation of damages that she can be restored, by repairs, to her original condition for a smaller sum, and may satisfy his liability by pay-

57, 1 Supp. Rev. St. p. 443, Comp. St. 1901, p. 2945. The Adelaide, 131 F. 1002.

90. Assignments merely colorable and nothing paid therefor. The Trader, 129 F. 462.

91. The Translt, 130 F. 996; The C. R. Hoyt, 136 F. 671. Yacht and submerged scow in tow. The H. S. Beard, 134 F. 648. Steamer and vessel anchored in harbor in fog and in violation of harbor regulations. The Amiral Cecille, 134 F. 673. Tug in fault for insufficiently anchoring tow, and tow for not having anchor. The Flushing, 134 F. 757. Two steamers, one of which attempted to pass other, each liable for half of damages resulting from collision with tow of passing steamer. The Edward Smith [C. C. A.] 135 F. 32. Insurance company held entitled to recover for loss of cargo on canal boat injured by swells of passing steamer so that she sank. Damages to boat divided between owners and steamer. The Asbury Park, 136 F. 269. Damages caused by sinking of unseaworthy tow divided because of negligence in taking her in tow and in not observing proper care in accordance with her condition. Dady v. Bacon, 133 F. 986.

92. The C. R. Hoyt, 136 F. 671.

93, 94. The Conemaugh, 135 F. 240.

95. See 2 Curr. L. 1662.

96. The Reno [C. C. A.] 134 F. 555. Value with interest, and net freight pending at time of collision. The Cumberland, 135 F. 234.

97, 98. The Reno [C. C. A.] 134 F. 555.

99. The Cumberland, 135 F. 234.

1. The Reno [C. C. A.] 134 F. 555. Items for painting, labor, dockage, etc., not made necessary by collision, disallowed. The Dorchester, 134 F. 564. Items for expenses incurred in procuring evidence for use at hearing of cross libels for collision disallowed. Id.

2, 3, 4. The Sequoia, 132 F. 625.

5. The Dorchester, 134 F. 564.

6. Especially where vessel is modern steel steamer, and repairs require special superintendence and knowledge of the responsibility of bidders. The Dorchester, 134 F. 564.

7. No allowance will be made for items not proven. Damages reduced. The Reno [C. C. A.] 134 F. 555. Evidence insufficient to establish amount of loss, after eliminating hearsay evidence. The Anson M. Bangs [C. C. A.] 129 F. 103.

ing the cost of such repairs.[8] So too, if the cost of repairs is greater than the loss of value, he may ordinarily satisfy his liability by paying the latter sum.[9]

The allowance of interest by way of damages in collision cases is ordinarily in the discretion of the court,[10] but this does not apply to a suit for personal injuries.[11] In case the recovery is for loss of value, interest will ordinarily be allowed from the date of the collision to the time of payment.[12] In case it is for the cost of repairs, the libellant is entitled to demurrage as compensation for the loss of the vessel's use during repair,[13] or, in case she is sold without repairing, but before repairs could have been completed, to demurrage up to the time of sale.[14] But where other substantial repairs of benefit to the vessel are made at the same time, which must have necessarily been made in the near future, a deduction should be made on account thereof from the amount recoverable.[15] He is not entitled to recover her probable earnings on a voyage voluntarily abandoned because of such detention, in order to be ready to enter on another charter previously made.[16]

A libellant recovering damages for a collision for which his own vessel was not in fault is, in the absence of a showing of fraud, entitled to costs, though the amount recovered is much less than that claimed.[17] Where the libeled vessel is held without fault for a collision and the libel dismissed, it is proper to allow respondent to tax all costs necessarily or properly incurred, including those incident to the bringing in of a new party.[18]

§ 8. *Carriage of passengers.*[19]—A carrier of passengers by sea is held to the greatest possible care and diligence,[20] but is not an insurer,[21] and does not warrant that the vessel is seaworthy.[22] It is bound to exercise the utmost care in regard to the machinery and appliances constituting the operative means of transportation and the management of the same,[23] but in regard to other machinery and appliances, need only exercise reasonable care in view of the dangers to be apprehended.[24] The vessel must be provided with a crew adequate in numbers, and competent for their duty with reference to all the exigencies of the intended route.[25] The ship is not liable for the errors, mistakes, or negligence of the ship's doctor in caring for a passenger, in the absence of a showing of negligence in selecting him.[26]

8, 9. The Cumberland, 135 F. 234.

10. Bethell v. Mellor & Rittenhouse Co., 135 F. 445.

11. Burrows v. Townsdale [C. C. A.] 133 F. 250.

12. The Cumberland, 135 F. 234.

13. The Cumberland, 135 F. 234. Measure of damages for detention ordinarily is value of her use while she is necessarily so detained. The Sequoia, 132 F. 625.

14. The Cumberland, 135 F. 234.

15. Half the value of the use deducted. The Sequoia, 132 F. 625.

16. The Sequoia, 132 F. 625.

17. The Thomas M. Parsons, 129 F. 972.

18. The Maurice, 130 F. 634.

19. See 2 Curr. L. 1663.

20. The Oregon [C. C. A.] 133 F. 609. A stevedore, who is required by his duties to live on the vessel and whose employment is continuous while en route, is not a passenger, and is only entitled to that degree of care required as to servants. Instructions approved. Lambert v. La Conner T. & T. Co. [Wash.] 79 P. 608. Captain, having qualified as expert, held properly allowed to give opinion as to whether he could have prevented collision resulting in injury after he saw projection in bridge. Id. Evidence held to justify verdict for defendant. Id.

21. The Oregon [C. C. A.] 133 F. 609. Evidence held not to show that owners, officers, or agents sent vessel on voyage knowing that rudder was in defective condition. Id.

22. The Oregon [C. C. A.] 133 F. 609.

23. Ganguzza v. Anchor Line, 97 App. Div. 352, 89 N. Y. S. 1049.

24. Where steerage passenger injured by parting of wire rope used to hoist ashes, while he was leaning against jamb of door leading to "stokehole fidley" watching hoisting, and it was not usual for passengers to be in such a position, he was only entitled to exercise of ordinary care to guard him from injury. Ganguzza v. Anchor Line, 97 App. Div. 352, 89 N. Y. S. 1049.

25. Both under general maritime law and Rev. St. § 4463 (Comp. St. 1901, p. 3045). Must be competent to act in case of wreck. In re Pacific Mail S. S. Co. [C. C. A.] 130 F. 76. Chinese crew not efficient and

As in the case of other carriers, it is the duty of a steamboat company t keep its wharves or docks, on which passengers are invited for the purpose o embarking, in a reasonably safe condition,[27] and to furnish a reasonably saf means for discharging its passengers.[28] It is the duty of the carrier to provid suitable accommodations for the passengers,[29] to keep the vessel in a clean con dition,[30] and to supply her with sufficient food and provisions to meet the con tingencies of accident and the resulting delay in the voyage, from whatever caus such accident and delay may arise.[31] Under a contract that passengers will b supplied with good and sufficient food and lodging during the whole journey including any unavoidable delay, the carrier is liable for injuries to a passenger' health caused by its failure to provide them during a quarantine required b the government,[32] and it is not relieved from liability in this regard by a provisio exempting it from liability for delay from restraints of princes, rulers, and peo ples.[33]

A passenger wrongfully ejected is entitled to damages for the indignit thereby put upon him,[34] and also to recover his necessary expenses resultin therefrom, including the price of another ticket, with interest.[35] So too, on assaulted by the captain has a right of action against the company.[36] The bur den of proving facts alleged in justification of the assault is on the defendant.[3

The court may properly permit a large number of passengers to join in libel in rem against the vessel to recover damages from causes common to all.[3 In such case it is not essential that the damages of each should be separatel proved, or that each should testify.[39]

A provision in a ticket exempting the carrier from responsibility for it own or its agent's negligence, provided it has used due diligence to make th vessel seaworthy, is void as against public policy.[40] So too, is a provision ex empting the ship from liability for loss of a passenger's effects by theft or an act of neglect or default on the part of the owner's servants.[41]

competent where only two could speak English, and where they had never been drilled in launching the life boats. Id.

26. The Napolitan Prince, 134 F. 159.

27. Carrier negligent in leaving unguarded hole in dock. White v. Seattle, E. & T. Nav. Co., 36 Wash. 281, 78 P. 909. Passenger not guilty of contributory negligence because she did not remain in waiting room (Id.), or because she deviated some 30 feet from a straight line between waiting room and entrance to slip (Id.).

28. Gang plank not reasonably safe. Burrows v. Lownsdale [C. C. A.] 133 F. 250. Evidence sufficient to justify amount of award. Id.

29. Evidence held not to show overcrowding. The Oregon [C. C. A.] 133 F. 609. Evidence insufficient to sustain allegations of libel by steerage passengers to recover damages for breach of contract for failure to furnish them with proper food, quarters, and bedding. The Centennial, 131 F. 816.

30. Vessel held not to have been kept clean. The Oregon [C. C. A.] 133 F. 609.

31. Evidence held to entitle passengers to damages on ground that food was insufficient in quantity and inferior in quality. The Oregon [C. C. A.] 133 F. 609.

32. Complaint held to state a cause of action. Larsen v. Allan Line S. S. Co. [Wash.] 80 P. 181. Evidence held sufficient to show defendant's negligence (Id.), and that plaintiff's deafness was caused thereb (Id.).

33. Larsen v. Allan Line S. S. Co. [Wash. 80 P. 181.

34. Libellant was furnished with ticke under contract with third person, which wa subsequently extended by claimant. Wa subsequently canceled without notice to him and, on his presenting it to agent, it was ac cepted, and he was assigned berth and wen on board. Was ejected shortly before vesse sailed. Held, that he was entitled to dam ages, though excessive force not used. L Gascogne, 135 F. 577.

35. Expenses during delay. La Gascogne 135 F. 577.

36. Evidence held to authorize verdict fo plaintiff. Levidow v. Starin [Conn.] 60 A 123. Complaint sufficient after verdict t justify evidence of all attending circumstan ces of assault, including public insults. Id Evidence that it was customary to arous passengers at certain hour properly stricken Id.

37. Levidow v. Starin [Conn.] 60 A. 123.

38. For failure to keep vessel clean, an to supply suitable accommodations, and suf ficient wholesome food. The Oregon [C. C A.] 133 F. 609.

39. The Oregon [C. C. A.] 133 F. 609.

40. Even if applicable to shortage of pro visions. The Oregon [C. C. A.] 133 F. 609.

41. Valuing baggage at certain sum i

The carrier's liability for loss of a passenger's personal effects, taken from his cabin, is that of an insurer, in the absence of negligence on his part,[42] but it may limit its liability in this regard,[43] and require a notice of claim to be given within a certain time after landing.[44]

The Federal statutes require shippers of jewelry, when lading the same as freight or baggage, to give to the agent a written notice of its true character and value, and to have the same entered on the bill of lading, and limit the liability of the vessel to the value as stated in such notice.[45]

Passenger steamers are prohibited from carrying as freight certain articles, including petroleum products and other explosive products, except in certain cases and under certain restrictions.[46] They may, however, at their option, transport automobiles carrying gasoline or petroleum products as fuel, provided that all fire in such vehicles is extinguished before entering the vessel, and is not relighted until after leaving it.[47]

§ 9. *Carriage of goods.*[48]—It is the duty of the carrier to furnish a vessel seaworthy for a full load.[49]

The ship is liable for damages resulting from improper stowage, no matter by whom the stevedores are employed.[50] This is especially true where the master permits such stowage by stevedores wholly under his direction and control.[51]

absence of bill of lading and payment of freight, and exempting ship from liability for jewelry under any circumstances unless declared and delivered to purser. The Minnetonka, 132 F. 52. Fact that passenger filled blanks in ticket containing such provisions under caption requiring information for government authorities does not make them binding on her, it appearing that she never read or adopted them. Id. Facts held to establish theft by ship's servants for which it was liable. Id. Not guilty of contributory negligence in leaving door open under circumstances. Id.

42. Evidence held not to show such negligence. Not bound to lock door. Hart v. North German Lloyd S. S. Co., 92 N. Y. S. 338.

43. Not liable in excess of limit, where passenger bought round-trip steamship ticket and checked trunk on return portion some months after using going portion. Lindsey v. Maine S. S. Co., 88 N. Y. S. 371.

44. Notice of claim for loss of jewels held to substantially comply with provision requiring it to be given within 48 hours after passengers landed. The Minnetonka, 132 F. 52.

45. Rev. St. § 4281, Comp. St. 1901, p. 2942. Does not apply where passenger was robbed of jewelry she was accustomed to wear before she could deposit it, and without fault on her part. The Minnetonka, 132 F. 52.

46. U. S. Rev. St. § 4472. The Texas, 134 F. 909.

47. U. S. Rev. St. § 4472, as amended by Act Feb. 27, 1877, c. 69, 19 St. 252, and Act Feb. 20, 1901, c. 386, 31 St. 799 [Comp. St. 1901, p. 3050]. Penalty provided by § 4499, Comp. St. 1901, p. 3060. The Texas, 134 F. 909. Gasoline in tank of automobile transported on ferry boat is freight, and automobile operated by gasoline engine carries fire while it is in motion from its own power. Hence carrying such machine a violation of the statute when it is run on and off vessel under its own power. Id.

48. See 2 Curr. L. 1664.

49. Shipper entitled to cargo spaces. The William Power, 131 F. 136. Damage to cargo of hay held due to leakage caused by inability of canal boat to carry cargo for which she was chartered without straining. Id. Evidence held to show that damage to hay was due to defective covering rather than leaky condition of boat. Graham v. Planters' Compress Co., 129 F. 253. Barge held unseaworthy from the manner of her loading, and consequently liable for damage to cargo caused by her sinking. The G. B. Boren, 132 F. 887. Barge liable for dumping part of cargo of ore which she was unloading from vessel and for injury to vessel, on ground of unseaworthiness, due to weakness from long use in same business. The Willie, 134 F. 759. Sinking of carfloat and cars due to its unseaworthy condition, it being partly filled with water. Respondent not in fault, it not being its duty to inspect float, and it not being notified of its condition, and having removed cars in usual manner. Bush Co. v. Central R. Co., 130 F. 222.

50. Breaking open bales and storing licorice root in unusual places. Bethel v. Mellor & Rittenhouse Co., 131 F. 129. Duty of the master to attend to the distribution of the cargo. The William Power, 131 F. 136. A provision in the charter party that charterers' stevedores are to be employed by the master and paid by him does not change the rule, since they are, in such case, held to be in his employ and under his direction and control as the representative of the owners. Charter provided that they were to be wholly under his direction and control. Bethel v. Mellor & Rittenhouse Co., 131 F. 129. Evidence held to show that damage to skins was due to leakage of brine from barrels negligently stowed near them. Lazarus v. Barber [C. C. A.] 136 F. 534. Damage to sugar held due to sweat for which ship was not liable, and not to negligent stowage. The Niceto, 134 F. 655.

It is also responsible for the value of a part of the cargo eaten by rats during the voyage,[52] but not liable for damages to a deck cargo resulting from defective covers furnished by the shipper.[53] The consignee is not bound to receive cargo injured through the fault of the vessel.[54]

A vessel receiving merchandise in good condition and delivering it in damaged condition has the burden of showing that such damage was caused by a risk excepted in the bill of lading,[55] but when it is manifestly of the sort excepted, it need not show the promoting cause.[56] Where it is shown that the damage was occasioned by one of the excepted causes in the absence of some fault on the part of the vessel, the burden is on the libellant to show that it might have been prevented by reasonable skill and diligence.[57] Under a bill exempting the carrier from liability for loss or damage to goods on the wharf awaiting shipment, not happening through its fault or negligence, the burden is on the shipper to show such fault or negligence.[58] Negligence in the loss of the vessel will not be presumed, but must be proved by the party alleging it.[59]

One delivering goods to forwarders for shipment is not entitled to recover as against them for their loss at sea, where they were shipped on the first steamer leaving for the port of consignment, in accordance with the custom of the parties, and it does not appear that the vessel was unseaworthy at the time of her departure.[60]

A bill of lading issued by the master is prima facie evidence of, and, in the absence of proof to the contrary, establishes, the receipt on board of the goods therein described.[61] Bills of lading containing a formal recital of specific weights and also containing the clause "Weight, measure and contents unknown," are not conclusive upon the ship as to the number of pounds of freight shipped, but are open to explanation.[62] The delivery to and acceptance by the shipper of a bill of lading or receipt after the goods have been accepted by the carrier for transportation does not constitute it a binding contract.[63]

As in the case of other contracts, the bill of lading is to be construed according to the natural and usual import of the language used,[64] and cannot be varied or altered by parol evidence.[65] Ordinarily the shipper is bound to ex-

51. Bethel v. Mellor & Rittenhouse Co., 131 F. 129.

52. Poppy and canary seed. The Seefahrer, 133 F. 793.

53. Hay. The M. C. Currie, 132 F. 125.

54. Condition of certain seed held such that consignees were not bound to receive it, and were justified in abandoning it to the vessel. The Seefahrer, 133 F. 793.

55. In absence of satisfactory proof, court justified in finding for libellant, though cause does not appear. The Patria [C. C. A.] 132 F. 971. The burden to show that damage was due to a cause for which she is not liable may be sustained by circumstantial evidence. The Wildcroft [C. C. A.] 130 F. 521.

56. The Patria [C. C. A.] 132 F. 971.

57. Lazarus v. Barber [C. C. A.] 136 F. 534.

58. Loss by fire or flood. Washburn-Crosby Co. v. William Johnston & Co. [C. C. A.] 125 F. 273.

59. Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860.

60. Fowle v. Pitt, 183 Mass. 351, 67 N. E. 343.

61. The Titania [C. C. A.] 131 F. 229.

62. Poppy and canary seed. The Seefahrer, 133 F. 793.

63. No consideration for subsequent agreement. Burns v. Burns [C. C. A.] 131 F. 238.

64. Shipping. Washburn-Crosby Co. v. William Johnston & Co. [C. C. A.] 125 F. 273. According to legal import of terms. Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860.

Particular provisions construed: Clause providing that merchandise on wharf awaiting shipment or delivery shall be at shipper's risk of loss or damage by fire or flood applies where goods burned after being placed on wharf, but before shipment. Washburn-Crosby Co. v. William Johnston & Co. [C. C. A.] 125 F. 273. Provision requiring consignee "to tow vessel in and out of Back Bay free" is a contract to provide the towage and not merely to pay for it, and hence he is liable for injuries resulting from negligence of tug. Winslow v. Thompson [C. C. A.] 134 F. 546. Order for towage held to have come from consignee. Id.

65. Proof of custom not admissible to contradict it, where unambiguous. Portland

amine it and is bound by its terms if he accepts it without objection.[66] Equity will, however, correct mutual mistakes therein.[67] Stipulations in bills of lading do not apply to cases arising during the forwarding of the goods from the first port of destination to their final destination on bills issued by the vessel taking them to the latter port, the forwarding being at the ship's expense, but subject to the stipulations, exceptions, and conditions in the latter bills.[68]

Provisions exempting the vessel from liability for damage caused by dangers of the sea, river, or navigation are binding, in the absence of negligence on her part.[69]

The question of the duty of the carrier as to delivery is to be determined by the bill of lading, and without regard to the charter party of which the shipper had no notice until after the terms of his contract with the ship have been unalterably fixed.[70] Actual delivery to the consignee is not necessary, delivery on the wharf being sufficient.[71] But to establish such a constructive delivery of the goods, the carrier must show that they were landed on the wharf, that they were segregated from the general bulk of the cargo so as to be conveniently accessible, and that notice was given to the consignee of their arrival and location, and a reasonable time allowed for their removal.[72] A provision requiring delivery to be "on wharf as customary" means as customary at the port of discharge.[73] A custom existing at the port of shipment in regard to designating a wharf for the discharge of cargo cannot control the express provisions of the contract of purchase.[74] The right of the carrier to compel the consignees to take goods from alongside is waived by unloading them onto the dock in accordance with the terms of the bills of lading and the custom of the port.[75]

The vessel is liable for damages caused by her failure to reasonably protect perishable goods while they remain on the dock and under her control.[76] A ves-

Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860.

66. Cannot set up ignorance of its contents, or resort to prior parol negotiations to vary it. Burns v. Burns [C. C. A.] 131 F. 238.

67. Where, by reason of a mutual mistake, fails to properly set out the actual contract with respect to the vessel upon which goods are to be shipped. Answer broad enough to open defense of mutual mistake. Fowle v. Pitt, 183 Mass. 351, 67 N. E. 343. Evidence held to show that insertion of name of steamer in bill by forwarders was mutual mistake, and that it was intention that goods were to be shipped on first steamer, in accordance with custom. Id.

68. That vessel shall have benefit of insurance on cargo. Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317.

69. Philadelphia & R. R. Co. v. Peale, 135 F. 606. Barge injured by ice not negligent in starting. Injury caused by danger of river navigation, and not liable for delay incident thereto. Id. Loss of logs, which broke loose from raft by reason of high wind, after they had been towed out to steamer for loading in open sea, held due to a peril of the sea and vessel exempt from liability under bill of lading. Munson S. S. Line v. Steiger & Co., 132 F. 160.

70, 71. The Titania [C. C. A.] 131 F. 229.

72. Not sufficient to deposit entire cargo on wharf and inform inquiring owners that, if their goods arrived, they will be found somewhere in general mass. The Titania [C. C. A.] 131 F. 229. To discharge the carrier from his liability as such, delivery must ordinarily be made at the usual wharf of the vessel, and actual notice be given to the consignee, if he is known. Notice must be sufficient under the circumstances. Rosenstein v. Vogemann, 102 App. Div. 39, 92 N. Y. S. 86. Though bill of lading provided that carrier's liability was to cease immediately when goods left ship's deck or tackle, liable for destruction of goods on pier on day after they were unloaded, where vessel had no usual place of landing, and notice of its arrival and location not given until afternoon of day before loss occurred. Id.

73. Moore v. U. S., 25 S. Ct. 202, afg. 38 Ct. Cl. 590.

74. Custom in San Francisco requiring consignee to designate berth for discharge of cargo cannot prevail over terms of contracts requiring delivery of coal to government "at the wharf" and "on wharf as customary" at Honolulu, at which place custom is to discharge on wharf, so as to render government liable for demurrage for delay in reaching berth by ships chartered by vendor, caused by conditions in harbor, and without fault of government. Moore v. U. S., 25 S. Ct. 202, afg. 38 Ct. Cl. 590. Same rule applies where delivery was to be made from vessel's tackles, it being impossible to deliver cargo at that port from tackles or otherwise without first arriving at wharf. Rosenfeld's Case, 38 Ct. Cl. 608.

75. The Titania [C. C. A.] 131 F. 229.

76. Not relieved by provision in bill of

sel detained after the expiration of the time for unloading by the act of the consignee is liable as a warehouseman only, for reasonable care in keeping the cargo.[77]

A provision requiring a claim for loss and damage to be presented within a specified time after the landing of or a failure to deliver the goods is valid,[78] but it may be waived.[79]

The Harter Act.[80]—Under the Harter Act the owners, agents, and charterers of a vessel, and the vessel itself, are exempted from liability for damage or loss resulting from faults or errors in her navigation or management, provided the owner has exercised due diligence to make her in all respects seaworthy, and properly manned, equipped, and supplied.[81] The limitation applies to faults primarily connected with the navigation or management of the vessel, and not with the cargo.[82] Thus, it does not exempt the vessel from liability for damages to the cargo from the sinking of the ship, due to hurried and imprudent unloading, which brings the center of gravity too high for safety.[83]

The burden is on the owner to establish the fact that the vessel was seaworthy when she sailed, or that due diligence had been exercised to make her so;[84] but there is a presumption in his favor in that regard, which is sufficient to support the burden of proof so imposed, until it is overthrown or controverted by some evidence.[85]

The owner is also exempted from liability for loss arising from the inherent defect, quality, or vice of the thing carried.[86]

The act makes it unlawful to insert in a bill of lading any clause relieving the ship from liability for damages arising from negligence, fault, or failure in proper loading, stowage, custody, care or proper delivery of merchandise or other property, and declares that any such clause shall be void.[87]

lading requiring consignee to be ready to receive cargo as soon as vessel was ready to unload, in default of which she was authorized to land, warehouse, or lighter same at consignee's risk, where she refused to permit consignee's agent to remove them, though having no claim for freight. The Ainwick, 135 F. 884.

77. Delay due to seizure under legal process. The M. C. Currie, 132 F. 125.

78. Bills of lading generally exempt the carrier from liability for loss and damage unless a claim therefor is presented within a specified time after landing of, or a failure to deliver, the goods. Such provision does not preclude recovery, where ship placed cargo in store, taking receipts therefor, and consignee presented claim as soon as shortage came to his attention. The Niceto, 134 F. 655.

79. Agent of line in whose name bill of lading was issued held to have authority to make such waiver, though ship was sailing on owner's account. The Niceto, 134 F. 655.

80. See 2 Curr. L. 1666.

81. Act Feb. 13, 1893, c. 105, § 3, 27 St. 445, Comp. St. 1901, p. 2946. The Wildcroft [C. C. A.] 130 F. 521. Where vessel shown to have been seaworthy at time of loading, damage to cargo while it was being discharged, due to escape of water into hold by reason of valve having been improperly left open while water from river was being pumped into engine tank, held due to fault in management of vessel. Id. Owner not relieved from liability if, after proper manning and equipment, adopts course rendering both inefficient. Liable for loss due to sinking caused by ice while vessel was tied up at pier, where, according to custom, fires were banked, steam allowed to get cold, captain and engineer went ashore, and balance of crew went to sleep without keeping watch. The Valentine, 131 F. 352.

82. Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317.

83. Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317. If the damage is attributable to negligent unloading, it is immaterial whether the part unloaded or that remaining on the ship is injured. Id.

84. The Wildcroft [C. C. A.] 130 F. 521.

85. May help to sustain it when controverted. Casting burden on him does not destroy presumptions in his favor. The Wildcroft [C. C. A.] 130 F. 521.

86. By § 3. Sweating of hay. The M. C. Currie, 132 F. 125.

87. By § 1. Notation on bill that vessel should not be responsible for broken or cut bales held of no effect. Bethel v. Mellor & Rittenhouse Co., 131 F. 129. Damages to cargo from sinking of ship in port, due to hurried and improper unloading, which brings center of gravity too high for safety, is within this section. Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317. Evidence held to sustain findings of lower courts that loss was due to negligent unloading. Id. Fact that expert on spot did what, at the time, his judgment approved, did not relieve him from liability. Id.

The act does not affect the rights of parties under a charter party.[88] It will be applied to foreign vessels in suits brought in the United States.[89]

§ 10. *Freight and demurrage. Freight.*[90]—In the absence of a provision to the contrary, freight is not deemed earned until the voyage is completed and the goods are delivered or ready to be delivered at the point of destination;[91] but this rule may be changed by contract.[92]

The consignor is primarily liable for the payment of the freight, irrespective of whether he is the owner, or whether it is secured by a lien on the cargo.[93] Presumptively the master has no authority to collect freight payable under a charter in advance of the charter terms.[94]

Demurrage.[95]—A voyage begins when a ship sets about doing what is to earn freight for the owner.[96]

Under a charter requiring a vessel to deliver her cargo at a particular dock, the voyage is not completed, and the lay days for discharging do not commence to run until she reaches such dock and is in condition to discharge,[97] unless she is prevented from reaching it through the active fault of the charterer or consignee.[98] If the word "days" alone is used with reference to lay days or days for loading a ship, all the running or successive days, including Sundays and holidays, are counted.[99] If the term "working days" is used, all days are counted except Sundays and holidays.[1] In neither case are stormy days excluded.[2] Notice of a ship's readiness to receive cargo can be given only after she is ready, and at her proper place, for loading.[3]

Though the charter provides that dangers of the seas, etc., shall be mutually excepted, the charterer is not entitled to a deduction of demurrage on that ground in the absence of a showing that he was necessarily prevented by storms from properly loading.[4] The fact that a libellant, proceeding in rem against a vessel in good faith and under advice of counsel, is unsuccessful in establishing a lien, does not render him liable for demurrage or compensation to the owner other than the ordinary taxable costs.[5] The construction of particular contracts will be found in the note.[5]

88. Lake Steam Shipping Co. v. Bacon. 129 F. 819.

89. Oceanic Steam Nav. Co. v. Aitken, 25 S. Ct. 317. Where carrier sets up act and relies on § 3, cannot show limitations in bills of lading which are void under § 1. Id.

90. See 2 Curr. L. 1667.

91. Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860.

92. Provision in bill of lading "The several freight and primages to be considered as earned, steamer or goods lost or not lost at any stage of the entire transit," is valid and enforceable. Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860.

93. Portland Flouring Mills Co. v. British & Foreign Marine Ins. Co. [C. C. A.] 130 F. 860. Where cargo was insured by shipper for sufficient to cover its value and freight, fact that, on wrecking of vessel, cargo was surrendered by master to insurer without notice to shipper, did not prejudice him, and no defense to action against him for freight. Id.

94. Merchants' Banking Co. v. Cargo of The Afton [C. C. A.] 134 F. 727.

95. See 2 Curr. L. 1668.

96. Voyage held to have begun at Seattle, though vessel stopped at other ports to take on cargo before proceeding to port of destination. The Buckingham, 129 F. 975. Under a contract to pay the market rate of freight, a vessel is entitled to the rate current when the voyage commences, though it is afterwards interrupted without her fault, through a cause excepted in the bill of lading. Voyage held to have begun when barge left, notwithstanding fact that she was injured by ice when she had proceeded a short distance and was delayed for repairs. Philadelphia & R. R. Co. v. Peale, 135 F. 606.

97, 98. In re 2,098 Tons of Coal [C. C. A.] 135 F. 317.

99, 1. Hughes v. Hoskins Lumber Co., 136 F. 435.

2. If desire to except them should use expression "weather working days," or "with customary dispatch," or the like. Hughes v. Hoskins Lumber Co., 136 F. 435.

3. Under provision in charter that lay days should commence on notice of readiness by master. Dantzler Lumber Co. v. Churchill [C. C. A.] 136 F. 560.

4. Hughes v. Hoskins Lumber Co., 136 F. 435.

5. Lien claimed for money advanced. The Alcalde, 132 F. 576.

The question of when and how far a consignee is liable for demurrage depends upon the particular facts of each case.[7] He is not liable if not interested in the cargo,[8] but a consignee who is interested in the cargo and accepts it under a charter party between the vessel and the consignor, which provides for demurrage, is liable therefor in case of his default.[9] A consignee receiving the goods under a bill of lading is ordinarily bound to pay the demurrage stipulated for therein, though payment is not exacted before delivery.[10] But this rule does not apply where he is the owner of the goods, and they have been transported under a different contract with him, and delivered without any new understanding.[11] Bills of lading requiring the consignee to pay freight do not obligate him to pay demurrage.[12]

In the absence of a stipulation in the charter or bill of lading as to the time of unloading and discharge, the vessel is entitled to reasonable dispatch under the circumstances then existing.[13]

The charterer or consignee is not an insurer and is not liable for delay caused by circumstances beyond his control,[14] as by war,[15] by the acts of the owner or his agents,[16] or by failure of the vessel to arrive as scheduled.[17]

6. Charter party for carriage of lumber providing that lay days for discharging should be "as customary" held not to make rule 7 of N. Y. Maritime Ass'n rules applicable, in absence of any reference thereto, especially in view of uncertainty of meaning of term "board measure" as used in such rule. Smith v. Sizer & Co., 134 F. 928. Under charter requiring discharge of a certain amount of cargo "per weather working day, ship to discharge according to custom of port," held that custom constituting 24 hours a day's work governed in computing demurrage. 24 hours, day or night, during which weather was such that work could safely proceed constituted "weather working day." Weir v. Northwestern Commercial Co., 134 F. 991. Evidence insufficient to show agreement on part of master not to charge demurrage, in consideration of respondent paying half of stevedores' charges. Smith v. Sizer & Co., 134 F. 928.

7, 8, 9. Graham v. Planters' Compress Co., 129 F. 253.

10. Burns v. Burns [C. C. A.] 131 F. 238.

11. Burns v. Burns [C. C. A.] 131 F. 238. Libellant held liable for demurrage only at rate stipulated in verbal agreement instead of that specified by provision in bill, inserted without his knowledge or consent. Id.

12. To pay balance of freight at rate agreed on in accordance with terms of charter party. Graham v. Planters' Compress Co., 129 F. 253.

13. In re 2,098 Tons of Coal [C. C. A.] 135 F. 317. Charterers impliedly agree to unload cargo within a reasonable time, and in accordance with the custom and usage of the port. Consignee liable for delay. McArthur Bros. Co. v. 622,714 Feet of Lumber, 131 F. 389. A contract to purchase cargoes to be delivered from ships, containing no provision in regard to the rate of discharge, binds the purchaser to receive them at a rate customary and reasonable under the circumstances (Furness, Withy & Co. v. Leyland Shipping Co. [C. C. A.] 134 F. 815), and, where he does so, he cannot be held liable for demurrage which the seller was bound to pay under charter parties requiring a more rapid discharge (Id.). Letters held to constitute complete contract. Id.

14. Such as presence of another vessel discharging at dock where delivery is to be made, and which is only one available, or temporary derangement of dock machinery for which he is not responsible, and which he could not prevent. In re 2,098 Tons of Coal [C. C. A.] 135 F. 317. Neither owner, consignee, or carrier liable for demurrage for delay in unloading cargo from barge, caused by her inability to deliver it at dock because of heavy load. Both carrier and libellant knew that she could not reach dock when she was loaded. Ronan v. 155,453 Feet of Lumber, 131 F. 345. Unsigned memorandum held not to preclude proof of parol agreement releasing carrier from liability. Barge not ready "to deliver" when could not reach dock, as libellant knew when she was loaded. Id. As a general rule, it is the duty of the consignee to procure a customhouse permit for the discharge. Delay due to fact that permit was mislaid by customs officer not chargeable to charterer, where he procured it soon after discharge was stopped, and did not appear that stevedore was ready to proceed when it arrived. 2,000 Tons of Coal ex The Michigan [C. C. A.] 135 F. 734.

15. Compliance with contract excused by hostilities between the government forces and revolutionists at the port of discharge, in so far as they render it practically impossible to receive cargo with the contemplated dispatch, either because of the intrinsic danger incident to unloading, or the inability to secure the necessary men to do the work, and the charterers are relieved from liability under a provision requiring them to pay demurrage for detention by default of themselves or their agent. Burrill v. Crossman [C. C. A.] 130 F. 763.

16. Where vessel's agent arranged for discharge at different dock than that selected by charterer, on ground that latter was unsuitable, charterer not responsible for delay due to its being occupied. 2,000 Tons of Coal ex The Michigan [C. C. A.] 135 F. 734. Evidence insufficient to show that fail-

A time charterer compromising a claim for demurrage against the consignee cannot assert a claim for the balance in dispute against the vessel on the ground that he could have recovered the balance in full but for the master's misconduct.[18]

The owner cannot recover demurrage from one repairing the vessel for delay, in the absence of a contract, or of evidence showing an actual loss of earning capacity, or what her earnings during the detention would probably have been.[19] An agreed rate of demurrage applicable to a class of vessels to which an injured vessel belongs may be taken as the basis for computing the damages recoverable for the delay while she was being repaired.[20]

The respondent vessel cannot maintain a cross libel for damages caused by her seizure and detention in a suit in rem for collision, where such suit was brought in good faith and there has been no abuse of the court's process.[21]

A consignee failing to take the cargo within a reasonable time after arrival is liable for damages arising from undue delay.[22] So too, the owner of the vessel is liable for damages resulting from unreasonable delay in transportation.[23] The allowance of interest on damages for delay in transportation depends on circumstances, and rests in the discretion of the court.[24]

§ 11. *Pilotage, towage, wharfage. Pilotage.*[25]—Ordinarily a pilot contracts to devote the whole day to the service of the ship and no more.[26] He is entitled to additional compensation for detention until the next day,[27] and for services rendered on such day.[28]

The master has authority to bind the ship to pay for extra pilotage services

ure to furnish sufficient lighters was due to fault of charterer. Id. Not liable for delay in discharging, which was done by employe of ship's agent. Id. Where delay was due to change in portholes so as to allow of reasonably convenient loading. Hughes v. Hoskins Lumber Co., 136 F. 435. Evidence held to show that delay in loading was due to fact that stevedore, hired by master in accordance with charter provisions, did not have men to do the work, and not to failure of charterer to furnish cargo. Dantzler Lumber Co. v. Churchill [C. C. A.] 136 F. 560. Not where delay caused by the wrongful refusal of the master to receive the amount of cargo contracted for. Sewall v. Wood [C. C. A.] 135 F. 12. Delay held not due to vessel. Deductions from hire improper. The Buckingham, 129 F. 975.

17. By reason of which other vessels arriving in meantime were loaded first. McArthur Bros. Co. v. 622,714 Feet of Lumber, 131 F. 389. Vessels are entitled to be loaded in the order of their arrival at the dock. Id.

18. Time charterer compromising and settling claim for demurrage against consignee cannot assert claim for balance in dispute against vessel on ground that he could have recovered in full but for master's misconduct. The Buckingham, 129 F. 975.

19. The Mary N. Bourke, 135 F. 895.

20. Thompson v. Winslow, 130 F. 1001 afd. [C. C. A.] 134 F. 546.

21. The Amiral Cecille, 134 F. 673.

22. Consignee improperly refusing to take part of cargo, though not liable for demurrage under bill of lading or charter party, is liable for damages according to ordinary rules of law governing in absence of specific agreement, including wharfage charges necessarily incurred during delay. Graham v. Planters' Compress Co., 129 F. 253. In action for damages for unreasonable failure to unload canal boat, in consequence of which it was alleged that boat and cargo were frozen in, held that no damage was proven, it appearing that boat would have been frozen in if it had been immediately unloaded, and that calking was necessary in the spring, whether boat was frozen in with load or not, and there was no showing that same repairs would not have been necessary if boat had been frozen in unloaded. Scott v. International Paper Co., 92 App. Div. 615, 86 N. Y. S. 785.

23. Award of damages on basis of ten days' delay in transportation of horses held reasonable, and damages not excessive. La Conner Trading & Transp. Co. v. Widmer [C. C. A.] 136 F. 177.

24. La Conner Trading & Transp. Co. v. Widmer [C. C. A.] 136 F. 177.

25. See 2 Curr. L. 1669.

26. Day begins at 12 A. M. and ends at 12 midnight. Pilotage fee covers all services rendered on day of arrival in port. N. Y. City Consolidation Act, §§ 2101, 2105, 2107 (Laws 1882, p. 511, c. 410, and Laws 1853, p. 921, c. 467, relating to compensation of pilots in New York harbor, construed. The Cervantes, 135 F. 573.

27. Where brought in vessel in afternoon, and remained on board, at master's request, while she was anchored overnight, and took her to dock next afternoon, he is entitled to detention money and extra compensation for moving vessel. The Cervantes, 135 F. 573.

28. The Cervantes, 135 F. 573.

rendered at his request.[29] In pilotage cases, resort may be had to the vessel, the owner, or the master.[30]

State legislation concerning pilotage is not necessarily repugnant to the commerce clause of the Federal constitution.[31] No inherent rights guaranteed thereby are infringed by state statutes restricting the right to pilot to pilots appointed according to their provisions,[32] nor do they create any monopoly or combination forbidden by the Federal anti-trust laws.[33]

States are prohibited from adopting any regulations or provisions discriminating between the rate of pilotage or half pilotage charged vessels sailing between the ports of one state and those sailing between the ports of different states, or discriminating against steam vessels, or national vessels of the United States, and all existing provisions or regulations making such discriminations are annulled.[34] This prohibition does not have the effect of revoking the power of the states to legislate on the subject of pilotage, or to abrogate existing state laws, but only to abrogate the discriminatory provisions therein.[35] Whether such provisions may be eliminated without destroying the other provisions of the statute is a state and not a Federal question, and the Federal courts will follow the decisions of the state courts in that regard.[36]

Coastwise steam vessels are exempted from the operation of state pilotage laws.[37] The exemption of such vessels either by the Federal or state statutes does not concern vessels in the foreign trade, and hence does not operate to produce discrimination against British vessels engaged in foreign trade, and in favor of United States vessels in such trade.[38]

Wharfage[39] is the use of a wharf furnished in the ordinary course of navigation.[40] Claims for wharfage are of a maritime nature, and may be protected by maritime liens;[41] but a lease of a wharf, based solely upon the credit of the lessee rather than upon that of the vessel, the rent being payable whether the vessel ever uses the wharf or not, relates to real estate and is not maritime.[42]

§ 12. *Repairs, supplies, and like expenses.*[43]—Maritime liens for supplies are given as a basis of credit to enable the master, in the absence of the owner, to secure means to make the vessel seaworthy, so that she may proceed on her voyage without detention for lack of necessaries.[44] Hence the continued presence of the owner, even at a place other than his domicile, if known to the supplyman, defeats the power of the master to impress a lien on the ship.[45]

29. Detention money. The Cervantes, 135 F. 573.

30. The Cervantes, 135 F. 573.

31. Even though they are regulations of commerce, they are within that class of powers which may be exercised by states until congress sees fit to act upon subject. Olsen v. Smith, 25 S. Ct. 52.

32. Not repugnant to 14th Amendment, since pilotage is subject to governmental control. Olsen v. Smith, 25 S. Ct. 52.

33. Olsen v. Smith, 25 S. Ct. 52.

34. U. S. Rev. St. § 4237, Comp. St. 1901, p. 2903. Olsen v. Smith, 25 S. Ct. 52. Exempting clause of Texas Rev. St. 1895, arts. 3790-3794, 3796, 3803, is void in so far as it discriminates in favor of state vessels and state ports. Id.

35, 36. Olsen v. Smith, 25 S. Ct. 52.

37. Olsen v. Smith, 25 S. Ct. 52. This section interferes with state laws only in so far as they relate to the vessels referred to. Id.

38. State laws not in conflict with treaty with Great Britain providing that no higher or other duties or charges shall be imposed in any ports of the United States on British vessels than those payable in same ports by vessels of the United States. Olsen v. Smith, 25 S. Ct. 52.

39. See 2 Curr. L. 1670.

40. The James T. Furber, 129 F. 808.

41. The Surprise [C. C. A.] 129 F. 873. Contract relating to wharfage. The James T. Furber, 129 F. 808.

42. Admiralty has no jurisdiction to enforce lien therefor given by state statute. The James T. Furber, 129 F. 808. Maine Rev. St. c. 93, § 7, giving lien for use of wharf, dry dock, or marine railway, only provides remedy under contract wholly and distinctly maritime. Use of wharf means wharfage. Id.

43. See 2 Curr. L. 1670.

44. The Alcalde, 132 F. 576.

45. Place of business of owner in another state than that of its domicile, and officers there present. The New Brunswick [C. C. A.] 129 F. 893.

The master may bind the vessel for the necessary wharfage at ports other than the home port,[46] for the services of stevedores in loading or unloading the vessel,[47] and also for such provisions and other supplies as are necessary for immediate or every-day use in the navigation of the vessel,[48] without consulting the owners,[49] and this is true, though she is being navigated by a charterer who is bound to make all disbursements, and to protect the vessel from liens.[50]

There must be a maritime necessity for pledging the vessel,[51] and the actual receipt by the ship of the supplies and repairs, or the actual expenditure of the money for the benefit of the vessel, must be shown.[52] Where it appears that they were necessary and were furnished in good faith, the presumption is that the vessel is responsible, unless it appears that the master had funds on hand applicable to such purposes, which fact was known to those furnishing the supplies,[53] or that they had knowledge of facts sufficient to put them on inquiry, so that they could have ascertained, by due diligence, that the master had no authority to contract for such supplies on the credit of the vessel.[54]

One advancing money to disburse the ship is in same position as other creditors furnishing supplies and the like.[55] The equitable rule of subrogation does not ipso jure transfer existing liens to a mere volunteer advancing money to disburse a ship, when there is no stress of necessity.[56]

In order to raise a lien on the vessel for supplies furnished on the order of the owners, there must be a meeting of the minds so as to create an understanding or contract that such a lien shall exist as security.[57] This is true, though they are furnished in a foreign port,[58] or though the party furnishing them intended to rely upon the credit of the vessel.[59]

An owner who, being without funds, in person orders supplies or borrows money for the benefit and on the credit of the vessel in a foreign port, is estopped

46. The Surprise [C. C. A.] 129 F. 873.

47. Is maritime contract. The Worthington [C. C. A.] 133 F. 725.

48. The Surprise [C. C. A.] 129 F. 873. The master represents not only the owners, but also her passengers, cargo, and crew. As common agent must provide ordinary maritime necessities irrespective of stipulations between owners and charterers. Id. The law presumes that the owners consented that they should be obtained on the credit of the vessel. Id.

49. Provisions, etc. The Surprise [C. C. A.] 129 F. 873.

50. Immaterial whether those furnishing supplies knew of charter or its conditions. Is implied condition of every charter. The Surprise [C. C. A.] 129 F. 873.

51. Parties dealing with him are bound to take notice of such limitation on master's authority. The Worthington [C. C. A.] 133 F. 725. Money advanced to load vessel. Id. No such maritime necessity for loan used in disbursing ship as to give lien therefor. The Alcalde, 132 F. 576.

52. The Worthington [C. C. A.] 133 F. 725.

53. The Wyandotte, 136 F. 470. Their necessity being shown, everything else is presumed in favor of a lien. Burden on whomsoever disputes its validity. Presumed that they were furnished on credit of vessel. The Surprise [C. C. A.] 129 F. 873. Where charter provided that charterer's agents at foreign ports were to act as ship's brokers, and they procured libellants to purchase draft drawn by master to pay necessary and usual charges in port where cargo was received, which master was bound to, and did, pay from proceeds, owners were not entitled to offset against same, in hands of the holders in good faith, claims against charterers or their agents for dead freight or demurrage. The Wyandotte, 136 F. 470. Fact that charter provided that such disbursements should be advanced, payable from freight only, and that master was in possession of drafts for freight, when draft in suit was drawn, which he could have used, but which he later sent to owners, held no defense where purchaser had no knowledge of such facts. Id.

54. The Wyandotte, 136 F. 470.

55. The Alcalde, 132 F. 576. Sufficient showing of circumstances or exigency, of supplying of funds on credit of vessel, of necessity for credit, and of implied hypothecation. The Worthington [C. C. A.] 133 F. 725.

56. The Alcalde, 132 F. 576.

57. Evidence insufficient to show meeting of minds. The New Brunswick [C. C. A.] 129 F. 893.

58. Must show that the credit of the ship was pledged as security. The Reed Bros. Dredge No. 1, 135 F. 867. Where they are ordered by the owner, whether registered or pro hac vice, there are no presumptions in favor of a lien. The Surprise [C. C. A.] 129 F. 873.

59. Entries on their books only slight evidence of such intention. The Reed Bros. Dredge No. 1, 135 F. 867.

to say, as against the party furnishing them, that they were diverted from the purposes for which they were obtained, and not applied to the service of the ship.[60]

Where the vessel is in her home port, the parties are presumed to be dealing on the personal credit of the owners, unless the supplies are actually furnished on the credit of the vessel, and a lien therefor is given by the statutes of the state.[61]

State statutes giving a lien for supplies will be strictly construed, and cannot be sustained by construction, analogy, or inference.[62] The remedy is ordinarily limited to such articles as are for the benefit of the ship in aid of the voyage, and necessary to enable her to accomplish her undertakings.[63] A competent master must be presumed, in the absence of evidence to the contrary, to have provided what is fit and proper for the service in which the vessel is engaged, and to have acted for the owners in so doing.[64]

A proceeding cannot be maintained to enforce a lien under a state statute for supplies furnished to a foreign vessel.[65] The rule is not changed by the fact that she was enrolled at the port where they were furnished in the absence of a showing that the person furnishing them was thereby misled into believing that she was a domestic vessel.[66]

Boats constructed in Oregon are subject to a lien for debts due by virtue of a contract, express or implied, with the owners or their contractors for materials or labor furnished in their construction.[67] All actions to enforce such liens must be commenced within one year after the cause of action accrues.[68]

In Louisiana there is no privilege accorded upon a dredge boat to one advancing money to repair the same.[69]

A state court has jurisdiction to construe a state statute relating to liens on water craft, and when the balance of purchase money for a boat is brought into court by the party owning it to direct to whom it shall be paid.[70] Where the lien is to

60. Money borrowed for purpose of loading vessel. The Worthington [C. C. A.] 133 F. 725.

61. The Gordon Campbell, 131 F. 963. No lien under general maritime law. Fredericks v. James Reese & Sons Co. [C. C. A.] 135 F. 730.

62. The Mary F. Chisholm, 129 F. 814; The James T. Furber, 129 F. 808. Penn. Act 1858 (P. L. 363), giving lien for repairs or supplies on "all ships, steamboats, or vessels navigating" certain rivers, embraces only such vessels as are engaged in trade or commerce, and does not apply to dredge boat without motive power, and used only for supporting and moving dredging apparatus. Fredericks v. Rees & Sons Co. [C. C. A.] 135 F. 730.

63. Me. Rev. St. c. 93, § 7. The Mary F. Chisholm, 129 F. 814. Under statute giving lien for supplies furnished vessel for her use on order of master, owner, or part owner, there is no lien for provisions furnished to part owner living on vessel with family, while she is laid up in home port for winter, presumption being that they were furnished on his personal credit. The Gordon Campbell, 131 F. 963; The Mary F. Chisholm, 133 F. 598. In order to make a sale of supplies maritime in character, they must be for the ship, in aid of the voyage. The Mary F. Chisholm, 129 F. 814. Clothing, tobacco, and other articles of personal use sold to fishermen about to start on a fishing voyage are not "supplies necessary for the employment of the vessel" within the meaning of Maine Rev. St. c. 93, § 7. Id. Is not a maritime transaction, and admiralty court has no jurisdiction though lien is claimed. Id. Where coal is furnished to a vessel part to be used thereon and part to be unloaded at a certain port for a known use, a lien will attach to the vessel for coal used in its navigation [Ohio St. § 5880]. Shaller v. Hanlon, 4 Ohio C. C. (N. S.) 401.

64. Milk, vegetables, canned goods, etc., held necessary supplies. The Mary F. Chisholm, 133 F. 598. Evidence insufficient to show custom requiring crew to pay for such supplies. Id. Prices charged for duck held reasonable. Id. The judgment of the master, acting in good faith, as to what food may be furnished to the men, must prevail. Id.

65. Vessel owned by foreign corporation. The New Brunswick [C. C. A.] 129 F. 893.

66. The New Brunswick [C. C. A.] 129 F. 893.

67. B. & C. Comp. § 5706. Barstow v. The Aurelia [Or.] 77 P. 835.

68. B. & C. Comp. § 5722. Limitations begin to run from the expiration of the credit allowed by the contract under which the material is furnished, and not from the furnishing of the material. Barstow v. The Aurelia [Or.] 77 P. 853.

69. Elstner-Martin Grocery Co. v. Lamont, 113 La. 894, 37 So. 868.

70. Ohio St. § 5880. Shaller v. Hanlon, 4 Ohio C. C. [N. S.] 401.

be enforced by a proceeding in rem, the jurisdiction of the Federal courts is exclusive.[71]

A contract with a shipyard for repairs to a vessel will, in the absence of evidence to the contrary, be presumed to have been made with reference to its known custom to add to the net measurement of the timber used an arbitrary percentage for wastage.[72] The production of bills claimed to have been paid, and the testimony of witnesses that they paid them is sufficient prima facie proof of the cost of repairs.[73]

§ 13. *Salvage.*[74]—Salvage is a reward or bounty, exceeding the full value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods has been saved from shipwreck or other dangers of the sea.[75] Towing a disabled vessel on the high seas,[76] or from the vicinity of a fire, have been held to be salvage services.[77]

The services must be voluntary,[78] the test being whether they are rendered by those under no legal obligation to do so.[79] The master and crew of one vessel may recover salvage for services rendered another vessel belonging to the same owner,[80] but salvage cannot be claimed by the owners of the vessel through whose fault the services were rendered necessary.[81] This is true though she is afterwards libeled for the loss and her owners take advantage of the statutes relating to the limitation of liability in such cases.[82]

71. When to be enforced by proceeding in rem. Fredericks v. James Rees & Sons Co. [C. C. A.] 135 F. 730.

72. The Mary N. Bourke, 135 F. 895. Account for materials and labor furnished in making repairs adjusted. Id.

73. Finding of an assessor of cost of repairs to vessel made necessary by grounding through fault of charterer, based on itemized account and uncontradicted evidence that account was paid and repairs were necessitated by grounding, will not be disturbed. Thompson v. Winslow, 130 F. 1001, afd. [C. C. A.] 134 F. 546.

74. See 2 Curr. L. 1671.

75. The Lottie E. Hopkins, 133 F. 405. There must be a marine peril. The Dumper No. 8 [C. C. A.] 129 F. 98.

76. The Lottie E. Hopkins, 133 F. 405.

77. Of a low order. Award of $100. The Fred E. Scammell, 133 F. 608. Libellants taking master and two deckhands to vessel moored to burning dock, and assisting in loosening and rescuing her from imminent peril, held to have performed salvage service. The America, 136 F. 510.

78. A salvor is one who, as a volunteer adventurer, without any particular relation to a vessel in distress, or any pre-existing contract that connects him with the duty of employing himself for its preservation, renders it useful service. The Dumper No. 8 [C. C. A.] 129 F. 98.

NOTE. Rights of seamen as salvors: As a rule seamen may not become salvors of their own vessel, since, by their contract of service, they engage to render any services necessary in its behalf. The rule has been held to apply to stevedores loading the ship (Kidney v. The Ocean Prince, 38 F. 259), to the one well seaman on board a ship infected with yellow fever, who was, on that account, compelled to perform extra services (Coffin v. The Akbar, 5 F. 456), to master and seamen refusing to go on board salving steamer (The D. W. Vaughan, 9 Ben. 26, Fed. Cas. No. 4,222), and to pilots (Mesner v. Suffolk Bank, 1 Law. Rep. 249, Fed. Cas. No. 9,493), or surgeons performing extraordinary services outside the line of their regular duties (Phillips v. M'Call, 4 Wash. C. C. 141, Fed. Cas. No. 11,104). An abandonment of the crew and ship by the master operates to dissolve the seamen's contracts, so that they are entitled to compensation for services thereafter rendered. The abandonment must, however, appear to have been without hope of return. See The Umatilla, 29 F. 252; Mason v. The Blaireau, Fed. Cas. No. 9,230, afd. 2 Cranch, 240, 2 Law. Ed. 266. Extra compensation in the nature of salvage will, however, sometimes be allowed seamen for meritorious services. From note to Gilbraith v. Stewart Transp. Co. [U. S.] 64 L. R. A. 193.

79. The Dumper No. 8 [C. C. A.] 129 F. 98. A contract by an owner of tugs to tow dumpers out to sea and back imposes no obligation on the master and crew of one of such tugs to go to the rescue of a dumper which has been abandoned by another tug and has drifted out to sea. Service voluntary, and entitled to salvage. Id. A tug is not released from a towage contract by the mere fact that her tow requires assistance which, under ordinary circumstances, would entitle those rendering it to salvage. The Pine Forest [C. C. A.] 129 F. 700.

80. Both vessels belonging to United States. Rees v. U. S., 134 F. 146.

81. By owners of tug liable for sinking of tow. The Pine Forest [C. C. A.] 129 F. 700. A towage contract cannot be converted into a salvage service under conditions brought about by the fault of the tug. Id.

82. Statute contains no suitable provision or machinery for working out any salvage compensation in such cases. Rule might be otherwise if vessel had been surrendered before services were rendered. The Pine Forest [C. C. A.] 129 F. 700.

Personal property of the United States on board vessels for transportation is liable to a lien for salvage services rendered in saving it.[83] A salvor of imported goods on which the duties have been paid, but which are still in the custody of the customs officers, is entitled to salvage on the amount of such duties at the same rate allowed against the goods themselves.[84] The amount of freight to be reckoned in the value of the salved property, where the services are rendered before the completion of the voyage, is the proportion thereof which has been actually earned at the time of the salvage service.[85]

A claim for salvage is based on an implied contract.[86]

All salvage cases are to be determined on their particular facts.[87]

The salvors are first entitled to recover the actual expenses incurred by them in performing the salvage services,[88] and compensation for delay at the rate of demurrage provided for in the charter.[89]

The amount awarded for salvage generally rests in the discretion of the court awarding it;[90] but such discretion must be exercised in the spirit of the decisions recognized and enforced by the appellate courts,[91] and the amount will be readjusted on appeal if the decree does not follow in the path of authority, even though no principle has been violated or mistake made.[92] A readjustment will more readily be made if the award below appears to have been enlarged through some misapprehension of the facts.[93]

The award should be sufficiently liberal to induce prompt and eager assistance,[94] without inflicting too heavy a burden on the salved property.[95] Fifty per cent. is frequently allowed in case the vessel saved is a derelict.[96]

83. Rees v. U. S., 134 F. 146.

84. Has interest to extent of such duty. Cornell Steamboat Co. v. U. S., 130 F. 480. Court will not make findings of law defining powers of secretary of treasury in respect to refunding duties under Rev. St. § 2984 (Comp. St. 1901, p. 1958), had sugar been destroyed. Id.

85. Item of freight wholly eliminated from award, the amount, if any, earned and saved to owners being inconsiderable. Perriam v. Pacific Coast Co. [C. C. A.] 133 F. 140.

86. Cornell Steamboat Co. v. U. S., 130 F. 480.

87. The Theta, 135 F. 129. The court cannot follow any unvarying rule as to proportion in reference to values. The Lottie E. Hopkins, 133 F. 405.

88. The Theta, 135 F. 129; The Santurce, 136 F. 682. Value of hawser destroyed. The John Fleming, 136 F. 486.

89. The Santurce, 136 F. 682.

90. The Edith L. Allen [C. C. A.] 129 F. 209; The Santurce, 136 F. 682. Award charged five-twelfths against ship and seven-twelfths against cargo. Perriam v. Pacific Coast Co. [C. C. A.] 133 F. 140. The amount will not be readjusted on appeal where there has been no mistake of fact or application of an unwarranted rule of compensation in arriving at it. Id. Will not be set aside on account of its amount or the method of its distribution, unless the appellate court is plainly convinced that the discretion of the trial judge has been manifestly abused. The Eliza Strong [C. C. A.] 130 F. 99.

91. The Edith L. Allen [C. C. A.] 129 F. 209. Not at liberty to render a mere arbitrary judgment upon individual discretion, but must be governed by the principles of the law of salvage. The Lottie E. Hopkins, 133 F. 405.

92. The Edith L. Allen [C. C. A.] 129 F. 209.

93. Award for rescue of stranded schooner reduced. The Edith L. Allen [C. C. A.] 129 F. 209. See note to this case showing percentage of salvage allowed for rescue of wooden vessel stranded on the Atlantic Coast.

94. The Lottie E. Hopkins, 133 F. 405; The Santurce, 136 F. 682.

Amounts awarded in particular cases: $100 for towing vessel from vicinity of fire, where danger was remote. The Fred E. Scammell, 133 F. 608. $10,000 for towing disabled vessel 240 miles in two and a quarter days. Value of salved vessel $210,000 with cargo, and of towing vessel $70,000. See this case for tables showing awards in similar cases. The Santurce, 136 F. 682. $1,175 for rescue of dumper, valued at $8,000 or $10,000, which had become derelict and would probably have been total loss, held reasonable, where service was entirely successful, and was performed at considerable personal risk. The Dumper No. 8 [C. C. A.] 129 F. 98. Award to two tugs for towing barge to place of safety in hurricane raised to $1,200. The Marcus Hook [C. C. A.] 135 F. 744. $200 for taking master and two deckhands to vessel moored to burning pier, and assisting in saving her. Vessel worth $18,500. The America, 136 F. 510. Evidence insufficient to show settlement (Id.), or larceny of shovel by libellants, so as to preclude recovery (Id.). $350 for rescuing scow which had gone adrift in New York Bay, after collision, in view of fact that scow was in some danger. The John Fleming, 136 F. 486. Towing disabled steamer 400 miles held mer-

In fixing the amount allowed, the value of both vessels,[97] the risk to which the salved ship is exposed,[98] the risk incurred by the salvors,[99] the success achieved,[1] and, in case the salved vessel is a derelict, the danger to navigation resulting from her remaining afloat, may be considered.[2]

A certain proportion of the award is generally divided among the officers and crew of the vessel rendering the services.[3]

In order to substitute for a salvage claim a different contractual relation between the owners of a rescued vessel and the persons performing the services, there must be proof of a contract distinct and specific in its terms, and providing for compensation in any event, whether the imperiled property is saved or not.[4] A contract for salvage or rescue services does not bar a court of admiralty from reaching the merits, or from applying the fundamental rules in regard thereto when circumstances justify it.[5]

The question of salvage is a judicial one, of which a court of admiralty only has jurisdiction.[6] The captain of a revenue cutter has no authority to determine it, in the absence of an agreement submitting it to him as arbitrator.[7] The Federal courts have jurisdiction to determine a salvage claim against the government.[8]

§ 14. *Loss and expense.*[9]—Under the Federal statutes the liability of a vessel owner for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without his knowledge or privity, is limited to the amount or value of his interest in the vessel, and her freight then pending.[10] A court of admiralty

itorious salvage service, though she was not in imminent danger of immediate destruction, and though towing vessel not exposed to great danger. Steamer in situation justifying signals of distress, and services were prompt, willing, and efficient. Award of $8,640 salvage on vessel without cargo, vessel and cargo being worth $200,000. The Cottage City, 136 F. 496. $200 to tug for towing disabled fishing vessel. The Lottie E Hopkins, 133 F. 405. $500 for services in saving property belonging to United States from wreck, where little of any danger connected therewith. Rees v. U. S., 134 F. 146. $1,000 for towing scow, picked up while drifting in harbor in moderate wind, by tug sent for it by its owners. Compensation allowed on basis of very low order of salvage and not that of rescue of property at sea in imminent peril of loss or deterioration. The Hughes Brothers & Bangs No. 49 [C. C. A.] 135 F. 746.

95. The Santurce, 136 F. 682.

96. The Theta, 135 F. 129.

97. The Theta, 135 F. 129; The Marcus Hook [C. C. A.] 135 F. 744.

98. The Theta, 135 F. 129; The Marcus Hook [C. C. A.] 135 F. 744; The Hughes Brothers & Bangs No. 49 [C. C. A.] 135 F. 746.

99. The Theta, 135 F. 129; The Marcus Hook [C. C. A.] 135 F. 744. Towing at sea always involves some peril. The Santurce, 136 F. 682.

1. The Theta, 135 F. 129; The Dumper No. 8 [C. C. A.] 129 F. 98.

2. The Theta, 135 F. 129.

3. Rees v. U. S., 134 F. 146. Twenty five per cent given to officers and crew, to be divided according to wages except that master received double share. The Santurce, 136 F. 682. Master and crew awarded fourth of salvage, master being given three parts, and mate and men who went on derelict two parts each. Division according to wages. The Theta, 135 F. 129.

4. Sufficiently shown by proving that parties intended that salvor was to be paid in any event. Merritt & C. Derrick & Wrecking Co. v. Tice, 97 App. Div. 380, 89 N. Y. S. 1057. Evidence of attempt to secure settlement of some claim (Id.), and as to insurance carried on vessel held inadmissible (Id.). Complaint alleging that plaintiff furnished necessary equipment, etc., and pulled schooner off the ways and seeking to recover on quantum meruit held not to entitle it to recover for "materials used up on the job." Merritt & C. Derrick & Wrecking Co. v. Greene, 129 F. 969. Report of commissioner fixing value of services in raising dredge approved. Merritt & C. Derrick & Wrecking Co. v. Morris & C. Dredging Co., 132 F. 154.

5. Agreement to pay tug salvage for raising tow ineffectual, where it is finally determined that she was responsible for her loss. The Pine Forest [C. C. A.] 129 F. 700. Compensation stipulated for in contract to get yacht off of shore held not excessive, especially in view of damage to tug. Amount not in excess of what would have been allowed in absence of contract. The Lasca, 133 F. 1005.

6. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

7. Evidence insufficient to show agreement. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

8. Where amount is under $1,000, suit may be brought in district court under Tucker Act (Act March 3, 1887, c. 359, §§ 1-7; 24 St. 505, 506; Comp. St. 1901, pp. 752-755), providing for suits on contract. Cornell Steamboat Co. v. U. S., 130 F. 480.

9. See 2 Curr. L. 1673.

10. Rev. St. § 4283; Comp. St. 1901, p. 2943. In re Michigan S. S. Co., 133 F. 577; The San Rafael, 134 F. 749.

has jurisdiction to limit liability only in case it could take original cognizance of a suit in rem or in personam to recover the loss or damage upon which the claim is made.[11] The right to a limitation does not depend upon the fact that the vessel is actually engaged in the prosecution of a voyage at the time of the doing of the act or the happening of the event against which it is sought.[12]

The owner is entitled to a limitation against the claims of passengers for damages growing out of a collision,[13] even though such owner is a railroad company operating the vessel in connection with its road, and the passenger was riding on a ticket entitling him to both land and water transportation,[14] and though the owner also owns the other vessel concerned in and partly in fault for the collision, which is not surrendered, where such ownership is not disclosed in the petition.[15] A decree limiting the liability of petitioner as owner of one of two vessels, equally in fault for a collision, is no bar to an action against it as owner of the other vessel for damages for wrongful death resulting from the same collision, though libellant appeared and presented a claim for such damages in the limitation proceedings.[16] The amount allowed him in such former proceeding will, however, be deducted from the award in the second suit.[17]

The owner is not entitled to a limitation of liability for damages to persons and baggage growing out of the loss of the vessel, where he fails to furnish a competent crew.[18]

A petition to limit the liability of a vessel and cargo for a collision must state the facts and circumstances by reason of which it is claimed, in order to entitle the petitioner to contest the question of fault on the part of the vessel;[19] but a failure to do so cannot be taken advantage of by the adverse parties, where by stipulation such proceedings have been consolidated with cross suits between the two vessels, in which the question of liability has been put in issue by the pleading.[20]

§ 15. *General average.*[21]—No one can make a claim for general average contribution if the danger, to avert which the sacrifice was made, arose from his own fault, or from the fault of those for whose acts he is responsible to the co-contributors.[22] Thus, the shipowner is not entitled to a general average contribution, where the loss was occasioned by the fault of the master or crew.[23]

§ 16. *Wreck.*[24]—One purchasing a sunken vessel takes it subject to the right

11. The San Rafael, 134 F. 749. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance. Id.

12. Applies to claims for personal injuries from blowing up of oil tank while vessel was being fitted to burn oil. In re Michigan S. S. Co., 133 F. 577.

13. Steam ferry boat. The San Rafael, 134 F. 749.

14. The San Rafael, 134 F. 749.

15. Decree will be restricted to adjudication of liability as owner of one referred to. The San Rafael, 134 F. 749.

16. Two ferryboats, both owned by same corporation. Hall v. North Pacific Coast R. Co., 134 F. 309; The San Rafael, 134 F. 749.

17. Hall v. North Pacific Coast R. Co., 134 F. 309. Evidence held to justify finding that deceased was passenger on vessel sunk in collision, and that he was drowned. Id.

18. Not entitled to limitation where loss results from violation of statute. U. S. Rev. St. § 4493 (Comp. St. 1901, p. 3058). Crew incompetent. In re Pacific Mail S. S. Co. [C. C. A.] 130 F. 76.

19. Admiralty rule 56. The Sacramento, 131 F. 373. Admiralty rule 56. The Trader, 129 F. 462.

20. The Trader, 129 F. 462.

21. See 2 Curr. L. 1674.

22. Tarabochia v. American Sugar Ref. Co., 135 F. 424.

23. Stranding of vessel on unmarked, charted reef, necessitating jettisoning a part of her coal and cargo, held, under evidence, to probably have been due to negligence or error of mate in overrunning course, and hence vessel not entitled to general average contribution from cargo. Tarabochia v. American Sugar Ref. Co., 135 F. 424. Failure to produce mate who was navigating vessel when accident occurred tends to show that master's orders in regard to course were not carried out. Id.

24. See 2 Curr. L. 1674.

of the cargo owners to assert their lien for damages against it, and is bound to take notice of their rights.[25]

§ 17. *Marine insurance.*[26] *The contract.*[27]—As in the case of other insurance, the contract is one of indemnity.[28] An insurer paying the entire amount of the loss becomes subrogated, to the extent of such payment, to whatever interest the insured has in the property, and to the latter's right to proceed against one who has negligently caused the loss.[29] In case the insured thereafter recovers from the party causing the loss, the insurer is entitled to be reimbursed only to the amount actually paid out by it, with interest, any balance going to the insured.[30] This is true, though the policy is a valued one and the loss is total, and though the insured has abandoned the vessel to the insurer and conveyed her to it by bill of sale.[31]

The charterer of a vessel has an insurable interest in goods in his possession as carrier to the full extent of their value, against a loss for which it is possible that he may become responsible.[32] He has the right to insure against his own negligence, as well as against the necessity of being required to enter into the inquiry whether his own negligence was responsible for, or contributed to, the loss.[33] The question of his right to recover under the policy is not to be determined after the loss by inquiring whether he is then in fact liable to the owners of the property for the value thereof or for damage thereto.[34]

A ship's boats or launch, while being used in performance of the proper business of the vessel to which they belong, are considered to be a part thereof,[35]

25. Owner of cargo of brick which sank with barge held not to have lost right to lien for damages as against insurer, who had bought and raised her, by waiting to assert it until after she was raised and extent of loss could be definitely determined. Insurer knew that there would be damage to cargo, and was chargeable with notice of legal rights of owners. The G. B. Boren, 132 F. 887.

26, 27. See 2 Curr. L. 792.

28, 29. The Livingstone [C. C. A.] 130 F. 746.

30. Where insurance is paid, and insured recovers actual value of vessel, which is in excess of value stated in policy, without assistance from, and against opposition of insurer. The Livingstone [C. C. A.] 130 F. 746.

31. Such conveyance and abandonment does not vest in insurer right of action against vessel in fault for collision and consequent loss. The Livingstone [C. C. A.] 130 F. 746. The fact that the same insurance companies are liable under policies whereby they agreed to become responsible for any loss caused by the vessel at fault for the collision is immaterial. Id.

Note: This decision reverses the holding of the district court in the same case, 122 Fed. Rep. 278. While at first blush it may seem most equitable, it is certainly not in accord with the weight of authority. It is based on the propositions that the rights of the insurer to recovery are only such as he derives by subrogation to the rights of the insured; that the doctrine of subrogation springs from equity; and that it would be clearly inequitable to allow the insurer to recover more than his loss while insured recovered less than his. Some stress also seems to be laid on the fact that the petitioner sought to hinder rather than to assist in the prosecution of the libel. In North of England Ass'n v. Armstrong, L. R. 5 Q. B. 244, decided in 1870, a leading case and parallel to the one in point, where there had been a total loss and abandonment under a valued policy, it was held that the entire damages recovered belonged to the underwriters. This case seems to have been generally followed, the ground taken being that the value named in the policy is an absolute estoppel as between insurer and insured. P. & S. S. S. Co. v. Phoenix Ins. Co., 89 N. Y. 559. The position taken in the principal decision is hardly supported even by the cases cited in its behalf. For the most part they are cases either where the loss was only partial or there was no abandonment (The St. Johns, 101 F. 469), or the policy was not a valued one. See 2 Am. & Eng. Enc. of Law [2nd Ed.] 367, note; Comegys v. Vasse, 1 Pet. [U. S.] 193, 7 Law. Ed. 529; Globe Ins. Co. v. Shirlock, 25 Ohio St. 50; Mason v. Marine Ins. Co., 110 F. 452.—From 3 Mich. L. R. 162. See, also, discussion of this question in 18 Harv. L. R. 383.

32. Against general average charges. Munich Assur. Co. v. Dodwell & Co. [C. C. A.] 128 F. 410.

33. To stranding of vessel, jettison, and resulting general average charges. Munich Assur. Co. v. Dodwell & Co. [C. C. A.] 128 F. 410.

34. Munich Assur. Co. v. Dodwell & Co. [C. C. A.] 128 F. 410.

35. Naphtha launch held to be "of and in" a yacht, while being used in usual way as means of communication with shore, and to have been covered by policy on yacht. Dennis v. Home Ins. Co., 136 F. 481.

and, in the absence of an express provision to the contrary, the insured is entitled to recover for their loss while so engaged.[36]

Every underwriter is presumed to be acquainted with the practice of the trade he insures, and it must be supposed to be the intention of the contract to conform the indemnity to the known practice.[37] The ordinary rules of interpretation apply.[38] Words are to be given their ordinary meaning.[39]

The rule that the policy is to be construed most strongly against the insurer does not apply where the language used is that of the insured.[40] In such case it should be reasonably interpreted in the light of the surrounding circumstances.[41]

A policy is to be interpreted in accordance with the law of the place where it is made,[42] in the absence of a provision specifying the place of performance, in which case the law of the latter place controls. An underwriter on a British marine policy may stipulate that it shall be construed and applied, in whole or in part, in accordance with the law of any foreign state.[43]

A provision limiting the right to recover to losses incurred while the vessel is in certain specified waters is binding.[44] A policy insuring against risks incident to inland waters does not cover risks incurred in the open ocean, though within waters deemed inland for navigation purposes.[45]

Warranties and representations.[46]—The breach of an express warranty in a policy bars a recovery, whether it causes any injury or not.[47] The materiality of a spontaneous representation by the insured is a question of fact,[48] but a misrepresentation by the insured of a fact specifically inquired about by the insurer avoids the policy, whether actually material or not.[49] A representation once made in the progress of the negotiations continues in force until it is withdrawn.[50]

36. Dennis v. Home Ins. Co., 136 F. 481.

37. Launch covered by policy on yacht. Dennis v. Home Ins. Co., 136 F. 481.

38. See Insurance, 4 Curr. L. 169. Under a provision in a towage liability policy that $200 should be deducted from the amount of loss in all cases of claim, held that such sum was to be deducted from the share of the loss to be paid by the company, and not from the whole loss where there was concurrent insurance. Ronan v. Indemnity Mut. Marine Assur. Co., 127 F. 757. Marine policy insuring charterer as well in his own name "as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all," held to cover whole cargo, whether belonging to him or to others, and to entitle him to recover full amount of general average charges apportioned against cargo. Munich Assur. Co. v. Dodwell & Co. [C. C. A.] 128 F. 410.

39. "Adjacent." Kirk v. Home Ins. Co., 92 App. Div. 26, 86 N. Y. S. 980. "Inland waters." Fulton v. Insurance Co. of North America, 127 F. 413.

40. Kirk v. Home Ins. Co., 92 App. Div. 26, 86 N. Y. S. 980.

41. Marine policy on dredge, providing "Warranted confined to the use and navigation of the waters of New Haven Harbor and adjacent inland waters," and that any deviation shall avoid policy, does not cover it when in use in inland waters adjacent to Bridgeport harbor, 17 miles distant. Kirk v. Home Ins. Co., 92 App. Div. 26, 86 N. Y. S. 980.

42. International Nav. Co. v. Sea Ins. Co. [C. C. A.] 129 F. 13, afg. 124 F. 93; Progresso S. S. Co. v. St. Paul Fire & Marine Ins. Co. [Cal.] 79 P. 967.

43. Under provision, "General average, salvage and special charges as per foreign custom," the settlement of salvage charges must be in accordance with the laws of the country in which the insured pays them. International Nav. Co. v. Sea Ins. Co. [C. C. A.] 129 F. 13, afg. 124 F. 93.

44. Houseboat held to have been lost within natural as well as statutory boundaries of inland waters of New York harbor, and covered by policy containing warranty that boat should be confined to inland waters of New York, New Jersey, and Long Island. Fulton v. Insurance Co. of North America [C. C. A.] 136 F. 182. Marine policy held not to cover injuries received by scow while on tributary to "North River." Hastorf v. Greenwich Ins. Co., 132 F. 122.

45. House boat. Atlantic ocean off Coney Island within limits established by acts of congress for application of inland navigation rules [28 St. 672 (U. S. Comp. St. 1901, pp. 2899, 2900)]. Fulton v. Insurance Co. of North America, 127 F. 413.

46. See 2 Curr. L. 793.

47. That vessel should at all times have competent watchman on board. Snyder v. Home Ins. Co., 133 F. 848.

48. Kerr v. Union Marine Ins. Co. [C. C. A.] 130 F. 416.

49. Conclusively presumed to have been material. As to time of sailing. Kerr v. Union Marine Ins. Co. [C. C. A.] 130 F. 415.

50. Construed to refer to time of completion of contract. Policy avoided where representation that vessel had not sailed was

Extent of loss. Abandonment.[51]—A valuation in the policy is conclusive between the parties in the adjustment of either a total or partial loss, if the insured has some interest at risk.[52] Under a policy containing a suing and laboring clause and providing that the insurer will contribute to the expense incurred thereunder in proportion as the sum insured is to the whole sum at risk, the sum at risk is the valuation of the property as stated in the policy.[53] The rule is not changed because such sum happens to equal the sum insured, thus obligating the insurer to pay the whole of the expense.[54] A claim for expenses will be disallowed under a policy insuring against total loss only, where it does not appear that there was danger of a total loss.[66]

In the United States, under a valued marine policy covering salvage, the insured is entitled to recover ratably from the several underwriters a sum which bears the same ratio to the entire salvage he is compelled to pay as the amount of the policy bears to the policy value of the ship.[56] By the law of England he can recover only such part of said sum as bears the same ratio to the whole as the policy valuation bears to the valuation on which the adjustment was made.[57]

There is an actual total loss when the vessel is rendered valueless to the owner for the purposes for which he holds the same.[58]

A constructive total loss is one upon the happening of which the insured may abandon the subject-matter of the insurance.[59] Unless there remains something of value to pass to the underwriter, there is, as a matter of course, nothing to abandon, and no case for the operation of the doctrine of abandonment.[60] Hence there can be no abandonment, where, before it was attempted, the cargo has absolutely passed from the insured.[61] A salvage service is a loss by peril of the sea and the insured may, prior to a sale ordered to satisfy the lien of the salvors, abandon and claim as for a total loss.[62] Under a policy providing that the insurer shall be liable only in case the loss equals fifty per cent. of the sound value of the cargo at the port of delivery, there can be no recovery where there is no showing as to the amount of the damage, or the value of the salvage services.[63]

Policies generally provide that all claims paid shall reduce any further liability to the extent of the sum so paid, unless the amount is made good by additional insurance and an additional premium is paid.[64]

Risks and causes of loss.[65]—The insured is bound to minimize the loss as far as possible.[66]

true when rate of insurance was inquired about, but sailed before contract was completed. Kerr v. Union Marine Ins. Co. [C. C. A.] 130 F. 415.

51. See 2 Curr. L. 793.

52. Cal. Code Civ. Proc. § 2736. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

53. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636. Where vessel or property is justifiably sold after damage by peril insured against and condemnation, it is a total loss without abandonment. Facts held not to constitute total loss without abandonment. Id.

54, 55. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

56, 57. International Nav. Co. v. Sea Ins. Co. [C. C. A.] 129 F. 13, afg. 124 F. 93.

58. Evidence held to justify finding that owner was deprived of vessels at port of destination, and that they were rendered valueless for purposes for which he held them, and hence that there was an actual total loss under Cal. Civ. Code, § 2704, subd. 3 & 4. So injured that could not proceed to place where were to be used. Progresso S. S. Co. v. St. Paul Fire & Marine Ins. Co. [Cal.] 79 P. 967.

59, 60. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

61. Where it has been sold. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

62, 63. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

64. Insurer held entitled to have amount paid on claim for schooner under towage liability policy deducted from amount of policy before determining its liability for damages to barge subsequently injured, though it admitted tug's liability in latter case, and directed insured to make settlement therefor without suit. Ronan v. Indemnity Mut. Marine Assur. Co., 127 F. 757.

65. See 2 Curr. L. 793.

66. Question whether insured used any

Under the statutes of California the insurer is not liable for loss occasioned by the willful act of the insured, but is not exonerated by the negligence of the insured, or that of his agents or others.[67]

Actions on policies.[68]—A provision limiting the time within which an action may be brought on the policy applies to an action against the agent under a statute making him personally liable on all contracts of insurance made by him on behalf of a foreign company which has not complied with the state statutes.[69]

A finding in an action by the owner of goods, lost while being transported in a scow, that the scow was unseaworthy, is not conclusive in an action by the scow owner against the insurer of the cargo.[70]

§ 18. *Maritime torts and crimes. Torts.*[71]—Ordinarily when the cargo is loaded or unloaded under the direction of an independent contractor or master stevedore, and pursuant to contract, the duty of the ship to the stevedores ends when it furnishes them a reasonably safe place to work, and a safe passage thereto.[72] It is, however, bound to properly inspect hatch covers[73] and other appliances, and is liable for defects therein;[74] but it is not liable for their reckless use by the stevedores.[75] So, too, the shipowner owes no duty to the employes of a contractor making repairs to see that they do not render the place in which they are working unsafe by reason of their own negligence in prosecuting such work.[76] Where the

effort to adjust salvage or minimize loss held for jury. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

67. Civ. Code Cal. § 2629. Conduct of master in attempting to force vessel through ice so as to arrive at destination more quickly held to relieve insurer from liability for damages caused thereby. Doctrine of respondeat superior applies. Standard Marine Ins. Co. v. Nome Beach L. & Transp. Co. [C. C. A.] 133 F. 636.

68. See 2 Curr. L. 794.

69. Pa. Act May 1, 1876 (P. L. 66) § 48. Rothschild v. Adler-Weinberger S. S. Co. [C. C. A.] 130 F. 866.

70. Does not estop plaintiff or defendant in latter action. Chesapeake Lighterage & Towing Co. v. Western Assur. Co., 99 Md. 433, 58 A. 16.

71. See 2 Curr. L. 1674, § 17.

For duty of vessel to passengers, see § 8, ante. For duty to seamen, see § 4, ante.

72. The Saranac, 132 F. 936; The Elleric, 134 F. 146. The owners are bound to furnish a safe and suitable place for those performing maritime services for the vessel to work in. The Santiago, 131 F. 383. Thus, in the absence of a contract to the contrary with the head stevedore, they are bound to furnish lights to longshoremen working in the hold (Id.), and the vessel is liable for the failure of the watchmen, charged with that duty, to furnish such lights. Failure held proximate cause of injury to longshoreman (Id.).

73. Evidence insufficient to render vessel liable for injuries resulting from falling of hatch cover. The Saranac, 132 F. 936. Statement by mate, 10 minutes after accident, that covers never did fit, inadmissible as part of res gestae. Id.

74. Where charter provided that captain should render all customary assistance with tackle and boats, owner bound to furnish topping lift supporting boom necessarily used in discharging cargo, though clause requiring him to furnish ropes, falls, and slings for handling cargo was stricken out, and liable for injuries to stevedore resulting from defect therein. Connors v. King Line, 90 N. Y. S. 652. Servant selecting such topping-lift not guilty of contributory negligence in taking it instead of chain span. The King Gruffydd [C. C. A.] 131 F. 189. Not as matter of law. Connors v. King Line, 90 N. Y. S. 652. Master guilty of negligence in permitting use of topping lift after mere external inspection of splice, where it had been permitted to remain on deck, exposed to weather, for several voyages, and vessel liable for injuries to stevedore caused by its breaking. The King Gruffydd [C. C. A.] 131 F. 189. Owner liable, though not required by charter party to furnish it. Connors v. King Line, 90 N. Y. S. 652. Ship guilty of negligence in failing to remove tarred twine serving covering splice in cable, where it appeared that had this been done, defect would have been discovered, and liable for resulting injuries to stevedore. Cable only given visual inspection. The Tresco [C. C. A.] 134 F. 819. Evidence that libellant noticed that splice was not smooth and that wires projected from covering and failed to report same, held not to render him guilty of contributory negligence. Id.

75. Not for injuries resulting from placing hatch covers in wrong place. The Elleric, 134 F. 146. Fault on part of stevedores or contracting stevedore in employing but one fore-and-after not chargeable to ship. Id. Vessel not responsible for injury to stevedore resulting from putting cover in wrong place, where obvious that it did not belong there, and could have ascertained, by trying, where it did belong, though mate told foreman that covers would fit. Id. Duty of stevedores to ascertain by trying where hatch covers belonged, where numbers obliterated by repairs. Id.

76. In re Michigan S. S. Co., 133 F. 577.

ship has fulfilled her duty of furnishing the necessary appliances, there is no presumption that she is to blame for their being thereafter misplaced.[77] The vessel is also liable for injuries to a stevedore resulting from the negligence of a winchman in the employ of the ship.[78]

The negligence of the vessel must be the proximate cause of the injuries complained of,[79] the burden being on the libellant to affirmatively establish that fact.[80] The fact that the negligence of the injured party was of a lesser degree than that of the vessel cannot be taken into consideration in admiralty, unless the ratio was so overwhelming as to render his negligence trivial.[81]

The admiralty rule that damages arising from the concurrent fault of both parties will be divided applies in actions for injuries to parties lawfully on vessels.[82]

The owners of the vessel are responsible for the safety of passengers, visitors, or workmen from shore, unaccustomed to the regulation of the ship's internal economy and arrangement, who are either expressly or impliedly invited to be upon and go about the vessel in the vicinity of open hatches,[83] in the absence of contributory negligence, the burden of proving such negligence being on defendant.[84]

A person in a rowboat attempting to cross the bows of an approaching steamer, which he sees, or could have seen if he had looked, is guilty of contributory negligence, so as to ordinarily preclude a recovery for injuries caused by the resulting collision.[85] One going out in a rowboat with another is chargeable with the negligence of the latter, who does the rowing and has charge of the boat with his consent.[86]

77. Fore-and-afters. The Elleric, 134 F. 146.

78. Where a negligent person is placed by the master in a position requiring care and caution, he is incompetent, and the master is liable for injuries resulting from his negligence. The Elton, 131 F. 562. Injury held due to negligence of winchman. Injury to longshoreman, an employe of the stevedores, held due to negligence of winchman, an employe of barge. Award of $1,750. The City of San Antonio, 135 F. 879. A sailor placed at the winch by the officers of a vessel is not a fellow-servant of the employes of a stevedore. The Elton, 131 F. 562; The City of San Antonio, 135 F. 879.

79. Carelessness of employe of contractor, and not negligence of shipowner in filling oil tanks, held proximate cause of explosion. In re Michigan S. S. Co., 133 F. 577. Injury to workman employed by contractor to make repairs on vessel lying at dock, caused by fall of ladder on which he was attempting to climb from dock to deck, after being told to use gangway, held to be solely due to his own negligence. The Patria, 135 F. 255.

80. The Saranac, 132 F. 936. Evidence insufficient to show that falling of stanchion and consequent injury to libellant, who was engaged in discharging cargo, was due to its unsoundness or insecure fastenings. The Allison White, 131 F. 991.

81. Government inspector on dredge. The Steam Dredge No. 1 [C. C. A.] 134 F. 161.

82. The Steam Dredge No. 1 [C. C. A.] 134 F. 161, rvg. 134 F. 160. Divided where government inspector on dredge was injured by breaking of bitt on which he was sitting, due to negligence of person in charge of winch in failing to throw it out of gear, so that it was revolved before spuds were raised, and to contributory negligence of inspector in unnecessarily placing himself within bight of rope. Id.

83. Owner liable for death of quarantine physician who fell down unguarded and unlighted hatchway, while on vessel in night in performance of official duties. Vessel coaling, which was unusual in nighttime. Ward v. Dampskibselskabet Kjoebenhaven, 136 F. 502.

84. Mere notice that there was some danger, without appreciating its extent, not sufficient to preclude recovery. Warning insufficient. Ward v. Dampskibselskabet Kjoebenhaven, 136 F. 502.

85. One rowing boat who knew course of steamer and that it would soon be along, and who, on seeing it when 150 feet away, changed course and got in front of it, held guilty of contributory negligence. Yarnold v. Bowers [Mass.] 71 N. E. 799. Deceased held guilty of contributory negligence in attempting to cross bows of tug with tows, which he must have seen if he had looked, and could have avoided if he had looked in time and taken proper course. Klutt v. Philadelphia & R. R. Co., 133 F. 1003. Persons in charge of steamer held not guilty of negligence in colliding with small rowboat in darkness, where carried lights and did everything possible to prevent collision after rowboat was seen, and not liable for death of person standing up in rowboat and thrown overboard by collision. Yarnold v. Bowers [Mass.] 71 N. E. 799.

In the absence of a statute, there is no liability for death caused by collision,[87] but such a statute may apply to a collision on the high seas if the vessel in fault is of the state where such statute exists,[88] and it may be enforced in a collision case in admiralty if both vessels are of that state.[89] The statutes of California do not give a lien on a vessel for damages recoverable for death by wrongful act resulting from a collision, and a suit in rem therefor cannot be maintained in admiralty.[90]

The owner of a vessel is liable for injuries to a water pipe on the bottom of a river resulting from negligent navigation.[91]

Crimes.—Under the Federal statutes every captain, engineer, pilot, or other person employed on a vessel, by whose misconduct, negligence, or inattention to duty the life of any person is destroyed, and every owner, inspector, or other public officer, through whose fraud, connivance, misconduct, or violation of law, the life of any person is destroyed, is guilty of manslaughter.[92] The master may be indicted under this act for failure to exercise the requisite amount of care to know whether the vessel has been equipped with life preservers according to law, and some care with regard to their maintenance,[93] or for neglect of his duties in regard to the posting of station bills for the crew, and their exercise in fire drill and in the use of the fire apparatus and the boats.[94] So, too, an owner failing to comply with the statutory requirements in regard to life preservers and fire appliances is guilty of a violation of law, subjecting him to prosecution thereunder, where such violation results in death.[95] The offense may also be aided and abetted by third persons who may be properly charged in the indictment as principals, even though they were not present when the death occurred.[96] A corporation owner of a vessel may be guilty of the offense specified, notwithstanding the fact that it cannot be subjected to the punishment imposed, and the fact that it cannot be punished does not affect the right to prosecute individuals aiding and abetting it in the commission of the crime.[97] An indictment charging a violation of the statute and rules, in that a large number of the life preservers supplied for the

86. Yarnold v. Bowers [Mass.] 71 N. E. 799.

87, 88, 89. In re Clyde S. S. Co., 134 F. 95. See 5 Columbia L. R. 234, for note discussing this question.

90. Code Civ. Proc. § 813, making vessels liable for injuries committed by them to persons or property not applicable to § 377, giving right of action against the person causing the death. The Dauntless [C. C. A.] 129 F. 715.

91. Where captain of schooner taken in tow by tug knew that water pipe across river was in his path and where it was, and did not know how much anchor chain he had out when he started out, and took no precautions to prevent fouling pipe, and permitted vessel to be towed nearly to pipe, where hawser was cast off without notice or protest to captain of tug, and vessel drifted across pipe and fouled it, held that inference of negligence was so unmistakable that no reasonable inference could be drawn to the contrary. Maine Water Co. v. Knickerbocker Steam Towage Co. [Me.] 59 A. 953. When an injury is the result of concurring acts of two parties, one is not exempt from full liability although the other was equally culpable. No defense that tug was also negligently managed. Id.

92. Rev. St. Tit. 70, § 5344; Comp. St. 1901, p. 3629. United States v. Van Schaick, 134 F. 592.

93. United States v. Van Schaick, 134 F. 592. While it is not primarily his duty to equip vessel with life preservers or other appliances, it is his duty, before navigating, to exercise care to know whether ship has such equipment, and whether it is apparently sufficient and in accordance with law, and to exercise some care with respect to its maintenance. Id.

94. Imposed directly on him by rule 5, § 15, of the inspector's rules and regulations. United States v. Van Schaick, 134 F. 592. Such rule is within power conferred on board of inspectors by Rev. St. § 4405 (Comp. St. 1901, p. 3017), and is valid. Does not purport to create offense, but merely to prescribe duties, but breach of it, resulting from master's misconduct, negligence, or inattention, causing death, is manslaughter under § 5344. Id.

95. Either by supplying none, or by supplying unsuitable, inefficient and useless ones, not complying with inspector's rules. United States v. Van Schaick, 134 F. 592. Primary duty of owner to furnish life preservers (Rev. St. §§ 4482, 4488, 4489; Comp. St. 1901, pp. 3054-3056), and fire equipment (Rev. St. § 4471; Comp. St. 1901, p. 3049). Rules of board of supervising inspectors, § 18, rule 3, prescribes kind of preservers, and duties of inspectors. Id.

96. By officers of corporation owner. United States v. Van Schaick, 134 F. 592.

use of the passengers were useless, is not bad in failing to also charge a failure to supply the requisite number of good ones.[98]

SIGNATURES; SIMILITER; SIMULTANEOUS ACTIONS, see latest topical index.

SLAVES.

Peonage[1] is a status or condition of compulsory service based upon the indebtedness of the peon to his master.[2] Within the meaning of the act of congress making it an offense for any person to hold, arrest, return, etc., any person to a condition of peonage, it is a holding of any person to service or labor for the purpose of paying or liquidating any indebtedness due from the laborer or employe to the employer, when such employe desires to quit or leave the employment before the debt is paid off,[3] and it matters not whether the contract whereby the laborer is to work out an indebtedness is entered into voluntarily or not,[4] or whether made in consideration of a pre-existing indebtedness or for a loan advanced at the time the contract was made.[5] The act of congress prohibiting peonage in any state or territory of the United States is authorized by the 13th amendment to the Federal constitution,[6] whether or not the holding is sanctioned by state or municipal laws.[7] Under an indictment charging one with returning certain persons to a condition of peonage, evidence of a prior condition of peonage to which such persons were returned is essential to support a conviction.[8] "Crime," as used in Federal and state constitutions, forbidding involuntary servitude except as a punishment for crime, includes all offenses in violation of penal laws;[9] but it is a violation of the 13th amendment if persons, in jail not because of their conviction of any offense, are compelled to labor.[10]

Slave marriages.[11]—Statutes which infuse inheritable blood into the issue of slave marriages are generally held valid.[12]

SLEEPING CARS; SOCIETIES, see latest topical index.

SODOMY.

Penetration alone is sufficient to consummate the offense.[13] Owing to the indecency of the offense the rules as to particularity of averment are greatly relaxed.[14]

SPANISH LAND GRANTS; SPECIAL INTERROGATORIES TO JURY; SPECIAL JURY; SPECIAL VERDICT, see latest topical index.

SPECIFIC PERFORMANCE.

§ 1. Nature and Propriety of Remedy in General (1495).
§ 2. Subject-Matter of Enforceable Contract (1497).
§ 3. Requisites of Contract (1500).
A. Necessity of Contract (1500).
B. Mutuality of Contract (1501).
C. Definiteness of Contract (1502).

97, 98. United States v. Van Schaick, 134 F. 592.

1. See 2 Curr. L. 1676.

2. Clyatt v. U. S., 25 S. Ct. 429.

3. Rev. St. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715). Peonage Cases, 136 F. 707.

4, 5. Peonage Cases, 136 F. 707.

6. U. S. Rev. St. §§ 1990, 5526 (U. S. Comp. St. 1901, pp. 1266, 3715). Clyatt v. U. S., 25 S. Ct. 429.

7, 8. Clyatt v. U. S., 25 S. Ct. 429.

9. Stone v. Paducah [Ky.] 86 S. W. 531.

10. Persons committed for default of surety for good behavior or to keep the peace. Stone v. Paducah [Ky.] 86 S. W. 531.

11. See 2 Curr. L. 1677.

12. Under ch. 4749, p. 135, Acts 1899, a child and grandchild tracing their relationship through a slave marriage may inherit the property of their ancestor who died subsequent to emancipation. Johnson v. Wilson [Fla.] 37 So. 179.

13. State v. McGruder [Iowa] 101 N. W. 646, collating the authorities.

14. Averment of copulation "in an opening of the body other than the sexual parts" sufficient. State v. McGruder [Iowa] 101 N. W. 646.

D. Legality and Fairness of Contract (1502).
E. Necessity of Written Contract (1503).
§ 4. **Performance by Complainant (1504).**
§ 5. **Actions.** Jurisdiction (1506). The Statute of Limitations (1507). Parties (1507). Defenses (1508). Pleading (1509). Evidence (1510). The Tender (1510). The Relief Granted (1510). A Decree (1511). Costs (1512).

§ 1. *Nature and propriety of remedy in general.*[15]—A suit for specific performance of a contract is an equitable proceeding,[16] and the court in granting or withholding the relief prayed for is influenced by equitable considerations;[17] presupposing of course the existence of the contract rights hereafter discussed.[18] Specific performance may be granted in any equitable action as to which it is appropriate general relief.[19] A contract may be enforced against transferees with notice,[20] and may be invoked by assignees.[21] It has been said that the basis of equitable interference in cases of specific performance is the want of an adequate remedy at law.[22] The remedy at law must, however, be as practical and efficient to the ends of justice and its prompt administration as is the relief afforded in equity,[23] and ordinarily, relief will not be granted where an award of damages would adequately redress the breach of the contract.[24] A clause for liquidated damages does not prevent enforcement in specie.[25] It is said that a recent case[26]

15. See 2 Curr. L. 1678.

16. Hutchinson v. Hutchinson [N. J. Eq.] 58 A. 528; International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 86 N. Y. S. 736. The granting of relief, by way of compelling specific performance of a contract, is peculiar to, and afforded alone by, a court of chancery. Mutual Life Ins. Co. v. Blair, 130 F. 971.

17. Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030.

18. See post, §§ 2-4.

19. Decreed on a bill to cancel a contract where defendant disproves forfeiture and tenders the price. Shaw v. Benesh [Wash.] 79 P. 1007.

20. Coolbaugh v. Ransberry, 23 Pa. Super. Ct. 97.

21. Blount v. Connolly [Mo. App.] 85 S. W. 605.

22. Harlow v. Oregonian Pub. Co. [Or.] 78 P. 737.

23. Livesley v. Johnston [Or.] 76 P. 946. **Note:** Mr. Justice Fuller in Gormley v. Clark, 134 U. S. 338, 33 Law. Ed. 909, said: "The jurisdiction of equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances." The remedy is what is to be looked at, and equity will not decree specific performance where the contract lacks consideration or assent. Clark v. Flint, 22 Pick. [Mass.] 231, 33 Am. Dec. 733; Parker v. Garrison, 61 Ill. 250; Livesley v. Heise [Or.] 76 P. 952; Kaster v. Mason [N. D.] 99 N. W. 1083.—From 3 Mich. L. R. 155.

NOTE. "Adequacy of legal remedy in contracts for sale of land: The defendant, for valuable consideration, gave the plaintiff an option to buy a piece of land for the sum of nine thousand dollars. The plaintiff's bill for specific performance alleged that he had contracted to sell the land to a third person for fourteen thousand dollars. The defendant demurred. Held, that inasmuch as the plaintiff, on his own showing, has an adequate remedy at law, he must seek his remedy there. Hazelton v. Miller, 33 Wash. Law Rep. 217. Contracts to sell land which the seller has agreed to buy or on which he holds an option are of everyday occurrence. Yet no case has been found where the original seller has been allowed to set up his purchaser's contract for resale as a defense to a suit for specific performance. Originally of course, the jurisdiction of equity in contracts concerning real estate was based on the difficulty of a fair appraisal of the value of the land to the purchaser, but the relief has long since been allowed as a matter of course. See Story, Eq. Jur. [12th Ed.] §§ 717, 751. Contra in suits by the vendor. Porter v. Land Co., 84 Me. 195; Kauffman's Appeal, 55 Pa. 383. Sustaining a demurrer, therefore, in the principal case, where a plea ought to have been of no avail, seems unfortunate. The plaintiff did not even ask for an alternative remedy—specific performance or the value of his bargain. Compare Dowling v. Betjemann, 2 John. & H. 544. Moreover, the court entirely overlooked the fact that, by refusing the plaintiff relief, they were not only exposing him to an action by his purchaser, but also depriving the latter of his right to specific performance of his contract. Compare Shriver v. Seiss, 49 Md. 384."—18 Harv. L. R. 625.

24. Harlow v. Oregonian Pub. Co. [Or.] 78 P. 737. Equity will not specifically enforce a promise to convey land based on a past consideration, where the promisee has an adequate remedy at law and it would work a hardship on others to enforce the agreement. Brevator v. Creech [Mo.] 85 S. W. 527. Agreement to deliver stock for that of another corporation and also the resignations of corporate officers held remediable in damages at law. Butler v. Wright, 93 N. Y. S. 113. An agreement by a railroad to construct a passway under its tracks is not a "building contract" performable by any person, hence is enforceable in equity. Owens v. Carthage & W. R. Co. [Mo. App.] 85 S. W. 987.

25. Agreement to ship freight. Lone Star

extends this remedy beyond contracts wanting an adequate legal remedy or the breach of which would be irreparably injurious. The general opinion is that it should be restricted to such equitable grounds,[27] except in case of contracts affecting land.[28] The granting or withholding of the relief is a matter of discretion to be exercised with reference to the equitable considerations incident to each case,[29] and will not work inequity by refusing relief.[30] Thus a court of equity will not decree the specific performance of an unconscionable contract,[31] or one procured by fraud or unfair methods,[32] or when the ability and knowledge of the contracting parties were so unequal as to result in one being overreached and his property sacrificed for an inadequate consideration,[33] nor where to do so would work a hardship on the defendant, though the oppressive character of a decree, if made,

Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

26. Note in 5 Columbia L. R. 153 on Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11, wherein an agreement in reasonable restraint of trade was protected by injunction regardless of adequacy of the legal remedy or irreparability of a breach. Cited, as in accord, article by Prof. Langdell in 1 Harv. L. R. 383.

27. Note. See "Specific Performance of Negative Covenants" note 5 Columbia L. R. 153. Cases seeming to hold otherwise are either obiter dictum (Kimberly v. Jennings, 6 Sim. 340), or such as in reality present an inadequacy of legal remedy (Whittaker v. Howe, 3 Beav. 383). Where breach of negative covenants for benefit of a going business involves speculative damages, there is an inadequacy of legal remedy. Williams v. Montgomery, 148 N. Y. 519; Finley v. Aiken [Pa.] 1 Grant's Cas. 83. Where the law will assess present and prospective damages in one action (Tippin v. Ward, 5 Or. 450; Shaffer v. Lee, 8 Barb. [N. Y.] 412; Ennis v. Buckeye Pub. Co., 44 Minn. 105), it is said that a continuing covenant would be irreparable in damages. And on the other hand if successive actions might be threatened or necessary (Terry v. Beatrice Starch Co., 43 Neb. 866; Hunt v. Tibbetts, 70 Me. 221), avoidance of multiplicity would invoke equity. See Shimer v. Morris Canal Co., 27 N. J. Eq. 364.

28. The writer of the note (5 Columbia L. R. 154) suggests that even there the jurisdiction rests on the usual equitable grounds, citing Richmond v. Railroad, 33 Iowa, 422; Townsend v. Vanderwerker, 20 App. D. C. 197.

Note: It is doubtful if that case is intended as a precedent for the specific enforcement of contracts generally except on the ordinary equitable grounds. The opinion reads: "Courts of equity will and frequently do interpose by injunction thereby indirectly enforcing the performance of negative covenants." Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11. The court cites Consolidated Coal Co. v. Schmisseur, 135 Ill. 371; Hursen v. Gavin, 162 Ill. 377, both of which were cases of injunctive relief against threatened breach of contracts relating respectively to a mineral lease and to re-engaging in a competitive business.

29. Law v. Smith [N. J. Eq.] 59 A. 327; Farson v. Fogg, 205 Ill. 326, 68 N. E. 755; Prusiecke v. Ramzinski [Tex. Civ. App.] 81 S. W. 771; Tillery v. Land, 136 N. C. 537, 48 S. E. 824; Kane v. Luckman, 131 F. 609; Western Union Tel. Co. v. Pennsylvania Co. [C. C. A.] 129 F. 849; Cox v. Raider [Mich.] 101 N. W. 531; Christiansen v. Aldrich [Mont.] 76 P. 1007; Brevator v. Creech [Mo.] 85 S. W. 527; Murray v. Harbor & Suburban Bldg. & Sav. Ass'n, 91 App. Div. 397, 86 N. Y. S. 799; Dreiske v. Joseph N. Eisendrath Co. [Ill.] 73 N. E. 379; Illingworth v. Bloemecke [N. J. Eq.] 58 A. 566; Meyer Land Co. v. Pecor [S. D.] 101 N. W. 39; International Paper Co. v. Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. S. 736; Farady Coal & Coke Co. v. Owens, 26 Ky. L. R. 243, 80 S. W. 1171.

Equities must be clearly with complainant. Brown v. Widen [Iowa] 103 N. W. 158. Where the obvious purpose of a bill for specific performance is to enable the complainant to avail themselves of the fruits of an unlawful business, equity will not aid them. Illingworth v. Bloemecke [N. J. Eq.] 58 A. 566.

30. Denial of relief would be inequitable where complainant railroad had performed by constructing its line on consideration of agreement for certain amount of traffic. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

31. Kane v. Luckman, 131 F. 609; Rathbone v. Groh [Mich.] 100 N. W. 588; Ratterman v. Campbell, 26 Ky. L. R. 173, 80 S. W. 1155; Dreiske v. Eisendrath Co. [Ill.] 73 N. E. 379. Any trace of fraud or unfairness on the part of complainant will prevent specific performance. It requires a less flagrant case of fraud to prevent specific performance than to recover damages. Schneider v. Schneider [Iowa] 98 N. W. 159. It is not sufficient to justify a decree awarding specific performance that a legal contract has been entered into. In order to warrant a decree, the contract which is to be enforced must be based on a good consideration, be reasonable, just and equitable, entered into in open, fair, and honorable dealing, without oppression, unconscionable advantage, or under circumstances making its enforcement inequitable, and it is competent to show circumstances dehors the writing, making it inequitable to enforce it. Stubbings v. Durham, 210 N. Y. 542, 71 N. E. 586.

32. York v. Searles, 97 App. Div. 331, 90 N. Y. S. 37.

33. Welford v. Steele [Ky.] 84 S. W. 327; Ratterman v. Campbell, 26 Ky. L. R. 173, 80 S. W. 1155.

would arise from the relation of the parties independently of the contract.[34] Equity will not permit the right to have a specific performance of a contract evaded or denied by a mere technical or immaterial objection. It will look to the real substantial terms of the contract, and decree its performance with such variations as will effectuate the intentions of the parties.[35] Where the law has made performance impossible, the doing of a thing not agreed will not be compelled merely to compensate the promisee.[36]

A party to a contract may lose his right to its specific performance by laches in asserting his claim,[37] though the contract does not, by its terms, make the time of performance of the essence of the contract;[38] or by concealment of his right under such circumstances as will constitute an estoppel.[39]

Compensatory damages[39a] will not be allowed for inability to procure the authority to convey minor's property which the purchaser knew was necessary to make title.[40]

§ 2. *Subject-matter of enforceable contract.*[41]—The contract must relate to a definite subject-matter,[42] and be performable by acts which the court may coerce.[43] It will be denied where the performance of the provisions of the contract require the doing of numerous and continuously recurring acts, so that a final decree cannot be entered, but would require the constant supervision of the court and supplemental proceedings to enforce it,[44] especially where the acts are to be done in another state and the contract is indefinite as to the manner of their performance;[45] but may be enforced if it calls for ministerial acts only.[46] The fact that a contract produces sufficient business to keep a suitor solvent, and its breach might produce insolvency, will raise an equity.[47] It may be had against a trustee who is personally bound, notwithstanding he may by reason of the contract be accountable

34. Thus where defendants agreed to convey land in part payment for personal property and after he had made a considerable cash payment the complainant retook possession of the personal property under a provision of the contract allowing him to do so in case default should be made in the payment of the balance of the purchase price for such personal property and the value of the property retaken together with the payments made by defendant equaled the price agreed to be paid. Sanders v. Newton, 140 Ala. 335, 37 So. 340. Where complainant, having a contract for the purchase of land, stated to a subsequent negotiator therefor, that he had abandoned his contract and the subsequent negotiator entered into a contract with the owner for the purchase of the land and took possession and made improvements in reliance on such statement, equity will not decree specific performance against him. Cox v. Raider [Mich.] 101 N. W. 531.

35. Tillery v. Land, 136 N. C. 237, 48 S. E. 824; Hosmer v. Wyoming R. & Iron Co., 129 F. 883. While it will not make a new contract for the parties or interpolate stipulations not of their own selection, nevertheless it will distinguish between those provisions which pertain to the form and those which are of the substance of their agreement to the end that the former be not permitted to lead to an inequitable and unjust result. Hosmer v. Wyoming R. & Iron Co., 129 F. 883.

36. Railroad had been required to elevate tracks and agreement to afford crossing was not enforceable by compelling tunnelling. Speer v. Erie R. Co. [N. J. Err. & App.] 60 A. 197.

37. Lozier v. Hill [N. J. Eq.] 59 A. 234. Delay of twenty-five months in bringing suit held not fatal. Pennsylvania Min. Co. v. Martin, 210 Pa. 53, 59 A. 436. Delay of one year after repudiation of contract by respondent held fatal. Hernreich v. Lidberg, 105 Ill. App. 495.

See, also, 2 Curr. L. 1679.

38. Especially where he has been negligent in carrying out the terms of the contract by him to be kept and performed and the value of the land has increased. Findley v. Koch [Iowa] 101 N. W. 766; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856.

39. Lozier v. Hill [Vt.] 59 A. 234.

39a. See 2 Curr. L. 1697, n. 76.

40. Eggert v. Pratt [Iowa] 102 N. W. 786.

41. See 2 Curr. L. 1681.

42. Agreement to purchase house and at death leave it to promisee held indefinite. Leary v. Corvin [N. Y.] 73 N. E. 984.

43. See text and notes following.

44. Western Union Tel. Co. v. Pennsylvania Co., 129 F. 849; Harlow v. Oregonian Pub. Co. [Or.] 78 P. 737; Hernreich v. Lidberg, 105 Ill. App. 495.

45. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

46. Traffic contract for 20 years. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

47. Traffic contract to ship enough to pay operating charges of railroad. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

for mismanagement.[48] A court of equity will not take jurisdiction to compel specific performance of a verbal agreement to make a valid contract of guaranty where it would not reform such a contract, through mutual mistake defectively reduced to writing.[49] A contract to issue an annuity contract to certain designated persons on the death of the insured may be specifically enforced.[50] An agreement to endow a professorship should one be established is enforceable against the promisor when irreparable loss will ensue to the promisee which has performed.[51]

Agreements which involve the procurement of another's action may be enforceable.[52]

The jurisdiction of equity to decree the specific performance of a contract is as ample when the contract relates to personalty as when it relates to realty.[53] The tendency of modern decisions is to enlarge the right to specific performance of contracts fairly entered into, as to both classes of property.[54] Ordinarily, equity will not decree the specific performance of a contract for the sale of personal property, since complainant has a speedy and adequate remedy at law, by an action for damages.[55] And it will not act if parties have agreed on the value of the chattels.[58] Equity will readily lend such relief whenever a case is presented where other relief than compensation is requisite or where an award of damages would be unavailing.[57] Mere insolvency is not such a case;[58] though such fact is of weight, where other grounds for the exercise of equitable jurisdiction exist.[59] It was also allowed where a seller's administrator having undertaken to complete a sale refused to continue, and the buyer having made large advances reserving a lien was in danger of loss if delivery was not promptly made.[60] If the chattels are of some special value to the purchaser, or they are unique, rare, or incapable of being compensated for by money damages, the contract may be specifically

48. He made a renewable lease at less than a proper rental. Weir v. Barker, 93 N. Y. S. 732.

49. Rowell v. Smith [Wis.] 102 N. W. 1.

50. Mutual Life Ins. Co. v. Blair, 130 F. 971.

51. Robb v. Washington & Jefferson College, 93 N. Y. S. 92.

52. Agreement to sell land and procure lessee to cancel lease thereof is enforceable. Jacobson v. Rechnitz, 93 N. Y. S. 173.

53. Livesley v. Johnston [Or.] 76 P. 946; Law v. Smith [N. J. Eq.] 59 A. 327.

54. Kane v. Luckman, 131 F. 609.

55. Livesley v. Johnston [Or.] 76 P. 946; Kane v. Luckman, 131 F. 609; Harlow v. Oregonian Pub. Co. [Or.] 78 P. 737; Hendry v. Whidden [Fla.] 37 So. 571; Bay City Irr. Co. v. Sweeney [Tex. Civ. App.] 81 S. W. 545. An action to compel the specific performance of a contract to issue shares of stock to complainant cannot be maintained where there is no proof that the stock has any peculiar value or that the complainant could not recover in an action at law the damages he sustained. Kennedy v. Thompson, 97 App. Div. 296, 89 N. Y. S. 963. Equity will not specifically enforce a contract to convey personal property while the title of the defendant thereto is in litigation, occasioned by the wrongful acts of the complainant. Cowles v. Rochester Folding Box Co., 179 N. Y. 87, 71 N. E. 468. Fraudulent collusion by the seller of personal property with others to avoid his obligation to deliver the chattels is ground for the granting of specific performance. Livesley v. Heise [Or.] 76 P. 952.

56. Kane v. Luckman, 131 F. 609.

57. Livesley v. Johnston [Or.] 76 P. 946.

58. Livesley v. Johnston [Or.] 76 P. 946; Hendry v. Whidden [Fla.] 37 So. 571.

59. A purchaser of a crop of hops is entitled to specific performance of the contract and delivery of hops raised under the agreement where he has contributed towards the expense of making the crop and the seller is insolvent. The defendant cannot object that the crop is not up to the quality contracted to be delivered. Livesley v. Johnston [Or.] 76 P. 946.

Note: It was urged a court of equity has no jurisdiction to decree specific performance, because it is generally considered the plaintiff has a plain, speedy, adequate remedy at law. Mr. Justice Fuller in Gormley v. Clark, 134 U. S. 338, 33 Law. Ed. 909, said, "the jurisdiction of equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances." The remedy is what is to be looked at, and equity will not decree specific performance where the contract lacks consideration or assent. Clark v. Flint, 22 Pick. [Mass.] 231, 33 Am. Dec. 733; Parker v. Garrison, 61 Ill. 250; Livesley v. Heise [Or.] 76 P. 952; Kaster v. Mason [N. D.] 99 N. W. 1083.—3 Mich. L. R. 154.

60. Purchase of wood which was in river being floated. Ridenbaugh v. Thayer [Idaho] 80 P. 229.

enforced.[61] That it would be inconvenient to show the value of the personal property is not a sufficient reason for decreeing specific performance.[62] Depletion and replenishment of merchandise stock is no cause for refusing to enforce exchange of it for other property.[63]

Contracts for the creation or transfer of an interest in specific lands[64] are enforceable, including easements,[65] and restrictive covenants,[66] leases[67] and covenants therein for renewal or purchase by the lessee,[68] mineral rights,[69] and homesteads.[70]

A marriage settlement[71] or a contract for separate maintenance of a wife, when not void as against public policy, may be specifically enforced.[72]

A contract to adopt a child or make it the heir of the promisor,[73] or to bequeath or devise money or property to another,[74] if the same be definite,[75] in

61. Kane v. Luckman, 131 F. 609. Contract to convey shares of corporate stock not procurable on market and having no market value and value of which depends on ownership of patents by corporation which are incapable of valuation will be specifically enforced. Butler v. Murphy, 106 Mo. App. 287, 80 S. W. 337. Contract to furnish water for irrigation where complainant has rented land and put in crop in reliance on contract and crop will be lost without supply of water. Bay City Irr. Co. v. Sweeney [Tex. Civ. App.] 81 S. W. 545.

62. Kane v. Luckman, 131 F. 609.

63. Gibson v. Brown [Ill.] 73 N. E. 578.

64. See Leary v. Corvin [N. Y.] 73 N. E. 984.

65. Where the owner of land plats the same into lots and streets, one to whom he sells lots by reference to such plat is entitled to the use of the streets shown by the plat as an appurtenance to his lot, and can maintain a suit for the specific performance of the contract for easement, and a mandatory injunction will lie to compel the person who owns the land platted to open for public use the streets shown on the plat with reference to which the lot was purchased. Edwards v. Moundsville Land Co. [W. Va.] 48 S. E. 754.

66. Agreements restricting, within reasonable limits, the use of premises sold or demised, may be specifically enforced, irrespective of the fact that adequate relief may be had in an action for damages, e. g., alteration of premises in violation of terms of lease. Peer v. Wadsworth [N. J. Eq.] 58 A. 379.

67. Carnegie Natural Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. A contract to lease certain property can be specifically enforced at the suit of an assignee of the contract, where it was contemplated by the parties at the time they entered into the contract that it should be so assigned. Pittsburgh Amusement Co. v. Ferguson, 91 N. Y. S. 666. Lease by officer ratified by corporation enforced in favor of lessee who had expended large sums. Clement v. Young-McShea Amusement Co. [N. J. Eq.] 60 A. 419.

68. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

Covenant enforceable by assignee: A covenant of renewal in a lease runs with the land, and passes to an assignee of the term (when there is no restriction in the lease), and equity will compel the specific performance of the agreement to renew at the suit of the assignee. Where the lessor has brought unlawful detainer, equity will enjoin the prosecution of the legal action. Blount v. Connolly [Mo. App.] 85 S. W. 605.

Provided the lease is a binding contract: An agreement in a lease providing "that the party of the second part shall have the right to purchase * * at any time before the expiration of six months upon the payment of the sum of * * during said time," the lease also providing as a condition precedent that the lessee shall give security for the performance of the covenants of the lease by him to be performed, cannot be specifically enforced when the lessee did not give the required security, since the lease was not in force and hence there was no consideration for the agreement to sell. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

69. Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716.

70. Faraday Coal & Coke Co. v. Owens, 26 Ky. L. R. 243, 80 S. W. 1171.

71. Phalen v. United States Trust Co., 44 Misc. 57, 89 N. Y. S. 699.

72. Where a wife brings a suit for separate support in the probate court, the husband may interpose the making of such a contract with a trustee for the wife as a defense. Bailey v. Dillon [Mass.] 71 N. E. 538. Under some circumstances equity will enforce pecuniary agreements embodied in separation agreements, but not when the separation agreement is entered into contemporaneously with the marriage, looking to a possible or probable separation in the future, and in the nature of things tending to bring such a separation about. Sawyer v. Churchill [Vt.] 59 A. 1014. See title Husband and Wife, 3 Curr. L. 1669.

73. Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895; Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841.

74. Bush v. Whitaker, 45 Misc. 74, 91 N. Y. S. 616.

75. To buy "a house" and devise it, is indefinite. Leary v. Corvin, 86 N. Y. S. 1139. Where a certain and definite contract is clearly established, and is fair, even though it involves an agreement to leave property by will and it has been performed on the part of the promisee, equity will compel a specific performance. Rhoades v. Schwartz, 85 N. Y. S. 229.

consideration of personal services to be performed by the promisee, will be specifically enforced where the promisee has performed the contract, and to suffer it to go unenforced would work a fraud on the promisee.[76]

Contracts for personal services will not be specifically enforced,[77] nor will contracts requiring the exercise of skill, judgment, energy and integrity on the part of respondent.[78]

Stipulations between attorneys to an action may be enforceable.[79] An agreement to arbitrate a controversy is not.[80]

§ 3. *Requisites of contract.*[81] *A. Necessity of contract.*[81a]—To entitle one to specific performance of a contract, it must clearly appear that there was a valid contract between the parties;[82] that their minds met and agreed on all its terms;[83] and that there was a valuable[84] or adequate consideration for the promise sought

76. Earnhardt v. Clement [N. C.] 49 S. E. 49. See, also, infra, § 3.

77. Wood v. Iowa Bldg. & Loan Ass'n [Iowa] 102 N. W. 410; Hayman v. Campbell, 2 Ohio N. P. (N. S.) 213. A contract to develop land for the purpose of determining whether or not it contains oil, involving the performance of personal labor and services, cannot be specifically enforced. Los Angeles & B. Oil & Development Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25.

78. Contract of newspaper carrier to deliver paper to every subscriber in a designated district, increase subscription and secure advertising, cannot be specifically enforced, nor will the negative terms of such a contract be enjoined when so doing is tantamount to an attempt to decree specific performance. Harlow v. Oregonian Pub. Co. [Or.] 78 P. 737. Contracts requiring individual skill, personal labor, or cultivated judgment, will not be specifically enforced. Western Union Tel. Co. v. Pennsylvania Co. [C. C. A.] 129 F. 849.

Manufacture and sale of machines: Myers v. Steel Mach. Co. [N. J. Eq.] 57 A. 1080.

79. Stipulation that final disposition of a case should abide the result of an appeal in another case involving same issues of law. Brown v. Arnold, 131 F. 723.

80. Schneider v. Reed [Wis.] 101 N. W. 682.

81. See 2 Curr. L. 1682.

81a. See 2 Curr. L. 1682.

82. Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716; Jayne v. Brown, 93 App. Div. 617, 88 N. Y. S. 589; Davis v. Davis, 96 App. Div. 611, 88 N. Y. S. 998; Kaster v. Mason [N. D.] 99 N. W. 1083; Spencer v. Spencer [R. I.] 58 A. 766; Turner v. Burr [Mich.] 101 N. W. 622. The receiving in silence by defendant of an assertion by plaintiff of the existence of a contract between the two is not ground for a suit for specific performance. Schnitzer v. Cole, 4 Ohio C. C. (N. S.) 319.

Infants and married women: An infant's contract to sell land cannot be specifically enforced so long as he remains an infant, if after he becomes of age he ratifies the contract, it may be specifically enforced. In North Carolina a contract by a married woman to convey her real estate cannot be enforced by specific performance. Tillery v. Land, 136 N. C. 537, 48 S. E. 824. A court of equity will not compel parties to sign a contract and then decree specific performance of it. Kaster v. Mason [N. D.] 99 N. W. 1083. A mere agreement to execute a contract does not make the latter operative so as to entitle the promisee to its specific performance. Baltimore Humane Impartial Soc. & Aged Women's & Aged Men's Homes v. Pierce, 99 Md. 352, 58 A. 26.

83. Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716; Keene v. Lowenthal, 83 Miss. 204, 35 So. 341; Welsh v. Williams [Miss.] 37 So. 561; J. L. Gates Land Co. v. Ostrander [Wis.] 102 N. W. 558. When it appears from letters that have been exchanged that the parties intended to reduce their agreement to writing and that some of the terms of the sale had not been agreed on, specific performance cannot be decreed. Dreiske v. Eisendrath Co. [Ill.] 73 N. E. 379. A letter from one of the parties to a suit to a real estate broker offering to pay a certain price for certain land, and a letter from the owner to the broker offering to sell at the same price, is not a contract between the parties, neither letter referring to the other party to the alleged contract. Ratterman v. Campbell, 26 Ky. L. R. 173, 80 S. W. 1155. An option contract for the sale of designated tract of land which provides that if the option is accepted the sale is to be consummated by a survey of the land by a surveyor to be mutually agreed on, the selection of a surveyor and the making of a survey is not essential to the completion of the contract, but after acceptance by the holder of the option may be specifically enforced, though no surveyor has been selected. Howison v. Bartlett [Ala.] 37 So. 590. One purchasing at foreclosure sale under a notice which does not properly describe the land is not bound to take the property, and hence specific performance will not lie to compel him to do so. Jackson v. Binnicker, 106 Mo. App. 721, 80 S. W. 682.

84. Cowles v. Rochester Folding Box Co., 179 N. Y. 87, 71 N. E. 468. Specific performance does not lie to enforce the performance of a voluntary promise of a gift. Brevator v. Creech [Mo.] 85 S. W. 527. An agreement to pay a certain proportion of the cost of erecting a house on certain land is a sufficient consideration for a contract to convey it to the person so promising. Clark v. Hindman [Or.] 79 P. 56. A recited nominal consideration is insufficient to support the remedy. Berry v. Frisbie [Ky.] 86 S. W. 558.

to be enforced.[85] A contract made by an unauthorized agent may be specifically enforced after it has been ratified by the principal for whom the agent purported to act,[86] and an undisclosed principal may sue or be sued in his own name on a contract entered into for him by an agent who purported to act in his own name.[87]

(§ 3) *B. Mutuality of contract.*[87a]—The general rule is that to entitle a party to a contract to its specific performance it must be mutual in obligation, and if from the nature or form of the contract or for any other reason it cannot be specifically enforced against one of the parties, the other cannot have such relief, though he alleges his willingness to perform.[88] If, however, the party as against whom specific performance could not be decreed has fully performed his part of the contract, he is entitled to specific performance by the other.[89] The general rule has, however, been narrowed in its application by modern equity practice. If the contract is intended to bind both parties, or where it is of such form or nature that it contains mutual executory provisions, then the doctrine applies, and if for any reason one of the parties is not bound, the other cannot compel specific performance.[90] Such rule does not, however, apply to contracts unilateral in form, though bilateral in effect.[91] Thus as to contracts which the statute of frauds requires to be in writing, the tender of performance and filing of the bill for specific performance by the party who did not sign the contract is deemed to make it mutual, both as to obligation and remedy.[92] Such mutuality does not arise, however, if before the commencement of the suit the party who signed

85. Where for the purpose of preventing litigation over alleged conflicting rights to minerals in lands patented to respondent, the latter agreed to convey a two-thirds interest in such minerals to complainant who had located the same, in consideration of complainant's agreement to convey an undivided one-third interest to respondent, the agreement is without such consideration as will support specific performance under Mont. Civ. Code, § 4417, which provides that specific performance cannot be enforced against a person unless he has received an adequate consideration for the contract, the complainant as a matter of fact having no interest in the minerals. Traphaagen v. Kirk [Mont.] 77 P. 58. A cane of the value of $40.00 held sufficient consideration for agreement to bequeath $1,000. Bush v. Whitaker, 45 Misc. 74, 91 N. Y. S. 616.

86. A contract entered into by an agent, though the authority of the agent was not in writing, may be specifically enforced where the vendor with full knowledge of the terms and conditions of the sale ratified the same in writing, and the mere fact that the vendor did not know the purchaser's name is immaterial. Butman v. Butman, 213 Ill. 104, 72 N. E. 821. A corporation may maintain a suit for the specific performance of a contract entered into in its behalf by an officer of the corporation without special authority so to do, where his acts are subsequently ratified by the corporation, though not until after the vendor has repudiated the contract and the suit has been instituted. Washington State Bank v. Dickson, 35 Wash. 641, 77 P. 1067.

87. Randolph v. Wheeler, 182 Mo. 145, 81 S. W. 419.

87a. See 2 Curr. L. 1684.

88. Hayman v. Campbell, 2 Ohio N. P. (N. S.) 213; Law v. Smith [N. J. Eq.] 59 A. 327. Baltimore Humane Impartial Soc. & Aged Women's & Aged Men's Homes v. Pierce, 99 Md. 354, 58 A. 26; Harlow v. Oregonian Pub. Co. [Or.] 78 P. 737. Thus a contract within the statute of frauds and required to be in writing cannot be enforced against the party who signed it where complainant did not. Kane v. Luckman, 131 F. 609; Berry v. Frisbie [Ky.] 86 S. W. 558.

Illustrations: An agreement that a traffic contract shall cease without notice when the promisee railroad and another existing road shall cease to compete is terminable on contingency and not at will. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355. A contract to purchase a crop of hops, the obligation to take being made dependent on their being of a proper quality and condition "according to the judgment of buyer," not wanting in mutuality. Livesley v. Johnston [Or.] 76 P. 946; Livesley v. Heise [Or.] 76 P. 952.

Contra: A mutually enforceable contract need not be mutually enforceable in specie. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355. [It was performed on one side. Editor.] Compare note following.

89. An agreement to care for and maintain another during his natural life in consideration of his agreement to convey certain land cannot be specifically enforced during the life of the latter, since not fully performed and not enforceable against the other. Prusiecke v. Ramzinski [Tex. Civ. App.] 81 S. W. 771.

90, 91. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

92. Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352; Engler v. Garrett [Md.] 59 A. 648; Cummins v. Beavers [Va.] 48 S. E. 891.

the contract has repudiated it and conveyed the land to another, though such conveyance was voluntary.[93] An optional contract based on a proper and sufficient consideration will be specifically enforced if accepted within the time limited.[94] Mutuality is not lacking if, though one sold that to which he did not at the time have title, the other assented after the title had been acquired and recognized the contract.[95] A contract that cannot be enforced as an entirety will not be enforced in part,[96] unless the stipulations sought to be enforced clearly and distinctly appear by the contract to stand by themselves, independent of and wholly unaffected by any others.[97]

(§ 3) *C. Definiteness of contract.*[97a]—To entitle it to specific performance the contract must be specific and distinct as to its terms, plain and definite in its meaning.[98] It must be certain as to the estate to be conveyed.[99] In contracts for the sale of lands, the description is sufficient to authorize specific performance if the land described in the contract can be identified with the aid of parol evidence.[1] Parol evidence may be resorted to, to fit the description given in the contract to the land, but where there is no description or an insufficient one, parol evidence is inadmissible to describe and then identify the land.[2]

(§ 3) *D. Legality and fairness of contract.*[2a]—No contract affected with illegality will, generally speaking, be enforced,[3] even where it has already been accom-

93. Nason v. Lingle, 143 Cal. 363, 77 P. 71.

94. Frank v. Stratford-Handcock [Wyo.] 77 P. 134; Pennsylvania Min. Co. v. Martin, 210 Pa. 53, 59 A. 436; Carnegie Natural Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548. A writing acknowledging the receipt of a certain sum of money as a part of the purchase price of land described therein and reciting that the person from whom the money is received shall have a designated time within which to pay a further specified sum which shall constitute the balance of the purchase price, is a contract to convey and not a mere option. Payment within the specified time not being made of the essence of the contract, specific performance will be decreed if tender of the balance is made within a reasonable time, though after the time fixed in the contract. Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352.

95. Gibson v. Brown [Ill.] 73 N. E. 578.

96. Los Angeles & B. Oil & Development Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25.

97. Hayman v. Campbell, 2 Ohio N. P. (N. S.) 213.

97a. See 2 Curr. L. 1685.

98. Bush v. Whitaker, 45 Misc. 74, 91 N. Y. S. 616; Powers v. Rude, 14 Okl. 381, 79 P. 89; Halsell v. Renfrow, 14 Okl. 674, 78 P. 118; J. L. Gates Land Co. v. Ostrander [Wis.] 102 N. W. 558; Welsh v. Williams [Miss.] 37 So. 561; Kane v. Luckman, 131 F. 609; Tillery v. Land, 136 N. C. 537, 48 S. E. 824; Henry v. Black, 210 Pa. 245, 59 A. 1070; McKee v. Higbee, 180 Mo. 263, 79 S. W. 407; Dreiske v. Eisendrath Co. [Ill.] 73 N. E. 379; Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895. The acceptance by defendant of an offer by complainant which contained two propositions, is too indefinite to be specifically enforced. Welsh v. Williams [Miss.] 37 So. 561. A contract in which the terms of credit, time for performance, and character of security for deferred payments are left to future negotiations between the parties, is too uncertain to be specifically performed. Meyer Land Co. v. Pecor [S. D.] 101 N. W. 39. A contract to purchase land and pay what it is worth and if the parties cannot agree as to its value, the price to be determined by arbitrators, cannot be enforced, since too uncertain. Schneider v. Reed [Wis.] 101 N. W. 682.

"A fair valuation by appraisement" held sufficiently certain as to price to authorize specific performance. Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247. Traffic contract calling for routeing a proportion of freight shipments held certain. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

99. Powers v. Rude, 14 Okl. 381, 79 P. 89.

1. Clawson v. Brewer [N. J. Eq.] 58 A. 598; Henry v. Black, 210 Pa. 245, 59 A. 1070; Lester Agricultural Chemical Works v. Selby [N. J. Eq.] 59 A. 247; Howison v. Bartlett [Ala.] 37 So. 590. Thus a contract to convey a quarter section in a designated section, town and range, but not designating whether the range is east or west or what particular quarter section, is sufficient where it is shown the vendor owned only one quarter in a section to which the description could possibly apply. Ruzicka v. Hotovy [Neb.] 101 N. W. 328. A decree for specific performance will not be refused merely because the contract does not state in what county or state the land lies, provided the description of the premises is not rendered altogether indefinite. Where the contract gives the street and number and the name of the inhabitant and the premises can be identified therefrom, a decree will be rendered. Engler v. Garrett [Md.] 59 A. 648.

2. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118; Powers v. Rude, 14 Okl. 381, 79 P. 89.

2a. See 2 Curr. L. 1687.

3. Contract contrary to **public policy** will not be enforced. Cowles v. Rochester Folding Box Co., 179 N. Y. 87, 71 N. E. 468.

plished.[4] Equity will not decree the specific performance, by a corporation, of an ultra vires contract, nor one which it has no power to perform without the consent of a third person,[5] nor a contract to incorporate where, contrary to the policy of the law, a large proportion of the proposed incorporators is insolvent.[6]

The contract must be fair and just in its operation,[7] and a fraud may be followed through several transfers.[8] Any fact showing inequity and unfairness in the contract defeats the right.[9] The stipulation of damages for breach by one party only is not unequal or unfair if designed to secure performance and not to facilitate discharge.[10] Mere misstatement by a purchaser of his purpose in buying does not affect his equity to performance; otherwise if it be done as part of a scheme of fraud.[11]

(§ 3) *E. Necessity of written contract.*—An oral contract to convey land will be specifically enforced where there has been a part performance, and to refuse to enforce it would be a fraud on complainant.[12] One who purchases from the vendee in possession under such circumstances would likewise be entitled to specific performance against the original vendor.[13] Mere possession without acts creating an equity is not enough.[14] Where the contract is for the sale of an undivided interest, joint possession with the vendor's co-tenant, the other elements existing, is sufficient.[15] The acts relied on as a part performance must be exclusively referable to the parol contract and established by evidence free from doubt;[16] if reasonably explicable on some other ground, the relief will be refused.[17] The mere payment of the consideration will not constitute such part performance.[18]

4. If the contract looked toward an illegal thing, no relief will be given. Agreement to procure excessive issue of corporate stock and make over part of it to promisee. Volney v. Nixon [N. J. Err. & App.] 60 A. 189.

5. Agreement by private corporation to pave street in front of complainant's property, to the doing of which consent of city necessary. Farson v. Fogg, 205 Ill. 326, 68 N. E. 755.

Note: Enforcement of ultra vires contracts of private corporations. See Clark & M. Corp. § 213.

6. The Illinois incorporation act clearly contemplates that subscribers to capital stock should be persons of financial responsibility. Hernreich v. Lidberg, 105 Ill. App. 495.

7. Kane v. Luckman, 131 F. 609; Sanders v. Newton, 140 Ala. 335, 37 So. 340; Rathbone v. Groh [Mich.] 100 N. W. 588; Cox v. Raider [Mich.] 101 N. W. 531; Ratterman v. Campbell, 26 Ky. L. R. 173, 80 S. W. 1155; Dreiske v. Joseph N. Eisendrath Co. [Ill.] 73 N. E. 379; York v. Searles, 97 App. Div. 331, 90 N. Y. S. 37; Wolford v. Steele [Ky.] 84 S. W. 327.

8. Where fraud on creditors persists through several transactions, reconveyance to the fraudulent grantor will be refused. The grantee conveyed to one who was to reimburse his advances by procuring a new loan and then reconvey. He died and his heirs refused. McBrerty v. Hyde [Pa.] 60 A. 507.

9. Schneider v. Schneider [Iowa] 98 N. W. 159; Stubbings v. Durham, 210 Ill. 542, 71 N. E. 586. Mineral lease under which lessee bore no duty to work his discoveries. Berry v. Frisbie [Ky.] 86 S. W. 558. Traffic contract held not fraudulent because of personal interest of corporate officers. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

10. Agreement to route rail traffic. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

11. Miller v. Fulmer, 25 Pa. Super. Ct. 106.

12. Coleman v. Dunton [Me.] 58 A. 430. Thus where complainant has entered into possession, made improvements, discharged encumbrances and the vendor is insolvent, specific performance will be decreed. McKay v. Calderwood [Wash.] 79 P. 629. Oral contract to convey land in consideration of marriage, followed by marriage, will be enforced. Allen v. Moore, 30 Colo. 307, 70 P. 682. Payment of consideration and entry into possession, in good faith, under contract, with consent of vendor and making of valuable improvements. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118. A small expenditure for improvements not sufficient. Wisconsin & M. R. Co. v. McKenna [Mich.] 102 N. W. 281.

13. Kuteman v. Carroll [Tex. Civ. App.] 80 S. W. 842.

14. It is not equities arising out of the contract but equities arising out of what has been done by way of executing it and in reliance upon it, with the acquiescence of the other party that courts act on in such cases. Wisconsin & M. R. Co. v. McKenna [Mich.] 102 N. W. 281.

15. McKay v. Calderwood [Wash.] 79 P. 629.

16. Seitman v. Seitman, 204 Ill. 504, 68 N. E. 461.

17. Gates Land Co. v. Ostrander [Wis.] 102 N. W. 558.

18. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118; Lozier v. Hill [N. J. Eq.] 59 A. 434; Cooper v. Colson [N. J. Err. & App.] 58 A. 337.

An agreement may suffice, though it was also intended as a declaration of trust or a gift as to which it was deficient.[19] In California the code entitles plaintiff, if he has performed or offers performance, to relief, though he has not signed a written contract signed by defendant.[20]

An oral agreement to devise land will be enforced, if reasonably certain as to its subject-matter and stipulations and there has been such part performance by the promisee as will take it out of the statute of frauds,[21] provided the situation of the parties is such that the consideration rendered by the promisee is such that it cannot be measured by and compensated for by pecuniary damages.[22] To entitle a party to specific performance of such an agreement, he must establish it by clear and convincing evidence,[23] as well as show that the services were rendered wholly in accordance with such agreement and in reference thereto.[24] While the lack of a writing is not disprobative, the failure to explain why there was none may be so. Declarations of promisor are weak proof.[25]

§ 4. *Performance by complainant.*[26]—One seeking the specific performance of a contract must show that he has performed his part of the contract or that he is able, willing and ready to perform.[27] He is not excused by showing that

19. Robb v. Washington & Jefferson College, 93 N. Y. S. 92.

20. Civ. Code, § 3388. Bird v. Potter [Cal.] 79 P. 970.

21. Laird v. Vila [Minn.] 100 N. W. 656. A suit by the promisee against devisees of the promisor, to compel specific performance of such an agreement, is not a collateral attack on the judgment of the probate court admitting the will of the promisor to probate. Best v. Gralapp [Neb.] 99 N. W. 837.

An oral contract to adopt a child or make it an heir will be specifically enforced where it has been fully performed by the child and its parent, and to refuse to do so would work a fraud on the child. Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895.

22. Best v. Gralapp [Neb.] 99 N. W. 837; Clawson v. Brewer [N. J. Eq.] 58 A. 598. Thus if the consideration be the rendition of labor and services that may be liquidated in money, specific performance will not be decreed. Laird v. Vila [Minn.] 100 N. W. 656. Performance of oral agreement to render personal services as housekeeper and attendant during lifetime of another will not take contract out of statute of frauds, since such services are capable of pecuniary compensation. To entitle to specific performance it must appear that the services were of an exceptional character and that the parties not only did not intend that they should be measured by ordinary standards, but that they were of such peculiar character that it is impossible to estimate their value by any such standard. Cooper v. Colson [N. J. Err. & App.] 58 A. 337.

23. Laird v. Vila [Minn.] 100 N. W. 656; Grantham v. Gossett, 182 Mo. 651, 81 S. W. 895; Lozier v. Hill [N. J. Eq.] 59 A. 234; McKee v. Higbee, 180 Mo. 263, 79 S. W. 407; Cooper v. Colson [N. J. Err. & App.] 58 A. 337; Clawson v. Brewer [N. J. Eq.] 58 A. 598; Spencer v. Spencer [R. I.] 58 A. 766; Earnhardt v. Clement [N. C.] 49 S. E. 49. An oral contract to devise lands will be specifically enforced only when the proof of the contract and its terms and conditions have been established by proof so cogent, clear and forcible as to leave no reasonable doubt in the mind of the chancellor, and it appears that the complainant has performed his part of the contract. Evidence held not to authorize specific performance of the contract. Asbury v. Hicklin, 181 Mo. 658, 81 S. W. 390. A parol contract to make one a legatee must be established by very clear proof that it was made, what were its terms, that it was on valuable consideration. Rosenwald v. Middlebrook [Mo.] 86 S. W. 200. A young physician who entered a partnership with an older one of high standing, able, and well equipped held to have parted with nothing. Id.

24. Cooper v. Colson [N. J. Err. & App.] 58 A. 337; Rosenwald v. Middlebrook [Mo.] 86 S. W. 200. Attention to office work and to personal matters of the senior partner held attributable to their relations and not to the promise of a legacy. Id.

25. Rosenwald v. Middlebrook [Mo.] 86 S. W. 200.

26. See 2 Curr. L. 1689.

27. Kuntz v. Schnugg, 90 N. Y. S. 933; Hutchinson v. Hutchinson [N. J. Eq.] 58 A. 528. Where a provision of a contract was that the vendor should prosecute a suit to recover a portion of the land in possession of another, and in case title to that portion failed, it was to be appraised and the amount deducted from the purchase price. In an action for the performance of the contract, the suit against the third person was still pending and no steps had been taken to appraise the property. Held, the purchaser was not entitled to a decree providing for an appraisal. Wold v. Newgaard, 123 Iowa, 233, 98 N. W. 640. Complainant as part consideration agreed to pay a mortgage on the land and instead of so doing bought it in and caused foreclosure proceedings to be commenced, thereby compelling defendant to pay it. Held, not entitled to specific performance. Clay v. Mayer, 183 Mo. 150, 81 S. W. 1066. Vendee seeking specific performance must show payment of contract price or bring same into court, though action therefor by vendor barred by statute of limitations. De Hihns v. Free [S. C.] 49 S. E. 841. A car shortage at a season when crops were moving and after defendant had misinformed

defendant was first in fault in refusing to perform,[28] nor by defendant's refusal to perform instanter when demand was arbitrarily made without opportunity to investigate and counsel.[29] He must show that he has the title which he contracted to convey.[30] If the contract is silent as to the title, he must offer a marketable title.[31] Ordinarily an offer of performance is a prerequisite to the maintenance of a suit,[32] unless the respondent has repudiated the contract, in which case an offer of performance in the bill is sufficient.[33] This rule is not rigorously enforced where it would be inequitable to do so,[34] and in at least one jurisdiction

plaintiff as to its need for cars, held not to show inability because of equipment to perform agreement for carriage. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355. Plaintiff's agreement to procure loan on property to be exchanged held to have been substantially performed. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

28. Clay v. Mayer, 183 Mo. 150, 81 S. W. 1066.

29. Refusal to deliver deed during temporary absence of vendor's counsel from the room for the purpose of examining invoice of property to be exchanged held not a refusal to perform justifying rescission. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Tender and demand made during momentary delay to examine property tendered in exchange held in bad faith and rescission on refusal unjustified. Id.

30. The fact that respondent might, by reason of a defective registration of the instrument constituting the defect in complainant's title, acquire a good title, does not authorize specific performance. Eversole v. Eversole [Ky.] 85 S. W. 186. Where a party has contracted for title free from encumbrances, he is not required to accept a title subject to an inchoate right of dower. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097. Specific performance will not be decreed where complainant's title is based on a presumption of fact, unless it also appears that there is no reasonable ground for apprehending that the evidence to establish the presumption will not be available for the protection of the respondent in the future, and that there is no reasonable ground for apprehending that evidence to overcome the presumption can be adduced. Specific performance refused where complainant's title based on unexplained absence of her husband for such period as to raise presumption of death. Potter v. Ogden [N. J. Eq.] 59 A. 673. Complainant is not entitled to a decree where it appears that at the commencement of suit he did not have title agreed to be conveyed. Kuntz v. Schnugg, 90 N. Y. S. 933; Brown v. Widen [Iowa] 103 N. W. 158. Furnishing satisfactory abstract and tendering of marketable title not shown. Id. Production of releases of mortgages held equivalent to performance of covenant against incumbrances. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

See, also, section 5, subdivision Defenses.

31. Scudder v. Watt, 90 N. Y. S. 605; Downey v. Seib, 92 N. Y. S. 431. Possibility of issue held to be a cloud and decree did not remove same. Id. "The test of a marketable title is, whether it is clear beyond a reasonable doubt and, will not expose the purchaser to litigation. If there is a considerable—a rational doubt," it is not marketable. Miller v. Bronson [R. I.] 58 A. 257. Dormant defects in title are no defense (nonjoinder of wife in mortgage presumptively for purchase price). Gibson v. Brown, 214 Ill. 330, 73 N. E. 578.

32. Vendee must tender price. Hughes v. Antill, 23 Pa. Super. Ct. 290. It is necessary to show that prior to the commencement of the suit plaintiff vendee made an unconditional and absolute tender of the purchase money. An offer to pay the purchase price on delivery of a properly executed deed is not an unconditional tender. Terry v. Keim [Ga.] 49 S. E. 736.

Tender of sufficient deed prerequisite to suit: Lanyon v. Chesney [Mo.] 85 S. W. 568. A party seeking specific performance of a contract must aver and prove the performance, or an offer to perform on his part of every essential ingredient of the contract which is required of him by the terms of the agreement. He must show a tender of a deed in accordance with terms of contract. Id.

33. Christiansen v. Aldrich [Mont.] 76 P. 1007; Pittsburgh Amusement Co. v. Ferguson, 91 N. Y. S. 666; Hughes v. Antill, 23 Pa. Super. Ct. 290; Payne v. Melton [S. C.] 48 S. E. 277; Lanyon v. Chesney [Mo.] 85 S. W. 568; Kreutzer v. Lynch [Wis.] 100 N. W. 887.

Waiver: An answer which denies that the complainant has title to land which he seeks to compel purchaser to take does not constitute a waiver of his right to a tender of the deed by the vendor, since respondent might be willing to take deed and rely on covenants of warranty. Lanyon v. Chesney [Mo.] 85 S. W. 568. It is no defense to a suit for specific performance that the complainant demanded that a survey be made to determine the number of acres in the tract, where such survey is necessary to ascertain the price to be paid, and made his tender dependent on such surveys being made, where the vendor's refusal to convey, at the time of the offer of the vendee to perform, was not based on his demand for a survey. Cole v. Killam, 187 Mass. 213, 72 N. E. 947.

34. When time is not made an essential element of a contract for the sale of premises, and the parties have substantially progressed with performance, the rule requiring tender before institution of suit for specific performance is not of imperative application. Much depends on the equities of the particular case and whether the omission to proffer performance has resulted in a hardship or loss that cannot be readily remedied by the decree. Hosmer v. Wyoming R. & Iron Co. [C. C. A.] 129 F. 883. Where complainant alleges that he has fully paid the purchase price and the court finds

is regarded as merely affecting the question of costs.[35] Where time is not made of the essence of the contract,[36] specific performance will be decreed, though the purchase price was not paid or performance tendered at the exact time fixed by the contract,[37] if the complainant has acted in good faith and with reasonable diligence,[38] unless there has been such a change in the circumstances affecting the equities of the parties as would make it inequitable to do so.[39] A forfeiture must have been declared if plaintiff's default did not of itself determine the contract.[40] Even where time is essential, affirmative action to forfeit is required.[41]

Where one who has contracted to sell land conveys it to a third person who takes with notice of the contract, a tender to the vendor is sufficient to entitle the purchaser to maintain specific performance against the grantee of the vendor.[42] The vendor's grantee having accepted payments cannot say there was a default when the deed to him passed.[43]

§ 5. *Actions. Jurisdiction.*[44]—A suit for specific performance of a contract to convey land is one in personam and cannot be maintained without personal jurisdiction of the respondent; it may be brought in a jurisdiction other than that in which the land is situate.[45] A suit against a guardian for specific perform-

against him as to the fact, and the contract has not been rescinded, the bill will not be dismissed without giving him an opportunity to pay the balance of the purchase price. Mason v. Atkins [Ark.] 84 S. W. 630. Where the amount complainant is under obligation to pay is uncertain, an offer in the bill to pay whatever complainant may be under obligation to pay is sufficient. International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 86 N. Y. S. 736. Where in a contract for the sale of land, the stipulations are that the purchaser shall pay the money and the vendor shall execute a conveyance and there is no provision that either is to be done first, the covenants are mutual and dependent; it is not necessary on the part of the purchaser to make a strict tender, it is sufficient that when the time comes for the transaction he is able and prepared to pay and demands the deed. Cole v. Killam, 187 Mass. 213, 72 N. E. 947.

35. In an action for specific performance, a failure to make either a tender or demand before suit would affect only the question of costs. A formal tender of the purchase price was not a prerequisite to maintenance of the suit for specific performance. Murray v. Harbor & Suburban Bldg. & Sav. Ass'n, 91 App. Div. 397, 86 N. Y. S. 799.

36. Specific performance will not be decreed when time is of the essence of the contract and complainant is not able to perform at time fixed by contract. Garcin v. Pennsylvania Furnace Co. [Mass.] 71 N. E. 793.

37. If the complainant has not shown any disposition to abandon the contract but on the other hand has shown that he is endeavoring to carry it out, a short delay is not fatal. Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030. Where a contract for the sale of land provides that the purchaser shall pay for the same in instalments and that if he shall default for 30 days in payment of instalments when due, payments already made shall be forfeited, equity will enforce the contract where after a large part of the price has been paid the purchaser defaults for 30 days, but the vendor thereafter receives money on the purchase price and at the time of the purchaser's offer to pay the balance no notice had been given the purchaser of the vendor's intention to terminate the contract. Murray v. Harbor & Suburban Bldg. & Sav. Ass'n, 91 App. Div. 397, 86 N. Y. S. 799. Slight tardiness in payment of a balance when not objected to is not a defense. Cosby v. Honaker [W. Va.] 50 S. E. 610. If there be no stipulation as to time, it is not of the essence and a reasonable time is allowed. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Agreement respecting purchase of coal rights held an option and enforcement refused for tardy performance by plaintiff. Standiford v. Thompson [C. C. A.] 135 F. 991.

38. Wright-Blodgett Co. v. Astoria Co. [Or.] 77 P. 599. The court will not countenance delay, nor will it aid complainant if he is passive while the value of the land he seeks to obtain is stable or lessening, and he seeks performance only when it is increasing in value. Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030. Delay for two years and increase in value of land, together with acquiescence in claim that contract abandoned precludes specific performance. Henderson v. Beatty, 124 Iowa, 163, 99 N. W. 716.

39. Where, at time agreed on, vendor did not have clear title, and purchaser, before the title was cleared, invested his money elsewhere and vendor was six months in clearing title, specific performance refused. Miller v. Bronson [R. I.] 58 A. 257.

40. Thompson v. Colby [Iowa] 103 N. W. 117.

41. Zeimantz v. Blake [Wash.] 80 P. 822.

42. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

43. Kuhn v. Skelley, 25 Pa. Super. Ct. 185.

44. See 2 Curr. L. 1691.

45. Silver Camp Min. Co. v. Dickert [Mont.] 78 P. 967. Mont. Code Civ. Proc. § 637, providing for service of summons on nonresident defendants by publication, has no application in actions strictly in per-

ance of a contract to locate land may be brought in the county in which the guardian was appointed, though not the county in which the land is situate or in which the respondent resides.[46] Equity will not take jurisdiction of such an action if the complainant has an adequate remedy at law.[47] The court of general equity powers and not the probate court administering the estate of a party has jurisdiction to apply the remedy.[48] Where the title of respondent is defective and complainant sues for specific performance, with an abatement of the purchase price, the question of what amount shall be abated on account of the defect is for the chancellor and cannot be determined by a master.[49]

The statute of limitations does not commence to run against a cause of action for specific performance until the complainant is entitled to a conveyance.[50]

Parties.[51]—As a general rule, the only parties necessary to a suit for specific performance are the parties to the contract. If a party to the contract is not the real party in interest, but only allows the use of his name for the purchase of the land, the real party in interest should be joined.[52] One who takes a conveyance of land with notice that his grantor had previously contracted to sell it to another takes it subject to the latter's equities, and the latter can maintain a suit against the grantee for the specific performance of the contract.[53] The custodian of the deed is a necessary party if delivery of the deed is part of the relief sought.[54] All persons having or claiming an interest in the land derived from the vendor after the contract and with notice of the rights of complainant are necessary parties defendant.[55] So, too, a purchaser from the vendee can maintain the suit against the vendor or one to whom he has conveyed and who took with notice,[56]

sonam, such as a suit for specific performance. Id. Domicile of parties and not situation of land gives jurisdiction. It may lie in another state. Rea v. Ferguson [Iowa] 102 N. W. 778.

46. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

47. An objection in a suit for specific performance that the complainant has a complete remedy at law is jurisdictional and may be enforced by the court on its own motion, though not raised by the pleadings or suggested by counsel. Kane v. Luckman, 131 F. 609.

48. Tenney v. Turner [Mo. App.] 86 S. W. 506. In Minnesota the probate court has no jurisdiction of an action to enforce an oral agreement entered into by a decedent. Laird v. Vila [Minn.] 100 N. W. 656.

49. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097.

50. Suit for specific performance held not barred by statute of limitations where evidence does not show when the complainant's right to a conveyance accrued. Betzer v. Goff [Tex. Civ. App.] 80 S. W. 671.

51. See 2 Curr. L. 1692.

52. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097.

53. Cummins v. Beavers [Va.] 48 S. E. 891; Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694; Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030; Engler v. Garrett [Md.] 59 A. 648.

Practice: The proper practice is to direct a specific performance of the contract by the subsequent purchaser in whom resides the legal title. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

54. Rea v. Ferguson [Iowa] 102 N. W. 778.

55. International Paper Co. v. Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. S. 736. A mortgagee of property as to which specific performance is sought is a proper party to a suit. Id. In an action to compel the specific performance of a contract to devise lands, persons claiming under a voluntary conveyance from the decedent are proper parties defendant and the action can be maintained against them, but in such case the personal representative is not a necessary party defendant. One who has succeeded by inheritance to the interest of one of the voluntary grantees of the promisor is a proper party defendant. Rhoades v. Schwartz, 41 Misc. 648, 85 N. Y. S. 229. Where testator left property to a trustee to hold in trust, in violation of a prior contract entered into by him, and his executors have delivered the trust funds to the trustee, the executors are not necessary parties to a suit against the trustee, for the specific performance of the testator's contract. Phalen v. United States Trust Co., 44 Misc. 57, 89 N. Y. S. 699.

Actual notice necessary when: It will not be enforced against a third person who has purchased from the vendor, without actual notice, though chargeable with constructive notice by reason of the recording of the contract, when to do so would work an injustice on the purchaser. Rathbone v. Groh [Mich.] 100 N. W. 588.

56. Where an officer of a corporation takes an option to purchase land in his own name, but for the benefit of the corporation, a vendee of the corporation can enforce specific performance of his contract to purchase against the corporation, the officer and one to whom the officer has caused the land to be conveyed, where the latter took with

and a purchaser from the vendor who takes with notice may require the vendee to pay the price agreed on and take the land.[57] In Missouri a contract for the conveyance of land by a married woman, entered into subsequent to the enactment of the married woman's act of 1889, can be specifically enforced against her.[58] In South Carolina she can maintain the suit without the joinder of her husband where it concerns her separate property.[59] A suit may be maintained by[60] or against[61] the personal representative of a deceased party to the contract. One of two parties to a contract to purchase cannot maintain a bill to compel the conveyance of the entire title to him,[62] but a bill may be maintained against two persons to compel the conveyance of a title which they have contracted to convey and which they can convey acting collectively, though neither alone could convey, where jurisdiction of both has been acquired.[63]

Defenses.[63a]—It may be proved defensively that any of the essentials already discussed is lacking.[64] Basing a refusal on specific acts of non-performance waives all others.[65] Default in payment cannot be set up by one who has repudiated the contract.[66] Impossibility of performance in specie, to-wit, that respondent has, prior to the commencement of the suit, sold and conveyed the land to a bona fide purchaser, constitutes a defense;[67] but the respondent cannot object that he cannot convey the title contracted for, since complainant is entitled to a conveyance of the title which he has, with an abatement of the purchase price to the extent of the diminution in value caused by the defect.[68] That the complainant has not title

notice of complainant's equities. Henry v. Black [Pa.] 59 A. 1070.

57. Randolph v. Wheeler, 182 Mo. 145, 81 S. W. 419.

58. Clay v. Mayer, 183 Mo. 150, 81 S. W. 1066.

59. Under Code N. C. §§ 178, 183, providing that where a married woman is a party to an action her husband must be joined unless the action concerns her separate property, a married woman may sue for the specific performance of a contract to bequeath certain personal property in consideration of the performance of certain services by her, without joining her husband. Earnhardt v. Clement [N. C.] 49 S. E. 49.

60. An administratrix of a deceased vendor may maintain a suit against the heirs of the decedent to compel them to convey in accordance with his contract where it appears the purchaser is willing to complete the contract; she may join herself as one of the complainants in her individual capacity, and the fact that she will be entitled to all the proceeds as personalty but will not be entitled to all the real property is not a sufficient reason for refusing the relief. Butman v. Butman, 213 Ill. 104, 72 N. E. 821.

61. Where pending a suit for specific performance the respondent conveys the land to another under such circumstances that the complainant is not entitled to a decree for specific performance, and after such conveyance the respondent dies, the complainant may file a supplemental bill for damages and have the cause revived as against the personal representative of the respondent under Rev. St. Wis. 1898, §§ 3501, 3907. Fleming v. Ellison [Wis.] 102 N. W. 398.

62. Davis v. Pfeiffer, 213 Ill. 249, 72 N. E. 718.

63. Resnick v. Campbell [N. J. Eq.] 59 A. 452.

63a. See 2 Curr. L. 1691.

64. See ante, §§ 1-4.

65. Gibson v. Brown [Ill.] 73 N. E. 578. An absolute denial of liability under the contract waives the defense of plaintiff in complete performance. Zeimantz v. Blake [Wash.] 80 P. 822.

66. Zeimantz v. Blake [Wash.] 80 P. 822.

67. Coleman v. Dunton [Me.] 58 A. 430; Weaver v. Snively [Neb.] 102 N. W. 77.

68. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097. It is no defense to a suit for the specific performance of a contract to convey "any interest which complainant may have" in certain land, that he cannot convey a good title thereto, when respondent at the time of making the contract knew of the defect alleged in his answer no fraud or undue influence being claimed. Ewart v. Bowman [S. C.] 49 S. E. 867. Where a married man has contracted to convey a good title to land and his wife has refused to release her dower interest, the vendor may maintain a suit for specific performance and retain from the purchase price the value of the wife's inchoate dower interest. Payne v. Melton [S. C.] 48 S. E. 277.

Compare Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097, holding that where the contract has not liquidated the value of the wife's inchoate right of dower no abatement can be made therefor, since incapable of valuation and that complainant must either rely on covenants of warranty or repudiate contract. Where one of several joint tenants contracts to sell his own interest in land together with the interest of the other joint tenants, and it is apparent that his willingness to sell his interest is dependent on the sale of the interest of his joint tenants, but it eventuates that he was not authorized to contract for the sale of his co-

to all the land which he contracted to convey or that he has not the title which he has contracted to convey is a defense to the suit, but the respondent may by cross bill require the complainant to convey such land or title as he has with a diminution of the purchase price to the extent of the defect.[69] Subsistence of a like contract to that sued on is not a defense if it be not shown that the two would exceed complainant's ability to perform.[70] That complainant intends to carry on an unlawful and immoral business on the premises sought to be conveyed is a good defense, but the relief will not be denied where the business is not necessarily so, but may become so only by reason of the manner of conducting it.[71]

Pleading.[72]—The bill need not allege that there is no adequate remedy at law, where such fact is apparent from the other allegations.[73] Nor need it allege that the respondent was the owner of the land at the time the contract was entered into.[74] It is not necessary to allege that the contract was in writing,[75] though part performance to take the case out of the Statute of Frauds must be pleaded,[76] likewise a parol implied trust.[77] If the contract was made by an agent, it is not necessary to allege that his authority was in writing.[78] Complainant need not plead that a thing purchased by him was in all respects according to seller's contract.[79] It will be presumed without pleading it that a seller of crops to be grown on another's land was a lessee entitled to grow and sell them.[80]

A general denial puts in issue all the facts alleged as entitling complainant to the relief.[81] Laches must be pleaded.[82] Defectiveness of title in that the vendor's wife will not join must be pleaded and proved defensively.[83] A denial that damage will be irreparable raises the issue of adequacy of legal remedy.[84] The want of a writing may be raised by denying that there was a written contract,[85] or by denying the making of one.[86] If, however, the making of the contract is admitted and other defenses are relied on to defeat the remedy, the statute must be pleaded.[87]

tenants' interests, specific performance as to his own interest will not be decreed, since to do so would be to enforce a contract he did not make. Tillery v. Land, 136 N. C. 537, 48 S. E. 824. Unless the purchaser objects, the wife's nonjoinder in the contract of sale and deed is no defense. Hughes v. Antill, 23 Pa. Super. Ct. 290.

69. Tillery v. Land, 136 N. C. 537, 48 S. E. 824. A vendee in possession under a contract to purchase cannot resist the vendor's suit for specific performance and payment of the purchase price, on the ground the vendor has not such a title as he agreed to convey, unless he surrenders possession and rescinds the contract. If the title is defective as to only a part, he may surrender as to such part and insist on specific performance as to the balance with an abatement of the purchase price. Lanyon v. Chesney [Mo.] 85 S. W. 568.

70. Agreements to route traffic via certain railroads. Lone Star Salt Co. v. Texas Short Line R. Co. [Tex. Civ. App.] 86 S. W. 355.

71. Hamilton v. Bell [Tex. Civ. App.] 84 S. W. 289. See, also, ante, § 3.

72. See 2 Curr. L. 1692.

73. International Paper Co. v. Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. S. 736. Under Civ. Code Mont. § 4410, providing that specific performance of a contract may be granted where pecuniary compensation for its breach cannot be given an allegation of a breach of a contract to convey land raises a presumption that pecuniary compensation would not afford adequate relief; it is not necessary for plaintiff to allege special circumstances showing he has no adequate remedy at law. Christiansen v. Aldrich [Mont.] 76 P. 1007.

74. The fact that respondent cannot perform is a matter of defense. Christiansen v. Aldrich [Mont.] 76 P. 1007.

75. Wilhite v. Skelton [Ind. T.] 82 S. W. 932; also holding that where, on the argument of a demurrer, complainant admitted that a contract within the statute of frauds and required to be in writing was not so, an order sustaining the demurrer, will not be reversed.

76, 77. People's Min. & Mill. Co. v. Central Consol. Mines Corp. [Colo. App.] 80 P. 479.

78. The bill will be demurrable for such reason only when it affirmatively appears that the authority is not in writing. Butman v. Butman, 213 Ill. 104, 72 N. E. 821.

79. He may waive defects and enforce performance. Livesley v. Johnston [Or.] 76 P. 946.

80. Livesley v. Johnston [Or.] 76 P. 946.

81. Southern M. & A. R. Co. v. Graves, 182 Mo. 211, 81 S. W. 405.

82. Thompson v. Colby [Iowa] 103 N. W. 117.

83. Campbell v. Beard [W. Va.] 50 S. E. 747.

84. Butler v. Wright, 93 N. Y. S. 113.

85. People's Min. & Mill. Co. v. Central Consol. Mines Corp. [Colo. App.] 80 P. 479.

86. Lozier v. Hill [N. J. Eq.] 59 A. 234.

87. Christiansen v. Aldrich [Mont.] 76 P. 1007.

Evidence.[88]—One who seeks to enforce the specific performance of a contract is bound to establish clearly and satisfactorily the existence of the contract and its terms. If the testimony is contradictory or doubtful, a decree will be refused.[89] It is competent to show circumstances dehors the written contract which make it inequitable to enforce it,[90] and evidence that complainant intends to use the premises sought to be conveyed for an unlawful and immoral purpose is admissible, though not pleaded.[91] One resisting the specific performance of a contract to convey, on the ground of fraud or mistake in the contract sought to be enforced, has the burden of proving facts which relieve him from the obligation of the contract.[92] So the burden is on him to show a forfeiture.[93]

The tender in equity need not be in court, since the decree may and should direct execution and delivery of a deed on payment.[94]

The relief granted[94a] must be consistent with the allegations of the bill.[95] The court having acquired jurisdiction will settle all matters in controversy,[96] though in so doing it may be required to pass on questions cognizable at law.[97] Violations of the contract by either party pending the determination of the suit may be enjoined.[98] If by reason of the fault of respondent or any change of conditions, not due to the fault of complainant, specific performance cannot be decreed, the court may nevertheless give the complainant relief by way of damages for breach of the contract,[99] and in case complainant has paid all or a part of the purchase price, may decree a return thereof with interest,[1] and charge the land with a lien therefor.[2] Likewise it may award him compensation for permanent improvements made in good faith.[3] If the vendor's title has failed as to a part of the

88. See 2 Curr. L. 1694.

89. Deeds v. Stephens [Idaho] 79 P. 77. Evidence held to show executed exchange. Ford v. Smith, 121 Ga. 300, 48 S. E. 914.

90. Stubbings v. Durham, 210 Ill. 542, 71 N. E. 586.

91. Hamilton v. Bell [Tex. Civ. App.] 84 S. W. 289.

92. Cape Fear Lumber Co. v. Matheson [S. C.] 48 S. E. 111. In an action to compel the acknowledgment of a deed theretofore executed by defendant, the burden is on complainant to show that the execution was done under circumstances entitling him to the relief. Southern M. & A. R. Co. v. Graves, 182 Mo. 211, 81 S. W. 405.

93. Thompson v. Colby [Iowa] 103 N. W. 117.

94. Hughes v. Antill, 23 Pa. Super. Ct. 290.

94a. See 2 Curr. L. 1696.

95. Levandowski v. Althouse [Mich.] 99 N. W. 786.

96. Lanyon v. Chesney [Mo.] 85 S. W. 568. In an action for the specific performance of a contract to exchange property, when the defense is that complainant made false and fraudulent representations as to the rentals of his property and that the same were relied on by defendant, the court may by its decree provide for the equalization of writs, interest, and taxes on each piece of property. Ragette v. Zimmer, 90 N. Y. S. 221. In an action for specific performance of a contract by the purchaser, the defendant cannot complain that the court by its decree required the plaintiff to secure the deferred payments by mortgage, since otherwise he would have had to rely on the purchaser's personal responsibility. Ruzicka v. Hotovy [Neb.] 101 N. W. 328. Where a contract for the purchase of land contemplates that interest on deferred payments shall run from the time the purchase was completed and possession given thereunder, a decree providing that the complainant shall within a specified time make and deposit notes and mortgages for such deferred payments, will be construed as requiring the notes to bear interest from their date, within the time limited by the decree and when the complainant is to have possession. Id.

97. Clinton v. Shugart [Iowa] 101 N. W. 785.

98. Pending a suit for specific performance of a contract, operations or acts by either party in violation of the contract may be enjoined to preserve the status quo, and obedience to the final decree may be compelled by prohibitory or mandatory injunction or both according to the exigencies of the case. Carnegie Natural Gas Co. v. South Penn Oil Co. [W. Va.] 49 S. E. 548.

99. Findley v. Koch [Iowa] 101 N. W. 766; Fleming v. Ellison [Wis.] 102 N. W. 398; Farson v. Fogg, 205 Ill. 326, 68 N. E. 755. Where the complainant had practically abandoned the contract and neglected to insist on performance for such a length of time as precludes a specific performance at his suit, he is not entitled to any damages. Findley v. Koch [Iowa] 101 N. W. 766.

1. Wolford v. Steele [Ky.] 84 S. W. 327. But see Findley v. Koch [Iowa] 101 N. W. 766.

2. Clay v. Mayer, 183 Mo. 150, 81 S. W. 1066.

3. Schneider v. Reed [Wis.] 101 N. W. 682.

property, or it be found defective or encumbered, the purchaser may waive his right to repudiate the contract and have performance enforced as far as the vendor is able to perform, with suitable abatement from the contract price.[4] The measure of diminution in case of failure of title to part of the land is a pro rata reduction of the price.[5] The court may as a condition of granting a decree require the complainant to pay interest on the purchase price during the time he has unreasonably delayed suit, where no tender before suit was shown.[6] In case of an inability to deliver title because of the wife's refusal to join, the decree may order a reservation of one-third the price to await her joinder or the further order of court.[7] In Louisiana a demand for damages coupled alternatively with one for specific performance will fail if the specific performance be waived.[8] Where one who has contracted to convey land has made a voluntary conveyance to another, the court can decree the deed to such other to be null and void and decree specific performance against the grantor.[9] If the suit is against a grantee of the vendor, who has taken with notice of the complainant's equities, the grantee is entitled to reimbursement out of any money owing by complainant to the grantor for the consideration paid by him to the grantor.[10] A bill may pray for specific performance, or in the alternative, for a rescission of the contract, and all persons affected by either relief made parties, where the same transactions are to be considered in granting either remedy.[11] The decree need not give the vendor an election to refund payments made or complete a sale unless he in the pleadings seeks it,[12] and has previously taken necessary steps to declare a forfeiture.[13]

A decree[13a] entered pursuant to an offer of judgment must be in conformity with the pleadings and the terms of the offer.[14] The taking of an appeal and filing of a supersedeas bond by respondent extends the time within which complainant may comply with the decree.[15] A decree requiring specific performance of a contract to convey land, not appealed from or in any way superseded, passes the title, as to persons chargeable with notice, as fully as a deed of record.[16] The decree cannot affect the rights of joint owners of land who are not parties to the action.[17]

4. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097; Clinton v. Shugart [Iowa] 101 N. W. 785; Capstick v. Crane [N. J. Err. & App.] 57 A. 1045. Where the respondent sets up false and fraudulent representations by the complainant, relied on and affecting value of property or title contracted to be conveyed, he may waive his right to resist specific performance and have the purchase price reduced by amount of diminution in value caused by defect. Lanyon v. Chesney [Mo.] 85 S. W. 568.

Operation of rule: This rule will not be carried to the extent of making a new contract for the parties. Thus deduction from contract price will not be made for defective repair of premises, where by terms of contract vendor has a specified time after exchange of title within which to make repairs. Sokolski v. Buttenwieser, 96 App. Div. 18, 88 N. Y. S. 973.

5. The vendee is not entitled to a greater measure of reduction by reason of the fact that the land as to which complainant's title failed adjoined other land owned by respondent and was for that reason especially valuable to him for business purposes, where it does not appear complainant knew such facts at time contract was entered into. Capstick v. Crane [N. J. Err. & App.] 57 A. 1045.

6. Pennsylvania Min. Co. v. Martin [Pa.] 59 A. 436.

7. Thompson v. Colby [Iowa] 103 N. W. 117.

8. Honor Co. v. Stevedores' & Longshoremen's Benev. Ass'n [La.] 38 So. 271.

9. Payne v. Melton [S. C.] 48 S. E. 277.

10. Faraday Coal & Coke Co. v. Owens, 26 Ky. L. R. 243, 80 S. W. 1171; Frank v. Stratford-Handcock [Wyo.] 77 P. 134. If the deed was given as security for money used to clear the premises of a mortgage thereon at the time the contract was entered into, such debt may be paid from the purchase price. Payne v. Melton [S. C.] 48 S. E. 277.

11. International Paper Co. v. Hudson River W. P. Co., 92 App. Div. 56, 86 N. Y. S. 736.

12. Rea v. Ferguson [Iowa] 102 N. W. 778.

13. Code, §§ 4299, 4300. Rea v. Ferguson [Iowa] 102 N. W. 778.

13a. See 2 Curr. L. 1696.

14. Abel v. Bischoff, 90 N. Y. S. 990.

15. Where complainant pursuant to terms of a decree deposits a part of the purchase price in court he does not abandon his rights under the decree by withdrawing such deposit after the respondent has filed a supersedeas bond and taken an appeal. Ruzicka v. Hotovy [Neb.] 101 N. W. 32.

16. Kelly v. Bramblett, 26 Ky. L. R. 167, 81 S. W. 249. Hence it is not essential to

Costs.[18]—In the Federal courts the costs in suits for specific performance may be apportioned on an equitable basis.[19]

SPENDTHRIFTS, see latest topical index.

STARE DECISIS.

§ 1. The Doctrine and Its Application (1512).
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A. Inferior and Appellate (1514).
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D. Different State Courts (1516).

§ 1. *The doctrine and its application.*[20]—Where a court has decided the legal result of a given state of facts, it has established a precedent, which, until the decision is reviewed and overruled, is bound to control any subsequent case in which the same question is presented on the same state of facts.[21] The doctrine applies to matters of law as distinguished from matters of fact which are rendered conclusive when ascertained by the rule of res adjudicata.[22] To overrule a decision deliberately made, a court should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it,[23] or that other circumstances intervene, as where the decision was obiter dictum, or where conflicting decisions have since been made by inadvertence or otherwise, so that the position of the court is already uncertain.[24] Comity and necessity require that the various judges, who sit in the same court, should not attempt to overrule the decisions of each other, especially upon questions involving rules of property and practice, except for the most cogent reasons, such as a certainty that a previous ruling was erroneous or that no conflict would arise and no injustice would result from disregarding it;[25] but where the court of last resort

the validity of a deed executed by a married woman in pursuance of a decree that she should acknowledge it in the manner required by law for the acknowledgment of deeds by a married woman. Goldstein v. Curtis [N. J. Err. & App.] 59 A. 639.

17. Where, after a decree of specific performance against a part only of several owners in common of land, one of the cotenants against whom no decree was rendered brings partition and the land is sold to one who had notice of the decree for specific performance, the complainant in the suit for specific performance cannot by a supplemental bill in the suit for specific performance have the sale in partition proceedings set aside unless they were of such a nature as to render the sale void. Tobin v. Larkin, 187 Mass. 279, 72 N. E. 985.

18. See 2 Curr. L. 1698.

19. Kane v. Luckman, 131 F. 609. See, generally, Costs, 3 Curr. L. 940.

20. See 2 Curr. L. 1698.

21. Where, in a suit on a bond, the surety set up the same defense as the principal in an earlier case and relied on the same facts to support it, the court followed its former decision. Fidelity & Deposit Co. v. Nisbet, 119 Ga. 316, 46 S. E. 444. The doctrine applies to a question of jurisdiction (Fisheries Co. v. Lennen [C. C. A.] 130 F. 533), or constitutionality of a statute (State v. Scampini [Vt.] 59 A. 201, 203), or construction of a contract (Akers v. Jefferson County Sav. Bank, 120 Ga. 1066, 48 S. E. 424).

22. Whether a railroad bridge is part of a "continuous line of road" (Comp. St. 1899, p. 954, c. 77, art. 1), is a question of law, and a prior determination is not conclusive. Chicago, etc., R. Co. v. Cass County [Neb.] 101 N. W. 11. See, also, Former Adjudication, 3 Curr. L. 1476.

23. The court refused to alter its former rule applying the statute of limitations against municipal corporations, and it appeared that since the accrual of the rights by adverse possession relied upon, the rule had been reversed by statute, so that no further harm could come of it. City of Wahoo v. Netheway [Neb.] 102 N. W. 86.

24. A former construction of a married woman's statute was adhered to, regardless of how the matter would be decided were it res integra, the court saying that "certainty of the law is more essential to justice than absolute correctness." Lonstorf v. Lonstorf, 118 Wis. 159, 95 N. W. 961.

See, also, Bailey v. McAlpin [Ga.] 50 S. E. 388.

25. Fritter v. Bohl, 2 Ohio N. P. (N. S.) 365. "The rule itself and a careful observance of it are essential to prevent unseemly conflict, to the speedy conclusion of litigation and to the respectable administration of the law, especially in the national courts, where many judges are qualified to sit at the trials and are frequently called on to act in the same cases." Plattner Implement Co. v. International Harvester Co. [C. C. A.] 133 F. 376. Co-ordinate courts or judges should not on rules of property or practice overrule each other except for the most cogent rea-

has decided that the questions decided in a decision of a lower court were not involved in the case, such decision is not a precedent for a co-ordinate lower court.[26] Not every decision is a binding precedent, as where, to satisfy a constitution which required the concurrence of the majority of a court for a decision, an evenly divided court affirmed the judgment below in order to end the litigation, the decision was held to have no force as a precedent;[27] also a prior decision may control a later one where the court was divided in its reasoning;[28] and so where the language used had not in view the matter as to which the case is invoked as a precedent,[29] or where a matter involved in a case passed without consideration.[30] and the same rule obtains as to "unofficial" opinions of supreme court commissioners;[31] but opinions of supreme court commissioners of Nebraska published "officially" are in all respects opinions of the court.[32] Where a court overrules its own decision and a defendant in a criminal case may have acted on the advice of counsel based on the law as laid down in the earlier decision, a new trial will be ordered under the rules of law formerly laid down, but the new construction will be followed in all subsequent cases.[33]

Law of the case.—A phase of the law often met is the adherence in a retrial to the law of the case as already decided.[34]

§ 2. *Decisions and obiter dicta.*[35]—A point may be considered and passed upon by the court which only comes in question incidentally and is not necessary to the determination of the case. In that event the decision, so far as it concerns that point, is merely obiter dictum and not entitled to the weight of a precedent.[36] Where a decision of any one of two or more questions presented would dispose of a case and the court decides them all, the decision is not mere obiter, but a binding precedent as to all points decided;[37] and where a court passes upon a question not necessarily involved in the decision, but deemed pertinent in deciding the case, its decision on that point is of persuasive force and not mere obiter dictum.[38]

sons. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650.

26. Ex parte Conley [Tex. Cr. App.] 75 S. W. 301.

27. State v. McClung [Fla.] 37 So. 51.

28. Bailey v. McAlpin [Ga.] 50 S. E. 388.

29. Tarrant County v. Butler [Tex. Civ. App.] 80 S. W. 656; Flint v. Chaloupka [Neb.] 99 N. W. 825, 826.

30. The fact that the court entertained jurisdiction in a prior case, in the absence of any suggestion as to the want of it, renders the case not binding as a precedent. New v. Territory of Oklahoma, 25 S. Ct. 68. But where a court has enforced a statute repeatedly without discussion of its constitutionality, its decisions will be regarded as a rule of property binding as a precedent on the question of the validity of the statute. Lacy v. Gunn, 144 Cal. 511, 78 P. 30.

31. "The doctrine of stare decisis has no application to decisions of this character. The court is not necessarily bound by anything said therein, nor to the propositions of law enunciated on which the conclusions are predicated. It only approves the conclusions. * * * They [the decisions] rest on an altogether different footing from opinions published in official reports." Flint v. Chaloupka [Neb.] 99 N. W. 825; Hoagland v. Stewart [Neb.] 100 N. W. 133.

32. Lancaster County v. McDonald [Neb.] 103 N. W. 78.

33. State v. Bell [N. C.] 49 S. E. 163.

34. See full treatment Appeal and Review, § 15F, 3 Curr. L. 295. A ruling on demurrer may be vacated for error at any time during trial without violating the law of the case. De La Beckwith v. Superior Court of Colusa County [Cal.] 80 P. 717. A clearly erroneous ruling will be reversed on second appeal if no change of status or vesting of property has intervened. Board of School Directors of Buncombe County v. Asheville [N. C.] 50 S. E. 279.

35. See 2 Curr. L. 1699.

36. First Nat. Bank v. Covington, 129 F. 792, 797; Southern R. Co. v. Simpson [C. C. A.] 131 F. 705. "It is not so much what a court says, in the decision of a case, as that which it actually does, that should be considered in applying the principles of the case as a precedent. Courts often use language in an opinion responsive to an argument of counsel, of which the reader of the opinion is not cognizant and thus general statements may be given undue weight." Flint v. Chaloupka [Neb.] 99 N. W. 825, 826. An inadvertent statement in the syllabus of decision on a point not in issue and not considered by the court is obiter dictum. Wilson v. Ulysses Tp. of Butler County [Neb.] 101 N. W. 986.

37. First Nat. Bank v. Covington, 129 F. 792, 799.

38. Where the question was whether a party instituting condemnation proceedings could dismiss them before the filing of the

§ 3. *Rules of property.*[39]—Where a court has recognized, without discussion, a statute as valid and has enforced its provisions, and its decisions have been generally considered and acted on as judicial recognitions of the validity of the statute, the decisions are considered rules of property and will be followed.[40] A decision, in reliance upon which rights of innocent purchasers have arisen, will not be overruled where the effect would be to disturb those rights.[41]

§ 4. *Courts of different jurisdictions. A. Inferior and appellate.*[42]—Inferior courts are bound by the decisions of appellate courts in their jurisdictions made either in a prior phase of the same case,[43] or in other cases involving similar facts,[44] even when there are questions involved, which were not raised or considered by the appellate court, if the cases are substantially alike.[45]

(§ *A*) *B. Federal and state courts. When Federal courts follow state decisions.*[46]—The Federal courts are bound by the decisions of state courts on matters of local but not of general or Federal law.[47] Hence they follow the construction put upon a state statute by the highest court of the state,[48] especially

award, a statement that it could not dismiss after the filing of the award was held not to be mere obiter dictum. Sprague v. Northern Pac. R. Co. [Wis.] 100 N. W. 842. A matter involved in the case and decided after argument is not dictum, though but indirectly involved in the turning point of the case. Lancaster County v. McDonald [Neb.] 103 N. W. 78.

39. See 2 Curr. L. 1700.

40. Lacy v. Gunn, 144 Cal. 511, 78 P. 30. As to interpretation of state statute by state courts establishing a rule of property, binding on Federal courts, see post, § 4B.

41. Validity of municipal bonds. State v. Bristol, 109 Tenn. 315, 70 S. W. 1031.

42. See 2 Curr. L. 1700.

43. Kent v. Williams [Cal.] 79 P. 527; Hoagland v. Stewart [Neb.] 100 N. W. 133; New York Life Ins. Co. v. English [Tex. Civ. App.] 79 S. W. 616, 619; Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180, 182. A prior decision of an appellate court in the same case is binding upon it as part of the law of the case, especially on a question of practice where the parties have acted upon the decision. Williams v. Miles [Neb.] 102 N. W. 482, 483. A fuller discussion of the "law of the case" will be found in Appeal and Review, § 15F, 3 Curr. L. 295.

44. Carson v. Southern R. Co., 68 S. C. 55, 46 S. E. 525, 529.

45. Ballou v. United States Flour Milling Co. [N. J. Eq.] 59 A. 331.

46. See 2 Curr. L. 1701.

47. "The Federal courts follow state courts in cases depending on the laws of a particular state and not controlled by the constitution, laws or treaties of the United States or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application." York v. Washburn [C. C. A.] 129 F. 564, 567. The United States supreme court is concluded by a decision of the state court as to conspiracy to defraud as a common-law offense, no Federal question being involved. Howard v. Fleming, 191 U. S. 126, 48 Law. Ed. 121.

48. York v. Washburn [C. C. A.] 129 F. 564, 567.

Illustrations: Decisions construing statute of limitations of action for land which have become rule of property. Scott v. Mineral Development Co. [C. C. A.] 130 F. 497. Statute as to issue of patents for land. Lockard v. Asher Lumber Co. [C. C. A.] 131 F. 689. As to constitutionality of bill increasing salaries of judges. Michell Co. v. Matthues, 134 F. 493. Rule of evidence based on statute. Manhattan Life Ins. Co. v. Albro, [C. C. A.] 127 F. 281. As to validity and execution of local improvement statute. Treat v. Chicago [C. C. A.] 130 F. 443. Whether chattel mortgage is valid is local, though necessary to decide whether mortgagee in possession took thereby a preference in bankruptcy. Thompson v. Fairbanks, 25 S. Ct. 306. Construction of state "anti-trust" law. National Cotton Oil Co. v. Texas, 25 S. Ct. 379; Southern Cotton Oil Co. v. Texas, 25 S. Ct. 383. Interpretation of state statute binding, though found only by implication from applications of it. Jacobson v. Commonwealth, 25 S. Ct. 358. Validity of county ordinance. Flanigan v. Sierra County, 25 S. Ct. 314; Wheeler v. Plumas County, 25 S. Ct. 316. Whether one was incompetent as witness under state law because a physician to the person against whom the testimony was sought. Supreme Lodge K. P. v. Meyer, 25 S. Ct. 754. Rights of policy holder under the insurance contract. Polk v. Mutual Reserve Fund Life Ass'n, 137 F. 273. Whether return of substituted service in Federal courts can be amended is a question as to which state decisions are binding. King v. Davis, 137 F. 198. That a state statute gives damages regardless of contributory negligence of one injured by locomotive, the bell of which was not sounded. Rogers v. Cincinnati, etc., R. Co. [C. C. A.] 136 F. 573. State decision that board of equalization of taxes might levy in percentages. Paine v. Germantown Trust Co. [C. C. A.] 136 F. 527. Validity of road bond act under state constitution. Rees v. Olmsted [C. C. A.] 135 F. 296.

When a cause of action is created by statute, the question when the right of action is brought into existence and what conditions authorize its enforcement are matters for judicial construction, as to which the decisions of the highest state court are controlling. Whitman v. Atkinson [C. C. A.] 130 F. 759.

where the construction of the statute is of such long standing and so firmly established as to constitute a rule of property,[49] and even where the state court ascertains the meaning and scope of the statute, as well as its validity, by pursuing a different rule of construction from that used by the Federal courts.[50] But the opinions of intermediate appellate state courts[51] and dicta of the highest courts[52] are persuasive merely. Where the question of the validity of a statute has never been passed upon by the highest state court and the weight of authority of the lower courts is in favor of the constitutionality of the act, the Federal court should hold it constitutional, if possible.[53] The correctness of the state court ruling is immaterial,[54] and the Federal court is bound to assume that when the question arose in the state court it was thoroughly considered by that tribunal, and that the decision rendered embodies its deliberate judgment thereon.[55] Where there are conflicting decisions of the state court, the Federal court will ordinarily follow the latest, unless contract rights have become vested under the earlier decisions.[56] The construction by a state court of a state statute is not binding upon the Federal courts where rights had become vested before the decision.[57] The state courts are not followed as to the construction of the state constitutions and laws as to rights under Federal laws or constitution,[58] or involving some rule of general[59] or com-

The question whether a state statute is separable so that part may be held a violation of the Federal constitution and part valid is one upon which the decisions of the state courts are binding on the Federal courts. Olsen v. Smith, 25 S. Ct. 52, 54.

49. Statute of Frauds applied to real estate. York v. Washburn [C. C. A.] 129 F. 564; Scott v. Mineral Development Co. [C. C. A.] 130 F. 497.

50. "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations, as well as the method by which they shall be determined." Smiley v. Kansas, 25 S. Ct. 289, 290.

51. Anglo-American Land, Mortgage & Agency Co. v. Lombard [C. C. A.] 132 F. 721, 741.

52. First Nat. Bank v. City of Covington, 129 F. 792, 797; Southern R. Co. v. Simpson [C. C. A.] 131 F. 705, 709.

53. Kane v. Erie R. Co. [C. C. A.] 133 F. 681.

54, 55. Manhattan Life Ins. Co. v. Albro [C. C. A.] 127 F. 281.

56. Yocum v. Parker [C. C. A.] 134 F. 205, 212.

57. Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 890, 909; Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180. As to rights antedating a state decision, the Federal courts are not bound. Wicomico County Com'rs v. Bancroft [C. C. A.] 135 F. 977. Decisions impairing or destroying contract rights previously acquired by citizens of different states. Westinghouse Air Brake Co. v. Kansas City Southern R. Co. [C. C. A.] 137 F. 26.

58. Kibbe v. Stevenson Iron Min. Co. [C. C. A.] 136 F. 147. Where a Federal statute forbade the admission in evidence of instruments not stamped as required by Federal statute, decisions of a state court admitting such instruments are not binding on the Federal courts. Sackett v. McCaffrey [C. C. A.] 131 F. 219. A Federal court, in construing the meaning of a state statute as to what contract is contained therein, and whether the state has passed any law impairing its obligation, is not bound by previous decisions in state courts, except when they have been so long and firmly established as to constitute a rule of property, but will decide independently, whether there is a contract, and whether its obligation has been impaired (Columbia Ave., etc., Trust Co. v. Dawson, 130 F. 152, 166), especially where the law in the state was unsettled at the time the contract was made, although it has been settled since that time (Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180).

59. Kibbe v. Stevenson Iron Min. Co. [C. C. A.] 136 F. 147.

Illustrations: The right of collateral attack upon a judgment. Phoenix Bridge Co. v. Castleberry [C. C. A.] 131 F. 175. Return of replevied property. Three States Lumber Co. v. Blanks [C. C. A.] 133 F. 479. Construction of will. Russell v. United States Trust Co., 127 F. 445. Necessity of insurable interest in assignee of policy of life insurance. Gordon v. Ware Nat. Bank [C. C. A.] 132 F. 444.

Contra: Where the highest state court has decided that an adjudication as to the taxes of one year is not a bar to the recovery of the taxes of another year, the Federal court will follow that rule. First Nat. Bank v. Covington, 129 F. 792.

"A well defined distinction exists between the establishment of a rule of property by means of the interpretation by the highest court of a state of the general principles of common law and the construction by such a court of a local statute. In the former case a settled course of decisions of the state court is generally requisite. A single decision, although always persuasive, may not be controlling." Yocum v. Parker [C. C. A.] 134 F. 205. Whether special limitation of action by contract is compatible with public policy is general. Spinks v. Mutual Reserve Fund Life Ass'n, 137 F. 169. What presumptions will aid defective return of substituted service is general. King v. Davis, 137 F. 198.

mercial law.[60] Federal courts have refused to follow state decisions on the proposition that not even in equity do the statutes permit a married woman to contract with her husband respecting her sole property.[61]

When state courts follow Federal decisions.[62]—Decisions of the Federal courts are binding on the state courts as to the construction of the Federal constitution[63] or statutes.[64] On questions of general law, the decisions of the Federal courts do not control the state courts.[65]

(§ 4) *C. Different Federal courts.*[66]—Although the Federal courts in one circuit will follow, if possible, decisions in other circuits, they are not bound to do so, especially where the decisions in other circuits are inharmonious.[67] In regard to validity of patents, the decisions of other circuit courts of appeals will have especial weight.[68]

(§ 4) *D. Different state courts.*[69]—A state court will follow its own previous interpretation of the common law, and is not bound by that of the court of another state as to a contract made in that state,[70] or a will executed there, devising land in the state where the question arises.[71] The court of one state will not attempt in an action upon a judgment rendered by the court of another state, to correct an error of the foreign court in rendering the judgment.[72] The court of one state will follow the decision of the court of another state construing a local statute, but it need not follow a decision of said court as to the mode of procedure and practice in giving the remedies provided by the statute.[73]

STATE LANDS; STATEMENT OF CLAIM; STATEMENT OF FACTS, see latest topical index.

STATES.

§ 1. **Boundaries and Jurisdiction (1516).**
§ 2. **Property (1517).**
§ 3. **Contracts (1517).**
§ 4. **Officers and Employes (1517).**
§ 5. **Fiscal Management (1519).**
§ 6. **Claims (1520).**
§ 7. **Actions By and Against (1521).**

§ 1. *Boundaries and jurisdiction. Boundaries.*[74]—A boundary line variant

60. Kibbe v. Stevenson Iron Min. Co. [C. C. A.] 136 F. 147. Existence of double insurance. Meigs v. London Assur. Co., 126 F. 781.

61. James v. Gray, 131 F. 401, applying Massachusetts Married Women's Act.

Note: The generally accepted rule is that no right is enforced save that recognized by the state courts, but that the remedy is outside this rule. Lippincott v. Mitchell, 94 U. S. 767, 24 Law. Ed. 315; Allen v. Massey, 17 Wall. [U. S.] 351, 21 Law. Ed. 542, which were cases relating to property rights; also, Meister v. Moore, 96 U. S. 76, 24 Law. Ed. 826; Maynard v. Hill, 125 U. S. 190, 31 Law. Ed. 654. The leading case so holding is Meade v. Beale, Taney, 393, wherein it is said that state decisions will be followed, though contrary to the generally accepted doctrines of equity. It is said that James v. Gray, 131 F. 401, while perhaps not so intended, transcends this limitation and affects matter of right.—From note 4 Columbia L. R. 589.

62. See 2 Curr. L. 1702.

63. As to discrimination in liquor law within the provisions of the fourteenth amendment to the Federal constitution. State v. Scampini [Vt.] 59 A. 201, 210. As to what constitutes a fugitive from justice within Federal constitution. In re Letcher, 145 Cal. 563, 79 P. 65.

64. Federal extradition laws. Ex parte Dennison [Neb.] 101 N. W. 1045. What is a preference under Bankruptcy Law. Stewart v. Hoffman [Mont.] 81 P. 3.

65. Decision of Federal court on fellow-servant doctrine not followed in subsequent suit for same cause of action in state court. Spring Valley Coal Co. v. Patting, 210 Ill. 342, 351, 71 N. E. 371.

66. See 2 Curr. L. 1702.

67. As to patents. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167.

68. Westinghouse Elec. & Mfg. Co. v. Stanley Instrument Co. [C. C. A.] 133 F. 167.

69. See 2 Curr. L. 1703.

70. Akers v. Jefferson County Sav. Bank, 120 Ga. 1066, 48 S. E. 424.

71. The court declared that it had been repeatedly held that the courts of the respective states will construe for themselves wills and other instruments in writing affecting the titles to land situated within their state, by the law of their state. Folsom v. Board of Trustees of Ohio State University, 210 Ill. 404, 71 N. E. 384.

72. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

73. Clark v. Knowles, 187 Mass. 35, 72 N. E. 352.

74. See 2 Curr. L. 1703.

from the original grant may be established by prescription if thereby the political power and influence of a state be not enlarged.[75] Avulsion has no effect on a boundary line. It remains in the center of the original channel.[76]

Jurisdiction.[77]—The jurisdiction of a state is co-extensive with its territorial boundaries,[78] but extends no further;[79] but the police power of a state, for certain purposes, extends over public lands of the United States within the state.[80]

§ 2. *Property.*[81]—Adverse possession does not run against the state.[82] A constitutional provision that the credit of the state shall not be given to a private individual is not violated by a statute providing for the giving of a lien on state tide lands where the state is not liable for the lien,[83] nor does such a statute contravene a provision against contracting a debt by or on behalf of the state where the land becomes liable after the state has parted with its title.[84]

§ 3. *Contracts.*[85]—The revocation of a waiver of its exemption from action against it is not an impairment of the obligation of a contract entered into when the waiver was in effect.[86] An estoppel may be created in favor of a state by statements made to one of its employes.[87]

§ 4. *Officers and employes.*[88]—Presidential electors are for certain purposes

75. Town of Searsburg v. Woodford, 76 Vt. 370, 57 A. 961.

76. Avulsion by Missouri River which forms the boundary between Missouri and Nebraska. Missouri v. Nebraska, 25 S. Ct. 155; Id., 25 S. Ct. 580.

77. See 2 Curr. L. 1703.

78. Texas has jurisdiction over the Red River to the center of the stream. Parsons v. Hunt [Tex.] 84 S. W. 644.

79. Where low water mark of a river forms the boundary of a state, it has no jurisdiction beyond such mark. Evansville C. & H. Traction Co. v. Henderson Bridge Co., 134 F. 973. Its statutes have no extra-territorial effect. Holshouser Co. v. Gold Hill Copper Co. [N. C.] 50 S. E. 650.

80. Relative to the keeping of live stock. Spencer v. Morgan [Idaho] 79 P. 459.

NOTE. States as corporations: The different states and territories of the union are corporations. State v. Woram, 6 Hill [N. Y.] 33, 40 Am. Dec. 378; Dikes v. Miller, 25 Tex. 281; Michigan State Bank v. Hastings, 1 Doug. [Mich.] 225, 41 Am. Dec. 549; People v. St. Louis, 10 Ill. 351, 48 Am. Dec. 339; Territory v. Hilderbrand, 2 Mont. 426. A state was held not to be a corporation, however, within the meaning of an act of congress requiring payment of a duty by "every firm, corporation, etc., engaged in transporting persons for hire." State v. Atkins, 35 Ga. 315. Act Congress June 30, 1864, as amended by act March 3, 1865. See Clark & M. Corp. § 32.

81. See 2 Curr. L. 1704.

82. See Adverse Possession, 3 Curr. L. 51. Topping v. Cohn [Neb.] 99 N. W. 372.

83, 84. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845.

85. See 2 Curr. L. 1704.

86. See Public Contracts, 4 Curr. L. 1089.

The plaintiff had a contract with the defendant for installing a heating plant in a state public school. When the contract was made with the school board, the laws of the state had made the board a corporate body, with power to sue and be sued. After the contract was made the state deprived the board of the power to sue and be sued. Held, the power to sue and be sued, which the state gave the board, was no part of the contract, and can be revoked by the state without impairing any contract obligation. Wheeler v. Board of Control of State Public Schools [Mich.] 100 N. W. 394.

Note: Since the school board was a creature of the state, and in a sense its agent, the suit against it was in effect regarded as a suit against the state. The general doctrine is that a state cannot be sued against its consent (Railroad Co. v. Tennessee, 101 U. S. 337, 25 Law. Ed. 960); but that it may waive this immunity (Clark v. Barnard, 108 U. S. 436, 447, 27 Law. Ed. 780). As over against the right of the state, stands the prohibition of the United States Constitution against laws impairing contract obligations. It would seem as if the act of the state in the principal case did impair plaintiff's contract right. This would be a logical view to take, but the courts have not followed it. The notion that the state could not be sued against its consent, or unless it waived the privilege of sovereignty, was too strong to be overcome. See Beers v. Arkansas, 20 How. [U. S.] 527, 15 Law. Ed. 991. Cooley's Cons. Lim. p. 388.—4 Columbia L. R. 599.

87. Statements made to an architect of a public building employed by a state board. Fransen v. Regents of Education of South Dakota [C. C. A.] 133 F. 24.

Note: A state may make a valid contract in a like manner as a private individual may do so (State v. Bank, 29 Houst. [Del.] 99, 73 Am. Dec. 699), and in entering into a contract with its own citizens can claim no exemptions from the rules applicable to contracts between individuals. Patton v. Gilmer, 42 Ala. 548, 94 Am. Dec. 665. When it breaks its contracts it may be liable for prospective profits (Danolds v. State, 89 N. Y. 36, 42 Am. Rep. 277); but it cannot be sued except by its consent (Carter v. State, 42 La. Ann. 927, 21 Am. St. Rep. and note; Julian v. State, 122 Ind. 68). See note to Carr v. State [Ind.] 22 Am. St. Rep. 649.

88. See 2 Curr. L. 1705. See, also, Officers and Public Employes, 4 Curr. L. 854.

regarded as state officers.[89] An officer receiving his appointment from a political subdivision is a state officer when he performs duties which affect the general public welfare.[90] Where a legal office is established without any specific provision for the appointment of a person to fill it, the governor may appoint,[91] and since the office may be filled by a de facto officer, the validity of the appointment and the right of the appointee to hold cannot be questioned in a habeas corpus proceeding.[92] A power in the legislature to provide for appointments to fill public offices may be delegated,[93] and this power not being for the benefit of the body to whom it is delegated, is not a right or privilege forbidden by the constitution.[94] The legislature has no power to provide for more justices of the peace than are provided for by the constitution.[95]

The deputation of an assistant is confined to the term of the official appointing; hence such deputy's bond does not extend beyond such term.[96]

Whether the discretion vested in the legislature to apportion senators and representatives has been abused is a judicial question,[97] and may be raised by any voting citizen in the state, whether or not the wrong complained of exists in his district.[98] The clerk, sheriff, and auditor of the county in which the action is brought are the only necessary parties.[99]

The governor is not a part of the law making body. His authority over the legislature is limited to the recommendation of such legislation as he deems expedient. The power of the legislature to enact such legislation is plenary.[1] A constitutional prohibition against increasing the governor's compensation during his term is not violated by an appropriation for an executive mansion,[2] unless part of the appropriation be used for the purchase of provisions to be used there.[3] A power in the legislature to determine a contested election to the office of governor does not give it power to adopt a report to the effect that frauds rendered it impossible to determine who had been elected, and declare a vacancy in the office.[4] The legislature may call on the supreme court for an opinion as to whether it may adopt such report and declare a vacancy.[5] In the absence of fraud or collusion, the acts of public officers within the limits of power conferred upon them are acts of the state.[6]

Where the state auditor acts in a quasi-judicial capacity and in a manner which affects rights of citizens analogous to the manner in which they would be affected by the decision of a court, his acts may be reviewed by certiorari.[7] The return to the writ is to be taken as a true statement of the facts relating to the audit.[8]

89. Within the meaning of a constitutional provision providing for the filling of a vacancy in an elective office at the next succeeding annual election. Donelan v. Bird, 26 Ky. L. R. 55, 80 S. W. 796.

90. A town constable committing a prisoner to a town lockup. Mains v. Ft. Fairfield [Me.] 59 A. 87.

91. Act Feb. 27, 1901, establishing a State Board of Medical Examiners. Ex parte Gerino, 143 Cal. 412, 77 P. 166.

92. Ex parte Gerino, 143 Cal. 412, 77 P. 166.

93. Under a constitutional provision that all officers whose offices may be hereafter created by law shall be appointed as the legislature may direct. Ex parte Gerino, 143 Cal. 412, 77 P. 166.

94. Ex parte Gerino, 143 Cal. 412, 77 P. 166.

95. In Tennessee two for each civil district outside of towns. Grainger County v. State [Tenn.] 80 S. W. 750.

96. Jackson v. Martin, 136 N. C. 196, 48 S. E. 672.

97. Brooks v. State, 162 Ind. 568, 70 N. E. 980. Acts 1903, p. 358, c. 206, apportions senators and representatives in an unequal manner and is a violation of Const. §§ 2-6. Id.

98, 99. Brooks v. State, 162 Ind. 568, 70 N. E. 980.

1. State v. Clancy [Mont.] 77 P. 312.

2, 3. Bailey v. Kelly [Kan.] 79 P. 735.

4, 5. In re Senate Resolution No. 10 [Colo.] 79 P. 1009.

6. State engineer acting under Laws 1902, p. 1125, c. 473, held not liable for trespass for entering on private property, though the statute did not in terms authorize the entry. The entry was necessary in order to make the survey. Litchfield v. Bond, 93 N. Y. S. 1016.

7. Refusal to pay a bounty because the statute providing it is unconstitutional.

Mandamus will not issue to compel a public officer to do a nugatory act.[9]

Under a constitutional provision that the attorney general shall perform such duties as are prescribed by law, he has no powers except such as are given him by statute,[10] and may not intervene on behalf of the state in any action other than those specified by law;[11] but his statutory powers can be limited only by a clear expression of the legislature to such effect.[12] Where he is party to a civil proceeding in court or an officer representing public interests he is bound by the action of his authorized attorney as any other party is.[13]

When the duty to prepare proposed legislation is vested in the legislature, the trustees of a state institution have no power to employ counsel to draft a revision of the laws relative to such institution.[14]

§ 5. *Fiscal management.*[15]—Scrip can be issued only in accordance with constitutional limitations.[16] State funds can be paid out of the treasury only on duly executed[17] and countersigned warrants.[18]

Though the care of the poor generally has been given over to the counties and cities, the state is not precluded from making an appropriation for their use.[19] An appropriation to a private corporation organized to care for a certain class of dependent poor is for a public purpose,[20] and is not repugnant to a constitutional provision against making a donation to any private corporation,[21] nor is it a loan of the credit of the state;[22] and since it is alterable both as to amount and manner of application, it constitutes a mere gratuity and does not create an indebtedness against the state.[23] An appropriation for the establishment and maintenance of a state fair is for a public purpose.[24] An appropriation to aid counties in constructing roads does not contravene a constitutional prohibition against giving aid to any individual, association, or corporation,[25] or one forbidding the general assembly

Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454.

8. People v. Miller, 91 N. Y. S. 639.

9. The state comptroller may withhold a warrant on the state treasurer until it can be honored. Trustees of Rutgers College v. Morgan [N. J. Err. & App.] 60 A. 205.

10. Ark. const. art. 6, § 22. Railroad Tax Cases, 136 F. 233.

11. Kirby's Dig. art. 6, c. 62, enumerates in what actions he shall represent the state. Railroad Tax Cases, 136 F. 233.

12. Rev. Laws, c. 7, §§ 1, 9, giving him power to appoint assistants and employ such additional legal assistance as he deems necessary, held not to limit his previous power to give jurisdiction to the courts and to bind himself as a party representing the public. McQuesten v. Attorney General, 187 Mass. 185, 72 N. E. 965.

13. McQuesten v. Attorney General, 187 Mass. 185, 72 N. E. 965.

14. Trustees of Michigan asylum for the insane. Phelps v. Auditor General [Mich.] 99 N. W. 374.

15. See 2 Curr. L. 1706.

16. Issue of revenue scrip under South Carolina Act of March 2, 1872, to relieve the state of its liability on railway bonds, authorized by act of September 15, 1868, when there was no outstanding liability, is prohibited by Const. April 16, 1868, art. 9, § 10, forbidding the issue of scrip except in redemption of an evidence of indebtedness previously issued. Lee v. Robinson, 25 S. Ct. 180.

17. Laws 1893, p. 45, c. 4121, providing a special method of disbursing funds by the state treasurer, does not conflict with Const. 1885, art. 4, § 24, and when a requisition is made by the clerk on the comptroller for money to be paid to jurors and witnesses, and the amount deemed by him necessary is endorsed on the requisition and countersigned by the governor, such requisition becomes an order on the treasurer and is authority for the transfer of the money to the clerk. State v. Croom [Fla.] 37 So. 303. The state comptroller is not authorized to draw his warrants for coyote bounties earned under St. 1891, p. 280, c. 198, until the claim has been approved by the state board of examiners. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

18. The requisition must be countersigned by the governor. State v. Knott [Fla.] 37 So. 307.

19. Hager v. Kentucky Children's Home Soc., 26 Ky. L. R. 1133, 83 S. W. 605.

20. Acts 1904, p. 33, c. 7, appropriating a sum for the benefit of a home for destitute children. Hager v. Kentucky Children's Home Soc., 26 Ky. L. R. 1133, 83 S. W. 605.

21. The corporation being required to give bond and render annual accounts. Hager v. Kentucky Children's Home Soc., 26 Ky. L. R. 1133, 83 S. W. 605.

22, 23. Hager v. Kentucky Children's Home Soc., 26 Ky. L. R. 1133, 83 S. W. 605.

24. Act March 29, 1902, p. 243, c. 112. Kentucky Live Stock Breeders' Ass'n v. Hager [Ky.] 85 S. W. 738.

25. Acts 1904, p. 388, c. 225. Bonsal v. Yellott [Md.] 60 A. 593.

from involving the state in the construction of works of internal improvement, or granting any aid thereto.[26] A provision that adjacent state land shall be liable for its proportion of the cost of a public improvement in the same manner as the property of private individuals does not contravene a constitutional exemption from taxation of public property used for public purposes,[27] nor one forbidding any debt to be contracted on behalf of the commonwealth, except for specified purposes.[28] Unless forbidden by the constitution, the legislature may provide for its attendance in a body at a patriotic celebration in another state, and that the expenses be paid out of public funds,[29] and authorize a committee to make a contract for meals.[30] Such a provision does not violate a constitutional inhibition against increasing the compensation of legislators during their term.[31] In Kentucky the expenses of the militia when called into active service, which exceed the general appropriation, are payable out of the treasury without any special appropriation.[32]

Under a statute authorizing a revenue agent to investigate the collection and disbursement of public funds, he may bring action against a county judge to recover public moneys alleged to have been illegally paid over to him.[33] He may also maintain action to recover an unaccounted for balance paid over to such judge by the back tax attorney,[34] and though the district attorney general has power to look after the accounts of public financial officers, the revenue agent may without joining him institute proceedings to inquire into the settlement of county claims.[35] A limitation on the power of the legislature to create an indebtedness does not apply to the power of the people to create a liability at a general election.[36] Liabilities for which no provision has been made by appropriation are not debts.[37] A waiver of the defense of limitations is not a gift of state funds.[38]

§ 6. *Claims.*[39]—States not being subject to actions in their own courts have generally provided tribunals in which claims may be heard.[40] No moral obligation can be predicated on an unconstitutional statute.[41] A claim may be barred by limitations,[42] if not presented for allowance within the statutory period.[43] Mandamus will not issue to compel the issue of a warrant for or the payment of a claim if there is no fund to meet it,[44] nor to compel the allow-

26. Bonsal v. Yellott [Md.] 60 A. 593.

27. Ky. St. 1903, § 2833a. Hager v. Gast [Ky.] 84 S. W. 556.

28. Hager v. Gast [Ky.] 84 S. W. 556.

29. Legislature of Pennsylvania attending the dedication of the General Grant Monument in New York. Russ v. Com. [Pa.] 60 A. 169.

30. Resolution of the legislature held to give such power to the committee. Russ v. Com. [Pa.] 60 A. 169.

31. Russ v. Com. [Pa.] 60 A. 169.

32. Sweeney v. Com., 26 Ky. L. R. 877, 82 S. W. 639.

33. Act 1901, p. 373, c. 174. State v. Kelley [Tenn.] 82 S. W. 311.

34, 35. State v. Kelley [Tenn.] 82 S. W. 311.

36. Indebtedness of the state, represented by funded debt bonds issued under St. 1869-70, held not state debts within Const. art. 16, § 1, limiting state indebtedness. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

37. Claim for coyote bounties under St. 1891, p. 280, c. 198, in the absence of an appropriation to pay the same, held not debts of the state within Const. art. 16, § 1. Bickerdike v. State, 144 Cal. 681, 78 P. 270. St. 1901, p. 280, c. 198, creating a coyote bounty, held not in violation of Const. art. 16, § 1, creating a legislative debt limit. Id.

38. Bickerdike v. State, 144 Cal. 681, 78 P. 270.

39. See 2 Curr. L. 1706.

40. One whose lands were trespassed on by the state engineer may present his claim for damages in the court of claims [Code Civ. Proc. § 264]. Litchfield v. Bond, 93 N. Y. S. 1016.

41. Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 97 N. W. 454. A contract made by the legislature in violation of the constitution does not create a moral obligation of the state to discharge it. Oxnard Beet Sugar Co. v. State [Neb.] 102 N. W. 80.

42. Where claimant does not apply for a recommendatory decision under § 10, art. 5, Const. for several years after it becomes due. Small v. State [Idaho] 76 P. 765.

43. The fact that a state has not made an appropriation for the payment of a claim does not excuse a creditor from presenting it for allowance within the statutory period. Lincoln Safe Deposit & Trust Co. v. Weston [Neb.] 101 N. W. 16.

44. Where a claim is payable only out of

ance of a claim where such allowance lies in the discretion of a state board.[45] Where the claim arises out of a single transaction, it is proper to audit it in one item.[46] In auditing a claim the comptroller properly takes into consideration his own knowledge relative to value of services on which it is based,[47] and his judgment will not be overruled unless it is clear that he has erred.[48] In Michigan it is the duty of the auditor general to refuse to audit claims for unauthorized expenditures without regard to the motives or good faith which prompted them.[49] The state may not pay a claim to the original creditor where it has notice of its assignment.[50] Where the validity of a claim against the state has been determined by a court of competent jurisdiction, the act of the auditor of public accounts in drawing his warrant for the amount is ministerial.[51] He is not liable on his official bond for payment of a just claim, though paid on vouchers signed by persons wrongfully acting as governor and attorney general.[52]

§ 7. *Actions by and against.*[53]—A state is not subject to action or suit by a private individual, except by its consent, or unless it waives its sovereign right,[54] nor is one of its departments clothed with public duties.[55] In such case, relief can be granted only by the legislature,[56] and its immunity cannot be waived by the attorney general,[57] nor can he commit or bind the state by a proceeding, the result of which places the state in the attitude of a defendant.[58] Where a state waives its sovereign right, actions against it can be prosecuted only in the manner prescribed by statute.[59] A judgment for or against it is as binding as a judgment against a private individual.[60] Where one state sues another in its courts, it is en-

a specific appropriation which has been exhausted. Bosworth v. Shuck, 26 Ky. L. R. 324, 81 S. W. 240.

45. Where a state board is not required to entertain a second time a claim against the state once rejected by it unless upon such facts as between individuals would furnish ground for a new trial, mandamus will not lie to compel the allowance of a claim once rejected. Sullivan v. Gage, 145 Cal. 759, 79 P. 537. Counsel fees for an attorney for a receiver appointed by the state are not "costs" within a statute providing that in a suit where the state is a party and costs are awarded against it, they must be paid out of the state treasury. State Board of Examiners have a discretion in allowing such a claim. Id.

46. Claim by one employed to appraise several tracts of land and testify in regard thereto in a certain action, there having been but one employment and the testimony having all been given at one time. People v. Miller, 91 N. Y. S. 639.

47. People v. Miller, 91 N. Y. S. 639.

48. Not where audited at the same amount as fixed by the attorney general and state banking department whose duty it was to pass thereon. People v. Miller, 91 N. Y. S. 639.

49. Comp. Laws 1897, § 1207. Phelps v. Auditor General [Mich.] 99 N. W. 374.

50. It is no defense as against the assignee that it has made payment to the original creditor. Williams v. State, 94 App. Div. 489, 88 N. Y. S. 19.

51. State v. Weston [Neb.] 99 N. W. 520.

52. Expenses of militia called into active service. Sweeney v. Com., 26 Ky. L. R. 877, 82 S. W. 629.

53. See 2 Curr. L. 1706.

54. Laws 1900, p. 1614, c. 755 is a waiver of this right, and an authority to the court of claims to award judgment against the state upon a state of facts warranting recovery against a private individual. Williams v. State, 94 App. Div. 489, 88 N. Y. S. 19. Under Rev. Laws, c. 128, § 31, relative to proceedings for registration of land titles, and providing that if the state has a claim adverse to the applicant, notice shall be given the attorney general, the state is a proper party to a proceeding to register title to land over which there is claimed to be a public landing place. McQuesten v. Attorney General, 187 Mass. 185, 72 N. E. 965.

55. The Minnesota State Agricultural Society is a department of the state under ch. 126, Laws 1903. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.

56. Assault and battery by servants of the Minnesota State Agricultural Society. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732.

57. Under a constitutional provision that state shall not be made a party to any action or suit. People v. Sanitary Dist. of Chicago, 210 Ill. 171, 71 N. E. 334.

58. By filing a cross petition in condemnation proceedings. People v. Sanitary Dist. of Chicago, 210 Ill. 171, 71 N. E. 334.

59. Under Code Civ. Proc., providing that the supreme court may certify a cause to the circuit court with direction to submit issues of fact to a jury, the parties cannot by consent confer jurisdiction on the circuit court to determine the facts. Michel Brewing Co. v. State [S. D.] 103 N. W. 40.

60. State v. Cloudt [Tex. Civ. App.] 84 S. W. 415.

titled to no greater consideration as regards the law of comity than an ordinary suitor.[61]

A bill asking that state officials be restrained from the misuse of public moneys or from applying such moneys to purposes not warranted by law is not a suit against the state.[62]

STATUTES.

§ 1. **Enactment (1522).**
§ 2. **Special or Local Laws (1525).**
§ 3. **Subjects and Titles (1529).**
§ 4. **Amendments and Revisions.** Amendments (1532). Reference to the Act Amended (1532). Effect (1533). Revisions (1533).
§ 5. **Interpretation in General (1533).** Every Presumption is in Favor of Validity (1534). Aids to Interpretation (1534). Laws in Parl Materia (1535). Whole Act is to be Considered (1535). General and Particular Provisions (1535). Words (1536). Punctuation (1536). Avoiding Hardship or Absurdity (1536). Presumption of Legislative Knowledge of the Law (1536). Mandatory or Directory Acts (1536). Revisions (1536). Codification (1537). Re-enacted Laws (1537). Strict or Liberal Constructions (1537). General Powers and Limitations of Legislature (1538). Partial Invalidity (1538).
§ 6. **Retrospective Effect (1539).**
§ 7. **Repeal (1539).**

§ 1. *Enactment.*[63]—A bill in order to become a law must be passed according to the procedure prescribed by the constitution.[64] A bill must be introduced while there remains time to pass it.[65] It is usually required that a bill must be read three times in each branch of the legislature,[66] and passed on three different days;[67] but it is always within the power of either branch of the legislature to suspend its rules and pass ordinary bills through their several readings on the same day.[68] The formal call of yeas and nays necessary on final passage does not apply to a motion to reconsider action taken on the passage of a bill,[69] and an amendment requires only a concurrence.[70] No law can be enacted unless both houses pass the same bill.[71] A report of a conference committee appointed by the house and senate must be concurred in by a majority of the conferees of each house,[72] and be adopted by both houses.[73] The adoption of the report by one house does not indicate con-

61. Holshouser Co. v. Gold Hill Copper Co. [N. C.] 50 S. E. 650.

62. Not within the prohibition of Const. 1870, art. 4, § 26, declaring that a state shall not be made a party to any action or suit. Burke v. Snively, 208 Ill. 328, 70 N. E. 327.

63. See 2 Curr. L. 1707.

64. Held valid: Act relative to hawkers and peddlers held to have been validly passed. People v. DeBlaay [Mich.] 100 N. W. 598. Laws 1903, p. 584, c. 110, amending § 3a, art. 13, c. 83, Comp. St. 1901, relative to deposit of county funds, was constitutionally adopted. State v. Cronin [Neb.] 101 N. W. 325.

Held void: Loc. Acts Oct. 6, 1903, relative to transfer of causes from Lawrence county court to the circuit court, repealing Loc. Acts 1898-99, p. 836, held not passed in accordance with the constitutional provisions. Kumpe v. Irwin [Ala.] 36 So. 1024. Act Oct. 12, 1903 (Acts 1903, p. 566), held not passed according to the provisions of the constitution, and therefore not enacted as a law. Board of Revenue of Jefferson County v. Crow [Ala.] 37 So. 469. Acts 1901, p. 114, relative to gambling, was not passed in accordance with constitutional requirements. Rogers v. State [Ark.] 82 S. W. 169.

65. Amendments not germane to original title of bill as introduced are void. People v. Loomis [Mich.] 98 N. W. 262.

Note: The construction of constitutional limitations of time for the introduction of bills is the subject of a note in 67 L. R. A. 965.

66. See 2 Curr. L. 1707, n. 4.

67. Duplicate bills being introduced in the house and senate, respectively, the substitution and final passage of the house bill on the third reading in the senate does not render the substituted bill obnoxious to the constitutional requisite that the bills shall be passed on three different days in the senate. Archibald v. Clark [Tenn.] 82 S. W. 310.

68. Bray v. Williams [N. C.] 49 S. E. 887.

69. Andrews v. People [Colo.] 79 P. 1031.

70. The substitution of a new bill by the house, instead of passing the bill which the senate had passed can be considered by the senate an amendment. Callison v. Brake [C. C. A.] 129 F. 196.

71. Under Const. art. 5, § 21, providing that no law shall be passed except by bill, and § 22, relative to voting on bills. Rogers v. State [Ark.] 82 S. W. 169. A bill must not be so altered or amended as to change its purpose. Acts 1900-01, p. 2598, as originally introduced and amended, held not to violate the constitutional provision that no bill shall be so altered or amended as to change its purpose. Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85.

72. Board of Revenue of Jefferson County v. Crow [Ala.] 37 So. 469. Under Const. § 64 in order that a vote of the house adopting a report of a conference committee operate as a vote of concurrence in amendments proposed by the senate, it is necessary that the report recommend concurrence. Id.

73. Where the senate sends a bill back

currence in any measures other than those contained in the report.[74] Bills must be signed by the presiding officer of each house,[75] and be approved by the governor,[76] and he must approve the same bill passed by the legislature,[77] and return it to the house in which it originated within the period prescribed by the constitution.[78] A bill takes effect as a law from date of approval by the governor,[79] and where the governor deposits a bill in the office of the secretary of state with his approval indorsed thereon, it passes beyond his control;[80] but the mere fact that he has signed a bill does not cause it to become a law while he retains it during the period he is given to consider it.[81] Where a special bill for the relief of a defendant in an action for a penalty is introduced, it is not necessary to notify the plaintiff of its introduction.[82]

The latest expression of the legislature on a given subject is the law concerning it.[83] Where an annual volume of laws contains two acts, identical except as to the penalty imposed, and both signed on the same day, it is competent for a reviewing court, having before it the case of an accused person sentenced under one of these acts, to determine whether the act under which sentence was pronounced was the one actually in force.[84] In determining such a question, resort will first be had to the journals of the two houses of the general assembly, and failing to thus establish which act was the last to be signed, the one which appears last in the printed volume, and to which the compiler of that volume has given the highest number, will be presumed to be the latest expression of the law-making power on that subject.[85]

A statute must be certain in its terms as to the territory which it affects.[86] An act "concerning private corporations" has been held broad enough to cover legislation respecting public service franchises to corporations.[87]

to the house with amendments which are not concurred in, and a conference committee is appointed which recommends recession from specified amendments. Board of Revenue of Jefferson County v. Crow [Ala.] 37 So. 469.

74. That the house adopted a conference report which recommended recession by the senate from two amendments does not demonstrate a concurrence by the house in other amendments. Board of Revenue of Jefferson County v. Crow [Ala.] 37 So. 469. It is not even evidence of such concurrence. Id.

75. Sess. Laws 1903, p. 671, c. 157, relative to a monument of Abraham Lincoln, held void. State v. Mickey [Neb.] 102 N. W. 679.

76. Under Const. art. 3, § 30, where the governor inadvertently signs a bill and before it leaves his chamber erases his signature there is no approval. Commissioners of Allegany County v. Warfield [Md.] 60 A. 599. The fact that the governor signed it by mistake may be proved by his oral testimony. Id.

77. Enrolled bill signed by the governor (Acts 1900-01, p. 2154) was not the same bill passed by the legislature. Yancy v. Waddell, 139 Ala. 524, 36 So. 733.

78. A constitutional provision that all bills not returned by the governor to the house in which they originated within three days shall become laws means three days during which the house in which it originated is in session. State v. South Norwalk [Conn.] 58 A. 759.

79. Where two bills are passed, one dependent for its validity upon the prior enactment of the other, it is immaterial in what order they were introduced or put upon their final passage, so long as executive approval was in the proper order of priority. Wright v. Overstreet [Ga.] 50 S. E. 487.

80. He cannot thereafter get it and veto it. People v. McCullough, 210 Ill. 448, 71 N. E. 602.

81. Under constitutional provision relative to submission of bills to the governor. People v. McCullough, 210 Ill. 448, 71 N. E. 602. Evidence held to show that the governor vetoed a bill before filing it in the office of the secretary of state. Id.

82. Bray v. Williams [N. C.] 49 S. E. 887.

83. Where there are two conflicting sections in a code and both are derived from legislative acts, that section prevails which is derived from the later act. Berry v. Jordan, 121 Ga. 537, 49 S. E. 607. Date of legislative approval of a compilation held not to be regarded as the date of the approval of an act contained in the compilation. Beard v. State [Tex. Cr. App.] 83 S. W. 824.

84, 85. Roswell Derby, Jr., v. State, 6 Ohio C. C. (N. S.) 91.

86. Acts 1895, p. 21, c. 21; Rev. St. tit. 60, c. 2, relative to irrigation, is not void, because not clearly designating the territory to which it applies. Borden v. Trespalacios Rice & Irrigation Co. [Tex. Civ. App.] 82 S. W. 461. Act Feb. 25, 1905, abolishing Watson judicial district, is not void for uncertainty. Waterman v. Hawkins [Ark.] 86 S. W. 844.

87. Gen. St. 1868, c. 23, and amendatory acts. Laws 1871, p. 168, c. 64; Laws 1876, p. 153, c. 58; Laws 1891, p. 149, c. 85; Laws 1899, p. 191, c. 95; Laws 1901, p. 240, c. 128, held

The journals.[88]—Legislative journals may be looked into for the purpose of ascertaining whether a law was properly enacted,[89] and if it affirmatively appears that it was not, it is void;[90] but if the journals are silent, it is presumed that the constitution was followed,[91] unless it is expressly provided that the journal shall be the only evidence,[92] or that it shall affirmatively appear that constitutional requirements were complied with.[93] The recitals of legislative journals, and the presumptions which attach through their silence, cannot be contradicted by parol.[94]

Special sessions.[95]—It is frequently provided that the business transacted at a special session of the legislature must be limited to the matters mentioned by the governor in calling the session.[96] A general law may be enacted at a special session.[97]

Submission to popular vote.[98]—In construing statutes requiring a majority of the votes cast at an election, it has been almost unanimously held that a majority of all the votes cast is required, and not merely a majority of those who voted on the particular bill.[99] The declaration of the canvassing officer that a provision submitted to popular vote was legally adopted is not conclusive.[1]

Presumptions and evidence of passage.[2]—An enrolled bill and the legislative journals alone can be looked to in order to establish what a law is.[3] An enrolled bill found in the office of the secretary of state, signed by the officers of both branches of the legislature and approved by the governor, is prima facie evidence of its enactment,[4] and in order to overthrow such bill it must affirmatively appear from the journals that it did not pass.[5] The authenticated published statutes of the United States cannot be impeached.[6]

Publication.[7]—The authority to designate the paper in which statutes shall be published is regulated by law.[8] Notice of an intention to apply for the enact-

to be properly expressed in title. City of La Harpe v. Elm Tp. Gas, Light, Fuel & Power Co., 69 Kan. 97, 76 P. 448.

88. See 2 Curr. L. 1709.

89. Colburn v. McDonald [Neb.] 100 N. W. 961.

90. Journal held not to show affirmatively that the constitutional requirements had not been complied with. Andrews v. People [Colo.] 79 P. 1031.

91. Andrews v. People [Colo.] 79 P. 1031. The silence of the legislative journals is not conclusive evidence of the nonexistence of a fact which ought to be recorded therein regarding the enactment of a law. Colburn v. McDonald [Neb.] 100 N. W. 961.

92. Waterman v. Hawkins [Ark.] 86 S. W. 844.

93. Under Const. § 64, it must affirmatively appear upon the journals that amendatory provisions of bills received the concurrence of each house, and what those amendments are; and any implication of an adoption of a report of a conference committee must be a necessary one. Board of Revenue of Jefferson County v. Crow [Ala.] 37 So. 469. Under Const. § 64, concurrence by the house in senate amendments must appear on the journal by aye and nay vote, and no presumption of a valid enactment arises from the enrolling of a bill as having been enacted with the amendments contained therein. Id.

94. Andrews v. People [Colo.] 79 P. 1031.

95. See 2 Curr. L. 1708.

96. State v. Ciancy [Mont.] 76 P. 10; Baker v. Kaiser [C. C. A.] 126 F. 317. Act Dec. 10, 1903, amending Code Civ. Proc. § 180, held germane to the governor's call of a special session. State v. Ciancy [Mont.] 77 P. 312.

97. Act Dec. 10, 1903, amending Code Civ. Proc. § 180, is general, and it is immaterial that it was enacted at a special session called by the governor to relieve an industrial condition existing in three cities of the state. State v. Ciancy [Mont.] 77 P. 312.

98. Sec 2 Curr. L. 1709.

99. Under Const. Ark. 1874, art. 19, § 22. Knight v. Shelton, 134 F. 423.

1. Knight v. Shelton, 134 F. 423.

2. See 2 Curr. L. 1709.

3. A law cannot be established by the certificates of the clerical officers of the senate and house of representatives, made after the adjournment of the legislature for the purpose of authenticating a purported act as having been passed. State v. Mickey [Neb.] 102 N. W. 679.

4, 5. Colburn v. McDonald [Neb.] 100 N. W. 961.

6. Cannot be shown to have been approved by the president on a date different from the one recited in the record. Gibson v. Anderson [C. C. A.] 131 F. 39.

7. See 2 Curr. L. 1709.

8. Under County Laws (Laws 1892, p. 1749, c. 686, § 19), amended by Laws 1900, p. 933, c. 400, county supervisors may not designate for more than one year a paper to publish session laws and resolutions of the

ment of a special law, if necessary,[9] must contain the substance of the proposed act,[10] and whether it does or not is a question for the court;[11] but after the law has been passed, publication is conclusively presumed.[12] It is not sufficient that the notice state the title of the act which gives but a faint conception of its substance.[13]

§ 2. *Special or local laws.*[14]—A law is special, in a constitutional sense, when by force of an inherent limitation it arbitrarily separates some persons, places, or things from those upon which, but for such separation it would operate.[15] Want of uniformity of provision does not make a law special.[16] Whether an enactment is general or local, public or private, is a question of law for the court,[17] and will not be declared special unless it is clearly so.[18] Its publication in the public or private statutes does not determine its character.[19] A special act is permissible where the subject is special and particular in its nature.[20] The legislature may by special act create school districts, leaving their government and fiscal affairs to be regulated by general laws.[21]

A temporary act may be either general or special.[22] An act which operates uniformly throughout the state but which is limited in operation to a specified period of time is temporary.[23] It is generally provided by the constitution that legislation must be by general laws whenever a law of a general nature can be made to apply,[24] and local or special laws relative to such subjects,[25] or to sub-

legislature. In re Troy Press Co., 88 N. Y. S. 115.

9. Notice of an intention to apply for special legislation may be rendered unnecessary in certain cases by the constitution. Const. art. 7, § 3, as amended in 1883, relative to the formation of school districts. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

10. Publication of notice to apply for enactment of a special law (Acts 1903, p. 510, No. 511), held not to state the substance of the proposed act, and that therefore the law was void. Lancaster v. Gafford, 139 Ala. 372, 37 So. 108. Notice to apply for the enactment of Act Sept. 18, 1903 (Acts 1903, p. 255), held not to state the substance of the act. Hooton v. Mellon [Ala.] 37 So. 937.

11. Wallace v. Board of Revenue of Jefferson County, 140 Ala. 491, 37 So. 321. Affidavit of publisher that notice to apply for a local law had been published in his paper, held insufficient compliance with the constitutional provision requiring such publication. Kumpe v. Irwin [Ala.] 36 So. 1024.

12. The legislature being the sole judge as to whether it has or not. Waterman v. Hawkins [Ark.] 86 S. W. 844.

13. Wallace v. Board of Revenue of Jefferson County, 140 Ala. 491, 37 So. 321.

14. See 2 Curr. L. 1710.

15. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

16. The Brannock Local Option Law does not fail for want of uniform operation. City of Columbus v. Jeffrey, 2 Ohio N. P. (N. S.) 85. A constitutional prohibition of special or local laws on certain subjects does not require uniformity of provision. Commonwealth v. Middleton [Pa.] 60 A. 297. A section of a general act repealing all inconsistent acts and containing a proviso which preserves existing conditions, contracts and obligations under existing laws, does not make such act special. Dickinson v. Chosen Freeholders of Hudson County [N. J. Err. & App.] 60 A. 220.

17. State v. Patterson, 134 N. C. 612, 47 S. E. 808.

18. Under a constitutional provision that the legislature shall pass general laws relative to matters of local concern intrusted to municipal corporations and all other matters which in its judgment may be provided by general laws. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. Act relative to the oyster industry held not void. State v. Price [N. J. Law] 58 A. 1015.

19. State v. Patterson, 134 N. C. 612, 47 S. E. 808.

20. The legislature may by special act authorize the **condemnation** of particular property for a particular use. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. In Texas **stock laws** applicable to portions of a county other than a political subdivision may be enacted and made applicable by a vote of the people of the district affected [Const. § 33]. Ex parte Thompkins [Tex. Cr. App.] 83 S. W. 379.

21. P. L. 1904, p. 28, is not unconstitutional. Howe v. Board of Education of Landis Tp. School Dist. [N. J. Law] 60 A. 518. The provision of the constitution which preserves the local school system as it existed in 1877 forms a necessary exception to the uniformity of legislation relative thereto, required by the constitution [Civ. Code 1895, § 5906]. Barber v. Alexander, 120 Ga. 30, 47 S. E. 580.

22, 23. Cincinnati St. R. Co. v. Horstman [Ohio] 73 N. E. 1075.

24. Acts 1899, p. 231, fixing compensation of coal oil inspectors, is not violative of a provision that no special law shall be enacted where a general law can be made applicable. State v. Speed, 183 Mo. 186, 81 S. W. 1250. Acts Feb. 20, 1904 (Acts 1904, p. 33, c. 7), appropriating money for the benefit of destitute children of the state, does not violate a provision that no special law shall be enacted where a general one can be

jects relative to which provision has been made by an existing general law,[26] are void.

made applicable. Hager v. Kentucky Children's Home Soc., 26 Ky. L. R. 1133, 83 S. W. 605.

25. Taxation: See 2 Curr. L. 1714. Laws 1902, c. 3, § 21, relative to taxation, is uniform. In re Magnes' Estate [Colo.] 77 P. 853. Ball. Ann. Codes & St. § 938, subd. 7, providing for a poll tax, is void for nonuniformity. State v. Ide, 35 Wash. 576, 77 P. 961. Act authorizing a township to contribute to the erection of a bridge to be built by the county, and authorizing a tax levy for the purpose of meeting such contribution, is not void for want of uniformity. McMillan v. Board of Com'rs of Payne County, 14 Okl. 659, 79 P. 898. Revenue Act (Acts 1901, p. 373, c. 174), § 81, providing for the appointment of revenue agents, held constitutional. State v. Kelly, 111 Tenn. 583, 82 S. W. 311. Rev. St. 1899, § 6275, does not violate a constitutional provision requiring taxes to be uniform. State v. Allen, 178 Mo. 555, 77 S. W. 868. Provision of Kansas City Charter relative to local assessments is not special legislation. Haag v. Ward [Mo.] 85 S. W. 391. Act to authorize county commissioners to issue certificates of indebtedness does not impose unjust and unequal taxation. State v. Gunn, 92 Minn. 436, 100 N. W. 97. Ky. St. § 4224, imposing a tax on oil, violates the constitutional provision of uniformity. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020.

Laws relating to courts: An act relating to taxation does not regulate the jurisdiction of a court, since assessment is not inherently a judicial proceeding. Does not violate a provision that laws relating to courts must be general. In re Philadelphia Co. [Pa.] 60 A. 93. Sess. Laws 1903, p. 223, relative to public waters, does not confer judicial power on the state engineer, and is not special legislation relative to courts. Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25. Act Oct. 9, 1903 (Acts 1903, p. 745), relative to the consolidation of the courts of a certain city, is a local law applying to a political subdivision. Wallace v. Board of Revenue of Jefferson County, 140 Ala. 491, 37 So. 321.

Regulating internal affairs: Act April 22, 1903, providing a scheme for the relief of the Passaic Valley Sewerage District from pollution, held a local law for the prosecution of a public work and not a law regulating the internal affairs of towns and counties. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Err. & App.] 60 A. 214. Laws 1903, p. 38, c. 27, § 3, amended by Laws 1903, p. 80, c. 49, held a local and special law regulating county affairs and void. Territory v. Gutierrez [N. M.] 78 P. 139. Laws 1903, p. 225, c. 119, § 12, relative to appointment of road supervisors, does not contravene a provision that a provision for the election of county officers must be uniform. State v. Newland [Wash.] 79 P. 983. Act relative to street railways held to violate a constitutional provision against a special act **conferring corporate powers.** Perrine v. Jersey Central Traction Co. [N. J. Law] 56 A. 374; People v. People's Gaslight & Coke Co., 205 Ill. 482, 68 N. E. 950. Act to relieve from pollution rivers and streams within Passaic Valley Sewerage District is not a special act conferring corporate powers. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. Special laws **granting corporate powers** or authorizing expenditure of school money are invalid in Wisconsin. State v. Van Huse, 120 Wis. 15, 97 N. W. 503. Laws 1901, p. 1765, c. 712, is not a special act granting to a corporation the right to lay railroad tracks as the power is conferred on the city and not on a private corporation. In re City of New York, 45 Misc. 184, 91 N. Y. S. 987. Act 1903, p. 201, c. 105, providing for the consolidation of municipalities, is the **creation of a corporation** by special act and is unconstitutional. Town of Longview v. Crawfordsville [Ind.] 73 N. E. 78. Laws 1902, c. 3, relative to an inheritance tax, does not change the **laws of descent,** which under Const. art. 5, § 25, cannot be done by special law. In re Magnes' Estate [Colo.] 77 P. 853. Loc. Acts 1903, p. 369, relative to the **transfer of causes** from the city court of Bessemer to the circuit court, is not a local or special law for a **change of venue.** Dudley v. Birmingham R., Light & Power Co., 139 Ala. 453, 36 So. 700. Acts 1903, p. 140, c. 67, is not a local or special law relative to **fees or salaries.** Board of Com'rs of Perry County v. Lindemann [Ind.] 73 N. E. 912. Acts 1892, p. 392, c. 116, is a local law with regard to **summoning and impaneling juries.** Burt v. State [Miss.] 38 So. 233. Act Minn. April 10, 1901, relative to **taxation** for payment of the debts of disssolved municipalities. Pepin Tp. v. Sage [C. C. A.] 129 F. 657. In Illinois the charter of a **municipal corporation** cannot be amended by special act. Act May 11, 1903, and Act May 15, 1903, held a violation of this provision. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399.

Held not to be special laws: St. 1885, p. 110, c. 127, § 1, carried into St. 1901, p. 564, c. 175, § 1, **regulating practice of dentistry.** Ex parte Whitley, 144 Cal. 167, 77 P. 879. A statute providing a penalty for unjust discrimination by express companies is not violative of the provision restraining local or special laws for the **punishment of crimes and misdemeanors,** since the act does not define a crime, but gives a penalty recoverable only by civil action. Adams Exp. Co. v. State, 161 Ind. 328, 67 N. E. 1033. St. 1901, p. 646, c. 214, authorizing suits against the state for **coyote bounties.** Bickerdike v. State, 144 Cal. 681, 78 P. 270. Denver City Charter, art. 7, § 34, does not violate the constitutional inhibition against special legislation. City of Denver v. Campbell [Colo.] 80 P. 142. Acts 1871-72, p. 288, relative to **establishment of county courts.** Lamar v. Prosser, 121 Ga. 153, 48 S. E. 977. Acts 1901, p. 120, providing for an **additional judge** of the circuit court of Jasper county. State v. Dabbs, 182 Mo. 359, 81 S. W. 1148. 92 Ohio Laws, p. 277, is general. Cincinnati St. R. Co. v. Horstman [Ohio] 73 N. E. 1075. Act Feb. 25, 1905, abolishing Watson **judicial district** in Desha county. Waterman v. Hawkins [Ark.] 86 S. W. 844. Rev. St. § 3836-3 (Bates' Ann. St. p. 2130), relative to **Building and Loan Associations.** Cramer v. Southern Ohio

Classification.[27]—Classification is proper and often necessary in order to define the objects on which a general law is to take effect,[28] and in order to definitely apply and effectuate the purposes of the legislation;[29] but it must not be arbitrary, fictitious, or otherwise faultily made and used to evade constitutional limitations under the form of general legislation.[30] It must rest on peculiarities or characteristics that substantially differentiate the localities included from the localities excluded, and that render divergent legislation appropriate to the several localities respectively,[31] and may produce some diversity of result and yet be general if based on genuine distinctions.[32] Municipalities may be classified on the basis of population having a reasonable relation to the purposes of the legislation.[33] But a class cannot be arbitrarily made for the sole purpose of enabling certain munici-

Loan & Trust Co. [Ohio] 74 N. E. 200. Laws 1891, pp. 61, 63, no. 41, relative to **exemption** of railroads **from taxation.** Bennett v. Nichols [Ariz.] 80 P. 392. St. 1889, p. 32, relative to **vaccination of school children.** French v. Davidson, 143 Cal. 658, 77 P. 663. Sess. Laws 1903, p. 223, relative to **public waters.** Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25. Acts 29th Gen. Assem. p. 103, c. 137, relative to the applicability of the **statute of limitations** to judgments. Wooster v. Bateman [Iowa] 102 N. W. 521. Act ch. 161, Laws 1903, relative to enforcement of **payment of taxes.** Picton v. Cass County [N. D.] 100 N. W. 711. Act 1903, p. 170, c. 126, whereby the state is given control and title of the State Agricultural Association. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732. Act to relieve from **pollution, rivers and streams** within the Passaic Valley sewerage District. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. Act authorizing the appointment of road commissioners. Rees v. Olmsted [C. C. A.] 135 F. 296. Acts 1899, p. 231, fixing the compensation of coal oil inspectors, is not special because in effect applying only to the city of St. Louis. State v. Speed, 183 Mo. 186, 81 S. W. 1260.

26. Acts 1903, p. 273, relative to public schools, violates the constitutional provision relative to uniformity and forbidding special legislation where provision is made by an existing general law. Barber v. Alexander, 120 Ga. 30, 47 S. E. 580. Acts 1903, p. 588, establishing a school district, held a special law enacted in a case for which provision had been made by an existing general law. Neal v. McWhorter [Ga.] 50 S. E. 381. Loc. Acts 1903, p. 369, relative to the transfer of causes from the city court of Bessemer to the circuit court, does not violate a provision against enacting a special law in any case which is provided for by general law, there being no general law on the subject. Dudley v. Birmingham R., Light & Power Co., 139 Ala. 453, 36 So. 700.

27. Sec 2 Curr. L. 1710.

28, 29. Gentsch v. State [Ohio] 72 N. E. 900.

30. Gentsch v. State [Ohio] 72 N. E. 900. Law relative to **insurance companies** may exclude from its operation losses sustained because of the destruction of certain kinds of personal property. Aetna Ins. Co. v. Brigham, 120 Ga. 925, 48 S. E. 348. A statute imposing on **unincorporated companies** conditions which are not imposed upon **corporations in the same business** is not class legislation unless the distinction made is unreasonable. Brady v. Mattern [Iowa] 100 N. W. 358. May discriminate between classes in regulating a business where the discrimination is based on a reasonable **distinction involving public welfare.** Id. A law may be enacted relative to one class of **insurance** so long as it is general in its terms as to that particular class of business. Idaho Mut. Co-op. Ins. Co. v. Myer [Idaho] 77 P. 628. Act providing for classification of property in cities of second class, for purposes of taxation, is not local or special. In re Philadelphia Co. [Pa.] 60 A. 93.

31. Municipalities cannot be classified as those created by special act and dissolved by its repeal and those created and dissolved under general laws. Pepin Tp. v. Sage [C. C. A.] 129 F. 657. Act classifying municipalities for the purpose of assessment for public improvement held special. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399. Classification based on **counties about to erect a court house.** Dickinson v. Board of Chosen Freeholders of Hudson County [N. J. Law] 58 A. 182. Act to authorize county commissioners to issue certificates of indebtedness in certain cases is not special classification by counties which have established roads and issued orders for their construction. State v. Gunn, 92 Minn. 436, 100 N. W. 97. A substantial distinction exists between cities of 50,000 population or over **which have or have not issued bonds** for building an armory. State v. Rogers [Minn.] 100 N. W. 659. Laws 1901, p. 362, c. 174, § 12, does not make an unreasonable or arbitrary classification of corporations. State v. Fraternal Knights & Ladies, 35 Wash. 338, 77 P. 500. St. 1901, p. 564, c. 175, § 12, amended by St. 1903, p. 322, c. 244, regulating practice of **dentistry,** does not create an arbitrary classification. Ex parte Whitley, 144 Cal. 167, 77 P. 879. Acts 1903, p. 140, c. 67, relative to **fees and salaries,** is not class legislation. Board of Com'rs of Perry County v. Lindemann [Ind.] 73 N. E. 912. Act respecting the expenditure of money in cities of the second class, held local and special. Halsey v. Nowrey [N. J. Law] 59 A. 449.

32. Act May 23, 1874 (P. L. 254), relative to school districts, is not special. Commonwealth v. Middleton [Pa.] 60 A. 297.

33. Classification into two classes, one having 50,000 or less, the other having more, is valid. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399.

palities to enjoy special powers,[34] or for the purpose of conferring special privileges on their electors and property holders,[35] unless such municipalities may be regarded as comprising a separate and distinct class;[36] but the fact that there is only one municipality in a certain class does not render legislation special.[37] While a classification with a view to the enactment of general laws cannot be based on existing conditions only, yet a distinctive class may be based on existing circumstances where the purpose of the law is temporary only.[38]

Based on population.[39]—A bona fide classification based on a real and substantial difference in population is generally held valid,[40] and the rule that in determining the validity of a classification of municipalities on this basis, that municipalities afterwards growing into the class shall be brought within its operation, does not apply where conditions which necessitate certain legislation may not be anticipated as to other localities;[41] but the legislation must be applicable to all within the class.[42]

Local option laws[43] are generally held not to be within the objection of being local or special,[44] but statutes of local application to the liquor traffic cannot be enacted.[45]

Special privileges.[46]—In determining whether a law violates a constitutional

34. Act relating to local improvements held not a proper classification. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399.

35, 36. L'Hote v. Milford, 212 Ill. 418, 72 N. E. 399.

37. Ky. St. 1903, § 2833a, relative to public improvements in cities of the first class, is not special, though there is but one such city in the commonwealth. Hager v. Gast [Ky.] 84 S. W. 556. St. 1903, p. 93, c. 86, amending Municipal Corporation Act, § 862, held not special legislation because applicable to only one of six classes of municipal corporations. Ex parte Jackson, 143 Cal. 564, 77 P. 457. See 2 Curr. L. 1711, n. 54.

38. Involving large contracts for construction, and bond issues to raise necessary funds for erecting a court house. Dickinson v. Board of Chosen Freeholders of Hudson County [N. J. Law] 58 A. 182.

39. See 2 Curr. L. 1711.

40. § 2926a, Rev. St., relative to opening and closing of polls on election days, is general. Gentsch v. State [Ohio] 72 N. E. 900. Limitation to counties of a minimum population. Dickinson v. Board of Chosen Freeholders of Hudson County [N. J. Law] 58 A. 182. Legislative determination of salaries in proportion to population and services under Const. art. 4, § 22, can only be set aside where in manifest defiance of the constitution. Board of Com'rs of Perry County v. Lindemann [Ind.] 73 N. E. 912. Laws 1901, p. 80, c. 55, relative to roads in counties of from 120,000 to 150,000 population, is not class legislation. Archibald v. Clark [Tenn.] 82 S. W. 310.

Held a reasonable classification: Statute limited in operation to counties expending $7,000 for court house purposes. Hetland v. Board of Com'rs of Norman County, 89 Minn. 492, 95 N. W. 305. Statute limited in operation to cities between 23,000 and 35,000 is not special. Evansville & T. H. R. Co. v. Terre Haute, 67 Ind. 26, 67 N. E. 686. Jury law applicable to counties of 200,000 and over. State v. Ames, 91 Minn. 365, 98 N. W. 190. Acts 1903, p. 347, c. 198, § 1, relative to **public schools** in towns of a certain population. School City of Rushville v. Hayes, 162 Ind. 193, 70 N. E. 134. Act 1903, p. 201, c. 105, providing for the extension of corporate boundaries of cities operating under a special charter and of a population exceeding a certain number, held special. Town of Longview v. Crawfordsville [Ind.] 73 N. E. 78. Laws 1901, p. 73, relative to **smoke,** is not class legislation because not applicable to cities having less than 100,000 population. State v. Tower [Mo.] 84 S. W. 10. And the fact that it contains a provision that one charged with its violation may show by way of defense that there is no practicable device to prevent it does not render it so. Id. Nor because by implication it excludes steamboats and railroad engines. Id. Laws 1901, p. 73, relative to "smoke" and applicable to cities having a population of 100,000, applies to cities having a population of more than that number. State v. Tower [Mo.] 84 S. W. 10.

Held special: A classification of counties having a population of 50,000 according to the census of 1900. State v. Scott [Neb.] 100 N. W. 812. Violates a constitutional provision prohibiting local laws regulating township or county offices where a general law can be made applicable. Id.

41. Relative to permitting streams to become polluted. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571.

42. Act March 19, 1901 (P. L. 1901, p. 79), relative to acquisition of land and erection of public buildings, is special. Dickinson v. Board of Chosen Freeholders of Hudson County [N. J. Err. & App.] 60 A. 220.

43. See 2 Curr. L. 1713.

44. Local option act (Sayles' Rev. St. arts. 3384, 3399) is not unconstitutional. Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859.

45. State v. Barrett [N. C.] 50 S. E. 506. Act 1897, p. 203, c. 72, relative to sale of intoxicating liquors, is not local or special. State v. Barber [S. D.] 101 N. W. 1078.

46. See 2 Curr. L. 1715.

prohibition against granting any exclusive privilege, immunity, or franchise, the criterion is whether it relates to the recipients of the grant rather than to the territory within which the privilege is to be exercised.[47] Laws granting special privileges or immunities are void,[48] as also is class legislation;[49] laws creating a monopoly;[50] denying equal protection of the laws;[51] or violating other constitutional inhibitions.[52] A corporation is not a citizen within the provision of the Federal constitution which prohibits the abridgement of privileges or immunities.[53]

Police Power.[54]—Statutes relative to the health and safety[55] or general welfare of the people[56] are generally sustained as being within the police power.

§ 3. *Subjects and titles.*[57]—It is generally provided by the constitution that laws must be relative to but one subject and that must be expressed in the title.[58]

47. State v. Price [N. J. Law] 58 A. 1015.

48. **Held not to grant a special privilege:** Act relative to **oyster and clam industry.** State v. Price [N. J. Law] 58 A. 1015. Comp. St. 1903, c. 93a, art. 2, § 28, relative to irrigation. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286. St. 1901, p. 56, c. 51, relative to the **appointment of members of the State Board of Medical Examiners.** Ex parte Gerino, 143 Cal. 412, 77 P. 166. Laws 1901, p. 362, c. 174, § 12, relative to **fraternal insurance companies.** State v. Fraternal Knights & Ladies, 35 Wash. 338, 77 P. 500. St. 1885, p. 110, c. 127, § 1, carried into St. 1901, p. 564, c. 175, § 1, regulating practice of **dentistry.** Ex parte Whitley, 144 Cal. 167, 77 P. 879. Laws 1903, p. 225, c. 119, § 12, relative to **appointment of road supervisors.** State v. Newland [Wash.] 79 P. 983.

49. **Held class legislation:** Sess. Laws 1901, p. 155, § 8, relative to peddlers, is class legislation. In re Abel [Idaho] 77 P. 621.

Held not class legislation: Comp. Laws 1897, c. 136, relative to **hawkers and peddlers.** People v. De Blaay [Mich.] 100 N. W. 598. Sess. Laws 1901, p. 156, relative to peddlers and hawkers of farm products. In re Abel [Idaho] 77 P. 621. Acts 1903, p. 110, relative to **building and loan associations.** State v. Preferred Tontine Mercantile Co. [Mo.] 82 S. W. 1075. St. 1899, p. 101, c. 85, relative to a **collateral inheritance tax.** In re Campbell's Estate, 143 Cal. 623, 77 P. 674. Rev. Laws, c. 72, § 16, relative to unauthorized use of **registered beverage bottles.** Commonwealth v. Anselvich [Mass.] 71 N. E. 790. Though it makes possession by a dealer **in bottles,** registered with the name of a manufacturer, with his written consent or purchase from him, prima facie evidence of unlawful traffic. Id.

50. **Held not to create a monopoly:** 13 Sp. Laws, p. 321, authorizing a cemetery association to apply for **condemnation of land** of another cemetery, does not violate a provision against monopolies. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467. The business of **building and loan associations** may be limited to corporations. Brady v. Mattern [Iowa] 100 N. W. 358. **Uniform School Book Law** (Acts 1903, p. 167), does not create a monopoly and grant a special privilege. Dickinson v. Cunningham, 140 Ala. 527, 37 So. 345. The fact that a statute imposes a condition which renders it impossible for some persons or associations to engage in the business does not render it void as conferring a monopoly. Brady v. Mattern [Iowa] 100 N. W. 358.

51. Batt's Ann. St. arts. 4560a, 4560b, relative to the redemption of unused railroad tickets, does not deny equal protection of the laws. Texas & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047.

52. St. 1899, p. 101, c. 85, imposing an inheritance tax, is not violative of the **14th amendment** of the Federal constitution. In re Campbell's Estate, 143 Cal. 623, 77 P. 674. St. 1889, p. 32, relative to vaccination of school children, is not repugnant to the 14th amendment of the Federal constitution. French v. Davidson, 143 Cal. 658, 77 P. 663. Denver City Charter, art. 7, § 6, does not violate the Bill of Rights guarantying a remedy for every injury to person or property. City of Denver v. Campbell [Colo.] 80 P. 142.

53. Civ. Code 1895, § 2110 (Dodson Law), relative to insurance companies, is valid. Aetna Ins. Co. v. Brigham, 120 Ga. 925, 48 S. E. 348.

54. See 2 Curr. L. 1716.

55. St. 1889, p. 32, relative to the **vaccination of school children.** French v. Davidson, 143 Cal. 658, 77 P. 663. Relative to the **practice of medicine.** Ex parte Whitley, 144 Cal. 167, 77 P. 879.

56. Municipal Code, § 1841, relative to public **meetings on the streets.** Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. Acts 1903, p. 110, relative to **building and loan associations.** State v. Preferred Tontine Mercantile Co. [Mo.] 82 S. W. 1075. Act requiring **itinerant vendors** to take out a license held not an arbitrary restriction on trade. State v. Feingold [Conn.] 59 A. 211.

57. See 2 Curr. L. 1717.

58. **Held to violate the provision:** Laws 1895, c. 1, p. 57. Oxnard Beet Sugar Co. v. State [Neb.] 102 N. W. 80. Laws 1901, ch. 312, p. 524, § 1, re-enacted in Laws 1903, ch. 232, p. 337. In re Day [Minn.] 102 N. W. 209. Laws 1895, c. 1, p. 57, relative to the **manufacture.** Oxnard Beet Sugar Co. v. State [Neb.] 102 N. W. 80.

Held not to violate: Relative to **lunatics, idiots, drunkards and spendthrifts.** Lang v. Friesenecker, 213 Ill. 598, 73 N. E. 329; Browne v. Providence [La.] 38 So. 478. Laws 1901, p. 203, c. 106, § 8 (Gen. St. 1901, § 4205), relative to **ill treatment of children.** State v. Hahn [Kan.] 79 P. 670. Ch. 353, p. 612, Laws 1901 (Gen. St. 1901, § 6521), relative to **charitable and reformatory institutions.** Ex parte Schley [Kan.] 80 P. 631. Ch. 273, p. 653, Laws 1895, declaring certain **weeds** to be nuisances and providing for their destruction. State v. Boehm, 92 Minn. 374, 100 N.

Whether an act embraces more than one subject is to be determined from the body, not from the title,[59] and in construing this provision the courts hold that a subject embraced in the title includes all subsidiary details which are means for carrying into effect the object and purpose of the act disclosed in that subject;[60] hence the fact that the title contains more of a synopsis of the details of the act than is necessary does not make it obnoxious to the constitutional provision named, provided the subsidiary details are germane thereto, and necessary to carry the object of the act into effect;[61] but if the title be a restrictive one, carving out for consideration a part only of a general subject, the legislation must be confined within the same limits.[62] The title can embrace but one subject,[63] and should be sufficiently definite and comprehensive to indicate the scope and purpose of the act.[64]

W. 95. Ch. 153, p. 397, Sp. Laws 1871, relative to **adoption and heirship.** In re Atwell's Estate [Minn.] 101 N. W. 946. **Relative to freight charges** [Comp. St. 1903, c. 72, art. 5]. Chicago, etc., R. Co. v. Anderson [Neb.] 101 N. W. 1019. Laws 1897, pp. 210, 211, c. 72, §§ 11, 16, relative to sale of **intoxicating liquors.** Garrigan v. Kennedy [S. D.] 101 N. W. 1081. The special act for Screven county (Acts 1874, p. 403), regulating the grant of licenses to sell liquor. Kemp v. State, 120 Ga. 157, 47 S. E. 548. Ch. 382, p. 690, Laws 1903, relative to **public improvements.** Merchants' Nat. Bank v. East Grand Forks [Minn.] 102 N. W. 703. Acts 27th Gen. Assem. p. 48, c. 84, relative to **county schools.** Boggs v. School Tp. of Cass, Guthrie County [Iowa] 102 N. W. 796. **Insolvency Act** (Laws 1890, p. 88), § 15. Jensen-King-Byrd Co. v. Williams, 35 Wash. 161, 76 P. 934. Act March 23, 1893 (St. 1893, p. 233, c. 188), relative to **building and loan associations.** Provident Mut. Bldg-Loan Ass'n v. Davis, 143 Cal. 253, 76 P. 1034. Acts 1903, p. 110, relative to building and loan associations. State v. Preferred Tontine Mercantile Co. [Mo.] 82 S. W. 1075. Laws 1901, p. 356, c. 174, relative to **fraternal beneficiary orders.** State v. Fraternal Knights & Ladies, 35 Wash. 338, 77 P. 500. Comp. Laws 1897, § 10,421, relative to bringing **actions of assumpsit** in certain cases. First Nat. Bank v. Steel [Mich.] 99 N. W. 786. Title to Ch. 104, p. 151, Laws 1885 (§§ 1251, 1252, Gen. St. 1901), relative to formation of **telephone companies.** City of Wichita v. Missouri & K. Tel. Co. [Kan.] 78 P. 886. Laws 1893, p. 32, c. 24, § 1, relative to **liens** for labor and material. Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 P. 1106.

Uniform Text-Book Law (Act March 1903, p. 167). Dickinson v. Cunningham, 140 Ala. 527, 37 So. 345. Act April 1, 1903 (Acts 1903, p. 1563, c. 599), relative to **civil districts.** State v. Hamby [Tenn.] 84 S. W. 622. Acts 1895, p. 21, c. 21 (Rev. St. 1895, tit. 60, c. 2), relative to **irrigation.** Borden v. Trespalacios Rice & Irrigation Co. [Tex.] 86 S. W. 11. Act March 19, 1895 (Acts 1895, p. 21, c. 21; Rev. St. tit. 60, c. 2), relative to irrigation. Id. [Tex. Civ. App.] 82 S. W. 461. Acts 1903, p. 140, c. 67, relative to compensation of **clerks and sheriffs.** Board of Com'rs of Perry County v. Lindemann [Ind.] 73 N. E. 912. Laws 1903, p. 367, c. 176, relative to the incorporation of **trust companies.** State v. Nichols [Wash.] 80 P. 462. Act June 26, 1895 (P. L. 317), relative to **adulteration of food.** Commonwealth v. Kebort, 26 Pa. Super. Ct. 584. Laws 1897, p. 49, relative to **public works** in cities of a certain class. State v. Allen, 178 Mo. 555, 77 S. W. 868.

59. Act classifying real estate for the purpose of municipal taxation held to express its subject in its title. Monaghan v. Lewis [Del.] 59 A. 948.

60. Weed v. Goodwin, 36 Wash. 31, 78 P. 36. If all parts of an act relate directly or indirectly to the general subject of the act, it is not open to the objection of plurality. Monaghan v. Lewis [Del.] 59 A. 948.

61. Laws 1899, p. 261, c. 131, entitled "An act providing for condemnation proceedings for right of way for irrigation ditches, canals, and flumes for agriculture and mining purposes and relating to appropriation of water," is not in violation of Const. art. 2, § 19, as embracing more than one subject expressed in its title. Weed v. Goodwin, 36 Wash. 31, 78 P. 36.

62. Laws 1903, c. 132, relative to trusts, held not to express subject-matter in its title. Watkins v. Bigelow [Minn.] 100 N. W. 1104.

63. Laws 1904, p. 1493, c. 629, **held to embrace more than one subject.** Cahill v. Hogan [N. Y.] 73 N. E. 39.

Held to embrace but one subject: Sess. Laws 1902, c. 3, relative to public revenue. In re Magnes Estate [Colo.] 77 P. 853. Laws 1893, p. 241, c. 99, relative to **tide lands and liens thereon.** Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845. Title of the act is sufficient to embrace all the subject-matter. Id. Act No. 34, p. 42 of 1902, providing a penalty for **desertion** of wife or children. State v. Baker, 112 La. 801, 36 So. 703. Act 1895 (Sayles' Ann. Civ. St. 1897, p. 1929), relative to **appeals.** Gulf, etc., R. Co. v. Fromme [Tex.] 84 S. W. 1054.

64. Title sufficient: Act relative to **taxation** held to cover provisions relative to mode of procedure of assessment and finality of the assessor's action. In re Philadelphia Co. [Pa.] 60 A. 93. Title of Acts 1899, p. 250, c. 142, establishing **taxing districts.** City of Memphis v. Hastings [Tenn.] 86 S. W. 609. Provisions of Act Feb. 18, 1895, § 4 (Acts 1894-95, p. 907), relative to **local assessments.** City Council of Montgomery v. Moore, 140 Ala. 638, 37 So. 291. Title of Laws 1903, p. 223, c. 119, relative to **taxes** and the appointment of **road supervisors.** State v. Newland [Wash.] 79 P. 983. Title of St. 1899, p. 101, c. 85, relative to **inheritance tax.** In re

If it fairly calls attention to the subject-matter, though in general terms,[65] so as to reasonably direct inquiry into the body of the act,[66] it is sufficient, and long continued use of a general title to a particular class of legislation is such a construction by the legislature of the constitutional provision as will be considered by the courts in determining the sufficiency of the title.[67] In case of a supplement to an act, where the original act is sufficiently expressed in its title and the provisions of the supplement are germane to the original, the subject of a supplement is covered by a specific reference to the original by its title.[68] The fact that superfluous matter is introduced into the title does not affect it if it is otherwise sufficient.[69]

Campbell's Estate, 143 Cal. 623, 77 P. 674. Title of Sess. Laws 1902, c. 3, relative to **public revenue.** In re Magnes Estate [Colo.] 77 P. 853. Subject-matter of an act relative to **drainage and sanitary matters.** Rev. St. 1901, p. 347, § 26. City of Chicago v. Cicero, 210 Ill. 290, 71 N. E. 356. Act relative to **insane asylums.** Grinky v. Durfee [Mich.] 100 N. W. 171. Act No. 232, p. 368, Laws 1903, relative to **incorporation** of manufacturing and mercantile companies. Grimm v. Secretary of State [Mich.] 100 N. W. 269. Act relative to the **practice of medicine** (Code, § 2579) is broad enough to include a provision requiring an itinerant physician to procure a license. State v. Edmunds [Iowa] 101 N. W. 431. Code, § 2581, relative to **itinerant physicians.** Eastwood v. Crane [Iowa] 101 N. W. 481. Laws 1897, p. 203, c. 72, is a **license law** and not void because "prohibition" is not used in the title. State v. Barber [S. D.] 101 N. W. 1078. Title of an act to prohibit the sale of **intoxicating liquors.** Oglesby v. State, 121 Ga. 602, 49 S. E. 706. Title of Sess. Laws 1903, p. 223, relative to appropriation of **public waters.** Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25. Title of Sess. Laws 1903, p. 223, relating to public waters, held sufficient to include provisions for the appropriation of such waters and the settlement of rights to the use of them. Id. St. 1889, p. 32, relative to **vaccination of school children.** French v. Davidson, 143 Cal. 658, 77 P. 663. Title of Laws 1903, p. 27, § 1, relative to the pursuit of the trade of a **barber.** State v. Briggs [Or.] 78 P. 361. Title of Sess. Laws 1903, pp. 159, 164, cc. 79, 80. **Establishing a county.** School Dist. No. 1 in Denver v. School Dist. No. 7 in Arapahoe County [Colo.] 78 P. 690. Title to Laws 1893, p. 161, relative to **boundaries of counties.** Allison v. Hatton [Or.] 80 P. 101. Acts 1893, p. 173, **amending the charter** of the City of Atlanta. Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793. Title of Loc. Acts 1903, p. 369, relative to the **transfer of causes** from the city court of Bessemer to the circuit court. Dudley v. Birmingham R. Light & Power Co., 139 Ala. 453, 36 So. 700. Title to Ch. 4395, p. 159, Acts 1895, relative to the amendment of the Rev. St. of Florida, embraces the subject of grand larceny. Ex parte Bush [Fla.] 37 So. 177. Statement in the title of Acts 1895, p. 21, c. 21, Rev. St. tit. 60, c. 2, as to one of the purposes of the act held not to avoid a provision relative to **eminent domain.** Borden v. Trespalacios Rice & Irrigation Co. [Tex. Civ. App.] 82 S. W. 461. Acts 1889-90, p. 130, c. 1334, relative to mechanics' and materialmen's **liens.** Humboldt Bldg. Ass'n Co. v. Ducker's Ex'r, 26 Ky. L. R. 931, 82 S. W. 969. Act March 3, 1903 (Acts 1903, p. 140, c. 67), relative to **fees and salaries.** Hargis v. Perry County Com'rs [Ind.] 73 N. E. 915. Title of Laws 1889-90, p. 499, relative to **alienation of Indian lands.** Goudy v. Meath [Wash.] 80 P. 295. Act of April 4, 1901 (P. L. 65), relative to **private roads.** Dickinson Tp. Road, 23 Pa. Super. Ct. 34.

Title insufficient: Act to authorize a city to **issue bonds.** Smith v. Annapolis, 97 Md. 736, 57 A. 976. Relative to **municipal improvements.** Cahill v. Hogan [N. Y.] 73 N. E. 39. Act 1899, p. 284, No. 204, relative to **hawkers and peddlers.** People v. De Blaay [Mich.] 100 N. W. 598. Acts 1882-83, p. 234, relative to the sale of **intoxicating liquors.** Watson v. State, 140 Ala. 134, 37 So. 225.

License taxation of commercial salesmen or travelers selling by sample is not germane to license taxation of peddlers and hawkers peddling goods carried by them. Beary v. Narran, 113 La. 1034, 37 So. 961. Act No. 49 of 1904, amending § 12 of Act No. 103, p. 164 of 1900, relative to a license tax. Id. Laws 1904, p. 1493, c. 629. Cahill v. Hogan, 44 Misc. 360, 89 N. Y. S. 1022. Act of May 13, 1903, § 2 (P. L. 359), relative to safety and health of **miners** in the anthracite region. Commonwealth v. Schulte, 26 Pa. Super. Ct. 95. Act for **incorporation,** etc., of certain classes of cities, can contain no valid enactment relative to the powers of county officers. Sess. Laws 1901, § 87, ch. 18, is void. Wheeler v. State [Neb.] 102 N. W. 773.

Misleading: Act May 24, 1878 (P. L. 134), relative to **justices of the peace.** Moore v. Moore, 23 Pa. Super. Ct. 73.

65. Subject of act to authorize county commissioners to issue certificates of indebtedness is expressed in the title. State v. Gunn, 92 Minn. 436, 100 N. W. 97.

66. Act relative to the acquisition by counties of bridges and for the abolition of tolls held to embody subject in title. Bridgewater Borough v. Big Beaver Bridge Co. [Pa.] 59 A. 697.

67. In re Atwell's Estate [Minn.] 101 N. W. 946. A statute that has not been questioned in the state court during the 30 years of its existence will not be held invalid in the Federal court on this ground, the case not being clear. Pegram v. American Alkali Co., 122 F. 1000.

68. Act June 9, 1891 (P. L. 248), relating to the sale of intoxicating liquors, does embrace its subject-matter in its title. Stroudsburg Boro. v. Shick, 24 Pa. Super. Ct. 442.

69. Goodbar v. Memphis [Tenn.] 81 S. W. 1061; Browne v. Providence [La.] 38 So. 478.

Partial invalidity.[70]—Where there are two subjects in the body of the act and but one in the title, it is valid as to the one in the title and void as to the other.[71]

§ 4. *Amendments and revisions. Amendments.*[72]—The subject-matter of an amendment must be germane to the original act.[73] Where the title to the original act is broad enough to embrace the amendment, the new matter inserted thereby, if germane to the act amended, will be held valid.[74] Where a general act is changed by special act or amendment, constitutional requirements must be strictly complied with.[75] Amendment by implication, being expressly forbidden by the constitution, is not favored by the courts;[76] but where the intent to amend a certain act is apparent, specific reference to it is not necessary,[77] and an error in reference is immaterial.[78]

Reference to the act amended.[79]—It is generally provided that an act cannot be amended by reference to its title,[80] but the act amended,[81] or the substance of it, must be recited in the amendment;[82] but this provision has no application to an independent enactment, though it impliedly modifies a former statute.[83] Under a constitutional provision that all acts which amend prior laws shall recite in their caption or otherwise the title or substance of the law amended, it is not necessary for an act amending an act previously amended to refer to the amendment,[84] nor that the title of the amendatory act set out the character of the amendment so long as the title of the amended act is set out and the provisions of the amendatory act are germane to the original.[85] Sections of the statute to be amended need not be set out in full and followed by the proposed amendment, but it is sufficient to set out the law as amended.[86]

70. See 2 Curr. L. 1719.

71. Smith v. Annapolis, 97 Md. 736, 57 A. 976.

72. See 2 Curr. L. 1720.

73. Where the title to a bill is to amend a particular section, no amendment is permissible which is not germane to the subject-matter of the section. Preston v. Stover [Neb.] 97 N. W. 812. Acts 1901, p. 475, c. 82, amending § 592, Code Civ. Proc., limiting the time for commencing proceedings to reverse or modify judgments, is germane to the title of the original act. Chicago, etc., R. Co. v. Sporer [Neb.] 100 N. W. 813. Laws 1903, p. 1065, c. 459, § 4, relative to child labor, is germane to consolidated school laws (Laws 1894, c. 556), and a proper amendment. City of New York v. Chelsea Jute Mills, 43 Misc. 266, 88 N. Y. S. 1085.

74. Sess. Laws 1899, c. 104, p. 358, amending § 125 of the criminal code, is valid. Moline v. State [Neb.] 100 N. W. 810.

75. Cahill v. Hogan [N. Y.] 73 N. E. 39.

76. Wheeler v. State [Neb.] 102 N. W. 773.

77. Laws 1901, p. 101, amending local improvement act 1897, held to amend Laws 1899, p. 93, amending §§ 38, 42, of the Act of 1897, though it did not specifically refer to it. Village of Melrose Park v. Dunnebecke, 210 Ill. 422, 71 N. E. 431.

Note: This decision is important as overruling an earlier Illinois case, and settling the law of that state in accord with the great weight of authority. Compare Louisville, etc., R. Co. v. East St. Louis, 134 Ill. 656; Columbia Wire Co. v. Boyce, 104 F. 172. It is argued by the opponents of this position that where a section of a statute is amended, it ceases to exist, and therefore cannot be the subject of further legislation by amendment. Feibleman v. State, 98 Ind. 516. This reasoning, however, seems too refined for practical value. While in theory the amended act no longer exists, in reality it retains its place upon the statute book. A reference to it would, therefore, seem sufficient as clearly showing the intention of the legislature that the present enactment should take place of the previous act as amended. Commonwealth v. Kenneson, 143 Mass. 418.—18 Harv. L. R. 233.

78. Laws 1901, p. 6, c. 6, amending Rev. St. § 3299, relative to terms of court, refers to the revision of 1899, notwithstanding the designation by the formal title of the "Revision of 1887." Hollibaugh v. Hebn [Wyo.] 79 P. 1044.

79. See 2 Curr. L. 1720.

80. St. 1899, p. 101, c. 85, held to comply with this requirement. In re Campbell's Estate, 143 Cal. 623, 77 P. 674. Acts 1903, p. 140, c. 67, is not an amendment of prior legislation within the meaning of a constitutional prohibition against amendment by reference to title. Board of Com'rs v. Lindemann [Ind.] 73 N. E. 912.

81. Ch. 104, p. 151, Laws 1885 (§§ 1251, 1252, Gen. St. 1901), relative to telephone companies, does not contravene a provision against amending or reviving an act unless the new act contain the entire act revived or section amended. City of Wichita v. Missouri & K. Tel. Co. [Kan.] 78 P. 886.

82. Act 1899, p. 457, c. 213, relative to death by wrongful act, amending § 4025, Shannon's Code, is void. Southern R. Co. v. Maxwell [Tenn.] 82 S. W. 1137.

83. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 71 N. E. 218.

84, 85. Goodbar v. Memphis [Tenn.] 81 S. W. 1061.

86. Bray v. State, 140 Ala. 172, 37 So. 250.

Effect.[87]—The original act is not repealed by an amendment except in so far as they are in conflict.[88] An amendment is no indication that the law was otherwise prior to its enactment.[89]

Revisions.[90]—No change of legislative purpose is to be inferred from a mere condensation of prior statutes in a subsequent revision;[91] and a mere change in phraseology in the revision will not work a change in the law unless it clearly appears that such was the intention of the legislature.[92]

§ 5. *Interpretation in general.*[93]—Statutes should be construed with a view to ascertaining and giving effect to the intention of the legislature,[94] and where the intent and purpose is clear and consistent, necessary words may be implied, and words limited or enlarged in meaning, and the ordinary meaning of words and phrases required to yield to the construction which upholds and makes effective the legislation,[95] and a mere implication or inference of a contrary particular or special intent arising out of language of doubtful meaning, must yield to the general intent.[96] The court may consider the spirit, intention and purpose of the law, look to contemporaneous and prior legislation on the same subject, and the historical facts and conditions which led to the enactment of the provision under review.[97] Contradiction and repugnance must be avoided when it is possible to do so.[98] Meaningless terms may be disregarded.[99] The spirit rather than the letter is the guiding star,[1] and a thing may be within the letter of the statute and not within its meaning or intention.[2] It has been said that statutes passed at different times and without real consideration of each other should not be examined for refinements of meaning when seeking to ascertain the intent of the legislature.[3]

A statute that deals exclusively with one subject and repeals all acts in con-

87. See 2 Curr. L. 1721.

88. Laws 1901, p. 101, amending Local Improvement act of 1897, held to repeal laws 1899 amending such act. Village of Melrose Park v. Dunnebecke, 210 Ill. 422, 71 N. E. 431. Acts 1903, p. 1097, c. 366, relative to the local government of the city of Memphis, held not repealed by ch. 258, passed a few days later. Goodbar v. Memphis [Tenn.] 81 S. W. 1061.

89. The amendment of 3 Starr & C. Ann. St. 1896, c. 120, § 222, so as to require the certificate of purchase at tax sale to be recorded, does not indicate that prior to the amendment recordation was not intended to be necessary, the statute prior to amendment being doubtful. Village of Morgan Park v. Knopf, 210 Ill. 453, 71 N. E. 340.

90. See 2 Curr. L. 1721.

91. Fletcher v. Tuttle, 97 Me. 491, 54 A. 1110.

92. Eastwood v. Crane [Iowa] 101 N. W. 481.

93. See 2 Curr. L. 1722.

94. See 2 Curr. L. 1726. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804. A construction which would have the effect of placing it in the power of a transgressor to defeat by an evasion the object and purpose of a statute will not be favored. State v. Hand [N. J. Law] 58 A. 641. Statutes will be construed with a view to ascertain the intent of the legislature and to give force and meaning to the language used. Idaho Mut. Co-op. Ins. Co. v. Myer [Idaho] 77 P. 628. Comp. St. 1887, div. 5, § 707, being a part of Act March 3, 1887, relating exclusively to steam railroads, has no application to street railroads. Daly Bank & Trust Co. v. Great Falls St. R. Co. [Mont.] 80 P. 252. It was the intention of Code D. C. § 1640 to enlarge the jurisdiction of courts of equity. Lesh v. Lesh, 21 App. D. C. 475. A statute is to be construed with a view to the purpose it was intended to accomplish. Commonwealth v. Brown, 25 Pa. Super. Ct. 269. Purpose and intent of the legislature should be carried out. Bailey v. State [Ind.] 71 N. E. 655.

95. Bailey v. State [Ind.] 71 N. E. 655.

96. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746. A clearly expressed intention in one part does not yield to a doubtful construction of another portion. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

97. St. 1897, p. 34, c. 36, amending Civ. Code, § 61, relative to divorce, was to prevent collusive divorces and hasty remarriages. Grannis v. Superior Court of San Francisco [Cal.] 79 P. 891.

98. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

99. A recital in an act establishing a city court, that the court is established in a named city when the municipality referred to is not a city, is not binding on the courts. White v. State, 121 Ga. 592, 49 S. E. 715.

1. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

2. Statute relative to fire escapes in buildings in which trade, manufacture, or business is carried on, held not to apply to a kitchen in a restaurant. Carrigan v. Stillwell [Me.] 59 A. 683.

3. State v. Cooley, 2 Ohio N. P. (N. S.) 589.

flict with it will be construed as intended to cover all subjects and matters of the new act.[4]

Every presumption is in favor of validity,[5] and a statute will not be held unconstitutional unless its invalidity is so apparent as to leave no doubt on the subject.[6] A construction that violates the constitution will never be adopted if the statute is susceptible of any other,[7] and if of two interpretations, one leads to a result that exceeds the power of the legislature, the other will be deemed to be what was intended,[8] and a statute will not be declared void because of difficulty of construction or apparent hardship in application.[9] The fact that a bill when introduced in the legislature would have been invalid does not affect its validity, when before its enactment the constitution was amended to permit its enactment.[10]

Aids to interpretation.—The title[11] is not a controlling element in construction.[12] In Kentucky it is considered as containing all the law on the subject of which it treats.[13]

Legislative history[14] and reports of committees having the bill in charge[15] may be considered to ascertain the intent;[16] but inquiry as to what individual members supposed the bill to mean may not be resorted to.[17] An undeviating course of legislation in a certain direction, in an effort to systematize the law relative to a certain subject, strongly emphasizes the express language embodying the final declaration of the legislative will.[18]

Official construction.[19]—The contemporaneous construction of legislation covering a long period of time by those charged with its enforcement is highly persuasive of the correctness of such interpretation, especially where the law has been re-adopted without change after the construction has been given;[20] but, except in cases of doubtful construction,[21] it is never controlling,[22] and in order to entitle it to a controlling force, the provision must be ambiguous,[23] and such construction must have been uniform and within a reasonable time of the enactment.[24]

Judicial construction.—A decision of a court construing and applying a statute is not to be considered as determining its validity where such question was not raised.[25] The construction placed upon statutes by nisi prius courts is not binding on the court of last resort.[26]

4. Idaho Mut. Co-op. Ins. Co. v. Myer [Idaho] 77 P. 628.

5. See 2 Curr. L. 1722, n. 58, et seq. Statute held not void as productive of disproportionate taxation. Warren v. Street Com'rs of Boston, 187 Mass. 290, 72 N. E. 1022.

6. State v. Ide, 35 Wash. 576, 77 P. 961.

7. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020. Where a law is reasonably susceptible of a construction which will make it valid, such a one will be adopted rather that one which will make it void, though the latter be more reasonable or obvious. In re Campbell's Estate, 143 Cal. 623, 77 P. 74.

8. City of East Orange v. Hussey, 70 N. J. Law, 244, 57 A. 1086.

9. Weigand v. District of Columbia, 22 App. D. C. 559.

10. Morrison v. Kent [Mich.] 97 N. W. 45.

11. See 2 Curr. L. 1723.

12. Laws 1903, p. 472, c. 349, relative to dealing in liquor in G. M. and C. counties, applies to a sale of liquor anywhere in the state. State v. Patterson, 134 N. C. 612, 47 S. E. 808.

13. Louisville Public Warehouse Co. v. Miller, 26 Ky. L. R. 351, 81 S. W. 275.

14. See 2 Curr. L. 1723.

15. Mosle v. Bidwell, 130 F. 334.

16. Ex parte Keith [Tex. Cr. App.] 83 S. W. 683; Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

17. Mosle v. Bidwell [C. C. A.] 130 F. 334.

18. Wellsburg & S. L. R. Co. v Panhandle Traction Co. [W. Va.] 48 S. E. 746.

19. See 2 Curr. L. 1723.

20. City of Louisville v. Louisville School Board [Ky.] 84 S. W. 729.

21. Where an act is uncertain, it is proper to follow the departmental construction. Act July 14, 1879 (Acts Sp. Sess. 16th Leg. p. 48, c. 52), reserving lands from location. State v. Gunter [Tex. Civ. App.] 81 S. W. 1028.

22. Practice of an executive department, founded on the interpretation of a statute conferring powers and duties of administration. Payne v. Houghton, 22 App. D. C. 234.

23, 24. Knight v. Shelton, 134 F. 423.

25. Federal court may consider such question when raised. Knight v. Shelton, 134 F. 423.

26. Rodwell v. Rowland [N. C.] 50 S. E. 319.

Legislative construction.—While not conclusive on the courts,[27] it is persuasive.[28]

The surrounding conditions,[29] history of the times and the mischief intended to be remedied,[30] may be considered where the language is ambiguous or the meaning doubtful. The applicability of a law may be limited by a change in conditions since its enactment.[31]

Original act.[32]—All former statutes on the same subject, whether repealed or not, may be considered in construing provisions that remain in force.[33]

Statutes adopted from foreign states[34] are given the construction given them by the state of their origin;[35] but this rule does not prevail against an express provision to the contrary.[36]

State statutes in Federal courts.[37]—Federal courts follow the construction placed upon constitutional provisions or statutes by the courts of last resort of the state by which they are enacted.[38]

Foreign statutes.—In an action involving the construction of the statutes of a sister state, the decisions of the supreme court of such state may be considered.[39]

Laws in pari materia[40] must be read together,[41] and if divers statutes relate to the same thing, they are all to be considered in construing any one.[42] If it can be gathered from a subsequent statute in pari materia what meaning the legislature attached to the words of a former one, it will amount to a legislative declaration of its meaning.[43]

Whole act is to be considered.[44]—An original statute, with all its amendments, must be read together, and viewed as one act, passed at the same time.[45]

All language is to be effectuated.[46]—A statute will be so constructed, if possible, that it will be harmonious.[47] Effect should be given to all its parts. No sentence, clause, or word should be construed as unmeaning, if a construction can be found which will give it effect.[48]

General and particular provisions.[49]—Where specific and general terms of the same nature are employed, whether the latter precede or follow the former, the general terms take their meaning from the specific.[50] The particular terms must

27. Village of Morgan Park v. Knopf, 210 Ill. 453, 71 N. E. 340.

28. City Council of Denver v. Board of Com'rs of Adams County [Colo.] 77 P. 858.

29. See 2 Curr. L. 1723.

30. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746. Conditions that induced the enactment. Bailey v. State [Ind.] 71 N. E. 655.

31. Penal ordinance against swinging from "street cars" held not to apply to a later type of car (summer cars with running boards). Frank Bird Transfer Co. v. Morrow [Ind. App.] 72 N. E. 189.

32. See 2 Curr. L. 1723.

33. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

34. See 2 Curr. L. 1724.

35. Gilman v. Matthews [Colo. App.] 77 P. 366. The construction given such law prior to its adoption is presumed to have been adopted. Murphy v. Nelson [S. D.] 102 N. W. 691.

36. Express provision inserted into the statute at the time of its adoption. Missouri Pac. R. Co. v. State, 69 Kan. 552, 77 P. 286.

37. See 2 Curr. L. 1725.

38. Rees v. Olmsted [C. C. A.] 135 F. 296. Scope and meaning of a statute as indicated by the exclusion of evidence. Jacobson v. Com., 25 S. Ct. 358. Whether a state pilotage law granting discriminatory exemptions in violation of U. S. Rev. St. § 4237 can be eliminated without destroying remaining provisions, is a question for the state court and will not be reviewed by the Federal supreme court. Olsen v. Smith, 25 S. Ct. 52.

39. Blumle v. Kramer, 14 Okl. 566, 79 P. 215.

40. See 2 Curr. L. 1725.

41. Laws 1885, p. 525, c. 305 Laws 1890, p. 1082, c. 565, and Laws 1892, p. 1382, c. 676. O'Reilly v. Brooklyn Heights R. Co., 95 App. Div. 253, 89 N. Y. S. 41.

42. Resolution of a legislature to attend a public celebration and act appropriating money to cover expenses. Russ v. Com. [Pa.] 60 A. 169.

43. Mosle v. Bidwell, 130 F. 334.

44. See 2 Curr. L. 1726. Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

45. Gilfeather v. Grout, 91 N. Y. S. 533.

46. See 2 Curr. L. 1727.

47. The sections of Denver City Charter are not in conflict. City of Denver v. Campbell [Colo.] 80 P. 142.

48. State v. Fontenot, 112 La. 628, 36 So. 630; Wellsburg & S. L. R. Co. v. Panhandle Traction Co. [W. Va.] 48 S. E. 746.

49. See 2 Curr. L. 1728.

50. State v. Fontenot, 112 La. 628, 36 So. 630.

be given effect and the general terms construed to embrace only such cases as are not within them;[51] but the fact that certain enumerated things fall within the general terms does not limit the application of the statute to them.[52]

Words.[53]—The plain words of a statute are not to be refused their application upon any theory that a more reasonable provision could have been adopted for the state of the case presented.[54] Words and phrases are to be construed according to the common and approved usage of language,[55] and technical words according to their technical meaning,[56] in the absence of anything to indicate that such was not the intention.[57] General words are to be restricted and limited to the fitness of the subject-matter and construed as particular if the intention be particular.[58] The same word used several times in statutes pari materia is presumed to have the same significance.[59]

Punctuation.[60]—Punctuation is a minor and not a controlling element in interpretation, and may be disregarded or the statute repunctuated if necessary to give effect to what otherwise appears to be its purpose and true meaning,[61] and while not regarded as of paramount importance and will not be permitted to overturn what seems to be a plain meaning,[62] yet when so used as to enable the language to bear an interpretation which will render the entire statute rational and consistent, it is entitled to as much consideration as the language itself.[63] The scope of a penal statute which is grammatically accurate cannot be extended by repunctuation.[64]

Avoiding hardship or absurdity.[65]—The argument of inconvenience, absurdity, injustice, or prejudice to public interests, may be considered in construing a statute when the language is ambiguous,[66] and general terms should be so limited in their application as not to lead to injustice or absurd consequences.[67]

Presumption of legislative knowledge of the law.[68]—It is presumed that the legislature knows the existing law and seeks to make some change therein when it enacts a statute;[69] but an explicit provision on a given subject does not of itself prove that the law was different before.[70]

Mandatory or directory acts.[71]—Statutes relating to the summoning of a jury are directory only.[72]

Revisions.[73]—The language of a revised statute may be traced to the original enactment for the purpose of ascertaining its meaning.[74] In the construction of

51. Where a statute includes both a particular and also a general enactment which in its most comprehensive sense would include what is embraced in the particular one. Act Cong. March 2, 1889, c. 405, § 21 (25 Stat. 896), relative to public lands. Sanford v. King [S. D.] 103 N. W. 28.

52. Certain articles falling under the term "goods" used in a statute, specifically referred to. State v. Fontenot, 112 La. 628, 36 So. 630.

53. See 2 Curr. L. 1727.

54. Weigand v. District of Columbia, 22 App. D. C. 559.

55, 56. Ky. St. § 460. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020.

57. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784.

58. "Any school district" limited to country school districts. State v. Balch [Mo.] 85 S. W. 328.

59. Oneida County v. Tibbetts [Wis.] 102 N. W. 897.

60. See 2 Curr. L. 1728.

61. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

62, 63. Blood v. Beal [Me.] 60 A. 427.

64. United States v. York, 131 F. 323.

65. See 2 Curr. L. 1727.

66. Immigration Soc. of Albemarle County v. Com. [Va.] 48 S. E. 509.

67. "Workmen" held not to apply to kitchen employes in a restaurant within a statute relative to fire escapes. Carrigan v. Stillwell [Me.] 59 A. 683.

68. See 2 Curr. L. 1728.

69. Reed v. Goldneck [Mo. App.] 86 S. W. 1104.

70. State v. Balch [Mo.] 85 S. W. 328.

71. See 2 Curr. L. 1728.

72. State v. Lehman, 182 Mo. 424, 81 S. W. 1118.

73. See 2 Curr. L. 1729.

74. Fletcher v. Tuttle [Me.] 54 A. 1110; Schmidt v. U. S. [C. C. A.] 133 F. 257.

the U. S. Revised Statutes, a mere change in phraseology of a prior statute is not regarded as altering the law unless it is clear that such was the intent.[75]

Codification.—Where separate statutes covering the same general subject are brought together by codification, it is presumed that the legislature intended to adopt previous judicial constructions.[76] Yet if the intent of the legislature to change a statute is plain, the decisions of the courts as to it are not binding.[77] The interpolation of a letter during a codification will be referred to mistake rather than intent to change the law.[78]

Re-enacted laws.—The re-enactment of a statute formerly in effect is presumed to carry the construction formerly placed upon it.[79]

Strict or liberal constructions.—Statutes changing the common law[80] modify or abrogate it no further than the clear import of its language necessarily expresses;[81] but this doctrine does not demand that the obvious intent of the legislature be frustrated.[82]

Penal statutes[83] are strictly construed;[84] to extend a penal statute to a case not specifically described, the intention of the legislature must appear from the words of the act and cannot be made out by conjecture or based on probabilities,[85] but this rule does not permit such construction to defeat the obvious intent of the legislature.[86] A statute made for the good of the public, though penal, should be equitably construed.[87]

Various other strict constructions.[88]—Laws in derogation of the liberty of the citizen are to be strictly construed,[89] and what before their enactment was a legal occupation does not become generally illegal where the persons to whom it applies are designated.[90] A statute authorizing a grant of public lands is construed most strongly against the grantee.[91] A statute authorizing condemnation of land will not be construed to apply to land already devoted to public use, unless such intention is clearly apparent.[92]

The proviso.[93]—The office of a proviso is to restrain the enacting clause; to except something which would otherwise be within it, or in some manner modify it, and where it follows and restricts an enacting clause general in its scope and language, it is to be strictly construed.[94]

75. Naturalization laws. Schmidt v. U. S., 133 F. 257.

76. Shelton v. Sears [Mass.] 73 N. E. 666.

77. Martin v. Oskaloosa [Iowa] 102 N. W. 529.

78. Bailey v. McAlpin [Ga.] 50 S. E. 388.

79. Supreme Council A. L. H. v. Anderson [Tex. Civ. App.] 83 S. W. 207. Where a statute has been construed by the courts and is then re-enacted, the construction is presumed to be sanctioned and thenceforth becomes obligatory. Swift & Co. v. Wood [Va.] 49 S. E. 643.

80. See 2 Curr. L. 1728.

81. Modifying servant's assumption of risk. Johnson v. Southern Pac. Co. [C. C. A.] 117 F. 462. If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed. Smith v. Boston & A. R. Co., 99 App. Div. 94, 91 N. Y. S. 412.

82. Act March 2, 1893 (27 Stat. at L. 531, ch. 196; U. S. Comp. St. 1901, p. 3174), relative to automatic couplers. Johnson v. Southern Pac. Co., 25 S. Ct. 158.

83. See 2 Curr. L. 1729.

84. Rev. St. U. S. § 3449, providing a penalty for shipping liquors under any but the proper name. United States v. Twenty Boxes of Corn Whisky [C. C. A.] 133 F. 910. This statute applies only to dealers in liquor and not to all persons generally. Id. A revenue law requiring peddlers to obtain a license being penal so far as it imposes a penalty. Kloss v. Com. [Va.] 49 S. E. 655.

85. The Ben R. [C. C. A.] 134 F. 784.

86. Johnson v. Southern Pac. Co., 25 S. Ct. 158.

87. Tyner v. U. S., 23 App. D. C. 324.

88. See 2 Curr. L. 1729.

89. Commonwealth v. Beck [Mass.] 72 N. E. 357. A statute in derogation of the natural right of a person to manage his own property. Gray v. Stewart [Kan.] 78 P. 852.

90. Laws relative to liquor traffic. Commonwealth v. Beck, 187 Mass. 15, 72 N. E. 357.

91. District of Columbia v. Cropley, 23 App. D. C. 232.

92. Starr Burying Ground Ass'n v. North Lane Cemetery Ass'n [Conn.] 58 A. 467.

93. See 2 Curr. L. 1728.

94. Futch v. Adams [Fla.] 36 So. 575. Takes no case out of the enacting clause which does not fall fairly within its terms. Towson v. Denson [Ark.] 86 S. W. 661.

Liberal construction[95] should be given the language of the title.[96] Statutes authorizing the issuance of injunctions are liberally construed.[97] Statutes, the purpose of which is the protection of the lives of men, are so construed as to prevent the mischief and advance the remedy, so far as the words fairly permit.[98] Where it is necessary to resort to construction of a statute to relieve a property owner from a municipal assessment, it should be construed in his favor rather than against him.[99]

Remedial statutes[1] should be liberally construed, but must be followed with strictness where they give a remedy against a party who would not otherwise be liable.[2]

General powers and limitations of legislature.[3]—The protection of the public from fraud and deception and the protection of private property are proper objects of legislation.[4] The legislature may regulate the right to divorce,[5] and prescribe rules and regulations whereby rights and priorities of appropriators to the use of public waters may be settled.[6] It may incorporate into a law a statute prepared by men bearing no official relation.[7] It may change the law of procedure to affect pending actions;[8] declare in a statute the sense in which it used certain words contained therein;[9] but may not exercise judicial power.[10] The legislative power cannot be delegated.[11] The legislative powers of territorial governments are as broad as those exercised by the states.[12]

Partial invalidity.[13]—A statute good in part and void as to the remainder will be enforced in so far as valid,[14] providing the invalid portion is not so important

95. See 2 Curr. L. 1728.

96. See ante, § 3, Subjects and Titles.

97. Rev. St. 1887, § 4288. Shields v. Johnson [Idaho] 79 P. 394.

98. Chicago, etc., R. Co. v. Voelker [C. C. A.] 129 F. 522.

99. Gilfeather v. Grout, 91 N. Y. S. 533.

1. See 2 Curr. L. 1729. Gen. St. 1902, § 4487, fixing liability of the owner of dogs for damages done, is remedial, not penal. Leone v. Kelly [Conn.] 60 A. 136.

2. Statute relative to rights of an abutter against a municipality for change in grade of a highway. Smith v. Boston & A. R. Co., 99 App. Div. 94, 91 N. Y. S. 412.

3. See 2 Curr. L. 1730.

4. Rev. Laws, c. 72, § 16, relative to unauthorized use of registered bottles. Commonwealth v. Anselvich [Mass.] 71 N. E. 790.

5. Civ. Code, §§ 131, 132, are constitutional. Grannis v. Superior Court of San Francisco [Cal.] 79 P. 891.

6. Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25.

7. That a mortality table was originally prepared by a body of men bearing no official relation to the legislature. State v. Fraternal Knights & Ladies, 35 Wash. 338, 77 P. 500.

8. No person has a vested right in any particular mode of procedure. Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25. The law of evidence is a part of the remedy and is within legislative control. Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25; State v. Barrett [N. C.] 50 S. E. 506.

9. Does not usurp a judicial function. Getz v. Brubaker, 25 Pa. Super. Ct. 303.

10. Act to authorize county commissioners to issue certificates of indebtedness is not an exercise of judicial power by legislation. State v. Gunn, 92 Minn. 436, 100 N. W. 97.

11. Rev. Code, § 664, providing that the insurance commissioner shall prescribe the form of policy to be used, is void. Phenix Ins. Co. v. Perkins [S. D.] 101 N. W. 1110. Acts 1898-99, p. 683, amended by Acts 1900-01, p. 170, to prevent stock from running at large, does not delegate legislative power. Davis v. State [Ala.] 37 So. 454. Acts April 28, 1899 (P. L. 67 and 68), and Acts April 11, 1866 (P. L. 658), are void. McGonnell's License, 24 Pa. Super. Ct. 642.

12. Laws 1891, pp. 61, 63, No. 41, relative to exemption of railroads from taxation, is not in excess of legislative power. Bennett v. Nichols [Ariz.] 80 P. 392.

13. See 2 Curr. L. 1731.

14. In re Campbell's Estate, 143 Cal. 623, 77 P. 674. Sess. Laws 1901, p. 155, § 8. In re Abel [Idaho] 77 P. 621. St. 1903, p. 124, c. 163, held not rendered invalid as a whole by the unconstitutionality of one clause. Lentell v. Boston & W. St. R. Co. [Mass.] 73 N. E. 542. A statute impairing the obligation of any particular contract may be declared inoperative as to it without destroying its constitutionality in other respects. Brady v. Mattern [Iowa] 100 N. W. 358. Laws 1893, p. 241, c. 99, relative to state tide lands, though void as to one section is not wholly void. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845. That a provision of Sayles' Rev. St. arts 3384, 3399, is void, does not invalidate it in toto. Hoover v. Thomas [Tex. Civ. App.] 80 S. W. 859. Unconstitutionality of Acts 1873, p. 138, c. 103, § 6, relative to removal of county seats, does not affect the validity of the rest of the act. Lindsay v. Allen [Tenn.] 82 S. W. 171. That a portion of Act Feb. 25, 1905, abolishing Watson judicial district is

that the statute would not have been passed had the legislature foreseen its invalidity.[15] This doctrine is most frequently applied where some of the sections are valid and others void, but is equally applicable where both the valid and invalid portions are in the same section.[16] But where they are so connected or dependent on each other that the act would not have been passed except as a whole, the entire statute must fall.[17]

§ 6. *Retrospective effect.*[18]—All statutes are to be so construed as to have a prospective effect only,[19] but this rule is one of construction only and is not to be resorted to when the terms of the statute are clear;[20] but retrospective laws prohibited by the constitution are void.[21] Statutes relating merely to the mode of procedure are remedial in character and applicable to prior as well as subsequent causes of

void, does not invalidate the entire statute. Waterman v. Hawkins [Ark.] 86 S. W. 844.

15. Ex parte Gerino, 143 Cal. 412, 77 P. 166. Prohibitive features of Loc. Acts 1903, pp. 62, 68, 71, relative to the sale of liquor in Louderdale county, held to operate independently of the dispensary features of the act and are not affected by the invalidity of them. Mitchell v. State [Ala.] 37 So. 407. Batts' Ann. St. arts. 4560a, 4560b, relative to the redemption of railroad tickets, though void in part is not void in all its provisions. Texas & P. R. Co. v. Mahaffey [Tex. Civ. App.] 81 S. W. 1047. Acts 1903, p. 1536, c. 576, relative to county attorneys. State v. Trewhitt [Tenn.] 82 S. W. 480. Kansas City Charter, art. 9, § 18, relative to assessments for local improvements, is not so interwoven with the rest of the section that it cannot be declared void. Haag v. Ward [Mo.] 85 S. W. 391. That the portion of the act of the 28th Leg., organizing the 62d Judicial District relative to the impaneling of a jury, is void, does not invalidate the remainder of the act. St. Louis Southwestern R. Co. v. Hall [Tex.] 85 S. W. 786. Section of Sess. Acts 1899, p. 96, relative to monopolies, does not invalidate the entire law. Finck v. Schneider Granite Co. [Mo.] 86 S. W. 213. The authority conferred by P. L. 237, upon the governor, to appoint county boards of election, is separable from the provisions respecting nominations for such appointment. State v. Corrigan [N. J. Law] 60 A. 515. Enough of P. L. 1894, p. 524, providing an elective system for members of the board of street commissioners of cities of the first class, held valid to constitute a complete act. Fagan v. Payen [N. J. Err. & App.] 59 A. 568. Provision for an unlawful search and seizure held not so essential to the remainder of the act as to render it unconstitutional. Commonwealth v. Anselvich [Mass.] 71 N. E. 790.

16. Act relative to sale of intoxicating liquors held valid in part. State v. Scampini [Vt.] 59 A. 201. Act relative to corporations held valid as to domestic though void as to foreign. Murphy v. Wheatley [Md.] 59 A. 704.

17. Laws 1893, p. 97, c. 73, relative to sale and redemption of railroad tickets. Texas & P. R. Co. v. Mahaffey [Tex.] 84 S. W. 646. Provisfon relative to eminent domain held to invalidate the entire statute. Albright v. Sussex County Lake & Park Commission [N. J. Err. & App.] 59 A. 146.

18. See 2 Curr. L. 1732.

19. Mills' Ann. St. § 2923, relative to adverse possession, is prospective. Edelstein v. Carlile [Colo.] 78 P. 680; Bushnell, Estate of, 2 Ohio N. P. (N. S.) 673. The repeal of a provision of a tax law does not affect the liability of a taxpayer for taxes which have already become a charge on his property. Hooper v. State [Ala.] 37 So. 662. It is to be presumed unless the contrary appears that the operation of a statute is to be prospective only. City of Haverhill v. Marlborough, 187 Mass. 150, 72 N. E. 943.

Held prospective only: Laws 1897, p. 168, § 6a, amending Laws 1879, p. 85 (Homestead and Loan Association Act). Assets Realization Co. v. Heiden [Ill.] 74 N. E. 56. Act Ark. March 27, 1893 (Acts 1893, p. 169), relative to outstanding city warrants. Condon v. Eureka Springs, 135 F. 566. Acts 1903, p. 110, to regulate the business of persons engaged in making or issuing contracts (Building and Loan Associations). State v. Preferred Tontine Mercantile Co. [Mo.] 82 S. W. 1075. Const. art. 15, § 2, forbidding the enactment of any law imposing on the people of any municipal subdivision a new liability with respect to any past transaction or consideration, is not applicable to municipal corporations or governmental subdivisions. School Dist. No. 1 v. School Dist. No. 7 [Colo.] 78 P. 690. Sess. Laws 1901, pp. 133, 138, as amended by Sess. Laws 1903, pp. 159, 164, relative to the apportionment and appraisement of property belonging to certain school districts. Id. Negotiable Instruments Law. Jefferson County Nat. Bank v. Dewey [N. Y.] 73 N. E. 569. Provision of Bankruptcy Act 1898, forbidding discharge, if there has been a prior one, within six years, is not retroactive as applied to cases where proceedings were had prior to its enactment. It merely adds a new condition of discharge. In re Carleton, 131 F. 146. A constitutional provision against the organization of corporations by special law has no application to corporations chartered prior to its adoption. State v. Bangor, 98 Me. 114, 56 A. 589.

20. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

Held not retrospective: Rev. Laws, c. 75, § 54, relative to the recovery of expenses paid by a town for the preservation of the public health, is prospective. City of Haverhill v. Marlborough, 187 Mass. 150, 72 N. E. 943.

21. Acts June 15, 1897 (P. L. 165), and of July 2, 1901 (P. L. 609), relative to compensation of constables. Edwards v. McLean, 23 Pa. Super. Ct. 43.

action;[22] thus statutes of limitations may be retrospective if they do not impair contracts or disturb vested rights;[23] but where the bar has once attached, the right may not be revived.[24] A statute passed after the rendition of judgments may be applicable to those judgments if they are still pending in appellate courts on review.[25] A law fixing punishment of persons "hereafter convicted" has been held to be prospective,[26] and though contrary to the general rule,[27] seems to be well founded in reason.[28]

§ 7. *Repeal.*[29]—A general repealing clause in an act is a legislative expression which carries with it a repealing effect only where by law, the effect would be the same without such repealing clause.[30] If a section of a statute to be repealed is designated by an incorrect number in the title of an act, it is not repealed, though correctly designated in the body of the act;[31] but such error does not render the statute void.[32] A provision that the repeal of a repealing law shall not operate to revive the former unless expressly so provided, applies only to cases of absolute repeal.[33]

Vested rights[34] secured by the constitution cannot be disturbed by the legislature,[35] nor can the obligation of a legislative contract be impaired;[36] but the presumption is against the irrepealable character of a statute.[37] The repeal of a statute pending an action or legal proceeding commenced under it does not abate either.[39]

22. Relative to parties in actions of adverse possession. Campbell v. Equitable Loan & Trust Co. [S. D.] 94 N. W. 401; Edelstein v. Carlile [Colo.] 78 P. 680. Remedial statutes relate to existing causes of action. Statute relative to contribution among joint tort feasors. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

23. Edelstein v. Carlile [Colo.] 78 P. 680. Statute of limitation (Act Colo. April 29, 1895), amended by Act April 6, 1899, held retroactive. Lamb v. Powder River Live Stock Co. [C. C. A.] 132 F. 434.

24. Edelstein v. Carlile [Colo.] 78 P. 680. But see, Limitation of Actions, 4 Curr. L. 445, citing cases to the contrary.

25. Writ of mandamus to compel disconnection of land from a city was granted. While pending on appeal, statute was passed making such proceeding discretionary. Held, that the statute applied to the judgment, the ordinance of disconnection not having been passed. City of Roodhouse v. Briggs, 105 Ill. App. 116.

26. In re Lambrecht [Mich.] 100 N. W. 606. Pub. Acts 1903, p. 168, No. 136. Id.

27. Note: The general rule is that laws fixing the punishment for crime operate as well on crimes already committed as on future ones. Flaherty v. Thomas, 12 Allen [Mass.] 428; People v. Hayes, 140 N. Y. 484, 37 Am. St. Rep. 572; Commonwealth v. Kimball, 21 Pick. [Mass.] 373. This rule applies even though the punishment be augmented. In re Medley, 134 U. S. 160, 33 Law. Ed. 835; Heald v. State, 36 Me. 62. It matters not whether the repeal be by implication or in general terms or of specific statutes. Garvey v. People, 6 Colo. 559, 45 Am. Rep. 531; State v. Daley, 29 Conn. 272. When retroactively increased, the law is of course offensive to the ex post facto inhibition. 4 Columbia L. R. 593.

See Criminal Law, 3 Curr. L. 979; Constitutional Law, 3 Curr. L. 730.

28. Note: In a note in 4 Columbia L. R. 593, it is said that punitive statutes are not wholly remedial and therefore presumptively designed by the legislature to be uniform in operation on existing as well as future rights (citing Bishop, Stat. Crimes [3d Ed.] §§ 175, 176, 183), but that the punishment affects rights for which reason legislative intent presumptively looks only to such as may take their inception in the future. The decisions under the ex post facto clause are cited as implying such a distinction, from the fact that punitive laws are void if retroactive while laws retroactively changing criminal procedure purely are valid (citing Jaquins v. Commonwealth, 9 Cush. [Mass.] 279; Gut v. State, 9 Wall. [U. S.] 35, 19 Law. Ed. 573).

29. See 2 Curr. L. 1733.

30. City of Wichita v. Missouri & K. Tel. Co. [Kan.] 78 P. 886. No part of general telegraph act (art. 8, c. 23, Gen. St. 1868), was repealed by the charter act of cities of the first class (ch. 37, p. 79, Laws 1881). Id.

31, 32. State v. Knoll, 69 Kan. 767, 77 P. 580.

33. Gen. St. Minn. 1894, § 258, providing that the repeal of a law repealing a former law shall not revive the former law unless expressly so provided, applies only to cases of absolute repeal. Pepin Tp. v. Sage [C. C. A.] 129 F. 657. Const. Minn. §§ 33, 34, prohibiting special laws relative to municipal corporations, construed. Id.

34. See 2 Curr. L. 1733.

35. Power of married women to dispose of their property. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784. Repeal of Act Ark. Feb. 27, 1875 (Acts 1874-75, p. 189), relative to outstanding city warrants, did not impair vested rights. Condon v. Eureka Springs, 135 F. 566. Right to maintain a bridge erected pursuant to Act Cong. July 14, 1862, which contained no reservation of a right to amend, is not affected by subsequent prospective acts. United States v. Parkersburg Branch R. Co., 134 F. 969. And see Constitutional Law, 3 Curr. L. 730.

36. See Constitutional Law, 3 Curr. L. 730.

37. Board of Sup'rs v. Hubinger [Mich.] 100 N. W. 261.

Effect on pending actions.[39]—A general saving clause providing that the repeal of a statute shall not affect accrued rights or pending causes protects accrued or pending causes of action;[40] but where a law takes away a subject of jurisdiction, a proceeding founded on it must fall.[41]

Implied repeal.[42]—The repeal of statutes is wholly a question of legislative intent. Repeal by implication is not favored,[43] especially where it is expressly forbidden by the constitution,[44] and in order that such a repeal may be given effect, the contradictions between two laws must be irreconcilable,[45] and there must be a general and positive repugnance,[46] so clear as to admit of no other reasonable construction,[47] otherwise an apparent conflict may be read as an exception;[48] but a purpose to repeal inconsistent acts need not be expressed in the title.[49] It is necessary to the repeal of a statute by implication that the object of the two statutes be the same.[50]

38. Rights of the parties are preserved by Gen. St. 1901, § 7342, subd. 1. Consolidated Barb Wire Co. v. Stevenson [Kan.] 79 P. 1085.

39. See 2 Curr. L. 1733.

40. Blumle v. Kramer, 14 Okl. 366, 79 P. 215.

41. Washington Borough, 26 Pa. Super. Ct. 296.

42. See 2 Curr. L. 1734.

43. York Gazette Co. v. York County, 25 Pa. Super. Ct. 517. Two laws passed at the same session should be construed as if embraced in one act and should be so construed that both may stand. McGrady v. Terrell [Tex.] 84 S. W. 641. In construing two provisions of a statute, it is the duty of the courts to preserve the force of both without destroying the evident intent of either. State v. Givens [Fla.] 37 So. 308.

44. Wheeler v. State [Neb.] 102 N. W. 773.

45. Acts 28 Leg. 1903, p. 133, c. 101, relative to publication of election notices, does not repeal Acts 26th Leg. 1899, p. 22, c. 128 (Local Option Stock Law). Ex parte Kimbrell [Tex. Cr. App.] 83 S. W. 382. Local Option Law, art. 3387, was not repealed by Terrell Election Law (Gen. Laws 28th Leg. 1903, p. 133). Ex parte Keith [Tex. Cr. App.] 83 S. W. 683. Gen. Laws 27th Leg. p. 253, c. 88, not repealed by Gen. Laws 27 Leg. p. 292. c. 88, §§ 7, 9. McGrady v. Terrell [Tex.] 84 S. W. 641.

Held inconsistent: Const. art. 3, § 21, relative to compensation of the attorney general, held to repeal Territorial Acts 1887-88, p. 9, c. 7, § 8. State v. Maynard, 35 Wash. 168, 76 P. 937. Code, § 616, as amended by Acts 1895, p. 105, c. 105, § 1, as amended by Acts 1899, p. 144, c. 49, relative to hearing of cases to try title to office, is inconsistent with Code, § 613. McCall v. Webb, 135 N. C. 356, 47 S. E. 802. Rev. St. 1899, § 1987, relative to killing or maiming a horse, was repealed by § 1988. State v. Taylor [Mo.] 85 S. W. 564. § 4 Act of June 2, 1871 (P. L. 283), relative to extension of limits of boroughs, repealed by Act April 22, 1903 (P. L. 247). Donora Borough v. Donora Borough, 26 Pa. Super. Ct. 300. Sess. Laws 1895, p. 522; Act No. 230, §§ 26, 27, relative to township road system impliedly repealed by Loc. Acts 1899, pp. 229, 230, as amended by Loc. Acts 1901, p. 115. Board of Sup'rs v. Hubinger [Mich.] 100 N. W. 261. Act of April 22, 1903 (P. L. 247) repeals Acts April 3, 1851 (P. L. 283), § 4, July 15, 1897 (P. L. 296), and April 6, 1899 (P. L. 33). Washington Borough, 26 Pa. Super. Ct. 296. Sec. 1265 Code D. C. (Limitations) repeals Secs. 1 and 2 of 21 James I., ch. 16. Gwin v. Brown, 21 App. D. C. 295. Sec. 111, Code D. C., relative to adverse possession, repealed Sec. 2, Act of 21 James 1, ch. 16. Id. Repeal by necessary implication. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Err. & App.] 60 A. 214.

Held not inconsistent: Act providing a special system for collection of taxes held not repealed by a subsequent act which did not create a complete system. The acts are to be read in connection with each other. Commonwealth v. Couch, 209 Pa. 354, 58 A. 667. Rev. St. U. S. § 3227, limitations not repealed by Act of March 3, 1887 (ch. 359, § 1, 24 Stat. 505). Christie-Street Commission Co. v. U. S. [C. C. A.] 136 F. 326. Laws 1901, p. 126, § 2251, relative to counties, did not repeal Laws 1898, p. 27. Allison v. Hatton [Or.] 80 P. 101. Act March 13, 1903 (P. L. 26), relative to desertion of children by a parent, did not repeal Act of April 13, 1867 (P. L. 78). Commonwealth v. Mills, 26 Pa. Super. Ct. 549. Laws 1891, pp. 61, 63, No. 41, relative to exemption of railroads from taxation, not repealed by Rev. St. 1901, § 3834. Bennett v. Nichols [Ariz.] 80 P. 392. Act Feb. 12, 1828, relative to appeals and appeal bonds, is not repealed by Civ. Code Proc. § 682, nor by the Code of 1877, which contains the same provision as the Code of 1851. Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013. Acts 1891, p. 50, c. 4021, going into effect May 19, 1891, relative to appeals from municipal courts, not repealed by Acts 1891, p. 92, c. 4055, § 1. State v. Wills [Fla.] 38 So. 289.

46. York Gazette Co. v. York County, 25 Pa. Super. Ct. 517. Act of June 23, 1885, relative to elections, not repealed by Act of June 10, 1893 (P. L. 419), as amended by Act of June 26, 1895 (P. L. 392). Id.

47. Sections 2117, 2118, 2147, Rev. St. U. S., not repealed by subsequent legislation. Morris v. Hitchcock, 21 App. D. C. 565. Sections of Gen. St. 1901, § 2452, held not so inconsistent that they could not stand together. Newman v. Lake [Kan.] 79 P. 675.

48. Sec. 111, Code D. C. must be read as an exception to sec. 1265. Gwin v. Brown, 21 App. D. C. 295.

49. Monaghan v. Lewis [Del.] 59 A. 948.

50. Sess. Laws 1903, p. 244, c. 29, art. 2, not repealed by Act March 17, 1903, p. 236,

Where a new law covers the whole subject-matter of an old one, the latter is repealed by implication.[51] A subsequent statute repeals a prior one in so far as they are clearly repugnant;[52] but if the statute can be harmonized without repeal, they should be so interpreted,[53] especially where the repeal would lead to absurd and mischievous consequences.[54] An act intended as a substitute for existing laws is not one extending them.[55]

An unconstitutional law is ineffectual to repeal one inconsistent with it;[56] and an unconstitutional amendment does not repeal by implication the original act.[57]

The re-enactment of a previous statute is not construed as an implied repeal of the prior law, but as a continuation thereof.[58] This principle is applicable to the construction of an ordinance.[59]

General and special laws.[60]—Specific legislation on a particular subject and a general law on that and other subjects must stand together unless clearly repugnant.[61] Special laws are not repealed by general ones unless specially mentioned or such purpose is apparent,[62] though their provisions be inconsistent,[63] unless they are repugnant to each other,[64] or a contrary intent is clearly apparent.[65] Where an act is passed to carry into effect a mandatory general provision of the constitution, it is presumed to repeal local inconsistent laws.[66] Where a town is reincorporat-

c. 29, art. 1, concerning roads and bridges. McMillan v. Board of Com'rs of Payne County, 14 Okl. 659, 79 P. 898.

51. Pen. Code 1895, art. 185, relative to sale of liquor on election days, was repealed by Terrell Election Law, § 120 (Gen. Laws [28th Leg.] p. 154, c. 101), defining and prohibiting the same offense. Fleeks v. State [Tex. Cr. App.] 83 S. W. 381. Local Act of April 11, 1866 (P. L. 658), relative to sale of liquor in Potter county, repeals Local Act of March 27, 1866 (P. L. 339). McGonnell's License, 24 Pa. Super. Ct. 642.

52. In re Lambrecht [Mich.] 100 N. W. 606. Act fixing a rate of taxation different from the rate fixed by a prior act repeals the prior one. Monaghan v. Lewis [Del.] 59 A. 948. Laws 1892, p. 1470, c. 715, § 3, relative to newspapers in which to publish the session laws, held repealed by County Laws (Laws 1892, p. 1479, c. 686, § 19), as amended by Laws 1900, p. 933, c. 400. In re Troy Press Co., 94 App. Div. 514, 88 N. Y. S. 115.

53. It is presumed that the prior act was not intended to be interfered with unless it is repugnant or the reason of it has been removed. York Gazette Co. v. York County, 25 Pa. Super. Ct. 517. Acts 28 Gen. Assem. c. 29, p. 15, § 3, relative to special assessments, does not repeal § 971 of the Code and substitute § 832 in its place. Diver v. Keokuk Sav. Bank [Iowa] 102 N. W. 542. Pol. Code, § 3891, providing that its revenue laws are to be construed as though the Code had been passed on the last day of the session, does not render void an earlier revenue act unless there is some repugnancy. Rosasco v. Tuolumne, 143 Cal. 430, 77 P. 148.

54. Indeterminate sentence law (Pub. Acts 1903, No. 136), held not to repeal Comp. Laws, § 11,784. In re Lambrecht [Mich.] 100 N. W. 606.

55. Mechanics' Lien Act of July 4, 1901 (P. L. 431), does not extend existing laws. Gety v. Brubaker, 25 Pa. Super. Ct. 303.

56. Statute relative to peddlers. People v. De Blaay [Mich.] 100 N. W. 598; State v. Insurance Co. [Neb.] 100 N. W. 405.

57. Laws 1896, p. 69, c. 112 (Liquor Tax Law), § 28, subd. 2, not affected by the invalidity of the amendment (Laws 1900, p. 836, c. 367). In re Cullinan, 97 App. Div. 122, 89 N. Y. S. 683.

58. A re-enactment of an old statute is simply a continuance of an old rule. Galloway v. Bradburn, 26 Ky. L. R. 977, 82 S. W. 1013.

59. Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346.

60. See 2 Curr. L. 1736.

61. The one as the law of the particular subject, the other as the general law of the land. Christie-Street Commission Co. v. U. S. [C. C. A.] 136 F. 326.

62. Terrell Election Law (Laws 1903, p. 133, c. 101), relative to notices of a special election, did not repeal Local Option Law (Laws 1899, p. 220, c. 128). Ex parte Neal [Tex. Cr. App.] 83 S. W. 831; Ex parte Kimbrell [Tex. Cr. App.] 83 S. W. 382. Local Act of April 4, 1870 (P. L. 834), relative to county commissioners of certain counties, not repealed by General Act of April 19, 1895 (P. L. 38). Commonwealth v. Brown, 25 Pa. Super. Ct. 269. Laws 1873, p. 944, c. 620, relative to the collection of taxes in Suffolk county, not repealed by Laws 1891, p. 411, c. 217. Welstead v. Jennings, 93 N. Y. S. 339. Laws 1892, p. 1152, c. 603, as amended by Laws 1895, p. 788, c. 438, § 20, not repealed by Laws 1898, p. 436, c. 182, as amended by Laws 1899, p. 1272, c. 581. People v. Monroe County Court, 93 N. Y. S. 452.

63. Act relative to contracts of county commissioners in certain counties. Commonwealth v. Brown [Pa.] 59 A. 479.

64. Loc. Act April 10, 1873, is repealed by General Act July 30, 1897. Sun & B. Pub. Co. v. Bennett, 26 Pa. Super. Ct. 243. Various special acts relative to the city of Covington were repealed by the Gen. Act of Oct., 1892. McInerney v. Huelefeld, 25 Ky. L. R. 272, 75 S. W. 237.

65, 66. Commonwealth v. Brown [Pa.] 59 A. 479.

ed as a city by an act which repeals all inconsistent laws, the town charter is repealed by implication;[67] but affirmative statutes of a general nature do not repeal by implication charters and special acts passed for the benefit of particular municipalities.[68] A general act will be repealed pro tanto by a subsequent special act where the two cannot stand together,[69] but otherwise if they are not clearly repugnant.[70]

STATUTORY PROVISOS, EXCEPTIONS AND SAVINGS.

[Special Article by William A. Robertson and Thomas M. Lane.]

A proviso in a statute is a clause generally following the enacting clause, and used either to except something from the enacting clause, to qualify or restrain its generality, or to exclude misinterpretation.

A proviso

(a) Is generally to be strictly construed, and takes no case out of the enacting clause not fairly within its terms.

(b) Having properly a restrictive use, it should not be construed to enlarge or add to the substantive provisions of an act.

(c) Is, in general, to affect only that portion of the act to which it is appended.

(d) Probably repeals the enacting clause if totally repugnant to it.

An exception exempts something absolutely from the operation of a statute by express words in the enacting clause.

A saving clause resembles an excepting proviso, and is in common use to preserve rights, liabilities and remedies from the operation of repealing laws.

A saving clause totally repugnant to the purview of an act is probably void.

"An *exception* is, generally, part of the enactment itself, absolutely excluding from its operation some subject or thing that otherwise would fall within its scope."[1] A *proviso* is a clause usually following or engrafted upon the enacting clause.[2] It "is generally intended to restrain the enacting clause, and to except

67. Wright v. Overstreet [Ga.] 50 S. E. 487.

68. Pub. Laws 1903, p. 621, c. 375, relative to selling bonds for the improvement of roads of Heywood county, does not repeal Priv. Laws 1885, p. 1098, c. 127, § 16, Waynesville Town Charter. Town of Waynesville v. Satterthwait, 136 N. C. 226, 48 S. E. 661.

69. Act relative to administration of the estate of a lunatic held repealed. Lang v. Friesenecker, 213 Ill. 598, 73 N. E. 329. Ch. 375, p. 571, Laws 1903, held to repeal by implication § 5686, Gen. St. 1901, as it covers the entire ground of that section. State v. Knoll, 69 Kan. 767, 77 P. 580.

70. The Special Act for Screven County (Acts 1874, p. 403), regulating the grant of licenses to sell liquor, is supplementary to the general law. Kemp v. State, 120 Ga. 157, 47 S. E. 548.

1. Rowell v. Janvrin, 151 N. Y. 60, 68, 45 N. E. 398. The exception of a single thing from general words shows that the legislature considered that the thing excepted would but for the exception have been within the general words. Commonwealth v. Summerville, 204 Pa. 300. Bish. Written Laws, § 58. See, however, note 21, post. Where a special statute declares that a certain law shall not, with the exception of certain section apply to a particular county, the excepted sections are as to such county deemed embodied in the special statute. Gabel v. Williams, 39 Misc. [N. Y.] 489.

2. Rowell v. Janvrin, 151 N. Y. 60, 68, 45 N. E. 398.

The term "provided" in deeds and wills is held to be an apt word to create a condition. Cromwell's Case, 2 Co. 72a; Stanley v. Colt, 5 Wall. [U. S.] 119, 166, 18 Law. Ed. 502; Chapin v. Harris, 90 Mass. 594, 596.

The technical distinction between a proviso and an exception in private instruments is thus stated by Mr. Sergeant Williams in the notes to Saunders' Rep. (1 Saunders' Rep. [5th Ed.] note c, p. 234), "A proviso is properly the statement of something extrinsic of the subject-matter of the covenant, which shall go in discharge of that covenant by way of defeasance: an exception is a taking out of the covenant some part of the subject-matter of it."

Speaking of this distinction in statutes, the New York Court of Appeals said, in Rowell v. Janvrin, 151 N. Y. 60, 68, 45 N. E. 398: "The distinction, however difficult to state, has always been recognized. An exception exempts something absolutely from the operation of a statute by express words in the enacting clause; a proviso defeats its

something which would otherwise have been within it, or in some measure to modify the enacting clause;"[3] or "to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."[4] A *saving clause* resembles an excepting proviso,[5] and is customarily inserted in a statute to preserve rights, liabilities, remedies, etc., depending upon laws which it repeals.[6] The words "Except," "Provided,"

operation conditionally. An exception takes out of the statute something that otherwise would be a part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse." So Manning, J., in Myers v. Carr, 12 Mich. 63, 71, remarked: "An exception excludes in express terms the thing excepted from the statute—leaving it as before the statute. A proviso only excepts a thing within the statute from its operation in certain circumstances or on certain conditions." Waffle v. Goble, 53 Barb. [N. Y.] 517, 522: "A proviso in a statute always implies a condition unless modified by subsequent words." Note also Voorhees v. Bank of U. S., 10 Pet. [U. S.] 449, 471.

But in deeds and wills the term "provided" does not necessarily import a condition (Chapin v. Harris, 90 Mass. 594, 596), but "gives way to the intent of the parties as gathered from an examination of the whole instrument" (Stanley v. Colt, 5 Wall. [U. S.] 119, 166, 18 Law. Ed. 502), and is often used by way of limitation or qualification only (Cromwell's Case, 2 Co. 72a; Chapin v. Harris, 90 Mass. 594, 596; Stanley v. Colt, 5 Wall. [U. S.] 119, 166, 18 Law. Ed. 502), and this is also true of provisos in statutes. Furthermore, a proviso may serve to introduce an absolute exception to the statute.

To define the proviso in written laws, therefore, as a conditional exemption or defeasance merely, however accurate from a technical standpoint, would not express the comprehensive sense in which the term is ordinarily used by jurists, as the authorities in the text and in note 3 will indicate. Note 8 Amer. Jur. 233, at 242.

In legislation the word "provided" is frequently misused to introduce clauses that are not provisos within any of the definitions. See note 17, post. For basis of the distinction between exceptions and provisos in pleading, see note 7, post.

3. Mr. Chief Justice Marshall in Wayman v. Southard, 10 Wheat. [U. S.] 30, 6 Law. Ed. 253. Deitch v. Staub, 115 F. 309; United States v. Macfarland, 18 App. D. C. 120; Futch v. Adams [Fla.] 36 So. 575.

The proviso may restrain the generality of a grant of power or right, or annex a condition. Where a statute empowered commissioners to pave highways, "provided the same be not less in length than one, nor exceeding three squares at one time," at the expense of abutting owners, it was held that "the proviso is a limitation of power, and amounts to a negation of all authority beyond its prescribed and clearly defined limits," and the commissioners could not recover from the property owners the expense of paving more than three squares at one time. Kensington v. Keith, 2 Pa. 218. So where a statute authorized the court of claims to hear and determine barred claims of the successors and representatives of A, provided it be shown to the court that A and his surviving representatives were loyal to the government throughout the war of the Rebellion, it was held that the proviso "negatived the authority granted beyond the limit defined," and made loyalty a jurisdictional fact and not merely necessary to the right of recovery. Austin v. U. S., 155 U. S. 417, 431-2, 39 Law. Ed. 206. Certain acts prescribed by a proviso to be done previous to a sale in attachment proceedings were regarded as conditions precedent to the valid exercise of the power to sell. Voorhees v. Bank of U. S., 10 Pet. [U. S.] 449, 471. And a proviso in an act authorizing a private company to construct a log boom that "navigation shall be as free as it is now" was held to be a condition which made the whole grant void if it could not be complied with. Mason v. Boom Co., 3 Wall. Jr. 252, 16 Fed. Cas. 1012. Note also Dugan v. Bridge Co., 27 Pa. 303. In an act forfeiting a bet on the election to the directors of the poor, a proviso that an action for the recovery shall be brought within two years was construed as a conditional limitation upon the right to recover, and not as a statute of limitations which must be pleaded. Forscht v. Green, 53 Pa. 138; Clark v. Rochester, 24 Barb. [N. Y.] 446; Graves v. State, 6 Tex. App. 228; Silvis v. Aultman, 141 Ill. 632, 639, 31 N. E. 11.

The purpose of the proviso may be simply exclusive, that is, it may except a case from the statute without making a new and independent provision for it. Den v. Jones, 8 N. J. Law, 340, 343. As to save certain cases from the operation of a repealing enactment. United States v. Passmore, 4 Dall. [U. S.] 372; Anon., 1 W. C. C. 84, 1 Fed. Cas. 1032. Or to except certain property from an exempting statute. Campbell v. Wiggins, 85 Tex. 424, 428, 21 S. W. 599.

The proviso may take a particular case out of the statute absolutely and provide specially for it. United States v. One Pearl Necklace [C. C. A.] 111 F. 164, 170; People v. Company, 153 Ill. 25, 37, 38 N. E. 752; People v. Board of Sup'rs, 185 Ill. 288, 298, 56 N. E. 1044. When a statutory enactment is modified by engrafting upon it a new provision by way of amendment, providing conditionally for a new case, such modification is in the nature of a proviso. Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398.

4. Mr. Justice Story in Minis v. U. S., 15 Pet. [U. S.] 423, 445, 10 Law. Ed. 791; Sutton v. People, 145 Ill. 279, 285, 34 N. E. 420; Ex parte Lusk, 82 Ala. 519, 2 So. 140.

5. Potter's Dwar. on Stat. & Const., p. 117. Bish. Written Laws, § 59. Sutherland, Stat. Const., § 225.

6. Sutherland, Stat. Const., § 225.

A permanent saving clause in the general body of the law, if clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute. People v. McNulty, 93 Cal.

"Nothing in this act shall," or similar expressions, are commonly used to introduce, respectively, exceptions, provisos and saving clauses.[7] In pleading statutes, an important distinction is observed between exceptions and provisos, it being the received canon that the former must be negatived while the latter need not be.[8]

Exceptions in statutes[9] and statutes conferring exemptions from the general operation of law are ordinarily to be strictly construed, and doubts resolved against the one asserting the exemption.[10] So, "where the enacting clause is general in its language and objects, and a *proviso* is afterward introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fairly fall within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."[11] The principle has been

427, 437, 29 P. 61; Kleckner v. Turk, 45 Neb. 176, 63 N. W. 469; Farmer v. Illinois, 77 Ill. 322; State v. Shaffer, 21 Iowa, 486; State v. Boyle, 10 Kan. 113; Lakeman v. Moore, 32 N. H. 410.

But where a repealing statute contains a special saving clause, the general saving statute will not apply, and those rights and remedies only are preserved which the special clause names. State v. Showers, 34 Kan. 269, 8 P. 474.

7. Bish. Written Laws, §§ 57-59.

Carroll v. State, 58 Ala. 396, 401: "It does not necessarily follow because the term **provided** is used, that which may succeed it is a **proviso**, though that is the form in which an exception is generally made to, or a restraint or qualification imposed on the enacting clause. It is the matter of the succeeding words, and not the form which determines whether it is or not a technical **proviso.**"

Myers v. Carr, 12 Mich. 63, 71: "The word **except** is not necessary to create an exception, nor the word **provided** an exemption. Other words clearly indicating the one or the other intention are sufficient."

Comm. v. Hart, 11 Cush. [Mass.] 130, 136.

8. Rowell v. Janvrin, 151 N. Y. 60, 45 N. E. 398: "The reason upon which this rule of pleading rests seems to be that when a party counts upon the enacting clause of a statute containing an exception, as the foundation of his action, he cannot logically state the case unless he negative the exception. But if the modifying words are no part of the enacting clause, but are to be found in some other part of the statute, or in some subsequent statute, it is otherwise, and he may then state his case in the words of the enacting clause, and it will be prima facie sufficient. When we bear in mind the reason of the rule and the necessity for pleading the negative, it is not very important to deal with the somewhat vague and shadowy distinctions, which are to be found in the books, between an exception and a proviso."

Mr. Justice Clifford, in United States v. Cook, 17 Wall. [U. S.] 168, 176, 21 Law. Ed. 538: "If the exception is so incorporated with the clause describing the offense that it becomes in fact a part of the description, then it cannot be omitted in the pleading, but if it is not so incorporated with the clause defining the offense as to become a material part of the definition of the offense, then it is matter of defense and must be shown by the other party, though it be in the same section or even in the succeeding sentence."

Jones v. Axen, 1 Ld. Raym. 119; Thibault v. Gibson, 1 D. & L. 253, 12 Mees. & W. 88, 7 Jur. 1043, 13 L. J. Exch. 2; Wells v. Igguldeu, 3 Barn. & C. 186, 189; Comm. v. Hart, 11 Cush. [Mass.] 130; Comm. v. Jennings, 121 Mass. 47; Vandegrift v. Meihle, 66 N. J. Law, 92, 49 A. 16; Hirn v. State, 1 Ohio St. 15, 24; Smalley v. Ashland Brown-Stone Co., 114 Mich. 104, 109, 72 N. W. 29.

9. Bragg v. Clark, 50 Ala. 363; Haskel v. Burlington, 30 Iowa, 232, 234; Brocket v. Railroad, 14 Pa. 241; Epps v. Epps, 17 Ill. App. 196.

As to exceptions in statutes of limitations, note Angell, Lim. § 23; § 194 et seq.; § 485; Buswell, Lim., § 104 et seq.; Demarest v. Wynkoop, 3 Johns. Ch. [N. Y.] 129, 142; Amy v. Watertown, 22 F. 418.

10. United States v. Allen, 163 U. S. 499, 41 Law. Ed. 242; Mitchell v. Union Elec. Co., 70 N. H. 569, 49 A. 94; Academy v. Philadelphia Co., 22 Pa. 496; Gast v. Board of Assessors, 43 La. Ann. 1043, 10 So. 184; State v. Fisher, 119 Mo. 344, 24 S. W. 167; Sloane v. McCarroll, 40 Iowa, 61; Briggs v. French, 2 Sumn. 251, 4 Fed. Cas. 117.

Otherwise as to statutes creating exemptions from levy and forced sale under execution. Thompson, Homesteads & Exemptions, §§ 4-7.

11. Mr. Justice Story in United States v. Dickson, 15 Pet. [U. S.] 141, 165, 10 Law. Ed. 689; Huidekoper v. Burrus, 1 Wash. C. C. 109, 12 Fed. Cas. 840, 843-4; United States v. Allen, 163 U. S. 499, 41 Law. Ed. 242; Ryan v. Carter, 93 U. S. 78, 23 Law. Ed. 807; Dollar Savings Bank v. U. S., 19 Wall. [U. S.] 227, 22 Law. Ed. 80; Towson v. Denson [Ark.] 86 S. W. 661; Clark's Appeal, 58 Conn. 207, 20 A. 456; Huddleston v. Francis, 124 Ill. 195, 16 N. E. 243; Epps v. Epps, 17 Ill. App. 196; Paxton, etc., Irrigating Co. v. Farmers', etc., Irrigating Co., 45 Neb. 884, 900, 64 N. W. 343; Bruner v. Briggs, 39 Ohio St. 478; Earnfit v. Winans, 3 Ohio, 135; Kensington v. Keith, 2 Pa. 218; Collins v. Warren, 63 Tex. 311.

For strict construction of provisos and exceptions in statutes removing disability of parties to actions as witnesses, see Bragg v. Clark, 50 Ala. 363; Lanning v. Lanning, 17 N. J. Eq. 228; McRae v. Holcomb, 46 Ark. 306; Roberts v. Yarboro, 41 Tex. 449; Potter v. National Bank, 102 U. S. 163, 26 Law. Ed. 111; Looker v. Davis, 47 Mo. 140.

applied to saving clauses as well.[12] A learned author has said, however, that exceptions and provisos in criminal and other penal statutes should be liberally construed,[13] stating the doctrine to be that "when from any of the recognized reasons the main provisions of a statute are to be construed strictly, the same reasons require those which create exceptions, exemptions, and the like to be interpreted liberally."[14] This statement of the law has been adopted by writers on statutory construction.[15]

The true office of the proviso being, as the definitions show, to except something from, or to limit, restrain, or qualify, the terms of, the enacting clause, it is not its legitimate function to introduce substantive provisions enlarging the purview or containing distinct propositions, and this effect should not be given it unless it appear with reasonable certainty that such was the legislative intent.[16] The repeal of the enacting clause repeals the proviso,[17] and the meaning of words used in the proviso and the scope of its language are, in general, determined by a consideration of the subject-matter of the purview.[18] It is not uncommon in legislation, however, for clauses embodying positive enactments to be introduced by the term "provided." Provisions of this character must be given the effect intended, as expressions of the legislative will, but the word "provided," in such a connection, it is plain, has merely the force of a conjunction, and does not create a proviso in the usual sense of the term.[19]

12. See opinion of Story, J., in United States v. Mann, 1 Gall. 177, 26 Fed. Cas. 1153.

Willie, C. J., in Collins v. Warren, 63 Tex. 311, referring to a saving clause in a statute, said, "It is a proviso and subject to the rules which govern such." United States v. Passmore, 4 Dall. 372, 1 W. C. C. 84, 1 Fed. Cas. 1032; Aaron v. State, 40 Ala. 307; Jones v. State, 1 Iowa, 395. But see Downs v. Huntington, 35 Conn. 588.

A clause of reservation in derogation of a right of freehold given by an act must be construed most strictly against the person claiming under it. Duke of Devonshire v. O'Connor, 59 Law J. Q. B. 206, 24 Q. B. Div. 468, 62 Law T. 917, 38 Wkly. Rep. 420, 54 J. P. 740; Sowerby v. Smith, 43 Law J. C. P. 290, 9 C. P. 524. Note also, Ryan v. Carter, 93 U. S. 78, 23 Law. Ed. 807.

13. Bish. Written Laws, §§ 226-7, 229-30.

14. Bish. Written Laws, § 226.

15. Sutherland, Stat. Const., § 227. Endlich, Interp. of L., § 186, n. 32.

16. In re Day, 181 Ill. 73, 54 N. E. 646; Lake St. El. R. Co. v. Chicago, 183 Ill. 75, 78, 55 N. E. 721; Chicago v. Phoenix Ins. Co., 126 Ill. 276, 280, 18 N. E. 668; Walsh v. Van Horn, 22 Ill. App. 170; Rice v. Keokuk, 15 Iowa, 579; Wolf v. Bauereis, 8 Law. Rep. Ann. 680, 19 A. 1045; Detroit v. Plank Road Co., 12 Mich. 333; In re Webb, 24 How. Pr. [N. Y.] 247; Allen v. Parish, 3 Ohio, 187, 193; Treasurer v. Clark, 19 Vt. 129, 131; Lord Advocate v. Hamilton, 1 Macq. H. L. 46, 55.

The court said in Ihmsen v. Monongahela Co., 32 Pa. 153, "If it (the proviso) was not intended to restrain the general clause, it was a nullity." So a proviso in the form of a positive enactment has been held to be null and void in Pennsylvania, on the ground that it is not the proper office of a proviso to confer a power. Comm. v. Hough, 22 Pa. Co. Ct. R. 440, 443; Collner's Estate, 22 Pa. Co. Ct. R. 198; Portuonda's Estate, 20 Pa. Co. Ct. R. 209.

17. Church v. Stadler, 16 Ind. 463; Horsnail v. Bruce, 8 L. R. C. P. 378, 385.

18. Washington, C. J., in United States v. Passmore, 4 Dall. [U. S.] 372; Anon., 1 W. C. C. 84, 1 Fed. Cas. 1,032: "If the proviso be ambiguous, its explanation may best be obtained by understanding the scope of the enacting clause, and discovering the mischief to be remedied."

Colt, J., in United States v. Newhall, 91 F. 525, 529: "The proviso must be considered in connection with the body of the section and the subject-matter to which it relates." King v. Taunton, St. James, 9 Barn. & C. 831, 836; Ex parte Partington, 6 Q. B. 649, 653; People v. Morrill, 26 Cal. 336, 355; Lanning v. Lanning, 17 N. J. Eq. 228, 233; In re Webb, 24 How. Pr. [N. Y.] 247; Ditto v. Geoghegan, 58 Ky. 169; Treas. of Vermont v. Clark, 19 Vt. 129; State v. Daniell, 17 Wash. 111, 115, 49 P. 243; Wolf v. Bauereis, 8 Law. Rep. Ann. 680, 19 A. 1045.

19. Mr. Justice Field, in Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 Law. Ed. 377: "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of the statute, or from some provision of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

Cartwright, C. J., In re Day, 181 Ill. 73, 80, 54 N. E. 646: "This proviso, instead of excepting something from the enactment or

So it is held, in general, not to be the proper office of a proviso to confer a power or right or otherwise add to the provisions of the enacting clause, *by implication.*[20] But a proviso may be resorted to to explain ambiguity in the enacting clause;[21] and, under the maxim *exceptio probat regulam,* implications which strengthen the enacting clause or give the general provisions of an act a comprehensive meaning that will embrace things of the same class with that excepted, may arise from exceptions and provisos;[22] although the common legislative practice of inserting such provisions from abundant caution, to prevent possible misinterpretation, and without intent to except anything from the act, has led to a guarded application of the principle by the courts.[23]

qualifying it in some way, attempts to enlarge the enactment to which it is appended and is designed to operate as a substantive enactment itself. That is not the legitimate office of a proviso. There is authority, however, for holding that the intention of the legislature, if plainly expressed, is to have the force of law, although in the form of a proviso, and we will treat this proviso as an enactment in itself." Also United States v. Babbit, 1 Black. [U. S.] 55, 17 Law. Ed. 94; Detroit Citizens' St. R. Co. v. Detroit [C. C. A.] 64 F. 628, 641; Carroll v. State, 58 Ala. 396; Cumberland v. Magruder, 34 Md. 381; Smalley v. Ashland Brown Stone Co., 114 Mich. 104, 107, 72 N. W. 29; Wheeler v. Plattsmouth, 7 Neb. 270, 278; State v. Minton, 23 N. J. Law, 529. But see Ihmsen v. Monongahela Co., 32 Pa. 153, 157; Commonwealth v. Hough, 22 Pa. Co. Ct. R. 440, 443; Collner's Estate, 22 Pa. Co. Ct. R. 198; Portuonda's Estate, 20 Pa. Co. Ct. R. 209.

20. Lord Watson in West Derby Union v. Metropolitan Life Assur. Soc., 66 Law J. Ch. 726, A. C. 647, 77 Law T. 284, 61 J. P. 820: "If the language of the enacting part of the statute does not contain the provisions which are said to occur in it, these provisions cannot be imported by implication from a proviso." Also Mullins v. Surrey, L. R. 5 Q. B. Div. 173; People v. Morrill, 26 Cal. 336, 354, 355; Wilkins v. Abell, 26 Colo. 462, 58 P. 612; Clark's Appeal, 58 Conn. 207, 20 A. 456; Boon v. Juliet, 1 Scam. [Ill.] 258; Swigart v. People, 154 Ill. 284, 297, 40 N. E. 432; Rice v. Keokuk, 15 Iowa, 579, 583. But see State v. Eskridge, 1 Swan. [Tenn.] 413.

21. Williar v. Loan & Annuity Ass'n, 45 Md. 546, 556; Eayre v. Earl, 8 N. J. Law, 359; West Derby Union v. Metropolitan Life Assur. Soc., 66 Law J. Ch. 726, A. C. 647, 77 Law T. 284, 61 J. P. 820. And a proviso may be read for this purpose, even though it has been held to be unconstitutional (Philadelphia v. Barber, 160 Pa. 123, 28 A. 644; General Assembly v. Gratz, 139 Pa. 497, 20 A. 1041; Commonwealth v. Potts, 79 Pa. 164), or has been repealed (Bank for Savings v. Collector, 3 Wall. [U. S.] 495, 18 Law. Ed. 207).

22. Mr. Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. [U. S.] 191, 6 Law. Ed. 23: "It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted —that which the words of the grant could not comprehend." In Brown v. Maryland, 12 Wheat. [U. S.] 438, 6 Law. Ed. 678, applying this rule to the provision in the constitution that "no state shall, without the consent of congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," the Chief Justice said, "This exception in favor of duties for the support of inspection laws goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purpose of inspection, with duties on imports and exports, and supposed them to be prohibited."

Story, J., in Adams v. Bancroft, 3 Sumn. 384, 1 Fed. Cas. 84: "If the legislature had intended to except silk gloves, the exception ought to have been found in the paragraph. 'Sewing silk' is excepted; and in such case the exception of one thing is equivalent to an affirmation of the exclusion (inclusion) of all other manufactures of silk in the same paragraph. Exceptio probat regulam de rebus non exceptis." Also Viner's Ab., "Grants," H. 13, p. 61; "Statutes," E, 8, 6; Taylor v. Corporation of Oldham, L. R. 4 Ch. Div. 395, 412, 25 Wkly. Rep. 178; Bank for Savings v. Collector, 3 Wall. [U. S.] 495, 18 Law. Ed. 207; Arnold v. U. S., 147 U. S. 494, 499, 37 Law. Ed. 253; Briggs v. French, 2 Sumn. 251, 257, 4 Fed. Cas. No. 117, 119; Schriefer v. Wood, 5 Blatch. 215, 218, 21 Fed. Cas. No. 737; Haskell v. Burlington, 30 Iowa, 232; Tinkham v. Tapscott, 17 N. Y. 141, 152; Williar v. Loan & Annuity Ass'n, 45 Md. 546; Oliver's Appeal, 101 Pa. 299.

23. Lord Campbell in Gurly v. Gurly, 8 Clark & F. 743, 764: "Now there can be no doubt that, logically speaking, the exception ought to be of that which would otherwise be included in the category from which it is excepted; but there are a great many examples to the contrary; and there is one which will probably strike everyone, in the second book of Paradise Lost: 'God and His Son excepted, created beings.' It is not supposed that God and His Son were part of the created beings; it merely means that They were not included in the description of created beings. This is a common mode of expression, both in a legal instrument and in common parlance; and it is used not to exclude that which would otherwise be included in that from which it is supposed to be excepted, but to intimate that it is not included."

Denio, J., in Tinkham v. Tapscott, 17 N. Y. 141, 152: "It is matter of common experience that savings and exceptions are often introduced from abundant and even excessive caution, and it would sometimes prevent the intention of the author of the writing if

It is often important and difficult to ascertain how far the proviso extends over and qualifies preceding or following matter in the enactment. The effect of the proviso, where nothing to the contrary appears, is to be confined to that which precedes it, and is most frequently restricted to the distinct portion of the act in which it is incorporated, as, the clause, section, or paragraph.[24] But if the legislative intent, as revealed by the express terms of the proviso, or by the sense and reason of the enactment as a whole, require a broader application, that must be given it, and may make the operation of the proviso extend to other parts of the same act and even to other statutes.[25]

A very ancient rule in England makes a *saving clause* which is repugnant to the purview of the act void.[26] But it was held there in a case arising in 1731 that a *proviso* repugnant to the enacting clause repeals it, as embodying the last intention of the lawmakers.[27] This distinction between saving clauses and provisos has

every other thing of the same general nature as that excepted should be regarded as embraced in the general words. * * * The correct statement of this rule of construction is, that where it would be equivocal upon the general language whether a particular thing was embraced, the exception of another thing of a similar kind will show that the first was intended to be included."

Lurton, J., in Baggaley v. P. & L. S. Iron Co. [C. C. A.] 90 F. 636, 638: "The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible." Viner's Ab. "Statutes," E. 8, 10. Mullins v. Surrey, L. R. 5 Q. B. Div. 170, 173-4; Duncan v. Dixon, L. R. 44 Ch. Div. 211, 215.

24. Rawls v. Doe, 23 Ala. 240, 248; Pearce v. Bank of Mobile, 33 Ala. 693, 702; Coxe v. Davis, 17 Ala. 714; Spring v. Collector of Olney, 78 Ill. 101; De Graff v. Went, 164 Ill. 485, 45 N. E. 1075; Gaither v. Wilson, 164 Ill. 544, 548, 46 N. E. 58; Fleming v. Potter, 14 Ind. 486, 490; Detroit v. Plank Road Co., 12 Mich. 333; School District v. Coleman, 39 Neb. 391, 58 N. W. 146; Lanning v. Lanning, 17 N. J. Eq. 228, 233; Fire Dept. v. Bacon, 3 Keyes [N. Y.] 402, 2 Abb. Dec. 127; In re Webb, 24 How. Pr. [N. Y.] 247; Leader Print. Co. v. Territory, 6 Okl. 302, 50 P. 1001; County of Lehigh v. Meyer, 102 Pa. 479; Bull v. Kirk, 37 S. C. 395, 16 S. E. 151; Callaway v. Harding, 23 Grat. [Va.] 542; Sullivan v. Bailey [Mich.] 83 N. W. 996, 7 Det. Leg. N. 419; In re Blankensteyn, 116 F. 776; Ex parte Partington, 6 Q. B. 649, 653.

25. Holroyd, J., in King v. Newark-upon-Trent, 3 Barn. & C. 59, 71: "Whether a proviso in the whole or in part relates to, and qualifies, restrains, or operates upon the **immediately preceding provisions** only of the statute, or whether it must be taken to extend in the whole or in part to **all the preceding matters** contained in the statute, must depend, I think, upon its words and import, and not upon the divisions into sections that may be made, for convenience of reference in the printed copies of the statute." This case arose at a time when statutes were not divided into sections upon the Parliament roll. Wilberforce Stat. L., p. 303. King v. Threlkeld, 4 Barn. & Ad. 229.

Clopton, J., in Wartensleben v. Haithcock, 80 Ala. 565: "When from the context, and a comparison of all the provisions relating to the same subject-matter, it is manifest that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection."

In Cumberland v. Magruder, 34 Md. 381, a proviso in a city charter, requiring the question of borrowing sums above a certain amount to be submitted to the voters of the city, was held to apply to a subsequent act empowering the city authorities to issue bonds for the purpose of building a bridge. Commenting upon the proviso the court said: "Its language is too plain to be misunderstood, too imperative to be disregarded, and the result it seeks to attain too salutary and important to be defeated by any nice construction founded on the position in which it is placed, the connection in which it is found, or the technical word by which it is prefaced. In respect to position and connection it is equally potent as if enacted in a separate section." U. S. v. Babbit, 1 Black [U. S.] 55, 17 Law. Ed. 94; Marine v. Packham [C. C. A.] 52 F. 579; Milne v. U. S., 115 F. 410; Friedman Bros. v. Sullivan, 48 Ark. 213, 2 S. W. 785; Mazzia v. State, 51 Ark. 177, 10 S. W. 257; In re Mechanics' & Farmers' Bank, 31 Conn. 63, 73; Considine v. Metropolitan Life Ins. Co., 165 Mass. 462, 43 N. E. 201; Wheeler v. Plattsmouth, 7 Neb. 270, 278; Bank v. The Mfg. Co., 96 N. C. 298, 3 S. E. 363; Collom's Appeal, 12 Wkly. Notes Cas. [Pa.] 309.

26. Alton Wood's Case, 1 Co. 47a; Walsingham's Case, Plow. 565; Ward v. Cecil, 2 Vern. 711; Riddle v. White, 4 Gwill. 1387, 1394-5; Yarmouth v. Simmons, L. R. 10 Ch. Div. 518; Thornby v. Fleetwood, 10 Mod. 115; 1 Bl. Comm. 89. Vin. Abr., "Statutes," E 8, pl. 5, 9. Bac. Abr., "Statute," I, 2.

Where there is an **exception** coextensive with and therefore repugnant to the enactment, the enactment must prevail. The rule of law, that an exception must be of part

been applied or recognized in numerous adjudged cases in the United States, and is probably supported by the weight of authority.[28] Instances are not wanting, however, in which the analogy to the saving clause, and preference for the older rule, have led the courts to declare repugnant provisos void.[29] Courts seek to avoid a construction that will make the proviso saving, or exception repugnant to the act.[30] Such clauses must necessarily, of course, be repugnant to the extent of the exception or limitation they create, but this is not repugnancy within the rule, unless it be coextensive with the act, rendering it "inconsistent and destructive of itself."[31] The distinction between saving clauses and provisos alluded to has been criticized as without reasonable basis,[32] and the true principle maintained to be that "the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail."[33]

The effect of an invalid proviso or exception on the remainder of the act is governed by the general rule relating to partial invalidity, that if the remainder of the act is severable and there is no such connection that it cannot be believed that the legislature would have passed one without the other, it will be allowed to stand.[34]

STAY OF PROCEEDINGS.[71]

Stay pending proceedings for review is elsewhere treated.[72]

Pendency of another suit for the same relief[73] or involving the same issues[74]

of the thing only and not of all, applies as well to acts of parliament as to deeds. Clelland v. Ker, 6 Ir. Eq. R. 35, afd. 1 Dr. 227.

27. Attorney General v. Governor & Co. of Chelsea Water Works, Fitz. 195. Bac. Abr., Statute, I, 2.

28. Farmers' Bank v. Hale, 59 N. Y. 53, 59; Waffle v. Goble, 53 Barb. [N. Y.] 517, 522; State v. Jersey City, 42 N. J. Law, 101; Townsend v. Brown, 24 N. J. Law, 80; State v. Liedtke, 9 Neb. 490, 496, 4 N. W. 75; Hill v. Commissioners, 22 Ga. 203; Macon R. R. v. Gibson, 85 Ga. 1, 19 (Contra, 33 Ga. 296, 11 S. E. 442); Tatum v. Tamaroa, 14 F. 103; Graves v. State, 6 Tex. App. 228; White v. Nashville & N. W. R. Co., 7 Heisk. [Tenn.] 518, 534.

As to effect of repugnant provisos in charters of corporations, see Dugan v. Bridge Co., 27 Pa. 303; Mason v. Boom Co., 3 Wall. Jr., 20 Leg. Int. 12, 16 Fed. Cas. 1012.

29. In re Courts of Lancaster, 4 Clark [Pa.] 315, 322; Jackson v. Moye, 33 Ga. 296, 302 (Contra, 22 Ga. 203, 85 Ga. 1, 19); Carpenter v. Rodgers, 1 Mont. 90; State v. Daniell, 17 Wash. 111, 116, 49 P. 243; Hull v. Johnson, 63 Pa. 455, 456; Sams v. King, 18 Fla. 557.

In Dugan v. Bridge Co., 27 Pa. 303, it was held that while a proviso or saving clause which is repugnant to the purview is not to have effect, this principle does not apply where such proviso is part of an act constituting a private corporation, which in such case is taken to be an essential condition of the compact between the public and the corporation. Note, also, Mason v. Boom Co., 3 Wall. Jr. 252, 20 Leg. Int. 12, 16 Fed. Cas. 1012.

30. State v. Bailey, 37 Ohio St. 98, 103: "The terms of the proviso must be in such direct conflict with the other provisions of the act that both cannot stand."

State v. Jersey City, 42 N. J. Law, 97: "The repugnancy to justify the court in striking the conflicting exception from the act should, after every reasonable effort, by construction and accommodation to retain it, and give it some force in the enactment, remain totally irreconcilable with the enacting clause." Dollar Sav. Bank v. U. S., 19 Wall. [U. S.] 227, 22 Law. Ed. 80; Follmer's Appeal, 87 Pa. 133, 137; Renner v. Bennet, 21 Ohio St. 431, 445; Pond v. Maddox, 38 Cal. 572; State v. Liedtke, 9 Neb. 490, 497, 4 N. W. 75.

31. 1 Kent, Comm. 462. Savings Inst. v. Makin, 23 Me. 360, 369; Macon R. Co. v. Gibson, 85 Ga. 1, 18, 11 S. E. 442; People v. Board of Sup'rs, 185 Ill. 288, 298, 56 N. E. 1044; Ex parte Smith, 40 Cal. 419.

32. 1 Kent, Comm. 463. Bish. Written Laws, § 65. State v. Bailey, 37 Ohio St. 98, 102-3; In re Courts of Lancaster, 4 Clark [Pa.] 315, 323; State v. Liedtke, 9 Neb. 490, 496, 4 N. W. 75.

33. 1 Kent, Comm. 463, note b. Bish. Written Laws. § 65. Hardcastle on Stat. L. (London, 1901), p. 227-8. Follmer's Appeal, 87 Pa. 133.

34. Bennett v. State [S. D.] 93 N. W. 643.

71. See 2 Curr. L. 1736.

72. See Appeal and Review, 3 Curr. L. 200.

73. Action by stockholders for accounting should have been deferred until determination of suit by director under the statute for the same relief. Loewenstein v. Diamond Soda Water Mfg. Co., 94 App. Div. 383, 88 N. Y. S. 313.

74. Where the decision in one action will determine the right set up in another action, and the judgment on one trial will dispose of the controversies in all the actions, a case for a stay is presented. But held that first action would not settle all issues which would be raised in others. Jones v. Leopold, 95 App. Div. 404, 88 N. Y. S. 568. Where

is ground for a stay. But a court has no authority to stay proceedings in one case until the determination of another pending case, where the party against whom a stay is sought is neither a party nor privy to such other action, and would not be bound by an adjudication therein.[75] Where a finding as to the truth of an essential allegation of a cross bill is necessarily involved in a decision of the issues under the original bill, proceedings under the cross bill are properly stayed until the issues under the original bill have been determined.[76] A judge may properly refuse to proceed with a chancery case while an action at law involving the same issues between the same parties is pending on writ of error in the appellate court.[77]

Where defendants plead and prove pendency of a suit to set aside the judgment on which plaintiff's action is based, the proceedings should be stayed until the determination of such suit.[78] The pendency of a suit in equity between alleged owners involving the title to land is no ground for a stay of proceedings to condemn the land for a railroad right of way.[79] Proceedings on junior attachments against a garnishee should be stayed until proceedings on senior attachments against the same garnishee are determined, unless the amount garnished is sufficient to satisfy both sets of attachments.[80] The Missouri statute providing for trial of a plea in abatement in an attachment suit does not require a stay of proceedings on the merits, on denial of the plea, until defendant has filed his bill of exceptions.[81] A continuance of an accounting by an executrix is properly refused, pending an action in a Federal court in another state involving title to land of the testator, when the duration and outcome of such litigation is uncertain, and the debts of creditors are increasing.[82]

The pendency in a state court of a prior action to determine the same issues pending in a subsequent action in the Federal court between the same parties presents no bar and furnishes no ground for the abatement of the later action.[83] But a state court having obtained jurisdiction of such a proceeding, a Federal court will stay proceedings until the state court has determined the matter.[84] When the state court secures by proper process the custody or dominion of specific property, which it is one of the objects of the suit in the Federal court to subject to its judgment or decree, the latter action should not be dismissed; but it should proceed as far as may be without creating a conflict concerning the possession of the property, and then be stayed until the proceedings in the state court have been concluded, or ample time for their determination has elapsed.[85]

Since the pendency of a suit between the same parties and for the same cause

defendants commenced a suit on a claim growing out of the same subject-matter, which they might have used as a counterclaim in plaintiff's suit, the suit by defendants will not be stayed pending determination of plaintiff's claim, the issues not being necessarily the same. Id. Pendency of another action as abatement, see Abatement and Revival, 3 Curr. L. 1.

75. Motion to stay proceedings in action for pollution of stream refused, though other action pending by another owner against same defendants. Sammons v. Parkhurst, 93 N. Y. S. 1063.

76. Henderson v. Kibbie, 211 Ill. 556, 71 N. E. 1091.

77. Schmid v. Benzie Circuit Judge [Mich.] 101 N. W. 620.

78. Avocato v. Dell' Ara [Tex. Civ. App.] 84 S. W. 443.

79. Code 1887, §§ 1081, 1084. Richmond & P. Elec. R. Co. v. Seaboard Air Line R. Co. [Va.] 49 S. E. 512.

80. Prichard & Co. v. Critchlow [W. Va.] 49 S. E. 453.

81. Construing Rev. St. 1899, § 407. American Nat. Bank v. Thornburrow [Mo. App.] 83 S. W. 771.

82. Phillips v. Phillips' Adm'r, 26 Ky. L. R. 145, 80 S. W. 826.

83. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650; Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945.

84. Proceeding in Federal court for an accounting by a trustee under a will stayed until a state court should determine whether the trust had determined and the trustee had been properly appointed. Security Trust & Safe Deposit Co. v. Alexander's Ex'rs, 134 F. 767.

85. Boatmen's Bank of St. Louis v. Fritzlen [C. C. A.] 135 F. 650; Barber Asphalt Pav. Co. v. Morris [C. C. A.] 132 F. 945.

of action is no bar to a subsequent suit in a sister state, the remedy of a defendant is to apply to the court in which the subsequent suit is brought to stay proceedings, or to refuse final determination until the suit first instituted is determined.[86] But this remedy is not available where the parties to the two suits are not the same.[87] Where proceedings in two states involve the construction of a statute on the same point, proceedings in one may properly be stayed until the court of the other has construed its own statute.[88]

A bankrupt is entitled to a stay of a pending suit on a claim from which a discharge in bankruptcy would be a release, pending bankruptcy proceedings.[89] But this rule does not apply to a suit based on the alleged fraud of the bankrupt, even though plaintiff waives the tort and sues on implied contract, since such a discharge would not operate as a release of such a claim.[90] A tenant being adjudicated a bankrupt after distress by the landlord, the property comes under the control of the bankruptcy court, which will stay the proceedings in distress.[91] Proceedings having as their object the infliction of a penalty or a punishment for nonpayment of a debt dischargeable in bankruptcy will be stayed pending bankruptcy proceedings.[92]

Defendants are entitled to a stay until the costs adjudged against plaintiffs in a former proceeding have been paid.[93] Proceedings being stayed for failure of plaintiffs to pay costs to defendants on another motion, failure to pay costs does not deprive the court of jurisdiction to issue an order for the examination of a witness, but merely renders proceedings irregular.[94] Stay of proceedings during the pendency of a rule for security for costs expires when the rule for security is satisfied, and the effect of the rule to plead is then restored.[95] Where one action is legal and the other equitable, the rule to stay proceedings in the latter until the costs of the former are paid will not be applied.[96]

A court having ordered a reduction of a verdict, an order staying proceedings but permitting an appeal from the order reducing the verdict is proper.[97]

STEAM.

In supervising and regulating the generation of steam, laws requiring licenses to operate "steam boilers and steam machinery of any kind" will not be applied to operators of private plants exempt by another act from inspection.[98] The duty of an employer[99] of servants in and about the operation of steam plants is to provide reasonably safe boilers and reasonably careful inspection of them.[100] Negli-

86, 87. Kirkpatrick v. Eastern Milling & Export Co., 135 F. 144.

88. Attachments being sued out in Pennsylvania and Virginia by different plaintiffs but against the same defendant, and served on the same garnishee, and the question of priority of the attachments under the Pennsylvania statute having arisen in both suits, proceedings in Virginia should be stayed until the question of priority has been determined by the Pennsylvania courts. Prichard & Co. v. Critchlow [W. Va.] 49 S. E. 453.

89. See 2 Curr. L. 1736. And see title Bankruptcy, 3 Curr. L. 434.

90. Mackel v. Rochester, 135 F. 904.

91. In re Lines, 133 F. 803.

92. Proceedings to remove a fireman from the department for failure to pay a bill stayed pending determination of his discharge in bankruptcy, the debt being provable in bankruptcy. In re Hicks, 133 F. 739.

93. In absence of showing authorizing discretionary refusal of such stay. Lederer v. Krausz, 90 N. Y. S. 402.

94. Irregularity cured by payment of costs before return day of motion. Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56, 90 N. Y. S. 824.

95. American Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

96. Johnson v. Amberson, 140 Ala. 342, 37 So. 273.

97. Cullen v. Uptegrove & Bro., 91 N. Y. S. 511.

98. Boiler in residence and business building not within act. State v. Justus [Minn.] 102 N. W. 452.

99. See Master and Servant, 4 Curr. L. 533.

100. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. See. also, Master and Servant, 4 Curr. L. 546 et seq.

gence[101] and contributory negligence[102] are as in other cases questions of fact. One may be liable if he allows steam to escape or whistles to be blown so that injury results, as where done near highways, whereby horses are frightened.[103]

STENOGRAPHERS.

A reporter appointed by the court, though only for a single case, is a public officer, and a contract to pay him more than his legal compensation is void.[1] He is not an officer within the meaning of a constitutional provision that the duration of offices not fixed by the constitution shall not exceed two years.[2] A constitutional provision allowing city charters to provide for police courts and attaches of the judges thereof authorizes a charter provision for the appointment of a reporter on salary.[3] A stenographer in the superior court of Iowa is entitled to compensation for every day at which he is required to attend at court, though not actually engaged in reporting proceedings.[4] Where the statute provides that he shall receive salary for each "week or part of a week" in which court shall be held, he is entitled to a week's salary where he attended at a term which was adjourned without further proceedings.[5] In Texas the stenographer of a district composed of more than one county is not entitled to receive his fees out of the general fund of any county.[6] Where the statute requires stenographers' fees in criminal cases to be paid by the county, it is immaterial that the stenographer also received compensation from private persons.[7] On appeal from an allowance of stenographer's fees for transcript in a criminal case, it will be presumed to sustain an order for such transcript that the prosecuting attorney requested it.[8] In Kentucky notice to the fiscal court of allowance by the circuit court of a claim for stenographers' services is not required,[9] and if it were, actual notice and hearing on an application to set aside the allowance suffices.[10] In Iowa there is no time fixed within which the translation of the notes in law actions should be filed.[11] A statute requiring the reporter to furnish a transcript within such time as the judge may direct does not require him to furnish it unless his fees are paid,[12] and the judge need not fix the time for filing the transcript until such payment is made.[13] A party who consents to a particular method of certifying the notes and translation thereof is estopped to object.[14] The stenographer may be allowed a page rate per transcript instead of the statutory folio rate if the amount allowed does not exceed what would have been proper under the folio rate.[15] Though it is agreed that the stenographer's compensation shall be taxed as part of the referee's fees, the stenographer cannot recover from the referee who has retained the entire amount taxed without showing that a particular part thereof was paid him for the stenographer.[16]

101, 102. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435. It may be shown that engineer and fireman who both perished in boiler explosion were careful men, also that the boiler had been much used and had previously received a severe shock. The rules for inspection and the common practice may be shown. Illinois Cent. R. Co. v. Prickett, 210 Ill. 140, 71 N. E. 435.

103. See Railroads, 2 Curr. L. 1382; Highways and Streets, 3 Curr. L. 1593; 2 Curr. L. 194, n. 17. Compare Gas, 3 Curr. L. 1559.

1. Dull v. Mammoth Min. Co. [Utah] 79 P. 1050.

2. Robertson v. Ellis County [Tex. Civ. App.] 84 S. W. 1097.

3. Accordingly such a charter provision superseded Pen. Code, § 869, providing for appointment of reporter to take preliminary examinations. Elder v. McDougald, 145 Cal. 740, 79 P. 429.

4. Ferguson v. Pottawattamie County [Iowa] 101 N. W. 733.

5. Wood v. Chickasaw County [Miss.] 37 So. 642.

6. Robertson v. Ellis County [Tex. Civ. App.] 84 S. W. 1097.

7, 8, 9, 10. Polsgrove v. Walker, 26 Ky. L. R. 938, 82 S. W. 979.

11. Hofacre v. Monticello [Iowa] 103 N. W. 488.

12, 13. Richards v. Superior Court of San Francisco, 145 Cal. 38, 78 P. 244.

14. Hofacre v. Monticello [Iowa] 103 N. W. 488.

15. Polsgrove v. Walker, 26 Ky. L. R. 938, 82 S. W. 979.

16. Poucher v. Faber, 90 N. Y. S. 385. Compare, however, the ruling on a subsequent appeal, Id., 92 N. Y. S. 870.

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STIPULATIONS.[17]

Stipulations by parties or their attorneys, entered into for the government of their conduct or control of their rights, in the trial of a cause, are generally enforced by the courts, unless they appear to be unreasonable, or in contravention of good morals or of sound public policy.[18] Hence proper and valid stipulations preclude action by the parties inconsistent with the terms of their agreement.[19] Thus a stipulation that only certain issues are to be tried[20] precludes the introduction of evidence irrelevant to such issues,[21] and a stipulation permitting the court to decide a case on the pleadings only, restricts the court to a consideration of the pleadings.[22] A party who has stipulated that certain allegations of a complaint are true cannot thereafter set up claims inconsistent with such allegations.[23] Where the record does not contain the evidence but the parties agree that the evidence warranted each instruction given, a judgment cannot be disturbed if a state of facts could exist, which would warrant an instruction complained of.[24] But a stipulation made by an attorney without authority may be repudiated by the client.[25] An attorney for plaintiff has authority to stipulate that defendant shall have the same time to answer or demur as plaintiff has in which to serve the complaint, as a condition of an extension of the time in which to serve the complaint.[26]

The court will not extend an agreement beyond the limits set by the parties or the law.[27] A stipulation will not be construed as a release of errors and waiver of a right of appeal, unless that intent is manifested by express words or by strongest implication.[28] A stipulation which authorizes action contrary to law is invalid and unenforceable.[29] In an action for trespass to land, the parties cannot by stipulation refer the question of the amount of damages, without the consent of the court[30] A stipulation extending the time within which exceptions may be taken

17. See 2 Curr. L. 1740.

18. Stipulation that only issue in action on accident insurance policy should be cause of death enforced. Continental Casualty Co. v. Lloyd [Ind.] 73 N. E. 824. Parties are bound by the acts of their attorneys of record in making agreements and admissions in the course of judicial proceedings and courts recognize and enforce such agreements. Roper Lumber Co. v. Elizabeth City Lumber Co. [N. C.] 49 S. E. 946.

19. Amendment to answer properly disallowed because too late according to terms of an agreement relative to opening of a default. Insurance Co. of North America v. Leader, 121 Ga. 260, 48 S. E. 972.

20. An agreement, in a suit to quiet title to premises in possession of a tenant, to allow payment of rent to be suspended during the suit, to be finally paid to the prevailing party, amounts to a stipulation that the question of actual possession shall be treated as immaterial. Moran & Co. v. Palmer, 36 Wash. 684, 79 P. 476. A stipulation that if a city has the right to construct and own a waterworks system, it contemplates providing for the cost in the manner provided by law, narrows a controversy to the right of the city to construct and maintain the plant, and renders immaterial the question of the right to impose a tax, or the invalidity of any method of acquiring such plant. Helena Waterworks Co. v. Helena, 25 S. Ct. 40.

21. As where parties agreed there was only one issue. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011.

22. Blackgrove v. Flaherty, 92 N. Y. S. 257.

23. Driscoll v. Brooklyn Union El. R. Co., 95 App. Div. 146, 88 N. Y. S. 745.

24. Forsee v. Hurd [Mo.] 84 S. W. 872.

25. Where, in dismissing an action by stipulation, an attorney does not assume to act by virtue of the general authority conferred on him by his employment, but proceeds upon the mistaken assumption that express authority had been conferred on him, his client is not necessarily bound thereby, but may within a reasonable time repudiate the stipulation and have the cause reinstated. Schaefer v. Schoenborn [Minn.] 103 N. W. 501.

26. Morris v. Press Pub. Co., 90 N. Y. S. 673.

27. A technical trespass to land only being admitted, only nominal damages could be allowed. Roper Lumber Co. v. Elizabeth City Lumber Co. [N. C.] 49 S. E. 946.

28. Stipulation leaving money in hands of clerk until final determination of its ownership held not a waiver of right to appeal. Ryan v. Donley [Neb.] 96 N. W. 234.

29. Stipulation providing for reasonable compensation to referee, without reference to statutory compensation, is unenforceable because it does not fix the rate of compensation as required by Code Civ. Proc. § 3296. New York Mut. Sav. & Loan Ass'n v. Westchester Fire Ins. Co., 90 N. Y. S. 710.

30. Construing Code 1883, §§ 398, 416, 420. Roper Lumber Co. v. Elizabeth City Lumber Co. [N. C.] 49 S. E. 946.

to instructions is binding to the extent of extending the time to the entry of judgment, but cannot make effective an exception taken after judgment has been entered.[31]

A stipulation or agreed statement of facts constitutes neither the pleadings nor the issues, but only the proof upon which a cause is tried by the court.[32] To constitute such a stipulation, there must be an actual agreement as to the facts.[33] A stipulation which does not purport to be a complete statement, and as to the effect of which the parties differ widely, will be disregarded.[34] Where such stipulation does not contain evidentiary facts, the statement of ultimate facts therein is binding.[35] Parties cannot prove claims inconsistent with the facts as agreed upon.[36] A stipulation that certain facts will be admitted on trial, in the absence of a provision limiting its effect to a single trial, is available to either party in a subsequent suit involving substantially the same issues.[37] A stipulation that an agreed statement of facts shall constitute the evidence in the trial of the cause does not prevent the introduction of further evidence on a second trial.[38] A stipulation in respect to evidence should receive a fair and reasonable construction, so as to carry into effect the apparent intention of the parties, and promote a fair trial on the merits.[39] A stipulation of facts under which an action is submitted for decision, which recites that a judgment was duly entered, admits performance of jurisdictional acts necessary to sustain the judgment;[40] and a recital that a tax sale was on notice duly given warrants a finding that notice was given as required by law.[41] A stipulation that a stenographer would, if present, state that his notes were incomplete, but correct as to the evidence contained therein, constitutes a waiver of the production and proof of the notes to authorize their use as evidence, but does not waive an objection to the relevancy of the contents of the notes.[42] An agreement of parties that if there was evidence sufficient to go to the jury on the issue of defendants' alleged negligence, judgment should be for plaintiff in a certain amount, otherwise for defendants, has substantially the same effect as a denial of a motion by defendants for a directed verdict, subject to exception.[43] The constructions placed upon particular statements of facts are given in the note.[44]

Where the statute provides the manner of proving a stipulation, evidence outside the terms of the statute is incompetent.[45] In some states an agreement of

31. Weber v. Snohomish Shingle Co. [Wash.] 79 P. 1126.

32. In re Teopfer's Estate [N. M.] 78 P. 53.

33. A stipulation being an agreement by an attorney entered into to bind his clients so far as he may do so (Code Civ. Proc. § 283), the fact that a notice of appeal, and the acknowledgment of service of the notice recited that a judgment was made and entered on a certain date, did not amount to a stipulation that judgment was in fact entered on such date. In re More's Estate, 143 Cal. 493, 77 P. 407.

34. Barnard v. Lawyers' Title Ins. Co., 91 N. Y. S. 41.

35. Stipulation that escape of immigrants who were being deported did not occur through negligence of the officers of the steamship held binding on government. Hackfeld & Co. v. U. S., 25 S. Ct. 456.

36. A stipulation in trespass to try title, that defendant was common source of title and no other proof of common source should be required, prevents plaintiff's showing that the land was conveyed to defendant for the purpose of transferring to plaintiff's husband, under whom plaintiff claims. Pinkston v. West [Tex. Civ. App.] 85 S. W. 1014.

37. Nathan v. Dierssen [Cal.] 79 P. 739.

38. Hence the cause should be remanded when judgment was reversed on appeal; the appellate court should not render judgment. Imhoff v. Whittle [Tex. Civ. App.] 84 S. W. 243.

39. Chicago Live Stock Commission Co. v. Fix [Okl.] 78 P. 316.

40, 41. Purcell v. Farm Land Co. [N. D.] 100 N. W. 700.

42. Beavers v. Bowen, 26 Ky. L. R. 291, 80 S. W. 1165.

43. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938.

44. Stipulation construed as admission that defense in prior suit was on certain ground. Rankin v. Big Rapids [C. C. A.] 133 F. 670. A stipulation that certain streets within the boundaries of plaintiff's mining claim were used as public highways at the time the claim was located, and had ever since been so used, construed as an admission of defendant's claim to the same effect. Murray v. Butte [Mont.] 77 P. 527.

counsel in reference to pending litigation must be in writing,[46] oral stipulations being unenforceable.[47] An oral understanding of parties, with the consent of the court, that the record should show the filing of motions for a new trial within the proper time and the overruling of the same, cannot supply a record of such facts.[48]

A court may relieve a party from a stipulation thoughtlessly or improvidently made by his attorney,[49] but such action is discretionary and will not be taken except upon cause shown.[50]

45. Pol. Code (S. D.) 1903, § 699, subd. 2, requires the statement of the attorney himself, his written agreement, signed and filed with the clerk, or an entry thereof on the record. Stipulation held not proved. Gibson v. Allen [S. D.] 100 N. W. 1096. Code Iowa, § 319, requires the statement of the attorney himself, his written agreement, signed and filed with the clerk, or any entry thereof on the records. Under this statute an affidavit by one attorney that the other agreed to trial in a certain district is incompetent. Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594.

46. Agreement between regular counsel for a municipality and attorneys for plaintiffs that a structure on plaintiff's premises would not be destroyed until after a certain suit, made prior to commencement of suit against the municipality for destruction of the structure, was not an agreement having reference to pending litigation, and hence not required to be in writing. Town of Frostburg v. Hitchins [Md.] 59 A. 49. Under Rule 11, requiring stipulations to be in writing and subscribed, a stipulation as to the time of trial cannot be proved by one of the attorneys. Schlesinger v. Keene, 88 N. Y. S. 1042. Oral consent in open court to trial at another place in the county than at the court house is not a compliance with Code Civ. Proc. § 37, authorizing such a stipulation in writing. Armstrong v. Loveland, 90 N. Y. S. 711.

47. Oral stipulations to admit certain signatures in evidence. Sudworth v. Morton [Mich.] 100 N. W. 769.

48. Griffin v. Wabash R. Co. [Mo. App.] 85 S. W. 111.

49. Morris v. Press Pub. Co., 90 N. Y. S. 673. Defendant relieved from stipulation, on payment of costs and reasonable counsel fee to plaintiff, where admission therein was made by attorney inadvertently and without client's consent. Calvet-Rogniat v. Mercantile Trust Co., 93 N. Y. S. 241.

50. Relief from stipulation extending time to answer denied, no fraud, collusion, or change of circumstances being shown. Morris v. Press Pub. Co., 90 N. Y. S. 673. A motion to vacate a stipulation extending time to answer is properly denied where there is no proof that the stipulation was procured by misreprosentation, or that plaintiff's interest has been prejudiced. Lee v. Winans, 90 N. Y. S. 960. Stipulation held to fairly state the facts; hence refusal to set it aside was proper, no prejudice resulting from its being hastily signed being shown. In re Teopfer's Estate [N. M.] 78 P. 53.

NOTE. When stipulations will be set aside in equity: There is a difference of opinion in regard to the effect of stipulations. It is held in some jurisdictions that stipulations or engagements made in open court touching the subject of the suit are contracts which the court is bound to enforce. Banks v. American Tract Soc., 4 Sandf. Ch. [N. Y.] 438; Staples v. Parker, 41 Barb. [N. Y.] 650; Meagher v. Gagliardo, 35 Cal. 602; Jewett v. Albany City Bank, Clarke Ch. [N. Y.] 241. In other jurisdictions, such agreements are not treated as binding contracts, to be absolutely enforced, but as mere stipulations, which may be set aside, when such action may be taken without prejudice to either party (Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Hancock v. Winans, 20 Tex. 320; Buck v. Fawcett, 3 P. Wms. 242. See Casey v. Leslie, 12 App. Div. 34, 42 N. Y. S. 362; Barry v. Mutual Life Ins. Co., 53 N. Y. 536); and it is held that whether or not a court will sustain or set aside a stipulation rests in the exercise of its sound discretion, whenever the parties can be restored to the same condition they would have been in if the stipulation had not been made (Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Prestwood v. Watson, 111 Ala. 604, 20 So. 600; Chicago & N. W. R. Co. v. Hintz, 132 Ill. 265, 23 N. E. 1032; Richardson v. Musser, 54 Cal. 196; Barry v. Mutual Life Ins. Co., 53 N. Y. 536; Wells v. American Express Co., 49 Wis. 224; Magnolia Metal Co. v. Pound, 60 App. Div. 318, 70 N. Y. S. 230). Where it is held that stipulations have the force of contracts, it is said that they will not be set aside upon any lower grounds than those which would warrant a rescission of other contracts, viz.: fraud, collusion, accident, surprise, or some ground of the same nature, and that the court will not relieve parties from the effects of a stipulation made under a full understanding of the facts existing at the time it was entered into; and that the mere fact that a party, by such a stipulation, has waived defenses which he might otherwise urge, is not sufficient ground for setting it aside. Thompson, Trials, § 194. Bingham v. Winona County Sup'rs, 6 Minn. 136 (Gil. 82); Rogers v. Greenwood, 14 Minn. 33 (Gil. 256); Charles v. Miller, 36 Ala. 141. It is said that, where the agreement involves something more than a mere matter of practice, and affects the substance of the cause of action, or the character of the defense, and it appears that it has been entered into by counsel without a knowledge of the facts, and that its withdrawal will not operate to the prejudice of either party, the motion to set aside the stipulation ceases to be a matter of mere discretion, and should be granted by the court. Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Keens v. Robertson, 46 Neb. 837, 65 N. W. 897; Sullivan v. Eddy, 154 Ill. 199, 40 N. E. 482; Brown v. Cohn, 88 Wis. 627, 60 N. W. 826. It is also said that the agreement should not be set aside at the instance of either party, when the

STOCK AND STOCKHOLDERS; STOCK EXCHANGES; STOPPAGE IN TRANSIT; STORAGE, see latest topical index.

STREET RAILWAYS.

[BY ELLERY H. CLARK.*]

§ 1. **The Franchise or License to Operate a Street Railway (1556).**
A. Nature of Franchise; How Acquired and Lost (1556).
B. Rights and Duties Under Franchise (1560).
§ 2. **Taking Property and the Right of Eminent Domain (1561).**
§ 3. **Taxes and License Fees (1562).**
§ 4. **Street Railway Corporations (1563).**
§ 5. **Location, Construction, Equipment and Operation in General (1563).** General Rules of Care in Equipment and Operation (1566).
§ 6. **Injuries to Persons Other Than Passengers or Servants (1567).**
A. Trespassers and Licensees (1567).
B. Travelers on Highway. Pedestrians Run Over (1567). Negligence of Company (1570). Children Run Over (1571).
C. Accidents to Drivers or Occupants of Wagons. Collisions Between Car and Wagon (1572). Driving On or Near Tracks (1574). Imputed Negligence (1576). Negligence of Company (1576). Frightening Horses (1578).
D. Bicycle Riders; Horseback Riders; Animals Run Over (1579).
§ 7. **Damages, Pleading and Practice in Injury Cases (1580).**
§ 8. **Statutory Crimes (1581).**

This topic is limited to the law of street railways, excluding their ordinary character as carriers,[51] corporations,[52] or employers,[53] but including railways which, though not upon streets or strictly urban, are more akin in the character of their public service to street railroads than to ordinary railroads.[54]

§ 1. *The franchise or license to operate a street railway. A. Nature of franchise; how acquired and lost.*[55]—A contract to operate cars over a public bridge for a time certain is not a franchise.[56] The privilege of constructing and operating a street railway is obtained from the state, legislating in any constitutional manner.[57] Conditions may be imposed on the franchise, which must be at least substantially fulfilled.[58] This power of the state to determine upon what conditions the

party invoking such action has obtained an advantage under it, or when its withdrawal will place the opposite party in a worse position than if it had never been made. Porter v. Holt, 73 Tex. 447, 11 S. W. 494; Rogers v. Greenwood, 14 Minn. 333 (Gil. 256); Barry v. Mutual Life Ins. Co. of New York, 53 N. Y. 536. The application for the setting aside of a stipulation should be made without laches, and, where considerable delay has intervened, courts are reluctant to interfere to set aside the stipulation. Milbank v. Jones, 60 N. Y. Super. Ct. 259, 17 N. Y. S. 464; Page v. Brewsters, 54 N. H. 184; Continental Ins. Co. v. Delpeuch, 82 Pa. 225. Where an application to set aside a stipulation is granted at the instance of one party, the other party should be restored to the rights he had when such stipulation was entered into. Howe v. Lawrence, 22 N. J. Law, 116; Barry v. Mutual Life Ins. Co., 53 N. Y. 536. See, for enforcement of stipulations, People v. Rathbun, 21 Wend [N. Y.] 509; Davies v. Burton, 4 Car. & P. 166; Heming v. English, 6 Car. & P. 542; Casey v. Leslie, 12 App. Div. 34, 42 N. Y. S. 362.—From Fletcher, Eq. Pl. & Pr., § 447.

51. See Carriers, 3 Curr. L. 591.

52. See Corporations, 3 Curr. L. 880.

53. See Master and Servant, 4 Curr. L. 533.

54. Compare Railroads, 4 Curr. L. 1181.

55. See 2 Curr. L. 1742.

56. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754.

57. When the constitution forbids the legislature to pass any local act granting any corporation the right to lay railroad tracks, a special act authorizing the reconstruction of the Manhattan terminal of the Brooklyn Bridge and conferring the power to lay tracks is not a violation of the constitution, since this power is conferred on the city and not on a private corporation. In re City of New York, 45 Misc. 184, 91 N. Y. S. 987.

58. **Kind or character of construction:** The amendments to Rev. St. §§ 3437, 3439, relating to street railway grants, are unconstitutional in that they lack uniform operation throughout the state. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583. Laying single track gave no rights under double track franchise which excluded council to grant to others. Newport News & O. P. R. & Elec. Co. v. Hampton Roads R. & Elec. Co., 102 Va. 795, 47 S. E. 839.

Consent of local authorities: Where a statute provides for this it must be obtained. People's Traction Co. v. Atlantic City [N. J. Law] 57 A. 972. Under construction of a statute, the consent of hamlets or villages held to be a necessary condition to construction of road. Electric St. R. Co. v. North Bend, 70 Ohio St. 46, 70 N. E. 949.

Protection of crossings: A statute provided that street railway companies desiring to cross railroad tracks must operate certain safety devices within 6 months after

* Author of "Street Railway Accident Law."

franchise shall be granted is to a large extent delegated to the municipal or other local authorities,[59] and may be given to any one of several officers or bodies who might otherwise have authority over highways.[60] On a change in the organic existence of a locality, this power usually passes to the new municipality.[61] In Illinois the consent of the county board is expressly required if any public ground outside a city, town or village be taken.[62] The grant must be made in the mode prescribed,[63] but being legislative is not judicially reviewable on questions of expediency.[64] A grant by de facto officers may become binding.[65] Direct grants with a delegation of power to merely impose terms or regulations are not subject to be limited in duration by local authorities.[66] This delegated power must be exercised in a rea-

commencing to use the crossing, and made provision as to damages. Held, that the 6 months began to run when the crossing was used and was not postponed until termination of litigation as to damages. Chicago, I. & L. R. Co. v. Indianapolis & N. W. Traction Co. [Ind.] 74 N. E. 513. A street railway which in crossing the tracks of a steam railroad makes no attempt to comply with the provisions of a statute relative to the adoption of certain safety devices cannot, in litigation with the railroad, raise the question of a portion of the statute being unconstitutional in requiring the work to be done to the satisfaction of the state auditor. Id.

59. A city entitled to grant a street railway franchise had power to limit the grant as to time prior to the passage of a statute providing that no grant should be valid for more than 25 years, though prior to the passage of such statute there was no statute authorizing the city to limit such grants. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111. Interurbans may acquire the right from the local authorities to construct extensions or branches. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583.

60. Where a statute provides that a street railway company may construct and maintain its road under terms agreed on by the company and the township board, state and territorial roads within the territory of the township come under this authority, and a highway commissioner cannot maintain proceedings to disfranchise the company on the ground that the board has usurped his authority. Smith v. Jackson & Battle Creek Traction Co. [Mich.] 100 N. W. 121.

61. Newport News & O. P. R. & Elec. Co. v. Hampton Roads R. & Elec. Co., 102 Va. 795, 47 S. E. 839. The validity of a grant for a street railway route made by county commissioners through unincorporated territory is **not affected by the subsequent annexation of such territory to a municipality.** Belle v. Glenville & C. Elec. R. Co., 5 Ohio C. C. (N. S.) 461.

62. Hartshorn v. Illinois Val. Traction Co., 210 Ill. 609, 71 N. E. 612.

63. Although, by statute, a city can grant a street railway company a franchise only by ordinance, where such ordinance is passed, subject to a provision that certain points as to location shall be under the control of the city council, the city may, by a mere motion adopted by the council, authorize the company to change the location of a curve in the track. Mannel v. Detroit, etc., R. Co. [Mich.] 102 N. W. 633. Where the mayor and council of a city granted a franchise to a street railway company by resolution, passed without notice to the owners of property on the streets affected and without prior publication as required by the charter in case of ordinances, it was held that they had no authority to thus legislate by resolution, and that the property owners could maintain a suit in equity to enjoin the laying of tracks. Holst v. Savannah Elec. Co., 131 F. 931. Title of an ordinance being the extension of a certain street railway does not violate Rev. St. § 1694, where provision is made for the repeal of a portion of one ordinance, the revival of a portion of another, and the amendment of a third. Belle v. Glenville & C. Elec. R. Co., 5 Ohio C. C. (N. S.) 461.

64. Where a statute authorized a municipal corporation to grant street railways the right to use the streets within the corporate limits for laying its tracks, and the municipality granted such right by ordinance, it was held that since such ordinance is legislative in character, the court could not properly revise it, at the suit of an abutting owner, on the ground of inexpediency. Lange v. La Crosse & E. R. Co., 118 Wis. 558, 95 N. W. 952. The action of the council of a municipality in granting to street railway company a franchise in a street which crosses a steam railroad at grade is not the subject of judicial review, where it does not appear that in so doing council exceeded its power, or that its action was induced by fraud. Nor would a review be authorized by a showing to the effect that a safer crossing could be made on another street. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583.

65. Where township supervisors stand by and permit a street railway to spend large sums of money in construction, they cannot demand the removal of the railway months afterwards, because consent was given by de facto supervisors. Jordan v. Washington & C. R. Co., 25 Pa. Super. Ct. 564.

66. Where a statute created a street railway company, providing that the terms of operation should be prescribed by the common council of the city in which it was to operate, it was held that this was a grant direct to the company, and not a mere grant to the city to in turn grant a franchise, and that the council had no power to determine the life of the grant. Govin v. Chicago, 132 F. 848.

sonable manner, oppressing neither the railway company[67] nor adjacent property owners.[68] As a check upon the local authorities and to insure the protection of the rights of the public, notice or the consent of a certain proportion of the abutting owners is usually made a condition precedent to the granting of the franchise.[69] Consent must rest on such ownership as the statute contemplates,[70] or on authority from an owner,[71] and must cover the proposed grant.[72] Injunction will lie against construction without consent,[73] but the public alone may complain if no private interest is affected.[74]

67. Where a street railway company had a vested right, under its franchise, to continue its line across a parkway, subject to reasonable regulations as to location of tracks, etc., by the park commissioner, such commissioner has no right to impose the condition that no cars shall be run in trains operated by steam, electricity, or other power, and he may be compelled by mandamus to issue a proper permit. People v. Kennedy, 97 App. Div. 103, 89 N. Y. S. 603.

68. Where a city, over the protest of every abutting owner on a residence street, refuses them a hearing and grants in secret caucus the right to a street railway company to appropriate said street for its tracks to shunt empty cars into the car barn at midnight and out again at dawn, where the company has a suitable track only a block away, such action is unreasonable and oppressive, and should be enjoined by a court of equity. Holst v. Savannah Elec. Co., 131 F. 931.

69. Council obtains jurisdiction to grant a street railway franchise only by the production of consents from more than one-half the frontage. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393. A departure from the established route of a street railway, by running over private right of way to avoid sharp curves, is not fraud per se against abutting property owners, whose consents were secured with the understanding that the line would follow the line specified. Ireton Bros. & E. v. Ft. Wayne, Van Wert & Lima Traction Co., 2 Ohio N. P. (N. S.) 317. Where a street railway company, to gain the assent of an abutting owner, agreed to give him a valuable option on the purchase of the company's stocks and bonds, this was in violation of the policy of the statute making such consent necessary, and could not be enforced. Montclair Military Academy v. North Jersey St. R. Co., 70 N. J. Law, 229, 57 A. 1050. Where a statute gives the commissioner of bridges authority to select real estate for the reconstruction of the terminal of the Brooklyn Bridge, and provides that no street railroad shall be built without the consent of the owners of one-half the value of the property bounded on the portion of the street to be used, and where the plan submitted shows that the tracks cut the streets in such a way that there is no property left bounded on the portion of the street where it is intended to lay the tracks, such consent of property owners need not be obtained. In re City of New York, 45 Misc. 184, 91 N. Y. S. 987. In computing the lineal feet of property fronting on a street, cross streets are to be omitted. People's Traction Co. v. Atlantic City [N. J. Law] 57 A. 972. Burden of proof is upon one asserting that council granted the right to build a street railway without the necessary consents having been secured. Ireton Brothers & Eckenberg v. Ft. Wayne, Van Wert & Lima Traction Co., 2 Ohio N. P. (N. S.) 317. The presumption is that the council granted the right to build the road after being satisfied that the requisite consents had been given, and the burden of proof is upon one asserting the contrary. Id.

An extension of a street railway into or through a municipality being an original line, the notice prescribed by Rev. St. §§ 2502, 3739, is a prerequisite to the granting of a franchise. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583.

70. A vendee of land under a contract to convey, being in possession of the property and not being in default, has the right to consent to the construction of a street railway on the adjoining street. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393.

71. The consent of an abutter to the building of a street railway may be signed by another who has authority to so do. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393. It is immaterial whether the name signed is that of the owner or his agent, if he intends the signature to be his (Id.), and this intent may be gathered from authorization or ratification (Id.).

72. Consents are not functus officii, but the first grant being enjoined, they may be considered as consents to a later grant, if presented as such, it appearing that the abutters had knowledge of the new application and never withdrew their consents. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393. If an owner consents to the construction of a railway, either generally or specifying some particular individual or corporation, his consent inures to the benefit of the individual or corporation offering to carry passengers for the lowest fare; if he consents to the extension of the tracks of an existing street railway, such consent inures only to the benefit of the railway specified. Id.

73. A street railway company which has not the consent of all the local authorities of the districts through which it proposes to pass, or of all of the abutting owners, may be enjoined from construction by a person or corporation whose interests are adverse. Pennsylvania R. Co. v. Parkersburg & C. St R. Co., 26 Pa. Super. Ct. 159.

Intersected line may raise question: The question as to whether such notice is a condition precedent may be raised by a steam railway in an action to enjoin the latter from operating its road across the

Extensions may under numerous statutes be allowed without the publicity or consent requisite for new lines.[75] In Wisconsin, where submission to vote is essential, a distinction is made so that extensions of franchises but not of lines must be so submitted.[76] The word "extension" is not restricted to a projection in a straight line,[77] but such provisions should not be so construed as to authorize new roads under the name of extensions,[78] or to allow construction of a different character of line.[79] Extension of a line does not impliedly extend a franchise to which the line is attached.[80]

A power to renew a franchise at its "expiration" does not forbid renewal before expiration.[81] The franchise may be forfeited through failure to comply with the conditions on which it was granted,[82] barring legal obstacles,[83] or by terms may become void ipso facto.[84] Such forfeitures must be enforced and claimed by

former's tracks. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583.

74. Ireton Bros. v. Ft. Wayne Traction Co., 2 Ohio N. P. (N. S.) 317.

75. Provision of Rev. St. 1536-189, requiring publication of resolutions or ordinances relating to changes in a street railway route, is not applicable to an extension of a route. Belle v. Glenville & C. Elec. R. Co., 5 Ohio C. C. (N. S.) 461.

76. Where a statute provided that no ordinance granting a street railway franchise or extending the life of any franchise should be operative unless submitted to a direct vote of the people, if demanded, but declared that it should not apply to "the extension of any existing line, if the term of the extension expires at the same time as the franchise of which it is a part," it was held that submission to a direct vote was necessary where an ordinance granted an original franchise or extended the life of an existing one, but not where the existing line was merely extended on other streets, the extension expiring at the same time as the franchise. State v. Common Council of Wauwautosa [Wis.] 102 N. W. 894.

77. A grant may be made for an extension of a street railway route, though the extension is to be built at right angles to the original route. Belle v. Glenville & C. Elec. R. Co., 5 Ohio C. C. (N. S.) 461.

78. By statute the certificate of the railroad commissioners on the question of public convenience was made a prerequisite to the construction, but not to the extension of a road. It was held that the statute must be given a reasonable, rather than a literal, construction, and that an "extension" for 70 miles of a road originally 5 miles long was the construction of a new road. New York, etc., R. Co. v. Buffalo & W. Elec. R. Co., 96 App. Div. 471, 89 N. Y. S. 418.

79. An extension of an interurban, into or through a municipality, is an original line. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583. In a case of conflict as to municipal lines or extensions, the general provisions of section 3437 et seq. must yield to the specific provisions of section 2505 et seq. Id. The original grant providing that the motive power should be horses, the grant for an extension is not rendered invalid by reason of the fact that electricity is specified as the motive power, where the line has been operated for many years by electricity. Belle v. Glenville & C. Elec. R. Co., 5 Ohio C. C. (N. S.) 461.

80. Extension of a franchise by implication is not favored, and the "extension" of a line is not a new route. It has no independent life, but is a part of the line to which it is added. It has no legal existence without the original line, and can have no tenure of life beyond that of the original line. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111.

81. A municipal council may renew a street railway grant prior to the expiration of the original grant, although the statute conferring such power reads, "The council may renew any such grant at its expiration." City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102; City of Cleveland v. Cleveland Elec. R. Co., 194 U. S. 538, 48 Law. Ed. 1109. A grant for an extension of a street railway route for a period of less than 25 years does not violate Rev. St. 1536-185, by reason of the fact that the period named in the original grant will expire long before that named in the extension. Belle v. Glenville & C. Elec. R. Co., 5 Ohio C. C. (N. S.) 461.

82. Where a franchise provided that a street railway company must complete its road within a certain time, and, this not being done, a special act was passed extending the time, it was held that there could be no forfeiture of the franchise at the suit of an abutting owner. Kent v. Common Council of City of Binghamton, 94 App. Div. 522, 88 N. Y. S. 34.

83. Where the failure to complete a street railway within the time specified is due to an injunction being granted against the company at the instance of a competitor, the right to complete the line is not lost, and such failure cannot be taken advantage of in a private action by a competitor, but any forfeiture can be enforced only by the state. Newport News & O. P. R. & Elec. Co. v. Hampton Roads R. & Elec. Co., 102 Va. 795, 47 S. E. 839.

84. Where the supervisors of a township granted to a street railway company the right to lay its tracks, provided that if this was not done within a certain time the franchise should be void, and the tracks were not laid within the time specified, it was held that no action by the township was necessary to complete the forfeiture. Millcreek Tp. v. Erie Rapid Transit St. R. Co., 209 Pa. 300, 58 A. 613.

the public.[85] Waiving forfeiture is not the grant of a new right.[86] There is no abandonment even with virtual nonuser, where an intent to the contrary appears.[87] An unlimited franchise may be surrendered by acceptance of other incompatible franchises.[88]

(§ 1) *B. Rights and duties under franchise.*[89]—It is well settled that a street railway company secures certain vested rights under its franchise which cannot arbitrarily be interfered with.[90] It is a guiding principle in cases involving the rights of the company that the interests of the public must be regarded as of primary importance.[91] If a street railway takes action under a statute granting it certain advantages, it is subject to the liabilities imposed by such statute as well.[92] They

85. Newport News & O. P. R. & Elec. Co. v. Hampton Roads R. & Elec. Co., 102 Va. 795, 47 S. E. 839.

86. Company failed to lay a track within the time limited. Newport News & O. P. R. & Elec. Co. v. Hampton Roads R. & Elec. Co., 102 Va. 795, 47 S. E. 839.

87. Where a railroad constructed another road on another street, and for some months ran only one car a day on its original line, and on days of snowfalls ran no car at all, such action was held not to be enough to show an abandonment of the route so as to give the city the right to remove the tracks. Forty-Second St., etc., R. Co. v. Cantor, 93 N. Y. S. 943.

88. Where a street railway company having an alleged unlimited franchise to operate a line on a certain street granted prior to a statute limiting such grants to 25 years, accepted the terms of a subsequent ordinance authorizing it to extend its lines on such street and to operate all of its tracks on such street for 25 years, such acceptance operates as a surrender of its alleged unlimited franchise. Cleveland Elec. R. Co. v. Cleveland, 137 F. 111.

89. See 2 Curr. L. 1745.

90. Where St. 1859, § 1, created the Chicago City Ry. Co. and gave them certain powers for 25 years, with a right to operate in South and West Chicago, and § 10 provided that all such powers should be conferred upon others, by the name of the North Chicago Ry. Co., and where St. 1861 amended St. 1859, § 1, extending its provisions for 99 years, it was held that the North Chicago R. Co. benefited as well. Govin v. Chicago, 132 F. 848. Commissioners were authorized to construct a bridge over a river, with power to authorize a railroad over the bridge. By statute the commission was abolished, and its powers given to the commissioner of bridges of N. Y. It was held that the commissioner had power to contract for the running of street cars over the bridge and that such a contract did not illegally create a franchise in the street car company, there remaining no vested property rights at the expiration of the contract. Schinzel v. Best, 45 Misc. 455, 92 N. Y. S. 754.

Grant of conflicting franchise: An act providing that a street railway company shall have a continuous route, and locating a portion of it on a street already occupied by the tracks of another company, is illegal. Altoona Belt Line St. R. Co. v. City Pass. R. Co., 209 Pa. 280, 58 A. 477. A street car company is entitled to use the material torn up from the street in laying track when putting the street in proper condition. By ordinance the railway was required to put the street in proper condition. The city removed some of the material torn up. It was held liable to the company therefor. City of Detroit v. Detroit R. Co. [Mich.] 99 N. W. 411.

91. A street railway company built a tunnel under the Chicago river under a statute permitting such action if navigation was not obstructed. In mandamus by the city to compel the lowering of the tunnel on the ground that it did constitute such an obstruction, it was held that this was not a taking or damaging of the railway's property for public use, that the city could insist on the removal of the tunnel, although no such right was reserved when the license was granted, and that the fact that other tunnels obstructed navigation was no defense. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393. A street railway company in A. and one operating between S. and A. agreed that the latter company could run over the tracks of the former, the cars not to be of excessive size or to run at excessive speed. Later the A. railway, objecting to certain cars which had run for some time without accident, used physical force to prevent the S. railway's running cars on its tracks. Held, that in view of the rights of the public, the A. company would be restrained from interference and must seek relief from the courts. Schenectady R. Co. v. United Traction Co., 44 Misc. 282, 89 N. Y. S. 931. A street railway company subject to the authority of the county laid a single track, and had the right to lay a double track. The road then became subject to city control; and where the company refused, in defiance of the orders of the city, to lay the double track, and the public were not being properly served, it was held proper to grant the right to lay a double track on the same street to another company. Newport News & O. P. R. & Elec. Co. v. Hampton Roads R. & Elec. Co., 102 Va. 795, 47 S. E. 839. Where an electric road is forbidden by statute to use its electricity for lighting purposes, this does not preclude it from using its electricity for lighting as an incident to its business, and is no excuse for failure to comply with order of selectmen as to lighting streets on which its cars ran. Cunningham v. Boston & W. St. R. Co. [Mass.] 74 N. E. 355.

92. An ordinance granting a franchise to a street railway company required planking, paving, etc. Held, that these conditions were not unreasonable and that the company must comply with them at its own expense; further, that the company by accepting the ordinance was estopped from saying that the

have an interest to redress the obstruction of public ways affording access to their lines.[93] Injunction will not lie to protect railway structures in a street from interfering with public works, which if injurious will be reparable in damages.[94]

Rates.[95]—The legislature may regulate the charges of street railways,[96] and may delegate this authority to a city.[97]

§ 2. *Taking property and the right of eminent domain.*[98]—No private property may be taken without compensation or consent,[99] and property already in public

conditions were not reasonable. In re Topping Ave. [Mo.] 86 S. W. 190. The assignment, grant, transfer or lease of a street railway franchise imposes on the grantee all the duties and obligations resting upon the original holder, but where the privileges are parted with, the liabilities do not remain. Reynolds v. Pacific Elec. R. Co. [Cal.] 80 P. 77. Where, by ordinances imposing certain conditions, two companies were allowed to consolidate, and their franchise, that of one company expiring in 1904 and that of the other in 1908, was granted to 1908; it was held that such ordinances, being duly accepted, were contracts, and that an ordinance passed in 1904, granting a conflicting franchise to a new company, was unconstitutional and void. Cleveland Electric R. Co. v. Cleveland, 135 F. 368. Where a street railway company accepts the provisions of statutes permitting it to enter into a contract for leasing lines of other companies, it is bound to assume the obligations as to rates of fare, etc., imposed by the statutes as consideration for the privilege. O'Reilly v. Brooklyn Heights R. Co., 95 App. Div. 253, 89 N. Y. S. 41. Several companies were consolidated subject to all of the obligations and liabilities to the state which belonged to or rested upon any of such corporations making such consolidation. This was held to be an assumption of the obligations of each of the corporations arising ex contractu or ex delicto. Kansas City-Leavenworth R. Co. v. Langley [Kan.] 78 P. 858.

93. Where two competing street railways, one operated by a receiver appointed by a Federal court, terminated at a street leading to a bathing beach, and under a prior agreement to which defendant's predecessor was a party, a triangle of land was dedicated to the public as an approach to the beach, it was held that the receiver was entitled to a preliminary injunction preventing the defendant from closing the triangle and thus denying the passengers on the receiver's line direct access to the beach. Hampton Roads R. & Elec. Co. v. Newport News & O. P. R. & Elec. Co., 131 F. 534.

94. Where a street railway company had a franchise to operate an elevated railway in certain city streets, and the city under its charter was about to erect a public comfort station so that it became necessary to underpin certain pillars of the elevated structure, it was held that the company had only an easement in the street, and could not maintain an injunction to enjoin the erection of the station, since if the work should properly be done by the city, the railroad, after doing it, would have an adequate remedy at law. Interborough Rapid Transit Co. v. Gallagher, 44 Misc. 536, 90 N. Y. S. 104.

95. See, generally, Carriers, 3 Curr. L. 591.

96. Where a statute provides that a street railway company may establish rates of fare subject to its charter, a subsequent statute providing that selectmen may impose such conditions as the public interest may require in granting a location does not authorize them to impose a limitation on the rates of fare. Cunningham v. Boston & W. St. R. Co. [Mass.] 74 N. E. 355. A state constitution provided that all franchises granted by the legislature should be subject to its control. Subsequently a street railway company obtained a franchise with the right to charge full fare, and then an act was passed providing for half fare for school children. It was held that the act did not impair the obligation of a contract, and where no evidence of an oppressive burden was given, that it did not deprive the company of its property without due process of law, or deny it the equal protection of the law. San Antonio Traction Co. v. Altgelt [Tex. Civ. App.] 81 S. W. 106. Where a street railway company operated its road through the village of H. to W. and was entitled under its franchise to charge a five cent fare between the limits of H. and W., it was held that it could properly charge another fare for a ride through the village of H. Byars v. Bennington & H. V. R. Co., 90 N. Y. S. 736.

97. A municipal contract guaranteeing a five cent fare for a term of years does not violate a statute that a municipal corporation shall not during the term of a street railway grant, or renewal thereof, release the grantee from any obligation thereby imposed; such contract being made in good faith for the benefit of the public. City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 48 Law. Ed. 1102; City of Cleveland v. Cleveland Elec. R. Co., 194 U. S. 538, 48 Law. Ed. 1109. Where a city agrees to guarantee a five cent fare for a certain time, where a number of street railways are consolidated, this creates a contract right to charge such a rate which cannot afterwards be reduced by the municipality under authority to regulate fares reserved in an ordinance adopted prior to the consolidation. Id. Where a township granted a franchise on condition that no more than a certain fare should be charged, it was held that abutting owners were not proper parties to a bill to restrain the company from charging a greater rate of fare. Millcreek Tp. v. Erie Rapid Transit St. R. Co., 209 Pa. 300, 58 A. 613.

98. See, generally, Eminent Domain, 3 Curr. L. 1189.

99. A street railway, authorized by ordinance to lay its tracks on a public street, the fee to which is in the abutting lot owners, cannot burden the street with its tracks without obtaining the consent of such lot owners or resorting to condemnation pro-

use cannot be condemned.[1] A power to a "street" railroad to condemn "rural" property necessary for its line implies that the highway shall be followed as far as practicable[2] or the power ceases.[3] If a rural district be so sparsely peopled as not to furnish supporting traffic, no public necessity as to such district exists,[4] and a power of eminent domain granted to serve such public convenience fails.[5] The rule is generally stated to be that a street railway is not an added burden on the highway so as to give abutting owners a right to compensation.[6] A deviation from the plan allowed,[7] or from an existing right,[8] requires compensation if it imposes additional burdens.[9]

§ 3. *Taxes and license fees.*[10]—The legislature has the power to tax street railway franchises exempting those of sub-surface ones[11] and despite the payment of a consideration for the franchise;[12] and as a police measure, each car may be sub-

ceedings. Lange v. La Crosse & E. R. Co., 118 Wis. 558, 95 N. W. 952.

1. Where a railroad owned land in fee which crossed a public highway, it was held that a street railway company was or was not entitled to cross, depending upon whether the railroad land was part of its "right of way" or not. If this point is in doubt, a court of equity will not restrain the street railway from laying its tracks. Pennsylvania R. Co. v. Inland Trac. Co., 25 Pa. Super. Ct. 115.

2, 3. Hartshorn v. Illinois Val. Traction Co., 210 Ill. 609, 71 N. E. 612. Evidence held insufficient to show needless digression. Id.

4, 5. Hurd's Rev. St. 1899, c. 131a, § 3, does not grant such power solely in view of the connecting of cities and towns, but also to serve the country between. Hartshorn v. Illinois Val. Traction Co., 210 Ill. 609, 71 N. E. 612.

6. The construction of a street passenger railway does not impose an additional servitude on the property fronting on the street so occupied. Hester v. Durham Traction Co. [N. C.] 50 S. E. 711. The construction and operation of an interurban electric railroad to carry passengers, their baggage, light express matter and mail in trains consisting of one or two cars, is not an additional servitude upon the street for which the abutting property owners are entitled to compensation. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642. An electric railway, with its incidental poles and wires, within the lines of public streets for municipal travel, imposes no additional servitude on abutting property. Montclair Military Academy v. North Jersey St. R. Co., 70 N. J. Law, 229, 57 A. 1050.

7. Where an underground railroad had authority to construct and then without consent of abutters or an order of court, made unauthorized modifications in its plans, it was held that to sanction the change the road must pay the property owners the damages done by such unauthorized construction. In re Board of Rapid Transit R. Com'rs of New York, 93 N. Y. S. 930.

8. A prescriptive right to use a portion of a street for a steam railroad does not justify the erection of a structure for an elevated road. Leffmann v. Long Island R. Co., 92 N. Y. S. 647. Where a corporation had a prescriptive right to use a portion of a street for a steam railroad, a statute directing the erection of an elevated road by the corporation and the city in place of the surface road, making no provision for damages to abutters, does not prevent the latter from getting relief by damages or injunction for the invasion of easements of light, air, and access. Id. Where, in condemnation proceedings, plaintiff sought to condemn only easements of light, air, and access, but the judgment provided for other injuries, defendant was entitled to damages resulting from pillars extending into vaults dug beneath the sidewalk. In re Brooklyn Union El. R. Co., 93 N. Y. S. 924.

9. See, also, Eminent Domain, 3 Curr. L. 1189.

Damages: Where a street railway maliciously lays its track on a highway against the protest of an abutting landowner in such a way as to injure the land and buildings, the railway cannot demand that damages be assessed as if the injuries had been done in the lawful exercise of the right of eminent domain. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367. A street railway company, in consideration of $3,481.07 paid by the owner of property fronting on the line, agreed that for one-half the period of the charter (25 years), the road should be operated for its entire length, and for failure to so do, the road would pay $3,481.07. It was held that this was not a penalty, and that, on breach of the condition, the owner could recover it as liquidated damages, and that there was a breach if the road was not operated continuously from the time of the contract until the expiration of 25 years, any 25 out of the 50 years not being sufficient. Santa Fe St. R. Co. v. Schutz [Tex. Civ. App.] 83 S. W. 39.

Necessity of payment or tender: Where a statute provided that aldermen and selectmen, when petitioned for a location by a street railway company, should give notice and assess damages to abutters as in highway cases, and the highway statute provided that no land should be used until damages were assessed and either paid or tendered, it was held that such assessment and payment or tender was a condition precedent to occupancy, but that an abutter who waited until the road was built waived his right to prepayment as a condition precedent, although he might still apply to have his damages assessed. Strickford v. Boston & M. R. Co. [N. H.] 59 A. 367.

10. See full discussion, Licenses, 4 Curr. L. 428; Taxes, 2 Curr. L. 1786.

11, 12. Although street railway compan-

jected to license fee.[13] Local assessments cannot be laid where the law renders liable only "abutting real estate."[14] In Iowa interurban railways are taxed as railroads.[15]

§ 4. *Street railway corporations.*—The business and corporate activities of street railway companies are governed by the general law of corporations.[16] A number of miscellaneous rulings have been recently made on the rights of street railway companies to buy and sell and to perform similar corporate functions.[17] It is held in New York that a lease for 999 years is not invalid as a virtual surrender of corporate franchises,[18] and since the power to lease exists in that state,[19] such a lease is valid if fair.[20]

§ 5. *Location, construction, equipment and operation in general.*[21]—The granted route must be substantially followed,[22] but the state alone may question the franchise because of an alleged deviation.[23] A grant of location may not be varied

ies are granted the right to operate in consideration of the payment of a certain sum, a subsequent franchise tax does not impair the obligation of contracts, and the exemption of sub-surface street railways is constitutional. People of State of New York v. State Board of Tax Com'rs, 25 S. Ct. 705. Where a street railway agreed to pay to a city a percentage of its gross receipts, and this was later reduced to a certain sum in consideration of the road's granting transfers, it was held that this sum was in the nature of a tax and should be deducted from the state's special franchise tax. Heerwagen v. Crosstown St. R. Co., 179 N. Y. 99, 71 N. E. 729.

13. A municipality under its general police power has authority to impose an annual license tax of $25.00 on each street car operated in the city. Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77. In ascertaining the number of cars subject to such tax, trucks, and not bodies should be considered. Id. Tax bills on the cars of a street railway company bear interest like other taxes, and payments on them are to be applied as of the date made. City of Louisville v. Louisville City R. Co. [Ky.] 84 S. W. 535.

14. Under Statute 1891 (P. L. 75) assessments for benefits can be levied only against real estate abutting upon the improvements, not against a street railway occupying a street improved or against the tracks of such street railway. Harriott Avenue, 24 Pa. Super. Ct. 597.

15. A statute provided that (1) any street railway operated by other power than steam extending beyond corporate limits to another city or town is an interurban railway. (2) Such companies and roads shall be governed by the same laws as railroads and railroad companies. (3) Such companies within city limits shall be governed by rules applying to street railways. (4) Property of street railway companies within or without the municipality shall be assessed by local assessors. (5) All railways shall be assessed by the executive council. It was held that a line connecting three municipal corporations was an interurban railway, that the provision (3) did not give a street railway the right to be assessed as a street railway and not as a steam railroad and that provision (5) impliedly revoked provision (4). Cedar Rapids & M. C. R. Co. v. Cummins [Iowa] 101 N. W. 176.

16. See Corporations, 3 Curr. L. 880.

17. A note given by a street railroad company for its own stock is not without consideration, though the stock subsequently proved to be worthless. Leonard v. Draper [Mass.] 73 N. E. 644. A corporation has a right to purchase its own stock, unless forbidden by statute, and such purchase is not a reduction of its capital stock, where the stock is kept in existence, ready to be sold and transferred to another party. Id. A statute with reference to conditional sales of street railway rolling stock, requiring each car to be marked on each side with the name of the seller followed by the word "owner," applies to completed cars, and a provision that the sale shall not be valid against a purchaser in good faith unless recorded does not apply to a conditional sale of trucks, motors, etc. Lorain Steel Co. v. Norfolk & B. St. R. Co. [Mass.] 73 N. E. 646. Where rails were sold to a street railway company by a contract providing that they should remain the property of the seller until paid for, the laying of the rails on a track on land in which the company had no interest did not make them part of the realty so as to prevent the seller from recovering them. Id. Where a trustee by virtue of a power in a mortgage given to secure bonds takes possession of the mortgaged street railway, the mortgage also providing that he shall be reimbursed all outlays, and his disbursements shall be a first lien, one who advances him funds for necessary operating expenses is entitled to priority over the mortgagee. Mersick v. Hartford & W. H. Horse R. Co., 76 Conn. 11, 55 A. 664. One who furnished the company with funds for necessary operating expenses before the trustee took possession is not entitled to priority over the bondholders. Id.

18, 19, 20. Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. S. 714. One who sold a right founded on the assumption that the lease was valid cannot assail it. Id.

21. See 2 Curr. L. 1747.

22. Jordan v. Washington & C. R. Co., 25 Pa. Super. Ct. 564. Adoption of private right of way to avoid curves held not a fraud on abutters who consented to street line. Ireton Bros. v. Ft. Wayne Traction Co., 2 Ohio N. P. (N. S.) 317.

23. A reasonable divergence from the

by oral agreement with the granting officers.[24] The general power to impose conditions on a franchise warrants a permit to use a certain rail without paving to be replaced by a different one with paving if unsatisfactory,[25] and the decision of a city council that one is not satisfactory is not reviewable.[26] Performance of such conditions is not the "repair" of a public way from which by payment of a tax the company exempts itself.[27] Neither is financial embarrassment any reason to excuse nonperformance.[28] As part of the conditions of the franchise it is common to require improvement and reconstruction of the streets occupied. Many cases have arisen with respect to the liability of street railway companies for paving the streets occupied by their tracks. It depends chiefly on the terms of the particular franchises which are not reducible to rule; hence cases are merely collated.[29] Such

chartered route of a street railway is in the discretion of the railway. Whether such divergence has been exceeded is a question not for the township, but for the commonwealth. Jordan v. Washington & C. R. Co., 25 Pa. Super. Ct. 564.

24. Selectmen of Gardner v. Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

25, 26, 27, 28. Inhabitants of Gardner v. Templeton R. Co., 184 Mass. 294, 68 N. E. 340.

29. Rev. Laws, c. 112, § 100, means that all construction must be to the satisfaction of selectmen. Selectmen of Gardner v. Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340. A provision of a city charter, requiring street railway companies to pay the cost of paving between the rails and tracks of the railway and for two feet on either side, is not unconstitutional. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874. Under a statute authorizing the selectmen of a town to grant a street railway location under such restrictions as the public interests may require, restrictions as to paving more onerous than those contained in the general laws are proper, and restrictions as to relaying track and using heavier rails are also proper. Dunbar v. Old Colony St. R. Co. [Mass.] 74 N. E. 352. A statute provided that a street railway company should keep in repair the surface of the street within its rails, but that if the street was permanently improved it should bear no part of the expense. This agreement was embodied in a contract between the city and the company, and ratified by the city on a new consideration moving from the company. Subsequently laws were passed compelling all street railroads to pave the street between its tracks. It was held that these laws were inoperative as concerning the street railway in question, as impairing the obligation of a contract. City of Rochester v. Rochester R. Co., 98 App. Div. 521, 91 N. Y. S. 87. A city imposed the condition that a street railway company, after laying its tracks, should replace the pavement in accordance with the rules of the department of public works, and should renew the pavement as required by the commissioners, supplying trap block pavement between the rails and for a space outside, and if they refused, the city might do the work at the company's expense. The company accepted the condition and laid its tracks. Afterwards the city council voted to pave with granite blocks. It was held that the company was liable to the extent of what trap block pavement would have cost. City of New York v. Harlem Bridge, etc., R. Co., 91 N. Y. S. 557. St. 1893 provided that a street railway company must keep in repair the part of the highway on which its tracks were laid, and 2 feet on either side, and made it liable for nonrepair. St. 1897 provided that the cost of keeping in repair might be considered in determining the cost per square yard which the city might collect from property owners and railroads. Where a city paid a contractor a certain sum per square yard for paving a street and agreeing to keep it in repair for 10 years, it was held that a street railroad was not liable for the proportion of the cost for prospective repairs, the contractor's bond not inuring to the benefit of the railroad. Fair Haven & W. R. Co. v. New Haven [Conn.] 58 A. 703. The mere use of railroad tracks by a street railway is not enough to make the street railway company liable for injuries to a pedestrian on the street on which the tracks are laid, where the injuries were the result of a defective cross walk alongside of the track. Ross v. Metropolitan St. R. Co., 93 N. Y. S. 679. Under a statute requiring a street railway company to keep in repair the paving of the portions of the street occupied by its tracks, the company is not liable for a defect in the pavement between its tracks but outside the rails, as "occupied by its tracks" refers to the rails and the space between them over which the cars pass. City of Boston v. Boston El. R. Co. [Mass.] 71 N. E. 295. Where an ordinance required a street railway company to pave and keep in good repair all streets in which its tracks were laid, 8 feet in width where a single track, 16 where a double, it was held that the company was not liable to an assessment for the laying of a water pipe on one side of the street. McChesney v. Chicago, 213 Ill. 592, 73 N. E. 368. Under a statute requiring a street railway company to pave between its rails and on either side, it is not liable for the cost of underground drainage. City of Mobile v. Mobile Light & R. Co. [Ala.] 38 So. 127. A railroad having the right to lay rails and operate a railroad in a street, and undertaking to pave the street when required by the city council, is not liable for injuries to a pedestrian caused by a defective cross walk alongside the track, in the absence of evidence that the council ever ordered the railroad to pave. Ross v. Metropolitan St. R. Co., 93 N. Y. S. 679. Where an ordinance provided that if a city should pave

conditions follow the franchise when transferred.[30] When contained in an act enabling the extension of roads or establishment of new ones, existing lines are not so charged.[31] Statutory remedies in equity to enforce such conditions are not suits to enforce contracts,[32] and do not involve compulsion to do continuous acts.[33] If adequate they exclude the right to mandamus,[34] and costs on mandamus unnecessarily prosecuted will be denied.[35] The company is liable for negligence in such constructive work whereby travelers are injured.[36] In New York the general railroad law requiring cattle guards at crossings applies to street surface railroads in rural districts.[37] A railroad is subject to the right to cross at grade if the street be one in which a street railway is a contemplated servitude.[38] But the state may regulate or establish crossings by one line of another.[39] Under the laws of Virginia there is a presumption in favor of an order of the State Corporation Commission establishing a crossing.[40] Jurisdiction of a special commission to settle crossing disputes cannot be affected by the pendency of other proceedings, determined however, before decision.[41] At railroad crossings care must be taken by both roads.[42] The company has a use of the streets in common with the public and must construct its line in such manner,[43] and so operate its cars,[44] as to admit of other uses with

any street along which a street railway might run, the railway should pave said street, this did not render the road liable where a street was paved on which it was authorized to run, but on which it had not actually built its tracks. Harris v. Macomb, 213 Ill. 47, 72 N. E. 762. Where property belonging to a street railway company, assessed for a street improvement, was leased by the railway company and used as a public amusement resort, it was not held or used for railroad purposes. Chicago Union Traction Co. v. Chicago [Ill.] 74 N. E. 449.

30. A street railway company contracted with a city for exemption from paving the streets where its tracks were laid, and then consolidated with a second company, which had a franchise to lay tracks on C. street. A third company, which had been given a similar right and had laid a single track on C. street, was then consolidated with the first company, which tore up the single track and laid and operated a double track in connection with its other line. It was held that the double track, being laid under the disused franchise of the second company, was an extension of the first company's line, and therefore covered by the contract with the city. Kent v. Common Council of Binghamton, 94 App. Div. 522, 88 N. Y. S. 34.

31. A statute provided that every street railway company extending or operating a railway under the statute should keep in repair the street between its rails, and another section, relative to fares, provided that such section should not apply to roads previously constructed unless they acquired the right to extend under the statute. Held, that the first section applied to roads constructed under the statute and to extensions of existing roads, but not to existing roads. City of Rochester v. Rochester R. Co., 98 App. Div. 521, 91 N. Y. S. 87.

32, 33, 34, 35. Selectmen of Gardner v. Templeton St. R. Co., 184 Mass. 294, 68 N. E. 340.

36. Under laws authorizing a company to construct its road on a highway upon such terms as might be agreed upon between it and the town board, the franchise granted by the township provided that the grade should conform to grade of the highways where they might cross. Held, the company was liable for an accident caused by an unprotected excavation on the traveled portion of the highway. Kaiser v. Detroit & N. W. R. Co. [Mich.] 99 N. W. 743. The fact that the township officers did not protest at the time of the construction was not a ratification. Id. Operatives of a street car removed from the track an obstruction which had been unlawfully placed there and left it in the street where a bicycle rider ran into it and was injured. The company held not liable. Howard v. Union R. Co., 25 R. I. 652, 57 A. 867.

37. Evans v. Utica & M. V. R. Co., 44 Misc. 345, 89 N. Y. S. 1089.

38. An interurban rightfully occupying a street cannot be enjoined from crossing a steam railroad at grade, where the street will not thereby be subjected to other than its ordinary uses. C., C., C. & St. L. R. Co. v. Urbana, B. & N. R. Co., 5 Ohio C. C. (N. S.) 583.

39, 40, 41. Newport News, etc., R. & Elec. Co. v. Hampton Roads R. & Elec. Co., 102 Va. 847, 47 S. E. 858.

42. Duties concurrent in point of time are imposed upon both steam and street railway companies at grade crossings, and a failure on the part of either company to take the required precautions will render such company liable for negligence in case of injuries resulting. Kopp v. B. & O. S. W. R. Co., 6 Ohio C. C. (N. S.) 103. The liability of the carrying road for accident is treated in Carriers, 3 Curr. L. 591; that of the other road in this topic or Railroads (4 Curr. L. 1131) respectively.

43. A switch built so that ten feet is left between cars and curb does not materially obstruct the public use of the street nor operate as a serious interference with abutter's enjoyment of his property. Rosenbaum v. Meridian Light & R. Co. [Miss.] 38 So. 321. Where a curve was built in front of complainant's lot and when first used cars ran off the track, this was held in-

no unnecessary obstruction or inconvenience. Injunction will not issue on the mere anticipation of failure to do so.[45]

General rules of care in equipment and operation.[46]—Cars and equipment must be such as are in general use in towns and cities of the same size.[47] The fact that a car is not provided with a conductor is not of itself negligence.[48] Omission to use fenders may be negligence.[49] The company will be liable for injuries due to defects left in streets by negligence attributable to it.[50] If it interferes with fire apparatus, it may be liable to the owner of property destroyed for want of protection.[51]

A street railway company must use greater care at street crossings, and must use greater care in crowded city streets than in the open country.[52] In a rural region the rules as to electric railway crossings approximate such as apply to railroads.[53]

In the use of electric motive power, care proportionate to its dangerous character is demanded,[54] especially when conveyed in an accessible and unguarded third-

sufficient to show damage to complainant's right of egress and ingress. Hester v. Durham Traction Co. [N. C.] 50 S. E. 711.

44. A street railway company has only a common easement in the use of the highway, and cannot travel at a speed which unreasonably interferes with the rights of others, and where the company can remove the probability of collision by reasonably slackening speed, it has no right to require other users to use expensive special devices to insure the company the opportunity to run at unlimited speed. Camden & T. R. Co. v. United States Cast Iron Pipe & Foundry Co. [N. J. Eq.] 59 A. 523.

45. It will not be presumed that a street railway company will violate its contract with a city, and the mere anticipation of a breach and consequent injury to an abutting owner will not entitle the latter to an injunction against the construction of the road. Mordhurst v. Ft. Wayne & S. W. Traction Co. [Ind.] 71 N. E. 642.

46. See post, § 6, as to specific rules.

47. Indianapolis St. R. Co. v. Schomberg [Ind. App.] 71 N. E. 237.

48. Di Prisco v. Wilmington City R. Co., 4 Pen. [Del.] 527, 57 A. 906.

49. Where an injury would have been prevented if they had been used and they are usually attached to cars in similar localities through the country and have proved efficacious in protecting persons on the highway. Fritsch v. New York, etc., R. Co., 93 App. Div. 554, 87 N. Y. S. 942. Held, that a jury could not have been misled by an instruction on the subject of fenders where the use of fenders on other car lines had been proved and the court charged that they were to consider the absence of the fender only on the particular car in connection with its management at the time of the injury. Id.

50. Where a pedestrian fell into a trench which was being dug under a permit from the city, it was held that the city must use due care to guard against accident in that part of the street occupied by street railway tracks, and that a statute rendering the railway liable for keeping the surface of a street in repair did not apply. Hyde v. Boston [Mass.] 71 N. E. 118. Where a street railway company, in replacing a broken rail, left a dangerous hole, it was held that the company was liable, though it had no notice of the defective condition alleged. Citizens' St. R. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921. Though the public have an equal right with a street railway company to use city streets, if the street is defective by reason of defectively laid tracks of the company, and such defect is obvious, a traveler is not entitled to use the street unless a person of ordinary prudence would do so. Citizens' R. Co. v. Gossett [Tex. Civ. App.] 85 S. W. 35. Plaintiff, after alighting from defendant's street car, attempted to cross tracks in the dark, being familiar with all the surroundings and the condition of the track and knowing of a safer way. She was held guilty of contributory negligence. Kalberg v. Seattle Elec. Co. [Wash.] 79 P. 1101.

51. Where a motorman ran over a fire hose, cutting it, so that a building was burned for lack of water, the owner was held entitled to recover damages from the street railway company. Little Rock Traction & Elec. Co. v. McCaskill [Ark.] 86 S. W. 997.

52. Di Prisco v. Wilmington City R. Co., 4 Pen. [Del.] 527, 57 A. 906. See, also, ante, § 5.

53. Robinson v. Rockland, etc., R. Co. [Me.] 58 A. 57.

54. One using electricity is required to use care commensurate with the situation. Wires of street railway company. Citizens' Elec. R., Light & Power Co. v. Bell, 5 Ohio C. C. (N. S.) 321. See, generally, Electricity, 3 Curr. L. 1181. A derrick blew down, carrying with it trolley and telephone wires, the latter becoming charged and killing the horses of a passing driver. It was shown that those in charge of the railway power plant knew of the state of affairs for an hour before turning off the power. Judgment for plaintiff was affirmed. Sorrell v. Titusville Elec. Trac. Co., 23 Pa. Super. Ct. 425.

Negligence presumed: Where a live wire is found down in a city thoroughfare, this raises a presumption of negligence against the street railway company, and proof of a general strike of carmen and attendant lawlessness does not rebut the presumption. Cleary v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1029. A live electric wire falling into the street and a passerby being injured, the burden is on the owner of the wire to

rail.[55] In the case of crossed wires, there may be joint liability.[56] The mere effect of currents aside from negligence is not a wrong.[57]

§ 6. *Injuries to persons other than passengers or servants. A. Trespassers and licensees.*[58]—A person riding upon a car not as a regular passenger, but under somewhat unusual circumstances, may or may not be regarded as a trespasser.[59] A master is responsible for the acts of a servant committed in the scope of his employment, even where the servant acts wrongfully, willfully, or illegally, and even where the acts are committed upon a trespasser.[60] One is not a trespasser ab initio who having endeavored to enter a car is ejected and walks back on the track towards his starting place,[61] and he does not become one by continuing in the absence of caution or remonstrance to so walk.[62] Therefore he may recover for injuries from the hidden danger of a heavily charged "third rail" of which he knew not.[63] Where a street railway company, under an arrangement with the U. S. P. O. Dep't, placed mail boxes in its cars, the mail to be taken at the car barn by a postal carrier, the company was held bound to provide such carriers with safe access to the cars they were required to visit in the barn.[64]

(§ 6) *B. Travelers on highway. Pedestrians run over. Adults. Due care of plaintiff.*[65]—A pedestrian must use ordinary care in approaching and crossing street

prove that there was no negligence. Citizens' Elec. R., Light & Power Co. v. Bell, 5 Ohio C. C. (N. S.) 321.

Contributory negligence: A child is held to such care and prudence only as are usual among children of his age and capacity. Citizens' Elec. R., Light & Power Co. v. Bell, 5 Ohio C. C. (N. S.) 321. Whether he uses such care in a particular case is a question for the jury. Id. Where the driver of a horse brought suit for injuries to the horse from contact with a live wire, whether the driver used ordinary care under the circumstances was held to be for the jury. Cleary v. St. Louis Transit Co. [Mo. App.] 83 S. W. 1029.

55. Where a person with a proper ticket stepped on the front step of an electric car, supposing that a closed door would be opened, and was forced from the car at a station at night without directions or warning and with no opportunity to board again, and stepped on a rail charged with electricity, it was held that such person was not a trespasser but entitled to reasonable protection from hidden dangers, and that negligence and contributory negligence were for the jury. Anderson v. Seattle-Tacoma Interurban R. Co., 36 Wash. 387, 78 P. 1013.

56. A street railway company is jointly liable for an accident caused by a telephone wire falling across a trolley wire and into the street, where the negligence of each company co-operated with that of the other to bring about the injury. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386.

57. A street railway company, operating a single trolley electric system under a franchise manifestly contemplating such a system, is liable for injury to the water pipes of the city from the return current only to the extent that its operation of the system has been negligent. Dayton v. City R. Co., 6 Ohio C. C. (N. S.) 41. Equity will not compel a change of a single trolley street railway system to avoid electrolysis to water pipes when there is a sharp conflict in the evidence as to whether the system in use is a proper system. Id.

58. See 2 Curr. L. 1749.

59. A street car sometimes made an extra trip for extra pay. A person, knowing this, hailed the car on its last trip, and, on the car stopping, boarded to negotiate for a ride. The car started suddenly, and he was injured. It was held that he was not a trespasser, and that the company was bound to use ordinary care towards him while he was on the car. Brock v. St. Louis Transit Co. [Mo. App.] 81 S. W. 219. A child, non sui juris, riding on the step of the rear platform on the side of the car not in use, across which is a closed gate, is a trespasser, and the company owes him no duty to discover his peril. Monehan v. South Covington, etc., R. Co., 25 Ky. L. R. 1920, 78 S. W. 1106.

60. Where a conductor assaulted a boy trepasser, the evidence was held sufficient to justify a finding that his act was within the scope of his employment. Hewson v. Interurban St. R. Co., 95 App. Div. 112, 88 N. Y. S. 816. If a boy trespasser of 5 gets on a car unobserved and falls or jumps off, the company is not liable, but, after discovery, the company must use reasonable care to avoid injury, and frightening a child into jumping off a moving car would render the company liable. Goldstein v. People's R. Co. [Del.] 60 A. 975. Due care for a boy of 5 is that degree of care which children of the same age, of ordinary prudence, are accustomed to exercise under like circumstances. Id.

61, 62. Anderson v. Seattle-Tacoma Interurban R. Co., 36 Wash. 387, 78 P. 1013.

63. Anderson v. Seattle-Tacoma Interurban R. Co., 36 Wash. 387, 78 P. 1013. Whether failing to warn him was negligence or whether he contributed by his own negligence is for the jury. Id. Evidence of contributory negligence for jury. Walking on track with "third rail." Id.

64. Young v. People's Gas & Elec. Co. [Iowa] 103 N. W. 788.

65. See 2 Curr. L. 1750, 1751.

railway tracks.[66] Negligence contributing as an efficient cause of injury will defeat an action therefor, irrespective of the quantum of negligence of the respective parties.[67] In determining the question of due care, it becomes necessary in some cases to take into consideration the fact that the pedestrian is suffering from some infirmity.[68] Intoxication does not relieve a man from the degree of care required of a sober man under the same circumstances.[69] As a general rule, where a pedestrian goes in front of a car, and there is evidence either that he did not look or that he had a clear view and could have seen the car if he had looked, he cannot recover.[70] A common case is where there are double tracks, and a pedestrian, either crossing the street or having just alighted from a car, crosses in the rear of the car and is struck by a car coming in the opposite direction on the other track.[71] Where

66. Some courts remain satisfied with this general statement of the rule, and deny that there is any absolute rule of law requiring a person to look and listen before crossing a street railway track. Donovan v. Lynn & B. R. Co., 185 Mass. 533, 70 N. E. 1029; Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850. Other courts lay down the more specific rule that a pedestrian is bound to look and listen before crossing a street railway track. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140; Birmingham R., Light & Power Co. v. Oldham [Ala.] 37 So. 452. He is not bound to stop, look and listen. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140. Where a woman was run over and gave no evidence as to the distance she had to travel before reaching a place of safety, it was held that she failed to show freedom from contributory negligence. Lazar v. New York City R. Co., 94 N. Y. S. 9. .

67. Richmond Traction Co. v. Martin's Adm'r, 102 Va. 209, 45 S. E. 886. It is not contributory negligence as a matter of law for a person to cross a street railway track between two motionless cars. Fitzgerald v. New York City R. Co., 92 N. Y. S. 732. Evidence sufficient to support direction to find contributory negligence where plaintiff's intestate at a late hour was struck by car running at high speed on a track not subject to street traffic and in an outlying district sparsely peopled. McLean v. Omaha & C. B. R. & Bridge Co. [Neb.] 100 N. W. 935.

68. If a person is deaf, it is more incumbent upon him to exercise his sight. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850. The fact that an insane person run over by a car was at large and unattended does not necessarily show contributory negligence on the part of his custodian. Simpson v. Rhode Island Co. [R. I.] 58 A. 658.

69. Vizacchero v. Rhode Island Co. [R. I.] 59 A. 105. Where a drunken man was crawling on his hands and knees on a street railway track in the country, and was struck by a car visible for 800 feet, he was held guilty of contributory negligence. Id. Where a drunken man lying on the track at night was run over, it was held that the company would be liable only for failing to use proper care after the man had been actually discovered. Taylor v. Houston Elec. Co. [Tex. Civ. App.] 85 S. W. 1019. Where a drunken man was walking on a street car track at night, and it was not possible to stop the car in time to avoid the accident, it was held that the plaintiff could not recover. Bugbee v. Union R. Co. [R. I.] 59 A. 165.

70. Itzkowitz v. Boston El. R. Co. [Mass.] 71 N. E. 298; Barney v. Metropolitan St. R. Co., 94 App. Div. 388, 88 N. Y. S. 335. Where a street car was well lighted so that it could be seen from 150 to 300 feet away, and made sufficient noise in setting brakes to attract attention, and the plaintiff stepped on the track when the car was only 10 feet away, she was held guilty of contributory negligence. Donovan v. Lynn & B. R. Co., 185 Mass. 533, 70 N. E. 1029. If a pedestrian, between crossings, steps from behind a wagon onto the track without looking, or passes in front of the wagon, knowing it will prevent her retracing her steps, without pausing to look for a car, in either case she is guilty of contributory negligence. Barney v. Metropolitan St. R. Co., 94 App. Div. 388, 88 N. Y. S. 335.

71. Where the plaintiff went on the second track without looking, he was held guilty of contributory negligence. Reed v. Metropolitan St. R. Co. [N. Y.] 73 N. E. 41. Where a pedestrian stopped and listened, and then crossed the second track without looking, he was held guilty of contributory negligence, although the car was run at high speed without warning. Giardina v. St. Louis & M. R. Co. [Mo.] 84 S. W. 928. Where a passenger, alighting under this state of facts, looked and listened before going on the parallel track, he was held not guilty of contributory negligence as matter of law, and the negligence of the company was likewise held to be for the jury. Reed v. Metropolitan St. R. Co., 87 App. Div. 427, 84 N. Y. S. 454. Where a passenger, transferring to another car, looked before but not after alighting and there was an ordinance forbidding a driver of a car to pass another car at a crossing until such car had gone 20 feet, due care and negligence were held to be for the jury. Craven v. International R. Co., 91 N. Y. S. 625. Where a passenger alighted at a crossing, and after looking, crossed in the rear of the car and was struck by a car coming in the opposite direction, and there was evidence of high speed and lack of warning, it cannot be said that the pedestrian was guilty of lack of due care, as a matter of law. Beers v. Metropolitan St. R. Co., 93 N. Y. S. 278. Where plaintiff looked before alighting, and there was an ordinance that no driver of a car should pass a car standing at a crossing until such car should have started and cleared 20 feet, the

it appears that a pedestrian did look for a car, this is generally sufficient to take the question of his due care to the jury, especially where there are other circumstances tending to show negligent operation of the car.[72] The mere fact of looking, however, does not absolve the pedestrian from the duty of taking further precautions. If he sees a car and determines to take his chances of crossing ahead of it, but miscalculates his distance, he is unable to recover.[73] A number of cases of injury have arisen where pedestrians have been walking on or near the tracks, or laborers have been compelled to work in close proximity to the tracks.[74]

plaintiff's due care was held to be for the jury. Craven v. International R. Co., 91 N. Y. S. 625. Where a witness for the plaintiff testified that just as plaintiff reached the car track witness heard the gong and the plaintiff was instantly struck and killed by a car running from 12 to 15 miles an hour, and the proof tended to show that no warning was given and that deceased had almost cleared the track, the due care of deceased was held to be for the jury. Chicago Union Traction Co. v. O'Donnell, 211 Ill. 349, 71 N. E. 1015. Where a boy of 15 alighted 10 feet from a crossing and, there being no evidence that he stopped, looked and listened, crossed the parallel track and was struck by a car coming at high speed, contributory negligence was held to be for the jury. Monck v. Brooklyn Heights R. Co., 97 App. Div. 447, 90 N. Y. S. 818. Where a pedestrian was injured under this state of facts, it was held that the question of his contributory negligence was not affected by rules of the company as to stopping and giving warning at crossings, where it did not appear that such rules were customarily observed, or that plaintiff knew of them or relied upon them. Birmingham R., Light & Power Co. v. Oldham [Ala.] 37 So. 452.

72. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140; Lofsten v. Brooklyn Heights R. Co., 97 App. Div. 395, 89 N. Y. S. 1042; Polacci v. Interurban St. R. Co., 90 N. Y. S. 341. Where a pedestrian saw a car and attempted to cross, but was struck, and it appeared that the car was traveling at excessive speed, the case was held to be for the jury. Fellers v. Warren St. R. Co., 26 Pa. Super. Ct. 31. Where plaintiff looked and listened, but was struck by a car coming at speed greater than that permitted by a city ordinance, due care was held to be for the jury. Rissler v. St. Louis Transit Co. [Mo. App.] 87 S. W. 578. Where a pedestrian was last seen standing on the curb looking up and down the track and was next found lying against the curb, having been struck by a car running at unusual speed, it was held that due care was for the jury. Haughey v. Pittsburg R. Co., 210 Pa. 363, 59 A. 1110. Due care for jury where plaintiff claimed that at a crossing the motorman signalled for him to cross and then increased the speed of the car and struck him. Fiori v. Metropolitan St. R. Co., 90 N. Y. S. 521. A person crossing a street railway has a right to presume, unless he has knowledge to the contrary, that cars will not be operated at a speed exceeding the limit imposed by a city ordinance. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140. A pedestrian is not negligent in merely failing to guard against the omission of ordinary care upon the part of the person in charge of the car. Polacci v. Interurban St. R. Co., 90 N. Y. S. 341. A pedestrian who sees a car approaching at what seems to him to be a safe distance to allow him to cross does not have the right to assume that the car will be controlled and the speed slackened. Toohey v. Interurban St. R. Co., 92 N. Y. S. 427.

73. Hornstein v. Rhode Island Co. [R. I.] 59 A. 71; Gentile v. New York City R. Co., 92 N. Y. S. 264. One who in broad daylight stops beside a street car track until a car approaching at unlawful speed is within 10 feet, and then attempts to cross, is guilty of contributory negligence as a matter of law. Wolf v. City & Suburban R. Co. [Or.] 78 P. 668. Where a pedestrian saw a car and walked in front of it without looking again, crossing when the car was but 10 feet away, he was held to be guilty of contributory negligence. Greene v. Metropolitan St. R. Co., 91 N. Y. S. 426. One who sees a car and attempts to cross in front of it without looking again, is guilty of contributory negligence. Keough v. Interurban St. R. Co., 92 N. Y. S. 733.

74. A pedestrian who has the whole roadway to choose from and is struck by a car while pulling down the leg of his trousers on the track, is guilty of contributory negligence. Jordan v. Old Colony St. R. Co. [Mass.] 74 N. E. 315. An employe struck by a car while walking on the track without necessity therefor before light, when the car could have been seen for 350 feet, cannot recover. Stewart v. Washington, etc., R. Co., 22 App. D. C. 496. A pedestrian who assumes a position safe with reference to ordinary cars is not guilty of contributory negligence when struck by a car of unusual width, and does not assume the risk of being struck. Denison & S. R. Co. v. Craig [Tex. Civ. App.] 80 S. W. 865. A laborer who stands near the track and sees a car approaching, but miscalculates the distance so that he is struck, cannot recover. Sullivan v. New York City R. Co., 91 N. Y. S. 325. In such a case, the motorman cannot be held to a greater degree of care than the pedestrian. If one is negligent, so is the other. Kaufman v. Interurban St. R. Co., 43 Misc. 634, 88 N. Y. S. 382. Where a laborer worked on a street putting up a fence along a trench and was obliged to be dangerously near a street railway track, to the knowledge of the motorman of the car that struck him, it was held that the company was not entitled to an instruction that the plaintiff must be vigilant to look for cars and avoid them at the time of their passage. Hennessey v. Forty-Second St., etc., R. Co., 44 Misc. 198, 88 N. Y. S. 728. A workman working on a fence about 30 inches from the track paid no attention to passing cars,

Negligence of company.[75]—Notwithstanding a pedestrian's lack of due care, the company may nevertheless be held liable if it could have prevented the accident by the use of ordinary care;[76] but it is a qualification of this rule as important as the rule itself that in cases where there are no intervening facts to give rise to a new situation the rule cannot properly be applied.[77] At street crossings the rights of the car and the pedestrian are held to be equal.[78] Between crossings a street car has the right of way.[79] If a pedestrian steps directly in front of a car where it is so close that the accident cannot be avoided, there is no negligence on the part of the company.[80] A street railway company is bound to use only ordinary care under the circumstances to avoid injury to pedestrians. The mere happening of an accident raises no presumption of negligence.[81] Various rulings have been made on the question of what is a proper lookout,[82] what is proper warning,[83] and what is proper

relying on hearing the bell. While other workmen got out of the way of a car, he was injured. He was held guilty of contributory negligence. Id., 92 N. Y. S. 1058. A laborer whose work requires him to be near the track is not held to as high a degree of care in watching for cars as are ordinary pedestrians. McGrath v. Metropolitan St. R. Co., 93 N. Y. S. 519. Where a workman was injured by a street car striking a timber which he and a companion were carrying, and there was much conflicting testimony, the case was held to be for the jury. Chicago City R. Co. v. Nelson [Ill.] 74 N. E. 458.

75. See 2 Curr. L. 1753.

76. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140; Rhymes v. Jackson Elec. R., Light & Power Co. [Miss.] 37 So. 708; Richmond Traction Co. v. Martin's Adm'r, 102 Va. 209, 45 S. E. 886. It may be negligence to drive a car into a dangerous place, despite the fact that one was careless in being there and that care was taken after discovering him. Eichhorn v. New Orleans & C. R., Light & Power Co., 112 La. 236, 36 So. 335. Travelers are not bound to know or instantly perceive that because of the width and length of cars the space between tracks is too narrow for them to safely occupy. Id. The company and its servants are bound to know and guard against unusual perils at a place due to topography, track construction and character of equipment. Id.

77. Richmond Traction Co. v. Martin's Adm'r, 102 Va. 209, 45 S. E. 886; Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850. Where there is no intervening time in which the motorman could have time to act, the "last clear chance" rule does not apply. McLean v. Omaha & C. B. R. & Bridge Co. [Neb.] 103 N. W. 285. Where no intervening time, "last clear chance" rule does not apply. Rissler v. St. Louis Transit Co. [Mo. App.] 87 S. W. 578.

78. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140; Birmingham R., Light & Power Co. v. Oldham [Ala.] 37 So. 452. It is negligence per se to operate a street car over a crossing at a speed exceeding the limit imposed by a city ordinance. Deitring v. St. Louis Transit Co. [Mo. App.] 85 S. W. 140.

79. The driver of a street car has a right to assume that between crossings a pedestrian starting to cross the street will stop and allow the car to pass, and engaging in conversation with a passenger is not necessarily negligence, since, if he had been looking ahead, he would not have been expected to stop the car. Barney v. Metropolitan St. R. Co., 94 App. Div. 388, 88 N. Y. S. 335.

80. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850. Held not negligence where child ran in front of car when it was too late to stop. Miller v. St. Charles St. R. Co. [La.] 38 So. 401. Failure to stop as quick as was possible is unimportant where in any event it could not have been stopped soon enough. Id. Where a pedestrian in crossing a street upon which there were double tracks, stepped back, to avoid one car, in front of another, there was held to be no negligence. Vought v. New York City R. Co., 92 N. Y. S. 235.

81. Where a woman was struck while crossing a street car track, and gave no evidence of high speed, lack of warning, or the distance of the car away, it was held that the mere occurrence of the accident raised no presumption of negligence. Welsh v. Metropolitan St. R. Co., 88 N. Y. S. 166. Where a fender on the rear of a car fell and injured a pedestrian, the mere happening of the accident was held to raise no presumption of negligence. Klyachko v. Central Crosstown R. Co., 88 N. Y. S. 1073. In a derailment case, it is error to charge that it is the duty of the company to have the car rails, etc., so constructed that the car will stay on the tracks, as this practically makes the company an insurer against accidental derailment. Kelly v. United Traction Co., 88 App. Div. 283, 85 N. Y. S. 433. Where a car was derailed and struck a person standing near the track, there was held to be evidence sufficient to justify the jury in finding negligence from an open switch. Chicago City R. Co. v. Bruley [Ill.] 74 N. E. 441. Where pedestrians sue for injuries received from snow falling from the structure of an elevated railway, it must be proved that the snow did fall from such structure. McGee v. Boston El. R. Co. [Mass.] 73 N. E. 657. Where a truck was struck by a street car and thereby caused injury to a pedestrian, the liability of the street railroad to the pedestrian is not affected by the contributory negligence of the driver of the truck. Demarest v. Forty-Second St., etc., R. Co., 93 N. Y. S. 663.

82. A street railway company is bound to anticipate the rightful presence of persons upon its tracks, and must keep a constant

speed at which to run a car.[84] A street railway company may run its cars on both tracks in either direction as the needs of business may require, and is not bound to use the right hand track for cars running in one direction and the left hand track for cars running in the other.[85]

Children run over.[86]—Whether a child is so young as to be incapable of contributory negligence is a question which has come frequently before the courts. In some cases it is held as a matter of law that the child is non sui juris.[87] In others, whether or not a child is sui juris is held to be a question for the jury.[88] If a child is admitted to be sui juris, it is universally held that the standard of care for him is that degree of care which might reasonably be expected from a child of his age and capacity.[89] Where a parent sues for injury to a child, the parent's contributory

lookout to avert injury. Indianapolis St. R. Co. v. Schmidt [Ind. App.] 72 N. E. 478. The rule that a motorman may act on the theory that a person on or near the track who sees a car approaching will get out of the way of danger, has no application after it becomes reasonably apparent that this will not be done. Denison & S. R. Co. v. Craig [Tex. Civ. App.] 80 S. W. 865. A motorman who sees an adult, apparently in possession of his faculties, on the track, is entitled to assume that such person is actually of sound mind. Simpson v. Rhode Island Co. [R. I.] 58 A. 658. The motorman of a slowly moving car is not negligent in not anticipating that a push cart will run into the car after the head of the car has safely passed it. Schneiders v. Central Crosstown R. Co., 87 N. Y. S. 453. Drunk and disorderly passenger was ejected, and ran after car. Car on return trip ran over him lying on track in dark 600 feet from point where ejected. Held that company was not negligent. Johnson v. Chester Traction Co., 209 Pa. 189, 58 A. 153. Where a man was run over at night in the middle of a block, and there was no evidence of undue speed, and street and car were well lighted, there was held to be no evidence of the company's negligence. Kelly v. Union Traction Co. [Pa.] 60 A. 998.

83. The jury are warranted in finding negligence where there is an ordinance requiring a motorman to give warning and to stop at the first appearance of danger, and a motorman on a special car of unusual width saw a pedestrian standing near the track and proceeded without stopping or giving warning. Denison & S. R. Co. v. Craig [Tex. Civ. App.] 80 S. W. 865. Running down a sharp grade in the day time where a crowd of people stand near the track at the scene of a recent accident, with no control of the car and without sounding an alarm, is gross negligence. Rhymes v. Jackson Elec. R., Light & Power Co. [Miss.] 37 So. 708. Though a pedestrian hears the bell of a street car and does not get off the track, those in charge of the car have no right to run him down. Peterson v. New York City R. Co., 94 N. Y. S. 22.

84. Where there is evidence of too great speed and lack of control, negligence is for the jury. Mulligan v. Third Ave. R. Co., 87 App. Div. 320, 84 N. Y. S. 366. The speed of a car in sparsely settled country districts is not to be governed by the same rules as the speed of a car in a crowded city street. Vizacchero v. Rhode Island Co. [R. I.] 59 A. 105. On long stretches of country road, where the statutes and town ordinances fix no limit to their speed, no given rate of speed is per se excessive. Id.

85. Stewart v. Washington, etc., R. Co., 22 App. D. C. 496.

86. See 2 Curr. L. 1755.

87. An infant of 2½ is too young to be negligent himself, or to have the negligence of others imputed to him. Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995. A child under three years of age cannot be guilty of contributory negligence. Indianapolis St. R. Co. v. Schomberg [Ind. App.] 71 N. E. 237.

88. Child of seven. Indianapolis St. R. Co. v. Antrobus, 33 Ind. App. 663, 71 N. E. 971. A jury may find that a boy 7½ years of age is non sui juris. Fritsch v. New York & Q. C. R. Co., 93 App. Div. 554, 87 N. Y. S. 942. A child of 8½ is not entitled to a ruling that he is incapable of contributory negligence, as a matter of law. Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 A. 5. Whether a child of nine years and three months is sui juris is a question for the jury. The presumption is that he is not sui juris. Dempsey v. Brooklyn Heights R. Co., 90 N. Y. S. 639.

89. Fry v. St. Louis Transit Co. [Mo. App.] 85 S. W. 960; Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 A. 5; Di Prisco v. Wilmington City R. Co., 4 Penn. [Del.] 527, 57 A. 906; Indianapolis St. R. Co. v. Antrobus, 33 Ind. App. 663, 71 N. E. 971; Heinzie v. Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848. Instructions applying to six year old child same rule as to contributory negligence as would apply to adult, held error. Id. A girl of eight who runs diagonally across the street in front of a car, when she, if going in the most direct line, must go 16 feet before the car goes 85, is guilty of contributory negligence. Poland v. Union R. Co. [R. I.] 58 A. 653. Boy of 5 years and 4 months held guilty of contributory negligence in going in front of car. Murphy v. Boston El. R. Co. [Mass.] 73 N. E. 1018. A girl of 15 who voluntarily placed herself in a position of danger to rescue a young child was held not guilty of contributory negligence, as a matter of law, and not to be a trespasser in acting as she did. Manzella v. Rochester R. Co., 93 N. Y. S. 457. Where a boy of 15 alighted 10 feet from a crossing and, crossing a parallel track, was struck by a car coming at high speed in the opposite direction, contributory negligence is for the jury, though there is no evidence that plaintiff stopped,

negligence is a defense.[90] A street car company has a superior right of way, since the cars cannot leave their tracks.[91] The general rule is that those in charge of a street car must use reasonable care to prevent accident.[92]

(§ 6) *C. Accidents to drivers or occupants of wagons. Collisions between car and wagon. Due care.*[93]—It is well settled that the driver of a wagon, in approaching and crossing street railway tracks, must use due care under all the circumstances of the case.[94] Some courts remain satisfied with this general statement of the rule, and discourage any attempt to have it stated with greater particularity.[95] Others

listened or looked. Monck v. Brooklyn Heights R. Co., 97 App. Div. 447, 90 N. Y. S. 818. Where a boy of nine could have stood in safety between two parallel tracks, but tried to cross ahead of an approaching car, his due care was held to be for the jury. Fry v. St. Louis Transit Co. [Mo. App.] 85 S. W. 960. Where a boy of 4½ was sent to the store in charge of a sister of 11, a finding of the jury that parents and children were free from contributory negligence and that the motorman was negligent was held to be justified. Cameron v. Duluth-Superior Traction Co. [Minn.] 102 N. W. 208.

90. Indianapolis St. R. Co. v. Antrobus, 33 Ind. App. 663, 71 N. E. 971. Where a woman let her two little children play on the porch and went about her housework for five minutes, during which time one child strayed onto the track and was killed, there was held to be no evidence of the mother's negligence. Indianapolis St. R. Co. v. Schomberg [Ind.] 72 N. E. 1041.

91. Di Prisco v. Wilmington City R. Co., 4 Pen. [Del.] 527, 57 A. 906.

92. Indianapolis St. R. Co. v. Antrobus, 33 Ind. App. 663, 71 N. E. 971; Heinzle v. Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848. An instruction that the servants of a street car company must take reasonable measures to avoid injuring persons in the street is not objectionable as giving the jury to understand that the pedestrian has rights superior to those of the company, or that the gripman must look in any particular direction. North Chicago St. R. Co. v. Johnson, 205 Ill. 32, 68 N. E. 463. Where a child of two was run over in the daytime and there was evidence of high speed and that plaintiff was or should have been seen a long distance away, instructions that neither speed nor failure to sound gong contributed to or had any effect in causing the injury are properly refused. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. An instruction that a motorman "must make sure" that a child will be free of the track at the point where it is approaching or crossing the track is erroneous. The company is not an insurer of the child's safety. Indianapolis St. R. Co. v. Schomberg [Ind.] 72 N. E. 1041. An instruction that children have the right to use the streets and that the company must use due care, in proportion to the danger, is correct. Indianapolis St. R. Co. v. Schomberg [Ind. App.] 71 N. E. 237. Conduct of a street railway company which would come up to the proper standard in the case of injury to an adult may fall short of it when a child is injured under the same circumstances. Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 A. 5. Those in charge of a street car have no right to presume that a child of 2½ approaching the car, will turn back from impending peril. Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995. Same—child under 3. Indianapolis St. R. Co. v. Schomberg [Ind. App.] 71 N. E. 237. Where a child of 2½ ran suddenly and unexpectedly directly in front of an electric car, it was held that the company was not responsible. Miller v. St. Charles St. R. Co. [La.] 38 So. 401. Where a motorman ran past one child, knocking him out of the way, and then ran over and killed another, when the car could have been easily stopped, it certainly cannot be said that there is no evidence of negligence. Dempsey v. Brooklyn Heights R. Co., 90 N. Y. S. 639. A motorman has no right to assume that a child under 3 will exercise the care of an adult, and not enter the track as a car is approaching. Indianapolis St. R. Co. v. Schomberg [Ind.] 72 N. E. 1041. Where a child 3½ years old was playing in the street and when first the motorman observed her she was running toward the track and he immediately shut off the power and put on the brake, but was unable to stop the car in time, the company was held not liable. Coessens v. Rapid R. Co. [Mich.] 99 N. W. 751. Negligence in running over a child is for the jury where there is evidence of high speed and evidence that the motorman could have stopped the car in time to avoid the accident. Indianapolis St. R. Co. v. Bordenchecker, 33 Ind. App. 138, 70 N. E. 995. Where speed is limited by an ordinance the company cannot claim they are entitled to travel at the maximum limit, for circumstances may make it necessary to go more slowly. Fry v. St. Louis Transit Co. [Mo. App.] 85 S. W. 960. Where a pedestrian sees a car, not to give warning is not negligence. Id.

93. See 2 Curr. L. 1757.

94. Lack of due care, however slight, if it contributes to cause the injury, will bar recovery. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374. One who is caught in a position of sudden peril is not held to the usual standard of care. Where a horse caught his foot in the track and the driver did not jump out as a car approached, but kept trying to get the horse free, the driver's due care was held properly submitted to the jury. Murphy v. St. Louis Transit Co. [Mo.] 87 S. W. 945. Where the street was obstructed with other teams and the plaintiff's horse fell while crossing the track, it was held that it was not the duty of the plaintiff to leave the wagon, as a matter of law. Kansas City-Leavenworth R. Co. v. Langley [Kan.] 78 P. 858.

95. Macon R. & Light Co. v. Barnes, 121 Ga. 443, 49 S. E. 282; Columbus R. Co. v. Peddy, 120 Ga. 589, 48 S. E. 149; Indianapolis St. R. Co. v. Schmidt [Ind. App.] 71 N. E.

believe in stating the rule more specifically, and it has been held that it is the duty of a driver to look and listen before crossing the track.[96] In a rural region a driver approaching a crossing where the view is obstructed must not assume that no car is approaching.[97] He must be careful in proportion to the known peril of the situation and must look and listen if reasonable prudence dictates it.[98] As a general rule where a driver goes in front of a car and there is evidence either that he did not look or that he had a clear view and could have seen the car if he had looked, he cannot recover.[99] If the driver of a wagon swears that he looked for a car and saw none, while all the facts go to show that if he had looked he must have seen the car, his testimony may be disregarded.[1] As a general rule where there is evidence that the driver did look for a car, this is sufficient to take the question of his due care to the jury; especially where there is evidence of negligence on the part of the company, such as high speed, lack of warning, or failure to stop in time.[2] Evidence of negligence held sufficient where horse's shoe caught in track and car approached and struck without slacking speed.[3] The mere fact of looking once for a car, however, does not by any means absolve the driver from taking further precautions.[4]

663; Butler v. Rockland, etc., R. Co. [Me.] 58 A. 775. Whether failure to look and listen is negligence is a question for the jury. Indianapolis St. R. Co. v. O'Donnell [Ind. App.] 74 N. E. 253. Rules governing a driver's conduct in approaching a steam railroad do not apply to street cars; in approaching the tracks of the latter a driver need not look and listen as a matter of law. Marden v. Portsmouth, etc., R. Co. [Me.] 60 A. 530. He need not look and listen as an absolute matter of law. Richmond Passenger & Power Co. v. Gordon, 102 Va. 498, 46 S. E. 772. Failure to look and listen in a city is not contributory per se. Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624. A person about to cross a street railway track in a city is not bound to stop, look and listen, as a matter of law. Los Angeles Traction Co. v. Conneally Co. [C. C. A.] 136 F. 104. Failure of a person about to cross a track to stop and look is not negligence per se. It is a question for the jury. Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624.

96. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741. Failure to look and listen before crossing a street railway track is negligence. Hartman v. St. Louis Transit Co. [Mo. App.] 87 S. W. 86. Failure to look and listen, however, will not preclude recovery where plaintiff could have crossed in safety but for an excavation of which he had no knowledge. Frank v. St. Louis Transit Co. [Mo. App.] 87 S. W. 88.

97. Robinson v. Rockland, etc., R. Co. [Me.] 58 A. 57.

98. Looking and listening is not an absolute duty but may be duty in fact. Robinson v. Rockland, etc., R. Co. [Me.] 58 A. 57.

99. Butler v. Rockland, etc., R. Co. [Me.] 58 A. 775; Dunn v. Old Colony St. R. Co. [Mass.] 71 N. E. 557; Markowitz v. Metropolitan St. R. Co. [Mo.] 85 S. W. 351. A charge that in the absence of evidence tending to show whether deceased, killed in a collision between a wagon and a car, stopped, looked and listened before crossing, it would be presumed that he did, is error, where there was evidence that the horse was going at a gallop and that the driver saw the car. Los Angeles Traction Co. v. Conneally Co. [C. C. A.] 136 F. 104.

1. Lightfoot v. Winnebago Traction Co. [Wis.] 102 N. W. 30; March v. Union Traction Co., 209 Pa. 46, 57 A. 1131.

2. Robinson v. New York City R. Co., 90 N. Y. S. 368; Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43; Indianapolis St. R. Co. v. O'Donnell [Ind. App.] 73 N. E. 163; Evensen v. Lexington, etc., R. Co., 187 Mass. 77, 72 N. E. 355; McCarthy v. Boston El. R. Co. [Mass.] 73 N. E. 559; Wood v. Boston El. R. Co. [Mass.] 74 N. E. 298; Story v. St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992; Murray v. St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Freymark v. St. Louis Transit Co. [Mo. App.] 85 S. W. 606; Conrad v. Elizabeth, etc., R. Co., 70 N. J. Law, 676, 58 A. 376; Vrooman v. North Jersey St. R. Co. [N. J. Err. & App.] 59 A. 459; New York Bread Co. v. New York City R. Co., 91 N. Y. S. 421; Kennedy v. Consolidated Traction Co., 210 Pa. 215, 59 A. 1005. Where the driver of a hose cart testified that he had his team under control, that the car stopped before the crossing, and that when he went ahead the car started up and struck him, it was held that his due care was for the jury. O'Neill v. St. Louis Transit Co., 108 Mo. App. 453, 83 S. W. 990. The driver of a truck is not negligent, as a matter of law in attempting to cross a street railway track when a car is coming at very high speed 550 feet away. He has a right to assume the car will not continue to run at illegal speed. Vrooman v. North Jersey St. R. Co. [N. J. Err. & App.] 59 A. 459. The driver of a wagon has a right to presume that the driver of a street car will use proper care to avoid a collision. Robinson v. New York City R. Co., 90 N. Y. S. 368.

3. Murphy v. St. Louis Transit Co. [Mo.] 87 S. W. 945.

4. Where a driver saw a car coming, and proceeded to cross the track without quickening his speed and without looking again, he was held guilty of contributory negligence. Monahan v. Interurban St. R. Co., 87 N. Y. S. 537; Daly v. New York City R.

If he sees a car coming and determines to take his chances of getting across in front of it, but miscalculates his distance, he is held unable to recover,[5] and it is contributory negligence for a driver to place himself in a position of danger where there is sure to be a collision unless the car is stopped, relying upon the motorman to avoid the collision.[6] Certain other circumstances are to be taken into consideration as bearing on the question of the driver's due care, such as that the street[7] or the view[8] is obstructed.

Driving on or near tracks.[9]—The driver of a wagon has a perfect right, not only to drive in the street where street railway tracks are situated, but to drive upon the tracks themselves, provided he uses due care;[10] but it is equally well settled that he must be on the alert in some manner, and in many cases his lack of due care

Co., 92 N. Y. S. 245; Goldmann v. Milwaukee Elec. R. & Light Co. [Wis.] 101 N. W. 384. When driver of buggy on dark night arranged to have companion look for cars while he drove, negligence is for jury. Indianapolis St. R. Co. v. Slifer [Ind. App.] 74 N. E. 19. It is not enough to look for a car and then to go back to a team and drive slowly onto the track, where the view is obstructed, without looking again. A driver who does this is guilty of contributory negligence. Gilmore v. United Traction Co., 26 Pa. Super. Ct. 97.

5. Groening v. Interurban St. R. Co., 88 N. Y. S. 355; Riley v. Shreveport Traction Co. [La.] 38 So. 83; Heying v. United R. & Elec. Co. [Md.] 59 A. 667; Bernstein v. New York City R. Co., 92 N. Y. S. 228; Daly v. New York City R. Co., 92 N. Y. S. 245; Lyons v. Union Traction Co., 209 Pa. 72, 58 A. 118; Criss v. Seattle Elec. Co. [Wash.] 80 P. 525. Where a driver knew a car was coming by the noise and the light, and deliberately took his chances of getting across ahead of it, he was held not to be in the exercise of due care. Atlanta R. & Power Co. v. Owens, 119 Ga. 833, 47 S. E. 213. Where one drove across a street car track at a crossing after having seen a car approaching, he was held guilty of negligence precluding his right to recover. Mease v. United Traction Co., 208 Pa. 434, 57 A. 820.

6. Zerr v. Interurban St. R. Co., 88 N. Y. S. 353.

7. A driver stopped his truck on the track, with a car approaching not more than 30 feet distant, to let a loaded truck pass. If he had not stopped, he could have cleared the car, and his only excuse was that he gave the loaded truck the right of way. It was held that he was guilty of contributory negligence precluding a recovery. Heinz v. Union R. Co., 88 N. Y. S. 392; Heuber v. Consolidated Traction Co., 210 Pa. 70, 59 A. 430. A driver of a vehicle who attempts to cross a track between cars, blocked and stationary, and while his passage is delayed by an obstructing vehicle is injured by the sudden starting of the car, is not contributorily negligent as a matter of law. Walker v. St. Louis & S. R. Co., 106 Mo. App. 321, 80 S. W. 282. Where a driver looked for a car and attempted to cross a crowded street, but was forced back by a team and struck by a car coming at high speed, the case was held to be one for the jury. Oehmler v. Pittsburg R. Co., 25 Pa. Super. Ct. 617.

8. The failure of a driver to pause before crossing a track until a moving car has passed out of his line of vision, so as to give him a clear view of the track, is contributory negligence precluding a recovery for a collision with a car coming from the opposite direction. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741. Where a driver looked while his view was obstructed by a passing car, and then, looking straight ahead, drove onto the tracks and was struck by a car coming on the other track, and hearing was not to be depended on since it was not possible to distinguish between the noise of the two cars, there was held to be no evidence of his due care. Saltman v. Boston El. R. Co., 187 Mass. 243, 72 N. E. 950. Where the view at a street crossing is obstructed, the driver must use increased care. Dungan v. Wilmington City R. Co., 4 Pen. [Del.] 458, 58 A. 868.

9. See 2 Curr. L. 1759.

10. Belford v. Brooklyn Heights R. Co., 43 Misc. 148, 88 N. Y. S. 267; Hellriegel v. Southern Traction Co., 23 Pa. Super. Ct. 392. Driver is not a trespasser but must use care in driving on track. Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976. He may anticipate that a proper lookout will be kept by the carmen and that they will exercise ordinary care to avoid running into him. Greene v. Louisville R. Co. [Ky.] 84 S. W. 1154. He has a right to drive on the track even on a dark night, where there is room in the road, and he need not be constantly looking back, but may rely to some extent on the motorman's using due care. Ablard v. Detroit United R. Co. [Mich.] 102 N. W. 741. The failure of a driver to leave the track when not warned by an approaching car will not, as matter of law, prevent a recovery for the negligence of the motorman in running him down without warning. Barringer v. Union Traction Co., 91 N. Y. S. 386. A charge that a street railway track is a place of danger and that one who goes thereon without looking and listening does so at his peril is improper, as applied to the facts, when it appeared that a wagon was 12 inches from the track when struck and that the plaintiff was driving alongside and not on the track. Rouse v. Detroit Elec. R. Co. [Mich.] 100 N. W. 404. Where a driver drove on the left hand of a street because the right was in such condition as rendered it impracticable or unsafe, it was held that he did not violate an ordinance requiring drivers to "keep as nearly as practicable to the right." Indianapolis St. R. Co. v. Slifer [Ind. App.] 72 N. E. 1055.

has been held to be so evident as to bar recovery,[11] and it has been held that it is the duty of a person driving on the tracks to get out of the way of a car coming up so as not to make it slow down or stop, and if he fails to do so and is injured, the railroad company is not liable.[12] On the other hand, the circumstances may be such that the question of due care is more properly left to the jury.[13] In cases of teams left near the track, the circumstances may be such as to preclude recovery,[14] or the case may properly go to the jury on the questions of due care of the driver and negligence of the company.[15]

11. It is the duty of the driver to look back at intervals for a car if he can. Union Biscuit Co. v. St. Louis Transit Co., 108 Mo. App. 297, 83 S. W. 288. A driver is not in the exercise of due care when he drives for three-fourths of a mile within 3 or 4 feet of the track when he can see only in front, and then turns suddenly across the track without looking or listening. Seele v. Boston, etc., R. Co., 187 Mass. 248, 72 N. E. 971. It is the duty of one who needlessly drives upon the track of a street railway to look back at intervals for approaching cars, and it is not sufficient to look merely when going upon the track, and afterwards after driving thereon for 200 feet. Schleicher v. Interurban St. R. Co., 91 N. Y. S. 356. The driver of a covered wagon, with its back obstructed by a leather curtain, who drives on the track unnecessarily without looking back for a block, is negligent and cannot recover. Sauer v. Interurban St. R. Co., 88 N. Y. S. 865. Where a driver had plenty of room, but drove with one wheel inside the track, and, although he had a clear view for 500 feet, was struck by a car coming in the opposite direction, he was held not to be in the exercise of due care. Indianapolis St. R. Co. v. Slifer [Ind. App.] 72 N. E. 1055. Where the driver of a three horse team, driving near the track, drew nearer to the track without looking to the rear and was struck by a rapidly approaching car, it was held that he was not in the exercise of due care. Cicardi v. St. Louis Transit Co., 108 Mo. App. 462, 83 S. W. 980. Where the plaintiff, driving on the track at night, was struck by a car coming in the opposite direction with gong ringing, and lights which could be seen for 521 feet, the plaintiff was held unable to recover. Randall v. Union R. Co. [R. I.] 59 A. 165.

12. Belford v. Brooklyn Heights R. Co., 43 Misc. 148, 88 N. Y. S. 267.

13. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374. It is not negligence to drive on the track with side and rear curtains down. A street car company cannot ordinarily run down a team from behind without negligence or wilful wrong. Richmond Passenger & Power Co. v. Allen [Va.] 49 S. E. 656. Driver turning onto track to avoid an obstacle. Sullivan v. Boston El. R. Co., 185 Mass. 602, 71 N. E. 90. Driving on a street car track, if negligence, is not the proximate cause of an accident resulting from being struck by an electric car running with power on and without an attendant. Chicago City R. Co. v. Eick, 111 Ill. App. 452. A driver has a right to drive on a street railway track, using due care, and failure to leave the track on hearing a gong ring will not justify a motorman in running the wagon down. Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976. Where the driver of a team drove on the track at night and was struck by a car without headlight, and there was evidence that there was no signal, the case was held to be one for the jury. Sexton v. West Roxbury, etc., R. Co. [Mass.] 74 N. E. 315. One driving upon the side of a street has a right to drive upon a street railway track in order to pass another vehicle standing between the curb and the track. Goodson v. New York City R. Co., 94 N. Y. S. 10. Where a man drove on the car tracks on a dark night, with a light in the rear of his wagon, due care was held to be for the jury. Davis v. Media, etc., R. Co., 25 Pa. Super. Ct. 444. Where a driver drove on the track unnecessarily at night, and looked back a minute before he was struck, his due care was held to be for the jury. Kimble v. St. Louis & S. R. Co., 108 Mo. App. 78, 82 S. W. 1096. Where the driver of a coach drove on the tracks because the street was obstructed with snow, and heard no warning from the car which struck him, the question of his due care was held to be for the jury. Dages v. New York City R. Co., 91 N. Y. S. 29.

14. Where both the motorman and the driver of a truck left standing near the track were at fault in calculating that there was space enough for the car to pass, there can be no recovery. Gass v. New York City R. Co., 88 N. Y. S. 950. Where the uncontradicted evidence of the motorman showed that a wagon was left near the track with another wagon between it and the car, and that there would have been no collision if the horse had not backed towards the track as the car approached, there was held to be no evidence of the company's negligence. Wilson v. United Traction Co., 94 App. Div. 539, 88 N. Y. S. 122. Where a driver, while loading his truck, backed against the curb, turning his horse and shafts at right angles to the wagon, and then turned the horse slightly so that he was struck by a passing car, the driver was held to be guilty of contributory negligence. Silz v. Interurban St. R. Co., 92 N. Y. S. 302.

15. Where a cart was struck by a long and heavy car which projected about four feet beyond the rail as it rounded a curve, it was held that negligence and contributory negligence were for the jury. Metropolitan R. Co. v. Blick, 22 App. D. C. 194. Where the plaintiff sat in a buggy standing near the track, and the horse becoming frightened backed upon the track, due care and negligence were held to be for the jury. Montgomery St. R. Co. v. Shanks, 139 Ala. 489, 37 So. 166. Where a man left his team on the track while collecting laundry, and it was struck by a car coming at high speed, the case was held to be for the jury. Barnes Bros. v.

Imputed negligence.[16]—The question as to whether a driver's lack of due care can be imputed to a person driving with him has arisen in a number of cases. The true rule would seem to be that where the passenger has no opportunity for direction or control, the driver's lack of due care cannot be imputed to him,[17] although the contrary has been held.[18]

Negligence of company.[19]—A street railway company is required to use only reasonable care to avoid accidents.[20] This duty to use reasonable care devolves equally upon the driver of the team and those in charge of the car.[21] Between street crossings a street car has a superior, but not an exclusive, right of way.[22] At street crossings the rights of those in charge of a team and of a street car are equal.[23]

Pittsburg R. Co., 26 Pa. Super. Ct. 36. Leaving a horse unhitched in the street in violation of a city ordinance will not bar an action for negligent injury by a street railway company unless the illegal act is a proximate cause of the injury. Munroe v. Hartford St. R. Co., 76 Conn. 201, 56 A. 498. Though a horse is wrongfully in the street, a street railway company is liable for killing it if the accident could have been prevented by the motorman's using ordinary care. Laronde v. Boston, etc., R. Co. [N. H.] 60 A. 684.

16. See 2 Curr. L. 1761. See, generally, Negligence, 4 Curr. L. 764.

17. The negligence of a driver is not imputable to a guest or companion who exercises no control. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245. The negligence of the driver of an engine is not imputable to the engineer riding on the rear of the wagon. McKernan v. Detroit Citizens' St. R. Co. [Mich.] 101 N. W. 812. Where a wife was the passive guest of her husband in a wagon, it was held that the wife must use due care under all the circumstances, but that if she did use due care, the negligence of the husband could not be imputed to her. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571. The plaintiff rode gratuitously with the driver and owner of an ice cart, who was engaged in carting ice for the plaintiff, his customers and others. The plaintiff was not authorized to have any control over the wagon, and exercised none. It was held that the driver was not a servant and that his negligence was not imputable to the plaintiff. Scarangello v. Interurban St. R. Co., 90 N. Y. S. 430. Where the plaintiff rode in a closed carriage, the company is not relieved of its negligence because the driver of the carriage was also negligent. Chicago Union Traction Co. v. Leach [Ill.] 74 N. E. 119.

18. Negligence of a driver precludes recovery by a person driving with him. Lightfoot v. Winnebago Traction Co. [Wis.] 102 N. W. 30. The negligence of a servant who is driving a wagon is chargeable to his master who is riding in the wagon with him. Markowitz v. Metropolitan St. R. Co. [Mo.] 85 S. W. 351. The negligence of a driver is imputable to a companion who intrusts himself to the care of the driver. Evensen v. Lexington, etc., R. Co., 187 Mass. 77, 72 N. E. 355. Whether plaintiff, driving in company with another man who did the driving, was chargeable with driver's negligence, held to be a question of fact. Joyce v. St. Louis Transit Co. [Mo. App.] 86 S. W. 469. In an action by one who drove in a wagon trusting himself entirely to the driver, plaintiff has a right to have the question of the driver's due care submitted to the jury. Sullivan v. Boston El. R. Co., 185 Mass. 602, 71 N. E. 90.

19. See 2 Curr. L. 1761.

20. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245.

21. In case of collision, there is no presumption as to whether it was caused by the driver of the car or the wagon. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245; Conrad v. Elizabeth, etc., R. Co., 70 N. J. Law, 676, 58 A. 376. An instruction in a derailment case that the company must run its cars so that the safety of other travelers will be protected, is error, as imposing too great a liability upon the company. Perras v. United Traction Co., 88 App. Div. 260, 84 N. Y. S. 992. A presumption of negligence on the part of the company is raised by the fact that a street car having no one in charge collides with a vehicle. Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624. In the case of a collision with a float it was held that where the street is crowded the motorman must use greater care. Haas v. New Orleans R. Co., 112 La. 747, 36 So. 670. Willful negligence has been defined as a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to exercise ordinary care to prevent the injury. Alger, Smith & Co. v. Duluth-Superior Traction Co. [Minn.] 101 N. W. 298. Where an accident occurs through a car's running along a public street, with the power turned on and no one in control, this raises a presumption of negligence. Whether this presumption is successfully rebutted is for the jury. Chicago City R. Co. v. Eick, 111 Ill. App. 452.

22. Perras v. United Traction Co., 88 App. Div. 260, 84 N. Y. S. 992. In the interests of the public, the general right of a street railway company, over that portion of the street where its tracks lie, is superior to that of other persons using the street. Chicago City R. Co. v. Mauger, 105 Ill. App. 579. This qualified right of way gives the company no right to drive its cars at a dangerous rate of speed. Vrooman v. North Jersey St. R. Co. [N. J. Err. & App.] 59 A. 459.

23. Koehler v. Interurban St. R. Co., 88 N. Y. S. 904. At street crossings the rights of wagons and electric cars are equal. Marden v. Portsmouth, etc., R. Co. [Me.] 60 A. 530; Little v. Boston, etc., R. Co., 72 N. H. 502, 57 A. 920. At street crossings both the driver of a train and those in charge of the car must use reasonable care under all the

Perhaps no rule of law is more often invoked in cases of collisions between wagons and street cars than that known as the "last clear chance" rule. This rule embodies the principle that notwithstanding the plaintiff's lack of due care, if the company in the exercise of ordinary care could nevertheless have avoided the accident, it may still be held liable.[24] It should be noted, however, that while this rule is universally accepted as correct, it is not always applicable to the facts presented in each individual case.[25] Some cases hold that violation of an ordinance limiting the speed of a car is negligence per se.[26] Other cases hold exactly the opposite view.[27] Apart from

circumstances. Foulk v. Wilmington City R. Co. [Del.] 60 A. 973. Both the driver of the team and those in charge of the car must use reasonable care, under all the circumstances of the case. Boudwin v. Wilmington City R. Co. [Del.] 60 A. 865. A driver can presume that at a street crossing a motorman will use due care with regard to speed, control and warning. Meng v. St. Louis & Suburban R. Co., 108 Mo. App. 553, 84 S. W. 213. If the driver of a team who reaches a crossing and sees a car coming is justified in thinking he can cross before the car, running at its usual speed, reaches the crossing, he cannot be said to be negligent as matter of law in trying to cross. Omaha St. R. Co. v. Mathiesen [Neb.] 103 N. W. 666. Where a driver was injured at a street intersection, where his rights were equal to those of the operatives in charge of a street car, it was held that his motive in attempting to cross at that point was immaterial. Solomon v. Buffalo R. Co., 96 App. Div. 487, 89 N. Y. S. 99. Where an ordinance provides that vehicles going north and south shall have the right of way over vehicles going east and west, a street railway company is entitled to an instruction that such ordinance is controlling. Kroder v. Interurban St. R. Co., 91 N. Y. S. 341. An ordinance providing that vehicles going north and south have the right of way over vehicles going east and west does not give a street car going north an absolute right to the exclusive use of the street as against a vehicle going west. Demarest v. Forty-Second St., etc., R. Co., 93 N. Y. 663. Because a team is nearer a point of crossing than a car, this fact gives the driver of the team no absolute right of way. Post v. New York City R. Co., 93 N. Y. S. 1109. A funeral procession has no right of way over street cars at a street crossing, although a uniform custom of the company to give way, known to the driver of the carriage, may be considered on the question of his due care. Foulk v. Wilmington City R. Co. [Del.] 60 A. 973. Where two streets intersected a third so as to form a triangle, this was held to be a street intersection, where the rights of the company and the driver of the vehicle were equal. Solomon v. Buffalo R. Co., 96 App. Div. 487, 89 N. Y. S. 99. Where the night is dark, and a street car is lighted up, the driver of a wagon cannot impose on a street car company the duty to exercise greater vigilance than the law requires of himself by driving without any lights on his wagon against recognized custom and regulations, relying on the vigilance of the street car driver. Koehler v. Interurban St. R. Co., 88 N. Y. S. 904.

24. Birmingham R., Light & Power Co. v. Brantley [Ala.] 37 So. 698; Indianapolis St. R. Co. v. Schmidt [Ind. App.] 71 N. E. 663; Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 1034; Union Biscuit Co. v. St. Louis Transit Co., 108 Mo. App. 297, 83 S. W. 288; Murray v. St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995; Meng v. St. Louis & Suburban R. Co., 108 Mo. App. 553, 84 S. W. 213; Little v. Boston, etc., R. Co., 72 N. H. 502, 57 A. 920; Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374. Where negligence of plaintiff directly contributed to injury, he may recover if motorman was guilty of reckless or wanton misconduct. Frank v. St. Louis Transit Co. [Mo. App.] 87 S. W. 88. If a collision with a team be due to wanton negligence supervening the contributing negligence of the driver, the street railway is liable. Evidence that car was 500 feet away when driver turned onto the car track held insufficient. Alger, Smith & Co. v. Duluth-Superior Traction Co. [Minn.] 101 N. W. 298. It is a wrong to run into a wagon even if the driver was negligent in remaining on track. Strode v. St. Louis Transit Co. [Mo.] 87 S. W. 976.

25. Kimble v. St. Louis & S. R. Co., 108 Mo. App. 78, 82 S. W. 1096; Richmond Passenger & Power Co. v. Gordon, 102 Va. 498, 46 S. E. 772. Where a horse was killed in a collision, and evidence showed that the brakes were applied and the track sanded for 20 feet from where the collision took place, and the car ran 75 feet beyond, held, the "last chance doctrine" did not apply. Asphalt Granitoid Const. Co. v. St. Louis Transit Co. [Mo. App.] 80 S. W. 741. The doctrine does not apply where the negligence of the plaintiff and that of the defendant are practically simultaneous. Butler v. Rockland, etc., R. Co. [Me.] 58 A. 775. Where there is no intervening time in which the motorman could have time to act, the "last clear chance" rule does not apply. Lindgren v. Omaha St. R. Co. [Neb.] 103 N. W. 307.

26. Violation of city ordinance with regard to speed and lookout is negligence per se. Holden v. Missouri R. Co., 108 Mo. App. 665, 84 S. W. 133. Violation of a city ordinance regulating the speed of the car and the driver's lookout is negligence per se. Such an ordinance, however, must be given a reasonable construction. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374.

27. The violation of a rule of a street railway company as to limited speed in passing engine houses is not negligence per se. McKernan v. Detroit Citizens' St. R. Co. [Mich.] 101 N. W. 812. A speed ordinance does not govern the speed at which cars may run at street intersections. This depends on the conditions and surroundings. Story v. St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992.

the question of regulation by ordinance, numerous rulings have been made on the question of proper speed,[28] proper warning,[29] and proper lookout and care of motorman.[30]

Frightening horses.[31]—Taking into consideration the many different states of fact which attend cases of this description, it is difficult to lay down any more specific rule of law than that the driver of the horse and the employe in charge of the car must both do what they reasonably can to avoid the danger of an accident.[32]

28. A speed of 8 or 10 miles an hour in a city is not of itself a violation of law. Reid Ice Cream Co. v. Interurban St. R. Co., 97 App. Div. 303, 89 N. Y. S. 968. A charge that a car may be run faster in the suburbs than in the crowded city is the statement of a fact which it is the jury's place to determine. Indianapolis St. R. Co. v. O'Donnell [Ind. App.] 73 N. E. 163. Running at usual speed at the place of the accident, though this is faster than in other parts of the city, does not show negligence. Warner v. St. Louis, etc., R. Co., 178 Mo. 125, 77 S. W. 67. It is negligence to run at high speed on a dark night, relying solely on the ringing of the gong. Ablard v. Detroit United R. Co. [Mich.] 102 N. W. 741. In an accident at a street crossing where the car was running 25 miles an hour when it was 200 feet away, and speed was not slackened, this was held to make a prima facie case of negligence. Paine v. San Bernardino Valley Traction Co., 143 Cal. 654, 77 P. 659. Driving street car 25 to 30 miles an hour on dark night without headlight is certainly evidence of negligence. Indianapolis St. R. Co. v. Slifer [Ind. App.] 74 N. E. 19. It is reversible error to affirm without qualification the point that "A railway is negligent if it runs its car at a rate of speed that will not permit its stopping within the distance covered by its own headlight. The rate of speed proper to be maintained necessarily varies with the circumstances. Jensen v. Philadelphia, etc., R. Co., 24 Pa. Super. Ct. 4. A rule of a street railway company that its cars shall not go over four miles an hour when passing engine houses should not be construed as applying only to the space directly in front of such houses. McKernan v. Detroit Citizens' St. R. Co. [Mich.] 101 N. W. 812. Evidence that the motorman had a clear view and was running at a speed greater than that allowed by a city ordinance makes out a strong prima facie case. Impkamp v. St. Louis Transit Co., 108 Mo. App. 655, 84 S. W. 119. Ordinance regulating speed of steam cars is not applicable to street railways. Columbus R. Co. v. Peddy, 120 Ga. 589, 48 S. E. 149. An ordinance declaring it unlawful for any cart, wagon or other vehicle used to carry passengers to be driven through the streets at a greater than specified speed is not applicable to street surface cars operated by electricity. Robinson v. Metropolitan St. R. Co., 92 N. Y. S. 1010.

29. Hellriegel v. Southern Traction Co., 23 Pa. Super. Ct. 392. Where the gong was sounded 1,000 feet away from the accident and again sharply three times when 160 feet away, there is no negligence in this respect. Warner v. St. Louis & M. R. Co., 178 Mo. 125, 77 S. W. 67. That every street car is furnished with a gong is matter of common knowledge. An instruction as to giving warning need not specify how the warning should have been given. Story v. St. Louis Transit Co., 108 Mo. App. 424, 83 S. W. 992. If the approach of a car is known, there is no negligence in not ringing the gong. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245.

30. Chicago City R. Co. v. Gemmill, 209 Ill. 638, 71 N. E. 43; Indianapolis St. R. Co. v. Schmidt [Ind. App.] 71 N. E. 663; Butler v. Rockland, etc., R. Co. [Me.] 58 A. 775; Evensen v. Lexington, etc., R. Co., 187 Mass. 77, 72 N. E. 355; Schaub v. St. Louis Transit Co. [Mo. App.] 87 S. W. 85; Kimble v. St. Louis & S. R. Co., 108 Mo. App. 78, 82 S. W. 1096; Muriano v. Interurban St. R. Co., 92 N. Y. S. 262. Negligence presumed from uncontrolled car striking buggy after motorman had fallen off due to electric shock. Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624. A statute requiring operatives on steam railroads to stop before crossing intersecting tracks does not apply to a street railway. Georgia R. & Elec. Co. v. Joiner, 120 Ga. 905, 48 S. E. 336. Where a wagon is driven suddenly in front of a car so that the car cannot be stopped in time to avoid an accident, the company is not liable. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245. A motorman cannot be expected to infer that the driver of a train will leave a place of safety near the track and turn in upon the track. Hollingsead v. Camden & S. R. Co. [N. J. Law] 60 A. 514. A motorman who sees a wagon approaching the track has a right to presume the driver will use his senses in looking for cars. Markowitz v. Metropolitan St. R. Co. [Mo.] 85 S. W. 351. Where the view is obstructed at a street crossing, the motorman must use increased care and caution. Dungan v. Wilmington City R. Co., 4 Pen. [Del.] 458, 58 A. 868. Where a wagon was driven on the track on a dark night with a light in the rear, and was struck by a car coming at a high speed, the negligence of the motorman was held to be for the jury. Davis v. Media, etc., R. Co., 25 Pa. Super. Ct. 444. Instruction that motorman must keep car under perfect control held erroneous. Columbus R. Co. v. Peddy, 120 Ga. 589, 48 S. E. 149. A motorman seeing a team approaching the track has a right to assume it will stop in a place of safety. Heying v. United R. & Elec. Co. [Md.] 59 A. 667. In the case of a collision between a cab and a car, where there was no evidence of the distance between them when the horse backed onto the track, there was held to be no evidence of defendant's negligence. Herbst v. New York City R. Co., 93 N. Y. S. 1109. An instruction that in a given exigency, any special one of several means at hand should be adopted to avoid an accident, is error. Memphis St. R. Co. v. Haynes [Tenn.] 81 S. W. 374.

31. See 2 Curr. L. 1765.

(§ 6) *D. Bicycle riders; horseback riders; animals run over.*[33]—If a bicycle rider without looking[34] or after having looked when he could not see,[35] or otherwise negligently rides on a track,[36] he cannot recover for resultant injuries, though the car was negligently managed,[37] unless in view of his danger the company or its servants then failed to save him while it might have done so.[38] It is not ex-

32. Where a girl of 15, driving with her sister, attempted to alight to hold their frightened horse by the head, it was held that she was not guilty of contributory negligence as a matter of law. McVean v. Detroit United R. Co. [Mich.] 101 N. W. 527. Where the plaintiff drove with one hand and held on to a barrel in his wagon with the other, and continued to so drive after his horse became frightened at an electric car until the accident occurred, he was held guilty of contributory negligence. Moulton v. Sanford, etc., R. Co. [Me.] 59 A. 1023. Where one was injured by a collision with a car while driving along a street, evidence that operatives of the car failed to stop when they saw the horse was frightened and the driver motioned them to, held to show negligence. Lexington R. Co. v. Fain, 25 Ky. L. R. 2243, 80 S. W. 463. Where one was injured in a collision, an instruction that if the operatives saw the danger in time to stop the car, the driver should recover, but if the car stopped and when stationary the wagon was brought in contact with it by the motion of the horse, he should not, was proper. Id. An instruction on contributory negligence should have been given where evidence tended to show that a collision was the result of a driver's mismanagement of his horse while the car was stationary. Id. A street railway company in operating its cars along a public road must not make unusual and unnecessary noises likely to frighten animals, and if they do so, they are liable for resulting damage. Georgia R. & Elec. Co. v. Joiner, 120 Ga. 905, 48 S. E. 336. If the gong is rung after either the motorman or conductor sees that it is frightening a horse, the company is liable without regard to whether the gong was sounded by the one who made the discovery, since the one making the discovery should at once have notified the one ringing the gong to desist. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054. When an ordinance limited the speed of a car to 12 miles an hour, and the car which frightened a horse was going 20 miles an hour, it is proper to submit the issue whether the horse was frightened by the car being run at excessive speed. Id. Where a horse becomes frightened in a narrow space crowded with other vehicles, the motorman, on seeing the horse's fright, should immediately bring his car as far as possible under control. McVean v. Detroit United R. Co. [Mich.] 101 N. W. 527. Where a motorman sees that a team of horses are frightened, and the horses are in close proximity to the car, he should stop the car if he can reasonably do so, in time to avoid the injury. Christy v. Des Moines City R. Co. [Iowa] 102 N. W. 194. In the case of an accident resulting from a horse taking fright at an electric car, there is no presumption of negligence on the part of the company merely from the happening of the accident. Atlanta R. & Power Co. v. Johnson, 120 Ga. 908, 48 S. E. 389. Where a horse became frightened and backed suddenly onto the track at night in front of a car, there was held to be no evidence of the motorman's negligence. Dunkle v. City Passenger R. Co., 209 Pa. 125, 58 A. 268. Where it appears in evidence that the motorman after discovery of the situation made every proper effort not only to prevent a collision, but to avoid further frightening the horse, no negligence of the company is shown. O'Brien v. Blue Hill St. R. Co. [Mass.] 71 N. E. 951. A street railway company cannot use unnecessary noises to frighten horses. Georgia R. & Elec. Co. v. Blacknall [Ga.] 50 S. E. 92. Where a horse became frightened at an electric car while crossing a narrow bridge, whether the motorman used the reasonable care of an ordinarily prudent man was held to be for the jury. Adsit v. Catskill Elec. R. Co., 88 App. Div. 167, 84 N. Y. S. 393.

33. See 2 Curr. L. 1766.

34. Where the facts show that the rider of a bicycle could have seen the car if he had looked and could have heard it if he had listened, he is guilty of contributory negligence. Indianapolis St. R. Co. v. Zaring, 33 Ind. App. 297, 71 N. E. 270.

35. Plaintiff looked for cars when his view was obstructed, and then, without looking again, crossed and was struck. He was held guilty of contributory negligence. Knapp v. Metropolitan St. R. Co., 92 N. Y. S. 1071.

36. Where the testimony showed that a woman on a bicycle either saw a car and took her chances of crossing ahead of it or failed to see it when she had ample opportunity for doing so, she was held guilty of contributory negligence. Schroder v. Metropolitan St. R. Co., 87 App. Div. 624, 84 N. Y. S. 371. A bicycle rider, approaching a double track, saw two cars coming in opposite directions. Waiting for the north bound car to pass, she passed directly behind it and was run over by the south bound car. It was held that she was guilty of contributory negligence. Furlong v. Metropolitan St. R. Co., 92 N. Y. S. 1008.

37. Where a bicycle rider turned suddenly in front of a car traveling at a high rate of speed, there was held to be no negligence on the part of the motorman. McKee v. Harrisburg Traction Co. [Pa.] 60 A. 498. Where a bicycle rider was struck at a narrow place between the track and curb, and there was evidence that the motorman had a clear view and increased his speed, the case was held to be for the jury. Reid v. United Trac. Co., 26 Pa. Super. Ct. 55.

38. Even if the rider of a bicycle is negligent in placing himself in a position of danger upon the tracks, the motorman may still be held liable if he could have prevented the accident by the use of ordinary care. Rawitzer v. St. Paul City R. Co. [Minn.] 100 N. W. 664. Where the rider of a bicycle rode

cused by the contemporaneous negligence of a driver which forced the bicycle rider into a place of danger.[39] Horseback riders are governed by rules similar to those of drivers.[40] Aside from statutory liability,[41] and in the absence of negligence in allowing animals to be on or near the track, there is no liability respecting animals at large save for willful, wanton or reckless acts.[42] If, when an animal running at large is on the track or apparently about to go on, nothing is done to avoid striking it, a street railway is liable.[43]

§ 7. *Damages, pleading and practice in injury cases* are governed by rules which pertain to other topics.[44] A few illustrative cases of peculiar pertinency have been collected. Any evidence descriptive of the place or conditions,[45] the car or its equipment,[46] tending to show care or the lack of it or to increase or diminish the measure of it, is relevant; but prior accidents[47] and that which relates to other cars[48] or times[49] are not, and it is error to show that the carmen were arrested soon after the accident.[50] The violation of safety regulations may be proved, though common-law negligence alone and not statutory is pleaded,[51] unless they merely enact the common law.[52] Experts may state how shortly a car might

near the track not in a position of obvious danger and suddenly fell against a passing car, it was held that an instruction that the company was liable if the motorman saw the peril in time to avoid the injury, but failed to do so, was properly refused. Shaw v. Louisville R. Co., 26 Ky. L. R. 359, 81 S. W. 268.

39. Where a bicycle rider adduced evidence to show that through the negligence of the driver of a team he was forced to turn suddenly when near the track, it was held that such negligence would not relieve the company from the consequences of its own negligence, if any, and that the negligence of the bicycle rider and the company were rightly left to the jury. Palmer v. Cedar Rapids & M. C. R. Co., 124 Iowa, 424, 100 N. W. 336.

40. A horseback rider may lawfully go upon the tracks of a street railway, if he uses due care, and a motorman must give him due warning of the approach of the car. Brown v. St. Louis Transit Co., 108 Mo. App. 310, 83 S. W. 310. See, also, ante, § 6 C.

41. For failure to erect cattle guards in country district, road is liable when animals are injured. Evans v. Utica, etc., R. Co., 44 Misc. 345, 89 N. Y. S. 1089. A dog is the kind of property for an injury to which an action at law may be maintained, but is not within a code provision as to "cattle and other live stock." Moore v. Charlotte Elec. R., Light & Power Co., 136 N. C. 554, 48 S. E. 822.

42. A street railway company, with cars properly equipped, is not liable for killing a dog unless the killing was willful, wanton, or reckless. Moore v. Charlotte Elec. R., Light & Power Co., 136 N. C. 554, 48 S. E. 822. As in the case of a man, a motorman may assume that a dog, apparently in possession of his faculties, will get out of the way of an approaching car when on or near the track. Id.

43. Airikainen v. Houghton County St. R. Co. [Mich.] 101 N. W. 264. See, generally, Animals, 3 Curr. L. 159, and compare Railroads, 4 Curr. L. 1181.

44. See Damages, 3 Curr. L. 997; Negligence, 4 Curr. L. 764; Pleading, 4 Curr. L. 980; Instructions, 4 Curr. L. 133; Trial, 4 Curr. L. ...., and other practice topics.

45. Evidence that prior to an accident many small boys were gathered in the vicinity is admissible to show that it was a thronged place. Di Prisco v. Wilmington City R. Co., 4 Pen. [Del.] 527, 57 A. 906. Where a horse was frightened by a street car, it is proper to show that the street was much traveled by the public, as showing the care required in operating the car. Denison & S. R. Co. v. Powell [Tex. Civ. App.] 80 S. W. 1054. In a street car accident, evidence that the scene of the accident was a crowded city street is admissible as bearing on the question of the company's negligence. Indianapolis St. R. Co. v. Taylor [Ind.] 72 N. E. 1045.

46. In an action for negligent killing of a person in the street, evidence that no fender was on the particular car which caused the accident is admissible. Fritsch v. New York, etc., R. Co., 93 App. Div. 554, 87 N. Y. S. 942.

47. In an action for injuries caused by a defective rail, evidence of prior accidents of similar character at the same place is inadmissible. Gregory v. Detroit United R. Co. [Mich.] 101 N. W. 546. In a derailment case, evidence of derailment at other times and places under circumstances not similar is inadmissible. Perras v. United Traction Co., 88 App. Div. 260, 84 N. Y. S. 992.

48. Where a dog was run over by an electric car, evidence as to fenders on other cars is not competent. Moore v. Charlotte Elec. R., Light & Power Co., 136 N. C. 554, 48 S. E. 822.

49. Testimony of a motorman, on cross examination, that he had trouble on another line, is improperly admitted. Munroe v. Hartford St. R. Co., 76 Conn. 201, 56 A. 498.

50. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195.

51. Where, in an action for common-law negligence, an ordinance is not pleaded, evidence of violation of such ordinance is nevertheless admissible as bearing on the question of general negligence. Meng v. St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213.

52. Municipal ordinances as to the care

have been stopped,[53] and whether electric equipment was safe,[54] and lay witnesses may testify as to speed.[55] The usual rule of res gestae is illustrated in the cases below,[56] likewise the admissibility of statements against the declarant.[57] As in other cases an inference may be drawn from the failure to produce many accessible witnesses.[58] An allegation that a car was "carelessly, negligently and wrongfully run and managed" is general and does not specify negligence so as to exclude the rule res ipsa loquitur.[59] If a negligent act be specifically alleged and the proof if any relates to a different act of negligence, the evidence cannot go to the jury.[60] It is for the jury to say what care is proper to the circumstances.[61]

Notice of claim.—Under a statute providing for written notice in cases of accident from the negligence of a street railway, a notice by a married woman gives her husband a right to maintain an action for loss of her services.[62]

§ 8. *Statutory crimes* against ordinary railroads have no application to street railways.[63]

to be exercised by employes of a street railway company held to state merely general rules of law, and to be properly excluded from evidence. Christy v. Des Moines City R. Co. [Iowa] 102 N. W. 194.

53. A motorman who has run cars on a line for more than a year and who is familiar with a street crossing is qualified to testify as an expert as to the distance within which a car approaching the crossing at a certain speed could be stopped. Such a question should include a due regard to the safety of the passengers. Heinzle v. Metropolitan St. R. Co., 182 Mo. 528, 81 S. W. 848. Expert evidence as to time in which car could have been stopped held admissible. Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 169. Expert evidence as to time in which car could have been stopped held admissible. Meng v. St. Louis, etc., R. Co., 108 Mo. App. 553, 84 S. W. 213.

54. Testimony of an expert witness as to the safety of an insulator is properly admitted, but evidence as to other insulators is not competent. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386.

55. A witness standing in his storehouse, 25 feet from the door, may testify as to the speed of a car 80 feet from the place of the accident. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 663, 47 S. E. 850. Any one of average intelligence who sees a moving car is competent to testify as to its speed. Metropolitan R. Co. v. Blick, 22 App. D. C. 194. A question whether a car was moving "slowly or fast" is bad on account of its indefiniteness and uncertainty. Lindgren v. Omaha St. R. Co. [Neb.] 103 N. W. 307.

56. In a collision case, a declaration of the motorman almost immediately after the accident that he "lost control" is not admissible as part of the res gestae. Norris v. Interurban St. R. Co., 90 N. Y. S. 460. Statements of a witness made several minutes after a collision, after the car had left, are not admissible as part of the res gestae, but merely to contradict the witness. Hot Springs St. R. Co. v. Hildreth [Ark.] 82 S. W. 245. Testimony of a witness to the accident as to remarks made by him to the motorman when he stopped the car is inadmissible. Indianapolis St. R. Co. v. Taylor [Ind.] 72 N. E. 1045. A statement made by a child of 8 as witness was assisting in taking his body from under the car is admissible as part of the res gestae. Di Prisco v. Wilmington City R. Co., 4 Pen. [Del.] 527, 57 A. 906.

57. Declarations of a servant made after the accident cannot be used for or against the company, but may be used to contradict the witness. Columbus R. Co. v. Peddy, 120 Ga. 589, 48 S. E. 149. Declarations of a motorman made to plaintiff's attorney long after the accident are not competent evidence against defendant. Dorry v. Union R. Co., 93 N. Y. S. 637.

58. It is not error for plaintiff's counsel to draw an inference from the absence of witnesses, where the record shows that a car had a conductor and 50 passengers, and there was no effort to obtain the conductor and but one of the passengers. Airikainen v. Houghton County St. R. Co. [Mich.] 101 N. W. 264.

59. Chicago City R. Co. v. Barker, 209 Ill. 321, 70 N. E. 624.

60. Where negligence of motorman is claimed, and evidence is introduced that conductor was talking with passengers, the court cannot refuse to charge that there is no evidence that collision was due to conductor's negligence. Palmer v. Larchmont Horse R. Co., 95 App. Div. 106, 88 N. Y. S. 447. Where a pedestrian alleged negligence on the part of motormen in charge of cars traveling in opposite directions on separate tracks, and the evidence failed to show negligence on the part of one motorman, it was error to refuse to charge that there was no evidence of such negligence, though the court stated that both sides claimed that the injury was caused by the other car. Sealey v. Metropolitan St. R. Co., 97 App. Div. 399, 89 N. Y. S. 1045.

61. An instruction that greater care must be used in operating cars in crowded cities than in sparsely settled districts is erroneous, as invading the province of the jury. Indianapolis St. R. Co. v. Taylor [Ind.] 72 N. E. 1045.

62. Peck v. Fair Haven & W. R. Co. [Conn.] 58 A. 757.

63. The willful breaking of a window of a street car in use upon a street railway is not a violation of a statute making it a felony to maliciously injure or destroy locomotive cars, etc. State v. Cain, 69 Kan. 186, 76 P. 443.

STREETS; STRIKES; STRIKING OUT; STRUCK JURY, see latest topical index.

SUBMISSION OF CONTROVERSY.

Statutes providing for the submission of controversies without action do not apply to the submission of ordinary actions on an agreed statement of facts.[64]

In Pennsylvania any persons willing to become parties to an amicable action may enter into an agreement in writing for that purpose, and on production of such agreement to the prothonotary of any court having jurisdiction of the subject-matter, he is required to enter the same on his docket, after which the case shall be deemed pending in like manner as though it had been commenced by summons.[65] Where no action is pending and the parties desire the opinion of the court on a case stated, it should be filed in connection with an amicable action so as to show upon the record an actual, pending action.[66]

In order to confer jurisdiction on the court to determine questions submitted to it without action, on an agreed statement of facts, there must be a real controversy between the parties, which they could have settled in a civil action brought by one against the other.[67]

After the filing of the submission, the controversy becomes an action and is subject to all provisions of law relating to proceedings in an action.[68] One of the parties should be designated as the plaintiff, and the other as the defendant,[69] and the claim of each set forth in the nature of a prayer for judgment.[70] All the essential facts should be stated so as to indicate the basis of the claim of each party, and to enable the court to render judgment upon it.[71] In case the statement is defective, an additional statement may be filed.[72]

The judgment should fully conform to the terms of the agreed statement.[73] A judgment cannot be entered upon default, or upon the failure of one of the litigants to appear and argue his side of the controversy.[74]

Where the agreed statement provides that the court may draw such infer-

64. Mo. Rev. St. 1899, § 793, does not apply to case which was commenced by petition, and in which answer was interposed and issues made up in ordinary manner. Smith v. Smith [Mo. App.] 86 S. W. 586. In such case statement can be brought upon appeal only by bill of exceptions, and is not part of record proper. Id.

65. Act June 13, 1836 (P. L. 568). Miller v. Cambria County, 25 Pa. Super. Ct. 591. Where two persons cause paper to be filed in court of common pleas, as of a certain term, the caption of which shows that parties have assumed positions of plaintiff and defendant, and which stipulates that cause shall be tried by court without a jury, court will construe it as agreement for amicable action. Id.

66. Altoona v. Morrison, 24 Pa. Super. Ct. 417.

67. Cal. Code Civ. Proc. § 1138. De Lucca v. Price [Cal.] 79 P. 853. Where justice issued search warrant against L., which had been delivered to sheriff who had not taken any steps to serve it, held that there was no question in difference between justice and L. which could be subject of an action so as to authorize submission by them of question whether justice had jurisdiction to receive and file the affidavit for the warrant, and to issue the same. Id. Fact that action of justice was reviewable by certiorari immaterial. Id. It must appear by affidavit that the controversy is real, and that it is brought in good faith to determine the rights of the parties. De Lucca v. Price [Cal.] 79 P. 853; Heasty v. Lambert, 90 N. Y. S. 595.

68. Code Civ. Proc. § 1280. In re Yerks' Estate, 89 N. Y. S. 869.

69, 70, 71. In re Yerks' Estate, 89 N. Y. S. 869.

72. Code Civ. Proc. § 1281. Case continued for single term for that purpose. In re Yerks' Estate, 89 N. Y. S. 869.

73. Where agreed case stipulated that if a certain foreclosure proceeding was invalid, plaintiff owned the property subject to a mortgage, judgment for plaintiff should expressly declare that his ownership was subject to defendant's rights under the mortgage. Langmaack v. Keith [S. D.] 103 N. W. 210. On submission between county and city to determine whether members of fire department are exempt from county and state taxation, no judgment can be rendered against city for taxes which should have been collected in past years, but were not, though counsel stipulated that it might be, in case of a decision against the exemption. Jefferson County v. Watertown, 90 N. Y. S. 790.

74. Heasty v. Lambert, 90 N. Y. S. 595.

ences of fact as are warranted, an appeal presents only questions of law, and the supreme court cannot draw any inference of fact.[75]

In Maryland, where the case is submitted upon an agreed statement of facts, the court may draw all inferences of law or fact that the court or jury could have drawn from such facts, as if they had been offered in evidence on a trial.[76] Hence, where the case is submitted to the court for an opinion on the facts, the judgment will not be reversed on appeal because the statement of facts was not in proper form.[77]

SUBPOENA, see latest topical index.

SUBROGATION.

§ 1. Definition and Nature (1583).
§ 2. Definition and Nature (1583).
§ 3. How Forfeited or Lost (1586).
§ 4. Remedies and Procedure (1586).

§ 1. *Definition and nature.*[78]—Subrogation is the substitution of another person in place of a claimant to whose rights he succeeds in relation to the claim,[79] or an equitable assignment investing one paying the debt of another with all the rights of the creditor thereto.[80] The right of subrogation or of equitable assignment is not founded upon contract, nor upon the absence of contract, but is founded upon the facts and circumstances of a particular case and upon principles of natural justice.[81] Such facts and circumstances may, however, arise out of contract looking expressly toward a subrogation as well as by operation of equity in the absence of contract.[82] At law, if the surety pays off the debt for which he is bound, and upon which a judgment has been obtained against his principal and himself, he must, if he would preserve the judgment with the liens and other rights thereby acquired against the principal, procure its assignment to a third person;[83] but

75. Webber v. Cambridgeport Sav. Bank [Mass.] 71 N. E. 567.

76. Code Pub. Gen. Laws, art. 26, § 15. City of Baltimore v. Consolidated Gas Co., 99 Md. 540, 58 A. 216.

77. City of Baltimore v. Consolidated Gas Co., 99 Md. 540, 58 A. 216.

78. See 2 Curr. L. 1768.

79. Cyc. Law Dict. "Subrogation." An exhaustive monograph covering all phases of "The Right to Subrogation" is found in 99 Am. St. Rep. 474, appended to American Bonding Co. v. National Mechanics' Bank [97 Md. 598] 99 Am. St. Rep. 466.

80. Ferd Heim Brew. Co. v. Jordan [Mo. App.] 85 S. W. 927.

81. Potter v. Lohse [Mont.] 77 P. 419.

82. Voluntary payment or mere understanding will not give right. Browder & Co. v. Hill [C. C. A.] 136 F. 821.

NOTE. Conventional subrogation arises, not by force of law, but by reason of an agreement by the parties that a third person or one having no previous interest in the matter involved shall, upon discharging an obligation or paying a debt, be substituted in the place of the creditor in respect to such rights, remedies, and securities as he may have against the debtor. Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Home Sav. Bank v. Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; Barker v. Boyd, 24 Ky. L. R. 1389, 71 S. W. 528. It has been said that conventional subrogation can result only from an express agreement, either with the debtor or creditor, and that it is not enough that a person paying the debt of another shall do so merely upon the understanding on his part that he should be subrogated to the rights of the creditor. New Jersey, etc., R. Co. v. Wortendyke, 27 N. J. Eq. 658; Seeley v. Bacon [N. J. Eq.] 34 A. 139. It is not to be understood from this, however, that an agreement for subrogation will never be implied. Wilkins v. Gibson, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204; Heuser v. Sharman, 89 Iowa, 355, 56 N. W. 525, 48 Am. St. Rep. 390. The agreement may be made between the debtor, creditor, and the third person, or between the creditor and the third person, or even between the debtor and the third person so long as the creditor is not thereby prejudiced. Patterson v. Clark, 96 Ga. 494, 23 S. E. 496; Citizens' Nat. Bank v. Wert, 26 F. 294; Fivel v. Zuber, 67 Tex. 275, 3 S. W. 273, citing Fuller v. Hollis, 57 Ala. 435; Mitchell v. Butt, 45 Ga. 162; Caudle v. Murphy, 89 Ill. 352; New Jersey, etc., Ry. Co. v. Wortendyke, 27 N. J. 658; Owen v. Cook, 3 Tenn. Ch. 78; Morgan v. Hammett, 23 Wis. 34. Compare Harrison v. Bisland, 5 Rob. [La.] 204; Hoyle v. Cazabat, 25 La. Ann. 438; Brice v. Watkins, 30 La. Ann. 21. But substitution cannot be brought about, probably, by a contract between the debtor and a stranger to which the creditor is not a party, as to a part only of the debt. Smith v. Morrison [Tex. Civ. App.] 29 S. W. 1116.—From monograph, "The Right to Subrogation," 99 Am. St. Rep. 476.

83, 84. Davison v. Gregory, 132 N. C. 389, 43 S. E. 916.

in equity, when the surety or a subsequent incumbrancer, or any other person having an interest in the property affected by the liens, pays off the debt of his principal for the protection of the property liable for the debt, he is subrogated to the rights of the creditor whose debt he has paid, and to all securities held by him, without a formal assignment.[84] Once arising, the right of subrogation is assignable, and may be enforced by the assignee.[85]

§ 2. *Right to subrogation.*[86]—The general rule is that when two or more persons are each liable to a third and one of them ought to pay the amount rather than the other, and one of the latter does pay the indebtedness, he is thereupon subrogated so as to stand in the shoes of the principal with all his rights and remedies against the principal, sureties, and co-sureties. It is generally and most frequently applied to cases where the person advancing money to pay the debt is a surety or secondarily liable,[87] or where one of several equally liable satisfies the entire claim,[88] and it subsists whether or not the obligation is satisfied of record.[89] Where by statute the personal property of a decedent is primarily liable for his debts, and his widow pays debts secured by a lien upon real estate to which she is entitled, she is subrogated to the claim against the personalty.[90] Where the payment of interest coupons is secured by a mortgage, the assignee is subrogated thereto irrespective of whether he would be so by operation of law.[91] Subrogation is also applicable to cases where a party is compelled to pay the debt of a third person to protect some interest of his own,[92] or where one in good faith purchases property sold to satisfy a lien, which sale was in fact invalid,[93] such as a void foreclosure sale,[94] even when the premises in question were a homestead;[95] but the purchaser seeking subrogation must allege in his complaint that

85. Weimer v. Talbot [W. Va.] 49 S. E. 372.

86. See 2 Curr. L. 1768.

87. Kolb v. National Surety Co., 176 N. Y. 233, 68 N. E. 247; In re Rock Hill Cotton Factory Co., 68 S. C. 436, 47 S. E. 728; Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892; Weimer v. Talbot [W. Va.] 49 S. E. 372. By a guarantor or indorser. Mankey v. Willoughby, 21 App. D. C. 314.

Note: Right of stockholder paying corporate debts, see Clark & Marshall, Corp'ns, § 830.

88. Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445.

89. The cancellation of the mortgage of record will not necessarily defeat such subrogation, save as against the intervening rights of third parties without notice. Bennett v. First Nat. Bank [Iowa] 102 N. W. 129.

90. Whitmore v. Rascoe [Tenn.] 85 S. W. 860.

91. Washington Loan & Trust Co. v. Ritz [Wash.] 80 P. 174.

92. Butler v. Brown, 205 Ill. 606, 69 N. E. 44. A junior mortgagee may redeem from a senior mortgagee and thereby become subrogated to all the rights of such senior mortgagee. Illinois Nat. Bank v. Trustees of Schools, 211 Ill. 500, 71 N. E. 1070. When a person having an interest in real property pays money to satisfy a lien thereon in order to protect that interest, he is entitled to be subrogated to the rights of the incumbrancer, and considered as an assignee of the lien, for the purpose of affecting substantial justice, although the lien is discharged of record. Bennett v. First Nat. Bank [Iowa] 102 N. W. 129. Where creditors secured by a third trust deed furnish their trustee the money with which to pay off or take up the note secured by the first trust deed, they are entitled to be substituted to the rights of the payee thereunder, though the form of the endorsement on the note is to their trustee, as trustee for the debtor. Davison v. Gregory, 132 N. C. 389, 43 S. E. 916. Where an owner of land sold the timber thereon, and thereafter sold the timber to a third person, and such third person paid a mortgage thereon, on the decree for specific performance of the first sale, such third person is entitled to be subrogated to the rights of the mortgagee. Cape Fear Lumber Co. v. Evans [S. C.] 48 S. E. 108. A co-tenant paying encumbrances is subrogated thereto against his co-tenants. Funk v. Seehorn, 99 Mo. App. 587, 74 S. W. 445. Assignee of junior incumbrancer who redeems from sale is subrogated to purchaser. Illinois Nat. Bank v. Trustees of Schools, 111 Ill. App. 189.

93. A bona fide purchaser of property for value from a pledgee of the same, who sold it in violation of the pledge, succeeds to all the rights of the pledgee. Potter v. Lohse [Mont.] 77 P. 419.

94. Griffin v. Griffin [S. C.] 49 S. E. 561. Purchaser at invalid sheriff's sale by mortgagee is subrogated to mortgage. Rey v. Pitman, 119 Ga. 678, 46 S. E. 849.

95. Butler v. Brown, 205 Ill. 606, 69 N. E. 44.

he purchased under the belief he was obtaining the legal title.[96] And so where one advances money to satisfy an existing lien and substitute therefor one to himself, and if for some reason this latter lien is ineffective, the person so satisfying the first lien may be subrogated thereto;[97] but the mortgage or incumbrance paid off must be a valid subsisting lien,[98] and be given for the exclusive purpose of paying the prior one.[99] Subrogation cannot rest solely on the basis of an agreement with the debtor unless equities are thereby created, and they do not conflict with those of the creditor or third persons,[1] as where the debt was secured, and to enforce the lien will prejudice collection of other debts to the same creditor.[2]

The right will be granted only to one who has an interest to protect,[3] and not to a mere volunteer,[4] and he must be a purchaser for value,[5] and have satisfied the entire claim,[6] either by himself or some person acting in privity with

96. Griffin v. Griffin [S. C.] 49 S. E. 561.

97. Sproal v. Larsen [Mich.] 101 N. W. 213; Lashua v. Myhre, 117 Wis. 18, 93 N. W. 811.

98. One who loans money to pay off a void mortgage which was given to pay off a valid lien is not subrogated thereto. Henry v. Henry [Neb.] 103 N. W. 441. Where notes were given as part of the purchase price of a saw mill, on payment thereof by the sureties they were substituted to the vendor's lien; but the sureties on notes given subsequently by the vendees to release the lien are not on payment thereof subrogated thereto, for it ceased when released by the vendors. Miller v. Knight Mfg. Co., 26 Ky. L. R. 1201, 83 S. W. 631.

99. Where an invalid mortgage is executed for the payment of a purchase-money mortgage and to purchase additional material for improvements, the mortgagee is not subrogated to the original mortgage to the exclusion of prior liens. Nicholson v. Aney [Iowa] 103 N. W. 201. And further subrogation may be had where by fraudulent representations as to the value of the consideration one is induced to satisfy a mortgage. Coulter v. Minion [Mich.] 102 N. W. 660.

1. Browder & Co. v. Hill [C. C. A.] 136 F. 821. Neither a laborer's lien (Acts Tenn. 1897, p. 222, c. 78), nor the preference given to wages in bankruptcy will result to claimants who filled store orders given for wages, charging the same to the bankrupt, his estate being insufficient to pay preferred claims. Id.

2. Browder & Co. v. Hill [C. C. A.] 136 F. 821.

3. Blydenburgh v. Seabury, 93 N. Y. S. 330. Being interested in the payment of the debts of his deceased wife, the husband had a right to pay debts in order to avoid the bringing of action thereon, and is entitled to be subrogated to the rights of the creditors whose debts he paid. Riddle v. Riddle, 26 Ky. L. R. 231, 80 S. W. 1129. Where money borrowed by an executor was used to pay debts of the estate, the lender was entitled to subrogation to the rights of the creditors whose debts were thus discharged, though a mortgage unauthorized. Talliferro v. Thornton's Ex'r, 26 Ky. L. R. 183, 80 S. W. 1097. Where an administrator pays debts to protect the estate, he is subrogated to the rights of the creditors. Jones v. Dulaney [Ky.] 86 S. W. 547. The grantee of an estate involved in litigation as conveyed in fraud of creditor has such interest as to entitle him to be subrogated to liens thereon which he satisfied, though the conveyance is subsequently set aside. Lilianthal v. Lesser, 92 N. Y. S. 619.

4. A purchaser of municipal bonds in the open market is a volunteer who is not subrogated to special equities which may have existed in favor of the original holders. Beardsley v. Lampasas [C. C. A.] 127 F. 819. Where an insurance agent agreed to pay the first premium on a policy issued to defendant, in the absence of evidence that the agent was secondarily liable to insurer for such premium, an action to recover the same could not be maintained by insurer for the benefit of the agents on the ground that they were subrogated to insurer's rights to recover the premium. Equitable Life Assur. Soc. v. Wetherill [C. C. A.] 127 F. 947. A mere volunteer will not be subrogated to rights of earlier creditor. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800; Schneider v. Sellers [Tex. Civ. App.] 81 S. W. 126. A prospective heir is a mere volunteer. Blydenburgh v. Seabury, 93 N. Y. S. 330. One who at request of a co-tenant discharges an incumbrance, claiming an assignment, is not a mere volunteer. Simonson v. Lauck, 93 N. Y. S. 965.

5. Payment of incumbrances as part of the purchase price. Stastny v. Pease, 124 Iowa, 587, 100 N. W. 482. Conveyance of land in consideration of love and affection; grantee on payment of liens not entitled to recover on promise of grantor to satisfy them. Fischer v. Union Trust Co. [Mich.] 101 N. W. 852. A surety subrogated to creditor rights against security with a co-surety only on payment of indebtedness. North Ave. Sav. Bank v. Hayes [Mass.] 74 N. E. 311.

6. Where a surety on a tax collector's bond pays the full amount of his bond, he is not subrogated where the entire loss is not satisfied. State v. Perkins [La.] 38 So. 196. A junior incumbrancer, who has paid the interest and certain instalments only on the principal of the prior incumbrance, is not, in the absence of some special agreement, entitled to subrogation until the whole debt has been paid; the rights of the mortgagee must be entirely divested before

him,[7] and have no notice of the prior liens,[8] and subrogation is not allowed where his interest is that of grantee of the mortgagor.[9]

The party subrogated may enforce all the remedies to which the creditor was entitled,[10] but he also takes subject to such claims of set-off and equities as the principal may have against the surety;[11] but his right does not extend to subrogation to the claims of the creditor against persons secondarily liable for the default of the principal with whom he has no privity.[12]

§ 3. *How forfeited or lost.*[13]

§ 4. *Remedies and procedure.*[14]—While at law if a surety pays off the debt primarily owed by another, he must take an assignment to himself or a third person in equity, it operates as such an assignment without a formal transfer.[15] In some states the surety must not only pay the amount due on the execution but must also have the entry of payment made thereon, before he can control the judgment and execution against a surety.[16] In a state of facts which entitles the plaintiff to be subrogated in equity under the prayer for general relief to the rights of the judgment creditor, the failure to ask specifically for such relief, is not ground for dismissing the bill.[17] Where the purchaser at a void foreclosure sale seeks subrogation to the mortgage, he must allege in his complaint that he

another person can be substituted, by mere operation of law. Chapman v. Cooney [R. I.] 57 A. 928. Support for life consideration of conveyance—till at least part performance, subrogation cannot be had. Helms v. Helms, 135 N. C. 164, 47 S. E. 415.

7. Where judgments for torts were obtained against a city in such a manner as to give it a recovery over against a water board representing the commonwealth, or against contractors acting under contract with the water board, such contractors being the parties ultimately liable, and the commonwealth paid the judgment, it was subrogated to the rights of the city against the contractors; and the city could enforce the commonwealth's right of subrogation in an action against the contractors for the use of the commonwealth, although the judgments were never paid by the city, but by the commonwealth directly to the judgment creditors. City of Cambridge v. Hanscom [Mass.] 70 N. E. 1030.

8. Where a purchaser knowingly buys property subject to tax liens on payment thereof, he cannot assert them as against prior incumbrancers. In re Brinker, 128 F. 634; Rothschild v. Bay City Lumber Co., 139 Ala. 571, 36 So. 785; King v. Huni, 25 Ky. L. R. 2266, 81 S. W. 254.

9. The grantee of the mortgagor paying the tax liens and the mortgage does not cut out prior judgments, for the legal effect of his payments is as if the mortgage had never been made. Stastny v. Pease, 124 Iowa, 587, 100 N. W. 482.

10. Regardless of any claim for indemnity being barred by statute. Ferd Heim Brew. Co. v. Jordan [Mo. App.] 85 S. W. 927. Note secured by mortgage; may enforce mortgage. Gunby v. Armstrong [C. C. A.] 133 F. 417; Cook v. Landrum, 26 Ky. L. R. 813, 82 S. W. 585; Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892. On payment of judgment may have execution thereon against the principal. Wilks v. Vaughan [Ark.] 83 S. W. 913; City of Cambridge v. Hanscom [Mass.] 70 N. E. 1030; Nelson v. Webster [Neb.] 100 N. W. 411; Kolb v. National Surety Co., 176 N. Y. 233, 68 N. E. 247; Lawrence Co. Nat. Bank v. Gray, 23 Pa. Super. Ct. 62; Pickens v. Wood [W. Va.] 50 S. E. 818. The surety of a defaulting trustee may on payment follow the trust funds into the hands of a third party as could the cestui que trust. Coffinberry v. McClellan [Ind.] 73 N. E. 97. Where a fire insurance company pays a loss caused by the negligence of a railroad, it is entitled to be subrogated to the insurer's right of action against the latter. Caledonia Ins. Co. v. Northern Pac. R. Co. [Mont.] 79 P. 544. A surety for a defaulting guardian, who settles with her successor, is subrogated to the rights of the wards, and entitled to recover from debtors of the estate whose claims the guardian wrongfully compromised, such amounts as the wards themselves could have recovered. Browne v. Fidelity & Deposit Co. [Tex.] 80 S. W. 593. Where a purchaser gives a bond to pay dower in land and defaults, his surety on payment of the same is entitled to the land. Van Ormer's Estate, 25 Pa. Super. Ct. 234. In a suit by an insured against an insurer, the surety of an appeal bond therein continuing, the case may enforce the remedy of the latter against the former. City Trust, Safe Deposit & Surety Co. v. Haaslocher, 91 N. Y. S. 1022.

11. In re Rock Hill Cotton Factory Co., 68 S. C. 436, 47 S. E. 728.

12. A surety company has no cause of action against a bank who negligently paid money of employer to a defaulting employe. American Bonding Co. v. First Nat. Bank [Ky.] 85 S. W. 190.

13. See 2 Curr. L. 1770, and ante, § 2.

14. See 2 Curr. L. 1770.

15. Davison v. Gregory, 132 N. C. 389, 43 S. E. 916.

16. Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162.

17. Hawpe v. Bumgardner [Va.] 48 S. E. 554.

bought with the belief he was obtaining the legal title.[18] The debtor who procured one to take up and be subrogated to a mortgage then in foreclosure may have the suit discontinued.[19]

SUBSCRIBING PLEADINGS, see latest topical index.

SUBSCRIPTIONS.

§ 1. Nature, Requirements and Sufficiency as a Contract (1587).
§ 2. Rights and Liabilities Arising from Subscriptions (1587).
§ 3. Enforcement, Remedies and Procedure (1588).

§ 1. *Nature, requirements and sufficiency as a contract.*[20]—To make a subscription binding, it must be accepted as any other promise or offer; and if this is not done within a reasonable time, the subscription is a mere offer and cannot be enforced.[21] Where the terms of the subscription stipulate that an express acceptance is required within a stated time, such acceptance is a condition precedent to the validity of the contract.[22] But it is held that subscription contracts made to foster and encourage public and quasi-public enterprises are favored in law, and performance is the only acceptance, and notice of acceptance, required,[23] and there need be no particular or formal delivery, but only a delivery to him who takes the subscription.[24] It is not necessary that the acceptor or person who performs the act or does the thing for or toward which the subscription is to go shall be in esse at the time the subscription is made.[25] The acceptance of contracts for subscriptions to churches or charitable or kindred institutions is generally held to constitute a good consideration, since obligations are thereby assumed.[26]

§ 2. *Rights and liabilities arising from subscriptions.*[27]—To render the subscriber or promisor liable, there must be a performance of the conditions of the

18. Griffin v. Griffin [S. C.] 49 S. E. 561. Where a surety pays a debt owed by the principal to the state to enforce subrogation thereon, the state need not be made a party. Pickens v. Wood [W. Va.] 50 S. E. 818.

19. Simonson v. Lauck, 93 N. Y. S. 965.

20. See 2 Curr. L. 1770.

21, 22. Powers v. Rude, 14 Okl. 381, 79 P. 89.

23. Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22. Notice of acceptance of subscription for railroad, and express obligation to build the road, held unnecessary, where subscriber allowed work to be done without giving notice that he would not pay. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899.

24. Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22 That makes him an agent to deliver or communicate it to the world, or any person or corporation that would comply with its conditions. Id.

25. A subscription to the owner of premises on which a business should be located, could be accepted by a corporation thereafter organized, which owned the building in which the business was carried on. Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22.

26. Subscription for foreign missionary work upheld where society accepted the obligation, received a payment on account, sent missionaries to the field designated, and did not attempt to raise funds in the field itself. Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 A. 689.

NOTE. Consideration: Where several promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of the others. Cong. Soc. v. Perry, 6 N. H. 164, 25 Am. Dec. 455; Church in Second Precinct v. Stetson, 5 Pick. [Mass.] 506; 1 Parsons, Contr. 399-401. If a benefit accrues to the promisor, or if any loss or disadvantage accrues to the promisee, at the request or on the motion of the promisor, in either case the consideration is sufficient to maintain assumpsit. Forster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; Hildreth v. Pinkerton Academy, 29 N. H. 227; Haines v. Haines, 6 Md. 435.—See note in 3 L. R. A. 468.

27. See 2 Curr. L. 1771.

NOTE. Whether subscription contract is joint or several: In case of the ordinary subscription contract, where signers agree to pay the sums set opposite their names, the courts have usually considered the contract of each subscriber as separate from that of the others, so as to sustain an action against each subscriber individually. In most instances, however, the cases are brought and determined without any question being raised as to the form of the action. The following are illustrative: Beach v. First M. E. Church, 96 Ill. 177; McDonald

contract by the party to whom the subscription is to be paid;[28] but substantial compliance with the terms of the contract is sufficient.[29] If no condition or obligation to perform is expressed in the contract, it will be implied in law.[30] Conditions must be performed in the stipulated time or in a reasonable time if none be stipulated.[31] After acceptance of a subscription and partial performance by the acceptor, the subscriber cannot withdraw his subscription or release himself from his obligation.[32] One who subscribes to the construction of a railroad, on condition of its extension to a certain point, is estopped, after construction of the road, to deny liability on the ground that the point to which the line was extended was outside the state where the company was chartered, and its agreement was therefore ultra vires.[33] Funds being subscribed and the trustee having collected a part of the money before performance of the condition, the funds collected should be returned to the subscribers, when it appears that conditions will not be performed.[34] A subscription for an unfulfilled purpose is not payable by the custodian to the intended beneficiary, even though such custodian may have acquired it by false promises.[35]

§ 3. *Enforcement, remedies and procedure.*[36]—Subscribers may recover their money paid to a purpose which was not or cannot be realized.[37] Parol evidence is in such a case admissible to show the purposes for which funds were raised.[38] In a suit to obtain such funds, all the members of the committee should be made parties, though the treasurer retained the money as custodian.[39] In an action on a subscription, only such evidence relative to performance of conditions is relevant and material as goes to the subscriber's liability.[40] Actual notice of a condition is a question of fact.[41]

v. Gray, 11 Iowa, 508, 79 Am. Dec. 509; Haskell v. Oak, 75 Me. 519; Springfield Street R. Co. v. Sleeper, 121 Mass. 29; Twenty-third Street Baptist Church v. Cornwall, 117 N. Y. 601, 6 L. R. A. 807. Sometimes the language of the contract leaves no doubt as to the intention to create a several liability. First Religious Soc. v. Stone, 7 Johns. [N. Y.] 113. See, also, Mass v. Wilson, 40 Cal. 159; Robertson v. March, 4 Ill. 198; Watkins v. Eames, 9 Cush. [Mass.] 537, and other cases cited in note on the question appended to Gibbons v. Bente [Minn.] in 22 L. R. A. 80.

28. Railroad company held to have no right to funds in hands of a trustee because it had not completed its road to the designated point. Larrimer v. Murphy [Ark.] 82 S. W. 168. A subscription or promise to give to a charitable or public enterprise is not enforceable after the abandonment of the enterprise. Commercial Travelers' Home Ass'n of America v. McNamara, 95 App. Div. 1, 88 N. Y. S. 443. Where a scheme for the building of a home by plaintiff was abandoned, a committee which secured funds by a "woman's edition" of a newspaper "for the completion of the home in process of construction" was not bound to turn such funds over to plaintiff. Id.

29. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. An annual subscription to the owner of premises on condition that the premises are occupied by a certain business concern, payments not to continue more than 15 years, does not require a lease of the premises for a term of 15 years. Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22. The owner of the building in which the concern is located is the owner of the "premises" to whom the subscription is to be paid, though the building is on leased land. Id. A provision for the payment of $1 annual rent does not violate a condition requiring a stock exchange to occupy premises free of rent for a certain term where the rental value of premises was $30,000. Id. Condition of securing a lease of a building by a certain company held to have been performed. Id. Building constructed held to conform substantially to condition. Id. Acts required to be performed by subscription contract held not ultra vires the charters of the corporations which were parties thereto. Id.

30. Commercial Travelers' Home Ass'n of America v. McNamara, 95 App. Div. 1, 88 N. Y. S. 443.

31. Powers v. Rude, 14 Okl. 381, 79 P. 89.

32. Subscription for railroad binding. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899.

33. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899.

34. Larrimer v. Murphy [Ark.] 82 S. W. 168.

35. Only persons who had paid the money might complain. Commercial Travelers' Home Ass'n v. McNamara, 95 App. Div. 1, 88 N. Y. S. 443.

36. See 2 Curr. L. 1772.

37. Commercial Travelers' Home Ass'n v. McNamara, 95 App. Div. 1, 88 N. Y. S. 443; Larrimer v. Murphy [Ark.] 82 S. W. 168.

38, 39. Commercial Travelers' Home Ass'n v. McNamara, 95 App. Div. 1, 88 N. Y. S. 443.

40. Evidence of acceptance of a subscription contract and performance of work

SUBSTITUTION OF ATTORNEYS; SUBSTITUTION OF PARTIES; SUBWAYS; SUCCESSION, see latest topical index.

SUICIDE.

In civil cases the presumption is against suicide.[42] There is no law denying burial to the body of a suicide.[43] The aiding and abetting of suicide is a murder of which the aider stands as a principal[44] in the second degree if he be absent at the time,[45] but the acts done must have been so intended,[46] and in Kentucky proved by more than an uncorroborated confession.[47]

SUMMARY PROCEEDINGS; SUMMARY PROSECUTIONS; SUMMONS, see latest topical index.

SUNDAY.

The term "Sunday" ordinarily comprehends the natural day, the time from midnight to midnight, but it is competent for the legislature to regulate the day to be observed.[48]

Sunday as nonjudicial or nonlegal day.[49]—Service of judicial process on Sunday was unquestionably void at common law;[50] but the fact that a writ of replevin directs summons to issue on Sunday, so that a second writ is necessary, does not affect the probative force of the return to the first writ as showing defendant's possession,[51] and the publication of an ordinance not being publication of process does not render it void.[52] Where a statute requires an act to be done within a certain number of days, Sunday must be reckoned as one, though it happen to be the last unless expressly or impliedly excluded.[53] Where the last day for the performance of a condition of a contract falls on Sunday, it is sufficient if it is performed the following Monday.[54]

Violation of Sunday laws as defense to actions.[55]—The making of a contract on Sunday is not contrary to public policy.[56] Contracts made in violation of a statute forbidding the doing of any business on Sunday are void and cannot be made the basis of a recovery in the law,[57] and the fact that the defendant does not

in accordance with its terms is admissible in an action on the subscription. Doherty v. Arkansas & O. R. Co. [Ind. T.] 82 S. W. 899. Evidence relative to railroad company's interest in a town, and manner and time of competing a portion of its road, held immaterial or irrelevant as not affecting liability of subscriber. Id.

41. Merchants' Bldg. Imp. Co. v. Chicago Exch. Bldg. Co., 210 Ill. 26, 71 N. E. 22.

42. Clemens v. Royal Neighbors [N. D.] 103 N. W. 402.

43. Kitchen v. Wilkinson, 26 Pa. Super. Ct. 75.

44, 45, 46, 47. Commonwealth v. Hicks, 26 Ky. L. R. 511, 82 S. W. 265.

Note: "Inciting or abetting suicide as crime," see note 66 L. R. A. 304.

48. Comp. Laws N. M. 1897, § 1372, providing that Sunday shall be regarded as the time between sunrise and midnight, is valid. Harrison v. Wallis, 44 Misc. 492, 90 N. Y. S. 44. One claiming that publication of process was void because made on Sunday must show that it was made between such hours. Id.

49. See 2 Curr. L. 1772.

50. "Dies Dominicus non est juridicus." See Story v. Elliott, 8 Cow. [N. Y.] 27, 18 Am. Dec. 432.

51. American Nat. Bank v. Strong [Mo. App.] 85 S. W. 639.

52. That an ordinance creating a paving district was published on Sunday held not to invalidate a local assessment. City of Denver v. Dumars [Colo.] 80 P. 114.

53. Under Denver City Charter, art. 7, § 3, requiring notice of a public improvement to be published for 20 days, Sunday is to be included, though it is the last day of publication. Code, § 382 refers only to procedure in courts of record. City of Denver v. Londoner [Colo.] 80 P. 117.

54. Under provisions of a charter party, a vessel was to be ready for cargo on or before a certain date which fell on Sunday. Held, the vessel was in time when she arrived on such date, though notice was not given the charterer until next day, because by the law of the port she could not be loaded on Sunday. Manchester S. S. Co. v. Parr & Son, 130 F. 999.

55. See 2 Curr. L. 1772.

56. See note from Rodman v. Robinson, 134 N. C. 503, 47 S. E. 19; 2 Curr. L. 1772, n. 34.

57. Pearson v. Kelly [Wis.] 100 N. W. 1064. In an action on a contract, instruction eliminating the question of performance or failure to perform on Sunday was

plead freedom from liability on such ground does not preclude him from asserting the defense.[58] The contract being void, it is incapable of ratification.[59]

Sunday laws and prosecution for their violation.[60]—Sunday laws are generally held to be within the police power and therefore constitutional.[61] Where prosecution is provided for their violation, they are penal and are strictly construed.[62] The legislative history may be consulted in ascertaining their meaning.[63] Trivial, technical offenses are not considered as violations.[64] An act imposing a penalty on a seller does not affect the purchaser.[65] Laws forbidding the conduct of a play or public diversion generally except entertainments given by religious or charitable societies,[66] and management of such an entertainment does not subject the manager to criminal punishment.[67] An act not of itself a violation but only so when it interrupts the repose and religious liberty of the community is not an offense unless it causes such interruption;[68] but under a statute, the purport and intent of which is to make it an offense to sell or barter on Sunday or for one to permit his place of business to be open for such purpose, the question of sale is immaterial.[69] In a law that permits entertainments by religious or charitable

proper as there was no evidence that the contract provided for Sunday labor. Go Fun v. Fidalgo Island Canning Co. [Wash.] 79 P. 797.

58. Pearson v. Kelly [Wis.] 100 N. W. 1064.

59. Acts of the parties recognizing its existence cannot validate it. Sherry v. Madler [Wis.] 101 N. W. 1095.

NOTE. Ratification of Sunday contracts: As to whether a contract which is unenforceable not because it calls for doing of work on Sunday or is based on work done on that day, but merely because it was entered into on Sunday, there is much conflict of authority. One line of cases holds that an agreement, if otherwise valid, may be confirmed by the promisor on a subsequent week day. Van Hoven v. Irish, 3 McCrary, 443, 10 F. 13; Tucker v. West, 29 Ark. 386; King v. Fleming, 72 Ill. 21, 22 Am. Rep. 131; Love v. Wells, 25 Ind. 503, 87 Am. Dec. 375; Perkins v. Jones, 26 Ind. 499; Russell v. Murdock, 79 Iowa, 101, 18 Am. St. Rep. 348; Cambbell v. Young, 9 Bush. [Ky.] 240; Wilson v. Milligan, 75 Mo. 41; Sayles v. Wellman, 10 R. I. 465; Flinn v. St. John, 51 Vt. 334; Schmidt v. Thomas, 75 Wis. 529. Another line of cases holds that since the agreement is void in its inception it is incapable of ratification. Shippey v. Eastwood, 9 Ala. 198; Plaisted v. Palmer, 63 Me. 576; Cranson v. Goss 107 Mass. 439, 9 Am. Rep. 45; Costello v. Ten Eyck, 86 Mich. 348, 24 Am. St. Rep. 128; Kounty v. Price, 40 Misc. 341; Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179; Ryno v. Darby, 20 N. J. Eq. 231. See Grant v. McGrath, 56 Conn. 333.—From Hammon, Contracts, § 213. See, also, this work for a valuable discussion of Sunday laws and their construction, and works of necessity, §§ 211a, 212.

60. See 2 Curr. L. 1773.

61. The provision of 97 O. L. 436, which prohibits hunting or shooting or having in the open air for such purpose any implements for hunting or shooting on any Sunday, does not abridge the right to keep and bear arms. Walter v. State, 3 Ohio N. P. (N. S.) 13.

62. Rev. Laws, c. 98, § 2, subjecting persons violating its provisions to a fine. Commonwealth v. Alexander, 185 Mass. 551, 70 N. E. 1017.

63. "Destination" in Pen. Code 1895, § 420, prohibiting the running of freight trains, means the point at which the train finally stops and not the point at which it crosses the state line. Seale v. State, 121 Ga. 741, 49 S. E. 740.

64. The act of the steward of a club in selling two bottles of beer does not constitute labor under Pen. Code 1895, art 196. Benson v. State [Tex. Cr. App.] 85 S. W. 800. The purchase of a cigar is not a worldly employment or business within the meaning of the law of April 22, 1794. Commonwealth v. Hoover, 25 Pa. Super. Ct. 133. Evidence held insufficient to sustain a conviction for doing labor on Sunday. Moss v. State [Tex. Cr. App.] 84 S. W. 1065.

65. One who purchases a cigar on Sunday does not violate the Law of April 22, 1794. Commonwealth v. Hoover, 25 Pa. Super. Ct. 133.

66. A corporation chartered for the purpose of worship in accordance with the principles of the Hebraic religion is a religious and charitable society within Rev. Laws, c. 92, § 2. Commonwealth v. Alexander, 185 Mass. 551, 70 N. E. 1017.

67. Entertainment given by a religious and charitable society. Commonwealth v. Alexander, 185 Mass. 551, 70 N. E. 1017.

68. Playing baseball. People v. Hesterberg, 43 Misc. 510, 89 N. Y. S. 498. Playing baseball is a violation of Pen. Code, § 259, which prohibits acts which interfere with the repose and religious liberty of the community. People v. Poole, 44 Misc. 118, 89 N. Y. S. 773.

69. Under Pen. Code 1895, art. 199, the gist of the offense is the selling, bartering or permitting a place of business to be open for that purpose, and a liquor dealer keeping his place open where his customers congregated, violated the statute, though he made no sale. Armstrong v. State [Tex. Cr. App.] 84 S. W. 827.

societies, the proceeds of which are to be devoted exclusively to a charitable or religious purpose, "proceeds" means the net returns.[70]

The giving of entertainments in violation of a law may be restrained.[71]

Prosecutions.[72]—An information must charge all the elements of the crime,[73] but an indictment need not allege that the offense charged is not within any of the statutory exceptions.[74]

The superintendent of a company charged with violating the law may justify by showing that employes acted in disobedience of his orders, but mere general orders and rules are not a justification.[75]

Evidence of violation of the law on any Sunday prior to the indictment and within the statute of limitations is sufficient to meet a general averment.[76]

SUPERSEDEAS; SUPPLEMENTAL PLEADINGS, see latest topical index.

SUPPLEMENTARY PROCEEDINGS.

§ 1. Nature, Occasion and Propriety (1591).
§ 2. Proceedings Necessary on Which to Base Remedy (1591).
§ 3. Application for, and Examination of, Defendant and Debtors (1592).
A. Affidavit and Opposition to Same (1592).
B. Order and Citation Process or Warrant (1592).
§ 4. Relief Against Defendants or Debtors (1592).
A. Order for Payment or Delivery (1592).
B. Receivership or Other Equitable Relief (1593).
C. Contempt (1594).
§ 5. Procedure at and after Examination (1594).

§ 1. *Nature, occasion and propriety.*[77]—Proceedings supplementary to execution were not devised to change or defeat the ordinary remedy by execution, or to deprive the debtor of the right given him to enjoy temporarily his real property after it is sold upon execution, but is intended as an equitable remedy, more in the nature of a creditor's bill, to reach property which, from its nature, or from the fact that it is out of the jurisdiction, or that it is hidden, cannot be effectually reached by execution.[78]

§ 2. *Proceedings necessary on which to base remedy.*[79]—An execution issued in a proceeding where it is proper,[80] and in a regular manner,[81] is essential. The fact that the debtor's property is subject to execution does not preclude a judgment creditor from obtaining an order for the debtor's examination, under

70. Under Rev. Laws, c. 92, § 2, necessary expenses incidental to the entertainment may be deducted. Commonwealth v. Alexander, 185 Mass. 551, 70 N. E. 1017.

71. Under Pen. Code, §§ 259, 260, 265, prohibiting public sports, exercises or shows, owners of property adjacent to a baseball park may restrain playing on Sunday, on the ground that they are disturbed by the noise and confusion. Dunham v. Binghamton & L. Baseball Ass'n, 44 Misc. 112, 89 N. Y. S. 762.

72. See 2 Curr. L. 1773.

73. The playing of baseball on Sunday, not being in and of itself a crime, but only where it interrupts repose and religious liberty of the community, a warrant may not be issued for the arrest of one charged with such offense unless the information charges such interruption. People v. Hesterberg, 43 Misc. 510, 89 N. Y. S. 498.

74. Indictment for violation of Pen. Code 1895, § 420, prohibiting the running of freight trains on Sunday. Seale v. State, 121 Ga. 741, 49 S. E. 740.

75. Superintendent of a railroad responsible for the making of the schedule charged with violating Pen. Code 1895, § 420, prohibiting the running of freight trains on Sunday. Seale v. State, 121 Ga. 741, 49 S. E. 740.

76. Violation of Pen. Code 1895, § 420, prohibiting the running of freight trains. Seale v. State, 121 Ga. 741, 49 S. E. 740.

77. See 2 Curr. L. 1774.

78. Steenberger v. Low, 92 N. Y. S. 518.

79. See 2 Curr. L. 1774.

80. Execution on order for support of wife and children pending divorce or separation proceedings, being unauthorized, supplementary proceeding cannot be based thereon. Weber v. Weber, 93 App. Div. 149, 87 N. Y. S. 519.

81. The order for examination must be based upon the issue or return of an execution issued upon the judgment as prescribed by Code Civ. Proc. §§ 2435, 2441. Bank of Port Jefferson v. Darling, 92 N. Y. S. 483.

the Wisconsin law, when the debtor unjustly refuses to apply his property to the judgment.[82]

§ 3. *Application for, and examination of, defendant and debtors. A. Affidavit and opposition to same.*[83]—Affidavits made on information and belief will not sustain an order for an examination of a judgment debtor unless the sources of the affiant's information are set forth,[84] and unless the sources so disclosed would be competent as direct evidence of the facts stated.[85] The same rule applies to an affidavit for the examination of a third person, alleged to have property of the debtor.[86] A statute requiring the affidavit "to be made to the best of the knowledge and belief of the affiant" is not complied with by an affidavit made according to the "best information and belief" of the affiant.[87] An affidavit alleging the issue and delivery of execution in a certain county, where the judgment debtor had a place for the regular transaction of business, "in person or by agent," is fatally insufficient because of the alternative allegations.[88] Where the judgment has been assigned, supplementary proceedings may be instituted by the attorney of the plaintiff in the action in which the judgment was recovered; and in such case it is immaterial that the original affidavit does not disclose the real ownership of the judgment, such ownership being made to appear by subsequent affidavits.[89] Under the Wisconsin statute, the affidavit for the arrest of a debtor, who is about to leave the state or conceal himself, for the purpose of examining him concerning his property, need not specify the property which he refuses to apply on the judgment.[90] Judgment debtors may oppose an order for the examination of a third person, when the order includes an injunction restraining such third person from paying or delivering their property to the debtors.[91]

(§ 3) *B. Order and citation process or warrant.*[92]—Irregularities in an order for examination cannot be relied on as an excuse for noncompliance unless the debtor appears and moves to vacate the order.[93] The service of notice upon a debtor to appear for examination, no order forbidding transfer of disposition of the property being made, does not give plaintiff a lien upon defendant's property,[94] nor prevent the defendant from withdrawing funds from the reach of creditors by investing them in a homestead.[95]

§ 4. *Relief against defendants or debtors. A. Order for payment or delivery.*[96]—Property expressly exempt from execution cannot be reached in supplementary proceedings.[97] Personal earnings of an unmarried man having a widowed mother wholly dependent upon him for support are exempt in Ohio.[98] The court has no authority to order a debtor to collect his choses in action and apply them on

82. Construing Rev. St. 1898, § 3031. Enders v. Smith [Wis.] 100 N. W. 1061.

83. See 2 Curr. L. 1774.

84, 85. Ackerman v. Green, 107 Mo. App. 341, 81 S. W. 509.

86. Statement that affiant believed a bank had property of the debtor, because of statements made by the cashier, what the cashier said not being included, insufficient. In re First Nat. Bank, 90 N. Y. S. 941.

87. Ackerman v. Green, 107 Mo. App. 341, 81 S. W. 509.

88. Valid issue and return of execution according to law must appear. Bank of Port Jefferson v. Darling, 92 N. Y. S. 483.

89. Such procedure does not prejudice the debtor's rights. Maigille v. Leonard, 92 N. Y. S. 656.

90. Construing Rev. St. 1898, §§ 3031, 3032. Enders v. Smith [Wis.] 100 N. W. 1061.

91. In re First Nat. Bank, 90 N. Y. S. 941.

92. See 2 Curr. L. 1774.

93. Rupert v. Lee, 101 App. Div. 492, 92 N. Y. S. 75.

94, 95. McConnell v. Wolcott [Kan.] 78 P. 848.

96. See 2 Curr. L. 1774.

97. Code, § 2463. Steenberger v. Law, 92 N. Y. S. 518. See, generally, Exemptions, 3 Curr. L. 1408. In New York, debtor's wages for 60 days prior to examination are exempt. Corde v. Laughlin, 86 N. Y. S. 795.

98. Earnings less than $150 earned within 3 months next preceding the institution of proceedings. Under Rev. St. §§ 6489, 6680-1. Duffey v. Reardon, 70 Ohio St. 328, 71 N. E. 712.

the debt, but should appoint a receiver for the purpose.[99] The court cannot order property to which defendant's title is not clear and undisputed, to be applied in satisfaction of the judgment.[1]

(§ 4) *B. Receivership or other equitable relief.*[2]—A receiver of the debtor's property may be appointed where the debtor refuses to apply unexempt property to the satisfaction of the judgment,[3] or where title to property in the hands of a third person is in issue.[4] The appointment of a receiver and his title to the debtor's property are not subject to subsequent collateral attack when statutory requirements were substantially met.[5] No warrant being issued, a receiver can be appointed only after an order for examination has been made.[6] Interveners cannot complain of appointment of a receiver,[7] but may assert title hostile to the parties or the receiver.[8] The receiver can take only such property as may be liable to execution.[9] A receiver may sue a mortgagee, who has sold the mort-

99. State v. Second Judicial Dist. Court [Mont.] 78 P. 69.

1. First Nat. Bank v. Cook [Wyo.] 76 P. 674.

2. See 2 Curr. L. 1775.

3. By direct provisions of Rev. Code Civ. Proc. 1902, c. 14. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604.

4. Title must be decided in an action. Thompson v. Sage, 94 N. Y. S. 31.

NOTE. Receivers in supplementary proceedings: At any time after making an order requiring a judgment debtor or any other person to attend and be examined, or after issuing a warrant, the judge before whom the order or warrant is returnable may make an order appointing a receiver of the judgment debtor's property. Colton v. Bigelow, 41 N. J. Law, 266; Tillotson v. Wolcott, 48 N. Y. 188; Second Ward Bank v. Upmann, 12 Wis. 499. The appointment rests in the sound discretion of the court. Flint v. Webb, 25 Minn. 263; Dilling v. Foster, 21 S. C. 334. But it would be an oppressive abuse of discretion to appoint a receiver where it appears that mortgage security is ample to pay the creditor in full. Bean v. Heron, 65 Minn. 64. There can be but one appointment of a receiver in such a proceeding. Sparks v. Davis, 25 S. C. 381.

"In the earlier practice, the question of property or no property seems to have been disregarded in appointing receivers in supplementary proceedings, on the ground that, if there was no property to preserve, the plaintiff proceeded at the peril of costs, and that, if there was nothing for the receiver to take, the defendant could not be injured by the appointment. Bloodgood v. Clark, 4 Paige [N. Y.] 574, 577; Fitzhugh v. Everingham, 6 Paige [N. Y.] 29; Browning v. Bettis, 8 Paige [N. Y.] 568. But the practice has somewhat changed. While a debtor's mere denial of having property is no defense to an application for a receiver in supplementary proceedings (Colton v. Bigelow, 41 N. J. Law, 266; Bloodgood v. Clark, 4 Paige [N. Y.] 574; Browning v. Bettis, 8 Paige [N. Y.] 568; Fuller v. Taylor, 6 N. J. Eq. 301), it is not proper to appoint a receiver where the court is satisfied that the defendant has no property (Rodman v. Harvey, 102 N. C. 1; Williams v. Green, 68 N. C. 183), or where he has none outside of that which is exempt (Colton v. Bigelow, 41 N. J. Law, 266; Adler v. Turnbull, 57 N. J. Law, 62); but to justify the appointment of a receiver it is not necessary for it to appear with certainty that the judgment debtor has property which should be applied on the judgment. A reasonable ground to believe that he has such property is enough. Flint v. Zimmerman, 70 Minn. 346; Coates v. Wilkes, 92 N. C. 376; Journeay v. Brown, 26 N. J. Law, 111. In cases where assets subject to the payment of debts are disclosed, a receiver of course is proper. McCullough v. Jones, 91 Ala. 186; Dilling v. Foster, 21 S. C. 334; Penn v. Whiteheads, 12 Grat. [Va.] 74. The appointment of a receiver of the property or interest of a judgment debtor is not 'execution,' and the executors of a deceased judgment creditor are, therefore, not entitled to the appointment of a receiver of the judgment debtor's property. Norburn v. Norburn, 1 Q. B. 448. See the extended note to Lathrop v. Clapp [N. Y.] 100 Am. Dec. 512, as to the appointment of receivers in proceedings supplemental to execution."—From extended note on "When It is Proper to Appoint a Receiver," in 72 Am. St. Rep. 94.

5. Juckett v. Fargo Mercantile Co. [S. D.] 102 N. W. 604. Irregularity in filing receiver's bond cannot be taken advantage of in action by receiver against a debtor of the judgment debtor. Boynton v. Sprague, 91 N. Y. S. 839. The order requiring bond to be filed may be amended nunc pro tunc so as to conform with actual filing with clerk of city court. Id.

6. Code Civ. Proc. § 2464. Bank of Port Jefferson v. Darling, 92 N. Y. S. 483.

7. Mortgagees and lien creditors of a partnership, not parties to an action against the firm in which a judgment was recovered, who intervene in supplementary proceedings, cannot complain of the appointment of a receiver in such proceedings. First Nat. Bank v. Cook [Wyo.] 76 P. 674.

8. The fact that one intervener consented to the appointment without understanding that the receiver would take property claimed by him does not estop him to object to possession and control of such property by the receiver. First Nat. Bank v. Cook [Wyo.] 76 P. 674.

9. A receiver in supplementary proceedings against a municipal officer, wrongfully discharged and reinstated, is not entitled to the salary of such officer after his reinstatement, since it is not subject to attachment

gaged chattels and become the purchaser, for an accounting, on the ground that the mortgage was not filed in the proper county.[10]

The receiver is not vested with any real title to the real estate of the judgment debtor, but only has a certain claim upon or right to it for the purpose of satisfying the debt.[11] Any interest which the receiver has ceases upon payment of the debt, upon the debt ceasing to be a lien upon real estate, or upon the property having been sold by virtue of an execution and sheriff's deed given.[12] Lands of a judgment debtor being condemned, the award is properly paid to the receiver.[13] The right to such award is not limited by the life of the lien of the judgment, but continues during the life of the judgment.[14]

(§ 4) *C. Contempt.*[15]—In New York, a judgment debtor who willfully disobeys an order requiring him to appear for examination,[16] or an order restraining disposition of property,[17] or a defendant who refuses to produce books as ordered, without giving a valid reason for his refusal,[18] may be fined for contempt and the fine directed to be paid to the judgment creditor.[19] But a fine cannot be imposed in such case to indemnify a plaintiff for loss, without proof of actual loss.[20] A defendant is not guilty of contempt in disobeying an injunction against disposition of his property, contained in an order for his examination, when such order was never served.[21] Contempt proceedings should be instituted in the manner provided by law,[22] but an objection that they were not so instituted may be waived by failure to urge it at special term.[23]

§ 5. *Procedure at and after examination.*[24]—Where, in examination of a third party, a question of fact is raised as to satisfaction of the judgment, the remedy of the judgment debtor is a motion to have the judgment satisfied of record, and not a motion to vacate the order for the examination.[25] The validity of the claims of lien creditors and mortgagees cannot be litigated in proceedings in aid of execution.[26] In any case, it is improper for the court to direct a receiver, appointed in the proceedings, to examine such claims and report thereon to the court.[27] The court has no authority to order sold to pay expenses of a receivership property adversely claimed by lien creditors and mortgagees.[28] Under the Wisconsin statute, costs may be awarded against a debtor whose misconduct has made the proceeding necessary.[29]

in satisfaction of the judgment. People v. Grout, 45 Misc. 505, 92 N. Y. S. 742.

10. Brunnemer v. Cook & Bernheimer Co. [N. Y.] 73 N. E. 19.

11. Steenberger v. Low, 92 N. Y. S. 518. A debtor's interest in land held by him as tenant in entirety, and subject to execution, does not vest in a receiver so as to entitle the latter to maintain partition. Id. A receiver cannot take title to realty so as to deprive the debtor of his right of redemption and occupation of the premises during the redemption period, given by law. Id.

12. Steenberger v. Low, 92 N. Y. S. 518.

13, 14. Van Loan v. New York, 45 Misc. 482, 92 N. Y. S. 734.

15. See 2 Curr. L. 1775.

16. New Jersey Foundry & Mach. Co. v. Siebert, 90 N. Y. S. 468. Contempt order, merely describing order to appear without specifying act or omission for which debtor was adjudged guilty, was sufficient. Id.

17. As where debtor paid money out of bank account. Maigille v. Leonard, 92 N. Y. S. 656.

18. Friedman v. Newman, 86 N. Y. S. 735.

19. Under Code Civ. Proc. § 2284, a fine of $250 and costs, or a greater amount if the creditor has suffered actual loss, may be directed to be so paid. New Jersey Foundry & Machine Co. v. Siebert, 90 N. Y. S. 468.

20. Fine for refusal to produce books held excessive and unauthorized. Friedman v. Newman, 86 N. Y. S. 735.

21. Especially when the debtor had voluntarily tendered himself for examination, on learning of proceedings, but creditor's attorney was not present. Corde v. Laughlin, 86 N. Y. S. 795.

22. In New York, under Code Civ. Proc. § 2269, by attachment or order to show cause, not by notice of motion. Maigille v. Leonard, 92 N. Y. S. 656. See Contempt, 3 Curr. L. 795.

23. Maigille v. Leonard, 92 N. Y. S. 656.

24. See 2 Curr. L. 1776.

25. On the proper motion the question may be referred for determination. Thompson v. Sage, 94 N. Y. S. 31.

26, 27, 28. First Nat. Bank v. Cook [Wyo.] 76 P. 674, affirmed on rehearing 78 P. 1083.

29. Rev. St. 1898, § 3038. Enders v. Smith [Wis.] 100 N. W. 1061.

In Missouri, an order for the examination of a judgment debtor is appealable.[30] An order of a justice in proceedings in aid of execution that a third person who appears on notice and admits an indebtedness to the judgment debtor, shall pay the amount of the debt into court to apply on the judgment, the order being made over the objection of the judgment debtor that the amount due him is exempt under the laws of Ohio, is a final order reviewable on error at the suit of the judgment debtor.[31] An order directing punishment for contempt is not appealable unless final.[32] A finding by a justice of the peace as to the fact of the indebtedness of a third person to a judgment debtor is not a denial of the right of trial by jury on that question, since such third person may appeal therefrom.[33]

SURCHARGING AND FALSIFYING, see latest topical index.

SURETY OF THE PEACE.

This remedy is designed preventively, and is required when there is probable cause to fear that the person principally bound will commit a breach of the peace.[34] Where the process was lawful, habeas corpus will not try the existence of probable cause.[35]

SURETYSHIP.

§ 1. **Definitions and Distinctions (1595).**
§ 2. **The Requisites of the Contract (1596).**
§ 3. **The Sureties' Liability (1596).**
§ 4. **The Sureties' Defenses (1599).**
A. Legal Defenses to Surety's Liability (1599).
B. Defenses Based on Extinguishment or Absence of Principal's Liability (1599).
C. Defenses Based on Change of Contract or Increase of the Risk (1599).
D. Defenses Arising Out of Suspension of Liability of Principal (1601).
E. Defenses Based on Impairment of Surety's Secondary Remedies Against Principal or Collateral Securities (1602).
F. Defenses Based on Fraud or Concealment by Creditor of Material Facts (1602).
G. Other Defenses (1603).
§ 5. **Rights of Surety Against Principal and Co-surety (1603).**
§ 6. **Security Held by Surety and Rights Therein (1605).**
§ 7. **Remedies and Procedure (1605).**

This topic excludes the requisites, form and validity of bonds,[36] and the rights and liabilities under particular kinds of bonds.[37] It is confined to the law of suretyship strictly.

§ 1. *Definitions and distinctions.*[38]—Where two or more persons are both liable to a third for the same debt, and one in equity should pay rather than the other, the latter is regarded as surety for the other.[39] A surety is distinguished from a guarantor in that he undertakes to pay the debt of another and becomes an original party to the same debt that the principal undertakes; while a guarantor

30. Under Rev. St. 1899, § 806, as to appeals, and §§ 3227, 3230, relative to supplementary proceedings. Ackerman v. Green, 107 Mo. App. 341, 81 S. W. 509.

31. Duffey v. Reardon, 70 Ohio St. 328, 71 N. E. 712.

32. An order granting a motion to punish a judgment debtor for contempt, unless the debtor appears and submits to examination, but denying the motion in case the debtor appears, is appealable. Rupert v. Lee, 101 App. Div. 492, 92 N. Y. S. 75. An order was made that a judgment debtor be punished for contempt unless he appear for examination and pay costs. A subsequent order directed the former order to stand and remain in full force. Held, second order not final and appealable. Field v. White, 92 N. Y. S. 848.

33. Carlin v. Hower, 5 Ohio C. C. (N. S.) 70.

34. Cyc. Law Dict. "Surety of the Peace."

35. Justice of peace has jurisdiction and his process was lawful. Young v. Fain, 121 Ga. 737, 49 S. E. 731.

36. See Bonds, 3 Curr. L. 507.

37. See Indemnity (fidelity and like bonds) 3 Curr. L. 1698; Officers and Public Employes (official bonds) 4 Curr. L. 854; Appeal and Review (appeal bonds) 3 Curr. L. 167; Building and Construction Contracts, 3 Curr. L. 550.

38. See 2 Curr. L. 1776.

39. A bank president who took up certain debts due the bank and became liable, held under the facts an original debtor, not a surety. Gund v. Ballard [Neb.] 103 N. W. 309.

merely promises to pay if the surety does not, and his engagement is an entirely separate undertaking.[40]

§ 2. *The requisites of the contract.*[41]—The contract must be executed so as to conform with the requirements of the statute of frauds,[42] and like all contracts, must be supported by some consideration,[43] and to be binding must be accepted.[44] Where judgment has been brought against a principal debtor with whom one is surety, the latter is so identified with him that he is not a good surety on a second bond in the proceeding.[45]

§ 3. *The sureties' liability.*[46]—The liability of the surety is that contemplated by the contract.[47] The principal and surety on an obligation are jointly or severally liable to the promisee,[48] and therefore where the liability is joint and several, the surety may be sued without the principal being made a party[49] or demand made on him.[50] But in some states by statute the creditor is required

40. Rouss v. King [S. C.] 48 S. E. 220. An agreement reading "in case said trustee fails to make the payments when due, the undersigned agrees to make the payments as though primarily liable," constitutes a contract of suretyship and not guaranty. American Radiator Co. v. Hoffman, 26 Pa. Super. Ct. 177. Cal. Civ. Code, § 2844, gives a surety all the rights of a guarantor. Bateman Bros. v. Mapel, 145 Cal. 241, 78 P. 734.

41. See 2 Curr. L. 1777.

42. See, generally, Frauds, Statute of, 3 Curr. L. 1527. The recital in a bond that it is for value received is sufficient to satisfy the statute of frauds. White Sew. Mach. Co. v. Fowler [Nev.] 78 P. 1034. The statute of frauds does not require that an appeal bond shall show consideration on its face. Gein v. Little, 43 Misc. 421, 89 N. Y. S. 488.

43. Need not be for benefit of sureties: A bond showing that it is to enable the principal to enjoy an extension of credit is sufficient. White Sew. Mach. Co. v. Fowler [Nev.] 78 P. 1034. That by failure of court to approve a supersedeas bond is inoperative does not render it void as to sureties because of failure of consideration. English v. Smith, 1 Neb. Unoff. 670, 96 N. W. 60. To enlarge the liabilities of an endorser to that of a surety, there must be some new consideration. Chapman v. Pendelton [R. I.] 59 A. 928. The question of lack of consideration to a surety on an appeal bond may be raised, though not pleaded. Gein v. Little, 43 Misc. 421, 89 N. Y. S. 488.

44. Actual acceptance of a bond of a lodge officer and two sureties by the lodge is binding, though the by-laws require three sureties. Coombs v. Harford [Me.] 59 A. 529. Neglect of the court to approve an appeal bond otherwise valid does not relieve the sureties of liability. Bromberg v. Fidelity & Deposit Co., 139 Ala. 338, 36 So. 622. Where approval of a probate bond is withheld, its subsequent ratification by the probate judge is sufficient to make it binding. Best v. Robinson, 26 Ky. L. R. 620, 82 S. W. 302. To hold the sureties the complaint must show the bond of a chief of police was accepted and approved by the city council. Baum v. Turner, 25 Ky. L. R. 600, 76 S. W. 129. The failure to enter the approval and acceptance of an official bond upon the minutes of the county board does not relieve the sureties of liability where it is in fact accepted. Baker County v. Huntington [Or.] 79 P. 187.

45. Woodliff v. Bloodworth, 121 Ga. 456, 49 S. E. 289.

46. See 2 Curr. L. 1777.

47. The surety on an attachment bond cannot be held liable for the debt. Webb v. Pope, 118 Ga. 627, 45 S. E. 478.

48. North Ave. Sav. Bank v. Hayes [Mass.] 74 N. E. 311. Because parties to a note are sureties, they are none the less co-makers. Snook v. Munday, 96 Md. 514, 54 A. 77.

49. Brannon v. Wright [Tenn.] 84 S. W. 612; United States Fidelity & Guaranty Co. v. Overstreet [Ky.] 84 S. W. 764; Knott v. Peterson [Iowa] 101 N. W. 173. Especially true where the principal is dead and his estate is insolvent. State v. Henderson, 120 Ga. 780, 48 S. E. 334. A bond where the principals and sureties are each bound for a specified sum is joint and several, whether so stated or not. Mariposa County v. Knowles [Cal.] 79 P. 525. Each surety is primarily liable for his portion of the debt and for the balance as surety for the others. Kellogg v. Lopez, 145 Cal. 497, 78 P. 1056. Where a husband and wife join in a written instrument, they are prima facie joint debtors, though in fact the wife is surety. Algeo v. Fries, 24 Pa. Super. Ct. 427. A surety may be sued for a note after the maker's death without presentation of the claim to the administrator of the principal. Planters' & Mechanics' Nat. Bank v. Robertson [Tex. Civ. App.] 86 S. W. 643. Where by statute the surety of a liquor bond is jointly and severally liable with the principal, he may be sued alone without joinder of the latter. Knott v. Peterson [Iowa] 101 N. W. 173. Under a statute providing that persons severally liable on the same obligation may all or any of them be sued in the same action, at the option of plaintiff, the obligee in a bond, which is a joint and several obligation against the principal and surety, may sue the surety alone. Pacific Bridge Co. v. United States Fidelity & Guaranty Co., 33 Wash. 47, 73 P. 772. Since in an action in claim and delivery against a constable for wrongful seizure the liability is for the property, the sureties on his bonds are not proper parties thereto. Gallick v. Bordeaux [Mont.] 78 P. 583.

50. A petition for recovery from sureties on the bond of an official need not allege a demand upon the principal, or notice to

to proceed first against the principal before suing the surety.[51] An indebtedness to the estate of a decedent from one of two administrators will be considered as having come into the joint possession of both, and as between themselves and the surety on their joint bond, they are both principals.[52] The surety, however, may always show by parol his relation with the principal.[53] Thus a wife signing an obligation with her husband may show she is in fact his surety,[54] a relationship between them,[55] prohibited by common law,[56] and by statutes in some states.[57] Where one purchasing the assets of a partnership assumes its liabilities, he is in the position of the principal debtor and the former owner, being also liable to the creditors, is in the position of surety,[58] and similarly, where a mortgagor had granted his interest in mortgaged premises to one who promises to assume the mortgage, the land is looked upon as a surety and entitled to the same equities.[59] The liability of a surety is limited by that of his principal,[60] and cannot exceed the amount stated in the bond,[61] and judgment against the principal is binding on

the surety of the default. City of St. Marys v. Rowe, 2 Ohio N. P. (N. S.) 645.

51. Texas Rev. St. 1895, § 3814. Under the Pa. St., in an action against the surety of a guardian bond, the complaint must set forth the rendition of judgment against the principal. Commonwealth v. Magee, 24 Pa. Super. Ct. 329. Under Civ. Code Proc. § 923, proof of dishonor or an affidavit of nonresidence is necessary before recovery can be had directly against a surety. Singer v. Pollock, 91 N. Y. S. 755. A right given by the Rev. St. 1895, § 3814, to have property of the principal sold first before proceeding against surety, is not in force when the principal is dead. Planters' & Mechanics' Nat. Bank v. Robertson [Tex. Civ. App.] 86 S. W. 643. This statute is held not to apply where foreclosure is sought of a trust deed given as security of the debt of another than the grantee. Duncan v. Hand [Tex. Civ. App.] 87 S. W. 233.

52. Dorger v. Woodward, 4 Ohio C. C. (N. S.) 623.

53. North Ave. Sav. Bank v. Hayes [Mass.] 74 N. E. 311. Position of names on the instrument is immaterial. Trammell v. Swift Fertilizer Works, 121 Ga. 778, 49 S. E. 739. Evidence that A and B executed a joint note and that A took all the proceeds, though it was paid for by B, does not prove B a surety. Bettinger v. Scully, 36 Wash. 596, 79 P. 203.

54. That a wife never requested the loan and did not ask an acknowledged surety to sign for her, and has no other occupation than housekeeper, and was not present when the loan was made and received no part of the money which was not expended for her use or any estate which she had, shows her to be the surety on a note signed by herself and her husband and another. Neighbors v. Davis [Ind. App.] 73 N. E. 151. When a husband and wife join in an instrument, they are presumptively joint debtors, and no presumption of suretyship arises but this may be rebutted by parol. Algeo v. Fries, 24 Pa. Super. Ct. 427. Where it is shown no consideration passes to a wife for her signature of a note, it is evidence that she is a surety for her husband. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494.

55. A married woman cannot become surety for any one. Hazleton Nat. Bank v. Klntz, 24 Pa. Super. Ct. 456.

56. At common law and by statute a wife cannot become surety of her husband. Cook v. Landrum, 26 Ky. L. R. 813, 82 S. W. 585.

57. Under Burn's Ann. St. 1901, a wife cannot be surety for her husband. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494; Neighbors v. Davis [Ind. App.] 73 N. E. 151. Where it appears that a wife is surety for her husband, under the Act of June 8, 1893, her obligation is void. Algeo v. Fries, 24 Pa. Super. Ct. 427; Wilson v. Fitzgerald, 25 Pa. Super. Ct. 633. Where a wife cannot be surety for her husband she cannot by representation estop herself as to creditors who have notice. Ft. Wayne Trust Co. v. Sihler [Ind. App.] 72 N. E. 494. Ky. St. 1903, § 2127. Cook v. Landrum, 26 Ky. L. R. 813, 82 S. W. 585.

58. Malanaphy v. Fuller & J. Mfg. Co. [Iowa] 101 N. W. 640. The co-partner promising to pay the partnership debts is a principal while a retiring partner occupies the position of surety. Preston v. Garrard, 120 Ga. 689, 48 S. E. 118.

59. Regan v. Williams [Mo.] 84 S. W. 959; New York Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916; Germania Life Ins. Co. v. Casey, 90 N. Y. S. 418; Winslow v. Stoothoff, 93 N. Y. S. 35; Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22. Where by decree of a court the land itself is charged with the payment of alimony, this rule does not apply but the land is regarded as directly liable. Wilson v. Hinman, 90 N. Y. S. 746. Where land of a third party is mortgaged to secure the debt of another, it is subject to all the benefits and equities of a personal surety. Planters' & Mechanics' Nat. Bank v. Robertson [Tex. Civ. App.] 86 S. W. 643.

60. Board of Com'rs of Ramsey County v. Sullivan [Minn.] 102 N. W. 723; Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 S. W. 871.

61. United States v. American Surety Co. [C. C. A.] 135 F. 78. The judgment of more than penalty named in the bond is erroneous. Garofalo v. Privldi, 43 Misc. 359, 87 N. Y. S. 467. A surety on a redelivery bond in replevin is liable for costs after judgment for plaintiff, though the bond is silent in that regard [under Miss. Code 1892, §§ 3729, 3716]. Sparks v. Hopsen, 83 Miss. 124, 35 So. 446. A judgment which by the addition of interest during the pendency of

the surety,[62] and the admissions of the principal as to his liability are binding upon the surety.[63] The liability of a surety on an agent's or officer's bond extends to subsequent terms of office according to the evident intention of the parties as expressed therein.[64] The default for which a surety may be held must be of the principal,[65] and must occur during the time contemplated in his contract and not prior or subsequent thereto,[66] and in general a surety is liable for the unauthorized acts of his principal done under color of his office.[67]

an action thereon exceeds the amount of the bond, is not per se excessive. Getchell & M. Lumber & Mfg. Co. v. National Surety Co., 124 Iowa, 617, 100 N. W. 556. Where on default of a building contractor after notice to his surety, the owner relets the contract at an advanced price, the surety cannot complain and is liable for the difference. Degnon-McLean Const. Co. v. City Trust, Safe Deposit & Surety Co., 90 N. Y. S. 1029.

62. Price v. Carlton, 121 Ga. 12, 48 S. E. 721. Where a surety on a contractor's bond has notice of a suit being brought to enforce a mechanic's lien, and is tendered the defense thereof, he is estopped to deny that the judgment is binding. Henry v. Aetna Indemnity Co., 36 Wash. 553, 79 P. 42. In the absence of fraud, the surety of a building contract is estopped to deny the validity of a default judgment against the principal when the obligee sues. Friend v. Ralston, 35 Wash. 422, 77 P. 794. The surety is estopped from pleading the same defense as the principal, where a court has found against the latter, for as to the subject-matter in the suit, it is res adjudicata. Beh v. Bay [Iowa] 103 N. W. 119. A judgment against a government official is not sufficient to charge his sureties, for it does not show the acts complained of occurred during the life of the bond. United States v. Meade [Ariz.] 76 P. 467. A judgment against an official on his bond is evidence only that such judgment was maintained and no more. Loewer's Gambrinus Brewery Co. v. Lithauer, 43 Misc. 683, 88 N. Y. S. 372. As against the surety, the judgment against a village marshal is not conclusive as to his misconduct. Id. A judgment against an administrator personally is proof that he had funds in his hands and left unpaid debts owed by the estate and is to this extent binding on his surety. American Bonding & Trust Co. v. United States, 23 App. D. C. 535. The records of an action against a building contractor are conclusive upon his surety, providing they disclose with sufficient certainty his negligence and misconduct. Lake Drummond Canal & Water Co. v. West End Trust & Safe-Deposit Co., 131 F. 147. Failure of an administrator to obey an order of the court to pay a sum found to be due an attorney for services rendered the estate is a breach of his bond, for which the surety thereon is liable. Smith v. Rhodes, 68 Ohio St. 500, 68 N. E. 7.

63. Thompson v. Commercial Union Assur. Co. [Colo. App.] 78 P. 1073; Knott v. Peterson [Iowa] 101 N. W. 173. But return of "not found" by the sheriff is conclusive upon the surety of a bail bond. Garofalo v. Prividi, 43 Misc. 359, 87 N. Y. 467. Where by terms of the contract an architect's certificate is necessary for alterations and conclusive upon the cost thereof, the sureties are thereby bound. Dallas Homestead & Loan Ass'n v. Thomas [Tex. Civ. App.] 81 S. W. 1041.

64. Where the bond of a cashier whose term of office is for one year recites his appointment and that he "will well and truly perform his duties," it does not cover defalcations made by him during a second term of office. Blades v. Dewey, 136 N. C. 176, 48 S. E. 627. When a bond ends whenever the principal "ceases to hold office," it continues, though he is elected annually. Coombs v. Harford [Me.] 59 A. 529. But ceases if his holding of office is intermittent. Id. Unless limited by its terms, the bond of an agent is continuing. Danvers Farmers' Elevator Co. v. Johnson [Minn.] 101 N. W. 492. A bond given for a bank cashier whose term is for one year is not continuing. Ida County Sav. Bank v. Seidensticker [Iowa] 102 N. W. 821.

65. Building contract; not liable for debts of a subcontractor. Miller v. State [Ind. App.] 74 N. E. 260. A bond given on a building contract running to the owner and "all persons who may be injured by any breach of its conditions," includes subcontractors among those by whom actions may be brought. Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550. Liable for damages recovered against owner for loss to an adjoining building. Leppert v. Flaggs [Md.] 60 A. 450. Payment of liabilities by the owner is not a prerequisite to suit on a building bond. Trinity Parish of Seattle v. Aetna Indemnity Co. [Wash.] 79 P. 1097. Owner may recover for unpaid material bills without first suffering suit. Friend v. Ralston, 35 Wash. 422, 77 P. 794.

66. The sureties of a tax collector's bond for the faithful performance of the duties of his office during one term are liable for his undiscovered defaults in that term, though prior to the execution of the bond. Inhabitants of Hudson v. Miles, 185 Mass. 582, 71 N. E. 63. Bond of bank given to state for "said sums deposited or to be deposited" includes sums on deposit at the time of execution of the bond. Kephart v. Buddecke [Colo. App.] 80 P. 501. On an indemnity bond of a government official, the complaint must allege that the acts complained of occurred during the life of the bond. United States v. Meade [Ariz.] 76 P. 467.

67. Clark v. Pence [Tenn.] 76 S. W. 885. Surety on a guardian's bond not liable for acts done prior to execution of the bond. Freedman v. Vallie [Tex. Civ. App.] 75 S. W. 322; Howe v. White, 162 Ind. 74, 69 N. E. 684. In the absence of evidence that the guardian converted property to his own use prior to the execution of the bond, his surety is liable under the N. Y. statute for money which came into his possession as

§ 4. *The sureties' defenses. A. Legal defenses to surety's liability.*[68]—A surety may set up as a defense the nonfulfillment of any conditions precedent he may make to his liability,[69] such as the signature of the principal debtor,[70] or of other sureties.[71] Where the penal sum is left blank in a guardian's bond, by giving the principal authority to deliver it, the sureties give him authority to fill in blanks.[72] Having bonded themselves to secure a charge and a release of certain liens, sureties cannot deny its validity.[73]

(§ 4) *B. Defenses based on extinguishment or absence of principal's liability.*[74]—A release or discharge of the principal by operation of law does not discharge the surety,[75] and because the statute of limitations has run against the principal, the estate of a surety is not thereby released from liability where the death of the debtor tolls the statute.[76] A surety is not relieved because of a chance remark by the plaintiff's attorney that the obligation was not good.[77] The surety may make use of such set-offs as run in favor of the principal against the creditor.[78] Where the principal does not defend in good faith, the surety may appear and assume the defense.[79]

(§ 4) *C. Defenses based on change of contract or increase of the risk.*[80]—A surety has the right to stand on the strict terms of his agreement, and any alteration thereof without his consent operates as a new contract to which he

guardian before his appointment. In re Guardianship of Fardette, 86 App. Div. 50, 83 N. Y. S. 521. Surety of a guardian not liable for his unauthorized acts done by order of the court. Commonwealth v. American Bonding Co., 25 Pa. Super. Ct. 145. Collection of extortionate fees. Eccles v. United States Fidelity & Guaranty Co. [Neb.] 101 N. W. 1023. Sureties liable though the acts complained of were torts committed by the principals who were assignees for the benefit of creditors. Wilson's Assignees v. Louisville Nat. Banking Co., 25 Ky. L. R. 1065, 76 S. W. 1095. Not liable for general indebtedness incurred outside of the scope of his employment. United States Fidelity & Guaranty Co. v. Overstreet [Ky.] 84 S. W. 764. Sureties liable where a bank officer paid his own debts with the funds of the bank. Rankin v. Bush, 92 N. Y. S. 866.

68. See 2 Curr. L. 1779. See, also, ante, § 3.

69. A recital in a bond securing a mortgage of a prior lien of $91,000, is not a condition precedent to liability, though it appears that the lien was in fact for a greater amount. Raymond v. Tallman, 91 N. Y. S. 670.

70. Where the name of the principal appears as one of the makers of the bond, it is not binding on the sureties till he executes it. American Radiator Co. v. American Bonding & Trust Co. [Neb.] 100 N. W. 138. The omission of the signature of the principal, through his name appears in the body of the instrument, does not release the sureties unless they signed subject to this being obtained. Clark v. Bank of Hennessey, 14 Okl. 572, 79 P. 217. Since an appeal bond is capable of amendment, the absence of the signature of the principal does not operate as a discharge of the sureties. McDermid v. Judge [Ga.] 49 S. E. 800. The failure of the employe to sign a fidelity bond is not waived by his sureties where it appears this failure is peculiarly within the knowledge of his employer, who has had continual possession of the bond. Platauer v. American Bonding Co., 92 N. Y. S. 238.

71. Where two co-sureties are present and one insists that the obligation shall be inoperative till another signs, it is presumed that he acts as spokesman for the other. Norris v. Cetti [Tex. Civ. App.] 79 S. W. 641. Surety cannot be held where he signed as such on the precedent unfulfilled condition known to the creditor that another should sign. Barber v. Ruggles [Ky.] 87 S. W. 785.

72. Rollins v. Ebbs [N. C.] 50 S. E. 577. Where it appears on the face of a bond that the principal had no authority to deliver it without additional signatures, this need not be set up in the pleading. Baker County v. Huntington [Or.] 79 P. 187.

73. Ruggles v. Bernstein [Mass.] 74 N. E. 366.

74. See 2 Curr. L. 1779.

75. The principal's discharge in bankruptcy does not release the sureties. Leader v. Mattingly, 140 Ala. 444, 37 So. 270.

Note. When the principal is released by operation of law, the surety is nevertheless bound. Cragoe v. Jones, L. R. 8 Exch. 81. This idea inheres in the contract by the surety with the creditor, which is immediate, direct and absolute. Stearns on Suretyship, § 6. Moreover, the surety who has paid a debt barred by the statute may recover against the principal. Godfrey v. Rice, 59 Me. 308. Such a recovery is allowed, not on any principle of subrogation to the creditor's rights, but upon the implied promise which exists by law between the principal and surety in such cases. Faires v. Cockerell, 88 Tex. 428.—5 Columbia L. R. 65.

76. Charbonneau v. Bouvet [Tex.] 82 S. W. 460.

77. Irwin v. Hudson, 24 Pa. Super. Ct. 72.

78. Fidelity & Deposit Co. v. Schelper [Tex. Civ. App.] 83 N. W. 871.

79. Price v. Carlton, 121 Ga. 12, 48 S. E. 721.

80. See 2 Curr. L. 1779.

is not a party, and he is consequently discharged, and this is true, though the surety sustains no injury, and even if the change is for his benefit.[81] The contract, however, may in terms provide or clearly contemplate such alterations, and the surety is then deemed to have given his consent in advance to such change.[82]

81. Orleans & J. R. Co. v. International Const. Co. [La.] 37 So. 10. It is not necessary that an alteration of a contract should be to the detriment of a surety; he is bound to the contract which he makes and not to one which he did not make. Griffith v. Newell [S. C.] 48 S. E. 259. The recital of the receipt of a large consideration in the contract does not prevent the discharge of a surety for a material alteration. Zeigler v. Hallahan [C. C. A.] 131 F. 205. In determining whether alterations of a contract are sufficient to discharge the sureties, the question is not whether they are prejudicial to the surety, but whether it was a material alteration of the contract to which he was a party, so as to render it a new conract. Id.

Held to be a material alteration: Putting a waterworks tunnel through a hill instead of around it. City of Middletown v. Aetna Indemnity Co., 90 N. Y. S. 16. The change of an obligation from "joint or several" to "joint and several." Coombs v. Harford [Me.] 59 A. 529. An increase of the rate of interest. Casey-Swasey Co. v. Anderson [Tex. Civ. App.] 83 S. W. 840. A complete alteration of the time of a charter party. Michigan S. S. Co. v. American Bonding Co., 93 N. Y. S. 805. The insertion of a provision to a ten-year lease, avoiding it in case of damage by fire. Zeigler v. Hallahan [C. C. A.] 131 F. 205. A material change in the terms of a bond. Cudahy Packing Co. v. Shepard [Tex. Civ. App.] 82 S. W. 786. Liquor seller's bond. A misdescription of lot 11 for lot 13. O'Banion v. DeGarmo, 121 Iowa, 139, 96 N. W. 739. Where the date of a note is so altered as to postpone the time of payment, the surety is discharged, though on the face of the note permission to extend the time of payment is granted. Brannum Lumber Co. v. Pickard, 33 Ind. App. 484, 71 N. E. 676. Where a sales agent became the owner of a company to whom he sold goods for his employer, of which fact the latter has knowledge, it is such a change in the terms of his contract with his employer as to discharge the sureties liable for his defaults. Cudahy Packing Co. v. Shepard [Tex. Civ. App.] 82 S. W. 786.

Held not to be a material alteration: Affixing names of witnesses. Heard v. Tappan, 121 Ga. 437, 49 S. E. 292. Where a trust agreement provides for the custody of cash and notes, securities are in fact delivered. Pogue v. Ross, 25 Ky. L. R. 187, 74 S. W. 1101. Certain delays and alterations in the time of commencement of a steamboat charter. Michigan S. S. Co. v. American Bonding Co., 93 N. Y. S. 805. The surety on a court bond is not released by a change in the complaint where such amendment is allowed under the rules of the court. Campbell & Zell Co. v. American Surety Co., 129 F. 491. A voluntary payment by the mortgagor of an increased rate of interest is not a novation discharging the surety in the absence of any agreement making such an increase binding. New York Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916. The surety of a running account is not released by the removal of the principal's business. Rouss v. King [S. C.] 48 S. E. 220. Where a note is given for the privilege of exclusive sale of a publication in one county, the giving of the same right in an adjoining county will not relcase the surety thereon. Heddrick v. Huffaker, 26 Ky. L. R. 201, 80 S. W. 1130.

Building contracts: Failure to pay instalments promptly not resulting in damage. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327. Failure to pay advance instalments. Getchell & M. Lumber & Mfg. Co. v. National Surety Co., 124 Iowa, 617, 100 N. W. 556. Failure to promptly select materials causing delay. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327. In the absence of proof as to damages, extension of time of completion of building. Beebe v. Redward, 35 Wash. 615, 77 P. 1052. In the absence of loss, failure to insure a building as provided for in contract. Hohn v. Shideler [Ind.] 72 N. E. 575. Trivial alterations in work not changing the amount due thereon. Id. In the absence of damage, an extension of time of completion of work. Henry v. Aetna Indemnity Co., 36 Wash. 553, 79 P. 42. To be relieved from liability, the surety of a building contract must show alterations to his damage and to that extent only will he be relieved from liability. Schreiber v. Worm [Ind.] 72 N. E. 852. Premature payment of an instalment on a building contract (before all materials were delivered), held to release surety. Glenn County v. Jones [Cal.] 80 P. 695.

Note: It is held that a surety who engages for a consideration and profit to himself is not entitled to the same favor shown towards gratuitous sureties. The same strictness in interpreting the engagement in the sureties' favor is not indulged, but the rule applied to insurers is followed. Cowles v. United States F. & G. Co., 32 Wash. 120, 72 P. 1032, 98 Am. St. Rep. 839, with note, p. 844. In that note the growth of this doctrine is recognized and numerous cases are cited which adopt or lean towards it. Supreme Council Catholic Knights, etc., v. Fidelity, etc., Co. [C. C. A.] 63 F. 48; American Surety Co. v. Pauly, 170 U. S. 133, 42 Law. Ed. 977. The strict construction in favor of the surety has however been applied in American Surety Co. v. Thorn-Halliwell, etc., Co., 9 Kan. App. 8, 57 P. 237; Harrisburg Sav. etc., Ass'n, v. United States Fidelity, etc., Co., 197 Pa. 177, 46 A. 910; United States v. National Surety Co. [C. C. A.] 92 F. 549, and other recent cases cited 98 Am. St. Rep. 846 (note). As the annotator there says, the question usually arises on contracts in which the indemnification of the other party is the predominant object, e. g., fidelity bonds. See Indemnity, 3 Curr. L. 1698.

82. Bateman Bros. v. Mapel, 145 Cal. 241, 78 P. 734; Commonwealth Bldg. & Loan Ass'n v. Steele, 23 Pa. Super. Ct. 19. The alteration of the character of membership in a lodge does not increase the risk and does not release the surety of an officer thereof. Coombs

The surety also has an additional ground for discharge from an altered contract on the ground that it increases his risk, and this is held to be a complete defense, whether or not the alteration was in fact for his benefit.[83] Where the breach of the contract may have contributed to induce a total default, the release will be entire and not partial.[84] The burden is upon the creditor to show he has done nothing to release the surety.[85] An averment by the surety that the contract is materially altered is bad unless it alleges what the alterations were.[86]

(§ 4) *D. Defenses arising out of suspension of liability of principal.*[87]—Since a promise on part of the creditor to extend the time of payment of an obligation would prevent immediate enforcement thereof by the surety on his payment and consequent subrogation to the rights of the creditor, from the time of the making of such a promise, the surety is discharged.[88] Such promise must

v. Harford [Me.] 59 A. 529. On the theory that the principal is the agent of the surety in consenting to alteration, the latter was not released when the doors connecting the saloon of the principal and the hotel of the plaintiff were permanently closed, thereby decreasing the business value of the saloon. Quandt v. Smith [Wash.] 80 P. 287. Though an officer of a corporate surety finds material alterations, his silence cannot be construed as consent. City of Middletown v. Aetna Indemnity Co., 90 N. Y. S. 16. A surety cannot complain of excessive advancements upon a building contract where they are permitted in the body thereof. Bateman Bros. v. Mapel, 145 Cal. 241, 78 P. 734. Where a railroad contract left the choice of routes to the constructors, a complete change in location does not release the sureties. American Surety Co. v. Choctaw Const. Co. [C. C. A.] 135 F. 487. Alterations not causing additional cost when such stipulated for in contract. Bagwell v. American Surety Co., 102 Mo. App. 707, 77 S. W. 327. Contract held not to forbid change in plans but only change at contract price, hence making change did not release surety. Daly v. Busk Tunnel R. Co. [C. C. A.] 129 F. 513.

83. Held to be an increase of the risk: Where the terms of the employment provide that collections shall be delivered to the employe. Indiana & O. Live Stock Ins. Co. v. Bender, 32 Ind. App. 287, 69 N. E. 691. Where the duties of the employment provide for weekly reports, the neglect to obtain these will release the surety from all liability. Singer Mfg. Co. v. Boyette [Ark.] 86 S. W. 673.

Building contracts: Too early payment of a building contract. Lawhon v. Toors [Ark.] 84 S. W. 636. Where the contract provides that the contractor shall not be paid till he produces receipts for all material and labor bills, the payment without such production discharges the surety. Shelton v. American Surety Co. [C. C. A.] 131 F. 210. Lack of notice of prior delays releases the surety of a defaulting contract for penalties for delays but not for default. Heffernan v. United States Fidelity & Guaranty Co. [Wash.] 79 P. 1095.

Held not to be an increase in the risk sufficient to amount to a discharge: Excessive payments on a building contract. Degnon-McLean Const. Co. v. City Trust, Safe Deposit & Surety Co., 90 N. Y. S. 1029. Alterations to a heating plant which have no effect on its efficiency do not release surety from liability for its failure. Board of Education of St. Louis v. National Surety Co., 183 Mo. 166, 82 S. W. 70. Where excessive advancements have been made on a building contract which have been repaid prior to the default of the contractor, the surety cannot complain. Leghorn v. Nydell [Wash.] 80 P. 833. Where a building contract provides that fifteen days shall elapse from fulfillment of the contract before payment, and such payment is prematurely made, the sureties thereof are not necessarily released. Lawhon v. Toors [Ark.] 84 S. W. 636.

84. Premature payment of part of building contract price. Glenn County v. Jones [Cal.] 80 P. 695.

85. Stendal v. Ackerman, 43 Misc. 54, 86 N. Y. S. 468. In a suit on a bond for the payment of alimony, the burden is upon the plaintiff to show she has done nothing which in equity releases the sureties. Id.

86. Leppert v. Flaggs [Md.] 60 A. 450.

87. See 2 Curr. L. 1781.

88. Bowling v. Chambers [Colo. App.] 77 P. 16; Preston v. Garrard, 120 Ga. 689, 48 S. E. 118; Regan v. Williams [Mo.] 84 S. W. 959; Westbay v. Stone [Mo. App.] 87 S. W. 34; Winslow v. Stoothoff, 93 N. Y. S. 335; Iowa Loan & Trust Co. v. Schnose [S. D.] 103 N. W. 22. The giving of renewal notes amounts to an extension of time. People v. Grant [Mich.] 100 N. W. 1006. The giving of a new note does not amount to an extension of time, but merely a conditional payment pending upon the collectibility of the new note. Hummelstown Brownstone Co. v. Knerr, 25 Pa. Super. Ct. 465. The subsequent extension of old credits for which surety is not liable does not thereby release him. Rouss v. King [S. C.] 48 S. E. 220. The acceptance after maturity of an obligation of unmatured interest amounts to an extension of time thereon. Germania Life Ins. Co. v. Casey, 90 N. Y. S. 418. The acceptance of unmatured interest three days before due where two and one-half of these days were legal holidays does not amount to an extension of time. New York Life Ins. Co. v. Casey, 178 N. Y. 381, 70 N. E. 916. A sixty-day extension of time granted the obligor of a building bond running to the United States, conditioned to pay all material and labor bills on maturity when granted by a materialman, does not discharge the surety. United States Fidelity & G. Co. v. United States, 191 U. S. 416, 48 Law. Ed. 242.

be made without the consent of the surety,[89] and be an enforceable forbearance,[90] supported by a good and valuable consideration.[91]

(§ 4) *E. Defenses based on impairment of surety's secondary remedies against principal or collateral securities.*[92]—A surety can only be relieved for injury of his right of subrogation by affirmative proof of actual injury.[93] A surety is discharged pro tanto by the wrongful surrender of the security for a debt[94] or the release of attached property;[95] but that a creditor refuses to take certain collateral security does not necessarily release a surety.[96]

(§ 4) *F. Defenses based on fraud or concealment by creditor of material facts.*[97]—Before entering upon a contract it is the duty of the creditor or obligee to disclose all pertinent facts regarding the subject-matter of the contract in his knowledge;[98] but in the absence of inquiry, the knowledge of personal defects of the principal need not be communicated;[99] but the false representations of the principal to the surety afford no defense to an action brought by the creditor,[1] except where they are made in the creditor's presence, and he, knowing them to be false, does not deny them.[2] Negligence on part of an employer or his agents in not discovering the default of his servant is not sufficient to discharge the surety,[3] and while the employer is generally bound to notify the surety immediately on discovery of any default whereby the latter would become liable,[4] yet formal notice need not be given when the surety is of necessity in full possession of that

89. United States v. Guerber, 124 F. 823; Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297. An extension of time granted with consent of the surety does not operate as a discharge. Cook v. Landrum, 26 Ky. L. R. 813, 82 S. W. 585. When a surety agrees with the creditor that he shall be looked to as the principal, an extension of time does not operate as a release. Merchants' Nat. Bank v. Murphy [Iowa] 101 N. W. 441.

90. Extension of note must have been definite for consideration without consent of surety and he known to be such. Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297. Evidence held insufficient to show such extension. Id.

91. Lehnert v. Lewey [Ala.] 37 So. 921; Bowling v. Chambers [Colo. App.] 77 P. 16; Regan v. Williams [Mo.] 84 S. W. 959. Mere indulgence to principal does not release. Barber v. Ruggles [Ky.] 87 S. W. 785.

92. See 2 Curr. L. 1781.

93. North Ave. Sav. Bank v. Hayes [Mass.] 74 N. E. 311.

94. Brown v. First Nat. Bank [C. C. A.] 132 F. 450. Where a secured creditor releases one surety, the co-sureties are released in a proportionate amount. Wanamaker v. Powers, 93 N. Y. S. 19. Where stock is pledged for the payment of a note, the creditor on sale cannot use the proceeds for any other purpose. Iowa Nat. Bank v. Cooper [Iowa] 101 N. W. 459. See, also, ante, § 4 C.

95. National Surety Co. v. Walker [Iowa] 101 N. W. 780.

96. Rouss v. King [S. C.] 48 S. E. 220.

97. See 2 Curr. L. 1782.

98. Indiana & Ohio Live Stock Ins. Co. v. Bender, 32 Ind. App. 287, 69 N. E. 691. On bond of town official the knowledge must be shown to be constructively that of the town. Inhabitants of Hudson v. Miles, 185 Mass. 582, 71 N. E. 63. Statements of the obligee concerning the employe will not be construed as warranties unless not open to any other interpretation. Guthrie Nat. Bank v. Fidelity & Deposit Co., 14 Okl. 636, 79 P. 102.

99. Sherman v. Harbin [Iowa] 100 N. W. 629. Prior indebtedness. Wanamaker v. Powers, 93 N. Y. S. 19. Account overdrawn at plaintiff bank. Lee v. Grant County Deposit Bank, 25 Ky. L. R. 1208, 77 S. W. 374.

1. Inhabitants of Hudson v. Miles, 185 Mass. 582, 71 N. E. 63; Bromberg v. Fidelity & Deposit Co., 139 Ala. 338, 36 So. 622.

2. First Nat. Bank v. Terry, 135 F. 621.

3. But see United States Fidelity & Guaranty Co. v. Blackley, 25 Ky. L. R. 1271, 77 S. W. 709; Anderson v. Blair, 121 Ga. 120, 48 S. E. 951; American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

4. Building contract which provides for notification of sureties of any act of principal for which they may be held liable does not require them to notify of mere indebtedness but merely of the filing of liens. Ovington v. Aetna Indemnity Co., 36 Wash. 473, 78 P. 1021; Denny v. Spurr [Wash.] 80 P. 541. Neglect to notify of delay is a defense to liability for delay but not of entire default. Trinity Parish of Seattle v. Aetna Indemnity [Wash.] 79 P. 1097. Where by terms of the contract, the surety is liable for defaults discovered within six months of termination of the bond or within six months of dismissal of employe and more than six months after defalcations they were discovered, and followed by instant dismissal, recovery can be had. Hawley v. United States Fidelity & Guaranty Co., 90 N. Y. S. 893. Where by statute (Rev. St. 1895, §§ 3811-3814), it is provided that a creditor must sue at the request of a surety, and on failure, the latter is discharged, the surety on a building contract cannot plead that if notice had been given to him of a breach of contract he would have completed the work himself. Dallas Homestead & Loan Ass'n v. Thomas [Tex. Civ. App.] 81 S. W. 1041.

information.[5] Fraudulent acts which would be a good equitable defense to any obligee are a good defense to a surety.[6]

(§ 4) *G. Other defenses.*[7]—A surety is entitled to have the security of a secured debt sold before resort to him,[8] and where payments are made by the principal on a running account, part of which is secured, they should be applied according to priority of time,[9] and failure to apply the same discharges the surety pro tanto.[10] In states where at the request or demand of a surety the creditor must sue the principal, a mere notice from the surety that the latter was selling his property and preparing to leave the state does not release the surety.[11] That the negligence of the county treasurer was the proximate cause of the loss upon a county auditor's bond is no ground of defense for the sureties in a suit brought thereon by the county.[12]

§ 5. *Rights of surety against principal and co-surety.*[13]—Upon payment to the creditor of the full amount of the liability of the principal, the surety is subrogated to his rights against the principal, security, and the co-sureties for their proportional share of the indebtedness.[14]

Indemnity and contribution.[15]—Moreover, on payment of any sum as surety for the principal, the surety has a right of indemnity to recover on an implied contract from the principal;[16] but the payment must be in satisfaction of a debt for which the surety is legally liable,[17] and the right to recover is barred by the statute of limitations at the same time as on any implied contract.[18] For any

5. Formal notice provided for in the contract may be dispensed with where surety already has knowledge. Henry v. Aetna Indemnity Co., 36 Wash. 553, 79 P. 42. Surety on additional bond of treasurer to secure repayment of money held by him, held liable, though treasurer had in his hands more than the sum allowed by the by-laws, and though he received no notice of the condition of his accounts, he being a member of the lodge and familiar with accounts, and the bond being given for very reason that treasurer had extra funds in his hands. Court Vesper No. 69, Foresters of America, v. Fries, 22 Pa. Super. Ct. 250.

6. A surety on maturity of certain obligations gave renewal notes, after which suit was brought on one of the prior instruments of indebtedness. The surety claimed this as a discharge on ground of fraud. Held, on the dismissal of the suit and release of the claim by the plaintiff, the surety was still liable, suffering no injury. Sowles v. First Nat. Bank, 130 F. 1009.

7. See 2 Curr. L. 1783.

8. Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co., 119 Wis. 54, 94 N. W. 777. But see, Olds v. City Trust, Safe Deposit & Surety Co., 185 Mass. 500, 70 N. E. 1022.

9. Ida County Bank v. Siedensticker [Iowa] 102 N. W. 821.

10. Lowe v. Reddan [Wis.] 100 N. W. 1038; Crane Co. v. Pacific Heat & Power Co., 36 Wash. 95, 78 P. 460. In the absence of any stipulation, the applications of payments by a creditor to any one of several notes cannot be questioned. Wanamaker v. Powers, 93 N. Y. S. 19. No release where the deposit of funds with the creditor bank was never sufficient to pay debt. Fordsville Banking Co. v. Thompson, 26 Ky. L. R. 534, 82 S. W. 251. A surety paying the entire obligation is entitled to have any sums owed the co-surety by the creditor applied to the debt. In re Rock Hill Cotton Factory Co., 68 S. C. 436, 47 S. E. 728.

11. Bowling v. Chambers [Colo. App.] 77 P. 16.

12. Board of Com'rs of Ramsey County v. Sullivan [Minn.] 102 N. W. 723.

13. See 2 Curr. L. 1783.

14. See Subrogation, 2 Curr. L. 1768. Where a purchaser of land gives a bond to satisfy the dower right and defaults, his surety on satisfaction, is entitled to the land. Van Ormer's Estate, 25 Pa. Super. Ct. 234. Paying sureties are subrogated to all the creditor's rights against co-sureties and the debtor. Wilks v. Vaughan [Ark.] 83 S. W. 913.

Note: An exhaustive monograph on "The Right of Subrogation" with special treatment of rights of sureties will be found in 99 Am. St. Rep. 533.

15. See 2 Curr. L. 1784.

16. Culver v. Caldwell, 137 Ala. 125, 34 So. 13. The surety need not wait till judgment is rendered before payment. Howe v. White, 162 Ind. 74, 69 N. E. 684. The surety must not only pay the amount due on the execution, but must also have the entry of payment made thereon, before he can control the judgment and execution against a surety. Cureton v. Cureton, 120 Ga. 559, 48 S. E. 162.

17. Where a series of successive guardians' bonds with different sureties, the latter cannot arbitrarily apportion the loss among themselves and look to him for indemnity but each must show the satisfaction of his individual legal liability in order to recover from the principal. Howe v. White, 162 Ind. 74, 69 N. E. 684.

18. Usher v. Tyler [Ky.] 85 S. W. 166. Though a party for whom a payment is made may not be liable on any implied contract,

payment in excess of his pro rata share, surety may recover in an action for contribution from his co-sureties, which action is akin to indemnity,[19] even when the original obligation is barred by statute,[20] or where no action lies on the original obligation.[21] This right he may enforce either in law or equity.[22] At law, however, he must bring an action against each surety separately for his aliquot part, which is all that he can recover, even when one or more of the sureties are insolvent;[23] but in equity the proceeding may be against all the co-sureties, and, upon proof of the insolvency of one or more, the payment of the amount will be distributed among the solvent parties in due proportion.[24] The right of contribution is such a claim as may be assigned by a surety and enforced against a co-surety by the assignee.[25] Where a surety has property given him by the principal to indemnify him against loss, he may be compelled to share it with his co-sureties,[26] and so where a surety releases a judgment against the principal,[27] or property given him as security, his co-sureties are released pro tanto;[28] but not where the right to sue co-sureties is reserved,[29] or where it was given as further security and not in pursuance of a common understanding,[30] or lost by the nonculpable act of the surety holding it.[31] Co-sureties cannot object to the sale of a surety's property in satisfaction of the debt.[32] Sureties on different notes for the purchase of the same goods are not necessarily co-sureties of each other,[33] and so when the owner of premises is liable with the lessee for injuries caused by the sale of liquor, he is not such a co-surety with the sureties on the liquor seller's bond as to entitle them to contribution.[34] The surety may compel the principal in an equitable action, in the nature of specific performance, to exonerate him from liability.[35]

he may be liable on an express or independent promise to pay. Kellogg v. Loper, 145 Cal. 497, 78 P. 1056.

19. Strickler v. Gitchel, 14 Okl. 523, 78 P. 94; Kellogg v. Lopez, 145 Cal. 497, 78 P. 1056; Bailey v. McAlpin [Ga.] 50 S. E. 388. Where one surety has paid the entire obligation of the principal, his co-sureties must contribute to him their pro rata share. Wash v. Sullivan & Co. [Tex. Civ. App.] 84 S. W. 368. The measure of liability of a co-surety is the whole amount of the principal and interest paid by the other surety, together with interest from the date of such payment. Weimer v. Talbot [W. Va.] 49 S. E. 372. Where several persons jointly subscribe to an undertaking with a right of contribution given by the contract, they are liable pro rata, not including the subscriptions of insolvents. Kentucky Live Stock Breeders' Ass'n v. Miller [Ky.] 84 S. W. 301.

20. Charbonneau v. Bouvet [Tex.] 82 S. W. 460. See, also, "note," ante, § 4B.

21. Kellogg v. Lopez, 145 Cal. 497, 78 P. 1056.

22. Where one surety is compelled, on account of the neglect or failure of the principal, to pay or discharge a common debt, he has a right to contribution from his co-surety, which he may enforce either at law or in equity. Thompson v. Hibbs [Or.] 76 P. 778.

23. Thompson v. Hibbs [Or.] 76 P. 778. Where one surety pays a creditor the entire amount of a note already paid by another surety, believing that no payment has been made, he may recover from the creditor only the excess of his pro rata payment. Wash v. Sullivan & Co. [Tex. Civ. App.] 84 S. W. 368.

24. Thompson v. Hibbs [Or.] 76 P. 778.

25. Weimer v. Talbot [W. Va.] 49 S. E. 372.

26. North Ave. Sav. Bank v. Hayes [Mass.] 74 N. E. 311.

27. Anderson v. Hendrickson, 1 Neb. Unoff. 610, 95 N. W. 844.

28. Bull v. Rich, 92 Minn. 475, 100 N. W. 212.

29. Kolb v. National Surety Co., 176 N. Y. 233, 68 N. E. 247.

30. North Ave. Sav. Bank v. Hayes [Mass.] 74 N. E. 311.

31. The relation of a surety who has paid the claim against the principal to a co-surety is that of trustee, and he is only chargeable with good faith and reasonable care to the extent of the value of the property secured by him as indemnity for his claim against the principal. Bull v. Rich, 92 Minn. 475, 100 N. W. 212.

32. Terry v. Johnston [C. C. A.] 129 F. 354.

33. Miller v. Knight Mfg. Co., 26 Ky. L. R. 1201, 83 S. W. 631.

34. Wanack v. Michels [Ill.] 74 N. E. 84.

35. The grantee of a mortgagor not assuming the debt may require the mortgagee to apply any securities he may receive to the payment of the mortgage debt. Illinois Trust & Sav. Bank v. Alexander Stewart Lumber Co., 119 Wis. 54, 94 N. W. 777. The secured surety may set aside a fraudulent conveyance of the security from husband to wife. Cook v. Landrum, 26 Ky. L. R. 813, 82 S. W. 585.

§ 6. *Security held by surety and rights therein.*[36]—On payment of the indebtedness, a surety is entitled to share in the security deposited with a co-surety for his indemnification,[37] and a creditor is entitled to security in the hands of a surety for the indemnification of the latter on the debt.[38]

§ 7. *Remedies and procedure.*[39]—The questions of practice are almost all referable to some of the equitable remedies and rights mentioned in a preceding section,[40] and to the practice in actions on bonds or notes.[41] In an action on the bond, a release of sureties should be specially pleaded.[42] The court may refuse leave to sureties to file it during trial.[43] It must plead facts amounting to one of the defenses already referred to.[44]

SURFACE WATERS; SURPLUSAGE; SURROGATES; SURVEYORS; SURVIVORSHIP; SUSPENSION OF POWER OF ALIENATION; TAKING CASE FROM JURY, see latest topical index.

TAXES.[45]

[BY JOSEPH H. DUNNEBACKE.]

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§ 1. *Nature and kinds.*[46]—A tax has been defined as an enforced contribution from a citizen to the state to be applied for governmental purposes.[47] It is not, in its essential characteristics, a debt,[48] but an import, levied by authority of government upon its citizens or subjects for the support of the state.[49] This

36. See 2 Curr. L. 1785.

37. North Ave. Sav. Bank v. Hayes [Mass.] 74 N. E. 311.

38. State v. Bergfeld, 108 Mo. App. 630, 84 S. W. 177.

39. See 2 Curr. L. 1785.

40. See section 5 and the topics, Contribution, 3 Curr. L. 865; Subrogation, 2 Curr. L. 1768, and the like.

41. See Bonds, 3 Curr. L. 507; Negotiable Instruments, 4 Curr. L. 787.

42, 43. Leader v. Mattingly, 140 Ala. 444, 37 So. 270.

44. Answer of surety for corporation held demurrable because it neither alleged release of debtor by failure to sue nor alleged such agreement with debtor as to affect the risk. Durbin v. Northwestern Scraper Co. [Ind. App.] 73 N. E. 297.

45. This title includes all matters of general taxation and excludes to Public Works, and Improvements, 4 Curr. L. 1124, the law of local and special assessments.

46. See 2 Curr. L. 1786.

47. Citing Davies, System of Taxation, p. 1. Heerwagen v. Crosstown St. R. Co., 179 N. Y. 99, 71 N. E. 729.
See 2 Curr. L. 1786, n. 1.

48. Taxes are neither the subject of set-off nor may they be used for that purpose. Appeal of Bailies [Iowa] 102 N. W. 813; Board of Com'rs of Dawes County v. Furay [Neb.] 99 N. W. 271.

49. Appeal of Bailies [Iowa] 102 N. W. 813. The theory of taxation is that each individual shall contribute to the state a fair proportion of his substance within its limits in return for the protection to his person and his property afforded him while within its jurisdiction. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3.

authority or power to lay a tax is an incident of sovereignty,[50] residing in the legislative branch of the government,[51] and, in the absence of constitutional restraints, is as unlimited as the subject with which it deals.[52] Nevertheless, there are several well defined limitations upon the exercise of this power, some of which have been in express terms incorporated by the people in their fundamental charters; thus the provisions of the Federal constitution guarantying equal protection of the laws,[53] forbidding the deprivation of property without due process of law,[54] and denying to the states the right to tax objects of interstate commerce,[55] and imports and exports,[56] and those of the state constitution restricting

50. State v. Ide, 35 Wash. 576, 77 P. 961. It is not founded upon contract or agreement, but operates **in invitum.** Appeal of Bailies [Iowa] 102 N. W. 813. See 2 Curr. L. 1786, n. 2.

51. State v. Guilbert, 70 Ohio St. 229, 71 N. E. 636. It is for the legislature to determine all questions of state necessity, discretion, or policy, involved in ordering a tax, and in apportioning it (Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874), and to make the necessary rules and regulations which are to be observed in order to produce the desired returns (Id.), and it must decide upon the agencies by means of which collections shall be made (Id.). What property shall be embraced within a tax district, and whether it shall be taxed for municipal purposes, is a political question to be determined by the legislature. Id. When the people adopt a constitution and thereby create a department of government upon which they confer the power to make laws, the power of taxation is conferred as a part of such general powers. State v. Ide, 35 Wash. 576, 77 P. 961.

52. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3; Aachen & M. Fire Marine Ins. Co. v. Omaha [Neb.] 100 N. W. 137; Western Union Telegraph Co. v. Omaha [Neb.] 103 N. W. 84; Hacker v. Howe [Neb.] 101 N. W. 255; In re Morris' Estate [N. C.] 50 S. E. 682. The power to tax is the power to destroy. People's Sav. Bank v. Layman, 134 F. 635.

53. A statute taxing debts due from solvent debtors does not offend a constitutional provision against double taxation, nor does it violate the provisions of the 14th amendment. Kingsley v. Merrill [Wis.] 99 N. W. 1044. Intent to impose taxation which is double even from an economic view point is not to be ascribed to legislation in absence of clear and unambiguous expression. First Nat. Bank v. Douglas County [Wis.] 102 N. W. 315. A street railway is not denied the equal protection of the laws because a municipallty taxes its business at the rate of $100 per mile, when a steam railway making an extra charge for local deliveries of freight brought over its road from outside the city is not subjected to the same tax. Savannah, etc., R. Co. v. Savannah, 25 S. Ct. 690. An excise tax which operates uniformly throughout the state, and bears equally upon all persons standing in the same category, does not deprive any of the equal protection of the laws. State v. Guilbert, 70 Ohio St. 229, 71 N. E. 636. The Federal constitution does not forbid state taxation of the franchise of a domestic corporation at a different rate than is assessed upon the tangible property in the state. Coulter v. Louisville & N. R. Co., 25 S. Ct. 342.

54. The constitution and statutes of a state in so far as they may undertake to forfeit and divest the title of any person to his land and vest the same in another person or in the state without provision for redemption, are in contravention of the 14th amendment. King v. Hatfield, 130 F. 564. A statute providing for the taxation for fire protection of all buildings and the land on which they stand, which do not take water from the municipal waterworks, is invalid as taking property without due process of law. Village Law, § 230, as amended by Laws 1902, p. 1628, c. 591. Village of Canaseraga v. Green, 88 N. Y. S. 539. Assessing by the frontage rule the entire cost of a street extension including a charge for planking is not so manifestly unfair to an abutting owner whose property lies some distance beyond the point where the planking stopped as to render the assessment void as a denial of due process of law. City of Seattle v. Kelleher, 25 S. Ct. 44. An owner is not deprived of his property without due process of law by means of taxation if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings either before that amount is finally determined or in subsequent proceedings for its collection. Hacker v. Howe [Neb.] 101 N. W. 255.

55. In re Enforcement of Personal Property Taxes Delinquent in Ramsey County 1902 [Minn.] 192 N. W. 721. A license tax imposed on an agent of a corporation of one state for the privilege of selling goods in another state is a tax on Interstate commerce and invalid when laid by a state. In re Julius, 4 Ohio C. C. (N. S.) 604. Cars of a foreign corporation (not a railroad corporation) which are merely in transit in a given state for the purpose of taking merchandise into or through the state are instruments of interstate commerce and not taxable. Union Tank Line Co., In re, 204 Ill. 347, 68 N. E. 504. That a toll bridge is part of a structure which carries trains engaged in interstate commerce does not prevent its taxation. Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85. Exemption from interstate business does not, however, relieve one from taxation who at the same time carries on a business intrastate. Smith v. Clark [Ga.] 50 S. E. 480. Taking the entire valuation of a railroad property, without as well as within the state, and dividing it upon a mileage basis for the purpose of fixing the value of that portion within the state, does not offend commerce clause of constitution. St. Louis, etc., R. Co. v. Davis, 132 F. 629.

56. The tax imposed by Laws 1903 of

the rate of taxation,[57] the purposes for which taxes may be levied,[58] and providing for uniformity and equality,[59] must not be violated. Again, the taxing power is circumscribed by several well defined implied limitations; thus, the persons and property must be within the territorial limits of the taxing power,[60] the tax laid must operate uniformly and equally throughout the taxing district,[61] and the

North Carolina, p. 723, c. 414, on shellfish taken and "shipped out of the county," is not an export tax, and is, therefore, not unconstitutional for that reason. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401.

57. Town of Bardwell v. Harlin, 26 Ky. L. R. 101, 80 S. W. 773. The enactment of the Colorado legislature (Sess. Laws 1903, p. 159, c. 79), making specific provision for the payment by the city and county of Denver to the counties of Adams and South Arapahoe of their proportionate interest in the former county of Arapahoe, which the constitutional amendment vested in the city and county of Denver, is valid, though by reason of it the annual levy for the city and county will exceed the constitutional rate. City Council of City and County of Denver v. Board of Com'rs of Adams County [Colo.] 77 P. 858.

58. Certain acts of the South Carolina legislature exempting part of Williamsburg county in that state from the operation of the general stock law, held valid, though in conflict with Const. 1895, art. 10, § 6, the constitution being construed as operating prospectively only. McCullough v. Graham [S. C.] 49 S. E. 1.

59. A tax possesses the requisite character of uniformity if the persons subject to it are duly divided into classes and the law operates on the members of each class uniformly under substantially the same circumstances and conditions (foreign insurance company). Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. Under the Nebraska constitution, insurance companies not organized under the laws of that state may be treated as a single class, and taxed at a rate different from that imposed upon such corporations that are so organized. Id. The only limitations in territories applicable to the question is that contained in the 14th amendment, which guaranties to all persons the equal protection of the laws. Territory v. Denver, etc., R. Co. [N. M.] 78 P. 74. This guaranty is not quite the exact equivalent of "equality" and "uniformity" as used in state constitutions. Given a reasonable and just classification of taxpayers, all that the fourteenth amendment guaranties is that all in the class shall be treated alike. Id. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class. St. Louis, etc., R. Co. v. Davis, 132 F. 629. Reasonable classifications of property for the purposes of taxation are not in violation of the rule of uniformity. Taxation of debts due from **solvent** debtors. Kingsley v. Merrill [Wis.] 99 N. W. 1044. A tax required for the enforcement of a police regulation is not a tax within the meaning of the constitutional requirement of uniformity and equality. Tax imposed on shellfish taken and shipped out of county. Brooks v. Tripp, 135 N. C. 159, 47 S. E. 401.

Note: See as to sale of liquor, sale of cotton seed, fence laws, cattle running at large, working public roads, etc., the authorities collected in State v. Sharp, 125 N. C. 632, 34 S. E. 264, 74 Am. St. Rep. 663. The provision of the Michigan statute (Comp. Laws 1897, § 3834) that the personal property of all corporations organized under the laws of that state for the purpose of engaging in maritime commerce or navigation shall be assessed in the city, village or township which is stated in their articles of association or in any amendment thereof, violates the constitutional provision as to uniformity. Teagan Transp. Co. v. Board of Assessors of Detroit [Mich.] 102 N. W. 273; City of Detroit v. Mackinaw Transp. Co. [Mich.] 103 N. W. 557.

Note: Whether taxation in two different jurisdictions is double taxation is discussed in 5 Columbia L. R. 50, commenting on Buck v. Beach [Ind.] 71 N. E. 963. Poll tax exempting firemen of city of third class held unconstitutional as violating rule of uniformity. State v. Ide, 35 Wash. 576, 77 P. 961. That part of the Nebraska revenue act after providing for a tax on net receipts, that insurance companies shall be subject to no other taxes, fees or licenses, held unconstitutional because exempting personal property from taxation. State v. Insurance Co. of North America [Neb.] 100 N. W. 405, reversing 99 N. W. 36.

60. It is within the power of the state to tax all property over which **it has jurisdiction,** whether the owner resides in state or is nonresident. Railroad cross ties ready to be shipped out of state. Johnson v. Bradley-Watkins Tie Co. [Ky.] 85 S. W. 726. This excludes the idea of tangible property lying within the confines of another state which belongs to residents of the foreign state being subject to taxation within the local state. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. This power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufacture, and in transportation. Commonwealth v. Williams, 102 Va. 778, 47 S. E. 867, quoting from State Tax on Foreign-Held Bonds, 15 Wall. 300.

61. Village of Canaseraga v. Green, 88 N. Y. S. 539.

tax must be for a public purpose,[62] and the public interest must be coextensive with the territory upon which the tax is laid.[63] Since the power of taxation is a sovereign power and belongs exclusively to the legislative branch of the government, where the legislature has not exercised this power, no other department of the government can supply the omission.[64] But authority to tax may be expressly delegated to municipalities.[65]

Poll taxes are no longer levied in several states.[66]

Legislative acts under which the authority to impose taxes is asserted are to be strictly construed.[67] The amendment to the Iowa Code providing for taxation of telephone companies, being unconstitutional, vitiated the entire statutory scheme for the taxation of those companies by that state.[68] The Pennsylvania

62. The Massachusetts statute (St. 1904, p. 473, c. 458), directing payments to Civil War veterans, held unconstitutional in an opinion of the justices to the governor. In re Bounties to Veterans [Mass.] 72 N. E. 95. Draining and reclaiming swamp land is a public purpose. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141. The appropriation of an annual sum for the care of destitute and homeless children is for a public purpose. Hager v. Kentucky Children's Home Soc., 26 Ky. L. R. 1133, 83 S. W. 605.

63. The rule enunciated in Baldwin v. Fuller, 39 N. J. Law, 576, 40 N. J. Law, 615, that the legislature may not create a taxing district narrower in extent than the political district of which it is a part, has no applicancy to a taxing district that includes the whole of certain political districts and parts of others, and where the taxes in question are imposed not by any delegated authority but by the legislature itself. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Law] 58 A. 571. An act of the legislature which authorizes a township to contribute to the erection of a bridge to be built under the supervision of the county commissioners, and authorizing a tax levy for the purpose of meeting such contribution, is not void because it authorizes an unequal burden of taxation on the people of such township. McMillan v. Board of Com'rs of Payne County, 14 Okl. 659, 79 P. 898.

64. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. The levy of taxes is not a judicial function. Its exercise by the constitutions of all the states and by the theory of our English origin is exclusively legislative. McConnell v. Hampton [Ind.] 73 N. E. 1092. The judicial power cannot legitimately question the policy or refuse to sanction the provisions of any law not inconsistent with the fundamental law of the state. Kettle v. Dallas [Tex. Civ. App.] 80 S. W. 874. It is only when the legislature has abused its powers and transcended its legislative function by the enactment of that which is called a tax but which is not such in fact that the department of the judiciary can call in question the legislative enactment. Id. When the constitution confers upon the legislature the power to levy taxes, the amount of the tax to be levied is committed to that department of the government and not open to review by the judicial department. State v. Roberson, 136 N. C. 587, 48 S. E. 595; McCray v. U. S., 195 U. S. 27, 49 Law. Ed. ——.

65. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. A municipality can levy no taxes for general purposes by an inherent power. Adams v. Ducate [Miss.] 38 So. 497. The provisions of Priv. Laws 1857, p. 219, c. 11, giving city council of Joliet authority to levy taxes for school purposes, were not repealed by the general school law. People v. Mottinger [Ill.] 74 N. E. 150. Every system of taxation consists of two parts, the elements that enter into the imposition of the tax, and the steps taken for its assessment and collection. The former is a legislative function, conserved by constitutional prescription; the other is mere machinery, and may be designated to other than governmental agencies. Matters of computation, appraisement, adjustment, and such like, involving mere certainty of detail, follow the delegable power. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Err. & App.] 60 A. 214. A grant of the power of local taxation to be valid must conform to the fundamental doctrine that the area over which such power extends shall be coincident with a political district of the state exercising some power of local government over the area selected for taxation. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Err. & App.] 60 A. 214. The legislature, in which the governmental power of taxation resides, does not possess the power to delegate to another body having no governmental function the authority to determine in its judgment a discretion the amount to be raised by taxation. Sewerage district. Van Cleve v. Passaic Valley Sewerage Com'rs [N. J. Err. & App.] 60 A. 214.

66. Poll taxes are prohibited by the constitutions of Ohio and Maryland. State v. Ide, 35 Wash. 576, 77 P. 961. Article 5, § 1, of the North Carolina constitution, providing that the general assembly shall levy a capitation tax equal on each person to the tax on property valued at $300, applies solely to state and county taxation, and does not require a municipal poll tax to be equal to the tax on $300 worth of property. Wingate v. Parker, 136 N. C. 369, 48 S. E. 774.

67. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. The Ky. revenue act of March 29, 1902 (Ky. Stat. 1903, c. 108), repealed all former provisions of law relating to the state's revenue which are not contained therein. Bevins v. Commonwealth [Ky.] 86 S. W. 544.

68. Layman v. Iowa Tel. Co., 123 Iowa, 591, 99 N. W. 205.

act of February 27, 1872, providing a special system for the collection of state and county taxes local to a particular county, was not repealed by the act of 1885.[69]

§ 2. *Persons, objects, and interests taxable. A. Taxable property and its classification.*[70]—In laying taxes the legislature has the right to classify persons and corporations; but no discrimination can be tolerated in favor of or against one of the same class. There is no valid objection, however, in the fact that one class is required to share in the common burden of taxation in a different way, even in a different degree, from those in other classes.[71] The classification of property for taxation as real or personal is usually made on common-law distinctions, though by statute it may be otherwise provided.[72]

(§ 2) *B. The persons liable*[73] are determined by ownership at the time of taxability. When taxes become a lien upon real property prior to and are unpaid at the time of the death of the owner, the executor is liable therefor, and not a testamentary trustee who came into possession of the property at the owner's death.[74] In Louisiana, buildings and improvements constructed after the first day of January of the current tax year are not subject to assessment,[75] and the taxable status of property in the city of New York is determined by its condition on the second Monday of January.[76] Property annexed to a city after the time fixed for the assessor's return of the list of taxable property cannot for that year be taxed for the local taxes of the city.[77] Under Mississippi statutes lands purchased from the state after February first, but before October first, are not liable to taxation for that year.[78] The title of a county to land bid in by it at a sale for taxes is not perfected before service of a notice of redemption and execution of a deed, and until that time the land should be assessed to the person in whose name the title stands.[79]

Vendor and vendee.—One who sells property after taxes are levied and before they become a lien is as between vendor and vendee liable for the taxes.[80]

Mortgagor and mortgagee.—A chattel mortgagor was not relieved from taxes assessed in his name, though a statute of the state provided that the legal title should be in the mortgagee and the latter had taken possession.[81]

As between a landlord and his tenant,[82] the former, unless otherwise stipulated, is obligated to pay taxes.[83]

Property of a bankrupt[84] in the hands of a trustee is not exempted from liability to state taxation by the National Bankruptcy Act of July 1, 1898.[85] The

69. Commonwealth v. Couch, 209 Pa. 354, 58 A. 667.

70. See 2 Curr. L. 1790.

71. Humphreys v. State, 70 Ohio St. 67, 70 N. E. 957.

72. Machinery in sugar refining plant. Commissioners of Anne Arundel County v. Baltimore Sugar Refining Co., 99 Md. 481, 58 A. 211.

73. See 2 Curr. L. 1790.

74. Loomis v. Von Phul, 2 Ohio N. P. (N. S.) 423.

75. Bunkie Brick Works v. Police Jury of Avoyelles, 113 La. 1062, 37 So. 970.

76. Ogden v. Getty, 91 N. Y. S. 664; People v. Wells, 89 N. Y. S. 847.

77. City of Latonia v. Meyer [Ky.] 86 S. W. 686.

78. Wildberger v. Shaw [Miss.] 36 So. 539.

79. Armstrong v. Nassau County, 91 N. Y. S. 867.

80. Appeal of Bailles [Iowa] 102 N. W. 813.

81. Foy v. Board of Com'rs of Comanche County, 69 Kan. 206, 76 P. 859.

82. See 2 Curr. L. 1791, n. 34.

83. Covenants in a lease that the tenant will pay all taxes and water charges run with the land. Lehmaier v. Jones, 91 N. Y. S. 687. Where a lease for 21 years, expiring October 1, 1903, required the lessee to pay all taxes during the term, the lessee was liable for the taxes of 1903, the rolls having been completed, and, with the warrant, having been given to the receiver of taxes September 15, 1903. Ogden v. Getty, 91 N. Y. S. 664.

84. See 2 Curr. L. 1791.

85. Swarts v. Hammer, 194 U. S. 441, 48 Law. Ed. 1060; In re Prince & Walter, 131 F. 546; In re Flynn, 134 F. 145.

notes and solvent credits of an insolvent state bank, passing to an assignee by a general assignment, are taxable in the hands of the assignee.[86]

Personalty of a decedent,[87] until distributed, is taxable to the personal representative,[88] and he is personally liable for the payment of the tax,[89] but for property not in his possession at the time it should have been listed, he is not liable.[90]

A life tenant[91] is charged with the duty of paying the taxes accruing during the continuance of his estate,[92] and he cannot, by neglecting this duty, acquire a tax title valid as against a remainderman.[93]

Property of a firm[94] in a state may be assessed to the partners jointly, where all the partners are nonresidents; and such assessment is sufficiently made in the assessment roll in the name of the firm.[95] Under the Indiana law, making each partner liable for the whole tax against the partnership, a partner is liable for back taxes, which the partnership omitted to list in previous years.[96]

(§ 2) *C. Corporations.*[97]—Corporations, like individuals, are subject to the taxing power of the state, and the methods employed in the various states for the taxation of these interests are diverse. First of all there is the franchise fee, payable to the state upon the organization of the corporation.[98] If the corporation owns realty within the state, this is usually assessed separately, as in the case of individuals.[99] Its personalty is usually not taxed as such, but enters into and is considered when assessing the company's franchises, capital, and the like.[1]

86. Gerard v. Duncan [Miss.] 36 So. 1034.

87. See 2 Curr. L. 1791.

88. Commonwealth v. Williams, 102 Va. 778, 47 S. E. 867. He is charged with the duty of payment; tax collector not required to present claim for taxes against estate. Cullop v. Vincennes [Ind. App.] 72 N. E. 166.

89. City of Louisville v. Robinson's Ex'r [Ky.] 85 S. W. 172.

90. Scott v. People, 210 Ill. 594, 71 N. E. 582.

91. See 2 Curr. L. 1791, n. 36.

92. In re Corbin's Will, 91 N. Y. S. 797; Woolley v. Louisville, 26 Ky. L. R. 872, 82 S. W. 608; Morrison v. Fletcher [Ky.] 84 S. W. 548. Where the life tenant died after assessment but before payment, the remainderman must pay the taxes to relieve the property from the lien thereof. Joyes v. Louisville, 26 Ky. L. R. 713, 82 S. W. 432. But see Rissberger v. Brown [Ky.] 85 S. W. 731, where remainderman was not made party to the action. Tennessee Act of 1897, c. 1, § 4, extends the lien to the estate of the remainderman. Hadley v. Hadley [Tenn.] 87 S. W. 250. Where the life tenant is not brought before the court in a suit against the remainderman, no interest of the life tenant passes under a judgment or sale. Fenley v. Louisville [Ky.] 84 S. W. 582.

Note: The life tenant is bound to pay the ordinary taxes on the property. Hagan v. Varney, 147 Ill. 281; Varney v. Stevens, 22 Me. 331; Jenks v. Horton, 96 Mich. 13; Bone v. Tyrrell, 113 Mo. 175; Roche v. Waters, 72 Md. 264, 7 L. R. A. 533; Johnson v. Smith, 5 Bush (Ky.) 102; Deraismes v. Deraismes, 72 N. Y. 154; Disher v. Disher, 45 Neb. 100. But of assessments for permanent improvements he need pay only a proportionate share. Plympton v. Boston Dispensary, 106 Mass. 547; Reyburn v. Wallace, 93 Mo. 326, Finch's Cas. 609; Thomas v. Evans, 105 N. Y. 601, 59 Am. Rep. 519; Outcalt v. Appleby, 36 N. J. Eq. 73, 80; Chambers v. Chambers, 20 R. I. 370. Unless the improvement is one that will probably not outlast the tenant's life. Wordin's Appeal, 71 Conn. 531, 71 Am. St. Rep. 219; Hetner v. Ege, 23 Pa. St. 305; Reyburn v. Wallace, 93 Mo. 326, Finch's Cas. 609. Extracted from Tiffany on Real Property, § 32, p. 75.

93. Jeffers v. Sydnam, 129 Mich. 440, 89 N. W. 42.

94. See 2 Curr. L. 1791, n. 38.

95. People v. Wells, 85 App. Div. 387, 83 N. Y. S. 387.

96. Burns' Ann. St. 1901, § 8423. Parkison v. Thompson [Ind.] 73 N. E. 109.

97. See 2 Curr. L. 1791. Taxation of corporations and their stock, see Clark & Marshall Corp. § 284 et seq.; Helliwell Stock & Stockholders, §§ 346-355.

98. See 2 Curr. L. 1792, n. 42. The renewal of a corporation under a general incorporation act is not the formation of a new corporation subject to a franchise tax. Burris v. Jessup & Moore Paper Co. [Del. Super.] 59 A. 860.

99. See 2 Curr. L. 1792, n. 43. Switches, wires and meters of an electric lighting company installed on property belonging to individuals to whom the company furnishes electricity, are not realty of the company subject to taxation. People v. Feitner, 45 Misc. 12, 90 N. Y. S. 826; People v. Feitner, 90 N. Y. S. 904. The United States has no such interest in land conveyed by it to a corporation for dry dock purposes with a reserved right of free use of the dock and a provision for forfeiture as will prevent a state from taxing the corporation's interest in such land. Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 25 S. Ct. 50.

1. See 2 Curr. L. 1792, n. 44. Machinery used by a sugar refining company in its building held to be personalty and within the provisions of the Maryland Code (Pub. Gen. Laws, art. 81, § 4), exempting from

A franchise tax is imposed by many states upon the privilege of exercising, under corporate organization, rights and powers not accorded to individuals.[2] This is not a tax upon property, but upon a privilege,[3] though the amount thereof may be measured by the value of property, and upon such basis as the legislature may prescribe.[4] The failure of a corporation to pay the franchise tax does not authorize the secretary of state to declare a forfeiture of its charter.[5]

taxation the personal property of any corporation having capital stock divided into shares when the shares are subject to taxation. Commissioners of Anne Arundel County v. Baltimore Sugar Refining Co., 99 Md. 481, 58 A. 211. Bonds which a foreign insurance company is required to deposit with the superintendent of insurance as a condition of doing business are personal property taxable within the state. Scottish Union & National Ins. Co. v. Bowland, 25 S. Ct. 345. Loan and trust companies in Iowa cannot be taxed on moneys and credits. The Code, § 1323 makes special provision for the taxation of this class of companies. Mahkonsa Inv. Co. v. Ft. Dodge [Iowa] 100 N. W. 517.

2. See 2 Curr. L. 1793, n. 56. When a corporation merely does what it has the right to do without the consent of the state, it is not in any legal or proper sense exercising a franchise, and hence past transactions are not within the scope of a statute imposing a tax for the privilege of exercising corporate franchises. Insurance renewals. People v. Miller, 179 N. Y. 227, 71 N. E. 930. Title and guaranty company held not to exercise any privilege not allowed to private persons, and therefore not subject to a franchise tax. Hager v. Louisville Title Co. [Ky.] 85 S. W. 182. The assessment and payment of a tax for the franchise to be a corporation in the state where the corporation is located is not a bar to the assessment and collection of a tax on the market value of the shares in a state where such corporation does business. Rhode Island Hospital Trust Co. v. Tax Assessors of Providence, 25 R. I. 355, 55 A. 877. A corporation owning a large body of land and water and taking natural ice from its own lake, storing the same in its own warehouses upon the margin thereof, and selling such ice in carload lots, is not liable for the mercantile license taxes imposed by Pennsylvania Act of May 2, 1899 (P. L. 184). Commonwealth v. Pocono Mountain Ice Co., 23 Pa. Super. Ct. 267. Pennsylvania Act of May 2, 1899 (P. L. 184), was intended to deal only with mercantile pursuits. Commonwealth v. Pocono Mt. Ice Co., 23 Pa. Super. Ct. 267.

NOTE: Franchise tax: A statute of New York which went into effect Oct. 1, 1901, relating to "franchise taxes of insurance companies," provided for an annual state tax upon life insurance companies equal to one per cent. on the gross amount of premiums received during the preceding calendar year for business done in the state. Held, that since this tax is imposed "for the privilege of exercising corporate franchises," it can be laid only upon such business as depended upon the exercise of such franchises after the passing of the state; and since the collection of premiums upon contracts of insurance already made is not the exercise of a franchise, but depends upon an absolute contract right, premiums received upon contracts of insurance entered into before Oct 1, 1901, cannot be taken as part of that gross amount of premiums upon which the tax is imposed. People ex rel. The Provident, etc., Society v. Miller, 32 N. Y. L. J. 303 (N. Y., Ct. of App., Oct. 18, 1904).

The rule laid down that the franchise tax can be imposed only upon such business as depends upon the existence of the franchise is novel. A franchise tax is not a tax on business done; it is a tax on the value of the franchise. People v. Home Insurance Co., 92 N. Y. 328. The cases hold that it is necessary only that the method of taxation employed furnish a fair basis by which to estimate this value. Connecticut Insurance Co. v. Commonwealth, 133 Mass. 161. The total amount of business done is considered a fair measure, but so, also, is the market value of the stock. State Tax on Railway Gross Receipts, 15 Wall (U. S.) 284; Hamilton Company v. Massachusetts, 6 Wall. (U. S.) 632. But granting the correctness of the holding as to what this tax reaches, it is difficult to understand the ruling that the collection of premiums upon contracts already entered into is not the exercise of a corporate franchise. It would seem axiomatic that every act of a corporation within its powers is an exercise of a corporate franchise. It is submitted, therefore, that the decision is erroneous. Cf. Patterson, etc., Co. v. State Board of Assessors, 69 N. J. Law. 116.—18 Harv. L. R. 233.

3. See 2 Curr. L. 1793, n. 57. The franchise tax imposed by New York Laws 1901, p. 316, c. 132, is not a tax on property but on corporate functions. Security Trust Co. v. Liberty Bldg. Co., 96 App. Div. 436, 89 N. Y. S. 340. Tax based upon premium receipts is a tax on the franchise and not a property tax. Western Assur. Co. v. Halliday, 127 F. 830. A tax of $10 per mile on railroad franchises, irrespective of varying conditions, volume of business, earning capacity or value of the road, is not a property tax but a privilege tax. Gulf, etc., R. Co. v. Adams [Miss.] 38 So. 348. Making a paving compound is the production of a new and distinct substance, which constitutes manufacturing, but the preparation of a street and placing the pavement thereon is not. People v. Knight, 90 N. Y. S. 537.

4. See 2 Curr. L. 1794, n. 58. In New York a franchise tax is imposed upon domestic corporations based upon their capital employed within the state, and graduated according to the dividends earned. Tax Laws 1896, § 182, c. 908. People v. Miller, 179 N. Y. 49, 71 N. E. 463. The term capital stock means not the share stock, but the capital represented by such share certificates. People v. Morgan, 178 N. Y. 433, 70 N. E. 967. Bonds of the United States and of certain railroads, if purchased by such capital, are to be treated as capital employ-

The capital of a corporation may be properly used as a basis of taxation,[6] and, unlike the tax based upon the franchise, is a tax upon property.[7]

Shares of stock[8] are personal property, and as such are taxable to the shareholder.[9] It is within the power of a state to fix for the purposes of taxation the situs of stock in a domestic corporation, whether owned by residents or nonresidents, and the Maryland provision that stock of a nonresident may be taxed to the corporation and the corporation given a right of action to recover it of the nonresident owner has been sustained, as not being unconstitutional as denying due process of law.[10]

Dividends[11] *and gross receipts*[12] for business done often furnish the basis for taxation.[13]

ed within the state and therefore enter into the basis upon which the franchise tax is to be computed; otherwise, if purchased with surplus. People v. Morgan, 178 N. Y. 433, 70 N. E. 967, reversing 86 App. Div. 577, 83 N. Y. S. 998. A corporation organized for the purpose of taking title to unimproved city real estate owned by tenants in common so as to execute a mortgage thereon to pay past due mortgages and taxes, and hold the same for sale, is not liable to the tax. People v. Miller, 179 N. Y. 49, 71 N. E. 463. The good will of a corporation is an asset to be considered in fixing the franchise tax. People v. Morgan, 96 App. Div. 110, 88 N. Y. S. 1066. Taxation of franchises in Nebraska must be by valuation and in proportion to value. Western Union Tel. Co. v. Omaha [Neb.] 103 N. W. 84. Gross receipts may properly be considered as an item in estimating the value of a franchise, but such receipts, standing alone, are not a proper measure of such franchise value. Id. Where a new corporation was organized merely as a means for the division of profits, it was not entitled to exemption from the franchise tax on the ground that 50 per cent of its capital was invested in manufacturing in the state. Buffalo Refrigerating Mach. Co. v. State Board of Assessors [N. J. Law] 60 A. 65. The limitation prescribed by Mass. St. 1903, p. 450, c. 437, § 75, is to be applied after the local taxes are deducted from the amount ascertained by taking 1-100 of 1 per cent of the authorized capital of the corporation. American Can Co. v. Commonwealth [Mass.] 73 N. E. 856. Gas pipes and mains laid in city streets, included in a state assessment under the franchise tax law, are not taxable by local authorities. People v. Wells, 42 Misc. 606, 87 N. Y. S. 595. Franchises of turnpike companies are not taxable by the towns in which portions of the roads are located. In re President, etc., of Albany & B. Turnpike Road, 87 N. Y. S. 1104. Where a foreign corporation purchased five patents, the fact that two of such patents proved worthless did not entitle it to a deduction therefor in determining the amount of franchise tax. People v. Kelsey, 91 N. Y. S. 955. Ky. St. 1903, §§ 4079, 4080, 4084, 4090, providing manner of determining value of franchises held not exclusive. Commonwealth v. Adams Exp. Co., 26 Ky. L. R. 190, 80 S. W. 1118.

5. Rippstein v. Haynes Medina Valley R. Co. [Tex. Civ. App.] 85 S. W. 314.

6. Capital as used in section 3836 of the Connecticut Revision of 1888 describes the surplus over liabilities, representing the fund in which the shareholder is equitably interested and to which he would look were the company to be wound up. Appeal of Bulkeley [Conn.] 58 A. 8. The franchise of a corporation is not to be considered in assessing its taxable capital. People v. Wells, 42 Misc. 606, 87 N. Y. S. 595. The words "capital" and "capital stock" often used interchangeably are found in tax laws to be applied to one or another of three different mental conceptions; first, to the shares or interest which the stockholders have in a corporation; second, to the money or property which the incorporators contribute and transfer to the corporation as capital, and which thus becomes its property; thirdly, the word is often used as a mere measure of size of the corporation as a test for graduating taxes, usually by way of license. First Nat. Bank v. Douglas County [Wis.] 102 N. W. 315.

7. The Hub v. Hanberg, 211 Ill. 43, 71 N. E. 826. A tax on the value of the capital of a corporation is a tax on the property in which that capital is invested, and in consequence no tax can thus be levied which includes property otherwise exempt. Delaware, etc., R. Co. v. Commonwealth, 25 S. Ct. 669.

8. See 2 Curr. L. 1793, n. 50.

9. See Helliwell Stock & Stockholders, §§ 346-355. Shareholders as individuals are different entities, for the purposes of taxation, from the corporation in which they hold stock, and their stock interest therein is wholly distinct property from either the capital of the company or any of its property. First Nat. Bank v. Douglas County [Wis.] 102 N. W. 315. The shares of stock in a corporation whose capital consists wholly of patent rights are not exempt from taxation. Scott v. Smith, 2 Ohio N. P. (N. S.) 617. Shares of stock in a foreign corporation held by a domestic corporation are taxable as the property of the latter. Wright v. Louisville & N. R. Co., 25 S. Ct. 16.

10. Corry v. Baltimore, 25 S. Ct. 297.

11. Money paid into the treasury of a corporation solely for the purpose of strengthening the company, and thereafter returned, was not a dividend within the meaning of a provision of the tax law, taxing corporations on the basis of dividends. People v. Knight, 96 App. Div. 120, 89 N. Y. S. 72.

12. See 2 Curr. L. 1793, n. 54.

13. Under the Massachusetts statute (Rev. Laws, c. 14, § 44, cl. 2), providing that the percentages of gross receipts of street

Public service corporations.[13a]—The franchise, land and chattels of a public service corporation constitute one individual thing for the purpose of taxation. The franchise is personal property and all things of a proprietary nature connected therewith, whether land or movables, partake of its character, and the value of that which is created by a combination of tangible and intangible things forms the legitimate basis of taxation.[14]

Banks[15] are not required to pay taxes on the money deposited with them by their customers, nor on assets which represent it,[16] nor in the absence of a statute so providing are they liable for the taxes assessed to the shareholders upon the shares of stock.[17] Credits on the books of a bank consisting of sums paid to branches of the bank in other states, and charged to them as mere matter of bookkeeping without obligation on the part of the debited branches to return them, were not taxable credits.[18] The state's power to tax national banks is subject to two restrictions, that the rate shall not be greater than is assessed upon other moneyed capital in the hands of individuals in the state, and the shares of any national banking association owned by nonresidents must be taxed in the city or town where the bank is located. The discrimination forbidden does not necessarily result from the adoption by the state of a different method of taxation with reference to national banks from that which it has adopted for state banks.[19] The sale of a private

railway companies to be ascertained for purposes of taxing "shall be based upon the annual gross receipts for each mile of track," the computation is to be made by dividing the annual gross receipts by the entire number of miles of track operated, and not the number of miles operated in the public streets only. Greenfield & T. F. St. R. Co. v. Greenfield [Mass.] 73 N. E. 477. Under the New York statute (Laws 1899, p. 1593, c. 712, § 46), where a street surface railway pays to a city a certain sum under an agreement that a percentage of its gross receipts previously payable be reduced in consideration that it thereafter grant transfers to passengers, this was a tax and should be deducted from the special franchise tax. Heerwagen v. Crosstown St. R. Co., 179 N. Y. 99, 71 N. E. 729. In a suit by a foreign insurance company to restrain the collection of a tax, evidence as to the meaning of the phrase "net receipts" as understood among insurance experts was properly admitted. National Fire Ins. Co. v. Hanberg [Ill.] 74 N. E. 377.

13a. See 2 Curr. L. 1792, n. 47.

14. Chicago, etc., R. Co. v. Nelson [Wis.] 100 N. W. 1033; Town of Washburn v. Washburn Waterworks Co., 120 Wis. 575, 98 N. W. 539. The Act of Congress of July 24, 1866, known as the Post Roads Act, does not confer upon telegraph companies accepting its provisions any immunity from taxation, whether such property be tangible or intangible. Western Union Tel. Co. v. Omaha [Neb.] 103 N. W. 84. In New Jersey, lands owned by a railroad company adjacent to the main right of way and reasonably necessary or convenient for the purposes of a railway, or used incidentally for such purposes and not actually used for other purposes, are only subject to the special taxation imposed by the state board of assessors. In re Central R. Co. of New Jersey [N. J. Law] 58 A. 1089; In re Central R. Co. of New Jersey [N. J. Law] 59 A. 1062. Where a parcel of land owned by a railroad was occupied by certain sidetracks and the spaces between such tracks were occasionally and necessarily used for the storage of bulky articles, such parcel was used for railroad purposes and exempt (Grand Rapids & I. R. Co. v. Grand Rapids [Mich.] 100 N. W. 1012), but other land owned by the railroad, in the possession of private individuals, and used exclusively by them for wood and coal yards, were not used for railway purposes (Id.). Grain elevator held to be essential part of a railroad so as to be exempt under the Wisconsin scheme of railroad taxation. Chicago, etc., R. Co. v. Douglas County [Wis.] 99 N. W. 1030.

15. See 2 Curr. L. 1795.

16. Commonwealth v. Bank of Commerce, 26 Ky. L. R. 407, 81 S. W. 679.

17. Shares of bank stock being assessable for taxation to the individual shareholder, and the bank not being liable for the taxes, it could not properly pay the same, except from dividends or other property of the stockholders in its possession. Redhead v. Iowa Nat. Bank [Iowa] 103 N. W. 796.

18. London & San Francisco Bank v. Block [C. C. A.] 136 F. 138.

19. Hewett statute (U. S. Rev. St. § 5219). City of Covington v. First Nat. Bank, 25 S. Ct. 562; San Francisco Nat. Bank v. Dodge, 25 S. Ct. 384. Act Kentucky March 21, 1900 (Acts 1900, p. 65, c. 23), providing for the taxation of shares of national banks, is valid and enforceable as applied to taxes for subsequent years. First Nat. Bank v. Covington, 129 F. 792. The act did not give the commonwealth a new cause of action, but a new remedy for the collection of taxes on national bank stock, and the five year statute of limitations is therefore applicable. Citizens' Nat. Bank v. Commonwealth, 25 Ky. L. R. 62, 81 S. W. 686. The same act in providing for retrospective taxation is not invalid in making the situs therefor the domicile of the bank, whereas theretofore the situs of the stock was the domicile of the owners of the shares, since it applies

bank to a national bank stops taxation of the former.[20] Shares of national bank stock must be assessed to the individual shareholders, not in solido to the bank,[21] but the bank may be required to pay the tax in the first instance.[22]

Foreign corporations[23] doing business in a state must submit to such conditions of taxation as the state may think proper or prudent to impose.[24] In New York foreign corporations doing business within the state are taxed on the amount of capital employed; and the exercise of this right to tax is dependent upon the existence of two concurrent conditions, that the corporation shall be doing business within the state,[25] and that its capital, or some portion thereof, shall be employed within the state.[26] Shares of the capital stock of a foreign corporation, whose capital consists wholly of patent rights, are not exempt from taxation.[27] The property of a foreign railroad corporation which leases or operates the property of a domestic or canal company, other than that which it derives from the lessor, is taxable in like manner as that of a domestic railroad.[28] A tax imposed under a statute applying to domestic corporations will not be sustained when imposed upon a foreign but naturalized corporation.[29]

Where a corporation was not organized till within a year prior to the statement of a tax, it should be assessed only for the proportionate part of the time during which it was in existence and doing business.[30]

(§ 2) *D. Public property.*[31]—Public property, Federal and state, and the various instrumentalities of government, are not taxed.[32] Where doubt exists as to

only to shares which have escaped taxation. Town of London v. Hope, 26 Ky. L. R. 112, 80 S. W. 817.

20. Schoonover v. Petcina [Iowa] 100 N. W. 490. Real estate of a national bank, shown to have been acquired with and to constitute part of its capital, is exempt. First Nat. Bank v. Douglas County [Wis.] 102 N. W. 315.

21. Jefferson County v. First Nat. Bank [Wash.] 80 P. 449.

22. Commonwealth v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158.

23. See 2 Curr. L. 1794.

24. Municipal bonds and securities deposited with the state treasurer by a foreign corporation to enable it to transact business within the state acquire a situs within the state for business purposes which confers jurisdiction on the state to tax them. State v. Fidelity & Deposit Co. of Maryland [Tex. Civ. App.] 80 S. W. 544. See, also, Foreign Corporations, 3 Curr. L. 1455.

25. See 2 Curr. L. 1794, n. 61. People v. Wells, 90 N. Y. S. 313. The nonresident must have a permanent or continuous business within the state. People v. Wells, 42 Misc. 86, 85 N. Y. S. 533. A foreign corporation manufacturing goods in France maintained an agency for sale of such goods in New York, rented a storage place, and remitted proceeds, less expenses of agency, to France. Held, the corporation was taxable only on the value of its office furniture. People v. Wells, 42 Misc. 423, 87 N. Y. S. 84. A foreign corporation having an office in the city of New York, with an agent to take orders for goods to be manufactured and paid for at the home office, but to be delivered from the New York office, the corporation having no local bank account, and paying the agent a commission monthly on sales, is not liable to such tax. People v. Wells 42 Misc. 86, 85 N. Y. S. 533.

26. See 2 Curr. L. 1794, n. 62. Where it appeared that a certain amount of the stock of a corporation was outside the state for sale, but not how much was without the state which was never returned thereto, it was proper to refuse to deduct from the assessment any part of the amount claimed as without the state. People v. Miller, 94 App. Div. 564, 88 N. Y. S. 197. Under the New York tax law (Laws 1896, p. 856, c. 908, § 182), providing that where a foreign corporation pays more than 6 per cent dividends it shall pay a tax to be computed on the basis of the amount of its capital stock employed within the state, the basis of taxation is that portion of the capital employed within the state which is represented by the actual value of the property owned, whether in money, goods or other tangible things. People v. Morgan, 86 App. Div. 577, 83 N. Y. S. 998.

27. Scott v. Smith, 2 Ohio N. P. (N. S.) 617.

28. In re Lehigh Valley R. Co. [N. J. Law] 58 A. 103.

29. Cincinnati, etc., R. Co. v. Commonwealth, 26 Ky. L. R. 1106, 83 S. W. 562.

30. People v. Miller, 94 App. Div. 564, 88 N. Y. S. 197. People v. Knight, 90 N. Y. S. 537; People v. Miller [N. Y.] 73 N. E. 1102, affirming People v. Miller, 90 N. Y. S. 755.

31. See 2 Curr. L. 1796.

32. Land conveyed by the United States for a dry dock is not entirely exempt from state taxation as an agency of the United States, because of a reservation in the conveyance of the right of free use of the dock and a provision for forfeiture in case of misuse or nonuse. Baltimore Shipbuilding & Dry Dock Co. v. Baltimore. 25 S. Ct. 50. Where an easement in land taken for a public highway under the right of eminent domain involves practically the exclusive possession and control of the property by the

the construction of a statute permitting taxation of state property, the doubt must be resolved in favor of the state.[33] Property owned by a city necessary to the exercise of those duties which are strictly governmental is exempt from taxation,[34] but not so of that property which is held and used by the municipality for the comfort of its citizens individually or collectively, or for money making purposes merely.[35] The tax exemption of cemeteries continues after abandonment for burial purposes until all the bodies have been removed.[36] United States,[37] but not generally municipal bonds, are exempt.[38] County bonds to refund indebtedness held exempt.[39] Though government bonds are not subject to taxation, the money or property obtained by a pledge of such bonds is subject to taxation,[40] and in estimating the value of shares of stock in a bank, the value of United States bonds owned by the bank may be considered.[41] Interest on United States bonds is not taxable,[42] nor does such interest become taxable immediately upon being paid into the hands of the bondholders.[43] When the beneficial title to public lands has passed from the government, they are no longer free from taxation.[44] In Michigan, lands on which the taxes have not been paid for a period of years are withdrawn by the state from taxation.[45]

(§ 2) *E. Realty.*[46]—Taxes on land include buildings, structures and improvements affixed to the land.[47] Where one is the owner of buildings, the owner-

public, and leaves the original owner with no right of substantial value, the property is exempt from taxation. Lancy v. Boston [Mass.] 71 N. E. 302.

33. People v. Miller, 94 App. Div. 567, 88 N. Y. S. 253.

34. Land used as city park. Robb v. Philadelphia, 25 Pa. Super. Ct. 343. A building and a stock of liquors owned by a municipal corporation and operated by it as a dispensary are public property within the meaning of the Georgia Pol. Code, 1895, § 762, and as such are exempt from taxation. This is so, although the town had no legal authority to maintain and operate a dispensary. Walden v. Whigham, 120 Ga. 646, 48 S. E. 159.

35. Bonds given to city on purchase of its lighting plant. Board of Councilmen of City of Frankfort v. Commonwealth, 26 Ky. L. R. 957, 82 S. W. 1008. The property of a water company, all the stock of which is owned by a municipality, is subject to taxation. City of Louisville v. McAteer, 26 Ky. L. R. 425, 81 S. W. 698.

36. Watterson v. Halliday, 2 Ohio N. P. (N. S.) 693. Conducting a green house thereon for the purpose of growing flowers and plants to beautify the grounds is not a use for other than cemetery purposes. State v. Lakewood Cemetery Ass'n [Minn.] 101 N. W. 161.

37. See 2 Curr. L. 1796, n. 78. The act of Congress exempting U. S. bonds is disobeyed by a law taxing the capital of a corporation when that capital has become invested in such bonds. First Nat. Bank v. Douglas County [Wis.] 102 N. W. 315.

38. See 2 Curr. L. 1796, n. 79.

39. Chester County v. White Bros. [S. C.] 50 S. E. 28.

40. Hooper v. State [Ala.] 37 So. 662.

41. First Nat. Bank v. Independence, 123 Iowa, 482, 99 N. W. 142; People's Sav. Bank v. Des Moines [Iowa] 101 N. W. 867; Security Sav. Bank v. Carroll [Iowa] 103 N. W. 379; People's Sav. Bank v. Layman, 134 F. 635.

42. Mosely v. State [Tenn.] 86 S. W. 714.

43. Id.

44. See 2 Curr. L. 1796, n. 75. After county school land has been sold by the county, it becomes property of vendee for purpose of taxation, though the sale be on credit on an executory contract. Taber v. State [Tex. Civ. App.] 85 S. W. 835. Lot leased at an annual rental by owner of fee to a school board to be used for school purposes, not exempt under the Missouri constitution and statutes. State v. Macgurn [Mo.] 86 S. W. 138. Where school lands are purchased from the state on deferred payments, they become taxable, and may be sold for unpaid taxes. But one who buys such lands at a tax sale takes only the interest of the original purchaser, subject to a possible forfeiture for a nonpayment of the balance due, or the interest on the same; and, if a forfeiture occurs, it effectually terminates the interest of the original purchaser and those holding under him, and the full title to the lands then reverts to the state, free from any lien or claim for taxes. Board of County Com'rs of Russell County v. Mahoney, 69 Kan. 661, 77 P. 692.

45. Board of Sup'rs of Alcona County v. Powers [Mich.] 101 N. W. 657. The finding by the auditor general and land commissioner that no suits are pending to set aside taxes on lands returned as delinquent and purchased by the state is conclusive. Semer v. Auditor General, 133 Mich. 569, 95 N. W. 732; Board of Sup'rs of Alcona County v. Powers [Mich.] 101 N. W. 657.

46. See 2 Curr. L. 1797.

47. See Curr. L. 1796, n. 81. Where safety deposit vaults were constructed subsequently to the time a tax on relator's personalty was levied, they could not form the basis of a deduction from the amount of such tax on the ground that they were assessed as real estate. People v. Wells, 99 App. Div. 455, 91 N. Y. S. 283. The term "real estate" in the Connecticut statute, taxing bridge companies, is to be taken in the

ship of the land being in another, each interest may be assessed to its owner, and an assessment of the buildings as real estate is proper.[48] The New Jersey act[49] providing that all property mortgaged to or owned in trust by any person by appointment of any court shall be taxable applies only to lands.[50] Water power as such is not taxable, but the value of land upon which a mill privilege exists may be greatly enhanced by the fact that its topography is such that a dam may be erected across a stream upon it and water power thereby created.[51] Minerals in the earth are real estate, and when the owner of them has not the fee to the surface of such land, they should be separately assessed and taxed.[52] Mineral land in Virginia is to be assessed as of the first of February.[53]

(§ 2) *F. Personalty.*[54]—In the taxation of personal property,[55] the state may include credits,[56] debts,[57] and securities,[58] and in the absence of statute, there can be no deduction from taxes on credits for debts owing by the taxpayer.[59] A taxpayer is not entitled to deduct his indebtedness unless he asserts that right when he lists his credits.[60]

§ 3. *Exemption from taxation.*[61]—When the selection of the subjects of tax-

sense in which it is employed in the taxation of realty of private individuals. Middletown & P. Bridge Co. v. Middletown [Conn.] 59 A. 34. In contemplation of tax laws, the character of a building attached to a city lot is not changed by its unlawful severance, and the right to subject the same to the payment of real estate taxes the amount of which was fixed with reference to such improvement cannot be thus defeated. Easton v. Cranmer [S. D.] 102 N. W. 944. Vaults in a safe deposit company, constructed in a building owned by other persons, in such manner as to be realty, constitute an interest in real estate subject to taxation as such. People v. Wells [N. Y.] 73 N. E. 961, affirming same case, 99 App. Div. 455, 91 N. Y. S. 283. As to what are fixtures, see Bronson, Fixtures.

48. In re Long Beach Land Co., 91 N. Y. S. 503. A stationary saw mill, in which boilers are set in masonry, erected upon lands of another, held by owners of mill under lease and as to which owners of mill had right to remove at any time, were liable to taxation as real estate. Bemis v. Shipe, 26 Pa. Super. Ct. 42.

49. Act April 1, 1898, p. 202.

50. Swope v. Fraser [N. J. Eq.] 58 A. 531.

51. Penobscot Chemical Fibre Co. v. Bradley [Me.] 59 A. 83.

52. Bakersfield & Fresno Oil Co. v. Kern County, 144 Cal. 148, 77 P. 892; In re Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786; Cherokee & P. Coal & Min. Co. v. Board of Com'rs of Crawford County [Kan.] 80 P. 601; Murray v. Hinds [Mont.] 76 P. 1039; Hadley v. Hadley [Tenn.] 87 S. W. 250; Interstate Coal & Iron Co. v. Commonwealth [Va.] 49 S. E. 974.

53. Pardee v. Commonwealth, 102 Va. 905, 47 S. E. 1010.

54. See 2 Curr. L. 1797.

55. Shingles and lumber held to be the product of manufacture and taxable as such, under Sand. & H. Dig. § 6444. Arkansas Cypress Shingle Co. v. Lonoke County [Ark.] 84 S. W. 1029.

56. Credit arising out of sale of land. Cross v. Snakenberg [Iowa] 102 N. W. 508. The word "credits" as used in § 10,427, Cobbey's Ann. St. 1903, means net credits. The indebtedness of the taxpayer may be deducted from gross credits to find the true value of credits for assessments. Lancaster County v. McDonald [Neb.] 103 N. W. 78. Cotton in the hands of the owner and under his control on the 1st day of June was not listable as a solvent credit under a statute that the value of cotton in the hands of a commission merchant should be deemed a credit. Murdock v. Iredell County Com'rs [N. C.] 50 S. E. 567.

57. Debts due by a solvent resident to nonresident are taxable on the theory that it is the state which enforces them. In re Daly's Estate, 91 N. Y. S. 858.

58. Notes and mortgages are property and subject to taxation. Kingsley v. Merrill [Wis.] 99 N. W. 1044. Loans secured by stocks and bonds are assessable as solvent credits. Savings & Loan Soc. v. City & County of San Francisco [Cal.] 80 P. 1086. The provision of the California constitution, art. 13, § 4, that a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall for the purposes of assessment and taxation be deemed and treated an interest in the property affected thereby, and the value of such security shall be taxed to the owner thereof where the property affected thereby is situate, applies only to liens on real estate. Bank of Woodland v. Pierce, 144 Cal. 434, 77 P. 1012.

59. Debt consisting of unpaid taxes. Appeal of Bailes [Iowa] 102 N. W. 813. The Minnesota statute (§ 1526, Gen. St. 1894), providing for deduction of indebtedness from credits listed for taxation, is constitutional. State v. Northern Pac. R. Co. [Minn.] 103 N. W. 731. An assessment on personal property of a nonresident is not subject to a deduction for an indebtedness due from the owner unless the indebtedness stands in some direct relation to the property. People v. O'Donnell, 92 N. Y. S. 577.

60. A railway company taxed under the provisions of the gross earnings law is not within the rule with respect to credits taxable by the state outside of the gross earnings tax. State v. Northern Pac. R. Co. [Minn.] 103 N. W. 731.

61. See 2 Curr. L. 1797.

ation has been made, and the general rule determined upon, it is customary for the legislature for reasons of general policy to make certain exemptions of either persons or property.[62] In accordance with this policy,[63] it is the universal practice to exempt property devoted to religious,[64] charitable,[65] benevolent,[66] and educational or literary uses,[67] the institutions not being conducted for pecuniary gain,[68] though

62. See 2 Curr. L. 1798, n. 1.

63. Courts will not pass upon legislative policies so long as the legislation does not offend the fundamental law. Pratt Institute v. New York, 99 App. Div. 525, 91 N. Y. S. 136.

64. See 2 Curr. L. 1798, n. 2. An institution which has as its primary object the inculcation of religious belief, but in addition thereto dispenses charity without discrimination, is entitled to exemption from taxation on the property used in connection with its charities. Watterson v. Halliday, 2 Ohio N. P. (N. S.) 693. Where the only use of a certain tract of land belonging to a religious corporation was to take lumber therefrom, as occasion required, for improving other portions of the corporation's grounds, such tract was not solely used for charitable and religious purposes so as to be exempt from taxation. People v. Reilly, 85 App. Div. 71, 83 N. Y. S. 39. Religious society held not exempt from assessments for local improvements authorized and begun during the exempt period, but the assessments for which were not levied until the end of the period. In re Opening of East 176th St., 85 App. Div. 347, 83 N. Y. S. 433. A trust fund devoted to the propagation of the principles of primitive Christianity, as taught by the Christian Church, through the employment of evangelists and otherwise cannot be exempted as church property. Commonwealth v. Thomas, 26 Ky. L. R. 1128, 83 S. W. 572. Land purchased by a religious society for religious purposes after the taxes for the then current year have attached is taken subject to, and not exempt from, such taxes. McHenry Baptist Church v. McNeal [Miss.] 38 So. 195.

65. See 2 Curr. L. 1799, n. 3. A charity which is dispensed to the public, and is not limited or confined to any class of persons, is a "purely public charity" within the meaning of the constitution. Watterson v. Halliday, 2 Ohio N. P. (N. S.) 693. Buildings belonging to the Roman Catholic Church, and occupied by its bishops, priests or sextons, and not rented, or used or intended for profit, are within the meaning of the phrase "purely public charity" and exempt from taxation under the constitution and laws of Ohio. Id. So grounds contiguous to churches, schools and priests' houses, used in connection therewith, or for ornamental or recreation purposes, fall within the same exemption; but vacant lots, used for or intended for other purposes, are not entitled to exemption. Id. An incorporated sanitarium association held sufficiently charitable in its character to entitle it to exemption. Michigan Sanitarium & Benevolent Ass'n v. Battle Creek [Mich.] 101 N. W. 855. Where realty was devised in trust for five years, during that time to be sold and the resulting fund to be paid to a nontaxable orphan's institution, the trust fund during the five years was exempt. Norton's Ex'rs & Trustees v. Louisville, 26 Ky. L. R. 846, 82 S. W. 621. A trust fund devoted to the propagation of the principles of primitive Christianity as taught by the Christian Church is not a "purely public charity" under the Kentucky constitution. Commonwealth v. Thomas, 26 Ky. L. R. 1128, 83 S. W. 572. Laws 1902, p. 1758, c. 605, § 1, exempting from water tax a building used by a social settlement, does not exempt a building owned by a church and partly used by a social settlement conducted therein by the officers. People v. Monroe, 40 Misc. 286, 81 N. Y. S. 972.

66. Elk's clubhouse held not to be exempt under Rev. St. Wisconsin, § 1038, exempting property of benevolent associations. Trustees of Green Bay Lodge, No. 259, B. P. O. E. v. City of Green Bay [Wis.] 100 N. W. 837. Michigan Building and Loan Act, exempting from taxation stock and securities held by building associations, was not affected by General Tax Laws. National Loan & Investment Co. v. Detroit [Mich.] 99 N. W. 380.

67. See 2 Curr. L. 1799, n. 4. Rettew v. St. Patrick's Roman Catholic Church of Wilmington, 4 Pen. (Del.) 593, 58 A. 828. The criterion of whether property is used exclusively for educational purposes, within New York Laws 1896 (p. 797, c. 908, § 4, subd. 7), is whether it is exclusively devoted to the use of the institution in the mental, moral and physical training and proper maintenance of those attendant upon it. People v. Mezger, 90 N. Y. S. 488. Pharmacy college held to be an "institution of education" and exempt. Louisville College of Pharmacy v. Louisville, 26 Ky. L. R. 825, 82 S. W. 610. Under Rev. Laws, c. 12, real estate contiguous to the school site and used as residence for teachers and play grounds for children, is exempt from taxation. Emerson v. Trustees of Milton Academy, 185 Mass. 414, 70 N. E. 442.

68. See 2 Curr. L. 1799, n. 5. A college athletic field rented to outside persons during vacation is not "used exclusively" for educational purposes. People v. Wells, 97 App. Div. 312, 89 N. Y. S. 957. Infirmary connected with medical school operated for gain is not exempt. Wathen v. Louisville [Ky.] 85 S. W. 1195. An educational institution having a capital stock, and formed as a business proposition, is not within the exemption. Brenau Ass'n v. Harbison, 120 Ga. 927, 48 S. E. 363. A school managed by trustees serving without compensation, but entirely supported by tuition from pupils and receiving a rental of $150 per year from its principal, is not a purely public charity. Harrisburg v. Harrisburg Academy, 26 Pa. Super. Ct. 252. Where the building of a benevolent and charitable institution is designed for use by it for its own purposes, and a substantial use is made of all of the building by the association for its own purposes in good faith, the property is exempt, notwithstanding such occupation may not be exclusive, and the owner may sometimes allow others to use some portions for a

an endowment fund of a college, belonging exclusively to it, and devoted solely to deriving an income for its support, is exempt.[69]

The power of the legislatures, territorial as well as state,[70] to grant these exemptions, even retrospectively,[71] is unquestioned.[72]

States in their infancy frequently grant exemptions from taxation, in various forms and for various periods, to railroads as an inducement to their construction within the state.[73] When the conditions and considerations upon which a grant of exemption was based have once been met, a contract right exists which cannot be impaired by subsequent statute of modification or repeal.[74] But where the legislature has reserved the right to amend, alter or repeal corporate charters, the withdrawal of an exemption does not impair the obligation of contract.[75]

A legislative exemption being a mere gratuity does not constitute a vested right and is revocable;[76] and, being in the nature of a renunciation of sovereignty, must, as a general rule, be construed most strongly against the grantee, and can never be permitted to extend either in scope or duration beyond what the terms of the concession clearly require.[77] Exemption being the exception and not the rule,[78] general exemption laws have no application to special assessments.[79]

§ 4. *Place of taxation.*[80]—In the absence of statutory provisions, realty is to

rental when it can be done without interfering with the use of the same by the owner for its own purposes. Curtis v. Androscoggin Lodge, No. 24, I. O. O. F. [Me.] 59 A. 518.

69. See Curr. L. 1799, n. 7. Little v. United Presbyterian Theological Seminary [Ohio] 74 N. E. 193.

70. Territorial governments possess the power to grant exemptions from taxation. Even such as may ripen into a contract and therefore become binding upon a subsequent state government. Bennett v. Nichols [Ariz.] 80 P. 392.

71. See 2 Curr. L. 1797, n. 91. Laws 1855, p. 483, exempting from taxation all property owned by Northwestern University, exempts all property (a business block owned for banking purposes) owned by it prior to the passage of the act. In re Assessment of Property of Northwestern University, 206 Ill. 64, 69 N. E. 75.

72. See 2 Curr. L. 1797, n. 90. Stock and securities held by building associations. National Loan & Investment Co. v. Detroit, [Mich.] 99 N. W. 380.

73. See 2 Curr. L. 1800, n. 11. A territorial statute exempting a railroad from taxation for a period of 20 years is not in conflict with act of Congress, July 30, 1886 (24 Stat. 170, c. 818), providing that the legislatures of the territories shall not pass any local or special laws granting to any corporation or individual any special or exclusive privilege, immunity or franchise. Bennett v. Nichols [Ariz.] 80 P. 392. The word "stock" in the exempting clause of the Georgia Railroad Company's charter means the capital of the corporation and not the shares in the hands of the individual owners. Georgia R. & Banking Co. v. Wright, 132 F. 912.

74. Bennett v. Nichols [Ariz.] 80 P. 392. A railroad, though it may have for its primary and principal function the carrying of logs to a sawmill, is nevertheless entitled to the exemption, where it runs regular freight and passenger trains with a fixed schedule of charges. Amos Kent Lumber & Brick Co. v. Tax Assessor of Parish of St. Helena [La.] 38 So. 587; Wicomico County Com'rs v. Bancroft [C. C. A.] 135 F. 977.

75. Pratt Institute v. New York, 99 App. Div. 525, 91 N. Y. S. 136.

76. Monaghan v. Lewis [Del.] 59 A. 948. General Tax Law of New York (Laws 1896, p. 797, c. 908, § 4, subd. 7) supersedes and repeals by implication all statutes exempting from taxation. Pratt Institute v. New York, 99 App. Div. 525, 91 N. Y. S. 136.

77. Brenau Ass'n v. Harbison, 120 Ga. 927, 48 S. E. 363. See 2 Curr. L. 1798, n. 97. The exemption from taxation to the amount of $500 of members of a fire department held to apply only to municipal taxes. Jefferson County v. Watertown, 90 N. Y. S. 790; People v. Cahill [N. Y.] 74 N. E. 422. A sale on foreclosure of a deed of trust of all the property and franchises of the corporation did not pass to the purchaser the immunity from taxation granted by the state to the original corporation, its successors and assigns. Lake Drummond Canal & Water Co. v. Commonwealth [Va.] 49 S. E. 506. Under the constitution of Georgia, a city has no power directly or indirectly to exempt a water company from the payment of an ad valorem tax on its property for municipal purposes. Columbia Ave. Savings Fund, Safe Deposit, Title & Trust Co. v. Dawson, 130 F. 152. The word "flour" in article 230 of the Louisiana constitution, exempting the capital machinery and other property employed in the manufacture of flour, is used in a restricted sense as the ground and bolted substance of wheat manufactured for human consumption. Atlas Feed Products Co. v. New Orleans, 113 La. 611, 37 So. 531. The exemption from the taxing power of the state of the capital of a corporation consisting wholly of patent rights does not exempt the shares of stock from taxation. Scott v. Smith, 2 Ohio N. P. (N. S.) 617.

78. Jefferson County v. Watertown, 90 N. Y. S. 790.

79. Hager v. Gast [Ky.] 84 S. W. 556. See 2 Curr. L. 1800, n. 16.

80. See 2 Curr. L. 1800.

be taxed in the district where located, the physical situs being regarded as controlling,[81] while as to personalty, tangible and intangible, the general rule is that it is to be taxed where the owner resides, regardless of its actual situs.[82] In the case of goods in transit,[83] of migrating herds,[84] and the rolling stock and vessels of transportation companies,[85] the permanent situs as distinguished from the place of temporary sojourn is of controlling force.[86] It is, however, within the province of the legislature to fix the situs of both realty[87] and personalty[88] to accord with common-law rules, or otherwise, as it may deem best,[89] and, where tangible personalty is actually within the state, the legislature may for the purpose of taxation separate it from the domicile of a nonresident owner.[90] So, promissory notes, owned by a nonresident, which are permanently kept in the hands of an agent within the state, may be treated as personal property within the state.[91] Property properly assessable in one district cannot escape taxation by temporary removal at time of assessment.[92]

81. Walton County v. Morgan County, 120 Ga. 548, 48 S. E. 243.

82. For the purpose of taxation the situs of personal property of every description is the domicile of the owner. Refrigerator cars. Commonwealth v. Union Refrigerator Transit Co., 26 Ky. L. R. 23, 80 S. W. 490. In determining domicile, the act and intent must concur, and the intent may be inferred from declarations and conduct. Barron v. Boston, 187 Mass. 168, 72 N. E. 951. Credits are taxable in the state and at the domicile of the owner. Commonwealth v. Williams' Ex'r, 102 Va. 778, 47 S. E. 867. See 2 Curr. L. 1801, n. 24. A trust estate consisting of personal property is to be taxed in the same town where the private, personal estate of the beneficiary under the trust is taxed. Clarke v. Addeman, 99 R. I. 356, 58 A. 623.

83. Coal awaiting sale in another state may be treated as permanently in that state and taxed there accordingly. Delaware, etc., R. Co. v. Commonwealth, 25 S. Ct. 669. Saw logs and timber held properly assessed at principal place of business of owner under Wisconsin Rev. St. 1898, § 1040. State v. Fisher [Wis.] 102 N. W. 566.

84. Stock temporarily grazed in one county is nevertheless to be assessed in the county where they are permanently reared and kept. Rosasco v. County of Tuolumne, 143 Cal. 430, 77 P. 148.

85. Vessels which though engaged in interstate commerce are employed wholly within the state are subject to taxation in that state, notwithstanding they have been registered at a port outside the limits of the state. Old Dominion S. S. Co. v. Commonwealth, 25 S. Ct. 686.

86. Rosasco v. County of Tuolumne, 143 Cal. 430, 77 P. 148.

87. Land divided by county lines. Walton County v. Morgan County, 120 Ga. 548, 48 S. E. 243.

88. Teagan Transp. Co. v. Board of Assessors of Detroit [Mich.] 102 N. W. 273. Railroad property. State v. Back [Neb.] 100 N. W. 952. Statute providing that corporations in Alleghany County shall pay taxes levied on assessed valuation of their capital stock held by resident or nonresident stockholders, and that the holders shall not be liable is violative of the constitution which provides that property of residents shall be taxed in the county where they reside. City of Baltimore v. Alleghany County Com'rs, 99 Md. 1, 57 A. 632.

89. It may provide that certain classes of personal property because of their relation to real estate, and the uses made thereof on the real estate may be taxed therewith and treated as a part thereof for the purpose of taxation. Morgan County v. Walton County, 120 Ga. 1028, 48 S. E. 409. This is wholly independent of the question as to whether the personal property has lost its character as personalty, and, by becoming a fixture, is to be treated as a part of the realty. Morgan County v. Walton County, 121 Ga. 659, 49 S. E. 776. Contracts for sale of land made in favor of a foreign corporation doing business within another state may be given such a situs as to render them liable to taxation by that state. State v. Northern Pac. R. Co. [Minn.] 103 N. W. 731. Kentucky Act March 21, 1900, p. 66, c. 23, § 3, providing for retrospective taxation of bank stock, is not invalid in making the situs therefor the domicile of the bank, whereas theretofore the situs for taxation of such stock was the domicile of the owners of the shares. Town of London v. Hope, 26 Ky. L. R. 112, 80 S. W. 817.

90. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3. Bonds of a nonresident insurance company, deposited with the insurance commissioner of a state as a condition to doing business in that state, do not have a situs at the domicile of the company, because beyond its control, but at the domicile of the commissioner, and are subject to taxation within that state. Western Assur. Co. v. Halliday, 127 F. 830. Texas statutes do not exclude from taxation property owned by nonresidents that has a taxable situs within the state. State v. Fidelity & Deposit Co. of Maryland [Tex. Civ. App.] 80 S. W. 544. In Kentucky all personal property of a corporation organized in the state, though having its principal place of business outside the state, is taxable in the state. Commonwealth v. Union Refrigerator Transit Co., 26 Ky. L. R. 23, 80 S. W. 490.

91. Buck v. Beach [Ind.] 71 N. E. 963. See 2 Curr. L. 1802, n. 25.

92. Moneys and credits. Buck v. Beach [Ind.] 71 N. E. 963; Snakenberg v. Stein [Iowa] 102 N. W. 533. Live stock in herds. Jandt v. Sioux County [Neb.] 102 N. W. 763.

§ 5. *Assessment. A. Assessing officers.*[93]—An assessment is an official listing of persons and property with an estimate of the value of the property of each for purposes of taxation.[94] An assessment in some form is necessary,[95] which to be valid, must be made by proper officers having competent authority and the qualifications required by law.[96] In nearly all the states an assessing officer is designated by law, and upon him, in the first instance, rests the duty of making the assessment;[97] but in some states it has been found convenient and practicable to invest state boards with power to make assessments in certain instances.[98] The acts of assessors in determining what property is liable to taxation are judicial in their character.[99] Mandamus therefore will not issue to compel a board of assessors to assess lands of relator as one solid parcel.[1] Assessors in making an assessment must proceed at the time[2] and in the manner pointed out by statute.[3] Presumptively, officers making up a tax roll have authority to act, and if such action is properly taken according to law and properly evidenced, it constitutes a valid assessment,[4] and places upon the taxpayer the burden of establishing an alleged illegality.[5] An assessor in Kentucky is not entitled to a commission upon property which is exempt from taxation.[6]

(§ 5) *B. Formal requisites. The roll or list.*[7]—In making an assessment it is essential that a proper roll or list be prepared, containing, among other things, a description of the property to be taxed, its value, and the name of the owner thereof.[8] The purpose of *description* is designation and identification.[9] This pur-

93. See 2 Curr. L. 1802.

94. Hacker v. Howe [Neb.] 101 N. W. 255.

95. See 2 Curr. L. 1802, n. 28.

96. See 2 Curr. L. 1802, n. 30. De facto officer may assess. Village of Canaseraga v. Green, 88 N. Y. S. 539.

97. A supervisor of assessments has no authority to make the assessment of an owner's property, that duty being devolved upon the assessor. State v. Williams [Wis.] 100 N. W. 1048.

98. See 2 Curr. L. 1802, n. 31. The Hub v. Hanberg, 211 Ill. 43, 71 N. E. 826. Bridge over Missouri river held to be part of the continuous line of a railway and assessable by the state board and not by local assessors. Chicago, etc., R. Co. v. Cass County [Neb.] 101 N. W. 11. Bridge approach held to be "track" under a statute dividing realty of a railroad company into two classes for taxation, one of which consisted of track, right of way, etc., and hence was to be assessed by state board. People v. Illinois Cent. R. Co. [Ill.] 74 N. E. 116. An elevator is a storehouse within the meaning of a statute giving local authorities power to tax storehouses, etc., located on the railroad right of way. Adams County v. Kansas City & O. R. Co. [Neb.] 99 N. W. 245. The owners of such elevators cannot escape local assessment by voluntarily listing them for taxation with the auditor of public accounts and the payment of taxes levied by the state board. Id. Interurban railways should have been assessed by the executive council and not by local assessors. Cedar Rapids & M. C. R. Co. v. Cummins [Iowa] 101 N. W. 176.

99. Stockton v. Craig [W. Va.] 49 S. E. 386. The Pennsylvania act of July 9, 1897 (P. L. 219), relating to taxation, is not a regulation of jurisdiction or practice of any court, as assessment for taxation is not inherently a judicial proceeding. In re Philadelphia Co. [Pa.] 60 A. 93.

1. State v. Board of Assessors, 113 La. 925, 37 So. 878.

2. The entire assessment when completed must take effect as of a given day, in order that it may be known when the period covered by the tax ends, and the period for the assessment of another annual tax may commence. But as to the doing of the work of making the assessment, it is not necessary nor is it practically possible that it should be done on any particular day. The Rhode Island statute only requires that it should be done within the time limited therefor by the vote of the town directing the assessors when to make the assessment. Kettelle v. Warwick & Coventry Water Co., 24 R. I. 485, 53 A. 631.

3. See 2 Curr. L. 1803, n. 38.

4. New York v. Vanderveer, 91 App. Div. 303, 86 N. Y. S. 659; Brunson v. Starbuck, 32 Ind. App. 457, 70 N. E. 163. Testimony of assessors is not admissible to contradict their records. Saco Water Power Co. v. Buxton, 98 Me. 295, 56 A. 914. Assessors are not agents of a town so as to make their opinion as expressed in official valuations, admissible against the town. Penobscot Chemical Fibre Co. v. Bradley [Me.] 59 A. 83.

5. In re Enforcement of Personal Property Taxes Delinquent in Ramsey County [Minn.] 102 N. W. 721; New York v. Vanderveer, 91 App. Div. 303, 86 N. Y. S. 659; Bell's Trustee v. Lexington [Ky.] 85 S. W. 1081.

6. Powers v. Osbon, 26 Ky. L. R. 744, 82 S. W. 419.

7. See 2 Curr. L. 1803.

8. See 2 Curr. L. 1803, n. 40. Assessment lists are mere preliminary memoranda for the assessors use, and not evidence in a suit for the collection of taxes. The tax books are the primary evidence. State v. Birch [Mo.] 85 S. W. 361.

pose is accomplished when the description is such that thereby it can be identified,[10] either with or without extrinsic evidence,[11] and does not mislead the owner.[12] It is usually required that in the assessment of real estate distinct parcels of land shall be listed separately.[13] An assessment of personalty which does not show the number, kind, amount, and quality is not necessarily invalid;[14] but an assessment of several lots in the aggregate, the owner having disregarded the lot lines, has been sustained.[15] The assessment must be in the name of *the owner,* if known,[16] otherwise as belonging to an unknown owner,[17] or to unoccupied land, as the case may be.[18] In some states statutes have been enacted validating assessments in the name of one other than true owner.[19] The assessment roll, when completed and certified, is the only evidence of the acts and intentions of the assessing officers.[20]

9. An accurate description of lands assessed is essential to the validity of the assessment, and without certainty in that respect no foundation is laid for bringing an action to enforce the collection of the tax. City of Rochester v. Farrar, 44 Misc. 394, 89 N. Y. S. 1035.

Sufficient description: The abbreviations "exc'pt rip'in r'g't" sufficiently indicates riparian rights. Newaygo Portland Cement Co. v. Sheridan Tp. [Mich.] 100 N. W. 747. Where a railroad right of way crossed a lot, a certificate describing the land charged by its black number "less the right of way" was valid, the right of way not being in fact included in the land charged. Hamar v. Leihy [Wis.] 102 N. W. 568. Under the Washington Code (§ 1748), the use of the figure "4" placed in the position of an algebraic exponent is permissible in the description of parcels of land. Washington Timber & Loan Co. v. Smith, 34 Wash. 625, 76 P. 267. "8 25-100 acres in the Rees Tract, Gist Survey, Section 27, Township 8, Range 22, assessed to Margaret W. Black, to Leavenworth City," held a sufficiently certain and definite description to preserve the tax lien and permit recovery by one holding an invalid tax title, who had paid the taxes. Douglass v. Byers, 69 Kan. 59, 76 P. 432.

Insufficient description: Palomares Land Co. v. Los Angeles County [Cal.] 80 P. 931. An assessment of the interest of a turnpike company, where it does not own the fee, as "five miles of highway" is fatally defective. People v. Selkirk [N. Y.] 73 N. E. 248. Describing land as the N. W. ¼ of section 9, but giving no range or government surveyed township number is insufficient to support a sale thereof. Paine v. Germantown Trust Co. [C. C. A.] 136 F. 527. Likewise a description as "Pt. N. E. ¼ of Sec. 26, T. 1 N., R. 1 W., Salt Lake meridian, said part containing seven acres more or less." Moon v. Salt Lake County, 27 Utah, 435, 76 P. 222.

10. There cannot be a tax privilege or a tax sale without an assessment identifying the property. Posey v. New Orleans, 113 La. 1059, 37 So. 969. Where land is sufficiently identified therein, an assessment is valid, though it contains no certificate or survey number. Taber v. State [Tex. Civ. App.] 85 S. W. 835.

11. See 2 Curr. L. 1805, n. 46, 47. Although descriptions of property taxed cannot be supplied by parol evidence, it is competent to explain abbreviations and to clear up latent ambiguities by evidence aliunde the instrument or proceedings. Douglass v. Byers, 69 Kan. 59, 76 P. 432. Property assessed as a "mill privilege" held to properly include the water and power as well as the structure and adjacent land. Saco Water Power Co. v. Buxton, 98 Me. 295, 56 A. 914.

12. See 2 Curr. L. 1804, n. 43. The designation of land will be sufficient if it affords the means of identification, and does not positively mislead the owner or be calculated to mislead. "N. E.—N. E." in proper columns held to be sufficient. Stoddard v. Lyon [S. D.] 99 N. W. 1116; Seymour v. Deisher [Colo.] 80 P. 1038.

13. Phelps v. Brumback, 107 Mo. App. 16, 80 S. W. 678; Gehrhardt v. Schwartz, 92 N. Y. S. 613.

14. Savings & Loan Soc. v. San Francisco [Cal.] 80 P. 1086.

15. Barber Asphalt Pav. Co. v. Peck [Mo.] 85 S. W. 387.

16. See 2 Curr. L. 1804, n. 49. Joyes v. Louisville, 26 Ky. L. R. 713, 82 S. W. 432. Assessments may be made in the name of the person, dead or alive, who appears to be the owner on the books of the conveyance office. Succession of Williams v. Chaplain, 112 La. 1075, 36 So. 859. Where at least three of the owners of a mining claim sold for taxes could have been ascertained by an inspection of the records of the county, but no effort was made to obtain such names and the property was assessed to "unknown owner," sale under such assessment was void. Jungk v. Snyder [Utah] 78 P. 168. Where property was assessed in the name of another, limitation against an action for collection does not commence to run till after the correction. City of Louisville v. Louisville Courier-Journal Co. [Ky.] 84 S. W. 773. Where the agent of a corporation gave in the corporation's land for assessment and by mistake it was set down to another corporation and paid, both being owned by the same stockholders, the land was not liable to another assessment. Falls Branch Jellico Land & Imp. Co. v. Com., 26 Ky. L. R. 1028, 83 S. W. 108.

17. See 2 Curr. L. 1804, n. 49. A tax debtor cannot be proceeded against at the same time as a known and as an unknown owner. Assessment to "heirs of J. F." Fennimore v. Boatner, 112 La. 1080, 36 So. 860; Succession of Williams v. Chaplain, 112 La. 1075, 36 So. 859.

18. Assessment of unoccupied land to "unknown owner," statute providing it should be assessed as "unoccupied land." Blackburn v. Lewis [Or.] 77 P. 746.

19. Taber v. State [Tex. Civ. App.] 85 S. W. 835. Under the direct provisions of

Lists by taxpayers.[21]—In many states it is required of the taxpayer that he furnish the assessing officer a statement of his taxable property.[22] The power of an assessor to make an assessment cannot be atrophied or destroyed by the mere refusal of a recalcitrant taxpayer to make a list when requested,[23] and, in some jurisdictions, its value.[24] One who lists various pieces of land as a single item is estopped from claiming that they should have been valued separately,[25] and where a trustee delivered an unsworn statement of the aggregate values belonging to the cestui que trust, without disclosing the items, an assessment levied thereon did not embrace property omitted.[26] An assessor has power to add property to the verified list furnished in the statement of a taxpayer, although the latter has not been subpoenaed and examined;[27] but where lists are wholly uncontradicted, he may not arbitrarily disregard them.[28] Schedules of personal property, filed with the assessor, and verified by affidavit, which contained no statement of plaintiff's ownership of a note sued on, were admissible to support an allegation that she did not own the note at the time such schedules were made.[29]

Notice.[30]—Notice of an assessment and opportunity to be heard, either before the assessment is made or upon a review thereof, is essential to its validity.[31] Statutes which fix the time and place of the assessment, or of the meeting of the reviewing board, satisfy this absolute right of the taxpayer to be heard.[32] In the absence of such statutes, notice must be given, either personally,[33] or by publication.[34] Failure to make proof is not sufficient to create a presumption that notice of the completion of tax rolls was not given as required by law.[35]

Irregularities.[36]—Mere official errors or omissions appearing in an assessor's

Burns' Ann. St. 1901, § 8633, an assessment of land for taxation in a name other than that of the owner does not render the assessment invalid. Fell v. West [Ind. App.] 73 N. E. 719.

20. Savings & Loan Soc. v. San Francisco [Cal.] 80 P. 1086.

21. See 2 Curr. L. 1805.

22. See 2 Curr. L. 1805, n. 58. Upon the personal representative of a deceased person rests the duty of rendering a list of the decedent's property. Cullop v. Vincennes [Ind. App.] 72 N. E. 166. President of foreign corporation held authorized ex officio to make and swear to a return of property held in trust by the corporation. Boston Safe Deposit & Trust Co. v. Assessors of Taxes, 25 R. I. 524, 57 A. 301. A person in adverse possession may render the premises for taxation in the name of the person for whom he is holding, or in his own name when holding for himself, though other persons claiming the same land may at the same time pay taxes thereon. Thomson v. Weisman [Tex.] 82 S. W. 503. A regulation charging the husband primarily with the duty of paying the annual taxes on the wife's real estate and relieving her of the duty of returning a separate list is reasonable regulation of personal status. Union School Dist. v. Bishop, 76 Conn. 695, 58 A. 13. The president and cashier of a national bank are properly made parties in an action to collect taxes on the stock as omitted property, since it was their duty to list it. Commonwealth v. Citizens' Nat. Bank [Ky.] 80 S. W. 158. Presumption that assessing officers do duty, as applied to listing of property by taxpayer. Page v. Melrose [Mass.] 71 N. E. 787.

23. State v. Birch [Mo.] 85 S. W. 361.

24. See 2 Curr. L. 1085, n. 59.

25. Parcels owned by husband and wife separately. Union School Dist. v. Bishop, 76 Conn. 695, 58 A. 13.

26. The fact that the assessors improperly accepted such illegal return did not bind the city. Bell's Trustee v. Lexington [Ky.] 85 S. W. 1081.

27. Rosasco v. Tuolumne County, 143 Cal. 430, 77 P. 148.

28. People v. Wells, 93 App. Div. 212, 87 N. Y. S. 543.

29. Fudge v. Marquell [Ind.] 72 N. E. 565.

30. See 2 Curr. L. 1806.

31. See 2 Curr. L. 1806, n. 63. People v. Selkirk [N. Y.] 73 N. E. 248; Bialy v. Bay City [Mich.] 102 N. W. 1033. That the taxpayer has a remedy by certiorari does not dispense with the necessity of the opportunity to be heard. Trumbull v. Palmer, 93 N. Y. S. 349.

32. Chicago, etc., R. Co. v. Richardson County [Neb.] 100 N. W. 950. The time and place for public hearing on assessment being fixed by statutes does not deprive of property without due process of law. St. Louis, etc., R. Co. v. Davis, 132 F. 629.

33. That notice of an assessment was given by advertisement and by posters instead of actual service did not render a tax invalid as taking private property without due process of law. Hoertz v. Jefferson Southern Pond Draining Co. [Ky.] 84 S. W. 1141.

34. Ballard v. Hunter [Ark.] 85 S. W. 252; Bialy v. Bay City [Mich.] 102 N. W. 1033; Auditor General v. Calkins [Mich.] 98 N. W. 742.

35. Sherman v. Fisher [Mich.] 101 N. W. 572.

36. See 2 Curr. L. 1806.

list or roll, however obvious, do not necessarily invalidate the assessment,[37] but a substantial departure from the mandate of the law, prejudicial to the taxpayer, will render the assessment utterly void as without jurisdiction,[38] and hence subject to collateral attack.[39] Irregular assessments may be cured, but such as are wholly void are incapable of validation.[40]

(§ 5) *C. Valuation.*[41]—The legislature has power to direct the manner of arriving at the value of property and franchises for the purpose of taxation. Any rule or method of ascertaining the value of property or franchise adopted by the legislature that is reasonably fair and just in its operation, and fairly well adapted to the attainment of the end required, is sufficient; but the legislature has no power to establish an arbitrary rule or standard which has no relation to the ascertainment of value.[42] It is unnecessary in making an assessment to disintegrate the various elements which enter into it and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value.[43] Since various elements enter into and affect the value of a given piece of property, all that can be required of assessors is that they exercise an honest judgment, based on the information they possess or are able to acquire.[44] An estimate therefore by a board of supervisors in excess of the actual value cannot be remedied in a suit to enjoin the collection of the tax,[45] but where an assessor knowingly assessed improvements at an amount in excess of their true cash value, the assessment was wrongful as to the excess, and a recovery could be had.[46] The methods of determining the value of corporate stock, franchises and property are discussed in the notes.[47] As taxing officers are presumed to have properly performed their duties,

37. Failure of auditor to sign jurat under signature of assessor to assessment list. Corbet v. Rocksbury [Minn.] 103 N. W. 11. Failure of assessor to go on the land and actually view it for assessment (Grant Land Ass'n v. People, 213 Ill. 256, 72 N. E. 804), or to attach affidavit to assessment roll (Horton v. Driskell [Wyo.] 77 P. 354; Douglas v. Fargo [N. D.] 101 N. W. 919). Failure to require bond from assessor. United States Fidelity & Guaranty Co. v. Board of Education of Somerset [Ky. L. R.] 86 S. W. 1120. Assessing three lots together, instead of separately, as required by the Kansas City charter, is a mere irregularity, which does not impair the validity of a deed. Phelps v. Brumback, 107 Mo. App. 16, 80 S. W. 678.

38. Assessment of unoccupied land to "unknown owner," the statute providing it should be assessed as "unoccupied land." Blackburn v. Lewis [Or.] 77 P. 746.

39. Layman v. Iowa Tel. Co., 123 Iowa, 591, 99 N. W. 205; People v. Feitner, 45 Misc. 12, 90 N. Y. S. 826. Tax sales cannot be set aside in a collateral proceeding because of irregularities. Flint Land Co. v. Godkin [Mich.] 99 N. W. 1058.

40. City of Rochester v. Farrar, 44 Misc. 394, 89 N. Y. S. 1035.

41. See 2 Curr. L. 1807.

42. The provisions of section 78, Nebraska Laws 1903, c. 73, which fixes the gross receipts of express, telephone and telegraph companies as the value of their franchises, violates the constitution of that state. Western Union Tel. Co. v. Omaha [Neb.] 103 N. W. 84. Assessment by a state board of a railroad on the basis of a 100% valuation, the bulk of other property in the state being assessed on an 80% valuation, reduced. Louisville & N. R. Co. v. Coulter, 131 F. 282.

43, 44. People v. State Board of Tax Com'rs, 25 S. Ct. 713.

45. Johnson v. Bradley-Watkins Tie Co. [Ky. L. R.] 85 S. W. 726.

46. Zeigler v. Board of Com'rs of Blackford County, 33 Ind. App. 375, 71 N. E. 527. Where property was correctly valued on a tax duplicate but a wrong description of frontage was given, the auditor had no power to change the frontage and increase the valuation; and an attempt to do so would be enjoined. Deshler v. Sims, 2 Ohio N. P. (N. S.) 385. Upon failure of a county auditor to make corrections in a tax duplicate, a court may hear evidence and make the correction. Id. The county auditor may make corrections in the tax duplicate upon discovery of errors, and to that end may receive evidence, including parol. Id. County auditor has power to fix valuation of property omitted from tax duplicate. Id.

47. See, also, 2 Curr. L. 1807, n. 75. Personal property of a nonresident express company situated outside the state cannot be included in determining the value of property taxable in the state, on the mileage basis. The theory that such property gave the credit necessary to carry on the business in the state, and so might be taxed therein, is untenable. Fargo v. Hart, 193 U. S. 490, 48 Law. Ed. 761. The amount of gross receipts taken in by express, telephone and telegraph companies during the year prior to the time of assessment taken alone is not a reasonable and proper method of ascertaining the value of the franchise possessed by such corporations. Western Union Tel. Co. v. Omaha [Neb.] 103 N. W. 84. Real es-

one claiming a raise of valuation of his property to be illegal has the burden of proof.[48]

(§ 5) *D. Reassessment; omitted property.*[49]—An assessment, though inadequate, if made without fraud, and unappealed from, is final.[50] When, however, a defect rendering an assessment void consists of an irregularity which the legislature might have authorized, or an omission of something which it might have dispensed with, in the first instance, the error may be cured by a subsequent act authorizing a reassessment,[51] and when for any reason property has escaped taxation altogether, there are statutory provisions in nearly all the states[52] for the listing and assessment of such omitted property.[53] Such statutes are not invalid as retrospective.[54] The property sought to be listed and taxed must be described with sufficient particularity,[55] and the amount of taxes due must be stated.[56] Cases illustrating the procedure are collated in the notes.[57]

tate purchased with capital stock should be deducted (Hempstead County v. Hempstead County Bank [Ark.] 84 S. W. 715), and coal mined within a state but situate in another state pending sale cannot be included, in valuing capital stock (Delaware, L. & W. R. Co. v. Com., 25 S. Ct. 669). In Illinois the corporations mentioned in the last proviso of par. 4, § 3, c. 120, Hurd's Rev. St. 1903, are assessed the fair cash value of the capital stock, including the franchise over and above the assessed value of the tangible property. The Hub v. Hanberg, 211 Ill. 43, 71 N. E. 826. Under the New York Tax Law of 1896, p. 802, c. 908, § 12, the capital stock of every company, after deducting the assessed value of its real estate, must be assessed at its actual value. In estimating the value of capital stock accumulated surplus may be included. People v. Kelsey, 91 N. Y. S. 711. Where real estate is mortgaged, and payment of the mortgage has not been assumed by the corporation, and the value of the equity alone has been included in determining the value of the capital stock, only the value of the equity, and not the whole assessed value of the real estate, should be deducted from the valuation. People v. Wells [N. Y.] 72 N. E. 626, reversing People v. Wells, 95 App. Div. 574, 88 N. Y. S. 1030.

48. Fell v. West [Ind. App.] 73 N. E. 719. On an issue as to value of land, admissibility of evidence considered. Tennessee Coal, Iron & R. Co. v. State [Ala.] 37 So. 433.

49. See 2 Curr. L. 1809.

50. People's Sav. Bank v. Layman, 134 F. 635. An over or under valuation will not of itself establish that an assessment was fraudulently made. Barkley v. Dale, 213 Ill. 614, 73 N. E. 325. In an action by the state to recover omitted taxes, the burden is on the state to show that their actual value was greater than the valuation as returned, since the presumption is that the assessor did his duty. Commonwealth v. Higgins' Trustee, 26 Ky. L. R. 910, 82 S. W. 601.

51. Warren v. Street Com'rs of Boston, 187 Mass. 290, 72 N. E. 1022; City of Seattle v. Kelleher, 25 S. Ct. 44.

52. Pierce's Code, § 8640. Phillips v. Thurston County, 35 Wash. 187, 76 P. 993. Under a statute that the county board of review shall add to the assessment roll any taxable property in the county not included in the assessment as returned by the assessor, the board has power to add omitted property, though no property was assessed to the owner by the assessor, and his name does not appear at all on the assessment roll. Horton v. Driskell [Wyo.] 77 P. 354. Power to assess back taxes cannot be implied, but must be expressly conferred. Milster v. Spartanburg, 68 S. C. 26, 46 S. E. 539.

53. The fact that agents do the clerical work of making the entries in a record of omitted property does not affect the validity of the assessment, it appearing that the work was done with the approval and under the supervision of the proper officer. In re Morgan's Estate [Iowa] 101 N. W. 127. A taxing officer, in assessing taxes against omitted property, is not authorized to alter the valuation fixed by proper township officer on property listed and returned by the taxpayer, but his duty in the premises is confined to an assessment of the property which was not listed and returned. Parkinson v. Thompson [Ind.] 73 N. E. 109.

54. State v. Vogelsang, 183 Mo. 17, 81 S. W. 1087.

55. See 2 Curr. L. 1809, n. 82. Description held sufficient. Brunson v. Starbuck, 32 Ind. App. 457, 70 N. E. 163. Under the Kentucky statutes, a description of the property as notes, bonds, securities, investments and cash is sufficient. Belknap v. Com. [Ky.] 85 S. W. 693.

56. See 2 Curr. L. 1809, n. 83.

57. In Kentucky notice to the bank is notice to the agent of the stockholder within the meaning of a statute providing for the collection of taxes on omitted property. Commonwealth v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158. Pleadings held not to support a judgment. Commonwealth v. Vanderbilt, 26 Ky. L. R. 716, 82 S. W. 426. Under Kentucky statutes in proceedings to list property for taxation as omitted, the property owner may amend his answer so as to set up limitations. Commonwealth v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158. In proceedings to collect taxes on bank stock as omitted property where the bank was given notice, it cannot raise the question of want of notice to the stockholders nor that some of the shares might have changed hands nor that the proceeding was violative of the 14th amendment to the Federal constituton. Id. A taxing officer having given notice of an intention to assess certain omitted property, and a hear-

§ 6. *Equalization, correction, and review.*[58]—As stated in a former number of Current Law,[59] the purpose in inspecting the work of assessors is twofold: to examine individual assessments with a view to the correction of errors; to examine the assessments as a whole with a view to determining whether they are relatively equal as between different parts of a taxing district. The first of these purposes, properly speaking, is review, while the latter is equalization.[60] Individual discrepancies and inequalities the law contemplates shall be corrected by local boards, who are specially empowered to hear complaints and grievances as between individual taxpayers and to adjust and remedy the same as may be just.[61] This local board is usually some body of general administrative or legislative jurisdiction, such as the township board, village or city council, county commissioners and the like.[62] In some states such board may add to the assessment rolls property omitted therefrom.[63] It is not essential that the application for an abatement be in writing.[64]

ing having been had, need not make his determination on the day of hearing, but may take a reasonable time for consideration. Three days held reasonable. Snakenberg v. Stein [Iowa] 102 N. W. 533. Over payments of taxes by a bank were properly credited on a judgment in a proceeding requiring them to list omitted property. The auditor had already certified the amount due to the sheriff with directions for him to credit it. The officer should not credit such payments a second time. Citizens' Nat. Bank v. Com., 25 Ky. L. R. 2254, 80 S. W. 479. In Kentucky, retrospective assessments on omitted property are barred after five years from when the property should have been assessed. Commonwealth v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158, affirmed 80 S. W. 479. See 2 Curr. L. 1809, n. 80. Under the express provisions of Kentucky statute 1903, § 4241, relative to taxation of omitted property, the sheriff has the right to serve the summons and is entitled to the penalty. Harrison v. Wilkerson, 26 Ky. L. R. 260, 80 S. W. 1190. City assessor must be made party to appeal from judgment dismissing proceedings to list omitted property. Daily v. Washington Nat. Bank [Ind.] 72 N. E. 260. Under section 2803, simple tax should be added for each and every preceding year in which property has escaped taxation as far back as the next preceding decennial appraisement and equalization of real estate, and penalties may be added under section 2844, but not the 5 per cent. penalty provided for in section 1094. Street assessments are properly chargeable. Watterson v. Halliday, 2 Ohio N. P. (N. S.) 693. In proceedings to recover back taxes, the property sought to be reached can only be assessed for the five years next preceding the institution of the action. Commonwealth v. Thomas, 26 Ky. L. R. 1128, 83 S. W. 572; State v. Vogelsang, 183 Mo. 17, 81 S. W. 1087.

58, 59, 60. See 2 Curr. L. 1810.

61. A taxpayer failing to avail himself of the opportunity thus presented has no legal ground of complaint because of the action of the state board in lowering or raising the valuation of all property in a county so as to conform with all other property throughout the state. Hacker v. Howe [Neb.] 101 N. W. 255. A county board of review in assessing property is not confined to the statement of the taxpayers' witnesses, but may act upon information coming to it from other sources or upon its own knowledge. In re Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786. In proceedings before a board of review to reduce an assessment, the testimony of the agent of the owner asking for the reduction must be taken most strongly against the owner. State v. Williams [Wis.] 100 N. W. 1052. A statute providing only for oral testimony before a board of review, none other can be considered. State v. Hobe [Wis.] 102 N. W. 350. The determination of the assessor as to the place at which property is assessable and as to the value of the property to be assessed is presumptively correct and can only be overturned by the board of review by definite impeaching evidence. State v. Fisher [Wis.] 102 N. W. 566; Hempstead County v. Bank of Hope [Ark.] 84 S. W. 1030. A county board of supervisors as such has nothing to do with the assessments made by the various towns except to equalize them. A township, therefore, which in assessing a railroad property acted upon the advice of supervisors and incurred expense in resisting an appeal from the assessment, cannot look to the county for reimbursement. People v. Board of Sup'rs of St. Lawrence County, 91 N. Y. S. 948.

62. See 2 Curr. L. 1810, n. 91. The board of revision sits only to correct the work of the board of equalization, and is not superseded by that board. Courtright v. Jones, 2 Ohio N. P. (N. S.) 522. A city assessor having refused to correct the tax list of his ward as directed by the common council and delivered his uncorrected list to the county board of equalization as the duplicate of assessment, such board had power to ascertain whether such list was the duplicate required by law and was bound to heed the notice sent by the council and fix the quota of the city accordingly. City of Englewood v. Board of Equalization of Taxes of Bergen County [N. J. Law] 59 A. 15. In creating a county board of appraisers and in clothing such board with authority to fix the valuation upon real property in the first instance, the legislature of Montana did not contravene any provision of the constitution of that state. Missouri River Power Co. v. Steele [Mont.] 80 P. 1093.

63. See 2 Curr. L. 1811, n. 96. A board of review is powerless to review and increase an assessment of personal property for for-

After tax rolls have been passed on by local boards of review and are properly certified by the members thereof, no change can be made by the board or any assessing officer;[65] the work of equalization is frequently though not always done by a body specially organized or created for that purpose, such as county and state boards of equalization.[66] The state board of equalization cannot deal with individual assessments, nor take into consideration inequalities as between individual taxpayers; but it deals only with the values of the taxable property of a county as a whole,[67] although in some states the state board is given power to make alterations in individual assessments.[68]

In various states the state board or some similar body is made a special board for the assessment of railroad and other public service corporations[69] with power to apportion the valuation among the several districts in which such companies do business.[70] The mileage basis of apportionment in taxing railroads and other public service companies is just, but there are exceptional cases where deductions should be made to prevent manifest inequality of value per mile.[71] The assessment is not final until acted upon by the county and state boards of equalization, and not until

mer years on the theory that the assessment was too low and that the board is engaged in assessing omitted credits. Barkley v. Dale, 213 Ill. 614, 73 N. E. 325. Rev. St. 1899 of Wyoming, § 1785, empowering the board of equalization to add to the assessment roll any taxable property in its county not included in the assessment as returned by the assessor, does not require the board to hear evidence as a condition precedent to correcting the assessment roll, but it may act on the personal knowledge of its members or on information gained by them from any source at their command. Ricketts v. Crewdson [Wyo.] 81 P. 1, rehearing; former opinion 79 P. 1042. Where additions to tax lists are made by equalizing boards, the facts as to each separate item should be entered on the record with sufficient fullness and clearness to show the addition justifiable. Hayes v. Yost, 4 Ohio C. C. (N. S.) 455.

64. Page v. City of Melrose [Mass.] 71 N. E. 787.

65. Blaly v. Bay City [Mich.] 102 N. W. 1033. Under a statute that after approval of the roll an assessment can be changed only in case of an increase of value by reason of improvements, the construction of a railroad through a village, indirectly enhancing the value of a lot, is not such an improvement as is contemplated by the statute. Hancock County Sup'rs v. Simmons [Miss.] 38 So. 337. In Iowa, property having been duly entered upon the books by the assessor, and his work having been approved by the board of equalization, the assessment becomes a finality and the county treasurer is without authority to raise an assessment because appearing to him to be below actual valuation. German Sav. Bank v. Trowbridge, 124 Iowa, 514, 100 N. W. 333.

66. See 2 Curr. L. 1811, n. 92. In Idaho the county board of equalization is a constitutional board, exercising powers and duties separate and distinct from those exercised by the board of county commissioners. Section 1776, Rev. St. 1887, as amended by Laws 1899, p. 248, does not authorize an appeal from an order of a board of equalization. Feltham v. Board of County Com'rs [Idaho] 77 P. 332; Humbird Lumber Co. v. Morgan [Idaho] 77 P. 433.

67. Hacker v. Howe [Neb.] 101 N. W. 255. In the equalization of property as between different counties, it is not required to enter into a formal investigation, examine witnesses, etc., in ascertaining the relative values of the property of the different counties of the state. It may act upon the abstracts of assessments of the different counties and the knowledge of its own membership as to values generally. Id.

68. Bialy v. Bay City [Mich.] 102 N. W. 1033.

69. See 2 Curr. L. 1811. Comp. St. Nebraska 1901, art. 1, ch. 77, providing for the assessment of railroad and telegraph properties by the state board of equalization, held constitutional. Chicago, B. & Q. R. Co. v. Richardson County [Neb.] 100 N. W. 950. In the assessment of railway property as therein provided, it is competent for the legislature to classify such property, and provide for the assessment of the same as personalty, and to fix the situs of the property assessed by providing for the valuation of the property as an entirety and the distribution of the total value to each taxing district according to the number of miles of track located therein. State v. Back [Neb.] 100 N. W. 952. The Arkansas state board of railroad commissioners are a continuous body, and having made an assessment of railroad property, had power to modify the same for the purpose of compromising litigation. Railroad Tax Cases, 136 F. 233. Mississippi Act 1898, p. 23, c. 5, § 66, under which the railroad commission must annually on or before the first Monday in August classify the several railroads for the purpose of privilege taxation, gives the commission no power to back classify. Gulf & S. I. R. Co. v. Adams [Miss.] 38 So. 348.

70. See 2 Curr. L. 1811, n. 98.

71. Where a company operates in connection with its transportation business, lines of steamboats across navigable waters beyond its termini the length of such lines should be excluded from the computation in determining the franchise tax. State v. Canadian Pac. R. Co. [Me.] 60 A. 901.

the action of the latter is certified to the county clerks of the different counties, and by them extended upon the tax rolls.[72]

Notice.[73]—In many states a board of review may not increase the valuation of a taxpayer's property without notice to him.[74] Such notice, being for the benefit of the taxpayer, is jurisdictional,[75] and cannot be waived by subsequent appearance.[76] In some states it is essential that the notice be served personally;[77] in others it may be given by publication;[78] while in many others no notice is required other than that given by statutes of the existence of the board, its powers and duties, and the time and place of its meetings.[79]

Review by the courts.[79a]—Statutory provisions relating to equalizing assessments and making additions to tax lists are mandatory and must be strictly complied with,[80] and since boards of review and equalization acting on the assessments of property are special tribunals of limited and inferior powers, the facts showing jurisdiction must affirmatively appear from the record of their proceedings.[81] In the exercise of their powers, they act quasi judicially,[82] and, in the absence of fraud or other misconduct, or arbitrary exercise of power equivalent thereto,[83] the rule is universal that their discretion cannot be controlled by the courts in collateral proceedings,[84] nor can errors of judgment and overvaluation in the assessment of property,[85] estimate by board of supervisors in excess of actual value,[86] be rightfully reviewed by the courts in the absence of statutes authorizing such proceedings.[87] In most states, however, an appeal to some ap-

72. Hacker v. Howe [Neb.] 101 N. W. 255.

73. See 2 Curr. L. 1811, n. 99.

74. Montana Ore Purchasing Co. v. Maher [Mont.] 81 P. 13. In Indiana the validity of an assessment is not affected by the fact that the record of the board of review does not show notice to the owner of the contemplated action of the board unless the valuation, as raised, exceeds the true cash value. Fell v. West [Ind. App.] 73 N. E. 719.

75. See 2 Curr. L. 1812, n. 1. Montana Ore Purchasing Co. v. Maher [Mont.] 81 P. 13; United States Fidelity & Guaranty Co. v. Board of Education [Ky. L. R.] 86 S. W. 1120. Where report of the board of review does not show that notice was given, the burden of showing want of notice is on the taxpayer. Brunson v. Starbuck, 32 Ind. App. 457, 70 N. E. 163.

76. See 2 Curr. L. 1812, n. 2. The taxpayer having had notice to appear before the board to show cause why his assessment should not be increased and having appeared and been informed, the notice was sufficient under Cal. Pol. Code, § 3681, requiring five days notice to the taxpayer. Savings & Loan Soc. v. City & County of San Francisco [Cal.] 80 P. 1086. Voluntary appearance after increase to seek reduction. Montana Ore Purchasing Co. v. Maher [Mont.] 81 P. 13.

77. See 2 Curr. L. 1812, n. 3. Notice of an addition to a tax list by the board must be on the owner of property affected personally. Putting notice in post office not sufficient. Hayes v. Yost, 4 Ohio C. C. (N. S.) 455.

78. See 2 Curr. L. 1812, n. 4. Where a statute requires that notice be given for "at least six days prior" to the meeting of the city council as a board of review, the notice must be given during the six days immediately prior to the date of the meeting. Shannon v. City of Omaha [Neb.] 100 N. W. 298.

79. See 2 Curr. L. 1812, n. 5. Hacker v. Howe [Neb.] 101 N. W. 255.

79a. See 2 Curr. L. 1813.

80. See 2 Curr. L. 1812. Hayes v. Yost, 4 Ohio C. C. (N. S.) 455. Failure of a board of revision to be sworn does not invalidate the assessment. Manor Real Estate & Trust Co. v. Cooner, 209 Pa. 531, 58 A. 918. The sending by a reviewing board of the original instead of a transcript of the triennial assessment as required by statute did not invalidate assessment. Id.

81. Parol evidence is inadmissible to contradict or vary the recitals of these records. Montana Ore Purchasing Co. v. Maher [Mont.] 81 P. 13.

82. Hacker v. Howe [Neb.] 101 N. W. 255; Wead v. Omaha [Neb.] 102 N. W. 675.

83. Wead v. Omaha [Neb.] 102 N. W. 675. A mere excessive assessment and overvaluation by a reviewing board cannot be revised by the courts in the absence of a showing that the action of the board was fraudulent. Ricketts v. Crewdson [Wyo.] 79 P. 1042.

84. Hacker v. Howe [Neb.] 101 N. W. 255.

85. The action of a board of review in assessing property too low is binding upon the state. Citizens' Nat. Bank v. Com., 25 Ky. L. R. 2254, 80 S. W. 479.

86. Johnson v. Bradley-Watkins Tie Co. [Ky. L. R.] 85 S. W. 726.

87. Neither courts of law nor of equity have jurisdiction of appeals from assessing boards save as that jurisdiction is expressly conferred by statutes. Board of Com'rs of Arapahoe County v. Denver Union Water Co., 32 Colo. 382, 76 P. 1060. In Connecticut a taxpayer is entitled to a decision of the superior court on the legality of an assessment after the board of relief has made the alleged assessment binding upon him. Morris v. City of New Haven [Conn.] 58 A. 748. Under Penn. Act July 9, 1897 (P. L. 219),

propriate judicial tribunal is provided,[88] the customary and appropriate remedy being certiorari.[89] The issue, admissibility of evidence, and various matters of procedure, on appeal, are given in a note.[90] An assessment is not vacated by appeal.[91]

where a corporation assessed for taxation has failed to appeal to the board of assessors as provided by the act, it cannot under the direct provisions of the act appeal to the court of common pleas. In re Philadelphia Co. [Pa.] 60 A. 93.

88. See 2 Curr. L. 1813, n. 12. The Colorado Act of 1889 (2 Mills' Ann. St. §§ 3839-3842) creates a special proceeding from which no appeal lies from the district court to the court of appeals. Pilgrim Consol. Min. Co. v. Board of Com'rs of Teller County [Colo. App.] 78 P. 617. Under the Alabama Code 1896, § 3979, authorizing the commissioners' court to hear evidence and raise or reduce an assessment, and declaring that an appeal from such judgment may be taken to the circuit court, that court may on an appeal by a taxpayer whose assessment has been increased by the commissioner's court, still further increase the assessment on a declaration filed by the state asking such an increase. Tennessee Coal, Iron & R. Co. v. State [Ala.] 37 So. 433.

89. See 2 Curr. L. 1813, n. 14. If a board of review in reaching a determination is required to act upon evidence and it acts without evidence, or any evidence warranting the result in any reasonable view thereof, or if it is required to receive evidence and refuses so to do, it commits a clear violation of law and jurisdictional error, and its final determination may be challenged by certiorari, if the error appears of record. State v. Williams [Wis.] 100 N. W. 1048. Inequality as a ground for relief by certiorari under the New York Tax Law (Laws 1896, p. 882, c. 908, § 250) must be something more than a valuation disproportionate to that placed upon a few other pieces of property in the same vicinity. People v. Feitner, 95 App. Div. 217, 88 N. Y. S. 694. Evidence held to sustain a finding of inequality justifying relief. People v. Feitner, 95 App. Div. 481, 88 N. Y. S. 774; People v. Feitner, 96 App. Div. 615, 88 N. Y. S. 779. An order of the supreme court granting certiorari to review an assessment of a special franchise by the state board of tax commissioners cannot be amended so as to permit outside parties to intervene after issue joined between the original parties and just before the close of the trial. People v. Priest [N. Y.] 73 N. E. 1100, reversing 91 N. Y. S. 1006.

90. Parties: People v. Priest, 95 App. Div. 44, 88 N. Y. S. 11; People v. Priest, 91 N. Y. S. 772; People v. Priest, 91 N. Y. S. 1001; People v. Priest, 91 N. Y. S. 1006.

Petition for certiorari to review increased tax assessment held not to allege facts to present constitutionality of act in question. People v. Wells, 99 App. Div. 364, 91 N. Y. S. 219. Failure to file a **transcript** of the proceedings of a board of review until during the trial of an appeal therefrom does not oust the district court's jurisdiction. City Council of Marion v. Cedar Rapids & M. C. R. Co., 120 Iowa, 359, 94 N. W. 501. The provision of the Idaho statute requiring the clerk to transmit the papers on appeal from an order of the board of commissioners to the district judge within five days after the service of the notice of appeal is not jurisdictional, and a failure to do so does not deprive the appellant of the benefits of his appeal. Humbird Lumber Co. v. Kootenai County [Idaho] 79 P. 396. Where an appeal is allowed to any court from an assessing body, whatever the grade of the court, it is one of limited **jurisdiction** for such purpose and must keep strictly within it. Pilgrim Consol. Min. Co. v. Board of Com'rs of Teller County [Colo. App.] 78 P. 617. In such special proceedings jurisdiction on appeal is no more extensive than that possessed by the assessing body from whose decision the appeal is taken. Id. Slight or even considerable differences in valuations are not sufficient when honestly made to authorize the court to set aside an assessment. Henderson v. Pierce County [Wash.] 79 P. 617. Where, however, the assessment is many times the actual value of the land, and is higher proportionately than other property, a condition does arise when the courts are authorized to do so. Id. Under a statutory provision that a person to whom it is proposed to list and assess omitted property may appeal to the district court, **the issue** before the district court is as to the correctness of the action of the assessing officer, and the evidence must be confined to that issue (Mahkonsa Inv. Co. v. Ft. Dodge [Iowa] 100 N. W. 517); but the taxpayer is entitled to have determined every question which such officer was called upon to determine; and when the evidence is submitted, it is for the court to determine on the whole thereof whether the officer has acted properly (Schoonover v. Petcina [Iowa] 100 N. W. 490). In the trial of an appeal from the assessment of taxes, **evidence** of the valuation for the purposes of taxation placed by the assessors upon other property in the town is inadmissible. Whether it would be admissible upon proof that the assessors had designedly and generally valued the property in town at less than its true value, quaere (Penobscot Chemical Fibre Co. v. Bradley [Me.] 59 A. 83), and the valuation placed upon the appellant's property by the assessors in other years is likewise inadmissible upon the question of true value (Id.). If an appellant's property has been rated at no more than its true value, evidence tending to show merely a disproportionate valuation by comparison with the valuation placed upon other property is irrelevant. Id. In Alabama on appeal to the circuit court from an additional assessment imposed by the back tax commissioner under Revenue Code 1900, p. 158, § 10, the state has the burden of proof in sustaining the assessment. Hooper v. State [Ala.] 37 So. 662. Under the New York special statutory writ of certiorari, the review of an assessment is in effect a new hearing, and evidence bearing on the validity of the assessment may be introduced by either party. People v. Wells, 91 N. Y. S. 283; People v. Wells,

§ 7. *Levies and tax lists.*[92]—A grant of power to levy taxes must be strictly construed, and the method prescribed by the legislature must be substantially followed.[93] Failure to comply with statutory requirements is not merely an irregularity but an error rendering the tax void.[94] As a general rule, a levy can be made only by legislative enactment or authority[95] within the limits[96] and in the form prescribed by law,[97] and by a duly authorized[98] and properly constituted body.[99] Where the electors of a town can direct the raising of money by taxa-

101 App. Div. 600, 92 N. Y. S. 5. In order to justify a claim of irregularity, a petitioner must show a state of facts from which a presumption justly arises that the irregularity of which he complains will subject him to the payment of more than his just proportion of the aggregate tax (People v. Wells, 92 N. Y. S. 769), and this presumption does not arise by proof that in a particular instance other property, even if contiguous, is assessed at a proportionately lower valuation than his own (People v. O'Donnell, 92 N. Y. S. 770). Where the question to be determined was whether premises were assessable by the board of railroad assessors or by the local assessors, and the agreed state of facts disclosed the same question to be determined in a **former adjudication** between the parties or their predecessors, and the facts or conditions were not shown to have been changed, held res adjudicata. Union Pac. R. Co. v. Board of Com'rs of Wyandotte County, 69 Kan. 572, 77 P. 274.

Costs on review arising from the irregularities of the assessing officers may be imposed upon the county. Manor Real Estate & Trust Co. v. Cooner, 209 Pa. 531, 58 A. 918.

91. The burden is upon the appellant to show that he is entitled to relief by way of an abatement of the tax. Penobscot Chemical Fibre Co. v. Bradley [Me.] 59 A. 83.

92. See 2 Curr. L. 1814.

93. Chicago, B. & Q. R. Co. v. People, 213 Ill. 458, 72 N. E. 1105; Wabash R. Co. v. People, 214 Ill. 568, 73 N. E. 749; Rice v. Shealy [S. C.] 50 S. E. 868.

94. Chicago, B. & Q. R. Co. v. People, 213 Ill. 458, 72 N. E. 1105; Wabash R. Co. v. People, 214 Ill. 568, 73 N. E. 749; Rice v. Shealy [S. C.] 50 S. E. 868.

95. See 2 Curr. L. 1814, n. 20. The power of a town to raise money by taxation is entirely a creature of statute, including only so much of the general power of taxation as the legislature delegates to the town. Flood v. Leahy, 183 Mass. 232, 66 N. E. 787. A tax to maintain a public library is not one for education within the meaning of Kentucky constitution (§ 184), prohibiting a tax for education other than in common schools till it has been authorized at an election. Ramsey v. Shelbyville, 26 Ky. L. R. 1102, 83 S. W. 116. The power of a municipality to levy sufficient general taxes to pay the bonds of their city is a legal inference from the authority to issue the bonds, in the absence of any constitutional or statutory limitation or inhibition of this power. United States v. Saunders [C. C. A.] 124 F. 124. Under Burns' Ann. St. 1901, §§ 4362, 4393a, town trustees may not levy taxes for public utilities until after the contracts therefor have been entered into. Brewer v. Bridges [Ind.] 73 N. E. 811.

96. See 2 Curr. L. 1814, n. 21. Desha County v. State [Ark.] 84 S. W. 625. The placing on the tax rolls by the county clerk in any year of a sum of money to be raised for state purposes in addition to the regular levy for state purposes will not be construed to make the levy excessive when such sum is insufficient to meet the amount in which the county is already delinquent to the state. Crebbin v. Wever [Kan.] 80 P. 977. For the purpose of paying existing indebtedness, city may levy taxes in excess of rate limited for general purposes. City of St. Joseph v. Pitt [Mo. App.] 83 S. W. 544. Levy by village council in excess of rate fixed by statute, in absence of showing to contrary, necessity therefor will be presumed. Diamond Match Co. v. Ontonagon [Mich.] 103 N. W. 578. The magistrates of a county who ex officio constitute the fiscal court in levying taxes as such court act in a legislative capacity, and are not liable on their official bonds for levying a tax in excess of the constitutional limit. Commonwealth v. Kenneday, 26 Ky. L. R. 504, 82 S. W. 237.

97. See 2 Curr. L. 1815, n. 23. Where a township organization act requires that a certain officer shall certify the amount of taxes to be raised, his certificate is necessary to sustain a levy. Indiana, D. & W. R. Co. v. People, 201 Ill. 351, 66 N. E. 293. The fact that in some instances the amount levied by a city was less than the amount named in the appropriation bill was no valid objection to the tax. Cincinnati, I. & W. R. Co. v. People, 213 Ill. 197, 72 N. E. 774. A certificate of levy for "road and bridge fund" is sufficient if levy itself was made in accordance with section 111 of the Illinois road and bridge law. People v. Chicago & E. I. R. Co., 214 Ill. 190, 73 N. E. 315. Omission of seal to the tax levy is not necessarily fatal to validity of tax. Schmohl v. Williams [Ill.] 74 N. E. 75. While a levy in percentages by the state board of equalization is valid (Fisher v. Betts, 12 N. D. 197, 96 N. W. 132), a levy by county commissioners based on percentages and not in specific amounts is invalid (Paine v. Germantown Trust Co. [C. C. A.] 136 F. 527).

98. See 2 Curr. L. 1815, n. 24. The authority to assessors to "assess a tax," is not the discretionary power to order the assessment, which power is vested only in the town. Franklin v. Warwick & C. Water Co., 25 R. I. 384, 55 A. 934.

99. See 2 Curr. L. 1815, n. 24. The power of the trustees of the town of Argo, now a constituent part of the city and county of Denver, to levy taxes remained intact until the first day of December, 1902. Boston & C. Smelting Co. v. Elder [Colo. App.] 77 P. 258.

tion, a ratification by them of an attempted levy amounts to a direction.[1] Under a statute providing for the abolition of school districts and vesting title to their property in the towns in which they are located, and that the property so vested shall be appraised by a commission and a tax shall be levied upon the whole town equal to the amount of appraisement, and there shall be remitted to the taxpayers of each district their proportional share of the appraised value of the school property in such district, the requirements of appraisal and remittance are mandatory.[2] A tax is presumed to have been legally levied, and the burden of proof is on the party objecting thereto to establish the contrary.[3]

Mandamus[4] will issue to compel the levy of a tax for a specific purpose, the duty of the taxing officers being clear.[5]

The record[6] must recite the facts showing that each essential step in the laying of the tax has been performed.[7] If the levy was for a specific purpose, this should appear,[8] together with the amount of each where there are several purposes.[9] Testimony of a town clerk to show the purpose of the levy is inadmissible.[10] Where the power to levy a tax is regularly exercised by the proper authorities in substantial conformity to the law, the court, upon proof of such fact, may permit the certificate of levy to be amended.[11] But if the statute authorizing the levy has not in fact been followed and complied with, the levy cannot be made valid by amendments of certificates or proceedings, because that would not be a correction of a mere irregularity, but would be an attempt to make valid a levy at the time of the amendment.[12]

The ministerial act.[13]—When proceedings in the levy of a tax have culminated in the extension of the tax and the completion of the assessment roll,[14] and

1. Cincinnati, L. & C. R. Co. v. People, 206 Ill. 387, 69 N. E. 39.

2. Tefft v. Lewis [R. I.] 60 A. 243. Such tax, being null and void, could not be validated by the act of the court in confirming the same. Id. Nor were the taxpayers estopped to assert the invalidity of the tax by reason of their having been notified by publication of the filing of the report of the commission of appraisal, and of the time of hearing of a motion to confirm such report. Id.

3. In re Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786; Cleveland, etc., R. Co. v. People, 212 Ill. 551, 72 N. E. 790.

4. See 2 Curr. L. 1815, n. 26.

5. To satisfy judgment: Guthrie v. Sparks [C. C. A.] 131 F. 443; Ex parte Folsom, 131 F. 496; City of Ft. Madison v. Ft. Madison Water Co. [C. C. A.] 134 F. 214; Cooper v. Cape May Point [N. J. Law] 60 A. 516; Territory v. Socorro [N. M.] 76 P. 283. Mandamus will not lie to compel the payment of money raised by township officers for current expenses upon bonded indebtedness, nor upon judgments based upon such indebtedness, where it does not appear that the indebtedness arose out of ordinary expenses of the township, nor that the fund raised for current expenses is more than sufficient for that purpose. Ward v. Piper, 69 Kan. 773, 77 P. 699.

6. See 2 Curr. L. 1815.

7. Chicago, etc., R. Co. v. People, 213 Ill. 458, 72 N. E. 1105.

8. See 2 Curr. L. 1815, n. 30. A **town** tax levy "for town purposes," without defining the purposes, is not sufficient. People v. Indiana, etc., R. Co., 206 Ill. 612, 69 N. E. 575; Cincinnati, etc., R. Co. v. People, 212 Ill. 518, 72 N. E. 770; Murphy v. People, 213 Ill. 154, 72 N. E. 779; People v. Chicago, etc., R. Co., 214 Ill. 190, 73 N. E. 315.

County levy. Cincinnati, etc., R. Co. v. People, 213 Ill. 197, 72 N. E. 774; Cincinnati, etc., R. Co. v. People, 214 Ill. 302, 73 N. E. 312; Chicago, etc., R. Co. v. People, 213 Ill. 458, 72 N. E. 1105.

9. Failure to state separately the amounts for each purpose, there being several purposes. People v. Cincinnati, etc., R. Co., 213 Ill. 503, 72 N. E. 1119; Cincinnati, etc., R. Co. v. People, 213 Ill. 558, 73 N. E. 310.

10. Illinois Cent. R. Co. v. People, 213 Ill. 174, 72 N. E. 1006.

11. By allowing the individual signatures to be substituted for the corporate name. Illinois Cent. R. Co. v. People, 213 Ill. 174, 72 N. E. 1006. Where the certificate of a board of education of the levy of a tax was signed by but two of the five members, it was proper to permit the certificate to be amended, so as to show all the names, on the testimony of the members that had they known signature by all was necessary, they would have signed at the time of the levy. Illinois Southern R. Co. v. People [Ill.] 74 N. E. 97.

12. Illinois Cent. R. Co. v. People, 213 Ill. 174, 72 N. E. 1006.

13. See 2 Curr. L. 1816.

14. The only authority of the county clerk in Illinois for extending a tax is some paper or certificate which purports to be a certified copy of an ordinance levying a tax. Failure to file certified copy. Cincinnati, etc., R. Co. v. People, 213 Ill. 558, 73 N. E. 310. Where the certificate of levy for road

its delivery,[15] properly signed and certified,[16] to the receiver of taxes, with a warrant for the collection of the sums assessed to the persons named therein, this is a final act of the governing body, possessing the attributes of a judgment and entitled to legal presumptions in its support.[17]

§ 8. *Payment and commutation.*[18]—Payment of taxes must be made at the time,[19] and in the funds provided by law;[20] but where a landowner in good faith applies to the proper officer to pay his taxes and is prevented by the mistake, wrong or fraud of the officer from doing so, such attempt will be treated as equivalent to payment.[21] Where taxes on personalty are a lien on the land of the same owner, the collector is not obliged to accept and receipt separately for that part of the tax assessed to the land.[22] Payment of an illegal tax for one year does not bar the right to contest that for another year.[23] When the general levy is within limits, one who fails to pay cannot be discharged on the ground that there is no need for his portion.[24] No presumption of payment arises merely from the duty to pay,[25] nor from lapse of time.[26] Though the taxes on distilled spirits in bond are not required to be paid until the bonded period is ended or the United States government taxes are paid, the warehouseman must pay interest from December 1st in the year following the assessment for the privilege of retaining the state's money.[27] Payment by a mere volunteer gives him no right of recovery against the landowner,[28] but where one of two partners on dissolution of partnership assumes payment of taxes, but omits to do so, the other may pay them to save property, and in suit for specific performance recover them back.[29] Payment of tax is sometimes made a condition precedent to the registration of conveyances.[30]

and bridge tax fails to state the amount required for each of the various purposes, and the aggregate amount required for all purposes, but such amounts can be ascertained by computation based on the rate of taxation stated therein, the certificate is sufficiently certain. Chicago, etc., R. Co. v. People, 214 Ill. 471, 73 N. E. 747.

15. Under charter provision that tax roll shall be delivered July 1st, and that forthwith six days' notice by publication shall be deemed a demand for payment, a publication for six days but excluding and omitting a legal holiday is sufficient. Walker v. Detroit [Mich.] 101 N. W. 809.

16. Failure to sign roll before delivery to reviewing board held fatal to validity of tax. Lowe v. Detroit [Mich.] 101 N. W. 810.

17. City of New York v. Matthews [N. Y.] 72 N. E. 629.

18. See 2 Curr. L. 1816.

19. See 2 Curr. L. 1816, n. 38.

20. See 2 Curr. L. 1816, n. 38. Payment by check. Dolman v. Pitt [Mo. App.] 82 S. W. 1111. Certificates of audited expenses cannot be accepted by collecting officers in payment of taxes. Oneida County v. Tibbetts [Wis.] 102 N. W. 897.

21. Hoffman v. Auditor General [Mich.] 100 N. W. 180. Where one tenders the full amount of taxes on his land to the tax collector, who not only tells him that the taxes have been paid but shows him a list indicating that the taxes have been paid by another party, a subsequent sale is void. Brannon v. Lyon [Miss.] 38 So. 609.

22. Wyoming Rev. St. 1899, § 1870. Ricketts v. Crewdson [Wyo.] 81 P. 1.

23. Carpenter v. Central Covington, 26 Ky. L. R. 430, 81 S. W. 919; City of Detroit v. Mackinaw Transp. Co. [Mich.] 12 Det. Leg. N. 123, 103 N. W. 557.

24. The fact that payment will make an unexpected surplus is of no importance. Milster v. Spartanburg, 68 S. C. 26, 46 S. E. 539; Cincinnati, etc., R. Co. v. People, 214 Ill. 302, 73 N. E. 312.

25. State v. Jackson [W. Va.] 49 S. E. 465.

26. Land returned delinquent. Mills v. Henry Oil Co. [W. Va.] 50 S. E. 157.

27. Commonwealth v. Rosenfield Bro. & Co., 25 Ky. L. R. 2229, 80 S. W. 1178.

28. The owner of a first mortgage who bought the property at a foreclosure sale thereunder and obtained title, and who thereafter redeemed from a sale for the tax levied on a second mortgage and paid other taxes levied on such mortgage to free the property from the lien thereof had no cause of action to recover such taxes from the owner of the second mortgage, there being no contractual relation between them and no personal obligation to pay the taxes resting on the defendant. Henry v. Garden City Bank & Trust Co., 145 Cal. 54, 78 P. 228.

29. Hutchinson v. Hutchinson [N. J. Eq.] 58 A. 528.

30. A county auditor is required by § 1624, Gen. St. 1894, to certify upon deeds conveying real estate that taxes have been paid upon such property only when it appears from the records of his office that such payments have been made. State v. Krahmer, 92 Minn. 397, 100 N. W. 105.

§ 9. *Lien and priority.*[31]—Statutes may provide when the tax shall become a lien,[32] but in the absence of other provision, a tax upon land becomes a lien at the moment the amount thereof is ascertained and determined.[33] An assessment of taxes refers back, for the purpose of enforcing payment thereof, to the date upon which the lien attached, notwithstanding all the steps necessary in making up the assessment are taken subsequent to the date of the lien.[34] The repeal of the law or any provision thereof under which a tax lien was acquired will not affect the lien,[35] and the fact that for a time during the existence of a lien no procedure was provided for its enforcement did not extinguish the lien.[36] A lien is not discharged pro tanto by allowing a transfer without officially apportioning the taxes between original and granted portions of a tract.[37] The life of a lien depends on the life of the action instituted to enforce it, and if for any reason the action should abate or be dismissed, the lien would die with it.[38] The lien for general taxes is paramount to all other claims and demands, including the lien of assessments for local improvements,[39] even though the latter are payable in instalments, some of which have matured.[40] Whether it would be competent for a legislature to postpone in favor of taxes a lien already duly acquired, quaere.[41] Under the national bankruptcy act, taxes due and owing by the bankrupt are entitled to preference.[42] Tax liens held by the state of Minnesota are not interests in and claims upon the land on which they are a lien, within the meaning of the Land Title Registration act.[43]

§ 10. *Relief from illegal taxes.*[44]—A court of equity will in general interfere to restrain the collection of a tax or annul tax proceedings only where it appears either that the property sought to be taxed is not subject to taxation,[45]

31. See 2 Curr. L. 1817. Lien of taxes, see Tiffany, Real Property, 1319.

32. Under a statutory provision that all taxable property shall be assessed between the first Monday in February and the first Monday in June, property acquired between those dates is subject to taxation if assessed before the latter date, notwithstanding another provision that the lien shall attach on the first of February. Aztec Land & Cattle Co. v. Navajo County [Ariz.] 80 P. 318. The South Dakota Act of March 5, 1897, providing that all taxes assessed on personal property shall be a first lien on all personalty of the person against whom assessed from and after December 1st in each year is not retrospective. Hulin v. Butte County [S. D.] 100 N. W. 739.

33. See 2 Curr. L. 1817, n. 47. A corporation whose property is exempt from taxation takes real estate subject to the taxes where it acquires title after the tax books for the fiscal year are closed, but before the tax has ripened into a lien. People v. Wells, 89 N. Y. S. 847. A tax or assessment cannot exist as a lien upon real estate until its amount is ascertained or determined. Gillmor v. Dale, 27 Utah, 372, 75 P. 932.

34. Loomis v. Von Phul, 2 Ohio N. P. (N. S.) 423.

35. Hagler v. Kelly [N. D.] 103 N. W. 629, reversing Gull River Lumber Co. v. Lee, 7 N. D. 135, 73 N. W. 430; Hooper v. State [Ala.] 37 So. 662.

36. Auditor General v. Carpenter [Mich.] 101 N. W. 1025.

37. A transfer of part of a tract charged with taxes by the auditor under § 1025, Rev. St. does not work a forfeiture against the state of any of the taxes so charged. Williamson v. Lewis, 2 Ohio N. P. (N. S.) 1.

38. City of Louisville v. Burke [Ky.] 87 S. W. 269.

39. See 2 Curr. L. 1818, n. 61. Pennsylvania Co. v. Tacoma, 36 Wash. 656, 79 P. 306; Patton v. Camp, 120 Ga. 936, 48 S. E. 361.

40. City of Ballard v. Ross [Wash.] 80 P. 439.

41. In re Prince & Walter, 131 F. 546.

42. In re Prince & Walter, 131 F. 546; In re Flynn, 134 F. 145.

43. Laws 1903, c. 234, § 6, p. 341. National Bond & Security Co. v. Daskam, 91 Minn. 81, 97 N. W. 458.

44. See 2 Curr. L. 1819.

45. Glos v. Hayes, 214 Ill. 372, 73 N. E. 802. Injunction is the proper form of relief from an assessment for taxation made upon unconstitutional principles. Fargo v. Hart, 193 U. S. 490, 48 Law. Ed. 761. The collection of taxes may be enjoined on the ground that the plaintiff had no taxable property in the county without first making application to the board of equalization to correct the assessment. Horton v. Driskell [Wyo.] 77 P. 354. Courts of equity have full authority to review the decision of the auditor where the foundation of the right to tax is challenged. Considering Rev. St. § 5848. Kraay v. Gibson, 2 Ohio N. P. (N. S.) 537. The foundation of the right to tax being challenged, the action of the auditor is prima facie only. Id. District courts in Louisiana have original jurisdiction in all cases of illegal assessment and taxation, irrespective of the amount involved. Bunkie Brick Works v. Police Jury of Avoyelles, 113 La. 1062, 37 So. 970.

or the tax itself is not wholly authorized by law,[46] or the taxes are assessed or levied by unauthorized persons,[47] or the taxing officers have acted fraudulently,[48] or the taxes have been illegally levied,[49] or the assessment made unjustly,[50] or without uniformity;[51] and the plaintiff must, in addition, bring himself within some recognized head of equity jurisprudence,[52] and must also tender, unless statutory provisions make such tender unnecessary, or pay, the taxes justly chargeable upon his property, if ascertainable,[53] before an injunction should issue to restrain the collection of the taxes. A property owner is not estopped by delay to contest a tax levied without jurisdiction.[54] There is no statutory estoppel when the property is not subject to taxation, and no equitable estoppel when the

46. The omission to attach the assessor's affidavit to an assessment roll does not invalidate an assessment in an equitable proceeding. Douglas v. Fargo [N. D.] 101 N. W. 919.

47. Where the assessment on which a tax was extended is void because made by a board of assessors without authority to make the same, a court of equity has jurisdiction to restrain the collection of the tax. Chicago & M. Elec. R. Co. v. Vollman, 213 Ill. 609, 73 N. E. 360. If a municipal corporation acts ultra vires in the levying of a tax or assessment and attempts to collect it, equity has jurisdiction upon proper bill filed by the parties, subject to such tax or assessment to enjoin its collection. Cain v. Elkins [W. Va.] 49 S. E. 898.

48. Wead v. Omaha [Neb.] 102 N. W. 675. In the absence of a showing that school trustees, in changing the location of the school building, did not act for the best interests of the district, a levy of taxes will not be restrained. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18.

49. A taxpayer is not entitled to injunctive relief against taxes on the ground of excessive valuation, without showing that a tax has been imposed on his property greater than its just share. Fell v. West [Ind. App.] 73 N. E. 719. Allegation in a petition to restrain the collection of taxes that the board of equalization acted illegally and arbitrarily is a mere legal conclusion which is not admitted by demurrer. Ricketts v. Crewdson [Wyo.] 81 P. 1. That the certificate of levy was not under seal is not sufficient ground for injunctive relief. Schmohl v. Williams [Ill.] 74 N E. 75.

50. Assessment illegally increased. Montana Ore Purchasing Co. v. Maher [Mont.] 81 P. 13. The collection of a tax cannot be restrained on the bare ground that the assessment was illegal (Trumbull v. Palmer, 93 N. Y. S. 349), or that the estimate of the board of supervisors was in excess of actual value (Johnson v. Bradley-Watkins Tie Co. [Ky.] 85 S. W. 726), or merely for failure of the assessor to attach the oath required by statute to the assessment where it does not appear that the tax is for some reason inequitable (Horton v. Driskell [Wyo.] 77 P. 354; Douglas v. Fargo [N. D.] 101 N. W. 919). See § 5 B, Irregularities; also § 6, Review by Courts.

51. Douglas v. Fargo [N. D.] 101 N. W. 919.

52. Mere errors or excess in valuation or hardship or injustice of the law or any grievance which can be remedied by a suit at law, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay a collection of tax. In addition to illegality the case must be brought within some of the recognized foundations of equitable jurisdiction. McConnell v. Hampton [Ind.] 73 N. E. 1092. But equity will enjoin the collection of a tax levied without jurisdiction, though there may be an adequate remedy at law. Statute providing for the tax was unconstitutional. Smith v. Peterson, 123 Iowa, 672, 99 N. W. 552. Where the only injury which a taxpayer will suffer through a proposed tax levy, which is claimed to be in part to provide funds for the payment of an illegal claim, is the imposition of a tax upon his property, a court of equity will not interfere at his suit to restrain the levy and suspend the regular course of tax proceedings upon the ground that his injury will be irreparable. When his property rights are invaded by the unlawful imposition of the tax, his remedies at law or in equity, as the case may be, are adequate. Torgrinson v. Norwich School Dist. No. 31 [N. D.] 103 N. W. 414. Sufficiency of adequate remedy at law to prevent a suit to restrain collection of a tax against a corporation as a cloud on title. Indiana Mfg. Co. v. Koehne, 188 U. S. 681, 47 Law. Ed. 651. Equity will not enjoin the unlawful seizure and sale of personal property for taxes. Such seizure being a trespass, is remediable in a court of law. City of Jacksonville v. Massey Business College [Fla.] 36 So. 432. Courts have jurisdiction to inquire into the validity of a tax levy on personal property, and restrain the collection thereof, if found void, at the suit of the injured party, if the tax be due and payable and a levy on the part of collecting officers is threatened. Phillips v. Thurston County, 35 Wash. 187, 76 P. 993.

53. Montana Ore Purchasing Co. v. Maher [Mont.] 81 P. 13; Bell's Trustee v. Lexington [Ky.] 85 S. W. 1081; Wead v. Omaha [Neb.] 102 N. W. 675. If it appears that a portion of the taxes are legal and the amount ascertainable, and a part illegal, collection of the illegal portion will not be restrained unless the legal portion has been paid or tendered. Douglas v. Fargo [N. D.] 101 N. W. 919. Tender is not a prerequisite to injunctive relief against an assessment for taxation made upon unconstitutional principles. Fargo v. Hart, 193 U. S. 490, 48 Law. Ed. 761. Bill to reform deed and cancel tax certificates. Burgson v. Jacobson [Wis.] 102 N. W. 563.

54. Statute providing for tax was unconstitutional. Smith v. Peterson, 123 Iowa, 672, 99 N. W. 552.

acquiescence of a taxpayer for the time being is superinduced by the representations of the assessor.[55] The decision of town commissioners that the statutory conditions barring the collection of a tax were complied with is conclusive as against collateral attack by a taxpayer seeking to enjoin collection of the tax.[56] Cases illustrative of the proper parties and practice in an injunctive proceeding will be found in the note.[57] A law providing that property purchased for delinquent taxes shall become the property of the county, subject to redemption, does not prevent the taxpayer from compromising a dispute as to the validity of tax proceedings with the county.[58]

Recovery back of payments.[59]—A taxpayer whose property has been illegally taxed may pay the tax under protest,[60] and sue to recover it back.[61] But a pay-

55. Bunkie Brick Works v. Police Jury of Avoyelles, 113 La. 1062, 37 So. 970.

56. Demaree v. Bridges, 30 Ind. App. 131, 65 N. E. 601.

57. In a suit against a state board of railroad commissioners, to restrain the collection of taxes on assessments made by them, the attorney general held to have had no power to intervene on behalf of the state. Railroad Tax Cases, 136 F. 233. A holder of mortgage bonds of a company has such interest in its property as entitles him to maintain a suit to enjoin its illegal taxation, where a proper showing is made of the refusal of the mortgage trustee to prosecute such suit. Wicomico County Com'rs v. Bancroft [C. C. A.] 135 F. 977. The fact that a township is not a party defendant to enjoin a board of county commissioners from enforcing a township railroad aid tax does not render the injunction void as to those who were made parties. State v. Board of Com'rs of Clinton County, 162 Ind. 580, 70 N. E. 373. A municipal corporation has no power to sue out an injunction to prevent the collection of a tax claimed by the police jury of the parish from one of the residents of the town on property situated within the limits of the town. If the property owners of the town are exempt, it is incumbent upon them to plead the exemption, for the exemption is a personal right, which must be invoked by the taxpayers themselves. Town of Donaldsonville v. Police Jury of Ascension Parish [La.] 36 So. 873. The holders of bonds are necessary parties to an action to restrain a school district from levying a tax to pay interest on such bonds. Boesch v. Byrom [Tex. Civ. App.] 83 S. W. 18. Persons against whom an unlawful exaction in the form of a tax is sought to be made may unite in an application for an injunction to restrain the collection of the tax. They are not obliged to pay the same and bring separate suits against the tax officer. Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765. An injunction restraining county commissioners from entertaining proceedings for enforcement of railroad aid tax, and the county treasurer from collecting the same, was void as to the board but valid as to the treasurer; it is a defense against mandamus to compel the board to order its collection. State v. Board of Com'rs of Clinton County [Ind.] 70 N. E. 373. On reversing a decree which enjoins a county from collecting a tax, the court will not continue in force the injunction merely because the law for the collection of taxes in force when the suit was brought has been repealed, as there may be a method to collect the tax under the new law. Cochise County v. Copper Queen Consol. Min. Co. [Ariz.] 76 P. 595.

58. Laws 1893, p. 28. Multnomah County v. Title Guarantee & Trust Co. [Or.] 80 P. 409.

59. See 2 Curr. L. 1820.

60. The indorsement "The amount paid in settlement of this bill of taxes was paid to me by said taxable under protest as being illegally exacted and with the avowed intention of suing for its recovery," does not amount to payment under protest. Monaghan v. Lewis [Del.] 59 A. 948. In a suit by a taxpayer to recover taxes paid under protest on the ground that the assessment was not legally made, the burden was on him to show that the acts relative to the assessment were unauthorized. Savings & Loan Soc. v. San Francisco [Cal.] 80 P. 1086. The superior courts in North Carolina have no jurisdiction to entertain an appeal from an order of county commissioners or to enter judgment in favor of a taxpayer for taxes paid by him under protest. The proper remedy to test the legality of the tax is by an action to recover the amount paid. The superior court would then have jurisdiction. Murdock v. Iredell County Com'rs [N. C.] 50 S. E. 567.

61. See 2 Curr. L. 1820, n. 75. Payment by check, subsequently cashed, does not prevent recovery of illegal tax. Michigan Sanitarium & Ben. Ass'n v. Battle Creek [Mich.] 101 N. W. 855. Where an assessor knowingly assessed improvements at an amount in excess of their true cash value, the assessment was wrongful as to the excess, and the taxpayer can recover the taxes paid. Zeigler v. Board of Com'rs of Blackford County, 33 Ind. App. 375, 71 N. E. 527. An owner who pays an assessment which he claims to be void, under protest, may recover by proceeding by action against the county or presenting his claim to the supervisors for a refunding by the county treasurer. Remedy under Pol. Code, § 3819, is not exclusive of that provided in § 3804. Stewart Law & Collection Co. v. Alameda Co., 142 Cal. 660, 76 P. 481. The rule in equity that in a suit by one taxed he will not be relieved of his share of the burdens does not apply in an action at law to recover a tax erroneously spread and paid under protest. Murphy v. Dohben [Mich.] 100 N. W. 891. Tax upon personalty. Torgrinson v. Norwich School Dist. [N. D.] 103 N. W. 414.

ment voluntarily made, with full knowledge of the facts, and in the absence of a present threat to enforce collection, cannot be recovered.[62] An action for the recovery of money paid by reason of an illegal tax is regarded as an action for money had and received, to which statutes of limitations apply;[63] in common law states, recovery may be had under the common counts,[64] but the action cannot be maintained against the collecting officer,[65] unless he has paid the money into the treasury upon an indebtedness of his own, in which case he holds the moneys collected in trust for the benefit of the taxpayers.[66]

Refunding is authorized only when a tax has been illegally or erroneously exacted.[67] The claimant need not allege or prove payment to be involuntary or under protest, either when presenting the claim to supervisors or enforcing it in court,[68] and the right to interest follows without any express provision upon the subject.[69] One who takes an assignment of a certificate from the county treasurer, under a mistaken theory that it is necessary to protect a supposed interest therein, is entitled after the assessment has been declared void, to refundment of the money paid for the certificate.[70]

§ 11. *Collection. A. Collectors.*[71]—The appointment,[72] qualifications,[73] powers,[74] duties,[75] liabilities,[76] and compensation,[77] are quite generally matters of

62. See 2 Curr. L. 1820, n. 77. Payment of amounts illegally exacted as a condition to redemption is not voluntary, and may therefore be recovered. Palomares Land Co. v. Los Angeles County [Cal.] 80 P. 931. A statement by a tax ferret to a taxpayer who had wrongfully withheld property from taxation, that if others did not have to pay taxes on omitted property for that year the taxes paid would be refunded, is not binding on the county so as to authorize a recovery of the amount voluntarily paid as taxes. Kehe v. Blackhawk County [Iowa] 101 N. W. 281. Voluntary payment for a number of years of taxes on the vacant land of another by a stranger to the title, under the mistaken belief that he had a tax deed to the land, creates no obligation on the part of the owner of the land to repay. Bryant v. Nelson-Frey Co. [Minn.] 102 N. W. 859.

63. In re Hoople's Estate, 179 N. Y. 308, 72 N. E. 229. Limitations did not commence to run against an action to recover money expended in paying defendant's taxes at his request when the taxes were due but when the payment was made. Rhodes v. Negley [Ky.] 84 S. W. 1144. Where a city was charged with the duty of discovering any illegality, and a purchaser paid an illegally exacted fee, such payment did not charge the purchaser with knowledge of the illegality so that the statute of limitations began to run from the time of payment. Gove v. Tacoma, 34 Wash. 434, 76 P. 73.

64. Michigan Sanitarium & Ben. Ass'n v. Battle Creek [Mich.] 101 N. W. 855.

65. Where officer collecting a void tax has paid it into the proper treasury, an action to recover the tax cannot be brought against him individually. Craig v. Boone [Cal.] 81 P. 22. A person paying a tax to the sheriff under an agreement that in case the payer was not liable therefor it would be returned to him cannot maintain an action against such sheriff for the return of the money after it had been paid by the latter to the state treasurer. Teeter v. Wallace [N. C.] 50 S. E. 701.

66. Commonwealth v. Donnelly [Ky. L. R.] 85 S. W. 720.

67. The error, to justify a refund, must be some irregularity connected with the assessment or levy of the tax. Kehe v. Blackhawk County [Iowa] 101 N. W. 281. The California statute (Pol. Code, § 3804) does not authorize the board of supervisors to order a refund on claims filed after the expiration of six months after the making of the payment. Perrin v. Honeycutt, 144 Cal. 87, 77 P. 776.

68. Construing Pol. Code, § 3804. Stewart Law & Collection Co. v. Alameda County, 142 Cal. 660, 76 P. 481.

69. In re O'Berry, 179 N. Y. 285, 72 N. E. 109.

70. People v. Board of Sup'rs of Nassau County, 93 N. Y. S. 344.

71. See 2 Curr. L. 1820.

72. The revenue agent provided by the Kentucky statutes, though an appointee of the auditor, is not removable by him. Hager v. Lucas [Ky. L. R.] 86 S. W. 552.

73. In an election contest for the office of city tax collector, evidence held to justify a finding that defendant had not been a resident of the city for five years next prior to his election as required by the city charter, and was therefore ineligible. Sheehan v. Scott, 145 Cal. 684, 79 P. 350.

74. A tax collector who undertakes to enforce the collection of taxes prior to the receipt of his warrant is a trespasser. Orange County v. Texas, etc., R. Co. [Tex. Civ. App.] 80 S. W. 670.

75. Under the tax law of New York, the county treasurer may be mandamused to sell real estate delinquent for three years. Laws 1896, c. 908, §§ 150, 151. People v. Lewis, 92 N. Y. S. 642. It being the duty of a city treasurer to advertise the sale of property for taxes, the official paper has the right to require him by mandamus to discharge the duties imposed on him by law. Register Newspaper Co. v. Yeizer, 25 Ky. L. R. 2186, 80 S. W. 478.

76. Orders of a county judge employing counsel to aid the sheriff in the collection

statutory regulation. In some states the duty of collecting taxes is cast upon collectors as such,[78] but ordinarily some officer of a county is made the agent of the state and its political subdivisions for the collection of taxes.[79] Tax collectors cannot lawfully pay or purchase claims against the parish.[80] A bill by a former city tax collector against a municipality to recover overpayments, which does not allege what amount was overpaid, nor in what year or on what account the errors or inaccuracies resulting in the alleged overpayments arose, is demurrable.[81] Cases arising on the sufficiency of collectors' bonds and the liability of sureties thereunder are gathered in a note.[82] Penalties belonging to a county may be

of taxes, and directing the sheriff to pay such counsel a sum of money for his fee, being void, did not justify the sheriff in making the payment, or exempt him from liability to account for the money so paid. Scoville v. Baugh [Ky.] 84 S. W. 1146. Kentucky Revenue Act 1901, p. 373, c. 174, authorizing the appointment of revenue agents, is broad enough to recover from a county judge an alleged unaccounted for balance. State v. Kelly, 111 Tenn. 583, 82 S. W. 311. Under the Kentucky statute 1903, § 4146, a settlement had with the sheriff, as the tax collecting officer, duly recorded in the fiscal court, and from which no appeal is taken, is binding on the county. Fidelity & Deposit Co. of Maryland v. Logan County [Ky.] 84 S. W. 341. The penalty of 6 per cent. for which a sheriff is liable for failure to collect and pay over taxes does not draw interest. Id. Where a collector of taxes has made default in the payment of taxes he will be charged with interest from the time of such delinquency. Ross v. Walton, 67 N. J. Law, 688, 52 A. 1132, afg. without opinion 63 N. J. Law, 435, 44 A. 430.

77. In North Carolina, sheriff is entitled to commission for collecting school tax. Board of Education of Iredell County v. Board of Com'rs of Iredell County [N. C.] 49 S. E. 47. County treasurer in Iowa not entitled to commission on the "general mulct charge" provided by Code, § 2445. City of Waverly v. Bremer County [Iowa] 101 N. W. 874. In Minnesota a sheriff is not entitled to a fee of $1.00 from his county for each execution issued upon a personal property tax judgment delivered to him and returned by him unsatisfied. Appeal of Justus [Minn.] 101 N. W. 943. In Kentucky the remuneration of an auditor's agent is to be based on the amount actually covered into the treasury (Citizens' Nat. Bank v. Com., 26 Ky. L. R. 62, 81 S. W. 686); and as between an auditor's agent and the sheriff, the one first filing an information or statement against a decedent's estate to recover unpaid taxes is entitled to receive the penalty (Riedel v. Com., 26 Ky. L. R. 898, 82 S. W. 635). A county auditor is entitled, under the statute, to an additional allowance for clerk hire during the year in which the decennial reappraisement of real property and up to the time when the board of equalization must have completed its work—the fourth Monday in January of the second year following the reappraisement. State v. Godfrey, 4 Ohio C. C. (N. S.) 465. A county auditor is entitled to receive for indexing the records of county commissioners the same fees as other officers receive for like services. Id. The fact that property formerly improperly omitted from tax duplicates is placed thereon through evidence furnished by an inquisitor employed and paid for that purpose, does not deprive the county auditor of his compensation for amounts collected from property so listed. Id.

78. See 2 Curr. L. 1820, n. 82. In Georgia it is held to be the duty of the receiver of taxes and not the tax collector to issue executions for taxes against unreturned wild lands. Barnes v. Carter, 120 Ga. 895, 48 S. E. 387. The clerk of council held to be charged with the collection of taxes for educational purposes and to be liable for failure to pay over to the treasurer of the board of education the moneys so collected. Anderson v. Blair, 118 Ga. 211, 45 S. E. 28.

79. See 2 Curr. L. 1821, n. 83. Under Kentucky St. 1903, § 4136, providing that if the sheriff shall die during his term of office his sureties shall have the right to nominate a person to collect the revenue for that year, the sureties do not have such right of nomination where the sheriff resigns. Combs v. Eversole [Ky. L. R.] 86 S. W. 560.

80. But where they have been authorized by the police jury to pay or take up certificates and orders issued for legal and valid parish indebtedness, and have done so, they are entitled in equity to restitution. Young v. East Baton Rouge, 112 La. 511, 36 So. 547.

81. Lowrey v. Biloxi [Miss.] 38 So. 42.

82. Sufficiency of collector's bond. Bromberg v. Fidelity & Deposit Co., 139 Ala. 338, 36 So. 622. Bond of a municipal clerk who was required to collect street assessments; duties thus imposed not appropriate to the office and sureties not liable. City of St. Marys v. Rowe, 2 Ohio N. P. (N. S.) 645. Where a collector of taxes who held office for different terms with different sureties applied sums received from taxes during one term to the payment of taxes due from him during a previous term, the sureties on the bond for the latter were liable if the sums paid were received in good faith by the town. Inhabitants of Hudson v. Miles, 185 Mass. 582, 71 N. E. 63. The sureties on a tax collector's bond are liable for sums received by the collector during the term for which the bond was given, although received before the bond was actually given. Id. It is no defense to an action on a tax collector's bond that the money embezzled by him was collected without a warrant or under a defective one. Entries made by the collector's deputies showing that the money was collected by them, held binding on his sureties. Lake County v. Neilon, 44 Or. 14, 74 P. 212. A surety on a tax collector's bond knew he was in default and held a claim against him which should be paid out of the

recovered by action on sheriff's bond, though by mistake he was not charged therewith on his settlement with the county.[83]

(§ 11) *B. Method.*[84]—Before the officer who is designated by law for the duty of collecting taxes can lawfully proceed to do so, he must have his warrant for the purpose, in due form of law. This may be the assessment roll or list with the tax extended upon it, or it may be a duplicate of the list with a like extension, or it may be either of these with a formal warrant attached. Such warrant constitutes the basis of the collector's authority and is the source of his power.[85] Where the warrant and affidavit do not appear on the roll as introduced in evidence, no presumption will be indulged that they were attached to the roll when it was filed.[86] A tax collector has no authority to collect taxes before the rolls are delivered to him.[87] The revenue laws of the several states provide for the compulsory collection of taxes in divers ways. One method of procedure is by distraint.[88] This method of collecting taxes is one of the most ancient known to the law, and has frequently received the sanction of the courts.[89] Another method is by an action at law. But since taxes are not debts in the ordinary acceptance of that term, generally an action at law will not lie for their collection, in the absence of statutory provision therefor.[90] While the right to an action may be implied from a failure of the legislature to provide any means for enforcing the payment of taxes,[91] yet where the legislature has provided a means of enforcing payment, that remedy is exclusive.[92] In such an action the estab-

taxes for the year in which he was surety. He induced another to become surety the following year. Held, he could not appropriate to payment of his claim taxes belonging to the subsequent year's fund, and render the surety for that year liable on his bond and relieve himself. State v. Fidelity & Deposit Co., 99 Md. 244, 57 A. 669.

83. Commonwealth v. Pate [Ky.] 85 S. W. 1096. Action on bond sustained. United States Fidelity & Guaranty Co. v. Fossati [Tex. Civ. App.] 81 S. W. 1038. Surety who pays amount of a bond is not entitled to subrogation as against a creditor to the latter's prejudice. State v. Perkins [La.] 38 So. 196.

84. See 2 Curr. L. 1822.

85. See 2 Curr. L. 1822. The collection of taxes by a sheriff in excess of the constitutional limit is not a trespass vi et armis within the meaning of a statute authorizing the issuance of a capias on all judgments for trespasses of that character. Commonwealth v. Ratcliff [Ky.] 84 S. W. 1147.

86. White v. Hill, 91 N. Y. S. 623.

87. One who has thus paid his taxes, the collector having failed to turn the taxes over to the county, is still liable therefor. Orange County v. Texas, etc., R. Co. [Tex. Civ. App.] 80 S. W. 670.

88. The exemption of United States bonds from state taxation does not prevent their distraint to satisfy taxes lawfully levied on unexempt personal property of the owner of such bonds. Scottish U. & N. Ins. Co. v. Bowland, 25 S. Ct. 345. Under the express provisions of Ky. St. 1903, § 3187, a city of second class has authority to collect retrospective tax bills on omitted personalty by distraint. Bell's Trustee v. Lexington [Ky.] 85 S. W. 1081.

89. Scottish U. & N. Ins. Co. v. Bowland, 25 S. Ct. 345, and cases cited.

90. Board of Com'rs of Dawes County v. Furay [Neb.] 99 N. W. 271. No action will lie to recover payment of taxes unless especially provided for by statute. It was sought to recover taxes levied against a partnership by instituting administration proceedings upon the estate of a dead nonresident who was a member of the firm. Id. Chapter 161, p. 213, North Dakota Laws 1903, providing for the enforcement of payment by judicial proceedings and giving to the several boards of county commissioners of all counties in the state a discretionary authority to institute proceedings therein provided for, held constitutional. Picton v. Cass County [N. D.] 100 N. W. 711. The provision of the Minnesota statute that all contests involving the validity of personal property taxes shall be tried and determined at the first term of court held next after the same become delinquent is directory merely. Laws 1899, c. 246, p. 285. State v. Meehan, 92 Minn. 283, 100 N. W. 6. Nebraska law to enforce the collection of delinquent taxes and special assessments held constitutional. Woodrough v. Douglas County [Neb.] 98 N. W. 1092. It does not deprive the owner of his property without due process. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

91. Board of Com'rs of Dawes County v. Furay [Neb.] 99 N. W. 271.

92. Board of Com'rs of Dawes County v. Furay [Neb.] 99 N. W. 271. In Michigan it is not necessary that the treasurer of a village exhaust his remedy by warrant before the village can authorize the bringing of suit to recover a tax. Village of Chelsea v. Holmes [Mich.] 100 N. W. 448. Mandamus will not lie to compel a board of county commissioners to order the collection of a railroad aid tax which it has been enjoined from enforcing, especially where the personnel of the board has changed since the injunction decree was rendered. State v.

lishment of a valid assessment roll is an essential of the cause of action,[93] and if defendant is not subject to such tax in his person or property, he must raise the question by way of defense, as the city is not required to assume the burden of showing jurisdiction.[94] Demand is not necessary as a condition precedent to the enforcement of the collection of taxes.[95] A claim for taxes under the assessment for one year is not the same cause of action as a claim for taxes on the same property for a prior year.[96] A judgment obtained for personal property taxes may be sold or assigned under the North Dakota general revenue law of 1890.[97] Statutes providing for proceedings for the recovery of taxes are liberally construed so as to promote their object;[98] but statutes empowering an officer to levy upon and sell lands for taxes are to be construed strictly.[99] Cases involving the proof necessary to make a case,[1] as to what constitutes prima facie case in action to recover taxes,[2] and matters of practice, are noted below.[3] The amendment to Greater New York charter (Laws 1901, p. 395, c. 466), authorizing an order dismissing an action to enforce personal property tax, was enacted for the purpose of enabling those having an "equitable defense" to the assessment of a

Board of Com'rs of Clinton County, 162 Ind. 580, 70 N. E. 373. That a law provides for two methods of collection, either of which the county board may pursue, does not amount to a delegation of legislative authority. Woodrough v. Douglas County [Neb.] 98 N. W. 1092.

93. City of New York v. Vanderveer, 91 App. Div. 303, 86 N. Y. S. 659.

94. City of New York v. Matthews [N. Y.] 72 N. E. 629.

95. Milster v. Spartanburg, 68 S. C. 26, 46 S. E. 539. Under a charter provision that a tax roll shall be delivered July 1st and that forthwith six days' notice by publication on the official daily paper shall be deemed a demand for payment, a publication for six days but excluding and omitting a legal holiday is sufficient. Keho v. Auditor General [Mich.] 101 N. W. 809. A claim for taxes is not required to be filed against a decedent's estate. It is the duty of the administrator to take notice of and pay the tax before his final settlement. Cullop v. Vincennes [Ind. App.] 72 N. E. 166.

96. Chicago, etc., R. Co. v. Cass County [Neb.] 101 N. W. 11.

97. Hagler v. Kelly [N. D.] 103 N. W. 629.

98. Holder of an invalid tax deed may retain possession until taxes he has paid are returned by the owner. Gen. St. 1901, § 7681. Douglass v. Byers, 69 Kan. 59, 76 P. 432.

99. The receiver of taxes, and not tax collector, held to be charged with duty of issuing executions for taxes against unreturned wild lands. Barnes v. Carter, 120 Ga. 895, 48 S. E. 387. Taxes and special assessments levied on real estate under the general revenue laws of Nebraska create no personal liability against the owner for the payment of which a judgment in personam can be obtained. It is the property alone which is assessed that can be taken in satisfaction of the taxes levied against the same. City of Beatrice v. Wright [Neb.] 101 N. W. 1039. In Georgia an execution issued by a tax collector for state and county taxes cannot be lawfully transferred by the tax collector in a county having a population of less than 75,000. Hill v. Georgia State B. & L. Ass'n, 120 Ga. 472, 47 S. E. 897.

1. See 2 Curr. L. 1824, n. 28.

2. City of New York v. Streeter, 91 App. Div. 206, 86 N. Y. S. 665. In an action by a township to collect taxes, the provision that the tax roll shall be prima facie evidence of the debt does not conflict with a taxpayer's constitutional rights. Decatur Tp. v. Copley, 133 Mich. 546, 95 N. W. 545, 10 Det. Leg. N. 254. In proceedings to recover taxes paid, the assessment and tax rolls, which contain the original extension of the levies made by the taxing officers for all purposes, are competent evidence to show the levies of taxes. Douglass v. Byers, 69 Kan. 59, 76 P. 432. In an action to recover delinquent license taxes, the orders of the commissioner's court introduced to show levies of county taxes made by that court were sufficient to create such levies, and were properly admitted. Southern Car & Foundry Co. v. Calhoun County [Ala.] 37 So. 425. Evidence held insufficient to support judgment. People v. Chicago, etc., R. Co., 214 Ill. 25, 73 N. E. 339.

3. Taxes assessed in a ward in a city where each ward has a tax roll are due to and collectible by the city and not by the ward. City of St. Joseph v. Vail [Mich.] 100 N. W. 388. In an action by a township to recover a tax, the declaration need not aver the particulars in which a certain quoted law validated the tax. Kettelle v. Warwick & C. Water Co., 24 R. I. 485, 53 A. 631. In Kentucky the sheriff has power to commence proceedings in the name of the commonwealth for the collection of taxes assessed against omitted property. Commonwealth v. Citizens' Nat. Bank, 25 Ky. L. R. 2100, 80 S. W. 158. In Michigan, during the period the township treasurer is empowered to collect taxes, his authority to bring suit for the collection of such taxes is exclusive, and suit cannot during that time be brought by the supervisor of the township for the collection of a tax included in the treasurer's warrant. Decatur Tp. v. Copley, 133 Mich. 546, 95 N. W. 545.

tax to appear and be heard.[4] Certiorari will not lie in Minnesota to review personal property tax judgments.[5] In some states lands on which the taxes remain unpaid for a term of years are forfeited to the state. Cases discussing such laws are cited below.[6] A provision of a state constitution providing for forfeiture of estates of 1,000 acres and over and not of those of less extent is an unjust classification and invalid.[7]

§ 12. *Sale for taxes.*[8] *A. Prerequisites to sale.*[9]—Since tax sales are made exclusively under statutory authority, the provisions of the statute conferring such authority must be fully complied with, and any substantial departure therefrom prejudicial to the owner will invalidate the sale.[10] The statute in force when the suit was instituted governs throughout in all matters of procedure.[11] A valid tax,[12] legally due and unpaid,[13] and enforceable against the particular

4. City of New York v. Holzderber, 44 Misc. 509, 90 N. Y. S. 63. Cities of third class in Pennsylvania may add penalty of one per cent. per month on amount of lien after lien for taxes has been filed and until judgment is entered on scire facias, after which it is entitled to six per cent. interest on amount of judgment. Altoona v. Morrison, 24 Pa. Super. Ct. 417.

5. The proper remedy is by appeal taken in the manner provided by section 19, c. 2, p. 13, Gen. Laws 1902, for the review of real estate tax judgments. State v. District Court of Ramsey County [Minn.] 100 N. W. 889.

6. In West Virginia a proceeding for the sale of forfeited lands for the benefit of the school fund is a judicial proceeding. Starr v. Sampselle, 55 W. Va. 442, 47 S. E. 255. It is in the nature of a proceeding against the land itself, and when completed is prima facie evidence of the forfeiture of the land against all persons (Id.), and a final decree is not rendered void for error in the proceeding unless it was jurisdictional (Id.), nor can such error be considered where the decree is collaterally brought in issue (Id.). In a bill by the state to sell forfeited lands and annul a tax deed constituting title hostile to that of the state, a tender by the state to the tax purchaser is not necessary. State v. Harman [W. Va.] 50 S. E. 828. If a tax deed is void passing no title, and if the owner in whose name the land was sold omits to keep the land on the tax book in his own name, his title will be forfeited for five years' omission. Payment of taxes in the name of the tax purchaser will not prevent such forfeiture. Id. Forfeited lands cannot be redeemed from forfeiture if already the state's title by such forfeiture has been transferred to another title. State v. Jackson [W. Va.] 49 S. E. 465. Lands bid in for the state at a tax sale under the North Dakota tax laws (ch. 132, Laws 1890) and not redeemed or assigned within three years from such sale, become forfeited lands and are not thereafter subject to sale for taxes while they remain forfeited lands. Patton v. Cass County [N. D.] 102 N. W. 174. Where a forfeiture of land was invalid, deed to such land of state conveyed no title, but only removed the lien for taxes which state had on land. Henry v. Knod [Ark.] 85 S. W. 1130. A verbal contract conveying the right to redeem land forfeited to the state is void under statute of frauds. Id. Forfeitures of land to the state in part for taxes assessed before it had parted with title to the land are void. Carraway v. Moore [Ark.] 86 S. W. 993. Where the owner has once entered his land on the books, his duty is fulfilled and no omission of the state officers in carrying it forward can subject him to forfeiture. King v. Hatfield, 130 F. 564.

7. King v. Hatfield, 130 F. 564.

8. See as to tax titles, Tiffany, Real Property, 1063.

9. See 2 Curr. L. 1824.

10. Jungk v. Snyder [Utah] 78 P. 168; In re Lindner, 113 La. 772, 37 So. 720. When the law is driven from the necessity of the case to authorize a judgment that will affect the property rights of an absent or unknown owner, on a notice by mere publication in a newspaper, it demands of the plaintiff a strict compliance with the terms of the statute under which the publication purports to have been made. Eminence Land & Min. Co. v. Current River Land & Cattle Co. [Mo.] 86 S. W. 145. A delinquent list which shows it was filed in the office of the county clerk of a given county instead of with the clerk of the county court, though the offices are held by the same individual, is defective. Glos v. Hanford, 212 Ill. 261, 72 N. E. 439. Statutes authorizing a city to collect its taxes by sale of the property are permissive, not compulsory. After property has been adjudicated to the city and offered for sale, proceedings may be abandoned. State v. New Orleans, 112 La. 408, 36 So. 475. The Pennsylvania act of June 2, 1891, was not intended to apply to seated and unseated lands bought in by commissioners at treasurer's sales for nonpayment of taxes. A sale under such act passed no title. Walker v. Bergbigler, 207 Pa. 427, 56 A. 963. The power vested in a public officer to sell land for nonpayment of taxes is a naked power, not coupled with an interest, and a purchaser must show that all the requirements of law have been strictly complied with. The charging of a larger fee than allowed by law for a sale, will invalidate the sale. Moon v. Salt Lake County, 27 Utah, 435, 76 P. 222.

11. Taylor v. Huntington, 34 Wash. 455, 75 P. 1104.

12. See 2 Curr. L. 1824, n. 30. A sale of lands to the state for taxes was void where they were sold for the county taxes of a certain year, which were levied in the next year. St. Louis Refrigerator & Wooden Gutter Co. v. Thornton [Ark.] 86 S. W. 852. In Michigan the fact that irregularities may be

land to be sold, is essential to a valid sale.[14] Delinquent taxes do not lose their identity as such from the fact that the land against which they are assessed was regularly sold at a tax sale, and for want of a purchaser, bid in for the state.[15] Where there is personal property primarily liable for the payment of taxes, it must be exhausted before proceeding against the real estate.[16]

A judicial determination by a court of competent jurisdiction that the lands are delinquent, with an order for their sale, is generally necessary.[17] As in the case of other judicial proceedings, jurisdictional requirements must be present.[18] Thus it is essential that the delinquent owner[19] be duly notified[20] of the appli-

discovered in proceedings antedating a petition for sale of land for taxes is no obstacle to enforcing the state's lien for a tax equitably due and chargeable to the land sought to be subjected to the lien, provided there is enough in the proceedings to show that the levy of the tax is authorized. Auditor General v. Griffin [Mich.] 103 N. W. 854. Sale declared void for irregularities in assessment and sale, charter provisions not being followed (Tacoma city charter). Gove v. Tacoma, 34 Wash. 434, 76 P. 73. Where sidewalks for the construction of which plaintiff's land was sold were built without an order therefor by the town board such sale and the deed issued thereupon were void. Mitchell v. Titus [Colo.] 80 P. 1042.

13. See 2 Curr. L. 1824, n. 31.

14. Land cannot be foreclosed under a lien for taxes on personal property. Union School Dist. v. Bishop, 76 Conn. 695, 58 A. 13.

15. They remain delinquent until actually paid to the county treasurer either by the landowner, the purchaser at a tax sale, or by an assignee of the state. Jenswold v. Minnesota Canal Co. [Minn.] 101 N. W. 603.

16. Richcreek v. Russell [Ind. App.] 72 N. E. 617; Leszinsky v. Le Grand, 26 Ky. L. R. 1235, 83 S. W. 1038.

17. A tax deed to land sold pursuant to a judgment rendered by a justice of the peace is absolutely void because of want of jurisdiction to render such a judgment. Adams v. Carpenter [Mo.] 86 S. W. 445.

18. Under ch. 67, p. 76, Laws 1897, pertaining to obtaining judgments against specific tracts of land to enforce payment of taxes against the owner, the jurisdiction of the court to enter judgment against a particular tract appearing on the list filed with the clerk as unpaid is not affected by the fact that all taxes against the owner and against the tract had been previously paid. Purcell v. Farm Land Co. [N. D.] 100 N. W. 700. By express provision of Hurd's Rev. St. 1899, c. 120, par. 323, § 29, failure to publish an assessment is not a valid objection to application for judgment for tax sale. Grant Land Ass'n v. People, 213 Ill. 256, 72 N. E. 804. Failure to make out and swear to a list of lands delinquent for taxes by the first Monday in June, as required by Code 1887, c. 30, § 18, will not invalidate a deed under tax sale. Hornage v. Imboden [W. Va.] 49 S. E. 1036. The fact that a list of lands delinquent for taxes was acted on at a special term of a county court, in the call for which no reference was made to action on such list, will not invalidate a tax deed. Id. Failure to present a list of lands delinquent for taxes in the county court at the levy term as required by Code 1887, c. 30, § 21, and presenting it at a later term, will not invalidate tax deed. Id.

19. A tax sale should be made only after giving notice to the delinquent. The delinquent referred to is the owner actually in possession on the day that proceedings are taken to advertise and sell. In re Lafferranderie [La.] 37 So. 990. If property has been assessed to an unknown owner, and the certificate of delinquency has been so issued, the foreclosure may be had in form against an unknown owner. Williams v. Pittock, 35 Wash. 271, 77 P. 385. A proceeding against an unknown owner and others is valid. Morrison v. Shippen [Wash.] 79 P. 632. In proceedings to foreclose delinquency certificates, a notice running to the reputed owner on the tax rolls when certificates were issued and to all persons claiming an interest charges all such persons with notice. Carson v. Titlow [Wash.] 80 P. 299. Judgment in suit against record owner and unknown owners binds purchaser contracting for but obtaining title after its entry. Williams v. Pittock, 35 Wash. 221, 77 P. 385; Plumb v. Dyas [Wash.] 80 P. 432. A purchaser at a tax sale under judgment for taxes in a suit wherein the record owner is made a party defendant acquires a good title as against the holder of an unrecorded deed from the record owner. Lucas v. Currant River Land & Cattle Co. [Mo.] 85 S. W. 359. Where land was conveyed to and registered in the name of "J. B., administratrix of B., deceased," a tax sale made after the death of such administratrix in the individual name of "Mrs. J. B.," is invalid as against B.'s heirs. Baines v. Alker, 207 Pa. 234, 56 A. 433. A failure to serve one of the executors will not render a judgment for taxes void. If erroneous at all, it is at most voidable, and a suit to set it aside must be brought in the court which entered it. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. Where property is advertised for tax sale as owned by an owner properly present, the proceedings cannot be changed to such as are followed when the taxpayer is unknown. Succession of Williams v. Chaplain, 112 La. 1075, 36 So. 859. Citation in the name of "A. H. G.," record title being in "Aubrey H. G.," rendered proceedings void. Gillingham v. Brown [Mo.] 85 S. W. 1113.

20. Where notice is necessary, it ought to appear that such notice was given in due time. In re Lafferranderie [La.] 37 So. 990. No notice is required to be given of a sale of real estate for taxes delinquent for a period of over five years, which is to be sold under the provisions of c. 76, p. 519, Session Laws of 1903. The fact that no notice of sale is required other than that con-

cation or petition for sale,[21] which notification, whether by summons or otherwise, must be sufficient in form and contents,[22] and must be served personally,[23] or as is more often the case, by publication in some designated newspaper.[24] Statutes variously provide that the petition,[25] publication of delinquent lists,[26] and the resulting judgment, contain a correct description of the premises to be

tained in the act itself does not render it void as taking property without due process of law. City of Beatrice v. Wright [Neb.] 101 N. W. 1039.

21. Whether notice of application for a tax deed was properly served upon the legal owner and person in possession of the land is a question of fact. State v. Coughran [S. D.] 103 N. W. 31. That a petition for foreclosure of a tax lien discloses that no preliminary sale for taxes was had will not of itself render the foreclosure proceedings totally void if had **coram judice** and with jurisdiction of the parties. Selby v. Pueppka [Neb.] 102 N. W. 263. In Michigan the auditor general has authority to include delinquent drain taxes in his petition for sale of land for nonpayment of taxes. Rumsey v. Griffin [Mich.] 101 N. W. 571.

22. Under the Washington statute, a tax foreclosure publication summons must set out the date of the first publication. The words "Date of first publication, October 9th, 1902," following the attorney's signature, sufficiently set forth the date of the first publication. Williams v. Pittock, 35 Wash. 271, 77 P. 385. But in a proceeding under a prior statute, such designation held insufficient, the time of appearance dating from time of service and not date of first publication. Dolan v. Jones [Wash.] 79 P. 640. Notice directed "to the sheriff or any constable of Lubbock county," the statute prescribing a notice to all persons owning or claiming or having any interest, is insufficient. Babcock v. Wolffarth [Tex. Civ. App.] 80 S. W. 642. For cases bearing on sufficiency of notice or summons, see, also, Eminence Land & Min. Co. v. Current River Land & Cattle Co. [Mo.] 86 S. W. 145; Dolan v. Jones [Wash.] 79 P. 640; Luff v. Gowan [Wash.] 80 P. 766; Young v. Droz [Wash.] 80 P. 810. Citation to "A H G" record title being in "Aubrey H G," rendered sale void. Gillingham v. Brown [Mo.] 85 S. W. 1113; see, also, Spore v. Ozark Land Co. [Mo.] 85 S. W. 556.

23. Where the owner is in the actual occupation of land through agents or tenants, and his title is of record, the state is charged with knowledge of his possession and cannot without **actual notice** to him deprive him of title in a suit to foreclose delinquent tax liens. Bingham v. Matthews [Tex. Civ. App.] 86 S. W. 781.

24. A tax foreclosure proceeding is essentially a proceeding in rem and is in this sense an action against the person of the owner of the property. A judgment of foreclosure against property of a resident owner therefore is not void, though service was had by publication. Allen v. Peterson [Wash.] 80 P. 849. The publication of delinquent list required by section 8, Act. No. 147 of 1873, has for its sole purpose the forfeiture of the right of the delinquent to bring suit and be a witness in a court of justice. It aims at the taxpayer individually and not at the property. Finney v. Gulf States Land & Imp. Co., 112 La. 949, 36 So. 814. Failure to post a list of lands delinquent for taxes as required by § 20, c. 30, Code 1887, will not invalidate deed. Hornage v. Imboden [W. Va.] 49 S. E. 1036. Publication is insufficient where the affidavit shows that the "list" of property was published in a weekly paper each week for the four successive weeks and that the "list and notice" were published once in the daily edition of the paper. Paine v. Palmborg [Colo. App.] 79 P. 330. It is not essential to the validity of a service by publication that there be a sheriff's return to the effect that the defendant cannot be found in the county. An affidavit complying with the statute is sufficient authority upon which to base a publication of summons. Allen v. Peterson [Wash.] 80 P. 849. Mere defect in the proof of publication is not material on collateral attack. It is the publication and not the proof of it that confers jurisdiction on the court. Palmer v. Ozark Land Co. [Ark.] 85 S. W. 408. The fact that an affidavit to a list of sales of delinquent land contains no venue and does not show of what county the notary is a notary will not invalidate tax deed. Hornage v. Imboden [W. Va.] 49 S. E. 1036. Republication of delinquent lists will not be compelled solely on the ground that the newspaper was not designated by proper official authority. State v. Fink [Neb.] 102 N. W. 771. The auditor general has power to set aside a sale of land for taxes because of a defect in the publication thereof and to resell the land. Rumsey v. Griffin [Mich.] 101 N. W. 571. An estoppel applies to all persons claiming any interest in the land, even though summons was by publication and parties claiming interests did not appear. Laws 1901, pp. 385, 386, requiring all persons claiming interests to take notice of foreclosure proceedings and all steps thereunder. Washington Timber & Loan Co. v. Smith, 34 Wash. 625, 76 P. 267. Under Kirby's Dig. § 7086, requiring the clerk to certify the published list of lands to be sold for taxes, the certificate must be made before the day of sale. Hunt v. Gardner [Ark.] 86 S. W. 426. Service by publication in an action to foreclose a lien for delinquent taxes is insufficient to give the court jurisdiction where it does not affirmatively appear that personal service could not be made. McManus v. Morgan [Wash.] 80 P. 786.

25. A judgment in a suit for the sale of land for taxes is void where it is attempted thereby to affect land not described in the petition. Missouri Rev. St. 1899, § 9328, providing for abbreviations in assessment lists, has no application to averments in a petition for sale of lands. O'Day v. McDaniel, 181 Mo. 529, 80 S. W. 895.

26. A list of lands delinquent for taxes, giving no specification or description whatever of a tract or lot of land sold for taxes, renders the sale and deed under it void. Mosser v. Moore [W. Va.] 49 S. E. 537. Description held sufficient. Mahlun v. Thayer [Minn.] 101 N. W. 653.

sold,[27] and the amount for which sold.[28] In case of death of the owner before decree, revivor against his heirs is not necessary.[29] Decisions bearing upon the effect and validity of the judgment,[30] and questions arising on appeal therefrom, are given in the notes.[31] Due notice of the sale must also be given.[32] In Illinois the certificate of the clerk, which constitutes the process for the sale of land for taxes, must be made on the day advertised for the sale; if made on the day the judgment is rendered, the sale is void for want of proper process.[33] Mere irregularities do not on collateral attack render a decree of sale void.[34] The duties of a county auditor with respect to making up a delinquent tax duplicate are such only as are prescribed by statute, and a court is without right to require of him the performance of any service in that behalf not specifically enjoined upon him or required of him by law.[35]

(§ 12) *B. Conduct of sale.*[36]—The sale should be made at the time and place advertised.[37] The amount for which the sale shall be made is dependent entirely upon statute. This is usually for the taxes due, together with interest

27. Where there are two additions to a city of the same name and a "Lot No. 5 of Sec. 1" in each addition, the description held insufficient. Peareson v. Branch [Tex. Civ. App.] 87 S. W. 222.

28. A judgment in a tax foreclosure suit held to show the amount in an intelligible form, though figures alone were used without marks to indicate dollars and cents. Washington Timber & Loan Co. v. Smith, 34 Wash. 625, 76 P. 267.

29. Under the provisions of Shannon's Code, §§ 6190, 6193, a judicial sale of realty for taxes was not void because the owner died intestate before the entry of the decree for sale, leaving surviving him two children against whom the cause was never revived. Dunham v. Harvey [Tenn.] 69 S. W. 772.

30. A judgment for taxes against the unknown heirs of a former owner is void as to the owner under grant from the deceased and who had no notice of the suit. He could, therefore, attack such judgment collaterally. Green v. Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345. That the judgment and order of a tax sale were against the executors personally and not as executors is immaterial. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. Judgment in name of "A H G," record owner's name being "Aubrey H. G.," held void. Gillingham v. Brown [Mo.] 85 S. W. 1113. Judgment in name of "W. D. S.," land being recorded in name of "William D. S." Spore v. Ozark Land Co. [Mo.] 85 S. W. 556. A judgment for taxes could not be held void on the theory that it was rendered within a year after death of the decedent, where date of death did not appear from the pleadings. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. In Washington a judgment for a deed to realty sold for taxes estops all parties from raising objections thereto, or to a tax title based thereon, which might have been raised during the progress of the trial. So the objection to the entry of a nunc pro tunc order in regard to the filing of a certificate of delinquency could not be subsequently raised. Ballinger's Ann. Codes & St. § 1767. Washington Timber & Loan Co. v. Smith, 34 Wash. 625, 76 P. 267. In case of a void judgment the owner of the land is not bound to appeal, but may resist it and assert its invalidity at all times. City of Rochester v. Farrar, 44 Misc. 394, 89 N. Y. S. 1035. A judgment of a court of general jurisdiction, having special statutory jurisdiction in tax foreclosure suits, cannot be set aside on motion, on the ground that as a court of special jurisdiction, it had no jurisdiction in a particular suit on account of a defect in the affidavit of publication of the notice. Taylor v. Huntington, 34 Wash. 455, 75 P. 1104.

31. Session Laws 1903, p. 74, c. 59, § 4, providing that an appeal from a judgment of foreclosure in a tax proceeding must be taken within 30 days, applies to an appeal from an order in such action to vacate the judgment, though the litigation is between a private certificate holder and the owner of the property. Brown v. Davis, 36 Wash. 135, 78 P. 779. Where plaintiff appeals from a judgment in effect denying his right to foreclose a delinquency tax certificate, he may do so by giving a bond under the general provisions of the law relating to appeals, and need not give the bond required by Laws 1903. Nolan v. Arnot, 36 Wash. 101, 78 P. 463.

32. See 2 Curr. L. 1826. The statute requires only that notices of sales pursuant to judgment obtained by a city for taxes be mailed to the property owner, not that they shall be received by him. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. Notice of sale published in the supplement to a newspaper held void. Morton v. Horton, 91 N. Y. S. 950. An advertisement published on the day of and after the hour of the sale is insufficient. In re Lindner, 113 La. 772, 37 So. 720.

33. See 2 Curr. L. 1828, n. 75 [Hurd's Rev. St. 1903, p. 1542, c. 120, § 194]. Glos v. Dyche, 214 Ill. 417, 73 N. E. 757; Glos v. Hanford, 212 Ill. 261, 72 N. E. 439; Glos v. McKerlie, 212 Ill. 632, 72 N. E. 700; Glos v. Gleason, 209 Ill. 517, 70 N. E. 1045.

34. Arbuckle v. Matthews [Ark.] 83 S. W. 326.

35. Omission of former auditors to enter and carry forward unpaid personal taxes. State v. Smith [Ohio] 72 N. E. 300.

36. See 2 Curr. L. 1826.

37. See 2 Curr. L. 1826, n. 49.

or penalty and costs.[38] A sale for an amount substantially in excess of the amount due renders the sale void.[39] Similarly where the sale is made under execution, as ordinary judgments are enforced, an excessive levy renders it void.[40] It is a question for the court whether a title is so defective that an adjudicatee at a sheriff's sale should be compelled to take it.[41]

(§ 12) *C. Proceedings after sale.*[42]—The sale is usually followed by the issue to the purchaser of a certificate which recites the fact of sale and states the time when the purchaser will be entitled to his conveyance.[43] Such certificate is assignable.[44]

A report of the sale[44a] by the officer making it is commonly provided for.[45]

After confirmation[45a] of a sale it and the deeds issued thereunder can be set aside only on the ground that the taxes were paid,[46] that the land was exempt from execution,[47] or for want of jurisdiction to enter the order of sale.[48] The

38. See 2 Curr. L. 1827. In Washington the board of county commissioners have the power to fix a minimum price below which county property shall not be sold. State v. Phillips, 36 Wash. 651, 79 P. 313. A tax purchaser who does not pay the state the price required by law gets no title. That a state official erred in his computation will not avail. The purchaser is bound to know the law. Hoffman v. Silverthorn [Mich.] 100 N. W. 183. A tax deed issued by the state upon premises acquired by the state under a tax sale is void if the amount paid therefor by the purchaser does not include the amount of the then due and delinquent subsequent tax. Chadbourne v. Hartz [Minn.] 101 N. W. 68.

39. See 2 Curr. L. 1827, n. 58. Where fees charged and included in a tax sale are greater than allowed by law, the sale is void. Gabel v. Williams, 42 Misc. 475, 87 N. Y. S. 240. Judgment excessive by $9.86, costs erroneously taxed. Richcreek v. Russell [Ind. App.] 72 N. E. 617. The intentional inclusion in the amount for which a tax sale is made of an unauthorized penalty of six cents will invalidate the sale. Green v. McGrew [Ind. App.] 72 N. E. 1049. Amount excessive by $1.85. Harvey v. Douglass [Ark.] 83 S. W. 946. Where a fee was charged for the issuance of a certificate, which was not included in the notice in the sum for which the property was sold, the certificate was illegally issued and the purchaser could recover the purchase price (Tacoma city charter). Gove v. Tacoma, 34 Wash. 434, 76 P. 73. Inclusion of certificate fee of 25c. Kirker v. Daniels [Ark.] 83 S. W. 912. Where the officers collected $7 when only $4 was authorized, sale was void. Moon v. Salt Lake County, 27 Utah, 435, 76 P. 222. County clerk not entitled to fees for recording tax certificate. Error of $3.25 not fatal. Village of Morgan Park v. Knopf, 210 Ill. 453, 71 N. E. 340. A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249; Ballard v. Hunter [Ark.] 85 S. W. 252.

40. See 2 Curr. L. 1827, n. 59. Where land of the value of $3,800 was sold on an execution for $39.17 taxes, the sale was void. Richcreek v. Russell [Ind. App.] 72 N. E. 617.

41. In a sale for taxes. Defect in description. Discrepancy of a few inches in measurement not sufficient. Getman v. Harrison, 112 La. 435, 36 So. 486.

42. See 2 Curr. L. 1828.

43. The statute runs against a purchaser at delinquent tax sale from the day he was entitled to present his certificate to the county auditor and receive a deed. Wolcott v. Holland, 5 Ohio C. C. (N. S.) 604. The Arkansas statute of limitations (§ 4819) runs from the date of the deed and not from the date of sale and certificate of purchase. Harvey v. Douglass [Ark.] 83 S. W. 946; Haggart v. Ranney [Ark.] 84 S. W. 703.

44. It is not essential to the validity of an assignment of a tax certificate by a county treasurer that the payment of the amount due shall be completed when the assignment is delivered. When the required payments are in fact made, the assignment becomes effective. Darling v. Purcell [N. D.] 100 N. W. 726.

44a. See 2 Curr. L. 1828.

45. In Arkansas the clerk of the county court is required to attend sales of land for taxes and make a record thereof, a copy of which he must transfer to the auditor of public accounts. Held, a mere report of such sale to the auditor was inadmissible as evidence of the facts stated therein. Wagner v. Arnold [Ark.] 80 S. W. 577. The report of sale required by West Virginia Code 1887, c. 31, §§ 11, 12, need not have a column for the day of sale, nor need it state the particular day of sale. Hornage v. Imboden [W. Va.] 49 S. E. 1036. A report of a tax sale unauthorized by law was not evidence that the land sold for the amounts named where there was no express statement of the fact, though it was admitted in evidence without objection. Wagner v. Arnold [Ark.] 80 S. W. 577.

45a. See 2 Curr. L. 1828.

46. Rumsey v. Auditor General [Mich.] 101 N. W. 623.

47. The fact that petitioner's land was traversed by a railroad right of way which was not excepted from the description of his premises was but an irregularity cured by the decree. Smith v. Auditor General [Mich.] 101 N. W. 807; Flint Land Co. v. Godkin [Mich.] 99 N. W. 1058.

48. Rumsey v. Griffin [Mich.] 101 N. W. 571. Under this rule an erroneous computation of interest, making the decree of sale excessive, was merely an irregularity, for which the sale would not be set aside. Smith v. Auditor General [Mich.] 101 N. W. 807.

fact that an applicant for the confirmation of a tax title had agreed to sell the land as soon as he procured the decree of confirmation did not deprive the court of jurisdiction to confirm the tax title.[40] Under the Arkansas Act of 1901, where a sale to the state was reported to the court by the commissioner and was confirmed, the sale was complete without any certificate to the county clerk and by him to the commissioner of state lands.[50]

The deed,[50a] it has been said, is the last act in the execution of the statutory power of sale,[51] and all conditions precedent must be complied with before it can lawfully be given.[52] The deed should conform to the statute in the formalities of execution, such as signing, sealing, witnessing, and acknowledgment.[53] Statutes prescribing the form of a deed call for only substantial compliance.[54] The description of the premises, however, must be accurately given.[55] What recitals the deed shall contain may or may not be determined by the statute of the state.[56] A deed reciting that notice was given when in fact none was given is void and confers no title.[57] In Louisiana, defective recitals in tax deeds are cured by constitutional prescriptions.[58] At common law a tax deed would prove its own execution, nothing more. Whoever claims lands therefor under a sale for delinquent taxes must take upon himself the burden of proving that taxes were duly assessed, which were a charge upon the land, and that the successive steps were taken which led to a lawful sale therefor, at which he or some one under whom he claims became the purchaser.[59] To obviate this difficulty, statutes have been passed in most if not all the states, which go to various lengths in making deeds evidence, some making a tax deed prima facie evidence only of

Omission of six inch strip from the description on the assessment roll did not deprive of jurisdiction. Keho v. Auditor General [Mich.] 101 N. W. 809.

49. Ingram v. Sherwood's Heirs [Ark.] 87 S. W. 435.

50. Kelley v. Laconia Levee Dist. [Ark.] 85 S. W. 249.

50a. See 2 Curr. L. 1828.

51. Cooley, Taxation [3d. Ed.] p. 992.

52. A tax deed vests title only when all of the requirements of law have been complied with by the officers charged with the duty of assessing and collecting taxes. Richcreek v. Russell [Ind. App.] 72 N. E. 617.

53. Sealing and acknowledgment. Laughlin v. Kieper [Wis.] 103 N. W. 264. A tax deed not signed, witnessed or acknowledged by the persons designated by statute, is not prima facie evidence of title. Green v. McGrew [Ind. App.] 72 N. E. 1049. A tax deed must be either acknowledged or proven before it can be recorded. If recorded without such acknowledgment or proof, it passes no title. State v. Harman [W. Va.] 50 S. E. 828. Under the Illinois Revenue Act, § 221, prescribing the form of a tax deed and providing that such deed by the county clerk under the official seal of his office shall be recorded in the same manner as other conveyances of real estate, without further acknowledgment or evidence of such conveyance, it is not necessary that tax deeds be acknowledged. Village of Morgan Park v. Knopf, 210 Ill. 453, 71 N. E. 340.

54. A recital that the sale was made at the office of the county treasurer complies with a statutory requirement that the sale be made at the seat of justice of the county. Washburn Land Co. v. Chicago, etc., R. Co. [Wis.] 102 N. W. 546. Sealing and acknowledgment held sufficient. Laughlin v. Kieper [Wis.] 103 N. W. 264.

55. The assessment roll cannot aid the description in the deed when it contains a patent ambiguity. Smith v. Brothers [Miss.] 38 So. 353. Where the description in a tax deed is insufficient to identify the land sold, nothing passes by virtue of the tax sale. Levy v. Gause, 112 La. 789, 36 So. 684. A tax deed which covers several disconnected tracts of land and fails to state the amount for which each separate tract was conveyed is invalid upon its face, and may be set aside on that ground, even after the lapse of five years from the time it was recorded. Gibson v. Kueffer, 69 Kan. 534, 77 P. 282. In a tax deed reciting the sale of several disconnected tracts, the use in the granting clause of the words "and each and every separate tract and parcel thereof" in addition to the statutory form designating the property conveyed as "the real property last hereinbefore described" indicates a purpose to convey all of the land sold. Id.

56. Tax deed held to be valid on its face, as it recited compliance with the statutory requirements. Silver Queen Min. Co. v. Crocker [Ariz.] 76 P. 479. Where the recital in a tax deed shows a sale to the county and a deed obtained by virtue of the sale to the county, the deed must contain a recital to show the right of the county to purchase at such tax sale, and unless such deed contains such recital, it is void on its face. Wade v. Crouch, 14 Okl. 593, 78 P. 91.

57. Succession of Williams v. Chaplain, 112 La. 1075, 36 So. 859.

58. The period is 3 years. Levy v. Gause, 112 La. 789, 36 So. 684.

59. Cooley, Taxation [3d Ed.] p. 1004.

the facts therein recited,[60] others making it prima facie evidence of the regularity of all the proceedings leading up to and including the sale,[61] while still others undertake to make the deed conclusive evidence of some or all the antecedent proceedings.[62] Such a statute is a pure statute of limitation and affected by the disability of infancy of plaintiffs.[63] Where a tax deed is thus made prima facie evidence of title, the burden is cast upon a contestant to defeat its effect.[64] In a suit in which complainants base their title on a tax collector's deed made an exhibit to the bill, it is error not to admit and consider such deed.[65] The validity of a tax deed is to be tested by the statute in force when the sale was made.[66] The validity of a tax deed good upon its face may be put in issue by an unverified pleading.[67] Where, under the facts disclosed, it was the duty of the auditor general to issue a certificate of error to recall a sale of state tax land, mandamus was the proper remedy to compel such action on his refusal to issue the same.[68] The curative provisions as to tax sales in section 25, c. 31, of the West Virginia Code of 1899, apply to purchases by the state of land sold for taxes.[69]

§ 13. *Redemption.*[70]—The statutory right of redemption differs essentially

60. Under the statutory law of Colorado, a tax deed is prima facie evidence that the property described therein was subject to taxation. Mitchell v. Denver [Colo.] 78 P. 686. In Illinois a tax deed is only color of title, and prima facie evidence of certain facts enumerated in the statute, and is not sufficient to pass title unless accompanied by the notice required by statute. Glos v. Mulcahy, 210 Ill. 639, 71 N. E. 629. A deed of the Arkansas state land commissioner makes a prima facie case in favor of the validity of a tax. Hill v. Denton [Ark.] 86 S. W. 402. A certified copy of a tax judgment sale is prima facie evidence of the facts therein recited. Tifft v. Greene, 211 Ill. 389, 71 N. E. 1030.

61. Wall v. Holladay-Klotz Land & Lumber Co., 175 Mo. 406, 75 S. W. 385. The Michigan "graduation act" of 1881 (P. A. 1881, No. 229) did not do away with the prima facie effect of tax deeds. Hoffman v. H. M. Loud & Sons Lumber Co. [Mich.] 100 N. W. 1010. See, also, Lever v. Grant [Mich.] 102 N. W. 843, rehearing denied 12 Det. Leg. N. 224, 103 N. W. 843. In Ohio the auditor's deed to a purchaser at delinquent tax sale is not prima facie evidence of a good and valid title, as provided in section 2827, unless it appear that the preliminary proceedings on the part of the county auditor and treasurer were regular and in conformity with the statutes governing such sales. Wolcott v. Holland, 5 Ohio C. C. (N. S.) 604. Where, under a statute making a tax deed prima facie evidence of the regularity of the prior proceedings, plaintiff introduces in evidence the tax deed, and defendant then introduces testimony to show the tax deed void, a motion to strike out the tax deed is properly overruled. The proper course is for the defendant to request the court to charge upon the legal effect of his evidence. Ropes v. Minshew [Fla.] 36 So. 579.

62. Under section 29, c. 31, West Virginia Code of 1899, a tax deed is conclusive evidence against strangers to the tax sale to show that such title as was sold as delinquent was vested in the person in whose name it was sold. State v. Jackson [W. Va.] 49 S. E. 465.

63. Jones v. Boykin [S. C.] 49 S. E. 877. Regularity of proceedings must be shown to establish title under tax sales; auditor's deed not prima facie evidence of valid title, unless statute of limitations runs against the purchaser from the date he was entitled to receive a deed. Wolcott v. Holland, 5 Ohio C. C. (N. S.) 604.

64. Skelton v. Sharp, 161 Ind. 383, 67 N. E. 535. Under the Missouri statute making a tax bill prima facie evidence of the regularity of antecedent proceedings, the burden is on defendant to establish the contrary. State v. Vogelsang, 183 Mo. 17, 81 S. W. 1087. Where the statutory affidavit was not filed the prima facie effect given a tax deed by Ky. St. 1894, § 4030, was overcome and the sale was invalid. Leszinsky v. Le Grand, 26 Ky. L. R. 1235, 83 S. W. 1038. Where the want of notice is alleged in answer to a claim of ownership under a tax title, and the deed or no extraneous evidence shows that notice was given, the deed is not prima facie evidence as against one who claims in opposition to the tax title. In re Lafferranderie [La.] 37 So. 990. Demurrer to bill based upon such deeds held to have been improperly sustained. Coffee v. Coleman [Miss.] 37 So. 499.

65. Wallace v. Lyle [Miss.] 37 So. 460.

66. Unless there is some expression in a later act denoting an intendment that the later act should operate retrospectively. Blackburn v. Lewis [Or.] 77 P. 746. Whether the legislature can pass an act curing defects in a past tax deed which rendered it void by the law in force at its date, quaere. State v. Harman [W. Va.] 50 S. E. 828.

67. Curtis v. Schmehr, 69 Kan. 124, 76 P. 434.

68. Hoffman v. Auditor General [Mich.] 100 N. W. 180.

69. State v. McEldowney, 54 Va. 695, 47 S. E. 650, overruling point 3 of the syllabus in McGhee v. Sampselle, 47 W. Va. 352, 34 S. E. 815.

70. See 2 Curr. L. 1830.

from the equity of redemption proper. It is usually self-executing, and, to enjoy the benefit thereof, no proceedings are ordinarily required to be had in the courts to make such right effective.[71]

The right of redemption,[72] especially in the case of minors and persons under disability,[73] is highly favored, and statutes conferring it have always been accorded liberal construction.[74] It is within the power of the legislature, however, after an assessment has been made, and before the sale, to prescribe the conditions under which redemption may be had if the premises taxed are sold; and acts of this character are not considered unconstitutional as impairing any vested or contractual rights that might be acquired by a purchaser.[75]

Redemption gives no new title; it simply relieves the land from the sale which had been made.[76]

Any one having an interest making it his duty to pay the tax may redeem,[77] and it has been held that a mere stranger on behalf of the owner may redeem,[78] and that such voluntary redemption may be ratified by the owner.[79]

The statutory right must be exercised within the time prescribed;[80] and since the legislature has power from time to time to change the mode of enfor-

71. Logan County v. McKinley-Lanning Loan & Trust Co. [Neb.] 101 N. W. 991. This right or privilege is given by statute to the owner of the equity of redemption or his grantee. Carly v. Boner [Neb.] 102 N. W. 761. Where vacant and unoccupied lands are redeemed from a tax sale after the issuance of a tax deed, no action is necessary to entitle the legal owner to take possession. Hoffmann v. Peterson [Wis.] 102 N. W. 47.

72. Statutes for redemption are to be liberally construed to attain the end. Mosser v. Moore [W. Va.] 49 S. E. 537.

73. Cain v. Brown, 54 W. Va. 656, 46 S. E. 579; Hoffmann v. Peterson [Wis.] 102 N. W. 47. For further cases of redemption by infants, see this section, "Period for redemption."

74. See 2 Curr. L. 1830, n. 93. Where plaintiffs if not intentionally misled by defendant himself, acted in the erroneous belief that the taxes on their property were being paid as they became due, and in ignorance of the sale, they will be allowed to redeem on the ground of mistake. O'Callaghan v. Lancy [Mass.] 73 N. E. 551.

75. Rogers v. Nichols [Mass.] 71 N. E. 950.

76. See 2 Curr. L. 1830, n. 3. Where land is sold for taxes, the purchaser during the time allowed for redemption has a statutory lien on the land for taxes, costs, and interest, which is discharged by payment of the taxes and charges within the redemption period. Beck v. Meroney, 135 N. C. 532, 47 S. E. 613. Where an insolvent husband's land goes to tax sale and his wife purchases, the purchase will be treated in favor of his creditors as a redemption. Herrin v. Henry [Ark.] 87 S. W. 430.

77. By minor after disability removed. Hodges v. Harkleroad [Ark.] 85 S. W. 779. Payment of taxes under a void donation deed from the state gives the grantee a lien on the land for the taxes paid, and such an interest therein as entitles him to redeem from a tax sale. Smith v. Thornton [Ark.] 86 S. W. 1008. A tax deed issued after the property has passed into the hands of a receiver appointed by a court is ineffectual to cut off the receiver's right of redemption. Johnson v. Southern B. & L. Ass'n, 132 F. 540. Where land assessed to the heirs of a deceased person becomes delinquent for nonpayment of taxes, and, before sale for such delinquency, partition thereof is made among the heirs, and part of the land allotted to one of the heirs is purchased by a stranger at the tax sale, any of those who shared in the partition, and against whom the tax was assessed, may redeem. Cain v. Brown, 54 W. Va. 656, 46 S. E. 579. Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or encumbrance on the land, amounts to such an ownership as will entitle the party holding to redeem. Smith v. Thornton [Ark.] 86 S. W. 1008, citing Woodward v. Campbell, 39 Ark. 580. One who claims the right to redeem by virtue of a donation deed may rely on the deed alone, and if the donation title is valid he can redeem whether he has paid taxes or made improvements or not; but if the donation title is itself void, he must show such facts in order to entitle him to redeem. Snider v. Smith [Ark.] 87 S. W. 624.

78. Any one may, for the advantage of the owner of the property, act as his negotiorum gestor, and make payment of redemption money; this even without his knowledge. State v. Register of Conveyances [La.] 36 So. 900.

79. An owner may ratify unauthorized redemption by stranger. Sloan v. Cobb [Ark.] 85 S. W. 1126.

80. See 2 Curr. L. 1831, n. 6. Article 9, section 3, of the Nebraska constitution, providing for two years' time within which to redeem from tax sales, applies to judicial as well as administrative sales. Selby v. Pueppka [Neb.] 102 N. W. 263. Under a statute providing that real property sold for taxes may be redeemed at any time before the expiration of three years from sale is valid where it appears from evidence aliunde that it was not delivered until after expiration of the required three years. David v. Whitehead [Wyo.] 79 P. 19.

cing the collection of delinquent taxes, it may shorten the period of redemption, provided it leaves a reasonable time within which to exercise the privilege.[81] Persons under disability are permitted to redeem usually within some prescribed time after the removal of the disability.[82]

It is usually required of an owner who seeks to redeem that he repay to the tax purchaser the amount the latter advanced to the state to obtain title,[83] together with costs[84] and necessary expenditures for improvements while in possession,[85] and subsequent taxes paid by him.[86] Steps to redeem must be timely taken.[87] Certificates of redemption are proper evidence as to the amounts paid to redeem from tax sales.[88] Where land conveyed to an assignee in bankruptcy was sold by city to pay taxes and surplus paid to the assignee, the city was not liable therefor to a subsequent purchaser on redemption.[89]

Upon the owner making proper tender, the tax purchaser's interest in the land is at an end.[90] A small deficiency in the amount of money tendered, attributable to mistake, will not vitiate the tender,[91] and actual production of the money in offering to redeem is not necessary, when the purchaser declines to allow redemption on the ground that the party is not entitled to redeem.[92]

The notice of the expiration of the period of redemption required in some

81. Allen v. Peterson [Wash.] 80 P. 849.

82. See 2 Curr. L. 1831, n. 8. Under the Arkansas statute, giving the owner of land sold for taxes two years in which to redeem, a minor or insane person whose land is sold for taxes is entitled to redeem within two years after the disability is removed (Smith v. Thornton [Ark.] 86 S. W. 1008), and the right is not affected by failure to make tender, where the right to redeem was denied. (Hodges v. Harkleroad [Ark.] 85. S. W. 779.) One year in West Virginia. Cain v. Brown, 54 W. Va. 656, 46 S. E. 579. The right of redemption given to a minor by Wisconsin Rev. St. 1898, § 1166, is not impaired by the fact that a deed has been issued. Hoffmann v. Peterson [Wis.] 102 N. W. 47.

83. See 2 Curr. L. 1831, n. 10. The expression "delinquent taxes" as used in subd. 3, § 1602, Minnesota Gen. St. 1894, relating to the amount required to redeem from tax sale, construed to mean all taxes that are overdue and unpaid in fact. Jenswold v. Minnesota Canal Co. [Minn.] 101 N. W. 603. Under statute allowing property owners two years to redeem from sale by paying double the amount of the sale price, inadequacy of price at sale is no ground for setting it aside. Ross v. Drouilhet [Tex. Civ. App.] 80 S. W. 241. The Minnesota requirement that the amount for which land is sold on a tax sale shall be stated in the auditor's notice of expiration of redemption is mandatory [Gen. St. 1894, § 1654]. State v. Scott, 92 Minn. 210, 99 N. W. 799. The statute providing that interest shall be paid to the time of redemption enters into the transaction and makes the amount required to redeem definite and certain. Roessler v. Romer, 92 Minn. 218, 99 N. W. 800. Where a sheriff as ex officio tax collector erroneously computed the amount necessary to redeem land from tax sale, and the tax debtor paid the amount demanded by the sheriff, such payment constituted a redemption, the debtor being entitled to rely on the statement of the state's officer as to the amount due. Beck v. Meroney, 135 N. C. 532, 47 S. E. 613.

84. On redemption of several parcels the clerk can charge only one fee for a redemption receipt, the law warranting no more. Plyley v. Allison [Tenn.] 82 S. W. 475.

85. Succession of Williams v. Chaplain, 112 La. 1075, 36 So. 859. The Michigan statute (Comp. L. 1897, § 3927), allowing purchasers to recover for improvements, includes homestead purchases (Platz v. Englehardt [Mich.] 101 N. W. 849), but (under § 10,995) no claim for improvements can be enforced by defendants who have not been in possession for six years and have not occupied the premises under color of title (Boucher v. Trembley [Mich.] 12 Det. Leg. N. 187, 103 N. W. 819). In Arkansas color of title as well as good faith is made necessary to entitle an occupant of lands to compensation for improvements made by him. A bond for title is not color of title. Beasley v. Equitable Securities Co. [Ark.] 84 S. W. 224.

86. In re Lindner, 113 La. 772, 37 So. 720; Govern v. Russ [Iowa] 100 N. W. 325. Missouri Act March 6, 1903 (Laws 1903, pp. 254, 255), requiring offer of refund to defendant of taxes paid by him, applies only to future sales. Petring v. Current River Land & Cattle Co. [Mo. App.] 85 S. W. 933.

87. Lapse of 13 years after acquirement of void tax title and payment of taxes during that time is insufficient evidence of laches in suit to redeem from void sale. Jackson v. Boyd [Ark.] 87 S. W. 126.

88. Arneson v. Haldane, 105 Ill. App. 589.

89. Gavenesch v. Jersey City [N. J. Law] 59 A. 25.

90. Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639; Glos v. Dyche, 214 Ill. 417, 73 N. E. 757. Tender by attorney representing two claimants. Cook v. Franklin [Ark.] 83 S. W. 325. The payment of redemption money to the sheriff in the form of a check, which was cashed and the money tendered to the tax purchaser, which was refused, the fact that the sheriff received the check instead of money did not make against the sufficiency of the tender. Beck v. Meroney, 135 N. C. 532, 47 S. E. 613.

91. Mosser v. Moore [W. Va.] 49 S. E. 537.

92. Cain v. Brown, 54 W. Va. 656, 46 S. E. 579.

states must conform strictly to the statutes,[93] and is to be tested by the statute in force at the time of the sale.[94] Failure to give the notice vitiates the deed if one is subsequently issued.[95]

§ 14. *Tax titles. Who may purchase.*[96]—One who is under the obligation to pay taxes cannot directly or indirectly purchase at a sale, caused by his own default, and thereby acquire title to the property sold.[97] Thus, the trustee of a minor,[98] a life tenant,[99] one acting as the agent of another,[1] a purchaser at a sheriff's sale,[2] and the parties to a mortgage,[3] are all within the reason of the rule. But a sale for taxes is not invalidated because the purchaser is the wife of the collector conducting the sale, in the absence of fraud or irregularity.[4]

Purchaser's rights and estate.[4a]—The purchaser at a tax sale has, during the period allowed for redemption, and before receiving his deed, no estate in the land;[5] he has but a lien for the repayment of the purchase money, interest and charges.[6] One who buys land from another who pur-

93. Notice to owner of fee, though addressed to him as "mortgagee," is sufficient. Bradley v. Williams [Mich.] 102 N. W. 625. The New York Forest Preserve Commission is an occupant within the meaning of the statute of that state, requiring that where land is sold for taxes notice shall be given to the occupant to redeem before a deed is given [Laws 1896, p. 842, c. 908, § 134]. People v. Kelsey [N. Y.] 72 N. E. 524, reversing 96 App. Div. 148, 89 N. Y. S. 416. A notice which falls to include in the statement of the amount required to redeem the amount for which the land was thus bid in for the state is fatally defective. Jenswold v. Minnesota Canal Co. [Minn.] 101 N. W. 603. The stating, in a final redemption notice, of a sum substantially greater than the amount of taxes charged and interest calculated to the last day of redemption as being due on a parcel of land and unnecessary for its redemption from tax sale will make voidable a tax deed issued by virtue of such sale and notice if attached in time. Shinkle v. Meek, 69 Kan. 368, 76 P. 837. A return of service failing to show either the place or time of acceptance of service the notice is insufficient. Barcroft v. Mann [Iowa] 101 N. W. 276. A statute providing that the owner shall be entitled to a four-months notice by the tax purchaser before the right of redemption ceases does not apply to one whose right of redemption has already expired when the statute is enacted. Harrison v. Thomas [Va.] 49 S. E. 485.

94. See 2 Curr. L. 1832, n. 18. Roessler v. Romer, 92 Minn. 218, 99 N. W. 800.

95. Foy v. Houstman [Iowa] 103 N. W. 369.

96. See 2 Curr. L. 1832. See Tiffany, Real Property, 1063.

97. One not the owner nor in possession under claim of title is under no obligation to pay the taxes, merely because asserting an interest adverse to the legal owners. Palmer v. Ozark Land Co. [Ark.] 85 S. W. 408. The real owner of property may buy it at a tax sale made to satisfy taxes assessed against the ostensible owner, and the property will pass to him free of the mortgages consented upon it by the ostensible owner as a fraud upon him; he owes no duty either to the ostensible owner or to the latter's mortgagee to pay the tax. Hillard v. Taylor [La.] 38 So. 594.

98. Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639.

99. Jeffers v. Sydnam, 129 Mich. 440, 89 N. W. 42.

1. See 2 Curr. L. 1832, n. 20. State v. Goldberg's Unknown Heirs [Tenn.] 86 S. W. 717. Where the husband, whilst acting as the agent of his wife, becomes the adjudicatee at tax sale of property belonging in indivision to her and her co-heirs, in a succession of which she is administratrix, he acquires no title thereto adverse to that of the owners, and the prescription quieting tax titles and titles acquired at public sales has no application. Alexander v. Light, 112 La. 925, 36 So. 806.

2. Gibson v. Gilman [Kan.] 80 P. 587.

3. See 2 Curr. L. 1832, n. 19.

Mortgagee: Ross v. Frick Co. [Ark.] 83 S. W. 343; Shepard v. Vincent [Wash.] 80 P. 777. In states where the mortgagee has merely a lien on the mortgaged property, so long as the relation of mortgagor and mortgagee exists, the latter cannot as against the former acquire title to the property by virtue of a tax sale. It is conclusively presumed that the disbursements on account of taxes were made to redeem and protect the property. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14. A mortgagor who has expressly covenanted to pay the taxes on mortgaged premises is not thereby prohibited from acquiring a tax title thereon, if the same does not affect interests or rights arising from or accruing under the mortgage. Ross v. Cale [Minn.] 103 N. W. 561.

4. Means v. Haley [Miss.] 38 So. 506.

4a. See 2 Curr. L. 1832.

5. See 2 Curr. L. 1833. Title does not become absolute until period of redemption has expired. Adkin v. Pillen [Mich.] 100 N. W. 176. The title of the purchaser at a tax sale is not the same as that of the owner in whose name the land was sold. They are separate hostile claims with no privity between them. State v. Harman [W. Va.] 50 S. E. 828. A purchaser at a tax sale of property charged on the land book as part of a certain town lot acquires by virtue of the provisions of sec. 25, c. 31, West Va. Code 1899, the right, title, and estate of the person so charged in and to the entire lot by obtaining a deed therefor under such purchase. Cain v. Fisher [W. Va.] 50 S. E. 752.

6. He cannot therefore maintain an action

chased the same at a tax sale, and subsequently brings an action to recover it from a third person in possession, is not, in the event he fails to recover, entitled to a lien on the property for the amount of the purchase price which he paid to the original holder of the tax title.[7] This lien, however, if not cut off in some manner recognized by law, will ultimately ripen into ownership,[8] and where tax leases were purchased from a city, the title of the purchaser thereunder vested from the date of the lease.[9] The purchaser gets a title clear of all prior incumbrances, easements or other rights,[10] except the state's claim for the taxes of prior years.[11] Where the surface of land is owned by one person and the oil in place by another, a sale for taxes in the name of the owner of the surface will pass also the oil still in the ground.[12] The rule of caveat emptor applies to the purchase of lands at a tax sale,[13] and in a proceeding to register a land title, a claimant under a tax deed must establish its validity;[14] but where a tax deed is set aside for irregularity, the holder thereof is entitled to a lien on the land for the taxes on account of which it was sold and for any other taxes that may have been paid on the land subsequently.[15] A sale of land as seated but in fact unseated at time of assessment is void and passes no title to purchaser.[16]

Possession.[16a]—The tax purchaser is not entitled to possession until expiration of the period of redemption,[17] but in the case of wild and unoccupied lands, constructive possession is conferred by the deed.[18] Kirby's Dig. § 5057, providing that unimproved lands shall be deemed in possession of the person who pays the taxes thereon, if he have color of title thereto, applies only to those cases where such constructive possession is conclusive.[19] Generally, possession under a tax deed

to recover the possession of timber cut on the land before the issuing of the tax deed. Millard v. Breckwoldt, 90 N. Y. S. 890. All sales under chapter 67, North Dakota Laws 1897 are subject to redemption, and until the right of redemption is eliminated, the sheriff's certificate of sale is evidence of a lien only. Cruser v. Williams [N. D.] 100 N. W. 721. The fact that a street was laid through property formerly described as a single tract, the same description being used in all the tax proceedings, will not operate to defeat a tax lien or prevent recovery by one who paid the taxes. Douglass v. Byers, 69 Kan. 59, 76 P. 432.

7. Maddox v. Arthur [Ga.] 50 S. E. 668.

8. Under the North Dakota Laws, the certificate of sale is the only muniment of title and title passes by operation of law when the redemption period has expired and not before. Cruser v. Williams [N. D.] 100 N. W. 721; Darling v. Purcell [N. D.] 100 N. W. 726. When a person's property is sold at tax sale, the owner is not ipso facto deprived of the ownership and the legal possession thereof, though the adjudicatee acquires certain rights in respect to the property, which if not cut off by redemption will ripen into ownership. State v. Register of Conveyances [La.] 36 So. 900.

9. Sherman v. Fisher [Mich.] 101 N. W. 572.

10. See 2 Curr. L. 1833, n. 25. Under Arkansas statutes, title to land sold to the state for taxes vested in the state and was not affected by failure of the clerk to file a proper transcript in the auditor's office. Wagner v. Arnold [Ark.] 80 S. W. 577. The purchaser at a sale under a judgment providing that the sale shall be subject to the liens for unpaid taxes not recovered by the judgment takes subject to such liens. Burton v. Louisville [Ky.] 85 S. W. 727.

11. See 2 Curr. L. 1833, n. 26. Berger v. Multnomah County [Or.] 78 P. 224. A city had property adjudicated to it for taxes. It did not take possession but continued to assess it to the tax debtor. It was sold for later assessments and the purchaser paid taxes thereon for several years on assessments made in his name. Held, that the city was estopped to assert its claim for taxes on the prior assessments. State v. New Orleans, 112 La. 408, 36 So. 475.

12. Peterson v. Hall [W. Va.] 50 S. E. 603.

13. See 2 Curr. L. 1834, n. 32. The state can transfer only such title and such rights as she had. In re Lafferranderie [La.] 37 So. 990. A purchaser of land from a county, which the latter had acquired under a tax sale, cannot recover of the county the price paid on the ground that the tax certificate was void because of alleged error in the description. Minnesota L. & Inv. Co. v. Beadle County [S. D.] 101 N. W. 29. An execution for municipal taxes, not describing any particular property, but simply directing the seizure of the goods and chattels, lands and tenements of "the estate of A. J. Miller," is void and a purchaser at a sale under such levy obtains no title. Miller v. Brooks, 120 Ga. 232, 47 S. E. 646.

14. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1; Glos v. Mickow, 211 Ill. 117, 71 N. E. 830.

15. Paine v. Palmborg [Colo. App.] 79 P. 330.

16. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

16a. See 2 Curr. L. 1833.

17. See 2 Curr. L. 1833, n. 30.

18. The execution of a tax deed on vacant property is insufficient to give the grantee constructive possession. Mitchell v. Titus [Colo.] 80 P. 1042.

19. Towson v. Denson [Ark.] 86 S. W. 661.

for the statutory period will confer an absolute title,[20] and adverse possession may be invoked to cut off a tax title held by a city;[21] but bare lapse of time is insufficient to cure defects in an invalid tax title.[22] In some states a summary proceeding is provided by statute.[23] In others, the purchaser is entitled to some possessory action, such as ejectment.[24] In Wisconsin the owner of unoccupied land may bring ejectment therefor against the person in whom the title appears of record at the commencement of the action.[25] Usually before process for the possession of land can issue, a notice must be given to the grantee in the last recorded deed, either personally or by publication.[26] In some jurisdictions the purchaser may conclude the former owner, or those claiming under him, by a foreclosure of the tax lien,[27] while in others he may file a bill in equity to quiet his title.[28]

Cancellation and quieting title.[28a]—When the proceedings through which property has been subjected to sale for taxes are materially affected with fraud or irregularity, the owner may[29] within the period prescribed by statute,[30] maintain an action or writ to set aside or cancel the

20. See 2 Curr. L. 1834, n. 38. Where adverse claimants both rely on void tax deeds, the position of the party in possession is superior to that of the party seeking to recover possession. Rhea v. McWilliams [Ark.] 84 S. W. 726. A tax or assessment lease is not a written instrument of conveyance within Code Civ. Proc. § 369, such that adverse possession may be based thereon. Miller v. Warren, 94 App. Div. 192, 87 N. Y. S. 1011.

21. See 2 Curr. L. 1835, n. 39. Cass Farm Co. v. Detroit [Mich.] 102 N. W. 848.

22. Jackson v. Boyd [Ark.] 87 S. W. 126.

23. Utica (N. Y.) city charter provides for summary proceedings the same as in case of a tenant holding over after expiration of his term. Gabel v. Williams, 42 Misc. 475, 87 N. Y. S. 240. The purchaser, in order to maintain summary proceedings against an occupant must first obtain a deed in the manner provided by law. Id.

24. See 2 Curr. L. 1835, n. 40. Wade v. Crouch, 14 Okl. 593, 78 P. 91; Kreamer v. Vonelda, 24 Pa. Super. Ct. 347.

25. Stephenson v. Doolittle [Wis.] 100 N. W. 1041.

26. If diligent and honest effort to make personal service be not made, substituted service is ineffectual to bar right to redeem. Winters v. Cook [Mich.] 12 Det. Leg. N. 228, 103 N. W. 869. The inclusion of a right of way in a statutory notice by the tax purchaser is no defense by such tax purchaser to quiet title. Flint Land Co. v. Godkin [Mich.] 99 N. W. 1058.

27. A tax foreclosure cuts off the lien of a local improvement assessment. Both as to matured and unmatured instalments. Pennsylvania Co. v. Tacoma, 36 Wash. 656, 79 P. 306. It is not necessary that the city be made a party to the foreclosure proceeding; the statute requiring notice only to the owner of the property. Id. The fact that there was no record of proof that the treasurer gave notice by publication that the tax books had been turned over to him was a mere irregularity, not invalidating the foreclosure proceedings. Washington Timber & Loan Co. v. Smith, 34 Wash. 625, 76 P. 267.

28. The purpose of the Louisiana act of 1898, no. 101, p. 127 is to enable a tax purchaser to quiet his title by bringing suit against the real party in interest. Such suit may be properly brought, though not brought against the person to whom the property was assessed when sold if such assessment was erroneous and such person neither has nor pretends to have any interest in the title. Slattery v. Kellum [La.] 38 So. 170. Neither such act nor the jurisprudence of the state requires that a tax purchaser suing under such act to quiet his title shall allege possession in himself or want of possession in the defendant. Id. Where the former owner who is brought into court in an action to quiet tax title prima facie valid makes no attack thereon, such title becomes conclusively valid. Lisso & Bro. v. Unknown Owner [La.] 38 So. 282. Plaintiff having a donation deed from the state, which claimed under a sale for taxes that was in fact void, could not maintain a suit to quiet title against one having color of title. St. Louis Refrigerator & Wooden Gutter Co. v. Thornton [Ark.] 86 S. W. 852. In a suit to quiet title, evidence that plaintiff once went upon the land and directed another to put up a fence, which was done, though the fence was not a substantial one, sufficiently showed possession entitling him to maintain the suit. Bland v. Windsor [Mo.] 86 S. W. 162. A grantee who received his deed August 24, 1900, and commenced suit January, 22, 1901, to quiet title, was not guilty of laches. Id.

28a. See 2 Curr. L. 1837.

29. A grantee of land under a deed subject "to all unpaid taxes and sales for the same" was not thereby estopped to deny the validity of a tax sale, where the assessment on which the sale was based was wholly void. Blackburn v. Lewis [Or.] 77 P. 746.

30. Laches may preclude a taxpayer from maintaining a suit to open the tax sale decrees. Bending v. Auditor General [Mich.] 100 N. W. 777. Owner not estopped after lapse of 16 years to assert title to land sold under void sale. Weir v. Cordz-Fisher Lumber Co. [Mo.] 85 S. W. 341. Tax sales and certificates issued for municipal improvements are within the application of Wis. Rev. St. 1898, § 1210h, providing that no action shall be brought to cancel tax certificate after one year from date of sale. Hamar v. Leihy [Wis.] 102 N. W. 568.

sale or deed.[31] He must show title in himself,[32] and should tender the amount of taxes and disbursements where the sale or deed is vacated for mere irregularity;[33] but an assessment and sale thereunder being void, the payment of the taxes by the purchaser is the act of a mere volunteer, and the landowner is not bound to pay the taxes and interest so paid as a condition to have the tax deeds vacated.[34] A tender is not necessary as a prerequisite to the maintenance of an action to set aside such tax deed.[35] The owner may likewise sue to quiet his title. It must not only be alleged that the complainant is the owner of the premises, but also either that he is in possession of the premises at the time of filing the bill, or that the premises are vacant and unoccupied when the bill is filed.[36] In such suit it is incumbent upon him to allege and prove the invalidity of the tax deed.[37] Here again he must do equity by reimbursing the tax purchaser for such sums as he may have paid to become possessed of the tax title.[38]

The state in a suit to quiet title may question the validity of defendant's title under a tax deed, although the irregularities complained of were committed by the state's agents and officers.[39]

§ 15. *Inheritance and transfer taxes.*[40]—The theory on which taxation of this kind on the devolution of estates is based, and their constitutionality sustained,[41] is clearly established, and is founded on two principles: (1) A succes-

31. Money sent to county treasurer to pay taxes and misapplied by him, resulting in sale of land to state, entitles taxpayer to cancellation of tax deed without payment of original tax as pre-requisite to cancellation. Kent v. Auditor General [Mich.] 101 N. W. 805.

32. See 2 Curr. L. 1837, n. 59. In proceedings under the Burnt Records Act of Illinois, the holder of a tax title, who is made a defendant, has the burden of showing the validity of his title if he asserts its validity [Hurd's Rev. St. 1903, p. 1484, c. 115]. Glos v. Kelly, 212 Ill. 632, 72 N. E. 378.

33. See 2 Curr. L. 1837. When a tax deed is vacated for irregularity in the proceedings of record, where the land is chargeable with taxes, the owner must as a condition precedent to the vacation of the deed pay the purchaser what is required to be paid by state. Mosser v. Moore [W. Va.] 49 S. E. 537. Though a tax deed does not pass title because of irregularity, the grantee acquires the lien of the state and may be granted the compensation provided by statute in such case for outlays. Green v. McGrew [Ind. App.] 72 N. E. 1049. Where, in an action to recover land sold for taxes, there was no verdict but there was a finding, such finding took the place of a verdict and defendant's right to 15 per cent. interest terminated at the date of the finding. Pinkerton v. J. L. Gates Land Co. [Wis.] 100 N. W. 841.

34. Paine v. Germantown Trust Co. [C. C. A.] 136 F. 527; Wade v. Crouch, 14 Okl. 593, 78 P. 91; State v. McEldowney, 54 Va. 695, 47 S. E. 650.

35. Shinkle v. Meek, 69 Kan. 368, 76 P. 837. Where plaintiff in a suit to cancel a tax deed tendered to defendant all he was entitled to receive, which defendant refused, the latter was properly charged with such costs as were made necessary by the refusal. Glos v. Stern, 213 Ill. 325, 72 N. E. 1057.

36. Glos v. Miller, 213 Ill. 22, 72 N. E. 714. A suit to cancel alleged fraudulent and void decrees and deeds as a cloud upon title to land cannot be maintained by those having no present interest in or title to such land, either legal or equitable. Stockton v. Craig [W. Va.] 49 S. E. 386. Where a bill specifically described the tax deed sought to be set aside, and the answer admitted that defendant had derived some interest in the premises by the tax deed, and alleged that the deed described in the complaint was valid, the existence of the deed was admitted, and it was unnecessary for plaintiff to offer it in evidence. Glos v. McKerlie, 212 Ill. 632, 72 N. E. 700.

37. State v. McEldowney, 54 Va. 695, 47 S. E. 650; Langlois v. People, 212 Ill. 75, 72 N. E. 28.

38. Plaintiff bound to pay or tender only the amount due when property was first sold to the county, together with taxes assessed and since matured, costs and expenses, and not the amount paid by the purchaser to the county at the time of sale. Young v. Droz [Wash.] 80 P. 810, following McManus v. Morgan [Wash.] 80 P. 786. Allegations of bill as to tender of taxes, costs and penalties held sufficient. McManus v. Morgan [Wash.] 80 P. 786.

39. State v. Coughran [S. D.] 103 N. W. 31. When the state is compelled to come into court to establish its title to property alleged to be wrongfully withheld or claimed by a defendant, the case is to be tried precisely as it would be between private individuals, except that in certain cases the statute of limitations is not applicable to the state, and laches cannot be imputed to it. Public Act 1899, No. 97, of Michigan, providing that the auditor general shall be made a party defendant to all proceedings instituted for the purpose of setting aside any sale for delinquent taxes, is not to be construed as expressing a waiver by the state of its constitutional immunity from suit in a United States court. It applies rather to proceedings in the courts of that state. Chandler v. Dix, 194 U. S. 590, 48 Law. Ed. 1129.

40. See 2 Curr. L. 1838.

41. In re Magnes' Estate, 32 Colo. 527, 77

sion tax is a tax upon the right of succession to property, and not on the property itself;[42] (2) the right to take property by devise or descent is not one of the natural rights of man, but is the creature of the law. Accordingly it is held that the states may tax the privilege,[43] grant exemptions,[44] discriminate between relatives, and between these and strangers,[45] and are not precluded from the exercise of this power by constitutional provisions requiring uniformity and equality of taxation;[46] neither is it necessary to the validity of the tax that the state constitution should contain a specific delegation of power authorizing the legislature to impose such taxation.[47] Statutes imposing taxes of the kind in question, unless the contrary is distinctly expressed or is clearly to be implied, are prospective in character.[48] The imposition of a succession tax on property passing under the intestate laws is not a change in pre-existing laws of descent.[49]

The occasion[50] for the imposition of a tax of the kind in question arises, under the statutes of nearly if not all the states, upon the transfer or acquisition of any property, real or personal,[51] or of any interest therein or income therefrom,[52] in trust or otherwise,[53] either by will,[54] by the intestate law of the state, or by sale or gift made in contemplation of death,[55] or to take effect in use or enjoyment thereafter.[56]

P. 853; State v. Guilbert, 70 Ohio St. 229, 71 N. E. 636.

42. In re Hitchins' Estate, 43 Misc. 485, 89 N. Y. S. 472. Since the tax is imposed not upon the property, but upon the succession to or transfer of it, no tax can be collected where the beneficiary under a will renounces the legacy; but the succession thereon becomes taxable in accordance with the ultimate devolution of the property. In re Wolfe's Estate, 89 App. Div. 349, 85 N. Y. S. 949.

43. In re Magnes' Estate, 32 Colo. 527, 77 P. 853.

44. See, infra, this section.

45. A statute based upon the distinction as to inheritances between those of the direct line and collateral relations, sustained as constitutional. In re Campbell's Estate, 143 Cal. 623, 77 P. 674.

46. State v. Guilbert, 70 Ohio St. 229, 71 N. E. 636; In re Magnes' Estate, 32 Colo. 527, 77 P. 853. North Carolina Revenue Act 1903 (p. 323, c. 247), imposing a succession tax, is not void in that it imposes a tax on personalty only. In re Morris' Estate [N. C.] 50 S. E. 682.

47. In re Morris' Estate [N. C.] 50 S. E. 682.

48. Hence property passing under the will of a testator who died prior to the passage of an act was not subject to tax thereunder. Gilbertson v. Ballard [Iowa] 101 N. W. 108.

49. The inheritance tax law of Colorado is not unconstitutional as changing the law of descent by special act in contravention of Const. art. 5, § 25. In re Magnes' Estate, 32 Colo. 527, 77 P. 853.

50. See 2 Curr. L. 1839.

51. See 2 Curr. L. 1839, n. 80. The right to impose the tax does not depend on the nature or kind of property transferred. Tax on personal property only. In re Morris' Estate [N. C.] 50 S. E. 682. Securities of a deceased nonresident legatee having come into the possession of the personal representative are subject to the transfer tax. In re Clinch's Estate, 44 Misc. 190, 89 N. Y. S. 802. Money deposited with a broker by a nonresident to margin stock transactions which could be withdrawn at any time is subject to transfer tax. In re Daly's Estate, 91 N. Y. S. 858. Stocks in New York corporations, physically present in that state although held by a nonresident at the time of his death, are taxable under the transfer tax law. In re Clinch, 90 N. Y. S. 923.

52. Interests which have accrued before the passage of a transfer tax law cannot be subjected to a transfer tax. In re Craig's Estate, 97 App. Div. 289, 89 N. Y. S. 971.

53. See 2 Curr. L. 1839, n. 81. In re Tracy, 179 N. Y. 501, 72 N. E. 519; People v. McCormick, 208 Ill. 437, 70 N. E. 350; Singer v. Guarantee Trust & Safe Deposit Co., 24 Pa. Super. Ct. 270. Property held in trust by provision made in a will becomes subject to an inheritance tax law, which has been enacted during continuance of the trust. Hostetter v. State, 5 Ohio C. C. (N. S.) 337. Where testator creates a trust directing the income to be paid to the beneficiary during life, the taxes imposed must be charged to the income, to be paid before any payment to the beneficiary, and cannot be divided into annual payments based on the expectancy of the life of the annuitant. In re Tracy, 87 App. Div. 215, 83 N. Y. S. 1049.

54. Property passing by deed taking effect at grantor's death is subject to the tax. In re Skinner's Estate, 45 Misc. 559, 92 N. Y. S. 972.

55. Absolute conveyances, though without consideration, made three days before grantor submitted to contemplated surgical operation, from the effects of which he died, are in contemplation of death. Merrifield's Estate v. People, 212 Ill. 400, 72 N. E. 446. Gift by a husband to his wife 33 days before his death held to have been subject to tax under statute providing for the taxation of gifts made in contemplation of death [Laws 1895, p. 301]. Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121. Property awarded a natural child in a suit for specific performance of a contract made in 1862, the intestate dying in 1900, not subject to the tax. In re Demers' Estate, 84 N. Y. S. 1109.

56. See 2 Curr. L. 1839, n. 82. Where distribution is delayed for many years, and an inheritance tax law becomes operative in

Powers of appointment.[57]—*Exemptions*[58] are usually granted in favor of the institutions exempt under the general tax laws,[59] and persons within certain degrees of consanguinity or affinity,[60] and, as there, one claiming an exemption has the burden of establishing his right thereto.[61] A statute exempting from the inheritance tax a life estate in property devised or bequeathed to testator's wife has no application where the wife renounces the provisions of the will.[62]

Jurisdiction[63] to impose the tax exists only where the person dying seized of the property is domiciled within the state,[64] or the property is within the state.[65]

When tax accrues.[66]—As to estates of present enjoyment, whether absolute or for a term of years, the tax accrues immediately upon the death of the decedent.[67] As to the time of accrual of the tax upon remainders, the prevailing rule appears to be that the tax does not become due until the property devised or bequeathed actually vests.[68] A tax not levied until after the repeal of the statute authorizing it is not collectible.[69]

Appraisal and collection.[70]—Proceedings to determine the liability of an es-

the meantime, the shares are subject thereto. Hostetter v. State, 5 Ohio C. C. (N. S.) 337.

57. See 2 Curr. L. 1840.

58. See 2 Curr. L. 1840, n. 90.

59. Boards and societies and auxiliaries thereto, which are incorporated and organized under the laws of other states for purposes of purely public charity, are not institutions of that class within the Ohio statute (§ 2731, Rev. St.), granting exemption. Humphreys v. State, 70 Ohio St. 67, 70 N. E. 957. A gift to a charitable institution is not subject to the inheritance tax in New Jersey. Gen. St. p. 3342. A society the purpose of which was to collect and preserve historical and current accounts was not an educational or charitable institution. In re Landis' Estate [N. J. Eq.] 56 A. 1039. U. S. bonds being exempt under the transfer tax act of 1892, a tax thereon, paid in 1895 by an executor was held illegal. In re Hoople, 87 N. Y. S. 842.

60. Uncle and niece held not to stand in relation of parent and child. In re Davis' Estate, 90 N. Y. S. 244.

61. In re Davis' Estate, 90 N. Y. S. 244. Petition for order declaring estate to be exempt held insufficient. In re Collins' Estate, 93 N. Y. S. 342.

62. Connell v. Crosby, 210 Ill. 380, 71 N. E. 350.

63. See 2 Curr. L. 1840.

64. Appeal of Hopkins [Conn.] 60 A. 657. Where a resident of Pennsylvania dies entitled to, but before she has received, a share of the personal estate of her brother, who died intestate in another state, such share was in her constructive possession and subject to the Pennsylvania inheritance tax. In re Milliken's Estate, 206 Pa. 149, 55 A. 853.

65. See 2 Curr. L. 1840. Lands of an intestate situate in a sister state cannot be taxed, since they do not pass under the intestate laws of the local state. Connell v. Crosby, 210 Ill. 380, 71 N. E. 350. Where, under a will, a resident of France was entitled to a share of the residuary estate, but died before his share was paid to him, and it was paid to his executor and trustee under his will, which was admitted to probate in the city of New York, the share is liable to transfer tax, and is not exempt on the ground that the interest of the legatee was a chose in action, the situs of which was in France, the domicile of the trustee. In re Clinch's Estate [N. Y.] 73 N. E. 35.

66. See 2 Curr. L. 1841.

67. The bequest of a residuary estate to a charitable institution vests at the death of the testator and is exempt from taxation. It is not affected by the fact that the estate has not been settled and the legatee has not received the legacy at the time of the assessment. People v. Wells, 179 N. Y. 257, 71 N. E. 1126. The act of April 25th, 1904 (vol. 97, p. 398, O. L.), which provides for the taxation of the right to succeed to, or inherit property, does not apply to such vested estates when the decedent died prior to the passage of the act, even though distribution has not been made of such estates. Hostetter et al, executors, v. State of Ohio, 5 C. C. (N. S.) 337, distinguished. Whether the law applies to the estate of any decedent dying prior to the passage of the act—quaere. Estate of Asa S. Bushnell, 2 Ohio N. P. (N. S.) 673.

68. See 2 Curr. L. 1841, n. 96. The collateral inheritance tax of Massachusetts is postponed until the person entitled thereto comes into possession [St. 1902, p. 381, c. 473]. Stevens v. Bradford, 185 Mass. 439, 70 N. E. 425. Under Hurd's Ill. Rev. St. 1901, c. 120, § 366, imposing a tax where one becomes beneficially entitled to any property, where testator's residuary estate was devised in trust for 20 years, it could not be taxed until the end of that period. People v. McCormick, 208 Ill. 437, 70 N. E. 350. The interest of a residuary legatee, conditioned on his attaining a certain age, cannot be deemed taxable under the War Revenue Act of June 13, 1898, before the happening of the contingency. Vanderbilt v. Eidman, 25 S. Ct. 331. Where a vested though defeasible interest in remainder passes under a will to the remainderman on the testator's death, though the possession does not pass until the death of the life tenant, the transfer on succession is referred to the time of the death of the testator, and if that occurred prior to the enactment of the act taxing transfers of property, the remainder is not taxable. In re Hitchins' Estate, 43 Misc. 485, 89 N. Y. S. 472.

69. Succession tax held not imposed within saving clause of repealing act. Tilghman v. Eidman, 131 F. 651, following Mason v. Sargent, 104 U. S. 689, 26 Law. Ed. 894.

70. See 2 Curr. L. 1841.

tate are usually instituted by the appointment of an appraiser, whose duty it is to ascertain the value of the estate in question.[71] Where an appraisement is of the property as a whole, without any separate valuation of an annuity, or the land on which it is charged, and there is no legacy "upon a condition or contingency," the orphan's court has no authority to appoint an auditor to apportion the collateral tax.[72] If it does so and the apportionment is allowed to stand as the proper appraisement, the costs of the audit will be charged upon the collaterals through whose neglect the proper appraisement was not made.[73] The duty of computation under the Connecticut statute is placed upon the probate court having jurisdiction of the principal administration.[74] In Ohio, where the probate court in the settlement of the estate of a decedent determines the liability of a devise, legacy, bequest, or inheritance to pay a collateral inheritance tax, appeal may be taken by either party to the controversy to the court of common pleas.[75] Personal property without the state must be inventoried.[76] The surrogate has no power to modify an order fixing a transfer tax and allow a partial refund to the executor on discovery of a debt due by the estate,[77] nor to modify a decree of appraisal under the transfer tax law on the ground that a sale of the property subsequent to the appraisement showed that the latter was too high,[78] nor may he modify an order assessing a transfer tax voluntarily paid,[79] and his decree setting aside his prior order fixing a transfer tax need not direct the state comptroller to refund.[80] Where an administrator paid the transfer tax on real estate from the personalty, he is subrogated, as against the heirs, to the claim for such for the benefit of the creditors of the estate.[81] In California the county treasurer may receive and retain in addition to the compensation provided by the county government act certain commissions upon all amounts collected by him for the state under the provisions of the inheritance tax law.[82] Cases cited are illustrative of rules for determining the amount taxable.[83] A legacy of less than $500 left to testator's niece, and exempt from the transfer tax because of its amount and the relationship she bore to the testator, may nevertheless be added to certain other legacies in determining the aggregate amount of the estate transferred,[84] and the person

71. See 2 Curr. L. 1841, n. 1. A direct inheritance tax law by providing for an appraisement without notice is not thereby unconstitutional as taking property without due process of law. Hostetter v. State, 5 Ohio C. C. (N. S.) 337. The report of an appraiser that the value of certain life interests could not at that time be ascertained, which report is confirmed by order of the surrogate court, precludes subsequent action unless there is a change in the condition of the estate. In re Lawrence's Estate, 96 App. Div. 29, 88 N. Y. S. 1028.

72, 73. Burkhart's Estate, 25 Pa. Super. Ct. 514.

74. Appeal of Hopkins [Conn.] 60 A. 657; Appeal of Bridgeport Trust Co. [Conn.] 60 A. 662.

75. Rev. St. § 2731-13. Humphreys v. State, 70 Ohio St. 67, 70 N. E. 957.

76. Appeal of Bridgeport Trust Co. [Conn.] 60 A. 662.

77. Remedy by appeal. In re Hamilton's Estate, 84 N. Y. S. 44.

78. In re Lowry's Estate, 89 App. Div. 226, 85 N. Y. S. 924.

79. In re Mather's Estate, 84 N. Y. S. 1105.

80. The statute provides for such refund. In re Cameron's Estate, 97 App. Div. 436, 89 N. Y. S. 977.

81. Hughes v. Golden, 44 Misc. 128, 89 N. Y. S. 765.

82. San Diego County v. Schwartz, 145 Cal. 49, 78 P. 231.

83. See 2 Curr. L. 1842, n. 8. In determining the amount of an inheritance tax, the relationship of the testator to the persons to whom the property actually passes under the statute to prevent lapsed legacies will govern, and not their relationship to the person named in the will as legatee or devisee. Iowa Code, § 3281, in regard to lapsed legacies, and § 1467 in regard to inheritance tax. In re Hulett's Estate, 121 Iowa, 423, 96 N. W. 952. Legacies payable to collateral heirs and strangers in another state. In re Clark's Estate [Wash.] 80 P. 267. The amendment (Laws 1903, p. 165, c. 41) to Section 221 of the New York Transfer Tax Law, made no change in the provisions of the section, except to include real estate as well as personalty in estimating the value of property transferred, and did not change the construction theretofore placed thereon by the courts. In re Fisher's Estate, 96 App. Div. 133, 89 N. Y. S. 102. The provision of Section 2713 of the New York Code Civ. Proc. that certain articles of personalty shall be set apart to the husband at the wife's death, contemplates things in existence, and the husband may not deduct the value thereof from the value of the estate. In re Libolt's Estate, 102 App. Div. 29, 92 N. Y. S. 175.

84. In re McMurray's Estate, 96 App. Div. 128, 89 N. Y. S. 71.

or fund liable, are collected in the note.[85] General laws imposing limitations for actions and special proceedings do not apply to proceedings to recover taxes, when the tax laws prescribe full limitations.[86]

§ 16. *License taxes.*[87]—A license fee is understood to be a charge for the privilege of carrying on a business or occupation, and is not the equivalent of a property tax.[88] It has been said that license fees may be imposed for the purposes: (1) For regulation; (2) for revenue; (3) to give monopolies; (4) for prohibition.[89] The charge is not imposed in the exercise of the taxing power for general revenue purposes, but in the exercise of the police power, to meet the expense arising from the duty of municipal supervision.[90] It is mainly for the purpose of regulation that the fee is required,[91] and usually of public service corporations, such as railroad[92] and street railway companies,[93] telegraph and telephone companies,[94] gas companies,[95] toll bridges,[96] though not infrequently upon private business or occupations.[97] Where there was dispute as to the character

85. See 2 Curr. L. 1842, n. 9. Where an estate is devised in trust to collect the income and after paying necessary expenses the net income to be divided in equal shares, the collateral inheritance tax is payable out of gross income and not of principal of estate. In re Brown's Estate, 208 Pa. 161, 57 A. 360. In New York, transfer taxes on life and remainder interests in a trust fund are payable out of the capital, though the remainders are contingent. Laws 1896, p. 877, c. 908, amended by Laws 1899, p. 100, and of 1900, p. 1438. In re Hoyt's Estate, 44 Misc. 76, 89 N. Y. S. 744. The transfer taxes imposed upon trust estates for life and in remainder by will are to be paid from the principal of such trust and life estates. In re Tracy, 179 N. Y. 501, 72 N. E. 519. Various dispositions of trust estate held to constitute legacies and entitled under terms of will to have transfer tax paid out of residuary estate. Isham v. New York Ass'n for Improving Condition of the Poor, 177 N. Y. 218, 69 N. E. 367. Federal taxes under the War Revenue Act of June 13, 1898 imposed on any person having in charge or trust any legacy or distributive shares are payable from the capital. In re Hoyt's Estate, 44 Misc. 76, 89 N. Y. S. 744.

86. Tax law limitations held not affected by Code Civ. Proc. §§ 380, 382, 414, regarding actions against the state comptroller. In re Hoople, 93 App. Div. 486, 87 N. Y. S. 842. Under a construction of Laws 1892, c. 399, § 6, and Laws 1897, c. 284, a transfer tax paid in November 1895 was refunded on application made in October, 1903, notwithstanding the lapse of time. Id.

87. See 2 Curr. L. 1842. See, also, Licenses, 4 Curr. L. 428.

88. People of State of New York v. State Board of Tax Com'rs, 25 S. Ct. 713. A tax upon the gross amount of premiums received by a foreign fire insurance company during the preceding year within the county, town, city, village and school district where the agent conducts the business is not a tax upon property, but is a tax upon business. Aachen & Munich Fire Ins. Co. v. Omaha [Neb.] 101 N. W. 3.

89. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020. Quoting Cooley on Taxation.

90. Hence it is immaterial whether the amount fixed is designated a fee, a tax, or a charge. Braddock Borough v. Allegheny County Tel. Co., 25 Pa. Super. Ct. 544.

91. A license tax of $10 on each oil depot in the state where oils are stored in bulk or in tank sustained as a police regulation. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020. A license tax for the privilege of selling goods is in effect a tax on the goods themselves. In re Julius, 4 Ohio C. C. (N. S.) 604.

92. Suffolk Town Charter, § 18, providing for an occupation tax, as applied to the business of a railroad company, is not in conflict with Const. art. 10, § 4, permitting the legislature to impose license taxes on any business which cannot be reached by the ad valorem system. Norfolk & W. R. Co. v. Suffolk [Va.] 49 S. E. 658.

93. A municipality has power to impose an annual license tax upon street cars run or operated within the city. Erie City v. Erie Elec. Motor Co., 24 Pa. Super. Ct. 77. Money paid by a street railway company on the basis of a license tax must be credited to it, a court having held that it must pay an ad valorem tax instead of a license tax or a tax on gross earnings. City of Louisville v. Louisville R. Co., 26 Ky. L. R. 378, 81 S. W. 701.

94. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406; Schellsburg v. Western Union Tel. Co., 26 Pa. Super. Ct. 343; Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346. A city has power to impose by ordinance an annual license tax upon a telephone company, although such company is engaged in both local and interstate commerce business, if there is nothing in the ordinance indicating an intention to tax interstate commerce business. Johnstown v. Central Dist. & Print. Tel. Co., 23 Pa. Super. Ct. 381. License tax on telegraph and telephone companies imposed by township. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306.

95. Kittanning Borough v. Kittanning Consol. Nat. Gas Co., 26 Pa. Super. Ct. 355.

96. Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85.

97. Savannah, etc., R. Co. v. Savannah, 25 S. Ct. 690, affirming 115 Ga. 137, 41 S. E. 592. Furnishing "trading stamps." City Council of Montgomery v. Kelly [Ala.] 38 So. 67; Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 785, 67 L. R. A. 795. Hawkers and peddlers. Commonwealth v. Rearick, 26 Pa. Super. Ct. 384.

of the business, there was no abuse of discretion in granting an injunction until a fuller investigation could be had.[98] A trust company authorized inter alia to buy and sell real estate, is not liable to the state license tax on real estate brokers.[99] Requiring a license from owners and users of automobiles is a proper exercise of police power.[100] Prohibitory license taxes are permissible only in case of such pursuits or indulgences as in their general effect are believed to be more harmful than beneficial to society and which the public interest requires to have ended.[101] A corporation cannot avail itself of licenses issued to other corporations whose property it has bought.[102]

§ 17. *Income taxes.*[103]

§ 18. *Distribution and disposition of taxes collected.*[104]—A county in collecting taxes acts as collecting agent for the towns within its limits.[105] Whatever sums therefore it may collect in excess of what is due it under the statutes should be covered into the town or municipal treasuries for their use.[106] In a suit by a town to recover excess of taxes collected by a county, suit should be against the county and not against its treasurer.[107]

It is the policy of the law to make losses occurring through defective tax proceedings chargeable to the state, county, or municipality through the default of whose officers the loss has occurred. The auditor general of a state therefore is not liable for failure of local officers to report delinquents who had paid.[108] It is of no consequence that the amount of a tax as originally levied went into the general fund, and the "percentages" into the contingent fund. The person against whom assessment was made became obligated to pay both in case payment of original tax was deferred.[109] Decisions affecting the rights of school districts in certain funds are noted below.[110] The right of a town to sue a county treasurer for taxes wrongfully paid to a supervisor who absconded cannot be taken away by a subsequent act attempting to validate such payment.[111]

98. Schwarz v. National Packing Co. [Ga.] 50 S. E. 494.

99. Commonwealth v. Real Estate Trust Co., 26 Pa. Super. Ct. 149.

100. Commonwealth v. Boyd, [Mass.] 74 N. E. 255.

101. Standard Oil Co. v. Com., 26 Ky. L. R. 985, 82 S. W. 1020.

102. Southern Car & Foundry Co. v. Calhoun County [Ala.] 37 So. 425.

103, 104. See 2 Curr. L. 1842.

105. Town of Spooner v. Washburn County [Wis.] 102 N. W. 325; Town of Paoli v. Charles [Ind.] 74 N. E. 508. Lands bid in by a county for delinquent taxes are held by it in trust. Political subdivisions being entitled to a portion of the taxes. Woodrough v. Douglas County [Neb.] 98 N. W. 1092. In Louisiana the state, in selling her property acquired at tax sale, is expected, through the tax collecting department, to collect her own taxes and those of the municipality in which the property is situated. In re Lindner [La.] 38 So. 610.

106. Where taxes returned by a town treasurer to the county treasurer as delinquent are assailed by legal proceedings as invalid, and the amounts levied were compromised by order of the court, the county in accounting to the town for the taxes due it should be charged only with the amount actually collected under the compromise. Town of Spooner v. Washburn County [Wis.] 102 N. W. 325. The "general mulct charge" provided by the Iowa statute, § 2445 is not a municipal tax, and the mere fact that when collected one-half thereof shall be turned over to the city gives the county treasurer no right to retain the commission provided for in § 490. City of Waverly v. Bremer County [Iowa] 101 N. W. 874. The tax on bank stock provided by the New York statute is to be distributed not alone to the "tax districts" mentioned in the statute, but to the villages and school districts as well. People v. Board of Sup'rs of Columbia County, 93 N. Y. S. 1093.

107. Town of Newbold v. Douglas [Wis.] 100 N. W. 1040.

108. Oppenborn v. Auditor General [Mich.] 12 Det. Leg. N. 67, 103 N. W. 515.

109. City of Rochester v. Bloss, 91 N. Y. S. 642.

110. School districts and other departments of the Louisville City government held to have no right to any part of the interest arising from tax delinquencies. City of Louisville v. Louisville School Board [Ky.] 84 S. W. 729. Art. 5, § 7, North Carolina constitution, does not apply merely to taxes on property, and the limit of $2 poll taxation having been reached in Macon county for general purposes, taxes collected under the act of 1903 did not belong to the school and poor fund, but could only be used for the purpose specified in the statute. Board of Education of Macon County v. Board of Com'rs of Macon County [N. C.] 49 S. E. 353.

111. Town of Walton v. Adair, 96 App. Div. 75, 89 N. Y. S. 230.

TELEGRAPHS AND TELEPHONES.[1]

§ 1. **Franchises and Licenses, Property and Contracts, and Corporate Affairs (1657).** Rights and Powers Granted (1658). Ouster (1659). Municipal Regulation; Rentals and License Taxes (1659). Contracts and Transfers (1661).
§ 2. **Construction and Maintenance of Lines, and Injuries Thereby (1661).**
§ 3. **Telegraph Messages (1662).**
A. Duty and Care; to Whom Owed (1662).
B. Injury and Damages (1665).
C. Penalties (1669).
D. Procedure (1669).
§ 4. **Telephone Service (1671).**
§ 5. **Quotation and Ticker Service (1672).**
§ 6. **Rates, Tariffs and Rentals (1672).**
§ 7. **Offenses (1672).**

§ 1. *Franchises and licenses, property and contracts, and corporate affairs.*[2]—The granting of franchises for the use of streets is variously regulated and controlled by statute. In Ohio, the probate court has jurisdiction to grant telephone franchises,[3] and to fix the mode of use of streets.[4] In West Virginia, the county court is authorized to consent to the placing of poles and wires for a telephone for public use along a county road by an individual, as well as by an incorporated company.[5] In Missouri, a grant of the right to construct and operate a telephone system to the company offering the highest percentage of gross receipts was held valid,[6] and an ordinance authorizing such grant and a bond given by a company accepting the conditions imposed, was held a compliance with a statute requiring contracts with cities to be in writing.[7] Since the ordinance did not grant an exclusive right, the fact that other companies were given similar rights without charge was no defense to an action to collect the agreed percentage of receipts.[8] A grant may be by resolution in Illinois.[9] A resolution[10] or ordinance[11] granting a franchise must be properly passed, and in Nebraska the object must be sufficiently expressed in its title.[12] An ordinance granting a telephone franchise is not repealed by a subsequent ordinance granting certain enumerated rights to, and imposing certain duties upon, the successor of the original company.[13] Telephone and telegraph companies are given the right to use streets and roads by statute in Kansas,[14] and cities have only the power of regulating such use, by the exercise of their police power.[15] Notice of termination of a franchise must fix the date of termination, or it is ineffectual.[16]

1. Note: See note on validity of notice sent by telegraph in 61 L. R. A. 933.

2. See 2 Curr. L. 1843.

3. Probate court can grant franchises to telephone companies only by the exercise of judicial power applied to orderly and well defined issues, otherwise the grant is legislative and void. Queen City Tel. Co. v. Cincinnati, 5 Ohio C. C. (N. S.) 411.

4. Rev. St. § 3461, alone governs in the matter of the fixing by the probate court of the mode of use of streets by a telephone company. Court has authority to order wires under ground. Middletown H. Tel. Co. v. Middletown, 2 Ohio N. P. (N. S.) 455.

5. Construing "companies" in Acts 1891, p. 297, c. 96. Lowther v. Bridgeman [W. Va.] 50 S. E. 410.

6, 7, 8. City of California v. Bunceton Tel. Co. [Mo. App.] 87 S. W. 604.

9. Though the right to use streets is usually granted to telephone companies by ordinance, there is no decision in Illinois that the right cannot be granted in some other way. Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146.

10. In cities of the sixth class in Kentucky, no resolution granting a telephone franchise may be passed within 5 days after its introduction, or at any other than a regular meeting of the trustees. Ky. St. 1903, § 3699. Held, a resolution granting a franchise, passed at a special meeting at which it was introduced, was void. Rough River Tel. Co. v. Cumberland Tel. & T. Co. [Ky.] 84 S. W. 517.

11. Passage held proper as shown by record. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

12. Held sufficient. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

13. City of Wichita v. Old Colony Trust Co. [C. C. A.] 132 F. 641.

14. Gen. St. 1868, c. 23, art. 8, § 74. City of Wichita v. Old Colony Trust Co. [C. C. A.] 132 F. 641.

15. General incorporation act of Kansas did not repeal telegraph statute, or give cities the power to remove poles and wires from streets where they had been maintained for some time, no claim of interference with public use being made. City of Wichita v. Old Colony Trust Co. [C. C. A.] 132 F. 641.

16. Action of city council held ineffectual to terminate telephone franchise. City of Wichita v. Old Colony Trust Co. [C. C. A.] 132 F. 641.

Rights and powers granted.[17]—A statute granting the right to construct telegraph or telephone lines along the public highways of the state confers the right to use streets and alleys of cities to the extent made necessary by public demands.[18] The acceptance of a grant under this statute by a telephone company gives the company the right to extend its service over as many streets as are required by the public necessity.[19] A license lawfully granted to a telephone company by a municipality to erect poles and wires in certain designated streets, after the company had put up poles and wires in reliance thereon, cannot be revoked by the municipality at its pleasure,[20] since the company thereby acquires a vested right to use such streets so long as it conforms to the conditions of its license.[21] A telephone company, operating under a void franchise, is not entitled to an injunction against another company for interference with its system by the construction of a new line on the same street.[22]

The power to exercise the right of eminent domain must be conferred expressly or by necessary implication.[23] In New York a telephone company may acquire the right to erect poles and lines in a street by condemnation proceedings.[24] The Federal statute granting telegraph companies the right to construct, maintain and operate telegraph lines through and over the public domain, and over and along military and post roads of the United States, is simply an exercise by congress of its power to regulate interstate commerce withdrawing such regulation from the states, and does not grant telegraph companies the right of eminent domain, or give them the right to enter upon and occupy the rights of way of railway companies, without the consent of the owners.[25] Nor do provisions of the charter of a telegraph company giving it the right to occupy roads, highways, streets and waters within the state, confer the right to occupy railways.[26] The lessee of a telegraph company cannot exercise a right of eminent domain conferred on its lessor, since the right of eminent domain cannot be delegated.[27]

A reasonable use of a public highway for the purpose of placing thereon poles and wires for a telephone system for public use, under legislative authority, is not an additional servitude upon the fee of the abutting owner in such highway,[28] nor may an adjoining owner have the erection or maintenance of a line in the highway, and near his premises, enjoined.[29]

17. See 2 Curr. L. 1844, 1845.

18, 19. The use of the words "public roads" in Code 1897, in place of "public highways" used in the original statute did not change its effect in this particular. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

20, 21. Village of London Mills v. Fairview-London Tel. Circuit, 105 Ill. App. 146.

22. Rough River Tel. Co. v. Cumberland Tel. & T. Co. [Ky.] 84 S. W. 517.

23. Act of April 29, 1874, § 33 (P. L. 73) does not give telephone companies the right of eminent domain over private lands of individual owners. Pennsylvania Tel. Co. v. Hoover, 24 Pa. Super. Ct. 96; Pfoutz v. Pennsylvania Tel. Co., 24 Pa. Super. Ct. 105.

24. New Union Tel. Co. v. Marsh, 89 N. Y. S. 79. See this case for procedure. See, also, Eminent Domain, 3 Curr. L. 1189.

25. Construing Act July 24, 1866 (14 Stat. at L. 221, c. 230). Western Union Tel. Co. v. Pennsylvania R. Co., 25 S. Ct. 133. Charter provisions of the railway companies declaring the railways "public highways" do not make them public property so as to subject them to the right of occupation by telegraph companies, under the Federal act. Id.

26. Railways are not "highways" within the meaning of such charter. Western Union Tel. Co. v. Pennsylvania R. Co., 25 S. Ct. 150.

27. Western Union Tel. Co. v. Pennsylvania R. Co., 25 S. Ct. 150.

28. Lowther v. Bridgeman [W. Va.] 50 S. E. 410. See, also, 2 Curr. L. 1844, n. 33, et seq.

29. Poles erected close to hedge hindered trimming of hedge and grass; held, no relief. McCann v. Johnson County Tel. Co., 69 Kan. 210, 76 P. 870, 66 L. R. A. 171.

Note: In the case last cited, "the court was divided—four to three. The controlling opinion is to the effect that the purpose of a highway—the main question here—is not limited to the use of such methods of travel and communication only, as existed in the first days of highways, or even at the time of the acquisition of any particular easement, but includes the use of all modern methods, such as the telegraph and telephone. The

Ouster.—Forfeiture of the franchise and easement of a telephone company can be declared and enforced only by a court of competent jurisdiction.[30] Failure to comply with a statute requiring foreign corporations to register abstracts of their charters in each county of the state where they engage in business, such noncompliance not being willful, but merely through inadvertence or mistake, is not cause for forfeiture of the franchise of a telephone company, at the suit of the state, especially where the statute is complied with on discovery of the mistake.[31] The purchase of a smaller competing company by a telephone company, in order to end a rate war, is not illegal, and is not ground for forfeiture of the charter of the purchasing corporation;[32] nor is the fact that an ultra vires lease of its plant was made, which was afterward abandoned, the corporation having long since resumed business, ground for such forfeiture.[33]

The remedy to set aside a telephone franchise irregularly or fraudulently granted, the party to whom it was granted being in the exercise of the privileges conferred by it, is by quo warranto at the suit of the state, and not by an equitable action by private parties.[34] A taxpayer of a city cannot maintain a suit to prevent the granting of a telephone franchise unless the franchise constitutes such a wrongful squandering and surrendering of money or property of the city that taxation will be thereby increased.[35] An objection that a statute authorizing the use of streets by telegraph and telephone lines is void because not providing for compensation to abutting owners is personal to such owners and cannot be raised in a quo warranto proceeding by the state.[36]

Municipal regulation; rentals and license taxes.[37]—The use of streets by a telephone company is subject to reasonable control, supervision and regulation by municipal authorities, by virtue of the general police power, though the right to use streets comes from the state.[38] The Federal act giving telegraph companies the right to construct lines along post roads did not put such companies beyond municipal control with respect to the use of highways.[39] Thus township road commissioners have power to adopt a regulation requiring telegraph lines to be erected along the property line.[40]

main requirement is that the public benefit be not decreased. Numerous authorities are cited. See Cater v. Northwestern Tel. Exch. Co., 60 Minn. 539, 51 Am. St. Rep. 543, 28 L. R. A. 310; Julia Bldg. Ass'n v. Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398; People v. Eaton, 100 Mich. 208; Hershfield v. Telephone Co., 12 Mont. 102; Magee v. Overshiner, 150 Ind. 127, 65 Am. St. Rep. 358, 40 L. R. A. 370. The dissenting opinion is to the effect that anything which 'exclusively and continuously occupies' the highway, as a telephone pole, is a new use. A distinction is also attempted between the extent of the easement in a city street and a rural highway. See Eels v. Telephone Co., 143 N. Y. 133, 25 L. R. A. 640; Barnett v. Telegraph Co., 107 Ill. 507, 47 Am. Rep. 453; Eaton v. Telegraph Co., 170 Ill. 513, 62 Am. St. Rep. 390, 39 L. R. A. 722; 2 Dillon, Mun. Corp. § 698a. The weight of authority seems to be with the majority of the court, the tendency of recent decisions being to do away with the distinction between city streets and rural highways as to the extent of the servitude. This is due mainly to the extension of city facilities into the country." —3 Mich. L. R. 81.

30. City could not destroy company's privileges and property without judicial warrant. Nebraska Tel. Co. v. Fremont [Neb.] 99 N. W. 811.

31, 32, 33. State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390.

34, 35. Clark v. Interstate Independent Tel. Co. [Neb.] 101 N. W. 977.

36. State v. Nebraska Tel. Co. [Iowa] 103 N. W. 120.

37. See 2 Curr. L. 1845, n. 38 et seq.

38. New Union Tel. Co. v. Marsh, 96 App. Div. 122, 89 N. Y. S. 79. The general police powers of cities of the first class may be exercised by such cities over telegraph and telephone companies within their limits, as well as the regulatory powers conferred by statute on such cities. City of Wichita v. Missouri & K. Tel. Co. [Kan.] 78 P. 886. And see City of Wichita v. Old Colony Trust Co. [C. C. A.] 132 F. 641, supra. In Kansas, cities of the first class have the right to determine and designate streets and alleys to be occupied and used by posts and wires of telegraph and telephone companies. Construing Laws 1903, p. 187, c. 122, § 53, and Gen. St. 1868, c. 23, art. 8. City of Wichita v. Missouri & K. Tel. Co. [Kan.] 78 P. 886.

39. American Tel. & T. Co. v. Harborcreek Tp., 23 Pa. Super. Ct. 437.

40. Such regulation construed to require

Municipalities having the power and charged with the duty of regulating the use of streets may impose a reasonable charge, in the nature of a rental, for the occupation of certain portions of their streets by telegraph and telephone companies.[41] A rental for use of streets by poles, fixed by ordinance, is prima facie reasonable.[42] A resolution adopted by a city of Florida while under a provisional government, consenting to the use of streets by a telephone company, and providing for use of the poles for the city fire alarm system, did not constitute a contract between the city and the company so as to estop the city from subsequently adopting and enforcing an ordinance requiring an annual rental for each pole to be paid the city.[43]

License taxes imposed on telegraph and telephone companies by municipalities are valid,[44] if reasonable.[45] The elements of a reasonable license tax on telegraph poles and wires are the necessary or probable expense incident to issuing the license and the probable expense of such inspection, regulation and police surveillance as the municipality may lawfully give to the erection and maintenance of such poles and wires.[46] An ordinance imposing a license tax on telegraph poles and wires is not void because not expressly restricted to poles and wires maintained on highways and public property.[47] A license tax for inspection by the municipality may be imposed, though the poles and wires of the company are on a road owned by a turnpike company.[48] Since a municipality has no power to exempt a telephone company from charges arising from the exercise of the police epower, an ordinance granting a franchise and exemption from taxation and special assessment in consideration of free service to the municipality, does not relieve the company from a license tax on poles and wires imposed by a former ordinance.[49] In an action to recover a license tax on telegraph poles and wires, the company may show that no inspection has been made, and no money paid out or expense incurred therefor,[50] or that the tax is unreasonable.[51]

poles to be placed on that part of the highway next to the property lines, all necessary parts of the poles being within the highway. American Tel. & T. Co. v. Harborcreek Tp., 23 Pa. Super. Ct. 437.

41. In an action to recover rent fixed by ordinance, the complaint is not defective for failure to allege authority to rent the streets. City of Pensacola v. Southern Bell Tel. Co. [Fla.] 37 So. 820.

42. Complaint to recover rent need not allege reasonableness of rental charged. City of Pensacola v. Southern Bell Tel. Co. [Fla.] 37 So. 820.

43. Defense of estoppel not available in action to recover rent from company. City of Pensacola v. Southern Bell Tel. Co. [Fla.] 37 So. 820.

44. Municipalities may impose a reasonable charge on telephone and telegraph companies in the enforcement of local governmental supervision, in the exercise of the police power. City of Pensacola v. Southern Bell Tel. Co. [Fla.] 37 So. 820. Commissioners of townships of the first class have power to impose by ordinance a reasonable license tax on telegraph and telephone companies for each pole in the township. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306. A borough may impose a reasonable license tax for the inspection of poles and wires of a telegraph company in order to avoid liability for injuries caused by defects in the telegraph system. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406.

45. Inspection by municipality held such as to render license tax of $1.00 per pole and $2.50 per mile of wire prima facie reasonable. Kittanning Borough v. W. U. Tel. Co., 26 Pa. Super. Ct. 346. Evidence of an amount spent by the company for repairs and reconstruction in a particular year, without evidence as to the nature, extent and cost of supervision and inspection by the company, held not to overcome prima facie showing of reasonableness. Id. It is immaterial how a charge on telegraph and telephone poles and wires, imposed to pay the cost of inspection and supervision, is designated; the only question which can be raised is as to its reasonableness. Braddock Borough v. Allegheny Co. Tel. Co., 25 Pa. Super. Ct. 544.

46. Rule applied in rulings on evidence in proceeding to determine validity of borough license tax. Schellsburg v. Western Union Tel. Co., 26 Pa. Super Ct. 343.

47. The court will presume that such poles and wires were intended, or will restrict the operation of the ordinance to them. Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346.

48. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406.

49. Braddock Borough v. Allegheny County Tel. Co., 25 Pa. Super. Ct. 544.

50. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406.

51. Norwood Borough v. Western Union

Contracts and transfers.[52]—If formally granted,[53] an easement to maintain a telephone line, with necessary poles, wires and guys, with the right to trim trees so that they shall not come in contact with wires, is continuous, and contemplates the stringing of as many wires as are necessary to the proper conduct of the business.[54] But the right to trim trees is limited to necessary trimming.[55] Under the provision of the Kentucky constitution which requires telephone companies operating exchanges in different towns to receive and transmit each other's messages without unreasonable delay or discrimination, a contract between two companies which have extended and connected their lines, providing for the transmission of each other's messages over the lines so connected is not terminable at the will of either party, but continues during the corporate existence of the two companies,[56] that is, so long as the two companies maintain exchanges and continue to do business at the two towns from which their lines were extended, or at the point of connection.[57] In construing such contract, the court will look to the situation and circumstances, and the construction placed thereon by the parties during previous operation of the system.[58]

A transfer of telephone lines and equipment and all appurtenances includes the franchise of the company, though it is not expressly mentioned.[59] A contract for sale of a telephone line, providing that the buyers shall maintain the line and allow the sellers free use thereof for five years, at which time title thereto shall vest in the buyers, does not pass absolute title and control to the buyers until after the expiration of five years.[60]

§ 2. *Construction and maintenance of lines, and injuries thereby.*[61]—Persons or companies operating telephone and electric light systems for the transmission of electricity upon and over public highways owe the public the duty of properly constructing and maintaining their respective wires and poles.[62] They are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary protection must be afforded to avoid casualties which may be reasonably expected.[63] Which of two companies is under the duty to erect and maintain guards between wires at crossings may depend upon the ordinance imposing such duties.[64] A telegraph company can acquire no right from a turnpike

Tel. Co., 25 Pa. Super. Ct. 406. Affidavit of defense in action to collect license tax held sufficient to prevent judgment because showing tax imposed unreasonable. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306. Evidence as to number of poles and miles of wire, amount of capital stock, bonded debt and net receipts, irrelevant on issue of reasonableness of license tax, in action to recover same. Kittanning Borough v. Western Union Tel. Co., 26 Pa. Super. Ct. 346.

52. See 2 Curr. L. 1846.

53. A voucher, properly attested and signed, held sufficient to grant easement to telephone company. Barber v. Hudson River Tel. Co., 93 N. Y. S. 993.

54. Barber v. Hudson River Tel. Co., 93 N. Y. S. 993.

55. Easement does not include right to destroy or unnecessary cutting of limbs. Barber v. Hudson River Tel. Co., 93 N. Y. S. 993.

56. Ky. Const. § 199. Campbellsville Tel. Co. v. Lebanon, L. & L. Tel. Co., 26 Ky. L. R. 127, 80 S. W. 1114.

57. Extending opinion in Campbellsville Tel. Co. v. Lebanon, L. & L. Tel. Co., 26 Ky. L. R. 127, 80 S. W. 1114; Id. [Ky.] 84 S. W. 518.

58. Contract construed as calling for transmission of all messages, whether or not they originated in the two towns from which the lines were extended in order to connect them. Campbellsville Tel. Co. v. Lebanon, L. & L. Tel. Co., 26 Ky. L. R. 127, 80 S. W. 1114.

59. City of Wichita v. Old Colony Trust Co. [C. C. A.] 132 F. 641.

60. Murphy v. Smith, Walker & Co. [Tex. Civ. App.] 84 S. W. 678.

61. See 2 Curr. L. 1848.

62. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361.

63. Whether failure to erect and maintain certain guards and other devices between telephone and electric light wires was negligence, held a question for the jury. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361. It is negligence to string telephone wires across and but a few inches above trolley wires with no guards or insulators at that point. North Amherst Home Tel. Co. v. Jackson, 4 Ohio C. C. (N. S.) 386.

64. Ordinance relative to duties of telephone and electric light companies held to impose such duty on company doing the latest construction at the point where wires cross. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361.

company, in whose road, which is a borough street, poles and wires are maintained, to maintain such poles and wires in a condition dangerous to travelers, or such as to interfere with public use of the street.[65]

The degree of care and skill required in the construction and maintenance of electrical equipment is commensurate with the danger involved in the use of electricity.[66] Reasonable care must be exercised to prevent injury by defective insulation of wires.[67] The duty to maintain wires in a safe condition extends to wires over private property, as to persons who have a right to be on such property.[68] The duties owed to employes are treated elsewhere.[69]

Telephone companies are liable for injuries which ought reasonably to have been anticipated; and it is immaterial that the particular injury resulting from a defective condition could not have been foreseen.[70] A company, not otherwise negligent, is not liable for the falling of an electrically charged wire, caused by a storm of unusual severity, which could not have been reasonably foreseen and its consequences guarded against.[71] But the fact that a recent storm contributed with negligence of a company in causing crossed wires did not relieve the company from liability for a resulting accident.[72] A complaint alleging in effect that a telephone company permitted its line to become out of repair and to remain in a dangerous condition for five months, sufficiently alleges notice to the company of the condition of its wires.[73] Defective insulation cannot be made the basis of a recovery unless shown to be a proximate or efficient cause of the injury.[74] Contributory negligence defeats recovery.[75]

§ 3. *Telegraph messages. A. Duty and care; to whom owed.*[76]—"Telegraph and telephone companies are common carriers of news,"[77] and failure of a telegraph company to promptly and correctly transmit and deliver a message received by it is a breach of a public duty, imposed by law.[78] For a violation of the duty to transmit and deliver messages without unreasonable delay, or for a negligent performance thereof, it is responsible to the party for whose benefit the contract was made, whether it be the sender or the addressee.[79] But in order

65. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406.

Note: For extended treatment of duties and liabilities of electric corporations in respect to proper construction and maintenance of wires, poles, and plants in general, see note to Hebert v. Lake Charles Ice, Light & Waterworks Co. [111 La. 522, 35 So. 731] in 100 Am. St. Rep. 515.

66. Barto v. Iowa Tel. Co. [Iowa] 101 N. W. 876. See, also, Electricity, 3 Curr. L. 1181; Negligence, 4 Curr. L. 764.

67. Duty to keep insulation in repair was owed to employe as to wires 25 feet from ground where employes were likely to go in performing duties. Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711.

68. Central Union Tel. Co. v. Lokola [Ind. App.] 73 N. E. 143.

69. See Master and Servant, 4 Curr. L. 533. A telephone company which permits an electric light company to use its poles must use ordinary care to see that such use does not expose its own employes to dangers not assumed by them. Barto v. Iowa Tel. Co. [Iowa] 101 N. W. 876. In the absence of an agreement as to signals between an electric and a telephone company, the former was not liable for the death of a telephone employe caused by the turning on of the current without warning. Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711.

70. Central Union Tel. Co. v. Lokola [Ind. App.] 73 N. E. 143.

71. Telephone wire, broken by a storm and charged by an electric light wire, caused death of a person 30 minutes after a storm, before notice of the defect was possible. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361.

72, 73. Central Union Tel. Co. v. Lokola [Ind. App.] 73 N. E. 143.

74. Heidt v. Southern Tel. & T. Co. [Ga.] 50 S. E. 361.

75. Failure of employe to use strap to fasten himself to pole immaterial, when electric shock was sufficient to cause death, though he had not fallen. Rowe v. Taylorville Elec. Co., 213 Ill. 318, 72 N. E. 711. See, also, Master and Servant, 4 Curr. L. 533; Negligence, 4 Curr. L. 764.

76. See 2 Curr. L. 1849.

77. State v. Cumberland Tel. & T. Co. [Tenn.] 86 S. W. 390.

78. Green v. Western Union Tel. Co. [N. C.] 49 S. E. 165. Negligent delivery is a breach of a general duty imposed by law by reason of the relation of the parties. Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12.

for the addressee to sue, it is essential that it appear that he was to be benefited by the contract for sending the message,[80] and that this fact was known to the company when it received the message for transmission, either from the language of the message or otherwise.[81] Negligence of third persons, not connected in any way with plaintiff, will not relieve a company from liability for negligent failure to deliver a message.[82] For transmission of a forged or fraudulent message,[83] a company is not liable to a stranger to it and the telegram, merely because he has seen the telegram and acted upon it to his injury.[84]

Transmission and delivery.[85]—A telegraph company has the power to make a regulation establishing reasonable office hours, and is under no duty to receive, transmit or deliver a message out of established office hours, if reasonable,[86] in the absence of circumstances showing an agreement to the contrary, or showing a waiver of the regulation.[87] Nothing appearing to the contrary, it is presumed that agents authorized to receive messages have authority to bind the company by their agreements as to the time of sending them, even to the extent of disregarding the regulation as to the hours of opening and closing the office.[88] It is the duty of a company, to which a message has been given for transmission, on discovering that delay in transmission will be inevitable, ow-

79, 80. Frazier v. Western Union Tel. Co. [Or.] 78 P. 330.

81. Telegram to real estate brokers reading: "See S. Take his last offer. Wire me at F," did not show that addressee was to be benefited, so as to enable him to sue. Frazier v. Western Union Tel. Co. [Or.] 78 P. 330. A telegraph company which accepts a message which discloses on its face that it is to be communicated to, or is for the benefit of, a third person, is liable to such third person for delay in transmission. Whitehill v. Western Union Tel. Co., 136 F. 499.

Note: Says the Columbia Law Review, commenting on Frazier v. W. U. Tel. Co., supra: "In the United States the addressee of a telegram has a right of action for delay or error in the transmission. New York, etc., Tel. Co. v. Dryburg, 35 Pa. 298, 78 Am. Dec. 338; Mentzer v. Western Union Tel. Co., 92 Iowa, 752; 2 Columbia L. R. 267. The English rule is contrary. Dickson v. Reuter's Telegram Co., 3 C. P. Div. 1. Those jurisdictions allowing recovery on the theory of beneficial interests in a contract are of necessity in accord with the principal case. Western Union Tel. Co. v. Wood, 57 Fed. 471. Where, however, recovery is allowed in a tort action for breach of the general duty the defendant owes the public by virtue of its calling, it would seem that notice is unnecessary to charge the company. Western Union Tel. Co. v. Fatman, 73 Ga. 285, 54 Am. Rep. 877; Pollock, Torts [6th Ed.] pp. 532-534. The latter view seems the better one."—5 Columbia L. R. 170.

82. Barnes v. Western Union Tel. Co. [Nev.] 76 P. 931.

83. NOTE. Liability for transmission of forged message: A telegraph company is liable to the addressee for the damage sustained for negligently transmitting or delivering a forged message. Strause v. Western Union Tel. Co., 8 Biss. 104, Fed. Cas. No. 13,531; Elwood v. Western Union Tel. Co., 45 N. Y. 549, 6 Am. Rep. 140. But there is no liability if there were no suspicious circumstances. Western Union Tel. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1. If the agent of the company knowingly transmits the forged message, his fraud renders the company liable for damages sustained. McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N. W. 315, 12 Am. St. Rep. 636, 1 L. R. A. 143; Bank of California v. Western Union Tel. Co., 52 Cal. 280; Pacific Postal Tel. Cable Co. v. Bank of Palo Alto [C. C. A.] 109 F. 369, 54 L. R. A. 711; Magouirk v. Western Union Tel. Co., 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663. As to liability for delivery of fraudulent message put on the wires by wire tappers, see Western Union Tel. Co. v. Uvalde Nat. Bank [Tex. Civ. App.] 77 S. W. 603, 65 L. R. A. 805, 2 Curr. L. 1853.—See note on general subject in 65 L. R. A. 805.

84. Instruction erroneous because permitting jury to find that company was charged with notice, from the telegram, that a stranger was intending to act on it. Western Union Tel. Co. v. Schriver [C. C. A.] 129 F. 344. Fraudulent telegram from one bank to another that a check would be accepted. Id.

85. See 2 Curr. L. 1850, 1851.

86. No negligence where message was received after hours, and delivered within an hour after opening. Bonner v. Western Union Tel. Co. [S. C.] 51 S. E. 117. No negligence where message was taken by a person not connected with the company, committed to writing by him, and left on the operator's desk, outside reasonable office hours, and the message was delivered immediately on opening office next morning. Harrison v. Western Union Tel. Co. [S. C.] 51 S. E. 119.

87. Mere proof of occasional transmission or delivery after office hours is insufficient to establish a waiver of such regulation. Bonner v. Western Union Tel. Co. [S. C.] 51 S. E. 117.

88. Western Union Tel. Co. v. Crumpton [Ala.] 36 So. 517.

ing to a defect in its line, to promptly inform the sender, when that is possible.[89] This duty being performed, there is no liability in such case for not transmitting.[90] A stipulation on a telegram blank that the company is the agent of the sender for transmission over other lines does not render a company liable for failure to forward a message received, by telephone, in the absence of an express contract to do so.[91] Under the Federal statute requiring revenue stamps to be affixed to telegrams, a company was not liable for failure to transmit a message to which the sender had affixed no stamp.[92] Failure, on tender of charges, to repeat or trace a telegram which has been erroneously transmitted, is negligence.[93]

Whether a company has, in a particular instance, discharged its duty to use reasonable diligence to find the addressee and make a delivery[94] within a reasonable time,[95] depends upon the circumstances. Delivery of a message by placing it in the postoffice is not negligence where the language of the message and the circumstances indicated that this was desired and intended by the sender.[96] An error in the addressee's name, made by the receiving operator in taking it from the wire, does not excuse nondelivery at the street number given in the message.[97] Where delivery cannot be made, it is the duty of the company to so inform the sender promptly.[98]

A company may make reasonable regulations fixing limits within which free delivery will be made.[99] But the fact that the addressee lives outside free delivery limits is no defense when the gist of the action is delay in transmission.[1] Where a regulation does not require prepayment of extra charges for delivery outside free delivery limits, the parties may contract with reference to a custom whereby messages were delivered outside such limits without prepayment.[2] A regulation providing for free delivery within a radius of one-half mile from the office includes points within that distance measured in a straight line, without regard

89. Swan v. Western Union Tel. Co. [C. C. A.] 129 F. 318.

90. No duty to use telephone or other telegraph line, on discovery, after receipt of message that wires were down. Faubion v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 56.

91. Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12.

92. Western Union Tel. Co. v. Waters, 139 Ala. 652, 36 So. 773.

93. But damages therefrom held not to have been proved. Newsome v. Western Union Tel. Co. [N. C.] 50 S. E. 279.

94. A showing that messenger went to plaintiff's house at 8 o'clock in the evening, found a light but no one at home, and thereupon left and made no effort to deliver the message or telephone plaintiff until next morning, is sufficient to take the question of negligence to the jury. Postal Tel. Cable Co. v. Pratt [Ky.] 85 S. W. 225. A company performs its contract by delivering a message to a person in whose care it is sent, the addressee having left the city so that it could not be delivered to him. Sweet v. Western Union Tel. Co. [Mich.] 102 N. W. 850. A company does not discharge its entire duty in endeavoring to deliver a message addressed "care of some hotel," by inquiring at all the hotels, if by ordinary diligence the addressee could have been found elsewhere. Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695. Evidence that a message sent in care of H. T. Benton was received as in care of K. T. Benton; that H. T. Benton was a well-known person who could have been found; and that message was not delivered to the addressee until it was too late for him to arrive home in time to view the remains of his deceased wife, tends to show negligence in delivery or transmission. Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052.

95. Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052.

96. As where message was directed to a person "P. O. Idaho, Fayetteville, N. C.," and was placed in the Fayetteville postoffice, Idaho being outside delivery limits. Gainey v. Western Union Tel. Co., 136 N. C. 261, 48 S. E. 653.

97. Green v. Western Union Tel. Co. [N. C.] 49 S. E. 165.

98. Green v. Western Union Tel. Co. [N. C.] 49 S. E. 171.

99. Regulation fixing free delivery limits held reasonable as to addressee who lived 2½ miles from receiving office. Western Union Tel. Co. v. Scott [Ky.] 87 S. W. 289.

1. Western Union Tel. Co. v. Scott [Ky.] 87 S. W. 289.

2. The terms of the written contract are not contravened by pleading such custom. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493.

to the traveled route by which a particular point is reached.[3] Failure to make any attempt to deliver a message because the sendee lives outside the free delivery limits, and failure to notify the sender of additional charges, or of refusal to deliver at all, renders a company liable for resulting damages.[4]

(§ 3) *B. Injury and damages.*[5] *Conflict of laws.*[6]—As to what law governs a recovery for negligence in transmission or delivery, where a message is filed in one state to be delivered in another, there is a conflict, some courts holding that the law of the state where the message is filed controls;[7] while others hold that the law of the state wherein delivery is to be made, this being the place of performance, governs the recovery of damages,[8] regardless of whether the negligence causing delay was that of the agent in the sending or in the receiving office.[9] In South Carolina it is held that an action for negligent delivery is an action in tort, based upon a breach of the general duty imposed on the defendant by law,[10] and hence the law of the place of delivery governs recovery.[11]

For pecuniary loss.[12]—The rule that the damages recoverable for breach of a contract should be such as arise naturally from such breach of contract, or such as may reasonably be supposed to have been in contemplation of the parties at the time they made the contract, is applied in actions for negligence in the transmission and delivery of messages.[13] Recovery being based on the special nature of a telegram, its importance must appear from the words used, or knowledge of the company of its special importance, otherwise acquired, must be shown.[14]

3. Western Union Tel. Co. v. Jennings [Tex.] 84 S. W. 1056.

4. Hood v. Western Union Tel. Co., 135 N. C. 622, 47 S. E. 607. Failure to send a service message for information regarding charges outside free delivery limits, when on receipt of a message it is ascertained that the addressee lives outside such limits, thereby delaying delivery of a death message, is negligence. Western Union Tel. Co. v. Kuykendall [Tex. Civ. App.] 86 S. W. 61.

5. See 2 Curr. L. 1853; also Damages, 3 Curr. L. 997.

6. See 2 Curr. L. 1854, n. 67, 68.

7. In North Carolina, it was held that where a message was filed in Maryland for transmission to Virginia, the law of Maryland as to recovery of damages for mental anguish, unaccompanied by physical injury, controlled, since that law governed the validity and interpretation of the contract and the rule for measure of damages. Hancock v. Western Union Tel. Co. [N. C.] 49 S. E. 952 (for numerous decisions in Texas, and one in North Carolina, adhering to the rule as above stated, see 2 Curr. L. 1854, n. 67).

8. Message filed in West Virginia, and negligently delivered in Kentucky; held, damages for mental anguish unaccompanied by physical injury recoverable, though such damages not allowed in West Virginia. Howard v. Western Union Tel. Co. [Ky.] 84 S. W. 764 (decision adhered to on petition for modification of opinion, Howard v. Western Union Tel. Co. [Ky.] 86 S. W. 982.)

9. Howard v. Western Union Tel. Co. [Ky.] 86 S. W. 982.

10. Duty to use due diligence in delivery, being imposed by reason of the contract relation of the parties. Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12; Harrison v. Western Union Tel. Co. [S. C.] 51 S. E. 119.

11. Damages for mental suffering may be recovered for delay in delivering, in South Carolina, a message from Virginia, though the doctrine as to mental suffering does not obtain in Virginia. Harrison v. Western Union Tel. Co. [S. C.] 51 S. E. 119.

12. See 2 Curr. L. 1854, 1855.

13. Williams v. Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559.

Illustrations: Instruction erroneous as submitting element of damage that could not have been foreseen. Western Union Tel. Co. v. Scott [Ky.] 87 S. W. 289. Damages for loss of compensation because of failure to attend probate hearings, the claim being compromised, held too uncertain and speculative. Sweet v. Western Union Tel. Co. [Mich.] 102 N. W. 850. Where plaintiff, having failed to receive a message through failure of the company to transmit an order to forward messages to him, made a railroad journey home instead of sending a message of inquiry, he could not recover the expenses of such journey. Hilley v. Western Union Tel. Co. [Miss.] 37 So. 556. In an action for failure to deliver a death message, plaintiff cannot recover his expenses in going to the place where the deceased was. Hunter v. Western Union Tel. Co., 135 N. C. 459, 47 S. E. 745. The expenses of a railroad journey which would not have been taken had a message been delivered may be recovered. Kopperl v. Western Union Tel. Co. [Tex. Civ. App.] 85 S. W. 1018. But fees which the plaintiff would have earned as a lawyer, had he not taken the trip, cannot be recovered. Id.

14. Message held not to indicate its importance. Capers v. Western Union Tel. Co. [S. C.] 50 S. E. 537. Where a message of itself gave no notice of the purpose for

It must also appear that the loss claimed would not have occurred had the contract for transmission been duly performed,[15] or that the addressee used due diligence to mitigate or avoid the loss.[16]

In general, the actual loss proximately caused by negligence in transmission or delivery is the measure of damages.[17] Illustrative applications of the general rule, in the case of delayed messages[18] and of messages erroneously transmitted[19] are given in the notes.

For mental anguish.[20]—Recovery for mental pain and suffering for negligence in the delivery of social telegrams is allowed in many jurisdictions, but always on the theory that such damages are within the reasonable contemplation of the parties at the time the contract was entered into.[21] Hence there can be no re-

which whisky was ordered, or of the consequences which would follow failure to receive it, and the company had no knowledge thereof, damages for failure to deliver the message ordering it could not be recovered. Newsome v. Western Union Tel. Co. [N. C.] 50 S. E. 279.

15. Damages cannot be recovered for failure to deliver a message ordering whisky unless it is shown that the whisky would have been sent had the message been received. Newsome v. Western Union Tel. Co. [N. C.] 50 S. E. 279. In an action for delay in delivery of message to deposit money in a bank to pay a check, it must be alleged that the money would have been delivered and deposited in time to avoid the injurious consequences claimed. Capers v. Western Union Tel. Co. [S. C.] 50 S. E. 537.

16. Evidence sufficient to show party in charge of horses, on failure to receive message, used best judgment and due diligence in disposing of them to the best advantage. Brooks v. Western Union Tel. Co. [Utah] 76 P. 881. No loss of profits recoverable if such loss could have been prevented by ordinary diligence by plaintiffs. Western Union Tel. Co. v. Scott [Ky.] 87 S. W. 289.

17. One who has telegraphed for bids may recover damages for delay in delivery of a reply making a bid; and the fact that the delayed message is only one step in the negotiations, and not the completion of a contract, is not a valid objection to such recovery. Western Union Tel. Co. v. Love-Banks Co. [Ark.] 83 S. W. 949.

18. A message to a real estate broker containing an offer being delayed, and a sale thereby prevented, the broker may recover the amount of his commission. Harper v. Western Union Tel. Co. [Mo. App.] 86 S. W. 904. Where, in reliance on a message erroneously transmitted, a mule buyer paid more than the purchaser intended, the measure of damages was the difference between the stated price and that paid. Hays & Bro. v. Western Union Tel. Co. [S. C.] 48 S. E. 608. The measure of damages for delay in delivering a message containing a bid for construction of a building is the difference between the amount of the bid and what it would have cost to construct the building according to the plans and specifications. Texas & W. Tel. & T. Co. v. Mackenzie [Tex. Civ. App.] 81 S. W. 581. Where two bids for cotton were solicited, and a message making a bid was received, but one making the higher bid was delayed, the measure of damages was the difference between the bid received, which might have been accepted, and the bid delayed, and not the difference between the delayed bid and the depreciated market price at the time the cotton was sold. Western Union Tel. Co. v. Love-Banks Co. [Ark.] 83 S. W. 949. Where, in an action for failure to deliver a message tendering an option on 100 bales of cotton, it appeared that plaintiffs, to fill a contract, were obliged to buy in the market at a higher price, 50 bales on one day and 50 on the next, the measure of damages was the difference between the option price and the market price on the first day, provided they could have bought 100 bales in the market on that day. Western Union Tel. Co. v. L. Hirsch [Tex. Civ. App.] 84 S. W. 394. The measure of damages for delay in transmission, and failure to inform the sender or addressee of such delay, whereby the addressee bought stock at a higher price than he would have paid if he had received the message promptly and bought on its receipt, is the difference between the price paid, and the price at which he could have bought on receipt of the message, if promptly delivered. Swan v. Western Union Tel. Co. [C. C. A.] 129 F. 318.

19. An offer to sell lumber at $35 per thousand, being transmitted as $25 per thousand, and accepted, and plaintiff having delivered without discovering the mistake, he could recover the resulting damage. Fisher v. Western Union Tel. Co. [Ky.] 84 S. W. 1179. One receiving a telegram stating the cost of machinery, who makes a contract with a third person in reliance on the telegram, may recover from the company the amount of his loss caused by an error in transmission whereby the cost was incorrectly stated. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129. Where, through error in transmission of a message, an agent pays more for a stock of goods than his principal authorized him to pay, the measure of damage is the actual loss suffered by the principal as a result of the mistake. Western Union Tel. Co. v. Spivey [Tex.] 83 S. W. 364. Such loss cannot exceed the difference between the price paid and the value of the goods. Id. If the goods were worth less than the amount paid for them, the difference, not to exceed the difference between the authorized price and the price paid, would be the measure of damages. Id.

20. See 2 Curr. L. 1855.

21. Western Union Tel. Co. v. Reid [Ky.] 85 S. W. 1171.

covery for mental anguish which cannot reasonably be supposed to have been contemplated as a consequence of negligence of the company,[22] or which is not the direct and proximate result of such negligence.[23] It follows that the message in question must on its face apprise the company of its importance[24] to the plaintiff,[25] unless notice of its importance and the probable consequences of negligence in transmission or delivery is otherwise communicated. To warrant recovery of such damages, it must appear that the mental anguish complained of would have been avoided by prompt or correct transmission or delivery.[26] Contributory negligence on the part of the addressee will defeat recovery.[27]

22. That woman would have no night robe with her and would sleep in wet clothes could not be anticipated by the company as consequence of failure to deliver message to meet her. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580. Message to meet sender who was coming with the body of his mother was not delivered. While sender went to get conveyance, neighbors placed corpse in a wagon, intending to convey it to sender's home, and left it in a wagon yard for three hours. Held, the fact of the corpse so remaining in the wagon yard was too remote to have been contemplated as a possible contingency by the parties, and was not a basis for recovery. Western Union Tel. Co. v. Burch [Tex. Civ. App.] 81 S. W. 552.

23. Arial v. Western Union Tel. Co. [S. C.] 50 S. E. 6. Suffering caused by pain and anguish of the wife and baby of plaintiff are not the direct, natural and proximate cause of failure to deliver a message, which on its face showed no connection with the wife and baby. Jones v. Western Union Tel. Co. [S. C.] 50 S. E. 198. Damages cannot be recovered for mental anguish caused by addressee's own misapprehension. Bowers v. Western Union Tel. Co., 135 N. C. 504, 47 S. E. 597. Grief naturally arising from the death of a near kinsman is not a part of the mental anguish caused by failure to deliver a death message. Hancock v. Western Union Tel. Co. [N. C.] 49 S. E. 952. Where a husband received a message in time to take a train to attend the burial of a grandchild, and the wife was prevented from doing so by inability to place her children in care of a neighbor, negligence in delivery was not the cause of mental anguish of the wife. Cranford v. Western Union Tel. Co. [N. C.] 50 S. E. 585. Mental suffering of a father from seeing the suffering of his child during the time in which delivery of a message to a physician to come and relieve the child is delayed, is not a ground for damages. Western Union Tel. Co. v. Reid [Ky.] 85 S. W. 1171. No damages for mental anguish can be recovered for delay in delivery of a death message when plaintiff was not deprived of the privilege of attending the funeral, and the mental anguish suffered was from uncertainty as to whether the funeral would be postponed so she could be present. Western Union Tel. Co. v. Reed [Tex. Civ. App.] 84 S. W. 296. Discomfort and sickness resulting from exposure to inclement weather, where plaintiff was not met at a train, owing to delay in delivery of message, held not ground for damages. Western Union Tel. Co. v. Siddall [Tex. Civ. App.] 86 S. W. 343.

24. Western Union Tel. Co. v. Reid [Ky.] 85 S. W. 1171. A telegram stating the death of a person and time of burial is sufficient of itself to inform a company of its importance (Harrison v. Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772); though the relation between deceased and addressee does not appear (Postal Tel. Cable Co. v. Pratt [Ky.] 85 S. W. 225). Delay in transmission of telegram, "Come at once," from plaintiff's mother, who was not seriously ill, but wished to see him on business, did not render defendant liable for mental suffering of plaintiff, who was delayed in getting home. Bowers v. Western Union Tel. Co., 135 N. C. 504, 47 S. E. 597. No damages for mental anguish for mistake in transmission of message to have Dr. R. meet sender at train, when message did not show R.'s services as physician were required. Williams v. Western Union Tel. Co., 136 N. C. 82, 48 S. E. 559. A telegram inquiring as to the condition of a member of one's family usually indicates sickness and anxiety on account of it, and is sufficient to give the company notice of the importance of the message. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538. Receipt of message announcing serious illness, with an extra fee, the company having notice of the addressee's residence, is some evidence of a contract to deliver promptly. Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12. Where messages sent, announcing sickness, did not show that an answer was expected or that persons were to come, failure to deliver an answer was not the proximate cause of anxiety of the sender of the first messages, which caused him to leave the bedside of his dying father and meet incoming trains. Arial v. Western Union Tel. Co. [S. C.] 50 S. E. 6.

25. Delay in delivery of telegram to husband, announcing death of grandchild, and disclosing no interest of the wife in the subject-matter does not render the company liable for mental anguish of the wife because of inability to attend the burial. Cranford v. Western Union Tel. Co. [N. C.] 50 S. E. 585.

26. Evidence held insufficient to show that plaintiff could have reached his son's bedside before his death, even had a message announcing the illness been promptly delivered. Howard v. Western Union Tel. Co. [Ky.] 84 S. W. 764. To warrant recovery for mental anguish for failure to deliver a message announcing the coming of the sender with the body of his brother, whereby the father failed to meet the train and make preparations for the burial, and the burial was delayed, plaintiff must prove that, had the message been delivered, his father could and would have met the train, and that the

In some states there can be no recovery for mental anguish, unaccompanied by any other injury;[28] in others, the existence of accompanying physical pain or injury is not necessary.[29] Mental anguish caused by inability to view the remains of a deceased relative has been held to warrant recovery.[30] Only nominal damages can be recovered where the result of negligent failure to deliver a message was that the sender was obliged to keep a corpse in her house two days and nights.[31] Damages for mental anguish caused by failure to deliver a death message may be recovered, though plaintiff is only a distant relative of deceased,[32] and though the company had no knowledge of the relationship.[33] But mental suffering will not be presumed where deceased was not a blood relative of the plaintiff.[34] Damages were allowed to a delicate woman,[35] to a young girl,[36] and to the latter's father,[37] for worry and annoyance resulting from delay in delivery of a message announcing arrival. Disappointment and regret,[38] mere annoyance at not being met at a train,[39] and vexation caused by dishonor of a check,[40] have been held

results complained of would have been avoided. Hancock v. Western Union Tel. Co. [N. C.] 49 S. E. 952. No recovery of damages for having to walk through rain to a hotel and sleep in wet clothes in the absence of a showing that plaintiff would have been met at train if message had been delivered, and that plaintiff could not procure a conveyance. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580. In an action for failure to deliver two messages, one announcing the illness and the other the death of a sister, evidence held sufficient to show that plaintiff would have attended the funeral had she received the message; hence failure to deliver the second message was properly submitted as a basis of recovery. Western Union Tel. Co. v. Ridenour [Tex. Civ. App.] 80 S. W. 1030.

27. Evidence held to sustain finding that plaintiff was not negligent in not taking an earlier train for a funeral. Western Union Tel. Co. v. Porterfield [Tex. Civ. App.] 84 S. W. 850. One who receives a death message too late to attend the funeral is not bound to request a postponement in order to recover damages for delay in delivery. Postal Tel. Cable Co. v. Pratt [Ky.] 85 S. W. 225. Failure of a sender to use other means of communication within his reach, when he failed to receive a reply to his message, may be considered in mitigation of damages for mental anguish. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538.

28. No recovery for mental anguish, apart from injury to person or estate of plaintiff. Western Union Tel. Co. v. Waters, 139 Ala. 652, 36 So. 773.

29. Kentucky. Howard v. Western Union Tel. Co. [Ky.] 84 S. W. 764. Mental worry and distress resulting from exposure, cold, hunger, exertion, and lack of a place to sleep, caused by failure to deliver a telegram for money, is ground for damages. Barnes v. Western Union Tel. Co. [Neb.] 76 P. 931. $400 held not excessive for such damage, and loss of time, etc. Id.

30. As where son could not view mother's remains or attend funeral, owing to the nondelivery of messages relating to her sickness and death. Western Union Tel. Co. v. Crumpton [Ala.] 36 So. 517. Mental anguish caused by inability to view remains of deceased wife, decomposition having set in, is not too remote or speculative to warrant recovery of damages for failure to deliver a message announcing the wife's illness. Western Union Tel. Co. v. Hamilton [Tex. Civ. App.] 81 S. W. 1052. Lack of knowledge by the company that deceased was a large woman, and that decomposition of her body would be rapid, would not relieve the company of liability for such damage. Id. A daughter is entitled to damages for not being able to view father's remains, owing to decomposition, the death message having been delayed. Thomas v. Western Union Tel. Co. [Ky.] 85 S. W. 760. A grandmother may recover for mental anguish for deprivation of the privilege of viewing the remains of a deceased grandchild. Western Union Tel. Co. v. Porterfield [Tex. Civ. App.] 84 S. W. 850. $500 held not excessive. Id.

31. Denham v. Western Union Tel. Co. [Ky.] 87 S. W. 788.

32. Second cousin. Hunter v. Western Union Tel. Co., 135 N. C. 459, 47 S. E. 745.

33. Hunter v. Western Union Tel. Co., 135 N. C. 459, 47 S. E. 745.

34. Message announced death and time of burial of stepson. Harrison v. Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772.

35. Damages may be recovered for fright, worry, annoyance, and nervous shock, suffered by a delicate woman, with a child, on failure to be met at a train by her mother, owing to nondelivery of a message, the company having notice of the facts. Western Union Tel. Co. v. Siddall [Tex. Civ. App.] 86 S. W. 343.

36. Failure to deliver a message announcing the arrival of a young girl at midnight in a town where she was a stranger is a warrant for damages for anguish and annoyance because of having no one to meet her. Green v. Western Union Tel. Co. [N. C.] 49 S. E. 165.

37. Company received his message about midnight, and failed to inform him of its nondelivery until the next morning. Green v. Western Union Tel. Co. [N. C.] 49 S. E. 171.

38. Hancock v. Western Union Tel. Co. [N. C.] 49 S. E. 952.

39. No recovery for mental suffering for failure to deliver message from wife to husband to meet her, where she went to a hotel, but could not get lodgings, and volun-

not to constitute mental anguish for which a recovery may be had. The fact that mental anguish already in existence is protracted by delay in delivery of a message is not ground for damages.[41] The mental anguish for which one may recover for failure to deliver a message to which a reply is expected extends from the time when such reply should have been received to the time when positive information was received.[42] The South Carolina statute authorizing recovery of damages for mental anguish or suffering for negligence in receiving, transmitting, or delivering messages, makes no distinction between anxiety and other kinds of mental suffering, or between negligence which originates suffering and that which prolongs it.[43]

Exemplary damages.[44]—Punitive damages may be recovered for willful breach of the duty to deliver a message without delay.[45] A company is not liable in punitive damages for transmission of a libelous message, no malice or evil motive on the part of its agents being shown.[46] A mere allegation of gross negligence in delivery, without any allegation of fraud, malice, or oppression, will not support a claim for punitive damages.[47]

(§ 3) *C. Penalties.*[48]—The Mississippi statute authorizing recovery of a penalty for incorrect transmission of a message does not authorize recovery of such penalty for delay in transmission or for failure to transmit.[49]

(§ 3) *D. Procedure. Notice of claim.*[50]—A stipulation in a contract for transmission of a message that the company will not be liable for damages unless a claim therefor is presented within sixty days after the message is filed is reasonable and valid.[51] A sender is presumed to assent to this stipulation when he uses a blank on which it is printed or written, in preparing his message.[52] Such a stipulation is binding upon the addressee, his rights being controlled by the contract made with the sender.[53] The presentation of a claim must be in writing, fairly identifying the message in question, and stating the negligence complained of, and the nature and extent of the damages suffered.[54] The institution of suit and service of process upon the company may operate as a presentation, when service is within sixty days after the message was filed, and the process contains the information required to be given by a formal claim, or the declaration, containing such information, is filed within the prescribed time.[55] An agent of the company may waive the requirement as to such written notice by seeking information, and accepting verbal statements relative to the claim within the sixty-day period.[56]

tarily went with a stranger, who treated her courteously, to another hotel, when her husband was found. Western Union Tel. Co. v. Taylor [Tex. Civ. App.] 81 S. W. 69.

40. Construing Civ. Code 1902, § 2223. Capers v. Western Union Tel. Co. [S. C.] 50 S. E. 537.

41. News of illness received before plaintiff sent a telegram, the reply to which was delayed. Kopperl v. Western Union Tel. Co. [Tex. Civ. App.] 85 S. W. 1018.

42, 43. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538.

44. See 2 Curr. L. 1856.

45. Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12.

46. Western Union Tel. Co. v. Cashman [C. C. A.] 132 F. 805.

47. Kopperl v. Western Union Tel. Co. [Tex. Civ. App.] 85 S. W. 1018.

48. See 2 Curr. L. 1860.

49. Rev. Code 1893, § 4326, construed. Hilley v. Western Union Tel. Co. [Miss.] 37 So. 556.

50. See 2 Curr. L. 1856.

51. Western Union Tel. Co. v. Courtney [Tenn.] 82 S. W. 484.

52. Western Union Tel. Co. v. Courtney [Tenn.] 82 S. W. 484.

Note: As to contracts when telegrams are written on blanks of another company, or on blank paper, or when the message is given by telephone or orally, see note in 56 L. R. A. 741.

53. Whitehill v. Western Union Tel. Co., 136 F. 499.

54. Western Union Tel. Co. v. Courtney [Tenn.] 82 S. W. 484.

55. Summons merely stating that defendant must answer in an action for $2,000 is not equivalent to a formal claim. Western Union Tel. Co. v. Courtney [Tenn.] 82 S. W. 484.

56. Hays v. Western Union Tel. Co. [S. C.] 48 S. E. 608.

Pleading and parties.[57]—Counts upon a breach of the contract to transmit cannot be joined with a count upon a breach of the common-law duty to deliver the message within a reasonable time.[58] Two persons whose injuries arise from negligence in delivery of a single message have separate causes of action.[59] An action being based on nondelivery, and not on erroneous transmission, allegations relative to mistakes in the wording of the message may be stricken.[60] Where two telegrams are to be construed together, both may be pleaded and relied on in an action for delay in their delivery.[61] In an action for negligent delivery, an allegation of the receipt of a previous message, announcing a death, is proper, to show notice by the company of promptness required in delivering the message in question.[62] Allegations looking to the recovery of punitive damages need not be stricken, though actual damages are also sought.[63] Other decisions as to the sufficiency of the complaint,[64] and answer,[65] and necessary parties,[66] are given in the notes.

Evidence, presumptions, burden of proof.[67]—Proof of receipt of a message is evidence tending to prove a contract to deliver[68] with reasonable promptness.[69] Proof of improper transmission, or delay in delivery, is presumptive evidence of negligence.[70] Where a complaint alleges wantonness and willfulness, and also negligence in failing to deliver a message, defendant is not entitled to a nonsuit on the whole cause of action, though there is no evidence of wantonness and willfulness.[71] Various decisions applying general rules as to burden of proof,[72] and competency and relevancy of evidence,[73] are given in the notes.

57. See 2 Curr. L. 1857.

58. Western Union Tel. Co. v. Waters, 139 Ala. 652, 36 So. 773.

59. As where a father and daughter were compelled to walk some distance through the rain, and pay hotel bills, by reason of failure to deliver a message sent by the father announcing their coming. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 81 S. W. 580.

60. Jones v. Western Union Tel. Co. [S. C.] 50 S. E. 198.

61. First message informed of death and requested sister to come; second told of intention to bury at another place. Held, both should be construed together, and it was error to strike one and the allegations relating thereto from the complaint. Thomas v. Western Union Tel. Co. [Ky.] 85 S. W. 760.

62. Jones v. Western Union Tel. Co. [S. C.] 50 S. E. 198.

63. Bonner v. Western Union Tel. Co. [S. C.] 51 S. E. 117.

64. Complaint for damages for failure to deliver a message, alleging loss of a situation, and amendments alleging that plaintiff's residence was within free delivery limits, and the time during which plaintiff was out of employment, held good against demurrers. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493. That plaintiff did not allege that he would have attended a funeral, if he had received a death message in time, did not render the complaint demurrable. Harrison v. Western Union Tel. Co. [S. C.] 51 S. E. 119.

65. Where allegations of an answer admit that delivery was to be in Kentucky, other allegations that the contract was made with reference to the laws of West Virginia and that it was there performed, were mere conclusions and unavailing. Howard v. Western Union Tel. Co. [Ky.] 86 S. W. 982. Under the general issue, defendant may prove that the mental anguish alleged was caused by plaintiff's own negligence. Mitchiner v. Western Union Tel. Co. [S. C.] 50 S. E. 190.

66. In an action against a telegraph company for delay in delivery of message, caused by failure to send a service message to ascertain if charges for delivery outside free delivery limits had been paid or guaranteed, a telephone company through which the message was sent to the sending office of the telegraph company need not be joined. Western Union Tel. Co. v. Kuykendall [Tex. Civ. App.] 86 S. W. 61.

67. See 2 Curr. L. 1857, 1858.

68. Message was received by one not connected with company, and left on operator's desk, where he found it next morning and had it delivered. Harrison v. Western Union Tel. Co. [S. C.] 51 S. E. 119.

69. Message and extra charge for delivery outside free limits received, with notice of addressee's residence. Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12.

70. Poulnot v. Western Union Tel. Co. [S. C.] 48 S. E. 622.

Delay: Hellams v. Western Union Tel. Co. [S. C.] 49 S. E. 12; Harrison v. Western Union Tel. Co., 136 N. C. 381, 48 S. E. 772. Failure to deliver within reasonable time. Arial v. Western Union Tel. Co. [S. C.] 50 S. E. 6. Nondelivery of message until called for by sendee, company having received sendee's street number. Green v. Western Union Tel. Co. [N. C.] 49 S. E. 165.

71. Under the act of 1898, providing that plaintiff need not elect where two or more acts of negligence are set out in the same complaint. Poulnot v. Western Union Tel. Co. [S. C.] 48 S. E. 622; Arial v. Western Union Tel. Co. [S. C.] 50 S. E. 6.

72. Plaintiff, in an action for mental an-

Questions of law and fact; instructions.[74]—The reasonableness of regulations fixing free delivery limits,[75] or office hours at a certain station,[76] is for the court. Whether a company was negligent in delivery,[77] or in notifying the sender of inability to transmit,[78] whether the company's negligence was the proximate cause of plaintiff's mental suffering,[79] and whether a delayed telegram would have been answered, if delivered, so as to relieve the sender's mind,[80] are held questions of fact. The usual rules as to instructions apply.[81]

§ 4. *Telephone service.*[82]—Telephone companies cannot lawfully discriminate between subscribers of the same class.[83] In an action to recover the penalty for discrimination in refusal to supply telephone service, under the Arkansas statute, the complaint must allege facts showing discrimination.[84] A suit for a mandatory injunction, and not for mandamus, is the proper remedy, in Kentucky, to compel installation of a telephone.[85] Punitive damages are recoverable for failure to give service, only on a showing of willful, oppressive or malicious misconduct.[86] In an action for failure to furnish telephone connections, dam-

guish for failure to deliver a message, must establish his case by a preponderance of the evidence; evidence held insufficient. Mitchiner v. Western Union Tel. Co. [S. C.] 50 S. E. 190. But plaintiff need not prove want of contributory negligence. Dehougne v. Western Union Tel. Co. [Tex. Civ. App.] 84 S. W. 1066. In a suit for damages for failure to inform a sender of a message of delay in its transmission, the burden is on the company to explain the delay, and in the absence of any showing, it will be presumed that the agent had such information as made it his duty to inform the sender of the delay. Swan v. Western Union Tel. Co. [C. C. A.] 129 F. 318. In an action for loss of employment by negligent delivery of message, the burden is on defendant to prove plaintiff could have obtained other employment by reasonable diligence. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493.

73. A plaintiff may not testify as to his particular conclusions and apprehensions from failure to receive a message. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538. The sendee may testify when, if he had received the message, he would have answered it. Id. In an action for delay in delivery of a telegram containing a bid for construction of a building, the evidence of persons to whom the bid was to be submitted that it would have been accepted if received in time, is competent. Texas & W. Tel. & T. Co. v. Mackenzie [Tex. Civ. App.] 81 S. W. 581. Evidence tending to show that a messenger would have been directed to the addressee if he had gone to a person to whom he was directed is admissible in an action for delay in delivery. Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695. In an action for loss of employment caused by failure to deliver a message, evidence of a conversation in which the contract of employment was made by plaintiff's agent was competent. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493. Where the defendant, in an action to recover a loss caused by erroneous transmission, introduces evidence that the error was made by the author of the message, the plaintiff may show on cross-examination that the error was made by the sending operator. Wolf Co. v. Western Union Tel. Co., 24 Pa. Super. Ct. 129.

74. See 2 Curr. L. 1859.

75. Facts with reference thereto being undisputed. Western Union Tel. Co. v. Scott [Ky.] 87 S. W. 289.

76. Western Union Tel. Co. v. Love-Banks Co. [Ark.] 83 S. W. 949.

77. Whether a telegram was delivered within a reasonable time. Poulnot v. Western Union Tel. Co. [S. C.] 48 S. E. 622.

78. Notice that lines were down being received after message had been filed. Faubion v. Western Union Tel. Co. [Tex. Civ. App.] 81 S. W. 56.

79. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538.

80. Message inquiring as to mother's condition. Willis v. Western Union Tel. Co. [S. C.] 48 S. E. 538.

81. Mental anguish for deprivation of privilege of moving father's remains not being alleged, an instruction thereon is erroneous. Western Union Tel. Co. v. Bowen [Tex.] 81 S. E. 27. Instruction requested by defendant company held not to have invited an instruction submitting such mental anguish as an element of damage. Id. An instruction to consider the plaintiff's mental suffering, if any, by reason of his not being present during the last hours of his mother's life, held not objectionable for not supplying a measure of damages, especially in view of other instructions. Western Union Tel. Co. v. Waller [Tex. Civ. App.] 84 S. W. 695.

82. See 2 Curr. L. 1860.

83. Finding of trial court in mandamus that relator's residence was outside the limits of the territory in which a company was doing business sustained on appeal; denial of service not unlawful. Crouch v. Arnett [Kan.] 79 P. 1086.

84. Allegation held a mere conclusion of law, insufficient to show cause of action under Laws 1885, p. 178, c. 107, § 11. Phillips v. Southwestern Tel. & T. Co. [Ark.] 81 S. W. 605.

85. Williams v. Maysville Tel. Co., 26 Ky. L. R. 945, 82 S. W. 995. Petition to compel installation of telephone held not to show unreasonable charges or discrimination. Id.

86. In an action for punitive damages, evidence that the refusal was caused by lack of equipment and inability to handle the

ages for breach of the contract for service may be counterclaimed.[87] A contract for telephone connection on condition that the subscriber will not use another system is contrary to public policy.[88]

§ 5. *Quotation and ticker service.*[89]

§ 6. *Rates, tariffs and rentals.*[90]—In exercising its power to direct the mode of construction of telephone lines, conferred by statute upon the probate court in Ohio, that court has no authority to prescribe or determine rates to be charged citizens for service.[91] A company is not estopped to deny the jurisdiction of the court to prescribe rates, by having applied for an order directing the mode of construction.[92]

§ 7. *Offenses.*[93]—Under the California statute making it a felony to send by telegraph a false or forged message with intent to deceive, an information charging the sending of such a message, with intent to deceive a certain person, is sufficient, though it does not allege the nature of the deceit.[94] An allegation that defendant sent a message, without alleging that it was sent by telegraph, is sufficient, where a previous allegation designated it as a telegraphic message.[95] In a prosecution for sending a forged telegram, proof that defendant furnished the operator a forged message to be sent does not constitute a variance.[96] A defendant who induces a woman to marry him by means of a forged telegram, purporting to withdraw the mother's objection to the marriage, is guilty of deceit within the meaning of the statute.[97]

TENANTS IN COMMON AND JOINT TENANTS.

§ 1. Definitions and Distinctions (1672). **§ 2. Rights and Liabilities Between Tenants (1674).** The Possession (1674). A Conveyance by One (1675). Purchases (1675). Accountability, Contribution and Exoneration (1675). Agency (1676). The Right and Remedy of Partition (1677). Rents, Profits and Proceeds of the Property (1677). Interest (1677). Trespass and Waste (1677). Actions (1677). Replevin (1678).

§ 1. *Definitions and distinctions.*[98]—Joint tenancy rests on four unities: time, title, interest and possession,[99] while in a tenancy in common the only unity recognized is that of possession,[1] which in case of a water right must extend to

business, and that other applicants had been refused for the same reason, while inadmissible as a defense, is competent in mitigation of damages. Gwynn v. Citizens' Tel. Co. [S. C.] 48 S. E. 460. Where plaintiff refused to pay full rentals for his house telephone, claiming it was defective, the act of the local manager in directing operators to refuse plaintiff connection with the long distance telephone, and in removing the house telephone before he was authorized to do so, was not such a wanton, willful, oppressive and malicious act as to warrant recovery of punitive damages. Cumberland Tel. & T. Co. v. Baker [Miss.] 37 So. 1012.

87. Code 1902, § 171. Gwynn v. Citizens' Telephone Co. [S. C.] 48 S. E. 460.

88. Gwynn v. Citizens' Tel. Co. [S. C.] 48 S. E. 460.

89. See 2 Curr. L. 1861. Compare Exchanges and Boards of Trade, 3 Curr. L. 1397; Property, 4 Curr. L. 1087.

90. See 2 Curr. L. 1861.

91. So much of an order as attempted to prescribe rates held void. State v. Toledo Home Tel. Co. [Ohio] 74 N. E. 162.

92. Question raised in quo warranto to oust company from use of streets for charging excessive rates. State v. Toledo Home Tel. Co. [Ohio] 74 N. E. 162.

93. See 2 Curr. L. 1861.

94. Construing Pen. Code, § 474. People v. Chadwick, 143 Cal. 116, 76 P. 884.

95, 96. People v. Chadwick, 143 Cal. 116, 76 P. 884.

97. Though the woman was of full age, and the marriage was valid and not subject to annulment. People v. Chadwick, 143 Cal. 116, 76 P. 884.

98. See 2 Curr. L. 1862.

99. See Cyc. Law Dict. "Joint Tenants." Testimony of the wife that she and her husband had a house built for themselves and occupied it, held sufficient evidence of their joint ownership. Harlow v. Standard Imp. Co., 145 Cal. 477, 78 P. 1045. Where two parties purchased land and had it conveyed to themselves jointly and one farmed the land, the other paying for half his time and half the other expense, the parties were joint owners of land and crops and not partners. Logan v. Oklahoma Mill Co., 14 Okl. 402, 79 P. 103.

1. See Cyc. Law Dict. "Tenants in Common." Deed to "A and the heirs of her body which she now has or may have by B, her husband," makes A and her children by B tenants in common of the fee. Reeves v. Cook [S. C.] 51 S. E. 93. One asserting exclusive ownership under a deed does not by

the right of user.[2] The estate of tenancy in common is favored, and in many states it is provided by statute that a conveyance or devise to two or more persons shall be construed to create such an estate unless it is expressly provided or manifestly appears that a joint tenancy was intended.[3] Such statutes do not abolish the estate of joint tenancy,[4] but merely favor tenancies in common.[5] Husband and wife ordinarily hold a chose in action made to them jointly during coverture as tenants in common and not as joint tenants.[6] An ownership cast on several by operation of law is in common.[7] Partners hold the legal title to firm realty as tenants in common.[8] A purchaser of the share of one co-tenant becomes a co-tenant with the others.[9] Where heirs as co-tenants claim title through the adverse possession of their ancestor, they are bound by his acts and declarations relative to the nature of his possession.[10]

Estates in entirety as recognized at common law existed until the enactment of laws abolishing survivorship.[11] Such laws did not affect estates of this nature already vested.[12] In states where this estate is not in disfavor, it is, as at common law, created by a conveyance to husband and wife whether the consideration be furnished by one or both,[13] unless it is apparent from the terms of the grant or otherwise that a joint tenancy or tenancy in common was intended;[14] but a clause

merely accepting a deed of an alleged interest of a widow as survivor of a community in such property, make himself tenant in common with the heirs of the deceased husband, and preclude himself from asserting title by limitation against them. York v. Hutcheson [Tex. Civ. App.] 83 S. W. 895.

NOTE. Relation created by a cropper's contract: The rule expounded by the late cases is that a contract between a laborer and the owner of the land by which the latter agrees to furnish the land, necessary teams, etc., and the former the labor, the crops to be divided equally or otherwise between them, makes them tenants in common of the crop until it is divided, no matter what the form of the contract. Adams v. State, 87 Ala. 89, 6 So. 270; Ponder v. Rhea, 32 Ark. 435; Creel v. Kirkman, 47 Ill. 344; Reynolds v. Reynolds, 48 Hun [N. Y.] 142; Reed v. McRill, 41 Neb. 206, 59 N. W. 775; Rohrer v. Babcock, 126 Cal. 222, 58 P. 537; State v. Jewell, 34 N. J. Law, 259; Anderson v. Liston, 69 Minn. 82; Strangeway v. Eisenman, 68 Minn. 395. But see Porter v. Chandler, 27 Minn. 301, 38 Am. Rep. 142.—From note to Kelly v. Rummerfield [Wis.] 98 Am. St. Rep. 961.

NOTE. Property commingled by consent makes the parties tenants in common in the mass in proportion to their respective shares. Low v. Martin, 18 Ill. 286; Van Liew v. Van Liew, 36 N. J. Eq. 637; Inglebright v. Hammond, 19 Ohio, 337, 50 Am. Dec. 430; Monographic note to Pulcifer v. Page [Me.] 54 Am. Dec. 590.—From note to Stone v. Marshall Oil Co. [Pa.] 101 Am. St. Rep. 917.

2. Does not exist where two file their claims to waters of a creek, construct a ditch from the point of diversion to the property of one where one-half the water is turned onto such property and the remainder onto the property of the other. City of Telluride v. Davis [Colo.] 80 P. 1051. Either may change his place of use or the point of its diversion if rights of the other are not infringed. Id. Water right. Norman v. Corbley [Mont.] 79 P. 1059.

3. Under Burns' Ann. St. 1901, § 3341, a devise "to be owned equally and jointly" creates a tenancy in common. Taylor v. Stephens [Ind. App.] 72 N. E. 609.

4. The Act of March 31, 1812 (5 Smith's Laws, p. 395) merely takes away survivorship as an incident of joint tenancy. It makes no change where such an estate is expressly created. In re McCallum's Estate [Pa.] 60 A. 903.

5. If the language of the instrument creating the estate be doubtful, it will be resolved in favor of a tenancy in common. Taylor v. Stephens [Ind. App.] 72 N. E. 609.

6. Aubry v. Schneider [N. J. Eq.] 60 A. 929.

7. Under Rev. St. 1895, art. 1696, providing that on the death of a wife community property descends one-half to the husband and one-half to the children, husband and children hold as tenants in common. Wiess v. Goodhue [Tex.] 83 S. W. 178.

8. The legal title to realty purchased with partnership funds, whether title be taken to the individuals composing the firm or to the partnership, is in the partners as tenants in common, but the equitable title is in the partnership. Hartnett v. Stillwell, 121 Ga. 386, 49 S. E. 276.

9. Purchaser at execution sale. Rippe v. Badger [Iowa] 101 N. W. 642.

10. Woodlief v. Woodlief, 136 N. C. 133, 48 S. E. 583.

11. In Kansas until enactment of Laws 1891, p. 349, c. 203. Holmes v. Holmes [Kan.] 79 P. 163.

12. Doctrine of survivorship would apply as to them. Holmes v. Holmes [Kan.] 79 P. 163.

13. Stalcup v. Stalcup [N. C.] 49 S. E. 210. Gen. St. 1865, c. 108, § 12, favoring tenancies in common over joint tenancies, does not apply to a deed to husband and wife and reduce the estate created to one in common. Wilson v. Frost [Mo.] 85 S. W. 375.

14. Conveyance to both under an agreement to convey one-half to each, each having furnished one-half the consideration, makes

in the premises specifying that each is to hold an undivided half does not alter the effect of a deed which otherwise would create such an estate.[15] During their joint lives tenants by the entirety occupy as tenants in common.[16]

§ 2. *Rights and liabilities between tenants.*[17]—In the absence of evidence to the contrary, the interests of co-tenants are presumed to be equal.[18] A fiduciary relation exists between them.[19] All have an equal right of entry, therefore one cannot recover against the others for the use and occupancy of the property without an express contract to pay rent, or ouster.[20] They may contract with each other concerning the use of the common property,[21] and have the undoubted right to create the relation of landlord and tenant between themselves;[22] but such a contract can only exist by virtue of the mutual intention and agreement of the parties,[23] and does not arise by virtue of an agreement that one is to have exclusive occupancy and pay rent.[24] The co-tenants of personalty in possession may lawfully manage and control the same.[25] One co-tenant of a mining claim does not lose his interest to his co-tenant by not contributing to the assessment work of the latter.[26]

The possession of one is the possession of all.[27] Therefore one cannot acquire title by adverse possession without notice to the others that it is adverse,[28] or unless he does some act of which they should take notice;[29] but after ouster, adverse possession for the statutory period will give him title,[30] as where one occupies as equitable owner of the whole,[31] or commits acts of exclusive ownership of such nature as to preclude the idea of joint ownership, and such acts are brought home to the others or are of so open and public a character that a reasonable man would discover them;[32] but since the possession of one is presumed to be pursuant to his

them tenants in common. Stalcup v. Stalcup [N. C.] 49 S. E. 210. Under Rev. St. 1899, §§ 4387, 6600, husband and wife held tenants in common and not by the entirety. Harrison v. McReynolds, 183 Mo. 533, 82 S. W. 120.

15. Neither the granting clause nor habendum suggested any other estate. Wilson v. Frost [Mo.] 85 S. W. 375.

16. Steenberger v. Low, 92 N. Y. S. 518.

17. See 2 Curr. L. 1862.

NOTE. Rights in fixtures as between tenants in common, see Bronson on Fixtures, §§ 80-84.

18. Gilmer v. Beauchamp [Tex. Civ. App.] 87 S. W. 907.

19. Where one in a suit to determine rights to land procures a decree by fraud on his co-plaintiffs, who have an interest in the land, he holds the land in trust to the extent of their interest, and a purchaser from them subsequent to the decree is in equity a co-tenant with him. Clevenger v. Mayfield [Tex. Civ. App.] 86 S. W. 1062.

20. Wells v. Becker, 24 Pa. Super. Ct. 174. Act June 24, 1895 (P. L. 237), providing for the liability of a co-tenant in possession to the others, does not apply to co-tenants under a lease for years, but only to owners who were co-tenants at common law. Id.

21. Smith v. Smith, 98 Me. 597, 57 A. 999. One may make a valid agreement with another to pay him for the use of his undivided share. Id.

22, 23. Smith v. Smith, 98 Me. 597, 57 A. 999. An agreement by one to pay his co-tenant a specific sum as his share of the monthly income, even though the term "rent" was used to signify such share, does not establish the relation of landlord and tenant unless it is so understood. Id.

24. That one, permitted to have the exclusive occupation, agrees to pay his co-tenant a compensation for the use of his undivided share, does not make his occupancy that of a tenant at will. Smith v. Smith, 98 Me. 597, 57 A. 999.

25. Their employment of a person to care for it will entitle him to a lien for his pay for such service, dependent on possession. Williamson v. Moore [Idaho] 80 P. 227.

26. Faubel v. McFarland, 144 Cal. 717, 78 P. 261.

27. The mere sole possession of one is not notice to purchasers of the shares of others of the right of such occupant to those shares under a prior unrecorded purchase. Martin v. Thomas [W. Va.] 49 S. E. 118.

28. Faubel v. McFarland, 144 Cal. 717, 78 P. 261. Not adverse to the others until ousted. Green v. Cannady [S. C.] 51 S. E. 92. Not adverse unless exclusive and under a claim of right continuing for the statutory period. Woodlief v. Woodlief, 136 N. C. 133, 48 S. E. 583. Where the deed of married women of their interest in land to one who also had an interest, was void, the grantee's possession was that of a joint tenant and not adverse. Furnish's Adm'r v. Lilly [Ky.] 84 S. W. 734. Evidence insufficient to show adverse possession by one. Mead v. Mead, 26 Ky. L. R. 777, 82 S. W. 598.

29. Keith v. Keith [Tex. Civ. App.] 87 S. W. 384.

30. Green v. Cannady [S. C.] 51 S. E. 92.

31. Did not recognize another's right of co-tenancy. Butcher v. Butcher [Mich.] 100 N. W. 604.

32. As where one plats the property and conveys the same by deeds of warranty and borrows money on the strength of his title. Cox v. Tompkinson [Wash.] 80 P. 1005. A

title and consistent with the rights of the others,[33] there is no constructive ouster; positive hostile acts must be shown.[34] The possession of one co-tenant in a remainder is not adverse to the others until the death of the life tenant.[35] Where the facts as to disseisin are undisputed, the question of ouster is for the court.[36]

A conveyance by one of the entire property passes his interest;[37] but does not prejudice rights of the others,[38] if they have not ratified the sale,[39] or estopped themselves;[40] nor can one sell the entire property merely because the interests of all are chargeable with common debts.[41] Where the sale is to a purchaser with notice of the character of the property, the others may recover from him their share,[42] and if such purchaser has disposed of a part, they may recover the remaining portion.[43] Where one conveys his interest with a reservation and the other conveys to the same grantee without reservation, the one who makes the reservation has the exclusive right to it.[44]

Purchases.—One may purchase for his own benefit an outstanding interest;[45] but he cannot buy up outstanding incumbrances and foreclose them against his co-tenants without showing that they are liable for the entire amount of such incumbrances,[46] and one who purchases the common property at a tax sale acquires no greater interest than he had before, but merely has a claim against the others for reimbursement.[47]

Accountability, contribution and exoneration.[48]—One who pays off an incumbrance on the common property is entitled to contribution,[49] which may be recov-

conveyance by one by warranty deed of the entire property to bona fide purchasers who take possession and convey to others. Brigham v. Reau [Mich.] 102 N. W. 845. Where one who supposed he legally acquired the title of the others made valuable improvements and described himself in a deed of trust of the property as owning it. Hendricks v. Musgrove, 183 Mo. 300, 81 S. W. 1265. Adverse possession under color of title for 18 years. Broom v. Pearson [Tex.] 85 S. W. 790.

33. Evidence to overcome this presumption must be strong. Coberly v. Coberly [Mo.] 87 S. W. 957.

34. Wells v. Becker, 24 Pa. Super. Ct. 174. In North Carolina an ouster will not be presumed from possession for less than 20 years, even though such possession be under color of title. Bullin v. Hancock [N. C.] 50 S. E. 621.

35. Bullin v. Hancock [N. C.] 50 S. E. 621.

36. Hendricks v. Musgrove, 183 Mo. 300, 81 S. W. 1265.

37. Broom v. Pearson [Tex.] 85 S. W. 790. In Michigan one tenant in common may in ejectment recover the entire premises as against a person who has no interest, hence their grantee may do so, though some of them did not properly execute the deed. Lamb v. Lamb [Mich.] 102 N. W. 645.

See, also, 2 Curr. L. 1864.

38. Conveyances of specific portion by one. Broom v. Pearson [Tex.] 85 S. W. 790.

39. In trespass to try title to recover an entire tract, the petition cannot be construed as a repudiation or affirmation of what has been done by co-tenants in selling specific portions. Zimpelman v. Power [Tex. Civ. App.] 85 S. W. 69.

40. One who does not join in a deed is not estopped to assert his interest by the fact that he witnessed an agreement of his co-tenant to sell the property, he not having known that the deed purported to convey the entire property. Faubel v. McFarland, 144 Cal. 717, 78 P. 261.

41. Sale by guardian of a minor co-tenant. Broom v. Pearson [Tex.] 85 S. W. 790.

42. Sale of the entire proceeds of the common property to a purchaser with notice of its status. Logan v. Oklahoma Mill Co., 14 Okl. 402, 79 P. 103.

43. The grantee cannot oppose the claim to the undisposed portion, it being less than their undivided share. Zimpelman v. Power [Tex. Civ. App.] 85 S. W. 69.

44. Reservation of a right to work a mine. City of New Haven v. Hotchkiss [Conn.] 58 A. 753.

45. He is not precluded from doing so though tenant in common of a remainder under a will devising an entire tract of which the testator owned but a part. Woodlief v. Woodlief, 136 N. C. 133, 48 S. E. 583.

46. Burnett v. Kirk [Wash.] 80 P. 855. See, also, 2 Curr. L. 1864.

47. This principle is applicable where a husband as agent for his wife becomes the adjudicatee at a tax sale of property belonging in indivision to her and her coheirs, in a succession of which she is administratrix. Alexander v. Light, 112 La. 925, 36 So. 806.

48. See 2 Curr. L. 1866. See, also, post, this section, "Rents and Profits."

49. A co-tenant who purchases the common property at a mortgage sale is a constructive trustee for a co-tenant who seasonably elects to share in the benefits by paying his portion of the expense. Ryason v. Dunten [Ind.] 73 N. E. 74.

NOTE. Subrogation: Where one pays the whole, or more than his proportion, of an incumbrance, equity will consider the lien as still existing and sub-

ered from a purchaser of his co-tenant's interest with notice of his rights.[50] One who pays off a mortgage without procuring a release of record and who knows that the interest of his co-tenant is to be sold under execution is not bound to attend the sale and notify prospective purchasers of his right to contribution.[51] The right to contribute and share in such benefits may be lost by laches[52] or waived.[53] One in possession is accountable for rents,[54] but he is entitled to recover moneys necessarily expended for taxes, insurance and necessary repairs;[55] but contribution cannot be had for improvements which do not inure to the benefit of all,[56] nor for improvements made by a disseisor,[57] nor can one recover from his co-tenant for services rendered in connection with the common property,[58] or commissions on collections.[59]

Agency.[60]—One is not the agent of the others,[61] unless by virtue of a contract,[62] but one may grant a license to enter the common property,[63] especially where it is done with the knowledge and consent of the other;[64] but a license given by one at a time he has no interest is not binding on his co-tenants when he afterwards acquires an interest.[65] One who is a member of a firm in possession under a lease for a year may in opposition to his co-tenant permit the firm to continue in possession temporarily without subjecting it to the liabilities of a tenant holding over.[66] In proceedings to foreclose a mortgage on the premises, one may procure

rogate him to the rights of the creditor in order to enforce contribution. Oliver v. Lansing, 57 Neb. 352, 77 N. W. 802; Kinkead v. Ryan [N. J. Eq.] 55 A. 730; Haverford Loan, etc., Ass'n v. Fire Ass'n, 180 Pa. 522, 57 Am. St. Rep. 657. Compare Leach v. Hall, 95 Iowa, 611, 64 N. W. 790. But such right does not pass to a mortgagee under a mortgage purporting to convey the undivided interest of one. Oliver v. Lansing, 57 Neb. 352. Where one redeems from a mortgage, he may hold the land as if the mortgage still existed until the others contribute (Hubbard v. Ascutney Mill Dam Co., 20 Vt. 402, 50 Am. Dec. 41), and one paying a mortgage in ignorance that his co-tenant has conveyed his interest is substituted in the place of the mortgagee (Shaffer v. McCloskey, 101 Cal. 576, 36 P. 196). Where two purchase and give their note for the unpaid purchase money secured by a lien reserved in the deed, and one, to protect his own share, is compelled to pay the note, he will be subrogated to the vendor's security and may enforce his right to reimbursement against his co-purchaser or his vendee who, after partition, buys with notice of the incumbrance. Dowdy v. Blake, 50 Ark. 205, 7 Am. St. Rep. 88; Dobyns v. Rawley, 76 Va. 537; Miller's Appeal, 119 Pa. 620, 13 A. 504.—From note to American Bonding Co. v. National, etc., Bank [Md.] 99 Am. St. Rep. 532.

50. One paid off a mortgage but did not discharge it of record. His co-tenant's interest was sold under execution to one whose agent had notice of the insolvency of the co-tenant whose share was sold and of the possession of the other. Rippe v. Badger [Iowa] 101 N. W. 642. This right is not affected by Code, § 2925. Id.

51. Rippe v. Badger [Iowa] 101 N. W. 642.

52. Where an infant co-tenant neglects for a long time after attaining majority to sue to enforce his right. Ryason v. Dunten [Ind.] 73 N. E. 74.

53. Infant co-tenant after attaining majority may waive. Ryason v. Dunten [Ind.] 73 N. E. 74.

54. Sharp v. Zeller [La.] 38 So. 449.

55. This recovery may be had in partition proceedings. Sharp v. Zeller [La.] 38 So. 449.

56. Where parties acquired land as co-tenants and one put up valuable improvements and the other agreed to deed his interest to the former's wife in consideration of other land, he should not be charged for one-half the value of improvements. Minder v. Mottaz [Wash.] 79 P. 996.

57. Rippe v. Badger [Iowa] 101 N. W. 642.

58. Unless by virtue of special agreement. Gay v. Berkey [Mich.] 100 N. W. 920. Compensation for superintendence. Sharp v. Zeller [La.] 38 So. 449.

59. Sharp v. Zeller [La.] 38 So. 449.

60. See 2 Curr. L. 1865.

61. Cannot dedicate the common property to public use. Sherman Lime Co. v. Glens Falls, 91 N. Y. S. 994.

62. Where one with the approval of another leases the premises and the others make no objection, it will be presumed after the lapse of a considerable period that the lease was made with the knowledge and consent of all. Schwartz v. McQuaid [Ill.] 73 N. E. 582. One in possession is agent for the others and is accountable for their portion of the rents from the date he is notified to account. Moreira v. Schwan, 113 La. 643, 37 So. 542.

63. License to enter and construct a telephone line. Granger v. Postal Tel. Co. [S. C.] 50 S. E. 193.

64. Granger v. Postal Tel. Co. [S. C.] 50 S. E. 193.

65. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

66. Valentine v. Healey, 178 N. Y. 391, 70 N. E. 913.

a third person to pay the amount due and take an assignment of the mortgage for his benefit.[67]

The right and remedy of partition has been treated in a separate article.[68] The right cannot be prescribed against so long as the thing remains in common.[69] Where an answer does not deny an averment that partition in specie cannot be equitably made, such fact need not be proven,[70] and lack of such an averment may be cured by the answer.[71]

Rents, profits and proceeds of the property.[72]—One who is a disseisor is chargeable with the rental value of his co-tenant's share whether he receives it or not;[73] but one in possession cannot maintain action against another for rents received at a time the one receiving them was not asserting title in himself.[74] One in possession, applying the rents to the payment of the expenses of other common property, should cease such application on notice from the others that they do not consent to such use,[75] and they may recover their portion from the date of such notice,[76] but the income so used without objection from them will be accounted for in the settlement of the affairs of such other property.[77]

Interest.[78]—On accounting between co-tenants, interest may be allowed from the time settlement should have been made.[79]

Trespass and waste.[80]—One may restrain another from committing malicious waste tending to destroy the chief value of the property,[81] but only to the extent of his interest.[82]

Actions.[83]—Where co-owners cannot agree as to the administration of the property, one out of possession can sue for partition and an accounting, but not for possession and to recover his proportion of the rents.[84] If one in possession wrongfully confiscates the other's share of the rents and profits, they may sue to recover the same and to be reinstated in their rights.[85] An action at law for a portion of the income will not lie until an accounting has been had,[86] unless as against one in possession under an agreement to pay for the occupancy,[87] and a bill for an accounting by one out of possession, claiming to be a joint owner, cannot be maintained until the question of title is determined in an action at law.[88] One may recover possession from a trespasser, and a recovery inures to the benefit of all;[89] but where one is in possession and suit is brought against him to be al-

67. He is entitled to do this and to an order discontinuing the action, as a matter of right. Simonson v. Lauck, 93 N. Y. S. 965.

68. See Partition, 4 Curr. L. 898. See, also, 2 Curr. L. 1865.

69. Rhodes v. Cooper, 113 La. 600, 37 So. 527.

70. Berry Lumber Co. v. Garner [Ala.] 38 So. 243.

71. A defect in a bill for sale and partition of the proceeds in that it does not allege that it cannot be partitioned in specie without impairing its value is cured by a denial of such fact in the answer. Taylor v. Webber, 26 Ky. L. R. 1199, 83 S. W. 567.

72. See 2 Curr. L. 1867.

73. Rippe v. Badger [Iowa] 101 N. W. 642. Co-tenant who wrongfully excludes his tenant in common and works mines is liable without deduction of costs of mining from gross value of product. Sweeney v. Hanley [C. C. A.] 126 F. 97.

74. Ryason v. Dunten [Ind.] 73 N. E. 74.

75, 76, 77. Moreira v. Schwan, 113 La. 643, 37 So. 542.

78. See 2 Curr. L. 1867

79. Action on account rendered. Sieger v. Sieger, 209 Pa. 65, 58 A. 140.

80. See 2 Curr. L. 1867.

81. Leatherbury v. McInnis [Miss.] 37 So. 1018.

82. Restrained from destroying one-half the trees. Leatherbury v. McInnis [Miss.] 37 So. 1018.

83. See 2 Curr. L. 1868.

84, 85. Moreira v. Schwan, 113 La. 643, 37 So. 542.

86. Assumpsit will not lie. Hunt v. Rublee, 76 Vt. 448, 58 A. 724.

87. Chapman v. Duffy [Colo. App.] 79 P. 746.

88. Swearingen v. Barnsdall, 210 Pa. 84, 59 A. 477.

89. Keith v. Keith [Tex. Civ. App.] 87 S. W. 384. One alone may maintain ejectment against a stranger. Dorlan v. Westervitch, 140 Ala. 283, 37 So. 382. In trespass to try title in the absence of objection because of want of proper parties, one may recover the entire property as against mere possessors without title. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

lowed the right of entry, all desiring the benefit of a recovery must join.[90] One suing alone can recover only his proportion of the rents and profits,[91] and one joint owner of personalty suing for damages for its injury can recover only his share.[92] Therefore he must prove with reasonable certainty the extent of his interest.[93]

Replevin, ordinarily, will not lie between co-tenants, but may be maintained where one repudiates the interest of others in property susceptible of division.[94]

TENDER; TERMS OF COURT, see latest topical index.

TERRITORIES AND FEDERAL POSSESSIONS.

§ 1. Political Status (1678).
§ 2. Organization and Government (1678).
§ 3. Jurisdiction, Powers, Duties and Liabilities (1678).
§ 4. Local Laws and Practice; Territorial Courts (1678).

§ 1. *Political status.*[95]

§ 2. *Organization and government.*[96]—The entire Potomac River, within the limits of the District of Columbia is subject to the legislative control of congress, as well in respect to matters of police as to all other subjects of legislation.[97] Congress may establish temporary governments for its possessions, and give to such governments the power to legislate for the territory under their control.[98] License fees imposed on certain lines of business in Alaska for the purpose of supporting the territorial government are not rendered unconstitutional by the fact that the taxes are paid into the treasury of the United States without any specific appropriation of them to the needs of the territory, the total sum derived from such fees and other revenues of the territory being insufficient to meet the expenses of the territorial government.[99]

§ 3. *Jurisdiction, powers, duties and liabilities.*[1]—During the occupation of the island of Cuba, after the treaty with Spain, the governor of the island became personally liable for wrongful interference with the property of a Spanish subject, in the course of his civil administration of Cuban affairs.[2] The District of Columbia has exclusive control of the streets of the city of Washington, and is charged with the duty of seeing that they are kept reasonably safe for the passage of persons using the traveled portions of such streets.[3]

§ 4. *Local laws and practice; territorial courts.*[4]—After the Philippines were ceded to the United States, the local laws regulating rights to property and prescribing rules for commercial transactions and prescribing the manner of formation of commercial associations continued in force;[5] hence a corporation created under those laws has a legal existence.[6] Congress has power to establish a system of trial

90. Keith v. Keith [Tex. Civ. App.] 87 S. W. 384.

91. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

92, 93. Waggoner v. Snody [Tex.] 85 S. W. 1134.

94. One repudiated his co-tenant's interest in cattle, divided them and sold one-half. Held, the other could replevin the half retained. Cornett v. Hall, 103 Mo. App. 353, 77 S. W. 122.

95. See 2 Curr. L. 1868.

Note: A resume of the Philippine Island cases decided in the U. S. supreme court will be found in 3 Mich. L. R. 54.

96. See 2 Curr. L. 1869.

97. Smoot v. District of Columbia, 23 App. D. C. 266.

98. Philippine Commission had power to enact the "libel law" of Oct. 24, 1901. Dorr v. U. S., 195 U. S. 138, 49 Law Ed. ——.

99. Alaska Pen. Code, tit. 2, § 460, as amended by Act of June 6, 1900. Binns v. U. S. 194 U. S. 486, 48 Law. Ed. 1087; Wynn-Johnson v. Shoup, 194 U. S. 496, 48 Law. Ed. 1091.

1. See 2 Curr. L. 1869.

2. Spanish franchise taken on the ground that it was a monopoly; complaint based on the act held good on demurrer. O'Reilly De Camara v. Brooke, 135 F. 384.

3. Must use reasonable care in removing shade trees. Ward v. District of Columbia, 24 App. D. C. 524.

4. See 2 Curr. L. 1870.

5, 6. Philippine Sugar Estates Development Co. v. U. S., 39 Ct. Cl. 225.

of crimes and offenses committed in the Philippine Islands, without providing therein for trial by jury,[7] and the constitution does not, of its own force, and without legislation, give the people of the Philippines the right to such trial.[8] Alaska, however, has been so incorporated into the United States by the treaty under which it was acquired, by acts of congress, and by decisions of the Federal supreme court, that in legislating for that territory, congress is to be governed by the Federal constitution.[9] Hence the provision of the act of June 6, 1900, that six jurors shall constitute a legal jury in trials for misdemeanors in Alaska, is repugnant to the sixth amendment and void.[10] The constitutional provision that no one shall be twice put in jeopardy for the same offense having been extended to the Philippine Islands by the act of July 1, 1902, the government cannot appeal from a judgment of acquittal rendered by a court of competent jurisdiction in the islands.[11] The act of 1902 changed former military orders and acts of the Philippine commission, so far as such right of appeal had been recognized by them.[12]

The jurisdiction of the Federal court for the district of Porto Rico extends to all cases which could be brought in a federal circuit court.[13] The Federal supreme court has jurisdiction of an appeal from the Federal district court for Porto Rico in the same cases in which it may review the final judgment of a supreme court of one of the territories.[14] The statutes of Hawaii, conferring upon the judges of the several courts, at chambers, within their respective jurisdictions, judicial power not incident or ancillary to some cause pending before a court, are not in conflict with the organic act of the territory.[15]

TESTAMENTARY CAPACITY; THEATERS; THEFT, see latest topical index.

THREATS.[16]

The language or conduct which will constitute the unlawful use of threats need not be such as to induce a fear of personal injury.[17] Any words or acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business or property, are equivalent to threats.[18] A combination which contemplates the use of threats to induce workmen to abandon the service of their employers is criminal.[19] Coupled with other matters, a threat may be an assault,[20] or a false imprisonment,[21] or a false pretence,[22] or a postal offense,[23] or it may justify violent or forcible self protection.[24]

An indictment for "white-capping" by posting threatening or ominous unsigned notices, under the Texas statute, must aver that persons were to have been intimidated, and if the threat was ambiguous, must aver facts showing how it was

7. Conviction in trial, without jury, in Manila, upheld. Dorr v. U. S., 195 U. S. 138, 49 Law. Ed. ——.

8. Dorr v. U. S., 195 U. S. 138, 49 Law. Ed. ——.

9, 10. Rassmussen v. U. S., 25 S. Ct. 514.

11. Kepner v. U. S., 195 U. S. 100, 49 Law. Ed. ——; Secundino Mendezona y Mendezona v. U. S., 195 U. S. 158, 49 Law. Ed. ——.

12. Military order No. 58, and act of Philippine commissions, Aug. 10, 1901. Kepner v. U. S., 195 U. S. 100, 49 Law. Ed.——; Secundino Mendezona y Mendezona v. U. S., 195 U. S. 158, 49 Law. Ed. ——.

13. By provisions of 31 Stat. at L. 84, c. 191. Hijo v. U. S., 194 U. S. 315, 48 Law. Ed. 994.

14. As action to recover value of use of vessel taken in Spanish war and used by quartermaster's department, amount involved being more than $5,000. Hijo v. U. S., 194 U. S. 315, 48 Law. Ed. 994.

15. Section 81 continues in force previous laws of Hawaii concerning "the civil courts, their jurisdiction and procedure." Carter v. Gear, 25 S. Ct. 491.

16. Includes the statutory crime of making threats and like statutory crimes.

17, 18. State v. Stockford [Conn.] 58 A. 769.

19. Gen. St. § 1296 construed. State v. Stockford [Conn.] 58 A. 769.

20. Assault and Battery, 3 Curr. L. 319.

21. False imprisonment, 3 Curr. L. 1417.

22. False Pretenses and Cheats, 3 Curr. L. 1419.

23. Postal Law, 4 Curr. L. 1061.

24. Assault and Battery, 3 Curr. L. 319; Homicide, 3 Curr. L. 1643.

to do so.[25] Mere animadversions toward the class of persons to which certain ones belong do not suffice to prove the posting of a notice against them.[26]

TICKETS, see latest topical index.

TIME.[27]

When time is an element of a fact, its beginning is deemed to have been coincident with the first moment of the first day of the event.[28] When years are reckoned, the first day is included.[29] A legal day commences at 12 o'clock at night and continues until the same hour the following night,[30] and in the computation of time, fractions of a day are not reckoned.[31] Hence a person attains majority on the day preceding his twenty-first birthday.[32] In computing time, Sunday is to be included unless the last day falls on Sunday;[33] but when a statute requires an act to be done within a certain number of days, Sunday must be reckoned as one, though it happens to be the last, unless expressly or impliedly excluded,[34] and a statute providing that time shall be computed by excluding the first and including the last day, and if the last be Sunday, it shall be excluded, does not apply to an order extending the time for serving a case made.[35] When an act is required to be done within a specified period from or after a particular date, the general rule is to exclude the day thus designated and include the last day of the specified period;[36] but where an act is required to be done within a certain time, the last day is excluded.[37] When time is given until a certain date, "until" is ordinarily exclusive unless it be shown that the contrary was intended;[38] but "by" a certain date includes the day designated.[39] In cases of doubt, that construction will be adopted which will protect rights and save forfeitures.[40]

25. An indictment for posting a whitecap notice directed against D. and P. held insufficient, the notice being addressed to "Mr. Nigs" and it not being alleged that either of the persons mentioned were negroes. Bettis v. State [Tex. Cr. App.] 85 S. W. 1074.

26. Evidence held insufficient to sustain a conviction for whitecapping. Bettis v. State [Tex. Cr. App.] 85 S. W. 1074.

27. Includes only rules for measuring lapse of time. See Contracts (Time as essential to performance) 3 Curr. L. 805, also the topics treating of particular acts, things or proceedings for the time within which they may be done, or during which they may subsist.

28. Erwin v. Benton [Ky.] 87 S. W. 291.

29. For limitation purposes. Vose v. Kuhn, 45 Misc. 455, 92 N. Y. S. 34. A year in law is 365 calendar days. Erwin v. Benton [Ky.] 87 S. W. 291.

30. Cheek v. Preston [Ind. App.] 72 N. E. 1048.

31. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758.

32. A person born June 9, 1883, is eligible to vote June 8, 1904. Erwin v. Benton [Ky.] 87 S. W. 291.

33. See 2 Curr. L. 1871, n. 25. Swift & Co. v. Wood [Va.] 49 S. E. 643. Where an offer to sell is made on Sunday to expire the following day, Sunday is included in calculating the time; limit does not extend until Tuesday. Ropes v. John Rosenfeld's Sons, 145 Cal. 671, 79 P. 354.

34. Under Denver City Charter, art. 7, § 3, requiring publication of notice of a public improvement, Sunday is to be included, though it be the last day of publication. Code, § 382, providing that it shall be excluded, being applicable only to procedure in courts of record. City of Denver v. Londoner [Colo.] 80 P. 117. The fact that the last day of the period of limitations falls on Sunday does not authorize the commencement of an action the following day. Vose v. Kuhn, 45 Misc. 455, 92 N. Y. S. 34.

35. Under Code Civ. Proc. § 722, where the time within which to serve a case made was extended to August 10, service was required before the expiration of August 9, though the 9th fell on Sunday. Buck's Stove & Range Co. v. Davidson [Kan.] 79 P. 119.

36. Where a lease granting an option to purchase at its expiration terminated on October 1st, the lessee could accept the option at any time during the day. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758. Under Const. 1876, art. 14, § 2, providing that all uncertified land certificates shall be returned to the General Land Office within five years after the adoption of the constitution, the day on which the constitution took effect is to be excluded. Eyl v. State [Tex. Civ. App.] 84 S. W. 607. An order giving 60 days to prepare a bill of exceptions means 60 days after the day of date. Gates v. Davis [Ky.] 86 S. W. 1132.

37. Under Va. Code 1904, p. 6, a notice for judgment served on the 21st and returned on the 26th day of the month is not returned within five days. Swift & Co. v. Wood [Va.] 49 S. E. 643.

38. Carver v. Seevers [Iowa] 102 N. W. 518.

39. A tenant notified October 13 to quit

TIME TO PLEAD, see latest topical index.

TOLL ROADS AND BRIDGES.[41]

§ 1. Franchises and Rights of Way, and Acquisition by Public (1681).
§ 2. Public Aid and Immunities (1681).
§ 3. Establishment, Construction, Location and Maintenance (1681).
§ 4. Right of Travel and Tolls (1682).

§ 1. *Franchises and rights of way, and acquisition by public.*[42]—The legislature having granted a turnpike company an unrestricted charter, the company is not bound by a general act subsequently passed limiting tolls.[43]

Acquirement by public.[44]—Under the Pennsylvania law successive petitions for condemnation of a toll road may be filed within a year of each other.[45] A bona fide purchase of a turnpike by the public is not a violation of a constitutional provision prohibiting a corporation from selling its franchise.[46]

§ 2. *Public aid and immunities.*[47] *Taxation.*[48]—That the upper portion of a toll bridge is used by trains engaged in interstate commerce[49] and is in two counties[50] does not effect its taxability. An additional tax imposed by the county in which the state license is collected is a mere appendage to the state levy, and must be paid in the county where the state levy is made.[51] The fact that a toll bridge is on the right of way of a railroad company,[52] and that its upper portion is used as a railroad bridge,[53] does not prevent a license being required. The amount of the tax is largely governed by statutes.[54] The assessment description must accurately describe the interest the company has in the land.[55]

§ 3. *Establishment, construction, location and maintenance.*[56]—Only those whom a special form of construction was to benefit can bring an action for damage resulting from its breach.[57]

at the expiration of 10 days has all day the 23d in which to comply with the notice under Burns' Ann. St. 1901, § 1304, declaring that in computing time the first day shall be included and the last excluded. Cheek v. Preston [Ind. App.] 72 N. E. 1048.

NOTE. Meaning of various words: The word "until" appearing in a statute or contract must be taken as implying an intention to exclude the day to which it refers. People v. Walker, 17 N. Y. 502; Buner v. Reed, 16 Barb. [N. Y.] 374; Ryan v. State Bank, 10 Neb. 524; Willey v. Laraway, 64 Vt. 566. When time is given until a certain day to file a bill of exceptions, it may be filed on or before that day. Newport News Co. v. Thomas, 96 Ky. 613. But the above rule must yield when the intention to include it is manifest (Kendall v. Kingsley, 120 Mass. 94); and the word "may," in a contract or a law has an exclusive or inclusive meaning, depending upon the subject, transaction or connection about or in which it is used (Webster v. French, 12 Ill. 302). If an act is required to be done "within" a certain number of days, the day of date is to be excluded. Bemis v. Leonard, 118 Mass. 502; Grant v. Paddock, 30 Or. 312. "Between" excludes both the first and last days. Wier v. Thomas, 44 Neb. 507, 48 Am. St. Rep. 741; Delaware, etc., R. Co. v. Mehrhof Bros., 53 N. J. Law, 205. "Before" is exclusive of the date named. Alston v. Falconer, 42 Ark. 114. "To" a certain date includes it. Clark v. Ewing, 87 Ill. 344; Conawingo, etc., Co. v. Cunningham, 75 Pa. 138. "Forthwith" means within twenty-four hours. Champlin v. Champlin, 2 Edw. Ch. 328.—From note to State v. Michel [La.] 78 Am. St. Rep. 386. See, also, note to Halbert v. San Saba Springs L. & L. Ass'n [Tex.] 49 L. R. A. 193, for exhaustive review of cases on computation of time.

40. Eyl v. State [Tex. Civ. App.] 84 S. W. 607.

41. Matters of general highway (3 Curr. L. 1593) or bridge (3 Curr. L. 529) law or corporation (3 Curr. L. 880) law applied to toll road or bridge companies are excluded.

42. See 2 Curr. L. 1872.

43. Heath v. Manire [Tenn.] 84 S. W. 808.

44. See 2 Curr. L. 1873.

45. Perkiomen v. Sumneytown Turnpike Road, 25 Pa. Super. Ct. 462.

46. Roush v. Vanceburg, etc., Turnpike Co. [Ky. L. R.] 85 S. W. 735.

47, 48. See 2 Curr. L. 1873.

49, 50, 51, 52, 53. Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85.

54. Under Acts 1900-01, p. 2620, § 17, subd. 38, a toll bridge having a city of 5,000 inhabitants within 2 miles of one end and a city of over 2,000 but less than 5,000 inhabitants within two miles of the other end is liable for a tax of $75. Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85.

55. Assessment description "five miles of highway is fatally defective," it being shown that the turnpike company simply had a public easement in the highway. People v. Selkirk [N. Y.] 73 N. E. 248.

56. See 2 Curr. L. 1874.

57. The duty imposed by charter upon the Bergen Turnpike Co. with regard to the condition of the middle portion of its turnpike was designed for the benefit of travelers

§ 4. *Right of travel and tolls.*[58]—A turnpike road is a public highway; every traveler has the right to use it upon paying toll; it cannot be closed against the public use; its obstruction is a public nuisance for which indictment will lie;[59] hence the turnpike company cannot authorize any act inconsistent with these rights.[60] A borough through which the turnpike runs has the power to make reasonable regulations to prevent what, if done on any other public highway within its limits, would be a public nuisance, provided no right or franchise of the turnpike company is abridged or infringed.[61] An act exempting persons on horseback does not apply to persons traveling in wagons.[62]

TORTS.

§ 1. Elements of a Tort (1682).
§ 2. What is an Injury or Wrong (1684).
§ 3. What is Damage (1684).
§ 4. Parties in Torts (1684).

§ 1. *Elements of a tort.*[63]—A tort is an act or omission which is related to harm suffered by a determinate person.[64] It may be an act which without lawful justification or excuse is intended to cause harm,[65] such as procuring a violation of contract,[66] or an act or omission causing harm which the person so acting or omitting did not intend to cause but might and should with due diligence have foreseen and prevented,[67] or it may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits to avoid or prevent.[68] It is not necessary that he should have been able to foresee the injury that did in fact result, if he should have foreseen that injury of some nature would probably result.[69] There must be a violation of a legal duty owed by virtue of common law[70] or statute,[71] such as one's right of privacy,[72] personal security,[73]

and not of adjacent landowners. Kaufman v. Bergen Turnpike Co. [N. J. Law] 58 A. 109.

58. See 2 Curr. L. 1875.

59. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406.

60. A telegraph company can acquire no right from a turnpike company, whose road is a borough street, to maintain its wires and poles in such negligent manner as to endanger the lives and limbs of those who travel on the same, or to interfere unnecessarily with the extinguishment of fires, or, unnecessarily, to impede travel. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406.

61. Norwood Borough v. Western Union Tel. Co., 25 Pa. Super. Ct. 406.

62. Sess. Acts 1899, p. 869, c. 369, exempting persons going to or returning from a gristmill on horseback with grain for family use from toll, does not apply to one carrying grain in a wagon. Heath v. Manire [Tenn.] 84 S. W. 808.

63. See 2 Curr. L. 1875.

64. Tenant negligent in care of premises by reason of which a stranger passing in the street was injured. Hirschfield v. Alsberg, 93 N. Y. S. 617. Changing channel of a stream so as to cause another's land to be overflowed. San Antonio & A. P. R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842.

Note: Effect of bad motive to make actionable what would otherwise not be. See note to Passaic Print Works v. Ely & W. Dry Goods Co., 105 F. 163, 62 L. R. A. 673.

65. See Assault and Battery, 3 Curr. L. 319. Master wrongfully blacklisting a servant. Willis v. Muscogee Mfg. Co., 120 Ga. 597, 48 S. E. 177.

66. Unlawfully procuring one to be discharged from his employment. Suarez v. McFall Bros. [Tex. Civ. App.] 87 S. W. 744. The malicious procurement of a breach of contract during its subsistence is actionable. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353. Persuading a breach of contract relations between parties where the persuasion is used for the direct purpose of injuring a party. Morehouse v. Terrill, 111 Ill. App. 460.

67. See Negligence, 4 Curr. L. 764. Evidence held to show a connection between defendant's wrongful conduct and plaintiff's loss. First Nat. Bank v. Steel [Mich.] 99 N. W. 786. Where an act is itself lawful, liability depends, not on the consequences flowing from it, but upon whether a prudent man would have foreseen that injury would naturally or probably result. Drum v. Miller, 135 N. C. 204, 47 S. E. 421.

68. Injuries caused by dangerous instrumentalities in one's control. A vicious dog. Grissom v. Hofius [Wash.] 80 P. 1002. One whose duty it is to receive and keep animals fereae naturae is not liable in the absence of negligence. Keeper of National Zoological Park. Jackson v. Baker, 24 App. D. C. 100.

69. Drum v. Miller, 135 N. C. 204, 47 S. E. 421.

70. Where an employer has a right to discharge an employe, it is not an actionable wrong for another to procure him to do so. Holder v. Cannon Mfg. Co. [N. C.] 50 S. E. 681. It is not a tort for one to procure another to persuade a testator not to change

or personal liberty,[74] and such wrong must cause damage.[75] A conspiracy to do a wrongful act is not a tort.[76] The wrong consists in doing acts pursuant to the conspiracy.[77] The wrong must be the proximate cause of the injury, but need not be the nearest in point of time or sequence of events.[78] If it be the efficient and proximate cause, it is immaterial that a remote or incidental cause intervene.[79]

As a general rule, consent to a wrong is a complete justification; but if the wrong constitutes a crime, the consent is void and is no defense.[80] An offer to repair the damage caused is no defense.[81]

One may waive his right of action in tort and proceed in assumpsit,[82] but after he makes his election, he is precluded from thereafter proceeding in tort.[83]

his will so as to name as a beneficiary one in whose favor he had expressed a desire to change it. Marshall v. De-Haven, 209 Pa. 187, 58 A. 141. A railroad company owes trespassers no duty of providing them safe appliances. Hortenstine v. Virginia-Carolina R. Co., 102 Va. 914, 47 S. E. 996. Nor in regard to the rate of speed or schedule of its trains. Id. One whose duty toward another is fixed by the requirements of a contract is not liable in tort for the violation of such contract. Galbraith v. Illinois Steel Co. [C. C. A.] 133 F. 485. A railroad company owes no duty to delay its train for a belated passenger. Pickett v. Southern R. Co. [S. C.] 48 S. E. 466.

71. Failure of a railroad company to put in culverts as required by Rev. St. 1895, art. 4436. San Antonio & A. P. R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842.

72. Violation of one's right of privacy is a tort. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68, disapproving and critlcising Roberson v. Rochester Folding Box Co., 171 N. Y. 540, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478. The publication of one's photograph without his consent is a violation of his right of privacy. Id.

73. Personal security includes the right to exist and enjoy life and is invaded by a deprivation of those things which are necessary to enjoy life according to the nature, desires and temperament of the individual. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68.

NOTE. Liability of proprietor of public resort for insult to guests: The defendant owned and maintained a park used as a place of public resort. One of its servants mistook the plaintiff for a woman of ill repute, and requested her to leave. No publication of defamatory matter was charged, and the employe, as well as the defendant's manager, apologized almost immediately. Held, that every person not a member of a prescribed class, has a right to be free from insult and personal indignities in a public resort, and that the plaintiff may recover for the mental humiliation which she suffered. Davis v. Tacoma R. & Power Co., 35 Wash. 203, 77 P. 209.

No court has gone so far as to recognize a general right to be free from insults causing only mental suffering. See Reed v. Maley, 25 Ky. L. R. 209, 74 S. W. 1079; Prince v. Ridge, 66 N. Y. S. 454. The establishment of such a right would render useless the limitations of the law of libel and slander, and open wide the door to fraudulent litigation. The Washington case must be regarded as an attempt to extend the liability of the owner of property toward invited persons. The most that a host has been held for hitherto is physical injury to guests from the dangerous condition of the premises; and to enlarge his responsibility as suggested would make his position unduly difficult. Furthermore, it would seem for the public good that the proprietors of public resorts should not be held to act at their peril in ejecting obnoxious persons. The responsibility of railroads for insults to passengers by employes does not furnish a conclusive argument by analogy, for the rule in those cases is founded on the peculiar law of carriers, a class within which street railway parks do not fall. See Purcell v. Daly, 19 Abb. N. C. [N. Y.] 301; Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 18 Harv. L. R. 153.

74. Personal liberty includes not only freedom from physical restraint, but also the right to be let alone, to determine one's mode of life whether it shall be a life of publicity or of privacy. Pavesich v. New England Life Ins. Co. [Ga.] 50 S. E. 68.

75. Where there is no proof of damage, it is proper to grant a nonsuit. McEarchern & Co. v. Edmondson [Ga.] 49 S. E. 798. Fraud to procure a void release is no damage. Walker v. Russell [Mass.] 71 N. E. 86. Under Sherman's Anti-Trust Act (26 Stat. 209) § 7, a complaint must show that by reason of the unlawful act committed plaintiff has been injured in his business. Rice v. Standard Oil Co., 134 F. 464.

76. Green v. Davies, 91 N. Y. S. 470.

77. Green v. Davies, 91 N. Y. S. 470. A combination of two or more persons to injure one in his trade by inducing his employes to break their contract with him is actionable if damage results. Employing Printers' Club v. Doctor Blosser Co. [Ga.] 50 S. E. 353.

78. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2. Obstruction of watercourse held the proximate cause of loss by another because he could not float his logs through. Creech v. Humptulips Boom & River Imp. Co. [Wash.] 79 P. 633.

79. Wabash R. Co. v. Billings, 212 Ill. 37, 72 N. E. 2.

80. McNeil v. Mullin [Kan.] 79 P. 168.

81. Berry v. Ryan [Colo. App.] 79 P. 977.

82. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98. One who brings an action of attachment against a party accused of fraud in obtaining goods affirms the sale to him and waives the tort. Ermeling v. Gibson Canning Co., 105 Ill. App. 196. See, also, cases cited in Assumpsit, 3 Curr. L. 348; Implied Contracts, 3 Curr. L. 1690.

§ 2. *What is an injury or wrong.*[84]—Whatever invades a man's right of dominion over his property is a legal injury whether damage ensues or not.[85] There is no liability for acts done in the performance of governmental duties,[86] nor for erroneous judicial acts committed in a proceeding in which jurisdiction has been acquired.[87]

§ 3. *What is damage.*[88]—For damage caused as the result of an inevitable accident, there can be no recovery.[89]

§ 4. *Parties in torts.*[90]—Joint tort feasors are jointly and severally liable,[91] and a concert in illegal acts makes the wrongdoers jointly liable, though they act singly and without unlawful combination;[92] but contributors to an injury are liable for whatever damage is caused by their respective wrongful acts, and none other.[93] Where a joint tort is charged, there must be proof of community of fault in order to authorize a recovery;[94] but if the proof fails to show concert of action,

83. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98.

84. See 2 Curr. L. 1876.

85. To wrongfully cause water to flow on another's land which would not flow there naturally. Allen v. Stowell, 145 Cal. 666, 79 P. 371.

86. Wrongful arrest by servant of the Minnesota State Agricultural Society. Berman v. Minnesota State Agricultural Soc. [Minn.] 100 N. W. 732. Officer shooting a fugitive while attempting to arrest him. Sharp v. Erie R. Co., 90 App. Div. 502, 85 N. Y. S. 553. Acts of public officers within the limits of power conferred upon them are acts of the state. Litchfield v. Bond, 93 N. Y. S. 1016.

87. McVeigh v. Ripley [Conn.] 58 A. 701.

88. See 2 Curr. L. 1876.

89. Collision because of a dense fog. Kenova Transp. Co. v. Monongahela River Consol. Coal & Coke Co. [W. Va.] 48 S. E. 844.

90. See 2 Curr. L. 1877.

91. Bailey v. Delta Elec. Light, Power & Mfg. Co. [Miss.] 38 So. 354; Weathers v. Kansas City Southern R. Co. [Mo. App.] 86 S. W. 908. Complaint joining a railroad company with its employes, but alleging negligence only by the employes, the company's liability being based wholly on the fact that the acts of the employes were within the scope of their employment, does not charge a joint tort. Sessions v. Southern Pac. Co., 134 F. 313. Persons who jointly start and allow a fire to spread. Dunn v. Newberry [Tex. Civ. App.] 86 S. W. 626. Each partner is liable for the torts of the co-partnership. Grissom v. Hofius [Wash.] 80 P. 1002. Under Rev. St. 1899, § 2864, all parties whose acts contributed to an unlawful death are jointly and severally liable, but the fact that the one sued was held not the proper party does not establish the liability of the other. Packard v. Hannibal & St. J. R. Co., 181 Mo. 421, 80 S. W. 951. Where two or more parties are guilty of negligent conduct resulting in a common injury, such fact affords no defense in an action brought against one of the parties on account of the injury. Dayton v. City R. Co., 6 Ohio C. C. (N. S.) 41. For an injury caused by the negligence of a servant while engaged in the business of his master, both master and servant are liable. Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co. [Ind. App.] 72 N. E. 183.

Note: The plaintiff brought a joint action against a railroad company and its special officer for injuries inflicted by the latter. A nonsuit was entered as to the company and a judgment was rendered against the officer. The entry of nonsuit was appealed. Held, that since the plaintiff has one judgment on the joint action, the judgment of nonsuit cannot be reversed. Higby v. Pennsylvania R. Co., 209 Pa. 453.

An injured party may, at his election, sue joint tort-feasors jointly or severally. Cabell v. Vaughan, 1 Wm. Saund. 291f; Sessions v. Johnson, 95 U. S. 347, 24 Law. Ed. 596 (semble). Logically once having made his choice, he cannot turn a joint into a several action. Accordingly, in Pennsylvania, a plaintiff having alleged a joint tort is not allowed to enter a nolle prosequi as to one defendant and recover as to another, for a several tort. Wiest v. Electric, etc., Co., 200 Pa. 148; Wallace v. Third Avenue R. Co., 36 App. Div. [N. Y.] 56. In the principal case the plaintiff elected a joint action and the nonsuit could not change its nature. The judgment secured was a joint, and on principle he could not split it by appealing from that part constituted by the nonsuit. Compare Leese v. Sherwood, 21 Cal. 151. The court rests its decision on this narrow ground of technical procedure, but modern practice generally allows greater liberality. The action has been considered both joint and several, and so, in New York, a contrary decision was reached. Hurley v. New York, etc., Co., 13 App. Div. [N. Y.] 167. For purposes of review the action was regarded as severed, and a new trial granted as to one defendant.—18 Harv. L. R. 229.

92. Green v. Davies, 91 N. Y. S. 470.

93. Individual acts of several causing pollution of a stream. Watson v. Colusa-Parrot Min. & Smelting Co. [Mont.] 79 P. 14. If two acting independently contribute to an injury, each is liable only for his proportion. San Antonio & A. P. R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842.

94. Sturzebecker v. Inland Traction Co. [Pa.] 60 A. 583. A joint judgment cannot be sustained as to one unless it be sustained as to all. Chicago Union Traction Co. v. Stanford, 104 Ill. App. 99.

plaintiff may amend and proceed against the party liable.[95] As a general rule there is no contribution among joint tort feasors,[96] but where the offense is merely malum prohibitum and does not involve moral delinquency, it is not against the policy of the law to inquire into the relative delinquency and to administer justice between them, although both parties are wrongdoers.[97] The giving of one joint tort feasor the right of contribution against others at any time before he has paid the judgment works a change in the remedy, not in the right.[98] Full satisfaction by one releases all.[99]

TOWAGE, see latest topical index.

TOWNS; TOWNSHIPS.[1]

§ 1. Creation, Organization, Status and Boundaries (1685).
§ 2. General Powers and Exercise Thereof (1686).
§ 3. Property (1686).
§ 4. Contracts (1686).
§ 5. Officers and Employes (1687).
§ 6. Fiscal Affairs and Management and Expenses (1687).
§ 7. Claims (1688).
§ 8. Torts (1688).
§ 9. Actions by and Against (1689).

§ 1. *Creation, organization, status and boundaries.*[2]—Towns are incorporated for two distinct purposes; first, for the welfare of their own inhabitants; second, for the general welfare;[3] where one has existed and exercised its powers for a long time, the validity of its charter cannot be questioned.[4] In Wisconsin a town containing an unincorporated village may by resolution direct that all powers conferred on village boards may be exercised by the town board.[5] In Nebraska a township is only a quasi corporation.[6] A town's identity is not changed by its transference from one county to another,[7] or if the boundary lines have been changed, it may become the legal successor of the old township;[8] but a town is not liable on warrants previously issued by a road district, part of which has been included in the town.[9] Where commissioners are appointed to divide a township in Pennsylvania, the inhabitants have a right to a hearing, and it is the duty of the commissioners to give notice thereof.[10]

95. Sturzebecker v. Inland Traction Co. [Pa.] 60 A. 583.

96. Conspirators. Ladd v. Ney [Tex. Civ. App.] 81 S. W. 1007.

97. A contractor can recover from a subcontractor for injury caused a traveler because of his negligence in leaving the street in a dangerous condition if he did not personally participate in the work. Phoenix Bridge Co. v. Creem, 92 N. Y. S. 855. Where two are liable but one took no part in the wrongful act and had no notice in time to guard against it, he is entitled to indemnity against the active wrong doer. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258.

98. Statute having this effect being remedial may be retroactive. First Nat. Bank v. Steel [Mich.] 99 N. W. 786.

99. Bailey v. Delta Elec. Light, Power & Mfg. Co. [Miss.] 38 So. 354. Robertson v. Trammell [Tex. Civ. App.] 83 S. W. 258.

1. Scope of topic. The same relative scope has been given as to Municipal Corporations, see ante, p. 720.

2. See 2 Curr. L. 1877.

3. Under the first head the town may be liable in contract or tort for the acts of its officers; under the second it is not liable, as in the case here, of injury to a prisoner from a defective lockup. Mains v. Inhabitants of Ft. Fairfield [Me.] 59 A. 87.

4. A Vermont town had existed under a charter granted by a Lieut. Governor of N. Y. for over 100 years. Town of Readsboro v. Woodford, 76 Vt. 376, 57 A. 962.

5. Such powers were not required to be exercised by the electors, but might be exercised by the town board. Bennett v. Nebagamon [Wis.] 99 N. W. 1039.

6. It accepts no special charter, but the system of government may be forced on them against their will. Wilson v. Ulysses Tp. of Butler County [Neb.] 101 N. W. 986.

7. It remains liable on its bonds. Planters' & Sav. Bank v. Huiett Tp., 132 F. 627.

8. It will be liable for the bonds of the old township where it contains substantially the same territory. Taylor v. Pine Grove Tp., 132 F. 565; Susong v. Cokesbury Tp., 132 F. 567.

9. The liability remains on the county, and it may levy a road tax on the part of the district not embraced within the town. Custer County Bank v. Custer County [S. D.] 100 N. W. 424.

10. On an appeal where the report is ambiguous as to notice and there is no exception, it will be presumed that the commissioners did their duty. Stowe Tp. Division, 23 Pa. Super. Ct. 285.

The boundary line between two towns may be the bank instead of the center of a stream.[11] The doctrine of prescription is applicable to boundary lines between towns unless the statute confines the courts to locating the true or charter line.[12]

§ 2. *General powers and exercise thereof.*[13]—The authority of township trustees is not necessarily repealed or abridged by a later act conferring similar power upon county commissioners "to provide for the abolition of dangerous grade crossings."[14] A town authorized to provide a system of fire protection may borrow money and issue its bonds.[15]

Town meetings can only take action on matters mentioned in the notice or warning calling the town meeting;[16] the failure of the clerk to post the proper notice of the biennial town meeting or the submission of misleading questions renders the action of the meeting void,[17] unless the will of the people has been fairly expressed.[18]

§ 3. *Property.*[19]—A town may lease land which it owns for any legitimate purpose, and it may acquire land by adverse possession.[20]

§ 4. *Contracts.*[21]—Town supervisors can only bind the town when acting together and not when acting separately.[22] A single supervisor can only bind the township in a ministerial matter; in any others there must be deliberation, and he cannot delegate his power to fellow supervisors.[23] It is the duty of a township trustee to sign a contract with the bidder, whose bid is approved by the advisory board.[24] Water commissioners[25] or highway commissioners are not agents of the town with authority to bind the town on contracts.[26] The fact that village officers

11. In that case the town may not be liable under a statute for its one-half of a bridge over streams forming boundary lines, but may be liable equitably for its proportion. Town of East Fishkill v. Wappinger, 97 App. Div. 7, 89 N. Y. S. 599. Towns may be jointly liable to construct a bridge, though the stream does not run along the boundary line, but traverses it. In re Towns of Madrid, Waddington, and Louisville, 44 Misc. 431, 90 N. Y. S. 110.

12. V. S. 140, providing for appointment of commissioners by the court to establish the line, was held to only authorize the court to determine the charter boundaries and not one claimed by prescription. Town of Searsburg v. Town of Woodford, 76 Vt. 370, 57 A. 961.

13. See 2 Curr. L. 1878.

14. Railway crossings. Grinnell v. Portage County Com'rs, 6 Ohio C. C. (N. S.) 180.

15. There need be no express authorization, as this is a usual and convenient means of exercising the power. Bennett v. Nebagamon [Wis.] 99 N. W. 1039. See 2 Curr. L. 931; Id., 4 Curr. L. 706.

16. Under a warning of a town meeting to take action on the purchase of land and building a new school house, a vote to buy land and build a school house and to expend a certain sum in addition to what the present building may be sold for, was invalid so far as authorizing the sale of the building, but not as to the rest. Benham v. Potter [Conn.] 58 A. 735. Under a warning of a town meeting "to take action upon the report of the finance committee," the meeting could pass upon the recommendations or change the same. Id.

17. Submission of local option questions required to be submitted annually by statute, together with another question; new election ordered. In re Smith, 44 Misc. 384, 89 N. Y. S. 1006.

18. Street lighting district. Brown v. Street Lighting Dist. No. 1, 70 N. J. Law, 762, 58 A. 339.

19. See 2 Curr. L. 1878.

20. Acts of disseisin and the letting of land by a town have the same effect on the title as the acts of an individual. Murphy v. Com. [Mass.] 73 N. E. 524.

As to sale of land, see City of New York v. Brooklyn & R. B. R. Co., 90 N. Y. S. 695.

21. See 2 Curr. L. 1878.

22. Town held liable on a contract for a road machine which was separately signed by the supervisors, but which after trial and deliberation they had accepted. Austin Mfg. Co. v. Ayr Tp., 24 Pa. Super. Ct. 91.

23. A majority may act after a reasonable deliberation; exchanging road scrapers is not a ministerial matter. Western Wheeled Scraper Co. v. Butler Tp., 24 Pa. Super. Ct. 477.

24. The act did not intend that he should supervise the board, but that the board should supervise him. Lincoln School Tp. of Hendricks County v. Union Trust Co. [Ind. App.] 74 N. E. 272.

25. The statute authorized the establishment of water districts, and the only liability of the town was to raise the money and pay it to the commissioners; this duty may be enforced by mandamus. Holroyd v. Indian Lake [N. Y.] 73 N. E. 35.

26. One was employed to cut brush along the highway at the expense of the town. Wright v. Wilmurt, 44 Misc. 456, 90 N. Y. S. 90. Where road machines are purchased

assist a sheriff in the removal of a smallpox prisoner will not render the village liable for the expenses of quarantine.[27] The burden is on one, seeking to enforce a contract, to show that the township trustee acted within his authority.[28]

§ 5. *Officers and employes.*[29]—Assessors are not town officers or agents in Maine.[30] The term of office of trustees of common which was established by an old colonial patent is not altered by a general law affecting town officers generally.[31] Officers or employes of the town are only entitled to such pay as the town[32] or the legislature authorizes. The latter may in California regulate the compensation on the basis of population, or on a fee basis, but not on both.[33]

The action of township,[34] or village boards is illegal unless the meeting was called in accordance with the statute,[35] as a board can only act as a body and not as individuals.[36] The selectmen may employ a night watchman,[37] but a town board has no authority to convey, or to contract to convey, land of the town.[38]

§ 6. *Fiscal affairs and management and expenses.*[39]—The power to borrow money and the power to secure the payment thereof by the issue of notes are distinct powers,[40] though they may be incidental to other express powers.[41] Supervisors have no power to borrow money and to give a judgment note therefor.[42] County commissioners may be authorized to issue township bonds on the vote of the electors thereof, and any irregularity in their issue may be waived by the payment of interest thereon,[43] unless they were issued in excess of the debt limit as determined by the assessment. Then they are void, notwithstanding irregularities in the assessment.[44] The transference of a township from one county to another

by the commissioners of highways to be paid for out of the highway tax, the town is not primarily liable. Assumpsit will not lie on the contract, but the remedy is mandamus to compel the levy of a tax. Pape v. Benton Tp. [Mich.] 103 N. W. 591.

27. It was a proper county charge. In re Boyce, 43 Misc. 297, 88 N. Y. S. 841.

28. Where warrants were required to be first approved by the county commissioners, a complaint based thereon must allege, and plaintiff must prove, such approval. Mitchelltree School Tp. v. Hall [Ind.] 72 N. E. 641.

29. See 2 Curr. L. 1879.

30. This opinion as expressed in their official valuation is not admissible against the town. Penobscot Chemical Fibre Co. v. Bradley [Me.] 59 A. 83.

31. A patent of 1686 made the term of office one year for the trustees of freeholders and commonalty of the town of Southampton, and Chap. 133 of Law of 1902, providing biennial elections for town officers, did not affect it. Lane v. Tilton, 43 Misc. 214, 88 N. Y. S. 428.

32. The chairman of a building committee not entitled to pay where the town in making the appointment failed to provide for any payment. Beckwith v. Farmington [Conn.] 59 A. 43.

33. Constitutional provision that salaries of county officers might be regulated on a population basis did not exclude township officers; but a provision that justices of the peace in townships of 6,000 population may receive fees up to $140 a month, and that in those of less population they could only receive fees up to $90 a month was unconstitutional as not being regulated in "proportion to duties." Tucker v. Barnum, 144 Cal. 266, 77 P. 919.

34. Two members of board purported to change township line in the absence of the other member and without notice to him of the meeting. Schuman v. Sanderson [Ark.] 83 S. W. 940.

35. Action at a meeting not called in the statutory manner and at an adjourned meeting in ordering a drain was void. Kleimenhagen v. Dixon [Wis.] 100 N. W. 826.

36. But the action of the supervisors as individuals in purchasing a road machine, if subsequently ratified by them after deliberation, is binding. Austin Mfg. Co. v. Ayr Tp., 24 Pa. Super. Ct. 91.

37. Where town voted to raise "$150 to help pay a watchman," it is immaterial whether there was any existing authorization to appoint one. Knowlton v. New Boston, 72 N. H. 590, 58 A. 509.

38. In the absence of statutory authority, or authority from the electors. City of New York v. Brooklyn & R. B. R. Co., 90 N. Y. S. 695.

39. See 2 Curr. L. 1880.

40. So the debt is enforceable against a town, though the note securing it was void because it ran for a longer period than one year. Ford v. Washington Tp., Bergen County [N. J. Law] 58 A. 79.

41. Authority to provide for protection from fire includes authority to borrow and to issue bonds. Bennett v. Nebagamon [Wis.] 99 N. W. 1039. As to bonds generally, see Municipal Bonds, 2 Curr. L. 931; 4 Curr. L. 706.

42. To pay off an ordinary note given for a road grader. Good Roads Machinery Co. v. Old Lycoming Tp., 25 Pa. Super. Ct. 156.

43. Cannot raise objections after 14 years. Rice v. Shealy [S. C.] 50 S. E. 868.

44. Bonds in hands of purchasers in good faith and interest had been paid for many years, and county auditor had made his

does not affect its liability on its bonds.[45] A township is liable on the bonds of its predecessor,[46] though it does not contain all the territory that its predecessor did.[47] In Wisconsin the county collects the delinquent taxes and the county board cannot by resolution balance the accounts without giving the towns an opportunity to be heard.[48] An act establishing a department of finance does not deprive the town of the right to make appropriations other than those proposed by the department.[49] The power to impose a reasonable license on telegraph poles does not allow a tax for revenue.[50] In apportioning the debt on a division, obligations yet unaccrued are excluded,[51] whilst public funds to be divided include those in process of collection.[52]

A town cannot recover from another town the medical expenses of a smallpox patient unless authorized by statute;[53] such statutes have only a prospective operation.[54]

§ 7. *Claims.*[55]—It is frequently required that one having a claim for injuries shall give notice within a certain period of the accident. It is a question for the jury if the notice was received.[56] Before action can be brought on a contract the claim must be presented to the town auditor[57] or the board of town auditors. They may review their action in disallowing a claim.[58] The board of supervisors, where appeal has been made from the board of town auditors, is not required to summon the claimant to appear, but may examine related claims together, and its discretion will not be interfered with when it is reasonably exercised.[59]

§ 8. *Torts.*[59a]—One cannot recover from a town for injuries resulting from confinement in an unhealthy lockup;[60] but one may recover for injuries received

certificate showing that they were not issued in excess of the debt limit. Corbet v. Rocksbury [Minn.] 103 N. W. 11.

45. Planters' & Sav. Bank v. Huiett Tp., 132 F. 627.

46. The boundaries of a township were changed and it was included in another county. Taylor v. Pine Grove Tp., Saluda County, 132 F. 565.

47. A small portion of the territory was left in the old county. Susong v. Cokesbury Tp., Abbeville County, 132 F. 567. See, also, ante, § 1.

48. It is like an open account, and interest only begins to run after a demand has been made by the town. Town of Spooner v. Washburn County [Wis.] 102 N. W. 325. A town supervisor while acting as county commissioner is not a representative of his town to protect its rights against the county. Id.

49. The act provided that the recommendations should be submitted to the annual town meeting. Benham v. Potter [Conn.] 58 A. 735.

50. Tax of 50 cents a pole was bad, as being more than the cost of the company of maintaining the poles, and many times more than the cost of any inspection; further, it was a tax on interstate commerce. Lower Merion Tp. v. Postal Tel. Cable Co., 25 Pa. Super. Ct. 306.

51. A contract to pay annual hydrant rentals is not a "debt then incurred," and the original town cannot collect any proportion of it from the detached town. Town of Vaughn v. Montreal [Wis.] 102 N. W. 561.

52. Rev. St. § 1377, providing for the apportionment of public funds when a township is divided, requires a division of all funds actually in the treasury or in process of collection. State v. Cooley, 2 Ohio N. P. (N. S.) 589.

53. The patient was a resident of an unincorporated town and suit brought against the oldest incorporated adjoining town was held not to be authorized by a statute giving to such town the care of persons needing relief in unincorporated towns. Inhabitants of Machias v. Wesley [Me.] 58 A. 240.

54. May recover for medical attendance on a smallpox patient, but not for services of a policeman in enforcing quarantine, or for supplies furnished to other persons in the quarantined building. City of Haverhill v. Marlborough, 187 Mass. 150, 72 N. E. 943.

55. See 2 Curr. L. 1880.

56. Where the notice was handed to a domestic at the house of a selectman on the evening of the last day, the jury were warranted in finding that it was served in time, although the selectman testified he did not receive it until three days later. McCarthy v. Dedham [Mass.] 74 N. E. 319.

57. Contract made by a highway commissioner to cut brush along the highway. Wright v. Wilmurt, 44 Misc. 456, 90 N. Y. S. 90.

58. Provided they are the same board. In re Weeks, 97 App. Div. 131, 89 N. Y. S. 826.

59. Where they were justified in finding that claims presented for services in making arrests were fraudulent, they were justified in disallowing all, and were not required to sift them and find the few that might have been proper. People v. Board of Sup'rs of Orleans County, 90 N. Y. S. 318.

59a. See 2 Curr. L. 1880, n. 54.

60. The constable acted as agent of the

from its employes engaged in a business occupation.[61] The liability of towns for injuries resulting from defective highways is statutory,[62] and the trustee must have had actual notice of the defect.[63]

§ 9. *Actions by and against.*[64]—Towns may be sued, and where no limitation is imposed it will be presumed that the legislature intended suits might be brought in all cases.[65] Towns may petition court to have its boundaries established,[66] but no taxpayer has the right to contest the severance of certain territory.[67]

TRADE-MARKS AND TRADE-NAMES.

§ 1. Definition, and Words or Symbols Available (1689).
§ 2. Acquisition, Transfer, and Abandonment (1691).
§ 3. Infringement and Unfair Competition (1691).
§ 4. Remedies and Procedure (1694).
§ 5. Statutory Registration, Regulation and Protection (1696).

§ 1. *Definition, and words or symbols available.*[68]—A trade-mark is an arbitrary, distinctive name, symbol or device to indicate or authenticate the origin of the product to which it is attached,[69] and when adopted, becomes the exclusive property of its proprietor.[70] It must be definite,[71] and be designed and used to give notice of origin or ownership;[72] therefore, words primarily descriptive,[73] un-

state and not of the town. Mains v. Inhabitants of Ft. Fairfield [Me.] 59 A. 87.

61. Plaintiff was injured by a blast in a quarry operated by the town for commercial purposes. Duggan v. Inhabitants of Peabody [Mass.] 73 N. E. 206.

62. Evidence insufficient to show that deceased came to his death by reason of an unguarded platform. Wells v. Chazy, 95 App. Div. 618, 88 N. Y. S. 54. Where a horse took fright at a bicycle where there was an unguarded embankment it is error to assume that such frightening was such an extraordinary occurrence as could not be provided against. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624. Aside from statute a town is not liable for injuries resulting from its defective highways. It is only a quasi corporation. Wilson v. Ulysses Tp. of Butler County [Neb.] 101 N. W. 986.

A town is not liable for an accident resulting from failure to keep the entire width of a country road in suitable condition. The road was 50 feet wide with a smooth graveled roadway and culvert 15 feet wide, and plaintiff fell into a ditch at the side. Hammacher v. New Berlin [Wis.] 102 N. W. 489.

A township cannot escape liability for an accident occurring by reason of a defective bridge on the ground that it had no means to repair the bridge. The township had elected to maintain the bridge by the labor of its inhabitants instead of by general taxation, and after Nov. 1st the labor had been performed for the year. Pearl v. Benton Tp. [Mich.] 100 N. W. 188.

At common law an abutter has no claim for damages against a town for the change in the grade of a highway (statute makes them liable in the case of state roads, but the railroad commissioners have no power to determine the matter. Smith v. Boston & A. R. Co., 99 App. Div. 94, 91 N. Y. S. 412), though it diverts surface water onto his land (not decided whether the township would be liable if the surface water had been diverted from a definite channel [Carroll v. Rye Tp. (N. D.) 101 N. W. 894], or for the destruction of trees on a highway. They were alleged to be an incumbrance of the highway [Finucan v. Ramsden, 95 App. Div. 626, 88 N. Y. S. 430]).

63. More than 5 days before the injury; it need not be in writing and actual knowledge is equivalent to notice; knowledge of the injured person is not a bar to recovery as a matter of law. Erie Tp. v. Beamer [Kan.] 79 P. 1070.

The subject is fully treated in **Highways and Streets,** 3 Curr. L. 1593; **Bridges,** 3 Curr. L. 529.

64. See 2 Curr. L. 1880.

65. Town clerk may sue for his per diem allowance for making out the tax lists, though he has not presented his claim to the board of town auditors. Town of Ross v. Collins, 106 Ill. App. 396.

66. Where adjoining towns have failed to agree on a line. Town of Searsburg v. Woodford, 76 Vt. 370, 57 A. 961.

67. The town must prosecute suits in its own name; but the question here involved the right of the township officers to exercise authority over a certain district, and so involved a question of franchise sufficient to confer jurisdiction on the supreme court. People v. Vermilion County, 210 Ill. 209, 71 N. E. 368.

68. See 2 Curr. L. 1881.

69. Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703.

70. Sartor v. Schaden [Iowa] 101 N. W. 511. Every one is presumed to know the right of another to secure the exclusive use of a symbol as a trade-name. Id. The appropriator of a trade-name who establishes a reputation in connection with it acquires a property right in it. Wormser v. Shayne, 111 Ill. App. 556.

71. A registered trade-mark consisting of "a red or other distinctively colored streak applied to or woven in a wire rope" is too indefinite to be sustained as a valid trademark. Leschen & Sons Rope Co. v. Broderick & B. Rope Co. [C. C. A.] 134 F. 571.

72. Color, shape and material of a cigar

less they have acquired a secondary meaning,[74] words which designate quality,[75] elements of mechanical construction essential to the practical operation of a manufacture or which serves to promote its efficiency,[76] or a bare numeral or series of numerals,[77] cannot be appropriated; but arbitrary or fanciful words may be;[78] so also the exclusive use of a geographical[79] or descriptive name may be acquired if it has a secondary significance in connection with a certain line of business.[80] As a general rule the generic name of a thing cannot be appropriated,[81] though expressed in a foreign language;[82] but the inventor of a game, by giving it a distinct name, may obtain a trade-mark in it, though he never copyrights or patents the game;[83] but no other person by making and selling it can.[84] Words originated by another and afterward abandoned may be adopted.[85]

A man may use his own name in any reasonable, honest and fair manner;[86] therefore a personal name cannot be exclusively appropriated as against others who have a right to use it;[87] but if injury would result to another and a fraud be perpetrated on the public,[88] or if one has sold the right to use his name,[89] he may be enjoined from using it, and one who has given his name to a corporation to be used possessively as a popular name may be enjoined from engaging in the same line of business with another corporation of similar corporate and possessive names.[90]

A corporation cannot select and use a name similar to one around which another has built up a trade and reputation,[91] especially where it has been

band held not to constitute a valid trade-mark. Regensburg & Sons v. Portuondo Cigar Mfg. Co., 136 F. 866.

73. Sartor v. Schaden [Iowa] 101 N. W. 511. Size and shape of a confection which is old in use. Heide v. Wallace & Co. [C. C. A.] 135 F. 346. "Licorice Pastilles." Id. Color and size of tobacco tags. Continental Tobacco Co. v. Larus & Bro. Co. [C. C. A.] 133 F. 727. The adoption of "Whirling Spray" as a trade-name does not deprive another of the right to adopt "Whirlspray." Marvel Co. v. Pearl [C. C. A.] 133 F. 160.

74. Use of word "She" on cigar labels enjoined as to a particular locality where the word had acquired a secondary meaning. Sartor v. Schaden [Iowa] 101 N. W. 511.

75. "Toothache gum." Devlin v. McLeod, 135 F. 164; Devlin v. Peek, 135 F. 167.

76. Marvel Co. v. Pearl [C. C. A.] 133 F. 160.

77. Dennison Mfg. Co. v. Scharf Tag, Label & Box Co. [C. C. A.] 135 F. 625.

78. "Eureka." Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561. "Pepto-Mangan." Breitenbach Co. v. Spangenberg, 131 F. 160.

79. "Elgin" in connection with the watch and jewelry trade. Elgin Nat. Watch Co. v. Loveland, 132 F. 41.

80. Where one corporation has built up a trade under a descriptive popular name, another will be enjoined from using that name in the same line of business. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

81. "Flinch" as applied to a game. Chaffee Mfg. Co. v. Selchow, 131 F. 543.

82. "Parcheesi," the name of a Hindoostanee game. Selchow v. Chaffee & S. Mfg. Co., 132 F. 996. The French word "brasslere" cannot be appropriated by a manufacturer of braces. De Bevoise Co. v. H. & W. Co. [N. J. Eq.] 60 A. 407.

83, 84. Chaffee Mfg. Co. v. Selchow, 131 F. 543.

85. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648. One who alleges himself to be the owner of a trade-mark may sustain his ownership by proof of abandonment by the originators and subsequent adoption, though no such facts were alleged. Id.

86. Howe Scale Co. v. Wyckoff, 25 S. Ct. 609. A person may use his own name, although it is used in the same business by a corporation of which he was at one time a leading stockholder, so long as he does not resort to any artifice to palm off his goods as those of the corporation. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

87. Howe Scale Co. v. Wyckoff, 25 S. Ct. 609.

88. The public are entitled to protection from deception by the use of previously appropriated names or symbols. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525. Use of the name "Best & Co." with or without prefixes, also use of term "Liliputian" restrained. Ball v. Best, 135 F. 434. Name upon which a large trade in a certain line of business has been built up. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879. "Coats" in connection with Coates Thread. Coats v. John Coates Thread Co., 135 F. 177.

89. Van Stan's Stratena Co. v. Van Stan, 209 Pa. 564, 58 A. 1064.

90. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

91. International Silver Co. v. Rogers Corp. [N. J. Err. & App.] 60 A. 187. A corporation may be enjoined from using a trade-name lawfully adopted prior thereto by a partnership engaged in a like business at the same place. Nesne v. Sundet [Minn.] 101 N. W. 490. "Landlords' Protective Bureau" confused with "Landlords' Pro-

adopted for the purpose of creating confusion and to enable one to obtain the business of the other.[92] A corporation may not use the name of one of its incorporators where it is the name by which an article made by another dealer is usually called for and described.[93] Incorporation by several members of a voluntary association under the name of such association does not give it an exclusive right to such name as against other members forming another corporation.[94]

The assumption of a corporate name by individuals for the purpose of soliciting business thereunder is forbidden by statute in Illinois.[95]

§ 2. *Acquisition, transfer, and abandonment.*[96]—Trade-names are peculiarly local and may be appropriated by one person in one locality and by another in a different one.[97] Printers who sell uncopyrighted stock labels to manufacturers have no property in the designs sent out by them.[98] The right to use a trade-mark may pass by assignment,[99] but neither trade-marks nor trade-names are property which can be assigned in gross.[1] A purchaser of the good will of a firm acquires the right to use its trade-name, though it does so in such manner as to avoid calling public attention to the successorship,[2] and may not be restrained from doing so by a member of the original firm who sets up an establishment in his own name.[3] Where one's business is sold by an assignee in insolvency, it is presumed unless otherwise shown that the insolvent retains the right to use his trade-mark,[4] and the mere sale of a trade-mark apart from the business in which it is used does not confer on the transferee the right to enjoin its use by another.[5]

A complete disuse of terms appropriated is an abandonment.[6]

§ 3. *Infringement and unfair competition.*[7]—Two trade-marks are the same in legal contemplation if the similarity is such as to deceive an ordinary purchaser giving such attention as such a purchaser usually gives.[8] Although a difference

tective Department." Koebel v. Chicago, Landlords' Protective Bureau, 210 Ill. 176, 71 N. E. 362.

92. International Silver Co. v. Rogers Corp. [N. J. Err. & App.] 60 A. 187. Use of "J. S. Dodge Co." may be enjoined as a fraud of "The Dodge Stationery Company." Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

93. Coats v. John Coates Thread Co., 135 F. 177. A stockholder cannot by becoming a member of a new corporation confer on it a right to adopt a name similar to that used by the former one to palm off the goods of the new as that of the old one. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879. "Rogers," in connection with the cutlery trade. International Silver Co. v. Rodgers Bros. Cutlery Co., 136 F. 1019.

94. Original La Tosca Social Club v. La Tosca Social Club, 23 App. D. C. 96.

95. "Imperial Mfg. Co.—I. Schwartz, proprietor" is such a modification of a name such as usually applied to corporations, as to deceive no one, and is not a violation of the statute. Imperial Mfg. Co. v. Schwartz, 105 Ill. App. 525.

96. See 2 Curr. L. 1883.

97. Sartor v. Schaden [Iowa] 101 N. W. 511.

98. A manufacturer who appropriates a stock label and registers it does not perpetrate a fraud on the printer. Sartor v. Schaden [Iowa] 101 N. W. 511.

99. Assignment in terms, granting assigning and setting over the exclusive use of a certain trade-mark, held to pass the ownership and good will and was not a mere license. Griggs, Cooper & Co. v. Erie Preserving Co., 131 F. 359.

1. Crossman v. Griggs [Mass.] 71 N. E. 560. An instrument given by a creditor to his debtor, undertaking that the debtor would not dispose of his interest in the name or trade-mark of his business without the creditor's consent or until the happening of certain conditions is not an assignment of the trade-mark or name. Id. And though he agreed on the nonperformance of certain conditions to assign to the creditor, it was not an implied assignment. Id.

2. Smith v. Brand & Co. [N. J. Eq.] 58 A. 1029.

3. Brand & Smith sold to another and Smith thereafter set up in business under the name of William Smith & Bro. Smith v. Brand & Co. [N. J. Eq.] 58 A. 1029.

4. Taylor, Jr., & Sons Co. v. Taylor [Ky.] 85 S. W. 1085.

5. Falk v. American West Indies Trading Co. [N. Y.] 73 N. E. 239.

6. Evidence held to show an abandonment. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648.

7. See 2 Curr. L. 1883.

8. Cusimano & Co. v. Olive Oil Importing Co. [La.] 38 So. 200.

Held infringed: "White Label Hunter Whisky, Bottled by," is an infringement of another's exclusive right of trade-mark in the word "Hunter." Lanahan v. Kissel, 135 F. 899.

Held not infringed: Cigar brand held not

may exist, there is an infringement if the general appearance is such as to deceive an unwary purchaser.[9] In order to constitute an infringement, it is not necessary that every word in a trade-mark should be appropriated,[10] nor that the imitation be exact.[11]

Both infringement of a trade-mark and unfair competition are based on the principle that no person has the right to palm off his goods as those of another, but there is a well marked distinction between them. Infringement consists in the use of the genuine, or an exact copy or imitation thereof, upon substituted goods,[12] and constitutes an invasion of the proprietor's property rights[13] while unfair competition does not necessarily involve the exclusive right[14] or proprietary interest of another in the name, symbol or device imitated.[15] A word may be purely generic or descriptive, and yet there be unfair competition in the use of it.[16] The main difference between the cases is in the matter of proof. It being essential in the latter to prove actual deception or conduct calculated to deceive,[17] and competition.[18]

One has no right to palm off his goods as the goods of a competitor,[19] whether misrepresentations are made by word of mouth or by simulating the collocation of details of appearance,[20] or by the use of a particular trade-name,[21] or surname,[22]

infringed by another of same size, shape and color, but containing different lettering. Regensburg & Sons v. Portuondo Cigar Mfg. Co., 136 F. 866. Trade-mark consisting of a fac simile signature and other nonessential terms is not infringed by the use of such nonessential terms by another. Taylor, Jr., & Sons Co. v. Taylor [Ky.] 85 S. W. 1085. Evidence insufficient to show an infringement of a trade-mark in a color device. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561. Trade-mark consisting of a device in colors held not infringed. Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703.

9. Cusimano & Co. v. Olive Oil Importing Co. [La.] 38 So. 200.

10. "Home Comfort" is an infringement on "Home Brand," "Home" being the essential feature. Griggs, Cooper & Co. v. Erie Preserving Co., 131 F. 359. The wrongful use of one of several words. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561.

11. May be infringed by the use in connection with other words. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561.

12. Sartor v. Schaden [Iowa] 101 N. W. 511; Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703.

13. Sartor v. Schaden [Iowa] 101 N. W. 511.

14. Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703.

15. It is sufficient that plaintiff is entitled to the good will of a business and that such good will is injured or is about to be injured by the palming off of the goods of another as his. Dodge Stationery Co. v. Dodge, 146 Cal. 380, 78 P. 879. The simulation of trade or business names is enjoined, not because of a property interest therein, but to prevent fraud and deception. Original La Tosca Social Club v. La Tosca Social Club, 23 App. D. C. 96.

16. Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703.

17. Scriven v. North [C. C. A.] 134 F. 366.

18. The issue of unfair trade in the use of a trade-name does not arise until there is a showing of fraud or deception and unless there is competition. Sartor v. Schaden [Iowa] 101 N. W. 511.

19. International Silver Co. v. Wm. H. Rogers Corp. [N. J. Eq.] 57 A. 1037. Authorities collected and reviewed. A bill alleging that defendants make a preparation similar to one made by plaintiff, which they have given a similar name and have supplied to customers asking for plaintiff's preparation, states a cause of action. Breitenbach & Co. v. Spangenberg, 131 F. 160; Scriven v. North [C. C. A.] 134 F. 366. Where one resorts to the use of an artifice for the purpose of representing his goods as those of a competitor, it is a fraud which may be enjoined. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879.

20. Grinding mills having the characteristic shape, design, color and ornamentation of mills made and sold by another. Enterprise Mfg. Co. v. Landers [C. C. A.] 131 F. 240. Evidence held to show unfair competition in use of boxes, cartons, labels and advertising matter. Bickmore Gall Cure Co. v. Karns [C. C. A.] 134 F. 833. Evidence held to show unfair competition in the marking and dressing of goods. Scriven v. North [C. C. A.] 134 F. 366. One may be restrained from selling electrical platers similar to those of a rival dealer unless he places distinguishing marks upon them. Edison Mfg. Co. v. Gladstone [N. J. Eq.] 68 A. 391. The duplication of disk records for use in talking machines by taking an impression thereof with a matrix, placing the copies on the market colored and marked the same as those of the original manufacturer, is unfair competition. Victor Talking Mach. Co. v. Armstrong, 132 F. 711. Evidence held to show unfair competition in style of packages, labels, size and color of type, etc. Devlin v. Peek, 135 F. 167.

21. Use of "Old Crow" on an inferior brand of whisky held such a fraud on the

or similar names,[23] though the injured party has not an exclusive right to the use of it;[24] but there must be such an imitation as to deceive purchasers into buying the goods of one when they intended to buy those of another,[25] and similarity in form, dimensions or general appearance, especially where such similarity is characteristic of the article,[26] or results from an effort to comply with physical requirements essential to its operation,[27] is insufficient. The use of a trade-name in connection with the genuine article is not unfair competition,[28] nor does it arise out of

public as would be enjoined. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648. The use of the word "Elgin" in connection with a jewelry business by one who had no factory at Elgin, Illinois, but only kept a clerk there to forward letters, is unfair competition. Elgin Nat. Watch Co. v. Loveland, 132 F. 41. One who appropriates a descriptive name simply because it has been used by another and incorporates such other person's name into a corporate name for the sole reason of deceiving the public as to the origin of the goods is guilty of unfair competition. Selchow v. Chaffee & Selchow Mfg. Co., 132 F. 996.

22. International Silver Co. v. Rogers Corp. [N. J. Eq.] 57 A. 1037. One having a right under an implied license to make an article patented by another held not entitled to use such other's name to designate his goods, it being unfair competition, as it was also to imitate his packages. Hygienic Fleeced Underwear Co. v. Way, 133 F. 245. Evidence held to show that the adoption of a word as a part of a corporate name was for the purpose of availing itself of the reputation of another. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561. This rule is the same where a corporation takes or imitates the name of a rival trader. International Silver Co. v. Wm. H. Rogers Corp. [N. J. Eq.] 57 A. 1037. Retail dealer handling cocoa made by Walter Baker & Co. Ltd. and also a brand put up by W. H. Baker. Walter Baker & Co. v. Slack [C. C. A.] 130 F. 514.

23. Van Houten's Cocoa and Hooton's Cocoa. Van Houten v. Hooton Cocoa & Chocolate Co., 130 F. 600. The change of a letter in names which are idem sonans is insufficient to prevent confusion. Insertion of "d" in "Rogers," making it "Rodgers." International Silver Co. v. Rodgers Bros. Cutlery Co., 136 F. 1019.

24. International Silver Co. v. Rogers Corp. [N. J. Err. & App.] 60 A. 187.

25. "Brand & Smith" is not a fraud on "William Smith & Bro." Smith v. Brand & Co. [N. J. Eq.] 58 A. 1029. Evidence held insufficient to entitle one to an injunction restraining the use of a business name. Corbin v. Taussig & Co., 132 F. 662. One using a cigar band similar to that used by another but with no intention to imitate, and where the difference was distinguishable to a person of ordinary intelligence, held not guilty of unfair competition. Regensburg & Sons v. Portuondo Cigar Mfg. Co., 136 F. 866. That one who has used a certain label for several years adopts a different label for an altogether different and competing article, the label being similar to one used by the competitor, does not show unfair competition. Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703. Liquorice Pastilles of the same shape, size and price but embossed with a different letter held not a fraud. Heide v. Wallace & Co., 129 F. 649. The writing of a single letter to a customer of a competitor stating that such competitor is infringing a patent and that any one purchasing from him would be held an infringer is insufficient proof of unfair competition. George Frost Co. v. Kora Co., 136 F. 487. The use of a bare numeral or series of numerals cannot be enjoined on the ground of unfair competition. Dennison Mfg. Co. v. Scharf Tag & Box Co. [C. C. A.] 135 F. 625. That one is a large purchaser as a jobber from a manufacturer does not preclude him from placing on the market a competing article. Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703. Evidence insufficient to show unfair competition in sending out a circular similar to one sent out by a competitor. Id. Labels and cartons compared and held not to show such similarity as to indicate unfair competition. Id.

26. One is not guilty of unfair competition who sells a confection of the same shape and size as that of a rival dealer, but which is dissimilar in coloring and lettering, so that ordinary purchasers would not be deceived. Heide v. Wallace & Co. [C. C. A.] 135 F. 346. Putting up tobacco in a method in common use and putting on it a tag similar in shape and color, but having reading matter different from that used by another, held not unfair competition. Continental Tobacco Co. v. Larus & Bro. Co., 133 F. 727.

27. Marvel Co. v. Pearl [C. C. A.] 133 F. 160.

28. Where one purchased "Le Page's Glue" in bulk, bottled and sold it under its true name with a statement by whom manufactured and by whom bottled. Russia Cement Co. v. Frauenhar [C. C. A.] 133 F. 518.

Note: The principle upon which the law of unfair competition rests has been expressed as follows: "Nobody has any right to represent his goods as the goods of somebody else." Reddaway v. Banham, App. Cas. 199. Such a representation is a fraud both upon the owner of the trade-name and upon the public. Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 34 Law. Ed. 997. So, refilling stamped or labeled packages, bottles or boxes with spurious goods is obviously unfair competition. Samuel Bros. & Co. v. Hostetter Co., 118 F. 257. It is unfair competition to buy wornout articles, revamp them and sell them under the original name (General Elec. Co. v. Re-New Lamp Co., 121 F. 164), or to sell inferior goods of a manufacturer under labels used by him only for articles of a higher grade (Russia Cement Co. v. Katzenstein, 109 F. 314). But these cases all proceed upon the ground either that the public is likely to be deceived or

the use in a corporate name of the surname of an incorporator, where such use by the individual would not be open to that charge.[29] The principles which interdict unfair competition will protect one against the unlawful use of his trade-mark, though used as the name of books, the copyright whereof has expired.[30] The law of unfair competition seeks only to restrain fraudulent practices inducing confusion of goods and deception of the public, and never interferes with fair competition.[31]

Whether a court will enjoin the simulation of a trade-name depends on the circumstances of each particular case,[32] such as whether a confusion of goods put upon the market by the respective parties has been, or is likely to be produced;[33] whether there have been actual sales and mistakes of one product for the other;[34] or whether there is such a similarity that one may be readily mistaken for the other.[35] There is no right of injunction because of mere similarity of names.[36]

An intent to deceive is not essential to relief either in the case of infringement[37] or unfair competition,[38] the probable consequences as distinguished from the motive being the test;[39] but an intent may be presumed from the adoption of a particular word,[40] or from the fact that confusion is likely to arise.[41]

§ 4. *Remedies and procedure.*[42]—In a suit between citizens of the same state for infringement of a trade-mark, the jurisdiction of the Federal court is confined to the trade-mark as registered,[43] and the validity of the mark depends on the registration and not as used.[44] The Federal court has jurisdiction, though the actual value of the mark is not alleged nor that it will be destroyed by defendant's unlawful use of it.[45] A Federal court has no jurisdiction to enforce rights under a state statute relating to trade-marks and their registration, where the transactions complained of occurred outside such state.[46]

A corporation is not an indispensable party in a suit for unfair competition, though the defendants are charged with having fraudulently assumed a corporate name,[47] and one who has no interest in a trade-mark is not a proper party to a proceeding to have it applied in payment of a debt it is pledged to secure.[48]

that the complainant is being defrauded. Hopkins, Unfair Trade, p. 29. Neither of these elements existed in the principal case, and there is no ground for equity's interference. Under similar facts the same result has been reached. Sweezy v. McBriar, 89 Hun [N. Y.] 155, afg. 157 N. Y. 710; Kipling v. G. P. Putnam's Sons, 120 F. 631. See 3 Columbia L. R. 494.—5 Columbia L. R. 63.

29. Howe Scale Co. v. Wyckoff, 25 S. Ct. 609.

30. Books containing the same literary matter. Merriam Co. v. Straus, 136 F. 477.

31. Cole Co. v. American Cement & Oil Co. [C. C. A.] 130 F. 703.

32. Original La Tosca Social Club v. La Tosca Social Club, 23 App. D. C. 96.

33, 34, 35. Sartor v. Schaden [Iowa] 101 N. W. 511.

36. Injury must be shown. Original La Tosca Social Club v. La Tosca Social Club, 23 App. D. C. 96.

37. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561.

38. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879; Van Houten v. Hooton Cocoa & Chocolate Co., 130 F. 600; Van Stan's Stratena Co. v. Van Stan, 209 Pa. 564, 58 A. 1064; International Silver Co. v. Rogers Corp. [N. J. Eq.] 57 A. 1037. A misrepresentation, ignorantly, innocently or mistakenly made, is sufficient. International Silver Co. v. Rogers Corp. [N. J. Eq.] 57 A. 1037. The fact that such name is assumed in good faith and without design to mislead the public or acquire the trade of a competitor is immaterial. Nesne v. Sundet [Minn.] 101 N. W. 490.

39. Nesne v. Sundet [Minn.] 101 N. W. 490.

40. Where a corporation selects as a part of its corporate name a fancy word which has come to distinguish in the trade to the knowledge of the incorporators a certain line of goods, an intent to profit by the competitor's reputation will be presumed. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 60 A. 561.

41. Similarity of package held to entitle one to an injunction restraining its use. Devlin v. McLeod, 135 F. 164.

42. See 2 Curr. L. 1885.

43. Has no jurisdiction of an issue of unfair competition. Leschen & Sons Rope Co. v. Broderick & B. Rope Co. [C. C. A.] 134 F. 571.

44. Leschen & Sons Rope Co. v. Broderick & B. Rope Co. [C. C. A.] 134 F. 571.

45. Griggs, Cooper & Co. v. Erie Preserving Co., 131 F. 359.

46. Rehbein v. Weaver, 133 F. 607.

47. Elgin Nat. Watch Co. v. Loveland, 132 F. 41.

Where the infringement of a trade-mark is of such a character as is calculated to deceive purchasers, the owner need not wait until injury has resulted before seeking relief.[49]

A preliminary injunction will not be granted unless the bill clearly shows the plaintiff to be entitled to the relief sought,[50] especially as against one who is financially responsible,[51] or where it appears doubtful whether complainant would be entitled to any relief.[52]

On the principle that one who comes into a court of equity must come with clean hands, one who has himself been guilty of unfair competition in the use of a trade-name cannot enjoin its use by another;[53] but the fraud must be as to a material matter in order to preclude him.[54]

The denials in a plea to a bill to enjoin unfair competition must fully meet the averments,[55] and defenses which can be raised by denying the statements in the bill should be met by answer, not by plea.[56] The defense of limitations is not available in a suit to enjoin infringement,[57] and one who seeks relief on the ground of unfair competition as soon as simulation is discovered,[58] or the goods come into competition with his,[59] is not guilty of laches, though the other party has used the mark for several years.

For infringement of a trade-mark, relief may be obtained in an action at law for damages or in equity for an injunction and an accounting,[60] and though the extent of the use does not entitle one to an accounting, he may be entitled to restrain further use;[61] and though there has been no infringement and he is not entitled to an injunction and accounting, he may be entitled to recover damages for fraudulent simulation.[62] The use by one of a name similar to that used by another will be enjoined only so far as is necessary to prevent fraud.[63] Defendant in an infringement suit cannot have affirmative relief for unfair competition.[64]

48. Crossman v. Griggs [Mass.] 71 N. E. 560.

49. Lanahan v. Kissel, 135 F. 899. Under an averment that "defendant also intends to make other mills which will be substantially the same as other mills made by the complainant" their sale may be restrained, although there was no proof of any sale of such mills. Enterprise Mfg. Co. v. Landers [C. C. A.] 131 F. 240.

50. Bill held insufficient. Smith Dixon Co. v. Stevens [Md.] 59 A. 401. An affidavit that one has used a word for a long time is too indefinite for judicial action in a suit to enjoin the use of a trade-name. De Bevoise Co. v. H. & W. Co. [N. J. Eq.] 60 A. 407.

51. Evidence held insufficient to entitle complainant to a preliminary injunction against an alleged infringement of a trade-mark by one who was financially responsible. Mueller Mfg. Co. v. McDonaly & M. Mfg. Co., 132 F. 585.

52. Though unfair competition by simulating the dress of another's goods is apparently shown, a preliminary injunction will not issue where it appears that defendant has publicly used the same dress for many years. Von Mumm v. Steinmetz, 137 F. 168.

53. Sartor v. Schaden [Iowa] 101 N. W. 511. One who has wrongfully appropriated the business of a licensee under a patent and prevented him from selling the patented article has no standing to complain of unfair competition because of his sale of a similar article under a like name. Corbin v. Taussig & Co., 132 F. 662.

54. Representation that one was the sole manufacturer when he was not a manufacturer at all, but was a sole representative, held not a material representation. Gluckman v. Strauch, 99 App. Div. 361, 91 N. Y. S. 223. One who registers a trade-mark when he hears that others are about to make use of it, but prior to making an effort to ascertain whether it is in use by another, is not guilty of fraud. Sartor v. Schaden [Iowa] 101 N. W. 511. Misrepresentation that one was a manufacturer of the product held immaterial. Wormser v. Shayne, 111 Ill. App. 556.

55, 56. Merriam Co. v. Strauss, 136 F. 477.

57. Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648.

58. Devlin v. McLeod, 135 F. 164; Gaines & Co. v. Whyte Grocery, Fruit & Wine Co. [Mo. App.] 81 S. W. 648.

59. Sartor v. Schaden [Iowa] 101 N. W. 511.

60. In an action for infringement, plaintiff may be required to elect. Taylor, Jr., & Sons Co. v. Taylor [Ky.] 85 S. W. 1085.

61. Devlin v. McLeod, 135 F. 164.

62. Taylor, Jr., & Sons v. Taylor [Ky.] 85 S. W. 1085.

63. Only in the business in which both are engaged and not in another. Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879. In a suit for unfair competition in the fraudulent use of a trade-name, a Federal court

Where one has deliberately engaged in unfair trade, he is liable in damages and for profits from the time he violated the rights of others.[65] The amount of damages sustained must be proven.[66] In determining profits the expense of making sales must be deducted from gross profits.[67] Where a statute makes infringement criminal and leaves the quantum of damages largely in the discretion of the court, the court is not restricted to the actual damages proven.[68]

One who disobeys an injunction restraining the use of a trade-name is guilty of contempt.[69] Proceedings for contempt for violation of an injunction enjoining infringement are civil.[70]

§ 5. *Statutory registration, regulation and protection.*[71]—The copyright laws of the United States do not apply to trade-marks.[72] The re-using of registered bottles is criminal in some states.[73] In New York by statute it is a misdemeanor to simulate a partnership or corporation name,[74] or for one to have in his possession or sell counterfeit trade-marks.[75] Where two act in concert in the commission of the offense, they may be tried together,[76] and declarations of one in the absence of the other are admissible against both.[77]

TRADE SECRETS, see latest topical index.

TRADE UNIONS.[78]

§ 1. Nature of the Union (1696).
§ 2. The Union and the Public (1697).
§ 3. The Union and Its Members (1697).
§ 4. Members and the Union (1697).

§ 1. *Nature of the union.*[79]—An unincorporated trade union is not a business association within the meaning of statutes permitting the latter associations to sue and be sued in the association name.[80] It has been held that a union may be fined for contempt of court.[81]

cannot enjoin the completion of the organization of a corporation under the same name, which has been duly authorized by the laws of another state and is also authorized to do other kinds of business. Elgin Nat. Watch Co. v. Loveland, 132 F. 41.

64. George Frost Co. v. Kora Co., 136 F. 487.

65. Walter Baker & Co. v. Slack [C. C. A.] 130 F. 514.

66. In contempt proceedings for violating an injunction enjoining the infringement of a trade-mark, proof of the amount of profits made by defendant on the sales is not proof that the plaintiff was damaged in such sum. Davidson v. Munsey [Utah] 80 P. 743.

67. Walter Baker & Co. v. Slack [C. C. A.] 130 F. 514.

68. Under Act No. 49, p. 56 of 1898, damages beyond the pecuniary loss established may be awarded. Cusimano & Co. v. Olive Oil Importing Co. [La.] 38 So. 200.

69. Janney v. Pan-Coast Ventilator & Mfg. Co., 131 F. 143.

70. Mode of procedure is the same as in civil cases. Davidson v. Munsey [Utah] 80 P. 743.

71. See 2 Curr. L. 1887.

72. Wormser v. Shayne, 111 Ill. App. 556.

73. Rev. Laws, c. 72, §§ 16, 17, relative to using registered beverage bottles of another manufacturer. Commonwealth v. Anselvich [Mass.] 71 N. E. 790. Rev. Laws, c. 72, §§ 16, 17, making it a misdemeanor to use, deface or traffic in registered beverage bottles of another manufacturer, is not class legislation or otherwise unconstitutional. Id.

74. McArdle v. Thames Iron Works, 96 App. Div. 139, 89 N. Y. S. 485.

75. Pen. Code, § 364. People v. Strauss, 94 App. Div. 453, 88 N. Y. S. 40.

76. People v. Strauss, 94 App. Div. 453, 88 N. Y. S. 40. Corroborating evidence held sufficient. Id.

77. People v. Strauss, 94 App. Div. 453, 88 N. Y. S. 40.

78. **This article deals** only with the trade union as an organization; the legality of its acts and those of its members in carrying out the purposes of the organization are treated elsewhere. See Conspiracy, 3 Curr. L. 726; Constitutional Law, 3 Curr. L. 730; Injunction, 4 Curr. L. 96; Master and Servant, 4 Curr. L. 533; Threats, 4 Curr. L. 1679. Compare Building and Construction Contracts (impossibility of performance) 3 Curr. L. 550.

79. See 2 Curr. L. 1888.

80. Gen. St. 1894, § 5177, considered. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725. See Associations and Societies, 3 Curr. L. 346.

Note: The rule is otherwise if the association insures its members. Taylor v. Order Ry. Conductors, 89 Minn. 222, 94 N. W. 684.

81. **Note:** Franklin Union, No. 4, an incorporated union of employes, was before the court to show cause why it should not be punished for contempt for violation of an injunction. The bill had charged that the union and its officers had conspired unlawfully to obstruct and interfere with the business of Chicago Typothetae, a voluntary association of employers engaged in publish-

§ 2. *The union and the public.*[82]—Closed shop agreements are void.[83]

§ 3. *The union and its members.*[84]—The members of an unincorporated trade union are liable for a breach of a contract made for them by the association, if liable at all, on the law of principal and agent, and must be proceeded against individually.[85] A union may refuse to allow its members to work with members of a rival union, and may strike or threaten to strike if the latter are not discharged.[86]

§ 4. *Members and the union.*[87]—The duty of deciding questions referred from different districts does not constitute a board of directors a tribunal to settle the grievances of individual members.[88]

TRADING STAMPS; TRANSFER OF CAUSES; TRANSITORY ACTIONS, see latest topical index.

TREATIES.[89]

A supplemental article not appended to a treaty until after it is signed cannot be referred to to explain the preceding articles.[90] A treaty provision limiting the duty upon foreign vessels to those paid by vessels of the United States in the same ports refers only to United States vessels engaged in foreign trade.[91]

ing and printing, and prayed for an injunction restraining any unlawful interference with their business or employes. The injunction was granted to the above effect, and specifically forbade picketing and other forms of unlawful persuasion. Subsequently many employes of the plaintiff were assaulted and intimidated by members, committeemen and officers of the union. One of the worst aggressors was defended by the union's attorney, and strike benefits were paid with the union's money, with no discrimination against members known to be guilty of criminal acts. Held, the evidence established the union as a co-conspirator with its offending members, privy to violations of the injunction, and therefore guilty of violation, and amenable to discipline. Respondent union was fined $1,000. People v. Franklin Union, No. 4, 36 Chicago Leg. N. 237; No. 51 Bulletin of Bureau of Labor.

This seems to be the only case reported in this country in which a fine has been imposed upon a labor union, probably because few of them are incorporated. The primary question for solution was, whether Franklin Union, No. 4, was so connected with violations of the injunction by its members as to make it a party to such violations. The evidence conclusively shows that all the overt acts proven were planned at union headquarters and directed by and with the consent of its officers. The record book and stub check book of the union were destroyed to prevent their use in evidence, and therefore every presumption of fact and conclusion reasonably deducible therefrom is to be indulged against them. Stock Exchange v. Board of Trade, 196 Ill. 407. A combination to injure a man by preventing him from carrying on his business is unlawful. Doremus v. Hannessy, 176 Ill. 608, 68 Am. St. Rep. 203. Conspiracy once established, each conspirator becomes responsible for the means used by any conspirator in accomplishing the common purpose. Lasher v. Litell. 202 Ill. 551. The responsibility of defendant was sought to be avoided on the ground that it had surrendered its charter on the day the relators filed their petition for the rule. The union was, however, amenable for all liabilities prior to dissolution. Singer v. Hutchinson, 176 Ill. 48.—From 3 Michigan L. R. 80.

82. See 2 Curr. L. 1888.

83. In an action on a promissory note given as security for the performance of an agreement between a labor union and an employer, whereby the latter was bound not to engage labor other than members of the union and to discharge all nonunion men, it was held that the unlawful character of such a contract is a good defense. Jacobs v. Cohen, 90 N. Y. S. 854. A nonunion man sought an injunction to restrain his employer from discharging, under a contract with a labor union, employes who refused to join such union. Held, an employe has no right to retention as will entitle him to interfere with the master's right to discharge. Mills v. U. S. Printing Co., 91 N. Y. S. 185.

Note: See 5 Columbia L. R. p. 239. See, also, Contracts, 3 Curr. L. 805.

84. See 2 Curr. L. 1889.

85. St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37 [Minn.] 102 N. W. 725.

86. National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369. See, also, Wunch v. Shankland, 59 App. Div. 482, 69 N. Y. S. 349. Neither the men discharged nor their unions have any right of action against the rival unions or its members, provided no force is employed nor any unlawful act committed. Id.

87. See 2 Curr. L. 1889.

88. Moeller v. Machine Printers' Beneficial Ass'n [R. I.] 60 A. 591. Hence it is not necessary for members unlawfully suspended from the union to submit their claims to the directors before applying to the court for relief. Id.

89. Treaty provisions designed to regulate the rights and status of aliens (see Aliens, 3 Curr. L. 138) and of neutrals and belligerents (see War, 2 Curr. L. 2025; 4 Curr. L. ——) are excluded.

90. Ship Tom, 39 Ct. Cl. 290.

91. Is not violated by an exemption of

The provision of the Spanish treaty of 1899, referring to property and rights of individuals, applies to the property and rights of Spanish subjects in Cuba under Spanish law at the time.[92]

Indian treaties.[93]—Where a restriction upon the exercise of the power of taxation by a recognized government is claimed under the stipulations of a treaty with another, whether the former be dependent upon the latter or not, its existence ought to appear beyond a reasonable doubt.[94] The rights and status of Indians under the several Indian treaties are fully discussed in "Indians."[95]

TRESPASS.

§ 1. Acts Constituting Trespass and Right of Action Therefor (1698).
§ 2. Actions (1701).
A. At Law (1701).
B. In Equity (1703).
§ 3. Damages and Penalties (1704).
§ 4. Criminal Liability (1706).
§ 5. Trespass to Try Title (1706).

§ 1. *Acts constituting trespass and right of action therefor.*[1]—The term "trespass" generally involves the idea of force, yet in its broadest sense it comprehends any misfeasance, transgression, or offense which damages another's person, health, reputation or property.[2] Trespass to property is an interference with one's possessory rights,[3] even though such possession is wrongful.[4] An interference with the possession of lessee is an interference with the possession of the lessor.[5] The question of title is immaterial,[6] therefore the tort may be committed by the owner of the fee[7] or chattel.[8] The motive[9] or intent[10] of the tres-

coastwise steam vessels of the United States from pilotage. Olsen v. Smith, 25 S. Ct. 52.

92. O'Reilly De Camara v. Brooke, 135 F. 384. The United States Governor General could not take the right to slaughter cattle pertaining to the hereditary office of "Alguacil Mayor of Havana" from the holder of such office without paying for the same. Such right, though exclusive, being valid and a property right under Spanish law. Id.

93. See 2 Curr. L. 1890. See, also, Indians, 3 Curr. L. 1706.

94. Morris v. Hitchcock, 21 App. D. C. 565. No restriction upon the taxing power of the Chickasaw Nation is contained in the clause of art. 7 of the Treaty of 1855, which excepts white persons from the jurisdiction of such nation. Id.

95. See 3 Curr. L. 1706.

1. See 2 Curr. L. 1891.

2. Libel is a trespass. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

3. City unlawfully constructing a walk on the land of an abutting owner. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142. Ore and rocks thrown upon adjacent premises by blasting. Herron v. Jones & Laughlin Co., 23 Pa. Super. Ct. 226. An allegation of ownership of an estate in land and that defendant drove a large band of sheep upon it and depastured it, states a cause of action. Minter v. Gose [Wyo.] 78 P. 948. In trespass quare clausum, evidence held insufficient to warrant the direction of a verdict for the plaintiff. Davis v. Poland [Me.] 59 A. 520. Evidence held to show that the land trespassed upon was not a part of the public highway. Jeppson v. Almquist [Minn.] 103 N. W. 10. Constable breaking into the room of a boarder at the instance of the lessor is a trespasser. Oliver v. Wheeler, 26 Pa. Super. Ct. 5. If an owner is annoyed in his possession, he may maintain trespass. Bossier's Heirs v. Jackson [La.] 38 So. 525. Whether the defendant committed the trespass complained of held a question for the jury. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665. In trespass quare clausum, possession by plaintiff entitles him to judgment unless the defendant shows a better right of possession. Jenkins v. Palmer, 72 N. H. 592, 58 A. 42. While a lessee was incarcerated in jail, the premises were sold under partition decree and the purchaser forcibly entered. Schwartz v. McQuaid [Ill.] 73 N. E. 582.

4. Where the rights of a lessee in possession have not been adjudicated, the owner may not forcibly enter, though the possession is wrongful. Schwartz v. McQuaid [Ill.] 73 N. E. 582.

5. Bright v. Bell, 113 La. 1078, 37 So. 976. The possession of a tenant may be shown where the possession of the landlord is involved. Vanderslice v. Donner, 26 Pa. Super. Ct. 319.

6. Where the jury found that no trespass had been committed, it was error to adjudicate the question of title. Roper Lumber Co. v. Elizabeth City Lumber Co., 135 N. C. 742, 47 S. E. 757. Where a statute forbids an invasion with force and strong hand, title and right to possession are not involved. Giffin v. Martel [Vt.] 58 A. 788. It is sufficient if the plaintiff shows that he was in actual, and so far as defendant is concerned, lawful possession at the time of the trespass. Davis v. Alexander [Me.] 58 A. 55.

7. The owner of the fee entering during the continuance of the right of possession of a tenant is a trespasser. Hayward v. School Dist. No. 9 of Hope Tp. [Mich.] 102 N. W. 999. The owner of the fee may trespass against one in possession. Tustin v. Sam-

passer is immaterial. A trespass may be aggravated by the manner in which it is committed.[11]

In trespass to lands there must be an entry[12] and an interference with possession,[13] and mere negligence is not a trespass.[14] Any entry on the premises of another without a license express or implied is a trespass;[15] but one who enters under a license is not a trespasser unless he does something not incident to the right granted or exercises such right in a negligent manner.[16] The license must be obtained from one with authority to grant it.[17] A license to do a particular thing carries with it by implication the right to do those things necessary to be done in order to avail the licensee of his rights under the license.[18] Whether this implied license has been exceeded may be a question for the jury.[19] An entry otherwise lawful may become a trespass if made with an unlawful purpose,[20] or if a license is exceeded.[21] The entry of a tenant after the expiration of his lease is a trespass,[22] unless he has a right to make such entry;[23] but the en-

mons, 23 Pa. Super. Ct. 175. Where entry is made by force and strong hand, those making it have no right in order to remain, to assault the person in possession. Giffin v. Martel [Vt.] 58 A. 788.

8. A bailor who unlawfully takes possession from the bailee. Boyd v. McArthur, 120 Ga. 974, 48 S. E. 358.

9. Street commissioners making an unlawful entry to improve the appearance of a hedge. Bright v. Bell, 113 La. 1078, 37 So. 976.

10. An entry by mistake by one's servants without his consent. Mishler Lumber Co. v. Cralg [Mo. App.] 87 S. W. 41. One who enters on land of another not knowing whether he has a right to do so or not is a trespasser. Sanders v. Ditch, 110 La. 884, 34 So. 860.

11. A master who after discharging a servant, forcibly removes and destroys her furniture, is guilty of a wanton trespass. Behm v. Damm, 91 N. Y. S. 735. A trespasser though acting in honest belief as to his rights may be so grossly negligent in ascertaining them that his attempt to make good his claim by force will amount to a wanton trespass. Beaudrot v. Southern R. Co. [S. C.] 48 S. E. 106.

12. It is not a trespass to cut off branches of trees that protrude over the line. Bright v. New Orleans R. Co. [La.] 38 So. 494.

13. A son living with his father is not in possession of his father's property, and a taking of it is not an interference with his possession. Saenz v. Mumme & Co. [Tex. Civ. App.] 85 S. W. 59.

14. Negligence of a plumber acting under a permit from a city in opening a street, which resulted in cutting off an adjacent owner's water supply, is not a trespass. Rice v. Hogan, 90 N. Y. S. 395.

15. One in building a line fence cut branches off trees standing on his neighbor's land. Newberry v. Bunda [Mich.] 100 N. W. 277. The rule as to what must appear to relieve a person from the imputation of being a trespasser when doing an act in a public street is "When conditions are annexed to a license substantial compliance therewith is essential; but consent and compliance relieve the owner from the imputation of trespassing in doing the act consented to and place him in a position of one liable for negligence only." Sanford v. White, 132 F. 531. See, also, Babbage v. Powers, 130 N. Y. 281, 14 L. R. A. 398.

16. Granger v. Postal Tel. Co. [S. C.] 50 S. E. 193. No evidence that permit to enter had been fraudulently procured or that the license granted had been exceeded. Mason v. Postal Tel. Cable Co. [S. C.] 50 S. E. 782. A recovery in trespass for using a way for the benefit of one tract of land does not estop the defendant from asserting a right to use it for the benefit of another tract. Norman v. Sylvia [R. I.] 59 A. 112. A right in a lease to cut timber for certain purposes held not to give a right to cut for other purposes. Lewis v. Virginia-Carolina Chemical Co. [S. C.] 48 S. E. 280. Evidence as to whether a permit had been fraudulently procured held to raise a question of fact. Burnett v. Postal Tel. Cable Co. [S. C.] 50 S. E. 780.

17. Permit to enter from one who has no title or right to possession is no justification. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

18. License to build a line fence carries a right to cut branches from trees standing near the line. Newberry v. Bunda [Mich.] 100 N. W. 277.

19. Whether it was necessary to cut off certain branches from trees in order to build a line fence. Newberry v. Bunda [Mich.] 100 N. W. 277. Evidence as to whether a person could sight along a line without cutting certain branches from trees is material. Newberry v. Bunda [Mich.] 100 N. W. 277; Purnett v. Postal Tel. Cable Co. [S. C.] 50 S. E. 780.

20. Where defendant went to plaintiff's house for the purpose of having sexual intercourse with a female boarder and was admitted by her, he was a trespasser. Watson v. Dilts, 124 Iowa, 344, 100 N. W. 50.

21. A railroad company which enters under color of condemnation proceedings and makes excavations, etc., becomes a trespasser ab initio when it subsequently dismisses the proceedings and abandons its claim of right of way. Enid, etc., R. Co. v. Wiley, 14 Okl. 310, 78 P. 96.

22. Kenney v. Apley [Mich.] 102 N. W. 854.

23. Where a school district erects a school house on leased land and the tenancy terminates on a contingency, entry to remove the

try of one entitled to possession is not,[24] and it has been held that an entry by one non sui juris is not.[25]

One may resist a trespass whether the motive in so doing be good or bad.[26]

In many of the western states the owner of cattle is not liable for a trespass committed by them unless they have broken through a sufficient fence.[27]

It is a trespass to the person[28] to commit any assault or battery upon him,[29] as, to set in motion a force which comes in contact with another,[30] or to use unnecessary force where a reasonable degree is justifiable.[31]

Right of entry and other matters in justification.[32]—A license to a third person to enter is no justification to a trespasser,[33] and a trespasser who sets up an outstanding title in a stranger is entitled to no particular consideration;[34] he must prove such title and that he rightfully entered under it.[35] A plaintiff's failure to obey an injunction is no justification.[36] A judgment of a court, void for want of jurisdiction, will not justify a trespass committed under it, even though the writ issuing on such judgment be regular on its face;[37] otherwise if the court had jurisdiction.[38] An entry by a public officer pursuant to authority from the state does not render him liable in trespass.[39] Special grounds of justification must be specially pleaded.[40]

Parties in the tort.[41]—All who co-operate in a trespass are jointly liable.[42] A principal is not liable for a trespass committed by an independent contractor;[43] nor are members of a board of street commissioners who do not concur in or

house may be made within a reasonable time. Hayward v. School Dist. No. 9 of Hope Tp. [Mich.] 102 N. W. 999. Entry within five days after happening of the contingency is within a reasonable time. Id.

24. Landlord making entry after expiration of lease. Dickson v. Wood, 209 Pa. 345, 58 A. 668.

25. A child of tender years who reaches across a line and comes in contact with a live wire. Lynchburg Tel. Co. v. Bokker [Va.] 50 S. E. 148.

26. Slingerland v. Gillespie [N. J. Err. & App.] 59 A. 162.

Note: Life cannot be taken in order to prevent the commission of a mere trespass (Oliver v. State, 17 Ala. 587; Davidson v. People, 90 Ill. 221), and a person should not in defense of his property resort to means calculated to endanger life (State v. Dooley, 121 Mo. 591), and if life be taken for this purpose, it is murder (Harrison v. State, 24 Ala. 67, 60 Am. Dec. 450; State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714; State v. Hoyt, 13 Minn. 132; Carpenter v. State, 62 Ark. 286). If, however, the trespass amounts to a felony, the killing is justified (Crawford v. State, 90 Ga. 701, 35 Am. St. Rep. 242; Pond v. State, 8 Mich. 150; Ledbetter v. State, 26 Tex. App. 22).—From note to Morrison v. Com. [Ky.] 67 L. R. A. 538.

27. Where goats went through a fence that was not goat proof, evidence held insufficient to show a trespass under the laws of Texas. Wilson v. Caffall [Tex. Civ. App.] 83 S. W. 726.

28. See 2 Curr. L. 1892.

29. See Assault and Battery, 3 Curr. L. 319.

30. A contractor who in constructing an underground railway injures a pedestrian on the street by a blast which throws a stone against him, is a trespasser. Turner v. Degnon-McLean Contracting Co., 90 N. Y. S. 948.

31. Though a passenger is subject to ejection, it is a trespass to use unnecessary force or eject him while the train is in motion. Chicago, etc., R. Co. v. Stratton, 111 Ill. App. 142.

32. See 2 Curr. L. 1894.

33. Defendant cannot show an agreement between plaintiff and a third person as to a right of way. Beaudrot v. Southern R. Co. [S. C.] 48 S. E. 106.

34. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

35. Love v. Turner [S. C.] 51 S. E. 101.

36. Ejection of enjoined defendant and his goods. McAllin v. McAllin [Conn.] 59 A. 413.

37. Bradford v. Boozer, 139 Ala. 502, 36 So. 716.

38. Where timber is cut pursuant to an order of court and the proceeds paid into court to await its judgment, there can be no recovery in damages. Chenault v. Quisenberry, 26 Ky. L. R. 462, 81 S. W. 690.

39. State engineer acting under Laws 1902, p. 1125, c. 473. Litchfield v. Bond, 93 N. Y. S. 1016.

40. A writ of replevin is not available as a defense where justification on that ground is not specially pleaded. Giffin v. Martel [Vt.] 58 A. 788.

41. See 2 Curr. L. 1892.

42. In trespass for taking mules, one pointing them out and, if he acted as agent for another, both he and his principal are liable. Fulgham v. Carter [Ala.] 37 So. 932. Liable in solido for compensatory and punitive damages. Bright v. Bell, 113 La. 1078, 37 So. 976.

43. Korn v. Weir, 88 N. Y. S. 976.

ratify a trespass committed by others.[44] The purchase price of goods taken may be recovered from a purchaser with notice.[45]

§ 2. *Actions. A. At law.*[46]*—Title,*[47] *or possession,*[48] actual or constructive,[49] is essential to the maintenance of the action, and such possession must be more than a mere intrusion on the actual or constructive possession of another.[50] If the land entered is wild, possession is presumed to accompany the title, and this constructive possession will support the action;[51] but if it is improved, that fact shows possession by some one, and plaintiff cannot rest on his title but must show possession.[52]

Trespass is the appropriate remedy either to recover damages for mere unlawful entry,[53] to recover the value of trees removed, considered separately from the value of the land,[54] or to recover damages to the land resulting from the special value of the trees as shade or ornamental trees.[55] The owner of the legal title may maintain trespass for an interference with his rights when he had only an equitable interest.[56] Successive actions may be maintained for a continuing trespass.[57]

An owner in his own right of land enclosed with that of others need not join the others in an action for damages for trespass.[58] Where the injury affects merely the present enjoyment, a tenant may sue.[59]

An action in replevin to recover the property taken is a bar to trespass for the wrongful taking.[60] Counts in trespass and trover are properly joined.[61]

44. Bright v. Bell, 113 La. 1078, 37 So. 976.

45. Where a trespasser sells logs to a purchaser with notice, the owner's failure to set up title in an action by the trespasser for the price is no defense to his right to recover their value from the purchaser. Jones Lumber Co. v. Gatliff, 26 Ky. L. R. 616, 82 S. W. 295.

46. See 2 Curr. L. 1895.

47. See 2 Curr. L. 1893. Complaint showing no title or right to possession does not state a cause of action. Lomax v. Phillips, 113 La. 850, 37 So. 777. Evidence held to show sufficient title in plaintiff to recover for a trespass. Restetsky v. Delmar Ave. & C. R. Co. [Mo. App.] 85 S. W. 665. In an action for injuries to property where plaintiff failed to show any interest in the property, a verdict in his favor cannot be sustained. Georgia R. & Elec. Co. v. Knight [Ga.] 50 S. E. 124. A deed to himself from a person not appearing to have had title or possession is insufficient proof of title. Rollins v. Atlantic City R. Co., 70 N. J. Law, 664, 58 A. 344.

48. See 2 Curr. L. 1893. Vanderslice v. Donner, 26 Pa. Super. Ct. 319. One lawfully in possession may maintain trespass. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490. Possession under claim of ownership being prima facie evidence of title, the occupant may maintain trespass against a wrong doer. Southern R. Co. v. Horine, 121 Ga. 386, 49 S. E. 285.

49. To entitle one to maintain trespass quare clausum. Hayward v. School Dist. No. 9 of Hope Tp. [Mich.] 102 N. W. 999; Tustin v. Sammons, 23 Pa. Super. Ct. 175.

50. Vanderslice v. Donner, 26 Pa. Super. Ct. 319.

51, 52. Tustin v. Sammons, 23 Pa. Super. Ct. 175.

53, 54. Eldridge v. Gorman [Conn.] 60 A. 643.

NOTE. As applied to fixtures, trespass de bonis will lie for the carrying of them away after severance. Wadleigh v. Janvrin, 41 N. H. 503, 77 Am. Dec. 780; Ricker v. Kelly, 1 Me. 117, 10 Am. Dec. 38. The owner may elect to treat the articles severed as personalty and maintain de bonis, or he may sue in quare clausum for damages to the realty. Gardner v. Finley, 19 Barb. [N. Y.] 317; Barnes v. Burt, 38 Conn. 541. To maintain the action, the party in whom the property right is vested need not be in actual possession at the time of the severance. Van Brunt v. Schenck, 11 Johns. [N. Y.] 377. Thus the owner of land in possession of a tenant may maintain de bonis against a stranger (Buckley v. Dolbeare, 7 Conn. 232; Ward v. Andrews, 2 Chit. 636), and a landlord may maintain it against his tenant for a removal during his term (Schermerhorn v. Buell, 4 Denio [N. Y.] 422). A tenant may maintain this form of action against a tort feasor for the asportation of a subtenant's fixtures (Miller v. Baker, 1 Metc. [Mass.] 27), and it has been held that the tenant may maintain the action as against a wrong doer even though he has no right of removal of the fixtures severed (Hitchman v. Walton, 4 Mees. & W. 409).—From Bronson, Fixtures, § 108.

55. Eldridge v. Gorman [Conn.] 60 A. 643.

56. Trespass committed on public land after filing thereon by a homestead entryman and prior to patent issued. Gilbert v. McDonald [Minn.] 102 N. W. 712.

57. Injuries to abutting owner resulting from operation of a railroad. Becker v. Lebanon & M. St. R. Co., 25 Pa. Super. Ct. 367.

58. Adair v. Witherspoon [Tex. Civ. App.] 86 S. W. 926.

59. City of Clinton v. Franklin, 26 Ky. L. R. 1053, 83 S. W. 142.

60. Palmer v. People, 111 Ill. App. 381.

Any error in the joinder as a matter of pleading is waived by failure to object to it on that ground.[62]

Where either trespass or case may be maintained, there is no variance between a writ stating an action in trespass and a declaration sounding in case.[63]

Joint trespassers are not entitled to separate trials as a matter of law.[64] A satisfaction by one joint trespasser is a bar to proceedings against the others.[65]

Pleading, issues and proof.[66]—A complaint must allege all circumstances necessary for the support of the action.[67] In quare clausum it should describe the land, allege title (lawful possession) in the plaintiff, and designate the particular wrong or injury, but need not recite plaintiff's chain of title.[68] An amendment that goes to the form of assertion of a right rather than to the substance of the right itself does not state a different cause of action.[69]

A complaint in trespass vie et armis need not allege evidentiary facts.[70]

A prayer for the recovery of personal property taken sounds in trover not in trespass.[71]

The right to possession is the only issue.[72]

Where, in an action for a statutory penalty, there were facts authorizing a recovery, an affirmative charge for defendant should not be given.[73]

In a verdict for possession and damages, the portion as to possession is surplusage and may be rejected.[74]

Evidence.[75]—A plaintiff claiming title by adverse possession has the burden of proving it.[76] All evidence tending to show the trespass is admissible.[77] There is some presumption that the real owner is in possession, therefore the admission of title deeds is not necessarily an error.[78] Where one acts as agent for

61, 62. Meloon v. Read [N. H.] 59 A. 946.

63. Action under Laws 1896, p. 373, c. 111, § 3, providing that one bitten by a dog may recover in either trespass or case. Barlow v. Tierney [R. I.] 59 A. 930. Any variance is amendable. Id.

64. Meloon v. Read [N. H.] 59 A. 946.

65. One who brings separate actions against joint trespassers and accepts satisfaction of a judgment recovered against one before the trial of the case against the other, voluntarily abandons his demand against the latter. Western Coal & Min. Co. v. Petty [C. C. A.] 132 F. 603.

66. See 2 Curr. L. 1895.

67. The time when the trespass occurred. Warren v. Powell [Ga.] 49 S. E. 730. Complaint for cutting timber on school land held too vague to call for an answer. Adams v. Griffin [Miss.] 37 So. 457. An allegation that defendants unlawfully caused a large band of sheep to be taken on plaintiff's land and kept them there until the land was depastured states but a single cause of action. Minter v. Gose [Wyo.] 78 P. 948.

68. Gray v. Peay, 26 Ky. L. R. 989, 82 S. W. 1006.

69. Complaint under a statute amended by alleging threatened irreparable damage and insolvency. Swindell & Co. v. Saddler [Ga.] 49 S. E. 753.

70. Such as existence of the relation of passenger and carrier. Haggerty v. Potter, 111 Ill. App. 433.

71. For the recovery of the possession of one steer this day forcibly taken and detained, of the value of, etc. Vinson v. Knight [N. C.] 49 S. E. 891.

72. The question as to which shall prevail in a contest for title of a mining claim to which neither party had a perfect right of conveyance from the government is not in issue. Columbia Copper Min. Co. v. Duchess Min., Mill. & Smelting Co. [Wyo.] 79 P. 385. Submission of an issue as to whether certain lands described in the complaint had been trespassed upon held proper. Roper Lumber Co. v. Elizabeth City Lumber Co., 135 N. C. 742, 47 S. E. 757.

73. Bradford v. Boozer, 139 Ala. 502, 36 So. 716.

74. Love v. Turner [S. C.] 51 S. E. 101.

75. See 2 Curr. L. 1897.

76. Monk v. Wilmington [N. C.] 49 S. E. 345. A confession of a trespass entitles plaintiff to judgment. Norman v. Sylvia [R. I.] 59 A. 112.

77. In an action for damages for cutting trees, evidence held immaterial. Hathaway v. Goslant [Vt.] 59 A. 835.

Immaterial evidence: In trespass for breaking and entering premises, evidence that the building was in a delapidated condition. Schwartz v. McQuaid [Ill.] 73 N. E. 582. In trespass for taking mules, the fact that plaintiff's vendor had stolen them. Fulgham v. Carter [Ala.] 37 So. 932. Rejected evidence held not shown to have been material. Hathaway v. Goslant [Vt.] 59 A. 835.

78. Davis v. Alexander [Me.] 58 A. 55. Deed held admissible as against a trespasser without color of title. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

another in committing a trespass, all evidence tending to show his agency is admissible.[70] Where a cause is referred to a referee, evidence of a trespass on a different part of plaintiff's close than that described in his pleadings is admissible.[80] In trespass de bonis, evidence of the cost of the goods is admissible in proof of their value,[81] but the question of conversion is immaterial.[82] A defendant in possession may show title under a plea of not guilty.[83] Allegations not essential to the cause of action need not be proven.[84] The judgment entered must conform to or be in consonance with the verdict rendered.[85]

(§ 2) *B. In equity.*[86]—As a general rule the commission of a mere trespass will not be enjoined,[87] and to warrant the issuance of an injunction, title must be undisputed or established by legal adjudication and the injury complained of must be irreparable in its nature;[88] therefore proof of damages already suffered does not authorize the issuance of an injunction,[89] and if the injury threatened is not irreparable, it will not be enjoined unless some other ground entitling complainant to relief be shown,[90] nor will it issue when the defendant has an apparent right

79. Evidence relative to removal of the goods during defendant's absence. McAllin v. McAllin [Conn.] 59 A. 413. In trespass for taking mules, a letter written by a principal to a third person, stating that his agent would identify the mules and render any other assistance he could, was held admissible. Fulgham v. Carter [Ala.] 37 So. 932.

80. Misdescription could be cured by amendment and defendants were placed at no disadvantage. Pollard v. Barrows [Vt.] 58 A. 726.

81. Giffin v. Martel [Vt.] 58 A. 788. The value of the goods 16 months prior to the taking is admissible where evidence tended to show that they remained substantially the same. Id.

82. Giffin v. Martel [Vt.] 58 A. 788.

83. Edwards v. Woodruff, 25 Pa. Super. Ct. 575.

84. Where plaintiff alleges that a mob trespassed, he need not prove that the persons acting in concert constituted a mob within the definition of that term. Stevens v. Sheriff [Kan.] 80 P. 936.

85. Judgment entered by the prothonotary held not fatally defective. Maus v. Mahoning Tp., 24 Pa. Super. Ct. 624.

86. See 2 Curr. L. 1898.

87. Where a city threatens to compel the removal of fruit stands which the owners claim stands upon private property and not in the street. Pagames v. Chicago, 111 Ill. App. 590.

88. Curtin v. Stout [W. Va.] 50 S. E. 810. The removal of timber will not be enjoined where there is a conflict as to title and the defendant is solvent. Id. Evidence held to show that telephone poles threatened to be destroyed were not erected in the public street. Heck v. Greenwood Tel. Co. [Ind. App.] 73 N. E. 960.

NOTE. Irreparable, destructive, and permanent injuries: A trespass which will cause permanent and lasting injury to real estate will be restrained by injunction (Ryan v. Brown, 18 Mich. 196, 100 Am. Dec. 154; Echelkamp v. Schrader, 45 Mo. 505; Miller v. Lynch, 149 Pa. 460, 24 A. 80); so will a trespass which will result in the destruction of the property in the character of its use and enjoyment (Peterson v. Hopewell, 55 Neb. 670, 76 N. W. 451; Scudder v. Trenton Delaware Falls Co., 1 N. J. Eq. 694, 23 Am. Dec. 756); and, in general, the commission of a trespass calculated to work irreparable mischief will be enjoined (Newlin v. Prevo, 81 Ill. App. 75). What constitutes an irreparable injury has engaged our attention in an earlier note in this series of reports. See the note to Dudley v. Hurst [Md.] 1 Am. St. Rep. 374-379. A reference to this note will show that the best criterion for determining whether or not an injury is irreparable is this: Can complete compensation for it be had by a recovery of damages in an action at law? An injury which cannot adequately be compensated by a verdict for damages is generally regarded as irreparable, while an injury which can fully be compensated by damages at law is ordinarily not regarded as irreparable.—From note to Moore v. Halliday [Or.] 99 Am. St. Rep. 735.

89. Bryant v. Lamb Timber Co. [Wash.] 79 P. 622.

90. Such as the insolvency of the wrongdoer. Stephenson v. Burdett [W. Va.] 48 S. E. 846.

NOTE. Insolvency of trespasser: If a trespasser is insolvent, and therefore unable to respond in damages for the injuries he may cause, this is a circumstance to be taken into consideration in determining whether his action should be restrained. Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575; Derry v. Ross, 5 Colo. 295; Walker v. Walker, 51 Ga. 22; Cottle v. Harrold, 72 Ga. 830; Silva v. Rankin, 80 Ga. 79, 4 S. E. 756; Justice v. Aiken [Ga.] 30 S. E. 941; Wall v. Mercer [Ga.] 46 S. E. 420; Commissioners of Highways v. Green, 156 Ill. 504, 41 N. E. 154; Harms v. Jacobs, 158 Ill. 505, 41 N. E. 1071; Gibbs v. McFadden, 39 Iowa, 371; Martin v. Davis, 96 Iowa, 718, 65 N. E. 1001; Sword v. Allen, 25 Kan. 67; Musselman v. Marquis, 64 Ky. 463, 89 Am. Dec. 637; Coulson v. Harris, 43 Miss. 728; Sumner v. Blakslee, 59 N. H. 242, 47 Am. Rep. 196; Wilson v. Hill, 46 N. J. Eq. 367, 19 A. 1097; Mechanics', etc., Bank v. Debolt, 1 Ohio St. 591; Hanley v. Watterson, 39 W. Va. 214, 19 S. E. 536. But while the pecuniary irresponsibility of the wrongdoer will be given due weight, it is not decisive of the question. Kellogg v. King, 114 Cal. 378, 55 Am. St. Rep.

to enter.[91] A continuing trespass on a railroad which is a menace to the public safety may be perpetually enjoined.[92]

Upon an application for an injunction, plaintiff must allege that he is in possession,[93] or a state of facts showing that he is entitled to relief without being in possession,[94] or that he has pending an action to recover possession or is about to institute such an action.[95] In the latter case the court will enjoin until the right of possession is determined.[96]

An injunction against trespass is not a bar to subsequent expropriation proceedings as to the same property.[97]

§ 3. *Damages and penalties.*[98]—The measure of damages is the amount which will compensate for the injury done,[99] both immediate and consequential.[1] If the trespass was innocent, the actual damages sustained is the measure,[2] and if no actual damage is suffered,[3] or if the extent of the injury is not shown, nominal damages only can be recovered;[4] but remote and speculative damages cannot be.[5] Where the injury to the land is not of a permanent character, the cost of restoring it to its normal condition is the measure;[6] but if the injury is

74, 46 P. 166; Morgan v. Palmer, 48 N. H. 336. His insolvency alone will not give chancery jurisdiction, when the other circumstances of the case preclude it. Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 P. 703; Carney v. Hadley, 32 Fla. 344, 13 So. 4, 37 Am. St. Rep. 101, 13 South. 4; Centreville, etc., Turnpike Co. v. Barnett, 2 Ind. 536; Murray v. Knapp, 62 Barb. [N. Y.] 566, 42 How. Pr. 462; Parker v. Furlong, 37 Or. 248, 62 P. 490; Moore v. Halliday (the principal case), ante, p. 724. And on the other hand, his solvency will be no defense to the issuance of an injunction if the other facts of the case are such as to render an injunction the proper remedy. Crescent City Wharf, etc., Co. v. Simpson, 77 Cal. 286, 19 P. 426; McPike v. West, 71 Mo. 199; Roper Lumber Co. v. Wallace, 93 N. C. 22.—From note to Moore v. Halliday [Or.] 99 Am. St. Rep. 741.

91. Defendant had a contract for the sale to him of the timber, the cutting of which it was sought to enjoin. Swindell & Co. v. Saddler [Ga.] 49 S. E. 753.

92. One riding on the railroad track with a railroad bicycle. Atchison, etc., R. Co. v. Spaulding, 69 Kan. 431, 77 P. 106. A trespasser may be restrained from using a velocipede on a railroad track. Gulf, etc., R. Co. v. Puckett [Tex. Civ. App.] 82 S. W. 662.

93, 94. Ramey v. Counts, 102 Va. 902, 47 S. E. 1006.

95. Ramey v. Counts, 102 Va. 902, 47 S. E. 1006. Bill alleging that defendant threatened to construct a dam in a stream below his premises which would flood the same, states facts sufficient to entitle plaintiff to an injunction. Bryant v. Lamb Timber Co. [Wash.] 79 P. 622.

96. Ramey v. Counts, 102 Va. 902, 47 S. E. 1006.

97. Xavier Realty v. Louisiana R. & Nav. Co. [La.] 38 So. 427.

98. See 2 Curr. L. 1900.

99. Where one witness, not qualified, testified that the damage caused was $2,500 and the only other evidence was to the effect that it did not exceed $15, a finding of $200 cannot be sustained. Ferguson v. Buckell, 91 N. Y. S. 724. An injury caused in the execution of a plan for grading a street cannot be made the basis of a recovery by one who has been awarded damages by a jury of view, for injuries likely to result. Beach v. Scranton, 25 Pa. Super. Ct. 430.

1. Recovery may also be had for loss of use of the premises by reason of the trespass and for the expense incidental to his removal therefrom. Herron v. Jones & Laughlin Co., 23 Pa. Super. Ct. 226. Where entry is made on the roof of one's house for the purpose of stringing telephone wires, the rental value for the purpose for which it is used may be recovered. Bunke v. New York Tel. Co., 91 N. Y. S. 390.

2. In erecting a pole at the intersection of streets, a telephone company did not know that they were on private property. Southwestern Tel. & T. Co. v. Whiteman [Tex. Civ. App.] 81 S. W. 76. Where a lessee cuts timber under an honest mistake as his right to do so. Lewis v. Virginia-Carolina Chemical Co. [S. C.] 48 S. E. 280.

3. One cut timber belonging to another but which was as valuable cut as standing. De Camp v. Wallace, 45 Misc. 436, 92 N. Y. S. 746; Eldridge v. Gorman [Conn.] 60 A. 643.

4. No evidence to show quantity of sand taken from the beach. Murray v. Pannaci [C. C. A.] 130 F. 529.

5. Loss of time in trying to get a trespasser to remove a telephone pole planted on his premises. Southwestern Tel. & T. Co. v. Whiteman [Tex. Civ. App.] 81 S. W. 76. Expense incurred in determining whether any action could be maintained cannot be recovered. Murray v. Pannaci [C. C. A.] 130 F. 529. Where no injury resulted from the stringing of wires close to premises, the **possibility of injury** to life, limb and security of the inhabitants cannot be recovered for. Southwestern Tel. & T. Co. v. Whiteman [Tex. Civ. App.] 81 S. W. 76.

Danger from fire by reason of brush heaps cannot be considered. Chase v. Clearfield Lumber Co., 209 Pa. 422, 58 A. 813.

6. Cost of filling up a hole and making the grass grow. Southwestern Tel. & T. Co. v. Whiteman [Tex. Civ. App.] 81 S. W. 76. Admission of evidence as to depreciation in value of the land was error. Id. For trespass to land, the measure is the cost of re-

of a permanent character,[7] or if such cost is greater than the diminution in value,[8] the latter is the measure. For the willful taking of timber, the measure is the value at the time of demand;[9] but if innocent, it is the stumpage value.[10] For goods unlawfully taken, it is their value at the time of taking.[11]

Evidence of an offer to return damaged goods,[12] or that defendant acted on advice of counsel based on different facts, is properly excluded, as mitigation of damages.[13]

A trespasser may in Louisiana claim reimbursement for the cost of clearing land for cultivation, when to cultivate it is its chief value.[14] He may also claim for such ameliorations as have added to the permanent value of the land.[15]

Recovery can be had only for the trespass declared for,[16] and in an action for trespass, a complainant cannot recover for a breach of a contract;[17] but where both actual and punitive damages are alleged, the actual damages may be recovered, though there is no proof of punitive damages.[18] Special damages must be specially pleaded.[19]

Punitive damages[20] may be recovered for a willful trespass,[21] but to justify their imposition, it must be shown that the trespass was malicious or wanton or at least with wrongful motive.[22] Intentionally injuring property in known violation of the possessor's rights is evidence of malice.[23]

Multifold damages.[24]—Where a statute provides for treble damages, ordinary rules do not apply.[25] In Missouri a willful trespasser taking sand from premises is liable for treble damages;[26] but if the trespass was not willful, only single dam-

pairing the injury unless such cost exceeds the value of the property, in which case the value of the property is the measure. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79; Herron v. Jones & Laughlin Co., 23 Pa. Super. Ct. 226. For **removing lateral support** the amount of injury actually done. Ruppert v. West Side Belt R. Co., 25 Pa. Super. Ct. 613.

7. For destruction of shade or ornamental trees, the reduction in the pecuniary value of the land. Eldridge v. Gorman [Conn.] 60 A. 643. The measure of damages for the unreasonable cutting of trees for the erection of a telephone is the difference in the value of the land as it would have been if the cutting had been reasonable and its value after the cutting, not the difference in value before and after the cutting. Meyer v. Standard Tel. Co., 122 Iowa, 514, 98 N. W. 300.

8. Enid & A. R. Co. v. Wiley, 14 Okl. 310, 78 P. 96.

9. Jones Lumber Co. v. Gatliff, 26 Ky. L. R. 616, 82 S. W. 295.

10. Where the purpose of an action is to recover only the value of the timber removed, the rule for damages is the market value of the trees for lumber or fuel. Eldridge v. Gorman [Conn.] 60 A. 643.

11. Constable wrongfully seizing and selling goods. Mansfield v. Bell, 24 Pa. Super. Ct. 447. Damages may be estimated on a basis of the cost of the goods and the amount they have been used in the absence of better proof. Behm v. Damm, 91 N. Y. S. 735.

12. Giffin v. Martel [Vt.] 58 A. 788.

13. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490.

14, 15. Sigur v. Burguieres, 111 La. 711, 35 So. 823.

16. Notice under the act of May 2, 1876, cannot be used to bring in separate causes of action, arising between the issuance of the writ and the trial. Tustin v. Sammons, 23 Pa. Super. Ct. 175; Jackson v. Gunton, 26 Pa. Super. Ct. 203.

17. In this case no contract was pleaded nor were the pleadings amended. Korn v. Weir, 88 N. Y. S. 976.

18. Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675.

19. Peculiar value of shade or ornamental trees. Eldridge v. Gorman [Conn.] 60 A. 643.

20. See 2 Curr. L. 1900, n. 23 et. seq.

21. Beaudrot v. Southern R. Co. [S. C.] 48 S. E. 106; Duke v. Postal Tel. Cable Co. [S. C.] 50 S. E. 675. Where the trespass is an outrage without mitigating circumstances, exemplary damages may be recovered. Bright v. Bell, 113 La. 1078, 37 So. 976. Where a railroad company lays its track against the protest of abutting owner, in such manner as to injure his premises, it cannot demand that damages shall be assessed on the same basis as in eminent domain proceedings. Becker v. Lebanon & Myerstown St. R. Co., 25 Pa. Super. Ct. 367.

22. Murray v. Pannaci [C. C. A.] 130 F. 529. Question of malice held for the jury. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490.

23. Digging ditches in disregard of written protest from the occupant. Louisville & N. R. Co. v. Smith [Ala.] 37 So. 490.

24. See 2 Curr. L. 1901.

25. Under Rev. St. 1899, § 4572, providing for treble damages for carrying away sand, gravel, etc., the measure is treble the value of the sand removed without regard to the value of the land before and after. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989.

26. A railroad company authorized by Rev. St. 1899, § 1058, to take gravel from ad-

ages can be recovered.[27] One entering with probable cause to believe that he has such right is not converted into a willful trespasser by mere notice from the owner to leave.[28] A contract to purchase land does not give the proposed purchaser reasonable cause to believe that he has a right to enter.[29] In Michigan plaintiff can recover treble damages for cutting down and carrying away trees only by proving title to the land on which the trees stood unless title is admitted by the defendant.[30] Title is deemed admitted if claimed by plaintiff and not denied by defendant who files a bond and pays fees and costs.[31] A recovery of statutory treble damages cannot be had unless the petition sets forth a trespass for which the statute allows such recovery;[32] but a complaint bottomed on the statute, though insufficient to authorize such recovery, may state a cause of action at common law.[33] Treble damages for wrongfully mining coal, and single damages for an injury to the mine caused by negligence in operating it, can be recovered in one action.[34]

§ 4. *Criminal liability.*[35]—In statutes making willful trespass a crime, "willful" means "malicious."[36] No criminal liability is incurred by an entry under a license.[37] A trespass continuing after warning is not an entry after warning.[38]

In Texas, by statute, an indictment for trespass on the lands of a married woman may allege ownership and possession in her or in her husband.[39] An unnecessary description of the land, in an indictment, does not render it indefinite.[40]

The trespass must be established beyond a reasonable doubt.[41] An indictment charging an entry after warning is not supported by evidence of a refusal to leave after notice, after an entry before warning.[42] On a prosecution for entry on the separate property of a married woman, consent of the husband is immaterial.[43]

§ 5. *Trespass to try title.*[44]—Trespass to try title is an action peculiar to the state of Texas, and lies to settle disputes concerning boundaries,[45] title,[46] or the rents and revenues of the land.[47]

jacent lands, but requiring them to first agree as to the damages or have it appraised, is a willful trespasser if it enters prior to such agreement or appraisement. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989.

27. One who has reasonable cause to believe he has a right to take sand is not a willful trespasser, though in fact he has no right to enter. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989.

28, 29. Cox v. St. Louis, etc., R. Co. [Mo. App.] 85 S. W. 989.

30. Laws 1897, § 11,204. Reynolds v. Maynard [Mich.] 100 N. W. 174.

31. Comp. Laws 1897, § 786. Reynolds v. Maynard [Mich.] 100 N. W. 174. Allegation of title to trees cut is not an allegation of title to the land within the meaning of this law. Id.

32. Under Rev. St. 1899, § 4572, giving such damages where a trespasser with no right or interest digs up gravel, the complaint must allege that he had no right or interest. O'Bannon v. St. Louis & G. R. Co. [Mo. App.] 85 S. W. 603.

33. Complaint under Rev. St. 1899, § 4572, insufficient because not stating that the trespasser had no interest in the premises. Mishler Lumber Co. v. Craig [Mo. App.] 87 S. W. 41.

34. Jackson v. Gunton, 26 Pa. Super. Ct. 203.

35. See 2 Curr. L. 1902.

36. Gen. St. 1894, § 6781, subd. 3. Price v. Denison [Minn.] 103 N. W. 728. One who enters in good faith and severs mature crops and does not destroy, injure or conceal the same, is not guilty. Id.

37. Deed of right of way held to give authority to enter on adjacent land. Hames v. State [Tex. Cr. App.] 81 S. W. 708.

38. One enclosed a portion of an adjoining owner's land with a fence. While he was temporarily absent he received warning not to enter on the premises. A subsequent entry held not an entry after warning under Cr. Code 1896, § 5606. Brunson v. State, 140 Ala. 201, 37 So. 197.

39. Code Cr. Proc. 1895, art. 445. Hames v. State [Tex. Cr. App.] 81 S. W. 708.

40. Under Sand. & H. Dig. § 1773. State v. Hooker [Ark.] 81 S. W. 231.

41. Refusal to give an instruction relative to boundaries held error. Mann v. State [Tex. Cr. App.] 83 S. W. 195.

42. Under Cr. Code 1896, § 5606. Brunson v. State, 140 Ala. 201, 37 So. 197.

43. Hames v. State [Tex. Cr. App.] 81 S. W. 708.

44. See 2 Curr. L. 1903.

45. See 2 Curr. L. 1903, n. 59 et seq. Evidence held to sustain a finding as to the location of the land sued for. Cochran v. Moerer [Tex. Civ. App.] 87 S. W. 160. Evi-

An interest in the land is necessary to enable one to maintain the action,[48] but a trustee may maintain it.[49]

A warrantor properly impleaded should be retained as a party to the cause.[50]

Pleading and procedure.[51]—The complaint must contain a description of the land sufficient to identify it.[52] An objection to the petition that it is not indorsed, "An action to try title as well as for damages" cannot be raised by general demurrer.[53]

The defense of stale demand is not available where the legal or equitable title asserted is sufficient to sustain the action.[54]

After the plaintiff has established a prima facie case,[55] the defendant has the burden of showing a defect in his title.[56] Where plaintiff shows a superior title from the common source, the defendant has the burden to show that the common source was without title,[57] which is not met by proof that some third person once had title,[58] but by disproving title as asserted by the plaintiff.[59] Proof of a superior title from a common source does not estop defendant from showing a claim through another source.[60] One asserting an equity against the legal title must show that the holder of the legal title did not pay value or that he purchased with notice of the equity.[61] A preponderance of evidence is all that is required.[62]

Evidence tending to show possession,[63] title,[64] or the derivation thereof, is

dence held not to raise an issue as to the location of a boundary. Lewis v. Brown [Tex. Civ. App.] 87 S. W. 704.

46. Evidence held insufficient to show title in plaintiff. Cobb v. Bryan [Tex. Civ. App.] 83 S. W. 887; Buster v. Warren [Tex. Civ. App.] 80 S. W. 1063; Barclay v. Waller [Tex. Civ. App.] 83 S. W. 721; Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 87 S. W. 235. Title under a will. Hymer v. Holyfield [Tex. Civ. App.] 87 S. W. 722. Evidence held to justify a presumption of a grant from state to the plaintiff. Ortiz v. State [Tex. Civ. App.] 86 S. W. 45. Evidence held insufficient to establish an outstanding title. Schultz v. Tonty Lumber Co. [Tex. Civ. App.] 82 S. W. 353. Evidence as to plaintiff's title held for the jury. Jones v. Wright [Tex. Civ. App.] 81 S. W. 569. Peremptory instruction properly refused under the evidence. Field v. Field [Tex. Civ. App.] 87 S. W. 726.

47. Field v. Field [Tex. Civ. App.] 87 S. W. 726.

48. An executory agreement to convey giving one no present interest will not support the action. Prusiecke v. Ramzinski [Tex. Civ. App.] 81 S. W. 771. Plaintiff cannot recover on a deed of defendant's homestead not signed by his wife. Pinkston v. West [Tex. Civ. App.] 85 S. W. 1014. Evidence held sufficient to establish an equitable title in the defendant under performance of a locative contract. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395.

49. Lewis v. Brown [Tex. Civ. App.] 87 S. W. 704.

50. Under the statute authorizing the defendants to implead their warrantor, it is improper to grant a severance as to a warrantor impleaded. Cobb v. Robertson [Tex.] 86 S. W. 746.

51. See 2 Curr. L. 1905.

52. Description held sufficient. Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082. Description in a complaint by one claiming title by adverse possession held sufficient. Parker v. William Cameron & Co. [Tex. Civ. App.] 86 S. W. 647.

53. Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082.

54. Lyster v. Leighton [Tex. Civ. App.] 81 S. W. 1033.

55. Where he establishes a superior title emanating from a common source, he has made out a prima facie case. Gilmer v. Beauchamp [Tex. Civ. App.] 87 S. W. 907.

56. Both parties claimed under applications to purchase from the state. Jones v. Wright [Tex. Civ. App.] 81 S. W. 569. One claiming under an application to purchase from the state land awarded to another has the burden of overcoming the presumption of regularity of the award. Smith v. Hughes [Tex. Civ. App.] 86 S. W. 936. Where both parties claim under applications to purchase from the state and one is in possession under a sale by him from the state, the burden is on the other to show the invalidity of the sale. Jones v. Wright [Tex.] 84 S. W. 1053.

57, 58. Ellis v. Lewis [Tex. Civ. App.] 81 S. W. 1034.

59. Where plaintiff introduces a patent to the common source, evidence that the common source was not the patentee rebuts the presumption of title in him. Ellis v. Lewis [Tex. Civ. App.] 81 S. W. 1034.

60. Gilmer v. Beauchamp [Tex. Civ. App.] 87 S. W. 907.

61. Catrett v. Brown Hardware Co. [Tex. Civ. App.] 86 S. W. 1045.

62. Instruction that plaintiffs must prove their case by clear and positive testimony properly refused as requiring too great a quantum of proof. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 87 S. W. 235.

63. That defendant was on the land picking cotton when the citation was served on him. Field v. Field [Tex. Civ. App.] 87 S. W. 726.

64. Records showing decree for specific

admissible.[65] Possession is not necessary to a presumption of a grant from the exercise of acts of ownership.[66]

One seeking to recover from a trespasser must show title.[67] A title acquired by an unlawful scheme will not support a recovery.[68] In an action to recover an entire tract the plaintiff may recover the whole or any part thereof according to his proof of title, legal or equitable.[69]

The sufficiency of evidence to make out a particular title or derivation thereof presents questions of proof of descent,[70] devise,[71] conveyance[72] or purchase,[73] adverse occupancy,[74] entry, location, and patent of public lands,[75] and like matters which are elsewhere topically treated; hence all such matters have been excluded to the topics cited.

TRESPASS ON THE CASE; TRESPASS TO TRY TITLE, see latest topical index.

TRIAL.

§ 1. Scope of Article; Definitions (1708).
§ 2. Joint and Separate Trials (1709).
§ 3. Course and Conduct of Trial (1709). Remarks and Conduct of Judge (1710). Remarks and Conduct of Counsel (1711).
§ 4. Reception and Exclusion of Evidence (1711). How Introduced (1711). Order of Proof (1711). Reopening a Case (1712). The Recall of a Witness (1713). The Right to Open and Close (1713). The Power of the Court to Reject Merely Cumulative Evidence (1714). Admissions of Counsel (1714). An Offer of Proof (1715). The Proper Objection to Evidence That Has Been Received (1715). The Effect of Evidence Admissible Only on Certain Issues, or Admitted for a Certain Purpose (1716). Permission to Perform Experiments in the Presence of the Jury (1716).
§ 5. Custody and Conduct of the Jury (1716).
A. During Trial (1716).
B. After Submission of the Case (1717).

§ 1. *Scope of article; definitions.*[76]—Many important and really distinct matters of trial procedure are given separate treatment in Current Law. Thus the law relating to dockets, calendars and trial lists,[77] continuance and postponement,[78] argument of counsel[79] and the right to open and close the same, examination of witnesses,[80] objections and exceptions to evidence,[81] trial by jury,[82] questions of law and fact,[83] instructions,[84] directing verdict and demurrer to evidence,[85] discontinuance, dismissal and nonsuit,[86] verdicts and findings,[87] has been excluded from this article on Trial, which includes principally only such matters as do not readily lend themselves to such separate treatment. The subjects of Evidence,[88] Pleading,[89] and Witnesses,[90] are also fully treated elsewhere. As to the hearing in equity, see article on Equity;[91] and for matters peculiar to criminal procedure, see Indictment and Prosecution.[92]

performance of a locative contract held admissible to show title in plaintiff. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. A deed containing a description of the property sufficient to identify it is admissible. Echols v. Jacobs Mercantile Co. [Tex. Civ. App.] 84 S. W. 1082.

65. In a suit by W. M. Read, application by Wm. Reed to purchase the land when it was state school land is admissible. Goethal v. Read [Tex. Civ. App.] 81 S. W. 592.

66. Ortiz v. State [Tex. Civ. App.] 86 S. W. 45.

67. In an action to recover certain school land alleged to have been purchased by plaintiff. Knippa v. Brown [Tex. Civ. App.] 82 S. W. 658.

68. Pinkston v. West [Tex. Civ. App.] 85 S. W. 1014.

69. Zimpelman v. Power [Tex. Civ. App.] 85 S. W. 69.

70. See Descent and Distribution, 3 Curr. L. 1081.

71. See Wills, 2 Curr. L. 2076.

72. See Deeds of Conveyance, 3 Curr. L. 1056.

73. Vendors and Purchasers, 2 Curr. L. 1976.

74. Adverse Possession, 3 Curr. L. 51.

75. Public Lands, 4 Curr. L. 1106.

76. See 2 Curr. L. 1907.

77. See 3 Curr. L. 1140.

78. See 3 Curr. L. 801.

79. See 3 Curr. L. 306.

80. See 3 Curr. L. 1383.

81. Saving Questions for Review, See 4 Curr. L. 1590.

82. See Jury, 4 Curr. L. 358.

83. See 4 Curr. L. 1165.

84. See 4 Curr. L. 133.

85. See 3 Curr. L. 1093.

86. See 3 Curr. L. 1097.

87. See 2 Curr. L. 2009.

88. See 3 Curr. L. 1334.

89. See 4 Curr. L. 980.

90. See 2 Curr. L. 2163.

91. See 3 Curr. L. 1232. See, also, Fletcher, Eq. Pl. & Pr. § 673-699.

What is a trial.—The taking of testimony is not essential to the "trial" of an action. If the pleadings present such a case as to entitle either party to relief, action of the trial court in giving judgment on the pleadings, after hearing arguments, is itself a trial.[93]

§ 2. *Joint and separate trials.*[94]—Consolidation of trials should be distinguished from consolidation of causes of action.[95] The latter idea appears in questions of joinder and severance of causes of action.[96] Whether an action shall be tried by itself or in connection with another is a question for the trial court.[97] Joint trespassers are not entitled to separate trials as a matter of law.[98]

The codes commonly provide that whenever two or more actions are pending at the same time between two parties in the same court, which might have been joined, the court may order them consolidated.[99] Under these statutes identity of parties is essential.[1]

Several suits against the same defendant are properly consolidated when the issues are practically identical,[2] and the rights of all the parties may be adjusted in a single suit.[3]

The consolidation of actions under statutes merges all actions consolidated into one suit,[4] in which there can be but one judgment, settling all the issues.[5] Where an order of consolidation is made, the court should require the pleadings to be reconstructed as in one suit, if necessary, and should determine what costs, if any, should be charged to either party in the original suits.[6] If the pleadings are ordered reformed, the complaint in the consolidated suit should state all of plaintiff's causes of action against the defendant as alleged in each of the suits consolidated, and the answer of defendant should present all issues which he has raised in such suits.[7] On the trial, several findings may be had upon the several causes of action stated in the pleadings, and if legal and equitable actions are consolidated, they may be tried in the same manner as though such causes had been joined in the same complaint.[8] All costs in the consolidated suit accrue only after consolidation.[9] Dismissal of one of the separate actions, without costs or other relief, is proper.[10]

§ 3. *Course and conduct of trial.*[11]—The conduct of the trial and the order of procedure are very largely left to the discretion of the trial court, the ex-

92. See 4 Curr. L. 1.

93. Dodge v. U. S. [C. C. A.] 131 F. 849.

94. See 2 Curr. L. 1908.

95. A consolidation of actions means uniting several into one, not consolidation of trials. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

96. See Pleading, 4 Curr. L. 980.

97. Meloon v. Read [N. H.] 59 A. 946. Where one plaintiff brings several actions in a justices' court, for the killing of separate and distinct animals, and defendant moves to consolidate, whether such actions shall be consolidated is discretionary with the justice, if the amounts sued for, as consolidated do not exceed the jurisdiction of the court. Atlantic Coast R. Co. v. Dupont [Ga.] 50 S. E. 103.

98. Meloon v. Read [N. H.] 59 A. 946.

99. Under Code 1896, § 3318, two suits to recover different instalments due on a timber contract may be consolidated. Garrison v. Glass, 139 Ala. 512, 36 So. 725. Several actions against the same person to subject the same real estate to sale for the benefit of all the creditors are properly consolidated, under Rev. St. 1898, § 2792. Allen v. McRae [Wis.] 100 N. W. 12.

1. Under Kirby's Dig. § 6083, a suit against a railroad on an order given a contractor cannot be consolidated with a suit by another against the contractor in which the railroad company is garnishee. Choctaw, etc., R. Co. v. McConnell & Co. [Ark.] 84 S. W. 1043.

2. Several actions against different newspapers for publishing the same libel, in which issues for the jury were substantially identical, consolidated, though elements of damage in several cases varied slightly [Rev. St. § 921]. Butler v. Courier-Citizen Co., 127 F. 1015.

3. Suits by different persons against a lodge on the same benefit certificate may be consolidated. Clement v. Clement [Tenn.] 81 S. W. 1249.

4, 5. Handley v. Sprinkle [Mont.] 77 P. 296; Allen v. McRae [Wis.] 100 N. W. 12.

6, 7, 8, 9. Handley v. Sprinkle [Mont.] 77 P. 296.

10. Allen v. McRae [Wis.] 100 N. W. 12.

11. See 2 Curr. L. 1909.

ercise of which in regard to these matters will not be reviewed, in the absence of a manifest abuse. Thus the order of trial of legal and equitable issues in a case;[12] the conduct of the argument of a case;[13] the regulation of the manner in which a witness may present testimony;[14] and the exclusion of witnesses from the court room while other witnesses are testifying,[15] are all matters within the province of the trial court. Where there is an order for the separation of witnesses, exceptions therefrom as to witnesses not parties to the case are also discretionary.[16] The Oregon statute, providing that, on request of either party, the judge may exclude from the court room any witness of the adverse party not under examination, does not authorize exclusion of a party;[17] but an officer of a corporation litigant may properly be excluded, where it does not appear that he possessed any special information which would render his presence necessary to protect the interests of the corporation.[18] So, too, a request during the progress of the trial for permission to withdraw an announcement of ready and verify a plea is addressed to the discretion of the court.[19]

Remarks and conduct of judge.[20]—Absence of the presiding judge is fatal to the proceedings,[21] if objection to such conduct is seasonably made,[22] and it appears that the complaining party has been prejudiced;[23] but absence for a short time with the consent of the parties is not reversible error, when no resulting harm is shown.[24] A judge has the right to question witnesses in order to advise himself of the facts and to enable him to correctly charge the jury;[25] but it is error to make comments minimizing the effect of certain testimony,[26] or to put to an expert who has testified, questions such as to intimate an opinion that the testimony is improbable or erroneous.[27] A remark by the court addressed to counsel in the presence of the jury which amounts to a comment on a material and disputed question of fact is cured by full instructions afterwards given the jury.[28]

12. McCreery Land & Investment Co. v. Myers [S. C.] 49 S. E. 848; Crosby v. Scott-Graff Lumber Co. [Minn.] 101 N. W. 610. The order of trial of legal and equitable issues in action against a city for damages for changes of grade, and an action against the city, its treasurer and another, to annul an assessment certificate and for an injunction, held within court's discretion. Haubner v. Milwaukee [Wis.] 101 N. W. 930.

13. Refusal to allow counsel for defendant to argue a claim which counsel for plaintiff had argued in his opening, but which defendant's counsel claimed, after the closing argument, was a new position taken by plaintiff, held proper. Schmidtt v. Northern Pac. R. Co., 120 Wis. 397, 98 N. W. 202. See Argument of Counsel, 3 Curr. L. 306.

14. Evidence as to plaintiff's condition being conflicting, denial of motion to permit her to testify, reclining on a stretcher, held proper, in personal injury action. Blanchard v. Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94. Permitting crippled plaintiff in personal injury action to walk to witness stand in view of the jury held not error. City of Minden v. Vedene [Neb.] 101 N. W. 330. Permitting witnesses to form paper cylinders to illustrate and explain a well about which they were testifying held not error. Comer v. Thornton [Tex. Civ. App.] 86 S. W. 19.

15. King v. Hanson [N. D.] 99 N. W. 1085. Refusal of order to place witnesses under the rule of exclusion from the courtroom is discretionary. Griffith v. Ridpath [Wash.] 80 P. 820. Granting or refusing application to exclude witnesses of adverse party not under examination, as provided in Code Civ. Proc. § 3371, is discretionary. Finlen v. Heinze [Mont.] 80 P. 918.

16. City Elec. R. Co. v. Smith, 121 Ga. 663, 49 S. E. 724.

17. Trotter v. Stayton [Or.] 77 P. 395.

18. City recorder held properly excluded. Trotter v. Stayton [Or.] 77 P. 395.

19. Refusal proper where facts had been fully developed. Hamilton v. Bell [Tex. Civ. App.] 84 S. W. 289.

20. See 2 Curr. L. 1909.

21. Wells v. O'Hare, 209 Ill. 627, 70 N. E. 1056. A judge cannot properly absent himself from the courtroom for any considerable time. Dehougne v. Western Union Tel. Co. [Tex. Civ. App.] 84 S. W. 1066.

22, 23. Wells v. O'Hare, 209 Ill. 627, 70 N. E. 1056.

24. Dehougne v. Western Union Tel. Co. [Tex. Civ. App.] 84 S. W. 1066.

25. State v. Knowles [Mo.] 83 S. W. 1083.

26. Belt R. Co. of Chicago v. Confrey, 111 Ill. App. 473.

27. City of Columbus v. Anglin, 120 Ga. 785, 48 S. E. 318.

28. Remark to the effect that evidence clearly showed an express agreement, while complaint was for quantum meruit, and inquiring as to result, held cured by instructions. Cummings v. Weir [Wash.] 79 P. 487.

It is not error for a trial judge, in declining to permit counsel to read a decision to the jury, to state in the presence of the jury that the decision is not applicable to the case on trial.[29] A remark that no further discussion as to the propriety of a question was necessary, and that further discussion might lead the court to change its ruling, was held not to render the trial unfair.[30] Impartial criticism of both counsel, in the court's charge, which could not have affected the verdict, is not ground for setting it aside.[31]

Remarks and conduct of counsel.[32]—Conduct of counsel in not acquiescing in rulings of the court is to be condemned.[33] Thus, remarks of counsel during trial for the purpose of getting before the jury evidence which had been ruled out by the court was held to constitute ground for new trial.[34] It is proper for the trial court to avoid confusion, to require arrangements to be made by which a single counsel for each party should make objections.[35] Counsel have no right to advise the jury that they do not intend to ask for instructions.[36] But counsel's statement that he had no instructions was not cause for reversal when made in reply to the court's direction to pass up instructions.[37] The action of the court in sustaining an objection to improper remarks or conduct of an attorney will not always be regarded as purging the record of error.[38]

§ 4. *Reception and exclusion of evidence.*[39]—In a court trial, greater latitude is permissible than in a jury trial.[40]

How introduced.[40a]—In common law actions, evidence is adduced orally,[41] and in chancery usually by written interrogatories and answers.[42] Papers presented for the consideration of matters of law need not be introduced like evidence.[43] Documents produced in court and marked for identification are not thereby put in evidence.[44]

Order of proof.[45]—In general, the party having the burden of proof should be allowed to close his case before any defensive matter may be introduced.[46] It is also a general rule that where the relevancy or competency of certain evidence depends on the existence of certain other facts, such facts should be first

29. Martin v. Peddy, 120 Ga. 1079, 48 S. E. 420.

30. Lee v. Dow [N. H.] 59 A. 374.

31. Feldman v. Senft, 92 N. Y. S. 231.

32. See 2 Curr. L. 1911.

33. Oliver v. Jessup's Estate [Mich.] 100 N. W. 900.

34. Evidence of compromise. Salter v. Rhode Island Co. [R. I.] 60 A. 588. Conduct of counsel in asking questions and offering proof, in presence of jury, contrary to a ruling of the court on evidence, held to require setting aside of verdict. Batchelder v. Manchester St. R. Co. [N. H.] 56 A. 752.

35. As where three attorneys were talking at once. Simonds v. Cash [Mich.] 99 N. W. 754.

36, 37, 38. Indiana, etc., R. Co. v. Otstot, 212 Ill. 429, 72 N. E. 387.

39. See 2 Curr. L. 1912.

40. In a trial by a court without a jury, there is no necessity for such a rigid adherence to the rules of evidence as would be proper in a trial before a jury. Shelley v. Wescott, 23 App. D. C. 135.

40a. See 2 Curr. L. 1915, n. 89 et seq.

41. Importers' & Traders' Nat. Bank v. Lyons, 134 F. 510.

42. See Equity, 3 Curr. L. 1210. Compare Depositions, 3 Curr. L. 1074.

43. Unnecessary to put pleadings in evidence in order to determine whether allegations of complaint are denied by answer. West v. Messick Groc. Co. [N. C.] 50 S. E. 565. Pleadings in a case are before the court and jury, and may be commented on for the purpose of defining the issue and showing admitted allegations, though not formally put in evidence. Foley v. Young Men's Christian Ass'n, 92 N. Y. S. 781.

44. Judgment roll. Shelton v. Holzwasser, 91 N. Y. S. 328.

45. See 2 Curr. L. 1912.

46. Evidence offered by defendant before plaintiffs rest properly excluded. Bowen v. White [R. I.] 58 A. 252. Special defensive matter cannot be introduced while plaintiff himself is testifying, and before he has closed his case. Yazoo, etc., R. Co. v. Grant [Miss.] 38 So. 502. An offer of evidence, the purpose of which is to introduce defendant's case in advance by a cross-examination of the plaintiff, is properly refused. Field v. Schuster, 26 Pa. Super. Ct. 82. The party having the burden of proof is required to introduce all his evidence before his opponent can be required to assume any burden of proof. Winn v. Itzel [Wis.] 103 N. W. 220. Witnesses for defense should not be examined before plaintiff has opened his case, unless by consent. But error held not to require new trial. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

shown.[47] But the order of proof is very largely discretionary with the trial court,[48] and since the exercise of this discretion is not ordinarily subject to review,[49] it is usually held that the admission of evidence prior to the introduction of foundation evidence, to show its relevancy or competency,[50] the admission of evidence, properly rebuttal, in the examination in chief,[51] or on cross-examination,[52] and the admission of evidence in rebuttal which should have been introduced as a part of the examination in chief,[53] are not grounds for reversal or new trial. While the preliminary question as to the admissibility of evidence is for the court, where the question of admissibility depends on disputed facts, the court may submit the evidence to the jury with proper hypothetical instructions.[54]

Reopening a case[55] after it has been formally closed, to admit further proof, is also a matter for the exercise of the trial court's discretion,[56] and this is so, though the motion to reopen the case is made after a motion for a nonsuit,[57] or directed verdict,[58] or a demurrer to evidence,[59] has been interposed. Where a de-

47. Proof of agency must precede evidence tending to show extent of agent's authority (Jos. Schlitz Brewing Co. v. Grimmon [Nev.] 81 P. 43), or acts or concessions to bind an alleged principal (Sloan v. Sloan [Or.] 78 P. 893).

[The question is usually one of relevancy or competency, and not merely as to the order of proof. See Evidence, 3 Curr. L. 1334. —Editor.]

48. Fitch v. Mason City & C. L. Traction Co., 124 Iowa, 665, 100 N. W. 618; Burnside v. Everett [Mass.] 71 N. E. 82.

49. McAllin v. McAllin [Conn.] 59 A. 413.

50. Where testimony admitted becomes in the end pertinent, no claim of error in the order of its admission will be heard. Patch Mfg. Co. v. Protection Lodge No. 215, I. A. M. [Vt.] 60 A. 74. In proving a conspiracy, proof of acts and declarations of members may, in the discretion of the court, be admitted in advance of proof the conspiracy itself, where the acts of each tend to show a common purpose. Wright v. Stewart, 130 F. 905. Allowing examination of witness before putting in evidence to show competency of testimony is discretionary with the court. Earnhardt v. Clement [N. C.] 49 S. E. 49. Time of admission of evidence as to effect of a fire, in action for damages, discretionary with court. Spink v. New York, etc., R. Co. [R. I.] 58 A. 499. Warranty deed regular upon its face may be admitted in evidence without first showing possession thereunder; possession may be shown afterwards. English v. Openshaw [Utah] 78 P. 476. Changing order of proof by allowing evidence of bias before testimony making it material to his credibility harmless. Fine v. Interurban St. R. Co., 91 N. Y. S. 43.

51. That evidence competent in rebuttal was introduced in the examination in chief held not reversible error. Alquist v. Eagle Iron Works [Iowa] 101 N. W. 520.

52. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209. No reversal for introducing written statement, to contradict oral statements of witness, on cross-examination instead of rebuttal. Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443.

53. Permitting evidence in rebuttal which should have been in chief is discretionary. Logan v. Metropolitan St. R. Co., 183 Mo. 582, 82 S. W. 126. The calling of a witness by plaintiff in rebuttal who gives testimony that pertains to the main case is not necessarily prejudicial, but is a matter resting largely in the discretion of the trial court. Petersburg School Dist. of Nelson County v. Peterson [N. D.] 103 N. W. 756. It is within discretion of court to refuse to admit new evidence on redirect examination, and the exercise of that discretion will be reviewed only where an abuse appears. Shafer v. Russell [Utah] 79 P. 559.

Limitation: Evidence which might have been elicited from a witness on direct examination, but to which the attention of the witness had not been called on direct or cross examination, but for which the witness could be recalled, cannot be excluded on redirect in the court's discretion. Gleason v. Metropolitan St. R. Co., 90 N. Y. S. 1025.

54. King v. Hanson [N. D.] 99 N. W. 1085.

55. See 2 Curr. L. 1913.

56. Schilling v. Curran [Mont.] 76 P. 998. In equity. Winn v. Itzel [Wis.] 103 N. W. 220. Trial by court without a jury. Work v. Braun [S. D.] 103 N. W. 764. Receiving evidence which is not strictly rebuttal after the testimony on both sides has been in other respects formally closed. Willett v. Morse [N. J. Err. & App.] 60 A. 362. Allowing depositions to be read by counsel for defendant after he had closed his case held within discretion of court, the omission of such depositions having been by an oversight of counsel. Davis v. Collins [S. C.] 48 S. E. 469. Refusal to reopen case to hear additional proof not an abuse of discretion when witness knew all the facts at the trial and would have testified to them had not his attorney declined to bring them out. Commercial Bank v. Brinkerhoff [Mo. App.] 85 S. W. 121. Reopening case to admit formal introduction of answers already in the case as pleadings held not an abuse of discretion. Kane v. Kane, 35 Wash. 517, 77 P. 842.

57. Reopening after motion for nonsuit proper. Knapp v. Order of Pendo, 36 Wash. 601, 79 P. 209. Even though court had announced that motion for nonsuit would be sustained. Brooke v. Lowe [Ga.] 50 S. E. 146.

58. Plaintiff's attorney properly permitted to recall a witness to examine him on points he had overlooked, after motion for directed verdict by defendant. Hill v. Glenwood, 124 Iowa, 479, 100 N. W. 522.

murrer to plaintiff's evidence is interposed, and plaintiff moves to reopen the case to put in certain specific evidence, the court may grant the motion upon condition that certain other accessible evidence, deemed essential, shall be submitted;[60] and on refusal of the plaintiff's attorney to comply with such condition, judgment may properly be rendered for defendant.[61] Where the court grants leave to introduce certain specified testimony, its refusal to allow the introduction of testimony other than that specified is within its discretion.[62] Further evidence cannot be received after rendition of a verdict.[63] While a ruling inconsistent with a previous announcement is not ground for reversal unless a party has been thereby prejudiced,[64] a trial should be reopened when a party has waived a right in reliance upon an announcement by the trial judge, and the decision is inconsistent with such announcement, and it appears that on a rehearing the party will be able to establish his case, and was not guilty of laches.[65]

The recall of a witness[65a] to make proof of omitted matter,[66] or to explain former testimony,[67] is discretionary. A court is not required to recall a witness merely because counsel disagree as to his testimony, where no desire for such recall is indicated by the jury.[68]

The right to open and close[69] is in the party having the burden of proof.[70] A defendant may be entitled to open and close, by virtue of admissions, if such admissions are made in the pleadings, and are not merely oral,[71] and if they make a prima facie case for plaintiff, thus relieving him of the necessity of introducing evidence.[72] The Code provision that the party having the burden of the issue shall have the right to open and close the argument, "but shall disclose in the opening all the points relied on in the cause," does not take from a trial court all discretionary power relative to argument of counsel.[73] A defendant has no

59, 60, 61. Cole v. Gray [Kan.] 79 P. 654.

62. Alling v. Weissman [Conn.] 59 A. 419.

63. The court reserved ruling on evidence of assignments of the cause of action until after verdict, and then admitted the evidence. Held error. Bahnsen v. Horwitz, 90 N. Y. S. 428.

64. Declaration by a judge of his purpose to direct a verdict for plaintiff, after the testimony was all in, and his subsequent direction of verdict for defendant, held not prejudicial to plaintiff as inducing him to omit certain evidence, since it was the duty of counsel to put in the evidence in question. Sparks v. Green [S. C.] 48 S. E. 61.

65. At the close of the evidence the judge gave an opinion as to the effect of new matter introduced under an amended pleading, and the other party, in reliance thereon, did not attempt to meet such new matter. The decision was at variance with the opinion so given, and it appeared that the new matter might have been successfully met. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

65a. See 2 Curr. L. 1915, n. 87.

66. See, also, 2 Curr. L. 1915. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493.

67. Piehl v. Piehl [Mich.] 101 N. W. 628.

68. Scott v. State [Tex. Cr. App.] 81 S. W. 47.

69. See 2 Curr. L. 1914.

70. Where defendant admits the plaintiff's cause but files a counterclaim, he has the burden of proof. Shaffer Bros. v. Warren [Iowa] 102 N. W. 497. When a plaintiff's cause is admitted, evidence tending to support it is properly excluded. Id. Plaintiff, in action on life insurance policy, held to have burden of proof and right to open and close. Union Cent. Life Ins. Co. v. Loughmiller, 33 Ind. App. 309, 69 N. E. 264. In action on account stated, defendant, having counterclaimed, was held to have the burden of proof in the action, so as to be entitled to the closing argument, within the meaning of Civ. Code Prac. § 526. Mattingly v. Shortell [Ky.] 85 S. W. 215. Under Court Rule 31, giving defendant the right to open and close if plaintiff's cause of action is admitted, except as defeated by matters set up in the answer, where in an action for money loaned and for commissions on sales, defendant alleged negligence in the care of the property sold, and plaintiff denied negligence, and defendant filed an admission of plaintiff's cause of action, the burden was on defendant to prove plaintiff's negligence. Kleinsmith v. Kempner [Tex. Civ. App.] 83 S. W. 409.

71. Oral admission ineffectual for this purpose. Du Bignon v. Wright [Ga.] 50 S. E. 65.

72. Du Bignon v. Wright [Ga.] 50 S. E. 65. Where admissions in defendant's answer make a prima facie case for plaintiff, the burden of proof and the right to open and close are with defendant. Atlanta Suburban Land Corp. v. Austin [Ga.] 50 S. E. 124.

Note: As to effect of admissions to change right to open and close, see note in 61 L. R. A. 513.

73. Where counsel for plaintiff opened, and counsel for defendant made no closing

absolute right to deprive a plaintiff of his privilege of making a closing argument by failure to argue his case.[74]

The power of the court to reject merely cumulative evidence[75] on a chief issue, while generally committed to the discretion of the trial court, subject to review,[76] is denied in Massachusetts.[77] It is said elsewhere to be the duty of the court to reasonably limit testimony on a given issue,[78] and limitation of the number of witnesses on an issue,[79] and refusal to hear a repetition of testimony already given,[80] or to hear wholly immaterial evidence,[81] are held a proper exercise of the discretion of the court.

Admissions of counsel,[82] dispensing with the formal proof of facts, are binding on clients,[83] if of record and authorized.[84] Any statement which necessarily recognizes a fact admits it.[85] Announcement by counsel in open court that claims

argument, refusal to permit a closing argument for plaintiff was not cause for reversal, in the absence of a showing of prejudice to plaintiff. Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489.

74. Conrad v. Cleveland, etc., R. Co. [Ind. App.] 72 N. E. 489.

75. See 2 Curr. L. 1917.

76. See 21 Enc. Pl. & Pr. 980. Cumulative may be refused. Slegelman v. Jones, 103 Mo. App. 172, 77 S. W. 307. Refusal to permit introduction of corroborative evidence by defendant held reversible error. Honigstein v. Hollingsworth, 85 N. Y. S. 818.

As to the harmlessness of the ruling when there is other evidence to the same fact, see Harmless and Prejudicial Error, 3 Curr. L. 1579.

Note: It is said (see Note 18 Harv. L. R. 381) that as to expert's character and usage there is no conflict (as to character, reputation or credibility, see State v. Beabant, 100 Iowa, 155; Bays v. Hunt, 60 Iowa, 251; Williams v. McKee, 98 Tenn. 139. Cited 21 Enc. Pl. & Pr. 980, et seq. As to expert evidence see Fraser v. Jennison, 42 Mich. 206; State v. Pratt County, 42 Kan. 641; Riggs v. Sterling, 60 Mich. 643, 1 Am. St. Rep. 554; White v. Herman, 51 Ill. 243; Huett v. Clark, 4 Colo. App. 231; Hilliard v. Beattie, 59 N. H. 462; Sixth Ave. R. Co. v. Metropolitan El. R. Co., 138 N. Y. 548; Powers v. McKenzie, 90 Tenn. 167; and see, 21 Enc. Pl. & Pr. 981; 8 Enc. Pl. & Pr. 782. The case of Green v. Phoenix Mut. L. Ins. Co., 134 Ill. 310, will be found instructive as to the occasions when the number of witnesses may be limited.

It is suggested that a division may be made which will tend to harmony, viz.: (a) Cases of collateral issues; (b) Cases of chief issues which in their nature lie in the knowledge of many witnesses whose number may be indefinite, e. g. Matters of opinion, usage, public knowledge or observation and the like; (c) Cases of chief issues whose nature does not invlove the probability of many witnesses, e. g. eye and ear witnessing to a certain occurrence.

77. Perkins v. Rice, 187 Mass. 28, 72 N. E. 323.

Note: This case is commented on in a note in 18 Harv. L. R. as ignoring the disadvantage of expense, delay and confusion of the jury which may result from receiving an unlimited amount of merely cumulative testimony. It is noteworthy that while denying power to withhold cumulative evidence from the jury during trial the same practical result is reached on a motion for new trial where it will be refused if the only ground is newly discovered cumulative evidence. See Gardner v. Gardner, 2 Gray [Mass.] 434; Gardner v. Mitchell, 6 Pick. [Mass.] 114, 17 Am. Dec. 349; Sawyer v. Merrill, 10 Pick. [Mass.] 16, cited in 14 Enc. Pl. & Pr. 814.

78. Action of court in stopping introduction of evidence on damages held proper, six or seven witnesses having testified on the point. Burt-Brabb Lumber Co. v. Crawford [Ky.] 86 S. W. 702.

79. Restriction of number of impeaching witnesses proper. Donaldson v. Dobbs [Tex. Civ. App.] 80 S. W. 1084. Limiting number of expert witnesses on question of value of realty to three for each side, not an abuse of discretion. Swope v. Seattle, 36 Wash. 113, 78 P. 607. Permitting one party to examine witnesses on an issue more in number than specified in a rule by the court limiting the number of witnesses for each party on such issue is discretionary. Brady v. Shirley [S. D.] 101 N. W. 886.

80. Not error to refuse further cross-examination on same subject when ground had been covered by counsel several times. San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025. Refusal to permit repetition of testimony on redirect examination is discretionary. Shafer v. Russell [Utah] 79 P. 559. Refusal to allow repetition of evidence of a custom of hiring employes to corroborate testimony for defendant held proper. Johnson v. Crookston Lumber Co., 92 Minn. 393, 100 N. W. 325.

81. Action of the court in refusing to hear immaterial evidence and telling the witness to leave the stand is not ground for error when no further relevant evidence was offered and no request was made to be heard in argument. In re Hayden's Estate [Cal.] 79 P. 588.

82. See 2 Curr. L. 1918.

83. Everett v. Marston [Mo.] 85 S. W. 540.

84. Alleged admission of sales by nodding of head, while going over items of bill of particulars, held not binding on client. Jefferson Bank v. Gossett, 90 N. Y. S. 1049.

85. A statement as to what was the basis of action taken by an auditing board held an admission that they wrongly refused to audit a claim. People v. Mole, 82 N. Y. S. 747.

in a petition were abandoned, and only those set up in an amendment would be relied on, is equivalent to striking out such claims in the petition, and renders submission of the abandoned issues unnecessary.[86] A remark of counsel as to a claim of plaintiff cannot be considered as an abandonment of the claim as alleged in the petition, when the attorneys do not so treat it on trial.[87] An admission by an attorney in a pending cause may be used on a subsequent trial, and cannot be retracted, unless by leave of the court on a proper showing of mistake, imposition or surprise.[88] Incompetency of testimony as against infant parties cannot be waived by counsel.[89]

An offer of proof[90] must show the materiality of evidence sought to be introduced.[91] An offer is not sufficient without having the witness present and calling him, or asking leave to call him, or without affirmatively showing that the offer is made in good faith, and with the means of doing or trying to do what is desired.[92] It is proper to offer to prove matters after questions relating thereto have been ruled out on objection.[93] If an offer of proof is such that it may mislead or prejudice the jury, it is proper to have the jury withdrawn until the offer is made.[94] The matter rests largely in the trial court's discretion.[95] Refusal to rule on offers of proof when made is error.[96]

The proper objection to evidence that has been received[97] is a motion to strike it out,[98] or a request for an instruction to the jury to disregard it.[99] A motion to strike at the close of case is too late,[1] unless on the ground that the evidence is inadmissible under the pleadings.[2] A motion to strike will be denied when part of the testimony to which it is directed is proper and part improper.[3] Strik-

86. Southern Cotton Oil Co. v. Dukes, 121 Ga. 787, 49 S. E. 788.

87. Cudahy Packing Co. v. Broadbent [Kan.] 79 P. 126.

88. Copy of by-laws, admitted by attorney to be competent on formal trial, held admissible. Wells & M. Council No. 14, Junior Order United American Mechanics v. Littleton [Md.] 60 A. 22.

89. Jespersen v. Mech, 213 Ill. 488, 72 N. E. 1114.

90. See 2 Curr. L. 1915.

91. When it is not apparent on the face of a question that the evidence is material, the party seeking to introduce it must state what he expects to prove. Marshall v. Marshall [Kan.] 80 P. 629.

See, also, Saving Questions for Review, 4 Curr. L. 1368.

92. Schilling v. Curran [Mont.] 76 P. 998.

93, 94, 95. Henrietta Coal Co. v. Campbell, 211 Ill. 216, 71 N. E. 863.

96. Verdict and judgment set aside where court refused to rule formally on defendant's offer of proof, but ruled that all offers would be considered as proven, and thereupon directed verdict for plaintiff. Montelius v. Montelius, 209 Pa. 541, 58 A. 910.

97. See 2 Curr. L. 1920.

98. The remedy for an answer which is not responsive to the question is a motion to strike out and reject the answer. Diamond Block Coal Co. v. Cuthbertson [Ind.] 73 N. E. 818. After an answer is made, neither the question nor answer is open to the objection of incompetency; the proper motion is to exclude the answer. Western Union Tel. Co. v. Bowman [Ala.] 37 So. 493. Testimony being shown, on cross-examination, to be hearsay, it should be stricken, on motion. Missouri, etc., R. Co. v. Renfro [Tex. Civ. App.] 83 S. W. 21. Refusal to strike evidence of improper elements of damage in condemnation proceedings held error. Illinois Cent. R. Co. v. Trustees of Schools of Tp. 9 S. R. 2 W., 3d P. M., Jackson County, 212 Ill. 406, 72 N. E. 39.

See other cases in Saving Questions for Review, 4 Curr. L. 1368.

99. Request for instruction, and not motion to strike, is the proper remedy in New York, when a question is answered before objection. Mollineaux v. Clapp, 90 N. Y. S. 880. Improper evidence having been admitted, the court may withdraw it from the jury and refuse to allow counsel to discuss it before the jury. Coruth v. Jones [Vt.] 60 A. 814.

1. Smith v. New York City R. Co., 90 N. Y. S. 1061. It is error to strike out opinion evidence of an expert at the close of the case of the side offering such evidence, on the ground that the detailed facts upon which it is based were not given, no effort having been made on cross-examination to elicit testimony in that regard; and especially is this so where no objection is made because of want of such detail. Manning v. School Dist. No. 6 of Ft. Atkinson [Wis.] 102 N. W. 356.

2. Evidence of locomotor ataxia properly so stricken because damages therefor not alleged. Wilkins v. Nassau Newspaper Delivery Exp. Co., 90 N. Y. S. 678.

3. Southern Pac. R. Co. v. San Francisco Sav. Union [Cal.] 79 P. 961; Hollingsworth v. Ft. Dodge [Iowa] 101 N. W. 455; Witzel v. Zuel, 90 Minn. 340, 96 N. W. 1124.

ing out as much of a statement as is specified in a motion to strike and leaving the rest as res gestae is not a cause of complaint by the moving party.[4] A motion to strike out evidence admitted without objection is addressed to the discretion of the court, even though the evidence would have been inadmissible if seasonably objected to.[5] It is discretionary with the court to exclude improper evidence at once, or to reserve such ruling until the close of the case.[6] But it has been held that the practice, in equity cases, of hearing evidence subject to objection, reserving the ruling until the decision of the case, is erroneous, and is ground for reversal if the evidence is material and exception is preserved.[7] It is a question of fact for the trial court whether a trial was rendered unfair by erroneous testimony, excluded at the time, the court later instructing the jury to disregard it.[8] It will be presumed that excluded evidence was not considered by the jury.[9] Where pertinent testimony is properly admitted, no subsequent complaint touching its informal admission will prevail.[10] Withdrawal of evidence, after it has been rebutted, may be refused, when the purpose is to effect the withdrawal of the rebuttal.[11]

The effect of evidence admissible only on certain issues[12] *or admitted for a certain purpose*[13] should be properly restricted, and a party wishing to restrict the effect of evidence should request such restriction at the time the evidence is offered, or request an instruction limiting the effect to be given it by the jury.[14]

Permission to perform experiments in the presence of the jury cannot be demanded as a matter of right, but is discretionary with the court.[15]

§ 5. *Custody and conduct of the jury. A. During trial.*[16]—In general, the conduct of jurors, selected to try a case, should be such as to avoid all suspicion of improper influence.[17] Thus, it is improper for a party to treat[18] or dine[19] jurors, or for jurors to mingle freely, during the trial, with counsel and witnesses.[20] Discussion of the merits of the case by a witness of the prevailing party in the presence and hearing of certain jurors is reversible error,[21] unless the objection to such misconduct has been waived by failure to urge it, with knowledge

4. Frenchi v. New York City R. Co., 92 N. Y. S. 771.

5. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154.

6. Hearsay introduced before objection could be made. Baumgartner v. Eigenbrot [Md.] 60 A. 601.

7. Asbury v. Hicklin, 181 Mo. 658, 81 S. W. 390.

8. Erroneous admission held cured by instruction. Lee v. Dow [N. H.] 59 A. 374.

9. Answers excluded. Henning v. Stevenson, 26 Ky. L. R. 159, 80 S. W. 1135.

10. Vanderslice v. Donner, 26 Pa. Super. Ct. 319.

11. Where, on cross-examination, evidence was brought out tending to show interest of the witness in the suit, and this was rebutted, it was not error to refuse to permit withdrawal of the evidence elicited on cross-examination. Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984.

12. Robinson v. First Nat. Bank [Tex.] 82 S. W. 505.

13. When testimony is admitted to impeach a witness by showing that he has made statements out of court different from those made on trial, it is error for the court to fail to limit its consideration by the jury to the purpose for which it was admitted. Texas Loan & Trust Co. v. Angel [Tex. Civ. App.] 86 S. W. 1056.

14. San Miguel Consol. Gold Min. Co. v. Bonner [Colo.] 79 P. 1025.

15. Carr v. American Locomotive Co. [R. I.] 58 A. 678.

16. See 2 Curr. L. 1921.

17. Albers v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 81 S. W. 828.

18. It is highly improper for a party to the action to treat jurors to liquor at a saloon during the trial. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872.

19. The practice of one party in dining or treating jurors during the trial is unwarranted if not censurable. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856.

20. Detroit, etc., R. Co. v. Campbell [Mich.] 12 Det. Leg. N. 202, 103 N. W. 856. Improper for a juror to go to the house of a person unfriendly to plaintiff, in company of defendant's attorney, and remain there for the night. Albers v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 81 S. W. 828.

21. It is immaterial that such discussion was without the knowledge or consent of the party to the suit, for whom witness testified. Belcher v. Estes [Me.] 59 A. 439.

of the facts, at the proper time.[22] To constitute reversible error, alleged misconduct must usually be shown to have been prejudicial.[23]

Whether a view should be taken[23a] in any case is a matter peculiarly within the discretion of the court,[24] but refusal to allow an inspection of premises in controversy may be ground for reversal.[25] The New York statute relative to viewing property in actions for waste is not applicable to other actions,[26] and misconduct of two jurors in viewing property during a recess, in an action for work done and materials furnished, is not cured by an unauthorized order directing a view by the entire jury.[27] A plaintiff in a personal injury action may be permitted to show his wounds and contusions to the jury, but should not be permitted to make a dramatic demonstration as to the extent of his physical disabilities.[28] A private physical examination of a party by the jury outside of the courtroom is improper.[29]

It is largely discretionary with the court to say what papers or articles shall be sent out with the jury,[30] and the practice of various courts differs.[31]

(§ 5) *B. After submission of the case.*[32]—Federal judges are not required to follow state regulations regarding submission of issues and control of deliberations of the jury, since the common law governs such procedure.[33] It is error for the court to recall the jury and give an additional charge, on its own motion,[34] but the court may explain its instructions, after submission of the case, on

22. Objection waived where senior counsel knew of facts before the jury retired and failed to object. The objection was waived, and was too late, after verdict. Belcher v. Estes [Me.] 59 A. 439.

23. Conversation at noon recess between a juror and an adjuster of defendant railroad company not cause for setting verdict aside, the subject of conversation not being shown. Werner v. Interurban St. R. Co., 99 App. Div. 592, 91 N. Y. S. 111. Action of juror in personal injury suit in walking up the street behind plaintiff, during a recess, and watching him to discover how badly he was crippled, and whether he was pretending, the juror concluding the injury was real, held not reversible. Gratz v. Worden, 26 Ky. L. R. 721, 82 S. W. 395.

23a. See 2 Curr. L. 1912, n. 59.

24. Denial of motion to permit view of plaintiff in her home, in personal injury action, held proper. Blanchard v. Holyoke St. R. Co., 186 Mass. 582, 72 N. E. 94.

25. Weidner v. Lund, 105 Ill. App. 454.

26. Code Civ. Proc. § 1659, does not authorize a court to direct a view of property in an action for work done and materials furnished. Buffalo Structural Steel Co. v. Dickinson, 90 N. Y. S. 268.

27. Buffalo Structural Steel Co. v. Dickinson, 90 N. Y. S. 268.

28. Felsch v. Babb [Neb.] 101 N. W. 1011. See, also, the rules as to real and demonstrative evidence. Evidence, 3 Curr. L. 1334.

29. Error to allow private examination by jury of brakeman charged with committing rape on passenger. Garvik v. Burlington, etc., R. Co., 124 Iowa, 691, 100 N. W. 498.

30. See 2 Curr. L. 1922. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. Whether papers read in evidence may be taken, discretionary under California statute. Powley v. Swensen [Cal.] 80 P. 722.

31. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. The practice of allowing **pleadings** to be taken to the jury room, whether read in evidence or not, is not to be commended, but in the absence of prejudice it is not reversible error. Powley v. Swensen [Cal.] 80 P. 722. Paragraphs of petitions which have been stricken out on motion should not be submitted to the inspection of the jury. Trumbull v. Trumbull [Neb.] 98 N. W. 683. Jury may properly be permitted to take out the pleadings, including amendments thereto. Willoughby v. Willoughby [S. C.] 50 S. E. 208.

Interrogatories, though read in evidence should not be delivered to the jury. Shedden v. Stiles, 121 Ga. 637, 49 S. E. 719. Where they are so delivered, over objection, after the jury have retired to deliberate, and are of a character to influence the jury in favor of the prevailing party, a new trial should be granted to the party objecting against whom a verdict was rendered. Id. It is improper to send out a **statement of a claim** with the jury, especially where the evidence is conflicting and the claim is simple and easily kept in mind. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79. Permitting jury to take out **photograph** of plaintiff, showing his condition after an injury, held not reversible error. Toledo Traction Co. v. Cameron [C. C. A.] 137 F. 48. A statute authorizing the jury to take to jury room "papers read in evidence" permits them to take out an X-ray photograph. Chicago & J. Elec. R. Co. v. Spence, 213 Ill. 220, 72 N. E. 796. In action for damages for killing cattle on track, not error, under Code, § 1083, to allow jury to take out **map of place of accident,** used by witnesses, but not admitted in evidence. Carman v. Montana Cent. R. Co. [Mont.] 79 P. 690.

32. See 2 Curr. L. 1923, 1924.

33. Liverpool & L. & G. Ins. Co. v. Friedman Co. [C. C. A.] 133 F. 713.

34. Rev. St. 1895, art. 1321, providing for additional instructions when asked for by the jury, does not authorize such action. Bailey v. Hartman [Tex. Civ. App.] 85 S. W. 829.

request of a juror.[35] When a jury reports failure to agree, the court may properly show the importance of their arriving at a verdict, and require a reconsideration.[36] It is error to permit the official stenographer to enter the jury room and read his notes to the jury.[37] Permitting jurors to leave the jury room to communicate with their families by telephone,[38] and separation of the jurors to go home during Thanksgiving,[39] were held not reversible error, no misconduct or improper influence having been shown.

ADDITIONAL INSTRUCTIONS AFTER RETIREMENT OF JURY.

[SPECIAL ARTICLE.*]

§ 1. Right and Duty to Give Additional Instructions (1718).
- A. General Rule (1718).
- B. At Request of Jury (1719).
- C. At Request of Parties (1720).
- D. By Consent of Counsel (1721).
- E. What Further Instructions Proper (1721).
- F. Same—Necessity of Repeating Entire Charge (1722).
- G. Exceptions to Additional Instructions (1722).

§ 2. Delivery in Open Court (1723).
- A. General Rule (1723).
- B. Violation of Rule as Ground for Reversal (1723).
- C. Waiver of Objections (1724).

§ 3. Presence of Counsel (1724).
- A. Rule that Presence of or Notice to Counsel is Unnecessary (1724).
- B. Rule that Presence of Counsel or Notice is Necessary (1725).
- C. Same—Violation of Rule as Ground for Reversal (1727).

§ 1. *Right and duty to give additional instructions. A. General rule.*—In Mississippi, the trial judge is prohibited by statute from giving the jury any instructions, unless a request therefor is made by the parties,[1] and this prohibition makes it erroneous for the court, of its own motion, or at the request of the jury, to give the jury further instructions after they have retired to consider their verdict.[2] Except in this state, it is a rule of almost universal application that the trial court may, of its own motion, recall the jury after they have retired to deliberate on their verdict, to give them further instructions,[3] especially after they have considered a case submitted to them for some length of time,[4] or where they report that they are unable to agree on a verdict.[5] On learning of a jury's dis-

35. By express provisions of Code Civ. Proc. § 321. City of Covington v. Bostwick, 26 Ky. L. R. 780, 82 S. W. 569.

36. Statement of court to jury on sending them back for further deliberation held unobjectionable. City of Covington v. Bostwick, 26 Ky. L. R. 780, 82 S. W. 569.

37. Error to permit official stenographer to enter jury room, in absence of counsel, and read notes of examination and cross-examination of plaintiff and defendant, such notes not being evidence of recorded testimony. Otto v. Young, 43 Misc. 628, 88 N. Y. S. 188.

38. No cause for new trial, though improper. Baizley v. Welsh [N. J. Law] 60 A. 59.

39. Fire insurance case, and all jurors lived outside city where fire occurred. Liverpool & L. & G. Ins. Co. v. Friedman Co. [C. C. A.] 133 F. 713.

1. Lavenburg v. Harper, 27 Miss. 299. See, also, Blashfield on Instructions, § 126.

2. Duncan v. State, 49 Miss. 331; Taylor v. Manley, 6 Smedes & M. [Miss.] 305; Randolph v. Govan, 14 Smedes & M. [Miss.] 9, holding that a violation of the statute is a mere irregularity, and not ground for reversal where the instruction given is correct.

3. Morris v. State, 25 Ala. 57; National Lumber Co. v. Snell, 47 Ark. 407; McDaniel v. Crosby, 19 Ark. 533; People v. Perry, 65 Cal. 568; People v. Mayes, 113 Cal. 618; Hayes v. Williams, 17 Colo. 465; People v. Odell, 1 Dak. 197; White v. Fulton, 68 Ga. 511; Wood v. Isom, 68 Ga. 417; Pritchett v. State, 92 Ga. 65; Shaw v. Camp, 160 Ill. 425; City of Joliet v. Looney, 159 Ill. 471, affirming 56 Ill. App. 502; Breedlove v. Bundy, 96 Ind. 319; Hartman v. Flaherty, 80 Ind. 472; Hall v. State, 8 Ind. 439; Nichols v. Munsel, 115 Mass. 567; Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 70; Scott v. Haynes, 12 Mo. App. 597; McClary v. Stull, 44 Neb. 191; Phillips v. New York Cent. & Hudson River R. Co., 127 N. Y. 657; Cox v. Highley, 100 Pa. 252; State v. Lightsey, 43 S. C. 114; Jones v. Swearingen, 42 S. C. 58; Benavides v. State, 31 Tex. Cr. App. 173.

4. Allis v. United States, 155 U. S. 117; State v. Rollins, 77 Me. 380.

5. McDaniel v. Crosby, 19 Ark. 533; Hogg v. State, 7 Ind. 551; State v. Pitts, 11 Iowa, 343; State v. Chandler, 31 Kan. 201; Com.

* From Blashfield on Instructions. Copyright 1902. Keefe-Davidson Co. See, also, late cases in Trial, 2 Curr. L. 1923, 4 Curr. L. 1708; Instructions, 2 Curr. L. 476; 4 Curr. L. 153.

agreement, "it is competent for the court, of its own motion, to give them any additional instruction, proper in itself, which may be necessary to meet the difficulty in their minds."[6] No request on the part of the jury for further instructions is necessary in any case.[7] It is within the discretion of the judge to have the jury brought in at any time to give them additional instructions, or to restate the evidence and principles of law applicable to the case, and the jury cannot forestall the action of the court by saying that they do not desire additional instructions.[8] The trial court has a large discretion in recalling juries and submitting amended or additional legal propositions by way of instructions, and, unless it fairly appears that such discretion has been abused to prejudice of the party complaining, there is no ground for reversal.[9] The discretion with which the court is thus vested is based on the soundest reasons. In the hurry of the trial, the court may have overlooked some instruction vitally important to a correct determination of the case.[10] It may also be that the instructions which it has given are vague and obscure, and have a tendency to mislead, which may be removed by a little explanation.[11] So, the court may have given some instructions which are, in point of law, erroneous.[12] It can hardly be contended that it would be preferable to leave the court no discretion in the matter of giving further instructions in any of these contingencies, and to run the risk of an erroneous verdict and the expense of a new trial.[13] In a number of states this matter of further instructing the jury after their retirement has been made the subject of statutory regulations, but it is believed that no court in which one of these statutes has been construed has ever held that the court cannot, of its own motion, give further instructions when the exigencies of the case demand such action. It has been held that, even after the jury have announced their verdict, but before its acceptance, the court may correct any erroneous instruction that has been given, and send them back again to deliberate.[14]

(§ 1) *B. At request of jury.*—With the exception of one state, where the court can only give instructions on the request of the parties,[15] it is well settled that the court may properly recall the jury if they request it, and give them additional instructions.[16] This is a practice not only common, but approved by all

v. Snelling, 15 Pick. [Mass.] 334; Edmunds v. Wiggin, 24 Me. 505; Dowzelot v. Rawlings, 58 Mo. 75; Salomon v. Reis, 5 Ohio Cir. Ct. R. 375; Alexander v. Gardiner, 14 R. I. 15; Turner v. Lambeth, 2 Tex. 365; Hannon v. State, 70 Wis. 448.

6. State v. Chandler, 31 Kan. 201.

7. See cases cited in two preceding notes.

8. Nichols v. Munsel, 115 Mass. 567.

9. Hayes v. Williams, 17 Colo. 465.

10. City of Joliet v. Looney, 159 Ill. 471; Cox v. Highley, 100 Pa. 252.

11. Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 70; Morris v. State, 25 Ala. 57.

12. State v. Lightsey, 43 S. C. 114.

13. In Com. v. Snelling, 15 Pick. [Mass.] 334, the court said that the propriety of recalling the jury and explaining the matter further is hardly open to reasonable doubt.

14. Jack v. Territory, 2 Wash. T. 101. See, also, dictum in Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 71. Compare State v. Johnson, 30 La. Ann. 921, where it was held "not within the province of the judge presiding at a criminal trial to give such instructions to the jury" as would lead to a modification or change of the verdict.

15. Lavenburg v. Harper, 27 Miss. 299. In this case it was held error to recall the jury and give them further instructions at their request, but without the consent of parties. It was further held that, if the instruction given were in conformity to law, the cause would not be reversed. See, also, Taylor v. Manley, 6 Smedes & M. [Miss.] 305; Randolph v. Govan, 14 Smedes & M. [Miss.] 9.

16. Lee v. Quirk, 20 Ill. 392; Shaw v. Camp, 160 Ill. 425; Arnold v. Phillips, 59 Ill. App. 213; Farley v. State, 57 Ind. 331; Sage v. Evansville & T. H. R. Co., 134 Ind. 100; Gaff v. Greer, 88 Ind. 122; Wilkinson v. St. Louis Sectional Dock Co., 102 Mo. 130; State v. Williams, 69 Mo. 110; Hulse v. State, 35 Ohio St. 421; Wilson v. State, 37 Tex. Cr. App. 156; Turner v. Lambeth, 2 Tex. 365; State v. Kessler, 15 Utah, 142; Williams v. Com., 85 Va. 607; Richlands Iron Co. v. Elkins, 90 Va. 249; Woodruff v. King, 47 Wis. 261; Forrest v. Hanson, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943; Turner v. Foxall, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255; United States v. White, 5 Cranch, C. C. 116, Fed. Cas. No. 16,677. A rule of court that represents for instructions will not be considered "unless presented before the com-

authorities.[17] And some decisions go a step further, and hold that it is not only proper, but the duty of the court, to comply with a request from the jury for further instructions.[18] As was said in one case: "There may be instances when it will become the imperative duty of a court to rectify some omission, or cure some oversight, by giving to a jury * * * an additional instruction."[19]

(§ 1) *C. At request of parties.*—As shown in another section, the court is not bound to give requested instructions unless the request was made within the proper time, but that it is within the sound discretion of the court to do so if it sees fit.[20] The action of the trial court in refusing requests for instructions, made after the retirement of the jury,[21] or after they have announced their inability to agree on a verdict, has accordingly been sustained,[22] it being considered that, when the jury has retired under instructions to which there was no exception, it is within the unreviewable discretion of the court whether they shall be recalled for further instructions.[23] Even if the court should choose to exercise its discretion by recalling the jury for further instructions at the request of the parties, it should not do so without good grounds. The indiscriminate exercise of such discretion might place it in the power of counsel to have emphasized by the court any proposition he might choose to submit, and have the jury believe the court attached great weight to the matter about which it had been recalled for instructions.[24] A somewhat different question is presented when the court has given the jury further instructions of its own motion, or at the request of the jury, and the decisions are not entirely harmonious as to the right of the parties to further instructions. A mere repetition of instructions already given does not give parties the right to ask a new and substantial charge,[25] or for any additional instructions whatever, though it would seem that it is within the court's discretion to comply with a request for additional instructions in such case.[26] So, in one state, when the court gives further instructions of its own motion, or at the request of the jury, no right of the parties to any further instructions is recognized.[27] So, in another state, it was held that, where the court gave additional instructions at the request of the jury, a refusal to give further instructions at the request of the parties was not reversible error.[28] In all other jurisdictions where this question has been passed upon it has been either held or said that the parties are entitled to further instructions by way of explanation or modification of additional instructions given by the court of its own motion, or at the request of the jury.[29]

mencement of the final argument" has no application to requests by a juror for further instructions. Arnold v. Phillips, 59 Ill. App. 213.

17. Woodruff v. King, 47 Wis. 261; Bank of Kentucky v. McWilliams, 2 J. J. Marsh. [Ky.] 263.

18. O'Shields v. State, 55 Ga. 696; Phelps v. State, 75 Ga. 571; Bank of Kentucky v. McWilliams, 2 J. J. Marsh. [Ky.] 263; King v. State, 86 Ga. 355.

19. Dowzelot v. Rawlings, 58 Mo. 75.

20. See Blashfield, Inst'ns, § 134, "Necessity for Request in Apt and Proper Time." See, also, Buck v. Buck, 4 Baxt. [Tenn.] 392, where it was held that, after the jury have failed to agree, they may be recalled at the instance of a party, and given further and fuller instructions.

21. Norton v. McNutt, 55 Ark. 59; State v. Barbee, 92 N. C. 820; Scott v. Green, 89 N. C. 278; State v. Rowe, 98 N. C. 629; Lafoon v. Shearin, 95 N. C. 391; Forrest v. Hanson, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943; Turner v. Foxall, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255; Williams v. Com., 85 Va. 699.

22. Cady v. Owen, 34 Vt. 598.

23. Lafoon v. Shearin, 95 N. C. 391.

24. Bowling v. Memphis & C. R. Co., 15 Lea [Tenn.] 122.

25. Prosser v. Henderson, 11 Ala. 484, where it was said: "If this can be done, we see no reason why the jury should not be required to be brought again into court at any time before they have rendered their verdict, and additional charges required to be given by the court."

26. Harvey v. Graham, 46 N. H. 175.

27. Nelson v. Dodge, 116 Mass. 367; Kellogg v. French, 15 Gray [Mass.] 354.

28. State v. Maxent, 10 La. Ann. 743; Williams v. Com., 85 Va. 607.

29. Shaw v. Camp, 160 Ill. 430; Fisher v. People, 23 Ill. 283; Keeble v. Black, 4 Tex. 69; Harper v. State, 109 Ala. 66; Prosser v. Henderson, 11 Ala. 484; Kuhl v. Long, 102 Ala. 569; Page v. Kinsman, 43 N. H. 328;

(§ 1) *D. By consent of counsel.*—It is no error for the judge, by consent of counsel on both sides, to indorse on instructions already given additional instructions to the jury.[30]

(§ 1) *E. What further instructions proper.*—After the retirement of the jury, the court may, of its own motion, recall them and give instructions inadvertently omitted,[31] or which have been erroneously refused,[32] or instructions explanatory of those already given,[33] or withdrawing or modifying an erroneous instruction given;[34] or, where the parties have consented that the jury shall take the minutes of the testimony to the jury room, the court may recall the jury to read to them a portion of a deposition admitted on the trial, but which, through inadvertence, had not been given to the jury,[35] or to restate the court's opinion as to the credibility of a witness (the court having stated such opinion in the original charge, at the instance of counsel);[36] or to define the punishment for the different degrees of crime;[37] or to admonish the jury of the impropriety of a juror going into the jury box with a predetermination as to the result which he will favor, and to cause a disagreement if the verdict cannot be rendered as he wants it.[38] So, the original instructions may be re-read to the jury when they say that they do not understand them,[39] or request that the instructions be re-read in order to satisfy them as to the true state of the law upon the issue before them;[40] and when a request is made that the instructions be re-read, the court may correct an erroneous instruction given,[41] or give additional instructions.[42] So, where the jury request further instructions, the court may withdraw instructions already given.[43] In some jurisdictions the court may restate the evidence, or a portion of it.[44] This, however, is not proper in most jurisdictions, as judges are expressly prohibited from charging in respect to matters of fact.[45] The court may, at their request, give the jury any further instruction on any question of law arising on the facts proven, on which they say that they are in doubt.[46] Nevertheless, the court is not justified, in any case, in giving another full, complete, and different charge to the jury upon nearly all, or even some, of the material questions in-

O'Connor v. Guthrie, 11 Iowa, 80; Chouteau v. Jupiter Iron Works, 94 Mo. 388; Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 55; Cook v. Green, 6 N. J. Law, 109. See, also, Yeldell v. Shinholster, 15 Ga. 189, in which it was held that where, after failure to agree, the jury return into court for further instructions, and a party requests an instruction on a point omitted in the charge, and to which omission the party had called the court's attention at the time, it is error to refuse the instruction. Where, after failure to agree, the jury return into court for further instructions, and a party requests an instruction on a point omitted in the charge, and to which omission the party had called the court's attention at the time, it is error to refuse the instruction.

30. Noffsinger v. Bailey, 72 Mo. 216.

31. Pritchett v. State, 92 Ga. 65; Cox v. Highley, 100 Pa. 252; Com. v. Snelling, 15 Pick. [Mass.] 334; Dowzelot v. Rawlings, 58 Mo. 75.

32. Phillips v. New York Cent. & H. R. R. Co., 127 N. Y. 657.

33. Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 70; Com. v. Snelling, 15 Pick. [Mass.] 334.

34. State v. Lightsey, 43 S. C. 114; Jack v. Territory, 2 Wash. T. 101; Scott v. Haynes, 12 Mo. App. 597; Hartman v. Flaherty, 80 Ind. 472; Hall v. State, 8 Ind. 439; Sage v. Evansville & T. H. R. Co., 134 Ind. 100.

35. Coit v. Waples, 1 Minn. 134 (Gil. 110).

36. State v. Summers, 4 La. Ann. 27.

37. State v. Kessler, 15 Utah, 142.

38. State v. Lawrence, 38 Iowa, 51. See, also, State v. Blackwell, 9 Ala. 79.

39. Gaff v. Greer, 88 Ind. 122; Salomon v. Reis, 5 Ohio. Cir. Ct. R. 375. See, also, Nichols v. Munsel, 115 Mass. 567.

40. Woodruff v. King, 47 Wis. 261.

41. McClelland v. Louisville, N. A. & C. Ry. Co., 94 Ind. 276; Sage v. Evansville & T. H. R. Co., 134 Ind. 100.

42. Hamilton v. State, 62 Ark. 543.

43. Sage v. Evansville & T. H. R. Co., 134 Ind. 100.

44. Hulse v. State, 35 Ohio St. 421; Nichols v. Munsel, 115 Mass. 567; Allis v. United States, 155 U. S. 117; Byrne v. Smith, 24 Wis. 68; Hannon v. State, 70 Wis. 448; Drew v. Andrews, 8 Hun [N. Y.] 23; Edmunds v. Wiggin, 24 Me. 505.

45. See State v. Maxwell, 42 Iowa, 208. See, also, Blashfield on Instructions, § 38 et seq.

46. O'Shields v. State, 55 Ga. 696; Wilkinson v. St. Louis Sectional Dock Co., 102 Mo. 130; State v. Chandler, 31 Kan. 201.

volved in the case.[47] The Texas statute provides that, where the jury, after retirement, asks further instructions, no charge shall be given except upon the particular point on which it is asked,[48] and this statute has been strictly enforced in a number of cases.[49] The wisdom of such a statute is questionable, and the general rule is that, "in answering questions asked by the jury when they come in for further instructions, the court is not restricted to categorical answers," but may and should give any further instructions necessary.[50] As already shown, the discretion of the court in recalling the jury for further instructions is practically unlimited, and, this being so, there can be no reason why it should be restricted to answering the precise point presented by the jury. On principle, there can be no difference in the extent to which it may go in giving further instructions, whether it takes the initiative, and gives further instructions of its own motion, or merely at the request of the jury.

(§ 1) *F. Same—Necessity of repeating entire charge.*—In case the jury asks the court to repeat a portion of the charge, or to give a new instruction on a particular point, it is not, according to some decisions, bound to repeat the whole charge,[51] as this practice might lead to confusion, and tend to protract proceedings needlessly.[52] It has been held, however, in one case, that, if the jury merely disagree as to the result, after considering the evidence and instructions, it is erroneous for the court to repeat or recharge disputed portions of the charge, and the reason assigned was that the jury would probably conclude that the matter thus recharged was controlling in the case.[53] Assuming to follow this decision it was held in another case that it was reversible error to recall the jury, and repeat a portion of the charge, in the absence of a request by the jury, and against the objection of the appellant.[54] A refusal to accede to a request of a party to re-read a portion of the instructions touching a special point is not error where the court offers to re-read the entire charge if the jury desire it, and the foreman states that the jury do not desire such reading.[55] In jurisdictions where it is permissible for the court to state the evidence in charging the jury, the court is not bound to repeat all the evidence when asked by the jury to restate a portion of it.[56] Though it is better practice, on restating the evidence upon a particular point, to restate all of it, yet, under a statute authorizing the court to state anew the evidence or any part of it, the court may merely state the evidence in favor of one party.[57] But where a part only of the evidence is restated, it is well to caution the jury that the other evidence in the case must be equally considered.[58]

(§ 1) *G. Exceptions to additional instructions.*—When further instructions are given after the retirement of the jury, parties have the same right to except to such instructions as to those originally given,[59] and may also except to a refusal

47. Foster v. Turner, 31 Kan. 65.

48. Pasch. Dig. art. 3079.

49. Chamberlain v. State, 2 Tex. App. 451; Garza v. State, 3 Tex. App. 287; Hannahan v. State, 7 Tex. App. 610; Wharton v. State, 45 Tex. 2.

50. Paine v. Hutchins, 49 Vt. 314; McClelland v. Louisville, N. A. & C. Ry. Co., 94 Ind. 276; Edmunds v. Wiggin, 24 Me. 509; Hamilton v. State, 62 Ark. 543; Sage v. Evansville & T. H. R. Co., 134 Ind. 100. And see, generally, the cases cited supra, this section.

51. Wilson v. State, 68 Ga. 827; O'Shields v. State, 55 Ga. 696; Hatcher v. State, 18 Ga. 460; Gravett v. State, 74 Ga. 196.

52. Gravett v. State, 74 Ga. 196.

53. Swaggerty v. Caton, 1 Heisk. [Tenn.] 202.

54. Granberry v. Frierson, 2 Baxt. [Tenn.] 326.

55. Cockrill v. Hall, 76 Cal. 192.

56. Allis v. United States, 155 U. S. 117; Byrne v. Smith, 24 Wis. 68.

57. Byrne v. Smith, 24 Wis. 69.

58. Allis v. United States, 155 U. S. 124.

59. Kellogg v. French, 15 Gray [Mass.] 357; Com. v. Snelling, 15 Pick. [Mass.] 334; Nelson v. Dodge, 116 Mass. 367; Wade v. Ordway, 1 Baxt. [Tenn.] 229; Cook v. Green, 6 N. J. Law, 109; Kuhl v. Long, 102 Ala. 563; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; State v. Frisby, 19 La. Ann. 143; O'Connor v. Guthrie, 11 Iowa, 81; Fish

of further instructions asked by them in cases where they are entitled to ask for further instructions.[60]

§ 2. *Delivery in open court. A. General rule.*—After the jury have retired, the judge should not go to the jury room to communicate with the jury, nor should he send additional instructions by the hands of an officer,—all communications should be made in open court.[61] If they desire any further instructions, they should send a request to the court through the officers in attendance, that they may, in a body, be brought into court.[62] The judge has no more right in the jury room while the jury are deliberating than any other person, even though he holds no communication with them,[63] and, if he does so, the honesty of his intentions in no way lessens the impropriety of such action.[64] In one case it was said that the affidavits of jurors cannot be read to impeach their verdict after it has been rendered, so that it may be impossible to show in any given case whether or not an intruder in the jury room did converse with the jury, or what he said, and that, if it were assumed that the judge said nothing, but merely remained in the jury room listening to their discussions, it could not be said that his presence did not affect their decision.[65] So, in another case, the judgment was reversed because the judge went to the jury room and stood in the doorway, which was partially open. It was held that the party in whose favor the decision was rendered could not be permitted to show that the judge said nothing to the jury.[66] The rule prohibiting judges from communicating with the jury except in open court is applicable, though the court has temporarily adjourned. "The judge carries no power with him to his lodgings, and has no more authority over the jury than any other person, and any direction to them from him, either verbal or in writing, is improper."[67] In New Hampshire, the rule that no communications between the court and jury should be had except in open court does not obtain.[68] In South Carolina, a similar decision was made in an early case.[69]

(§ 2) *B. Violation of rule as ground for reversal.*—In most of the cases where the court has violated the rule requiring instructions to be delivered in open court, the judgment has been reversed for that reason,[70] and the position

v. Smith, 12 Ind. 563; Crabtree v. Hagenbaugh, 23 Ill. 349.

60. Prosser v. Henderson, 11 Ala. 484; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180.

61. Johnson v. State, 100 Ala. 55; Cooper v. State, 79 Ala. 54; Fisher v. People, 23 Ill. 283; Crabtree v. Hagenbaugh, 23 Ill. 349; Chicago & A. R. Co. v. Robbins, 159 Ill. 598; Hall v. State, 8 Ind. 444; Fish v. Smith, 12 Ind. 563; Quinn v. State, 130 Ind. 340; Low v. Freeman, 117 Ind. 341; Blacketer v. House, 67 Ind. 414; Goode v. Campbell, 14 Bush [Ky.] 75; Sargent v. Roberts, 1 Pick. [Mass.] 337; Read v. City of Cambridge, 124 Mass. 567; Hopkins v. Bishop, 91 Mich. 328; Fox v. Peninsular White Lead & Color Works, 84 Mich. 676; Snyder v. Wilson, 65 Mich. 336; Hoberg v. State, 3 Minn. 262 (Gil. 181); Chouteau v. Jupiter Iron Works, 94 Mo. 388; Norton v. Dorsey, 65 Mo. 376; State v. Miller, 100 Mo. 606; Watertown Bank & Loan Co. v. Mix, 51 N. Y. 561; Taylor v. Betsford, 13 Johns. [N. Y.] 487; Mahoney v. Decker, 18 Hun [N. Y.] 365; Plunkett v. Appleton, 51 How. Pr. [N. Y.] 469; Kehrley v. Shafer, 92 Hun [N. Y.] 196; Kirk v. State, 14 Ohio, 511; Sommer v. Huber, 183 Pa. 162; State v. Smith, 6 R. I. 33; State v. Patterson, 45 Vt. 316; Campbell v. Beckett, 8 Ohio St. 211; State v. Wroth, 15 Wash. 621; High v. Chick, 81 Hun [N. Y.] 100; Wiggins v. Downer, 67 How. Pr. [N. Y.] 68; Smith v. McMillen, 19 Ind. 391; State v. Alexander, 66 Mo. 148.

62. Fisher v. People, 23 Ill. 283.

63. Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 463; Hoberg v. State, 3 Minn. 262 (Gil. 181).

64. Fish v. Smith, 12 Ind. 563; Hoberg v. State, 3 Minn. 262 (Gil. 181); Valentine v. Kelley, 54 Hun [N. Y.] 79.

65. Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 461.

66. State v. Wroth, 15 Wash. 621.

67. Sargent v. Roberts, 1 Pick. [Mass.] 337.

68. School Dist. No. 1 in Milton v. Bragdon, 23 N. H. 517; Allen v. Aldrich, 29 N. H. 63; Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Shapley v. White, 6 N. H. 172.

69. Goldsmith v. Solomons, 2 Strob. [S. C.] 296.

70. See Plunkett v. Appleton, 51 How. Pr. [N. Y.] 469; High v. Chick, 81 Hun [N. Y.] 100; Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 461; Fish v. Smith, 12 Ind. 563; Quinn v. State, 130 Ind. 340; Hall v. State, 8 Ind. 439; Chicago & A. R. Co. v. Robbins, 159 Ill. 598; Sargent v. Roberts, 1 Pick. [Mass.] 337;

taken that injury will be conclusively presumed, without stopping to inquire whether the instruction given was material, or had any influence upon the verdict,[71] or was prejudicial to either party,[72] and that the party complaining need not show that he was prejudiced, in order to be entitled to a new trial.[73] There are decisions, however, in which the court has refused to reverse for a violation of this rule, basing the decision on the ground that no prejudice could have resulted in that particular case.[74]

(§ 2) *C. Waiver of objections.*—If the parties consent to the giving of further instructions otherwise than in open court, the trial judge may properly do so, as this amounts to a waiver of the rule,[75] but both parties must consent.[76] Some decisions hold that, where irregular communications are made to the jury, either in the absence of counsel or by sending to the jury room, and counsel are afterwards apprised of the communication, and make no objection, a new trial will not be granted.[77] Others hold that consent must be expressly given.[78] That counsel are aware that the judge is going into the jury room, and make no objection, does not amount to a consent to instructions given while in the jury room.[79] Even when consent is obtained for the trial judge to go to the jury room, he should confine his visit strictly to the purpose for which permission was granted, and should not give any instructions without the knowledge of counsel.[80]

§ 3. *Presence of counsel. A. Rule that presence of or notice to counsel is unnecessary.*—In a number of states it is held that, while a trial court should refrain from instructing a jury in the absence of counsel, when it can do so conveniently, it is not reversible error for the court to give further instructions after the retirement of the jury, in compliance with a request from the jury, or upon the court's own motion, although counsel for neither party is present, and no attempt has been made to notify them, where such instructions are given in open court, during a regular session, when counsel might reasonably have been expected to be in attendance.[81] Although it is said in some of these cases cited that it would be better to attempt to notify counsel,[82] this is regarded as a matter of courtesy, rather than of legal right.[83] "In contemplation of law, the parties and their counsel remain in court until a verdict has been rendered, or the jury discharged from rendering one."[84] The giving of notice to counsel is a matter of

State v. Alexander, 66 Mo. 148; Norton v. Dorsey, 65 Mo. 376; Chouteau v. Jupiter Iron Works, 94 Mo. 388; Hopkins v. Bishop, 91 Mich. 328; Hoberg v. State, 3 Minn. 262 (Gil. 181); Somner v. Huber, 183 Pa. 162.

71. Kehrley v. Shafer, 92 Hun [N. Y.] 196; Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 461.

72. Read v. City of Cambridge, 124 Mass. 567.

73. People v. Linzey, 79 Hun [N. Y.] 23.

74. Moseley v. Washburn, 165 Mass. 417; Galloway v. Corbitt, 52 Mich. 461.

75. Smoke v. Jones, 35 Mich. 408; McCrory v. Anderson, 103 Ind. 12; City of Joliet v. Looney, 159 Ill. 471. See, also, Taylor v. Betsford, 13 Johns. [N. Y.] 487; Neil v. Abel, 24 Wend. [N. Y.] 185; Benson v. Clark, 1 Cow. [N. Y.] 258; Plunkett v. Appleton, 51 How. Pr. [N. Y.] 469; Hopkins v. Bishop, 91 Mich. 328.

76. Smith v. McMillen, 19 Ind. 391.

77. Thorp v. Riley, 29 N. Y. St. Rep. 520; Zust v. Smitheimer, 34 N. Y. St. Rep. 583; Mahoney v. Decker, 18 Hun [N. Y.] 365.

78. Watertown Bank & Loan Co. v. Mix, 51 N. Y. 561; Moody v. Pomeroy, 4 Denio [N. Y.] 115; Bunn v. Crowl, 10 Johns. [N. Y.] 239.

79. Moody v. Pomeroy, 4 Denio [N. Y.] 115.

80. Seeley v. Bisgrove, 83 Hun [N. Y.] 293.

81. Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; Reilly v. Bader, 46 Minn. 212; Alexander v. Gardiner, 14 R. I. 15; Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295; Torque v. Carrillo, 1 Ariz. 336; State v. Pike, 65 Me. 111; Cooper v. Morris, 48 N. J. Law, 607; Ahearn v. Mann, 60 N. H. 472; Milton School Dist. v. Bragdon, 23 N. H. 507; Allen v. Aldrich, 29 N. H. 63; Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Leighton v. Sargent, 31 N. H. 119; Meier v. Morgan, 82 Wis. 289; Kullberg v. O'Donnell, 158 Mass. 405 (explaining Sargent v. Roberts, 1 Pick. [Mass.] 337); Aerheart v. St. Louis, I. M. & S. R. Co. [C. C. A.] 99 Fed. 907.

82. Meier v. Morgan, 82 Wis. 289; Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; Torque v. Carrillo, 1 Ariz. 336.

83. Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; State v. Pike, 65 Me. 111; Chapman v. Chicago & N. W. R. Co., 26 Wis. 295.

84. Cooper v. Morris, 48 N. J. Law, 607.

grace or favor, and, while the custom of giving notice is not inherently vicious, the court must have power to proceed without such notice; otherwise, the transaction of business would be dependent upon the favor of counsel or litigants.[85] "The court may proceed without it [notice], subject to the power of opening the proceedings, where sufficient cause of absence is shown, and it appears that injustice has been done. The idea that the court cannot proceed without causing notice to be given, or that it is error to do so, and that it must await the motion and presence of counsel or their clients, would be intolerable, for then no business could be done and no proceedings taken except by the favor of counsel or of litigants."[86] "Counsel, by purposely or inadvertently withdrawing from the court, cannot take away the power, or suspend the right to exercise it until they can be found and brought in, if willing to come. It is the duty of counsel engaged in the trial of a case to remain in or be represented at the court during its sessions until the jury having the case in charge is discharged. * * * The failure of counsel to perform their duty does not deprive the court of its power to discharge its duty. The court is not required to send out its officers to invite counsel to attend to their duties, and hear additional instructions which the court proposes to give to the jury. Undoubtedly, in most cases, courts will endeavor, as a matter of courtesy, to secure the attendance of counsel before reinstructing a jury, but it is not error if it is not done."[87] The power to reinstruct a jury in the absence of counsel, like other powers, may be abused, and in such case the remedy is by motion for a new trial.[88]

(§ 3) *B. Rule that presence of counsel or notice is necessary.*—In a number of jurisdictions, usually under statutes regulating the practice, any additional instructions must be given either in the presence of counsel, or after an attempt has been made to notify them that further instructions will be given.[89] It has

85. Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295.

86. Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 306.

87. Cornish v. Graff, 36 Hun [N. Y.] 160. To the same effect is Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52.

88. Cornish v. Graff, 36 Hun [N. Y.] 160.

89. People v. Trim, 37 Cal. 274; Redman v. Gulnac, 5 Cal. 148; People v. Mayes, 113 Cal. 618; Goode v. Campbell, 14 Bush [Ky.] 75; Pierce v. Com. [Ky.] 42 S. W. 107; Martin v. State, 51 Ga. 569; McNeil v. State, 47 Ala. 498; Kuhl v. Long, 102 Ala. 569; Johnson v. State, 100 Ala. 55; State v. Davenport, 33 La. Ann. 231; State v. Frisby, 19 La. Ann. 143; Jones v. Johnson, 61 Ind. 257; Fish v. Smith, 12 Ind. 563; Blacketer v. House, 67 Ind. 414; Chinn v. Davis, 21 Mo. App. 363; State v. Miller, 100 Mo. 606; Wade v. Ordway, 1 Baxt. [Tenn.] 229; People v. Cassiano, 30 Hun [N. Y.] 388; Wheeler v. Sweet, 137 N. Y. 438; Kehrley v. Shafer, 92 Hun [N. Y.) 196. Contra, Wiggins v. Downer, 67 How. Pr. [N. Y.] 69. In Ohio there is a statutory provision as follows: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the point of law shall be given; and the court may give its recollection as to the testimony on the point in dispute, in the presence of, or after notice to, the parties or their counsel." Code, § 270. The decisions under this statute are so conflicting that no rule can be deduced therefrom. In Campbell v. Beckett, 8 Ohio St. 211, it was held reversible error for the judge, during recess of court, in the absence of parties and counsel, and without notice to them, to give further instructions on a point of law. In Chambers' Adm'r v. Ohio Life Ins. & Trust Co., 1 Disn. [Ohio] 327, and Milius v. Marsh, 1 Disn. [Ohio] 512, it was held that the provision requiring the presence of or notice to counsel when the court states its recollection of the evidence to the jury does not apply to instructions on matters of law. "There is a clear distinction, under section 270 of the Code, between further instructions in matter of law and a statement by the court of the evidence on a point." So, in Seagrave v. Hall, 10 Ohio Cir. Ct. R. 395, it was held that a verdict should be set aside where the jury were recalled and given further instructions, not upon questions of law, without any attempt to notify the parties or their counsel, none of whom were present. On the other hand, it was held in Moravee v. Buckley, 11 Wkly. Law Bul. [Ohio] 225, that an instruction by the court as to the form of the verdict, given on the jury's request after they had retired to deliberate upon their verdict, was an instruction on the law of the case, and, if given in the absence of counsel, was error. In Emery v. Whitaker, 2 Cin. Super. Ct. R. 36, it was held that, where the jury come out and ask further instructions on

been held, however, that re-reading a portion of the charge already given in the absence of counsel is not within the rule, and that error cannot be assigned thereto.[90] The impropriety of giving further instructions in the absence of counsel, and without an attempt to notify them, is increased when the court is convened and the instructions given on a day during which no court business is usually transacted. "When a court meets at a time so unusual, and without notice to parties, it is manifestly improper, and might work oppressively, to proceed in so important a matter as that of charging a jury without the knowledge or presence of a party or of his counsel."[91] Where, before giving additional instructions, the court sends officers to look for counsel, the court may proceed in their absence,[92] particularly if the party represented by the absent counsel is present.[93] And it is, of course, proper to give further instructions to the jury at their request, in the absence of counsel, where they have been duly notified that further instructions will be given, and neglect or refuse to attend.[94] It must depend largely on circumstances as to what notice will be sufficient, and much must be left to the discretion of the trial judge. It has been held a sufficient notice to call the attorneys at the court-house door, or at any place where witnesses are usually called.[95] Instructions to the jury after they have retired, in the absence of counsel, are objectionable, though no harm is done, for the reason that all proceedings of the court should be open and notorious, so that, if a party is not satisfied with them, he may take exceptions.[96] This objection, of course, does not apply in jurisdictions where instructions given after the jury retire are returned into court with the verdict, and are then allowed to be excepted to.[97] Where the jury have been charged, and have retired, counsel may presume that no other instructions will be given without notice or an attempt to notify, and can reasonably object to instructions given in their absence, as they thereby lose the opportunity of asking for explanatory charges, if deemed necessary,[98] and of excepting to their refusal if the court declines to give them.[99] The objection that counsel could stop the trial by absenting himself from the court house has been disposed of as follows: "Courts are armed with plenary authority to enforce the discharge of duty on the part of all their officers; and, besides a fitting and proper penalty on derelict counsel in the case supposed, they could, in cases when the necessity arose, require the defendant to procure other counsel, or make the appointment for him. If the absence of counsel resulted from a cause which would be a good ground for continuance, and it would not be proper to substitute other counsel, it were better that there should be a continuance, or at least a temporary postponement, than that one not skilled in the law, and who was largely ignorant of

the law, in the absence of counsel, though no call for counsel is made at the court-house door, if the counsel is sent for into every court room and office in the c urt-house, it is sufficient, though it seems that even this is not necessary when the court is in session.

90. People v. La Munion, 64 Mich. 709.

91. Davis v. Fish, 1 G. Greene [Iowa] 410. The additional instructions in this case were given on Sunday.

92. McNeil v. State, 47 Ala. 498; People v. Mayes, 113 Cal. 618; State v. Dudoussat, 47 La. Ann. 996; Preston v. Bowers, 13 Ohio St. 1; Dobson v. State, 5 Lea [Tenn.] 277; Collins v. State, 33 Ala. 434.

93. People v. Mayes, 113 Cal. 618.

94. Cook v. Green, 6 N. J. Law, 109.

95. McNeil v. State, 47 Ala. 498; Dobson v. State, 5 Lea [Tenn.] 277.

96. Wade v. Ordway, 1 Baxt. [Tenn.] 229; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; Crabtree v. Hagenbaugh, 23 Ill. 349. In Wade v. Ordway, 1 Baxt. [Tenn.] 229, however, it was held that, if the upper court could see that no harm had been done, the trial court would not be reversed for its departure from propriety.

97. Allen v. Aldrich, 29 N. H. 63; School Dist. No. 1 v. Bragdon, 23 N. H. 507; Shapleigh v. White, 6 N. H. 172.

98. Wade v. Ordway, 1 Baxt. [Tenn.] 229; Kuhl v. Long, 102 Ala. 569.

99. Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180.

his legal rights, and perhaps totally ignorant of the practice on which those rights rested, should lose a privilege, the value of which cannot be estimated."[100]

(§ 3) *C. Same—Violation of rule as ground for reversal.*—In a number of cases, both civil and criminal, the giving of additional instructions in the absence of counsel, and without attempting to notify them, has been held reversible error.[101] Where additional instructions are given to a jury in the absence of counsel, a constitutional provision guarantying the right to prosecute a cause by counsel is violated, and the reviewing court cannot "inquire, in such a case, what instructions were given by the court to the jury,—whether they were correct or incorrect, prejudicial or otherwise. We cannot be informed of their nature or effect by lawful and constitutional methods. The counsel not being present to observe the proceedings of the court, and learn for themselves what transpired, and, by their advice and counsel, it may be, give shape to the action of the court, the plaintiff can have no just and fair representation—indeed, no constitutional representation by counsel—in making up the record for the presentation of the illegal proceedings to this court for review."[102] In another case it was said that additional instructions, given in the absence of counsel, and at the request of the jury, will be presumed important, if the contrary is not shown, from the fact that the jury have asked for them.[103] In other cases the reviewing court has refused to reverse, where it was apparent that no prejudice resulted.[104]

TROVER; TRUST COMPANIES; TRUST DEEDS, see latest topical index.

TRUSTS.[40]

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§ 17. Termination and Abrogation of Trust. Acts of Settler (1758).

This article does not treat of trust deeds, so called, given as security for a debt, or, more accurately, security deeds with power of sale,[41] or of charitable gifts,[42] or of the construction of the trust as violating the laws of perpetuities and accumulations.[43] Trustees in bankruptcy are also treated elsewhere.[44]

100. Martin v. State, 51 Ga. 569.
101. McNeil v. State, 47 Ala. 498; Kuhl v. Long, 102 Ala. 569; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; Reidman v. Gulnac, 5 Cal. 148; People v. Trim, 37 Cal. 274; People v. Cassiano, 30 Hun [N. Y.] 388; State v. Davenport, 33 La. Ann. 231; State v. Frisby, 19 La. Ann. 143.
102. Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180.
103. Redman v. Gulnac, 5 Cal. 148.
104. Wade v. Ordway, 1 Baxt. [Tenn.] 229; Smith v. Kelly, 43 Mich. 390.
40. See 2 Curr. L. 1924. See, also, Tiffany, Real Property, §§ 90-103, for a full discussion of the subject as it affects realty.
41. See Chattel Mortgages, 3 Curr. L. 682; Foreclosure of Mortgages on Land, 3 Curr. L. 1438; Mortgages, 4 Curr. L. 677.
42. See Charitable Gifts, 3 Curr. L. 678.

§ 1. *Definitions and distinctions.*[45]—A trust is a right of property, real or personal, held by one party for the benefit of another,[46] and must be distinguished from a pledge,[47] from a conveyance on condition,[48] from the relation of debtor and creditor,[49] and from the trust that pertains to the office of executors.[50]

§ 2. *Express trusts. Nature and elements.*[51]—An express trust is distinguishable from those implied by law in that it arises by agreement while the latter do not.[52] In order to have a valid trust the settlor must have an interest in the property at the time the trust is created,[53] there must be a designated beneficiary,[54] a designated trustee,[55] though equity will not permit a trust to fail for

43. See Perpetuities and Accumulations, 4 Curr. L. 975.

44. See Bankruptcy, 3 Curr. L. 434.

45. See Tiffany, Real Prop. § 91.

46. Cyc. Law Dict. 926. The legal title and beneficial ownership must not be in one person as an individual. Tucker v. Linn [N. J. Eq.] 57 A. 1017; Watkins v. Bigelow [Minn.] 100 N. W. 1104. A gift by deed, devise or bequest to an existing corporation, or one to be thereafter organized within the time limited by law, with directions or conditions as to the use or management of the subject-matter of the gift which are reasonably consistent with the corporate purposes of the donee, is not a gift in trust, but an absolute one to the corporation within the meaning of the Minnesota statute of uses and trusts. Id. A deed to a religious society's trustees and their successors in fee, without any restrictions or limitations whatever, does not create a trust. Shaeffer v. Klee [Md.] 59 A. 850.

For distinction between trusts and **agency,** see Clark & Skyles, Agency, 29.

47. Check deposited to secure performance of contract and to be forfeited on default is not held in trust. Furth v. West Seattle [Wash.] 79 P. 936.

48. Conveyance of stock on condition that the grantor have the income for life held not to create a trust. Bloodgood v. Terry [Mich.] 96 N. W. 446.

49. Where defendant received money in accordance with a contract of sale requiring him to pay it over to plaintiff, the relation is that of debtor and creditor. Holland v. Shannon [Tex. Civ. App.] 84 S. W. 854. Where husband borrowed money of wife and gave notes therefor held merely a debt. In re Deaner's Estate [Iowa] 102 N. W. 825. An employer agreeing to "keep" an employe's wages and pay him interest held merely debtor and creditor. Tucker v. Linn [N. J. Eq.] 57 A. 1017.

50. Where powers and duties of a trustee are conferred upon an executor, the latter becomes a trustee by implication of law, but such trusteeship is terminated by revocation of the appointment as executor. Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385. Where the income is to be devoted to the support of testator's wife and children, held defendants took estate as trustees and not as executors, so far as it was not required to pay debts. Jastram v. McAuslan [R. I.] 58 A. 952. Mere directions that executor shall take charge of property, execute mortgages if necessary, and at the end of two years have the property sold, do not create an express trust in real estate, but create only such a trust as pertains to the office of executor. In re Pforr's Estate, 144 Cal. 121, 77 P. 825. Where the residuary estate is devised to executors to be invested and kept for a term of years and then turned over to a charitable corporation, held the executors took as trustees. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008. An executor being empowered to sell realty, will be deemed a trustee. Dingman v. Beall, 213 Ill. 238, 72 N. E. 729.

51. See 2 Curr. L. 1924. See Tiffany, Real Property, § 92 et seq.

52. Eaton v. Barnes, 121 Ga. 548, 49 S. E. 593; Heil v. Heil [Mo.] 84 S. W. 45.

Illustrations: A power of sale is a trust. Coleman v. Cabaniss, 121 Ga. 281, 48 S. E. 927. Where a married woman cannot hold title in her own name, a deed to her husband as her agent renders him her trustee. Johnson v. Cook [Ga.] 50 S. E. 367. Placing bank stock in the name of trustees for the benefit of designated beneficiaries creates a trust. Lattan v. Totten, 44 Misc. 116, 89 N. Y. S. 761. Where three persons purchased land to be resold as city lots, and in order to facilitate the enterprise one conveyed his interest to the others, held the latter were trustees of an express trust. Sawyer v. Cook [Mass.] 74 N. E. 356. One advancing money to purchase land and taking a deed in his own name, there being an agreement that he should convey to another upon payment to him of the amount paid, is a trustee of an express trust. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335. [The court also refers to the transaction as a loan.] Where owner of legal title agreed that another should have control of property, and own all improvements made by him, and if on sale of property the former should have $4,000 in cash or property, held to give the party in control an equitable right in the land, the first party having merely the legal title and a claim for $4,000. Squires v. O'Maley [Ky.] 84 S. W. 1172. Where several creditors of an insolvent assign their claims for value to a committee, the intention being that the latter shall purchase the property of the insolvent and sell it in the interest of the assigning creditors, the committee is the trustee of an express trust. In re Kenney Co., 136 F. 451. One collecting and loaning money for another is not the trustee of a direct and continuing trust. Hitchcock v. Casper [Ind.] 73 N. E. 264.

53. One assigning property absolutely to another and relinquishing all control over the same, a subsequent direction as to the disposal of the property is insufficient to create a trust. Mussman v. Zeller [Mo. App.] 83 S. W. 1021.

54. Brown v. Spohr [N. Y.] 73 N. E. 14

want of a trustee,[56] a definite purpose,[57] an identified trust fund or estate,[58] an actual delivery or legal assignment with the intention of passing title to the trustee as such,[59] an acceptance by the trustee,[60] and the instrument of creation should be reasonably certain as to the manner of executing the trust.[61] The requirement of a designated beneficiary may be met by an absolute deed to a corporation to be formed for the purposes of the trust.[62] The settlor may re-

afg. 84 N. Y. S. 995. Cited 2 Curr. L. 1924, n. 88; Smullin v. Wharton [Neb.] 103 N. W. 288. The beneficiary must be a definite, certain ascertainable person, natural or corporate. Weaver v. Spurr [W. Va.] 48 S. E. 852. Where property was to be held in trust for "Trinity Parish, in the town of Moundsville, in the county of Marshall and state of West Virginia, held void for uncertainty of beneficiaries. Id. See Charitable Gifts, 3 Curr. L. 678.

55. Brown v. Spohr [N. Y.] 73 N. E. 14, afg. 84 N. Y. S. 995. See 2 Curr. L. 1925, n. 89. Who may be a trustee, see post, § 6, subd. 1.

56. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412; Sells v. Delgado [Mass.] 70 N. E. 1036; Morrow v. Morrow [Mo. App.] 87 S. W. 590; Robbins v. Smith, 5 Ohio C. C. (N. S.) 545. That railroad's act in taking title in trust is ultra vires is immaterial on an issue as to the beneficial ownership. City of Hickory v. Southern R. Co. [N. C.] 49 S. E. 202. If by any possibility the trust is capable of execution by the court. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412. Will not be allowed to fail, though beneficial interest of cestui que trust is to be measured and determined by the discretion of the trustee appointed by the creator of the trust. Id. A trust for the assistance of grandchildren is not so uncertain as to render it impossible for the court to execute it. Id.

57. Weaver v. Spurr [W. Va.] 48 S. E. 852. Words "In Trust" held without legal effect, no purpose of the trust being named. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

58. Brown v. Spohr [N. Y.] 73 N. E. 14, afg. 84 N. Y. S. 995. See 2 Curr. L. 1925, n. 90. Where trust fund was embraced in loan account, held a sufficient identification. Id. Terms must be reasonably certain as to property embraced. Smullin v. Wharton [Neb.] 103 N. W. 288.

59. Brown v. Spohr [N. Y.] 73 N. E. 14, (afg. 84 N. Y. S. 995. Cited 2 Curr. L. 1925, n. 91). Trustee demanding money of bank and immediately redepositing it, held to constitute a sufficient delivery. Id.; Peck v. Scofield [Mass.] 71 N. E. 109. Where a woman living apart from her husband made deposits in a bank, some in trust for her son, some in her own name and others for herself or son, and anticipating death delivered the bank books in a sealed package to a friend, with written instructions that they were in trust for her son, held a trust. Id.

60. Peck v. Scofield [Mass.] 71 N. E. 109.

61. Smullin v. Wharton [Neb.] 103 N. W. 288. A trust for children is not void because not specifying how much shall be expended for their support and education. In re Reith's Estate, 144 Cal. 314, 77 P. 942.

NOTE. Discretionary trusts: While the discretionary power granted to the trustees is absolute and uncontrollable in its nature, the trust will fail. Biddles v. Biddles, 16 Simons, 1; Thorp v. Owen, 2 Hare, 608; Estate of Sanford, 136 Cal. 97; Spiers v. Roberts, 73 Mich. 666, 41 N. W. 841; Howze v. Barber, 29 S. C. 466, 7 S. E. 817. But equity courts will, whenever they deem it possible, even where the terms are absolute, construe the will as granting a reasonable discretion only which is subject to legal control. Colton v. Colton, 127 U. S. 300, 1164, 32 Law. Ed. 138; McDonald v. McDonald, 92 Ala. 537; Jones v. Newell, 78 Hun [N. Y.] 290. A mere statement of the motive for making the gift is insufficient; the testator's intention to direct the trustee to exercise his discretion should appear. 28 Am. & Eng. Enc. Law, 914; 2 Redfield on Wills,* p. 421; 1 Jarman, Wills [6th Ed.] 369. The courts are generally in harmony as to the principles of law involved, but differ widely in their application to particular cases. The criterion is the enforcement of the testator's true intent. The principal case is undoubtedly successful in this, and in accord with the current of authority.—3 Mich. L. R. 167.

Where property was devised upon trust that so much of it as may seem proper be allotted to the assistance of certain persons, the trust was held valid. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412. On the theory that a thing subject to reasonably accurate ascertainment by computation is sufficiently definite for the trust res, a trust for the support or maintenance of a person is allowed, as equity can determine to a reasonable degree the amount of the res. Hunter v. Slembridge, 12 Ga. 192. Colton v. Colton, 127 U. S. 300, 32 Law. Ed. 138. Perry on Trusts [5th Ed.] § 116. To carry this doctrine to the principal case, where the amount lies wholly within the discretion of the trustee, as the mere word "assistance" would make it, seems to enter the realm of uncertainty as to the trust subject-matter. Lines v. Darden, 5 Fla. 51; Perry, Trust, § 119, and the better rule is to consider that word as creating merely a moral obligation. Benson v. Whittan, 5 Sim. 22.—4 Columbia L. R. 606.

62. Where an absolute gift is given a corporation afterwards to be formed for the express purpose of administering relief to worthy poor, it is not an evasion of laws prohibiting charitable trusts and requiring beneficiaries to be certain or capable of being made certain. Watkins v. Bigelow [Minn.] 100 N. W. 1104. While Laws 1895, p. 343, ch. 158, relating to the organization of corporations to furnish relief and charity to the worthy poor, does not authorize the corporation to take property by gift to hold in trust for purposes not otherwise authorized by law, it does, however, authorize the corporation to take as owner, by gift, any property, subject to such conditions and limita-

tain powers not inconsistent with the trust.[63] A recorded and acknowledged deed reciting delivery is prima facie evidence thereof.[64]

In New York the trustee must take the legal estate or he has a mere power in trust.[65]

Validity of purpose.[66]—In many of the states statutory provisions abolish express trusts for all but specified purposes; constructions placed on such statutes are shown in the notes.[67] In California an express trust to convey real property is void,[68] and its invalidity will defeat a similar trust in personalty when part of the same trust scheme,[69] though as a general rule a valid part of the trust being severable from the remainder without destroying the purpose of the donor, it may be sustained, while the rest fails.[70] In the absence of direct heirs the giving of the residue of one's estate to a fraternal organization is not unnatural or improvident.[71]

Spendthrift trusts.[72]—A provision against alienation is essential.[73] The absence of a power of revocation in the beneficiary and settlor is not fatal.[74]

Establishment by parol and extrinsic evidence.[75]—In order to establish an express trust by parol, the evidence must be full, clear and satisfactory,[76] and this is especially true where it is sought to establish a parol trust upon an absolute deed,[77] though this rule does not apply where the property is a mining claim located upon the public domain.[78]

Declarations by trustee[79] are in some of the states required to be in writing.[80] The existence of the trust[81] and any of its elements[82] may be shown by declarations

tions as are not inconsistent with its corporate purposes, as the donor may impose. Id.

63. Where settler received rents and profits and exercised control over the property, held a valid trust. Dayton v. Stewart, 99 Md. 643, 59 A. 281. Where settlor collected rents, held a valid trust. Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508.

64. Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508.

65. Where real estate was conveyed in trust for the benefit of the donor's son and grandchildren, they not to take any interest until the death of the donor and his wife, who were to have full possession and control of the rents and profits, held a mere power in trust. Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101. Deed in trust whereby trustee was to turn over rents and profits to grantor during life and at her death convey the property to her surviving children creates an express trust for the benefit of the grantor and a power in trust for the benefit of the children. Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508.

66. See 2 Curr. L. 1925.

67. Laws 1903, p. 188, c. 132, relating to express trusts, is unconstitutional because the subject-matter of the act is not expressed in its title. Watkins v. Bigelow [Minn.] 100 N. W. 1104.

68. Civil Code, tit. 4, § 847. In re Dixon's Estate, 143 Cal. 511, 77 P. 412.

69. In re Dixon's Estate, 143 Cal. 511, 77 P. 412.

70. Robb v. Washington & Jefferson College, 93 N. Y. S. 92.

71. Deed creating spendthrift trust for benefit of grantor, income after his death to be paid to wife for life, then estate to go to children, or if none, to Masonic lodge, held not an improvident or unnatural disposition of the property. Carroll v. Smith, 99 Md. 653, 59 A. 131.

72. See 2 Curr. L. 1926.

73. Where there was no provision restraining the alienation of the income and no prohibition against the income being seized by creditors of the beneficiary, held not a spendthrift trust. Wenzel v. Powder [Md.] 59 A. 194. See 2 Curr. L. 1926, n. 13.

74. Carroll v. Smith, 99 Md. 653, 59 A. 131.

75. See 2 Curr. L. 1928.

76. Personalty. Donithen v. Independent Order of Foresters, 23 Pa. Super. Ct. 442; Hatfield v. Allison [W. Va.] 50 S. E. 729. Uncorroborated evidence of husband is insufficient to establish express trust in favor of wife, so as to defeat the rights of creditors. Pickens v. Wood [W. Va.] 50 S. E. 818. Where college property was sold at foreclosure proceedings and the purchaser deeded the property to the managers of the institution for a valuable consideration and free from any trust or conditions, held managers were not trustees of the property. Langford v. Searcy College [Ark.] 83 S. W. 944.

77. Deed imported a consideration. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379. A mere preponderance of evidence is insufficient. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775. See, also, Morrow v. Matthew [Idaho] 79 P. 196, where there is a collection of the authorities on this point.

78. Has no application to a case where a party to a "grub-stake" agreement invokes the aid of equity in establishing a trust in mining claims located on the public domain by one of the parties to such agreement. Morrow v. Matthew [Idaho] 79 P. 196.

79. See 2 Curr. L. 1928.

80. See Frauds, Statute of, 3 Curr. L. 1527, and post, this section.

81. Goodell v. Sanford [Mont.] 77 P. 522.

of the trustee or his predecessor.[83] In most states, oral declarations concerning realty are void unless enforced to avoid fraud,[84] though the contrary is true if the trust estate consist of personalty.[85] The payment for and taking stock by a parent in his name as trustee for his son is a complete declaration of the trust in favor of his son, which a court of equity will enforce.[86]

Bank deposits in trust.[87]—A deposit for a certain purpose[88] or for the benefit of designated beneficiaries,[89] and especially when such deposit is made in the name of trustees,[90] constitutes a trust.

Construction.[91]

Active and passive trusts.[92]—The construction of testamentary trusts is treated elsewhere.[93] Unless a place of performance is designated, a deed of trust of personalty is governed by the law of the state where it was executed, acknowledged, delivered and accepted.[94] A deed of trust is to be construed solely with reference to the intent of the donor.[95] The extent and duration of the estate are measured by the objects of its creation.[96] Prima facie the term "trustees," without more, implies a trust in favor of an undisclosed beneficiary.[97] A reference to another trust deed for the purpose of defining the trustee's powers does not draw in the trustees of the former trust.[98] The constructions of particular provisions are given in the notes.[99]

A trust is active when the interposition of the trustee is necessary to carry out its purpose, with respect to immediate or remote beneficiaries.[1] A trust is

Declarations of trustee held admissible in trespass to try title. Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 87 S. W. 235.

82. Where stock was subscribed in the name of a person as beneficiary, declarations of trustees are admissible to prove the identity of the beneficiary. Johnson v. Amberson, 140 Ala. 342, 37 So. 273.

83. Declaration by former trustee held to show that his assignee was a trustee. Woolf v. Barnes, 93 N. Y. S. 219.

84. In re Ryan's Estate [Minn.] 100 N. W. 380. Civ. Code 1895, § 3153. Eaton v. Barnes, 121 Ga. 548, 49 S. E. 593. Laws 1896, p. 592, c. 547. Hill v. Warsawski, 93 App. Div. 198, 87 N. Y. S. 551.

85, 86. Johnson v. Amberson, 140 Ala. 342, 37 So. 273.

87. See 2 Curr. L. 1928.

88. A deposit for the payment of a corporation's debts under an agreement that none of the money should be paid out until all the corporation's debts were discharged in full constitutes a trust fund to pay the corporation's debts. Ellis v. National Exch. Bank [Tex. Civ. App.] 86 S. W. 776.

89. Wife having the right to draw community property deposited in a bank and having the right of survivorship, the bank is a trustee for her benefit, and her actual drawing of the money would not defeat the husband's intention to defeat the trust. Sprague v. Walton, 145 Cal. 228, 78 P. 645. [The ordinary relation between banker and depositor is that of debtor and creditor. See Banking and Finance, 3 Curr. L. 417.]

90. Though trustees subsequently withdrew moncy and gave it to donor. Lattan v. Totten, 44 Misc. 116, 89 N. Y. S. 761.

91. See 2 Curr. L. 1929.

92. See Uses, 2 Curr. L. 1965, n. 24.

93. See Wills, 2 Curr. L. 2076.

94. Mercer v. Buchanan, 132 F. 501. This is true though the trustees are citizens of another state. Id.

95. Mercer v. Buchanan, 132 F. 501.

96. Brillhart v. Mish, 99 Md. 447, 58 A. 28.

97. Maffet v. Oregon & C. R. Co. [Or.] 80 P. 489.

98. Koch v. Robinson, 26 Ky. L. R. 969, 83 S. W. 111.

99. Clause "pay all debts" held not to enlarge previous provision in deed to pay all debts contracted prior to the execution of the deed. Smith v. Taylor [Ind. App.] 72 N. E. 651. Words "heirs at law" held to refer to those who were such at the time of the death of ancestor mentioned and not those surviving at the period of distribution. Merrill v. Preston, 187 Mass. 197, 72 N. E. 941. Where the income of property is given one for the support of herself and children, she is entitled to the whole income and must support the children out of it so long as they form a part of her family. In re Miskey's Estate, 209 Pa. 474, 58 A. 845. A trust deed providing that immediately "from and after the death" of the grantor the trustee should hold the estate for the use of the grantor's children free from the trust, "provided" that an account should be taken of advancements made, held accounting was not a condition precedent to partition after death of grantor. Shipley v. Jacob Tome Institute, 99 Md. 520, 58 A. 200.

1. Owens v. Naughton, 23 Pa. Super. Ct. 639. Where trustee is authorized to sell property at his discretion, held an active trust. Id. Where trustees were to manage the estate and the beneficiaries were only entitled to the income, held an active trust. In re Shower's Estate [Pa.] 60 A. 789. A devise in trust to collect and divide profits and make improvements and repairs until a certain beneficiary became 25 years old is an active trust. Moll v. Gardner [Ill.] 73 N. E. 442. Where the trustee has the single

passive when the trustee has no duty to perform, or when the trust serves no purpose, or none that would not be equally served without it.[2]

The instrument creating or declaring the trust and the sufficiency thereof.[3]—Whether a trust exists is to be ascertained from the intention of the parties,[4] technical terms being unnecessary.[5] The question whether a will is aptly expressed to create a trust is treated elsewhere.[6]

Necessity of writing.[7]—As a general rule an express trust in personalty need not be in writing,[8] and, in a few states, the same is true of realty,[9] though in most states an express trust in realty is void unless evidenced by a written instrument executed in conformity with statutory requirements.[10] The statute requiring the writing to be signed by the party to whom the sale is to be made, the trustee's signature is sufficient.[11] The statute of frauds does not prevent the granting of relief to the trustee under a parol trust who is sued for breach of incumbrances.[12]

Administrators, receivers and assignees.[13]—A receiver of an insolvent corporation in a creditors' action to administer its affairs for their benefit is a trustee of corporate assets in the right of the corporation for such creditors, and for the latter in their right as to all liabilities to which they may properly resort as a class,

duty of requiring lessees under a long term lease to pay rent and taxes, the trust is an active one. Rev. St. 1898, §§ 2074, 2081, 2093, construed. Patton v. Patrick [Wis.] 101 N. W. 408. See Tiffany, Real Property, § 95.

2. Owens v. Naughton, 23 Pa. Super. Ct. 639. Where the trustees are to hold the fund "to and for" such persons as the cestui que trust may by will appoint, there is a mere naked or passive trust after the death of the life tenant. Graham v. Whitridge, 99 Md. 248, 58 A. 36. Where father purchased property with own money and took title in himself, managing the estate, etc., a daughter who subsequently entered on the land, held not entitled to claim a passive trust. Coppock v. Austin [Ind. App.] 72 N. E. 657. One taking land as trustee for a third person held a passive trustee, as to the real owner of the land which was conveyed to such trusteee by the apparent but not the real owner. Halloran v. Holmes [N. D.] 101 N. W. 310. Where trustee was to hold property "for the benefit of" certain persons, held a passive trust. [Code 1896, §§ 1020, 1027, 1028, construed.] Berry v. Bromberg [Ala.] 37 So. 847. Where trustee is to hold for the benefit of another who is to have the free use of the rents and the care and management of the property, the trust is a dry trust. Fink v. Metcalfe, 26 Ky. L. R. 1263, 83 S. W. 643. Where trustee was, with the consent of the grantor, to have the power of sale and reinvestment, the grantor to be paid all the profits and have the right of testamentary disposition, held a dry trust. City of Louisville v. Anderson [Ky.] 84 S. W. 573. See Tiffany, Real Prop. § 95.

3. See 2 Curr. L. 1926.

4. Sawyer v. Cook [Mass.] 74 N. E. 356; In re Reith's Estate, 144 Cal. 314, 77 P. 942. Will. Hughes v. Fitzgerald [Conn.] 60 A. 694.

5. Sawyer v. Cook [Mass.] 74 N. E. 356; In re Reith's Estate, 144 Cal. 314, 77 P. 942; Robbins v. Smith, 5 Ohio C. C. (N. S.) 545. Words "trust" or "trustee" are unnecessary. Hughes v. Fitzgerald [Conn.] 60 A. 694.

6. See Wills, 2 Curr. L. 2076.

7. See 2 Curr. L. 1927.

8. Merritt-Allen Co. v. Torrence [Iowa] 102 N. W. 154; In re Fisher's Estate [Iowa] 102 N. W. 797; Peck v. Scofield [Mass.] 71 N. E. 109; Robb v. Washington and Jefferson College, 93 N. Y. S. 92; Berry v. Evendon [N. D.] 103 N. W. 748. Parol evidence held admissible to establish that personal property was taken as security. Id. Where an old and feeble woman orally gave another $5,000 in drafts, he to perform certain duties and dispose of the estate in a certain way, held a valid express trust. Morris v. Hughes, 45 Misc. 278, 92 N. Y. S. 288.

9. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335; Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379.

10. Code, § 2918. Hoon v. Hoon [Iowa] 102 N. W. 105. Civ. Code 1895, § 3153. Eaton v. Barnes, 121 Ga. 548, 49 S. E. 593; Cassels v. Finn [Ga.] 49 S. E. 749. Rev. St. 1899. § 3416. Heil v. Heil [Mo. Sup.] 84 S. W. 45. Letter held insufficient [Gen. St. 1894, § 4213]. Rawson v. Morris [Minn.] 101 N. W. 970; Bryan v. Bigelow [Conn.] 60 A. 266. Parol agreement by grantee to pay certain sum to another upon sale of land held not enforceable as a trust. Sheldon v. Carr [Mich.] 103 N. W. 181. A deed absolute on its face and reciting a consideration cannot, in the absence of fraud, be shown by parol to be a trust in the grantor. Ostenson v. Severson [Iowa] 101 N. W. 789; Byerly v. Sherman [Iowa] 102 N. W. 157. Breach of an oral agreement to purchase a lease for mining oil held insufficient to raise a trust. Wilhite v. Skelton [Ind. T.] 82 S. W. 932.

11. Comp. St. 1887, p. 651, construed. Goodell v. Sanford [Mont.] 77 P. 522.

12. Deaver v. Deaver [N. C.] 49 S. E. 113.

13. See Estates of Decedents, 3 Curr. L. 1238; Receivers, 4 Curr. L. 1238; Assignments for Benefit of Creditors, 3 Curr. L. 337.

not enforceable by the corporation;[14] but he is not a trustee who may be made a defendant as such in a creditor's suit, within the statutory meaning of "trustee."[15]

§ 3. *Implied*[16] *and involuntary trusts.*—In certain cases, though no express trust is created, a trust will be implied in order to carry out the evident intention of the settlor; thus a trust may be implied where precatory words are used in a mandatory sense,[17] or where the grantee of a conveyance is to support the grantor,[18] or where under an agreement between joint purchasers the title is taken in one of them.[19] Also a trustee upon the expiration of the trust holds the property as an implied trustee for the benefit of those entitled to it.[20]

§ 4. *Constructive trusts. A. Trusts raised where property is held or obtained by fraud.*[21]—Constructive trusts are implied not from agreement,[22] but from actual or legal fraud[23] on the part of the alleged trustee,[24] rendering the creation of a

14. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

15. Rev. St. 1898, § 3228. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

16. See 2 Curr. L. 1929.

17. Hughes v. Fitzgerald [Conn.] 60 A. 694; Smullin v. Wharton [Neb.] 103 N. W. 288. Deed for the purpose of "aiding in the establishment of a home for indigent widows or orphans or in the promotion of any other charitable or religious objects," held not to create a trust. St. James' Parish v. Bagley [N. C.] 50 S. E. 841.

"It is my wish and desire that my said wife shall pay the sum of three hundred dollars a year to my sister-in-law, Miss Nellie Post." Held not to create a trust upon the estate which the intended beneficiary could enforce. Post v. Moore [N. Y.] 73 N. E. 482.

NOTE. Precatory words: The last case cited is an illustration of the reaction against the earlier tendency in favor of raising trusts for the purpose of carrying into effect the wish or desire of the testator expressed in merely precatory or recommendatory terms. The rule has been laid down that precatory words will create a trust, if the subject-matter be certain, if the person intended as beneficiary be certain, and if the words are so used that upon the whole they ought to be construed as imperative. Knox v. Knox, 59 Wis. 172, 48 Am. Rep. 487 (and note to latter report); Warner v. Bates, 98 Mass. 274. It will be observed that in the principal case, and cases like it, the decision must be based squarely upon the application of the third essential, since the first two are clearly satisfied. The earlier cases went to great lengths in holding precatory words similar to those above to be imperative, and to create trusts binding the estate granted, some even showing a tendency to give this doctrine the weight of a rule of construction. Harrison v. Harrison's Adm'x, 2 Grat. [Va.] 1, 44 Am. Dec. 365 (the cases being collected in a note to the latter report). In later years a decided reaction against this tendency is apparent, and a disposition is manifested by the courts to give to such words only their usual or ordinary meaning, rather than to find in them an imperative intent, unless such an intent as clearly appears as though positive terms had been used. Bryan v. Milby, 6 Del. Ch. 208, 24 A. 333, 13 L. R. A. 563; LeSage v. LeSage, 52 W. Va. 323, 43 S. E. 137, 27 Am. & Eng. Enc. Law, pp. 38-45. It may be questioned whether this reaction has not already carried the courts of some of the states too far. It seems, at least, that the decision in the principal case cannot be reconciled with such comparatively recent and well-considered cases as Foster v. Willson, 68 N. H. 241, 38 A. 1003, 73 Am. St. Rep. 581; Murphy v. Carlin, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699; Blanchard v. Chapman, 22 Ill. App. 341; Colton v. Colton, 127 U. S. 300, 32 Law. Ed. 138.—3 Mich. L. R. 593.

See Wills, 2 Curr. L. 2076.

18. Grant v. Bell [R. I.] 58 A. 951.

19. Scott v. Isaacsen [W. Va.] 49 S. E. 254.

20. Where on death of life beneficiary fund was to be divided among designated parties. Dunn v. Dunn [N. C.] 50 S. E. 212.

21. See 2 Curr. L. 1930. See Tiffany, Real Prop. § 94.

22. De Bardeleben v. Bessemer Land & Imp. Co., 140 Ala. 621, 37 So. 511; Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

23. Schneider v. Sellers [Tex.] 84 S. W. 417; Avery v. Stewart, 136 N. C. 426, 48 S. E. 775. Otherwise trust if oral is void under statute of frauds. Ammonette v. Black [Ark.] 83 S. W. 910. Where county auditor unlawfully secured possession of property but there was no allegation as to the manner of obtaining possession, held findings of fact did not warrant conclusion that property was held in trust for the county. Coffinberry v. McClellan [Ind.] 73 N. E. 97. In the absence of actual fraud, the failure to perform an oral promise made by the sole heir at law of one desiring to dispose of her estate by will to third persons, that he will so dispose of the estate cannot make the heir at law, in case of intestacy, a trustee ex malificio. Cassels v. Finn [Ga.] 49 S. E. 749.

NOTE. Oral promise by heir—necessity for actual fraud: A devise in reliance on the devisee's oral promise (Hoge v. Hoge, 1 Watts [Pa.] 163, 214, 26 Am. Dec. 52), to hold the property in trust, imposes on the devisee a constructive trust in favor of the intended beneficiary, even in the absence of actual fraud. Reech v. Kennegal, 1 Ves. 122; Dowd v. Tucker, 41 Conn. 197; Amherst v. Ritch, 151 N. Y. 282. The cases which rely on fraud define it as the neglect or refusal to perform the promise by which the property was secured (Glass v. Gilbert, 102 Mass. 24, 40, 3 Am. Rep. 418; Norris v. Frazer, 15 L. R. Eq. 318; In re Will of O'Hara, 95 N. Y. 403), so that the theory of

trust necessary to protect the equities of an innocent party, and all parties participating in the wrong are jointly liable therefor.[25] The existence of an evil intention at the time the promise was made may be inferred from a failure to comply with the promise.[26]

The mere nonperformance of a beneficial parol agreement is not of itself sufficient to create a trust,[27] though in some states, one promising to purchase, for the benefit of another, at a judicial sale of property in which the promisee has an interest, he is deemed to be a constructive trustee.[28] One fraudulently obtaining property intended for another is deemed a constructive trustee for the latter,[29] and the cestui que trust may enforce the trust against him irrespective of the fact that he had no enforceable claim against the original owner of the property.[30] Hence a devisee obtaining the devise by expressly or impliedly promising to carry out the testator's wish in regard thereto holds the property as a constructive trustee.[31] A thief changing the form of the property by reinvestment,[32] or one who obtains property in fraud of creditors,[33] are constructive trustees, and the liability of the latter may properly be determined in a creditors' suit.[34] A grantee selling rights reserved to the grantor,[35] or one obtaining possession of a mining claim and changing the markers,[36] are constructive trustees.

the cases is not based upon fraud but upon a principle analogous to restitution. The same principles have been applied to cases where, as in the principal case, the heir procures property by a promise to hold it in trust (Williams v. Fitch, 18 N. Y. 546; Grant v. Bradstreet, 87 Me. 583); and it would seem that the distinction made between taking as heir and as devisee (Bediliars v. Seaton, 3 Fed. Cas. 38), is unsound, the making or not making of the will being in either case the result of the promise, and that therefore the principal case is wrongly decided.—5 Columbia L. R. 407. See, also, post, this section, for cases where devisee obtains title by virtue of an oral promise.

24. Where plaintiff and defendant agreed to buy land and divide profits on resale, the mere fact that defendant broke the contract and that his son purchased and sold the land is insufficient to raise a constructive trust in favor of plaintiff. Forrest v. O'Bryan [Iowa] 102 N. W. 492.

25. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

26. Koefoed v. Thompson [Neb.] 102 N. W. 268.

27. Agreement to convey land. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775. But where promisee had relied on the promise to his detriment, held a constructive trust arose. Id. Nor does the fact that the promisee agreed to pay the promisor more than he paid, affect the case. Id. Agreement by purchaser to sell land to another for price paid and 7% interest, no time for performance being fixed, held not to impress the property with a trust. Markham v. Katzenstein, 209 Ill. 607, 70 N. E. 1071.

28. One buying at a judicial sale for another held a constructive trustee. Parker v. Catron [Ky.] 85 S. W. 740. Where mortgagor's vendee bought property at foreclosure and had it conveyed to mortgagee on the understanding that the latter would reconvey upon payment of the debt, held, on refusal to carry out such agreement, a trust ex malificio came into existence. Phillips v. Hardenburg, 181 Mo. 463, 80 S. W. 891.

Note: There is a conflict on this point; for cases pro and con, see 15 Am. & Eng. Enc. Law [2nd Ed.] p. 1189.

29. Moore v. Crump [Miss.] 37 So. 109. Fraudulent representations by trustee that he represented another. Johnston v. Reilly [N. J. Err. & App.] 57 A. 1049.

30. Johnston v. Reilly [N. J. Err. & App.] 57 A. 1049.

31. Where devisee takes the devise with the knowledge and consent that it is intended for a third person, a constructive trust arises. Smullin v. Wharton [Neb.] 103 N. W. 288. Where shortly before dying, donor conveyed property to one child for all, held latter was a trustee for all the heirs. Stahl v. Stahl [Ill.] 73 N. E. 319. Where residuary legatees have no knowledge of the purpose or beneficiary of the trust during the testator's lifetime, they cannot be charged as trustees ex malificio on the express trust being declared void for insufficiency. Bryan v. Bigelow [Conn.] 60 A. 266.

32. Lamb v. Rooney [Neb.] 100 N. W. 410. [The court refers to the trust as a resulting one.]

33. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Property transferred by debtor to his wife held subjected to a trust in favor of creditors. Mertens v. Schlemme [N. J. Eq.] 59 A. 808.

34. Clark v. Bauner & V. Printing Co., 50 Wis. 416, 7 N. W. 309, held to have been overruled and never followed so far as it holds that persons to whom property of an insolvent has been transferred in fraud of creditors can be made defendants in an administrative suit only for purposes of discovery [Rev. St. Wis. 1898, § 3228]. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

35. McKenna v. Brooklyn Union El. R. Co., 95 App. Div. 226, 88 N. Y. S. 762.

36. One who under a contract of purchase obtained possession of a mining claim, changed the markers so as to exclude a large body of ore and then claimed the latter held a trustee for the owner. Butterfield v. Nogales Copper Co. [Ariz.] 80 P. 345.

One standing in a fiduciary relation with another and obtaining an advantage thereby becomes a trustee for the latter;[37] but it is essential that confidence has been reposed and betrayed.[38]

A constructive trust is not within the statute of frauds.[39] The same rule as to the certainty of the property embraced applies to constructive as to express trusts.[40]

Defects in a contract to convey are no defense where a valid conveyance is executed thereunder.[41]

Burden of proof and evidence.[42]—There must be clear and convincing proof of the fraud,[43] and the confidential relation and the transaction being shown, the burden is upon the person occupying the superior position to establish the integrity of his claim.[44]

(§ 4) *B. Trusts by equitable construction in the absence of fraud.*[45]—When necessary to prevent injustice, equity will construct a trust, though there be no fraud;[46] thus where land is recovered by one not the owner and in an action to

37. Agency: Where agent intermingled funds given him to invest and his own funds and invested the whole in land. Patton v. Pinkston [Miss.] 38 So. 500. Where agent, with his own funds, purchased property for his principal and took title in his own name. Morris v. Reigel [S. D.] 101 N. W. 1086. Deception as to purchase price by joint purchaser and agent. Johnston v. Little [Ala.] 37 So. 592. Agent buying property he should have bought for principal held a trustee ex malificio. Harrison v. Craven [Mo.] 87 S. W. 962. Where one joint purchaser fraudulently charged other purchasers more than he paid. Kroll v. Coach [Or.] 78 P. 397. Evidence held sufficient to show a joint purchase. Id. See Agency, 3 Curr. L. 68.

Attorney and client: An attorney acquiring property adversely to his client's interests. Stanwood v. Wishard, 134 F. 959.

Corporate officer acquiring, in the course of his employment, interest adverse to the corporation, held a constructive trustee. De Bardeleben v. Bessemer Land & Imp. Co., 140 Ala. 621, 37 So. 511. See Corporations, 3 Curr. L. 880.

Husband and wife: A husband coercing his wife to convey her property to him without consideration, a constructive trust arises in her favor. Huffman v. Huffman [Ind. App.] 73 N. E. 1096. See note on this subject in Husband and Wife, 3 Curr. L. 1673.

Parent and child: Where children were fraudulently induced to convey land to father, held the latter was a constructive trustee. Gregory v. Bowlsby [Iowa] 102 N. W. 517.

Partners: Partner held trustee for benefit of partner transferring property to him. Koefoed v. Thompson [Neb.] 102 N. W. 268.

Tenant in common purchasing a sheriff's certificate at a foreclosure sale is a constructive trustee for his co-tenant. Ryason v. Dunten [Ind.] 73 N. E. 74.

38. One promoting a deal for the sale of securities held not to have sustained trust relations with administrators, who were men of affairs and had access to all sources of information. Gray v. Hafer, 2 Ohio N. P. (N. S.) 341.

39. Morris v. Reigel [S. D.] 101 N. W. 1086; Koefoed v. Thompson [Neb.] 102 N. W. 268. Cobbey's Ann. St. 1903, § 5953. Smullin v. Wharton [Neb.] 103 N. W. 288; Moore v. Crump [Miss.] 37 So. 109; Avery v. Stewart, 136 N. C. 426, 48 S. E. 775; Kroll v. Coach [Or.] 78 P. 397. Sand. & H. Dig. § 3480, only applies to express trusts. Ammonette v. Black [Ark.] 83 S. W. 910; Parker v. Catron [Ky.] 85 S. W. 740.

40. Smullin v. Wharton [Neb.] 103 N. W. 288.

41. Where original owner's wife joined in deed, it is immaterial, so far as defendant is concerned, whether she joined in the contract to convey which plaintiff had and which defendant assumed. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

42. See 2 Curr. L. 1931.

43. Moore v. Crump [Miss.] 37 So. 109. Evidence held insufficient to show that grantee obtained title by fraud. Id. Evidence held insufficient to show fraud. Rawson v. Morris [Minn.] 101 N. W. 970. Evidence held insufficient to show that title was obtained on fraudulent promise to convey to another. Ammonette v. Black [Ark.] 83 S. W. 910. Where one bought at judicial sale and allowed another to remain in possession and treat the land as his own, evidence held sufficient to show a constructive trust. Parker v. Catron [Ky.] 85 S. W. 740.

44. Huffman v. Huffman [Ind. App.] 73 N. E. 1096. Evidence held insufficient to show that purchaser at time of sale was acting as plaintiff's attorney. Laning v. Darling, 209 Pa. 254, 58 A. 477.

45. See 2 Curr. L. 1932.

46. Upon failure of bankrupt to pay for stock bought in bulk in compliance with a law requiring such sales to be accompanied by a list of the seller's creditors and payment of the price to be applied to their claims, the stock remaining at the time of bankruptcy will be regarded as a trust for the seller's creditors. In re Gaskill, 130 F. 235. Where, by agreement between sole legatee, and heirs, judgment setting aside will was set aside and certain land was to be conveyed by the legatee to the heirs, held, until the execution of such deeds, the legatee was a trustee for the heirs. Allard v. Allard [Ky.] 86 S. W. 679. Where freight was payable on delivery and the consignee remitted the entire sum due to the shipper, the latter to settle the freight, held, such

which the latter is not a party, the person so recovering the land will be regarded as a trustee for the owner.[47]

One wrongfully detaining property of another is an involuntary trustee for the owner.[48]

§ 5. *Resulting trusts.*[49]—*The general rule* is that where the purchase money is paid by one person and the legal[50] title to the property is conveyed to another, a trust results in favor of the person furnishing the consideration.[51]

A resulting trust may be declared in anything which a court of equity recognizes as property,[52] but the trust interest must be measureable as to its value, or as to its fractional dimensions as compared with the whole tract divided or undivided.[53] A resulting trust arises solely by operation of law,[54] and this is not changed by the fact that the trustee recognizes the trust by parol.[55] It follows that the trust is not within the statute of frauds,[56] and cannot arise where there is an express written agreement showing a contrary intent,[57] and such agreement cannot be assailed by parol.[56] Though the trust arise out of complainant's own fraud, he is nevertheless entitled to relief if he is not obliged to disclose the fraud in making out his case.[59]

sum was impressed with a trust in favor of the shipowner for the freight. Michigan S. S. Co. v. Thornton [C. C. A.] 136 F. 134.

47. Smith v. Cornett, 26 Ky. L. R. 265, 80 S. W. 1188.

48. Civ. Code, §§ 2958, 2959. Upon sale by a receiver wrongfully appointed, purchaser holds property as an involuntary trustee for the owner, and receiver holds funds as an involuntary trustee for the purchaser. Lutey v. Clark [Mont.] 77 P. 305.

49. See 2 Curr. L. 1932. See Tiffany, Real Prop. § 93.

50. Lynch v. Herrig [Mont.] 80 P. 240. There is no resulting trust in favor of the purchaser at an execution sale where the deed is void. Livingstone v. Murphy, 187 Mass. 315, 72 N. E. 1012.

51. Herlihy v. Coney [Me.] 59 A. 952; Los Angeles & Bakersfield Oil & Development Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25.

Facts showing a resulting trust: Where one furnished money toward buying corporate stock, title being taken in another. In re Brown's Estate [Pa.] 60 A. 147. Where parent bought land, title being taken in a child's name. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412. Where husband bought land with wife's money, taking title in his own name. Sparks v. Taylor [Tex. Civ. App.] 87 S. W. 740. Where husband sold property of his wife and bought other property with the proceeds. Gittings v. Winter [Md.] 60 A. 630. Widow and minor children completing contract of sale held by husband and acquiring title to land, held to hold as trustee for the heirs of the husband to the extent of their interest therein. Brown v. Arkansas Cent. R. Co. [Ark.] 81 S. W. 613.

Facts falling to show a resulting trust: Where land was purchased in the name of the husband with joint savings of the husband and wife, and was afterward conveyed to the wife to prevent the husband from encumbering it, there was no resulting trust. Fretz v. Roth [N. J. Eq.] 59 A. 676. Where purchaser at mortgage foreclosure sale agreed to convey to mortgagor on redemption within a certain time and no such redemption was made. Banes v. Morgan, 204 Pa. 185, 53 A. 754.

52. May be declared in an executory contract to purchase land. Lynch v. Herrig [Mont.] 80 P. 240.

53. Held no resulting trust applied to a prior location on mineral land. Los Angeles & Bakersfield Oil & Development Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25. Where one party furnished stock having only a speculative value, the court cannot determine what interest in trust such party has and cannot enforce it. Id.

54. There must be no agreement. Heil v. Heil [Mo.] 84 S. W. 45; Lynch v. Herrig [Mont.] 80 P. 240. Under Rev. Civ. Code, § 303, stating the general rule as to a resulting trust. Hickson v. Culbert [S. D.] 102 N. W. 774.

Kentucky: Under Ky. St. 1903, § 2353, providing that there shall be no resulting trust unless the deed be taken in the grantee's name without the consent of the person paying the consideration, no resulting trust arises where there was an agreement that the grantee should take title in his own name. Fields' Heirs v. Napier, 26 Ky. L. R. 240, 80 S. W. 1110.

55. Long v. Mechem [Ala.] 38 So. 262. May be proved by parol. Id.

56. Lynch v. Herrig [Mont.] 80 P. 240.

57, 58. De Hihns v. Free [S. C.] 49 S. E. 841.

59. Where, in a suit to impress property with a trust, the issue is solely as to the title to the property without reference to any fraudulent conveyance, the complainant cannot be denied relief because of a fraudulent purpose to avoid taxation by placing the property in defendant's name. Monahan v. Monahan [Vt.] 59 A. 169.

NOTE. Illegal purpose: As a general rule, where parties are in pari delicto, neither can recover against the other. Taylor v. Chester, 4 Q. B. 309. At law, however, the plaintiff is not barred if he does not have to disclose his own wrong in the pleadings. See Swan v. Scott, 11 Serg. & R. [Pa.] 155. In equity it is doubtful if this limitation would apply, if the plaintiff's wrong appear-

The consideration[60] must be paid at the time of purchase[61] by the beneficiary himself,[62] or by someone in his behalf,[63] and such person may be the trustee;[64] but the money must belong to the cestui que trust in specie, or by its payment by the hands of another he must incur an obligation to repay, so that the consideration actually moves from him at the time.[65] It must be shown with certainty and exactness what part of the purchase money was paid by or for the beneficiary,[66] and such sum must be an aliquot part of the whole consideration or for the value of some particular estate in the premises conveyed.[67]

Presumption of gift or advancement.[68]—In the absence of evidence to the contrary, where the purchaser is under a legal, or in some cases even a moral obligation to support the grantee named in the deed, equity raises a presumption that the purchase is intended as a gift or advancement;[69] but this presumption is

ed in the presentation of the case, because equity will not aid one who does not come with clean hands, where his wrong was part of the same transaction. Cadman v. Horner, 18 Ves. Jun. 10. On this ground the principal case seems wrong. A stronger objection may be urged. Where a parent pays the purchase money, but takes title in the child's name, a presumption arises that the transaction was intended as an advancement to the child. Respass v. Jones, 102 N. C. 5. Here the plaintiff could rebut the presumption only by evidence that he intended the transaction as a device to evade taxation. Where proof of his illegal purpose is essential to the establishment of his case, it seems clear that equity should not aid him. Ch. Roberts v. Lund, 45 Vt. 82.—18 Harv. L. R. 547.

60. See 2 Curr. L. 1933.

61. Payment must be made at the time or before the legal title passes to the party to be charged. Lynch v. Herrig [Mont.] 80 P. 240.

Contra: It is not essential that the consideration be paid or secured at the time the deed is taken in the name of the alleged trustee [Rev. Civ. Code, § 303]. Hickson v. Culbert [S. D.] 102 N. W. 774.

62, 63, 64. Herlihy v. Coney [Me.] 59 A. 952.

65. Herlihy v. Coney [Me.] 59 A. 952. Evidence held sufficient to support a finding that the transaction between the alleged trustee and the beneficiary was a loan which the latter was bound to repay. Id. Evidence must show that the alleged beneficiary had title to or an interest in the property sold to produce the fund. Cunningham v. Cunningham [Iowa] 101 N. W. 470. Evidence held sufficient to show that claimant's grantor furnished part of the purchase price. Id.

66. Where money was advanced husband by wife. Pickens v. Wood [W. Va.] 50 S. E. 818.

67. Lynch v. Herrig [Mont.] 80 P. 240; Long v. Scott, 24 App. D. C. 1; Leary v. Corvin [N. Y.] 73 N. E. 984. Where daughter gave money to father to buy a house and five years thereafter he purchased a house, taking a deed in his own name, for a much greater sum than that paid by her, held, there was no trust impressed on the property. Id.; Onasch v. Zinkel, 213 Ill. 119, 72 N. E. 716. Where property was bought with fund to which the whole family had contributed their earnings, evidence held insufficient to show a resulting trust in the father. Id.

NOTE. Effect of indeterminate contribution to purchase price: Almost universally, when several persons contribute proportionate shares to the purchase price of land conveyed to one, a trust results in their favor. It is often stated that the share must be some aliquot portion of the whole amount (i. e. one-third, one-sixth, etc.), giving a proportionate aliquot interest in the land. McGowan v. McGowan, 14 Gray [Mass.] 119, 74 Am. Dec. 668. Such seems to be the rule in Illinois. But see Fleming v. McHole, 47 Ill. 282. A more reasonable rule obtains in most jurisdictions, where any fraction has been allowed; so long as a definite share is found, a trust arises to the extent of the contribution. Currence v. Ward, 43 W. Va. 367. Almost everywhere the claimant must prove a definite interest and leave no uncertainty as to his share; and a general, indeterminable contribution creates no trust. Olcott v. Bynum, 17 Wall. [U. S.] 44, 21 Law. Ed. 570. Yet, in a few cases, where the shares were undefined, they were presumed to be equal. Edwards v. Edwards, 39 Pa. 369. Even if the amounts had been ascertainable in the present case, no other result should have been reached, since, as between husband and wife, the doctrine does not apply, and the legal conveyance to the wife is deemed an advancement unless there be satisfactory evidence of a contrary intention. See Adlard v. Adlard, 65 Ill. 212.—18 Harv. L. R. 473.

68. See 2 Curr. L. 1934.

69. Husband and wife: A purchase of land by a husband in the name of his wife will be presumed to be an advancement. Deuter v. Deuter [Ill.] 73 N. E. 453. Where land was paid for with wife's money, but title was taken in name of husband who made all payments and assured creditors that he owned the same, held no trust. Kline v. Kline's Creditors [Va.] 48 S. E. 882. Money furnished husband by wife presumed, as against a creditor of the former, to have been a gift. Pickens v. Wood [W. Va.] 50 S. E. 818.

Parent and child: Where purchase money is paid by parent and the legal title taken in a child, the transaction is presumed to be an advancement. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412; Hoon v. Hoon [Iowa] 102 N. W. 105. Where husband bought land with wife's money, the deed

not conclusive, and may be overcome by clear and satisfactory proof;[70] the burden of proof being upon the claimant;[71] but to permit the introduction of such proof, the party asserting the trust must allege the facts upon which he relies.[72] This presumption has been held not to arise where the husband has the possession of or legal title to the wife's separate property,[73] in which case the burden is upon the husband, or those claiming under him, to establish the gift,[74] the question being one for the jury.[75]

The law of the state where wife resided before marriage and where property, from which purchase money was realized, is situated, governs.[76]

Property purchased with trust funds[77] may result.[78]

Evidence to establish[79] a resulting trust must be clear and satisfactory.[80] The trustee claiming to have become the beneficial owner, the burden is upon him to prove it.[81] In the absence of contrary evidence, a trust once shown to exist is presumed to continue.[82] The resulting trusts which can be rebutted by extrinsic

giving her a life estate with remainder to the husband's children by her, held no resulting trust. Trumbo v. Fulk [Va.] 48 S. E. 525.

NOTE. Presumption of gift or advancement: While ordinarily, if the party furnishing the consideration is morally or legally bound to support the one in whose name the conveyance is made, equity will presume that a gift was intended (2 Pom. Eq. Jur. § 1039; Dyer v. Dyer, 2 Cox, 92; Sunderland v. Sunderland, 19 Iowa, 325; Sweet v. Dean, 43 Ill. App. 650), yet if the facts indicate a different intention, a trust will (In the absence of a statute to the contrary, Johnson v. Johnson, 16 Minn. 512) result in favor of the real purchaser. Guthrie v. Gardner, 19 Wend. [N. Y.] 414; Harden v. Darwin, 66 Ala. 55. Thus a trust was created where the husband believed that by virtue of a deed to the wife they would have a joint title in the premises. Wallace v. Bower, 28 Vt. 628; Milner v. Freeman, 40 Ark. 62. As a general rule no trust is created where one makes improvements on the land of another. Bodwell v. Nutter, 63 N. H. 446, 3 A. 421.—3 Mich. L. R. 165.

70. Hoon v. Hoon [Iowa] 102 N. W. 105; Deuter v. Deuter [Ill.] 73 N. E. 453; Hickson v. Culbert [S. D.] 102 N. W. 774; Kline v. Kline's Creditors [Va.] 48 S. E. 882. Evidence held sufficient that deed to wife was not intended as an advancement. Id.; Robinson v. Powell, 210 Pa. 232, 59 A. 1078. Evidence held insufficient to show that money deposited in defendant's bank account was impressed with a trust in favor of plaintiff. Id. Where mother paying purchase price lived separate from her husband, and the taking title in the child was a device to render the transfer of the property easy, held, there was a resulting trust. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412. So held where money of husband was deposited by the wife in her own name. Monahan v. Monahan [Vt.] 59 A. 169. Husband held entitled to reimbursement for land purchased with his own money, title being taken in the name of his wife on the faith of a void contract between them, whereby if she died first he was to have all her property. Stroud v. Ross, 26 Ky. L. R. 521, 82 S. W. 254. But, in such a case, he is not entitled to recover expenditures for taxes and improvements made on realty which the wife owned and to purchase which the husband did not contribute his own money. Id. Where land was purchased by husband with funds of wife and he declared upon the public records, and whenever the transaction was mentioned that it was hers, and recognized the title of her son after her death, held sufficient to establish a resulting trust. Leslie v. Bell [Ark.] 84 S. W. 491. Where husband purchases and takes title to land purchased with wife's funds, held a resulting trust arose. Madator Land & Cattle Co. v. Cooper [Tex. Civ. App.] 87 S. W. 235.

71. Hickson v. Culbert [S. D.] 102 N. W. 774; Deuter v. Deuter [Ill.] 73 N. E. 453.

72. Hoon v. Hoon [Iowa] 102 N. W. 105.

73. Where on amicable partition, deed of married woman's share was made out in her husband's name. Carter v. Becker, 69 Kan. 524, 77 P. 264.

74, 75. Carter v. Becker, 69 Kan. 524, 77 P. 264.

76. Sparks v. Taylor [Tex. Civ. App.] 87 S. W. 740.

77. See 2 Curr. L. 1935.

78. One receiving funds to invest in securities and holds the latter for another, the holder has no equitable title to the securities. Tucker v. Linn [N. J. Eq.] 57 A. 1017. One intrusted with money of another purchasing, without authority, shares of stock in his own name, a resulting trust arises. In re Fisher's Estate [Iowa] 102 N. W. 797.

79. See 2 Curr. L. 1935.

80. Gilbert Bros. & Co. v. Lawrence Bros. [W. Va.] 49 S. E. 155; In re Fisher's Estate [Iowa] 102 N. W. 797; Matador Land & Cattle Co. v. Cooper [Tex. Civ. App.] 87 S. W. 235. Must be clear, specific, satisfactory and of such a character as to leave in the mind of the judge no hesitation or substantial doubt. Carter v. Carter [N. D.] 103 N. W. 425.

81. In re Fisher's Estate [Iowa] 102 N. W. 797.

82. In re Fisher's Estate [Iowa] 102 N. W. 797. That trustee of bank stock was prosperous and that the beneficiary, his sister, was unsuccessful in a business way, is not inconsistent with the continuance of the trust. Id.

evidence are those claimed upon a mere implication of law, not those arising on the failure of an express trust for imperfection or illegality.[83] Sufficiency of the evidence in particular cases is shown in the notes.[84]

§ 6. *The beneficiary. His estate, rights and interest.*[85]—The beneficiary takes an equitable estate,[86] and upon becoming incompetent, payments of income should be made to his guardian.[87]

The Statute of Uses,[88] which is a part of the law of almost all the states, operates to convey the legal as well as the equitable title to the beneficiary of a passive trust.[89]

Rights between beneficiaries.[90]

Income and principal.[91]—In determining whether a dividend is income or principal, the courts will determine the matter for themselves from all the facts of the case.[92] As a general rule, as between life tenants and remaindermen of trust funds invested in corporate stock, a cash dividend is to be regarded as income, and stock dividends as capital,[93] and this rule will not yield, though in a given case it appears to fail to accomplish exact justice.[94] The above rule obtains where undistributed profits have been invested in permanent improvements, and the cash dividend is declared out of the proceeds of a sale of such improvements,[95] though such sale is the result of the corporation withdrawing from certain incidental branches of its business, the amount of corporate stock remaining unchanged,[96] though if the acts leading up to the declaring of the dividend amount to a partial liquidation, the dividend is regarded as capital.[97] Stock dividends representing surplus earnings constitute income.[98] Subscription rights in additional stock represent principal.[99] Dividends on stocks and bonds pledged as collateral security to creditor of testator in latter's lifetime, being applied on the obligations secured, cannot be regarded as income.[1] Where payments are made out of the income instead of out of the principal, they may be satisfied from the proceeds acquired from a sale of the latter.[2] In a suit by the life tenant, the burden is upon him to show that the thing demanded is income.[3]

83. Bryan v. Bigelow [Conn.] 60 A. 266.

84. Evidence held insufficient to show that purchase price of land was furnished by father to son-in-law under an agreement that title should be taken in the former's daughter's name. Barnett's Adm'r v. Adams, 26 Ky. L. R. 622, 82 S. W. 406. Where son deeded property to father, the latter to erect a building thereon and the property to then revert to the son, evidence held insufficient to show a resulting trust. Heil v. Heil [Mo.] 84 S. W. 45.

85. See 2 Curr. L. 1936.

86. Johnson v. Cook [Ga.] 50 S. E. 367; Morrow v. Morrow [Mo. App.] 87 S. W. 590. Where the owner of a life estate created a trust for his sole personal benefit for life, held, he retained the beneficial interest, and having consented to a partition of the property among the remaindermen freed from his life estate, the trustee had no interest to contest the proceeding. Brillhart v. Mish, 99 Md. 447, 58 A. 28.

"To hold in trust" is not equivalent to vesting title in the beneficiary. In re Dixon's Estate, 143 Cal. 511, 77 P. 412.

87. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

88. See 2 Curr. L. 1936.

89. See, also, Uses, 2 Curr. L. 1965.

90, 91. See 2 Curr. L. 1936.

92. They are not bound by the name given the transaction by the corporation declaring the dividend. Mercer v. Buchanan, 132 F. 501.

93. Smith v. Dana [Conn.] 60 A. 117.

94. Smith v. Dana [Conn.] 60 A. 117. Declaring dividend income held not to operate to the injury of the remaindermen where it appeared that the capital stock constituting the corpus of the estate remained worth three times what it was when the trust took effect. Id.

95. Smith v. Dana [Conn.] 60 A. 117.

96. In such case there is no partial liquidation so as to warrant a holding that the dividend was capital. Smith v. Dana [Conn.] 60 A. 117.

97. Mercer v. Buchanan, 132 F. 501. Where corporation sold portion of plant and subsequently ceased business, held, sale was a partial liquidation, and dividends payable in corporate stock taken in payment for the property sold were capital. Id. The court, stating the New York rule, calls them "cash dividends." Id.

98. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

99. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737.

1. Skinner v. Taft [Mich.] 12 Det. Leg. N. 153, 103 N. W. 702.

2. Townsend v. Wilson [Conn.] 59 A. 417.

3. Mercer v. Buchanan, 132 F. 501.

Charges on income.[4]—Whether premiums paid for bonds are chargeable to the principal or income depends upon whether it is the intent of the settlor that the beneficiary shall have the full income or the remaindermen the entire principal;[5] if the former, the premium is chargeable to the principal, if the latter, it is chargeable to the income,[6] and if chargeable on the income, the latter is determined by deducting from the interest as it becomes due, such sums as will at maturity pay the premium.[7] Repairs[8] and improvements merely enhancing rental value[9] are chargeable on income.

Claims enforceable against trust funds or estate.[10]—Permanent improvements are chargeable to the capital.[11] The war revenue taxes of 1898[12] and transfer taxes[13] are payable from the principal. Unpaid interest upon a mortgage which has been foreclosed cannot be advanced from capital upon the theory that the capital account may be made good to this extent by a sale of the premises.[14] A trust fund is not chargeable with the expenses of procuring letters with the will annexed.[15]

Rights of creditors and assignees of beneficiary.[16]—While the power of alienation is not necessarily incident to the beneficiary's estate,[17] and does not obtain where contrary to the purpose of the trust,[18] still there being no provision against anticipation, alienation, or attachments, the cestui que trust may generally dispose of his interest,[19] or his creditors may reach the same through the medium of a court of equity,[20] though in some states this cannot be done unless the settlor and beneficiary are the same person.[21] In New York a judgment for necessaries may be enforced against the income[22] where there is no unsatisfied outstanding execution against the judgment debtor.[23] An assignee of the beneficiary takes subject to pre-existing equitable charges or burdens on the property.[24] Where the beneficiary is a married woman, statutes generally require the husband to join in the deed.[25]

4. See 2 Curr. L. 1936.

5, 6. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

7. In re Allis' Estate [Wis.] 101 N. W. 365.

8. Whittingham v. Fidelity Trust Co. [Ky.] 86 S. W. 689.

9. In re Parr, 45 Misc. 564, 92 N. Y. S. 990.

10. See 2 Curr. L. 1937. See ante, prior subdivision, "Charges on Income."

11. In re Parr, 45 Misc. 564, 92 N. Y. S. 990.

12. In re Hoyt's Estate, 44 Misc. 76, 89 N. Y. S. 744.

13. Laws 1896, p. 877, c. 908, as amended by Laws 1899, p. 100, c. 76, and amendments of 1900, p. 1438, c. 658, construed. In re Hoyt's Estate, 44 Misc. 76, 89 N. Y. S. 744. **Contra:** Conger v. Conger, 90 N. Y. S. 1062 [Advance sheets only].

14, 15. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737.

16. See 2 Curr. L. 1938.

17. Wenzel v. Powder [Md.] 59 A. 194.

18. A beneficiary entitled to a life support cannot convey away such right. Hoyt v. Hoyt [Vt.] 59 A. 845.

19. Bronson v. Thompson [Conn.] 58 A. 692. The **whole income** being given the beneficiaries for their support, it belongs to them and is alienable. Wenzel v. Powder [Md.] 59 A. 194. The beneficiary taking a **vested equitable estate,** it is assignable. Jastram v. McAuslan [R. I.] 58 A. 952. **Contra. Wisconsin:** Under Rev. St. 1898, § 2089, a beneficiary of a trust for the receipt of rents of lands cannot assign his interest. Patton v. Patrick [Wis.] 101 N. W. 408.

20. Bronson v. Thompson [Conn.] 58 A. 692.

21. Wenzel v. Powder [Md.] 59 A. 194. Creditors of wife living separate from her husband cannot reach real estate constituting a trust created by the husband for the benefit of his wife and children. Stout v. Apgar [N. J. Eq.] 60 A. 52.

22. Code Civ. Proc. § 1391, as amended by 1903, p. 1071, c. 461. A judgment in an action on a judgment of another state is not one recovered for, for necessaries. Neuman v. Mortimer, 90 N. Y. S. 524.

23. Code Civ. Proc. § 1391, as amended by Laws 1903, p. 1071, c. 461. An allegation that "there is no execution on this judgment now outstanding or not unsatisfied" is insufficient. Neuman v. Mortimer, 90 N. Y. S. 524.

24. Uehling v. Lyon, 134 F. 703. Where the beneficiaries' interests were to be subject to advancements, a purchaser of a beneficiary takes subject to charges against his grantor. Shipley v. Jacob Tome Institute, 99 Md. 520, 58 A. 200.

25. Kentucky: Under Gen. St. c. 52, art. 4, § 17, providing that title to land conveyed in trust for married women may be conveyed if the husband and trustee, if there be one, unite in the conveyance, a conveyance by the husband and wife after the death of the trustee and by the wife after the death of the trustee and her husband

The beneficiary having absolute control over the personal property, it may be reached by his creditors.[26] In New York the trustee is a necessary party to an application for an execution against the income.[27]

Representation of beneficiary by trustee.[28]—Acts of a trustee bind the beneficiaries,[29] hence, as a general rule, the latter is not a necessary party defendant,[30] and the possession of the trustee is that of the beneficiaries.[31] When suit by the trustee is barred, the right of the beneficiary to sue is also gone, though he may have been under disability at the time the cause of action arose.[32] A beneficiary can maintain an action in relation to the trust property only after the trustee has refused to sue and the complaint must show such refusal.[33]

§ 7. *The trustee. Appointment, qualification, resignation and removal. Who may be trustee.*[34]—While the trustee need have no legal or equitable interest in the property,[35] there is no objection to the beneficiary being a trustee;[36] but a trust cannot be executed by the sole beneficiary as trustee, without either the appointment of a trustee not under disability or a supervision of the execution of the trust by the court.[37] A charitable corporation having an interest in either the principal or income,[38] or the settlor's attorney,[39] may act as trustees.

Qualification and acceptance of trust.[39a]—The person named as trustee is not obliged to accept or execute the trust,[40] and he is entitled to a reasonable time within which to decide,[41] and the acceptance[42] or disclaimer[43] may be indicated by acts as well as by words. A trustee has the right within the limitations of the law to make an acceptance of his trusteeship conditional,[44] and such condition, when expressed in the instrument, forms an essential and necessary part of it, and the validity of the trust is dependent thereon.[45]

Succession and judicial appointment of new trustee.[46]—In the absence of express authority, the trustee has no power to appoint his successor,[47] the power resting in the courts of equity,[48] who have the power to appoint a trustee in the

pass title. Brain v. Bailey, 26 Ky. L. R. 853, 82 S. W. 582.

26. Ullman v. Cameron, 93 N. Y. S. 976, afg. 92 App. Div. 91, 87 N. Y. S. 148.

Note: Such a provision in a trust concerning real estate renders the trust void. Wendt v. Walsh, 164 N. Y. 154, 58 N. E. 2.

27. Code Civ. Proc. § 1391, as amended by Laws 1903, p. 1071, c. 461, construed. King v. Irving, 92 N. Y. S. 1094. Laws 1903, p. 1071, c. 461, are not retroactive. Id.

28. See 2 Curr. L. 1938.

29. Johnson v. Cook [Ga.] 50 S. E. 367.

30. So held in a suit to foreclose a mortgage. Thompson v. Price [Wash.] 79 P. 951.

31. Trustee having no interest in the property and the beneficiaries having a vested interest, the latter are in possession within the meaning of Civ. Code Proc. § 490, subsec. 2, providing for the sale of an estate in possession. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931.

32. Wiess v. Goodhue [Tex.] 83 S. W. 178.

33. Woolf v. Barnes, 93 N. Y. S. 219.

34. See 2 Curr. L. 1938.

35. Coleman v. Cabaniss [Ga.] 48 S. E. 927.

36. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. The trust being valid in its inception and indivisible, the partial interest of the sole trustee as one of the beneficiaries does not prevent his executing a power of sale. Sweet v. Schliemann, 95 App. Div. 266, 88 N. Y. S. 916.

Contra: See Brown v. Spohr [N. Y.] 73 N. E. 14, afg. 84 N. Y. S. 995, where one of the elements of a valid trust in personalty is stated to be "a designated trustee who must not be the beneficiary."

37. Haendle v. Stewart, 84 App. Div. 274, 82 N. Y. S. 823.

38. Robb v. Washington & Jefferson College, 93 N. Y. S. 92.

39. The trustee's share of the commissions is compensation for services, not a benefit granted by the deed. Carroll v. Smith, 99 Md. 653, 59 A. 131.

39a. See 2 Curr. L. 1938, 1939.

40. Sells v. Delgado [Mass.] 70 N. E. 1036.

41. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412.

42. Johnson v. Cook [Ga.] 50 S. E. 367. The trustee by signing and acknowledging the deed and **covenanting to perform the trust** accepts the same. Dayton v. Stewart, 99 Md. 643, 59 A. 281.

43. Disclaimer may be inferred from a failure to act or qualify. Sells v. Delgado [Mass.] 70 N. E. 1036.

44. Schreyer v. Schreyer, 91 N. Y. S. 1065. A condition that he **may resign or surrender** the trust at any time is valid. Id.

45. Schreyer v. Schreyer, 91 N. Y. S. 1065.

46. See 2 Curr. L. 1938, and 2 Curr. L. 1940.

47. Whitehead v. Whitehead [Ala.] 37 So. 929.

48. Morrow v. Morrow [Mo. App.] 87 S. W. 590. City court of Bessemer has such jurisdiction. Whitehead v. Whitehead [Ala.] 37 So. 929.

place of a single trustee who dies,[49] or who becomes totally unable to perform the duties of the trust,[50] and this power includes the one to appoint a co-trustee to aid him in the performance of those duties,[51] and the fact that administration proceedings are pending does not deprive the court of this power.[52] All of the trustees failing to qualify, equity may appoint,[53] but one of several trustees qualifying, he becomes vested with the property as sole trustee,[54] and the court is without power to appoint a trustee to act for the ones who failed to qualify,[55] though this rule has been altered by the statutes of some states.[56] Unless the trust is clearly invalid and inoperative, a testamentary trustee should be appointed on application.[57] The widow of a trustee is not entitled to be preferred in the appointment of a successor to administer the trust estate.[58] Remaindermen may have a trustee appointed to preserve the estate and pay the income to the life tenant.[59]

As a general rule the cestui que trust is regarded as the jurisdictional party,[60] though in Georgia the rule does not apply to beneficiaries under age.[61] A bill which presents a prima facie case for the exercise of the power of appointment is not open to demurrer,[62] and whether the power will be properly exercised in making the appointment must be determined upon proofs in support of the allegations.[63] In the absence of an express provision, the order of appointment of a substituted trustee does not divest and invest title,[64] nor does such decree render the question of the creation of the trust res judicata as to the personal representatives of the deceased trustee.[65] The court having jurisdiction, the appointment cannot be collaterally attacked.[66]

In New York the trust devolving upon the court, it appoints, not a substituted trustee, but a representative or agent to execute the trust.[67]

Bonds.[68]—As a general rule a trustee is obliged to give a bond, even though he is selected by the beneficiaries.[69]

Resignation.[70]

49. It being shown that a trust was created, that the trustee qualified and acted and is dead, a new trustee should be appointed. In re Landmesser, 91 N. Y. S. 774.

50. Force v. Force [N. J. Eq.] 57 A. 973; Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214.

51. Force v. Force [N. J. Eq.] 57 A. 973.

52. Where administrator was trustee. Morrow v. Morrow [Mo. App.] 87 S. W. 590.

53. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412.

54. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214; Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385.

55. Mullanny v. Nangle, 212 Ill. 247, 72 N. E. 385.

56. Under Pa. Act April 10, 1849, § 2 (P. L. 597), courts of equity have power to appoint a trustee in place of one of several executors in all cases of trust where any of those named in the will resign, die, or are removed, whether the duties of the trust were to be executed by them by virtue of their office or otherwise. Gehr v. McDowell, 206 Pa. 100, 55 A. 851.

57. Appeal of Beardsley [Conn.] 60 A. 664.

58. Whitehead v. Whitehead [Ala.] 37 So. 929.

59. So held where testamentary trustees had no further active duties to perform and the property held by them was subject to a life estate with remainder over. Graham v. Whitridge, 99 Md. 248, 58 A. 36.

60. Under Act April 14, 1828 (P. L. 453), children of cestui que trust, being entitled to remainders on death of beneficiary, held could not attack appointment of substitute trustee in a collateral proceeding. Haines v. Hall, 209 Pa. 104, 58 A. 125.

61. In order to secure the appointment of a successor to a deceased trustee, beneficiaries under age need not be served [Civ. Code 1895, §§ 3164, 3165]. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

62, 63. Force v. Force [N. J. Eq.] 57 A. 973.

64. Coffman v. Gates [Mo. App.] 85 S. W. 657.

65. In re Landmesser, 91 N. Y. S. 774.

66. Haines v. Hall, 209 Pa. 104, 58 A. 125.

67. In re Gueutal, 97 App. Div. 530, 90 N. Y. S. 138; In re Mayne, 90 N. Y. S. 1050. In such case the order was modified so as to apply only to the beneficiary wronged. Id. Agent of court appointed where beneficiary's right was denied and the estate had been divided without notice among other beneficiaries. Id.

68. See 2 Curr. L. 1940. Liability on bond, see post, § 10.

69. A provision permitting the beneficiaries to select their own trustees does not entitle a foreign trustee to take control of the property without being appointed in the state of his residence and giving bond as required by statute. Ky. St. 1903, §§ 4709, 4710, construed. Butler v. Taggart's Trustee [Ky.] 86 S. W. 541.

70, 71. See 2 Curr. L. 1939.

Removal.[71]—The removal of a trustee lies in the discretion of the court, and is dependent upon the circumstances of each case.[72] Mere differences of opinion[73] or unfriendliness[74] between the trustee and beneficiary, are insufficient to warrant the removal of the former unless the relations between them become so acrimonious as to operate to the detriment of the trust.[75] The fraudulent investment of trust funds may be ground for removal;[76] but unless the fund be in danger of being lost, the trustee will not be removed for every violation of duty or breach of trust.[77]

§ 8. *Execution and administration of the trust. A. Nature of trustee's title and establishment of estate.*[78]—The trustee of an active trust[79] takes the legal title[80] to such estate as is necessary for the performance of the trust,[81] and, in the absence of substitutionary provisions in the instrument of creation, the trustee's title is inheritable and passes to his heirs at law, who hold as trustees until the court appoints a successor.[82]

Receipt and establishment of estate.[83]—Delivery of personal property passes title.[84]

Possession[85] of the trustee is presumed to be that of the beneficiary.[86]

(§ 8) *B. Discretion and general powers of trustees and judicial control.*[87]—The control of trust estates is peculiarly within the province of equity,[88] and the courts thereof may compel the trustee to fairly perform his duties.[89] In the absence of statute,[90] discretionary powers are personal,[91] and are presumed to have been

72. Polk v. Linthicum [Md.] 60 A. 455. Removal for misconduct. Haines v. Elliot [Conn.] 58 A. 718. The court has authority to require a valid and sufficient cause to be shown for the removal. Act April 9, 1868 (P. L. 785) does not alter the above rule. In re Price's Estate, 209 Pa. 210, 58 A. 280.

73. In re Price's Estate, 209 Pa. 210, 58 A. 280.

74. Polk v. Linthicum [Md.] 60 A. 455.

75. In re Price's Estate, 209 Pa. 210, 58 A. 280; Polk v. Linthicum [Md.] 60 A. 455. Unfriendliness of trustee held ground for removal. Morrow v. Morrow [Mo. App.] 87 S. W. 590.

76. Where part of fund was fraudulently invested, held court would take custody of the entire fund. Cropsey v. Johnston [Mich.] 100 N. W. 182.

77. Haines v. Elliot [Conn.] 58 A. 718. Where trustees of school fund had failed to account, had loaned money to one of the trustees, which had been repaid, and at one time had been negligent in keeping their accounts, held, they would not be removed, there being no danger of the fund being lost. Id.

78. See 2 Curr. L. 1940.

79. Passive trusts, see Uses, 2 Curr. L. 1965.

80. In re Kenney Co., 136 F. 451. Moll v. Gardner [Ill.] 73 N. E. 442; Peck v. Scofield [Mass.] 71 N. E. 109; Morrow v. Morrow [Mo. App.] 87 S. W. 590; Woolf v. Barnes, 93 N. Y. S. 219. Judgment creditors of beneficiaries can obtain no lien on the property. Moll v. Gardner [Ill.] 73 N. E. 442.

81. In re Reith's Estate, 144 Cal. 314, 77 P. 942. It being essential to the execution of the trust that the trustees take title in fee, they will be held to so do. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Warranty deed, land to be held in trust, held trustee took fee, though balance of proceeds after fulfillment of trust was to be returned to grantors. Thompson v. Price [Wash.] 79 P. 951. A conveyance to one in trust for another for life, and on the death of the life tenant to her children in remainder, clothes the trustee with the legal title to the life estate, but not to the estate in remainder (Luquire v. Lee, 121 Ga. 624, 49 S. E. 834), nor is this changed by vesting in the trustee a power to dispose of both estates (Id.).

82. Kirkman v. Wadsworth [N. C.] 49 S. E. 962.

Alabama: Under the express provisions of Code 1896, § 1044, the executor of a trustee does not succeed to the right to administer the trust. Whitehead v. Whitehead [Ala.] 37 So. 929.

83. See 2 Curr. L. 1941, 1944.

84. Morris v. Hughes, 45 Misc. 278, 92 N. Y. S. 288.

85. See 2 Curr. L. 1941.

86. See ante, § 5. "Representation of beneficiary by the trustee."

87. See 2 Curr. L. 1941.

88. Morrow v. Morrow [Mo. App.] 87 S. W. 590.

89. Where executor was bound to select from stocks and bonds left by the testator a sufficient amount to make up for deficiencies in trust funds. Blair v. Scribner [N. J. Err. & App.] 60 A. 211.

90. Under Rev. Laws, c. 147, §§ 5, 6, providing for the appointment of a new trustee where the one appointed refuses or declines to serve such second trustee, can exercise a discretionary power vested in the trustee, but not limited to the trustee named. Sells v. Delgado [Mass.] 70 N. E. 1036.

91. Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151. Does not inure to administrator with the will annexed. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737. As to when, under the interpretation of a will, a power is discretionary, see Wills, 2 Curr. L. 2076.

honestly exercised.[92] Hence, in the absence of fraud or unless the rights of the beneficiary are otherwise jeopardized, the court will not interfere.[93] In testamentary trusts the investigation of the trustee's powers and duties usually involves a question of what testator meant. Such cases are treated in the topic Wills.[94]

Judicial instructions.[95]—The jurisdiction of a court of equity to direct trustees will only be exercised so far as actually needed for existing emergencies, and will not be extended to giving directions as to their conduct in future contingencies.[96] The general rules as to the relevancy of evidence[97] and the effect of decrees[98] apply.

(§ 8) *C. Management of estate and investments.*[99]—A trustee is held to the exercise of good faith and the care of an ordinarily prudent man,[1] and whether such care was exercised is to be determined with reference to the situation at the time the act was done.[2] He must not do any act inconsistent with the trust, or deny the title of the cestui que trust.[3] He has the right to employ agents to perform ministerial duties,[4] and if he exercises ordinary care in their selection, he is not liable for their defalcations.[5]

Powers to invest should be strictly construed,[6] though equity may, when beneficial to the estate, disregard such provisions.[7] As a general rule the trustee cannot invest the trust funds in personal securities,[8] but in certain cases investments in second mortgages[9] and railroad bonds[10] have been held permissible and not inconsistent with a sound discretion. In Connecticut, trust funds may be invested in a savings bank,[11] and in New York the same rule has been applied to a small

92. In re Bailey's Estate, 208 Pa. 594, 57 A. 1095.

93. Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716.

94. See Wills, 2 Curr. L. 2076; 4 Curr. L. ——.

95. See 2 Curr. L. 1941.

96. Kidder's Ex'rs v. Kidder [N. J. Eq.] 56 A. 154. Trustees of a fund granted in aid of a corporation authorized to sell land purchased therewith and distribute proceeds to the donors in event of dissolution cannot maintain a bill for instructions before dissolution. Nicolai v. Maryland Agricultural & Mechanical Ass'n, 96 Md. 323, 53 A. 965.

97. In a suit for instructions, evidence that grantee in trust deed had agreed to withdraw objections to trustee if the latter would deliver to the former certain property bequeathed to her, held irrelevant. Winn v. Itzel [Wis.] 103 N. W. 220.

98. A decree ordering the holding in trust the sum left the beneficiary but who was an absentee held not an adjudication that the absentee or any of his issue were living. George v. Clark [Mass.] 71 N. E. 809.

99. See 2 Curr. L. 1943.

1. Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151. In preventing property from being sold for taxes. Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639; Conger v. Conger, 90 N. Y. S. 1062 [Advance sheets only]; Taft v. Smith [Mass.] 70 N. E. 1031. Hence is not liable for mere mistakes in judgment. Id.

2. And not in the light of subsequent events which could not have been reasonably anticipated. Taft v. Smith [Mass.] 70 N. E. 1031.

3. Petty v. Emery, 96 App. Div. 35, 88 N. Y. S. 823. A trustee undertaking to discharge his duties cannot deny the trust. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931.

4. Agreement between beneficiaries and trustee authorizing another to carry out the trust held valid only as to ministerial duties. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214.

5. Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151. Where agent had been employed and trusted at various times by all parties interested in the estate, held not liable for his defalcation. Id.

6. Where board of trustees was authorized to erect building on property to be donated, held not empowered to erect building on property acquired from previous treasurer of the board in settlement of a shortage in his account. State v. Chickering, 72 N. H. 219, 55 A. 937.

7. Could authorize lease of property for 99 years, though will prohibited leases for more than 10 years. Denegre v. Walker [Ill.] 73 N. E. 409.

8. Laws 1903, p. 510, c. 317, § 1, providing that trust funds may be invested in governmental or real estate securities, recognizes that the law of the state forbids the investment of trust funds in personal securities. In re Allis' Estate [Wis.] 101 N. W. 365.

9. Where trust property subject to a first mortgage was sold by the trustee who took back a second mortgage for part of the purchase price, held not to show a failure to exercise a sound discretion. Taft v. Smith [Mass.] 70 N. E. 103.

10. Trustees having full power to invest and change investments, held they had authority to invest the trust funds in railroad and street railway bonds. In re Allis' Estate [Wis.] 101 N. W. 365.

11. Fanning v. Main [Conn.] 58 A. 472.

sum.[12] The subject is largely regulated by statutes.[13] Except as provided by statute, the jurisdiction of equity to permit an investment can only be exercised on a bill.[14]

Delivery of control to beneficiary.[15]—Where, in pursuance to authority conferred on the trustee, the beneficiary is allowed to pledge stock belonging to the estate, his action in so doing is as agent of the trustee.[16]

Estoppel of beneficiaries to question acts.[17]—Beneficiaries by requesting and authorizing the trustee to enter into a certain transaction,[18] or by receiving the benefits thereof,[19] are estopped to hold him liable for a violation of his duty by so doing, but this remedy will not be enforced so as to work an anticipation in violation of the deed of settlement,[20] and in this connection a distinction is made between accumulated and undisposed income and that which is accruing and to accrue.[21] This estoppel only extends to the beneficiaries so consenting,[22] hence remaindermen are not bound by the assent of a life tenant to the impairment of the fund,[23] and the trustee's account being disallowed, such assent does not bar the life tenant from claiming rights decreed him by the final decree.[24] As to whether the estoppel extends to infants, there is a conflict.[25]

(§ 8) *D. Creation of charges, mortgage and lease of estate.*[26]—A committee appointed to collect claims against an absconded debtor has no right to vote a gratuity, out of the trust fund, to the police, for having brought the debtor back from a foreign country.[27]

Power to lease.[28]—Unless regulated by statute,[29] the power to lease for a long

12. Where sum was $400 and there was no evidence that it could be readily invested so as to obtain more than 3½ per cent. In re Wiley, 98 App. Div. 93, 91 N. Y. S. 661.

13. New Jersey: Under Laws 1897, p. 190, c. 101, the court should not permit the use of trust funds to erect a building on trust property, where the proof leaves it doubtful that any benefit will result. In re Miller [N. J. Eq.] 58 A. 383.

14. Any jurisdiction of the chancery court except under Laws 1897, p. 190, c. 101, to permit the use of trust funds to erect a building on trust property can be exercised only on a bill and not on a petition. In re Miller [N. J. Eq.] 58 A. 383.

15. See 2 Curr. L. 1944.

16. After death of beneficiary, trustee is alone entitled to demand return. Bristol Sav. Bank v. Holley [Conn.] 58 A. 691.

17. See 2 Curr. L. 1945.

18. Herbert v. Squire [Mass.] 71 N. E. 534; Matthews v. Thompson [Mass.] 71 N. E. 93. Has the right to call on the cestui que trust, requesting investment, to make good any loss, so far as his interest in the trust fund will suffice. Furniss v. Leupp [N. J. Eq.] 58 A. 374. Where the residue of the estate was placed in trust and by an agreement "satisfactory to all parties," the debts had been partially paid out of the income, the trustees were held to take the property cum onere. Jastram v. McAuslan [R. I.] 58 A. 952. Where owing to the fact that devisee was a foreigner, a beneficiary took his portion, the trustee is equitably subrogated to the beneficiary's rights in such property to the extent that he misapplied trust funds for the benefit and at the instance of such beneficiary. State v. Thresher [Conn.] 58 A. 460.

19. Acceptance of the purchase money held to estop beneficiary from questioning trustee's right to sell. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058. Allegation in answer to suit to set aside that complainants ratified and approved the sale, held to sufficiently indicate that defendants relied on the defense of waiver, acquiescence and ratification. Id. Widow receiving monthly allowances during administration of husband's estate, held, she could not assert that the funds were diverted from the purpose intended, testator's will providing for an annuity, etc., in lieu of dower, homestead and support. Skinner v. Taft [Mich.] 103 N. W. 702.

20, 21. Furniss v. Leupp [N. J. Eq.] 58 A. 374.

22. Where income was to go to testator's wife and son, held, defense to an action on the trustee's bond that the money was paid out with the son's consent was insufficient, because not showing that the son mentioned was testator's only child. State v. Thresher [Conn.] 58 A. 460.

23, 24. Bennett v. Pierce [Mass.] 74 N. E. 360.

25. That it does: Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058.

That it does not: In the absence of fraud on their part, infants are not estopped by receipt of income from purchase money from claiming property sold by the trustee. Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508.

26. See 2 Curr. L. 1945.

27. Rowland v. Maddock [Mass.] 67 N. E. 347.

28. See 2 Curr. L. 1945.

29. In view of other legislation and Real Property Law, § 86, a five-year lease executed in 1900 by a trustee of a life beneficiary,

term is largely regulated by the probable benefits that will accrue to the estate therefrom.[30]

Mortgages.[31]—A power to sell[32] or to sell for reinvestment,[33] or to change investments,[34] does not grant authority to mortgage, while a provision that the property shall be kept free from incumbrances renders a mortgage by the trustee void;[35] but the power to sell stock for certain purposes includes the power to pledge it for a loan for the same purposes.[36] The power to continue a business includes the power to mortgage the property to secure money borrowed to carry on the business.[37] A power to mortgage for a particular purpose must be strictly construed.[38] As a general rule, the court may in its discretion order the execution of a mortgage.[39]

(§ 8) *E. Sale of trust property.*[40]—The trustee either under the terms of the instrument[41] or as a necessary implication from duties placed upon him,[42] may be empowered to sell the trust property, and this power may extend to the entire fee, though the trustee has no interest in a legal estate in remainder.[43] A trustee vested with the legal title can pass the same by conveyance, even when made in breach of his trust.[44] In the absence of restrictive phrases, the words "sell and convey" imply a conveyance in fee.[45] The power of sale may be discretionary,[46] and in such case is personal.[47] A power to sell being conferred upon several quali-

containing an option for renewal for five years, is enforceable against the trustee, subject only to the contingency of being terminated by the beneficiary's death during the term of the lease. Weir v. Barker, 93 N. Y. S. 732.

30. Trustees being authorized to rent and manage real estate, held, a lease of an undesirable building for 99 years was proper, all parties interested having consented, except infants having a contingent interest, notwithstanding that there was a possibility of future interests in persons not in esse. Denegre v. Walker [Ill.] 73 N. E. 409.

31. See 2 Curr. L. 1945.

32. Townsend v. Wilson [Conn.] 59 A. 417.

33. Scottish-American Mortg. Co. v. Clowney [S. C.] 49 S. E. 569.

34. A trustee with full power to change investments has no authority to pledge any part of the fund as security for the payment of a note made by him as trustee, though the money so received was expended for purposes for which the income of the trust fund could have been lawfully appropriated. Tuttle v. First Nat. Bank [Mass.] 73 N. E. 560.

35. Civ. Code, § 870. Gardiner v. Cord, 145 Cal. 157, 78 P. 544.

36. Security Trust Co. v. Merchants' Sav. Bank, 4 Ohio C. C. (N. S.) 616. Both parties to the loan acting in good faith, a succeeding trustee could not recover the security without tendering the amount due on the note. Evidence is competent to show propriety of the transaction and good faith of the parties. Id.

37. Though the will prohibited the disposal of the business. Roberts v. Hale, 124 Iowa, 296, 99 N. W. 1075.

38. A power to mortgage to improve the realty does not include a power to mortgage to raise money to pay the beneficiaries. Townsend v. Wilson [Conn.] 59 A. 417.

39. Under Gen. St. § 253, real estate held in trust may, through the action of the probate court, be mortgaged when to so do will, in the opinion of the court, best promote the interests of the beneficiaries. Townsend v. Wilson [Conn.] 59 A. 417.

40. See 2 Curr. L. 1945.

41. The trustees being empowered to **"change investments,"** they may sell unproductive realty. In re Curtis [R. I.] 60 A. 240. Trustee having the power to **"invest"** and on death of beneficiary to pay over the estate to certain parties has the power to sell. Foil v. Newsome [N. C.] 50 S. E. 597. Deed providing for successor and, except as to certain named exceptions, providing that he was to have the same powers as his predecessor, held to include a power of sale. Coleman v. Cabaniss [Ga.] 48 S. E. 927.

42. Foil v. Newsome [N. C.] 50 S. E. 597.

43. Civ. Code 1895, § 3171. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

44. Chesapeake Beach R. Co. v. Washington, etc., R. Co., 23 App. D. C. 587.

45. St. Louis Land & Bldg. Ass'n v. Fueller, 182 Mo. 93, 81 S. W. 414. Conveyance to husband, his successors and assigns forever in trust for his wife for life and then for his heirs, but giving the wife power to order the sale or conveyance of the same, held to authorize trustee to convey a fee on the request of the wife. Id. This interpretation is not altered by the fact that the husband paid the consideration, and his children, one of whom was by a former wife, were the remaindermen. Id. Under Rev. St. 1899, p. 1096, § 4590, providing that unless the contrary appears, every conveyance of realty shall pass all the estate of the grantor therein, a power to a trustee having title in fee to "sell or convey" authorizes a conveyance in fee. Id.

46. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931.

47. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834. Expires with the death of the nominated trustee. Id. Court has no power to order its subsequent appointee to sell any but the trust estate. Id.

fied and acting trustees, a deed by one of them is void,[48] and such power continues to a single survivor, and may be exercised by him alone after the death of his co-trustee, unless a contrary intent is manifest from the instrument of creation.[49] Beneficiaries may waive provisions in their favor.[50]

In making the sale, it is the trustee's duty to obtain the highest price possible,[51] and in the absence of special necessity or specific directions, it is misconduct to sell at a disadvantageous time,[52] though if the power of sale be discretionary, the court will never interfere except in cases of actual fraud or collusion,[53] and in such case the purchaser is not bound to make inquiry as to whether the trustees have properly exercised their powers.[54]

Where the sale is unauthorized[55] or obtained through fraud[56] or misconduct, it will not be confirmed, and the beneficiaries may have it vacated,[57] though, it being possible to adjust plaintiff's rights, equity will not necessarily set aside the sale, but may allow it to stand and hold the purchaser as trustee.[58] The court in considering the propriety of confirming a sale should take into consideration that a majority of those interested in the property except to the ratification.[59] The action to recover the property from one other than a bona fide purchaser may be maintained by the trustee,[60] and the property sold consisting of corporate stock, the corporation issuing the same is a proper party.[61]

Bonds.—Unless required by statute[62] or by the instrument of creation,[63] the trustee is not required to give a bond before sale. A bond being required, it should run to the person designated by the statute.[64]

Application of proceeds.[65]—Purchasers under a discretionary power of sale are not required to see that the proceeds are invested according to the trust,[66] and this is true, even though the beneficiaries are infants.[67]

48. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563.

49. Haggart v. Ranney [Ark.] 84 S. W. 703.

50. That trustee should only convey to parties designated by them. Altschul v. Casey [Or.] 76 P. 1083. Where beneficiaries conveyed to one of their number and that one and the trustee joined in conveying to a third party, such condition is waived. Id. Where trustee has power to convey on written direction of beneficiary, the latter joining in a deed by the former, the deed is valid, though there be no written direction. Kirkman v. Wadsworth [N. C.] 49 S. E. 962.

51. Holderman v. Hood [Kan.] 78 P. 838; Callaway v. Hubner, 99 Md. 529, 58 A. 362. Evidence held to show that trustees failed to exercise proper diligence. Id.

52. Dingman v. Beal, 213 Ill. 238, 72 N. E. 729. The trustee, being directed to sell at the best price reasonably attainable, is not required to make such sale within any specified time. Id.

53, 54. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058.

55. Where an option contract for the sale of trust property should not have been authorized in view of the facts, the sale procured through the option contract ought not to be ratified. Callaway v. Hubner, 99 Md. 529, 58 A. 362.

56. Evidence held to show that value of property attained after sale was an inherent value known to the purchaser, and not an accidental appreciation, and hence a refusal to ratify the sale was proper. Callaway v. Hubner, 99 Md. 529, 58 A. 362.

57. So held where sale was made at a disadvantageous time. Dingman v. Beal, 213 Ill. 238, 72 N. E. 729.

58. McKenna v. Brooklyn Union El. R. Co., 95 App. Div. 226, 88 N. Y. S. 762. Where purchaser bought with notice of the trust, evidence of value held admissible. Id.

59. Callaway v. Hubner, 99 Md. 529, 58 A. 362.

60. 61. Ludington v. Mercantile Nat. Bank, 92 N. Y. S. 454.

62. Illinois: Hurd's Rev. St. 1903, c. 3, has no application to trustees. Dingman v. Beal, 213 Ill. 238, 72 N. E. 729.

Maryland: Under Code Pub. Gen. Laws, art. 16, § 205a, providing that where a trust is created as security for a debt a bond must be given before sale, a valid sale of real estate cannot be made under a mortgage deed of trust until the trustee has filed a bond, and a filing at any time before ratification is not sufficient. Union Trust Co. v. Ward [Md.] 59 A. 192.

63. Dingman v. Beall, 213 Ill. 238, 72 N. E. 729.

64. Where a sale of an infant's contingent interest in real property is made under Civ. Code Proc. § 401, and no bond was given by the testamentary trustee, the purchase-money bonds should be made payable to the court commissioner. Crutcher v. Rodman, 26 Ky. L. R. 294, 81 S. W. 252.

65. See 2 Curr. L. 1947.

66. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931; Campbell v. Virginia-Carolina Chemical Co., 68 S. C. 440, 47 S. E. 716.

Kentucky: Ky. St. 1903, § 4846, providing that where a trustee has the power to sell

(§ 8) *F. Payments or surrender to beneficiary.*[68]—It is desirable that the trustee within a reasonable time[69] apportion the estate, allotting to each beneficiary the income of his certain part;[70] but until such apportionment, the beneficiary's income is to be computed on the amount designated, at the average rate realized on the whole trust.[71] If a trustee abuses a discretionary power of payment, the wrong may be corrected by a court of equity;[72] but the payment being made, the trustee is not charged with the duty of supervising its expenditure.[73] Excessive payments voluntarily paid the beneficiary cannot be recovered,[74] though, as against the beneficiary and all claiming under him, the trustee is entitled to a credit for the sum so paid.[75]

It is the duty of a trustee to notify his successor of all assignments by beneficiaries of which he has notice.[76]

Encroachments on principal.[77]

§ 9. *Liability of trustee to estate and third persons.*[78]—The trustee[79] and all those assisting and aiding him[80] are personally liable for all fraudulent,[81] negligent,[82] and otherwise improper conduct[83] of the former, and the remedy of the beneficiary is not to undo what, as to third persons, has lawfully been done, but to

and reinvest, the purchaser need not look to the application of the purchase money unless expressly required by the deed or devise in trust, applies where land is deeded to persons for the benefit of themselves and children. Louisville & A. R. Co. v. Horn, 26 Ky. L. R. 829, 82 S. W. 567.

67. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058.

68. See 2 Curr. L. 1942. See, also, ante, § 8C.

69. It is inadvisable to wait eleven years and a half. Fanning v. Main [Conn.] 58 A. 472.

70. Trustees appointed to preserve fund for remaindermen and pay income to life tenants should apportion the investments into as many parts as there are life estates. Graham v. Whitridge, 99 Md. 248, 58 A. 36. Will giving beneficiary income of certain amount and directing residue to be invested and distributed at a certain time, held proper to set out separate fund for beneficiary and make a separate investment of it. Fanning v. Main [Conn.] 58 A. 472.

71. Fanning v. Main [Conn.] 58 A. 472; Webb v. Lines [Conn.] 58 A. 227; In re Hoyt's Estate, 44 Misc. 76, 89 N. Y. S. 744.

72. Barbour v. Cummings [R. I.] 58 A. 660.

73. Where payment of principal to beneficiary of income was a matter of discretion. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

74. Fanning v. Main [Conn.] 58 A. 472.

75. Where payments were made without order of court. Bronson v. Thompson [Conn.] 58 A. 692.

76. Seger v. Farmers' Loan & Trust Co., 92 N. Y. S. 629. Oral notice to successor held sufficient. Id.

77. See 2 Curr. L. 1942.

78. See 2 Curr. L. 1942, 1950.

79, 80. Holderman v. Hood [Kan.] 78 P. 838.

81. Where trustee knowingly paid more for corporate stock than it was worth, held fraud entitling the beneficiary to recover the fund. Cropsey v. Johnston [Mich.] 100 N. W. 182. Trustee investing so as to personally profit thereby is personally liable for any loss resulting therefrom. Carr's Estate, 24 Pa. Super. Ct. 369.

82. Where a trustee unnecessarily **surrenders the joint custody of funds to the sole custody of co-trustees,** he becomes liable for the application of the funds by his co-trustees. In re Halstead, 44 Misc. 176, 89 N. Y. S. 806. Turning over bonds to be placed in safety deposit vault, being in the ordinary course of business, comes within the definition of the word "necessary." Id. Where there was no negligence on the part of one trustee in permitting a co-trustee to take possession of bonds, held there was no negligence on his part in **permitting the securities to remain negotiable** as at the death of the testator, or in purchasing others without requiring them to be registered in the names of the trustees jointly. Id. There being no suspicion of wrongful acts being done, failure by one co-trustee to examine safety deposit vault for five years held not negligence, there having been an agreement for the settlement of accounts every five years. Id. Trustee permitting **note** of his attorney **to remain uncollected** for ten years is chargeable therewith. Carr's Estate, 24 Pa. Super. Ct. 369.

83. A trustee, after knowledge that a **co-trustee is a defaulter,** let him have the active management of the estate, is guilty of "willful default" within the meaning of such term, as used in a will exempting the trustee from liability for all except such acts. In re Mallon's Estate, 43 Misc. 569, 89 N. Y. S. 554. Where trustee **repudiated the trust** and ousted the beneficiary from possession, held liable for the rental value of the premises. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335. Trustee **wrongfully paying money** to beneficiary's guardian who appropriated the same to his own use, held liable therefor. Darlington v. Turner, 24 App. D. C. 573. See, also, Oneida Indians' Case, 39 Ct. Cl. 116, where it is held that if the United States should pay away a fund held for the benefit of Indians, they might be liable therefor.

proceed against the trustee.[84] The trustee, and consequently his estate,[85] must account to the beneficiary for the proceeds of a sale of trust property,[86] and the value of its use during the time he actually used it or was obliged to use it;[87] and this liability is that of debtor and creditor.[88] He is also liable for any loss occasioned by his failure to turn over the property on the termination of the trust,[89] but not for rents or profits accruing during the time the property is in the hands of a receiver.[90] A trustee cannot end his relations to the cestui que trust by destroying the identity of the trust property,[91] and he is liable for any loss resulting from such act.[92] A trustee is not liable for an incumbrance assumed by the beneficial owner at the time of acquiring his interest.[93] Substituted trustees are chargeable with uncollected amounts due from their predecessor.[94] In Arkansas the homestead exemption does not extend to trustees of an express trust for moneys due from them in their fiduciary capacity.[95] A trustee is only liable for actual loss,[96] and the evidence of the damages must be clear and explicit and must show with reasonable certainty that injury has been sustained by reason of the acts complained of.[97]

While unauthorized acts of the trustee cannot be enforced against the estate,[98] the trustee is personally liable thereon,[99] unless expressly exempted from liability.[1] A trustee continuing a business is personally liable to third person,[2] and he can only look for indemnity to the property or fund employed in the business prior to the testator's death.[3] Equity will enforce a trustee's contract, though to do so will render the trustee liable to the estate for mismanagement.[4]

§ 10. *Liability on trustee's bond.*[5]—A trustee's estate is liable on his bond solely as a personal obligation, unless the trust funds become a part of his estate,[6] hence its liability is barred like a mere debt, not like a trust.[7] In an action on the

84. Miller v. Butler, 121 Ga. 758, 49 S. E. 754.

85. Williams v. Williams' Ex'r, 25 Ky. L. R. 836, 76 S. W. 413.

86, 87. Berry v. Evendon [N. D.] 103 N. W. 748.

88. Cunningham v. Cunningham [Iowa] 101 N. W. 470.

89. An injunction being secured against him, he is liable for any decline in value during the injunctive period. Ingersoll v. Weld, 93 N. Y. S. 291.

90. Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639.

91. This doctrine is not affected by the fact that trust property so changed and lost cannot be recovered in specie. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

92. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

93. Deaver v. Deaver [N. C.] 49 S. E. 113.

94. Deficit caused by ill advised investment. Bennett v. Pierce [Mass.] 74 N. E. 360.

95. Const. 1874, art. 9, § 3. Where money is left with one in trust for another, the beneficiary may enforce a judgment for such amount against the trustee's homestead. Godfrey v. Herring [Ark.] 85 S. W. 232.

96. Taft v. Smith [Mass.] 70 N. E. 1031. Trustee with power to invest exercising the power in good faith held not personally liable, the property not having passed beyond the reach of the cestui que trust. James v. Aller [N. J. Eq.] 57 A. 1091.

97. Statement of witness that the beneficiary had been obliged to expend a certain sum by reason of the trustee's fraudulent acts held insufficient to justify a recovery therefor. San Fernando Copper Min. & Reduction Co. v. Humphrey [C. C. A.] 130 F. 298.

98. Tuttle v. First Nat. Bank [Mass.] 73 N. E. 560. In an action for breach of the trust, expenses incurred in obtaining an abstract of title and legal advice thereon cannot be credited to trustee, they not being shown to have been assumed by the beneficiary. Lucia v. Adams [Tex. Civ. App.] 82 S. W. 335.

99. Execution of note for the benefit of the estate. Tuttle v. First Nat. Bank [Mass.] 73 N. E. 560. Unauthorized investment. Furniss v. Leupp [N. J. Eq.] 58 A. 374.

1. Where trustees are empowered to deal with the trust property as if they were the absolute owners thereof and are expressly exempted from a master's liability, the estate is liable for the negligent acts of employes. Prinz v. Lucas [Pa.] 60 A. 309.

2, 3. Roberts v. Hale, 124 Iowa, 296, 99 N. W. 1075.

4. That rental obtained from a lease of trust property was less than fair rental value, held not a matter of objection to a suit for specific performance by the lessee on the ground that equity will not compel a trustee to commit waste. Weir v. Barker, 93 N. Y. S. 732.

5. See 2 Curr. L. 1940.

6. Herbert v. Squire [Mass.] 71 N. E. 534.

7. The two-year statute of limitations does not begin to run against an action on

trustee's bond for failure to account, the good faith of the trustee is not in issue,[8] and it is not necessary for plaintiff to prove that title had been transferred with all legal formality.[9] A surety upon a bond conditioned upon the faithful discharge by the trustee of the duties of his appointment is liable for a misappropriation by the trustee.[10]

§ 11. *Personal dealings with estates.*[11]—A court of equity scrutinizes closely all dealings between trustees and beneficiaries, and it will presume that the trustee has dealt unfairly,[12] though this presumption may be rebutted, the burden of proof being upon the trustee,[13] and the fact that the plaintiff acted under independent advice goes a great distance in overcoming this presumption.[14] As a general rule, it is held that a purchase of trust property by the trustee is merely voidable at the election of the beneficiary,[15] and this right of the beneficiary is personal,[16] and must be exercised with reasonable diligence,[17] and the same rule extends to a sale to the trustee's wife,[18] or his attorney.[19] Such sale is, however, void if the trustee has a duty to perform inconsistent with his character as purchaser.[20] In some states a purchase by the trustee is valid if it be fair, free from fraud and for full value.[21] In South Dakota a trustee cannot enforce any claim against the trust property which he may acquire after his appointment as trustee.[22] A trustee mixing trust funds with his own money is liable therefor, though the property into which it is converted depreciates without fault on the part of the trustee.[23]

§ 12. *Actions and controversies by and against trustees.*[24]—In all but a few states[25] actions by or against a trustee must be in his representative capacity.[26]

a trustee's bond, conditioned to pay fund to successor until demand. Herbert v. Squire [Mass.] 71 N. E. 534. Where action was brought within 20 years after execution of bond, it is not barred by the general statute of limitations. Id.

8. State v. Thresher [Conn.] 58 A. 460.

9. So as to negative the possibility of the trustee still having title. State v. Thresher [Conn.] 58 A. 460.

10. State v. Thresher [Conn.] 58 A. 460.

11. See 2 Curr. L. 1943.

12. Brown v. Hafer, 2 Ohio N. P. (N. S.) 341.

13. Brown v. Hafer, 2 Ohio N. P. (N. S.) 341. Rule applied to a purchase of stock by the managing officer of a corporation. Stewart v. Harris, 69 Kan. 498, 77 P. 277.

14. Brown v. Hafer, 2 Ohio N. P. (N. S.) 341.

15. Bronson v. Thompson [Conn.] 58 A. 692. Trustee investing in mortgage, taking the same in his own name and on foreclosure buying the property, the beneficiary may either take the property or the amount invested with interest. Carr's Estate, 24 Pa. Super. Ct. 369. A bidding in by trustees at their own sale is not necessarily invalid. The trust deed authorizing it and an enhanced price being secured. Etna Coal & Iron Co. v. Marting Iron & Steel Co. [C. C. A.] 127 F. 32.

16. Bronson v. Thompson [Conn.] 58 A. 692. Where trustee purchased in good faith and for an adequate price, held creditors of beneficiary could not impeach his title. Id.

17. Where, in such case, the cestui que trust or the court for him surrenders the property to the wrongful holder, he cannot recover more than the damages sustained. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Where creditors surrendered property wrongfully disposed of by the trustee of the fund, their rights therein were regarded as foreclosed, where to enforce them would entail much expense, an erroneous judgment in regard thereto having been rendered, changes having occurred, and there being no real benefits recoverable. Id.

18. Scottish-American Mortg. Co. v. Clowney [S. C.] 49 S. E. 569.

19. In re Robbins' Estate [Minn.] 103 N. W. 217.

20. Woolf v. Barnes, 93 N. Y. S. 219. A trustee cannot directly or indirectly purchase at a tax sale caused by his own default (Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639), and this is true though he purchase after the expiration of the redemption period (Id.). If he does so purchase, the reconveyance will be treated, in equity, as a correction of the wrong, leaving the property impressed with the original trust. (Id.)

21. Lake v. Owens [Cal.] 79 P. 589.

22. Civ. Code, § 1641. Fowler v. Iowa Land Co. [S. D.] 99 N. W. 1095.

23. Where property was converted into Confederate money during the Civil War. Dunn v. Dunn [N. C.] 50 S. E. 212.

24. See 2 Curr. L. 1947. See, also, post, § 14. Accounting.

25. **Colorado:** Trustee of an express trust may, at his option, sue in his own name or may join the beneficiary. Mills' Ann. Code, § 5 is permissive. Hecker v. Cook [Colo. App.] 78 P. 311. Held that part of title of complaint following names of trustees might be treated as descriptio personae. Id. In an action on official bond given to trustees of an unincorporated association, so much of the complaint as sets forth that the association is unincorporated is surplusage. Id.

Texas: Trustee may maintain an action of trespass to try title in his own name.

The right to sue to recover and preserve the trust property[27] and to recover damages, to the use of the beneficiary's property, health, and comfort, arising from a nuisance,[28] rests in the trustee, and such actions may be instituted and defended without joining the beneficiaries as parties,[29] and, in the absence of fraud, the latter are bound by the judgment therein.[30] The survivor of trustees must sue on a cause of action accruing to them as trustees, in exclusion of the personal representatives of the deceased trustee.[31]

The general rule that no action at law can be brought until the trustee's accounts are fully settled does not generally apply to an action on a special bond.[32] Death of a passive trustee does not abate the action.[33]

The beneficiary alleging misconduct by the trustee must allege facts constituting such misconduct.[34] In a suit to compel the restoration of trust funds, the defendant, on alleging that he has become the sole beneficiary, may file a cross-bill to enable him to present the question of his right to control the trustees.[35]

Equity will grant appropriate relief, though there is a variance.[36] In a suit to set aside a trust deed, one cannot recover both the property and a personal judgment for its value.[37] The right of appeal is discussed elsewhere.[38]

§ 13. *Compensation and expenses.*[39]—Unless he agrees to serve without compensation,[40] or waives his right thereto, a trustee is entitled to commissions on yearly income, etc.,[41] as compensation,[42] and if he accounts for and pays over income annually, he is entitled to retain full commissions upon such payments computed annually.[43] This compensation must be sought exclusively in equity,[44] and cannot be collected from the executor of the beneficiary.[45] A trustee is not en-

Lewis v. Brown [Tex. Civ. App.] 87 S. W. 704.

26. McNamara v. Vanderpoel, 88 N. Y. S. 145.

27. Neither beneficiaries nor their guardians can so sue. Morrow v. Morrow [Mo. App.] 87 S. W. 590.

28. Railroad terminals. Louisville & N. Terminal Co. v. Lellyett [Tenn.] 85 S. W. 881.

29. Miller v. Butler, 121 Ga. 758, 49 S. E. 754. In a suit to recover moneys for the trust estate, the cestuis que trust are neither necessary nor proper parties. In re Kenney Co., 136 F. 451.

30. Miller v. Butler, 121 Ga. 758, 49 S. E. 754.

31. Maffet v. Oregon & C. R. Co. [Or.] 80 P. 489.

32. Held not to apply where the bond was given in consideration of permission to do an act for which he otherwise would have been answerable for as for a breach of trust. Herbert v. Squire [Mass.] 71 N. E. 534.

33. Action against beneficiary and trustee for taxes. City of Louisville v. Anderson [Ky.] 84 S. W. 573.

34. Must allege facts inconsistent with or constituting a denial of the trust. Petty v. Emery, 96 App. Div. 35, 88 N. Y. S. 823. Allegations that defendant has arbitrarily and wrongfully manipulated affairs and disputed plaintiff's right to certain property are mere conclusions of law. Id. Where trustee was required to sell property when advisable or when required by the interested parties, a complaint alleging a violation of this duty but failing to allege that there was a market for the stock and that the parties interested wanted the sale, held demurrable. Woolf v. Barnes, 93 N. Y. S. 219.

35. Riley v. Fithian [N. J. Eq.] 59 A. 302.

36. Where a person is prosecuted for an accounting in regard to trust property, being charged with having obtained possession thereof by fraud, and the charge of fraud fails but the fact of wrongful possession is established, the proper judgment for restoration of the trust property may be rendered. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

37. Ingersoll v. Weld, 93 N. Y. S. 291.

38. See Appeal and Review, 3 Curr. L. 167.

39. See 2 Curr. L. 1948.

40. Offer of certain creditors of an absconded debtor to act as a committee in the collection of claims held not to import that they would so act without compensation. Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347. Statement in agreement that all the creditors would share the expenses held not to import that the committee was not to be compensated for its services in case it succeeded in collecting part of the claims. Id.

41. The compensation is not to be determined by a quantum merult. Hazard v. Coyle [R. I.] 58 A. 987.

42. The trustee's share of the commissions is compensation for services, not a benefit granted by the deed. Carroll v. Smith, 99 Md. 653, 59 A. 131.

43. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

44. Hazard v. Coyle [R. I.] 58 A. 987. Assumpsit will not lie. Id.

45. Hazard v. Coyle [R. I.] 58 A. 987.

titled to commissions on money paid out for the improvement of real property,[46] and, prior to separate investment, is not entitled to extra compensation for managing the fund so invested;[47] he is, however, entitled to commissions on the gross amounts paid by tenants, though the latter pay the taxes.[48] If a trustee dies, he is entitled to one-half commissions for receiving and nothing for paying over.[49] The trustee forfeits his right to compensation by fraudulent misconduct,[50] and by failing to collect his commissions at the proper time, he is deemed to have waived his right thereto,[51] except where it appears that there was sufficient accrued income in his hands at the time of his death to pay such commissions.[52]

The trustee is entitled to look to the trust property,[53] but not to the beneficiaries individually[54] for reimbursement for expenses incurred in protecting and preserving the estate, and if he cannot advance or borrow funds, he should apply to the chancellor for an order to sell or mortgage, so as to save at least a part of the corpus for the beneficiaries.[55] By the personal collection of a few rents, the trustee is not barred from claiming commissions paid a real estate agent.[56]

Attorney's fees and expenses.[57]—Where the trustee's attorney has no adequate remedy at law, he may maintain an action directly against the beneficiaries to charge the value of his services on the income.[58] Attorneys employed by a beneficiary to protect his interest in an action begun by the trustee are not entitled to a first lien on the fund recovered.[59]

§ 14. *Accounting and discharge.*[60]—The adjustment of accounts involves the rectitude or propriety of all the acts of execution or management of the trust.[61] A beneficiary[62] is entitled to sue for an accounting,[63] though the payment of income to him rests in the discretion of the trustee,[64] and this right is not lost by retaining, without indorsing or cashing, a check for the last dividend paid.[65] The action does not sound in tort,[66] and the remedy survives against the trustee's personal representatives.[67]

46. Conger v. Conger, 90 N. Y. S. 1062 [Advance sheets only].

47. Fanning v. Main [Conn.] 58 A. 472.

48. In re McCallum's Estate [Pa.] 60 A. 903.

49. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

50. Holderman v. Hood [Kan.] 78 P. 838. Rule held not to apply where trustees refused to account and spent money without authority, there being no claim of dishonesty. Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347.

51. Failed to deduct annual commissions. Conger v. Conger, 90 N. Y. S. 1062 [Advance sheets only]. Is not entitled to collect full commissions upon a final accounting where he failed to collect them when money was paid out. Id.

52. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

53. Coffman v. Gates [Mo. App.] 85 S. W. 657. Where one held interest in lands in fee and the remainder in trust for others, held, he had a right to look to the trust property for proportionate reimbursement. Id.; Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639.

54. Coffman v. Gates [Mo. App.] 85 S. W. 657.

55. Bourquin v. Bourquin, 120 Ga. 115, 47 S. E. 639.

56. Casely's Estate, 23 Pa. Super. Ct. 646.

57. See 2 Curr. L. 1949.

58. So held where the trustees were the sole beneficiaries and the attorney was employed to protect the rights of one as trustee as against the others. Campbell v. Barber, 93 N. Y. S. 182.

59. Sloan v. Smith [Conn.] 58 A. 712.

60. See 2 Curr. L. 1949.

61. As to them, see ante, §§ 8-13.

62. An unsecured creditor of a decedent, who has a mere legal demand not reduced to judgment, is not a beneficiary of a trust so as to be entitled, in the absence of fraud, gross wrong, or unreasonable delay, to maintain a bill for an accounting against the executor. Thiel Detective Service Co. v. McClure, 130 F. 55.

63. Morris v. Hughes, 45 Misc. 278, 92 N. Y. S. 288; Woolf v. Barnes, 93 N. Y. S. 219. The trustee is bound to give full information to the beneficiary as to the condition of the trust. Id.

64. Barbour v. Cummings [R. I.] 58 A. 660.

65. Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347.

66. Though the facts may be such that an action for damages for the wrong might lie. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

67. Action for an accounting as to personalty in trustee's possession. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

Interest[68] may be allowed where the trustee refuses to account[69] or wrongfully pays money to a third person.[70]

Credits and charges.[71]—The trustee must account for the trust property received by him and is liable for all losses due to mismanagement;[72] but, in the absence of evidence, there is no presumption that the entire trust fund came into the hands of a deceased trustee.[73] The trustee is entitled to credit for all lawful payments.[74] In some cases charges have been set off against credits due the trustee in another capacity.[75] Trust funds cannot be applied to pay the trustee's individual debts.[76]

Procedure on accounting.[77]—The rights of infant beneficiaries will be protected, though their special guardian makes no formal objection to the items.[78]

Costs and appellate expenses.—Plaintiff can only recover taxable statutory costs.[79] The trustee being guilty of misconduct, he must bear the expense of auditing his account.[80] Where no costs are allowed accounting parties, the charge of printing papers on appeal cannot be allowed against the trust fund.[81]

Opening account.[82]—The allowance of an account does not conclude the rights of beneficiaries not notified as required by statute;[83] but a disputed matter having been heard and settled, it cannot, in most states, be opened by any party to the dispute, except by leave of court.[84] After approval, the burden is on the one questioning the correctness of the account to show error.[85] Where only a part of the beneficiaries dispute the account, they are only entitled to their pro rata share of the benefits derived from a correction.[86]

Appellate review.—After confirmation, a bill of review can be had as a matter

68. See 2 Curr. L. 1949.

69. Where trustees refused to account, interest held properly allowable on sum found due and last dividend, which complainant had not cashed, from the time of filing the bill. Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347.

70. In such case interest runs from the date of wrongful payment. Darlington v. Turner, 24 App. D. C. 573.

71. See 2 Curr. L. 1950.

72. See ante, § 8, subd. C. Management of estate and investments, and § 9. Liability of trustee to estate and third persons.

73. Executor of trustee having no means of ascertaining the amount that came into testator's hands, held not liable for whole amount of fund. Farmers' Loan & Trust Co. v. Pendleton, 179 N. Y. 486, 72 N. E. 508.

74. Trustee's estate held entitled to credit for payments made beneficiary's father, though beneficiary claimed payment was in settlement of a debt due the father by the trustee personally, where it appeared that the father had no money of his own at the time. Darlington v. Turner, 24 App. D. C. 573.

75. Trustees held not chargeable with a small amount inadvertently omitted when such sum is less than an amount still due them for services rendered as executors. Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151.

76. Hoyt v. Hoyt [Vt.] 59 A. 845. Executor cannot agree with trustee that what is due trustee as such shall be applied to what he owes as individual. Marshall v. Hall, 51 W. Va. 569, 42 S. E. 641.

77. See 2 Curr. L. 1951.

78. In re Parr, 45 Misc. 564, 92 N. Y. S. 990.

79. Cannot recover attorney fees. Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347.

80. So held where a trustee invested trust funds in his own name and delayed collecting a debt, due the trust estate, for many years and until the debtor becomes insolvent. Carr's Estate, 24 Pa. Super. Ct. 369.

81. Jewett v. Schmidt, 45 Misc. 471, 92 N. Y. S. 737.

82. See 2 Curr. L. 1952.

83. Gen. St. §§ 383, 384, considered. State v. Thresher [Conn.] 58 A. 460. Allegations that the accounts were allowed on "due hearing" and that the trustee acted under the advice and orders of the court is insufficient to constitute allegations of the notice required by Gen. St. § 483. Id. Pub. St. 1882, c. 144, § 9, providing for the opening of accounts by one having no notice of the former proceedings, "notice" means actual notice. Parker v. Boston Safe Deposit & Trust Co. [Mass.] 71 N. E. 806. Same statute, § 14, providing that decree of court having jurisdiction shall be final except in cases of fraud, etc., relates only to final accounts. Id.

84. Rev. Laws, c. 150, § 17. A judicial decree requiring a trustee to make good an impairment of the trust estate notwithstanding the assent of a beneficiary, is not an adjustment of a dispute between the trustee and beneficiary within the meaning of such act. Bennett v. Pierce [Mass.] 74 N. E.] 360.

85. In re Bailey's Estate, 208 Pa. 594, 57 A. 1095.

86. Rowland v. Maddock, 183 Mass. 360, 67 N. E. 347.

of right only for new matter that has arisen since the confirmation, or for errors of law appearing on the face of the record.[87] The findings of the lower court will not be disturbed unless manifestly incorrect.[88]

§ 15. *Establishment and enforcement of trust and remedies of beneficiary. A. Express trusts. Jurisdiction.*[89]—In the absence of statutory regulations, the enforcement and administration of trusts is within the exclusive jurisdiction of equity.[90] Jurisdiction over legacies is inadequate to include the enforcement of trust duties.[91] The validity of a trust should not be decided upon a motion to appoint an agent of the court to execute the trust, the original trustee being dead and there being no authority for appointing a substituted trustee.[92] Though the beneficiary cannot institute a proceeding to obtain the trust funds until an award has been made, he may maintain an action to enforce the trust so that an order of distribution may be made.[93]

Laches, limitations[94] *and estoppel.*[95]—While laches will run against an express trust, though there has been no repudiation of the same,[96] a repudiation, if known to the beneficiary, opens the door to its use as a defense;[97] but the right being clear and there being no countervailing circumstances, mere lapse of time short of the period of limitations will not bar the right.[98] Limitations do not run against the beneficiary of an express trust until repudiation.[99] Acquisition of title by the trustee may amount to a repudiation.[1] A trustee may by his pleadings become estopped to deny the trust.[2]

Who may sue.[3]—The grantor in a deed of trust cannot maintain a bill to determine whether the deed prevents a testamentary disposition of the property by the grantor.[4]

Remedies.—Where land is conveyed to a trustee on condition that he support

87. In re Bailey's Estate, 208 Pa. 594, 57 A. 1095.

88. Finding of auditing judge confirmed by court in banc. Casely's Estate, 23 Pa. Super. Ct. 646.

89. See 2 Curr. L. 1952.

90. Dingman v. Beall, 213 Ill. 238, 72 N. E. 729. County or probate courts have no jurisdiction over either. Id. Flynn v. Foley, 91 Minn. 444, 98 N. W. 332. See, also, Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909. Also Equity, 3 Curr. L. 1210.

91. Section 3 of the Orphans' Court Act of June 14, 1898 (P. L. p. 716), construed. In re Lippincott's Estate [N. J. Eq.] 59 A. 884.

92. In re Guental, 97 App. Div. 530, 90 N. Y. S. 138; In re Mayne, 90 N. Y. S. 1050.

93. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909.

94. See 2 Curr. L. 1952. For general rules and distinctions between two, see Equity, 3 Curr. L. 1210.

95. See Estoppel, 3 Curr. L. 1327.

96. Sawyer v. Cook [Mass.] 74 N. E. 356. 29 years delay held to bar right where beneficiary ceased to take any interest in enterprise. Id. Where the beneficiary of a trust for his support leased land from trustee and voluntarily supported himself, held could not enforce the trust. Hoyt v. Hoyt [Vt.] 59 A. 845. Evidence reviewed and held there was no laches. Darlington v. Turner, 24 App. D. C. 573.

97. Patterson v. Hewitt, 25 S. Ct. 35.

98. Cantwell v. Crawley [Mo.] 86 S. W. 251. So held where recorded contract recited the trust. Id.

99. Thorne v. Foley [Mich.] 100 N. W. 905; Hitchcock v. Cosper [Ind.] 73 N. E. 264; Felkner v. Dooly [Utah] 78 P. 365. Under Rev. St. 1898, §§ 2855, 2883, four years bars action to recover interest of beneficiary in the proceeds of a sale by the trustee. Id. Potter v. Kimball [Mass.] 71 N. E. 308. Where a locative interest in land was held in trust and possession taken under such title. Logan v. Robertson [Tex. Civ. App.] 83 S. W. 395. Where trustee repudiated trust and claimed to be the owner of the property, 45 years delay held to bar the suit. Thorne v. Foley [Mich.] 100 N. W. 905. Under Comp. St. § 41, as amended by Sess. Laws 1889, p. 172, an action to enforce a declaration of trust may be commenced at any time within eight years. Goodell v. Sanford [Mont.] 77 P. 522.

1. Where a will gave land to son for life and if he should die without issue to the state in trust, and the testatrix died without acquiring the legal title, which title was subsequently acquired by the son, held, the recordation of the latter deed was constructive notice to the state of the son's renunciation of the trust. Commonwealth v. Clark, 26 Ky. L. R. 993, 83 S. W. 100.

2. Answer of alleged trustee in a suit by the public administrator that he was disposing of property as requested by decedent does not estop him in a subsequent suit by the distributees of decedent's estate from relying upon an absolute ownership by virtue of an assignment. Mussman v. Zeller [Mo. App.] 83 S. W. 1021.

3. See 2 Curr. L. 1952.

4. Carroll v. Smith, 99 Md. 653, 59 A. 131.

the grantors, the latters' remedy for breach of trust is by a bill to foreclose the trustee's interest.[5]

Pleadings.[6]—The complaint need not allege that the contract was in writing.[7] Under a general denial, the alleged trustee can avail himself of an absolute assignment of the property to him.[8] The general rules as to what constitute a variance apply.[9]

Evidence.[10]—The one claiming the trust must establish the same by the preponderance of evidence,[11] and both parties are entitled to the benefit of all presumptions arising in their favor.[12] Cases considering the sufficiency of the evidence are collected in the notes.[13]

(§ 15) *B. Implied trusts.—Limitations* run against actions to enforce an implied trust to pay money on demand.[14]

(§ 15) *C. Constructive trusts.*[15] *Jurisdiction.*—In the absence of statutory regulations, equity has exclusive jurisdiction as in case of express trusts.[16]

Laches and limitations.[17]—Unreasonable delay amounting to laches will bar the right to enforce the trust.[18] Limitation runs during the existence of a constructive trust.[19] One may by his acts become estopped to enforce the trust.[20]

Parties.—All parties interested in the subject-matter are proper parties.[21]

Pleading.[22]—The facts disclosing how the relation of trustee and cestui que trust arose in the particular case must be stated.[23] A mere denial of the trust on

5. Hoyt v. Hoyt [Vt.] 59 A. 845.

6. See 2 Curr. L. 1953.

7. Is not demurrable. Wilhite v. Skelton [Ind. T.] 82 S. W. 932; Eaton v. Barnes, 121 Ga. 548, 49 S. E. 593; Phillips v. Hardenburg, 181 Mo. 463, 80 S. W. 891.

8. Mussman v. Zeller [Mo. App.] 83 S. W. 1021.

9. Proof of a passive trust does not constitute a variance amounting to a failure of proof, it being alleged that defendant holds the property as security for a debt. Halloran v. Holmes [N. D.] 101 N. W. 310. Proof that trustee wrongfully paid over a part of the fund to a third person held not to constitute a fatal variance. Darlington v. Turner, 24 App. D. C. 573.

10. See 2 Curr. L. 1953.

11. Lide v. American Guild [S. C.] 48 S. E. 222.

12. In an action by the original beneficiary in a life insurance policy to establish a trust in her favor as against the substituted beneficiary, the latter was entitled to the benefit of the presumption arising from the fact that she appeared as beneficiary in the certificate. Lide v. American Guild [S. C.] 48 S. E. 222.

13. Where there was a change of beneficiaries in an insurance policy, evidence held insufficient to show that the substitute beneficiary was a trustee for the former one. Lide v. American Guild [S. C.] 48 S. E. 222. Evidence held sufficient to show that land belonged to the estate of plaintiff's deceased husband. Devine v. Billingsley [Or.] 77 P. 958.

14. Dunn v. Dunn [N. C.] 50 S. E. 212. If demand is made, expiration of 3 years therefrom bars action; otherwise ten years. Code, § 158. Id.

15. See 2 Curr. L. 1954.

16. Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; Kroll v. Coach [Or.] 78 P. 397. See, also, Equity, 3 Curr. L. 1210.

17. See 2 Curr. L. 1954.

18. Forty-two years delay by assignee of certificate of purchase held to bar right to claim that holder of legal title, under patent issued plaintiff's assignor, was a trustee. Bland v. Windsor & Cathcart [Mo.] 86 S. W. 162. Delay of several years by co-tenant in asserting his rights as beneficiary of a constructive trust against the other co-tenant held to bar action against remote grantee of the latter who had paid a fair price. Ryason v. Dunten [Ind.] 73 N. E. 74. Where attorney acquired property adversely to his client's interests, held, six years delay, complainant residing at a distance and having no knowledge of the transaction, did not constitute laches. Stanwood v. Wishard, 134 F. 959. Delay unaccompanied by any change for the worse in the situation of the parties, and acquiesced in by those interested, held not to constitute laches. Potter v. Kimball [Mass.] 71 N. E. 308. See Equity, 3 Curr. L. 1210.

19. Commonwealth v. Clark, 26 Ky. L. R. 993, 83 S. W. 100. Right to enforce a constructive trust is barred in 10 years. Code 1892, §§ 2763. Patton v. Pinkston [Miss.] 38 So. 500. See Limitation of Actions, 4 Curr. L. 445.

20. Repaying money paid by mistake after knowledge of fraud rendering the payee a trustee ex malificio held not to estop the enforcement of such trust. Kroll v. Coach [Or.] 78 P. 397. See Estoppel, 3 Curr. L. 1327.

21. In a suit by mortgagor's vendee to enforce a trust against mortgagee, held, mortgagor's widow was a proper party. Phillips v. Hardenburg, 181 Mo. 463, 80 S. W. 891.

22. See 2 Curr. L. 1955.

23. Hitchcock v. Cosper [Ind.] 73 N. E. 264. Facts constituting the fraud must be pleaded. Hoon v. Hoon [Iowa] 102 N. W. 105.

information and belief is insufficient.[24] The general rules as to multifariousness apply.[25]

Evidence.—Corroborative evidence is admissible.[26] It is for the jury where there is a jury trial to say whether the evidence is of the necessary convincing character.[27]

Relief granted.[28]—When necessary for the protection of the beneficiary, the constructive trustee may be required to convey the property to him;[29] but the conveyance need not contain covenants of general warranty.[30] A constructive trustee obtaining title by fraud and refusing to reconvey, equity may set aside the conveyance and restore the grantor to his rights;[31] but the decree should not be limited to the cancellation of the conveyance, but the trust should be ascertained and enforced.[32]

(§ 15) *D. Resulting trusts. Jurisdiction.*[33]—A state court has jurisdiction to declare a resulting trust in national bank stock.[34]

Laches, limitations,[35] *and estoppel.*[36]—Delay amounting to laches will bar suit.[37] Disavowal of the trust is a question of fact.[38] A beneficiary of national bank stock by allowing trustee to become a director in the bank is not estopped to deny the trust.[39]

Parties.[40]—A resulting trust may be enforced by the beneficiaries' legal representatives.[41]

Pleading.[42]—The bill must contain a prayer for appropriate relief,[43] and must set out in substance powers of attorney involved in the trust.[44]

Evidence.[45]—The person seeking to establish the trust must do so by clear and satisfactory evidence.[46] Though a consideration is recited in a conveyance,

24. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

25. Bill by vendee of mortgaged premises and widow of mortgagor to enforce a trust and to assert the latter's claim to dower is not multifarious. Phillips v. Hardenburg, 181 Mo. 463, 80 S. W. 891. A bill by a defrauded vendee is not multifarious, though containing a prayer that the complainant be invested with the title, or that an intermediary be held to account to him for the purchase money received by her, or that the defendants be held to account to him for the amount of which he was defrauded. Johnston v. Little [Ala.] 37 So. 592. See Equity, 3 Curr. L. 1210.

26. In a suit to attach a parol trust to an absolute deed, evidence that defendant stated that he could not sell at the agreed price held corroborative of an admission of the agreement as a fact dehors the record. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

27. Under Code, § 413, forbidding judges to give an opinion whether a fact is sufficiently proved. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

28. See 2 Curr. L. 1954.

29. Avery v. Stewart, 136 N. C. 426, 48 S. E. 775.

30. When trustee purchased land in his own name at judicial sale. Hatfield v. Allison [W. Va.] 50 S. E. 729.

31. Koefoed v. Thompson [Neb.] 102 N. W. 268.

32. Pollard v. McKenney [Neb.] 101 N. W. 9.

33. See 2 Curr. L. 1954.

34. In re Fisher's Estate [Iowa] 102 N. W. 797.

35. See 2 Curr. L. 1954. See, also, Equity, 3 Curr. L. 1210; Limitations of Actions, 4 Curr. L. 445.

36. See Estoppel, 3 Curr. L. 1327.

37. Where corporate officer retained property in his own name after resigning, nine years' delay held to constitute laches. Kansas City Southern R. Co. v. Stevenson, 135 F. 553.

38. Whether the trustee recognized the rights of the beneficiary, whether he afterward disavowed the trust, the time of disavowal and whether the beneficiary had knowledge, or should have known it, are questions of fact. Crowley v. Crowley, 72 N. H. 241, 56 A. 190.

39. In re Fischer's Estate [Iowa] 102 N. W. 797.

40. See 2 Curr. L. 1955.

41. Gittings v. Winter [Md.] 60 A. 630.

42. See 2 Curr. L. 1955.

43. A bill to quiet title and enforce resulting trust with prayer appropriate only to quieting title is demurrable as inconsistent with itself. Long v. Mechem [Ala.] 38 So. 262.

44. Bill to quiet title and enforce resulting trust held demurrable for failure to set out substance of powers of attorney therein referred to by date and place of recordation. Long v. Mechem [Ala.] 38 So. 262.

45. See 2 Curr. L. 1955.

46. Cunningham v. Cunningham [Iowa] 101 N. W. 470. A widow selling property of husband and reinvesting the proceeds, a son, in order to establish a trust in the property bought, must prove the death of his father, his owning of the property, but

parol evidence is admissible to establish a resulting and constructive trust in favor of one other than the grantor.[47] Parol agreements between the parties may be considered in determining the ownership of the money and how it was invested.[48] The admissibility[49] and effect[50] of particular evidence in particular cases is shown in the notes.

Decree.[51]—If the grantee makes no claim for an accounting and introduces no evidence to show that he has contributed more than his share, the court is not required to state an account before rendering the decree.[52]

§ 16. *Following trust property.*[53]—As between the beneficiary and trustee, and all persons claiming under the trustee, otherwise than by purchase for a valuable consideration without notice, all property belonging to the trust, however changed or altered, continues subject to the trust,[54] and if it be mingled with other property of the trustee, the beneficiary may establish a charge on the mass for the amount of the fund.[55]

Identification of fund.[56]—It is essential that the trust property can be identified in its altered or substituted form,[57] and the burden is on the claimant to so identify it.[58]

Bona fide purchasers[59] are protected against secret trusts, and hence the beneficiary cannot follow the property into their hands.[60] In order to occupy the position of a bona fide purchaser, the purchaser must have had neither actual[61] nor

also that upon his death some part of his property passed to the son. Id.

47. Brooks v. Union Trust & Realty Co. [Cal.] 79 P. 843.

48. Lynch v. Herrig [Mont.] 80 P. 240.

49. Where money used was the proceeds of a sale of corporate stock belonging to the beneficiary, held, **memorandum list of securities** was admissible in suit by beneficiary's trustee. Gittings v. Winter [Md.] 60 A. 630.

50. That alleged beneficiary quitclaimed to others does not tend to show that he had any interest in the property. Cunningham v. Cunningham [Iowa] 101 N. W. 470.

51. See 2 Curr. L. 1955.

52. Koefoed v. Thompson [Neb.] 102 N. W. 268.

53. See 2 Curr. L. 1956.

54. James v. Aller [N. J. Law] 57 A. 1091. Trustee with power to invest, purchasing property in name of husband, held property subject to lien in favor of the cestui que trust for the amount of the fund. Id. Personal property converted into realty. Berry v. Evendon [N. D.] 103 N. W. 748. The beneficiary of a constructive trust is entitled to recover the proceeds of a sale of the property by the trustee and from subsequent investments made by him of such money. Huffman v. Huffman [Ind. App.] 73 N. E. 1096.

55. The mere mingling of funds which are to be devoted to a specific purpose with other funds of the depositary does not destroy the right of the true owners to claim such specific funds. Brown v. Spohr [N. Y.] 73 N. E. 14, afg. 84 N. Y. S. 995.

Note: See Metropolitan Nat. Bank v. Campbell Commission Co., 77 F. 705, where there is a full discussion of the subject.

56. See 2 Curr. L. 1956.

57. In re Gaskill, 130 F. 235; Winston v. Miller, 139 Ala. 259, 35 So. 853; Squires v. O'Maley [Ky.] 84 S. W. 1172; Texas Moline Plow Co. v. Kingman Texas Implement Co. [Tex. Civ. App.] 80 S. W. 1042. Estate held not entitled to recover money belonging to it deposited by executor in lieu of bail, there being no identification of the particular money misappropriated nor proof that the sheriff or treasurer knew that the money did not belong to the executor. Sutherland v. St. Lawrence County, 91 N. Y. S. 962. Analogous cases dealing with the transfer of property by one having no title will be found in topics Agency, 3 Curr. L. 68; Conversion in Equity, 3 Curr. L. 876; Criminal Law, 3 Curr. L. 979. As to **bank deposits,** see 2 Curr. L. 1957, and also Banking and Finance, 3 Curr. L. 403.

Evidence held insufficient to show that proceeds of sale were invested in other land which was conveyed to the trustee in trust for other parties. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

58. Texas Moline Plow Co. v. Kingman Texas Implement Co. [Tex. Civ. App.] 80 S. W. 1042.

59. See 2 Curr. L. 1957, n. 5-14. See, also, Notice and Record of Title, 4 Curr. L. 829.

60. Rhea v. Shields [Va.] 49 S. E. 70. Land held not impressed with a trust in favor of one advancing money to pay liens as against a bona fide purchaser of the property. Camfield v. Plummer, 212 Ill. 541, 72 N. E. 787. Beneficiaries under a will held not entitled to an interest in the land, from the sale of which the trust fund arose, as against a bona fide mortgagee of the testator. Curtis v. Brewer [Mich.] 103 N. W. 579.

61. Schneider v. Sellers [Tex.] 84 S. W. 417; McKenna v. Brooklyn Union Elevated R. Co., 95 App. Div. 226, 88 N. Y. S. 762. Pledgee of property. Tuttle v. First Nat. Bank [Mass.] 73 N. E. 560. Where trustee mortgaged trust property to a bank to which both he and his cestuis que trust were indebted. Berner v. German State

constructive[62] notice of the trust before paying the purchase price,[63] and he is not relieved from liability by conveying to an innocent purchaser,[64] and the enforcement of such trust does not come within the statute of frauds.[65] The general doctrine of bona fides has been discussed in another topic.[66]

§ 17. *Termination and abrogation of trust. Acts of settlor.*[67]—In the absence of fraud, undue influence, or mistake,[68] a trust cannot be revoked by the grantor unless he reserves a power of revocation. Except where the rights of creditors are involved, such a power is valid and consistent with the idea of a trust,[69] and its exercise being dependent upon the assent of a third person, the power expires upon the death of the latter without giving consent.[70] No form for the revocation being exercised, any instrument clearly expressing an intention to revoke is sufficient.[71] A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor,[72] but it is merely a tentative trust revocable at will until the depositor dies,[73] or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary.[74]

Bank [Iowa] 101 N. W. 156. Purchaser of homestead entry agreeing to abide by contract of grantor to convey certain land for church and cemetery purposes is a trustee for such church. Eimer v. Wellsand [Minn.] 101 N. W. 612. One acquiring title to a trust estate with knowledge of its character is presumed to have taken subject to the trust, though this presumption may be rebutted. Schwingel v. Anthes [Neb.] 101 N. W. 335. Where holder of title bond devised land to son for life and if he should die without issue to the state in trust, and the testatrix died without acquiring the legal title, which title was subsequently acquired by the son, held, the latter was a constructive trustee for the state. Commonwealth v. Clark, 25 Ky. L. R. 993, 83 S. W. 100. Husband receiving money from wife, knowing that it was impressed with a trust for the son, cannot, in an action on a note given therefor and assigned to the wife, claim that it was void because executed before the passage of Ky. St. 1903, c. 66, art. 3, or plead in bar thereof a judgment for alimony. Kefauver v. Kefauver, 26 Ky. L. R. 1058, 83 S. W. 119.

62. Facts sufficient to put on inquiry. Ludington v. Mercantile Nat. Bank, 92 N. Y. S. 454. Record. McKenna v. Brooklyn Union Elev. R. Co., 95 App. Div. 226, 88 N. Y. S. 762. Word "trustee" on a share of stock held sufficient to put the purchaser on inquiry. Johnson v. Amberson, 140 Ala. 342, 37 So. 273.

63. Halloran v. Holmes [N. D.] 101 N. W. 310; McKenna v. Brooklyn Union Elev. R. Co., 95 App. Div. 226, 88 N. Y. S. 762. Notice before payment of draft held effectual. Sparks v. Taylor [Tex. Civ. App.] 87 S. W. 740.

64. Schneider v. Sellers [Tex.] 84 S. W. 417.

65. It is the original instrument that creates the trust. Squires v. O'Maley [Ky.] 84 S. W. 1172.

66. See Notice and Record of Title, 4 Curr. L. 829.

67. See 2 Curr. L. 1958. See, also, Tiffany, Real Property, § 101.

68. Dayton v. Stewart, 99 Md. 643, 59 A. 281. Evidence held insufficient to show any fraud or undue influence in procuring the deed. Id. Evidence held insufficient to show that the absence of a power of revocation was due to mistake. Id.

69. Schreyer v. Schreyer, 91 N. Y. S. 1065, afg. Id., 43 Misc. 520, 89 N. Y. S. 508; Robb v. Washington and Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92.

70. Schreyer v. Schreyer, 43 Misc. 520, 89 N. Y. S. 508. Afd. 91 N. Y. S. 1065.

71. Need not be executed in accordance with Real Property Law, § 153. Schreyer v. Schreyer, 91 N. Y. S. 1065, afg. 43 Misc. 520, 89 N. Y. S. 508.

72. In re Totten, 179 N. Y. 112, 71 N. E. 748.

Note: The New York court formerly held that a deposit by one person in trust for another raises the presumption that a trust was intended; and where no evidence of a contrary nature appeared, the beneficiary was allowed to recover. Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; contra, Clark v. Clark, 108 Mass. 522. Where the depositor's real intent was to evade a rule of the bank, or to avoid taxation, this presumption is rebutted and no trust is created. Brabrook v. Boston, etc., Bank, 104 Mass. 228, 6 Am. Rep. 222. The principal case expressly establishes a new doctrine in New York, and seems to lay down different rules according as the question arises before or after the donor's death, allowing revocation before death of what after death would be presumed an absolute trust. This would seem an unfortunate distinction, as it tends to obscure the vital question as to the intent of the donor at the time of making the deposit. If he then intended to create a trust, it should be irrevocable, unless the power of revocation was expressly reserved at that time. Mabie v. Bailey, 95 N. Y. 206. —18 Harvard L. R. 70.

73. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor. In re Totten, 179 N. Y. 112, 71 N. E. 748.

74. In re Totten, 179 N. Y. 112, 71 N. E. 748. Bank deposit "in trust," coupled with

The trustee having the right to resign and reconvey terminates the trust by so doing.[75]

The beneficiary by assigning his interest does not terminate the trust.[76]

Termination by agreement.[77]—All persons receiving or likely to receive a benefit from the trust, being of full age and consenting, the trust may be terminated.[78] It follows that all the beneficiaries must consent,[79] and there must be no contingent limitation over.[80]

Termination for failure or completion of purpose.[81]—Unless terminated by act of the parties or of a court of competent jurisdiction, the trust continues until its objects have been fully accomplished or rendered impossible.[82] When such time arrives, the trust ceases,[83] and in the absence of an abuse of discretion clearly shown, the appellate court will not review the findings of the lower court in this regard.[84] A personal trust dies with the trustee.[85] The trustee being personally before the court, the latter may order him to convey to the beneficiaries the trust property which is without its territorial jurisdiction.[86] After a reasonable time for completion has elapsed, the trust will not be presumed to be open.[87]

Union of equitable and future legal estate.[88]—If the equitable and legal estates meet in one person, the equitable estate is generally merged in the legal and the trust ends.[89] There must be an identity of person and present interest.[90]

declaration that donor wanted the beneficiary of the trust to get the money, held to create an irrevocable trust, the donor having died. O'Brien v. Williamsburg Sav. Bank, 91 N. Y. S. 908.

75. Schreyer v. Schreyer, 91 N. Y. S. 1065. Afg. Id., 43 Misc. 520, 89 N. Y. S. 508.

76. Bronson v. Thompson [Conn.] 58 A. 692.

77. See 2 Curr. L. 1958.

78. Matthews v. Thompson [Mass.] 71 N. E. 93; Lewis v. Howe, 174 N. Y. 340, 66 N. E. 975, 1101. Where mortgagees are referred to in the declaration of trust merely for the purpose of recognizing the priority of their claims, the trust may be discharged without any action on their part. Matthews v. Thompson, Mass., 71 N. E. 93; Thompson v. Same, Id.

Generally required to be in writing: Rev. Laws, c. 127, § 3, construed, and written request and authorization by beneficiaries to trustee held sufficient where the latter, by the record title, held an absolute estate in fee. Matthews v. Thompson [Mass.] 71 N. E. 93. **Effect and sufficiency:** Agreement authorizing trustee to loan fund to a firm of which he was a member, and providing that he was to receive no compensation for services and was absolutely bound to repay the fund, held not to terminate the trust. Herbert v. Squires [Mass.] 71 N. E. 534.

79. Where trust was to continue during lifetime of two legatees, held not subject to termination before such time, one of the beneficiaries objecting. Hoffman v. New England Trust Co., 187 Mass. 205, 72 N. E. 952.

80. Where income was to go to wife and children and after the former's death the estate to be divided among the children, and if dead, their children to take by right of representation, held, the fact that widow conveyed her interest to the children did not terminate the trust. Wenzel v. Powder [Md.] 59 A. 194.

81. See 2 Curr. L. 1958.

82. Robbins v. Smith [Ohio] 73 N. E. 1051. Where will provided that at a certain time the property might be partitioned, held to continue after such time, there being no partition. Davies v. Dovey [Ky.] 85 S. W. 725.

83. Laws 1896, p. 574, c. 547, § 89. Where trust was created to prevent disposal during coverture, held, on death of husband, grantor was entitled to an adjudication terminating the trust, there having been no issue of the marriage. Sharman v. Jackson, 90 N. Y. S. 469. Where trustees were to hold property until it enhanced in value, it appearing that it only brought in $2,000 net per year, and in 20 years had only advanced from $7,500 to $9,000, held, trust would be terminated. Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151.

84. Under Act of February 23, 1853 (P. L. 98), in the absence of an abuse of discretion clearly shown, the appellate court will not review the discretion of the orphans' court in refusing exoneration. McCoy's Estate, 23 Pa. Super. Ct. 282.

85. A testamentary devise of property to executors to hold in trust for 25 years and then convey to charitable corporation will not be regarded in equity as personal so as to be defeated by the death of the executors within the 25 year period. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

86. Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151.

87. A simple trust to sell real estate and pay debts will be presumed not to be open 14 months after converting the property in cash and part of the latter is shown to have been paid out. Holderman v. Hood [Kan.] 78 P. 838.

88. See 2 Curr. L. 1959.

89. Raffel v. Safe Deposit & Trust Co. [Md.] 59 A. 702.

Statutes: Laws 1897, p. 507, c. 417, § 3,

If the trustee acquires the equitable estate, he must be the sole beneficiary;[91] if the beneficiary acquires the legal title, the equitable estate must be alienable and unrestricted.[92]

Procedure to dissolve.[93]—Upon proceedings to terminate the trust, the court may appoint a receiver for the property, though there has been no improper conduct on the part of the trustees.[94]

TURNPIKES; ULTRA VIRES, see latest topical index.

UNDERTAKINGS.

In New York in an action on an undertaking, the beneficial plaintiff must allege the granting of the order permitting him to sue.[95] The undertaking being annexed to the pleading, its form controls over the pleader's conclusion as to its legal effect.[96]

UNDUE INFLUENCE, see latest topical index.

UNITED STATES.

§ 1. Contracts (1760).
§ 2. Officers and Employes (1761).
§ 3. Claims (1762).
§ 4. Actions By and Against (1762).

Scope of title.—The powers of the United States, are nearly, if not always, raised in questions of constitutional law.[97] Its political power is investigated in the same class of questions, also in cases of treaties,[98] or pertaining to territories and Federal possessions,[99] extradition,[1] and the like, which obviously command a separate treatment. Property rights in the public domain have also been elsewhere treated.[2]

§ 1. *Contracts.*[3]—A contract to furnish all necessary labor and materials for the construction of a government building is a contract for the construction of a building within the act of congress requiring the contractor to give bond for the payment of laborers and materialmen.[4] But the labor done or the materials furnished must be supplied in the prosecution of the work provided for by the contract,[5] and an agreement to supply materials to a contractor is not supplying them.[6] An action on such bond in the name of the United States can be maintained only in a court authorized to require security for costs in case judgment is for the defendant.[7] In the distribution of proceeds recovered on the bond the United States does not take priority over laborers and materialmen also secured.[8] The liability

providing for the merger of the estates, is not retroactive. Metcalfe v. Union Trust Co. [N. Y.] 73 N. E. 498.

90. Where the trustee does not represent the estate in remainder, there can be no merger. Luquire v. Lee, 121 Ga. 624, 49 S. E. 834.

91. Robb v. Washington and Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92.

92. Metcalfe v. Union Trust Co. [N. Y.] 73 N. E. 498.

93. See 2 Curr. L. 1960.

94. Donaldson v. Allen, 182 Mo. 626, 81 S. W. 1151.

95. Code Civ. Proc. § 814, construed. Goldstein v. Michelson, 91 N. Y. S. 33.

96. Goldstein v. Michelson, 91 N. Y. S. 33. Where undertaking ran to county clerk, held to render nugatory averment that it ran to plaintiff's assignor. Id.

97. See Constitutional Law, 3 Curr. L. 730.

98. See Treaties, 4 Curr. L. 1697.

99. See Territories and Federal Possessions, 4 Curr. L. 1678.

1. See Extradition, 3 Curr. L. 1414.

2. See Public Lands, 4 Curr. L. 1106.

3. See 2 Curr. L. 1960.

4. Act of August 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523). United States v. Murdock [Me.] 59 A. 60.

5. General transportation is not within the words "labor or material." United States v. Conkling [C. C. A.] 135 F. 508.

6. United States v. Murdock [Me.] 59 A. 60.

7. A domestic corporation bringing action on such a bond impliedly authorizes the court to require security, and hence the court has jurisdiction. Sayre & Fisher Co. v. Griefen [N. J. Law] 60 A. 513.

8. Bond conditioned as required by 28 Stat. 278. United States v. American Surety Co. [C. C. A.] 135 F. 78.

of the sureties is limited to the penalty named, though the bond contains two distinct obligations,—one to the United States and one to the laborers.[9] The statute limiting expenditures to "the appropriations made by congress for that fiscal year," and prohibiting the involving of "the government in any contract for the future payment of money in excess of such appropriation," prohibits the renting of building for a longer period than the fiscal years for which the appropriations are made.[10] If the government abandons the lease and vacates the premises during the year, rent may be recovered up to the end of the current fiscal year, but not longer.[11] To defraud the United States does not necessarily mean to do the government a pecuniary injury.[12] The general law of public contracts is treated separately.[13]

§ 2. *Officers and employes.*[14]—A department clerk not appointed in any manner provided by the constitution is not an officer of the United States.[15] The government is under no obligation under the civil service laws and rules to employ men on probation or in the permanent service whose services are not needed.[16] The right of a clerk acting under the direction of the head of a department to compensation depends on congressional legislation on that subject.[17] Officers of the United States in their official capacity are special agents who must act within legally prescribed limitations.[18] They are personally liable for their torts, though done in good faith and in supposed obedience to acts of congress,[19] and the United States is not liable unless by virtue of authorization or ratification.[20] If the act is done maliciously, punitive damages may be recovered.[21] A senator may not receive compensation for services rendered by him to any person or bureau of the United States in relation to a matter in which the United States is interested.[22] It is a crime to do so.[23] The president may act through the head of a department, and the acts of the head of a department are deemed the acts of the president, except where he acts judicially.[24]

9. United States v. American Surety Co. [C. C. A.] 135 F. 78.

10. Smoot's Case, 38 Ct. Cl. 418. A lease for a term of years founded upon an annual appropriation is binding upon the government only until the end of the fiscal year, with a future option from year to year until the end of the term. Id.

11. Smoot's Case, 38 Ct. Cl. 418. A formal surrender of the premises is not necessary when the lease is void because of want of power on the part of the agent of the United States to contract. Id.

12. Corrupt misconduct on the part of an official of the postal department that operates to impair the administration of the affairs of that department is a wrong within the meaning of U. S. Rev. St. § 5440, U. S. Comp. St. p. 3676. Tyner v. United States, 23 App. D. C. 324.

13. See Public Contracts, 4 Curr. L. 1089.

14. See 2 Curr. L. 1961.

15. Cashier of the mint appointed by the superintendent of the mint is not. United States v. Cole, 130 F. 614. Third class clerk in the post office department is subject to indictment under Rev. St. §§ 1781, 1782, as an "officer and agent" or an "officer and clerk." McGregor v. United States [C. C. A.] 134 F. 187.

16. Brown's Case, 39 Ct. Cl. 255.

17. Bartlett v. United States, 25 S. Ct. 433.

18. Houser's Case, 39 Ct. Cl. 508.

19. Military governor of Cuba during temporary occupation. O'Reilly De Camara v. Brooke, 135 F. 384. Property seized and retained without color of process after right to possession has ceased. Crawford v. Eidman, 129 F. 992. Thus where one takes private property for public use without compensation, be is liable. O'Reilly De Camara v. Brooke, 135 F. 384. A revenue officer is liable for the wrongful seizure of property, whether or not he acts with probable cause or under orders from his superior [under Rev. St. § 989]. Haymes v. Brown, 132 F. 525.

20. Washington L. &. T. Co.'s Case, 39 Ct. Cl. 152.

21. Crawford v. Eidman, 129 F. 992.

22, 23. Inquiry relative to fraud in a proceeding in which the United States is interested within Rev. St. U. S. § 1782. United States v. Burton, 131 F. 552. Indictment for such offense held sufficient. Id. The jurisdiction of the postmaster general relative to fraudulent use of the mails is sufficient for the prosecution of a senator for taking compensation for services in endeavoring to get a favorable decision for the offender. Id.

24. Truitt's Case, 38 Ct. Cl. 398. The appointment by the secretary of the navy of a meteorologist to perform work ordinarily performed by officers of the navy, and making such employment a charge on the national defense emergency fund, must be re-

§ 3. *Claims.*[25]—The officers of the treasury department cannot arbitrarily select between contending claimants.[26] The court of claims has jurisdiction generally of claims founded upon a law of congress.[27] A limitation on the power of the head of a department to allow a claim is not a limitation on the court of claims.[28] Claims cannot be assigned before their allowance,[29] but the purpose of the statute making void such assignments is to prevent frauds upon the treasury, not to aid persons to avoid their obligations,[30] and notwithstanding such statute, a court may prevent a claimant from withdrawing the proceeds of his claim from the reach of his creditors,[31] and if a court should enjoin a claimant from collecting his claim and appoint a receiver to do so, it would not be in contravention of the statute.[32]

An allowance by the commissioner of internal revenue for the refund of a tax illegally collected is conclusive unless impeached for fraud or mistake.[33] If such claim is rejected by the commissioner, the party may maintain action against the collector.[34] If the claim is allowed by the commissioner and payment refused by the accounting officers, suit may be brought directly against the government.[35]

The act of congress, requiring the secretary of the treasury to withhold from a claim presented for payment the amount of any debt due the United States from the claimant, does not create a lien in favor of the government.[36] The failure to so withhold an amount due for breach of contract does not release the sureties on the contractor's bond from liability therefor.[37]

Where a claimant contributes by his conduct to mislead the accounting officer, in consequence of which bounty money is paid away, the government cannot be required to pay a second time.[38]

Mandamus will issue against the treasurer to compel him to make payment of a claim allowed and for payment of which an appropriation has been made.[39]

Interest is not recoverable against the government.[40]

§ 4. *Actions by and against.*[41]—The United States cannot be sued by an individual except as permitted by the acts of congress,[42] nor can an action be maintained against a United States marshal and the United States jointly.[43] The United States may maintain an action to protect the conditional ownership of its

garded as the act of the president. Hayden's Case, 38 Ct. Cl. 39.

25. See 2 Curr. L. 1961.

26. Congress created the court of claims to determine the right of anyone to receive money due by the United States. People's Trust Co.'s Case, 38 Ct. Cl. 359. A ministerial officer cannot arbitrarily disregard the legal holder of a claim, a receiver, and pay the money in dispute to a creditor; and such payment cannot be set up in discharge of the United States. Id.

27. Act appropriating money for the payment of arrears due volunteers is such a law. Sowle's Case, 38 Ct. Cl. 525.

28. If allowed by the court of claims it would not be payable out of the same appropriation. Geddes' Case, 38 Ct. Cl. 428.

29. A contract that an attorney's fee for prosecuting a claim shall be a lien of the draft issued in payment of the claim is not an assignment within Rev. St. U. S. §§ 3737, 3477. Roberts v. Consaul, 24 App. D. C. 551.

30, 31, 32. People's Trust Co.'s Case, 38 Ct. Cl. 359.

33, 34, 35. Edison Electric Illuminating Co.'s Case, 38 Ct. Cl. 208.

36. Act March 3, 1875, c. 149 (18 Stat. 487). United States v. Ennis, 132 F. 133.

37. United States v. Ennis, 132 F. 133.

38. Officer accepted amount of bounty money awarded to him as an ensign, when he held a higher rank. Gates' Case, 38 Ct. Cl. 52. It is a question whether the government can be held to have paid in its own wrong and be compelled to pay a second time, where a vice-consul withholds his accounts and the accounting officer makes a settlement with the consul without notice to the vice-consul. Wilbor's Case, 38 Ct. Cl. 1.

39. Roberts v. Consaul, 24 App. D. C. 551.

40. In an action under a special statute to recover damages because of a collision with a naval vessel. Watts v. U. S., 129 F. 222.

41. See 2 Curr. L. 1963.

42. See United States v. McLemore, 4 How. 287; Hill v. United States, 9 How. 387.

43. Bill to restrain seizure of property on a judgment in favor of the United States on a forfeited recognizance. Kirk v. United States, 131 F. 331.

wards in allotted property,[44] and such right cannot be affected by state laws.[45] The United States must be made a party to suits by Indians involving their rights to lands allotted to them by law or treaty.[46]

Under the Tucker Act, suits for claims founded on contract in which the amount does not exceed $1,000 may be maintained in a district court;[47] but actions sounding in tort cannot be maintained.[48]

Where a statute making provision for actions by the United States does not designate the court in which they may be instituted, when brought in a Federal court, they fall within the general grant of jurisdiction found in the Judiciary Act of August 13, 1888.[49] In a suit by the United States in a circuit court, in which the annulment of a contract between corporations is sought, all corporations, parties to such contract whose interests will be affected, are indispensable parties.[50]

An act referring a claim to the court of claims dispenses with the consideration of the question of limitations.[51]

The equities of the United States appeal to a court of chancery with no greater or less force than those of an individual in like circumstances.[52]

UNITED STATES COURTS, see latest topical index.

UNITED STATES MARSHALS AND COMMISSIONERS.

The Federal statute providing for the appointment of deputy United States marshals does not disable the marshal from employing a private citizen to perform services for him in aid of his official duties.[53] The Federal statute relative to the procedure by which a deputy collects his compensation does not apply to a private citizen who performs services for a marshal.[54] Under a statute making a marshal liable for the amount of an execution which he has failed to return, he is not liable for the amount of two executions on the same judgment where he failed to return either.[55] A bond conditioned to protect a marshal from liabilities for the execution of a writ of attachment does not secure fees of custodians who take charge of the attached property.[56]

A commissioner authorized to issue warrants to seize for extradition cannot issue a warrant to be executed outside his district.[57]

UNLAWFUL ASSEMBLY.[57a]

USAGES; USE AND OCCUPATION, see latest topical index.

USES.[58]

The statute of uses executes a passive trust[59] without the aid of a deed or

44. Cattle allotted to Indians. McKnight v. United States [C. C. A.] 130 F. 659.

45. Notice or demand as a condition precedent to action. McKnight v. United States [C. C. A.] 130 F. 659.

46. 28 Stat. 305, as amended by 31 Stat. 760. Parr v. United States, 132 F. 1004.

47. Claim for salvage is founded on implied contract. Cornell Steamboat Co. v. United States, 130 F. 480.

48. Act of March 3, 1887 (24 St. at L. 505). Hijo v. United States, 194 U. S. 315, 48 Law. Ed. 994.

49. 25 St. 433. United States v. Northern Pac. R. Co. [C. C. A.] 134 F. 715. Under this act a corporation is an inhabitant of the state where incorporated and not suable elsewhere without its consent. Id.

50. United States v. Northern Pac. R. Co. [C. C. A.] 134 F. 715.

51. Bishop's Case, 38 Ct. Cl. 473.

52. Relative to public lands. United States v. Detroit Timber & Lumber Co. [C. C. A.] 131 F. 668.

53, 54. Murray v. Pfeiffer [N. J. Err. & App.] 59 A. 147.

55. Grubbs v. Needles [Ind. T.] 82 S. W. 873.

56. Tully v. Cutler [Ind. T.] 82 S. W. 714.

57. Pettit v. Walshe, 194 U. S. 205, 48 Law. Ed. 938.

For discussion of the case in the lower court, see 4 Columbia Law Review, 217.—Col. L. R. IV. 602.

57a. No cases have been found during the period covered.

58. For a full discussion of the law of Uses, see Tiffany on Real Property, vol. 1, ch. 5, §§ 82-90, pp. 197-216.

59. In re De Rycke's Will, 99 App. Div. 596, 91 N. Y. S. 159. Transfers the use in possession by converting the estate or in-

decree of court,[60] though on the demand of the beneficiary, the trustee will be obliged to execute a conveyance to him.[61] What constitutes a passive trust is treated elsewhere.[62] The statute can be invoked to execute a deed of trust but not to annul it,[63] and it does not apply to executed gifts.[64] It applies to personalty,[65] and upon the beneficiary taking possession, the trust becomes executed.[66] Upon the execution of the trust, the beneficiaries take as tenants in common.[67] If trustee and beneficiary join in a deed, the latter is effectual as a conveyance of title.[68]

USURY.

§ 1. Elements and Indicia (1764).
§ 2. The Defense of Usury (1766).
§ 3. The Effect of Usury (1767).
§ 4. Affirmative Relief and Procedure (1768).

§ 1. *Elements and indicia.*[69]—*There must be an intention to exact an excessive rate,* and an unlawful intent cannot be imputed so long as the acts of the

terest of the cestui que trust into a legal estate, and by destroying the intermediate estate of the trustee. Graham v. Whitridge, 99 Md. 248, 58 A. 36. A passive trust is no real ownership as against the beneficial owner. Halloran v. Holmes [N. D.] 101 N. W. 310.

60. Where an active use became passive. Moll v. Gardner [Ill.] 73 N. E. 442.

61. Fink v. Metcalfe, 26 Ky. L. R. 1263, 83 S. W. 643.

62. See Trusts, § 2, subd. Construction.

63. Where settlor made himself the beneficiary for life under a passive trust, held, he could not invoke the statute of uses to annul the deed. Dayton v. Stewart, 99 Md. 643, 59 A. 281.

64. A parol contract by which a part owner of land was authorized by other part owners to sell the same, and apply a part of the proceeds to the payment of a debt owed by himself and another party to the contract, is not after performance within the statute of uses (Comp. Laws, §§ 8829. 8833, 9509). Lasley v. Delano [Mich.] 102 N. W. 1063.

65. Real Property Law, § 73, construed, and as the reason for the rule applies to personalty, held, the rule should apply. In re De Rycke's Will, 99 App. Div. 596, 91 N. Y. S. 159.

A devised the residue of his estate, real and personal, to trustees and their successors on trust to pay the income to B for life, and after her death to hold for such of A's descendants as B should by will appoint; and on default of appointment to hold for others. B duly appointed the estate to several persons for life, and the remainders went as on default. Held, that the life estates and the remainder are legal and not equitable estates. Graham v. Whitridge [Md.] 58 A. 36.

Note: The court says the original trust became passive on the death of B and was executed by the Statute of Uses. This application of the statute to personalty is technically wrong, because the grantor is not "seized" of it, and is contrary to the weight of authority. Willlams v. McConico, 36 Ala. 22. But without noticing this, courts have sometimes applied the statute to an estate composed of both realty and personalty where the trustee's active duties ceased with the life estate. Doe d. White v. Simpson, 5 East, 162. The result may be supported if the court can find an expressed intention to give the trustees a legal estate for only a limited period, with legal remainders over; and there is some evidence of this intention in the fact that the donor reached this result as to his realty and purported to treat his personalty in the same way. But this is solely a matter of construction, and seems to be ineffective in the principal case in the face of an express requirement that the trustees continue to hold either, for the purposes of the appointment or on default of appointment.—18 Harv. L. R. 234.

66. Kronson v. Lipschitz [N. J. Eq.] 60 A. 819.

67. Trust of personalty. Real Property Law, § 56, construed. In re De Rycke's Will, 99 App. Div. 596, 91 N. Y. S. 159.

68. Fink v. Metcalfe, 25 Ky. L. R. 1263, 83 S. W. 643.

69. See 2 Curr. L. 1966. In case of a note lawful on its face, some corrupt agreement, device, or shift must be shown. Gunby v. Armstrong [C. C. A.] 133 F. 417. Usurious transaction in the form of a building contract. Cooper v. Brazelton [C. C. A.] 135 F. 476. The fact that a larger amount has been paid as interest does not establish usury; there must be proof of a usurious contract. In re Samuel Wilde's Sons, 133 F. 562. There is no usury where the excess is caused by error in computation (Becker v. Headsten [Mich.] 100 N. W. 752), or by mistake in drawing the note (Goodale v. Wallace [S. D.] 103 N. W. 651), or by fraud of the creditor or by mutual mistake (Weicker v. Stavely [N. D.] 103 N. W. 753; Aldrich v. McClay [Ark.] 87 S. W. 813). A note may be made payable before maturity with interest to date and a fixed sum in addition. Kilpatrick v. Germania Life Ins. Co., 95 App. Div. 287, 88 N. Y. S. 628. In Minnesota a note providing for interest upon interest was held not usurious, but inequitable and not enforceable. Lee v. Melby [Minn.] 100 N. W. 379. A written agreement to pay a prior debt may provide for the highest legal rate of interest. Stewart v. Slocumb, 120 Ga. 762, 48 S. E. 311. A stipulation in the nature of liquidated damages, for failure to perform, is not usurious. Allen-West Commission Co. v. People's Bank [Ark.] 84 S. W. 1041. But compounding interest oftener than once a

parties admit of a lawful construction.[70] The courts have declined to lay down any general rule, but leave each case to be determined upon its own facts.[71] The principal is bound by the acts of his agent in making usurious loans;[72] and notice to a purchasing agent of the usurious character of a note is notice to the principal.[73] Whether a transaction is a sale or loan of personal credit or simply a cloak to cover usury is a question of fact.[74] In an action by an assignee, the defendant must show that plaintiff knew a note, fair on its face, to be usurious.[75]

There must be a loan or forbearance[76] in order to offend the usury laws,[77] and usury can never be predicated of the consideration paid for the purchase of property.[78]

The aggregate of the exactions must exceed the legal rate,[79] to be usurious, but the entire interest may be made payable at such times and in such instalments as the parties agree.[80] Where services are rendered by the parties advancing sums of money, the amount retained for such services and interest may exceed the legal rate.[81] Stipulations for payment of taxes on mortgage and debt, where they do not make the exactions exceed the legal rate, do not violate the statutes.[82]

Discounts, bonuses, commissions and other deductions or charges.[83]—A commission charged by one commission house, for guarantying commissions sent to another, in addition to interest charged and credited in the accounts current with consignors, is not usurious.[84] Reasonable expenses by the lender, such as inspection of the land and examination of the title, at the request of the borrower, may be allowed;[85] but an exaction for services in procuring a loan, in addition to the legal rate of interest, is usurious.[86]

The taint of usury[87] is not removed by extension of the loan at legal rates, without restitution of usurious interest.[88]

Usury statutes[89] are penal in their nature and must be strictly construed.[90]

year, under the Missouri statutes, is usury. Citizens' Nat. Bank v. Donnell, 25 S. Ct. 49. Six per cent. interest before and twelve per cent. after maturity held valid; also twelve per cent. on taxes paid by mortgagee. Sloane v. Lucas [Wash.] 79 P. 949. And the highest rate of interest in advance computed monthly on average daily debit balances, may be taken by a bank. First Nat. Bank v. Waddell [Ark.] 85 S. W. 417.

70. Norris v. W. C. Belcher Land Mortg. Co. [Tex.] 82 S. W. 500.

71. Tomlin v. Morris, 26 Ky. L. R. 681, 82 S. W. 373.

72. So held under the Washington statute. Ridgway v. Davenport [Wash.] 79 P. 606.

73. Haynes v. Gay [Wash.] 79 P. 794.

74. Forgotson v. Raubitschek, 87 N. Y. S. 503.

75. Haynes v. Gay [Wash.] 79 P. 794.

76. See 2 Curr. L. 1966.

77. Mortgage executed to secure loan of mortgagee's credit. Bouker v. Galligan [N. J. Eq.] 57 A. 1010; Flagg v. Fisk, 93 App. Div. 169, 87 N. Y. S. 530. An arrangement between commission houses guarantying consignment, sent to another and charging a percentage on sales, held not usurious. Ryttenberg v. Schefer, 131 F. 313.

78. Flagg v. Fisk, 93 App. Div. 169, 87 N. Y. S. 530.

79. See 2 Curr. L. 1967.

80. Metz v. Winne [Okl.] 79 P. 223. And interest at the highest legal rate may be made payable monthly as it falls due. Goodale v. Wallace [S. D.] 103 N. W. 651. Several notes, payable at different times, including interest due at maturity and 8 per cent. after maturity, with stipulation that all should become due in case of default in one, held not usurious. McCrary v. Woodard [Ga.] 50 S. E. 941.

81. A loan of credit. Ryttenberg v. Schefer, 131 F. 313. Services as note brokers. In re Samuel Wilde's Sons, 133 F. 562.

82. Such stipulations are void in Idaho (First Nat. Bank v. Glenn [Idaho] 77 P. 623); also where no such tax has been imposed or paid (Norris v. W. C. Belcher Land Mortg. Co. [Tex.] 82 S. W. 500).

83. See 2 Curr. L. 1967.

84. Ryttenberg v. Schefer, 131 F. 313.

85. Liskey v. Snyder [W. Va.] 49 S. E. 515.

86. Osborn v. Payne [Mo. App.] 85 S. W. 667.

87. See 2 Curr. L. 1968.

88. Nicrosi v. Walker, 139 Ala. 369, 37 So. 97.

89. See 2 Curr. L. 1968.

90. In re Worth, 130 F. 927, citing Tiffany v. Bank, 18 Wall. 409, 21 Law. Ed. 862; Dickerman v. Day, 31 Iowa, 444, 7 Am. Rep. 156. In Michigan an agreement to compound interest, made before the interest is due, is void. Gay v. Berkey [Mich.] 100 N. W. 920, citing Hoyle v. Page, 41 Mich. 533, 2 N. W. 665; Voigt v. Beller, 56 Mich. 140, 22 N. W. 140. But after interest is due, an agreement to pay interest upon interest is valid. In

Conflict of laws.[91]—Contracts are governed by the usury laws of the state where the money is payable;[92] and courts, on the ground of a supposed public policy, should not refuse to enforce them, because the rates of interest are higher than those of their own state.[93] Parties may stipulate that the law of the place of performance or that of the place where made may govern;[94] and oral evidence is admissible to prove such stipulation.[95]

Usury laws as applied to building and loan association contracts.[96]—The charter privileges of such associations must be regarded in determining the question of usury.[97] The subject of inquiry in such cases is whether a contract has been made, either directly or indirectly providing for usurious interest.[98] In the absence of statutes authorizing foreign associations to do business in the state, their loans are governed by the same rules as apply to others.[99] A note given to such an association will not be rendered usurious because of an accompanying stock contract, in the absence of proof of a corrupt agreement.[1] Where the statute provides for letting loans to the highest bidder and that no premium shall be deemed usurious, the exaction of a premium without such competitive bidding is usurious.[2]

§ 2. *The defense of usury.*[3]—This defense is personal to the borrower and cannot be interposed by a stranger to the contract,[4] though any one in privity

Kentucky, more than 6 per cent. on simple loans is usurious. Guenther v. Wisdom [Ky.] 84 S. W. 771. In New York, note brokers adopting as a branch of their business the loaning of money to customers on security of notes held for sale are deemed engaged in the banking business and exempt from liability of forfeiture of the principal of usurious loans [Laws N. Y. 1870, p. 437, c. 163, amd. by Laws 1880, p. 823, c. 567]. In re Samuel Wilde's Sons, 133 F. 562.

91. See 2 Curr. L. 1968.

92. In re Worth, 130 F. 927, citing De Wolff v. Johnson, 10 Wheat. 367, 6 L. Ed. 343; Call v. Palmer, 116 U. S. 98, 29 L. Ed. 559; Missouri Trust Co. v. Krumseig, 172 U. S. 351, 43 L. Ed. 474; Bigelow v. Burnham, 83 Iowa, 120, 49 N. W. 104, 32 Am. St. Rep. 294. Deemed to be performed at the home office of building and loan association when so provided in by-laws. Allen v. Riddle [Ala.] 37 So. 680. Where, a Pennsylvania corporation, as trustee for a foreign building and loan association, loans money to a citizen of that state, taking mortgage security on land in Pennsylvania and an assignment of shares of stock in the foreign association, it is a Pennsylvania contract. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256. A mortgage based on a note usurious both in the state where made and where payable, though void in the latter, may be enforced there with any consequences the laws of the state where made may impose. Davis v. Tandy [Mo. App.] 81 S. W. 457.

93. Midland Savings & Loan Co. v. Solomon [Kan.] 79 P. 1077.

94. Davis v. Tandy [Mo. App.] 81 S. W. 457. In the absence of stipulation, it is presumed that parties intended the law which makes the contract valid. Id.

95. Davis v. Tandy [Mo. App.] 81 S. W. 457.

96. See 2 Curr. L. 1969.

97. National Bldg. Ass'n v. Quinn, 121 Ga. 307, 49 S. E. 312. The powers and immunities granted to these associations under Pennsylvania statutes do not extend to foreign associations. Land Title & Trust Co. v. Fulmer, 24 Pa. Super. Ct. 256.

98. Ford v. Washington Nat. Bldg. & Loan Inv. Ass'n [Idaho] 76 P. 1010, citing Vermont Loan & Trust Co. v. Hoffman, 5 Idaho. 376, 49 P. 376, 37 L. R. A. 509, 95 Am. St. Rep. 186; Stevens v. Home Sav. & Loan Ass'n, 5 Idaho, 741, 51 P. 779, 986; Fidelity Sav. & Loan Ass'n v. Shea, 6 Idaho, 405, 55 P. 1022.

99. Transaction held usurious in Nebraska. Clarke v. Woodruff [Neb.] 100 N. W. 314. Also where foreign associations have not complied with the statutes of the state. Miller v. Monumental Savings & Loan Ass'n [W. Va.] 50 S. E. 533.

1. Gunby v. Armstrong [C. C. A.] 133 F. 417.

2. Lewis v. Farmers' Loan & Bldg. Ass'n, 183 Mo. 351, 81 S. W. 887; Clarke v. Conners [S. D.] 101 N. W. 883.

3. See 2 Curr. L. 1970.

4. Settled rule in Iowa. In re Worth, 130 F. 927, citing Carmichael v. Bodfish, 32 Iowa, 418; Green v. Turner, 38 Iowa, 112; Burlington Mut. Ass'n v. Heider, 55 Iowa, 424, 5 N. W. 578, 7 N. W. 686; Sullivan Sav. Inst. v. Copeland, 71 Iowa, 67, 32 N. W. 95; Pardoe v. Iowa Nat. Bank, 106 Iowa, 345, 76 N. W. 800. An employer, when sued for the wages of his employe, assigned to secure a usurious loan, cannot make this defense (Union Credit & Inv. Co. v. Union Stockyard & Market Co., 92 N. Y. S. 269), or creditors of a bankrupt against the claim of another creditor (In re Worth, 130 F. 927), or a purchaser of mortgaged premises, as against foreclosure suit, though he is the only person affected (In re Worth, 130 F. 927, citing Sullivan Savings Institution v. Copeland, 71 Iowa, 67; Pritchett v. Mitchell [involving right of second mortgage to this defense against foreclosure of prior mortgage], 17 Kan. 355, and cases cited; Bens-

with the borrower may plead it.[5] Usury under the present law in Georgia does not defeat a bona fide taker.[6]

The statute of limitations applies as well to the defense as to actions brought to recover for usury exacted.[7]

Pleading and proof.[8] This defense must be specially pleaded,[9] except where the usury appears upon the face of plaintiff's pleadings;[10] and the party alleging usury must prove it.[11] Where the defense of usury is set up to a contract governed by the laws of another state, a reply, denying usury, must plead the laws of such other states.[12] The defense of usury being personal with the debtor, a purchaser of real estate charged with a usurious debt cannot set it up without joining the debtor in such defense.[13]

§ 3. *The effect of usury.*[14]—A note executed as a renewal of a usurious note is itself tainted with usury,[15] and every agreement, sealed or unsealed, entering into a usurious transaction, is invalid,[16] notwithstanding the trifling amount of the illegal exaction.[17] A pledge to secure a usurious debt is illegal and void.[18]

ley v. Hormier [involving right of judgment creditor to plead usury in action to foreclose mortgage prior to his judgment lien], 42 Wis. 631).

5. The doctrine of estoppel cannot be invoked to defeat it, when the party is legally entitled to the plea. Ford v. Washington Nat. Building & Loan Inv. Ass'n [Idaho] 76 P. 1010. A grantee subject to a mortgage given to a building and loan association without including the usurious premium, knowing nothing about it, may set up this defense against the association. Lewis v. Farmers' Loan & Building Ass'n, 183 Mo. 351, 81 S. W. 887. It can be interposed by a trustee in bankruptcy to a claim against the estate. In re Samuel Wilde's Sons, 133 F. 562, citing Matter of Kellogg, 10 Am. Bankr. Rep. 7, 121 F. 333, 57 C. C. A. 547. And by the widow of the borrower, who joined in the mortgage, as to payments made by her husband prior to conveyance of premises to her in anticipation of death. Egan v. North American Savings, Loan & Building Co. [Or.] 76 P. 774.

6. Under the present Georgia statute (Civ. Code 1895, § 2886), providing that consideration must be both illegal and immoral to prejudice rights of a bona fide holder of negotiable instruments, the defense of usury is not good as against a bona fide purchaser of corporate bonds, for value, without notice and before maturity. Former decisions to the contrary are based on 1 Ga. 407, and the old statute (Cobb's Dig. 393), expressly making all notes and bonds void as to excessive interest. Weed v. Gainesville, etc., R. C. [Ga.] 46 S. E. 885. Per Lamar, J., citing 69 Ga. 664, and 73 Ga. 641.

7. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14, citing Faison v. Grandy, 128 N. C. 438, 83 Am. St. Rep. 693; Harrell v. Blount, 112 Ga. 711, 38 S. E. 711; First Nat. Bank v. McInturff, 3 Kan. App. 536, 43 P. 839; First Nat. Bank v. Turner, 3 Kan. App. 352, 42 P. 936; Walsh v. Mayer, 111 U. S. 31, 28 L. Ed. 338; Brown v. Sec. Nat. Bank, 72 Pa. 209; Carter v. Moses, 39 Ill. 543; Davis v. Converse, 35 Vt. 506.

8. See 2 Curr. L. 1971.

9. Thayer v. Buchanan [Or.] 79 P. 343; Rogers v. O'Barr [Tex. Civ. App.] 81 S. W. 750. It cannot be added by amendment after the impaneling of the jury (Robinson v. Lampel, 97 App. Div. 198, 89 N. Y. S. 853), nor can the claim to usurious interest be relinquished after affirmation of judgment for borrower, on new trial ordered on other grounds, by filing an amended petition (Second Nat. Bank v. Fitzpatrick [Ky.] 84 S. W. 1150).

10. Davis v. Tandy [Mo. App.] 81 S. W. 457.

11. In re Samuel Wilde's Sons, 133 F. 562, citing White v. Benjamin, 138 N. Y. 623, 33 N. E. 1037; Rosenstein v. Fox, 150 N. Y. 363, 44 N. E. 1027; Bosworth v. Kinghorn, 94 App. Div. 187, 87 N. Y. Supp. 983.

12. Columbian Bldg. & Loan Ass'n v. Rice, 68 S. C. 236, 47 S. E. 63.

13. Harper v. Middle States Loan, Bldg. & Const. Co., 55 W. Va. 150, 46 S. E. 817.

14. See 2 Curr. L. 1972.

15. The promise of a debtor to pay illegal interest, however often repeated, is not in itself sufficient to avoid the consequences of a usurious contract. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14. Promise to pay usurious interest void and unenforceable in North Carolina. Erwin v. Morris [N. C.] 49 S. E. 53.

16. So held under the New Jersey statute. Clarke v. Day [N. J. Law] 60 A. 39. In New York a usurious contract is merely voidable at the option of the borrower or his privies. And even as to privies the right of this defense may be cut off by the waiver of the original party. Union Credit & Investment Co. v. Union Stockyard & Market Co., 92 N. Y. S. 269. In Iowa it is voidable as to the interest in excess of the legal rate. In re Worth, 130 F. 927. The amount recoverable on a usurious note taken by a national bank depends upon the law of congress and state courts must follow the adjudications of the United States supreme court. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14, citing Farmers' Bank v. Oliver, 55 Neb. 774, 76 N. W. 449; Robbins v. Muldrow, 39 Kan. 112; National Bank of Auburn v. Lewis, 75 N. Y. 516, 31 Am. Rep. 484; Holden v. Cosgrove, 12 Gray [Mass.] 216; Bridge v. Hubbard, 15 Mass. 96, 8 Am. Dec. 86; Steele v. Whipple, 21 Wend. [N. Y.] 103; Reed v. Smith, 9 Cow. [N. Y.] 647; Tut-

Forfeitures.[19]—The only penalty necessarily attaching to the exaction of illegal interest, under the Federal banking law, is the forfeiture of all interest.[20] In New York the principal of a usurious loan is forfeited.[21] Plaintiff, when met by a plea of usury, cannot avoid the forfeiture of the entire interest by electing to remit the excess.[22]

Application of usurious payments.[23]—Usurious payments, not barred by the statute of limitations,[24] are to be applied to the reduction of the principal,[25] and where payments, applied at a legal rate of interest, are sufficient to discharge the indebtedness, the borrower is entitled to a cancellation of the mortgage security.[26]

§ 4. *Affirmative relief and procedure.*[27]—By suing to have a contract to convey and a deed of real estate declared an equitable mortgage, complainant estops himself to complain of its usurious nature.[28]

Recovery of usury.[29]—An action to recover must be based on an actual payment of usurious interest;[30] but the recovery need not necessarily be against the party who received it.[31] The obligation to repay usurious interest implies a contract to do so.[32]

An action under a statute[33] to recover usurious interest paid must be brought within the prescribed time.[34]

The penalty.[35]—In New York, the taking of unlawful interest is a misdemeanor.[36] In North Dakota,[37] and North Carolina, double the usurious interest paid can be recovered.[38]

VAGRANTS.[39]

hill v. Davis, 20 Johns. [N. Y.] 285; Mathews' Adm'r v. Traders' Bank [Va.] 27 S. E. 609; First Nat. Bank v. Plankinton, 27 Wis. 177, 9 Am. Rep. 453; Snyder v. Mt. Sterling Nat. Bank, 94 Ky. 231, 21 S. W. 1050; Brown v. Marion Nat. Bank, 169 U. S. 416, 42 Law. Ed. 801; Farmers' & Mechanics' Bank v. Hoagland (C. C.) 7 F. 159; Boyd v. Engelbrecht, 36 N. J. Eq. 612; Taylor v. Morris, 22 N. J. Eq. 606; 27 Am. & Eng. Enc. Law, 967, 968. A court of equity will not enforce a usurious contract prohibited by law, but will require the debtor to do equity. Gund v. Ballard [Neb.] 103 N. W. 309. In an action to obtain release from the lien of a chattel mortgage void for usury, a tender of the amount actually loaned is not necessary. Lyons v. Smith [Mo. App.] 86 S. W. 918.

17. Citizens' Nat. Bank v. Donnell, 25 S. Ct. 49.

18. Osborn v. Payne [Mo. App.] 85 S. W. 667.

19. See 2 Curr. L. 1973.

20. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

21. In re Robinson, 136 F. 994. But brokers making a business of advancing loans to their customers, on security of notes held for sale, are deemed engaged in the banking business and exempt from liability of forfeiture of the principal. In re Samuel Wilde's Sons, 133 F. 562.

22. Citizens' Nat. Bank v. Donnell, 25 S. Ct. 49.

23. See 2 Curr. L. 1973.

24. First Nat. Bank v. McCarthy [S. D.] 100 N. W. 14.

25. Nicrosi v. Walker, 139 Ala. 369, 37 So. 97. So under the Missouri statute. Lewis v. Farmers' Loan & Bldg. Ass'n, 183 Mo. 351, 81 S. W. 887.

26. Egan v. North American Savings Loan & Bldg. Co. [Or.] 76 P. 774.

27. See 2 Curr. L. 1973.

28. Malone v. Danforth [Mich.] 100 N. W. 445.

29. See 2 Curr. L. 1973.

30. First Nat. Bank v. Lasater, 25 S. Ct. 206.

31. Usurious interest, paid to the innocent holder of a negotiable note, may be recovered from the original payee. Harbaugh v. Tanner [Ind.] 71 N. E. 145.

32. Buntyn v. National Mut. Bldg. & Loan Ass'n [Miss.] 38 So. 345.

33. See 2 Curr. L. 1974.

34. In Louisiana the limitation is attached to the right of recovery itself and is not a part of the law of the remedy; if the right is not asserted within the prescribed time, it ceases to exist. Gunby v. Armstrong [C. C. A.] 133 F. 417, citing Walsh v. Mayer, 111 U. S. 36, 28 Law. Ed. 338. In North Carolina the defense that the action was not brought within two years is available, though not pleaded. Tayloe v. Parker [N. C.] 49 S. E. 921. Barred in Louisiana twelve months after settlement of accounts. Dannenmann & Charlton v. Charlton [La.] 36 So. 965.

35. See 2 Curr. L. 1974.

36. People v. Warden of City Prison of Manhattan, 89 N. Y. S. 322.

37. Waldner v. Bowdon State Bank [N. D.] 102 N. W. 169.

38. Tayloe v. Parker [N. C.] 49 S. E. 921.

39. No cases have been found for this subject since the last article. See 2 Curr. L. 1975

VALUES; VARIANCE; VENDITIONI EXPONAS, see latest topical index.

VENDORS AND PURCHASERS.[40]

§ 1. **The Contract Generally and Interpretation of It (1769).** Under the Statute of Frauds (1770). Construction of Contract (1771). Options (1772).
§ 2. **Title and Incumbrances (1774).**
§ 3. **Condition, Quantity and Description of the Property.** Estate (1776). Quantity of Land Contracted For (1776). Description of Land Contracted For (1777).
§ 4. **Rights and Liabilities Between Date of Sale and Delivery of Deed (1778).**
§ 5. **Waiver of Performance of Defects (1780).**
§ 6. **Default and Its Effect (1781).**
§ 7. **Performance of the Contract.** Time of Performance (1783). Tender of Performance (1785).
§ 8. **Rescission and Reformation.** Right to Rescission (1786). Rights of Vendor After Rescission (1789). Rights of Vendee After Rescission (1789).
§ 9. **Adjustment of Rights After Conveyance or Breach of Contract (1790).**
§ 10. **Enforcement Generally (1791).**
§ 11. **Vendor's Liens (1793).**
A. Implied Lien (1793).
B. Express Lien (1795).

§ 1. *The contract generally and interpretation of it.*[41] *Creation of Contract.*[42]—The general principles applicable to all other contracts are essential to the creation of a contract for the sale of land; thus there must be a meeting of the minds of the parties as to its terms,[43] and an intention to contract one with the other.[44] A mere proposal, without consideration, creates no obligation, unless accepted according to its terms,[45] and it may therefore be withdrawn at any time before acceptance,[46] though if such offer is allowed to remain open until accepted, it will become a binding contract.[47] An acceptance of an offer must be unconditional and in the terms of the offer.[48] There must be a sufficient consideration, though the promise to sell is a sufficient consideration for a promise to purchase.[49] In some jurisdictions a contract for the sale of land entered into by an agent in behalf of the owner is invalid, unless the agent's authority is in writing subscribed by the owner,[50] and describing the land which he is authorized to sell.[51]

40. This topic treats of the contract for sale or purchase of land and excludes to separate topics the law of deeds (see Deeds of Conveyance, 3 Curr. L. 1056), which are from this point of view merely one of the acts of performance of a sale or purchase, the law of notice and recording (see Notice and Record of Title, 4 Curr. L. 829). It also excludes matters of general contract law which are not dependent on the fact that the contract in question is one for sale of lands (see Contracts, 3 Curr. L. 805), and other topics related thereto as Deceit, 3 Curr. L. 1045; Fraud and Undue Influence, 3 Curr. L. 1520; Frauds, Statute of, 3 Curr. L. 1527).

41, 42. See 2 Curr. L. 1976.

43. Lord v. Meader [N. H.] 60 A. 434. Letters construed and held not to constitute a contract since clearly contemplating subsequent negotiations between the parties and the execution of a formal contract. Dreiske v. Joseph N. Eisendrath Co., 214 Ill. 199, 73 N. E. 379.

44. An offer in writing to sell certain land at a certain price addressed to a real estate broker, and an offer by another to purchase the same land at the price named in the offer of sale, likewise addressed to the real estate broker, does not constitute a contract of purchase and sale, nor can parol evidence be received to connect the two communications for the purpose of creating a contract. Ratterman v. Campbell, 26 Ky. L. R. 173, 80 S. W. 1155. An instrument construed and held to be a binding contract of purchase and sale. Bernzweig v. Zwisohn, 91 N. Y. S. 736.

45, 46, 47. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

48. A conditional acceptance of an option for purchase amounts to a practical rejection thereof. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758. An acceptance of the "growth" on certain land is not an acceptance of an offer to sell the "timber" in the absence of evidence that the terms are synonymous. Lord v. Meader [N. H.] 60 A. 434. An offer must be accepted in its exact terms in order that a contract should arise therefrom, and any attempt to impose new conditions or terms in the acceptance, however slight, will ordinarily deprive the acceptance of any efficacy as creating a contract. A letter accepting an option to purchase land and directing deed and abstract to be forwarded to a designated bank to be delivered on examination by purchaser and his satisfaction with the title held not to impose new terms, but to constitute an unconditional acceptance of the offer and give rise to an executory contract. Kreutzer v. Lynch [Wis.] 100 N. W. 887.

49. Where a contract is signed by one who thereby promises to purchase certain land from another on the happening of a certain contingency, at a price named, an obligation on the part of the promisee to convey at the price named will be implied, and hence there is a consideration for the contract, and on the happening of the contingency and the offer of the vendor to convey, the purchaser is bound by his contract. Ferguson v. Getzendaner [Tex.] 83 S. W. 374.

50. Halsell v. Renfrow, 14 Okl. 674, 78 P.

In other jurisdictions an agent whose authority rests in parol may by a contract in writing make a contract binding on his principal.[52] Where the statute requires the authority to be in writing and describing the land, the ratification of a sale by an agent not so authorized must be in writing, describing the land with such definiteness as would be binding on the principal if found in a contract executed by him.[53] The agent to make a valid contract must act within his authority,[54] which is revoked by a sale by the owner.[55]

Under the statute of frauds[56] an executory contract for the sale of lands is void unless in writing.[57] But payment of the purchase price and taking posses-

118. Where the wife of the owner of land, purporting to act for him in the sale thereof, signed his name to a contract for its sale, but without authority in writing as required by the statute of frauds, the fact that the owner, on the same day, indorsed his name on a check given by the purchaser for a part of the purchase price and as earnest money, does not constitute such a note or memorandum as will take the sale out of the operation of the statute of frauds. Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061.

Pleading want of authority in writing: When one, sued on a contract for the sale of land entered into by one purporting to act as his agent, seeks to avoid the contract on the ground that the agent was not authorized to act for him, he must plead such facts as will show the want of authorization in writing, though it is not necessary to refer to the statute of frauds. Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061.

51. Under Rev. St. Mo. 1899, § 3418, no contract for the sale of land, entered into by an agent in behalf of his principal, is binding unless the authority of the agent is in writing. The authority of the agent must describe the land which he is authorized to sell with as great a degree of definiteness as would be required in a contract by the owner to sell. It cannot be identified by parol evidence. Johnson v. Fecht [Mo.] 83 S. W. 1077.

52. Kreutzer v. Lynch [Wis.] 100 N. W. 887.

53. Johnson v. Fecht [Mo.] 83 S. W. 1077.

54. When an agent is authorized to sell two tracts of land for a specified price, he has authority to sell the two tracts to different persons, provided the sale is made at the same time and the price received from the two sales aggregates the specified amount. Campbell v. Beard [W. Va.] 50 S. E. 747. See, also, title Agency, 3 Curr. L. 68.

Double agency: Where it is sought to set aside a contract on the ground that the agent for one party was also the agent of the other, evidence that one had paid him commissions is admissible on the question of agency. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863. See, also, Agency, 3 Curr. L. 68; Brokers, 3 Curr. L. 535. See, generally, as to agencies for purchase or sale of land, Clark and Skyles, Agency, §§ 533-554, 596-604.

55. An authority to another to sell land as agent of the owner can be revoked at any time, and the giving of an option to a third person and notice of his acceptance is a revocation of the agent's authority. Faraday Coal & Coke Co. v. Owens, 26 Ky. L. R. 243, 80 S. W. 1171. Where an owner who has placed real estate in the hands of a broker for sale sells the land, the broker's agency is terminated without notice, and the production of a purchaser by the broker after that does not entitle him to commission. Wallace v. Figone [Mo. App.] 81 S. W. 492.

56. See title Frauds, Statute of, 3 Curr. L. 1527.

57. In order to comply with the statute of frauds requiring contracts for the sale of land to be in writing, it is not necessary that the whole agreement should be written on one piece of paper, but it can be fully collected from various papers referring to one another or directly related to one another, such as letters and telegrams written and sent and the replies thereto, so that they may be fairly said to constitute one paper relating to the contract; it is a sufficient agreement if it appears therefrom that the minds of the parties met and if the terms of the contract by referring to the various writings can be made to clearly appear. Cobb v. Glenn Boom & Lumber Co. [W. Va.] 49 S. E. 1005. Negotiations looking to the creation of contract of promise of sale of immovable property contemplated a written contract. Until the contract is reduced to writing and executed either party may withdraw. Levy v. Levy [La.] 38 So. 155.

NOTE. Sufficiency of memorandum: An action was brought by a vendee for the specific performance of a contract for the sale of land. The contract was evidenced by a memorandum which states how certain instalments of the consideration were to be paid, but did not mention the manner of payment of the residue. Held, that oral evidence is admissible to show when the remainder of the consideration was to be paid. Ruzicka v. Hotovy (Neb. 1904) 101 N. W. 328.

This decision is contrary to the weight of authority, the general rule being that a contract for the sale of land to be valid must contain the precise terms of payment. Wright v. Walker (1862) 25 N. Y. 153, 82 Am. Dec. 331. Nelson v. Baby Manufacturing Co. (1892) 96 Ala. 515, 38 Am. St. Rep. 116. Snow v. Nelson (1902) 113 F. 353. Whenever the statute provides that the consideration must be stated, there is no doubt that all the terms of payment are intended. If the statute does not stipulate for mention of the consideration yet it would appear that the word contract should include all the terms thereof. Such interpretation is in accord with the weight of authority and seems more in consonance with the purpose of the statute than that adopted by the principal case. O'Donnell v. Leeman (1857) 43 Me. 158, 69 Am. Dec. 49. Browne on the

sion of the land and making valuable and permanent improvements thereon will take it out of the operation of the statute of frauds,[58] as will the execution of a deed and delivery of possession to the vendee.[59] Thereafter the deed is conclusive evidence of the contract between the parties, except as to the consideration.[60] Part payment of the purchase price alone is not such part performance as will take a contract out of the statute of frauds.[61] A contract in writing for the sale of land may be modified by a subsequent oral contract which has been executed.[62] A contract exists and becomes operative as soon as one copy is executed and delivered; the subsequent execution of a duplicate does not refer the inception of the contract to the execution of the duplicate.[63] Where a contract is executed by one party and submitted to the other for execution and he interlines other terms and executes it and returns the same to the party who first executed it, the retention of the copy without objection is an acceptance of the new terms.[64] A purchaser of land may maintain a suit for specific performance on a written contract signed only by the vendor.[65] A contract to enter into a contract of sale does not give the promises the remedies of a purchaser.[66] A conveyance of land by one who has an executory contract for the purchase thereof will transfer his rights under the contract to the grantee.[67] A sale of standing timber confers on the purchaser a vested interest in the land, and the rules applicable to the recording of conveyances apply to the contract of sale.[68]

Construction of contract.[69]—The general rules applicable to the construction of contracts apply to the construction of contracts for the sale of land. If the paper itself affords a reasonably clear understanding of what the parties have engaged themselves to, its language alone should be consulted and parol evidence is inadmissible.[70] It will be construed according to its legal effect and not ac-

Statutes of Fraud [4th Ed.] § 379, et seq. 5 Columbia L. R. 163.

58. Bringhurst v. Texas Co. [Tex. Civ. App.] 87 S. W. 893. Where the owners of land by parol authorize another to deed it to a third person who in consideration of money paid by such third person deeds it to the latter and he goes into possession and makes valuable improvements, the transaction amounts to a parol sale of the land and the purchaser can compel specific performance. Kuteman v. Carroll [Tex. Civ. App.] 80 S. W. 842.

59, 60. Tucker v. Dolan [Mo. App.] 84 S. W. 1126. An oral contract for the sale of lands is taken out of the operation of the statute of frauds by the execution and delivery of a deed, and the putting of the vendee in possession, and in such case the vendor can show by parol evidence what the price agreed to be paid was, though the deed given recited a different amount from that agreed on, and can recover any amount not paid, though in excess of the recited consideration for the deed. See v. Mallonee [Mo. App.] 82 S. W. 557.

61. Koenig v. Dohm, 209 Ill. 468, 70 N. E. 1061.

62. Hence where a dispute arose between the parties to a written contract as to whether the price was to be for the tract in gross or a specified sum per acre, the acceptance of a sum per acre in settlement of the controversy is binding, there being a deficiency in the quantity of land. Hill v. Maxwell [Kan.] 79 P. 1088.

63. Morehouse v. Terrill, 111 Ill. App. 460.

64. The fact that the purchaser made improvements before the return of the interlined copy which provided for their forfeiture in case of default does not affect his rights under the changed contract in which he has acquiesced. Church v. Lapham, 94 App. Div. 550, 88 N. Y. S. 222.

65. Hyden v. Perkins, 26 Ky. L. R. 1099, 83 S. W. 128. See, also, title Specific Performance, 2 Curr. L. 1678.

66. Where the owner of land enters into an agreement with another to lease to him the land and also agrees that such lease shall contain a clause giving the lessee an option to purchase the land, the lessee cannot enforce specific performance or damages for refusal of the lessor to convey, where the owner has requested the execution of the lease in accordance with the contract and the lessee has refused to execute the lease. Livesley v. Muckle [Or.] 80 P. 901.

See, also, post this section, "Options."

67. Lynch v. Herrig [Mont.] 80 P. 240.

68. J. Neils Lumber Co. v. Hines [Minn.] 101 N. W. 959. Where the owner of land executes a writing reciting that for and in consideration of a certain sum the receipt whereof is acknowledged, he "agrees to sell" certain timber growing on the land, the contract will be regarded as an executed conveyance of the timber transferring title thereto to the purchaser. Brodack v. Morsbach [Wash.] 80 P. 275.

69. See 2 Curr. L. 1976.

70. Harmon v. Thompson [Ky.] 84 S. W. 569.

cording to the name given to it by the parties.[71] The interpretation put on an ambiguous contract by the parties thereto will be followed by the courts.[72] Where it is doubtful as to whether a conveyance was intended as a conditional sale or mortgage, it will be held to be a mortgage.[73] A quit-claim deed cannot be construed as an agreement to convey any after-acquired title which the grantor may obtain.[74] Conveyance and payment of the purchase price are to be performed concurrently, unless it clearly appears that such was not the intention of the parties.[75] Where a contract for the sale of land provides that "a survey shall be made by a competent surveyor to be mutually agreed on," the selection of a surveyor is not essential to a completion of the sale, and where the vendor refuses to agree on a surveyor, the purchaser may have the tract surveyed and enforce specific performance.[76] The parties are bound to exert reasonable efforts to carry into effect an agreement that the purchase price shall be fixed by appraisers.[77]

Options.[78]—An option has been defined as "an unaccepted offer to sell." It transfers no title or right in rem, but creates a right in personam, and that right is to accept or reject a present offer within a limited or reasonable time in the future.[79] Option contracts are valid and will be enforced if seasonably accepted.[80] The fact that one who takes an option to purchase land does so for the purpose of speculation does not make it fraudulent.[81] An option given without consideration is a mere offer and can be withdrawn at any time before acceptance,[82] on notice to the person to whom it was given that it is revoked;[83] but if

71. Hence a contract, of which time is stipulated to be of the essence by which one denominated the lessee is to pay a certain sum per year "as rent" for a specified number of years, after which if the payments are all made the lessor agrees to convey the land to the lessee, is a contract for sale creating the relation of vendor and purchaser. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402. An instrument containing terms of grant in the present tense, but also showing that the grantor did not have title or possession at the time of its execution, and contemplating the subsequent execution of a deed held to be an executory contract to convey and not a deed. Prusiecke v. Ramzinski [Tex. Civ. App.] 81 S. W. 771.

72. "Saw timber" as used in a contract construed with reference to conduct of parties. Chemical Charcoal Co. v. Smith [Miss.] 38 So. 232. Where the contract is indefinite, the construction and practical interpretation placed on it by the parties themselves will control. Webster v. Major, 33 Ind. App. 202, 71 N. E. 176. Where the owner of land signs a contract for the sale of land and it is thereafter referred to by the parties in correspondence as an option, it will be so regarded by the courts. Standiford v. Thompson [C. C. A.] 135 F. 991.

73. Instrument construed and held to be a mortgage and not a conditional sale of land. Fulwiler v. Roberts [Ky.] 80 S. W. 1148.

74. Chamberlain v. Abrams, 36 Wash. 587, 79 P. 204.

75. Stein v. Waddell [Wash.] 80 P. 184.

76. Howison v. Bartlett [Ala.] 37 So. 590.

77. An agreement in a contract for the sale of land that the value thereof shall be ascertained by appraisers is not revocable by the parties; they are bound to use reasonable efforts to carry such stipulation into effect. It must be appraised within the time named or within a reasonable time. The submission may be revoked by the refusal of the appraisers to act, by the death of a party to the contract, or by death of the appraiser, and where there is no agreement for resubmission, it may be revoked by the failure of the appraiser to agree or where an award made is set aside. The implied revocation of the submission does not, however, authorize a rescission of the contract. Parsons v. Ambos, 121 Ga. 98, 48 S. E. 696.

78. See 2 Curr. L. 1979.

79. Standiford v. Thompson [C. C. A.] 135 F. 991. An option has been defined as follows: The obligation by which one binds himself to sell and leaves it discretionary with the other party to buy is what is termed in law an "option," which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time. An option conveys no title to the thing sold, but creates rights in personam which may be again sold or assigned by the vendee. Womack v. Coleman, 92 Minn. 328, 100 N. W. 9. An option is a contract by which an owner agrees with another person that he shall have the privilege of buying certain property at a fixed price within a specified time. It is neither a sale nor an agreement to sell. The person to whom it is given acquires no interest in the land until after acceptance. Myers v. J. J. Stone & Son [Iowa] 102 N. W. 507. An instrument construed and held to be an option and not a contract of sale. Milstein v. Doring, 92 N. Y. S. 417.

80. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

81, 82. Cummins v. Beavers [Va.] 48 S. E. 891. A parol extension of an option, without consideration for the extension, is merely an offer, and can be withdrawn at any time before acceptance. Id.

83. Notice of revocation: The recording

it is given for a valuable consideration, it cannot be withdrawn before the expiration of the time for which it was given.[84] If the option is contained in a lease, the covenants of the lease may constitute a consideration.[85] Where an option does not specify the time within which it must be accepted, the person to whom it is given has a reasonable time for acceptance.[86] The acceptance of an option within the time limited by the option contract, when given for a consideration or before withdrawal and notice, if not based on a consideration, gives rise to an enforceable contract.[87] The acceptance must be unconditional, but a mere request for a change in the terms of the option does not nullify the effect of a contemporaneous, unconditional acceptance.[88] A conditional acceptance of an option amounts to a practical rejection of it.[89] Where the last day, within which by its terms the holder of an option could accept it, fell on Sunday, an acceptance on the following Monday is in time and creates a binding contract.[90] The posting of a letter of unqualified acceptance of an offer makes the acceptance complete from the moment the letter is mailed, where it is apparent the parties contemplated the use of the mails as an agency of communication.[91] In the absence of language in the option contract indicating a con-

of a deed executed by a person who has given an option to another for the purchase of the land described in the deed, before the expiration of the time when by its terms the option would expire, is not a notice to the holder of the option, it being without consideration, that the vendor has revoked the option. Smith v. Russell [Colo. App.] 80 P. 474. Where a deed is deposited in escrow and an option given to another to purchase the land described in the deed within a specified time on payment of a specified sum to the person holding the deed in escrow, a notice by the vendor to the holder of the deed that the offer is revoked is not a notice to the person to whom the option was given and an acceptance by him before such notice though after notice to the person holding the deed, constitutes a binding contract for the sale of the land. Notice of revocation of an option must be communicated to the person to whom the option is given. Id.

84. Cummins v. Beavers [Va.] 48 S. E. 891. The release of a notarial bill for $3.00 held not a sufficient consideration for an option on land, the purchase price of which was stipulated to be $8,000.00. Wallace v. Figone [Mo. App.] 81 S. W. 492.

85. When an option is given to a lessee to purchase the leased premises, the lease is a sufficient consideration to support the option, and the lessor cannot withdraw it before the time given in which to accept it has expired; but when the time for its acceptance is specified, unless accepted at that time it expires. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758. An optional agreement to convey, made on proper consideration, or forming part of a lease or other contract that is in fact the consideration for it, cannot be revoked by the vendor within the period granted for the exercise of the option. Frank v. Stratford-Handcock [Wyo.] 77 P. 134. A lease containing an option for the purchase of the demised land by the lessee and also containing a clause requiring the lessee as a condition precedent to his right of possession to give security for the performance of the covenants of the lease, held not to constitute a consideration for the option, where the lease never became operative by reason of the lessee's failure to give the security. Id.

Liability of lessee accepting option for rent: Under Rev. Laws Mass. c. 129, § 8, a lessee who during a rent period exercises an option given by the lease, to purchase the leased premises is liable for rent for the period before the execution of the conveyance by the landlord and after the lessee has taken possession under the lease. Withington v. Nichols [Mass.] 73 N. E. 855.

86. Where an option provides that the first payment shall be made on or before a certain date or as soon thereafter as the title should be examined and accepted, the vendee has a reasonable time after the date specified within which to examine the title and accept the offer. Standiford v. Thompson [C. C. A.] 135 F. 991.

87. Pennsylvania Min. Co. v. Smith, 210 Pa. 49, 59 A. 316. There is no contract of purchase or obligation to sell and convey until the option is accepted. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758.

An option to purchase **given a lessee** by the terms of his lease is a continuing offer to sell and a contract of sale is completed on the date of notice that the option is taken advantage of. King v. Raab, 123 Iowa, 632, 99 N. W. 306.

88. An acceptance of a formal and carefully prepared option of sale of land, within the time by it allowed and according to its terms, although accompanied by a request for a departure from its terms as to the time and place of performance, is an unconditional acceptance and converts the option into an executory contract of sale provided the request be not so worded as to limit or qualify the acceptance. Turner v. McCormick [W. Va.] 49 S. E. 28.

89. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758.

90. Smith v. Russell [Colo. App.] 80 P. 474.

91. Campbell v. Beard [W. Va.] 50 S. E. 747. An option "for 20 days" given on the 3d of the month may be accepted at any

trary intent,[92] an option for the purchase of land is assignable, and on acceptance by the assignee gives rise to a contract enforceable by him.[93] So, too, the rights of the vendor under an option contract may be enforced by one to whom the vendor has contracted to convey subject to the prior option.[94] Option contracts are construed as are all other contracts, and the intention of the parties governs.[95] After an option has been repudiated, no rights can be claimed under it.[96]

§ 2. *Title and incumbrances.*[97]—One who has contracted to purchase land is entitled to a marketable title.[98] The test of a marketable title is whether it is clear beyond a reasonable doubt and will not expose the purchaser to litigation.[99]

time on the 23d of the same month. Where the person who gave the option was absent from home on the last day for which the option was given, a letter accepting the offer left at the residence of the vendor is sufficient. Holmes v. Myles, 140 Ala. 665, 37 So. 588.

92. An unrestricted option to purchase land is assignable, and when contained in a lease may be enforced by an assignee of the lease, but the owner of the property by providing in the contract that the person to whom it is given "but no other person" shall have the right to purchase, may make it a mere personal privilege not assignable. Myers v. J. J. Stone & Son [Iowa] 102 N. W. 507.

93. Kreutzer v. Lynch [Wis.] 100 N. W. 887. An assignment by the holder of an option to purchase land, of an interest in such option, does not carry with it an implied warranty of title when the option contract shows on its face that it is given in consideration of services to be rendered in the future. Shuttleworth v. Myer [Ky.] 87 S. W. 270.

94. Where the owner of land gives to another an option to buy it at a certain price and subsequently gives another an option, subject to the previous option, and the person to whom the last option was given and within the time limited thereby accepts the offer, he has the right to require that the person to whom the first option was given shall pay the price fixed in such first option, and he succeeds to the rights of his vendor thereunder and can maintain a suit for specific performance against the holder of the first option to whom the owner conveyed at a less figure than that named in the option, the grantee taking with notice of the rights of the holder of the second option. Faraday Coal & Coke Co. v. Owens, 26 Ky. L. R. 243, 80 S. W. 1171.

95. Cross v. Snakenberg [Iowa] 102 N. W. 508. A contract construed and held to be a contract of agency to sell land and not an option to purchase. Faraday Coal & Coke Co. v. Owens, 26 Ky. L. R. 243, 80 S. W. 1171. See, also, infra, Performance of the Contract.

96. An assignee of such an option who takes with notice of all the facts acquires no rights. Notley v. Shoemaker, 25 Pa. Super. Ct. 584.

97. See 2 Curr. L. 1980.

98. Miller v. Bronson [R. I.] 58 A. 257; Scudder v. Watt, 90 N. Y. S. 605; Downey v. Seib, 92 N. Y. S. 431. A vendee is entitled to a marketable title, and one free from reasonable doubt or pending litigation. Muller v. Palmer, 144 Cal. 305, 77 P. 954. Where a building on land contracted to be sold encroaches on adjoining land to such an extent that the owner of the land encroached on can maintain an action to recover possession thereof, the purchaser can refuse to complete the contract on the ground the title is not marketable. Bergman v. Klein, 97 App. Div. 15, 89 N. Y. S. 624. Encroachment of adjoining buildings 1 to 3½ inches on land contracted for held to render title unmarketable. Klim v. Sachs, 102 App. Div. 44, 92 N. Y. S. 107. A conveyance by the Society of Shakers held to vest a marketable title in vendor. Feiner v. Reiss, 90 N. Y. S. 568. A title is not unmarketable because there are judgments of record against the vendor's grantor where it also appears that subsequent to the entry the grantor was adjudged a bankrupt and discharged as to such judgments. Grosso v. Marx, 45 Misc. 500, 92 N. Y. S. 773. Evidence held to show a marketable title in the vendor. Doll v. Pizer, 96 App. Div. 194, 89 N. Y. S. 277.

99. Downey v. Seib, 92 N. Y. S. 431. Title held not marketable. Miller v. Bronson [R. I.] 58 A. 257. It is well settled in this state that a court of equity will never compel a purchaser to take a title unless it be one which puts the purchaser in all reasonable security that no flaw or doubt will come to disturb its marketable value, provided the doubt be real and not fanciful. A deed to certain persons "as trustees and their successors in office," "in trust to erect thereon a place of worship for the use of the members of a certain church organization," does not grant such a title to the organization, as a corporation, as will sustain a suit for specific performance by it against a purchaser. Methodist Episcopal Church at Bound Brook v. Roberson [N. J. Eq.] 58 A. 1056. A purchaser is entitled to a title free from doubt and uncertainty that litigation will not be necessary to defend it. The doubt ought not to be captious, but must be considerable and rational,—such as would and ought to induce a prudent man to hesitate to take the title if he was effecting an original purchase. A mere possibility of a defeat or a threat or the possibility of a contest is not enough. Wollenberg v. Rose [Or.] 78 P. 751. Where one who had contracted to convey land procured from a mortgagee thereof a conditional release of a prior mortgage, the title thus acquired is not to be regarded as a merchantable title. Spooner v. Cross [Iowa] 102 N. W. 1118. A purchaser of land for a valuable consideration will not be compelled to take a title that is doubtful or one that will involve him in almost certain litigation. Brown v. Widen [Iowa] 103 N. W. 158.

Title founded on adverse possession: A

A title which is in litigation is not a marketable title.[1] Immaterial defects and technical objections, where the purchaser gets substantially what he contracts for, will not be permitted to be set up to defeat a decree for specific performance.[2] The mere existence on the day when title is to be closed of an incumbrance, which it is within the power of the vendor to remove, is not a breach of a contract to sell free of incumbrance.[3] Ordinarily the contract by its terms defines the title which is to be conveyed.[4] One who has contracted for a title free from incumbrances is not required to accept a title subject to an inchoate right of dower. But if the purchaser is willing to take such title with an abatement of the purchase price to the extent of such dower interest, the vendor cannot object.[5] The

vendee will not be compelled to accept a title acquired by adverse possession, upon the mere fact of uninterrupted possession for the statutory period, unless it is shown by the vendor that the legal owners were not under a disability so that the statute would run against them. Carolan v. Yoran, 93 N. Y. S. 935.

1. "A marketable title is one about which there can be no fair and reasonable doubt, and a title in litigation is unmarketable." Corbett v. McGregor [Tex. Civ. App.] 84 S. W. 278. Where a vendor tenders a title which is involved in litigation and asks for specific performance, the court cannot determine that the litigation is groundless and without merit, since the parties to such litigation are not parties to the suit. Wollenberg v. Rose [Or.] 78 P. 751.

2. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. See, also, title Specific Performance, 2 Curr. L. 1678.

3. Rabin v. Risnikoff, 95 App. Div. 68, 88 N. Y. S. 470.

4. "By the terms of the agreement, the title to the premises was to be good and marketable and the premises were to be conveyed clear of incumbrances and free of all restrictions." Held, that a covenant in a deed running with the lands restricting the grantee from building within a given distance of the street line constituted such a defect of title as precluded plaintiff from furnishing defendant with a marketable title and one free from restrictions. Coues v. Hallahan, 209 Pa. 224, 58 A. 158. A contract entered into subsequent to a contract of sale construed and held to authorize a suit for specific performance for a balance of the purchase price retained by the purchaser, pending determination of another suit involving question of whether certain tax assessments were a lien at time deed was to be given with covenants against incumbrances. Luyster v. Joseph, 179 N. Y. 53, 71 N. E. 458. A contract to purchase the vendor's "one-half interest in remainder, reversion or whatever nature the same may be" in certain land, obligates the purchaser to take whatever interest the vendor has and to pay the agreed price therefor. Ewart v. Bowman [S. C.] 49 S. E. 867. Where subsequent to the execution of a contract to convey the vendor's "interest" in certain land the land is sold pursuant to judicial proceedings to which the purchaser is made a party, to satisfy claims which existed against it at the time the contract of purchase was entered into and of which the purchaser is deemed to have had notice, the purchaser cannot recover the amount paid by him on account of such purchase. Webster v. Major, 33 Ind. App. 202, 71 N. E. 176. Where the owner of land contracted to sell and convey it, subject to a mortgage, which it was agreed should be placed thereon and that the purchaser should assume and agree to pay such mortgage, the vendor was authorized to place on the land a mortgage in the form and containing conditions usually found in mortgages of similar property, i. e., semi-annual payment of interest, stipulation for attorney's fees in case of foreclosure, insurance clause and clause for forfeiture in case of nonpayment of interest when due. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Where a purchaser of land agrees to accept title so soon as the vendor obtains a decree quieting title, a decree obtained in good faith and under form of law is sufficient and ordinarily he will not be excused from performance because there is a possibility that defendants in the action to quiet title may open the decree and defend within the time fixed by statute. Bales v. Williams [Iowa] 103 N. W. 150. Where the heirs of a deceased owner of land contract to sell and convey it by a "good deed free of all incumbrances," they are bound to exonerate it from claims against the decedent's estate. Forthman v. Deters, 206 Ill. 235, 69 N. E. 97. Where adjoining lots are sold at auction sale pursuant to a notice that recites that certain building restrictions are to be placed on the lands and deeds are made accordingly, each purchaser is entitled to the enforcement of the restrictions as constituting a general scheme of improvement. But lands not sold at such auction and afterwards conveyed by the vendor without restriction are not subject thereto, and the prior purchaser cannot maintain suit to enforce them. McCusker v. Goode, 185 Mass. 607, 71 N. E. 76. See, also, title Buildings and Building Restrictions, 3 Curr. L. 572. A special tax which has not ripened into a lien, by reason of the issuance of the tax bill by the city, is not an incumbrance within the meaning of a contract for the sale of land which obligates the vendor to convey free of existing incumbrances. Contract of sale construed with reference to obligation of vendor to pay taxes not a lien at time of contracting. Everett v. Marston [Mo.] 85 S. W. 540. Where a contract provides for the laying out of a roadway across a part of the land to be sold, the purchaser is not entitled to a deed omitting an exception of such roadway. Levandowski v. Althouse [Mich.] 99 N. W. 786.

5. Payne v. Melton [S. C.] 48 S. E. 277 The purchaser is entitled to a deed, with a

purchaser is not entitled to a deed signed by the wife unless she joined in the execution of the contract.[6] The fact that a wife does not join with her husband in giving an option will not relieve him from the duty of specific performance if the option is exercised.[7] In the ordinary contract of purchase and sale there is an implication that the conveyance to be made thereunder will transfer the title to the property; but in the absence of any special agreement on the subject, it is incumbent upon the vendee to examine the title for himself and to point out any objections he may have to the title tendered him by the vendor.[8] Where a contract for the sale of land provides that the purchaser shall be the sole judge as to whether the title is good and as to whether he will accept the title, he cannot arbitrarily and in bad faith reject the title. Where under such circumstances a purchaser rejects a title it will be presumed he did so because the title is defective and not marketable.[9] The right to reject the title offered may be exercised by the assignee of the original purchaser.[10] The purchaser of an equitable title takes it with all its imperfections.[11] A vendee who takes with notice that his vendor has agreed to convey a right of way through the premises will be compelled to specifically perform the agreement.[12] When one agrees to purchase land with notice that any coal under it has been sold, but no such reservation is made in the agreement, and he subsequently joins in a prayer for specific performance, he thereafter cannot refuse performance and he is liable for the full value of the land unless he shows the value of coal under it.[13] A contract, title to pass on the performance of certain conditions by the vendee, gives him a mere equitable title.[14]

§ 3. *Condition, quantity, and description of the property.*[15] *Estate.*—A contract in general terms, for the sale of land, is a contract for the conveyance of the entire estate in the lands sold, by a good and sufficient deed.[16]

Quantity of land contracted for.[17]—Where a tract of land is sold in gross and the contract recites that it contains a certain number of acres, neither party in the absence of fraud is entitled to extra compensation or abatement of the purchase price in case there is an excess or deficiency,[18] unless the deficiency

proportionate abatement of the contract price, if the amount of the deduction can be ascertained. The question of the amount of the deduction cannot be determined by a master, but must be determined by the chancellor. Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097. In ordering the specific performance of a contract for the sale of land which does not fix a sum as liquidated damages for the failure of the wife to join in the deed, the chancellor has no power to provide for a deduction from the purchase price of any sum as the value of the inchoate right. Such inchoate right is incapable of valuation, and the purchaser must either take a deed and rely on its covenants or refuse to consummate the deal. Id.

6. Rankin v. Rankin, 111 Ill. App. 403.

7. Purchasers may elect to take such title as he can give. Hughes v. Antill, 23 Pa. Super. Ct. 290.

8. Goodell v. Sanford [Mont.] 77 P. 522.

9. Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451. Where a contract for the sale of land provides that the vendor shall furnish an abstract showing title to the satisfaction of the vendee's attorney, the vendee cannot be deemed in default where the attorney acting bona fide and in good faith rejects the title. Moling v. Mahon [Tex. Civ. App.] 86 S. W. 956.

10. Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451.

11. The vendee of an equitable title is not a bona fide purchaser, protected against the equities of the grantor of his vendor. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

12. Coolbaugh v. Ransberry, 23 Pa. Super. Ct. 97.

13. Schoonover v. Ralston, 25 Pa. Super. Ct. 375.

14. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

15. See 2 Curr. L. 1982.

16. Arentsen v. Moreland [Wis.] 99 N. W. 790. A contract with a railroad company entitled to land grants from the government, held to contemplate the conveyance of a fee-simple title. Maffet v. Oregon & C. R. Co. [Or.] 80 P. 489.

17. See 2 Curr. L. 1983.

18. A contract for the sale of land designating the land and reciting the quantity in such a way as indicates that it is unknown, is regarded as a sale in gross, and the purchaser, in the absence of actual fraud and misrepresentation by the ven-

is so great as to amount to a failure of consideration or defeat the object of the purchase.[19] In such case there is no implied warranty as to quantity.[20] On the other hand, where lands are sold by the acre, the purchaser cannot be required to pay for more than the tract contains, irrespective of the recitals of the contract. If he has paid for an excess, he can recover the amount so paid.[21] In the last mentioned case the vendee can maintain an action for damages, though an instalment of the purchase price is not due.[22] If the price agreed to be paid is an exact multiple of the number of acres recited in the contract, it is deemed ambiguous as to whether the sale is in gross or by the acre, and parol evidence is admissible to show the fact in that respect.[23] A party may by express contract waive his right to object to a deficiency of land conveyed.[24] The purchaser is not bound to accept a deed for a materially less quantity of land than that contracted for,[25] but after a contract is closed, a vendee who does not offer to rescind and reconvey can recover a portion of the purchase price on the ground of fraud only in a clear and satisfactory case.[26]

Description of land contracted for.[27]—A contract which describes the land in such a manner that it can be ascertained by the aid of parol evidence to a certainty what land was intended to be sold, is enforceable;[28] but where an in-

dor touching the quantity of land, relied on by the purchaser, cannot recover or have an abatement of the purchase price where the tract does not contain the recited quantity. In such case the burden is on the vendee to prove the fraudulent intent of the vendor. Cork v. Cook [W. Va.] 48 S. E. 757. Where a contract for the sale of a tract of land described by metes and bounds or otherwise recites that it contains a certain number of acres, and it appears that the sale was in gross, and not by the acre, the vendor on discovering that the tract contains more than the recited quantity cannot recover for the excess, or rescind the contract; on the other hand under some circumstances the vendee is entitled to an abatement of the purchase price where the tract contains less than that recited. Newman v. Kay [W. Va.] 49 S. E. 926. Where no fraud is shown, and the deficiency small, a purchaser under a partition decree who pays over the purchase money which is distributed, cannot after a considerable lapse of time recover the amount of the deficiency. Landreth v. Howell, 24 Pa. Super. Ct. 210.

19. Where a tract is sold in gross, as a certain tract, though the number of acres in the general description is mentioned, yet accompanied with the words more or less, an abatement will not be allowed, as a matter of course, but only where the deficiency is so great as to amount to a failure of consideration or defeat the object of the purchase. Harsey v. Busby [S. C.] 48 S. E. 50.

20. Newman v. Kay [W. Va.] 49 S. E. 926.

21. Harsey v. Busby [S. C.] 48 S. E. 50. A vendee, where there is a shortage in the quantity of the land conveyed pursuant to a contract, may offset the value of the land not conveyed when sued for the purchase price, or he can recover the same in an independent action where the purchase price has been paid. Joiner v. Trail [Ky.] 86 S. W. 980. Where a contract for the sale of land described by metes and bounds provides that the purchaser shall pay a certain sum per acre, the number of acres to be determined by a survey, excluding from the computation the right of way of a railroad which crosses the tract, the area occupied by highways is not to be deducted from the area for which payment is to be made. Beach v. Hudson River Land Co. [N. J. Err. & App.] 60 A. 210.

22. One who has entered into a contract for the purchase of land and who has paid a part of the price and entered into possession may maintain an action to recover damages caused by a deficiency in the quantity of the land in the tract contracted for, though a part of the purchase price is not due and is unpaid. Stearns v. Kennedy [Minn.] 103 N. W. 212.

23. Newman v. Kay [W. Va.] 49 S. E. 926.

24. Lowndes v. Fishburne [S. C.] 48 S. E. 264.

25. Albro v. Gowland, 90 N. Y. S. 796. Where the owner of a lot contracts to sell the same and in the contract it is recited that the lot contains a certain quantity of land "more or less," the vendee is not bound to accept a deed for less than the recited quantity, unless it appears that the lot described as a fact was not of the dimensions recited and that the deed conveyed the entire lot. A reduction of 9 inches in width and 5 feet in depth of a city lot held a material reduction. Raben v. Risnikoff, 95 App. Div. 68, 88 N. Y. S. 470.

26. Evidence insufficient. Schmitz v. Roberts, 26 Pa. Super. Ct. 472.

27. See 2 Curr. L. 1983.

28. Kent v. Williams [Cal.] 79 P. 527; Halsell v. Renfrow, 14 Okl. 674, 78 P. 118; Howison v. Bartlett [Ala.] 37 So. 590. A contract for the sale of a "farm of about 20 acres known as the V. farm" is a sufficient description, since it can be identified by parol evidence, where the description can only be applied to one tract. Hyden v.

sufficient description is given or where there is no description, such evidence is inadmissible, because the court will never receive parol evidence both to describe the land and then to apply the description.[29] The construction of a contract acted on by the parties, with reference to the description of the land, as in other features, will be adopted by the courts.[30] A vendor who permits a vendee to contract with him on faith of his statements as to value is bound to know that they are true.[31]

§ 4. *Rights and liabilities between date of sale and delivery of deed.*[32]— Under a contract for the sale of lands, the purchaser becomes the equitable owner of the lands and the seller the equitable owner of the purchase money; the purchaser has all the benefit of subsequent improvements and increase in value, and is also subject to all losses and depreciation not occasioned by the negligence or default of the seller in carrying out the contract.[33] The vendee can maintain an action for a wrongful injury to the premises by a third person.[34] His interest may be conveyed, descends to his heirs and is subject to the lien of a judgment against him,[35] and under some circumstances his wife is entitled to dower therein.[36] The vendee, according to the terms of the contract, may or may not be entitled to possession during the time intervening between the execution of the contract and the time when by its terms the conveyance is to be made.[37] If by its

Perkins, 26 Ky. L. R. 1099, 83 S. W. 128. "That tract of land adjoining section nine and known as the Phil Allen place" held a sufficient description. Raines v. Baird [Miss.] 37 So. 458. A contract which describes the premises to be conveyed as being occupied by a person named and by street and number is sufficiently definite as to description, though it does not give the city, county or state, where the premises can be definitely identified by parol evidence. Engler v. Garrett [Md.] 59 A. 648.

29. Halsell v. Renfrow, 14 Okl. 674, 78 P. 118.

30. Where there is a difference between the descriptive language used in an act of sale and a diagram prepared under the direction of the vendor, with reference to which land is sold, and the vendor puts the vendee in possession of the property called for in the diagram and all the facts and inferences disclosed or suggested by the evidence point to the conclusion that the vendor intended to sell and the vendee to buy the property of which the latter is thus put in possession, a purchaser of the rights of the heirs of the vendor in the land of which possession was surrendered but which was not described in the act of sale, who buys after the lapse of many years and without warranty and with a stipulation against the return of the price, cannot recover the land referred to in the diagram, but not described in the act of sale. Gray v. Coco [La.] 36 So. 878.

31. Jack v. Hixon, 23 Pa. Super. Ct. 453.

32. See 2 Curr. L. 1984.

33. Marion v. Wolcott [N. J. Eq.] 59 A. 242. A vendee in possession under an executory contract for the purchase of land is the equitable owner of the land and the vendor holds the legal title in trust for him and as security for his compliance with the conditions of the contract. Schauble v. Schulz [C. C. A.] 137 F. 389.

Application of proceeds of insurance policy: Where a contract for the sale of land provides that until payment of all the purchase price and conveyance the purchaser shall keep the premises insured in a designated sum for the benefit of the vendor as his interest may appear, the proceeds of insurance in case of loss before conveyance are payable to the vendor for application on the purchase price, but in the absence of a stipulation therefor in the contract, he cannot be required to devote such money to rebuilding the burned buildings. Marion v. Wolcott [N. J. Eq.] 59 A. 242. A contract construed and held not to impose on the vendor the burden of paying for insurance on the premises sold during the time intervening the making of the contract and the making of the deed. Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58. Interests arising on contract of sale, see Tiffany, Real Property, 264.

34. Shinn v. Guyton & Herlington Mule Co. [Mo. App.] 83 S. W. 1015.

35. Stearns v. Kennedy [Minn.] 103 N. W. 212. A vendee in possession under a contract for the purchase of land has a vendible interest in the land, as has one to whom such vendee has assigned her equitable title. The title of a vendee in possession can be sold under execution against him. Hubbard v. Kansas City Stained Glass Works & Sign Co. [Mo.] 86 S. W. 82.

36. One who has entered into possession of land under a parol contract for the purchase thereof, and who has paid the purchase price therein, has such an equitable estate therein as entitles his widow to dower therein. Howell v. Parker, 136 N. C. 373, 48 S. E. 762. See, also, title Dower, 3 Curr. L. 1144.

37. Where a married woman enters into a contract for the purchase of land, which contract provides for the cultivation of the land by the purchaser, the fact that the husband of the purchaser lived with her and devoted his time and labor to raising a crop does not overcome the presumption

terms he is entitled to possession, his right to possession continues after a breach by him, until the vendor has disaffirmed the contract or until a sale of the premises pursuant to a foreclosure of the vendor's lien.[38] If entitled to possession, he is not, of course, liable for rent,[39] and if deprived of possession during time which under the contract he is entitled to possession, he can require the vendor to account for its use and occupation.[40] Where he enters into possession under the contract, his possession is subordinate to the rights of the vendor,[41] and for some purposes will be regarded as the possession of the vendor.[42] The vendor is entitled to interest on the purchase price from the time when by the terms of the contract it should have been paid.[43] One who sells property after taxes are levied and before they become a lien is as between vendor and vendee liable therefor,[44] and if he retains possession until the time fixed by the contract for conveying, for taxes accruing during the interim,[45] unless otherwise provided by statute.[46] One who takes a conveyance of land with notice that his grantor has entered into a contract for its sale to another takes it subject to the equities of such other.[47] Hence, where a purchaser of land is entitled to specific performance as against his vendor, he is entitled to the same relief as against a grantee of his vendor, who took with knowledge of the vendee's rights,[48] otherwise as to a

of ownership by the wife. Thurston v. Osborne-McMillan Elevator Co. [N. D.] 101 N. W. 892.

38. Runge v. Gilbough [Tex. Civ. App.] 87 S. W. 832.

39. One in possession of land under an oral contract with the owner for the conveyance thereof to him is not liable for rent during the time he is in possession, where the vendor subsequently ousts him from possession and refuses to convey. Robards v. Robards [Ky.] 85 S. W. 718.

40. Where an owner of land in possession thereof sues one who has contracted to purchase it and recovers the purchase price, the vendee is entitled to an accounting for the rents and profits of the land from the time when by the terms of the contract sued on he was to have possession. The vendor is not liable for rent in the sense of compensation for his possession, but he must account for what he actually received from the property. Ferguson v. Epperly [Iowa] 103 N. W. 94. When specific performance of a contract for the sale of land is decreed and by the terms of the contract payment was to be made upon delivery of the deed, the vendee is entitled to the profits accruing between the day when the deed should have been delivered and the day it is delivered, and the vendor is entitled to interest on the purchase money for the same period. But where by the terms of the contract the purchase money is not to be paid at such time, the vendor is entitled to interest only from the time when payment was to be made. Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58.

41. Where one enters into and holds possession of land under an executory contract of purchase, the entry and possession are in subordination to the title of the vendor until payment or performance of all the conditions by the vendee or until the vendee has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly or by legal implication to the vendor's knowledge and until then adverse possession cannot be predicated on the vendee's possession. Runge v. Gilbough [Tex. Civ. App.] 87 S. W. 832. See title Adverse Possession, 3 Curr. L. 51.

42. Where a vendee is in possession under an executory contract, his possession will be regarded in equity as that of the vendor where necessary to protect the rights of the latter against third persons. State v. Harman [W. Va.] 50 S. E. 828.

43. Holyoke Envelope Co. v. United States Envelope Co., 186 Mass. 498, 72 N. E. 58.

44. Appeal of Bailies [Iowa] 102 N. W. 813.

45. Duty to pay taxes: As between the parties to an executory contract for the sale of lands, the seller where he retains the possession, rents and profits until the conveyance is due, must pay the accruing taxes, in the absence of any agreement by which the purchaser assumes that obligation. Clinton v. Shugart [Iowa] 101 N. W. 785.

46. Under Ky. St. 1903, § 4023, a vendee in an executory contract for the sale of land, though by the terms thereof the first payment is not to be made until after the 15th of September succeeding the execution of the contract, is liable for taxes assessed on the 15th of Sept. after the execution of the contract, and this too, though the contract provides that the vendor shall convey free of incumbrances and the conveyance is not to be made until the first payment. Hughes v. McCreary [Ky.] 86 S. W. 522.

47. Alexander v. Goetz [Ala.] 37 So. 630. All persons claiming title through a vendor, with notice of the rights of third persons or acquiring title as heirs or devisees are bound by the terms of the contract previously entered into by their grantor. Tingue v. Patch [Minn.] 101 N. W. 792.

48. Engler v. Garrett [Md.] 59 A. 648; Cummins v. Beavers [Va.] 48 S. E. 891; Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030; Forthman v. Deters, 206 Ill. 159,

bona fide purchaser without notice.[49] The vendee may be bound by acts of the vendor with reference to the property, of which he has knowledge and to which he does not object,[50] though the vendee cannot be regarded as the agent of the vendor for the purpose of purchasing building material.[51]

§ 5. *Waiver of performance or defects.*[52]—A written contract for the sale of land may be abandoned or annulled by the parties thereto by parol agreement,[53] unless the vendee has acquired a homestead right in the premises, in which case his wife must join in the release.[54] The parties may waive a forfeiture incurred by either under the terms of the contract.[55] After waiver of a forfeiture neither

69 N. E. 97. See, also, Specific Performance, 2 Curr. L. 1678. A purchaser of land, with notice of a prior contract to convey the same to another, takes it subject to the equitable rights of the original contractor to a completion of his bargain, and may be compelled in equity to perform the contract of his vendor, and upon a bill filed by the original vendee against the vendor and his grantee, the proper practice is to direct a specific performance of the complainant's contract by such grantee, in whom resides the legal title. In such case the subsequent grantee having paid the vendor is entitled to the purchase price to be paid by the complainant. Frank v. Stratford-Handcock [Wyo.] 77 P. 134.

49. One who for a valuable consideration and without notice of a prior contract by the owner to convey land to another takes a conveyance thereof, takes a title superior to that of the vendee in the contract. Martin v. Thomas [W. Va.] 49 S. E. 118. See, also, Notice and Record of Title, 4 Curr. L. 829.

50. Vendee is bound by consent of vendor to the building of a street railway in front of the property, when vendee has knowledge of the consent, and does not revoke it. Day v. Forest City R. Co., 5 Ohio C. C. (N. S.) 393.

51. Vendee not constituted agent of the vendor in the purchase of material for buildings to go upon the land under a contract for transfer of the land after erection of the buildings; interest of the vendor not liable to the party furnishing the materials. Lapham v. Ransford, 5 Ohio C. C. (N. S.) 577.

52. See 2 Curr. L. 1986.

53. Hougen v. Skjervheim [N. D.] 102 N. W. 311. Where one to whom the owner has contracted to convey land states to one subsequently negotiating for its purchase that he has abandoned his contract and does not intend to consummate it, and such other thereupon enters into a contract for the purchase of a tract of which it forms a part and which is more valuable by reason of the inclusion of it, equity in a suit for specific performance by the assignee of the first purchaser will treat the first contract as abandoned and will not permit a retraction of the abandonment. Cox v. Raider [Mich.] 101 N. W. 531.

54. A release by a vendee to a vendor of his rights under a contract for the purchase of land of which he is in possession under the contract and which is used as a home for himself and family and which is community property, is not binding on the wife and minor children, and they can enforce the contract against the vendor where she did not join in or consent to the release. Zeimantz v. Blake [Wash.] 80 P. 822. See, also, title Homesteads, 3 Curr. L. 1630.

55. A party to a contract for the sale of land, who knowingly consents to a postponement of the performance by the other of some stipulation of the contract which is for his benefit, cannot, after the other has acted on the consent, avail himself of the default to declare a forfeiture, though the performance of the stipulation at the time specified may have been made of the essence of the contract. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482.

Waiver of forfeiture by vendor: A vendor in a contract for the sale of land which by its terms provides for payment within a specified time and that in case such payments are not made the vendee's rights shall cease, may waive a forfeiture by a subsequently executed parol agreement. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482. A vendor of land may waive a forfeiture of the vendee's rights under the contract, either expressly, or by estoppel arising from acts tending to mislead the vendee or lull him into the belief that strict performance will not be exacted. Vito v. Birkel, 209 Pa. 206, 58 A. 127. A provision in a contract providing that the rights of the purchaser shall be forfeited if he fails to make the payments at the times specified in the contract, even though time be made of the essence of the contract, may be waived by the subsequent conduct of the parties, and if waived specific performance will be decreed on an offer by the purchaser to comply with the contract by a tender of all amounts due. Cugham v. Larson [N. D.] 100 N. W. 1088. Where a contract for the sale of land provides that time shall be of the essence and also that default in payments shall work a forfeiture of the vendee's rights in the land, the fact that the contract also provides that overdue instalments of the purchase price shall bear interest at a greater rate after due than before is not inconsistent with the position that default should ipso facto work a forfeiture, but is intended to be operative only in case the vendor elects to waive the forfeiture. Maffet v. Oregon & C. R. Co. [Or.] 80 P. 489.

Waiver by vendee: Where a contract of which time is of the essence provides that the vendor shall deliver a deed and abstract showing a good title at a date specified, and on such date the purchaser states that he will take title as soon as the vendor has procured a decree quieting title, he will be deemed to have waived his right to a rescission and cannot pending the suit

party can insist thereon without first giving the other notice to perform and affording a reasonable time for so doing.[56] After the contract is complete, a change in the value of the property without the fault of either party will not excuse compliance with it.[57] Where a subsequent condition not contemplated by the parties arises, which imposes a heavy burden on the vendor for the benefit of the property, the vendee may be required to assume such burden as a condition to specific performance.[58]

§ 6. *Default and its effect.*[59]—Where a purchaser has lost his right to specific performance because of his laches in performing the terms of the contract by him to be performed, he is not entitled to damages for breach of the contract after a belated offer to perform on his part.[60] An express repudiation of the contract by one of the parties thereto before the time for performance is a breach thereof, giving the other a right of action, though before the time for performance has arrived he sells to another.[61] One who contracts to convey land knowing he has no title,[62] or having title refuses to convey to the purchaser,[63] or conveys to a third person, is liable to the purchaser for the purchase price paid by him and damages for breach of the contract.[64] In such case the measure of damages is the difference between the market value of the land at the time the vendor had agreed to

to quiet title maintain an action to rescind the contract and recover payments made. Bales v. Williamson [Iowa] 103 N. W. 150.

56. Where a vendor has once waived the strict performance of a contract by a vendee, he cannot again assume the original relations and insist on a forfeiture, unless on a subsequent default not within the purview of the waiver without giving the purchaser notice of his intention and a reasonable time in which to comply with the demand for payment. Maffet v. Oregon & C. R. Co. [Or.] 80 P. 489. See infra, "Performance of the contract," § 7.

57. King v. Raab, 123 Iowa, 632, 99 N. W. 306.

58. Streets in front of the premises paved at expense of abutting owners. King v. Raab, 123 Iowa, 632, 99 N. W. 306.

59. See 2 Curr. L. 1987.

60. See, also, post, § 7. "The same reasons which can be urged against specific performance can also be urged against the action for damages where the vendor has been able and willing to perform his part of the contract; and his failure to perform has been due to want of willingness to perform on the part of the vendee." Findley v. Koch [Iowa] 101 N. W. 766. Equity will not decree specific performance where after the making of the contract the purchaser has neglected to complete performance on his part and only acts when it appears that there is an increase in value, where the circumstances are such as to make it inequitable to do so. Id. See, also, title Specific Performance, 2 Curr. L. 1678.

61. Where one party to an executory contract for the sale of land, before the time appointed for performance, repudiates it by declaring that he will not perform, the other party may treat such declaration as a breach and at once bring an action for damages. Where it is stipulated that earnest money shall be forfeited as stipulated damages in case of the purchaser's failure to perform, he cannot recover the same, where he repudiates the contract before the time for performance, though at such time the vendee is unable to perform. Woodman v. Blue Grass Land Co. [Wis.] 103 N. W. 236.

62. One who contracts to convey land, to which, at the time he makes the contract, he knows he has no title, is liable to the vendee for the difference between the real value of the land and the contract price, at the time the contract was by its terms to be performed, where the former exceeds the latter, though the vendee knew the vendor had no title. Arentsen v. Moreland [Wis.] 99 N. W. 790.

63. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482. Where one who has contracted to sell land refuses to do so, not because he has not title but because he does not want the land used for the purpose for which the vendee intends to use it, the vendee is entitled to damages for the loss of his bargain as well as the money paid on account of the purchase price, nor can the vendor avoid the payment of such damage where it appears that his wife has an inchoate right of dower in the land where it does not appear the wife refused to join in the deed. Brown v. Honniss, 70 N. J. Law, 260, 58 A. 86.

64. Where subsequent to entering into a contract to convey, the vendor, without canceling the contract in the manner required by statute, sells and conveys to a third person, the purchaser can recover the part of the purchase price paid pursuant to the contract, together with damages for its breach. Wolke v. Chas. A. Watts & Co. [Iowa] 101 N. W. 76. When the vendor conveys the premises to a third person and thus puts it out of his power to carry out his contract to convey, the purchaser may maintain a suit for damages. Evidence held to show that a note given by the purchaser was received in payment, and an extension of time for payment made by one to whom the note was transferred by the vendor, held not such a breach of purchaser's contract as precludes suit for damages for failure to convey. Delaney v. Shipp [Ind. App.] 71 N. E. 973.

convey, and the contract price, together with a return of what he has paid on the purchase price.[65] Market value of land is the highest price obtainable in the open market for cash.[66] The vendor cannot recover damages where the vendee's refusal to perform is due to the vendor's default.[67] The purchaser on the vendor's failure to convey the title contracted for can recover the part of the purchase price paid.[68] The failure of the parties to perform in accordance with the terms of the contract, as affecting their right to a rescission of the contract, are treated elsewhere in this article.[69] Where time is of the essence of a contract, failure of the purchaser to make the payments at the time specified, in the absence of statute, operates as a forfeiture of his rights under the contract,[70] unless such forfeiture has been waived by the vendor.[71] According to the terms of the contract, such forfeiture may arise without action by the purchaser,[72] or it may be necessary for him to declare his intention to forfeit the rights of the vendee.[73] Conveyance to

65. In an action by a vendee to recover damages for breach of a contract for the sale of land, the measure of damages is the difference between the contract price and the market value of the land at the time of the breach, and it is immaterial whether the market value at that time is fixed by conditions which are permanent or merely temporary and due to speculative interests. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088. A vendor of lands who has title but refuses to convey in accordance with his contract is liable to the vendee for the damages sustained by the loss of his bargain which is the market value of the land, less any unpaid instalments of the purchase price. Neppach v. Oregon & C. R. Co. [Or.] 80 P. 482. The measure of damages for the total breach of a contract to convey land is the value of the property which the vendor agreed to convey, in case the purchase price has been paid. Where the price has not been paid and the claim for it is released or abandoned, the measure of damages is the difference between the value of the property and the unpaid purchase price. Watkins v. American Nat. Bank [C. C. A.] 134 F. 36.

66. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088.

67. Where a contract for the sale of land provided that the vendor should procure a loan on the land for the purchaser and also provided that in case the vendor could not get the loan because of a defect in the vendor's title, then the purchaser was to be relieved of all liability on account of the contract, the vendor cannot recover damages for breach of the contract where it appears the only person to whom the vendor made an application for a loan refused it because of a defect in the title, though the purchaser refused to execute the notes intended to be given for the loan. Jackson v. Martin [Tex. Civ. App.] 84 S. W. 603.

68. Where the purchaser contracted to convey subject to a mortgage imposing certain conditions, a conveyance subject to a mortgage imposing more onerous conditions justifies a refusal to accept the conveyance and the vendee can recover. Schiff v. Tamor, 93 N. Y. S. 853. An assignee of the vendee on breach of the vendor's agreement to convey can recover the deposit made and expenses of examining title. Forbes v. Reynard, 46 Misc. 154, 93 N. Y. S. 1097.

69. See section 8, "Rescission and Reformation."

70. Tingue v. Patch [Minn.] 101 N. W. 792. Where a contract provided for the sale of a certain number of acres for a specified sum provided the vendor should remove an incumbrance on a part of the land within a specified time, and a less sum in case he did not, and by its terms time was of the essence of the contract, the vendor by removing the incumbrance after the time specified is not entitled to the difference between the amount paid and what would have been paid had the incumbrance been removed within the specified time. Bracken v. Sobra Vista Oil Co., 143 Cal. 678, 77 P. 649.

71. One seeking to forfeit a contract for the sale of land, because of default in the performance of the conditions of the contract by the purchaser, must act promptly after the default occurs, and if he does not the default is deemed waived. Cughan v. Larson [N. D.] 100 N. W. 1088. Where a vendor waives a strict performance and permits the vendee after default to continue in possession of the property and make payments on the purchase price or permanently improve the property, he can effect a cancellation of the contract and forfeiture of the vendee's rights, only by giving notice and allowing a reasonable time within which to perform. The same rule applies where time is not of the essence of the contract. The vendor cannot arbitrarily cut off the rights of the vendee. Tingue v. Patch [Minn.] 101 N. W. 792. See, also, ante, "Waiver of performance and defects."

72. Where a contract for the sale of land provides that if the vendee fails to make the payments therein provided for at the time stipulated, he should forfeit as liquidated damages the payments already made and "the contract shall be rescinded," time is of the essence of the contract and the vendee's failure to make the payments at the time specified ipso facto rescinds the contract and works a forfeiture. Vito v. Birkel, 209 Pa. 206, 58 A. 127.

73. Where a contract for the sale of land, of which time is declared to be of the essence, provides that the defendant shall have the right to declare a forfeiture in case the payments contracted for are not made, the vendee loses no rights by reason of his failure to make the payments con-

another may be sufficient notice of such election.[74] In some jurisdictions the statutes provide that the vendor shall give the vendee notice and a reasonable time within which to perform, irrespective of the terms of the contract,[75] and in Pennsylvania though time is made of the essence as to deferred instalments, a forfeiture cannot be declared except on reasonable notice.[76] In such jurisdictions the statute must be complied with.[77] A vendor relying on a forfeiture must show that he was not himself in default.[78] Forfeitures are not regarded with favor by courts of equity, and slight circumstances are seized on to avoid them;[79] thus where the contract specifies the grounds for forfeiture, other grounds cannot be relied on therefor.[80] Where forfeiture is once waived and several payments accepted, it cannot be subsequently declared for the prior default.[81]

§ 7. *Performance of the contract.*[82] *Time of performance.*[83]—In the absence of a stipulation to the contrary, the delivery of the deed and payment of the purchase price are to be made concurrently.[84] Where a contract is silent as to

tracted for, provided the vendor does not declare a forfeiture, and hence until then the vendee can enforce specific performance, and the burden of proving the declaration of forfeiture is on defendant. Thompson v. Colby [Iowa] 103 N. W. 117. Where a contract for the sale of land provides that if the purchaser shall default in the performance of the terms of the contract by him to be kept and performed, the vendor shall have the right to declare the contract void, the vendor cannot recover possession of the premises without first giving the purchaser notice of a forfeiture of the contract. Miner v. Dickey [Mich.] 12 Det. Leg. N. 254, 103 N. W. 855.

74. Where, after the lapse of a year and a half after the time a vendee by the terms of a contract to purchase land had agreed to pay for it, the vendor conveys to another by deed which is recorded, the vendee is deemed to have constructive notice of the cancellation of the contract by the vendor. If, after notice of forfeiture, he does nothing towards performance, he will be deemed to have acquiesced in the cancellation of the contract. Moran & Co. v. Palmer, 36 Wash. 684, 79 P. 476. A party to a contract of sale for cash upon delivery is excused from performance if the other party at the time fixed for performance refuses to perform, but requests an extension of time. Notice to the defaulting party and sale to another constitutes a rescission by the vendor. Mason v. Strickland [Neb.] 103 N. W. 458.

75. The holder of an option has no such interest in the land described in the option as requires the giving of a notice in conformity with Laws 1897, c. 223, to terminate his rights. Womack v. Coleman, 92 Minn. 328, 100 N. W. 9.

76. Kuhn v. Skelley, 25 Pa. Super. Ct. 185.

77. Proceedings to effect a forfeiture of a contract to convey land and money paid by a purchaser on account of such a contract must be strictly in accordance with the statute authorizing it, and where a notice of forfeiture purports to recite the description of the land, it must do so correctly; if it do not, the notice is of no effect and the purchaser can recover the money paid where subsequent to the ineffectual notice the vendor has sold and conveyed the land intended to be conveyed to another. Wolke v. Chas. A. Watts & Co. [Iowa] 101 N. W. 76.

78. Where a contract declares time to be of the essence and further provides that the rights of the vendee shall be forfeited in case he fails to make the payments at the time stipulated in the contract, the vendor cannot maintain an action to declare a forfeiture without showing that he has tendered a deed in accordance with the contract, where by the terms of the contract payment and the delivery of the deed are to be concurrent. Stein v. Waddell [Wash.] 80 P. 184.

79. Courts do not regard with favor forfeiture clauses in contracts, and where a party offers to do all that in equity he should do and promptly invokes the aid of a court of equity and offers to abide its judgment, the other cannot insist that he has forfeited his rights under the contract. Clinton v. Shugart [Iowa] 101 N. W. 785. The vendor's remedy by rescission and forfeiture of payments made is a harsh one and slight circumstances are seized upon to defeat such remedy, and any conduct on the part of the vendor recognizing the continuance of the contract and affirming it will defeat his recovery of possession of the land. Delay after default in declaring a forfeiture and seeking recovery will also defeat the remedy. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504.

80. Where a contract specifies how a vendor may terminate it and on what grounds, he cannot rely on grounds not specified for its forfeiture. Forfeiture of contracts by act of one of the parties is deemed a harsh proceeding and will not be upheld unless within the terms of the agreement between the parties. In declaring forfeitures, so far as the grounds therefor and procedure are concerned, the terms of the contract govern and must be followed. Cugham v. Larson [N. D.] 100 N. W. 1088.

81. Kuhn v. Skelley, 25 Pa. Super. Ct. 185.

82. See 2 Curr. L. 1987. See, also, ante, § 6.

83. See 2 Curr. L. 1987.

84. Webb v. Hancher [Iowa] 102 N. W. 1127. Where a contract for the sale of land merely provides that the purchaser shall pay a certain sum of money and that the vendor shall execute a conveyance, and

the time of performance, the general rule is that it must be performed within a reasonable time.[85] If time is not of the essence of the contract, each party has a reasonable time after the time fixed by the contract in which to comply with its provisions.[86] Performance within a reasonable time after the time limited in the contract is effectual.[87] Where there has been a failure to comply with the contract within the time fixed by its terms, the party not in default may by notice fix a reasonable time within which the other shall perform, and the time so fixed becomes essential, and if he fails to perform within the time so fixed, equity will not aid him in enforcing the contract, but will leave him to his legal remedies.[88] If the vendee is in possession the vendor cannot maintain ejectment without declaring a forfeiture or effecting a rescission.[89] In equity the time of payment is not of the essence of a contract for the sale of real estate unless made so by express agreement of the parties, by the nature of the contract itself or by the circumstances under which the contract was executed.[90] The intention of the

there is no provision that one is to be done first, the covenants are mutual and dependent, and to be performed simultaneously. It is not necessary on the part of the purchaser to make a strict tender; it is sufficient that when the time comes he is able and prepared to pay, and demands a deed. Cole v. Killam, 187 Mass. 213, 72 N. E. 947.

85. Tingue v. Patch [Minn.] 101 N. W. 792. See, also, Cohen v. Parnass, 93 N. Y. S. 649. Where a contract provides that the vendor shall furnish an abstract showing "good and merchantable title" to the land, the vendor must furnish such an abstract within a reasonable time, and the furnishing thereof is a condition precedent to the vendee's obligation to perform. Spooner v. Cross [Iowa] 102 N. W. 1118. Where a contract for the sale of land provides that the vendor shall furnish an abstract showing good title, but does not prescribe the time when the same shall be furnished, it must be furnished in reasonable time for examination before the contract is to be performed. If not so furnished, it is ground for rescission of the contract. Martin v. Roberts [Iowa] 102 N. W. 1126.

86. Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352; Merk v. Bowery Min. Co. [Mont.] 78 P. 519; Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. Where time is not of the essence of a contract of sale, equity will prevent a forfeiture of money paid on account of the purchase price, though the balance is not paid within the time prescribed by the contract, and will decree specific performance, and provided that the land be sold in satisfaction of the vendor's lien in case the balance of the purchase price be not paid in accordance with the decree. Gnamer v. Draper [Colo.] 79 P. 1040. The acceptance of an option to purchase within the time limited by the option contract constitutes a contract to sell on the one hand and to purchase on the other, and the purchaser has a reasonable time thereafter within which to complete the deal, examine the title and make payment. His failure to pay on tender of a deed does not authorize a rescission of the contract, where he states that he desires to complete the purchase. He is bound to pay interest on the purchase price from such time. Pennsylvania Min. Co. v. Smith, 210 Pa. 49, 59 A. 316. One who has contracted to convey land and who is ready and willing to convey is entitled to a reasonable time in which to procure his title papers and examine the figures of an invoice of goods he is to take in exchange for the land, after a demand has been made for the deed, and his failure to deliver the deed under such circumstances when demanded is not ground for a rescission. Gibson v. Brown, 214 Ill. 330, 73 N. E. 578. See, also, infra, "Rescission and Reformation."

87. Where a vendor deposited a deed with a bank with instructions that it be delivered on payment of a certain sum in accordance with a contract, of which time is not of the essence, a payment to the bank and acceptance of the deed by the purchaser after the time he had agreed to make the payment, the vendor having made no effort to withdraw, the deed passes title. Wright-Blodgett Co. v. Astoria Co. [Or.] 77 P. 599.

88. Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352; Cosby v. Honaker [W. Va.] 50 S. E. 610.

89. Where time is not made of the essence of a contract for the sale of land, the vendor cannot maintain ejectment against a vendee in possession who has failed to pay the balance of the purchase price according to his agreement, until he has declared a forfeiture or effected a cancellation and rescission by a return of the money received, less a fair rental, also a return or offer to return securities if any received for payment of the balance of the purchase price. Brixen v. Jorgensen [Utah] 78 P. 674. A contract to convey land vests the equitable title thereto in the vendee in possession, and the vendor cannot maintain ejectment, though the purchase price has not been paid, where time is not of the essence of the contract and it contains no stipulation for forfeiture in case of nonpayment. Campbell v. Kansas Town Co., 69 Kan. 314, 76 P. 839.

90. Wright-Blodgett Co. v. Astoria Co. [Or.] 77 P. 599. Generally time is not of the essence of contracts for the sale of lands, the reason being that such a construction would result in enforcing a penalty. By express stipulation or reasonable construction, time may be made of the essence, though even if such express stipulation is inserted as a penalty, it will be disregarded by courts of equity. In all cases it must

parties to make time of the essence must affirmatively appear from the contract,[91] though the absence of an express stipulation making time of the essence is not conclusive, and oral evidence is admissible on that issue.[92] Though time is made of the essence, the mere fact that payments are not made by the vendee at the time agreed on does not without action on the part of the vendor work a forfeiture. If he remains passive after default until payment is tendered, he is bound to accept it and to perform his part of the contract.[93] Time is of the essence of an option to purchase, though not so expressly stipulated.[94]

Tender of performance.[95]—Unless there has been a repudiation of the contract,[96] neither party can put the other in default without tendering unconditional performance.[97] A vendee in possession, seeking to avoid payment of interest on

clearly appear that it was the intent of the parties that time should be of the essence of the contract. Merely prescribing a time for performance does not make time of the essence. Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352. It is well settled in this state that time is not of the essence of an agreement to convey lands, unless the parties have expressly so stipulated, or it follows by necessary implication from the nature of the transaction. Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030. In a contract of sale, prima facie time of payment is not of the essence of the contract. Weaver v. Griffith, 210 Pa. 13, 59 A. 315.

91. Cosby v. Honaker [W. Va.] 50 S. E. 610. The general rule applied in courts of equity is that time is not ordinarily of the essence of a contract for the sale of real property, and it will not be so regarded unless it affirmatively appears that the parties so intended. Such intent may be indicated by express stipulation to that effect, or it may be implied from the character of the contract, or the avowed purposes of the parties with reference thereto. Hosmer v. Wyoming Ry. & Iron Co. [C. C. A.] 129 F. 883.

Contract of which time is the essence construed as to time of payment: A contract provided that the first payment should be made on the day of the execution of the contract, the second ten days thereafter, and the third "within one year thereafter." Held, that the third payment was to be made one year after the date of the contract and not 1 year and ten days. Flanagan Estate v. Great Cent. Land Co. [Or.] 77 P. 485.

92. Gumaer v. Draper [Colo.] 79 P. 1040. Time will be regarded as of the essence of a contract where such is clearly the intention of the parties, though there is no express stipulation to that effect. Standiford v. Thompson [C. C. A.] 135 F. 991.

93. Zeimantz v. Blake [Wash.] 80 P. 822. Where a contract for the sale of land provides that "in case the purchaser does not make payment as above specified at the time herein stated then this agreement is to be null and void and all parties are to be released from all liabilities herein and all money previously paid forfeited," it will be presumed that the forfeiture clause is for the benefit of the vendor and enforceable at his election, and if he fail to so elect, the contract is enforceable against him and the obligation of the purchaser to perform likewise continues. Failure of purchaser to pay at the stipulated time did not ipso facto terminate the contract. Weaver v. Griffith, 210 Pa. 13, 59 A. 315.

94. Where the contract is merely an option, time is of its essence and the purchaser wishing to avail himself of the option must act promptly within the time specified or his right is lost. Merk v. Bowery Min. Co. [Mont.] 78 P. 519. A contract to convey land and a provision obligating the purchaser to pay therefor, followed by a proviso that if the purchaser does not make the payment at the time stipulated he is to be released from all liability, is a mere option to purchase, and the failure of the purchaser to pay within the specified time terminates all his rights under the contract. Verstine v. Yeaney, 210 Pa. 109, 59 A. 689. An agreement by the owner of land to sell and convey the same on notice from the other party to the contract, and also providing that a failure to make the first payment within a specified time should render the agreement void, is a mere option to purchase, and time is of the essence thereof, though not specially so stipulated; and failure to accept within the specified time for making the payment, terminates the contract. Swank v. Fretts, 209 Pa. 625, 59 A. 264. An option to purchase at the expiration of a lease may be exercised at any time during the day on which the term expired, but could not be accepted at any time thereafter so as to constitute a contract of sale. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758.

95. See 2 Curr. L. 1989.

96. Where a purchaser demands a deed and informs the vendor that the money will be paid when the deed is delivered, and the vendor repudiates the contract, the purchaser need not make a formal tender as a condition precedent to an action for damages. Miller v. Smith [Mich.] 12 Det. Leg. N. 249, 103 N. W. 872. A purchaser, unless the vendor has repudiated the contract, is not entitled to a decree for specific performance until after he has made a tender of the purchase price and demanded a deed. But a suit may be maintained without first making a tender, where the vendor has denied his obligation to convey and repudiated the contract. Kreutzer v. Lynch [Wis.] 100 N. W. 887. See, also, title Specific Performance, 2 Curr. L. 1678. If the person to whom a conveyance is to be made refuses to accept it, the vendor need not keep the tender alive, but may sue for damages at once. Cohen v. Parnass, 93 N. Y. S. 649.

97. Webb v. Hancher [Iowa] 102 N. W. 1127. The vendor or personal representative

the purchase price for the time subsequent to the time when the conveyance should have been made, must show a full and complete tender.[98] The tender of performance must be made at the place fixed by the contract.[99] The vendee is not bound to accept a deed from any person except the vendor, his heirs or personal representatives.[1]

§ 8. *Rescission and reformation. Right to rescission.*[2]—An executory contract that contains no stipulations for its rescission and that has not been induced by fraud may, in general, be rescinded by one party only when the other expressly refuses to perform, or has rendered himself incapable of performing, or has otherwise evidenced his abandonment of, the contract. Mere delay in the performance of a contract, where time is not of its essence, does not of itself entitle the other party to rescind.[3] Where a vendor is unable,[4] or refuses to convey the land at the time agreed on, the vendee may treat the contract as rescinded and sue for the part of the purchase price already paid, without first tendering the balance of the purchase price.[5] Where time is of the essence, one seeking to rescind on the ground that the other party has failed to perform within the specified

of a deceased vendor cannot recover the purchase price under a contract to convey until he has tendered a conveyance in accordance with the contract. Wollenberg v. Rose [Or.] 78 P. 751.

98. Wood v. Howland [Iowa] 101 N. W. 756.

99. Schnurer v. Birbeck Sav. & L. Co., 91 N. Y. S. 742. Where the owner of land situate in a state other than that of his residence by letter offers to sell the same to a person living in the state where the land is situate, and the latter accepts the same by telegraphing to the owner his acceptance of his offer, the purchaser is bound to tender the purchase price at the place of the vendor's residence. The vendor is not bound to deliver the deed and accept payment at a place other than that agreed in the contract, which under circumstances above detailed is presumed to be place of vendor's residence. Scott v. Grant [Tex. Civ. App.] 84 S. W. 265.

1. A purchaser of land from one who has died subsequent to the contract to sell is not under obligation to take a deed from a grantee of the heirs of the decedent, though such grantee's deed would convey a good title. The vendee is not bound to accept title from any one except the vendor, his heirs or his personal representatives, acting in their representative capacity and duly authorized. Wollenberg v. Rose [Or.] 78 P. 751.

2. See 2 Curr. L. 1990.

3. Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030. Where it is sought to set aside the contract on the ground of fraud, the question of laches should not be submitted where it appears that the period of limitations has not elapsed since the transaction. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

4. Where a vendor is unable to convey the title and give possession contracted for at the time when by the terms of the contract he has agreed to do so, the vendee can rescind and recover the purchase money already paid, and in such case he need not prove a tender on his part. Martin v. Roberts [Iowa] 102 N. W. 1126. Where the vendor of land has no title to it at the time fixed by the contract for conveyance by him, the purchaser may rescind, and it is not necessary that he should make a tender of the purchase price. A demand for performance is sufficient. The vendor is not entitled to a reasonable time within which to perfect his title. Webb v. Hancher [Iowa] 102 N. W. 1127. Where a contract for the sale of land provided that the vendor should have a reasonable time within which to perfect any defects in the title objected to by the purchaser, the vendor is not entitled to an extension of the time limited by the contract for performance, and which is of the essence of the contract, for the purpose of procuring title where it appears they had none at all; and in such case the purchaser is entitled to a rescission of the contract. Primm v. Wise & Stein [Iowa] 102 N. W. 427. Where vendor failed for 8 months to furnish abstract which he had agreed to furnish within a reasonable time and at time of commencement of action had no title, the vendee can rescind and recover money paid. Gray v. Central Minnesota Immigration Co. [Iowa] 103 N. W. 792.

5. "If the vendor had in no way repudiated the contract, the vendee would be obliged to tender the entire amount of the purchase money before he would be entitled to disaffirm and sue for the amount already paid on account of the purchase price. But on the other hand, the refusal of the vendor to perform his part of the contract would discharge the vendee from further responsibility and entitle him to claim at once repayment of the part of the purchase price paid," without a tender of the balance due under the contract. Durham v. Wick, 210 Pa. 128, 59 A. 824. Where a vendor in a parol contract to convey land refuses to make a conveyance to the trustee in bankruptcy of the purchaser, the trustee may treat such refusal as a repudiation of the contract by the vendor, and sue for the part of the purchase price already paid by the bankrupt, and he need not make a tender of the balance of the purchase price before disaffirming and suing. Id.

time must show that on the date fixed for performance he was ready, able, and willing to perform, and made a substantial tender of performance and that defendants refused or were unable on the date to substantially perform the contract on their part.[6] Inadequacy of price alone, or the payment by the purchaser of a greater price than the land is worth, will not authorize a rescission of the contract.[7] A purchaser of land has a right to rely on the representations of the vendor that he has good title to the land; he need not search the records or otherwise exercise diligence in investigating the facts,[8] and on discovery of the falsity of the representations, may rescind;[9] and it is immaterial whether the vendor knew or did not know that his representations were false.[10] So, too, the purchaser may rescind the contract for false representations as to material facts affecting the value of the land, relied on by him,[11] nor does the honest belief entertained by the

6. Primm v. Wise & Stern [Iowa] 102 N. W. 427. Where time is of the essence of a contract, the vendor, on the purchaser's failure to perform, may rescind the contract. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402. Where a contract for the sale of land provided that the vendor should furnish the vendee with an abstract showing good title, by a certain time, the tender of an abstract showing an imperfect title is not a compliance with the contract, though as a matter of fact the vendor has a good title, and in such case the purchaser can rescind the contract and recover payments already made. Brown v. Widen [Iowa] 103 N. W. 158. One asserting that he has rescinded a contract to sell land because of the purchaser's failure to pay the contract price at the time agreed on must show that he tendered a deed and demanded payment and that payment was refused. Cranwell v. Clinton Realty Co. [N. J. Eq.] 58 A. 1030.

7. Sohan v. Gibson, 26 Ky. L. R. 279, 80 S. W. 1173.

8. Morris v. Brown [Tex. Civ. App.] 85 S. W. 1015.

9. Where a vendor falsely represents that he has a good title, the vendee may rely on such representation, and if he has paid a part of the purchase price, may, on discovery of the falsity of the representation, rescind the contract and recover what he has paid. The fact that the vendor perfected the title several years afterwards does not preclude recovery by the vendee of the money paid. Muller v. Palmer, 144 Cal. 305, 77 P. 954.

10. Where a vendor knows or may be reasonably supposed to know material facts concerning the title which are unknown to the vendee and which cannot otherwise be ascertained by him at the time and place of sale, and the vendee informs the vendor that he must rely solely on the truth of his statements in regard to the title, and the vendor makes such statements, relative thereto which, if true, would constitute a good title, and the vendee, relying upon the truth of such statements, buys and the statements afterwards prove to be untrue and the title bad, the vendee can to the extent of the failure of title, surrender the property and defend against an action for the purchase price, and it is immaterial whether the vendor knew such representations to be false or made them without knowing whether they were true or not, and this, too, where the vendor is an independent executor. Altgelt v. Mernitz [Tex. Civ. App.] 83 S. W. 891.

11. Stearns v. Kennedy [Minn.] 103 N. W. 212; Kellenberger v. Meisner, 103 App. Div. 231, 93 N. Y. S. 44.

Pointing out wrong land: Where the agent of the owner of land points out to a prospective purchaser thereof certain land as the land to be sold, and the sale is consummated and a contract describing land other than that pointed out, and which the purchaser intended to buy, is entered into, the purchaser on discovery of the error can rescind the contract and recover the amount paid, though the vendor did not authorize the agent to point out any other land and did not know of his having done so at the time the contract was entered into. In such case the vendor must return all that was paid by the purchaser, though a part of it was retained by the agent as compensation for his services. Schmitz v. Peterson [La.] 36 So. 915.

Quantity of land: Representations by a vendor as to the quantity of land in a tract which he offers for sale are not mere matters of opinion, but are material, and the vendee may rely upon them, unless by the exercise of ordinary prudence he may readily ascertain their falsity. The vendor, if his representations are false, cannot avoid their consequences merely because the purchaser might have learned the truth by having the land surveyed or by consulting official records and plats. Stearns v. Kennedy [Minn.] 103 N. W. 212.

Reliance on false representation: In an action to rescind a contract for the sale of real estate, an allegation that complainant "relied" on certain representations made by respondent, which representations are alleged to have been false, is equivalent to an allegation that complainant believed such representations to be true. Spencer v. Hersam [Mont.] 77 P. 418. The vendor, in a contract for the sale of land, must be able to convey to the purchaser an estate or interest substantially corresponding with that bargained for, as well in regard to the tenure and the situation as the conditions and natural advantages of the property. Any misdescription of the estate or interest or of the nature and extent of the property in a material and substantial point avoids the contract and releases the purchaser if he elects to rescind. Slingluff v. Dugan, 98 Md. 518, 56 A. 837.

vendor at the time of making such representations that they were true preclude the exercise of such right.[12] If, however, the party to whom the representations were made was in as good a position to judge of the truth of the representations as was the person making them, he cannot rescind,[13] unless he was prevented from investigating such representations by the fraudulent artifices of the other party.[14] He may, if he so elects, stand on his contract and sue for damages for the deceit,[15] unless he has waived the damages or estopped himself to claim them.[16] An election by a purchaser to stand on the contract, in order to be irrevocable must have been made with knowledge of his legal rights or at least after a reasonable opportunity to learn of them.[17] If he brings an action for damages, he thereby affirms the contract.[18] False and fraudulent representations by a purchaser to the effect that he would improve the premises in a way that would be beneficial to adjoining land owned by the vendor, if made without any intention of carrying them out, is a ground for rescission,[19] but if made with an intention of carrying into effect, the vendor can only recover damages for breach of the contract to improve.[20] Fraud in procuring the execution of the contract is ground for its cancellation.[21]

A contract which does not express the intention of the parties will be reformed.[22] An erroneous description of the premises may be reformed by an executed parol agreement of the parties.[23]

12. Du Bois v. Nugent [N. J. Eq.] 60 A. 339; Annis v. Ferguson [Ky.] 84 S. W. 553.

13. Representations by a purchaser of land as to its value and intrinsic worth, though false and made for the purpose of procuring it at a favorable price, is not a ground for rescission, where the vendors were in a position to know the value of the land, and whether such representations were true, to the same extent as was the purchaser. Storthz v. Arnold [Ark.] 84 S. W. 1036. Mere expressions of opinion made by a vendor of land as to its quality and value, though false, are not ground for a rescission where the purchaser inspected the land before purchasing and had an opportunity to judge as to the quality and value. Sohan v. Gibson, 26 Ky. L. R. 279, 80 S. W. 1173.

14. Where one is overreached in the sale of land by means of artifices employed to prevent an investigation as to value or quantity, and by this means is compelled to pay for or part with property upon a valuation fixed by the party practicing such artifice, the contract may be rescinded for fraud. Garr v. Alden [Mich.] 102 N. W. 950.

15. Stearns v. Kennedy [Minn.] 103 N. W. 212. Where one has been induced to enter into a contract for the purchase of land by false and fraudulent representations of the vendor as to some specific material fact affecting the value of the property, he may, on discovery of the fraud, rescind the contract, or he may stand by his purchase and sue for damages, or if the purchase money is not paid, he may reduce it by the amount of the damages to which he is entitled. Lanyon v. Chesney [Mo.] 85 S. W. 568.

16. A purchaser of land who has been misled as to its true location by the fraudulent representations of the vendor, can retain the land conveyed and recover damages for the fraud, unless he has waived the damages or estopped himself to claim them. Guinn v. Ames [Tex. Civ. App.] 83 S. W. 232. If the vendee of property discovers that he has been defrauded before he has paid the purchase price and with knowledge accepts a conveyance, he cannot refuse to pay and if he has paid, he cannot maintain an action for deceit. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964.

17. A demand for possession from a tenant of the vendor before discovery of the falsity of the vendor's representations is not such an election. Annis v. Ferguson [Ky.] 84 S. W. 553.

18. Stearns v. Kennedy [Minn.] 103 N. W. 212.

19. Troxler v. New Era Bldg. Co. [N. C.] 49 S. E. 58.

20. Troxler v. New Era Bldg. Co. [N. C.] 49 S. E. 58.

21. While as a matter of law, a party to a written contract cannot say that he is not bound by its terms as written, because he neglected to read it and therefore was not aware of its contents at the time of its execution, yet on the other hand, if he is misled as to the contents by the act of the other party in reading it to him otherwise than written, and with knowledge that the reading is relied on for information as to its contents, then a party thus misled may have relief on the ground of fraud, and equity will cancel the contract. Heitsman v. Windahl [Iowa] 100 N. W. 1118.

22. Where, in a contract of sale of land, the land is erroneously described so as to include a larger area than either party intended, the vendor is not precluded from setting up the mistake by reason of the fact that he could have discovered the fact had he availed himself of means of knowledge within his power, since such neglect is not a neglect of a legal duty within the purview of Rev. Code N. D. § 3853, and in such case equity will either rescind the contract or reform it so as to express the intention of the parties. Benesh v. Travelers' Ins. Co.

An executory contract for the sale of land, whether written or oral, can be rescinded or waived, in equity, by word of mouth, if possession be given up or the writing be destroyed, but not without something done by way of rescission or waiver.[24] In an action for rescission, as a general rule, it is incumbent on the complainant to offer to restore what he may have received in performance of the contract.[25]

Rights of vendor after rescission.[26]—Where a vendor rescinds a contract because of the vendee's failure to make payments, he cannot recover possession until he accounts for purchase money received and improvements made by the purchaser in good faith,[27] especially where he has been guilty of fraud in the transaction,[28] unless the parties have contracted otherwise.[29]

Rights of vendee after rescission.[30]—Where a vendor fails to convey in accordance with his contract, the vendee on surrendering possession is entitled to a return of the purchase price paid by him, with interest, less the reasonable rental of the land while he has been in possession.[31] In some cases he is entitled

[N. D.] 103 N. W. 405. A contract for the sale of timber will be enforced where its terms are clear and unambiguous unless the person claiming it does not represent the true agreement between the parties seeking its reformation. E. Swindell & Co. v. Saddler [Ga.] 49 S. E. 753. Evidence held to show a mutual mistake of fact authorizing reformation of contract as to description of land. Albro v. Gowland, 90 N. Y. S. 796.

23. An erroneous description in a written contract of the land sought to be sold may be reformed by an executed parol agreement of the parties, as where the purchaser accepts a deed for the land intended to be described and pays the purchase price after notice that the vendor claims that the land described in the deed is all the land intended to be described in the contract. Benesh v. Travelers' Ins. Co. [N. D.] 103 N. W. 405.

24. Marsh v. Despard [W. Va.] 49 S. E. 24.

25. In actions to rescind contracts for the sale of land for nonpayment of the purchase price, it is as a general rule incumbent on the vendor to tender a return of what has been paid as a condition precedent to the maintenance of a suit, but this rule is not of inexorable operation, and where it appears that the rental value of the land of which vendee had possession exceeds the amount paid and that on a final adjustment there will be nothing due the vendee, the tender is not a condition precedent. Succession of Delaneuville v. Duhe [La.] 38 So. 20.

26. See 2 Curr. L. 1993.

27. When a vendor has rescinded a contract for the sale of land, because of the failure of the vendee to make payments at the times agreed on, time being of the essence of the contract, he cannot recover possession until he accounts for purchase money received and improvements made by the vendee; in such accounting the vendor is entitled to credit for damages sustained by reason of the breach of the contract, including the rental value of the premises during the time the vendee has been in possession. If the vendor does not elect to pay for the improvements, the land should be sold. Lytle v. Scottish American Mortg. Co. [Ga.] 50 S. E. 402.

28. Where a vendor has contracted to convey a title satisfactory to the vendee's attorney, and is unable to satisfy the vendee, and the vendee has gone into possession, the vendor is entitled to a rescission and possession of the premises without profits on returning to the vendee the money paid without interest and allowing the vendee the fair value of improvements made in good faith before he had notice of the defect in vendor's title, where he is unable to perfect the title, and has been guilty of fraud or injustice. Moling v. Mahon [Tex. Civ. App.] 86 S. W. 956.

29. It is competent for the parties to stipulate for liquidated damages or what the purchaser shall pay as rent during the time he has had possession, in case of rescission, provided the damages are not so excessive as to come within the prohibition against penalties and forfeitures. Parol evidence is admissible to show that the "rent" stipulated for is excessive and hence a penalty. Lytle v. Scottish-American Mortg. Co. [Ga.] 50 S. E. 402.

30. See 2 Curr. L. 1993.

31. See, also, Shemwell v. Carper's Adm'r [Ky.] 87 S. W. 771. When a vendor without right so to do rescinds a contract for the sale of land and the vendee consents thereto, the latter, on surrendering possession, is entitled to a return of the purchase money paid by him. An abandonment by one party of performance may be treated as a proposition to rescind by the other; and the rights of the parties are then the same as where there has been a mutual rescission. Moffat v. Oregon & C. R. Co. [Or.] 80 P. 489. Where the vendee under an executory contract for the purchase of real estate takes possession and the title of the vendor fails, or he is unable to make conveyance as stipulated, the remedy of the purchaser is either to rescind the contract and restore or offer to restore possession, in which case he may recover the purchase money and interest, or retain possession under the contract and pay the purchase price, accepting such title as the vendor may be able to give. He cannot retain both the land and the purchase money until a perfect title shall be offered to him. Livesley v. Muckle [Or.] 80 P. 901. When a contract provides that in certain contingen-

to compensation for improvements made by him on the land,[32] and, under some circumstances, to a lien on the land agreed to be conveyed for the value of improvements made by him.[33] He is not, however, entitled to a lien for the money paid in part performance of the contract.[34] In Minnesota the vendee cannot recover what he has paid under an oral contract repudiated by him.[35] In a suit by the purchaser to recover the part of the purchase price paid, he must show that he has surrendered his equitable rights in the land acquired by the contract.[36] If he fails to prove the fraud alleged as the ground of rescission, he cannot recover the purchase money on the ground that the contract was made under a mutual mistake of fact, and base his rescission thereon.[37] If the vendor fails to convey, the vendee may maintain a suit for money had and received.[38] A vendor who has refused tender of the purchase money cannot recover interest after a decree for specific performance except from the date of tender of a deed in compliance with the decree.[39] Where the contract is set aside for fraud, interest on sums paid may be recovered, though not prayed for.[40]

§ 9. *Adjustment of rights after conveyance or breach of contract.*[41]—One resisting an action to recover the purchase price of land on the ground that vendor had no title must show eviction or title in a third person.[42] After conveyance,

cies the part of the purchase price paid by the vendee shall be returned to him, he is not precluded from recovering the same on failure of the vendor to convey, though such failure to convey is not one of the contingencies provided for in the contract. Seibel v. Purchase, 134 F. 484. Where a purchaser of land goes into possession pursuant to the contract and refuses to pay the balance of the purchase price on the ground that the vendor cannot convey a good title, he can resist an action for the balance of the purchase price and recover the money already paid if his contention is well founded, provided he offers to surrender possession of the premises and rescind the contract. Lanyon v. Chesney [Mo.] 85 S. W. 568.

32. Vendee entitled to compensation for improvements: Having rescinded he may recover the payments made, with interest, together with the value of improvements made, less such sum as his possession of the premises is reasonably worth, and if necessary for his protection, the court will also provide for the retention until the plaintiff is paid or secured to his satisfaction for the items for which he has recovered. Dunn v. Mills [Kan.] 79 P. 146.

33. Where the owner of a tract agrees to convey a part thereof to another in consideration of his making certain improvements thereon, such other is entitled to lien on the part of the land agreed to be conveyed for the value of the improvements, the promisor refusing to convey. The fact that the land is the promisor's homestead will not defeat the lien. Robards v. Robards [Ky.] 85 S. W. 718.

34. Klim v. Sachs, 102 App. Div. 44, 92 N. Y. S. 107.

35. In Minnesota, where a vendor, under an agreement for the sale of lands which is oral and hence within the statute of frauds, is nevertheless willing and offers to perform, but the vendee refuses to perform and repudiates the contract, the latter is not entitled to recover an instalment of purchase money previously paid. York v. Washburn [C. C. A.] 129 F. 564.

36. One suing for a return of money paid pursuant to a contract whereby the defendant had agreed to convey land to plaintiff, on the theory that he had rescinded the contract because of the delay of the defendant in tendering the deed, must show that he has returned or offered to surrender his contract and equitable rights in the land acquired by the contract, or that defendant had refused to accept a surrender of the contract. Phelps v. Mineral Springs Heights Co. [Wis.] 101 N. W. 364.

37. Connell v. El Paso Gold Min. & Mill. Co. [Colo.] 78 P. 677.

38. When the vendee in an executory contract for purchase of land has paid a part of the purchase price and the vendor fails to convey in accordance with the contract, the vendee may disaffirm the contract and bring an action for money had and received. The time fixed by the contract for performance is deemed of the essence, so that, if the vendor is unable to convey at that time, the vendee may rescind and sue for money paid. Seibel v. Purchase, 134 F. 484. The vendee of an executory contract may recover, as for money had and received, the value of a stock of merchandise turned over to the vendor to apply on the purchase price of land, upon a failure on the part of the vendor to comply with his agreement to convey and rescission of the contract by the purchaser. Proctor v. C. E. Stevens Land Co. [Minn.] 102 N. W. 395.

39. Hughes v. Antill, 23 Pa. Super. Ct. 290.

40. Slaughter v. Coke County [Tex. Civ. App.] 79 S. W. 863.

41. See 2 Curr. L. 1992.

42. Where a purchaser of land, in a suit on a note given for a part of the purchase price and to foreclose a vendor's lien seeks to have the amount of the plaintiff's recovery reduced by the amount of the value of a part of the land purchased as to which he claims the vendor had no title, he is bound to show a legal eviction therefrom or a superior title in a third person. The mere enclosing of a part of the land by a fence by a

the deed is the evidence of the final contract between the parties.[43] The vendee can, however, maintain an action for damages caused by the fraud or false representations of the vendor.[44] On breach of contract, action cannot be maintained against a disclosed agent to recover payments which he has turned over to his principal, of which fact the plaintiff has notice.[45]

§ 10. *Enforcement generally.*[46]—Upon breach by the vendee of an executory contract for the sale of land, the vendor's remedy is in equity for specific performance or at law for damages; he cannot maintain an action at law for the recovery of the contract price.[47] His cause of action for damages is not affected by the sale of the land to another after the time when by the contract he was to convey.[48] If the contract is oral, no action for damages will lie unless there has been such part performance as takes it out of the statute of frauds,[49] though either party may sue for breach of a contract signed only by the vendor, when

third person is not such an eviction. Wilson v. Moore [Tex. Civ. App.] 85 S. W. 25.

43. Where the purchaser of land, under a contract which obligates him to pay a certain price per acre for a designated tract, takes a deed reciting that the land conveyed thereby contains a certain number of acres, and pays the grantor therefor at the contract price, he cannot on subsequently ascertaining that the tract conveyed does not contain the recited number of acres, recover the excess paid, since the deed will be presumed to contain the final contract of the parties and measure the grantor's liability, there being no claim that the deed was procured by fraud or that anything was omitted therefrom by fraud, mistake or accident, and the recital as to the number of acres a mere representation. Corrough v. Hamill [Mo. App.] 84 S. W. 96.

44. **Measure of damages:** In an action for deceit arising from the sale of land, the measure of damages is the difference between the actual value of the land and what it would have been worth if it were as represented, together with legal interest on such difference. In determining the value of the land the price agreed on is not to be taken as its value. Love v. McElroy, 106 Ill. App. 294. Where a vendor has contracted to convey free of incumbrances and the land is subject to a right of occupancy by another, the vendee can recover the rental value of the premises for the period such other is entitled to possession, less whatever such occupant is bound to pay therefor. Toch v. Horowitz, 87 N. Y. S. 455. Where a vendor points out certain lands as being those which it is intended to sell to another, and the deed calls for other lots, the vendee can recover damages for the false representations, though the vendor acted in good faith and thought he was pointing out the land to be conveyed. The vendee can recover for the value of improvements placed on the land pointed out before he had notice of the mistake. Nor is the vendee precluded from recovering by reason of the fact that he might have discovered the error by investigation. Lawson v. Vernon [Wash.] 80 P. 559. Where a purchaser of land has given a mortgage for a part of the purchase price and he has been damaged by the false and fraudulent representations of the vendor concerning the quality of the land sold, the purchaser is entitled to a cancellation of the mortgages where a rescission cannot be had, where the amount of his damages equals the amount of the mortgage, and this can be awarded by a court of equity in one action. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964. The fact that a purchaser of lands sued the agent who acted for him in the transaction, to recover a secret commission paid to such agent by the vendor is not a ratification of the contract made by the agent so as to preclude the purchaser from maintaining an action to recover damages against the vendor for false and fraudulent representations as to the property. Barnsdall v. O'Day [C. C. A.] 134 F. 828.

45. Gable v. Crane, 24 Pa. Super. Ct. 56.

46. See 2 Curr. L. 1994.

47. Prichard v. Mulhall [Iowa] 103 N. W. 774. A contract to sell land, unlike one to sell personal property, gives to the vendor the choice of two remedies for its breach by the vendee; to-wit, one for specific performance, in which case the vendor must allege and prove that he has the title contracted to be sold and must tender it; the other an action to recover damages; in the latter case where the contract is executory, he elects to retain the land; he need not tender a deed where vendee has repudiated, but he must show title and ability to convey at the time agreed in the contract. Harmon v. Thompson [Ky.] 84 S. W. 569. The performance of a contract which is the consideration of a deed cannot be enforced in ejectment. Adams v. Barrell, 26 Pa. Super. Ct. 641.

48. Where the vendee in an executory contract to buy land abandons the agreement and refuses to comply with its terms, the vendor, upon electing to proceed for damages for its breach, may, after the expiration of the time fixed by the contract for the conveyance, sell or otherwise dispose of the land without prejudice to his cause of action for damages. Harmon v. Thompson [Ky.] 84 S. W. 569.

49. An action to recover damages for breach of an **oral** contract to convey land cannot be maintained where there has been no such part performance as will take the agreement out of the statute of frauds. Payment of the purchase price alone is not such part performance. Chamberlain v. Abrams, 36 Wash. 587, 79 P. 204.

it has been accepted by the vendee.[50] On breach by the vendee and refusal to accept a conveyance, the vendor can recover the difference between the market value and the contract price, where the latter exceeds the former, together with interest from the time the purchase price was to have been paid.[51] Ordinarily the vendor must show that prior to the commencement of the action he tendered a conveyance in accordance with the terms of his contract.[52] Likewise the measure of damages recoverable by the vendee is the difference between the market value of the land and the contract price where the former exceeds the latter,[53] together with interest thereon from the time of the breach.[54] Evidence as to what other lands in the same neighborhood, having a general similarity in location, character and adaptability were sold for at or about the time the breach occurred, is admissible on the question of market value.[55] The right of either party to a specific performance of the contract is treated elsewhere in this work.[56] Where the vendor has no title to a part of the land contracted to be conveyed, the vendee may compel specific performance as to the part as to which he has title with a

50. A contract for the sale of land signed only by the vendor, which has been accepted by the vendee and on which he has paid a part of the purchase price, is binding on both of the parties, and either may maintain an action thereon for its breach and the fact that the defendant did not have title so that specific performance could be enforced does not preclude the recovery of damages. Miller v. Smith [Mich.] 12 Det. Leg. N. 249, 103 N. W. 872.

51. Kuntz v. Schnugg, 90 N. Y. S. 933; Harmon v. Thompson [Ky.] 84 S. W. 569. On breach by a vendee of a contract for the sale of land, the vendor can recover as damages the difference between the contract price and the market value of the land at the time of the breach, less whatever has already been paid on the contract price. Prichard v. Mulhall [Iowa] 103 N. W. 774. One who has contracted to sell land, to which he has no title, in an action to recover damages for breach of the contract by the vendee, if he can recover at all, can recover only the difference between the price for which he could have procured it from the owner and the price the vendee agreed to pay. Scheer v. Schlomowitz, 88 N. Y. S. 170.

52. In suits in equity for specific performance and in actions at law to recover the purchase price, the vendor must show that prior to the commencement of the action he made a tender of a conveyance of the land and demanded performance by the purchaser. Stein v. Waddell [Wash.] 80 P. 184.

53. Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796; Goodman v. Wolf, 95 App. Div. 522, 88 N. Y. S. 934. In an action by a vendee to recover damages for breach of a contract to convey land, the measure of damages is the difference between the price agreed to be paid and the value of the land when the breach occurred, with interest, but if the purchaser has been let into possession, he must rescind the contract and surrender possession. Nolde v. Gray [Neb.] 102 N. W. 759. Where the owner of an undivided interest in land contracts to convey the entire property and the purchaser at the time of making the contract knows that the vendor has not the entire property, and the vendor is free from fraud or bad faith, the purchaser on the failure of the vendor to convey the entire property is not entitled to damages as for loss of profits, as to so much of the land as the vendor had no title. The undivided interest which vendor could not convey belonged to the vendor's minor wards, and the court would not authorize conveyance at price stipulated. Eggert v. Pratt [Iowa] 102 N. W. 786. Where the owner of land as a part of the contract for the sale of it agreed to renew a mortgage loan thereon, but failed to do so, the purchaser can recover the amount paid by him for broker's commission in securing a new loan, and the increased interest over the amount which the renewal was to bear, for the entire term of the new loan. Tolchinsky v. Schiff, 93 N. Y. S. 1073.

54. Interest is allowable in an action to recover unliquidated damages for the breach of an executory contract of sale where the property has a market value. Reynolds v. Burr, 93 N. Y. S. 319.

55. Dady v. Condit, 209 Ill. 488, 70 N. E. 1088. In an action to recover damages for breach of a contract for the sale of land, on the issue as to the market value of the land, the plaintiff may introduce evidence as to the price paid for other lands in the same neighborhood, though such sales were not entirely for cash, but were in part on time with interest on the deferred payments. The defendant on cross-examination and in rebuttal may show that many of such sales were never completed, and that in some cases the vendors discounted the mortgages taken for the deferred payments. Id. In determining the market value of land, in an action to recover damages for breach, a contract for the sale of the land, the expectations of the owners of land in the vicinity, that extensive improvements are to be made in the neighborhood, are elements to be considered in determining the market value, where such expectations do actually affect the market value. Id.

The price brought at a subsequent public sale of the land will be deemed its value. Le Roy v. Jacobosky, 136 N. C. 443, 48 S. E. 796.

56. See title Specific Performance, 4 Curr. L. 1494.

rebate of the value of the land as to which the vendor has no title.[57] In the absence of fraud, insolvency of the vendor or other special circumstances, a vendee, in possession under his contract and whose possession has not been disturbed, cannot resist an action for the purchase money on the ground of lack of title in the vendor, unless he rescind the contract and restore possession to the vendor.[58] If he has accepted a deed, that is a performance of the contract, and his remedy is by way of a counterclaim for breach of covenant, if any there be.[59]

§ 11. *Vendor's liens.*[60] *A. Implied lien.*[61]—A vendee in possession takes the land charged with an equitable lien in favor of the vendor to secure the unpaid purchase price.[62] It is not founded on contract, but arises by implication of law.[63] It is an incident of the debt; and while it cannot survive the debt, it continues to exist until the debt is paid or otherwise discharged.[64] One who has made a voluntary conveyance of land, without any agreement on the part of the grantee to pay for the land, is not entitled to a vendor's lien,[65] nor is one who has loaned money to another with which to purchase the land.[66] It arises in favor of a vendor who has agreed to take property in exchange or payment for the land sold.[67] The lien is enforceable against the land while the title

57. Lanyon v. Chesney [Mo.] 85 S. W. 568. When a vendor's title to a part of the property contracted to be sold fails, the vendee, when no price was agreed on for the tract as to which the title has failed, is entitled to a rebate from the price of an amount equal to the proportion which the actual value of the tract as to which title fails bears to the actual value of all the lands agreed to be conveyed. Cypress Lumber & Shingle Co. v. Tillar [Ark.] 84 S. W. 490.

58. Dunn v. Mills [Kan.] 79 P. 146.

Where vendor guilty of fraud: Where one who has given his note in payment for a conveyance of land is sued by one to whom the note has been transferred under circumstances that permit the maker of the note to interpose defenses that were available against the payee, he may set up fraud on the part of the vendor, and failure of consideration and title to the land as a defense without tendering a reconveyance of the land. Nor need he show eviction under a paramount title, showing an outstanding title under which there is danger of eviction is a sufficient defense. Morris v. Brown [Tex. Civ. App.] 85 S. W. 1015. In an action to recover the purchase price of land, the defendant cannot defeat the recovery by showing that plaintiff did not have title to the land conveyed by introducing a title deed showing title in another, where the answer does not allege such ground of defense. Bank of Winchester v. White [Tenn.] 84 S. W. 697.

59. Where the owner of land has contracted to convey to another "by good and sufficient deed a good and unincumbered title," the acceptance by the vendee of a deed is an execution of the contract, and the vendee in an action by the vendor on a note given for the purchase price cannot set up a defect in title as a defense to the action, but is remitted to the covenants in the deed; if there is a breach thereof he can set up the same as a counterclaim. Thurgood v. Spring, 139 Cal. 596, 73 P. 456.

Total or partial failure of consideration may be shown as a complete or partial defense in an action on a note given for the purchase price of land sold with covenants, where the title has failed or partially failed, and that, in case of a breach of a covenant against incumbrances, the purchaser is entitled to a credit on the note given for the purchase price, of the amount paid by him to protect his title against an incumbrance. It is not necessary to maintain action that he should have been evicted under the paramount title. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353.

60. See 2 Curr. L. 1996, also see Tiffany, Real Property, 1287.

61. See 2 Curr. L. 1996.

62. Borror v. Carrier [Ind. App.] 73 N. E. 123. By a contract of sale an equitable conversion takes place, the vendee being deemed the owner of the land in equity and the vendor to have a lien thereon for the purchase price; but at law these relations are not recognized. The vendor's lien rests on the idea that the title has passed to the vendee, which to that extent is a fiction, since in law and reality it has not. The so-called lien is simply the vendor's right to enforce his claim for the purchase money against the vendee's equitable interest. Flanagan's Estate v. Great Cent. Land Co. [Or.] 77 P. 485.

63, 64. Cassell v. Lowry [Ind.] 72 N. E. 640.

65. Ostenson v. Severson [Iowa] 101 N. W. 789.

66. The mere lending of money to the purchaser of land to enable him to pay for it does not give rise to a vendor's lien in favor of the person so lending the money. It is indispensably necessary to the existence of a vendor's lien that the parties should stand in the relation to each other of vendor and vendee. It arises out of and is incident to the purchase, and is founded upon an implied trust between the vendor and purchaser. Hardin v. Hooks [Ark.] 81 S. W. 386.

67. A vendor's lien arises as well where land is to be received as where money in specie is to be paid; hence where, on an exchange of lands, the title to a part of

thereto continues in the vendee or his heirs, or any subsequent purchasers having notice that the purchase money remains unpaid,[68] or any voluntary grantee of the vendee.[69] In Oregon the vendor's lien does not exist after title has passed from the vendor to the purchaser by conveyance.[70] The lien is superior to the homestead rights in the land acquired by the purchaser,[71] as well as the rights therein of the purchaser's wife,[72] though in Wisconsin, the homestead, by virtue of statute, descends to the heirs of the purchaser free of the vendor's lien.[73] It may be enforced by a third person to whom the purchaser has agreed to pay the purchase price,[74] likewise it may be enforced against the land where the conveyance has been made to a person other than the one who agreed to pay the purchase price.[75] A vendor's lien may be waived.[76] Generally, the acceptance of any distinct and independent security by the vendor will constitute a waiver.[77] The vendor may be deprived of his right to assert his lien by the acquisition by others of a title thereto by adverse possession.[78] A vendor's lien remains where nothing was done to discharge the debt but to pay over inapplicable trust funds.[79]

the land received by one of them fails, he can maintain a suit in equity to charge the lands conveyed by him with a lien for the value of the land as to which the title failed, and this though the grantor is solvent and an action for breach of warranty would lie. Johnson v. Burks, 103 Mo. App. 221, 77 S. W. 133. A vendor of land has an equitable lien for the unpaid purchase price, and where by fraudulent practices he has been induced to take worthless property in payment of the purchase price, he can sue in equity for a decree establishing a lien for the difference between the actual and represented value of the property so taken. Montgomery v. McLaury, 143 Cal. 83, 76 P. 964. On an exchange of lands, one damaged by a breach of the covenants in the deed taken by him is entitled to a lien on the land conveyed by him to the extent of the damages sustained by breach of the covenant. Newburn v. Lucas [Iowa] 101 N. W. 730.

68. Borror v. Carrier [Ind. App.] 73 N. E. 123. See, also, McKenna v. Brooklyn Union Elevated R. Co., 95 App. Div. 226, 88 N. Y. S. 762. The grantor's lien is an equitable right to resort to the land, if there be not sufficient personal assets; it is available against the grantee, his heirs, devisees and other immediate successors in interest, and against all subsequent incumbrancers of the land under the grantee who are not bona fide purchasers for value. Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229.

69. Johnson v. Burke, 103 Mo. App. 221, 77 S. W. 133.

70. Flanagan's Estate v. Great Cent. Land Co. [Or.] 77 P. 485.

71. Fontaine v. Nuse [Tex. Civ. App.] 85 S. W. 852.

72. The right of a woman in land by virtue of her marriage, both while it remains inchoate and after it has become consummated by the death of her husband, is subject to the lien of the husband's grantor for the payment of the purchase price. Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229.

73. Rev. St. Wis. 1898, § 2271, providing that the homestead shall descend free from all judgments and claims against the deceased owner, abrogates the right to a vendor's lien thereon. Schmidt v. Schmidt's Estate [Wis.] 101 N. W. 678.

74. Where the purchaser of land assumes as a part of the purchase price and agrees to pay certain notes theretofore given by the vendor to a third person, such third person can assert a vendor's lien against the land for the payment of the notes, which lien is superior to the homestead rights of the purchaser. Fontaine v. Nuse [Tex. Civ. App.] 85 S. W. 852. Under the provisions of the Code, requiring that actions shall be brought in the name of the real party in interest, a third person to whom a grantee promised to pay a part of the consideration for the conveyance can maintain a suit to enforce a vendor's lien for such unpaid purchase price. Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229.

75. One who pursuant to a contract with the father of several minor children conveys land to the children in consideration of the father's agreement to pay a certain sum therefor, can enforce a vendor's lien against the land while the title remains in such minors. Acree v. Stone [Ala.] 37 So. 934.

76. A vendor of land subject to a mortgage was made a party to a suit to foreclose the mortgage, the land was sold for enough to satisfy the mortgage but not his lien, the mortgagor wished to redeem and the vendor released his judgment and took new notes with the understanding that his vendor's lien should continue subject to a new mortgage given to raise funds with which to redeem. Held, that he had not waived or lost his vendor's lien. Borror v. Carrier [Ind. App.] 73 N. E. 123.

77. Acree v. Stone [Ala.] 37 So. 934.

78. Where one having a vendor's lien on land acquiesces in the dedication of a part of the land to public use as a street for the statutory period of limitation, by his vendee, the use and possession by the public is adverse and ripens into a title as against the vendor, and the mere fact that he had procured a decree foreclosing his lien does not interrupt the running of the statute. City of Ft. Worth v. Cetti [Tex. Civ. App.] 85 S. W. 826.

Enforcement of the lien.[80]—A court of equity[81] may foreclose a vendor's lien by a sale of the property and application of the proceeds to the payment of the amount of the purchase price due the vendor, and pay the overplus to the vendee,[82] or it may require the purchaser to pay the balance within a specified time or be thereafter barred of any interest or title in or to the land.[83] Strict foreclosure will not be granted unless to refuse to grant it would be inequitable.[84] A sale pursuant to a decree of foreclosure, not redeemed from, defeats the lien as to an unsatisfied part of the judgment.[85] If the debt is barred by the statute of limitations, an action to enforce the lien is also barred.[86] Cases referring to the evidence admissible,[87] defenses available,[88] and the effect of the decree, are set forth in the notes.[89]

(§ 11) *B. Express lien.*[90]—The legal title[91] which remains in the vendor, where a lien is reserved in his deed to secure the purchase money, descends to the heirs of the vendor.[92] The lien may be assigned[93] or waived.[94] The lien

79. Marshall v. Hall, 51 W. Va. 569, 42 S. E. 641.

80. See 2 Curr. L. 1997.

81. An action to enforce a vendor's lien is an equitable action and properly triable on the equity side of the court, though the issues involve questions of fact properly triable by a jury. Robards v. Robards [Ky.] 85 S. W. 718.

82, 83. Flanagan's Estate v. Great Cent. Land Co. [Or.] 77 P. 485.

84. The remedy is a harsh one and not favored by a court of equity, yet if a vendee without excuse fails to make payments as required by the contract, and for an unreasonable time remains in default, a strict foreclosure may be decreed. Flanagan's Estate v. Great Cent. Land Co. [Or.] 77 P. 485. Where, pursuant to a contract for the sale of land the vendor places a deed to the premises in escrow to be delivered on payment of the price, the fact that he subsequently conveys the lands to another subject to the deed deposited in escrow is not such a breach of his contract to sell as will preclude an action by him for a strict foreclosure of the purchaser's rights in the land. Id.

85. A foreclosure of a vendor's lien and sale of the property on decretal order issued on account of such foreclosure and not redeemed from during the year for redemption defeats the lien as to any unsatisfied part of the judgment or debt. Borror v. Carrier [Ind. App.] 73 N. E. 123.

86. When an action on the debt secured by the lien is barred by the statute of limitations, a suit in equity to subject the land to a vendor's lien is also barred. But though the debt is barred by the statute of limitations, the debtor cannot have the lien cancelled in an action to quiet title, since he who seeks the aid of equity must do equity. Cassell v. Lowry [Ind.] 72 N. E. 640. See, also, Berger v. Waldbaum, 46 Misc. 4, 93 N. Y. S. 352.

87. Evidence: Where a husband purchases land claimed by an adjoining owner, parol evidence is admissible, in an action by the vendor to establish and foreclose a vendor's lien thereon, that the purchaser's wife was present and consented to the purchase and that such purchase was made for less than the real value of the land in compromise of the claim of the wife then made that the land purchased was a part of a tract owned by her deceased first husband, to which she had succeeded. Cavin v. Wichita Valley Town Site Co. [Tex. Civ. App.] 82 S. W. 342.

88. Defenses: A purchaser of improved property cannot resist the enforcement of a vendor's lien by the vendor on the ground that the vendor made false representations as to the repair and condition of the property, where it appears the purchaser examined the property and was in a position to judge for himself as to its condition and state of repair. Newton v. Levy, 26 Ky. L. R. 476, 82 S. W. 259. A purchaser of land who is in the undisturbed possession thereof cannot set up as a defense to an action to foreclose a vendor's lien thereon that the vendor, at the time the contract of sale was entered into and at the time of the commencement of the suit, was not the owner of the legal title, but that such title was in a third person. Young v. Figg [Neb.] 100 N. W. 311.

89. Effect of decree: Where the vendors in a contract for the sale of land, in an action to recover the purchase price, tender a deed and ask that they have a lien on the land for the unpaid purchase price, and the court awards the relief prayed, the judgment of the court transfers the title to the vendee as effectually as though he had accepted the deed out of court. Kelly v. Bramblett, 26 Ky. L. R. 167, 81 S. W. 249.

90. See 2 Curr. L. 1998.

91. An executory conveyance of land, by the terms of which the grantor reserves a vendor's lien, does not divest the grantor of the superior legal title, but such legal title passes by a subsequent deed executed by the vendor. Austin v. Lauderdale [Tex. Civ. App.] 83 S. W. 413.

92. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504. They can convey such title to the assignee of the purchase-money notes secured by such lien, and he can enforce it under the same circumstances as it would be enforceable by the vendor. McCord v. Hames [Tex. Civ. App.] 85 S. W. 504.

93. An instrument quitclaiming land and purporting to release a vendor's lien, held to be an assignment of the vendor's lien to the grantee in such instrument. Zieschang v. Helmke [Tex. Civ. App.] 84 S. W. 436.

94. A purchaser of land gave vendor's

may be enforced against the land in the hands of a fraudulent grantee of the vendee.[95] A grantee of the purchaser is not personally liable for the purchase price secured by a lien unless he has expressly assumed and agreed to pay it.[96] In an action by a vendor to recover on notes given for the purchase price of land and to enforce a vendor's lien, the burden is on the defendant to show a failure of the vendor's title, where he defends on such ground.[97] If the vendee has accepted a deed, he cannot resist the action on the ground that vendor had no title, unless the grantor is insolvent or a nonresident, or he has been evicted from the land. In such case he can recover only for breach of the warranties in the deed,[98] though he can offset an amount paid to remove an encumbrance constituting a breach of the vendor's warranty,[99] nor can he resist payment and at the same time ask damages for breach of the vendor's contract.[100] In a proper case the court will appoint a receiver to collect the rents and profits.[101] All persons claiming an interest in the land, either by conveyance from the vendee[102] or as heirs of such vendee, should be joined as parties defendant in an action to foreclose.[103] A vendor's lien apparently barred by the statute of limitations is unenforceable against the land in the hands of an innocent purchaser for value, though as a matter of fact the debt has been kept alive by payments and new promises.[104] A purchaser who admits the contract reserving the lien cannot plead the statute of limitations.[105] Cases relating to the relief which may be awarded in actions to foreclose the lien are set forth in the notes.[106]

lien notes in payment of a part of the purchase price; he afterwards reconveyed an undivided one-half to his grantor, who conveyed to a third person and took a vendor's lien note for a part of the purchase price of such undivided half, from such third person. Held, that the acceptance of the vendor's lien note by the vendor in the last transaction was not a waiver of his lien on the entire title created by the vendor's lien note taken under the first transaction, and that the last purchaser could not complain, except that on payment of his note he was entitled to an undivided one-half free of the encumbrance of the first vendor's note, he having taken a title by warranty deed. Dickinson v. Duckworth [Ark.] 85 S. W. 82.

95. A vendor of land who has retained a vendor's lien on the land, in an action to recover the purchase price and foreclose the lien, may have a fraudulent sale of the land by the vendee set aside and the lien enforced against the land. Kinney v. Craig [Va.] 48 S. E. 864.

96. McNeill v. Cage [Tex. Civ. App.] 85 S. W. 57.

97. Kiser v. Lunsford [Tex. Civ. App.] 86 S. W. 927.

98. Joiner v. Trail [Ky.] 86 S. W. 980.

99. In an action by a vendor on notes given in part payment for the purchase price of land and to foreclose a vendor's lien reserved by the terms of the notes, the vendee can offset the amount which he has paid to discharge tax liens on the lands purchased and which constituted an incumbrance in breach of the vendor's warranty. Bullitt v. Coryell [Tex. Civ. App.] 85 S. W. 482.

100. A defendant in a suit to enforce a vendor's lien cannot resist payment of the balance of the purchase price and at the same time ask a court of equity to award him damages for a shortage in the land purchased under the contract giving the lien sought to be enforced. Bargo v. Bargo [Ky.] 86 S. W. 525.

101. Under Tex. Rev. St. 1895, art. 1465, § 2, a vendor, in an action to foreclose a vendor's lien, may have a receiver appointed where it appears the purchaser is collecting the rents and failed to perform the contract, and that the value of the land is probably insufficient to satisfy the plaintiff's claim, though the purchaser is not insolvent and such receiver may collect the rents and revenue of the land. Cotulla v. American Freehold Land Mortg. Co. [Tex. Civ. App.] 86 S. W. 339.

102. Where a transferee of notes given as a part of the purchase price of land and for which a lien was reserved in the deed given by the vendor brings a suit to establish his lien and foreclose the same by a sale of the premises, he should join as parties defendants the holder of the legal title by subsequent conveyance as well as the makers of the notes, and any decree procured without the joinder of such person is not binding on him and will not support ejectment by the purchaser at foreclosure sale. Nunnelly v. Barnes, 139 Ala. 657, 36 So. 763.

103. Where one who has contracted to sell land to another executes a deed to a third person and is threatened with a suit by the heirs of the person to whom he contracted to convey, he may, in a suit to enforce a vendor's lien, join as parties defendant all claimants of any interest in the land, and invoke the equity jurisdiction of the court to determine the respective rights of all defendants in the land and pray a cancellation of his deed if necessary. Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007.

104. Wise v. Wolfe [Ky.] 85 S. W. 1191.

105. Under Ky. St. 1903, § 2543, a defend-

VENUE AND PLACE OF TRIAL.

§ 1. **The Proper Venue (1707).**
A. The Nature of the Action (1797).
B. Local Actions; Actions Concerning Real Estate (1797).
C. Transitory Actions (1798).
D. Special Actions and Proceedings and Equitable Proceedings (1799).
E. Suits Against Corporations (1800).
F. De Facto Counties (1800).
G. Laying Venue and Effect of Improper Venue (1800).
§ 2. **When Change Is Allowable, Necessary or Proper (1801).**
§ 3. **Procedure for Change (1802).**
§ 4. **Results of Change of Venue (1803).**

§ 1. *The proper venue. A. The nature of the action*[1] is determined from the gravamen of the complaint,[2] or if it be not clear, from the prayer.[3] It is determined by the complaint as filed, and cannot be altered by amendment or by the answer.[4] As already seen in the topic Set-Off and Counterclaim, there must be a correspondence in form and remedy between the main action and that counterclaimed.[5] At common law, the test was the local or transitory character of the predicate for the cause of action.

Whether an action is local or transitory in its nature is now greatly affected by statutes, whereby some actions have been localized either as respects situs of their origin or domicile of the parties, some have been excepted from the ordinary rules, and in a few states the distinction has been abolished, and the domicile or other criteria adopted.[6]

(§ 1) *B. Local actions; actions concerning real estate.*[7]—Usually actions in replevin must be brought in county where the property is situated,[8] but in Indiana they must be brought in the county of defendant's residence.[9] Actions against municipal corporations[10] or boundary suits between parishes are local actions.[11]

ant in an action to enforce a vendor's lien, who admits in his pleadings that he is in possession under the contract by which the lien was reserved and that the contract is as alleged in the complaint, cannot set up the statute of limitations as a bar to the suit. Bargo v. Bargo [Ky.] 86 S. W. 525.

106. In a suit to enforce a vendor's lien on land in possession of the vendee's wife, she being in possession and having a community interest in the land, the vendor is entitled to a judgment establishing the debt and for foreclosure of the lien, but should not be awarded the possession of the premises, since the wife is entitled to redeem by paying the judgment debt. Cavin v. Wichita Valley Town Site Co. [Tex. Civ. App.] 82 S. W. 342. Where the holder of a vendor's lien intervenes in an action to foreclose another lien, he should be allowed to recover interest and attorney's fees stipulated for in the lien notes, where it is decreed that his lien is enforceable against the land. Id. Under Civ. Code Colo. § 169, on a complaint to recover possession of land after default in the terms of the contract, the vendor may without prayer for equitable relief have a decree of sale to satisfy his vendor's lien. Smith v. Ellis [Tex. Civ. App.] 87 S. W. 856; Gumaer v. Draper [Colo.] 79 P. 1040.

1. See 2 Curr. L. 2000.

2. Price v. Parker, 44 Misc. 582, 90 N. Y. S. 98; Jones v. Leopold, 95 App. Div. 404, 88 N. Y. S. 568; Frick v. Freudenthal, 90 N. Y. S. 344.

3. Zeiser v. Cohn, 44 Misc. 462, 90 N. Y. S. 66; Frick v. Freudenthal, 90 N. Y. S. 344.

4. See 2 Curr. L. 2000.

The amendment must not change the nature of the action. See Pleading, 4 Curr. L. 980. The answer must be responsive to the complaint and is not appropriate to declaring on new or cross demands or liabilities. See Pleading, 4 Curr. L. 980.

See, also, Forms of Action, 3 Curr. L. 1495.

5. See 4 Curr. L. 1425.

6. See 22 Enc. Pl. & Pr. 776, and post, this section.

7. See 2 Curr. L. 2000.

8. The clerk cannot transfer the case to the county of defendants' residence on affidavits that the action was intended to be in trover. State v. District Ct. of Hennepin County, 92 Minn. 205, 99 N. W. 806. Code, § 190, entitled to removal as matter of right to such county. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515. Action of replevin against a sheriff really in conversion and so could not be maintained. Woodling v. Mitchell [Iowa] 103 N. W. 15.

9. Under Burns' Ann. St. 1901, § 314, providing that in all other cases action shall be commenced in the county of defendant's residence, replevin cannot be brought where the goods are situated. Fry v. Shafor [Ind.] 74 N. E. 503.

10. If brought in wrong county, city does not waive rights by failing to appear. City of Nashville v. Webb [Tenn.] 85 S. W. 404.

11. May be brought in either parish affected. Parish of Caddo v. Parish of De Soto [La.] 38 So. 273; Parish of Caddo v. Parish of Red River [La.] 38 So. 274.

Actions regarding real estate, as actions to foreclose,[12] or as to disputed boundaries,[13] or to establish title in land,[14] or for enforcement of liens are local and must be brought in the county where the land or some part of it is situated,[15] but in the territories under act of congress, the actions must always be brought where the defendant resides.[16] An action for value of trees cut off plaintiff's land,[17] or to cancel a contract for the sale of land,[18] or for damages for breach of covenants in a deed,[19] or for an accounting in a business venture resulting in the purchase of lands, is not an action to determine rights in real property.[20] The situs of a patent follows that of the owner and belongs to his place of residence.[21]

(§ 1) *C. Transitory actions.*[22]—Transitory actions as a rule must always be brought in the county[23] or Federal district of the same state, where defendants, or one of them,[24] resides,[25] or is found,[26] provided there is jurisdiction of the persons or cause of action.[27] Thus a partnership,[28] parties jointly liable for fraud,[29] or joint trespassers, may be sued in any county where one of them has a residence;[30] but one must be entitled to recover from all of the defendants,[31] and

12. Though the appointment of a receiver is incidentally asked for by a foreign trust corporation not admitted to do business. Commercial Tel. Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66. Action to foreclose should be in county where mining claim is [Rev. St. 1898, § 2928]. Fields v. Daisy Gold Min. Co., 26 Utah, 373, 73 P. 521. Though both parties reside outside of the state and the debt accrues outside. Wells v. Scanlan [Wis.] 102 N. W. 571.

13. By consent of parties may be tried in another county. Lyon v. Waggoner [Tex. Civ. App.] 83 S. W. 46.

14. Action to be adjudged the owner of mining property and to require defendant to execute a conveyance thereof. McFarland v. Martin, 144 Cal. 771, 78 P. 239.

15. Where land was situated in two counties and judgment was erroneously entered for sale of land in county of suit, it might be set aside, and the court did not lose jurisdiction to render a judgment affecting land in both counties. Kent v. Williams [Cal.] 79 P. 527.

16. Act Cong. May 2, 1890; Code Civ. Proc. § 48, requiring suits as to land to be brought in county where it is situated, is in conflict and void. Burke v. Malaby, 14 Okl. 650, 78 P. 105.

17. Suit in Tennessee may be brought for trees cut in Mississippi. West v. McClure [Miss.] 37 So. 752.

18. No relief as to any real estate record asked. State v. District Court of Pine County [Minn.] 102 N. W. 869.

19. Covenant of seisin and right to convey. Eames v. Armstrong, 136 N. C. 392, 48 S. E. 769.

20. Need not be tried in county where the land was situated. Barnes v. Barnhart, 92 N. Y. S. 459.

21. Jurisdiction cannot be obtained over nonresident owners of patents. Hildreth v. Thibodeau [Mass.] 71 N. E. 111.

22. See 2 Curr. L. 2001.

23. Suit may be brought in one state for value of trees cut off plaintiffs' land in another state. West v. McClure [Miss.] 37 So. 752. Jurisdiction cannot be acquired in another county by publication of summons and attachment of property over a resident of the territory. First Nat. Bank v. Hesser, 14 Okl. 115, 77 P. 36. A purchaser residing in another county cannot be made a party to an action by a real estate broker for commissions. Scottish-American Mortg. Co. v. Davis [Tex. Civ. App.] 72 S. W. 217. An action by an agent to recover indemnity from his principal for judgment and expenses incurred because of a tort committed while acting in good faith under the principal's instructions, is properly brought in the county where both resided, though the tort was committed in another county. Hoggan v. Cahoon, 26 Utah, 444, 73 P. 512.

24. Judiciary Act of March 3, 1887, as amended by Act of Aug. 13, 1888, had not repealed the former practice, by provision that suit shall only be brought in the district of which either plaintiff or defendant is an inhabitant. John D. Park & Sons Co. v. Bruen, 133 F. 806.

25. Where defendant lived with his family and paid taxes was his place of residence, and not where he did business and where he had an apartment which he used while there. Washington v. Thomas, 92 N. Y. S. 994. Plaintiff's residence will be presumed to be as he alleges it to be until the contrary appears. Dabaghian v. Kaffafian [N. J. Law] 58 A. 106.

26. May be brought where the plaintiffs reside and defendants or any of them may be found. Where plaintiff brought suit in the county of his residence and defendant resided and was found in another county, the latter was entitled to a change as a matter of right. Bond v. Hurd [Mont.] 78 P. 579.

27. But under a statute requiring **foreign corporations** to appoint an agent to accept service in any action pertaining to **property, business, or transactions within the state,** jurisdiction cannot be obtained of an action for injuries in another state. Olson v. Buffalo Hump Min. Co., 130 F. 1017.

28. As will confer on the courts jurisdiction of his person, regardless of the place of his citizenship. J. B. Pyron & Son v. Ruohs, 120 Ga. 1060, 48 S. E. 434.

29. Sawyer v. J. F. Wieser & Co. [Tex. Civ. App.] 84 S. W. 1101.

30. Trespass on the case proper form of action at common law to recover for joint

where the action is dismissed as to resident co-defendants, the nonresident defendant is entitled to a dismissal.[32] In some states an action for breach of contract may be tried in the county where the contract was to have been performed, as well as in the county of domicile or service,[33] or where the contract was made.

Actions against persons engaged in constructing a railroad on a contract relating thereto do not include a contract of a subcontractor for the purchase of grain for his horses.[34] In some states a "trespass,"[35] fraud,[36] or active wrong,[37] or any action ex delicto or part thereof,[38] may be sued where the cause of action arose. One count will sustain venue under such a provision, though others arose in a different county.[39] A suit against a sheriff joined with a nonresident plaintiff to a writ for abuse of process is properly brought in the county where the cause of action arose.[40] The place where a cause of action arises is not determined by the place where an action may be enforced.[41]

(§ 1) *D. Special actions and proceedings and equitable proceedings. Divorce.*[42]—Actions for divorce may be brought in county where plaintiff resides,[43] but the parties may stipulate for a change of venue.[44]

libel. Cox v. Strickland, 120 Ga. 104, 47 S. E. 912.

31. In a suit for price of goods, plaintiff's agents cannot be joined and suit brought in the county of their residence on the plea that they were entitled to part of the recovery as their commission. Russell & Co. v. F. W. Heitmann & Co. [Tex. Civ. App.] 86 S. W. 75. A suit against the maker and indorser of a note cannot be maintained in the county where the indorser resides, where the complaint discloses that the indorser is not liable because of failure to fix the same in time by suit or protest. Beauchamp v. Chester [Tex. Civ. App.] 86 S. W. 1055. Where one assigned a claim to secure a debt and guaranteed that $1,000 would be realized, the assignee could bring suit on the claim in the county of his assignor where the latter was joined as a defendant, though the assignment was made in order to bring suit in another county. Leahy v. Ortiz [Tex. Civ. App.] 85 S. W. 824.

32. Action in replevin against sheriff in another county and against residents thereof. By dismissal as to all except the sheriff, the action became one in conversion and must be dismissed. Woodling v. Mitchell [Iowa] 103 N. W. 115.

33. Action on a nursery contract, there being an oral contract to replace all dead trees, could only be maintained in county of defendant's residence, where no act must necessarily have been done elsewhere. Moyers v. Council Bluffs Nursery Co. [Iowa] 101 N. W. 508. Code, § 613; action on an open account for medical services is not such an action. Bond v. Hurd [Mont.] 78 P. 579. Where a consignee overpaid a consignor for cotton, the bill of lading with draft attached having been sent to a bank, he could sue in the county where the cotton was delivered and defendant could not remove the suit to the county of his residence. Callender, Holder & Co. v. Short [Tex. Civ. App.] 78 S. W. 366. There being no designated place of payment, an action for the purchase price must be brought in the county wherein the purchaser resides, though the goods were to be delivered F. O. B. in another county. Russell & Co. v. F. W. Heitmann & Co. [Tex. Civ. App.] 86 S. W. 75. Defendant consented to a divorce decree requiring him to pay certain rents to a bank for the use of his divorced wife, and was liable to suit therefor in the county where the bank was situated. Connellee v. Werenskiold [Tex. Civ. App.] 87 S. W. 747.

34. Wilkinson v. McCarthy [Iowa] 103 N. W. 136.

35. Where plaintiff was injured by a piece of iron knocked off a stake while defendants were moving a house, he could not sue defendant in county where accident occurred, as that was not a trespass within the meaning of the statute. Stewart v. Nichols & Haralson [Tex. Civ. App.] 82 S. W. 339. Pasturing cattle knowingly with diseased cattle is either a trespass or a crime within the Texas statute. Baldwin v. Richardson [Tex. Civ. App.] 87 S. W. 353.

36. See Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793.

37. Culpepper v. Arkansas Southern R. Co., 110 La. 745, 34 So. 761.

38. Hoge v. Herzberg [Ala.] 37 So. 591.

39. Where as to one count the action was brought in the proper county, it was immaterial whether the other counts could be maintained in that jurisdiction. Hoge v. Herzberg [Ala.] 37 So. 591.

40. State v. District Court of Wright County, 92 Minn. 402, 100 N. W. 2. The defendants could not demand a change as in an action brought in the wrong county. Id.

41. The right of action given by the Kansas constitution to a creditor against a stockholder of an insolvent corporation arises in Kansas, though it may not be enforceable there. Anglo-American Land, Mortgage & Agency Co. v. Lombard [C. C. A.] 132 F. 721. The provision of the constitution of Utah that all "business" arising in any county must be tried in that county has reference only to "causes of action" and not to mere matters or rights that may never be brought to trial. Art. 8, § 5. Gibbs v. Gibbs, 26 Utah, 382, 73 P. 641, overruling Konold v. Rio Grande Western R. Co., 16 Utah, 151.

42. See 2 Curr. L. 2003.

43. But may be removed to county where adultery was committed unless defendant

Actions for penalties.[45]—Actions for penalty for unauthorized use of milk cans under the New York statute must be brought in county where owner resides and not where the penalty was incurred.[46]

(§ 1) *E. Suits against corporations*[47] are regulated almost wholly by statutes under which they are usually suable, in the county where their principal place of business is, or in the county where the obligation or liability arises,[48] though it has no agency there;[49] but in Texas a suit for a receiver must be brought in the county where the principal office of the corporation is located,[50] in which state suits against railroads for personal injuries may be brought in the county of plaintiff's residence or in the county where the accident occurred,[51] and suits against connecting carriers for damages, may be brought in any county where one of them has its lines.[52]

Suits against municipal corporations are local.[53]

(§ 1) *F. De facto counties*[54] may constitute a venue.

(§ 1) *G. Laying venue*[55] *and effect of improper venue.*[56]—The summons and complaint must specify the place where plaintiff desires trial,[57] but it is not necessary to lay a venue in the statement of claim.[58] The action is triable in the county which plaintiff designates, where there is no evidence that either of the parties resided in the state at the commencement of the action.[59]

The right of venue is absolute when properly invoked,[60] and where suit is brought in the wrong county, defendant is entitled to have the judgment reversed,[61] and where a defendant against whom plaintiff has no claim is fraudu-

falls to object. Gibbs v. Gibbs, 26 Utah, 382, 73 P. 641. Sufficient that plaintiff is a resident of the state, and the fact that the action is brought in the wrong county is not jurisdictional. Cochran v. Cochran [Minn.] 101 N. W. 179.

44. The son having been made a cross defendant, he joined in the stipulation. Kane v. Kane, 35 Wash. 517, 77 P. 842.

45. See 2 Curr. L. 2003.

46. Not controlled by Code Civ. Proc. § 983, providing that actions for penalties must be tried in the county where the cause of action arose. Bell v. Polymero, 90 N. Y. S. 920.

47. See 2 Curr. L. 2003.

48. In a libel suit a change from the county where the paper circulated to the county where it was published was refused. Tingley v. Times-Mirror Co., 144 Cal. 205, 77 P. 918. Railroad corporation. Atlantic Coast R. Co. v. Dupont [Ga.] 50 S. E. 103. Action on certificate of membership of a fraternal benefit association may be brought in county of member's residence at the time of his death, and the return of the officer making service should show the reason of service on the local agent. Hildebrand v. United Artisans [Or.] 79 P. 347. Where an accident was due to defective tracks, it was more than a mere "fault of omission," and action could be brought in the parish of the injury. Culpepper v. Arkansas Southern R. Co., 110 La. 745, 34 So. 761. Action of fraud may be in county where committed, though corporation has no local agency [Rev. St. 1895, art. 1194, subd. 7]. Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793.

49. An action of fraud may be sued in the county where it was alleged to be committed. Trinity Valley Trust Co. v. Stockwell [Tex. Civ. App.] 81 S. W. 793.

50. Rev. St. 1895, art. 1488. Commercial Tel. Co. v. Territorial Bank & Trust Co. [Tex. Civ. App.] 86 S. W. 66.

51. The residence of one employed for an indefinite time is where he establishes his headquarters and boards and sleeps, and not where he intends to return some time in the indefinite future. Gulf, etc., R. Co. v. Rogers [Tex. Civ. App.] 82 S. W. 822.

52. Plea that the carrier whose line was in the county was fraudulently joined is valid, but error in striking it out was harmless where such carrier was found liable for a part of the damage. San Antonio, etc., R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302.

53. Execution on a judgment obtained in another county will be enjoined. City of Nashville v. Webb [Tenn.] 85 S. W. 404. See, also, ante, this section.

54. See 2 Curr. L. 2004.

55. See, also, Pleading, 4 Curr. L. 980.

56. See 2 Curr. L. 2004.

57. Where the summons specified one county and the complaint which had been retained by defendant specified another county, the action was pending in the latter county. Tolhurst v. Howard, 94 App. Div. 439, 88 N. Y. S. 235.

58. Action for goods sold. American Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

59. An affidavit that affiant resides in a certain county does not show his residence there at the time of the commencement of the action. Burke v. Frenkel, 97 App. Div. 19, 89 N. Y. S. 621.

60. Where suit brought in wrong county, judgment will be reversed and action dismissed. Gulf, etc., R. Co. v. Rogers [Tex. Civ. App.] 82 S. W. 822.

61. Suit against railroad not at principal office or where wrong was committed. At-

lently joined,[62] or where plaintiff has not acted in good faith, the action will be dismissed.[63] Improper venue may be waived by a general appearance of defendant,[64] or by the consent[65] or conduct of the parties.[66]

§ 2. *When change is allowable, necessary or proper.*[67]—Where the action is brought in the wrong district,[68] a change is allowable if a demand is made for a transfer before joinder of issue.[69] The right is not waived by obtaining an extension of the time to answer.[70] The right to a change cannot be defeated by joining other causes of action.[71] Where the venue is correct, defendants cannot affect a change by agreement among themselves.[72]

A party has in ordinary cases the right to a change on the ground of prejudice of the judge,[73] or because he is a party to a proceeding, or interested in the event,[74] or for any cause which disqualifies him from acting,[75] or on the ground that an officer of the court is a party, unless provision is made by statute for another person's acting.[76] In Montana, when an affidavit of prejudice of the judge is filed, a motion for change of venue will be allowed unless within 30 days another judge appears.[77]

lantic Coast R. Co. v. Dupont [Ga.] 50 S. E. 103.

62. Plaintiff sued two railroad corporations on a joint contract and evidence showed that one was in no wise liable. Atchison, etc., R. Co. v. Waddell Bros. [Tex. Civ. App.] 86 S. W. 655.

63. Plaintiff before suit swore that defendant's residence was unknown to him, but he did receive information a day or two before the suit was brought by publication. Mills v. Brown [Tex. Civ. App.] 85 S. W. 33.

64. Right of defendant to be sued in the district of his residence is a personal privilege and not strictly jurisdictional. Von Voight v. Michigan Cent. R. Co., 130 F. 398. Code Civ. Proc. § 315 gave N. Y. City Court jurisdiction over an action against a domestic corporation where a money judgment was sought; here suit was brought against a corporation resident in another county for personal injuries. Mulligan v. New York, etc., R. Co., 89 N. Y. S. 288.

65. By consent of parties, action to establish boundaries was moved to another county, and the court held that on defendant filing a cross complaint to compel the conveyance of the land in question, plaintiff could not remove the suit to the county where the land was situated. Lyon v. Waggoner [Tex. Civ. App.] 83 S. W. 46.

66. Where, through inadvertence, the county named in the complaint differs from that in the summons and both parties act on the assumption that the county named in the summons is the place of trial, the mistake does not change it. Bell v. Polymero, 90 N. Y. S. 920.

67. See 2 Curr. L. 2004.

68. Suit for recovery of personal property brought in county of plaintiff's residence may be removed by defendant as matter of right to county where the property is situated. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515. Divorce action may be removed to county where the adultery was committed. Gibbs v. Gibbs, 26 Utah, 382, 73 P. 641.

69. In writing, or in open court specifying the district to which transfer is demanded, a demand to transfer "to some other district" is insufficient. Fischer v. Brooklyn Heights R. Co., 84 N. Y. S. 254. Properly denied where no evidence of any demand made before answering, and evidence insufficient to show the residence of parties, or that the convenience of witnesses would be served by a change. Cochran v. Cochran [Minn.] 101 N. W. 179.

70. Grant v. Bannister, 145 Cal. 219, 78 P. 653.

71. Right to change clear in two out of three causes of action and change granted. Bond v. Hurd [Mont.] 78 P. 579.

72. Where suit was brought in the county of residence of one of the defendants, they cannot join and secure its removal to county of residence of the other defendant. State v. District Court of Wright County, 92 Minn. 402, 100 N. W. 2.

73. Smith v. King of Arizona Min. & Mill Co. [Ariz.] 80 P. 357. Affidavit of prejudice of judge where suit was pending, of all the other judges of the court, and of the inhabitants of the county, was only effective as to the judge where the suit was pending, and he properly transferred the suit to another judge. Gerhart Realty Co. v. Welter [Mo. App.] 83 S. W. 278. No evidence can be heard against the application, but party entitled to only one change and cannot by his affidavit disqualify other judges. Eudaley v. Kansas City, etc., R. Co. [Mo.] 85 S. W. 366. Act Dec. 10, 1903, amendatory of Code Civ. Proc. § 180, providing for change for disqualification of the judge, does not apply to contempt proceedings. State v. District Court of Second Judicial Dist. [Mont.] 77 P. 318.

74. Gen. Laws 1896, c. 228, § 16, but the disqualification of wardens of a town is no ground for mandamus by a private individual to require certification of complaints to a district court. Williams v. Champlin [R. I.] 59 A. 75.

75. The ground for a change must be one of the facts enumerated in the statute. Finlen v. Heinze [Mont.] 80 P. 918.

76. Sergeant of a city whose duty it was to summon a jury. American Bonding & Trust Co. v. Milstead, 102 Va. 683, 47 S. E. 853.

77. But no motion for change of judge is proper [Code Civ. Proc. §§ 180, 615].

A change of venue is usually authorized by statute when necessary for the convenience of witnesses,[78] and to promote the ends of justice.[79] Where a majority of witnesses reside in the county of defendant's residence,[80] or in the county where the cause of action arose, a change will be granted.[81] The rule that venue will not be changed for convenience of experts does not include those who testify to value from personal experience. Witnesses who could not furnish any material evidence may be disregarded.[82] A plaintiff may apply for a change of venue on this ground.[83] A change may be granted on the ground that essential evidence is located in another county.[84]

Local prejudice such as to prevent a fair and impartial trial,[85] or the undue influence of an adversary in the county, is a ground for a change of venue[86] in the sound discretion of the court.[87] The court must try the issue on all of the evidence,[88] and not decide the question on an examination of the jury panels merely.[89] The right to a change of venue may be denied on the ground of laches.[90] The ruling on a change of venue may be corrected on appeal,[91] provided proper exception has been made,[92] but it will not be disturbed unless there was an abuse of discretion or palpable error.[93]

§ 3. *Procedure for change.*[94]—The motion cannot be made in county where action should have been brought.[95] The demand must be served with or before

State v. District Court of Second Jud. Dist. [Mont.] 77 P. 318.

78. Where all witnesses except plaintiff resided in the county to which the change was made, the order would not be reversed, though the affidavit did not give the names of the witnesses or the testimony expected from them. Grant v. Bannister, 145 Cal. 219, 78 P. 653. Plaintiff applied on affidavit of its managing agent, which was not contradicted. Robertson Lumber Co. v. Jones [N. D.] 99 N. W. 1082. Venue may be changed where witnesses must necessarily produce books which are in daily use by a going corporation, the plaintiff alone being discommoded. Groff v. Rome Metallic Bedstead Co., 90 N. Y. S. 691.

79. In a suit for false representations in the prospectus of a corporation brought by plaintiff in the county where he read and acted upon them, it was not improper to refuse to transfer to the county where defendants lived and where most of the transactions to be examined occurred, and many of the witnesses lived, as it was not clear that the convenience of the witnesses would be promoted and the court calendar there was congested. Kavanaugh v. Mercantile Trust Co., 94 App. Div. 575, 88 N. Y. S. 113.

80. Action for breach of contract made and to be performed in county of defendants' residence. Church v. Swigert, 90 N. Y. S. 939.

81. Action in county of Lewis on action arising in county of N. Y. and plaintiff the only witness residing in the county of Lewis. Larocque v. Conhaim, 45 Misc. 234, 92 N. Y. S. 99.

82. Groff v. Rome Metallic Bedstead Co., 90 N. Y. S. 691.

83. Code Civ. Proc. § 987. Remedy is by motion and not by amendment of the declaration. Lindsley v. Sheldon, 43 Misc. 116, 88 N. Y. S. 192.

84. Within discretion of judge. Eames v. Armstrong, 136 N. C. 392, 48 S. E. 769.

85. Discretion properly exercised in refusing a change because of prejudice against defendant corporation where plaintiff was a negro who lived in another state and probably had no influence on the jury. Louisiana & N. W. R. Co. v. Smith [Ark.] 85 S. W. 242.

86. Ky. St. 1903, § 1094, does not authorize change for undue influence of adversary's counsel. Louisville & E. R. Co. v. Poulter's Adm'r [Ky.] 84 S. W. 576.

87. Fitzhugh v. Nicholas [Colo. App.] 77 P. 1092.

88. Where there are counter affidavits, the court must hear evidence on the issue and determine the same on the merits. Eudaley v. Kansas City, etc., R. Co. [Mo.] 85 S. W. 366.

89. Court examined jury panels as to prejudice, but it did not appear that this was the sole evidence before the court, so it was presumed that the refusal was justified. Western Coal & Min. Co. v. Jones [Ark.] 87 S. W. 440.

90. Motion made 26 months after issue joined and after there had been one trial resulting in a disagreement was made too late. Haines v. Reynolds, 95 App. Div. 275, 88 N. Y. S. 589.

91. Eudaley v. Kansas City, etc., R. Co. [Mo.] 85 S. W. 366. It involves the merits of the action. Robertson Lumber Co. v. Jones [N. D.] 99 N. W. 1082.

92. Where venue changed to a county not contiguous because of prejudice of inhabitants and of judges, and for the latter cause venue could only be changed to a contiguous county, it would be presumed that the change was made for the first cause. Wright v. Kansas City [Mo.] 86 S. W. 452.

93. No abuse where the larger number of witnesses resided in the county of defendants' residence. Pattison v. Hines, 93 N. Y. S. 1071; Southern R. Co. v. State [Ind. App.] 72 N. E. 174.

94. See 2 Curr. L. 2006.

95. Should be filed in county where ac-

answer,[96] or plea of privilege,[97] or motion for removal must be filed before the time for answering expires.[98] In Indiana the demand must be made on or before the third day after the return of the summons.[99] The plea of privilege is not waived by a continuance.[1] A change cannot be granted where no notice is given to the adverse party.[2] An application made after trial is too late in any case.[3] In the case of justices of the peace, the change must usually be to a justice of the peace of the same village or to a justice of a town adjoining a village.[4] Affidavits must be specific as to the time and place of the residence of the parties.[5] The averments of the petition are accepted as true for the purpose of conferring jurisdiction,[6] unless defendant avers that they were fraudulently made.[7] The procedure in New York is by motion where demanded for the convenience of witnesses.[8]

§ 4. *Results of change of venue.*[9]—The court to which the change is made acquires full jurisdiction,[10] unless the change is illegal, when it acquires none.[11]

If a change be defective, the defect may be waived by a counter application for a further change.[12]

VERDICTS AND FINDINGS.

§ 1. Definitions and Nature (1804).
§ 2. General Verdicts (1804).
§ 3. Special Interrogatories and Verdicts (1804).
§ 4. Conflicts Between Verdicts and Findings (1807).
§ 5. Separate Verdicts as to Different Counts, Causes of Action, or Parties (1808).
§ 6. Submission to Jury, Rendition and Return (1808).
§ 7. Amendment and Correction (1810).
§ 8. Recording, Entry and Effect of Verdict; Impeachment (1811).
§ 9. Findings by Court or Referee (1812).
§ 10. Objections and Exceptions (1816).

The present title treats of verdicts, general and special, and findings of fact

tion in fact was brought. Bell v. Polymero, 90 N. Y. S. 920.

96. The fact that a demurrer was overruled after the demand had been made was immaterial. Washington v. Thomas, 92 N. Y. S. 994.

97. Where the plea was improperly stricken the error was harmless where the findings were such as to negative the allegations of the plea. San Antonio, etc., R. Co. v. Dolan [Tex. Civ. App.] 85 S. W. 302.

98. Matter of right in actions for recovery of personal property. Brown v. Cogdell, 136 N. C. 32, 48 S. E. 515. After default, defendant cannot object that the statement of claim was insufficient because it did not lay venue. American Mfg. Co. v. Morgan Smith Co., 25 Pa. Super. Ct. 176.

99. Such a rule of court is reasonable, and on an appeal from county commissioners, the time began to run when the case stood for trial 10 days after the filing of the transcript. Perdue v. Gill [Ind. App.] 73 N. E. 844.

1. The order specially stating that it was made without prejudice. Leahy v. Ortiz [Tex. Civ. App.] 85 S. W. 824.

2. Mills' Ann. Code, § 30. Fitzhugh v. Nicholas [Colo. App.] 77 P. 1092. Proper to refuse where failed to give notice to adverse party, or to file verified petition. Louisville & E. R. Co. v. Poulter's Adm'r [Ky.] 84 S. W. 576.

3. Motion on the ground of prejudice of judge, but no notice ever given. Smith v. King of Arizona Min. & Mill. Co. [Ariz.] 80 P. 357.

4. Not to a justice of a town adjoining the town in which the village is located. Wadena Cracker Co. v. Gaylord [Minn.] 101 N. W. 72.

5. Affidavit that affiant resides in a certain county does not show that he resided in such county at the time of the commencement of the action. Burke v. Frenkel, 97 App. Div. 19, 89 N. Y. S. 621. Affidavit that a party was a resident of a certain county at the commencement of the suit was a mere conclusion of law; but allegations on information and belief are sufficient where the sources of the information are given. Boyle v. Standard Oil Co., 92 N. Y. S. 677.

6. Where the original pleadings are not on file, the appellate court may treat the copy of the pleadings set out in the transcript made on the change of venue as a sufficiently certified copy of the original pleadings. Indianapolis & G. Rapid Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145. Plaintiff's residence presumed to be as he alleges it until the contrary appears. Dabaghian v. Kaffafian [N. J. Law] 58 A. 106.

7. Defendant not entitled to be sued in county of domicile for pasturing plaintiff's cattle with infected cattle. Baldwin v. Richardson [Tex. Civ. App.] 87 S. W. 353.

8. Not by an amendment of plaintiff's declaration. Lindsley v. Sheldon, 43 Misc. 116, 88 N. Y. S. 192.

9. See 2 Curr. L. 2008.

10. The court to which a case has been transferred has jurisdiction to order a nunc pro tunc entry on notice to the other party. Indianapolis & G. Rapid Transit Co. v. Andis, 33 Ind. App. 625, 72 N. E. 145.

11. Clerk transferred a replevin case on affidavits that it was intended to be in trover, but brought in replevin to defeat defendant's right to a transfer. Jones v. District Ct. of Hennepin County, 92 Minn. 205, 99 N. W. 806.

12. Southern Indiana R. Co. v. McCarrell [Ind.] 71 N. E. 156.

and of law in civil cases.[13] It does not cover the procedure anterior[14] or posterior to them.[15]

§ 1. *Definitions and nature.*[16]—In a general verdict the jury apply the law to the facts and pronounce generally upon all the issues;[17] in a special verdict they find the facts only and the trial judge determines their legal effect.[18]

§ 2. *General verdicts.*[19]—A general verdict determines all material issues, in its favor,[20] and every reasonable presumption will be indulged in its support,[21] though if the amount shows that it was based upon an error, it will be set aside.[22] Where mere title to a specific thing is involved, the verdict should be for a party generally.[23]

The verdict should not present the evidence.[24] Informalities, verbal inaccuracies, and technical defects, are to be disregarded.[25] In Illinois a jury cannot be required in their general verdict to specify under what count or counts of the declaration the same is returned.[26]

Interest is not allowable on a verdict for unliquidated damages for the time between its finding and the rendition of judgment thereon.[27]

§ 3. *Special interrogatories and verdicts. When proper.*[28]—At common law the practice of submitting special interrogatories to a jury was not allowed,[29]

13. For verdicts and findings in criminal cases see Indictment and Prosecution, 4 Curr. L. 1.

14. See Jury (selection and requisites), 4 Curr. L. 358; Trial (conduct and custody of jury), 4 Curr. L. 1716.

15. See Judgments (conformity to findings and legal sufficiency thereof and judgment non obstante) 4 Curr. L. 287; New Trial and Arrest of Judgment, 4 Curr. L. 810; Appeal and Review, 3 Curr. L. 167.

16. See 2 Curr. L. 2009.

17. Rev. Codes 1899, § 5444, considered. Morrison v. Lee [N. D.] 102 N. W. 223. A general verdict is the response of the jury to the whole of the evidence in the cause. Ft. Wayne Traction Co. v. Hardendorf [Ind.] 72 N. E. 593. See 2 Curr. L. 2009, n. 35.

18. Rev. Codes 1899, § 5444, considered. Morrison v. Lee [N. D.] 102 N. W. 223. See 2 Curr. L. 2009, n. 36.

19. See 2 Curr. L. 2009.

20. Is a finding of all disputed questions of fact in favor of the prevailing party. Busher v. New York Life Ins. Co., 72 N. H. 551, 58 A. 41. In an action for personal injuries, the effect of a general verdict for plaintiff is that all material allegations of the complaint have been proved, that defendant has been guilty of actionable negligence, or the omission of a statutory duty, and that this negligence or omission was the proximate cause of the injury. Foster v. Bemis Indianapolis Bag Co. [Ind.] 71 N. E. 953. Where the jury made no special findings as to defendant's plea of reconvention, but returned a verdict for plaintiff for the full amount claimed the verdict should be construed as a finding against defendant on such plea. De Witt v. Berger Mfg. Co. [Tex. Civ. App.] 81 S. W. 334. A verdict for the "foreclosure of plaintiff's lien" includes a finding that the lien existed. Fontaine v. Nuse [Tex. Civ. App.] 85 S. W. 852. Except as saved by an exception to some ruling of law is conclusive as to all questions. Paul v. Delaware, etc., R. Co., 130 F. 951.

21. Ft. Wayne Traction Co. v. Hardendorf [Ind.] 72 N. E. 593; Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571. In an action against an initial carrier for damages to cattle while in the hands of a connecting carrier, the jury finding that it was not all of defendant's contract to safely deliver the cattle, held, such provision would be presumed to be contained in the further part of the contract in order to sustain a general verdict for plaintiff. Chicago, I. & L. R. Co. v. Woodward [Ind.] 72 N. E. 558. Also in such case it was presumed that the cattle were delivered to the connecting carrier in good condition. Id.

22. A verdict for less than the full amount of license fees due on poles and wires of an interstate telegraph company will be considered void because based upon an exercise of the police power which the court and jury must have deemed unreasonable. Postal Tel.-Cable Co. v. New Hope, 192 U. S. 55, 48 Law. Ed. 338.

23. Should not be against the other for a stated sum. King Optical Co. v. Royal Ins. Co., 24 Pa. Super. Ct. 527.

24. Should not set forth the conduct from which an agreement to pay is implied. Brown v. Ricketts, 5 Ohio C. C. (N. S.) 675.

25. Gillespie v. Ashford [Iowa] 101 N. W. 649. Verdict in the following form, which, except as to the figures and signature, was prepared by the court: "We the jury find for the plaintiff * * * in the sum of $113.91. We the jury find for the defendants. Melvin Brooks, Foreman,"—held for plaintiff. Id.

26. Junction Min. Co. v. Ench, 111 Ill. App. 346. This information can only be obtained by resort to the statute authorizing the submission of special findings or interrogatories. Id.

27. Clyde Milling & Elevator Co. v. Buoy [Kan.] 80 P. 591. See Interest, 4 Curr. L. 241.

28. See 2 Curr. L. 2010.

29. Gila Valley, etc., R. Co. v. Lyon [Ariz.] 80 P. 337.

though at the present day the practice is incorporated into the statutes of most of the states. As a rule these statutes, unless mandatory in terms,[30] are construed as permitting the practice, but leaving its exercise in the discretion of the court.[31] It is improper to submit such special interrogatories without notice to counsel and an opportunity given them to argue the same.[32] Where the element of responsible causation appears as a matter of law from the evidence and other facts found, no specific finding on the subject is necessary.[33] In Texas a waiver of a general charge is not essential.[34]

Requests for and submission of special issues or interrogatories.[35]—Unless the court announces that it will not submit an issue,[36] a party cannot complain of its nonsubmission unless he requests its submission,[37] though in this connection it should be remembered that it is the duty of the court to submit such issues as are sufficient to dispose of the controversy and enable the court to proceed to judgment.[38] Generally a request for the submission of an issue must be in writing.[39]

Form and requisites of special interrogatories.[40]—While no single interrogatory should require an answer determinative of the case,[41] yet the interrogatories, as a whole, should cover all material[42] issues of fact raised by the pleadings and controverted by the evidence,[43] each question admitting of an answer in the negative or affirmative;[44] but the court should not attempt to embody all the facts and circumstances as in a hypothetical question to an expert,[45] and should not copiously recite the testimony.[46] The interrogatories should not be directed to counts[47] or facts[48] unsupported by the evidence. If the form of the question sub-

30. Rev. St. 1898, § 2858, requiring the court to submit special verdicts, covering the material issues of facts, when requested by the parties, is mandatory. Pearson v. Kelly [Wis.] 100 N. W. 1064.

31. Gila Valley, etc., R. Co. v. Lyon [Ariz.] 80 P. 337. Rev. St. 1901, par. 1427, providing that the court may submit such interrogatories, so construed. Id. Under Sayles' Ann. Civ. St. Supp. p. 156, art. 1333, providing that a case shall not be submitted on special issues unless requested by a party, held such submission is discretionary with the trial judge. Home Circle Soc. No. 2 v. Shelton [Tex. Civ. App.] 85 S. W. 320. The submission of special questions lies in the discretion of the court. Elwell v. Roper, 72 N. H. 585, 58 A. 507.

32. Chicago City R. Co. v. Jordan [Ill.] 74 N. E. 452.

33. Hallum v. Omro [Wis.] 99 N. W. 1051.

34. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

35. See 2 Curr. L. 2011.

36. If it so announces, the aggrieved party need not request its submission. Falkner v. Pilcher & Co. [N. C.] 49 S. E. 945.

37. Must tender the issue. Falkner v. Pilcher & Co. [N. C.] 49 S. E. 945. Where the case has been tried and judgment entered on a special verdict, the court cannot at the instance of the losing party try controverted issues tendered by such party on the trial, but which he omitted to have submitted to the jury. Coke v. Ikard [Tex. Civ. App.] 87 S. W. 869.

38. Falkner v. Pilcher & Co. [N. C.] 49 S. E. 945.

39. **In Texas** it seems that the request need not be in writing. Stahl v. Askey [Tex. Civ. App.] 81 S. W. 79. See, also, York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

40. See 2 Curr. L. 2011.

41. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468.

42. Where the evidence was conflicting as to whether gangrene was caused by endocarditis or vice versa, a special interrogatory as to whether endocarditis existed before the accident alleged to have caused death held properly refused, as an affirmative answer could not have affected the general verdict. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468.

43. Hallum v. Omro [Wis.] 99 N. W. 1051. Facts must be provable within the issues. Interrogatory as to whether jury gave plaintiff damages because of written or because of oral contract held properly refused. American Quarries Co. v. Lay [Ind. App.] 73 N. E. 608. Should not be directed to conceded and undisputed facts. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468. Where the vendee made no claim that vendor guaranteed quantity of land, held error to submit an interrogatory as to the existence of such a guaranty. Boddy v. Henry [Iowa] 101 N. W. 447. **In personal injury suits** should include a question covering the subject of proximate cause, and explain it so the jury may answer intelligently. Hallum v. Omro [Wis.] 99 N. W. 1051.

44. Hallum v. Omro [Wis.] 99 N. W. 1051.

45. Knickel v. Chicago, etc., R. Co. [Wis.] 101 N. W. 690. In an action for damages by fire, held not error to refuse to insert after word "locomotive" the words "properly equipped with proper spark-arresting machinery in good condition." Id.

46. Jenkins v. Beachy [Kan.] 80 P. 947.

47. Should not be directed to counts unsupported by evidence. Chicago City R. Co. v. Jordan [Ill.] 74 N. E. 452.

48. Evidence that president of corporation presented claim for compensation at direc-

mitting an issue to the jury is insufficient to require a finding of the necessary facts upon which such issue is made to depend, and for a proper determination thereof, the party complaining should request in writing a finding of such additional facts.[49] In the absence of such request, the imperfect submission of the issue or the failure to submit it altogether is not ground for reversal.[50]

Special interrogatories must relate only to ultimate facts,[51] must not call for a conclusion of law,[52] or for a conclusion which must be based on a finding of several facts.[53] The interrogatory must not be ambiguous,[54] nor call for a single answer to a compound question.[55] Time being essential, it should be made an element of the question.[56] In tort actions interrogatories requiring the jury to itemize its elements of damages should be refused.[57]

Form and requisites of special verdict.[58]—The verdict should be a specific[59] and responsive[60] answer to all issues submitted;[61] but argumentative or indirect answers, while not commendable, are not always ground for reversal,[62] and the one in whose favor an ambiguous answer is construed cannot complain thereof.[63] In order to take advantage of failure to answer interrogatories, one must have requested that they be answered when returned unanswered.[64] Where the sole issue in the case is submitted in form of a special issue, it is immaterial whether the

tor's meeting held insufficient to warrant the submission of question whether there was an "express or implied contract" for compensation. Lowe v. Ring [Wis.] 101 N. W. 698.

49. Rev. St. 1895, art. 1331, considered. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117.

50. Rev. St. 1895, art. 1331, considered. York v. Hilger [Tex. Civ. App.] 84 S. W. 1117; A. E. Holly & Co. v. Simmons [Tex. Civ. App.] 85 S. W. 325. Such article 1331 applies only to cases submitted on special issues by the court. Union Carpet Lining Co. v. George F. Miller & Co. [Tex. Civ. App.] 86 S. W. 651.

51. Chicago & Alton R. Co. v. Bell, 111 Ill. App. 280; Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225. Interrogatories in the nature of a cross-examination of the jurors concerning the methods of their deliberations held properly refused. Greenlee v. Mosnat [Iowa] 101 N. W. 1122.

Must not relate to evidentiary matters: Interrogatories as to whether car ran into child or child into car held improperly submitted. Chicago City R. Co. v. Jordan [Ill.] 74 N. E. 452. Burns' Ann. St. 1901, § 555. Interrogatory as to whether goods were ordered by certain letters held properly refused. O. M. Cockrum Co. v. Klein [Ind.] 74 N. E. 529.

52. Boddy v. Henry [Iowa] 101 N. W. 447. Burns' Ann. St. 1901, § 655. Fire Ass'n of Philadelphia v. Yeagley [Ind. App.] 72 N. E. 1035. In an action on a policy, a special interrogatory requesting a finding whether insurer's local agent had authority to consent to incumbrances on the property held properly refused. Id.

53. Special interrogatories as to the cause of gangrenous condition held properly refused. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468.

54. Interrogatory as to whether gangrenous condition was caused by a fall or by endocarditis held ambiguous. Morrow v. National Masonic Acc. Ass'n [Iowa] 101 N. W. 468.

55. A special interrogatory whether plaintiff knew, or had reason to know, that a bridge was unsafe held objectionable. Jones v. Shelby County, 124 Iowa, 551, 100 N. W. 520. Question whether there was an "express or implied" contract held faulty. Lowe v. Ring [Wis.] 101 N. W. 698.

56. A special interrogatory as to whether plaintiff saw notice of unsafe condition of bridge held objectionable as not limiting the jury to a time before the accident. Jones v. Shelby County, 124 Iowa, 551, 100 N. W. 520.

57. Southern Indiana R. Co. v. Moore [Ind. App.] 72 N. E. 479; Cleveland, etc., R. Co. v. Miller [Ind.] 74 N. E. 509.

58. See 2 Curr. L. 2012.

59. The time of use by a buyer being material, an answer, "We do not know," to a special interrogatory as to the length of such time should be referred back for a more specific answer. Hallwood Cash Register Co. v. Dailey [Kan.] 79 P. 158. An answer "No" to the issue whether a sale of goods was fraudulent or was to secure the payment of a valid debt is uncertain. Riske v. Rotan Grocery Co. [Tex. Civ. App.] 84 S. W. 243.

60. An answer "No" to the issue whether anything was paid for certain notes is not responsive unless construed to mean nothing. Riske v. Rotan Grocery Co. [Tex. Civ. App.] 84 S. W. 243.

61. A finding is not essential in matters not submitted. City of San Antonio v. L. A. Marshall & Co. [Tex. Civ. App.] 85 S. W. 315.

62. Atchison, etc., R. Co. v. Davis [Kan.] 79 P. 130.

63. Where certain interrogatories answered "Doubtful," were treated as equivalent to negative answers in favor of defendant, the latter cannot complain that they were not sufficiently specific. Norman v. Hopper [Wash.] 80 P. 551.

64. Mayo v. Halley, 124 Iowa, 675, 100 N. W. 529.

finding of the jury be "Yes" or "No" or a finding for or against a party.[65] An answer to a question submitted upon a condition which does not occur may be disregarded.[66] Where one is not entitled to judgment on answers to interrogatories, a refusal to require certain of the answers to be rendered more specific is harmless.[67]

Interpretation and construction.[68]—A special finding shows that the facts stated, as the jury believed, were proven upon the trial, and that they were probably considered by the jury,[69] and such construction cannot be extended by argument.[70] Technical words do not necessarily receive a technical interpretation.[71]

§ 4. *Conflicts between verdicts and findings.*[72] *General verdicts.*—Inconsistent verdicts, rendered by the same jury and upon the same testimony, being irreconcilable with each other, should be set aside,[73] unless one is unmistakably right and the other manifestly wrong, in which case the correct one may be sustained and the other set aside.[74]

General verdicts and special findings.[75]—If reasonably possible, special findings should be construed so as to harmonize with and uphold the general verdict,[76] and they will only control when there is an irreconcilable conflict,[77] apparent upon the face of the record,[78] and beyond the possibility of being removed or reconciled by any evidence legitimately admissible under the issues in the case.[79] All rea-

65. Stahl v. Askey [Tex. Civ. App.] 81 S. W. 79.

66. Where question was submitted to be answered in case a previous question was answered affirmatively, and the latter was answered in the negative. McGeehan v. Gaar, Scott & Co. [Wis.] 100 N. W. 1072.

67. Lake Erie & W. R. Co. v. McFall [Ind.] 72 N. E. 552.

68. See 2 Curr. L. 2013.

69. Ft. Wayne Traction Co. v. Hardendorf [Ind.] 72 N. E. 593.

70. On a trial in which there was a cause of action on an oral contract and one on a written contract, a special finding that the jury had considered the statute of frauds and the question of ratification cannot be extended so as to have the effect of showing that the verdict was founded on the oral contract. Ellis v. Block [Mass.] 73 N. E. 475.

71. The word **"neglect"** held capable of implying an omission or failure merely without regard to the question of legal negligence. Chicago, etc., R. Co. v. Willard, 111 Ill. App. 225.

72. See 2 Curr. L. 2014.

73. Stevens v. Walker [Me.] 58 A. 53. So held where two cases, one for personal trespass and one for malicious prosecution, were brought by the same plaintiff against the same defendant and were tried together before the same jury. Id.

74. Stevens v. Walker [Me.] 58 A. 53. When contradictory verdicts are returned in favor, respectively, of two several parties, it is the duty of the court to ascertain whether there is any error, and, if not, which of them, if either, is such as only could be upheld by the evidence, and, if either of them is such, to render a judgment of affirmance thereon, disposing of the other as the law and the relations of the parties require. Chicago, etc., R. Co. v. McManegal [Neb.] 103 N. W. 305. Where, in a joint action against a principal and agent for negligence, there is a judgment, supported by the evidence, in favor of the latter, held, there should be a judgment for the principal, though there is a verdict against it. Id.

75. See 2 Curr. L. 2014.

76. Burnell v. Bradbury, 69 Kan. 444, 77 P. 85. In an action for an assault, special findings awarding $1 punitive damages and no actual damages construed and held to mean nominal damages, there being a general verdict of $1. Id.

77. Flickner v. Lambert [Ind. App.] 74 N. E. 263; Pittsburg, etc., R. Co. v. Newsom [Ind. App.] 74 N. E. 21. Burns' Ann. St. 1901, § 556. Ft. Wayne Traction Co. v. Hardendorf [Ind.] 72 N. E. 593.

78. Flickner v. Lambert [Ind. App.] 74 N. E. 263.

79. Smith v. Michigan Cent. R. Co. [Ind. App.] 73 N. E. 928; Flickner v. Lambert [Ind. App.] 74 N. E. 263; Farmers' Ins. Ass'n v. Reavis [Ind.] 71 N. E. 905. Where, in an action on a fire policy in which the complaint contained a cause of action on an account stated, an answer to a special interrogatory showing that there was a mere statement by defendant's agent as to when plaintiff would probably get his money, held not to overrule a general verdict. Id. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571. In an action for injury resulting from collision with street car, special findings that plaintiff did not look for the car and heard it approaching, held not to overcome general verdict in her favor. Id. Where special findings show contributory negligence, they should prevail over a general verdict for plaintiff in a personal injury suit. National Brass Mfg. Co. v. Rawlings [Kan.] 80 P. 628; Southern R. Co. v. Davis [Ind. App.] 72 N. E. 1053. In an action for personal injuries, answers to special interrogatories disclosing that the work was not dangerous, any danger being obvious and appreciated by plaintiff and avoidable by the use of ordinary care, held inconsistent with general verdict for plaintiff. Foster v. Bemis Indianapolis Bag Co. [Ind.] 71 N. E. 953. Where, in an action for personal injuries, the general verdict proceeded

sonable presumptions will be indulged in favor of the general verdict,[80] and nothing can be presumed in favor of the special findings or answers to interrogatories.[81] An inaccurate answer affords no ground for setting aside the general verdict.[82] The special findings prevailing, a judgment non obstante may be entered.[83]

Between special findings.[84]—Inconsistent[85] answers to interrogatories neutralize one another, and the findings of the general verdict prevail.[86]

§ 5. *Separate verdicts as to different counts, causes of action, or parties.*[87]—A single cause of action being stated in separate counts, a general verdict is good,[88] though upon request it is the duty of the court to instruct the jury to bring in separate verdicts on different counts;[89] but this right is waived by the failure to make such request.[90] Where causes are consolidated but the plaintiffs have no joint interest in the recovery sought, separate findings are necessary.[91] Where several causes of action are joined, a single verdict is not severable.[92] A general verdict against one of two defendants is a finding in favor of the other.[93]

§ 6. *Submission to jury, rendition and return.*[94]—Whenever there are any questions of fact in evidence, the case must be submitted to the jury[95] under proper instructions,[96] and according to the orderly methods of trial procedure.[97]

The court may submit the form of the verdict, and there being but one possible legal result, but one form need be submitted.[98] Failure to submit a particular form is not erroneous in the absence of a request therefor.[99] While the usual

on the theory that the proximate cause was uncovered cogwheels and the special findings showed that the proximate cause was a loose piece of iron on the floor, held conflict irreconcilable. P. H. & F. M. Roots Co. v. Meeker [Ind.] 73 N. E. 253.

Special findings that deceased did not look or listen for second train and that such train was running at an excessive speed, held not inconsistent with a general verdict for plaintiff for deceased's wrongful death. Smith v. Michigan Cent. R. Co. [Ind. App.] 73 N. E. 928. A verdict of $200, in an action for personal injuries where the damages were to be limited to medical expenses and compensation for loss of time, taking into consideration whether injuries were temporary or permanent, is not inconsistent with special verdicts allowing $16 for loss of time and $50 for physician. City of Eureka v. Neville [Kan.] 80 P. 39. In an action for injuries by collision with a street car, answers to interrogatories showing that motorman rang his gong, was in a proper position and paying attention, that danger was apparent when car was within 40 feet of buggy and could have been stopped within 35 feet, held not inconsistent with general verdict for plaintiff. Indianapolis St. R. Co. v. Seerley [Ind. App.] 72 N. E. 169. Answer to interrogatory assuming what was not established by any other answer, viz., that plaintiff was entirely off sidewalk when injured, held not to establish contributory negligence in the face of a general verdict for plaintiff. City of Vincennes v. Spees [Ind. App.] 72 N. E. 531.

80. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571. See, also, Chicago, I. & L. R. Co. v. Woodward [Ind.] 72 N. E. 558; Ft. Wayne Traction Co. v. Hardendorf [Ind.] 72 N. E. 593.

81. Indianapolis St. R. Co. v. Johnson [Ind.] 72 N. E. 571.

82. Where interrogatories did not call for important or ultimate facts. Kuehl v. Chicago, etc., R. Co. [Iowa] 102 N. W. 512.

83. See Judgments, 4 Curr. L. 287.

84. See 2 Curr. L. 2015.

85. Findings that wheat was shipped as specified, but was worthless when received, held inconsistent, there being no evidence of damage to it during shipment. Commerce Milling & Grain Co. v. Morris [Tex. Civ. App.] 86 S. W. 73. In an action for the breach of an implied warranty of sale, answers that article was rejected in January, 1899, and was used until May, 1899, held not inconsistent. Graham v. Hatch Storage Battery Co. [Mass.] 71 N. E. 532. Inconsistency in answers that amounts expended by a city for improvements were necessary but unreasonable, held explained by an answer to a question as to the amount that was unnecessary or unreasonable. City of San Antonio v. L. A. Marshall & Co. [Tex. Civ. App.] 85 S. W. 315.

86. Flickner v. Lambert [Ind. App.] 74 N. E. 263.

87. See 2 Curr. L. 2015.

88. Leu v. St. Louis Transit Co. [Mo. App.] 85 S. W. 137.

89, 90. Goodale v. Rohan [Conn.] 58 A. 4.

91. Rapid Transit R. Co. v. Miller [Tex. Civ. App.] 85 S. W. 439.

92. Higby v. Pennsylvania R. Co., 209 Pa. 452, 58 A. 858.

93. Taylor v. Houston, etc., R. Co. [Tex. Civ. App.] 80 S. W. 260.

94. See 2 Curr. L. 2016.

95. Directing Verdict and Demurrer to Evidence, 3 Curr. L. 1093; Discontinuance, Dismissal and Nonsuit, 3 Curr. L. 1097. As to what are questions of fact, see Questions of Law and Fact, 4 Curr. L. 1165.

96. Instructions, 4 Curr. L. 133.

97. Trial, 4 Curr. L. 1708.

98. Is not prejudicial error. Seidel v. Quincy, etc., R. Co. [Mo. App.] 83 S. W. 77.

99. Triggs v. McIntyre [Ill.] 74 N. E. 400.

and better practice, where the court directs the verdict, is that a formal, written verdict be returned by the jury, the absence thereof is not fatal.[1] The court may require the jury to indicate the paragraph of the charge or the issue upon which they base their verdict.[2]

In the absence of statutory authority, the verdict must be unanimous;[3] but in order to take advantage of a want of unanimity, the aggrieved party must object at the time of the receipt of the verdict, and must preserve his objection in the bill of exceptions and make such defect a ground for a motion for a new trial.[4]

The verdict must be certain;[5] but errors not affecting substantial rights will generally be disregarded.[6] A verdict is valid without a recital that the findings in favor of plaintiff were against defendant, there being no one else to whom they could refer.[7] The validity of particular forms is shown in the notes.[8] Where causes are consolidated and the verdict finds separately for each plaintiff, a signature of the foreman at the conclusion of the verdict is a sufficient authentication.[9] In Texas a juror being excused by agreement, it is not necessary that all the remaining jurors sign the verdict.[10]

While a verdict must conform to the evidence[11] and the instructions,[12] the rule does not extend to a technical disregard[13] or one due to a mistake.[14]

1. Moore v. Petty [C. C. A.] 135 F. 668.

2. Action on a note and to foreclose a chattel mortgage. Scaling v. First Nat. Bank [Tex. Civ. App.] 87 S. W. 715. See ante, § 5.

3. Laws 1899, p. 244, being unconstitutional, a verdict agreed to by five out of six jurors is a nullity. Star Loan Co. v. Duffy Van & Storage Co. [Colo. App.] 77 P. 1092. A verdict in a civil action is not erroneous because returned by only 9 of the 12 jurors. McClure v. Feldmann [Mo.] 84 S. W. 16. Judgment should not be entered on a verdict to which all the jurors do not agree. Lincoln Traction Co. v. Heller [Neb.] 100 N. W. 197. See, also, Jury, 4 Curr. L. 358.

4. Wores v. Preston, 4 Ariz. 92, 77 P. 617.

5. In an action for rafting and boomage services, the evidence relating exclusively to the reasonableness of the charges, a verdict "for plaintiff in the sum of $—— For Tidi Watter Logs 35 c m; For Fresh Watter Logs 50 c m." is void for uncertainty. Grays Harbor Boom Co. v. Lytle Logging & Mercantile Co. [Wash.] 80 P. 271.

6. Under Civ. Code Prac. §§ 325, 134, a verdict for "1800," read and assented to as a verdict for $1,800, held, a judgment for $1,800 was properly entered. Kentucky Distilleries & Warehouse Co. v. Leonard [Ky.] 87 S. W. 809.

7. Rapid Transit R. Co. v. Miller [Tex. Civ. App.] 85 S. W. 439.

8. A form of verdict "We, the jury, find for plaintiff in the sum of $——" is not erroneous as allowing the jury to find for plaintiff for more than his damage. Wages v. Quincy, etc., R. Co. [Mo. App.] 85 S. W. 104. Instruction that if the jury find "for the plaintiff and against both of the defendants," held not misleading. Economy Light & Power Co. v. Hiller, 211 Ill. 568, 71 N. E. 1096.

Texas: Under Sayles' Ann. Civ. St. 1897, arts. 2970, 2971, the verdict **need not recite that the debts incurred by a married woman** were reasonable or proper, but it is sufficient if their verdict, construed with reference to the pleadings and evidence, implies such a finding. Evans v. Gray [Tex. Civ. App.] 86 S. W. 375.

9. Rapid Transit R. Co. v. Miller [Tex. Civ. App.] 85 S. W. 439.

10. Sayles' Ann. Civ. St. 1897, arts. 3228, 3229, construed. Gray v. Freeman [Tex. Civ. App.] 84 S. W. 1105.

11. Where plaintiff sued for $767.96 and admitted a counterclaim of $611.18, a verdict for $335.25 was not justified by the evidence and could not be sustained. Wulfart v. Weinstein, 91 N. Y. S. 359. Where, in an action for breach of contract, the evidence would support a verdict for plaintiff for the full amount claimed or for defendant for no cause of action, a compromise verdict cannot be sustained. Meyers v. Zucker, 91 N. Y. S. 358. A verdict should not be for a sum smaller than an amount conceded to be due. Farry v. Shea [N. J. Law] 59 A. 21. Verdict unauthorized by the evidence will be set aside. Baldwin v. Webb, 121 Ga. 416, 49 S. E. 265; James Clark Distilling Co. v. Bauer [W. Va.] 49 S. E. 160; St. Paul Boom Co. v. Kemp [Wis.] 103 N. W. 259. This under a statute authorizing a new trial for insufficiency of the evidence to justify the verdict. Clark v. Great Northern R. Co. [Wash.] 79 P. 1108.

12. Where the court ruled that a servant's action was maintainable under the employer's liability act, and other counts were undisposed of, held, a verdict for more than the amount allowed by the liability act could not stand. Lynch v. M. T. Stevens & Sons Co. [Mass.] 73 N. E. 478.

13. In replevin for wheat or its value, defendant alleging that plaintiff sold the wheat to defendant and that defendant had tendered the balance, and the reply denying these allegations and the court charging that plaintiff was entitled to a verdict, a general verdict for "defendant," and special findings to the effect that defendant had tendered to plaintiff a draft for the balance due are not void. Wallerich v. Puget Sound Warehouse Co. [Wash.] 80 P. 763.

14. Where court instructed that there

The amount must be reached by a proper method of computation,[15] hence a quotient verdict will be set aside on proper motion and proof;[16] but use of the quotient process is not illegal if its object is merely to afford a basis for subsequent consideration and without previous agreement that the result should be the verdict.[17] That such process was so used may be proved by the jurors themselves.[18]

The clerk cannot receive the verdict, even though the court directs such procedure.[19] Counsel voluntarily consenting that the court may receive the verdict in their absence, the consent carries with it the power to deal with emergencies.[20] The personal presence of all the jurors in court at the opening of a sealed verdict is essential to the validity of the verdict.[21] Where the jury is polled and less than the requisite number answer in the affirmative, more than one poll may be taken where the court believes a mistake has been made,[22] or is informed by a juror that he desires to change his vote.[23] Where the jury is polled as to its general verdict, it is not error to poll it en masse, over a party's objection, with reference to its special findings.[24] Whispered conversation between jurors after which one juror changes his vote does not show that improper influences were brought to bear on the juror.[25] In case of a disagreement, the court may point out to the jurors the consequences thereof, and may ask them to reconsider the case if at the same time he tells them that such consequences must not affect their judgment.[26]

§ 7. *Amendment and correction.*[27]—In equity[28] or where the trial by jury is not a constitutional or statutory right,[29] the verdict is merely advisory and may be adopted, modified or rejected as the court sees fit.[30] The verdict being exces-

was no proof as to $31.20 claimed, but that verdict should be rendered for $131.94, a verdict for $163.04 is not perverse, it being assumed that the instruction as to the $31.20 was forgotten. Hart v. Godkin [Wis.] 100 N. W. 1057.

15. Where verdict was not in excess of the aggregate of the **items of the bill of particulars,** it was not objectionable on the ground that there was no tangible evidence as to any amount having been overcharged, and that it could not have been reached by any proper method of computation. City of Battle Creek v. Haak [Mich.] 102 N. W. 1005.

16, 17. Birmingham Railway L. & P. Co. v. Clemons [Ala.] 37 So. 925; Conover v. Neher-Ross Co. [Wash.] 80 P. 281.

18. Birmingham Railway, L. & P. Co. v. Clemons [Ala.] 37 So. 925.

19. Morris v. Harburger, 91 N. Y. S. 409.

20. Where juror asked if he could change his vote and court answered that he could if he had made a mistake, held no error. Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 P. 839.

21. Ellsworth v. Varnum, 105 Ill. App. 487.

22. Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 P. 839. Ball. Ann. Codes & St. § 5012, providing that unless 10 jurors answer in the affirmative the jury shall be returned to the jury room for further deliberation, does not change the rule. Id.

NOTE. Waiver of right to poll jury: The right to have the jury polled is waived by omitting to exercise it when the verdict is opened and received in their presence. Rigg v. Cook, 9 Ill. 336, 46 Am. Dec. 462; State v. Allen, 1 McCord, L. [S. C.] 525, 10 Am. Dec. 687; Root v. Sherwood, 6 Johns. [N. Y.] 68, 5 Am. Dec. 191; Walters v. Junkins, 16 Serg. & R. [Pa.] 414.—From note to Wightman v. Chicago & Northwestern R. Co., 2 L. R. A. 185.

23. Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 P. 839.

24. Norman v. Hopper [Wash.] 80 P. 551.

25. Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 P. 839.

26. An instruction that the case had to be decided by them or by some other jury and pointing out the expense incident to a disagreement, though expressly telling them not to sacrifice their consciences, is not objectionable. City of Covington v. Bostwick, 26 Ky. L. R. 780, 82 S. W. 569.

27. See 2 Curr. L. 2017.

28. Special verdict. Jenkins v. Kirtley [Kan.] 79 P. 671. See Equity, 3 Curr. L. 1210.

Contra. Minnesota: A verdict of a jury upon specific questions of fact submitted to them in an equity action is as binding on the court as a general verdict in a legal action and is subject to the same rules as to setting it aside for insufficiency of evidence (Reider v. Walz [Minn.] 101 N. W. 601), hence it should not be set aside by the court on its own motion without giving the parties an opportunity to be heard (Id.).

29. Kelly v. Home Sav. Bank, 92 N. Y. S. 578.

30. NOTE. Power to modify or amend verdict: Until the verdict is actually rendered and recorded, the jury have the power to either alter or withdraw it. Until received by the court and discharged from its consideration, they have full control over it. Root v. Sherwood, 6 Johns. [N. Y.] 68, 5 Am. Dec. 191; Thomae v. Zushlag, 25 Tex. 255; State v. Waterman, 1 Nev. 543. But a verdict cannot be amended after the jury is discharged, when it does not appear upon its face that

sive,[31] or a mistake being made in computation,[32] the court may modify or correct the same, or may permit the jury to retire and make the correction,[33] or may require a remission of excess to avoid a new trial or reversal.[34] Where, on inquiry, it is clear that the jury disregarded an instruction as to double damages, the jury was properly permitted to return to the jury room and correct their verdict by doubling it.[35] The excessiveness of a verdict is a question of fact.[36] The relief tendered being refused, a judgment for the sum given by the verdict is proper.[37] The verdict failing to award interest, the court may add it.[38] A verdict being fatally defective and the right of recovery clear, it is proper to allow one party at his option, and whether the other consents or not, to terminate the controversy by a judgment for less than the amount named by the jury.[39] In such case the only proper basis for determining the correct amount is the probable finding of an impartial jury, reasonable doubts being resolved against the party to whom the option is given to take or submit to judgment.[40] Such practice, if grounded upon a proper basis, does not violate the rights of either party, but is highly beneficial in the administration of justice.[41] The court has authority without the knowledge or consent of the jury to put the verdict in proper form.[42] A part of the verdict not being responsive to the pleadings, it may be rejected as surplusage.[43] The verdict may be corrected or amended in open court,[44] but not after the term of rendition.[45]

§ 8. *Recording, entry and effect of verdict; impeachment.*[46]—The verdict

the alteration would be agreeable to the intention of the jury. Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393; Rigg v. Cook, 9 Ill. 336, 46 Am. Dec. 462. The court may direct the jury to amend when the verdict is imperfect and informal, and may send them back to the jury room for that purpose. Flinn v. Barlow, 16 Ill. 39; Goodwin v. Appleton, 22 Me. 453; Cook v. State, 26 Ga. 596; Hobson v. Humphries, 2 Mills (Const.) 371. The court may mould the verdict so as to meet the facts of the case and the ascertained conclusions of the jury. McMahan v. McMahan, 13 Pa. 380. Where the meaning intended to be conveyed by the jury can be ascertained from their verdict, the court may instruct the jury to alter the expressions preserving the substance so as to render it good in law; and the court should give effect to a verdict when its meaning can be ascertained. Truehody v. Jacobsen, 2 Cal. 269.—From note to Wightman v. Chicago & Northwestern R. Co., 2 L. R. A. 185.

31. Excessive verdict modified where recovery was more rapid and complete than was anticipated by the physicians on whose testimony the verdict was based. Darnell v. Krouse, 134 F. 509.

32. Where, in following out instructions, the jury erred in calculating interest, held, court could correct error. Gould v. Hartwig [Kan.] 80 P. 976.

33. Jury stating that verdict was reasonable value of animal instead of a double recovery authorized by statute, the court may permit them to retire and double the verdict. Campbell v. Iowa Cent. R. Co., 124 Iowa, 248, 99 N. W. 1061.

34. See New Trial and Arrest of Judgment, 4 Curr. L. 810; Appeal and Review, 3 Curr. L. 167; Damages, 3 Curr. L. 997.

35. Animal killed by train; first verdict only reasonable value of animal. Campbell v. Iowa Cent. R. Co., 124 Iowa, 248, 99 N. W. 1061.

36. Determination of the court of civil appeals is conclusive. International, etc., R. Co. v. Goswick [Tex.] 85 S. W. 785.

37. Campbell v. Pittsburg Bridge Co., 23 Pa. Super. Ct. 138.

38. McAfee v. Dix, 91 N. Y. S. 464. Special verdict. City of San Antonio v. L. A. Marshall & Co. [Tex. Civ. App.] 85 S. W. 315.

39. Heimlich v. Tabor [Wis.] 102 N. W. 10.

40. Heimlich v. Tabor [Wis.] 102 N. W. 10. Where the option is given plaintiff, the sum should be placed as low as an impartial jury would probably name, and if the option be given defendant to submit, it should be placed as high as an impartial jury would probably find. Id. In providing as indicated, the court cannot legitimately invade the right of trial by jury by submitting its judgment on the evidence. Id.

41. Heimlich v. Tabor [Wis.] 102 N. W. 10.

42. Malott v. Howell, 111 Ill. App. 233.

43. Where, in an action for trespass, the verdict was for the possession of the land and $1 damages, the part awarding possession may be treated as surplusage. Love v. Turner [S. C.] 51 S. E. 101.

44. So held where jury intended to find in favor of the answering defendant, and hence worded the verdict as against a defaulting defendant. B. F. King & Son v. Lane, 63 S. C. 430, 47 S. E. 704.

45. So held where one moved to amend the clerk's minutes so as to change the effect of the verdict. Duerr v. Consolidated Gas Co., 93 N. Y. S. 766.

46. See 2 Curr. L. 2013.

may cure defects in the pleadings.[47] Affidavits of jurors will not be received to impeach their verdict,[48] but may be heard as to misconduct.[49]

§ 9. *Findings by court or referee. Referee.*[50]—In equity[51] and under various statutes[52] it is proper to submit questions to be found and reported to the court for its advisement. The findings so made must conform and be confined to the authority delegated, and must suffice to intelligently inform the court.[53] Such findings are nearly always only advisory, not conclusive, and may be revised or rejected.[54]

Findings by the court.[55]—By statutes in most of the states or by consent,[56] a jury may be dispensed with in some cases; but these statutes are contrary to common law and must be strictly complied with.[57]

What may or what must be found.[58]—As a general rule it is held to be the duty of the court on its own motion to make findings covering all material issues,[59] and unless requested, failure to make a particular finding is not reversible error, there being sufficient evidence to sustain the judgment.[60] Requests made after findings and conclusion have been filed with the clerk are too late.[61] The court stating that it will make findings of fact,[62] or requesting written findings,[63] relieves the parties from making requests therefor. The rendition of special findings is generally discretionary.[64] In the Federal courts the making and effect thereof are governed by the acts of congress,[65] and there cannot be both a general and special finding.[66]

As before stated, the findings must cover all material issues;[67] but if the court

47. Leu v. St Louis Transit Co. [Mo. App.] 85 S. W. 137. See Pleading, 4 Curr. L. 980.

48. City of Battle Creek v. Haak [Mich.] 102 N. W. 1005; Galloway v. Floyd [Tex. Civ. App.] 81 S. W. 805. Cannot be attacked by the affidavits of dissenting jurors that, in their opinion, the conclusion of the majority was reached by giving a wrong construction or too much weight to a part of the evidence. Spencer v. Spencer [Mont.] 79 P. 320; Moore v. Missouri, etc., R. Co. of Texas [Tex. Civ. App.] 69 S. W. 997. Irrelevant comments in jury room about one of the parties. Weil v. Stone, 33 Ind. App. 112, 69 N. E. 698.

49. Use of "quotient process." Pence v. California Min. Co., 27 Utah, 378, 75 P. 934; Birmingham Railway, L. & P. Co. v. Clemons [Ala.] 37 So. 925. Statement by a juror that a party or witness had made different statements to juror's wife. Douglass v. Agne [Iowa] 99 N. W. 550.

50. See 2 Curr. L. 2019.

51. See Masters and Commissioners, 4 Curr. L. 614.

52. See Reference, 4 Curr. L. 1257.

53. See Reference, § 6, 4 Curr. L. 1259. See, also, Masters and Commissioners, 4 Curr. L. 614.

54. See Reference, § 10, 4 Curr. L. p. 1262. See, also, Masters and Commissioners, 4 Curr. L. 614.

55. See 2 Curr. L. 2019.

56. One consenting "that there be no jury," the latter may be dispensed with and the court may pass on all the issues. Bernheim v. Bloch, 91 N. Y. S. 40.

57. Fleer v. Reagan, 24 Pa. Super. Ct. 170.

58. See 2 Curr. L. 2019.

59. Jennings v. Frazier [Or.] 80 P. 1011.

60. State v. Coughran [S. D.] 103 N. W. 31; Cannon v. McIntyre [Mich.] 12 Det. Leg. N. 63, 103 N. W. 530. As to issues made by the evidence outside of the pleadings. Jennings v. Frazier [Or.] 80 P. 1011.

Montana: Under Code Civ. Proc. § 1114, a judgment is not reversible for want of findings unless the complaining party filed a written request for findings and had such request entered on the minutes. Bordeaux v. Bordeaux [Mont.] 80 P. 6.

61. Schilling v. Curran [Mont.] 76 P. 998. A request for a separate finding of facts made after rendition of judgment and after overruling a motion for a new trial is too late. Moberly v. Trenton, 181 Mo. 637, 81 S. W. 169.

62, 63. Quinlan v. Calvert [Mont.] 77 P. 428.

64. Application for a peremptory writ of mandamus. West Virginia Northern R. Co. v. United States [C. C. A.] 134 F. 198. Under Mansf. Dig. § 5149 (Ind. T. Ann. St. 1899, § 3354), the failure of the trial court to make findings of fact is not ground for reversal. In re Taylor's Estate [Ind. T.] 82 S. W. 727.

65. By Rev. St. §§ 649, 700 [U. S. Comp. St. 1901, pp. 525, 570], and not by state statutes. Jones v. United States [C. C. A.] 135 F. 518.

66. Under Rev. St. §§ 649, 700. Streeter v. Sanitary Dist. of Chicago [C. C. A.] 133 F. 124.

67. Standley v. Flint [Idaho] 79 P. 815. So that on appeal if the trial court's conclusions of law are incorrect, the appellate court may under Rev. St. § 701, direct judgment without the necessity of awarding a new trial. Anglo-American Land, Mortgage & Agency Co. v. Lombard [C. C. A.] 132 F. 721. Unless such findings are made, a proper judgment cannot be entered. Dieterle v. Bekin, 143 Cal. 683, 77 P. 664; Lewis v. First Nat. Bank [Or.] 78 P. 990. See,

finds on an issue that ultimately determines and necessarily supports the judgment rendered, other issues in the case become immaterial, and a failure to find thereon does not constitute prejudicial error.[66] No findings are necessary on admitted facts.[69] It is proper for the findings of fact to show that plaintiff at the trial waived one of his alleged causes of action.[70] If there is no evidence upon an issue, the finding must be against the party who had the burden of proof.[71] Where the failure to find a fact does not affect the substantial merits of the controversy, it will not be considered reversible error.[72]

The findings may be prepared and submitted by a party, at the request of the court, and without notice to the other party.[73] The findings must conform to the pleadings and evidence.[74] Where a complaint states a cause of action, a general finding that all of the allegations thereof are true is sufficient,[75] unless the answer set up affirmative matter.[76]

The findings should be[77] clear and concise statements of ultimate facts,[78] leav-

also, Fitchette v. Victoria Land Co. [Minn.] 101 N. W. 655.

In Arizona the court need only find on those issues of fact which arise upon the pleadings. McCoy v. Brooks [Ariz.] 80 P. 365. Does not apply to issues arising on motions. Id.

Pennsylvania: Findings stating the material facts that appeared in evidence and adding there was no warranty made, held to comply with Act of April 22, 1874 (P. L. 109). Krauskopf v. Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506.

68. Lewis v. First Nat. Bank [Or.] 78 P. 990. In an action by one claiming to be an assignee, court need not find on question of assignment, it having found facts supporting its judgment for defendant, though there was an assignment. Id. A finding that defendant assured plaintiff he was ready to carry out the agreement is unnecessary where it is found that defendant fully carried out the agreement. Boyd v. Liefer, 144 Cal. 336, 77 P. 953. Where the court found that a certain instrument was executed in full settlement of all claims arising out of a certain grant, it was not necessary for it to specifically pass on the questions of fraud and want of consideration in such grant. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. A general finding that certain parties are the owners in fee of the interest claimed settles all questions of title not negatived by the special findings. Id. In an action of foreclosure wherein it was alleged that the mortgage provided for attorney's fees, etc., a finding that the allegations of the complaint are true renders a finding that there is due plaintiff "$135 costs, percentage and necessary disbursements," unnecessary. Damon v. Quinn, 143 Cal. 75, 76 P. 818. Such allegation and finding held sufficient foundation for such portion of the judgment as was in excess of the amount found to be due as principal and interest. Id.

69. Jennings v. Frazier [Or.] 80 P. 1011. Where the fact was stipulated in open court. Boyd v. Liefer, 144 Cal. 336, 77 P. 953.

70. William Barie Dry Goods Co. v. Casler [Mich.] 101 N. W. 215.

71. Dieterle v. Bekin, 143 Cal. 683, 77 P. 664.

72. Borror v. Carrier [Ind. App.] 73 N. E. 123. Failure to make special findings is not prejudicial where if they had been made they would not have changed the court's conclusion of law on the facts. Hohn v. Shideler [Ind.] 72 N. E. 575.

73. Bernheim v. Bloch, 91 N. Y. S. 40.

74. A finding that all the allegations of the complaint are true and those of the answer untrue, held not against the pleadings and evidence, because plaintiff admitted some uncontroverted allegations of the answer. Continental Bldg. & Loan Ass'n v. Wilson, 144 Cal. 776, 78 P. 254. Finding that one appeared held supported by a writing signed by him declaring such appearance. Christ v. Davidson, 116 Wis. 621, 93 N. W. 532. In a suit to determine adverse claims, evidence held sufficient to sustain the findings of fact. Fitchette v. Victoria Land Co. [Minn.] 101 N. W. 655.

75. Norton v. Wilkes [Minn.] 101 N. W. 619. Findings which show affirmatively plaintiff's right to recover and which contain a general finding in favor of plaintiff on all issues, are sufficient as findings on all issues presented. Custer County Bank v. Custer County [S. D.] 100 N. W. 424. In ejectment, a finding that all the allegations of plaintiff's pleadings were true and those of defendant's untrue held to cover all material issues. Continental Building & Loan Ass'n v. Wilson, 144 Cal. 776, 78 P. 254. Findings in a foreclosure suit that there is due and owing plaintiff a certain amount and that all the allegations of the complaint are true, sufficiently disposes of issues of payment and amount. Damon v. Quinn, 143 Cal. 75, 76 P. 818.

76. Under Code Civ. Proc. § 1112, requiring the court to state the facts found and conclusions of law. Quinlan v. Calvert [Mont.] 77 P. 428.

77. See 2 Curr. L. 2020.

78. Fairfield v. Hart [Mich.] 102 N. W. 641; Fitchette v. Victoria Land Co. [Minn.] 101 N. W. 655. Should not be a statement, report or recapitulation of evidence from which such facts may be found or inferred. Anglo-American Land, Mortgage & Agency Co. v. Lombard [C. C. A.] 132 F. 721.

A written opinion of the trial judge setting forth the reasons for his decision is not a special finding of the ultimate facts in the nature of a special verdict, though copied into the judgment entry. York v. Washburn [C. C. A.] 129 F. 564.

ing nothing to be supplied by presumptions or intendments.[79] In Wisconsin both evidentiary and ultimate facts must be stated.[80] In some states a separate finding is required for each issuable fact,[81] and it is good practice to separately number each finding.[82] In most states the findings of fact should be stated separately from the conclusions of law.[83] As to whether a finding of fact found among the conclusions of law can be regarded as a finding of fact, there is a conflict.[84] While not commendable practice,[85] the findings are sufficient if they merely refer to instruments involved and in the record.[86] The court must comply with statutory provisions as to form.[87]

Interpretation and construction.[88]—When inconsistent, special findings and conclusions of law supersede a general finding;[89] but if possible, the findings must be construed so as to be reconcilable.[90] Nothing can be added to a special finding by inference or intendment.[91] Material ultimate facts not found will be presumed to have been found against the party who had the burden of proving them.[92] The constructions given particular findings are shown in the notes.[93]

79. Anglo-American Land, Mortgage & Agency Co. v. Lombard [C. C. A.] 132 F. 721; Green v. McGrew [Ind. App.] 72 N. E. 1049. Special findings in a suit to quiet title to land depending on a tax deed should state it was signed, witnessed and acknowledged by the persons designated by statute. Id. The separate findings should be so definite that the party may have a fair opportunity to except to the decision of the court upon the conclusions of law involved in the trial. Vickers v. Buck Stove & Range Co. [Kan.] 79 P. 160.

80. Under Rev. St. 1898, § 2863, requiring that the "facts found" be stated. McKenzie v. Haines [Wis.] 102 N. W. 33.

81. Rev. St. 1898, § 2863, requires a separate finding as to each issuable fact without any evidentiary or mere opinion matter, and also requires a specific decision as to each minor question of law and the final conclusion as well. McDougald v. New Richmond Roller Mills Co. [Wis.] 103 N. W. 244.

82. Vickers v. Buck Stove & Range Co. [Kan.] 79 P. 160.

83. California: Code Civ. Proc. § 633. The existence and nature of a contract should be found as facts, its validity as a conclusion of law. California Iron Const. Co. v. Bradbury, 138 Cal. 328, 71 P. 346, rehearing denied 71 P. 617.

Kansas: Should separate them on request. Vickers v. Buck Stove & Range Co. [Kan.] 79 P. 160.

New York: A decision which fails to separate the findings of fact and the conclusions of law as required, by Code Civ. Proc. § 1022, in the long form of decision, is in the short form permitted by Laws 1894, p. 1719, c. 688, § 3, amending such § 1022. Jefferson County Nat. Bank v. Dewey [N. Y.] 73 N. E. 569.

South Dakota: Under Code Civ. Proc. §§ 276, 277, the entry of judgment without written findings of fact stating the facts and conclusions of law separately is erroneous. Thomas v. Issenhuth [S. D.] 100 N. W. 436.

84. A finding that, with reference to certain land, the action is barred by certain statutes and that various parties occupying and claiming the tract are the owners thereof, is a finding of an ultimate fact, and to be treated as such, though contained in the conclusions of law. Adams v. Hopkins, 144 Cal. 19, 77 P. 712. A finding that money was "paid by plaintiff to defendant as legatee," being placed among the conclusions of law, cannot be treated as a finding of fact. Scott v. Ford [Or.] 80 P. 899.

85. Murry v. Nixon [Idaho] 79 P. 643.

86. Johnson v. Sherwood [Ind. App.] 73 N. E. 180. May refer to maps and plats on file in the case for a complete and definite description of the property involved in the litigation. Murry v. Nixon [Idaho] 79 P. 643.

87. Neither an entry in the minutes of the clerk nor a memorandum opinion of the court can take the place of the formal decision required by Code Civ. Proc. § 1022. Electric Boat Co. v. Howey, 96 App. Div. 410, 89 N. Y. S. 210. Where court orally announced views and conclusions, which were taken in the stenographer's minutes and transcribed and included in the judgment roll without being entitled, dated, or signed, held not to constitute a decision within Code Civ. Proc. § 1010. Dobbs v. Brinkerhoff, 90 N. Y. S. 480.

88. See 2 Curr. L. 2021.

89. Aetna Life Ins. Co. v. Stryker [Ind. App.] 73 N. E. 953.

90. Heaton-Hobson Associated Law Offices v. Arper, 145 Cal. 282, 78 P. 721. A finding that the account sued on was an open, mutual and current account as alleged in the complaint instead of a stated account as claimed in the answer, and further stating that there is no balance due from defendant to plaintiff, should not be construed as a finding that all of the allegations of the complaint are true. Id.

91. Sellers v. Hayes [Ind.] 72 N. E. 119; Coffinberry v. McClellan [Ind.] 73 N. E. 97.

92. Coffinberry v. McClellan [Ind.] 73 N. E. 97; Aetna Life Ins. Co. v. Stryker [Ind. App.] 73 N. E. 953.

93. Findings that "In the month of July" contract of employment was terminated and that "after the month of July" services were rendered, held to mean that the contract continued during the month of July. De La Cuesta v. Montgomery, 144 Cal. 115, 77 P. 887. A finding that a road has been generally, habitually and universally traveled by the public at large, adversely, continuously

Signing, filing and entering.[94]—The signature of the trial judge to a special finding is required only for the identification of the paper, and may be dispensed with when the same is brought into the record by a bill of exceptions or order of court.[95] Failure to give notice of findings of fact is immaterial, the aggrieved party having excepted to the findings.[96] Findings may be entered nunc pro tunc.[97]

The amendment of findings.[98]—A motion to modify or change a special finding or to make additional findings is not recognized in Indiana.[99]

The effect of the findings.[1]—Findings have the same effect as a verdict.[2] Findings of fact offered by the losing party do not constitute an admission by him that the facts are as stated.[3]

Conclusions of law.[4]—Either party may ask them.[5] In the Federal courts the court cannot be required to rule on specific propositions of law.[6] The refusal of immaterial propositions of law is harmless.[7] The court's legal conclusions must be supported by the findings,[8] and in determining such conclusions only ultimate facts are to be considered.[9] In a trial by the court, an "instruction" that one party is entitled to recover amounts to an announcement by the court that in its opinion the law and evidence required a finding for defendant.[10] It is good practice to separate and number the conclusions of law.[11] Mixed propositions of law and fact,[12] or propositions of law pertaining purely to questions of fact,[13] should be

and uninterruptedly necessarily means that the use was not permissive. City of Seattle v. Smithers [Wash.] 79 P. 615.

94. See 2 Curr. L. 2021.

95. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

96. Krausknopf v. Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506.

97. School Dist. No. 3, Carbon County v. Western Tube Co. [Wyo.] 80 P. 155. On a motion for an entry nunc pro tunc, bill of exceptions, reciting the rendition of judgment and the filing of findings on a certain date, is competent evidence that the findings were in fact made on that date. Id.

98. See 2 Curr. L. 2021.

99. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000.

1. See 2 Curr. L. 2021.

2. On appeal there can be no inquiry as to the sufficiency of the evidence. York v. Washburn [C. C. A.] 129 F. 564; Paul v. Delaware L. & W. R. Co., 130 F. 951; Streeter v. Sanitary Dist. of Chicago [C. C. A.] 133 F. 124; West v. Houston Oil Co. [C. C. A.] 136 F. 343; Lewis v. First Nat. Bank [Or.] 78 P. 990. A special finding is the equivalent of a special verdict. Anglo-American Land, Mortgage & Agency Co. v. Lombard [C. C. A.] 132 F. 721. Findings are conclusive in the absence of manifest error. Hayes's Estate, 23 Pa. Super. Ct. 570; Fleer v. Reagan, 24 Pa. Super. Ct. 170; Krauskopf v. Pennypack Yarn Finishing Co., 26 Pa. Super. Ct. 506; Hortz's Estate, 26 Pa. Super. Ct. 489. Burden is on appellant to show error. Id. Proceedings to incorporate a borough. Edgeworth Borough, 25 Pa. Super. Ct. 554. Finding of auditing court confirmed by court in banc. Casely's Estate, 23 Pa. Super. Ct. 646. Equity findings of fact will not be set aside if they appear to be warranted by the evidence. Obney v. Obney, 26 Pa. Super. Ct. 116; Id., 26 Pa. Super. Ct. 122. See, also, Appeal and Review, 3 Curr. L. 167, and Equity, 3 Curr. L. 1210.

3. Under Rules of Court, p. 92, § 7, it is proper for him to describe the facts as he understands they have been or will be found by the court. Osborne v. Norwalk [Conn.] 60 A. 645.

4. See 2 Curr. L. 2021.

5. They serve to show what theory the judge adopted. E. E. Souther Iron Co. v. Laclede Power Co. [Mo. App.] 84 S. W. 450.

6. Streeter v. Sanitary Dist. of Chicago [C. C. A.] 133 F. 124.

7. Sloan v. Smith [Conn.] 58 A. 712. Affords no ground for appeal. Id. The refusal of correct propositions of law is harmless where the case is correctly decided on a theory rendering such propositions immaterial and inapplicable. Saffer v. Lambert, 111 Ill. App. 410. See Harmless and Prejudicial Error, 3 Curr. L. 1579.

8. In a suit to compel the removal of obstructions from an alleged public street, findings held insufficient to sustain a conclusion of law that the way had been accepted. McKenzie v. Haines [Wis.] 102 N. W. 33. In a suit to follow trust funds wrongfully obtained by the principal in an official bond as county auditor, on which the plaintiffs as sureties had been compelled to make payment for breaches, conclusions of law held not supported by special findings. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

9. Coffinberry v. McClellan [Ind.] 73 N. E. 97.

10. It does not amount to a withdrawal by the court from itself of a consideration of any part of the evidence. Kansas City v. Askew, 105 Mo. App. 84, 79 S. W. 483.

11. Vickers v. Buck Stove & Range Co. [Kan.] 79 P. 160.

12. Illinois Cent. R. Co. v. Seltz [Ill.] 73 N. E. 585.

13. Raftery v. Easley, 111 Ill. App. 413.

refused. A motion to modify a conclusion of law by reducing the judgment is improper.[14]

§ 10. *Objections and exceptions*[15] are essential to appellate review.[16] An exception to the conclusions of law must be taken at the time decision is made.[17] For the purposes of the exception, an exception to a conclusion of law admits the correctness of the findings of fact.[18] The question whether the evidence is sufficient to warrant a verdict in favor of plaintiff must be raised before the evidence is closed.[19] An exception to the denial of a motion to set aside the verdict as against the evidence is of no merit where there is some evidence.[20]

VERIFICATION.[21]

Necessity.[22]—As a general rule in most states answering pleadings need not be verified unless the pleading answered is properly[23] sworn to.[24] In some states the plea of non est factum[25] or one going to the jurisdiction of the court[26] must be verified; in others, the right of plaintiff to sue in a representative capacity must be specifically denied under oath.[27] Except in the cases enumerated by statute, the petition for the removal of a cause to the Federal courts need not be verified.[28] In Georgia, that defendant intends to prove a release by copy does not make it necessary that he should plead the defense under oath.[29] The validity of a tax deed good upon its face may be put in issue by an unverified pleading.[30]

14. Halstead v. Sigler [Ind. App.] 74 N. E. 257.

15. See 2 Curr. L. 2022.

16. Fleer v. Reagan, 24 Pa. Super. Ct. 170. In order to secure a review of the sufficiency of a verdict, it must appear that there were exceptions not only to the rulings of the court on the motions in arrest and for new trial, but that the court's attention was called to the matter by proper objection and exception to the judgment. Gillespie v. Ashford [Iowa] 101 N. W. 649. Under Code Civ. Proc. § 1114, a judgment is not reversible for defects in the findings unless exceptions are taken in the trial court. Bordeaux v. Bordeaux [Mont.] 80 P. 6.

See full treatment Saving Questions for Review, 4 Curr. L. 1368; Appeal and Revlew, 3 Curr. L. 167.

17. Leedy v. Capital Nat. Bank [Ind. App.] 73 N. E. 1000.

18. Halstead v. Sigler [Ind. App.] 74 N. E. 257.

19, 20. Elwell v. Roper, 72 N. H. 585, 58 A. 507.

21. Compare Affidavits of Merits of Claim or Defense, 3 Curr. L. 66.

22. See 2 Curr. L. 2023.

23. An unverified answer may be properly served to an insufficiently verified complaint. Morris v. Fowler, 90 N. Y. S. 918.

24. The petition not being verified, the answer need not be. Conant v. Jones, 120 Ga. 568, 48 S. E. 234. Proceeding to set aside a default judgment under Code Civ. Proc. 1902, § 195. Farmers' & Mechanics' Mercantile & Mfg. Co. v. Smith [S. C.] 49 S. E. 226. Where the declaration is supported by an affidavit of merits, all the pleas thereto must be also so supported. Blizzard v. Epkens, 105 Ill. App. 117. Under Code 1887, § 3286, where plaintiff in assumpsit files an affidavit with his declaration, all pleas in bar must be accompanied by an affidavit or plaintiff is entitled to judgment. Price v. Marks [Va.] 48 S. E. 499.

25. In order to deny the execution and genuineness of a written contract set forth in the complaint, the answer must be verified [Code Civ. Proc. § 447]. Cutten v. Pearsall [Cal.] 81 P. 25. Where, in an action on a benefit certificate, the answer sets up the execution of the application by plaintiff, a further pleading by him, not purporting to be a plea of non est factum, need not be verified. Home Circle Soc. No. 1 v. Shelton [Tex. Civ. App.] 81 S. W. 84. See 2 Curr. L. 2023, n. 68.

26. A plea that the court has no jurisdiction of the defendant's person must be sworn to by him [Civ. Code 1895, §§ 5081, 5082]. Akers v. J. M. High Co. [Ga.] 50 S. E. 105.

27. Under Rev. Code 1892, § 1797, declaring that plaintiff need not prove description of character unless specifically denied by verified plea, an allegation that one suing as trustee in bankruptcy was not legally appointed, verified only by an affidavit relating to the discovery given in answers to interrogatories, is insufficient to require proof of the legality of plaintiff's appointment. Thompson v. First Nat. Bank [Miss.] 37 So. 645. Under Rev. Code 1892, § 1797, failure to specifically deny plaintiff's representative capacity by verified plea not only relieves plaintiff from proving it, but precludes defendant from showing that plaintiff is not entitled to sue in a representative capacity. Id.

28. Need not be verified except where the ground of removal is prejudice or local influence, or the denial of equal civil rights, or the case is a suit or prosecution against a revenue officer. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284. See Removal of Causes, 4 Curr. L. 1277.

29. Suit for breach of contract. Civil Code 1895, § 5673 is a rule of evidence not

In equity.[31]—Amendments to a sworn bill, setting up no new fact or defense,[32] or being offered in order to make the pleading conform to the proof,[33] need not be verified.

By whom.[34]—In most states the verification may be made by an agent[35] or attorney if the facts are within his personal knowledge and the affidavit so states,[36] or where the party he represents is without the jurisdiction of the court.[37]

Form and positiveness.[38]—A verification which shows that the affiant has no personal knowledge of the facts is insufficient.[39] The officer of a domestic corporation is to be considered a party for the purposes of verification,[40] and hence in New York he need not state the source of his information or belief.[41] It is not necessary that the affiant sign a verification certified to by a notary public as having been sworn to before him.[42] The omission of a seal through clerical misprision may be disregarded.[43]

Defects, objections and amendments.[44]—Lack of verification may be waived,[45] and the benefit accruing from such waiver may be enforced by a suit in equity to restrain the use of the defense of failure to verify.[46] Failure to verify a pleading must be reached by a motion to strike from the files,[47] and the defect can only be taken advantage of at the appearance term of the case.[48]

pleading. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

30. Curtis v. Schmehr, 69 Kan. 124, 76 P. 434.

31. See 2 Curr. L. 2023.

32. Conant v. Jones, 120 Ga. 568, 48 S. E. 234.

33. Patterson v. Johnson [Ill.] 73 N. E. 761.

34. See 2 Curr. L. 2024.

35. Under Laws 1901, p. 854, c. 610, amending Code, § 258, the verification for a corporation may be made by a managing or local agent thereof as well as an officer. Godwin v. Carolina Tel. & T. Co., 136 N. C. 258, 48 S. E. 636.

36. May be made by the general manager of plaintiff's business. My Maryland Lodge No. 186 v. Adt [Md.] 59 A. 721. There is a sufficient compliance with the requirement of Act June 28, 1898 (30 Stat. 495, c. 517), relating to suits to dispossess an intruder on Indian lands, if the complaint is verified by the authorized attorney of the tribe or nation which is plaintiff, and who states that the facts are within his knowledge. Brought v. Cherokee Nation [C. C. A.] 129 F. 192.

37. While not commendable practice, yet a libel in which a large number of persons join may be signed and verified by their proctor on behalf of libelants shown to be without the jurisdiction and whose signatures and verification it is impracticable to obtain. The Oregon [C. C. A.] 133 F. 609. Under Laws 1902, p. 1541, c. 580, providing for a verification by an attorney when a party is not within the county where the attorney resides, a verification by an attorney stating that defendant was in Europe is sufficient. Levey v. Duff, 90 N. Y. S. 410. May be by agent of foreign corporation [Code Civ. Proc. § 525]. American Audit Co. v. Industrial Federation of America, 84 App. Div. 304, 82 N. Y. S. 642.

38. See 2 Curr. L. 2024.

39. Morris v. Fowler, 90 N. Y. S. 918.

40. Code Civ. Proc. § 525, subd. 1, construed. Henry v. Brooklyn Heights R. Co., 43 Misc. 589, 89 N. Y. S. 525.

41. Code Civ. Proc. § 526, construed. Henry v. Brooklyn Heights R. Co., 43 Misc. 589, 89 N. Y. S. 525.

42. Petition for removal of cause to Federal court. Groton Bridge & Mfg. Co. v. American Bridge Co., 137 F. 284.

43. Under Code, § 393, empowering deputy clerks of courts to administer oaths in mechanic's lien cases, the failure of a deputy clerk to attach an impression of the official seal of the clerk to such statement filed in his office does not invalidate the verification. Wheelock v. Hull, 124 Iowa, 752, 100 N. W. 863.

44. See 2 Curr. L. 2024.

45. Failure to move to strike an unverified pleading from the files waives the defect. Turner v. Hamilton [Wyo.] 80 P. 664. Where verified claim against a decedent's estate was by mistake presented without verification and later recognized as presented by estate's attorney, held, lack of verification was waived. Seymour v. Goodwin [N. J. Eq.] 59 A. 93. The mere taking of depositions when the case has not been set for hearing does not constitute a waiver of a verification to an answer. Price v. Marks [Va.] 48 S. E. 499. Where plaintiff in assumpsit filed an affidavit with his declaration as authorized by Code 1887, § 3286, the misprision of the clerk in placing the cause on the issue docket for a "writ of enquiry" on defendant does not constitute a waiver of plaintiff's right to judgment on his affidavit for the amount of the account sued on. Id.

46. Where, in an action on a claim against a decedent's estate, a decree, under Revision 1898, p. 764, § 62, barring all claims not duly verified and presented, was set up as a defense. Seymour v. Goodwin [N. J. Eq.] 59 A. 93.

47. Cannot be reached by demurrer. Turner v. Hamilton [Wyo.] 80 P. 664.

48. Where defendant failed to verify his plea. Rodgers v. Caldwell [Ga.] 50 S. E. 95.

VIEW; WAIVER, see latest topical index.

WAR.

War has been defined to be that state in which a nation prosecutes its right by force,[49] a formal declaration of war being unnecessary.[50] The existence of a condition of war must be determined by the political department of the government; and the courts will take judicial notice of such determination and are bound thereby.[51] Territory declared in insurrection by the President continues so until excepted and recognized as loyal territory by some act of the political branches of the government.[52]

Rights of neutrals—On the sea.[53]—The right to free and uninterrupted trade with nations at war is a right reserved to all neutrals so long as they do not engage in the trade of contraband goods,[54] and, under the rules of international law, the matter of neutrality must be decided according to the principles of good faith;[55] the presence of papers not necessarily implying a fair case, nor their absence furnishing conclusive ground for condemnation.[56] The right of search is a recognized right in belligerents,[57] the proper exercise of which involves no responsibility of wrong against the power exercising it.[58] Upon the seizure of a neutral vessel, all presumptions are in favor of the legality of the seizure, and the burden of proving the contrary is upon the parties contesting its legality.[59] A belligerent seizing a neutral vessel on the high seas upon mere suspicion is responsible for the act, for the consequences, and for the vessel, and is excusable for a loss only where it is caused by an unavoidable casualty.[60] The voluntary destruction of the vessel by the captors for their own ends and purposes being destructive of the right of restitution renders the belligerent liable for the loss,[61] and in such case a decree of restitution does not discharge the claim for indemnity.[62] In the last century if freight and charges were to be paid by a belligerent consignee, it was ground for suspicion justifying a seizure for judicial investigation.[63]

Horses are not contraband per se.[64] Materials for the building, equipment and armament of ships of war are contraband.[65] The probable use of articles may be inferred from their known destination. If the port be a general commercial one, it is presumed that the articles are intended for civil use, otherwise if the predominating character of the place be that of a port of naval or military equipment.[66] Contraband articles are infectious, contaminating other articles belonging

49. Hamilton v. McClaughry, 136 F. 445, quoting from Prize Cases, 67 U. S. (2 Black) 666, 17 Law. Ed. 459.

50. Hamilton v. McClaughry, 136 F. 445. The "Boxer" uprising of 1900 held to constitute a state of war. Id. Services in insurrection in Philippine Islands, held to be in time of war, though peace had been agreed on between Spain and the United States. Thomas's Case, 39 Ct. Cl. 1.

51. Hamilton v. McClaughry, 136 F. 445. What was or was not hostile territory during the civil war could be determined only by the president or congress, and cannot be inquired into or passed upon by the judiciary. County Court of Berkeley's Case, 38 Ct. Cl. 205. Evidence to show that a county declared hostile by the president was in fact loyal is inadmissible. Id.

52. County Court of Berkeley's Case, 38 Ct. Cl. 205.

53. See 2 Curr. L. 2025.

54. Schooner Bird's Case, 38 Ct. Cl. 228.

55, 56. Schooner Hazard, 39 Ct. Cl. 376. **Manifest and invoice** held insufficient to show neutrality of cargo. Schooner Nantasket, 39 Ct. Cl. 119.

57, 58. Brig Fair American, 39 Ct. Cl. 184.

59. Brig Fair American, 39 Ct. Cl. 184. That port of belligerent was not a port of military or naval equipment. Schooner Atlantic, 39 Ct. Cl. 193.

60. Ship Tom, 39 Ct. Cl. 290.

61. So held where the captors ran the vessel ashore to prevent themselves from being captured. Ship Tom, 39 Ct. Cl. 290.

62, 63. Ship Tom, 39 Ct. Cl. 290.

64. Schooner Atlantic, 39 Ct. Cl. 193. See, also, Brig Juno's Case, 38 Ct. Cl. 465.

65. Schooner Bird's Case, 38 Ct. Cl. 223. Tar is such an article. Id.

66. Brig Juno's Case, 38 Ct. Cl. 465. Where a belligerent port is neither in a state of seige, blockaded nor garrisoned, horses on board a neutral bound for that port will be presumed to be for purposes of peace. Id.

to the same owner,[67] and where the owner of the vessel owns the contraband goods,[68] or, either personally or impliedly,[69] has knowledge thereof,[70] the vessel is involved. The carrying of contraband with a false destination will work a condemnation of the ship as well as the cargo,[71] if the deception works real injury to the belligerent.[72] The carrying of contraband on an outward voyage does not affect the condition of the vessel on her return voyage if she practiced no fraud on the outward voyage.[73] Under a treaty provision that free ships make free goods, the right of detention ends when it is ascertained by actual search that the ship's papers are correct and its cargo legal.[74] A provision limiting both parties to the right to remove contraband without forfeiture of the vessel cannot be extended to shield a fraudulent transaction.[75]

Prize money and bounty.[76]—An officer misstating his rank and accepting the amount awarded him is estopped from claiming a proportionate amount on higher rank.[77]

Prize courts and proceedings therein.[78]—The master being deprived of the right to defend, the condemnation is ex parte and the proceedings illegal,[79] even though the seizure and condemnation may have been for good cause.[80] Pending judicial proceedings in a prize court, it is the duty of the captors to preserve without diminution or destruction the property seized, so that the vessel might be restored with no other damage than delay.[81] Indemnity may be recovered for property removed while in custody.[82]

French spoliation claims.[83]—Irrespective of the supplemental article, the treaty of 1800 with France left the matters of difference in this plight: First, claims, for captures and condemnations were reserved for future negotiations; second, property within the control of France, i. e., "not yet definitively condemned," was to be restored; third, property condemned after the signing, if not restored, was to be paid for; fourth, claims not included in the foregoing classes were abandoned.[84] In order to render France liable, the owners of a vessel illegally seized must prosecute or resist appellate procedure until there is a decree by the court of last resort;[85] if they compromise the claim in order to avoid an appeal from a decree of restitution, France is not liable.[86] Where there exists in law sufficient ground to justify condemnation, the fact is available in the defense of the United States, although it does not appear as one of the reasons of condemnation.[87] In the absence of proof, it is presumed that the cargo on board was the equivalent of the carrying capacity of the vessel, and the burden is upon the de-

67, 68. Schooner Bird's Case, 38 Ct. Cl. 228.

69. If officers of ship have knowledge it is sufficient. Schooner Atlantic, 39 Ct. Cl. 193. Where shipment consisted of a large number of horses, held, character of shipment was known to shipowner and officers. Id.

70. Schooner Atlantic, 39 Ct. Cl. 193.

71. Schooner Betsey & Polly, 38 Ct. Cl. 30. Vessel carrying horses cleared for neutral port when in fact sailing for belligerent port, the owner of the ship was the owner of the cargo, held ship liable to seizure. Brig Betsey, 39 Ct. Cl. 452.

72. Where cargo was innocent and real destination was a nonblockaded belligerent port, held, neither vessel nor cargo was subject to condemnation. Schooner Betsey & Polly, 38 Ct. Cl. 30.

73. Sloop Ralph, 39 Ct. Cl. 204. Hence the right of capture ceases upon the consummation of the act of carrying. Id. False destination or false papers on the outward voyage affect the return voyage. Id.; Brig Lucy, 39 Ct. Cl. 221. False destination renders the ship liable to seizure on the homeward voyage. Id.

74. Treaty with France, art. XXIII construed. Brigantine Speedwell, 39 Ct. Cl. 34.

75. Treaty of 1778 with France construed. Brig Betsey, 39 Ct. Cl. 452.

76. See 2 Curr. L. 2027.

77. Gates's Case, 38 Ct. Cl. 52.

78. See 2 Curr. L. 2028.

79, 80. Schooner Maria, 39 Ct. Cl. 147.

81, 82. Brigantine Speedwell, 39 Ct. Cl. 34.

83. See 2 Curr. L. 2029.

84. Ship Tom, 39 Ct. Cl. 290.

85, 86. Brig Amiable Matilda, 39 Ct. Cl. 138.

87. Sloop Ralph, 39 Ct. Cl. 204.

fendants to show the contrary.[88] It cannot be assumed that the proceeds of an outward bound cargo were invested in the return cargo.[89] Charterer paying insurance to original owner and the latter disclaiming, the charterer is entitled to indemnity.[90]

WAREHOUSING AND DEPOSITS.

A warehouse is any place used for the reception and storage of goods.[91]

Warehousemen and depositaries[92] are special kinds of bailees usually for hire. Carriers holding cattle or merchandise for the convenience of the owner are liable only as depositaries;[93] but where goods are delivered for immediate transportation and are placed in a warehouse for the convenience of the carrier and not of the owner, the liability is that of a common carrier.[94] A statute providing that a corporation may be organized for any commercial business authorizes a corporation for warehousing goods for shipment.[95]

Licensing and public regulation[96] must not interfere with interstate commerce.[97] The Minnesota statute forbidding a sale of property stored with a warehouseman except by one who has obtained his license within 30 days after the passage of the act is unconstitutional.[98] A storage contract may be implied.

Warehouse receipts[99] by certain statutes may be made negotiable by indorsement of the party to whose order it is issued,[1] unless marked "non-negotiable,"[2] and the transfer of warehouse receipts may be regarded as equivalent to an actual, physical delivery of the property, and will operate as a constructive delivery passing title,[3] and the title of the transferee is not affected by any method of dealing

88, 89, 90. Brig Maria, 39 Ct. Cl. 39.

91. A vacant lot suffices where the goods are weighty and bulky. Bush v. Export Storage Co., 136 F. 918.

92. See 2 Curr. L. 2029. See definition, Id. Compare Bailment, 3 Curr. L. 400.

Note: When carrier's liability is reduced to warehouseman's. See Carriers, 3 Curr. L. 591, and also note 97 Am. St. Rep. 84.

93. For the jury to determine whether held at convenience of owner. Flint v. Boston & M. R. Co. [N. H.] 59 A. 938. A railroad's liability for goods deposited with it awaiting orders of the owner for transportation is that of a warehouseman. Louisville & N. R. Co.'s Case, 39 Ct. Cl. 405.

94. North German Lloyd Steamship Co. v. Bullen, 111 Ill. App. 426.

95. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036.

96. See 2 Curr. L. 2029.

97. NOTE. Warehousing as interstate commerce: The relator appealed from an order of court affirming an assessment made under a state franchise tax, on the ground that he was engaged in an "interstate" business. His sole business was to load and store grain from outside the state, then to reload it for points within the state. Held, the relator's business was of an interstate character and as such not subject to the tax. People ex rel. Connecting Terminal R. Co. (1904) 178 N. Y. 194.

It has been repeatedly held that elevators, though efficient means of promoting interstate commerce, are not within the protection of the commerce clause of the Federal constitution. Munn v. Illinois (1876) 94 U. S. 113; Budd v. New York (1892) 143 U. S. 517. Unlike the principal case, these cases did not show that the service of the elevators was a part of a continuous interstate carriage on through bills of lading. From the principal case it would seem that the existence of a single contract covering the entire transportation was the determining test as to whether a part of the transportation entirely within one state was a part of interstate commerce. New York ex rel. Penn. R. Co. v. Knight (1904) 192 U. S. 21; 4 Columbia Law Review, 296. Though the relator here was not a party to the bills of lading, the case would on this point seem clearly within the reason of the cases of Norfolk & W. R. Co. v. Pennsylvania (1889) 136 U. S. 114, and McCall v. California (1889) 136 U. S. 104.—4 Columbia L. R. 600.

98. Laws 1895, § 8, c. 149, p. 322. Webb v. Downes [Minn.] 101 N. W. 966.

99. See 2 Curr. L. 2030.

1. B. & C. Comp. § 4606. Lewis v. First Nat. Bank [Or.] 78 P. 990.

2. 3 Gen. St. 3746. Wheeler & Wilson Mfg. Co. v. Brookfield, 70 N. J. Law, 703, 58 A. 352.

3. Farmers' & Merchants' Bank v. Bennett & Co., 120 Ga. 1012, 48 S. E. 398; Lewis v. First Nat. Bank [Or.] 78 P. 990. 3 Gen. St. p. 3746. Wheeler & Wilson Mfg. Co. v. Brookfield, 70 N. J. Law, 703, 58 A. 352. Where the intention of the parties is clear, delivery of a warehouse receipt without formal indorsement transfers the title to the goods. Sloan v. Johnson, 20 Pa. Super. Ct. 643. The delivery to a pledgee of a warehouse receipt operates as a constructive delivery of the property and entitles the pledgee to recover actual possession. Bush v. Export Storage Co., 136 F. 918.

between the depositor and warehouseman;[4] but holders of warehouse receipts, "transferable only on the books of the yard," cannot recover thereon in the absence of proof of such transfer or that the property was in possession of the bailees at the acquiring of the receipts, and that the bailees had notice of such purchase.[5] The pledge of a receipt need not be evidenced by writing, but may be effected by mere delivery.[6]

Care and protection of goods stored.[7]—In the absence of special contract, warehousemen are ordinary bailees for hire, and as such are bound only to common care and diligence[8] regarding property entrusted to them;[9] and the degree of their responsibility is less than that of common carriers,[10] while a gratuitous bailee is liable only for loss from his negligence.[11] A warehouseman is not liable for the destruction of property in his custody unless the loss was a proximate result of his negligence;[12] but one who receives notice that a flood is liable to be precipitated against his house must exercise ordinary care to remove goods stored, to a place of safety.[13] Contracts against liability for negligence are not favored by the law, and are strictly construed with every intendment against the party seeking their protection.[14] A contract providing for "no liability for fire,"[15] or that property is stored "at owner's risk," does not release the bailee from liability for failure to use ordinary care.[16] A bailee storing property in another place than that specified in the contract of bailment assumes the risk of the destruction of the property;[17] and that the new place of storage is equally safe and desirable as the former is no defense.[18] Where controversies arise between the depositor of an indemnity fund and the beneficiary thereof, the sole obligation of the depositary is to hold the fund until the rights of claimants are settled inter sese and then pay to the rightful claimant.[19] At common law the warehouseman delivered the goods at his peril.[20] By statute a warehouseman may be required to deliver the goods to the holder of the receipt, unless the property has been removed by operation of law.[21] One having no reason to believe that a warehouseman would not keep a proper temperature is not guilty of contributory negligence in failing to protect fruit there stored.[22]

4. Withdrawal of property first deposited and substitution of other property of the same kind. Bush v. Export Storage Co., 136 F. 918.

5. Sanger v. Travis County Farmers' Alliance [Tex. Civ. App.] 84 S. W. 856.

6. Act 72 of 1876, p. 113, relative to hypothecation of warehouse receipts, has no application to United States bonded warehouse receipts. Blanc v. Germania Nat. Bank [La.] 38 So. 537.

7. See 2 Curr. L. 2030.

8. Denver Public Warehouse Co. v. Munger [Colo. App.] 77 P. 6. A warehouseman is only bound to exercise ordinary care and diligence such as faithful warehousemen are accustomed to give in like circumstances. Louisville & N. R. Co.'s Case, 39 Ct. Cl. 405.

9. All surrounding circumstances should be considered. Dieterle v. Bekin, 143 Cal. 683, 77 P. 664.

10. McLane, Swift & Co. v. Botsford Elevator Co. [Mich.] 99 N. W. 875.

11. Gerrish v. Muskegon Sav. Bank [Mich.] 100 N. W. 1000.

12. By fire. McLane, Swift & Co. v. Botsford Elevator Co. [Mich.] 99 N. W. 875.

13. He received notice that a dike above his house was liable to break at any hour, but was under no duty to repair it. Laurence L. Prince & Co. v. St. Louis Cotton Compress Co. [Mo. App.] 86 S. W. 873.

14. Denver Public Warehouse Co. v. Munger [Colo. App.] 77 P. 5. A railroad company is not relieved from responsibility for fire because the bailors are stockholders of the warehouse company whose lease from the railroad company waived all claims for destruction of the warehouse by acts of the railroad company. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036.

15. Dieterle v. Bekin, 143 Cal. 683, 77 P. 664.

16. Damage to apples by cold. Denver Public Warehouse Co. v. Munger [Colo. App.] 77 P. 5.

17. Insurance by bailor on property at its supposed location under the contract. Hudson v. Columbian Transfer Co. [Mich.] 100 N. W. 402.

18. McCurdy v. Wallblom Furniture & Carpet Co. [Minn.] 102 N. W. 873.

19. Leonard v. Camden Nat. Bank [N. J. Err. & App.] 59 A. 143.

20. Wheeler & Wilson Mfg. Co. v. Brookfield, 70 N. J. Law, 703, 58 A. 352.

21. 3 Gen. St. 3746. Wheeler & Wilson Mfg. Co. v. Brookfield, 70 N. J. Law, 703, 58 A. 352.

22. Denver Public Warehouse Co. v. Munger [Colo. App.] 77 P. 5.

Insurance.[23]

Damages.[24]—Where goods are destroyed by reason of his negligence, the measure of damages is their value at the date of demand for their delivery.[25] Where goods, removed by the bailee from an agreed to another place of storage without notice to or consent of the bailor, are destroyed by fire, the bailee is liable for the reasonable market value of the goods.[26]

Charges and lien therefor.[27]—In a contract which makes no provision for payment of charges in case of failure to substantially perform, there is an implied contract to pay what his services are reasonably worth.[28] A contract for storage, with a requirement that the warehouseman is to keep the property insured, does not show a contract to pay the agreed charge when he turns over the insurance money on destruction of the goods;[29] nor is he entitled to the full charge on the ground of substantial performance, where he turns over an amount equal to the highest market price of the goods during the season.[30] A warehouseman has a lien for his charges on the stored property while it remains in his possession.[31] In Michigan and New York the lien is general and attaches to any goods in the possession of the warehouseman to secure the payment of all his charges, including those arising under a previous contract of storage.[32] One holding property under a lien for storage charges is entitled to reasonable storage charges while so holding,[33] and may hold the property until the claim is paid.[34] A demand by a warehouseman of a sum in excess of the amount due him under a storage contract waives a tender of the correct amount and destroys the lien.[35] A notice of intention to sell to satisfy a lien, describing carpenter's tools, a violin, and other articles of domestic use, as "household goods," is not improper.[36] One present at a sale of his goods to satisfy a lien, and not then objecting, cannot thereafter complain that the goods were sold in bulk.[37]

Conversion.[38]

Actions and procedure.[39]—One depositing money with another to defraud creditors may not maintain suit to recover it.[40] Evidence tending to show a failure to redeliver goods under a contract for storage and delivery makes a prima facie case of negligence,[41] and evidence of a lack of ordinary care by defendant casts upon him the burden of showing that the loss was not due to his negligence.[42] Whether an agreement is general or specific as to place of storage is a question of fact.[43] A warehouseman may require rival claimants to property in his possession to interplead in an action to determine ownership.[44] Contributory negligence need not be negatived in the complaint, but must be pleaded to be available as a de-

23. See 2 Curr. L. 2031.

24. See 2 Curr. L. 2032.

25. Laurence L. Prince & Co. v. St. Louis Cotton Compress Co. [Mo. App.] 86 S. W. 873.

26. McCurdy v. Wallblom Furniture & Carpet Co. [Minn.] 102 N. W. 873.

27. See 2 Curr. L. 2032.

28. Reasonable worth of services held a question for the jury. Clough v. A. J. Stillwell Meat Co. [Mo. App.] 86 S. W. 580.

29, 30. Clough v. A. J. Stillwell Meat Co. [Mo. App.] 86 S. W. 580.

31. A bargeman, where barges are detained by low water. Nicolette Lumber Co. v. People's Coal Co., 26 Pa. Super. Ct. 575.

32. Comp. Laws, § 503. Kaufman v. Leonard [Mich.] 102 N. W. 632. And see Reidenbach v. Tuch, 88 N. Y. S. 366 [advance sheets only].

33, 34. Reidenbach v. Tuch, 88 N. Y. S. 266 [advance sheets only].

35. Stephenson v. Lichtenstein [N. J. Law] 59 A. 1033.

36, 37. Webb v. Downes [Minn.] 101 N. W. 966.

38. See 2 Curr. L. 2033. See, also, Conversion as Tort, 3 Curr. L. 866.

39. See 2 Curr. L. 2033.

40. Bryant v. Wilcox [Mich.] 100 N. W. 918.

41. Toplitz v. Timmins, 88 N. Y. S. 946.

42. Dieterle v. Bekin, 143 Cal. 683, 77 P. 664.

43. McCurdy v. Wallblom Furniture & Carpet Co. [Minn.] 102 N. W. 873.

44. An offer to deliver as directed by the court is sufficient; property need not be produced in court or entrusted to its clerk. Beebe v. Mead, 101 App. Div. 500, 92 N. Y. S. 51.

fense, as must also an Act of God.[45] Money unlawfully withdrawn from the county treasury and deposited in a bank which has notice of its character may be recovered by the county without procuring a judgment against the supervisor who withdrew it.[46]

Crimes and penalties.[47]—The state may provide a penalty for delivery to any other than the holder of the warehouse receipt.[48]

WARRANTS; WARRANTY, see latest topical index.

WASTE.

Waste consists in whatever does a lasting damage to the freehold or inheritance,[49] and whether it has been committed or permitted is to be determined from the facts and circumstances of each particular case.[50] A tenant must make repairs necessary to prevent waste and decay of the premises.[51] The cutting of timber by a tenant for years for use as fire wood is not.[52] Equity will enjoin the commission of waste,[53] and will not compel a trustee to commit it.[54] A bill cannot be sustained as one against waste if defendant has no property in which complainant has a lien or interest.[55] One co-tenant may restrain another from committing malicious waste tending to destroy the chief value of the property,[56] but only to the extent of his interest.[57] A life tenant and remainderman may maintain an action for waste,[58] and in New York a statute giving the remainderman a right to recover therefor does not deprive the life tenant of such right,[59] and he may recover, not only for his own loss, but also for the loss of the remainderman.[60] In Georgia a remainderman cannot assert a forfeiture of the life estate un-

45. Orient Ins. Co. v. Northern Pac. R. Co. [Mont.] 78 P. 1036.

46. Harrison County v. State Sav. Bank [Iowa] 103 N. W. 121.

47. See 2 Curr. L. 2033.

48. 3 Gen. St. p. 3746. Wheeler & Wilson Mfg. Co. v. Brookfield, 70 N. J. Law, 703, 58 A. 352.

49. Impairment and weakening of a cellar wall; removal of partitions and altering the size of rooms. Smith v. Chappell, 25 Pa. Super. Ct. 81.

50. Mortgagee in possession, who went in at a time when the buildings and fences were out of repair, held not guilty of permissive waste. Chapman v. Cooney, 25 R. I. 657, 57 A. 928; Smith v. Chappell, 25 Pa. Super. Ct. 81.

51. Smith v. Chappell, 25 Pa. Super. Ct. 81.

52. Anderson v. Cowan [Iowa] 101 N. W. 92.

53. Complaint to enjoin against waste and quiet title held sufficient under Comp. Laws 1897, § 4010. Marquez v. Maxwell Land Grant Co. [N. M.] 78 P. 40.

54. Compel him to execute a lease of the trust property at a rental less than the value. Weir v. Barker, 93 N. Y. S. 732.

55. Raphael v. Trask, 194 U. S. 272, 48 Law. Ed. 973.

56, 57. Leatherbury v. McInnis [Miss.] 37 So. 1018.

58. Under Burns' Ann. St. 1901, §§ 287, 288, for cutting timber and leaving the tops scattered over the ground. Halstead v. Sigler [Ind. App.] 74 N. E. 257.

59. Note: A tenant for life brought an action against his subtenant for waste committed in cutting down and appropriating growing timber, claiming damages for injury done the inheritance. Held, a tenant for life is entitled to recover such d[illegible] ages, as the statute giving to the remainderman a right against third parties for waste to the inheritance does not take from the life tenant the right to recover therefor. Dix v. Jaquay, 88 N. Y. S. 228.

The court rejects the doctrine of Wood v. Griffin, 46 N. H. 230, and Cal. Drydock Co. v. Armstrong, 17 F. 216, where on a similar state of facts, the recovery by the life tenant was made dependent upon his having first satisfied the claim of the remainderman. A tenant being absolutely liable to the remainderman for injury to the inheritance, though committed by a stranger, he should not be required to satisfy the liability and then take his chance of reimbursement from the wrongdoer. Cook v. Champlain Trans. Co., 1 Denio [N. Y.] 91. The law will allow a recovery where the mere liability has been incurred. Reynolds v. City of Niagara Falls, 81 Hun [N. Y.] 353.

A recovery by the tenant for life would be a bar to a separate action by the remainderman, as in the case of a bailee recovering for injury to property in his possession. Woodman v. Nottingham, 49 N. H. 387. A common carrier also has an action against a wrongdoer for injury done goods in his possession, and may recover the entire value, holding it in trust for the owner. Merrick v. Brainard, 38 Barb. [N. Y.] 574.—4 Columbia L. R. 516.

60. Dix v. Jaquay, 94 App. Div. 554, 88 N. Y. S. 228. Complaint held sufficient. Id.

less there has been both permissive and voluntary waste by the life tenant, and the voluntary waste was wanton.[61] Where a prayer for relief is for forfeiture or damages, if the evidence does not establish grounds for forfeiture, both issues should be submitted,[62] and especially should the issue relative to damages be submitted where there is evidence tending to support a recovery.[63] A writ of estrepement is a proper remedy to stay or prevent threatened waste.[64]

WATERS AND WATER SUPPLY.

§ 1. Definition and Kinds of Waters (1824).
§ 2. Sovereignty over Waters and Lands Beneath (1824).
§ 3. Rights in Natural Watercourses (1825).
§ 4. Rights in Lakes and Ponds (1829).
§ 5. Rights in Subterranean and Percolating Waters (1830).
§ 6. Rights in Tide Waters (1831).
§ 7. Rights in Artificial Waters (1831).
§ 8. Ice (1832).
§ 9. Surface Waters and Drainage or Reclamation (1832).
§ 10. Lands Under Water (1835).
§ 11. Levees, Dykes, Sea Walls and Other Protective Works (1836).
§ 12. Levee, Drainage and Reclamation Districts (1836).
§ 13. Milling and Power and Other Nonconsuming Privileges; Dams, Canals and Races (1837).
§ 14. Irrigation and Water Supply, and Priorities in Use of Water. Common Law Rights and the Doctrine of Prior Appropriation. Common-Law Rule (1839). The Measure of Two Riparian Owners' Rights (1839). Prior Appropriation Rule (1839). Appropriation Consists In (1840). Limit, Measure and Extent of Right (1841). Nature of the Right (1841). Appropriators May Change the Place or Character of the Use (1842). Interference, and Diminution of Flow (1842). A Water Right May Be Obtained by Adverse User and Prescription (1842). The Right of Appropriation Can Be Lost Only by Abandonment or Adverse Possession (1843). Joint and Common Rights (1843). Ditch Rights of Way (1843). The Right to Use a Ditch (1844). Remedies and Procedure for Misuse of Water or Interference (1844). Suits to Establish or Fix Priority (1844).
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§ 17. Water Service and Rates. Service Contracts (1852). Injuries from Deficient Supply or Equipment, and Negligence (1852). Rules and Regulations of Service; Pipes, Meters, and Consumption (1853). Water Rates (1854). Remedy for Nonpayment of Charges (1854). Local Assessments for Pipes (1854). Rates for Irrigation and Payment for Service (1854).
§ 18. Contracts, Grants and Licenses (1855).
§ 19. Torts Relating to Waters (1857).
§ 20. Crimes and Offenses Relating to Waters (1859).

The scope of this title includes the general law of waters and the use and supply thereof, except as other topics cited below cover necessary exclusions.[65]

§ 1. *Definition and kinds of waters.*[66]—The elements of a watercourse are definite banks, with an obvious bed or channel, showing the presence of water at times, at all events,[67] although there need not be a continuous flow.[68] But the overflow or flood water of a stream does not cease to be a part thereof unless so separated from it as to prevent its return.[69]

§ 2. *Sovereignty over waters*[70] *and lands beneath.*—A state is the owner of the navigable waters within it and of the soils thereunder for the common use and

61. Under Civ. Code 1895, § 3090. Roby v. Newton, 121 Ga. 679, 49 S. E. 694. Fish, P. J., and Lamar, J., dissent.

62, 63. Roby v. Newton, 121 Ga. 679, 49 S. E. 694.

64. Smith v. Chappell, 25 Pa. Super. Ct. 81.

65. See Bridges, 3 Curr. L. 529; Ferries, 3 Curr. L. 1423; Navigable Waters, 4 Curr. L. 757; Riparian Owners, 4 Curr. L. 1310; Shipping and Water Traffic, 2 Curr. L. 1648; Wharves, 2 Curr. L. 2074.

66. See 2 Curr. L. 2035.

67. A depression varying from 2 to 5 feet and from 150 to 300 feet in width, without defined banks and cultivated, and not having water in it more than 3 or 4 times in 40 years, was held not to be a watercourse. Erwin v. Erie R. Co., 90 N. Y. S. 315.

68. Erwin v. Erie R. Co., 90 N. Y. S. 315; Gramann v. Eicholtz [Tex. Civ. App.] 81 S. W. 756.

69. Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378; Fordham v. Northern Pac. R. Co. [Mont.] 76 P. 1040.

70. See 2 Curr. L. 2035.

benefit of its inhabitants.[71] A state has jurisdiction over its littoral waters extending three miles from the coast line thereof.[72] The state of Texas has jurisdiction over the waters of the Red river to the center of the stream.[73] Full power over the erection of bridges and other works in navigable streams wholly within a state resides in the state in the absence of the exercise by congress of authority to the contrary.[74] The state holds lands under navigable waters in trust for the public,[75] and may devolve such trust upon a municipal corporation.[76] The latter cannot convey the same for the benefit of riparian proprietors.[77] A custom under which riparian proprietors used the land for the erection of wharves and the like cannot be shown in support of a contention that the city has thereby been divested of title.[78]

§ 3. *Rights in natural watercourses.*[79]—The right of a riparian owner to the natural and usual flow of a stream is annexed to and part of his land.[80] It is property and, as such, entitled to protection, and may not be taken for public use

71. Acts of congress of March 2, 1881, and April 1, 1882, empowering the commissioners of the District of Columbia to sell at public auction certain water lots in Georgetown construed, and were held not to authorize the sale of land under the waters of the Potomac. District of Columbia v. Cropley, 23 App. D. C. 232.

72. New Jersey act of 1846 (Law 1846, p. 146), ceding Sandy Hook to United States, construed and held not to include exclusive jurisdiction of littoral waters. Hamburg American S. S. Co. v. Grube, 25 S. Ct. 352.

73. Parsons v. Hunt [Tex.] 84 S. W. 644.

74. Under the existing legislation by congress, no one can lawfully place an obstruction across a navigable river wholly within a state without the concurrent authority of the state legislature and secretary of war, and in accordance with plans recommended by the chief of engineers of the United States. Maine Water Co. v. Knickerbocker Steam Towage Co. [Me.] 59 A. 953.

NOTE. Public right to construct a wharf on navigable waters: Brookhaven, by royal grant of 1693, confirmed by art. 1, § 17, of Constitution of New York, was seized in fee of the land covered by the waters of Great South Bay. The defendant seized of certain upland property, by patent of 1697, built a wharf out beyond the high-water line. Held, the public right of navigation did not include the right to build such wharf, and the defendant was a trespasser. Trustees of Town of Brookhaven v. Smith (1904) 90 N. Y. S. 646.

By the common law in 1693, the fee in all land covered by navigable water was in the king, subject only to the public rights of navigation and fishing. Fitzwalter's Case (1673) 3 Keb. 242; Anonymous (1673) 1 Mod. 105; also cases cited in Shively v. Bowlby (1893) 152 U. S. 1, 13. A riparian owner had no right, without license, to build a wharf on land below high-water mark. Blundell v. Catterall (1821) 5 B. & Ald. 268, 298; also cases cited in Shively v. Bowlby, supra. The plaintiffs, therefore, by royal grant, acquired title to the land below high-water mark free from any easement or right other than the public rights of navigation and fishing. The public right of navigation therefore, as held in the principal case, does not include the right to build a private wharf. However, the court expresses the opinion that no authority in New York has ever held that an owner of lands bounded by high water has a right to build a dock upon submerged land, the title to which is in another individual or corporation. This doctrine, however, was distinctly laid down in Rumsey v. N. Y. & N. E. R. Co. (1892) 133 N. Y. 79, 28 Am. St. Rep. 600, and approved in People v. Woodruff (1899) 157 N. Y. 709, the former decision expressly overruling the common-law doctrine of Gould v. R. R. (1852) 6 N. Y. 522. A grant made today of land under navigable water by the state of New York would therefore be subject to every riparian owner's right to gain access to that part of the stream navigable, in fact, by means of a dock; because the state has sanctioned by adjudication this encroachment upon its own absolute title. But the confirmation in art. 1, § 17, of the state constitution of the original royal grant is tantamount to a grant to the plaintiff from the state of the same title as was conferred by the royal grant. Having, therefore, created a vested right, the state cannot thereafter destroy it. Fletcher v. Peck (1810) 6 Cranch, 87, 137; S. S. Co. v. Jolliffe (1864) 2 Wall. 450; Wilmington R. v. Reid (1871) 13 Wall. 264.—From 5 Columbia L. R. 168.

75. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298. As to the lands under the navigable part of the river, the state is said to be the trustee for all the people, and it probably cannot grant them in fee if the right of free navigation would thereby be interfered with. Woodcliff Land Imp. Co. v. New Jersey S. L. R. Co. [N. J. Law] 60 A. 44.

76. Ala. Act Jan. 31, 1867 (Laws 1866-67, p. 307), granting to city of Mobile so much of shore and soil under Mobile River as was within its boundaries constitutional. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

77. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298. Statute of 1810 construed as merely defining powers of a corporation and not granting property rights in tidal flats. Scully v. Commonwealth [Mass.] 74 N. E. 342.

78. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

79. See 2 Curr. L. 2035.

80, 81. City of Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779.

without due compensation.[81] Riparian owners are entitled, as against each other, to the reasonable use of the waters of a stream for domestic,[82] agricultural,[83] and manufacturing purposes,[84] as well as for irrigation,[85] and fishing,[86] or even ornamental, purposes.[87] What is a reasonable use is a question of fact depending on the particular circumstances of each case.[88]

Lands to be riparian must be within the watershed of the stream and actually touching its waters.[89] An upper owner has no right to convey the waters of a stream to nonriparian lands, although the lower owner has water sufficient for his needs.[90]

Interference and obstruction.[91]—A riparian owner has a right to the "fair flow" of the stream in its natural bed,[92] without disturbance or interruption by any other riparian owner either to impede or backflow, and equity will afford appropriate relief[93] and damages may be recovered.[94] Riparian owners may not em-

82. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799; Muncie Pulp Co. v. Koontz, 33 Ind. App. 532, 70 N. E. 999. But the rule has limitations, as where a stream is so small that if the upper riparian owner makes any use at all of the stream, it would be worthless to the lower owner, the former may use it all. Gutierrez v. Wege, 145 Cal. 730, 79 P. 449.

83. Muncie Pulp Co. v. Koontz, 33 Ind. App. 532, 70 N. E. 999.

84. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799; DeWitt v. Bissell [Conn.] 60 A. 113.

85. See post, § 13.

86. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879.

87. Reservoirs both ornamental and useful. Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799.

88. Reese v. Johnstown, 45 Misc. 432, 92 N. Y. S. 728. A question for the jury. Muncie Pulp Co. v. Koontz, 33 Ind. App. 532, 70 N. E. 999. Reasonable use defined. Reese v. Johnstown, 45 Misc. 432, 92 N. Y. S. 728; Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854.

NOTE. User by railway: A railway company's road crossed a natural stream. The company being the owner of the land at the crossing, under a claim of right, inserted a pipe at that point and drew off water to supply a tank half a mile away. From this tank it supplied water to its locomotives. The defendant, a lower proprietor, obstructed the flow in the pipe and the plaintiff sought to enjoin such interference. The defendant's flow was not materially altered. Held, that since the plaintiff's user was unlawful, the injunction would be denied. McCartney v. Londonderry, etc., R. Co. (1904) A. C. 301. The question whether a railway can draw water from a stream, on which it is riparian owner, and use the water to supply its locomotives, has arisen twice before in England. In Attorney General v. Gt. Eastern R. Co. (1871) L. R. 6 Ch. App. 572, the railway company was restrained, but the case was complicated by other facts. In Earl of Sandwich v. Gt. North Ry. Co. (1878) L. R. 10 Ch. Div. 707, Bacon V. C. held that the railway could take a reasonable quantity. The present decision by the House of Lords holds that no such user can be reasonable. Riparian rights are inherent in the land bordering upon the stream, and a riparian owner cannot use the water for purposes unconnected with his riparian land, without infringing the right of a lower proprietor to all the water not used by the upper proprietor for purposes strictly connected with his land. Swindon Waterworks Co. v. Wilts & Berks Canal Co. (1875) L. R. 7 H. L. 697. Hence riparian rights cannot be assigned. See 4 Columbia L. R. 431. Infringement of this right is actionable without proof of injury, because it legally imports damage. Blodgett v. Stone (1880) 60 N. H. 167. Otherwise, the railway would in time acquire a prescriptive right. This fact seems to be lost sight of in Massachusetts. Elliott v. Fitchburg Ry. Co. (1852) 10 Cush. [Mass.] 191, 57 Am. Dec. 85. The weight of authority in this country is in accord with the principal case. Clark v. Penna R. Co. (1891) 145 Pa. 438, 27 Am. St. Rep. 710; Garwood v. N. Y. Central Ry. Co. (1881) 83 N. Y. 400, 38 Am. Rep. 452.—From 5 Columbia L. R. 65.

89. As to government survey. Clements v. Watkins Land Co. [Tex. Civ. App.] 82 S. W. 665.

90. Equity will restrain such diversion. The right may, however, be gained by **prescription.** Clements v. Watkins Land Co. [Tex. Civ. App.] 82 S. W. 665. A city which buys land on a non-navigable river several miles from its limits may not as a riparian owner take water from the stream to supply its inhabitants. City of Elberton v. Hobbs, 121 Ga. 749, 49 S. E. 779.

91. See 2 Curr. L. 2035 et seq.

92. Artificial openings, basins, or channels may be closed so long as the natural channel is not crowded thereby. Rickels v. Log Owners' Booming Co. [Mich.] 102 N. W. 652. Levees and embankments may be constructed upon one's own land outside the channel of the stream if they do not interfere with the free flow thereof in the full width of the channel. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625. But a city is under no duty to keep a stream flowing through it, not used for sewerage, at its original depth and width. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555; A. L. Lakey Co. v. Kalamazoo [Mich.] 101 N. W. 841. Where filth collected in creek through negligent use thereof by city, defense of "vis major" was not allowed. O'Donnell v. Syracuse, 102 App. Div. 80, 92 N. Y. S. 555.

bank against the natural overflow of an inland stream when the effect may be to cast an increased volume of water upon the land of other proprietors to their injury.[95] A riparian owner who does not cause or have any control over an obstruction in a stream is not liable for damages caused by an overflow.[96]

Diversion.[97]—The course of a stream within the limits of one owner's land may be diverted, provided it is restored to its original channel before the land of another is reached and provided no injury to the lands of another by overflow is caused thereby;[98] but this is not true if the diversion is not wholly within the limits of the land of the owner directing it.[99] Equity will restrain the unlawful diversion of water from a stream by a riparian owner[1] and damages may also be had.[2] Riparian ownership by a city does not warrant permanent diversion of the water of a stream, through the construction of a dam, for municipal purposes.[3]

Nuisance and pollution.[4]—Riparian owners may not so use the waters of a

93. American Plate Glass Co. v. Nicoson [Ind. App.] 73 N. E. 625. A mandatory injunction will issue to restore stream to its normal condition without a finding of damage. Allen v. Stowell, 145 Cal. 666, 79 P. 371. Obstruction by dam. Krause v. Oregon Iron & Steel Co. [Or.] 77 P. 833; Schwarzenbach v. Electric Water Power Co., 101 App. Div. 345, 92 N. Y. S. 187. Owners whose lands are flooded and washed away by the construction of a dam and the releasing of water at intervals to float logs down stream held entitled to injunction, if intention to continue trespass is shown. Bryant v. Frank H. Lamb Timber Co. [Wash.] 79 P. 622. Obstruction of natural flow of stream will not be enjoined, unless necessary to prevent irreparable loss or injury, and the other grounds for equitable intervention exist. Boynton v. Hall [Me.] 60 A. 871. A municipality may be restrained from arbitrarily cutting off the water supply and thereby closing down an establishment employing a large number of laborers. Penn Iron Co. v. Lancaster, 25 Pa. Super. Ct. 478.

94. Neely v. Detroit Sugar Co. [Mich.] 101 N. W. 664. Flowing land to any extent gives right to nominal damages. Chaffin v. Fries Mfg. & Power Co., 136 N. C. 364, 48 S. E. 770. For injury caused an upper owner from an interference resulting from damming the stream or construction of an artificial substitute for the channel, he is liable in damages. Matlack v. Callahan, 25 Pa. Super. Ct. 454. An owner of a mill damaged by backing of water by a boom, lessening the working power of his mill may recover damages from the owner of the boom. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872. So, even though the latter be leased, if the nuisance existed at the time of the execution of the lease. Id.

95. Construction of embankment enjoined. Keck v. Venghause [Iowa] 103 N. W. 773.

96. Acts of a stranger. Jacobs v. Hershey Lumber Co. [Wis.] 102 N. W. 319. A city is not liable for obstruction by a riparian owner of a creek flowing through it not used for sewage. A. L. Lakey Co. v. Kalamazoo [Mich.] 101 N. W. 841. Acts of **lessee.** Bachert v. Lehigh Coal & Navigation Co., 208 Pa. 362, 57 A. 765. Acts of **predecessor.** Where a riparian owner alleged positive wrongful acts only and made no complaint of acts of omission or a continuance of unlawful acts, it was held not to be wrong to charge the jury that the defendant was not liable for the acts of its predecessors. Rickels v. Log Owners' Booming Co. [Mich.] 102 N. W. 652.

97. See 2 Curr. L. 2036.

98. Daum v. Cooper, 208 Ill. 391, 70 N. E. 339; Craft v. Norfolk & S. R. Co., 136 N. C. 49, 48 S. E. 519; Gramann v. Eicholtz [Tex. Civ. App.] 81 S. W. 756. A proprietor may change the whole course of a stream within the limits of his own land, provided he restores the water undiminished to the original channel before leaving his premises, and if he has exercised reasonable care and foresight, cannot be held liable for injuries resulting from unforeseen causes. Neumeister v. Goddard [Wis.] 103 N. W. 241.

99. In North Carolina, neither a corporation nor an individual may divert water from its natural course, although they may increase or accelerate its flow. Craft v. Norfolk & S. R. Co., 136 N. C. 49, 48 S. E. 519.

1. Roberts v. Claremont R. & Lighting Co. [N. H.] 59 A. 619; Miller & Lux v. Enterprise Canal & Land Co., 145 Cal. 652, 79 P. 439. Held to be a private nuisance, but injunction refused on account of laches. Penrhyn Slate Co. v. Granville Electric Light & Power Co. [N. Y.] 73 N. E. 566. An injunction will not issue to prevent the possible acquisition of an easement where the present diversion is very small. Id. Riparian owner may not divert water from stream for the purpose of forming a pond and selling the ice formed thereon. Samuels v. Armstrong, 93 N. Y. S. 24.

2. Roberts v. Claremont Ry. & Lighting Co. [N. H.] 59 A. 619. Damages allowed, though injunction refused. Penrhyn Slate Co. v. Granville Electric Light & Power Co. [N. Y.] 73 N. E. 566.

3. Nor can the right to divert more than a reasonable amount be gained by the making of necessary repairs in the dam. Osborne v. Norwalk [Conn.] 60 A. 645. Discharge of an amount of water in freshet time on private lands, greater than that which the freshet alone would discharge, may be an actionable invasion of the owner's rights, even though necessary to protect public waterworks. Id.

4. See 2 Curr. L. 2037.

stream as to create a nuisance, and equity will enjoin such use.[5] So unreasonable pollution of a stream is a nuisance.[6] Damages may also be recovered.[7] Where the pollution is caused by several persons independently, one alone cannot be made to pay the whole damages, but they must be apportioned.[8] But in New York several riparian owners who severally contributed to the joint pollution of a stream may be joined in one suit.[9] Pollution of a stream is a taking of property for which compensation must be made.[10] A stream wholly within a municipal corporation, having been generally used as an open sewer for over twenty-one years, becomes charged with a servitude authorizing its like use by other citizens as against a riparian owner who contributes to and acquiesces in such use.[11]

Bridges and culverts, etc.[12]—It is the duty of a railroad so to construct its bridges and culverts as to accommodate the waters of streams which naturally flow through them at ordinary flood or high water,[13] and also to make necessary changes

5. A nuisance is created where the use of the stream by the first user is unreasonable in character and such as to produce a condition actually destructive of physical comfort or health or causing tangible visible injury to property. Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854.

6. Equity will restrain (West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879; Watson v. Colusa-Parrot Mining & Melting Co. [Mont.] 79 P. 14), and it is immaterial whether the polluting material was discharged directly or indirectly into the stream (U. S. Board & Paper Co. v. Moore [Ind. App.] 72 N. E. 487), or whether the complainants became owners of this land before or after its diminution in value (Doremus v. Paterson [N. J. Eq.] 57 A. 548), and New Jersey Statute (P. L. 1903, p. 777) held not to be a bar to this right (Id.). An injunction against pollution by refuse was allowed under California statute (Code Civ. Proc. § 731), providing that anything which is injurious to health or offensive to the senses, etc., is a nuisance. McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 542, 78 P. 7. Under a Montana statute (Civ. Code, §§ 1880, 4550, 4605), no person had a right to cover the land of another with mining debris, and where a man sold the right to the use of water, reserving to himself the right to use it for placer mining, it was held that he only had a right to the reasonable use of it for the purpose named, and he could not pollute it so as to cover a lower owner's land with debris. Chessman v. Hale [Mont.] 79 P. 254.

7. Where permanent injury to land does not take place, yearly damage to crops may be recovered, and in order to recover for such damage and also for the permanent injury, the complaint must set forth distinctly when the permanent injury took place, the annual injury prior to that date, and how much land was permanently injured. Watson v. Colusa-Parrot Mining & Smelting Co. [Mont.] 79 P. 14.

8. Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854; Watson v. Colusa-Parrot Mining & Smelting Co. [Mont.] 79 P. 14. An injunction will not be granted, however, to one who is himself polluting the stream (Reese v. Johnstown, 45 Misc. 432, 92 N. Y. S. 728), nor after the nuisance has been abated (Perry v. Howe Co-op. Creamery Co. [Iowa] 101 N. W. 150).

9. Warren v. Parkhurst, 45 Misc. 466, 92 N. Y. S. 725.

10. Doremus v. Paterson [N. J. Eq.] 57 A. 548.

11. City of Cleveland v. Standard Bag & Paper Co. [Ohio] 74 N. E. 206.

12. See 2 Curr. L. 2038.

13. Held to be a **common-law duty** and that state of Illinois (Hurd's Rev. St. 1901, p. 687), providing for the building of bridges and culverts by commissioners or railroads which shall not interfere with the free flow of water, was but declaratory of the common law and constitutional. Chicago B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219; Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378. Common-law doctrine of "Sic utere tuo" applied to railroads. Fordham v. Northern Pac. R. Co. [Mont.] 76 P. 1040. Evidence reviewed where a railroad had obstructed a watercourse and held that a nonsuit was wrong. Denison v. New York Cent., etc., R. Co., 90 N. Y. S. 263. Railroad was held to be negligent. Denison, etc., R. Co. v. Barry [Tex.] 83 S. W. 5, mod. and afg. [Tex. Civ. App.] 80 S. W. 634.

Ordinarily this duty is imposed by statute: Vyse v. Chicago, B. & Q. R. Co. [Iowa] 101 N. W. 736. Prior to the act of 1897 (Code of Laws of 1892, § 2041), a railroad corporation was not liable in damages for the obstruction of a watercourse unless the damages resulted from negligence in the construction of its road or other works. Lampley v. Atlantic Coast Line R. Co. [S. C.] 50 S. E. 773. Law of Texas (St. 1895, art. 4436). Taylor v. San Antonio, etc., R. Co. [Tex. Civ. App.] 83 S. W. 738; Gulf, etc., R. Co. v. Provo [Tex. Civ. App.] 84 S. W. 275. Under law of Texas (Rev. St. 1895, art. 4436), providing that railroads must build necessary culverts or sluices as the lay of the land requires for the necessary drainage thereof, and that it must provide against extraordinary floods which may reasonably be anticipated, it was held that the evidence tended to show negligence and that the railroad was liable to extent of injury done irrespective of use of land at time of original construction. Texas & P. R. Co. v. Whitaker [Tex. Civ. App.] 82 S. W. 1051. A railroad company is not liable for damages caused by an overflow due to a trestle if the floods were unprecedented and such as could not have been anticipated by a prudent man skilled in the work. San Antonio, etc., R. Co. v.

to accommodate an increased flow allowed or caused by artificial means.[14] It is not bound to anticipate unprecedented floods such as could not reasonably have been foreseen,[15] but it is liable for damages caused by unprecedented floods where such damage would not have occurred but for the negligent construction of its bridge.[16] Whether a flood is extraordinary is generally a question for the jury.[17] So a municipal corporation must provide for the flow of a stream under its streets.[18] A statute authorizing a municipality to improve brooks flowing through it, and for such purpose to take land in fee or otherwise, authorizes only the taking of such an interest in lands as is necessary for the proposed improvement.[19]

Rights to interfere with the waters of a stream may be acquired by prescription[20] or by acquiescence.[21] A lower riparian owner cannot show an adverse user of water against an upper riparian owner in the absence of proof of recognition of his right by the upper owner.[22]

§ 4. *Rights in lakes and ponds.*[23]—The law divides natural fresh water ponds into two classes, the small which pass by an ordinary grant of land as a part

Kiersey [Tex.] 86 S. W. 744. Law of Indiana (Burns' Ann. St. 1901, § 5153, cl. 5), providing that railroads must construct roads so as not to interfere with free use of any watercourse or canal, and must restore same to such a state as not to impair its usefulness, construed, and it was held that where a railroad filled up a drainage ditch and placed a pipe of insufficient capacity in its place, it was liable for the injury caused by the nuisance. Pittsburg, etc., R. Co. v. Greb [Ind. App.] 73 N. E. 620. Under Texas law (Rev. St. 1895, art. 4436), providing that a railroad must construct necessary culverts and sluices as the necessary lay of the land requires for drainage, held, railroad liable for overflow of land and must pay expenses of constructing new bridge and roads incurred by the plaintiff. San Antonio, etc., R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842. Where the railroad embankment was partially the cause of the overflow and a levee of another independent of the railroad contributed to the damage, it was held the railroad would only be liable for damages caused by it, but if the two acted in concert or the railroad consented and participated in the act of the other, it would be responsible for the entire damages. Id. The fact that a person bought land after and with knowledge of the faulty construction by the railroad. San Antonio, etc., R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842. So where the railroad was only partly the cause of the overflow and another stream which it had not obstructed caused the rest, the railroad was only held liable for the proportionate damages caused by its negligence (Taylor v. San Antonio, etc., R. Co. [Tex. Civ. App.] 83 S. W. 738; Gulf, etc., R. Co. v. Provo [Tex. Civ. App.] 84 S. W. 275), or sold the land after the damage occurred does not preclude recovery (Id.).

14. Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

15. Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378. Where a trestle was so constructed as to catch and hold quantities of driftwood it was held to be negligence. San Antonio, etc., R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045.

16. Vyse v. Chicago, etc., R. Co. [Iowa] 101 N. W. 736.

17. San Antonio, etc., R. Co. v. Gurley [Tex. Civ. App.] 83 S. W. 842; Albers v. San Antonio, etc., R. Co. [Tex. Civ. App.] 81 S. W. 828; Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378. To show that a flood was due to an unprecedented storm, evidence that other farms were overflowed was held inadmissible where it did not appear that they were no more subject to be flooded than that of the plaintiff. Bell v. Missouri, etc., R. Co. [Tex. Civ. App.] 82 S. W. 1073.

18. Where a city, in reconstructing the wrought surface of a street to the full width of the original location, blocked a stream which had formerly flowed under it, it was held that it was under a duty to extend an arch or otherwise provide for the passage of the water of the stream under the street. Commonwealth v. Newton, 186 Mass. 286, 71 N. E. 699.

19. Under St. 1898, p. 37, c. 63, § 1, intended the taking only of an easement for the improvement of brooks in Newton. Newton v. Newton [Mass.] 74 N. E. 346.

20. See 2 Curr. L. 2040. Rickels v. Log Owners' Booming Co. [Mich.] 102 N. W. 652. Right to dam. Pluchak v. Crawford [Mich.] 100 N. W. 765. A prescriptive right may be gained against a riparian owner holding a title under a government patent. Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767. Where an owner of a prescriptive right to use the waters of a stream but by whose use water by percolation and seepage got back into the stream, sold his right to one beyond the water shed of the stream and cut off thereby the percolation and seepage, it was held that an injunction would issue to restrain the diversion beyond the water shed in behalf of lower riparian owners. Id.

21. Where a change is made in the flow of a stream artificially or otherwise, and riparian owners acquiesce for 15 years therein, they cannot thereafter restore the stream to its original condition. Harrington v. Demaris [Or.] 77 P. 603.

22. Harrington v. Demaris [Or.] 77 P. 603.

23. See 2 Curr. L. 2040.

thereof, and the large, which are exempt from the operation of such a grant and are public waters.[24] A riparian owner on a great pond may make a reasonable use of the water for domestic, agricultural, and mechanical purposes,[25] and while his ownership of the land bordering on the pond ceases at high-water mark,[26] yet he may build wharves and other structures into the pond so as not unreasonably to interfere with the rights of the public in the pond.[27] Where a great pond is taken by right of eminent domain, all rights in it appurtenant to the land should be taken into consideration in determining the value thereof.[28] A grant of land bordering on a small lake extends ad filum medium aquae.[29] A riparian owner may not drain a pond or lake to the injury of another owner.[30] Riparian owners on private fresh water lakes have the right of fishing.[31]

§ 5. *Rights in subterranean and percolating waters.*[32]—The owner of the surface of the land may divert the percolating waters below it and may exercise unlimited control over it.[33] But this doctrine does not apply where the diversion is purely malicious, wasteful, and made simply to injure another landowner.[34] In California the doctrine of "Sic utere tuo" is applied to percolating waters.[35] A

24. A natural fresh water pond situated in the midst of a tract of land belonging to a single owner and containing more than 10 acres was held to be a great pond. Dolbeer v. Suncook Waterworks Co., 72 N. H. 562, 58 A. 504. A body of water among swamp lands 1½ miles wide by 3 miles long in a shallow depression from 3 to 6 feet deep, fed by rain and snow and filled with swamp vegetation which was non-navigable and had been tilled, surveyed and sold to various owners, was held to be surface water. Applegate v. Franklin [Mo. App.] 84 S. W. 347.

25, 26, 27, 28. Dolbeer v. Suncook Waterworks Co., 72 N. H. 562, 58 A. 504.

29. This rule will not be applied however where the land is described by courses and distances but does not call for the lake nor the bank or shore thereof as a boundary. Smoulter v. Boyd, 209 Pa. 146, 58 A. 144.

30. Where surface water becomes a settled body of water retained, in a natural body forming a lake or pond emptied only by evaporation, it loses its character of surface water and may not be drained to injury of lower tenement. Davis v. Fry, 14 Okl. 340, 78 P. 180.

31. N. J. Statute of 1901 (R. L. p. 333), providing for the acquisition by counties of the common right to fish in such lakes, construed and held to be unconstitutional in not providing a proper method of compensation to riparian owners. Albright v. Sussex County Lake & Park Commission [N. J. Err. & App.] 59 A. 146.

32. See 2 Curr. L. 2040.

33. Where a railroad sank a well and drained a neighboring well, it was held not to be liable. Houston, etc., R. Co. v. East [Tex.] 81 S. W. 279; Howard v. Perrin [Ariz.] 76 P. 460. Rights by appropriation, see post, § 14.

34. Equity will enjoin such diversion. Gagnon v. French Lick Springs Hotel Co. [Ind.] 72 N. E. 849; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

NOTE. Malicious waste—Injunction: The plaintiff owned premises of great value as a health resort by reason of medicinal springs located thereon. The defendant, for the sole purpose of injuring plaintiff, sank a well on his own adjoining land and pumped water therefrom till the flow of plaintiff's springs was stopped. In a suit to enjoin defendant from further pumping, held, that injunction would lie. Gagnon v. French Lick Springs Hotel Co. [Ind.] 72 N. E. 849.

The law relating to the malicious waste of percolating waters is in a state of uncertainty. By the general rule, the owner thereof could make such beneficial use of them as he saw fit, even though injury result to his neighbor, regardless of motive. Gould on Waters, Sec. 290; Phelps v. Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Chatfield v. Wilson, 28 Vt. 49; Walker v. Cronin, 107 Mass. 555, 564. However, there were even among the earlier cases, dicta to the effect that if the acts of the owner were wholly malicious and resulted in no benefit to himself but only in injury to his neighbor, the courts might interfere. Wheatly v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Greenleaf v. Francis, 18 Pick. [Mass.] 117. See, also, Frazier v. Brown, 12 Ohio St. 294. The tendency of the most recent cases is to break away from the strict rule of the common law and to follow the principles announced in these dicta. Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080, 100 Am. St. Rep. 365; Cohen v. La Canada Land & Water Co., 142 Cal. 437, 76 P. 47. See, also, 2 Michigan Law Review, 403. In New York an unreasonable and unjust use cannot be made of such Y. 357, 54 N. E. 787. Wisconsin has de- Y. 357, 54 N. E. Rep. 787. Wisconsin has declined to follow the lead of the later cases, and a statute providing for a civil action against one making an unreasonable use of such waters has been there held invalid. Huber v. Merkle, 117 Wis. 355, 94 N. W. 354, 62 L. R. A. 589. The English courts adhere to the strict rule. Mayor of Bradford v. Pickles (1895), A. C. 587. The principal case, however, is wholly in accord with the spirit of the majority of recent cases, and is just and equitable in its results. See Farnham's Waters and Water Rights, sec. 938.—From 3 Mich. L. R. 491.

35. When percolating waters which went into a stream were diverted so as to create

riparian owner on a great pond may obstruct or change the flow of percolating waters from the pond through his land to a reasonable extent.[36] The right to the use of percolating waters under land taken for a highway is not included in the taking.[37] If water flows in a definite channel under ground, the same rules apply to it as apply to surface streams, and the landowner may not use or destroy it at his pleasure.[38] Where a city constructed driven wells and a pumping station and diminished the flow of surface and subsurface waters on land of another, upon examination of the evidence it was held that the landowner had suffered more damage than the mere cost of driving his well further down to the lowered water table.[39] The burden of proof is upon those asserting the right to waters below the surface, on the ground that they flow in a subterranean stream with well defined banks, to establish the existence of that stream.[40] The right to lay pipes over real property and convey water from a spring thereon is an easement for the benefit of the dominant estate.[41]

§ 6. *Rights in tide waters.*[42]—Tide waters are public.[43] By statute in Virginia, riparian proprietors are entitled to have assigned to them for their exclusive use a tract of land not exceeding one-half acre in extent, for an oyster planting ground.[44]

§ 7. *Rights in artificial waters.*[45]—A riparian owner on a canal has a right not to have his land overflowed through negligence of the canal owner.[46] Riparian owners on canals cut for navigation may acquire by prescription the same riparian rights as obtain upon natural watercourses.[47] Artificial waters and waterway re-

a direct draft on the flow, such use was held to be unlawful. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113.

Note: "Correlative rights in percolating waters," see note 64 L. R. A. 236.

36. Dolbeer v. Suncook Waterworks Co., 72 N. H. 562, 58 A. 504.

37. Under the law of California (Pol. Code, § 2631), providing that where land was taken for a highway the public only acquired a right of way and rights incidental to the enjoyment and maintenance of same, it was held that equity would enjoin a county from boring wells in the highway and using the subterranean waters for street sprinkling. Wright v. Austin, 143 Cal. 236, 76 P. 1023.

NOTE. Right to use percolating waters to sprinkle streets: The defendants, road commissioners, bored a well on a highway for the purpose of getting water to sprinkle the streets. The plaintiffs, abutting owners, seek to enjoin such action. Held, the highway easement does not justify the defendants' acts. Wright v. Austin [Cal. 1904] 76 P. 1023.

There seems to be no authority on the precise point. The waters of a spring rising in the highway may not be diverted to a watering trough (Suffield v. Hathaway, 44 Conn. 521, 26 Am. Rep. 483), and where a highway crosses a stream the public may be kept from the stream, where it is of no use for highway purposes (Old Town v. Dooley, 81 Ill. 255). It is the general rule that soil may be used to the extent of taking from one place on the highway to another if for the improvement of both places. Robert v. Sadler, 104 N. Y. 229, 58 Am. Rep. 498; New Haven v. Sargent, 38 Conn. 50, 9 Am. Rep. 360. As to whether trees growing on the highway may be used, the authorities are in conflict. Felch v. Gilman, 22 Vt. 38; Tucker v. Eldred, 6 R. I. 404. It would seem that there is no necessary distinction between water and other things within the highway. The question in each case should be determined rather by the usefulness to the public than by the position of the abutting owner, and the court might without violence to the plaintiff's rights have refused the injunction.—From 4 Columbia L. R. 515.

38. Gagnon v. French Lick Springs Hotel Co. [Ind.] 72 N. E. 849; St. Amand v. Lehman, 120 Ga. 253, 47 S. E. 949.

39. Reisert v. New York, 91 N. Y. S. 780. In a suit for damages for lowering the natural level of the water table under plaintiff's land, evidence held insufficient to support a finding that plaintiff had suffered no damage other than the cost of driving his wells further into the ground. City of New York v. Biffle, 91 N. Y. S. 737.

40. Howard v. Perrin [Ariz.] 76 P. 460.

As to use of subterranean waters for purposes of irrigation, see post, § 13.

41. Must be executed and attested like a grant of a freehold estate. Clark v. Strong, 93 N. Y. S. 514.

42. See 2 Curr. L. 2042.

43. Dolbeer v. Suncook Waterworks Co., 72 N. H. 562, 58 A. 504.

44. Code 1887, § 2137. Right should not be exercised arbitrarily but in manner least injurious to others, if that can be accomplished without wrong to him. Taylor v. Com., 102 Va. 759, 47 S. E. 875.

45. See 2 Curr. L. 2042.

46. State was held liable for overflow of a state canal due to a depression in the bank and the failure of its employes to let off waters. Crowley v. State, 90 N. Y. S. 496.

47. Recovery allowed for lowering level

garded as irrigation and supply.[48] Drainage[49] or mill and power plants are considered in subsequent sections.[50]

§ 8. *Ice.*[51]—The right to cut and take ice is more in the nature of a profit a prendre than an easement, but it may be annexed to premises under lease.[52] In New York, ice on the Hudson River belongs to the state.[53]

§ 9. *Surface waters and drainage or reclamation.*[54]—Its source of supply and not its quantity seems to be a criterion of surface water.[55] Flood water of a river is not surface water unless it becomes separated from or leaves the main stream never to return.[56]

Civil-law rule.[57]—Under the civil law an upper proprietor is entitled to an easement for the flow of surface water from his land,[58] but some cases confine this

of canals whereby they had to be deepened. Beidler v. Sanitary Dist., 211 Ill. 628, 71 N. E. 1118.

48. See post, §§ 13-15.

49. See post, § 9.

50. See post, § 12.

51. See 2 Curr. L. 2042.

52. Lease of artificial pond and land under it for flowage purposes with right to flow, store and use water in the pond, reserving, however, the exclusive right to cut and sell ice from the pond, construed, and it was held that the lessee could not turn hot water into the pond so as to melt the ice, although it was reasonably necessary for the proper operation of the lessee's business. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937. A lease of land on the edge of a mill pond on which to erect a building to be used only as an ice house carries no right to any of the pond or to take ice therefrom (Oliphant v. Richman [N. J. Eq.] 59 A. 241), and permission from the lessor to take ice was merely a revocable license and a taking thereunder for the statutory period was not an adverse user (Id.). Under a lease of an ice house and land with the free use of an adjoining pond to cut ice, whose only adequate supply was by a ditch pointed out by lessor, it was held that the lessor would be restrained from stopping the ditch and obstructing flow of water to pond. McCollum v. Williamson, 96 App. Div. 638, 89 N. Y. S. 119.

53. Laws of New York (Laws 1895, p. 882, c. 595; 1899, p. 486, c. 264; and 1904, p. 1906, c. 749), granting rights in ice fields in the Hudson River and also providing that this right should not deprive riparian owners of their right to use the river bank for lawful purposes, construed, and it was held that the casting of dirt and cinders on the ice fields by such owners in the lawful use of their property would not be enjoined. American Ice Co. v. Catskill Cement Co., 90 N. Y. S. 801.

54. See 2 Curr. L. 2042.

55. NOTE. Determination of what constitutes surface water: A depression of two thousand five hundred acres was permanently covered by water to a depth of from three to six feet, without any flow, and supplied entirely by surface water. It was dotted with islands and covered with vegetation. The defendant, owner of a large tract of the submerged land, drained the same, thus drawing off the water from the plaintiff's land, and destroying his fisheries. Held, the water was not distinguishable from surface water, and the defendant therefore had the right to drain it away. Applegate v. Franklin [Mo. 1904] 84 S. W. 347.

The criteria for determining what is surface water are not well defined. This decision regards as surface water a permanent and substantial body of water, a result believed to have been reached for the first time. Railroad Co. v. Brevoort (1894) 25 L. R. A. 527, note; Carr v. Moore (1903) 119 La. 152; Brandenberg v. Zeigler (1901) 62 S. C. 18, 89 Am. St. Rep. 887. A pond of four and a quarter acres, fed solely by surface water, five feet deep, and overflowing during only six or eight weeks of the year, was held to be governed by the law of watercourses. Schaefer v. Marthaler (1886) 34 Minn. 487, 57 Am. Rep. 73. Water covering five hundred acres of cypress brake supplied entirely by surface water, overflowing through a small bayou, was held to be a lake. Alcorn v. Saddler (1888) 66 Miss. 221. Mere marsh water is surface water. Curtiss v. Ayrault (1871) 47 N. Y. 73. The fact that this body of water was a menace to health, that is, a nuisance, influenced the decision in the principal case.—From 5 Columbia Law Rev. 329.

56. Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378; Fordham v. Northern Pac. R. Co. [Mont.] 76 P. 1040; Johnson v. Gray's Point Terminal R. Co. [Mo. App.] 85 S. W. 941.

57. See 2 Curr. L. 2042.

58. Stated in Applegate v. Franklin [Mo. App.] 84 S. W. 347; Cranson v. Snyder [Mich.] 100 N. W. 674. The owner of a dominant estate has a natural right to discharge all waters falling or accumulating on his land upon or over the land of the servient owner as in a state of nature. Applegate v. Franklin [Mo. App.] 84 S. W. 347. A landowner cannot protect his own land by turning surface water which naturally flows there upon the land of another. Wood v. Moulton [Cal.] 80 P. 92. The civil law makes no distinction between the waters of natural streams and surface waters. Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378.

Civil-law rule held not to apply under the artificial conditions created by the building of cities and improvement of lots, and where an owner raised the grade of his lot to the level of the street and thereby turned surface water on the land of another, he was held not liable. Hall v. Rising [Ala.] 37 So. 586.

right to surface water flowing in a well defined channel.[59] No change or innovation in the distribution of water from a superior to an inferior tenement is material unless it operates to prejudice or injure in some way the inferior tenement.[60]

Common-law rule.[61]—Under the common-law rule, surface water is the common enemy of mankind, and each owner has a right to protect his own land therefrom.[62] Some courts lay down the rule that any one may interfere with the drainage of surface water even to turning it back on the land of a neighbor regardless of the result,[63] or that a landowner may carry waters accumulating on his lands in the course of natural drainage to the limit of his land in any manner he may elect.[64] Other courts hold that an upper owner may lawfully obstruct or divert the natural flow or surface water and turn it back or over lands of others, only if he does it in a reasonable and careful manner.[65] In Minnesota it has recently been held with much reason that in cities the rule is modified to this extent: If improved city property is so situated that connection with an adequate sewer system can be made, such connection of water spouts and gutters will be required, when necessary to avoid injury to adjacent property by the throwing of water upon it.[66] A landowner has the right, providing he does not interfere with a natural or prescriptive watercourse, to construct or build on his own land levees, embankments, or other barriers to protect his property from surface water which flows thereon from adjoining land.[67]

It is a necessary corollary of either of the rules that there is no right anywhere to the continued flow of surface water which has taken no definite course but spreads out over the surface of the ground. Neither rule has any application unless some channel for surface water has been obstructed or its water diverted.[68]

It is generally held that a landowner has no right to collect surface water in a body[69] and discharge it in a ditch or drain on the land of another to his injury. This rule applies to railroads[70] and municipal corporations,[71] as well as

59. The civil-law rule is that natural depressions and channels which afford drainage for surface water cannot be obstructed or the waters diverted from them to the drainage of others. Carroll v. Rye Tp. [N. D.] 101 N. W. 894. Surface water **in a well defined course** cannot be interfered with to injury of another. Brown v. Armstrong [Iowa] 102 N. W. 1047.

60. Riverside Cotton Mills v. Lanier, 102 Va. 148, 45 S. E. 875.

61. See 2 Curr. L. 2043.

62. Todd v. York County [Neb.] 100 N. W. 299; Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378. There is no legal right in one landowner to have surface water flow naturally over the land of another. Barnett v. Matagorda Rice & Irr. Co. [Tex.] 83 S. W. 801. Where structures were built causing an increased volume of surface water to flow over adjacent land it was held that there was no liability. Sullivan v. Browning [N. J. Eq.] 58 A. 302. Under the common-law rule, neither upper nor lower proprietors can claim any right to drainage for surface water through mere natural surface channels which do not come within the technical definition of a watercourse. Carroll v. Rye Tp. [N. D.] 101 N. W. 894. A town is not liable for the increased flow of surface water **not in a definite channel**, caused by the improvement of a highway carefully made. Id.

63. Johnson v. Gray's Point Terminal R. Co. [Mo. App.] 85 S. W. 941; Gramann v. Eicholtz [Tex. Civ. App.] 81 S. W. 756.

64. Tile drain throwing water on adjoining land at the line held lawful. Dorman v. Droll [Ill.] 74 N. E. 152. No liability is incurred for turning surface water onto the premises of another, or for damming against such water. Bryant v. Merritt [Kan.] 80 P. 600.

65. Applegate v. Franklin [Mo. App.] 84 S. W. 347; Werner v. Popp [Minn.] 102 N. W. 366. He may collect the surface water into a natural surface water drain. Todd v. York County [Neb.] 100 N. W. 299.

66. Ginter v. Rector, etc., of St. Mark's Church in City of Minneapolis [Minn.] 103 N. W. 738.

67. Railroad company has same right in protection of its right of way. Clay v. Pittsburg, etc., R. Co. [Ind.] 73 N. E. 904.

68. Carroll v. Rye Tp. [N. D.] 101 N. W. 894; Brown v. Armstrong [Iowa] 102 N. W. 1047; Erwin v. Erie R. Co., 90 N. Y. S. 315.

69. See 2 Curr. L. 2043, n. 45-47.

70. Uhl v. Ohio River R. Co. [W. Va.] 49 S. E. 378; Baltimore & O. S. W. R. Co. v. Quillen [Ind. App.] 72 N. E. 661; Gartner v. Chicago, etc., R. Co. [Neb.] 98 N. W. 1052; Tletze v. International, etc., R. Co. [Tex. Civ. App.] 80 S. W. 124; Chicago, etc., R. Co. v. Longbottom [Tex. Civ. App.] 80 S. W. 542. One collecting surface water and sending it in greater volume and with greater force than it was accustomed to flow, upon

individuals.[72] Neither the owner of a dominant or servient estate has the right to dam or collect surface water and cast it upon his neighbor's land in an increased or unnatural quantity or way, to his injury.[73]

Easements as to surface water may be gained by prescription[74] or estoppel,[75] if there be a well defined and continuous user,[76] including the right to flow or discharge water in a body,[77] and equity will enjoin an obstruction, even though the damages are trifling.[78]

A municipal corporation[79] is not liable for an injury caused by surface water resulting from the construction of a street, unless the construction is negligent.[80]

The right of draining surface water through a natural watercourse[81] is a natural easement appurtenant to the land of every individual through which it runs,[82] so long as the natural capacity of the stream is not exceeded.[83]

the land of another, is liable for the damages caused thereby. Tyrus v. Kansas City, etc., R. Co. [Tenn.] 86 S. W. 1074. Evidence held sufficient to show that the defendant had so done. Id. In Texas the liability of a railroad company for failing to maintain proper culverts and sluices is not dependent on negligence. St. Louis S. W. R. Co. v. Baer [Tex. Civ. App.] 86 S. W. 653.

71. Cities and towns: Baldwin v. Ohio Tp. [Kan.] 78 P. 424. Where grade of highway was negligently changed and surface water collected in gutters and discharged on adjacent land, held a continuing nuisance and immaterial that complainant had bought after the change. Stillman v. Pendleton [R. I.] 60 A. 234; Holbrook v. Town of Norcross, 121 Ga. 319, 48 S. E. 922. "A city has no greater power over its streets in disposing of surface water which accumulates thereon than a private individual has in disposing of the surface water which falls or collects on his own land." Johnson v. White [R. I.] 58 A. 658. Where outlets for gutters were insufficient to provide for discharge of surface water therein it was held that the city was liable for an overflow. City of Houston v. Hutcheson [Tex. Civ. App.] 81 S. W. 86. Where, in the improvement of a highway, the township road official diverted the natural course of surface water upon land of another, an injunction issued to restrain him. Smith v. Eaton Tp. [Mich.] 101 N. W. 661. Under the Massachusetts Statute (St. 1894, p. 283, c. 288), providing for damages for taking of land for park purposes, it was held that damages could not be recovered for accumulation of surface water on land because of a change of grade of a parkway. McSweeney v. Commonwealth, 185 Mass. 371, 70 N. E. 429. A lot owner may recover damages from a city caused by surface water negligently thrown on his lot, though he has not raised the entire surface of the lot to the established grade. Monarch Mfg. Co. v. Omaha, etc., R. Co. [Iowa] 103 N. W. 493.

Counties: Equity will abate a nuisance. Schofield v. Cooper [Iowa] 102 N. W. 110.

72. Geneser v. Healy, 124 Iowa, 310, 100 N. W. 66; Todd v. York County [Neb.] 100 N. W. 299; Brown v. Armstrong [Iowa] 102 N. W. 1047. Where a dam was built to cast water on land of another, the structure was held to be uniawful. Everett v. Christopher [Iowa] 101 N. W. 521.

73. Keck v. Venghause [Iowa] 103 N. W. 773.

74. See 2 Curr. L. 2044, n. 53-55.

75. Brown v. Armstrong [Iowa] 102 N. W. 1047.

76. Where a ditch was originally dug to connect a lake and mill pond, and was later abandoned and filled nearly level, water running in it only in times of high water in the lake, no prescriptive right to reconstruct and maintain it as a drain could arise. Flynn v. Service [Mich.] 12 Det. Leg. N. 113. 103 N. W. 541.

77. Cranson v. Snyder [Mich.] 100 N. W. 674; Brown v. Armstrong [Iowa] 102 N. W. 1047; Robertson v. Lewie [Conn.] 59 A. 409. An easement in lands for the discharge of surface water thereon **cannot arise from permissive use** of lands for such purpose. All the elements of an easement by prescription must be present. Clay v. Pittsburg, etc., R. Co. [Ind.] 73 N. E. 904.

Estoppel: Brown v. Armstrong [Iowa] 102 N. W. 1047. **In Illinois,** where a system of **combined drainage** has been **constructed under parol license,** the right to revoke such license is forever barred if not exercised within the time provided by law. One year from date of passage of Laws 1889, p. 116, § 4, in case of existing drains. Dorman v. Droll [Ill.] 74 N. E. 152. A combined drain having been constructed by mutual license, the flow of water therein cannot be interfered with by one landowner without the consent of the owners of the other lands benefited. Id.

78. Robertson v. Lewie [Conn.] 59 A. 409.

79. See 2 Curr. L. 2044, n. 49.

80. Taylor v. Houston, etc., R. Co. [Tex. Civ. App.] 80 S. W. 260. Where by a negligent change of a street grade a depression was left where water gathered and interfered with access to abutting land, the city was held liable therefor. Howard v. Lamoni, 124 Iowa, 348, 100 N. W. 62.

81. See 2 Curr. L. 2043, n. 40.

82. Chicago, B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219. Where an owner of a tract separated it into lots and conveyed them to different persons, the grantees of upper lots have by implication an easement for the flowage of spring and surface water along natural channels over lower lots. Riverside Cotton Mills v. Lanier, 102 Va. 148, 45 S. E. 875.

83. Where highway commissioners in improving highways turned surface water in-

A person may not allow surface water to accumulate[84] and stand in depressions on his land, until it becomes stagnant, resulting in the sickness of the adjoining owner. This rule applies both to municipal and private corporations.[85]

The general rules relating to drainage or reclamation[86] are the subject of a separate article.[87] One has a right to drain surface water even though it be drawn from adjacent lands to the owner's detriment.[88]

§ 10. *Lands under water.*[89]—The right to acquire and reclaim public subaqueous and swamp lands is given by various Federal and state laws.[90]

A strip of land formed by the caving of the banks of a river, which has no permanent situs but is shifted and changed more or less by the action of the water, is not tide land.[91]

The state may sell the fee in lands lying between high and low water mark.[92]

Private rights in such lands.—Any such rights conveyed by it to any person become the private property of the grantee,[93] his title being as absolute as the terms of the grant import.[94] The interest so acquired is subject to condemnation under the power of eminent domain.[95] The fact that neither the city nor the

to stream, they were held not liable. Baldwin v. Ohio Tp. [Kan.] 78 P. 424. A city may use a natural watercourse flowing through it for street and storm drainage, and is not liable for dirt and other materials carried into it thereby. A. L. Lakey Co. v. Kalamazoo [Mich.] 101 N. W. 841. Where surplus water from an artesian well flowed across the land of another in a natural watercourse and no damage was done, it was held equity would not restrain the digging of the well. Mead v. Mellette [S. D.] 101 N. W. 355. A landowner may drain his land into natural and usual channels if the amount of water thrown upon the servient estate is not thereby unduly increased. Construction of tile drains held lawful, though amount of water thrown into stream was somewhat increased, and the flow accelerated. Dorr v. Simmerson [Iowa] 103 N. W. 806.

84. See 2 Curr. L. 2044.

85. Where a railroad through insufficient culverts caused accumulations of stagnant water, it was held liable for sickness and inconvenience and lessened enjoyment of his home by a landowner. Taylor v. Houston, etc., R. Co. [Tex. Civ. App.] 80 S. W. 260. But under the same facts the drain being in the street, it was held the city would only be liable for injury to the property. Id. Relief asked for which is impracticable will not be granted. McKee v. Grand Rapids [Mich.] 100 N. W. 580.

86. See Sewers and Drains, 2 Curr. L. 1628.

87. Compare Public Works and Improvements, 2 Curr. L. 1328.

88. NOTE. Right to drain surface water from adjoining land: The parties owned adjoining lands covered by a body of water twenty-five hundred acres in area, fed solely by rain and snow, and varying in depth from three to six feet. The defendant, in order to reclaim his land, constructed thereon a ditch which drained the water from the plaintiff's land and ruined his valuable fishery. Held, that the plaintiff cannot recover. Applegate v. Franklin [Mo. App.] 84 S. W. 347.

The fact that surface water collects temporarily in considerable quantities in a natural depression does not alter its character. Boynton v. Gilman, 53 Vt. 17. But if the pond formed be permanent, it ceases to be surface water, and may not be drained without the consent of all whose land it covers. Schaefer v. Marthaeler, 34 Minn. 487, 57 Am. Rep. 73. Assuming that the court correctly found the pond in question to be surface water, the case raises a new problem, whether for purposes of improvement one may artificially drain his land and thereby deprive an adjoining proprietor of surface water. An upper owner may not, by artificial drainage, discharge a body of surface water upon lands below. Rhoads v. Davidheiser, 133 Pa. 226, 19 Am. St. Rep. 630. But he has an absolute right to surface water before it reaches the lower owner. Broadbent v. Ramsbotham, 11 Exch. 602. Even in jurisdictions which limit the owner's right in percolating waters to reasonable user, artificial drainage thereof for purposes of improvement is lawful, though it deprive a neighbor of his supply. Ellis v. Duncan, 21 Barb. [N. Y.] 230. These last two analogies tend to support the present decision, whether we regard the defendant's right to surface water as absolute or as restricted to reasonable user.—From 18 Harv. Law Rev. 626.

89. See 2 Curr. L. 2044, n. 56.

90. See Public Lands, 2 Curr. L. 1295.

91. Injunction to restrain construction of boom denied. Sengstacken v. McCormac [Or.] 79 P. 412. Recitals in deeds held not to estop defendant to dispute character of lands. Id.

92. Woodcliff Land Imp. Co. v. New Jersey S. L. R. Co. [N. J. Law] 60 A. 44.

93. N. J. P. L. 1869, p. 1017, P. L. 1871, p. 113 (Gen. St. vol. 3, pp. 2786, 2796), P. L. 1891, p. 214, §§ 3, 4 (Gen. St. p. 2794). Woodcliff Land Imp. Co. v. New Jersey S. L. R. Co. [N. J. Law] 60 A. 44.

94. Woodcliff Land Imp. Co. v. New Jersey S. L. R. Co. [N. J. Law] 60 A. 44.

95. Railroad may condemn right of way over such lands longitudinally with river. Woodcliff Land Imp. Co. v. New Jersey S. L. R. Co. [N. J. Law] 60 A. 44.

river commission objected to the construction of expensive works thereon by a riparian owner does not estop the city to deny his right to continue to occupy the same.[96] But where the works are constructed with the city's knowledge, and the riparian proprietor pays taxes and fees for the privilege of maintaining them, it is only entitled to a restoration of the land on payment of reasonable compensation to the proprietor for the loss sustained.[97] Where the state owns all tide lands affected, and provides for private construction of a waterway with a lien on tide lands for compensation, individuals who have a mere first option to purchase such tide lands are not deprived of any right.[98] The right to a riparian grant must be determined by keeping within side lines at right angles with the high-water line, if the latter is straight,[99] and, if it is curved or irregular, then within side lines which divide the foreshore proportionately among the littoral owners.[1] A riparian grant to the owner of land not reached by the ordinary line of high water is invalid.[2] The question whether it is so reached is to be determined as of the date when the claimant acquired title rather than the date when the grant was made.[3] Riparian grants should not be set aside, reformed, or controlled in their operation upon the ground that they were induced by false suggestion or fraud, in the absence of clear and cogent proofs.[4] In Illinois, riparian owners on navigable streams own the soil to the center thereof, and are entitled to a reasonable use of the waters, subject to the right of navigation therein by the public.[5] Title by accretion can be acquired only where the accretion is due to a gradual and natural deposit of soil along the border of the upland.[6] The doctrine of accretion does not apply to land reclaimed by human agencies.[7]

§ 11. *Levees, dikes, sea walls and other protective works.*[8]—A levee district is liable for damages resulting from the overflow of a lake caused by the improper construction of a levee built to protect the lands from a river, though in the absence of such levee the lands would have been similarly overflowed by the river.[9] Power to build sea walls is conferred on counties in Texas by statute.[10]

§ 12. *Levee, drainage and reclamation districts.*[11]—The formation of levee, drainage and reclamation districts and the powers and duties of the officers of such districts are governed by statute.[12] The validity of such legislation is sup-

96, 97. City of Mobile v. Sullivan Timber Co. [C. C. A.] 129 F. 298.

98. Seattle & L. W. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 P. 845.

99, 1. Bradley v. McPherson [N. J. Eq.] 58 A. 105.

2. Invalid where corner of lot was washed only by storm and extra high tides, and it was claimed, when lot was sold to defendant, that there was ground between it and high-water mark. Bradley v. McPherson [N. J. Eq.] 58 A. 105.

3. Bradley v. McPherson [N. J. Eq.] 58 A. 105.

4. Attorney General v. Central R. Co. [N. J. Eq.] 59 A. 348.

5. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118. Owners of upland along Harlem river own in fee only to high-water mark, though entitled to riparian easements. In re Driveway in City of New York, 93 N. Y. S. 1107.

6, 7. In re Driveway in City of New York, 93 N. Y. S. 1107.

8. See 2 Curr. L. 2044.

9. Bader v. St. Francis Levee Dist. [Mo. App.] 85 S. W. 654.

10. Under Laws 1901 (1st Ex. Sess.) p. 24, c. 12, a county bordering on the Gulf of Mexico has power to construct a sea wall within the limits of a city in the county. Johnston v. Galveston County [Tex. Civ. App.] 85 S. W. 511.

11. See 2 Curr. L. 2045. See, also, Sewers and Drains, 4 Curr. L. 1429; Public Works and Improvements, 4 Curr. L. 1124.

12. California statute (Pol. Code, §§ 3446-3493½), establishing reclamation districts, construed. Rico v. Snider, 134 Fed. 953. Act of Arkansas (Acts of 1887, p. 63; Acts of 1893, p. 157; Acts of 1901, p. 27), creating levee districts and board of commissioners, construed. Pratt v. Dudley [Ark.] 84 S. W. 781. Illinois Drainage Act (Hurd's Rev. St. 1899, c. 42, § 200), providing that tax assessors should determine whether the act had been violated, construed, and held unconstitutional as imposing judicial powers upon them. Cleveland, etc., R. Co. v. People, 212 Ill. 638, 72 N. E. 725. Illinois Farm Drainage Act (Hurd's Rev. St. 1901, p. 723, c. 42), construed, and held not to affect the levee act (Hurd's Rev. St. 1901, p. 707, c. 42). Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219. Under the drainage act of 1879, additional drainage, petitioned for under § 59,

ported by the public, beneficial nature of the work[12] and the officers administering the same are often a separate public corporation,[14] possessed of a wide discretion with which the courts will not ordinarily interfere,[15] and endowed with power to take land by eminent domain,[16] to issue bonds[17] and certificates of indebtedness,[18] and to levy taxes[19] on land benefited.[20] Such powers cannot be exercised so as to injure private property,[21] and are subject to constitutional limitations.[22]

§ 13. *Milling and power and other nonconsuming privileges; dams, canals and races.*[23]—Since an enforcement by riparian owners of their rights at common law would often make it impossible for any of them to use water power effectively,

need not be abandoned on presentation of a petition for that purpose after the original contract has been let. Soran v. Commissioners of Union Drainage Dist. No. 1 [Ill.] 74 N. E. 129. Laws 1903, p. 162, providing for the organization of land affected by additional drainage into a subdistrict is not applicable where the petition for additional drainage was filed before the law was passed. Id. Indiana Statute (Acts 1901, p. 545, c. 235; Burns' Ann. St. § 5653a), providing for the construction of public drains, construed. Kemp v. Adams [Ind. App.] 73 N. E. 590. Louisiana Act of 1829, p. 102, No. 31, relative to the levees of the Parish of Concordia, construed, and it was held that it should be construed in connection with Rev. St. § 2786. Glass v. Parish of Concordia, 113 La. 544, 37 So. 189. Act No. 97, p. 107 of 1890 provides for the registry in the office of the recorders of the respective parishes of the titles to land thereby conveyed by the state to the board of commissioners of the Atchafalaya levee district, and the general law upon the subject of registry applies to the conveyance of all lands alienated by said board. Williams v. White Castle Lumber & Shingle Co. [La.] 38 So. 414. Laws of N. J. 1866 (P. L. p. 941), providing for drainage of certain swamp lands and appointing commissioners and Laws 1903 (P. L. p. 544, c. 241), providing for payment of improvement certificates, construed and declared constitutional. O'Neill v. City of Hoboken [N. J. Law] 60 A. 50.

13. O'Neill v. City of Hoboken [N. J. Law] 60 A. 50; Rico v. Snider, 134 F. 953.

14. Quasi-public corporation. Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219. Levee boards held to be bodies politic. United R. & Trading Co. v. Mevers, 112 La. 897, 36 So. 797.

15. Gross error or arbitrary acts will be considered by the courts and it is open to landowners to show that more land than was necessary was taken. Board of Levee Commissioners, Orleans Levee Dist. v. Jackson's Estate [La.] 36 So. 912. Under law of California (Pol. Code, §§ 3446-3493½), providing for reclamation districts and board of commissioners, it was held that until the board has passed on the question whether land is reclaimed, the court will not pass on that question. Rico v. Snider, 134 F. 953.

16. O'Neill v. City of Hoboken [N. J. Law] 60 A. 50. Farm Drainage Act. Chicago B. & Q. R. Co. v. People, 212 Ill. 103, 72 N. E. 219.

17. Laws of Miss. (Act 1884, p. 140, c. 168; Acts 1886, p. 102, c. 39, § 3; Code 1892, c. 108, § 3412; Acts 1894, c. 21, c. 29; Acts 1898, p. 14, c. 5), incorporating board of levee commissioners of Yazoo & Mississippi Delta and authorizing taxes for the use of board, construed. Tate v. Board of Levee Com'rs [Miss.] 36 So. 395.

18. O'Neill v. City of Hoboken [N. J. Law] 60 A. 50. The Louisiana law (Act of 1829, p. 102, No. 31), relative to the levees at Concordia, and giving the police jury certain powers construed, and it was held that while the police jury could tax, it could not issue negotiable paper. Glass v. Parish of Concordia, 113 La. 544, 37 So. 189.

19. O'Neill v. City of Hoboken [N. J. Law] 60 A. 50; Chicago, etc., R. Co. v. People, 212 Ill. 103, 72 N. E. 219; Glass v. Parish of Concordia, 113 La. 544, 37 So. 189. Laws of Mich. (Comp. Laws, §§ 3860, 4338, 4356; Pub. Acts 1899, pp. 463, 465, No. 272, c. 4, § 2), construed and it was held that the board of supervisors had the right to refuse to spread a drain tax among other townships than those taxed. Kenyon v. Board of Sup'rs of Ionia County [Mich.] 101 N. W. 851. Constitution of 1898 of Louisiana construed and it was held that the tax by the levee board for levee purposes was not a municipal tax. United R. & Trading Co. v. Mevers, 112 La. 897, 36 So. 797. Laws of Arkansas (Acts 1887, p. 63; Acts 1893, p. 157; Acts 1901, p. 27), creating levee districts and board of inspectors to superintend the construction of levees, construed, and it was held that a proceeding in chancery was the proper mode for the levee commissioners to receive from the county treasurer funds collected by him for levee purposes. Pratt v. Dudley [Ark.] 84 S. W. 781; Collier v. Campbell Lumber Co. [Ark.] 86 S. W. 295. The county court has no jurisdiction to require the collector of levee taxes to refund the same, if the levee district was created by a valid statute, though such statute is repealed subsequent to the collection of the taxes. Id. Laws of Arkansas (Acts 1895, pp. 88, 89, c. 71), providing for suits for the enforcement of levee taxes, construed, and held to be constitutional. Ballard v. Hunter [Ark.] 85 S. W. 252.

20. O'Neill v. City of Hoboken [N. J. Law] 60 A. 50.

21. Illinois drainage act of March 29, 1886 (Starr & C. Ann. St. 1896, c. 42), construed, and it was held that the lowering of the water of a navigable canal was a taking of private property. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 628, 71 N. E. 1118.

22. See Constitutional Law, 1 Curr. L. 569.

23. See 2 Curr. L. 2046. Appropriation, see post, § 14.

the states have passed "Mill Acts."[24] The use of a dam and of land under the water are not separate rights.[25] The interference with the use of neighboring property by the appropriation of a mill site is not a taking under the right of eminent domain.[26] For injuries wrought by dams and mill privileges, remedies are given riparian owners by statute,[27] as well as at common law,[28] but not for all injuries.[29] Under a grant to flow specified land below a dam, the flooding of other land by percolation through or under the dam is not a necessary or natural consequence of the use of the privilege nor appurtenant thereto.[30]

The owner of a mill race must use care proportionate to the danger to prevent water percolating through the banks to the injury of adjacent owners.[31] The adjacent owner if required to exercise any care is bound only to use ordinary care to prevent injury,[32] and is not required to expend in doing so more than the value of the land.[33]

The extent of a prescriptive right[33a] to flood land or injure it by percolation depends not upon the height of the dam but upon the reach and elevation of the back water during the period the dam was maintained.[34] To acquire a prescriptive right to flow land by means of a milldam without the payment of damages, it must appear that the land was flowed for twenty consecutive years and that some appreciable damage to it was thereby occasioned.[35] One lawfully using a

24. Under the Massachusetts Act (R. L. c. 196), it was held that as between two riparian owners, priority of appropriation gives the better right to establish a mill, and the rule calls for an actual occupation of a site for a dam followed by the completion of same and actual use of the water within a reasonable time. Otis Co. v. Ludlow Mfg. Co., 186 Mass. 89, 70 N. E. 1009. Indiana Act (Burns' Ann. St. 1901, §§ 4833, 4844; Rev. St. 1881, §§ 3702, 3703; Horner's Ann. St. 1901, §§ 3702, 3703), providing for condemnation of land for a dam, construed, and it was held there was no appeal from the order of the lower court refusing to appoint appraisers and dismissing the proceeding. Noblesville Hydraulic Co. v. Evans [Ind.] 72 N. E. 126.

25. Where one entitled to mill privileges only used the land as subservient to the use of the water, it was held that he was not liable for the use of the land. Dyer v. Cranston Printworks [R. I.] 58 A. 450.

26. Otis Co. v. Ludlow Co., 186 Mass. 89, 70 N. E. 1009.

27. Under Maine Mill Act (Rev. St. c. 94, § 1), regulating the height of dams so as to guard against injury to upper owners at ordinary stages of the water, including freshets, which were to be expected, it was held that to be extraordinary, a freshet need not be unprecedented or higher than any within the memory of man. Inhabitants of Palmyra v. Waverly Wooien Co. [Me.] 58 A. 674. Law of Wisconsin (Rev. St. 1898, § 3375), providing against the raising of existing dams to the injury of others, construed, and it was held that there had been a violation of it. Evans v. Bacon, 118 Wis. 380, 95 N. W. 375. Missouri Laws (Rev. St. 1899, § 8750), providing for a penalty for the heightening of a dam not in accordance with the laws, and (§ 8752) declaring such illegal obstructions to be a public nuisance, construed, and it was held that it was not laches to delay three years before bringing a suit when there was a protest at the time that the illegal act was being done, but that such obstruction would not be abated where one stood by for five years and allowed it to be made at great expense. Scheurich v. Southwest Missouri Light Co. [Mo. App.] 84 S. W. 1003. Law of North Carolina (Code, § 1859), providing for the recovery for injuries from building a dam and for the sale of same on the return of an execution unsatisfied in an action to abate, construed, and it was held that the payment of judgment did not amount to a purchase of an easement to flow, nor was it a condemnation of the land. Candler v. Asheville Elec. Co., 135 N. C. 12, 47 S. E. 114.

28. Nominal damages at least will be given for any flooding of land by a dam. Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226.

29. Where, in the necessary and natural use of a mill pond, the bottom was exposed in the summer months and caused a nuisance, it was held that there could be no recovery therefor by persons who bought after the pond had become established. DeWitt v. Bissell [Conn.] 60 A. 113.

30. Schwarzenbach v. Electric Water Power Co., 101 App. Div. 345, 92 N. Y. S. 187.

31. Scott v. Longwell [Mich.] 102 N. W. 230.

Contra: Where one grants an easement to flow certain land or the right to maintain a dam at a given height, no damages can be claimed which result from a necessary and proper use of the easement granted. Reid v. Courtenay Mfg. Co., 68 S. C. 466, 47 S. E. 718.

32. Scott v. Longwell [Mich.] 102 N. W. 230.

33. Where there is a break in a canal. Welliver v. Pennsylvania Canal Co., 23 Pa. Super. Ct. 79.

33a. See 2 Curr. L. 2052, n. 35, 36.

34. Carrington v. Brooks, 121 Ga. 250, 48 S. E. 970.

35. Under Mill Act (Rev. St. c. 94), there can be no action for flowage except as

mill privilege cannot gain a prescriptive right to the continued use and maintenance of reservoirs lawfully constructed by upper riparian owners, which materially increase the power at the mill.[36] One who grants a dam privilege, reserving all water rights and privileges to use the same, cannot compel the dam owner to construct an opening in the dam for the enjoyment of his rights, but must do it at his own expense.[37]

§ 14. *Irrigation and water supply,*[38] *and priorities in use of water.*[39] *Common-law rights and the doctrine of prior appropriation.*[40] *Common-law rule.*[41]—A riparian owner has a right to the reasonable use of the waters of a stream flowing by his land for irrigation purposes, subject to a like right in all other riparian proprietors.[42] A diminution of the flow of water over riparian land, caused by its use for irrigation purposes by upper riparian owners, occasions no injury for which damages may be allowed, unless it results in subtracting from the value of the land by interfering with the reasonable uses of the water which the landowner is able to enjoy.[43] A riparian owner's right as such, to the use of water for irrigation purposes, applies to riparian lands only, and he cannot rightfully divert to nonriparian lands water which he has a right to use on riparian land but does not so use.[44] A riparian owner cannot divert water to land lying beyond the watershed of the stream, except where the drainage area is small and the water supply abundant.[45]

The measure of two riparian owners' rights is not dependent solely upon their respective frontages upon the stream, but also upon the extent of the stream, the volume of water, the character of the soil, and the area of land which each proposes to irrigate.[46] In determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate, the principle of equality of right with others should control, irrespective of the accidental matter of governmental subdivisions of the land.[47] A lower riparian owner acquires no prescriptive right against upper proprietors to receive a given quantity of the flow of a stream by diverting and using it after it has left their land;[48] and an upper proprietor can acquire no prescriptive right to divert water, as against owners down the stream, so long as the flow is sufficient for the needs of all.[49]

Prior appropriation rule.[50]—In many western states the doctrine of prior appropriation has taken the place of or modified the common-law rule as to the use of water.[51] Congress has recognized the doctrine.[52]

provided in the act. Foster v. Sebago Imp. Co. [Me.] 60 A. 894.

36. Sawyer v. Commonwealth, 185 Mass 356, 70 N. E. 438.

37. Harris v. Ft. Miller Pulp & Paper Co., 92 N. Y. S. 959.

38. See 2 Curr. L. 2046.

39. See, generally, Long on Irrigation.

40, 41. See 2 Curr. L. 2046.

42. Gutierrez v. Wege, 145 Cal. 730, 79 P. 449; McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249; Pierson v. Speyer, 178 N. Y. 270, 70 N. E. 799; Harrington v. Demaris [Or.] 77 P. 603; Clements v. Watkins Land Co. [Tex. Civ. App.] 82 S. W. 665, afd. 86 S. W. 733. The use of the water of a running stream for irrigation, after its primary uses for domestic requirements have been subserved, is one of the common-law rights of a riparian owner. Clark v. Allaman [Kan.] 80 P. 571. Such use must be reasonable, and the right must be exercised with due regard to the equal right of every other owner along the stream. Id.

43. Clark v. Allaman [Kan.] 80 P. 571.

44. Clements v. Watkins Land Co. [Tex. Civ. App.] 82 S. W. 665. A riparian owner cannot sell water to others to irrigate nonriparian lands, such use not being a "natural" one. Watkins Land Co. v. Clements [Tex.] 86 S. W. 733.

45. Watkins Land Co. v. Clements [Tex.] 86 S. W. 733.

46. Southern California Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767.

47, 48, 49. Clark v. Allaman [Kan.] 80 P. 571.

50. See 2 Curr. L. 2047.

51. Laws of Ariz. (Rev. St. 1887, par. 3199, § 1) and Act No. 86 (Laws 1893, p. 135), providing that all streams of running water are public and applicable for irrigation, and allowing the construction of aqueducts for irrigation and for the appropriation of unappropriated waters for domestic and other beneficial uses, construed. Howard v. Perrin [Ariz.] 76 P. 460. Laws of Idaho (see Laws 1903, p. 223), to regulate the appro-

The doctrine of prior appropriation may exist in the same state with the common-law doctrine of riparian rights,[53] but the right acquired by the prior appropriator is superior to the right of the riparian owner at common law.[54] The common-law rules relating to the rights of riparian owners to the waters of running streams are in force in Kansas,[55] and cannot be controlled or repealed by local customs.[56] The doctrine of prior appropriation of waters for irrigation purposes received no recognition in Kansas until the statute of 1886, authorizing the acquisition of such rights by appropriation.[57] Though the doctrine has since been recognized, property in the flow of running water acquired under the previously existing common-law system is protected by the fourteenth amendment to the Federal constitution.[58]

Waters of subterranean streams flowing in natural channels between well-defined banks, are subject to appropriation.[59]

The doctrine of prior appropriation applies as between two appropriators from the same interstate stream who reside in different states.[60]

Appropriation consists in[60a] an intent to apply the water to a beneficial use existing at the time, an actual diversion and an application to a beneficial use.[61] Various statutes prescribe methods for appropriation by location and application approved by designated officers and followed by application to beneficial use.[62]

priation and diversion of public waters and to establish the right to the use of said waters and the priority of such rights, construed, and it was held to be constitutional, and that "public waters" means all waters running in natural channels, and that the state had power to regulate the use and appropriation of same. Boise City Irr. Co. v. Stewart [Idaho] 77 P. 25. Irrigation act of Nebraska (Laws 1895, p. 244, c. 69), authorizing and regulating the appropriation of the waters of the state for irrigation, construed and held to be constitutional. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249. Irrigation act of Nebraska (Laws 1895, p. 244, c. 69), providing for appropriation and a State Board of Irrigation, construed. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286. Laws of Washington (Laws 1899, p. 261, c. 131), providing for condemnation proceeding for rights of way for irrigation ditches and relating to the right of appropriation of water, construed and held constitutional. Weed v. Goodwin, 36 Wash. 31, 78 P. 36.

52. 14 Stat. 253, c. 262; U. S. Comp. St. 1901, p. 1467. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25.

53. Clark v. Allaman [Kan.] 80 P. 571. This is the case in Nebraska. The Nebraska Irrigation Act (Laws 1895, p. 244, c. 69) is construed so as not to impair water rights, appropriated, or acquired prior to the act. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249. The irrigation act is in subordination to the common-law right of riparian owners to the reasonable use of water for irrigation purposes, and allows compensation to such owners both upper and lower for the impairment or destruction of their rights. Id.

54. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249.

55, 56, 57, 58. Clark v. Allaman [Kan.] 80 P. 571.

59. No distinction exists between waters running under the surface in well-defined channels and those running in distinct channels on the surface. Howard v. Perrin [Ariz.] 76 P. 460.

60. A prior appropriation of water in Wyoming from a stream which rose in Colorado was held to be valid as against a subsequent appropriation in Colorado, and the police regulation of Wyoming in regard to the distribution of water in that state were held to be immaterial. Hoge v. Eaton, 135 F. 411.

60a. See 2 Curr. L. 2050, n. 6-11.

61. Rodgers v. Pitt, 129 F. 932. Where the intention was to secure a right and hold and not use it, it was held that no right was gained thereby as against a diversion by a subsequent appropriator. Miles v. Butte Elec. & Power Co. [Mont.] 79 P. 549; Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25. The use of water to irrigate wild grass is a beneficial use which is not confined to the cultivation of crops or fine grass. Rodgers v. Pitt, 129 F. 932. The fact that at the time of the appropriation the land intended to be irrigated was a swamp and unfit for cultivation does not affect the right to the appropriation as against one who did not appropriate until after the land was drained, cultivated and being irrigated by the water appropriated. Id.

62. The law of Montana (Comp. St. 1887) requires the posting of a notice containing statements such as the name of the stream, the location, the purpose, the amount of water, the method of diversion, and the date of diversion, and the work must be begun within 40 days after posting. Miles v. Butte Elec. & Power Co. [Mont.] 79 P. 549. The recording of the notice required by previous appropriators does not constitute an appropriation, but is merely a notice to the world of their claims [Comp. St. 1887, § 1258]. Norman v. Corbley [Mont.] 79 P. 1059. Under the law of Nebraska (Laws 1895, p. 244, c. 69), an application cannot be made to the state board setting forth the location by section, township and range

To make the appropriation relate back to the time when the appropriation was made, the work must have been prosecuted to completion with reasonable diligence.[63] Reasonable diligence is a question of fact in each case.[64]

Limit, measure and extent of right.[65]—No person can acquire a right to more water than he can beneficially use,[66] the surplus water over and above this goes to subsequent appropriators.[67] If, however, the water is used for irrigation, the amount is not limited to that used at the time of the appropriation, but extends to such other amount within the capacity of the ditch as may be required for the future improvement and cultivation of lands for which the appropriation was made,[68] and an appropriation of water is not confined to the amount of water used or to the amount of land irrigated during dry seasons,[69] nor solely to use on riparian lands.[70] If the prior appropriator only takes part of the water of the stream for a certain part of the year, subsequent appropriators may acquire a right to appropriate the water at other times.[71] One who appropriates water sufficient to run a mill, subject to a prior appropriation of a certain amount by a city, cannot be limited in his use to certain months, during which only, owing to climatic conditions, the flow is sufficient to run the mill.[72]

Appropriations may be measured by the system in common use in the locality, even though not perfect.[73]

In Montana, where one has a right by appropriation to the use of the waters of two creeks, he may not let the waters of one go to waste and use the full amount of his appropriation from the waters of the other to the damage of a subsequent appropriator,[74] nor can the subsequent appropriator as of right compel him to exhaust the waters of the first creek before resorting to the second.[75]

The Colorado statute authorizing exchange or loan of waters does not change the rights or privileges of water-right owners;[76] thus the statute does not authorize a loan of water by a senior appropriator to the prejudice of other appropriators junior to those to whom the water is loaned.[77]

Nature of the right.[77a]—A prior appropriator who has acquired a vested right to the use of water has a right in the nature of a property right entitled to protection,[78] and descendible by inheritance as an easement and an incorporeal hereditament;[79] but the right is usufructuary only.[80] In some states a water right ap-

and a description of the land. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286; Cline v. Stock [Neb.] 102 N. W. 265. Under the law of Wyoming (Rev. St. 1899, § 917), an application must be made to the state engineer which shall state the nature of the use and a map cannot be filed showing the location and area of the land. Johnston v. Little Horse Creek Irr. Co. [Wyo.] 79 P. 22.

63. Rodgers v. Pitt, 129 F. 932; Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25. Until a claimant is in a position to use the water, the right to use the water does not exist so as to give a right of action for diversion. Miles v. Butte Elec. & Power Co. [Mont.] 79 P. 549.

64. Rodgers v. Pitt, 129 F. 932.

65. See 2 Curr. L. 2048, n. 97; Id., 2049, n. 3, 4.

66. Rodgers v. Pitt, 129 F. 932.

67. Johnston v. Little Horse Creek Irr. Co. [Wyo.] 79 P. 22; Rodgers v. Pitt, 129 F. 932; Norman v. Corbley [Mont.] 79 P. 1059. An appropriator cannot sell or give away his surplus water as against a subsequent appropriator. Johnston v. Little Horse Creek Irr. Co. [Wyo.] 79 P. 22.

68. The intention, object and purpose of the appropriation, the acts of carrying it out, and the amount and character of the land, must be considered. Rodgers v. Pitt, 129 F. 932.

69. Rodgers v. Pitt, 129 F. 932.

70. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249; Weed v. Goodwin, 36 Wash. 31, 78 P. 36.

71. Rodgers v. Pitt, 129 F. 932; Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25.

72. City of Telluride v. Blair [Colo.] 80 P. 1053.

73. Rodgers v. Pitt, 129 F. 932.

74, 75. Norman v. Corbley [Mont.] 79 P. 1059.

76. Sess. Laws 1899, c. 105, p. 236, construed. Ft. Lyon Canal Co. v. Chew [Colo.] 81 P. 37.

77. Ft. Lyon Canal Co. v. Chew [Colo.] 81 P. 37.

77a. See 2 Curr. L. 2050, n. 12, 13.

78. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249.

79. Equity has jurisdiction to restrain an interference with it. Gutheil Park Ins. Co. v. Town of Montclair, 32 Colo. 420, 76 P. 1050.

80. There is no distinct and separate own-

purtenant to land is real estate[81] and may be sold separate from the land for which it was appropriated.[82] An interest in water rights, ditches, etc., though constituting a part of a system, becomes appurtenant to and a part of a homestead for the use of which it was obtained.[83]

Appropriators may change the place or character of the use[84] after an appropriation and application to a beneficial use in the absence of statutory prohibition,[85] and may also change the place of diversion.[86]

What may be appropriated.[87]

Interference, and diminution of flow.[88]—As soon as the prior appropriation and right of use is established, the appropriator is entitled to have sufficient water flow down to his point of diversion and to an injunction against an interference with this right by subsequent appropriator,[89] and this right applies to the waters of tributary streams.[90]

A water right may be obtained by adverse user and prescription.[91]—So long as a prior appropriator has sufficient water, no right by prescription can be gained against him.[92] Where a prescriptive right to the use of water is set up, the burden of proof is upon the one claiming the right.[93] An easement must be used in such a manner as to impose as little damage as possible to the servient estates.[94]

ership in the corpus of the water itself. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25; Chessman v. Hale [Mont.] 79 P. 254; Norman v. Corbley [Mont.] 79 P. 1059; Johnston v. Little Horse Creek Irr. Co. [Wyo.] 79 P. 22.

81. Talcott v. Mastin [Colo. App.] 79 P. 973. Rev. St. 1887, § 2825. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25. One who has granted away a water right by mistake but who has remained in possession of the same was held not to be barred by the California statute (Code Civ. Proc. § 338), providing for action within 3 years after discovery of mistake, but only by § 318 thereof, providing for an action to be brought within 5 years for recovery of or possession to real estate. South Tule Independent Ditch Co. v. King, 144 Cal. 450, 77 P. 1032.

82. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25; Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 P. 1053. The right to use water based on prior appropriation is a property right and capable of transfer, and the only limitation upon the sale of a water right separate from the land to which it was first applied and to which it becomes appurtenant is that it shall not injuriously affect the right of other appropriators. Johnston v. Little Horse Creek Irr. Co. [Wyo.] 79 P. 22. The sale of a water right was declared to be valid as against a subsequent appropriator, where it was shown that no surplus water was included therein. Id.

Contra: In Nebraska the right to the use of water may not be separated from the land to which it is applied. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286.

83. Payne v. Cummings [Cal.] 80 P. 620.

84. See 2 Curr. L. 2051.

85. Laws of Nebraska (Comp. St. 1903, c. 93a, art. 1, § 5), construed and held that taken in connection with the Irrigation Act of 1895, a change of user could only be made by permission and under control of the board of irrigation. Farmers' & Merchants' Irr. Co. v. Gothenburg Water Power & Irr. Co. [Neb.] 102 N. W. 487.

86. The Montana Statute (Civ. Code, § 1882) allows appropriators or owners of water rights to change the place of diversion as well as the use and place thereof. Hayes v. Buzard [Mont.] 77 P. 423.

87. See 2 Curr. L. 2051.

88. See 2 Curr. L. 2048, n. 95, 2050, n. 5.

89. Moe v. Harger [Idaho] 77 P. 645. See, also, post, this section "Remedies and procedure," etc.

90. An appropriation of the water of a stream includes all the tributaries and other sources of supply so far as necessary to insure the amount of water covered by the appropriation. Anderson Land & Stock Co. v. McConnell, 133 F. 581.

91. See 2 Curr. L. 2052. To create a right by prescription, there must be a continuous use and occupation for beneficial purposes, open and notorious, hostile to the title of the owner, for the full prescriptive period. Montecito Val. Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113. Evidence held insufficient to show that riparian owner had acquired the right to appropriate one-half of the flow of a spring by prescription. Watkins Land Co. v. Clements [Tex.] 86 S. W. 733.

92. Norman v. Corbley [Mont.] 79 P. 1059.

93. Where a person dies who probably attempted to assert an adverse user, as his declarations would be in his own interest and inadmissible, the law from the mere use invokes a presumption that it was initiated under a claim of right, thereby imposing on the adverse party the burden of proving the use was under a license. Bauers v. Bull [Or.] 78 P. 757.

94. Negligently and carelessly allowing the ditch to fill up and flow back or enlarging the ditch, thereby increasing the flow to the damage of the servient estate or operating the ditch so as to cause a nuisance, will be restrained. Board of Regents of

The right of appropriation can be lost only by abandonment or adverse possession.[95]—The fact of abandonment is a mixed question of law and fact, and there must be an intention to abandon coupled with an act.[96] Nonuser must be continued for the statutory period of limitations in order to amount to an abandonment.[97] An abandonment occurs when the party in possession deserts the property with the intention never to reclaim it.[98] There can be no abandonment to a definite person by nonuser,[99] but a verbal sale or transfer of a water right operates ipso facto as an abandonment.[1]

Joint and common rights.—If no special or other agreements exist among owners as to their proprietary interests, constituting them something else, they are tenants in common and their rights are governed by the common-law rules regulating tenancy in common.[2] To constitute a tenancy in common in a water right, unity in the right of possession must extend to unity in the right of user.[3]

Where two parties join in filing claims and constructing a ditch, but use the water separately, either may change the point of diversion of the water used by him, or the place of its use, if the other party's rights are not thereby changed or injured.[4]

Ditch rights of way. Eminent domain.[5]—United States Statutes (U. S. Comp. St. 1901, p. 1437), granting the right to conduct or store water across or upon government land and that patentees should take subject to such rights, gives the right only in cases of necessity and not convenience.[6] Where lands have been withdrawn from the public domain, if a ditch and the right to use it were a burden on it by reason of a government grant at the time of entry, such burden cannot be increased for a third person under Act of Congress of July 26, 1866 (14 Stat. 251, c. 262), giving citizens the privilege of running ditches over unoccupied government lands.[7] The use of water for irrigation is a public use, and a statute providing for the condemnation of lands for canal and other purposes is constitutional.[8]

State Agricultural College v. Hutchinson [Or.] 78 P. 1028.

95. See 2 Curr. L. 2053.

96. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286. Law of Montana (Comp. St. 1887, div. 5, § 1251) provides that when an appropriator or his successor in interest abandons and ceases to use the water, the right ceases; but the question of abandonment is a question of fact and shall be determined as other questions of fact. Miles v. Butte Elec. & Power Co. [Mont.] 79 P. 549; Norman v. Corbley [Mont.] 79 P. 1059. Under Laws of Utah (Rev. St. 1898, § 1262), an abandonment or nonuser for seven years, right of appropriation ceases; but the questions of abandonment shall be questions of fact and the evidence was held not to establish an abandonment. Promontory Ranch Co. v. Argile [Utah] 79 P. 47.

97, 98. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286.

99. Norman v. Corbley [Mont.] 79 P. 1059.

1. Griseza v. Terwilliger, 144 Cal. 456, 77 P. 1034.

2. Griseza v. Terwilliger, 144 Cal. 456, 77 P. 1034. If each one of several tenants in common has a right to enter upon and occupy the whole of the common property and every part thereof, any one may recover the whole from a trespasser. Rodgers v. Pitt, 129 F. 932.

3. Two parties who locate, survey and file claims to waters of a creek, build a ditch to a certain point, and there divide the water into two streams, one going to the land of each party, do not become joint owners of the appropriated waters. City of Telluride v. Davis [Colo.] 80 P. 1051.

4. City of Telluride v. Davis [Colo.] 80 P. 1051.

5. See 2 Curr. L. 2053. See, also, special article Ditch and Canal Rights, 3 Curr. L. 1112.

6. Boglino v. Giorgetta [Colo. App.] 78 P. 612.

7. Campbell v. Flannery [Mont.] 79 P. 702.

8. Texas Statute (Rev. St. 1895, art. 642, subd. 23, art. 704, subd. 6, arts. 3125, 3126; Acts 1895, p. 21, c. 21; Rev. St. tit. 60, c. 2). Borden v. Trespalacios Rice & Irr. Co. [Tex. Civ. App.] 82 S. W. 461. Law of Washington (Laws of 1899, p. 261, c. 131), providing for condemnation proceedings for rights of way for irrigation ditches, canals and flumes, construed and held to be constitutional. Weed v. Goodwin, 36 Wash. 31, 78 P. 36. Under Law of Nebraska (Laws 1895, p. 244, c. 69, § 42), the unappropriated waters of the state are declared to be public property and dedicated to a public use. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286. Law of Idaho (Sess. Laws 1903, p. 223), to regulate the appropriation of public waters, construed, and it was held that "public waters"

The right to use a ditch[9] for the benefit of one's land may exist, though he can enjoy the same only by procuring a right of way through intervening lands.[10]

Remedies and procedure[11] *for misuse of water or interference.*—Equity will restrain a diversion of water by a subsequent appropriator.[12] In Nebraska a riparian owner is entitled to damages for the impairment of his common-law right.[13] Where it is found that a certain amount of water has been wrongfully diverted, an injunction and damages will not be refused because the court is unable to determine what part of the water if undiverted or returned, would have reached the claimant's point of diversion.[14] A single suit may be brought to restrain several diverters, though each is acting independently of the others.[15] But injunction will not issue at suit of one who has stood by and seen a work completed which he had reasonable cause to believe would divert his water, unless the injunction is necessary to restore to him the amount of water diverted.[16] In a suit to restrain loaning of water on the ground that it will interfere with the vested rights of other owners, the burden is upon the parties to the loan to show that there will be no such interference.[17] A decree, in a suit by the mill owner to enjoin interference with the flow of water to which he was entitled, which gives him the amount of water to which he is entitled when the volume is sufficient for the intended use, and permitting the city to divert all the water when the volume was insufficient for milling purposes, was proper.[18]

Suits to establish or fix priority.[19]—In a proceeding to establish the quantity of an appropriation, left undetermined by a former decree, persons whose rights had been determined both as to time and quantity in the former decree are not necessary parties.[20] The statutory proceeding in Idaho must be based on maps and surveys by the state engineer.[21]

referred to all waters running in the natural channels of streams and that the state had power to regulate their use. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25. Constitution of Idaho (art. 15, § 1). Boise City Irr. & Land Co. v. Clark [C. C. A.] 131 F. 415. Canals, etc., declared to be works of internal improvement and the right of eminent domain is extended to all engaged in the construction of such works. Cline v. Stock [Neb.] 102 N. W. 265.

9. See 2 Curr. L. 2053, n. 40 et seq.

10. Blankenship v. Whaley, 142 Cal. 566, 76 P. 235.

11. See 2 Curr. L. 2054.

12. Moe v. Harger [Idaho] 77 P. 645. Equity will protect tenant in common. Rodgers v. Pitt, 129 F. 932. An upper riparian owner will be restrained from diverting water belonging to a prior appropriator, even though the latter has not begun proceedings under the statute to condemn the riparian rights of the upper owner. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249. Where a certain amount of water is being diverted by a defendant, a mandatory injunction will issue to restore it but not to restrain further use of the water until the entire amount being diverted is restored. Montecito Val. Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113. The allegation that "more than 100 cubic feet of water per second" have been appropriated will be treated as a claim for 100 cubic feet. Anderson Land & Stock Co. v. McConnell, 133 F. 581. A bill was held sufficient which alleged a diversion from two streams by a subsequent appropriator without setting out the amount of water appropriated or the precise date thereof. Id.

13. He may not enhance it by constructing irrigation ditches subsequently to the appropriation by which to make use of his riparian rights. McCook Irrigation & Water Power Co. v. Crews [Neb.] 102 N. W. 249. A riparian owner cannot have one who has duly obtained a right to the use of water enjoined, but he is relegated to his action at common law for damages. Cline v. Stock [Neb.] 102 N. W. 265. On a trial to enjoin unlawful interference with water rights, equity has jurisdiction and having obtained it, can decide all questions involved and grant appropriate relief. Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 P. 1053.

14. Montecito Val. Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113.

15, 16. Montecito Val. Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 P. 1113.

17. Ft. Lyon Canal Co. v. Chew [Colo.] 81 P. 37.

18. City of Telluride v. Blair [Colo.] 80 P. 1053.

19. See 2 Curr. L. 2049, n. 1.

20. In re Priorities of Water Rights in Dist. No. 12 [Colo.] 80 P. 891. In such a proceeding, an answer setting up that there were other interested owners, not made parties, is insufficient, if it does not give their names or interests. Id.

21. Sess. Laws 1903, p. 223ff. Boise City Irr. & Land Co. v. Stewart [Idaho] 77 P. 25.

A decree under a statutory proceeding for the adjudication of priorities is res judicata unless appealed from.[22] The mode of appeal is statutory in Colorado.[23]

§ 15. *Irrigation districts and irrigation and power companies.*[24]—Irrigation districts may be formed under various statutes prescribing the manner of creation and the powers and duties of their officers.[25] In some states the statute provides for organization by vote of electors, signifying a majority assent,[26] by petition of landowners.[27] An irrigation district is a municipal corporation as regards its functions,[28] but not a municipal corporation to the extent that the state can dispose of its property as it pleases.[29]

It has no powers not given it by statute, expressly or by implication.[30] A quasi-public corporation engaged in supplying water for irrigation purposes is not subject to be adjudged an involuntary bankrupt under the Federal bankruptcy act.[31] For purposes authorized, a district may in some states issue bonds,[32] and may levy assessments which constitute a lien on the land.[33] An ap-

22. Farmers' Irr. Dist. v. Frank [Neb.] 100 N. W. 286. Laws of Colorado (Laws 1881, p. 154, § 22, Mills' Ann. St. § 2421), providing that no claim to priority to water rights of any person who had failed to offer evidence under any adjudication should be regarded by any water commission in distributing water in times of scarcity until by order of court such person should have obtained leave and made proof and secured a decree of priority, and (Mills' Ann. St. § 2425), authorizing a review of a state decree written two years thereafter at the instance of a party thereto, construed, and it was held that one who appears and files a verified statement of his claim but refuses to offer proof, must apply for a review within 2 years or the decree will become res adjudicata as to him and his privies. Crippen v. X. Y. Irrigating Ditch Co., 32 Colo. 447, 76 P. 794. A proceeding to complete proof of an appropriation by the grantee of water rights of a party to a former decree under the irrigation statutes is not within Mills' Ann. St. § 2435, precluding persons from setting up claims adverse to a decree after four years from its entry. In re Priorities of Water Rights in Dist. No. 12 [Colo.] 80 P. 891. Nor does § 2425, that a reargument or review must be applied for within two years, apply to a conditional decree, which left the quantity of an appropriation undetermined. Id. Revised decree awarding priority under Mills' Ann. St. § 2425, construed, and held not to affect a prior decree awarding a priority. Magill v. Hyatt [Colo. App.] 80 P. 472.

23. Colorado Laws (Mills' Ann. St. § 2432), regulating the method of appeals from proceedings to determine priorities, construed. Baer Bros. Land & Cattle Co. v. Wilson, 32 Colo. 500, 77 P. 245.

24. See 2 Curr. L. 2055.

25. Idaho Law (Sess. Laws 1903, p. 165). Pioneer Irr. Dist. v. Campbell [Idaho] 77 P. 328. Law of Oregon (Laws 1895, p. 13). Little Walla Walla Irr. Dist. v. Preston [Or.] 78 P. 982. Under the Laws of Wyoming (Rev. St. 1899, §§ 888ff), providing for the creation of irrigation districts in charge of water commissioners empowered to regulate the use of priorities and giving an appeal from their decision to the superintendent, and from him to the state engineers and from them to the courts, it was held that the decision of the commissioners and superintendent, even though not appealed from, was not binding on the court. Ryan v. Tutty [Wyo.] 78 P. 661. In Colorado the water commissioners of the various districts are charged with the duty of regulating and distributing water in accordance with decrees regulating the priorities. Crippen v. X. Y. Irrigating Ditch Co., 32 Colo. 447, 76 P. 794.

26. Law of California (St. 1887, p. 29, c. 34, § 11). Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937.

27. Act of California (St. 1887, p. 29, c. 34, amended by St. 1899, cc. 19, 20, 178; St. 1891, cc. 57, 127, 128, 171). Marra v. San Jacinto & P. V. Irr. Dist., 131 F. 780.

28. Act of California (St. 1893, p. 175, c. 148), authorizing the mortgaging of statutory powers of its board of directors in the possession and management of the water system, construed and held to be unconstitutional as delegating to private individuals the power to control any municipal improvement or property. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937.

29. Act of California (1887, p. 34, c. 34, § 11) providing that the legal title to all the property acquired by the district shall be vested in the district and held by it in trust as set forth in the act, construed and held to be unconstitutional in that it took property without due process of law. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937.

30. Law of Oregon (Laws 1895, p. 13), providing for the incorporation of irrigation districts, construed, and it was held that it did not authorize the district officers to regulate the rights of private individuals. Little Walla Walla Irr. Dist. v. Preston [Or.] 78 P. 982.

31. In re Bay City Irr. Co., 135 F. 850.

32. Marra v. San Jacinto & P. V. Irr. Dist., 131 F. 780. Laws of Idaho (Sess. Acts 1903, p. 167), providing for the organization of irrigation districts and for surveys, plans and maps upon the issuance of bonds, construed and held where a bond issue was insufficient and a further issue authorized, there need be no new survey or additional maps and plans. Pioneer Irr. Dist. v. Campbell [Idaho] 77 P.

proval of the map of a canal or ditch and reservoir, subject to all existing vested rights, does not give the company any rights as against a claimant who has entered and occupied lands under the pre-emption laws.[34] A forfeiture of a reservoir location for failure to complete within five years may be declared by state courts.[35]

Irrigation and power companies.[36]—A company diverting water from a stream for the purpose of supplying water for irrigation is a quasi-public servant.[37] If authorized, they may exercise the power of eminent domain.[38] Despite their quasi-public character, irrigation companies may limit their liability for their own negligence by contract with one who has not a statutory right to demand their services.[39] Irrigation companies will be compelled to specifically perform contracts entered into by them in certain cases or pay damages for injuries caused by their failure fully to perform.[40]

328. Laws of California (St. 1887, p. 29, c. 34; 1891, p. 149, c. 128, § 22), creating irrigation districts and authorizing the board of directors to levy an assessment to pay interest on bonds, construed and held the court could not declare that the bonds were a lien on the land or interfere with the discretion of the board in determining the amount of the assessment to be raised except in a case of abuse of discretion. Boskowitz v. Thompson, 144 Cal. 724, 78 P. 290. Act of California (St. 1887, p. 29, c. 34), providing for the organization of an irrigation district by majority vote, construed, and it was held it created a contract by which property owners consented that the bonds and interest of the district should be paid by the annual assessments on the property of the district, which should remain liable therefor and that the act in amendment (St. 1893, p. 175, c. 148), authorizing the board of directors without consent of the property holders to pledge the property as security for the bonds was unconstitutional in that it impaired the obligation of the contract. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937.

33. Merchants' Nat. Bank v. Escondido Irr. Dist., 144 Cal. 329, 77 P. 937. Laws of California (St. 1891, p. 244, c. 171, § 18, subd. 2), creating irrigation districts and providing that in the assessment books land within the district shall be listed by township, range, section or fractional section, and where there are no congressional districts, by metes and bounds or other description sufficient to identify it, construed and held that the assessment is a lien on the land described in the assessment book. Best v. Wohlford, 144 Cal. 733, 78 P. 293.

See, generally, Municipal Bonds, 4 Curr. L. 706.

The remedy of a holder of a bond, if execution thereon is returned unsatisfied, was held to be a writ of mandamus against the officers of the district to levy an assessment against the property of the district. Marra v. San Jacinto & P. V. Irr. Dist., 131 F. 780.

34, 35. Baldridge v. Leon Lake Ditch & Reservoir Co. [Colo. App.] 80 P. 477.

36. See 2 Curr. L. 2056.

As to rates, see post, § 17.

37. Laws of Texas (Rev. St. 1895, art. 642, subd. 23; art. 704, subd. 6, and arts. 3125, 3126, Acts 1895, p. 21, c. 21, Rev. St. tit. 60, c. 2), providing for incorporation of irrigation and power company, construed. Borden v. Trespalacios Rice & Irrigation Co. [Tex. Civ. App.] 82 S. W. 461. A common carrier. Moore-Cortes Canal Co. v. Gyle [Tex. Civ. App.] 82 S. W. 350. Irrigation company is a public servant to carry water. Farmer's Irr. Dist. v. Frank [Neb.] 100 N. W. 286. California Constitution, art. 14, declares waters appropriated and distributed to be a public use and an irrigation company an agent of the state in the administration of a public use. Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032.

38. Laws of Oregon (B. & C. Comp. St. §§ 5022, 5023, 5024, 5025, 5026, 5027, 5028, 5029 and 5030), authorizing corporations engaged in supplying electrical power for all purposes to use the surplus water of streams and condemn rights to the water of riparian owners and land for rights of way and providing that notices should be posted at the points of diversion and recorded, construed, and it was held that by posting and recording, the right to appropriate was acquired, and a joint action to condemn land for a ditch and to condemn the rights of riparian owners might then be maintained. Grande Ronde Electrical Co. v. Drake [Or.] 78 P. 1031. Taking land for irrigation purposes is a public use. Borden v. Trespalacios Rice & Irrigation Co. [Tex.] 86 S. W. 11. Under Rev. St. 1895, art. 642, subd. 23, art. 704, subd. 4 and 6, and Acts 1895, c. 21, §§ 11, 12, a corporation organized for the purposes of irrigation, milling, navigation and stock raising has the power of eminent domain. Id. The Act of 1895 is not void for indefiniteness as to territory, nor unconstitutional in that its title covers more than one subject. Id. Under Laws of Texas (Rev. St. 1895, arts. 3125, 3126), providing for the incorporation under that act and the general laws of corporations to construct and maintain ditches, flumes, feeders, etc., for irrigation, mining, milling, city waterworks, and stock raising, and giving such corporations the power of eminent domain, construed, and it was held to be constitutional and only gave the power to corporations formed to supply water to the industries named, and does not give it to corporations formed to conduct them. Id.

39. Moore-Cortes Canal Co. v. Gyle [Tex. Civ. App.] 82 S. W. 250.

40. Where land was prepared and planted in reliance upon the contract, specific per-

§ 16. *Water companies and water supply districts; municipal ownership; private corporations and franchises.*[41]—The general law of corporations as applied to water companies[42] and other general matters[43] have been excluded.

Water franchises.[44]—An ordinance granting a franchise to a water company is, after acceptance by the company, a contract,[45] which is protected from impairment by the Federal constitution[46] and is irrevocable by the municipal corporation.[47] Where the franchise granted is for a term of years, the municipality may not, within the term, impair the contract by erecting a system of waterworks of its own, and competing with the company.[48] But the mere grant of a franchise, without words of exclusion or limitation, to a company to construct and maintain a system of waterworks, does not raise an implied contract that it will not compete with the company by building municipal waterworks.[49] Some courts hold that the grant of an exclusive franchise by a municipal corporation to a water company is ultra vires.[50] Other courts hold municipalities have the right to give an exclusive franchise for a limited period, and[51] the grant of a franchise to a water company by a municipal corporation does not of itself raise an implied contract that the grantor will never do any act by which the value of the franchise may in the future be reduced,[52] and an "exclusive" contract for a term of years leaves a city free to construct a system of its own after the expiration of such term.[53]

Water companies[54] are quasi-public corporations.[55] They may be empowered to use the streets without municipal consent, but this right is not such a contract that the legislature cannot in the exercise of the police power prevent its abuse.[56]

formance was ordered. Bay City Irr. Co. v. Sweeney [Tex. Civ. App.] 81 S. W. 545. Where there is only a partial performance, the charge for the water service will be proportioned to the definitely established benefits derived by the customer after deducting damages for failure to perform in full, and if the benefit cannot be clearly established, there can be no recovery. Hunter Canal Co. v. Robertson's Heirs, 113 La. 833, 37 So. 771.

41. See 2 Curr. L. 2057.

42. See Corporations, 1 Curr. L. 710.

43. See Taxes, 2 Curr. L. 1786.

44. See 2 Curr. L. 2057, n. 84-92.

45. Armour Packing Co. v. Metropolitan Water Co. [C. C. A.] 130 F. 851; Weller v. Gadsden [Ala.] 37 So. 682; Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180.

46. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152.

47. Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180; Columbia Sav. Fund, etc., Co. v. Dawson, 130 F. 152. An ordinance repealing a franchise ordinance was held ineffectual so far as the latter was valid. Weller v. Gadsden [Ala.] 37 So. 682.

48. Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180; Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 890. In this case the contract was "exclusive," and it was held that equity would enjoin construction of competing works by the municipality. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152.

49. Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 890; Helena Waterworks Co. v. Helena, 25 S. Ct. 40.

50. Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 180; Weller v. Gadsden [Ala.] 37 So. 682. An exclusive franchise means that a city will not itself compete in the business nor confer a similar franchise upon another company. Id. The grant of an exclusive franchise will not be implied and must arise if at all from some specific contract binding upon the city. Helena Waterworks Co. v. Helena, 25 S. Ct. 40. Where a city with power so to do granted an exclusive franchise to a company for twenty years, it was held that if it had the statutory power, it might after the expiration of the 20 years build its own waterworks. Farmers' Loan & Trust Co. v. Sioux Falls, 131 F. 890.

51. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152; Mercantile Trust & Deposit Co. v. Columbus Waterworks Co., 130 F. 180. Laws of Indian Territory (Mansf. Dig. c. 29, § 755), authorizing cities to contract for a supply of water, construed, and it was held not to conflict with act of Congress (32 Stat. 200), authorizing cities and towns in the territory to issue bonds and borrow for construction of waterworks, and that cities could give exclusive franchises to companies for 60 years. Incorporated Town of Tahlequah v. Guinn [Ind. T.] 82 S. W. 886.

52. City of Sioux Falls v. Farmers' L. & T. Co [C. C. A.] 136 F. 721.

53. City of Sioux Falls v. Farmers' L. & T. Co. [C. C. A.] 136 F. 721. See, generally, Franchises, 3 Curr. L. 1495.

54. See 2 Curr. L. 2057, n. 79-83.

55. Whitehouse v. Staten Island Water Supply Co., 91 N. Y. S. 544; Wiemer v. Louisville Water Co., 130 F. 251.

56. Where a water company by charter had the right to dig up the streets to lay and repair its pipes, it was held that under the Virginia Code of 1887, § 1093, provid-

But a municipality by statute may be authorized to regulate the use of its streets by a water company or an individual.[57] A water company is liable for injuries caused by a hole in a city street dug by its orders, into which a person, in the exercise of due care, fell.[58] A municipality may not, without express authority, impose license fees upon water companies for the right to maintain fire plugs under the general power to regulate water pipes and plugs and require licenses from persons engaged in certain occupations, when there was no reference to water companies, it not being a legitimate exercise of the police power.[59] The law of agency applies to water companies.[60]

Condemnation of property by water companies.[61]—Water companies are frequently given the power of eminent domain,[62] which may include the power to take property held for a public use as well as private property,[63] especially where it is for a more necessary public use.[64]

Water boards and districts.[65]—Water districts are the creation of the legislature and are sometimes organized by the petition of a majority in number and value of resident landowners.[66] Water commissioners may have power to condemn necessary lands.[67] They may also make any contracts necessary for the proper construction of the plants,[68] and conduct the same after completion and fix rates for private use.[69] Such powers vested in water commissioners are proprietary and not governmental.[70] A town in which a water district is created may be authorized to issue bonds which are a charge upon it, and to be collected from property within the water district.[71]

The municipality may be authorized by statute even to supply neighboring

ing that a water company must obtain municipal consent to the use of its streets and that a city might prevent the encumbering of its streets in any way, a city had power to forbid the extension of the company's system, the company being practically insolvent. City of Petersburg v. Petersburg Aqueduct Co., 102 Va. 654, 47 S. E. 848.

57. N. J. Law (P. L. 1895, p. 275). Stowe v. Kearny [N. J. Law] 59 A. 1058.

58. Iseminger v. New Haven Water & Power Co., 209 Pa. 615, 59 A. 64. See, also, Highways and Streets, 3 Curr. L. 1593.

59. Commissioners of Cambridge v. Cambridge Water Co., 99 Md. 501, 58 A. 442.

60. A water company is bound by a contract made by its superintendent who was clothed with apparent authority. Milledgeville Water Co. v. Edwards, 121 Ga. 555, 49 S. E. 621.

61. See 2 Curr. L. 2058.

62. Independent Natural Gas Co. v. Butler Water Co., 210 Pa. 177, 59 A. 984.

63. Independent Natural Gas Co. v. Butler Water Co., 210 Pa. 177, 59 A. 984. The Pennsylvania Act of April 29, 1874 (R. L. 73, § 34, c. 2) as amended by Stat. of 1889 (P. L. 226) gives water companies this right. Id. A water company required by its charter to supply a certain borough with water will not be enjoined from taking land for a dam in which a natural gas company has its pipes, where they could be removed to other land of the water company not covered by the dam at a small expense. Id.

64. Laws of California (Code Civ. Proc. § 1237), providing that property already taken for a public use may be taken by right of eminent domain for a more necessary public use, construed, and it was held that the land of a private person subject to an easement for a public highway may be taken by a water company for a dam and reservoir. Marin County Water Co. v. Marin County, 145 Cal. 586, 79 P. 282.

65. See 2 Curr. L. 2058.

66. Holroyd v. Indian Lake [N. Y.] 73 N. E. 35.

67. Holroyd v. Indian Lake [N. Y.] 73 N. E. 35. Laws of Mass. (St. 1895, c. 488, § 14), providing for a metropolitan water supply and the condemnation of land therefor and for the determination of damages suffered by the owner of an established business on land taken, construed. Sawyer v. Commonwealth, 185 Mass. 356, 70 N. E. 438.

68. Holroyd v. Indian Lake [N. Y.] 73 N. E. 35. It is not ultra vires for the commissioners of water works appointed by statute for the acquiring of lands and the construction of a water system, to lease a private railroad over the grounds primarily to secure freighting facilities. Ampt. v. Cincinnati, 2 Ohio N. P. (N. S.) 489.

69. Under the Michigan law (Pub. Acts 1853, p. 180, c. 90), which established a board of water commissioners with power to build and control a system of waterworks and fix rates for **private** use, it was held that it might charge the Board of Education for its use of water. Board of Water Com'rs of Detroit v. Board of Education of Detroit [Mich.] 100 N. W. 455.

70. Ampt v. Cincinnati, 2 Ohio N. P. (N. S.) 489.

71. New York Statute (Laws 1900, p. 1119, c. 451). Holroyd v. Indian Lake [N. Y.] 73 N. E. 35.

municipalities;[72] but a city not under a legal contract to supply a town with water cannot authorize the laying of a pipe for such supply.[73]

A person performing secretarial duties to a water board may be a mere employe and not a public officer.[74]

The water funds of Chicago, though not wholly consumed, cannot be turned into any other fund.[75]

Public ownership.[76]—The legislature may grant to municipal corporations the power to construct or purchase and maintain a system of waterworks to furnish water for municipal purposes and to supply the inhabitants,[77] and exercise the right of eminent domain therefor.[78] In a recent case the nature of a taking for public ownership and the mode of appraising the value of the property and system taken is elaborated in detail.[79] If authorized, a city may contract with a

72. The New Jersey Borough Act (P. L. 1897, p. 323, § 376) authorizes water contracts with adjoining municipalities only. Borough of East Newark v. New York & N. J. Water Supply Co. [N. J. Eq.] 57 A. 1051.

73. Rehill v. Jersey City [N. J. Law] 58 A. 175.

74. Secretary of Waterworks Trustees is not an office within the legal acceptance of the word, and one appointed thereto for a specified term, but who was discharged before the term expired, cannot enforce a claim for salary for remainder of term. Hutchison v. Lima, 3 Ohio N. P. (N. S.) 55.

75. Under Illinois statutes, a surplus in the Chicago water fund cannot be transferred to the general fund, but must be used for waterworks purposes exclusively. People v. Hummel [Ill.] 74 N. E. 78.

76. See 2 Curr. L. 2059.

77. Doughten v. Camden [N. J. Law] 59 A. 16. In Georgia a city can do those things necessary to supply its inhabitants with water for domestic use and to provide the city with protection in case of fire. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152.

78. In condemnation proceedings it was held that the finding that a water company was not devoting certain water to which it was entitled to a public use was not warranted where the cause of the nonuse was the temporary cessation of flow of the water by reason of drought and the city's own acts. City of Santa Barbara v. Gould, 143 Cal. 421, 77 P. 151. See Brunswick & T. Water Dist. v. Maine Water Co. [Me.] 59 A. 537.

79. Under the Maine statute (Priv. & Special Laws 1903, c. 158) providing for the taking of part of the water system of a water company by a water district and for appraisers appointed by the court to fix the value of the plant property and franchises taken, and to assess damages for the taking and declaring that the value of the property taken together with the additional damages found for the severance should be fixed so as to equal the difference between the value of the entire plant, property and franchises before the severance and the value of the part not taken, after the severance, both of which valuations were to be found under the rules of eminent domain, and further providing that the act should take effect when approved by a majority vote of the inhabitants of the water district, which approval should constitute an acceptance of the method of appraisal and be binding upon both the district and the company, the appraisers were instructed as follows:

(1) That **what was being taken** was the structure i. e. pipes, pumps, engines, machinery, reservoirs, etc., with land and water rights, in actual use i. e. as a going concern, together with the franchises, by means of which the plant was in lawful use.

(2) Therein applying the rule that the basis of calculation as to the reasonableness of rates charged by a public service company, is the fair value of the property used by it for its service, franchises are to be considered, as well as the question of the risk involved in the undertaking, and whether the plant is reasonably necessary or unnecessarily expensive.

(3) That the **actual cost** bears upon the reasonableness of rates as well as upon the present value of the structure, but in estimating the latter, prior cost is not the only criterion. The rise and fall in prices of materials may affect, favorably or unfavorably, the present value and the same factors should be considered in estimating the reasonableness of rates.

(4) That **what is reasonable** depends on varying circumstances and in determining what are reasonable rates so as to produce a fair return to the company the amount of money reasonably and necessarily invested in the structure and its natural increment, if any, is to be considered together with the franchises which may enhance the value of the plant.

(5) Reasonableness relates both to the company and to the consumer, and if they cannot be to both they must be to the consumer.

(6) A public service company can not lawfully charge in any event more than the services are reasonably worth to the public as individuals even if the charge so limited would fail to produce a fair return to the company upon the value of its property or investment.

(7) Profits which in the aggregate exceed a fair return on the companies' property and franchises involve **unreasonable** rates and furnish no criterion either of franchise or going concern values. What is a fair return depends upon the circumstances of each case, and these various questions are to be determined in accordance with the preponderance of evidence.

(8) Where the **value of the structure** is to be determined as of a certain date, **present prices** of materials govern. By present prices is meant those at that date and within a

water company for a supply of water and include in the contract an option to purchase the plant of the company.[80] Where a city exercises an option to buy the plant of a water company, contained in a contract, the sale is perfected and the appraisals called for in the contract were a mere administrative detail to determine the fair market value, and are not a condition to the exercise of the option.[81]

The authorities empowered to acquire or build waterworks may raise money by taxation to pay for the same,[82] which taxes are a lien on the land benefited.[83]

Title of the public.[84]

Inalienability of public supply.[85]

Contracts for public supply.[86]—Municipal corporations may be authorized to contract for a water supply for themselves and their inhabitants, and to grant franchises to companies with which they contract to construct and operate waterworks.[87] Apart from statute, they have no power to buy and sell water as a commodity.[88] They have only such powers to add terms as can be read from the statute,[89] but the fact that one or two clauses in the franchise contract are ultra

period prior to it necessary for the construction of the plant, rather than former prices and **interest** upon the money invested in the plant during the construction thereof is to be added.

(9) Damages caused by the severance, if any, are to be added as provided by the act.

(10) The provision for **rules for fixing the damages** is valid because it was not the legislature which adopted them but the inhabitants of the water district by their majority vote, which vote signified an assent to and adoption of the rules.

(11) When the **worth of a public service** to the public is spoken of as one of the elements to be considered, it is the expense at which the public or customers as a community might serve themselves were they free to do so and were it not for the practically exclusive franchises of the company and the water is to be regarded as a product and the cost at which it can be produced or distributed is an important element of its worth.

(12) The **worth of a water service to its customers** means its worth to them as individuals, but as individuals making up a community of water takers, and such a community is entitled to the benefit of existing natural advantages, so that if there is more than one source of supply, other things being equal, it is entitled to have the least expensive one used. The company cannot be permitted to charge a higher rate based upon the expense of bringing the water from a more expensive source.

(13) Where the rates which furnish a basis for **estimating value** are earned in **part by the property taken and in part by property not taken**, the appraisers must discriminate and so far as the value may depend upon the rates, should charge the property only for its fair proportion of the earnings.

(14) **The rules of eminent domain** which are to be applied in making the award **are those agreed to by the majority vote** of the inhabitants of the district approving the charter. Brunswick & T. Water Dist. v. Maine Water Co. [Me.] 59 A. 537.

80. Livermore v. Millville [N. J. Law] 59 A. 217.

81. A water company was not allowed to avoid the contract because of an appraisal made by an appraiser substituted with the knowledge of its officers and counsel. City of Fayetteville v. Fayetteville Water, L. & P. Co., 135 F. 400.

82. Helena Waterworks Co. v. Helena, 25 S. Ct. 40. A statute to enable a city to supply its citizens with water is constitutional which makes a fixed charge per foot of frontage a lien upon land bordering on streets through which water pipes are laid for the purpose of meeting the expenses of laying the pipes, at least in regard to landowners who use the water. Doughten v. Camden [N. J. Law] 59 A. 16. Constitution of Kentucky, §§ 157-159, limiting the taxing powers of cities by classes, and providing that when a municipality is authorized to enter into a contract it must provide for collection of an annual tax to pay for it and to create a sinking fund, construed, and it was held that a town of the 6th class could not levy an additional tax to one already levied to pay the interest on and provide a sinking fund for waterworks bonds. Town of Bardwell v. Harlin, 26 Ky. L. R. 101, 80 S. W. 773.

83. Doughten v. Camden [N. J. Law] 59 A. 16.

84, 85, 86. See 2 Curr. L. 2061.

87. Weller v. Gadsden [Ala.] 37 So. 682.

88. Where a city, with no water supply of its own, contracted with a water company for a supply of water for it and a neighboring borough to which it was under no binding contractual obligation to furnish water, it was held it had no power to sell the water to the borough and could not recover the price of it. Borough of East Newark v. New York & N. J. Water Supply Co. [N. J. Eq.] 57 A. 1051.

89. Under the constitution of Georgia, a city has no power to exempt a water company from the payment of an ad valorem tax on its property for municipal purposes, either directly or by commuting such taxes in return for service supplied to it by the company. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152.

Estoppel: It is not ultra vires for a city which has power by statute (Sess. Laws 1888, p. 116, c. 48, art. 4, § 1, subd. 14) to maintain or contract for a water supply to lease its water rights for a nominal sum,

vires will not render the entire contract bad when they are severable and distinct.[90] Where a city may make a water supply contract for a reasonable length of time, the contract will be invalid for any time in excess of what is reasonable.[91] The fact that one municipality has a contract to supply another with water gives it no right to question a contract between the other and a water company, for a water supply.[92] Where a statute has invested a municipal corporation with the power of local taxation to meet its engagements under a contract with a water company, the power of taxation thus conferred enters into and becomes a part of the contract and may not be withdrawn or lessened until its obligations are satisfied.[93]

Water contracts are not always of the character of public contracts which require advertisement, proposals, and letting to the lowest bidder.[94] An ordinance is not necessary unless prescribed.[95] A contract for a water supply to a city is a contract for the sale of goods, wares and merchandise, and is within the statute of frauds.[96] Such a contract is subject to interpretation by reference to a map or plan,[97] and to existing rights outstanding. Thus where a contract granting a right to maintain a dam on certain premises makes no reference to a prior mortgage on the premises, and the premises are first sold and thereafter the easement is sold, on foreclosure of the mortgage, the right to maintain the dam, under such contract, is cut off;[98] and the obligation to supply water under the contract ceases at the same time.[99]

Breach and enforcement of public contract.[1]—The public may show in defense to action for the price that the supply was deficient.[2] In a proper case, the rights, franchises, and contracts of a water company may be declared forfeited for insufficient service, and failure to perform a contract.[3] Where a city

the real consideration being a supply of water for itself and inhabitants, where its own system is practically worthless. Ogden City v. Bear Lake & River Waterworks & Irr. Co. [Utah] 76 P. 1069. Where a city contracted with a company to construct and maintain waterworks by which to supply it and its inhabitants, and for six years used the water supply and assessed the company and collected the tax and allowed the title to the waterworks to be transferred, it was held that the city was estopped to deny the validity of the contract because of informality in its execution. Id.

90, 91. Weller v. Gadsden [Ala.] 37 So. 682.

92. Jersey City v. Kearny [N. J. Law] 59 A. 1056.

93. Mandamus will lie to order the city to levy a special tax. City of Ft. Madison v. Ft. Madison Water Co. [C. C. A.] 134 F. 214.

94. See Public Contracts, 4 Curr. L. 1089.

95. Where the legislature has authorized a city to contract or act in regard to a water supply and has not required an ordinance, a motion or resolution is valid. Jersey City v. Harrison [N. J. Law] 58 A. 100.

A resolution is sufficient: New Jersey Law (P. L. 1895, p. 240; Gen. St. p. 3536). Stowe v. Kearney [N. J. Law] 59 A. 1058. Under Law of Utah (Sess. Laws 1888, p. 116, c. 48, art. 4, § 1, subd. 14), authorizing a city council to construct and maintain waterworks or authorize others so to do, it was held that a contract with a company for such construction and maintenance was valid, although made by a resolution and not by an ordinance. Ogden City v. Bear Lake & River Waterworks & Irr. Co. [Utah] 76 P. 1069. In contracting for a water supply for itself and its inhabitants, a city is exercising proprietary and not governmental powers, hence an ordinance is not essential. Id.

96. Jersey City v. Harrison [N. J. Law] 58 A. 100.

97. In construing a contract with a water company, a map showing location of mains and hydrants and depositions showing the acceptance of the system thus shown are admissible. Lexington Hydraulic & Mfg. Co. v. Oots [Ky.] 86 S. W. 684.

98, 99. Wykes v. Caldwell [Kan.] 80 P. 941.

1. See 2 Curr. L. 2063, n. 51-53.

2. On a question as to the sufficiency of water supply for a borough, an expert may testify as to what is a sufficient supply for a town of the population of the defendant, if an objection is not made that only a portion of the population used the water. Ephrata Water Co. v. Ephrata Borough, 24 Pa. Super. Ct. 353. In an action to recover from a borough the contract price of water during a particular period, evidence as to the condition of the company's reservoir at any time subsequent to such period is immaterial. Ephrata Water Co. v. Ephrata Borough, 24 Pa. Super. Ct. 353.

3. Facts were held not to warrant a forfeiture. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152.

has paid hydrant rentals to a company for a number of years under a contract, and then repudiates it, but continues to use water for fires, at no time complaining of the service, cannot invoke a forfeiture of the contract because of deficient or ineffective service as a defense to a suit upon the contract.[4] A contract between a borough and a water company to supply the former with water cannot be deemed to have been rescinded when the company offered to enter into a new contract, which offer was not accepted.[5]

§ 17. *Water service and rates.*[6] *Service contracts.*—A municipality in furnishing water to its citizens acts as a private corporation or individual, and is as much bound by its contracts as an individual.[7]

Injuries from deficient supply or equipment, and negligence.[8]—In providing a water supply for the use of inhabitants and for fire protection, under statutory authority, a city performs a governmental function carrying with it no liability for negligence in its exercise for fire protection,[9] and statutory authority to construct and maintain public waterworks does not authorize the making of an express contract which would render a municipality liable for failure to maintain a certain pressure;[10] but in so far as it conducts the business of supplying water for profit, it performs a nongovernmental function, and is liable if in managing or constructing the pipes and plant it is guilty of negligence whereby the water damages adjacent property,[11] nor is a water company liable to the inhabitants of a city for failure to perform its contract to supply the city and its inhabitants with sufficient water for fire protection.[12] A company will be protect-

4. Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152. Where by a Mississippi statute (Laws 1886, p. 589, c. 325), a city was authorized to contract for a supply of "pure and wholesome water," and upon a failure to furnish water reasonably within those terms and also to furnish such fire protection as the contract called for, the contract was declared forfeited. Meridlan Waterworks Co. v. Meridian [Miss.] 37 So. 927.

5. Ephrata Water Co. v. Ephrata Borough, 24 Pa. Super. Ct. 353.

6. See 2 Curr. L. 2064, 2065. Irrigation service contracts, see post, § 18.

7. Penn Iron Co. v. City of Lancaster, 25 Pa. Super. Ct. 478.

Contracts construed: Contract for a supply of water by a water company for one year and thereafter until notice to discontinue was given construed, and it was held that the contract did not run from year to year after the first year and that the company was not bound to supply water for the whole of the subsequent year because it failed to act upon the consumer's default at the beginning of it. Hieronymus Bros. v. Bienville Water Supply Co. [Ala.] 36 So. 453. Where an individual water consumer has paid the company's rates for several years, a contract will be implied to furnish him with a sufficient supply of water for ordinary uses, and the fact that the house was on an eminence and that the cold weather reduced the pressure was held to be no defense; the measure of damages was declared to be the fair value of the labor employed to obtain a sufficient supply. Whitehouse v. Staten Island Water Supply Co., 91 N. Y. S. 544. A contract between a city and a water company, providing for furnishing water to manufacturers and large consumers and rates for house service and for the extension of the service, construed. Berends v. Bellevue Water & Fuel Gaslight Co., 26 Ky. L. R. 912, 82 S. W. 983. Where a contract for water supply provided that the rates to consumers should not exceed the rates charged to citizens of a neighboring city, it was held that this provision should be construed to relate to prices charged by the corporation and not by a neighboring city after it took over the waterworks of the corporation. Armour Packing Co. v. Metropolitan Water Co. [C. C. A.] 130 F. 851.

8. See 2 Curr. L. 2064.

9. United States v. Sault Ste. Marie, 137 F. 258; Allen & Currey Mfg. Co. v. Shreveport Waterworks Co., 113 La. 1091, 37 So. 980. Negligence in keeping fire service pipes repaired is not actionable. Aschoff v. Evansville [Ind. App.] 72 N. E. 279.

10. Contract by defendant city to maintain certain pressure on Federal reservation for fire protection ultra vires and city not liable for loss caused by failure of water supply. United States v. Sault Ste. Marie, 137 F. 258.

11. Not liable where extra fire pressure burst pipe, and flooded cellar. Aschoff v. Evansville [Ind. App.] 72 N. E. 279.

Note: The authorities are collected and reconciled in this opinion.

The business of selling water by a city to its inhabitants and to street sprinkling contractors is not an exercise of the police power. A city is not exempt from liability for negligence in maintaining its system. City of Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N. E. 386.

A city is liable for the bursting of a dam negligently constructed. The ground that supplying water was a governmental function held to be no defense. Town of Southeast v. New York, 96 App. Div. 598, 89 N. Y. S. 630.

12. Allen & Curry Mfg. Co. v. Shreveport

ed in case its failure to perform a contract with a city or an individual is due to an accident which ordinary prudence could not have foreseen and guarded against,[13] but it may by contract guard against its own negligence.[14] The measure of damages for failure to supply at all times sufficient water for fire protection is full indemnity for the loss caused thereby, and not merely the value of the water which should have been supplied.[15] The measure of damages for failure to supply water whereby a consumer had to obtain water from another source is the fair value of the labor employed in procuring it.[16]

Rules and regulations of service; pipes, meters, and consumption.[17]—A water company may make and enforce such reasonable rules and regulations as will protect its supply of water from theft, waste, misuse, or deprivation by any other unlawful means.[18] A water company chartered to supply a city and its inhabitants may make reasonable regulations in respect to furnishing water for sprinkling the streets.[19]

Waterworks Co., 113 La. 1091, 37 So. 980; Metropolitan Trust Co. v. Topeka Water Co., 132 F. 702; Blunk v. Dennison Water Supply Co. [Ohio] 73 N. E. 210.

Contra: Lexington Hydraulic & Mfg. Co. v. Oots [Ky.] 84 S. W. 774; Jones v. Durham Water Co., 135 N. C. 553, 47 S. E. 615. Under a contract requiring the water company to furnish an adequate supply of water to extinguish fires and on four minutes notice to furnish sufficient pressure to throw five streams 100 feet into the air, the former condition determines the company's liability to the owner of a burnt building. Jones v. Durham Water Co. [N. C.] 50 S. E. 769.

NOTE. Beneficiaries under city's contract with water company: The appellant, a water company, contracted with the city to furnish a supply of water at a certain pressure for fire purposes. A householder brought an action for the breach of this contract. Held, he could recover damages for loss of his house for failure of the water company to furnish pressure according to their contract with the city. Lexington Hydraulic, etc., Co. v. Oots [Ky.] 84 S. W. 774.

The decision in the principal case is contrary to the great weight of authority, it being almost universally held that a property holder cannot sue on such a contract. Wainwright v. Queens Co. Water Co., 78 Hun, 146; Howsman v. Trenton Water Co., 119 Mo. 304, 41 Am. St. Rep. 654; Britton v. Waterworks Co., 81 Wis. 48, 29 Am. St. Rep. 856. Nor does the assumption by the company of functions properly appurtenant to the municipal corporation put the former under a duty to the plaintiff, since the municipality itself would not be liable under the circumstances. Eaton v. Fairbury Waterworks Co., 37 Neb. 546, 40 Am. St. Rep. 510, see Van Horne v. Des Moines, 63 Iowa, 447, 50 Am. Rep. 750; Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 664; Dillon's Mun. Corp. [4th Ed.] § 976. The court follows Paducah Lumber Co. v. Water Supply Co., 89 Ky. 340, 25 Am. St. Rep. 536, saying that a principle "when settled right ought to be adhered to without reference to the number of contrary adjudications in other jurisdictions." Though incidentally the contract benefits the individual, the central object of such contract on the part of the city is to secure the discharge of its functions as agent of the state, a fact overlooked by the court in the principal case.—From 5 Columbia Law Rep. 397.

13. Springfield Fire & Marine Ins. Co. v. Graves County Water & Light Co. [Ky. I. R.] 85 S. W. 205. Where, under a contract between a city and a water company for first class fire protection, it was stipulated that different sized pipes might be used, the sizes being given, it was held that this fact did not lessen the obligation to furnish first class protection and that the city was not estopped to complain that the requisite protection was not afforded by the pipes actually used. Meridian Waterworks Co. v. City of Meridian [Miss.] 37 So. 927. Under the Act of June 2, 1887 (P. L. 310) which was enacted to insure the performance of a public duty, equity has no jurisdiction to assess damages against a water company for failure to supply a customer with water, because of an accidental breakdown. Brace v. Pennsylvania Water Co., 24 Pa. Super. Ct. 249. This act was not intended to abrogate the jurisdiction of law courts to adjudicate the question of damages growing out of contracts between water companies and private individuals. Id.

14. Buchanan & Smock Lumber Co. v. East Jersey Coast Water Co. [N. J. Law] 59 A. 31.

15. Harris & Cole Bros. v. Columbia Water & Light Co. [Tenn.] 85 S. W. 897.

16. Labor and apparatus for drawing water from a cistern. Whitehouse v. Staten Island Water Supply Co., 91 N. Y. S. 544.

17. See 2 Curr. L. 2067.

18. A rule requiring faucets to be placed so as not to be accessible to persons not customers held enforceable against one who boxed the tap but did not lock the box. State v. Everett Water Co. [Wash.] 80 P. 794. The rule may be enforced against one customer, though others are permitted to have faucets where they are accessible. Id.

19. A rule that persons in that business must obtain a license from the company and providing that not more than one would be granted to cover the same street and would be granted to the person having the largest list of petitioning owners of property on the street was held reasonable and within the powers of the company. Louisville Water

Water rates.[20]—The rates charged for water service must be reasonable[21] and a condition in the charter of a water company that it should not charge private families more than a fixed amount yearly is a contract from which the company cannot be relieved by the legislature.[22] A statutory provision that water companies organized under the statute should have power to establish rates, which should be subject to regulation by the appropriate board of supervisors, but should not by them be reduced below a certain point, is not a contract that the state will not authorize supervisors to make such reduction.[23] The reasonableness will be determined by considering their application as to all customers supplied.[24] The complainant has the burden of proving that the rates are unreasonable.[25] A water rent paid and acquiesced in for a long series of years cannot be arbitrarily greatly increased without notice and without opportunity to appeal to the water committee as provided by ordinance.[26]

Remedy for nonpayment of charges.[27]

Local assessments for pipes.—It has been held that placing pipes in a street fronting a lot already supplied is not a benefit such as to support a local assessment for pipes.[28]

Rates for irrigation and payment for service.[29]—The legislature has power to fix maximum rates to be charged by irrigation companies for water.[30] The owner of a ditch or canal in Idaho may require from claimants for water payment or security in advance.[31] But if water is furnished without such payment or security, the remedy is by suit to enforce payment and not by a rule to refuse a water supply until arrearages are paid.[32]

Co. v. Wiemer [C. C. A.] 130 F. 257. Overruling Wiemer v. Louisville Water Co., 130 F. 251 on this point.

20. See 2 Curr. L. 2065.

21. A full discussion as to reasonableness of water rates: Brunswick & T. Water Dist. v. Maine Water Co. [Me.] 59 A. 537. Where city waterworks were extended to an outlying section to serve summer residents, it was held that in view of the expense of furnishing the water, the nature of the use and the special expense of the extension and the interest thereon, it was proper to charge such users at a higher rate than users in the center of the city. Souther v. Gloucester, 187 Mass. 552, 73 N. E. 558. Under a statute of Illinois (Laws 1891, p. 85), authorizing municipalities to prescribe maximum rates to be charged, and that same should be "just and reasonable," it was held that to require arbitrarily the charge of the same rates as was charged by the municipal waterworks and to supply charitable, religious and educational institutions free was unjust, unreasonable and unconstitutional, as being a taking of property. City of Chicago v. Rogers Park Water Co., 214 Ill. 212, 73 N. E. 375. Under the same statute, it was held that a municipal corporation must in each case see whether charges are just and reasonable before the adoption of the ordinance. Id.

22. White Haven Borough v. White Haven Water Co., 209 Pa. 166, 58 A. 159.

23. Construing Cal. St. 1853, p. 87, as amended by St. 1862, p. 540, § 3. Stanislaus County v. San Joaquin & K. R. Canal & Irrigation Co., 192 U. S. 201, 48 Law. Ed. 406. Even though a contract was thereby created, legislature had power, under Const. 1849, art. 4, § 31, to pass Stat. 1885, p. 95, § 5, authorizing supervisors to reduce rates to not less than 6 nor more than 8 per cent. upon the then value of the property actually used by a company in supplying water. Id. A reduction of rates so as to give 6 per cent upon the value of the property used, held not a taking of property without due process, or a denial of equal protection. Id.

24. Where the company charged some of its customers at lower rates than others, it was not allowed to attack the maximum rate fixed by law as being unreasonable, because when applied to the rest of its customers it would not yield a fair income. Boise City Irr. & Land Co. v. Clark [C. C. A.] 131 F. 415.

25. Souther v. Gloucester [Mass.] 73 N. E. 558.

26. Penn Iron Co. v. City of Lancaster, 25 Pa. Super. Ct. 478.

27. See 2 Curr. L. 2067.

28. A lot of land in a city already supplied with water from one street is not benefited by a water supply on another street on which it fronts and is not liable to assessment for the water pipes laid in the other street. McChesney v. Chicago, 213 Ill. 592, 73 N. E. 368.

29. See 2 Curr. L. 2065.

30. Law of Idaho (Civ. Code, § 2579) construed and declared not to be unconstitutional on the ground that the maximum rate allowed would not yield a reasonable income, it appearing that the plant was on too large a scale for present needs. Boise City Irr. & Land Co. v. Clark [C. C. A.] 131 F. 415.

31. Sess. Laws 1899, p. 382, § 19. Shelby v. Farmers' Co-op. Ditch Co. [Idaho] 80 P. 222.

32. Rev. St. 1887, § 3203. Shelby v. Farmers' Co-op. Ditch Co. [Idaho] 80 P. 222.

§ 18. *Contracts, grants and licenses.*[33]—Water rights of various kinds may be the subject of a grant, as for example, the right to take water from a spring or well,[34] the right to set back water by a dam,[35] the right to divert water from a stream,[36] or the right of way for a pipe line or ditch to carry water.[37] A water right may be dedicated to the public.[38]

A grantee of land takes subject to a prior grant to a dam owner to keep, maintain, rebuild and repair the dam.[39] Under such grant, it is immaterial where the dam is rebuilt, after it has been carried away;[40] and after adverse user of the reconstructed dam for twenty years, the right to the location selected becomes fixed.[41] A grant of dam rights having reserved the right to the natural flow from the dam, a grantee of the land is not entitled to an increased flow from the stored waters, the natural flow being unobstructed.[42] Loss of water from evaporation is within the contemplation of parties to a grant of dam rights, even though it is expressly agreed that the grantor's lower mill privileges shall not be affected.[43] If appurtenant, the water right passes with a grant of the dominant estate, without special mention,[44] and although appurtenant to land, a water right may be granted without it.[45] One who asserts that water rights are appurtenant has the burden of proof.[46] Where water rights are obtained by contract, the

33. See 2 Curr. L. 2067.

34. Right to take water from a spring. Water Supply Co. v. City of Georgetown, 26 Ky. L. R. 327, 81 S. W. 660. A grant of a right to "tap a spring branch" by a pipe, not specifying the point at which this might be done, gives the right to tap at any point after the branch left the pool of the spring. Id. A contract for the right to use water from an artesian well construed. Chapea Water Co. v. Chapman, 144 Cal. 366, 77 P. 990.

35. Sweetland v. Grant's Pass New Water, L. & P. Co. [Or.] 79 P. 337. A contract for a flowing right construed, and it was held that the evidence warranted an award of actual and not nominal damages. Nuckolls v. Anderson, 120 Ga. 677, 48 S. E. 191.

36. Everett Water Co. v. Powers [Wash.] 79 P. 617. A deed granting the right to divert all the waters of a stream by a pipe except an amount for use of one family for domestic uses and for use in case of fire was held not to be void for uncertainty and the right reserved for domestic use was to take water from the bed of the stream. Id. A deed of the right to divert the waters of a stream cannot be attacked by the grantor or his successors on the ground that the grantee did not acquire the rights of lower riparian owners. Id. The fact that a deed conveying the right to divert the waters of a stream for the purposes of a certain town was held not to limit the grant, but in the absence of express prohibition, the surplus water could be used for other purposes. Id.

37. Everett Water Co. v. Powers [Wash.] 79 P. 617. A contract for a lease of water from a mine and a right of way for a ditch in which to conduct the same, construed. Tilton v. Sterling Coal & Coke Co. [Utah] 77 P. 758. A conveyance of a water ditch, with the right to convey water therein, and all appurtenant rights, conveys an extension of the ditch, made for the purpose of using the ditch as an easement. Pogue v. Collins [Cal.] 80 P. 623.

38. The right to flow land. Boye v. Albert Lea [Minn.] 100 N. W. 642. The right to use an underground stream flowing entirely under one's own land for sewer purposes. Sherman Lime Co. v. Glens Falls, 42 Misc. 440, 87 N. Y. S. 95.

39, 40, 41, 42, 43. Roe v. Redner, 46 Misc. 25, 93 N. Y. S. 258.

44. Sweetland v. Grants Pass New Water, Light & Power Co. [Or.] 79 P. 337. Mere proof of ownership of an interest in a mining claim is insufficient to prove right to use water in a ditch which is appurtenant thereto, nor does a statement in a lease of several claims that a water right is appurtenant to the land leased tend to show that it was appurtenant to any one. Leggat v. Carroll [Mont.] 76 P. 805. The grant to a power company and its successors and assigns forever of the right to maintain an abutment for a dam is a grant of an easement in fee and appurtenant to the grantee's plant, so as to pass to its successors, since at the time the grantee was building a plant and dam to the knowledge of the grantor. Sweetland v. Grants Pass New Water, L. & P. Co. [Or.] 79 P. 337. Where part of a tract of land is sold subject to the right to take water from springs on it, such right becomes appurtenant to the remainder. Mason v. Thwing, 94 App. Div. 77, 87 N. Y. S. 991. Where the right to take water from two springs on another's land was appurtenant to certain land and at the time water was being used from only one spring part of premises was conveyed with the privilege of taking water "as at present used," and "all the appurtenances," it was held that the right to take water from both springs passed. Id.

45. Whether a deed of land conveys the water rights depends on the intention of the grantor, which is to be found from the express language used, or where the deed is silent on the subject, from the presumption which arises from the circumstances, and whether such right is or is not an incident and necessary to the beneficial use of the land. Bessemer Irr. Ditch Co. v. Woolley, 32 Colo. 437, 76 P. 1053.

46. The fact that a lessee of land uses an

acts and conduct of the parties and their manner of use will have great weight in construing the contract.[47] The ordinary rules of instruction apply to grants and leases of, and contracts in relation to, water rights.[48] Illustrative cases are cited.[49] Permission for which no consideration is given is a mere parol license and revocable at will.[50] Where acquiescence does not work an estoppel, nor the fact that the license was acted upon at a great cost.[51] A void deed of aqueous lands does not work a reversion for deviation from a purpose annexed to the title.[52]

unknown amount of water on it does not give rise to the inference of an intent to make the rise appurtenant to the land. Hayes v. Buzzard [Mont.] 77 P. 423.

47. Walker Ice Co. v. American Steel & Wire Co., 185 Mass. 463, 70 N. E. 937. Where, under a contract, a right to acquire a given amount of water from a canal was acquired and the use of it acquiesced in for over 60 years by the canal commissioners, it was held that they could not thereafter lessen that amount by the erection of weirs. Merrifield v. Canal Com'rs of Illinois & M. Canal, 212 Ill. 456, 72 N. E. 405.

48. See Contracts, 3 Curr. L. 805; Deeds of Conveyance, 3 Curr. L. 1056.

49. Grants construed: Where an owner of two adjoining tracts who owned an undivided half of a ditch mortgaged one parcel with all his right and title and interest in and to the ditch, "the same being used for and necessary to the irrigation of the lands," and later used water on both tracts, it was held that upon foreclosure and sale of the land by a deed conveying the ditch and all water rights of the mortgagor, only so much of his interest in the ditch passed as was used for and necessary to the irrigation of the land described in the deed. Farm Inv. Co. v. Gallup [Wyo.] 76 P. 917.

Contracts for water supply construed: A contract to pay a given amount per annum for future water service was held not to be an "existing" indebtedness. Town of Vaughn v. Town of Montreal [Wis.] 102 N. W. 561; Columbia Ave. Sav. Fund, etc., Co. v. Dawson, 130 F. 152; Mercantile Trust & Deposit Co. v. Columbus Waterworks, 130 F. 180. Contract to supply water held not to limit place where water was to be used, but only to fix the place of delivery; hence there could be recovery for loss of crops on certain section. Candler v. Washoe Lake Reservoir & G. C. Ditch Co. [Nev.] 80 P. 751. An agreement in lease for 20 years which provided for flooding certain land by a dam, and further specifying that the party of the second part and his heirs, etc., "hereby agree to permit and recognize the right of the first party to flood the said premises by the waters of the Missouri River, as they may be raised by the dam of said first party, as said dam now exists or as the same may be hereafter raised or lowered, without claim for damage construed, and it was held that in event of all the facts it was a grant to raise the dam without liability for damages and also a release of any claim for damages resulting from its exercise to other lands of the party of the second part which would incidentally be flooded by the floods of the lands particularly described. Stadler v. Missouri River Power Co., 133 F. 314. Under the California Law (Civ. Codes, § 806), the extent of a servitude is determined by the terms of the grant, and it was held that under an express covenant that a given amount of water should flow perpetually from the grantor's land to the grantee's land and that the covenant should bind the grantor's heirs, successors in interest, and assigns of the servient estate, no question was involved as to whether or not the covenant ran with the land and bound subsequent owners of the servient estate. Los Robles Water Co. v. Stoneman [Cal.] 79 P. 880. In construing a mortgage of land on which there is an irrigation ditch, to determine what interest in the ditch passed by it, the instrument must be examined in the light of the use of the ditch before and after the execution of the instrument. Farm Inv. Co. v. Gallup [Wyo.] 76 P. 917. The Act of Congress (26 Stat. 748), granting to the state of Montana a section of land to be selected "so as to embrace the buildings and improvements thereon," construed and held that the right to use water in a stream from which the government had taken water by means of a ditch across other lands to the land granted was not included in the grant, the question being one of intent. Story v. Woolverton [Mont.] 78 P. 589.

50. Knoll v. Baker [Ind. App.] 72 N. E. 480. An instrument in the form of a deed by which the grantor grants, bargains, sells, conveys and confirms to the grantee, his heirs and assigns, a right of way for a pipe line with a right to divert waters of a stream to the same parties constitutes a grant of both the right of way and the use of the water, and is not merely a revocable license. Everett Water Co. v. Powers [Wash.] 79 P. 617.

51. Death acts as a revocation. Pioneer Min. & Mfg. Co. v. Shamblin, 140 Ala. 486, 37 So. 391.

Contracts for water construed: Instrument of taking construed as giving owners water rights belonging to property without limitation to the methods previously used. Klous v. Commonwealth [Mass.] 74 N. E. 330. In a suit to enforce a contract for the use of waters in a ditch for irrigation, it was held that the evidence supported a finding that the construction of the ditch was done under the agreement that the plaintiff should have the use of the water jointly with others and that "jointly" meant only that plaintiff had not an exclusive right or one superior to that of others. Blankenship v. Whaley, 142 Cal. 566, 76 P. 235.

A promise to make a contract gives no right to a supply. Where a promise to give a contract was made by a company but complainant refused to sign it, he cannot thereafter sue the company for failure to furnish a sufficient supply of water to him. Colorado Canal Co. v. Dennis & Rugely [Tex. Civ. App.] 85 S. W. 443.

52. A deed by a reclamation district of land conveyed to it for reclamation purposes

Enforcement.[53]—A contract to supply water may be specifically enforced by one who has planted crops in reliance on it.[54] A water company under covenant to supply water granted to it for stockholders may sue to enforce rights of its stockholders, the grant being for its benefit[55] and it being the owner of an easement over the grantee's land;[56] and the stockholders are not in such case the real parties in interest. A mortgagee of land in a mortgage covering all the crops to be grown on the land for a year, may maintain an action against a water company for failure to furnish water under its contract with the mortgagor.[57]

§ 19. *Torts relating to waters.*[58]—Any interference with or detriment to the rights of other riparian owners may be a tort.[59] There must be a water right before there can be damage to it.[60] One cannot recover for conversion of water from a well where the evidence shows that the well is not located on his land.[61] Where land is overflowed by the negligent construction of a railroad embankment, the party entitled to damages is the one who owned and had possession of the land when the injury was done.[62] An assignee who has done nothing to increase the nuisance caused by the assignor must have notice to abate and fail to comply therewith before suit can be brought.[63] It has been held that one who gathers water on his land is not liable for its escape without negligence on his part.[64] An irrigation company is liable for the damages caused by the obstruction of a natural drain where it fails to provide a culvert sufficient to carry off an ordinary rain.[65] An irrigation company is not relieved from liability for the obstruction of a natural drain by the fact that it employed a competent engineer to superintend the construction of its plant.[66] A city is not liable for injuries resulting from an accumulation of water in an artificial pond, unless such pond is in a public street or in dangerous proximity thereto.[67] Ordinary care is required in the maintenance of premises to avoid injury to others by discharging water on their premises.[68]

only, with a reverter to the grantor if used for other purposes, if void for want of power in the district to make, it does not work a forfeiture of the land to the original grantor. Reclamation Dist. No. 551 v. Van Loben Sels, 145 Cal. 181, 78 P. 638.

53. See 2 Curr. L. 2070, n. 30, 31; Id., 2054, n. 48, 49.

54. Bay City Irr. Co. v. Sweeney [Tex. Civ. App.] 81 S. W. 545.

55, 56. Despite the fact that under the California law (Code Civ. Proc. § 367), an action must be brought in the name of the real party in interest, it was held that a water company, incorporated to supply its stockholders with water from land under contract with the owner thereof, who had covenanted with the stockholders as her grantees to cause a given amount of water to flow perpetually to their lands, may maintain an action in its own name to restrain a diversion of water by subsequent owners of the land in view of section 369 which allows a person with whom or in whose interest a contract is made for the benefit of another to sue without joining the beneficiaries, and of section 809 which allows the owner of an estate in a dominant, or the occupant of such tenement, to maintain an action for the enforcement of the easement attached thereto. Los Robles Water Co. v. Stoneman [Cal.] 79 P. 880.

57. Equitable Securities Co. v. Montrose & D. Canal Co. [Colo. App.] 79 P. 747.

58. See 2 Curr. L. 2070.

59. The relative rights and duties respecting different waters and water rights have already been discussed and need not be repeated. See ante, §§ 3-7.

60. Where through failure to exercise an option there was no beneficial interest or right in the person seeking to recover for the taking of water from a well, no damages were allowed. Rollins v. Blackden [Me.] 58 A. 69.

61. Couch v. Texas & P. R. Co. [Tex. Civ. App.] 87 S. W. 847.

62. Not a subsequent purchaser. Texas Cent. R. Co. v. Brown [Tex. Civ. App.] 86 S. W. 659.

63. Seaboard & R. R. Co. v. Ambrose [Ga.] 49 S. E. 815.

64. McCord Rubber Co. v. St. Joseph Water Co., 181 Mo. 678, 81 S. W. 189. A person may not gather unusual quantities of water upon his land without proper precaution against its escape upon his neighbor's lands. American Security & Trust Co. v. Lyon, 21 App. D. C. 122.

65, 66. Barstow Irr. Co. v. Black [Tex. Civ. App.] 86 S. W. 1036.

67. No liability for death of boy by drowning because no connection shown between city's negligence and boy's death. Reeder v. Omaha [Neb.] 103 N. W. 672.

68. In suit for damages caused by rain, collected on roof and discharged so as to injure foundation of neighboring premises,

Damages.[69]—Whenever permanent injury is done to land by pollution,[70] flooding, or back flowing,[71] the depreciation in rental value,[72] or the difference between the value just before and that after, is reckoned as the damage.[73] For temporary injuries which may be rectified, the cost of restoring the former condition is taken,[74] or if that be greater than the value, then the value of the land.[75] Injury to crops is their probable value matured, less expense of bringing them to that state.[76] Where the crop is destroyed and land is only temporarily injured, the owner thereof may recover the actual cash market value of the crop, and such further sum as will compensate him for the injury to the land.[77] Where permanent injury does not take place for several years, damages occurring yearly prior to that time but not after can be recovered as well as damages for the permanent injury.[78] In an action for damages from a diversion of the water of a stream, evidence as to the beneficial uses for which the water power was adapted in view of its extent, location, and availability, is admissible.[79]

Damages for physical injury resulting from fright and resulting sickness produced by an unlawful flood may not be recovered.[80]

Damages caused by destruction of mill power by right of eminent domain may be recovered.[81] In an action for damages caused by a public improvement where

rule that ordinary care is required in maintenance of premises approved. Hamlin v. Blankenburg [N. H.] 60 A. 1010.

69. See generally, Damages, 3 Curr. L. 997.

70. Unlawful pollution of a stream. West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879. Pollution by mining and reduction companies. Watson v. Colusa-Parrot Mining & Smelting Co. [Mont.] 79 P. 14. Damage which consists in the depreciation of the usable value of property directly caused by the pollution of the stream may be ascertained without determining to a mathematical certainty the precise amount of that value which the stream polluted and its precise amount after pollution. Dudley v. New Britain, 210 Conn. 326, 59 A. 89. Findings of fact made were held to justify the amount found as the damage to the rental value. Id.

71. The measure of damages for flooding the land of another is the injury actually occasioned to the date of the suit, measured by the difference in the value of the property before and after the injury. Erection and maintenance of dam. Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226. One unlawfully collecting and **discharging surface water** upon the land of another, and the injury being permanent, the plaintiff is entitled to prove the extent of the impairment of the value of the property for the purpose of assessing damages. Tyrus v. Kansas City, etc., R. Co. [Tenn.] 86 S. W. 1074.

72. The facts held to show a continuing nuisance rather than a permanent injury, and recovery for the temporary loss was allowed. Muncie Pulp Co. v. Martin [Ind.] 72 N. E. 882. Overflow by log jam. Osborn v. Mississippi & Rum River Boom Co. [Minn.] 103 N. W. 879. Overflow caused by embankment. Texas Cent. R. Co. v. Brown [Tex. Civ. App.] 86 S. W. 659. In an action to recover damages to a mill caused by backwater from a boom, evidence as to rental value held admissible. Pickens v. Coal River Boom & Timber Co. [W. Va.] 50 S. E. 872.

73. Flooding by which crops were injured. Brewer v. Califf, 92 N. Y. S. 627. Flood due to insufficient railroad sluices. Denison, B. & N. O. R. Co. v. Barry [Tex. Civ. App.] 80 S. W. 634 [Tex.] 83 S. W. 5. Where a railroad company negligently constructs a trestle, the difference between the value just before and just after the overflow is the proper measure of damages to the land. San Antonio & A. P. R. Co. v. Kiersey [Tex.] 86 S. W. 744. Held error to admit evidence as to the value of the land before the construction of the trestle. Id.

74. Where through insufficient railroad culverts land was flooded and filth and other refuse deposited thereon, it was held that damages might be recovered for a reasonable amount of time and labor spent in removing same. Taylor v. Houston & T. C. R. Co. [Tex. Civ. App.] 80 S. W. 260.

75. The measure of damages for the obstruction of a stream by refuse is prima facie the cost of removal unless it exceeds the value of the entire property. Coal dirt from a colliery. Bachert v. Lehigh Coal & Nav. Co., 208 Pa. 362, 57 A. 765.

76. Difference between the market value of the probable crop and the expense of maturing, preparing and getting it to market. San Antonio, etc., R. Co. v. Kiersey [Tex. Civ. App.] 81 S. W. 1045.

77. St. Louis S. W. R. Co. v. Baer [Tex. Civ. App.] 86 S. W. 653.

78. The proof must show distinctly when the permanent injury occurred, how much of the land was permanently injured and the amount of yearly damage prior to the date of the permanent injury. Watson v. Colusa-Parrot Mining & Smelting Co. [Mont.] 79 P. 14.

79. Roberts v. Claremont R. & Lighting Co. [N. H.] 59 A. 619.

80. Flood caused through insufficient sluices. Denison, B. & N. O. R. Co. v. Barry [Tex.] 83 S. W. 5, overruling on this point [Tex. Civ. App.] 80 S. W. 634.

81. The question of damages to which a mine owner is entitled for the taking of the waters of a stream for a city water supply under Massachusetts act (St. 1895, c. 384),

there is no taking, the measure of damages is the difference between the fair market value of the property before and after the improvement was completed.[82]

The injured party can only recover such damages as could not have been avoided by the use of ordinary and reasonable care.[83] What constitutes such care is usually a question for the jury.[84]

Actions.[85]—In California a party injured by a nuisance may in the same action obtain a judgment abating the nuisance and recover damages caused thereby.[86] The character of the water right injured must be substantially pleaded and proved.[87] The general rule is that where the obstruction causing an overflow of water and consequent damage is of a character that if not interfered with will continue indefinitely, damages past and prospective are recoverable in one action, and successive actions therefor cannot be maintained.[88] The burden of proof is upon the complainant to show that the defendant's obstruction caused the flood;[89] but nominal damage is presumed if an obstruction like a dam be maintained.[90]

§ 20. *Crimes and offenses relating to waters.*[91]—Numerous statutes make the pollution of waters an indictable nuisance.[92] It may be nuisance to back waters on a highway, obstructing the same.[93] In Idaho it is a misdemeanor for an appropriator to waste water.[94] In Wyoming, willfully to use or conduct into or through one's ditch water, the use of which has been lawfully denied by the water commissioner or other competent authority, is a misdemeanor.[95]

WAYS, see latest topical index.

WEAPONS.

§ 1. The Crime of Carrying or Pointing Weapons (1859).
§ 2. Other Public Regulations Concerning Weapons (1860).
§ 3. Indictment and Prosecution (1861).

§ 1. *The crime of carrying or pointing weapons.*[96]—The constitutional right

discussed at length. Lakeside Mfg. Co. v. Worcester, 186 Mass. 552, 72 N. E. 81.

82. Waters in a navigable stream so lowered that abutting owners had to excavate and deepen it. Beidler v. Sanitary Dist. of Chicago, 211 Ill. 268, 71 N. E. 1118.

83. Barstow Irr. Co. v. Black [Tex. Civ. App.] 86 S. W. 1036. Held not duty of injured party to cut irrigation embankment which obstructed natural drain. Id.

84. Barstow Irr. Co. v. Black [Tex. Civ. App.] 86 S. W. 1036.

85. See 2 Curr. L. 2050, n. 12, 13; Id., 2054, 2070.

86. California Statute (Code Civ. Proc. § 731). Astill v. South Yuba Water Co. [Cal.] 79 P. 594. Nuisance in maintenance of a reservoir and in allowing waters of a ditch to overflow. Id.

87. Where one does not sue as a riparian owner, he cannot recover as such. Rickels v. Log Owners' Booming Co. [Mich.] 102 N. W. 652.

88. Gartner v. Chicago, etc., R. Co. [Neb.] 98 N. W. 1052.

89. Gulf, etc., R. Co. v. Huffman [Tex. Civ. App.] 81 S. W. 789.

90. In an action for damages for maintenance of a dam, nominal damages may be recovered without showing any injury capable of being estimated. Chaffin v. Fries Mfg. & Power Co., 135 N. C. 95, 47 S. E. 226.

91. See 2 Curr. L. 2071.

92. See Nuisance, 4 Curr. L. 839.

In Indiana persons who maintain paper factories on the banks of a stream and discharge chemicals into it, thereby polluting it and rendering it unfit for use and killing the fish, are guilty of maintaining a public nuisance. Laws of Indiana (Burns' Ann. St. 1901, § 2154). West Muncie Strawboard Co. v. Slack [Ind.] 72 N. E. 879.

Under the law of Missouri all obstructions of watercourses not made in accordance with the law are deemed public nuisances [Missouri Rev. St. 1899, § 8752]. Scheurich v. Southwest Missouri Light Co. [Mo. App.] 84 S. W. 1003. The discharge of waste products in the Potomac river is prohibited by the **District of Columbia** Code. Code D. C. § 901, prohibiting the discharge of waste products into the Potomac river, does not simply provide protection for fish, but its object is to keep the river as free from pollution as possible. Holden v. United States, 24 App. D. C. 318. Reasonable diligence in eliminating the waste products is no defense. Id. The fact that the literal enforcement of such section will virtually render it impracticable to manufacture gas for the use of the city of Washington will not justify the court in refusing to enforce it. Id.

93. Richardson v. State [Tex. Cr. App.] 85 S. W. 282.

94. Idaho Sess. Laws 1903, p. 223. Boise City Irrigation & Land Co. v. Stewart [Idaho] 77 P. 25.

95. Wyoming Rev. St. 1899, § 971, as

of the people to keep and bear arms is not infringed by legislation prohibiting the carrying of weapons concealed.[97] A pistol so exposed to public view as to show plainly that it is a pistol is not a concealed weapon.[98] One carrying a pistol in a wagon has not got it on or about his person within the Texas statute.[99] Probably all statutes and ordinances on this subject exempt certain classes from its operation; police officers[1] and travelers[2] being among the most frequent exemptions; but a fugitive from justice is not entitled to the benefits of the exemption in favor of travelers,[3] and one who has been on a journey cannot, after returning to his accustomed haunts, continue to carry his pistol as a traveler.[4] To authorize the carrying of a pistol on one's person under the Texas statute, the danger of attack on him must be so imminent as not to admit of the arrest of the party about to make the attack.[5] Under the Alabama statute it is no defense that threats had been made against defendant's life sufficient to impress him with a reasonable apprehension of attack.[6] A person may commit but one offense of carrying a weapon concealed, though he carries it thus for many hours,[7] but when the continuity of the act constituting the offense is broken, another offense is committed when the weapon is again concealed on his person.[8] In Alabama the presentation of any firearm at another whether loaded or unloaded is made an offense,[9] while under the Georgia statute only the intentional pointing or aiming of a gun or pistol at another person is prohibited.[10] That the accused was cursed at is no defense for presenting a firearm at another.[11]

§ 2. *Other public regulations concerning weapons.*[12]—The discharge of a gun on one's own property is not a violation of the Ohio statute regulating the use of firearms.[13] A statute prohibiting shooting at random on a public highway is violated by shooting on a highway, title to which has been acquired by prescription.[14]

amended by Laws 1901, p. 95, c. 86, § 1. Ryan v. Tutty [Wyo.] 78 P. 661.

96. See 2 Curr. L. 2071.

97. Federal Const. Amend. II. An ordinance to this effect may be passed by a village under its general police power to provide for the regulation and police of the town [Rev. St. 1899, § 6010]. Town of Orrick v. Ackers [Mo. App.] 83 S. W. 549.

98. Town of Orrick v. Akers [Mo. App.] 83 S. W. 549.

99. Thompson v. State [Tex. Cr. App.] 86 S. W. 1033.

1. One specially deputized to make an arrest, under a statute conferring on such appointees the rights and duties of peace officers, is not subject to prosecution for carrying a pistol during the execution of the process. Jenkins v. State [Tex. Cr. App.] 82 S. W. 1036. A special deputy constable may carry a pistol on going into another county to serve writs as ordered by his principal, although his deputation is technically invalid. Black v. State [Tex. Cr. App.] 85 S. W. 1143. That one is attempting to arrest a person supposed to have stolen from him does not justify the carrying of a pistol. Smith v. State [Tex. Cr. App.] 85 S. W. 1078. A surety is not entitled to carry a pistol in attempting to arrest and surrender his principal to the officers. Id.

2. Testimony that defendant was going to a station does not raise the issue that he was a traveler, in the absence of proof as to how far he had to go to reach the station. Simpson v. State [Tex. Cr. App.] 85 S. W. 15.

3. Underwood v. State [Tex. Cr. App.] 85 S. W. 794.

4. Sand. & H. Dig. § 1498. Holland v. State [Ark.] 84 S. W. 468. A traveler carrying a concealed weapon after reaching his room cannot sustain the defense allowed in Mississippi of the right of a traveler to carry concealed weapons until he reaches his destination. Rosaman v. Okolona [Miss.] 37 So. 641.

5. Evidence held to show that the danger was not so imminent and threatening. Thompson v. State [Tex. Cr. App.] 86 S. W. 1033.

6. Code 1896, § 4420. House v. State, 139 Ala. 132, 36 So. 732.

7. Morgan v. State, 119 Ga. 964, 47 S. E. 567.

8. Where one carries a pistol concealed into a house, lays it on the mantel, takes it up and again conceals it on his person, two offenses are committed. Morgan v. State, 119 Ga. 964, 47 S. E. 567.

9. Code 1896, § 4342. Elmore v. State, 140 Ala. 184, 37 So. 156.

10. Intention must be charged [Pen. Code 1895, § 343]. Herrington v. State, 121 Ga. 141, 48 S. E. 908.

11. Elmore v. State, 140 Ala. 184, 37 So. 156.

12. See 2 Curr. L. 2072.

13. Rev. St. § 6962. Martin v. State, 70 Ohio St. 219, 71 N. E. 640.

14. Commonwealth v. Terry [Ky.] 86 S. W. 519.

§ 3. *Indictment and prosecution.*[15]—A conviction of assault with a pistol is no bar to a prosecution for carrying such pistol concealed,[16] and a prosecution for carrying concealed weapons in the presence of one person does not bar a prosecution for an offense in the presence of another unless the charges referred to the same transaction or one of the persons was present at both instances.[17]

An indictment for carrying concealed weapons may charge the commission of the offense in general terms,[18] but must charge the act declared by the statute to be an offense,[19] and if the descriptive averments are specific, the proof must correspond,[20] though in general the state may show that defendant carried a pistol at any time within the statute of limitations previous to the day the information was filed.[21]

Several decisions discussing the admissibility of evidence are cited in the note.[22]

A court is not obliged of its own motion to charge on the question of defendant being a traveler and therefore entitled to go armed.[23]

Upon conflicting evidence, a verdict based on the weapon being concealed will not be disturbed.[24] Where the accused answered that he had not carried a pistol concealed at the time inquired about or during that day, in answer to a question whether he carried a pistol concealed at a different time from that charged the error if any is error without injury.[25]

In Alabama, one convicted of carrying concealed weapons may be sentenced to hard labor for six months or less in addition to the fine imposed by the jury.[26]

WEIGHTS AND MEASURES.

An act of Congress failing to fix the standard of weights and measures, the English standard which was brought to the colonies as a part of the common law governs.[27] An act allowing a commission to prescribe the amount of tolerance

15. See 2 Curr. L. 2073.
16. Brown v. State [Ala.] 37 So. 408.
17. Morgan v. State, 119 Ga. 964, 47 S. E. 567.
18. Morgan v. State, 119 Ga. 964, 47 S. E. 567. Under the Alabama statute, an affidavit that affiant had probable cause for believing and did believe that defendant carried a concealed pistol is sufficient [Code 1896, § 4600]. Ross v. State, 139 Ala. 144, 36 So. 718. In Georgia a presentment for carrying metal knucks need not allege them to have been "manufactured and sold for the purpose of offense and defense" [Acts 1898, p. 60]. Nixon v. State, 121 Ga. 144, 48 S. E. 966. An indictment under the Alabama statute charging that defendant "did unlawfully present a gun, pistol or other firearm" etc., is not void for uncertainty. Elmore v. State, 140 Ala. 184, 37 So. 156.
19. An indictment charging the "willful and unlawful" display of a weapon does not charge a crime within the meaning of a statute denouncing a "rude" display. Fuller v. State [Tex. Cr. App.] 87 S. W. 832.
20. Morgan v. State, 119 Ga. 964, 47 S. E. 567.
21. Schrimsher v. State [Tex. Cr. App.] 80 S. W. 1013; Morgan v. State, 119 Ga. 964, 47 S. E. 567; Springer v. State, 121 Ga. 155, 48 S. E. 907. Testimony that witness saw defendant with a pistol within twelve months prior to indictment is admissible. Brown v. State [Ala.] 37 So. 408.
22. Where defendant claims the rights of a traveler, evidence is admissible to show that he was branding cattle. That one is on a prairie with cattle is some evidence that he is not a traveler. Underwood v. State [Tex. Cr. App.] 85 S. W. 794. It is error to allow a witness for the prosecution to state that defendant was drunk at the time of the offense charged. Gainey v. State [Ala.] 37 So. 355. On cross-examination, a witness may be asked whether he went to church with the accused with a pistol in the buggy. Ross v. State, 139 Ala. 144, 36 So. 718. Evidence as to whether the prosecuting witness "went and got a gun and what he said about killing defendant" is irrelevant. Id. A question whether witness went to defendant's brother and told of threats made on defendant's life and whether the brother procured and sent a gun to defendant by witness was properly excluded. House v. State, 139 Ala. 132, 36 So. 732. That one had no legal right to search the accused does not render inadmissible evidence that in such search a concealed weapon was discovered. Springer v. State, 121 Ga. 155, 48 S. E. 907.
23. Schrimsher v. State [Tex. Cr. App.] 80 S. W. 1013.
24. Sanders v. State [Ga.] 50 S. E. 66.
25. Ross v. State, 139 Ala. 144, 36 So. 718.
26. Code 1896, §§ 4420, 5415. Brown v. State [Ala.] 37 So. 408.
27. Thompson v. District of Columbia, 21 App. D. C. 395.

to be allowed does not constitute a delegation of legislative power.[28] Regulations must be reasonable.[29] That one measures milk into tanks and fills small bottles therefrom is insufficient to show that the latter are not used as measures.[30] Since the Texas statute governing public weighers forbids only factors, commission merchants, and persons in a like business from weighing the cotton of others consigned to them for sale, other persons may engage in the business of private weighers.[31]

WHARVES.[32]

Right to erect and maintain wharves and ownership therein.[33]—As a general rule a riparian owner has the right to erect wharves out to the line of navigation,[34] provided that the wharf does not pass over land owned by another.[35] But the exercise of such right is subject to such general rules and regulations as the legislature may see proper to impose for the protection of the public's rights.[36] A grant of the land under water for commercial purposes does not confer upon the riparian owner the exclusive use of a dock erected thereon.[37]

Public and private wharves.[38]—A wharf may be private or public, though owned by an individual,[39] and the use it has been put to at least furnishes the basis for an inference of the owner's intention in its construction and maintenance.[40] A private wharf may exist on the shores of a navigable river or lake, or in a harbor of a city from which access is obtained directly from the sea.[41] That a wharf is erected by a private party under municipal authority and at the end of a public street does not render it a public one.[42]

Access to wharves.[43]

The right to collect wharfage.[44]

Uses of public wharves.[45]—A grant by a city of the right to lay railway tracks on wharf is for a public use.[46]

Damages.—Where a city wharf is unlawfully used, the city may either base its claim for damages upon the rental value of the pier for general purposes, or demand damages growing out of the particular use to which it was subjected.[47] Under the first alternative, all the uses to which the pier would ordinarily be devoted are proper subjects of consideration;[48] under the second alternative, the value of the pier for the specific purpose to which it was put may be recovered, less the cost of adapting it thereto.[49]

28. Act of Congress of March 2, 1895, as amended by the act of March 28, 1896, considered. Thompson v. District of Columbia, 21 App. D. C. 395.

29. In the absence of evidence, a fee of fifty cents per one hundred bottles of milk inspected and sealed is not unreasonable. Thompson v. District of Columbia, 21 App. D. C. 395. A regulation requiring glass bottles to be stamped will not be held unreasonable on the statement of a dealer that it increases the risk of breakage. Id. Nor will such regulations be held unreasonable on the showing of a dealer that it is impossible to make all such bottles of a given supposed size uniform in capacity, the act containing a tolerance provision. Id.

30. Thompson v. District of Columbia, 21 App. D. C. 395.

31. Davis v. McInnis [Tex. Civ. App.] 81 S. W. 75.

32. See 2 Curr. L. 2074. See, also, Shipping and Water Traffic, 4 Curr. L. 1450.

33. See 2 Curr. L. 2074.

34. Thousand Island Steamboat Co. v. Visger, 179 N. Y. 206, 71 N. E. 764.

35. Under the common law, as it existed in 1693, a littoral proprietor had no right to maintain a wharf on land below high-water mark. Trustees of Town of Brook-Haven v. Smith, 90 N. Y. S. 646. The general public right of navigation did not justify such a structure. Id. The grantee of land below the high-water mark of the Atlantic Ocean having the right to reclaim and appropriate the same, may maintain ejectment against one occupying a pier erected upon the land under water. Burkhard v. H. I. Heinz Co. [N. J. Err. & App.] 60 A. 191.

36, 37. Thousand Island Steamboat Co. v. Visger, 179 N. Y. 206, 71 N. E. 764.

38. See 2 Curr. L. 2075.

39, 40. Thousand Island Steamboat Co. v. Visger, 179 N. Y. 206, 71 N. E. 764.

41, 42. Louisville & N. R. Co. v. West Coast Naval Stores Co., 25 S. Ct. 745.

43, 44, 45. See 2 Curr. L. 2075.

46. Murray v. City of Allegheny [C. C. A.] 136 F. 57.

47, 48, 49. City of New York v. Brown, 179 N. Y. 303, 72 N. E. 114.

Duty and care respecting wharf and injuries thereat.[50]—It is the wharfinger's duty to use reasonable care to provide a safe bottom for boats coming to his dock,[51] and to use the same care to maintain the bottom in proper condition.[52] The defense of contributory negligence must be affirmatively proven by a preponderance of the evidence.[53] The owner of a private wharf is not liable for injuries to a trespasser, such injuries not being willfully inflicted.[54] There being no room for a laden vessel at the wharf, it is the wharfinger's duty in removing her to see that she is removed to a place of safety.[55]

WILLS.

§ 1. Right of Disposal, and Contracts Relating to It (1864). Contracts to Devise or Bequeath (1866).
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E. Of Terms Respecting Administration, Management, Control, and Disposal (1937).
F. Abatement, Ademption, and Satisfaction (1939).
G. Proceedings to Construe Wills (1940).
§ 6. Validity, Operation, and Effect in General (1942).

The scope of this title is apparent from the analytical index. It does not include the law governing the rights and liabilities between successors in estate, nor that controlling the settlement of estates,[56] nor that relating to the estates

50. See 2 Curr. L. 2076.

51. Daly v. Quinlan, 131 F. 394; The Thomas Quigley [C. C. A.] 130 F. 336. Held liable where he placed fenders at end so as to protect boats from submerged piling, but failed to notify the master of the vessel of the obstruction, the fender being pulled up and the boat injured. The Nellie, 130 F. 213. Held liable for injury resulting to boat from broken spile which could have been discovered and removed by the exercise of reasonable care. Barber v. Lockwood, 134 F. 985. Held liable for injury caused by sunken rock while vessel was being moved to a place designated by defendant's agent. Smith v. Gould, 136 F. 719.

52. Failure to inspect bottom for two years, though notified of pointed rock, held to render him liable. Daly v. Quinlan, 131 F. 394.

53. The Nellie, 130 F. 213. In the absence of warning, boatman lawfully using the wharf cannot be considered negligent because they make an erroneous guess as to why fenders were placed at end of wharf. Id.

54. Downes v. Elmira Bridge Co., 179 N. Y. 136, 71 N. E. 743.

55. Roney v. New York, etc., R. Co., 132 F. 321. See Shipping and Water Traffic, 4 Curr. L. 1470.

56. See Estates of Decedents, 3 Curr. L. 1238; Election and Waiver, 3 Curr. L. 1177.

which may have been created by the will, except in so far as the interpretation of the will involves such questions.[57]

§ 1. *Right of disposal, and contracts relating to it.*[58]—The right to dispose of one's property by will is not a vested right, but rests upon statute, and is subject to such limitations and restrictions, as respects the substance, form, and beneficiaries, as the law imposes.[59]

As a general rule all persons competent to contract may dispose by will of any interest descendible to their heirs, in realty, or in personal property, to any person or corporation capable of holding the same.[60] One cannot, of course, dispose of property not belonging to him,[61] nor can he devise property which he has conveyed to another, even though such conveyance was fraudulent.[62] Neither can the grantor in a deed of trust maintain a bill to determine whether the deed prevents him from making a different testamentary disposition of his property.[63]

A testator cannot dispose of his property to the prejudice of his creditors or in such manner as to prefer one to another,[64] nor can a married man or woman dispose of his or her property so as to deprive the surviving spouse of his or her statutory interest therein.[65]

A person taking out a policy of insurance on his own life, payable to his executors, administrators or assigns, may dispose of the same by will, notwithstanding a statutory provision that life insurance shall go to his widow and children or next of kin, freed from his debts;[66] but in order to do so, he must use language directly significant of such an intention.[67] The proceeds of accident or casualty insurance are as much the subject of testamentary disposition as the proceeds of life policies payable to the estate.[68]

57. See Life Estates, Reversions and Remainders, 4 Curr. L. 438; Perpetuities and Accumulations, 4 Curr. L. 975; Trusts, 2 Curr. L. 1924, and the like.

58. See 2 Curr. L. 2077.

59. Limited in appointment of executor by provisions of statutes and by public policy. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974. Formalities prescribed are essential to its validity. In re Seaman's Estate [Cal.] 80 P. 700.

60. Burns' Ann. St. 1901, § 2726. Chaplin v. Leapley [Ind. App.] 74 N. E. 546.

61. Where a deposit stands in the wife's name, creating a presumption that it was a gift to her, the fact that the husband leaves a will containing a large money legacy without leaving an estate sufficiently large to pay it will not defeat the right of the wife to the deposit. In re Klenke's Estate [Pa.] 60 A. 166.

62. Though it may be set aside by his executor or administrator. Laws 1895, p. 165, construed. Moore v. Waldstein [Ark.] 85 S. W. 416.

63. Cannot be determined until will becomes operative. Carroll v. Smith, 99 Md. 653, 59 A. 131.

64. Attempted disposition in trust held invalid, the estate being insolvent. Succession of Henderson [La.] 36 So. 904.

65. A husband cannot devise realty held by himself and his wife by entireties. Goes to survivor, and hence not descendible to heirs. Chaplin v. Leapley [Ind. App.] 74 N. E. 546. A married woman may ordinarily dispose of all her personalty without her husband's consent [N. J. Act March 27, 1874, § 9; 2 Gen. St. p. 2014] (In re Folwell's Estate [N. J. Eq.] 59 A. 467), but cannot dispose of her realty so as to deprive him of any interest therein to which he would be entitled by law on her dying intestate (Id.). In Iowa a widow's one-third interest in her husband's lands cannot be affected by his will unless she consents thereto within six months after notice to her of its provisions, which consent must be entered on the records of the court. Code 1873, § 2452. Can lose interest only by election in accordance with statute, and not by estoppel, where will gives her life estate in lieu of dower. Byerly v. Sherman [Iowa] 102 N. W. 157. Under the Texas statute providing that where husband or wife becomes insane or dies intestate, leaving no children, the community property passes to the survivor, the insanity of the wife does not deprive the husband of the right of disposition of the community property during his life, but gives him no authority to dispose of her interest by will. Schwartz v. West [Tex. Civ. App.] 84 S. W. 282.

66. Cooper v. Wright, 110 Tenn. 214, 75 S. W. 1049. Evidence held to show that policy was in such form as to give testator right to dispose of proceeds. Succession of Henderson [La.] 36 So. 904.

67. Courts will not presume such an intention from general terms. Cooper v. Wright, 110 Tenn. 214, 75 S. W. 1049. Provision requiring debts to be promptly paid, and direction that property should go to wife after all debts were paid, held not to render policy subject to claims of creditors. Id.

68. Laws N. Y. 1892, p. 2015, c. 690, § 212,

By statute in New York, no one having a husband, wife, child, or parent is permitted to devise or bequeath more than half of his estate to charity.[69] In order to determine whether he has done so, the value of the widow's dower should be deducted from the gross value of the estate, unless she has elected to accept a provision of the will in lieu thereof.[70] If too much is given, the excess will be deducted from the shares of those devisees given the residuum after the payment of specified legacies.[71] Anyone who would take any interest in the estate if the provisions were declared void may invoke the statute.[72]

In some states all devises and bequests for benevolent, religious, or charitable purposes are invalid in case the testator dies within a year from the time of executing his will, leaving issue of his body, or an adopted child, or the legal representative of either.[73] Such provisions are for the protection of the children or their representatives, and may be waived by them.[74]

In Louisiana, a gift by will to one with whom testator has lived in open concubinage must be reduced, at the instance of the heirs at law, to one-tenth part of the value of the estate, payable from the movables.[75]

In many states a child born after the making of the parent's will is entitled to share in the estate as though the parent had died intestate, unless he is mentioned therein, or it appears from the will that the parent intended to make no provision for him.[76] The testator is only bound to make such provision for such child as he may deem proper, and the court has no authority to determine its adequacy.[77] Any provision showing that he has such child in mind, and makes clear his intention to provide for it, is sufficient.[78] In case the will is ambiguous,

do not apply to such insurance. In re Smith's Estate, 94 N. Y. S. 90.

69. Laws 1860, p. 607, c. 360. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143. Applies only to testamentary disposition of property. Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92. Fund created by deed of trust providing for payment of income to son for life, with reverter to testator on son's death, or in case testator was dead, it to go to such persons as he might appoint, held to pass under deed and not under will making appointment though words of bequest used therein, and hence should not be considered in determining amount devised to charities. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

70. Release relates back to death of testator. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

71. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

72. Next of kin who would take under intestate laws if trust were declared invalid. Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92. Residuary legatee cannot attack trust when residuary estate would not be in any way augmented if it were declared unlawful. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

73. Ohio Rev. St. 1890, § 5915. Folsom v. Ohio State University Trustees, 210 Ill. 404, 71 N. E. 384.

74. Folsom v. Ohio State University Trustees, 210 Ill. 404, 71 N. E. 384. Under devise to university, with provision that, on failure of devise property should go to brother's children, and further provision empowering daughter to ratify devise and providing that, should she do so, devise over should be revoked, held that, even if daughter could not confirm devise so as to make it valid, execution by her of deed of confirmation revoked devise over. Id. If university did not take under will by virtue of confirmation, property passed to her as sole heir at law, and it took by virtue of her deed of confirmation. Id.

75. Openness of concubinage held established by admissions of parties. Succession of Landry [La.] 38 So. 575.

76. Ky. St. 1903, § 4848. Porter v. Porter's Ex'r [Ky.] 86 S. W. 546. 3 Gen. St. N. J. p. 3760, § 19. In re Wilcox, 64 N. J. Eq. 322, 54 A. 296. Pa. Act April 8, 1883, § 15 (P. L. 251). In re Newlin's Estate, 209 Pa. 456, 58 A. 846. Wis. Rev. St. 1898, § 2286. In re Sandon's Will [Wis.] 101 N. W. 1089. Cal. Civ. Code, § 1306. Deceased regarded as having died intestate as to such share, and will be considered as not existing in so far as such child is concerned. In re Smith's Estate, 145 Cal. 118, 78 P. 369. Pretermitted heirs [Rev. St. 1899, § 4611]. Story v. Story [Mo.] 86 S. W. 225. Gen. Laws R. I. 1896, c. 203, § 22. Omission to provide for children held to be deliberate and intentional, and not the result of accident or mistake. Greene v. Greene [R. I.] 60 A. 675; Daignault v. Daignault [R. I.] 60 A. 675. 1 Ball. Ann. Codes & St. Wash. § 4601. If "not named or provided for," will invalid as to them. Van Brocklin v. Wood [Wash.] 80 P. 530.

77. In re Newlin's Estate, 209 Pa. 456, 58 A. 846.

78. Provision for payment of income to wife during minority of children, and for conveyance to trustee of share of each daughter on becoming of age, held sufficient provision for afterborn daughter. In re Newlin's Estate, 209 Pa. 456, 58 A. 846.

extrinsic evidence of the circumstances surrounding testator when it was made is admissible to aid in determining whether a child born after the making of the will was intentionally omitted from its provisions;[79] but such evidence cannot be received to add such an intention to a will which is plain and certain on its face.[80] In neither event are testator's declarations concerning the making of the will, and as to his intent concerning such child, admissible to show such intent.[81] The omission of a child does not render the whole will invalid, but after his share has been set off to him, the balance of the estate passes in accordance with its provisions.[82] The child's share should first be taken from the estate undisposed of, if any,[83] after the payment of the debts and the expenses of administration.[84] If that is not sufficient, so much as is necessary will be taken from the shares of all the devisees and legatees, in proportion to the value they are respectively entitled to under the will,[85] unless the obvious intention of the testator with respect to some specific devise, bequest, or other provision would thereby be defeated, in which case such devise, bequest, or provision may be exempted, and a different apportionment, consistent with such intent, may be adopted.[86] The mere fact that one legacy is specific and another residuary does not show an intention to exempt the former.[87] Such statutes apply to adopted children.[88]

Contracts to devise or bequeath.[89]—One may make a valid agreement to dispose of his property in a particular way by will,[90] and such contracts may be enforced in equity, after his decease, against his heirs, devisees, or personal representatives.[91] They must, however, have all the essentials of an ordinary contract, be fair and equitable, and definite and certain in their terms.[92] They must also

Where a testator provided that after-born children should share in such personal property as was not bequeathed to his wife, such after-born children were not pretermitted. Porter v. Porter's Ex'r [Ky.] 86 S. W. 546. Evidence insufficient to show that testator had pretermitted any of his heirs. Story v. Story [Mo.] 86 S. W. 225.

79. In re Sandon's Will [Wis.] 101 N. W. 1089. See, also, In re Smith's Estate, 145 Cal. 118, 78 P. 369.

80, 81. In re Sandon's Will [Wis.] 101 N. W. 1089.

82. Merely invalid as to child. Van Brocklin v. Wood [Wash.] 80 P. 530; In re Wilcox, 64 N. J. Eq. 322, 54 A. 296. Pretermission of heirs no ground for setting aside the will [Rev. St. 1899, § 4611]. Story v. Story [Mo.] 86 S. W. 225.

83. Cal. Civ. Code, § 1308. In re Smith's Estate, 145 Cal. 118, 78 P. 369.

84. Van Brocklin v. Wood [Wash.] 80 P. 530.

85. Cal. Civ. Code, § 1308. In re Smith's Estate, 145 Cal. 118, 78 P. 369. Devisees and legatees must contribute ratably [3 Gen. St. N. J. p. 3760, § 19]. In re Wilcox, 64 N. J. Eq. 322, 54 A. 296.

86. Will held not to show intent to exempt annuity [Cal. Civ. Code, § 1308]. In re Smith's Estate, 145 Cal. 118, 78 P. 369.

87. In re Smith's Estate, 145 Cal. 118, 78 P. 369.

88. In re Sandon's Will [Wis.] 101 N. W. 1089; Van Brocklin v. Wood [Wash.] 80 P. 530.

89. See 2 Curr. L. 2078.

90. Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841; Laird v. Vila [Minn.] 100 N. W. 656; Bush v. Whitaker, 45 Misc. 74, 91 N. Y. S. 616; Earnhardt v. Clement [N. C.] 49 S. E. 49; Spencer v. Spencer, 25 R. I. 239, 55 A. 637. Provisions in a will in violation of an antenuptial agreement are void. Codicil held to violate agreement to make no distinction between children. Phalen v. United States Trust Co., 44 Misc. 57, 89 N. Y. S. 699.

91. Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841; Bush v. Whitaker, 45 Misc. 74, 91 N. Y. S. 616; Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92. They will be regarded as trustees for his benefit. Spencer v. Spencer, 25 R. I. 239, 55 A. 637. An appeal from the probate of a will is not a bar to an action for that purpose. Id. Held not inequitable or unjust to decree specific performance of contract to bequeath stock. Earnhardt v. Clement [N. C.] 49 S. E. 49. Will be decreed where consideration is that promisee shall assume peculiar and domestic relation to promisor, and render services of such character that pecuniary value cannot be ascertained. Minors assuming relation of children. Laird v. Vila [Minn.] 100 N. W. 656. Probate court has no jurisdiction to decree performance of contract to devise realty, but district court has. Id. The right to specific performance may be barred by laches and estoppel. Lozier v. Hill [N. J. Eq.] 59 A. 234. One for whose benefit an antenuptial agreement is entered into may maintain suit. Son whose parents, on his marriage, agree to make no discrimination in dividing their property among their children. Phalen v. United States Trust Co., 44 Misc. 57, 89 N. Y. S. 699. Executors, who have been discharged, not necessary parties to suit by testator's son. Id. The surrogate has no jurisdiction to enforce such agreement, and hence his decree as to distribution of trust fund is not res adjudicata as to rights under it. Id.

comply with the provisions of the statute of frauds;[93] but will be exempted from its operation in case enforcement is necessary to prevent fraud,[94] or in case of part performance,[95] particularly when entered into on the basis of a family arrangement.[96]

The proof of such contracts, when in parol, must be clear and convincing,[97] the burden of establishing their existence being on the one seeking to establish a right to property thereunder.[98]

The failure of the sole heir at law of one desiring to make a will for the benefit of third persons to perform an oral promise that he will dispose of her estate as she desires does not make such heir, in case of her intestacy, a trustee ex maleficio as to such estate, in the absence of actual fraud.[99]

92. Parol agreement to leave all property to plaintiff. Hanly v. Hanly, 93 N. Y. S. 864. An agreement to treat a child as a person would treat his own child confers upon the child no right whatever to such person's property. Id. Must be founded on valuable consideration. Earnhardt v. Clement [N. C.] 49 S. E. 49. Evidence held merely to show promise to make a gift without consideration and hence unenforceable. Mitchell v. Pirie [Wash.] 80 P. 774. Written promise that if nephew would procure cane for testator he would leave it to him, and would also leave him $1,000, enforced where cane furnished and accepted. Not void for inadequacy of consideration. Bush v. Whitaker, 45 Misc. 74, 91 N. Y. S. 616. A contract whereby intestate agreed that if plaintiff would support her husband, who was his grandson, out of her separate estate, he would leave her a certain sum in his will, is valid and enforceable, plaintiff having performed on her part. She is not bound to use her separate property for his support. Robinson v. Foust, 31 Ind. App. 384, 68 N. E. 182. Contract between husband and wife that property of the one first dying should go to the survivor and heirs forever, held unenforceable as against heirs of wife, she having died first, because not acknowledged and recorded as required by Ky. St. 1903, § 2128, relating to contracts between husband and wife. Stroud v. Ross, 26 Ky. L. R. 521, 82 S. W. 254. Such contract being declared unenforceable, husband is entitled to reimbursement for money paid to purchase and improve property on the faith of the contract, but not for taxes and improvements on wife's own property. Id.

93. Promise to give one certain amount of money by will if she would marry certain person must be in writing. Memorandum insufficient. Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841. Contracts to devise land. Answer denying promise entitles defendant to benefit of statute. Lozier v. Hill [N. J. Eq.] 59 A. 234. Absolute conveyance cannot be shown by parol to have been made in consideration of promise to devise it to grantor. Id.

See, also, note 102 Am. St. Rep. 240.

94. Clawson v. Brewer [N. J. Eq.] 58 A. 598. No fraud or abuse of confidential relations where sister conveyed to brother, who agreed to devise land back to her. Lozier v. Hill [N. J. Eq.] 59 A. 234.

95. Laird v. Vila [Minn.] 100 N. W. 656. Conveyance of land for full value or nearly full value not part performance of contract by grantee to devise it to grantor. Lozier v. Hill [N. J. Eq.] 59 A. 234. Parol contract to devise land. Best v. Gralapp [Neb.] 99 N. W. 837. Though the statute makes contracts between husband and wife in regard to realty void, where the wife induces him to convey land to her upon condition that she will devise the same to designated persons, upon default on her part, she takes as trustee ex maleficio in trust for them. Heirs estopped from disputing validity of agreement. Laird v. Vila [Minn.] 100 N. W. 656.

96. Only adequate remedy. Clawson v. Brewer [N. J. Eq.] 58 A. 598. Agreement between stepmother and stepson in regard to father's property held family arrangement. Abandonment by son of claim against father's estate, and stepmother's enjoyment of property during lifetime sufficient consideration. Id. Contract not too vague and indefinite to be enforced. Id.

97. Instructions approved. Earnhardt v. Clement [N. C.] 49 S. E. 49. To devise land. Clawson v. Brewer [N. J. Eq.] 58 A. 598. Must be clearly established by testimony of disinterested witnesses. Hanly v. Hanly, 93 N. Y. S. 864. Must be established with reasonable certainty. Lozier v. Hill [N. J. Eq.] 59 A. 234. Will be closely scrutinized, particularly when claimed to have been made with aged and infirm persons and to the detriment of the lawful heirs, and will only be allowed to stand when established by the strongest evidence. Spencer v. Spencer [R. I.] 58 A. 766. Conceding that valid contract by legatee to make certain disposition of property bequeathed to him absolutely, which court will enforce after his death, may be established by parol, such evidence must be very clear and the contract or promise must be definite and certain in its terms, so that, if not carried out, a fraud would be perpetrated upon the testator. Russell v. Jones [C. C. A.] 135 F. 929.

Evidence insufficient to show contract: Austin v. Kuehn, 211 Ill. 113, 71 N. E. 841; Lozier v. Hill [N. J. Eq.] 59 A. 234; Hanly v. Hanly, 93 N. Y. S. 864; Spencer v. Spencer [R. I.] 58 A. 766; Russell v. Jones [C. C. A.] 135 F. 929.

Evidence sufficient: Laird v. Vila [Minn.] 100 N. W. 656; Clawson v. Brewer [N. J. Eq.] 58 A. 598.

98. Parol. Hanly v. Hanly, 93 N. Y. S. 864.

99. Cassels v. Finn [Ga.] 49 S. E. 749.

A contract to make joint wills cannot be revoked after the death of one of the parties thereto.[1]

A bequest of property in trust is not a substantial compliance with a contract to bequeath it absolutely.[2]

The measure of damages for failure to devise as contracted is the value of the property agreed to be given.[3] Where services are rendered upon a promise to make compensation therefor by will, which promise is not performed, the person rendering them is entitled to compensation as a creditor of the estate for their value.[4]

§ 2. *Testamentary capacity, fraud, and undue influence. A. Essentials to capacity.*[5]—In order to have testamentary capacity, the testator must have sufficient mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of the property constituting his estate and which he intends to dispose of, and to recollect the objects of his bounty.[6]

1. Minor v. Minor, 2 Ohio N. P. (N. S.) 439. An oral compact to make mutual wills having been established by sufficient evidence, an adequate consideration appearing, and the parties having complied with the law, the wills speak for themselves. Id. There being a compact to make mutual wills and the will of the survivor cannot be found at his death, its provisions will be carried out, if there is no question as to its exact contents, or as to the execution of mutual wills, or the adequacy of the consideration to the survivor. Id.

2. Acceptance of dividends from stock so bequeathed held not to estop legatee from seeking specific performance. Earnhardt v. Clement [N. C.] 49 S. E. 49.

3. Bush v. Whitaker, 45 Misc. 74, 91 N. Y. S. 616.

4. Whether failure due to accident or design. Bair v. Hager, 97 App. Div. 358, 90 N. Y. S. 27. Limitations do not begin to run until death of promisor. Id. Evidence sufficient to establish contract and extent and value of services. Id. Charge authorizing recovery of value of house if found that deceased had agreed to devise it in payment held erroneous. Lane v. Calby, 95 App. Div. 11, 88 N. Y. S. 465. Evidence that wages were paid for such services is admissible to disprove the contract. Waters v. Cline [Ky.] 85 S. W. 750.

5. See 2 Curr. L. 2078.

6. Hartley v. Lord [Wash.] 80 P. 433. The law does not arbitrarily declare one incompetent who is unable to know both the extent and value of his property. Instruction properly refused as requiring too rigid a test. Barricklow v. Stewart [Ind.] 72 N. E. 128. It is as necessary to have such sensibilities as will enable one to know the obligations he owes to the natural objects of his bounty, as it is to have the capacity to know the nature and value of his estate, and a fixed purpose to dispose of it. McDonald's Ex'rs v. McDonald [Ky.] 85 S. W. 1084. Where testator showed hatred for family and did not want any of them to have any of his estate, held to show lack of testamentary capacity. Id. It is sufficient if testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, extent and condition of his property, and his relation to those to whom he gives and those from whom he excludes his bounty. In re Randall [Me.] 59 A. 552. It is sufficient if testator, at the time he makes his will, is able to and does recollect the property he means to dispose of and the persons to whom he means to give it, and understands the manner in which he means to dispose of it and the relative claims of those who are, or should be, the objects of his bounty. Kennedy v. Dickey [Md.] 59 A. 661. Statements of legatee held not admission of insanity such as would show lack of capacity. Geseil v. Baugher [Md.] 60 A. 481. By competency is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he is making of it, and the persons or objects he makes the beneficiaries of his bounty. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32. To comprehend perfectly the condition of his property, his relations to the persons who were or should or might have been the objects of his bounty, and the scope and bearing of the provisions of the will. Roche v. Nason, 93 N. Y. S. 565. He must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other and be able to form some rational judgment in relation to them. Id. One knowing the natural objects of his bounty, the property he owns, and the disposition he wishes to make of it has capacity. In re Allison's Estate, 210 Pa. 22, 59 A. 318. If has sufficient intelligence to comprehend condition of his property, and scope, meaning, and effect of provisions of will. In re Donohue's Will, 97 App. Div. 205, 89 N. Y. S. 871. One who is able to enumerate his property and remembers who are the natural objects of his bounty and successfully conducts considerable business interests, has sufficient mental capacity, though he be eighty-four years old and somewhat forgetful as to minor matters. Rewell v. Warden, 4 Ohio C. C. (N. S.) 545.

Mere feebleness of mind or body,[7] moral depravity,[8] erroneous views as to the law of descents or wills,[9] a belief in spiritualism,[10] or any particular belief in regard to a future state,[11] mere jealous suspicion, however groundless,[12] personal eccentricities,[13] or the fact that testator committed suicide,[14] or a discordance between the will as executed and testator's previously expressed intention,[15] does not necessarily show lack of capacity. Neither does the fact that he distributes his property unequally or unnaturally,[16] or leaves it to his wife to the exclusion of his collateral kin.[17] It has, however, been held that those claiming under a will which is unreasonable in its provisions and inconsistent with testator's duties with reference to his property and family have the burden of showing some reasonable explanation of its unnatural character, or at least that it is not the effect of mental defect, obliquity, or perversion.[18] The fact that testator made no changes in the will, though he lived for some years after its execution, tends to prove capacity.[19]

The fact that testatrix occasionally suffers from "spells," rendering her incapable of transacting business, does not render her incapable of making a will at other times.[20] Monomania is partial insanity, as distinguished from general insanity.[21]

An insane delusion is a fixed belief, based upon supposed facts existing

7. Roche v. Nason, 93 N. Y. S. 565. Does not raise presumption of incapacity. In re Donohue's Will, 97 App. Div. 205, 89 N. Y. S. 871; In re Hawley's Will, 44 Misc. 186, 89 N. Y. S. 803. That testator was 71 years old and was afflicted with Bright's disease and organic valvular heart trouble. Morris v. Straughan [Ky.] 86 S. W. 529. Intellectual feebleness from age or other causes. In re Donohue's Will, 97 App. Div. 205, 89 N. Y. S. 871; In re Randall [Me.] 59 A. 552. Unsoundness of mind will not be inferred from physical suffering, disease, and old age. Woodman v. Illinois Trust & Savings Bank, 211 Ill. 578, 71 N. E. 1099. The mere statement that as one advanced in years her mind was not so vigorous as formerly imparts no information as to her want of capacity. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

8. Conclusion that testator was monomaniac not warranted by fact that he disinherited his wife because she interfered with his carrying out his deliberate choice to lead an immoral life. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

9. Very slight evidence, if any. Barricklow v. Stewart [Ind.] 72 N. E. 128.

10. Unless supposed communications refer to disposition of property. In re Randall [Me.] 59 A. 552. Not error in a suit to contest a will to give special charge to the effect that the testatrix's belief in spiritualism does not afford ground for setting the will aside, where the charge as requested does not set forth all the facts brought out at the trial concerning the testatrix's belief and practice of spiritualism. Schoch v. Schoch, 6 Ohio C. C. (N. S.) 110.

11. Cannot of itself be evidence of an insane delusion or of monomania. Truth or falsity cannot be demonstrated. Belief in Swedenborgianism, and enthusiasm manifested in propagating that faith. Scott v. Scott, 212 Ill. 597, 72 N. E. 708.

12. Not delusional insanity. Held error not to have stricken certain grounds of caveat on demurrer. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

13. Unusual and irregular habits, known as personal eccentricities, do not incapacitate one, unless they have been indulged in to such an extent as to amount to insanity. Fact that testatrix had "spells." Lancaster v. Alden [R. I.] 58 A. 638. That one tears his own and another's hair (Story v. Story [Mo.] 86 S. W. 225), that years after execution of will testator inadvertently put on his pantaloons "hindside before" (Id.), and calling child like a dog, held insufficient to show testamentary incapacity (Id.).

14. Not sufficient to overcome presumption of sanity. Roche v. Nason, 93 N. Y. S. 565.

15. Struth v. Decker [Md.] 59 A. 727.

16. May be considered simply as a circumstance in connection with other facts, but of itself it is insufficient. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32. Any instruction which gives undue prominence to the fact of unequal distribution of property is subject to criticism and is faulty. Id. The fact that the will makes an unequal division of property among testator's family, or gives the estate to strangers to the exclusion of his own blood, will not invalidate it, if the testator had the requisite capacity and was free from undue influence. Gesell v. Baugher [Md.] 60 A. 481.

17. Does not tend to show it. In re Peterson, 136 N. C. 13, 48 S. E. 561.

18. Fact that testatrix was widow without issue, that she was not on intimate terms with relatives, that she owed beneficiary money, and recital in will that she made him beneficiary because he had been kind to her when relatives had neglected her, held sufficient explanation. Lancaster v. Alden [R. I.] 58 A. 638.

19, 20. Lancaster v. Alden [R. I.] 58 A. 638.

21. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

only in the diseased imagination of the deluded person, persisted in against undisputable evidence of its falsity.[22] A mere mistake of fact, or belief founded upon insufficient or very slight evidence, does not justify the rejection of the will.[23] A will made in pursuance of an insane delusion is invalid,[24] but such delusion must actually have influenced testator in making it, to the prejudice and injury of contestant.[25]

The law presumes every man to be sane, and to possess the requisite capacity to make a will.[26] Proof that the testator was affected with permanent insanity prior to the execution of the will,[27] or that he was delirious immediately before and after that time, places the burden of proving capacity at the moment of execution on those seeking to uphold it,[28] and in such case, the burden is not shifted by reason of the fact that the expressions and dispositions of the will are intelligent and judicious, unless it be also shown affirmatively that it was made or dictated by the testator himself, unaided and uncontrolled.[29] So too, a person who is adjudged non compos mentis, and placed under guardianship as such, is thereby rendered prima facie incapable of making a will.[30] There is a conflict of authority as to the effect of an adjudication that one is mentally incapable of taking care of himself or his property, and the appointment of a guardian for him on that ground.[31]

The question of capacity is to be determined not merely from testator's con-

22. Davenport v. Davenport [N. J. Eq.] 58 A. 535. A belief in something impossible in the nature of things, or under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason. Does not exist unless fallacy can be certainly demonstrated. Scott v. Scott, 212 Ill. 597, 72 N. E. 708. Subject-matter must have no foundation in fact, and must spring from diseased intellect. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

23. In re Long's Will, 43 Misc. 560, 89 N. Y. S. 555. A mistaken conclusion arrived at upon consideration of existing facts, though not justified thereby, is not such a delusion. Davenport v. Davenport [N. J. Eq.] 58 A. 535. Not a misconception which is result of an erroneous conclusion based either upon a mistake of fact or upon illogical deduction drawn from facts as they really exist. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

24. Courts cannot speculate as to whether he would have made a different will if sane, or whether will as made is result of suggestions other than such delusion. In re Long's Will, 43 Misc. 560, 89 N. Y. S. 555. Also immaterial that contest was made by collateral relatives and not by disinherited husband. Id.

25. Instructions approved. In re McKenna's Estate, 143 Cal. 580, 77 P. 461. The existence of a delusion even at the time of the execution of the will, as to particular persons or things, will not invalidate the will unless it is the product of such delusion. That certain persons were trying to poison him. Gesell v. Baugher [Md.] 60 A. 481.

26. Gesell v. Baugher [Md.] 60 A. 481; In re Nelson's Will, 97 App. Div. 212, 89 N. Y. S. 865; Solley v. Westcott, 43 Misc. 188, 88 N. Y. S. 297; In re Donohue's Will, 97 App. Div. 205, 89 N. Y. S. 871; Roche v. Nason, 93 N. Y. S. 565; In re Allison's Estate, 210 Pa. 22, 59 A. 318.

27. Gesell v. Baugher [Md.] 60 A. 481. If insanity is of a permanent character, it is presumed to continue, and the burden is on proponent to prove by a preponderance of evidence that testator was sane at the time of the execution of the will. Keely v. Moore, 25 S. Ct. 169. Where it is shown that testator was habitually insane before, about the time of, and after the making of the will, the burden of proving sanity at the moment of making the will is upon those who seek to uphold the validity of the will. Succession of Morere [La.] 38 So. 435.

28. Where deceased is shown to have had pneumonia and to have been delirious for three days before and until death, three days after its execution. In re Coughlin's Will [N. J. Eq.] 59 A. 879.

29. Succession of Morere [La.] 38 So. 435.

30. In re Cowdry's Will [Vt.] 60 A. 141. Answer to general interrogatory that testator was in good health and sane held admissible in the absence of surprise or denial of application seasonably made to cross-examine. Kelly v. Moore, 22 App. D. C. 9.

31. Adjudication under Vermont Acts 1898, p. 41, No. 58, does not render him prima facie incapable. Appointment of guardian for one old and infirm, and who had long been town charge, when she suddenly fell heir to sum of money. In re Cowdry's Will [Vt.] 60 A. 141. A decree adjudging one to be of weak mind and incapable of caring for his own property raises a presumption of his incapacity. Pa. Act June 25, 1895 (P. L. 300), providing that person for whom such guardian is appointed shall be incapable of making any contract or gift, or any instrument in writing, does not make codicil executed after appointment wholly void. In re Hoffman's Estate, 209 Pa. 357, 58 A. 665. Presumption can only be overcome by satisfactory evidence of restoration to capacity, or at least that it was executed during a lucid interval. Id.

duct and appearance at the time of the execution of the will, but from those circumstances in connection with all the circumstances leading up to that time.[32] The evidence to support a caveat on the issue of insanity must either show that the testator was of unsound mind when the will was executed, or that he was affected with permanent insanity prior to its execution.[33] Testimony to overcome the presumption of sanity and capacity must be directed to the date of the execution of the will, and must tend to show incapacity at that time.[34] Evidence of testator's bodily and mental condition both before and after that time is admissible only for the purpose of shedding light on his condition at that time.[35]

Nonexperts may give an opinion founded on observation as to testator's sanity, provided they detail the circumstances on which their conclusions are based.[36]

An inference arises from the mere fact of attestation that the subscribing witnesses believed that the testator possessed testamentary capacity at the time of the execution of the will, though there be no formal recital to that effect.[37] Their testimony and that of those present at the execution of the will is ordinarily entitled to great weight.[38] This does not apply, however, to their opinion as to testator's capacity where they had no previous acquaintance with him.[39] The evidence of persons around testator is entitled to great weight where incapacity due to senile dementia is claimed.[40] Where the mental disorder is a delusion in regard to one or several subjects, the testimony of persons with whom testator has not had occasion to speak in regard to them is of no weight.[41]

The opinion of physicians that testator was incapable of making a will is not controlling on the question of capacity, and does not preclude the court from acting on evidence satisfying him of the existence of such capacity.[42] Their testimony as to the capacity of one in regard to whom they have no personal knowledge is entitled to no greater weight than that of nonexperts who have personally observed and known him.[43] Insanity cannot be proved by the certificates of physicians for the commitment of the testator to an insane asylum in a foreign country.[44] The ordinary rules as to expert testimony apply.[45]

32. Rathjens v. Merrill [Wash.] 80 P. 754.

33. Gesell v. Baugher [Md.] 60 A. 481.

34. Gesell v. Baugher [Md.] 60 A. 481. If the opinion of the witness is desired for the purpose of proving incapacity, the inquiry must be limited to the date of the making of the will. Id.

35. Gesell v. Baugher [Md.] 60 A. 481.

36. Spencer v. Spencer [Mont.] 79 P. 320. Burns' Ann. St. 1901, § 496, requiring any one summoning more than three witnesses to testify to same facts to pay the additional costs incurred, does not apply to lay witnesses in will contest who detail facts and circumstances within their personal knowledge on which they base opinions as to capacity where such facts are not the same. Westfall v. Wait [Ind.] 73 N. E. 1089. Witnesses who have enjoyed an adequate opportunity to observe deceased's capacity. Stutsman v. Sharpless [Iowa] 101 N. W. 105. Must state facts on which opinion is predicated. In re Selleck's Will [Iowa] 101 N. W. 453. Intimate acquaintances, giving reasons for opinion. Cal. Code Civ. Proc. § 1870, subd. 10. Persons held intimate acquaintances. In re McKenna's Estate, 143 Cal. 580, 77 P. 461. Who are such acquaintances is within discretion of trial court, and his ruling will not be reversed unless abuse shown. No abuse. Id. May express an opinion as to the general capacity of the testator, to be determined from his habits, conduct and demeanor (Struth v. Decker [Md.] 59 A. 727), but not upon his capacity as affected by physical exhaustion merely, or obscuration of the mental faculties upon the near approach of death (Id.). Attorney who had known testator for 15 years properly asked his condition on day will was drawn as compared with mind as he knew him before. Id.

37. More v. More, 211 Ill. 268, 71 N. E. 988.

38. Evidence of testator's widow and son, who caveated against will (Van Riper v. Van Riper [N. J. Eq.] 59 A. 244), and of his physician, insufficient to overcome evidence of capacity (Id.).

39. Grant v. Stamler [N. J. Eq.] 59 A. 890.

40. Though not experts. In re Wendel's Will, 43 Misc. 571, 89 N. Y. S. 543.

41. In re Long's Will, 43 Misc. 560, 89 N. Y. S. 555.

42. Grant v. Stamler [N. J. Eq.] 59 A. 890.

43. Instruction erroneous. In re Peterson, 136 N. C. 13, 48 S. E. 561.

44. Kelly v. Moore, 22 App. D. C. 9.

45. See, also, Evidence, 3 Curr. L. 1334. After experts had been permitted to testify to symptoms of disease, refusal to allow them to take will, written by decedent, and point out evidence of disease in the hand-

Statutes giving the privilege of secrecy to all information acquired by a physician from his patient apply in will contests.[46]

Declarations of testator indicating constraint in certain of his acts,[47] or at variance with the provisions of the alleged will, are admissible;[48] but not his declarations, made at a time when he concededly was sane, that he would leave a certain person a certain sum on certain conditions.[49] The relations existing between testator and the beneficiaries may be shown,[50] but not those of testatrix's son to his father.[51] Evidence as to how testatrix came by her property is admissible.[52] Witnesses may testify as to general conversations with testator, embraced within a reasonable time before and after the making of the will.[53] The intrinsic evidence of the will itself arising from the unreasonableness or injustice of its provisions in reference to the amount of testator's property and the situation of his relatives may also be considered.[54] Where a will is assailed as unreasonable or unjust, evidence of the financial condition of those having claims on the bounty of deceased and likely to have been taken into consideration by him, if in a normal condition of mind, in executing his will, is admissible.[55] The rule should not, however, be extended so as to admit pooof of mere expectancies, unless of such a nature that they were likely to have been known and considered by him.[56] Where it is claimed that testator was a victim of the morphine habit, evidence that he exhibited symptoms indicating such habit is admissible as a basis for expert testimony on the subject.[57]

An application by testator for admission to an insane asylum,[58] evidence of the insanity of other members of testator's family where there has been no offer of direct proof of his insanity,[59] evidence that the principal beneficiary owned land which was exchanged in part for that devised to her,[60] evidence of previous crimes committed by testator,[61] the declarations of one having no interest in the

writing, held proper. Henning v. Stevenson, 26 Ky. L. R. 159, 80 S. W. 1135. Hypothetical question held proper. In re Peterson, 136 N. C. 13, 48 S. E. 561. Not error to exclude question as to whether expert would have made contract with testator when will was drawn. Struth v. Decker [Md.] 59 A. 727. Hypothetical question held proper cross-examination. Id. Physician properly asked whether persons in testator's condition ever rallied and regained consciousness and intelligence. Id. Instruction permitting jury to say what facts were material in procuring opinion of expert and to what extent a variance in facts would have changed his opinion, held erroneous. Stutsman v. Sharpless [Iowa] 101 N. W. 105. Charge as to expert evidence argumentative and erroneous. Buxton v. Emery [Mich.] 102 N. W. 948.

46. Wis. Rev. St. 1888, § 4075, precludes him from giving testimony as to capacity, opinion being based entirely on information derived from testator. Privilege can be waived only by patient himself. In re Hunt's Will [Wis.] 100 N. W. 874. For a full discussion of this question, see Witnesses, 2 Curr. L. 2163.

47. Westfall v. Walt [Ind.] 73 N. E. 1089.

48. Flowers v. Flowers [Ark.] 85 S. W. 242.

49. Utermehle v. Norment, 22 App. D. C. 31.

50. That three devisees lived in testatrix's house and were called by her "her boys." Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133. Evidence of friendly relations between testator and daughter practically disinherited, and care and attention bestowed on him by her. Admission of receipt from daughter for all claims not prejudicial. Piper v. Andricks, 209 Ill. 564, 71 N. E. 18.

51. That they had had fights and quarrels. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

52. To show possible motives actuating her in disposing of it. Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133.

53. Not involving execution of will, or its contents. Though not admissible for purpose of proving facts. In re McKenna's Estate, 143 Cal. 580, 77 P. 461.

54. French v. French [Ill.] 74 N. E. 403.

55. Evidence of mother's means to provide for minor beneficiaries. Stutsman v. Sharpless [Iowa] 101 N. W. 105.

56. Not proof of value of estate of grandfather of proponents. Stutsman v. Sharpless [Iowa] 101 N. W. 105.

57. Buxton v. Emery [Mich.] 102 N. W. 948.

58. Keely v. Moore, 25 S. Ct. 169.

59. Where merely claim of feebleness of health, induced by disease. Pringle v. Burroughs, 91 N. Y. S. 750.

60. Bailey v. Bailey, 26 Ky. L. R. 650, 82 S. W. 387.

61. That sold intoxicating liquor contrary to law. Lancaster v. Alden [R. I.] 58 A. 638.

estate that he knew that testatrix had made a will, and what its contents were,[62] statements of testator's mother to a physician and letters written by her,[63] the inventory and appraisement, and evidence of delinquencies on the part of the executor,[64] and evidence as to what the witness had heard in the family as to the insanity of certain of testator's ancestors, are inadmissible.[65]

Lack of capacity must be clearly established.[66]

The question of capacity is one of fact for the jury.[67]

(§ 2) *B. Constituents of fraud and undue influence.*[68]—In order to avoid the will, undue influence must be such as to destroy the free agency of the testator at the time and in the very act of making the will.[69] The true test is not so much in the nature and extent of the influence exercised as in the effect it has on the testator.[70] It may be exercised through threats or fraud.[71]

62. Husband of devisee, in whose bouse testatrix resided when will was made. In re McKenna's Estate, 143 Cal. 580, 77 P. 461.

63. Roche v. Nason, 93 N. Y. S. 565.

64. Barricklow v. Stewart [Ind.] 72 N. E. 128.

65. Roche v. Nason, 93 N. Y. S. 565.

66. In re Allison's Estate, 210 Pa. 22, 59 A. 318.

Evidence held to show capacity: Scott v. Scott, 212 Ill. 597, 72 N. E. 708; Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099; Barricklow v. Stewart [Ind.] 72 N. E. 128; Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133; In re Randall [Me.] 59 A. 552; Gesell v. Baugher [Md.] 60 A. 481; Kennedy v. Dickey [Md.] 59 A. 661; In re Clapham's Estate [Neb.] 103 N. W. 61; In re Owen's Estate [Neb.] 103 N. W. 675; Grant v. Stamler [N. J. Eq.] 59 A. 890; Van Riper v. Van Riper [N. J. Eq.] 59 A. 244; In re Wheaton's Will [N. J. Eq.] 59 A. 886; In re Middleton's Will [N. J. Eq.] 59 A. 454; Roche v. Nason, 93 N. Y. S. 565; In re De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. S. 364; In re Nelson's Will, 97 App. Div. 212, 89 N. Y. S. 865; In re Hawley's Will, 44 Misc. 186, 89 N. Y. S. 803; In re Donohue's Will, 97 App. Div. 205, 89 N. Y. S. 871; In re Wendel's Will, 43 Misc. 571, 89 N. Y. S. 543; In re Rockhill's Estate, 208 Pa. 510, 57 A. 989; Lancaster v. Alden [R. I.] 58 A. 638. Evidence and inferences from attestation of deceased witnesses. More v. More, 211 Ill. 268, 71 N. E. 988. At time of destruction of will for purpose of revoking it. Davenport v. Davenport [N. J. Eq.] 58 A. 535. Evidence insufficient to sustain finding of incapacity and such as to require submission of question to jury. In re Small's Will, 93 N. Y. S. 1065. Issue devisavit vel non refused though testator was blind and ill. In re Allison's Estate, 210 Pa. 22, 59 A. 318.

Evidence sufficient to show incapacity: Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19; Osborn v. Osborn [Iowa] 101 N. W. 83; Beebe v. McFaul [Iowa] 101 N. W. 267; Hartley v. Lord [Wash.] 80 P. 433; Rathjens v. Merrill [Wash.] 80 P. 754. Where testatrix was aged and childish. Gutman v. Turner [Ky.] 85 S. W. 185. Verdict of incapacity not manifestly against weight of evidence. Piper v. Andricks, 209 Ill. 564, 71 N. E. 18; French v. French [Ill.] 74 N. E. 403; In re Selleck's Will [Iowa] 101 N. W. 453. Evidence insufficient to support surrogate's finding of capacity. In re Goodwin's Will, 95 App. Div. 183, 88 N. Y. S. 734.

Evidence insufficient to show execution during lucid interval: In re Coughlin's Will [N. J. Eq.] 59 A. 879.

67. Henning v. Stevenson, 26 Ky. L. R. 159, 80 S. W. 1135.

68. See 2 Curr. L. 2083.

69. Must amount either to deception, or to force and coercion, destroying free agency. Caveat held to sufficiently allege undue influence. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306. If any degree of free agency or capacity remains, so that, when left to himself he is capable of making a will, the influence must be such as is intended to mislead him to the extent of making a will essentially contrary to his duty. Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099. Must deprive testator of free agency, and render will not his free and unconstrained act, such as, he is too weak to resist. Kennedy v. Dickey [Md.] 59 A. 661. It is insufficient to show merely that there was influence affecting testator's disposition of his property, but it must also appear that he was thereby deprived of his free agency and prevented from exercising his judgment and choice. Id. Must amount to overpersuasion, coercion, or force, destroying the free agency and will power of the testator. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32. Must appear some element of dominance over the will of the testator, by which he is constrained to do that which, save for the force exerted over him, he would not have done. Davenport v. Davenport [N. J. Eq.] 58 A. 535; In re McLaughlin's Will [N. J. Eq.] 59 A. 892. Evidence insufficient to show seclusion of testator by beneficiary for the purpose of having him under control, so as to shift burden of repelling inference of undue influence. Davenport v. Davenport [N. J. Eq.] 58 A. 535. Must appear that influence was sufficient to overcome testator's will, and conclusion must be inevitable that his mentality was reduced to helplessness, and that he succumbed to influence making his will another's. In re Hawley's Will, 44 Misc. 186, 89 N. Y. S. 803. Testator must become mere instrument of another's craft and his testament that of a superior will. In re Allison's Estate, 210 Pa. 22, 59 A. 318. Must destroy freedom of his will, and thus render instrument more the offspring of the will of others than his own. Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099. Instructions in regard to undue influence and credibility of witnesses misleading.

A mere showing that one had influence over testator,[72] or had an opportunity to exert undue influence with a motive for exercising it, is insufficient;[73] nor do such facts alone cast the burden of proof on the beneficiary,[74] though they may do so in connection with sufficient other facts.[75]

The influence must be specially directed toward procuring a will in favor of particular parties,[76] and must have proved successful to some extent.[77] Influence exerted merely to induce the making of a will while leaving the testator free as to its provisions is not undue.[78] It must not be merely the influence of affection or attachment, nor the desire of gratifying the wishes of one beloved and trusted by the testator.[79]

Where the testator has capacity and a present knowledge of the contents of the will, which is executed according to law, the influence to avoid it must amount to force or coercion.[80] The will of a person of sound mind will not be set aside on evidence showing only a possibility or suspicion of undue influence,[81] but in such case strong evidence of such influence is necessary.[82] On the other hand, where there is extreme age and possible susceptibility to influence, all the facts and circumstances surrounding the parties when the will was made will be carefully considered.[83]

The mere fact that testator changes his will so as to make one with whom he has not been on good terms the principal beneficiary thereunder,[84] or that he prefers others to his relatives,[85] or divides his property unequally,[86] or unnaturally,[87] or appeals to one in whom he has great confidence for advice and assistance in the management of his affairs,[88] or that there is a discordance between the will as executed and testator's previously expressed intention,[89] are not of themselves sufficient to show undue influence, though they may be considered in corroboration of other evidence.

Solicitations and persuasion,[90] particularly when made by a wife and chil-

Weston v. Teufel, 213 Ill. 291, 72 N. E. 908. Undue influence is a relative term. Bailey v. Balley, 26 Ky. L. R. 650, 82 S. W. 387.

70. Whatever its nature and extent, it vitiates will, if cannot resist it because of physical or mental weakness and nature and persistency of influence, and it deprives him of his free agency. Appeal of O'Brien [Me.] 60 A. 880.

71. In re Allison's Estate, 210 Pa. 22, 59 A. 318. To show duress, threats, or force. In re Small's Will, 93 N. Y. S. 1065.

72. Must be shown that influence was unduly or unjustly exercised. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

73. In re Hawley's Will, 44 Misc. 186, 89 N. Y. S. 803; Grant v. Stamler [N. J. Eq.] 59 A. 890; Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

74. Relationship and opportunity. In re Sperl's Estate [Minn.] 103 N. W. 502.

75. May make out a prima facie case of undue influence so as to cast burden upon the principal beneficiary. Facts and circumstances shown held insufficient to shift burden to proponent. In re Sperl's Estate [Minn.] 103 N. W. 502.

76, 77. Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099.

78. Struth v. Decker [Md.] 59 A. 727; Appeal of O'Brien [Me.] 60 A. 880; Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099.

79. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

80. Must be proved that it was obtained thereby. In re Nelson's Will, 97 App. Div. 212, 89 N. Y. S. 865.

81. Kennedy v. Dickey [Md.] 59 A. 661.

82. Where it appears that testator's mind, memory and understanding were unimpaired. No evidence, and issue devisavit vel non properly refused. In re Rockhill's Estate, 208 Pa. 510, 57 A. 989.

83. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

84. Slater v. Slater, 209 Pa. 194, 58 A. 267.

85. Lancaster v. Alden [R. I.] 58 A. 638. Devise by widow to husband's physician, where had no very close relatives, and long standing indifference, if not dislike, to those she had, held valid. In re Rockhill's Estate, 208 Pa. 510, 57 A. 989.

86. Kennedy v. Dickey [Md.] 59 A. 661; Gessell v. Baugher [Md.] 60 A. 481.

87. Gessell v. Baugher [Md.] 60 A. 481. May be evidence of it. In re Warnock's Will, 92 N. Y. S. 643. Does not shift burden of proof. Id.

88. Fact that testatrix appeals to brother not sufficient ground for claim that he improperly influenced her in favor of his children. In re McLaughlin's Will [N. J. Eq.] 59 A. 892.

89. Struth v. Decker [Md.] 59 A. 727.

90. In re Allison's Estate, 210 Pa. 22, 59

dren,[91] advice, suggestions, reasons, or arguments addressed to testator's judgment and adopted by him,[92] and honest and moderate intercession or persuasion, unaccompanied by fraud, deceit, or threats,[93] do not of themselves constitute undue influence.

No presumption of undue influence arises from the existence of meretricious relations between the testator and beneficiary,[94] or from the fact that testator leaves his property to his wife to the exclusion of collateral kin,[95] or because he took sides with a beneficiary in a quarrel.[96]

A will procured by misrepresentations or fraud of any kind, to the injury of the heirs at law, is void.[97] So too a will is invalid which is the result of a mistake of fact on the part of testator.[98] Such mistake need not appear on the face of the will.[99] A mere error of judgment is insufficient.[1]

On an issue of undue influence, testamentary capacity will be presumed,[2] but, since a weak mind is more easily influenced than a strong one, testator's precise mental condition may be shown.[3]

The relations existing between testator and the beneficiaries, or the natural objects of his bounty,[4] but not those of testatrix's son with his father,[5] evidence as to how testatrix came by her property,[6] conditions of which testator was ignorant, but which may nevertheless have influenced him,[7] the acts and declarations of one alleged to have exerted undue influence when advised to have another will

A. 318. If has sufficient capacity to properly weigh and consider them, and to resist them if he so desires. Appeal of O'Brien [Me.] 60 A. 880.

91. Davenport v. Davenport [N. J. Eq.] 58 A. 535.

92. If intelligently and freely adopted. Appeal of O'Brien [Me.] 60 A. 880.

93. Kennedy v. Dickey [Md.] 59 A. 661.

94. Must be proof that mistress exerted influence directly in procuring will in her favor. In re Middleton's Will [N. J. Eq.] 59 A. 454; In re Lewis' Estate [Pa.] 60 A. 260. Mere proof of unlawful cohabitation is insufficient, especially where the person charged with exercising the undue influence died 16 days before the execution of the will and 6 months before the execution of a codicil reaffirming it. Stant v. American Security & Trust Co., 23 App. D. C. 25.

95. In re Peterson, 136 N. C. 13, 48 S. E. 561. Where aged testator bequeathed over one-third of his estate to his wife, held insufficient to raise a presumption of undue influence. Rewell v. Warden, 4 Ohio C. C. (N. S.) 545. Not established by the fact that she was his third wife and treated him with great kindness, anticipating his wants and aiding him in his affairs. Id.

96. With granddaughter as against daughters. Stant v. American Security & Trust Co., 23 App. D. C. 25.

97. Ga. Civ. Code 1895, § 3261. Allegations of caveat sufficient. Not necessary to set out evidence. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

98. Ga. Civ. Code 1895, § 3262. As to conduct of heir. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306. Codicil held not to show mistake of fact amounting to a fraud or delusion, in regard to gift of business to son during testator's lifetime. Solley v. Westcott, 43 Misc. 188, 88 N. Y. S. 297.

99. Demurrer properly overruled. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

1. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306. Will be presumed that caveator had in mind such a mistake as is referred to in statute, and not mere mistaken belief, such as would afford no ground for caveat. Need not allege facts negativing unwarranted inference to contrary. Demurrer properly overruled. Id.

2. Kennedy v. Dickey [Md.] 59 A. 661; Struth v. Decker [Md.] 59 A. 727.

3. Kennedy v. Dickey [Md.] 59 A. 661. Mental capacity and strength of mind may be considered. Appeal of O'Brien [Me.] 60 A. 880. Any competent evidence tending to prove mental condition at a date sufficiently recent to affect his susceptibility to undue influence is admissible. In re Sperl's Estate [Minn.] 103 N. W. 502.

4. Evidence that three devisees lived in testatrix's house and were called by her "her boys." Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133. Evidence of the friendly relation between testator and a daughter, partially disinherited, and of the care and attention bestowed on him by her. Piper v. Andricks, 209 Ill. 564, 71 N. E. 18. The admission of a receipt from the daughter to testator for all claims against him for care and support is not prejudicial. Id.

5. Evidence that they had engaged in fights and quarrels. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

6. To show the possible motives which actuated her in disposing of it. When testatrix left her second husband only the estate she received from her father, it is permissible to show what estate she received from her first husband. Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133.

7. Since a testator may have been influenced by conditions of which he did not know the cause. Rapp v. Becker, 4 Ohio C. C. (N. S.) 139.

written,[8] and the contents of a prior will, may be shown.[9] The intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions in reference to the amount of testator's property and the situation of his relatives, may also be considered.[10]

Evidence that the principal beneficiary owned land which was exchanged in part for that devised to her,[11] evidence of crimes committed by the testator,[12] the declarations of one having no interest in the estate that he knew that testatrix had made a will, and what its contents were,[13] declarations of testator indicating constraint in certain of his acts,[14] his declarations as to coercion alleged to have been exerted over him when he executed a former will, in the absence of a showing that it continued,[15] his statements made after the execution of the will,[16] and the inventory and appraisement and evidence of alleged delinquencies of the executor, are inadmissible.[17]

The rule that courts of equity may set aside gifts to one standing in confidential or fiduciary relations to the donor applies to gifts made by will.[18] There is a conflict of authority as to the effect of the existence of confidential or fiduciary relations between the testator and the principal beneficiary under the will. Some courts hold that the burden is thereby placed on the beneficiary to show that his influence did not overcome testator's free agency.[19] Others that the burden may thereby be shifted in certain cases.[20] Others hold that proof of such relations is prima facie evidence of the exercise of undue influence,[21] and casts upon the proponent the necessity of showing that the execution of the will was not the result thereof,[22] but does not change the rule that upon the whole case the burden is on contestant to establish undue influence.[23] Still others hold that the burden is still on contestants,[24] but that the existence of such relations may, in connection with other facts and circumstances, make a case requiring explanation, and which will impose on proponent the burden of satisfying the court that the will was the free, untrammeled and intelligent expression of testator's wishes and intentions,[25] or

8. To rebut evidence of such influence. In re Peterson, 136 N. C. 13, 48 S. E. 561.

9. To show intention before influence brought to bear. In re Selleck's Will [Iowa] 101 N. W. 453.

10. French v. French [Ill.] 74 N. E. 403.

11. Wife. Bailey v. Bailey, 26 Ky. L. R. 650, 82 S. W. 387.

12. That testatrix sold intoxicating liquor in violation of law. Lancaster v. Alden [R. I.] 58 A. 638.

13. Husband of devisee, in whose house testatrix resided when will was made. In re McKenna's Estate, 143 Cal. 580, 77 P. 461.

14. Only competent on issue of unsoundness of mind. Westfall v. Wait [Ind.] 73 N. E. 1089.

15. In re Clapham's Estate [Neb.] 103 N. W. 61.

16. Rapp v. Becker, 4 Ohio C. C. (N. S.) 139.

17. Barricklow v. Stewart [Ind.] 72 N. E. 128.

18. Particularly applicable to gifts by parent to child. In re Sperl's Estate [Minn.] 103 N. W. 502.

19. In re Birdseye [Conn.] 60 A. 111. The law presumes that a will made by a ward in favor of the guardian is the result of undue influence. Establishes prima facie the existence of such influence, so as to defeat will unless and until it is overcome by counterproof. Does more than shift burden. Evidence insufficient. In re Cowdry's Will [Vt.] 60 A. 141.

20. Grant v. Stamler [N. J. Eq.] 59 A. 890.

21. Where the will is written or its preparation is procured by a beneficiary standing in such a relation to the testator that the latter reposes trust and confidence in him. Weston v. Teufel, 213 Ill. 291, 72 N. E. 908.

22. Weston v. Teufel, 213 Ill. 291, 72 N. E. 908. Proof of such facts standing alone, and undisputed by other evidence, entitles contestants to a verdict. Id.

23. Presumption arising from proof of fiduciary relations may or may not be preponderance of all the evidence. Weston v. Teufel, 213 Ill. 291, 72 N. E. 908.

24. Petition to revoke probate of codicil. In re Hawley's Will, 44 Misc. 186, 89 N. Y. S. 803. By the fact that the proponent, who receives a considerable bequest thereunder, and drew the will or took an active part in its preparation, occupied a confidential relation to testator. Burden, in its technical and proper sense, does not shift during trial so long as parties remain at issue upon proposition affirmed on one side and denied on other. Appeal of O'Brien [Me.] 60 A. 880.

25. In re De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. S. 364. Fact of confidential rela-

that the relations, in the absence of some explanation, may be an additional fact of more or less weight, in the nature of evidence,[26] the question still remaining one of fact.[27] In any event, where a person largely benefited by a will has much to do with its preparation, the facts and circumstances surrounding its making will be carefully scrutinized.[28]

Fraud and undue influence will not be presumed but must be proved by the party alleging their existence.[29]

The question of undue influence is for the jury,[30] and judgment should be rendered, notwithstanding the verdict, only in cases where it is clear, upon the whole record, that the moving party is, as a matter of law, entitled to judgment on the merits.[31]

§ 3. *The testamentary instrument or act. A. Requisites, form, and validity.*[32]—An instrument or gift is testamentary in character which passes no interest or right in the property referred to until after the death of the maker.[33] If some present interest passes, it is not testamentary, even though the right to

tions not conclusive. Physician. In re Small's Will, 93 N. Y. S. 1065. No presumption of fraud arises from the fact that the chief beneficiary under the will had control of decedent's estate during his lifetime. In re De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. S. 364. Evidence of confidential relations held not sufficient to raise presumption of undue influence. In re Small's Will, 93 N. Y. S. 1065.

26, 27. Appeal of O'Brien [Me.] 60 A. 880.

28. Appeal of O'Brien [Me.] 60 A. 880. Large bequests to one child, having opportunity to exert undue influence, to exclusion of others, will be regarded with extreme circumspection, and will be avoided unless clearly appear to have been righteous. In re Sperl's Estate [Minn.] 103 N. W. 502.

29. In re Nelson's Will, 97 App. Div. 212, 89 N. Y. S. 865. Must be clearly established. In re Allison's Estate, 210 Pa. 22, 59 A. 318. Where there is no evidence of undue influence, it is proper to instruct the jury that the evidence in the case can be considered only on the question of capacity. Barricklow v. Stewart [Ind.] 72 N. E. 128.

Evidence insufficient to show undue influence: Woodman v. Illinois Trust & Sav. Bank, 211 Ill. 578, 71 N. E. 1099; Scott v. Scott, 212 Ill. 597, 72 N. E. 708; Westfall v. Wait [Ind.] 73 N. E. 1089; Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133; Appeal of O'Brien [Me.] 60 A. 880; Struth v. Decker [Md.] 59 A. 727; Kennedy v. Dickey [Md.] 59 A. 661; In re Owen's Estate [Neb.] 103 N. W. 675; In re McLaughlin's Will [N. J. Eq.] 59 A. 892; Grant v. Stamler [N. J. Eq.] 59 A. 890; In re Nelson's Will, 97 App. Div. 212, 89 N. Y. S. 865; In re Hawley's Will, 44 Misc. 186, 89 N. Y. S. 803. Slater v. Slater, 209 Pa. 194, 58 A. 267; Lancaster v. Alden [R. I.] 58 A. 638. Evidence held to warrant setting aside verdict finding undue influence, and granting new trial. In re Birdseye [Conn.] 60 A. 111. To establish a conspiracy on the part of two of testatrix's children to unduly influence her. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32. Direction of verdict proper. In re Clapham's Estate [Neb.] 103 N. W. 61. To sustain finding by surrogate of undue influence, held to require submission of question to jury. In re Small's Will, 93 N. Y. S. 1065. To procure revocation of will. Davenport v. Davenport [N. J. Eq.] 58 A. 535. By mistress. In re Middleton's Will [N. J. Eq.] 59 A. 454; In re Lewis' Estate [Pa.] 60 A. 260. Though will written by testator's brother and witnessed by latter's wife, and brother's children principal beneficiaries, and testator was blind and ill. Issue refused. In re Allison's Estate, 210 Pa. 22, 59 A. 318. By one having control of estate. In re De Vaugrigneuse's Will, 46 Misc. 49, 93 N. Y. S. 364.

Evidence sufficient: Where testatrix was aged and childish, held evidence. Gutman v. Turner [Ky.] 85 S. W. 185. To require submission of question to jury. Buxton v. Emery [Mich.] 102 N. W. 948. To support verdict. French v. French [Ill.] 74 N. E. 403. Motion to instruct that there was no evidence of undue influence, properly denied. Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19.

30. In re Sperl's Estate [Minn.] 103 N. W. 502.

31. Evidence held not to have so conclusively failed to show undue influence as to justify granting of motion. In re Sperl's Estate [Minn.] 103 N. W. 502.

32. See 2 Curr. L. 2088.

33. One not intended to take effect until after the maker's death. Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471. If intention that it shall not convey present interest but shall be revocable during maker's lifetime. Cribbs v. Walker [Ark.] 85 S. W. 244. A writing in whatever form, if manifesting an intention to give the writer's property to another, and to take effect on the writer's death, is properly construed as a will. Declaration of trust signed in duplicate. Boatman v. Estate of Boatman, 105 Ill. App. 40.

Held testamentary in character: Verbal gift of stock certificates. Noble v. Garden [Cal.] 79 P. 883. Letter directing disposition of deposit to be made after writer's death. De Martini v. Allegretti [Cal.] 79 P. 871. Letter referred to in will. Bryan v. Bigelow [Conn.] 60 A. 266. Unsigned memorandum on back of demand note directing that, if not paid in full before payee's death, maker should expend amount due for payee's funeral expenses, for monument and for caring for grave. Moore v. Weston [N. D.] 102 N. W. 163.

possession is postponed,[34] the question in all cases being one of intention.[35] A power of revocation does not necessarily stamp an instrument as a will.[36]

A joint or mutual will executed by two persons is valid, provided that it can be given effect on the death of either so far as his property is concerned.[37]

(§ 3) *B. Execution of will.* 1. *Mode of execution.*[38]—As a general rule a will devising realty must be executed in accordance with the laws of the state where the property is situated, while a will of personalty is sufficient if executed in accordance with those of testator's domicile.[39] The law in force at the time of the testator's death governs.[40]

In order that a testamentary disposition of property may be valid, the statutory requirements as to execution must be strictly complied with,[41] and the intention of the testator cannot be considered in determining the sufficiency of the will in this regard.[42]

34. Wills take effect in the future upon testator's death, while declarations of trust take effect in praesenti during the life of the settlor. Declaration held not testamentary in character. Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92. Where property is disposed of in praesenti by a declaration of trust, so that title is intended to vest before the settlor's death, such disposition is valid, though possession does not pass until his death, or the enjoyment is contingent on the survivorship of another, or some other provisions look to a distribution after the settlor's death. Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92.

Held not testamentary: A deed from a husband to his wife, containing apt words of conveyance, and directing her to hold the property on certain trusts for the grantor, the trustee and the grantor's children, and reserving a right of revocation, and a right in the trustee to direct conveyances. Cribbs v. Walker [Ark.] 85 S. W. 244. Deed of life tenant to owner of fee, providing that after grantor's death his estate should pay to grantee's children the amount paid as consideration. Parker v. Walls [Ark.] 86 S. W. 849. Assignment. Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471. Instrument having form and all requisites of deed and purporting to make absolute conveyance, though grantor reserved right to possession for life. Jones v. Lingo, 120 Ga. 693, 48 S. E. 190; Griffith v. Douglas, 120 Ga. 582, 48 S. E. 129. Fact that it is signed by three witnesses may be of importance if character is doubtful, but cannot operate to change deed into will. Jones v. Lingo, 120 Ga. 693, 48 S. E. 190. Declaration of trust. Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92.

35. Robb v. Washington & J. College, 103 App. Div. 327, 93 N. Y. S. 92. To be derived from whole instrument read in light of surrounding circumstances. Cribbs v. Walker [Ark.] 85 S. W. 244.

36. Cribbs v. Walker [Ark.] 85 S. W. 244.

37. Unless disposition of property suspended after death of one until death of other so that it cannot be probated as separate will of each. Gerbrich v. Freitag, 213 Ill. 552, 73 N. E. 338. Disposition of lands to devisees not suspended by fact that beneficial use vested in husband, and hence will properly probated as that of wife. Id.

38. See 2 Curr. L. 2089.

39. A foreign will cannot operate to pass title to realty in Georgia unless it is executed in accordance with the laws of that state, even though it is sufficient under the laws of the state where it is made. Civ. Code 1895, § 3299. Foreign will attested by only two witnesses cannot operate to revoke former will executed in Georgia devising realty. Castens v. Murray [Ga.] 50 S. E. 131; Janes v. Dougherty [Ga.] 50 S. E. 954. Validity of will made in Louisiana by citizen of that state, devising realty situated in Mississippi, must be tested by laws of Mississippi. Succession of Hasling [La.] 38 So. 174. A nonresident may devise realty by a will executed in accordance with the laws of the state where it is situated, and bequeath personalty by a will executed either in accordance with the laws of its situs or of the state where the will is executed. B. & C. Comp. Or. § 5561. Will and codicil not attested held insufficient to pass title to realty. Montague v. Schieffelin [Or.] 80 P. 654. The law of the place where the property is situated. Applies to foreign wills executed outside the United States. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

40. Colonna v. Alton, 23 App. D. C. 296.

41. As to what instruments are testamentary, see § 3, ante. De Martini v. Allegretti [Cal.] 79 P. 871; Noble v. Garden [Cal.] 79 P. 883; Moore v. Weston [N. D.] 102 N. W. 163; Savage v. Bowen [Va.] 49 S. E. 668. Letter referred to by will but not sufficiently incorporated therein so as to make it a part thereof, and not executed as a will, held not to create valid trust, it being of testamentary character and not intended to take effect until after death. Bryan v. Bigelow [Conn.] 60 A. 266. Where mother deposited money in bank in name of self or daughter, or survivor of them, with intent that, at her death, daughter should have it, held insufficient as testamentary disposition thereof. Kelly v. Home Sav. Bank, 44 Misc. 102, 89 N. Y. S. 776, rvd. on other grounds 92 N. Y. S. 578. Evidence held to show due execution. In re Small's Will, 93 N. Y. S. 1065; In re Nelson's Will, 97 App. Div. 212, 89 N. Y. S. 865.

42. Parol evidence inadmissible to show that intended place where he signed to be end of will, if in fact it is not. In re Seaman's Estate [Cal.] 80 P. 700. Courts look to the intention of the legislature rather

Matter attempted to be inserted must be plainly referred to, and be susceptible of certain identification.[43] In order that an extrinsic paper may be incorporated therein by reference, it must be in existence at the time of the execution of the will,[44] and must be described in clear and definite terms.[45] A reference defective in these particulars cannot be aided by parol.[46]

Where sheets of paper constituting a will are found bound together at testator's death, the presumption is that they were so bound together at the time of its execution.[47]

The will must be executed animo testandi.[48] Testator must know its contents and that it is his will which he is signing.[49] If, after its execution, he has it in his possession a sufficient length of time and with the opportunity and ability to acquaint himself with its contents, he will be presumed to have read it,[50] and if, after such opportunity, he preserves it, the presumption that it was prepared in accordance with his instructions becomes conclusive, particularly where it follows his pronounced intentions, and provides for no unnatural distribution of his property.[51]

In some states the will must be signed by the testator at the end thereof,[52] that is, the signature must be written at the termination of the testamentary provisions.[53] It need not be in immediate juxtaposition with the concluding words of the instrument, but must be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes.[54]

than to that of the testator. Irwin v. Jacques [Ohio] 73 N. E. 683.

43. Irwin v. Jacques [Ohio] 73 N. E. 683.

44. Held not to appear that letter referred to was in existence. Whether such paper may be incorporated at all not decided. Appeal of Bryan [Conn.] 58 A. 748.

45. Reference to letter "which will be found with this will" insufficient. Appeal of Bryan [Conn.] 58 A. 748; Bryan v. Bigelow [Conn.] 60 A. 266. Separate paper containing trust provisions, identifying beneficiaries and their interests, held properly construed in connection with the will, and as a part thereof. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931.

46. Appeal of Bryan [Conn.] 58 A. 748; Bryan v. Bigelow [Conn.] 60 A. 266.

47. Roche v. Nason, 93 N. Y. S. 565. Evidence held sufficient to establish that two sheets of paper purporting to be a codicil were executed at the same time and constituted a single instrument, though fastened together in inverse order. In re Dake's Will, 90 N. Y. S. 213.

48. Finding that testator told scrivener, who was also witness, that instrument was a "fake, made for a purpose," held fatal to its validity. Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499. This result not obviated by further finding that testator meant that he did not intend to complete instrument by having it signed and attested by two other witnesses. Id. When the will is acknowledged before each of the witnesses separately, the animus testandi must exist at the time of each acknowledgment. Where does not exist when first witness signs, will not be rendered valid by fact that it does exist when other two sign, three witnesses being necessary. Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499.

49. Evidence sufficient. In re McLaughlin's Will [N. J. Eq.] 59 A. 892. Evidence held to show that makers of joint will understood its contents and executed it according to law. Gebrich v. Freitag, 213 Ill. 552, 73 N. E. 338. Where joint will gave husband full beneficial use of entire property for life, and he was not deceived with reference thereto, and no issue of fraud was involved, exclusion of evidence that he refused to sign until assured that he was to receive entire property in case of wife's prior death, held not error. Id. Evidence held to show that foreigner understood contents of will, and that same was properly executed through interpreter. In re Wendel's Will, 43 Misc. 571, 89 N. Y. S. 543.

50, 51. In re McLaughlin's Will [N. J. Eq.] 59 A. 892.

52. Rev. St. § 5916. Irwin v. Jacques [Ohio] 73 N. E. 683. Cal. Civ. Code, § 1276. In re Seaman's Estate [Cal.] 80 P. 700. Ky. St. 1903, §§ 468, 4828. Ward v. Putnam [Ky.] 85 S. W. 179.

53. In re Seaman's Estate [Cal.] 80 P. 700. Where dispositive clause was written vertically on margin without anything to show where it was to be read in relation to rest of will, and evidence showed that it was written at request of testator after all the other provisions and before he attached his signature, held that will was not signed at end. Instruction approved. Irwin v. Jacques [Ohio] 73 N. E. 683. Such clause can only be regarded as surplusage where it has no legal signification and no effect on other provisions. Clause providing that anyone contesting should take nothing, held dispositive. Id.

54. Signature on outside of folded instrument on different page, held insufficient. In re Seaman's Estate [Cal.] 80 P. 700. Suffi-

It is sufficient if the testator adopts the signature of some one else by making his mark.[55] It will not be presumed that he signed the will from the fact that its body is in his handwriting.[56]

Testator must sign or acknowledge the will in the presence of the statutory number of witnesses,[57] who must sign it in his presence.[58] An attestation in the same room is prima facie in testator's presence,[59] and in a different room, prima facie not in his presence.[60] In some states testator must sign first.[61] The acknowledgment may be made before each witness separately.[62]

cient though signatures of witnesses are separated by a small space from the signature of the testator, such space being occupied by written matter put there by the attorney drawing the will. Ward v. Putnam [Ky.] 85 S. W. 179. If an unsigned clause following the signature adds to or revokes previous bequests, the whole instrument is invalid; but if the clause added below the signature does not affect the disposition of the estate, it is usually held not to invalidate the instrument. Id. Such statutes held complied with where unsigned clause following signature provided for the appointment of executors with power to sell if necessary; such clause not being essential to the validity of the instrument, under Ky. St. 1903, §§ 3891, 3892. Id.

55. Sufficient evidence as to signing to justify instruction. Mann v. Balfour [Mo.] 86 S. W. 103.

56. In re Burtis' Will, 43 Misc. 437, 89 N. Y. S. 441.

57. B. & C. Comp. §§ 5548, 5575. Foreign will and codicil not attested held insufficient to pass title. Montague v. Schieffelin [Or.] 80 P. 654. Otherwise insufficient to pass title to realty. Janes v. Dougherty [Ga.] 50 S. E. 954. Under District of Columbia Code, § 1626, an unattested will of personalty is void. Colonna v. Alton, 23 App. D. C. 296. In some states three witnesses are necessary. Mass. Rev. Laws, c. 135, § 1. Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499. Georgia. Janes v. Dougherty [Ga.] 50 S. E. 954; Castens v. Murray [Ga.] 50 S. E. 131. A will not attested by the requisite number of witnesses is void on its face, and can derive no aid from probate and being admitted to record. Two witnesses. Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694.

58. In re Beggans' Will [N. J. Eq.] 59 A. 874. Is not necessary that he should actually see them sign, but is sufficient if he has knowledge of their presence and knows what they are doing, and can, if so disposed, readily see them sign, though some slight physical exertion may be necessary to enable him to do so. Healey v. Bartlett [N. H.] 59 A. 617. Signature in room across hall from that in which testator was confined to his bed by a broken leg, held sufficient. Id. Evidence of experiment admissible as against objection of irrelevancy. Id. Must be present at the same time, and must subscribe in testator's presence [Va. Code 1887, § 2544; Code 1904, P. 1297]. Savage v. Bowen [Va.] 49 S. E. 668. It is not necessary that each witness, prior to signing, should know that the other was to be an attesting witness, and that such other had been requested to act in that capacity. Id.

59. In re Beggans' Will [N. J. Eq.] 59 A. 874.

60. Evidence insufficient to overcome presumption. In re Beggans' Will [N. J. Eq.] 59 A. 874.

NOTE. Attestation "in presence of testator:" Where the weight of testimony showed a will to have been subscribed by the witnesses in a room adjoining that in which decedent lay, but the subscribing witnesses might possibly have been seen by decedent by changing her position, held, in the absence of proof that decedent actually placed herself in position to see the witnesses sign, the will is void. In re Beggans' Will [N. J. Eq.] 59 A. 874.

The decision is noticeable only in that it evinces a determination to follow the narrow and technical construction of that clause of the statute of frauds which requires wills to be subscribed by witnesses "in the presence of the testator"; which construction is supported by the overwhelming weight of authority, but seems, in many cases, to defeat, rather than promote, the object of the statute. Thus, it is held that the tests of presence are vision and mental apprehension. Jarman, Wills, p. 87. It is not necessary, even under this rule, that the testator actually see the witnesses sign, but he must be in such position that he can, if he has his eyesight, see them sign if he so chooses. 29 Am. & Eng. Enc. Law, 210; Ambre v. Welshaar, 74 Ill. 109; Reynolds v. Reynolds, 1 Spears [S. C.] 253, 40 Am. Dec. 599. The courts of three states, at least, have broken away from this construction, and have abandoned vision as an exclusive test of presence. Sturdivant v. Birchett, 10 Grat. [Va.] 67; Riggs v. Riggs, 135 Mass. 238; Cook v. Winchester, 81 Mich. 581. These cases announce the doctrine that where the testator is in hearing distance, is conscious of all that is taking place, and expressly signifies his approval, and where no fraud is practiced, the subscription of the witnesses will be upheld as valid even though done outside the testator's line of vision. It would seem that the decision reached in these latter cases throws around the execution of the will all the safeguards provided by the generally accepted rule, and at the same time escapes the probability of defeating the intentions of testators by the too technical constructions of a statute designed for their benefit. See an article by James Schouler, "In Presence of a Testator," 26 Am. Law Rev. 857.—3 Mich. L. R. 591.

61. Evidence held to show that witnesses signed first. In re Beggans' Will [N. J. Eq.] 59 A. 874.

62. Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499.

The testator must inform the witnesses that the instrument is his will,[63] but they need not know its contents,[64] nor need they be expressly requested to attest it.[65] The fact that the witness attaches his official certificate of acknowledgment or that his official title follows his name does not render the attestation invalid.[66]

A formal attestation clause is not necessary.[67] A perfect attestation clause is, however, prima facie evidence of all the facts therein stated,[68] and in the absence of any attestation clause, the proponent must affirmatively prove the actual performance of all the required acts.[69] So too, where the attestation

63. Declarations before signature held sufficient publication. In re Breining's Estate [N. J. Eq.] 59 A. 561. Evidence held to show publication. In re Beggans' Will [N. J. Eq.] 59 A. 874. The declaration need not be by word, but any method by which he clearly and distinctly makes the fact known to them is sufficient. In re Breining's Estate [N. J. Eq.] 59 A. 561; Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

64. Need not be able to testify that provisions of will when offered for probate are same as were when will was executed. Roche v. Mason, 93 N. Y. S. 565.

65. Request may be implied from facts and circumstances. Savage v. Bowen [Va.] 49 S. E. 668. Need not be made at some time prior to their signing. Id. Where witnesses to will testified that testator requested that it be written, and that it was written, read to and signed by the testator, held sufficient to show proper execution, though both witnesses denied that they were requested to sign by testator. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

66. Keely v. Moore, 25 S. Ct. 169, afg. 22 App. D. C. 9.

Note: In the case last cited a will was executed in England disposing of realty in the District of Columbia, the statute of the latter place requiring three witnesses. At the foot of the will appeared the signature of the testator, followed by an attestation clause signed by two witnesses. Still lower down, and bearing date of the day following the execution of the will, appeared a certificate of acknowledgment of the testator's signature, signed by one John H. Cooksey, Vice Consul, United States of America, and sealed with the consular seal. This certificate was added under the mistaken impression that it was necessary for the proof of the will in a foreign country. Held, a valid will.

The court adopted the view that since the official certificate was wholly without force as such, and since its language showed the vice consul actually to have been a witness, that he should be counted as such. The court says: "The facts certified are appropriate to the attestation of the instrument, and, if true, we see no reason for holding it to be invalid as an attestation because it was signed under the impression that it was necessary for some possible purpose as a certificate." Reported cases precisely in point seem to be rare. But those somewhat similar in facts go to uphold the decision in the principal case. Thus, where a sindico, describing himself as such, signed under a clause separate from the other witnesses, but it did not appear that it was intended to lend validity to the will by his official character, the sindico was counted as a witness. Adams v. Norris, 23 How. [U. S.] 353, 16 Law. Ed. 539. And where witnesses signed with a double intent, both as witnesses and to denote themselves as executors, their signatures as witnesses were held valid. Griffiths v. Griffiths, L. R. 2 Prob. & Div. 300. And where one signed a will as having written it for the testatrix, but later adopted the signature as an attestation, it was held good as such. Pollock v. Glassell, 2 Grat. [Va.] 439. So, too, where justices of the peace, county clerks, or notaries public have appended official certificates to wills under the impression that such certificates would lend aid to their validity, such officials have been counted as witnesses. Payne v. Payne, 54 Ark. 415, 16 S. W. 1; Murray v. Murphy, 39 Miss. 214; Hull's Will, 117 Iowa, 738, 89 N. W. 979; Franks v. Chapman, 64 Tex. 159. But see, as opposing the principal case, Clarke v. Turton, 1 Ves. Jr. 240, where the precise question was decided the other way.—3 Mich. L. R. 495.

67. Word "witness," "attest," or "test," sufficient, or there need be no words at all. More v. More, 211 Ill. 268, 71 N. E. 988. Will of real estate. Kelly v. Moore, 22 App. D. C. 9. Where attestation clause omits to state that it was signed by the subscriber as a witness at the request of the testator, but does state that the testator acknowledged the paper to be his will before the subscriber, it will be presumed that the testator requested the subscriber to sign as a witness. Id. Signature of witnesses all that is essential under Burns' Ann. St. Ind. 1901, § 2746. Hence fact that it is defective in form is immaterial. Barricklow v. Stewart [Ind.] 72 N. E. 128. Validity depends on conformity of execution to statutory requirements, and not on attestation clause. Id. Fact that witnesses do not attach their names to attestation clause but place them elsewhere is mere informality. Id. Use of word "executor" in attestation clause instead of "testator" mere clerical error, not misleading, and hence immaterial. Id.

68. In re Beggans' Will [N. J. Eq.] 59 A. 874; More v. More, 211 Ill. 268, 71 N. E. 988. A deposition of one of the subscribing witnesses, made before the surrogate when probate is applied for, as to the execution of the will, is admissible before the orphans' court on appeal, and, if supported by a perfect attestation clause, raises a strong presumption in favor of due execution. In re Beggans' Will [N. J. Eq.] 59 A. 874.

69. In re Beggans' Will [N. J. Eq.] 59 A. 874.

clause fails to recite the performance of some of the necessary acts, the proponent must prove their performance.[70]

"Credible" witnesses means such persons as, at the time of attestation, would be legally competent to testify in a court of justice to the facts which they attest by subscribing their names to the will.[71] Persons pecuniarily interested are not competent.[72] A subscribing witness is not disqualified by reason of the fact that his wife is a legatee.[73]

When the witnesses are dead, their signatures and that of testator must be proved by legal evidence, and also such other circumstances as show that the formalities of the statute have been complied with.[74] Proof of the signature of a witness, whose name is signed after that of another witness, does not prove the signature of the latter.[75]

The will is not invalidated by the fact that the person drawing it is named as executor.[76]

The evidence of legal execution and publication must be certain and reliable.[77] Parol evidence is admissible to contradict the statements in the instruments that it is a will; that it has been signed as such by the person named

70. That witnesses signed in testator's presence. In re Beggans' Will [N. J. Eq.] 59 A. 874.

71. Means "competent." O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090. The fact that in the county court, or upon an appeal from an order admitting a will to probate, the parties are confined to the testimony of the subscribing witnesses on the question of capacity, does not vest such witnesses with judicial power to determine that question (Id.), and consequently it is not necessary for them to be persons who would be competent to act as judges or jurors in a suit between the heirs and the devisees or legatees under the will (Id.).

72. Witness not disqualified by fact that his grandson was pecuniarily interested in sustaining will. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090.

73. Not prevented from giving evidence as to its execution, notwithstanding Gen. St. 1901, § 4771. Lanning v. Gay [Kan.] 78 P. 810.

Note: Where a devise or bequest is made to either husband or wife of an attesting witness, by the decided weight of authority such witness is thereby disqualified. Sullivan v. Sullivan, 106 Mass. 474. In arriving at this conclusion, courts are guided by the consideration that such witnesses are incompetent on account of personal interest, and that a husband and wife cannot ordinarily testify for or against each other. In some jurisdictions, however, where bequests to subscribing witnesses are void by statute, a strained interpretation makes a bequest to the husband or wife of such a witness invalid, thus rendering the witness competent by removing the objectionable element of interest. Jackson, ex dem. Beach v. Durland, 2 Johns. Cas. [N. Y.] 313. In a few jurisdictions, where a husband and wife are permitted by statute to testify for or against each other, the interest of either party in a bequest to the other is considered too remote to disqualify him or her as an attesting witness. Lippincott v. Wikoff, 54 N. J. Eq. 107. Lanning v. Gay [Kan.] 78 P. 810, which apparently holds the whole will valid, seems to have gone farther than any previous one in arriving at this result without statutory aid.—From 18 Harv. L. R. 474.

74. In re Burbank, 93 N. Y. S. 866. Will may be admitted on proof of witnesses' signatures, or on other secondary evidence, such as is sufficient to establish written contracts generally [Hurd's Rev. St. Ill. 1903, p. 1906, c. 148, § 6]. More v. More, 211 Ill. 268, 71 N. E. 988. Where, on its face, appears to have been regularly executed, proof of the genuineness of witnesses' signatures and that of the testator raises a presumption that the statutory requirements were complied with, even in the absence of an attestation clause. Id. Proof of signature is sufficient prima facie proof of attestation. Kelly v. Moore, 22 App. D. C. 9. The opinions of experts as to handwriting are valuable only when they point out satisfactory reasons for the conclusions reached. In re Burtis' Will, 43 Misc. 437, 89 N. Y. S. 441.

Admissibility of evidence: Witnesses who had seen testatrix write and were familiar with her handwriting, held qualified, as non-experts, to give opinions as to genuineness of paper offered as will. Yelton v. Black, 26 Ky. L. R. 885, 82 S. W. 634. Witnesses held not to have sufficiently qualified as experts to enable them to give opinions as to genuineness of signature of witness. In re Burbank, 93 N. Y. S. 866. Evidence of bank officers as to signature of witnesses held admissible. Savage v. Bowen [Va.] 49 S. E. 668.

75. Must prove both. In re Burbank, 93 N. Y. S. 866.

76. Fact that he was named as executor with provision appointing another in case he should be unable, or should refuse, to act, where he had no intention of acting, and refused to do so before will was probated. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090.

77. Evidence insufficient to show existence of legal attestation clause in destroyed will. Davenport v. Davenport [N. J. Eq.] 58 A. 535.

as testator, and attested and subscribed by the persons signing as witnesses.[78] The evidence of the subscribing witnesses makes out a prima facie case of due execution,[79] but other evidence is also admissible on that issue.[80] On an issue as to the validity of one of several wills, the others are admissible in evidence.[81]

The evidence of subscribing witnesses who attack the will is of little weight.[82] Declarations of testator concerning the disposition of his property are of doubtful value and cannot be accepted as controlling proof of the facts which they purport to recite.[83]

(§ 3B) 2. *Nuncupative and holographic wills.*[84] *Nuncupative wills.*[85]—Nuncupative wills are not favored,[86] and must be executed in strict conformity to the statute authorizing them.[87] It must be proved that the deceased, while uttering the words offered as a will, had not only a present testamentary intention, but also an intention to make an oral will, and that he intended the words uttered, and no others, to constitute such will.[88] It must also be proved that he did, at the time of making it, bid the persons present or some of them to bear witness that such was his will, or to that effect.[89] Such a will cannot be established by one having an interest as legatee thereunder.[90]

The will must be made during testator's last sickness.[91] It is not necessary, however, that he be in extremis, or in articulo mortis, or that he be prevented from making a written will by surprise of sudden death;[92] but the statutory requirement is satisfied if his disease has progressed to such a point that he expects death at any time, and is liable to die therefrom at any time, and if he makes such will in view of, and as preparatory to, such expected death, and thereafter dies from such sickness.[93] The will is not rendered invalid by the fact

78. To show that it was not signed animo testandi. Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499.

79. Beebe v. McFaul [Iowa] 101 N. W. 267.

80. Scrivener, who affixed signature not as witness, competent to prove publication. In re Breining's Estate [N. J. Eq.] 59 A. 561. On trial of opposition to execution and registry of an alleged testament, the notary before whom the instrument was passed, and the three subscribing witnesses, are competent to testify to show that formalities required by law were not observed. Succession of Theriot [La.] 38 So. 471.

81. Three wills were offered for probate. The first was admitted to probate, but on appeal the second was admitted in evidence; held not error. Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133. Where an alleged prior will is introduced in evidence, cannot be said, even in absence of other proof, that there was no evidence before court on which could base finding that such will was signed by decedent, and purported on its face to be her will. In re Hunt's Will [Wis.] 100 N. W. 874.

82. Execution. Hughes v. Rader, 183 Mo. 630, 82 S. W. 32.

83. On issue of genuineness of signature. In re Burtis' Will, 43 Misc. 437, 89 N. Y. S. 441.

84, 85. See 2 Curr. L. 2091.

86. Godfrey v. Smith [Neb.] 103 N. W. 450; In re Megary's Estate, 25 Pa. Super. Ct. 243.

87. Godfrey v. Smith [Neb.] 103 N. W. 450. All essential requisites must be clearly established by competent evidence. In re Megary's Estate, 25 Pa. Super. Ct. 243.

88. Instructions as to will which he desires to have reduced to writing cannot operate as will. Godfrey v. Smith [Neb.] 103 N. W. 450; In re Megary's Estate, 25 Pa. Super. Ct. 243.

89. Cobbey's Ann. St. 1903, § 4993. Must be three witnesses in Nebraska. Godfrey v. Smith [Neb.] 103 N. W. 450. In Kansas must be proved that he called upon some person present at the time the testamentary words were spoken to bear testimony to said disposition as his will [Gen. St. 1901, § 8007]. Baird v. Baird [Kan.] 79 P. 163. Regatio testium must be proved. No particular form of expression necessary, but words or signs used must be intended as request, and witnesses must so understand them. Godfrey v. Smith [Neb.] 103 N. W. 450. Need not follow words of statute. Will held valid. Baird v. Baird [Kan.] 79 P. 163.

90. Cobbey's Ann. St. 1903, § 4995, relating to effect of interest of subscribing witnesses, applies. Godfrey v. Smith [Neb.] 103 N. W. 450.

91. Cobbey's Ann. St. Neb. 1903, § 4993. Godfrey v. Smith [Neb.] 103 N. W. 450. Kan. Gen. St. 1901, § 8007. Baird v. Baird [Kan.] 79 P. 163.

92. Godfrey v. Smith [Neb.] 103 N. W. 450; Baird v. Baird [Kan.] 79 P. 163. In Pennsylvania must be in extremity of his last sickness. In re Megary's Estate, 25 Pa. Super. Ct. 243.

93. Sufficient if made when sickness has so progressed that he expects death therefrom at any time, and when made near to,

that there had been prior preparation to make it.[94] There is a conflict of authority as to whether such wills are invalidated by the fact that there was sufficient time and opportunity thereafter to have permitted the making of a written will.[95]

Under the Louisiana statute declaring that a nuncupation by public act "must be dictated by the testator and written by the notary as it is dictated," such dictation must be by words pronounced orally.[96]

Holographic wills.[97]—An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself.[98] It must be dated,[99] but is not rendered invalid by the fact that the date is erroneous.[1] The will need not all be written on the same day.[2] An olographic will may be proved in the same manner as other private writings.[3]

At common law a will of personal property written in testator's own hand is good, though not signed, providing his handwriting is sufficiently proved.[4] In order that an incomplete and unsigned will or memorandum may be admitted

and in view of, death, and preparatory thereto. Evidence sufficient. Godfrey v. Smith [Neb.] 103 N. W. 450. Will held valid. Baird v. Baird [Kan.] 79 P. 163.

94. Baird v. Baird [Kan.] 79 P. 163.

95. Not invalidated. Godfrey v. Smith [Neb.] 103 N. W. 450; Baird v. Baird [Kan.] 79 P. 163. Must not have been time. In re Megary's Estate, 25 Pa. Super. Ct. 243.

NOTE. Meaning of term "last sickness:" In Baird v. Baird [Kan.] 79 P. 163, the court bases its opinion on the authority of three cases, Johnson v. Glasscock, 2 Ala. 218; Nolan v. Gardner, 7 Heisk. [Tenn.] 215, and Harrington v. Stees, 82 Ill. 50, 25 Am. Rep. 290, and though the last two, at least, of these cases are not so extreme in their facts as the principal case, still the language of all of them supports the conclusion reached in it and announces the doctrine that "If a person, in the sickness of which he subsequently dies, impressed with the probability of approaching death, deliberately makes his will in conformity with the statute, we do not feel authorized to say that it will be invalid, because, in point of fact, he had time and opportunity to reduce it to writing." Opposed to these decisions stands the great weight of authority, which follows the rule laid down by Chancellor Kent in the leading case of Prince v. Hazelton, 20 Johns. [N. Y.] 502, 11 Am. Dec. 307, "A nuncupative will is not good unless it be made by a testator when he is in extremis, or overtaken by sudden and violent sickness, and has not time nor opportunity to make a written will." To illustrate this rule, where the decedent had capacity to execute a written will afterwards, probate was refused, in the following cases, to nuncupative wills on the ground that they were not made in extremis, where the decedent survived four days. Haus v. Palmer, 21 Pa. 296. Nine days. In re Yarnall's Will, 4 Rawle [Pa.] 46. Six days. Prince v. Hazelton, 20 Johns. [N. Y.] 602, 11 Am. Dec. 307. One day, where the testator repeated substantially the alleged nuncupative declarations made a fortnight before. Sykes v. Sykes, 2 Stew. [Ala.] 364, 20 Am. Dec. 40. Three days. Scaife v. Emmons, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383. Nine days. Carroll v. Bonham, 42 N. J. Eq. 625, 9 A. 371. Five or six days. Reese v. Hawthorne, 10 Grat. [Va.] 548. These courts take the ground that nuncupative wills are not favored by the law, and that it is not intended that they shall take the place of written wills, but shall serve only to carry out the testator's wishes when he has reached such a point that a written will is no longer feasible. And this is the view favored by text writers. Schouler, Wills, § 370; 1 Redfield, Wills, p. 184, et seq.—3 Mich. L. R. 495.

96. Civ. Code art. 1578, not complied with where testator handed written memoranda to notary, saying only "like this" (comme ca) while the instrument was being written. Succession of Theriot [La.] 38 So. 471.

97. See 2 Curr. L. 2091, n. 62.

98. Cal. Civ. Code, § 1277. In re Fay's Estate, 145 Cal. 82, 78 P. 340. A request in a testamentary letter to "answer at once" will not be presumed to alter its nature as a will, nor will a statement that "this is private." Buffington v. Thomas [Miss.] 36 So. 1039. Letter by a person during her last illness, stating how she desired her property disposed of, held a valid holographic will. Id.

99. Cal. Civ. Code, § 1277. In re Fay's Estate, 145 Cal. 82, 78 P. 340.

Where will was merely memorandum of property, dated at top, and followed by clause disposing of same, held immaterial whether date was that of the will or that on which he owned such property. In re Clisby's Estate, 145 Cal. 407, 78 P. 964. If latter, memorandum being part of will, date would be that of will also, and, in any event, testator could adopt as date of will the date previously written by him. Id.

1. Dated 1859 instead of 1889. True date may be shown by parol. In re Fay's Estate, 145 Cal. 82, 78 P. 340.

2. Date as written is date of will, whether commenced or finished on such day. In re Clisby's Estate, 145 Cal. 407, 78 P. 964. Counsel held to have no right to assume that memorandum was made with no intention of making it part of will, and that such action was afterthought. Id.

3. In re Fay's Estate, 145 Cal. 82, 78 P. 340.

4. Cruit v. Owen, 21 App. D. C. 378.

to probate as the last will of the writer, however, it must have been intended to operate as a will in its then state, or if a memorandum for the preparation of a formal will, it must appear that the testator had been prevented from carrying out this later intention through sickness, death, or some other casualty, and there must also have been a continuance of this intention down to the time when the act of God intervened to prevent its execution.[5] Such paper itself furnishes no intrinsic evidence that it was intended to be the last will of the deceased, and the presumption is strongly against its operation as such.[6]

(§ 3) *C. Revocation and alteration. Right to revoke.*[7]—The power to make a will implies a power to revoke it.[8]

A will executed by both husband and wife, which disposes of the separate property of each, but not of their joint property, will be regarded as the separate will of each, and may be revoked by either, in the absence of a valuable consideration to support a contract to dispose of the property in the manner set forth in the will.[9]

Revocation in general.[10]—There can be no revocation by act of the testator without an intention to that effect,[11] a joint operation of act and intention being necessary.[12]

Wills may generally be revoked by canceling or destroying them.[13] There is ordinarily no presumption of revocation from the fact that the signature is canceled in the absence of proof that the will was so found in testator's possession or custody.[14] Hence in such case the burden of proving revocation is on the party alleging it.[15] By statute in Georgia, where a will has been canceled or obliterated in a material part, a presumption of revocation arises, and the burden is on the propounder to show that no revocation was intended.[16] Where the paper is found among testator's effects, there is also a presumption that he made the cancellations or obliterations.[17] The presumption as to revocation exists, though the cancellations were made with lead pencil, that fact being only entitled to consideration in connection with other facts in arriving at the intention.[18]

In some states a revocation by cancellation must be witnessed in the same

5. Cruit v. Owen, 21 App. D. C. 378. This common-law rule has recently been abrogated in the District of Columbia by the new code, § 1626. Id.

6. Cruit v. Owen, 21 App. D. C. 378.

7. See 2 Curr. L. 2091.

8. Provision in wills that they are irrevocable, held immaterial. Robbins v. Smith [Ohio] 73 N. E. 1051.

9. Is a double and not a joint will, there being no compact between the makers in form or effect. Buchanan v. Anderson [S. C.] 50 S. E. 12.

10. See 2 Curr. L. 2091.

11. Evidence held to show that will, from which piece had been cut out, had not been revoked. In re Westbrook's Will, 44 Misc. 339, 89 N. Y. S. 862. Ga. Civ. Code, § 3344. Will held to show no intention to revoke devise in former one. Castens v. Murray [Ga.] 50 S. E. 131.

12. Where act exists question is one of intention for jury. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

13. Iowa Code, § 3276. Richardson v. Baird [Iowa] 102 N. W. 128. Evidence held to show revocation by destruction of instrument. Davenport v. Davenport [N. J. Eq.] 58 A. 535. Evidence held to show that will was destroyed by testator. Buchanan v. Anderson [S. C.] 50 S. E. 12.

14. Lines draw through it. In re Hopkin's Will, 89 N. Y. S. 561.

15. Where proceedings for probate are, on appeal from decree admitting will, remitted for trial to determine whether will was revoked, contestant has burden of proof, and hence right to open and close. In re Hopkins' Will, 89 N. Y. S. 561.

16. Ga. Civ. Code 1895, § 3343. As where draws lines through, and pastes slips of paper over clauses, and draws lines through his signature and those of subscribing witnesses. Evidence insufficient to rebut presumption. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

17. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

18. In England, lead pencil cancellation is presumptively deliberative, and not final, and raises no presumption of revocation. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

manner as the making of a new will.[19] Where there is no statutory cancellation, but a part of the will is completely obliterated so as to be illegible, effect will be given to the legible parts.[20] A part which is completely obliterated is destroyed, and the will remains as though it had never been written.[21]

Beneficiaries claiming that a will was destroyed by accident or mistake, or by the act of the testator while insane, have the burden of proving the observance of the statutory requirements in making and publishing it, its contents, and that its destruction was not brought about by the sane intent and capable act of the testator.[22] Testator's declarations accompanying the act of destruction, and those preceding it, when not too remote, are admissible to show his intention,[23] but not those made thereafter.[24]

Revocation by operation of law is not necessarily prevented because the statute provides the manner in which testator may himself revoke his will,[25] though in some states revocation may be accomplished only in the manner prescribed by statute.[26]

By statute in some states, no will may be revoked by any presumption of intention on the ground of alteration of circumstances.[27]

A subsequent deed of property devised revokes the devise.[28] The death of the sole beneficiary prior to that of testator does not work a revocation of the will,[29] nor is a bequest to testator's wife impliedly revoked by her subsequently obtaining a divorce.[30]

As a general rule, marriage of the testator revokes all former wills,[31] particularly in the case of a woman.[32]

19. Iowa Code, § 3276. Richardson v. Baird [Iowa] 102 N. W. 128.

20. To provision directing trustees to set aside certain sum for certain persons, though following words, evidently relating to same bequest, are obliterated. Richardson v. Baird [Iowa] 102 N. W. 128.

21. Richardson v. Baird [Iowa] 102 N. W. 128. Only by some other written will, or by writing of testator declaring such revocation and executed in manner in which will required to be executed, or by burning, tearing, canceling, obliterating, or destroying, with intent and for purpose of revoking same by testator himself [2 N. Y. Rev. St. 1829, p. 64, c. 6, tit. 1, art. 3, § 42]. In re Burbank, 93 N. Y. S. 866.

22. Evidence insufficient on all these points. Did not show presence of attestation clause or that it stated that testator had declared instrument to be his will [N. J. Gen. St. P. 3760, § 22]. Davenport v. Davenport [N. J. Eq.] 58 A. 535.

23. Remark by testator on day before he died that he wanted brothers, sisters, and niece to have some of his property, and statement that wife would not get all his property, admissible. Appeal of Spencer [Conn.] 60 A. 289. Declaration that he had made will in favor of wife to keep her quiet, inadmissible. Id. Provided they accompany an act which may be construed as an act of revocation or attempted revocation. Kimsey v. Allison, 120 Ga. 413, 47 S. E. 899. Declarations that will had been lost or stolen and that it was no longer his will, held inadmissible. Id.

24. If admissible, revocation in a manner different from that provided for by statute (2 Rev. St. 1829, P. 64, c. 6, tit. 1, art. 3, § 42) could be shown. In re Burbank 93 N. Y. S. 866. To the effect that he was satisfied with it. In re Colbert's Estate [Mont.] 78 P. 971. Where witness testified that she heard plaintiff say that she had destroyed will, held such evidence should be considered merely to impeach plaintiff who denied the statement in rebuttal. Mann v. Balfour [Mo.] 86 S. W. 103.

25. N. M. Comp. Laws 1897, § 1953 does not prevent revocation by subsequent marriage. In re Teopfer's Estate [N. M.] 78 P. 53.

26. In re Davis' Will, 93 N. Y. S. 1004.

27. R. I. Gen. Laws 1896, c. 203, § 18. Legacy to corporation in trust for three children not revoked by division of equal amount of personalty among them during lifetime, made for purpose of avoiding legacy tax, though such was evident intention. Rhode Island Hospital Trust Co. v. Keith [R. I.] 57 A. 1060.

28. Osborn v. Osborn [Iowa] 101 N. W. 83.

29. In re Davis' Will, 93 N. Y. S. 1004, afg. 45 Misc. 554, 92 N. Y. S. 968.

30. In re Jones' Estate [Pa.] 60 A. 915.

31. See, also, § 1, ante. In states where husband and wife are heirs of each other in the event that there are no children. In re Teopfer's Estate [N. M.] 78 P. 53. In South Dakota the marriage of testator revokes his will previously executed, where his wife survives him, unless provision is made for her by marriage contract, or by the will, or unless she is mentioned therein in a way showing an intention not to provide for her, and no other evidence to rebut the presumption of revocation may be received. [Rev. Civ. Code, § 1023, subd. 2]. In re Larsen's Es-

In some states a will is revoked by the birth of a legitimate child after its execution and before testator's death.[33]

Where an act is done by testator which may or may not amount to revocation, revocation will not result if it appears that the act was dependent upon the efficacy of another act, such as the making of a new will, and that testator did not intend to revoke his will unless such other act was consummated.[34] But where the will is completely revoked, the failure of another contemplated act cannot revive it.[35]

Presumption from failure to find will.[36]—If a will, shown to have been made and left in testator's custody, cannot be found after his death, there is a presumption that he destroyed it animo revocandi.[37] Such presumption does not shift the burden of proof,[38] but is one of fact merely and not of law, and may be overcome by proof to the contrary.[39] It may be rebutted by proof that after its execution testator's relations to his widow and next of kin were such as to render it improbable that he would wish to change the disposition of his property.[40]

By subsequent will or codicil.[41]—The law does not favor revocation of conditions of a prior will by implication.[42] Hence a later will can operate as an

tate [S. D.] 100 N. W. 738. Will not providing for wife held not made in contemplation of marriage, and revoked. Id. The revocation is absolute, and is not confined to that portion of the property which the wife would have taken had the husband died intestate (Id.), nor is the right to question the validity of the will confined to the surviving wife (Id.).

32. At common law the marriage of a feme sole revoked her will. In re Teopfer's Estate [N. M.] 78 P. 53. The will of a married woman is revoked by her subsequent remarriage after the death of her husband [Civ. Code 1895, § 3347]. McWhorter v. O'Neal, 121 Ga. 539, 49 S. E. 592.

33. Even though provision is therein made for it. Iowa Code, § 3276. This rule changed by amendment. Acts 30th Gen. Assem. p. 115, c. 120. Fry v. Fry [Iowa] 101 N. W. 144. The right to take advantage of such revocation is not confined to such children. Id.

34. Called doctrine of dependent relative revocation. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

35. If anything done indicating unmistakable intention to revoke. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501.

36. See 2 Curr. L. 2093.

37. Williams v. Miles [Neb.] 102 N. W. 482; Appeal of Spencer [Conn.] 60 A. 289; Hutson v. Hartley [Ohio] 74 N. E. 197. Prima facie only. Mann v. Balfour [Mo.] 86 S. W. 103. Where will last seen in his possession and he was mentally competent. In re Colbert's Estate [Mont.] 78 P. 971.

38. Hutson v. Hartley [Ohio] 74 N. E. 197.

39. Hutson v. Hartley [Ohio] 74 N. E. 197. Burden on proponent to prove the contrary by clear, satisfactory, and convincing evidence. Evidence insufficient. In re Colbert's Estate [Mont.] 78 P. 971. Evidence that one alleged to be a witness to a lost will, but who denied the same, stated at testator's funeral that he had the will in his pocket, held not to tend, even remotely, to prove that he had it in his possession, it not appearing that anyone had ever seen it in his possession. Id.

Note: The presumption is only prima facie and may be rebutted by proper evidence. It may sometimes be overcome by all the circumstances of the case when no one circumstance is sufficient to produce that result. Gardner v. Gardner, 177 Pa. 218, 35 A. 558. There is a conflict of authority as to whether or not declarations of the testator, in respect to his satisfaction with the will, are admissible in evidence to rebut the presumption. In England, and in probably a majority of the states in the Union, such declarations are held to be admissible. Sugden v. Lord St. Leonards, L. R. 1 P. D. 154; Behrens v. Behrens, 47 Ohio St. 323, 25 N. E. 209, 21 Am. St. Rep. 820; Williams v. Miles [Neb.] 94 N. W. 705; In re Valentine's Will, 93 Wis. 45, 67 N. W. 12. On the other hand, the United States supreme court and some of the most eminent state courts support the ruling of In re Colbert's Estate [Mont.] 78 P. 971, that such declarations are, in their nature, purely hearsay evidence, and that they can be brought under no recognized exception to the hearsay rule; hence, they are inadmissible unless they are a part of the res gestae, or are introduced to prove the mental condition of the testator. Throckmorton v. Holt, 180 U. S. 552, 45 Law. Ed. 663; In re Kennedy, 167 N. Y. 163, 60 N. E. 442.—3 Mich. L. R. 421.

40. Will in favor of widow. Appeal of Spencer [Conn.] 60 A. 289. Evidence showing the relations between testator and the beneficiary and his next of kin after the making of the will is admissible (Id.), but evidence of such relations before its execution are not admissible as evidence in chief on the part of such beneficiary (Id.). Where contestants introduce evidence showing that affectionate relations had always existed between testator and them, proponent may show testator's relations to them prior to execution of will. Id.

41. See 2 Curr. L. 2092.

42. By codicil. Sperry v. Sperry [Iowa]

implied revocation of a former one only in so far as the two are inconsistent.[43] The mere fact that testator states the later will is his last will and testament is not conclusive.[44]

If there is an express disclaimer of an intention to entirely revoke the former will, the two will, so far as is possible, be construed together, particularly when such a course is necessary to prevent a partial intestacy.[45]

When a later will is destroyed or cannot be produced, it is competent to prove by parol that it contained a revocatory clause.[46]

A codicil is supposed to express the testator's final and more deliberate purpose,[47] and will be considered as revoking all clauses of the will inconsistent therewith.[48]

Any writing containing an express revocation of a will must be executed with the same formalities and attested by the same number of witnesses as the will itself.[49]

In states where foreign wills are insufficient to pass title to realty unless executed in accordance with their laws, a foreign will not so executed cannot operate to revoke a former domestic will, though it expressly attempts to do so.[50]

(§ 3) *D. Republication and revival.*[51]—All the formalities required to make a valid will are necessary to the republication of a revoked will.[52]

The mere destruction of a subsequent will revoking a former one will not of itself operate to revive the latter will, the question of such revival being one of intention.[53]

102 N. W. 491. Where will required trustee to rent or sell certain tract of land and pay P. "up to equalizing with K. and B.," and provided that all property remaining should go to widow, and that she was to control such tract as trustee "for all the heirs, to sell or continue to rent," held that codicil, declaring that "all the heirs" did not mean those having share in realty, did not deprive P. of right to an amount from the proceeds of such tract sufficient to equalize him with K. & B., though he was given specific devise of realty. Balance went to heirs who did not take realty. Id.

43. Ga. Civ. Code 1895, §§ 3341, 3345. Castens v. Murray [Ga.] 50 S. E. 131. Evidence insufficient to establish revocation by execution of subsequent wills which were claimed to have been lost. In re Burbank, 93 N. Y. S. 866. A subsequent will may operate as a partial revocation only, the intention controlling [Iowa Code, § 3276]. Fry v. Fry [Iowa] 101 N. W. 144.

44, 45. Fry v. Fry [Iowa] 101 N. W. 144.

46. Evidence sufficient to show that will contained such clause. Williams v. Miles [Neb.] 102 N. W. 482.

47. Under codicil directing payment of certain sum monthly to each of four persons "for and on account of their respective quarterly shares of the net income of my estate," held that the fact that one of such persons had no share in the net income under the will did not deprive her of the right to such monthly payment. In re Edwards' Estate, 209 Pa. 19, 57 A. 1117.

48. Its effect must be limited to its purpose. In re King's Estate, 210 Pa. 435, 59 A. 1106. Trust not revoked by codicil changing beneficiaries. Id. Held to supplant provisions of will as to distribution of certain stock, and to require it to be kept together for specified period before distribution, legacies not being payable until such period has elapsed. Miller v. Metcalf [Conn.] 58 A. 743. Codicil revoking the third clause of a will and declaring that certain persons should not be beneficiaries, also revoking the ninth clause except as to one legatee, held to revoke the entire third clause and exclude the persons named from any share of the estate in case of a residuum. Dowler v. Rodes' Adm'r, 26 Ky. L. R. 1087, 83 S. W. 115. Second codicil held not to have changed first codicil modifying provisions of item as to certain bonds, but merely to have changed provisions as to whom estate named in such item should go. Hoffman v. New England Trust Co., 187 Mass. 205, 72 N. E. 952. Codicil held to revoke certain legacies and remainders. Ladies' Union Benev. Soc. v. Van Netta, 43 Misc. 217, 88 N. Y. S. 413. Original devise of house to be held in trust held revoked by codicil giving different one. In re Benson's Estate, 209 Pa. 108, 58 A. 135. Original devise held revoked. Id. Item held direction to convert remainder into money and distribute it, and to be inconsistent with codicil. Logan v. Cassidy [S. C.] 50 S. E. 794.

49. Civ. Code 1895, §§ 3341, 3342. Castens v. Murray [Ga.] 50 S. E. 131.

50. Ga. Civ. Code 1895, § 3299. Attested by only two witnesses. Castens v. Murray [Ga.] 50 S. E. 131.

51. See 2 Curr. L. 2094.

52. Contract between woman and second husband held not republication of will revoked by her second marriage. McWhorter v. O'Neal, 121 Ga. 539, 49 S. E. 592. Rights of parties under such contract cannot be determined by probate court. Id.

53. If presumption of revocation arises

§ 4. *Probating, establishing, and recording. A. Powers of courts.*[54]—The powers of courts in the probate and construction of wills and in subsequent actions to test their validity are fixed by statute, and vary in the different states.[55]

Diverse citizenship does not give a Federal circuit court jurisdiction of a bill seeking the declaration of the nonexistence of a will, and the nullity of its probate in the state court, where the state proceeding to contest, is but supplementary to the original probate proceeding.[56]

(§ 4) *B. Parties in will cases and the right to contest.*[57]—Where proponent is the executrix named in the will, she represents in the probate proceedings all persons claiming under the testament.[58]

Parties may so deal with the property attempted to be disposed of as to be estopped to deny the validity of the will.[59] Thus, in the absence of fraud or misrepresentation,[60] one receiving a benefit under a will is generally held to be estopped to thereafter contest its validity,[61] though there appears to be some conflict

from failure to find will left in testator's possession, it does not follow that a further presumption arises therefrom of intent thereby to revive former will. No evidence to show revival. Williams v. Miles [Neb.] 102 N. W. 482.

54. See 2 Curr. L. 2094.

55. Jurisdiction of bills to construe wills, see § 5G, post.

California: Under Code Civ. Proc. § 1699, providing that where testamentary trust is to continue until after distribution, superior court shall not lose jurisdiction by final distribution, held that such court has jurisdiction to determine the effect of the will on settlement of trustee's final account, for purpose of determining whether trust has been properly administered, and who is entitled to estate. McAdoo v. Sayre, 145 Cal. 344, 78 P. 874.

In Illinois the county court has exclusive original jurisdiction of a proceeding to establish and prove an alleged lost will. Under Const. art. 6, § 18, and statute of wills, has exclusive jurisdiction in all matters of probate. Equity has no jurisdiction until after probate. Beatty v. Clegg, 214 Ill. 34, 73 N. E. 383.

In Kansas the probate court has jurisdiction of petitions for the admission of wills to probate. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537.

In Maryland orphans' courts, or, during their recesses, registers of wills, have jurisdiction to take probate [Code Pub. Gen. Laws 1889, §§ 230, 265, 323, 327, art. 93]. Tilghman v. France, 99 Md. 611, 59 A. 277.

In Nebraska county court has original jurisdiction of all probate matters, and exclusive jurisdiction of probate of wills. Williams v. Miles [Neb.] 102 N. W. 482.

New York: If a party expressly puts in issue the construction of any disposition of personalty, on the probate of the will of a resident of the state, the surrogate must determine the question [Code Civ. Proc. § 2624]. In re Davis' Will, 93 N. Y. S. 1004, afg. 45 Misc. 554, 92 N. Y. S. 968; In re Howard's Estate, 94 N. Y. S. 86.

In New Jersey the prerogative court has original jurisdiction over the probate of wills, and on reversal of a decree of the orphans' court admitting a will, for failure to cite persons concerned, may allow the will to be there probated after proper citation. In re Young's Will [N. J. Eq.] 59 A. 154.

Ohio: In a will contest the court's jurisdiction is confined and the scope of its jurisdiction limited to a determination of the single question of the validity or invalidity of the will. Burgess v. Sullivant, 2 Ohio N. P. (N. S.) 327. It cannot, by the appointment of a receiver, draw to itself jurisdiction over real estate specifically devised by the will. Id.

56. O'Callaghan v. O'Brien, 25 S. Ct. 727.

57. In a will contest the court may inquire into the interest of the contestant as a preliminary question. This though Kirby's Dig. § 8041 provides that the sole question in will contests is whether the will offered for probate is the last will of the testator. Flowers v. Flowers [Ark.] 85 S. W. 242. An allegation that contestant was the wife of decedent, and is the surviving widow and as such is entitled to the community property of the estate, held a sufficient allegation of interest. Perry v. Moss [Tex. Civ. App.] 87 S. W. 871. A foreign administrator of testator's estate has no such interest as entitles him to demand an interpretation by the surrogate under Code Civ. Proc. § 2624. In re Davis' Will, 93 N. Y. S. 1004, afg. 45 Misc. 554, 92 N. Y. S. 968. See 2 Curr. L. 2095.

58. Hence legatee of sum of money is not a necessary party to an opposition contesting validity of will on ground of informality in execution. Succession of Theriot [La.] 38 So. 471.

59. Defendants held not estopped to assert invalidity of will having only two witnesses. Janes v. Dougherty [Ga.] 50 S. E. 954. Quare whether probate court should consider question of estoppel, where will had been probated, with consent of the caveator, for eleven years. Utermehle v. Norment, 22 App. D. C. 31. A verdict for the caveatees on the question of estoppel necessarily superinduces a verdict for them on the other issues. Id.

60. Promise by one beneficiary that another beneficiary would equalize matters held not to constitute fraud. Utermehle v. Norment, 22 App. D. C. 31.

61. Utermehle v. Norment, 22 App. D. C. 31; Wonsetler v. Wonsetler, 23 Pa. Super. Ct. 321; Utermehle v. Norment, 25 S. Ct. 291.

of authority in this regard.[62] Mere ignorance of the rule will not prevent its application.[63]

Any person who is interested in sustaining or defeating a will may appear and support or oppose the application for probate.[64] No one can question the validity of a will or any provision in it, unless he stands in such relation to the testator that, in the event the provision is invalid, he will be entitled to an interest in the property involved in the controverted provision.[65]

(§ 4) *C. Duty to produce will.*[66]—It is the duty of those having the custody of a will to produce it so that it may be probated.[67]

(§ 4) *D. Probate and procedure in general.*[68]—An unprobated will cannot be relied on to establish any title or interest in property, or to enable a legatee or devisee to maintain any action based on such title,[69] nor can the executor execute a power of sale thereby given to him.[70] A stranger cannot, however, object that the will has not been admitted to probate.[71]

Proceedings for the probate of wills are statutory and are substantially in rem.[72] Some form of written application for probate is generally required.[73]

All persons concerned,[74] or at least the known heirs, are generally required to be notified of the proceedings.[75]

One claiming an interest must give a free effect to the instrument as far as he can. Morrison v. Fletcher [Ky.] 84 S. W. 548. Held estopped after lapse of ten years, though offered to account for amount received. Utermehle v. Norment, 22 App. D. C. 31. The refusal of a legatee to accept a bequest must be absolute and unqualified not merely in word but in deed. Acts of dominion over the subject-matter of the bequest render ineffective positive terms of refusal. Wonsetler v. Wonsetler, 23 Pa. Super. Ct. 321.

62. The mere fact that one takes a beneficial interest under a will does not preclude him from claiming that other provisions therein are void. As contrary to rule against perpetuities. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37.

63. In the absence of fraud or misrepresentation. Utermehle v. Norment, 25 S. Ct. 291.

64. Public administrator appointed in another state to administer assets located therein is entitled to oppose admission of will simply appointing executor, and making no disposition of property. In re Davis' Will, 45 Misc. 306, 92 N. Y. S. 392.

65. Bowers v. McGavock [Tenn.] 85 S. W. 893. The heirs at law and distributees of the estate of the widow of testator have not such an interest as entitles them to contest the validity of testator's will, where the widow elected to take under the will. Id. An uninterested person cannot question the validity of a devise (Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133), or raise the question of the invalidity of the will because of its failure to provide for or mention testator's children. Cullen v. Bowen, 36 Wash. 665, 79 P. 305. Admissible to show nature of devisee's possession and claim of title to property destroyed by defendant. Id. Grantee of heir of testator may contest will found and filed for probate after the grant, by which the land was devised to grantor's children. Savage v. Bowen [Va.] 49 S. E. 668.

66. See 2 Curr. L. 2096.

67. Evidence held to show fraudulent conspiracy to suppress a will and to deprive certain beneficiaries of the benefit thereof. Anderson's Adm'r v. Smith, 102 Va. 697, 48 S. E. 29.

68. See 2 Curr. L. 2096.

69. Wis. Rev. St. 1888, § 2294. In re Hunt's Will [Wis.] 100 N. W. 874. Codicil to foreign will never probated in either state cannot be used as muniment of title. Montague v. Schieffelin [Or.] 80 P. 654.

70. Coy v. Gaye [Tex. Civ. App.] 84 S. W. 441.

71. Admissible to show nature of plaintiff's possession and claim to property destroyed by defendant. Cullen v. Bowen, 36 Wash. 665, 79 P. 305.

72. Cruit v. Owen, 21 App. D. C. 378. A will is admissible as a muniment of title, although erroneously probated as an independent will, since the judgment probating it is one in rem and vests title in the devisee named in the will. Glover v. Colt [Tex. Civ. App.] 81 S. W. 136. Such erroneous probate and the fact that the executrix sold property without an order of the county court will not defeat title of purchasers after the probate of the will. Id. The fact that such purchasers were attorneys in charge of the probate of the will is immaterial. Id.

73. Mere failure of the application to contain an allegation of mental soundness is not of itself sufficient to sustain a judgment denying probate. Rev. St. 1905, arts. 1904, 1884, considered. Moore v. Boothe [Tex. Civ. App.] 87 S. W. 882. A surrogate may decline to receive a will propounded for probate if not accompanied by written application required by orphans' court rules (Rule 1). In re Young's Will [N. J. Eq.] 59 A. 154. If he does receive it and finds caveat filed, is bound to issue citations, and orphans' court will acquire jurisdiction to act thereon. Id.

74. Under the N. J. Orphans' Court Act (P. L. 1898, p. 718, § 13), where a caveat is filed, the surrogate is required to issue cita-

Objections to the probate of a will should be filed prior to its admission.[76] The allegations of the caveat must be definite and certain.[77] No jury is available in the probate court.[78]

In some states the parties are confined to the testimony of the subscribing witnesses on the question of capacity;[79] while in others those interested in having the will admitted may produce other witnesses if they so desire.[80] A party interested in having the application denied may not, as a matter of right, demand the examination of his witnesses in opposition.[81] The will should be admitted upon prima facie proof of due execution, capacity, and freedom from restraint.[82] In Louisiana a presumptive heir, notified in writing, pursuant to statute, to attend the opening and proof of an alleged testament, passed before a notary and three witnesses, may at that time oppose the execution and registry of the instrument presented on the ground of nullity, because of want of formalities required by law.[83]

To constitute the probate, there must be some affirmative order or act by some constituted authority, in addition to the swearing of the witnesses.[84]

The probate of a will merely determines the validity of its execution.[85] Hence probate cannot be denied merely because some its provisions are invalid, or contrary to law,[86] or because it appoints no executor,[87] or because the sole legatee and devisee and executrix died before the testator,[88] or because it merely appoints an executor, and makes no disposition of testator's estate.[89]

A statute limiting the time within which wills must be presented for probate does not apply to ancillary probate of a foreign will for the purpose of completing title to land.[90]

In some states all original wills and the probate thereof are required to be

tions to "all persons concerned." In re Young's Will [N. J. Eq.] 59 A. 154. Both heirs at law and next of kin are persons concerned and must be cited, though not beneficiaries. Id.; In re Myers' Estate [N. J. Eq.] 59 A. 259.

75. Necessary in order to confer jurisdiction on the court. Floto v. Floto, 213 Ill. 438, 72 N. E. 1092. The fact that heirs not notified had actual knowledge of the proceedings is immaterial. Id. Evidence held to show that complainant was heir (Id.), and that widow, who offered will for probate, had knowledge and notice of that fact (Id.). Beneficiaries need not be cited, but only heirs at law and next of kin [Code Civ. Proc. § 2615]. In re Davis' Will, 93 N. Y. S. 1004.

76. In time, though filed after will, with formal proofs, was presented to court. Towles v. McCurdy [Ind.] 71 N. E. 129.

77. Allegations as to unnaturalness and unreasonableness and as to lack of capacity held sufficient. Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306.

78. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537.

79. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090.

80. In addition to subscribing witnesses. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537.

81. Same rule on appeal from order refusing to admit. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537.

82. Examination should go only to extent of making out prima facie case of validity. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537.

83. Such objection is not premature at such time. Succession of Theriot [La.] 38 So. 471.

84. No probate where orphans' court not in session, and register of wills also absent, and deputy register only took affidavit of subscribing witnesses, and no order admitting it was filed or letters issued. Tilghman v. France, 99 Md. 611, 59 A. 277.

85. In re Pforr's Estate, 144 Cal. 121, 77 P. 825.

86. Rule against perpetuities. Portion of such will cannot be admitted, and probate denied to remainder. In re Pforr's Estate, 144 Cal. 121, 77 P. 825.

87. In re Davis' Will, 45 Misc. 554, 92 N. Y. S. 968, afd. 93 N. Y. S. 1004.

88. Surrogate cannot determine that, by reason of the incapacity of the devisee to take, the will could have no effect. In re Davis' Will, 45 Misc. 554, 92 N. Y. S. 968, afd. 93 N. Y. S. 1004. If a will properly executed by one competent to make it assumes to make a devise of realty, or is broad enough to include a transfer thereof, the surrogate must probate it, if the petitioner so requests. Id.

89. In re Davis' Will, 45 Misc. 306, 92 N. Y. S. 392.

90. Ancillary probate in order to complete the title to lands in Kentucky is not subject to the 10 years statute of limitations. Morrison v. Fletcher [Ky.] 84 S. W. 548.

recorded by the clerk of the probate court.[91] The probate as recorded is notice only to those in privity with the proceedings.[92] The certificate of the county court of the oath of the subscribing witnesses cannot be varied by parol, on a suit to contest the will.[93]

(§ 4) *E. Burden of proof on the whole case.*[94]—Generally speaking, the law presumes testamentary capacity, due execution, and that the will contains the unrestrained wishes of the testator. Hence it is usually held that the burden upon the whole evidence is on the party attacking it on the ground of improper execution, lack of capacity, or undue influence to prove the facts which he alleges.[95] In some states, however, the burden is on proponent from first to last to establish such facts by a preponderance of all the evidence.[96] In others, proponents are first required to make out a prima facie case as to due execution and capacity, and the burden is then upon contestants to prove their allegations by a preponderance of all the evidence.[97]

91. Rev. St. 1879, § 4876. Hymer v. Holyfield [Tex. Civ. App.] 87 S. W. 722. Such statutes are for the sole benefit of the heirs and devisees of the testator. Whether the statute is complied with or not is immaterial as to third persons. Pasch. Dig. art. 1236, construed. Id. A clerk's certificate indorsed on the will, certifying that the will was on that date duly and correctly recorded in a specified book and page, is sufficient to show that the will was duly recorded. Laws 1848, p. 236, c. 157, considered. Id. A will being probated and the records subsequently destroyed, it will be presumed that the clerk properly recorded it. Id. The fact that the clerk's certificate to the affidavit of a subscribing witness, taken in open court, is not authenticated by seal, does not render the same inadmissible in evidence. Id. The indorsement of the county clerk, affidavit of attesting witness indorsed on will, certificate of record and the granting of letters of administration, held sufficient to prove probate of will. Id.

92. Kilgore v. Kirkland [S. C.] 48 S. E. 44.

93. As to date when it was taken. Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19.

94. See 2 Curr. L. 2097.

95. The burden of proof upon the whole evidence is upon the contestant to show undue influence by a preponderance of all the evidence. Appeal of O'Brien [Me.] 60 A. 880. On bill to set aside probate. Weston v. Teufel, 213 Ill. 291, 72 N. E. 908; In re Birdseye [Conn.] 60 A. 111; Hughes v. Rader, 183 Mo. 630, 82 S. W. 32; Weston v. Teufel, 213 Ill. 291, 72 N. E. 908. Where the will is properly executed. In re Warnock's Will, 92 N. Y. S. 643.

96. In Michigan, proponent has the burden of proving capacity. Error to refuse request to charge to that effect on appeal from a judgment admitting will. Buxton v. Emery [Mich.] 102 N. W. 948.

In Iowa, petitioners must establish the execution of the will by a preponderance of the evidence on the whole case. Suit to set aside will admitted to probate, and to establish alleged subsequent will. Answer alleged forgery. Beebe v. McFaul [Iowa] 101 N. W. 267.

Washington: It is incumbent on those relying upon a purported will to show that testator was of sound and disposing mind, and not acting under fraud, undue influence, or misrepresentation. Rathjens v. Merrill [Wash.] 80 P. 754.

97. In Kansas, when a will is offered for probate, the issue is whether it was duly attested and executed, and whether, at the time of execution, the testator was of full age, of sound mind and memory, and not under any restraint. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537. The burden of proving these facts is upon proponent. Id.

In New York, before admitting the will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied of the genuineness of the will and the validity of its execution [N. Y. Code Civ. Proc. § 2622] (In re Burtis' Will, 43 Misc. 437, 89 N. Y. S. 441), and the proponent is bound to satisfy him of these facts [Code Civ. Proc. § 2622] (Roche v. Nason, 93 N. Y. S. 565). Probate must be refused if surrogate not satisfied that signature is genuine, proponent having the burden of proof. In re Burtis' Will, 43 Misc. 437, 89 N. Y. S. 441. Evidence held to show that signature was forged. Id. Competency. In re Goodwin's Will, 95 App. Div. 183, 88 N. Y. S. 734. The burden is on the person asserting it to prove incapacity or undue influence. On application for probate. In re Nelson's Will, 97 App. Div. 212, 89 N. Y. S. 865.

Montana: In every will case proponent must first make out a prima facie case; that is must make such proof as would entitle the will to probate in the absence of a contest. Procedure prescribed by Mont. Code Civ. Proc. §§ 2340-2346. In re Colbert's Estate [Mont.] 78 P. 971. The contestant then attacks the validity of the will and proponent defends the same. Contestant rebuts testimony of proponent, and latter may offer evidence in sur-rebuttal in proper cases. Id. The contestant has the right to open and close the case. Id.

In Kentucky, when the propounders have proved due execution of a paper, not irrational in its provisions, nor inconsistent in its structure, language or details with the sanity of the testator, they have made a prima facie case, and the burden of proving incapacity then rests on the contestants.

In secondary proceedings to contest the validity of the will or on appeal the judgment or decree of the probate court admitting the will, is generally held to be prima facie evidence of its due execution and validity, and the burden of proving the contrary in such cases is therefore on contestants.[98]

It will not be presumed on a will contest that testator is not dead.[99]

Sufficiency of evidence and shifting of burden.[1]—The capacity of testator,[2] the freedom of his will from fraud or undue influence,[3] and the due execution and genuineness of the instrument,[4] must be fully proved either by the presumptions favoring such facts or from positive proof or both according to the strength of the opposing case. The constituent facts, and evidence on which each of these may be based have already been discussed and need not be repeated.

(§ 4) *F. Establishment of lost will.*[5]—A lost or destroyed will cannot be admitted to probate unless it is proved to have been in existence at testator's death, or is shown to have been fraudulently destroyed during his lifetime,[6] nor unless its provisions are clearly and distinctly established.[7]

The contents of a lost will,[8] or missing parts of a will in existence, may be proved by secondary evidence,[9] but it must be clear and satisfactory.[10] Declarations of the testator are admissible for that purpose.[11]

Henning v. Stevenson, 26 Ky. L. R. 159, 80 S. W. 1135.

98. California: Contestants have the burden of proving nonexecution after probate. If introduce no evidence on subject, is duty of court to find due execution on presumption in favor of it. Cannot, by abandoning such issue on trial to jury, require court to thereafter take evidence on such subject and thus deprive proponent of jury trial. In re McKenna's Estate, 143 Cal. 580, 77 P. 461.

In Illinois, in proceedings to contest a will after probate, the burden is on the proponents to prove due execution and capacity to the same extent as it was before probate. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090.

New York: The admission of the will by the surrogate is not conclusive on the appellate division on the question of capacity. In re Goodwin's Will, 95 App. Div. 183, 88 N. Y. S. 734. Such admission is prima facie evidence of its due execution and validity (Roche v. Nason, 93 N. Y. S. 565), and anyone thereafter attacking it has the burden of proving incapacity (Id.). In action under N. Y. Code Civ. Proc. § 2653a. Id. Suit to set aside. In re Hawley's Will, 44 Misc. 186, 89 N. Y. S. 803.

Ohio: The establishment by the probate court of a lost or spoliated will is prima facie evidence of the will for all purposes, including all that relate to the contest of the same. Rev. St. 1892, § 5948. Prima facie establishes that testator executed a will, of which paper proposed was true copy; that it was unrevoked at his death; and that will was lost or spoliated after his decease. Hutson v. Hartley [Ohio] 74 N. E. 197. Hence, in a subsequent contest to set aside the probate, after a copy of the will as probated and the probate has been introduced by the contestees, the burden is on the contestant to invalidate the will. That testator destroyed same with intention to revoke it. Id.

Washington: The formal admission of the will, upon the evidence of the subscribing witnesses, establishes a prima facie case in favor of its validity (Rathjens v. Merrill [Wash.] 80 P. 754), which may thereafter be rebutted by evidence introduced in a subsequent contest (Id.). Evidence held to have so far established incapacity as to require contestee to produce rebutting evidence as to testator's mental condition and the relations of the beneficiaries with him. Id.

99. Objection that proponents rested without proving death not considered. In re Owen's Estate [Neb.] 103 N. W. 675.

1. See 2 Curr. L. 2100.

2. See § 2A, ante.

3. See § 2B, ante.

4. See § 3B 1, 2, ante.

5. See 2 Curr. L. 2101.

6. Mont. Code Civ. Proc. § 2371. In re Colbert's Estate [Mont.] 78 P. 971.

7. By at least two credible witnesses [Mont. Code Civ. Proc. § 2371]. In re Colbert's Estate [Mont.] 78 P. 971.

8. By parol. Davenport v. Davenport [N. J. Eq.] 58 A. 535. That it contained revocatory clause. Williams v. Miles [Neb.] 102 N. W. 482.

9. Evidence of scrivener and of declarations of testator as to reasons for making certain provisions held admissible to show contents of piece of will which had been cut out and lost, and sufficient to show its contents. In re Westbrook's Will, 44 Misc. 339, 89 N. Y. S. 862.

10. Evidence insufficient where the probate record merely shows that the will was recorded, but does not show its contents, and testimony of witnesses as to the contents varies widely and statutory requirements as to execution and probate were disregarded. Nunn v. Lynch [Ark.] 83 S. W. 316. In a proceeding to establish an alleged lost will, evidence that testatrix executed will and thought it was recorded, held sufficient to require submission of the case to the jury. Mann v. Balfour [Mo.] 86 S. W. 103. Evidence sufficient to support finding on motion for new trial that there was a

The fact that decedent's property has been divided and disposed of by his heirs is no bar to the establishment of a lost will.[12]

(§ 4) *G. Judgments and decrees.*[13]—The will need not be incorporated in the judgment where it is sufficiently referred to and identified.[14]

The judgments of courts to which the proof of wills is confided, while unreversed, are generally held to be as conclusive and binding as those of any other courts, and are not ordinarily subject to collateral attack.[15]

A judgment admitting to probate a will appearing on its face not to have been properly executed is an absolute nullity.[16] No motion to set it aside is necessary, but its invalidity and that of the will may be urged at any time.[17]

(§ 4) *H. Appeals.*[18]—*Parties aggrieved thereby*[19] are generally given the

will made subsequently to one offered for probate. Williams v. Miles [Neb.] 102 N. W. 482.

11. Davenport v. Davenport [N. J. Eq.] 58 A. 535. Where substantial evidence has been adduced to show the due execution of the will, and that it has been lost, that it was not revoked, and its contents, it is then admissible to prove in corroboration of the other evidence what the testator himself said about it. Mann v. Balfour [Mo.] 86 S. W. 103. In proceedings to establish the validity of a will destroyed after testator's death, where the defense was that if such will was executed, it was the result of fraud and forgery, declarations of the testator, inconsistent with the existence of the will and contradicting the story of proponents with regard to its execution, are admissible. Lappe v. Gfeller [Pa.] 60 A. 1049.

12. That two daughters of testatrix divided personalty and subsequently one of them sold the other her interest in the realty, is no defense. Mann v. Balfour [Mo.] 86 S. W. 103.

13. See 2 Curr. L. 2102.

14. Failure to incorporate it not cause for reversal, when it was contained in pleadings and otherwise sufficiently identified in the record and referred to in the judgment. Glover v. Coit [Tex. Civ. App.] 81 S. W. 136.

15. In Kentucky, the judgment of a county court admitting a will cannot be collaterally attacked. Applies to foreign as well as domestic wills. Morrison v. Fletcher [Ky.] 84 S. W. 548.

In Missouri, a will duly probated can be contested only in the manner prescribed by law, and its validity cannot be assailed in a collateral proceeding. Under Rev. St. §§ 4622, 4636. Stevens v. Larwill [Mo. App.] 84 S. W. 113.

In Montana, probate is conclusive unless contested within a year, except that infants have a year after removal of disability in which to contest [Code Civ. Proc. § 2366]. Spencer v. Spencer [Mont.] 79 P. 320. Under this statute, in connection with provision making decree of distribution conclusive unless appealed from (Id. § 2844), a successful contest by a minor on becoming of age, after probate and distribution, operates only in his favor, and not in favor of those who have lost the right to contest. Heirs also estopped by acquiescing in distribution. Id.

Nebraska: A suit in the district court to enforce specific performance of a parol agreement to devise land and to quiet title against those claiming under will duly allowed and admitted to probate is not a collateral attack on the judgment of the county court admitting such will. Best v. Gralapp [Neb.] 99 N. W. 837.

In New Jersey, the orphans' court is a court of general jurisdiction in a sense that its judgments are presumed to be regular, and facts necessary to sustain jurisdiction will be presumed, and no evidence admitted to contradict them in any collateral proceeding. In re Young's Will [N. J. Eq.] 59 A. 154.

In New York, decree of surrogate admitting will operates as conclusive adjudication, which can only be avoided by an appeal taken within time allowed by statute, and proceedings under appeal must be confined to establishing rights of party prosecuting it. In re Hynes' Will [N. J. Eq.] 60 A. 951. His decree construing the provisions of the will in regard to personalty on petition of an interested party (N. Y. Code Civ. Proc. § 2624), is conclusive as to such construction, when not appealed from or revoked. That testator intended to give widow certain annuity in accordance with provisions of agreement of separation. In re Howard's Estate, 94 N. Y. S. 86.

In Texas, judgment of county court admitting will to probate is conclusive, so long as it remains in force, of its correctness and the validity of the will. Glover v. Coit [Tex. Civ. App.] 81 S. W. 136. Hence purchasers of land from devisees named in will after such judgment are purchasers in good faith. Id.

16. Because attested by only two witnesses. Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694; Janes v. Dougherty [Ga.] 50 S. E. 954.

17. Fortner v. Wiggins, 121 Ga. 26, 48 S. E. 694; Janes v. Dougherty [Ga.] 50 S. E. 954.

18. See 2 Curr. L. 2102.

19. Any person aggrieved may appeal within three months [Comp. Laws 1897, § 2014]. In re Teopfer's Estate [N. M.] 78 P. 53. N. J. Orphans' Court Act 1898, § 204 (P. L. 793). In re Young's Will [N. J. Eq.] 59 A. 154. One is aggrieved whose pecuniary interest is directly affected, or whose right of property may be established or divested by the decree. Id. Statute to be liberally construed. In re Hunt's Will [Wis.] 100 N. W. 874.

Persons aggrieved: Persons for whose benefit a trust is created are parties aggrieved by order refusing probate. Validity of trust will not be considered on their

right to appeal from orders or judgments of the probate court, or from judgments in actions to contest the validity of the will, the jurisdiction of courts to entertain such appeals depending on the statutes of the various states.[20]

A party is not estopped to appeal from the probate of an alleged former will by failing to appeal from an order refusing to admit a later will where his position in that case was not such as to involve the present issue.[21] An appeal may be dismissed with the consent of the appellant without notice to one who was cited to appear but did not himself appeal.[22]

In general the case is tried de novo.[23]

In some states on appeal from an order allowing probate, the parties are confined to the testimony of the subscribing witnesses on the question of capacity.[24] In others the district court has only such powers and pursues such procedure as would the probate court.[25] In Illinois, where proceedings to set aside

appeal. In re Fay's Estate, 145 Cal. 82, 78 P. 340. A general legatee or beneficiary has such an interest in the proper disposition of the personalty that he may appeal from any judgment affecting it. May appeal from judgment holding that other legatees are entitled to all the bank stock without showing that such stock will be needed to pay his bequest. Partner v. Citizens' Loan & Trust Co. [Ind.] 71 N. E. 894. Executor necessary party on appeal in will contest. Whisler v. Whisler, 62 Ind. 139, 70 N. E. 152. By decree admitting will. Legatee under alleged prior will, which has not been presented to county court. In re Hunt's Will [Wis.] 100 N. W. 874. Heir at law and next of kin who was not cited and did not know of, or appear in, contest in orphans' court. In re Young's Will [N. J. Eq.] 59 A. 154; In re Myers' Estate [N. J. Eq.] 59 A. 259.

20. California: Appeal lies from order refusing probate (Cal. Civ. Code, § 963, subd. 3), and is in time if taken within 60 days after entry of such order. In re Fay's Estate, 145 Cal. 82, 78 P. 340.

In Kansas, if probate is refused, an appeal may be had to the district court. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537.

In Nebraska, in all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment or decree to the district court [Cobbey's Ann. St. 1903, § 4823]. Williams v. Miles [Neb.] 102 N. W. 482. Denial of motion for new trial appealable to supreme court. Not necessary to proceed by writ of error. Id. Proceedings in county court to vacate probate of will held action in equity within meaning of statute allowing appeals to supreme court. Id.

In New Mexico an appeal lies to the district court from any decision of the probate court upon the approval or disapproval of any will [Comp. Laws 1897, § 2014, as amended by Laws 1901, p. 158, c. 81, § 40]. In re Teopfer's Estate [N. M.] 78 P. 53. Appeals are allowed in the same manner and subject to same restrictions as appeals from district to supreme court [Comp. Laws 1897, § 929]. Id.

In South Carolina, the supreme court has jurisdiction to review the finding of the circuit court on appeal from an order of the probate court fixing the fees of an executor's attorney, and determining from what fund they should be paid. Ex parte Landrum [S. C.] 48 S. E. 47.

Vermont: A pro forma decree overruling a demurrer to a bill to construe a will is interlocutory and not appealable. Vt. Acts 1896, Act No. 40 does not make case exceptional. V. S. 1629, in regard to passing exceptions and cause from county court to supreme court before final judgment, not applicable to chancery cases. Taft v. Mossey [Vt.] 59 A. 166.

21. Where due execution of a former will was not in issue, and the parties stipulated that the only issue to be tried was decedent's capacity when he executed the will in contest, and the first will was neither introduced in evidence nor any proof offered of its execution, the fact that contestant did not appeal from an order, admitting the former will after the latter had been held invalid, but before judgment had been entered, did not preclude contestants from appealing from such judgment within the time allowed by law. Stutsman v. Sharpless [Iowa] 101 N. W. 105. A caveatee desiring to appeal from a judgment denying probate need not summon other caveatees who refuse to appeal and obtain a severance from them. Cruit v. Owen, 21 App. D. C. 378.

22. In New Jersey, an appeal to the orphans' court from a decree of the surrogate admitting a will to probate may be dismissed, with the consent of the appellant, without notice to a person who was cited to appear, but did not himself appeal. N. J. Orphans' Court Act, § 202, p. 793 (P. L. 1898) does not make persons cited on appeal joint appellants, and they can only be heard in support of the appeal. In re Hynes' Will [N. J. Eq.] 60 A. 951.

23. Appeal deprives county court of jurisdiction and case is tried de novo [Cobbey's Ann. St. 1903, § 4823]. Williams v. Miles [Neb.] 102 N. W. 482. Hence motion for new trial should be made to district court. Id.

24. Does not confer judicial functions on witnesses, and hence not in violation of Const. art. 6, § 1, vesting judicial power in specified courts. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090. Nor does it deprive contesting heirs of their property without due process of law (Const. art. 2, § 2), since proceeding is merely for purpose of establishing capacity prima facie, and does not affect right to contest same on bill filed for that purpose. Id.

25. In Kansas, the district court on appeal from an order refusing to admit the will has only such powers and pursues such

the probate of a will are brought up directly from the court of original jurisdiction by appeal or writ of error, the supreme court will, on proper assignment of error, review the facts, and reverse the decree where the verdict is against the manifest weight of the evidence.[26]

A jury trial may be ordered in proper cases.[27]

In Connecticut the superior court may construe the will on appeal from an order of the probate court appointing a testamentary trustee to receive a bequest.[28]

(§ 4) *I. Revocation of probate.*[29]—A judgment admitting a will to probate may ordinarily be set aside for fraud.[30] The right to have probate set aside may be barred by laches.[31]

(§ 4) *J. Suits to contest.*[32]—In many states the order admitting a will to probate may be attacked within a specified time in an action brought for that purpose by anyone interested in the estate of the deceased.[33] A bill in chancery for that purpose can be maintained only by virtue of the statute, and not by virtue of any inherent jurisdiction in courts of equity.[34] The act in force at the time the bill is filed and not that in force when the will was admitted to probate governs the time within which such suit must be commenced.[35] The interests of the defendants are joint and inseparable, and the action, if properly commenced as to one, is saved as to all.[36]

The only question to be determined is whether the instrument is or is not the last will and testament of the testator.[37] The validity of the will is presented as a new and original question,[38] and the right to contest is not affected by the fact that

procedure as would the probate court. Order of trial and character and burden of proof the same. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537.

26. Scott v. Scott, 212 Ill. 597, 72 N. E. 708.

27. Where, on appeal to the appellate division from a decree of the surrogate's court in a proceeding for the probate of a will, it appears that the disposition to be made of the questions of fact presented by the evidence is not free from doubt, and the result reached in the surrogate's court is not satisfactory, the case will be sent to a trial term for a jury trial. In re Warnock's Will, 92 N. Y. S. 643.

28. The superior court on appeal from an order of appointment by the probate court may authoritatively declare the proper construction and effect of the will. On application to appoint testamentary trustee. Appeal of Beardsley [Conn.] 60 A. 664.

29. See 2 Curr. L. 2103.

30. Unfulfilled promises on part of widow to caveator and others ready to aid in contest, by reason of which contest was withdrawn, not such fraud as to entitle them to have decree of probate set aside. Whether orphans' court has authority to open decree in any event not decided. In re Myers' Estate [N. J. Eq.] 59 A. 259.

31. Delay of six years, until after estate had been settled and executor discharged. In re Myers' Estate [N. J. Eq.] 59 A. 259.

32. See 2 Curr. L. 2104.

33. Party having no pecuniary interest cannot institute or conduct proceedings. Godfrey v. Smith [Neb.] 103 N. W. 450. In Kansas may be attacked at any time within two years in district court. Bethany Hospital Co. v. Hale, 69 Kan. 616, 77 P. 537. In Ohio, an action dismissed for want of prosecution may be recommenced within one year. Hunt v. Hunt, 2 Ohio N. P. (N. S.) 577. Will be deemed to have been begun on the date of service of summons issued against the first co-defendant served. Id.

34. Only by virtue of § 7 of statute of wills (2 Starr & C. Ann. St. 1885 [1st Ed.] p. 2740). Sharp v. Sharp, 213 Ill. 332, 72 N. E. 1058.

35. Is the statute which confers jurisdiction and is not merely a limitation law. Sharp v. Sharp, 213 Ill. 332, 72 N. E. 1058. Laws 1895, p. 327, allowing two years for filing bill, conferred no vested rights on public so as to prevent legislature from totally abolishing remedy, or changing it. Id. Laws 1903, p. 355, limiting time to one year, is retroactive and applies to suits to contest wills probated before its passage. Id. Not unreasonable where applied to case of contestant of will probated in February, 1902, who brought suit in January, 1904. Id.

36. Hunt v. Hunt, 2 Ohio N. P. (N. S.) 577.

37. Contest upon an issue of devisavit vel non questions the execution of a will while the attack upon the validity of its provisions concedes its execution, but questions the legality of such provisions. Bowers v. McGavock [Tenn.] 85 S. W. 893. In an action to contest on the sole ground that will was not signed at the end, its construction or interpretation is not open to consideration by the court or jury. Irwin v. Jacques [Ohio] 73 N. E. 683.

38, 39, 40. O'Brien v. Bonfield, 213 Ill. 428, 72 N. E. 1090.

the will has been admitted to probate,[39] or that some or all of the contestants have appeared in the county court and cross-examined the subscribing witnesses.[40]

Both parties are generally entitled to a jury trial on all the issues,[41] though in some states the verdict of the jury on the questions of capacity and undue influence is merely advisory, and the court may dispense with the jury whenever it thinks proper.[42]

The certificate of the oath of the subscribing witnesses at the first probate is admissible in evidence.[43] The usual rules as to procedure apply.[44]

An issue devisavit vel non should be refused where it is entirely clear that no verdict against the will could be sustained.[45] As in other cases, on a motion to withdraw the case from the jury, the duty of the court is limited strictly to determining whether there is or is not evidence legally tending to prove the fact affirmed.[46]

(§ 4) *K. Suits to set aside.*[47]—In a proceeding to set aside a will admitted to probate, the sole question is whether the writing produced is or is not the will of the testator.[48]

The facts constituting fraud for which it is sought to have the will set aside must be pleaded.[49]

The admission of a memorandum, indorsed on the will by the probate judge, reciting that it was proved and admitted to probate,[50] or of evidence of the enhanced value of the land affected, is reversible error.[51]

(§ 4) *L. Costs.*[52]—The taxation of costs in will contests is within the discretion of the court.[53] Such discretion is not an arbitrary, but a legal one, to be exercised within the limits of legal and equitable principles.[54]

An executor will be allowed his costs[55] and reasonable counsel fees incurred in defending the will when its validity is contested.[56]

Where there is reasonable ground to believe that a will is valid and legal, the general guardian of testator's minor children, who is also appointed testa-

41. In re McKenna's Estate, 143 Cal. 580, 77 P. 461.

42. Rathjens v. Merrill [Wash.] 80 P. 754.

43. Hurd's Rev. St. Ill. 1901, c. 148, § 7. Certificate showing that oath was taken after will was admitted is not admissible. Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19.

44. Right to open and close held in discretion of court, where both parties introduce evidence [Clark's Code N. C. Rules 3, 6, pp. 952, 953]. In re Peterson, 136 N. C. 13, 48 S. E. 561.

45. Lack of capacity and undue influence. In re Rockhill's Estate, 208 Pa. 510, 57 A. 989; In re Allison's Estate, 210 Pa. 22, 59 A. 318.

46. Not his province to weigh evidence. Woodman v. Illinois Trust & Savings Bank, 211 Ill. 578, 71 N. E. 1099.

47. See 2 Curr. L. 2105.

48. Hurd's Rev. St. Ill. 1903, c. 148, § 7. Weston v. Teufel, 213 Ill. 291, 72 N. E. 908.

49. Story v. Story [Mo.] 86 S. W. 225. If the pleader identifies the fraud by a specification, he must be held to the precise specification pleaded. Id.

50. Where does not show on what evidence admission was based. Weston v. Teufel, 213 Ill. 291, 72 N. E. 908. Error not cured by necessary averment in bill that will had been admitted to probate (Id.), nor by an instruction that the order of the probate court admitting the will should not be considered by the jury (Id.).

51. Savage v. Bowen [Va.] 49 S. E. 668.

52. See 2 Curr. L. 2106.

53. Code Civ. Proc. § 623. In re Clapham's Estate [Neb.] 103 N. W. 61.

54. General costs properly charged against contestant where contest based on meager and indefinite suspicions rather than competent evidence. Fee of guardian ad litem for minor beneficiary not properly included. In re Clapham's Estate [Neb.] 103 N. W. 61.

55. Where offers a will for probate and attempts to show that it has not been revoked is entitled to his costs as executor, expended in good faith to sustain the will. Florre v. Green, 26 Ky. L. R. 1073, 83 S. W. 133.

56. Where a will is ultimately established, attorneys employed by the executor named therein, to resist a contest instituted before probate, are entitled to fees from the assets of the estate. Burns' Ann. St. 1901, §§ 2765, 2766, 2378, construed. Fillinger v. Conley [Ind.] 72 N. E. 597. An executor will be allowed reasonable counsel fees to compensate attorneys employed by him to defend the will when assailed after its admission to probate. Will not be allowed where will never admitted to probate and no letters testamentary were ever issued to defendant. Tilghman v. France, 99 Md. 611, 59 A. 277.

mentary guardian by the will, is justified in incurring necessary expense in resisting a contest thereof, though he does not succeed in establishing its validity.[57]

Petitioners seeking to set aside a will previously probated without contest, on the ground that testator had executed a later will in which they were named as beneficiaries, are properly taxed with the costs, if unsuccessful,[58] nor is one instituting a contest on the ground of want of capacity entitled to an attorney's fee out of the estate, where it appears that he had previously so acted as to in effect recognize testator's capacity.[59]

Costs on appeal from a judgment admitting the will to probate may, in proper cases, be paid out of the estate.[60]

Necessary costs and expenses should ordinarily be paid out of the residuary estate, rather than out of that specifically devised or bequeathed.[61]

(§ 4) *M. Recording foreign wills.*[62]—Certified copies of wills probated in another state and of the probate thereof may usually be recorded in the same manner as domestic wills, and are thereafter entitled to be admitted in evidence in the same manner and with like effect.[63]

In order that foreign wills may be admissible in evidence, they must be accompanied by a duly certified copy of the judgment of probate.[64]

A will being beyond the jurisdiction of the court, it is proper to prove it and its contents by the deposition of the official having custody of wills.[65]

§ 5. *Interpretation and construction.*[66]

Scope of this section.—There are numerous rules applicable to interpretation which may be called general. To them the first subsection applies. The four subsections following indicate four general classes of objects to which the terms of a will are addressed.[67]

(§ 5) *A. General rules.*[68]—The expressed[69] intention of the testator,[70] to

57. In re Brady [Idaho] 79 P. 75.

58. Not payable out of estate. Beebe v. McFaul [Iowa] 101 N. W. 267.

59. Grant v. Stamler [N. J. Eq.] 59 A. 890.

60. Grounds for review such that costs of appeal should be paid from estate. In re Breining's Estate [N. J. Eq.] 59 A. 561.

61. Attorney's fees for services to executrices in probating will. Ex parte Landrum [S. C.] 48 S. E. 47.

62. See 2 Curr. L. 2106.

63. B. & C. Comp. § 5562. Montague v. Schieffelin [Or.] 80 P. 654. Where a will executed in Ohio in accordance with the laws of Missouri and recorded in the latter state disposes of land there situate, no partition of such lands can be had contrary to the terms of the will. Express provisions of Rev. St. 1899, § 4383. Stevens v. Larwill [Mo. App.] 84 S. W. 113.

64. Civ. Code 1895, §§ 5167, 5237. Otherwise inadmissible, though accompanied by certificate of register of wills reciting that it was duly admitted to probate and record, and by duly certified copies of affidavits of attesting witnesses. Youmans v. Ferguson, [Ga.] 50 S. E. 141.

65. Kelly v. Moore, 22 App. D. C. 9.

66. See 2 Curr. L. 2106.

67. These classes may be determined by their responsiveness to four questions: (1) What property was meant? (2) What persons were intended to take? (3) What estate was given? (4) How was it to be administered?

68. See 2 Curr. L. 2106.

69. Townsend v. Wilson [Conn.] 59 A. 417; McGuire v. Gallagher [Me.] 59 A. 445; Ridgely v. Ridgely [Md.] 59 A. 731; Paul v. Philbrick [N. H.] 60 A. 682. To be gathered from language used. Dee v. Dee, 212 Ill. 338, 72 N. E. 429; Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37; Davis v. People, 111 Ill. App. 207; Partner v. Citizens' Loan & Trust Co. [Ind.] 71 N. E. 894; Matlock v. Lock [Ind. App.] 73 N. E. 171; Brisbin v. Huntington [Iowa] 103 N. W. 144; George v. George [Mass.] 71 N. E. 85; Crapo v. Pierce, 187 Mass. 141, 72 N. E. 935; Watkins v. Bigelow [Minn.] 101 N. W. 497; McCullough v. Lauman [Wash.] 80 P. 441. Must be ascertained from will and not from testator's oral declarations. In re Holt's Estate [Cal.] 79 P. 585. The construction must be derived from the instrument itself. Bryan v. Bigelow [Conn.] 60 A. 266. Expressed in his will or clearly deducible therefrom. Howard v. Evans, 24 App. D. C. 127. From context and, in certain cases, attendant circumstances. Mollenkamp v. Farr [Kan.] 79 P. 646. To be gathered from instrument itself without consulting canons of interpretation, if possible. Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235. The test must be, has testator effectuated his obvious intent in language expressive thereof? Thomas v. Thomas, 43 Misc. 541, 89 N. Y. S. 495. Not an intention independent of that the testator tried to express. Robbins v. Smith, 5 Ohio C. C. (N. S.) 545. The intent as evidenced by the language. Corrin v. Elliott, 23 Pa. Super. Ct. 449.

be ascertained from the whole will,[71] must govern when not in conflict with any settled rule of law or property.[72]

It is the duty of the court to construe the will which the testator has made,

70. In re Reith's Estate, 144 Cal. 314, 77 P. 942; Kidwell v. Ketler [Cal.] 79 P. 514; Hughes v. Fitzgerald [Conn.] 60 A. 694; Hill v. Terrell [Ga.] 51 S. E. 81; Craw v. Craw, 210 Ill. 246, 71 N. E. 450; Olcott v. Tope, 213 Ill. 124, 72 N. E. 751; Gruenewald v. Neu [Ill.] 74 N. E. 101; Partner v. Citizens' Loan & Trust Co. [Ind.] 71 N. E. 894; Nelson v. Nelson [Ind. App.] 72 N. E. 482; Mollenkamp v. Farr [Kan.] 79 P. 646; Gerting v. Wells [Md.] 59 A. 177; Crapo v. Pierce, 187 Mass. 141, 72 N. E. 935; Sondheim v. Fechenbach [Mich.] 100 N. W. 586; Brooks v. Brooks [Mo.] 86 S. W. 158; Schick v. Whitcomb [Neb.] 94 N. W. 1023; McManus v. McManus, 179 N. Y. 338, 72 N. E. 235; In re Ryder, 43 Misc. 476, 89 N. Y. S. 460; Kent v. Kent, 90 N. Y. S. 828; Ketchum v. Ketchum, 91 N. Y. S. 801; In re Fisk, 45 Misc. 298, 92 N. Y. S. 394; Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633; Kerr v. Girdwood [N. C.] 50 S. E. 862; Allen v. Tressenrider [Ohio] 73 N. E. 1015; Mulliken v. Earnshaw, 209 Pa. 226, 58 A. 286; Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999; Logan v. Cassidy [S. C.] 50 S. E. 794; Wiess v. Goodhue [Tex.] 83 S. W. 178; Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966; Russell v. United States Trust Co. [C. C. A.] 136 F. 758. As to meaning of "issue." Brisbin v. Huntington [Iowa] 103 N. W. 144. Same rule applies in England. McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75. Unless so uncertain that law is fairly baffled. Cook v. Universalist General Convention [Mich.] 101 N. W. 217. All courts and others concerned in execution of last wills required to have due regard to directions of will, and the testator's true intent and meaning in all matters brought before them [Mo. Rev. St. 1845, p. 1086, § 51; Rev. St. 1899, § 4650]. Yocum v. Parker, 130 F. 722, afd. [C. C. A.] 134 F. 205. The intention of the testator is the cardinal rule of construction. Missouri Baptist Sanitarium v. McCune [Mo. App.] 87 S. W. 93. Primary object to ascertain intent. Lamar v. Harris, 121 Ga. 285, 48 S. E. 932. The object of construction is to arrive at testator's intention. Craw v. Craw, 210 Ill. 246, 71 N. E. 450; Higgins v. Downs, 91 N. Y. S. 937; Taylor v. Stephens [Ind. App.] 72 N. E. 609. The primary duty is to ascertain and carry into effect testator's intention, and it will prevail notwithstanding unskillful and inaccurate phraseology. In re Smith's Estate, 94 N. Y. S. 90; In re Reith's Estate, 144 Cal. 314, 77 P. 942. And though apt legal words not used. Kerr v. Girdwood [N. C.] 50 S. E. 852.

71. In re Reith's Estate, 144 Cal. 314, 77 P. 942; Hill v. Terrell [Ga.] 51 S. E. 81; Lash v. Lash, 209 Ill. 595, 70 N. E. 1049; Craw v. Craw, 210 Ill. 246, 71 N. E. 450; Olcott v. Tope, 213 Ill. 124, 72 N. E. 751; Gruenewald v. Neu [Ill.] 74 N. E. 101; Snodgrass v. Brandenburg [Ind.] 71 N. E. 137; Partner v. Citizens' Loan & Trust Co. [Ind.] 71 N. E. 894; Taylor v. Stephens [Ind. App.] 72 N. E. 609, rehearing denied 74 N. E. 12; McGuire v. Gallagher [Me.] 59 A. 445; Sondheim v. Fechenbach [Mich.] 100 N. W. 586; Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235; Watkins v. Bigelow [Minn.] 101 N. W. 497; Dozier v. Dozier, 183 Mo. 137, 81 S. W. 890; Mueller v. Buenger [Mo.] 83 S. W. 458; Brooks v. Brooks [Mo.] 86 S. W. 158; Torrey v. Torrey, 70 N. J. Law, 672, 59 A. 450; Inglis v. McCook [N. J. Eq.] 59 A. 630; Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239; Langley v. Westchester Trust Co. [N. Y.] 73 N. E. 44; In re Ryder, 43 Misc. 476, 89 N. Y. S. 460; Thomas v. Thomas, 43 Misc. 541, 89 N. Y. S. 495; Kent v. Kent, 90 N. Y. S. 828; Jewett v. Schmidt, 45 Misc. 34, 90 N. Y. S. 848; Ketchum v. Ketchum, 91 N. Y. S. 801; Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999; Brown v. Hawkins [R. I.] 59 A. 78; Logan v. Cassidy [S. C.] 50 S. E. 794; Wiess v. Goodhue [Tex.] 83 S. W. 178; Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966; McCullough v. Lauman [Wash.] 80 P. 441.

To be gathered from four corners. Dee v. Dee, 212 Ill. 338, 72 N. E. 429; Snodgrass v. Brandenburg [Ind.] 72 N. E. 1030; Gerting v. Wells [Md.] 59 A. 177; Thompson v. Thompson [Ky.] 87 S. W. 790; In re Dickinson's Estate, 209 Pa. 59, 58 A. 120. To be gathered from general purport and scope of instrument. Hughes v. Fitzgerald [Conn.] 60 A. 694; Russell v. United States Trust Co. [C. C. A.] 136 F. 758. Whether words constitute common-law conditions, or regulations for the management of the estate. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412. Must construe all the provisions of the will. Wilder v. Wilder [Ky.] 86 S. W. 557. All clauses to be considered and given effect if possible, unless such a construction becomes inconsistent with manifest purpose. Thissell v. Schillinger [Mass.] 71 N. E. 300. Language used in one part which, if read by itself, would justify the finding of a particular intent, may be so modified by language in other parts as not to permit the inference of such intent. Dean v. Nutley, 70 N. J. Law, 217, 57 A. 1089. In same manner as contract. Mulliken v. Earnshaw, 209 Pa. 226, 58 A. 286. Every sentence and word must be considered. Fletcher v. Hoblitzell, 209 Pa. 337, 58 A. 672.

72. Nelson v. Nelson [Ind. App.] 72 N. E. 482; McGuire v. Gallagher [Me.] 59 A. 445; Gerting v. Wells [Md.] 59 A. 177. Except where certain forms of expression have become rules of property. Mulliken v. Earnshaw, 209 Pa. 226, 58 A. 286. Rule of law or construction. Ridgely v. Ridgely [Md.] 59 A. 731. Intention cannot control where violates law. Matlock v. Lock [Ind. App.] 73 N. E. 171; Taylor v. Stephens [Ind. App.] 72 N. E. 609; rehearing denied 74 N. E. 12; Craw v. Craw, 210 Ill. 246, 71 N. E. 450. For example, a rule of law whereby some fixed and definite meaning is given to words which he uses. Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633. Rule against perpetuities. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37. Testator must effectuate intent within the rules of law. Snodgrass v. Brandenburg [Ind.] 72 N. E. 1030.

and not to speculate as to his intention, or to make a will for him.[73] Hence, there is no room for construction where the intent clearly appears from the four corners of the will itself.[74]

Testator's motives cannot be investigated,[75] nor can the reasonableness of the will be criticised, if no provision of law or morality is violated.[76] Decisions upon other wills may assist, but cannot control, the construction.[77]

Effect should, if possible, be given to every provision of the will,[78] and every effort be made to reconcile clauses which are apparently repugnant and conflicting.[79]

All the pertinent statutes of the state enter into, qualify, and fix the character of the estate which the devisee of lands takes under the will.[80] The Federal courts will follow the decisions of the highest court of a state in interpreting local statutes concerning construction.[81]

The language used should be fairly and reasonably construed.[82] Words will be given their natural and ordinary meaning in the absence of anything to show a contrary intention,[83] having regard to the legal skill of the draughtsman,[84] but

73. Boston Safe Deposit & Trust Co. v. Buffum [Mass.] 71 N. E. 549. All rules of construction yield to the actual intention when that is reasonably clear to the mind of the court. Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239; In re Shedden's Estate, 210 Pa. 82, 59 A. 486.

74. Broadbridge v. Sackett [Mich.] 101 N. W. 525. Where the language is clear and explicit, it must prevail. Fiske v. Fiske's Heirs [R. I.] 59 A. 740; Todd v. Tarbell [Mass.] 73 N. E. 556.

75, 76. In re Smith's Estate, 94 N. Y. S. 90.

77. Mulliken v. Earnshaw, 209 Pa. 226, 58 A. 286. Little assistance, if any, derived from consideration of adjudged cases. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. The citation of authorities is in most cases of little value. Russell v. United States Trust Co. [C. C. A.] 136 F. 758. Court not bound to adhere to precedent. McCaffrey v. Manogue, 25 S. Ct. 319.

78. Howard v. Evans, 24 App. D. C. 127; Olcott v. Tope, 213 Ill. 124, 72 N. E. 751; Primm v. Primm, 111 Ill. App. 244; McGuire v. Gallagher [Me.] 59 A. 445; Thissell v. Schillinger [Mass.] 71 N. E. 300; Gilkie v. Marsh [Mass.] 71 N. E. 703; Ketchum v. Ketchum, 91 N. Y. S. 801; Parks v. Robinson [N. C.] 50 S. E. 649; Kerr v. Girdwood [N. C.] 50 S. E. 852. Each and every clause, sentence, and word to be given effect if possible. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. To avoid conflicts between its several parts so that entire paper may be dealt with as harmonious and consistent whole. Gerting v. Wells [Md.] 59 A. 177. Devise to grandson held vested, since if contingent, devise over to residuary legatees in case of his death unnecessary. Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999.

79. Robbins v. Smith [Ohio] 73 N. E. 1051. One will be rejected only as last resort. Direction to purchase 80 acres for son out of rents of farm on certain contingency, and in case it does not happen then son to take 80 acres owned by testator, not repugnant to previous devise of all testator's property. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. Repugnancy should be avoided if the will is susceptible of any other reasonable construction. Williams v. Boul, 101 App. Div. 593, 92 N. Y. S. 177; Logan v. Cassidy [S. C.] 50 S. E. 794.

80. Resort should not be had to one part of statute to exclusion of another having direct bearing upon question, but should be harmonized if possible. Yocum v. Parker [C. C. A.] 134 F. 205. Statutes with reference to administration. McCullough v. Lauman [Wash.] 80 P. 441.

81. Where conflict, will follow latest, when no intervening contract rights involved. Yocum v. Parker [C. C. A.] 134 F. 205.

82. In re Smith's Estate, 94 N. Y. S. 90. "I want her to have an equal share with my brothers and sisters" constitutes the brothers and sisters legatees. Id.

83. Nelson v. Nelson [Ind. App.] 72 N. E. 482; Brown v. Ferren [N. H.] 58 A. 870. Common and ordinary sense. Taylor v. Stephens [Ind. App.] 72 N. E. 609; Id., 74 N. E. 12. Plain and usual sense. Missouri Baptist Sanitarium v. McCune [Mo. App.] 87 S. W. 93. Ordinary, popular meaning. Paul v. Philbrick [N. H.] 60 A. 632. Ordinary and legal meaning. "Residue." In re Bradley's Will [Wis.] 101 N. W. 393. Word "also" held to mean "in addition," "besides," etc. Hill v. Terrell [Ga.] 51 S. E. 81. Will written in German construed and held to direct payment of the residue to "those who shall have paid" for the maintenance of the testator and his insane daughter rather than to "she who has" furnished such maintenance. Lehnhoff v. Theine [Mo.] 83 S. W. 469. Presumed that testator used word "estate" in its broad and inclusive signification so as to include realty, unless context requires different meaning. Foil v. Newsome [N. C.] 50 S. E. 597.

84. A will written by an unlearned person should receive the interpretation which unlearned persons would be presumed to have intended, unless some rule of law requires a different construction. In re Priester's Estate, 23 Pa. Super. Ct. 386. Where the will is not drawn by a lawyer, words will be given their popular rather than their technical meaning. Robbins v. Smith [Ohio] 73 N. E. 1051.

words which have acquired a definite legal meaning, and have, by construction, become a rule of property, must be regarded as having been used in their technical sense.[85] "Or" may be construed to mean "and," and vice versa, if necessary to effectuate the intention.[86] The language will be subordinated to the intention apparent from the whole will.[87]

Words, sentences, and clauses may be transposed, rejected, or supplied if necessary,[88] but no word or clause is to be rejected to which a reasonable effect can be given,[89] nor can missing words be supplied unless the words used show by necessary implication what they are,[90] and it appears from all the competent evidence that it is more probable than otherwise that testator's intention would thereby be more clearly or fully expressed.[91] The rule does not authorize the making of a new will or scheme of distribution,[92] or the reformation of a will by making additions thereto.[93] Punctuation should be resorted to as a means of interpretation only when all other means fail.[94] Equity will not undertake to rectify a mistake in a will.[95]

The will and codicils should be read together.[96]

A scilicet may particularize what before was general, or distribute what was in gross, or explain what was uncertain, but it must not be inconsistent with the premises.[97]

A construction which will render the will valid will be adopted in preference to one rendering it void[98] or meaningless.[99]

85. Gilkie v. Marsh [Mass.] 71 N. E. 703.

86. Olcott v. Tope, 213 Ill. 124, 72 N. E. 751. Held to be within the power of, and to be the duty of, the court to change the word "or" to "and." Davie v. Davie, 26 Ky. L. R. 312, 81 S. W. 246; Shropshire v. Gault, 26 Ky. L. R. 1197, 83 S. W. 590.

87. Kent v. Kent, 90 N. Y. S. 828. Where the idea is clear, the words employed must be read so as to give effect to the intention. Brooks v. Brooks [Mo.] 86 S. W. 158.

88. Words, sentences, and clauses may be transposed if necessary to arrive at testator's intention, and to harmonize and give effect to all its provisions. Thissell v. Schillinger [Mass.] 71 N. E. 300. Words may be transposed, rejected, or supplied. In re Smith's Estate, 94 N. Y. S. 90. Omitted words may be supplied in order to effectuate the intention as gathered from the context of the will. Olcott v. Tope, 213 Ill. 124, 72 N. E. 751. Where ambiguity or inconsistency arising on the face of the will is plainly ascribable to the omission of a word. Provision giving executor one year "after my decease" to sell land, held to mean one year "after my wife's decease." Lash v. Lash, 209 Ill. 595, 70 N. E. 1049.

89. Taylor v. Stephens [Ind. App.] 72 N. E. 609; Id., 74 N. E. 12. Words cannot be ignored. Paul v. Philbrick [N. H.] 60 A. 682.

90. Where will gave son $100 and provided that net income of balance should be paid to daughter for life, but made no disposition of corpus of fund, court cannot supply words giving it to daughter. Boston Safe Deposit & Trust Co. v. Buffum [Mass.] 71 N. E. 549.

91. Paul v. Philbrick [N. H.] 60 A. 682.

92. Merely authorizes discovery and effectuation of intent. In re Smith's Estate, 94 N. Y. S. 90. Where, on death of wife, property was to go to son, if living, and if not, wife was given power of appointment, court will not supply words "without issue" in second gift over. Todd v. Tarbell [Mass.] 73 N. E. 556.

93. To add grandchild as beneficiary under gift to children. Crawley v. Kendrick [Ga.] 50 S. E. 41.

94. Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239.

95. Olcott v. Tope, 213 Ill. 124, 72 N. E. 751.

96. Miller v. Metcalf [Conn.] 58 A. 743; Sperry v. Sperry [Iowa] 102 N. W. 491; Ladies' Union Benev. Soc. v. Van Netta, 43 Misc. 217, 88 N. Y. S. 413. As to power of trustees to convey realty. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058. As to payment of brother's indebtedness. Brown v. Ferren [N. H.] 58 A. 870. Codicils are treated as parts of the will. Sondheim v. Fechenbach [Mich.] 100 N. W. 586.

97. Brooks v. Brooks [Mo.] 86 S. W. 158, quoting from Stuckley v. Butler, Hobart's Reports, 168. Testator bequeathed his estate to brother in trust for his wife for life, remainder to children in fee, but if the wife should remarry, her life estate should cease and she should take a share equal to a child's share. By a codicil, testator bequeathed to a sister a portion equal to a share of the trustee's wife and children, "that is to say, should the wife of the trustee take a child's part then the sister" should take a child's part, held that the scilicet was only effective to define the sister's share, so that she took a child's share of the estate. Brooks v. Brooks [Mo.] 86 S. W. 158.

98. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37; Watts v. Griffin [N. C.] 50 S. E. 218; Kent v. Kent, 90 N. Y. S. 828. Estate construed as fee to prevent violation of rule against perpetuities. Mee v. Gordon,

That construction will prevail which will support testator's main intention,[1] minor parts of the testamentatory plan being subordinated thereto.[2] General provisions must give way to specific ones.[3]

The law favors equality among children,[4] and doubts in construction are to be resolved in favor of a widow accepting the provisions of the will in lieu of her rights under the intestate laws.[5] There is a presumption that the testator did not intend to disinherit the heir,[6] and that result can be accomplished only by express words or necessary implication.[7] In case of doubt or ambiguity, the general rules of inheritance will be adhered to as closely as possible.[8] Charitable donations are also favored, and will be carried into effect if possible.[9]

When the testator interprets a particular clause in his will, the courts, when called to consider it, will follow that interpretation.[10] A construction acquiesced in by the parties in interest for many years will not be disturbed unless clearly shown to be erroneous.[11]

As to time.[12]—The construction of a will is to be determined from its language as of the time when it takes effect.[13] The intention to be determined is that existing at the time of the execution of the will, and it cannot be varied or changed by any after occurring events.[14]

Extrinsic evidence[15] is not admissible to supply or contradict, enlarge or vary, the words of the will, or to explain the testator's intention,[16] except where

93 N. Y. S. 675, rvg. Id., 45 Misc. 259, 92 N. Y. S. 159.

99. Kelly v. Moore, 22 App. D. C. 9.

1. Watson v. Smith, 210 Pa. 190, 59 A. 988.

2. Mead v. Coolidge, 179 N. Y. 386, 72 N. E. 314.

3. Specific devise will be regarded as excepted from preceding general one. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. A reasonably clear general intent will rarely be defeated by an inaccuracy or inconsistency in the expression of a particular intent. Appeal of Beardsley [Conn.] 60 A. 664.

4. In re Vance's Estate, 209 Pa. 561, 58 A. 1063. Where will shows intention to treat all alike, construction which would defeat equality will be rejected, if possible. Ridgely v. Ridgely [Md.] 59 A. 731.

5. In re McCallum's Estate [Pa.] 60 A. 903.

6. McCaffrey v. Manogue, 25 S. Ct. 319. Deserves weight only in so far as it accords with natural impulse to provide for family and kindred. Torrey v. Torrey, 70 N. J. Law, 672, 59 A. 450.

7. Law will execute intention to do so only when it is put in clear and unambiguous shape. McCaffrey v. Manogue, 25 S. Ct. 319; Robbins v. Smith, 5 Ohio C. C. (N. S.) 545. Not by conjecture (Olcott v. Tope, 213 Ill. 124, 72 N. E. 751), or implication or construction (In re Union Trust Co., 179 N. Y. 261, 72 N. E. 107). Law presumes intention to favor only son, who was made principal object of testator's bounty, and construction will be made in light of such intention. Watson v. Smith, 210 Pa. 190, 59 A. 988.

8. In re Miller's Estate, 26 Pa. Super. Ct. 443. Construction will be adopted which will cast the property as the law would have cast it had no will been made. Taylor v. Stephens [Ind. App.] 72 N. E. 609; Id., 74 N. E. 12.

9. In re Merchant's Estate, 143 Cal. 537, 77 P. 475.

10. Brooks v. Brooks [Mo.] 86 S. W. 158.

11. A construction of provisions creating a trust acquiesced in for 35 years, in the absence of a showing of a clear abuse of the trust, or a clear misappropriation or misdirection of its funds. Kidwell v. Ketler [Cal.] 79 P. 514.

12. See 2 Curr. L. 2109.

13. Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633.

14. McManus v. McManus, 179 N. Y. 338, 72 N. E. 235.

15. See 2 Curr. L. 2112, n. 72.

16. However clearly it may indicate testator's intention. Question not what he meant to say, but what he meant by what he actually did say. Bryan v. Bigelow [Conn.] 60 A. 266. Letter not admissible to show purposes of trust. Id. Not to prove a devise or bequest not contained in the will. Id.

Parol evidence inadmissible: Chaplin v. Leapley [Ind. App.] 74 N. E. 546: To show that he meant one thing when he said another. Oliver v. Henderson, 121 Ga. 836, 49 S. E. 743. To superadd a qualification to the terms used and import into a will an intention not there expressed. Cannot be shown that property was devised in trust because of the beneficiary's incapacity and that since the disability is removed, he is entitled to the possession and management of the property. Carpenter v. Carpenter's Trustee [Ky.] 84 S. W. 737. Declarations of testator (George v. George [Mass.] 71 N. E. 85), made prior to (Cochran v. Lee's Adm'r [Ky.] 84 S. W. 337), or after the execution of the will as to his intentions with respect to his property (Lehnhoff v. Theine [Mo.] 83 S. W. 469). Subsequent declarations to show that intended to include stepdaughter of brother in gift to "my nieces." If admissible at all, only for purpose of showing that he so treated her. In re Hoit's Estate [Cal.] 79 P. 585.

there is a latent ambiguity arising dehors the will as to the person or subject meant to be described,[17] nor to rebut a trust in favor of residuary legatees resulting from the failure of an express trust contained in the will.[18] The court may put itself in the place of the testator at the time he executed the will,[19] and to that end may take into consideration all the circumstances and conditions existing when it was drawn,[20] and his manifest purpose,[21] particularly where doubts or ambigui-

17. When extrinsic facts appear in applying the will to objects or subjects therein referred to which produce latent ambiguity, as where it appears that testator attempted to dispose of property not subject of such disposition. Chaplin v. Leapley [Ind. App.] 74 N. E. 546. Extrinsic evidence is admissible to make clear the doubtful meaning of the language used. Where testator bequeathed sum in trust for purposes stated in sealed letter, which was not sufficiently incorporated in will to become part of it, failure of will to state purposes of trust not such a latent ambiguity as to justify admission of letter. Bryan v. Bigelow [Conn.] 60 A. 266.

Evidence held admissible: Declarations tending to show that relation of debtor and creditor existed between himself and his wife, and that he expected certain beneficiaries to pay the debt, it being a question of fact as to what he had actually done in the way of making provision for her in lieu of her interest in the property devised by him. Chaplin v. Leapley [Ind. App.] 74 N. E. 546. To apply the provisions to the subject or person intended when the description is uncertain or defective. Where there were no relatives answering description of "William Wilson's children," it may be shown that Seth Wilson's children were intended, testator having a brother-in-law of the latter name who had a brother named William, and it appeared that testator often confused William and Seth. In re Miller's Estate, 26 Pa. Super. Ct. 443. Where will designated named devisee as testator's half-brother, but he had no half-brother, to show that brother-in-law of same name was intended. Rathjens v. Merrill [Wash.] 80 P. 754. Evidence as to the name by which testator called his land. Fact that he habitually spoke of tract as "Wortendyke Farm." Ackerman v. Crouter [N. J. Eq.] 59 A. 574. To identify legatee to whom gift was made in trust for mission work (Cook v. Universalist General Convention [Mich.] 101 N. W. 217), when correct corporate name not used (Bowman v. Domestic & Foreign M. Soc., 90 N. Y. S. 898), but not if no name or description at all (Id.). Letter not admissible where beneficiary not named in will, and it appears from language of will that it was intention that should only be named in letter. Bryan v. Bigelow [Conn.] 60 A. 266. Both latent and patent ambiguities [Ga. Civ. Code 1895, § 3325]. Oliver v. Henderson, 121 Ga. 836, 49 S. E. 743. There must be some general description other than the false one, sufficient to identify the property intended to pass. Where will described property as "lot of land (78)" in a certain district, and testator did not own lot 78, but did own lot 68 in said district, petition alleging these facts and praying that averments as to intention might be shown by parol, held properly dismissed on demurrer, where it was not alleged that testator did not own any other lands in such district. Oliver v. Henderson, 121 Ga. 836, 49 S. E. 743.

18. Letter explaining purposes of trust. Bryan v. Bigelow [Conn.] 60 A. 266. See, also, on this question, Chaplin v. Leapley [Ind. App.] 74 N. E. 546; Russell v. Jones [C. C. A.] 135 F. 929.

19. Ackerman v. Crouter [N. J. Eq.] 59 A. 574; Sondheim v. Fechenbach [Mich.] 100 N. W. 586. Then examine surroundings to arrive at intention. Nelson v. Nelson [Ind. App.] 72 N. E. 482; Chaplin v. Leapley [Ind. App.] 74 N. E. 546. Should read the will in the lights that appeared to him. Dozier v. Dozier, 183 Mo. 137, 81 S. W. 890.

20. "In the event of the death of each of said children," then the property to go to brother, held, under circumstances, to refer to death before they reached 21. Woolverton v. Johnson, 69 Kan. 708, 77 P. 559. Each will must be construed in the light of the surrounding circumstances, the scheme disclosed, the language employed, and the intention of the testator, gathered from the general situation. Russell v. United States Trust Co. [C. C. A.] 136 F. 758. Primarily the language of the will is the basis of the inquiry, but extrinsic circumstances which aid in the interpretation of the language used and help to disclose the actual intention may also be considered. Fact that testator knew he did not have sufficient personalty in excess of certain trust accounts, as tending to show intent to charge legacies, etc., on land. McManus v. McManus, 179 N. Y. 338, 72 N. E. 235. The relation and condition of the parties, and all the surrounding facts and circumstances. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394. The intention must be gathered from the four corners of the will in the light of the circumstances under which it was written. Mueller v. Buenger [Mo.] 83 S. W. 458. Testator's surroundings. Torrey v. Torrey, 70 N. J. Law, 672, 59 A. 450; Paul v. Philbrick [N. H.] 60 A. 682; Russell v. United States Trust Co. [C. C. A.] 136 F. 758. Circumstances existing when it was made. Crapo v. Pierce, 187 Mass. 141, 72 N. E. 935; George v. George [Mass.] 71 N. E. 85. May look to the extent of the property devised. Olcott v. Tope, 213 Ill. 124, 72 N. E. 751. Testator's environment, his condition in life, and the nature, extent, and condition of his property. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. The condition of his family. Parks v. Robinson [N. C.] 50 S. E. 649.

21. Gift to wife of "all this world's goods of which I may be possessed," held to include realty. Torrey v. Torrey, 70 N. J. Law, 672, 59 A. 450. General scheme should be considered. Appeal of Beardsley [Conn.] 60 A. 664. Evident general purpose. McCullough v. Lauman [Wash.] 80 P. 441.

ties arise from the will itself.[22] Resort will not, however, be had to extraneous circumstances, if the language used plainly indicates testator's intention.[23] Hence evidence to show the circumstances surrounding him at that time is proper.[24]

(§ 5) *B. Of terms designating property or funds.*[25]—Being subject to fair and untechnical construction, words will carry any property which in common use they import, restricted only by the intent,[26] even though technically they might apply only to one class of property or to a specific thing,[27] or though that which is given as realty is in fact personalty or vice versa.

22. In case of uncertainty arising on the face of the will, as to the application of any of its provisions, the intention is to be ascertained from the words of the will, taking into consideration the circumstances under which it was made, exclusive of testator's oral declarations [Cal. Civ. Code, § 1318]. In re Smith's Estate, 145 Cal. 118, 78 P. 369. Must be gathered from the terms of the will itself, unless the inconsistencies and ambiguities in the language used make it doubtful, when the situation of the testator, the objects of his bounty, and all surrounding circumstances, may be considered. Missouri Baptist Sanitarium v. McCune [Mo. App.] 87 S. W. 93. Should consider surroundings and amount of estate. Sondheim v. Fechenbach [Mich.] 100 N. W. 586. Where ambiguous, the situation of testator, objects of his bounty, and all the surrounding circumstances. Missouri Baptist Sanitarium v. McCune [Mo. App.] 87 S. W. 93. When difficulties or ambiguities arise from the will itself, it may be read in connection with the situation of testator's property, and the persons taking. Whether legacy in lieu of dower has priority over devises of realty. Roll v. Roll [N. J. Eq.] 59 A. 296.

23. In re Smith's Estate, 94 N. Y. S. 90. Doubt, suggested by extrinsic evidence of the testator's circumstances at the time he executed the will, cannot affect the construction. Where terms are clear, it interprets itself. In re Alishouse's Estate, 23 Pa. Super. Ct. 146.

24. Declarations of testator tending to show that relation of debtor and creditor existed between himself and his wife, and that he expected certain beneficiaries to pay the debt. Chaplin v. Leapley [Ind. App.] 74 N. E. 546. To show true intention when it is obscure and uncertain. Letter written by testator to residuary legatees three days before executing codicil, held admissible for purpose of showing intention in executing it. Ladies' Union Benev. Soc. v. Van Netta, 43 Misc. 217, 88 N. Y. S. 413. Agreement by him to leave his property to one on condition that he leave his home and live with him and take charge of his property, which he did, may be considered. George v. George [Mass.] 71 N. E. 85. A declaration of the testator as to the diminution of his property owing to his illness is admissible to show the surrounding circumstances bearing on the construction of the will. Under Rev. Laws, c. 175, § 66. George v. George [Mass.] 71 N. E. 85.

25. See 2 Curr. L. 2113.

26. Where there is a general devise of property in one part of the will and a specific devise in another, the latter will be regarded as excepted out of general devise. Direction to wife to purchase tract of land for son out of rents and profits of land devised to her for life in certain contingency, and if that does not arise, then such tract to be taken from property given under general devise. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

Where particular chattels are described, the word "effects" coupled with them will be restricted to property ejusdem generis with that specifically mentioned. All my "household furniture and effects" held not to include residuary personalty. Gallagher v. McKeague [Wis.] 103 N. W. 233.

A direction to executors to purchase land and convey it to a devisee is valid where it is possible to ascertain from the will the description of the land directed to be purchased, or the amount directed to be devoted to the purchase. Where will directed purchase of 80 acres for son out of proceeds of farm after it had been fully paid for, and directed, in case wife died before that time, that he was to have specified 80 acres from farm, held, that it was duty of executrix to purchase tract of same value as that specifically described. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

Illustrations: Beginning point of boundary of land devised, determined. Thompson v. Thompson [Ky.] 87 S. W. 790. Will held to cover both realty and personalty. May v. Brewster [Mass.] 73 N. E. 546. A devise of all of the remainder of testator's property, personal or real, of all kinds and description, is sufficient to include all lands owned by the testator at the time of his death without describing them. Hymer v. Holyfield [Tex. Civ. App.] 87 S. W. 722. Under Ky. St. 1903, § 3865, providing that when the person entitled to rent dies before it becomes due, in the absence of testamentary disposition it shall be apportioned between the deceased's personal representatives and the person succeeding to the land, notes given the testator for rent, and not due at the time of his death, passed to his widow under his will, giving her all his personal estate. Penn's Ex'r. v. Penn's Ex'r. [Ky.] 87 S. W. 306.

The sum bequeathed will not be regarded as qualified or limited by the words **"not exceeding."** Colbert v. Speer, 24 App. D. C. 187. Bequests of "$500 of bank stock" and "$500 in **bank stock**" are bequests of that amount in stock estimated at its **par value.** Partner v. Citizens' Loan & Trust Co. [Ind.] 71 N. E. 894. Contingent interest held to include **"family home,"** together with two stores devised for purpose of maintaining it while in possession of first takers. Morton's Guardian v. Morton [Ky.] 85 S. W. 1188. Devise to wife of **"house and land appurtenant thereto,"** held to include strip not within subsequent erroneous description by metes

All which is incident to a thing goes with it.[28] Since the will speaks as of testator's death, the properties then subject to his disposal are meant,[29] including powers,[30] such as fall within the terms of ownership which he used.[31] After-acquired properties are ordinarily included.[32]

and bounds. Millerick v. Plunkett, 187 Mass. 97, 72 N. E. 354. Gift to wife of **"all this world's goods** of which I may be possessed," held to include realty. Torrey v. Torrey, 70 N. J. Law, 672, 59 A. 450. Devise of "the **farm I own** at Wortendyke, and **known as** the David D. A. Wortendyke farm," held to cover three tracts formerly owned by said Wortendyke and used by him together, and later acquired by testator. Part of it not severed by lease. Ackerman v. Crouter [N. J. Eq.] 59 A. 574. Presumed that used word **"estate"** in its broad and inclusive signification so as to include realty, unless context requires different meaning. Foil v. Newsome [N. C.] 50 S. E. 597.

27. The word **"devise"** is usually employed to denote a gift by will of real estate or of some interest therein. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121. The word **"bequeath"** may include a gift of realty. **"Give** and bequeath" in residuary clause held to pass realty. Id. The word **"give"** is applicable to both realty and personalty. Id.

A positive direction to sell realty ordinarily converts it into personalty, and the proceeds merge with the other personalty for the purposes of the will, if so required. In re Shedden's Estate, 210 Pa. 82, 59 A. 486; Duckworth v. Jordon [N. C.] 51 S. E. 109; Primm v. Primm, 111 Ill. App. 244.

But such technical conversion arises only in furtherance of testator's intent, and not to defeat it: Testatrix divided personalty equally between two legatees. She then directed realty to be sold, and after payment of two legacies, disposed of half of proceeds, but made no disposition of balance. Held, that intent was to keep two funds separate, and hence balance of proceeds of realty descended as intestate property. In re Shedden's Estate, 210 Pa. 82, 59 A. 486. The question is entirely one of intention, to be derived from the whole will [Cal. Civ. Code, § 1338]. In re Pforr's Estate, 144 Cal. 121, 77 P. 825. Beneficiaries take no interest in land. Id. Will held to show intention that conversion should take place. Id. Conversion not prevented by fact that testator used word "desire" instead of "direct" when authorizing sale. "Desire" is mere request when directed to devisee, but is mandatory when addressed to executor. Id. Allowance should be treated as bequest where testator intends it to be delivered in form of money, though property consists almost entirely of realty. McCullough v. Lauman [Wash.] 80 P. 441. Will be construed as will of personalty, and technical rules relating to devises of realty do not apply. Talbot v. Snodgrass, 124 Iowa, 681, 100 N. W. 500. Conversion takes place, though sale is not immediate or though time of sale is discretionary. As where sale is absolute necessity to carry out terms of will. In re Severns' Estate [Pa.] 60 A. 492. Conversion where direction to sell and divide proceeds among daughters whenever executrix deemed best. Id.

Bequests of the proceeds are regarded as bequests of personalty rather than as devises of realty: Lash v. Lash, 209 Ill. 595, 70 N. E. 1049. Beneficiaries take as legatees rather than as devisees. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020. Where land is sold under power to pay legacies, any undisposed of surplus descends to heirs as realty and not to next of kin. In re Weinstein's Estate, 43 Misc. 577, 89 N. Y. S. 535.

The death of one of the legatees before the testator does not prevent the conversion. Passes as intestate personalty, in absence of contrary intention. Lash v. Lash, 209 Ill. 595, 70 N. E. 1049. Neither does the transfer of by a legatee of his interest to the executor. Id.

Time of conversion: Such conversion will be deemed to have been effectuated at the time of testator's death, though the sale is postponed until after the death of a life tenant. Lash v. Lash, 209 Ill. 595, 70 N. E. 1049. Conversion takes place at death where direction is imperative. Direction held imperative. Thissell v. Schillinger [Mass.] 71 N. E. 300. Will held to show intention that realty should be converted into money after death of widow, and hence equitable conversion took place at testator's death, and children had no interest in it as realty and no power to sell, convey, mortgage or devise same. Nelson v. Nelson [Ind. App.] 72 N. E. 482. Where will was made less than month before death, and realty largely exceeds personalty, and latter insufficient to pay pecuniary legacies, will be presumed that testatrix knew that fact, and that realty would have to be sold. Thissell v. Schillinger [Mass.] 71 N. E. 300. Proceeds of sale to be personalty from time of testator's death (Cal. Civ. Code, § 1338), where time when it is to be made not specified. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020. When time of sale is postponed until happening of some future event, or until some fixed date, conversion is likewise postponed. Postponed until death of widow. Id.

See, also, Conversion in Equity, 3 Curr. L. 876.

28. Where testator for more than 30 years maintained passageway across land for access to his house, devisee took it subject to easement for that purpose. Winne v. Winne, 95 App. Div. 48, 88 N. Y. S. 625. A bequest of the proceeds of a sale of stock is not a bequest of the stock itself, and does not carry with it dividends which belong to the corpus of the estate. Missouri Baptist Sanitarium of St. Louis v. McCune [Mo. App.] 87 S. W. 93.

29. Wills should be construed as speaking at the date of the testator's death. Penn's Ex'r v. Penn's Ex'r [Ky.] 87 S. W. 306. Any article of personalty which he owns at that time, answering the description of an article bequeathed, passes under the bequest, though not identical with the one owned when the will was made. Bequest of "my diamond brooch" carries one afterwards acquired, the one originally owned having been disposed of. Waldo v. Hayes, 96 App. Div. 454, 89 N. Y. S. 69.

30. A disposition of the subject-matter of a power, made in express execution thereof,

(§ 5) *C. Of terms designating or describing persons or purposes.*[33]—In ascertaining what takers were meant, the particular intent also governs technical and precise meanings,[34] and so where a purpose charitable or otherwise is fastened on a gift,[35] provided in every case that certainty must by some rule be ascribable.[36] A mere misnomer or variation is not an uncertainty.[37] Words like

will be restricted so as not to affect the donee's individual estate, in the absence of anything showing a contrary intention. Heinemann v. De Wolf, 25 R. I. 243, 55 A. 707. Provision "for the purpose of executing the power vested in me," I give the estate which I am authorized by said will to appoint, held to show intent to exercise a power granted testatrix by her father's will only, and not to pass her interest in the share of a deceased sister in her father's estate. Id.

31. Under devise to wife of **all property, "including my interest in"** a specified form, during widowhood, and until youngest child became of age, when it was to be divided equally between wife and children, share and share alike, wife held not to take a specific bequest of partnership interest to be held by her in specie. Stehn v. Hayssen [Wis.] 102 N. W. 1074. A devise of property of which testator died **seized and possessed** does not dispose of an insurance fund paid to the estate on property which does not belong to it, but which was insured after testator's death under a belief that it did. Such fund passes as intestate property. Bloom v. Strauss [Ark.] 84 S. W. 511.

32. Under residuary clause. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121. A will disposing of all the testator's property applies to after-acquired property. Applies where held mortgage on property when will was made, and subsequently acquired fee by purchasing equity of redemption. Lee v. Scott, 5 Ohio C. C. (N. S.) 369. Gift of residue of all "I shall possess at my death," held to pass after-acquired property. Mueller v. Buenger [Mo.] 83 S. W. 458. After-acquired property held not to pass to particular devisee, but to a residuary legatee and the remaindermen there mentioned. Id.

33. See 2 Curr. L. 2115.

34. A gift to a named legatee in a certain character is not defeated by the fact that legatee does not fill the character. Gift **"to my wife M.,"** not defeated by her subsequent divorce. In re Jones' Estate [Pa.] 60 A. 915. Provision that in case of death of daughter without issue her share should go to such persons as would receive same had testator died **"unmarried"** and intestate, held to mean not married at testator's death, and never having been married, and property goes to his descendants rather than collateral relatives. In re Union Trust Co., 179 N. Y. 261, 72 N. E. 107. Where testatrix, knowing that son was engaged to M. and that marriage had not taken place, devised to her "daughter M., **wife"** of her son J., for life, with remainder to their children, and marriage had not taken place at time of her death, devise failed for want of person in being answering description. Words used were for purpose of describing character or capacity in which devisee was to take. Steen v. Steen [N. J. Eq.] 59 A. 675. Gift to named devisee as testator's **half-brother** held intended for his brother-in-law of same name, he having no half-brother. Rathjens v. Merrill [Wash.] 80 P. 754. **Heirs** held to mean those of testator and not those of life tenant. Abel's Estate, 23 Pa. Super. Ct. 531.

35. Bequest in trust for Oakland Red Cross society in California to be used to equip hospital, if there was one used in connection therewith, and to be used for the benefit of soldiers coming from the Pacific coast, held to indicate an intention that entire residue might be used to equip such hospital. In re Merchant's Estate, 143 Cal. 537, 77 P. 475. Bequest held not for benefit of persons composing society at testatrix's death, but for that of society in its organized capacity, and through it for charitable objects for which it was formed. Id.

36. Devises and bequests to unincorporated societies are valid, though no trustees are named and no specific purpose mentioned to which the funds are to be applied, where the testator has made the objects of his bounty sufficiently plain so that the court may enforce the application of the funds as he intended. Individuals composing societies take in trust. Snider v. Snider [S. C.] 50 S. E. 504. The burden is on those claiming that such organizations do not exist, or that their charitable purposes are too vague and uncertain to enable the court to control the administration of the trust imposed in their members, to prove those facts. Id. All that law requires is that beneficiary be so named and described as to be capable of identification. Trustee need not be named if clearly implied. Cook v. Universalist General Convention [Mich.] 101 N. W. 217. Corporation legatee need not be designated by correct name. Bowman v. Domestic & Foreign Missionary Soc., 90 N. Y. S. 898. Domestic and Foreign Missionary Society of the Protestant Episcopal Church held intended as legatee under bequest to "Indian missions and domestic missions of the United States." Id. Bequest to "Universalist Japan Mission Fund" for support of "Universalist Mission in Japan" held to belong to Universalist General Convention, it appearing that it alone had Universalist mission in Japan. Cook v. Universalist General Convention [Mich.] 101 N. W. 217.

Bequests held valid: To "Furman University," at a time between the expiration of its charter and its renewal, to "Southern Baptist Theological Seminary at Louisville, Kentucky," and the "Foreign Mission Board, now at Richmond, Virginia." Snider v. Snider [S. C.] 50 S. E. 504. To be used and held as an endowment for the prosecution of research in colonial history. Colbert v. Speer, 24 App. D. C. 187. To maintain a scholarship in medicine in some medical college in the District of Columbia. Id.

Held void for uncertainty: A bequest to be used to erect chimes in a church selected by another. Colbert v. Speer, 24 App. D. C. 187. Devise to be disposed of as others direct. Id.

37. Cook v. Universalist General Convention [Mich.] 101 N. W. 217; Bowman v. Do-

"heirs," "issue," "children," and the like, may be intended as words of purchase, i. e., descriptions of the takers; but more often the question is whether they are words of limitation. For the purpose of avoiding confusion and unnecessary repetition, the cases construing them have been collected elsewhere.[38]

(§ 5) *D. Of terms creating, defining, limiting, conditioning, or qualifying the estates and interests created. Particular words and forms of expression.*[39]—Words which in a deed would be a condition may in a will be a limitation.[40] The words "heirs" and "heirs of the body" are prima facie words of limitation,[41] and "child" and "children" words of purchase.[42] The words "heirs,"[43] "issue,"[44] "heirs of the body,"[45] "children,"[46] "offspring,"[47] "legal representatives,"[48] "nieces,"[49] and

mestic & Foreign Missionary Soc., 90 N. Y. S. 898. A devise to "Georgetown University" held sufficient, though corporation's name was "The President and Directors of Georgetown College." Colbert v. Speer, 24 App. D. C. 187. Bequests to "St. Vincent's and St. Joseph's Catholic Orphan Asylums" held valid, though correct corporate names of institutions were "St. Vincent's Orphan Asylum" and "The Trustees of St. Joseph's Male Orphan Asylum." Id.

38. See § 5D, post.

39. See 2 Curr. L. 2116.

40. Jossey v. Brown, 119 Ga. 758, 47 S. E. 350.

41. "Heirs of the body" unless the will shows that it was intended as a description of particular persons. Wheelock v. Simons [Ark.] 86 S. W. 830.

42. Always words of purchase unless context and circumstances show that they were intended to mean "heirs" and to be words of limitation. Martin v. Martin, 52 W. Va. 381, 44 S. E. 198. Under a devise to person and his children, he having no children at the time of the devise, neither a joint tenancy or tenancy in common between the parent and after-born children is created, unless by some other part of the will it appears that testator so intended. Id.

43. **"Heirs"** held to have been used synonymously with issue, and to mean "heirs of the body." Gannon v. Pauk, 183 Mo. 265, 83 S. W. 453. May mean children when evidently so intended. Shropshire v. Gault, 26 Ky. L. R. 1197, 83 S. W. 590. In devise to one and **"his heirs and assigns forever,"** held not to mean issue. Gannon v. Albright, 183 Mo. 238, 81 S. W. 1162.

"Without having heirs" held to mean without having a child or children, where limitation over is to those who might be heirs. In re Tucker's Estate, 209 Pa. 521, 58 A. 889.

"Without an heir" held to mean without a child. In re Jackson's Estate, 209 Pa. 520, 58 A. 890.

"My legal heirs" means next of kin and legal heirs of testator and not those of his wife. Miller v. Metcalf [Conn.] 68 A. 743.

"Lawful heirs" held to mean children. Lacy v. Floyd [Tex. Civ. App.] 84 S. W. 857. The werd **"lawful"** is not sufficient per se to show an intention not to use the word "heirs" in its ordinary legal sense, as a word of inheritance or limitation. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785.

44. Prima facie means lineal descendants, indefinitely, but may mean children if such is apparent intent. Brisbin v. Huntington [Iowa] 103 N. W. 144; In re Tenney, 93 N. Y. S. 811. Same rule applies where word "lawful" precedes it. Held to have ordinary meaning. Inglis v. McCook [N. J. Eq.] 59 A. 630. The use of the phrase in one clause without any restricting words, and in another clause with them, leads to conclusion that he intended them to have unrestricted meaning in first clause. Id. Does not include illegitimate children unless will shows contrary intention. Not where preceded by word "lawful," though child's father has recognized him in writing, thus giving him right to inherit. Brisbin v. Huntington [Iowa] 103 N. W. 144; In re Tenney, 93 N. Y. S. 811.

Held to mean "children": Brisbin v. Huntington [Iowa] 103 N. W. 144; Logan v. Cassidy [S. C.] 50 S. E. 794.

Held to mean heirs of the body: "Die without issue." Gilkie v. Marsh [Mass.] 71 N. E. 703.

45. Held to include grandchildren. Parrott v. Barrett [S. C.] 49 S. E. 563. Words "lawful heirs begotten of her own body," held to mean **"children"** when construed in connection with former clause expressly referred to. Wilkinson v. Boyd, 136 N. C. 46, 48 S. E. 516.

46. "Children" may mean "descendants" and include grandchildren if necessary to effectuate intent (In re Bender's Estate, 44 Misc. 79, 89 N. Y. S. 731), but grandchildren will not be included in the absence of something in the will to show such an intent (Lyon v. Baker [Ga.] 50 S. E. 44; Crawley v. Kendrick [Ga.] 50 S. E. 41). Held not to take under provision that share of child dying without issue should go to "surviving children." Lawrence v. Phillips [Mass.] 71 N. E. 541. Does not include son-in-law. Nelson v. Nelson [Ind. App.] 72 N. E. 482. Under gift in trust to pay income to one, and after his death to his wife for life, the principal to then be divided among children of said person and his wife, word "children" held not to include those of husband by former marriage. Phrase to be read collectively. Crapo v. Pierce, 187 Mass. 141, 72 N. E. 935. By statute in New York (Laws 1897, c. 408, p. 333), an **adopted child** will not be deemed to sustain the legal relation of child to the person adopting him, in the passing of realty and personalty depending upon such person dying without heirs, so as to defeat the rights of remaindermen. In re Hopkins, 43 Misc. 464, 89 N. Y. S. 467, afd. 92 N. Y. S. 463. Gift of residuary estate to children, the share of any one of them dying before the widow and without children to go to others. Held, adopted child of son so dying did not take adopted father's share. Id.

47. May mean **children** if there is a gift

"survivors,"[50] will be given their ordinary legal meaning unless a contrary intent appears. Words of survivorship are generally held to refer to the time of testator's death,[51] unless a specific intent to the contrary appears, as where they are words of limitation of a future estate.[52]

"In case of her death without issue" will be construed to mean in case she dies without having had issue.[53] A gift over to "my heirs" will be construed as meaning those who are such at the time of the testator's death, in the absence of words clearly showing a contrary intention.[54]

The words "die without issue" ordinarily import an indefinite failure of issue.[55] But a gift over in the case of the death of the first taker without issue, expressly limited to take effect after such death, imports a definite failure of issue at the death of the first taker.[56] Ordinarily where there is a gift to one absolutely,

over to grandchildren. Holton v. Jones, 133 N. C. 399, 45 S. E. 765.

48. Held to include one who was **executor and devisee** under husband's will. Gruenewald v. Neu [Ill.] 74 N. E. 101. Held to mean **children or lineal descendants.** Miller v. Metcalf [Conn.] 58 A. 743.

"Representatives" held not to include husband of deceased daughter who was sole devisee under her will. Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633.

49. Evidence insufficient to show intention to include stepdaughter of testatrix's brother. In re Holt's Estate [Cal.] 79 P. 585.

50. Will be given its ordinary and legal meaning of the **longest liver** in the absence of something to show a contrary intention. Will not be held to mean "other" merely because of resulting inconvenience, or to prevent intestacy. Hill v. Safe Deposit & Trust Co. [Md.] 60 A. 446. Under provision giving "survivor" of two daughters "being single and unmarried" at the time of her death power of appointment, held, that unmarried sister dying before married one could not exercise power. Id. Will not include one who was not originally within a class. Under gift in equal shares to children, the share of any child dying without issue and under 21 to go to the survivors, a child expressly excluded from the gift as having been provided for during testator's lifetime is not entitled to take as a "survivor." In re Wilcox, 64 N. J. Eq. 322, 54 A. 296.

51. Taylor v. Stephens [Ind. App.] 72 N. E. 609; Id., 74 N. E. 12. Where no other period apparent or intended in which event referred to shall occur. Morton's Guardian v. Morton [Ky.] 85 S. W. 1188. Word "surviving" held to refer to children surviving at time of death of testatrix and not at death of life tenant. In re Vance's Estate, 209 Pa. 561, 58 A. 1063.

Criteria of limitation or condition: The mere use of certain terms that are ordinarily used to express conditions or limitations is not always a sure test of the true nature of the estate devised, but may be taken, in the light of the context with which they are used, as expressing sometimes a condition and sometimes a limitation. Kennedy v. Alexander, 21 App. D. C. 424. The only general rule, perhaps, in determining whether words are words of condition or of limitation, is that when they circumscribe the continuance of the estate and mark the period which is to determine it, they are words of limitation; but when they render the estate liable to be defeated, in case the event expressed should arise before the determination of the estate, they are words of condition. Id.

52. Where the will shows on its face that the event to which the contingency refers is, in contemplation of the testator, to occur after his own death. Morton's Guardian v. Morton [Ky.] 85 S. W. 1188. Under devise to cousins for life, remainder to the survivor, and then over to others, held remainder to survivor was not limited to death of other cousin in testator's lifetime. Id. Children and surviving grandchildren held to refer to those living at death of grandchild, and not those living at time of distribution. Marshall v. Safe Deposit & Trust Co. [Md.] 60 A. 476. Word "theretofore," in gift of fund over to residuary legatees in case of death of grandson who had vested interest therein, "and if either shall theretofore have deceased," without issue, his share to be divided among the others, held to refer to time of distribution, i. e., death of grandson. Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999.

Referred to death of first taker: "In case of death" over to "survivors." Renner v. Williams [Ohio] 73 N. E. 221. Provision that "in the event of the decease of" either daughter her share to go to others. Ketchum v. Ketchum, 91 N. Y. S. 801.

53. Not without surviving issue. King v. King [Ill.] 74 N. E. 89.

54. Gift of residue of property after payment of annuity for life. Merrill v. Wooster [Me.] 59 A. 596.

55. Mean "die without leaving heirs of the body." Devise to nephew in words sufficient to constitute fee, with provision that, should he "die without issue," his share was to go to testator's heirs, gives him fee tail by implication. Too remote to take effect as executory devise. Entail barred by nephew's deed under Rev. Laws, c. 127, § 24. Gilkie v. Marsh [Mass.] 71 N. E. 703. Devise to M., but if she dies without issue, to S. and her heirs, held to contemplate an indefinite failure of issue. Corrin v. Elliott, 23 Pa. Super. Ct. 449. Gift to sons in fee held cut down to estate tail by provision that in case of death of both of them without leaving issue, it was to revert to testator's heirs. Gannon v. Pauk, 183 Mo. 265, 83 S. W. 453.

56. Hall v. Brownlee [Ind.] 72 N. E. 131. Where remainder limited to take effect on

and in case of his death without issue, to another, the contingency referred to will be held to be his death during testator's lifetime;[57] but this does not apply where another point of time is mentioned to which the contingency can be referred, or where another provision of the will evinces a contrary intent.[58]

Gifts by implication, gift of ownership or use, legal or equitable ownership, trust or power.[59]—Since no particular form of expression is necessary to constitute a legal disposition of property,[60] a devise may be held to exist by implication where the context requires it,[61] but the probability of such an intent must be so

death of any person without heirs or heirs of his body or without issue, words "heirs" or issue shall be construed to mean heirs or issue living at death of person named as ancestor [Mo. Rev. St. 1845, c. 32, § 6]. Yocum v. Parker [C. C. A.] 134 F. 205. Rev. St. 1899, § 4593 does not apply to executory devise. Mueller v. Buenger [Mo.] 83 S. W. 458. Has the effect of preventing words "dying without issue" from creating estate tail by implication. Gannon v. Albright, 183 Mo. 238, 81 S. W. 1162. In South Carolina when estate is limited to take effect on the death of any person without heirs of the body, or issue, or other equivalent words, such words must be construed as meaning a failure of issue at the time of such person's death, and not an indefinite failure [Civ. Code 1902, § 2464]. Harkey v. Neville [S. C.] 49 S. E. 218. Under this statute, devise to wife for life, and then to daughter for life, and in case of her death without issue, then to others, does not give her fee conditional by implication. Does not take fee on birth of child who predeceases her. Id.

57. Woolverton v. Johnson, 69 Kan. 708, 77 P. 559; Gragg v. Gragg, 94 N. Y. S. 53; Williams v. Boul, 101 App. Div. 593, 92 N. Y. S. 177; In re Ryder, 43 Misc. 476, 89 N. Y. S. 460. Devisee held to take fee. Smith v. Hull, 97 App. Div. 228, 89 N. Y. S. 854. Where the will indicates an intention that the primary devisee shall take the fee. Tarbell v. Smith [Iowa] 101 N. W. 118.

Held to refer to death before testator: Devise to nephews and if either shall "die without leaving a child or children surviving him," then over. Smith v. Smith, 139 Ala. 406, 36 So. 616.

58. When division is postponed, will be held to refer to death before division. Shropshire v. Gault, 26 Ky. L. R. 1197, 83 S. W. 590.

Held to refer to death before division: Provision that at the end of three years testator's estate be divided between his two sons, and if either or both should die before the expiration of such time or die leaving no heirs, then his or their share over, gives the two sons a fee if they are alive at the end of three years. Shropshire v. Gault, 26 Ky. L. R. 1197, 83 S. W. 590. Provision that in case any of the devisees should die without heirs his portion should be divided among the survivors. Smith v. Courtnay's Ex'rs [Ky.] 85 S. W. 1101. In case of devise to one or more infants, to be held by their trustees or guardians until they are twenty-one years old, and then to be turned over to them, or divided between them. Harvey v. Bell, 26 Ky. L. R. 381, 81 S. W. 671. Where will gave proceeds of property to trustees to be expended for support and education of two minor children, and "in the event of the death of each of" them, then over to testatrix's brother. Woolverton v. Johnson, 69 Kan. 708, 77 P. 559. Where the devise is to a class and the division is postponed, though the devisees are not infants. Harvey v. Bell, 26 Ky. L. R. 381, 81 S. W. 671. Where gift is in remainder, refers to death before termination of particular estate. Id. Remainder to children "or to the issue of either of said sons, if they shall have previously died leaving issue." People's Trust Co. v. Flynn, 44 Misc. 6, 89 N. Y. S. 706.

Held not to refer to death before that of testator: Gragg v. Gragg, 94 N. Y. S. 53. Devise for life with remainder to children, or in case of death without issue, then over. King v. King [Ill.] 74 N. E. 89. Devise with proviso that if either of the devisees died without issue, his share under the will should go to the survivors of the class. Construing Ky. St. 1903, §§ 2342, 2344, 4839. Harvey v. Bell, 26 Ky. L. R. 381, 81 S. W. 671. "Shall die without leaving a child or children of her own body." First taker took conditional fee. In re Ryder, 43 Misc. 476, 89 N. Y. S. 460. Contention that provision referred to death before testatrix held untenable, in view of provision for such contingency in another item. Talbot v. Snodgrass, 124 Iowa, 681, 100 N. W. 500. If bequest is made to person absolute in first instance, and it is provided that in case of death, or death without issue, another shall be substituted to the legacy so given, it will be construed to mean death before testator, if the gift is immediate, and death during the continuance of the prior estate if the limitation is by way of remainder. In re McAlpin's Estate [Pa.] 60 A. 321. Grandchildren held to have had vested remainder subject to be divested by exercise of power of appointment. Id. In Maryland, when a gift is made for life and then over to survivors, the period of survivorship is to be referred to the time of distribution and not to the death of the testator, in the absence of anything to the contrary in the will. Ridgely v. Ridgely [Md.] 59 A. 731.

59. See 2 Curr. L. 2121.

60. A clause in a holographic will stating that testatrix wished to record the wishes of her deceased husband, and that he desired certain property to be disposed of in a particular way, held a testamentary disposition of such property. Kerr v. Girdwood [N. C.] 50 S. E. 852. The use of technical words in disposing of property is not necessary. Personalty. Craw v. Craw, 210 Ill. 246, 71 N. E. 450. The words "I want her to have" are equivalent to "give" or "bequeath," and are sufficient to constitute a bequest. In re Smith's Estate, 94 N. Y. S. 90.

61. An estate may pass by mere implication without any express words to direct its

strong as to leave no hesitation in the mind of the court and permit of no other reasonable inference.[62]

Full legal ownership may be implied from a use which is equivalent thereto;[63] or from a gift with words ordinarily indicative of a trust or beneficial ownership or a power.[64] On the other hand a trust may be found without the artificial

course. Galloway v. Durham, 26 Ky. L. R. 445, 81 S. W. 659. Testator held to have intended to devise fee of land, or to bequeath principal sum derived therefrom, to person named, notwithstanding absence of words explicitly devising or bequeathing it. Olcott v. Tope, 213 Ill. 124, 72 N. E. 751. Devise of residuary estate to create four trust funds, the corpus of each of the other three to be added to that of the son on the death of the beneficiaries, and on death of son corpus of his fund to go to testator's next of kin. On death of son before testator, his fund was to go to testator's next of kin. Held, that on son's death after testator and before other beneficiaries, principal of each fund passed to testator's next of kin on death of beneficiaries. Mead v. Coolidge, 179 N. Y. 386, 72 N. E. 314. Estate held vested in grandchildren by implication arising from limitation over in event of their death without issue, subject to power of appointment in their mother, and that, on mother's death without exercising power, they took absolute estate freed from trust under which it was held for her benefit. In re McAlpin's Estate [Pa.] 60 A. 321.

62. Galloway v. Durham, 26 Ky. L. R. 445, 81 S. W. 659.

63. Where will created trust in favor of brother, and by subsequent clause directed sale of realty for payment of debts and legacies, with provision that residue was to be paid to brother, he took an unlimited use in any residue, in absence of any restriction in will as to his enjoyment thereof. Thissell v. Schillinger [Mass.] 71 N. E. 300. Devise of entire use and income, with possession and control subject to charge thereon for support of minor children, held equivalent to devise of property for life of widow after youngest child became of age, and she was not required to account for surplus income. Craw v. Craw, 210 Ill. 246, 71 N. E. 450.

Held fee: A gift of the interest, income, or produce of a fund, either directly or in trust, without limitation as to continuance, or limit as to time, passes the fund itself. In re Ingersoll, 95 App. Div. 211, 88 N. Y. S. 698. Gift of income a gift of the property itself, or at least raises presumption of such intention. Walker v. Hill [N. H.] 60 A. 1017. Rule applies only when the will does not show a contrary intention. In re Shower's Estate [Pa.] 60 A. 789. A mere passive trust in realty or personalty is avoided, and the beneficiary takes the legal estate. Bequest in trust for maintenance and education of children, without any other disposition. In re De Rycke's Will, 99 App. Div. 596, 91 N. Y. S. 159. Where trust for accumulation of income void, beneficiary held to take fee, payment to her being without limitation, and there being no remainder over. In re Hull, 97 App. Div. 258, 89 N. Y. S. 939.

Held life estate: A gift with power to consume, etc., does not give fee where contrary intention appears. Beneficiaries held to take only life estate in fund. Wixon v. Watson, 214 Ill. 158, 73 N. E. 306. Bequest of money does not always vest absolute estate therein. Where testator gave all his estate to trustees, and provided that they were to pay wife dividends "during the time last mentioned upon" certain shares of bank stock, held, that she was only entitled to the dividends and the shares belonged to estate. Mortimer v. Potter, 213 Ill. 178, 72 N. E. 817. Bequest in trust for nephew and niece, "the income to be paid them equally during their lives," held to give each of them an equitable life estate in half the gift, and not absolute estate to be held in trust for life and then to pass to heirs. Loomis v. Gorham [Mass.] 71 N. E. 981.

64. Trusts: Devise to wife to be held by her for life "in trust" for certain persons, does not create a trust where **no purpose** of the trust is named. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

A secret trust cannot be fastened on a trust created by will unless it arises from the intent of the testator and the promise or acquiescence of the legatee. No secret trust. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

A gift to executors in fee simple for the "following trusts," does not entitle them individually to the balance of the income remaining after the payments required by the trusts have been made. Falls into body of estate for benefit of devisees. Townsend v. Wilson [Conn.] 59 A. 417. Provision that in no case was husband of life tenant to have control over estate held not to create marital trust. Robbins v. Smith, 5 Ohio C. C. (N. S.) 545.

A gift to a corporation, existing or to be organized, with directions or conditions as to its use or management, which are reasonably consistent with the corporate purposes of the donee, is not a gift in trust, but an absolute one to the corporation, within the meaning of the statute of uses and trusts. Charitable gift held valid. Title remains in persons named until corporation organized, when vests in it. Watkins v. Bigelow [Minn.] 100 N. W. 1104. The term "absolute gift" as here used is in contradistinction to a gift in trust; it does not mean a gift without condition. Id.

Effect of precatory words: A trust will not be raised by expressions importing recommendation, confidence, or desire, unless it clearly appears that they were intended to be used in an imperative sense. Hughes v. Fitzgerald [Conn.] 60 A. 694. Whether precatory words are to be regarded as mandatory is question of intention. "I desire." Mollenkamp v. Farr [Kan.] 79 P. 646. Do not impose a trust where words of gift point to absolute enjoyment by donee himself, as where devise was to children absolutely, with clause expressing desire that devisees should live together and use income only for ten years. Clark v. Clark, 99 Md. 356, 58 A. 24. "Wish" and "desire" generally re-

words of one,[65] and such words may if clearly so intended import a power,[66] and will be so construed if there is a provision for disposal of the unconsumed por-

garded as precatory merely (In re Dickinson's Estate, 209 Pa. 59, 58 A. 120); but raise no presumption that they were used in precatory sense when they are used to express testator's will and intention (Id.). Under English law and that of Nova Scotia, the word "request" may be mandatory or directory, depending on the intention to be gathered from the will. McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75.

Held not to create trust: Absolute gift "to dispose of as she may deem best **for the benefit of** my daughters." Hughes v. Fitzgerald [Conn.] 60 A. 694. Gift to wife for life, or as long as she remained a widow, "to receive all the rents and profits thereof **for the benefit of** my family," with remainder to children. Give wife right to use income in her discretion for benefit of children. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. Statement that testatrix had expressed wishes to beneficiary and had full **confidence** that he would carry them out if possible. George v. George [Mass.] 71 N. E. 85. Absolute gift to wife accompanied by **"wish and desire"** that she pay certain sum to another. Post v. Moore [N. Y.] 73 N. E. 482. "It is my **wish and expectation"** that wife shall generously remember certain persons. Russell v. United States Trust Co. [C. C. A.] 136 F. 758. A mere **expectation** that property devised to a wife will be used in part for the care and support of children of the testator. Bloom v. Strauss [Ark.] 84 S. W. 511.

Effect of power of disposal: A devise in language indeterminate as to the quantity of the estate, accompanied by an express power of disposition without qualification, passes a fee, and a devise over of what is left is void. Tuerk v. Schueler [N. J. Err. & App.] 60 A. 357; Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770. Devise to wife to use and dispose of same during life in same manner testator could have done, and with power of sale and to appoint by will. Luckey v. McCray [Iowa] 101 N. W. 516. Gift of income with power to consume principal held to pass fee. A devise to the testator's wife of the avails of the property and if that is not sufficient for her use so much of the principal as shall be necessary. In re Farrington's Estate, 85 App. Div. 117, 83 N. Y. S. 742. Gift of half of residue in trust, income and as much as necessary of principal to be devoted to support and education, there being no other disposition. In re Ingersoll, 95 App. Div. 211, 88 N. Y. S. 698. Trust held void, or at least voidable, at widow's election. Solley v. Westcott, 43 Misc. 188, 88 N. Y. S. 297. Bequest of personalty in trust to pay income, rents, and profits to husband for life, with directions to trustee to turn over to him so much of principal as he wished, should he desire to engage in business, held to create mere naked trust and husband takes legal estate to same extent as beneficial interest given him. Ullman v. Cameron, 93 N. Y. S. 976. Id., 92 App. Div. 91, 87 N. Y. S. 148.

65. No particular words are necessary to create a trust, but is sufficient if language shows such an intention. Higgins v. Downs, 91 N. Y. S. 937. Not necessary to use words "trust" or "trustee," or other technical words (Hughes v. Fitzgerald [Conn.] 60 A. 694; Dee v. Dee, 212 Ill. 338, 72 N. E. 429); but some unequivocal language must be used from which intention to create one may be attributed to testator (Dee v. Dee, 212 Ill. 338, 72 N. E. 429). A mere direction to sell will not be held to create a trust rather than a power in trust. Where will directed property to be sold and net proceeds to be divided among children, daughters' shares to be held in trust, legal title to realty is in children, subject to power of sale coupled with trust. May v. Brewster [Mass.] 73 N. E. 546. The fact that there is no limitation over of the principal of the trust estate is insufficient to control the quantum of estate in the cestuis que trust. In re Shower's Estate [Pa.] 60 A. 789.

A bequest or devise upon condition of making payment to third persons is usually equivalent to a devise or bequest upon a trust. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412. Gift of whole estate to wife for life "with the condition" that "she shall apply" so much of income, remaining after providing for herself and testator's sister as the will directs, "as to her may seem proper," to the assistance of the children of such sister. Id. Son to whom land is devised on condition that he support his parents during their lives holds it in trust, though no trust is expressly created. Hoyt v. Hoyt [Vt.] 59 A. 845. Not relieved from obligation by indebtedness from father to him, nor can he offset it against amount due from him for such support. Id. Father cannot convey away his right to such support. Id.

Will held to create trust: In re Reith's Estate, 144 Cal. 314, 77 P. 942. Express trust for payment of debts. Gordon v. McDougall [Miss.] 37 So. 298. Valid express trust for purpose of receiving rents and profits and applying them to use of beneficiary for his life, with a power of appointment in the latter. Higgins v. Downs, 91 N. Y. S. 937. Held that, conceding that will imposed trust on wife to provide for children before her death, there was nothing requiring her to give them shares similar in nature and amount. Biggins v. Lambert, 213 Ill. 625, 73 N. E. 371. Under devise to executors to be invested and allowed to accumulate for term of years, and then transferred to corporation to be formed for charitable purposes, they took as trustees, though not so designated. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008. Gift in fee followed by provision directing devisee to leave property to testatrix's heirs by will. Merrill v. Webster [Mass.] 73 N. E. 672. A bequest to the Rev. K., or his successor, of a certain church "for the purpose of saying masses" for testator and others, is a gift for a religious use, and hence void under Pa. Act April 26, 1855 (P. L. 328), when made within 30 days from testator's death. Charged with a trust, and not personal gift for services rendered. In re O'Donnell's Estate, 209 Pa. 63, 58 A. 120. Bequest to grandchildren on their becoming of age, and to survivor if

tion.[67] A direction that the residue shall vest free from any trust features which are void has the effect of making the gift direct or upon trust in the alternative.[68]

Estates or interests created.[69]—A simple devise of land, without words of limitation or description of the extent of the interest devised, ordinarily creates a life estate only, unless the will shows a contrary intention.[70]

Words of inheritance are not, however, necessary to carry a fee, but any words suffice which carry that intent.[71] So, too, no particular words are neces-

either died before that time, and if both died, then over. Executor is trustee, in the absence of any other designation. Morrow v. Morrow [Mo. App.] 87 S. W. 590. Children held to have taken absolute title to income, but only life estate in corpus of estate, with power of appointment, and remainder in children in case power not exercised. Legal title in executor in trust. Robbins v. Smith [Ohio] 73 N. E. 1051. Under law of Nova Scotia, bequest to daughter with **"request"** that at her death she give same to her daughters, and providing that her receipt "shall be a sufficient discharge" to executors, held to give her right to use income for life, the principal being charged with trust in favor of her daughters. McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75. The income of an estate to one's children for life, remainder in fee to grandchildren at the death of all his children, creates a fee in the grandchildren which continues, equitable in form until the death of the last surviving child of the testator. In re Morton's Estate, 24 Pa. Super. Ct. 246.

Will held not to create trust: Where no mention of trust. Held to give wife half of estate in fee and balance for life, after payment of debts and legacies. Walker v. Hill [N. H.] 60 A. 1017. Marital trust. Robbins v. Smith [Ohio] 73 N. E. 1051.

66. The rule that a gift coupled with a power to consume or sell passes an absolute title cannot operate to defeat a clearly expressed intention to the contrary. In re Zimmerman's Estate, 23 Pa. Super. Ct. 130. Estate to testator's widow "to use, occupy and possess as I have done and am now doing, during her natural life" does not confer a right to consume the principal. Id. A devise and bequest of the residue of property to testator's sister, "but should she die without Issue and leave any of the property at her death given her by this will, then" such property should go to another, gives a fee to the sister, with power to sell. Galloway v. Durham, 26 Ky. L. R. 445, 81 S. W. 659.

67. Under absolute gift to husband and a subsequent provision that should he not expend it all during his lifetime **"it is my desire** at his death" to give remainder to others, word "desire" is mandatory, and husband has only power to consume estate in good faith, and mere nominal conversion by marking judgment to own use does not prevent gift over from taking effect. In re Dickinson's Estate, 209 Pa. 59, 58 A. 120. All my estate, real, personal and mixed, to my wife and at her death, whatever remains, over, gives the wife a life estate only in the realty. Martin v. Heckman, 25 Pa. Super. Ct. 451.

68. If valid, gift is subject to trusts, and if not, gift vests absolutely, freed from void trusts. Such provisions valid, and do not render will void for uncertainty. Watkins v. Bigelow [Minn.] 100 N. W. 1104.

69. See 2 Curr. L. 2125.

70. The evident intention of testator to dispose of his entire estate by a will making all his heirs at law devisees, with special aim at equality among them, evidenced by charging funeral expenses and debts on that devisee who was given more than others, prevents the application of the rule. McCaffrey v. Manogue, 25 S. Ct. 319, rvg. 22 App. D. C. 385.

71. No particular form of words necessary. Yocum v. Parker [C. C. A.] 134 F. 205, afg. 130 F. 722. Statutes in many states provide that the word heirs is not necessary, but that every devise passes fee in absence of anything to show a contrary intention [Ga. Civ. Code, § 3083]. Hill v. Terrell [Ga.] 51 S. E. 81. Hurd's Rev. St. 1903, c. 30, § 13. Gruenewald v. Neu [Ill.] 74 N. E. 101; King v. King [Ill.] 74 N. E. 89. Ky. St. 1903, § 2342. Galloway v. Durham, 26 Ky. L. R. 445, 81 S. W. 659. Ohio Rev. St. § 5970. Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770. In South Carolina no words of limitation are necessary to devise fee, but every gift of land by devise is to be deemed fee, unless such construction be inconsistent with express or implied intention [Civ. Code 1902, § 2483]. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476. In Indiana, every devise denoting testator's intention to devise his entire interest in all his real or personal property shall be construed to pass all his estate in such property [Burns' Ann. St. 1901, § 2737]. Snodgrass v. Brandenburg [Ind.] 72 N. E. 1030. Word "heirs" not necessary. Id.

Devise held to pass fee: "I bequeath my entire estate, both real and personal." Snodgrass v. Brandenburg [Ind.] 72 N. E. 1030. "I give and bequeath to my" nephew and niece "all the residue of my property" after payment of legacies. Gilkie v. Marsh [Mass.] 71 N. E. 703. "All the real and personal estate owned by me at my decease," with power of disposition. Huber v. Hamilton [Pa.] 60 A. 789. Where will provided for distribution of estate if son died without issue, but if he had heirs or issue, then the land to "be his and his heirs," held that son took fee simple on birth of issue. McCullough v. Johnetta Coal Co., 210 Pa. 222, 59 A. 984. "Give and bequeath" held to pass absolute estate in bonds, though possession postponed. Williams v. Boul, 101 App. Div. 593, 92 N. Y. S. 177. Devise for life, and at life tenant's death "to his children or their children who may be living at that time," held to vest fee in children who were in esse at testator's death, possession being postponed. Charleston & W. C. R. Co. v. Reynolds [S. C.] 48 S. E. 476.

Life estate: Devise to husband with power to use and dispose of property, with pro-

sary to constitute a life estate.[72] But technical words, when used, will be given their technical meaning, if no contrary intent be apparent.[73]

vision that it was testatrix's wish and desire that if any remained at his death it should be divided in certain manner, held to give him but life estate in lands undisposed of at his death so that he could not dispose of them by will. Gruenewald v. Neu [Ill.] 74 N. E. 101. Fee held limited to life estate by subsequent clause. King v. King [Ill.] 74 N. E. 89. If a gift of the use and control be construed as a gift of the full ownership, it endures as long as the use was to endure. See ante, this section, "Gifts by Implication," etc.

72. The intention may be manifested by words which lead to that conclusion, though term "life estate" is not used. Dozier v. Dozier, 183 Mo. 137, 81 S. W. 890. A provision placing property in trust for beneficiaries, the income to be paid them, the property to go to their descendants free from the trust gave the beneficiaries a life estate with remainder to their children and grandchildren in the direct line, free from the trust. Id. Where property is devised to one for life and the will provides that upon the death of the devisee, another shall occupy and fill the relation, as to the property held by the first devisee, held, the alternative devisee took a life estate upon the first devisee dying. Kennedy v. Alexander, 21 App. D. C. 424.

73. Where statute makes use of word "heirs" unnecessary, fact that it is used does not render intention to pass fee doubtful. "Devise to sons and their heirs and assigns forever." Gannon v. Albright, 183 Mo. 238, 81 S. W. 1162.

Estates tail: In order to create estate tail, will must contemplate an indefinite failure of heirs of class named. Will held not to create estate tail. Martin v. Martin, 52 W. Va. 381, 44 S. E. 198. Doctrine of estates tail does not apply to case where there is devise in fee simple with limitation over upon failure of issue, and failure of issue referred to is failure of living issue at death of first taker. Mo. Rev. St. 1845, c. 32, § 5, providing that devisee who would have taken estate tail at common law shall take life estate only, held not to apply in such case, when construed in connection with § 6, referring failure of issue to death of first taker. Absolute devise to son, with limitation over in case he died without issue, held to give him fee, subject to be divested on his death without living issue. Yocum v. Parker [C. C. A.] 134 F. 205, afg. 130 F. 722. Devise to sons and "their heirs and assigns forever," held to give them fee and not estate tail. Heirs not equivalent to issue. Gannon v. Albright, 183 Mo. 238, 81 S. W. 1162.

Words held to create estate tail, converted into fee by statute: A devise to one and "the heirs of her body." Young v. Amburgy [Ky.] 87 S. W. 802. A devise to a daughter, "to her and her bodily heirs forever." Marshall v. Walker, 26 Ky. L. R. 199, 80 S. W. 1132. Devise "not only to the said S., but to the heirs of his body" [3 Comp. Laws, § 8785]. Rhodes v. Bouldrey [Mich.] 101 N. W. 206. Provision that if son should die without issue land should go to heirs of testatrix, but if son should have heirs or issue, then it should be "his and his heirs," gives son fee tail on birth of issue. McCullough v. Johnetta Coal Co., 210 Pa. 222, 59 A. 984. Devise to "M.," but if she die without heirs, to S. and her heirs [P. L. 368]. Corrin v. Elliott, 23 Pa. Super. Ct. 449.

Words held to create fee tail converted into life estate with remainder in children: A devise to son and "his bodily heirs forever," with a provision that if either the son or a daughter of testatrix should die, without leaving a bodily heir, before receiving a share of the estate, such share should go to the surviving child and its bodily heirs forever [Rev. St. 1855, §§ 5-7]. Miller v. Ensminger, 182 Mo. 195, 81 S. W. 422. Devise to two sons, and their heirs and assigns forever, with provision that land should not be sold before younger became of age, and that, should either die without issue, the survivor, his heirs and assigns, should take his share, and that in event both should die, testator's surviving heirs should take [Sess. Acts 1815-16, p. 32, Rev. St. 1825, p. 216, and Rev. St. 1899, §§ 4592-93]. Gannon v. Pauk, 183 Mo. 265, 83 S. W. 453. Under Kirby's Dig. § 735. Devise with the provision that if the devisee die without heirs of her body or if both she and such heirs die, the property should revert to the estate. Wheelock v. Simons [Ark.] 86 S. W. 830. In such case the devisee surviving the testator and being herself survived by a son and daughter and the son died, leaving his father surviving, the latter took a life estate with remainder to the son's sister, since son took as purchaser under the will. Id.

Rule in Shelley's Case: The rule is not a rule of construction but a strict rule of law, and its operation cannot be prevented by any expression of intention to the contrary. Britt v. Rowland Lumber Co., 136 N. C. 171, 48 S. E. 586; Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785; Thompson v. Crump [N. C.] 50 S. E. 457. It applies where the same persons will take the same estate whether they take by descent or purchase. Tyson v. Sinclair [N. C.] 50 S. E. 450. Any words added to the limitation which carry the estate to any other person in any other manner, or in any other quality than the canons of descent provide, will take case out of operation of rule, and limit first taker to life estate. Id. Limitation over to "right heirs in fee," in default of heirs of the body, does not prevent operation of rule. Id. A gift from a father to his daughter and her children, or to a son and his children, or from a husband to a wife and children, will be construed as creating a life estate with remainder in the children. A bequest and devise of all the testator's property to his "daughter and her children" gives the daughter a life estate, with remainder to her children. Sims v. Skinner's Ex'r, 26 Ky. L. R. 443, 81 S. W. 703. Property being devised to testator's "son and his children," the word "children" is a word of purchase not of limitation. Smith v. Smith [Ky.] 85 S. W. 169. Rule does not apply where subsequent takers are designated as children. Wilkinson v. Boyd, 136 N. C. 46, 48 S. E. 516. Not under

It is the general policy of the law to adopt such a construction as will give a fee,[74] or absolute ownership[75] in the first taker, so as not to tie up property and suspend the power of alienation;[76] wherefore words of lesser estate may be enlarged to mean a greater,[77] whilst the reverse of this intention will be more reluctantly found.[78] The presence of a condition or charge,[79] or of a provision for a trust or power, may point the intent.[80]

devise to one for life, and at his death to his children as a class. Crawley v. Kendrick [Ga.] 50 S. E. 41. Nor does it apply where freehold given to one person, remainder to the heirs of the body of that person and another, and the persons are capable of having a common heir of their bodies, and such heirs take by purchase a contingent remainder in fee simple, and the original taker merely an estate for life. Thompson v. Crump [N. C.] 50 S. E. 457. Under devise to one for life, with remainder "to his lawful heirs, born of his wife." Id.

In Texas it is held that the rule will not be permitted to override the intention of the testator, as expressed in the will. In a devise to one for his natural life and at his death to his lawful heirs, "lawful heirs" held to mean "children" and the first taker took only a life estate. Lacy v. Floyd [Tex. Civ. App.] 84 S. W. 857. Will not be allowed to convert an intended life estate into a fee. Estate to one "to have and to hold during his natural life, and at his death to his lawful heirs," held to give the first taker only a life estate. Id.

Rule held to apply and to give devisee a fee. Devise in trust to C. and, if he ever marries and has a lawful heir, they to have the land. Words "and if he ever marries" will be treated as surplusage. Ex parte Cooper, 136 N. C. 130, 48 S. E. 581. Devise to brother for life, "and after his death to his heirs in fee simple." Fact that will further provides that in case he should die without heirs of his body the fee shall go to another, is immaterial where he leaves children. Morrisett v. Stevens, 136 N. C. 160, 48 S. E. 661. Under provision that, after death of life tenant, estate should be equally divided between two children, to be held by them for life, at their death to go to their lawful heirs, or, if they had none, then to testator's heirs, held, that estate vested absolutely in children on widow's death. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785. Devise to one and her heirs, "not subject to her debts, but lent to her, and then to be the bona fide property of her heirs." Britt v. Rowland Lumber Co., 136 N. C. 171, 48 S. E. 586. Devise to grandson for life with remainder to lawful heirs in fee simple. Tyson v. Sinclair [N. C.] 50 S. E. 450. Devise to one "to have and to hold during his natural life and at his death to his lawful heirs." Lacey v. Floyd [Tex.] 87 S. W. 665.

74. Will held to pass fee title to testator's children in lands not sold by executors, and not a life estate, with remainder over to grandchildren. Whitfield v. Thompson [Miss.] 38 So. 113.

75. Personalty may be bequeathed in fee tail or on condition, but will should not be so construed unless language clearly and explicitly requires it. Talbot v. Snodgrass, 124 Iowa, 681, 100 N. W. 500. Language held to indicate absolute bequest of personalty. Id.

76. Wills will be construed so as to vest fee simple as early as possible, and so as to rescue provisions which might be obnoxious to the statute against perpetuities. Provisions as to contingent remainders construed. McKee v. McKee's Ex'r, 26 Ky. L. R. 736, 82 S. W. 451. Devise to four children with equal rights in same until 21 years after their parents' death, when they and their heirs should own same in fee, held to vest them with fee, subject to the condition expressed, and on their becoming of age could by joint deed convey valid title. Each had veto power. Watts v. Griffin [N. C.] 50 S. E. 218.

77. Thus the addition of a power to a life estate may equal a fee. See notes preceding and following.

78. Estate of inheritance in realty or absolute interest in personalty may be reduced to lesser estate if subsequent language unequivocally shows such intention. In re Shower's Estate [Pa.] 60 A. 789; In re Sharpless' Estate, 209 Pa. 409, 58 A. 806. A clause in terms devising a fee absolutely may be so limited by subsequent provisions as to create only a life estate or trust. Higgins v. Downs, 91 N. Y. S. 937. But such limitation will operate only to the extent necessary to give effect thereto. Will held to create trust. Id. The rule rigorously rejecting a provision for a remainder after an absolute gift has been much softened in Ohio. Robbins v. Smith, 5 Ohio C. C. (N. S.) 545. Will giving income of estate to children for life, each child having the power to devise her portion, but in no case was any child's husband to have control over the principal or interest of such share, and providing for descent of property in the absence of a will by the child, held, provisions are not repugnant. Id. Each child took an estate for life in the body of the estate. Id. In case of a child dying intestate, the share passed according to the provisions of the father's will. Id. An express and positive devise in fee cannot be cut down to an inferior estate by a subsequent clause not equally expressive and positive. Fanning v. Main [Conn.] 58 A. 472; Martin v. Martin, 52 W. Va. 381, 44 S. E. 198. Intention to cut down estate of inheritance must appear unequivocally. Gift to grandchildren of half of residue, after payment of legacies, held to refer to personalty only, and not to cut down estate in fee in realty previously given to son. Watson v. Smith, 210 Pa. 190, 59 A. 988. By subsequent or ambiguous words, inferential in their intent (Yocum v. Parker, 130 F. 722, afd. [C. C. A.] 134 F. 205), or of doubtful meaning. Personalty (Williams v. Boul, 101 App. Div. 593, 92 N. Y. S. 177). An estate in fee once fully given cannot be withheld from the owner by the interposition of a naked trust (Fanning v. Main [Conn.] 58 A. 472), nor can his jus disponendi be abridged by a direction to his

trustees to pay the fund upon his death to another (Id.). Rule held not to apply, where no gift of capital to children until after termination of trust. Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239. A scilicet cannot restrict a grant where the former words are express and special. Secus, where the former words are so indifferent that they may receive such a restriction without apparent injury. Brooks v. Brooks [Mo.] 86 S. W. 158.

Fee held not cut down to life estate: By direction to pay income for life and residuum to heirs at law of beneficiaries. Fanning v. Main [Conn.] 58 A. 472. By subsequent clause directing his share to be invested for his benefit during his life, and for his wife and issue after his death. Mee v. Gordon, 93 N. Y. S. 675, rvg. 45 Misc. 259, 92 N. Y. S. 159.

Restrictions on right to alienate: Subsequent clauses cannot avail to take from an estate previously given, qualities which the law regards as inseparable from it, but are operative to define the estate given, and to show that what without them might be fee was intended as lesser right. In re Shower's Estate [Pa.] 60 A. 789. Words importing restriction on power to alienate cannot affect prior devise of fee. Devise of all real and personal estate to wife, she to dispose of any or all of it she wishes for her own use so long as she remains unmarried, and on death or remarriage "all of what is left to revert back to my legal heirs," held to give her fee. Huber v. Hamilton [Pa.] 60 A. 789. Attempt to cut down fee simple by withdrawing estate from liability for devisee's debts held of no effect. Britt v. Rowland Lumber Co., 136 N. C. 171, 48 S. E. 586. Same rule applies to conditions against alienating life estate. Sprinkle v. Leslie [Tex. Civ. App.] 81 S. W. 1018.

Conditions repugnant to an estate in fee fail: Fanning v. Main [Conn.] 58 A. 472; Brooks v. Brooks [Mo.] 86 S. W. 158. Conditions or limitations in restraint of alienation or essential enjoyment. Direction that estate should not be sold for 10 years, in absence of agreement by all the devisees. Clark v. Clark, 99 Md. 356, 58 A. 24. The intent to create an absolute estate must be beyond serious question before subsequent clauses creating remainders can be held void for repugnancy. Robbins v. Smith [Ohio] 73 N. E. 1051. Where, by one clause, property is devised by words prima facie importing an absolute estate, and by subsequent clause is given in remainder to another person, the first devisee takes only a life estate, and the remainder over is valid. Id.

Provisions void for repugnancy: Any provision as to what disposition shall be made of estate in fee simple in case devisee or legatee dies without issue, or upon any other contingency subsequent to the vesting of the estate. Talbot v. Snodgrass, 124 Iowa, 681, 100 N. W. 500; Cralle v. Jackson, 26 Ky. L. R. 417, 81 S. W. 669. Cannot give absolute and unlimited estate, with full power of disposal, and then make direction as to disposition of what remains on death of devisee. Tarbell v. Smith [Iowa] 101 N. W. 118. Nothing on which subsequent clause disposing of what is left on death of first taker can operate. Luckey v. McCray [Iowa] 101 N. W. 516.

Fee not cut down: By clause providing that if son died without issue, and wife was also deceased, etc., where son survived widow and died without issue. In re Sharpless' Estate, 209 Pa. 409, 58 A. 806. By provision that "When she * * * is done with it I give to * * * church * * * $1,000." Cox v. Anderson's Adm'r, 24 Ky. L. R. 1081, 70 S. W. 839. Rehearing of 24 Ky. L. R. 721, 69 S. W. 953 denied. By subsequent clause directing devisee to will property to testatrix's heirs. Merrill v. Webster [Mass.] 73 N. E. 672. By request that at her death what remained be divided among children. Snodgrass v. Brandenburg [Ind.] 71 N. E. 137. Rehearing denied, 72 N. E. 1030.

79. Where a devise without words of limitation or description of the extent of the estate is coupled with a personal charge upon the devisee, in effect a condition of the devise, the operation of such a charge is to enlarge the life estate that would otherwise pass into a fee simple. McCaffrey v. Manogue, 22 App. D. C. 385. Devise to widow in fee, with subsequent provision that she is to have property only so long as she remains unmarried, and making devise over in case she remarries, held to give her fee and not life estate, qualifying terms being condition against remarriage. Beatty v. Irwin [Ind. App.] 73 N. E. 926. A devise of the residue to one and his heirs forever "provided" he takes care of and looks after testatrix while she lives, creates an estate on condition and not a fee. Brennan v. Brennan, 185 Mass. 560, 71 N. E. 80.

80. Where will gave property to daughter as a sacred trust, and separate paper specified grandchildren as beneficiaries, held, such grandchildren had a vested equitable fee, with legal title in trustee, at death of testatrix, and not a remainder. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931. Devise of estate generally and indefinitely, with power of disposition carries fee. Cralle v. Jackson, 26 Ky. L. R. 417, 81 S. W. 669. Where estate is expressly limited to one for life or widowhood, the addition of a power of disposal does not enlarge it into a fee. Melton v. Camp, 121 Ga. 693, 49 S. E. 690; Fiske v. Fiske's Heirs [R. I.] 59 A. 740; Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770; Tuerk v. Schueler [N. J. Err. & App.] 60 A. 357. Will held to give wife life estate with power of disposition as to a part thereof. Nelson v. Nelson [Ind. App.] 72 N. E. 482. Will bequeathing property to husband "for him and to his use" for life with power to sell same, held to give him life estate, with power to sell and dispose of same for valuable consideration. Semper v. Coates [Minn.] 100 N. W. 662. Gift to wife "for her use, benefit and control during her natural life," and providing for division of "my estate" among others after her death, held to give her life estate only, without power to consume corpus. Provision that if for benefit of her or estate, realty may be sold by her and executor, does not show different intention. Schneider v. Schneider [Wis.] 102 N. W. 232. Son held only to be entitled to use interest of bonds for his support, and not principal, and hence did not take title to bonds themselves in any way inconsistent with the validity of a bequest over. Hall v. Brownlee [Ind.] 72 N. E. 131. Not power to sell and convey certain lots of the land in

Gifts over may be implied from life estates,[81] and vice versa.[82]

A devise with a gift over on specified contingencies is frequently held to give a defeasible fee to the first taker.[83]

fee, at the devisee's discretion, for maintenance and support. Kennedy v. Alexander, 21 App. D. C. 424.

The same rule may apply where the will clearly implies that the first taker is only to have a life estate. Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770.

Nor is a gift for life enlarged into a fee by a power of appointment with a limitation over in case it is not exercised. Fiske v. Fiske's Heirs [R. I.] 59 A. 740.

81. Devise to daughter-in-law for life or widowhood and if she married, property to go to her children, held, the will operated as a devise to the children subject to the rights of their mother as expressed in the will. Wilder v. Wilder [Ky.] 86 S. W. 557.

82. No definite estate being in terms given the first taker, a limitation over upon his death is construed as indicating an intent that such taker shall have a life estate. O'Connor v. Rowland [Ark.] 84 S. W. 472. Life estate may arise by implication where donor devises property generally, without specifying quantity of interest, and adds some power of disposition, with remainder over. Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770. Devise over in case first taker "leave any of the property at her death," held to give her power to sell and convey it. Galloway v. Durham, 26 Ky. L. R. 445, 81 S. W. 659. Where testator devised realty to his son but gave him no definite estate therein, and provided that the devisee's mother should have control of the property for her life, and if the son should die the property should go to a daughter, held, son took life estate charged with support of mother. O'Connor v. Rowland [Ark.] 84 S. W. 472. A will gave to testator's wife "all my Holmes place [describing it], also all my stock that I may have at my demise, after her demise to go" to a third person; held, wife received a life estate only both in the Holmes place and in the stock. Montgomery v. McPherson [Miss.] 38 So. 196.

83. In the absence of anything to indicate a contrary intention, a devise or bequest to a named person, followed by a provision that if he shall die childless the property shall pass to another, gives him a fee, subject to be divested upon his dying childless. Hill v. Terrell [Ga.] 51 S. E. 81. Such a devise does not give an estate in remainder to children. Will held not to show such an intent because provided for different disposition in case devisee died under age of 21, and unmarried, or because devisee's share given in trust. Id. Devisee does not take fee simple on birth of children. Wilkinson v. Boyd, 136 N. C. 46, 48 S. E. 516. Where there is no intervening estate, and no other period to which the words "dying without issue" can be reasonably referred, they are held, in the absence of something in the will evidencing a contrary intent, to create a defeasible fee, which is defeated by death of devisee at any time without children then living. Harvey v. Bell, 26 Ky. L. R. 381, 81 S. W. 671. Held, further,—the will providing that the trustee, appointed by the testator to hold the property, might, at any time he deemed wise, transfer the property to the devisees and relieve it of the trust,—that the words relating to death without issue were not limited to the time before such transfer of the property by the trustee. Id. A devise in trust followed by "If any of my children die without issue their portion to revert to my estate for the benefit of my living beirs," held to refer to after the death of the testatrix, therefore the children only took a defeasible fee. Cochran v. Lee's Adm'rs [Ky.] 84 S. W. 337.

Held to create defeasible fee: Under devise to wife for life and provision that, on her death, he desired that land be owned equally and jointly by his children, or in case of the death of any of them, his share to go to heirs of his body, if any, and if not, to those surviving, held, that children took conditional fee to ripen into absolute fee on death of widow, and defeasible by death of child before that of life tenant. Taylor v. Stephens [Ind. App.] 72 N. E. 609; Id., 74 N. E. 12. Under a will devising land to testator's son, with the provision that if the son does not live until his youngest child shall become a certain age, the land should go to the son's wife and children until such time arrives, held there is a devise of the fee with a conditional limitation over so that the death of the wife does not cause the children to lose their interest in the property. Sutton v. Dickerson [Ky.] 85 S. W. 687. Under devise to two persons for life with remainder to the survivor and at the latter's death to designated heirs of such survivor, held, such heirs had an interest which would descend to their heirs upon dying before the life tenant, though contingent. Morton's Guardian v. Morton [Ky.] 85 S. W. 1188. Provision held to give $5,000 to daughter for life, subject to be defeated by her remarriage; upon her death or remarriage, money to go to another. McKee v. McKee's Ex'r, 26 Ky. L. R. 736, 82 S. W. 451. Remainderman's title held to be defeasible fee, defeasible by his death without issue. Id. Will held to give property to a daughter for life, remainder in fee to her children living at her death, or their descendants, or if no children or descendants, to a nephew or his descendants; or if nephew and descendants, if any, be dead, to brothers and sisters or descendants. Id. Under devise in trust for distribution of income for 20 years to grandchildren, and on expiration of that period to be equally divided among them, in the event of any of them dying within that period, his share to go to his children, or, if none, to be equally divided among the survivors, held that grandchildren took vested equitable interests in trust estate, defeasible upon death within 20 year period, in which case his share accrued to his surviving children or to testatrix's surviving grandchildren as of the date of his death. Marshall v. Safe Deposit & Trust Co. [Md.] 60 A. 476. Devise in equal shares to sons, the share of any one dying intestate and unmarried to go to the other children, gives each son vested estate,

"Interest" and "income"[84] or like words, when definitive of the extent of benefit to result to the taker, may mean literally the entire income or only interest on a sum equal to the corpus of the property referred to,[85] or they may mean a

subject to be divested. Ridgely v. Ridgely [Md.] 59 A. 731. Devise to wife for life, remainder to oldest son, but if he should die without male issue, to second son, and, if he should die without male issue, to third son, etc., gives oldest son, or in case of his death, others in turn, vested estate, subject to be divested upon death without male issue. Id. Testator gave residue to nephew and niece in words sufficient to constitute fee, and provided that niece's share should go to her husband, should he survive her, and after his death to his children, but if he should leave no children, then to testator's heirs. Niece survived both husband and her only child, the latter dying intestate and unmarried after father's death. Held, niece took fee, whether will be construed as giving her fee at testator's death, or conditional fee subject to be divested on death without issue, or as life estate, remainder to husband for life, and remainder in fee to children surviving him, in which case would take as child's heir. Gilkie v. Marsh [Mass.] 71 N. E. 703. Devise to sons, their heirs and assigns forever, land not to be sold until younger son was of age; if sons should die without issue, the testator's surviving heirs to have the property. Gannon v. Albright, 183 Mo. 238, 81 S. W. 1162. Devise to children in fee, the share of any child dying under 21 and without issue to be divided among the survivors, gives each child a vested estate on death of testator, subject to be divested upon happening of double contingency. In re Wilcox, 64 N. J. Eq. 322, 54 A. 296. Devise to daughter, and if she should die without lawful heirs, then her share to be divided, held subject to be divested by her death without issue, such being evident intention as gathered from whole will. Dean v. Nutley, 70 N. J. Law, 217, 57 A. 1089. Under devise to husband and sister for life, or until his remarriage, and on death or remarriage of husband his share to go to sister and on her death her share to go to him, and on death of both then over absolutely, held, that husband's interest was divested by remarriage, and he acquired no further interest by subsequent death of sister. Fletcher v. Hoblitzell, 209 Pa. 337, 58 A. 672. Estate to A. for life then to B. and her heirs, but if B. die without issue, over, and B. survives the testator and life tenant and has issue which also survives, B. takes a fee. Brown v. Geissler, 25 Pa. Super. Ct. 258. Bequest of stock and money in trust for grandson, income, or so much as necessary, to be applied to his use and education until he reached 21, and after that, and until reached 25, all the income to be paid to him, the whole fund and accumulations to go to him at 25, or, in case of death before that time, to his issue, or in default of issue, to residuary legatees, held to give him vested interest in fund which was divested on death without issue, under age of 25. Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999. On his death under such circumstances, accumulated income held to go to his estate. Id. Under devise to wife for life, with remainder to children, with provision that if any child died before testator or his wife, his children should take share parent would have had, held that son took vested remainder in fee at testator's death, subject to be divested on death during widow's lifetime leaving children. On death during such time without children, estate went to son's heirs. Wicker v. Wicker [S. C.] 49 S. E. 10. Devise to son "with the express understanding and restriction" that if he died without lawful issue, estate was to go to others, held to give him fee on birth of issue, and not life estate with remainder to issue. Yocum v. Parker, 130 F. 722, afd. [C. C. A.] 134 F. 205.

84. See 2 Curr. L. 2130.

85. The word "income" will not be restricted to mean interest when to do so would create a void accumulation. In re Marshall, 43 Misc. 238, 88 N. Y. S. 550. Children held entitled to receive income of trust fund according to their necessities prior to becoming of age, and after majority, but before the distribution of the fund, each was entitled to an equal share of the income proportionate to the number of children then living, and on final distribution each was entitled to an equal share. No intent that there be an equalization of the entire amount received by each, including sums paid for support, etc. Williams v. Thacher [Mass.] 71 N. E. 567. Though beneficiary is entitled to only half the income of a trust fund, trust will be continued as to entire principal, gift of half the income of a fund being regarded as more desirable than income of half the principal. In re McCallum's Estate [Pa.] 60 A. 903. Dividends on stocks and bonds pledged by testator as collateral security, applied on indebtedness, held not to be income from which annuities could be paid. Skinner v. Taft [Mich.] 103 N. W. 702. Whether premiums paid by trustees for bonds should be charged to principal or income depends upon whether testator intended that beneficiary should receive full income of trust fund, or that entire principal should pass to remainderman on termination of trust. Will held to show intent that they be paid from principal. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

Accrual: In case of a bequest of the interest or income of a certain fund, the income accrues from testator's death. Cal. Civ. Code, § 1366. In re Brown's Estate, 143 Cal. 450, 77 P. 160; In re Sprague, 94 N. Y. S. 84. Under bequest of pecuniary legacy to be held in trust during beneficiary's infancy, the fund to be loaned, and the interest to be used in keeping, maintaining, and educating him, held, that interest was part of legacy itself, and legatees entitled thereto from death of testatrix. Gaston v. Hayden, 98 Mo. App. 683, 73 S. W. 938. Rule has been held not to apply where a sum is given in trust to pay income. Cannot pay it until they receive fund from executors and invest it. In re Brown's Estate, 143 Cal. 450, 77 P. 160. A bequest in trust to pay the income to a legatee for life will be construed as investing him with title thereto from date of testator's death, if estate is sufficient to pay

right to take profits from the soil, e. g., minerals.[86] Where income is to be paid as needed and the surplus turned back to await final distribution, the beneficiary has no interest in it till payment.[87]

Legacies, annuities, support, release of debts.[88]—A specific legacy is a gift of some specific thing.[89] A general legacy is one which does not necessitate delivering any particular thing, or paying money out of any particular portion of the estate.[90] A demonstrative legacy is a gift of a certain amount of money to come out of a particular fund.[91]

debts, and there is nothing to the contrary in the will. Webb v. Lines [Conn.] 58 A. 227. While estate is in executor's hands, beneficiary not entitled to receive income, but merely to have it added to corpus of fund. Where several such trusts, beneficiaries of each entitled to have share augmented by average income. Id. Will held not to have imposed on executor duty to separate widow's share as soon as practical so as to entitle her to legal interest. Id. A life tenant held entitled to the income of an estate in trust on the creation of the fund, but computed as from the testator's death. Estate consisting of unimproved real estate was given in trust, income to a life tenant, remainder over. Trustees were to sell and invest at their discretion. Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658. Where will directed trustees to pay half of net annual income to cousin, and also to provide for support of uncle in not to exceed a specified sum, cousin entitled to half clear net income, without deductions on account of payments for support of uncle. Townsend v. Wilson [Conn.] 59 A. 417.

Effect of death of beneficiary: Accumulated income goes to estate of beneficiary having vested interest in fund on his interest being divested by his death. Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999. In absence of statute, interest falling due prior to death of beneficiary goes to his estate, but dividends on stocks, composing trust fund declared next after his decease are not apportionable. Id. By statute in Rhode Island (Gen. Laws 1896, c. 203, § 39), if person entitled to annuity, interest, income, etc., dies or contingency on which it is to cease happens before termination of year from time when whole of annual amount for preceding year has become due, amount thereof will be apportioned, in absence of contrary provision in will. Id. Does not apply to wills made prior to Feb. 1, 1896 (Id. § 45). Id.

86. See 2 Curr. L. 2131, n. 35.

87. Under will giving property to defendant's children, but providing that it shall not be disturbed as long as he lives, but until his death income shall be subject to a reasonable support of him and his family, held that none of such income can be taken by defendant's creditors. Any balance belongs to children. Kelsey v. Webb, 94 App. Div. 571, 88 N. Y. S. 4.

88. See 2 Curr. L. 2131.

89. Of specified part of testator's personalty distinguished from all others of same kind. In re Fisher, 93 App. Div. 186, 87 N. Y. S. 567. A bequest of a specific article or fund, which can be distinguished from all the rest of the estate of the same kind. In re Stilphen [Me.] 60 A. 888.

Legacies held to be specific: Gift of $600 out of $1,100 in hands of brothers. In re Stilphen [Me.] 60 A. 888. Gift of "all my deposit of money" in specified banks. In re Howard's Estate, 94 N. Y. S. 86. Bequests of stock not residuary legacies, though postponed until after the death of the widow. In re Klenke's Estate [Pa.] 60 A. 167.

90. In re Fisher, 93 App. Div. 186, 87 N. Y. S. 567. Is payable out of general assets of the estate. In re Stilphen [Me.] 60 A. 888. Where a general legacy of stocks and bonds is given to a trustee, in case they are not found in the estate at testator's death, it is the duty of the executor to purchase a sufficient number of the different kinds to make up the deficiency. Blair v. Scribner [N. J. Err. & App.] 60 A. 211. Under provision that it was testator's "further meaning" that if he should not leave all stocks specified "he shall not be required to supply said bonds and stocks, but only take such as I may leave," held that it was not duty of executor to purchase others, but to take from other stock left by testator a sufficient quantity to supply deficiency in value. Id. If fails to do so, beneficiaries are entitled to relief in equity. Id.

Legacies held general: Legacies of specified number of shares of stock in named corporations to trustee for each of number of beneficiaries, where testator owned sufficient amount of each stock, when will was made, notwithstanding provision that if he did not leave all stocks mentioned trustee should not be required to purchase others, but should take what he did leave. Blair v. Scribner [N. J. Err. & App.] 60 A. 211. Bequest of contents of box in safe deposit vault to several persons in specified proportions, where securities contained therein could not be divided as directed without sale. In re Fisher, 93 App. Div. 186, 87 N. Y. S. 567.

91. Must appear that unconditional gift in nature of general legacy was intended, and bequest must indicate particular fund out of which it is payable. In re Stilphen [Me.] 60 A. 888. Demonstrative bequests out of grandson's legacy held contingent on death of latter before death of widow. On his surviving her, residuary estate held to go to him, and not to be applied to such bequests. Paul v. Philbrick [N. H.] 60 A. 682. Payable out of particular fund or security. In re Fisher, 93 App. Div. 186, 87 N. Y. S. 567. A demonstrative legacy is a bequest of a certain sum payable out of a particular fund, but if such fund is insufficient, the deficiency to be made good from the general funds of the estate. In re Howard's Estate, 94 N. Y. S. 86.

The question of the priority of a legacy in lieu of dower over devises of realty is one of intention, to be gathered from the will itself.[92]

An annuity[93] is a bequest of certain specified sums periodically.[94] If the fund or property out of which it is payable fails, resort may be had to the general assets.[95] Annuities will be made a charge on the whole estate or on whatsoever part or income thereof is designated for such purpose,[96] and no intent to encroach on the corpus beyond such fund will be easily implied.[97]

"Advancements"[98] so called[99] will not be deducted unless referred to in such way as to so intend.

92. Roll v. Roll [N. J. Eq.] 69 A. 296. See, also, post, "Charges," etc., and "Abatement," etc.

93. See 2 Curr. L. 2133.

94. Cal. Civ. Code, § 1357, subd. 3. Gift of specified sum in trust to pay beneficiary not to exceed certain sum monthly from the income, held not annuity, since amount of income, and hence amount to be paid monthly, is uncertain. In re Brown's Estate, 143 Cal. 450, 77 P. 160. A gift of income is not an annuity, and interest does not begin thereon until one year after testator's decease. Id. Annuity to servant, on condition that he remain in service of daughter, held distinct from wages, and not to be deducted therefrom. In re Tracy, 179 N. Y. 501, 72 N. E. 619. Will held to fix the expiration of a bequest of an annuity at a period of twenty-five years from and after probate. Davis v. People, 111 Ill. App. 207.

95. Cal. Civ. Code, § 1357, subd. 3. In re Brown's Estate, 143 Cal. 460, 77 P. 160.

96. Where annuity is payable out of residuary estate, it is proper for executors, as such, to set apart a sufficient sum to provide therefor, which is subject to distribution according to the will, when the annuity ceases. Merrill v. Wooster [Me.] 59 A. 596. Is part of residuum, and executor never parts with title to it. Even if treated as trust fund for benefit of annuitant, must be returned to executor for distribution. Id. Where will authorized executors to invest such sums as, in their discretion, they deemed necessary to secure payment of certain annuities, and that, when any fund provided for that purpose ceased to be needed, it should fall into residue, held that annuities could be paid out of general estate or by setting apart specific sums. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168.

97. Where sum of money, or life annuity, is given in such a way as to show separate and independent intention that it shall be paid at all events, that intention will not be overruled by direction that money is to be raised in particular way or out of particular fund. Skinner v. Taft [Mich.] 103 N. W. 702. Annuities to widow and children to be paid from income and profits not charge on corpus of estate, though provisions for her recited to be in lieu of dower where she was also to have part of corpus at time of distribution. Id. Where widow received allowance during administration, could not contend that sums so paid were diverted from purpose intended. Id.

98. Strictly speaking the word "advancement" is applicable only to cases of intestacy and refers to money advanced by a parent to a child in anticipation of his future share of the estate. In re Cramer, 43 Misc. 494, 89 N. Y. S. 469. It is, however, employed by courts of equity to denote money or property advanced as a satisfaction pro tanto of a general legacy given by a parent or one in loco parentis to a child or grandchild. Id.

99. Where will provided that money or property received by legatees during testator's lifetime was absolute gift and in no sense an "advancement," and should not be considered as reducing legacies, held, amount of note given by niece, who was also legatee, to testator, should be deducted from her legacy. In re Cramer, 43 Misc. 494, 89 N. Y. S. 469. Under Ky. St. 1903, §§ 4839, 4840, a provision that children should share equally in the estate, and amounts previously received by them should not be charged against them, applies only to advancements made before execution of the will. Nall v. Wright's Ex'rs, 26 Ky. L. R. 253, 80 S. W. 1120. Hence an advancement in the form of notes, subsequent to date of will, receipt for which recited it as an interest in the estate, was properly charged to the beneficiary receiving it. Id. But only to the extent that the notes were collectible. Id. Where bequest was to be paid unless testator had advanced equal sum to legatee and had taken his note therefor, in which event executor was directed to deliver to him any notes testator might hold against him to that amount, held that fact that testator had advanced to legatee more than amount of legacy and had taken his notes therefor did not deprive him of legacy, where, prior to his death, testator had delivered all the notes to legatee, and had none in his possession at his death. Blair v. Scribner [N. J. Err. & App.] 60 A. 356. Where the will provided that the estate, plus advancements, should be divided into four parts, one of which was to go to each of testator's children after deducting the amount advanced to him, and the advancements made to one of them, who was insolvent, exceeded one-fourth of the estate, held, that the shares of each of the other three should abate ratably to make up the deficiency, it being testator's evident intention that all should share equally. In re Whitmore's Will, 86 App. Div. 179, 83 N. Y. S. 213. Advancements do not bear interest unless there be a clearly manifest intention that they shall do so expressed in the will. In re Stahl's Estate, 25 Pa. Super. Ct. 402. One bequeathing **insurance policy** to children of deceased wife **"without abatement on account of premiums"** paid or to be paid, held, payment of premiums could not be set off against a note executed by the decedent and held by the estate of his wife. Claypool v. Claypool, 4 Ohio C.

Support.[1]—Whether the trustee is to pay over the income directly to the persons for whose support a trust is created, or is to personally use and apply it for their benefit, depends upon the language by which the trust is created.[2] Whether the corpus of the estate is to be used depends upon the intention.[3] A trust for children is not void because it fails to specify how much the trustees shall expend for their support and education.[4] In California, legacies for maintenance bear interest from testator's death.[5] If the evidence shows that the legatee had been supported by testator for many years prior to his death, the legacy will be construed as one for maintenance, though the will does not so state.[6]

A legacy to a debtor[7] does not operate as a release or extinguishment of the debt, unless it clearly appears that testator so intended.[8]

Cumulative legacies.[9]—There is a presumption that parents do not intend to give double portions to children, and therefore where the same quantity is given them and the same cause, or no additional cause, assigned for a repetition of a gift in a subsequent clause, the intention will be inferred to be the same, and accumulations will be rejected.[10]

Vesting and perpetuities.[11]—The law favors the early vesting of estates,[12] hence the interest will, if possible, be deemed vested in the first instance,[13] and if

C. (N. S.) 577. See 2 Curr. L. 2132. See, also Estates of Decedents, § 17b, 3 Curr. L. 1324.

1. See 2 Curr. L. 2133.

2. Trustee held authorized to pay over income directly to beneficiaries. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394.

3. Will held to authorize corpus of property to be used for support of widow, if necessary. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Under provision requiring trustee to pay over income "and so much of the principal as may be necessary for" the comfortable support and maintenance of the beneficiary, trustee is chargeable with exercise of discretion, and should not pay over any of the principal unless shown to be necessary for that purpose. In re Fisk, 45 Misc. 298, 92 N. Y. S. 394. Devise to wife for life or until her three sons became of age, at which time all the land was to belong to them, the wife, if then living, "to have her maintenance of the land," held not to give her any interest or estate therein, but, at most, only creates a charge in her favor, and does not affect son's right to possession. Not a condition. Whitaker v. Jenkins [N. C.] 51 S. E. 104.

4. In re Reith's Estate, 144 Cal. 314, 77 P. 942.

5. Civ. Code, § 1369. In re Brown's Estate, 143 Cal. 450, 77 P. 160.

6. Fact that made monthly payments to cripple held not to render legacy to her one for maintenance. In re Brown's Estate, 143 Cal. 450, 77 P. 160.

7. See 2 Curr. L. 2133.

8. Amount of note deducted from legacy. In re Cramer, 43 Misc. 494, 89 N. Y. S. 469.

9. See 2 Curr. L. 2133.

10. Codicil held to show intention to substitute gift of house in trust for adopted daughter for gift of another house previously given by the will. Gift subject to mortgage not payable out of estate. In re Benson's Estate, 209 Pa. 108, 58 A. 135. Provision in codicil giving legacy to daughter on her marriage, held substitute for and not in addition to that given her by will, where otherwise personalty would be insufficient to pay other legacies. Sondheim v. Fechenbach [Mich.] 100 N. W. 586.

11. See 2 Curr. L. 2134. See distinction between conditions precedent and subsequent, post, this section.

12. Ridgely v. Ridgely [Md.] 59 A. 731; Swerer v. Trustees of Ohio Wesleyan University, 2 Ohio N. P. (N. S.) 333; Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999. At earliest possible period, in absence of contrary intention. Tarbell v. Smith [Iowa] 101 N. W. 118. Construction most favorable to vesting will be adopted. Kent v. Kent, 90 N. Y. S. 828.

13. Unless language requires contrary, favors vesting after death of testator. Wicker v. Wicker [S. C.] 49 S. E. 10. The will becomes operative at testator's death. Estate of wife held to vest at that time. Walker v. Hill [N. H.] 60 A. 1017. The estates of intestates and of testates, where no condition is attached to the legacy itself, vest upon the death of the decedent, and the control of the administrators or executors over same is merely fiduciary and does not affect the successor's "right to succeed to, or inherit property." Estate of Asa S. Bushnell, 2 Ohio N. P. (N. S.) 673. The law favors a construction that will avoid the disinheritance of remaindermen who happen to die before the termination of the precedent estate. In re Hitchins' Estate, 43 Misc. 485, 89 N. Y. S. 472; Kent v. Kent, 90 N. Y. S. 828. Remainders will be held vested unless contrary intention appears. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Will never be regarded as contingent when may be regarded as vested consistently with apparent intention. Nelson v. Nelson [Ind. App.] 72 N. E. 482; Archer v. Jacobs [Iowa] 101 N. W. 195. Charitable gift held vested. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513. Legacy held payable on happening of any one of three contingencies, and to have vested on death of testator. Watkins v. Bigelow [Minn.] 101 N. W. 497. Executory devisee of personalty and contingent remainders are governed by the same rules so far as concerns their alienation or

not, then at the earliest possible moment,[14] unless the language of the will clearly shows a different intention.[15]

Where there is a devise to one remainder over direct to others, the presumption is that testator intended to create vested remainders, nothing appearing in the will to the contrary.[16]

Where the persons or the class who are to take in remainder,[17] or the hap-

transmission. Ingersoll v. Ingersoll [Conn.] 59 A. 413. Upon the death of one in whose favor either may have been created, though the contingency has not occurred on which his right to ultimate enjoyment may depend it will form a part of his estate, unless his survival until the termination of the prior estate is a condition precedent to his taking any benefit from it. Id. Bequest of personalty to M. for life, and on her decease to C., if then living, or if not, to be equally divided between S. and J., held to create executory devise in favor of C., his enjoyment of which was dependent on his surviving M., and executory devise in favor of S. and J., whose enjoyment thereof was dependent on their surviving C., and, neither C. nor S. having survived M., half goes to J. and half to testator's estate. Id.

14. Estate will be held to vest at early rather than remote period, unless will shows different intention. Marshall v. Safe Deposit & Trust Co. [Md.] 60 A. 476.

15. Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999. Rule adopted as guide to probable intention, and never applied when intention is that estate should not vest. Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239; Nelson v. Nelson [Ind. App.] 72 N. E. 482. Intendment of law will not prevail over fairly defined testamentary intention to the contrary. In re Adam's Estate, 208 Pa. 500, 57 A. 979. To make estate contingent must clearly appear from language used and circumstances that the time of payment was made the substance of the gift. Ridgely v. Ridgely [Md.] 59 A. 731. Title to property held in trust for children held not to vest in them until after termination of trust. Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239.

16. Devise of two-thirds of income to widow for life and balance to E. for life or until marriage, and on death of widow before death or marriage of E., two-thirds to E. and balance to daughter M. At marriage or death of E., remainder of estate was to be sold and proceeds divided equally among all children, and share of any deceased child, leaving children living at testator's death, to go to such children. Widow and M. died after testator. Held, that M. had vested interest which descended to her children. Woods v. Little [C. C. A.] 134 F. 229. Where remainder given to children of life tenant living at his death, question as to whether period of vesting is fixed as of testator's death or that of life tenant depends upon whether direction to divide among them describes class who shall take or simply fixes time at which gift shall be paid. If former, it is contingent. In re Adam's Estate, 208 Pa. 500, 57 A. 979. Gift in trust to pay so much of income to widow as she might need for support, and rest to children, and issue of any who died leaving issue, and after death of widow, the entire income to the children then living and issue of any who should have died. After death of children, income was to be paid to their children until they reached age of 21, when principal was to be divided according to intestate laws. Held to create vested interest in grandchildren. In re Smith's Estate [Pa.] 60 A. 255. Where persons who are to take a contingent interest are certain, as in case of gift over to children of C. by W., deceased, after death of son, if dies without issue, such interest on their death before that of the first taker, descends to their heirs or passes to their personal representatives according to whether the property is realty or personalty. Hall v. Brownlee [Ind.] 72 N. E. 131. A remainder over to a class, any one of which is in being at testator's death, vests at that time, but will open up to let in after-born members. Children of life tenant. Archer v. Jacobs [Iowa] 101 N. W. 195. Is the present capacity of taking in possession that distinguishes vested from contingent remainders. Id.

17. Where devisees compose a class, and there are no words of devise, except a simple direction to divide the property at a specified time, the gifts will not ordinarily vest until the time of division. Dee v. Dee, 212 Ill. 338, 72 N. E. 429.

Remainders held contingent: If persons who are to take are dubious and cannot be known until title in trustee becomes extinct. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Held to be intention that remainder should go to children, or issue of deceased children, living at termination of trust. Id. Where there is a devise to a class with a particular estate intervening between the death of testator and the period of distribution, all persons belonging to the class at the time of distribution take, though born after testator's death. Grandchildren. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37. As far as remainder is limited to children not in being, it is uncertain both as to event and person, and hence contingent. Archer v. Jacobs [Iowa] 101 N. W. 195. Devise in trust for joint lives of two daughters, P. and A., and lives of survivor of them, to pay income to P. for life and after her death, leaving A. surviving, during life of A. to apply such income to use of P.'s children and issue of any deceased, and after death of survivor of P. and A., the estate to go in fee to P.'s children. Held, that only children surviving both P. and A. in each case were entitled to share in the remainder. Denison v. Denison, 96 App. Div. 418, 89 N. Y. S. 126. Estate did not vest on death of P. leaving A. surviving, but only on death of A., in children and issue of deceased children then surviving. Id. Neither did income vest in children, they being only entitled to participate therein during their lives. Id. If time annexed to substance of gift, as condition precedent. Under provision "that at the expiration of

pening of the contingencies on which they are to take,[18] or the shares which they shall have, are uncertain, there is a contingency to which vesting is postponed. Words of contingency are so referred in time as to favor vesting,[19] and may be so read that remainders will accelerate.[20] Hence such words as "upon,"[21] or "at the death of,"[22] "surviving,"[23] "when,"[24] and "then,"[25] do or do not postpone vesting, according to the sense and connection in which they are used.

the life estate of my wife, that which is given to her for life shall be equally divided between all my children," representatives of deceased children to take parent's share, held, children took contingent remainders, the contingency being that they should survive their mother. Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633. Where gift over to children of life tenant describes class who are to take. In re Adam's Estate, 208 Pa. 500, 57 A. 979. Where no distinct gift to whole class preceding particular description, so that uncertain event forms part of description of devisee or legatee. Children "then living." Mulliken v. Earnshaw, 209 Pa. 226, 58 A. 286.

18. Gift to daughter in trust until she reached 25, when trust was to cease and property to "vest absolutely in" her, but "in the event of the death of" such daughter without heirs, then the property to go to others, held that gift over contingent on her death before reaching 25, and on reaching that age, she was entitled to property absolutely. Gerting v. Wells [Md.] 59 A. 177. Death is not a contingent event, the time when it may occur alone being uncertain, and hence the reference to it as terminating the daughter's estate must be understood to mean contingency of time it may come to pass in relation to her reaching 25. Id. Devise held contingent on devisees living until distribution of estate or leaving issue. Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235. Where a will bequeathed certain legacies to minors on their becoming of age, and to the survivor if either of them died before that time, and, if both died, then to certain others, such bequests were contingent and the legal title does not vest in the legatees during minority. Morrow v. Morrow [Mo. App.] 87 S. W. 590.

Held contingent remainders: A devise to be paid to children on their attaining majority, but if any of them died before they attained majority, their share to go to the survivors. Johnson v. Terry, 139 Ala. 614, 36 So. 775. Gift in case beneficiary should reach 21, but in case she should die before 20, without an heir, then to others. On death before 20 without heir, estate goes to secondary beneficiaries. In re Jackson's Estate, 209 Pa. 520, 58 A. 890. Devise in trust to pay interest to beneficiary for life, and at her death principal to be divided among three cousins of testator, children of deceased cousin to take his share, and in event of cousin dying without issue, estate to be divided among survivors. Ward v. Ward, 131 F. 946. Devise in trust to pay income to daughter until her marriage and birth of child, when she was to receive principal, with remainders over in case of her death unmarried and without issue. In re Ryder, 43 Misc. 476, 89 N. Y. S. 460.

19. See ante, this section, "Particular Words," etc.

20. Remainders will accelerate where devisee of life estate forfeits it by some act or omission, as by remarriage. Fletcher v. Hoblitzell, 209 Pa. 337, 58 A. 672. Under devise to wife for life or while she remains unmarried, with remainder over after her death. remainder takes effect in possession on her death or remarriage. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. Where a life tenant disclaims under Ky. St. 1903, § 2067, title at once vests in the remainderman, and where a subsequent clause disposed of all the residue of the testator's estate, nothing passed as in case of intestacy as provided in § 4843, from which the devisee was entitled to be equalized with other devisees as authorized by § 1407. Faulkner v. Tucker, 26 Ky. L. R. 1130, 83 S. W. 579. Legacies of stock, to take effect after wife should have income for life, are accelerated by wife's election not to take under the will. In re Klenke's Estate [Pa.] 60 A. 167. Lapse of preceding life estate accelerates remainders limited thereon. Fiske v. Fiske's Heirs [R. I.] 59 A. 740. Where there is a gift over in default of appointment and the donee dies before testator, the person named in the gift will take. Id. By death of life tenant before the testator. Lacey v. Floyd [Tex.] 87 S. W. 665. Where to take effect on termination of invalid trust. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143.

Compare post "Gifts taking effect freed from void limitations."

21. Direction that income and so much of principal as might be necessary should be applied to maintenance of son and that "upon" his reaching age of 21 he should receive realty and any surplus income "absolutely." Held, surplus income vested as paid in, time of enjoyment only being postponed. In re Ranken, 91 N. Y. S. 933. "Upon the death of" the life tenant, held to refer to time when remainderman shall come into possession, and not to time when estate shall vest. Archer v. Jacobs [Iowa] 101 N. W. 195. Gift over "upon the death" of child held to mean death at any time after that of testator, where he had provided for case of child who might die before he did. Lewisohn v. Henry, 179 N. Y. 352, 72 N. E. 239.

22. Devise to one for life and "at his death" to his children or their children who may be living at that time, held to give children living at testator's death a vested estate in fee, with possession postponed. Charleston, etc., R. Co. v. Reynolds [S. C.] 48 S. E. 476.

23. Words of survivorship may be held to be divesting limitations where if construed to postpone vesting they would conflict with a clear intention to produce equality. Ridgely v. Ridgely [Md.] 59 A. 731. Provision that in event of son dying intestate and unmarried his share shall go to all testator's "surviving children," refers to those surviving when such death occurs. Id. "Surviving children" held to mean those surviving at

"Vesting" is inquired of the creation of the estate or interest and not of possession or enjoyment, hence it is not postponed by words of futurity or contingency related to possession or enjoyment only, and the consequent uncertainty whether a taker may ever enjoy his estate in possession or whether it may not be divested does not prevent its vesting in interest, whether caused by the existence of a trust or a power or a restraint on alienation, or a divesting condition.[26] Limitations on contingencies named do not necessarily prevent vesting

death of one of the children. Lawrence v. Phillips [Mass.] 71 N. E. 541. Limitation over in case of death of child before reaching age of 21 and without issue, held not to refer to happing of such contingencies during testator's lifetime only, but limitation took effect on their happening after his death. In re Wilcox, 64 N. J. Eq. 322, 54 A. 296.

24. Devise of remainder to grandchildren "when my children are all dead," held vested. Kent v. Kent, 90 N. Y. S. 828. Legacy to daughter "when she is 18 years old," held contingent. Heberton v. McClain, 135 F. 226.

25. Devise in trust for life, and on death of life tenant remainder to be equally divided among his children "then living," with further limitation over in case life tenant died without issue. Estate held vested at death of life tenant. In re Adam's Estate, 208 Pa. 500, 57 A. 979. Devise for life, remainder to children "then living," held contingent. Mulliken v. Earnshaw, 209 Pa. 226, 58 A. 286. Direction that, after death of wife, property was to be sold, and after payment of certain legacies, "then" the remainder was to be divided among children, held to give them mere conditional fee or interest in proceeds, which did not become absolute until wife's death. Nelson v. Nelson [Ind. App.] 72 N. E. 482.

26. Power of sale: Devise of use of property for life with remainder over to defendant, subject to power of sale in life tenants, creates vested remainder. Hare v. Congregational Soc., 76 Vt. 362, 57 A. 964. Under devise to wife for life or widowhood, with power of disposal, and remainder over to his lawful heirs on her death, or in case of her remarriage, in the latter event she to be included as heir, held, heirs took vested remainder, subject to be defeated in whole or in part by exercise of power and subject to open and let her in, in event she remarried. Melton v. Camp, 121 Ga. 693, 49 S. E. 690.

Trust: Children held to take title in fee, subject to trust, and to possession by trustees during trust period, and, on death of one of them, his share vests in his heirs. In re Reith's Estate, 144 Cal. 314, 77 P. 942. Trust. In re Hitchin's Estate, 43 Misc. 485, 89 N. Y. S. 472. A provision that the estate remain in the name of testator's estate for five years after the death of the life tenant, and be administered by a person selected by the surviving heirs, does not prevent the vesting of the remainders. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785. An immediate vested interest passes when property is devised directly to devisees, but possession and control is placed in an executor for a term of years, the benefits during such period to inure to the devisees. Swerer v. Trustees of Ohio Wesleyan University, 6 Ohio C. C. (N. S.) 185. Where whole estate was vested in trustees, with provision for division among testator's sons, corpus held not to have vested in remainder during continuance of trust. People's Trust Co. v. Flynn, 44 Misc. 6, 89 N. Y. S. 706. Where a will devised $300 in trust for the education of a certain person, the devise vested on the death of the testatrix. Nevell's Adm'r v. Dunaway [Ky.] 86 S. W. 514. Where a testator devised land to his brother for life, and at his death to his children or descendants then living, a child of the brother took a vested remainder during the lifetime of the life tenant, subject to a reduction of his interest by the birth of other children to the life tenant and which children should survive their father. Hodges v. Harkleroad [Ark.] 85 S. W. 779. Where will directed residuary estate to be held by executors for 25 years, the income, after the payment of certain legacies, to be added to the principal, at the expiration of which time they were to form a corporation to which the whole of the estate was to be conveyed, to be by it used for founding of hospital for care of indigent sick in certain county, the residue being given accordingly, held that entire estate was impressed with trust in favor of charity from testator's death, and that gift vested at once on his death. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513. Validity of gift not affected by provision for accumulations, since, as whole estate vested in charity from testator's death, the accumulations would follow the principal in any event. Id. Legal estate vests in trustees, and equitable in that part of the public which is to be benefited. Nothing passes directly to corporation, but it takes only by conveyance from trustees. Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008.

Divesting conditions: Uncertainty whether remainderman will outlive life tenant and come into possession does not render remainder contingent, though it is liable to be divested on happening of such contingency. Archer v. Jacobs [Iowa] 101 N. W. 195. Vested remainder in children of testator by will providing property at death of wife, should go to seven children, and if any child died without issue living at death of wife, his share should go to the survivors. Roach v. Dance, 26 Ky. L. R. 157, 80 S. W. 1097.

Possession postponed: An interest may be vested in right, though not in immediate possession. Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999. If futurity is annexed to substance of gift, vesting is postponed. If annexed to time of payment only, estate vests immediately. Id. Fact that possession is postponed does not render remainder contingent. Archer v. Jacobs [Iowa] 101 N. W. 195. Postponement of possession does not of itself show intention to postpone vesting. Marshall v. Safe Deposit & Trust Co. [Md.] 60 A. 476. If payment or

of the precedent estate.[27] Estates over vest when all the contingencies are fulfilled.[28]

Perpetuities[29] and void accumulations should not be found,[30] but terms necessarily leading to such a result will not be denied their intended meaning.[31]

distribution is deferred merely for the purpose of creating an intervening life estate and not for reasons personal to the legatee, the estate will vest at testator's death, enjoyment only being postponed. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. Remainders held vested. Id. Fact that payment of legacy given absolutely is postponed until death of testatrix's husband does not postpone vesting so as to cause it to lapse on death of legatee during husband's life. In re Weinstein's Estate, 43 Misc. 577, 89 N. Y. S. 535. Estate a vested one, though executors directed to retain and manage it for 10 years before distributing it. In re Woods, 133 F. 82. Where will gives "title" to grandchildren, subject to life estate in children, and provides that on death of any child that such estate "shall vest in" his issue and be "divided among" them, the estate of the grandchildren vested in point of right at testator's death, "vest" as used in the will meaning a vesting in possession and enjoyment, and on death of child, his issue took his share at once. Smith v. Jordan [Conn.] 59 A. 507. In the absence of provisions showing a contrary intent, a legacy payable at specified time in future is not contingent, but vests immediately. Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235. Where the only words of gift are found in the direction to divide or pay at a future time, the gift is contingent, but this rule yields to an intent to make a present gift. In re Hitchins' Estate, 43 Misc. 485, 89 N. Y. S. 472. Where words "go and belong" were used instead of "pay and divide," will held to show intent that remainders should vest at testator's death. Id.

27. A limitation over to testator's heirs, on the death without heirs of testator's children, to whom estate in remainder was given, does not render estate of such children contingent or defeasible, since testator's heirs must necessarily be those of his children. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785. Bequest of residuary estate to husband for life, with remainder to two daughters equally, "should either of them die leaving issue, such issue to take and receive the share of its parent," held to create vested remainder. Heberton v. McClain, 135 F. 226.

28. Higgins v. Downs, 91 N. Y. S. 937. Not until then. In re Ryder, 43 Misc. 476, 89 N. Y. S. 460.

29. See 2 Curr. L. 2139. See, also, Perpetuities and accumulations, 4 Curr. L. 975.

30. Trusts to apply income invariably occasion suspension of the power of alienation, but trusts to pay annuities do not. Trusts to pay annuities held valid. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. May, on creation of trust, suspend power of alienation for two lives in being, and during such period provide for distribution among as many different persons and for as many successive lives as he sees fit. Id.

Provisions held valid: Bequest to charitable corporation to be held by it for the purposes of the incorporation thereof, the principal to be kept invested and the income expended for the charitable purposes of the corporation. Is an outright gift, and does not create a trust. Smith v. Havens Relief Fund Soc., 44 Misc. 594, 90 N. Y. S. 168. Trusts to apply income for benefit of beneficiaries. Id. Directions that executors collect the rents and maintain estate for two years, and then have it sold, does not suspend power of alienation. May be previously sold on order of court. In re Pforr's Estate, 144 Cal. 121, 77 P. 825. Devise of separate tracts to children for life with remainder to grandchildren, "when my children are all dead," held to create vested remainders, right of enjoyment vesting immediately on death of each grandchild. Kent v. Kent, 90 N. Y. S. 828. Devise of life estate with provision that devisee should elect within three months whether he would accept it. In re Trotter's Will, 93 N. Y. S. 404. Devise in trust to pay part of income to widow and balance to children, and after death of widow income to be divided among children then living or issue of any who had died, and after death of children income to be paid to grandchildren until arrived at age of 21, when principal was to be divided. In re Smith's Estate [Pa.] 60 A. 255. See, also, ante, preceding paragraphs.

31. Provisions held void: Gift to son until testator's youngest grandchild should attain the age of 25, when it was to be divided among grandchildren. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37. Suspension of power of alienation necessarily implied by creation of trust for 30 years and direction that land be sold after expiration of such period, and hence trust void (Burns' Ann. St. 1901, § 3382), though no express prohibition of alienation. Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520. Under devise to cousins for life, remainder to the survivor and then over to others, provision that the same should never be sold, in so far as it attempts to prohibit a sale after the vesting of the estate in the remaindermen. St. 1903, § 2360, construed. Morton's Guardian v. Morton [Ky.] 85 S. W. 1188. Held evident intention that surplus profits should accumulate during lifetime of sons for benefit of children, and accumulation void because not limited to period within their minority. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970. Trust for life of grandchild born after testator's death. In re Faile's Estate, 44 Misc. 619, 90 N. Y. S. 157. Vesting of trust estates held dependent on years instead of lives. Hagemeyer v. Saulpaugh, 97 App. Div. 535, 90 N. Y. S. 228. Power of sale given to trustees for purposes of distribution, proceeds being subject in all respects to the execution of the trusts, held not to cure such invalid provisions. Id. A provision that none of the realty shall be sold by the life tenant, or disposed of in any way. Wool v. Fleetwood, 136 N. C. 460, 48 S. E. 785. A provision for a deposit of money in bank, interest to be used yearly to keep burial lot in

Possession and enjoyment[32] accompany a present vested legal estate. In the case of a future interest, they await its vesting as a legal estate,[33] and in case of a trust or equitable estate, the beneficiary becomes entitled to possession when the trust is completed or whenever the conditions are satisfied on which testator made the right depend.[34] In case of a life tenancy in consumable personalty or money, special conditions of possession to protect future interests may be found.[35]

Individual rights in gifts to two or more.[36]—A devise to two or more, in the absence of an express declaration to the contrary, will be construed as creating a tenancy in common and not a joint tenancy, unless it clearly and explicitly appears from the language employed that the testator understood the nature and incidents of the different estates, and intended to create a joint tenancy.[37] Under a devise to husband and wife, it will be presumed that they take by entirety unless the will shows an intention to make them joint tenants or tenants in common.[38]

A will ordinarily speaks of persons from the death of the testator.[39] Hence a gift to a particular class of persons is a gift to those coming within that description at testator's death, in the absence of something to show a contrary intention.[40] The fact that the gift is in remainder,[41] or that, by such a construc-

condition. Const. art. 1, § 26. McIlvain v. Hockaday [Tex. Civ. App.] 81 S. W. 54.

32. See 2 Curr. L. 2141, n. 15.

33. See ante, as to time of "vesting."

34. See post, "Trust Estates and Interests," also post, § 5E.

35. See 2 Curr. L. 2141, n. 19, 20, and see, also, Life Estates, Reversions and Remainders, 4 Curr. L. 438.

36. See 2 Curr. L. 2142.

37. Tenancy in common unless expressed intention to contrary, or such intention manifestly appears from instrument. Burns' Ann. St. Ind. 1901, § 3341. Taylor v. Stephens [Ind. App.] 72 N. E. 609; Id., 74 N. E. 12. Whether or not survivorship is intended is to be gathered from the language of the will. In re McCallum's Estate [Pa.] 60 A. 903. Pa. Act March 31, 1812 (5 Smith's Laws, p. 395) merely takes away survivorship as incident to joint tenancy and makes no change where estate is created by will. Id. Under devise of fund in trust to pay income to wife and daughter, or survivor of them, and during lifetime of wife income should be paid to them equally, held, that on death of daughter before widow, latter took entire income for life. Id. N. Y. Laws 1896, p. 569, c. 547, § 56. Same rule applies to personalty, bequeathed to two or more persons in their own right. In re De Rycke's Will, 99 App. Div. 596, 91 N. Y. S. 159. A restriction postponing the right of tenants in common to partition is not invalid as repugnant to the estate created, or as against public policy. Dee v. Dee, 212 Ill. 338, 72 N. E. 429. Provision fixing time of division held express condition against prior partition. Id.

Devises held to create tenancies in common: Words of equality. Taylor v. Stephens [Ind. App.] 72 N. E. 609. Remainder "to be owned equally and jointly by my children," shares of deceased children to go to "heirs of their bodies if any, and if not, to those surviving." Id. Rehearing denied 74 N. E. 12. Phrase "share and share alike" in gift to several, implies tenancy in common. Testatrix held not to have intended to create joint tenancy with right of survivorship. Colville v. Kinsman [N. J. Eq.] 60 A. 959. Devise in remainder "in two parts" to pastors and deacons, respectively, of two churches, to be equally divided between them, with direction to use only the income, which was to be received and divided in peace and harmony. Osgood v. Rogers [Mass.] 71 N. E. 306. Bequest of income to several persons, to be divided "equally" among them. Loomis v. Gorham [Mass.] 71 N. E. 981. Devise over to several "to be equally divided between them, share and share alike." Langley v. Westchester Trust Co. [N. Y.] 73 N. E. 44.

38. Booth v. Fordham, 91 N. Y. S. 406.

39. Smith v. Smith [Mass.] 71 N. E. 314.

40. Bequest in trust for sister for life, with remainder over to the brothers and sisters of testatrix. Smith v. Smith [Mass.] 71 N. E. 314. Under devise over to a class, the objects thereof should be determined as of the date of testator's death. Melton v. Camp, 121 Ga. 693, 49 S. E. 690. As to the persons who are to take the will speaks from the death of the testator, but only in so far as the facts and circumstances are susceptible of anticipation by him, so that he can place himself in the position which he will then occupy with respect to his property and family. Remainder over to grandchildren held not to include child adopted by testator's son after will was made. In re Hopkins, 43 Misc. 464, 89 N. Y. S. 467, afd. 92 N. Y. S. 463. The words "heirs at law" when used in a will mean heirs at law at the time of distribution. Hostetter v. State, 5 Ohio C. C. (N. S.) 337.

41. Smith v. Smith [Mass.] 71 N. E. 314. Under devise to one for life with remainder to his children as a class, a grandchild of the life tenant, whose parent died before the testator, cannot share in the remainder with the only child of the life tenant in esse at testator's death and life tenant's death. Rule not changed by Civ. Code 1895,

tion, the life tenant is brought within the class among which the estate is to be divided, does not change the rule.[42] Naming the members has no controlling force if all of the class is named.[43] A distinct and positive direction as to what each shall take controls an expressed intention to make an equal division.[44]

Strangers to testator's line usually are found to take per capita, and descendants per stirpes,[45] unless by words of equality[46] or otherwise, as by placing those of different degrees or of the same degree but different lines in one class,[47] he negatives such intent. The term "equally to be divided" means division per capita and not per stirpes, no matter who the devisees,[48] but if the objects of the testator's bounty are divided into classes, the division is per stirpes.[49]

Conditions.[50]—No precise words are necessary to create a condition, any words showing such an intention being sufficient;[51] but conditions, especially if divesting, are reluctantly implied.[52] Whether they are precedent depends on the intent as to how they should operate on that to which they are attached.[53]

§ 3084. Crawley v. Kendrick [Ga.] 50 S. E. 41.

42. Smith v. Smith [Mass.] 71 N. E. 314. In an estate to a son for life remainder to the heirs, the life tenant is entitled to share in the remainder, he being one of the heirs. In re Abel's Estate, 23 Pa. Super. Ct. 531. As to the persons who are to take and their condition, the will speaks as of its date. Under gift "to my wife, M.," she takes, though she obtained absolute divorce prior to testator's death. In re Jones' Estate [Pa.] 60 A. 915. Pa. Act June 4, 1879 (P. L. 88), providing that will is to be construed as of time of testator's death with reference to any property embraced in it, does not change this rule. Applies only to subjects of disposition and not to objects. Id.

43. Where devised homestead in remainder to "children hereinafter named and their issue, share and share alike," and later provisions named all the children, all were entitled to share. Sondheim v. Fechenbach [Mich.] 100 N. W. 586.

44. Children. In re Heathcote's Estate, 209 Pa. 522, 58 A. 888.

45. Where joint will of husband and wife gave wife right and authority over joint property, and, in case she survived him, to live thereon till her death, the property left thereafter "to be divided equally between our lawful heirs on both sides," the wife's heirs take half the land per stirpes. Knutson v. Vidders [Iowa] 102 N. W. 433. Income to be divided among testator's two living children, and children or descendants of his deceased son. Prince v. Barrow, 120 Ga. 810, 48 S. E. 412. Under devise in remainder to children "equally, share and share alike," the representatives of any deceased child to take ancestor's share, held that, if any of them died leaving no representatives, the estate should be equally divided among the survivors. Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633.

46. Under devise in remainder to heirs of life tenant's body, "share and share alike," children and grandchildren held to take per capita. Parrott v. Barrett [S. C.] 49 S. E. 563.

47. Where a gift is to the children of several persons, they take per capita (Kidwell v. Ketler [Cal.] 79 P. 514), unless there is something in the will to show a contrary intention (Id.). Only slight indication of different intention is necessary, and some courts hold that the division will be per stirpes unless the language used is such as to exclude that intention. Id. Issue of niece and niece and nephew held to take per stirpes under devise to them in remainder. Id.

48. Priester's Estate, 23 Pa. Super. Ct. 386. The words "equally to be divided" when used in a will mean a division per capita and not per stirpes. Hughes v. Hughes, 26 Ky. L. R. 625, 82 S. W. 408.

49. "To my brother A's children, B's children, my sister, D, my sister-in-law E's children," to be equal beneficiaries, the children take per stirpes. Miller's Estate, 26 Pa. Super. Ct. 453.

50. See 2 Curr. L. 2144.

51. In order that conditions may be effectual, testator's intention must be reasonably clear and precise. Watts v. Griffin [N. C.] 50 S. E. 218. Condition that if sons should marry "common women" their interest should terminate, held void for uncertainty. Id. Devise to son for life, reversion of same in fee to his children; "but the express condition of this bequest is upon the penalty of forfeiture, that the said land is not at any time to be subject to any liens or incumbrances of any kind by the reversioners," held not to limit life tenant's control and disposal of his interest, and hence his interest was liable for his debts. Flaherty v. Stephenson [W. Va.] 49 S. E. 131. See, also, ante, "Particular Words," etc.

52. See 2 Curr. L. 2145, n. 47.

53. See, ante, Vesting. See post, § 6. Requirements in nature of consideration for devise will be regarded as conditions precedent. Mollenkamp v. Farr [Kan.] 79 P. 646. In case of devise of realty, fact that there is no provision as to effect of failure to perform condition does not militate against conclusion that it is precedent, but is important only as tending to show intent. Id. Held conditional fee to one on condition to pay all taxes, etc., and not encumber or sell before age of 40. Matlock v. Lock [Ind. App.] 73 N. E. 171.

Held condition precedent: Devise to widow for life, with provision that on her death land was to go to two sons "provided that they pay over whatever difference there may be in the appraisement or allotment made by their mother for the benefit of my other children, said allotment to be made at the discretion of my wife," held, that proviso

Where the condition is precedent, it must be performed before the estate will vest.[54]

Divesting clauses are strictly construed, and an estate once vested will not be divested unless all the events on which the gift over is to take effect happen.[55]

Intent to require election[56] may be found wherever provisions are made in the alternative,[57] or where by a complete disposal of property statutory rights are of necessity cut off by taking under the will.[58]

Charges, exonerations, and funds for payment.[59]—The question whether legacies and expenses are to be charged on the realty is always one of intention.[60]

A general direction that all testator's debts be paid charges them upon the realty.[61]

was condition precedent, and no title passed to sons thereunder on death of mother before making appraisement or allotment. Moilenkamp v. Farr [Kan.] 79 P. 646. Devise to one provided he cared for testatrix during her life. Brennan v. Brennan, 185 Mass. 560, 71 N. E. 80. Under provision directing payment of mortgage indebtedness of testator's brother, provided it had been reduced "by him" to certain sum, reduction by brother himself during his lifetime. He having died before making such reduction, legacy lapsed. Brown v. Ferren [N. H.] 58 A. 870.

A condition subsequent is one operating to divest rather than to prevent the vesting of an estate. Watts v. Griffin [N. C.] 50 S. E. 218. Where condition subsequent is void, the estate vests absolutely. Id.

Held conditions subsequent: Provision that should sons at any time marry common women their interest in devise should terminate. Watts v. Griffin [N. C.] 50 S. E. 218. Rights of widow held to terminate in case she remarried. Haseltine v. Shepherd [Me.] 59 A. 1025. Devise to one "on condition" that he appear and claim it before final distribution of estate, and in no event later than ten years from date of will. Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235.

54. Fact that condition was to be performed during lifetime of testatrix and that tenant had no knowledge thereof until after her death, immaterial except in so far as he is the heir at law. Brennan v. Brennan, 185 Mass. 560, 71 N. E. 80. When devisee on whom condition affecting realty is imposed is also the heir at law, it is incumbent on any person who would take advantage of the condition to give him notice thereof. Id. Where tenant is also an heir, he cannot be unqualifiedly ousted from the land, and compelled to account for rents and profits on nonperformance, since he would thereby be deprived of his interest as heir. Id. Condition in bequest to church that it should be paid over provided a certain additional sum for the erection of "a new house of worship" was raised within ten years, held not complied with by raising such sum for a new meeting house and vestry and expenditure of most of it for a vestry, no particular sum having been secured for the erection of a meetinghouse. Trustees of the Ministerial Fund of the First Parish in Cambridge v. First Parish [Mass.] 71 N. E. 74.

55. Smith v. Smith, 139 Ala. 406, 36 So. 616.

56. See 2 Curr. L. 2145. See, also, Election and Waiver, 3 Curr. L. 1177.

57. Will held to give husband and daughter right to occupy house, instead of receiving rent, on assuming and agreeing to pay mortgage, repairs, etc. Farrar v. Farmers' Loan & Trust Co., 85 App. Div. 478, 83 N. Y. S. 218.

58. Where a husband makes a specific testamentary provision for his wife, and disposes of the remainder of his property to others, the widow will not be permitted to take both under the will and under the law, when the manifest purpose of the testator would thereby be defeated. Will held inconsistent with intention that widow should have $500 statutory allowance (Burns' Ann. St. 1901, § 2424) in addition to legacies. Boord v. Boord [Ind.] 71 N. E. 891. Husband cannot deprive her of statutory rights, but where makes other provisions clearly intended in lieu thereof, she will be deemed to have waived statutory rights by accepting them. Id. The widow is required to elect only in case she receives some beneficial interest under the will. Not where only bequest to her is in payment of debt and devise was of estate held by them by entireties. Chaplin v. Leapley [Ind. App.] 74 N. E. 546.

59. See 2 Curr. L. 2146.

60. Where personalty consisted of deposits in banks standing in testator's name as trustee for his wife, daughters, and sisters, realty is charged with legacy and with taxes, etc., on realty devised, which executor is directed to pay. McManus v. McManus, 179 N. Y. 338, 72 N. E. 235. Devise of all realty and bequest of notes, etc., to daughter, "with the understanding that she shall pay" certain legacies out of her portion of the estate, makes legacies charge on whole estate, including realty. Broadbridge v. Sackett [Mich.] 101 N. W. 525. Where will gave husband land, stable on homestead on his paying mortgage on same, portion of house for life, and stock of goods in store, "he paying the debts," and paying specified sum to each child, and gave residue to children, he was required to pay both store debts and all other debts. Ashman v. Harriman, 72 N. H. 559, 58 A. 501. Provision requiring wife, to whom residuary estate was devised absolutely, to pay legacy to testator's adopted daughter of his estate, held to make legacy charge on realty. Gragg v. Gragg, 94 N. Y. S. 53. Taxes, insurance, and repairs on realty devised to daughter, directed to be paid by executors, held payable out of the corpus of the residuary estate and not out of the income of the personalty. In re Tracy, 179 N. Y. 501, 72 N. E. 519.

61. Personalty primary fund. Roll v. Roll

A residuary clause passing real and personal property in a blended mass has the effect of charging precedent money legacies on the whole estate.[62] Land devised immediately to executors will be considered charged with the legacies directed to be paid, whether there is a deficiency of personalty or not.[63] In the absence of a contrary intention appearing, a legacy directed to be paid in lieu of dower, and given for the support of the widow, will, as between her and the other devisees, be deemed payable out of the entire estate, and to be charged upon the lands.[64] Whether such legacy is to be paid out of the corpus or the income of the land is a question of intention.[65] An intention to charge the realty with the payment of legacies will not be inferred from the mere fact that there is a deficiency of personalty.[66]

A charge does not follow the transmutation of one property into another unless such property can be followed and identified, and it appears that such was the intention.[67] The fact that the charges may consume all of the property does not alter the character of the title, or prevent its transmission according to testator's intention.[68]

Where legacies are made a charge on certain land to the extent of half its value at an estimated price per acre, such estimated value and not the market value should be used as a basis for determining the amount of the lien.[69]

When an entire estate is charged with a life annuity, the remaindermen cannot, without the consent of the annuitant, have a portion of the estate alleged to be unnecessary to secure the annuity distributed to themselves.[70] Land on which legacies are charged cannot be partitioned until after the executor's accounts have been settled so as to show what amount of personalty is applicable to the payment of the legacies, and hence what portion of the land is subject to the lien.[71]

Deductions.[72]—A provision that the amount due testator from a legatee

[N. J. Eq.] 59 A. 296; McKinley v. Coe [N. J. Eq.] 57 A. 1030. Creates equitable lien which may be enforced in chancery. If land sold in partition free from debts, lien may be enforced against proceeds. Id. Is equitable estate or interest in land, created at testator's death, and if debt not barred at that time, may be enforced within 20 years from that time as if it were a legal estate created by the will. Id.

62. Held inequitable, under circumstances, to allow legatees who had accepted mortgage on land as security for legacies in ignorance of fact that they were charge thereon, to declare that it was not substituted security. Vernon v. Mabbett [N. J. Eq.] 58 A. 298. Clause not in terms residuary. Roll v. Roll [N. J. Eq.] 59 A. 296. Where gives certain legacies, and then remainder of estate, both real and personal, to trustees for certain purposes, legacies are charge on entire estate, and duty of executor to pay same, selling realty therefor if necessary. Coulter v. Bradley [Ind.] 71 N. E. 903.

63. Roll v. Roll [N. J. Eq.] 59 A. 296.

64. She will be considered as purchaser for value. Roll v. Roll [N. J. Eq.] 59 A. 296.

65. Annuity held payable out of corpus. Where executors have discretion as to time of sale, it will not be ordered unless abuse is shown. Roll v. Roll [N. J. Eq.] 59 A. 296.

66. Proceeds of sale of realty held not applicable to payment of legacies. In re Heathcote's Estate, 209 Pa. 522, 58 A. 888.

67. Will directed certain property to be sold and proceeds to be used to pay debts and legacies, any balance to be divided among certain persons. Specific legacies were advanced by testatrix during her lifetime, and she, having conveyed the property, executed a codicil reciting that fact and revoking the legacies, "leaving the rest of my said will as drawn." Held, that property subsequently purchased passed under a residuary clause, it not being shown that the proceeds of the property sold went into the purchase. Rickman v. Meier, 213 Ill. 507, 72 N. E. 1121.

68. After specific bequests, will gave residue of property to daughter in trust for grandchildren, subject to certain charges. Hughes v. Bent, 26 Ky. L. R. 453, 81 S. W. 931.

69. Not market value at time when lien was sought to be enforced, though value had depreciated. Mahoney v. Breckenridge, 84 App. Div. 156, 82 N. Y. S. 537.

70. The discretion of the orphan's court in a proceeding under P. L. 98, for the exoneration of trust estates will not be reviewed. McCoy's Estate, 23 Pa. Super. Ct. 282.

71. Where land is devised to children subject to use of one-third by widow for life, and charged with certain pecunlary legacies. Serena v. Moore [N. J. Eq.] 60 A. 953.

72. See 2 Curr. L. 2148.

shall be deducted from her share does not preclude the executor from proving the full amount of such indebtedness against her estate in bankruptcy.[73]

Trust estates and interests.[74]—A trust estate may be created, though part of its terms are found by implication only.[75] The trustee takes such an estate as the will defines or as the terms of the trust require.[76]

73. Particularly where distribution under will is postponed. In re Woods, 133 F. 82.

74. See 2 Curr. L. 2149.

75. Where it is necessary from the nature of the duties to be performed, an estate will vest in the trustees by implication, though there is no direct devise to them. In re Reith's Estate, 144 Cal. 314, 77 P. 942. Will requiring trustee to invest and reinvest fund and pay to legatee certain sum annually for certain period, the balance, if any, to be then paid over to him, held not to create passive trust, but nevertheless, in absence of provision against anticipation, alienation, or attachment, beneficiary could dispose of interest, and hence could be reached by creditors through court of equity. Bronson v. Thompson [Conn.] 58 A. 692. Bequest to defendants as trustees to pay over income to wife and children held to make them trustees and not executors, so far as that part of the estate exceeding debts was concerned. Jastram v. McAuslan [R. I.] 58 A. 952. Where such appears to have been intention, spendthrift trust will be sustained, though no provision that estate shall not be liable for debts of cestui que trust. In re Shower's Estate [Pa.] 60 A. 789. Devise in trust to invest and pay income to children and to so control estate that they shall not impair or diminish principal held to create active and not dry trust. Id. Will held to impose trust on executor to invest shares of two of devisees with necessary incidental powers. Schick v. Whitcomb [Neb.] 94 N. W. 1023. The court will find in language imposing on an executor or trustee the duty of disposing of a mixed fund or property an implied power to sell realty, to the end that he may discharge such duty. Trustee held to have such implied power for purpose of converting land into income producing property. Foil v. Newsome [N. C.] 50 S. E. 597. Title in trustee will be implied where duties are active, and such title is reasonably necessary, and such appears to have been intent. Higgins v. Downs, 91 N. Y. S. 937.

76. Title of trustee: Takes whatever estate necessary to enable him to accomplish purposes of trust, both as to extent and duration. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214; Olcott v. Tope, 213 Ill. 124, 72 N. E. 751; In re Reith's Estate, 144 Cal. 314, 77 P. 942. When directed and empowered to convey fee, necessarily takes legal title. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Though word "heirs" not used. Executor takes fee where authorized to sell or lease at discretion. Olcott v. Tope, 213 Ill. 124, 72 N. E. 751. Such as exigencies of trust require. Where will devises realty to executrix to use same for certain period for her own benefit, with direction to then sell same and divide proceeds among children, including herself, she holds legal title as trustee, and is entitled in her capacity as executrix to maintain petition to recover damages for taking of property under power of eminent domain. Bean v. Com. [Mass.] 71 N. E. 784. A will empowering "my executor" to sell and dispose of property, held to vest the legal title with power to sell in the executor as trustee under the will, and not by virtue of appointment by the court. Hoggart v. Ranney [Ark.] 84 S. W. 703. Mere directions that executors shall take charge of property, execute mortgages when necessary, and at end of two years have property sold, do not create an express trust in realty, but only such a trust as pertains to office of executor, sale requiring confirmation, and mortgage an order of court under Code Civ. Proc. §§ 1517, 1561, 1577, 1578. In re Pforr's Estate, 144 Cal. 121, 77 P. 825. Under a bequest of testator's personalty to trustees to pay an annuity and upon the annuitant's death to convey it to others, the trustees take all the personalty, though it is more than sufficient to produce an income sufficient to pay the annuity. In re Pichoir's Estate, 139 Cal. 694, 73 P. 604. Where property is devised to an executor to dispose of at either public or private sale and divide the proceeds among the testator's children in a given way, the title to the property vested in the executor to be disposed of in conformity to the will. Harris v. Kittle, 119 Ga. 29, 45 S. E. 729. Devise in trust to collect profits, make improvements and repairs, and pay over income until certain beneficiary reached age of 25, held to create active trust so that legal title vested in trustee, and remained there until beneficiary reached age of 25, when active duties ceased, and title became vested in beneficiaries by statute of uses. Trustee held not to have power of sale on termination of active duties. Moll v. Gardner, 214 Ill. 248, 73 N. E. 442. Devise in trust to sell property and pay income from investment of proceeds to wife for support of children during minority, held trust for benefit of children and not for widow's benefit, and trustees held legal title. Brown v. Doherty, 93 App. Div. 190, 87 N. Y. S. 563. Will imposing duties and discretionary powers on a trustee, held to create an active trust, hence the beneficiaries were not entitled to partition. Owens v. Naughton, 23 Pa. Super. Ct. 639. Court will not annul a trust created by will which charges trustee with care and supervision of realty, and requires exercise of his discretion. Schick v. Whitcomb [Neb.] 94 N. W. 1023.

Held dry trusts: A devise in trust but providing that the beneficiaries shall have full control of the property. Trustee and beneficiaries can convey a valid title. Trust will be vacated on demand of beneficiary, and trustee required to convey legal title. Fink v. Metcalfe, 26 Ky. L. R. 1263, 83 S. W. 643. A devise in trust to a certain person "for the children of said son" of the testator. Executed at testator's death. Carter v. Long, 181 Mo. 701, 81 S. W. 162.

Duties and powers in general: It will be presumed that charitable trust will be administered agreeably to intention disclosed by will, and such intention may be en-

Powers of appointment and beneficial powers of sale.[77]—A power may be implied from any rights or authority equivalent thereto,[78] and will be of the

forced by courts. In re Merchant's Estate, 143 Cal. 537, 77 P. 475. Will held to require plans for building to be approved by testamentary trustees and not trustees of industrial school named as beneficiary. Appeal of Beardsley [Conn.] 60 A. 664. Under bequest to institution for purpose of erecting memorial building, will held not to require that building should have been erected prior to certain date, but only that institution should have been incorporated. Id. Where stock was bequeathed to an executor in trust for daughter, and executors were directed to hold it and other stock until a certain date, and to pay the dividends "to each of said legatees annually," held, word legatees was used synonymously with children, and payments should be made directly to daughter, and executor who was also trustee was not entitled to commissions in both capacities. Lamar v. Harris, 121 Ga. 285, 48 S. E. 932. Gift in trust to apply so much of income as to trustee "may seem proper," held not to give her discretion to defeat trust, but simply discretion as to manner of its execution (Prince v. Barrow, 120 Ga. 810, 48 S. E. 412), and not to be too indefinite and uncertain to enable court to execute it on refusal of trustee to do so (Id.). A power conferred on trustees to distribute the estate at a certain time, if, in their judgment, it is prudent and for the best interests of the beneficiaries, is not a mere detached naked authority, purely discretionary, but is blended with the trust to which it attaches. Sells v. Delgado [Mass.] 70 N. E. 1036. Will held not to authorize trustee to purchase stock of corporation as investment, knowingly paying more than it was worth. Cropsey v. Johnston [Mich.] 100 N. W. 182. Under bequest to trustees to pay one-third of income to wife for life, and other two-thirds "to pay over and distribute equally for the support, education, and advancement" of all testator's children, each child has absolute vested right to income which he may mortgage. Trustees have no discretion. Jastram v. McAuslan [R. I.] 58 A. 952.

Powers of sale: Where such powers are discretionary, a court of equity will never interfere before or after sale, except in cases of actual fraud or collusion (Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058), nor is the purchaser bound to inquire whether the trustees have properly exercised their powers, nor to see to the application of the purchase money, though the beneficiaries are infants (Id.).

Trustee held to have power of sale: For purpose of paying taxes, redeeming from tax sales, etc., and to use corpus of fund for support of widow. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Discretionary power as to both realty and personalty. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058. Provision directing trustees to sell "such portion as remains in their hands" implies power to sell fee, or at least is proof of intention of testator that it might be sold, where there are other words creating doubt as to whether or not such power was intended. Id. To sell realty secured under foreclosure of mortgage, and power inured to benefit of substituted trustee, though she was also a beneficiary. Sweet v. Schliemann, 95 App. Div. 266, 88 N. Y. S. 916. Under direction that land be sold and proceeds divided. Duckworth v. Jordan [N. C.] 51 S. E. 109.

Manner of execution—Cy pres doctrine: If, where there is a general charitable intent, it becomes impracticable, in consequence of a change in circumstances, to administer the trust in the precise manner provided by its creator, the doctrine of cy pres will be applied, and the trust will be administered in a manner that shall conform as nearly as possible to its terms. Osgood v. Rogers [Mass.] 71 N. E. 306; Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008. Gift to pastors and deacons of churches, and their successors, forever, for the support of the churches in their religious worship, held to create valid public charitable trust. Osgood v. Rogers [Mass.] 71 N. E. 306. The full bench of the supreme judicial court may frame up a scheme for its administration under such circumstances. Id. Where trust created for benefit of two churches, and one of them, originally established by aid of other, was discontinued, held that its share should go to other. Id. Doctrine does not apply where only claim is that trustee is uncertain, there being no question as to intention as to what property should be used for, and object being lawful and possible. Cook v. Universalist General Convention [Mich.] 101 N. W. 217.

Termination of trust: Trust for benefit of minor children held to show intent that it should terminate upon their arriving at age of 21, though no direction that any property should ever be turned over to them. Woolverton v. Johnson, 69 Kan. 708, 77 P. 559. Where will placed property in trust until children attained the age of 21 years, when it could be partitioned, held trust continued, though all the children had attained the age of 21 years and there had been a partition of the estate. Davies v. Dovey [Ky.] 85 S. W. 725. A bequest of property held in trust held to indicate an intention that the property should be kept in trust. Cochran v. Lee's Adm'r [Ky.] 84 S. W. 337. Trust to continue during lives of two legatees valid, and will not be sooner terminated, especially where one of beneficiaries and trustee object. Hoffman v. New England Trust Co., 187 Mass. 205, 72 N. E. 952. Trust for benefit of children and sister held terminated on youngest child becoming of age as to all property except that in which sister had life estate, and such as was necessary to be held by trustees to pay taxes and assessments on her share. Williams v. Thacher [Mass.] 71 N. E. 567. Valid trust will not be decreed terminated where its objects have not been fully accomplished, and accomplishment has not been made impossible. Trust held to continue during life of daughters. Robbins v. Smith [Ohio] 73 N. E. 1051. Under will and codicil directing payments of income to be made to son's wife and children, during life of son and his wife and either of them, duration of trust measured by son's life, where he survived wife. In re King's Estate, 210 Pa. 435, 59 A. 1106.

kind and extent which fair meaning attributes to testator's words,[79] not usually exceeding the estate of the donee, at least to the extent of destroying other gifts made by testator,[80] unless he clearly intended it.[81] The power may be executed

Substituted trustees succeed to all the powers, rights, and duties conferred on the original trustees by the will. Estate vests in them on appointment. Mass. Rev. Laws, c. 147, §§ 5, 6. Sells v. Delgado [Mass.] 70 N. E. 1036. May exercise discretion as to distribution vested in original trustees. Id. Trust for creation of hospital not personal so as to be defeated by death of executors. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513. A person named as trustee in a will is not bound to act as such. May expressly decline to serve, or may be deemed to have disclaimed office by conduct, as where he refuses to qualify. Sells v. Delgado [Mass.] 70 N. E. 1036. In such case probate court or court of equity may appoint successor. Id. If one trustee fails to qualify, estate vests in other. Spengler v. Kuhn, 212 Ill. 186, 72 N. E. 214. Also when trustee becomes incompetent, trustee cannot delegate duties involving exercise of judgment or discretion, or which are personal in their nature. Id. Where a power is created and given by words clearly indicating that the donor placed special confidence in the donee, so that the element of personal choice or selection is found, its exercise must be confined to and exercised by such person, and is not ordinarily transmissible. Provision authorizing distribution and termination of trust at certain time, if, in the judgment of the trustees, "or the survivor of them," it should be for the welfare of the children, held not to confer merely personal power of distribution, but conferred power on whomsoever should be appointed to administer trust. Sells v. Delgado [Mass.] 70 N. E. 1036.

77. See 2 Curr. L. 2150.

78. A power to dispose of realty is not to be inferred from the mere use of words properly referable to another subject-matter. Bequest of an entire estate, real, personal and mixed, to testator's wife and after her death whatever remains, over, gives her a life estate only in the realty. Martin v. Heckman, 25 Pa. Super. Ct. 451. Will creating trust fund, with provision that, at death of beneficiary, principal was to go to those who would be legally entitled to receive it "were it given to him absolutely, and he owing no debts," held not to give beneficiary power of appointment. Otis v. March, 187 Mass. 298, 72 N. E. 961. Will of beneficiary held not an attempt to dispose of trust fund, but only to dispose of other property, and, it making no reference thereto and containing no intimation of how he would have disposed of it had it belonged to him, it should be disregarded in distributing such fund. Id.

79. Under bequest of money to a daughter and her bodily heirs, and provided that "she may use the estate so willed her, but at her death it is to go to her bodily heirs," held, she could spend her share, but anything left at her death should go to her children. Smith v. Courtnay's Ex'rs [Ky.] 85 S. W. 1101. Under gift to wife for life to be used according to her desire, and after her death all the property "remaining" to be divided, held that she took life estate with absolute power of sale over all of it, and right to use proceeds for support and comfort as she desired. McGuire v. Gallagher [Me.] 59 A. 445. Under devise to widow for life or until remarriage, with power of disposition, and remainder over to children, held that she had power to convey realty in fee during life and before remarriage, if necessary for her benefit and support. Haseltine v. Shepherd [Me.] 59 A. 1025. Under bequest to one "to hold, possess and enjoy during her natural life," with remainder over to another, the life tenant may use the property for her personal benefit if she chooses to do so, and the remainderman cannot recover the same from her estate without proof that there was a residue remaining. Board of Trustees of Westminster College v. Dimmitt [Mo. App.] 87 S. W. 536. Testator gave half of residuary estate in trust for widow, with power of appointment, and in case of failure to appoint the same to go to those then entitled to other half, to be distributed in same proportions, upon like trusts, and with like powers as such second half. Second half was given to surviving children in equal shares with power to appoint certain part thereof. Held, that on failure of widow to make valid appointment, her share went to children, and each had like power of appointment in regard to it. Inglis v. McCook [N. J. Eq.] 59 A. 630. A power "to alter and regulate, at her discretion, the proportions in which the same shall be distributed among the persons who shall be entitled thereto," does not authorize a gift to executors in trust for such persons, and such a gift is not an exercise of such power. In re Tenney, 93 N. Y. S. 811. Gift to wife "during her natural life and at her disposal" all the residue of estate, held to give her power to convey realty in fee. No remainder over. Parks v. Robinson [N. C.] 50 S. E. 649. Gift to wife "in fee simple, with power to sell and dispose of it as she may see fit," with provision that "if there is anything remaining" after wife's death it shall be disposed of in certain manner, gives her power to convey fee of whole or any part of realty whether she took fee or life estate with power of disposition. Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770. An estate to testator's wife "to have the same and use it at pleasure for her sole use," remainder over, gives her a right to convert all to her own use during her lifetime, but no authority to incumber the remainder for a debt, the proceeds of which is not used for her maintenance. Tyson's Estate, 24 Pa. Super. Ct. 533.

80. A devise of one-half of an estate to a husband for life with power to exercise acts of fee ownership over it, remainder of the estate to children, but providing that the husband should decide when the estate should be partitioned and execute deed in partition, did not give the husband the legal title to the portion devised to the children. Power to convey limited to property devised to him. Wiess v. Goodhue [Tex.] 83 S. W. 178.

in any manner,[82] and appointment made to any persons compatible with the character of the power and not restricted by the will.[83]

Lapse, failure and forfeiture.[84]—Legacies will lapse on the death of the legatee before the performance by him of a condition precedent to the vesting of the legacy,[85] or because there is no one in being to take them when they become payable.[86] Ordinarily a legacy or devise will lapse by the death of the legatee or devisee during testator's lifetime,[87] but by statute in some states his share in such case goes to his heirs.[88] Such statutes are generally limited in their application to cases where the devisee or legatee is a child or other descendant of testator.[89]

81. Absolute power of disposal held to give wife power to convey fee whether she had estate in fee or only life estate, notwithstanding provision that "if there is anything remaining" after her death, it shall be disposed of in certain manner. Bodmann German Protestant Widows' Home v. Lippardt, 70 Ohio St. 261, 71 N. E. 770.

82. Where the authority of disposition by will is a mere power given to one having no reversionary interest, and attempted execution of the power by will made in conformity with the terms of an alleged contract is invalid. Robbins v. Smith [Ohio] 73 N. E. 1051. A power of sale given to wife and executor if for benefit of wife or estate, to be exercised with approval of adult children, cannot be exercised without their consent. Schneider v. Schneider [Wis.] 102 N. W. 232.

83. Power to divide property among "my lawful issue," held not to permit exclusion of any of them. Inglis v. McCook [N. J. Eq.] 59 A. 630. Where power does not permit donee to exclude any of the objects of the appointment, such exclusion renders the execution of the power invalid, and the estate passes as in default of appointment. Id. Under devise in trust for children, giving them power to appoint "to and among his or her children or issue in such shares, proportions and estates, absolutely or upon trusts, as he or she may so will or appoint," donees restricted to its exercise in favor of designated class, but appointees within such class acquired all rights of ownership unlimited in power of disposition. Before execution of original trust, income goes to appointees. In re Lafferty's Estate, 209 Pa. 44, 67 A. 1112.

84. See 2 Curr. L. 2152.

85. Legacy held lapsed for failure of legatee to perform condition precedent. Brown v. Ferren [N. H.] 58 A. 870.

86. Under will giving legacies to those of nephews and nieces of testator's wife "who shall be living or whose legal representatives shall be living" at wife's death, children of deceased nephews or nieces took parent's share, but legacies of those dying childless lapsed. Miller v. Metcalf [Conn.] 58 A. 743.

Under will giving estate to daughter, or in case she died without having heirs, then to mother of testatrix, or in case she was dead, to her heirs and legal representatives, and providing that no part should go to husband or his relatives, held, where mother died first and then daughter, neither husband nor his relatives could claim through daughter as heir of grandmother. In re Tucker's Estate, 209 Pa. 521, 58 A. 889.

87. Fiske v. Fiske's Heirs, [R. I.] 59 A. 740; Langley v. Westchester Trust Co. [N. Y.] 73 N. E. 44.

Where a legatee dies before the testator, his legacy lapses. Lash v. Lash, 209 Ill. 595, 70 N. E. 1049. Common-law rule. Gilbert v. Gilbert [Iowa] 103 N. W. 789.

NOTE. Gift to discharge moral obligation: Where it appears that the legacy was left, not merely as a bounty but to discharge a moral though legally unenforceable obligation, it will not lapse by the legatee's death in the testator's lifetime. Stevens v. King, 2 Ch. Div. 30.

The broad common-law rule is that a legacy will lapse where the legatee dies before the testator. Wright v. Horne, 8 Mod. 222; Hard v. Ashley, 117 N. Y. 606. But inasmuch as the lapsing of a legacy would seem to defeat the intention of the testator, the general tendency of the courts is to restrict rather than to extend the operation of the rule. Crecelius v. Horst, 9 Mo. App. 51. The following well-defined exceptions have been grafted on the common-law doctrine; a legacy will not lapse when granted to joint tenants unless they all die during the testator's lifetime (Dow v. Doyle, 103 Mass. 489); nor will a legacy to a class, though as tenants in common, lapse by the death of one of the legatees before the survivor. The survivors will take the whole. Crecelius v. Horst, 9 Mo. App. 51. The intention of the testator is also held to keep a legacy from lapsing when it is left to pay debts. Turner v. Martin, 7 De Gex, M. & G. 429; Ward v. Bush, 59 N. J. Eq. 144. Even in the case of debts discharged by a bankruptcy certificate (In re Sowerby's Trusts, 2 K. & J. 630), or debts barred by the statute of limitations, the death of the legatee before the testator will not cause the legacy to lapse (Williamson v. Naylor, 3 Y. & C. Ex. 208; Philips v. Philips, 3 Hare, 281). Hence it would seem that the holding in the principal case is clearly justified by the decisions.—From 5 Columbia L. R. 170.

88. Iowa Code, § 3281. Will held to show intent that devise to wife should lapse on her dying before testator, and hence estate passed to children under subsequent clause, and not as their mother's heirs. Gilbert v. Gilbert [Iowa] 103 N. W. 789.

89. In New York when devisee or legatee, who is child or other descendant of testator, dies during testator's lifetime, leaving a child or other descendant who

A residuary clause fails when no beneficiary is named and there is no person competent to take.[89]

Forfeitures for breach of conditions are not favored,[91] and where the language used is capable of two interpretations, that which will avoid a forfeiture will be adopted.[92] A beneficiary entitled to maintenance out of an estate can be deprived of it only by clear and satisfactory evidence that he has forfeited his right.[93]

Since it is the policy of the law to carry out the testamentary intention so far as possible,[94] valid portions of the will will be allowed to stand and the invalid provisions alone cut off where the two are distinct and separable, and testator's intention will not be subverted thereby.[95]

Residuary clauses.[96]—The residue is that part of the estate not otherwise disposed of.[97]

survives testator, such descendant takes as though the devisee or legatee had survived testator and died intestate. 2 Rev. St. [1st Ed.] p. 66, pt. 2, c. 6, tit. 1, § 52. Pimel v. Betjemann, 99 App. Div. 559, 91 N. Y. S. 49. The fact that the gift to the descendant is only as one of a class (Pimel v. Betjemann, 99 App. Div. 559, 91 N. Y. S. 49), or that he died before the execution of the will and that testator had knowledge of that fact does not prevent the operation of the statute (Id.).

The Minnesota statute contains practically the same provisions. Gen. St. 1894, § 4449. Are substituted legatees and take subject to same contingencies as parents would have taken. Take as purchasers, and not as heirs. Brookhouse v. Pray, 92 Minn. 448, 100 N. W. 235.

90. Lehnhoff v. Theine [Mo.] 83 S. W. 469.

91. Carlin v. Harris [Md.] 59 A. 122. Where the literal effect of a conditional limitation or restriction in a will is to cut down and defeat a pre-existing estate for life or in fee, and make it determinable upon the event of marriage, the condition or limitation will be regarded as merely in terrorem and not allowed to operate a forfeiture of the estate devised or bequeathed. Kennedy v. Alexander, 21 App. D. C. 424.

92. Under devise of double house for life, with provision that devise shall be forfeited if devisee shall, by way of anticipation, charge income from the realty, and house shall go to C, but if not forfeited, one side shall go to J and other to W on death of life tenant, no forfeiture is worked by life tenant charging income from one side of house only. Carlin v. Harris [Md.] 59 A. 122.

93. A widow entitled to a specified annuity or as much more as is needed for her support will not be barred because she has made herself liable for a loan made out of moneys of the estate to one of testator's children, which loan was never returned. Winter's Estate, 26 Pa. Super. Ct. 643.

94. In re King's Estate, 210 Pa. 435, 59 A. 1106.

95. Invalid clauses will be treated as though never made, and constitute no part of the will. Schuknecht v. Schultz, 212 Ill. 43, 72 N. E. 37. Item held to create separate life estate independent of void trust. Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520. Separate and independent life estate sustained, though trust invalid as contrary to rule against perpetuities. Id. Provision for inclosure of family graves valid. Provision for annual expenditure for their care effective only during administration of estate. Id. Charitable bequests, though not within statutory rule against perpetuities, held invalid as part of general scheme creating trust for thirty years. Id. Invalidity of trust held not to disturb plan of distribution, though producing inequality. In re Faile's Estate, 44 Misc. 619, 90 N. Y. S. 157. Amount of void trust, where trust fund expressly excluded from residuary clause. Id. A remainder limited on a void trust held to fall with the trust. Id. Trust to pay income not separable and distinct from subsequent provision allowing trustee to pay over principal to beneficiary under certain contingency, so as to allow such latter provision to be rejected and trust to be sustained. Ullman v. Cameron, 93 N. Y. S. 976. Where can be expunged without essentially changing or destroying the general testamentary scheme. As where invalid trust bears no relation to ultimate and concededly valid disposition of principal, except to postpone its enjoyment. Lord v. Lord, 44 Misc. 530, 90 N. Y. S. 143; Robb v. Washington & Jefferson College, 103 App. Div. 327, 93 N. Y. S. 92. Devise of life estate held separable and distinct from void trust. In re Trotter's Will, 93 N. Y. S. 404. Though a trust provides for void accumulations, its provisions will be carried out in so far as they are valid. In so far as relates to maintenance of family. In re King's Estate, 210 Pa. 435, 59 A. 1106. Fact that at time of testator's death, charitable corporation could not hold property to amount of devise, held not to invalidate gift as to excess, since it was to corporation only which was legally capable of taking, and no rights of heirs affected by special act, subsequently passed, authorizing organization of such corporation. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

96. See 2 Curr. L. 2155, n. 30-40.

97. Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966. "Residue" means all that remains after all paramount claims on the estate are satisfied. After payment of debts and legacies, and satisfaction of widow's dominant right. In re Bradley's Will

No particular form of expression is necessary to constitute a residuary bequest,[98] but the intention to pass the whole estate must be expressed in some form.[99] The fact that the residuary clause is not the last of the disposing provisions is not of controlling importance in determining its character.[1]

A broad construction of an ambiguous residuary clause will be favored.[2] The enumeration of one or more particulars of the residuary estate, followed by a general expression which would include them and all else besides, manifests an intention to dispose of the residue as a whole.[3] The exclusion of certain children from the residue does not extend to their shares in a gift previously made.[4]

In the absence of a clear intention to the contrary, a general residuary clause operates upon all the estate remaining after effectuating the previous provisions of the will, including reversionary interests,[5] or additions by lapses, invalid dispositions, or other accident.[6] Where a disposition of an aliquot part of the residue itself fails, it will not ordinarily go in augmentation of the remaining parts, but will pass as intestate property.[7] A burial lot does not pass under a general residuary devise, but descends to the heirs as intestate property.[8]

[Wis.] 101 N. W. 393. Is different from net estate, and hence doctrine that undisposed-of property should first be used to satisfy widow's claim under statute does not apply. Hence where equal share is given to each of four persons, the second wife's statutory share should not be deducted from share of one of them which lapsed by reason of his death in testator's lifetime. Residuary legacies not abated by payment out of general estate. Id. Fact that second wife's share could not have been in contemplation when will was made, immaterial. Id.

98. Gallagher v. McKeague [Wis.] 103 N. W. 233. Any expression from which intention that designated person shall take surplus is discernible, is sufficient. Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966.

99. "Household furniture and effects" held not to include residuary personalty. Gallagher v. McKeague [Wis.] 103 N. W. 233. Words "the balance and residue of my estate of every kind I give, bequeath, and devise," held to include realty as well as personalty. Foil v. Newsome [N. C.] 50 S. E. 597.

1. Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966.

2. Intestacy thereby avoided. Thomas v. Thomas, 43 Misc. 541, 89 N. Y. S. 495; Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966.

3. Logan v. Cassidy [S. C.] 50 S. E. 794. Item of will held to dispose of whole residue, including remainder. Id.

4. Fuchshuber v. Krewson, 33 Ind. App. 257, 71 N. E. 187.

5. "Ralance and residue of my estate of every kind," held to include reversionary interest in realty, and to carry fee, subject to life estate therein. Foil v. Newsome [N. C.] 50 S. E. 597. "Rest, residue, and remainder" held to include remainder, consequent upon widow's death, in property set aside from the residuary estate to produce her annuity. Thomas v. Thomas, 43 Misc. 541, 89 N. Y. S. 495.

6. Thomas v. Thomas, 43 Misc. 541, 89 N. Y. S. 495. Provisions creating a residuary estate will be deemed to speak as of the date of testator's death. Hence include legacies which have lapsed by reason of death of beneficiary. Langley v. Westchester Trust Co. [N. Y.] 73 N. E. 44. In the absence of a contrary intention. N. C. Code 1883, § 2141. Lapsed legacy held to pass under residuary clause. Duckworth v. Jordan [N. C.] 51 S. E. 109. Where trust is not disclosed by will, and no valid trust created by letter referred to therein, gift to trustee becomes inoperative, and beneficial interest results to residuary legatees. Bryan v. Bigelow [Conn.] 60 A. 266. Void legacies for charitable purposes. Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966. Personal property was bequeathed in trust to certain beneficiaries, on their death to go to their descendants freed from the trust. Held, on death of a beneficiary without descendants, his share fell into the residuum and passed in equal shares to the residuary legatees as provided in the will. Dozier v. Dozier, 183 Mo. 137, 81 S. W. 890. As a rule, lapsed legacies pass under a general residuary clause in absence of anything showing contrary intention. Langley v. Westchester Trust Co. [N. Y.] 73 N. E. 44. Use of words "after" and "then" in residuary clause do not necessarily show intention to exclude all included in former provisions. Are words of description rather than of exclusion and limitation. Id. N. C. Code 1883, § 2142. Legacy lapsed by reason of death of legatee before testator. Duckworth v. Jordan [N. C.] 51 S. E. 109. Charitable bequests, lapsing because will not properly witnessed, under clause providing for division of "everthing not otherwise specified that I may own." In re Wood's Estate, 209 P. 16; 57 A. 1103. Gen. Laws 1896, c. 203, § 7. Fiske v. Fiske's Heirs [R. I.] 59 A. 740. Where a devisee or legatee, who is a child or grandchild of testator, dies without issue before the death of testator, the legacy is treated as intestate property. 2 Starr & C. Ann. St. 1896, c. 39, § 11. Lash v. Lash, 209 Ill. 595, 70 N. E. 1049.

7. Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966; Bowers v. McGavock

Substitutions.[9]—Future estates may be created to take effect in the alternative.[10]

A substitution by a codicil reciting the death of particular legatees will be referred to the legacy given to them, though there be other substitutions and some identity of legatees.[11] A substitution in a codicil supplants a substitution in the will.[12]

Gifts freed from void limitations.[13]—Where bequests of the residuary estate to a trustee are void, the property will go to the residuary legatees.[14]

Accumulations in excess of those allowed by law will ordinarily be divided among the beneficiaries under the trust.[15] By statute in New York, void accumulations go to those presumptively entitled to the next eventual estate.[16] Every impossible condition contrary to the laws and good morals is reputed not written in a will, and the property remains to the legatees free from the incumbrance of the impossible condition, mode, or charge.[17]

[Tenn.] 85 S. W. 893. In case of the lapse of a residuary legacy, the property descends as in case of intestacy. By death of one of those to whom it was left in remainder. Langley v. Westchester Trust Co. [N. Y.] 73 N. E. 44; In re Bradley's Will [Wis.] 101 N. W. 393. Where charitable corporation was made residuary legatee, and testatrix thereafter by codicil changed will so as to give specific sum for another charitable purpose, which latter bequest was void, held that amount of such void bequest passed under residuary clause. Not residue of residue. Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966.

8. In re Waldron [R. I.] 58 A. 453.

9. See 2 Curr. L. 2156.

10. Substitution of persons who would take under intestate laws held intended to be effectual only in case daughter died without leaving child who attained age of 21, and on leaving such child, property went to him when reached that age. In re Hull, 97 App. Div. 258, 89 N. Y. S. 939. Will held to have created two future estates to take effect in alternative, a remainder in son limited upon precedent trust estate, and contingent upon his arriving at age of 50, and exercise by executors of discretion to terminate trust, and remainder in testatrix's heirs, limited on same trust, and contingent upon failure of estate to vest in son, and his failure to exercise power of appointment. All contingencies must happen during son's lifetime. Higgins v. Downs, 91 N. Y. S. 937. Where remainders to children were contingent on their surviving the widow, remainder of anyone dying previously vested in representatives by purchase, there being a limitation of concurrent fees to take effect alternatively, or as substitutes one for the other. Bowen v. Hackney, 136 N. C. 187, 48 S. E. 633. Under provision that in case of failure of all the objects of the several trusts, property should go to those entitled under statute, word "several" held to mean "respective," and on failure of each trust respectively property goes to next of kin of testatrix at time of failure. Brown v. Hawkins [R. I.] 59 A. 78.

11. Five persons named in codicil held to take whatever bequest had been made to four legatees who died before it was made. In re Pearson's Estate [Pa.] 60 A. 585.

12. Estate to be distributed among certain persons named, and if any of them were not living at testatrix's death, then equal division to be made among those living and the Friend's Boarding House. One of the persons having died before testatrix's death, another was substituted in his place. Held, that Friend's Boarding House took no interest. In re Pearson's Estate [Pa.] 60 A. 585.

13. See 2 Curr. L. 2156.

14. Where bequests of residuary estate to trustee for purposes of certain trust are void, estate will be distributed to residuary legatees. In re Bogardus' Estate, 43 Misc. 473, 89 N. Y. S. 478.

15. In re King's Estate, 210 Pa. 435, 59 A. 1106.

16. By statute in New York (Laws 1896, p. 568, c. 574, § 53), void accumulations go to persons presumptively entitled to next eventual estate. Not the ultimate estate. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970. Undisposed of income. In re Bender's Estate, 44 Misc. 79, 89 N. Y. S. 731. Where impossible to determine who are so entitled, will descend as in case of intestacy. United States Trust Co. v. Soher, 178 N. Y. 442, 70 N. E. 970.

17. La. Code, art. 506. Where words sufficient to create legal title in legatee and intention to do so is ascertained, subsequent recommendations are innocuous, because if valid they will be executed, and if invalid they will be ignored. Succession of Hutchinson, 112 La. 656, 36 So. 639. Gift to Tulane University for the sole benefit of its medical department to be used in increasing its usefulness, held not to import a fidei commissium, since university and department are one. Id. The bequest is to Tulane purely and simply, and the tenure of the gift is in perfect ownership. Id. Gift to Tulane University for the sole benefit of the medical department, held to have vested absolute and unconditional title in the university, the designation of the objects and purposes of the gift not operating as a modification of the title, or forming any part of the dispositive portion of the gift, but being merely advisory. Id.

Property not effectually disposed of.[18]—Any property not disposed of by will descends as in case of intestacy.[19] In such case persons otherwise entitled take, though the will expressly excludes them from participation in the estate.[20] It will, however, be presumed that testator intended to dispose of all his property,[21] and, if possible, a construction will be adopted which will prevent a partial intestacy.[22]

18. See 2 Curr. L. 2154, n. 24-29.

19. **Property held to descend under intestacy laws:** Where testator provided for disposition of share of only one of his children who were each given life estate in case he died without issue, share of one of others dying under similar circumstances. Smith v. Jordan [Conn.] 59 A. 507. Lot not mentioned in will. Howard v. Evans, 24 App. D. C. 127. Where remainder, limited to grandchildren and their issue, with cross remainders to testator's son and his issue, is defeated by death of all remaindermen and their issue prior to the determination of the particular estate, the title reverts to testator's heirs. Archer v. Jacobs [Iowa] 101 N. W. 195. In Kentucky, by statute, if a bequest "fail or be void, or otherwise be incapable of taking effect." A bequest to one on condition that he be restored to his right mind is on his dying without restoration within St. 1903, § 4843. Schroeder v. Bohlsen [Ky.] 84 S. W. 535; Schroeder v. Bohlsen, 26 Ky. L. R. 1237, 83 S. W. 627. Balance in hands of administrator not specifically bequeathed. In re Stilphen [Me.] 60 A. 888. Undisposed of residuum. Hill v. Safe Deposit & Trust Co. [Md.] 60 A. 446. Corpus of trust fund undisposed of. Boston Safe Deposit & Trust Co. v. Buffum [Mass.] 71 N. E. 549. Devise to trustee, the income to go to child during his life, with power to dispose of the trust property at his death by will or otherwise, held, there being no disposal of the property at the death of the child, he inherited it as undisposed property, free from any trust restrictions. Peugnet v. Berthold, 183 Mo. 61, 81 S. W. 874. Where income of residue of estate is divided into portions and given to named legatees during their several lives, the principal to be divided at the death of nephew, the share of a life tenant dying before such nephew not disposed of. Colville v. Kinsman [N. J. Eq.] 60 A. 959. Will held not to show intention that such share should be added to principal. Id. Under absolute devise of residue to daughter "subject to the legal rights of my husband, should be survive me," held, as to personalty, intention was to give same to daughter only in case husband of testatrix had predeceased her, and as he survived her and was entitled jure mariti to personalty, bequest failed and testatrix died intestate thereof. In re Folwell's Estate [N. J. Eq.] 59 A. 467. Remainder in trust fund. Pomroy v. Hincks [N. Y.] 72 N. E. 628. Will held not to dispose of share of son in residuary estate, where he died intestate, unmarried, and without issue before termination of trust. People's Trust Co. v. Flynn, 44 Misc. 6, 89 N. Y. S. 706. Undisposed of surplus after sale of realty and payment of legacies. No residuary clause. In re Weinstein's Estate, 43 Misc. 577, 89 N. Y. S. 535. Half of proceeds of realty. In re Shedden's Estate, 210 Pa. 82, 59 A. 486. Under devise in trust to pay income to widow and children, after widow's death to children or issue of deceased children, and after their death to grandchildren until reached age of 21, the principal then to be divided, held that, on death of two children after widow, and without children, there was intestacy as to their shares. In re Smith's Estate [Pa.] 60 A. 255.

20. Grandson. People's Trust Co. v. Flynn, 44 Misc. 6, 89 N. Y. S. 706. Though testator has signified his intention that he should not inherit any part of estate. Pomroy v. Hincks [N. Y.] 72 N. E. 628.

21. Kennedy v. Alexander, 21 App. D. C. 424; Craw v. Craw, 210 Ill. 246, 71 N. E. 450. In the absence of clear evidence to the contrary. Primm v. Primm, 111 Ill. App. 244; Thomas v. Thomas, 43 Misc. 541, 89 N. Y. S. 495; In re Hull, 97 App. Div. 258, 89 N. Y. S. 939; In re Ranken, 91 N. Y. S. 933; In re Smith's Estate, 94 N. Y. S. 90; Foil v. Newsome [N. C.] 50 S. E. 597; Prison Ass'n of Va. v. Russell's Adm'r [Va.] 49 S. E. 966; Gallagher v. McKeague [Wis.] 103 N. W. 233. Will held to cover both realty and personalty. May v. Brewster [Mass.] 73 N. E. 546. "All of this world's goods of which I may be possessed at the time of my death" includes realty. Torrey v. Torrey, 70 N. J. Law, 672, 59 A. 450. Where directs executor to sell within five years, presumed that did not intend to die intestate as to such property in case it was not sold within that time, and hence provision merely directory. Molton v. Sutphin [N. J. Eq.] 57 A. 974. Fact that accumulations not specifically mentioned in devise over of fund held not to show intestacy as to them. Rhode Island Hospital Trust Co. v. Noyes [R. I.] 58 A. 999.

22. Thissell v. Schillinger [Mass.] 71 N. E. 300; Kent v. Kent, 90 N. Y. S. 828; Mee v. Gordon, 93 N. Y. S. 675, rvg. 45 Misc. 259, 92 N. Y. S. 159; In re Smith's Estate, 94 N. Y. S. 90; Robbins v. Smith, 5 Ohio C. C. (N. S.) 545. Where reasonably possible. Craw v. Craw, 210 Ill. 246, 71 N. E. 450; Howard v. Evans, 24 App. D. C. 127. "Survivor" will not be held to mean "other" merely for that purpose. Hill v. Safe Deposit & Trust Co. [Md.] 60 A. 446. Unless the contrary is unavoidable. "Surviving" held to refer to children surviving testatrix. In re Vance's Estate, 209 Pa. 561, 58 A. 1063. Will not favor a construction that may produce a partial intestacy, particularly if not in harmony with testator's general intent. Though such result improbable. Ridgely v. Ridgely [Md.] 59 A. 731. That interpretation is to be preferred which will prevent a total intestacy. Cal. Civ. Code, § 1326. One rendering will valid. In re Fay's Estate, 145 Cal. 82, 78 P. 340. Will not be construed so as to cause partial intestacy unless it cannot reasonably be otherwise interpreted. Fiske v. Fiske's Heirs [R. I.] 59 A. 740. Rule does not apply where the language used, when

In the absence of particular and sufficient words used for that purpose, surviving shares will not survive again.[23]

(§ 5) *E. Of terms respecting administration, management, control, and disposal.*[24]—In the absence of a contrary intent appearing, there is a presumption that testator intended his estate to be administered in the usual way.[25] He may, if he so desires, designate the estate to be appropriated for the payment of his debts and the expenses of administration.[26] If such provision is insufficient, any portion of the estate undisposed of may be taken for that purpose.[27]

Distribution should not ordinarily be required before the time fixed in the will.[28]

The will may authorize investments pending distribution,[29] or the continuance of testator's business.[30]

A direction to pay debts includes taxes.[31] A provision that no bond shall be required of the executrix relieves her from the necessity of giving bond as life tenant.[32] To the extent that directions to executors are inconsistent with law, they are nugatory.[33]

Directions as to a particular fund may be implied from other directions expressly made applicable to all other funds.[34] The amount to be placed in trust for beneficiaries depends on the terms of the will.[35]

fairly construed, is insufficient to carry the whole estate. Gallagher v. McKeague [Wis.] 103 N. W. 233. Not sufficient that he thought he was avoiding intestacy but must use words sufficient to dispose of whole estate. Id. Only a presumption, and cannot be permitted to overcome express language. Wixon v. Watson, 214 Ill. 158, 73 N. E. 306.

23. Under devise to four grandchildren in trust for 20 years, with provision that share of any one of them dying without issue was to be divided among survivors, held, that on death of one of them his share went to other three, but that, on subsequent death of one of the latter, only his original share survived to other three, and not the share derived from the first. Marshall v. Safe Deposit & Trust Co. [Md.] 60 A. 476.

24. See 2 Curr. L. 2157.

25. Administratrix required to collect debts due testator, and sell personalty not specifically bequeathed, and use proceeds to pay debts. Walker v. Hill [N. H.] 60 A. 1017.

26. Cal. Code Civ. Proc. § 1560. In re Traver's Estate, 145 Cal. 508, 78 P. 1058.

27. Cal. Code Civ. Proc. § 1562. Applies where no provision is made in will. In re Traver's Estate, 145 Cal. 508, 78 P. 1058.

28. Will, construing all provisions together, held to require division of estate and payment of residue to trustees to be made as soon as practicable, but not until after two years from testator's death, during which time the estate was to accumulate. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586. A provision embodying the advice of the testator that division be postponed for two years after the death of his wife is valid, and a suit for partition brought before the expiration of the two years is premature. Steinman v. Steinman, 5 Ohio C. C. (N. S.) 600. A provision postponing the division of the residuary estate until "the termination of all life annuities by the death of the beneficiaries named" prevents distribution until all are dead, and does not permit distribution pro tanto on the death of each. In re Trotter's Will, 93 N. Y. S. 404.

29. Investment in city real estate by executors pending distribution, held authorized. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586.

30. Provision that testator's interest in partnership business might be allowed to remain therein if interest was paid thereon at seven per cent., the legal rate when will was executed, held simply to show intent to secure maximum legal rate, and not to make payment at seven per cent. condition of acceptance or consummation of loan. In re Wotherspoon's Estate, 45 Misc. 81, 91 N. Y. S. 695.

31. Where testator directed the payment of his debts, the word "debts" was held to include all obligations and liabilities against his estate of every character, including the liability for taxes. Penn's Ex'r v. Penn's Ex'r [Ky.] 87 S. W. 306.

32. Where will provides that no bond shall be required of executrix, no bond will be required of her as life tenant. McGuire v. Gallagher [Me.] 59 A. 445.

33. In re Pforr's Estate, 144 Cal. 121, 77 P. 825.

34. Where will bequeaths income of certain sum, and directs residue of estate to be held for certain time before distribution of principal and income, held proper for executor to set apart special fund for first bequest and to make special investment of it. Fanning v. Main [Conn.] 58 A. 472.

35. Provision that one-fourth of remainder of estate on value as found by appraisement should be placed in trust for daughter, held to require amount to be paid her to be arrived at by deducting debts, expenses, and specific bequests from total value of estate when allowance payable, to be ascertained by an appraisement then made under direction of court. McCullough v. Lauman [Wash.] 80 P. 441.

A provision giving executors discretion to withold the share of any son who, in their judgment, is not of good moral character or competent to take charge of it, does not contemplate an arbitrary exercise of power, and they are not entitled to withhold the share of one who is in fact of good character and competent, and who is so regarded by them.[36]

The right of a residuary legatee to require payment in cash is controlled by the directions in the will.[37]

The extent of a power of sale depends upon the terms of the will.[38] Power to manage the estate does not necessarily include a power of sale,[39] or authorize the executors to carry on the business of a corporation of which testator owned most of the stock.[40] Testamentary authority to sell does not of itself give authority to mortgage,[41] nor does authority to mortgage for one purpose give authority to mortgage for a different purpose.[42]

Where the will plainly discloses an intention that the land shall be sold, the executors take a power of sale, though there is no express statement to that effect.[43]

If the effect of the provisions of the will is to subject the property in the hands of the executor, as such, to certain trusts to be carried out by him, he will be deemed to hold the same as trustee by virtue of his appointment as executor.[44] Thus an executor charged with the duty of selling lands after the death of the life tenant, and distributing the proceeds, becomes a trustee, and by implication of law takes under the will such title as may be necessary to enable him to sell and convey it.[45] A mere naked power of sale, however, gives him no title.[46]

36. Cushman v. Cushman, 92 N. Y. S. 833.

37. Will held to authorize executors to divide investments authorized to be made by them pending distribution, as well as the securities owned by testator at his death, and to turn them over to trustee as residuary legatee. Not necessary to turn them into cash. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586.

38. Where will devised realty to wife for life, then to testator's daughter, and provided that on marriage or death of the daughters, the property should be sold by the executor and the proceeds divided among heirs, held, power to sell became absolute on happening of contingency named. Pratt Land & Imp. Co. v. Robertson, 140 Ala. 584, 37 So. 419. Executor held entitled to sell land for erection of house, and where took equivalent amount from personalty for that purpose, persons to whom both realty and personalty went eventually could not require him to account therefor. Finley's Ex'rs v. Pearson, 25 Ky. L. R. 766, 76 S. W. 374. Will held to give executrix power to sell land, so as to pass fee simple title. Eshelby Tobacco Co. v. McNamara, 26 Ky. L. R. 889, 82 S. W. 620. Clause empowering executors to "dispose of my property as they think best," held not to vest executors with the power to sell property specifically devised. Thompson v. Thompson [Ky.] 87 S. W. 790. Provision that if property could not be divided in kind it should be sold and the proceeds divided, held, it was the intention of the testator that if by dividing the property in kind it should depreciate in value, in the judgment of the executor, it should be sold and the money divided. Offutt v. Hall's Ex'r [Ky.] 87 S. W. 785. Discretionary power to sell held a disposition of lands, so that another provision as to property not otherwise disposed of did not apply. Whitfield v. Thompson [Miss.] 38 So. 113. Will held to give executors discretionary power to sell residue lands but not to require sale. Id.

39. Trustee's rule does not apply where power of sale expressly given. Dickson v. New York Biscuit Co., 211 Ill. 468, 71 N. E. 1058.

40. Power to manage, control, invest, and reinvest the residuary estate, and to sell any part thereof, particularly where were forbidden to incur debts. In re Corbin's Will, 91 N. Y. S. 797.

41. Townsend v. Wilson [Conn.] 59 A. 417.

42. Power to mortgage for improvements gives no power to do so for purpose of raising money to pay beneficiaries under trusts. Townsend v. Wilson [Conn.] 59 A. 417.

43. May v. Brewster [Mass.] 73 N. E. 546. Where the will directs land to be sold without expressly conferring a power of sale on any one, and the proceeds are to be distributed by the executor. Will held also to show intention that executor should make sale. Lash v. Lash, 209 Ill. 595, 70 N. E. 1049.

44. Immaterial that is not named as trustee in will and has not been appointed such by probate court. Bean v. Com. [Mass.] 71 N. E. 784.

45. Fee vests in him and not in heirs. Lash v. Lash, 209 Ill. 595, 70 N. E. 1049.

46. Will directing realty to be converted into money and proceeds to be divided does not vest in executor any title to or interest in property, but has mere naked power to sell same and distribute proceeds. Nelson v. Nelson [Ind. App.] 72 N. E. 482. A naked power to sell given to an executor for the purpose of paying legacies or making dis-

A power to sell realty for the purpose of dividing the proceeds among certain beneficiaries creates a power accompanied by a trust.[47]

Under a provision authorizing a sale for the purposes of the will, the necessity therefor must be shown.[48] Where the executor is directed to sell property the fact that the time and terms of the sale are left to his discretion does not give him authority to prevent a sale or to postpone it indefinitely,[49] but such discretion is a reasonable and not an aribitrary one, and must be exercised so as to carry out testator's evident intention.[50] Where a limitation as to time is imposed and is of the essence thereof, the power must be executed within the prescribed period,[51] unless such limitation is merely directory.[52] Whether it is compulsory or directory is to be learned from the language of the whole will.[53]

A power of sale coupled with a trust is attached to the office and hence may be exercised by an administrator with the will annexed.[54] The same is true of a mandatory direction to sell realty on certain contingencies.[55] Under a provision that if any of those named as executors or trustees die or refuse to accept, the court shall fill the vacancies, "subject to the approval of the parties interested in" the estate, the court cannot arbitrarily appoint a person over the protest of an interested party, though he is competent.[56] Such a provision is applicable to the filling of all vacancies.[57]

The will may give the executor compensation in addition to that allowed him by law.[58]

(§ 5) *F. Abatement, ademption, and satisfaction.*[59] *Abatement.*[60]—General legacies abate before specific ones.[61] Specific legacies standing on the same footing abate ratably.[62] Legacies in lieu of dower do not abate with others.[63]

Ademption.[64]—A specific legacy is adeemed by the extinguishment of the specific thing, or the failure of the particular fund bequeathed,[65] while a demon-

tribution does not vest title in the executor but in the heir. Widow was given a life estate, executor power to sell at her death. Held, title during widow's life was in heirs, who had power to defend against all except the life tenant and executor's power of sale. Indiana R. Co. v. Morgan, 162 Ind. 331, 70 N. E. 368.

47. Not mere naked power. Shares of daughters given to trustee for investment. May v. Brewster [Mass.] 73 N. E. 546.

48. Provision authorizing executors to sell all or any part of estate, not specifically disposed of, and to execute good and sufficient deeds for all realty sold, "for the purpose of executing this will," executors could not make title in absence of necessity for a sale. Eberly v. Koller, 209 Pa. 298, 58 A. 558.

49. In re Severns' Estate [Pa.] 60 A. 492; Id., 60 A. 494.

50. In re Severns' Estate [Pa.] 60 A. 492. Its exercise may be compelled in proper case. After three years. Id., 60 A. 494. Fact that unmarried daughters, one of whom was executrix, were to occupy premises until sale, held not ground for postponing sale. Id. Answer that sale was in discretion, and that in their opinion time was not suitable, held insufficient in absence of showing that had any knowledge of value of realty in neighborhood. Id.

51. Molton v. Sutphin [N. J. Eq.] 57 A. 974.

52. Provision for sale "within five years of my decease," held directory, and executrix held power after expiration of that time. Molton v. Sutphin [N. J. Eq.] 57 A. 974.

53. Molton v. Sutphin [N. J. Eq.] 57 A. 974.

54. May v. Brewster [Mass.] 73 N. E. 546.

55. Ayers v. Courvoisier, 91 N. Y. S. 549. Direction to executor to sell property in case life tenants did not pay taxes, etc., held mandatory, though word "authorized" was used. Ayers v. Courvoisier, 91 N. Y. S. 549.

56. Cole v. Watertown, 119 Wis. 133, 96 N. W. 538.

57. Not confined to those caused by death or refusal to act of those named in will. Cole v. Watertown, 119 Wis. 133, 96 N. W. 538.

58. Notwithstanding N. Y. Code Civ. Proc. § 2730, providing that, where will gives him specific compensation, he must renounce it in order to be entitled to any other allowance for his services. In re Sprague, 94 N. Y. S. 84.

59. See 2 Curr. L. 2158.

60. See 2 Curr. L. 2169.

61. No fund out of which to pay legacy to son. In re Klenke's Estate [Pa.] 60 A. 167.

62. Specific legacies of stock held to abate proportionally where amount available to pay them was reduced by widow's election not to take under will. In re Klenke's Estate [Pa.] 60 A. 167.

63. The dowress is regarded as a purchaser for value. Roll v. Roll [N. J. Eq.] 59 A. 296.

64. See 2 Curr. L. 2158.

65. Gift of $600 out of $1,100 in hands of

strative legacy is not.[66] The identity of the fund, and not the particular place where it may be is the important consideration in determining whether or not an ademption has taken place.[67]

Satisfaction.[68]—In a suit by a legatee to recover a legacy from the executor, the burden is upon the latter to show that a payment after the date of the will was intended as a satisfaction of the legacy.[69]

Satisfaction of debts by legacies.[70]—A bequest or devise to a creditor will not generally be regarded as a payment of the indebtedness unless the will expressly declares, or the surrounding circumstances clearly indicate, such an intention.[71] In some states, however, such a bequest of a sum equal to or greater than the debt will be regarded as a satisfaction thereof, though the debt is not mentioned in the will.[72]

(§ 5) *G. Proceedings to construe wills.*[73]—Probate courts have no power to construe wills except in so far as may be necessary to enable them to exercise the powers and perform the duties imposed on them by law.[74] Equity has jurisdiction to construe a will only when such construction involves some equitable relief sought,[75] and will not entertain a bill for that purpose when only legal rights are involved.[76] No action for the construction of a will should be enter-

brothers, where fund not in existence at death of testatrix. In re Stilphen [Me.] 60 A. 888. If the subject-matter is destroyed, consumed, sold, exchanged, or otherwise disposed of, so that nothing remains in the estate at testator's death to which the particular dispositive words are applicable. In re Howard's Estate, 94 N. Y. S. 86.

66. In re Stilphen [Me.] 60 A. 888. Not by the entire failure of the fund with reference to which it is given. In re Edward's Estate, 209 Pa. 19, 57 A. 1117.

67. Bequest of money on deposit in certain bank, which subsequently went into liquidation. Receiver credited testator with amount of dividend declared upon books of its own bank and issued passbook to testator. Held, legacy not adeemed. In re Howard's Estate, 94 N. Y. S. 86.

68. See 2 Curr. L. 2158.

69. Swinebroad v. Bright, 25 Ky. L. R. 742, 76 S. W. 365. An allegation that a payment was intended by testator as a satisfaction of a legacy is necessarily an allegation that it was so intended by him when it was made. Id. The declarations of testator made before or after the payment are admissible to show his intention. Executor may testify as to his declarations but not devisees. Ky. Civ. Code, § 606. Swinebroad v. Bright, 25 Ky. L. R. 742, 76 S. W. 365.

70. See 2 Curr. L. 2160.

71. Devise to one rendering services while residing with testatrix as member of her family held not in payment therefor. In re Dailey's Estate, 43 Misc. 552, 89 N. Y. S. 538. Direction that all testator's debts shall be paid negatives such intention. Id. Where a will makes provision for the payment of debts and also a specific bequest to a creditor of a less sum than the debt, both provisions should be carried out. Smith v. Park's Adm'r [Ky.] 84 S. W. 304. Where bequest is in trust to be paid as the legatee may need it, it is evidence that it is not in payment of the debt. Id.

72. Cannot take both debt and legacy. Direction to beneficiaries to pay certain sum to wife. Chaplin v. Leapley [Ind. App.] 74 N. E. 546.

73. See 2 Curr. L. 2160, § 5G.

74. The surrogate has power to construe a will only in so far as is necessary to enable him to perform some other duty imposed on him by law. In re Davis' Will, 93 N. Y. S. 1004, afg. 45 Misc. 554, 92 N. Y. S. 968. Order made pursuant to stipulation simply declaring certain clause void and not making any judicial settlement of the estate or decree of distribution, held without authority and in excess of jurisdiction. In re Burdick's Estate, 90 N. Y. S. 161. The orphans' court has power to construe a will for purposes of distribution. Macy v. Mercantile Trust Co. [N. J. Eq.] 59 A. 586. The jurisdiction of the orphans' court to pass upon the right of an executor to turn over or appropriate securities for the payment of a legacy, when dependent upon the construction of the will, must be settled in a proceeding instituted for that purpose on actual notice to all parties interested in accordance with Gen. St. p. 2391, § 151. Id.

75. Will not express opinion as to construction with reference to title to realty, when no equitable relief is sought. Bevans v. Bevans [N. J. Eq.] 59 A. 896. Will be exercised where question involved is application of language to facts, and construction is necessary to relief which can only be given in court of equity, as where decree is sought requiring executors to sell land, in case it does not pass under certain devise. Ackerman v. Crouter [N. J. Eq.] 59 A. 574. Not unless a trust is involved. Primm v. Primm, 111 Ill. App. 244.

76. Steen v. Steen [N. J. Eq.] 59 A. 675. Thus, one who is neither a legatee, trustee, cestui que trust, or executor under a will, cannot maintain a bill for its interpretation to ascertain the validity of a devise to another of property of which he is in possession by purchase. When all interested parties are before court, he may amend so as to make it bill to quiet title. Id.

tained unless it is apparent that the executor, administrator with the will annexed, or trustee bringing it, cannot safely discharge the duties of his office without the advice and protection of a court of chancery.[77]

All other powers to entertain bills for the construction of wills depend upon statute and vary in the different states.[78]

The courts of equity will not assume jurisdiction unless the language of the will is such that the parties interested may, reasonably have doubts concerning its true meaning,[79] nor unless the party asking the questions has an interest in having them answered.[80] Where the construction is incidental to the relief sought in a proceeding of which the court has jurisdiction, it has jurisdiction to, and should, construe the will.[81]

There is no occasion for the filing of a bill where there are only two possible constructions, both of which would lead to same result.[82]

All persons who, by a possible construction, may be entitled to take, should be made parties.[83]

Where the court has jurisdiction to construe the will, it may, on a suit being filed for that purpose, determine the complainant's claim to heirship.[84]

In an action for construction, all questions which might arise from the instrument before the court are within the general scope and purview of the action, and can be litigated and determined therein.[85]

Costs[86] are allowable as in other equity cases, or cases wherein trustees are parties.[87]

77. Where administrator has none of the property in his possession, proceeding not a proper one to enable him to obtain it, and so has no such duty to perform. Hughes v. Fitzgerald [Conn.] 60 A. 694.

78. The supreme judicial court of Maine has jurisdiction in equity to construe a will upon the bill of a devisee, and to determine the character of the estate received by him thereunder and the extent of his powers in relation thereto as between himself and other devisees who claim or may claim adversely to him. Rev. St. c. 79, § 6, par. 8. Haseltine v. Shepherd [Me.] 59 A. 1025. It is not necessary that the claim be controversial and litigious, but is sufficient if doubt exists out of which litigious claims may arise between the devisees. Id.

79. Haseltine v. Shepherd [Me.] 59 A. 1025.

80. Devisee held to have interest. Haseltine v. Shepherd [Me.] 59 A. 1025. A judgment creditor of a beneficiary cannot maintain an action for construction for the purpose of determining the beneficiary's interest in the estate. Not under Code Civ. Proc. § 1866. Higgins v. Downs, 91 N. Y. S. 937. The widow is entitled to file a bill for construction for the purpose of being judicially advised whether, if she takes under the will, she will be obliged to contribute for the payment of the debts. Rev. St. § 5963. Allen v. Tressenrider [Ohio] 73 N. E. 1015.

81. Has jurisdiction. King v. King [Ill.] 74 N. E. 89. Where, in partition, the referee is directed to determine the interests of the several defendants, infant defendants are entitled to have their interests determined before sale, though a construction of a will is necessary to do so. Where properly excepted. Dwight v. Lawrence, 90 N. Y. S. 970. Where the executor, in a proceeding for the disposition of the funds of the estate, in answer to a cross complaint of an heir, asks a construction of the will, and a direction to whom the funds are to be paid, and all the interested parties are before the court, the court rightfully exercises its power. Phillips v. Heldt, 33 Ind. App. 388, 71 N. E. 520.

82. Pomroy v. Hincks [N. Y.] 72 N. E. 628.

83. Waker v. Booraem [N. J. Eq.] 59 A. 451.

84. Right of adopted child to inherit. Van Derlyn v. Mack [Mich.] 100 N. W. 278.

85. Must look to whole will to ascertain intent. Jewett v. Schmidt, 45 Misc. 34, 90 N. Y. S. 848.

Hence the judgment therein as to any such question, though it was not specifically presented by the pleadings, is conclusive on all the parties thereto, and all persons whose interests are derivative from the rights of such parties. Daughter and her issue. Jewett v. Schmidt, 45 Misc. 34, 90 N. Y. S. 848.

86. See 2 Curr. L. 2161, n. 82, 83.

87. Where a trust is involved, and the testator's intention is doubtful, so as to justify an application to a court of equity for the construction of the will and directions as to the execution of the trust, the costs should be borne by the estate (Craw v. Craw, 210 Ill. 246, 71 N. E. 450); but this rule does not apply where the bill is not filed merely for the purpose of obtaining a construction of the will and the direction of the court, but to enable complainant to obtain something as heir (not where filed to compel widow and other children to account for rents and profits of farm. Id.), nor should the costs be paid out of the estate where it is determined that the complainant has no interest in any event (Van Derlyn v. Mack [Mich.] 100 N. W. 278).

The costs can only be directed to be paid out of the fund in dispute,[88] or charged to some individual.[89]

A decree rendered in a suit for the construction of a will, directing the payment of costs by the executors out of the estate, includes only the taxable costs, and not attorneys' fees.[90]

§ 6. *Validity, operation, and effect in general.*[91]—The rights of the testator's heirs at law are subordinate to his testamentary disposition of his property.[92] The same limitations and conditions may be placed upon a devise of personal estate as upon a devise of real estate.[93] A limitation over from one charity, which speaks from the death of the testator to another charity, is valid.[94]

A provision for the purchase and erection of a monument on testator's grave is valid.[95]

A will is not void as against public policy because made by one contemplating and who subsequently commits suicide.[96]

Conditions[97] in restraint of marriage are void as against public policy,[98] but this rule does not apply where they are partial only, and are confined within reasonable limits.[99]

Provisions forfeiting legacies if the legatees contest the validity of the will are valid, but the penalty will not be enforced if the contest was justified under the circumstances.[100]

88. Where a case was stated in the circuit court for the construction of a clause in a will while the estate was still in process of administration in the orphans' court, and, after appeal and remand, circuit court rendered decree disposing of all the funds affected by the clause in dispute, circuit court had no authority to thereafter allow attorney's fees to counsel, to be paid out of estate. Hamilton v. Trundle [Md.] 59 A. 719. Where construction of a testamentary trust becomes necessary by reason of conflicting claims to income and the construction of the will with reference to the remainder is incidental only, and made to avoid future litigation, and the payment of costs out of the principal would necessitate a sale of the premises before the expiration of the trust, the costs will be charged against the income only. Denison v. Denison, 96 App. Div. 418, 89 N. Y. S. 126.

89. See Costs, 3 Curr. L. 940.

90. Hamilton v. Trundle [Md.] 59 A. 719.

91. See 2 Curr. L. 2162.

92. Heirs at law named as beneficiaries take under will, and not as heirs. Bank of Ukiah v. Rice, 143 Cal. 265, 76 P. 1020.

93. Smith v. Smith [Ky.] 85 S. W. 169.

94. Regardless of any question as to rule against perpetuities, or as to technical character of changes in title which may succeed each other. Sufficient if equitable interests are vested. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

95. McIlvain v. Hockaday [Tex. Civ. App.] 81 S. W. 54.

96. Roche v. Nason, 93 N. Y. S. 565.

97. See 2 Curr. L. 2162.

98. Watts v. Griffin [N. C.] 50 S. E. 218. Both by the common and civil law, all conditions annexed to gifts or devises generally prohibiting marriage are void, and where there is an attempt to fetter or restrain marriage by unreasonable conditions, such conditions or restrictions are inoperative and void. Kennedy v. Alexander, 21 App. D. C. 424. A condition that one shall hold property as long as she remains unmarried, without limitation over, is void. Id.

99. Watts v. Griffin [N. C.] 50 S. E. 218.

100. In re Friend's Estate, 209 Pa. 442, 58 A. 853. Question of probable cause for court, who will consider information possessed by legatee before he entered on contest. Advice of counsel not sufficient. Evidence held to show probable cause for contesting on ground of undue influence. Id. Burden on legatee to show that he should take. Id. An executrix, in her representative capacity, cannot object to the payment of legacies on the ground that the legatees have lost their rights thereto by violation of a provision of the will prohibiting them from contesting its provisions. In re Murphy's Estate, 145 Cal. 464, 78 P. 960.

Note: In re Friend's Estate, 209 Pa. 442, 58 A. 853. While the law upon the subject of such forfeiture clauses is in a very unsettled condition, the principal case does not seem to accord with the weight of authority. The rule is quite well established in England that in the case of bequests of personal property, a forfeiture clause, if there is no gift over, is merely in terrorem and void, but if there is a gift over to specified persons, the forfeiture clause will be upheld. In the case of devises of realty, the forfeiture clause will be upheld without a gift over. Cooke v. Turner, 14 Simons, 218, 493; 2 Jarman, Wills [6th Ed.] *p. 902; Redfield, Wills, *298. The American cases present a great diversity of judicial opinion, some enforcing the forfeiture regardless of a gift over and with no distinction between real and personal property. Bradford v. Bradford, 19 Ohio St. 546, 2 Am. Rep. 419; Thompson v. Gaut, 82 Tenn. 310. Such cases maintain the position, also upheld by the English courts, that no question of public policy is involved. Other cases express the opinion,

What law governs.[101]—Where all the essential facts are local in a state, the will will be construed in accordance with the law as therein settled when the rights of the parties accrued.[102] The construction and legal effect of a will of personalty is to be determined by the law of testator's domicile.[103] The validity and construction, as well as the force and effect, of a will devising land, depend upon the laws of the state where the land is situated.[104] The courts of such state will construe the will for themselves, and will not be governed by the decisions of the courts of the state in which the will was executed.[105]

WINDING UP PROCEEDINGS; WITHDRAWING EVIDENCE; WITHDRAWING PLEADINGS OR FILES, see latest topical index.

WITNESSES.

§ 1. Capacity and Competency of Witnesses in General (1944). Children (1945). Persons Acting in Official Capacity at Trial (1945). Conviction or Accusation of Crime (1945). Statutes (1946).

§ 2. Disqualification on Ground of Interest (1946).

§ 3. Disqualification of One Party to Transaction or Communication on Death of the Other (1946). The Adverse Party, or Party Against Whom the Witness is Offered, Must Represent the Decedent, or Derive His Interest From the Decedent (1947). Persons Disqualified as Witnesses (1948). Transactions and Communications (1951). Waiver or Removal of Disqualification (1952).

§ 4. Privileged Communications, and Persons in Confidential Relations (1953).

A. Attorney and Client (1953).

B. Physician and Patient (1954).

C. Husband and Wife. Confidential Communications (1956). Testimony For or Against Each Other (1956). In Criminal Prosecutions Against One Spouse (1957).

D. Miscellaneous Relations (1958).

§ 5. Credibility, Impeachment and Corroboration of Witnesses (1958).

A. Credibility in General (1958). Impeaching and Discrediting in General (1959). A Party Cannot Impeach His Own Witness (1960). A Witness Cannot be Contradicted or Impeached as to Collateral Matters (1961).

B. Character and Conduct of Witnesses (1961).

1. In General (1961).
2. Accusation and Conviction of Crime (1962).
3. Competency of Evidence as to Reputation for Veracity (1963).
4. Examination of Impeaching Witnesses (1963).

C. Interest and Bias of Witnesses (1963).

D. Proof of Previous Contradictory Statements (1964). Foundation for Proof of Contradictory Statements (1965).

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without directly so deciding, however, that all such clauses of forfeiture are void as against the policy or liberty of the law. Mallet v. Smith, 6 Rich. Eq. [S. C.] 12, 60 Am. Dec. 107. Probably the weight of American authority tends in the direction of the English rule. Smithsonian Institution v. Meech, 169 U. S. 398, 42 Law. Ed. 793; Chew's Appeal, 45 Pa. 228; Holt v. Holt, 42 N. J. Eq. 388, 7 A. 856, 59 Am. Rep. 43; Underhill, Wills, § 511; Rood, Wills, §§ 615-622. —3 Mich. L. R. 167.

Although the point raised by this case is in some conflict, the result reached seems eminently desirable. Against the case it may be urged that it apparently violates the express wishes of the testatrix. But to decree an absolute forfeiture in every case would work injustice. If a legatee reasonably believes that a will was procured by undue influence, he ought not to be forced to contest it at his peril. Furthermore if, reasonably thinking that a part of the will was inserted by mistake without the testator's knowledge, or that it is a forgery and so not entitled to probate, he contests it on that ground he should not be deprived of his legacy. To enforce the forfeiture in such case would frequently have no other effect than to aid dishonest persons in reaping the benefit of their wrong. On the other hand, the rule holding a forfeiture clause operative only where the contestant has not probate cause for his suit, would still discourage the bringing of vexatious suit, which after all, is ordinarily the real purpose of the testator. Cf. Jackson v. Westerfield, 61 How. Pr. [N. Y.] 399.—18 Harv. L. R. 399.

101. See 2 Curr. L. 2162, n. 92, 93. As to what law governs manner of execution, see ante, § 3B.

102. Where it is to be executed in state where testator was domiciled and where property is situated. Brigham v. Peter Bent Brigham Hospital [C. C. A.] 134 F. 513.

103. McCurdy v. McCallum, 186 Mass. 464, 72 N. E. 75. Laws of state where testator had residence and domicile and where realty situated control validity and legal effect of will, including appointment of executor, even though foreign executor is named. In re American Security & Trust Co., 45 Misc. 529, 92 N. Y. S. 974.

104. Folsom v. Board of Trustees, 210 Ill. 404, 71 N. E. 384. A will may be valid as a will of lands other than that of which the testator was a citizen, and in which the will was executed, and in such case the will is controlled by the laws of the state where the land lies. Haggart v. Ranney [Ark.] 84 S. W. 703.

105. Folsom v. Board of Trustees, 210 Ill. 404, 71 N. E. 384.

E. Corroboration and Sustentation of Witnesses (1967).
§ 6. Privileges of Witnesses (1967).
§ 7. Subpoenas, Attendance, and Fees (1970).

Scope of title.—This article treats of the competency of persons to give testimony in court. Since the competency, relevancy, and materiality of testimony,[1] the manner of eliciting the same from witnesses,[2] and the qualification and examination of experts,[3] are referable to other topics elsewhere fully treated, those matters are excluded from this title. The rules of law relative to the credibility of witnesses, their impeachment and corroboration, and their privileges, are here treated.

§ 1. *Capacity and competency of witnesses in general.*[4]—Possession or lack of personal knowledge of the facts in regard to which he is called to testify is sometimes applied as a test of the competency of the witness;[5] but it would seem that an objection, based on lack of personal knowledge of the witness, should be directed to the competency of the testimony, as that it is hearsay or opinion evidence,[6] and not to the competency of the witness; but while lack of personal knowledge does not, strictly speaking, go to the competency of the person testifying, it may properly be shown to affect his credibility.[7] The fact that a witness in giving certain evidence is in the attitude of supporting his own judgment goes only to his credibility, not to his competency.[8] If one is disqualified at the time of trial, his deposition is incompetent, though it was taken at a time when the witness was competent.[9] Incompetency of a witness is waived unless the objection is taken at the first opportunity.[10] A person who has violated the rule for sequestration of witnesses is not thereby rendered incompetent; whether he may testify rests in the discretion of the court.[11] The fact that he has heard the other evidence may go to the weight of his testimony, but does not disqualify him.[12]

1. See Evidence, 3 Curr. L. 1334.
2. See Examination of Witnesses, 3 Curr. L. 1383.
3. See Evidence, 3 Curr. L. 1370.
4. See 2 Curr. L. 2164.
5. **ILLUSTRATIONS. Witness held competent:** Persons who have resided, and own property, in the immediate neighborhood for several years, and who are well informed as to the situation, condition and value of land, are competent to testify as to damages to land caused by street grading. City of South Omaha v. Ruthjen [Neb.] 99 N. W. 240. Husband and wife are competent to testify to the value of their own household furniture. Lincoln Supply Co. v. Graves [Neb.] 102 N. W. 457. A witness who was present at an election of officers of an association may testify as to who were elected, though he was not a member of the association. State v. Farrier [La.] 38 So. 460.

Held incompetent: Witness who had heard only one person speak of character of prosecutrix incompetent character witness. State v. Day [Mo.] 87 S. W. 465. Witness who was in the United States at a time specified could not testify as to a demand for labor in Alaska at that time. Gillespie v. Ashford [Iowa] 101 N. W. 649. Witness testifying as to value of mining claims in one district in Alaska is not competent to testify to value of claims in other districts, in the absence of a showing that he knows such value, or that the value is the same in both districts. Id. The wife of a mortgagee, who had never seen the mortgagor, and had never seen him write, did not have knowledge such as to render her competent to testify to having seen a letter from the mortgagor to the mortgagee inclosing a payment. Carr v. Carr [Mich.] 101 N. W. 550. Witness could not testify from book entries as to matters of which she had no personal knowledge. Kirschner v. Hirschberg, 90 N. Y. S. 351. A witness who admits that he does not know what is the general custom of real estate brokers in the United States as to a particular matter is incompetent on that issue, though he knows the custom of particular localities. Edwards v. Davidson [Tex. Civ. App.] 79 S. W. 48. Witness not competent as to duties of employes in a particular mine, when he had not worked there, and was not shown to have any knowledge of its rules, customs and methods, but his knowledge was confined to other mines. Smith v. Hecla Mining Co. [Wash.] 80 P. 779.

6. As to hearsay and opinion evidence, see Evidence, 3 Curr. L. 1355, 1370.
7. Objection that witness was not near enough to a street car to observe its speed goes to the weight, not the admissibility, of his testimony. Portsmouth St. R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850.
8. Supervisor of assessment may testify in proceeding before board of review to reduce an assessment. State v. Williams [Wis.] 100 N. W. 1048.
9. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379.
10. Admission of deposition of witness without objection in probate proceedings was a waiver of incompetency at later stage

Children.[13]—The competency of a child depends on his or her intelligence, understanding and moral sense.[14] Ability to comprehend the nature and obligation of an oath is the test.[15] Such ability appearing,[16] it is immaterial that the child cannot define the legal obligation of an oath, or does not comprehend his responsibility to God for lying.[17] The competency of a child to testify is a question for the trial court,[18] the exercise of whose discretion in the matter will not be reviewed, in the absence of abuse.[19] The mere fact that a child has testified on a former trial of a case is not conclusive on the question of competency on a subsequent trial.[20] Since, in Texas, a child under nine cannot be punished for perjury, such a child is not a competent witness in a criminal case involving life or liberty.[21]

Persons acting in official capacity at trial.[22]—A judicial officer is not permitted to testify to statements or transactions taking place in a hearing before him,[23] or to appear as a witness and give his reasons for his decision.[24]

Conviction or accusation of crime.[25]—Statutes making defendants in criminal cases competent witnesses in their own behalf remove the common-law disqualification arising from infamy.[26] Hence, in most states, the fact of conviction of crime does not render a witness incompetent,[27] though it may be shown as affecting his credibility.[28] Where conviction of crime disqualifies,[29] a record of conviction must be produced, to establish incompetency.[30] To disqualify a witness as an

of proceedings. In re Imboden's Estate [Mo. App.] 86 S. W. 263. See Saving Questions for Review, 4 Curr. L. 1368.

11. Davis v. State, 120 Ga. 843, 48 S. E. 305.

12. Phillips v. State, 121 Ga. 358, 49 S. E. 290. Violation of rule of exclusion is not cause for refusing to allow witness to testify, in the absence of a showing of collusion with, or close relationship to, a party. Behrman v. Terry, 31 Colo. 155, 71 P. 1118.

13. See 2 Curr. L. 2164.

14. Child of 9 competent when she had been to school, knew difference between truth and falsehood, that her oath obliged her to tell the truth, and that she would be punished if she did not do so. Sokel v. People, 212 Ill. 238, 72 N. E. 382.

15. Child of 7 held competent as to this requirement. Freasier v. State [Tex. Civ. App.] 84 S. W. 360. Child of 11 who knew she would go to "bad place" if she lied, and knew of God and of bad place since she was last in court, competent. Landthrift v. State, 140 Ala. 114, 37 So. 287. Where on examination of a child of 8, it appeared that he was merely repeating what he had been told to say in order to qualify him, and that he was ignorant of the consequences of false swearing, it was error to allow him to testify. North Texas Const. Co. v. Bostick [Tex.] 83 S. W. 12.

16. As where witness is conscious that his oath binds him to tell the truth, and that he knows the difference between telling the truth and telling a lie, and would be punished for lying. Bright v. Com. [Ky.] 86 S. W. 527.

17. Child of 12 held competent. Bright v. Com. [Ky.] 86 S. W. 527.

18. Whether witness showed sufficient intelligence. Freasier v. State [Tex. Civ. App.] 84 S. W. 360.

19. Discretion of court in permitting three boys, aged 13, 14, and 16, to testify, not reviewed, no abuse appearing. Griffin v. State [Fla.] 37 So. 209.

20. Where, on second trial, the competency of a child is questioned on the ground that she does not understand the nature and sanctity of an oath, it is error for the court to refuse to examine her, and to refuse to allow counsel to examine her, and allow her to testify. Young v. State [Ga.] 50 S. E. 996.

21. Under Const. art. 1, § 5, and Pen. Code 1895, art. 34, a child of 7 is incompetent to testify in prosecution for rape. Freasier v. State [Tex. Civ. App.] 84 S. W. 360.

22. See 2 Curr. L. 2168.

23. Justice of the peace incompetent to testify to statement made by a witness in a hearing before him. State v. Dyer [Del.] 58 A. 947.

24. Contrary to public policy and convenience. Noland v. People [Colo.] 80 P. 887.

25. See 2 Curr. L. 2168.

26. But conviction may be shown to affect credibility. Smith v. State [Ark.] 85 S. W. 1123.

27. Conviction of burglary does not disqualify in Kentucky, though fact may be shown to discredit witness. Illinois Cent. R. Co. v. McManus' Adm'r [Ky.] 82 S. W. 399. One under sentence for life in a territorial prison is competent to testify in a criminal case, though the fact of conviction and sentence may be shown as affecting his credibility. Martin v. Territory, 14 Okl. 598, 78 P. 88.

28. See § 5 B 2, post.

29. Deposition of one convicted of a felony held properly excluded. Gulf, etc., R. Co. v. Johnson [Tex. Civ. App.] 86 S. W. 34.

30. Neither a judgment based on a verdict, nor a deposition showing witness had been in a reformatory, could take the place of such record. Gulf, etc., R. Co. v. Johnson [Tex.] 81 S. W. 4. To affect the competency of a witness, a conviction must be established by the record; but where a wit-

accessory after the fact, he must be proved such within the statutory definition.[31] Under some statutes, one who has been convicted of perjury is incompetent in any case, unless his conviction has been reversed, or he has been pardoned.[32] Such a statute does not disqualify a person who admits having committed perjury, but who has not been convicted of the crime.[33] A witness is not incompetent in a criminal prosecution by reason of the fact that he is under indictment for the same offense for which defendant is being tried.[34] Where, in a prosecution for conspiracy in a Federal court, a severance is granted, a co-conspirator is competent to testify for the government, the credibility of his testimony being for the jury.[35]

Statutes sometimes require special qualifications, as to witnesses called in certain actions to prove particular facts; as that the witness must be a resident freeholder and householder.[36] In Kentucky, the common-law rules as to competency of witnesses govern in criminal proceedings, except as to interest, and the like, since the civil code provision which practically makes competent all who show sufficient knowledge of the facts, is applicable only to civil proceedings.[37]

§ 2. *Disqualification on ground of interest.*[38]—While the interest of a witness in the event of the suit may be shown, as affecting his credibility, the fact of such interest does not now disqualify a person as a witness.[39]

§ 3. *Disqualification of one party to transaction or communication on death of the other.*[40]—Practically all the states have statutes which provide, in substance, that a party to an action, or a person interested in the event thereof, or a person from whom a party derives his interest, shall be incompetent to testify as to transactions or communications with a deceased person, when the adverse party represents, or derives his interest from, the deceased. The manifest design of such statutes is to prevent living witnesses from taking advantage of the death of a person, whereby contradiction of an alleged statement or transaction is rendered impossible, and the construction placed upon them is largely controlled by this purpose. The New Hampshire statute provides that the disqualified person may testify when it clearly appears to the court that injustice may be done without his testimony.[41] In California, neither the party asserting a claim,[42] nor the assignor of a claim[43] against a deceased person can testify to matters occurring

ness admits conviction, and no other proof is offered, the fact is before the jury as affecting the witness's credibility. Bise v. United States [Ind. T.] 82 S. W. 921.

31. Chenault v. State [Tex. Cr. App.] 81 S. W. 971.

32. Ballinger's Ann. Codes & St. § 5992, makes this exception to the rule that conviction of crime shall not render a person incompetent. State v. Pearson [Wash.] 79 P. 985.

33. State v. Pearson [Wash.] 79 P. 985.

34. Homicide. State v. Cobley [Iowa] 103 N. W. 99.

35. Wong Din v. United States [C. C. A.] 135 F. 702.

36. Required by Burns' Ann. St. 1901, § 1043, to prove bona fide residence of plaintiff in divorce. Witness held qualified. Roshniakorski v. Roshniakorski [Ind. App.] 72 N. E. 485. See Divorce, 3 Curr. L. 1127.

37. Bright v. Com. [Ky.] 86 S. W. 527.

38. See 2 Curr. L. 2168.

39. Since 1866, in Georgia, interest does not disqualify. McIntyre v. McIntyre, 120 Ga. 67, 47 S. E. 501. Beneficiary under a will may testify as to conversations with deceased in probation of will. In re McLaughlin's Will [N. J. Eq.] 59 A. 469. Mere fact that witness would be sole legatee under a will did not disqualify her to testify to execution of will. Rev. St. 1899, § 4652. Mann v. Balfour [Mo.] 86 S. W. 103. Under Const. Ark. Schedule, § 2, Kirby's Dig. §§ 3093, 3094, a party may be a witness against himself in a civil case. Wiley v. McBride [Ark.] 85 S. W. 84.

40. See 2 Curr. L. 2169.

41. Held proper, under Pub. St. 1901, c. 224, §§ 16, 17, to permit plaintiff to testify to facts only within the knowledge of himself and a deceased partner, in an action against the surviving partner on an order accepted by the firm. Parsons v. Wentworth [N. H.] 59 A. 623.

42. A married woman, suing for services rendered a deceased, cannot testify concerning the course of conduct of herself and husband as to her separate earnings, since such testimony would be as to matters occurring within the lifetime of deceased, under Code Civ. Proc. § 1880. Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272.

43. Where one of several lessees of a

in the lifetime of the deceased. The Michigan statute disqualifies interested persons in suits by or against representatives of a deceased to testify as to matters, which, if true, must have been equally within knowledge of the deceased.[44] Under the Pennsylvania statute, the surviving party to a contract may testify to matters occurring in the lifetime of deceased, only if there is living at the time of trial another person, between whom and the witness such matters occurred, and who is competent to testify, and does so testify.[45] The Kentucky statute also provides that no person shall testify for himself as to statements by or transactions with an infant under fourteen, except for the purpose and to the extent of affecting a living person over fourteen who heard the statement or was present at the transaction.[46]

The adverse party, or party against whom the witness is offered, must represent the decedent, or derive his interest from the decedent.[47]—Thus, the statutes are usually applicable in proceedings by or against executors and administrators,[48] unless they are merely nominal parties;[49] and by or against heirs,[50] devisees or

milling building assigned his interest to the others, and after the building was damaged by fire, the landlord agreed to repair, held, in an action against his executor for breach of the contract, the assignor was not the assignor of the claim sued on within Code Civ. Proc. § 1880. Frey v. Vignier, 145 Cal. 251, 78 P. 733.

44. Comp. Laws, § 10,212. Peirson v. McNeal [Mich.] 100 N. W. 458. For construction, see decisions under "Transactions and Communications," post.

45. P. L. 1891, 287. Montelius v. Montelius, 209 Penn. 474, 58 A. 910. Surviving party to contract cannot testify to transactions during lifetime of deceased, no other living witness having testified. Wright v. Hanna, 210 Pa. 349, 59 A. 1097.

46. Civ. Code Prac. § 606, subsec. 2, renders father incompetent to testify that deed to children under 14 was voluntary and that there was no delivery of deed. Mullins v. Mullins [Ky.] 87 S. W. 764.

47. Where the party on one side is the executor, administrator, heir at law, or next of kin of a deceased person, and has acquired title to the cause of action directly through deceased, the adverse party is incompetent to testify to any transaction or communication had with deceased [Gen. St. 1901, § 4770]. Roach v. Roach, 69 Kan. 522, 77 P. 108. In an action by administrators against a foreign executrix and a donee of a testator to recover the subject of the gift, admission of a conversation between one of plaintiffs, the deceased and executrix, nominally against the executrix, was error, since the evidence was only important as against the donee. Downey v. Owen, 90 N. Y. S. 280. Attorney held competent witness after death of his client, in suit to recover money from attorney paid him on his representation that he still represented the client. Girard Trust Co. v. Harrington, 23 Pa. Super. Ct. 615.

48. Under this statute (P. L. 1902, p. 363, § 4), in a suit against the estate of a testatrix to enforce performance of an oral agreement to devise land, complainant cannot testify as to transactions with decedent, her executors being parties to the suit. Clawson v. Brewer [N. J. Eq.] 58 A. 598. But complainant may testify as to transactions with his father, also dead, since the father's executors are not parties to the suit. Id. An action for claim and delivery involves the right of possession and not the ownership; hence such action is not a claim against an estate of a person represented by an administrator, within Rev. St. 1887, § 5957, subd. 3, so as to make plaintiff incompetent to testify in his own behalf. Cunningham v. Stoner [Idaho] 79 P. 228. Under Cal. Code Civ. Proc. § 1880, subd. 3, providing that a party cannot be a witness in an action against an administrator on a claim against the estate of a deceased person, a suit by a husband to quiet title to land which was community property is not a claim against the wife's estate so as to render the husband incompetent. Bollinger v. Wright, 143 Cal. 292, 76 P. 1108.

49. The Federal statute (Rev. St. 858) provides that in suits by or against executors, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator unless called by the adverse party or the court. This statute does not apply to suits in which executors are merely nominal parties, against whom no judgment could be rendered. Russell v. Russell, 129 F. 434. Hence, in a suit by a widow to enforce a claim of dower against her deceased husband's estate, she may testify to an antenuptial agreement, though his executors are parties. Id.

50. In a suit by a judgment creditor of a grantor to set aside a deed as fraudulent, the grantor is incompetent to testify for the plaintiff, and against the grantee's heirs and executrix as to conversations with deceased grantee; and the heirs and executrix were proper parties to raise the question of competency of such witness. Roberts v. Mack, 90 N. Y. S. 526. Under Rev. St. 1899, § 4652, providing that one party to a contract or cause of action being dead, the other cannot testify, the grantees of a deed may testify, in a suit by creditors to set aside the deed for fraud, though the grantor is dead, the grantor's heirs not being parties. Stam v. Smith, 183 Mo. 464, 81 S. W. 1217.

legatees.[51] But whether devisees or legatees represent a decedent, within the meaning of such statutes, may depend on the nature of the proceeding.[52] The heir, as adverse party, does not represent the deceased, within the meaning of the Nebraska statute, unless he stands in the place of the deceased and asserts a right which deceased had at the time of his death.[53] A surety of a deceased principal is entitled to the same protection as the representative of the principal.[54] That a party has derived his right from a decedent does not disqualify him if the opposite party has derived from decedent no right to the thing derived, and no right to dispute the derivation.[55]

Persons disqualified as witnesses[56] by the statutes are, first, parties to the action;[57] second, persons interested in the event of the action;[58] third, persons

51. In a contest of a will on the ground of undue influence, the testimony of a beneficiary as to a conversation had by him with a decedent through whom contestants were claiming as his legatees, is inadmissible, under Iowa Code, § 4604. In re Wiltsey's Will, 122 Iowa, 423, 98 N. W. 294.

52. Within the meaning of the New Jersey statute, a testatrix is not "represented" by devisees, in a suit against them to subject the proceeds of lands, sold in partition between them, to the payment of a note given by testatrix. Hence the petitioner, payee of the note, may testify as to execution of and consideration for the note. McKinley v. Coe [N. J. Eq.] 57 A. 1030. In an action to cancel a deed given to secure a debt, on the ground that the debt was released by the will of the creditor, plaintiff may testify in his own behalf, the action being against the testator's devisees and legatees, and not against his heirs or personal representatives. Emerson v. Scott [Tex. Civ. App.] 87 S. W. 369.

53. Code, § 329. Sorensen v. Sorensen [Neb.] 103 N. W. 455.

54. Adverse party cannot testify to transactions with deceased in action against surety, since surety can recover over from the estate. McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27.

55. A beneficiary's right to money on death of a member of a beneficial association is not derived from the deceased; hence, one claiming the money on ground of an antenuptial agreement may herself prove the agreement, and her marriage with deceased. Broadrick v. Broadrick, 25 Pa. Super. Ct. 225.

56. See 2 Curr. L. 2172.

57. Held incompetent: One suing as heir to set aside a deed by his grandmother, or establish a trust in the land conveyed, is incompetent to testify to conversation with grandmother as to consideration for deed. Sheldon v. Carr [Mich.] 103 N. W. 181. Under Hurd's Rev. St. 1903, c. 51, § 2, a party suing heirs to enforce an agreement with the ancestor to dedicate a street is incompetent. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19. Heir, suing as administrator, to collect a loan by deceased, is disqualified by interest to testify to transactions with deceased in order to prove the loan. Wakefield v. Wakefield, 92 N. Y. S. 399. Wife of one of testator's next of kin, who was party to a suit to contest a will, could not testify in such suit as to personal transactions and communications with testator. Roche v. Nason, 93 N. Y. S. 565. Plaintiffs held incompetent to establish by their own testimony a claim against the estate of a deceased person which arose in the lifetime of deceased. Moore v. Crump [Miss.] 37 So. 109. Where husband claimed provision in antenuptial agreement, whereby wife was permitted to will her property as she chose, was a forgery, and after her death, renounced her will and sought to obtain his share of her property under the law, he was incompetent as a witness against the estate. Watson v. Duncan [Miss.] 37 So. 125. Claimant cannot testify to establish his own claim against the estate of a deceased person. Jones v. Jones [Miss.] 37 So. 499. Under Code Civ. Proc. § 400, defendant may not testify to a conversation with deceased in an action by the administrator, defendant's interest being such that it might affect his testimony. Rhodes v. Southern R. Co., 68 S. C. 494, 47 S. E. 689. A creditor who files a claim in a creditor's suit to settle up a decedent's estate is incompetent to testify to transactions between himself and decedent under Code 1899, c. 130, § 23. Bank of Union v. Nickell [W. Va.] 49 S. E. 1003. Sureties on a bond given defendant's intestate, made parties to a suit are incompetent to testify for their principal regarding a transaction with intestate. Haberzettle v. Dearing [Tex. Civ. App.] 80 S. W. 539. In an action to recover land from heirs, plaintiff cannot testify to transactions or statements of decedent. Black v. Cox, 26 Ky. L. R. 599, 82 S. W. 278. In action against executor for services rendered a decedent, plaintiff cannot testify in his own behalf. Green's Ex'r, v. Green, 26 Ky. L. R. 1007, 82 S. W. 1011. Defendant, in an action by a community administratrix and heirs cannot testify to transactions between himself and deceased. Rogers v. Tompkins [Tex. Civ. App.] 87 S. W. 379.

Held competent: An executor and beneficiary under a will is not, in a proceeding to prove the will, a party suing or sued in a representative capacity, within the meaning of the statute. In re McLaughlin's Will [N. J. Eq.] 59 A. 469. Defendants may testify for a co-defendant, if their interests are adverse to the interests of such co-defendant. Jones v. Jones, 213 Ill. 228, 72 N. E. 695. One who, though an heir of defendant's deceased grantor, did not claim realty in suit as heir, nor bring suit as such, is competent to testify therein. Camfield v. Plummer, 212 Ill. 541, 72 N. E. 787. In an action by the administrator of a bank depositor to recover a deposit paid by the bank to the attorney of

from whom a party derives his interest.[59] One testifying against his own interest is competent, though the adverse party is an executor or legatee.[60] While the

the depositor after the latter's death, the bank could show by the attorney, who was not a party and would not be bound by a decree, his interest in the money, by declarations of the depositor and his own acts. Hoffman v. Union Dime Sav. Inst., 95 App. Div. 329, 88 N. Y. S. 686. Rev. St. 1895, § 2302, held not applicable where plaintiff sued in individual capacity and as guardian, and defendant witness, who testified that her deceased husband always claimed certain land, was not asserting any right as heir. Field v. Field [Tex. Civ. App.] 87 S. W. 726.

58. Held Incompetent:

Alabama: Complainant in suit to cancel deed to person since deceased cannot testify to transactions with deceased. Henderson v. Brunson [Ala.] 37 So. 549. But complainant's husband is not incompetent in such suit, since he has no interest in her lands, except that she may permit them to descend to him at her death. Id.

Illinois: A person owning land near that of plaintiff, who would be benefited by the dedication of the street, is incompetent, being interested in the event of the suit. Schneider v. Sulzer, 212 Ill. 87, 72 N. E. 19.

Kentucky: Where the interests of several parties are such that their claims must stand or fall together, each, incompetent to testify for himself, is also incompetent to testify for the others. Barnett's Adm'r v. Adams, 26 Ky. L. R. 622, 82 S. W. 406. In action for wrongful death, stockholders of defendant corporation are incompetent to testify to conversations or transactions with plaintiff's intestate. Kentucky Stove Co. v. Bryan's Adm'r [Ky.] 84 S. W. 537.

Missouri: Son of decedent incompetent to testify whether money received by him had been received as an advancement. Carpenter v. Coats, 183 Mo. 52, 81 S. W. 1089.

New York: One who will secure a larger legacy under a former will if a later one is annulled is incompetent to testify in the contest of the will. Pringle v. Burroughs, 91 N. Y. S. 750. Widow incompetent to testify to transactions between herself and husband tending to show invalidity of mortgage given by them, since if the mortgage was valid, it would make her dower interest in the property concerned subordinate. Smith v. Smith, 90 N. Y. S. 883.

North Carolina: One who is a surety on a prosecution bond has a legal interest in the action which disqualifies him, under the statute [Code, § 590]. McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27.

Pennsylvania: In action by executors of payee of note against the maker, the guarantor is incompetent to prove payment during the holder's lifetime, even though the guarantor has been discharged in bankruptcy, since the guaranty was made. Pattison v. Cobb, 26 Pa. Super. Ct. 72.

Texas: In a suit by a wife to recover her separate property from an executor, the husband, though not joined, is a party in interest, incompetent to testify to declarations of or transactions with deceased, under Rev. St. 1895, art. 2302. Tompkins v. McGinn [Tex. Civ. App.] 85 S. W. 452.

Held Competent.

Alabama: In a suit by a child to recover from a parent's estate the value of board and services furnished the parent, the son and wife of plaintiff are not disqualified by interest, under Code 1896, § 1794, to testify as to a contract between plaintiff and deceased. Meyers v. Meyers [Ala.] 37 So. 451.

Georgia: A stockholder of a corporation which is a party to a suit is not disqualified by interest to testify to transactions and communications with a deceased. Bank of Southwestern Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393.

Illinois: In an action against a street railway company for negligence of a motorman resulting in death, the motorman is competent to testify, since a judgment against the company could not be used in evidence against the motorman in a suit by the company to recover over from him. Feitl v. Chicago City R. Co., 211 Ill. 279, 71 N. E. 991.

Iowa: Daughter of deceased and her husband were not disqualified in action against executors on a note which deceased signed as accommodation indorser for them. German-American Sav. Bank v. Hanna, 124 Iowa, 374, 100 N. W. 57.

Kentucky: Where a minor sues by his guardian to enforce a contract made for his benefit by his guardian with a third person, the death of such third person does not render the guardian incompetent to testify for the minor as to the contract made with the decedent, since such guardian, though a party, has no disqualifying interest. Doty's Adm'rs v. Doty's Guardian, 26 Ky. L. R. 63, 80 S. W. 803. No disqualifying interest arises from the fact that costs may have to be paid out of assets in the hands of the guardian. Id. Nor does the fact that the court may allow the guardian reasonable compensation for services disqualify. Id.

Michigan: Where, on an appeal by heirs from an order allowing the administrator's account, the issue is whether certain personalty belongs to the estate, testimony by a witness called by the administrator that the property was a gift causa mortis to her was competent, she not being a real party in interest, or bound by the decree. Reed v. Whipple [Mich.] 12 Det. Leg. N. 77, 103 N. W. 548.

59. Under Code Civ. Proc. § 829, a mother who made a contract with the putative father of her child for a settlement of $100,000 on the child after she had supported him a certain time, is incompetent in an action by the child to enforce the contract. Rosseau v. Rouss [N. Y.] 72 N. E. 916. In trespass to try title, plaintiff claiming under mortgage foreclosure sale, the mortgagor and the heirs of his wife are incompetent, under Rev. St. 1895, § 2302, to prove by transactions between the mortgagor and his wife that the land mortgaged was the wife's separate property. Barrett v. Eastham Bros. [Tex. Civ. App.] 86 S. W. 1057.

60. An executor in a will, bound by contract to execute it, and who seeks in good faith to probate it, is a competent witness in a proceeding by contestants to set aside a subsequent will, defended by the executor and legatee therein, since the executor in

statute disqualifies a party to a contract[61] or transaction[62] to testify in regard thereto when the other party is dead, it does not disqualify one who was present and heard a conversation, but did not participate therein;[63] nor is a party to a transaction with a decedent disqualified, if the adverse party was also present and participated.[64] Death of an agent who made a contract renders the other party thereto incompetent;[65] and an agent becomes incompetent on death of the other party.[66]

such case testifies against his own financial interests. Godfrey v. Phillips, 209 Ill. 584, 71 N. E. 19.

61. After father's death, son and his wife are incompetent to prove a contract with the father whereby the son was to remain at home and have the farm in consideration of his managing it. Eastwood v. Crane [Iowa] 101 N. W. 481. A woman claiming to be the widow of a dead man, whose claim in that regard is denied by others who have or assert claims, as heirs, against his estate, is incompetent to testify to the fact of her marriage in a proceeding in which she seeks, as distributee, a portion or all of his personal property, until her status as widow bas been judicially determined. In re Maher's Estate, 210 Ill. 160, 71 N. E. 438. Under Civ. Code, § 606, maker of note, in action thereon by payee's administrator, cannot testify to contract made with deceased payee. Proctor v. Proctor's Adm'r, 26 Ky. L. R. 348, 81 S. W. 272. Vendee in executory contract of sale of land cannot, after vendor's death, testify to conversation with vendor relative to the amount of land to be conveyed. Bargo v. Bargo [Ky.] 86 S. W. 525. In a suit to enforce a contract to make plaintiff the heir of a person, plaintiff's mother, who made the contract with the decedent, cannot testify in regard thereto, under Rev. St. 1899, § 4652. Ashbury v. Hicklin, 181 Mo. 658, 81 S. W. 390. Woman seeking to enforce a claim as widow against a decedent's estate is incompetent to prove a common-law marriage with decedent. In re Imboden's Estate [Mo. App.] 86 S. W. 263. After death of payee, maker of note cannot testify as to consideration therefor, or that it was accommodation paper. Cody v. Hadcox, 90 N. Y. S. 873. In action for goods sold a firm, evidence by one partner, who admitted liability, as to a partnership agreement with the other, since deceased, was incompetent, as against the executor of the deceased. Moore v. Palmer, 132 N. C. 969, 44 S. E. 673. Where each of four sons brought separate suits for breach of an alleged oral contract to devise land, the contract being joint, the sons are incompetent to testify for each other as to the contract. Murphy v. Murphy, 24 Pa. Super. Ct. 547. Under Rev. St. 1895, art. 2302, the payee of a note, in a suit thereon against the maker's administrator, cannot testify that he never received money on the note. Abbott v. Stiff [Tex. Civ. App.] 81 S. W. 562.

62. Witness cannot testify to transactions between himself and decedent. Cook v. Landrum, 26 Ky. L. R. 813, 82 S. W. 585. In an action by a trustee in bankruptcy of a partnership against the administrator and others claiming under his intestate, a partner is incompetent to testify to transactions between him and intestate concerning the subject-matter of the suit. Johnston v. Coney, 120 Ga. 767, 48 S. E. 373.

63. Under the Iowa statute the wife of a party, who was present at, but took no part in, a transaction between deceased and such party, is competent to testify in regard thereto. Lucas v. W. W. McDonald & Son [Iowa] 102 N. W. 532. Conversation overheard by witness between her mother, since deceased, and the administrator of her estate, admissible in hearing on administrator's account. In re Andrews, 97 App. Div. 429, 89 N. Y. S. 965. In suit to recover personalty from husband and wife claimed as gifts causa mortis, the wife cannot testify to conversations between her husband and deceased, under D. C. Code, § 1064. Dawson v. Waggaman, 23 App. D. C. 428.

64. Plaintiff, executor, could prove loan by testifying to transaction between deceased and defendant, at which witness was present. Wakefield v. Wakefield, 93 N. Y. S. 554. But the fact that a conversation between a testator and his wife, and certain relatives, took place in the presence of a child, remotely related to testator, did not make such relatives competent to testify to the conversation, though the then child was executrix of the wife's estate in the contest [Code, § 590]. In re Peterson's Will, 136 N. C. 13, 48 S. E. 561.

65. A party to a contract made with a corporation's agent cannot testify regarding it after the agent's death. Central Bank of Kansas City v. Thayer [Mo.] 82 S. W. 142.

66. In a suit against an administrator to recover for work done for deceased, the person procuring the work to be done is incompetent under Civ. Code 1895, § 5269, pars. 1, 4. Skeen v. Moore, 120 Ga. 1057, 48 S. E. 425. Pub. Acts 1903, p. 36, No. 30, renders incompetent any person who acted as agent in the making or continning of a contract with a person since deceased, in a suit involving the contract. Albring v. Ward [Mich.] 100 N. W. 609. Held, in suit on a contract to make plaintiff an heir, plaintiff's natural father, who made the contract when his daughter was two years old, was incompetent. Id. Michigan Comp. Laws, § 10,212, provides that in suits prosecuted or defended by a surviving partner, the other party shall not be admitted to testify to matters, which, if true, must have been equally within the knowledge of the deceased partner; and that in suits by or against a corporation, the adverse party shall not testify to matters equally within the knowledge of a deceased officer of the corporation, not within the knowledge of any surviving officer. People's Nat. Bank v. Wilcox [Mich.] 100 N. W. 24. Held, under this statute, where it appeared, in a proceeding to foreclose a mortgage given by a surviving partner, as such, individually, on partnership property to a corporation, and to determine the rights of creditors of the surviving partner individually, the president of the corporation had died after

Transactions and communications.[67]—The disqualification extends to all personal transactions between the witness and deceased,[68] but not to transactions between the witness and a third person,[69] or between deceased and another.[70] The mere fact that one of the parties represents a decedent does not render the other party, or an interested person, incompetent as to testimony not involving transactions with deceased.[71] There is a conflict as to the competency of interested persons to testify to transactions with a decedent, or his acts and appearance, for the purpose of showing his mental condition.[72] The Michigan statute disqualifies as to all matters which, if true, might have been equally within the knowledge of deceased.[73]

execution of the mortgage:—neither the surviving partner, nor the officer of a bank which was endeavoring to postpone the mortgage, could show an agreement with the deceased president whereby the terms of the mortgage were changed. Id.

67. See 2 Curr. L. 2174.

68. An heir, occupying deceased father's farm, cannot testify that he paid rent to his father, this relating to a transaction with a decedent. Garrott v. Rives, 25 Ky. L. R. 2165, 80 S. W. 519. Plaintiff, in an action to foreclose a trust deed, cannot testify that the note, given by decedent, had not been paid. McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27. Widow of a testator cannot testify in suit to set aside a will, to giving a mortgage to a third person, pursuant to a separation agreement between her and deceased. Holland v. Holland, 90 N. Y. S. 208. One presenting a claim against an estate on an alleged note given by decedent cannot testify as to where he kept the note, where it was on day of deceased's death, and that he showed it to a third person. In re Blair, 99 App. Div. 81, 91 N. Y. S. 378. In action by executor for an accounting, testimony in effect denying that defendant was given certain information by deceased is incompetent. Komp v. Luria, 92 N. Y. S. 569. Physician, in action by him against administrator to recover for services, cannot testify to calls made and their dates, to giving deceased bills, that prescriptions charged were actually made, etc., these being personal transactions with deceased. Russell v. Hitchcock, 93 N. Y. S. 950.

69. In an action for services rendered a deceased, the contract therefor having been made with plaintiff by deceased's daughter, plaintiff was competent to testify, under Code, § 606. Crutcher's Adm'r v. Stuart, 26 Ky. L. R. 648, 82 S. W. 421. Under Code, § 590, a party may testify, as against a grantor, that a deed was to run to the party's wife, or in case of her death to the party, though the wife died subsequent to the execution of the deed, but before the giving of the testimony. Lehew v. Hewett [N. C.] 50 S. E. 459.

70. Under Code, § 590, a party to a suit for partition of a decedent's land may testify that she saw decedent hand deeds to her (witness') husband; this not being a transaction between witness and deceased. Johnson v. Cameron, 136 N. C. 243, 48 S. E. 640.

Contra: The disqualification extends to conversations or transactions between the deceased and third parties at which the witness was present, though not participating therein. Thus, in action to set aside deed from decedent, grantee could not testify as to conversation regarding a lease, executed at the same time, and in the grantee's presence. Burdick v. Burdick [N. Y.] 73 N. E. 23.

71. Evidence not relating to transactions or communications with a decedent is competent, under Civ. Code 1895, § 5269. Bank of Southwestern Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393. Under Civ. Code 1895, § 5269, an agent for one of the parties was a competent witness, though the original defendant had died, as to any matters except transactions between the agent and deceased. Murphey v. Bush [Ga.] 50 S. E. 1004. In action against representatives, plaintiff may testify if his evidence is not in regard to communications, transactions, etc., with deceased. Chenault v. Thomas, 26 Ky. L. R. 1029, 83 S. W. 109. One interested may testify to matters not involving transactions with deceased, under Rev. St. 1895, art. 2302. Tompkins v. McGinn [Tex. Civ. App.] 85 S. W. 452. Code, § 590, does not make an interested witness, in an action relating to boundaries, incompetent to testify to declarations of a deceased disinterested person. Yow v. Hamilton, 136 N. C. 357, 48 S. E. 782. In suit by administratrix of a grantee for breach of covenant against incumbrances, distributee of grantee's estate held competent to testify as to incumbrance in suit, since he was not interested, and did not testify to a communication or transaction with deceased, under Code, § 590. Deaver v. Deaver [N. C.] 49 S. E. 113.

72. Children of a testator, interested in the setting aside of a will, are incompetent to testify to the appearance and acts of testator indicating insanity. Holland v. Holland, 90 N. Y. S. 208. Executor and proponent of will, and beneficiary, may testify to transactions with decedent, to show testamentary capacity in probate proceedings. Grant v. Stamler [N. J. Eq.] 59 A. 890. A widow, defending a suit as executrix, may testify to acts, conduct, or transactions of her deceased husband within her observation, if wholly unparticipated in, and uninfluenced by her (Schultz v. Culbertson [Wis.] 103 N. W. 234), and may also give her mental impression as to his capacity to contract, based on such observation of his acts and conduct [Rev. St. 1898, §§ 4069, 4072] (Id.).

73. Comp. Laws, § 10,212. Peirson v. McNeal [Mich.] 100 N. W. 458. Held, the assignee of certain mortgages is incompetent to testify in an action by the executrix of the estate of the assignor to set aside the assignments. Id. The executrix, being sole devisee, was the real party in interest in such action, and hence was also incompetent to

Waiver or removal of disqualification.[74]—The disqualification created by the statutes under consideration is waived where the adverse party fails to make a proper objection,[75] or where such adverse party first calls the witness and examines him as to matters protected by the statutes;[76] but such waiver extends only to matters as to which the witness was examined by the adverse party.[77] There is no waiver if a witness examined was not a party,[78] or if a disqualified witness was not in fact called by the adverse party.[79] An offer of one who contests a claim against an estate to waive the statutory prohibition as to transactions with deceased, not accepted by the claimant, does not constitute a bind-

testify to facts equally within the knowledge of her deceased husband. Id. In suit by mortgagor's heirs to restrain foreclosure of mortgage, defendant's testimony that he had received a payment within 15 years in a letter from the mortgagor was incompetent, being a matter equally within the deceased mortgagor's knowledge. Carr v. Carr [Mich.] 101 N. W. 550. A widow in proving a claim against her husband's estate for expenses of his last sickness, may testify to items as to which deceased had no knowledge, but not as to those of which he had knowledge. Wilcox v. Wilcox [Mich.] 102 N. W. 954. In action on claim for services against decedent's estate, plaintiff's husband was incompetent to testify to conversation with decedent relative to a promise of decedent to leave property to the wife in consideration of being cared for by wife and husband. Finn v. Sowders' Estate [Mich.] 103 N. W. 177.

Held competent: A physician may testify to the reasonable value of services rendered, as proved by his book of account, in an action to enforce a claim therefor against an estate. Kwiecinski v. Newman's Estate [Mich.] 100 N. W. 391. Testimony of widow to show loss of notes in suit, and not in regard to execution, held not to violate statute, since no fact known equally to deceased was testified to. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832.

74. See 2 Curr. L. 2175.

75. Failure to make any objection is a waiver under Comp. Laws, § 10,212. Howatt v. Green [Mich.] 102 N. W. 734. An objection only on the ground that evidence related to privileged communications made to an attorney is a waiver of the incompetency of witness as an agent on the ground that the other party to the transaction is dead. Gerhardt v. Tucker [Mo.] 85 S. W. 552.

76. A party who calls a witness to testify to transactions with a deceased waives the statutory incompetency of the witness and cannot thereafter object when the witness testifies as to such transactions in his own behalf. Dee v. King [Vt.] 59 A. 839. Objection to incompetency of son to testify as to contract between him and his deceased mother waived, where adverse party examined him in regard thereto. Edwards v. Latimer, 183 Mo. 610, 82 S. W. 109. Where defendant first examined a claimant against the estate, as an adverse witness, as to transactions and conversations with deceased, claimant could testify in his own behalf under Rev. St. 1898, § 4069. Currie v. Michie [Wis.] 101 N. W. 370. Testimony by one interested in the estate of decedent lets in testimony by a person for himself regarding transactions with decedent, by direct provisions of Code Civ. Prac. § 606. Whitley v. Whitley's Adm'r, 26 Ky. L. R. 134, 80 S. W. 825. Where a party is examined by the adverse party, he is made competent as a witness for all purposes. Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007. Where an administrator introduces in evidence a letter of the adverse party reciting a transaction with deceased, the adverse party is entitled to testify in his own behalf in regard to the same matter. Code Civ. Proc. § 329. Cline v. Dexter [Neb.] 101 N. W. 246. In an action by the state on an official bond against the principal and the representatives of a deceased surety, the principal when called by the state may testify that the deceased promised to remain on the bond. United States Fidelity & Guaranty Co. v. Fossati [Tex. Civ. App.] 81 S. W. 1038.

77. A witness having testified to a conversation between plaintiff's assignor and deceased, the assignor may testify in rebuttal that witness was not present at the times mentioned by him, but not that she had no conversation with deceased. Healy v. Malcolm, 99 App. Div. 370, 91 N. Y. S. 207. While testimony was being taken by a master in a suit to reform a deed, a defendant who filed a cross-bill to have the deed set aside, died. Held, plaintiff was thereafter incompetent to testify, even though the deceased executor testified, the latter's testimony being confined to matters of which he learned from the testimony formerly given by the deceased. Clark v. Harper [Ill.] 74 N. E. 61. In ejectment by the heir against his ancestor's grantor, proof of admissions by the grantor as to the destruction of deeds was not a waiver of the incompetency of the witness to testify to transactions with or statements by deceased, where the admissions proved did not relate to matters equally within the knowledge of deceased. Wilbur v. Grover [Mich.] 12 Det. Leg. N. 99, 103 N. W. 583.

78. Examination of the husband of the administratrix as to a conversation between deceased and defendant does not make defendant competent to testify to such conversation, since said husband was not a party [Code, § 590]. Hall v. Holloman, 136 N. C. 34, 48 S. E. 515.

79. In an action against one member of an alleged partnership and the executrix of the other, the executrix only denying the existence of the partnership, the other defendant could not testify to transactions and statements of the testator tending to show a partnership [Rev. St. 1895, art. 2302]. Rascoe v. Walker Smith Co. [Tex.] 86 S. W. 728.

ing waiver as to the contestant.[80] An assignment of his interest by a party for the purpose of qualifying himself as a witness to testify to transactions with a deceased is ineffectual to accomplish that object.[81]

§ 4. *Privileged communications, and persons in confidential relations. A. Attorney and client.*[82]—Confidential communications by a client to his attorney are privileged and cannot be testified to by the attorney without the consent of the client.[83] The communication made, or knowledge gained, must be in fact confidential, and made or gained in the course of the professional employment of the attorney.[84] It follows that the relation of attorney and client must have existed[85] at the time,[86] though it is not necessary that a fee be asked or expected, in order to entitle the client to claim the privilege of the relation.[87] Communications to an agent are not privileged,[88] though the agent incidentally performs legal services,[89] nor does the fact that the person to whom declarations were made was afterwards retained as attorney render them privileged.[90] The privilege of the client does not extend to everything coming to the attorney's knowledge while acting as such, and does not include information derived from other persons or other sources.[91] Statements made by clients in the presence of third persons or of the opposite party and his attorneys are not privileged.[92] The privilege may be waived by the client.[93] A communication to a county attorney by a prosecuting witness, who requests the arrest of accused, is privileged, in an action by ac-

80. In re Blair, 99 App. Div. 81, 91 N. Y. S. 378.

81. Verstine v. Yeaney, 210 Pa. 109, 59 A. 689.

82. See 2 Curr. L. 2176.

83. A letter from an attorney to his client, relative to the amount recoverable in an action against the client, being of a confidential nature, a copy of such letter sent by the attorney to his associate is privileged. Jones v. Nantahala Marble & Talc. Co. [N. C.] 49 S. E. 94. In an action by a bondsman on an insurance agent's bond, to recover money paid the company, plaintiff cannot require an attorney of the company to testify as to the state of the agent's account with the company, nor to state whether he had said, in a former trial for embezzlement, that the agent did not owe the company anything. Wilson v. Ohio Farmers' Ins. Co. [Ind.] 73 N. E. 892. A witness having been cross-examined as to statements concerning her property, the attorney cannot thereafter be examined to contradict the witness. Kaufman v. Rosenshine, 97 App. Div. 514, 90 N. Y. S. 205. Attorney incompetent to testify as to conversations with deceased client, through whom a party claimed, and letters between attorney and client incompetent. Downey v. Owen, 90 N. Y. S. 280. An attorney who drew a will may not testify that the testator stated that the debt of plaintiff, released by the will, was secured by a deed, in an action by plaintiff to cancel such deed, against the heirs and devisees of the testator. Such testimony is not within the exception permitting an attorney to testify to testamentary dispositions as between different claimants. Emerson v. Scott [Tex. Civ. App.] 87 S. W. 369.

84. A communication by client to attorney is admissible as evidence, unless it is of such a character that it would not have been made except for that relation. Smart v. Masters, etc., of Lodge No. 2, 6 Ohio C. C. (N. S.) 15. Statement of client to attorney that he had borrowed money to pay for his services in a case which was completed in order to induce the attorney to take up a second case, held not privileged. Eekhout v. Cole, 135 N. C. 583, 47 S. E. 655. Evidence by an attorney to prove negotiations between his client and other parties held not confidential. List's Ex'x v. List, 26 Ky. L. R. 691, 82 S. W. 446. Knowledge of an attorney concerning a will, and property disposed by it, under which his former client claimed, held not privileged, though gained in work done for the client. King v. Ashley, 96 App. Div. 143, 89 N. Y. S. 482.

85. Conversation between attorney, who, on request of another, brought papers to him and such other, not privileged. Winn v. Itzel [Wis.] 103 N. W. 220.

86. Where attorney's evidence was confined to time before his employment, admission of testimony not error. Gerhardt v. Tucker [Mo.] 85 S. W. 552.

87. Mack v. Sharp [Mich.] 101 N. W. 631.

88. Declarations to an "attorney in fact." State v. Smith [N. C.] 50 S. E. 850.

89. The fact that an agent to procure a loan performs legal services while procuring it does not make the relation of the agent and borrower that of attorney and client, so as to make information gained by the agent privileged. Turner v. Turner [Ga.] 50 S. E. 969.

90. State v. Smith [N. C.] 50 S. E. 850.

91. Code Civ. Proc. § 835. King v. Ashley, 179 N. Y. 281, 72 N. E. 106.

92. Scott v. Aultman Co., 211 Ill. 612, 71 N. E. 1112.

93. In an action to recover attorney's fees, defendant introduced evidence of the amount involved in the action. Held, he thereby waived his privilege as to a letter to him from his attorney, the associate of the witness, relative to the amount recoverable in the suit. Jones v. Nantahala Marble & Talc, Co. [N. C.] 49 S. E. 94.

cused against the prosecutor for slander and malicious prosecution, both as a communication to an attorney,[94] and on the ground of public policy.[95]

(§ 4) *B. Physician and patient.*[96]—By statute in many jurisdictions, communications to a physician by a patient for the purpose of enabling the physician to treat or prescribe for the patient are privileged.[97] Such communications were not privileged at common law.[98] The statutory privilege extends not only to communications, but to all information acquired by the physician in his professional capacity.[99] The patient may claim the privilege, though the physician was called by the adverse party and for the latter's benefit, as in the case of an examination of an injured passenger by a railroad physician.[1] Testimony being incompetent, as privileged, under the statute, is incompetent also to impeach the patient as a witness.[2] The statutes do not, it is said, apply in a criminal case,[3] nor to communications made in furtherance of a criminal purpose.[4] Information not required or obtained for the purpose of medical treatment is not privileged,[5] and a physician may testify to the result of an examination made for the purpose of qualifying him as a witness, and not to enable him to prescribe.[6] In an action on a policy of insurance, the certificate of the attending physician, made a part of the proofs of death, is competent evidence as an admission against interest.[7] In Indiana, the prohibition extends to testimony in regard to testamentary dispositions, in controversies between the heirs and devisees of the testator.[8] In Michigan it is

94, 95. Gabriel v. McMullin [Iowa] 103 N. W. 355.

96. See 2 Curr. L. 2178.

97. Where, in an insurance case, it appeared insured had given birth to a stillborn child a few months after stating in her application that she was not pregnant, and a physician testified that any information possessed by him was gained in his professional capacity in order to treat her, he could not testify as to what period of gestation had elapsed before birth of the child. Van Bergen v. Catholic Relief & Beneficiary Ass'n, 99 App. Div. 72, 91 N. Y. S. 362.

98. Towles v. McCurdy [Ind.] 71 N. E. 129. The common-law rule which refuses to recognize a confidential communication to a physician as privileged, so as to protect the physician from divulging it when called on to do so as a witness in court, is followed in Rhode Island. Banigan v. Banigan [R. I.] 59 A. 313.

99. Towles v. McCurdy [Ind.] 71 N. E. 129; In re Hunt's Will [Wis.] 100 N. W. 874. Under Code, § 4608, a physician may not testify whether he found a patient injured in railway accident, conscious or unconscious, and whether he talked intelligently to persons about him. Battis v. Chicago, etc., R. Co., 124 Iowa, 623, 100 N. W. 543.

1, 2. Battis v. Chicago, etc., R. Co., 124 Iowa, 623, 100 N. W. 543.

3. People v. Griffith [Cal.] 80 P. 68.

4. Request of woman to physician to produce a miscarriage not privileged. McKenzie v. Banks [Minn.] 103 N. W. 497.

5. A physician may testify to the fact of employment and the rendition of professional services, under Burns' Ann. St. 1901, § 505. Haughton v. Aetna Life Ins. Co. [Ind.] 73 N. E. 592. A physician may testify to the fact of his professional attendance, the length of time the patient was confined to the house, and the number and dates of his calls. Becker v. Metropolitan Life Ins. Co., 90 N. Y. S. 1007. Statements to a physician relative to a contemplated lawsuit, and the patient's ability to pay the doctor's bill if the suit was successful, are not privileged. Holloway v. Kansas City [Mo.] 82 S. W. 89. The mere fact that a physician visits an acquaintance, who, charged with murder, is lying wounded at a hospital, is insufficient to show that the relation of patient and physician existed between them. State v. Lyons, 113 La. 959, 37 So. 890. Result of examination of prosecuting witness, after alleged rape, to discover if she then had a venereal disease, not privileged, examination not having been for the purpose of treatment. James v. State [Wis.] 102 N. W. 320. In a proceeding against the putative father of a bastard child for an order of filiation, a physician consulted by the mother as to her condition is competent to testify as to whether the woman at that time charged another than defendant with being the cause of her condition. People v. Abrahams, 96 App. Div. 27, 88 N. Y. S. 924.

6. Under Rev. St. 1899, § 4659. Arnold v. Maryville [Mo. App.] 85 S. W. 107.

7. Carmichael v. John Hancock Mut. Life Ins. Co., 90 N. Y. S. 1033.

8. Testimony of physician concerning physical and mental condition of testator, on issue of capacity, held incompetent. Towles v. McCurdy [Ind.] 71 N. E. 129.

Note: "It was held in Kern v. Kern, 154 Ind. 29, 55 N. E. 1004, that the rule in regard to confidential communications made to attorneys does not apply to testamentary dispositions, where the controversy is between the heirs and devisees of the testator. The supreme court of Missouri, in Thompson v. Ish, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552, held that a like exception should be made as to the testimony of physicians. The same view was taken by the supreme court of Iowa in Winters v. Winters, 102 Iowa, 53,

held that the statute forbidding a physician to disclose information acquired in his professional attendance on his patient applies to a hearing before a special tribunal of a beneficial order.[9]

Waiver.[10]—The privilege may be waived by the patient,[11] as where he himself testifies as to such communications,[12] or calls the physician to testify; but the privilege is not waived by a mere preliminary examination to lay a foundation for an objection to the physician's testimony.[13] It is not necessary that the waiver be made at the time of trial; it may be made a part of a contract which is sought to be enforced in the action in which the communication is offered.[14] Thus, a stipulation in a life insurance policy, that the proof of death shall consist in part of the affidavit of the attending physician, which shall state the cause of death and other information required by the insurer, constitutes a waiver, and renders the attending physician a competent witness as to disclosures made by the assured concerning his last sickness.[15] No one but the patient himself can effectually consent to a waiver of the privilege;[16] hence there can be no waiver after the patient's death.[17]

71 N. W. 184, 63 Am. St. Rep. 428. See, also, Russell v. Jackson, 9 Hare, 387, and Hogeman's Priv. Com. § 86. This court, however, in Brackney v. Fogle, 156 Ind. 535, 60 N. E. 303, expressly decided that the rule announced in Kern v. Kern, supra, did not apply to the testimony of physicians, and that even where the controversy was confined to the heirs and devisees of the decedent, the physician of the decedent was incompetent to testify in regard to communications made to him by his patient, or facts learned by him in the course of his business as such physician."—Towles v. McCurdy [Ind.] 71 N. E. 130.

9. Dick v. Supreme Body of International Congress [Mich.] 101 N. W. 564. In this case a determination by an association tribunal, based on the testimony of the physician who attended the insured, that he had fraudulently concealed a material fact, was held erroneous and not a bar to an action on the policy, notwithstanding a by-law that death claims should be submitted to such tribunal, and there should be no recourse to the courts. Id.

Note: This decision is commented on by a writer in the Columbia Law Review as follows: "While statutes like the one in the principal case make privileged the communications of a patient to his physician (4 Columbia Law Review, 438), yet a special tribunal is not bound by the common-law rules regulating the trial of actions or the admissions of evidence. It can arrange its own procedure and the decision of such a tribunal will not be disturbed by the courts unless it was procured by fraud. 5 Columbia Law Review, 52. The question remains whether the statutory rules of evidence are binding on such a tribunal. While the object of these statutes, however unfair their operation, is the protection of the confidential relation of physician and patient (5 Columbia Law Review, 646, Greenleaf on Evidence, § 247a), such a statute is in derogation of the common law, and the legislative intent to extend the restriction beyond the state courts should clearly appear. That intent is not evident in the statute involved in the principal case."—5 Columbia L. R. 247.

10. See 2 Curr. L. 2179.

11. Under express provisions of Code, § 333. Western Travelers' Acc. Ass'n v. Munson [Neb.] 103 N. W. 688.

12. A patient waives the privilege by testifying that a physician examined her and that she told him of her condition. Holloway v. Kansas City [Mo.] 82 S. W. 89. In an action for injuries resulting in death, plaintiff, by calling a physician and having him testify as to deceased's condition after the accident, and by introducing a hospital record made by the physician, waives the prohibition of Code Civ. Proc. § 834, and makes communications to the physician by the deceased admissible. Kemp v. Metropolitan St. R. Co., 94 App. Div. 322, 88 N. Y. S. 1. Where a patient testifies that a physician treated her for headaches only, such testimony does not make admissible to contradict her the physician's testimony as to what he treated her for. Holloway v. Kansas City [Mo.] 82 S. W. 89.

13. Where defendant, in a personal injury action, called its physician to testify as to an examination of plaintiff, and plaintiff's counsel asked permission to examine witness to lay a foundation for an objection to his testimony on the ground of privilege, such objection was not waived by the fact that in such preliminary examination, witness said plaintiff had been unconscious during a part of the examination of his injuries. Nugent v. Cudahy Packing Co. [Iowa] 102 N. W. 442.

14, 15. Western Travelers' Acc. Ass'n v. Munson [Neb.] 103 N. W. 688.

16, 17. In re Hunt's Will [Wis.] 100 N. W. 874.

NOTE. Effect of death of patient: The case last cited seems to be supported by the weight of authority, though there is a conflict. Says a writer in the Columbia Law Review, commenting on the case above: "At common law, communications from a patient to his physician were not privileged. Greenleaf on Evidence, § 247a. But public policy has dictated the enactment of statutes in some of the states making privileged the information obtained by physicians acting professionally. Westover v. Ins. Co., 99 N. Y. 56, 52 Am. Rep. 1. For citation of the statutes, see Chase's Stephens' Digest of Law

(§ 4) *C. Husband and wife.*[18] *Confidential communications*[19] between husband and wife are privileged, both at common law and under many modern statutes,[20] on the ground of public policy. The husband or wife may testify to contracts or transactions between each other,[21] or to communications[22] or disclosures[23] by one to the other, when such testimony does involve a breach of the confidential relation. A letter written by a prisoner to his wife, with knowledge that it would be opened, and examined by the jailer, is not a privileged communication.[24] The rule as to confidential communications made by one to the other during the marriage is not affected by their being joint parties and jointly interested in the action, or by one having acted as the agent of the other.[25] A divorced wife cannot testify to communications made during the marriage.[26]

Testimony for or against each other.—At common law, neither spouse was permitted to testify for or against the other, partly because it was deemed impossible that such testimony should be indifferent, but principally because of the common-law doctrine of the union of person.[27] The modern statutory disqualification is of course based on the former reason, and is commonly confined, in civil cases, to proceedings in which one spouse is directly interested.[28] Some statutes

of Ev. art. 117, note. The patient himself may waive the privilege even in the absence of express statutory authority. Scripps v. Foster, 41 Mich. 742. But there is a conflict as to whether, after the patient's death, the privilege may in his interest be waived by his personal representatives. Fraser v. Jennison, 42 Mich. 206; Winters v. Winters, 102 Iowa, 53; Loder v. Whelpley, 111 N. Y. 239. The prevailing view seems to be that the physician cannot testify as to the mental capacity of the deceased patient. Loder v. Whelpley, supra; Matter of Coleman, 111 N. Y. 220; In re Redfield, 116 Cal. 637. The principal case seems sound, for it is impossible to see how the privilege may be waived after the patient's death by others acting in his behalf. Renihan v. Dumin, 103 N. Y. 573, 57 Am. Rep. 770. There may be an express authorization to waive in the statute as is now the case in New York [Code Civ. Proc. § 836]. See 4 Columbia Law Review, 438."—5 Columbia L. R. 64.

The same view is taken by a writer in the Harvard Law Review, who says: "The general rule is that statutory provisions designed for the benefit of individuals may be waived by those entitled to their protection. State Trust Co. v. Sheldon, 68 Vt. 259. Hence it is agreed that the patient may waive the privilege. See Thompson v. Ish, 99 Mo. 160, 176, 17 Am. St. Rep. 552. There is a conflict, however, with regard to the existence of this right after the patient's death. In some jurisdictions it is extended to his personal representatives and devisees, and in others to his heirs. Fraser v. Jennison, 42 Mich. 206; Winters v. Winters, 102 Iowa, 53. On the other hand, the court above confines the right to the patient alone. This result seems sound. As the court points out, the purpose of the statute is personal—to encourage full and confidential disclosure to the physician of all facts necessary to a proper treatment. To this end it is essential that after the patient's death the seal of secrecy should remain unbroken. While it is true that an executor represents the deceased, he does so only with regard to rights of property, and not with reference to those which pertain to person and character. Westover v. Aetna, etc., Co., 99 N. Y. 56, 52 Am. Rep. 1."—18 Harv. Law Rev. 399.

18. See 2 Curr. L. 2165.

19. See 2 Curr. L. 2166, n. 37-43.

20. Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133. Husband and wife incompetent to testify to confidential communications by D. C. Code, § 1069. Trometer v. District of Columbia, 24 App. D. C. 242. Civ. Code, § 606, bars testimony by a husband, after the wife's death, that, during the marriage, she made him a gift of money. Buckel v. Smith's Adm'r, 26 Ky. L. R. 991, 82 S. W. 235.

21. Husband competent to testify to statements and acts of his wife tending to show her intention that she should leave all her property to him, in action to have a deed declared a mortgage, and for an accounting. Hannaford v. Dowdle [Ark.] 86 S. W. 818.

22. In trial of husband for homicide, evidence that the wife had told him that deceased had threatened his life was not incompetent as a confidential communication. Shepherd v. Commonwealth [Ky.] 85 S. W. 191.

23. In a suit by a trustee in bankruptcy against the wife of the bankrupt to set aside gifts of money, disclosures by the wife as to such gifts are not within the rule against privileged communications. Kirby's Dig. § 3095. Wiley v. McBride [Ark.] 85 S. W. 84. In a controversy over the distribution of a deceased wife's estate, between the husband, electing not to take under the will, and others, claiming under the will, the husband may show adultery of the wife by his own testimony, if it does not involve confidential communications. Hayes' Estate, 23 Pa. Super. Ct. 570.

24. De Leon v. Territory [Ariz.] 80 P. 348. The fact that the letter could not be secured from the wife, and that she could not offer it in evidence, authorizes proof of its contents by the sheriff, who read it. Id.

25. Marshall v. Marshall [Kan.] 80 P. 629.

26. German-American Ins. Co. v. Paul [Ind. T.] 83 S. W. 60.

27. See Sharswood's Blackstone, Bk. I, p. 443.

remove the common-law disqualification,[29] while in some jurisdictions husband and wife are competent, but not compellable, to give such testimony.[30] It is held in Illinois that the wife is competent if the husband's interest in the result is not direct, and if the record will not be legal evidence for or against him in any other action.[31] Under the Kentucky statute, the husband may testify in a proceeding in which the wife is interested, when the wife is not a witness.[32] It is held in Wisconsin that where the marital status has terminated, the former wife is under no disqualification merely because her former husband or his estate is party to the suit.[33] The wife is a competent witness in an action against the husband for necessaries furnished to her.[34] The Kansas statute disqualifying a husband or wife as a witness for or against each other in an "action," except in certain cases, does not disqualify the husband to testify in a probate proceeding;[35] and a husband who is a subscribing witness may testify to the due execution of a will, though his wife is a legatee.[36] In Vermont, a wife cannot testify in an action in the result of which her husband is interested,[37] except as to matters in which she acted as his agent.[38] In Michigan, a husband or wife is incompetent in a proceeding instituted by either on the ground of adultery.[39] In New Jersey, a husband or wife is competent to testify for the other in an action for divorce on the ground of adultery, but is not compellable to testify in such a proceeding, except as to the fact of marriage.[40]

In criminal prosecutions against one spouse,[41] the other was not a competent witness at common law; and this is the statutory rule in some states.[42] But the

28. Under Civ. Code Prac. § 606, the wife of an heir of a testator cannot testify for her husband in a will contest to which he is a party. Henning v. Stevenson, 26 Ky. L. R. 159, 80 S. W. 1135. Nor can she testify for other parties aligned with her husband, their interests being the same. Id. Husband incompetent to testify for wife as to transaction between wife and plaintiff, on issue whether a note left with his wife was a gift, or was left for collection. Wedding v. Wedding [Ky.] 87 S. W. 313.

29. A husband may testify to establish his wife's claim against his insolvent estate, under Code 1899, c. 130, § 22. First Nat. Bank v. Harris [W. Va.] 49 S. E. 252.

30. Since D. C. Code, § 1068, making husband and wife competent, is limited by § 964, which, in effect, requires, in divorce cases, evidence other than that of husband or wife alone to support a case. Lenoir v. Lenoir, 24 App. D. C. 160. C. D. Code, § 1068, makes wife competent, though the cause of action accrued and proceedings were commenced before its passage. Mallery v. Frye, 21 App. D. C. 105. [This statute applies to both civil and criminal proceedings. As to the latter, see following paragraph. Also 2 Curr. L. 2167, n. 47.—Editor.]

31. Phillips v. Poulter, 111 Ill. App. 330.

32. Code, § 606. The fact that her deposition was taken was immaterial when it was not read on the trial. Floore v. Green, 26 Ky. L. R. 1073, 83 S. W. 133.

33. Schultz v. Culbertson [Wis.] 103 N. W. 234.

34. Morgenroth v. Spencer [Wis.] 102 N. W. 1086.

35. Gen. St. 1901, § 4771 has reference to an "action," not to such an informal proceeding as this in the probate court. Lanning v. Gay [Kan.] 78 P. 810.

36. Lanning v. Gay [Kan.] 78 P. 810.

37. Payee of note, who transferred for consideration, is interested in result of action on note, and his wife cannot testify to making of note. Miller v. Stebbins [Vt.] 59 A. 844.

38. Wife held not to have executed note as agent of husband so as to be a competent witness for him. Miller v. Stebbins [Vt.] 59 A. 844.

39. Under Comp. Laws, § 10,213, in an action by a husband for alienation of the wife's affections, in which one count charged adultery, neither husband nor wife could testify. Knickerbocker v. Worthing [Mich.] 101 N. W. 540.

40. Construing P. L. 1900, pp. 362, 363; Evidence Act, §§ 2, 5. Schaab v. Schaab [N. J. Err. & App.] 57 A. 1090.

41. See 2 Curr. L. 2167, n. 44.

42. NOTE. Effect of marrying witness to prevent her from testifying: In the case of Moore v. State [Tex. Cr. App.] 67 L. R. A. 499, it is held that under the Texas statute, expressly prohibiting use of the wife as a witness against her husband, she cannot be so used, in a criminal prosecution against him, even though he married her for the purpose of suppressing her testimony. Citing Miller v. State, 37 Tex. Cr. Rep. 575, 40 S. W. 313; U. S. v. White, 4 Utah 499, 11 P. 570. Says the writer of the opinion: "It makes no difference at what time the relation of husband and wife begins. The exclusion of their testimony under our [Texas] statute, and to its fullest extent, operates wherever the interests of either are directly concerned (1 Greenl. Ev. § 334), and this although he married the witness after she was placed under process. State v. Armstrong, 4 Minn. 335, Gil. 251."—For note on the question collecting English and American cases, see 67 L. R. A. 499.

rule does not apply where the offense by one is against the person of the other.[43] A wife cannot testify for her husband in a criminal prosecution against him, although she was not his wife at the time the offense was committed.[44] The wives of two defendants, indicted and tried jointly for the same offense, are incompetent to testify for defendants.[45] The second wife of a bigamist, being no wife in law, is a competent witness against him.[46] The husband may testify when the wife, though implicated, is not a defendant.[47] The wife is a competent witness to prove a dying declaration of her husband.[48] In Missouri the marital relation does not disqualify, but may be considered as affecting credibility.[49]

(§ 4) *D. Miscellaneous relations.*[50]

§ 5. *Credibility, impeachment and corroboration of witnesses. A. Credibility in general.*[51]—The credibility of witnesses[52] and whether they have been successfully impeached[53] are questions for the jury. The jury may disregard the testimony of a witness who has willfully[54] sworn falsely to a material fact,[55] except

43. Husband may testify against his wife as to an assault upon his own person in which she participated. State v. Harris [Del.] 58 A. 1042. Wife may testify against husband in prosecution for threats to take her life. Murray v. State [Tex. Cr. App.] 86 S. W. 1024.

Contra: Wife is incompetent witness in prosecution of husband for assault with intent to rape, committed against the wife. Frazier v. State [Tex. Cr. App.] 86 S. W. 754.

44. Elmore v. State, 140 Ala. 184, 37 So. 156.

45. State v. Sargood [Vt.] 58 A. 971.

46. Murphy v. State [Ga.] 50 S. E. 48.

47. In prosecution for adultery, husband of woman with whom defendant is charged with living is competent to testify. Pruett v. State [Ala.] 37 So. 343.

48. Bright v. Commonwealth [Ky.] 86 S. W. 527. See, also, 2 Curr. L. 2167, n. 43.

49. In criminal prosecution defendant and his wife are competent witnesses for defendant; but jury may consider relation on credibility. State v. Lortz [Mo.] 84 S. W. 906.

50, 51. See 2 Curr. L. 2179.

52. State v. Dyer [Del.] 58 A. 947; Illinois Cent. R. Co. v. Smith, 111 Ill. App. 177; Acolia v. Elizabeth P. & J. R. Co. [N. J. Law] 57 A. 257; Hunt v. Dexter Sulphite Pulp & Paper Co., 91 N. Y. S. 279; State v. Wisnewski [N. D.] 102 N. W. 883; Kelton v. Fifer, 26 Pa. Super. Ct. 603; Smith v. Jackson Tp., 26 Pa. Super. Ct. 234; State v. Johnson, 36 Wash. 294, 78 P. 903. Instruction that jury might believe a witness, though impeached by proof of general bad character, held not erroneous. Ector v. State, 120 Ga. 543, 48 S. E. 315. Instruction that defendant's witnesses, being "sworn officers of the law" were entitled to more credit than plaintiff, erroneous. Durst v. Ernst, 91 N. Y. S. 13. The jury is not required as a matter of law to believe a witness, though uncontradicted and unimpeached. Hence an instruction cautioning the jury as to the weight to be given evidence of contradictory statements was held erroneous as invading the province of the jury. Bradley v. Gorham [Conn.] 58 A. 698. B. & C. Comp. § 693 provides that the direct evidence of one witness, who is entitled to full credit, is sufficient proof of a fact, except usage, perjury and treason; held, whether a fact is established by a witness is for the jury. State v. Leasia [Or.] 78 P. 328. Jury may consider opportunities of knowing things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest, probability or improbability of statements in view of all the other evidence, and facts and circumstances proven on the trial. Toledo, etc., R. Co. v. Fenstermaker [Ind.] 72 N. E. 561.

53. State v. Sharp, 183 Mo. 715, 82 S. W. 134. So that their testimony ought not to be believed, unless corroborated. Powell v. State [Ga.] 50 S. E. 369. The mere fact that an attempt was made to impeach or contradict a witness does not necessarily require the jury to disbelieve him. Franks v. State [Tex. Cr. App.] 87 S. W. 148. The jury may consider the omission of certain matters by a witness in his testimony on a former occasion, as affecting his credibility, even though he explains such omission by saying he was not examined as to such matters. An instruction to disregard the discrepancy, because of the explanation, held erroneous. State v. Rosa [N. J. Err. & App.] 58 A. 1010. Evidence held sufficient to sustain divorce case, though character of witnesses was assailed. Conner v. Pozo [La.] 38 So. 454. The purpose of payment of money to witnesses of a railroad accident by an agent of the railroad company, whether legitimate or to influence their evidence, is properly left to the jury. Enright v. Pittsburg Junction R. Co., 204 Pa. 543, 54 A. 317.

54. Entire testimony cannot be disregarded unless the false testimony was willfully false. Lee v. State [Ark.] 81 S. W. 385; Jackson v. Powell [Mo. App.] 84 S. W. 1132; Nielson v. Cedar County [Neb.] 97 N. W. 826; State v. Burns [Nev.] 74 P. 983. An instruction on the rule must contain the limitation that the false swearing must have been "willfully, knowingly and corruptly" done. Sardis & D. R. Co. v. McCoy [Miss.] 37 So. 706. Instruction to disregard testimony of witness if it was "palpable" that he had willfully testified falsely to a material fact, held error. West Chicago St. R. Co. v. Moras, 111 Ill. App. 531.

55. False testimony must relate to material issue. Weddemann v. Lehman, 111 Ill. App. 231.

in so far as such witness has been corroborated by credible evidence,[56] or by facts and circumstances proven upon the trial.[57] This rule does not require the jury to believe the corroborating evidence before considering it.[58] To warrant an instruction to the jury on this rule, the evidentiary facts and circumstances must tend to show that there was willfully false swearing,[59] and whether the rule is applicable to the evidence in the case is primarily a question for the trial court, and not for the jury.[60] Willfully false swearing is not to be imputed to a witness if discrepancies, conflicts and inconsistencies are explainable as honest mistakes.[61]

Impeaching and discrediting in general.[62]—The extent to which cross-examination of a witness for the purpose of testing his credibility may be carried,[63] limitation of the number of impeaching witnesses,[64] and permission to recall a witness, in order to lay the foundation for impeaching him,[65] are matters within the discretion of the trial court. A witness may be impeached by disproving facts testified to by him,[66] as by showing acts,[67] or statements[68] of the witness, or circumstances[69] inconsistent with such testimony.[70] Inherent improbabilities in the testimony of a witness may also be considered.[71] That a witness was drunk on the

56. Instruction stating the rule held fatally erroneous because requiring corroboration by "any other witness" instead of by "credible evidence." Hart v. Godkin [Wis.] 100 N. W. 1057. Instruction giving rule and calling for corroboration by "credible witnesses" held error, since corroboration by single witness may be sufficient. Weddemann v. Lehman, 111 Ill. App. 231.

57. General rule stated. Chicago & A. R. Co. v. Kelly, 210 Ill. 9, 71 N. E. 355. Instruction held to correctly state the law. State v. Waln [Idaho] 80 P. 221. Instruction laying down general rule held proper and applicable to facts. Strickler v. Gitchel, 14 Okl. 523, 78 P. 94. Instruction on rule held favorable to excepting party and not cause for reversal. Tucker v. Central of Georgia R. Co. [Ga.] 50 S. E. 128. A charge, that "if any witnesses have made contradictory statements as to material facts in this case, this may, in the discretion of the jury, create a reasonable doubt as to the truth of the evidence of such witnesses," is incorrect. (Overruling previous cases holding this instruction proper.) Brown v. State [Ala.] 38 So. 268.

58. Instruction permitting jury to disregard all the evidence of a witness who willfully swore falsely to a material fact, unless they believed the corroborating evidence, held erroneous. Chicago & A. R. Co. v. Kelly, 210 Ill. 449, 71 N. E. 355.

59. Evidence held not to warrant instruction. Pumorlo v. Merrill [Wis.] 103 N. W. 464.

60, 61. Pumorlo v. Merrill [Wis.] 103 N. W. 464.

62. See 2 Curr. L. 2181.

63. Nathan v. Uhlmann, 101 App. Div. 388, 92 N. Y. S. 13. See Examination of Witnesses, 3 Curr. L. 1383.

64. Donaldson v. Dobbs [Tex. Civ. App.] 80 S. W. 1084. See, also, Trial, 4 Curr. L. 1708.

65. Savage v. Bowen [Va.] 49 S. E. 668. See, also, Trial, 4 Curr. L. 1708.

66. Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650. Where tenant testified that a lease was set aside and that he occupied under an oral agreement, the lease was admissible to impeach him. Quandt v. Smith [Wash.] 80 P. 287.

67. A witness who testifies that a timber is too small to bear a certain weight may be contradicted by showing that he afterwards used timbers of the same size for scaffolds. Charping v. Toxaway Mills [S. C.] 50 S. E. 186. Where defendant in prosecution for using abusive language testified that he never swore, evidence that he had sworn on certain occasions and had settled other prosecutions by pleading guilty was competent. Lampkin v. State [Tex. Cr. App.] 85 S. W. 803. Where, after death of a testatrix, her son took her land as heir and conveyed to plaintiff, not probating the will which gave the property to his children, and, after his death, his wife proved the will as attesting witness, it may be shown that she joined in the deed to plaintiff, for the purpose of impeaching her. Savage v. Bowen [Va.] 49 S. E. 668.

68. See § 5 D, post. President of corporation having testified that he did not notify a director of a meeting, his statement at the meeting giving the reason for the director's absence, being inconsistent with his testimony, is competent to impeach him. Indianapolis, etc., R. Co. v. Hubbard [Ind. App.] 74 N. E. 535. The state may impeach a witness for the defense by bringing out statements in cross-examination inconsistent with those made in the direct examination, and by other competent evidence. Hicklin v. Territory [Ariz.] 80 P. 340.

69. Testimony as to execution of alleged lost lease held discredited by circumstances. Hawatt v. Green [Mich.] 102 N. W. 734. Fact that part of a track had been worked after a steer had been killed there, admissible on credibility of witnesses who testified to nonexistence of hoof prints on the track. Klay v. Chicago, etc., R. Co. [Iowa] 102 N. W. 526.

70. Testimony that witness was asked by a certain person to sign a paper cannot be contradicted by testimony that he was asked to sign by another, the two facts not being inconsistent. Clemens v. Kaiser, 211 Ill. 460, 71 N. E. 1055.

71. Rosenbloom v. Cohen, 91 N. Y. S. 382.

occasion as to which he is called upon to testify goes to his credibility and the weight of his testimony but not to his competency.[72] Dying declarations may be impeached in any of the modes by which the evidence of the deceased could have been impeached had he or she been alive and testifying on the witness stand.[73] When a showing is made for an absent witness, he may be impeached by showing his general character, though proof of contradictory statements cannot be made, since no predicate can be laid.[74]

Where evidence is admissible only to impeach a witness, being irrelevant or immaterial on the issues, its effect should be limited by proper instructions to the jury.[75]

A party cannot impeach his own witness[76] unless he has been surprised[77] or entrapped[78] by the witness. But a party calling a witness is not bound to accept his testimony as true, but may prove a different state of facts by other evidence,[79] and this is commonly done where the witness is the adverse party[80] or proves to be hostile.[81] A party may maintain the truthfulness of his own testimony, though contradicted by his witnesses.[82] Though a witness was used before the grand jury, this does not preclude impeachment by the state, when the witness is used by defendant, by showing contradictory statements made before the grand jury.[83] The Virginia statute permitting the party calling a witness to cross-examine such witness, or to show the truth by other witnesses, applies to criminal as well as civil

72. State v. Sejours, 113 La. 676, 37 So. 599.

73. As by showing bad character of declarant. Nordgren v. People, 211 Ill. 425, 71 N. E. 1042. Dying declarations may be impeached by showing contrary statements made to others after deceased had been wounded. Gregory v. State, 140 Ala. 16, 37 So. 259.

74. Gregory v. State, 140 Ala. 16, 37 So. 259.

75. Mann v. Balfour [Mo.] 86 S. W. 103. For full treatment of the subject, see Instructions, 4 Curr. L. 133.

76. See 2 Curr. L. 2181. Where state called a witness who testified in favor of defendant, evidence to impeach him was held improperly admitted, since the state had not been entrapped into calling a hostile witness. Dunk v. State [Miss.] 36 So. 609. In a criminal prosecution the state cannot substitute for his present testimony the testimony given by one of its witnesses on a former prosecution, nor discredit its own witness by the use of such former testimony. State v. Callahan [S. D.] 99 N. W. 1099. Plaintiff may show bias of a witness first called by him where witness' first material testimony is brought out by defendant. Fine v. Interurban St. R. Co., 91 N. Y. S. 43. Defendant cannot impeach the witness as to testimony so brought out by him. Id. Evidence as to which party summoned a witness is competent to show that that party thought the witness worthy of credence. Richmond & P. Electric R. Co. v. Rubin [Va.] 47 S. E. 834.

77. Steinke v. State [Tex. Cr. App.] 86 S. W. 753.

78. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143.

79. Moultrie Repair Co. v. Hill, 120 Ga. 730, 48 S. E. 143; Stout v. Sands [W. Va.] 49 S. E. 428. State not bound by every statement of its witnesses. State v. Boice [La.] 38 So. 584. Party who introduces witness may show by other evidence existence of facts which contradict testimony of witness. Joyce v. St. Louis Transit Co. [Mo. App.] 86 S. W. 469. Defendant, in action for injury caused by defective highway, held not conclusively bound by admission of town chairman called by it, so as to preclude its showing the condition of the highway by other witnesses. Kennedy v. Town of Lincoln [Wis.] 99 N. W. 1038.

80. The rule that a party cannot impeach his own witness does not prevent a defendant from discrediting statements of plaintiff, after calling plaintiff as a witness, by proof of contradictory statements on a former trial. Carney v. Hennessey [Conn.] 60 A. 129. There is said to be a difference between introducing evidence to establish a particular fact contrary to that testified to by a party's witness, and evidence introduced to impeach a witness. Ruhl v. Heintze, 97 App. Div. 442, 89 N. Y. S. 1031. Thus one who has called the adverse party, is not bound by his testimony, so as to be precluded from contradicting the witness as to material facts in his case. Id.

81. If a witness called be hostile, the actual facts may be shown by other testimony, though the hostile witness is thereby contradicted. Hetzel v. Easterly, 96 App. Div. 517, 89 N. Y. S. 154. One who calls adversary's servant vouches for his general credibility, but may contradict particular statements. Mead v. Otto Huber Brewery, 93 N. Y. S. 244.

82. As where plaintiff's testimony was contradicted by cross-examination in depositions taken by the adverse party, and read by the plaintiff. McDonald v. Smith [Mich.] 102 N. W. 668.

83. State v. Brown [Iowa] 102 N. W. 799.

cases.[84] Under the Kentucky statute a party introducing a witness may impeach him by proof of contrary statements out of court.[85]

A witness cannot be contradicted or impeached as to collateral matters[86] which are irrelevant,[87] immaterial,[88] or incompetent,[89] since the party who brings out such matters makes the witness his own to that extent, and is bound by his testimony.[90] This is the rule, whether the evidence relating to such matters was brought out on cross-examination, as it usually is, or on the direct examination,[91] and whether the witness gave it voluntarily or in response to questions calling for it.[92]

(§ 5) *B. Character and conduct of witnesses.* 1. *In general.*[93]—Proof of the general moral character of a witness is usually held incompetent,[94] attacks on the credibility of witnesses being confined to their reputation for truth and veracity.[95] But in some jurisdictions the general moral character of the witness may be shown,[96] though such proof should be confined as closely as possible to the time

84. Code 1904, § 3351. McCue v. Commonwealth [Va.] 49 S. E. 623.

85. Code, § 596. Whitt v. Commonwealth [Ky.] 84 S. W. 340.

86. Lambert v. Hamlin [N. H.] 59 A. 941; Plunkett v. State [Ark.] 82 S. W. 845; Sullivan v. State, 121 Ga. 183, 48 S. E. 949; Davis v. State [Miss.] 37 So. 1018. Where defendant is cross-examined as to other offenses, in a criminal prosecution for manslaughter, the prosecution cannot thereafter contradict the evidence so brought out. People v. De Garmo, 179 N. Y. 130, 71 N. E. 736.

87. Dunk v. State [Miss.] 36 So. 609; Wojtylak v. Kansas & T. Coal Co. [Mo.] 87 S. W. 506; Miller v. State [Tex. Cr. App.] 83 S. W. 393. Proof of statements, denied by witness, immaterial to any issue, cannot be made to contradict the witness. Yelton v. Black, 26 Ky. L. R. 885, 82 S. W. 634. Statements inconsistent with witness' testimony must be relevant to the issue, and must be of matters of fact, and not mere opinions. Construing Rev. St. 1887, § 6083, relative to impeachment by inconsistent statements. State v. Crea [Idaho] 76 P. 1013.

88. State v. Wasson [Iowa] 101 N. W. 1125; Fox v. State [Tex. Cr. App.] 87 S. W. 157.

89. A witness having denied that she expressed an opinion that accused was guilty, could not be contradicted by another witness. Parker v. State [Tex. Cr. App.] 80 S. W. 1008. A witness who has given an opinion on the soundness of mind of a testatrix based on observations a year before execution of the will cannot be impeached by a declaration after testatrix's death, based, apparently, only on provisions of the will. Myers v. Manlove [Ind.] 71 N. E. 893. Witness who testified to threats by prosecutor could not be impeached on cross-examination by calling for the exact language used. Simpson v. State [Tex. Cr. App.] 87 S. W. 826.

90. Cross-examiner is bound by answers as to irrelevant matters. Simms v. Forbes [Miss.] 38 So. 546; Mason v. State [Tex. Cr. App.] 81 S. W. 718. Denial by witness that he had been charged with larceny conclusive; he could not be contradicted. Coleman v. Southern R. Co. [N. C.] 50 S. E. 690. Witness, on cross-examination, denied making a certain statement; he could not be impeached by testimony that he had made the statement. The Saranac, 132 F. 936. Plaintiff's attorney having on cross-examination, questioned a witness as to declarations not touched by the direct examination, and the witness having denied making the declarations, the witness could not thereafter be impeached by proving the declarations were made, and what they were. Dorry v. Union R. Co., 93 N. Y. S. 637; McGurk v. New York City R. Co., 93 N. Y. S. 1081.

91, 92. Lambert v. Hamlin [N. H.] 59 A. 941.

93. See 2 Curr. L. 2182.

94. Credibility cannot be impeached by showing that witness is immoral in other respects. Camden & S. R. Co. v. Rice [C. C. A.] 137 F. 326. Improper to show separation from family and immoral character. Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195. Evidence that claimant had another husband living when she married decedent, and that she was unchaste, inadmissible. Taylor v. Taylor's Estate [Mich.] 101 N. W. 832. Proof that plaintiff was a "double grass widow" incompetent to impeach her as a witness. Edger v. Kupper [Mo. App.] 85 S. W. 949. Questions to a female witness on cross-examination, imputing want of chastity, held not reversible error, being put in the bona fide belief that they were competent. Knickerbocker v. Worthing [Mich.] 101 N. W. 540.

95. In civil cases. Smith v. Johnson, 3 Ohio N. P. (N. S.) 8.

96. When an accused takes the stand, he may be cross-examined not only as to his character for truth, but as to his general moral character. Helm v. Commonwealth, 26 Ky. L. R. 165, 81 S. W. 270. Where a witness is introduced to impeach another witness by evidence that his general moral character is bad, the opposite party may, in reply, attack the general character of the impeaching witness. Dunn v. Commonwealth [Ky.] 84 S. W. 321. Under Code, § 4614, general moral character of prosecutrix in action for seduction may be shown. State v. Haupt [Iowa] 101 N. W. 739. Evidence that plaintiff's reputation for morality was bad in her neighborhood, and that a certain person had made specific charges of immorality against her, held admissible. Hofacre v. Monticello [Iowa] 103 N. W. 488. Evidence of a bad reputation of a witness, and of specific charges of immorality against her, having been introduced, testimony of the person said to have made such

of trial.[97] Proof of specific acts of wrongdoing is incompetent to impeach the reputation of a witness.[98] When the reputation of a witness for truth has been assailed for a period of time, the party calling him may show his reputation during that period, and also in previous years.[99] The occupation or vocation of witness may be inquired into.[1] The extent of cross-examination of a witness as to his previous life and character, as bearing upon his credibility, is very largely discretionary with the trial court.[2] A person who knows nothing of a witness, except what one person thinks or says of him, is not qualified to testify as to the general reputation of such witness.[3] A father may testify to the good character of his son.[4]

(§ 5B) 2. *Accusation and conviction of crime.*[5]—Proof of conviction of a felony,[6] and in some states of a misdemeanor,[7] if it involves moral turpitude,[8] is admissible on the question of credibility. A statute permitting conviction of an infamous crime to be shown as affecting credibility, but not to disqualify the witness, makes admissible only conviction of crimes which at common law would have worked a disqualification.[9] Evidence of conviction is inadmissible until the witness has denied it.[10] Under the Illinois statute, permitting the fact of conviction of a crime to be shown as affecting the credibility of a witness, the guilt or innocence of defendant of the crime of which he was convicted, his punishment, term of service, and subsequent pardon, are incompetent and immaterial.[11] Cross-examination of a defendant in a criminal proceeding as to his confinement in a state prison is discretionary with the trial court.[12]

Indictment for an offense not involving moral turpitude cannot be sown.[13]

charges that he did not make them, was incompetent, as introducing a collateral issue. Id.

97. State v. Haupt [Iowa] 101 N. W. 739.

98. That witness was a defaulter and had been arrested for failure to provide for his family inadmissible. List's Ex'x v. List, 26 Ky. L. R. 691, 82 S. W. 446. Proof that a witness swore to a lie on a particular occasion incompetent; proof should have been confined to general reputation for truth and morality. Mount v. Commonwealth [Ky.] 86 S. W. 707. General reputation in neighborhood for chastity and virtue admissible to affect credibility of female witness; but not evidence of specific acts of immorality. Wright v. Kansas City [Mo.] 86 S. W. 452. The examination must be confined to general reputation and not be permitted as to particular facts. Deck v. Baltimore & O. R. Co. [Md.] 59 A. 650.

99. Dimmick v. United States [C. C. A.] 135 F. 257.

1. Curtis v. State [Tex. Cr. App.] 81 S. W. 29.

2. State v. Nergaard [Wis.] 102 N. W. 899. In prosecution for violating fish laws, a question whether defendant had not been previously arrested for a similar offense, and his answer that he had been arrested once and fined, held not to require reversal. Id. Where it had been shown that witness had formerly used liquor in excess, it was proper to refuse to compel him, on cross-examination, to tell how many times he had taken the "Keeley cure" or had had "snakes." Woods v. Dailey, 211 Ill. 495, 71 N. E. 1068.

3. City of South Bend v. Turner [Ind.] 71 N. E. 657.

4. Brown v. State [Ala.] 38 So. 268.

5. See 2 Curr. L. 2184.

6. Gray v. State [Tex. Cr. App.] 86 S. W. 764. See 2 Curr. L. 2184, n. 25.

7. As in Missouri. See 2 Curr. L. 2184, n. 26.

8. Conviction of a crime involving moral turpitude may be shown. Powell v. State [Ga.] 50 S. E. 369. Proof of conviction and punishment for an aggravated assault on wife competent. Curtis v. State [Tex. Cr. App.] 81 S. W. 29. Charge of simple assault in justice's court incompetent. Gray v. State [Tex. Cr. App.] 86 S. W. 764. Conviction of forcible trespass competent. Coleman v. Southern R. Co. [N. C.] 50 S. E. 690. Defendant in burglary prosecution having taken the stand could be impeached by proof of conviction of petit larceny. Smith v. State [Ark.] 85 S. W. 1123.

9. Under Code 1896, § 1795, conviction for manslaughter in first degree admissible; conviction for throwing stones into train not admissible, though made a felony by statute under some circumstances. Gordon v. State [Ala.] 36 So. 1009. In a prosecution for selling liquor without a license, a witness for defendant cannot be asked if he was under indictment for "public drunkenness." Wilkerson v. State, 140 Ala. 165, 37 So. 265.

10. Construing Code 1892, § 1746. Cook v. State [Miss.] 38 So. 110.

11. Gallagher v. People, 211 Ill. 158, 71 N. E. 842. See 2 Curr. L. 2184, n. 30, for contra decision.

12. Lang v. United States [C. C. A.] 133 F. 201.

13. Evidence that defendant in prosecution for violation of local option laws, is under indictment for the same offense elsewhere is inadmissible to impeach him. Hays v. State [Tex. Cr. App.] 82 S. W. 511. That witness had been indicted for card playing

That a witness has been indicted for perjury cannot be proved at the trial in which he is charged with having perjured himself.[14]

(§ 5B) 3. *Competency of evidence as to reputation for veracity.*[15]

(§ 5B) 4. *Examination of impeaching witnesses.*[16]—When proof of a former contradictory statement is sought to be made, the impeaching question must conform to the time and place specified in the question to the witness in laying the foundation for the impeachment.[17] In examining one witness for the purpose of laying a predicate for showing the bad character of another, it is proper to ask if he knew the general character of witness in the neighborhood where he lived.[18] It is improper to ask if he knew the general character of the witness as a turbulent, violent, and boisterous man.[19]

(§ 5) *C. Interest and bias of witnesses.*[20]—On the issue of credibility, it is proper to show that a witness is interested in the event of the action,[21] or is biased,[22] for other reasons. Thus, evidence showing ill will or hostility is competent.[23] The

incompetent. Webb v. State [Tex. Cr. App.] 83 S. W. 394.

14. Bennett v. State [Tex. Cr. App.] 81 S. W. 30.

15. See 2 Curr. L. 2185.

16. See 2 Curr. L. 2186.

17. Stancliff v. United States [Ind. T.] 82 S. W. 882.

18, 19. Ross v. State, 139 Ala. 144, 36 So. 718.

20. See 2 Curr. L. 2186.

21. Evidence that the defendant carried employers' liability insurance is incompetent as affecting the credibility of defendant's testimony in a personal injury action by an employe, since that fact would tend to strengthen rather than weaken his testimony. Iverson v. McDonnell, 36 Wash. 73, 78 P. 202. Interest of executor and proponent of will, and beneficiary, may be considered as affecting credibility of testimony as to testamentary capacity in probate proceedings. Grant v. Stamler [N. J. Eq.] 59 A. 890. Defendant may show that witness for plaintiff, and plaintiff, had brought a suit in equity to quiet title to property against defendant, the source of title to property claimed being the same as of the property in suit. Couch v. Couch [Ala.] 37 So. 405. Where the assignor is examined in an action by the assignee of a claim, he may properly be cross-examined as to whether he may have an interest in the event of the suit. Hirsh v. American Dist. Tel. Co., 92 N. Y. S. 794. In a personal injury action by a servant, evidence that defendant carries employers' liability insurance is incompetent to show the interest of the president of defendant as a witness. Lowset v. Seattle Lumber Co. [Wash.] 80 P. 431. Plaintiff may show that a witness for defendant was the active agent in procuring a person to negotiate with the judge in a former trial in attempting to secure a corrupt decision for defendant. Finlen v. Heinze [Mont.] 80 P. 918.

22. Taylor v. State, 121 Ga. 348, 49 S. E. 303. An instruction that jury might consider the "bias or impartiality" of witnesses "as the same may legitimately appear from the evidence" is proper. Macon R. & Light Co. v. Barnes, 121 Ga. 443, 49 S. E. 282. Error to reject evidence tending to show bias or prejudice of witness for or against defendant. State v. Crea [Idaho] 76 P. 1013. In a suit by a passenger for damages, involving misconduct of a flagman, the fact that plaintiff was a witness in another case involving misconduct of the flagman may be shown to prove bias of the flagman as a witness. Robertson v. Louisville & N. R. Co. [Ala.] 37 So. 831. Affidavits for continuance on ground of absent witnesses competent to impeach two witnesses who testified to facts related in affidavits but were not the persons there named, since this was evidence tending to show they were "trumped-up" witnesses. Malin v. Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S. W. 56.

Evidence held too remote on issue of bias: Evidence that witness, in homicide case, traded with deceased, who kept a grocery store, not admissible to show interest. Williams v. State, 140 Ala. 10, 37 So. 228. Refusal of court to allow evidence to show relation of attorney and client between a witness and counsel for plaintiff held not an abuse of discretion. Birmingham Southern R. Co. v. Lintner [Ala.] 38 So. 363. It is not competent, as tending to show bias of a witness, to prove that the prosecuting attorney made a plea for clemency in another case in which witness was defendant. Harrell v. State, 121 Ga. 607, 49 S. E. 703. Where it appears that a witness is a detective regularly employed by an agency, and that his continued employment does not depend upon conviction in the case in which he testifies, evidence as to the amount of his salary is properly excluded. White v. State, 121 Ga. 191, 48 S. E. 941. A physician, testifying as to personal injuries in an action for negligence, cannot be cross-examined as to opinions given in other personal injury actions (Chicago, etc., R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050); nor can his interest as a medical man in other suits be shown by the direct testimony of other witnesses (Id.).

23. Letter by plaintiff showing ill will toward defendant admissible. Lembeck v. Stiefel [N. J. Err. & App.] 59 A. 460. Unfriendliness of witness toward party. Seymour v. Bruske [Mich.] 103 N. W. 613. Evidence of a wife as to her hostility toward her husband is competent to impeach her as a witness in an action against the husband for necessaries furnished her. Fischer

extent to which an examination into the feeling existing between a witness and a party may properly be carried is largely discretionary with the trial court,[24] but details of difficulties between them should be excluded,[25] and the motives for ill feeling, and whether it ought or ought not to exist, are immaterial.[26] Evidence to show hostility of a witness having been introduced, evidence of an attempt by the party to conciliate him is admissible.[27] It is proper to inquire whether a witness is an employe of a party,[28] and whether the witness is paid for his testimony.[29] In a criminal prosecution it may be shown that a witness is under indictment for the same offense of which defendant is accused.[30] The acts of third parties intimidating a witness or influencing his testimony cannot be shown against an accused unless he is connected with those acts.[31]

(§ 5) *D. Proof of previous contradictory statements.*[32]—Prior statements of witnesses inconsistent with their testimony upon material issues are always competent as impeaching evidence.[33] Thus, oral statements out of court,[34] statements in letters,[35] affidavits,[36] depositions,[37] pleadings,[38] and bankruptcy schedules,[39] have

v. Brady, 94 N. Y. S. 25. Proof that state's witness had opposed the signing of a petition for pardon of accused, stating that he wanted accused hung, and that deceased was his friend, held competent. Creeping Bear v. State [Tenn.] 87 S. W. 653.

24. Seymour v. Bruske [Mich.] 103 N. W. 613.

25. Though unkindly feelings of state's witness toward defendant may be shown, it is improper to go into details of a difficulty between witness and defendant. McDuffie v. State, 121 Ga. 580, 49 S. E. 708. Where defense shows an assault on defendant by witness, to show bias, the state cannot show the details of the trouble. Gainey v. State [Ala.] 37 So. 355.

26. Seymour v. Bruske [Mich.] 103 N. W. 613.

27. Commonwealth v. Oakes, 187 Mass. 90, 72 N. E. 323.

28. Stowe v. La Conner Trading & Transportation Co. [Wash.] 80 P. 856; Central of Georgia R. Co. v. Bagley, 121 Ga. 781, 49 S. E. 780.

29. That a medical expert is paid by plaintiff affects the witness's credibility but not his competency. Wood v. Metropolitan St. R. Co., 181 Mo. 433, 81 S. W. 152. Where physician testified that he refused to come into court until paid, and that plaintiff's attorney sent him a check, it was proper to inquire how much he was paid. Brown v. Interurban St. R. Co., 94 App. Div. 374, 87 N. Y. S. 461.

Contra: Question whether witness for state paid his own expenses in coming to testify, and how much it cost him, inadmissible to show bias. Parrish v. State, 139 Ala. 16, 36 So. 1012.

30. That witness for state knew he was indicted. State v. Rosa [N. J. Err. & App.] 58 A. 1010. Whether defendant's witness had not been indicted. Wilkerson v. State, 140 Ala. 165, 37 So. 265.

31. Election of witness to position in corporation, after a homicide, inadmissible unless accused's connection with such election is shown. Swain v. State [Tex. Civ. App.] 86 S. W. 335.

32. See 2 Curr. L. 2187.

33. Under Code Civ. Proc. § 2052, a witness may be impeached by statements made at other times inconsistent with present testimony. Western Union Oil Co. v. Newlove, 145 Cal. 772, 79 P. 542. Oral statements out of court, letters, affidavits, written statements, verified pleadings, depositions, and previous testimony, are admissible to impeach a witness if material to the issue on which he is testifying, and if they tend to contradict or discredit him. Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12. Witness held sufficiently identified as man who had made contradictory statements, so as to admit impeaching evidence by proof thereof. Spencer Shoe Co. v. Jaramillo [Tex. Civ. App.] 84 S. W. 241.

34. State v. Lockhart [Mo.] 87 S. W. 457; Villineuve v. Manchester St. R. [N. H.] 60 A. 748; State v. Exum [N. C.] 50 S. E. 283. Statements of complaining witness the day after the assault. Thompson v. State [Tex. Cr. App.] 85 S. W. 1059. Declarations of witness to third persons contrary to testimony as to character of prosecutrix. Jordan v. State, 120 Ga. 864, 48 S. E. 352. Statements contradictory to testimony admissible to impeach, though not as res gestae. Sentell v. Southern R. Co. [S. C.] 49 S. E. 215. Statements by driver of wagon after collision. Burke v. Borden's Condensed Milk Co., 90 N. Y. S. 527. Declarations of employe after an accident. Columbus R. Co. v. Peddy, 120 Ga. 589, 48 S. E. 149. Statement of former owner after sale of property on foreclosure, in suit by subsequent holders to quiet title. Severson v. Gremm, 124 Iowa, 729, 100 N. W. 862. Where witness testified that he stole goods—the offense for which defendant was indicted—and that defendant was not with him and did not assist, he could be impeached by proving that he had said defendant was with him. Cage v. State [Ark.] 84 S. W. 631. Proper predicate having been laid in cross-examination of witness for defendant, in homicide case, state could in rebuttal prove that witness said before the murder that she was going to have defendant kill her husband; and that, after the murder, she told others that defendant had shot deceased through the window; witness having testified to the contrary, and having denied making the statements. Jones v. State [Ala.] 37 So. 390.

35. Eatman v. State [Fla.] 37 So. 576.

been held admissible. Statements of witnesses, under oath, in a judicial proceeding,[40] as in a preliminary examination,[41] or on a former trial,[42] are competent. Where contradictory statements on a former trial are shown by one party, the other party may show the mental condition of witness while making such statements.[43] It is proper, in examining a witness as to previous testimony given under commission, if he did not procure a witness to corroborate a statement then made, this being a circumstance going to his credibility.[44] To show previous inconsistent testimony in another proceeding, the stenographer who took the testimony is a competent witness, and may refresh his memory from his longhand transcript of the evidence taken.[45]

Foundation for proof of contradictory statements.[46]—A predicate for proof of oral statements is usually laid by inquiring of the witness whether he made a certain statement,[47] specifying in such preliminary question the time and place of such statement, the person to whom made, and the language used.[48] If the witness then denies making the statement,[49] or makes an evasive answer,[50] it is proper to show that he did make it, by other evidence. But it is only where there is a

Letters by an agent to his principal admissible to discredit the agent's testimony; their effect should have been limited to impeachment. Fred W. Wolf Co. v. Galbraith [Tex. Civ. App.] 87 S. W. 390. Note properly admitted to impeach a witness, if jury found he wrote it. Estes v. State, 140 Ala. 151, 37 So. 85.

36. Affidavit before a justice, stating facts relative to a murder, held competent to corroborate one witness and to impeach another, both having stated that it was correct at the time. State v. Exum [N. C.] 50 S. E. 283.

37. Original statement in deposition, before correction of deposition as used, held admissible to impeach testimony as given on trial. Gasquet v. Pechin, 143 Cal. 515, 77 P. 481.

38. Fox v. Erbe, 91 N. Y. S. 832.

39. Schedules of property filed in bankruptcy competent to impeach testimony of plaintiff that defendant owed him for services performed before he was adjudged a bankrupt. Rand v. Sage [Minn.] 102 N. W. 864.

40. Statements made by debtor in his examination in supplementary proceedings competent to contradict him as witness in other case. Fox v. Erbe, 91 N. Y. S. 832. A witness may be impeached by showing that he has testified in another proceeding involving the same subject-matter, different from and inconsistent with his testimony sought to be impeached. Harmon v. Territory [Okl.] 79 P. 765.

41. Contradictory statements before grand jury. Gallegos v. State [Tex. Cr. App.] 85 S. W. 1150. Contrary statement formerly made by witness for state on preliminary trial may be considered by jury as affecting credibility. Wilkerson v. State, 140 Ala. 165, 37 So. 265. Prosecutrix for rape, on trial, denied statements made in preliminary examination; held, former statements competent to impeach, but not as substantive testimony of guilt. People v. Miner [Mich.] 101 N. W. 536.

42. Testimony of witness at former trial competent to impeach testimony at second. Field v. Schuster, 26 Pa. Super. Ct. 82.

43. Weaver v. State [Tex. Cr. App.] 81 S. W. 39.

44. Joseph Joseph & Bros. Co. v. Schonthal Iron & Steel Co., 99 Md. 382, 58 A. 205.

45. Use of carbon copy of such transcript proper. Harmon v. Territory [Okl.] 79 P. 765.

46. See 2 Curr. L. 2189.

47. **Contra:** In New Hampshire it is not necessary to lay a foundation for impeaching evidence, consisting of statements out of court, by inquiring of the witness on cross-examination whether he has made the declarations of which it is proposed to offer proof. Opportunity to explain after such proof has been put in is held to meet the rule that the witness should be given an opportunity to explain by calling attention to circumstances. Villineuve v. Manchester St. R. [N. H.] 60 A. 748.

48. Time, place, and language used must be specified. Stancliff v. United States [Ind. T.] 82 S. W. 882. Time, place, and person to whom made. State v. Marks [S. C.] 50 S. E. 14. Question held properly excluded because not specifying time or place. Bradley v. Gorham [Conn.] 58 A. 698. Foundation for inconsistent statements must be laid by asking witness if he made the statements, and the statements must be related to him. Western Union Oil Co. v. Newlove, 145 Cal. 772, 79 P. 542. A question as to a previous contradictory statement is improper until the attention of the witness has been called to the conversation in which it is claimed to have been made. State v. Brady [N. J. Law] 59 A. 6. A question to a witness, in a prosecution for burning a house, whether his testimony was the same as when he testified to the burning of another house "for which defendant had been acquitted," held too indefinite to serve for impeaching the witness; and could not be considered an offer to prove acquittal of defendant on the other charge. Mitchell v. State, 140 Ala. 118, 37 So. 76.

49. Gregory v. Wabash R. Co. [Iowa] 101 N. W. 761; Wilson v. United States [Ind. T.] 82 S. W. 924.

50. Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443.

denial, direct or qualified, of the former statement, that proof of such statement can be introduced.[51]

When it is sought to impeach a witness by proof of written statements, the writing should be introduced in evidence before being read,[52] its genuineness should be established,[53] and the witness should be allowed to inspect it.[54] If the writing contains no matter which is irrelevant or immaterial or which does not go to contradict the witness, it should be admitted and allowed to be read in its entirety.[55] But if it contains much irrelevant or incompetent matter, only the relevant and competent portions should be received and read.[56] An objection to such a writing should be directed specifically against the portions claimed to be improper.[57] Unless the witness admits the writing, no examination as to its contents can be had.[58] Where it is sought to impeach a witness by an affidavit, and witness cannot read, it is proper to refuse to allow counsel to read the affidavit to witness, in order to find out if he signed it, until the jury has been sent from the room.[59] It is error to permit a witness to be impeached by the reading of what purports to be evidence before the grand jury, without proof that witness had read the testimony or heard it read, or that he had so testified.[60]

A witness sought to be impeached may explain contradictory statements proved against him,[61] and the party calling him has also the right to re-examine him in explanation of the contradiction.[62] The opposite party has at least the right to present to the witness an opportunity for explanation, and to show that the witness is either unable or unwilling to make any explanation, if such be the fact.[63]

51. Dean v. State [Tex. Cr. App.] 83 S. W. 816. When a witness confesses to have made contradictory statements, and admits what they were, evidence of the contradiction is inadmissible. Id. Where witness admitted signature to evidence given on preliminary trial, which contradicted testimony given on the trial, but denied that his former testimony had been correctly taken down, he could be contradicted only as to such denial; and the former evidence was properly excluded. Mitchell v. State [Ark.] 83 S. W. 1050.

52. Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12; Villineuve v. Manchester St. R. [N. H.] 60 A. 748. Written contradictory statements should be introduced in rebuttal and not on cross-examination. But reversal of this order is not cause for reversal of the judgment. Chicago City R. Co. v. Matthieson, 212 Ill. 292, 72 N. E. 443.

53. The genuineness and authorship of a letter claimed to have been written by a witness must be established before it can be used to impeach him. Burton v. State [Ala.] 37 So. 435.

54. McDonald v. Bayha [Minn.] 100 N. W. 679.

55. Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12.

56. No hard and fast rule can be laid down; the character of the particular writing must guide the court. Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12. [See this case for discussion of procedure in introducing oral or written impeaching evidence. And see 2 Curr. L. 2191, n. 13, for contra opinion in court below, and another contra holding. —Editor.]

57. Exclusion of all of a written statement, on a general objection held erroneous. Hanlon v. Ehrich, 178 N. Y. 474, 71 N. E. 12.

58. Villineuve v. Manchester St. R. [N. H.] 60 A. 748.

59. Robinson v. State, 120 Ga. 311, 47 S. E. 968.

60. Nash v. State [Ark.] 84 S. W. 497.

61. Witness may explain contradictory testimony on a former trial of the same case. Spearman v. Sanders, 121 Ga. 468, 49 S. E. 296. A witness may explain former testimony but cannot tell "what he meant" by his statements. Couch v. Couch [Ala.] 37 So. 405. A statement introduced into a case by a party may be explained by the witness who made it. State v. Taylor [W. Va.] 50 S. E. 247. The admission of part of evidence given on a former trial renders admissible other portions relating to the same matter. Aetna Ins. Co. v. Eastman [Tex. Civ. App.] 80 S. W. 255. The fact that a court reporter, called to contradict statements of a witness, gave answers to two questions on a former trial, using his notes to refresh his memory, did not warrant the introduction of witness' entire testimony on the former trial. Culver v. South Haven & E. R. Co. [Mich.] 101 N. W. 663. In an action on a contract, the defense being that it was a wager, defendant was properly allowed to ask plaintiff if he had not stated that it was his custom to make only wagering contracts, and to read from a case in which the issue was the same, stating that he read from an official stenographic report, and was properly denied permission to explain the facts of such other case, since it sufficiently appeared that the statements read were made by plaintiff under oath. Farnum v. Whitman [Mass.] 73 N. E. 473.

62, 63. Villineuve v. Manchester St. R. [N. H.] 60 A. 748.

(§ 5) *E. Corroboration and sustentation of witnesses.*[64]—In general, statements out of court are incompetent to corroborate a witness.[65] But where an effort is made to impeach the credibility of a witness by showing a motive or influence to testify falsely, former declarations, made when such motive or influence did not exist, are competent.[66] Mere contradiction of a witness by others who testify to a different state of facts is not ground for the admission of such former declarations,[67] nor for proof of corroborating circumstances, otherwise immaterial.[68] Evidence of collateral facts, corroborative of the statement of one party with respect to the main issue, is admissible, if confined to such matters as throw light upon the question.[69] The credibility of a witness who has been impeached by contradictory statements may be sustained by proof of good character,[70] or good reputation for truth and veracity.[71] A memorandum, proper to refresh a witness's memory, but incompetent as original evidence, should not be read in corroboration of a witness's testimony.[72] Evidence of an identifying witness that he had also identified accused before the grand jury is incompetent.[73]

§ 6. *Privileges of witnesses.*[74]—The provision of the fifth amendment of the Federal constitution, contained also in the bills of rights or constitutions of most of the states, that a person accused of crime cannot be compelled to be a witness against himself, is a common-law doctrine, and is in force in states which have not expressly adopted it.[75] The rule has been held not to be violated by the admission of statements by accused out of court,[76] by the introduction of his voluntary testimony on a former trial,[77] by testimony by a physician as to an examination of wounds on defendant's hands,[78] by evidence of a comparison between a bloody mark and defendant's hand, after he had voluntarily placed his hand on the mark,[79]

64. See 2 Curr. L. 2192.

65. Glover v. Coit [Tex. Civ. App.] 81 S. W. 136. No attempt having been made to impeach a witness, he cannot be corroborated by proof, former testimony, or statements out of court. McKenzie v. Watson [Tex. Civ. App.] 81 S. W. 1017. A published interview with a witness is not competent evidence to corroborate testimony of the witness in court. Southern Pac. Co. v. Schuyler [C. C. A.] 135 F. 1015. Declarations of a witness out of court are incompetent to corroborate testimony given on trial, even after he has been impeached or discredited. Chicago City R. Co. v. Matthleson, 212 Ill. 292, 72 N. E. 443. Permitting state's attorney to testify to statements made to him by one of his witnesses, to strengthen such witness, held error. Flowers v. State [Miss.] 37 So. 814.

66. Glover v. Coit [Tex. Civ. App.] 81 S. W. 136; Commonwealth v. Brown, 23 Pa. Super. Ct. 470. As where interest in action was shown, declarations before such interest existed were competent. Sweeney v. Sweeney, 121 Ga. 293, 48 S. E. 984. After an attempt to impeach by proof of contradictory statements, corroborative testimony as to statements similar to those on stand is admissible. State v. Sharp, 183 Mo. 715, 82 S. W. 134. Evidence being introduced to show that a witness for the state had given testimony because of threats of imprisonment, the state could show that witness made statements similar to his testimony before the alleged threats. State v. Bean [Vt.] 60 A. 807.

67. Glover v. Coit [Tex. Civ. App.] 81 S. W. 136.

68. Reynolds v. International & G. N. R. Co. [Tex. Civ. App.] 85 S. W. 323.

69. In an action for false representations as to value of land, evidence as to the real value of the land at the time of the transaction is admissible to corroborate a party's statement that there was no misrepresentation. Farmers' State Bank v. Yenney [Neb.] 102 N. W. 617. State allowed to show corroborating circumstance, when statement of its witness was attacked by inconsistent evidence. Ball v. Commonwealth [Ky.] 85 S. W. 226.

70. Brown v. State [Ala.] 38 So. 268.

71. Swain v. State [Tex. Civ. App.] 86 S. W. 335; Contreras v. San Antonio Traction Co. [Tex. Civ. App.] 83 S. W. 870.

72. Reading of memorandum by court reversible error. Garber v. New York City R. Co., 92 N. Y. S. 722.

73. Bowen v. State [Tex. Cr. App.] 82 S. W. 520.

74. See 2 Curr. L. 2193.

75. As in New Jersey. State v. Miller [N. J. Err. & App.] 60 A. 202.

76. State v. Inman [Kan.] 79 P. 162.

77. Where a defendant does not testify, the introduction of his voluntary testimony on a former trial is not compelling him to give evidence against himself, nor is it a violation of the law protecting him from prejudice from failure to testify. Bess v. Commonwealth, 26 Ky. L. R. 839, 82 S. W. 576.

78. Wounds being observable without removing his clothing. State v. Miller [N. J. Err. & App.] 60 A. 202.

79. State v. Miller [N. J. Err. & App.] 60 A. 202.

or by the taking of a photograph of accused, without excessive force, or illegal duress.[80] This right of an accused is waived when he voluntarily takes the stand in his own behalf, and he may then be cross-examined the same as any other witness.[81] But such cross-examination must be confined to matters brought out on the direct examination,[82] and cross-examination as to irrelevant and immaterial matters, tending to prejudice him before the jury, is improper.[83] Accused, testifying in his own behalf, need not personally claim his privilege, when questions concerning other crimes are asked, but may claim immunity through his counsel.[84] A defendant may claim his privilege as a witness, when called as such, though the particular question would have been proper if put in the course of the cross-examination of defendant, while on the stand in his own behalf.[85]

The constitutional provision does not limit protection of the accused to a prosecution against himself, but precludes the use of evidence given in any proceeding which might incriminate him, though it does not amount to a confession.[86] Hence a witness, in either a civil or criminal case,[87] cannot be compelled to answer questions when his answers would tend to incriminate him.[88] If a witness does not know his rights as to declining to give incriminating answers, the court should see that he is properly informed.[89] It is immaterial whether the court or counsel imparts such information to the witness.[90] Voluntary statements by a witness, who has been informed of his rights, are not privileged.[91] A witness may assert a legal privilege to refuse to give evidence or to produce documents on the taking of a deposition the same as though the examination was in open court, and has a right to be heard in the court before being compelled to answer or produce the documents.[92] One cannot be compelled to produce his own books, or the books of another, which are under his control as agent or otherwise, where their production would tend to incriminate him; neither can his clerk, whose possession is his possession, be compelled to produce them; but when, as the agent of another, he chooses to make entries on the books of that other, and the books are in the actual and

80. Photograph so taken was used by identifying witness. Shaffer v. United States, 24 App. D. C. 417.

81. State v. Miller [N. J. Err. & App.] 60 A. 202. Accused having taken stand could be cross-examined as to an attempt to break out of jail. Charba v. State [Tex. Cr. App.] 87 S. W. 829. Where defendant takes the stand, he may be cross-examined as to any matter germane to that brought on on the direct examination. Collins v. State [Tex. Cr. App.] 84 S. W. 585. Questions on cross-examination in criminal proceeding as to former residence and occupation held proper, though they brought out the fact that defendant had been an inmate of a reform school; since state has right to cross-examine on those subjects, though answers tend to degrade and disgrace. State v. Wasson [Iowa] 101 N. W. 1125.

82, 83. Razee v. State [Neb.] 103 N. W. 438.

84. Under Const. art. 1, § 12, permitting accused to testify. State v. Shockley [Utah] 80 P. 865.

85. In prosecution for violation of liquor law, defendant, after he had rested, was recalled by plaintiff. Cullinan v. Quinn, 95 App. Div. 492, 88 N. Y. S. 963.

86. Const. art. 2, § 18. Tuttle v. People [Colo.] 79 P. 1035. Statements by accused when examined as witnesses at a coroner's inquest are inadmissible in a subsequent prosecution for homicide. Id.

87. Wilson v. Ohio Farmers' Ins. Co. [Ind.] 73 N. E. 892.

88. Where in a grand jury investigation of the criminal misconduct of a person in the distribution of an estate, a witness was questioned as to his own conduct in the matter, his refusal to answer was held justified under Code Civ. Proc. § 2065. Rogers v. Superior Court of City and County of San Francisco, 145 Cal. 88, 78 P. 344. Certain scandalous matter, seriously reflecting on character of witness, stricken from affidavit submitted in support of application for removal of executrix. In re Magoun, 84 N. Y. S. 940.

Note: For extended discussion of the privilege of a witness as to incriminating testimony, see note to Evans v. O'Connor [174 Mass. 287] 75 Am. St. Rep. 318.

89, 90. Starr v. State [Tex. Cr. App.] 86 S. W. 1023.

91. Statements before grand jury after such notice properly used on trial. Davis v. State [Ga.] 50 S. E. 376.

92. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

93. Applied in investigation before grand jury, where corporation president refused to produce books. In re Maser [Mich.] 101 N. W. 588.

legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them, in a proper case, under a subpoena duces tecum.[93] It is held that the mere production of books for the purpose of refreshing the recollection of a witness cannot of itself tend to incriminate him.[94] Where books have been turned over to a trustee in bankruptcy, the examination of the trustee, and the production of the books before the grand jury, is constitutional.[95]

The witness is not the sole judge of the question whether his testimony will tend to incriminate him.[96] If the question is such that the answer may or may not incriminate him, he may refuse to answer;[97] but if the court is convinced that the answer cannot by any possibility incriminate him, and especially if the witness does not swear that he believes that it would, it is the duty of the court to compel him to answer.[98] The claim of privilege must be respected unless it is clear from the whole examination of the witness that he is mistaken in supposing that his answer would incriminate him, or that his refusal is purely contumacious.[99] The privilege being personal to the witness, it cannot be claimed by him for the purpose of protecting others;[1] nor can it be claimed for the witness himself by his counsel,[2] or by the adverse party.[3]

Statutes compelling witnesses to answer in certain special proceedings do not violate the constitutional privilege, if they grant complete protection against use of the testimony against the witness; as where the immunity granted is coextensive with the constitutional privilege of silence.[4] The provision of the bankruptcy act

94. Pray v. C. A. Blanchard Co., 95 App. Div. 423, 88 N. Y. S. 650.

Note: "The rule that a witness need not furnish evidence against himself is of long standing. East India Co. v. Campbell, 1 Ves. 246. And the production of documents to be used in evidence is within the privilege. Boyd v. United States, 116 U. S. 616. In the principal case [Pray v. Blanchard Co., supra], however, the books were, by the terms of the order, to be used, merely for the purpose of refreshing the recollection of the witness. It seems clear that a court has power to make such an order. Chapin v. Lapham, 20 Pick (Mass.) 467. If, upon the examination, questions should be put to the defendant the answers to which would tend to incriminate him, he could then assert his privilege. The mere production of documents does not make them evidence. Merrill v. Merrill, 67 Me. 70."—18 Harv. L. R. 234.

95. This procedure was held to violate neither § 7 of art. 1 of the Minnesota state constitution, as to compelling a defendant to be a witness against himself; nor § 10, as to unlawful searches and seizures. State v. Strait [Minn.] 102 N. W. 913.

96. In re Moser [Mich.] 101 N. W. 588.

97. In re Levin, 131 F, 388; In re Moser [Mich.] 101 N. W. 588.

98. Applied in bankruptcy proceeding, the bankrupt being under indictment at time of examination. In re Levin, 131 F. 388. Bankrupt ordered to produce his books, two witnesses having testified that an examination by them disclosed nothing which would incriminate him, and a referee having so found. In re Edward Hess & Co., 136 F. 988.

99. In an action by bondsmen to recover money paid an insurance company for default of an agent, it appeared that the agent had been acquitted of a charge of embezzlement. Held, he could not be required to answer a question as to whether he had been in arrears while with the company. Wilson v. Ohio Farmers' Ins. Co. [Ind.] 73 N. E. 892.

1. President of corporation guilty of contempt for refusing to produce books of corporation when contents could not criminate him, but might involve municipal officers charged with corruption in making contracts. In re Moser [Mich.] 101 N. W. 588.

2. Counsel for corporation could not make it ground for exception to interrogatories in a pleading. In re Knickerbocker Steamboat Co., 136 F. 956.

3. If witness chooses to answer incriminating questions, neither defendant nor his counsel can object. State v. Shockley [Utah] 80 P. 865. Where a witness in a criminal case claims the privilege, which is not allowed by the court, such ruling is not ground for complaint by the defendant, the claim of privilege being a matter personal to the witness. State v. Cobley [Iowa] 103 N. W. 99.

4. Laws 1897, p. 485, c. 265, § 10, relative to examination of witnesses in prosecutions for violation of the state anti-trust law, affords such immunity to witnesses. State v. Jack, 69 Kan. 387, 76 P. 911. The New York gaming law (Pen. Code, § 342, as amended by Laws 1904, c. 649), which provides that no person shall be excused from testifying in regard to a violation of its provisions, is held to grant complete immunity to witnesses; hence a witness cannot refuse to answer a question in an investigation by the grand jury. People v. Court of General Sessions of the Peace, 96 App. Div. 201, 89 N. Y. S. 364.

that no testimony by the bankrupt shall be offered in evidence against him in any criminal proceeding does not grant complete immunity.[5] Hence a bankrupt may plead the privilege to a demand for his books and papers;[6] but he should be required to produce the books or papers alleged to contain incriminating evidence before the court or referee, that it may be determined whether the plea is well founded, and that the court may make an order protecting him from the discovery of such evidence, if necessary,[7] and that the books and papers may be used for such necessary and proper purposes as are not inconsistent with the protection of his privilege.[8] A witness subpoenaed to testify in regard to violations of the Kansas anti-trust act cannot refuse to testify on the ground that the immunity granted by that law does not preclude use of his testimony against him in a prosecution for violation of the Federal anti-trust act.[9] The Tennessee statute, relative to purity of elections, providing that offenders against the election law may be compelled to testify, has reference only to criminal proceedings, and under it, a witness cannot be compelled to answer in a civil suit growing out of a fraudulent election.[10]

Under the California statute, a witness can be compelled to answer only such questions as are legal and pertinent to a matter in issue, and for refusal to answer questions not pertinent, cannot be adjudged guilty of contempt.[11] In Georgia, it is not contempt for a witness being examined before a commissioner, under a statute, to refuse to answer illegal or impertinent questions, which would not be admissible on the trial in court.[12]

A witness has a legal privilege to withhold testimony or documents which if given or produced would disclose trade secrets, if such testimony or documents are irrelevant or otherwise inadmissible in evidence.[13]

§ 7. *Subpoenas, attendance, and fees.*[14]—A clerk of a Federal circuit court has authority, when so directed by the court, to issue a subpoena duces tecum for the production of documents in the taking of depositions by him.[15] A subpoena duces tecum only requires a witness to produce books or papers in order that he can, by reference thereto, answer questions put to him: the subpoena does not give counsel the right to inspect the books produced.[16] One who fails to produce documents for which a subpoena has been issued may be punished as for contempt.[17] A Federal court has no authority to order the removal of books and papers produced before an examiner appointed to take evidence in an equity case, for use in the examination of witnesses in another district.[18]

5. Section 7, cl. 9, does not give complete immunity, since testimony given may be used to obtain other evidence. United States v. Goldstein, 132 F. 789. Neither § 7, cl. 9, of the bankruptcy act (see above) nor U. S. Rev. St. § 860, providing that no answer or other pleading or discovery of evidence obtained in any judicial proceeding shall be used against the party or witness in any court of the United States, provides complete immunity, so that a bankrupt cannot claim the privilege. In re Hess, 134 F. 109.

6. In re Hess, 134 F. 109.

7, 8. In re Hess, 134 F. 109; In re Hark, 136 F. 986.

9. State v. Jack, 69 Kan. 387, 76 P. 911.

10. Acts 1897, p. 134, c. 14, construed. Lindsay v. Allen [Tenn.] 82 S. W. 648.

11. Code Civ. Proc. § 2066. Rogers v. Superior Court of City and County of San Francisco, 145 Cal. 88, 78 P. 344.

12. Fenn v. Georgia R. & Elec. Co. [Ga.] 50 S. E. 103.

13. Books of corporation held irrelevant, and their production prejudicial, and claim of privilege of officer of corporation upheld. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

14. See 2 Curr. L. 2163, § 1, for corresponding matter.

15. Crocker-Wheeler Co. v. Bullock, 134 F. 241.

16. Franklin v. Judson, 96 App. Div. 607, 88 N. Y. S. 904.

17. Where a corporation officer, to whom a subpoena duces tecum had been issued, testified that he could not produce a release because he could not find it, and the attorney for defendant, on being examined, admitted having the release in court, the court had power to order its production, and to punish the attorney for contempt if he failed to do so.' Dunn v. New York Edison Co., 92 N. Y. S. 787. But in South Dakota, a committing magistrate has no power to punish for contempt a witness who refuses to produce documents called for by a sub-

A witness once duly served with a subpoena is required to attend from term to term until the case is tried.[19] An application for attachment of a witness must show why the testimony cannot be secured by deposition, or wherein a deposition on file does not make a full disclosure of facts.[20] An attachment will not be granted for a witness who is unable to attend court on account of illness.[21]

The allowance and amount of witness fees,[22] and mileage, [23] and liability therefor,[24] are statutory. A special contract to pay a witness in an ordinary case a fee larger in amount than that fixed by law to be paid witnesses for attendance upon court, is void for want of consideration and as against public policy.[25]

WOODS AND FORESTS; WORK AND LABOR; WORKING CONTRACTS, see latest topical index.

poena. Farnham v. Colman [S. D.] 103 N. W. 161.

18. Pepper v. Rogers, 137 F. 173.

19. Brady v. State, 120 Ga. 181, 47 S. E. 535.

20. City of Dallas v. Lentz [Tex. Civ. App.] 81 S. W. 55.

21. Gardner v. United States [Ind. T.] 82 S. W. 704.

22. Under Code, § 739, witnesses summoned in a prosecution for murder in the first degree, which is changed on trial to murder in the second degree, are entitled to only half fees. Coward v. Jackson County Com'rs [N. C.] 49 S. E. 207. Even though they attended from outside the county. Id. A witness is entitled to repayment in full of the amount paid the clerk for proving his ticket, though entitled only to half fees from the county, under Code, § 739. Id. Under the Iowa statute, when, in a criminal case, a defendant is adjudged not guilty, and witness fees are taxed to the county, the supervisors must allow them, and have no discretion in the matter. Code, § 4661. Climie v. Appanoose County [Iowa] 101 N. W. 98.

23. A witness attending a criminal case in response to a subpoena may properly be allowed mileage for distance traveled outside as well as inside the state. Construing Code, § 5492. Climie v. Appanoose County [Iowa] 101 N. W. 98. But the matter of allowance of mileage is largely discretionary, and the court may properly reduce the amount to mileage within the state. Perry v. Howe Co-op. Creamery Co. [Iowa] 101 N. W. 150.

24. Fla. Const. art. 16, § 9, as amended in 1894, does not require the several counties of the state to pay the per diem and mileage of witnesses before the grand jury. State v. Croom [Fla.] 37 So. 303. Such expense is by law imposed on the state. Id.

25. Witness held not a technical expert, so as to warrant recovery by him of extra fee. Ramschasel's Estate, 24 Pa. Super. Ct. 262.

NOTE. Contracts to furnish evidence: An agreement to furnish evidence to establish the claim of a party in a prospective suit is void. Lyon v. Hussey, 82 Hun 15, 31 N. Y. S. 281. A stipulation to procure witnesses to swear to a particular fact is also void. Patterson v. Donner, 48 Cal. 369. The same is held of promises to pay the witness a per centage of what is recovered in return for testimony. Stanley v. Jones, 7 Bing. 369; Dawkins v. Gill, 10 Ala. 206. It is the tendency of such agreements to produce corruption and injustice which causes them to be eyed with disapproval. Goodrich v. Tenney, 144 Ill. 422, 36 Am. St. Rep. 459, 33 N. E. 44. Though not actually corrupt, they are unenforceable. Boehmer v. Foval, 55 Ill. App. 71; Quirk v. Muller, 14 Mont. 467, 43 Am. St. Rep. 647, 36 P. 1077. Agreements to pay witnesses on the event that the suit terminate in favor of the promisor are not only void as concerning ordinary witnesses, but also as concerning experts. See Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369, 24 N. W. 154; Pollak v. Gregory, 22 N. Y. Super. Ct. (9 Bosw.) 116.

But contracts like those under consideration are not universally condemned. See Wood v. Casserleigh, 30 Colo. 287, 71 P. 360, 97 Am. St. Rep. 138. But if the contract to furnish testimony is linked with an agreement to suppress testimony, it is void. Young v. Thomson, 14 Colo. App. 294, 59 P. 1030.

Information as to an outstanding title to realty is a sufficient consideration to support a promissory note. Lucas v. Pico, 55 Cal. 126. See, also, Chandler v. Mason, 2 Vt. 193; Cobb v. Cowdery, 40 Vt. 25, 94 Am. Dec. 370.

For other authorities on general subject, see note to Wood v. Casserleigh [30 Colo. 287, 71 P. 360] in 97 Am. St. Rep. 145.

NEW YORK CITATION INDEX DIGEST.

FOR VOLS. 3 AND 4 CURRENT LAW.

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